

**Reconceptualising Home:  
A Study of the UK Bedroom Tax**

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## **Abstract**

This thesis examines the UK Coalition Government's 'Removal of the Spare Room Subsidy' – known by almost everybody else as the 'bedroom tax'. The policy has been the subject of political controversy, academic analysis from across disciplines and a number of other doctoral theses. So why is *yet another* PhD on the policy warranted?

This research makes two contributions to the chorus of criticism this policy has already garnered. It is the first detailed examination of the policy's reliance on the 'discretionary housing payment' (DHP) scheme. Second, it adopts a theoretical framework rooted in a conceptual focus on the home – drawing on Mariana Valverde's work on the sociology of knowledge – to examine underexplored elements of the bedroom tax policy.

The arguments made fall into three parts.

**Part I** makes two sets of interlinked arguments on the concepts of 'home' and 'discretion': on the former, that the widely employed 'concept of home' is an 'essentially contested concept'; on the latter, that the centrality of the DHP scheme to the operation of the bedroom tax is best analysed with a distinction between *structural* and *epistemic* discretion.

**Part II** outlines the two empirical strands that support the analysis: a vignette study with workers tasked with DHP scheme decision-making; and telephone interviews with tenants affected by the Social Sector Size Criteria (SSSC) policy.

**Part III** builds on the theoretical arguments made in **Part I** by drawing on Valverde's work on the sociology of knowledge to analyse: (i) DHP application forms, (ii) the appeal to 'common knowledge' of administrative workers, and (iii) the 'duty to know' imposed on affected tenants to set their home interest against an arbitrary financial penalty.

This is, therefore, a thesis which is focused on a narrow policy, but which makes wider-ranging theoretical arguments. It is hoped that the findings and its theoretical approach will help to inform future studies into the discretionary mitigation of welfare reforms and contribute to ongoing debates over the 'concept of home' in the home studies literature.



## Contents

Abstract .....	3
Contents .....	5
Figures.....	11
Cases .....	13
Statutes.....	15
Acknowledgments.....	19
Declaration.....	21

### **Part I**

#### **Chapter One - Introduction**

1. The story.....	27
1.1. A note on language .....	28
2. Why?.....	30
2.1. The gap.....	30
2.2. The problem.....	34
2.3. The importance .....	35
3. What?.....	38
3.1. The research questions.....	38
3.2. The argument .....	40
3.3. The structure .....	43
4. How?.....	44
4.1. The research process.....	45
4.2. The contribution.....	46
4.3. The limitations .....	47
5. A precis: the SSSC .....	49
5.1. Imposing the penalty.....	49
5.2. Extent and the claimants affected .....	54
5.3. Stated aims.....	59
6. Summary.....	65

#### **Chapter Two - Reconceptualising home: the home as an essentially contested concept and why this matters**

1. Defining the elephant.....	68
2. Three Preliminary issues: what is a ‘concept of home’? .....	71

3. The home as an essentially contested concept.....	75
3.1. Condition 1: the concept must be appraisive .....	79
3.2. Conditions 2 and 3: the concept must be internally complex and diversely describable .....	91
3.3. Condition 4: the concept must be ‘open’ .....	95
3.4. Condition 6: the sustainment of an exemplar .....	97
3.5. Conditions 5 and 7: recognition of contestation and progressive understanding .	102
4. Why the home as an essentially contested concept matters: implications for scholars .....	104
5. Why the home as an essentially contested concept matters: epistemological implications and the approach in this thesis .....	109
5.1. Where does this take us?.....	114
6. Conclusions: the home as an essentially contested concept .....	118

### **Chapter Three - Dealing with discretion: structural and epistemic discretion in the SSSC**

1. The problem with discretion.....	122
1.1. The argument .....	122
1.2. The structure of the argument .....	123
2. Perspectives on discretion .....	124
2.1. Getting away from doughnuts.....	127
2.2. A focus on an implementation gap .....	131
2.3. The organisational focus: fragmenting discretionary space.....	135
2.4. There is something about welfare .....	139
2.5. Tying the perspectives together: avoiding reductionism .....	141
3. The conception advanced here .....	144
3.1. A structural/epistemic distinction .....	145
4. Conclusion .....	147

### **Chapter Four - The importance and function of DHPs**

1. DHPs.....	150
1.1. Discretionary provision as an evergreen problem in social security support .....	152
2. The evolution of DHPs .....	154
2.1. An outline of the scheme .....	156
2.2. The evolution of the regulations .....	160
2.3. The treatment of DHPs in case law.....	167

3. Assumptions in the case law: a misguided interpretation of the DHP scheme.....	172
3.1. The trickle-down: central budgets to local authority variations in expenditure ...	172
3.2. Localism alongside centrally determined guidelines.....	183
3.3. Saving money? DHPs and their relationship with austerity .....	187
3.4. Flexible whilst stable .....	189
3.5. Assumptions about DHP practice .....	190
4. Structural and epistemic discretion within the DHP regime .....	192
4.1. Interrogating austerity localism .....	193
4.2. Proxies and classes of persons .....	197
4.3. Structural and epistemic discretion in proportionality review .....	202
5. Conclusions .....	208
<b>Part I Summary: Home and discretion</b> .....	211
1. The use and application of the ‘concept of home’ .....	211
2. The importance of discretion .....	212
3. Going forward.....	213

## **Part II**

### **Chapter Five - The research process**

1. Methodological anxiety syndrome .....	218
2. Epistemological positioning: where does this fit in to socio-legal studies and home studies research?.....	220
2.1. The magpies: a socio-legal approach.....	221
2.2. Situating the research within the social constructionist paradigm.....	228
2.3. Where does this thesis fit in? .....	231
3. The first empirical strand: the use of vignettes delivered via an online discussion board.....	235
3.1. Why a vignette-based approach? .....	236
3.2. Choosing the research design.....	237
3.3. Deciding on the type and content of the vignettes.....	243
3.4. Delivering the vignette study .....	249
3.5. Analysing the data.....	251
3.6. Ethical and practical considerations: the construction and delivery of the online platform.....	252
3.7. Operation of the online discussion board.....	258

4. The second empirical strand: undertaking interviews with tenants affected by the SSSC .....	261
4.1. The starting point: identifying gatekeepers and the research design .....	261
4.2. Recruiting and constructing the sample .....	266
4.3. The content and form of the interviews .....	271
5. Use of documents .....	276
6. Reflections on the research process .....	277
7. Summary .....	279

### **Part III**

#### **Chapter Six - DHP applications: analysis of the knowledge format**

1. Introduction .....	284
2. What does this have to do with the home? .....	289
3. Assessment of income and expenditure.....	291
3.1. A proxy-means test: problems with the income/expenditure assessment.....	301
4. Evidential requirements .....	305
4.1. Additional evidence on income and expenditure.....	306
4.2. Evidence of compliance with imposed conduct conditionality .....	310
4.3. Room use .....	318
4.4. Open-ended evidential requests .....	322
4.5. Evidence check-lists.....	325
5. Folding work: forms constraining the client's activity.....	329
6. Initial conclusions and relation to the broader DHP scheme.....	343
6.1. Lack of transparency.....	349
6.2. Epistemic obligations.....	350

#### **Chapter Seven - Death, disability and lifestyle: appeals to a common knowledge of home**

1. Introduction .....	354
1.1. Why is common knowledge important? .....	355
2. Grieving and the home .....	358
3. Constructing disability.....	369
3.1. Use of the space .....	372
3.2. Treatment of income from disability benefits and associated expenditure.....	376
4. Lifestyle and habits: smoking and unreasonable expenditure .....	380



5. Conclusions .....	388
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## **Chapter Eight - Should I stay or should I go? The ‘duty to know’ of tenants affected by the SSSC\_Toc502316614**

1. ‘Should I stay or should I go?’ .....	392
2. The duty to know: imperative knowledge under the SSSC .....	394
2.1. The importance of family .....	397
2.2. Tied to the space: the importance of the physical property .....	400
2.3. The ‘downsizers’ .....	402
2.4. The duty to know: a summary .....	408
3. The problem of cumulative impact .....	410
3.1. Why does cumulative impact matter? .....	416
4. Categorisation and participant perspectives on exemptions .....	419
5. Conclusion .....	424

## **Chapter Nine - Conclusion**

1. Wrapping up the story .....	428
2. Key empirical findings .....	429
2.1. The insufficiency of the DHP scheme .....	429
2.2. DHP application forms .....	431
2.3. Decisions made by tenants in response to the penalty .....	432
3. The key theoretical findings .....	433
3.1. The concept of home as essentially contested .....	433
3.2. A distinction between structural and epistemic discretion .....	435
4. Methodological approach .....	436
5. The contribution .....	437
5.1. Limitations .....	437
5.2. What does this study contribute? .....	438
6. Looking forward: what needs to be done? .....	439
6.1. Avenues for further research .....	439
6.2. Changes in the policy environment .....	440
References .....	443



## Figures

<b>Figure 1.1:</b> The total numbers affected by the SSSC between May 2013 and May 2016. Interactive version available online at: <a href="http://btgraph.socialrights.co.uk">btgraph.socialrights.co.uk</a> .	55
<b>Figure 1.2:</b> Maps indicating by local authority area (left to right), the mean SSSC penalty, the total numbers affected by the SSSC penalty, and total numbers being charged at the 25% level. Interactive online version available at: <a href="http://btmaps.socialrights.co.uk">btmaps.socialrights.co.uk</a> .	58
<b>Figure 2.1:</b> Application of Gallie’s criteria for ‘essential contestability’ to the ‘concept of home’.	78
<b>Figure 2.2:</b> Two diagrams identified in the home studies literature demonstrating the ‘concept of home’ being used appraisively.	85
<b>Figure 2.3:</b> A concept map of leading analyses in the home studies literature depicting overlapping and dominant concepts. An interactive version of the map is available online at: <a href="http://homemap.socialrights.co.uk">homemap.socialrights.co.uk</a>	93
<b>Figure 3.1:</b> An illustration of Dworkin’s ‘hole in the doughnut’ approach to discretion.	129
<b>Figure 3.2:</b> An illustration of the implementation approach to conceptualising discretion.	132
<b>Figure 3.3:</b> An overview of the different emphases of theoretical approaches to discretion.	142
<b>Figure 4.1:</b> Total DHP allocation against total Housing Benefit reductions following the Welfare Reform Act 2012. An interactive version of this graph is available online at: <a href="http://dhpdata.socialrights.co.uk">dhpdata.socialrights.co.uk</a> .	159
<b>Figure 4.2:</b> Diagram demonstrating the allocation formula for the central DWP DHP budget to local authorities in the 2014/15 financial year.	165
<b>Figure 4.3:</b> Percentage of 2014–2015 DHP budget allocation spent at end-of-year by local authority. For an online interactive version, see: <a href="https://goo.gl/wj5fby">https://goo.gl/wj5fby</a> .	176
<b>Figure 4.4:</b> Percentage of 2014–2015 DHP budget allocation spent at end-of-year by local authority attributed to topping up LHA payments. For an online interactive version, see: <a href="https://goo.gl/E15VhO">https://goo.gl/E15VhO</a> .	177
<b>Figure 4.5:</b> Percentage of 2014–2015 DHP budget allocation spent at end-of-year by local authority attributed to mitigating the SSSC. For an online interactive version, see: <a href="https://goo.gl/GCTftX">https://goo.gl/GCTftX</a> .	178
<b>Figure 4.6:</b> Percentage of 2014–2015 DHP budget allocation spent at end-of-year by local authority attributed to mitigating the Benefit Cap. For an online interactive version, see: <a href="https://goo.gl/Ycypjw">https://goo.gl/Ycypjw</a> .	179
<b>Figure 4.7:</b> Total 2014-15 DHP budget allocation in cash terms by local authority. For an online interactive version, see: <a href="https://goo.gl/wxMvu1">https://goo.gl/wxMvu1</a>	180
<b>Figure 4.8:</b> Total 2014–2015 DHP budget allocation in broken down by local authority political control, proportioned by total overall DHP allocation and percentage spend	181
<b>Figure 4.9:</b> Sankey chart detailing the movement between DHP expenditure areas	186
<b>Figure 4.10:</b> A flowchart summarising judicial review challenges to the Housing Benefit Regulations 2006 and resulting amendments	200
<b>Figure 4.11:</b> The area of policy options/structural discretion as inferred within the proportionality assessment	205

<b>Figure 5.1:</b> Annotated vignette presented to local authorities – case study of ‘Julie	246
<b>Figure 5.2:</b> Annotated vignette presented to local authorities – case study of ‘Ian’	247
<b>Figure 5.3:</b> Annotated vignette presented to local authorities – case study of ‘Suzanne’	248
<b>Figure 5.4:</b> Determination of percentiles from the 2014/15 DHP expenditure data	253
<b>Figure 5.5:</b> Histogram of DHP expenditure levels across local authorities in 2014/15, with the four sampling groups identified	254
<b>Figure 5.6:</b> Descriptive statistics – local authority DHP spend (%) levels	255
<b>Figure 5.7:</b> Flowchart illustrating the recruitment of local authorities to the online vignette platform	257
<b>Figure 5.8:</b> A flowchart illustrating the process of responding/replying on the online vignette platform	260
<b>Figure 5.9:</b> Outlining the sample building and consent procedures for the tenant interview empirical strand	265
<b>Figure 5.10:</b> Overview of the interview guide for the tenant interviews	275
<b>Figure 6.1:</b> A histogram of the number of prescribed income/expenditure headings within a sample of DHP application forms	296
<b>Figure 7.1:</b> Graphical depiction of the treatment of DLA and other income received from disability benefits within the DHP rubric	379
<b>Figure 7.2:</b> Eastland Homes Newsletter (Spring 2013), Eastland Homes Available at: < <a href="http://www.eastlandshomes.co.uk/files/ART28_1788%20-%20StreetsAhead_Issue%2041_web.pdf">http://www.eastlandshomes.co.uk/files/ART28_1788%20-%20StreetsAhead_Issue%2041_web.pdf</a> >	382
<b>Figure 8.1:</b> A diagram illustrating the overlapping reforms stated by participants in the telephone interviews	416
<b>Focus on Forms: Example Excerpts 6.1</b> – Open-ended requests for income/expenditure information	293
<b>Focus on Forms: Example Excerpts 6.2</b> – Income and expenditure tables	295
<b>Focus on Forms: Example Excerpts 6.3</b> – Evidential Demands	308
<b>Focus on Forms: Example Excerpts 6.4</b> – Demands to substantiate conduct conditionality	313
<b>Focus on Forms: Example Excerpts 6.5</b> – Evidential requirements on the use of the ‘spare’ room	320
<b>Focus on Forms: Example Excerpts 6.6</b> – Open-ended evidential requests	324
<b>Focus on Forms: Example Excerpts 6.7</b> – Evidence checklists	326
<b>Focus on Forms: Example Excerpts 6.8</b> – Imposed time limits	332
<b>Focus on Forms: Example Excerpts 6.9</b> – Self-classification	336
<b>Focus on Forms: Example Excerpts 6.10</b> – Space allocated for answers	338
<b>Focus on Forms: Example Excerpts 6.11</b> – Forcing consideration of specific issues	342
<b>Focus on Forms: Example Excerpts 6.12</b> – Explicit reference to the DHP scheme limitations	348
<b>Focus on Forms: Example Excerpts 7.1</b> – Death and DHP application forms	363

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Housing Benefit (Persons Who Have Attained the Qualifying Age for State Pension Credit) Regulations 2006/214  
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Social Security Contributions and Benefits Act 1992

Universal Credit Regulations 2013/376

Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013/380

Welfare Reform Act 2012

Welfare Reform Act 2012 (Consequential Amendments) Regulations 2013/1139

Welfare Reform and Work Act 2016



## **Abbreviations**

AMHB – appropriate maximum Housing Benefit

DHP – discretionary housing payment

DLA – Disability Living Allowance

DWP – Department for Work and Pensions

ECHR – European Convention on Human Rights

FOI – Freedom of Information request

LHA – Local Housing Allowance

PIP – Personal Independence Payments

PSED – public sector equality duty (s.149 Equality Act 2010)

SHBE – Single Housing Benefit Extract

SSSC – ‘Social Sector Size Criteria’, the terminology used in this thesis for the ‘bedroom tax’



## Acknowledgments

I am one of those really sad people who actually enjoys reading the acknowledgment sections of other people's theses. It seems that best practice is to keep things nice and concise, not go overboard on the 'thank-yous' and maintain a professional tone. This one doesn't really stick to any of that.

This project could never have happened without the willingness of affected tenants and local authorities to get involved. Sincere thanks go to all the participants in this study for giving me their time: both face huge time pressures of their own and their input is really appreciated. I am particularly grateful for the support and guidance of Caroline Hunter, who has been my supervisor and invaluable mentor over the last 4+ years of PhD research and more than ... \*cough\* ... 8 years at the University of York (!). There is no way I'd have even thought of doing a PhD without her encouragement and she has made this project a hugely rewarding experience. I would also like to thank Stuart Lowe – the second supervisor on this project – who has offered constant encouragement and enthusiasm, plus a reliable supply of pint-round buying to lubricate energising discussions. I'm lucky to have undertaken this project in such a supportive and stimulating department – I would like to thank Simon Halliday and Charlotte O'Brien in particular for their support and guidance. Huge thanks also go to Salwa and Marie for putting up with my complete lack of organisational capacity!

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I would like to thank the staff at the Eagle & Child pub for putting up with me spending too much time there and not giving me dark looks when I plugged my laptop in. I hope it is not *too* obvious which of the pages that follow were written in the warm embrace of a few couple of pints of Midnight Bell.

Finally, special thanks go to my family. Especially my sister, Freya – both the craziest and best person I know. And my mum and dad, who could not have been more supportive, even if not really understanding why I haven't finished university after so many years. The shelf in the toilet where they put my publications is indicative of their ability to be encouraging whilst simultaneously taking the mick. No doubt a copy of this thesis will end up there too. If that's where you're sat reading this, it's perhaps best to skip straight to the conclusion.



## Declaration

This thesis is the sole work of the author and has not been submitted for examination at this or another institution for another award. All sources are acknowledged as references.

Some of the arguments made in Chapter Four are included in parts of the following three publications:

Meers, J, 'Panacean Payments: The Increasing role of Discretionary Housing Payments in the Welfare Reform Agenda' (2015) 22(3) *Journal of Social Security Law* 115;

Meers, J, 'The Bedroom Tax in the Supreme Court: Implications of the Judgment', (2017) 25(2) *Journal of Poverty and Social Justice* 181;

Meers, J, 'The United Kingdom' in S Civitarese Matteucci and S Halliday (eds), *The Fate of Social Rights in an Age of Austerity: Law and Legal Challenge within Europe* (Routledge 2017) 122.

The main argument in Chapter Two forms the focus of the following forthcoming publication:

Meers, J, 'The Concept of Home as Essentially Contested and Why This Matters' (Forthcoming) *Journal of Housing Theory and Society*

In line with the requirements of the thesis declaration at the University of York, findings or an overview of this work were presented at the following conferences/workshops. The author would like to thank the audiences for their input.

Socio-Legal Studies Association Conference, Newcastle University, 6 April 2017

Socio-Legal Studies Association Conference, Lancaster University, 6 April 2016

I-SPHERE Seminar Series, Heriot-Watt University, Edinburgh, 17 November 2015

The impact of the financial-economic crisis on the guarantee of social welfare rights, University of York, 4–5<sup>th</sup> September 2015

European Network for Housing Research 2015, University of Lisbon, 28 June 2015

International Institute for the Sociology of Law, Onãti, 25 June 2015

Dipartimento di scienze giuridiche e sociali, Pescara, 14 May 2015

Housing Studies Association: Homes in Transition, University of Stirling, 6 November 2014

European Network for Housing Research 2014, University of Edinburgh, 1 July 2014

LSSI Seminar Series, University of Leeds, 15 May 2014

Questioning Austerity: Realities and Alternatives, University of York, 1 May 2014

Housing Studies Association Conference 2014, University of York, 15 April 2014

I can confirm that the thesis is under 120,000 words (inc. references, exc. bibliography and figures/tables).



# Part I





# Introduction

## Chapter One

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**Source:** A quote from David Cameron's defence of the so-called 'bedroom tax' during a session of Prime Minister's Questions (HC Deb 6 February 2013, c269). See Steve Bell, 'Steve Bell on the Bedroom Tax' <[https://www.theguardian.com/commentisfree/ cartoon/2013/feb/06/bedroom-tax-cartoon#comments](https://www.theguardian.com/commentisfree/cartoon/2013/feb/06/bedroom-tax-cartoon#comments)> accessed 15 August 2017.



## 1. The story

Writing a thesis is like telling a story; there can be short version and a long version.<sup>1</sup> The short version of the story told here is simply this. The 2010 Coalition Government's 'removal of the spare room subsidy' – known by almost everybody else as the 'bedroom tax' – introduces a penalty for under-occupation for working-age households in the social rented sector: 14% of the eligible rent for one bedroom too many; 25% for two or more.<sup>2</sup> This apparent simplicity disguises the complexity of its impact. To attain mitigation, affected tenants are expected to navigate the quagmire of the DHP scheme, putting the case for remaining in their home to the local authority and – if they are not successful – to decide between opting to stay and pay or, if possible, move elsewhere.

It is clear that this is a policy tied inextricably to the home. At its core is a penalty, based on an appraisal of the use of bedroom space, that puts the home of affected tenants under threat. It is also a policy which has come to be tied to local authority discretion. The government has created a layer of discretionary support that requires administrative workers to make decisions about the ongoing occupation of the home for these tenants, awarding payments to those worthy of staying and rejecting those who are not. The current dominant approaches to analysing these two concepts within the academic literature are not always well suited to examining key elements of the policy. Affected tenants have to articulate their home interest through the confines of lengthy DHP application forms; administrative workers have to assess the relevance of a myriad of circumstances to tenants' continued occupation of their homes; and tenants are expected to decide whether to stay or go in response to the penalty applied. This thesis argues for a new theoretical perspective for analysing the 'concept of home' rooted in the sociology of knowledge, drawing particularly on the work of Valverde,<sup>3</sup> to examine these otherwise neglected elements of this 'bedroom tax' policy.

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<sup>1</sup> See Christine Feak and John Swales, *Telling a Research Story* (University of Michigan Press 2009) 1; and Sarah Skwire and David Skwire, *Writing with a Thesis: A Rhetoric and Reader* (Cengage Learning 2013) 33.

<sup>2</sup> See Reg.B13 Housing Benefit Regulations 2006.

<sup>3</sup> See, in particular, Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton University Press 2003) and Mariana Valverde, 'Theoretical and Methodological Issues in the

The rest of this thesis is the long version of this same story. This introduction outlines the rationale and structure of what follows in three sections:

- (i) *why?* – the research gap, the problems addressed and the importance of the study;
- (ii) *what?* – the research questions, key arguments and structure; and
- (iii) *how?* – the research process, its limitations and contributions.

This introductory chapter closes with a concise precis on the ‘social sector size criteria’ to provide the reader with a sufficient grounding in the mechanics of the policy.

### **1.1.A note on language**

Naming the object of this thesis is a perilous act in itself. The penalty outlined in Reg.B13 Housing Benefit Regulations 2006/213 goes by many names; known most commonly as the ‘bedroom tax’, and defended by its supporters as either the ‘removal of the spare room subsidy’ or – confusingly – simply the ‘spare room subsidy’. The label here is important. As argued by Carr and Cowan, the fight against the penalty was ‘as much a battle of the label as it was over policy’.<sup>4</sup> The term ‘bedroom tax’ has its own etymology,<sup>5</sup> even being shortlisted for the Oxford English Dictionary’s 2013 ‘word of year’, sadly losing out to ‘selfie’.<sup>6</sup>

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Study of Legal Knowledge Practices’ in Martha Merrill Umphrey (ed), *How Law Knows* (Stanford University Press 2007).

<sup>4</sup> Helen Carr and Dave Cowan, ‘What’s the Use of a Hashtag? A Case Study’ (2016) 43 *Journal of Law and Society* 416, 434.

<sup>5</sup> See Jules Birch, ‘Welfare, the Bedroom Tax and the Battle of Language’ <<https://julesbirch.com/2013/08/02/welfare-the-bedroom-tax-and-the-battle-of-language/>> accessed 10 August 2017; and Richard Alcock, ‘They Can Call It What They Like. We Know It’s the Bedroom Tax’ *The Guardian* (22 November 2013) <<https://www.theguardian.com/media/mind-your-language/2013/nov/22/mind-your-language-bedroom-tax>> accessed 10 August 2017.

<sup>6</sup> OED, ‘The Oxford Dictionaries Word of the Year 2013’ <<http://blog.oxforddictionaries.com/press-releases/oxford-dictionaries-word-of-the-year-2013/>> accessed 10 August 2017.

Such is the force of language here that Lord Toulson’s lead judgment in *R (on the application of Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58 explicitly recognises its contested title.<sup>7</sup> Indeed, a wry aside about what to call the policy is a standard feature of such judicial review challenges.<sup>8</sup> He states that the name varies ‘according to political viewpoint’.<sup>9</sup> Therein lies the difficulty in adopting a nomenclature for use in this thesis. Although my own opinion of the policy is perhaps obvious to any reader (if it is not already, it will be shortly), I thought it appropriate to adopt a term that does not presuppose any of the findings that follow: be its imposition as a ‘tax’ for those unable to move, or as removing a form of ‘subsidy’.

Consequently, from this point onwards, this thesis uses the term ‘social sector size criteria’, hereafter abbreviated to the SSSC. I have previously received criticism for this.<sup>10</sup> I appreciate that no term here is ‘neutral’ *per se*, and the participants interviewed in the course of this study knew the policy by one name only: the ‘bedroom tax’. Nevertheless, a decision on the language used had to be taken and I settled on the SSSC.

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<sup>7</sup> *Carmichael* [2] (per Toulson L).

<sup>8</sup> Judgments often refer to what ‘opponents’, or ‘detractors’ often ‘colloquially’ refer to as the ‘bedroom tax’. See, respectively, *R (on the application of Cotton) v Secretary of State for Work and Pensions* [2014] EWHC 3437 (Admin) [1] (per Males J); *R (on the application of Michael Hardy) v Sandwell Metropolitan Borough Council* [2015] EWHC 890 (Admin) [3] (Phillips J); *R (on the application of Rutherford) v Secretary of State for Work and Pensions* [2014] EWHC 1631 (Admin) [4] (per Stuart-Smith J).

<sup>9</sup> *Carmichael* (n 7 above) [2] (per Toulson L)

<sup>10</sup> As an example, those affected by the policy have criticised my decision to refer in publications to the ‘social sector size criteria’ instead of the ‘bedroom tax’ on Twitter. See Rob Gershon, ‘Tweet @simplicityly <<https://goo.gl/2kKuxM>> accessed 10 August 2017. I have perhaps found myself tied up in the policy’s ‘hashtag politics’ outlined by Carr and Cowan (n 4) 441. Inversely, I have also been asked by both journal and blog editors to adopt language that is more ‘neutral’ by avoiding the use of the term ‘bedroom tax’, especially in article titles.

## 2. Why?

Before going on to provide an outline of the content of this thesis, it is first worth stating why this fairly narrow field of inquiry should be subject to such a detailed examination at all; where the study sits alongside similar projects and the ‘gap’ in the literature; what broader problems it attempts to address; and – crucially given the participants’ time and public money committed – why it is important.

### 2.1. The gap

This study is far from the only piece of research – or even the only PhD thesis – which draws on the ‘concept of home’ to analyse the SSSC. To my knowledge, three other doctoral projects focus explicitly on the policy and utilise theoretical approaches available in the home studies literature. Bogue, in her ethnographic study of the policy on one housing estate, argues that it ‘strikes at the very heart of notions of “home”’,<sup>11</sup> a sentiment echoed by McCoy’s psychosocial-focused assessment of how the imposition of the penalty ‘destabilises how one feels about their home’<sup>12</sup> and serves to neglect the ‘psychological attachment to the home’.<sup>13</sup> Fascinating ongoing work by Nowicki highlights the ‘domicidal home un-making’<sup>14</sup> of the policy, with clear ‘socio-symbolic and material implications’.<sup>15</sup>

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<sup>11</sup> Kelly Ann Bogue, ‘Precarious Social Housing: Reforming Policy, Changing Culture. An Ethnographic Case Study of the Impact of the “Bedroom Tax”’ (University of Manchester 2016) <[https://www.research.manchester.ac.uk/portal/files/54590911/FULL\\_TEXT.PDF](https://www.research.manchester.ac.uk/portal/files/54590911/FULL_TEXT.PDF)> accessed 24 July 2017, 13.

<sup>12</sup> Lauren Katy McCoy, ‘From a Lone Mother’s Perspective: An in-Depth Case Study on the Psychosocial Impacts of the “Bedroom Tax” in the UK’ (University of Manchester 2016) <[https://www.research.manchester.ac.uk/portal/files/57430758/FULL\\_TEXT.PDF](https://www.research.manchester.ac.uk/portal/files/57430758/FULL_TEXT.PDF)> accessed 8 August 2017, 21.

<sup>13</sup> Ibid 22.

<sup>14</sup> Mel Nowicki, ‘Domicide and the Coalition: Austerity, Citizenship and Moralities of Forced Eviction in Inner London’ in Katherine Brickell, Melissa Fernández Arrigoitia and Alexander Vasudevan (eds), *Geographies of Forced Eviction: Dispossession, Violence, Resistance* (Palgrave Macmillan 2017), 133.

<sup>15</sup> Ibid 135

More broadly, the SSSC has – perhaps due in part to the ‘political and media outburst’<sup>16</sup> it occasioned – been the focus of a panoply of other studies, drawing on similar perspectives. Aside from the more familiar assessments of the policy process or (lack of) efficacy of the scheme,<sup>17</sup> other research has drawn on the home studies literature to examine the policy’s impact on the claimants’ ‘deep attachment to home and place’,<sup>18</sup> as a form of ‘un-making of some welfare recipients’ homes’,<sup>19</sup> or as an example of the ‘power and influence of rhetorics of home’.<sup>20</sup> It would appear, therefore, that the policy and its connection to the home has been well serviced by the academy. Why then, is *yet another* PhD on the issue warranted? As will be argued throughout this thesis, there are three principle gaps within current research on the SSSC and the home.

First, the enormous weight shouldered by the DHP scheme – and the associated importance of discretion at the local authority level – is generally only mentioned in passing in these studies or is omitted altogether.<sup>21</sup> This is perfectly justifiable given that much of this research focuses specifically on the ambit of the underpinning SSSC regulations on their own terms. However, to borrow the frequent lament of the courts,

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<sup>16</sup> Peter Robson, ‘The Bedroom Tax’ (2015) 19 *Edinburgh Law Review* 134.

<sup>17</sup> See, in particular, DWP, ‘Evaluation of Removal of the Spare Room Subsidy: Final Report’ (2014) <<http://www.cchpr.landecon.cam.ac.uk/Projects/Start-Year/2013/Spare-Room-Subsidy-Household-Benefit-Cap/Final-Report>> accessed 10 December 2016; DWP, ‘Evaluation of Removal of the Spare Room Subsidy: Interim Report’ (2014) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/329948/rr88-2-evaluation-of-removal-of-the-spare-room-subsidy.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/329948/rr88-2-evaluation-of-removal-of-the-spare-room-subsidy.pdf)> accessed 10 December 2016; and Kenneth Gibb, ‘The Multiple Policy Failures of the UK Bedroom Tax’ (2015) 15 *International Journal of Housing Policy* 148.

<sup>18</sup> Suzanne Moffatt et al, ‘A Qualitative Study of the Impact of the UK Bedroom Tax’ (2016) 38 *Journal of Public Health* 197, 203.

<sup>19</sup> Gavin Brown, ‘Marriage and the Spare Bedroom: Exploring the Sexual Politics of Austerity’ (2015) 14 *ACME* 981.

<sup>20</sup> Mel Nowicki, ‘A Britain That Everyone Is Proud to Call Home? The Bedroom Tax, Political Rhetoric and Home Unmaking in UK Housing Policy’ [2017] *Social and Cultural Geography* 1.

<sup>21</sup> Indeed, neither McCoy, Moffatt et al, nor Brown mentions the existence of DHPs at all in their analysis of the SSSC. See McCoy (n 12); Moffatt et al (n 18); and Brown (n 19).

it is important to consider the ‘scheme as a whole’.<sup>22</sup> As I argue throughout this thesis, to omit the DHP framework is to provide only a partial picture of the SSSC, both in terms of assessing its impact and in any efforts to conceptualise its operation. It is the lynchpin that holds the policy together. Indeed, it is now difficult to find any ministerial statement or response on the SSSC that does not mention the DHP scheme in the same breath.<sup>23</sup>

Second, there has been comparatively little socio-legal analysis of the SSSC.<sup>24</sup> The law has been a central component in the ‘fight’ against the policy,<sup>25</sup> with the underpinning regulations being subject to a coterie of challenges. The framework underpinning Reg.B13 Housing Benefit Regulations 2006/213 bears the scars of these skirmishes, with a patchwork of amendments made following successful judicial

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<sup>22</sup> This phrase has been frequently adopted by the courts to assess the parallel operation of Reg.B13 Housing Benefit Regulations 2006/213 and the Discretionary Financial Assistance Regulations 2001. For example, see: *R (on the application of MA and Others) v The Secretary of State for Work and Pensions v Equality and Human Rights Commission* [2014] EWCA Civ 13 [40] (per Laws MR); and *Hardy* (n 8) [26] (per Phillips J).

<sup>23</sup> In Parliament, many of those asking about the SSSC now attempt to presuppose this response by referring to criticisms of the DHP scheme in their questions, for example, Gerald Jones’ lament that: ‘I know that the Government will say that they have provided discretionary housing payments, but that is only a temporary fix to an ongoing problem.’ See HC Deb 23 February 2016, c8WH.

<sup>24</sup> That is not to say there has not been any. See, for example: Helen Carr and Dave Cowan, ‘The Social Tenant, the Law and the UK’s Politics of Austerity’ (2015) 5 *Oñati Socio-legal Series*; Carr and Cowan (n 4); or case analyses focused on the judicial review challenges to the SSSC policy, such as Robson (n 16); and Mel Cousins, ‘The Bedroom Tax and the Supreme Court: Pragmatism over Principle’ <[http://works.bepress.com/mel\\_cousins/104/](http://works.bepress.com/mel_cousins/104/)> accessed 12 February 2017.

<sup>25</sup> Media reports have repeatedly situated judgments – particularly in the higher courts but also in the tribunals – as leading the ‘fight’ against the SSSC policy. For examples, see Bill Tanner, ‘Win for ““Bedroom Tax”” Fight at Supreme Court’ *24 Housing* (9 November 2016) <<http://www.24housing.co.uk/news/win-for-bedroom-tax-fight-at-supreme-court/>> accessed 8 August 2017; and Dawn Foster, ‘The Fight Goes on to Free More Families from the Bedroom Tax Nightmare’ *The Guardian* (11 November 2016) <<https://www.theguardian.com/housing-network/2016/nov/11/fight-families-bedroom-tax-supreme-court-housing-benefit-conservative-government>> accessed 8 August 2017.



review challenges.<sup>26</sup> The policy has been repeatedly hauled in front of the administrative courts to ‘scrutinise carefully’<sup>27</sup> the government’s justification for its discriminatory impacts, and advice services have been behind ‘significant victories’<sup>28</sup> lower down the judicial food chain, particularly within the First-Tier Tribunal.<sup>29</sup> Perhaps most notably of all, the recent United Kingdom Supreme Court (UKSC) decision in *R (on the application of Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58 has made a ‘further in-road into its reach’.<sup>30</sup> These legal developments – or what could be described as the ‘technicalities’ of the SSSC framework<sup>31</sup> – cannot and should not be ignored. As argued by Cotterrell, whether we analyse it or not, ‘law goes on the offensive’.<sup>32</sup> These judgments have impacted

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<sup>26</sup> The stories behind these challenges are dealt with in detail throughout this thesis, but for some examples of the amendments made to the Housing Benefit Regulations 2006/213 in the wake of successful judicial review action, see Reg.2(3)(c) Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations 2013/2828; Reg.2(3)(a) Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations 2013/2828; Reg.4(3)(b) Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations 2017/213; Reg.4(3)(a)(i) Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations 2017/213.

<sup>27</sup> Neville Harris, ‘Welfare Reform and the Shifting Threshold of Support for Disabled People’ (2014) 77 *Modern Law Review* 888, 924.

<sup>28</sup> Lorna Reid, ‘Thirteen Years of Advice Delivery in Islington: A Case Study’ in Ellie Palmer et al (eds), *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart 2016) 154.

<sup>29</sup> For access to some of these decisions, see (the absolutely indispensable) Nearly Legal blog’s dedicated page: Giles Peaker, ‘Bedroom Tax FTT Decisions’ <<https://nearlylegal.co.uk/bedroom-tax-fft-decisions/>> accessed 8 August 2017.

<sup>30</sup> Carla Clarke, ‘The Bedroom Tax Limp On’ (2017) 256 *Welfare Rights Bulletin* <[http://www.cpag.org.uk/content/bedroom-tax-limps#footnote1\\_zgq7dwk](http://www.cpag.org.uk/content/bedroom-tax-limps#footnote1_zgq7dwk)> accessed 8 August 2017.

<sup>31</sup> The importance of legal technicality is dealt with in Chapter Five. For an overview, see the influential arguments of Riles and subsequently Valverde: Annelise Riles, ‘A New Agenda for the Cultural Study of Law: Taking on the Technicalities’ (2005) 53 *Buffalo Law Review* 973; which was subsequently drawn on by Valverde in her discussion of the importance of ‘legal technicalities’, Mariana Valverde, ‘Jurisdiction and Scale: Legal “Technicalities” as Resources for Theory’ (2009) 18 *Social and Legal Studies* 139.

<sup>32</sup> Roger Cotterrell, ‘Why Must Legal Ideas Be Interpreted Sociologically?’ (1998) 25 *Journal of Law and Society* 171, 175.

significantly on the operation of the scheme, but their failure to do more is as significant as what they have achieved.

Third, there is a broader conceptual gap in the home studies literature, both in those studies focused on the SSSC and more generally. Dominant approaches within this field are generally reliant on applying a ‘concept of home’, usually fleshed out by a series of influential literature reviews,<sup>33</sup> or adopting approaches rooted in critical geography, such as the prominent ‘home *un*-making’ thesis. Why I view this as a gap is subject to sustained argument in Chapter Two, but, in summary, these dominant approaches – I argue – are ill-suited to analysing key elements of the SSSC policy, such as the detail of a DHP application form, the expectations of tenant behaviour, or how a tenant’s home interest is interpreted by a local authority worker.

## **2.2.The problem**

Having outlined key gaps in the current analysis of the SSSC, this thesis needs to do more than simply fill them. A PhD project can rarely be justified solely because ‘it has not been done before’.<sup>34</sup> Consequently, in addressing these fissures in current research, the project is also focused on three overarching and interlinked problems. The first two are theoretical. There is a sizable literature, and plenty of ongoing funded research, into the welfare reform agenda in the UK and a parallel literature focused on the ‘concept of home’. As will be argued throughout this thesis, there is a symbiotic relationship between the two: welfare reforms reach into their targets’ homes, and home interests feature as part of the functioning of welfare reform programmes. There is a danger that the home is neglected in the study of welfare reforms altogether; with the ‘concept of home’ abandoned in favour of theoretical tools better adapted for studying policies such as the SSSC. The problem is how best to conceptualise this

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<sup>33</sup> In particular, the influential threefold: Hazel Easthope, ‘A Place Called Home’ (2004) 21 *Housing, Theory and Society* 128.; Carole Després, ‘The Meaning of Home: Literature Review and Directions for Future Research and Development’ (1991) 8 *Journal of Architectural and Planning Research* 96; and Shelley Mallett, ‘Understanding Home: A Critical Review of the Literature’ (2004) 52 *Sociological Review* 62.

<sup>34</sup> Diana Ridley, ‘The PhD Literature Review: A Journey of Discovery’ in George Blue (ed), *Developing Academic Literacy* (Peter Lang 2011), 108.

complicated theoretical interface to ensure that welfare reforms such as the SSSC can be analysed drawing on the ‘concept of home’ in a useful way.

Tied to this first issue, the second is how to deal with this theoretical problem while examining the actual workings of the SSSC. As argued by Valverde, theorists too often have neglected the ‘more mundane question of how it’s all done’.<sup>35</sup> It is important not simply to assess the policy on its face value with reference to a reified conceptual framework, particularly given the importance of the underexplored floating layer of discretionary support under the DHP scheme and the well-established problems of complexity within the welfare state.<sup>36</sup> The solution to this theoretical problem must also allow for an examination of how the home becomes implicated in the actual workings of the SSSC policy, which – as I go on to argue – requires an understanding of how discretion operates in the policy’s framework.

The third problem is an empirical one: how best to explore these first two problems in the SSSC policy framework. There is already a large volume of empirical data on the SSSC readily available, including detailed government evaluations.<sup>37</sup> But what else do we need to know? What elements of the policy are the most important to be addressed in response to these first two problems? In exploring the operation of the SSSC, determining where to look and what to be looking for is the third overarching problem dealt with in this thesis.

### **2.3. The importance**

There is always a risk when researching welfare reforms of presenting oneself as a harbinger of ‘scaremongering and doom and gloom’,<sup>38</sup> a ‘pessimist’,<sup>39</sup> or (worst of all) a typical ‘leftie academic’.<sup>40</sup> The reality of the situation is, however, extremely acute

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<sup>35</sup> Valverde (n 2)

<sup>36</sup> Neville Harris, *Law in a Complex State* (Bloomsbury Publishing 2014).

<sup>37</sup> See DWP, ‘Evaluation of Removal of the Spare Room Subsidy: Final Report’ (n 17).

<sup>38</sup> HC Deb 30 June 2015, c444WH.

<sup>39</sup> HL Deb 5 March 2013, c1401.

<sup>40</sup> Perhaps the best example of this frequently employed dismissal is in the extraordinary treatment of the then UN Inspector General for the Right to Adequate Housing, Raquel

for many of those in receipt of Housing Benefit who find themselves subject to wave after wave of welfare reforms. There are two intersecting elements of the SSSC which make further research of this nature particularly important at this moment.

First, since the Welfare Reform Act 2012, the government's welfare reform agenda has been increasingly predicated on a 'cut-and-devolve' approach. Central budgets are reduced, often substantially, and then passed down to local authorities and other decentralised bodies that must pick up the pieces and shoulder the responsibility. It is an under-analysed 'perfect storm' as local authorities wrestle with insufficient migratory budgets – such as the Department for Work and Pensions (DWP) DHP pot – in the face of continual central reductions to social security programmes.<sup>41</sup> Indeed, when defending the SSSC before the court on behalf of the government, James Eadie QC argued that the policy was intended to 'shift the place of social security' from the 'central government to local government',<sup>42</sup> perhaps a surprising aim for a policy which *prima facie* seeks to address under-occupation in the social rented sector.

Second, reforms to Housing Benefit are increasingly putting claimants' occupation of the home under direct threat. The imposition of the SSSC penalty and decisions about the award (or not) of DHPs have been repeatedly recognised by the courts as engaging Art.8 (right to home) of the European Convention on Human Rights (ECHR). Justice

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Rolnik. See James Chapman and Steve Doughty, 'Outrage as "Loopy" UN Inspector Lectures Britain' *Daily Mail* (11 September 2013) <<http://www.dailymail.co.uk/news/article-2418194/Outrage-loopy-UN-inspector-lectures-Britain-Shes-violent-slum-ridden-Brazil-attacks-housing-human-rights.html>> accessed 14 August 2017.

<sup>41</sup> At the time this thesis was submitted, further reforms stemming from the Welfare Reform and Work Act 2016 were already placing further pressure on this approach, particularly the lower Benefit Cap, and the freeze to working-age benefits promises to draw many others (particularly on LHA) under the ambit of discretionary support in the DHP scheme.

<sup>42</sup> See the recording of the hearing in *Carmichael* (n 7) available at UKSC, '01 Mar 2016 – Morning – Part 4 of 6' at [www.supremecourt.uk/cases/uksc-2014-0125.html](http://www.supremecourt.uk/cases/uksc-2014-0125.html), 1:47:11, accessed 11 October 2017.

Phillips in *Hardy* emphasises this point<sup>43</sup> and the UKSC ‘accepted [it] unhesitatingly’<sup>44</sup> in *Carmichael*.<sup>45</sup> The reform’s clear ties to the claimants’ home interests come into sharp relief with the threat of eviction. Though, due partly to the nature of arrears, it is difficult to estimate precise figures, the DWP’s own evaluation suggests that 19% of affected tenants had been issued with a notice of intention to seek possession,<sup>46</sup> with two-thirds falling further into arrears.<sup>47</sup> Notwithstanding the absence of conclusive evidence for a ‘discernible increase’,<sup>48</sup> it is ‘not difficult to see’<sup>49</sup> how the policy puts the tenants it effects at greater threat of losing their homes, in addition to a wider ‘catalogue of miserable experiences’.<sup>50</sup>

It is worth underscoring that the arguments made in this thesis do not start and end with the SSSC. The policy itself carries through to the Godot of welfare reforms, Universal Credit. The same penalty structure applies for under-occupation, fixed at 14% or 25% of the housing element,<sup>51</sup> as does the same room standard.<sup>52</sup> The findings made in this thesis on the SSSC policy thus also apply to the ongoing roll-out of the Universal Credit scheme.

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<sup>43</sup> *Hardy* (n 8) [52] (per Phillips J).

<sup>44</sup> Tom Royston and Charlotte O’Brien, ‘Ironic and Inexplicable’ Contours of Legislation Breach Human Rights: ‘Bedroom Tax’ Unlawful Where Fails to Provide for Clear Disability Related Bedroom Needs’ (2017) 24 *Journal of Social Security Law* D11.

<sup>45</sup> *Carmichael* (n 7) [49] (per Toulson L).

<sup>46</sup> DWP, ‘Evaluation of Removal of the Spare Room Subsidy: Final Report’ (n 17), 100.

<sup>47</sup> Vickie Cooper and Kirsteen Paton, ‘The New Urban Frontier of Everyday Evictions: Contemporary State Practices of Revanchism’ in Abel Albet and Núria Benach (eds), *Gentrification as a Global Strategy: Neil Smith and Beyond* (Routledge 2018) 146.

<sup>48</sup> DWP, ‘Evaluation of Removal of the Spare Room Subsidy: Final Report’ (n 17) 100.

<sup>49</sup> Cooper and Paton (n 47).

<sup>50</sup> *Ibid.*

<sup>51</sup> See para.36, Sch.4 Universal Credit Regulations 2013/376.

<sup>52</sup> See paras.9–12, Sch.4 Universal Credit Regulations 2013/376. The only discernible difference is a more restrictive interpretation of the exemption for overnight care. Under para.12(3), paras.9–12, Sch.4 Universal Credit Regulations 2013/376, the authority must be satisfied that the claimant: (i) requires overnight care, *and* (ii) is in receipt of middle or higher rate DLA (or the PIP equivalent), whereas, under the current regime, it is sufficient for the claimant to simply prove the former, under Reg.B13(6)(a)–(ab) Housing Benefit Regulations 2006/213.

### 3. What?

Having provided an overview of where this thesis sits and the motivations for the inquiry, this section goes on to consider the content of what follows. After dealing with the broad overarching research questions, it focuses on the key arguments put forward and the organisation of subsequent chapters.

#### 3.1. The research questions

It has already been established that this thesis is a theoretically driven inquiry into how the SSSC can be usefully analysed using the concepts of home and – connected to the exploration of the home – the concept of discretion. Section 3.2. provides a summary of its key arguments, but it is first necessary to detail the two broader overarching research questions in which they are situated. Both focus on the effective use of the ‘concept of home.’ Within Chapter Two, the meaning of this term is discussed in some detail, but it is important to highlight that the ‘concept of home’ in the questions below – in common with many concepts in the social sciences such as ‘law’<sup>53</sup> – the base unit of analysis here is not neurons firing in the brain when an individual feels ‘at home’ or not,<sup>54</sup> or the assessment of some transcendental entity that exists outside of ‘how individual’s think of it’.<sup>55</sup> Instead, it is a shorthand for analysis of the social practices<sup>56</sup>

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<sup>53</sup> Kenneth M Ehrenberg, ‘Law Is Not (Best Considered) an Essentially Contested Concept’ (2011) 7 *International Journal of Law in Context* 209, 213

<sup>54</sup> Though the literature is comparatively modest, for some this *is* the focus. Psychologists have attempted to investigate some of the possible mechanics of place attachment in a way which expands on the social and environmental psychology that dominates. At the more accessible end of the spectrum, where even a law PhD student can just about grasp the principles at play, see Paul Morgan, ‘Towards a Developmental Theory of Place Attachment’ (2010) 30 *Journal of Environmental Psychology* 11; and Leila Scannell and Robert Gifford, ‘Place Attachment Enhances Psychological Need Satisfaction’ (2016) 49 *Environment and Behavior* 359.

<sup>55</sup> Frederic Schaffer, *Elucidating Social Science Concepts: An Interpretivist Guide* (Routledge 2015) 2.

<sup>56</sup> I am using the term ‘social practices’ fairly broadly here, simply to refer to the way in which people act in their social context in a way which is not a psychological focus on ‘social behaviour’. In other words, we are interested in social life, rather than some physical or biological assessment of behaviour. For a more detailed discussion on the meaning of social

– actions, interactions, knowledge production, and so on – that can be thought of as being interrelated with the home and would be difficult to analyse or explain ‘without the notion of a concept’.<sup>57</sup>

With that important clarification of the term in mind, one which is returned to in Chapter Two, there are two overarching research questions this thesis seeks to address.

*Q1. How can the ‘concept of home’ be best employed effectively to analyse the SSSC policy?*

This question focuses on how best to conceptualise those interrelated social practices organised around the home in the context of the SSSC. As outlined above, the SSSC is inescapably home-centric; it is a policy defined by (under)occupation and mitigated through an assessment of home interests by administrative workers. It is through this overarching question that a consideration of ‘discretion’ is necessary to respond to the articulation of DHP decision-making as a ‘discretion’ problem rather than a ‘home’ one.

*Q2. What does an analysis of the SSSC policy based on the ‘concept of home’ reveal?*

This question focuses on the application of the answer to the first research question: having assessed how the ‘concept of home’ can be usefully applied to the SSSC, what does this go on to tell us? Significant elements of this question include an analysis of key knowledge claims, duties and formats interrelated around the home (such as the role of DHP application forms), the expectations of tenant behaviour, and how local authority administrative workers make decisions about DHP awards.

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practices, see the conclusions drawn by Michael Esfeld, ‘What Are Social Practices?’ [2003] *International Review of Social and Human Sciences* 19, 40

<sup>57</sup> Elisabetta Lalumera, ‘On the Explanatory Value of the Concept–Conception Distinction’ (2014) 8 *Journal of the Italian Philosophy of Language* 73.

### 3.2. The argument

Having briefly summarised the research focus of what follows, this section outlines its key arguments. It will be apparent that this thesis is a fairly ambitious theoretical project, and I am conscious that it attempts to make a series of overlapping arguments which straddle a range of literatures. This section is intended to act as a digest of the key assertions made throughout the chapters, offering an overview of what follows and a point of reference to which to return.

Stemming from the research questions above, there are three key sets of arguments made throughout:

- (i) those focused on the use and application of the ‘concept of home’;
- (ii) those analysing the operation and conceptualisation of discretion within the DHP framework; and
- (iii) those which draw on the theoretical framework of the thesis outlined in these first two strands to analyse the SSSC.

The first set – indicated in **Key arguments 1.1.** – all focus on the home studies literature and the use of the ‘concept of home’ as an analytical tool. This thesis argues that the concept can be usefully analysed as being ‘essentially contested’<sup>58</sup> – a label readily (and arguably, too often)<sup>59</sup> applied to a whole host of different terms, particularly in political theory. I argue that the ‘concept of home’ is an archetypal essentially contested concept, comfortably meeting Gallie’s conditions. Importantly, this is far more than just a theoretical sticker; it has a series of implications for the use of the concept which, I argue, allows home studies scholars to draw on broader literatures – particularly those analysing knowledge practices – when adopting a theoretical framework informed by the literature on the ‘concept of home’.

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<sup>58</sup> As per the influential arguments made by Gallie: Walter Gallie, ‘Essentially Contested Concepts’ (1955) 56 *Proceedings of the Aristotelian Society* 167.

<sup>59</sup> Waldron, in particular, argues that the use of the term has ‘run wild’, see Jeremy Waldron, ‘Is the Rule of Law an Essentially Contested Concept (In Florida)?’ (2002) 21 *Law and Philosophy* 137.



### **Key arguments 1.1**

#### *The use and application of the ‘concept of home’*

- A1. The ‘concept of home’ aptly meets Gallie’s conditions of ‘essential contestability’.
- A2. Recognising the ‘concept of home’ as an ‘essentially contested concept’ has implications for its effective use of which scholars should take account.
- A3. Drawing on Valverde, the SSSC can be effectively analysed with a focus on how knowledge about the home is assessed by and assumed of those in the SSSC framework.

The next set – outlined in **Key arguments 1.2** – are focused on the second organising concept in this thesis: discretion. As touched on in this introduction, underscoring the importance of discretion to the operation of the SSSC framework – particularly in the form of the DHP scheme – is central to this thesis. The crux of my position is that the reliance on the palliative effects of DHPs within the SSSC framework is problematic on its own terms and has been misinterpreted by the courts. This is coupled with a theoretical claim that many widely utilised approaches to discretion – such as implementation-focused studies, epitomised by Lipsky’s seminal ‘street-level bureaucracy’,<sup>60</sup> or the intellectual descendants of the Dworkin ‘doughnut’ rules vs discretion continuum<sup>61</sup> – are ill suited to analysing many of the problems associated with the DHP scheme. Instead, I argue that a distinction between ‘structural’ and ‘epistemic’ discretion can be usefully applied to the SSSC framework.<sup>62</sup>

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<sup>60</sup> See Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Service* (30th Anniversary, Russell Sage Foundation 2010).

<sup>61</sup> See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977). 31.

<sup>62</sup> See, in particular, the outline and application of Alexy’s work by Molander et al: Anders Molander, Harald Grimen and Erik Oddvar Eriksen, ‘Professional Discretion and Accountability in the Welfare State’ (2012) 29 *Journal of Applied Philosophy* 214.

## **Key arguments 1.2**

### *Operation of discretion under the SSSC framework*

*B1.* DHPs – and consequently the exercise of discretion at the Local Authority Level – are central to the operation of the SSSC.

*B2.* The courts have made a series of problematic assumptions about the functioning of the DHP scheme.

*B3.* The most widely adopted theoretical approaches to discretion are insufficient for analysing the ambit of the DHP scheme.

*B4.* The role of the DHP scheme in the SSSC framework can be usefully analysed through a focus on its structural and epistemic dimensions.

These two sets of arguments, focused respectively on the home and discretion, do not exist in isolation from one another. The home is not protected from being subject to discretion, and discretionary decisions often have to engage with home interests; this is particularly so in the context of an SSSC penalty, where the continued occupation of the property is often at stake in discretionary decisions. My argument that the ‘concept of home’ can be usefully examined from a perspective rooted in the analysis of knowledge practices is of direct relevance to my parallel argument that discretion can be analysed as exhibiting both epistemic and structural dimensions. Put another way, the home-based knowledge practices outlined in Chapter Two work in the structural and epistemic space analysed in Chapters Three and Four.

The third set, **Key arguments 1.3**, draws on the first two to analyse neglected elements of the SSSC policy framework. There are three key submissions, each dealt with in respective chapters. The first involves the importance and role played by the ‘knowledge format’ of DHP application forms. The second is focused on the difficulty faced by administrative workers in assessing knowledges tied to the home – such as grief, disablement, and lifestyle – in their DHP decision-making. The third aims to examine the expectations of tenants – what they are required to know under the policy.

### **Key Arguments 1.3**

#### *Analysis of the SSSC policy framework*

C1. DHP Application forms shape and constrain the ability of tenants affected by the SSSC to communicate their need to stay in the property.

C2. The knowledges at play in the DHP mitigation process lead to the problematic appeal to common-knowledge by local authority administrative workers.

C3. The SSSC imposes misguided epistemic obligations on affected tenants, requiring them, *inter alia*, to set their home interest against the imposition of a financial penalty.

These three interrelated sets of arguments are not the only points made in this thesis. However, they are the most significant assertions from which the other arguments hang.

### **3.3.The structure**

The thesis is organised into nine chapters, split roughly into three halves: Part I deals with the theoretical footing of the thesis, Part II outlines the methodological approach, and Part III goes on to apply this analysis to the SSSC. Following this introduction, Chapters Two and Three each focus on the two key organising concepts: home and discretion. Chapter Two deals with the former and focuses on putting forward the assertions in **Key arguments 1.1** above. In discussing these points, the chapter also provides an indication of how this thesis fits into the broader (and very sizable) home studies literature.

Chapter Three shifts the focus over to discretion and the SSSC. It deals with **Key arguments 1.2**. The theoretical material follows directly on to a detailed outline and assessment of the DHP scheme in Chapter Four. Although the analyses in Chapters Two and Three work in parallel, they read as quite distinct assessments of concepts; consequently, following Chapter Four, a short summary – not constituting a chapter in its own right – recaps the key points and highlights the connection between the theoretical arguments made across the first half of the thesis. This marks the end of Part I, the section of the thesis that deals with the theoretical groundwork.

Chapter Five goes on to outline the ‘research process’ and the reasoning behind the two main empirical strands – and the two smaller sub-strands – of data collection. The chapter also reflects on how the methodology could have been improved.

Chapters Six through to Eight each draw on the theoretical approach outlined in Part I to analyse knowledge practices in the SSSC. Chapter Six looks specifically at the knowledge format of DHP application forms; Chapter Seven looks at the appeal to the common knowledge of administrative workers in the operation of the DHP scheme; and Chapter Eight looks, *inter alia*, at epistemological obligations under the policy, or the ‘duty to know’. The analysis offered in these chapters is not intended as an all-encompassing treatise on the operation of the SSSC, instead they each seek to highlight different elements of the policy which would otherwise go under-analysed (or omitted altogether) if adopting standard theoretical approaches.

Chapter Nine attempts to consider the implications of the assertions laid out in the **Key argument** figures introduced above and developed at length in the preceding chapters. It offers three outputs. The first is focused on the theoretical application of the concepts of home and discretion. Second, although generalisability is not the methodological aim of this thesis, there are a series of empirical findings that arise out of the underpinning data and the chapter provides a summary of these. Third, it offers reflections on the future focus of scholarly activity, particularly for socio-legal studies of welfare administration and for theorists working in the home studies literature. The thesis ends with a short prognosis, which looks forward at what is to come rather than back at the arguments made here.

#### **4. How?**

Having dealt with why this thesis is being undertaken and provided an outline of its structure and key assertions, this section considers how it accomplishes this. A summary is provided that outlines the research design, the nature of its intended contribution, and also touches on some of its key limitations.

#### 4.1. The research process

For reasons expanded on in Chapter Five, this thesis refers to the ‘research process’ as opposed to what is ordinarily titled the ‘methodology’ or ‘methods’. In doing so, it is hoped that a more holistic (and honest) account of the often messy process of doctoral research is presented, avoiding what can often read as a sterilised account, generally retrofitted *post hoc*.

This broader context aside, for the purposes of the present summary, it is worth briefly outlining the two main empirical strands that inform much of the data analysis. The first comprises 32 telephone interviews with tenants affected by the SSSC policy, with the sample drawn from two partner Housing Associations. The second is made up of responses to three DHP ‘vignettes’, based on the stories of tenants interviewed in the course of the first strand and presented to administrative workers involved in processing DHPs at 18 local authorities. These vignettes and the responses to them were managed via a bespoke online platform created for this project.

These two larger empirical strands are supplemented with two smaller sources of data that support elements of the analysis in Chapters Six to Eight: a documentary analysis of 242 DHP application forms and 14 responses to freedom of information (FOI) requests made of local authorities focused on their DHP guidance to administrative staff. All four strands are outlined in detail in Chapter Five.

The approach taken to the research design and the data analysis is what many would describe as ‘socio-legal’.<sup>63</sup> The aim is not to ‘wav[e] the flag of society as against

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<sup>63</sup> This is expanded upon in detail within Chapter Five. For an assessment of the term’s constituent elements, see the two edited collections published by Palgrave Macmillan: David Cowan and Daniel Wincott (eds), *Exploring the ‘Legal’ in Socio-Legal Studies* (Palgrave Macmillan 2016); and John Clarke, ‘The Contested Social’ in Dermot Feenan (ed), *Exploring the ‘Socio’ of Socio-Legal Studies* (Palgrave Macmillan 2013). To complete the set, perhaps the publishers will eventually entertain an ‘exploring the “studies” in socio-legal studies’.

law'<sup>64</sup> or 'juxtapose' the empirical data here against 'the law',<sup>65</sup> but instead to draw on social theory to understand the 'workings of law'.<sup>66</sup> The thesis takes the view that 'the extent that law exists' is in its 'actualisation',<sup>67</sup> which can take multiple forms in people's lives, which in turn are made the subject of analysis through socio-legal studies.

#### **4.2.The contribution**

Without wanting to appear overly defensive at the outset, the main criterion for a PhD award at the University of York is that 'the thesis constitutes a substantial original contribution to knowledge or understanding'.<sup>68</sup> Simply putting forward the arguments above is consequently not sufficient. The thesis has to work to add something of value to the literatures in which it is situated. It is worth prefacing what follows with what this 'contribution' is.

This thesis intends to contribute to knowledge and understanding in three areas. First, building on the arguments made in the first half of the thesis, it seeks to contribute theoretically to the development of the still evolving home studies literature and provide a helpful socio-legal framework for analysing discretion in welfare administration. On the former, it aims to highlight the problems in failing to account for the essentially contested nature of the 'concept of home' and underscore the implications of this argument for the use of the concept in future studies. For the latter, by addressing the limitations of currently available approaches, the thesis demonstrates the application of a distinction between structural and epistemic discretion.

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<sup>64</sup> Mariana Valverde, 'Theoretical and Methodological Issues in the Study of Legal Knowledge Practices' in Martha Merrill Umphrey (ed), *How Law Knows* (Stanford University Press 2007) 78.

<sup>65</sup> Cotterrell (n 32) 172.

<sup>66</sup> Sarah Blandy, 'Socio-Legal Approaches to Property Law Research' in Susan Bright and Sarah Blandy (eds), *Researching Property Law* (Palgrave Macmillan 2016) 24.

<sup>67</sup> Alain Pottage, 'The Materiality of What?' (2012) 39 *Journal of Law and Society* 167, 176.

<sup>68</sup> University of York, 'Examination for the Degree of PhD and EngD' <<https://www.york.ac.uk/about/departments/support-and-admin/student-services/exams/examiners/phd/>> accessed 10 August 2017.

Second, the thesis undertakes a detailed analysis of the operation and structural role of the DHP scheme in the SSSC. Although concerns have been raised about the function of DHPs and multiple calls made for further research,<sup>69</sup> the scheme's operation has not been subject to detailed scrutiny and analysis since 2005, when Walker and Niner offered a positive appraisal.<sup>70</sup> This study draws on empirical work with both local authorities and affected tenants to contribute a comprehensive assessment of the deficiencies in the scheme in mitigating the SSSC and the inability of the courts to adequately assess the payments in the course of judicial review challenges.

Third, in applying the theoretical framework to the SSSC, this thesis offers an analysis of elements of the SSSC framework that have so far been neglected or ignored altogether. Chapters Six to Eight add something new to the chorus of research on welfare reform, especially on the importance of particular documents – specifically DHP application forms – and the epistemological duties placed on local authorities and the tenants themselves are analysed in detail.

### **4.3. The limitations**

This thesis is a fairly ambitious exploratory theoretical project, but its empirical focus is limited to the narrow policy framework of the SSSC and its parallel DHP provision. Although I hope that the findings presented here will be useful in other contexts – particularly with reference to other welfare reforms, such as the lower Benefit Cap<sup>71</sup> and changes to Local Housing Allowance (LHA)<sup>72</sup> – this is not a generalisable study

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<sup>69</sup> Work and Pensions Select Committee, 'The Local Welfare Safety Net' (2016) <<http://www.publications.parliament.uk/pa/cm201516/cmselect/cmworpen/373/37302.htm>> accessed 1 July 2016 103.

<sup>70</sup> See Bruce Walker and Pat Niner, 'The Use of Discretion in a Rule-Bound Service: Housing Benefit Administration and the Introduction of Discretionary Housing Payments in Great Britain' (2005) 83 *Public Administration* 47, 63–64.

<sup>71</sup> See ss.8–10 Welfare Reform and Work Act 2016. For an overview, see Emma Laurie, 'The Welfare Reform and Work Act 2016' (2016) 23 *Journal of Social Security Law* D35.

<sup>72</sup> For an overview of the reforms, see Christina Beatty and Stephen Forthergill, 'The Uneven Impact of Welfare Reform: The Financial Losses to Places and People' (Sheffield Hallam University 2016) 6, 28, 38 and 74 <<http://shura.shu.ac.uk/15883/1/welfare-reform-2016.pdf>> accessed 11 August 2017.

and nor was it intended to be. At its core, it explores the application of a new theoretical framework to analyse underexplored elements of the SSSC. It is not a broader analysis of the welfare reform agenda and even less an exposition of what it means for any grander abstractions, like neoliberalism or the nature of social rights.

There are numerous methodological limitations that are addressed in detail in Chapter Five. I share the lament of many PhD students at the end of a project stretching over so many years from which I have learnt a great deal: if I were to do it again, I would do it very differently. The project has had to evolve alongside the at times uncertain policy context it analyses. Although I justify the research design and the data it generated, the approach taken – particularly the reliance on telephone interviews – is a clear limitation on the analysis that follows.

Notwithstanding the relatively narrow focus of the thesis, there is also much that is left out of this study. There are other questions which engage both the ‘concept of home’ and the SSSC policy which are not directly addressed, such as: the evolving rhetorics of ‘under-occupation’, the construction of the family under the room standard in Reg.B13(2) Housing Benefit Regulations 2006, or analysis of the impact of evictions as a result of substantial arrears accrued from the policy. Though these elements are touched on the analysis that follows, the thesis inevitably presents only a partial picture, both of the potential of the concept of home as an analytical tool and of the impact of the SSSC policy on those tenants it affects.

More broadly, no doubt some readers will find its focus on the home somewhat frustrating. The same data collected and analysed in the course of this study could have been analysed more ‘strategically’ to contribute to what Adler identifies as the lack of ‘critical mass’ in social welfare research.<sup>73</sup> In an effort to pursue its narrower line of inquiry, many other pressing issues which emerged in the data have necessarily been omitted – perhaps most notably important concerns over access to support or the implications for administrative justice. Although a limitation of this document, it is

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<sup>73</sup> Michael Adler, ‘Social Security and Social Welfare’ in Peter Cane and Herbert M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010) 399, 420.



hoped that myself and other researchers can go on to address many of these issues in future studies.

## **5. A precis: the SSSC**

This section is intended as a concise overview of the SSSC policy to provide sufficient context for the remaining thesis. It is not an SSSC literature review; relevant studies are dealt with at the appropriate point in the analysis which follows. Instead, it is delivered on a 'need to know' basis, covering how the SSSC penalty functions, giving an indication of the extent of its impact and the claimants affected, and summarising the principle stated reasons for its introduction.

### **5.1.Imposing the penalty**

At its core, the SSSC is a Housing Benefit penalty for under-occupation of a property: 14% of the eligible rent for one bedroom too many, 25% for two or more. In common with the rest of the social security system, this apparent simplicity on the surface beguiles complexity and interdependency within the regulations themselves. The root of the policy is s.69 Welfare Reform Act 2012 which amended the determination of the appropriate maximum Housing Benefit (AMHB) under s.130A Social Security Contributions and Benefits Act 1992. This change allowed a decoupling between the calculation of Housing Benefit in the social rented sector under s.130(1)(a) Social Security Contributions and Benefits Act 1992 and the actual amount of the rental liability. Put another way, the Housing Benefit paid could be 'taken to be an amount other than the actual amount of that liability'.<sup>74</sup>

This provides the space in which the penalty under Reg.B13 Housing Benefit Regulations 2006/213 sits. There are four stages to the application of the SSSC.

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<sup>74</sup> S.130A(5) Social Security Contributions and Benefits Act 1992.

i. Stage one – determining if the SSSC can apply

Before turning to the meat of the policy under Reg.B13, it is first necessary to consider if the regulation applies under Reg.A13 Housing Benefit Regulations 2006/213. Broadly speaking, the SSSC applies to working-age tenants in the social rented sector. An assessment of the maximum rent under Reg.B13 does not apply if any conditions in Reg.A13(2) are met, the most significant of which being sub-sections (d) and (e), which exempt those at the qualifying age for pension credit,<sup>75</sup> and where the dwelling is temporary accommodation,<sup>76</sup> respectively.

It is worth underscoring at this point that Reg.B13 – following Housing Benefit (Transitional Provisions) (Amendment) Regulations 2014/212 – applies across all tenants living in the social rented sector, *not* simply new entrants or those subject to churn within it. In this sense, the penalty can be characterised as a ‘retrospective rule’,<sup>77</sup> applying indiscriminately to decisions taken years – often decades – before its implementation, not least decisions normally taken by someone other than the tenant themselves, such as a housing or local authority worker managing social housing allocations.

ii. Stage two – determining the number of bedrooms allowed

The number of bedrooms required by the claimant household is assessed with reference to the size criteria in B13(5). Each of the following is accorded a bedroom under the criteria, providing that they – using the familiar Housing Benefit terminology

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<sup>75</sup> Following amendments made to Reg.5 Housing Benefit (Amendment) Regulations 2012/3040, this applies where any one member of a couple is of the qualifying age, rather than the original position that *both* would have to be of qualifying age to attain an exemption from the Reg.B13 criteria being applied.

<sup>76</sup> Temporary accommodation is defined under Reg.A13(3) and (4), such as accommodation provided by a local authority in discharging its homelessness functions under Part 2 Housing Act 1985.

<sup>77</sup> Andrei Marmor, ‘The Rule of Law and its Limits’ (2004) 23 *Law and Philosophy* 1, 19.

– ‘occupy the dwelling as their home’:<sup>78</sup> (i) a couple; (ii) an adult;<sup>79</sup> (iii) a child who cannot share a bedroom by reason of a disability;<sup>80</sup> (iv) two children of the same sex; (v) two children under 10 years old; (vi) where overnight care is required; (vii) where a family member is away on service in the armed forces;<sup>81</sup> and (viii) a child who does not fall under (iv) or (v). There is no maximum figure<sup>82</sup> – the output of stage one is the full total, taking the first applicable definition within Reg.B13(5).<sup>83</sup>

iii. Stage three – determining the number of bedrooms in the claimant’s dwelling (a.k.a. counting the ‘elephants’)

The relevant authority is required to determine under Reg.B13(2)(b) whether the permitted room total calculated in stage one exceeds the number of bedrooms in the dwelling. (Un)helpfully (depending on your viewpoint), the regulations are silent on what actually constitutes a ‘bedroom’ for the purposes of this calculation. Unsurprisingly, this has generated a plethora of appeals under Para.6(1), Sch.7, Child

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<sup>78</sup> This will not be dealt with in detail here, but for further information, see Reg.7 Housing Benefit Regulations 2006/213. It is worth briefly noting that someone who is temporarily absent may still count (see *SK v South Hams DC (HB)* [2010] UKUT 129 (AAC)) and that, in shared care arrangements, a child is considered only to be occupying the property in which they normally live (see *SSWP v AM and Northumberland CC (HB)* [2015] UKUT 360 (AAC)).

<sup>79</sup> Namely, somebody aged 16 or older. The definition of a child (and inversely, an adult) can be found in Reg.2(1) Housing Benefit Regulations 2006/213.

<sup>80</sup> This is defined under Reg.2(1) Housing Benefit Regulations 2006/213 and requires that the child is entitled to the middle or higher DLA care component (or the PIP equivalent) and for whom the authority is satisfied that they are unable to share a bedroom with another child as a result of their disability.

<sup>81</sup> They must also intend to return to the property when they have ceased operations. See Reg.2(1) Housing Benefit Regulations 2006/213.

<sup>82</sup> Unlike the equivalent calculation under LHA for claiming housing benefit in the private rented sector, where there is a maximum of four. See Reg.13D(2)(c) Housing Benefit Regulations 2006/213.

<sup>83</sup> Namely, a couple under Reg.B13(5)(a) cannot be treated as two ‘persons who are not a child’ under Reg.B13(5)(b), as the stipulation of a couple comes before the stipulation of a person who is not a child.

Support, Pensions and Social Security Act 2000, arguing that the determination of the AMHB was incorrect through misapplying Reg.B13(2)(b).<sup>84</sup>

Upper-Tier Tribunal decisions have gradually carved out some guidance on this. Despite some valiant (and often successful) attempts at the First-Tier, the overcrowding regulations under Housing Act 2004 and the associated Housing Health and Safety Rating System are clearly not determinative; as in *Stevenage Borough Council v ML (HB)* [2016] UKUT 164 (AAC), this legislation on overcrowding and space standards cannot be read across into the ambit of the Housing Benefit regulations. The authority can also not rely simply on the number of bedrooms specified within the tenancy agreement itself or the number for which rent are charged, as considered in *CB v Manchester City Council and SSWP (HB)* [2015] UKUT 556 (AAC).

So, what are the Housing Benefit authorities left with? The guidance in *SSWP v Nelson* [2014] UKUT 525 (AAC) is the closest to a set of criteria to consider. The court, in assessing Mr Nelson's case, determined that defining a bedroom 'reflects the old adage that it is difficult to define an "elephant" but we know one when we see one'.<sup>85</sup> In identifying this elephant, however, there are some signs and indicators, akin to the trunk and big ears. The suitability of the bedroom space should be assessed with reference to any of the people listed in Reg.B13(5)–(6). For instance, it is not necessary for a room to be suitable for a couple for it to be counted. The use of the room by the household at that time is also unlikely to be relevant, for instance, if – as successfully argued in earlier First-Tier Tribunal decisions – it was being used as a 'dressing room',<sup>86</sup> 'play room'<sup>87</sup> or for the use of a sewing machine.<sup>88</sup> The starting point for the authority may be the basis on which the property is being let, before outlining a series

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<sup>84</sup> Anyone working on the SSSC owes a debt of gratitude to Giles Peaker of [nearlylegal.co.uk](http://nearlylegal.co.uk) for making these often-secreted First-Tier Tribunal decisions easily accessible and making sense of them. For a full list, see Peaker (n 29).

<sup>85</sup> *SSWP v David Nelson and Fife Council* [2014] UKUT 0525 (AAC), at 23.

<sup>86</sup> *St Helens* [2014] SC244/14/00098 (SEC).

<sup>87</sup> *Liverpool* [2013] SC068/13/12831 (SEC).

<sup>88</sup> *St Helens* (n 86).

of ‘case sensitive factors’, such as: (i) size configuration and overall dimensions; (ii) access; (iii) lighting; (iv) ventilation; and (v) privacy.<sup>89</sup>

iv. Stage four – calculating the eligible rent

Having established the two key aspects to the SSSC penalty equation – the number of bedrooms permitted and the number of bedrooms in the property – the eligible rent for the property needs to be calculated. It is the eligible rent under Reg.12B(2) Housing Benefit Regulations 2006/213 that is the basis of any penalty applied under Reg.B13, not – as is widely stated elsewhere<sup>90</sup> – the amount of Housing Benefit received. Put another way, an individual working part-time and receiving £50 per week of Housing Benefit would face the same cash penalty on an eligible rent of £100 (i.e. £14 or £25), as someone on full Housing Benefit. The eligible rent charged by the social housing provider is subject to restrictions outlined elsewhere.<sup>91</sup>

v. Stage five – applying the reduction

The bedrooms calculated in stage two are then subtracted from those in stage one; if a positive integer remains the penalty under Reg.B13 applies. For one bedroom too many, a 14% penalty calculated on the eligible rent applies, for two or more, there is a penalty of 25%. This is referred to within the regulations as the ‘limited rent’.<sup>92</sup> If

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<sup>89</sup> *SSWP v David Nelson and Fife Council* [2014] UKUT 0525 (AAC), at 31

<sup>90</sup> The penalty is often described as such in media reports. See, for instance, Patrick Butler, ‘The Bedroom Tax Supreme Court Rulings: What Happened and What Does It Mean?’ *The Guardian* (9 November 2016) <<https://www.theguardian.com/society/2016/nov/09/the-bedroom-tax-supreme-court-rulings-what-happened-and-what-does-it-mean>> accessed 10 August 2017; and Ellie Cambridge, ‘Spare Room Penalty’ What Is the Bedroom Tax and Why Is It so Controversial?’ *The Sun* (9 November 2016) <<https://www.thesun.co.uk/news/2149962/what-is-the-bedroom-tax-and-why-is-it-so-controversial/>> accessed 10 August 2017.

<sup>91</sup> For more information, see Wendy Wilson, ‘Rent Setting: Social Housing (England)’ (House of Commons Library Briefing 2017) <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01090>> accessed 10 August 2017.

