Shifting the Place of Social Security:
Welfare Reform and Social Rights under the Coalition Government’s Austerity Programme

Jed Meers
Report by Jed Meers, York Law School

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Coordinator of the Research Unit – Prof. Stefano Civitarese Matteucci

1 Email: jed.meers@york.ac.uk
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<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>AMHB</td>
<td>Appropriate Maximum Housing Benefit</td>
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<td>CPAG</td>
<td>Child Poverty Action Group</td>
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<td>CPI</td>
<td>Consumer Price Index (Measure of Inflation)</td>
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<td>CTRS</td>
<td>Council Tax Reduction Scheme (which replaced council tax benefit)</td>
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<td>DHP</td>
<td>Discretionary Housing Payments</td>
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<td>DLA</td>
<td>Disability Living Allowance</td>
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<td>DWP</td>
<td>Department for Work and Pensions</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>EIA</td>
<td>Equality Impact Assessment</td>
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<td>EWCA</td>
<td>England and Wales Court of Appeal</td>
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<td>EWHC</td>
<td>England and Wales High Court</td>
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<td>ILF</td>
<td>Independent Living Fund</td>
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<td>LBC</td>
<td>London Borough Council</td>
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<td>LHA</td>
<td>Local Housing Allowance</td>
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<td>NPM</td>
<td>New Public Management</td>
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<td>PIP</td>
<td>Personal Independence Payments</td>
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<td>PSED</td>
<td>Public Sector Equality Duty</td>
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<td>SSSC</td>
<td>Social Sector Size Criteria (more commonly known as the 'bedroom tax')</td>
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<td>SSWP</td>
<td>Secretary of State for Work and Pensions</td>
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<td>UKSC</td>
<td>The Supreme Court of the United Kingdom</td>
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<td>UNCRC</td>
<td>United Nations Convention on the Rights of the Child</td>
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<td>UNCRPD</td>
<td>United Nations Convention on the Rights of Persons with Disabilities</td>
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1. **Introduction**

‘The engine of the [Social Sector Size Criteria] is not only the saving of public funds…there is also a strategic aspiration to shift the place of social security support in society.’

*Lord Justice Laws*

In assessing the motivations behind one of the most controversial planks of the Government’s welfare reform agenda - the so-called ‘bedroom tax’ - Laws LJ remarked that in addition to the perceived imperative of saving public funds, the change was also seeking to ‘shift the place of social security in society.’ Although there was no elaboration by the Court on what this meant, where they perceived the shift to be heading, or where its boundaries lay, the recognition of some underlying change is indicative that there is more to the Coalition Government’s welfare reform agenda than immediately meets the eye. Rather than simply attempting to create a conduit between austerity and social security expenditure, or to address material policy concerns such as mobility in the social rented sector, it suggests there exists a flowing undercurrent in the interface between Government aims and the social security system which has *shifted*, and is continually *shifting*, the way in which those claiming benefits are conceptualised and managed in the growing effort to control the behaviour of those on the receiving end of the welfare state.

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*R (MA & others) v The Secretary of State for Work and Pensions [2013] EWHC 2213 [58] (per Laws LJ)*
This report is focused on this ‘shift’. The motivations which lie behind it, the policies which bring it into being, and how the Courts attempts to deal with associated legal challenges, all require linked analysis in order to shed light on how the Coalition Government’s welfare reform agenda has pulled at the welfare safety net in the UK.

This shift is an incredibly complex picture, and modern changes to the welfare state – somewhat unsurprisingly – have garnered a thick, theoretical patina across multiple disciples. Debates straddle across broad arguments encompassing concepts such as control, responsibilisation and agency. Within this extensive literature, what is particularly pertinent to this report is how the pressures and responsibilities for reform have become increasingly sited within the welfare recipient themselves. Indeed, the welfare state is increasingly trying to act as the ‘Puppet Master’ for those on its receiving end, but his strings are resting on largely untested and academically contested assumptions about how a combination of ‘compulsion and incentives’ and the ‘ubiquity of conditionality’ can effectively ‘nudge’ the behaviour of benefit recipients in the direction he desires.

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5 Peter Dwyer and Sharon Wright, ‘Universal Credit, ubiquitous conditionality and its implications for social citizenship’ (2014) 22 Journal of Poverty and Social Justice 27
6 For an analysis of the nudge effect with reference to the Coalition Government welfare reform programme, see: Laura Davies, ‘Nudged into employment: lone parents and welfare reform’ in Malcolm Harrison and Teela Sanders (eds), Social Policies and Social Control (Policy Press 2014) 151
This ‘incentive paradigm’ results in a welfare reform agenda which is increasingly reliant on sanctions, attaching conditionality to social rights, or in some cases abolishing schemes of benefits altogether. This leads to layers of complexity building up within the welfare reform policies, as the inherent vulnerability (and residualisation) of many of those who claim welfare benefits ensures that the Government has to undertake the difficult task of sifting those who are able to take ‘responsibility’ for their actions (and face the consequences), from those who are ‘deserving’ of full assistance. The nature of this shift therefore, inevitably engages the law in ways which less punitive approaches do not.

Such policies designed to affect a shift in social security support invariably raise difficult questions for the Courts. They result in challenges which often require: (1) a detailed assessment of procedures, impact assessments, consultations and the policy process; (2) consideration of equality obligations under domestic legislation, (3) the balancing of protection from discrimination under human rights instruments and international obligations against democratic principles, (4) an examination of the aims and justifications of the policy, and (5) handling the incredible complexity, legislative interdependency, and built-in discretion of the UK social security system. This report seeks to utilise this body of case law to explore to what extent - if at all - this ‘shift’ has been mitigated or altered through domestic and supranational legislation, and how it has manifested itself in legal appeals within the UK.

8 For instance, see this section in this report on the removal of Council Tax Benefit
9 Such as the Equality Act 2010
11 Such as the United Nations Convention on the Rights of Persons with Disabilities
1.1. **QUESTIONS ADDRESSED BY THIS REPORT**

This report seeks to address five principal questions:

1) What are the stated motivations for the Coalition Government welfare agenda?

2) How have these motivations been translated into the welfare reform policies?

3) How have the Courts dealt with legal challenges to the key flagship welfare reform policies?

4) What themes have emerged in the case-law?

5) Drawing the answers to above questions together, has the Coalition Government’s welfare reform agenda affected the protection of social rights in the UK, and if so how?

1.2. **THE STRUCTURE OF THE REPORT**

In order to effectively address the questions above, the report is separated into three broad sections, each with their own focus.

The first, the ‘State of Welfare’, looks at the stated aims of the Coalition Government’s welfare reform agenda, drawing in particular on three flagship policies – the Social Sector Size Criteria (SSSC), the Benefit Cap, and the transition from ‘Disability Living Allowance’ to ‘Personal Independence Payments.’ There are many shared aims within the welfare reform package, and the motivations behind these policies have warranted detailed consideration by the Courts during appeals. The principle aim behind the section is to address the first two research questions outlined above, by providing a broad overview of changes in the welfare system brought into effect by the Coalition Government, using key policies as examples.
The second section looks at the key legal appeals which have followed specific reforms in order to provide an overview of the basis for legal challenge to the welfare reform agenda. It looks specifically at key cases on the removal of Council Tax Benefit, the transition from Disability Living Allowance to Personal Independence Payments, the so-called ‘Benefit Cap,’ and the abolishment of the Independent Living Fund.

The third section draws on a key theme which arises in much of the current case law – namely, the use of a discretionary exemption mechanism to push the management of the welfare reform agenda down to local authorities. This trend has warranted sizable judicial attention, particularly in the case law on the SSSC. Consequently, this section ties together the broader social science literature on the role of discretion in delivering welfare reforms with both: (1) public law challenges, and (2) initial evidence of the functioning of these payments on the ground.

The fourth and final section draws together the key findings from the analysis above in order to respond to the fifth research question above.
SECTION ONE: AN INTRODUCTION TO THE MOTIVATIONS FOR WELFARE REFORM

2.1. Sowing the Seeds - The Foundation for Reform

Before turning to the specific cases which delve deeper into many of these changes, it is worth focusing on the motivations and basic mechanisms behind some of the government’s key flagship welfare reform policies.

Before outlining each in turn, it is worth noting three key things about the analysis which follows.

Firstly, accurately assessing the motivations behind a sizable package of welfare reforms is a difficult (if not impossible) task. This report could – in an attempt to give a fuller picture – detail the multifarious web of pressures which bleed down to domestic policy on welfare reform, such as: the increasing globalisation of the financial markets, the associated ‘financialisation’ of the everyday, and the demands of changing demographics or lethargic economic growth. This context has heralded in what Vieira and Pinto call the ‘new politics of welfare reform’ – a complicated, intricate, and often self-contradicting set of ideological assumptions and political motivations which have provided the context for changes in welfare policy. Such

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12 For an assessment of the link between increasing globalisation of finance and austerity bleeding into domestic welfare reforms see William K. Tabb, ‘The wider context of austerity urbanism’ (2014) 18 City 87


14 Mónica Brito Vieira and Pedro Ramos Pinto, ‘Understanding the New Politics of Welfare Reform’ 61 Political Studies 474
analysis is far beyond the scope of this report. This section seeks to simply define the policies on their own
terms, using the justifications provided by government and assessing their motivations from the surface, with
some occasional deeper digging when warranted.

Secondly, it is clear that the motivations behind these policies overlap a great deal; consequently, there is some
potential for repetition. The guise of ‘austerity’ is a particular justification for all of these reforms; however, in
the analysis which follows, the concept will be applied concisely with specific reference to the reform at hand –
rather than in depth and in an abstract fashion in a way which could quickly become repetitive.

Thirdly, although this section draws on government and parliamentary reports, political rhetoric and some media
discussion to support its assertions, this does not purport to be a full-blown discourse analysis. References to
specific material are only designed to give an indication of the overall explicit justification of the policies being
analysed, rather than to conform to a specific methodology or represent a comprehensive analysis.

Fourthly, much of the discussion below focuses on policy documents and ministers from the Conservative Party.
Clearly, the welfare reform agenda forms part of the programme of government put into motion by the Coalition
– Liberal Democrat votes were necessary to secure the passage of the Welfare Reform Bill into law, and there
has been sizable liberal ministerial involvement in the development of the programme. It is difficult, as
highlighted by Hayton and McEnhill, to tease out a definitive ‘shared rhetorical position’ on welfare policy,\(^\text{15}\)
however, the focus below is not on the party politics but instead on the case put forward by the Government. If
something is said to defend the policy by a Government minister in Parliament, it is assumed that this is the
Government position, regardless of internal difficulties in the party machinery.

\(^{15}\) Richard Hayton and Libby McEnhill, ‘Rhetoric and Morality - How the coalition justifies welfare
policy’ in Judi Atkins and others (eds), *Rhetoric in British Politics and Society* (Palgrave MacMillian
2014) 102
Finally, not every welfare reform measure – even those stemming from the Welfare Reform Act 2012 - is detailed in what follows. Rather, this section focuses on three key flagship proposals, or those policies which have attracted the most attention from the Courts. Again, this is designed to be an indicative assessment of the picture as a whole, rather than a detailed explanation of the nooks and crannies of the welfare reform agenda. The reforms dealt with here are: the Social Sector Size Criteria, the Benefit Cap, and the creation of Personal Independence Payments to replace Disability Living Allowance. The comparatively smaller reforms of the removal of council tax benefit (to be replaced by local authority administered Council Tax Reduction Schemes), the scrapping of the Independent Living Fund and devolution of its budget to local authorities, and changes to the uprating of Local Housing Allowance, will be dealt with more concisely with reference to specific cases elsewhere in the report.

2.2. **The Social Sector Size Criteria**

The Social Sector Size Criteria (SSSC) have survived their first year and a half in force largely intact. The underlying policy goes by many names, initially defended by the Coalition Government as the ‘under-occupation penalty’ then the ‘removal of the spare room subsidy,’ and enduringly condemned by its critics as the ‘bedroom tax.’ The measure has controversial, and has sparked both protests on the streets and challenges in the courts.

The regulations impose size criteria on households in the social rented sector claiming housing benefit, and those deemed to be ‘under-occupying’ their homes pay a penalty based on their level of eligible rent – 14% for under-occupying by one bedroom, 25% for two or more. Namely, a tenant who claims housing benefit on a property with an eligible rent of £100, will face a penalty for under-occupying by one bedroom of £14 weekly, and for

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16 L Robertson, 'Protests planned to coincide with bedroom tax debate' (Inside Housing 2013) <http://www.insidehousing.co.uk/care/protests-planned-to-coincide-with-bedroom-tax-debate/6529421.article> [Accessed January 5, 2015]
two bedrooms, £25 weekly. Importantly, this charge remains static in line with eligible rent regardless of how much housing benefit is received. Consequently, if the same tenant were to receive partial housing benefit of £50 a week, the penalty remains £14 or £25.

2.2.1. ‘THE SCHEME AS WHOLE’ – INTRODUCING THE POLICY FRAMEWORK

The legislative change which brought the SSSC into existence is found in reg.B13 in the amended Housing Benefit Regulations 2006, SI 2006/213. Following political pressure and legal challenges, a number of exemptions have been granted for certain groups of tenants, including those requiring ‘overnight carers’ (reg.B13(6)), those on service in the armed forces (reg.B13(6),(7)) and, following *Burnip v Birmingham City Council*, those with children who are unable to share a bedroom due to disability.

However, the policy does not stand on the housing benefit regulations alone – the need to consider the ‘scheme as a whole’ results in a judgment which is as much about the provision of DHPs as it is about reg.B13. The Department for Work and Pensions (DWP) is using the previously small, locally administered DHP scheme to assist tenants who fall outside of exempted groups. Tenants who are receiving benefit and struggling to pay their rent can apply to their local authority for a DHP, which is then paid at the LA’s discretion from a capped fund provided by the Government. A total of £165 million has been distributed to local authorities to assist with plugging the gaps left by the SSSC, benefit cap and changes to local housing allowance. The payments operate within the legislative framework provided by the Discretionary Financial Assistance Regulations 2001/1167.

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17 Amended by Regulation 5(7) of the Housing Benefit (Amendment) Regulations 2012, 2012/3040
18 [2012] EWCA Civ 629
19 MA [40] (Dyson MR).
20 Certain limitations apply on how individual authorities can top up their own DHP budgets with money from other sources which are detailed in reg.4 Discretionary Financial Assistance Regulations 2001/1167
21 MA [96] (Dyson MR).
which provide some limits on the level of weekly payments provided by local authorities, but otherwise offer a sizable amount of discretion in how this money is best utilised and applications are assessed. These payments are considered in great detail in later sections in this report.

2.2.2. MOTIVATIONS BEHIND THE SSSC

As alluded to above, the key focus of this section is to ask what the key ‘substantive’ – or ‘politico-administrative’\(^\text{22}\) – goals the SSSC attempts to advance, and how these incorporate the individual benefit recipient. This is no simple task. In common with most social policies, there is a heavily intertwined ‘complex of factors’\(^\text{23}\) sitting behind their implementation. The SSSC is no different, and it is difficult to do justice to the wide variety of aims which have been posited in favour of the reform from its supporters. However, in the analysis which follows, three of the key reasons highlighted by Government ministers and political parties will be discussed: (1) the ‘austerity’ agenda, (2) the drive for ‘mobility’ in social housing, and (3) the importance attached to incentivising work.


2.2.3. Target One: Housing Benefit and Spiralling Spending – Austerity and Social Housing

If the policy were taken at face value, its main raison d'être is to reduce government expenditure on housing benefit. Lord Freud reminded his fellow peers that this is the ‘core argumentation' put forward by the government; a sentiment echoed in the DWP impact statement which asserts that:

‘The overall cost of Housing Benefit needs to be controlled, and reduced in order to tackle the budget deficit. This measure is part of the effort to contain Housing Benefit expenditure.’

The department’s impact assessment predicts a total recurring annual saving of five hundred million pounds, an estimate reached on the assumption that: (1) the mobility of social tenants will remain low and most will stay and pay the penalty, (2) under-occupying households who do move will transfer to more inexpensive accommodation, and (3) the freeing of larger properties will help to reduce the number of families in temporary accommodation and the costs associated with this. Although these savings have been hotly contested, this policy’s potential for reducing the Housing Benefit Bill characterised as ‘spiralling out of control' is the key argument advanced by the Department of Work and Pensions since its recommendation.

The under-occupation penalty does not find itself fighting for savings as a lone warrior, but instead runs alongside a plethora of policies in the Coalition Government’s stampede to reform social housing in the face of

24 HL Deb, 14 February 2012, c705
26 Ibid
27 Rosemary Bennett, ‘Housing benefit changes delayed after outcry’ The Times (01st December 2010) <http://www.thetimes.co.uk/tto/news/politics/article2828128.ece> accessed 02 January 2015
the ‘auspices of deficit reduction.’ The policy can therefore be seen as falling under the spell of what Newman and Clarke refer to as the ‘alchemy of austerity’ – namely, the ideological and political imperatives created by the government’s adherence to the ‘global wisdom’ of deficit reduction. This reasoning is given explicitly in defence of the reform, with Steve Webb suggesting that the under-occupation penalty is necessary to deal with the ‘vast, yawning deficit.’

Despite the policy being firmly cast in this light, concerns have been raised about the viability of the savings made. The Government claims savings of approximately £480million per year, and have been maintaining that savings remain around this figure until recently. For instance, in response to the tabling of the Affordable Homes Bill by Andrew George MP, the Department for Work and Pensions estimated that abolishing the SSSC (which they argued was effectively the output of the provisions in the Bill – though this is a problematic assumption) would cost £1billion across a two year period. Following an assessment of the model used by the DWP to calculate the savings from policy in line with real-data provided from Housing Associations and elsewhere, Tunstall found that actual savings were likely to be substantially lower (reducing by approximately £160million per annum), not including other costs incurred by local authorities and other organisations such as Housing Associations.

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30 Ibid 300
31 HC Deb, 22 January 2013, c74WH
32 HC Deb, 10 November 2014, cW
The Coalition Government’s sentiments are not entirely new – successive governments have articulated concerns over the high level of housing benefit expenditure.\textsuperscript{34} As suggested by MacLeavy, the form of welfare austerity which the under-occupation penalty is indicative of a policy which ‘continues and extends the trajectory of welfare reform instigated by New Labour.’\textsuperscript{35} However, in doing so, the Coalition has recharged the call to ‘foster autonomy’ amongst welfare recipients and the population at large; namely, the problem of governance is not seen as one entirely of economics, but as something which needs to be located in individuals as well in the guise of ‘we are all in this together.’\textsuperscript{36}

2.2.3.1. The policy framework for austerity – the SSSC and issues in its formation

When considering the position of the SSSC within the austerity agenda policy framework, there are three key things which are of particular importance to note.

Firstly, and as alluded to above, the SSSC is part of a wide package of reforms which are intended – at least in part – to save money. The scale and associated complexity of the cuts therefore causes some serious problems with overlaps between different measures which compounds the impact on those affected. This is more complicated than might be assumed. For instance, it is clear that changes to Council Tax benefit (detailed elsewhere in this report) share a natural constituency with those affected by the SSSC penalties – however, with

\textsuperscript{34} Peter Kemp, ‘Housing Benefit and Welfare Retrenchment in Britain’ (2000) 29 Journal of Social Policy 263
austerity bleeding across almost all government departments, the cumulative effect becomes fragmented across family members and welfare functions.

Another clear example of the compound impact of the policy can be seen in the seminal changes to the payment of benefits to those with disability. The transition from Disability Living Allowance to Personal Independence Payments (as elaborated on in more detail elsewhere in this report), has been highlighted as an important source of cumulativity, with Cross suggesting that the SSSC reforms contribute to the formation of a ‘bleak landscape’ for the formation of PIP to take place – especially as the SSSC disproportionately affects disabled populations.  

Although one might assume a clear constituency of impact for changes to the benefits system, the problem of compound effect stretches into reforms which do not immediately seem connected to tenants in social housing in the same way. For instance, taking Education as an example, O’Hara points specifically to what she identifies as the ‘double whammy’ of the abolition of Educational Maintenance Allowance alongside the imposition of the SSSC. For a family with one child receiving the full amount (£30 per week for term time), the abolition amounted to an annual loss to the household of £1,260. This is just one example of a heavily interlinked and complex welfare system fragmented across departments, leading to an equally interlinked and complex compound impact of those who bear the brunt of the reforms. It is perhaps surprising in this context that the Coalition Government has not conducted a review of the cumulative impact of the welfare reform agenda.

Secondly, the problems of compound impact outlined above invariably affect the measures utilised in the policy framework to mitigate problems the welfare agenda has caused, or to find alternative methods of tackling

37 Merry Cross, ‘Demonised, impoverished and now forced into isolation: the fate of disabled people under austerity’ (2013) 28 Disability & Society 719, 721
38 A payment of up to £30 per week for students studying at sixth form college (or equivalent vocational qualification)
39 Mary O’Hara, Austerity Bites: A Journey to the Sharp End of Cuts in the UK (Policy Press 2014) 75
40 Ibid
inequality. Taking reforms in the Department of Education as an example once more, ongoing research by Lupton has identified that teachers at schools in areas with particularly low socio-economic indicators, are utilising Pupil Premium\(^{41}\) funds to provide support to families affected by welfare reform measures (such as the SSSC), which has included buying food – and in fewer instances – providing clothing.\(^{42}\) This demonstrates how the changes induced by welfare reform measures can alter the context in which other reforms – many with aims not connected to welfare reform at all, like the Pupil Premium – operate. This is particularly true in a policy context where localised discretion is highly prized, and which consequently provides the flexibility for the diversion of funds to areas of greatest need (the use of discretion is explored in more detail in the dedicated section in this report).

Finally, the ability of the ‘austerity’ objective to be realised depends greatly on geography – the specific local authority area and dynamics of the local housing market (and particularly the management and composition of social housing stock) all factor heavily. Wilcox underscores this in his initial assessment of the functioning of the policy, when he gives particular emphasis to the ratio between the amount of smaller dwellings available in the social housing stock (and elsewhere if affordable under relevant Local Housing Allowance rates), and associated demand for relocation following the penalty. As detailed above, affected tenants staying put (through ‘choice’ or due to a lack of availability of other suitable properties to which to downsize) is the main – some would argue \textit{only} – realistic mechanism for the policy to generate savings, which renders this ratio particularly significant in the context of its austerity aims. Wilcox highlights that this extent of the mismatch between the demand and

\(^{41}\) A Government fund introduced in April 2011 providing approximately £600 million per annum to assist schools at increasing the attainment of disadvantaged pupils. The money can be used at the discretion of the school itself (with some government controls and accounting/reporting measures).

supply of smaller dwellings is both ‘substantial’ and – importantly – ‘varies greatly both between localities.’

This report explores the impact of regional and local authority variation in more detail with reference to the discretionary exemption mechanism utilised by the policy in the section on discretion.

2.2.4. Target Two: Problematic Social Housing – Increasing Mobility in the Social Rented Sector

Levels of residential mobility in the social rented sector have been a source of policy and academic concern for decades; however, the previous orthodoxy asserted that high levels of residential mobility were undesirable in social housing as it served to further the residualisation of the stock. The new focus has been on encouraging mobility in the social housing stock, with the view that higher mobility leads to better job prospects, and that low levels of movement through the stock contribute to high levels of both under-occupation and overcrowding.

Government ministers and policy documents advance the argument that the under-occupation penalty will help to encourage mobility in the Social Rented Sector and consequently free up larger homes for families who are either over-crowding or languishing on waiting lists. The benefit penalty is therefore advanced by the Department of

Work and Pensions as an ‘economic incentive for tenants to move to smaller properties where their accommodation is considered larger than necessary to meet their needs and those of their household.’\textsuperscript{47}

There are three key juxtapositions which result from this assertion.

Firstly, there is an uneasy juxtaposition in the Government rhetoric between: (1) the ‘imperative’ to reduce Housing Benefit costs, and (2) the aim to increase mobility in the social housing sector. The DWP’s own impact assessment estimates the savings on the basis that affected tenants are unlikely to move, stating that:

‘Estimates of Housing Benefit savings are based upon the current profile of tenants in the social rented sector, with little tenant mobility assumed.’

Therefore there is a clear tension between tenants staying put and paying the penalty, and thus reducing the amount of Housing Benefit they are eligible for, and households moving to smaller properties to satisfy the want for increased mobility in the social housing stock.

Secondly, there is a juxtaposition between the perceived necessity of securing ‘mobility’ for tenants in social housing, and the new importance ascribed to a ‘community-based rationale’ in welfare policy – a concept most starkly seen in the encouragement for subjects to form strong community bonds within the Big Society rubric. This reveals a problematic contradiction between the ‘revisionist critique’ of social housing,\textsuperscript{48} which views council estates and social rented housing as a ‘terminal destination’\textsuperscript{49} which magnifies the effects of housing poor people together.


\textsuperscript{48} David Robinson, ‘Social Housing in England: Testing the Logics of Reform’ (2013) 50 Urban Studies 1489

\textsuperscript{49} Richard Crisp and others, ‘Continuity or Change: considering the policy implications of a Conservative government’ (2009) 3 People, Place & Policy Online 63
The third juxtaposition follows on from the second. Those who live in social housing are faced with contradictory forms of citizenship. The thrust of many Coalition welfare reforms can be seen as reminiscent of the Poor Laws by casting welfare recipients as ‘deserving’ and ‘undeserving’ of assistance; however, in the context of social housing these distinctions can become blurred or seemingly cast simultaneously onto the same individuals.

On the one hand, tenants in the social rented sector are characterised as ‘second class’ citizens. This is best illustrated with reference to two points highlighted by Manzi: (1) the cultural discourse surrounding social housing, and (2) the social control discourse. These two problems are magnified by (3) housing being an easy foci for control.

The first point is best illustrated with reference to the damaging rhetoric of the ‘problem estate’ and the increasing problematisation of social housing over the last few decades. The perception is that a social housing estate is now by definition a problem estate and the continued normalisation of owner-occupied housing creates the perception that the sector is populated by the ‘other.’ Hancock and Mooney identify this trend in Coalition rhetoric on the ‘Broken Society’ and ‘Welfare Ghettos’, which in turn casts those who live in social housing as irresponsible and disorderly. Living within the social housing stock is seen to breed characteristics far removed from the physical property or symptoms of low income, such as accusations of a predisposition to

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50 Peter Beresford, ‘From ‘vulnerable’ to vanguard: challenging the Coalition’ (2012) 50 Soundings 46
54 Lynn Hancock and Gerry Mooney, ‘“Welfare Ghettos” and the “Broken Society”: Territorial Stigmatization in the Contemporary UK’ (2012) 30 Housing, Theory and Society 46
welfare dependency, poor motivation to access labour markets\textsuperscript{55} and ‘cultures of worklessness.’\textsuperscript{56} These concerns are indicative of the ‘revisionist critique’ of social housing, which characterises the sector as somewhere which manifests itself in undesirable characteristics for those who live within it.\textsuperscript{57}

This discourse then begins to present the social housing stock as a locus for social control. Cowan et al suggest that these estates are ‘spaces and places of poverty and control,’\textsuperscript{58} where there is a ‘political, legal and organisational framework’ that simply does not exist in other tenures,\textsuperscript{59} or would be thought of as ‘unthinkable’ in private rented or owner occupied housing.\textsuperscript{60} Though policies attempting to influence the behaviour and culture of tenants have been formulated for some time,\textsuperscript{61} the increasing problematisation of social tenants has resulted in an increasingly punitive approach to its management.

However, this re-casting of those in social housing as ‘underserving’ finds itself in direct conflict with the sector’s clear depiction as a place for the most vulnerable to reside. Social landlords have remained committed to housing the most vulnerable households in society,\textsuperscript{62} and the general trend of continued targeting within allocations of those deemed to be of particularly acute need has continued.\textsuperscript{63} Therefore, one would expect those already accepted as being ‘deserving’ to be treated as such within the social housing stock, however, such is the

\textsuperscript{55} David Robinson, ‘Social Housing in England: Testing the Logics of Reform’ (2013) 50 Urban Studies 1489
\textsuperscript{56} P Watt, ‘Social Housing and Regeneration in London’ in R Imrie, L Lees and M Raco (eds), \textit{Regenerating London: Governance, Sustainability and Community in a Global City} (Routledge 2009) 212
\textsuperscript{57} David Robinson, ‘Social Housing in England: Testing the Logics of Reform’ (2013) 50 Urban Studies 1489
\textsuperscript{58} Dave Cowan, Christina Pantazis and Rose Gilroy, ‘Social Housing as Crime Control’ (2001) 10 Social and Legal Studies 453
\textsuperscript{59} Alan Deacon, ‘Justifying conditionality: the case of anti-social tenants’ (2004) 19 Housing Studies 911, 914
\textsuperscript{60} Ibid
\textsuperscript{61} Manzi (n 51 above) 8
\textsuperscript{62} Ibid 17
\textsuperscript{63} Ian Loveland, ‘Legal Rights and Political Realities: Governmental Responses to Homelessness in Britain’ (1991) 16 Law & Social Inquiry 249
cultural change and shift in perception of social housing, that all of those residing in the sector are tarred with the same brush.

This contradiction in what to govern has been evident in the formation of exemptions to the under-occupation penalty. Although not originally drafted into the policy, armed personnel serving abroad and foster carers were exempted from the changes and the Discretionary Housing Payments system is being utilised by giving local authorities £60 million this year and £155 million next year to respond on a case-by-case basis. This confusing web of exemptions and use of unclear local authority level discretion highlights the complicated task of distinguishing who is conceptualised as being ‘deserving’ and ‘undeserving’ within the confines of the policy.

2.2.5. Target Three: ‘Float off’ Benefits – The Need for an Incentive to Work

The third main target of the policy is to incentivise those who are affected to enter work. There are two key strands to this argument. Firstly, by imposing a penalty, people will be inclined to ‘work a bit more and simply pay the shortfall’ and secondly, the principle that if the tenant does move to a property with lower rents, this will ‘provide an additional work incentive and enable claimants to ‘float off’ Housing Benefit at lower income levels.’

The policy is in effect attempting to govern the individual social tenants’ incentive framework by imposing a penalty for ‘undesirable’ behaviour. The point is perhaps best illustrated by Iain Duncan Smith’s message to

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65 DWP (n 47 above)
welfare recipients: ‘play ball or it's going to be difficult.’ These practices are heavily influenced by the arguments put forward by Murray, Field and Mead, who suggest, among many other things, that welfare policies intentionally or unintentionally can alter the incentives of recipients to find work or make other decisions, and consequently that changing levels of welfare payments and their conditionality can influence their individual incentive structures. This thinking has been described as manifesting itself in many different forms, ranging from attempts at a ‘well-placed behavioural nudge’ through to sanctions which could be described as building on a ‘more punitive welfare system’.71

This drive for incentivising work through the imposition of the penalty has been most recently evident in the case put by the UK Government to the Northern Irish Assembly to put the SSSC measures into place. As of yet, Northern Ireland have not brought the amended Housing Benefit Regulations into force which effectively introduce the policy. An explicit argument by the Government has been that ‘the reality is that our welfare reforms are about encouraging people into work’ and that ‘Northern Ireland is retaining a system that too often fails the people it is supposed to help by trapping them in dependency and discouraging work.’

2.3. POLICY TWO: THE ‘BENEFIT CAP’

Another of the Government’s flagship policies is the so-called ‘benefit cap,’ which introduces an overall ‘cap’ on the amount of total amount of benefits an individual household can receive of £500 per week (£26,000 a year) for

68 Frank Field, Losing Out: Emergence of Britain’s Underclass (Wiley-Blackwell 1989)
69 Lawrence Mead, Beyond Entitlement (The Free Press 1986)
70 Christopher Deeming, ‘Trials and Tribulations: The ‘Use’ (and ‘Misuse’) of Evidence in Public Policy’ (2013) 47 Social Policy & Administration 359, 364
72 HC Deb, 29 October 2014, c297
73 HC Deb, 29 October 2014, c297
those claiming as either a lone parent or a couple, or £350 a week (£18,200 a year) for single claimants. Like the SSSC outlined above, the delivery of any penalty is done through the withdrawal of housing benefit at a rate pursuant to the over-payment (or through the relative withdrawal of Universal Credit, for the limited number of households claiming through that scheme).

Importantly, the cap does not include all welfare benefits, though it does include the majority of the most commonly paid benefits. These are largely detailed in s.75E Housing Benefit Regulations 2006 as amended by the Benefit Cap (Housing Benefit) Regulations 2012/2994 this includes Job Seekers’ allowance, child benefit, incapacity benefit, and – often by far the largest contributor to the overall total – housing benefit.

There are some limited exemptions provided by the policy; particularly focused on those who claim certain disability benefits or pension credit. This is both in terms of some benefit income not being taken into account in the overall cap, and in the application of an exemption mechanism. An example of the former includes the ineligibility of housing benefit for ‘exempted accommodation,’ pursuant to s.75C of the amended Housing Benefit Regulations 2006, to be included in the overall total. This includes accommodation provided outside of the private rented sector for care, support or supervision purposes (though this is a more stringent test than it may first appear).

An example of the latter is the exemption provided for those in work. There is a straight exemption contained within s.75E of the amended Housing Benefit Regulations 2006, provided that the claimant (or their partner) is entitled to working tax credit – namely, they are in work for at least 16 hours a week (or for at least 30 hours a week if a single claimant aged between 25 and 59). Likewise, there is a ‘grace period’ for those who have been in work for at least 50 weeks of the last year who become unemployed of 39 weeks before the cap engages with the

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74 The inclusion of child benefit into the cap proved controversial during the legislative process, with concerns raised in the Lords in particular
household. Effectively, the principle is to exempt those who are in work; but under the regulations, any job will not suffice – it has to be for the number of hours necessary to achieve eligibility for working tax credit.

2.3.1. THE TARGET POPULATIONS AND LEVEL OF DEDUCTIONS

It is worth briefly noting the populations most heavily affected by the policy. As already noted above, the imposition of the cap has a definitive spatial dimension – particularly when considering the high rental costs in London and the South East relative to the rest of the UK. This results in a wide spectrum of penalties being levied on certain households. Some descriptive statistics from the most recent DWP data on the imposition of the benefit cap are outlined in the figures below.

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75 Hal Pawson and Steve Wilcox. (2011). UK housing review 2011 briefing paper. (Chartered Institute of Housing: Coventry)
Figure One: Numbers of children in households affected by the Benefit Cap

Figure Two: Level of Deduction from Housing Benefit (or Universal Credit) per household
2.3.2. HOUSEHOLDS FOLLOWING THE IMPOSITION OF THE BENEFIT CAP

Figure One clearly highlights that households with more children are affected more readily by the cap – indeed, 32% of affected households have five or more children. This is perhaps not surprising given the inclusion of child benefit into the overall calculation of the cap as outlined above, however, it does question somewhat the key use of working tax credit as the principle route for exemption from the policy – those with five or more children are less likely to go and find work, particularly given the high incidence of single parents affected.

Figures Two and Three show the sheer spread of reduction faced due to the policy, and importantly, the sizable level of penalty faced by most households. The majority of households have been levied with up to £50 a week, and 26% between £50.01 and £100 – a significant sum for a household surviving from benefits alone. The higher end of data, although only representing a small percentage of households (<1%), shows how the imposition of a static bright-line which is inclusive of most benefits, can generate the necessity of very sizable deductions. This is perhaps best reflected by the 298 households who had deductions of more than £350 a week; an amount which it is difficult to imagine being found through efficiencies within the household.
2.3.3. AN ANALYSIS OF MOTIVATIONS: THE CONCEPT OF ‘FAIRNESS’

In the formation of the benefit cap policy, the issue of ‘fairness’ has been the key rallying call for arguments in support of its implementation. The Government’s key stated intention is to ensure that ‘workless households do not receive more in benefits than the average working household.’\(^{77}\) This motivation has three key elements which are worth considering here.

Firstly, it cites ‘fairness’ not just relative to the circumstances and money received by the claimant, but with external fairness for those who pay for the policy. This point has been underscored by Hamnett, who stresses the ‘juxtaposition between fairness and affordability for tax payers’ inherent in the Coalition Governments use of rhetoric to support its welfare reform agenda.\(^{78}\) There is not an immediate cross-over between these two conceptions, and nor is it clear whether the focus is to ensure perceived fairness of the benefits system by tax payers or to generate actual ‘fairness’ through the use of an arbitrary cap.

Secondly, the formation of the actual bright-line annual amount based on median UK earnings has been subjected to a great deal of criticism, and was the focus of much bemusement during oral submissions to the Supreme Court in the appeal from \(R\ (SG\ and\ others)\ v\ SSWP.\)\(^{79}\) There are numerous issues surrounding the determination of £26,000 a year as being the appropriate ‘fairness’ barometer. The justification advanced by the Government is that it is at the level of ‘average earnings,’ as detailed by its architect Iain Duncan Smith MP:

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\(^{77}\) Ibid

\(^{78}\) Chris Hamnett, ‘Shrinking the welfare state: the structure, geography and impact of British government benefit cuts’ (2014) 39 Transactions of the Institute of British Geographers 490

\(^{79}\) [2014] P.T.S.R. 619
‘the introduction of the benefit cap meant that, for the first time ever, people who were out of work could not end up with more than the average earnings of people who work hard and try to make their way in the world.’

However, the cap does not take into account benefits received by households earning £26,000 – in some instances, levels of housing benefit and council tax benefit (or new relief under the council tax reduction scheme) could reach sizable totals to families in high-cost areas. Indeed, the Child Poverty Action Group estimated this could reach as much as £400 per week. Moreover, as illustrated by the particularly severe impact in London and the South East, the bulk of much of the benefit totals takes the form of housing benefit which often goes straight to the landlord, rather than as ‘earnings’ to the tenant themselves.

Thirdly, the idea of ‘fairness’ in this context has been imposed as a uniform litmus test for across the country, instead of being formed relatively with reference to geography (or even household composition). The available data seems to suggest the pattern is more complicated. For instance, Figure Four plots the level of Discretionary Housing Payments made in respect of Benefit Cap cases per local authority region. There is a clear geographical element, with London and the South, alongside key urban areas and large cities in the North, being very disproportionately affected. This spatial element is well recognised – and is framed as problematic – in early empirical studies which have attempted to assess the impact of the policy.

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80 HC Deb, 31 March 2014, c582
81 David Simmons, ‘To cap it all’ (Child Poverty Action Group, June 2011) <http://www.cpag.org.uk/content/cap-it-all%E2%80%A6> accessed 10 September 2014
82 Hal Pawson and Steve Wilcox. (2011). UK housing review 2011 briefing paper. (Chartered Institute of Housing: Coventry)
Figure Four: Map plotting the level of Discretionary Housing Payment expenditure on Benefit Cap payments between Local Authorities in the UK
2.3.4. AFFECTING BEHAVIOURAL CHANGE

The second key strand which comes from the policy documents and parliamentary debates is that of affecting behavioural change, particularly in relation to finding work. Iain Duncan Smith MP summarises a key output from the policy as being ‘positive employment-focused behavioural change for claimants affected by the cap.’

This is evidently tied to the ‘incentivising work’ target outlined above regarding the SSSC, however, the exemption mechanisms utilised by the benefit cap present a very large net benefit to those affected getting work. For instance, the deductions outlined above – with an average weekly deduction of nearly £100 a week – demonstrates the serious financial imperatives piled onto households to become eligible for working tax credit.

This focus of the policy has been explicitly audited by the DWP, who compared the proportion of households who went into work following the imposition of the cap with a control group of households sitting just below the cap level of £26,000 a year (or £18,200 respectively). They found that capped households were more likely to be in employment than the control group, with 19% of the former flowing into work over a year, compared with 11% of the latter.

In similarity with many of the other reforms, the strong geographical element manifests itself in this motivation as well. The same DWP research undertook a regression analysis which controlled for certain observable characteristics which could affect movement into work (such as region, and number of children), and found that

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83 HC Deb, 15 December 2014, c72WS
there was a strong London bend to the data – those in London subject to the benefit cap were 9.5% more likely to go into work in 2012 compared to those just below it, compared to 4.7% nationally (including London data).85

It is perhaps surprising that with such sizable financial pressures – and associated support to find work tied to the cap – that the numbers moving into work as a result are still relatively small. However, the drive for the policy to push people into work, and the use of this data to support the claim, has since formed the second key plank of the policy justification.86

2.4. THE TRANSITION FROM DISABILITY LIVING ALLOWANCE TO PERSONAL INDEPENDENCE PAYMENTS

A key transition at the heart of disability benefit provision in the UK has been the creation of a brand new benefit to replace ‘Disability Living Allowance’ (DLA) – ‘Personal Independence Payments’ (PIP). Both operate as a cash benefit which is not means-tested, designed to meet the extra costs of living with a disability. It is paid whether the claimant is in work or not, and claiming DLA or PIP operates as a passport to other benefits (such as carers allowance) and in some cases exemptions from other polices (such as second-rate care component exemption from the SSSC).87

85 Ibid
87 See Reg.B13 Housing Benefit Regulations 2013
Before turning to the stated motivations behind the change, there are four key elements to note in the functioning of the policy. Firstly, it recasts many of the same functions which occur under DLA, but with new benchmarks and quotas for accessing the higher tiers of benefit provision. Fundamentally, the difference lies in PIP’s utilisation of a points-based mechanism which assesses the claimant’s abilities with reference to everyday activities (such as dressing and walking etc.), and each activity has a number of descriptors which indicate relative disablement, and therefore, the correct component of benefit.

The changes made often manifest themselves in a tightening of criteria. For instance, PIP has a new mobility assessment of 20m for access to the higher rate component in comparison with DLA’s mobility assessment requirement of 50m. This raises the clear prospect of the ability of those previously able to access higher levels of benefit under the old benchmarks being clearly at risk of losing their entitlement, and associated access to other provision (such as mobility scooters) which are only available to higher rate receivers.

Another example of shifting benchmarks can be found in the re-casting of the qualifying rules, with PIP requiring claimants to have needed help for at least three months (qualifying period) and to need it for at least nine months after application (prospective test). This changes under PIP to a nine month prospective test, which the Government argues ‘aligns the PIP definition of a long-term health condition or disability with that generally used by the Equality Act 2010 and its published guidance.’

Secondly, and related to the resetting of the benchmarks, there is a requirement for almost all of those transitioning to the PIP scheme to undertake a new medical assessment to qualify for the benefit. DLA operated

principally through the use of self-assessments, with relatively few face-to-face examinations. Instead PIP is designed to provide face-to-face medical assessments for the majority of cases, and – importantly – for there to be another review at the end of the claim period (normally between two and five years).

Although requiring the full re-assessment of claimants on DLA may appear controversial enough, it has been made even more so through the contracting-out of the assessments to a private sector firms to administer the tests.

Thirdly, the new roll-out of the benefit differs from the provision made for introducing Universal Credit – namely, it is not a pilot-based, phased introduction. Instead, all DLA claimants are being assessed and transitioned on a timescale running until ‘late 2017.’ Importantly, although the policy is being subject to ongoing analysis, this is not as part of a phased entry, as is the case in Universal Credit. This means that the initial consultation was the final consultation; the policy is not subject to explicit ongoing revision or further consultation processes with affected claimants which may allow the Secretary of State to discharge their equality duties. However, as seems to be the hallmark of modern social security reform, severe delays in the IT system have rendered the timetable somewhat less certain.

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92 Julie Henry, ‘Early experiences of personal independence payments’ (2014) 22(3) Journal of Poverty and Social Justice 277, 278
2.4.1. MOTIVATIONS FOR THE POLICY

Government rhetoric and the supporting policy documents have presented a ‘pragmatic and principled’ face for the reforms, based on the general vacuities of efficiency and consistency. However, when digging deeper, there are a number of motivations which have been put forward in support of the policy, but chiefly, the imposition of the different benchmarks and the points-based system, the removal of a payment tier and the imposition of a new form of assessment, have been designed with the intention of encouraging those to work who are ‘able’ to do so, and in the process, save money from the overall welfare budget. This aim has been explicit. The Coalition Government stated that a key aim of the policy was to reduce the number of claimants from DLA’s 3,258,440 by 20% - effectively leading to the target of eventually removing 650,000 individuals from disability benefits. This in turn, it was estimated, will lead to savings of more than ‘a billion pounds per annum.’

Inevitably however, this logic is dependent on three inter-linked assumptions: (1) that a sizable proportion of claimants who were/are in receipt of DLA are not deserving of disability benefit by virtue of not meeting a suitable threshold of disability, due to their circumstances changing since their initial assessment, or because they have taken advantage of a system ‘open to abuse,’ (2) that these individuals therefore lack the motivation to work and so become ‘stuck’ on disability benefits unnecessarily, and that (3) these policy problems are solvable by tightening thresholds for access to disability payments, especially for the higher rate components.

93 Neville Harris, ‘Welfare Reform and the Shifting Threshold of Support for Disabled People’ (2014) 77(6) 888, 891
Raising the bar to access is the only real means available to address these concerns whilst preserving the *raison d’etre* behind the policy – universality of provision for individuals with disabilities in meeting the cost of their impairment. Though, as observed by Grover, in revising schemes to face demands of austerity, governments can still preserve elements of universality even when they draw the requirements for access ‘as tightly as [they] desire.’

In so doing, PIP creates an initial (and rolling) assessment which has been described by Harris as ‘undoubtedly…more rigorous and controlled than anything which has gone before it in this context.’ In pulling up the drawbridge in this way, the material impact of PIP is effectively to re-define what disability is in an out-of-work context. This has – some would say inevitably – led already to fears by claimants that this process will lead to the state ‘arbitrarily decid[ing] on whether a person is legitimately disabled or not,’ with reference to criteria outside of the confines of the individual (such as the perceived imperative to reduce welfare spending).

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98 Neville Harris, ‘Welfare Reform and the Shifting Threshold of Support for Disabled People’ (2014) 77(6) 888, 927
99 ibid
100 Alan Roulstone and Hannah Morgan, ‘Accessible public space for the ‘not obviously disabled’ in Karen Soldatic, Hannah Morgan and Alan Roulstone (eds), Disability, Spaces and Places of Policy Exclusion (Routledge 2014) 71
SECTION TWO: AN OUTLINE OF KEY CASES
3. THE ABOLITION OF COUNCIL TAX BENEFIT

3.1. CASE-LAW ON THE COUNCIL TAX REDUCTION SCHEME CONSULTATION

Throughout the imposition of the Coalition Government’s welfare reform agenda, the Courts have repeatedly been asked to assess whether the procedural elements leading to reform have aligned with the grain of some form of ‘fairness’ – be it with regards to a statutory duty or as implied by common law. These two approaches to fairness overlapped somewhat in the Supreme Court decision in Regina (Moseley) v Haringey London Borough Council,101 which is the first time either the Supreme Court of the House of Lords have considered the principles applicable to consultations in administrative decision making. The case concerned a consultation by Haringey London Borough Council into their proposed (and then implemented) Council Tax Reduction Scheme (CTRS) to replace the abolished, centrally funded, Council Tax Benefit.

In the creation of a new policy framework to replace the old formulated Council Tax Benefit, the local authority was bound in their preparation of the scheme by para.3(1)(c ) of Schedule 1A of the amended Local Government Finance Act 1992, in having to – inter alia - ‘consult such other persons as it considers are likely to have an interest in the operation of the scheme.’ Hence this judgment addressed the question at the heart of the issue of procedural fairness such a consultation process, namely, ‘when Parliament requires a local authority to consult

101 [2014] UKSC 56
interested persons before making a decision which would potentially affect all of its inhabitants, what are the ingredients of the requisite consultation?\textsuperscript{102}

Before turning to the salient legal points which arise from the case, there are three key issues which of particular significance to what follows.

Firstly, the claimants in the case stood to benefit from the CTRS subjected to the consultation process being quashed. The claimants were both single mothers who were, before the changes were brought into effect in April 2013, receiving full Council Tax Benefit – namely, following the payment of the benefit their council tax liability was zero.\textsuperscript{103} They argued that the consultation, of which they were eligible to participate, was not carried out lawfully, and consequently Haringey LBC’s decision to adopt the new CTRS should be quashed. In the earlier iterations of this appeal, the quashing of the scheme would have been of benefit to claimants, as it would require the council under para.4(1) Schedule 1A of Local Government Finance Act 1992 – at least as an interim measure – to adopt the ‘default scheme’ laid out in the Council Tax Reduction Schemes (Default Scheme) (England) Regulations 2012 (SI 2012/2886). The ‘default scheme’ here is not a particularly complicated formulation, instead, it simply asserts that the local authority should ‘grant relief against council tax after 1 April 2013 at the same level as had previously been granted by way of CTB.’\textsuperscript{104} Consequently, the claimants would be back to a zero-liability position.

Secondly, the abolition of Council Tax Benefit was likely to put severe strain on Haringey LBC’s finances, particularly in light of severe cuts imposed elsewhere. If the local authority was to provide relief at the equivalent level as centrally administered before April 2013 – or would be provided under the ‘default scheme’ outlined above - relative reduction in support for dealing with council tax payments equated to a 10% cut in 2013–2014

\textsuperscript{102} \textit{Moseley} \[1\] (per Wilson LJ)
\textsuperscript{103} \textit{Moseley} \[3\] (per Wilson LJ)
\textsuperscript{104} \textit{Moseley} \[8\] (per Wilson LJ)
but the effective shortfall would ‘rise to about 17–18%’ because of a trend towards more households in the authority’s area becoming eligible for council tax relief under the original scheme. Importantly, these figures represent the deduction in the silo of the money that was available for specifically dealing with Council Tax benefit, with what is now available for local authorities under the CTRS.

Thirdly – and centrally to the judgment in the case – Haringey LBC dismissed options for absorbing these cuts from elsewhere (for instance, by reducing services in other areas or raising the council tax levy on households). Instead, it was suggested that the benefit levels be reduced relative to cut made, but by exempted certain populations (such as pensioners and the disabled) – this led to a suggested reduction in support of between 18% and 22% per annum for the remaining recipients. In effect, this rendered the new council tax benefit scheme a conduit for passing on the cuts to council tax benefit in a direct, proportional fashion.

The context provided by these three points provides the backdrop to the consultation exercise.

3.2. THE CONSULTATION

In order to discharge the requirements under para.3(1)(c) of Schedule 1A of Local Government Finance Act 1992, it is necessary for the local authority to consult those it considers ‘likely’ to have an interest in the scheme. Haringey LBC took great precautions in ensuring that all potentially affected could have their say. They provided access to the consultation documents online and then hand-delivered a copy to all 36,000 households who were

105 Moseley [9] (per Wilson LJ)
eligible for Council Tax Benefit under the now defunct scheme. It can be said therefore, that sizeable efforts were made to allow relevant populations to respond to the proposed scheme.

However, the real thrust of the Court’s concerns lay in the presentation of the CTRS proposals within the context of the austerity agenda. The court considered in some detail the precise working of the cover letter and booklet present in the mail-out (and available online). As an example of this exercise, the Court highlighted the following passage from the cover letter:

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‘At present the Government gives us the money we need to fund council tax benefit in Haringey. We will receive much less money for the new scheme and once we factor in the increasing number of people claiming benefit and the cost of protecting our pensioners, we estimate the shortfall could be as much as £5·7m.

This means that the introduction of a local council tax reduction scheme in Haringey will directly affect the assistance provided to anyone below pensionable age that currently involves council tax benefit.’ (Bold text present in the original letter by Haringey LBC)

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In a similar vein, the accompanying booklet entitled ‘The Government is abolishing Council Tax Benefit’ stated that:

106 Moseley [16] (per Wilson LJ)
107 Moseley [17] (per Wilson LJ)
'Early estimates suggest that the cut will leave Haringey with an actual shortfall in funding of around 20%. This means Haringey claimants will lose on average approximately £1 in every £5 of support they currently receive in Council Tax Benefit.'

It is this drawing of a causal inference which troubled Wilson LJ. Indeed, is it clear that the LA’s proposed CTRS passes on the cuts into an associated reduction in council tax benefit, but ‘the reduction in government funding did not inevitably have that effect.’ In other words, though the necessity to consult on the adoption of the new scheme was due to the government’s abolition – and associated reduction in funding for – Council Tax Benefit, this funding cut did not necessarily have to manifest itself in proportional cuts in the new CTRS. Drawing a conduit between the imposed austerity and the new scheme did not necessarily follow.