<sup>92</sup> See Regs.B13(2) and (4) Housing Benefit Regulations 2006/213.

two more people make payments in respect of the dwelling, because they are joint tenants, for example, this ‘limited rent’ can be apportioned out between them.<sup>93</sup>

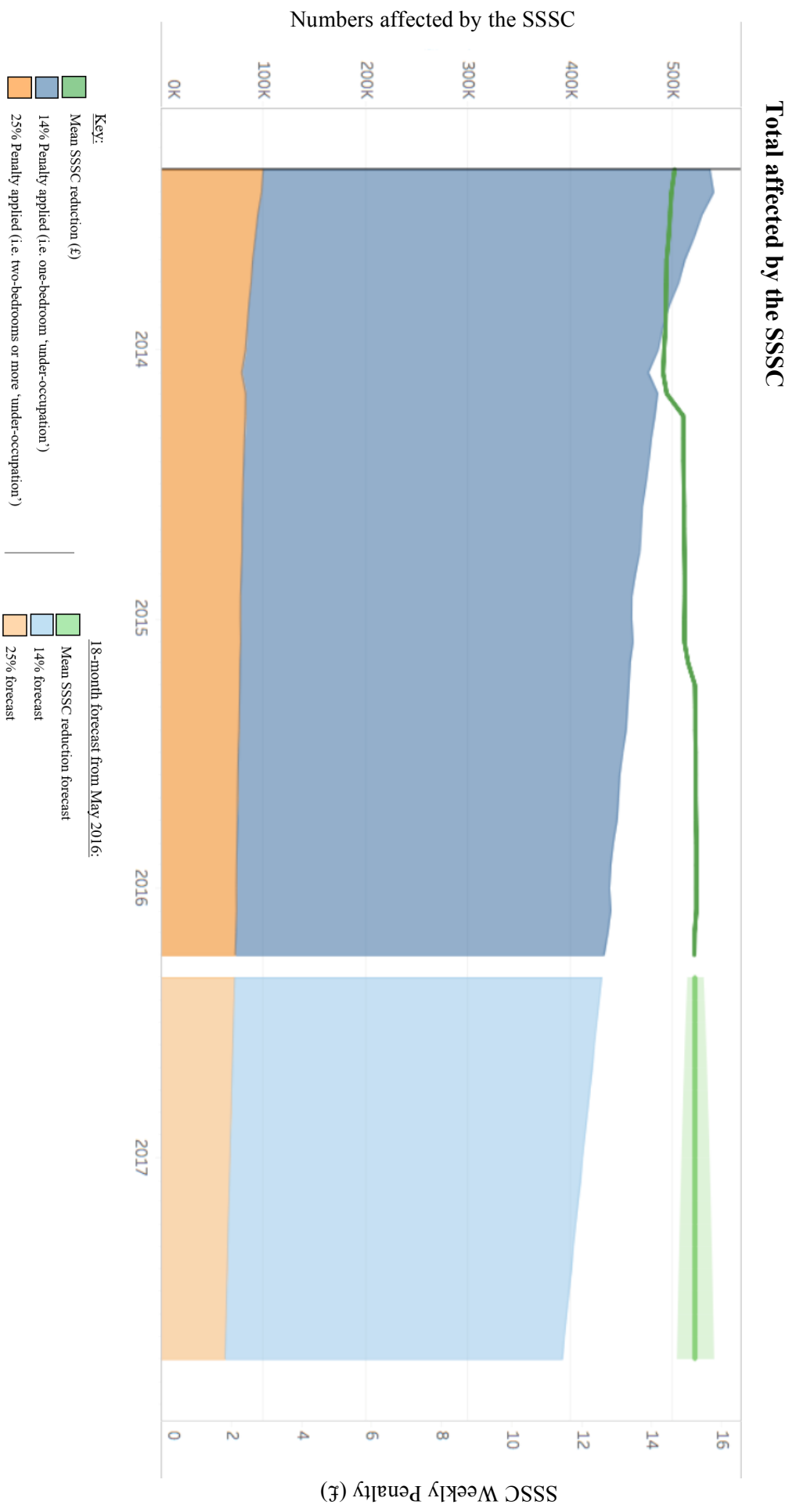
## **5.2.Extent and the claimants affected**

There are three trends within the SSSC data worth underscoring. The first is the modest reduction of affected tenants over time, either from natural churn or floating off the penalty. Those affected by the SSSC penalty peaked immediately following the policy’s introduction in May 2013, with 436,633 affected at the 14% rate, 99,737 at the 25% rate, and 10,971 affected at an unknown rate – a total of 547,341. The mean weekly penalty across these claimants was £14.65. The numbers affected have been falling ever since, as indicated in **Figure 1.1**.

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<sup>93</sup> See Reg.B13(2)(c) Housing Benefit Regulations 2006/213.

**Figure 1.1:** The total numbers affected by the SSSC between May 2013 and May 2016, organised by the 14% and 25% penalty and with the mean penalty applied. Forecast provided for the following 18 months. Interactive version available online at: [btgraph.socialrights.co.uk](http://btgraph.socialrights.co.uk).



At the time of (re)writing, the most recent figures available – April 2016 – provide a total caseload of 360,440 at the 14% rate and 72,292 at the 25% rate; with a penalty value, across both levels of under-occupation, of £15.21. In order to provide a general indication of how this trend is likely to continue, a forecast is provided for 18 months in the latter section of **Figure 1.1**.<sup>94</sup> This demonstrates – if trends to date persist – that the level of SSSC penalty applied is likely to remain fairly static, with overall numbers affected continuing a modest fall. The reasons for the fall are likely to be varied, with the DWP evaluation support suggesting that changes to family circumstances (such as children growing up or household members becoming eligible for pension credit) accounted for 46% and an increase in earnings for 20%.<sup>95</sup> Other explanations could include people moving on to Universal Credit, natural churn of the sector, changes to allocation practices impacting on-flows, or modest rates of downsizing. It does not – as underscored by the DWP’s evaluation – suggest that the penalty is necessarily incentivising significant changes in behaviour.

Second, the data point to sizable geographical variation. This is an issue returned to throughout, especially with reference to the DHP scheme in Chapter Four, but for our purposes here, the three maps in **Figure 1.2** are particularly instructive. All are unsurprising, but worthy of emphasis. The first demonstrates that there are significant geographic variations in the average level of the SSSC penalty applied – ranging from as little as £10.13 per week in North Lanarkshire to £24.18 in the London Borough of Wandsworth. This is to be expected given the role of property values and local earnings in the antecedent rent-setting formula.<sup>96</sup> The subsequent two maps, detailing the raw total numbers affected and numbers affected at the 25% rate, demonstrate that there are geographical hotspots where ‘under-occupation’ is particularly high. As a percentage of total stock, the maps would look different, with the most significant proportion of households being affected in Wales (up to 45% of social rented properties).

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<sup>94</sup> This was computed using an exponential smoothing model. This iteratively forecasts future SSSC loads on the basis of the weighted averages of past caseloads. The value of each time snapshot is influenced by every preceding value to an exponentially decreasing degree – the more recent caseload months being given a greater weighting.

<sup>95</sup> DWP, ‘Evaluation of Removal of the Spare Room Subsidy: Final Report’ (n 17).

<sup>96</sup> For more information, see Wilson (n 91).



The final point worth noting here is the sizable proportion of affected tenants with a form of disability. The DWP's initial impact assessment estimated that around two-thirds – 63% – would have a 'Disability Discrimination Act recognised disability'.<sup>97</sup> The present figures are difficult to substantiate using currently available DWP data as cross-tabulation only extends to payments which passport on to Housing Benefit. This more limited information indicates, however, that a total of 213,439 (49% of) affected households in May 2016 were in receipt of income-based employment and support allowance, inferring that these same claimants have – at the very least<sup>98</sup> – a 'capability to work [which] is limited by [a] physical or mental condition'<sup>99</sup> and will have been (or will be waiting to be) subjected to a work capability assessment.<sup>100</sup>

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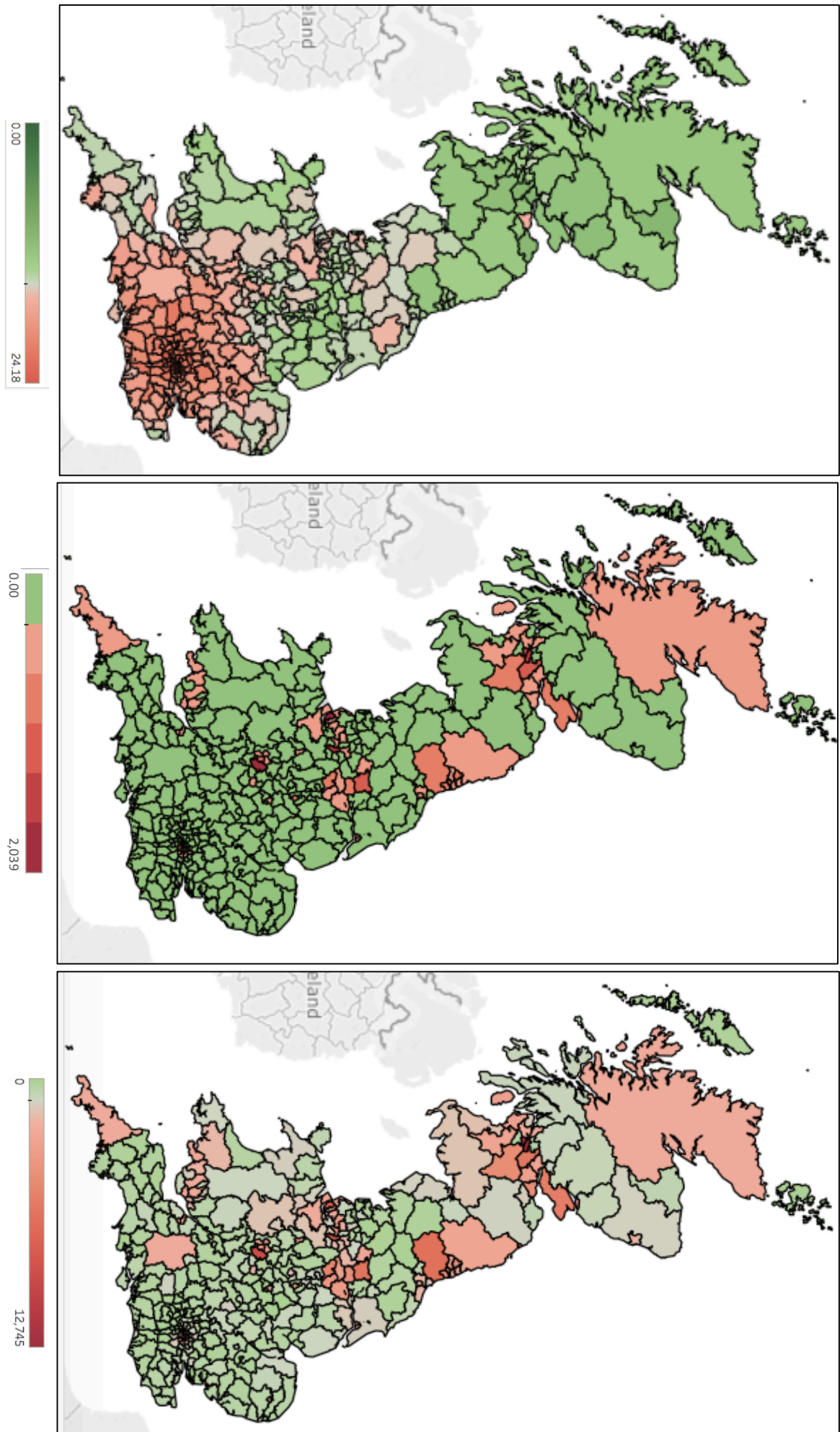
<sup>97</sup> DWP, 'Housing Benefit: Size Criteria for People Renting in the Social Rented Sector: Equality Impact Assessment' (2012)  
<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/220154/eia-social-sector-housing-under-occupation-wr2011.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/220154/eia-social-sector-housing-under-occupation-wr2011.pdf)> accessed 8 January 2017, [43]–[44]. Namely, under s.1 of the Disability Discrimination Act 1995, someone who 'has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities'.

<sup>98</sup> These households may also be in receipt of other benefits – most notably, DLA/PIP, or Carers' Allowance.

<sup>99</sup> S.15(1) Employment Support Allowance Regulations 2013/379.

<sup>100</sup> It is far beyond the scope of the inquiry here to provide a detailed overview of this, but for an overview of the employment and support allowance (ESA) regime and criticism of the work capability assessment. See, respectively, Chris Grover and Linda Piggott, 'From Incapacity Benefit to Employment and Support Allowance: Social Sorting, Sickness and Impairment, and Social Security' (2010) 31 *Policy Studies* 265; and Tom Griffiths and Terry Patterson, 'Work Capability Assessment Concerns' 22 *Journal of Poverty and Social Justice* 59, 59.

**Figure 1.2:** Maps indicating by local authority area (left to right), the mean SSSC penalty, the total numbers affected by the SSSC penalty, and total numbers being charged at the 25% level. Interactive online version available at: [btmaps.socialrights.co.uk](http://btmaps.socialrights.co.uk).



### 5.3. Stated aims

Although this thesis is not focused explicitly on political rhetoric, it is worth noting the stated aims behind the SSSC policy to help provide a context for what follows. This is not as straightforward as it may first appear for two reasons. In common with many of the reforms introduced in the wake of the Welfare Reform Act 2012, the ‘complex of factors’<sup>101</sup> behind the policy and the ideological assumptions made are often self-contradictory – what Vieira and Pinto argue is a key element of the ‘new politics of welfare reform’.<sup>102</sup> Second, the policy was designed and implemented under the 2010 Coalition Government. Teasing out a ‘shared rhetorical position’<sup>103</sup> – especially as the impact of the policy began to bite – becomes more problematic as the Coalition partners began to part company.<sup>104</sup>

Those caveats aside, there are four principle aims behind the SSSC policy worth underscoring here.

#### i. Reducing expenditure on Housing Benefit

The first is to reduce government expenditure on Housing Benefit.<sup>105</sup> This is the SSSC’s *raison d’être*, being – as Lord Freud reminded his fellow peers – the ‘core

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<sup>101</sup> Mitchell Dean and Barry Hindess, *Governing Australia: Studies in Contemporary Rationalities of Government* (Cambridge University Press 1998) 87.

<sup>102</sup> Mónica Brito Vieira and Pedro Ramos Pinto, ‘Understanding the New Politics of Welfare Reform’ 61 *Political Studies* 474.

<sup>103</sup> 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 Macmillan 2014) 102.

<sup>104</sup> For an examination of the SSSC in the context of the Coalition Government, see Libby McEnhill, ‘Unity and Distinctiveness in UK Coalition Government: Lessons for Junior Partners’ (2015) 86 *Political Quarterly* 101, 106; and Peter Somerville, ‘Coalition Housing Policy in England’ in Martin Powell and Hugh Bochel (eds), *The Coalition Government and Social Policy: Restructuring the Welfare State* (Policy Press 2016) 165–167.

<sup>105</sup> This has been a fairly longstanding government concern, stretching into the New Labour years. See Macleay’s argument that these reforms ‘continue and extend the trajectory of welfare reform instigated by New Labour’, or Kemp’s analysis, respectively: Julie MacLeavy, ‘A “NewPolitics” of Austerity, Workfare and Gender? The UK Coalition

argumentation'<sup>106</sup> behind it. The government's impact assessments and ministerial statements frame the policy as 'part of the effort to contain Housing Benefit expenditure',<sup>107</sup> playing its part to reduce the 'vast, yawning deficit'<sup>108</sup> and a housing benefit bill characterised as 'spiralling out of control'.<sup>109</sup>

The extent of actual savings is separate issue. The government figure of total savings – namely, the total reductions made to Housing Benefit via the imposition of the penalty – stands at £480 million per year. At the time of the tabling of the Affordable Homes Bill, the DWP consistently referred to the '£1 billion cost'<sup>110</sup> over two years of scrapping the policy. Following an assessment of the model used by the DWP to calculate the savings from the 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 £160 million per annum), not including other costs incurred by local authorities and other organisations, such as Housing Associations,<sup>111</sup> and the House of Commons Library suggests that the real

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Government's welfare reform proposals' (2011) 4 *Cambridge Journal of Regions, Economy and Society* 355, 362; and Peter Kemp, 'Housing Benefit and Welfare Retrenchment in Britain' (2000) 29 *Journal of Social Policy* 263.

<sup>106</sup> HL Deb 14 February 2012, c705.

<sup>107</sup> DWP, 'Housing Benefit: Under Occupation of Social Housing – Impact Assessment' (2012) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/214329/social-sector-housing-under-occupation-wr2011-ia.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/214329/social-sector-housing-under-occupation-wr2011-ia.pdf)> accessed 02 January 2015.

<sup>108</sup> HC Deb 22 January 2013, c74WH

<sup>109</sup> Rosemary Bennett, 'Housing Benefit Changes Delayed after Outcry' *The Times* (1 December 2010) <<http://www.thetimes.co.uk/tto/news/politics/article2828128.ece>> accessed 02 January 2015.

<sup>110</sup> HC Deb 10 November 2014, cW.

<sup>111</sup> Becky Tunstall, 'Testing DWP's Assessment of the Impact of the Social Rented Sector Size Criterion on Housing Benefit Costs and Other Factors' (*Centre for Housing Policy, University of York*, 2013) <<http://www.york.ac.uk/media/chp/documents/2013/Testing%20DWP%20Assessment%20of%20Impact%20of%20SRS%20Size%20Criterion%20on%20HB%20Costs%20University%20of%20York.pdf>> accessed 01 December 2014.

figure – though difficult to accurately calculate – is unlikely to align with the government estimates.<sup>112</sup>

ii. Incentivise downsizing

In addition to the perceived cost-saving potential of the reform, the government also underscored the ‘economic incentive for tenants to move to smaller properties where their accommodation is considered larger than necessary’.<sup>113</sup> This is the second aim: reducing perceived high levels of under-occupation in the social rented sector. The government argument is that low levels of residential mobility through the stock contribute to high levels of both under-occupation and – on the flipside for those on waiting lists for accommodation – overcrowding.<sup>114</sup> Rather than opting for a carrot approach, rooted in incentives to move and the supply of suitable accommodation,<sup>115</sup> the government decided on the stick, imposing a financial penalty designed – at least *prima facie*– to influence the tenant’s ‘incentive structure’.<sup>116</sup> It is a stick aimed exclusively at working-age households, rather than by far the most significant under-occupiers within the social rented sector: those of pensionable age.<sup>117</sup>

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<sup>112</sup> Wendy Wilson, ‘Impact of the Under-Occupation Deduction from Housing Benefit (Social Rented Housing)’ (2016)  
<<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06896>> accessed 14 August 2017, 7–8.

<sup>113</sup> DWP, ‘Impact Assessment: Housing Benefit: Under Occupation of Social Housing.’  
<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/214329/social-sector-housing-under-occupation-wr2011-ia.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/214329/social-sector-housing-under-occupation-wr2011-ia.pdf)> accessed 10 September 2014.

<sup>114</sup> Youngha Cho and Christine Whitehead, ‘The Immobility of Social Tenants: Is It True? Does It Matter?’ (2013) 28 *Journal of Housing and the Built Environment* 705, 704.

<sup>115</sup> This approach already has legislative backing under para.2, Sch.18 Housing Act 1996. For an outline and evaluation of ‘carrot’ incentive programmes to reduce under-occupation, see Hal Pawson and Stephen Sinclair, ‘Shopping Therapy? Incentive Payments and Tenant Behaviour: Lessons From Underoccupation Schemes in the United Kingdom’ (2003) 3 *International Journal of Housing Policy* 289; and Jill Barelli, *Underoccupation in Social Housing* (Department of the Environment, Transport and the Regions 2001).

<sup>116</sup> This is a common theme within modern housing policy. See Tim Brown and Peter King, ‘The Power to Choose: Effective Choice and Housing Policy’ (2005) 5 *European Journal of Housing Policy* 59.

<sup>117</sup> Barelli (n 115).

This aim may appear to sit oddly against the austerity-based ‘core argumentation’, not least because households moving elsewhere will clearly not be paying the penalty, but also due to the potentially significant additional costs of those families having to downsize into the private rented sector and so, consequently, likely claiming higher levels of LHA.<sup>118</sup> In any event, the dearth in availability of suitable smaller properties, particularly one-bedroom, and the complexities of the affected claimants’ housing situations has resulted in only a small proportion of downsizers. The DWP evaluation suggests that, although downsizing increased as a result of the policy, it has remained modest – sitting at around 6% of affected claimants by autumn 2014,<sup>119</sup> although obtaining an accurate assessment of actual moves is difficult.<sup>120</sup> The lack of alternative properties meant the policy was effectively ‘doomed to fail’ from the very start.<sup>121</sup> Indeed, more claimants have floated off the policy by virtue of changes to their household circumstances, for instance children expected to share rooms growing older, than by being able or willing to move accommodation.<sup>122</sup>

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<sup>118</sup> In fact, the National Housing Federation argued that the housing benefit bill could *increase* as a result of the SSSC measure for this reason, calculating an additional overall cost of £143 million per annum. See National Housing Federation, ‘The Bedroom Tax: Some Home Truths’ (2013) <[http://s3-eu-west-1.amazonaws.com/doc.housing.org.uk/News/Bedroom\\_tax\\_home\\_truths.pdf](http://s3-eu-west-1.amazonaws.com/doc.housing.org.uk/News/Bedroom_tax_home_truths.pdf)> accessed 14 August 2017.

<sup>119</sup> DWP, ‘Evaluation of Removal of the Spare Room Subsidy: Final Report’ (n 17) 72–75. There is evidence to suggest that these moves have been concentrated amongst those aged 50–65. See Adam Park and Friederike Ziegler, ‘A Home for Life? A Critical Perspective on Housing Choice for “Downsizers” in the UK’ (2016) 9 *Architecture MPS* 1, 4.

<sup>120</sup> The Department for Local Communities and Government CORE Data (Continuous Recording of Lettings and Sales in Social Housing in England) is not comprehensive, omitting Wales and any mutual exchanges. Estimates are therefore based on landlord surveys, where the reasons for moving may not be accurately recorded (if at all), hence making SSSC-imposed moves more difficult to differentiate from general stock churn. See DWP, ‘Evaluation of Removal of the Spare Room Subsidy: Final Report’ (n 17) 73–74.

<sup>121</sup> Gesche M Huebner and David Shipworth, ‘All about Size? – The Potential of Downsizing in Reducing Energy Demand’ (2017) 186 *Energy and Urban Systems* 226, 213.

<sup>122</sup> DWP, ‘Evaluation of Removal of the Spare Room Subsidy: Final Report’ (n 17) 72–75

iii. ‘Shift the place of social security’

The final two stated aims are more ambiguous. As Lord Justice Laws indicated in *R (on the application of MA and Others) v The Secretary of State for Work and Pensions* [2013] EWHC 2213, ‘the engine of the [SSSC] is not only the saving of public funds ... there is also a strategic aspiration to shift the place of social security support in society’.<sup>123</sup> The same formulation has been repeatedly put forward by the government, most notably in Eadie QC’s arguments in front of the Supreme Court in *Carmichael*, where he argued that the principle aim of the SSSC was to ‘shift the place of social security’ from the ‘central government to local government’.<sup>124</sup>

This nebulous formulation perhaps serves an important legal function as it avoids the evidential problems and ironies in arguing that the policy can both save substantial sums of money and affect significant downsizing within the social rented sector. This aim, however, brings the DHP scheme – and the associated ‘cut and devolve’ approach to welfare reform – directly into the centre of the SSSC’s stated purpose. Local authorities are having to ‘fill some of the spaces left’<sup>125</sup> by the SSSC policy, and this has been re-fashioned into a key ‘aim’.

iv. Fairness

The final aim stated in support of the policy is one which the government has shied away from articulating in the course of legal appeals: ‘fairness’. Perhaps as a means of avoiding the problems associated with aims one and two above, political rhetoric on the SSSC became increasingly supplemented by alluding to the ‘fairness’ of differences between the space entitlement for Housing Benefit in the private and social rented sectors.<sup>126</sup> Rarely standing alone, this aim is generally coupled with either the demands of austerity or efficient management of the social housing stock. The logic is

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<sup>123</sup> *MA* (n 22) [58] (per Laws LJ).

<sup>124</sup> See the recording of the hearing (n 42) in *Carmichael* (n 7).

<sup>125</sup> Nick Bailey, Glen Bramley and Annette Hastings, ‘Symposium Introduction: Local Responses to “Austerity”’ (2015) 41 *Local Government Studies* 571.

<sup>126</sup> Becky Tunstall, ‘Relative Housing Space Inequality in England and Wales, and its Recent Rapid Resurgence’ (2015) 15 *International Journal of Housing Policy* 105, 107.

perhaps best articulated by David Cameron's response when pressed on the SSSC during Prime Minister's Questions: 'There is a basic argument of fairness. Why should we be doing more for people in social housing on housing benefit, than people in private housing on housing benefit?'<sup>127</sup>

This same sentiment – having largely been absent as an argument during the formation of the policy itself – was subsequently frequently employed by government ministers.<sup>128</sup> Aligning the social rented sector against the private rented sector in this way is indicative of its suffering from a sustained identity crisis. This SSSC aim draws on the tenure as a 'fault line'<sup>129</sup> with which normalised housing consumption can be identified, with social housing tenants as 'flawed consumers'<sup>130</sup> subject to unwarranted subsidy.

In common with 'shifting the place of social security', the aim of 'fairness' is, of course, an incredibly porous one. Carr and Cowan have highlighted its 'banality' as a rationale for the SSSC.<sup>131</sup> Indeed, 'fairness' has been a key organising concept for groups *opposing* the policy,<sup>132</sup> with the government being 'hoist on its own petard'<sup>133</sup> defending a policy justified by fairness but 'widely seen as palpably unfair'. Public opinion seems to suggest that, in the context of welfare reform, public appraisals of 'fairness' are far more concerned about generational inequities rather than those

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<sup>127</sup> HC Deb 6 February 2013, c269.

<sup>128</sup> See HC Deb 3 November 2014, c532; HC Deb 14 November 2016, c617WH; and HC Deb 11 February 2015, c269WH.

<sup>129</sup> John Flint, 'The Responsible Tenant: Housing Governance and the Politics of Behaviour' (2004) 19 *Housing Studies* 893, 901.

<sup>130</sup> Helen Carr and Dave Cowan, 'Labelling: Constructing Definitions of Anti-Social Behaviour' in John Flint (ed), *Housing, Urban Governance and Anti-social Behaviour: Perspectives, Policy and Practice* (Policy Press 2006) 64; and Zhan McIntyre and Kim McKee, 'Creating Sustainable Communities through Tenure-Mix: The Responsibilisation of Marginal Homeowners in Scotland' (2012) 77 *GeoJournal* 235, 237.

<sup>131</sup> Carr and Cowan (n 24).

<sup>132</sup> Kate Hudson, 'The Left Unity Project of Britain' (2015) 15 *New Politics* 37.

<sup>133</sup> Ian Cole and Ryan Powell, 'Housing and Welfare Reform' in Liam Foster et al (eds), *In Defence of Welfare 2* (Policy Press 2015) 43.



between tenures.<sup>134</sup> Others have argued that the government ‘wrapping their cuts’<sup>135</sup> in a ‘reasonable cloak of fairness’<sup>136</sup> serves as a ‘clever and devious rhetorical device’,<sup>137</sup> playing divide-and-rule between claimants on LHA and those in the social rented sector.

## 6. Summary

This introduction has sought to provide an overview of the focus of this thesis and a roadmap for the arguments which follow. It is intended to serve as a reference point to which to return if required – providing an outline of *why* I argue this research is important, *what* form it takes and *how* it has been done. The design and mechanics of the SSSC has been summarised. Many of the details summarily referred to above are returned to and elaborated upon where appropriate in the thesis. Similarly, this introduction has been largely silent on the key legal challenges against the policy. These too are analysed at the appropriate points within the chapters which follow, particularly in Chapter Four’s assessment of the DHP regime and the analysis put forward in Chapters Six to Eight.

As will be apparent, this is a theoretically driven inquiry, using the key concepts of the home and discretion to explore the SSSC policy. As is also hopefully clear, however, it is likewise intended to contribute to the empirical evidence base on the policy. The research which follows outlines a detailed assessment of the DHP scheme, from both the perspective of affected tenants and the decision-making of local authorities, and analyses of underexplored elements of the policy that arise from the tenant interviews. It is through the participants’ stories that this thesis is able to tell its own.

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<sup>134</sup> Ian Cole, ‘Is a Little Knowledge about Welfare a Dangerous Thing? A Small Scale Study into Attitudes towards, and Knowledge about, Welfare Expenditure.’ (2015) 9 *People, Place and Policy Online* 62.

<sup>135</sup> Paul Hoggett, Hen Wilkinson and Phoebe Beedell, ‘Fairness and the Politics of Resentment’ (2013) 42 *Journal of Social Policy* 567, 568.

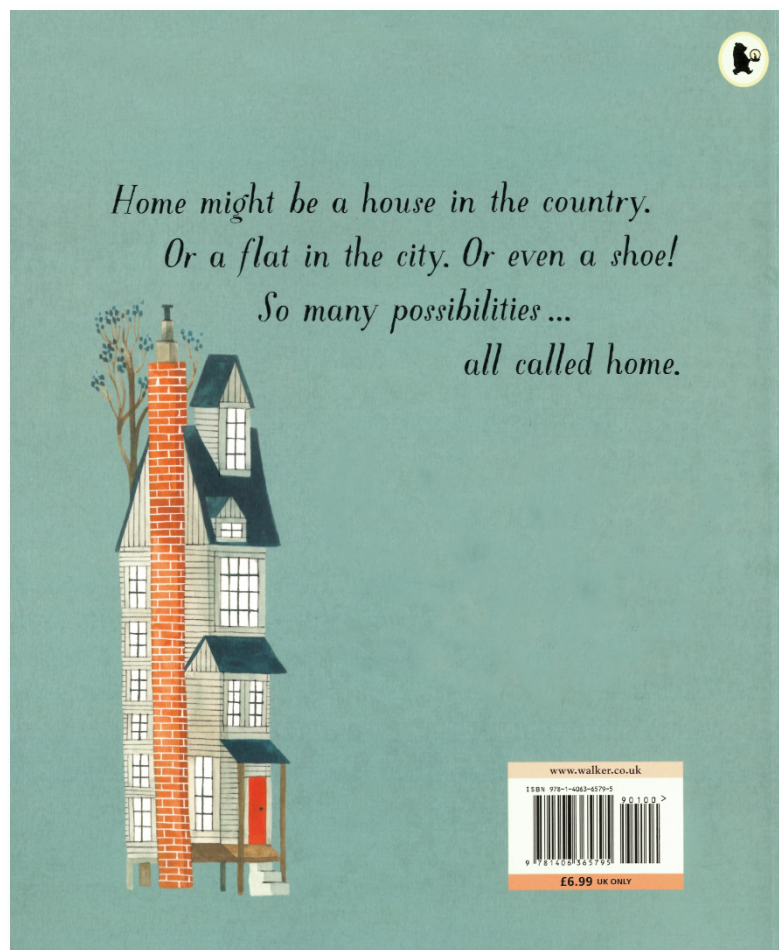
<sup>136</sup> Ibid.

<sup>137</sup> Tom Slater, ‘Revanchism, Stigma, and the Production of Ignorance: Housing Struggles in Austerity Britain’ in Suzanne Soederberg (ed), *Risking Capitalism*, vol.31 (Emerald Group 2016) 27.



# Reconceptualising home: home as an essentially contested concept and why this matters

## Chapter Two



**Source:** The back cover of Carson Ellis, *Home* (Candlewick Press 2015).

## 1. Defining the elephant

In 2013, David Nelson – a tenant who had lived in his social rented home in Fife, Scotland for 10 years – appealed the application of the SSSC penalty to his Housing Benefit. He argued that his ‘spare’ bedroom was not a bedroom at all. At 66 square feet it was too small, had no bed in it, and was used to store medical equipment. In dismissing his argument, the Upper-Tier Tribunal held that defining a bedroom ‘reflects the old adage that it is difficult to define an “elephant” but we know one when we see one’.<sup>1</sup> Those nuanced identifying elements, familiar to all of us and described in the First-Tier Tribunal as sitting ‘within a concept of home’,<sup>2</sup> were the focus of the tribunal’s attention.

David Nelson’s case demonstrates the problem this chapter seeks to address. A burgeoning academic literature has spent decades defining and refining a ‘concept of home’. Progress has been made in response to a scholarly ‘call to arms’<sup>3</sup> to advance the concept: research explores its constituent ‘modes’,<sup>4</sup> ‘signifiers’<sup>5</sup> or ‘essential elements’,<sup>6</sup> how the home can be ‘made and unmade’,<sup>7</sup> and its application to new settings and populations.<sup>8</sup> This scrutiny from across disciplines in a ‘multitude of different ways’<sup>9</sup> has developed a thick theoretical patina which highlights the internally complex and multi-faceted nature of home meanings.

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<sup>1</sup> *SSWP v David Nelson and Fife Council* [2014] UKUT 0525 (AAC), at 23.

<sup>2</sup> *Bedlington* [2014] UKFTT SC/231/13/01993 (SEC).

<sup>3</sup> Lorna Fox O’Mahony, ‘The Meaning of Home: From Theory to Practice’ (2013) 5 *International Journal of Law in the Built Environment* 156.

<sup>4</sup> Judith Sixsmith, ‘The Meaning of Home: An Exploratory Study of Environmental Experience’ (1986) 6 *Journal of Environmental Psychology* 281.

<sup>5</sup> Peter Somerville, ‘Homelessness and the Meaning of Home: Rooflessness or Rootlessness?’ (1992) 16 *International Journal of Urban and Regional Research* 529, 533.

<sup>6</sup> John E Annison, ‘Towards a Clearer Understanding of the Meaning of “Home”’ (2000) 25 *Journal of Intellectual and Developmental Disability* 251, 259.

<sup>7</sup> Richard Baxter and Katherine Brickell, ‘For Home Unmaking’ (2014) 11 *Home Cultures* 133.

<sup>8</sup> Iris Levin, *Migration, Settlement, and the Concepts of House and Home* (Routledge 2015).

<sup>9</sup> Hazel Easthope, ‘A Place Called Home’ (2004) 21 *Housing, Theory and Society* 128, 135.

It would be trite to say that ‘home’ is something different from the ‘bricks and mortar connotations’ of a house.<sup>10</sup> The ‘common-place sayings’<sup>11</sup> so regularly cited in the literature – ‘home is where the heart is’, ‘an Englishman’s home is his castle’, ‘home sweet home’ and so on<sup>12</sup> – all point to the innate assumption that the ‘concept of home is very simple’.<sup>13</sup> These diffuse experiences, however, do not lend themselves easily to conceptual clarity. Adjectives such as ‘vast’,<sup>14</sup> ‘scattered’,<sup>15</sup> and ‘overlapping’<sup>16</sup> have been employed to describe a body of research on home meanings that is difficult to summarise. Some researchers have gone as far as to call for abandoning the ‘concept of home’ altogether<sup>17</sup> and others lament its conceptual ‘confusion’.<sup>18</sup> The home studies literature does not aim to – and cannot – define the elephant.

This chapter does not seek to argue that this diversity in the home studies literature is ‘chaotic’<sup>19</sup> – in fact, I go on to assert that this range of competing perspectives and ongoing debates is an incredibly positive attribute. Instead, I make two interlinked theoretical arguments which inform the analysis in this thesis: that (i) the concept of home can be usefully described as an ‘essentially contested concept’ as articulated by

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<sup>10</sup> Chris Bevan, ‘Challenging “Home” as a Concept in Modern Property Law: Lessons from the Supreme Court Post Stack and Jones’ in Warren Barr (ed), *Modern Studies in Property Law*, vol.8 (Hart 2015) 197.

<sup>11</sup> Douglas Porteous, ‘Home: The Territorial Core’ (1976) 66 *Geographical Review* 383, 387.

<sup>12</sup> Lorna Fox, ‘The Meaning of Home: A Chimerical Concept or a Legal Challenge?’ (2002) 29 *Journal of Law and Society* 580; and Porteous (n 11) 387.

<sup>13</sup> Kumarini Silva, ‘Oh, Give Me a Home: Diasporic Longings of Home and Belonging’ (2009) 15 *Social Identities* 693, 694.

<sup>14</sup> Kathleen Mee, ‘“I Ain’t Been to Heaven Yet? Living Here, This Is Heaven to Me”’: Public Housing and the Making of Home in Inner Newcastle’ (2007) 24 *Housing, Theory and Society* 207.

<sup>15</sup> Frances Heywood, ‘Adaptation: Altering the House to Restore the Home’ (2005) 20 *Housing Studies* 531, 532.

<sup>16</sup> Daniel Williams and Norman McIntyre, ‘Where Heart and Home Reside: Changing Constructions of Place and Identity’ [2001] *Trends* 2000, 392.

<sup>17</sup> For a discussion of these arguments see: Bevan (n 10), 197; and Henny Coolen and Janine Meesters, ‘Editorial Special Issue: House, Home and Dwelling’ (2012) 27 *Journal of Housing and the Built Environment* 1, 2.

<sup>18</sup> Aviezer Tucker, ‘In Search of Home’ (1994) 11 *Journal of Applied Philosophy* 181, 181.

<sup>19</sup> Heywood (n 15) 532.

Gallie,<sup>20</sup> and (ii) that theorists working in the field of home studies should acknowledge the implications of this essentially contested status.

The label ‘essentially contested concept’ has been liberally applied elsewhere, particularly in socio-legal scholarship where Waldron argues its use has ‘run wild’.<sup>21</sup> Having been stretched from describing concepts as diverse as ‘democracy’<sup>22</sup> and ‘tourism’,<sup>23</sup> it is a term that is clearly in danger of being applied to any concept about which there exists a particularly aggravated debate. Gallie’s original articulation of the term, however, is narrower; as perhaps best expressed by Dryzek, an essentially contested concept ‘means not just that there is a lot of disagreement ... but rather that disagreement is integral to the concept’.<sup>24</sup> Gallie provides a series of ‘semi-formal conditions’<sup>25</sup> that are generally satisfied by concepts of this nature and which, I argue, are aptly met by the conceptual treatment of home in the academic literature.

Importantly, the argument here is not that diagnosing the ‘concept of home’ as ‘essentially contested’ is an end in itself; a theoretical badge that indicates something in its own right. Instead, I contend that the characteristics which Gallie identifies can usefully ‘direct our critical attention’<sup>26</sup> to thinking about how best to employ this concept in the home studies literature. The argument is in three sections. The first (‘Three preliminary issues: what is a concept of home?’) clarifies what is meant by a ‘concept’ in this context, highlighting the importance of the concept/conception

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<sup>20</sup> Walter Gallie, ‘Essentially Contested Concepts’ (1955) 56 *Proceedings of the Aristotelian Society* 167. For a particularly comprehensive assessment of the content of Gallie’s theory and subsequent criticism of it, see: Joonas Pennanen, ‘After Essentially Contested Concepts’ (University of Jyväskylä 2012) <[goo.gl/LfTCCT](http://goo.gl/LfTCCT)> accessed 20 May 2017.

<sup>21</sup> Jeremy Waldron, ‘Is the Rule of Law an Essentially Contested Concept (In Florida)?’ (2002) 21 *Law and Philosophy* 137.

<sup>22</sup> John S Dryzek, ‘Can There Be a Human Right to an Essentially Contested Concept? The Case of Democracy’ (2016) 78 *Journal of Politics* 357.

<sup>23</sup> Brian Garrod and Alan Fyall, ‘Managing Heritage Tourism’ (2000) 27 *Annals of Tourism Research* 682.

<sup>24</sup> Dryzek (n 22).

<sup>25</sup> Gallie (n 20) 168.

<sup>26</sup> Patrick J L Cockburn, ‘A Common Sense of Property?’ (2016) 17 *Distinktion: Journal of Social Theory* 78.

distinction and the home's position as an 'experience near', as opposed to 'experience distant', concept. The second ('The home as an essentially contested concept') argues that the concept of home aptly meets Gallie's criteria for essential contestability. The third ('Why the home as an essentially contested concept matters') argues that recognising the concept of home as essentially contested has a series of (hopefully helpful) implications for those utilising it in the home studies literature.

## 2. Three Preliminary issues: what is a 'concept of home'?

Before turning to debates in the home studies literature in more detail, it is important to first deal with key preliminary issues about what is meant by a *concept* of home both in the arguments that follow and within the context of the thesis itself. There are three fundamental points to make, which may appear obvious to some readers, but are not always immediately apparent from how the concept is deployed in the home studies literature.

First, in common with the use of other concepts such as 'law',<sup>27</sup> when referring to the 'concept of home', researchers within the social sciences are using the term as shorthand for a group of social practices that can be usefully conceptualised as interrelated. This is fundamental to conceptual analysis in the social sciences. As famously argued by John Stuart Mill, the 'very excellence of analysis' is that it 'enables us mentally to separate ideas which have only casually clung together'.<sup>28</sup> Put another way, the base unit of analysis here is not neurons firing in the brain when an

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<sup>27</sup> Kenneth M Ehrenberg, 'Law Is Not (Best Considered) an Essentially Contested Concept' (2011) 7 *International Journal of Law in Context* 209, 213.

<sup>28</sup> As cited in Johan Olsthoorn, 'Conceptual Analysis' in Adrian Blau (ed), *Methods in Analytical Political Theory* (Cambridge University Press 2017) 153.

individual feels ‘at home’ or not.<sup>29</sup> Instead it is the social practices<sup>30</sup> – actions, interactions, knowledge production, and so on – that can be thought of as being interrelated with the home and would be difficult to analyse or explain ‘without the notion of a concept’.<sup>31</sup> When Baxter and Brickell analyse home making and *unmaking*,<sup>32</sup> or when Hamzah and Adnan discuss its emotional construction,<sup>33</sup> their focus is not on the appraisal of some transcendental entity of ‘home’ as their language may *prima facie* suggest, but instead on how to best conceptualise those interrelated social practices.

This is not to make broader metaphysical claims about the nature of human experience. Positivist social and environmental psychology has been particularly influential in the development of the home studies literature,<sup>34</sup> and indeed, the way some of these assumptions have bled unquestioned into subsequent analysis has been criticised.<sup>35</sup> Of

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<sup>29</sup> Though the literature is comparatively modest, for some this *is* the focus. Psychologists have attempted to investigate some of the possible mechanics of place attachment in a way which expands on the social and environmental psychology which dominates. At the more accessible end of the spectrum, where even a law PhD student can just about grasp the principles at play, see: Paul Morgan, ‘Towards a Developmental Theory of Place Attachment’ (2010) 30 *Journal of Environmental Psychology* 11; and Leila Scannell and Robert Gifford, ‘Place Attachment Enhances Psychological Need Satisfaction’ (2016) 49 *Environment and Behavior* 359.

<sup>30</sup> I am using the term ‘social practices’ fairly broadly here, simply to refer to the way in which people act in their social context in a way which is not a psychological focus on ‘social behaviour’. In other words, we are interested in social life, rather than some physical or biological assessment of behaviour. For a more detailed discussion on the meaning of social practices, see the conclusions drawn by Esfeld: Michael Esfeld, ‘What Are Social Practices?’ [2003] *International Review of Social and Human Sciences* 19, 40.

<sup>31</sup> Elisabetta Lalumera, ‘On the Explanatory Value of the Concept-Conception Distinction’ (2014) 8 *Journal of the Italian Philosophy of Language* 73.

<sup>32</sup> Baxter and Brickell (n 7).

<sup>33</sup> Hasniyati Hamzah and Nohd Adnan, ‘The Meaning of Home and Its Implications on Alternative Tenures: A Malaysian Perspective’ (2016) 33 *Housing, Theory and Society* 305.

<sup>34</sup> For an early assessment of the significance of social and environmental psychology to the development of the home studies literature, see: Sixsmith (n 4).

<sup>35</sup> See: James G Cantrill, ‘On Seeing “Places” for What They Are, and Not What We Want Them to Be’ (2016) 10 *Environmental Communication* 525.; and Nestor Davidson, ‘Property, Well-Being, and Home: Positive Psychology and Property Law’s Foundations’ in



course, theorists working in the home studies literature differ in their epistemological and disciplinary standpoints which affects how they decide to operationalise the concept in ‘describing, evaluating, and comparing’<sup>36</sup> these social practices. The point here is to highlight that the discussion which follows is not analysing some concrete *a priori* entity about which there are disputes to its best conceptualisation, but is instead interrogating the way in which a set of social practices is conceptualised as being interrelated around the home.

The second fundamental point is that there is a difference between (a) the ‘concept of home’ and (b) *conceptions of* the ‘concept of home’. The (lengthy and ongoing) jurisprudential lineage on the concept/conception distinction is not a metaphysical rabbit-hole that needs to be entered here;<sup>37</sup> it suffices for our purposes to highlight that researchers can disagree about what elements may form part of a *concept* of home, while still having a viable *conception*. To give an example, Fox’s analysis places particular emphasis on ‘ontological security’,<sup>38</sup> particularly for home-owners, whereas Hohmann instead deals with security as an element of privacy.<sup>39</sup> Both authors are not ‘talking past each other’:<sup>40</sup> they agree on a great deal<sup>41</sup> and any differences of opinion are not capable of resolution by simple disambiguation into different concepts. Although they may disagree about the key principles which constitute the *concept*, clearly each advances a sensible *conception* of home<sup>42</sup> – in other words, both are

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Helen Carr, Brendan Edgeworth and Caroline Hunter (eds), *Law and The Precarious Home: Socio-Legal Perspectives on the Home in Insecure Times* (Hart 2018).

<sup>36</sup> Douglas Dow, ‘Working with Concepts: Challenging the Language-Reality Dichotomy’ in Dvora Yanow and Peregrine Schwartz-Shea (eds), *Interpretation and Method: Empirical Research Methods and the Interpretive Turn* (2nd edn, Routledge 2015) 66.

<sup>37</sup> For perhaps the best known examples, from Rawls and Dworkin respectively, see: John Rawls, *A Theory of Justice* (Oxford University Press 1999) 5–6, 108–109; and Ronald Dworkin, *Law’s Empire* (Harvard University Press 1986) 71–72.

<sup>38</sup> See: Lorna Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart 2007) 232–236, 390–393; and Fox, ‘The Meaning of Home: A Chimerical Concept or a Legal Challenge?’ (n 12) 605–607.

<sup>39</sup> Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Hart 2013) 156–159.

<sup>40</sup> Lalumera (n 31) 77.

<sup>41</sup> See, for instance, Hohmann’s use of Fox’s work: Hohmann (n 39) 164, 173.

<sup>42</sup> Rawls (n 37) 5.

focused on fleshing out similar sets of interrelated social practices, even if they may ‘organise the criteria’ for evaluating the meaning differently.<sup>43</sup>

Third, it is important to highlight the conceptual challenges a ‘concept of home’ presents in its status as an ‘experience near’ – as opposed to an ‘experience distant’ – concept.<sup>44</sup> Namely, the ‘home’ is a ‘commonplace word used in everyday contexts’<sup>45</sup> in a way that terms used in specialised scientific literatures, such as ‘place attachment’<sup>46</sup> and so on, are not. As will be discussed in more detail below, much of the home studies literature reads as if this did not pose a problem or as if the analysis were a positivist inquiry; namely, as if the home were an entity that enjoys an existence ‘independent of how individual’s think of it’.<sup>47</sup> The focus, therefore, is often on fleshing out descriptive features of the concept which can then be identified in empirical data. This distinction between ‘experience near’ and ‘experience distant’ concepts – and the associated problems of failing to account for the conceptual challenges posed by the former – is an important precis for the arguments on the use of the concept which follows the application of Gallie’s criteria for essential contestability below.

These three points, though they may appear self-evident to some, are important to underscore before turning to the analysis informed by Gallie’s notion of an ‘essentially contested concept’.<sup>48</sup> This approach avoids a ‘radical, sceptical nihilism’<sup>49</sup> that could arise should my focus instead be on some reified ‘concept of home’ itself, rather than the disputes about how best to conceptualise these social practices. Put another way, if I were to argue that a certain characteristic of the concept of home is problematic in

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<sup>43</sup> Dow (n 36) 68.

<sup>44</sup> Frederic Schaffer, *Elucidating Social Science Concepts: An Interpretivist Guide* (Routledge 2015) 3–4.

<sup>45</sup> Ibid.

<sup>46</sup> Some of this literature is returned to below, but for a thorough recent overview, see: Leila Scannell and Robert Gifford, ‘The Experienced Psychological Benefits of Place Attachment’ (2017) 51 *Journal of Environmental Psychology* 256.

<sup>47</sup> Schaffer (n 44) 2.

<sup>48</sup> Gallie (n 20).

<sup>49</sup> David Baldwin, ‘The Concept of Security’ (1997) 23 *Review of International Studies* 5,10.

its own right, then I would be advancing a ‘conceptual relativism’<sup>50</sup> which asserts that no conception of home could be better than any other. My argument is not focused on critiquing a certain characteristic of some transcendental concept of home, but rather on analysing the way that the concept is utilised within the home studies literature and disputes around its use.

### 3. The home as an essentially contested concept

If this were a typical thesis engaging with the concept of home, this would be the point at which the literature would be distilled into a set of heuristics to inform the later analysis. Most studies drawing on the concept of home start this process of structuring their analysis using influential literature reviews, particularly Easthope’s,<sup>51</sup> Després’,<sup>52</sup> or Mallet’s,<sup>53</sup> and situate new studies alongside the sub-concepts and themes they identify.<sup>54</sup> This exercise sets the terms for the subsequent discussion, with any empirical data or theoretical contributions framed within the key dimensions identified – such as ‘performativity, experiences and representations’<sup>55</sup> – or sub-concepts – such as ‘family and community’,<sup>56</sup> comfort, territory, control or security.<sup>57</sup>

Such reviews provide useful assessments of the conceptual debates and set out their stall within them. They do not, however, present single definitions or a unified front; they are contributions to an unending debate about how to best conceptualise home meanings. Some even criticise the utility of such an inductive approach, due to the

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<sup>50</sup> Pennanen (n 20) 51.

<sup>51</sup> Easthope (n 9).

<sup>52</sup> Carole Després, ‘The Meaning of Home: Literature Review and Directions for Future Research and Development’ (1991) 8 *Journal of Architectural and Planning Research* 96.

<sup>53</sup> Shelley Mallett, ‘Understanding Home: A Critical Review of the Literature’ (2004) 52 *Sociological Review* 62.

<sup>54</sup> Levin (n 8).

<sup>55</sup> Rowland Atkinson and Keith Jacobs, *House, Home and Society* (Palgrave Macmillan 2016) 38.

<sup>56</sup> Hamzah and Adnan (n 33).

<sup>57</sup> Adriana Mihaela Soaita, ‘The Meaning of Home in Romania: Views from Urban Owner-occupiers’ (2015) 30 *Journal of Housing and the Built Environment* 69.

‘sheer amount and diversity of material’.<sup>58</sup> As a phenomenon where ‘emotions are central’,<sup>59</sup> and which means ‘different things to different people’,<sup>60</sup> a single account of the concept of home will never be settled upon and nor should it be. As Spaic suggests with reference to a concept of law, ‘an accurate, adequate, noncircular and clear definition of the concept ... is legitimate only if we assume that a definition is the last word’.<sup>61</sup> The heavily nuanced and multi-faceted nature of the literature on home makes clear that no such definition is possible or indeed desirable.

Instead of undertaking its own version of this distilling exercise, this section advances the argument that the concept of home can be usefully thought of as being ‘essentially contested’, in the way outlined by Gallie<sup>62</sup> and then subsequently refined by many others.<sup>63</sup> His theory attempts to explain how there can be conceptual disputes that are not ‘resolvable by argument of any kind’, but are nevertheless ‘sustained by perfectly respectable argument and evidence’.<sup>64</sup> Gallie’s theory has been applied to the home studies literature in passing elsewhere, most notably by Marotta, who suggests that the home can ‘be considered one of those essentially contested concepts’.<sup>65</sup> Others have referred to the conceptualisation of the home as a particularly ‘contested domain’,<sup>66</sup>

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<sup>58</sup> Amos Rapoport, ‘Thinking about Home Environments: A Conceptual Framework’, *Home Environments* (Springer 1985) 255.

<sup>59</sup> Cecilie Juul Jørgensen, ‘The Space of the Family: Emotions, Economy and Materiality in Homeownership’ (2016) 33 *Housing, Theory and Society* 98.

<sup>60</sup> Griff Tester and Adia Harvey Wingfield, ‘Moving Past Picket Fences: The Meaning of “Home” for Public Housing Residents’ (2013) 28 *Sociological Forum* 70.

<sup>61</sup> Bojan Spaic, ‘On the Essential Contestedness of the Concept of Law: Gallie’s Framework for Essential Contestedness Applied to the Concept of Law’ (2014) 57 *Synthesis Philosophica* 175.

<sup>62</sup> Gallie (n 20).

<sup>63</sup> For a summary of the key debates on the interpretation of Gallie’s original theory, see: David Collier, Fernando Daniel Hidalgo and Andra Olivia Maciuceanu, ‘Essentially Contested Concepts: Debates and Applications’ (2006) 11 *Journal of Political Ideologies* 211.

<sup>64</sup> Gallie (n 20) 169.

<sup>65</sup> Vince Marotta, ‘Home, Mobility and the Encounter with Otherness’ in Michele Lobo and Fethi Mansouri (eds), *Migration, Citizenship and Intercultural Relations: Looking Through the Lens* (Routledge 2011) 193.

<sup>66</sup> April Veness, ‘Neither Homed nor Homeless: Contested Definitions and the Personal Worlds of the Poor’ (1993) 12 *Political Geography* 319, 324.

and there has been sustained attention on ‘property’ as an essentially contested concept, most notably by Waldron<sup>67</sup> and Cockburn.<sup>68</sup> This is – to my knowledge – the first attempt to explicitly apply Gallie’s criteria to the concept of home and consider the associated implications.

Gallie outlines seven ‘semi-formal conditions’,<sup>69</sup> many of which are ‘overlapping’.<sup>70</sup> Van der burg provides a useful initial characterisation of these as dealing respectively with *fit* and *function*. The first four conditions – (1) an appraisive character; (2) internal complexity; (3) diverse describability; and (4) openness – all deal with whether the use of the concept *fits* the requirements of essential contestability. The final three – (5) reciprocal recognition; (6) an original exemplar; and (7) progressive completion – all refer to the *function* of the ongoing debates on the concept, in other words, given their features of essential contestability, why bother to continue using the concept? Each of these will be considered in turn below. In the interests of keeping the analysis succinct and avoiding repetition of key assertions, (2) and (3) are taken together, as are (5) and (7). Figure 2.1 details a basic outline of how the ‘concept of home’ meets Gallie’s conditions for essential contestability, to act both as a summary and point of reference.

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<sup>67</sup> Jeremy Waldron, *The Right to Private Property* (Clarendon Press 1990) 51.

<sup>68</sup> Cockburn (n 26).

<sup>69</sup> Gallie (n 20) 168.

<sup>70</sup> Pennanen (n 20).

**Figure 2.1:** Application of Gallie’s criteria for ‘essential contestability’ to the ‘concept of home’.

<b>Criterion of ‘essential contestability’</b>	<b>Satisfaction by the ‘concept of home’</b>
<i>Fit</i>	
1. Appraisive	1. Home ascribed some value, be it positive or negative.
2. Internally complex	2. Literature repeatedly refers to multiple internal elements of the home.
3. Diversely describable	3. These elements are weighed in different ways.
4. Open character	4. Its meaning and significance has changed over time and is open to changing in the future.
<i>Function</i>	
5. Recognition of contestation	5. There are divergent approaches to the home in the literature and continuing academic debate on its best conceptualisation.
6. An original exemplar	6. Home studies shares a common analytical starting point which provides the implicit focus of modern conceptual debates.
7. Progressive understanding	7. The multiplicity of approaches is positive and has led to the development of new conceptions in the home studies literature.

To reiterate: to assert that the concept of home is essentially contested is not a criticism of the home studies literature. Instead, it is intended to ‘help explain its usage’.<sup>71</sup> As argued by Collier et al, to describe a concept as ‘essentially contested’ does not prima facie mean anything in its own right, but it should yield useful insights about the concept’s application.<sup>72</sup> Furthermore, as is hopefully made clear in the analysis which follows, the focus here is not on criticising abstracted features of a ‘concept of home’ itself; instead the focus is on how the concept is used by theorists and the resulting

<sup>71</sup> Ehrenberg (n 27) 40.

<sup>72</sup> Collier et al (n 63) 215.

‘intractability’ of these debates,<sup>73</sup> or to explain ‘the incompleteness of one’s theory of a concept’.<sup>74</sup> After outlining the applicability of the criteria, the implications of recognising the concept of home as essentially contested are considered.

### 3.1. Condition 1: the concept must be appraisive

First, in order to be considered essentially contested, the use of the concept of home must focus on some ascription of value, be it positive or negative (or both).<sup>75</sup> This criterion ensures that the concept is not being used as a ‘purely descriptive’<sup>76</sup> tag – as may be the case with object noun concepts,<sup>77</sup> such as a ‘house’ – when researchers wish to label their findings. In other words, the conceptual debate should not be solely focused on the semantics of the description: is this about the home or not? Instead, although conceptual debates will likely still include the discussion of ‘empirically describable and observable components’,<sup>78</sup> these must be capable of being ascribed some value, albeit one which may not be positive.

It is clear from the broad literature tackling home meanings that ‘home’, much like ‘democracy’, is an appraisive concept *par excellence*.<sup>79</sup> Perhaps the best illustration is the formulation employed by Rapoport and later Fox of the ‘home = house + X’,<sup>80</sup> with the conceptual challenge to ‘unravel [this] enigmatic “X factor”’,<sup>81</sup> representing those

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<sup>73</sup> Pennanen (n 20) 66.

<sup>74</sup> Ehrenberg (n 27) 41.

<sup>75</sup> Collier et al (n 63).

<sup>76</sup> Thomas D Perry, ‘Contested Concepts and Hard Cases’ (1977) 88 *Ethics* 20.

<sup>77</sup> Wibren van der Burg, ‘Law as a Second-Order Essentially Contested Concept’ [2016] *Jurisprudence* 1, 5.

<sup>78</sup> Michael Freeden, ‘Political Concepts and Ideological Morphology’ (1994) 2 *Journal of Political Philosophy* 140.

<sup>79</sup> Gallie (n 20).

<sup>80</sup> See: Amos Rapoport, ‘A Critical Look at the Concept of Home’ in Eje Arén, David Stea and David N Benjamin, *The Home: Words, Interpretations, Meanings, and Environments* (Ashgate 1995) 29; and Fox, *Conceptualising Home: Theories, Laws and Policies* (n 38) 590.

<sup>81</sup> Fox, ‘The Meaning of Home: A Chimerical Concept or a Legal Challenge?’ (n 12) 590.

‘more abstract functions of home’.<sup>82</sup> Much of the home studies literature is focused on exploring these ‘X factor categories’<sup>83</sup> of home, drawing on the now familiar coterie of sub-terms such as ‘identity’, ‘security’, ‘territory’ and so on. Recent contributions by Baxterer and Brickell<sup>84</sup> and Nowicki,<sup>85</sup> on home unmaking and domicide respectively, go further by conceptualising the ‘fluidity’<sup>86</sup> of this value and the nuanced ways in which it is ‘made, unmade and remade across the life course’.<sup>87</sup> The focus is on the ‘precarious process by which material and/or imaginary components of home’ – the appraisive value of home – ‘are unintentionally or deliberately, temporarily or permanently, divested, damaged or even destroyed’.<sup>88</sup>

More broadly, the sizable literature on home meanings is often implicitly preoccupied with appraisive questions of ‘lumpiness’ of the home, as articulated by Fennell:<sup>89</sup> the non-linear way in which people draw benefits (or not) from their homes, particularly with reference to migration and gerontology;<sup>90</sup> an assessment of the bare minimum of

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<sup>82</sup> Sarah Nield, ‘Article 8 Respect for the Home: A Human Property Right?’ (2013) 24 King’s Law Journal 147, 150.

<sup>83</sup> Lucy Finchett-Maddock, “‘Time’s Up – Resisting Private Limitations on Rights to Housing and Protest”” in Julian Sidoli, Michael Vols and Marvin Kiehl (eds), *Regulating the City: Contemporary Urban Housing Law* (Eleven International 2016) 81.

<sup>84</sup> Baxter and Brickell (n 7).

<sup>85</sup> Mel Nowicki, ‘Rethinking Domicide: Towards an Expanded Critical Geography of Home’ (2014) 8 Geography Compass 785.

<sup>86</sup> Helen Taylor, *Refugees and the Meaning of Home: Cypriot Narratives of Loss, Longing and Daily Life in London* (Palgrave Macmillan 2015) 25, 156.

<sup>87</sup> Nowicki (n 85).

<sup>88</sup> Baxter and Brickell (n 7) 134.

<sup>89</sup> Lee Fennell, ‘Lumpy Property’ [2012] Coase-Sandor Working Paper Series in Law and Economics 1.

<sup>90</sup> See: Farida Fozdar and Lisa Hartley, ‘Housing and the Creation of Home for Refugees in Western Australia’ (2014) 31 Housing, Theory and Society 148; Steve Taylor, “‘Home Is Never Fully Achieved ... Even When We Are In It’: Migration, Belonging and Social Exclusion within Punjabi Transnational Mobility’ [2013] Mobilities 1; Katherine H Leith, “‘Home Is Where the Heart Is ... or Is It?’: A Phenomenological Exploration of the Meaning of Home for Older Women in Congregate Housing’ 20(4) Journal of Aging Studies 317; and Adeline Cooney, “‘Finding Home’: A Grounded Theory on How Older People “find Home” in Long-Term Care Settings’ (2012) 7 International Journal of Older People Nursing 188.



what can constitute a home;<sup>91</sup> and how people create and choose between perceived home spaces.<sup>92</sup> Critical feminist perspectives which highlight negative values that can accompany the home rarely advocate abandoning the concept altogether, instead emphasising a commitment to ‘extend its positive values to everyone’.<sup>93</sup> These are all areas in which theorists use a theoretical concept of home to evaluate something of a perceived value. Given the extent of these literatures,<sup>94</sup> it is worth providing a short overview of how the concept of home has been used appraisively with reference to migration and gerontology. As an archetype example of the appraisive assessment of the home, this section then turns to conceptual arguments on the ‘minimum’ necessary to constitute a home.

### *3.1.1. Lumpy benefits of the home: migration and gerontology*

Many recent contributions to the home studies literature focus on the process of creating new attachments to home space or practices of ‘homemaking’. A sizable body of work has clustered around two groups in particular: migrants and the elderly. A ‘panoply of theories and techniques’ is used to study the meaning of home (and resettlement to new homes) of migrants and refugees.<sup>95</sup> Particular focus is placed on

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<sup>91</sup> See: Sandy G Smith, ‘The Essential Qualities of a Home’ (1994) 14 *Journal of Environmental Psychology* 31; Cameron Parsell, ‘Home Is Where the House Is: The Meaning of Home for People Sleeping Rough’ (2012) 27 *Housing Studies* 159; and Rebecca Sheehan, ‘“I’m Protective of This Yard”: Long-Term Homeless Persons’ Construction of Home Place and Workplace in a Historical Public Space’ (2010) 11 *Social and Cultural Geography* 539.

<sup>92</sup> See: Tomoko Tokunaga, ‘“I’m Not Going to Be in Japan Forever”: How Filipina Immigrant Youth in Japan Construct the Meaning of Home’ (2011) 6 *Ethnography and Education* 179.

<sup>93</sup> Iris Young, ‘House and Home: Feminist Variations on a Theme’ in Iris Young (ed), *Dilemmas of Gender, Political Philosophy, and Policy* (Princeton University Press 1997) 159.

<sup>94</sup> The *Journal of Housing for the Elderly* alone has carried 29 articles drawing on the ‘concept of home’ since 2008. A conservative search of Copac suggests that within the last five years, many hundreds of journal articles have been published focused on gerontology and the home, and migration and the home respectively.

<sup>95</sup> David Ralph and Lynn A Staeheli, ‘Home and Migration: Mobilities, Belongings and Identities’ (2011) 5 *Geography Compass* 517.

the complicated process of the home ‘creation’ for those settling in new places,<sup>96</sup> and about how transnational migrants renegotiate their conceptions of home and sense of belonging temporally and spatially.<sup>97</sup> The difficult circumstances many face, in terms of issues like mental health,<sup>98</sup> or traumatic experiences common for refugees,<sup>99</sup> provide the context for the ‘painful, complicated and difficult’ home-making which follows.<sup>100</sup> Effectively, the emphasis on this process of ‘continuing re-negotiation’<sup>101</sup> and on factors (either preceding or following the relocation) which appear to support or inhibit the home-making process orientates the literature around these lumpy questions of the non-linear conferral of benefits from the home. As described by Butcher in her study of Australians living in Singapore, it is the task of analysing the ‘home-making strategies deployed ... to replace home’.<sup>102</sup> Namely, what helps migrants feel at home, how can it happen more quickly, and what makes it more difficult?

Some recent research tackles these questions, even when not framed explicitly as such. Canefe’s discussion of the ‘acquisition’ of an attachment to the home in her review of four books on the meaning of home for migrants,<sup>103</sup> or Taylor’s analysis of the British

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<sup>96</sup> Farida Fozdar and Lisa Hartley, ‘Housing and the Creation of Home for Refugees in Western Australia’ (2013) 31 *Housing, Theory and Society* 148.

<sup>97</sup> Liangni Sally Liu, ‘A Search for a Place to Call Home: Negotiation of Home, Identity and Senses of Belonging among New Migrants from the People’s Republic of China (PRC) to New Zealand’ (2014) 10 *Emotion, Space and Society* 18.

<sup>98</sup> Laura Simich, David Este and Hayley Hamilton, ‘Meanings of Home and Mental Well-being among Sudanese Refugees in Canada’ (2010) 15 *Ethnicity and Health* 199.

<sup>99</sup> Nergis Canefe, ‘To Feel at Home Abroad or No Place Like Home: Meanings of Displacement in Refugee Studies’ (2010) 27 *Refuge* 147.

<sup>100</sup> Tokunaga (n 92) 191.

<sup>101</sup> Annika Philipp and Elsie Ho, ‘Migration, Home and Belonging: South African Migrant Women in Hamilton, New Zealand’ (2010) 36 *New Zealand Population Review* 81.

<sup>102</sup> Melissa Butcher, ‘From “Fish out of Water” to “Fitting in”’: The Challenge of Re-placing Home in a Mobile World’ (2010) 16 *Population, Space and Place* 23, 33.

<sup>103</sup> Canefe (n 99).

Punjabi community,<sup>104</sup> deal with similar questions by looking at how the home is ‘continually pursued [and] reproduced’ by immigrants settling in new places.<sup>105</sup>

The gerontological literature on the meaning of home aligns itself well with the theoretical approach taken in the study of immigrants and refugees. With the increasing public policy focus on ‘aging in place’ strategies and social care,<sup>106</sup> there is a sizable amount of research – much of it undertaken recently – on the concept of home for those moving into residential care settings. Questions relating to moving older individuals, particularly those who have been living in a property for a long period of time, are strongly aligned to an assessment of the home as this appraisive entity. It is not only a movement away from the home which can cause a discordant change, but remaining within one, with Sixsmith highlighting that ‘a ‘happy family home of middle adulthood can become a place of loneliness and despair in very old age’.<sup>107</sup> As researchers try to handle this problem in the context of moving the elderly into care home settings and the changing meaning of home across the life course, the focus of most of the literature is on the creation of ‘home like environments’ in residential care,<sup>108</sup> and analysis of the different types of factors – be they external to the individual

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<sup>104</sup> See Steve Taylor, ‘The Diasporic Pursuit of Home and Identity: Dynamic Punjabi Transnationalism’ (2014) 62 *Sociological Review* 276; Steve Taylor, ‘Searching for Ontological Security: Changing Meanings of Home amongst a Punjabi Diaspora’ (2013) 47 *Contributions to Indian Sociology* 395; and Steve Taylor, “‘Home is Never Fully Achieved ... Even When We Are In it’’: Migration, Belonging and Social Exclusion within Punjabi Transnational Mobility’ (2013) *Mobilities* 1.

<sup>105</sup> Taylor (n 90) 206.

<sup>106</sup> Antonio Cristoforetti, Francesca Gennai and Giulia Rodeschini, ‘Home Sweet Home: The Emotional Construction of Places’ (2011) 25 *Journal of Aging Studies* 225.

<sup>107</sup> Judith Sixsmith et al, ‘Healthy Ageing and Home: The Perspectives of Very Old people in Five European Countries’ (2014) 106 *Social Science and Medicine* 1, 2.

<sup>108</sup> Sheila L Molony, Deborah Dillon McDonald and Christine Palmisano-Mills, ‘Psychometric testing of an instrument to measure the experience of home’ (2007) 30 *Research in Nursing and Health* 518.

or ‘less concrete’ intrinsic ones<sup>109</sup> – which can help people transition to care home settings, or support ‘aging in place’.<sup>110</sup>

This treatment of the home as something which can be constructed under the right circumstances, or to which people can be ‘re-attached’ after being dislodged from elsewhere,<sup>111</sup> provides the implicit underlying thinking for a great deal of the gerontological literature utilising a concept of home. This is perhaps best illustrated using diagrams taken from Cooney’s research on ‘finding home’ in a carehome setting<sup>112</sup> – where she described the factors necessary for creating a sense of home – and Oswald et al’s research into the benefits gleaned from property over time for healthy, mobility impaired and blind older adults.<sup>113</sup> The former depicting the home as a series of puzzle pieces which can be assembled together to ‘create’ a home; the latter depicting the home as an area graph, comprised of sub-elements which can be created or manipulated to affect the home interest.

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<sup>109</sup> For an appraisal of different types of factors and their influence on the meaning of home for elderly people, see Leith (n 90).

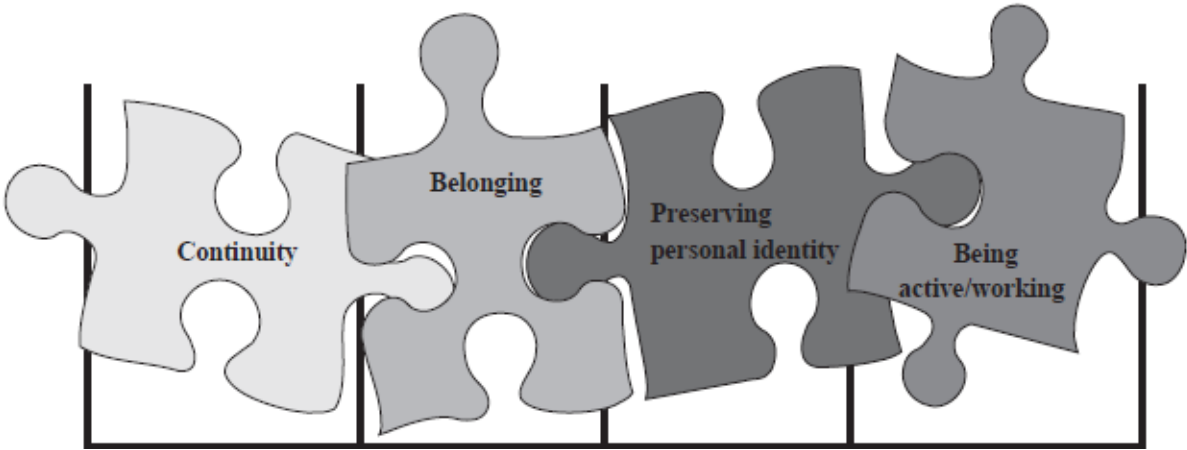
<sup>110</sup> Janine L Wiles et al, ‘The Meaning of “Ageing in Place” to Older People’ (2012) 52 *Gerontologist* 357.

<sup>111</sup> Marianne Granbom et al, ‘Residential Normalcy and Environmental Experiences of Very Old People: Changes in Residential Reasoning over Time’ (2014) 29 *Journal of Aging Studies* 9.

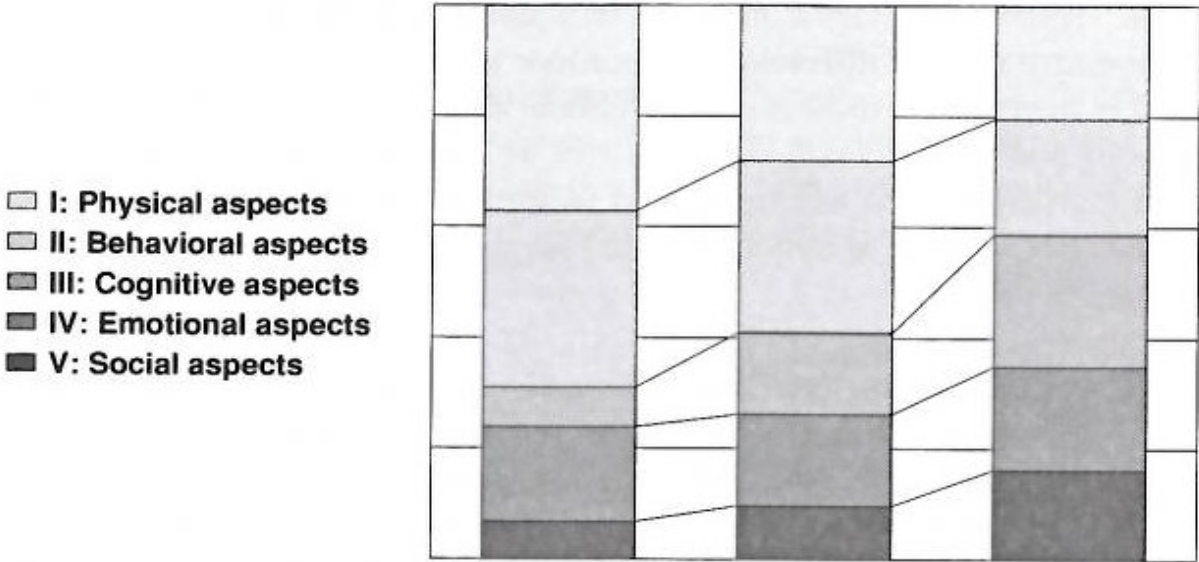
<sup>112</sup> Adeline Cooney, ‘“Finding Home”: A Grounded Theory on How Older People “Find Home” in Long-term Care Settings’ (2012) 7 *International Journal of Older People Nursing* 188, 196.

<sup>113</sup> Frank Oswald et al, ‘The Role of the Home Environment in Middle and Late Adulthood’ in Hans-Werner Wahl et al (eds), *The Many Faces of Health, Competence and Well-being in Old Age* (Springer 2006) 14.

**Figure 2.2:** Two diagrams identified in the home studies literature demonstrating the ‘concept of home’ being used appraisively.



**Source:** Adeline Cooney, ‘‘Finding Home’’: A Grounded Theory on How Older People ‘‘Find Home’’ in Long-term Care Settings’ (2012) 7 *International Journal of Older People Nursing* 188, 196



**Source:** Frank Oswald et al, ‘The Role of the Home Environment in Middle and Late Adulthood’ in Hans-Werner Wahl et al (eds), *The Many Faces of Health, Competence and Well-being in Old Age* (Springer 2006) 14

### 3.1.2. *What is the minimum necessary to constitute a home?*

Having argued that these migration and gerontological studies serve as convincing examples of how the ‘concept of home’ meets Gallie’s first criterion, a smaller area of the literature can provide a further illustration: debates on the minimum necessary to constitute a home. Such theoretical debates are a natural consequence of an appraisive concept. To attribute the concept of home with an appraisive character implies that it can admit of degrees: a migrant may be at more ‘at home’ in one place than another, for instance. Some scholars take this logic further, asking what can constitute a home at all? This can often be an important practical legal question, as indicated by Raquel Rolnik’s efforts as the previous UN Special Rapporteur on Adequate Housing<sup>114</sup> to flesh out a *smörgåsbord* of factors, including material considerations, such as sufficient space, affordability, some legal security, and access to green spaces,<sup>115</sup> through to considerations such as ‘cultural adequacy’ and a space to ‘exercise belonging’.<sup>116</sup>

There has been a broader conceptual effort to explore this question within home studies more broadly. A group of researchers, working principally in the environmental psychology discipline, consider what could be described as pinning down a ‘boundary between home and non-home’<sup>117</sup> – namely, what essential qualities render a space home-like to its inhabitants, and vice versa. Perhaps the best-known and most influential examples are earlier studies by Sixsmith on the ‘environmental experience

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<sup>114</sup> The full title of the position – the sheer verbosity of which effectively indicates the proxy-means through which home interests are ordinarily protected in international law – is the UN Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context. The current rapporteur, at the time of (re)writing, is Leilani Farha.

<sup>115</sup> Raquel Rolnik, ‘Place, Inhabitation and Citizenship: The Right to Housing and the Right to the City in the Contemporary Urban World’ (2014) 14 *International Journal of Housing Policy* 293, 294.

<sup>116</sup> *Ibid* 295.

<sup>117</sup> Fereshteh Ahmadi Lewin, ‘The Meaning of Home among Elderly Immigrants: Directions for Future Research and Theoretical Development’ (2001) 16 *Housing Studies* 353, 356.

of home'<sup>118</sup> and Smith's study into the 'essential qualities of home',<sup>119</sup> both of which determined a set of factors which participants used to distinguish between home (such as a childhood home or parent's home) and non-home spaces (such as army barracks, nursing quarters or student accommodation). These take the form of familiar sub-concepts which arise frequently throughout the literature, such as 'continuity, privacy, self-expression, social relationships, warmth' and so on, which were subject to a 'high degree of consensus' amongst her participants in defining what can constitute a 'home' space.<sup>120</sup> Both studies highlight the multidimensional aspect to home meaning, with the end result that, even if there is overlap between important factors, 'the sort of place that is a home for one person is not necessarily home for another'.<sup>121</sup>

A criticism which is often levelled at the environmental psychology literature is that 'for the most part [it] ignore[s] issues dealing with emotional attachment',<sup>122</sup> instead being focused on more quantifiable aspects of the person–environment relationship. Since the earlier studies outlined above, however, increased focus on delineating the step between a home and a non-home has resulted in a heavily developed literature. Further sets of discrete 'social, personal, physical, political and cultural' factors have been identified as necessary for constituting home,<sup>123</sup> and further attempts have been made to explore how these indicators can differ in their ability to create a home environment in relation to different socio-psychological filters, such as those identified by Oswald and Wahl as behavioural (e.g. having control over your home), cognitive (e.g. feelings of safety) and emotional (e.g. feelings of pride),<sup>124</sup> or the role of

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<sup>118</sup> Sixsmith (n 4).

<sup>119</sup> Sandy G Smith, 'The Essential Qualities of a Home' (1994) 14 *Journal of Environmental Psychology* 31.

<sup>120</sup> *Ibid* 45.

<sup>121</sup> Sixsmith (n 4) 294.

<sup>122</sup> Claire Cooper-Marcus, *House as a Mirror of Self: Exploring the Deeper Meaning of Home* (Nicolas-Hays, Incorporated 2006) 8.

<sup>123</sup> Jeanne Moore, 'Polarity or Integration? Towards a Fuller Understanding of Home and Homelessness' (2007) 24 *Journal of Architectural and Planning Research* 143, 145.

<sup>124</sup> Frank Oswald and Hans-Werner Wahl, 'Dimensions of the Meaning of Home in Later Life' in Graham Rowles and Habib Chaudhury (eds), *Home and Identity in Late Life: International Perspectives* (Springer 2005), 145.

perception of others as identified by Gustafson.<sup>125</sup> Some nuanced attempts to re-appraise the discipline's focus on what is required for a 'home' and a recognition of some of the limitations of previous studies can now be seen in the burgeoning 'place attachment' literature, an illustration of which is the explicit tackling of issues related to emotions and other traditionally neglected concepts (such as memory) by Gustafson,<sup>126</sup> Lewicka,<sup>127</sup> Fullilove<sup>128</sup> and Mazno.<sup>129</sup>

Instead, this interdisciplinary set of studies looks at the *same* home becoming a non-home due to changes in the life-course. These cluster around certain specific groups, such as the requirements of elderly households as they age further and health deteriorates,<sup>130</sup> the housing needs of particularly vulnerable groups with what can be volatile conditions such as mental health problems,<sup>131</sup> and those who are forced to relocate due to severe pressure caused by a lack of affordability.<sup>132</sup>

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<sup>125</sup> Per Gustafson, 'Meanings of Place: Everyday Experience and Theoretical Conceptualisations' (2001) 21 *Journal of Environmental Psychology* 5.

<sup>126</sup> Per Gustafson, 'Place Attachment in an Age of Mobility' in Lynne Manzo and Patrick Devine-Wright (eds), *Place Attachment* (Routledge 2014) 37.

<sup>127</sup> Maria Lewicka, 'In Search of Roots: Memory as Enabler of Place Attachment' in Manzo and Devine-Wright (n 126) 49.

<sup>128</sup> Mindy Fullilove, "'The Frayed Knot': What Happens to Place Attachment in the Context of Serial Forced Displacement' in Manzo and Devine-Wright (n 126) 141.

<sup>129</sup> Lynne Manzo, 'Exploring the Shadow Side: Place Attachment in a Climate Changed World' in Manzo and Devine-Wright (n 126) 178.

<sup>130</sup> See Tammy Aplin, Desleigh de Jonge and Louise Gustafsson, 'Understanding the Dimensions of Home that Impact on Home Modification Decision Making' (2013) 60 *Australian Occupational Therapy Journal* 101; Sung-Jin Lee, Kathleen R Parrott and Mira Ahn, 'Housing Adequacy: A Well-being Indicator for Elderly Households in Southern US Communities' (2014) 42 *Family and Consumer Sciences Research Journal* 235; and Frank Oswald et al, 'Relationships between Housing and Healthy Aging in Very Old Age' (2007) 47 *Gerontologist* 96.

<sup>131</sup> Annison (n 6); Rob Imrie, 'Disability, Embodiment and the Meaning of the Home' (2004) 19 *Housing Studies* 745; and Deborah K Padgett, 'There's No Place Like (a) Home: Ontological Security among Persons with Serious Mental Illness in the United States' (2007) 64 *Social Science and Medicine* 1925.

<sup>132</sup> See Azhan Abdul Aziz and Abdullah Sani Ahmad, 'Home Making in Low-Cost Housing Area' (2012) 49 *Procedia – Social and Behavioral Sciences* 268; and Robert Murdie, 'Pathways to Housing: The Experiences of Sponsored Refugees and Refugee Claimants in



These clusters of studies tend to assert two key things. Firstly, that a home can only function as such if all the objective and subjective elements (such as those highlighted above) are satisfied *en masse* – in other words, a home is a composite good requiring many elements to create, and the absence of just one of these elements could constitute it a non-home. For example, in his work on the meaning of home for individuals with an intellectual disability, Annison asserts that, ‘none of these sub-concepts [necessary to create a home], on its own, will enable a genuine home to be realised.’<sup>133</sup> As Douglas argues, if ‘you define the home on the basis of its health benefits, a health farm or a hotel could do as well’.<sup>134</sup> Likewise, if security were the aim, a prison would nicely suffice. Though the balancing of separate elements (such as the necessity for affordability and the requirement for security) may differ in relation to democratic and socio-psychological factors,<sup>135</sup> the key thrust of many of the arguments posed in these studies is that the ‘home’ functions as a ‘multi-faceted’<sup>136</sup> mass.

The second key argument which is generally asserted in such studies is that problems in one area of these sub-concepts or benefits of home can bleed into other areas and render the space a non-home. For instance, a lack of appropriate accommodation (in terms of affordability, for instance) may also have a direct effect on its ability to adequately act as a space for social relations with one’s family;<sup>137</sup> or elderly individuals who do not have adequate physical elements in place to allow for their mobility within the property may find that this bleeds into problems with the home as a source of autonomy.<sup>138</sup>

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Accessing Permanent Housing in Toronto’ (2008) 9 *International Migration and Integration* 81.

<sup>133</sup> Annison (n 6) 258.

<sup>134</sup> Mary Douglas, ‘The Idea of Home: A Kind of Space’ in Arien Mack (ed), *Home: A Place in the World* (NYU Press 1993) 261.

<sup>135</sup> Sixsmith (n 4) 294.

<sup>136</sup> Annison (n 6) 261.

<sup>137</sup> Carlotta Balestra and Joyce Sultan, *Home Sweet Home: The Determinants of Residential Satisfaction and Its Relation with Well-Being* (OECD Publishing 2013) 10.

<sup>138</sup> Lee et al (n 130).

Much of the academic literature points to an accurate construction of a dividing line between ‘home’ and ‘non-home’ being problematic, if not impossible. Finding the minimum necessary to constitute a home is dependent to a large extent on the perceptions of both the individual and of society. This issue has been recognised for a long time within the literature, as Watson alluded to when she said ‘in a society where the vast majority of the population live in mud huts, the community standard or cultural norm will be that mud huts constitute adequate accommodation’.<sup>139</sup> Likewise, Neale has highlighted how home is constructed in part by the individual’s own ideal of the concept, leading the idea that some who are ‘roofless and yet maintain that they are not homeless because their home is on the streets ... [or] ... people may have a very good material standard of accommodation, but nevertheless consider themselves to be homeless’.<sup>140</sup>

As a final point on this issue, many studies question whether it is actually possible not to possess a home at all, and that, even those in the most awful of housing conditions, retain some semblance of a meaning of home. This critique stems in part from the problem identified by Robinson as ‘the hallmark of homelessness research and policy’ that the definitions and criteria ‘measuring homelessness [are used to] conceptualise the experience of homelessness itself’.<sup>141</sup> So homelessness, instead of being defined with reference to empirical data, is itself often instead defined in relation to the home versus non-home factors, thresholds and the search for a definition explored above. This position has been critiqued with by Sheehan’s empirical study, where she argues that, even in the case of long-term homeless individuals living in a public square, ‘a permanent sense of home place remains fundamentally significant even as ideas of home must necessarily be reworked due to the dynamic nature of homelessness’.<sup>142</sup>

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<sup>139</sup> Helen Austerberry and Sophie Watson, *Housing and Homelessness: A Feminist Perspective* (Routledge 1986) 10.

<sup>140</sup> Joanne Neale, ‘Homelessness and Theory Reconsidered’ (1997) 12 *Housing Studies* 47, 55.

<sup>141</sup> Catherine Robinson, ‘Felt Homelessness: The Contribution of Qualitative Approaches to Homelessness Research’ in Paul Maginn, Susan Thompson and Matthew Tonts (eds), *Qualitative Housing Analysis: An International Perspective* (Emerald Group 2008) 93.

<sup>142</sup> Sheehan (n 91) 554.

### 3.1.3. *A summary: home as an appraisive concept par excellence*

As this first criterion, antecedent to the others, has been covered at some length in comparison to those which follow, it is worth pausing to briefly summarise what has been said. Hopefully, it is clear from the outline above that the concept of home is almost always employed appraisively; it is dealing with something of value, be that positive and/or negative. Questions about the utility drawn from the home asked within the migration and gerontology literatures, characterised here as its ‘lumpiness’, demonstrate this particularly well. A smaller range of studies, generally sitting within environmental psychology, carry this same logic through to its end-point by asking what is the minimum necessary to constitute a home? Home studies as a whole, it is argued, aptly meet Gallie’s first condition.

### **3.2. Conditions 2 and 3: the concept must be internally complex and diversely describable**

In addition to appraisiveness, to meet Gallie’s criteria the concept must also be ‘internally complex’<sup>143</sup> and ‘diversely describable’.<sup>144</sup> Both of these requirements are ‘tightly interrelated’<sup>145</sup> and are satisfied if the concept of home has two features: (i) it is composed of a variety of elements, but with its overall worth ‘attributed to it as a whole’;<sup>146</sup> and (ii) if the ‘existence of multiple meanings’ is not *a priori* contradictory.<sup>147</sup> In other words, the concept of home must be capable of being described in multiple ways simultaneously, in part because of the diversity and complexity of its internal features.

As with appraisiveness, the concept of home clearly meets these requirements. Any researcher engaging with the ‘meaning of home’ literature will be familiar with the coterie of sub-terms often used to signify its constitutive elements – territory, identity, privacy, security and so on – and the different layers at which the home is

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<sup>143</sup> Gallie (n 20) 171.

<sup>144</sup> Ibid 172.

<sup>145</sup> Collier et al (n 63).

<sup>146</sup> Gallie (n 20) 172.

<sup>147</sup> Collier et al (n 63).

conceptualised as operating within, such as Blunt and Dowling's influential distinction between the home as both a 'material and an imaginative site'.<sup>148</sup> These attributes 'stand in a family resemblance'<sup>149</sup> where, although different words may be used and a range of elements described, all recognise that the focus is on fleshing out a concept of home, not a confused set of sub-concepts for which separate definitions should otherwise be sought.

In order to demonstrate the overlapping and intersecting ways in which these sub-concepts are utilised by theorists in the home studies literature, **Figure 2.3** maps the conceptual terms used by 20 influential (and/or recently published) studies, such as those commonly utilised sub-concepts: shelter/physical structure; space; security; control; memory/time; and community/neighbourhood.

What this figure shows is the eco-system tied to these conceptual terms. None of the 20 studies sat as an outlier – all used at least some of the same conceptual terms as other scholars working in the field, even if deployed differently. That is not to say that some authors' work is not more utilised than others – a network analysis of the reach of the studies<sup>150</sup> demonstrates that Sixsmith, Després, and Somerville have been particularly influential. There is nothing 'absurd or contradictory' in these different articulations of the concept, or in the 'order of importance'<sup>151</sup> ascribed to its 'component parts'.<sup>152</sup> This is part of analysing a concept which is so diversely describable.

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<sup>148</sup> Alison Blunt and Robyn Dowling, *Home* (Routledge 2006) 61.

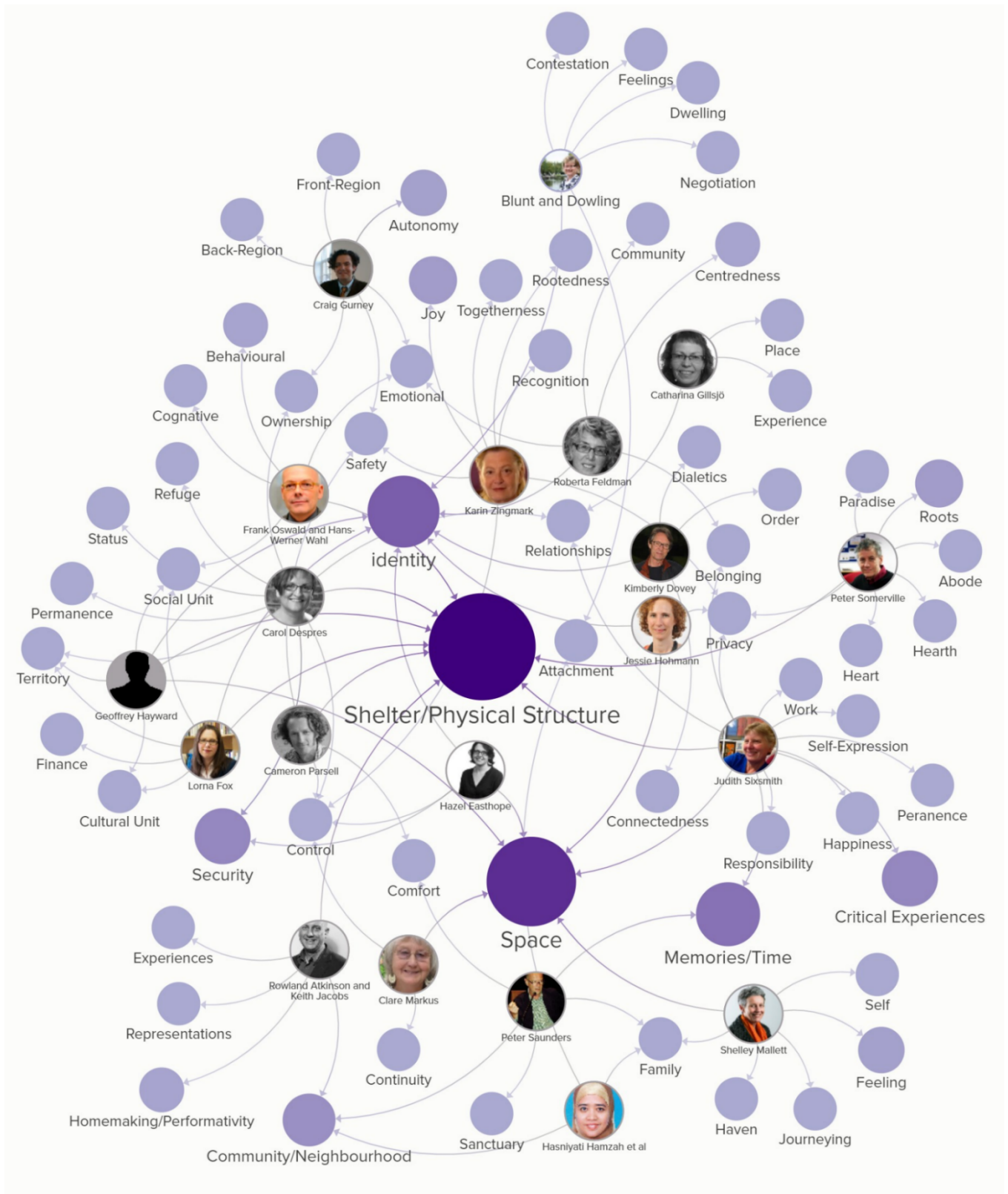
<sup>149</sup> Waldron (n 21).

<sup>150</sup> The 'reach' measures the portion of the network within two steps of the author. Here, the extent to which concepts utilised by one author were utilised by another. At the top of the table was Sixsmith.

<sup>151</sup> Gallie (n 20) 172.

<sup>152</sup> Ibid 172.

**Figure 2.3:** A concept map of leading analyses in the home studies literature depicting overlapping and dominant concepts. An interactive version of the map is available online at: [homemap.socialrights.co.uk](http://homemap.socialrights.co.uk)



Two further points need underscoring here. The first is the ‘incommensurability’ of these constitutive elements in the meaning of home literature.<sup>153</sup> Easthope’s ‘place identity’<sup>154</sup> does not trump Rubinstein and Medeiros’ ‘concept of identity’;<sup>155</sup> Fox’s ‘territory’<sup>156</sup> does not directly correlate with Hohman’s ‘space’.<sup>157</sup> Though often describing similar emotional connections with the home, these different compound elements are infinitely describable and consequently can give rise to ‘rival versions of the concept’<sup>158</sup> which prioritise and define these differently. Second, despite the diverse nature of these internal elements, the worth is attributed to the home as a whole. The home is, in other words, a ‘composite concept’.<sup>159</sup> This is not to say that the elements are not individually important or subject to different weighting by individual theorists, but rather that any one of these sub-terms which form the subject of so much of the academic debate over the home cannot be sufficient ‘on its own’.<sup>160</sup> Rather, they work in tandem to create something of value which is more than the ‘sum of its parts’.<sup>161</sup>

The consequences of this diverse describability can be seen in the use of the home studies literature by theorists developing their arguments. A good case study is the use of Rohe et al’s significant study into the social benefits of home-ownership,<sup>162</sup> a

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<sup>153</sup> Andrei Marmor, *The Language of Law* (Oxford University Press 2014).

<sup>154</sup> Easthope (n 9). 129

<sup>155</sup> Robert Rubinstein and Kate Medeiros, ‘Home, Self, and Identity’ in Rowles and Chaudhury (n 124).

<sup>156</sup> Fox O’Mahony (n 3).

<sup>157</sup> Hohmann (n 39).

<sup>158</sup> Peter M Shane, ‘Rule of Law and the Inevitability of Discretion, The Bureaucracy Unbound: Can Limited Government and the Administrative State Co-Exist: I. The Rule of Law and the Administrative State’ (2013) 36 *Harvard Journal of Law and Public Policy* 21.

<sup>159</sup> Fereshteh Ahmadi Lewin, ‘The Meaning of Home among Elderly Immigrants: Directions for Future Research and Theoretical Development’ (2001) 16 *Housing Studies* 353.

<sup>160</sup> Kate Amore, ‘Focusing on Conceptual Validity: A Response’ (2013) 7 *European Journal of Homelessness* 223; and Annison (n 6).

<sup>161</sup> Judith Carboni, ‘Homelessness Among the Institutionalised Elderly’ (1990) 16 *Journal of Gerontological Nursing* 32.

<sup>162</sup> The arguments are summarised in: William Rohe, Shannon Van Zandt and George McCarthy, ‘The Social Benefits and Costs of Homeownership: A Critical Assessment of the

prominent influence on many studies into the meaning of home. Fox<sup>163</sup> and Stern<sup>164</sup> both draw on this same study in support of almost diametrically opposed assertions. Throughout *Conceptualising Home* Fox refers to Rohe et al in support of the argument that home-owners gain greater satisfaction from their homes and neighbourhoods than those living in the private rented sector<sup>165</sup> and that home-ownership supports ‘social, psychological, emotional, and financial health’.<sup>166</sup> This same study is deployed by Stern to support assertions that there is an absence of such evidence.<sup>167</sup> The same study – and in some cases, the same page of it<sup>168</sup> – is drawn on to support two different arguments; one arguing residential protection is often too weak, and another arguing it is often too strong. Of course, variations in the interpretation of key concepts is a perennial problem within the social sciences.<sup>169</sup> However, this is especially aggravated for an essentially contested concept.

### 3.3. Condition 4: the concept must be ‘open’

The next criterion considered here is ‘openness’. This focuses on the interaction between the concept and the context; the way in which any concept of home advanced must be capable of ‘considerable modification in light of changing circumstances’<sup>170</sup> which may not be ‘prescribed in advance’.<sup>171</sup> In other words, its proper use in one setting does not guarantee its proper use in another future setting; it is ‘non-

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Research’ in Elizabeth Mueller and Rosie Tighe (eds), *The Affordable Housing Reader* (Routledge 2012) 196.

<sup>163</sup> Fox, *Conceptualising Home: Theories, Laws and Policies* (n 38).

<sup>164</sup> Stephanie Stern, ‘Residential Protectionism and the Legal Mythology of Home’ (2009) 107 Michigan Law Review 1093.

<sup>165</sup> Fox, *Conceptualising Home: Theories, Laws and Policies* (n 38). 197

<sup>166</sup> Ibid 237.

<sup>167</sup> Stern (n 164) 1117–1119.

<sup>168</sup> For an example of this see: Fox, *Conceptualising Home: Theories, Laws and Policies* (n 38). 199; and Stern (n 164) 1117.

<sup>169</sup> See, for instance, Sayer’s lament that ‘it is common today to acknowledge that texts and the way they are interpreted can never be fully controlled by their authors, and often I have been taken aback as much by supporters’ readings as by opponents’: Andrew Sayer, *Method in Social Science: A Realist Approach* (Routledge 1992) 5.

<sup>170</sup> Gallie (n 20) 172.

<sup>171</sup> Collier et al (n 63).

definitive'.<sup>172</sup> In this way, the concept is 'radically context dependent'<sup>173</sup> and capable of sizable modification to meet ongoing changes.<sup>174</sup> Gallie provides the example of 'art'.<sup>175</sup> At any one point in time, 'no one can predict or prescribe'<sup>176</sup> what may in the future be regarded as of artistic worth.

There are two key dynamics within the meaning of home scholarship which align with this requirement. First, the theoretical discussion of home is not hermetically sealed at the micro-level, but can instead be conceptualised as relating to broader societal shifts or grander abstractions, such as globalisation<sup>177</sup> or neoliberalism.<sup>178</sup> As argued by Duyvendak and Verplanke 'one cannot separate questions of how people inscribe space with meaning from social struggles involving class, race, gender and sexuality'.<sup>179</sup>

Second, the literature continually highlights the way in which the meaning of home is 'shaped by wider cultural processes',<sup>180</sup> and, in the burgeoning body of work examining this in the context of migration, the way in which meanings can and do differ across cultures over time.<sup>181</sup> Recent studies looking at changes in the use of the bedroom space underscore this point. From Gowing's analysis of the dramatic shifts in the use of bedroom space from the early modern period – where 'bedchambers were

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<sup>172</sup> Morris Weitz, 'Open Concepts' [1972] *Revue Internationale de Philosophie* 86.

<sup>173</sup> David Boromisza-Habashi, 'How Are Political Concepts "Essentially" Contested?' (2010) 30 *Language and Communication* 276.

<sup>174</sup> John Kekes, 'Essentially Contested Concepts: A Reconsideration' (1977) 10 *Philosophy and Rhetoric* 71.

<sup>175</sup> Gallie (n 20) 182.

<sup>176</sup> *Ibid* 182.

<sup>177</sup> Williams and McIntyre (n 16).

<sup>178</sup> Gillian Anderson, Joseph Moore and Laura Suski, 'Introduction: For a Sociology of Home in Canada' in Gillian Anderson, Joseph Moore and Laura Suski (eds), *Sociology of Home: Belonging, Community, and Place in the Canadian Context* (Canadian Scholars' Press 2016) 1.

<sup>179</sup> Jan Duyvendak and Loes Verplanke, 'Struggling to Belong: Social Movements and the Fight to Feel at Home', *Spaces of Contention: Spatialities and Social Movements* (Routledge 2013) 69.

<sup>180</sup> Atkinson and Jacobs (n 55).

<sup>181</sup> Hamzah and Adnan (n 33).



sociable places and beds were to be found all over the house'<sup>182</sup> – to analysis of the (infamously angsty) teenage use of bedrooms in the modern period by Lincoln<sup>183</sup> and Reid.<sup>184</sup>

### 3.4. Condition 6: the sustainment of an exemplar

These initial four criteria dealt with above were described by Gallie as the 'formally defining conditions of essential contestedness',<sup>185</sup> and have the potential to be broad in reach, arguably being applicable to 'many, if not most, socio-political concepts'.<sup>186</sup> Given these often problematic features, one might ask, 'Why continue to use such troublesome terms?'<sup>187</sup> These final conditions focus on the *function* of the debate. Despite being 'irresolvable',<sup>188</sup> the academic debate should be (i) rooted in a common exemplar, or shared analytical starting point, and (ii) the ongoing debate on the concept should positively advance understanding of this exemplar.

The criterion for an 'exemplar' – a 'common core' or 'line of descent' –<sup>189</sup> serves to root the conceptual debate. In practice, all this means is that there is a 'common problem'<sup>190</sup> which the studies are seeking to address and that the conceptual debate has

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<sup>182</sup> Laura Gowing, 'The Twinkling of a Bedstaff' (2014) 11 *Home Cultures* 275, 279.

<sup>183</sup> Sian Lincoln, "'My Bedroom Is Me": Young People, Private Space, Consumption and the Family Home', *Intimacies, Critical Consumption and Diverse Economies* (Palgrave Macmillan 2015) 87–106.

<sup>184</sup> See Jason Reid, *Get Out of My Room! A History of Teen Bedrooms in America* (University of Chicago Press 2016). Both Lincoln and Reid's work were the focus of an edition of BBC Radio 4's *Thinking Allowed*, which discussed the history of teen bedrooms. See: BBC Radio 4, 'Teen Bedrooms' (*Thinking Allowed*, 15 March 2017) <<http://www.bbc.co.uk/programmes/b08hpf77>> accessed 15 March 2017.

<sup>185</sup> Gallie (n 20) 180.

<sup>186</sup> Pennanen (n 20).

<sup>187</sup> John Markoff, 'Essential Contestants, Essential Contests' in Barbara Wejnert and Paolo Parigi (eds), *On the Cross Road of Polity, Political Elites and Mobilization*, vol.24 (Emerald Group Publishing 2016) 127.

<sup>188</sup> Ibid 127.

<sup>189</sup> Achim Hurrelmann, Steffen Schneider and Jens Steffek, 'Legitimacy – Making Sense of an Essentially Contested Concept', *Legitimacy in an Age of Global Politics* (Springer 2007).

<sup>190</sup> van der Burg (n 77) 11.

descended from a focus on this problem. This is not to say that antecedent studies occupy some kind of ‘privileged position’,<sup>191</sup> but rather that there is some unifying ‘starting point’<sup>192</sup> from which the different applications and debates about the use of the concept stem. This ensures the debate is about one contested concept, not a number of concepts suffering from ‘over-aggregation’,<sup>193</sup> meaning that parties could ‘simply choose new names and go on their own separate ways’.<sup>194</sup>

Within the home studies literature, there are two strands to this analytical starting point. The first is best articulated by Rapoport, and later Fox as discussed above, in their formulation of *Home = House + X*.<sup>195</sup> The point is that this ‘X factor’ warrants a conceptualisation of the home on its own terms, rather than through other theoretical interests, such as (prior to the twentieth century, principally) theology, as indicated by Weisel’s observation that ‘in the bible, as in life, the home precedes everything else’,<sup>196</sup> or, more recently, place-based environmental psychology, the ‘eclectic origins’ of which are described by Williams.<sup>197</sup> To be clear, it is not the perceived existence of this X factor which is the focus here. Indeed, as Bill Bryson argues in his best-selling book *At Home; A Short History of Private Life*, the ‘aura of homeliness ... is extremely ancient’.<sup>198</sup> Instead, it is that scholarly activity which has progressively tried to make sense of it.

The literature clusters around approaches to assessing the value of this X factor: its influences, components, importance, or construction/destruction. This recognition of something distinct from, but related to, the physical dwelling can be followed through

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<sup>191</sup> Ernst Gellner, *Contemporary Thought and Politics* (Routledge 2003) 97.

<sup>192</sup> Cockburn (n 26).

<sup>193</sup> Hurrelmann et al (n 189).

<sup>194</sup> Simon Evnine, ‘Essentially Contested Concepts and Semantic Externalism’ [2014] *Journal of the Philosophy of History* 118.

<sup>195</sup> See: Rapoport (n 80); and Fox, *Conceptualising Home: Theories, Laws and Policies* (n 38). 590

<sup>196</sup> Elie Wiesel, ‘Longing for Home’ in Leroy Rouner (ed), *The Longing for Home* (University of Notre Dame Press 1996) 17.

<sup>197</sup> Daniel Williams, “‘Beyond the Commodity Metaphor’ Revisited: Some Methodological Reflections on Place Attachment Research’ in Manzo and Devine-Wright (n 126) 89.

<sup>198</sup> Bill Bryson, *At Home: A Short History of Private Life* (Random House 2013) 38.

diachronic research, tracing the meaning of ‘home’ through ancient languages.<sup>199</sup> Modern studies from environmental psychology,<sup>200</sup> socio-legal studies,<sup>201</sup> or those from sociology – characterised as falling into the broad areas of ‘performativity, experiences and representations’<sup>202</sup> – share a common starting point that there is something about this *X* factor which is worth conceptualising in its own right.

This conceptual treatment of ‘home’ as something related to, but distinct from, the physical property arguably stretches back as far as Engels’ 1872 polemic, ‘The Housing Question’, where he laments the driving of families from ‘hearth and home’ by factory owners in the eighteenth century,<sup>203</sup> aligning with modern studies on forced displacement informed by a conceptual analysis of home.<sup>204</sup> Després argues the Romanticism in the latter nineteenth century was particularly influential in instilling ideas of the ‘home as a refuge of urban life’.<sup>205</sup> Early psychological studies have also been influential, particularly Jung and Freud’s later contributions on the symbolic significance of the home;<sup>206</sup> the latter’s was an important influence on Cooper-Marcus’ widely cited work, as he ‘first alerted [her] to the complex symbolic relationship with the homes we live in’.<sup>207</sup>

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<sup>199</sup> Stefan Brink, ‘Home: The Term and the Concept from a Linguistic and Settlement-Historical Viewpoint’ in Arén et al (n 80) 17.

<sup>200</sup> See: Sixsmith (n 4) ; and Gustafson (n 126).

<sup>201</sup> Hohmann (n 39) and Fox, *Conceptualising Home: Theories, Laws and Policies* (n 38).

<sup>202</sup> Atkinson and Jacobs (n 55).

<sup>203</sup> Friedrich Engels, *The Housing Question* (Progress Publishers 1970).

<sup>204</sup> See: Lee Crookes, ‘The Making of Space and the Losing of Place: A Critical Geography of Gentrification-By-Bulldozer in the North of England’ (University of Sheffield 2011) <<http://theses.whiterose.ac.uk/14595/1/575488.pdf>> accessed 2 February 2016; and Lorna Fox and James Sweeney, ‘The Idea of Home in Law: Displacement and Dispossession’ in Lorna Fox and James Sweeney (eds), *The Idea of Home in Law: Displacement and Dispossession* (Routledge 2016) 1.

<sup>205</sup> Després (n 52) 104.

<sup>206</sup> For a short overview, see: Michael Allen Fox, *Home: A Very Short Introduction* (Oxford University Press 2016) 61–62.

<sup>207</sup> Marcus (n 122) 59.

Gilman's influential *The Home: Its Work and Influence* – published in 1903 – is the first (at least to my knowledge) detailed examination of the conceptual treatment of the home. As she poetically describes it, her focus is on what 'the sweet word means'<sup>208</sup> and what is 'vital to the subject',<sup>209</sup> analysing its elements as if 'bravely pruning a most precious tree'.<sup>210</sup> Her organising concepts of 'shelter, quiet, safety, warmth, ease, comfort, peace and love'<sup>211</sup> and analysis of the 'exclusive confinement of women to the home'<sup>212</sup> would not be out of place in a contemporary study. Later sociological analyses have been particularly influential, such as the sociology of Dennis Chapman and – to a lesser extent – Robert Merton<sup>213</sup> or Alfred Schuetz.<sup>214</sup> Chapman's *The Home and Social Status*<sup>215</sup> focuses throughout on how 'the home is thought of in terms of social and emotional function',<sup>216</sup> with a conceptual analysis of the 'creation' of new homes.<sup>217</sup> Merton's formative work on the sociology of housing acknowledged how individuals are 'linked to neighbourhoods and to society via the homes we inhabit'.<sup>218</sup> He was particularly interested in the home and social networks, and how the home can act as a site of projection,<sup>219</sup> though his largest study, referred to beguilingly as his 'forthcoming housing study',<sup>220</sup> was never formally published.<sup>221</sup>

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<sup>208</sup> Charlotte Perkins Gilman, *The Home, Its Work and Influence* (Philips McClure 1903) 13.

<sup>209</sup> Ibid.

<sup>210</sup> Ibid.

<sup>211</sup> Ibid 16.

<sup>212</sup> Ibid 323.

<sup>213</sup> Robert Merton, 'The Sociology of Housing' in Wayne Dennis (ed), *Current Trends in Social Psychology* (University of Pittsburgh Press 1948).

<sup>214</sup> Alfred Schuetz, 'The Homecomer' (1945) 50 *American Journal of Sociology* 369.

<sup>215</sup> Dennis Chapman, *The Home and Social Status* (Routledge 1955).

<sup>216</sup> Ibid 41.

<sup>217</sup> Ibid 39.

<sup>218</sup> Atkinson and Jacobs (n 55). 19

<sup>219</sup> See: Merton (n 213) 163.

<sup>220</sup> James Coleman, 'Robert K Merton as Teacher' in Jon Clark, Celia Modgil and Sohan Modgil (eds), *Robert K Merton: Consensus and Controversy* (Falmer Press 1990) 28.

<sup>221</sup> The material linked to this study – comprising nine boxes with 59 folders of files dating from 1948–1949 – has a moniker within the Merton archives at Columbia University of *Patterns of Social Life: Explorations in the Sociology of Housing*. See: Columbia University Libraries, 'Robert K Merton Papers, 1928–2003 [Bulk Dates: 1943–2001]'

A more – in my view – neglected strand of research on these same questions sits within architectural studies, where researchers made sizable efforts from the 1940s onwards to ‘tie together the somewhat divergent thought patterns of architecture and sociology’.<sup>222</sup> As observed by Lancaster, the word ‘home’ ‘does more work in one language than most do in six’.<sup>223</sup> Polikoff’s question – ‘Whose meaning of home?’<sup>224</sup> – sought to assess the way in which the built environment should reflect the ‘soft domain’<sup>225</sup> of home meanings, while in the same vein Pawley’s ambitious thought-experiment on the concept of home took him to design what he termed, ‘The Time House’.<sup>226</sup> There is not room here to outline these arguments in more detail,<sup>227</sup> it is sufficient to note, however, that this strain of conceptual thinking that now provides the framework for the home studies literature is well established.

As argued by Rapoport, ‘if all the commotion about home is to show that it is more than house, then it hardly seems worth the excitement’.<sup>228</sup> There is, however, a second strand to this common starting point: the experience-centred construction of home meanings. As King suggests, ‘the use of dwelling creates meaning’.<sup>229</sup> The conceptual

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<[http://findingaids.cul.columbia.edu/ead/nnc-rb/ldpd\\_6911309/dsc/6](http://findingaids.cul.columbia.edu/ead/nnc-rb/ldpd_6911309/dsc/6)> accessed 10 November 2016.

<sup>222</sup> Svend Riemer, ‘Sociological Theory of Home Adjustment’ (1943) 8 *American Sociological Review* 272.

<sup>223</sup> Osbert Lancaster, *Homes Sweet Homes* (John Murray 1939).

<sup>224</sup> Bryan Polikoff, ‘Whose Meaning of Home?’ (1969) 8 *Transactions of the Bartlett Society* 89.

<sup>225</sup> *Ibid* 102.

<sup>226</sup> Pawley has explained his idea in two separate publications: Martin Pawley, ‘The Time House’ (1968) 38 *Architectural Design* 399; and Martin Pawley, ‘The Time House, or Argument for Existential Dwelling’ in Charles Jencks and George Baird (eds), *Meaning in Architecture* (Barrie and Jenkins 1970).

<sup>227</sup> In the interests of ensuring this section is sufficiently concise, I have restrained my enthusiasm for Pawley’s ‘Time House’ thought experiment, which in my view, is a significant early contribution to the home studies literature. A blog providing more detail about his idea can be accessed at: Jed Meers, ‘Martin Pawley – The Time House’ <<http://socialrights.co.uk/project/uncategorized/martin-pawley-the-time-house/>> accessed 10 December 2016.

<sup>228</sup> Rapoport (n 80).

<sup>229</sup> Peter King, *In Dwelling: Implacability, Exclusion and Acceptance* (Ashgate 2008).

treatment of home does not start from an assessment of this *X* factor as a static entity removed from individual experiences; it is inextricably tied to and created by emotions and experiences.<sup>230</sup> In this sense, the home is a ‘socio-cultural artefact’<sup>231</sup> which is ‘constructed’ physically, psychologically and socially,<sup>232</sup> and this construction takes place within the socio-cultural context in which the individual is situated. This provides the basis for those studies which look outside of an individually focused assessment of home meanings and towards the way in which these ‘seemingly private’ issues are treated at the societal level.<sup>233</sup>

### **3.5. Conditions 5 and 7: recognition of contestation and progressive understanding**

The penultimate feature of essentially contested concepts – generally referred to elsewhere as ‘progressive completion’ – underscores that ongoing theoretical debates are particularly valuable in leading to a better understanding and realisation of the concept, notwithstanding its essential contestability.<sup>234</sup> This has been characterised as akin to the ‘marketplace of ideas’ metaphor,<sup>235</sup> where continuous competition between conceptions weed out those which are ‘less defensible’ and, in turn, improve the quality of the ongoing debate on the ‘values inherent in the concept’.<sup>236</sup> Unlike the features above, this is not framed as a strict requirement of an essentially contested concept; it is instead an ‘empirical possibility’.<sup>237</sup>

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<sup>230</sup> Lynne C Manzo, ‘For Better or Worse: Exploring Multiple Dimensions of Place Meaning’ (2005) 25 *Journal of Environmental Psychology* 67.

<sup>231</sup> Roderick Lawrence, ‘A More Humane History of Homes’, *Home Environments* (Plenum Press 1985).

<sup>232</sup> Peter Somerville, ‘The Social Construction of Home’ (1997) 14 *Journal of Architectural and Planning Research* 226.

<sup>233</sup> Jan Willem Duyvendak, Leeke Reinders and Fenneke Wekker, ‘Homing the Dutch’ (2016) 13 *Home Cultures* 87.

<sup>234</sup> Gallie (n 20) 180.

<sup>235</sup> van der Burg (n 77) 12.

<sup>236</sup> *Ibid* 12.

<sup>237</sup> *Ibid*.

Two areas of conceptual debate in the home studies literature demonstrate this well. First are the long-standing feminist contributions seeking to highlight the home as a ‘site of struggle’ and which argue against ‘uses of the concept’<sup>238</sup> that neglect the often negative elements of the home for some women. The fervent disputes between Saunders and numerous feminist contributions on the meaning of home are a good example; leading to the former’s confrontational assertion that ‘either the academic feminists have got their theories wrong or millions of women are too stupid to recognise their own best interests’.<sup>239</sup> Summaries of the debate by Gurney<sup>240</sup> and Darke<sup>241</sup> highlight how these disagreements between those advancing conceptions of the concept of home – namely, how women’s meaning of home differs to that of men, or not – has served to deepen the literature’s assessment of negative home meanings or ‘unhomely’ narratives.<sup>242</sup> See, for instance, Brickell’s appraisal of feminist arguments over the home,<sup>243</sup> and her subsequent use of these ideas, with Baxter, to develop conceptual arguments on ‘home *unmaking*’<sup>244</sup> – particularly with reference to the ‘invisibilities’ and ‘porosity’ of home.<sup>245</sup>

Second is the conceptual work by numerous scholars to ‘turn over the coin’<sup>246</sup> by exploring the meaning of home for those who are homeless. These studies generally compare the results of empirical work with homeless individuals with ‘specifications

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<sup>238</sup> Jeannie Suk, *At Home in the Law: How the Domestic Violence Revolution Is Transforming Privacy* (Yale University Press 2011) 4.

<sup>239</sup> Peter Saunders, *A Nation of Home Owners* (Unwin Hyman 1990) 308.

<sup>240</sup> Craig M Gurney, “‘... Half of Me Was Satisfied’: Making Sense of Home through Episodic Ethnographies’ (1997) 20 *Women’s Studies International Forum* 373, 374.

<sup>241</sup> Jane Darke, ‘Women and the Meaning of Home’ in Rose Gilroy and Roberta Woods (eds), *Housing Women* (Routledge 1994) 13–14.

<sup>242</sup> Bilinda Straight, ‘Introduction: Women on the Verge of Home’ in Bilinda Straight (ed), *Women on the Verge of Home* (State University of New York Press 2005) 2.

<sup>243</sup> Katherine Brickell, “‘Mapping’ and ‘Doing’ Critical Geographies of Home’ (2012) 36 *Progress in Human Geography* 225, 226–228.

<sup>244</sup> Baxter and Brickell (n 7).

<sup>245</sup> *Ibid* 136–138.

<sup>246</sup> Kimberly Dovey, ‘Home and Homelessness: Introduction’ in Irwin Altman and Carol Werner (eds), *Home Environments* (Plenum Press 1985) 34.

of “home” in the literature’,<sup>247</sup> finding that they often appear ‘rather different’.<sup>248</sup> Somerville’s influential study highlights how what he describes as the ‘dimensions of meaning’<sup>249</sup> of the home – a range of those familiar sub-concepts, such as shelter, privacy, hearth and so on – differ for homeless households in order to ‘stimulate debate and guide future research’.<sup>250</sup> It is this continuous debate around the ‘values inherent in the concept’<sup>251</sup> which demonstrates its capacity for continual improvement and increased understanding, even if the debates themselves are inherently irresolvable.

The existence of these debates themselves serves to satisfy the final criterion considered here: the recognition of debate. This criterion requires that those utilising the concept of home ‘are aware that others are doing their own evaluations by their own criteria’.<sup>252</sup> This does not mean that those using a concept of home within their analysis need explicitly acknowledge converging conceptions against their position, but rather that their use of the concept may not be ‘consensual among scholars’.<sup>253</sup> Given the sources discussed above, this is clearly the case in the application of the concept of home.

#### **4. Why the home as an essentially contested concept matters: implications for scholars**

Having argued that the concept of home can be usefully considered essentially contested, this section explains why it was worth all the effort. The label ‘essentially contested’ does not mean anything in its own right. Instead, arguing that the concept of home meets Gallie’s criteria is a ‘theoretical tool’ to help explain the use of the concept and to recognise its limitations.<sup>254</sup> Nor is it a criticism of the home studies

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<sup>247</sup> Annabel Tomas and Helga Dittmar, ‘The Experience of Homeless Women: An Exploration of Housing Histories and the Meaning of Home’ (1995) 10 *Housing Studies* 493–510.

<sup>248</sup> Ibid 510.

<sup>249</sup> Somerville (n 5) 532.

<sup>250</sup> Ibid 532.

<sup>251</sup> van der Burg (n 77) 12.

<sup>252</sup> Markoff (n 187) 126.

<sup>253</sup> Ibid 130.

<sup>254</sup> Ehrenberg (n 27) 40.



literature or individual researchers working within it. As argued above, for a concept to be ‘essentially contested’ is not an inherently negative thing, but is rather a recognition of certain features within the debate on that concept.

So why does it matter that the concept of home is essentially contested? Here, I offer – what I argue – are four key insights that Gallie’s theory provides for scholars working in home studies research. Many of these may appear blindingly obvious to some readers and contentious to others: that is the nature of drawing theoretical conclusions about an essentially contested concept around which there is so much scholarly activity. Building on these points, the section goes on to consider what implications they may have for new studies using the concept of home as a theoretical tool and the approach adopted in this thesis.

First, when considering the usefulness of describing a concept as ‘essentially contested’, Ehrenberg asks whether it can serve to ‘obviate the apparent problem of a lacuna in the concept?’<sup>255</sup> Many of the criticisms levelled at academic output on the home set their sights on the concept’s perceived lack of ‘value, use and existence’.<sup>256</sup> As frequently cited by Fox,<sup>257</sup> Merritt’s derision of its status as a ‘chimera’ or an ‘entity which is purely phantasmal’<sup>258</sup> is indicative of a concern that it sits as a questionable ‘nebulous sub-division’<sup>259</sup> of what should otherwise be a more productive focus on property or some other more useful term. To say, however, that the lack of a unified concept of home is a problem is to misunderstand the nature of the theoretical arguments at play. As an essentially contested concept, there can never be such a unified front; a ‘clear definition of the concept’ would not be ‘the last word’.<sup>260</sup>

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<sup>255</sup> Ibid 42.

<sup>256</sup> Bevan (n 10) 195.

<sup>257</sup> See: Fox, *Conceptualising Home: Theories, Laws and Policies* (n 38) 27, 145; and Fox, ‘The Meaning of Home: A Chimerical Concept or a Legal Challenge?’ (n 12).

<sup>258</sup> Stephen Merrett and Fred Gray, *Owner-Occupation in Britain* (Routledge & Kegan Paul 1982) 65.

<sup>259</sup> Bevan (n 10) 195.

<sup>260</sup> Spaic (n 61).

As argued by Dow, the general assumptions of social scientists engaging in concept formation are unsettled in the context of an ‘essentially contested concept’.<sup>261</sup> Usually, the focus of conceptual debate is to ‘operationalise a particular concept, by translating it into specifying indicators’.<sup>262</sup> The goal is to purge ‘that which is ambiguous, contingent, and value-laden’ so the concept can ‘function as [a] tool of social science research’.<sup>263</sup> As an essentially contested concept, the meaning of the concept of home ‘resist[s] any fundamental determination’.<sup>264</sup> Critiques that target this lacuna – attacking what they argue is an ‘amorphous’ mythology<sup>265</sup> – neglect that a comprehensive account of the home is not the target of the conceptual debate.

Second, acknowledging the ‘concept of home’ as essentially contested allows for a clearer recognition that theorists can offer simultaneously valid, if divergent, interpretations. Gallie’s theoretical contribution seeks to, *inter alia*, explain why competing interpretations of a concept may be ‘regarded as legitimate and defensible’.<sup>266</sup> As an example, a number of scholars have drawn on the home studies literature to support their analysis of the SSSC: Nowicki’s focus on the rhetorics of home and everyday practices of home making;<sup>267</sup> Moffet et al’s analysis on the home’s importance to a sense of community;<sup>268</sup> and Brown’s emphasis on social relations in the domestic sphere.<sup>269</sup> These uses of a concept of home do not exist in a zero-sum competition with each other; all can usefully offer different interpretations that hold logically on their own terms. Setting one’s own interpretation against others should be a useful exercise. As Gallie argues:

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<sup>261</sup> Dow (n 36) 66–67.

<sup>262</sup> Ibid 66.

<sup>263</sup> Ibid.

<sup>264</sup> Ibid.

<sup>265</sup> Stern (n 164) 1106.

<sup>266</sup> van der Burg (n 77).

<sup>267</sup> Mel Nowicki, ‘A Britain That Everyone Is Proud to Call Home? The Bedroom Tax, Political Rhetoric and Home Unmaking in UK Housing Policy’ [2017] *Social and Cultural Geography* 1.

<sup>268</sup> Suzanne Moffatt et al, ‘A Qualitative Study of the Impact of the UK “Bedroom Tax”’ (2016) 38 *Journal of Public Health* 197.

<sup>269</sup> Gavin Brown, ‘Marriage and the Spare Bedroom: Exploring the Sexual Politics of Austerity’ [2015] *ACME* 14.

Recognition of a given concept as essentially contested implies recognition of rival uses of it as not only logically possible and humanly ‘likely’, but as of permanent potential critical value to one’s own use or interpretation of the concept in question.<sup>270</sup>

Third, it highlights how researchers using the concept of home as an analytical tool often have to evaluate its constituent elements – such as security, identity, territory, and so on – in the same way that users of the concept do.<sup>271</sup> As an example, Hamzah and Adnan draw on the home studies literature to inform their analysis of interviews with home-owners in Malaysia to argue that policymakers should recognise more explicitly the importance of ‘family and community’ within the home.<sup>272</sup> The weight policymakers attribute to these elements, however, requires them to evaluate those social practices in the same way Hamzah and Adnan do and, so doing, they may well arrive at different conclusions. Fox’s account of the ‘undoubtedly’ central role of ‘policy considerations’ illustrates this same problem.<sup>273</sup>

Within the home studies literature, there are some excellent contributions which account for this issue by taking an explicitly reflexive approach, in particular work by Marcus,<sup>274</sup> King,<sup>275</sup> Madden<sup>276</sup> and Darke.<sup>277</sup> The home, as argued by Duyvendak, is a ‘familiar sentiment to us all’, meaning that ‘everybody can participate in the debate’.<sup>278</sup> Those scholars seeking to undertake concept formation in as ‘value neutral’<sup>279</sup> a way as possible should recognise that the concept of home is inescapably value-laden.

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<sup>270</sup> Gallie (n 20) 193.

<sup>271</sup> Ehrenberg (n 27).

<sup>272</sup> Hamzah and Adnan (n 33) 321.

<sup>273</sup> Fox, *Conceptualising Home: Theories, Laws and Policies* (n 38) 524.

<sup>274</sup> Marcus (n 122).

<sup>275</sup> See: King (n 229); and Peter King, *Private Dwelling: Contemplating the Use of Housing* (Routledge 2004).

<sup>276</sup> Raymond Madden, ‘Home-Town Anthropology’ (1999) 10 *Australian Journal of Anthropology* 259.

<sup>277</sup> Darke (n 241) 11.

<sup>278</sup> Jan Willem Duyvendak, *The Politics of Home: Belonging and Nostalgia in Europe and the United States* (Springer Nature 2011) 27.

<sup>279</sup> Dow (n 36).

This problem can be situated within broader debates on the nature of ‘academic knowledge production’ within housing studies more generally. The debate between Allen and Flint,<sup>280</sup> particularly over the privileging of the ‘knowledge’ about dwelling by housing researchers over ‘ordinary people who live in houses’,<sup>281</sup> are instructive of some of the wider issues which can arise around class and academic habitus. Put another way, if scholars working in home studies need to engage with concepts in the same way as – to borrow Allen’s formulation – ‘ordinarily people who live in houses do’, then is it not – again, to borrow Allen’s phrasing – ‘epistemic arrogance’<sup>282</sup> to suggest that they have a greater claim to knowledge? This is an important issue and is returned to in the context of the susceptibility of the ‘home’ to common knowledge appeals below.

Fourth, researchers using a concept of home as a theoretical tool should present their arguments in a way that recognises the concept’s essential contestability. In other words, they should take care not to imply that ‘concept of home’ is a sort of concrete entity that can exist and be analysed independently of the social practices that constitute it. Theoretical contributions that package elements of the home together by creating a ‘framework’<sup>283</sup> or set of ‘component parts’<sup>284</sup> can fall foul of two interlinked problems. First, by articulating a unified concept of home, theorists may make claims of universalism using ‘generalizations that do not hold up’.<sup>285</sup> Second, they create what

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<sup>280</sup> See the key trilogy of papers: Chris Allen, ‘The Fallacy of “Housing Studies”’: Philosophical Problems of Knowledge and Understanding in Housing Research’ (2009) 26 *Housing, Theory and Society* 53; John Flint, ‘Housing Studies, Social Class and Being Towards Dwelling’ (2011) 28 *Housing, Theory and Society* 75; and Chris Allen, ‘A Welcome Critique: Some Comments on Flint’s Response to the Fallacy Paper’ (2011) 28 *Housing, Theory and Society* 92.

<sup>281</sup> Chris Allen, ‘The Fallacy of “Housing Studies”’: Philosophical Problems of Knowledge and Understanding in Housing Research’ (n 280) 55.

<sup>282</sup> *Ibid* 62.

<sup>283</sup> Rapoport (n 58).

<sup>284</sup> Nicole Cook, Aidan Davison and Louise Crabtree, ‘The Politics of Housing/Home’, *Housing and Home Unbound: Intersections in Economics, Environment, and Politics in Australia* (Routledge 2016) 1.

<sup>285</sup> Schaffer (n 44) 12.

Jiménez describes as a ‘trompe l’oeil effect’.<sup>286</sup> Here, instead of outlining the features of a distinct ‘concept of home’, these theoretical contributions are instead offering a ‘description of epistemic awareness’.<sup>287</sup> In other words, they are in danger of rendering a seemingly tangible set of principles and elements – a ‘concept of home’ to advance for policymakers or the judiciary – out of the ‘less than concrete foundations’<sup>288</sup> of the inherently intangible experiences of the home. This issue is a key implicit feature of essentially contested concepts; the home’s intractability and openness outlined above make definitive claims about its content problematic.

## **5. Why the home as an essentially contested concept matters: epistemological implications and the approach in this thesis**

Having outlined four key implications of my argument for scholars working in the home studies literature, this section goes on to consider the epistemological consequences of arguing that the ‘home’ is an essentially contested concept and what that means for this thesis. As argued above, the concept of home is often deployed as a means to an end – to argue against or for a law and policy framework, or for greater protection of home interest X or Y. Depending on the use to which the concept is put, my arguments on its essential contestability could have sizable epistemological implications.

As an example, consider Hamzah and Adnan’s recent argument that their work on Malaysian home owners’ emphasis on ‘family and community’ could support the ‘formulation and implementation of alternative housing tenures’,<sup>289</sup> or Fox’s influential argument that UK courts should ‘take a measure’ of the occupiers’ ‘interest in the property as a home’.<sup>290</sup> The natural consequence of arguing that the concept of home is essentially contested is that the conceptual arguments that lead them to make these claims cannot easily be read across into policy and practice. To argue for a

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<sup>286</sup> Alberto Corsín Jiménez, *An Anthropological Trompe L’Oeil for a Common World: An Essay on the Economy of Knowledge* (Berghahn Books 2013).

<sup>287</sup> Ibid.

<sup>288</sup> Bevan (n 10).

<sup>289</sup> Hamzah and Adnan (n 33) 321.

<sup>290</sup> Fox, *Conceptualising Home: Theories, Laws and Policies* (n 38) 524.

greater recognition of the ‘family and community’ aspects of home in policymaking is to argue for an essentially contested concept to be rendered sufficiently tangible to be operationalised, or at least interpreted in the same way as the author intends them to be.

So, to argue that the concept of home is essentially contested unavoidably makes a parallel argument about what scholars *know* about the home and are able to communicate to each other and to policymakers or other stakeholders. What is it that scholars can usefully add? As an essentially contested concept, to make a claim about the home is to make a claim about knowledge of it. If, as is argued so often throughout the literature, the home is ‘innate’,<sup>291</sup> how can scholars know any better? As referred to above, Allen goes as far as to suggest that elevating housing researchers to having a ‘superior form of knowledge’<sup>292</sup> from those experiencing the home directly would be ‘epistemic arrogance’.<sup>293</sup>

The concept of home is particularly susceptible as appearing to merely ‘seem like common sense and even common knowledge’,<sup>294</sup> or being ‘taken for granted’.<sup>295</sup> The epistemological literature on ‘common knowledge’ and ‘common sense’ is particularly instructive here. Drawing on Rescher’s analysis of appeals to common sense,<sup>296</sup> there are three key grounds by which the home is susceptible to being relegated to ‘common knowledge’.

The first ground deals with evidential problems. As discussed above, law and policy frameworks often mandate the consideration of home interests, however, their inherent subjectivity renders them difficult, or even impossible, to substantiate. Within the

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<sup>291</sup> Ibid.

<sup>292</sup> Chris Allen, ‘The Fallacy of “Housing Studies”’: Philosophical Problems of Knowledge and Understanding in Housing Research’ (n 280).

<sup>293</sup> Ibid.

<sup>294</sup> Carrie Jo Coaplen, ‘Recovering Home: Hurricane Katrina Survivors Rebuild Homes in a Digital Community’ 4 *Journal of Arts and Communities* 32, 35.

<sup>295</sup> Gurney, as cited at: Easthope (n 9) 134.

<sup>296</sup> Nicholas Rescher, *Common-Sense: A New Look at an Old Philosophical Tradition* (Marquette University Press 2005).

literature, the difficulty – or, as some argue, fallacy<sup>297</sup> – of accurately determining the many ‘intangible’<sup>298</sup> complexities of an individual’s meaning of home demonstrates this problem; there is no definitive ‘checklist’ to gauge home interests or set of comprehensive statistical tools to measure it, and many criticise even the thought of either.<sup>299</sup> This is not to say that researchers have not tried. Metrics such as the ‘Model of Residential Normalcy’<sup>300</sup> or the ‘Experience of Home Testing Instrument’<sup>301</sup> exist, but in their efforts to quantify they invariably over-simplify – even the broader literature has been criticised for neglecting the true complexity and ambivalence of home meanings.<sup>302</sup>

The basic problem is perhaps best demonstrated with reference to the evolving scholarship on eminent domain in the USA; the process by which the state can seize private property for public use providing ‘fair compensation’ is paid, ordinarily at the market value. Scholars have repeatedly pointed to the insufficiency of such compensation to adequately reflect the ‘sanctity of home’,<sup>303</sup> variously described as the ‘subjective premium’<sup>304</sup> or ‘uncompensated increment’<sup>305</sup> by arguing that reparations

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<sup>297</sup> Stern (n 164).

<sup>298</sup> Manzo (n 230).

<sup>299</sup> Craig Gurney, ‘The Meaning of Home in the Decade of Owner Occupation’ (School for Advanced Studies, University of Bristol 1990).

<sup>300</sup> Granbom et al (n 111).

<sup>301</sup> Sheila L Molony, Deborah Dillon McDonald and Christine Palmisano-Mills, ‘Psychometric Testing of an Instrument to Measure the Experience of Home’ (2007) 30 *Research in Nursing and Health* 518.

<sup>302</sup> See Gurney (n 240) and Fereshteh Ahmadi Lewin, ‘The Meaning of Home among Elderly Immigrants: Directions for Future Research and Theoretical Development’ (2001) 16 *Housing Studies* 353.

<sup>303</sup> John Fee, ‘Eminent Domain and the Sanctity of Home’ (2006) 81 *Notre Dame Law Review* 783, 794.

<sup>304</sup> Brian Lee, ‘Just Undercompensation: The Idiosyncratic Premium in Eminent Domain’ (2013) 113 *Columbia Law Review* 593, 601.

<sup>305</sup> Lee Anne Fennell, ‘Taking Eminent Domain Apart’ [2004] *Michigan State Law Review* 957, 958.

for the loss of a ‘home’ should be different to that of other property.<sup>306</sup> Indeed, this has been articulated as the ‘law of bloody common sense’.<sup>307</sup> The problem is the sheer difficulties in attaining ‘evidence’ to substantiate these subjective elements.<sup>308</sup> There are two problems with this substantiation.

First, there is a key difference in the nature of the evidence required to substantiate home meanings, or what could be described as the ‘standard of proof’. In dealing with inherently subjective issues, the consideration of home meanings is susceptible to being pitted against what is characterised as the ‘scientific standard’ of substantiation as opposed to one based on ‘common knowledge’ or a ‘natural attitude’.<sup>309</sup> the latter criticised for being ‘uniformly fuzzy, vague and imprecise’,<sup>310</sup> and the former as deficient due to subjective aspects of the meaning of home being ‘invisible at the level of detail and process at which science operates’.<sup>311</sup> In other words, home meanings are not necessarily ‘provable’ in the scientific context.<sup>312</sup> This has important implications for how the knowledge is constructed. The standard is not a scientific one. Instead, it can be based on a ‘set of heuristics’<sup>313</sup> or indications to support the self-evident principles of common knowledge, not the problematic distillation of social science evidence.

This issue is important, as it leads to the second key assertion: as knowledge claims founded on an appeal to common knowledge are based on perceived *validity* – not *exclusivity* – the conclusions individuals draw may not be the same. In other words, what is a common knowledge of home to one individual will not be to another; or as stated by Rescher, common knowledge is ‘not constituted by what people commonly

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<sup>306</sup> Janice Nadler and Shari Diamond, ‘Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity’ (2008) 5 *Journal of Empirical Legal Studies* 713, 722.

<sup>307</sup> Fee (n 303) 800.

<sup>308</sup> Ibid 794.

<sup>309</sup> Allen, ‘The Fallacy of “Housing Studies”: Philosophical Problems of Knowledge and Understanding in Housing Research’ (n 280).

<sup>310</sup> Rescher (n 296) 158.

<sup>311</sup> Ibid.

<sup>312</sup> Fox, *Conceptualising Home: Theories, Laws and Policies* (n 38) 76.

<sup>313</sup> Marion Ledwig, *Common Sense: Its History, Method, and Applicability* (P Lang 2007) 34.



see as obvious',<sup>314</sup> but rather what an individual perceives to be obvious to themselves and others.

The *practical* ground follows from these *evidential* problems and can be stated as follows: even though home interests are not susceptible to being easily assessed, law and policy frameworks can still demand that they are – explicitly or not – considered as part of decisions. In short, those evidential issues notwithstanding, decisions still need to be made with reference to knowledge about an individual's home meanings. The concept of home, however, is not a form of knowledge which is perceived as lending itself to expert analysis. Authorities pursuing eminent domain do not wheel in a 'meaning of home expert' to offer their analysis on the home interest of the individual, in the same way that a tenant applying for a DHP would more effectively bolster their application with a letter from their doctor outlining the mental health impact of having to relocate, rather than one focused on the importance of their home to them.

This practical expectation is rooted in the epistemological differences between 'expertise-admitting' and 'expertise-resisting' knowledge.<sup>315</sup> This is an echo of the 'experience near' and 'experience distant' distinction raised at the start of this chapter. For certain epistemological demands, expertise can be implied – in other words, we ought to prefer the judgements of those who 'know what they are talking about'.<sup>316</sup> When assessing the home, however, 'the learned enjoy no particular advantage over the vulgar'.<sup>317</sup> An individual's own subjective home meaning is inherently 'expertise-resisting'. It is this point which occupies Allen in his argument over the 'epistemic arrogance'<sup>318</sup> of the housing studies literature.

Finally, the home is susceptible to common knowledge appeal under a *social* ground. Rescher suggests that an appeal to common knowledge speaks to the 'confraternity of

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<sup>314</sup> Rescher (n 296).

<sup>315</sup> Ibid.

<sup>316</sup> Harry Collins and Robert Evans, *Rethinking Expertise* (University of Chicago Press 2008) 2.

<sup>317</sup> Rescher (n 296).

<sup>318</sup> Allen, 'The Fallacy of "Housing Studies": Philosophical Problems of Knowledge and Understanding in Housing Research' (n 280).

trust' between individuals – namely, it must at least have the illusion of being *common*.<sup>319</sup> This is the key assumption behind the appeal to common-sense principles in law and policy. As suggested by Ernst, common sense requires expectations of the 'knowledge of each other's knowledge'<sup>320</sup> – in other words, it cannot be assumed that something is common sense, if it is not also assumed that everybody 'knows' it. This speaks to the popular perception of the essential quality of home meanings as being 'intrinsic',<sup>321</sup> 'innately intangible'<sup>322</sup> or 'natural',<sup>323</sup> something which one could presume everybody knows from their day-to-day experience.

The second key issue which follows in this *social* ground is that the production of this assumption of knowledge being common amongst individuals is something which is inherently socially constructed, being based on 'diverse types of evidence', such as the mass media or structural forces in society.<sup>324</sup> This is particularly true of home meanings, as extensively argued with regards to the progressive normalisation of home-ownership in twentieth-century western societies.<sup>325</sup> Indeed, many of the 'common sense' assumptions which appear to derive from 'no place' can often serve existing hegemonies.<sup>326</sup>

### **5.1. Where does this take us?**

This chapter has argued that the concept of home can be usefully analysed as being 'essentially contested' in the way outlined by Gallie and subsequently refined by many others. The arguments above challenge the unspoken premise within much of the home

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<sup>319</sup> Rescher (n 296).

<sup>320</sup> Zachary Ernst, 'What Is Common Knowledge?' (2011) 8 *Episteme* 209.

<sup>321</sup> Fox, *Conceptualising Home: Theories, Laws and Policies* (n 38).

<sup>322</sup> Bevan (n 10).

<sup>323</sup> Srna Mandic and David Clapham, 'The Meaning of Home Ownership in the Transition from Socialism: The Example of Slovenia' (1996) 33 *Urban Studies* 83.

<sup>324</sup> Joachim J Savelsberg, 'Knowledge, Domination, and Criminal Punishment' (1994) 99 *American Journal of Sociology* 911.

<sup>325</sup> Richard Ronald, 'Home Ownership, Ideology and Diversity: Re-evaluating Concepts of Housing Ideology in the Case of Japan' (2004) 21 *Housing, Theory and Society* 49.

<sup>326</sup> Frank Ridzi, *Selling Welfare Reform: Work-First and the New Common Sense of Employment* (NYU Press 2009) 248.

studies literature that the purpose of the theoretical work is to devise and refine a theoretical ‘concept of home’ entity, or to explore how certain interventions ‘impact’ on this. This leads to a series of associated arguments about the use of the concept in home studies research; both in terms of how researchers can best utilise it and how the home is particularly susceptible to being relegated to ‘common knowledge’.

By way of summary, the key assertions have been as follows:

- i. The concept of home can be usefully described as ‘essentially contested’ in the way outlined by Gallie.
- ii. Researchers utilising the concept of home should recognise its essential contestability.
- iii. The concept of home’s essential contestability allows researchers to offer simultaneously valid, if divergent, interpretations of the home.
- iv. The essential contestability of the concept of home renders it particularly vulnerable to being relegated to common knowledge.

Bearing these arguments in mind, where does this lead the treatment of the concept of home within this thesis? In recognising the use of the concept as essentially contested, this study can adopt a broader theoretical frame than choosing sub-concepts or approaches identified in the home studies literature and analysing the data in the terms they identify. Put another way, though these approaches are perfectly valid on their own terms, the analytical starting point of this study is not a reified ‘concept of home’, with which the data collected can be compared or set against, and nor is it on the ‘impact’ of the SSSC on an individual’s ‘concept of home’. Nor does it adopt an intermediate approach, such as a focus on home unmaking, with an emphasis on the *process* by which ‘components of home’ are ‘divested, damaged or even destroyed’.<sup>327</sup> Although all of these are potentially illuminating approaches in the context of an analysis of the SSSC policy or to continue arguments over the exemplar outlined at 3.4 above, to acknowledge the concept of home as essentially contested opens up more possibilities for analysis.

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<sup>327</sup> Baxter and Brickell (n 7) 134.

Instead, the approach here argues that scholars in home studies can usefully depart from the literature attempting to craft a cohesive ‘concept of home’ and instead adopt ‘more flexible and dynamic frameworks’<sup>328</sup> drawing on the growing literature on the sociology of legal knowledge. In other words, what if we take an interest in the concept of home – those social practices we describe as being interrelated around the home – not with a view to making the SSSC take better account of or move closer to the concepts theorists identify (be they security, identity, and so on), or to assess the policy’s impact on this ‘concept of home’, but instead to study how the SSSC law and policy framework produces and uses knowledge about the home?<sup>329</sup>

I will provide some concrete examples of this approach in a moment, but I will first outline in broader terms what this means. As argued above, the concept of home is particularly susceptible to being relegated to common knowledge, and is not conceptually capable of definitive determination. So, what happens when law and policy frameworks require a consideration of home interests? To explore these issues in relation to the SSSC, the focus here draws on Valverde to focus on what she broadly describes as ‘technologies of knowledge’<sup>330</sup> – or more informally, the ‘knowledge moves’<sup>331</sup> actors make in law and policy contexts. These ‘knowledge moves’ allow actors to ‘acknowledge, receive, reject, transform, and otherwise translate knowledge claims’.<sup>332</sup> The aim here is not to analyse what the content of these knowledges are – as would be the case if I were asking how the SSSC conceptualised the home – and ‘much less what this all means for globalization, patriarchy, or any other grand abstraction’.<sup>333</sup> The focus is instead on looking for what these different knowledge practices do and ‘how they work’.<sup>334</sup>

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<sup>328</sup> Mariana Valverde, *Law’s Dream of a Common Knowledge* (Princeton University Press 2003) 12.

<sup>329</sup> For a corollary to this, see Valverde’s discussion of legal knowledges at: *ibid* 5.

<sup>330</sup> Mariana Valverde, ‘Theoretical and Methodological Issues in the Study of Legal Knowledge Practices’ in Martha Merrill Umphrey (ed), *How Law Knows* (Stanford University Press 2007) . 83.

<sup>331</sup> *Ibid*.

<sup>332</sup> *Ibid*.

<sup>333</sup> Valverde (n 328) 11.

<sup>334</sup> *Ibid*.

Rather than continuing to shadow-box these arguments in an abstracted way, it is high time to provide some concrete examples of how this approach differs to that generally pursued in the literature. A good example – reflected in the analysis presented in Chapters Six and Seven – is the role of DHPs. A thesis on the SSSC could analyse how the lack of secure access to Housing Benefit and the precariousness of repeated re-applications affect the feelings of security as part of the tenant’s concept of home, or could be analysed on its (almost certainly, negative) effects on the practices of homemaking. The conclusions would likely focus on how those components of home are intentionally destroyed through the imposition of the policy.

Instead, the focus here is on the ‘knowledge moves’<sup>335</sup> in this process. How do tenants translate their home interest to the administrative worker through the confines of the application forms for this payment? How does the application form itself limit and construct the tenant’s ability to communicate their home interest? How are the home interests communicated through these application forms processed by administrative workers using the information provided?

As another example, consider the impact of the under-occupation penalty itself. A thesis could analyse how the presence of the financial sanction works to destabilise people’s homes in a way that can be conceptualised through the sub-concepts made available in the home studies literature.<sup>336</sup> Indeed, two other PhD theses have focused on the SSSC penalty in this way; an approach perhaps best articulated within Kelly Anne Bogue’s recent study from the University of Manchester, where she argues that ‘this policy strikes at the very heart of notions of “home”’.<sup>337</sup>

Here, the focus is instead on the knowledge obligations placed on affected tenants (as analysed in Chapter Eight) – what Valverde describes at the ‘duty to know’.<sup>338</sup> In other

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<sup>335</sup> Valverde (n 330) 83.

<sup>336</sup> Moffatt et al (n 268).

<sup>337</sup> Kelly Ann Bogue, ‘Precarious Social Housing: Reforming Policy, Changing Culture. An Ethnographic Case Study of the Impact of the “Bedroom Tax”’ (University of Manchester 2016) <[https://www.research.manchester.ac.uk/portal/files/54590911/FULL\\_TEXT.PDF](https://www.research.manchester.ac.uk/portal/files/54590911/FULL_TEXT.PDF)> accessed 24 July 2017.

<sup>338</sup> Valverde (n 330) 89–90 and Valverde (n 328) 170–172.

words, how the affected tenants are expected to weigh their home interest against the financial sanction and arrive at an efficient conclusion. How do tenants know if they warrant exclusion from the policy and consequently to apply for a DHP? How can tenants know the effect of the SSSC penalty alongside all of the other welfare reforms they are subject to?

Put another way, the start and end points of the analysis are not how best to conceptualise the home. Instead, the thesis focuses on how the home becomes tied up with these minor technologies of knowledge which are so important to the day-to-day experiences of those living in homes, but are so often neglected. In the context of the SSSC, this allows the analysis which follows to focus on otherwise underexplored elements of the policy framework. These key arguments are returned to throughout this thesis, both in Chapter Five's discussion of the research process and the analysis chapters which form the second half of this thesis.

## **6. Conclusions: the home as an essentially contested concept**

This chapter has argued that the concept of home can be usefully thought of as being 'essentially contested'. The conceptual use of the home within the social sciences aptly meets the requirements laid out by Gallie's influential article. Applying the tag of 'essential contestability' is far from an end in of itself; instead, it leads to a series of conclusions about the use of the concept of home that can inform future work by theorists working within home studies and the basis of this thesis.

I have argued that there are four key implications of recognising the concept of home as essentially contested. The first is that it can obviate the criticisms of those who argue against the utilisation of a concept of home due to the lack of a tangible definition or unified front within the home studies literature. Gallie's concept highlights the value in the continuing debate on home meanings, notwithstanding the impossibility of providing such a cohesive definition. The second acknowledges that multiple competing conceptions of the home can be simultaneously viewed as being valid.

The final two key implications of essential contestability on the usage of the concept are highlighted. Users should be aware that key constituent components – be it identity,

territory, security, and so on – are liable to be evaluated in the same way everyday users of the concept do. An academic’s conceptualisation of the home and identity requires similar value judgements to anyone else. Researchers should also be careful to present their findings in a way which recognises the concept’s essential contestability, taking care not to present a unified ‘concept of home’ that appears to claim universality or provide a settled definition.

With these key implications in mind, the chapter outlined how the concept of home is approached in this thesis. These arguments are returned to in the discussion of the study’s epistemological position in the research and analysis chapters which follow. It argues for an approach focused on the knowledge claims that occur in law and policy frameworks as opposed to taking a ‘concept of home’ as its theoretical start and end points. Instead, the analytical focus can rest on what Valverde describes as ‘knowledge moves’,<sup>339</sup> to study how the SSSC law and policy framework produces and uses knowledge about the home.

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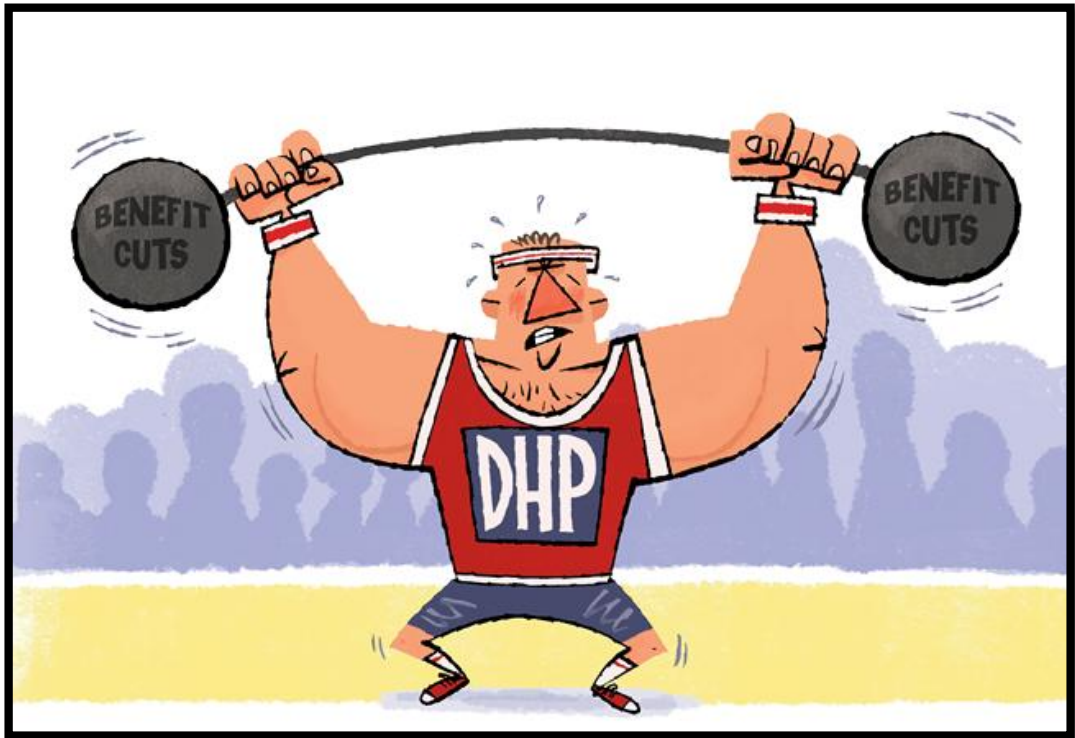
<sup>339</sup> Valverde (n 330) 89–90 and Valverde (n 328) 170–172.





# Dealing with discretion: structural and epistemic discretion in the SSSC

## Chapter Three



**Source:** Inside Housing, 'Weightlifter' <[http://www.insidehousing.co.uk/pictures/643xAny/0/5/2/35052\\_Weightlifter\\_illo.jpg](http://www.insidehousing.co.uk/pictures/643xAny/0/5/2/35052_Weightlifter_illo.jpg)> accessed 1 February 2017.

## 1. The problem with discretion

Perhaps the main criticism of the conclusions in Chapter Two is that my arguments are orientated around a straw man. If all this talk of ‘knowledge moves’ and DHPs is so important, am I not making the mistake of identifying the SSSC as a ‘home’ problem, when in fact it should more usefully (and properly) be considered a ‘discretion’ problem? After all, there are well-developed literatures on administrative decision-making, on the conferral of discretion by regulations and its holding to account by the courts, and on the implementation of policy: why not use those?

I argue here that this is not a zero-sum game. These discretionary decisions and the structural design of the regulations can – and should – be usefully be analysed from a perspective rooted in the ‘concept of home’. Dealing with discretion is therefore inevitable for this thesis. Indeed, as government ministers frequently state with regard to DHPs, the ‘clue is in the title’.<sup>1</sup> Chapters Three and Four focus on this problem. This one by placing the thesis within the theoretical literature on discretion and justifying its approach to the concept going forward. Chapter Four then provides a critical account of the key manifestation of the concept which is so central to the operation of the SSSC policy: the DHP scheme.

### 1.1.The argument

I argue here that ‘discretion’ within the SSSC can be analysed with a focus on its *structural* and *epistemic* elements. This is a position which builds on Alexy’s application of this distinction, subsequently adopted in the context of welfare administration by Molander and others.<sup>2</sup> Fundamentally, discretion is given for a

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<sup>1</sup> For example, see HC Deb, 26 March 2013, v560 c474WH. A sentiment echoed regularly in the courts, in observation that: ‘As the title indicates, such payments are discretionary.’ See: *R (on the application of Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58 [9] (per Toulson LJ).

<sup>2</sup> See Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2001) 393. For subsequent application in the field of social security, see: Anders Molander, Harald Grimen and Erik Oddvar Eriksen, ‘Professional Discretion and Accountability in the Welfare State’ (2012) 29 *Journal of Applied Philosophy* 214. And more recently, a longer dedicated

reason. Why are some classes of person exempted from Reg.B13 Housing Benefit Regulations 2006, when others are not? Why has the government adopted a wide-ranging reliance on DHPs administered by local authorities? Why does the DHP budget allocate money for some areas of impact but neglects others, and why does the DWP DHP guidance delineate some classes of person for assistance, but stay silent on many more? This thesis needs to interrogate the reasons behind and impact of these *structural* decisions in the SSSC design.

Equally as fundamentally, this *structural* conferment assumes that an administrative worker *knows* something. They are capable of making the judgements they have been tasked with and consequently there is an ‘*epistemic* assumption’<sup>3</sup> of them. As I go on to argue, for DHPs, this epistemic assumption is an ability to determine the need for an ongoing occupation of the home for tenants affected by the SSSC. This is where the focus of Chapter Two comes in: this epistemic element should be subject to an analysis rooted in the concept of home.

What emerges from this chapter, therefore, is a conceptualisation of discretion which allows for the analysis in this thesis to interrogate these important *structural* elements while not losing sight of the important *epistemic* dimension. In order to make this argument, an assessment of dominant approaches currently available within the academic literature is required, both to articulate the need for the approach adopted in this thesis and to distinguish how the approach here is different from them.

## **1.2.The structure of the argument**

Much of this chapter is spent critically outlining the approach *others* take to the analysis of discretion, rather than my own. Put another way, it may seem to take a while to get to the point. This is because the argument for adopting the structural/epistemic distinction used in this thesis is difficult to make in isolation; some significant groundwork is required to demonstrate (what I argue is) its value. The Section 2 – ‘Perspectives on discretion’ – lays this foundation. It outlines three

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assessment in Anders Molander, *Discretion in the Welfare State: Social Rights and Professional Judgment* (Routledge 2016).

<sup>3</sup> Molander et al (n 2) 219.

dominant theoretical approaches to discretion often employed in the literature: Dworkin's doughnut, the 'implementation gap', and organisationally focused studies. I then highlight the importance of judicial discretion and welfare provision as a specific site of decision-making.

I then argue for an analytical distinction between *structural* and *epistemic* discretion. First by outlining a problem of reductionism within other approaches and the requirements of an approach adopted for this thesis, before going on to outline the analytical distinction between structural and epistemic discretion.

## 2. Perspectives on discretion

In housing and social welfare scholarship, discretion suffers from a reputation problem. The starting point for analysis is generally its capacity to pervert or bastardise policy, perhaps best indicated by Charles Abrams' view that 'the provision of housing can be perverted ... by the floating area of discretion, which can become the area of unbridled tyranny'.<sup>4</sup> Concern about this 'area of unbridled tyranny' becomes further concentrated in the context of social housing. Whether it is the local authority homelessness officer deciding the duty owed to the applicant,<sup>5</sup> a receptionist at a housing association screening out repairs complaints,<sup>6</sup> or a judge ruling on a housing possession case,<sup>7</sup> the housing experiences of those in the social rented sector – more so than in any other tenure – are continually percolating through layers of discretionary space. For tenants in the social rented sector, having to come face-to-face with discretion is 'inevitable'<sup>8</sup> or a 'fact of life'.<sup>9</sup>

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<sup>4</sup> Charles Abrams as quoted in Scott Henderson, *Housing and the Democratic Ideal: The Life and Thought of Charles Abrams* (Columbia University Press 2013) 134.

<sup>5</sup> Susan J Smith and Sara Mallinson, 'The Problem with Social Housing: Discretion, Accountability and the Welfare Ideal' (1996) 24 *Policy and Politics* 339, 342.

<sup>6</sup> Penny Lidstone, 'Rationing Housing to the Homeless Applicant' (1994) 9 *Housing Studies* 459, 469

<sup>7</sup> Dave Cowan and Emma Hitchings, "'Pretty Boring Stuff': District Judges and Housing Possession Proceedings' (2007) 16 *Social and Legal Studies* 363.

<sup>8</sup> Smith and Mallinson (n 2) 353.

<sup>9</sup> Joel Handler, *The Conditions of Discretion* (Russell Sage Foundation 1986) 169.