3.3. CARVING OUT REQUIREMENTS: THE APPLICATION OF THE LAW AND ‘FAIRNESS’

Lord Wilson’s position (with Lord Kerr concurring), is that a public authority’s duty to consult can arise in a ‘variety of ways,’ either by statute or through the common law doctrine of legitimate expectation. In either event, he held that the same common law duty of ‘procedural fairness’ provided the benchmark for the Court’s

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108 Moseley [19] (per Wilson LJ)
109 Moseley [19] (per Wilson LJ)
110 Moseley [23] (per Wilson LJ)
assessment of lawfulness (a point which was the focus of some subtle disagreement between the justice, as discussed below).  

The question to be determined by the Court, therefore, is what constitutes ‘fairness’ in the context of a consultation exercise; as stated by Wilson LJ, the concept is an infamously ‘protean concept…susceptible [to] much generalised enlargement.’ In constituting a ‘fairness’ barometer into a set of material criteria, the Court drew on the principles laid out by Sedley QC as counsel in *R v Brent LBC, Ex p Gunning*, which can be formed broadly into the following requirements:

1. The consultation must be at time when the proposals are at a ‘formative stage’ – something launched once the decision has already been taken would never be considered sufficient to meet the requirement of ‘fairness.’

2. The local authority must outline their reasons for adopting a proposal in sufficient detail to permit ‘intelligent consideration and response’ by those consulted.

3. Adequate time must be given for consideration and response.

4. The responses from the consultation must be ‘conscientiously taken into account’ in reaching the final design of the scheme or proposal put out to consultation.

These were explicitly endorsed by the Court, with Wilson LJ going as far as to opine that ‘it is hard to see how any of his four suggested requirements could be rejected or indeed improved.’ This is not, as may be assumed by looking at the criteria alone, a static target. In drawing the criteria to the present context – namely, the removal of a form of benefit – the Court added an extra layer of gloss by asserting these two extra variables into the process:

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111 *Moseley* [23] (per Wilson LJ)
112 *Moseley* [24] (per Wilson LJ)
113 (1985) 84 LGR 168
114 *Moseley* [25] (per Wilson LJ)
1. The degree of specificity under which the local authority conducts its consultation exercise, is dependent on the nature of those it is consulting – for example, consulting members of the public may require more specificity than in consulting local businessmen etc.

2. The ‘demands of fairness’ are higher when removing a benefit from an individual (although how much higher, and under which criteria this rest, are not clear).  

In applying the above formulation, the key issue was the conduit drawn between the austerity driven cut and the direct causal inference with final levels of council tax relief under the new scheme, as implied in the consultation documents. This effectively engages the first two of the Sedley criteria as outlined above, and then engages both layers of added gloss imposed by the Wilson LJ in this case.

Consulting on alternatives to the proposal was held by the Court to be necessary ‘particularly when statute does not limit the subject of the requisite consultation to the preferred option’ in order to satisfy the requirement of fairness. However, strictly speaking, looking at the statutory formulation under para.3 of Schedule 1A of Local Government Finance Act 1992 alone, the duty to consult imposed on local authorities is very much couched within the confines of its own CTRS, not broader considerations. However, despite this, the Court held that ‘fairness’ may require ‘passing reference’ to be made to ‘arguable yet discarded alternative options,’ even where the duty imposed statutorily does not explicitly infer this.

It was the determination of this last point – whether fairness dictated the explicit referencing of alternative arrangements or not – which provides the key dividing line between the claimants being unsuccessful in the Court of Appeal, and being successful in the Supreme Court. In the Court of Appeal iteration, the Court was

115 Moseley [26] (per Wilson LJ)
116 Moseley [27] (per Wilson LJ)
117 Moseley [28] (per Wilson LJ)
satisfied that the explicit reference to other options was not required because ‘other options would have been reasonably obvious to those consulted.’\textsuperscript{118} This, Lord Wilson suggested, leads to two further unsubstantiated assumptions. Firstly, that those consulted would therefore also be aware of the reasons for rejecting these alternative arrangements, and secondly, that this inference of knowledge was accounted for in the consultation’s accompanying material (namely, the letter and booklet). Neither of these assumptions, the court held, was satisfied.\textsuperscript{119} Consequently, the Court of Appeal erred, and the appeal in this case was granted.

However, given the time elapsed since the original appeal, the relief to the claimants in this case was limited to the Court’s declaration. It was made clear that, in the context of the regulations, ‘it would not be proportionate to order Haringey to undertake a fresh consultation exercise in relation to a CTRS which will have been in operation for two years and which it is not minded to revise.’\textsuperscript{120} Indeed, the claimants did not seem overly optimistic of such a remedy, with Lord Wilson remarking that their counsel argued the case with ‘little apparent enthusiasm.’\textsuperscript{121}

It is worth noting briefly here that the Justices, while in agreement on the final outcome, were not in complete agreement on the role common law conceptions of procedural fairness play in the assessment of a statutorily imposed duty to consult. Indeed, as suggested by Matthias, they reached ‘the same conclusions in subtly different ways.’\textsuperscript{122} Lord Wilson’s account (with which Lord Kerr agreed) is laid out above as the main approach, but Lord Reed placed more emphasis on the statutory context, suggesting that the common law duty of procedural fairness – though existing in the present case – ‘varies almost infinitely depending upon the circumstances.’\textsuperscript{123}

\textsuperscript{118} Moseley [31] (per Wilson LJ)
\textsuperscript{119} Moseley [31] (per Wilson LJ)
\textsuperscript{120} Moseley [33] (per Wilson LJ)
\textsuperscript{121} Moseley [33] (per Wilson LJ)
\textsuperscript{122} David Matthias, ‘The duty to consult’ (2014) 158 Solicitor’s Journal 28
\textsuperscript{123} Moseley [33] (per Reed LJ)
The interpretation of a statutory duty in this context was also considered to be a heavily flexible activity in adherence to the specific circumstances implied by the statute. Reed LJ sets his judgment against the heavily formulaic and somewhat prescriptive utilisation of criteria by that of Wilson LJ, by asserting that ‘a mechanistic approach to the requirements of consultation should therefore be avoided.’

Instead of adopting such criteria, Reed LJ instead looks to the purpose of the statutory obligation to consult under the amended Local Government Finance Act 1992, and concludes the ‘the purpose of [it] in my opinion, [is] to ensure public participation in the LA’s decision-making process.’ In drawing the conduit between the cuts to the provision of council tax relief and the associated reduction in the CTRS, Haringey LBC had presented the reduction as inevitable, and therefore ‘disguised the choice made by Haringey itself.’

### 3.4. Drawing the Judgment Together: Agreement on the Bench?

Interestingly, Hale LJ and Clarke LJ opted to agree with both judgments, on the basis that there is ‘very little between them.’ This may well be true regarding the immediate facts of the case presented here; the same conclusions were drawn with broadly the same criteria adopted but I would suggest that this is far from the determinative case that one always hopes for from a Supreme Court decision. The key difference is worth noting here, as this case has some significance regarding the strand of procedural justice which flows through this report.

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124 Moseley [36] (per Reed LJ)
125 Moseley [38] (per Reed LJ)
126 Moseley [42] (per Reed LJ)
127 Moseley [44] (per Hale LJ and Clarke LJ)
When regarding future appeals, there is the potential for a sizeable difference in interpretation between the static set of ‘Sedley criteria’ with the extra layers of gloss – as outlined by Wilson LJ – and the far more flexible statutory based interpretation offered by Reed LJ. For instance, it is entirely plausible that a case may arise where the demands implied by the statutory context are met, but the broader demands of procedural fairness - with the added gloss above - are not. The tension between these two different approaches would be set into sharp relief in such a situation. Moreover, and with specific relevance to this report, it is also possible to imagine a situation where the protection afforded by Wilson LJ’s observation that the ‘demands of fairness’ are higher when removing a benefit, may not always feature in the consideration of the statutory purpose sitting behind a consultation (this problem is canvassed in the discussion of the case law on the transition from DLA to PIP elsewhere in this report).

Its early legacy appears to imply a pick and mix approach, where the court utilises the route best suited to it from the two options presented; if a statutory obligation to undertake an obligation exists then the Court can opt for Reed LJ, otherwise it can opt for Wilson LJ. This appears to be the case in its first application in in R (on the application of Thomas) v Hywel Dda University Health Board,128 where, in the existence of a statutory duty for a public authority, the judgment focused ‘especially [on] the judgment of Lord Reed.’129 This approach clearly raises the prospect of ‘fairness’ being treated differently between statutory consultations by the public authority and by those taken on voluntarily – particularly when undertaken to inform a proposal to remove benefit entitlement, given the added gloss in Wilson LJ’s judgment which is missing from Reed LJ’s.

128 [2014] EWHC 4044 (Admin)
129 Thomas [65] (per Hickenbottom J)
4. THE TRANSITION FROM DLA TO PIP

4.1. THE LEGAL CHALLENGE

The *Sumpter*\(^{130}\) case is the flagship appeal against the Government’s gradual transition away from Disability Living Allowance (DLA) and towards Personal Independence Payments (PIP). The claimant in this case suffers from post-viral syndrome, maternally-inherited diabetes and deafness, and at the time of the case was also undertaking tests for mitochondrial encephalomyopathy.\(^{131}\) His symptoms varied in severity each day, but he was unable to walk long distances even when comparatively mobile, and was often confined to using a wheelchair or assisted vehicle to aid mobility.\(^{132}\)

It is this issue of mobility, and consultations surrounding changes to the thresholds surrounding it, which form the basis for this appeal. Under DLA, the claimant receives the higher rate mobility component, which is paid to claimants who cannot walk more than 50m unaided. This provides not only more money per week than the standard rate, but also allows access to an adapted vehicle (for instance, a mobility scooter) to assist with mobility; a service used by the claimant. Under PIP, the two levels of award for mobility remain under the new ‘enhanced’ and ‘standard’ silos – both of these pay the same as the DLA tiers. However, importantly, in order to access the ‘enhanced’ rate, which would maintain the benefits the claimant is currently receiving, he has to demonstrate that he cannot walk 20m unaided, instead of 50m. The claimant was due to transition to the new PIP

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\(^{130}\) R (on the application of Steven Sumpter) v The Secretary of State for Work and Pensions [2014] EWHC 2434 (Admin)

\(^{131}\) *Sumpter* [17] (per Hickinbottom J)

\(^{132}\) *Sumpter* [19-20] (per Hickinbottom J)
scheme in 2016, and consequently was concerned that he will lose the higher rate component, his vehicle, and consequently ‘he fears a consequent loss of independence, and that his quality of life will be impaired.’

Clearly, it is outside the Court’s jurisdiction to consider the merits of the policy change; as underscored by Hickinbottom J, ‘how public money is distributed in welfare benefits is a matter for the Secretary of State and Parliament to which he is responsible.’ Instead, the principal issue before this appeal were the consultations built into the policy process surrounding the shift from the 50m criterion to the 20m one, and general regard to the equality duties imposed on the minister.

The challenge was therefore based on a familiar set of grounds, with the claimant contending that the consultation which formed part of the policy formation process was unlawful and that the Secretary of State did not adequately discharge his Public Sector Equality duty under s.149 Equality Act 2010.

Before turning to the law at hand and the decision of the Court, it is worth briefly outlining the somewhat messy and abridged consultation process.

4.2. THREE BITES OF THE CHERRY: THE CONSULTATION PROCESS

At risk of being overly descriptive and somewhat dry, it is central to the finding of the Court to assess the series of consultations which occurred in and around the formation of the policy. There were effectively three separate

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133 Sumpter [4] (per Hickinbottom J)
134 Sumpter [6] (per Hickinbottom J)
135 Sumpter [93] (per Hickinbottom J)
consultations issued by the Secretary of State into the policy; each with their own problems and potential avenues for legal challenge.

In a departure from the cases on the Council Tax Reduction Scheme discussed elsewhere in this report, there was no statutory duty to for the Secretary of State to issue a consultation. However, he decided to do so, and the first consultation on the proposed reforms was launched on December 2010 entitled ‘Disability Living Allowance Reform.’\(^ {136}\) This did not detail any specific changes on the thresholds for offering support in the different tiers, but did ask the general question: ‘what are your views on the weightings and entitlement thresholds for the Mobility activities?’\(^ {137}\)

Following the collation of responses from this consultation, a draft set of PIP reforms were designed and put out for a second consultation, entitled ‘DLA Reform and Personal Independence Payment – Completing the Detailed Design.’\(^ {138}\) This document was given a great deal of attention by the Court and is central to the arguments on both sides of the case. Importantly, the mobility threshold information was included in this consultation; however, it was very badly phrased and led to wild misinterpretation by the majority of those who responded to it. Indeed, Hickinbottom J remarks that the outline of the proposed changes was ‘at best, convoluted, inherently unclear, ambiguous and confusing. No construction of them allows for full coherence.’\(^ {139}\)

The Secretary of State clarified the position in his response to the consultation, and this led to the original claim for this case to be issued on the basis of a lack of clarity in the exercise of the consultation process prohibiting the consultees from responding to the shift from 50m to 20m.\(^ {140}\) Following this, and before the hearing for this original claim, the Secretary of State issued a third (and final) consultation document specifically on the mobility

\(^{136}\) Sumpter [22] (per Hickinbottom J)
\(^{137}\) Sumpter [49] (per Hickinbottom J)
\(^{138}\) Sumpter [51] (per Hickinbottom J)
\(^{139}\) Sumpter [106] (per Hickinbottom J)
\(^{140}\) Sumpter [69] (per Hickinbottom J)
criteria entitled ‘Consultation on the PIP assessment moving around activity.’\(^\text{141}\) This had only one question, which was focused specifically on the 50m to 20m criterion, which was: “Only one question was put out for consultation, set out in Part 3: ‘What are your views on the Moving around activity within the current PIP assessment criteria?’\(^\text{142}\) The consultation lasted 6 weeks, and received 1,145 responses;\(^\text{143}\) the majority of which – perhaps unsurprisingly – argued for the restoration of the 50m criterion.\(^\text{144}\) Importantly, by the time this final consultation had been carried out, the other criteria for PIP had been fixed, and the Secretary of State had ‘ruled out’ any substantial relaxation in the mobility criteria due to resources being dedicated elsewhere.\(^\text{145}\)

4.3. THE LAW ON GOVERNMENT CONSULTATIONS

At the risk of creating some repetition here in line with the other appeals detailed elsewhere in this report, it is worth briefly detailing the position on the legality of consultations adopted by Hickenbottom J. Although the judgment is relatively comprehensive, only the key elements sitting at the heart of the appeal warrant consideration here. Hickinbottom J starts with the uncontroversial position that if one is to undertake a consultation (either imposed by statute, as in the case of the Council Tax Reduction Scheme cases, or voluntarily, as in this case) it must be carried out properly. He adopts the well-established Gunning criteria detailed elsewhere, which can be briefly summarised as:

\(^\text{141}\) Sumpter [70] (per Hickinbottom J)
\(^\text{142}\) Sumpter [73] (per Hickinbottom J)
\(^\text{143}\) Sumpter [76] (per Hickinbottom J)
\(^\text{144}\) Sumpter [78] (per Hickinbottom J)
\(^\text{145}\) Sumpter [96] (per Hickinbottom J)
1. With particular relevance to the second consultation in 2013, the consultation must take place at a time when the policy is still in a formative stage – namely, the policy decision must be open for material influence of some description.

2. There must be adequate information provided to consultees, and they must be given adequate time to respond, in order to support meaningful participation in the consultation exercise.

3. The responses provided must be given ‘conscientious consideration’.

There are a number of other more general points raised by Hickenbottom J which inform his assessment, but two in particular warrant repeating here as they have some relevance to the current case:

1. To be fair, the decision maker must undertake the consultation with an ‘open mind’ – but importantly, ‘an open mind is not the same as an empty mind.’ This requirement bleeds somewhat into the necessity for the consultation to occur at a formative stage in the policy. In other words, there is little point undertaking a consultation if the decision has already been made in the mind of the Secretary of State, but that they may reasonable articulate their own strong opinions and position on the issue at hand.

2. Very importantly with regard to the current facts, the process ‘must be considered as a whole.’ Namely, further consultations issued after any larger initial consultation must be seen within the context of the process as a whole, rather than simply on their own individual merits.

With reference to this basic position, the claimants argued that: (1) the consultation process was unfair because consultees never had a proper opportunity to consider the 20m walking criterion, and (2) consultees were not

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146 Sumpter [94] (per Hickinbottom J)
147 Sumpter [94] (per Hickinbottom J)
provided with sufficient information (namely, the impact the proposals would have on physically disabled people) to enable to them to respond intelligently to the consultation.\(^ {148}\)

The basic thrust of this first argument was that the 2013 consultation could ‘not cure flaws in the 2012 consultation.’\(^ {149}\) This was for two reasons. Firstly, it did not meet the criteria above of still taking place in a ‘formative’ stage of the policy process – instead, the decision had effectively already been taken by the Secretary of State and regulations on other aspects had already been introduced. This was supported by Westgate QC by highlighting that ‘the 2013 Regulations were in force by the time the consultation started and… [therefore] decisions had already been made that precluded any real possibility of that criterion being changed to address the concerns raised in the consultation.’\(^ {150}\) This is compounded by the second key reason, which is that the consultation on the mobility criterion should have included other mobility activities to allow consultees to address the balance in the proposals as a whole – instead the Secretary focused exclusively on the threshold for movement, and this in turn jeopardised the requirements of fairness and was unlawful.\(^ {151}\)

The Court was unconvinced by the reasoning, and therefore the ground was dismissed. Looking at the consultation process ‘as a whole,’\(^ {152}\) Hickinbottom J concluded that although ‘not perfect’\(^ {153}\) the consultees did have an opportunity to comment on the 20m threshold change, and that the Secretary of State had considered responses to it with ‘an open mind.’\(^ {154}\) The judgment highlights the fact that consultations can occur in a ‘step-wise fashion’\(^ {155}\) – namely, had the Secretary of State decided in light of the 2013 consultation to make amendments to other elements of the regulations in order to shift the savings from the 20m criterion elsewhere,

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\(^ {148}\) Sumpter [93] (per Hickinbottom J)

\(^ {149}\) Sumpter [96] (per Hickinbottom J)

\(^ {150}\) Sumpter [116] (per Hickinbottom J)

\(^ {151}\) Sumpter [96] (per Hickinbottom J)

\(^ {152}\) Sumpter [123] (per Hickinbottom J)

\(^ {153}\) Sumpter [123] (per Hickinbottom J)

\(^ {154}\) Sumpter [123] (per Hickinbottom J)

\(^ {155}\) Sumpter [119] (per Hickinbottom J)
he could have reasonably launched a separate consultation into it. In the current case, he decided against changing the PIP criteria in light of the evidence from the 2013 consultation, and he was in his rights to do so.

The second ground on the lack of information was dismissed very quickly by the court. The reasoning behind the claimant’s submission was that the Secretary of State had crafted the policy to advance the aim of ‘re-allocat[ing] resources from those with physical impairments to those with non-physical impairment.’ This manifested itself in the more difficult physical criterion of 20m. However, this was not made clear as a policy decision in either of the consultation documents, and therefore, the consultees were unable to comment on a key plank of the policy.

This was quickly dismissed by the Court on the evidential basis of what was contained within the consultation documents, with Hickenbottom J agreeing with counsel for the DWP that ‘so far as assistance with mobility was concerned, the policy intention was to treat those with physical impairments and those with non-physical impairments equally’ and consequently ‘this ground too in any event effectively foundered on the evidence.’

4.4. **The Public Sector Equality Duty**

Again, at risk of some repetition with other sections elsewhere in this report, the Public Sector Equality duty (PSED) requires the Secretary of State to have ‘due regard’ to, inter alia, the elimination of discrimination, and to advance equality of opportunity between those with protected characteristics (of which having a disability is

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156 *Sumpter* [125] (per Hickenbottom J)
157 *Sumpter* [126] (per Hickenbottom J)
158 *Sumpter* [126] (per Hickenbottom J)
The duty, as highlighted by Hickinbottom J, requires a ‘conscious directing of the mind to the obligations.’

The argument of the claimants here somewhat mirrored those made for the unlawfulness of the consultations, but instead were focused on the Equality Impact Assessments carried out during the policy formation process. There were two of these throughout the period under review, both aligning approximately with the timings of the second and third consultations. It was argued that the PSED was not discharged adequately in either because: the first (in 2012) neglected to address the impact of the policy on those whose physical condition renders them unable to walk, and the second (in 2013) because by that point, the Secretary of State had already cast the non-physical criterion into regulations, and therefore, a key route for reducing the impact of the measure – namely, by re-balancing support between those with physical disability with those with non-physical disability – was already excluded.

This argument was given very short shrift by the court, with Hickenbottom J stating that he did not ‘consider it is arguable.’ In light of all the information canvassed in the judgment (two Equality Impact Assessments and the detailed consideration of the multiple consultations), he considered that, ‘when looked at fairly and in context, at all stages, the Secretary of State clearly had the impact of the proposals…and his section 149 duty to have regard to that impact, well in mind.’

Consequently, the appeal failed on all grounds.

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159 S.149 Equality Act 2010
160 Sumpter [137] (per Hickinbottom J)
161 Sumpter [135] (per Hickinbottom J)
162 Sumpter [142] (per Hickinbottom J)
163 Sumpter [140] (per Hickinbottom J)
4.5. SOME COMMENTS ON THE CONSULTATION PROCESS

There are two key points worth highlighting here in the case, particularly when set alongside the Supreme Court decision in *Moseley* (discussed in the section of the report on the removal of Council Tax Benefit) on the key issue of holding consultations to a benchmark of procedural justice.

Firstly, this case clearly demonstrates the emphasis placed by the Court on taking a composite approach to the assessment of the consultation process. Hickinbottom J makes clear that he would be unlikely – if required of him – to find that the initial consultation was lawful under the *Gunning* criteria and the other layers of gloss he adds to these requirements. Instead, the process was effectively rendered lawful through the satellite consultation in 2013 focused on a much narrower sub-set of the policy, and after some elements of the overall PIP policy framework had already been regulated for. It is effectively a procedural justice case of the whole being greater than the sum of its parts; no single consultation in the process was ‘lawful’, but all of them taken together can be considered as such. This somewhat stretches the *Gunning* criteria, which are clearly of a mind focused on one complete consultation process, rather than an initial flagship consultation followed by a series of afterthoughts.

This has a knock-on effect of placing far more reliance on the ‘open-minded’ nature of the Secretary of State’s position. Namely, in this case, the Secretary of State was considered ‘open-minded’ in the face of already having bought many of the changes into legislation before issuing the final consultation. The relative vacuities of an emphasis on retaining an ‘open-mind’ sits somewhat oddly alongside the far more specific and granular criteria advanced under *Gunning*.

Secondly, in light of the Supreme Court decision in *Moseley*, this case broadly follows the reasoning later adopted by Wilson LJ, although this is perhaps unsurprising given the lack of statutory obligation to undertake a
consultation in this instance rendering Reed LJ’s approach inapplicable. However, given that this decision predates that of the Supreme Court, it is worth considering if the approach taken here may have differed following Moseley. I would suggest that, although the outcome may well have been the same, the ‘added gloss’ pinned onto the Gunning criteria by Wilson LJ are particularly pertinent to this case.

These two ‘extra’ criteria, elaborated on in the section on the removal of Council Tax benefit, state that:

1. The degree of specificity under which the local authority conducts its consultation exercise, is dependent on the nature of those it is consulting – for example, consulting members of the public may require more specificity than in consulting local businessmen.

2. The ‘demands of fairness’ are higher when removing a benefit from an individual (although how much higher, and under which criteria this rest, are not clear).\(^{164}\)

These considerations are of particular relevance in the present case. It is well established by the court that the series of consultations certainly lacked clarity, with the second in particular being described as ‘at best, convoluted, inherently unclear, ambiguous and confusing.’\(^ {165}\) One could also argue, with reference to Wilson LJ’s extra criteria, that having such a fragmented consultation process would fall foul of the requirements of fairness by neglecting to both: provide sufficient specificity for vulnerable claimants by allowing the consideration of the scheme as a whole (under the first criterion above), and to meet the higher demands of fairness required when removing a benefit from an individual (under the second criterion above). Although the impact of the Supreme Court decision in Moseley is unclear here, I would suggest that Wilson LJ’s judgment – and in particular the two extra requirements he introduces for consultations affecting benefit claimants – seem focused on ensuring a lack of a clear regard to the consultation process, and efforts to communicate it effectively,

\(^{164}\) Moseley [26] (per Wilson LJ)
\(^{165}\) Sumpter [106] (per Hickinbottom J)
fall short of fairness benchmarks when the ultimate impact on those consulted can be as severe as in the case of the removal of a benefit.
5. The Benefit Cap Challenges

The so-called ‘benefit cap’ has been subject to a judicial review appeal in both the Divisional Court, on appeal in the Court of Appeal, in *R. (on the application of JS) v Secretary of State for Work and Pensions*,166 and finally up to the UKSC, in *R. (on the application of JS) v Secretary of State for Work and Pensions*.167 Here, the earlier decisions will be considered before turning to the ramifications of the significant UKSC decision.

The cases concerned two sets of claimants who were all adversely affected by the introduction of the cap. As stated in the judgment itself, ‘a summary description of their difficulties may not adequately communicate the depths of the very real day to day anxiety and distress which they must feel,’168 however, it suffices to say for the purposes of outlining the legal elements of the case, that both were single parents with one or more child resident with them, who had suffered domestic and sexual violence by their former partner.169 The total benefits they received in each case, crept over the benefit cap limit imposed by Part 8A into the Housing Benefit Regulations 2006 by between £50 and £85 per week; largely due to the high cost of their rental housing in the London area.

It was accepted by the Court that there were ‘powerful reasons’ why mitigation of the benefit cap, either by paying the difference of the amount removed from their housing benefit, moving elsewhere, or finding work, were not appropriate in these instances.170 This was for cultural reasons, issues finding work, and due to the

166 [2014] EWCA Civ 156
167 [2015] UKSC 16
168 JS [13] (per Dyson MR)
169 JS [13] (per Dyson MR)
170 JS [22] (per Dyson MR)
deductions involved being relatively large sums of money, and hence being unlikely to find through general
house-keeping measures.