It is worth noting at the outset that this section does not provide a full account of the vast literature on discretion. To do so would leave room for little else. Nor does it canvass how these ideas have evolved in as much detail as elsewhere. For a far more learned overview of the literature than the one provided here, see Hupe and Hawkins' assessments respectively.<sup>10</sup> Instead, the focus of this section is on outlining where this thesis fits within the broader literature on discretion and justifying the approach adopted throughout the analysis which follows. It does so with reference to – what I argue – are three analytical limitations within some of the commonly adopted approaches to conceptualising discretion.

Although initially somewhat of a 'cult interest' amongst administrative lawyers,<sup>11</sup> following the work of Ronald Dworkin,<sup>12</sup> Denis Galligan,<sup>13</sup> Kenneth Davis,<sup>14</sup> Aharon Barak<sup>15</sup> and others,<sup>16</sup> 'discretion' has grown into a heavily disputed concept which continually attracts heated debate in policy circles and intense scholarly attention.<sup>17</sup> There is by no means a settled consensus. Administrative law is dominated by

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<sup>10</sup> Keith Hawkins, 'The Use of Legal Discretion: Perspectives from Law and Social Science', *The Uses of Discretion* (Oxford University Press 1992) 11–46; and Peter Hupe, 'Dimensions of Discretion: Specifying the Object of Street-Level Bureaucracy Research' (2013) 6 *Der moderne Staat: Zeitschrift für Public Policy, Recht und Management* 425.

<sup>11</sup> Norman Lewis, 'Council Housing Allocation: Problems of Discretion and Control' (1976) 54 *Public Administration* 147.

<sup>12</sup> Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977).

<sup>13</sup> Denis Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press 1986).

<sup>14</sup> Kenneth Davis, *Discretionary Justice: A Preliminary Inquiry* (University of Illinois Press 1977).

<sup>15</sup> Aharon Barak, *Judicial Discretion* (Yale University Press 1989).

<sup>16</sup> In the field of social welfare, two works have been particularly influential in stirring debate: Michael Adler and Stewart Asquith (eds), *Discretion and Welfare* (Heinemann 1981); and Richard Titmuss, 'Welfare "Rights", Law and Discretion' (1971) 42 *Political Quarterly* 113.

<sup>17</sup> Roy Sainsbury, 'Administrative Justice, Discretion and the "Welfare to Work" Project' (2008) 30 *Journal of Social Welfare and Family Law* 323, 328.

discretion,<sup>18</sup> and as was said by Rosenberg in the early 1970s, ‘to speak of discretion in relation to law is to open a thousand doorways to discussion’.<sup>19</sup>

The position of the literature has only become more complicated as the growth of the welfare state has brought with it increasing challenges to the academic treatment of discretionary power,<sup>20</sup> with further rifts opening up between the differential treatment of discretion by legal academics and other social scientists,<sup>21</sup> and the ‘myths and assumptions’ inherent in attempting to draw ‘sharp distinctions’ between the operation of discretion in law and policy.<sup>22</sup> Increasingly, in evolving welfare states, ‘discretion’ provides the target for law and policy initiatives designed to ‘preserve, enhance, check, limit, shape, or eliminate’<sup>23</sup> discretion in different contexts, such as at a local authority level or that exercised in tribunals or other decision-making bodies.

The argument below focuses on three general characterisations of approaches within this broad literature to analysing discretion: the ‘doughnut’ approach; a focus on the ‘implementation gap’, including associated perspectives on judicial discretion; and analysis of organisational elements of and effects on discretion. The section then pauses to consider that there is something different about discretion exercised in welfare settings to that in other contexts. It then goes on to outline briefly the theoretical approach to discretion taken in this thesis.

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<sup>18</sup> Charles Koch, ‘Judicial Review of Administrative Discretion’ (1985) 54 *George Washington Law Review* 469.

<sup>19</sup> See Maurice Rosenberg, ‘Judicial Discretion of the Trial Court, Viewed from Above’ (1970–1971) 22 *Syracuse Law Review* 635, 635.

<sup>20</sup> Geneviève Cartier, ‘Administrative Discretion and the Spirit of Legality’ (2009) 24(3) *Canadian Journal of Law and Society* 313.

<sup>21</sup> Nicola Lacey, ‘The Jurisprudence of Discretion: Escaping the Legal Paradigm’ in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press 1991) 361, 363.

<sup>22</sup> Lorne Sossin and Laura Pottie, ‘Demystifying the Boundaries of Public Law: Policy, Discretion, and Social Welfare’ (2005) 38 *University of British Columbia Law Review* 186.

<sup>23</sup> Anna Pratt and Lorne Sossin, ‘A Brief Introduction of the Puzzle of Discretion’ (2009) 24(3) *Canadian Journal of Law and Society* 1.

## 2.1. Getting away from doughnuts

The first port of call for any law student reading about discretion is Dworkin's articulation of the interface between 'rules' and 'discretion'. The (in)famous 'doughnut' analogy captures the argument well: 'discretion, like the hole in the doughnut, does not exist except as an area left open by a surrounding belt of restriction'.<sup>24</sup> Namely, 'rules' (specifically, law and associated policy schema) and 'discretion' are negatively correlated entities – as you have more rules the discretionary hole shrinks accordingly, and vice versa. It is a 'negative characterization of discretion',<sup>25</sup> situating it as a residual product of the space left by the surrounding doughy belt. The resulting analysis, therefore, is about the extent of this 'hole in doughnut', what the optimal balance of rules and discretion is in different contexts, or about those structural mechanisms which restrain 'the actors' opportunity for moving in the hole'.<sup>26</sup> Although much of the recent academic literature has moved away from a reliance on this conceptualisation, the theoretical approach remains (perhaps surprisingly) resilient.<sup>27</sup> It is still described as a 'conventional view'<sup>28</sup> and 'common definition'<sup>29</sup> of discretion in policy debates and judicial considerations,<sup>30</sup> and many of its core assumptions are adopted in academic analyses undisturbed.<sup>31</sup>

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<sup>24</sup> Dworkin (n 12) 31.

<sup>25</sup> Robert E Goodin, 'Welfare, Rights and Discretion' (1986) 6 *Oxford Journal of Legal Studies* 232, 233.

<sup>26</sup> Molander et al (n 2) 65.

<sup>27</sup> Its continued use and development has led to a panoply of influential journal articles all titled using doughnut analogies, such as Pratt's 'Dunking the doughnut', Clark's 'Filling in the Doughnut' and Bronstein's mixed metaphor of 'Drowning in the hole of the doughnut'. See, respectively: Anna C Pratt, 'Dunking the Doughnut: Discretionary Power, Law and the Administration of the Canadian Immigration Act' (1999) 8 *Social and Legal Studies* 199.; David Clark, 'Filling in the Doughnut? Police Operational Discretion and the Law in Australia' (2014) 14 *Oxford University Commonwealth Law Journal* 195; Victoria Bronstein, 'Drowning in the Hole of the Doughnut: Regulatory Overbreadth, Discretionary Licensing and the Rule of Law' (2002) 119 *South African Law Journal* 469.

<sup>28</sup> Pratt and Sossin (n 23) 301.

<sup>29</sup> Lisa Wallander and Anders Molander, 'Disentangling Professional Discretion: A Conceptual and Methodological Approach' (2014) 4 *Professions and Professionalism* 1.

<sup>30</sup> Pratt and Sossin (n 23) 301.

<sup>31</sup> *Ibid.*

The doughnut logic has been particularly influential within the formative debates on the role of discretion in the British social security system. Perhaps most notably, Titmuss' seminal article, which went on to inform debates on discretion in the adjudication of benefits for decades after its publication, bears the key hallmarks of the doughnut. His fundamental contribution was to highlight a continuum between 'rules' and 'discretion', asking 'where on the scale might be the most serious and the most frequent injustice[?]'.<sup>32</sup> Hawkins too, in providing an initiation to the topic in his influential edited collection *Uses of Discretion*, refers to the problem of discretion as 'the space, as it were, between legal rules in which legal actors may exercise choice'.<sup>33</sup> **Figure 3.1** provides an illustration of the key tenets of this approach: the continuum between rules and discretion existing in a negative correlation with one another; a point of distinction between a 'rule' and the resulting 'discretion' where one ends and the other starts; and the continuum being subject to change and modification, where interventions by the courts or others can influence the balance between rules and discretion.

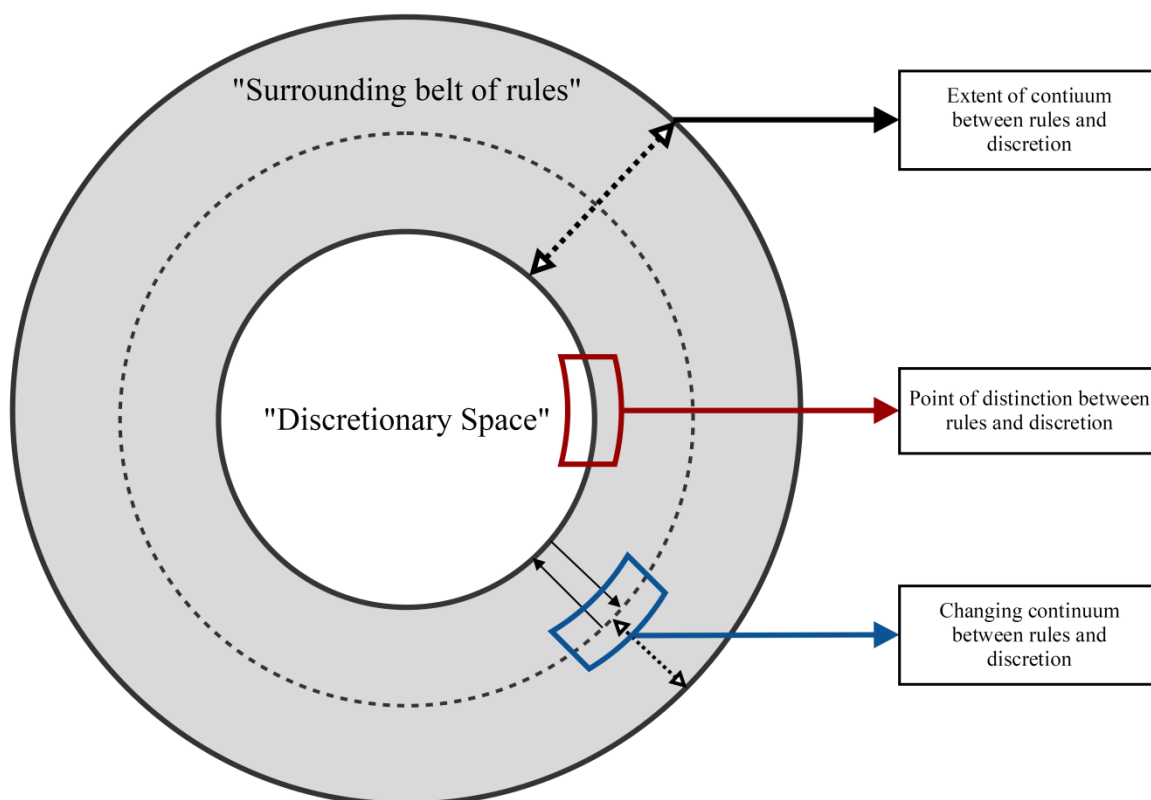
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<sup>32</sup> Titmuss (n 16) 114.

<sup>33</sup> It is worth noting that despite Hawkins outlining the analytical problem in this way, some of his arguments within the chapter undermine assumptions in the doughnut approach. For instance, see his discussion under the section 'Discretion in Using Rules': Hawkins (n 10) 35.



**Figure 3.1:** An illustration of Dworkin’s ‘hole in the doughnut’ approach to discretion.



There are three key limitations in this doughnut approach that would make its adoption in this thesis problematic. Firstly, it assumes that individuals are ‘essentially autonomous’, although susceptible to certain independent variables or constraints, when exercising the discretionary power in the middle of the doughnut.<sup>34</sup> This creates what has been described by Atiyah as ‘dead analytic space’<sup>35</sup> – a conception of discretion that does not recognise the complications inherent in how it is exercised. As an example, Jowell’s use of Dworkin’s arguments to show that the Supplementary Benefits Commission sits on a weak model of discretion<sup>36</sup> – namely, the hole in the doughnut is a small one – is useful in outlining the parameters of the scheme itself, but analytically tells us little other than where the author considers it to sit on the continuum between rules and discretion. How those decisions are made or how the knowledge is used and applied are left untouched.

<sup>34</sup> Ibid.

<sup>35</sup> Robert Post, ‘The Management of Speech: Discretion and Rights’ [1984] Faculty Scholarship Series. Paper 218 <[http://digitalcommons.law.yale.edu/fss\\_papers/218](http://digitalcommons.law.yale.edu/fss_papers/218)>.

<sup>36</sup> Jeffrey Jowell, ‘Administrative Law and Jurisprudence’ (1977) 55 *Acta Juridica* 55, 57.

Secondly, there are problems in defining exactly what these ‘rules’ entail. Trying to untangle their often complex and overlapping nature, sometimes ensnared in nuanced constitutional considerations, is what Olejarski describes as the ‘donut conundrum’.<sup>37</sup> The articulation of the metaphor by Dworkin appears to assert that law is overwhelmingly the most powerful influence in the regulation of discretionary space. However, this is a problematic assumption. There is clear evidence to support a divergence between what laws say and what those afforded discretionary space do. As stated by Black: ‘notions that rules are statements of what will occur ... [must] be seen as rather quaint ideas held onto by those who are still fixated by the legal paradigm’.<sup>38</sup> Moreover, a division between the implementation of rules and local level discretion is a ‘false dichotomy’.<sup>39</sup> Indeed, ‘rules are shot through with discretion’,<sup>40</sup> which leads Baldwin to assert that discretion is like a tube of toothpaste – if you squeeze at one point it simply oozes out somewhere else.<sup>41</sup> Assessing vague concepts such as ‘reasonableness’<sup>42</sup> clearly confers sizable discretion to a front-line worker, and even seemingly clearly delineated ‘rules’ can retain an irreducible ‘embedded discretion’.<sup>43</sup>

Finally, the doughnut perspective creates a rules/discretion cut-off point at which politics stops and administration begins: the latter being unable to undermine the constitutional validity of the former. In other words, there is a simultaneous expectation that actors within the discretionary space will toe the line on the exercise of the rules laid down in the surrounding belt, while simultaneously expecting unbridled tyranny at its cut-off. This is not always conceptualised as a clear bright line

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<sup>37</sup> Amanda Olejarski, *Administrative Discretion in Action: A Narrative of Eminent Domain* (Lexington Books 2013) 20.

<sup>38</sup> Julia Black, ‘New Institutionalism and Naturalism in Socio-Legal Analysis: Institutional Approaches to Regulatory Decision Making’ (1997) 19 *Law and Policy* 51, 52.

<sup>39</sup> Steven Maynard-Moody and Shannon Portillo, ‘Street-Level Bureaucracy Theory’ in Robert Durant (ed), *The Oxford Handbook of American Bureaucracy* (Oxford University Press 2010) 271.

<sup>40</sup> Black (n 38) 52.

<sup>41</sup> Mark Baldwin, *Care Management and Community Care: Social Work Discretion and the Construction of Policy* (Ashgate 2000) 4.

<sup>42</sup> Sainsbury (n 17) 328.

<sup>43</sup> Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press 2009) 96.

– Titmuss, for instance, talks of ‘overlapping zones’ as opposed to a ‘sharp’ distinction.<sup>44</sup> This limitation accords with criticisms made of the conceptualisation of administrative discretion within the field of public administration more generally, such as Harmon’s impossible exam question for scholars, where he asks for these overlapping expectations of administrative discretion to be justified.<sup>45</sup>

## 2.2.A focus on an implementation gap

Having outlined some of the limitations of the doughnut approach, this section turns to a second key approach. Many of the key conceptual debates over discretion in public administration can be characterised as falling into a ‘top-down’ or ‘bottom-up’ approach,<sup>46</sup> or as an attempt to ‘meld’ these two perspectives.<sup>47</sup> Put another way, their focus – explicitly or implicitly – is on the *implementation* of policy: how centrally determined policies can be refracted by discretion on their intricate journey to the frontline (top-down), and/or how administrative workers use their discretion themselves to determine the content and practice of these policies (bottom-up). **Figure 3.2** depicts a characterisation of the now commonly adopted ‘bottom-up’ approach to serve as a point of reference. It relies on an initial policy ( $\alpha$ ) being fed in at one end, potentially with some discretion built in or lack of clarity on its key elements, and then mangled around within a bureaucratic black-box before being churned out the other side ( $\nu$ ). It accords with the familiar meme in welfare contexts of unpredictable

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<sup>44</sup> Titmuss (n 16) 119.

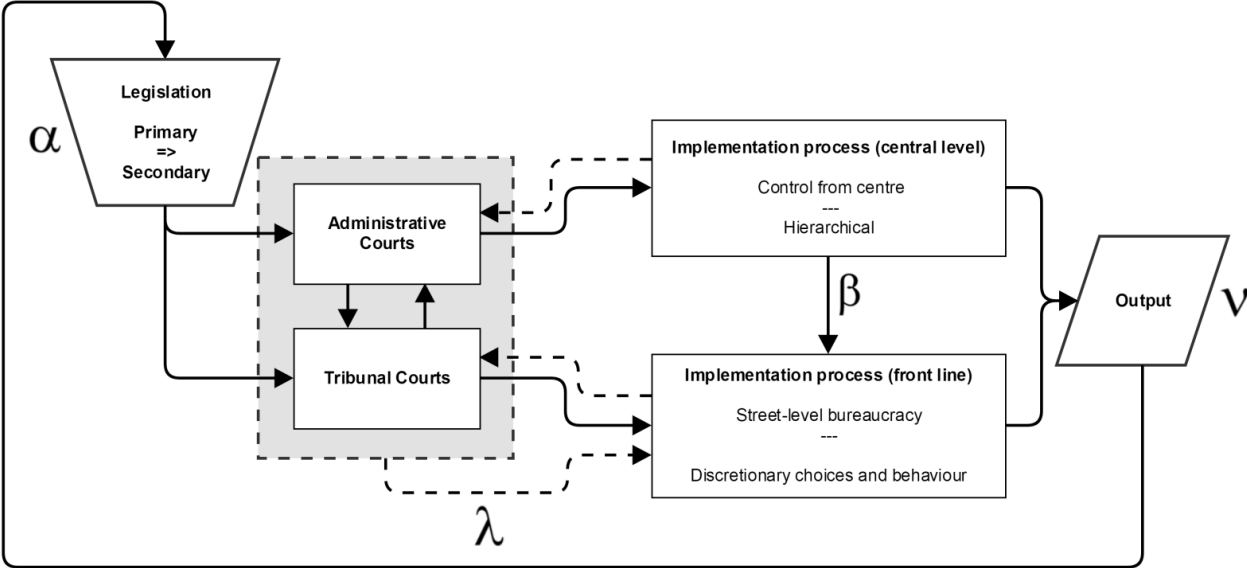
<sup>45</sup> Michael M Harmon, *Public Administration’s Final Exam* (University of Alabama Press 2006) 4.

<sup>46</sup> For a concise overview of the differences in how discretion is conceptualised within these two perspectives, see Lars Tummors and Victor Bekkers, ‘Policy Implementation, Street-Level Bureaucracy, and the Importance of Discretion’ (2014) 16 *Public Management Review* 527, 530. For broader seminal studies on the ‘top-down’ approach to the analysis of policy implementation, see Brian Hogwood and Lewis Gunn, *Policy Analysis for the Real World* (Oxford University Press 1984). For ‘bottom-up’ approaches, see: Susan Barrett and Colin Fudge, *Policy and Action: Essays on the Implementation of Public Policy* (Methuen 1981).

<sup>47</sup> Janet Vinzant, Janet Denhardt and Lane Crothers, *Street-Level Leadership: Discretion and Legitimacy in Front-Line Public Service* (Georgetown University Press 1998) 57.

administrative workers presenting a ‘bureaucratic challenge’<sup>48</sup> or people ‘suffer[ing] at the hands of bureaucracy’.<sup>49</sup>

**Figure 3.2:** An illustration of the implementation approach to conceptualising discretion.



By far the most influential thesis sitting in this implementation approach is Lipsky’s seminal ‘street-level bureaucracy’.<sup>50</sup> The core of his argument is that a centrally formulated policy ( $\alpha$ ) remains a mere abstraction until the point of delivery ( $\nu$ ). Those front-line workers – the ‘street-level bureaucrats’ – are themselves an inevitable and influential part of the policymaking process, with the potential to ‘distort’ the intentions of any policymaking process at the central level.<sup>51</sup> Their discretion is inevitable; problems of interpretation a practical reality. New policies have to be implemented alongside existing complexes of rules, guidelines and instructions,<sup>52</sup> and applied effectively to complicated individual circumstances.<sup>53</sup> His ideas have been

<sup>48</sup> HC Deb, 13 January 2016, c341WH.  
<sup>49</sup> HC Deb, 18 December 2012, c206WH.  
<sup>50</sup> Michael Lipsky, *Street-Level Bureaucracy: The Dilemmas of the Individual in Public Service* (Russell Sage Foundation 1980).  
<sup>51</sup> Tony Evans, *Professional Discretion in Welfare Services: Beyond Street-Level Bureaucracy* (Routledge 2016) 17.  
<sup>52</sup> Lipsky (n 50) 15.  
<sup>53</sup> Ibid 161.

subject to refinement over the last few decades, particularly at point  $\alpha$  where Evans' influential critiques argue that the role of senior managers has been neglected.<sup>54</sup> The core of the theory, however, remains intact and hugely influential in the study of discretion in social welfare settings in particular.<sup>55</sup>

Many socio-legal studies which examine discretion frequently (but not always) fall into similar camps. In applying methodologies which often adhere to one of these top-down and bottom-up groupings themselves,<sup>56</sup> studies generally either focus on how particular decisions of the courts impact on the exercise or space accorded to administrative discretion (top-down), analyse how those public officials tasked with these decisions 'interact with the law' (bottom-up) at point  $\lambda$ ,<sup>57</sup> or attempt to merge the approaches together by looking at discretion as 'deliberative space' between the top-down commands and the bottom-up reality.<sup>58</sup>

There would be – in my view – three limitations of adopting this widely used 'implementation gap' approach to analysing discretion in this thesis. The first two stem from its reliance on defining discretion relative only to an overall policy aim. Put another way, within this theoretical approach, discretion only exists in so far as it bastardises the central government's intention in a particular policy or intervention. There is a lack of emphasis on the granting of discretion without a determined (even if vague or unclear) aim. This is analytically problematic in situations where discretion is granted as an end in itself, as discussed in Chapter Four's analysis of the fetishisation

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<sup>54</sup> Evans (n 51).

<sup>55</sup> For an overview of Lipsky's influence in the study of homelessness services alone, see: Sarah Louise Alden, 'Welfare Reform and the Street Level Bureaucrat in Homelessness Services' (2015) 35 *International Journal of Sociology and Social Policy* 359, 361–363.

<sup>56</sup> Simon Halliday, *Judicial Review and Compliance with Administrative Law* (Hart 2004) 9.

<sup>57</sup> Marc Hertogh and Simon Halliday, 'Introduction' in Marc Hertogh and Simon Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Dimensions* (Cambridge University Press 2007) 2.

<sup>58</sup> Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State* (Oxford University Press Oxford 2009) 169.

of localism,<sup>59</sup> or where local-level discretion is used as a means to ‘deliberately fudge’<sup>60</sup> value conflicts in the formation of policy itself.

Second, within an ‘implementation gap’ focus, the discretion exercised by street-level bureaucrats is analysed with reference to its deviation from the central aim: a scholarly spot-the-difference between point  $\alpha$  and point  $\nu$ . The way in which the perceived knowledge or function of street-level bureaucrats can be constitutive of this aim is generally omitted. The dependent variable analysed by Lipsky and others is ‘discretion-as-used’, with ‘discretion-as-granted’ as an independent variable exerting effects on the former.<sup>61</sup> In other words, this analytical approach is ill-suited to assessing instances where discretion is a means to an end in itself. The focus of Lipsky and others is generally on how discretionary actions at the local-level can become (often unintended) policy, rather than how policies can attribute certain knowledge expectations of these local-level administrative workers.

A separate criticism generally made of Lipsky’s approach in particular, is that it is an overly ‘sweeping account’<sup>62</sup> of bureaucratic discretion, where bureaucrats and bureaucracies situated in wildly different contexts are all tarred with the same analytical brush. To make generalisations about street-level bureaucracies requires a sufficient ‘common denominator’<sup>63</sup> between them. Nurses, teachers, police officers, Housing Benefit processors and so on, are argued to have ‘common conditions that

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<sup>59</sup> See p.193.

<sup>60</sup> Tony Prosser, ‘The Politics of Discretion: Aspects of Discretionary Power in the Supplementary Benefits Scheme’ in Michael Adler and Stewart Asquith (eds), *Discretion and Welfare* (Heinemann 1981) 180.

<sup>61</sup> For a more detailed analysis of this issue, see how Hupe et al return to the use of the independent/dependent variable distinction in their introductory and concluding sections of *Understanding Street-Level Bureaucracy*: Peter Hupe, Michael Hill and Aurélien Buffat, ‘Introduction: Defining and Understanding Street-Level Bureaucracy’ in Peter Hupe, Michael Hill and Aurélien Buffat (eds), *Understanding Street-Level Bureaucracy* (Policy Press 2015) 18; and Peter Hupe, Michael Hill and Aurélien Buffat, ‘Conclusion: The Present and Future Study of Street-Level Bureaucracy’ in *ibid* 327.

<sup>62</sup> Evans (n 51) 18.

<sup>63</sup> Hupe et al, ‘Conclusion’ (n 61) 326.

give rise to common patterns of practice'.<sup>64</sup> These settings, however, of course vary dependent on the organisational culture, institutional factors, and countless other cross-national lines.<sup>65</sup> The provision of social security benefits is particularly sensitive to changes to resourcing and organisational factors, and – as I go on to argue throughout this thesis – decisions taken about an individual's occupation of the home face further nuances and complexities which mark them out from other decisions which may appear to be taken in a *prima facie* similar context. As an example, Olejarski's analysis of administrative discretion in the context of eminent domain (the American equivalent of compulsory purchase orders) points to the importance of rural/urban differences in making decisions about the possession of an individual's property.<sup>66</sup>

### **2.3. The organisational focus: fragmenting discretionary space**

Having looked at the classic doughnut and at implementation gap debates, the third commonly adopted approach concerns the important intervention particularly associated with the politics of the 1980s and 1990s: New Public Management. This is a perspective connected to the top-down/bottom-up literature but stands as a distinct and important influence. The now-familiar terms 'New Public Management' or 'New Public Services' are effectively 'managerial variant[s] of traditional top-down'<sup>67</sup> approaches, where the importance of the organisational and management structure is given particular emphasis.<sup>68</sup> These studies attempt to analyse 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'.<sup>69</sup> In this changing environment, the discretion

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<sup>64</sup> Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Service* (30th Anniversary, Russell Sage Foundation 2010) 27–28.

<sup>65</sup> Hupe (n 10).

<sup>66</sup> Olejarski (n 37) 78–80.

<sup>67</sup> Peter Hupe and Michael Hill, 'Street-Level Bureaucracy and Public Accountability' (2007) 85 *Public Administration* 279, 289.

<sup>68</sup> Ed Carson, Donna Chung and Tony Evans, 'Complexities of Discretion in Social Services in the Third Sector' (2014) *European Journal of Social Work* 1.

<sup>69</sup> John Hudson and Stuart Lowe, *Understanding the Policy Process: Analysing Welfare Policy and Practice* (Policy 2009) 137.

accorded to administrative workers has become more fragmented by the organisational structure in which they work.

New Public Management is ‘preoccupied’ with vertical structures of authority<sup>70</sup> with a focus on top-down control,<sup>71</sup> performance indicators, formalisation of behaviour,<sup>72</sup> and new partnership formation with private and non-profit organisations. The arguments over discretion generally align with two perspectives: either suggesting that these changes have reduced the extent of discretion – the so-called ‘curtailment thesis’ – or that advances in these organisational processes have provided further resources for front-line staff for their decision-making – the ‘enablement thesis’.<sup>73</sup>

The lines of discretion and power seen in more traditional approaches splinter due to New Public Management’s faith in private business methods,<sup>74</sup> the importance of keeping a ‘sharp distinction’ between politics and administration,<sup>75</sup> and the principle that preferences are fixed and best expressed through market mechanisms rather than by the individual choice of an administrative worker.<sup>76</sup> Local authority staff find themselves increasingly ‘managing an economy of incentives’<sup>77</sup> rather than directly making decisions on the allocation of resources.

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<sup>70</sup> Guoxian Bao et al, ‘Beyond New Public Governance: A Value-Based Global Framework for Performance Management, Governance, and Leadership’ (2013) 45 *Administration and Society* 443, 457.

<sup>71</sup> Kathryn Ellis, ‘“Street-level Bureaucracy” Revisited: The Changing Face of Frontline Discretion in Adult Social Care in England’ (2011) 45 *Social Policy and Administration* 221, 227.

<sup>72</sup> Jeroen Maesschalck, ‘The Impact of New Public Management Reforms on Public Servants’ Ethics: Towards a Theory’ (2004) 82 *Public Administration* 465, 484.

<sup>73</sup> Aurélien Buffat, ‘Street-Level Bureaucracy and E-Government’ (2015) 17 *Public Management Review* 149.

<sup>74</sup> Janet Denhardt and Robert Denhardt, *The New Public Service: Serving, Not Steering* (ME Sharpe 2011) 551.

<sup>75</sup> Peter Barberis, ‘The New Public Management And A New Accountability’ (1998) 76 *Public Administration* 451, 455.

<sup>76</sup> Linda Kaboolian, ‘The New Public Management: Challenging the Boundaries of the Management vs. Administration Debate’ (1998) 58 *Public Administration Review* 189, 190.

<sup>77</sup> Mark Considine and Siobhan O’Sullivan, ‘Introduction: Markets and the New Welfare – Buying and Selling the Poor’ (2014) 48 *Social Policy and Administration* 119, 120.



In studies of this kind an oft-cited example is the evolution of choice-based lettings. 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 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 New Public Management principles in mind, focused on embedding customer choice in an attempt to bring some of the benefits of market allocation to social housing.<sup>78</sup> It was designed to deal with perceived inefficiencies caused by discretion sitting in the hands of individual council officers tasked with the distribution of properties<sup>79</sup> and an associated unaccountable ‘cloak of discretion’.<sup>80</sup> In creating these systems, however, the same discretion that was viewed as problematic can simply be pushed elsewhere. Like a tube of toothpaste, 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.<sup>81</sup>

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.<sup>82</sup> Pressures to comply with performance targets in these environments can dominate the day-to-day concerns of workers,<sup>83</sup> 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.<sup>84</sup>

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<sup>78</sup> Colin Jones and Hal Pawson, ‘Best Value, Cost-Effectiveness and Local Housing Policies’ (2009) 30 *Policy Studies* 455, 466.

<sup>79</sup> Tim Brown and Nicola Yates, ‘Allocations and Lettings – Taking Customer Choice Forward in England?’ (2005) 5 *International Journal of Housing Policy* 343, 346.

<sup>80</sup> Denhardt and Denhardt (n 74) 90.

<sup>81</sup> Jones and Pawson (n 78) 467.

<sup>82</sup> Considine and O’Sullivan (n 77) 122.

<sup>83</sup> Paul Henman and Menno Fenger, ‘Reforming Welfare Governance: Reflections’ in Paul Henman and Menno Fenger (eds), *Administering Welfare Reform : International Transformations in Welfare Governance* (Policy Press 2006) 263.

<sup>84</sup> Baldwin (n 41) 81.

Before turning to some broader problems associated with welfare and reductionism, there are two limitations of this organisationally focused approach worth highlighting here. First, this fragmented view of discretion under New Public Management thinking is set against increased space for and expectations of officer discretion. The welfare reform agenda has been characterised by an extraordinary resurgence in an (at least rhetorical) emphasis on dealing with individuals on a case-by-case basis, as opposed to creating management structures for their assessment.<sup>85</sup> As recently highlighted by Jessen and Tufte, policies focused on the ‘activation’ of welfare subjects in particular ‘imply a wide scope for discretion’, providing opportunities for individual officers to ‘judge and control behaviour’.<sup>86</sup> Good examples include sanctions for jobseeker’s allowance<sup>87</sup> and the expansion of the DHP regime (on which, far more in Chapter Four), both of which are indicative of how changing relations between welfare agencies and their recipients have expanded the ‘sphere of administrative discretion’.<sup>88</sup>

Second, it is important to emphasise that these organisationally focused studies on the exercise of discretion are effectively bolt-ons to the implementation approach outlined above. They are, to varying degrees, focused on point  $\beta$  in **Figure 3.2**, with the analytical focus resting on how organisational factors – the nature of the local-level management context, the organisational controls on administrative discretion, and so on – have fundamentally changed or influenced the exercise of front-line discretion by the administrative workers.

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<sup>85</sup> This tension poses particular problems for the application of accountability mechanisms. As explored by, Avishai Benish and Asa Maron, ‘Infusing Public Law into Privatized Welfare: Lawyers, Economists, and the Competing Logics of Administrative Reform’ (2016) 50 *Law and Society Review* 953, 956.

<sup>86</sup> Jorunn Jessen and Arne Tufte, ‘Discretionary Decision-Making in a Changing Context of Activation Policies and Welfare Reforms’ (2014) 43 *Journal of Social Policy* 269, 270.

<sup>87</sup> See Sharon Wright, ‘The Administration of Transformation: A Case Study of Implementing Welfare Reform in the UK’ in Henman and Finger (eds) (n 83) 161.

<sup>88</sup> Neil Gilbert and Rebecca Van Voorhis, *Activating the Unemployed: A Comparative Appraisal of Work-Oriented Policies* (Transaction Publishers 2001) 297.

## **2.4. There is something about welfare: the social construction of discretion and the welfare applicant**

It is worth noting that sitting alongside these three broad perspectives is a recognition that there are specific problems associated with the exercise of discretion to (i) determine need (ii) in a social security context. The literature points to the determination of support for those in receipt of welfare benefits as being a particularly difficult analytical problem, often providing space for otherwise irrelevant considerations to enter the frame.

The core of these concerns is focused on the socially constructed nature of discretionary decision-making. Hasenfeld's description of the job of a welfare administrator as 'moral work' is indicative of this concern.<sup>89</sup> One of the archetypal theoretical objections to the exercise of discretionary power by administrative workers is that it allows room for the imposition of moral criteria, explicitly or implicitly, in the assessment of the welfare applicant<sup>90</sup> – this is particularly true when looking at the provision of publicly funded housing.<sup>91</sup> The operation of discretionary allocation at local authority level has been a main-stay in UK housing policy, and consequently this problem is a well-trodden road in the homelessness literature, where research has focused on the front-line staff who are routinely faced with the determination of 'need', and particularly the fraught concept of 'vulnerability'<sup>92</sup> with reference to what are often vague policies or legal benchmarks.<sup>93</sup>

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<sup>89</sup> Yeheskel Hasenfeld, 'Organizational Forms as Moral Practices: The Case of Welfare Departments' (2000) 74 *Social Service Review* 329.

<sup>90</sup> Goodin (n 25) 239.

<sup>91</sup> Ibid 240.

<sup>92</sup> Kate Brown, 'Re-moralising "Vulnerability"' (2012) 6 *People, Place and Policy Online* 41, 44.

<sup>93</sup> See Lidstone (n 6); and Suzanne Fitzpatrick and Mark Stephens, 'Homelessness, Need and Desert in the Allocation of Council Housing' (1999) 14 *Housing Studies* 413.

Any assessment of a welfare recipient's need is a socially constructed process<sup>94</sup> and is a product, at least in part, of the moral and social attitude of the official.<sup>95</sup> This inevitably colours the discretion exercised by the individual administrative workers tasked with making housing decisions. Bretherton et al have argued that this social construction of the individual is highly complex, and 'clearly begins at the point of initial interview' where the 'nature of the applicant' is assessed.<sup>96</sup> There are two complexities outlined in the literature which warrant attention here.

Firstly, the allocation of welfare, and especially housing, is tied closely to the sorting of claimants into different 'categories' of entitlement or deservingness; the service encounters between the welfare worker and the claimant providing the opportunity for this categorisation to take place.<sup>97</sup> As argued by Hasenfeld, even seemingly 'technical neutral' categories (such as being 'intentionally homeless', for instance) imply certain causalities and responses which confer a moral status on the applicant.<sup>98</sup> This 'social construction of clients'<sup>99</sup> has been found to be: inherently gendered (with women often treated as more 'vulnerable' in homelessness assessments);<sup>100</sup> based on a series of complicated and nuanced factors (such as body language and demeanour in interviews<sup>101</sup>); and are subject to change on the basis of the fluctuating availability of evidence.<sup>102</sup>

Secondly, this social construction of the individuals within a welfare context is not sited solely within the administrative workers themselves, but is instead embedded

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<sup>94</sup> Anne Schneider and Helen Ingram, 'Social Construction of Target Populations: Implications for Politics and Policy' 87*American Political Science Review* 334.

<sup>95</sup> Black (n 38) 52.

<sup>96</sup> Joanne Bretherton, Caroline Hunter and Sarah Johnsen, 'You Can Judge Them on How They Look ...' (2013) 7 *European Journal of Homelessness* 69, 86.

<sup>97</sup> Patrice Rosenthal and Riccardo Peccei, 'The Social Construction of Clients by Service Agents in Reformed Welfare Administration' (2006) 59 *Human Relations* 1633, 1634.

<sup>98</sup> Hasenfeld (n 89) 329.

<sup>99</sup> Rosenthal and Peccei (n 97) 1635.

<sup>100</sup> Helen Cramer, 'Informal and Gendered Practices in a Homeless Persons Unit' (2005) 20 *Housing Studies* 737, 749.

<sup>101</sup> Rosenthal and Peccei (n 97) 1654.

<sup>102</sup> Bretherton et al (n 96) 86.

within their organisational framework (for instance, in the benefit department and local authority as a whole).<sup>103</sup> A good example of this is provided by Mullins and Pawson when they discuss the banding criteria for social housing allocation under ‘choice-based lettings’.<sup>104</sup> They argue that the discretion of caseworkers in determining need is in part constructed by organisational pressures, which they term ‘landlord interest cases’ (for instance, people underoccupying their home).<sup>105</sup> This slots neatly into the recognition within the literature on discretion that informal professional socialisation changes the way in which applicants are socially constructed in discretionary decision-making.<sup>106</sup> Professional norms and practices therefore shape the way in which the ‘need’ or ‘deservingness’ of applicants are assessed and shifts the goalposts of the ‘moral work’ undertaken by administrative workers.

## **2.5.Tying the perspectives together: avoiding reductionism**

Each of these three broad perspectives on discretion outlined above is designed to meet different research aims. They function effectively on their own terms – for instance, an organisationally focused analysis is useful when considering effective management of human resources at a local authority and so on. However, all inevitably subscribe to a form of reductionism of one sort or another. By focusing on their own strata of analysis, they invariably neglect others.

A modified version of Hupe’s characterisation of the policy implementation literature can serve as a useful descriptive tool here.<sup>107</sup> In comparing Lipsky’s street-level bureaucracy with top-down perspectives, he suggests a comparative framework based on seeing how attention is given to key dimensions (the structure, content, and process)

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<sup>103</sup> Hasenfeld (n 89) 348.

<sup>104</sup> David Mullins and Hal Pawson, “‘The Land that Time Forgot’: Reforming Access to Social Housing in England’ (2005) 33 *Policy and Politics* 205, 216.

<sup>105</sup> *Ibid.*

<sup>106</sup> See Martha S Feldman, ‘Social Limits to Discretion: An Organizational Perspective’ in Hawkins (ed) (n 21).

<sup>107</sup> The table has been adopted frequently to summarise the literature by Peter Hupe. For a more detailed explanation of the terms used in the table, please see Peter Hupe, ‘Beyond Reductionism in the Study of Government-in-Action’ (April 14 2015) IPCAD Research Training Group of the Faculty of Economics and Social Sciences.

against different scales (system level, organisational level, and down to the individual level). In the above, I have added ‘law’ as an additional key dimension, as each of these approaches inevitably leads to different conceptualisations. To be clear, this is intended as a useful way of demonstrating how the limitations identified above overlap with one another; this section is not arguing for adopting this breakdown as a typology.

**Figure 3.3:** An overview of the different emphases of theoretical approaches to discretion.

Scale   Dimension	Structure	Content	Process	Law
<b>System</b>	<b>Context</b>	<b>Orientation</b>	<b>Control</b>	<b>Framework</b>
<b>Organisation</b>	<b>Setting</b>	<b>Tasks</b>	<b>Management</b>	<b>Accountability</b>
<b>Individual</b>	<b>Antecedents</b>	<b>Personal</b>	<b>Behaviour</b>	<b>Independent Variable</b>

– Top Down
  – Organisationally focused
  – Bottom-Up

The top-down and doughnut approaches focus on the **purple band** above, to the neglect of the organisational- and individual-focused bands. Their emphasis is on the structural context for the exercise of discretionary space, with the law providing the overarching framework which carves up this space and enforces the dividing line between ‘rules’ and ‘discretion’. Law is, in this context, part of the framework for these decisions, carving up some of the discretionary space or providing mechanisms for redress within it. Many of the formative studies within administrative discretion use the ‘doughnut approach’ as their analytical starting point with a focus on this purple band (see, for instance, Galligan’s seminal study on discretionary powers<sup>108</sup> and Allan’s theoretical arguments on the scope of administrative discretion).<sup>109</sup>

The widely adopted Lipsky-based analysis, rooted in the bottom-up study of discretion within policy implementation studies, focuses on the **red band** at the expense of the other two. The analysis is targeted at front-line discretion’s role in the formation of policy, with individual behaviour and the content of the decisions themselves forming

<sup>108</sup> Dennis Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press 1990) 14–20.

<sup>109</sup> Trevor Allan, ‘Doctrine and Theory in Administrative Law: An Elusive Quest for the Limits of Jurisdiction’ [2003] Public Law 429, 433–449.

the focus. In this context, law is relegated largely to an independent variable with the capacity to influence this front-line policy-making process, either directly or with reference to other ‘conditions and factors’.<sup>110</sup> The analytical attention is on this end point of the ‘implementation gap’; how the law features or indirectly affects this decision-making, as shown by Halliday’s influential work on the role of prior legal knowledge and competence on the role of the law within these decisions,<sup>111</sup> arguments which have been built on by others.<sup>112</sup>

The organisationally focused studies on discretion look principally at the **green band**. They analyse the way in which those meso-level factors present in organisational settings impact on the exercise of front-line discretion: middle-mangers; target and objective setting; organisational cultures; the role of technology,<sup>113</sup> and so on. They argue that fundamental changes in organisational settings – such as New Public Management principles – have changed the nature of discretion altogether. Here, the key legal question is one of accountability: how can these market-based systems be held to adhere to standards of good administration and where does fault lie when they go wrong?<sup>114</sup>

Many studies partially straddle these different bands. For instance, Evans’ influential work builds on Lipsky’s ‘street-level bureaucracy’ theory by introducing elements of organisational analysis, particularly on the role that the strata of management functions can play.<sup>115</sup> Most are, however, unavoidably reductionist, breaking this larger

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<sup>110</sup> See Halliday’s outline of his analytical focus in: Simon Halliday, *Judicial Review and Compliance with Administrative Law* (Hart 2004) 3–4.

<sup>111</sup> Ibid.

<sup>112</sup> See Marc Hertogh, ‘Through the Eyes of Bureaucrats: How Frontline Officials Understand Administrative Justice’ in Michael Adler (ed), *Administrative Justice in Context* (Hart 2010) 203–226; and Caroline Hunter et al, ‘Legal Compliance in Street-Level Bureaucracy: A Study of UK Housing Officers’ (2016) 38 *Law and Policy* 81.

<sup>113</sup> See, for instance, Michael Adler and Paul Henman, ‘Computerizing the Welfare State’ (2005) 8 *Information, Communication and Society* 315.

<sup>114</sup> For a more detailed discussion of this problem, see: Peter Barberis, ‘The New Public Management And A New Accountability’ (1998) 76 *Public Administration* 451.

<sup>115</sup> Evans (n 51). For an outline of his approach and where it fits into established thinking on Lipsky’s ‘street-level bureaucracy’, see 11–28.

theoretical material into these smaller more manageable strands. This is not necessarily problematic on their own terms, but given the wide-ranging focus of the theoretical perspective adopted in this study – and particularly its need to work across central government down to local authority decision-makers – adopting one of these approaches would limit the scope of the analysis in this study.

### **3. The conception advanced here**

Building on the limitations identified above, there are three key analytical requirements for an approach to discretion in this thesis. First, it should allow sufficient flexibility to move between the three scales above. As Chapter Four will demonstrate in more detail, analysing discretion from any one of the perspectives above would neglect key elements of the SSSC policy scheme. The central government decision to exempt certain (limited) classes of tenant within Reg.B13 and to adopt this floating layer of DHP provision are as important to interrogate as the decision-making of administrative workers or the design of application forms and internal guidance situated in local authority offices up and down the country.

Second, the approach should align with the arguments made in Chapter Two. This thesis is analysing discretion in the context of decisions taken about continuing to support the occupation of the home for individuals affected by the SSSC policy. In drawing on Valverde and others, as outlined in the previous chapter,<sup>116</sup> it would not be sufficient for my focus to be limited to the construction of the home within DWP and local authority-level DHP guidance. Instead there are a number of different elements of the exercise of discretion which will require analysis, such as the DHP application forms, the content of the regulations, appeals to knowledge by the local authority, the role of evidence, and so on.

Third, the approach taken should allow for a flexible consideration of the role of the courts in this process. As with many modern welfare reforms, discretion within the SSSC operates on a number of different levels and, consequently, legal challenges operate across these different levels too. There have been judicial review challenges

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<sup>116</sup> See p.114.



to the structural placement of discretion (namely, the differential treatment between groups that receive DHP and those who do not) within Reg.B13; the individual decisions taken by local authorities on DHP awards; the interpretation of ‘bedroom’ within Reg.B13; guidance issued on DHP processing at local authority level; and a series of other challenges to the role shouldered by DHPs in the context of other welfare reforms.

### 3.1.A structural/epistemic distinction

The chapter draws on the perspectives of Goodin,<sup>117</sup> Molander et al<sup>118</sup> and Alexy<sup>119</sup> to carve out a distinction between two elements of discretion: (1) structural and (2) epistemic. Namely, the discretionary space advanced to different stakeholders in the welfare context and how this is held to account (*structural*) on the one hand, and the exercise of discretionary decision-making and the knowledge practices involved on the other (*epistemic*).

Although these theorists all treat discretion differently and within separate contexts, the principle dividing line between these structural and epistemic aspects forms a link between both the administrative operation of discretion within modern welfare state structures, the knowledge it seeks to interpret and produce, and – particularly in the work of Alexy<sup>120</sup> – its holding to account within the courts. Though these issues will be returned to in more detail in the chapter which follows in its analysis of the DHP scheme, it is worth briefly outlining how this perspective can be drawn together.

The *structural* dimension of discretion recognises the reality of the use of discretion in policy-making and how regulations can work to confer discretionary powers to administrative workers. Indeed, within the SSSC, this has been a key focus of the

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<sup>117</sup> Goodin (n 25).

<sup>118</sup> Molander et al (n 2).

<sup>119</sup> Alexy (n 2).

<sup>120</sup> For a summary of the key elements of Alexy’s work of importance here, see: Jlio Aguiar de Oliviera and Alexandre Trisisonno Gomes Travessoni, ‘Alexy’s Theory of Law : Proceedings of the Special Workshop “Alexy’s Theory of Law” Held at the 26th World Congress of the International Association for Philosophy of Law and Social Philosophy in Belo Horizonte, 2013’ (2015).

discrimination-based administrative appeals.<sup>121</sup> Importantly, however, the focus is not simply on the conferral of discretionary space – or as characterised above, about the size of the hole in Dworkin’s doughnut – but instead about the structural placement of that discretion. What role is it intended to play? What have the actors been entrusted with? Why are actors entrusted with discretion over some and not others? How is the use of discretion justified?

The *epistemic* dimension assumes that discretion is conferred for a reason. Local authority administrative workers are expected to *know* how to take these decisions. For whatever reason – whether noble or nefarious – they have expectations made of them. The way in which knowledge is expected of claimants, administrative workers, the courts and the government and, importantly, the deference given to different parties ‘superior’ knowledges within this are analytically important. Valverde would likely describe these as ‘knowledge moves’,<sup>122</sup> along with the processing of these knowledge claims, the role of documentation (particularly application forms or internal guidance), assumptions made about the claimants’ lifestyles, the way some information is sidelined over others and who is expected to know what. All of these questions become analytically available by allowing a distinction focused on *epistemic* discretion. Put another way, epistemic discretion focuses on what is required and expected in order to make the decisions themselves, as opposed to the placement and construction of these decisions within the policy framework more broadly or the mechanics of individual decision-making.

Although the structural and epistemic dimensions can be analysed separately, one cannot exist without the other. The structural placement of discretion is tied to the entrustment of some form of knowledge, and those ‘knowledge moves’ and claims exist within the environment created by this structural conferment. In other words, as described by Molander, discretion is not accorded for ‘mere whimsies’;<sup>123</sup> the

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<sup>121</sup> This is discussed in far more detail in Chapter Four, after the ambit of the DHP scheme has been outlined.

<sup>122</sup> Mariana Valverde, ‘Theoretical and Methodological Issues in the Study of Legal Knowledge Practices’ in Martha Merrill Umphrey (ed), *How Law Knows* (Stanford University Press 2007) 83.

<sup>123</sup> Molander (n 2) 20.

structural dimension of discretion is an ‘entrustment’<sup>124</sup> with knowledge, which – in the case of administrative workers in particular – has to be justified publicly. Both elements are inherently fused together.

Connected to this point, there are certain practices which overlap between the two dimensions; it is a soft distinction between the two, rather than a bright line. The focus is instead on using the distinction in an analytically useful way. Some of those organisational-level practices, characterised as falling within the green band above, could be analysed as either a structural or epistemic dimension of discretion. As an example, a local authority issuing its own guidance to staff based on the DWP adjudication circular is both an exercise in conferring discretion in the expectation of knowledge of the administrative workers themselves and an epistemic practice using the knowledge entrusted by the national regulations.

Finally, the approach is particularly well suited to analysing the role of law; particularly the courts. Both dimensions are shot through with law. Alexy and Rivers’ application of the distinction to the exercise of proportionality weighting in public law cases demonstrates its capacity.<sup>125</sup> Both the policy options available to the government and the holding to account of the knowledge practices outlined throughout this thesis can be analysed using this distinction between structural and epistemic discretion.

#### **4. Conclusion**

Given the emphasis I place on the DHP scheme as an integral part of the SSSC, it is necessary to situate how the analysis which follows deals with discretion. I argue that applying a distinction between *structural* and *epistemic* discretion is analytically useful. It allows later chapters to interrogate the *structural* basis of the government’s conferment of discretionary powers to administrative workers, asking what role it plays and what problems emerge as a result. At the same time, it allows a focus on the expectation of knowledge, the *epistemic* element, inherent in the granting of discretion.

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<sup>124</sup> Ibid 25.

<sup>125</sup> This distinction is discussed with reference to the case law on DHPs in the following chapter, see p.202.

Who is expected to know what, how that knowledge is employed, and any role of documents and forms all feature as part of this assessment.

Importantly, the limitations I identify of those commonly adopted approaches – characterised here as the doughnut approach, a focus on the implementation gap, and organisationally focused studies – are not criticisms of those who utilise these literatures in their own work. Instead, my point is that these do not map well onto the arguments put forward in Chapter Two and for the analysis which follows in this thesis. The distinction between structural and epistemic discretion provides the flexibility needed in the analysis chapters which follow to analyse key elements of the SSSC policy schema without having to adopt an implementation-based focus, an organisationally orientated one, or a continuum between rules and discretion.

In covering this ground, the chapter has contributed two sets of the key arguments put forward in the introduction (**Key Arguments 1.2.**) asserting that the most widely adopted theoretical approaches to discretion are not well suited for analysing the full ambit of the DHP scheme, and that this structural/epistemic distinction is a useful analytical tool for doing so. These arguments will be revisited and their alignment with those made in Chapter Two underscored in the summary to the first part of this thesis. Chapter Four now builds on the arguments made here by providing a detailed outline of the DHP scheme – the key manifestation of discretion within the SSSC scheme – and applying this analytical distinction.

# The importance and function of DHPs

## Chapter Four

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**Pictures:** Campaigners protest outside of the UK Supreme Court hearing in MA/A/Rutherford. Signs read: 'Discretionary Housing Payments = Insecurity and Discrimination' and 'Housing Benefit Rights – Not Discretionary Payments'.

## 1. DHPs

As I returned to this chapter in June 2017 – chiefly to update it in light of a string of new judgments following the earlier draft – the disaster at Grenfell Tower unfolded. The tragedy, in which at least 80 people lost their lives, will be etched in the minds of the public for the years and decades to come. As argued in a dedicated edition of the *Journal of Housing Law*, it serves as a microcosm for a coterie of failures: of regulation, governance and resource allocation.<sup>1</sup> As the task of relocating the survivors and those displaced continues, this dreadful event continues to set deficiencies into sharp relief, including the one tackled in this chapter. Due to the dearth of suitable alternative accommodation, households relocated following the disaster are at risk of suffering sizeable shortfalls between their rent and Housing Benefit or – perhaps most perniciously and widely reported<sup>2</sup> – facing the imposition of the SSSC.

So, what is the government’s solution to this problem? The answer lies in a circular issued by the DWP.<sup>3</sup> It states simply that ‘former residents’ of Grenfell Tower should be ‘regarded as a priority when considering applications’ for DHPs.<sup>4</sup> The scheme has been returned to frequently in parliamentary debates on Grenfell Tower, with the government underscoring the availability of these ‘extra discretionary payments’ for those affected.<sup>5</sup>

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<sup>1</sup> Andrew Arden, ‘Grenfell Tower: The Greatest Failure’ (2017) 20 *Journal of Housing Law* 97.

<sup>2</sup> See: Sophie Barnes, ‘Grenfell Residents Forced to Move Home Could Be Hit by Bedroom Tax’ *Inside Housing* (23 June 2017) <<https://www.insidehousing.co.uk/home/grenfell-residents-forced-to-move-home-could-be-hit-by-bedroom-tax-51140>> accessed 10 August 2017; and Charles White, ‘Grenfell Tower Victims Could Be Stung by “Bedroom Tax” after Being Rehoused’ *The Metro* (24 June 2017) <<http://metro.co.uk/2017/06/24/grenfell-tower-victims-could-be-stung-by-bedroom-tax-after-being-rehoused-6731737/#ixzz4qfTU55Qu>> accessed 10 August 2017.

<sup>3</sup> Department for Work and Pensions, ‘Housing Benefit Urgent Bulletin – Discretionary Housing Payments: Royal Borough of Kensington and Chelsea Grenfell Tower Fire’ <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/621451/u3-2017.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/621451/u3-2017.pdf)> accessed 10 August 2017.

<sup>4</sup> *Ibid.*

<sup>5</sup> HL Deb 5 July 2017, vol.783, col.885.

It has become a government reflex to refer to this discretionary pot in the face of adversity. Any problem which results from the SSSC can be shouldered by this local discretionary scheme. It is treated as a panacea, capable of mitigating anything from day-to-day shortfalls in rent through to assisting in the housing of those affected by the Grenfell disaster.

Having assessed theoretical perspectives on discretion in the preceding chapter, this chapter provides a detailed account of the problematic role accorded to these discretionary payments in the SSSC. From a small-scale scheme managing £20 million per annum in 2001/2002,<sup>6</sup> the very same regulations now account for over £1 billion of expenditure over the course of this Parliament.<sup>7</sup> I argue that this floating layer of discretionary provision is incapable of mitigating the plethora of reforms which it has been tasked with neutralising and that the courts have struggled to delineate the scheme's role in the wake of the welfare reform agenda. More fundamentally, in applying the distinction between structural and epistemic discretion outlined in the previous chapter, I argue that the scheme is indicative of the government's 'cut-and-devolve' mentality, where reductions are introduced at the central government level and then responsibility pushed downwards to struggling local authorities.

A thorough examination of the scheme's shortcomings is necessary to progress the remaining arguments in **Key Arguments 1.2**, particularly: (i) the centrality of the DHP scheme to the operation of the SSSC, (ii) the problematic assumptions made by the courts about their operation, and (iii) the value of adopting an analysis of the scheme rooted in a distinction between structural/epistemic discretion. Following a short summary of discretionary provision in social security, these arguments are put forward in three sections. The first aims to provide a critical assessment of the rise of the DHP scheme, outlining its regulatory footing and operation before turning to its role in a series of high-profile legal challenges to the SSSC. This groundwork is necessary as there is little direct analysis of the modern DHP scheme available, bar one academic

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<sup>6</sup> Andrew Leicester and Jonathan Shaw, 'A Survey of the UK Benefits System' (2003) <<http://www.ifs.org.uk/ff/benefitsurvey.pdf>> accessed 10 August 2017, 5.

<sup>7</sup> See: HC Deb 22 June 2017, vol.626, col.230.

review funded by the DWP dating back to 2005.<sup>8</sup> Readers who are already very familiar with the DHP scheme can safely skip it and go straight to Section 2. This argues that the courts have made five misguided assumptions about the operation of the DHP scheme in the context of the SSSC. Finally, the third section applies the theoretical arguments on the structural/epistemic distinction presented in the previous chapter. It interrogates how these payments have been tied to the ‘localism’ and ‘austerity’ agendas simultaneously, being used by the government to externalise responsibility and ‘deliberately fudge’<sup>9</sup> delineating who bears the burden of the welfare reform agenda; how the scheme necessarily functions by setting classes of affected tenants against one another; and the problems it poses for proportionality review in Human Rights Act 1998-based judicial review challenges.

### **1.1. Discretionary provision as an evergreen problem in social security support**

Before outlining the DHP scheme in detail, it is worth first acknowledging that many of the concerns outlined below are not new. A layer of discretionary provision floating over a legally secure – though for many insufficient – minimum core has long been a key component, of varying scale and importance, in the British welfare state. This has generally been in the form of supplementary weekly additions or lump-sum payments working alongside base-level core provision.<sup>10</sup> From the Unemployment Assistance Scheme in 1934, this ‘dual approach’<sup>11</sup> has survived in one form or another through to the abolition of the discretionary Social Fund in 2013,<sup>12</sup> where the discretionary pot

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<sup>8</sup> Bruce Walker and Pat Niner, ‘The Use of Discretion in a Rule-Bound Service: Housing Benefit Administration and the Introduction of Discretionary Housing Payments in Great Britain’ (2005) 83 *Public Administration* 47.

<sup>9</sup> Tony Prosser, ‘The Politics of Discretion: Aspects of Discretionary Power in the Supplementary Benefits Scheme’, in Michael Adler and Stewart Asquith (eds), *Discretion and Welfare* (Heinemann 1981) 150.

<sup>10</sup> Carol Walker, ‘Discretionary Payments in Social Assistance’ in Peter Hupe, Michael Hill and Aurélien Buffat (eds), *Understanding Street-Level Bureaucracy* (Policy Press 2015) 45.

<sup>11</sup> *Ibid* 48.

<sup>12</sup> See s.70 Welfare Reform Act 2012.



was reduced and pushed down, though not in a ring-fenced way, to the local authority level.<sup>13</sup>

For instance, the concerns raised about the provision of awards under the supplementary benefits scheme are echoed in my arguments on DHP provision below. The government situates these discretionary schemes as dealing with the same policy problem: ‘distinguishing those needs which can usefully be expressed in the form of a universal entitlement’ against those ‘better provided for in a general discretionary power’.<sup>14</sup> The problem is presented as a question where the line should be drawn between legalised basic rights and discretionary additions, which – as Titmuss argues – is not a problem that can be left to the insufficient tools of ‘case law and precedent’.<sup>15</sup>

Many of the criticisms I make below – over-stretched local authority workers, insufficient budgets, an unclear conferral of discretion – have been made repeatedly by scholars analysing previous incarnations of these ‘top-up’ discretionary schemes.<sup>16</sup> Indeed, the pages of the *Journal of Social Welfare Law*<sup>17</sup> in the 1980s read as a veritable who’s who of social security academia raising concerns over the balance of discretion within the social security system; perhaps unsurprising given the preceding decade had been one in which scholars had ‘relentlessly debated discretion’.<sup>18</sup> Lister’s

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<sup>13</sup> Mark Drakeford and Kirrin Davidson, ‘Going from Bad to Worse? Social Policy and the Demise of the Social Fund’ (2013) 33 *Critical Social Policy* 365.

<sup>14</sup> Richard Wilding, ‘Discretionary Benefits’ in Michael Adler and Anthony Bradley (eds), *Justice, Discretion, and Poverty: Supplementary Benefit Appeal Tribunals in Britain* (Professional Books) 55, 56.

<sup>15</sup> Richard Titmuss, ‘Welfare “Rights”, Law and Discretion’ (1971) 42 *The Political Quarterly* 113, 127.

<sup>16</sup> For instance, see the series of chapters focused on discretion under the Supplementary Benefits Scheme in Adler and Bradley’s edited collection, in particular: Wilding (n 14); Henry Hodge, ‘Discretion in Reality’ in Michael Adler and Anthony Bradley (eds), *Justice, Discretion, and Poverty: Supplementary Benefit Appeal Tribunals in Britain* (Professional Books) 65–75.

<sup>17</sup> Since 1991, now as the *Journal of Social Welfare and Family Law*.

<sup>18</sup> David Bull, ‘The Anti-Discretion Movement in Britain: Fact or Phantom’ (1980) 2 *Journal of Social Welfare Law* 65.

blistering critique of the ‘increasing imbalance’<sup>19</sup> between the base-scale and discretionary additions in the Supplementary Benefits Scheme, highlights concerns at the time of an overreliance on applying to get ‘something extra’<sup>20</sup> in the face of ‘inadequate basic benefits’<sup>21</sup> and how the scheme was shouldering ‘a role far beyond what it was originally designed for’.<sup>22</sup> This is echoed in Bull’s concern with the ‘heavy reliance on discretionary extras’<sup>23</sup>, which he argued should not be ‘allowed to build up year after year’.<sup>24</sup> Loveland’s critique of the local authority administration of Housing Benefit lamented its ‘slow, error-prone and inconsistent’ blend of ‘rules ... and discretionary powers’ These concerns about the role of discretion – and an overreliance on discretionary additions through the supplementary benefits scheme in particular – show that the arguments made below have a lineage within the UK social security system.

## 2. The evolution of DHPs

Social security researchers are beginning to recognise the increasing importance of DHPs, highlighting the growing expectations of their capacity to mitigate the impact of changes to social security,<sup>25</sup> and the associated burden they have shouldered in legal appeals.<sup>26</sup> They now play a central role in the delivery of the welfare reform agenda and form the principal mitigation mechanism for many of the flagship policies stemming from the Welfare Reform Act 2012 and the Welfare Reform and Work Act 2016, including the SSSC, both iterations of the Benefit Cap,<sup>27</sup> and changes to LHA.

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<sup>19</sup> Ruth Lister, ‘Social Assistance – A Civil Servant’s View’ (1978) 1 *Journal of Social Welfare Law* 133, 139.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.* 134.

<sup>23</sup> Bull (n 18) 83.

<sup>24</sup> *Ibid.*

<sup>25</sup> Simon Rahilly, ‘The Election of a Coalition Government and an Austerity Budget’ (2010) 17 *Journal of Social Security Law* 207.

<sup>26</sup> Grainne McKeever, ‘Social Sector Size Criteria’ (2015) 22 *Journal of Social Security Law* 13, 14.

<sup>27</sup> The initial Benefit Cap rates (£26,000 for couples/families, £18,200 for single people), introduced under ss.96–97 Welfare Reform Act 2012, were subsequently lowered under ss.8–9 Welfare Reform and Work Act 2016 (to £20,000 for couples/families, £13,400 for

Their significance is unlikely to fade given the repeated emphasis by the government on their availability and capacity to shoulder upcoming reforms.<sup>28</sup>

In the Coalition government's effort to avoid 'standing back and imposing something',<sup>29</sup> this 'DHP strategy'<sup>30</sup> has introduced a layer of administrative discretion into the delivery of the SSSC. This originally modest scheme has grown exponentially from its humble beginnings in 2001,<sup>31</sup> when these payments were introduced as a 'very small'<sup>32</sup> scale form of discretionary relief distinct from the benefits system; numbers of awards were modest, reaching approximately 2,000 annually in 2002/2003.<sup>33</sup> In 2013/2014, this figure had risen to approximately 392,453,<sup>34</sup> with more than £800 million earmarked for their use across the current Parliament.<sup>35</sup> No longer simply

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single people outside of London; and £23,000 and £15,410 respectively, for those living inside London). For a mercifully concise overview of the regulations, see: *R (on the application of DA and Others) v Secretary of State for Work and Pensions* [2017] EWHC 1446 (Admin), [1]–[2], [7]–[10] (per Collins J).

<sup>28</sup> See, for instance, Sajid Javid's proud assertion in Parliament that: 'By 2020, we will have given local authorities £1 billion in discretionary housing payments for residents who need extra help.': HC Deb 22 June 2017, vol.626, col.230.

<sup>29</sup> Oral Evidence taken before the Work and Pensions Committee (12 February 2014), Q 564, <<http://data.parliament.uk/writtenevidence/WrittenEvidence.svc/EvidenceHtml/6101>>; HC 720 of 2013–14, accessed 10 November 2017.

<sup>30</sup> Ibid Q490.

<sup>31</sup> Established under s.69–70 Child Support, Pensions and Social Security Act 2000.

<sup>32</sup> Peter Kemp, *Housing Allowances in Comparative Perspective* (Policy Press 2007) 113.

<sup>33</sup> Andrew Leicester and Jonathan Shaw, 'A Survey of the UK Benefits System' (IFS 2003) <<http://www.ifs.org.uk/ff/benefitsurvey.pdf>> accessed 10 November 2017

<sup>34</sup> David Evans, 'Use of Discretionary Housing Payments' (Department for Work and Pensions 2014)

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/322455/use-of-discretionary-housing-payments-june-2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/322455/use-of-discretionary-housing-payments-june-2014.pdf)> accessed 10 November 2017. It is worth noting that these figures are only indicative of total caseloads – complexities in processing of DHPs, due in part to the generally short-term rolling nature of awards or the provision of partial rather than full awards – makes counting total separate claims unreliable.

<sup>35</sup> Summer Budget 2015 (8 July 2015)

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/443232/50325\\_Summer\\_Budget\\_15\\_Web\\_Accessible.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/443232/50325_Summer_Budget_15_Web_Accessible.pdf)>; HC 264 of 2015–16, accessed 10 November 2017.

focused on providing temporary, low-level payments in limited cases of hardship, DHPs now serve as the only viable mitigating mechanism for many of those affected by the Coalition government's flagship welfare reforms.

Given the central place these payments occupy in the welfare reform agenda, they have been subject to judicial scrutiny. They have generally been accorded a strong palliative effect by the courts in the assessment of proportionality and have proven to be the lynchpin for the continued legality of the Coalition government's flagship welfare reforms. There is an inherent irony which emerges in their judicial treatment. The underpinning regulations for the SSSC and the Benefit Cap grant few statutory exemptions, seemingly in a bid to avoid enforceable legal rights and consequent 'juridification of welfare'.<sup>36</sup> However, the courts have carved a function for DHPs which attempts to recreate the effect of such statutory exemptions in certain circumstances. It is argued here that: (1) many of the key assumptions made about DHPs in the case law are misguided or lack sufficient evidence to support them; and (2) the scheme in its current form cannot serve the role it has been cast in the welfare reform agenda.

The discussion is split into three sections. The first looks at the underpinning DHP regulations and how the scheme has evolved from its more modest origins into its current function. The second looks at the way in which the courts have treated the payments – particularly as a source of justification for otherwise unlawful discrimination – and potential problems with assumptions made about their operation.

## **2.1. An outline of the scheme**

Before turning to the regulatory framework, it is important to first underscore the sheer breadth of the burden these payments are shouldering following the Welfare Reform Act 2012 and Welfare Reform and Work Act 2016 reforms and provide some context

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<sup>36</sup> Suzanne Fitzpatrick, Bo Bengtsson and Beth Watts, 'Rights to Housing: Reviewing the Terrain and Exploring a Way Forward' (2014) 31 *Housing, Theory and Society* 447, 455.

on the sums of money involved. Their remit covers most instances of welfare reforms leading to shortfalls between Housing Benefit and rental liability, with payments being repeatedly emphasised by the government as the principal form of mitigation for the SSSC,<sup>37</sup> the Benefit Cap,<sup>38</sup> and for the impact of reforms to LHA.<sup>39</sup> There are other pressing demands, particularly in London, such as supplementing Housing Benefit to pay for – often very expensive – temporary accommodation for households owed a Part VII Housing Act 1996 housing duty.<sup>40</sup>

Given the pivotal role they play for the hundreds of thousands of households affected by these reforms, the sufficiency of the overall DHP budget allocation is a particularly acute issue. The National Audit Office,<sup>41</sup> Social Security Advisory Committee,<sup>42</sup> and the House of Commons Work and Pensions Select Committee<sup>43</sup> have all been particularly vocal on the budget's apparent arbitrariness and insufficiency – though they are far from alone.<sup>44</sup> The National Audit Office has attempted to quantify the extent of the shortfall, suggesting (back in 2011) that total DHP funding amounted to only 6% of total Housing Benefit reductions due in the Welfare Reform Act 2012.<sup>45</sup>

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<sup>37</sup> HL Deb, 24 February 2014, c202W; HL Deb, 10 April 2013, c309W.

<sup>38</sup> HC Deb, 21 November 2016, c52804 ; HC Deb, 14 November 2016, c52251.

<sup>39</sup> HC Deb, 16 January 2017, vol619, c670; HC Deb, 13 March 2017, c67193.

<sup>40</sup> For an analysis of this problem, see: Work and Pensions Select Committee, 'The Local Welfare Safety Net' (2016)  
<<http://www.publications.parliament.uk/pa/cm201516/cmselect/cmworpen/373/37302.htm>>  
accessed 1 July 2016, paras [22]–[30].

<sup>41</sup> Department for Work and Pensions, 'Managing the Impact of Housing Benefit Reform' (2012) <<https://www.nao.org.uk/wp-content/uploads/2012/11/1213681.pdf>> accessed 10 August 2017.

<sup>42</sup> Social Security Advisory Committee, 'Localisation and Social Security: A Review' (2015)  
<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/428356/localisation-and-social-security-ssac-may-2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/428356/localisation-and-social-security-ssac-may-2015.pdf)> accessed 10 August 2017.

<sup>43</sup> Work and Pensions Select Committee (n 41).

<sup>44</sup> Indeed, it is difficult to find sources in support of the sufficiency of the DHP budget within England and Wales. Indeed, insufficiency of the money provided was a key motivation for the eventual devolution to the Scottish Government, see: Tom Mullen, 'Devolution of Social Security' [2016] *Edinburgh Law Review* 382.

<sup>45</sup> Department for Work and Pensions, 'Managing the Impact of Housing Benefit Reform' (n 42).

To provide a clearer illustration and bring this estimate up-to-date, **Figure 4.1** provides a conservative representation of the ongoing shortfalls.<sup>46</sup>

Using data drawn from the Single Housing Benefit Extract (SHBE),<sup>47</sup> **Figure 4.1** provides an indication of total reductions in Housing Benefit occasioned by key Welfare Reform Act 2012 reforms and the corresponding baseline DHP allocation.<sup>48</sup> The technical note in **Appendix A** provides more detail on how this was constructed, but in summary, these figures are for England and Wales only<sup>49</sup> and provide indicative monthly figures between May 2013 and April 2016.

The reference lines for measure averages indicate the mean monthly total Housing Benefit reduction (relative to pre-reform levels) and baseline DHP allocation – in pink and yellow respectively. They demonstrate the problem. There is a continual and dramatic shortfall between key reforms – with an approximate monthly Housing Benefit reduction of £61,024,738 – and the availability of DHPs to mitigate the effects, with an approximate monthly availability of £11,612,694. **Figure 4.1** only presents a partial picture – other demands, such as temporary accommodation, are not included, and the estimates, particularly for LHA impacts, are conservative.

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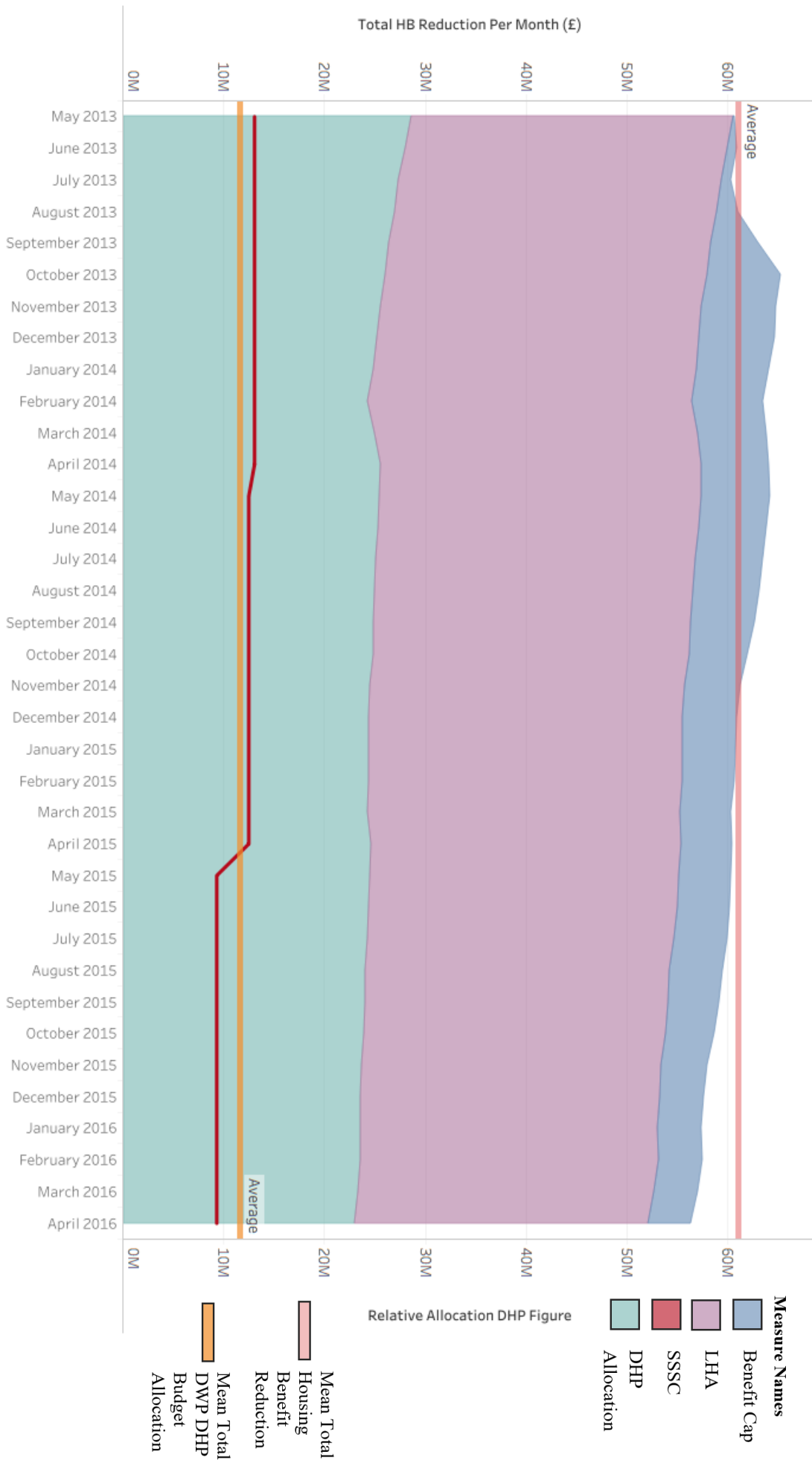
<sup>46</sup> An interactive version of this chart is available online at: [dhpdata.socialrights.co.uk](http://dhpdata.socialrights.co.uk).

<sup>47</sup> Available through DWP Statsexplore at: Department for Work and Pensions, ‘Stat-Xplore’ <<https://stat-xplore.dwp.gov.uk/webapi/jsf/login.xhtml>> accessed 10 August 2017.

<sup>48</sup> An interactive version of this figure is available at: [dhpdata.socialrights.co.uk](http://dhpdata.socialrights.co.uk).

<sup>49</sup> Scotland was removed from the analysis given the devolved approach to DHP supplementation to support the mitigation of the SSSC. For the underpinning regulations, see: Discretionary Housing Payments (Limit on Total Expenditure) Revocation (Scotland) Order 2014 made under the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2014.

**Figure 4.1:** Total DHP allocation against total housing benefit reductions following the Welfare Reform Act 2012. An interactive version of this graph is available online at: [dhpdata.socialrights.co.uk](http://dhpdata.socialrights.co.uk).



As this section goes on to consider the ambit of the scheme in some detail, it is important to recall this big-picture context: this is a scheme creaking under the weight of its role in the welfare reform agenda. The same regulations that used to administer £20 million of funding per annum, now shoulder more than £1 billion worth of expenditure over the course of this Parliament. At current levels, this overall budget pales in comparison to the amount of impact the payments have to mitigate, with further reforms – particularly the new lower Benefit Cap and upcoming limits to social rents in line with LHA-levels<sup>50</sup> – likely to exacerbate the problem further. It is within this difficult broader context that the regulations and the problems outlined below sit.

## 2.2. The evolution of the regulations

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 underpinning regulations that: ‘I would not award it the top prize in a competition for plain English.’<sup>51</sup> Wall LJ has been equally disparaging, referring to the underpinning legislation as ‘complex, obscure and, to many, simply incomprehensible’<sup>52</sup> and consequently a ‘blemish on our operation of the rule of law’.<sup>53</sup> In spite of this, this section seeks to outline their key characteristics in a tolerably concise fashion.

There is a *smörgåsbord* of continually amended statutory instruments which deal with the payment of DHPs and the various controls on their use imposed on local authorities.<sup>54</sup> The key statutory provisions can be found in the Discretionary Financial

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<sup>50</sup> A reform already dubbed the ‘pensioner bedroom tax’ due to its propensity to hit older social tenants, particularly in northern areas. See: Rob Merrick, ‘Poorest Pensioners to Lose Hundreds of Pounds a Year in “New Bedroom Tax”’ *The Independent* (30 September 2016) <<http://www.independent.co.uk/news/uk/politics/bedroom-tax-pensioners-social-housing-housing-crisis-council-houses-a7340136.html>> accessed 7 October 2017.

<sup>51</sup> *R (Gargett) v Lambeth London Borough Council* [2008] EWCA Civ 1450 [16] (per Mummery LJ).

<sup>52</sup> *Ibid* [36] (per Wall LJ).

<sup>53</sup> *Ibid*.

<sup>54</sup> See: Council Tax Benefit Abolition (Consequential Provisions) Regulations 2013/458; Discretionary Housing Payments Grants Amendment Order 2008/1167; Discretionary Financial Assistance Amendment Regulations 2008/637; Discretionary Housing Payments



Assistance Regulations 2001,<sup>55</sup> made under s.69 Child Support, Pensions and Social Security Act 2000, which outline the features of and eligibility requirements for the payments. The Discretionary Housing Payments (Grants) Order 2001<sup>56</sup> provides the legislative framework for how the DHP budget is paid to local authorities by the DWP.<sup>57</sup> Of course, the scheme sits alongside the voluminous body of legislation which deals with the provision for managing the award of Housing Benefit.<sup>58</sup>

Both of these statutory regimes have been subject to continual amendment by statutory instrument to shift requirements and controls on their use in light of further reforms to social security legislation.<sup>59</sup> Instead of providing a detailed description, 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?

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Grants Amendment Order 2005/2052; Discretionary Housing Payments Grants Amendment Order 2004/2329; Discretionary Housing Payments (Grants) Order 2001/2340; and Discretionary Financial Assistance Regulations 2001/1167.

<sup>55</sup> SI 2001/1167. These regulations replaced, and substantially broadened the discretion conferred by, Reg.62 Housing Benefit (General) Regulations 1987/1971 and Reg.51 and Reg.54 of the Council Tax Benefit (General) Regulations 1992/1814 – both of which allowed modest variation in the maximum award of both housing benefit and council tax benefit.

<sup>56</sup> SI 2001/2340.

<sup>57</sup> The mechanism laid out in the regulations does not require detailed attention here. Suffice to note that under art.2, the Secretary of State for Work and Pensions can vary the amount of DHP funding for Local Authorities with reference to the level of housing benefit expenditure by the authority and any ‘other matters he considers appropriate.’

<sup>58</sup> It is sufficient to note for our purposes that DHPs are not treated as income in the determination of a housing benefit award (see Part 6 of the Housing Benefit (Persons Who Have Attained the Qualifying Age for State Pension Credit) Regulations 2006/214) and arrears of DHPs can be disregarded as capital in the assessment of a housing benefit award (see Sch.6, para.9(1)(d) Housing Benefit Regulations 2006).

<sup>59</sup> See: Sch.1 Council Tax Benefit Abolition (Consequential Provisions) Regulations 2013/458; Discretionary Housing Payments Grants Amendment Order 2008/1167; Discretionary Financial Assistance Amendment Regulations 2008/637; Discretionary Housing Payments Grants Amendment Order 2005/2052; and Discretionary Housing Payments Grants Amendment Order 2004/2329.

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 the assessment and allocation of DHP monies is underpinned by the Discretionary Housing Payments (Grants) Order 2001.<sup>60</sup> This requires that the Secretary of State, when setting a local authority's respective allocation, should have *regard* to: (i) the most recent Housing Benefit expenditure figures;<sup>61</sup> and (ii) 'such other matters as he considers appropriate'.<sup>62</sup> It is not exactly a high bar to reach.

At present, the DWP allocates a certain level of grant to each individual local authority in line with a formula directly proportionate to various welfare reform impact measures and previous base-line DHP expenditure. I have summarised the broad outlines of the formula used in **Figure 4.2**. Unfortunately, for reasons which remain unclear, the government is unwilling to release the underlying formula.<sup>63</sup> Local authorities, once allocated this pot, are not given any more money directly to deal with DHP applications.<sup>64</sup> 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.<sup>65</sup>

It is not clear the extent to which this initial allocation is the amount which the DWP *expects* the local authorities to spend.<sup>66</sup> As argued in more detail below, there is an odd

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<sup>60</sup> SI 2001/2340.

<sup>61</sup> Reg.2(A).

<sup>62</sup> Reg.2(B).

<sup>63</sup> See, for example: HC Deb, 29 June 2017, cW. Sceptical observers would perhaps suggest that this is because the initial financial allocation – namely, the starting figure which is fed through the different welfare reform indicators as in Figure 4.2 – is entirely arbitrary.

<sup>64</sup> Though it is at the decision of the Secretary of State, as was decided in 2014, to invite applications for very limited further 'top-up' funding. This has, however, been a small exercise with limited funds, described by industry figures as 'futile'. See: Pete Apps, '£35million DHP Top-up Futile' *Inside Housing* (2013) <<http://www.insidehousing.co.uk/35million-dhp-top-up-futile/6527986.article>> Accessed 18 November 2017

<sup>65</sup> Reg.7 Discretionary Housing Payments (Grants) Order 2001/2340.

<sup>66</sup> Though the Supreme Court appeared to unproblematically accept the proposition that 'the practice is for the Department of Work and Pensions to make an annual DHP grant to local

dichotomy within the regulatory scheme, where a broad and transient discretionary power is passed down to local authorities, yet the lawfulness of discrimination within the regulations is reliant on their effective use. Given that the allocation formula outlined in **Figure 4.2** is expressly tied to the extent and severity of welfare reforms, it may be arguable that those authorities which spend far below their initial allocation – such as North Lincolnshire’s 16% and Calderdale’s 36% DHP expenditure in 2015/16<sup>67</sup> – are not having sufficient regard to the resources made available to them under the Discretionary Housing Payment (Grants) Order 2001. The extent of available resources provided by central government has been a relevant consideration in appeals to local authority-exercised discretion under s.2 Chronically Sick and Disabled Persons Act 1970, as in *R v Gloucestershire CC Ex p. Barry*<sup>68</sup> and subsequently *R (on the application of KM) v Cambridgeshire CC*.<sup>69</sup> The specific role of available DHP budgets remains untested in the courts, but these initial allocation figures may in practice be no more than an arbitrary fiscal starting point.

Aside from the initial budget itself, other limitations are imposed on local authorities on the amount which may be awarded in individual cases and on certain conditions any applicants must meet. Payments can only be made to those receiving Housing Benefit or the ‘relevant award of UC’<sup>70</sup> (ostensibly the ‘housing element’).<sup>71</sup> The local authority must be satisfied that the claimant requires ‘some further financial assistance in addition to the benefit to which they are entitled to meet their housing costs’.<sup>72</sup> Neither the requirement for ‘financial assistance’ or ‘housing costs’ are defined,

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authorities in respect of their anticipated expenditure’. See: *R (on the application of Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58 [9] (per Toulson LJ).

<sup>67</sup> Jed Meers, ‘Discretionary Housing Payment Expenditure 2015/16’  
<<http://socialrights.co.uk/project/blog/discretionary-housing-payment-expenditure/>>  
accessed 2 December 2017.

<sup>68</sup> [1997] AC 584.

<sup>69</sup> [2012] UKSC 23. For more information on the appeals, see: Gordon Junor, ‘Availability of Resources – Barry Not Revisited’ (2012) 422 SCOLAG 286.

<sup>70</sup> Reg 2(1)(a) Discretionary Financial Assistance Regulations 2001/1167, as inserted by Reg 2(3)(a) Welfare Reform Act 2012 (Consequential Amendments) Regulations 2013/1139.

<sup>71</sup> Namely, following an assessment under Sch.4 Universal Credit Regulations 2013/376.

<sup>72</sup> Reg 2(1)(b) Discretionary Financial Assistance Regulations 2001/1167.

though the latter has been determined to include rent arrears, removal costs, deposits and so on.<sup>73</sup> Payments cannot cover certain exempted areas, such as benefit sanctions, increases in rent due to arrears or service charges.<sup>74</sup> There are no limits at all for lump-sum DHP payments,<sup>75</sup> but DHPs paid weekly cannot exceed the relevant eligible rent, less the reductions laid out in Reg.12B Housing Benefit Regulations 2006; the usual suspects of water charges, service charges and so on. The amount of Housing Benefit in receipt, however, is not deducted from this amount; in other words, the net award of DHP and Housing Benefit may be higher than the eligible rent.<sup>76</sup>

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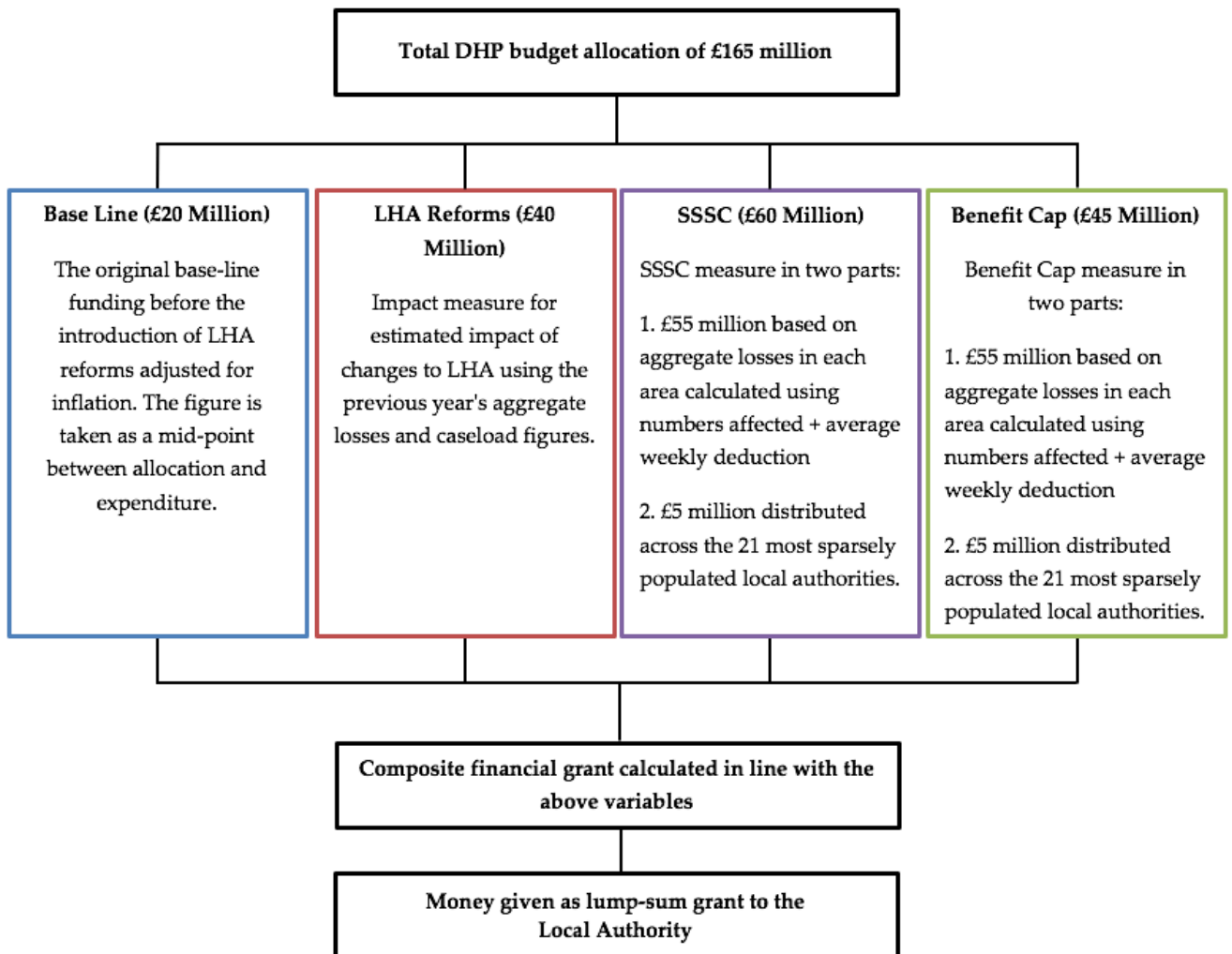
<sup>73</sup> See *Gargett* (n 52).

<sup>74</sup> Reg 3 Discretionary Financial Assistance Regulations 2001/1167.

<sup>75</sup> See paras.2.10 and 2.13 of the DHP guidance. Lump sum payments, for instance, to assist with housing removal costs, pay rent in advance or deposits etc, are not made with reference to a time period and are therefore not limited under regulations: Department for Work and Pensions, ‘Discretionary Housing Payments Guidance Manual: Including Local Authority Good Practice Guide’ (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/576787/discretionary-housing-payments-guide.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/576787/discretionary-housing-payments-guide.pdf)> accessed 10 November 2017.

<sup>76</sup> The limitations in Art.4 Discretionary Housing Payments (Grants) Order 2001 do not require an assessment of the net award amount between housing benefit and DHP monies – the limitation is only on the DHP award amount. It is still, however, subject to the requirement in Art.2 that DHPs are paid to provide ‘further financial assistance’ to meeting housing costs, consequently, housing benefit awards may be deducted, particularly if the DHP award concerns rent arrears (for a more detailed discussion of this, see: *Gargett* (n 52)).

**Figure 4.2:** Diagram demonstrating the allocation formula for the central DWP DHP budget to local authorities in the 2014/15 financial year.



Aside from this and 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 problems with and the evolution of this distinction are discussed below). There is a right to a written decision with stated reasons as ‘soon as is practically possible’.<sup>77</sup> The regulations imply a right to have the decision internally reviewed under Reg.6(3), though notwithstanding this, the local authority is accorded a discretion to review its own decision under Reg.8(1), and it is well-established that such a power should be exercised reasonably, such as when a claimant requests a review.<sup>78</sup>

The payments fall outside of para.6 of Sch.7 Child Support, Pensions and Social Security Act 2000 and are therefore outside of the jurisdiction of a first-tier tribunal.<sup>79</sup> DHPs may also find themselves sitting outside of Art.6 Human Rights Act 1998, given the Article’s problematic application to certain discretionary ‘top-up’ payments.<sup>80</sup> Although theoretically within the scope of the Local Government and Social Care Ombudsman,<sup>81</sup> the practicalities of arguing a claim render this difficult, particularly the determination of a fault in the way the decision was reached under s.34(3) Local Government Act 1974 and the relatively high bar for arguing maladministration under s.26(1) and s.26A(1) Local Government Act 1974. As clearly summarised by the Ombudsman in one attempt, ‘in relation to Discretionary Housing Payments, the

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<sup>77</sup> See Reg.6(3) Discretionary Financial Assistance Regulations 2001 (SI 2001/1167).

<sup>78</sup> For instance, see the consideration of a similar discretionary power to undertake a review under Reg.79 Housing Benefit (General) Regulations 1987/1971 in *R (on Application of Sibley) v West Dorset District Council* [2001] EWHC Admin 365. In this case, the decision of a local authority not to review its decision was held to be Wednesbury unreasonable. As stated by Sullivan LJ at[42]: ‘The discretion is broad but it is put there for a purpose: to enable the Council to correct mistakes that have been made.’

<sup>79</sup> This issue was considered as part of an appeal to the *Upper Tribunal in EA v Southampton CC* [2012] UKUT 381 AAC.

<sup>80</sup> See Christa Tobler, *Indirect Discrimination: A Case Study Into the Development of the Legal Concept of Indirect Discrimination Under EC Law* (Intersentia 2005); and Malcolm Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2009) 420.

<sup>81</sup> See Part III Local Government Act 1974.

Ombudsman does not act as an appeal body'.<sup>82</sup> Indeed, in the course of this research I have read every Local Government and Social Care Ombudsman decision involving DHPs and none were substantively successful.<sup>83</sup>

### 2.3.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.<sup>84</sup> Despite a number of pronouncements to the contrary, most notably in *Burnip v Birmingham City Council*<sup>85</sup> and in challenges in the tribunals under s.69 Child Support, Pensions and Social Security Act 2000 – such as *Carmichael v Sefton BC*<sup>86</sup> – in practice, the payments are accorded a palliative effect in favour of the operation of the SSSC scheme and other policies mitigated through their use.

Before the introduction of the SSSC, the much smaller DHP scheme was raised as part of challenges to changes to 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*,<sup>87</sup> the introduction of definitive caps on LHA rates<sup>88</sup> and a reduction of the 'largest dwelling category' from five to four bedrooms<sup>89</sup> were challenged on the basis that the Secretary of State had not had due regard to the impact this would have on

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<sup>82</sup> Local Government and Social Care Ombudsman, London Borough of Bexley (13 006 568)' <<http://www.lgo.org.uk/decisions/benefits-and-tax/housing-benefit-and-council-tax-benefit/13-006-568#point1>> accessed 10 August 2017.

<sup>83</sup> A total of 42 decisions. I hoped to have more words to show for my effort.

<sup>84</sup> Under the PSED Equality Act 2010, or beforehand, under the Race Relations Act 1976 and the Sex Discrimination Act 1975

<sup>85</sup> [2012] EWCA Civ 629.

<sup>86</sup> [2017] UKUT 174 (AAC) [13].

<sup>87</sup> [2011] EWHC 2616 (Admin).

<sup>88</sup> Under Art.2(3)(b)(iii) Rent Officers (Housing Benefit Functions) Amendment Order 2010.

<sup>89</sup> Under Reg.2(6)(a) of the Housing Benefit (Amendment) Regulations 2010.

lone parents and ethnic minority populations.<sup>90</sup> A similar challenge was raised in *R (Zacchaeus 2000 Trust) v Secretary of State for Work and Pensions*,<sup>91</sup> where restrictions to the uprating of LHA in line with consumer price index inflation measures were challenged under the PSED.

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’<sup>92</sup> and ‘in my judgment, he was right’.<sup>93</sup>

Other cases have also subscribed to the palliative effect of DHPs in providing them weighting in the proportionality exercise in challenges based on Art.1 of the First Protocol (A1P1, right to property), read with Art.14 ECHR. In *R (on the application of Knowles) v Secretary of State for Work and Pensions*<sup>94</sup> DHPs contributed to the finding of proportionality when rent officers set maximum rents under LHA for caravan sites<sup>95</sup> – a change which was assessed as being lawfully discriminatory against Romani Gypsies. Likewise, DHPs weighed favourably in the finding of proportionality in *(on the application of SG) v Secretary of State for Work and Pensions*,<sup>96</sup> which challenged the Benefit Cap on the basis of its discriminatory effect on lone parents, who are predominantly women (again, on the basis of A1P1 and Art.14). The availability of DHPs, and the fact that many claimants were currently in receipt of one, again weighed favourably in the proportionality exercise.<sup>97</sup>

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<sup>90</sup> Under his equality duties pursuant to Race Relations Act 1976 and the Sex Discrimination Act 1975.

<sup>91</sup> [2013] EWCA Civ 1202.

<sup>92</sup> Ibid [68] (per Sullivan LJ).

<sup>93</sup> Ibid [69] (per Sullivan LJ).

<sup>94</sup> [2014] EWCA Civ 156.

<sup>95</sup> Ibid [97] (per Hickinbottom J).

<sup>96</sup> [2014] EWCA Civ 156.

<sup>97</sup> Ibid [100] (per Dyson MR).



### 2.3.1. DHPs and the SSSC

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. This is far from arguing that their treatment has been positive; the courts have lamented shortcomings in the scheme, most notably in *Burnip*,<sup>98</sup> and Lady Hale’s dissenting judgment in *Carmichael* echoes those same concerns.<sup>99</sup> Instead, I argue here that 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.

The cases have turned principally on familiar arguments around discrimination using A1P1, which is now well established as including Housing Benefit,<sup>100</sup> or Art.8 (right to respect for the home), to leverage Art.14 (prohibition of discrimination). The first two articles are principally used as purchase for engaging Art.14, so the differences between their applications do not warrant a detailed discussion in this section. Instead, the legal question of particular significance is how indirect discrimination can be justified and what is the role of DHPs in this process. There are four key elements which unite the cases on this issue.

Firstly, there is a common recognition that these policies are more than just a conduit for austerity; the courts instead accept that there is an ideological undercurrent which informs the changes. This is perhaps best reflected in James Eadie QC’s arguments to the Supreme Court in *Carmichael v Secretary of State for Work and Pensions*<sup>101</sup> that an emphasis on the ‘discretionary’ element of DHPs ‘conceals the true nature of the beast’.<sup>102</sup> Instead, one should be looking at its aim to ‘shift the place of social security

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<sup>98</sup> *Burnip v Birmingham City Council* [2012] EWCA Civ 629, [46] (per Henderson J).

<sup>99</sup> *Carmichael* (n 67) [77] (per Lady Hale).

<sup>100</sup> See *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63.

<sup>101</sup> *Carmichael* (n 67).

<sup>102</sup> See recording of the hearing available at UK Supreme Court, ‘01 Mar 2016 – Morning – Part 4 of 6 – R (on the Application of Carmichael and Rourke) (Formerly Known as MA and Others) (Appellants) v Secretary of State for Work and Pensions (Respondent)’ <<https://www.supremecourt.uk/cases/uksc-2014-0125.html>>.

in society’ from the ‘central Government to the local Government’.<sup>103</sup> This sentiment was echoed throughout the preceding appeals, as in Lord Dyson MR’s assertion in *MA*<sup>104</sup> that in addition to saving public funds, a key goal of the SSSC is to ‘shift the place of social security in society’.<sup>105</sup> This is important, as discriminatory treatment is difficult to justify solely for the purposes of saving money,<sup>106</sup> so aligning the policy scheme with other more loosely defined aims – such as localism<sup>107</sup> and the ‘social and political’ aspects of the austerity agenda<sup>108</sup> – helps to provide further supplementary aims.

This bleeds into the second key issue of the welfare reform agenda being ‘unquestionably’<sup>109</sup> sited within the rubric of ‘high policy’,<sup>110</sup> which leads to the application of the deferential ‘manifestly without reasonable foundation’ test<sup>111</sup>. Effectively, under this rubric, the court has to be satisfied that there is a ‘serious flaw’ in the scheme which produces a discriminatory effect.<sup>112</sup> This evidently accords a ‘strong deferential tenor’<sup>113</sup> and demonstrates the ingrained judicial restraint regarding concerns about subsidiarity<sup>114</sup> – namely, national authorities are better placed to make these kinds of decisions than the court.<sup>115</sup>

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<sup>103</sup> Ibid.

<sup>104</sup> *R (on the application of MA and others) v Secretary of State for Work and Pensions* [2013] EWHC 2213.

<sup>105</sup> Ibid [58] (per Laws LJ).

<sup>106</sup> Tobler (n 81).

<sup>107</sup> *MA* (n 105) [66] (per Dyson MR).

<sup>108</sup> *Rutherford v Secretary of State for Work and Pensions* [2014] EWHC 1631 (Admin) [61] (per Stuart-Smith J).

<sup>109</sup> *MA* (n 105) [54] (per Dyson MR).

<sup>110</sup> Ibid.

<sup>111</sup> *Rutherford* (n 109) [45] (per Stuart-Smith J).

<sup>112</sup> *MA* (n 105) [54] (per Dyson MR).

<sup>113</sup> Jonas Christoffersen, *Fair Balance: A Study of Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009) 270.

<sup>114</sup> Ibid.

<sup>115</sup> *MA* (n 105) [50] (per Dyson MR).

Thirdly, DHPs are held to align with these high policy aims in a way which is not ‘manifestly without reasonable foundation’. DHPs have been seen as demonstrating characteristics which help to advance aspects of the vague notions of ‘localism’<sup>116</sup> and ‘austerity’<sup>117</sup> tied to the reforms, being described as exhibiting an element of ‘local accountability’,<sup>118</sup> flexibility in responding to changing needs (such as variability in severity of disability),<sup>119</sup> and being responsive to ongoing evaluation in their ability to be ‘topped up’<sup>120</sup> as required by the DWP.

Finally, the justification of discrimination caused by the SSSC’s current formulation is dependent not only on the existence of the DHP scheme itself, but *also* on the hypothetical mitigation it provides to those who may otherwise face Art.14 discrimination. This is a natural logical consequence of the *pari passu* problem as reflected in the crux of the late Toulson LJ’s assessment in *Carmichael* that, for the claimants in *MA*, the Secretary of State’s decision to ‘regard a DHP scheme as more appropriate ... was reasonable’.<sup>121</sup> In other words, the Secretary of State makes provision for these broader classes by way of DHPs or by way of Housing Benefit: what matters is the theoretical provision, not just the existence of the scheme. This position was echoed by the courts in earlier appeals,<sup>122</sup> since overtaken by the Supreme Court decision, and *Cotton*, where Males J determined that:

I accept that local authorities would be required to consider applications for DHPs so that if in a particular case a reduction in housing benefit did threaten to

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<sup>116</sup> Ibid [66] (per Dyson MR).

<sup>117</sup> Ibid [50] (per Dyson MR); and *Rutherford* (n 109) [61] (per Stuart-Smith J).

<sup>118</sup> *Rutherford* (n 109) [32] (per Stuart-Smith J).

<sup>119</sup> *MA* (n 105) [74] (per Dyson MR).

<sup>120</sup> Ibid [72] (per Dyson MR).

<sup>121</sup> *Carmichael* (n 67) [41] (per Toulson LJ).

<sup>122</sup> The decision of the High Court in *Rutherford* dedicated much of its reasoning to this problem. See Stuart-Smith J’s assessment that: ‘the use of DHPs as the conduit for payment may be justifiable, [but] it will not be justified if it fails to provide suitable assurance of present and future payment in appropriate circumstances’ and consequently “on the information that is available to me ... a decision to withhold DHPs [in this case] would appear to be unjustifiable. and if an award had not been made to the Rutherfords, ‘different considerations may apply’. See: *Rutherford* (n 109) [48]–[54] (per Stuart-Smith J).

infringe Convention rights, the relevant local authority would have a duty to consider awarding a DHP to avoid that infringement.<sup>123</sup>

In other words, the DHP scheme has to reflect the same characteristics as a statutory exemption from the SSSC, giving predictable awards of sufficient longevity in instances where a decision to do otherwise would not be Convention compliant. This is in spite of the courts recognising the ‘understandable anxiety ... and the stress’<sup>124</sup> caused by the application process, the potential to be rejected and requesting a review, or periods where the shortfall is mistakenly not covered,<sup>125</sup> let alone instances where egregious decisions are made but go unchallenged.

### **3. Assumptions in the case law: a misguided interpretation of the DHP scheme**

Having provided an outline of the scheme and the key features of its legal treatment, it is now important to interrogate the myriad of assumptions made in the case law about their use and function. Judgments are often rich pickings for social scientists looking to make criticisms; the aim here is not simply to point out where the courts state something questionable or for which there is evidence to the contrary. It is instead argued that this series of assumptions – five areas in total – have become ingrained within their judicial treatment.

#### **3.1. The trickle-down: central budgets to local authority variations in expenditure**

Firstly, it is assumed that there is a clear linear relationship between money being added to the overall DWP DHP allocation and this filtering through to (hypothetical) adversely affected claimants; generally, whatever category of claimant is in front of the court at that time. Consequently, Dyson MR in *MA* does not raise the issue of DHP *expenditure* by local authorities, choosing instead to focus squarely on *allocation* by

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<sup>123</sup> *R (on the application of Cotton) v Secretary of State for Work and Pensions* [2014] EWHC 3437 (Admin) [55] (per Males J).

<sup>124</sup> *Ibid* [30] (per Males J).

<sup>125</sup> *PC v Secretary of State (Housing and Council Tax Benefits: Payments that Are Eligible for HB)* [2014] UKUT 467 (AAC) [25] (per Judge Wright QC).

the DWP, a sentiment echoed by Laws LJ's earlier 'resumé of the evolution of the policy'<sup>126</sup> reproduced in Appendix 2 of the lead judgment in *Carmichael*.<sup>127</sup> Throughout the *MA* appeals, much weight is attributed to the evolving size of the 'pot',<sup>128</sup> and increased provision for DHPs plays a key role in departing from the reasoning of Henderson J in *Burnip v Birmingham City Council*.<sup>129</sup> This is also true of the UKSC's consideration of the initial Benefit Cap, where the particular housing needs of women who had suffered from domestic violence were 'capable of being addressed under the DHP Regulations' as funding had been 'increased for that very purpose'.<sup>130</sup>

This 'trickle-down' effect may not be as simple as the judgments and government rhetoric implies. Assuming that increased provision for a particular group naturally bleeds into further provision neglects to recognise the Janus-faced nature of the budget allocation and the award of these payments; DHPs are, of course, *discretionary*. The following paragraph from the DWP DHP guidance illustrates this problem well:

2.7 The allocation of the additional funding for disabled people broadly reflects the impact of this measure and the additional funding needed to support this group. However, due to the discretionary nature of the scheme, Local authorities should not specifically exclude any group affected by the removal of the spare room subsidy or any other welfare reform. It is important that Local authorities are flexible in their decision making.<sup>131</sup>

In other words, the money may at first instance be allocated to deal with a particular category of claimant, but do not let that colour the decision. Local authorities should be 'flexible'. Even a cursory glance at the most recently available DHP figures

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<sup>126</sup> *Carmichael* (n 67) [40] (per Toulson LJ).

<sup>127</sup> *Ibid* Appendix 2. See in particular [23]–[24].

<sup>128</sup> *Ibid* [22]–[24], [32], [72] (per Dyson MR).

<sup>129</sup> *Burnip* (n 99) [64] (per Henderson J).

<sup>130</sup> *R (on the application of SG and Others (previously JS and Others)) v Secretary of State for Work and Pensions* [2015] UKSC 16 [62] (per Reed LJ).

<sup>131</sup> Department for Work and Pensions, 'Discretionary Housing Payments Guidance Manual: Including Local Authority Good Practice Guide' (n 76).

provided by the DWP demonstrates that some local authorities are far more flexible than others. There is wide variation in the willingness or capacity to make awards between local authorities, with some spending as little as 17% of total DHP allocation and some up to the maximum of 250% allowed by the regulations.<sup>132</sup> To illustrate this divergence graphically, **Figure 4.3** plots the percentage expenditure of the DHP budget allocation by individual local authorities using the 2014/2015 returns data.<sup>133</sup> A filter was applied to indicate high and low spend – the lighter the colour the lower the percentage level of expenditure and vice-versa. One can see that there is little in the way of geographical pattern and even in high allocation areas (e.g. central London) there is still large variation between levels of expenditure.<sup>134</sup>

Further maps were produced to demonstrate how this variance in expenditure is more problematic than simply a reference to overall total spend, with four maps demonstrating a sizable geographical variance between local authorities in the percentage of their DHP spend allocated to: (i) topping-up LHA (**Figure 4.4**); (ii) specifically mitigating the SSSC (**Figure 4.5**); and (iii) specifically mitigating the impact of the Benefit Cap (**Figure 4.6**). The final map (**Figure 4.7**) demonstrates the sheer variance in total cash allocation, with some authorities receiving just under £4,000 and others nearly £5,000,000. This is not to suggest an even application of a discretionary-pot scheme is desirable, but merely to highlight that a static interpretation (as largely advanced by the courts) of how the centrally allocated finance trickles down is more complicated than is assumed.

Finally, on this graphical depiction of geographical variation, **Figure 4.8** provides an indication of the varying levels of spend relative to the political composition of the authority. The sizes of the bubble-plots show real cash-terms spend, the Y-axis the total percentage spend relative to initial government allocation, and the X-axis the political composition of the local authority. We can see that there is a bunching of

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<sup>132</sup> Evans (n 35).

<sup>133</sup> David Evans, 'Use of Discretionary Housing Payments' (Department for Work and Pensions 2015) <<https://www.gov.uk/government/statistics/use-of-discretionary-housing-payments-april-to-september-2015>> accessed 3 January 2018.

<sup>134</sup> An interactive version of this map is available to view at: [www.discretionaryhousingpayments.co.uk/map](http://www.discretionaryhousingpayments.co.uk/map).

expenditure around the 90–100% mark, then a great deal of variance across all political compositions. Generally speaking, Conservative-controlled councils spend less than others, though the variance is small and not explained via political control.

It seems unlikely that such a divergent spread of data across all of these metrics 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.<sup>135</sup> 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: administrative pressures leading to errors or delays;<sup>136</sup> uncertainty over the impact of the welfare reform agenda leading to over-caution;<sup>137</sup> decisions based on overtly ideological criteria, such as denying payments to those who smoke or have satellite television;<sup>138</sup> or inaccurate calculations of initial budgetary needs for local authorities due to the difficulties of quantifying the impact of the various welfare reforms.<sup>139</sup>

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<sup>135</sup> See DWP, HB Subsidy Circular S1/2014 (DWP 2014), available at <<https://www.gov.uk/government/publications/hb-subsidy-circular-s12014-discretionary-housing-payments-for-local-authorities-2014-to-2015>> accessed 12 November 2017.

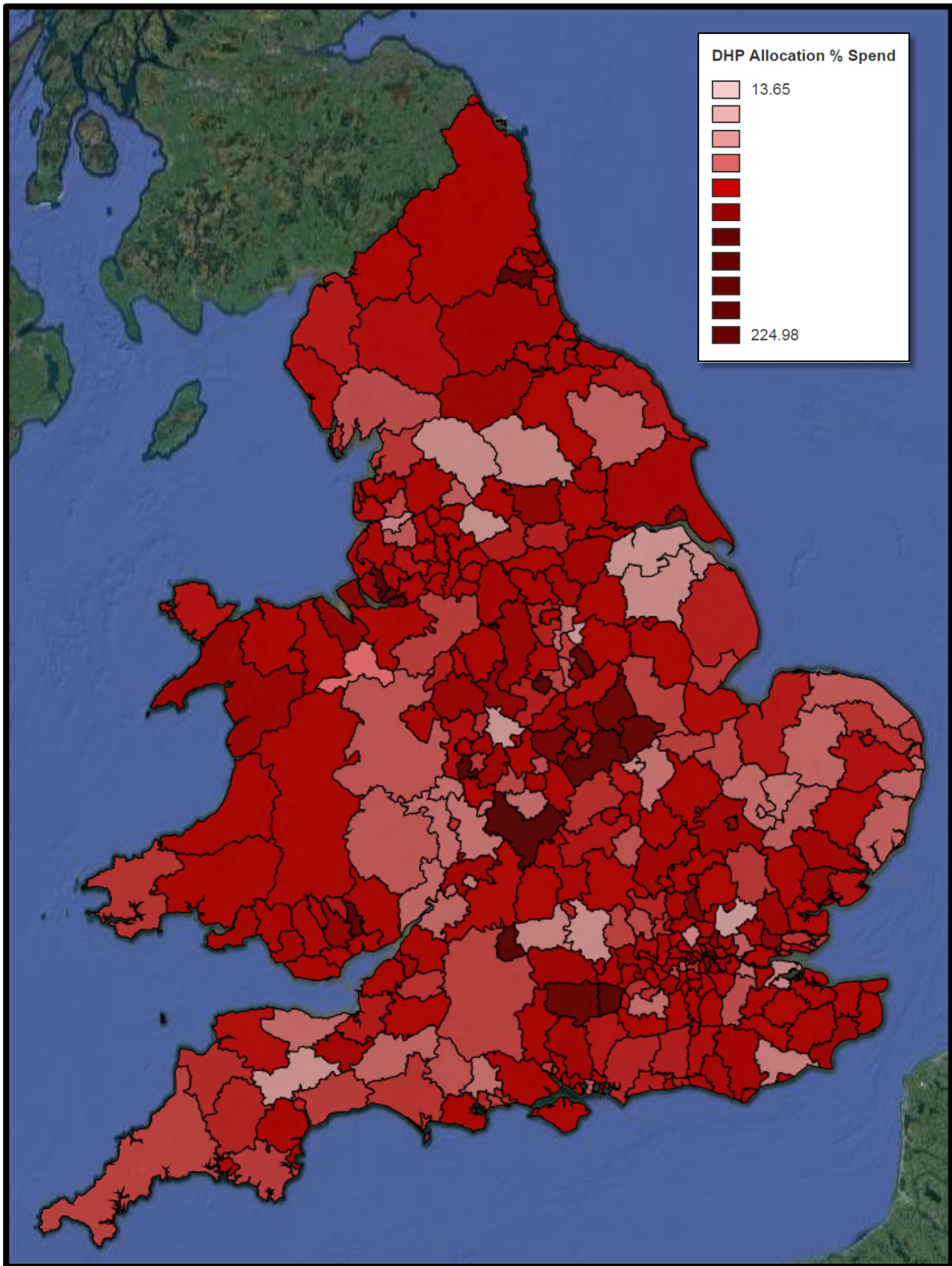
<sup>136</sup> Anna Clarke, 'Reality Dawns – The Impact of Welfare Reform on Housing Associations: A Mid-2014 view' (CCHPR, 2014) <<http://www.cchpr.landecon.cam.ac.uk/Projects/Start-Year/2013/Welfare-Reform-Impact-Assessment/Reality-dawns-impact-welfare-reform-housing-associations-mid-2014-view>> accessed 14 November 2017.

<sup>137</sup> Ibid.

<sup>138</sup> See Department for Work and Pensions, Evaluation of Removal of the Spare Room Subsidy (Research Report No 882, 2014) 44; and Pete Apps, 'Council Denies Hardship Funds to Smokers' *Inside Housing* 2013 available at <<http://www.insidehousing.co.uk/council-denies-hardship-funds-to-smokers/6529814.article>> accessed 14 November 2017.

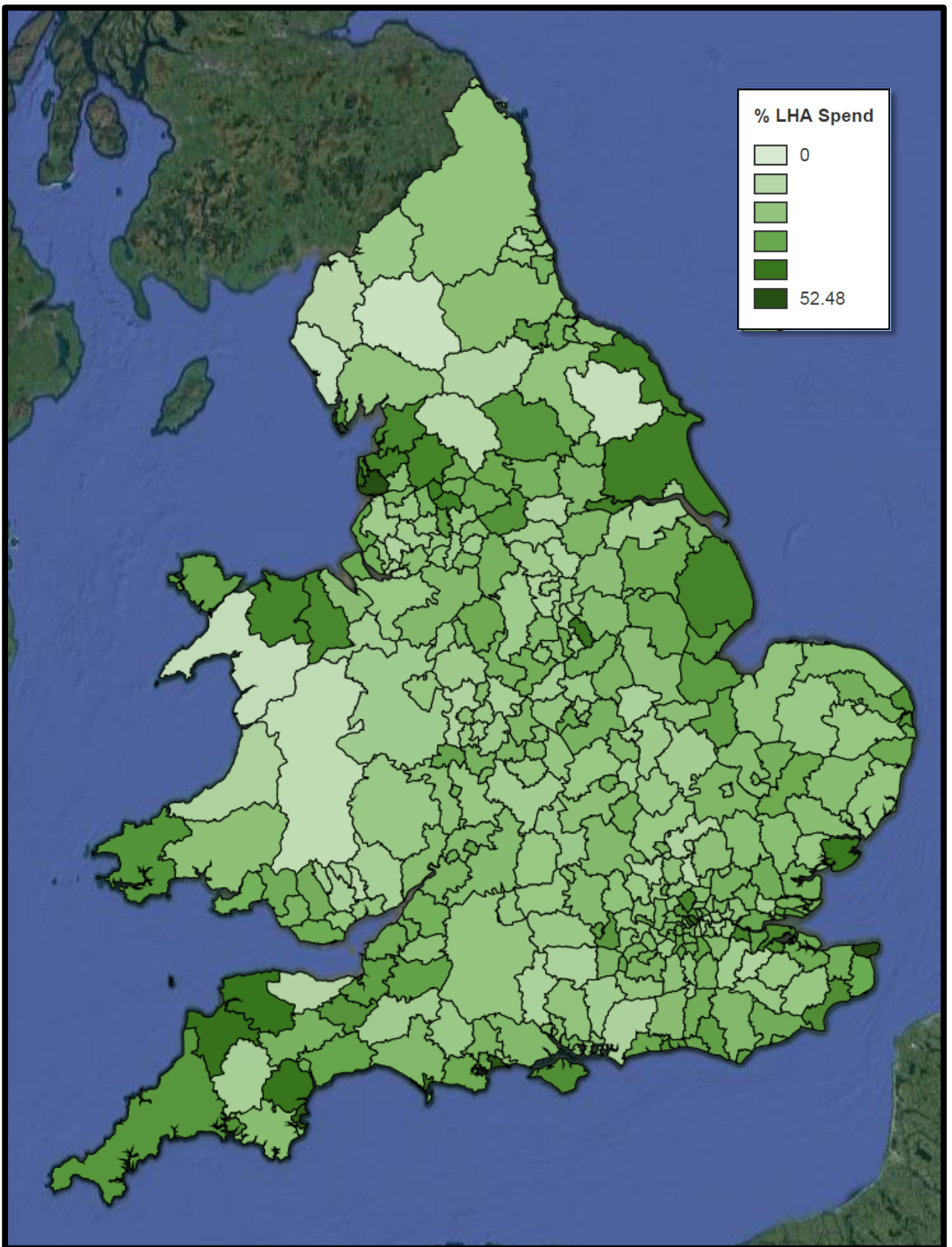
<sup>139</sup> As indicated in n 634 above, this is particularly difficult to effectively reverse engineer when the government is not willing to release the calculation used to determine the individual local authority DHP budget awards.

**Figure 4.3:** Percentage of 2014–2015 DHP budget allocation spent at end-of-year by local authority. For an online interactive version, see: <https://goo.gl/wj5fby>.

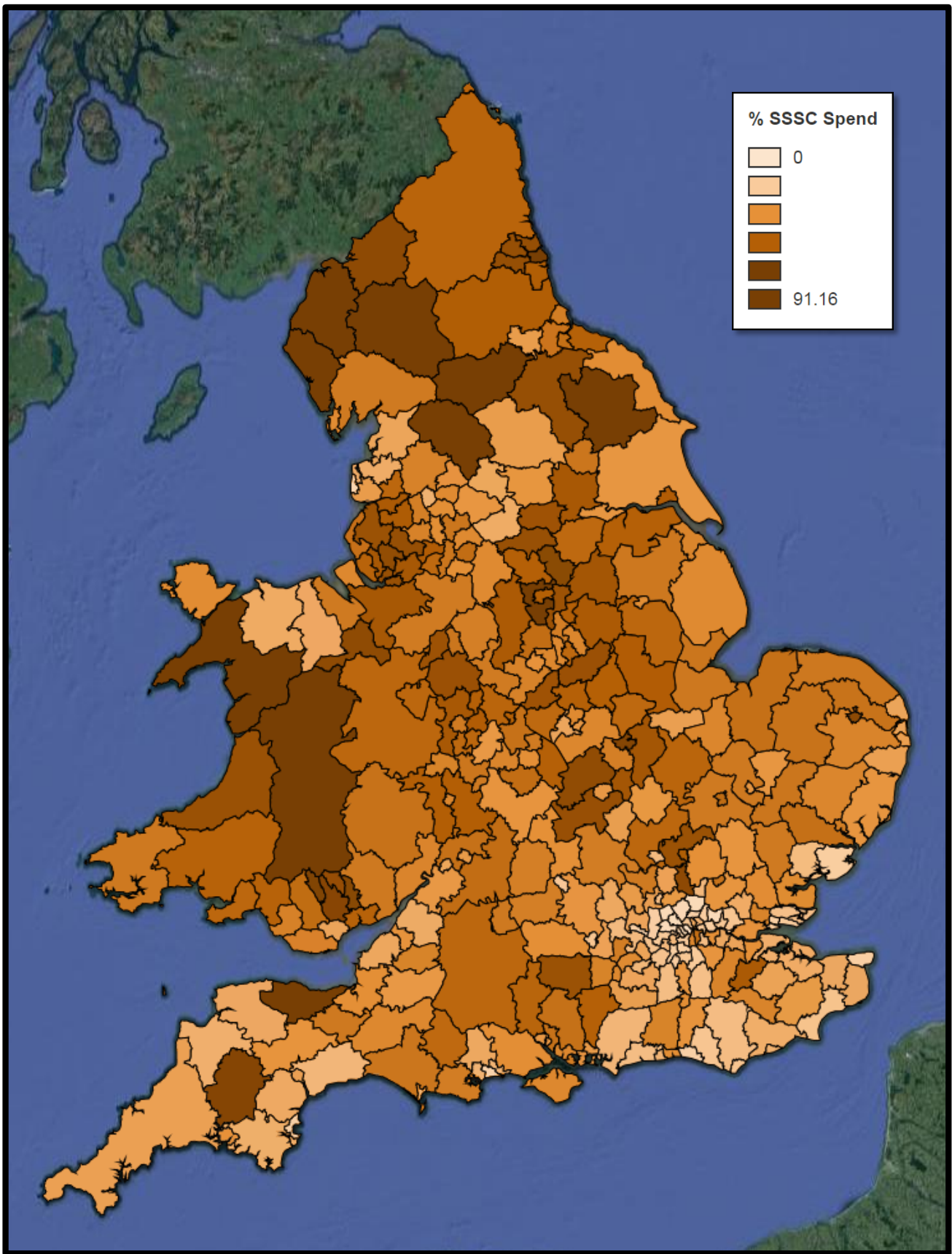




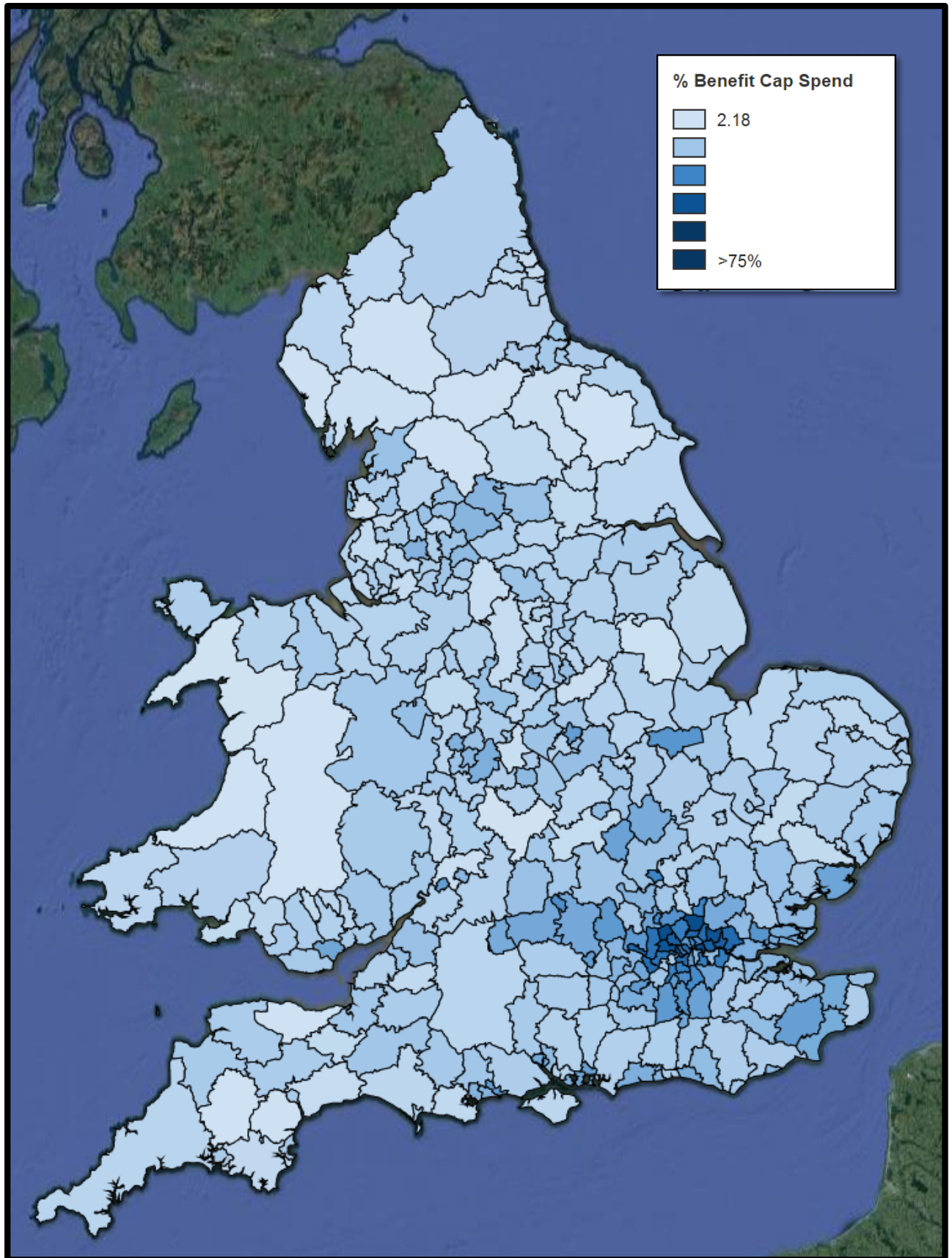
**Figure 4.4:** Percentage of 2014–2015 DHP budget allocation spent at end-of-year by local authority attributed to topping up LHA payments. For an online interactive version, see: <https://goo.gl/E15VhO>.



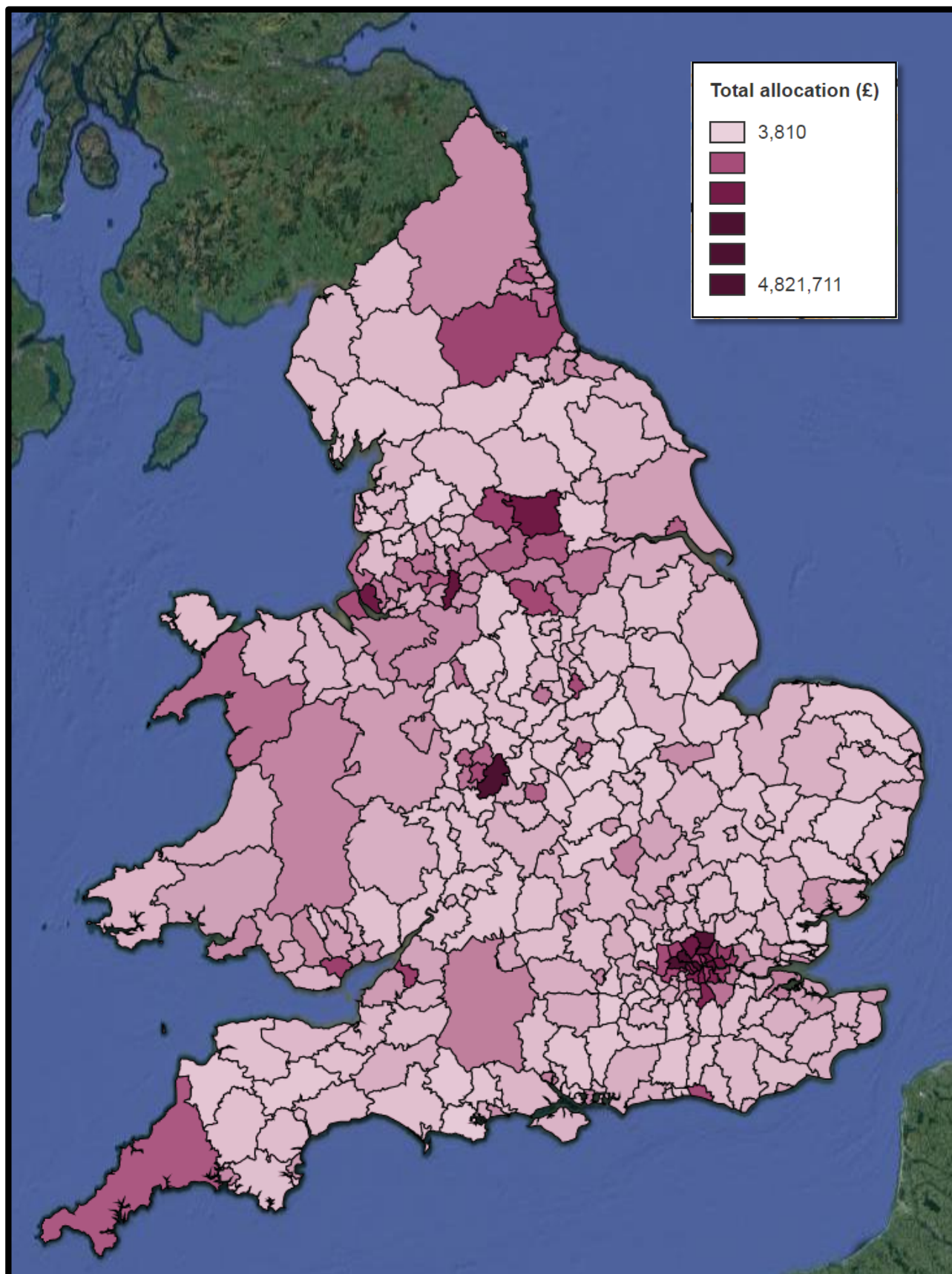
**Figure 4.5:** Percentage of 2014–2015 DHP budget allocation spent at end-of-year by local authority attributed to mitigating the SSSC. For an online interactive version, see: <https://goo.gl/GCTftX>.

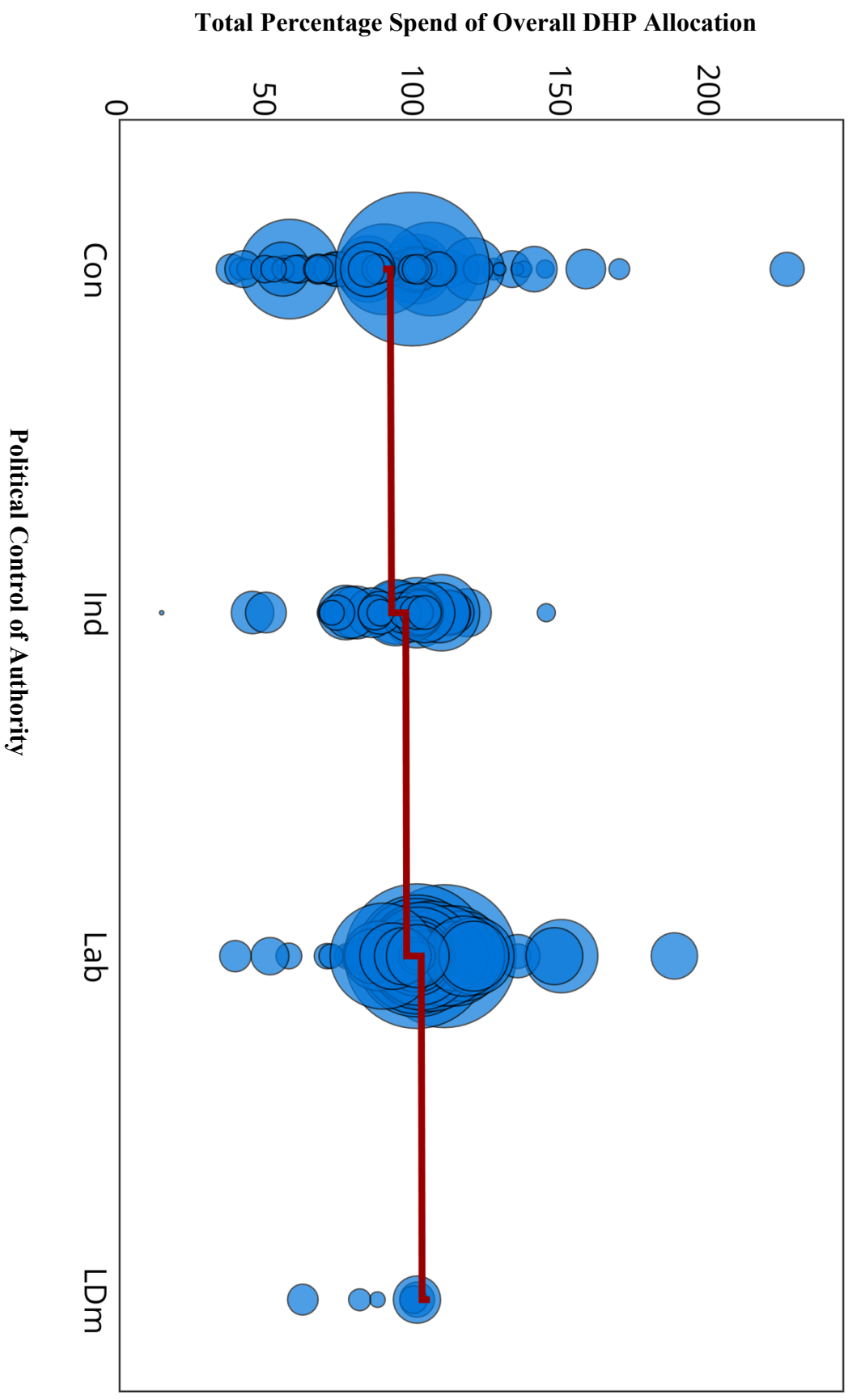


**Figure 4.6:** Percentage of 2014–2015 DHP budget allocation spent at end-of-year by local authority attributed to mitigating the Benefit Cap. For an online interactive version, see: <https://goo.gl/Ycypjw>.



**Figure 4.7:** Total 2014-15 DHP budget allocation in cash terms by local authority. For an online interactive version, see: <https://goo.gl/wxMvu1>.





**Figure 4.8:** Total 2014–2015 DHP budget allocation in broken down by local authority political control, proportioned by total overall DHP allocation and percentage spend.

Even so, it does not follow that a local authority spending the entirety of its DHP budget results in all of those warranting payments being in receipt of them. The government consistently uses DHP expenditure and returns data to argue that the need for payments – and consequent mitigation of the reforms – is being met.<sup>140</sup> The DHP allocations are, however, only a ‘small fraction’ of total shortfalls<sup>141</sup> and were never intended to mitigate the full impact of reductions in Housing Benefit.<sup>142</sup>

This problem is further compounded by the implicit assumption that all affected tenants who require assistance would naturally apply for mitigation through these payments. Under the ‘DHP strategy’,<sup>143</sup> the onus is firmly on those affected by the welfare reforms to apply to their local authority for DHPs themselves, effectively making the regime a form of ‘bounce-back’ exemption, reliant on post hoc action by the tenants themselves. This issue was given implicit attention by Males J in *Cotton*, where the claimant’s lack of a DHP award was due to *his* failure to make ‘correct applications’.<sup>144</sup> A similar sentiment is echoed in *KR v SSWP*,<sup>145</sup> where ‘application for [DHPs] was something that she was made aware of’ and she has ‘accordingly a remedy by another route’.<sup>146</sup> The arrears suffered by the claimants due to delays and limitations in the DHP process are framed firmly as their own responsibility, with little consideration on how onerous or unclear the application process imposed by the local authority may have been, or whether any support was provided.<sup>147</sup>

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<sup>140</sup> As a recent example, see HL Deb, 3 June 2015, c506.

<sup>141</sup> Rebecca Tunstall, “The Coalition’s Record on Housing: Policy, Spending and Outcomes 2010–2015” (CHP, 2015) available at <<http://sticerd.lse.ac.uk/dps/case/spcc/WP18.pdf>> Accessed April 14, 2016.

<sup>142</sup> Wendy Wilson (2014) Housing Benefit: Discretionary Housing Payments (DHPs) – Commons Library Standard Note SN06899 22nd September London: House of Commons Library.

<sup>143</sup> Oral Evidence taken before the Work and Pensions Committee (n 30) Q 490.

<sup>144</sup> *Cotton* (n 124) [30] (per Males J).

<sup>145</sup> [2014] UKUT 464 [6] (per Judge May QC).

<sup>146</sup> *Ibid.*

<sup>147</sup> It is clear that differential levels of support are provided by at both local authority, and for appropriate tenants, housing association level; see Department for Work and Pensions (n 139) 47.

Current data, however, suggests that many tenants are not utilising DHPs sufficiently. Within their initial report on the on SSSC, Clarke et al found that only one in five claimants had made an application,<sup>148</sup> with an average success rate of 49%<sup>149</sup> – people with disabilities were the most likely to apply, at a success rate of just 26%.<sup>150</sup> This led the Social Security Advisory Committee to raise concerns that many affected by the SSSC had not even heard of DHPs, let alone applied for a payment.<sup>151</sup> Although data is not available on the numbers of unsuccessful tenants who have applied for internal review, in line with findings elsewhere in the literature, one can assume that this is unlikely to be a high percentage.<sup>152</sup>

### **3.2. Localism alongside centrally determined guidelines**

There is also 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,<sup>153</sup> and that they will adhere to the centrally determined principles set out in DWP guidance on their use.<sup>154</sup> Ministers have been at pains to point out that the payments are discretionary, repeatedly offering the same vapid response that the ‘the clue is in the title’<sup>155</sup> and expressing an eagerness to avoid ‘standing back and imposing something’<sup>156</sup> – local authorities should decide when to make awards with reference to ‘local issues’.<sup>157</sup> This is set against a continued emphasis on central guidance being updated to help local authorities respond to and prioritise vulnerable populations. This

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<sup>148</sup> Ibid 39.

<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

<sup>151</sup> Social Security Advisory Committee, Report on the Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations (2013)  
<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/264025/9780108560064.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264025/9780108560064.pdf)> accessed 20 November 2017.

<sup>152</sup> For example, see David Cowan and Simon Halliday, *The Appeal of Internal Review: Law, Administrative Justice and the (Non-)Emergence of Disputes* (Hart 2003).

<sup>153</sup> *MA* (n 105) [66] (per Dyson MR).

<sup>154</sup> Ibid [72] (per Dyson MR).

<sup>155</sup> See HC Deb, 26 March 2013, c473WH; and HC Deb 25 Nov 2013, vol.571, col.13.

<sup>156</sup> Oral Evidence taken before the Work and Pensions Committee (n 30) Q 564.

<sup>157</sup> HC Deb 25 2013, vol.559, col.976W.

contradiction sits at the heart of the *MA* appeals,<sup>158</sup> which refer to the fact that ‘further guidance [on DHPs] has been issued to the [local authorities]’<sup>159</sup> to help justify taking a separate line of reasoning from *Burnip*, whilst at the same time emphasising that ‘[local authorities] and social landlords are better able than any central authority to ensure they use their housing stock to best effect’<sup>160</sup> and that ‘[Local authorities are] accountable locally for the money they spend.’<sup>161</sup> The role of the guidance has been scrutinised in some detail in other SSSC appeals, particularly *Cotton*,<sup>162</sup> and with reference to the Benefit Cap in *SG*, where Lord Reed highlighted that it states ‘funding is specifically aimed’<sup>163</sup> at those in the claimants’ circumstances. However, quite how local authorities are expected to balance their public law duty to ‘have regard’<sup>164</sup> to this 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 clear. This is complicated further by the initial budgets for the ‘localised’ aspects of reforms being set by central government, not the local authority; as stated by the Social Security Advisory Committee, the ‘transfer of responsibility for the delivery of services is not always matched by a transfer of funds to fulfil the task’.<sup>165</sup>

This is especially so given the DHP guidance’s emphasis on the payments being ‘first and foremost ... a discretionary scheme’.<sup>166</sup> The only prescriptive areas echo those

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<sup>158</sup> And its concomitant assumptions are relied upon within Appendix 2 of Lord Toulson’s lead judgment in *Carmichael* (n 67).

<sup>159</sup> *MA* (n 105) [64] (per Dyson MR).

<sup>160</sup> *Ibid* [66] (per Dyson MR).

<sup>161</sup> *Ibid* [75] (per Dyson MR).

<sup>162</sup> *Cotton* (n 124) [20–23] (per Males J).

<sup>163</sup> *SG* (n 131) [62] (per Reed LJ).

<sup>164</sup> For a demonstration of the complexities inherent in ‘having regard’ to the DHP guidance, and how local authority-generated guidance can clash with this, see *R (on the application of Halvai) v London Borough of Hammersmith and Fulham* [2017] EWHC 802 (Admin), in particular, [15], [25] and [30]–[32] (per Judge Cockerill).

<sup>165</sup> Social Security Advisory Committee, ‘Localisation and Social Security: A Review (2015) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/428356/localisation-and-social-security-ssac-may-2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/428356/localisation-and-social-security-ssac-may-2015.pdf)> 20 November 2017.

<sup>166</sup> Department for Work and Pensions, *Discretionary Housing Payments Guidance Manual* (2014)



demands made by statute or case law, such as limits to the level of DHP awards being set at the level of eligible rent, or suggesting that local authorities should ‘consider’ making payments in certain circumstances – such as when children are unable to share a bedroom due to disability, but fall outside of the statutory exemption by virtue of not receiving the middle or higher rate of DLA.<sup>167</sup> Indeed, the ‘entirely discretionary’ nature of the scheme, and the ability of local authorities to set their own priorities for whom to pay, is expressly raised as a concern by the Social Security Advisory Committee.<sup>168</sup>

This tension can also be seen in the allocation of the DHP budgets. The DWP clearly outlines a breakdown of proposed expenditure; separated into the individual reforms.<sup>169</sup> The reasoning behind the centrally determined allocations is repeatedly raised in front of the courts,<sup>170</sup> with financial allocations serving to ‘broadly reflect the impact of this measure and the additional funding needed to support this group’.<sup>171</sup> In reality, the use of these funds is far more complicated, with money not necessarily being used for the reasons for its initial allocation under the formula by the DWP. To illustrate this, **Figure 4.9** is a Sankey chart detailing the shifts in the use of DHP money over the course of the currently available expenditure figures.

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<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/300220/discretionary-housing-payments-guide-apr-14.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300220/discretionary-housing-payments-guide-apr-14.pdf)> accessed 19 November 2017.

<sup>167</sup> Ibid.

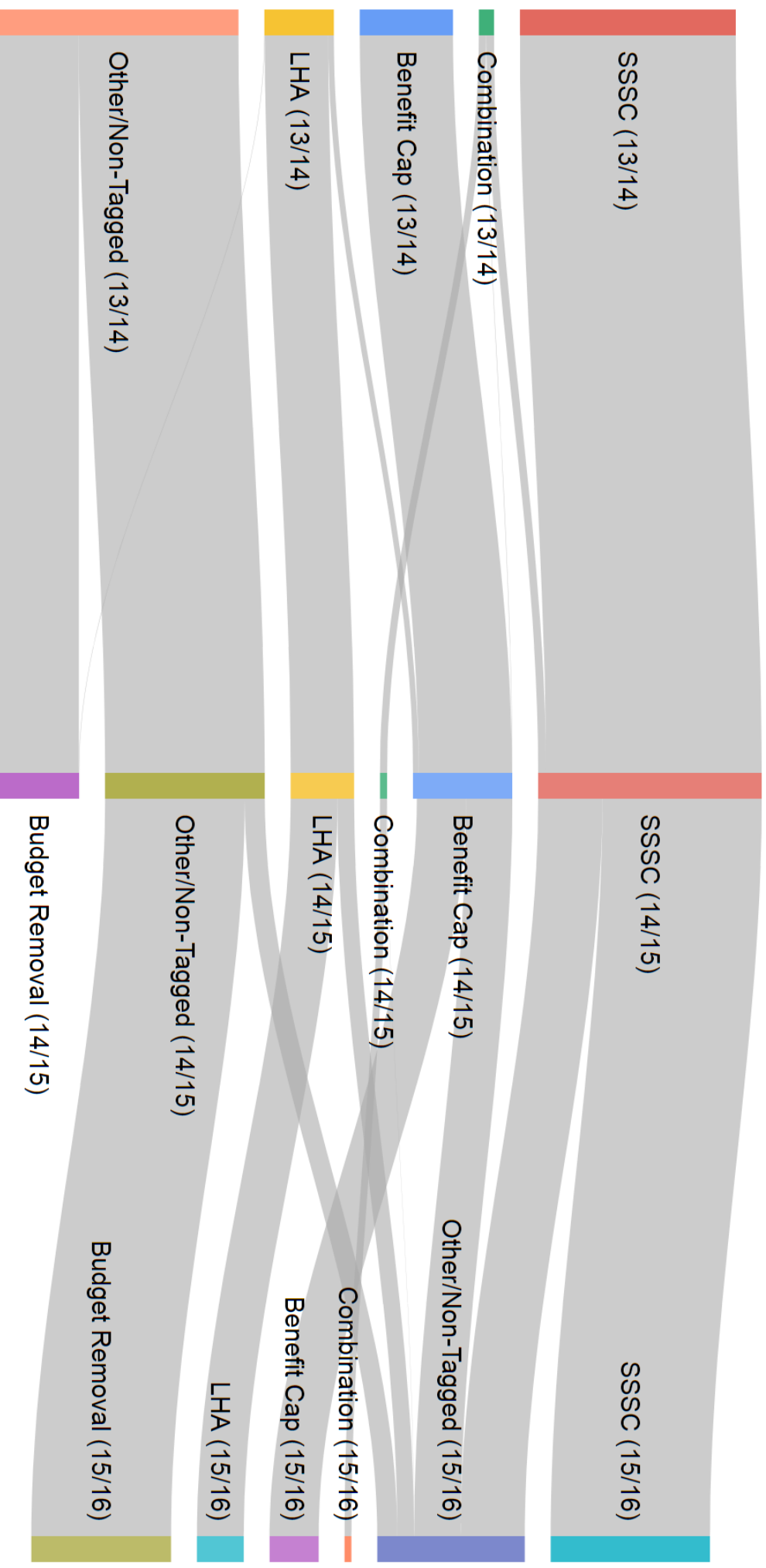
<sup>168</sup> Social Security Advisory Committee, Report on the Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations (2013) available at <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/264025/9780108560064.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264025/9780108560064.pdf)> accessed 20 November 2017.

<sup>169</sup> See, for instance, the annual DHP budget circulars outlining areas of expenditure: DWP, HB Subsidy Circular S1/2014 (DWP 2014) <<https://www.gov.uk/government/publications/hb-subsidy-circular-s12014-discretionary-housing-payments-for-local-authorities-2014-to-2015>> accessed 12 November 2017.

<sup>170</sup> See, in particular, *R (on the application of Hardy) v Sandwell MBC* [2015] EWHC 890 (Admin) [31] (per Phillips J) and the discussion of the reasoning behind DHP allocations in *MA* (n 105) [22], [29] (per Laws LJ), as referenced in Appendix 2 to *Carmichael* (n 67).

<sup>171</sup> *Hardy* (n 171) [31] (per Phillips J).

Figure 4.9: Sankey chart detailing the movement between DHP expenditure areas.



There are two interlinked issues depicted in **Figure 4.9**. A substantial portion of DHP expenditure is not directly focused on dealing with specific welfare reforms.<sup>172</sup> This is perhaps due in part to the sizable overlapping pressures on local authorities draining DHP expenditure, such as temporary accommodation costs arising from Part VII Housing Act 1996 duties as a result of, but directly mitigating, the Benefit Cap.<sup>173</sup> The second is the significance of changes to year-on-year DHP expenditure. Reductions to the DHP budget do not correspond with the DWP's concomitant allocation; in other words, taking money off the SSSC chunk does not mean that there will be a reduction in SSSC expenditure. Local authorities instead respond by shifting money around the different reforms.

### **3.3.Saving money? DHPs and their relationship with austerity**

There is a clear tension in the case law between the adoption of a policy scheme which was partly justified as 'part and parcel of the government's deficit reduction strategy',<sup>174</sup> while simultaneously being considered to 'provide the same sum of money'<sup>175</sup> as the adoption of a scheme based on the provision of statutory exemptions. Put another way, is it not incredulous to suggest that DHPs can both (i) work to save money and contribute to the reduction of the deficit in comparison to statutory exemptions, and (ii) exist on the level with exemption-based approaches, providing the same money but simply via a different route?

This tension arises throughout the body of case law on the SSSC. In *Rutherford*, Stuart-Smith J not only refers to *MA*'s assessment of local accountability,<sup>176</sup> but also highlights the problematic notion of 'austerity'. The formation of the policy at time of

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<sup>172</sup> Though it may seem that errors in local authority reporting may be to blame, the other/non-tagged expenditure is not a catch-all for non-reported expenditure (namely, local authorities' detailed non-direct welfare reform expenditure on DHPs as a separate reporting category alongside the welfare reforms, it is not a residual category).

<sup>173</sup> For an assessment of this, see: Work and Pensions Select Committee (n 41) paras 22–30.

<sup>174</sup> *MA* (n 105) [20] (per Laws LJ), as in Appendix 2 of Toulson LJ's lead judgment in *Carmichael* (n 67).

<sup>175</sup> *Carmichael* (n 67) [48] (Toulson L).

<sup>176</sup> *Rutherford* (n 109) [32] (per Stuart-Smith J).

‘extreme national financial austerity’<sup>177</sup> is emphasised by the court and this is aligned alongside the legitimate aims served by both the SSSC – and importantly – the use of a DHP scheme as opposed to a statutory exemption. However, as the court assumes that similar populations would be exempted at the discretion of a local authority under DHPs as they would be if statutory exemptions were utilised, then it is difficult to see how the former assists in serving the objectives of austerity – surely the only way is by not exempting individuals who would otherwise warrant exclusion from the policy?

Claimants repeatedly draw on this odd dichotomy in order to argue for statutory exemptions. Before the Supreme Court, counsel for the *Rutherfords/Carmichael* and for the broader *MA* class both provided draft statutory exemptions to cover their claimants.<sup>178</sup> Helen Mountfield QC, representing the Equality and Human Rights Commission intervening in *MA*, provides the clearest articulation of this point. If it is the case that certain classes of tenant are expected to be exempted (namely, those who would otherwise face unlawful discrimination), an exemption mechanism built into an amended Reg.B13 Housing Benefit Regulations 2006 would incur no additional expense;<sup>179</sup> indeed, ‘authorities must exercise their discretion under this regulation and consider applications for DHPs in any event’.<sup>180</sup> Put another way, if the aim is cost neutral, why not avoid the problems associated with the provision of DHPs and simply require an assessment underpinned via statute? And if it is not cost neutral, then surely the adoption of the DHP route does not exist on an equal footing with those in the regulations?

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<sup>177</sup> Ibid [61] (per Stuart-Smith J).

<sup>178</sup> The author thanks Martin Westgate QC of Doughty Street Chambers and Tom Royston of Garden Court North Chambers for providing sight of their skeleton argument and grounds.

<sup>179</sup> Indeed, it could be argued the administration would be cheaper, as there would be no requirement for numerous repeat applications as is generally the case for DHP awards. This point is put in the written arguments on behalf of the *MA* class of claimants in *Carmichael* (n 67).

<sup>180</sup> *MA* (n 105) [68] (per Dyson MR).

### 3.4. Flexible whilst stable

It is assumed that for certain classes of claimant DHPs both provide the ‘greater flexibility’<sup>181</sup> required to deal with the changing nature of ‘disability-related needs’,<sup>182</sup> whilst being sufficiently secure to provide an adequate form of exemption for those in difficult (often long-term) circumstances, who would otherwise be unlawfully discriminated against. The ‘flexibility’ of DHP awards have been repeatedly underscored in the legal appeals, both in terms of situating the scheme alongside the centrally imposed guidance which emphasises that they must be ‘flexible and allow for unusual cases’,<sup>183</sup> and from an *a priori* assumption that making payments from a fund provides a ‘flexible way of meeting needs’.<sup>184</sup>

This sits 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’<sup>185</sup> was seen as an antithesis to the temporary and discretionary nature of DHPs.<sup>186</sup> This same sentiment is expressed in Lady Hale’s dissenting judgment with reference to the circumstances of *A*, the claimant with a home adapted under a domestic violence sanctuary scheme, but curiously not for the broader *MA* class.<sup>187</sup> 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 *MA* class of claimant, with JD caring for his daughter who ‘has cerebral palsy with quadriplegia, learning difficulties, double incontinence and ... is registered blind’<sup>188</sup> or indeed Mr Rourke and his daughter’s disabilities and need to store medical equipment.<sup>189</sup>

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<sup>181</sup> Ibid [74] (per Dyson MR).

<sup>182</sup> Ibid [74] (per Dyson MR).

<sup>183</sup> *Halvai* (n 165) [46] (Judge Cockerill)

<sup>184</sup> See *Cotton* (n 124) [27] (per Males J). For the same sentiment, arising from the initial *MA* appeals, see *Carmichael* (n 67) [21] (per Toulson J).

<sup>185</sup> *Burnip* (n 99) [47] (per Henderson J).

<sup>186</sup> Ibid [46] (per Henderson J).

<sup>187</sup> *Carmichael* (n 67) [77] (per Hale L).

<sup>188</sup> See Appendix 1 [4] to Toulson L’s lead judgment in *Carmichael* (ibid).

<sup>189</sup> Ibid [5].

What emerges, therefore, is a body of case law which simultaneously laments the lack of long-term exemptions and raises concerns about the insecurity of ongoing awards, all whilst recognising the ability of the DHP scheme to provide ‘more appropriate’<sup>190</sup> protection and flexible support to certain classes of claimant. The idiosyncrasy of this position was highlighted in the context of the Benefit Cap by Collins J in *Hurley v Secretary of State for Work and Pensions*,<sup>191</sup> where counsel for the Secretary of State for Work and Pensions ‘criticised [the claimant] for referring to the possibility of obtaining DHPs as a short term measure, despite his own witness evidence that that is what it is’.<sup>192</sup> The DWP’s argument is effectively to have its cake and eat it; to both retain the perceived flexibility and responsiveness of DHPs, whilst simultaneously arguing that they provide sufficient stability.

### 3.5. Assumptions about DHP practice

Finally, there are assumptions within the cases about the practice of applying and awarding DHPs that bear scrutiny. First, the appeals do not consider cases where *partial* awards are made which do not cover the full deduction imposed by welfare reforms. For instance, evidence suggests that many local authorities are making DHP awards which do not cover the full deduction in SSSC cases.<sup>193</sup> In such a case, it is not clear whether the existence of a discretionary payment – even if it does not cover the full amount – is sufficient to prevent a disproportionate impact on protected populations and, if it does, where the line between a sufficient and an insufficient award lies. The appeals almost always assume a binary payment/non-payment distinction;<sup>194</sup> either a DHP award is made, or it is not.

Second, the courts will often lend weight to the fact that the claimants before them are in receipt of DHPs, as is almost always the case in judicial review appeals to Housing

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<sup>190</sup> *Carmichael* (n 67) [41] (per Toulson L).

<sup>191</sup> [2015] EWHC 3382 (Admin).

<sup>192</sup> *Ibid* [40] (per Collins J).

<sup>193</sup> Department for Work and Pensions (n 139) 51.

<sup>194</sup> A notable exception is the recent case of *Halvai* (n 165), where the court considered that the local authority’s policy to operate a £150 cut-off did not bear scrutiny, *inter alia*, because the discretion to consider a partial award would nevertheless remain. See [45] (per Judge Cockerill).

Benefit reforms. For instance, in *Cotton*, the court explicitly acknowledges the importance of current receipt in its reasoning, stating there was no interference with Art.8 ‘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’.<sup>195</sup> It is, of course, easy and comparatively cheap for a local authority threatened with judicial review action – or indeed, for local authorities involved in a challenge to the Secretary of State for Work and Pensions – to provide DHP provision where it may not have done so otherwise. This issue was raised during the Court of Appeal hearing with regards to *A*.<sup>196</sup> It is outside the ambit of this thesis to directly address arguments on the scope of s.4 Human Rights Act 1998, though it is suggested that the failure of the courts to sufficiently ‘look beyond the instant case when considering whether to make a declaration of incompatibility’<sup>197</sup> in the SSSC cases is in part a failure to recognise this practical reality.

Finally, the courts emphasise that DHPs are ‘in principle subject to judicial review’,<sup>198</sup> and consequently, should their payment cease in instances where there would otherwise be unlawful discrimination, this could be challenged by the claimants. In other words, the award of DHPs steps in where ‘a reduction in housing benefit did threaten to infringe Convention rights ... to avoid that infringement’.<sup>199</sup> This assumption ignores both the nuanced impact of judicial review action on the decision-making of administrative workers<sup>200</sup> – put more crassly, because something is unlawful does not mean local authorities do not decide to do it – and the sheer difficulty

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<sup>195</sup> *Cotton* (n 124) [2014] EWHC 3437 (Admin), [30] (per Males J).