The claimants made a series of interlinked submissions. They argued that the benefit cap:

1. Is unlawfully discriminatory against women pursuant to art.14 read in conjunction with art.1/1;

2. In the alternative, that the benefit cap is unlawfully discriminatory against women who are victims of
domestic violence pursuant to art.14 read in conjunction with art.1/1;

3. Infringes article 3.1 of the United Nations Convention on the Rights of the Child (namely, ‘In all actions
concerning children, whether undertaken by public or private social welfare institutions, courts of law,
administrative authorities or legislative bodies, the best interests of the child shall be a primary
consideration’)\textsuperscript{171}

4. Unlawfully discriminates against families in breach of article 14 read with article 8 of the Convention

5. Infringes article 8 of the Convention as a free-standing claim

6. Is unlawful at common law on the grounds of irrationality

All of these were rejected by the Court. Each of these submissions was handled in some detail in the judgment,
and this section serves to concisely outline the key tenets of the decision on each of them, before drawing out
some of the significant points which follow.

\textsuperscript{171} article 3.1 of the United Nations Convention on the Rights of the Child
5.1. DISCRIMINATION UNDER ART.14 WHEN READ WITH ART.1/1

As the bread-and-butter ground of appeal for the welfare reforms undertaken by the government, it is of little surprise that much of the judicial reasoning is focused on the issue of discrimination under art.14 read in conjunction with art.1/1.

The argument for discrimination fell on the demographic composition of certain affected populations. It was clear to the court – and accepted by the Secretary of State for Work and Pensions – that the imposition of the benefit cap disproportionately affected lone parents. Of these, 92% are women; consequently, it was accepted that the imposition of the cap disproportionately affects women.

This discrimination, in similarity with \textit{R (MA) v Secretary of State for Work and Pensions}^{172} detailed elsewhere in this report, the discrimination was held to be either indirect, or an instance of Thlimmenos discrimination (namely, ‘when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different’ of \textit{Thlimmenos v Greece}^{173}). The Court held that it did not matter which of these forms of discrimination the benefit cap actually embodied, as the same tests apply to each.

The issue before the Court therefore, was whether this discrimination was justified. In undertaking this assessment, Dyson MR applied the well-established ‘manifestly without reasonable foundation’ test.\textsuperscript{174} As detailed elsewhere in this report, the test sets a particularly high bar – an issue noted in the judgment itself when the utilisation of such a ‘stringent test’ was justified on the basis of ‘the distribution of state benefits are an aspect of political and governmental life in which the court should be very slow to substitute its own view for that of the

\begin{footnotesize}
\textsuperscript{172} [2014] PTSR 584
\textsuperscript{173} [2000] ECHR 162 [44]
\textsuperscript{174} JS [27] (per Dyson MR)
\end{footnotesize}
In taking this line, the fact the regulations were approved by affirmative resolution and many of the key issues put before the court were debated by Parliament afforded ‘the additional respect which is customarily afforded to judgments about social policy which find expression in legislation.’

Despite being a high test, the Court was entitled to give scrutiny to the reasons advanced in support of the measure and their constitution as ‘legitimate aims.’ In support of the justification of the policy, the Secretary of State advanced three such aims: ‘(i) to introduce greater fairness in the welfare system between those receiving out of work benefits and taxpayers who are in employment; (ii) to make financial savings where the cap applies and, more broadly, help make the system more affordable by incentivising behaviour that reduces long term dependency on benefits; and (iii) to increase incentives to work.’

Each of these was given careful consideration by the Court in response to forensic submissions by the claimants, and CPAG as interveners, on the validity and supporting logic of these aims. A particularly detailed assessment was undertaken into what extent ‘fairness’ – namely, a parity between median earnings (as opposed to income) and what it is possible to receive in benefits – was achieved by the policy, in the face of the claim by CPAG that ‘fairness here is emptied of all content as a legitimate aim.’ Issues surrounding the advancement of ‘financial savings’ as a legitimate aim around the policy were also dealt with by the Court, particularly in light of the decision in Ministry of Justice (formerly Department for Constitutional Affairs) v O’Brien that a discriminatory rule or practice can only be justified ‘with reference to a legitimate aim other than the simple saving of cost.’

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175 ibid
176 JS [28] (per Dyson MR)
177 JS [30] (per Dyson MR)
178 JS [43] (per Dyson MR)
179 [2013] UKSC 6
180 Ibid [69] (per Hope LJ and Hale LJ)
Both of these arguments – amongst other less persuasive ones – were dismissed by the Court. It was held that despite some logical concerns in its technical embodiment in this case, ‘a broad concept of fairness as between those who are in work and those who are not in work is a legitimate aim.’\(^{181}\) Likewise, it was held that although it is clear that financial savings cannot justify a discriminatory measure alone, it can service as a legitimate aim when in conjunction with other legitimate objectives.\(^{182}\)

Consequently, the Secretary of State had served to justify the discriminatory effect of the benefit cap on both women generally,\(^{183}\) and in the case of victims of domestic violence (who are disproportionately women).\(^{184}\)

5.2. THE UN CONVENTION OF THE RIGHTS OF THE CHILD

Though the UN Convention of the Rights of Child has not been incorporated into domestic law, it was common ground between the parties that the Court should have regard to its articles as an issue of ‘convention jurisprudence.’\(^{185}\) The key argument here revolved around the ‘primary consideration’ formulation within article 3.1, which states that:

\(^{181}\) JS [43] (per Dyson MR)
\(^{182}\) JS [48] (per Dyson MR)
\(^{183}\) JS [57] (per Dyson MR)
\(^{184}\) JS [66] (per Dyson MR)
\(^{185}\) JS [69] (per Dyson MR)
'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

The claimants submitted that it was insufficient that the Secretary of State had ‘merely considered the interests of children’ – instead, there was an obligation to treat the best interests of the child as a primary consideration in the formulation of the policy. Following a detailed assessment of evidence put before it that the government had looked at the impact the measure was likely to have on children, the Court held that ‘it is plain on the basis of this evidence that the rights of children were, throughout, at the forefront of the decision-maker’s mind.’ It was not necessary for the interest to fall first in a chain of reasoning, or chronologically – it was sufficient for present purposes that it was considered throughout the policy process. Consequently, this ground also failed.

5.3. CONSIDERATION OF ART.8

The claimants attempted to utilise art.8 in two key ways; firstly by using it as a means to access art.14, and secondly as a separate free-standing submission that the cap was an unjustified interference with art.8 rights.

Perhaps unsurprisingly, both of these grounds failed. In short, both of these submissions still required the assessment of justification under the ‘manifestly without reasonable foundation’ test which was undertaken in the...
first section. This, in many respects, rendered the question of engagement with art.8 somewhat academic, as the answer to the built-in qualification had already been considered in some detail by the Court.

Nevertheless, it is worth considering briefly two key issues which arose from the discussion. Firstly, a key issue which was considered in some detail was the possibility of one of the claimants being made homeless by the cap. This revolved around the criterion of ‘intentionality’ under s.191 Housing Act 1996, which forms one of a number of different hurdles a homeless applicant must pass to be owed the full housing duty. The question here was whether an individual made homeless due to failure to pay rent as a result of the imposition of the benefit cap, would be considered homeless intentionally. The Court assessed that this would – in theory, despite some potential practical issues – not be case.

Secondly, despite the problems the claimants faced regarding justification outlined above, the Court held that the benefit cap did have a ‘direct link with the ability or inability to retain a home,’ and consequently did engage art.8. However, it did not interfere with it, due to the impact of the measure not inducing a sufficient level of destitution. Indeed, the policy was some distance away from achieving, with Dyson MR making it clear that it was an ‘ambitious submission’ and ‘that the claimants fall well short of demonstrating a breach of article 8.’

189 JS [106] (per Dyson MR)
190 JS [86] (per Dyson MR)
191 JS [90] (per Dyson MR)
192 JS [87] (per Dyson MR)
193 JS [105] (per Dyson MR)
5.4. **PUBLIC LAW GROUND OF IRRATIONALITY**

The final ground considered – and ultimately dismissed – by the Court, was that of irrationality. The claimants here were not submitting irrationality in the widely argued *Wednesbury* sense. It was instead suggested that the Secretary of State had fallen foul of the Tameside principle – namely, that the secretary of state had ‘failed to sufficient information to ensure that his decision was properly informed with respect to the difficulties of those fleeing domestic violence and of those living in temporary accommodation.’

This ground was quickly dismissed by the Court on the basis that these issues had been considered in some detail throughout the legislative process by Parliament, which pulled the policy outside of the ambit of the Tameside principle. Dyson MR plainly held that ‘in our view there is no room in the particular circumstances of this case for the application of the Tameside principle.’

5.5. **THE SUPREME COURT DECISION – DRAWING CONDUITS UNDER THE UNCRC**

The case was then taken to the UKSC where Lady Hale provides a more detailed overview of the difficult circumstances under which the claimants make the appeal. The challenge followed the same legal arguments present above, with the appellants arguing the familiar ground that the cap is unlawfully discriminatory contrary

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194 *JS* [107] (per Dyson MR)
195 *JS* [107] (per Dyson MR)
196 *R. (on the application of JS) v Secretary of State for Work and Pensions* [2015] UKSC 16 [169-177] (per Hale LJ)
to Article 14 of the European Convention on Human Rights (ECHR), leveraged by either Article 1 of the First Protocol (Right to Property) or Article 8 (Right to Respect for Private and Family Life).

In common with the earlier decisions, the Court readily accepted the relevance of Art.1/1, however, in a break with the second instance decision (see the analysis of Dyson MR’s decision above) - considered that the case for the engagement of Article 8 had ‘not been made out.’ The issue of discrimination resulting for those suffering from domestic violence was quickly dismissed due to the availability of DHPs to mitigate a problem that was described as being ‘inherently of a temporary nature’ (see the later chapter dedicated to DHPs on the efficacy – or lack thereof – of these payments to meet such requirements).

The judgment was instead dominated by the Court wrestling with the second area of discrimination, and following the application of the ‘manifestly without reasonable foundation’ test, the majority concluded that the policy has a legitimate aim and the discriminatory impact on women was justified.

197 JS [80] (per Reed LJ)
198 JS [62] (per Reed LJ)
200 Lord Reed, Lord Hughes and Lord Carnworth
The Relevance of the United Nations Convention on the Rights of the Child

(UNCRC)

They the implication of this judgment, and its key deportation from earlier decisions, relates o the relevance of the UNCRC. The (potential) significance of supra-national obligations under UN Conventions – and specifically the UNCRC – has not gone unnoticed elsewhere. For instance, Markus has surveyed the potential for the UNCRC to influence particularly housing cases previously,\(^\text{201}\) despite it not being incorporated directly into domestic law. Others have suggested its use, at least as an interpretative guide, has been on the rise both within the UK and globally.\(^\text{202}\) Here, the key dividing line between the justices was the relevance of Article 3(1) of UNCRC in interpreting the application of Article 14 in the specific instance of a case of alleged gender discrimination. Indeed, further submissions by the Secretary of State on this point were the source of the significant delay in the handing down of the judgment.\(^\text{203}\)

Article 3(1) UNCRC states that:

‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.’\(^\text{204}\)

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\(^{201}\) Joseph Markus, ‘When are the best interests and welfare of the child relevant and how can they be used in housing-related claims? Part 2: application’ (2015) 18 Journal of Housing Law 10

\(^{202}\) Tonn Liefaard and Jaap Doek, ‘Litigating the Rights of the Child: Taking Stock After 25 Years of the CRC’ in Tonn Liefaard and Jaap Doek (eds), Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence (Springer Netherlands 2014) 8

\(^{203}\) JS [113] (per Carnwath LJ)

\(^{204}\) Article 3(1) UNCRC
There are two key points arising from the judgment on this issue. Firstly, a majority of the Court (3-2)\(^\text{205}\) held that the Government had not met their obligations under Article 3(1). This was principally illustrated through highlighting the clear positive correlation between numbers of children (and consequently, associated levels of child benefit, child tax credit and in all likelihood, housing benefit) and being subject to the cap. The particular prevalence of child-targeted benefits in tipping families above the prescribed level led Lord Carnworth to raise the question of why ‘the viability of a scheme, whose avowed purpose is directed at the parents not their children, is so disproportionately dependent on child related benefits.’\(^\text{206}\)

However, the relevance of the UNCRC to the interpretation of obligations transposed into domestic law when considering issues of gender divided the Court in the opposite direction (3-2).\(^\text{207}\) Following \textit{Demir v Turkey},\(^\text{208}\) it is well established that the UNCRC can be relevant in the interpretation of ECHR obligations, despite it not being directly incorporated into domestic law. However, the disagreement lay on the more nuanced consideration of whether the UNCRC can form part of the proportionality assessment under Article 14 read with Article 1 Part 1.

This drawing of a conduit between gender discrimination under Article 14, and the relevance of the UNCRC as a tool for interpreting justification of this discrimination, divided the justices. The majority were of the view that no such link existed; as stated by Lord Reed, ‘there is no factual or legal relationship between the fact that the cap affects more women than men, on the one hand, and the (assumed) failure of the legislation to give primacy to the best interests of children, on the other.’\(^\text{209}\) On this issue, Lord Hughes and - with ‘considerable

\(^{205}\) Lord Carnworth, Lady Hale and Lord Kerr
\(^{206}\) \textit{JS} [127] (per Carnwath LJ)
\(^{207}\) Lord Reed, Lord Hughes and Lord Carnworth
\(^{208}\) (2008) EHRR 1272
\(^{209}\) \textit{JS} [89] (per Reed LJ)
reluctance\textsuperscript{210} - Lord Carnwarth, agreed. This problem of drawing conduits between affected populations will be returned to in the concluding section.

\textsuperscript{210} JS [129] (per Carnwath LJ)
6. **The Independent Living Fund**

One of the lesser publicised elements of the Coalition Government’s welfare reform agenda has been the closure of the Independent Living Fund. The fund has a complicated history, with it starting in 1988 as an interim measure and transitioning into various new forms throughout the end of the 20th Century, however, broadly speaking, its role has been to work with local authorities to provide care packages for disabled people. It was run by a Board of Trustees who worked within the confines of a trust deed setting out the appropriate eligibility criteria for awardees. It was funded by the DWP, with a cost the year before closure of approximately £360 million per annum.\(^\text{211}\)

As a result of the fund no longer being perceived as ‘financially viable,’\(^\text{212}\) it was instead suggested by the Coalition Government that it be dissolved, and the money instead transferred (though not in a ring-fenced way) to local authorities to administer.

This measure unsurprisingly attracted legal appeals; the most notable being the Court of Appeal decision in *R. (on the application of Bracking) v Secretary of State for Work and Pensions.*\(^\text{213}\) The claimants in this case were all disabled people or other interested parties (such as carers) who were users, or cared for users of, the ILF. Consequently, all were affected by the closure of the fund and were eligible to participate in the consultation on the policy launched by the Government. The case put forward by the claimants revolved principally around the effectiveness of the consultation launched by the Secretary of State which preceded the policy, and on the consideration by the SSWP and other relevant ministers of the potential impact of the policy on disabled

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\(^{211}\) *R. (on the application of Bracking) v Secretary of State for Work and Pensions* [2013] EWHC 897 (Admin) [5] (per Blake J)

\(^{212}\) *R. (on the application of Bracking) v Secretary of State for Work and Pensions* [2013] EWHC 897 (Admin) [6] (per Blake J)

\(^{213}\) [2013] EWCA Civ 1345
populations under the Public Sector Equality Duty (PSED) under s.149 Equality Act 2010. The claimants argued that:

1. The SSWP had failed to effectively discharge the public sector equality duty under s.149 Equality Act 2010 (PSED)

2. The consultation which preceded the decision was inadequate;

3. The decision was based unlawfully on the assumption that the Government’s total policy package on care arrangements would be passed - particularly those in the Government White Paper, ‘Caring for the Future, reforming care and support’ and the draft Social Care Bill, which at the time of the appeal, was in the early stages of the legislative process

4. The judge in the divisional court, in dismissing such arguments, failed to give adequate reasons for his decision

6.1. THE LAWFULNESS OF THE CONSULTATION

The judgment dedicates a great deal of space to forensic attention to the finer details of the consultation document issued to inform the development of the proposal. The Government consultation was designed to act as a litmus test for the views of users of the ILF, their families, carers, and other interested individuals or organisations, and the consultation document was released with a view of eliciting responses from these groups on the potential impact of the closure of the ILF on either themselves or other parties they were aware of.

214 Bracking [9] (per McCombe LJ)
It was not an open consultation which was designed to inform the development of the law or to consider alternative options to closure - the process was far narrower in focus.

There are some relatively nonferrous obligations imposed on the undertaking of consultations by a public body, whether or not they are required by law to undertake one or not. These have long been enforced by the courts when assessing the removal of a benefit of some kind, in order to ensure some element of fair procedure in the process undertaken by the public body. The thrust of the position is that if a public body is to pertain to undertake a consultation in the formation of a policy, then at least it should be done properly. Adherence to this basic principle forms the benchmark by which the second ground, specifically focused on the consultation process itself, revolves. As cited by McCombe LJ, Woof MR lays the requirements out in *R v North and East Devon Health Authority, ex p. Coughlan*\(^{215}\). In order to be a valid consultation: (1) it must be undertaken at a time when proposals are still at a ‘formative stage’; (2) the consultation document must include sufficient reasons for the policy to allow those consulted to give it intelligent consideration; (3) adequate time must be given for this purpose; and (4) the product of consultation must be conscientiously taken into account when the ultimate decision is taken.\(^{216}\)

In attempt to demonstrate that these requirements had not been met, the claimants focused on a number of elements which they argued – cumulatively if not entirely by themselves - rendered the consultation unlawful under the *Coughlan* principles. They highlighted in particular:

1. That the consultation did not reveal the cost (approximately £39million) of abolishing the ILF, and consequently those responding were unable to take this factor into account.

\(^{215}\) [2001] Q.B. 213

\(^{216}\) *Bracking* [23] (per McCombe LJ)
2. When it was suggested to the minister by officials that the abolishment of the fund could be delayed, she dismissed it on the basis of it not ‘being in the interest of users’ without consultation on this issue.

3. The consultation did not explain why the ILF was being closed at all, which rendered it flawed. All of these issues were held by the Court not to render the consultation unlawful. McCombe LJ agreed with the Secretary of State that the internal funding arrangements of the fund were just that – internal arrangements. They did not have bearing on the end impact of service users, indeed: ‘the omission of this matter did not detract from the ability of consultees to explain how the closure of the fund would impact on them.’ In effect, it was a satellite issue which fell outside of the substance of what was being consulted on.

Similar treatment was given to the issue of the potential postponement of the closure of the fund. This was not detailed in the proposal itself - it was put to the minister afterwards following responses to the original consultation. As stated by McCombe LJ, ‘there was no plan or policy to consider alternative dates for closure and there could, therefore, be no need to consult upon a non-existent proposal.’ Effectively, the specific and narrow confines of the original consultation set the parameters for a consideration of lawfulness, and these remain static throughout the procedure. If the process or proposals evolve, the benchmark for its lawfulness does not evolve with it.

On the final issue raised by the claimants on the consultation document, the Court assessed the short prelude to the consultation setting out the reasons was sufficiently clearly to meeting this test, even if the outline was ‘a short one.’

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217 Bracking [27] (per McCombe LJ)
218 Bracking [29] (per McCombe LJ)
219 Bracking [31] (per McCombe LJ)
220 Bracking [32] (per McCombe LJ)
Given what was considered by the Court to be the clear lawfulness of the consultation, the original ground put forward by the claimants on the insufficiency of the Judge’s reasons in the divisional court’s dismissal of their appeal fell away. Even if this were not the case, McCombe LJ made clear that they were ‘were adequate, if succinct’—perhaps an indication of the relatively low bar set for this kind of public law appeal.

6.2. THE PUBLIC SECTOR EQUALITY DUTY UNDER S.149 EQUALITY ACT 2010

In a point of departure from the majority of the welfare reform appeal cases in the UK, the Court was far more concerned with the arguments surrounding the Secretary of State’s discharge of the PSED, indeed, as highlighted by McCombe LJ, submissions on this point were the claimants’ main ‘thrust of the attack.’ Despite the smorgasbord of case law which has grappled with its interpretation, the basic position and requirements of the PSED were not ‘significantly in dispute’ in this case. Instead, the decision revolved around a detailed assessment of the documentary material which led to the formation of the policy.

McCombe LJ summaries the duty’s key elements in some detail, but it is sufficient for present purposes to note here that:

1. An important evidential element in the demonstration of the discharge of the PSED is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements

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221 Bracking [34] (per McCombe LJ)
222 Bracking [35] per McCombe LJ
223 Bracking [25] per McCombe LJ
2. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in offering their advice

3. A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy.

4. It is not for the Court to themselves assess whether appropriate weight has been given to the duty, but rather just to see that the Secretary of State has given it sufficient consideration and appreciation of the measure’s impact with regards to the PSED.224

With this in mind - and accepted by both parties - the claimants contended a number of things which they argued amounted to the PSED not being discharged. Firstly, they suggested that the policy documents demonstrated that the minister did not have adequate information on the impact the measure was likely to have on disabled people in similar situations to the appellants. This is problematic in relation to the third aspect of the duty outlined above, which bleed into problems with the first - they can be little in the way of a process-based consideration of the impact if no sufficient evidence is provided to account for this.

The second contention flows from this problem with the evidential basis for the policy. The claimants argued that there was not a ‘conscious directing of the mind’ towards the statutory criteria inherent in the PSED, as required under the first criterion highlighted above, beyond a broad nod to general issues of equality. In particular, the minister ‘did not specifically consider “the need to … advance equality of opportunity” (under s.149(1)(b))225, or to ‘have due regard to the need to advance equality of opportunity’…in particular to the need to “…take steps to meet the needs of” disabled people ‘which are different from the needs of’ those who are not disabled (under

224 Bracking [25] per McCombe LJ
225 Equality Act 2010
This point was supported in part with reference to what was argued to be a particularly un-robust Equality Impact Assessment.

Thirdly, they argued that the limited evidence provided to the minister by their officials on the level of impact on disabled populations was widely optimistic, and consequently the process was not conducive to an adequate assessment of the level of impact the measure was likely to have on disabled populations. Counsel for the claimants went as far to suggest that the evidential material provided by the minister’s officials propagated a ‘Panglossian view.’

Fourthly, as a consequence of the above points, it had not been demonstrated that the minister as clear what the equality implications of the measure would be, or was sufficiently informed of the impact the measure was likely to have on the ability of individuals to ‘stay in their homes, in employment, or in education.’

Finally, and as will be clear from the first four grounds, it was asserted that the minister had failed to undertake a structured approach to the discharge of the duty; a key element in its statutory formulation as indicated in the first criterion outlined above. This lack of an indicated step which formed part of the process of the policy formation was indicted by references to the policy documents, and some temporal issues with what decisions were taken when, and how these related to the potential impact the policy would have on the end users.

The decision of the court rested on the policy documents which were brought before it, and despite the large volume of material considered by the bench, seemingly the most persuasive element was the failure by officials to adequately reflect concerns raised in the consultation about the impact of the policy - particularly on the likelihood of people not only losing money, but also being likely to lose their ability to live independently.

226 Bracking [38] per McCombe LJ
227 Bracking [73] per McCombe LJ
228 Bracking [37] per McCombe LJ
altogether - and communicate this to the minister.\footnote{329} Consequently, the ‘true message’\footnote{330} of the consultation had not been given, and hence the potential impact was not adequately assessed.

It was submitted by counsel for the SSWP that in criticising the language of the documents in this way, the appellants were effectively seeking to ‘micro-manage’ the policy formation process by an elected government, and were focusing on a far smaller sub-group of disabled people (in the form of the claimants) than was required under the PSED.\footnote{331}

However, this argument was given short shrift by the Court. It was made clear by McCombe LJ that the PSED is a ‘heavy burden upon public authorities,’\footnote{332} and there was a duty to provide sufficient evidence that it had been sufficiently discharged. Indeed, McCombe went as far to suggest that issues of equality should be ‘placed at the centre of formulation of policy’ if and when they arise,\footnote{333} and importantly, this has to form part of the procedure through which the policy is formulated. Moreover, evidence that this has taken place needs to be explicit, and not simply inferred by circumstance or by reading between the lines of the policy documents.

This problem was made clear in McCombe LJ’s stark dismissal of the arguments put forward by the SSWP that much of the discharge of duty can be demonstrated through the sheer existence of a Minister for Disabled People and can also be indicated in the minister’s consideration of the documents, even if not in the material presented to her itself. The judgment made clear that this position was not sustainable; the court clearly stated, ‘too much of the Respondent’s case depends upon the inferences that [counsel for the SSWP] invites us to draw from the facts as a whole rather than upon hard evidence.’\footnote{334}
The treatment of the PSED in this way makes it an interesting tool in the defence - albeit effectively by proxy - to polices which could interfere with the social rights of certain protected populations in the UK. There are three issues which are worth briefly underscoring here.

Firstly, the formation of a PSED benchmark which is based on the forensic examination of the documents submitted to the court clearly creates a sizable evidential burden - if not a substantive policy burden - to be reached by the appropriate minister and their officials. Namely, the focus is not on the weighting given to the considerations of impact by the Secretary of State, but rather, the quality of evidence that the impact was accurately put to them and formed part of the process of policy formation. I would argue, particularly in the context of other welfare reform challenges where the PSED forms a ground of challenge, that this benchmark becomes a test of administrative competence more than a litmus test of the level of consideration given to the impact on protected groups, and as a consequence, officials well versed in the procedures can navigate their way around the requirements with relative ease, regardless of the ultimate impact a policy may have on protected populations.