<sup>196</sup> In the hearing for, *Rutherford v Secretary of State for Work and Pensions* [2016] EWCA Civ 29, Karen Mumford QC acting for *A* raised the curious sequence of events leading to her client *eventually* receiving a DHP award. The payment was only made after the DWP had contacted the local authority when proceedings were already underway.

<sup>197</sup> For a far more detailed assessment of the legal arguments here, see: Shona Wilson-Stark, ‘Facing Facts: Judicial Approaches to Section 4 of the Human Rights Act 1998’ (2017) Forthcoming Law Quarterly Review.

<sup>198</sup> *Carmichael* (n 67) [9] (per Toulson LJ).

<sup>199</sup> *Cotton* (n 124) [55] (per Males J).

<sup>200</sup> For an analysis of the complexities of this relationship, see: Simon Halliday, *Judicial Review and Compliance with Administrative Law* (Hart 2004) 166–174.

claimants face in attempting to challenge such decisions via judicial review (or indeed to challenge them at all),<sup>201</sup> especially in the face of ongoing changes to legal aid.<sup>202</sup>

An important connected point is that of the remedies actually available to tenants who are challenging the regulations themselves or the award of Housing Benefit by the authority. Suffice to state for our purposes that it is not always clear what it is that judges can do in the face of a claimant arguing that the decision to impose the SSSC penalty is not Convention compliant. In many circumstances, the output of a decision that the Reg.B13 penalties cannot be lawfully applied may simply be that a local authority cannot withdraw DHP support; in other words, DHPs provide the route for mitigation rather than a recasting of the regulations per se. For an analysis of the jurisdictional problems here, particularly in the wake of the order made in *Burnip*, see Judge Mark's predicament in *LA v Bury Metropolitan Borough Council*,<sup>203</sup> and, more recently, the Upper Tier Tribunal's significant assessment in *Carmichael v Sefton BC*<sup>204</sup> – at the time of writing, floated for a hearing in the Court of Appeal in February 2018.

#### **4. Structural and epistemic discretion within the DHP regime**

Having provided a detailed overview of the ambit of the DHP scheme and its role in the SSSC policy, this section now turns to applying the theoretical position outlined in Chapter Three to the DHP scheme itself. The structural/epistemic distinction allows this section to interrogate government's use of this discretionary scheme as a floating panacea, designed to 'deliberately fudge' problems within the SSSC design and deflect

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<sup>201</sup> See Cowan and Halliday (n 153).

<sup>202</sup> For a good overview of the problems, see: Tom Mullen, 'Access to Justice in Administrative Law and Administrative Justice' in Ellie Palmer et al (eds), *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart 2016) 69–109. For a more detailed examination of the LASPO reforms to legal aid with reference to judicial review, see: Jamie Beagent, 'Funding for Judicial Review' (2013) 18 *Judicial Review* 143.

<sup>203</sup> [2013] UKUT 546 (AAC), [8]–[17] (per Judge Mark).

<sup>204</sup> [2017] UKUT 174 (AAC), [57]–[77]. For a concise summary of the sizeable ramifications of this case, see: Citizens Advice Bureau, 'First Tier Tribunals and Local Authorities Can Disapply Bedroom Tax Regulations which Are Discriminatory' (2017) 181 *Adviser* 46.



criticism from itself to local authorities. In avoiding the difficult task of delineating the impact of the SSSC, I argue that this structural placement of discretion may not be ‘politically innocent’.

Applying this structural/epistemic distinction to the DHP scheme also raises two further issues which are important to foreshadow before the analysis in later chapters. First, the heavy focus in appeals on the identification – and resulting arguments over the delineation of – affected classes of tenant. All of the judicial review challenges have been tasked with setting statutorily exempted classes of tenants against those reliant on the DHP scheme. I argue below that this is an exercise in the identification of proxies for discrimination; an issue which will be returned to in the analysis in later chapters. Given the dominance of A1P1/Art.8 with Art.14 challenges to the SSSC, the chapter closes with a more detailed assessment of the limitations imposed by proportionality review.

#### **4.1. Interrogating austerity localism**

The placement of discretion within the SSSC is indicative of what can be characterised as the government’s ‘cut and devolve’ approach; namely, reducing centrally administered budgets for programmes or individual social security payments and pushing the responsibility down to local authorities or other decentralised bodies to manage or mitigate the impact.<sup>205</sup> This approach has a clear rationale embedded in the ‘localism’ discourse.<sup>206</sup> On the surface, the principle is a simple one: if savings to welfare programmes have to be made, those closest to the impact are better placed to implement, mitigate or target them than a central government department. This

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<sup>205</sup> See, for example, the dissolution of the Independent Living Fund and its replacement with localised support, or the abolition of council tax benefit in favour of the Council Tax Reduction Scheme. See, in particular: *R (on the application of Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, [4]–[16] (per Blake J); and *R (on the application of Mark Logan) v London Borough of Havering* [2015] EWHC 3193 (Admin), [1]–[2], [41]–[44] (per Blake J).

<sup>206</sup> See Elena Vacchelli, ‘Localism and Austerity: A Gender Perspective’ [2015] 80 *Soundings: A Journal of Politics and Culture* 83.; and Chris Grover, ‘Localism and Poverty in the United Kingdom: The Case of Local Welfare Assistance’ (2012) 33 *Policy Studies* 349, 351.

approach, however, warrants examination, particularly when ‘localism’ becomes tied to an ‘austerity’ programme – described elsewhere as ‘sink or swim localism’<sup>207</sup> or ‘austerity-localism’.<sup>208</sup> There are many implications of this hybrid approach, but within the focus of this chapter there are four key problems of this ‘fetishisation’<sup>209</sup> of localism which have manifested themselves in the second section.

First, there is an assumption that, because many of the most pertinent impacts of reducing social security expenditure are discernible at the local level, solutions to them are best served at that level as well. This fails to recognise the problematic political asymmetry between the two: by reducing central expenditure and pushing decisions downwards, governments can ‘externalise responsibility’<sup>210</sup> for the impacts of spending reductions, while local authorities find themselves in a ‘political cul-de-sac’,<sup>211</sup> unable to change their fundamental basis. The contradiction between these two political scales can serve to distance the ‘electoral connection’ between the voters and those with responsibility for policy<sup>212</sup> – in other words, it places responsibility for controversial policies on local authorities who are not politically responsible for their implementation or design. This problem is often framed in the context of ‘fiscal equivalence’ – local authorities being expected to fulfil functions otherwise provided by different levels of government, without the concomitant financial support to do so.<sup>213</sup>

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<sup>207</sup> Vivien Lowndes and Lawrence Pratchett, ‘Local Governance under the Coalition Government: Austerity, Localism and the “Big Society”’ (2012) 38 *Local Government Studies* 21.

<sup>208</sup> David Featherstone et al, ‘Progressive Localism and the Construction of Political Alternatives’ (2012) 37 *Transactions of the Institute of British Geographers* 177.

<sup>209</sup> Ibid.

<sup>210</sup> Lowndes and Pratchett (n 208).

<sup>211</sup> Frank Gaffikin, ‘Paradoxes in Local Planning in Contested Societies’ in Simin Davoudi and Ali Madanipour (eds), *Reconsidering Localism* (Routledge 2015).

<sup>212</sup> John Huber and Charles Shipan, *Deliberate Discretion?: The Institutional Foundations of Bureaucratic Autonomy* (Cambridge University Press 2002) 2.

<sup>213</sup> Christian Schwab, Geert Bouckaert and Sabine Kuhlmann, ‘Conclusion: Lessons and Advice for Future Local Government in Europe’ in Christian Schwab, Geert Bouckaert and Sabine Kuhlmann (eds), *The Future of Local Government in Europe Lessons from Research and Practice in 31 Countries* (Nomos 2017).

Second, in shifting this responsibility to the local level, it may be that that this ‘localised approach’<sup>214</sup> is not ‘politically innocent’<sup>215</sup> – rather, it is seeking to avoid explicitly delineating the boundaries of who will, and importantly will not, be affected by individual policies. Devolving these problematic issues down to the local authority level can serve as a form of political sleight of hand, moving the legislative focus away from arguments over who should bear the burden of reductions in social security expenditure, and towards the discussion of local authority provision for these decisions. In other words, conflicts are ‘deliberately fudged,’<sup>216</sup> governments can attempt to ‘minimise’ the visibility of their reforms.<sup>217</sup>

This problem can be seen within parliamentary debates on the ambit of the SSSC and the DHP scheme. The availability of DHPs is invoked by government ministers as a veritable catch-all when challenged on the potential impact of the regulations. To give but a few recent examples of many, the availability of the payments has been used to justify the impact of measures on victims of domestic violence,<sup>218</sup> lone-parent households,<sup>219</sup> care leavers,<sup>220</sup> families with severely disabled children,<sup>221</sup> people with disabilities, jobseekers and people on low incomes.<sup>222</sup> More recently, their availability has even been used to placate concerns in Parliament that victims of the Grenfell fire may be affected by the SSSC upon relocation.<sup>223</sup> Often, there is an unclear dividing line between ‘exemptions’ and the availability of DHPs. The most high-profile example is that of the then Prime Minister David Cameron’s response in Prime Minister’s Question Time to a question about disabled individuals not being exempted

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<sup>214</sup> *Carmichael* (n 67) [23] (per Toulson LJ).

<sup>215</sup> Featherstone et al (n 209) 178.

<sup>216</sup> Prosser (n 9) 150.

<sup>217</sup> There is a literature in politics – known as the ‘blame avoidance’ thesis – which looks in more detail at these questions in the context of legislative design. See Giuliano Bonoli, ‘Blame Avoidance and Credit Claiming Revisited’, *The Politics of the New Welfare State* (Oxford University Press 2012) 93.

<sup>218</sup> HC Deb, 21 November 2016, Cw.

<sup>219</sup> HC Deb, 14 November 2016, Cw.

<sup>220</sup> HL Deb, 18 October 2016, vol.774, col.23WS.

<sup>221</sup> HC Deb, 4 May 2016, Cw.

<sup>222</sup> HC Deb 22 June 2017, vol.626, col.230.

<sup>223</sup> HL Deb 5 July 2017, vol.783, col.885.

from the SSSC: ‘the right hon. Gentleman is completely wrong, because anyone with severely disabled children is exempt from the spare room subsidy’.<sup>224</sup> Other examples abound, such the Minister of State for Pensions stating that ‘an additional bedroom will be allowed [for cancer patients] when determining the number of bedrooms they need’.<sup>225</sup> Importantly, these populations are not automatically statutorily exempted, but instead (in many circumstances) are reliant on the DHP process.

These two issues do not mean that such a localised approach to welfare reform is inherently problematic or misguided. Instead, it simply highlights that the current constitutional protections within the UK are ill-equipped to deal with the coupling of an austerity agenda mitigated or implemented at the local level. This allocation of resource and responsibility amongst tiers of government is a significant change to the ‘administrative constitution’,<sup>226</sup> rather than simply being a dry issue of policy implementation. In other words, ‘localism’ must be some sort of *end* in its own right, as opposed to simply a *means* of delivering or alleviating the hardship caused by policies determined at the central level. In the context of assessing government motivations for the welfare reform agenda, this *end* is not articulated well, or often, at all.

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<sup>224</sup> HC Deb, 6 March 2013, c952.

<sup>225</sup> HC Deb, 22 April 2013, c700W.

<sup>226</sup> Tony Prosser, ‘Constitutionalising Austerity in Europe’ [2015] Public Law 111, 281.

## 4.2. Proxies and classes of persons

Having outlined the DHP case law in some detail above, it will not have escaped the reader's attention that the vast majority of the courts' time has been focused on setting groups of tenants exempted via Reg.B13 Housing Benefit Regulations 2006 against those left to the whims of the DHP scheme. The courts are, to put it another way, evaluating the *structural* placement of discretion within the SSSC policy scheme. These cases chop away at the different categorisations of affected tenants built into the policy framework, drawing distinctions between those who should be statutorily exempted, and those who can justifiably be DHP reliant. Victory is to have the category exempted. To save describing all of the appeals here, **Figure 4.10** provides an overview of the relevant cases and resulting amendments to the Housing Benefit Regulations 2006.<sup>227</sup>

Setting these different categories of tenant against one another leads to the body of case law on the SSSC being dominated by two distinctions. The first arises in the way in which the claimants in *MA* (bar the *Carmichaels*)<sup>228</sup> were distinguished from *Burnip* throughout the appeals. The broader class of claimant with a disability was determined to be, by comparison to the tighter *Burnip* classes, 'relatively large, not always easy to recognise, may be open to abuse and (in some cases at least) will require monitoring'.<sup>229</sup> In addition, the increase to the DHP fund, assurances by the DWP that it would be 'kept under review', and alterations to the DHP guidance were the bases for drawing the distinction.<sup>230</sup> Consequently, it is for these reasons that the Secretary of State's decision to opt for a discretionary route for mitigation through the DHP scheme can be justified for these groups.

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<sup>227</sup> Namely, those amendments which followed *Burnip* (n 99) in the Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations 2013/2828, and those which followed *Carmichael* (n 67) in the Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations 2017/213.

<sup>228</sup> See the separate analysis of the *Carmichaels* within *MA* (n 105) [76]–[79] (per Dyson MR).

<sup>229</sup> *Ibid* 13 [72] (per Dyson MR).

<sup>230</sup> *MA* (n 105) [72] (per Dyson MR).

The second arises from the Supreme Court in *Carmichael*, where Lord Toulson’s lead judgment utilises a distinction based on the ‘transparent medical need for an additional bedroom’.<sup>231</sup> Appendix 1 of the judgment provides a detailed summary of the circumstances of the claimants, but for our purposes here, there were three classes: (i) a single parent, who is a victim of domestic violence, living in a home adapted under a sanctuary scheme (*A*); (ii) a couple who are unable to share a bedroom by reason of a disability (*Carmichael*), and a child who requires overnight care (*Rutherford*); and (iii) a broader class of tenant (*MA*), where an additional bedroom or continued occupation of the property is required for medical reasons, such as the storage of medical equipment (*Mr Rouke*) or due to significant mental health problems leading to the hoarding of newspapers (*Mr Drage*).

This ‘transparent medical need for an additional bedroom’<sup>232</sup> allows for successful appeals in *Rutherford* and *Carmichael* and dismisses those of *MA* and *A*. Utilising a distinction based on the use of the home avoids the clunkier and more logically problematic approach based on the delineation of the affected class which dominated the *Burnip/Gorry* cases and *MA*, notwithstanding its other problems.<sup>233</sup> In dismissing this approach in favour of his own distinction, LJ Toulson instead suggested that:

To favour those in a small group with strong societal reasons for staying in a bigger property than they need over those in a larger group with equally strong or possibly stronger reasons would be truly irrational.<sup>234</sup>

I would respectfully suggest that in utilising the caveats ‘transparent’, ‘medical’ and ‘additional bedroom’ (as opposed to a need to remain in the property, for instance), the court is achieving precisely the same effect through a different means. Leaving to one side for the moment the meaning of the different elements of these distinctions,<sup>235</sup> it is clear that the court is primarily concerned with the delineation of categories of

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<sup>231</sup> *Carmichael* (n 67) [42].

<sup>232</sup> *Ibid.*

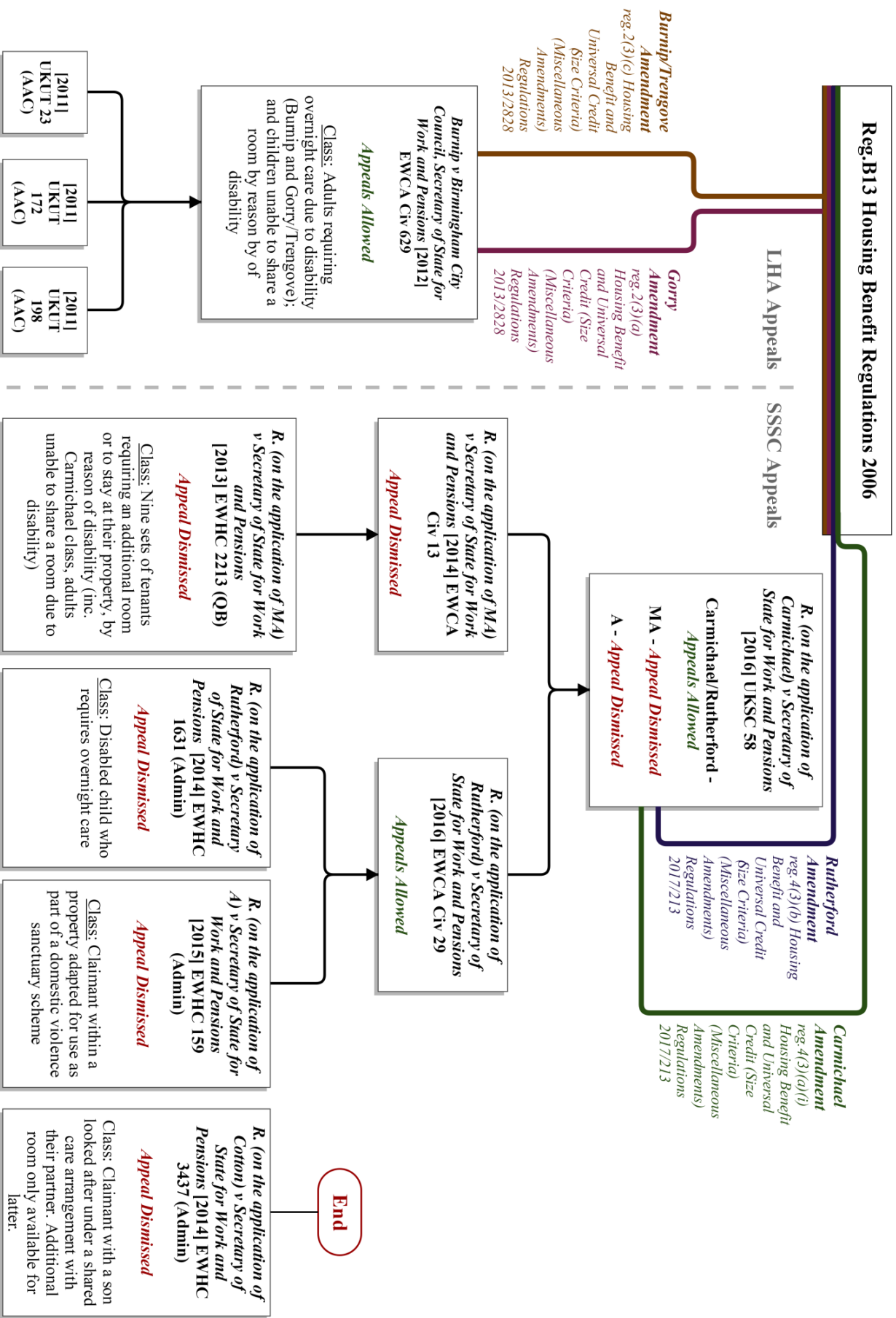
<sup>233</sup> This distinction is analysed in more detail elsewhere in this thesis, see p.419.

<sup>234</sup> *Carmichael* (n 67) [58] (per Toulson LJ).

<sup>235</sup> These issues are picked up again with reference to the data collected in this study in Chapter Seven, see p.419 onwards.

claimant. It is a structural assessment of the placement of exemptions within the SSSC scheme; if exempting one small category of persons, why not others with the inverse (and tightly drawn) circumstances?

Figure 4.10: A flowchart summarising judicial review challenges to the Housing Benefit Regulations 2006 and resulting amendments





These differentiations between affected claimants are also *epistemic* in nature. The end point of these claims are groups of claimants who require remaining in their home. The classes of claimant – such as a female living within a sanctuary scheme – therefore function as proxies for this end point. Justifying discrimination against these classes, by not providing a statutory exemption under Reg.B13, is a case of justifying why this class is not a sufficiently effective proxy for unlawful discrimination. In other words, the justification here is an inversion of Khaitan’s discussion of proxy justification.<sup>236</sup> The question Khaitan poses is whether the use of the proxy can be justified on the basis that it is an effective and proportionate determinant of a relevant qualification.<sup>237</sup> Here the question is the inverse: can the *neglect* to use a proxy be justified, when it is a reliable indicator of whether otherwise unlawful discrimination will arise? In other words, when is a particular class of persons such a reliable indicator of the potential for unlawful discrimination that subjecting their circumstances to individual assessment under the DHP scheme becomes disproportionate?

This issue is the answer to Lady Hale’s point to the majority in *Carmichael* – if DHPs are not sufficient for Rutherford/*Carmichael*, then why are they sufficient for A?<sup>238</sup> I would respectfully suggest it is for the same reason Lady Hale herself does not dissent on the broader *MA* class; membership of the *A* and *MA* classes – alongside that in *Cotton* – is not determined to be a sufficiently accurate proxy for needing to remain in the property. Put another way, the court determines that being part of that category does not tell the local authority everything it needs to know – some individual appraisal is required. For the *Rutherford* and *Carmichael* class, membership of that class alone is a sufficiently reliable proxy for otherwise unlawful discrimination.

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<sup>236</sup> Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press 2015) 189.

<sup>237</sup> Ibid.

<sup>238</sup> In her own words, Lady Hale argues: ‘if the discretionary housing payment scheme is not good enough to justify the discrimination against the Rutherford and Carmichael households, it is not good enough to justify the discrimination against Ms A’s household either’. *Carmichael* (n 67) [77] (per Hale L).

### 4.3. Structural and epistemic discretion in proportionality review

Having outlined the problem of austerity–localism and this reliance on proxy classes of affected claimants, it is important to finish by considering the mechanism of proportionality review itself. During the hearing in *Carmichael*, Martin Westgate QC was challenged to detail whether he would have any complaint if the DHP scheme were *entirely* discretionary. Namely, if there were none of these delineated classes of exempted tenants which I have criticised above, none of the DHP guidance seeking a dividing line between these classes, and fewer centrally imposed controls on expenditure, would he have a complaint? His response was that he would not. The familiar challenges which engage A1P1/Art.8 to leverage Art.14 could have little to say on such a design for the scheme. The target, therefore, is not discretion per se, but how it is employed within the SSSC policy.

As a response to this problem, it is important to close by applying the structural/epistemic distinction to the architecture of proportionality review. Structural discretion can helpfully highlight the ability of the government to choose from a range of legally permissible options. As described by Klatt and Schmidt, ‘what constitutional principles neither command nor prohibit falls within structural discretion’.<sup>239</sup> It follows that public law challenges under judicial review – and the requirement of proportionality discussed in the cases above – does not imply one correct policy course, but instead provides options for the legislature to pursue. In other words, ‘it neither dissolves all limits nor does it require one right answer’.<sup>240</sup> In the context of the DHP scheme, therefore, this speaks to the spectrum of legally permitted policy options that fall between offering a full statutory exemption to the SSSC to clearly delineated groups and adopting a fully discretionary scheme where no such exemptions exist.

The first key issue here is the standard of review. Hearings for *Carmichael* and its lower instance iterations were heavily dominated by arguments on the standard of

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<sup>239</sup> Matthias Klatt and Johannes Schmidt, ‘Epistemic Discretion in Constitutional Law’ (2012) 10 *International Journal of Constitutional Law* 69.

<sup>240</sup> Julian Rivers, ‘Proportionality, Discretion and the Second Law of Balancing’, *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (2007) 169.

review<sup>241</sup> – even if frequently dismissed summarily in the judgments themselves.<sup>242</sup> The arguments stem from *Stec*'s<sup>243</sup> distinction between the lighter-touch 'manifestly without reasonable foundation' bar, or the more testing 'very weighty reasons'. Which margin is applied will 'vary according to the circumstances' and discrimination at issue, with sex discrimination generally falling in the latter and socio-economic measures occasioning other forms of indirect discrimination in the former.<sup>244</sup> In all of the SSSC appeals, the 'manifestly without reasonable foundation' test has applied.<sup>245</sup>

Having established the test to apply, the question then turns to the central issue of proportionality. Although not always expressly indicated in the judgments themselves, the assessment of proportionality generally requires the court to consider four questions:<sup>246</sup>

1. Is there a legitimate aim which could justify a restriction of the relevant protected right?
2. Is the measure adopted rationally connected to that aim?
3. Could the aim have been achieved by a less intrusive measure?

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<sup>241</sup> The dominance of Martin Westgate QC's focus on these arguments in *Carmichael* (n 67) led James Eadie QC, counsel for the Secretary of State for Work and Pensions, to quip that he had 'learnt the lesson of yesterday' and 'will not be taking you to endless authorities which all say the same thing'. See the recording of the hearing available at UK Supreme Court, '01 Mar 2016 – Morning – Part 4 of 6 – R (on the Application of Carmichael and Rourke) (Formerly Known as MA and Others) (Appellants) v Secretary of State for Work and Pensions (Respondent)' <<https://www.supremecourt.uk/cases/uksc-2014-0125.html>> accessed 5 July 2017.

<sup>242</sup> *Cotton* (n 124) [35]–[37] (per Toulson L).

<sup>243</sup> *Stec v United Kingdom* (65731/01) (2006) 43 EHRR 47.

<sup>244</sup> *Ibid* [51].

<sup>245</sup> For some more recent judicial guidance on the application of these margins, see: *R (Public Law Project) v LCJ* [2015] EWCA Civ 1193 [36] (per Laws LJ); and *R (Hurley and others) v SSWP* [2015] EWHC 3382 (Admin), [69] (per Collins J).

<sup>246</sup> As argued by Brady, the courts are doing something more than simply asking if a measure is 'proportionate or not' – he argues doing so is little better than asking if it is 'good' or 'bad'. There are instead a series of questions the court should consider: Alan Brady, *Proportionality and Deference Under the UK Human Rights Act: An Institutionally Sensitive Approach* (Cambridge University Press 2012) 6–7.

4. And, on a fair balance, do the benefits of achieving the aim by the measure outweigh the dis-benefits resulting from the restriction of the relevant protected right?<sup>247</sup>

It is the limitation imposed by ensuring that there is not a less intrusive measure available along with the final ‘balancing’ exercise that provides the discretionary range of options available to the government. In other words, these two elements limit the extent to which the adoption of DHPs can proportionally be used within the set of policy options to the deliver the SSSC lawfully.

Alexy’s structural/epistemic distinction, as applied by Rivers, allows the discretion inferred by the proportionality assessment to be assessed.<sup>248</sup> This can be demonstrated graphically by plotting the realisation of the Art.14 prohibition of discrimination against the realisation of the SSSC aims – characterised here as the porous ‘shifting the place of social security’ – in **Figure 4.11**. The requirement of necessity – whether the rights breach is avoidable because the end can be achieved by less intrusive means – can be articulated as one of Pareto-optimality within the interaction of these two principles.<sup>249</sup> In other words, the full realisation of the right (in this case the prohibition of discrimination) and the diffuse aim must not be possible, otherwise the breach of the former to achieve the latter is not ‘necessary’. This is represented graphically in **Figure 4.11** by point X. The remaining options, therefore, fall within this shaded area of possible policy options which meet this criterion.

Over this, the final ‘balancing’ stage of the proportionality requirement can be added. At its core, the ‘outweighing of dis-benefits’ outlined above implies the ‘extent of

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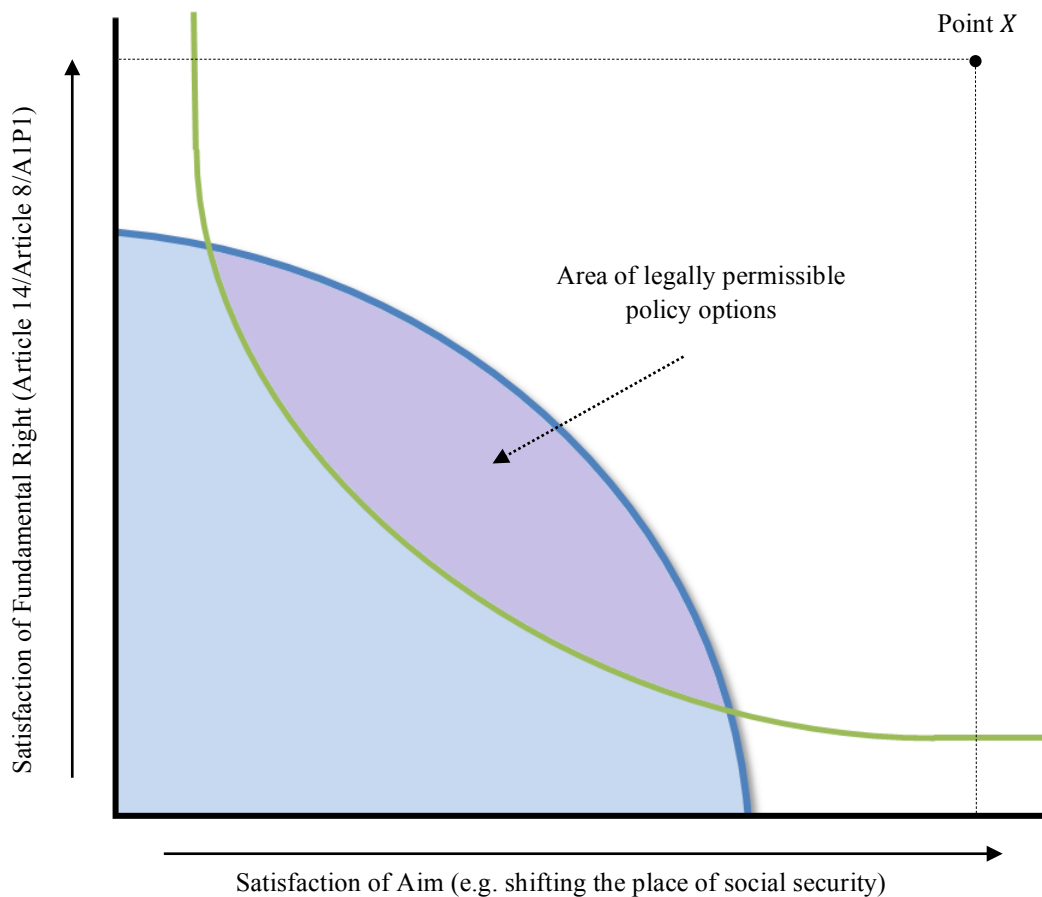
<sup>247</sup> These questions are adapted from Brady (ibid) and *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [45] (per Mance L). This section does not need to get into the weeds of constitutional theory to defend this characterisation, particularly the latter’s place in reviewing the legislative competence of the Welsh Assembly as distinguished against more general review mechanism in the course of a challenge under the Human Rights Act 1998. Suffice to note that this characterisation of proportionality is not a controversial one.

<sup>248</sup> Rivers (n 241).

<sup>249</sup> Ibid 172.

satisfaction of one principle to be directly proportional to the degree of infringement of another'.<sup>250</sup> The curve here, therefore, is inverse – as the more a right is interfered with (i.e. the more discriminatory the measure), the more the justification must increase proportionately (i.e. the more it must serve to ‘shift the place of social security’). At either extreme, justification is always required even for the ‘smallest’ of breaches, while extreme breaches may sometimes never be justified. Structural discretion falls within the labelled area. It is the range of options which meet the final two stages of the proportionality requirement.

**Figure 4.11:** The area of policy options/structural discretion as inferred within the proportionality assessment.



Therefore, the exercise of proportionality review, especially given its dominance in welfare reform challenges, places constraints on the government design of the SSSC scheme and its adoption of discretionary mitigation. The scheme must exist within the

<sup>250</sup> Ibid.

purple area in **Figure 4.11**, being effectively justified against the legitimate aim but necessarily occasioning a partial restriction of the protected right. Clearly, the question then turns to the justification of the aim. As outlined within the introduction to this thesis, the government's justification of the policy in court is dominated with vague banalities akin to 'shifting the place of social security' or making decisions in the 'shadow of the financial crisis'. Likewise, it parrots the austerity–localism assumptions, arguing that DHPs are merely parallel provision of support. Here, Alexy's epistemic discretion distinction, as employed by Rivers,<sup>251</sup> is illuminative in two ways.

There is a form of 'empirical' epistemic discretion accorded to the government which arises from 'ignorance of fact'.<sup>252</sup> An archetypal example of the point is Lord Chief Justice Thomas' question within the Court of Appeal hearing in *Rutherford*:<sup>253</sup> 'what is it you [the parties] are arguing about? They either get [their Housing Benefit] from DHP or directly from the regulations. Are both not *pari passu*?'<sup>254</sup> Without evidence on the functioning of the payments to the contrary, or evidence that those who would otherwise be unlawfully discriminated against are not in receipt of them, the court does not have the knowledge necessary to make an accurate determination.<sup>255</sup>

Second, 'normative' epistemic discretion arises when the information is known, but the weight to be ascribed to abstracted values is unclear.<sup>256</sup> This is most distinctly manifested in the case law above with regards to both 'austerity' and 'localism'. Although these may be legitimate aims in their own right (although, of course, there is fervent disagreement on this front), the extent to which each is achieved by a certain

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<sup>251</sup> See *Ibid* 169.

<sup>252</sup> *Ibid* 177.

<sup>253</sup> *Rutherford* (n 109).

<sup>254</sup> Though a transcript of the full hearing is not available, the author was present and took notes throughout the two days. For an analysis of some of the issues raised throughout the course of the hearing, see: Jed Meers, 'Hearing the "Bedroom Tax" Appeals: Themes in the Hearing for SR and A' <<http://socialrights.co.uk/project/blog/hearing-the-bedroom-tax-appeals-themes-in-the-hearing-for-sg-and-a/>> accessed 10 November 2017.

<sup>255</sup> This problem was posed by CJ Thomas in the hearing for *Rutherford* (n 109). See: Meers (n 255).

<sup>256</sup> Rivers (n 241) 178.

policy is open to a great deal of interpretation, or at the very least, the weight to be ascribed to each of the aims relative to the potential for a fundamental rights breach is not in any way clear. This is perhaps best illustrated by the gradual tempering of the power of ‘austerity’ or the reforms being made in ‘the shadow of the financial crisis’,<sup>257</sup> as a justificatory force. Time has appeared to have eroded what was a more powerful concern in earlier case law, with it having seemingly been replaced by the vehicular ‘fairness’ or ‘shifting the place of social security’.

This ‘austerity localism’ focus shifts the spotlight away from the justification of the policy and towards a justification of the local authority mitigation. This leads to the deferential tests outlined above being applied not to the *potential discrimination* by the policy itself, but instead to the *structural mechanism* of pushing the decision downwards. This problem is well reflected in the conclusion of the Supreme Court in *Carmichael* that ‘the Secretary of State’s decision to structure the scheme as he did was reasonable’. The structural design is the focus of its assessment, not the discriminatory impact at issue.<sup>258</sup>

These distinctions between epistemic and normative discretion results in judgments which are dominated by the consideration of ‘imaginary administrative decisions’,<sup>259</sup> which, by virtue of the availability of judicial review to challenge them, can be presumed to be Convention compliant. This has arisen particularly with reference to DHPs, where their availability – and the assumption that they will be awarded lawfully – justifies the supporting legislation, as opposed to the courts directing their attention to the questions at the heart of the proportionality appeal.<sup>260</sup> This approach at best abates the intensity of the proportionality review and, at worst, renders the bar so high as to be almost unassailable.

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<sup>257</sup> *MA* (n 105) [64]

<sup>258</sup> *Carmichael* (n 67) [23] (per Toulson LJ) [41] (per Toulson LJ).

<sup>259</sup> *Brady* (n 246) 18.

<sup>260</sup> See *Rutherford* (n 109) [46] (per Stuart-Smith J); and *R (on the application of A) v Secretary of State for Work and Pensions* [2015] EWHC 159 (Admin), [65] (per Worcester HHJ), *MA* (n 105) [82] (per Dyson MR).

## 5. Conclusions

This chapter has been a detailed examination of the DHP scheme. Given the lack of academic material available on their use and function, it has necessarily had to dedicate space to scene-setting by providing an outline of the scope and treatment of DHPS in case law, before turning to criticisms of their funding and elements of their judicial treatment. What emerges is a scheme that is buckling under the burden it is shouldering in the welfare reform agenda, subject to both wide geographical variation and problematic assumptions about its functioning. There are an uneasy set of tensions when looking at discretion within the SSSC. The key DHP mitigation mechanism – now described as an ‘integral part of housing benefit’<sup>261</sup> – sets ‘localism’ against centralised austerity, flexibility against ‘adequate assurances of future payments’,<sup>262</sup> and entitlements against local appraisalment.

Having established that some of these initial limitations, the key arguments in this chapter have focused on examining the operation of discretion within the scheme. I argue for the application of the distinction between structural and epistemic discretion outlined in Chapter Three. This facilitates a focus on three key areas of the role accorded to DHPs which will be returned to in the analysis which follows.

The distinction highlights the problematic ‘cut-and-devolve’ approach adopted by the government, reducing centrally determined welfare payments and pushing the responsibility to manage their impact down to local authorities or other decentralised bodies. Tied to both austerity and localism in way which may not be ‘politically innocent’,<sup>263</sup> this design of the SSSC allows for the scope of the policy’s impact to be ‘deliberately fudged’. The government refers continually to the presence of this floating discretionary panacea, being preoccupied with defending a series of ‘imaginary administrative decisions’,<sup>264</sup> while local authorities are tasked with mitigating the effects of the welfare reform agenda without adequate resources.

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<sup>261</sup> *Hardy* (n 171) [48] (per Phillip J).

<sup>262</sup> *Rutherford* (n 109) [48] (per Stuart-Smith J).

<sup>263</sup> Featherstone et al (n 209) 178.

<sup>264</sup> Brady (n 246) 18.



Delineating this dividing line between categories of claimant who require assistance and those who do not is set into sharp relief by adopting Alexy's distinction. Prioritising a small number of classes of claimants over others is central to the design of Reg.B13 and has dominated the high-profile judicial review challenges to the policy. I argue that this exercise operates by proxy, using certain features of these groupings as a predictor of discrimination. This is a point which will be returned to throughout, particularly in the detailed analysis of DHP application forms in Chapter Six.

Finally, given that high-profile legal challenges to the policy have (necessarily) been dominated by Art.14 ECHR (prohibition of discrimination) appeals, the way in which the proportionality assessment undertaken by the court maps onto the arguments made above cannot go unexplored. River's application of Alexy's distinction allows for the structural constraints on government – particularly limitations to the design of discretionary schemes – to be analysed alongside the epistemic constraints on the courts – particularly the lack of capacity to effectively interrogate the vehicular aims advanced for the policy, such as 'fairness', 'austerity' or 'shifting the place of social security'.

Before continuing onto the methodology, the next section – Part I summary: Home and Discretion – briefly summarises the key arguments within the first half of this thesis and appraises the links between the two.



## **Part I Summary: Home and discretion**

The first half of this thesis has covered a lot of ground, fleshing out both of its key organising concepts – home and discretion – and providing a critical outline of the key substantive elements of the SSSC, particularly the DHP scheme, and associated legal challenges. Consequently, before turning to an outline of the research process and the analysis chapters that follow, it is important to pause for breath and briefly revisit the arguments already put forward. This is intended as a short summary: far from a chapter in its own right, but a restatement of how the key arguments already made fit together and inform the analysis of the empirical data which follows.

### **1. The use and application of the ‘concept of home’**

As argued in Chapter Two, there are a number of perfectly justifiable approaches to analysing the SSSC policy. A researcher could appraise the policy against the sizeable literature on home meanings, focusing on its lack of regard for the concept’s key defining elements, such as security, identity, control and so on. Or they could instead assess the impact of the measure on the ‘concept of home’, analysing the policy from the perspective of home *unmaking* or *domicide*, focusing on how the home can be ‘unintentionally or deliberately, temporarily or permanently, divested, damaged or even destroyed’.<sup>1</sup> Another approach could look towards the construction of the home within the policy itself, such as a focus on the meaning of ‘under-occupation’ or on changing constructions of social housing.

This thesis takes a different route to try and shed light on otherwise underexplored elements of the SSSC policy which are still – in my view – important aspects of those social practices that the home studies literature situates under the banner of a ‘concept of home’. A key building-block of this argument is Chapter Two’s assertion that the ‘concept of home’ can be usefully analysed as being ‘essentially contested’ in the way outlined by Gallie and then refined by many others.<sup>2</sup> To reiterate, this is not a criticism

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<sup>1</sup> Richard Baxter and Katherine Brickell, ‘For Home Unmaking’ (2014) 11 *Home Cultures* 133, 134.

<sup>2</sup> For the most influential contributions underpinning that chapter, see: Walter Gallie, ‘Essentially Contested Concepts’ (1955) 56 *Proceedings of the Aristotelian Society* 167;

of the home studies literature per se, instead it allows for the recognition of both certain limitations in the application of the concept and some opportunities to consider more flexible frameworks for analysis.

Instead of setting the policy against a ‘concept of home’, conceptualising its ‘impact’ on it, or exploring the construction of the home within the policy, I argue for the viability of an approach which analyses those ‘knowledge moves’<sup>3</sup> within the SSSC as part of those interrelated social practices the home studies literature analyses as part of this ‘concept of home’. A claimant filling out a DHP application form in an effort to stay in their home, a local authority worker deciding whether their ongoing occupation there is warranted or not, and the expectation that an affected tenant will weigh their home interest against a financial penalty, are all important aspects of the SSSC policy which can and should be analysed from a perspective rooted in the ‘concept of home’.

## 2. The importance of discretion

If the home is so central, why bother with discretion? Chapter Four has argued that DHPs are vital to the ongoing operation of the SSSC scheme and are the lynchpin that secures its ongoing legality. I argue that to omit the role of DHPs would be to provide only a partial analysis of the effects of the SSSC policy; it is necessary to consider – in the words adopted frequently by the courts – the ‘scheme as a whole’.<sup>4</sup>

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Wibren van der Burg, ‘Law as a Second-Order Essentially Contested Concept’ [2016] Jurisprudence 1; David Collier, Fernando Daniel Hidalgo and Andra Olivia Maciuceanu, ‘Essentially Contested Concepts: Debates and Applications’ (2006) 11 Journal of Political Ideologies 211; and Patrick J L Cockburn, ‘A Common Sense of Property?’ (2016) 17 Distinktion: Journal of Social Theory 78.

<sup>3</sup> In the way outlined by Valverde, see: Mariana Valverde, ‘Theoretical and Methodological Issues in the Study of Legal Knowledge Practices’ in Martha Merrill Umphrey (ed), *How Law Knows* (Stanford University Press 2007) 72.

<sup>4</sup> *R (On the Application of MA) v Secretary of State for Work and Pensions* [2014] EWCA Civ 13, [40] (per Dyson MR).

The problem comes, however, in marrying the arguments in Chapter Two with this intermediate discretionary scheme. In applying an analysis rooted in a ‘concept of home’ to the SSSC framework, the natural criticism which follows is that I am attacking a straw man. If part of the problem is this floating layer of DHPs, then is it not really something that should more properly be analysed as a ‘discretion’ problem, rather than a ‘home’ problem?

Chapter Three sought to demonstrate how this local authority ‘discretion’ can still be subject to analysis without having to adopt a perspective which crowds out this ‘concept of home’ analysis. Characterised as falling within the three camps of a ‘doughnut approach’, ‘implementation-focused’ studies and ‘organisationally focused’ studies, dominant approaches in the literature, such as Lipsky’s street-level bureaucracy or Dworkin’s rights/discretion continuum – although useful on their terms – do not provide the flexibility to undertake an analysis of these ‘knowledge moves’ detailed in the analysis chapters which follow.

I argue that the conceptualisation of discretion rooted in Alexy’s structural/epistemic distinction presented in Chapter Three and applied to the DHP scheme in Chapter Four allows for my analysis to usefully deal with those problematic issues connected to the design and implementation of the SSSC regulations, while recognising those important ‘knowledge moves’ that occur within the policy schema which can be usefully analysed from a perspective rooted in the ‘concept of home’. The *structural* elements – the decision to ‘exempt’ some in Reg.B13 but not others, the design and funding of the DHP scheme, and so on – can still be interrogated alongside those *epistemic* elements – the expectations of local authority knowledge on claimants’ home interests, the tying of their decisions to vague notions of ‘localism’ and ‘austerity’, and all of those other ‘knowledge moves’ on the home which can be analysed following the arguments put forward in Chapter Two.

### **3. Going forward**

So, what emerges from Part I of this thesis are two sets of interrelated conceptual arguments – about the ‘home’ and ‘discretion’ respectively – and a detailed outline of the role and importance of the DHP scheme. This does not mark the end of the

theoretical arguments this thesis makes. These initial chapters have put forward a framework for the analysis which follows in this thesis, but the different elements it goes on to analyse require further unpacking at the relevant stages. Chapter Six's focus on the 'knowledge format' of the DHP application forms requires an engagement with contributions rooted in actor-network theory and linguistics, Chapter Seven's focus on local authority DHP decision-making and Chapter Eight's analysis of the 'duty to know' each draw on the broad literature on the sociology of knowledge.

Part II begins by outlining and reflecting on the research process underpinning this thesis in Chapter Five. It includes a justification of the epistemological approach and methodology adopted, setting out how all of this theory from the first half of the thesis can be usefully applied to the empirical data collected and – more fundamentally – why the collection of empirical data was required at all. Following this, the three analysis chapters – Chapters Six to Eight – each tackle a separate 'knowledge move' for analysis within this empirical data.

## **Part II**





# The research process

## Chapter Five

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**Source:** Stus.com, 'Research skills' <<http://www.stus.com/stus-cartoon.php?name=Research+Skills&cartoon=blg6004>> accessed 1 May 2017.

## 1. Methodological anxiety syndrome

In the introduction to their edited collection of interviews with socio-legal researchers, Schmidt and Halliday describe what they define as ‘Methodological Anxiety Syndrome’.<sup>1</sup> Symptoms include a ‘pervasive and sometimes debilitating doubt’<sup>2</sup> about one’s methodological pedigree, often accompanied by a sinking feeling, perhaps in the pit of the stomach, that empirical work has ‘gone wrong’.<sup>3</sup> Despite the lack of any verifiable diagnostics, I – along with a band of fellow sufferers<sup>4</sup> – can safely self-identify as a victim. Research can be messy and is rarely a linear process from start to finish. Researchers should instead be ready to pragmatically adapt their approach as the need arises or as deficiencies become apparent.<sup>5</sup>

Throughout this research project, the stability of the SSSC policy has oscillated between seemingly imminent repeal to forebodingly secure; now sitting somewhere in-between.<sup>6</sup> At the outset, the pivotal role played by DHPs was not immediately

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<sup>1</sup> Simon Halliday and Patrick Schmidt, *Conducting Law and Society Research: Reflections on Methods and Practices* (Cambridge University Press 2009) 2.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid 4.

<sup>4</sup> For a discussion of fellow sufferers, see: Lisa Whitehouse and Susan Bright, ‘The Empirical Approach to Research in Property Law’ in Sarah Blandy and Susan Bright (eds), *Researching Property Law* (Palgrave Macmillan 2016) 54; and Kelly Richards and Lorana Bartels, ‘Researching Crime and Justice: Tales from the Field’ (2012) 52 *British Journal of Criminology* 1024.

<sup>5</sup> This same sentiment is repeated throughout the literature on qualitative research, perhaps best reflected in in Strauss and Corbin’s representation of qualitative research as a ‘flow of work’, morphing and evolving across the research period. A similar emphasis on pragmatic flexibility is highlighted by Denzin and Lincoln. See, respectively: Juliet Corbin and Anselm Strauss, *Basics of Qualitative Research* (3rd edn, SAGE Publications 2008) 29; and Norman Denzin and Yvonna Lincoln, ‘Entering the Field of Qualitative Research’ in Yvonna Lincoln and Norman Denzin (eds), *Collecting and Interpreting Qualitative Materials* (Sage Publications 1998).

<sup>6</sup> See, for instance, the high profile accorded by Labour to scrapping the policy during the 2015 Election Campaign: Carl Brown, ‘Miliband Commits to Scrapping Bedroom Tax if Labour Win in 2015’ *Inside Housing* (2013) <<http://www.insidehousing.co.uk/miliband-commits-to-scrapping-bedroom-tax-if-labour-win-in-2015/6528703.article>> accessed 13 June 2017; and Jon Stone, ‘Labour Would Scrap the Bedroom Tax from Day One of a

obvious. The relentless pace of reforms to Housing Benefit has not slowed, with intersecting policies – particularly those stemming from the Welfare Reform and Work Act 2016<sup>7</sup> – hitting tenants throughout the duration of the research period.<sup>8</sup> From an ‘emblematic symbol’<sup>9</sup> of the austerity agenda, with housing associations ‘struggl[ing] to come to terms’<sup>10</sup> with the change, the SSSC has now become part of the day-to-day reality of claiming Housing Benefit in the social rented sector, for the time being, at least.<sup>11</sup>

The methods behind this project have evolved alongside the context it analyses. This chapter in a thesis is ordinarily titled ‘Methods and Methodology’ or something similar. Here, my aim is to provide a more holistic (and honest) account of the often messy process of research than that narrower remit would allow. Rather than present a sterilised representation of the empirical work, and in the process gloss over the challenges faced and how the methodological approach evolved, this chapter is a direct representation of the methods utilised in the course of this research and reflects on how they could have been improved. The methodological approach is far from perfect. With the benefit of hindsight, it would have been different. This is not to say that the

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Miliband Government, Party Says’ *The Independent* (London, 1 May 2015)

<<http://www.independent.co.uk/news/uk/politics/generalelection/labour-would-scrap-the-bedroom-tax-from-day-one-of-a-miliband-government-party-says-10219896.html>> accessed 13 June 2017.

<sup>7</sup> The raft of changes includes a reduction to the overall Benefit Cap (see ss.8–10), freezes to the majority of working age benefits until 2020 (see ss.11–12) and limitations to Child Tax Credit and (controversially) the child element of Universal Credit (see ss.13–14).

<sup>8</sup> This issue is dealt with elsewhere in this thesis, but for an overview of the increasing cumulative impact of the unending welfare reform agenda, see: Howard Reed and Jonathan Portes, *Research Report 94 Cumulative Impact Assessment* <<https://www.equalityhumanrights.com/sites/default/files/research-report-94-cumulative-impact-assessment.pdf>> accessed 31 June 2017.

<sup>9</sup> Mary O’Hara, *Austerity Bites: A Journey to the Sharp End of Cuts in the UK* (Policy Press 2014) 61.

<sup>10</sup> Peter Williams, Anna Clarke and Christine Whitehead, ‘Housing Associations and Welfare Reform: Facing up to the Realities’ (Cambridge Centre for Housing and Planning Research 2014) 5.

<sup>11</sup> See the Labour Party reaffirm their commitment to fight to scrap the policy in debates following the Queen’s speech in June 2017: HC Deb, 29 June 2017, vol.626, col.785.

empirical work which informs the later analysis chapters was not carefully considered and planned: this chapter is both a defence of the work undertaken and a recognition of how it could be better.

In order to contextualise what follows, this chapter needs to do three things: (i) situate this study epistemologically within both socio-legal studies and social constructionist approaches to housing (and particularly home studies) research; (ii) provide an account of the two key empirical strands – the online vignettes and the tenant interviews – and the use of documents, particularly DHP application forms, which inform the later analysis; and (iii) reflect on some of the methodological limitations and problems. The following three sections address each of these in turn. As an important preliminary issue, both of the key empirical strands outlined below separately received ethical approval from the University of York Economics, Law, Management, Politics and Sociology Ethics Committee.<sup>12</sup> In the interests of keeping this chapter a manageable size, some of the more granular elements from those applications – such as the adherence to university guidelines on encryption, or the security processes for the bespoke online vignette platform – are not dealt with in detail in the discussion which follows.

## **2. Epistemological positioning: where does this fit in to socio-legal studies and home studies research?**

Given that the research questions for this thesis – as detailed in the introduction<sup>13</sup> – focus on the concept of home and the SSSC policy, it is important to situate the study's epistemological position in two camps: (i) approaches to socio-legal research; and (ii) social constructionism within housing research. Much of the literature referenced in this thesis rests on one of these two axes, though I argue here that there is a great deal of overlap between the two. The features of each will be outlined in turn before situating this study within them.

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<sup>12</sup> For more information, see: University of York, 'Economics, Law, Management, Politics and Sociology Ethics Committee (ELMPS)' <https://www.york.ac.uk/about/organisation/governance/sub-committees/ethics/elmps/> accessed 13 June 2017.

<sup>13</sup> See p.38.

## 2.1. The magpies: a socio-legal approach

Socio-legal scholars often start an explanation of their discipline by stating there is no agreed definition of socio-legal studies,<sup>14</sup> or that any definitions – such as that offered by the Socio-Legal Studies Association<sup>15</sup> – are unduly broad.<sup>16</sup> Sometimes, the approach is set out in comparison to the doctrinal approaches which have traditionally dominated research in law schools,<sup>17</sup> with divisions being drawn – described variously as ‘intellectual apartheid’<sup>18</sup> or a ‘discernible friction’<sup>19</sup> – between ‘inward-looking’ doctrinal lawyers and socio-legal scholars engaging in ‘amateurish dabbling with theories and methods’.<sup>20</sup> The core of the approach, or its analytical starting point, is a

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<sup>14</sup> See: Fiona Cownie and Anthony Bradney, ‘Socio-Legal Studies: A Challenge to the Doctrinal Approach’ in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 34; Felicity Bell, ‘Empirical Research in Law’ (2016) 25 *Griffith Law Review* 262, 265; Khadijah Mohamed, ‘Combining Methods in Legal Research’ (2016) 11 *Social Sciences* 5191, 5194; and Amanda Perry-Kessaris, ‘What Does It Mean to Take a Socio-Legal Approach to International Economic Law?’ in Amanda Perry-Kessaris (ed), *Socio-legal Approaches to International Economic Law: Text, Context, Subtext* (Routledge 2013) 4.

<sup>15</sup> Socio-Legal Studies Association, ‘Statement of Principles of Ethical Research Practice’ <[http://slsa.ac.uk/images/slsadownloads/ethicalstatement/slsa%20ethics%20statement%20final\\_%5B1%5D.pdf](http://slsa.ac.uk/images/slsadownloads/ethicalstatement/slsa%20ethics%20statement%20final_%5B1%5D.pdf)> accessed 13 June 2017.

<sup>16</sup> See Little’s description of the SLSA’s ‘broad church definition’ as the ‘norm’. Gavin Little, ‘Developing Environmental Law Scholarship: Going beyond the Legal Space’ (2016) 36 *Legal Studies* 48, 52.

<sup>17</sup> Though, arguably, this is decreasingly the case. The sometimes awkward position of socio-legal studies within law departments is perhaps best illustrated by Cownie’s – at first glance contradictory – observations that a majority of legal academics thought that ‘socio-legal studies would dominate the discipline in the future’ while at the same time identifying the perception that ‘being socio-legal does not do much for one’s image as an academic lawyer’, see: Fiona Cownie, *Legal Academics: Culture and Identities* (Bloomsbury Publishing 2004) 57, 65. Since 2004, the picture for socio-legal scholars is perhaps a more optimistic one, see: Robert Lawless, ‘What Empirical Legal Scholars Do Best’ (2016) 87 *Temple Law Review* 711.

<sup>18</sup> David Nelken, ‘Law in Action or Living Law? Back to the Beginning in Sociology of Law’ (1984) 4 *Legal Studies* 157.

<sup>19</sup> Douglas Vick, ‘Interdisciplinarity and the Discipline of Law’ (2004) 31 *Journal of Law and Society* 163, 164.

<sup>20</sup> *Ibid* 165.

perspective that law is indivisible from the society in which it operates,<sup>21</sup> though by itself this does not tell us a great deal. Another route could be to reflect on its constituent semantic parts, taking the ‘socio’ and the ‘legal’ in turn, as has recently been the subject of two edited collections within the Palgrave Socio-legal Studies Series.<sup>22</sup>

What those edited collections demonstrate, however, is that a socio-legal approach does not simply require the setting of ‘society’ – be it through utilising social theory informed by sociology, anthropology or another discipline – against the ‘law’ – as seen in cases or textbooks. Socio-legal scholars are not ‘plumbers’ between the two,<sup>23</sup> and should, as argued by Valverde, ‘resist waving the flag of society as against law’.<sup>24</sup> The aim of socio-legal studies is not, in other words, to ‘juxtapose’ its analysis to that of other approaches,<sup>25</sup> but instead to draw on social theory to understand the ‘workings of law’.<sup>26</sup> As stated by Pottage, ‘the extent that law exists’ is in its ‘actualisation’,<sup>27</sup> which can take multiple forms in people’s lives, which in turn are made the subject of analysis through socio-legal studies. The SSSC is an archetype example of this problem. The regulations under the amended Reg.B13 Housing Benefit Regulations

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<sup>21</sup> John Clarke, ‘The Contested Social’ in Dermot Feenan (ed), *Exploring the ‘Socio’ of Socio-Legal Studies* (Palgrave Macmillan 2013) 39; and Dennis Galligan, ‘Legal Theory and Empirical Research’ in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 979.

<sup>22</sup> See: Feenan (n 20); and David Cowan and Daniel Wincott (eds), *Exploring the ‘Legal’ in Socio-Legal Studies* (Palgrave Macmillan 2016). To complete the set, perhaps the publishers will eventually entertain an ‘Exploring the “Studies” in Socio-legal Studies’.

<sup>23</sup> For a discussion of Riles ‘plumbers’ metaphor, see: David Cowan and Daniel Wincott, ‘Exploring the “Legal”’ in Cowan and Wincott (n 21).

<sup>24</sup> Mariana Valverde, ‘Theoretical and Methodological Issues in the Study of Legal Knowledge Practices’ in Martha Merrill Umphrey (ed), *How Law Knows* (Stanford University Press 2007) 78.

<sup>25</sup> Roger Cotterrell, ‘Why Must Legal Ideas Be Interpreted Sociologically?’ (1998) 25 *Journal of Law and Society* 171, 172.

<sup>26</sup> Sarah Blandy, ‘Socio-Legal Approaches to Property Law Research’ in Susan Bright and Sarah Blandy (eds), *Researching Property Law* (Palgrave Macmillan 2016) 24.

<sup>27</sup> Alain Pottage, ‘The Materiality of What?’ (2012) 39 *Journal of Law and Society* 167, 176.

2006, SI 2006/213, have produced a myriad of contradictory effects,<sup>28</sup> as ‘unintended consequences’ are part of the law’s ‘inherently social character’.<sup>29</sup>

Of course, this does not mean that socio-legal researchers should ‘ignore’<sup>30</sup> the study of legal materials. Socio-legal research cannot avoid dealing with doctrinal issues; the ‘technicalities of law’<sup>31</sup> are important. As Cotterrell argues, whether socio-legal scholars are active in the area or not, the ‘law goes on the offensive’, providing its own ‘explanations of the social world’.<sup>32</sup> Those decisions of First-Tier Tribunals which attempt to grapple with the meaning of a ‘bedroom’ under Reg.B13 demonstrate this problem well.<sup>33</sup> But more fundamentally, especially within the context of social welfare law, these legal technicalities are a ‘critical component’ in the ‘realities of poor people’s lives’.<sup>34</sup>

A socio-legal approach allows researchers, as in this thesis, to avoid ‘abstracting laws into [the] “law”’,<sup>35</sup> but instead to analyse how these technicalities intersect with

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<sup>28</sup> For an overview of the problems and some analysis of the impact across affected populations, see, respectively: Kenneth Gibb, ‘The Multiple Policy Failures of the UK Bedroom Tax’ (2015) 15 *International Journal of Housing Policy* 148; and Suzanne Moffatt et al, ‘A Qualitative Study of the Impact of the UK “Bedroom Tax”’ (2016) 38 *Journal of Public Health* 197.

<sup>29</sup> Elizabeth Mertz, ‘Conclusion: A New Social Constructionism for Sociolegal Studies’ (1994) 28 *Law and Society Review* 1243.

<sup>30</sup> Brian Z Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (Oxford University Press 1999) 14.

<sup>31</sup> See the influential arguments of Riles and subsequently Valverde: Annelise Riles, ‘A New Agenda for the Cultural Study of Law: Taking on the Technicalities’ (2005) 53 *Buffalo Law Review* 973; which were subsequently drawn on by Valverde in her discussion of the importance of ‘legal technicalities’: Mariana Valverde, ‘Jurisdiction and Scale: Legal “Technicalities” as Resources for Theory’ (2009) 18 *Social and Legal Studies* 139.

<sup>32</sup> Cotterrell (n 25) 175.

<sup>33</sup> As a good example, see *Sunderland County Council* [2014] UKFTT SC236/13/02942 (SEC).

<sup>34</sup> Helen Carr, ‘Legal Technology in an Age of Austerity: Documentation, “Functional” Incontinence and the Problem of Dignity’ in Cowan and Wincott (n 21) 206.

<sup>35</sup> Pottage (n 27) 179.

people's lives, how they can 'transfer functions'<sup>36</sup> to non-human actors such as forms or other documents,<sup>37</sup> or how technicalities in their own right can work like documents to 'mediate social practice'.<sup>38</sup> The 'epistemological pluralism'<sup>39</sup> offered by socio-legal studies, which allows researchers to 'borro[w] various theories to study legal processes',<sup>40</sup> treats researchers, like Dean's description of social policy academics, as 'magpies ... who purposefully, but imaginatively, pick what they need from across the social sciences in a way that is both pragmatic and creative'.<sup>41</sup>

The socio-legal approach is not without critics. For instance, it could be argued that this thesis could more productively examine the ambit of the home in a more concrete fashion, say through an analysis of Art.8 ECHR.<sup>42</sup> Though this section is not a defence of socio-legal studies *per se*, in defending the position taken by this thesis, it is worth dealing briefly with three key criticisms of the approach identified by Tamanaha.<sup>43</sup>

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<sup>36</sup> Emily Grabham, *Brewing Legal Times: Things, Form, and the Enactment of Law* (University of Toronto Press 2016) 38.

<sup>37</sup> This approach is adopted when analysing the particular importance of the Discretionary Housing Payment application process and the specific functions played by the application forms themselves.

<sup>38</sup> Federico Pérez, 'Excavating Legal Landscapes: Juridical Archaeology and the Politics of Bureaucratic Materiality' (2016) 31 *Cultural Anthropology* 215, 217.

<sup>39</sup> Mariana Valverde, "'Time Thickens, Takes on Flesh": Spatiotemporal Dynamics in Law' in Irus Braverman et al (eds), *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford University Press 2014) 54.

<sup>40</sup> *Ibid.*

<sup>41</sup> Hartley Dean, *Social Policy* (Wiley 2012) 12.

<sup>42</sup> Adam Ramshaw has already undertaken some brilliant doctrinal work on this issue in support of his thesis at Northumbria University, so it would be an exercise in duplication in any event. See: Adam Ramshaw, 'The Role of Article 8 of the European Convention on Human Rights in Public and Private Sector Possession Proceedings' (PhD thesis, Northumbria University 2016).

<sup>43</sup> Tamanaha (n 30) 1–26.



### 2.1.1. Criticism one: 'the questionable value of the work produced'

Socio-legal studies, particularly more theoretically oriented research, comes under criticism for appearing to have little real-world application or relevance. As argued by Tamanaha:

Every reflective socio-legal scholar must wonder whether anyone outside the group is reading or cares about his or her work.<sup>44</sup>

Aside from the oft-rehearsed arguments about the ability of theory-driven socio-legal research to act as a resource in legal scholarship or assist in the understanding of the workings of law,<sup>45</sup> the 'socio' within socio-legal studies is not divorced from the 'legal'; considerations which may be dismissed as being of niche theoretical interest repeatedly arise within case law. Perhaps the best examples in the context of the SSSC are the appeals within the First-Tier Tribunal on the application of the room standard laid out in Reg.B13 Housing Benefit Regulations 2006. Some of these decisions *explicitly* refer to the application of a 'concept of home'<sup>46</sup> or of a 'common-sense and practical approach'<sup>47</sup> to a concept which 'defies definition'.<sup>48</sup>

The courts repeatedly refer to the importance of assessing the 'scheme as a whole',<sup>49</sup> stretching the assessment of the SSSC outside the immediate confines of Reg.B13 Housing Benefit Regulations 2006 and into broader considerations of the operation of DHPs and the Discretionary Financial Assistance Regulations 2001, SI 2001/1167. A socio-legal approach allows for a more comprehensive assessment of those elements which sit outside the case law or the reach of doctrinal work. In this respect, a study

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<sup>44</sup> Ibid 14.

<sup>45</sup> Blandy (n 26) 24.

<sup>46</sup> See *Bedlington* [2014] UKFTT SC/231/13/01993 (SEC) and *Sunderland County Council* [2014] UKFTT SC236/13/02942 (SEC)

<sup>47</sup> Ibid.

<sup>48</sup> *SSWP v David Nelson and Fife Council, SSWP v James Nelson and Fife Council* [2014] UKUT 0525 (AAC).

<sup>49</sup> See: *R (Hardy) v Sandwell Metropolitan Borough Council (Zacchaeus 2000 Trust intervening)* [2015] EWHC 890 (Admin) [47] (Phillips J); *R (MA and others) v Secretary of State for Work and Pensions* [2014] EWCA Civ 13 [40] (Dyson MR).

into the SSSC is almost inescapably socio-legal; the insights provided by the approach are uniquely capable of meeting these empirical and theoretical demands.

These caveats do not say that research which may initially appear to have ‘no direct practical value’<sup>50</sup> cannot be worthwhile – as argued by Banakar and Travers, ‘studying the sociology of law will make you a better lawyer’.<sup>51</sup> Likewise, questions of whether research is ‘necessary’ or not is an ethical issue in all research involving human participants, not one confined to socio-legal studies.<sup>52</sup>

### 2.1.2. *Criticism two: ‘underdeveloped theory’*

Tamanaha characterises the problem as theoretical resources being used in an ad hoc manner, with socio-legal studies ‘being filled with references to fancy theories and theorists’,<sup>53</sup> but with ‘insufficient attention to [their] compatibility’<sup>54</sup> or comprehensiveness.<sup>55</sup> Blandy identifies the risk that socio-legal researchers can be dismissed as ‘eclectic collectors of different theories whose writing is inaccessible and marred by half-digested jargon’.<sup>56</sup>

This criticism targets a central element of socio-legal studies and this thesis: the role of theory. The aim here, as in much socio-legal work, is not to provide unifying – or, as Tamanaha might describe them, ‘totalizing’<sup>57</sup> – grand abstractions or static systems. Indeed, the approach is precisely to move away from such a dependence on those theories. The approach adopted here, as argued by Valverde, is to develop ‘analytic

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<sup>50</sup> Reza Banakar and Max Travers, ‘Introduction: Law and Social Theory’ in Reza Banakar and Max Travers (eds), *Law and Social Theory* (Hart 2013) 12.

<sup>51</sup> Ibid.

<sup>52</sup> This is generally in the form of ethical arguments surrounding the use of participants’ time if there is no clear need for the research to take place. See Janet Boddy, ‘The Ethics of Social Research’ in Nigel Gilbert and Paul Stoneman (eds), *Researching Social Life* (4th edn, Sage 2016) 206.

<sup>53</sup> Tamanaha (n 30) 17.

<sup>54</sup> Ibid 18.

<sup>55</sup> Ibid 19.

<sup>56</sup> Blandy (n 26) 24.

<sup>57</sup> Tamanaha (n 30) 19.

tools that are themselves as dynamic as the processes they study’,<sup>58</sup> by drawing on ‘philosophical approaches and methodological traditions as resources’,<sup>59</sup> instead of adopting a particular standpoint and consequently rejecting others. This is expanded upon below, following the discussion of social constructionism.

### 2.1.3. *Criticism three: ‘the influence of politics’*

Socio-legal studies has come under criticism for advocating a particular politics, or perhaps as more crassly contended by Tamanaha, ‘socio-legal studies is just leftist or far-left politics’.<sup>60</sup> This is an acute issue for a thesis examining the SSSC. The government’s twin rationales, the idea of ‘fairness’<sup>61</sup> between those claiming Housing Benefit in the social rented sector and those in the private rented sector, or the loaded concept of ‘under-occupation’<sup>62</sup> is particularly divisive. The policy itself has been a site for political contestations<sup>63</sup> and has been tied to both the ‘Poor Laws’<sup>64</sup> and the ‘moralisation’ of tenure within the UK.<sup>65</sup> My own political view on the policy could be easily established by a potential participant with even a cursory Google of my (sadly, fairly unique and therefore traceable) name.

This problem can be managed in the context of this research by acknowledging researcher reflexivity and, particularly, how researchers can themselves ‘affect the data

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<sup>58</sup> Valverde (n 24) 73.

<sup>59</sup> Ibid.

<sup>60</sup> Tamanaha (n 30) 20.

<sup>61</sup> Helen Carr and Dave Cowan, ‘The Social Tenant, the Law and the UK’s Politics of Austerity’ (2015) 5 *Oñati Socio-legal Series* 83.

<sup>62</sup> Ibid 84.

<sup>63</sup> BBC News, ‘Opponents of “Bedroom Tax” Protest throughout UK’ (30 March 2013) <<http://www.bbc.co.uk/news/uk-scotland-scotland-politics-21981163>> accessed 3 January 2018.

<sup>64</sup> Tony Murphy, ‘The Nomenclature of the Undeserving Poor: An Enduring History of Marginalisation’ (2015) 6 *Journal of European History of Law* 103, 105.

<sup>65</sup> Mel Nowicki, ‘A Britain That Everyone Is Proud to Call Home? The Bedroom Tax, Political Rhetoric and Home Unmaking in UK Housing Policy’ [2017] *Social and Cultural Geography* 1.

collection and the data analysis'.<sup>66</sup> Much social research is 'the work of humans who have failed to account for their humanness'<sup>67</sup> and this is a particularly important consideration in the context of research which focuses on the effects of austerity or participants with disabilities.<sup>68</sup> Here, the interview guide and the design of the vignette study do not presuppose a particular perspective on the SSSC policy and my own personal opinion on the SSSC was not discussed – or indeed raised by any of the participants – in the interviews themselves.

Analytically, however, although politics is an important element of the analysis presented in this thesis – particularly when trying to pin down the aims behind the policy – its theoretical standpoint is not a political one. The analysis in this thesis may have political *implications*, insofar as it may highlight deficiencies with the SSSC scheme, but it does not set out to make a political argument or frame the analysis using political theory. Of course, many socio-legal studies are more explicitly political in scope, particularly those which sit within the critical legal studies paradigm.<sup>69</sup>

## **2.2.Situating the research within the social constructionist paradigm**

Although I have situated this study firmly in the ambit of socio-legal studies, much of the literature this research seeks to build on – particularly in the home studies vein – would not describe itself as socio-legal at all, but instead as sitting within the social constructionist paradigm. Clapham outlines what he views as the four key traditions in social constructionist housing research, but only two require attention here: (i) the social problems approach; and (ii) interactionist approaches.<sup>70</sup> I will briefly outline the

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<sup>66</sup> Luigina Mortari, 'Reflectivity in Research Practice' (2015) 14 *International Journal of Qualitative Methods* 1.

<sup>67</sup> Jon Dean, *Doing Reflexivity: An Introduction* (Policy Press 2017) 1.

<sup>68</sup> See, Ruth Patrick, 'Disabling or Enabling: The Extension of Work-Related Conditionality to Disabled People' (2011) 10 *Social Policy and Society* 309, 313; and Dean (n 67) 74.

<sup>69</sup> Indeed, this approach has sometimes been referred to as a 'political movement' in addition to a 'school of thought'. See: Ugo Mattei, 'Comparative Law and Critical Legal Studies' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2012) 819.

<sup>70</sup> The two not detailed here because they are not of direct relevance to this study, are 'comparative national housing policy' and 'holistic approaches to housing'. See: David

substance of each before summarising the epistemological approach taken in this thesis.

### 2.2.1. *The 'social problems' approach*

Studies in this strand presuppose that the social construction of knowledge or ideas can be used to understand the meaning and definitions of social problems.<sup>71</sup> Homelessness is a 'classic example'.<sup>72</sup> The refinement of social constructionist approaches has been associated with a burgeoning literature tackling the framing of what homelessness is and what solutions are best placed to deal with it,<sup>73</sup> with Jacob et al's analysis of the 'rise and fall' of homelessness as a 'social problem' highlighting the particular relevance of this approach to assessing housing phenomena.<sup>74</sup> Others, such as Kemeny,<sup>75</sup> have adopted a more process-orientated approach, where the construction of social problems is seen as a 'claims-making process', where different groups (such as pressure groups or politicians) seek to impose their own definitions on others.<sup>76</sup>

This constructionist social problems approach is closest to that adopted – though mainly implicitly – in the leading legal studies which aim to provide a 'conceptual

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Clapham, 'Social Constructionism and Beyond in Housing Research' in David Clapham, William Clark and Kenneth Gibb (eds), *The SAGE Handbook of Housing Studies* (SAGE Publications 2012) 179.

<sup>71</sup> Ibid 178.

<sup>72</sup> Keith Jacobs, Jim Kemeny and Tony Manzi, 'The Struggle to Define Homelessness: A Constructivist Approach' in *Homelessness: Public Policies and Private Troubles* (Cassell 1999) 11.

<sup>73</sup> For a review of studies on homelessness set against this 'social problem' social constructionist tradition, see: Donileen Loseke, *Thinking about Social Problems: An Introduction to Constructionist Perspectives* (Aldine Transaction 2011). 100–101; and Kenneth Kyle, *Contextualizing Homelessness: Critical Theory, Homelessness, and Federal Policy Addressing the Homeless* (Routledge 2013) 20–24.

<sup>74</sup> Jacobs et al (n 72).

<sup>75</sup> Jim Kemeny, 'Extending Constructionist Social Problems to the Study of Housing Problems' in *Social Constructionism in Housing Research* (Ashgate 2004).

<sup>76</sup> Clapham (n 70) 179.

fastening'<sup>77</sup> for assessing home interests in the law. Both Fox's and Hohmann's analyses avoid an 'objective definition'<sup>78</sup> of home meanings, instead exploring home interests as a social construction, which can in turn be analysed by drawing on the home studies literature. The central role that the construction of home ownership has played in socially 'embedding these meanings'<sup>79</sup> is given particular emphasis by Fox, who dedicates a chapter of *Conceptualising Home* to the issue.<sup>80</sup> Hohmann underscores how the construction of the home differs across the contexts she outlines as 'artificial boundaries and definitions cannot be imposed and carried through from one section to the next'.<sup>81</sup>

### 2.2.2. *Interactionist approaches*

Within this strand of social constructionism, it is not a 'social problem' that is socially constructed, but instead relationships and roles. In other words, it is the output of the interaction between individuals or objects that is the subject of the analysis.<sup>82</sup> Kemeny has reflected on how the general trend within constructionist housing research to take the 'social problem' orientation has begun to swing towards more interactionist approaches.<sup>83</sup> Indeed, for a strand of constructionism which is concerned on how objects are given meaning through interaction, the home is perhaps an object of analysis *par excellence*.

'Symbolic interactionism' in particular is central to much research within the home studies literature, perhaps indicated by the attention the concept of home has received within the pages of *Symbolic Interaction* as a 'physical site of interaction'.<sup>84</sup> Clapham

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<sup>77</sup> Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Hart 2013) 142.

<sup>78</sup> Ibid 4; and Lorna Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart 2007) 26.

<sup>79</sup> Fox (n 78) 177; for an expansion on what she outlines as this 'construction', also see 185–186.

<sup>80</sup> See 'Home Ownership and the Meaning of Home' in ibid 181–244.

<sup>81</sup> Hohmann (n 77) 5.

<sup>82</sup> Clapham (n 70) 179.

<sup>83</sup> Chris Allen, 'Reflections on Housing and Social Theory: An Interview with Jim Kemeny' (2005) 22 *Housing, Theory and Society* 94, 102.

<sup>84</sup> See Melinda J Milligan, 'Interactional Past and Potential: The Social Construction of Place Attachment' (1998) 21 *Symbolic Interaction* 1; Jennifer Eileen Cross, 'Processes of Place

characterises the approach as focusing on ‘uncovering the lifeworlds of individuals and groups and describing the world as they see and experience it’,<sup>85</sup> with others emphasising concepts such as ‘self-definition’ and the ‘role of performance’.<sup>86</sup> McCormack draws on these ideas to explain key theoretical contributions to the meaning of home literature, such as ‘ontological security’ or the association of the home with ‘comfort, security and control’.<sup>87</sup> Studies informed by actor–network theory have been particularly influential, such as Hurdley’s work exploring the ‘meaning making processes’ of mantelpieces<sup>88</sup> and Cieraad’s argument that objects are antecedent to home meanings.<sup>89</sup> Others even focus on specific items, such as Turkish lace<sup>90</sup> or cleaning products.<sup>91</sup>

### 2.3. Where does this thesis fit in?

Although it takes a social constructionist position, particularly in its rejection of law as a ‘one way imposition of power’<sup>92</sup> and instead highlights the ability of actors to ‘shape and respond to legal innovations’,<sup>93</sup> this study does not slot easily into the Clapham camps. Either of the approaches outlined above could have been adopted in

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Attachment: An Interactional Framework’ (2015) 38 *Symbolic Interaction* 493; and Ronald Smith and Valerie Bugni, ‘Symbolic Interaction Theory and Architecture’ (2006) 29 *Symbolic Interaction* 123.

<sup>85</sup> Clapham (n70) 180.

<sup>86</sup> Åshild Lappegard Hauge and Arnulf Kolstad, ‘Dwelling as an Expression of Identity. A Comparative Study Among Residents in High-Priced and Low-Priced Neighbourhoods in Norway’ (2007) 24 *Housing, Theory and Society* 272, 274.

<sup>87</sup> Karen McCormack, ‘Comfort and Burden: The Changing Meaning of Home for Owners At-Risk of Foreclosure’ (2012) 35 *Symbolic Interaction* 421, 422.

<sup>88</sup> Rachel Hurdley, ‘Dismantling Mantelpieces: Narrating Identities and Materializing Culture in the Home’ (2006) 40 *Sociology* 717, 719.

<sup>89</sup> Irene Cieraad, ‘Homes from Home: Memories and Projections’ (2010) 7 *Home Cultures* 85.

<sup>90</sup> See Celikoglu’s analysis of lace in Turkish homes: Ozge Merzali Celikoglu, ‘Fragments of Modernization: Domestic Spaces Indicating Traditional Dialects in a Modern Speech’ (2014) 37 *Symbolic Interaction* 391.

<sup>91</sup> Lydia Martens and Sue Scott, ‘Under the Kitchen Surface: Domestic Products and Conflicting Constructions of Home’ (2006) 3 *Home Cultures* 39.

<sup>92</sup> Mertz (n 29) 1246.

<sup>93</sup> *Ibid* 1246.

relation to the SSSC, for instance, by focusing on the construction of ‘under-occupation’ in social housing and how the SSSC builds on that construction (a *social problems* approach), or a fully-fledged actor–network theory analysis of the process of making and sustaining a claim for DHPs (an *interactionist* approach). Instead of problems or interactions being socially constructed, here the focus is on a perspective rooted in Valverde’s work on the construction and deployment of knowledge.