Secondly, it is clear that a substantial procedural effort has to be maintained by the Secretary of State to ensure the discharge of the duty. A general nod towards some consideration of equality is nowhere near sufficient - even if it is done using something which at first-appearances is quite explicit, such as an Equality Impact Assessment - but rather, a detailed consideration of the impact a proposed policy will have on protected groups needs to settle into its own separate place in the policy process. Seemingly, this reflects an intention on the part of the statute and the courts to recognise the PSED as a distinct ‘stage’ which commands the attention of the Government minister early on in their construction of a policy, rather than a general sweeping duty where discharge can by attained by referencing potential impacts sporadically throughout the formulation process.
Finally, it is worth noting that the Courts appear generally reluctant to intervene unless the evidence that the PSED criterions have been met is seriously deficient, as in this case. Indeed, McCombe LJ made clear that he made his decision ‘with some reluctance’\textsuperscript{235} in the face of what was manifestly insufficient evidence that the effects on disabled persons had been considered. In this case, this mainly took the form of an express reluctance to concede, or lack of will to communicate, the problems which could be caused which were greater than simply a reduction in the care allowance (namely, the potential for very sizable hardship by people losing their homes, or by being unable to remain in employment).

6.3. THE SECOND CRACK OF THE WHIP

Perhaps the points above are best illustrated with reference to the re-run of this case following the successful appeal in \textit{Bracking}. Many of the same claimants (with the exception of the case’s name-sake Mr Bracking, who was forced to withdraw for reasons unconnected with the claim)\textsuperscript{236} and mostly the same lawyers, brought a challenge on the second decision to close the Independent Living Fund made in the light of a lack of PSED discharge outlined above, in \textit{R (on the application of Aspinall, Pepper and others) v Secretary of State for Work and Pensions}.\textsuperscript{237} The decision to go-ahead (again) with the closure of the fund by the new minister making the decision – who had been appointed before the judgment in \textit{Bracking} – was held as lawful by the Court, which allows for the analytical opportunity to see what about the process has changed. Effectively, the policy result at the end remains the same; only the administrative frame outlined above has changed.

\begin{footnotesize}
\begin{itemize}
  \item \textit{Bracking} [61] per McCombe LJ
  \item \textit{Aspinall} [2] (per Andrews J)
  \item [2014] EWHC 4134 (Admin)
\end{itemize}
\end{footnotesize}
The case put by the claimants can summarised in the basic position that, ‘the Minister was no better informed about those matters this time round than his predecessor was.’ \(^{238}\) The claim was focused solely on the discharge of the PSED, as made clear by Andrews J, ‘it was common ground before me that if the court was satisfied that there was due compliance with the PSED, this claim for judicial review must fail.’ \(^{239}\) Given the decision in *Bracking*, the documents leading to an assessment of the impact of the policy, unsurprisingly, referenced both the judgment and the associated legal obligations discussed in it. Therefore, the claimants could not argue the same successful ground in this case that the minister had not had his attention drawn to the legal obligations under the PSED and the United Nations Convention on the Rights of Persons with Disabilities – he plainly had, and this was in agreement between the parties. \(^{240}\) Instead, the challenge was confined to whether the (new) Minister had properly appreciated the full scope and impact of the policy on disabled populations affected.

6.4. THE UNCRPD

In the process of making this argument, Helen Mountfield QC intervening on behalf of the Equality and Human Rights Commission, drew on the UNCRPD to support the interpretation of the PSED. It is worth briefly outlining three key points stemming from her submissions to the Court.

Firstly, Mountfield QC key line of attack was focused on crafting a positive ‘non-regression’ obligation out of provisions in the UNCRDP. Starting with the uncontroversial position that by ratifying a convention, a state

\(^{238}\) *Aspinall* [47] (per Andrews J)

\(^{239}\) *Aspinall* [24] (per Andrews J)

\(^{240}\) *Aspinall* [30] (per Andrews J)
undertakes some form of obligation to ensure that its laws adheres to its norms, she goes onto to argue that ‘Article 4 of the UNCRDP contains not only an obligation to ‘take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes’ (Article 4(1)(c)), but an obligation to ‘refrain from engaging in any act or practice that is inconsistent with the Convention’ (Article 4(1)(d)). On this logic, the minister has an obligation to whether the closure to the ILF would be a regressive measure in terms of its promotion (or lack thereof) of the rights of persons with disabilities.

This argument, and particularly this construction of a positive ‘non-regression’ obligation on the minister through their interpretation of the PSED, was given short shrift by the Court. In comparing the less bold arguments submitted by Mountfield QC in Bracking with the ones put before the Court here, Andrew J observed that; ‘this appears to be at the very least a gloss on, and at the most a departure from, the submissions made by Ms Mountfield in [Bracking], and one for which there appears to be no legal justification.’ The Court was particularly troubled about the potential for a ‘non-regression’ principle to remove legitimate policy options a minister may decide to explore which may be beneficial overall – for instance, a decision to adopt a policy which adversely affects the ability of some disabled people to live independent lives, but supports others to do so. The potential for such shades of grey inherent in social policy made forcing this obligation into mix problematic.

Secondly, and in response to this first point, it was recognised by the court that the Equality Act 2010 is the ‘mechanism by which the UK has chosen to give effect to its international obligations to take positive steps towards advancing equality of opportunity.’ Hence, the minister in this case is required to give consideration

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241 Aspinall [32] (per Andrews J)
242 Aspinall [35] (per Andrews J)
243 Aspinall [36] (per Andrews J)
244 Aspinall [36] (per Andrews J)
245 Aspinall [39] (per Andrews J)
to the relevant statutory provisions laid out in the Act (in this case s.149) with the ‘benefit of knowledge and consideration of’ any relevant provisions under international obligations (in this case, art.4 of the UNCRDP).

Thirdly, and with particular overlap with conclusions on the Bracking case above, the Court was keen to reiterate that the issue of weighting is one left solely in the hands of the minister; it is not for the courts – or indeed the purpose behind the law itself – to impose anything more than a duty to have regard to these obligations. Consequently, the attempt by Mountfield QC to use international obligations to influence the force of the duty fell on deaf ears. As stated by Andrew J, ‘the UNCRPD does not affect the nature or extent of the [PSED] duty, still less the way in which the court will approach the question whether the duty has been discharged.’246 This invariably raises the issue of if the convention adds anything in process, bar being alluded to in the policy formation process. Although the Court repeatedly disparages ‘tick-box’ operations by ministers, it is difficult to see how its involvement here can be anything other than that.

6.5. THE FINAL DECISION ON THE PSED

With the above submissions rejected, the issue before the Court was a fairly routine application of a narrow PSED consideration: did the minister ‘have sufficient material before him to be able to truly appreciate the implications of closing the ILF for those most likely to be affected by its closure.’247 This section of the judgment therefore, is a detailed assessment of various documents leading to the (second) decision to close the ILF.

246 Aspinall [40] (per Andrews J)
247 Aspinall [47] (per Andrews J)
The finer details do not warrant attention here, but is sufficient to note that the Court was satisfied that ‘it was certainly not a ‘tick-box exercise’ conducted in a legal or factual vacuum.’\textsuperscript{248} The criticisms that were levied at the use of this material in \textit{Bracking} were not held to be applicable here, and the particular focus on the narrower ground of the Minister requiring more information to adequately discharge his duty – particularly on the numbers who would be affected – was dismissed categorically by the Court.\textsuperscript{249} Indeed, Andrews J suggested that ‘short of going down the pilot scheme route…there was nothing that he could have done that would have left him any better informed than the results of the consultation did.’\textsuperscript{250} On the specific point raised by the claimants of knowing the numbers of people affected in more detail, it was held that ‘[the minister] did not need to know precisely how many of them were likely to be affected or to carry out a quantitative assessment of the impact. It sufficed that he knew, as he did, that the impact would be substantial and significant.’\textsuperscript{251}

\begin{footnotesize}
\begin{tabular}{ll}
\textsuperscript{248} \textit{Aspinall} & [48] (per Andrews J) \\
\textsuperscript{249} \textit{Aspinall} & [123] (per Andrews J) \\
\textsuperscript{250} \textit{Aspinall} & [124] (per Andrews J) \\
\textsuperscript{251} \textit{Aspinall} & [130] (per Andrews J)
\end{tabular}
\end{footnotesize}
Due to the structuring of the housing benefits system within the UK, the impact of welfare reform straddles across social and private sectors to a great extent. The mechanism for gaining housing benefit to rent a private sector property is through Local Housing Allowance (LHA) – a means-tested benefit paid ex ante to tenants with reference to percentiles of local levels of rent and household characteristics (namely, how many bedrooms the family requires). This leads to welfare levers being utilised to gain purchase on private sector rent levels – indeed, nearly £8billion was spent on Local Housing Allowances alone in 2013-2014.²⁵²

The Coalition Governments reform to LHA does three key things: (1) it reduces the allowance from a maximum 50th percentile of local rents to the 30th percentile, (2) it abolishes the five-bedroom rate, and (3) it prevents the uprating of the allowance level to be any higher than CPI inflation. Changing levels of LHA had ‘long been the target’ of the Conservative Party in particular, as it offers a route for attaining more control over the levels of housing benefit claimed in proportion to income.²⁵³

Many of these changes are brought into force by the Rent Officers (Housing Benefit Functions) (Amendment) Order 2012, which was subject to a judicial review challenge in R (Zacchaeus 2000 Trust) v Secretary of State for Work and Pensions.²⁵⁴ The challenge focused principally on the changes to the maximum uprating of LHA allowances in line with CPI inflation. There were two principle grounds: (1) the ultra-vires challenge, and (2) a

²⁵² HC Deb, 20 February 2012, c657W
²⁵³ Hamnett (n 78 above), 497
²⁵⁴ [2013] EWCA Civ 1202
challenge based on the Secretary of State’s equality duty. The latter is of particularly interest here, but each will be considered in turn.

7.1. THE ULTRA-VIRES CHALLENGE

In the context of the aims of this report, the ultra-vires challenge does not warrant detailed consideration here. The submissions on this ground were technically creative, and based on a complex interaction between the different statutes which edited the LHA scheme. Indeed, in the High Court, making sense of the overall statutory framework was described as being akin to ‘piecing together a peculiarly intricate jigsaw puzzle.’ However, for the sake of completeness and to give context to the appeal as a whole, the basic argument will be re-counted here.

In short, the claimants submitted that the uprating of the appropriate maximum housing benefit (AMHB) by CPI inflation, if that figure was lower than the uprating with reference to the market rents undertaken routinely by the rent officer, infringed on the ‘expert decision’ undertaken by the rent officers in the statutory scheme’s reference to ‘rent officer determinations’ (under s.122 of the Housing Act 1996 and s.130A of the Social Security Contributions and Benefits Act 1992). Phrased somewhat more clearly, forcing the mechanical uprating of AMHB interfered with the statutorily granted ‘rent officer determination’ process, which was an ‘expert decision.’

255 Zacchaeus [4] (per Sullivan LJ)
On close scrutiny of the legislative framework, the Court dismissed this argument. S.122(1) of the Housing Act 1996, states that:

‘(1) The Secretary of State may by order require rent officers to carry out such functions as may be specified in the order in connection with [universal credit,] housing benefit and rent allowance subsidy.’

In making such an order, the Secretary of State was not acting in an ultra vires fashion to specify functions which are designed – at least in part – to save money. Indeed, the Court recognised that ‘the underlying statutory purpose of the housing benefit scheme was a balancing exercise to protect the public purse while preventing homelessness…[and consequently the Secretary of State can] specify the functions he required rent officers to carry out in connection with housing benefit under the Order [to achieve the] right balance.’

Effectively, the determination of AMHB is not simply a technical exercise, but one open to interference from the Secretary of State in a manner which they see fit in the broader exercise – supported by the statutory framework – of balancing public funds with the prevention of homelessness.

7.2. THE PUBLIC SECTOR EQUALITY DUTY

The element which speaks more directly to the broader themes of this report, and is more widely applicable outside of the immediate statutory context outlined in the first ground, is the claimant’s argument that the Secretary of State failed to discharge the Public Sector Equality Duty (PSED). At risk of some repetition with elsewhere in the report, the basic mechanics of the PSED require the Secretary of State to have ‘due regard’ to,

256 Zacchaeus [48] (per Sullivan LJ)
inter alia, the elimination of discrimination, and to advance equality of opportunity between those with protected characteristics (of which having a disability is one). The duty, as detailed elsewhere in this report, requires a ‘conscious directing of the mind to the obligations.’

The claimants made a number of submissions on the basis of the Equality Impact Assessment (EIA) carried out in the formation of the policy. They argued the following:

1. There was no express mention of the PSED in the EIA, and this fell foul of the duty to keep the statutory requirements ‘well in mind.’

2. The EIA made no attempt to quantify the impact of restricting any increase in LHA to the CPI uprating (namely, how many households with protected characteristics would be affected and in what way).

3. The analysis in the EIA was so limited as to be ‘irrelevant or uninformative’ in carrying out the discharge of the duty.

All of these grounds were dismissed by the Court.

On issue of quantification, the court considered the picture too complicated to lend itself to an impact assessment of the order demanded by the claimants. They pointed to the policy's objective of exerting a 'downward pressure on rents' and the associated finding of a later Impact Assessment which asserts that due to the unpredictability of how landlords will respond to any reduction, 'it is not possible to provide estimates on the distribution of

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257 Sumpter [137] (per Hickinbottom J)
258 Zaccheus [56] (per Sullivan LJ)
259 Zaccheus [61] (per Sullivan LJ)
260 Zaccheus [64] (per Sullivan LJ)
261 Zaccheus [63] (per Sullivan LJ)
losses.\textsuperscript{262} The Court suggests in this context, 'the lack of quantification in the EIA does not lead to the conclusion that there was a failure to have due regard to the specified factors.'\textsuperscript{263}

Although Sullivan LJ agreed that the analysis in the EIA was 'limited and that more could have been said,' he did not accept that it was irrelevant or uninformative. There is explicit reference - albeit brief - in the EIA to the potential for differential impact on those in protected groups,\textsuperscript{264} and it was important not to fall into the trap of encouraging what Underhill J had described at first instance as a 'drafting competition.'\textsuperscript{265}

A particularly interesting issue which was considered by the Court was the potential for the measure to impact adversely on children; something which had not been addressed in the EIA. This was theoretically drawn by the claimants, who contended that these changes to uprating were likely to result in the need to move house more often, and therefore, would result in children having to move schools – hence the differential impact on their ‘social development and education prospects.’\textsuperscript{266}

This was effectively treated by the Court as an attempt to grasp at straws. The Court considered whether there was any reason for the Secretary of State to believe that there may be an equality issue (other than the merely theoretical indication presented by the claimants). The first instance judge had concluded that there was not,\textsuperscript{267} which raised a challenge by the claimants on the basis that the Judge had substituted himself in the role of the Secretary of State in the equality exercise.

This argument was quickly dismissed by the Court, noting that the Judge had recognised the need for caution and had relied on two points in particular: (1) he had been presented no evidence to support the argument that there

\textsuperscript{262} \textit{Zacchaeus} [63] (per Sullivan LJ)
\textsuperscript{263} \textit{Zacchaeus} [63] (per Sullivan LJ)
\textsuperscript{264} \textit{Zacchaeus} [64] (per Sullivan LJ)
\textsuperscript{265} \textit{Zacchaeus} [59] (per Sullivan LJ)
\textsuperscript{266} \textit{Zacchaeus} [70] (per Sullivan LJ)
\textsuperscript{267} \textit{Zacchaeus} [71] (per Sullivan LJ)
was a connection between the two, and (2) that no interested group had raised the issue in the consultation
exercise. Consequently, he was entitled to conclude – in the words of the Court – that it was ‘something of a
lawyer’s point.’

Although this argument appears drawn together simply to facilitate the running the PSED challenge (namely,
there has to be a protected characteristic engaged and this facilitates the finding of some – even theoretical –
casual mechanism for impact), I would suggest that the connection was arguable at the time of the appeal. The
Judge dismisses the claim – in part – on the basis of a lack of evidence presented to them on the potential to
adverse impacts from the policy on children. This had already been established at the time by Fenton, who found
in assessing cuts to LHA that their simulation ‘demonstrates that this means increased poverty rates
among...children' and that this would result in 'costs...such as school disruption, distress and the loss of a settled
abode that cannot have a price attached to them.' Indeed, he suggests reforms to LHA would affect upwards of
258,000 children.

He is not alone. Ridge has indicated that ‘for many children, [welfare reforms such as LHA] will increase their
risk of experiencing deeper poverty and financial insecurity and anxiety. For some there will be homelessness,
disruption and dislocation, as their parents are forced to move away from family, friends, schools and
neighbourhoods.’ Clapham et al (in a report published after the hearing date) have also drawn the connection,
stating that ‘the reduction in the LHA, to cover only the lowest third of rents, may result in some of these young

268 Zacchaeus [74] (per Sullivan LJ)
269 Zacchaeus [74] (per Sullivan LJ)
270 Alex Fenton, ‘How Will Changes to Local Housing Allowance Affect Low-Income Tenants in
271 Tess Ridge, ‘We are All in This Together? The Hidden Costs of Poverty, Recession and Austerity
Policies on Britain’s Poorest Children’ (2013) 27 Children & Society 406, 408
people being unable to find accommodation suitable for children… However, the main worry with private renting was security and the inability to create a stable ‘family home’. Having to move schools and coming up with the money for removal costs and bonds each time a landlord required them to move out were of considerable concern.272

The point here is that the claimants could have presented evidence to suggest the measure may impact adversely on children, and that would leave the Court resting on the lack of a response raising this in the consultation, which would be shaky ground. Moreover, the sheer centrality of the role of children in the formation of the rent setting levels results in households with children being affected more adversely – namely, the cut is higher for those households with more children in them. I would suggest that the Court’s reasoning on this basis is therefore somewhat difficult to sustain with the benefit of hindsight, even if the end result of a failed challenge may have been the same had a different line of argument been made.

SECTION THREE: THE SSSC AND THE IMPORTANCE OF DISCRETIONARY EXEMPTION MECHANISMS
8. DISCRETIONARY EXEMPTION MECHANISMS – THE SSSC POLICY AND ITS LINKS TO THE LOCALISATION OF SOCIAL RIGHTS

A key finding in the research supporting this report has been the dominance of discretionary exemption mechanisms in the Welfare Reform Policies bleeding downwards to local authorities. This clearly has serious implications for the ability to maintain access to welfare benefits and consequently impacts heavily on the protections afforded to social rights under austerity government.

One area of the case-law in particular has been dominated by consideration of these issues – judicial review appeals to the SSSC. Much of the legal pre-occupation has been on the functioning of Discretionary Housing Payments (DHPs) and their role in the policy scheme as a whole. In order to effectively explore the functioning of these discretionary exemption mechanisms with this mind, these cases will be analysed in the context of the increased role administrative discretion has played.

To this end, this section is divided broadly into three key areas. The first looks at some previous academic material on discretion in the UK social security system to give some context, and provides an outline of how DHPs fit into this overall narrative. The second considers the payments in far more detail, and analyses the role they have played in the SSSC public law appeals. The third section reflects on initial evidence about the use of these payments using data currently available.
8.1. Section One: Framing Discretionary Space

Before turning to the functioning of discretion in the context of the UK welfare reform agenda, it is important to offer a primer on the role and importance attached to discretionary decision making by local authorities both in the academic literature.

The granting of discretion is inextricably linked to the granting of power. Power is ‘at its root,’ and the boundaries of discretion have long been defined with reference to delegation or concession of powers. It is well established, and stands to sense, that in a social welfare context power relations between those claiming benefits or a social good and those providing it, are far from equal. In treating discretion as a tool to ‘measure the power balance,’ there is often an implicit characterisation in the literature of a sliding scale approach; that increasing levels of discretion offered to an individual administrative worker is positively correlated to their power, and negatively correlated to the power of the claimant, and vice versa.

The logic of the ‘sliding scale’ can apply in situations where there is a clear conferral of absolute discretion on one individual to determine resources on another. However, the problems associated with ‘power’ held by public bodies involved in the provision of welfare benefits and housing is a more complicated scenario which is far removed from the binary zero-sum game characterised by the earlier literature. As made clear by Green et al, not all discretion is created equal – the discretion exercised by the street-level bureaucrats on the front lines is not the

273 Anna Pratt and Lorne Sossin, ‘A Brief Introduction of the Puzzle of Discretion’ 24 301
275 Aimee Grant, ‘Welfare reform, increased conditionality and discretion: jobcentre Plus advisers’ experiences of targets and sanctions’ 21 Journal of Poverty and Social Justice 165 (n 9) 166
same as that exercised by the strata of managers and policy-coordinators lying above. The issue is far more complicated in a new welfare context.

8.1.1. DISCRETIONARY POWER IN A NEW WELFARE CONTEXT

A key driver of complexity in this context is the development of what has been labelled ‘New Public Management’ (NPM), a term tied to Neo-Liberalism which attempts to encompass the changing practices in public sector governance which emphasise: ‘performance measurement and monitoring; a private-sector style of management; an emphasis on output controls; and a distrust of traditional professionals.’ In this changing environment, the discretion accorded to administrative workers has become more fragmented. NPM is ‘preoccupied’ with vertical structures of authority with a focus on: top-down control, performance indicators, formalisation of behaviour, and new partnership formation with private and non-profit organisations.

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277 R. Green, C.W. Shinn and K.S. Robinson, Foundations of Public Service (Sharpe 2008) 60
278 Ed Carson, Donna Chung and Tony Evans, ‘Complexities of discretion in social services in the third sector’ [Routledge] European Journal of Social Work 1
283 Bao and others ibid (n 280) 457
The lines of discretion and power splinter due to NPM’s faith in private business methods,\textsuperscript{284} the importance of keeping a ‘sharp distinction’ between politics and administration,\textsuperscript{285} and the principle that preferences are fixed and best expressed through market mechanisms rather than by the individual choice of an administrative worker.\textsuperscript{286} Local authority staff find themselves increasingly ‘managing an economy of incentives’\textsuperscript{287} rather than directly making decisions on the allocation of resources. This does not mean that discretion disappears from the process. Like the analogy of the tube of toothpaste described by Black, ‘squeeze it at one point, and it simply oozes out somewhere else.’\textsuperscript{288} The operation of administrative discretion therefore becomes more about creating the environment for the practice of these principles rather than the conferral of discretion onto administrative workers.

A good example of this in practice is the evolution of choice-based lettings in the allocation of social housing. Put into place by local authorities and social landlords, these systems work by allowing housing applicants to ‘bid’ for currently available properties – their success depends on a number of criteria (often expressed in terms of points), such as the amount of time they have waited for a property or their placement within a set of priority bands. The system was designed with the NPM principles in mind, being focused on embedding customer choice in an attempt to bring some of the benefits of market allocation to social housing.\textsuperscript{289} It came away from what were perceived as problems and inefficiencies caused by discretion sitting in the hands of individual council

\textsuperscript{285} Peter Barberis, ‘The New Public Management And A New Accountability’ (1998) 76 Public Administration 451, 455
\textsuperscript{287} Mark Considine and Siobhan O’Sullivan, ‘Introduction: Markets and the New Welfare – Buying and Selling the Poor’ 48 Social Policy & Administration 119, 120
\textsuperscript{289} Colin Jones and Hal Pawson, ‘Best value, cost-effectiveness and local housing policies’ [Routledge] 30 Policy Studies 455, 466
officers tasked with the distribution of property, and the unaccountable nature of the ‘cloak of discretion’ indicative of decisions made by agents. However, in creating these systems, the same discretion that was viewed as problematic is pushed goes elsewhere. Like the tube of toothpaste referred to above, the bulge shifts along to the other power holders in the choice-based lettings process - the central administrators who set the points criteria, customer services staff who offer support and administration teams who process the applications.

This increasingly fragmented view of discretion under NPM is set against the evolving role of activation policies and the increased space this often provides for officer discretion. As recently highlighted by Jessen and Tufte, polices focused on the ‘activation’ of welfare subjects ‘imply a wide scope for discretion’, providing opportunities for individual officers to ‘judge and control behaviour’. Good examples include sanctions for Job Seekers allowance and the expansion of the Discretionary Housing Payment regime, both of which are indicative of how changing relations between welfare agencies and their recipients (such as the demands to treat cases on a ‘case-by-case’ basis) have expanded the ‘sphere of administrative discretion.’

This picture remains complicated. Even in line with the broadening discretion found within the policy frameworks provided by welfare reforms focused on ‘activation,’ the local context and policy history of the individual agency has a great deal of influence over how these services are delivered. Pressures to comply with

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291 Denhardt and Denhardt (n 284) 90
292 Jones and Pawson (n 289) 467
296 Considine and O’Sullivan (n 287) 122
performance targets in these environments can dominate the day-to-day concerns of workers, and the ‘unacknowledged habits’ of routine practices or workplace customs generate complications in how discretionary power within agencies tasked with public welfare is distributed and held accountable internally.

8.1.2. A RESPONSIBILISING EXEMPTION: THE IMPORTANCE OF DISCRETIONARY HOUSING PAYMENTS

‘Responsibilising’ reforms to the benefits system, such as the RSRS, are immediately presented with a challenge; how best to filter out those who are too vulnerable, too politically sensitive, or lack capacity to take ‘responsibility’ for the sanction imposed on them, from those who are the target of the policy. In other words, where to draw the line to identify where the ‘sharp division between deserving and undeserving groups’ lies. This is a difficult task for policy-makers for two key reasons. Firstly, attempting to operationalise concepts of ‘vulnerability’ or ‘deservingness’ is problematic both in terms of codifying characteristics in legislation or policy-documents, and in guiding their interpretation and application to factual cases by front-line workers. Secondly, as has been well-established by Schneider and Ingram, the target populations of welfare interventions are inherently socially constructed groups – for instance, in the case of tenants targeted by the

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298 M. Baldwin, Care management and community care: social work discretion and the construction of policy (Ashgate 2000) 81
299 Peter Taylor-Gooby, ‘Why Do People Stigmatise the Poor at a Time of Rapidly Increasing Inequality, and What Can Be Done About It?’ (2013) 84 The Political Quarterly 31, 37
300 Kate Brown, ‘Re-moralising ‘Vulnerability’’ [2012] 6 People, Place & Policy Online 41, 49
301 Anne Schneider and Helen Ingram, ‘Public Policy and the Social Construction of Deservedness’ in Anne Schneider and Helen Ingram (eds), Deserving and Entitled: Social Constructions and Public Policy (New York University Press 2005) 3
SSSC or the ‘benefit cap,’ they are the constructed group of ‘life-long renters’ in social housing, who are congesting a system which could be better utilised by more ‘deserving’ households on waiting lists. Membership of this socially constructed group is hard to cast onto a great deal of households in the social rented sector, particularly given the high level of disadvantage and vulnerability (due to disability for instance) which pervades what is a heavily residualised sector. Sorting between those who fit the target group and those deserving of exemption, in other words determining the ‘magnitude of deservedness’ of those affected, becomes intensely fact-sensitive; for example, determining the level of disability required for exemption or the number of foster-children permitted in the regulations is a difficult factual assessment.