As an example, consider the Supreme Court decision in *R (on the application of Carmichael) v Secretary of State for Work and Pensions*<sup>94</sup> and, in particular, the lead judgment’s assessment of ‘transparent medical need for an additional bedroom’.<sup>95</sup> Much of the analysis which followed the decision, including my own,<sup>96</sup> focused on the delineation of this category.<sup>97</sup> Who fits into it and why? Are the government regulations to effect the change sufficient to capture this group?<sup>98</sup> The approach adopted here has the flexibility to go beyond an analysis which focuses on these ‘short term victories’<sup>99</sup> of arguing that certain groups should be ‘fitting into certain categories’<sup>100</sup> and, instead, questions the underlying reification of social processes which allows for this categorisation. Do people affected by the SSSC consider

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<sup>94</sup> [2016] UKSC 58.

<sup>95</sup> *R (on the application of Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58 [42] (Toulson LJ).

<sup>96</sup> See Jed Meers, ‘The “Bedroom Tax” in the Supreme Court: Disability Discrimination and “Transparent Medical Need”’ (2017) 39 *Journal of Social Welfare and Family Law* 112; and Jed Meers, ‘Discrimination and the “spare Room Subsidy”: An Analysis of Carmichael’ [2017] *Journal of Housing Law* 24, 27.

<sup>97</sup> For examples, see: Mel Cousins, ‘The Bedroom Tax and the Supreme Court: Pragmatism over Principle’ <[http://works.bepress.com/mel\\_cousins/104/](http://works.bepress.com/mel_cousins/104/)> accessed 13 June 2017; and Admas Habteslasie, ‘Room for Improvement’ (2017) 167 *New Law Journal* <<https://www.newlawjournal.co.uk/content/room-improvement-2>> accessed 13 June 2017.

<sup>98</sup> Within the (limited) scrutiny of the secondary legislation bringing the government changes to effect, the Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations 2017, the government indicated that it expected around 45,000 households would be brought into the ambit of the statutory exemptions as a result of the change, see: Secondary Legislation Scrutiny Committee, *Instruments Drawn to the Special Attention of the House* (HL 2016–17, 131).

<sup>99</sup> Mertz (n 29) 1256.

<sup>100</sup> *Ibid* 1256.



themselves part of a category that should not be affected? Do local authorities construct categories of person to whom they provide discretionary mitigation? How do they know this?

The courts' faith in the mitigation power of DHPs is another example.<sup>101</sup> It can be analysed as a question of capacity or administrative function: is there enough money in the pot to cover the likely cost,<sup>102</sup> or can local authorities effectively provide the required support?<sup>103</sup> The route adopted here questions the way in which the government and the courts ascribe importance to this local knowledge to make these decisions<sup>104</sup> and how local authorities and the applicants reliant on them engage with this. Here, it is the process 'by which concepts of the "local"'<sup>105</sup> emerge and how this is tied to a particular form of knowledge that is the focus of a social constructionist analysis.

Valverde has fashioned some general theoretical principles for this kind of methodological approach focused on the construction of knowledge. Law, rather than being a 'system of power with a unique authority'<sup>106</sup> is instead a 'system of knowledge among many such systems' and a means to 'process knowledge claims'.<sup>107</sup> It sits

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<sup>101</sup> For a more detailed assessment of this, see Chapter Four. An overview of the key argument here, and in particular the limitations within the assessment of proportionality, is available at: Jed Meers, 'Panacean Payments: The Role of Discretionary Housing Payments in the Welfare Reform Agenda' (2015) 22 *Journal of Social Security Law* 115.

<sup>102</sup> See Alice Diver, 'Putting Dignity to Bed? The Taxing Question of the UK's Housing Rights "Relapse"' in *Justiciability of Human Rights Law in Domestic Jurisdictions* (Springer 2016).

<sup>103</sup> See concerns raised from [47]–[56] within the Work and Pensions Committee Report, *The Local Welfare Safety Net* (HC 2015–16, 373)  
<<http://www.publications.parliament.uk/pa/cm201516/cmselect/cmworpen/373/37302.htm>> accessed 13 June 2017.

<sup>104</sup> See, for instance, reference made within the Court of Appeal in *MA* to how '[local authorities] and social landlords are better able than any central authority to ensure they use their housing stock to best effect' and that '[local authorities are] accountable locally for the money they spend': *R (on the application of MA) v Secretary of State for Work and Pensions* [2014] EWCA Civ 13 [66] and [75] (Dyson MR).

<sup>105</sup> Mertz (n 29) 1250.

<sup>106</sup> Valverde (n 24) 82.

<sup>107</sup> *Ibid* 82.

alongside the bureaucratic knowledge of the local authority and that of the affected tenants themselves, all working under the rubric of a policy which itself makes certain knowledge claims, such as what a bedroom and a household are,<sup>108</sup> or how tenants will respond to the imposition of the penalty.<sup>109</sup>

This knowledge-based approach has three principle advantages, in the context of this thesis at least, to adopting other perspectives. First, it allows for the flexibility to draw on a number of theoretical resources where they are useful, without having to ‘either accept or reject’<sup>110</sup> them because they are ‘in a competitive relation with other theories’.<sup>111</sup> For instance, actor–network theory is a particularly useful resource for the analysis of DHP application forms, as undertaken in Chapter Six, while other areas of the policy can still be explored in Chapters Seven and Eight. A focus on different knowledge claims and forms avoids an assumption that there is a ‘logic which can be studied across fields and situations ... to prove its dominance’.<sup>112</sup>

Second, by focusing on knowledge and, in particular, knowledge claims, or what Valverde describes as ‘knowledge moves’,<sup>113</sup> we can more easily zoom in to focus on the ‘minor technologies of knowledge’.<sup>114</sup> In other words, the target of the study is not on broader constructions (such as the UK government’s construction of the ‘meaning of home’) and how they filter down to individuals, but instead a more bottom-up approach, where the making and processing of knowledge claims is the focus. This approach builds on my arguments in Chapter 2, where I put forward some of the

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<sup>108</sup> See Reg.B13, Housing Benefit Regulations 2006.

<sup>109</sup> For an examination of the assumptions made in the SSSC impact assessment and elsewhere, see: Becky Tunstall, *Testing DWP’s Assessment of the Impact of the Social Rented Sector Size Criterion on Housing Benefit Costs and Other Factors* (University of York Centre for Housing Policy 2013)  
<<http://www.york.ac.uk/media/chp/documents/2013/Testing%20DWP%20Assessment%20of%20Impact%20of%20SRS%20Size%20Criterion%20on%20HB%20Costs%20University%20of%20York.pdf>> accessed 13 June 2017.

<sup>110</sup> Valverde (n 24) 82.

<sup>111</sup> Ibid.

<sup>112</sup> Mariana Valverde, *Law’s Dream of a Common Knowledge* (Princeton University Press 2003) 3.

<sup>113</sup> Valverde (n 24) 84.

<sup>114</sup> Ibid 83.

limitations of the current home studies literature; particularly its reliance on constructing theoretical benchmarks of home meanings with which to compare to empirical phenomena or ‘the law’.<sup>115</sup>

Third, this approach lends itself particularly well to empirical work and studying legal technicalities. A focus on knowledge claims is inherently not one confined to theoretical analysis; it is invariably about ‘how it’s all done’<sup>116</sup> in practice in people’s lives. Social constructionist approaches are themselves well suited to qualitative empirical analysis<sup>117</sup> and this is particularly so in the context of material on the home.<sup>118</sup> They adopt a view of the social as being ‘inherently constitutive of and constituted by legal interactions’<sup>119</sup> rather than as a standalone space subject to its own analysis.

### **3. The first empirical strand: the use of vignettes delivered via an online discussion board**

The DHP-focused strand of empirical work presents three vignettes of claimants affected by the SSSC to local authorities via an online discussion board. The vignettes were based on the circumstances of three tenants interviewed in the second strand of empirical work, with each designed to prompt participating local authorities on potentially problematic issues. In order to provide a comprehensive overview of the rationale and reasons behind the design of this approach, this section deals with the key ‘decision points’ when designing a vignette study outlined by Aguinis and Bradley,<sup>120</sup> which can be distilled into four key steps: (i) the reasons for adopting a

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<sup>115</sup> See p.79.

<sup>116</sup> Valverde (n 24) 11.

<sup>117</sup> Elizabeth Mertz, ‘Introduction: Legal Loci and Places in the Heart: Community and Identity in Sociolegal Studies’ (1994) 28 *Law and Society Review* 971, 975.

<sup>118</sup> Paul Maginn, Susan Thompson and Matthew Tonts, ‘House and Home: Methodology and Methods for Exploring Meaning and Structure’ in *Qualitative Housing Analysis: An International Perspective* (Emerald 2008) 51, 56.

<sup>119</sup> Emilie Cloatre, ‘Fluid Legal Labels and the Circulation of Socio-Technical Objects: The Multiple Lives of “Fake” Medicines’ in Cowan and Wincott (n 22) 97.

<sup>120</sup> Herman Aguinis and Kyle J Bradley, ‘Best Practice Recommendations for Designing and Implementing Experimental Vignette Methodology Studies’ (2014) 17 *Organizational Research Methods* 351.

vignette-based approach; (ii) the research design for delivering the vignettes; (iii) the content of the vignettes themselves; and (iv) the recruitment and management of the participants.

### 3.1. Why a vignette-based approach?

The administration of DHPs is notoriously ambiguous.<sup>121</sup> The government DHP guidance manual, though stretching to 56 pages, offers little in the way of substance, with general procedural requirements to ‘on a case by case basis hav[e] regard to the purpose of those disability related benefits’<sup>122</sup> or that ‘regard should be given to the Supreme Court’s judgment in *Rutherford*’<sup>123</sup> sitting alongside generalities, such as ‘LAs may interpret [further financial assistance] however they wish, taking into consideration the claimant’s financial circumstances and any other relevant factors’.<sup>124</sup> Interviewing or running focus groups with local authority workers on their DHP processing, though a useful way of gaining their views on the operation of the payments, is liable to duplicate these same generalisations. This would tell us little about the knowledge processes inherent in DHP award-making.

Vignettes benefit from presenting ‘plausible, short and concrete’<sup>125</sup> examples of potential claimants to elicit a response from the local authority participants. Rather than a hypothetical discussion about guiding principles or general approaches, they require an applied assessment of the extent of any DHP award with reference to the criteria in the scenario. The design of the vignettes can set certain criteria into sharp relief – the extent of any disability and how it relates to the use of a bedroom, non-

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<sup>121</sup> For example, see the repeated reference by witnesses to the Department of Work and Pensions Committee to the ‘postcode lottery’ of DHP availability at the Local Authority level: Work and Pensions Committee (n 103) 40.

<sup>122</sup> DWP, *Discretionary Housing Payments Guidance Manual* (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/524321/discretionary-housing-payments-guide.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/524321/discretionary-housing-payments-guide.pdf)> accessed 13 June 2017, 14.

<sup>123</sup> Ibid 33.

<sup>124</sup> Ibid 6.

<sup>125</sup> Philip Leith, ‘A Note on Using Vignettes in Socio-Legal Research’ (2013) 19 *European Journal of Current Legal Issues* accessed 13 June 2017.

material ties to the home, or certain lifestyles affecting financial security – to explore how the local authorities in the sample deal with specific circumstances.

Within the confines of a PhD study, especially given the costs of the second empirical strand on interviewing tenants affected by the SSSC, there is a practical need to address the research questions in as cost-effective a way as possible. As argued by Leith, the use of vignettes can serve to elicit attitudinal or outcome-based data (in the current case, data on DHP award decision-making) in a ‘reasonably complex environment in as low cost a manner as possible’.<sup>126</sup> The use of online vignettes can effectively leverage the relatively modest research budget provided for the empirical work underpinning this thesis.<sup>127</sup>

### 3.2.Choosing the research design

Having decided to adopt a ‘paper people’<sup>128</sup> vignette-based approach for the reasons outlined above, the focus naturally turns to how to go about designing such a study. Vignettes can be latched onto most qualitative approaches, having been used as stimuli in focus group settings,<sup>129</sup> as part of face-to-face interviews,<sup>130</sup> or to measure responses

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<sup>126</sup> Ibid.

<sup>127</sup> Of course, the funding provided through the ESRC for the project is greatly appreciated, though it is clear that Doctoral Training Centres work under increasing financial and ‘structural’ challenges. See: Ingrid Lunt, Lynn McAlpine and David Mills, ‘Lively Bureaucracy? The ESRC’s Doctoral Training Centres and UK Universities’ (2014) 40 *Oxford Review of Education* 151.

<sup>128</sup> See, for example, Rhidian Hughes and Meg Huby, ‘The Application of Vignettes in Social and Nursing Research’ (2002) 37 *Journal of Advanced Nursing* 382, 383.

<sup>129</sup> See *ibid* 384; Joanne Bretherton, Caroline Hunter and Sarah Johnsen, ‘You Can Judge Them on How They Look ...’ (2013) 7 *European Journal of Homelessness* 69, 77; and Dagmar Kutsar, Judith Strömpl and Avo Trumm, ‘Focus Group and Vignette Methods to Study Policy Responses’ (2006) 3 *European Studies on Inequalities and Social Cohesion* 3.

<sup>130</sup> See Nicholas Jenkins et al, ‘Putting It in Context: The Use of Vignettes in Qualitative Interviewing’ (2010) 10 *Qualitative Research* 175; Christine Barter and Emma Renold, “‘I Wanna Tell You a Story’: Exploring the Application of Vignettes in Qualitative Research with Children and Young People’ (2000) 3 *International Journal of Social Research*

or decision-making in survey-based research.<sup>131</sup> The approach adopted here is to use the vignettes as the focus-point of threads in an asynchronous online discussion board. Delivering the vignettes online does not, as argued by Graffigna and Bosio, simply serve as a ‘reproduction of traditional techniques on the internet’.<sup>132</sup> There are advantages and limitations of this approach. Before outlining its specific processes and features, it is worth – *very* concisely – highlighting the six key reasons why an online discussion board was used instead of more traditional approaches.

### 3.2.1. *The need to provide a geographical spread*

In order to adequately account for any geographical variation in the awarding of DHPs,<sup>133</sup> it is important that the approach adopted easily allows for a geographical spread of participants in a cost-effective manner. The logistical benefits of adopting an online platform to facilitate discussion has been considered extensively in the methodological literature, particularly where online discussion boards/chats are compared to face-to-face approaches.<sup>134</sup> As a static overhead, the cost of the online platform is fixed; there is no extra cost as a result of participant location. Likewise,

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Methodology 307; and Tom Wilks, ‘The Use of Vignettes in Qualitative Research into Social Work Values’ (2004) 3 *Qualitative Social Work* 78.

<sup>131</sup> See Cheryl Alexander and Henry Becker, ‘The Use of Vignettes in Survey Research’ (1978) 42 *Public Opinion Quarterly* 93; and David R Heise, ‘Surveys with Vignettes’ in *Surveying Cultures* (John Wiley and Sons 2009) 75–120.

<sup>132</sup> Guendalina Graffigna and Albino Claudio Bosio, ‘The Influence of Setting on Findings Produced in Qualitative Health Research: A Comparison between Face-to-Face and Online Discussion Groups about HIV/AIDS’ (2006) 5 *International Journal of Qualitative Methods* 56.

<sup>133</sup> This is explained in more detail elsewhere in this thesis see p.165. For a summary, see Meers ‘Panacean Payments’ (n 101) 294.

<sup>134</sup> For examples, see: Amanda Kenny, ‘Interaction in Cyberspace: An Online Focus Group’ (2005) 49 *Journal of Advanced Nursing* 414; Henrietta O’Connor and Clare Madge, ‘“Focus Groups in Cyberspace”: Using the Internet for Qualitative Research’ (2003) 6 *Qualitative Market Research: An International Journal* 133; Jennifer Oringderff, ‘“My Way”: Piloting an Online Focus Group’ (2004) 3 *International Journal of Qualitative Methods* 69; and – although fairly out of date on its observations of the availability (and shortcomings of) technology – Ted J Gaiser, ‘Conducting On-Line Focus Groups’ (1997) 15 *Social Science Computer Review* 135.

associated logistical difficulties – time spent travelling by the researcher and/or participant, the cost of cancellations or rescheduling and procuring suitable venues – do not arise.

### 3.2.2. *Convenience for both participant and researcher*

There is an important ‘temporal divide’<sup>135</sup> in online research methods: synchronicity and asynchronicity. In adopting the use of an online discussion board, where participants post at their own convenience over the research period,<sup>136</sup> this study adopts the latter. This approach is (partly) justified by convenience. Being able to login ‘at their own time and place’ has been identified as being ‘highly valued’ by participants in other studies using similar platforms.<sup>137</sup> Indeed, the authors of synchronous studies using similar technology often complain about poor or ‘non-attendance’ at the scheduled research time.<sup>138</sup>

Convenience for the participants is more than simply about safeguarding retention. Given the pressures increasingly faced by those working in local government – a Unison survey in 2016 indicated that 73% of those working in the sector reported

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<sup>135</sup> Kate Stewart and Matthew Williams, ‘Researching Online Populations: The Use of Online Focus Groups for Social Research’ (2005) 5 *Qualitative Research* 395, 402.

<sup>136</sup> Though the methodological literature on asynchronous discussion boards is comparatively limited, there is a burgeoning academic literature entirely focused on the medium in the context of online education. The findings of this are not controversial and align with the arguments made here. For a summary see: Gayle V Davidson-Shivers, Lin Y Muilenburg and Erica J Tanner, ‘How Do Students Participate in Synchronous and Asynchronous Online Discussions?’ (2001) 25 *Journal of Educational Computing Research* 351.

<sup>137</sup> Kiek Tates et al, ‘Online Focus Groups as a Tool to Collect Data in Hard-to-Include Populations: Examples from Paediatric Oncology’ (2009) 9 *BMC Medical Research Methodology* 15.

<sup>138</sup> Tom Moore, Kim McKee and Pauline McLoughlin, ‘Online Focus Groups and Qualitative Research in the Social Sciences: Their Merits and Limitations in a Study of Housing and Youth’ (2015) 9 *People, Place and Policy Online* <<http://extra.shu.ac.uk/ppp-online/online-focus-groups-and-qualitative-research-in-the-social-sciences-their-merits-and-limitations-in-a-study-of-housing-and-youth/>> accessed 13 June 2017.

increased stress levels and 60% are regularly working beyond contracted hours<sup>139</sup> – ensuring that participation does not unduly add to the workload of those in an already over-worked sector is an important consideration in the research design.<sup>140</sup> Moreover, given these working pressures and the very heavily targeted nature of Housing Benefit processing,<sup>141</sup> an important consideration should also be the impact of any research design on directing officer attention away from the processing of claims. An undue burden on their time could consequently negatively affect ongoing applications.<sup>142</sup>

### 3.2.3. *Preservation of anonymity while preserving a route for discussion*

The decision to award, or perhaps more pertinently *not* to award, DHPs has the potential to be controversial.<sup>143</sup> As discussed below, the vignettes presented to the

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<sup>139</sup> Steve Glenn, Ken Mulkearn and Louisa Withers, *Under Pressure Underfunded and Undervalued: UNISON Members Keeping Communities Together* (Unison 2016) <<https://www.unison.org.uk/content/uploads/2016/06/IDR-Report-LG-Members-Survey-UNISON-APRIL-2016-Summary-and-key-findingsFINAL.pdf>> accessed 13 June 2017.

<sup>140</sup> A broader study of public sector workers by *The Guardian* points to even starker measures of self-reported job satisfaction, with 95% of council staff stating that they are stressed at work. See: Tasmin Rutter, ‘Stressed, Angry and Demonised: Council Staff in Austerity Britain’ *The Guardian* (London, 1 July 2015) <<https://www.theguardian.com/public-leaders-network/2015/jul/01/stressed-angry-demonised-council-staff-austerity-britain>> accessed 13 June 2017.

<sup>141</sup> The majority (though not all) of DHP processing is done by staff in the relevant housing benefit department. For an overview of the sizeable data monitoring and centrally imposed targets (not including additional Local Authority level target setting, such as when services have been commissioned out to a contractor), see: DWP, *Housing Benefit: Statistics on Speed of Processing* <<https://www.gov.uk/government/collections/housing-benefit-and-council-tax-benefit-statistics-on-speed-of-processing--2>> accessed 13 June 2017.

<sup>142</sup> It is worth noting here that DHP applications are not subject to any centrally imposed targets for processing times, so would likely be the first area to suffer should officer time be unduly impeded.

<sup>143</sup> A good example of the controversy which can arise is North Lincolnshire Council’s decision to ban DHP awards to those who smoke or have satellite television, see: DWP, *Evaluation of Removal of the Spare Room Subsidy: Interim Report* (Research Report 882, DWP 2014) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/329948/rr882-evaluation-of-removal-of-the-spare-room-subsidy.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/329948/rr882-evaluation-of-removal-of-the-spare-room-subsidy.pdf)> accessed 13 June 2017, 44; and the subsequent media coverage of this decision at: Pete Apps, ‘Council Denies Hardship Funds



authorities in this study are designed to be less than straightforward, reaching at the edges of government guidelines<sup>144</sup> and what is lawful or unlawful. This leads to two interconnected problems. First, if presenting vignettes in a group situation, such as focus-groups of local authority workers, this may increase the pressure to give a ‘model’ answer or to ‘tow the party line’.<sup>145</sup> This could particularly be the case where multiple workers from the same local authority participate together, with internal staff dynamics – such as the relative seniority of participants – affecting the willingness to contribute or the realism of the answers put forward.<sup>146</sup>

Second, and connected to this, face-to-face qualitative research methods can sometimes discourage answers which the participant may perceive will lead to group conflict or appear controversial.<sup>147</sup> Given the particularly contentious nature of the vignettes (discussed below) and the way in which the circumstances of the ‘paper people’ invite judgments on potentially difficult issues (such as the grieving process and lifestyle habits), it is important that any research design avoids any hesitancy of participants to engage.

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to Smokers’ *Inside Housing* (London 6 December 2013)

<<http://www.insidehousing.co.uk/council-denies-hardship-funds-to-smokers/6529814.article#>> accessed 11 December 2016 and BBC News, ‘No Change on North Lincolnshire Housing Grant Ban for Smokers’ *BBC News Online* (2 December 2013) <<http://www.bbc.co.uk/news/uk-england-humber-25154871>> accessed 13 June 2017.

<sup>144</sup> DWP (n 122).

<sup>145</sup> This problem of staying on the ‘party line’ has been presented as a form of participant ‘gate-keeping’ within organisations such as Local Authorities, see: Lena Dahlberg and Colin McCaig, *Practical Research and Evaluation : A Start-to-Finish Guide for Practitioners* (SAGE 2010) 7.

<sup>146</sup> The potential for internal staff dynamics to influence the content of studies which present material in group-based settings is handled in detail within the literature on focus groups in particular. A summary is provided here: Anne Hofmeyer and Catherine Scott, ‘Moral Geography of Focus Groups with Participants Who Have Preexisting Relationships in the Workplace’ (2007) 6 *International Journal of Qualitative Methods* 69.

<sup>147</sup> See Jan Coetzee and Conrad Kotze, ‘Optimizing the Epistemological Potential of Focus Groups in Research on a Contested Issue’ (2014) 10 *Qualitative Sociological Review* 38; and Janet Smithson, ‘Using and Analysing Focus Groups: Limitations and Possibilities’ (2000) 3 *International Journal of Social Research Methodology* 103, 115.

Utilising an online discussion board for the delivery of the vignettes mitigates both of these issues. The guaranteed anonymity they can provide<sup>148</sup> and the removal of the face-to-face issues with group dynamics allow for discussion while also encouraging frank and honest responses.

#### *3.2.4. Researcher control over discussion and information shared*

Unlike other forms of delivering vignettes in qualitative research, in an online discussion thread the researcher can inspect contributions prior to their publication. Any identifying information (such as local authority details or other information which may allow other participants to identify the participant authority), or inappropriate contributions (such as abusive posts or offensive language) can be identified and deleted, or posts held back, prior to their publication on the board, to allow for edits. Although this can result in a period of delay while the researcher processes the new content, under an asynchronous model, processing delays do not substantially impact on the integrity of the method.

#### *3.2.5. The need for speed*

During the empirical stage of the research project, the future of the SSSC policy was not as forebodingly permanent as it appears currently. As discussed in the introduction to this chapter, there was a very real possibility that the election in May 2015 would be the end of the policy. Consequently, when developing this empirical strand, speed was of the essence; any efforts to collect data on the local authority processing of DHP awards on SSSC cases needed to be possible within a short time-frame (February to April 2015). Utilising an asynchronous online platform allows for a comparatively quicker delivery of the vignette material than other approaches, with the added flexibility of local authorities participating at their own convenience within the research period.

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<sup>148</sup> This is discussed in more detail with regard to the functioning of the online platform below.

### 3.2.6. *The need for rich data*

The adoption of an online discussion board allows more space for local authorities to expand on their responses to the vignettes than would be possible through a survey-based approach, or as argued by *Tates et al*, even approaches like online focus groups, as respondents have ‘time for reflection, to respond at length, and the opportunity to change or nuance their opinion’.<sup>149</sup> Asynchronicity also removes the ‘time pressures’ associated with synchronous methodologies, allowing ‘more considered and detailed responses’.<sup>150</sup>

### 3.3. **Deciding on the type and content of the vignettes**

As an ‘elicitation tool’,<sup>151</sup> vignettes have to be designed to draw the desired data from the participants. In other words, they need to have ‘construct validity’;<sup>152</sup> a clear link between the design of the vignette and the research questions behind it. Given that these vignettes intend to explore the provision of DHP awards by local authorities, a key aspect of this ‘construct validity’ is the plausibility of the hypothetical circumstances. A route for achieving this is to base the materials on real-life experiences or situations,<sup>153</sup> or to test them qualitatively externally.<sup>154</sup> In this study, the three vignettes were all based (roughly) on real participants who were engaged in the interview strand of the research project.

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<sup>149</sup> *Tates et al* (n 137).

<sup>150</sup> *Sarah Williams et al*, ‘Methodological Reflections on the Use of Asynchronous Online Focus Groups in Health Research’ (2012) 11 *International Journal of Qualitative Methods* 368, 374.

<sup>151</sup> *Wilks* (n 130) 82.

<sup>152</sup> Construct validity is repeatedly referred to throughout the literature on vignette methodologies. As an example, see: *Spencer C Evans et al*, ‘Vignette Methodologies for Studying Clinicians’ Decision-Making: Validity, Utility, and Application in ICD-11 Field Studies’ (2015) 15 *International Journal of Clinical and Health Psychology* 160.

<sup>153</sup> *Jenkins et al* (n 130) 96.

<sup>154</sup> *Lindsay O’Dell et al*, ‘The Problem of Interpretation in Vignette Methodology in Research with Young People’ (2012) 12 *Qualitative Research* 702, 707.

There are two caveats on this plausibility requirement. First, although the scenarios reflect some of the ‘mundane’<sup>155</sup> characteristics of managing on welfare benefits – the breakdown of the payments received, the living arrangements in the home, and so on – to help encourage interesting data, they should also introduce some ‘unusual occurrences’<sup>156</sup> to draw responses from the local authorities to test their actions at the margins of government guidance. In this sense, the scenarios are not *unrealistic* – the facts outlined below are all based on participants interviewed in the course of the study – but they may be *unusual* cases for day-to-day DHP award processing. Second, the information left out of a vignette can be as important as the information included. The methodological literature consistently points to the ‘dictum’ of ‘fuzziness is strength’;<sup>157</sup> that spaces left open by the factual constellation of the vignette can be an important part of eliciting a response. In the case of DHP awards, given the importance of evidential requirements and what considerations local authorities take into account when making their decisions,<sup>158</sup> providing space for participants to elaborate on what further information they require is an important part of the vignette design process.

The three vignettes used for this study were designed with these principles in mind. Their focus is each on a different area of knowledge expected of the local authority – the nature of a disability, the determination of lifestyle and the weight attributed to the grieving process – with a range of shortfalls, levels of under-occupation and extent of tenancy sustainability presented. As the vignettes in this study are offered without

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<sup>155</sup> The importance of vignettes also reflecting the reality of the mundane characteristics of the lives of their subjects is discussed by Rhidian Hughes, ‘Considering the Vignette Technique and its Application to a Study of Drug Injecting and HIV Risk and Safer Behaviour’ (1998) 20 *Sociology of Health and Illness* 381; and Janet Finch, ‘The Vignette Technique in Survey Research’ (1987) 21 *Sociology* 105.

<sup>156</sup> Finch (n 155).

<sup>157</sup> Wilks (n 130) 83; Caroline Bradbury-Jones, Julie Taylor and Oliver Herber, ‘Vignette Development and Administration: A Framework for Protecting Research Participants’ (2014) 17 *International Journal of Social Research Methodology* 427, 435; Finch (n 155) 112; and Patrick West, ‘Reproducing Naturally Occurring Stories: Vignettes In Survey Research’ (Medical Research Council Social and Public Health Sciences Unit 1982) <[www.sphsu.mrc.ac.uk/library/other%20reports/WP-May-1982.pdf](http://www.sphsu.mrc.ac.uk/library/other%20reports/WP-May-1982.pdf)> accessed 13 June 2017.

<sup>158</sup> These problems form an important part of the analysis which follows in the next section of this thesis. See, in particular, p.280.

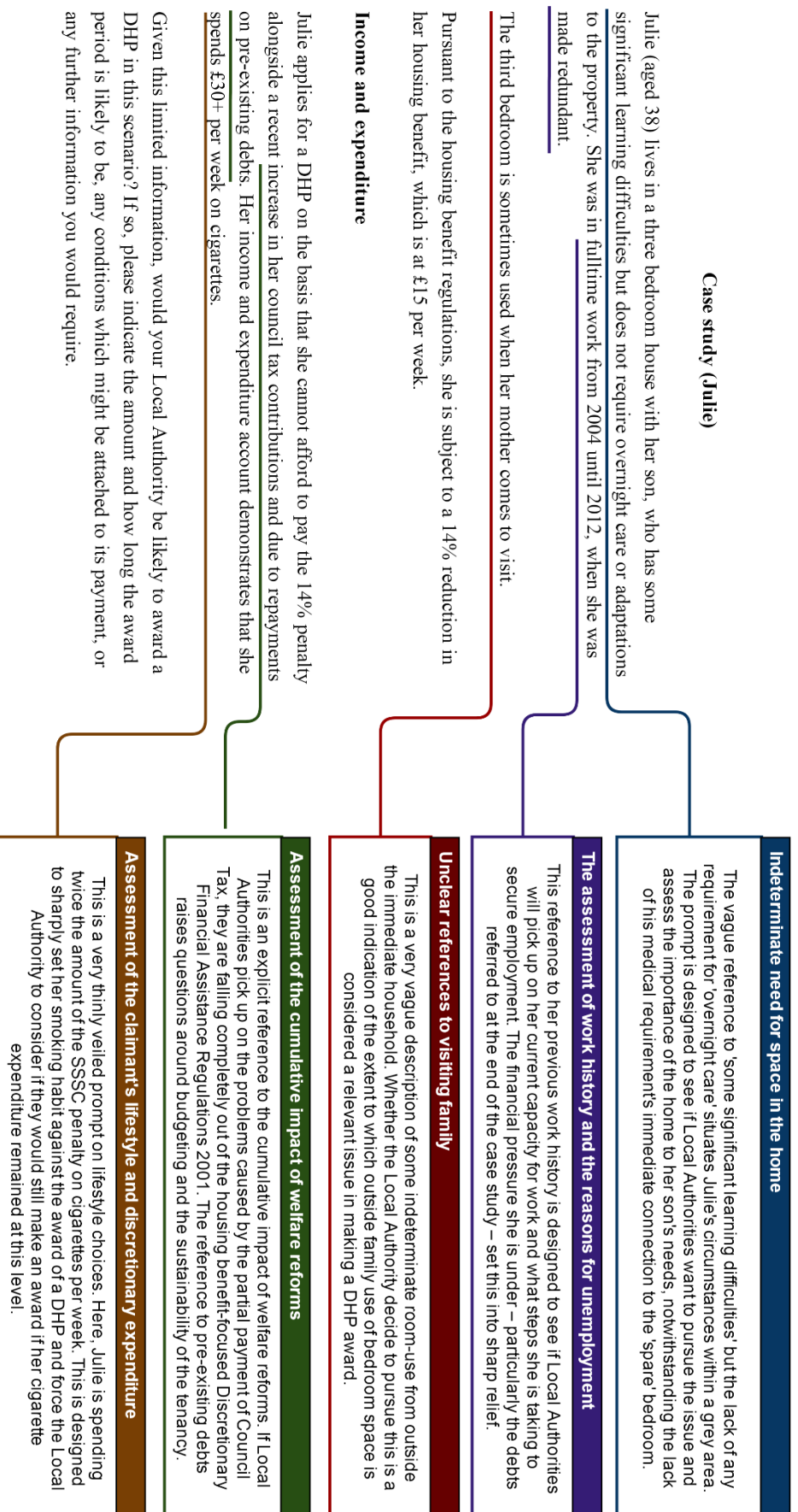
follow-up probing questions or specific interventions by the researcher,<sup>159</sup> it is important they are designed in a way which prompts the consideration of these different issues by providing adequate context and allowing the authority to ‘fill in the blanks from their own perspective’.<sup>160</sup> **Figures 5.1 to 5.3** provide annotated versions of the vignettes, to indicate the reasoning behind their design.

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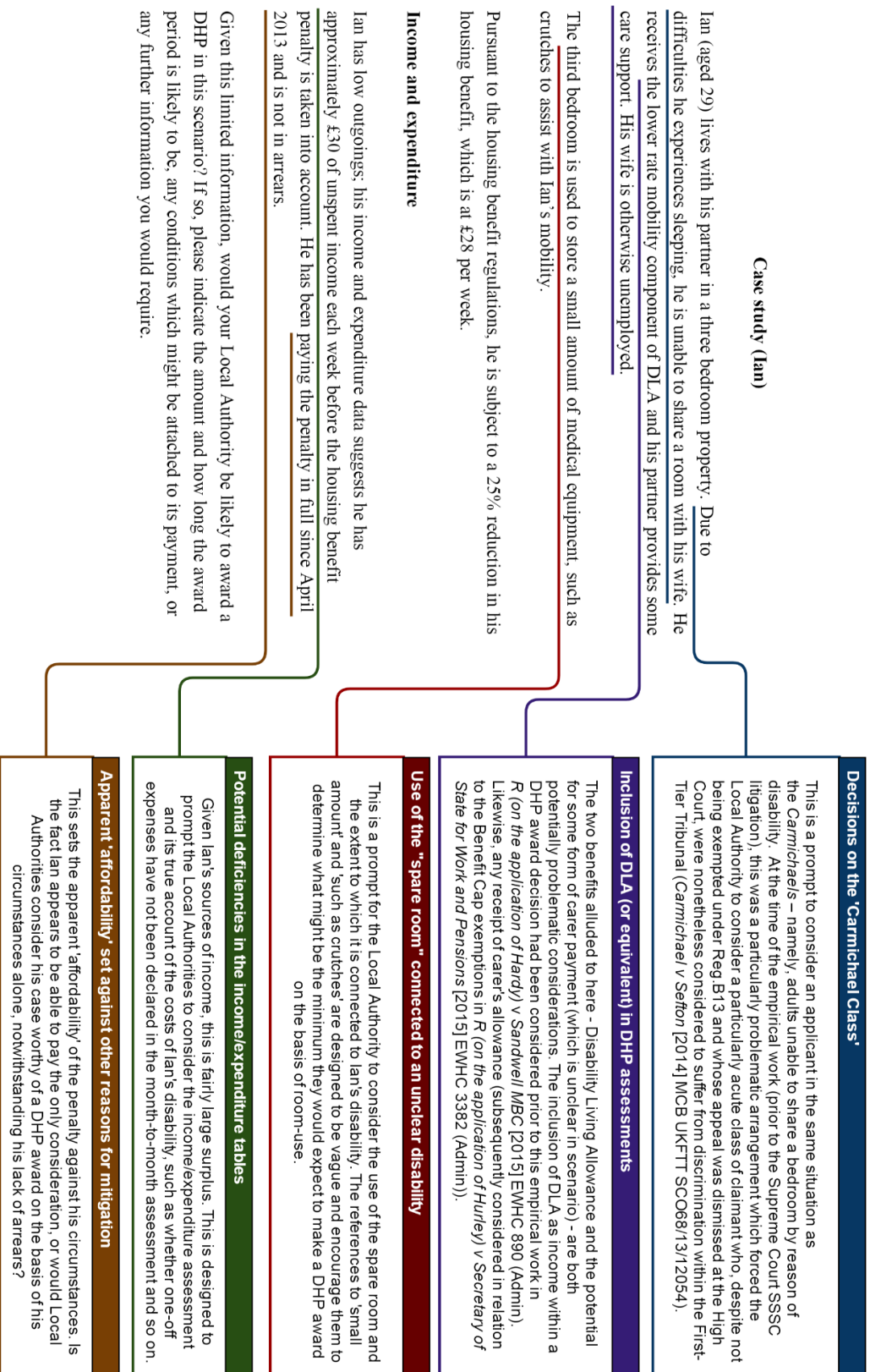
<sup>159</sup> The use of follow-up probing questions is particularly common in more traditional vignette-based methodologies. See: Jenkins et al (n 130) 177; Lennart Nygren and Siv Oltedal, ‘Constructing a Vignette for Qualitative Comparative Family Research’ 10 *Journal of Comparative Social Work* 7.

<sup>160</sup> Tricia Morrison, ‘Using Visual Vignettes: My Learning to Date’ (2015) 20 *The Qualitative Report* 359, 363

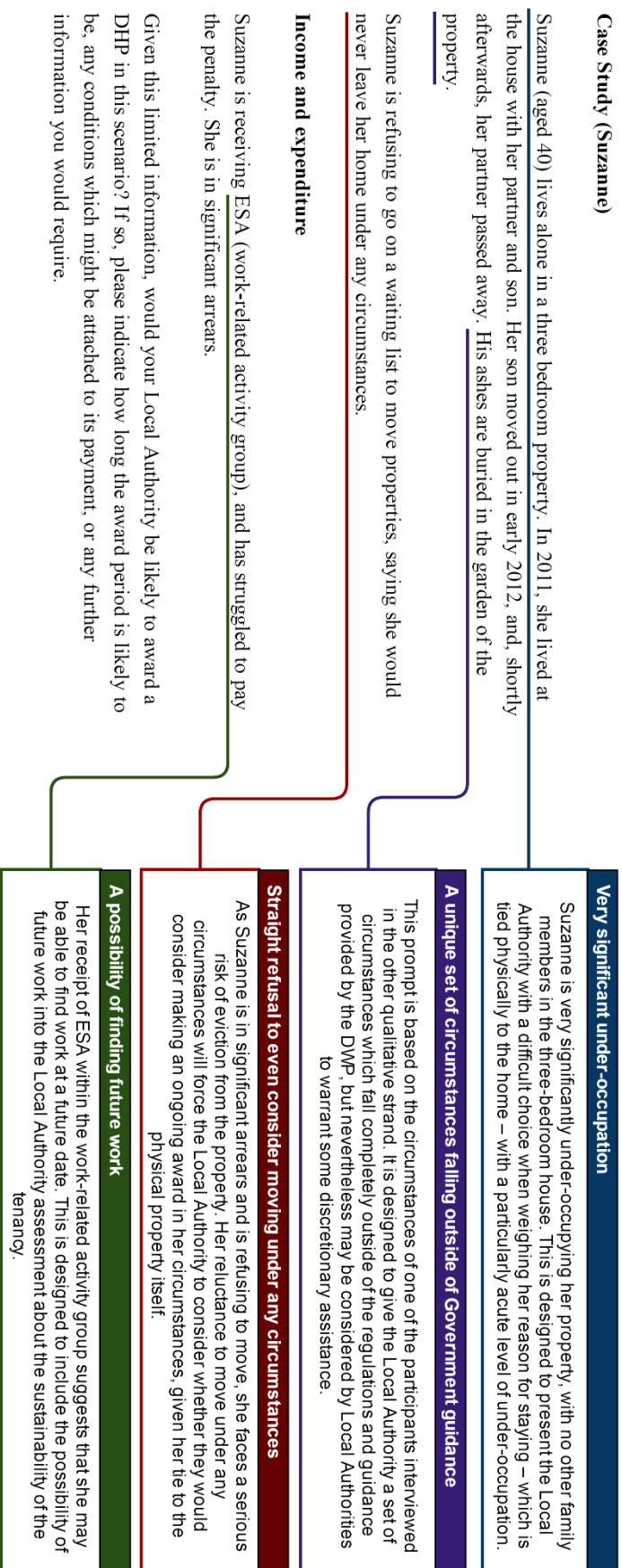
**Figure 5.1: Annotated vignette presented to local authorities – case study of 'Julie'.**



**Figure 5.2:** Annotated vignette presented to local authorities – case study of ‘Ian’.



**Figure 5.3: Annotated vignette presented to local authorities – case study of ‘Suzanne’.**





### 3.4. Delivering the vignette study

As with most doctoral research projects in the social sciences, funding to support the fieldwork itself was in relatively short supply for this research. The approach to delivering the vignette study had to cost-effectively cover a wide geographical spread, allow for the engagement of numerous local authorities and for secure retention of the data collected.

For these reasons, the study adopted a bespoke online platform – designed by the researcher – hosted online at [www.discretionaryhousingpayments.co.uk](http://www.discretionaryhousingpayments.co.uk). The practicalities and functioning of the platform, including how participants were handled and selected, is dealt with in detail in the next section. There are, however, four key practical points to outline here.

#### 3.4.1. Group size

The literature on online thread-based focus groups suggests that an upper group size of around 10 members is appropriate to prevent over-loading threads, however, this should be treated flexibly.<sup>161</sup> In the current study, it was determined that the thread would be loaded with participants incrementally and, if it was decided that a parallel thread should be created for additional participants, that would be done within the research period.

#### 3.4.2. Temporal controls

In this study, the threads were open for a two-week period in which the participant was able to login and contribute at any convenient time. This practice has been found to be both preferred by<sup>162</sup> and more convenient<sup>163</sup> for participants compared to real-time

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<sup>161</sup> Stewart and Williams (n 135) 395, 397.

<sup>162</sup> Marieke Zwaanswijk and Sandra van Dulmen, 'Advantages of Asynchronous Online Focus Groups and Face-to-Face Focus Groups as Perceived by Child, Adolescent and Adult Participants: A Survey Study' (2014) 7 BMC Research Notes 756.

<sup>163</sup> Tates et al (n 137).

participation and to generate broadly comparable quantity and quality of data to more traditional focus group methods.<sup>164</sup>

Further benefits of an asynchronous approach have been identified in the literature, particularly the potential for participants to reflect on their answers, or to finesse their contributions at a later stage.<sup>165</sup> This is potentially important for research addressing DHPs, as participants may need to check local authority guidelines or seek some clarification in order to provide an accurate answer.

The one-week period is a shorter time to keep the board open than elsewhere in the literature on similar methodologies – where online groups are generally maintained for a period of a couple of months.<sup>166</sup> However, this is in part due to the prevalence of temporal elements in much of the research that utilises similar methodologies, which is predominantly within the health sciences, where the ability to analyse ongoing symptoms is beneficial to the substantive focus of the study. This is not the case here.

#### *3.4.3. Regulatory controls*

There are some regulatory controls on the conduct of participants online (such as the service providers' acceptable use policies, or usage policies within specific organisations – such as local authority offices).<sup>167</sup> However, it is not anticipated that participating in an online discussion board would contravene any of these and adherence to such guidelines is explicitly implied by service agreements outside of the confines of the study.

#### *3.4.4. Potential for selection bias*

A perennial problem for online research is the potential for selection bias; namely, people without computers or sufficient online literacy being unable to participate who

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<sup>164</sup> Ibid.

<sup>165</sup> Ibid.

<sup>166</sup> Amanda Kenny, 'Interaction in Cyberspace: An Online Focus Group' (2005) 49 *Journal of Advanced Nursing* 414, 418.

<sup>167</sup> Stewart and Williams (n 135) 411

could otherwise do so in a face-to-face methodology – or in other words, a divide between the ‘have nets’ and ‘have nots’.<sup>168</sup> However, due to the study’s focus on recruiting local authority workers, who will invariably have access to computing facilities, and the study’s small sample, which does not seek full representativeness, it is not anticipated that this will pose a problem in this research.

### **3.5. Analysing the data**

The use of vignette data in this study can sidestep some of the standard interpretative problems which can arise in empirical work featuring the use of vignettes. For instance, the concerns identified by O’Dell et al about delineating when people are speaking directly about the circumstances in the vignette, or about themselves using the vignette as a proxy,<sup>169</sup> do not arise here. Likewise, the vignettes in this study, though designed to explore specific issues which arose both in the interview strand and the case law, are not designed to act as controls or points of comparison with one another. In other words, responses to one vignette do not necessarily cross-refer to other vignettes,<sup>170</sup> or work to track changes in responses when certain variables are manipulated.<sup>171</sup>

The analysis of the vignette responses, therefore, is comparatively modest in scope. In the theoretical framework identified above, the responses were analysed iteratively across the areas of theoretical interest incorporated into the vignettes, such as lifestyle choices (e.g. smoking), levels of disability, or particularly difficult issues tied to the home (e.g. bereavement).

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<sup>168</sup>     Tates et al (n 137).

<sup>169</sup>     O’Dell et al (n 154).

<sup>170</sup>     Studies which purposely change certain variables in vignettes with a view to analysing changes to decision-making are particularly utilised in criminology settings, where offending behaviour or suspect characteristics can be varied. For one of many examples, see: Karl Ask and Pär Anders Granhag, ‘Motivational Sources of Confirmation Bias in Criminal Investigations’ (2005) 2 *Journal of Investigative Psychology and Offender Profiling* 43.

<sup>171</sup>     For example, see Wilks (n 130).

### **3.6.Ethical and practical considerations: the construction and delivery of the online platform**

#### *3.6.1. The local authority sample*

As discussed in Chapter Four,<sup>172</sup> there is quite a wide spread of DHP budget expenditure levels between local authorities across England and Wales, some spending as (staggeringly) little as 16.45% of their budget in 2015/16, and others up to the maximum allowed by the regulations of 250%.<sup>173</sup> Consequently, despite a modest target sample of 20 local authorities, some purposive sampling was required in order to achieve a range of participants which was sufficiently representative of the spread of DHP expenditure.

In order to achieve this, four ‘target groups’ were created from the 2014/15 DHP expenditure data.<sup>174</sup> The result of this process is depicted in **Figure 5.5**. Though there is a relatively wide range of expenditure levels across authorities – the standard deviation of the values is 22.15 – the spread peaks at between 99.87% and 102.62%, with 40% of local authorities falling within this narrow range. In order to target a spread of participants, cut-points were identified for five equal groupings from the data, as detailed in **Figure 5.4**.

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<sup>172</sup> See p.172.

<sup>173</sup> I have provided an interactive version of this DWP-provided data online, at: Jed Meers, ‘Discretionary Housing Payment Expenditure 2015/16’ (SocialRights.co.uk 2016) <<http://socialrights.co.uk/project/blog/discretionary-housing-payment-expenditure>> accessed 13 June 2017.

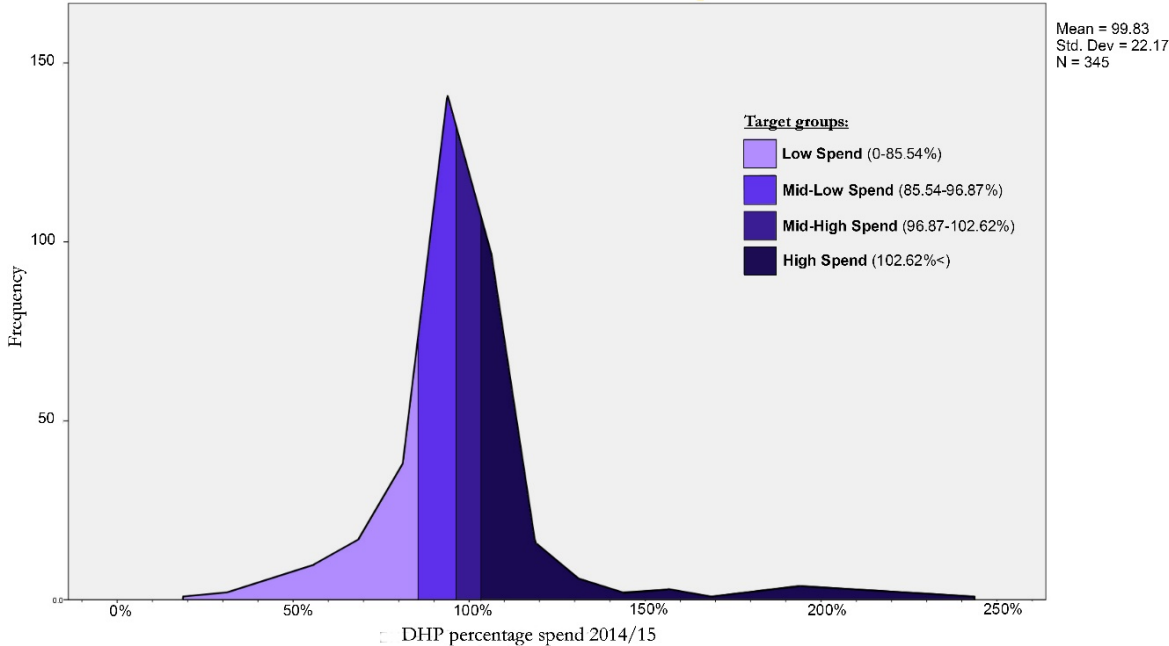
<sup>174</sup> Department for Work and Pensions, *Use of Discretionary Housing Payments GB: Analysis of End of Year Returns from Local Authorities April 2014–March 2015* (2015) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/437116/use-of-discretionary-housing-payments-2014-15.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/437116/use-of-discretionary-housing-payments-2014-15.pdf)> accessed 13 June 2017.

**Figure 5.4:** Determination of percentiles from the 2014/15 DHP expenditure data.

N		345
Percentiles	20	85.54
	40	96.87
	60	99.91
	80	102.6

In order to achieve a spread of target local authorities within a modest target sample of 20, the cut-point at the 60% level was removed, creating four groups in total: (a) 0–85.54%; (b) 85.54–96.87%; (c) 96.87–102.62%; and (d) 102.62% and above. Groups (a), (b) and (d) are equal in size, while group (c) is double the rest. These were then mapped onto the data, as indicated in the histogram depicted in **Figure 5.5**.

**Figure 5.5:** Histogram of DHP expenditure levels across local authorities in 2014/15, with the four sampling groups identified



These four groups formed the focus of the sampling exercise and, throughout the analysis chapters which follow, responses will be classified within these groupings. Local authorities were identified randomly within these groups and their Housing Benefit managers (or equivalent) contacted via email to explain the study and request participation (as detailed below). A total sample of 18 was created from these acceptances with the following breakdown:

- **low spend (0–85.84%):** 3 authorities
- **mid-low spend (85.54–96.87%):** 4 authorities
- **mid-high spend (96.87–102.62%):** 7 authorities
- **high spend (102.62% and above):** 4 authorities

Though ‘mid-high spend’ authorities are marginally over-represented and ‘low-spend’ under-represented, the principle behind this exercise was not to form a perfectly representative sample, but instead to ensure that there was a reasonable spread within the local authority participants across these groups, with each having some representation. Notwithstanding the small sample, the descriptive statistics of the final

18 resemble that of local authorities across England and Wales, as indicated in **Figure 5.6**.

**Figure 5.6:** Descriptive statistics – local authority DHP spend (%) levels

	English and Welsh authorities	Study participants
Mean	96.83%	94.52%
Median	99.02%	99.84%
Mode	100%	100%
Percentiles 25%	90.48%	92.41%
50%	99.02%	99.84%
75%	101.22%	100.30%

### 3.6.2. *The recruitment process*

Following on from this overview of how the sample was constructed, this section provides a more detailed examination of how the participants were recruited. There are a number of practical challenges facing the recruitment of local authority administrative staff. In the current fiscal environment,<sup>175</sup> the demands on staff time can make participation in research (particularly that of a student), unappealing or simply impossible due to time constraints. The identification of relevant participants often requires navigating a series of gatekeepers, with the starting point for most interactions taking place through a ‘customer’<sup>176</sup> facing contact centres or online contact forms intended for use by the claimants themselves. Even when through this quagmire,

<sup>175</sup> Local authorities have faced a series of budget cuts since 2008/09, leading to an increasingly acute financial position. For an overview of how Local authorities are attempting to respond to this new austerity-induced fiscal environment, see: Ileana Steccolini, Carmela Barbera and Martin Jones, *Governmental Financial Resilience under Austerity: The Case of English Local Authorities* (Chartered Institute of Management Accountants 2015) 11(3) <[http://www.cimaglobal.com/Documents/Thought\\_leadership\\_docs/NHS-public-sector/Governmental-financial-resilience-austerity.pdf](http://www.cimaglobal.com/Documents/Thought_leadership_docs/NHS-public-sector/Governmental-financial-resilience-austerity.pdf)> accessed 13 June 2017.

<sup>176</sup> The broader shift to customer relationship management practices at the local authority level has changed the way in which local authority departments and staff can be accessed. See: Stephen F King, ‘Citizens as Customers: Exploring the Future of CRM in UK Local Government’ (2007) 24 *Government Information Quarterly* 47.

communication between managers who may agree to the research and the participants who work under them may not be clear, with the potential for the ‘audit/research distinction’<sup>177</sup> to be blurred, or for the intended participants to be simply unaware of their intended involvement.

The recruitment practices here were intended to deal with these potential problems in as streamlined a process as possible. **Figure 5.7** outlines the steps between the identification of target local authorities and access to the vignette discussion board in a flowchart. Using the four-group sampling frame outlined above, a number of target authorities were identified. Email addresses for Housing Benefit managers or the equivalent were then sought from these authorities, generally over the phone, to create an Excel file of contacts for which anonymised logins were generated. These authorities were then approached via email to request participation.

The Housing Benefit managers who agreed to participate were asked to identify a member of staff who worked on the processing of DHPs to provide the responses and a login was sent to pass on to this individual. There was no direct contact between the researcher and the administrative worker, unless they were to ask a question through the participant contact feature. Upon logging in for the first time, the participant was provided with the initial consent page and the instructions (**Appendix B**). They were free to choose not to participate at this point and this would not be communicated to the local authority contact. If the participant agreed, they were then given access to the online platform and the vignettes.

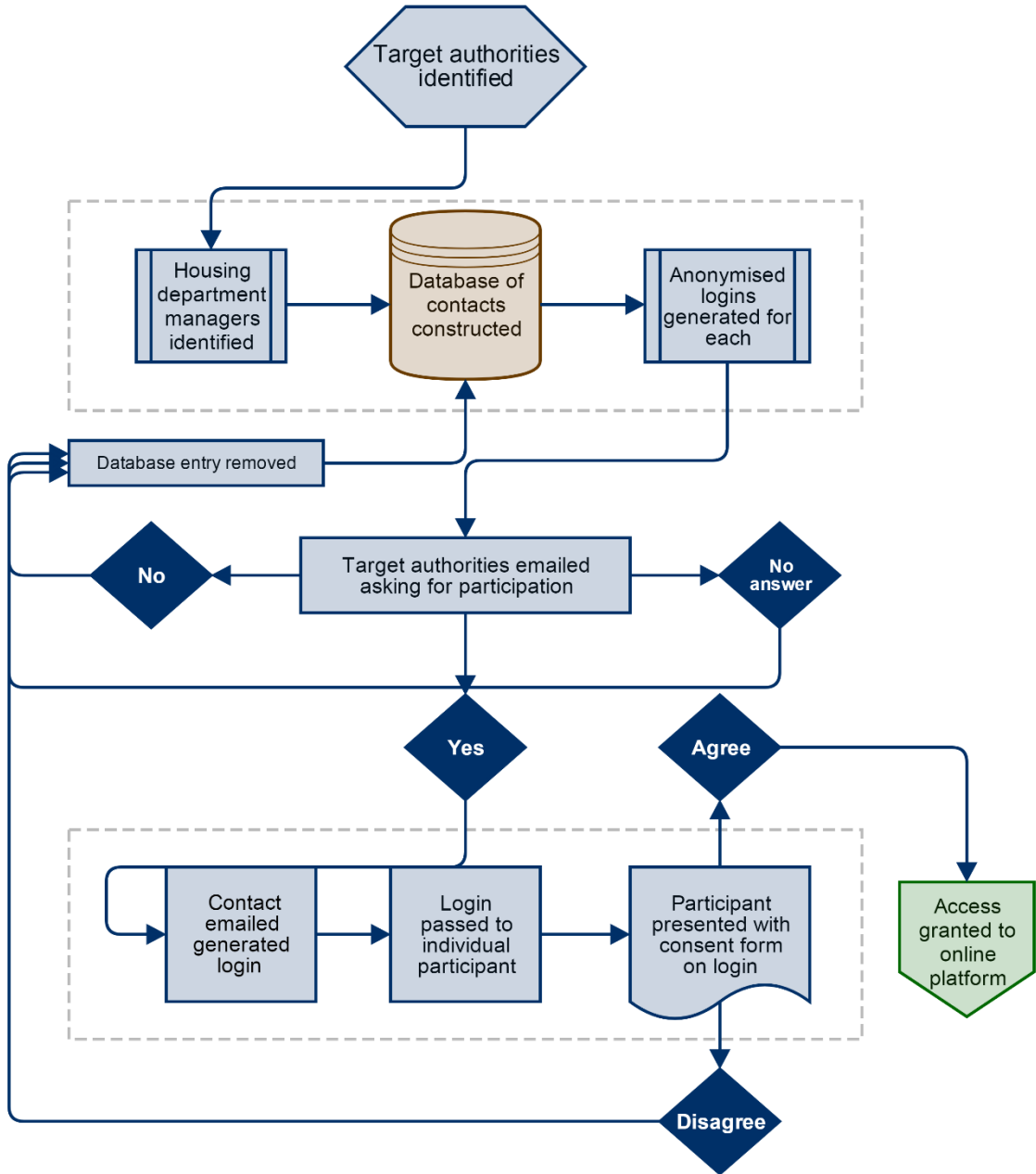
Using the Housing Benefit manager as the conduit for securing participants helps to ensure the integrity of sample – namely, that participants actually are members of staff who process DHPs at that local authority – and secures anonymity for the individual participating in the research. Given that, following the agreement to participate, the retention rate was 100%, it may be the case that engaging directly with a management point of contact at the outset ensured that participation was more likely.

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<sup>177</sup> Emily R Munro, Lisa Holmes and Harriet Ward, ‘Researching Vulnerable Groups: Ethical Issues and the Effective Conduct of Research in Local Authorities’ (2005) 35 *British Journal of Social Work* 1023, 1031.



**Figure 5.7:** Flowchart illustrating the recruitment of local authorities to the online vignette platform.



### **3.7.Operation of the online discussion board**

Having outlined the recruitment of the local authority participants, this section deals with the actual operation of the online discussion board. **Appendix C** details the arrangement of the key webpages themselves, with annotations highlighting key features. **Figure 5.8** is a flowchart depicting the process of accessing and responding to the vignettes once the participant had successfully logged into the system and navigated the consent stage outlined above.

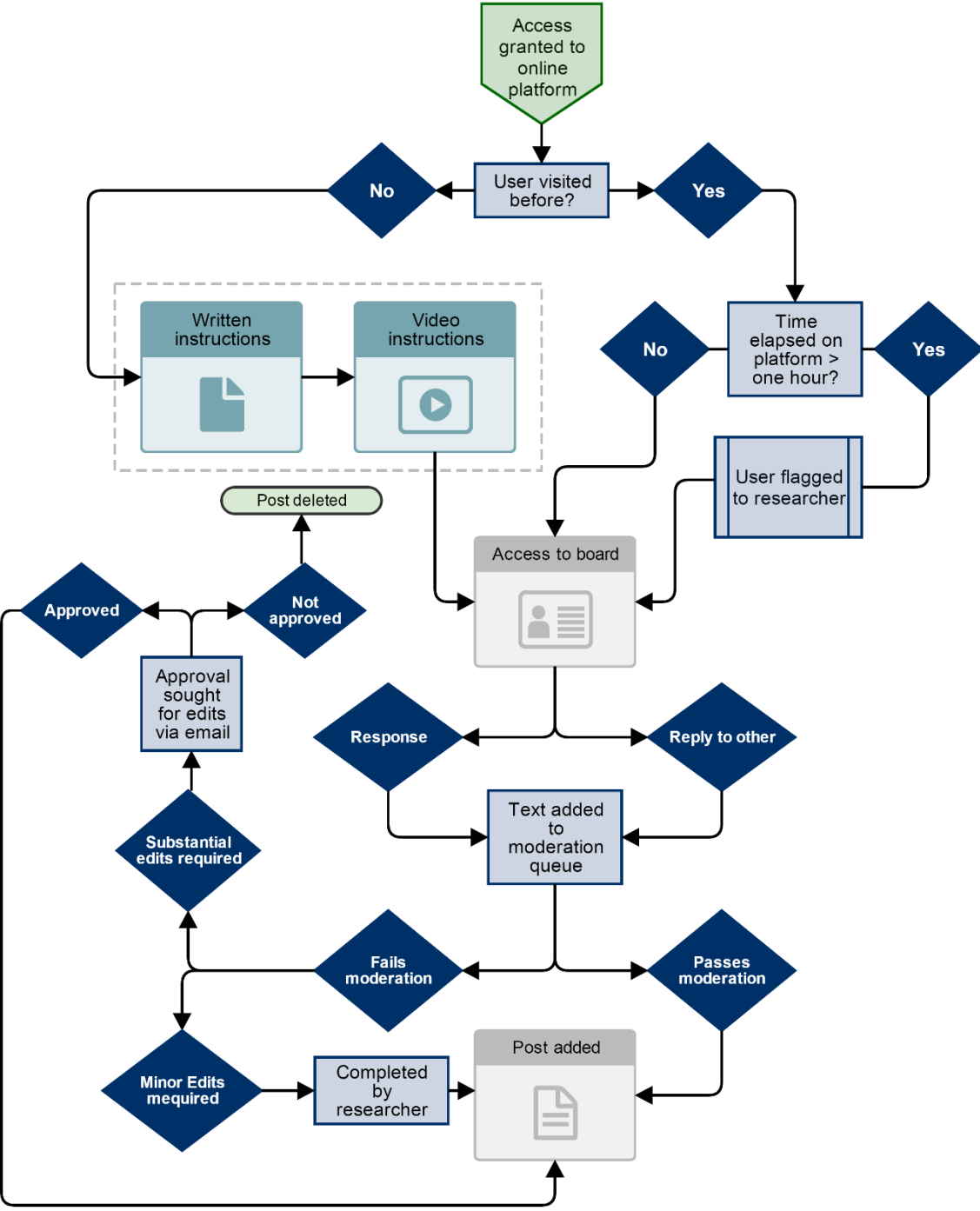
In summary, the online platform makes two distinctions: one based on whether a previous login exists for the user; and another on the time the user has spent on the system. When the participant logs in for the first time, the user is presented with detailed instructional material, including a video. This is also linked to the initial consent form to allow participants to see the operation of the platform before consenting to participation. If the user has visited before, they are taken directly to the vignettes, though they can view this instructional material again by clicking a ‘help’ tab on the menu.

The second distinction is based on the amount of time the user has been logged onto the system. As discussed in relation to the rationale of the research design above, there are ethical considerations attached to the amount of time local authority administrative staff spend engaging with the research and the need to avoid imposing open-ended time commitments. As a result of this concern, if a user has been logged into the system for longer than two hours, their user handle is flagged to the researcher. As the research design does not expect commitment of more than two hours, I can then assess on a case-by-case basis the extent to which participants are over-committing – for instance, if they are continuing to post replies or if the time might be accounted for by inactive browser activity. Should a participant be over-committing, an email would be sent to the local authority contact to confirm that they are happy to continue to participate and that the researcher does not expect additional time commitment from them should they not wish to do so.

Aside from these two distinctions, the operation of the platform is fairly straightforward. Users login, navigate to the vignette and post their responses or replies

to others (as detailed in **Appendix C**). All posts are subject to moderation from the researcher, with any identifying information (such as local authority names or location details) redacted. If post content was deemed to be inappropriate (for instance, being entirely off-topic, or using abusive language), there was a mechanism either to make edits (such as removing abusive language) or to email the local authority contact to receive clarification/changes. The entirety of this process is depicted in **Figure 5.8**.

**Figure 5.8:** A flowchart illustrating the process of responding/replying on the online vignette platform



## 4. The second empirical strand: undertaking interviews with tenants affected by the SSSC

This section describes the basis and research design of the qualitative interview strand in which a total of 32 telephone interviews with tenants affected by the SSSC were undertaken. It outlines: (i) the work with the gate-keeping housing associations; (ii) the recruitment processes and construction of the sample; (iii) the use of data and Data Protection Act 1998 (DPA 1998) compliance; (iv) a justification of the consent procedures; and (v) the content and structure of the interviews.

### 4.1. The starting point: identifying gatekeepers and the research design

As is frequently the case for qualitative social research, the starting point of the research design was identifying ‘gatekeepers’;<sup>178</sup> here, willing housing associations. Although they are often the most pressing practical reality, gatekeepers are not always accompanied by adequate theoretical and methodological reflection.<sup>179</sup> There is a danger, especially when summarising methods in a PhD thesis, of treating the identification of gatekeepers as ‘dis-embodied and instrumental’,<sup>180</sup> rather than as people who can ‘shape and transform’<sup>181</sup> the research as a whole. As they are

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<sup>178</sup> The centrality of ‘gate-keepers’ to the research process is perhaps best illustrated by their entry in the *SAGE Dictionary of Social Research Methods*, where they are described as the person ‘who makes the decision as to whether to allow the researcher access to undertake the research’, or by Punch’s call for researchers to ‘be aware of the complexities of Gatekeepers’, see, respectively: Victor Jupp, *The SAGE Dictionary of Social Research Methods* (SAGE Publications 2006) 126; and Keith Punch, *Introduction to Social Research: Quantitative and Qualitative Approaches* (SAGE Publications 2013) 43.

<sup>179</sup> This problem was the subject of a special issue of the *International Journal of Social Research Methodology*, 16(6), with the editorial arguing that ‘relatively little attention’ has been accorded to ‘gatekeepers’ or ‘gatekeeping’ in social research methods, see: Isabel Crowhurst and Madeleine Kennedy-Macfoy, ‘Troubling Gatekeepers: Methodological Considerations for Social Research’ (2013) 16 *International Journal of Social Research Methodology* 457.

<sup>180</sup> Isabel Crowhurst, ‘The Fallacy of the Instrumental Gate? Contextualising the Process of Gaining Access through Gatekeepers’ (2013) 16 *International Journal of Social Research Methodology* 463, 471.

<sup>181</sup> *Ibid.*

antecedent to the research design which follows, this section starts by addressing the key issues in the use of gatekeepers in this research, recognising their key role in the development and completion of this strand of the empirical research.

In seeking to interview a spread of tenants affected by the SSSC, there were a number of accompanying requirements. Given the theoretical (and legal) importance to this project of DHPs, geographical spread was important.<sup>182</sup> So too were descriptors which would naturally impact on the experience and severity of the penalty, particularly: the extent of under-occupation pursuant to Reg.B13; whether disabled adaptations had been made to the property;<sup>183</sup> the age of the tenants;<sup>184</sup> whether a member of the household is in receipt of disability living allowance (DLA) and/or personal independence payments (PIPs);<sup>185</sup> whether the household is in work;<sup>186</sup> and/or the

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<sup>182</sup> As argued in Chapter Four, the use and payment of DHPs appears to vary substantially between local authority areas.

<sup>183</sup> Tenants with sizable adaptations to their property were a particularly acute consideration in the formulation of the SSSC in the ongoing administration of the DHP scheme. The original SSSC DWP Equality Impact Assessment highlights the specific intention behind £30million of DHP funding (per annum – at the time) ‘to provide additional help to disabled claimants living in properties where significant adaptations have been made’ and the current DHP Guidance underscores the ‘importance of additional funding needed to support this group’. See, respectively: DWP, *Housing Benefit: Size Criteria for People Renting in the Social Rented Sector: Equality Impact Assessment* (DWP 2012) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/220154/eia-social-sector-housing-under-occupation-wr2011.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/220154/eia-social-sector-housing-under-occupation-wr2011.pdf)> accessed 13 June 2017; DWP (n 122).

<sup>184</sup> Notwithstanding that the SSSC only applies to working-age tenants, even within the age brackets under pensionable age, there has generally been sizably divergent levels of under-occupation within social housing relative to age. Particularly within those aged 40 and older. See: Hal Pawson and Stephen Sinclair, ‘Shopping Therapy? Incentive Payments and Tenant Behaviour: Lessons From Underoccupation Schemes in the United Kingdom’ (2003) 3 *International Journal of Housing Policy* 289, 297; and Jill Barelli, *Underoccupation in Social Housing* (Department of the Environment, Transport and the Regions 2001).

<sup>185</sup> This is especially important given the complexities of handling DLA/PIP income, particularly in the wake of *R (on the application of Hardy) v Sandwell MBC* [2015] EWHC 890 (Admin).

<sup>186</sup> Due to the way the SSSC is calculated with reference to the eligible rent for the property, as opposed to the apposite housing benefit award, the penalty is obviously experienced differently to those in work. For instance, the DWP impact assessment estimates that 40,000

number of children in the household. The tenants would obviously have to be verifiably affected by the SSSC penalty.<sup>187</sup> Any gatekeeper would also have to be willing to engage with a PhD student looking into an issue which – at the time of the empirical work – was controversial, but simultaneously slipping off the research agenda.<sup>188</sup> Given the political sensitivity and requirement for verifying being affected by the penalty, snowball sampling or general advertisements were deemed to be less effective than utilising partner organisations as a means for generating a sample.

As a necessary gatekeeper, the partner housing associations are de facto stakeholders in the research. This involvement can complicate the communication between the researcher and the participant. If the original sampling exercise is not managed well, the participant may perceive the researcher as working alongside or as an agent of the housing association, with the interviews consequently being influenced by their prior relationship with the organisation, or concerns they may have about communicating information which may impact on any ongoing issues, such as internal allocations (a particularly pertinent consideration in light of an interview which inevitably raises the issue of perceived under-occupation). Likewise, if the participant knows that the research findings will be fed back internally in the organisation, they may view the interview more through the frame of a ‘customer’<sup>189</sup> satisfaction exercise, or as a means to put forward a particular message to the housing association specifically, as

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households would float off housing benefit altogether as a result of the changes, see: Department for Work and Pensions, ‘Housing Benefit: Size Criteria for People Renting in the Social Rented Sector: Equality Impact Assessment’ (n 183), 32.

<sup>187</sup> The use of housing associations in particular to achieve a sample of households affected by welfare reforms is fairly common. For example, see Ruth Patrick’s longitudinal study on the lived experience of welfare reforms: Ruth Patrick, ‘Working on Welfare: Findings from a Qualitative Longitudinal Study into the Lived Experiences of Welfare Reform in the UK’ (2014) 43 *Journal of Social Policy* 705, 706.

<sup>188</sup> I was told by a senior member of staff at one housing association, who had originally agreed to participate but then decided against doing so, that ‘we have all moved on from the Bedroom Tax now’.

<sup>189</sup> Here, I’m adopting the particular language increasingly used to describe social housing tenants by social landlords, rather than making any comment on its appropriateness. For a discussion, see: Richard M Walker, ‘The Changing Management of Social Housing: The Impact of Externalisation and Managerialisation’ (2000) 15 *Housing Studies* 281.

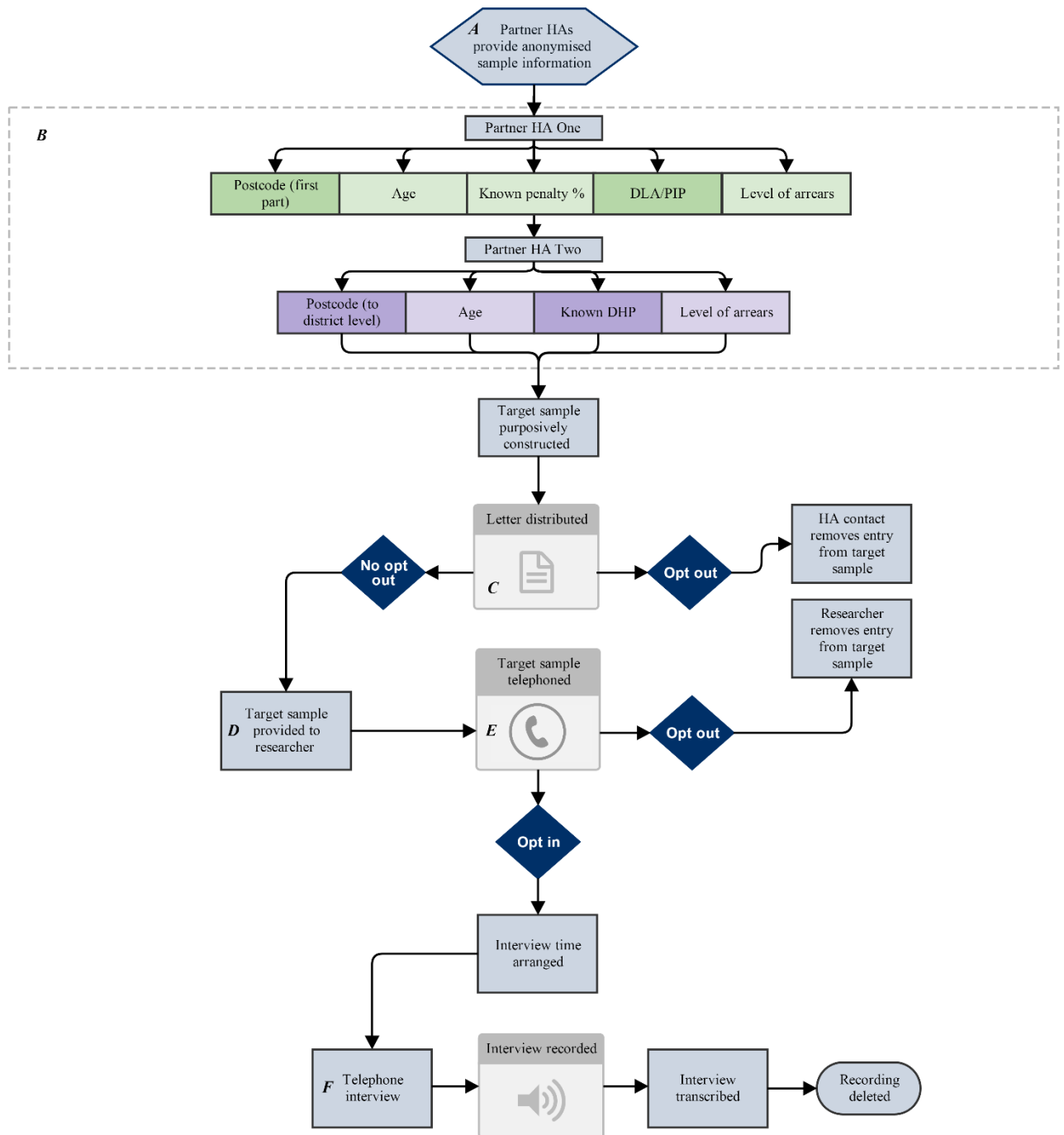
opposed to seeing it in the context of the broader issues that the research seeks to address. These problems bleed into soliciting informed consent. If the potential participant perceives the research as tied to the housing association, they may feel that they have little choice but to consent to being interviewed.

The initial communication is also important and requires careful management. As their first point of contact about the study, if the recruitment exercise is not carefully managed, the housing association can frame and set the tone of the research. As noted by many others, the first impressions of a research project can be both particularly influential for a participant and also difficult to shift.

With these issues in mind, **Figure 5.9** puts forward what may appear a fairly mechanistic representation of the qualitative interview process. The flowchart is designed to demonstrate the key areas where the design of the research has attempted to mitigate this gatekeeper role; leveraging access while taking control of the key high-risk steps, such as the initial point of contact and the confirmation of consent to participate.



**Figure 5.9:** Outlining the sample building and consent procedures for the tenant interview empirical strand



#### 4.2. Recruiting and constructing the sample

The process began with the partner housing associations providing a file comprising anonymous descriptors, each tied to a reference number which corresponded with the potential participant's contact details held by the research contact at the association. Following the provision of this information, I constructed a target sample using these descriptors. Given the limited information held by the associations, this process was designed to simply ensure that as wide a range of tenants were contacted as possible with the available data. Both associations retained different information; *Point B* demonstrates the differences in the available descriptors between the two partner housing associations. As discussed above, the location of the property and the levels of arrears were important theoretical considerations and attaining a spread across these descriptors was a priority. Where other information was available – for instance, if there were known adaptations at the property or if the age of the members of the household was available – the sampling focus was to provide a spread of target tenants, rather than seeking to construct a representative sample as such.

At the end of this process, there was a total target sample across the two partner associations of 150 tenants. The file was returned to the relevant research contacts who in turn identified the potential participants' information using the tied reference numbers and sent the opt-out letter as indicated at *Point C* of **Figure 5.9**. Following the waiting period of 14 days, the research contacts sent through the remaining sample with full names and telephone numbers reinstated (*Point D*).

At this point, I telephoned the sample to provide more details about the interview and ask if they would be willing to participate. As indicated at *Point E*, tenants could either opt out of the study or choose to opt in. For those who opted in, a convenient time to undertake a telephone interview was then organised. Formal consent was obtained at the start of the telephone interview itself (*Point F*), before any recording equipment was turned on.

Having provided a fairly succinct overview of the telephone interview process, there are three elements expanded upon below: (i) the use of data and DPA 1998 compliance; and (ii) a justification of the oral consent procedure.

#### 4.2.1. *The use of data and DPA 1998 compliance*

As the research design requires the transfer of the participant's contact details and telephone numbers, the data handled clearly falls under the ambit of the DPA 1998 and, given the nature of the interviews, may also fall under 'sensitive personal data' under s.2(e) due to the potential for information to be disclosed on the individual's 'physical or mental health or condition'.<sup>190</sup> Consequently, the release of contact information and the retention of interview data are important legal – as well as ethical – considerations within the research design.

The initial release of participant data by the housing association (as outlined at *Point D*) was governed by information-sharing agreements (sometimes referred to as data-sharing agreements or DSAs) with each organisation. For the purposes of providing the initial telephone numbers and full names, I (affiliated with York Law School) was listed as a data processor, with the association retaining data controller status. This imposes additional limitations on the use of the data within the research to that implied under the DPA 1998:

1. the contact information cannot be shared with a third party without the consent of the partner housing association;
2. the data can only be accessed by myself – the named contact within the DSA – and cannot be shared or deposited elsewhere; and
3. the data can only be used for the purposes of contacting the participants for the interviews, as agreed with the partner association.

In addition to these additional arrangements, obligations on the secure retention of the data and securing confidentiality apply. A number of steps were taken to ensure compliance both with the DSA, the relevant sections of the DPA 1998 and good practice on data handling more generally.