The solution in the case of the many of these welfare reforms - particularly the SSSC and the ‘benefit cap’ is to offer very limited statutory exemptions within the regulations themselves for small and easily identifiable groups, and utilise a discretionary exemption mechanism to deal with the majority of cases. For instance, those statutorily exempted in the case of the SSSC include adults who require ‘overnight carers’, those on service in the armed forces and, following legal challenges, those with children who are unable to share a bedroom due to disability. The discretionary mechanism is achieved through the previously small, locally administered, ‘low expenditure DHP scheme, to assist tenants who fall outside of exempted groups. Under the new system, DHPs have received somewhat of a second coming – they are cast as the ‘panacean payments’ for problems

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302 Hodkinson and Robbins (n 28 above), 69
305 Contained with Reg.B13 in the amended Housing Benefit Regulations 2006
306 See Burnip v Birmingham City Council [2012] EWCA Civ 629
presented by the policy. A total of £165 million has been distributed to local authorities in line with a formula based on certain impact indicators and previous DHP expenditure, to assist with plugging the gaps left by the SSSC, benefit cap and changes to local housing allowance. Tenants who are receiving benefit and are struggling to pay their rent are able to apply to their local authority for a DHP, which is then paid at their discretion from the capped fund provided by the DWP.

When considering the ‘responsibilising’ function of this scheme, the key consideration here is the discretion given to local authorities in administering these payments. This will be considered in far more detail below, but it is worth noting here the smorgasbord of statutory instruments that deal with payment of DHPs and the various controls on their use imposed on local authorities,\textsuperscript{309} which impose certain limitations on the amount of each award or criteria which must be met by the applicants. For instance, in cases where the local authority is meeting an ongoing rent-liability (as would be the case in awarding a DHP in response to the SSSC), then the total awarded by DHPs cannot exceed the eligible rent for the property, and payments cannot cover certain exempted areas (such as benefit sanctions, increases in rent due to arrears or service charges).\textsuperscript{310}

However, aside from these controls and a stream of guidance flowing out of the DWP, local authorities are left to their own devices to decide how to make DHP awards bound only by the general principles of public law. The payment of DHPs is not the payment of housing benefit. Though there is a right to a written decision with stated reasons and to seek review, the payments fall outside of para.6 of schedule 7 to the Child Support, Pensions and Social Act 2000 and are therefore outside of the jurisdiction of a first-tier tribunal.


\textsuperscript{310} See reg.3 Discretionary Financial Assistance Regulations 2001/1167
8.1.3. DHPs as a Tool of Responsibilisation

Although at first glance the utilisation of a discretionary exemption mechanism administered through local authorities instead of a statutory exemption may seem a rather dry distinction, the operation of these payments by local authorities has resulted in a starkly responsibilising scheme. Before turning to a more detailed consideration of the legal aspects, it is worth considering three key issues which serve to demonstrate this.

The first point is consistent with what has been described as the evolution of a ‘new localism’ often tied with the development of the ‘Big Society’ agenda, which sees the decentralisation of aspects of welfare provision as engendering a more democratically accountable and efficient alternative to a central command and control approach. However, the discretion given to local authorities in making these DHP decisions to achieve this can lead, in some instances, to the application of overtly moral criteria or the attachment of conditionality onto the awards. The most widely publicised examples are councils refusing to make DHP awards to those who smoke or have satellite television, or councils helping those who demonstrated that ‘they were making a serious attempt to remove themselves from the situation, either by finding work or moving home.’ These conditions align themselves startling well with the findings of Valentine and Harris on the ‘moral evaluation’ of those receiving benefits, with key indicators of being a ‘shirker’ being premised on ways of living (such as smoking and

313 Nick Clarke and Allan Cochrane, ‘Geographies and politics of localism: The localization of the United Kingdom’s coalition government’ (2013) 34 Political Geography 10, 11
315 Ibid
gambling) and economic worth. 316 Though as highlighted by Harrison and Sanders, separating out these behavioural characteristics from assumptions related to factors like intra-class demarcations and disability is difficult, 317 a point perhaps underscored by DWP findings that 75% of local authorities include Disability Living Allowance (DLA) in the means-testing for DHP payments. 318

Secondly, an issue which presents itself when utilising an application based discretionary exemption mechanism, is that the onus for attaining an exclusion from the policy falls onto the tenant themselves. In line with fostering responsibility for the ‘individual provision of welfare,’ 319 it is effectively a form of ‘bounce-back exemption’ - local authorities assess applications they receive; if the tenant does not fulfil their responsibility to apply and put their case for exemption, they are not considered and the mechanism cannot do its work. This point is particularly pertinent given recent empirical evidence collected on rates of DHP applications by those affected by the RSRS. 22% of tenants had applied for a DHP payment (and consequently the main form of exemption) over the course of the financial year, compared with 26% who had borrowed money to pay the penalty or 60% who had cut back on household expenditure. 320 Those who did not apply expressed concerns that others would be in greater hardship and needed the money more than them, and many affected tenants simply had never heard of the DHP scheme (56% of those who had not applied in the DWP report). 321

Thirdly, as the RSRS penalty is financial, DHPs are designed to meet this cost instead of offering a straight exemption – namely, the penalty is paid by DHPs rather than being removed altogether. This is important, as it

316 Gill Valentine and Catherine Harris, ‘Strivers vs skivers: Class prejudice and the demonisation of dependency in everyday life’ 53 Geoforum 84, 91
317 Harrison and Sanders 7
321 ibid
offers far more shades of grey in comparison to the binary finding of fact which often results from a statutory exemption, where an applicant either meets the criteria to warrant exemption from the measure or does not. The end result is a form of exemption which is far less secure and predictable, with a whole spectrum of different options available for local authorities, which can triangulate between the amount of money awarded, the period it is awarded for, and any conditionality attached. Consequently, local authorities can decide to partially exempt a household by awarding a payment which does not meet the full cost of the penalty, award an exemption for a time-limited period, or provide an exemption conditional on performing an action.

8.2. SECTION TWO: THE ‘DISCRETION’ IN DISCRETIONARY HOUSING PAYMENTS

In common with most of the social security system, the DHP scheme does not lend itself easily to a clear and concise description. Mummery LJ remarked of its under-pinning regulations that ‘I would not award it the top prize in a competition for plain English.’ Wall LJ has been equally disparaging, referring to the legislation as ‘complex, obscure and, to many, simply in comprehensible’ and consequently a ‘blemish on our operation of the rule of law.’

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322 R (Gargett) v Lambeth London Borough Council [2008] EWCA Civ 1450 [16] (per Mummery LJ)
323 ibid [36] (per Wall LJ)
324 ibid
There is a smorgasbord of continually amended statutory instruments which deal with payment of DHPs and the various controls on their use imposed on local authorities.\textsuperscript{325} Instead of providing a detailed assessment of these regulations, the key question here is what discretionary space is provided to local authorities in using the scheme as a form of exemption mechanism – how can they decide what criteria to apply, what limits are there on the level of payments they can make, and how can tenants appeal (or not) the decisions made?

There are two broad areas of statutory control. Firstly, there are limits on the amount of money which can be spent by the local authority on awarding DHPs. The finance for these payments is provided by central government to individual local authorities, and it is entirely at the discretion of the Secretary of State for Work and Pensions how much is provided to each area.\textsuperscript{326} At present, the DWP allocates a certain level of grant to each individual local authority in line with a formula directly proportionate with various welfare reform impact measures and previous base-line DHP expenditure. I have summarised the formula used in Figure Four. Local authorities, once allocated this pot, are not given any more money directly to deal with DHP applications\textsuperscript{327} - they can instead choose to top-up the grant using their own finances, but this can only be to 2.5 times the original allocation\textsuperscript{328}.


\textsuperscript{326} Reg. 2 Discretionary Housing Payments (Grants) Order 2001/2340

\textsuperscript{327} Though it is at the decision of the Secretary of State, as was decided in 2014, to invite applications for further DHP funding.

\textsuperscript{328} Reg. 7 Discretionary Housing Payments (Grants) Order 2001/2340
Figure Four: Diagram demonstrating the allocation formula for the central DWP DHP budget to local authorities

Total DHP budget allocation of £165 million

Base Line (£20 Million)
The original base-line funding before the introduction of LHA reforms adjusted for inflation. The figure is taken as a mid-point between allocation and expenditure.

LHA Reforms (£40 Million)
Impact measure for estimated impact of changes to LHA using the previous year’s aggregate losses and caseload figures.

SSSC (£60 Million)
SSSC measure in two parts:
1. £55 million based on aggregate losses in each area calculated using numbers affected + average weekly deduction
2. £5 million distributed across the 21 most sparsely populated local authorities.

Benefit Cap (£45 Million)
Benefit Cap measure in two parts:
1. £55 million based on aggregate losses in each area calculated using numbers affected + average weekly deduction
2. £5 million distributed across the 21 most sparsely populated local authorities.

Composite financial grant calculated in line with the above variables

Money given as lump-sum grant to the Local Authority
Other limitations are imposed on local authorities on the amount which can be awarded in individual cases and certain conditions any applicants must meet. Payments can only be made to those receiving housing benefit to cover the undefined area of ‘housing costs’ (such as rent, removal costs, deposits etc) which are not otherwise met by their benefits. More determinative is what the money cannot be spent on, which is outlined in reg.3 Discretionary Financial Assistance Regulations 2001/1167. These detail that in cases where the local authority is meeting an ongoing rent-liability (as would be the case in awarding a DHP in response to the SSSC), then the total awarded by DHPs cannot exceed the eligible rent for the property, and payments cannot cover certain exempted areas (such as benefit sanctions, increases in rent due to arrears or service charges).

Aside from this, despite a stream of guidance flowing out of the DWP, local authorities are left to their own devices to decide how to make DHP awards bound only by the general principles of public law. The payment of DHPs is not the payment of housing benefit. Though there is a right to a written decision with stated reasons and to seek review, the payments fall outside of para.6 of schedule 7 to the Child Support, Pensions and Social Act 2000 and are therefore outside of the jurisdiction of a first-tier tribunal. DHPs also find themselves sitting outside of Article 6 of the Human Rights Act 1998, as it is well established it does not apply where payment of ‘benefits’ is discretionary.

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329 See regs.12-12D of the Housing Benefit Regulations 2006/213
332 This issue was considered as part of an appeal to the Upper Tribunal in EA v Southampton CC [2012] UKUT 381 AAC

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8.2.1. PANACEAN PAYMENTS: THE TREATMENT OF DHPs IN CASE-LAW

Although the statutory framework for DHPs has only been in existence since 2001, the courts have had the opportunity to carve a role for these payments throughout a small number of public law challenges – principally in the assessment of proportionality and equality duties.\textsuperscript{334} They have almost invariably been accorded a strong palliative effect in favour of the policy under challenge (with the notable exception of \textit{Burnip v Birmingham City Council}\textsuperscript{335} discussed below).

Before the introduction of the SSSC, the much smaller DHP scheme was raised as part of challenges to changes to Local Housing Allowance (LHA) under equality duties imposed under the Sex Discrimination Act 1975, Race Relations Act 1976 and the Public Sector Equality Duty (PSED) under s.149 Equality Act 2010. In CPAG v Secretary of State for Work and Pensions,\textsuperscript{336} the introduction of definitive caps on Local Housing Allowance (LHA) rates\textsuperscript{337} and a reduction of the ‘largest dwelling category’ from 5 to 4 bedrooms\textsuperscript{338} were challenged on the basis that the Secretary of State had not had due regard on the impact this would have on lone parents and ethnic minority populations.\textsuperscript{339} A similar challenge was raised in \textit{R (Zacchaeus 2000 Trust) v Secretary of State for Work and Pensions},\textsuperscript{340} where restrictions to the uprating of LHA in line with Consumer Price Index inflation measures where challenged under the PSED.

\textsuperscript{334} Under the Public Sector Equality Duty (PSED) Equality Act 2010, or beforehand, under the Race Relations Act 1976 and the Sex Discrimination Act 1975  
\textsuperscript{335} [2012] EWCA Civ 629.  
\textsuperscript{336} [2011] EWHC 2616 (Admin)  
\textsuperscript{337} Under Article 2(3)(b)(iii) of the Rent Officers (Housing Benefit Functions) Amendment Order 2010  
\textsuperscript{338} Under Regulation 2(6)(a) of the Housing Benefit (Amendment) Regulations 2010  
\textsuperscript{339} Under his equality duties pursuant to Race Relations Act 1976 and the Sex Discrimination Act 1975  
\textsuperscript{340} [2013] EWCA Civ 1202
In both cases, DHPs were seen as being indicative of the Secretary of State having due regard to the impact the measures would have on affected populations and in satisfying his equality duties. Sullivan LJ held that DHPs ‘showed that the Secretary of State had been aware of the particular difficulties which might be faced by disabled people if they had to move home’\textsuperscript{341} and ‘in my judgment, he was right.’\textsuperscript{342}

Other cases have also ascribed to the palliative effect of DHPs in providing them weighting in the proportionality exercise in challenges based on article 1 of the First Protocol, read with article 14 ECHR. In \textit{R. (on the application of Knowles) v Secretary of State for Work and Pensions}\textsuperscript{343} DHPs contributed to the finding of proportionality when rent officers set maximum rents under LHA for caravan sites\textsuperscript{344} – a change which was seen as lawfully discriminatory against Romani Gypsies. Likewise, DHPs weighed favourably in the finding of proportionality in \textit{R. (on the application of SG) v Secretary of State for Work and Pensions},\textsuperscript{345} which challenged the benefit cap on the basis of its discriminatory effect on lone parents (again, on the basis of art.1 prot.1 and art.14). The availability of DHPs, and the fact that many of claimants were currently in receipt of one, again weighed favourably in the proportionality exercise.\textsuperscript{346}

\textbf{8.2.2. CASE-LAW: DHPs AND THE SOCIAL SECTOR SIZE CRITERIA}

In short, the provision of DHPs is the lynchpin which holds together the continued legality of the SSSC, so it is no surprise that judgments challenging the policy by the Courts have been dominated by consideration of them.

\textsuperscript{341} ibid [68] (per Sullivan LJ)
\textsuperscript{342} ibid [69] (per Sullivan LJ)
\textsuperscript{343} [2014] EWCA Civ 156
\textsuperscript{344} ibid [97] (per Hickinbottom J)
\textsuperscript{345} [2014] EWCA Civ 156
\textsuperscript{346} ibid [100] (per Dyson MR)
Indeed, Dyson MR in *R. (On the Application of MA) v Secretary of State for Work and Pensions*\(^{347}\) indicates that ‘if read in isolation and without regard to the DHP scheme [the SSSC] plainly discriminates\(^{348}\) against the disabled, so it is necessary to analyse ‘the scheme as a whole.’\(^{349}\) Within the existing case law, judgments make a series of assumptions about the scope and function of DHPs which are both contestable, and at times sit uncomfortably alongside each other.

***R. (ON THE APPLICATION OF MA) V SECRETARY OF STATE FOR WORK AND PENSIONS [2014]***

*EWCA Civ 13.*

*MA* is the most definitive example of this in action. There were five claimants, and their individual circumstances do not lend themselves easily to a summary. Each case is indicative of hardship caused by the imposition of the SSSC on disabled tenants who fall outside the current exemptions, including: adult tenants being unable to share rooms by reason of disability, tenants who use "spare rooms" for the storage of equipment or for other disability-related purposes, and those in properties which have been adapted for use by a disabled tenant. As it is well established that housing benefit is a possession falling under The European Convention on Human Rights (ECHR) Article 1 of the First Protocol, the claimants contended that:

1. Regulation B13 (the SSSC) was unlawfully discriminatory contrary to Art.14 of the ECHR, or in the alternative that;

2. The Secretary of State had violated the public sector equality duty (PSED) under s 149 of the Equality Act 2010 in failing to consider the needs of disabled tenants.


\(^{348}\) ibid [39] (per Dyson MR).

\(^{349}\) ibid [40] (per Dyson MR).
The appeal was dismissed on both grounds. It was held that the SSSC was indirectly discriminatory against disabled tenants, but that this discrimination was justified and therefore lawful. The decision in relation to Article 14 turned on three key elements: (1) the application of the “manifestly without reasonable foundation” test, (2) distinguishing the present case from *Burnip*, and (3) the palliative effect ascribed to DHPs. Each of these will be considered in turn.

Following the judgment of Laws J in the first instance, and in applying *Humphreys v Revenue & Customs Commissioners*, *Burnip*, and *R (RJM) v SSWP*, the SSSC was held to be an issue of “high policy,” resulting in the application of the deferential “manifestly without reasonable foundation” test in finding whether the policy was unlawfully discriminatory. In making this decision, Dyson MR highlighted the policy’s passage through affirmative resolution, stating that “respect for Parliament's constitutional function calls for considerable caution before the courts will hold it to be unlawful” alongside its “integral part of what was unquestionably a high policy decision” – namely, the Coalition Government’s decision to reduce under-occupancy in the social rented sector and its perceived link with the vague notion of “localism.”

This test sets a high bar. As stated by Dyson MR, the “stringent nature of the test requires the court to be satisfied that there is a serious flaw in the scheme” which produces a discriminatory effect. Accordingly, a sizable margin of appreciation is given to the Secretary of State in this assessment, even if the court must “scrutinise carefully the justification advanced.”

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350 [2012] UKSC 18
351 [2012] EWCA Civ 629
352 [2008] UKHL 63
353 MA [57] (per Dyson MR).
354 MA [54] (per Dyson MR).
355 MA [66] (per Dyson MR).
356 MA [54] (per Dyson MR).
357 MA [54] (per Dyson MR).
The reasoning of Henderson J in Burnip was central to the arguments put forward by the claimants.\(^{358}\) That case concerned the same size criteria applied to tenants in the private rented sector claiming local housing allowance and applied the stringent “manifestly without reasonable foundation” test. It was held that children who were unable to share a bedroom by reason of disability were unlawfully discriminated against. In MA, Burnip was distinguished on three key issues: the lack of a discrete group of disabled tenants in the present case, the fact that the DHP scheme has changed due to more guidance and money being allocated,\(^ {359}\) and that the SSSC was formed in the “shadow of the financial crisis” whereas local housing allowance was not.\(^ {360}\)

Having ascertained the test to apply and distinguished Burnip,\(^ {361}\) the court turned to the issue of justification. DHPs were central to Dyson MR’s assessment. These payments were ascribed a palliative effect by the court, being seen as: flexible enough to respond to the changing needs of the disabled, locally accountable in their use, and responsive in their ability to be “topped up”\(^ {362}\) as required by the DWP. It was further held that the Secretary of State was entitled to find that it was not practicable to add an imprecise class of persons to exempt by way of statute due to concerns over administrative cost.\(^ {363}\) Consequently, the scheme was not “manifestly without reasonable foundation” so the discrimination was justified.

The assessment of the PSED under s 149 Equality Act 2010 was focused on whether “in the process leading to the making of the decision, the decision-maker had “due regard” to the relevant considerations.”\(^ {364}\) Dyson MR was satisfied that during the formation of the SSSC policy, and in particular the development of DHPs, the

\(^{358}\) MA [64] (per Dyson MR).
\(^{359}\) MA [72] (per Dyson MR).
\(^{360}\) MA [64] (per Dyson MR).
\(^{361}\) See Burnip v Birmingham City Council [2012] EWCA Civ 629
\(^{362}\) MA [72] (per Dyson MR).
\(^{363}\) MA [73] (per Dyson MR).
\(^{364}\) MA [83] (per Dyson MR).
Secretary of State had considered the adverse impact imposing the criteria would have on disabled tenants\textsuperscript{365} - this view was supported in the judgment of Longmore LJ.\textsuperscript{366} The Court held that this was sufficient to satisfy the duty.

\textit{Rutherford v Secretary of State for Work and Pensions [2014] EWHC 1631 (Admin)}

The case revolves around the application of the SSSC penalty to the Rutherfords – a household composed of Warren Todd, who suffers from Potoki-Shaffer syndrome, and his grandmother and step-grandfather who care for Warren full-time. The care requirements of Warren were described by Stuart-Smith J as ‘intensively burdensome’\textsuperscript{367} and their home had been ‘significantly adapted’ to meet his needs.\textsuperscript{368} Warren’s grandparents are not in good health themselves, and help is provided by a professional carer who sometimes stays the night at the property in the ‘spare room’ which finds itself subject to the 14% penalty.

Although by virtue of reg.B13(5), adults who require overnight are exempted statutorily, children in a factually similar position such as Warren, are not. Consequently, the claimants contended that:

1. Similarly to \textit{MA}, as housing benefit is protected under art.1/1 European Convention of Human Rights, the policy was unlawfully discriminatory contrary to the art.14 prohibition of discrimination.

\textsuperscript{365} \textit{MA} [92] (per Dyson MR).
\textsuperscript{366} \textit{MA} [94]-[99] (per Longmore LJ).
\textsuperscript{367} \textit{Rutherford} [11] (per Stuart-Smith J)
\textsuperscript{368} \textit{Rutherford} [13] (per Stuart-Smith J)
2. That the failure to exempt children who require an overnight carer, even when adults in the same position are exempted, is "manifestly without reasonable foundation" and therefore is not justified, due to:

a. Warren falling within a readily identifiable and relatively small group, and therefore being distinguishable from the broader class of disabled tenant considered in MA

b. Warren’s case being indistinguishable from the successful challenge in Burnip, which considered children who were unable to share a bedroom due to disability

c. DHPs not being a satisfactory alternative to statutory exemption due to their discretionary, and often time-limited, nature.

Again, in common with all of the SSSC judicial review appeals, the judgment of the Court was dominated by the consideration of DHPs. Stuart-Smith J surveys familiar ground on the wide margin of appreciation given to the Secretary of State in the proportionality exercise on art.14, especially in the ‘context of a scheme which was introduced to meet a compelling social and political objective at a time of extreme national financial austerity.’

The most interesting element is his joining of the previous cases of R. (on the application of MA) v Secretary of State for Work and Pensions [2014] EWCA Civ 13 (the broader challenge to the discriminatory impact of reg.B13 on disabled people canvassed above) and Burnip (a successful challenge to the local housing allowance scheme to disabled children unable to share a room referenced in the consideration of MA above) – both binding on the court – where Stuart-Smith J held that ‘while a scheme including the use of DHPs as the conduit for payment may be justifiable, it will not be justified if it fails to provide suitable assurance of present and future payment in appropriate circumstances.’

369 Rutherford [61] (per Stuart-Smith J)
370 Rutherford [48] (per Stuart-Smith J)
So the consideration here was whether such an assurance existed in the current case, and the court’s assessment was that ‘the current DHP covers the shortfall until 6 April 2015… [and] there is no evidence to suggest that Pembrokeshire will refuse to make up the rental shortfall by further DHPs in the future.’\textsuperscript{371} The court goes further by suggesting that ‘on the information that is available to me… a decision to withhold DHPs [in this case] would appear to be unjustifiable’\textsuperscript{372} and if an award had not been made to the Rutherfords, ‘different considerations may apply’\textsuperscript{373} (para.54).

\textit{R. (on the application of Cotton) v Secretary of State for Work and Pensions}  

\textit{[2014] EWHC 3437 (Admin)}

Before turning to a comment on the treatment of these discretionary payments by the Courts, and potential issues with their role in the proportionality exercise which these appeals are so dependent on, the final SSSC appeal case to consider here is that of \textit{Cotton}. It follows a similar pattern to the previous appeals, however, this case concerned deductions made under the SSSC criteria in instances where parents had separated and there existed some joint custody of the children.

There were three claimants – the facts of two in particular were of greatest relevance to the judgment (the first was no longer affected by the custody situation at the time of appeal).

\textsuperscript{371} \textit{Rutherford} [17] (per Stuart-Smith J)  

\textsuperscript{372} \textit{Rutherford} [53] (per Stuart-Smith J)  

\textsuperscript{373} \textit{Rutherford} [54] (per Stuart-Smith J)
The second was, Mr Hutchinson who has secondary responsibility for two children fathered with his ex-wife. Under the 2012 regulations, due to his secondary responsibility, their bedrooms in his house are deemed to be unoccupied - thus leading to a 25% reduction in his housing benefit. Importantly, he was in receipt of DHP funding in three-month intervals since the regulations came into force in April 2013. There have been some gaps between these payment periods which have accordingly led to the build-up of some arrears. At the time of the appeal, he had been granted a DHP payment for a one-year period by his LA.

The third claimant was similar. Mr Cohen lives in a two-bedroom property, and shares the custody of his child equally with the mother. As child benefit is paid to the latter, under the SSSC regulations, the room is considered unoccupied and the one-bedroom housing benefit reduction of 14% was applied. In similarity with Mr Hutchinson, Mr Cohen is also in receipt of DHP payments - again in three-month intervals with new applications between these – and there was no guarantee at the time of the appeal that the payments would continue after the end of the most recent period applied for.

The claimants contended that the SSSC was unlawful because it:

1. Breached Article 8 of the European Convention on Human Rights;
2. Breached Article 8 of the Convention read with Article 14;
3. Was irrational under public law grounds

All grounds were dismissed. With regard to the first two grounds, Males J applied the well-established ‘manifestly without reasonable foundation’ test outlined above, in line with the previous appeals.\(^{374}\) Somewhat

\(^{374}\) Cotton [28] (per Males J)
unsurprisingly, in common with the other SSSC cases, the use of DHPs were central to the decision of the Court; indeed, J Males remarks that ‘the regime for payment of DHPs is of particular importance.’

The claimants had submitted that the DHP awards were unable to effectively mitigate the reduction in housing benefit if they were of a temporary nature. Instead, some assurance was needed of longer term ongoing exemption by the local authorities to mirror that of what would otherwise be a statutory exemption mechanism. In applying the case law referenced above, J Males quickly reached the conclusion that:

> ‘A short answer to this claim is that as a result of the DHPs received by each of the claimants, which have completely compensated for the reduction in housing benefit paid to them (or would have done, in the case of Mr Hutchinson and Mr Cohen if the correct applications had been made), none of the claimants has suffered any interference with their family life capable of amounting to a breach of article 8’

Effectively, in this case, despite ‘understandable anxiety…and the stress’ induced by the necessity to make continued applications for the discretionary payments, the payment of DHPs which are sufficient to negate the impact of the SSSC benefit reduction is enough to prevent a successful claim under the ‘manifestly without reasonable foundation’ test.

375 Cotton [20] (per Males J)
376 Cotton [22] (per Males J)
377 Cotton [30] (per Males J)
378 Cotton [30] (per Males J)
R. (on the application of Hardy) v Sandwell MBC [2015] EWHC 890 (Admin)

The decisions above all tackle DHPs as part of the broader legislative scheme behind other reforms – particularly the SSSC. In other words, in each of these cases, the focus is on whether the existence of DHPs within the overall scheme can justify the otherwise unlawfully discriminatory effect of another measure. The relative lack of cases which address the payment of DHPs more explicitly is a feature of quite how difficult they are to appeal – indeed, there have been a number of near-challenges, which have fallen through when the local authority has decided to concede and make an award to the potential appellant. Consequently, this has resulted in a lack of legal precedent clarifying some of the grey areas of legality surrounding the payments.

Currently one case, however, has made it to the High Court. In Hardy, Sandwell MBC’s policy of taking the care component of Disability Living Allowance (DLA) into account as income when assessing applications for DHPs was challenged as being unlawfully discriminatory against people with disabilities. This is not a practice which is particular to Sandwell MBC. The Department for Work and Pensions’ own research suggests that upwards of 76% of councils routinely take both elements (mobility and care) of DLA into account, with a small additional number of authorities doing so in ‘appropriate circumstances’ or sharing Sandwell’s position of only considering the care component. This appeal therefore addresses the DHP practice of the vast majority of local authorities.

The claimants had four grounds of argument, three of which were successful.

The first was a successful challenge on the council fettering their discretion, argued on the basis that it appeared from correspondence to the claimant (and reflected in the DHP policy itself) that Sandwell incorrectly believed

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379 R. (on the application of Hardy) v Sandwell MBC [2015] EWHC 890 (Admin)
381 ibid
they were unable, due to a misinterpretation of statutory constraints, to exclude the care component of DLA in their DHP assessments.\textsuperscript{382} The Council’s position was based largely on that in \textit{R (Turner) v London Borough of Barnet Housing Benefit Review Board};\textsuperscript{383} a decision stating that the DLA care component \textit{could} be taken into account in assessing hardship payments, but not necessarily \textit{should} be. However, the Court underscored this case was decided far before the imposition of the Coalition Government’s welfare reforms and the consequent updating of the DHP guidance.\textsuperscript{384} and in any event, did not mandate the consideration of this income, but rather did not preclude it.\textsuperscript{385} Perhaps the most striking fact unearthed in the course of the court’s assessment of this ground is that Sandwell MBC had not updated their DHP policy since the introduction of the SSSC – this is quite an extraordinary lapse of judgment given the heavily increased strain these payments have been forced to bear following the Welfare Reform Act 2012 in comparison to their previous role; even more so given the populations the policies were likely to effect.

Having failed to update their policy, Sandwell had clearly also failed to undertake a new Equality Impact Assessment following the sizable changes to the expectations of the DHP regime. In acting as a form of discretionary exemption mechanism for the majority of the disabled tenants affected by the SSSC, the potential for impact of not revising a DHP policy on a protected group is evident. It is perhaps not surprising therefore, that the policy was also subject to a successful challenge under the Public Sector Equality Duty (PSED) s.149

\textsuperscript{382} \textit{R. (on the application of Hardy) v Sandwell MBC} [2015] EWHC 890 (Admin) at [41]
\textsuperscript{383} [2001] EWHC 204 (Admin)
\textsuperscript{384} \textit{R. (on the application of Hardy) v Sandwell MBC} [2015] EWHC 890 (Admin) at [42]
\textsuperscript{385} \textit{R. (on the application of Hardy) v Sandwell MBC} [2015] EWHC 890 (Admin) at [37]
Equality Act 2010. As stated by the Court, this finding adds little to the first ground discussed above, but it does underscore the procedural failings went further than a misinterpretation of their statutory constraints.

A third ground, which was unsuccessful, challenged the decision in Turner on the basis that the Court incorrectly assessed the statutory purpose of s.73 (14) of the Social Security Contributions and Benefits Act 1992. It was argued that the distinction between considering the care but not the mobility component of DLA was due to the necessity for local authorities to assess a person’s means when setting charges for care they themselves provide. Once this distinction is established, a different statutory intention can be inferred for s.73(14) that disability benefits (both care and mobility components) should not be taken into account in assessing housing benefit.

The Court dismissed this argument on the basis that, even if this was the reason for the distinction, ‘it was not possible to extract a wider statutory purpose that [the care component] should be disregarded.’ In other words, the taking into account of the care component portion of DLA is not against the statutory purpose of s.73(14) or inherently irrational. Consequently, this ground failed.

The Situating of DHPs within Art.1/1/Art.8

The final ground is of particular interest and may have far-reaching consequences for the treatment of discretionary payments within UK welfare reform programmes. The claimants challenged the decision using the familiar formulation of Art.1/1 and/or Art.8 to leverage a discrimination challenge on the grounds of disability

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386 R. (on the application of Hardy) v Sandwell MBC [2015] EWHC 890 (Admin) at [67]
387 R. (on the application of Hardy) v Sandwell MBC [2015] EWHC 890 (Admin) at [73]
388 R. (on the application of Hardy) v Sandwell MBC [2015] EWHC 890 (Admin) at [73]
389 R. (on the application of Hardy) v Sandwell MBC [2015] EWHC 890 (Admin) at [74]
390 R. (on the application of Hardy) v Sandwell MBC [2015] EWHC 890 (Admin) at [77]
under Art.14. Evidently, the key issue here was whether the payment of DHPs could be regarded as engaging Art.1/1 – the scope of which is ordinarily confined to prescribed forms of benefit. Indeed, the reason why a judicial review of Sandwell’s decision is necessary is because they do not carry the same rights to appeal as prescribed forms of benefit, which would automatically engage the right to property.

However, Phillips J highlighted how dependent the SSSC regulations are on DHPs to their continued legality and the consequent emphasis by the Court in MA and elsewhere (outlined above) on assessing the ‘scheme as a whole,’ in his overall conclusion that ‘DHPs form an integral part of housing benefit entitlements for disabled applicants’ and that there is ‘at least a legitimate expectation that they will be used to supplement a shortfall in HB which would otherwise be unlawful.’ This is a tremendously significant conclusion.

This position is the logical extension of the increasingly prominent role cast for DHPs following Rutherford v Secretary of State for Work and Pensions, where it was held that the DHP scheme cannot be a source of justification for the SSSC scheme as a whole, if they fail ‘to provide suitable assurance of present and future payments in appropriate circumstances.’ This demonstrates the extent to which these payments have evolved in the case law from the clear distinction drawn in MA between this purely discretionary relief and the payment of housing benefit.

In any event, even if the Court had not found DHPs to fall under the ambit of art.1/1 in the scheme of a right of property, Phillips J further accepted that the payments would engage Article 8. Here, following the same logic casting DHPs alongside prescribed benefits, the potential risk of having to move from one’s accommodation

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391 See R (RJM) v Secretary of State for Work and Pensions [2008] UKHL 63
392 Under para.6(1) Schedule 7 of Child Support, Pensions and Social Security Act 2000
393 See R (MA & others) v The Secretary of State for Work and Pensions [2014] EWCA Civ 13 at [40]
394 R. (on the application of Hardy) v Sandwell MBC [2015] EWHC 890 (Admin) at [48]
395 [2014] EWHC 1631 (Admin)
396 Rutherford v Secretary of State for Work and Pensions [2014] EWHC 1631 (Admin) at [48]
397 R (MA & others) v The Secretary of State for Work and Pensions [2014] EWCA Civ 13 at [82]
highlighted as engaging Article 8 in *R. (on the application of Cotton) v Secretary of State for Work and Pensions* [2014] 398 (concerning the SSSC) was held in *Hardy* to apply to the removal of DHPs as well. 399 Namely, the discretionary payments were seen as such an integral part of ‘housing benefit’ provision, that a failure to make an award in certain circumstances would be both unlawful, and likely to subject the tenant to a heightened risk of losing their home sufficient to engage article 8.

**The application of UN obligations to DHP determinations**

The judgment in *Hardy* can be set alongside the UKSC decision in *SG* (outlined above) regarding the ‘benefit cap,’ in a way which demonstrates the potential applicability of UN conventions (particularly the United Nations Convention on the Rights of Persons with Disabilities) to the determination of DHP awards.

Firstly, the source of disagreement in *SG* focused on the ability to draw a conduit between discrimination on the grounds of gender (by virtue of the benefit cap disproportionately affecting lone parents) under Article 14, and the UNCRC (by virtue of this disproportionate effect indicating that the best interests of the child were not taken into account). However, no such problem would exist in any future challenge based on the same Art.1/1/Art.8 with Art.14 approach to discrimination on the grounds of disability, drawing on the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) as a guide for interpretation. This argument has precedence. When considering the justification for changes to Local Housing Allowance in *Burnip* (discussed

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398 EWHC 3437 (Admin) at [39]
399 *R. (on the application of Hardy) v Sandwell MBC* [2015] EWHC 890 (Admin) at [51]
above), although the case turned on other grounds, Maurice J indicated that he would have been willing to utilise the UNCRPD in his interpretation of Art.14 and find in favour of the claimants on that basis.

The use of the UNCRPD has already led to a ‘heightened standard of scrutiny’ elsewhere in ECHR case law, and Article 19 in particular offers the potential to ‘illuminate our approach to both discrimination and justification’ in cases involving housing benefit, given its focus on the right of those with disabilities to live independently and choose their place of residence on an equal basis to others. Elsewhere, others have pointed to the prospect of a ‘fusion’ between ECHR disability discrimination and the norms of the UNCRPD, and the majority position of the Supreme Court in SG demonstrates the important interpretative role the convention could play in future challenges to welfare reforms; particularly those with a discretionary element.

Secondly, in clearly situating DHP payments within the rubric of Art.1/1 and Art.8, the decision in Hardy, coupled with that in JS, extends the ability of the UNCRPD to aid the interpretation of Art.14 discrimination when challenging DHP awards. Although this is a logical extension of the importance placed on DHPs within the overall legislative scheme for the SSSC, it demonstrates the distance travelled from the Government’s initial casting of the payments as a form of discretionary relief to be decided with reference to ‘local issues’ – indeed, it was suggested initially that the ‘key is in the title.’ How much ‘discretion’ remains in these payments is questionable, as their role in the ongoing legality of the welfare reform agenda has been firmly cast.

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400 Burnip v Birmingham City Council and another [2012] EWCA Civ 629 at [22]
402 Burnip v Birmingham City Council and another [2012] EWCA Civ 629 at [22]
403 Article 19 United Nations Convention on the Rights of Persons with Disabilities
404 Broderick (n 401 above) 116
405 R. (on the application of Hardy) v Sandwell MBC [2015] EWHC 890 (Admin)
8.2.3. LOWER COURTS AND THE FUNCTIONING OF DHPs

With regards to the SSSC in particular, there have been a plethora of First and Upper Tier Tribunal Decisions appealing the application of the benefit penalty on applicants by local authorities. Discretionary Housing Payments have featured heavily in these appeals – especially in the UTT decisions. It is worth here considering two key themes which arise from these appeals. This section focuses on a small number of important UTT decisions, as (1) they provide a precedent for FTT decisions, and (2) the sheer volume of FTT decisions (the decisions for many of which may still not be available) renders a concise analysis of their multivariate themes difficult.

Firstly, the initial waves of FTT decisions which were successful in appealing the application of the SSSC criteria to different factual scenarios (such as those with serious disability, or shared care arrangements), were largely successful due to a lack of consideration of DHP payments. This was for two reasons. The first is that many appeals focused entirely on factual assessments of the room size (such as the amount of space required to render a bedroom as such for the purposes of reg.B13), and the second is that most claimants did not receive DHP monies at the same time of the initial decision. Consequently, the payment of DHP monies was not eligible to be taken into account by the tribunal, pursuant to s.6(9)(b) of Schedule 7 to the Child Support, Pensions and Social Security Act 2000, if the payments were made after the date of the LA’s decision to impose the SSSC benefit penalty which forms the basis of the appeal. The mechanism for DHP applications made this a particularly common occurrence, as the ‘bounce-back’ route for exemption discussed below requires the affected

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applicant to apply for their own exemption – unless a DHP is introduced by the local authority at the same time of the benefit deduction, this makes its involvement in the initial decision on appeal all but impossible.

The first theme which runs clearly out of the UTT with regards to the payment of DHPs is a largely uncritical application of *MA*, despite the added-gloss provided by later appeals. Once on appeal to the UTT, many of these first instance decisions have been successfully appealed by the Department for Work and Pensions on this basis, with the existence of DHPs forming the key cornerstone of the judgments. Indeed, in *PC v Secretary of State for Work and Pensions*.  

This case concerned a shared custody arrangement in a two-bedroom property, where the son went to live with his father in the ‘unoccupied’ bedroom on a weekly basis due to a longstanding agreement with his mother. Despite problems with the payment of DHP monies, Wright QC stated that he had ‘decided the case particularly on the basis of the discretionary housing payments,’ despite the fact that they were problems in their payment, including a short delay and an accidental failure to transfer the money for a short period.

The palliative effect of these payments was further underscored in the more recent case of *Secretary of State v MS and Inverclyde Council*, where Gamble J adopted the reasoning of *MA* that ‘it was the existence of the discretionary housing payment scheme that mattered for the purpose of justification not whether a particular claimant had received such a payment,’ [13] and consequently, the claim failed. This reasoning seems to sit at odds with the decision in *Rutherford*, where clearly some element of a case-by-case assessment is advanced by the Court.

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410 PC v Secretary of State (Housing and council tax benefits : payments that are eligible for HB) [2014] UKUT 467 (AAC)
411 Ibid [26] (per Wright QC)
412 Ibid [25] (per Wright QC)
413 Secretary of State v MS and Inverclyde Council (Housing and council tax benefits : payments that are eligible for HB) [2014] UKUT 465 (AAC)
414 Ibid [13] (per Gamble J)
The second key theme to tease out from the UTT decisions is the clear role given to DHPs as a remedy (or the only remedy) following a successful appeal of the application of the regulations. In fact, an applicant being in receipt of DHP was even described by May QC when dismissing an appeal has already having a ‘remedy by another route.’  

This issue is best illustrated using the case LA v Bury Metropolitan Borough Council (HB) [2013] UKUT 546 (AAC). This case concerned the application of the SSSC onto a family of five, with the parents sharing a room, and each of the three children having their own. Under regulations, two of the children were expected to share; however, one of these has a series of mental health problems (ADHD and autistic spectrum disorder) which rendered sharing a room problematic for both him, and for his brother. In this case, the appeal was successful on the basis of art.1/1 in conjunction with art.14. Consequently, the tribunal ordered that:

‘I am able to substitute my own decision for that of the council in the present case and I do so by remaking the council’s decision so as to determine that the claimant is entitled to be paid a sufficient amount in addition to anything payable under the Housing Benefit Regulations that will result in her and her family not being discriminated against contrary to Article 14. It is for the council to determine whether there are any further sums due to the claimant for it to comply with Article 14, and if so, to determine how much and to pay them. Any dispute as to the amounts due will carry a further right of appeal.’  

415 KR v Secretary of State (Housing and council tax benefits : payments that are eligible for HB) [2014] UKUT 464 (AAC) [9] (per May QC)

416 Ibid [17] (per Mark J)
Effectively, the local authority is bound to pay what is allowed under the Housing Benefit Regulations 2006 (which would be the amount subject to the 14% reduction originally appealed) and would then have to make up any deduction by other means – namely, via the payment of DHP monies. The use of these payments in this way is problematic given key assumptions made about their function elaborated on in the next section.

**Consideration under the Benefit Cap Case Law: R. (on the application of JS) v Secretary of State for Work and Pensions [2014] EWCA Civ 156**

To a lesser extent than the appeals to the SSSC, the lead appeal under the ‘Benefit Cap’ canvasses issues related to Discretionary Housing Payments. In *R. (on the application of JS) v Secretary of State for Work and Pensions*, the claimants argued that due to the overwhelming majority of those effected by the policy being female single mothers, the ‘benefit cap’ was:

1. Unlawfully discriminatory under art.1/1 and art.14; and/or
2. Unlawfully discriminatory under art.8 and art.14; and/or
3. Incompatible with art.3(1) of the UN Convention on Rights of the Child; and/or
4. Were irrational at common law

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[2014] EWCA Civ 156
The Court of Appeal dismissed the claims in applying the same test of ‘manifestly without reasonable foundation’ in the justification exercise – as was the case in the SSSC criteria appeals detailed above. Here, although DHPs were not as central to the reasoning as in previous cases, they were used as a key element in justifying difficult cases, with the Secretary of State advancing the argument that particular discriminatory impacts caused by the policy could be alleviated through the payment of this money. For instance, it was submitted that ‘DHPs can be made by local authorities to persons who are in temporary need of help to escape from domestic violence’ and the Court found that ‘even in the case of MG, which was the most extreme of the three before the court, the claimant’s position has been improved by the receipt of DHPs and by the fact that she has secured a reduction in her rent’. Likewise, in the later UKSC benefit cap appeal under SG, the availability of DHPs were assessed in the finding of proportionality by a majority of the Supreme Court in R. (on the application of SG) v Secretary of State for Work and Pensions, which challenged the benefit cap on the basis of its discriminatory effect on women (again, on the basis of Art.1/1 and Art.14). The issue of discrimination resulting for those suffering from domestic violence was quickly dismissed due to the availability of DHPs to mitigate a problem that was described as being “inherently of a temporary nature.”

418 Ibid [60] (per Elias LJ)
419 Ibid [100] (per Elias LJ)
422 R. (on the application of JS) v Secretary of State for Work and Pensions [2015] UKSC 16 at [80].
8.2.4. ASSUMPTIONS REGARDING DHPs

Firstly, it is assumed that there is a direct causal relationship between money added to overall DHP allocation and it filtering through to affected populations in circumstances akin to the claimants. Consequently, Dyson MR does not raise the issue of DHP expenditure by local authorities, choosing instead to focus squarely on allocation by the DWP. Much weight is attributed to the evolving size of the ‘pot’423, and increased provision for DHPs plays a key role in departing from the reasoning of Henderson J in Burnip v Birmingham City Council.424 This ‘trickle-down’ effect may not be as simple as the judgment implies. Even a cursory glance at the most recently available DHP figures provided by the DWP demonstrates stark differences in the level of spend between local authorities, with some authorities having spent as little as 7% of their total allocation by September 2013, and others supplementing expenditure to 140%.425

It seems unlikely that such a divergent spread of data could be caused by the severity of welfare reform impact alone, particularly as key indicators of an area’s susceptibility are captured in the DWP formula for DHP budget allocation.426 It is instead suggested that a number of factors complicate the causal inference that a higher allocation of money to local authorities results in an associated increase in ultimate DHP spend, such as: sizable administrative pressures on the management of DHPs in face of a changing welfare reform agenda; moralistic approaches being taken by a minority of authorities – as evidenced, for instance, North Lincolnshire Council’s

423 ibid [22]-[24],[32],[72] (per Dyson MR).
reported persistent refusal to make DHPs to those who smoke or have satellite television;\textsuperscript{427} and potential problems with the DWP formula for allocating DHP budgets.

Secondly, there is an inherent tension in the assumptions that local authorities will both make DHP awards with reference to their local knowledge in line with the ‘localism’ agenda,\textsuperscript{428} and that they will adhere to the centrally determined principles set out in DWP guidance on their use.\textsuperscript{429} Ministers have been at pains to point out that the payments are discretionary, highlighting that ‘the key is in the title’\textsuperscript{430} – local authorities should decide when to make awards with reference to ‘local issues.’\textsuperscript{431} This is set against a continued emphasis on central guidance being updated to help local authorities respond to and prioritise vulnerable populations. This contradiction sits at the heart of the judgment in \textit{MA}, which uses the fact that ‘further guidance [on DHPs] has been issued to the [LAs]’\textsuperscript{432} to help justify taking a separate line of reasoning from \textit{Burnip}, whilst at the same time emphasising that ‘[LAs] and social landlords are better able than any central authority to ensure they use their housing stock to best effect’\textsuperscript{433} and that ‘[LAs are] accountable locally for the money they spend.’\textsuperscript{434} Quite how local authorities are expected to balance central guidance alongside what they perceive as ‘local needs’ and how housing staff tasked with these decisions are held to account by the local population, is not elaborated upon.

\textsuperscript{428} \textit{MA} [66] (per Dyson MR).
\textsuperscript{429} ibid [72] (per Dyson MR).
\textsuperscript{430} HC Deb 25 Nov 2013, vol 571, col 13.
\textsuperscript{431} HC Deb 25 2013, vol 559, col 976W.
\textsuperscript{432} \textit{MA} [64] (per Dyson MR).
\textsuperscript{433} ibid [66] (per Dyson MR).
\textsuperscript{434} Ibid [75] (per Dyson MR).

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Likewise, in *Rutherford*, Stuart-Smith J not only refers to MA’s assessment of local accountability, but also highlights the problematic notion of ‘austerity.’ The formation of the policy at time of ‘extreme national financial austerity’ is highlighted by the Court and this aligned alongside the legitimate aims served by both the SSSC – and importantly – the use of a DHP scheme as opposed to a statutory exemption. It is not clear how an exemption mechanism designed to operate as an alternative to a statutory one can serve the objective of austerity – surely the only way is by not exempting individuals who would otherwise warrant exclusion from the policy?

This tension between flexibility (and the reasons for it) and what is expected by local authorities by the Courts in how they operate these payments has been implicitly referenced in the appeals. As was canvassed by Helen Mountfield QC representing the Equality and Human Rights Commission intervening in *MA*, if it is the case that certain classes of tenant are expected to be exempted (such as children who require carers who stay overnight), an exemption mechanism built into reg.B13 Housing Benefit Regulations 2006 would incur very minor, if any, expense; indeed, ‘authorities must exercise their discretion under this regulation and consider applications for DHPs in any event.’ Highlighting the virtues that DHPs provide over a statutory exemption therefore becomes a little difficult. This position is underscored when the court states clearly that withholding DHPs for the Rutherfords would ‘appear to be unjustifiable.’

Thirdly, and again somewhat problematically, it is assumed that DHPs both provide the ‘greater flexibility’ required to deal with the changing nature of ‘disability-related needs’, whilst being sufficiently secure to provide an adequate form of long-term exemption for those in situations analogous to the claimants. This sits

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435 *Rutherford* [32] (per Stuart-Smith J)
436 *Rutherford* [61] (per Stuart-Smith J)
437 *MA* [68] (per Dyson MR)
438 *Rutherford* [53] (per Stuart-Smith J)
439 Ibid [74] (per Dyson MR)
440 Ibid [74] (per Dyson MR)
uncomfortably alongside the judgment in *Burnip*, where the importance of housing as ‘a long term commitment…particularly so in the case of a severely disabled person’\(^{441}\) was seen as an antithesis to the temporary and discretionary nature of DHPs.\(^{442}\) It is difficult to see how this same critique cannot apply in the other appeals, or what is ‘flexible’ and ‘changing’ about the needs of the claimants before the court in *MA* who suffer from cerebral palsy, spinal osteoarthritis and spina bifida. Likewise, this treatment of DHPs appears to be an antithesis to the judgment in *Rutherford* that the DHP scheme cannot be justified if it ‘fails to provide suitable assurance of present and future payments in appropriate circumstances.’\(^{443}\) Reaching this high bar clearly requires a degree of permanence to the payments made – in other words, DHPs need to work to emulate the security provided by a statutory exemption, rather than exhibit the flexible and changing characteristics indicative of a short-term discretionary payment which they inherently display in many of the facts of the claimants in appeal cases.

Finally, there are some sizable practical problems which have been left unresolved by the current position. For instance, the appeals do consider cases where a *partial award* is made which does not cover the full deduction imposed by the SSSC. Evidence suggests that many local authorities are making partial awards or operate a weekly ‘cap’ on the total amount which can be awarded. In such a case, is the existence of a discretionary payment – even if it does not cover the full amount - sufficient to operate as an alternative to a statutory exemption which would pull the claimant outside of the remit of the policy altogether?

Another issue which presents itself is the onus on applicants to apply for DHPs themselves. Effectively, this makes the policy regime function using a bounce-back exemption, with those effected by the welfare reform

\(^{441}\) *Burnip* [47] (per Henderson J).
\(^{442}\) ibid [46] (per Henderson J).
\(^{443}\) *Rutherford* [48] (per Stuart-Smith J)
having to seek out a redress of their own accord. The balance of responsibilities here between the benefit applicant on the one hand, and the local authority on the other is unclear. It may be the case that the absence of an award due to the failure of the local authority to sufficiently advertise the DHP scheme mitigate the policy’s ability to pass the ‘manifestly without reasonable foundation’ test. This issue is particularly important given the consideration of Males J on the burden on the latter two claimants to make ‘correct applications.’ In Cotton, it appears as if the arrears suffered by the claimants were framed firmly as their own responsibility, with little consideration on how onerous or unclear the application process may or may not have been.

8.2.5. DEFERENCE AND DISCRETION - CONTAINING THE ‘DISCRETIONARY SPACE’

The first question facing the Court when assessing the proportionality of differential treatment is the standard of review; generally with cases relating to ‘general measures of economic or social strategy’ requiring a lower standard of review. As they sit within the ‘sphere of social policy,’ housing issues have been accorded a strong ‘deferential tenor’ by the Courts when it comes to assessment of proportionality. The ‘manifestly without reasonable foundation’ test is indicative of an ingrained judicial restraint regarding concerns about subsidiarity - namely, national authorities are better placed to make housing policy decisions than the court.

444 Cotton [30] (per Males J)
446 P Sales and B Hooper, ‘Proportionality and the Form of Law’ [2003] LQR 426, 436
447 R Walsh, ‘Integrating Proportionality Into Public Authority Possession Applications—Conclusive Answers from the Supreme Court?’ (2011) 22 KLJ 414, 426
449 MA [50] (per Dyson MR).
It has been suggested elsewhere that this is particularly true following the financial crisis, where the majority of governments of EU countries are introducing policies under the guise of fiscal consolidation and ‘austerity.’ On the power of austerity, Dimopoulos has suggested that it is tempting for courts ‘in economic crises [to] be deferential to financial policy,’ and Contiades et al go as far as to suggest that the financial crisis has led us to an ‘age of balancing’ where threats individual’s social rights (in this case, to a discriminatory treatment of housing benefit under art.1 prot.1 and art.14) are balanced against the wider interests of austerity.  

In the context of DHPs, as is the hallmark of social housing, the buck is passed down to local authorities. The central state, having been given a wide margin of appreciation due to being better placed to make these decisions, goes on to decide that local authorities are themselves even better placed. This raises concerns about what Elliot has described more broadly as the need to control the ‘ultimate boundaries of the discretionary space’ when assessing proportionality. A decision by way of DHPs as opposed to housing benefit is far harder for a tenant to appeal. The payment of DHPs is not the payment of housing benefit. Though there is a right to a written decision with stated reasons and to seek review, challenges to a LA’s decision can only be made using the standard public law toolkit. The difficulty in appealing these decisions is put forward by the claimants, but is left largely unconsidered by the court.

454 MA [41] (per Dyson MR).
8.3. **SECTION THREE: CURRENT EVIDENCE ON DHPs – THEIR ROLE IN THE MITIGATION OF THE WELFARE REFORM AGENDA**

Having outlined the legal treatment of DHPs, this section now attempts to draw initial conclusions by utilising the data on local authority mid-term expenditure in England and Wales on these payments[^455] - particularly with an aim to explore the influence of local politics on DHPs.

**8.3.1. FOCUSING ON ‘SPEND-PER-CASE’**

Much of the media coverage on DHPs has focused on overall percentage spend of the allocation – namely, how much of the money given to local authorities has actually been used to mitigate the impact of the reforms. However, in an attempt to show the near-impossible task presented to the civil servants at the DWP in charge of allocating the DHP pot out to local authorities, I have mapped some key indicators of the severity of under-occupation used in this analysis. The darker shades of red are indicative of higher values.

It is clear from the above that the impact of the ‘bedroom tax’ is far from even across authorities – indeed, recent analysis by Beatty and Fothergill makes clear that the impact of welfare reform is an inherently regional affair, with the worst-hit local authority areas losing around four times as much per head than the least affected. This stark divide between areas within the UK presents clear problems in the calculation of DHP allocation. The

formula used by the DWP is effectively a sophisticated stab-in-the-dark, using baseline DHP spend from the 2010/11 financial year alongside ‘anticipated losses’ from the flagship welfare reform programs.

The clouded nature of this allocation renders an interpretation of total percentage spend problematic, as the starting point is a loaded dice. Instead, this analysis uses the average DHP spend per ‘bedroom tax’ case – namely, dividing the money spent by the number of bedroom tax cases in the area. This does not remove the problems caused by the confusing nature of DHP allocation, but a focus on the payments made rather than on the total percentage spent should avoid the worst offending mistakes.

A good example of the clear differential impact can be seen in figures five to seven below. Here I have plotted key data indicators for inclusion in the regression onto a map of England and Wales. These maps show that all indicators of severity of impact in the measure (i.e. the amount being paid, the numbers heavily under-occupying and total numbers of cases) follow distinct geographical patterns. In short, the severity of the SSSC is - somewhat unsurprisingly – heavily dependent on the individual local authority you are in.
Figure Five: Average level of SSSC reduction per household by local authority area

<table>
<thead>
<tr>
<th>Percentile Split</th>
<th>Key</th>
</tr>
</thead>
<tbody>
<tr>
<td>£0-£12.84</td>
<td></td>
</tr>
<tr>
<td>£12.85-£13.78</td>
<td></td>
</tr>
<tr>
<td>£13.79-£14.72</td>
<td></td>
</tr>
<tr>
<td>£14.73-£16.17</td>
<td></td>
</tr>
<tr>
<td>£16.18-£18.53</td>
<td></td>
</tr>
<tr>
<td>£18.54-£25.06</td>
<td></td>
</tr>
</tbody>
</table>
Figure Six: Number of households affected by the SSSC under-occupying by two or more bedrooms by local authority area

<table>
<thead>
<tr>
<th>Percentile Split</th>
<th>Key</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-55</td>
<td></td>
</tr>
<tr>
<td>56-85</td>
<td></td>
</tr>
<tr>
<td>86-125</td>
<td></td>
</tr>
<tr>
<td>126-212</td>
<td></td>
</tr>
<tr>
<td>212-414</td>
<td></td>
</tr>
<tr>
<td>414+</td>
<td></td>
</tr>
</tbody>
</table>
Figure Seven: Total number of households affected by the SSSC by local authority area

<table>
<thead>
<tr>
<th>Percentile Split</th>
<th>Key</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-361</td>
<td></td>
</tr>
<tr>
<td>362-548</td>
<td></td>
</tr>
<tr>
<td>549-760</td>
<td></td>
</tr>
<tr>
<td>761-1212</td>
<td></td>
</tr>
<tr>
<td>1213-2623</td>
<td></td>
</tr>
<tr>
<td>2624+</td>
<td></td>
</tr>
</tbody>
</table>
8.3.2. The Role of Politics

There is a good theoretical case for exploring the role played by local politics in the making of DHP decisions. There are two aspects to this. Firstly, the mechanisms for local politics to influence DHP payments are well established. Local housing policy, even if fragmented somewhat due to stock-transfers or the contracting-out of housing benefit services, remains an area where local councillors possess political influence. Indeed, the political nature of housing decisions – and associated inefficiencies – have been long associated with local authority run housing stock, and have been seen as one factor which has led to more stock being transferred to housing associations. As discussed above, the discretionary space afforded to local authorities in how they assess DHP applications and make awards is sizable, and leaves scope for the influence of politically determined policies set at councillor level.

Secondly, the SSSC is also a form of locally implemented welfare reform, and evidence is rapidly coming to light which demonstrates that the implementation of austerity-driven reforms are particularly susceptible to being mediated (or exasperated) depending on the ‘local policy contexts’ which vary dramatically between separate localities. Indeed, Newman suggests that flagship government reforms – such as the SSSC – do not present an ‘unassailable logic’ without room for political influence at a local level, but instead that each local authority

are themselves a ‘political and governmental actor’ which can influence the implementation of what are often politically sensitive policies.\textsuperscript{461} John has recently argued that the political clout of local government is too often over-looked, suggesting that: ‘even if it does not have the heavy hitting power of directly elected mayors…English local government’s leadership is politically responsive if quietly so.’\textsuperscript{462}

8.3.3. ANALYSIS OF REGRESSION DATA

In order to explore general trends in DHP spend, a multiple regression was run using DWP data on levels of DHP expenditure for the period April to September 2013 broken down to local authority level (Figure Eight). These were supplemented with further information on the level of severity of the ‘bedroom tax’ deduction, and the political make-up of the authorities involved.

\textsuperscript{461} Ibid 8
\textsuperscript{462} Peter John, ‘The Great Survivor: The Persistence and Resilience of English Local Government’ (2014) Local Government Studies 1, 14
### Figure Eight: Results on the Multiple Regression on DHP Expenditure

<table>
<thead>
<tr>
<th>Variable</th>
<th>Unstandardised Regression Coefficient</th>
<th>Standardised Coefficient</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average Bedroom Tax Deduction (£)</td>
<td>33.865</td>
<td>.383*</td>
</tr>
<tr>
<td>Total number of Bedroom Tax Cases</td>
<td>-.060</td>
<td>-.446*</td>
</tr>
<tr>
<td>LHAReforms (£ Expenditure)</td>
<td>.002</td>
<td>.357*</td>
</tr>
<tr>
<td>Benefit Cap (£ Expenditure)</td>
<td>.003</td>
<td>.283*</td>
</tr>
<tr>
<td>No Overall Political Control vs Labour</td>
<td>45.089</td>
<td>.552*</td>
</tr>
<tr>
<td>Conservative vs Labour</td>
<td>-44.882</td>
<td>-.577*</td>
</tr>
</tbody>
</table>

**Note:** *p < 0.05.

The necessary assumptions for the tests were met. There was independence of residuals, as assessed by a Durbin-Watson statistic (value of 1.916). The test for a linear relationship between the non-categorical variables and the dependent variable was satisfied, and there was no significant multicollinearity as assessed by the Tolerance and VIF values (none of the former fell below 0.1, and none of the latter rose above 10).

Casewise diagnostics revealed a number of cases which fell outside of three standard deviations, consequently, problematic cases were checked against their leverage value, and any cases with a leverage score over 0.5 were removed from the test sample. The Cook’s Distance value was also analysed, and no values in the regressions exceeded 1 (the highest value was .12392) – no cases were removed as a result. Boxplots were undertaken to
explore the homoscedasticity of the data, and although there were some minor variations within the data set, the assumption was sufficiently satisfied for the analysis to proceed.

Using the variables below, the model statistically significantly predicted spend per case values $F= 61.893$, $p < .0005$, $adj.R^2 = .55$. All of the variables contributed statistically significantly to the prediction. A total of 318 councils were involved in the analysis (Con – 178, Lab – 85, No Overall Control – 55, other types of councils were left out of the regression due to low frequency).

8.3.4. INITIAL CONCLUSIONS FROM THE REGRESSION

Though there are some sizable limitations in this analysis, the key message from the regression is that it appears the political control of a local authority explains some variance in the amount awarded per case by DHPs, even when expected predictor variables (the average level of deduction and the total number of cases) and other welfare reforms (the spend on LHA reforms and the benefit cap) are controlled for. Conservative Councils are associated with spending less per ‘Bedroom Tax’ when compared to Labour Councils, and in turn, Labour Councils are associated with spending less per case than Councils with no overall control.

This section does not purport to go into the potential reasons for these discrepancies between political parties – it is sufficient here to note that local politics is associated with varying levels of DHP expenditure award. The principle that a social right (to housing benefit under art.1/1) is filtered through this politicised discretionary space will be examined with reference to appeals on the other parts of the welfare reform agenda in the concluding section of the report.
Some of the implications of the growing use of these payments are tied together in the concluding section below. Their increased role, funding, and legal attention are incredibly significant – and often under-reported and under-analysed – aspects of the welfare reform agenda. As reforms increase in conditionality and begin to affect larger swathes of claimants, DHPs provide what can appear to be an easy route for ensuring that particularly problematic cases of hardship are avoided; it is clear, however, that numerous problems remain in their use, and compared to their statutory alternatives, do not operate as an effective means of mitigating the impact of reforms.
Conclusions
9. CONCLUSIONS

This report has sought to examine the justifications for and legal challenges to the UK’s 2010 Coalition Government’s welfare reform programme. It makes no claims to be exhaustive or conclusive, but instead has aimed to identify common themes in some of the more high profile challenges, and to explore how the law has (and in many cases, has not) been used to fight the programme of reform in the Welfare Reform Act 2012.

What has emerged is a clear indication that mounting successful challenges to the reforms introduced under the guise of austerity is a difficult, and often fruitless, process. The limitations of often blunt procedural obligations, the high bar of deference given to the executive in the justification exercise, and the increasing utilisation of discretionary mechanisms instead of statutory exemptions, all serve to weaken the legal hand that can be played.

Instead of offering a summary of the more descriptive account presented in this report, this concluding section identifies four key issues that – in the opinion of the author – warrant further examination, and are likely to remain significant as the welfare reform agenda marches on.

9.1. The problem of compound impact

The extent and prevalence of the welfare reform agenda causes particular problems with compound impact. Multiple policy changes overlap with each other within certain constituencies of claimants – particularly those living in social housing – which has the potential to exasperate the severity of the reforms. This effect, however,
is completely neglected within Government assessments. Despite undertaking analysis on the distributional
effects of multiple policies across household income distributions,\textsuperscript{463} even if one is able to focus down on narrow
ranges of income, pockets of compound impact can be easily lost given its concentration on a number of
relatively small constituencies who may not be easily identified by income alone.\textsuperscript{464} Indeed, research by the
Equality and Human Rights Commission which has attempted to address this lacuna, suggests that the
cumulative impact of welfare reform is ‘substantial and widespread.’\textsuperscript{465}

The importance of the way in which these reforms overlap falls completely outside of the way in which the
Government meets its procedural equality obligations discussed in this report. What is required, and is often
completed by government officials, is the assessment of the potential impact a measure may generate on its own
terms, instead of how multiple measures may interact with new provisions. This leads to a smorgasbord of
individual impact assessments, which are never tied together in a way which addresses the reality of welfare
reform. This same issue has been highlighted by Harrison and Stephens in their assessment of local authority
impact assessments, but here we are seeing this same problem at a Government level.\textsuperscript{466}

By way of illustration, there were 20 individual equality impact assessments for the Welfare Reform Act 2012
alone; each of which detailing potential issues for protected groups connected to their own constituent provision,
but neglecting completely to assess how they may link together in the patchwork of reforms as a whole.\textsuperscript{467} The
legal appeals detailed in this report are limited to challenging the process behind these individual assessments

\textsuperscript{464} Declan Gaffney, ‘Retrenchment, Reform, Continuity: Welfare under the Coalition’ (2015) 231 National Institute Economic Review R44. 49
\textsuperscript{465} ibid. 49
\textsuperscript{467} For access to these documents, see https://www.gov.uk/government/collections/welfare-reform-act-2012-equality-impact-assessments
within the boundaries of the decision to introduce the individual policy; not the lack of consideration given to the impact of the package of reforms as a whole.

This problem is particularly acute for those with disabilities, as they are more likely to be in receipt of multiple benefits and less likely to be able to affect a change in their circumstances by, for instance, finding work.\textsuperscript{468} No attempt at a cumulative assessment on households with disabled members was made for the reforms dealt with in this report.\textsuperscript{469} There are two further factors which aggravate this problem.

Firstly, overlapping reforms can cause problems in the utilisation of a discretionary exemption mechanism (in the form of DHPs, outlined above), particularly when trying to assess the efficacy and sufficiency of payments made. This is because, despite DHPs being statutorily limited to dealing with a finite – and relative narrow – set of reforms,\textsuperscript{470} the impact of other policies invariably effect the individual’s financial income and outgoings which form part of the assessment of DHP awards. In other words, the problem of compound impact leads to an associated problem of compound exemption. As an example, despite the payments being expressly prevented from assisting with council tax payments, a tenant affected by another reform – such as changes to LHA – may find they are pushed into applying for a DHP, and meeting the income and expenditure requirements of their local authority, as a result of the overlapping effect caused by their local authority’s CTRS and the changes to LHA, and not just the reform earmarked for DHP support itself.

This complexity is worsened as a result of the austerity agenda stretching across multiple departments. As outlined in the first section of this report, cuts made elsewhere in government can spill into the same households affected by welfare reforms. A good example can be seen in the scrapping of Educational Maintenance

\begin{footnotesize}
\begin{enumerate}
\item Social Security Advisory Committee (n 457). 30
\item Alan Roulstone, ‘Personal Independence Payments, Welfare Reform and the Shrinking Disability Category’ (2015) 30 Disability & Society 673. 683
\item See Discretionary Financial Assistance Regulations 2001
\end{enumerate}
\end{footnotesize}
Allowance; a payment of up to £30 per week for students aged 16-18 in full-time education from low-income families. O’Hara highlights how this measure disproportionately affects the same constituency of claimants as the SSSC, adding a further annual loss to the household of £1,260.\(^{471}\) Moreover, this effect can be seen in the operation of exemption mechanisms as well. Ongoing research by Lupton has identified that teachers at schools in areas with particularly low socio-economic indicators, are utilising Pupil Premium\(^{472}\) funds to provide support to families affected by welfare reform measures (such as the SSSC), which has included buying food – and in fewer instances – providing clothing.\(^{473}\) This demonstrates how the changes induced by welfare reform measures can alter the context in which other reforms – many with aims not connected to welfare reform at all, like the Pupil Premium – operate.

9.2. The issues associated with drawing conduits

In the course of the report, the limitations of current procedural tools come into sharp relief where ‘lawyering’\(^{474}\) takes place to make the apparent negative impact of the reforms fit the pre-determined protected categories to facilitate a challenge. In other words, by providing protection to certain groups, currently equality duties can result in a legal connect-the-dots exercise, where a case is argued to be about discriminatory impact, where in actuality, it is about broader negative impacts on, for example, home interests. This problem has been articulated

\(^{471}\) Ibid
\(^{472}\) A Government fund introduced in April 2011 providing approximately £600 million per annum to assist schools at increasing the attainment of disadvantaged pupils. The money can be used at the discretion of the school itself (with some government controls and accounting/reporting measures).
\(^{473}\) Lupton (n 42 above)
\(^{474}\) R (Zacchaeus 2000 Trust) v Secretary of State for Work and Pensions [2013] EWCA Civ 1202 [74] (per Sullivan LJ)
before in the context of discrimination law by Vellani, who describes it as the ‘tyranny of the category;’ \(^{475}\) where appeals shift their focus onto specific instances of alleged discrimination

There are two principle examples of this outlined in the report. The first is the UKSC decision on the benefit cap, \(^{476}\) where the claimants argued, inter alia, that the policy was unlawfully discriminatory against women pursuant to Art.1/1 (right to property) with Art.14 (prohibition of discrimination). The argument, however, was focused on the interpretation of gender discrimination under Art.14 using the UN Convention on the Rights of the Child – namely, the issue at hand was the impact of the cap on children in lone parent families, but gender discrimination was used to facilitate this challenge. As discussed above, the drawing of this conduit divided the court, with the majority deciding that ‘there is no factual or legal relationship between the fact that the cap affects more women than men, on the one hand, and the (assumed) failure of the legislation to give primacy to the best interests of children, on the other.’ \(^{477}\)

A second example can be seen in a challenge to the Local Housing Allowance changes. \(^{478}\) Here, the issue at hand was the potential for the measure to result in families – particularly those with high numbers of children – having to move homes. The argument put before the court was focused on the measure potentially forcing children to move school, and therefore impact negatively on their ‘social development and education prospects.’ \(^{479}\) This potential impact, it was argued, had not been considered by the Government pursuant to their PSED obligations. The use of this conduit, however, failed, as the court concluded there was insufficient evidence to support the potential for impact, and consequently, it was ‘something of a lawyer’s point.’ \(^{480}\)

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\(^{475}\) Fayyaz Vellani, *Understanding Disability Discrimination Law through Geography* (Ashgate 2013). 182

\(^{476}\) R (SG and others) v SSWP [2014] P.T.S.R. 619

\(^{477}\) Ibid [89] (per Reed LJ)

\(^{478}\) R (Zacchaeus 2000 Trust) v Secretary of State for Work and Pensions [2013] EWCA Civ 1202

\(^{479}\) Ibid [70] (per Sullivan LJ)

\(^{480}\) Ibid [74] (per Sullivan LJ)
9.3. The importance (and problem) of discretion

This report emphasises the increasing importance of DHPs. They have featured prominently in the case law and in Government justifications of the welfare reform programme stemming from the Welfare Reform Act 2012 as a whole, being tasked with filling the gaps where statutory exemptions do not tread, or where particular hardship would result from reforms if some form of mitigation was not available. These payments are, however, severely limited in what they can achieve in their current form. At present, they are poorly funded, subject to extreme local variation, and have been cast a legal role they are unable to perform. A number of assumptions are made about how they function, and the current legal and policy position is self-contradictory in many respects.

In drawing together some of the points made in the section dedicated to these payments, there are five key issues worth drawing attention to in this concluding section.

Firstly, DHPs require tenants affected by specific, eligible reforms (particularly the SSSC, benefit cap, and LHA changes) to apply to their local authority for a payment. In this respect, they behave like a ‘bounce-back exemption,’ where the reform is imposed – with any consequent reduction in finances – and then the responsibility is placed on the tenant to apply for a form of mitigation. It is clear, however, that relatively few tenants apply. In their interim review of the SSSC, for instance, Clarke et al found that just 26% of tenants with disabilities had applied for a DHP; this was the group with the highest application rate. One would expect, if these payments are taking the place of what would otherwise be statutorily constructed exemptions, that more of those who may otherwise be subject to unlawful discrimination would be applying for the scheme to be effective.

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This issue is compounded by the difficulty claimants face in appealing DHP decisions. Though there is a right to a written decision with stated reasons 482 and to seek review, 483 the payments fall outside of para.6 of schedule 7 to the Child Support, Pensions and Social Act 2000 and are therefore outside of the jurisdiction of a first-tier tribunal. 484 DHPs also find themselves sitting outside of Article 6 of the Human Rights Act 1998, as it is well established it does not apply where payment of “benefits” is discretionary. 485 This effectively means that the only adequate way of appealing a DHP decision is using the public law tools available through judicial review – the problems this entails are perhaps best illustrated by the existence of only one High Court decision on DHPs to date. 486 Although statistics on the prevalence of internal review applications are not currently available, in line with other research on the rates of internal reviews elsewhere in the UK welfare state, 487 one can assume that relatively few claimants will be actively taking advantage of this.

This first two problems would not be so detrimental to the functioning of DHPs if they had not been ascribed such weighting in the case law. Their treatment has slowly evolved from a temporary sticking plaster, to sitting within Art1/1 and being described as an ‘integral part of housing benefit entitlements.’ 488 Successive appeals – chiefly, but not exclusively, regarding the SSSC – have continually cast DHPs as a reasonable alternative to statutory exemptions, providing payments are made with some element of continuity in cases where otherwise unlawful discrimination would arise. Given their ‘bounce-back’ quality above, this expectation is clearly not being fulfilled, but more fundamentally, it is difficult to see how a form of discretionary payment, subject to both

484 This issue was considered as part of an appeal to the Upper Tribunal in EA v Southampton CC [2012] UKUT 381 AAC.
485 See Langford 420, and Ali v Birmingham City Council (Secretary of State for Communities and Local Government intervening) [2010] UKSC 8 [75] (per Lord Kerr).
486 R. (on the application of Hardy) v Sandwell MBC [2015] EWHC 890 (Admin)
488 R. (on the application of Hardy) v Sandwell MBC [2015] EWHC 890 (Admin)
DWP and local authority budgetary pressures, can be expected to play such a prominent role in ensuring that unlawful discrimination does not arise.

This leads into the fourth key issue, which is the difficulties associated with assessing the sufficiency of DHP funding. The main DHP pot is provided by the DWP, which is then allocated to individual local authorities in line with a formula which assesses the severity of welfare reform impact, along with previous baseline DHP expenditure. Despite this approach, however, expenditure data points to extreme variation between local authorities on the use of these payments. The most recent DHP return statistics provided by the DWP demonstrate that some authorities are spending as little as 10-20% whereas others are topping up the payments to 200% of their allocation.\textsuperscript{489} It is difficult to see how differences in the pertinence of welfare reforms in particular areas can have such a wide-ranging impact, it is instead suggested that there is an element of a post-code lottery in the utilisation of these payments, which sits at odds with the role the courts have ascribed.\textsuperscript{490} The Government position appears to assume that unspent DHP funds indicate that the scheme is working, however, it is suggested here that the picture is more complicated.

Pressures on these budgets lead into the fifth key issue; the substantive differences these payments have to statutory exemptions. There are a number of elements here which are still yet to be considered sufficiently by the Courts. For instance, given recent cuts to the DHP pot administered by the DWP, many local authorities are awarding payments which cover partial shortfalls – for instance, by providing an award which pays 50% of a penalty imposed by SSSC. To what extent this could meet the legal requirement to avoid unlawful discrimination is unclear – how low would a payment have to be before it was considered ineffective, and how would such a


\textsuperscript{490} For more detail on this, see the dedicated section on DHPs above.
question be determined? Or are only full awards sufficient to avoid what could otherwise be unlawful
discrimination, and if so, how are these awards still discretionary?

Another example would be temporal variations in payments, where DHPs are provided for some periods of time,
but not others. For instance, if a tenant with a disability was not awarded a DHP for the first 6 months of a year,
but was for the latter 6 months, does the current payment prevent what would otherwise be unlawful
discrimination? The case law is focused on DHPs being in payment at the time of the appeal, not any arrears or
distress caused by previous lack of payment.

9.4. Political justification and deference

Another key issue which has emerged in the case law is the potentially problematic use of vague political
constructs to justify otherwise discriminatory treatment. The report’s title quotes LJ Laws in his assessment of
one such legitimate aim, determining that in introducing the SSSC the government had not intended solely to
save public funds, but had also sought to ‘shift the place of social security in society.’ 491 This assertion was not
elaborated upon, and its meaning is not clear. Though of course it is expected that the courts will offer a strong

491 R (MA & others) v The Secretary of State for Work and Pensions [2013] EWHC 2213 [58] (per Laws LJ)
‘deferential tenor’ to issues of social policy, the adherence to such ambiguous justifications raises questions about the ‘ultimate boundaries of the discretionary space.’

This issue is particularly problematic given the coupling of ‘austerity’ and ‘localism’ within the political discourse justifying the measures. The addition of localism alongside austerity is important, as discriminatory treatment is difficult to justify solely for the purposes of saving money. However, this raises some issues of the ‘discretionary space’ which Popelier and Heyning allude to in their analysis, as in the context of DHPs, the government, having been given a wide margin of appreciation due to being better placed to make these decisions, goes on to decide that local authorities are themselves even better placed. Those authorities, however, then have to made these localised decisions under the budgetary constraints set by central government under the austerity rubric. It is difficult in such a situation to see where the deference lies; in other words, whether the government decision to pass the responsibility down to local authorities should be held to account over the local authorities’ management of the reduced budgets in mitigating the impact of the welfare reform agenda.

These problems are unlikely to be addressed in the near (or even distant) future. The Conservative Party victory at the 2015 general election granted a majority and a mandate for a £12 billion programme of welfare cuts within the next two years – a figure which represents approximately 10% of total spending on working-age benefits. Early indications suggest that these cuts are likely to hit many of the same constituencies of claimants as the previous reforms, straining and exasperating the problems outlined in this report.

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492 Rachael Walsh, ‘Integrating Proportionality Into Public Authority Possession Applications—Conclusive Answers From The Supreme Court?’ (10) 22 King’s Law Journal 414.
495 Heyning (n 487).