First, all data for the purposes of building the sample were password protected and held solely on the secure University of York system, within a password-protected 7-

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<sup>190</sup> S.2(3) Data Protection Act 1998.

Zip file. The passwords for accessing the participant data once the anonymised fields had been populated were sent via a separate email to the file attachment and the login for the 7-Zip file was only ever known to the researcher. This information was only held electronically within this password file; it was never printed or otherwise transposed into a different format through the entirety of the research period. At the end of this period, the participant information was permanently deleted.

Second, at no point were the telephone interview recordings or transcriptions ever affiliated with the personal data provided by the partner association. In other words, there was no link between the personal data provided by the housing association to facilitate contact and the data prepared for transcription; recordings and transcriptions were instead only ever identified by a number. The telephone interview recordings were taken on a Philips DVT3600 Digital Recorder and immediately transferred via USB cable to a password-protected account on the University of York system. At the point of transcription, any potentially identifying information was removed, at which point the original recording was deleted. At this point, the anonymised transcriptions were still subject to the limitations imposed by elements of the DSA (namely, on depositing or use by third parties), but fall outside of the ambit of the DPA 1998 requirements due to the absence of personal data.

#### 4.2.2. *Justification of the oral consent procedure*

The approach adopted in this study does not follow what Alderson and Morrow describe as an ‘off the peg’ approach;<sup>191</sup> generally, in the context of a consent procedure, the standard suite of approaches where consent is obtained as a ‘one-off act’ via a hard-copy consent form to be signed by the participant and retained by the researcher.<sup>192</sup> In this study, a three-stage approach was adopted, providing an initial opt-out on the disclosure of contact data to the researcher (*Point C*), followed by oral consent to participate at the initial telephone contact (*Point E*) and again at the point

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<sup>191</sup> Priscilla Alderson and Virginia Morrow, *The Ethics of Research with Children and Young People: A Practical Handbook* (SAGE 2011) 4.

<sup>192</sup> Tina Miller and Mary Boulton, ‘Changing Constructions of Informed Consent: Qualitative Research and Complex Social Worlds’ (2007) 65 *Informed Consent in a Changing Environment* 2199, 2208.

of the telephone interview (*Point F*). There was no hard copy-consent form, nor any written record of the consent solicited from the participant. This approach can be justified both in line with the narrower requirements of consent under the DPA 1998 and more broadly as being a result of systematically balancing ‘risk, privacy and protection, and safety and potential harm’.<sup>193</sup> the key tenets of an effective consent procedure.

The DPA 1998 requires that participants should be notified of their right to withdraw and that permission must be obtained for the use of the data they provide and any recordings to be undertaken.<sup>194</sup> All of these steps were satisfied when oral consent was obtained at the start of the oral interview itself and in the prior distribution of the letter, which contained my contact details.

Consent for the initial release of the personal data – namely, the names and telephone numbers – was not wholly reliant on the opt-out process following the letter distributed by the housing association (*Point C*). Instead, as allowed under the DPA 1998, my status as a data controller allows access to this information, providing it is being used for the purposes for which it was taken by the housing association. Use for research, including for that undertaken by third parties, is one such reason. That being said, the opt-out letter distributed by the housing association remains an important step within the consent procedure as it serves to both notify potential participants of the research prior to the phone call and provide a mechanism for them to self-exclude at this earlier stage.

Having outlined how the approach is pursuant to the requirements of consent within data protection procedures, it is important briefly to outline the reasons why oral consent was obtained as opposed to relying on the standard practice of returning a written form. There are three key reasons.

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<sup>193</sup> Ibid 2209.

<sup>194</sup> Jennie Beck, ‘Qualitative Research and the Data Protection Act 1998’ (2002) 5 *Qualitative Market Research: An International Journal*  
<<http://www.emeraldinsight.com/doi/full/10.1108/qmr.2002.21605aaf.001>> accessed 3 January 2018.

First, as detailed above, there was no retention of participant contact data and no link between the transcripts and this information. If a written consent form had been solicited, it would be the only document linking the participant to the research and therefore a means through which they could be identified.<sup>195</sup> As this document is not necessary to meet the requirements of informed consent in this study, it would merely serve to present an additional risk to participant confidentiality.

Second, there are sizeable practical issues associated with obtaining written consent prior to a telephone interview. A written form would have to be sent to participants at *Point E*, for them to complete and return to the researcher before the telephone interview could then be organised. It is anticipated that this would have caused significant issues with retention within an already limited sample frame. Indeed, Economic and Social Research Council guidance explicitly highlights telephone interviews as an area where written consent ‘may not be possible’.<sup>196</sup>

Third, a key function of the consent form is to ensure that participants know who will be handling the data they are providing, how long it will be kept for, details of anonymisation and information on how the data will be used. In the study, this information is not only provided in the opt-out letter sent via the housing association, but is also the subject of the initial telephone contact with the target sample at *Point E*.

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<sup>195</sup> Steven Taylor, Robert Bogdan and Marjorie DeVault, *Introduction to Qualitative Research Methods: A Guidebook and Resource* (John Wiley & Sons 2015) 39.

<sup>196</sup> Economic and Social Research Council, ‘What If It Is Not Possible to Obtain Written Consent?’ <<http://www.esrc.ac.uk/funding/guidance-for-applicants/research-ethics/frequently-raised-questions/what-if-it-is-not-possible-to-obtain-written-consent/>> accessed 13 June 2017.

### 4.3. The content and form of the interviews

Overviews of qualitative research approaches often situate interviews on a ‘continuum’<sup>197</sup> or ‘spectrum’<sup>198</sup> between structured and unstructured: the former consisting of static ‘pre-set questions’<sup>199</sup> and the latter as ‘totally unplanned time’.<sup>200</sup> Within this framing, the heavily dominant ‘semi-structured interview’ method – utilised in this study – sits somewhere in the middle, being ‘loosely structured’ with some ‘some set questions’.<sup>201</sup> Although a concise way of characterising approaches, in my view this ‘continuum’ analogy is not particularly useful when outlining the content and form of semi-structured interviews. The ‘unstructured’ elements must still sit within an overall structure, even if the form they take may vary according to participant responses.

Taking Wengraf’s summary of the research interview as a starting point, at its core, putting an interview question to a participant is intended to produce material that is relevant to a particular theory question. As he argues, ‘you do not normally ask your theory questions to your interviewees’; the interview questions are instead formulated to be relevant to the interviewee and may be partially structured or unstructured depending on context. The problem within studies focused on home meanings is that the research questions do not transpose easily into an interview guide. As an inherently ‘subjective everyday experience’,<sup>202</sup> the home can prove a particularly methodologically demanding concept to examine.

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<sup>197</sup> See: Lisa Given, *The SAGE Encyclopedia of Qualitative Research Methods* (SAGE Publications 2008) 7; and Robyn Longhurst, ‘Semi-Structured Interviews and Focus Groups’ in Nicholas Clifford et al (eds), *Key Methods in Geography* (SAGE 2016) 145.

<sup>198</sup> Kathryn Roulston, *Reflective Interviewing: A Guide to Theory and Practice* (SAGE 2010) 15.

<sup>199</sup> Melanie Pearce, ‘Challenging the System: Rethinking Ethics Review’ in Will Van den Hoonaard (ed), *Walking the Tightrope: Ethical Issues for Qualitative Researchers* (University of Toronto Press 2002) 51.

<sup>200</sup> Ibid.

<sup>201</sup> Lisa Webley, ‘Qualitative Approaches to Empirical Legal Research’ in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010).

<sup>202</sup> Maginn et al (n 118) 36.

Within the home studies literature, there are two approaches in particular which are not well suited to this study. The first is asking directly about home meanings or the idea of ‘home’. This approach is commonly utilised and many of the foundational research studies in the home studies literature designed participant questions in this way. As an example, in his seminal ‘three towns’ study, Saunders asked participants ‘a single, rather bald’<sup>203</sup> question on their home: ‘People often distinguish between house and home. What does the home mean to you?’<sup>204</sup> Some researchers adopt almost the same formulation – such as ‘What does home mean to you and why?’<sup>205</sup> – or adopt similar variations, such as asking whether places ‘feel like home’ or not,<sup>206</sup> to ‘describe [the] meanings’<sup>207</sup> attached to their home, or to describe their ‘ideas of home’.<sup>208</sup>

This can often be a useful approach, particularly for studies focusing on rhetorical debates about home meanings or specifically how participants themselves view the idea of a ‘home’. In the context of this study, this risks putting the theoretical cart –

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<sup>203</sup> Jane Darke, ‘Women and the Meaning of Home’ in Rose Gilroy and Roberta Woods (eds), *Housing Women* (Routledge 1994) 13.

<sup>204</sup> Peter Saunders, *A Nation of Home Owners* (Unwin Hyman 1990) 30. This specific formulation has come under some criticism, particularly in relation to Saunders’ claim based on responses to this question that both women and men ascribe similar experiences to the home, or the lack of regard paid to the differences across the life course. For instance, see: Shery Ahrentzen, ‘Home as a Workplace in the Lives of Women’ in Irwin Altman and Setha Low (eds), *Place Attachment* (Springer 2012) 119; Jane Darke (n 202) 13; and Craig Gurney and Robin Means, ‘The Meaning of Home in Later Life’ in Sara Arber (ed), *Ageing, Independence, and the Life Course* (Jessica Kingsley 1993) 120.

<sup>205</sup> Tasoulla Hadjiyanni and Kristin Helle, ‘(IM)Materiality and Practice: Craft Making as a Medium for Reconstructing Ojibwe Identity in Domestic Spaces’ (2010) 7 *Home Cultures* 57, 66.

<sup>206</sup> Sandy G Smith, ‘The Essential Qualities of a Home’ (1994) 14 *Journal of Environmental Psychology* 31, 40.

<sup>207</sup> Craig M Gurney, ‘“... Half of Me Was Satisfied”: Making Sense of Home through Episodic Ethnographies’ (1997) 20 *Women’s Studies International Forum* 373, 382.

<sup>208</sup> Ann Dupuis and David C Thorns, ‘Meanings of Home for Older Home Owners’ (1996) 11 *Housing Studies* 485, 487. For a similar formulation, see: Griff Tester and Adia Harvey Wingfield, ‘Moving Past Picket Fences: The Meaning of “Home” for Public Housing Residents’ (2013) 28 *Sociological Forum* 70, 74.



home meanings – before the horse – the participants’ experience of the SSSC penalty. My focus here is on whether the participant’s understanding of their home is material to the functioning of the SSSC. An explicit question on this would both (i) pre-suppose that it is and (ii) frame the participant’s answer with reference to the abstracted issue of the ‘home’. Instead, the issue should – and, indeed, did – present itself without the interviewer having to explicitly ask about it.

The second approach is to avoid asking direct questions about the home, but instead to go through the theoretical ‘checklist’ which is concomitant with it, asking questions focused on identity,<sup>209</sup> social aspects of the home,<sup>210</sup> security<sup>211</sup> and the other sub-concepts<sup>212</sup> which are often identified in the home studies literature. Though useful in many contexts, in this study, this approach would effectively serve to code the data before it has been gathered. Instead, an iterative assessment of these issues at the analysis stage is a more effective approach.

What emerges, therefore, is a set of questions which may not appear at first instance to have much to do with the conceptual material on the home at all. That is the intention. The sub-questions which framed the interviews are focused on the operation

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<sup>209</sup> Kirsten Gram Hanssen and Claus Bech Danielsen, ‘House, Home and Identity from a Consumption Perspective’ (2004) 21 *Housing, Theory and Society* 17, 21.

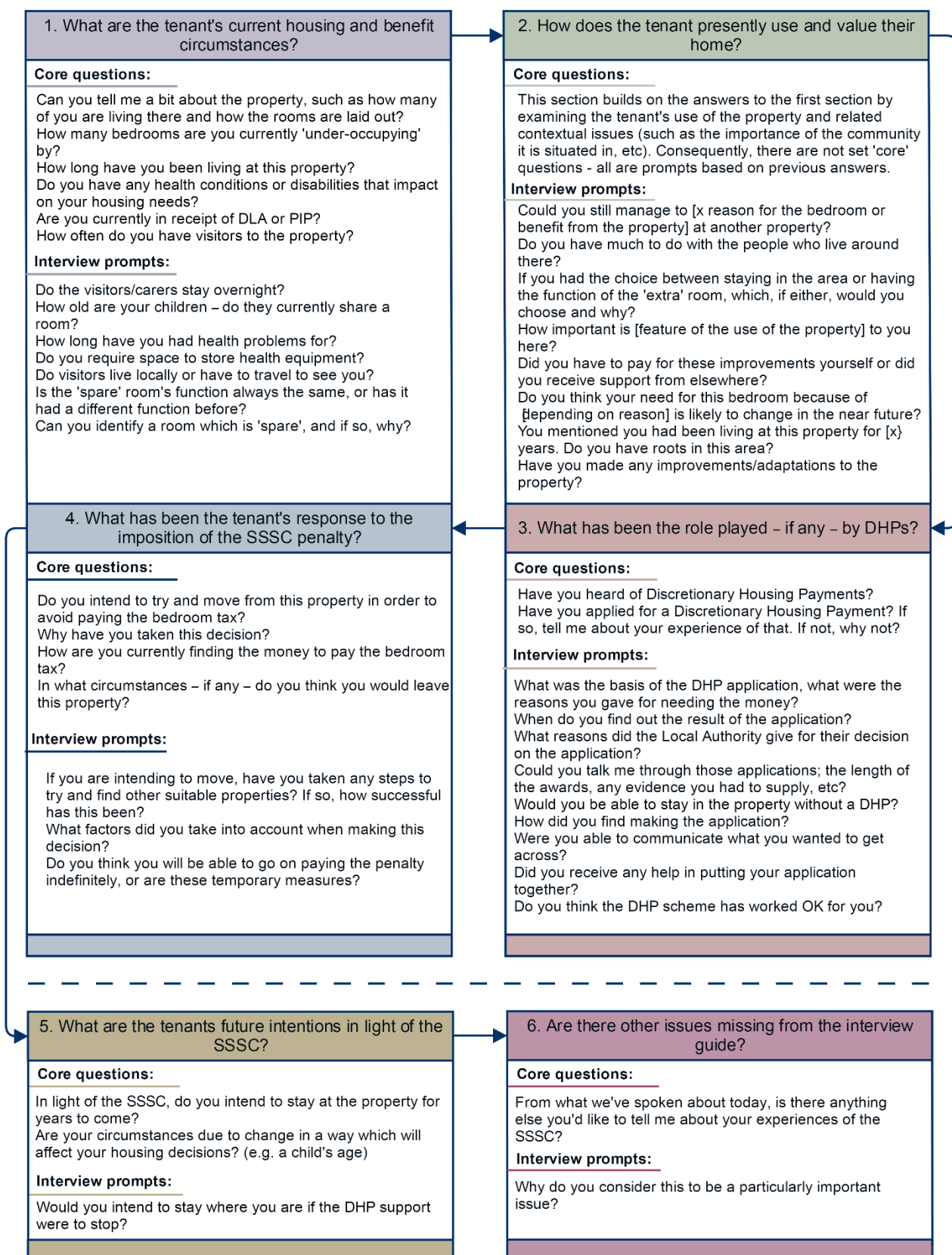
<sup>210</sup> For instance, see questions focused on the community, such as: ‘How would you describe your sense of belonging to this community?’: Denise Cloutier-Fisher and Jennifer Harvey, ‘Home beyond the House: Experiences of Place in an Evolving Retirement Community’ (2009) 29 *Journal of Environmental Psychology* 246, 249; Bronwyn Tanner, Cheryl Tilse and Desleigh de Jonge, ‘Restoring and Sustaining Home: The Impact of Home Modifications on the Meaning of Home for Older People’ (2008) 22 *Journal of Housing for the Elderly* 195, 202; and Erin Mifflin and Robert Wilton, ‘No Place like Home: Rooming Houses in Contemporary Urban Context’ (2005) 37 *Environment and Planning A* 403, 408.

<sup>211</sup> See Rosemary Hiscock et al, ‘Ontological Security and Psycho-Social Benefits from the Home: Qualitative Evidence on Issues of Tenure’ (2001) 18 *Housing, Theory and Society* 50.

<sup>212</sup> For examples of fully detailed interview guides in this vein, see: Daniel Knight, ‘The Biographical Narratives and Meanings of Home of Private Tenants’ (DPhil thesis, University of Wales 2002) 298; and Helen Taylor, ‘Narratives of Loss, Longing and Daily Life: The Meaning of Home for Cypriot Refugees in London’ (DPhil thesis, University of East London 2009) 308.

and experience of the SSSC penalty, with some contextual questions to assist in subsequent analysis. The full interview guide is depicted in **Figure 5.10**.

**Figure 5.10:** Overview of the interview guide for the tenant interviews.



## 5. Use of documents

In the course of the tenant interviews, it became clear that the DHP application forms themselves – the physical documents which tenants have to complete to attain support – were a central part of being affected by the SSSC for many participants. Navigating these forms, conveying the information they thought was necessary, and meeting their constitutive requirements, such as questions about family support or evidential demands, was a periodic concern for tenants each time their award came up for renewal. Consequently, throughout the analysis chapters which follow, excerpts from DHP application forms are drawn upon to support some of the arguments made. This is an especially important part of Chapter Six, where numerous ‘Focus on forms’ sections are interspersed throughout the analysis to provide examples of the phenomena described and support the arguments put forward.

From a methodological standpoint, it is therefore important to outline how these documents were collected and briefly account for how their analysis aligns with the other two empirical strands. In the course of this element of the research, a total of 242 DHP application forms were collated, 14 FOIs were issued to local authorities and numerous other publicly facing documents, such as local authority DHP policies and councillor meeting minutes, were analysed. The intention is not to use these materials as part of a systemic evaluation or other formal methodological approach rooted in semiotics or similar approaches.<sup>213</sup> Instead, the use of documents in this study is designed to exist as a form of ‘triangulation’ with the other two strands, providing examples and evidence to support the analysis from the tenant interviews and vignette responses which refer to the DHP forms.

The process for obtaining the application forms was not particularly sophisticated. Beginning with a list of all 348 English and Welsh local authorities which provide

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<sup>213</sup> For a discussion of these, see Paul Atkinson and Amanda Coffey, ‘Analysing Documentary Realities’ in *Qualitative Research* (3rd edn, SAGE Publications 2011); and Betsy Cullum-Swan and Peter Manning, ‘Narrative, Content, and Semiotic Analysis’ in Norman Denzin and Yvonna Lincoln (eds), *Handbook of Qualitative Research* (SAGE Publications 1994).

DHP returns to the DWP,<sup>214</sup> the procedure was simply to visit the authority's website and search for their DHP application form. There were three principal obstacles to assessing the forms. First, a minority of authorities – a total of 25 – did not make the DHP forms available online, instead potential applicants were required to contact or visit the council offices to initiate an application. Second, a sizable proportion of authorities – a total of 57 – managed DHP applications through an online application form which could only be accessed by logging into an account, or through providing contact information to initiate the claim. Finally, there were 14 authorities where a DHP form could not be located through their website, or the link to download the form was broken.

## 6. Reflections on the research process

The sections above, organised into neat subheadings and progressing in chronological order, may give the misguided impression that the experience of undertaking the research was an equally structured affair. Doctoral research is often an iterative process, where the initial proposal develops – often beyond easy recognition – as the empirical work progresses. The advice to doctoral researchers is to provide an 'honest account'<sup>215</sup> of their research and part of this transparency is the 'crucial practice'<sup>216</sup> of reflecting on the 'foibles' and 'mistakes'.<sup>217</sup> There are three areas in particular which – with the benefit of hindsight or were I to undertake the research again – I would have changed about my approach.

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<sup>214</sup> In other words, these are the local authorities within England and Wales that administer DHP awards for claimants in their geographical area, are provided an initial allocated budget to do so by the DWP, and provide returns information – the amount of overall expenditure and awards breakdown – every six months to the DWP. For an interactive list of these authorities, see: Meers, 'Discretionary Housing Payment Expenditure 2015/16' (n 173).

<sup>215</sup> David Silverman, *Doing Qualitative Research* (SAGE Publications 2009) 333.

<sup>216</sup> Mortari (n 66) 1.

<sup>217</sup> Sarah Tracy, 'Qualitative Quality: Eight "Big-Tent" Criteria for Excellent Qualitative Research' (2010) 16 *Qualitative Inquiry* 837, 841. It is worth noting that this 'reflection' is thinner than the methodological approaches often described as 'critical reflection' – for an outline of this, see: Gurid Aga Askeland and Greta Bradley, 'Linking Critical Reflection and Qualitative Research on an African Social Work Master's Programme' (2007) 50 *International Social Work* 671, 674.

Although justifiable in this context due to their cost-effectiveness and ease of geographical reach, when examining issues connected to the home, telephone interviews are inescapably inferior to their face-to-face counterparts. The limited literature on methodologies for exploring the home highlights this issue. The potential for richer data is not just because of the general tendency for face-to-face interviews to elicit more detailed responses, but also because the researcher can situate themselves in the participant's home, the very place under consideration, and talk to other members of the household.<sup>218</sup> More fundamentally, less traditional methodologies – such as visual ones, for example, photo elicitation<sup>219</sup> – could have worked more effectively to explore concerns around the SSSC than the social science hallmark of semi-structured interviews.

At the beginning of this study, the crucial importance of DHPs was not immediately clear. The vignette empirical strand was never envisaged at the start of this project; the data collection proposed was limited to the tenant interviews. Shortly after the policy came into force, their central role in the SSSC scheme became increasingly apparent, both in government rhetoric and in the early decisions of the High Court. In their interviews, tenants would discuss their applications or concerns about future awards. The methodology for this thesis had to expand significantly and quickly in order not to leave an empirical blind spot within the analysis.

As outlined above, key motivations for the online delivery of vignettes were speed and flexibility: a general election (in which the SSSC seemed likely to be scrapped) was approaching and it was not clear the extent to which a range of local authorities would be accommodating to a researcher examining what was a controversial and high profile welfare reform. In hindsight, the element missing from the vignettes is an important one: the application forms. I ask local authorities to examine hypothetical cases

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<sup>218</sup> Maginn, Thompson and Tonts (n 118) 44–45.

<sup>219</sup> As examples, see: Lindsey Jayne McCarthy, “‘It’s Coming from the Heart’”: Exploring a Student’s Experiences of “Home” Using Participatory Visual Methodologies’ (2013) 10 *Graduate Journal of Social Science* 76; and Antonio Cristoforetti, Francesca Gennai and Giulia Rodeschini, ‘Home Sweet Home: The Emotional Construction of Places’ (8) 25 *Journal of Aging Studies* 225.

without – what I go on to argue is – a key element of the means by which the knowledge necessary to undertake these decisions is communicated to them. Alternative methodologies, perhaps asking tenants within face-to-face interviews to complete DHP forms and then using those as the vignettes, could have been viably adopted.

Despite my efforts to expand the ambit of the research by including local authorities, there are still key actors missing from this research: most notably, housing associations. In the face of a seemingly continuous welfare reform agenda, with certain classes of tenants particularly egregiously affected by multiple overlapping reforms, many have become reliant on the support provided by their social landlords, particularly specialist teams addressing these welfare reforms. This thesis does not address the often important role their support plays. They too are as integral to these tenants as the local authorities tasked with DHP mitigation; they often assist or provide advice and deal with the output – namely, increasing arrears and the prospect of eviction – when things end badly.

## **7. Summary**

This chapter has sought to provide an overview of the research process underpinning this thesis. It situates this study firmly within the rubric of socio-legal studies, providing an overview of the approach and dealing with common criticisms. The literature on which this research is based and particularly those studies which form the basis of my arguments in Chapter 2, is mainly couched (often, implicitly) within the social constructionist paradigm. This study also sits within this tradition, though does not exclusively adopt the dominant ‘social problems’ or ‘interactionist’ approaches, instead using an approach outlined by Valverde<sup>220</sup> which – I argue – is commensurate with the social constructionist approaches which dominate much of the home studies literature upon which this study is based.

The two main empirical stands of the research have been outlined, with practical issues, ethical concerns and the integrity of the research assessed. The majority of the

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<sup>220</sup> See in particular, Valverde (n 24).

data analysed in the subsequent chapters comes from the 32 interviews with tenants affected by the SSSC and the discussion board data from the 18 local authorities responding to the DHP vignettes. The role of supplementary data – the use of DHP application forms, FOIs and policy documents, such as local authority DHP policies – has been briefly outlined. The three analysis chapters follow. Each draws on the data collected in each of the empirical strands where it is relevant – the analysis is thematic, as opposed to being dictated by the organisation of the data collection.



# **Part III**



# DHP applications: analysis of the knowledge format

## Chapter Six

The screenshot shows a web interface for a 'Discretionary Housing Payment claim form'. On the left is a dark blue sidebar menu with a 'Main menu' dropdown and a 'Benefits' section containing links for 'Benefits - fraud investigation', 'Council tax - discount', 'Local Government Pension Scheme', 'Local housing allowance', and 'School - travel support'. The main content area has a title 'Online forms: Discretionary Housing Payment claim form' and a subtitle 'Reducing your housing costs and/or increasing your income'. A green progress bar indicates 'You are 38% complete.' Below this, a message says 'Please complete all questions in this section.' The current question is '5. Please provide details of why you need to remain in the area you are currently living (Required)', followed by a large text input field.

**Source:** Pendle Borough Council, 'Online forms: Discretionary Housing Payment claim form' <[https://www.pendle.gov.uk/forms/form/161/en/discretionary\\_housing\\_payment\\_application\\_form](https://www.pendle.gov.uk/forms/form/161/en/discretionary_housing_payment_application_form)> accessed 24 April 2017.

## 1. Introduction

In the course of closing his oral arguments in *R (on the application of Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58, Martin Westgate QC directed the court to a particular exhibit: a blank copy of Harrogate Council’s DHP application form.<sup>1</sup> He argued that the document itself – its questions, checkboxes and income/expenditure tables – served to effectively ‘highlight ... the grounds of complaint’.<sup>2</sup> In the same case, the Child Poverty Action Group, acting for the *Rutherfords*, submitted exhaustive evidence, based on an analysis of more than 200 DHP application forms, which was repeatedly referred to throughout the hearing and in the claimant’s written case.<sup>3</sup> In the later challenge *R (on the application of Halvai) v London Borough of Hammersmith and Fulham* [2017] EWHC 802 (Admin), the

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<sup>1</sup> Harrogate Council, ‘Discretionary housing payments application form’ <[https://www.harrogate.gov.uk/download/downloads/id/14/discretionary\\_housing\\_payments\\_application\\_form.doc](https://www.harrogate.gov.uk/download/downloads/id/14/discretionary_housing_payments_application_form.doc)> accessed 24 July 2017.

<sup>2</sup> Though the application processes for DHPs were discussed throughout, the specific direction of the court to the example forms themselves was by Martin Westgate QC for appellants (in this instance, all the MA claimants bar the Carmichael family, who were dealt with alongside Rutherford). Referring to written evidence from Mike Spencer of the Child Poverty Action Group, Westgate QC submitted that: ‘He exhibits a number of application forms, and in particular you have got an application form from Harrogate [bundle reference], and that sets out the level of information needed there – very detailed information about an individual’s means – and it includes, importantly, questions about whether a family member or friend can make up the shortfall ... I make these points to really highlight what the detriment is, and what the grounds of complaint are in one sense.’: UK Supreme Court, ‘02 Mar 2016 – Afternoon Session – Part 6 of 6 – *R (on the application of Carmichael and Rourke) (formerly known as MA and others) (Appellants) v Secretary of State for Work and Pensions (Respondent)*’ <<https://www.supremecourt.uk/watch/uksc-2014-0125/020316-pm.html>> at 1:37:25 accessed 1 May 2017.

<sup>3</sup> The author thanks Mike Spencer and Sophie Earnshaw (Child Poverty Action Group) and Tom Royston (Garden Court North Chambers) for providing sight of this evidence and the claimant’s grounds and skeleton argument for this case.

claimants submitted as evidence a copy of the council’s DHP application form,<sup>4</sup> with the Court focusing attention on its content, questions and ‘particular boxes’.<sup>5</sup>

Both *Carmichael* and *Halvai* demonstrate the central role played by documents – and, in particular, DHP application forms – within the SSSC policy framework. As argued in Chapter Four,<sup>6</sup> the legality of the SSSC policy is fused to the operation of the DHP scheme, which in turn is reliant on these day-to-day documents to process these applications. As with Grabham’s analysis of gender recognition declarations, the law becomes ‘inseparable’ from the ‘documents themselves’.<sup>7</sup>

Those affected by the SSSC applying for support under the DHP regime face what Hibou may describe as their own ‘bureaucratic ordeal’<sup>8</sup> of endless ‘administrative documents’.<sup>9</sup> They are forced to translate their need to remain in their home through the confines of these application forms: applying and re-applying through a revolving door of time-limited awards, sometimes as often as every 6 weeks;<sup>10</sup> completing and evidencing detailed income and expenditure tables, some with more than 100 different items to substantiate;<sup>11</sup> repeatedly navigate specific questions about help from family

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<sup>4</sup> The author thanks Conor McCarthy (Monckton Chambers) and Rory Matheson (Osbornes Law) for providing sight of the claimant’s grounds and skeleton argument for this case.

<sup>5</sup> *R (on the application of Halvai) v London Borough of Hammersmith and Fulham* [2017] EWHC 802 (Admin) [33] (per Cockerill J). For a more detailed outline of the decision in the case, see Jed Meers, ‘Discretionary Housing Payment Policies: Long-Term Awards and Relevant Considerations’ (*Local Government Lawyer*, 26 May 2017) <[http://localgovernmentlawyer.co.uk/index.php?option=com\\_content&view=article&id=31292%3Adiscretionary-housing-payment-policies-long-term-awards-and-relevant-considerations&catid=60&Itemid=28](http://localgovernmentlawyer.co.uk/index.php?option=com_content&view=article&id=31292%3Adiscretionary-housing-payment-policies-long-term-awards-and-relevant-considerations&catid=60&Itemid=28)> accessed 24 July 2017.

<sup>6</sup> See p.172.

<sup>7</sup> Emily Grabham, *Brewing Legal Times: Things, Form, and the Enactment of Law* (University of Toronto Press 2016) [Cloud Ebook Reader, Location 2406].

<sup>8</sup> Beatrice Hibou, *The Bureaucratization of the World in the Neoliberal Era: An International and Comparative Perspective* (Palgrave Macmillan 2015) 2.

<sup>9</sup> Ibid 106

<sup>10</sup> See, for instance, Durham Council’s DHP Policy: Durham Council, ‘Discretionary Housing Payments Policy’ (2016).

<sup>11</sup> Based on an analysis of 242 DHP application forms undertaken by the author. Thanks to Mike Spencer and Sophie Earnshaw from the Child Poverty Action Group for also sharing their own analysis of 252 application forms undertaken in support of the *R (on the*

and friends,<sup>12</sup> or belongings they could sell,<sup>13</sup> detail their compliance with conditions imposed or evidence steps they have taken to improve their circumstances,<sup>14</sup> and make the case for continued occupation of their home in small boxes or through checklists – an ordeal all for a payment characterised as ‘an integral part of housing benefit entitlements’.<sup>15</sup>

Tenants interviewed in the course of this study referred repeatedly to the rigmarole of filling in forms to substantiate their occupation of the property and the struggle of translating their home interest to the administrative worker. The importance of these physical documents, their experiences of constant form-filling, and the constraints placed upon them by the process – such as time-limits, evidential burdens or seemingly arbitrary or irrelevant questions – are all central to their experiences of the SSSC ‘scheme as a whole’.<sup>16</sup> Exasperated, one participant noted:

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*application of Carmichael and Rourke*) v Secretary of State for Work and Pensions [2016] UKSC 58 hearing. Had we have known about each other’s work earlier, perhaps this partial duplication could have been avoided.

<sup>12</sup> For example, see York City Council, ‘Discretionary Housing Payments (DHPs) Policy and Guidance’ (2013).

<sup>13</sup> See, for instance, Ashfield District Council, ‘Application for Discretionary Housing Payment’ <<http://www.ashfield.gov.uk/media/1241/dhp-application.pdf>> accessed 24 July 2017; and Harlow Council, ‘Discretionary Housing Payments’ <<http://www.harlow.gov.uk/sites/harlow/files/Discretionary%20Housing%20Payments%20form%209%202.pdf>> accessed 1 July 2016

<sup>14</sup> David Ghelani, ‘What Makes a Good Local Welfare Support and Conditionality Scheme?’ (*Welfare Conditionality*, 5 October 2015) <<http://www.welfareconditionality.ac.uk/2015/10/what-makes-a-good-local-welfare-support-and-conditionality-scheme/>> accessed 24 July 2017.

<sup>15</sup> *R (on the application of Hardy) v Sandwell Metropolitan Borough Council* [2015] EWHC 890 (Admin) [48] (per Phillips J).

<sup>16</sup> As the combined effect of Reg.B13 Housing Benefit Regulations 2006 and the Discretionary Financial Assistance Regulations 2001 are referred to repeatedly as by the Courts. See: *R (Hardy) v Sandwell Metropolitan Borough Council* [2015] EWHC 890 (Admin) [26] (per Phillips J); and *R. (on the application of Rutherford) v Secretary of State for Work and Pensions* [2014] EWHC 1631 (Admin) [44] (per Stuart-Smith J).

Actually, my spare room is basically a filing room now because of all this stuff. I have masses, volumes, folders, spilling over, full of all these letters.

### **Participant 9**

Others were anxious about what they should be writing on these forms to receive the DHP assistance; what was ‘correct’ or what would get them a ‘sanction’ in DHP funding:

But the thing is that I’m not very good at filling forms in... I don’t mind, as long as I’m not going to get any grief back from it. I don’t mind, but do find it hard, because my writing – I can do it, I can write – but I don’t do it correctly, where people understand, and last time I done that, I got myself into so much trouble, that’s why they sanctioned my money and all sorts like that.

### **Participant 5**

To limit the analysis here to merely the outcome – namely, whether a DHP is awarded or not – would omit these elements which are so central to the scheme’s operation. It would be a restricted focus on what Hoag describes as the ‘disarticulated bureaucratic event’:<sup>17</sup> an administrative outcome detached from the actual experience of being affected by the SSSC. The importance of the documents themselves and people’s experiences of these forms means that a study preoccupied with outcomes ‘enters the frame too late’;<sup>18</sup> by looking at the ‘knowledge format’<sup>19</sup> of these application forms we can analyse the importance of bureaucratic practice ‘without fetishizing the bureaucratic decision’.<sup>20</sup> An analysis of the material formats can also act as a ‘kind of

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<sup>17</sup> Colin Hoag, ‘Assembling Partial Perspectives: Thoughts on the Anthropology of Bureaucracy’ (2011) 34 *PoLAR: Political and Legal Anthropology Review* 81, 86

<sup>18</sup> Ibid.

<sup>19</sup> Mariana Valverde, *Law’s Dream of a Common Knowledge* (Princeton University Press 2003), 177.

<sup>20</sup> Hoag (n 17) 85.

epistemological reverse engineering’,<sup>21</sup> where both the ‘type of client implied’<sup>22</sup> and the knowledge assumed or required of them can be analysed; documents like application forms or evidence checklists are not simply ‘instruments of bureaucratic organizations’, but are instead constitutive of their ‘knowledge practices’.<sup>23</sup> Fundamentally, as argued by Finn et al, ‘documents help the state see their citizens, but that they also help researchers see the state’.<sup>24</sup>

This chapter is therefore a dedicated analysis of the ‘knowledge format’ of DHP application forms. The arguments below draw on data from both the SSSC interviews and the local authority vignette case studies. Illustrative examples of form excerpts are provided throughout which are taken from the analysis of 242 DHP application forms, as detailed in Chapter 5.<sup>25</sup> Responses to FOI requests made of individual local authorities are used to substantiate assertions about the use of internal DHP guidance.

To underscore the place of this analysis in the thesis as a whole, the first section revisits arguments in Chapter 2 and emphasises why the arguments put forward here are important in the context of a thesis which is focused on conceptual arguments over the home. Following this, there are four key sections. The first – ‘Assessment of income and expenditure: a proxy means test’ – focuses specifically on a phenomenon present throughout almost all DHP forms: long, and often seemingly arbitrary, income/expenditure tables, requiring claimants to substantiate their day-to-day spending in detail. The second – ‘Evidential requirements’ – focuses on the evidential obligations imposed on tenants applying for support. The third – ‘Folding work: constraining the client’s activity’ – focuses on questions asked and the physical layout

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<sup>21</sup> Wolfgang Ernst, ‘Media Archaeography: Method and Machine versus History and Narrative of Media’ in Erkki Huhtamo and Jussi Parikka (eds), *Media Archaeology: Approaches, Applications, and Implications* (University of California Press 2011).

<sup>22</sup> Srikant Sarangi and Stefaan Slembrouck, *Language, Bureaucracy, and Social Control* (Real Language Series, Longman 1996) 127.

<sup>23</sup> Matthew Hull, ‘Documents and Bureaucracy’ (2012) 41 *Annual Review of Anthropology* 251.

<sup>24</sup> Megan Finn et al, ‘Seeing with Paper: Government Documents and Material Participation’ in *Proceedings of the 2014 47th Hawaii International Conference on System Sciences* (HICSS ’14, Washington DC, USA, IEEE Computer Society 2014) 1517.

<sup>25</sup> See p.276.



of the DHP application format. The final section – ‘Initial conclusions and relation to the broader DHP scheme’ – draws the first three together to summarise how the arguments made within the individual sections relate to the broader issues in the thesis and the structure of the SSSC scheme more broadly.

## **2. What does this have to do with the home?**

The first half of this thesis put forward two sets of interrelated arguments. First, that the concept of home – namely, those social practices that theorists can effectively analyse as interrelated around the home – can be usefully conceptualised as a form of knowledge practice. Second, that discretion within the SSSC policy can be usefully analysed with reference to a distinction between structural and epistemic discretion.

Generally, the analysis of these documentary practices – such as application forms and so on – do not engage either of these literatures, having received (to my knowledge) no attention whatsoever in the field of home studies and generally examined only in passing within the broad literature on welfare bureaucracy.<sup>26</sup> It is worth briefly underscoring in this section why the points which follow are particularly important with in a thesis focused on theoretical arguments on the home.

First, consider the null hypothesis to my position: DHP application forms do not engage a theoretical consideration of the home. For a discretionary payment which is focused on an individual’s continued occupation of the home and is situated as ‘an integral part of housing benefit entitlements’,<sup>27</sup> the rejection of this null hypothesis appears inevitable. The focus of these decisions is not just about the provision of benefit for those in need of financial assistance, it is a decision about that household’s ongoing occupation of the home. Applicants are forced to justify their continual presence in the property and articulate their home interest within the confines of the application forms. People either will be supported in their occupation of the property

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<sup>26</sup> See, in particular, Sarangi and Slembrouck (n 22) 123–7 and Joe Soss, ‘Welfare Application Encounters: Subordination, Satisfaction, and the Puzzle of Client Evaluations’ (1999) 31 *Administration and Society* 50.

<sup>27</sup> *Hardy* (n 15) [48] (per Phillips J).

via a DHP award or not. As argued below, those areas which appear to bear little direct resemblance to the use of the dwelling – such as the income and expenditure tables – operate via proxy to indicate lifestyles which contaminate the consideration of home interests by administrative workers.

A particularly stark example is the relocation of individuals affected by the fire at Grenfell Tower and subsequent evacuations from other tower blocks deemed to be a particularly acute fire risk. As outlined in Chapter 4,<sup>28</sup> in response to the tragedy the government issued a circular stating that residents who are relocated to larger properties – and consequently subject to the SSSC or Benefit Cap – should be ‘treated as a priority’ for DHP support, either if they are relocated within or ‘outside the LA [local authority] area’.<sup>29</sup> There is no dedicated form for DHP support for these residents either within Kensington and Chelsea or in the surrounding boroughs; those affected, particularly in the latter, will be reliant on navigating the confines of the boxes and tables outlined below in order to access this support. Those evacuated from Chalcots Estate in the London Borough of Camden, for instance, have been directed to the council’s main DHP application page – and, consequently, their generic application form – for assistance.<sup>30</sup>

Second, and following from this first point, a central argument in Chapter 2 is that the concept of home can be usefully analysed with a focus on the ‘knowledge practices’ outlined by Valverde and others. Within this study, a key aspect of this approach is a focus on the ‘form and dynamic of knowledges’.<sup>31</sup> In other words, the way in which

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<sup>28</sup> See p.150.

<sup>29</sup> Department for Work and Pensions, ‘Housing Benefit Urgent Bulletin – Discretionary Housing Payments: Royal Borough of Kensington and Chelsea Grenfell Tower Fire’ <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/621451/u3-2017.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/621451/u3-2017.pdf)> accessed 10 August 2017.

<sup>30</sup> See Camden London Borough Council, ‘Discretionary housing payments claim form’ <<https://www.camden.gov.uk/ccm/content/housing/housing-benefit/file-storage-items/discretionary-housing-payments-claim-form/>> accessed 24 August 2017.

<sup>31</sup> See Mariana Valverde, ‘Theoretical and Methodological Issues in the Study of Legal Knowledge Practices’ in Martha Merrill Umphrey (ed), *How Law Knows* (Stanford University Press 2007). And Alain Pottage, ‘The Materiality of What?’ (2012) 39 *Journal of Law and Society* 167, 168.

those tenants applying for DHP support communicate their home interest through the structure of the application form is ripe for analysis. Regardless of their reasons for wanting to remain in the property, these claimants are forced to translate their interest through the prism of these forms which, as the documents that manage this process, consequently deserve detailed analysis.

Third, the consequence of these first two points is that a study of the home and the SSSC which does not consider these DHP application forms would be incomplete. Participants in this study – many of whom are quoted below – repeatedly underscored the importance of the DHP applications process, and the forms that feature as part of it, in their experiences of being affected by the policy. A focus entirely on their own constructions of home, without regard to how these feature in the process, would neglect the important role these ‘knowledge formats’ play.

The chapter now turns to a focused assessment of the content of these application forms set against data collected from the empirical strands underpinning this study. Each section analyses a different area of information requested from the claimant: income and expenditure information, evidential demands, and questions which pre-package the applicants’ responses.

### **3. Assessment of income and expenditure**

The assessment of income and expenditure, generally through the means of a table for inputting individual numerical values for predetermined items, is almost ubiquitous across DHP application forms. All 18 of the local authority participants used an application form with a detailed income/expenditure section and all referred to an assessment of this within their responses to the vignette study. Nine explicitly highlighted the importance of this process and stated that they would want to see the ‘full’, ‘total’, or ‘full breakdown’ of the household’s finances.

The detailed assessment of an individual’s income and expenditure is unsurprisingly not specific to the DHP scheme. Though not particularly common in the mainstream

benefits system,<sup>32</sup> it is seen elsewhere in the determination of support at the local level. For instance, when assessing whether an applicant is intentionally homeless for the purposes of being owed a housing duty under Part VII Housing Act 1996, it is not unusual to undertake an income and expenditure assessment of a similar variety as seen within the DHP application process to assess the ‘affordability’ of the accommodation vacated.<sup>33</sup>

A curious feature of this income and expenditure assessment is the difference in local authority approaches. In particular, the headings of income and expenditure used to guide the information-gathering requested of the applicant can vary substantially between authorities. A minority choose to provide blank space for applicants to give a complete account of their income and outgoings based on assumed knowledge of what is ‘out of the ordinary’ or otherwise (see **Example Excerpts 6.1**).

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<sup>32</sup> Determinations for welfare benefits are usually means-tested solely on the basis of income and capital, without accounting for level or reasonableness of expenditure. See, for instance, the discussion of the confines of income and capital assessments in *R v SBC ex parte Singer* [1973] 1 WLR 713.

<sup>33</sup> For an example of a case which turned on the income and expenditure information in this context, see *Terryann Samuels v Birmingham City Council* [2015] EWCA Civ 1051, where the appellants described the interpretation of the income/expenditure information by the local authority as ‘laughable’ [15] (per Richards LJ). Another example can be seen in *Khadra Farah v the Mayor and Burgesses of the London Borough of Hillingdon* [2014] EWCA Civ 359, where the local authority asserted that the accommodation was affordable as ‘some items in [the claimant’s] weekly expenditure [were] exaggerated for a family of 4 with 3 children being under the age of 11’ [9] (per Patten J).



These open-ended requests clearly place a sizable epistemological burden on affected tenants to identify and substantiate those areas of expenditure most likely to justify their continued occupation of the property. What is meant by those key prompts outlined in **Example Excerpts 6.1**, such as ‘out-of-the-ordinary’ expenses, is left entirely to the imagination of the individual completing the form.

This is, however, an approach only adopted by a minority of local authorities: no tenants interviewed in the course of this study had experienced this approach in their own applications and none of the local authority vignette participants utilised an application form designed in this way. The far more common approach is to provide long prescriptive tables requiring applicants to detail individual areas of expenditure, as detailed in **Example Excerpts 6.2**.

## Focus on Forms: Example Excerpts 6.2

### *Income and expenditure tables*

These income and expenditure tables can be very lengthy affairs and are not reproduced here in full. Instead, some example headings are provided to give an indication of the sorts of information requests these forms make of the applicants.

**Form source:** Doncaster Metropolitan Borough Council, ‘Application for Discretionary Housing Payment Support’ <<https://dmbcpublicwebsite.blob.core.windows.net/media/Default/CouncilTaxBenefits/Documents/Discretionary%20Housing%20Payment%20form.pdf>> accessed 24 July 2017.

Essential Spending	£ Weekly Amount	For official use
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Doncaster’s DHP form provides a total of 72 suggested areas of ‘essential spending’ within its income/expenditure assessment. The excerpt above displays the column headers, with all 72 items requiring a ‘weekly amount’. The parallel column labelled ‘For official use’ indicates to the applicant that these figures will be subsequently assessed by an administrative worker. Groups of expenditure are pulled together, such as under the ‘Housekeeping’ heading below:

Housekeeping		
Food including bread and milk		
Cleaning and toiletries		
Newspapers and magazines		
Cigarettes, tobacco and sweets		
Alcohol		
Laundry and dry cleaning		
Clothing and footwear		
Nappies and baby items		
Pet food		

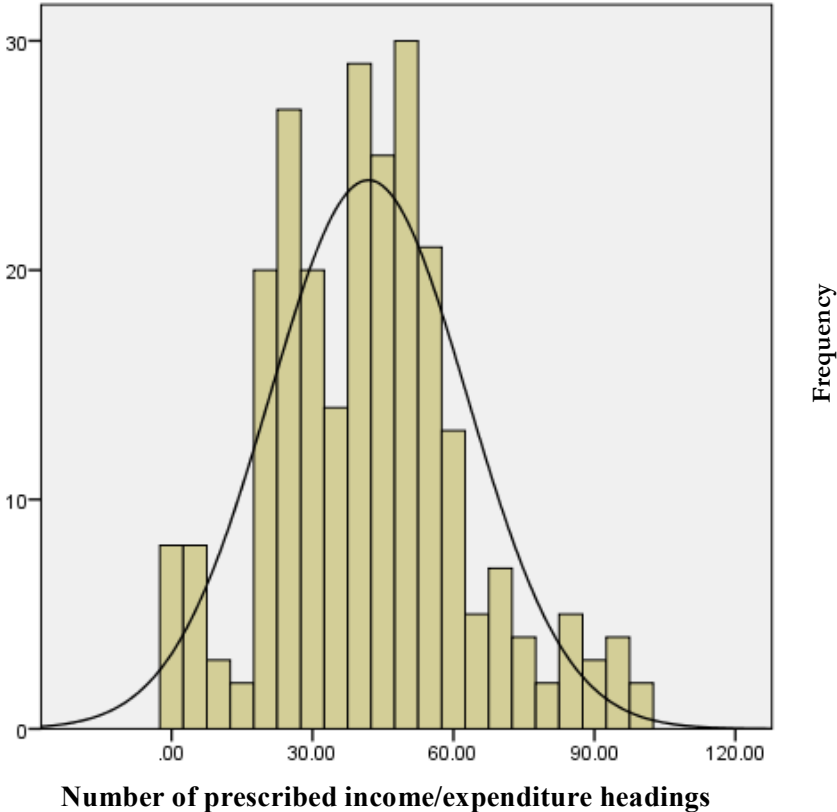
**Form source:** Taunton Deane Borough Council, ‘Application for Discretionary Housing Payment Support’ <<https://www.tauntondeane.gov.uk/irj/go/km/docs/CouncilDocuments/TDBC/Documents/Revenues%20and%20Benefits/DHP-DRCTL-claim-form-2015.pdf>> accessed 24 July 2017.

	OTHER EXPENDITURE		
75	Health (dentist, glasses, prescriptions)	£	every
76	Repairs (incl. window cleaning, maintenance)	£	every
77	Hairdressing / haircuts	£	every
78	Cable, satellite and Internet	£	every
79	TV, video and other appliance rental	£	every
80	School meals & meals at work	£	every
81	Pocket money and school trips	£	every
82	Lottery and pools etc.	£	every
83	Hobbies, leisure, sport (incl. pubs, gym)	£	every
84	Gifts (Christmas, birthdays, charity etc)	£	every
85	Vet Bills and insurance	£	every
86	Other (e.g. postage)	£	every
87	Other (e.g. Holidays)	£	every

Taunton Deane’s form has 101 income/expenditure headings, grouped in a similar way to Doncaster’s. The column to the right hand side provides limited space for the applicants to provide ‘notes’ to expand on their answers, however, this is limited to the (incredibly) tight confines of the table.

To provide an illustration of the diversity in approach, in the sample of 242 application forms used to inform the analysis in this chapter, the number of income/expenditure headings within the forms ranged from zero through to 102. **Figure 6.1** demonstrates a fairly normal distribution in between the two extremes, with a noteworthy standard deviation of 21 indicating that these income/expenditure tables do vary substantially in their design.<sup>34</sup>

**Figure 6.1:** A histogram of the number of prescribed income/expenditure headings within a sample of DHP application forms



The headings used in the course of this financial assessment are an important feature in the design of these forms. They list and group different headings of income and expenditure and, as a consequence, guide the process by which the applicant communicates their ‘lifestyle’ to the administrative officer. Such lists, as Young argues, programme action and ‘are thus never neutral’.<sup>35</sup> Decisions on how best to organise different expenditure headings, which to include and exclude, and how to

<sup>34</sup> The mean number of headings within the sample was 42.

<sup>35</sup> Liam Young, ‘On Lists and Networks: An Archaeology of Form’ (2013) 2 *Amodern: Network Archaeology* <<http://amodern.net/article/on-lists-and-networks>> accessed 24 July 2017.



group items together, demonstrate the importance of these lists in the DHP application process. Areas of ‘non-essential’ expenditure are pulled together into single boxes (such as the grouping of ‘cigarettes, tobacco and sweets’, ‘lottery and pools etc’), or specific items of expenditure are expounded on (for instance, the placing of milk within the assessment of expenditure on food, where the forms state ‘food, including bread and milk’ and ‘food and milk’).<sup>36</sup>

The way in which these forms organise earnings and expenditure information serves to limit the means by which it can be communicated to the administrative officer. These tables take a snapshot of income and expenditure at a given time within a household, generally requesting weekly breakdowns and evidence to substantiate the information. The assumption that household finances are managed in a linear and consistent fashion does not accord with what is known about how expenditure is managed in the home. The Joseph Rowntree Foundation’s report examining destitution in the UK<sup>37</sup> highlights how households living on low levels of income – including those out-of-work or in part-time work in receipt of Housing Benefit – often had a ‘limited degree of choice’ over their expenditure patterns, particularly where deductions had been made to benefit levels or when certain expenditure had to be prioritised over day-to-day living costs, such as travel costs to attend GP or hospital appointments.<sup>38</sup> Aside from these problems of unpredictability, the research also underscores the non-linear way in which low-income populations often exercise purchasing power, for instance, by stocking up on goods in some weeks to take advantage of cost-efficiencies and, consequently, spending less in subsequent weeks.<sup>39</sup> More broadly, research has repeatedly underscored the temporal dynamics of

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<sup>36</sup> Though not our immediate focus here, it is interesting to note that the forms often explicitly refer to bread and milk. Studies of living on low incomes have routinely pointed to them both as ‘household staples’, or the association of ‘bread and milk’ with low-income living. See Stephanie Baker Collins, ‘An Understanding of Poverty from Those Who Are Poor’ (2005) 3 Action Research 9, 19, and Elena Castellari et al, ‘Another Saturday Night: Food Stamp Timing and Monthly Consumption Patterns’ [2015] Available at SSRN. <<https://ssrn.com/abstract=2559615>> accessed 26 July 2017.

<sup>37</sup> Suzanne Fitzpatrick et al, ‘Destitution in the UK’ (Joseph Rowntree Foundation 2016).

<sup>38</sup> Ibid 36.

<sup>39</sup> Ibid 51.

expenditure in low-income households, with standard income and expenditure accounts often fluctuating between ‘negative’ and ‘positive’ results over short periods of time, with snapshot assessments not accounting for these fluctuations inherent in the challenges of living on low incomes.<sup>40</sup>

These income and expenditure tables also fail to account for the varied ways in which expenditure is managed or delegated at the household level. As an example, spending diary analysis has demonstrated the difficulty of accounting of the extra costs of disability – an area of particular importance within the SSSC framework, due to the emphasis within the DHP guidance on accounting for costs ‘committed to ... liabilities associated with disability’<sup>41</sup> and the widespread practice of local authorities ‘tak[ing] into account disability-related expenditure’.<sup>42</sup> For low-income households, however, the true costs of disability may not easily present themselves through an income and expenditure analysis. Instead, they can be ‘constrained by income’,<sup>43</sup> with household-level absorption in other areas of spending; for instance, higher levels of expenditure on food from members of the household with a disability may be ‘offset [by] reductions in spending on food for other members of the household’.<sup>44</sup>

The unpredictability of expenditure for households with disabled members was explicitly considered by the court when assessing the treatment of DLA as income under DHP award decisions in *R (on the application of Hardy) v Sandwell Metropolitan Borough Council* [2015] EWHC 890 (Admin). Justice Phillips determined that ‘the pattern of expenditure of a disabled person may well be different and more difficult to predict than that of an applicant without a disability’,<sup>45</sup> partly due

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<sup>40</sup> Mike Brewer et al, *Household Spending in Britain: What Can It Teach Us about Poverty?* (Policy Press 2006) 21.

<sup>41</sup> Department for Work and Pensions, ‘Discretionary Housing Payments Guidance’ (2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/524321/discretionary-housing-payments-guide.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/524321/discretionary-housing-payments-guide.pdf)> accessed 26 July 2017.

<sup>42</sup> *Hardy* (n 15) [39] (per Phillips J).

<sup>43</sup> Alison Matthews, Great Britain Department of Social Security and Philip Truscott, *Disability, Household Income and Expenditure: A Follow up Survey of Disabled Adults in the Family Expenditure Survey* (HMSO 1990) 31.

<sup>44</sup> *Ibid* 29.

<sup>45</sup> *Hardy* (n 15) [5] (per Phillips J).

to the problem that the ‘needs of the disabled may not be consistent or regular and may require considerable one-off expenditure’.<sup>46</sup> This problem with *expenditure* was addressed through a decision based on *income*; namely, that DLA should not be treated as income for the purposes of a DHP assessment. Problems with this position are dealt with elsewhere in this thesis,<sup>47</sup> but, for current purposes, it is clear that the non-linear reality of income/expenditure for households with disabilities, despite the linear expectations of the knowledge format, is widely acknowledged.

More fundamentally, however, as argued by Hirsch and Hill across a series of studies stemming from the Minimum Income Standard research programme, expenditure-based models relying on appraisal – What do you spend? – as opposed to budget standard models – What do you need to spend? – do not take into account unmet need for any classes of tenant affected by the SSSC, notwithstanding the acuteness of the issue for households with a disabled member.<sup>48</sup> The use of the income/expenditure tables as a proxy for lifestyle or need is therefore problematic; they may not indicate actual expenditure, nor accurately present actual need.

These problems were apparent in the tenant interviews, where the inability to convey the reality of everyday financial expenditure – and, importantly, how this relates to day-to-day living and lifestyle – was clear. Criticisms were levied directly at the income/expenditure tables within the form itself, with Participant 11 detailing how she took to ‘scribbling all over’ the application instead of containing her responses to the space and boxes provided to ‘make them think of the real world’:

The financial bit was very limited, because I went scribbling all over the form saying, well it’s all very well you want to know this bill and that bill – there was a lot they didn’t ask about. I volunteered the information to make them think of the real world. Of course, I did have to provide medical evidence to say that I’m on a small budget and I need this. **Participant 11**

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<sup>46</sup> Ibid.

<sup>47</sup> See p.369.

<sup>48</sup> Donald Hirsch and Katherine Hill, ‘The Additional Cost of Disability: A New Measure and Its Application to Sensory Impairment’ (2016) 31 *Disability and Society* 897, 900.

The technique of using these income/expenditure tables clearly serves to constrain an applicant's activity by preventing them from 'tell[ing] a whole story';<sup>49</sup> instead their function is 'packaging the client's case'<sup>50</sup> through the income/expenditure headings outlined as a proxy for determining their lifestyle (for instance, the issue of high cigarette expenditure).<sup>51</sup>

In packaging this information, the form's requirement for a linear articulation of an inherently non-linear spending pattern was also criticised, with tenants pointing to both the difficulty of standardising their expenditure where their lives lack such stability, and areas of the itemised income/expenditure headings which were particularly egregious to them, or indicative of a lifestyle which they felt was incorrectly assumed of them:

Basically, you know the criteria for qualifying? They're very confusing. They're not clear at all ... I just told them roughly what everything costs. I'm not used to having to weigh it up. Things like bus fares and food are easy, but things like clothes and stuff, I don't buy them that often. So they also said, do you have a TV? No! Do you have sky TV? No! I don't even have any TV. And I don't have the internet, no fancy phone or anything. **Participant 29**

Importantly for the arguments this chapter advances, tenants did not see the provision of financial information as a distinct, dis-attached means test limited to a simple assessment of their financial capacity. Instead, the provision of this information was seen as analysing their 'life' not just their financial arrangements:

... with the DHPs I just went through the pain barrier, and analysing all my life and my finances ... This detailed budgeting, I only ever do rough estimates and I get by on that. I felt like I was having to explain my life away ... it can make

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<sup>49</sup> Sarangi and Slembrouck (n 22). 129

<sup>50</sup> Ibid 129.

<sup>51</sup> This issue is considered in more detail at p.357. The issue of cigarette expenditure, in particular, has been controversial in the making of DHP awards. See Stuart Lowe and Jed Meers, 'Responsibilisation of Everyday Life: Housing and Welfare State Change' in *Social Policy Review 27* (Policy Press 2015) 65.

you feel a bit crap really, but it was all for a good reason. I thought, I'm going to go for this DHP if it's on offer – I thought if I don't try I'll never know.

### **Participant 30**

This experience of having to 'explain [their] life away' is indicative of the work this knowledge format is doing. The forms put forward a representation of the individual's lifestyle and how it relates to their home, with the income/expenditure tables acting as a 'bureaucratic construction'<sup>52</sup> to create the person 'through and within forms'.<sup>53</sup> The tenants do not detail their experience as one akin to applying for mainstream benefits through standard means-testing; they recognise the significance of how the information they are putting forward in these forms is going to be interpreted to make sense of their lives, not just their financial means.

#### **3.1.A proxy-means test: problems with the income/expenditure assessment**

Having outlined some of the key issues in operation of these income/expenditure tables and tenant's experiences of them, it is important to turn to their structure and interpretation. Given the central role played by these income/expenditure tables in the DHP application form, it is perhaps surprising that such a diversity of approaches exists across local authorities. Means-testing functions are generally – within the mainstream benefits system at least<sup>54</sup> – a standardised affair, with a uniform application process being imposed by the DWP for Housing Benefit assessment.<sup>55</sup> No such standard exists for DHPs. Where these lists of income/expenditure items, sometimes detailed at great length, come from and how these values are interpreted by

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<sup>52</sup> Hibou (n 8) 107.

<sup>53</sup> Grabham (n 7).

<sup>54</sup> These standardised application forms for means-testing benefits, such as Pension Credit or other mainstream elements of social security entitlement, have long come in for criticism for their capacity to dissuade applications, or for being overly complicated or intrusive. For a reflection on this with reference to Peter Townsend's writings, see Carol Walker, 'For Universalism and Against the Means Test' in *Fighting Poverty, Inequality and Injustice: A Manifesto Inspired by Peter Townsend* (Policy Press 2011) 138–40.

<sup>55</sup> The HCTB1 application form supplied by the DWP is statutorily underpinned by s.130(1) Social Security Contributions and Benefits Act 1992. Housing benefit is explicitly tied to this specifically formulated means-testing process.

the administrative workers are important when considering the function these forms fulfil.

The structural place they occupy within the SSSC scheme makes this even more problematic. Their purpose is generally characterised as a ‘stricter means test’<sup>56</sup> running parallel to the mainstream Housing Benefit determination under s.130 Social Security Contributions and Benefits Act 1992. However, this sits oddly alongside the wide discretion conferred to authorities under Reg.6(1) Discretionary Financial Assistance Regulations 2001. The determination of the award cannot be a means test in any robust capacity, as a local authority which imposed income/expenditure cut-offs or limitations would likely be unlawfully fettering their discretion. Indeed, Walker and Niner’s early study on DHPs indicated that benefit managers were well aware of the risks of ‘specifying the criteria for DHP in any detail’ for this reason.<sup>57</sup> Instead, local authorities must walk the line in between this position, with the knowledge format seemingly requiring information for a strict means test, whereas the detail provided can only feed into a broader assessment as a proxy for other things.<sup>58</sup>

When looking at the role of the application form in this process, there are consequently two key questions: (i) where these income/expenditure items come from, for instance, if they are refashioned means-test forms used for other benefits; and (ii) if local authorities provide internal guidelines or cut-offs on what amounts to reasonable or unreasonable expenditure, as if treating the assessment of income/expenditure within the DHP application process as a ‘stricter means test’.<sup>59</sup>

As outlined above, data collected from the local authority case studies points towards the importance of this income/expenditure element, but does not address the basis of the structure of the forms or any internal guidance. Instead, FOIs undertaken by the author have assisted in analysing this element of the income/expenditure tables. Using

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<sup>56</sup> *Carmichael* (n 12) [77] (per Lady Hale).

<sup>57</sup> Bruce Walker and Pat Niner, ‘The Use of Discretion in a Rule-Bound Service: Housing Benefit Administration and the Introduction of Discretionary Housing Payments in Great Britain’ (2005) 83 *Public Administration* 47, 60.

<sup>58</sup> For instance, the determination of lifestyle as indicated in the previous chapter.

<sup>59</sup> *Carmichael* (n 12) [77] (per Lady Hale).

the data on the nature of DHP forms, a range of authorities – some with extensive lists of income/expenditure items, others with far fewer – were asked to provide information on: (i) the source of the income/expenditure headings; and (ii) to provide any internal guidance used by administrative workers in their processing of them.

What emerges is a picture consistent with the local authority responses collected in the DHP form; an approach which does not operate as a ‘stricter means test’,<sup>60</sup> but instead is reliant on the use of the information provided as a proxy for other considerations.<sup>61</sup> Regarding the source of the income/expenditure tables, responses detailed the evolving nature of the items listed; these are generally not refashioned forms from elsewhere. Authorities underscored that they were ‘generated in-house’<sup>62</sup> as the ‘culmination of years of working on DHPs’,<sup>63</sup> with amendments taking place over time to ‘expand the headings to capture additional categories’.<sup>64</sup>

It was also clear that there was a lack of internal guidance offered to decision-makers, with decisions instead being made using the familiar mantras of a ‘case-by-case basis’<sup>65</sup> and ‘on its own merits’,<sup>66</sup> without ‘refer[ence] to any internal guidelines or documentation’.<sup>67</sup> Where guidance is offered for the staff tasked with processing the applications, it is redundant, offering largely meaningless recommendations which do little to materially assist with the determination of an award, such as:

You should only take reasonable expenditure into account. However, you need to remember that what is not reasonable for one individual/family maybe reasonable for another.<sup>68</sup> **Leeds City Council, Ref: FOI 2016/17577**

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<sup>60</sup> Ibid.

<sup>61</sup> Such as the assessment of ‘lifestyle’ detailed in the subsequent Chapter Seven.

<sup>62</sup> Doncaster Council – FOI/2016/5448

<sup>63</sup> Guildford Borough Council – FOI/2016/00330.

<sup>64</sup> Wakefield Council – FOI/2016/9620.

<sup>65</sup> Guildford Borough Council (n 63).

<sup>66</sup> Wakefield Council (n 64).

<sup>67</sup> Broadland District Council – FOI (no reference provided).

<sup>68</sup> Leeds City Council – FOI/2016/17577.

For example, housekeeping of £100 per week for a single person is considered to be too high, housekeeping of £15 is considered to be too low. Alcohol and tobacco can be reasonable in small quantities. We need to consider the quality of life of the customer.

It can be difficult to make a decision on the award of a DHP with no set criteria to follow, therefore examples of what to consider when making a decision are included below:

- Will a DHP safeguard [North Norfolk District Council's] residents in their homes? ...
- Will a DHP help those who are trying to help themselves? ...<sup>69</sup>

**North Norfolk District Council, Ref: FOI 2016/006827**

Consequently, even for those local authorities which offered guidance to their administrative staff, the knowledge format – the income/expenditure table – requires ‘common knowledge’ to act as a ‘supplement’<sup>70</sup> to its interpretation. In other words, the input for the income/expenditure assessment, the element which occupied the court in *R (on the application of Hardy) v Sandwell Metropolitan Borough Council* [2015] EWHC 890 (Admin), is only of secondary concern; the assessment is built on a far more transient assessment of what ‘reasonable expenditure’ or ‘quality of life’ means, and how this information can be inferred from the completed tables.

Therefore, when the court determines in *Hardy* that by refusing to discount DLA the local authority ‘fetters’<sup>71</sup> its discretion, the court is missing the nuance of the assessment of these income/expenditure tables. Hilson has argued that a policy which appears to be ‘non-fettering on [its] face’ is not always matched by ‘non-fettering in its application’.<sup>72</sup> Here, the inverse is true. The structure and form of these income/expenditure tables – asking for detailed financial breakdowns – seems to indicate the existence of some surreptitious bright-lines existing behind the scenes; in

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<sup>69</sup> North Norfolk District Council Procedures: Discretionary Housing Payments.

<sup>70</sup> Valverde (n 19) 178.

<sup>71</sup> *Hardy* (n 15) [43] (per Phillips J).

<sup>72</sup> Chris Hilson, ‘Judicial Review, Policies and the Fettering of Discretion’ [2002] Public Law 111, 112.



fact, the ‘common knowledge’ of administrative workers steps in. These income/expenditure tables work as a proxy for other more nuanced considerations, such as the individual’s lifestyle as indicative of their need to remain in the home, rather than being an end in their own right.

#### 4. Evidential requirements

I have already argued at length that DHPs occupy an anomalous position between discretionary assistance and a prescribed benefit. Cases fluctuate between characterising the payments as an ‘additional benefit’<sup>73</sup> or as Housing Benefit and DHPs as ‘separate benefits with separate rules applicable to them’,<sup>74</sup> through to being relegated to ‘additional support’<sup>75</sup> or ‘further financial assistance’.<sup>76</sup> The court, in *R (on the application of Michael Hardy) v Sandwell Metropolitan Borough Council v Zacchaeus 2000 Trust* [2015] EWHC 890, went further by situating the DHP scheme squarely as an ‘integral part of [Housing Benefit] entitlements’.<sup>77</sup> This is more than a mere semantic issue. As a system of support which runs parallel to the main Housing Benefits system, the extent to which DHPs impose their own superfluous requirements, and associated evidential thresholds, can demonstrate how the system does not fall *pari passu* with a statutory exemption.<sup>78</sup>

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<sup>73</sup> *R (Hurley and others) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2015] EWHC 3382 (Admin), [6] (per Collins J).

<sup>74</sup> *Burnip v Birmingham City Council, Secretary of State for Work and Pensions* [2012] EWCA Civ 629, [45] (per Henderson J).

<sup>75</sup> *R (SG and others) v Secretary of State for Work and Pensions (Child Poverty Action Group and another intervening)* [2015] UKSC 16, [37] (per Lord Reed).

<sup>76</sup> *R (on the application of Cotton and others) v Secretary of State for Work and Pensions* [2014] EWHC 3437 (Admin), [20] (per Males J).

<sup>77</sup> *Hardy* (n 15) [48] (per Phillips J).

<sup>78</sup> This issue in particular provided the focus of the court’s attention in the hearing for the joined cases *R (on the application of Rutherford) v Secretary of State for Work and Pensions* [2016], *R (on the application of A) v Secretary of State for Work and Pensions* [2016] EWCA Civ 29, where the equivalence between a right to a sum certain (under a statutory exemption) and the right to have one’s case considered for discretionary support (under DHPs) formed the basis of the oral submissions; see Jed Meers, ‘Hearing the “Bedroom Tax” Appeals: Themes in the Hearing for SR and A’ (SocialRights.co.uk 2015)

Evidential requirements imposed through the DHP forms and practices by local authorities constitute an important part of this consideration. The extent to which an equivalence can be argued between a right to a certain sum (in the form of a statutory exemption) and the right to have one's case considered for a DHP by a local authority, is heavily constrained if further evidential obligations are imposed on the latter.

The data collected in the course of this study suggests that the operation of the DHP scheme by local authorities is tied to an expansive range of evidential requirements – with associated deadlines, documentation or associated conditionality. Drawing on the vignette responses, tenant interviews, and example form-exerts, key elements of these evidential burdens are dealt with in turn: (i) requirements for income and expenditure evidence; (ii) evidence to substantiate adherence to conduct conditionality; (iii) evidence to substantiate room use; (iv) open-ended evidential requests; and (v) the presence of 'evidence checklists'.

#### **4.1. Additional evidence on income and expenditure**

The majority of local authorities in the case study responses required some form of additional evidence to substantiate the pervasive 'income/expenditure' sheets within the DHP applications, with bank statements often being required both to corroborate figures already indicated within the application and – importantly – to identify instances of expenditure deliberately not declared, or areas of declared expenditure which take a problematic form (for instance, food expenditure at fast-food outlets, or higher than average spending elsewhere).<sup>79</sup>

8 weeks up to date statements would be required for all bank, building society and post office accounts the customer has. This information is requested as it can often show additional expenditure the customer has not listed on occasions bank statements have shown capital the customer has not declared. The customer has 14 days to provide this information. We would require a full list of expenditure,

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<http://socialrights.co.uk/project/blog/hearing-the-bedroom-tax-appeals-themes-in-the-hearing-for-sg-and-a/> accessed 24 July 2017.

<sup>79</sup> As discussed in more detail in the next chapter in relation to the identification of payments from Starbucks and McDonalds, see p.380.

any expenditure listed that is higher than average would be questioned and evidence may be required. **Local Authority 26 (mid–high spend)**

I would request a full breakdown of her income and expenditure, firstly to ascertain exactly what she is spending her money on – our DHP forms request this info anyway and we would also ask for bank stats to support her application.

**Local Authority 22 (mid–low spend)**

The application forms themselves can often demand stringent evidence to support declared levels of income and expenditure. The evidential requirements indicated within the case study responses and the forms themselves include both specific requests for documents, particularly bank statements for the previous two months' expenditure, and broader indefinite requests for simply 'evidence' of 'all of your outgoings', as in Broxbourne's online DHP application form. Associated cut-off dates – such as the 14 days imposed by Local Authority 26 – are also evident, even if the reasoning behind their imposition appears entirely arbitrary.

### Focus on Forms: Example Excerpts 6.3

#### Evidential demands

Throughout the sample of forms there are a wide range of evidential demands imposed, particularly for the substantiation of income/expenditure information or specific requests for bank statements.

**Form source:** Broxbourne Borough Council, ‘Application for Discretionary Housing Payment Support’ <<https://www.broxbourne.gov.uk/resident-benefits/discretionary-housing-payment>> accessed 1 July 2016.

Please provide supporting evidence of:

1. All of your outgoings
2. Bank statements covering the last two months
3. Any arrangements to pay off arrears

File upload 1  no file selected

File upload 2  no file selected

Broxbourne Council’s online form provides ten file upload spaces for the previous two months of bank statements and evidence for ‘**all your outgoings**’. This is a particularly significant evidential requirement as the form itself details 27 headings for expenditure alone.

**Form source:** East Northamptonshire Council, ‘Application for Discretionary Housing Payment Support’ <[http://www.east-northamptonshire.gov.uk/site/scripts/download\\_info.php?downloadID=1047&fileID=3491](http://www.east-northamptonshire.gov.uk/site/scripts/download_info.php?downloadID=1047&fileID=3491)> accessed 24 July 2017.

**13. Please list all the bank accounts and other savings and/or invested money that you are your partner have including joint accounts. Please provide the last two months statements for each account. This includes overdrawn or seldom used accounts.**

East Northamptonshire Council’s request for two months’ worth of statements for all accounts – including those ‘**overdrawn or seldom used**’ is the more common approach taken by Local Authorities, rather than asking for substantiation of all expenditure listed.

**Form source:** Dudley Metropolitan Council, ‘Application for Discretionary Housing Payment Support’ <<http://www.dudley.gov.uk/EasysiteWeb/getresource.axd?AssetID=196137&type=full&servicetype=Attachment>> accessed 24 July 2017.

**E Your expenditure. You must supply proof of the following:**

	How Much Per Week £	Have you provided proof? If not, why not?
Gas		
Electricity		
Telephone		
Water Rates		

Dudley Metropolitan Council incorporates the evidential requirements into the income/expenditure form itself, with all 32 expenditure headings being accompanied by a column asking ‘Have you provided proof? If not, why not?’ There is very little physical space on the form to address any reasons why proof of expenditure may not be available.

Demanding evidential requirements for income and savings information is not in itself particularly noteworthy; it is a familiar practice at almost every juncture of the UK welfare state. As argued by Taylor-Gooby et al, within a liberal welfare state such as the UK, the ‘traditional liberal solution’ to any problem is ‘extended means testing’.<sup>80</sup> The practice here, however, is far removed from any understanding of ‘means testing’. Indeed, ‘individualised’ approaches to welfare delivery are often set against the ‘case-by-case’<sup>81</sup> approach which is attributed to the DHP scheme.<sup>82</sup> There is no *prima facie* eligibility on the basis of income and savings evidence, and the reasonableness – or lack thereof – of the expenditure evidence is taken into account.

Within more familiar means-tested approaches to income data, the evidence is an *end* in itself; an individual is eligible by virtue of the evidence presented of their income/savings or not, and this dividing line is often clearly delineated with a statutory footing.<sup>83</sup> Here, the income/expenditure data evidence is the *means* for the assessment of a non-delineated end. There are no earnings thresholds, no income disregards<sup>84</sup> and no passporting. The evidence requested in the forms is to support a consideration of the relative need of the applicant in a way which is not immediately discernible from the format itself.

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<sup>80</sup> Peter Taylor-Gooby et al, ‘Market Means and Welfare Ends: The UK Welfare State Experiment’ (2004) 33 *Journal of Social Policy* 573.

<sup>81</sup> DWP (n 41) para.3.9.

<sup>82</sup> Jane Millar, ‘Squaring the Circle? Means Testing and Individualisation in the UK and Australia’ (2004) 3 *Social Policy and Society* 67.

<sup>83</sup> For the statutory basis of this under housing benefit, see Part 6: ‘Income and Capital’, Housing Benefit Regulations 2006.

<sup>84</sup> The deceptively complicated position on the consideration of DLA following *Hardy* (n 15) is dealt with in the previous chapter.

#### 4.2.Evidence of compliance with imposed conduct conditionality

As discussed elsewhere in this thesis,<sup>85</sup> the imposition of ‘conduct conditionality’<sup>86</sup> is widespread in the practice of awarding DHPs.<sup>87</sup> Conditions levied are often tied with associated evidential requirements, particularly in repeat applications, to demonstrate that they have been discharged by the applicant. The failure to meet these accompanying requirements can serve, *prima facie*, to prevent further awards being granted. Internal local authority documents have described the imposition of conditionality in this fashion as ‘similar to the “claimant commitment”’ within Job Seeker’s Allowance/Universal Credit,<sup>88</sup> and as ‘good practice’.<sup>89</sup> This is not without problems: it could be argued that evidential requirements to demonstrate compliance with imposed conditionality are stretching what is permitted by the DHP regulatory scheme.

The underpinning regulations, under Reg.7 Discretionary Financial Assistance Regulations 2001 (SI 2001/1167), allow for the ‘provision of information’ by an applicant on the ‘particulars of the grounds of claim or, as the case may be, particulars of the grounds for a review’,<sup>90</sup> which is likely to cover income/expenditure information, but not further evidential requirements on other indirectly associated activity. The practice has come close to being directly considered by the courts. Permission was granted for a judicial review challenge to Westminster Council’s practice of requiring evidence of claimants (i) having effectively sought work and (ii) having searched for a more affordable property. Though, as with many judicial review

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<sup>85</sup> See the discussion of smoking in Chapter Seven at p.357.

<sup>86</sup> For more information on the growth of this form of welfare conditionality and its manifestation in the UK welfare system, see Beth Watts, ‘Welfare Sanctions and Conditionality in the UK’ (Joseph Rowntree Foundation 2014).

<sup>87</sup> See p.310.

<sup>88</sup> City of Lincoln Council, ‘Discretionary Housing Payment Policy’ (2015) para.4.1.

<sup>89</sup> Reading Borough Council, ‘Discretionary Housing Payment Policy’ (2015) para.1.5.

<sup>90</sup> See Reg.7 Discretionary Financial Assistance Regulations 2001 (SI 2001/1167) and also the antecedent s.69(2)(f) Child Support, Pensions and Social Security Act 2000.

challenges to such discretionary schemes, the challenge was settled before the full hearing.<sup>91</sup>

Notwithstanding these problems, the imposition of evidential requirements to demonstrate compliance with conditionality is widespread in the DHP applications process and, often, the conduct mandated is very specific. A series of examples are provided in Example Excerpts 5.4 from the local authorities' case study responses can serve to illustrate the approach taken at the point of a prospective original award to mandate conditions on any future reapplication:

If a further application was made, it is then we would want to see evidence of the jobs she has applied for, efforts to downsize, the cuts she has made in expenditure. If she hasn't taking up on any of our advice/guidance it is very unlikely another award would be granted despite her struggling to afford her shortfall. **Local Authority 28 (mid–low spend)**

I would make it clear to the customer that we would need to see evidence of what action she has taken, should she make another application. **Local Authority 25 (mid–high spend)**

If [the claimant] then re-applies for further assistance she would need to show supporting evidence of the steps taken to improve her circumstances. Further awards would be reduced or refused if no progress was being made. **Local Authority 25 (mid–high spend)**

All three of these examples deal with conditions imposed with the granting of the first award, on the basis that later awards are conditional on evidence of compliance being provided. This infers that the imposition of conditionality is dependent on the

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<sup>91</sup> See Heather Spurr, 'Council Faces High Court Challenge over Crisis Payment Conditions', *Inside Housing* (21 October 2014) <<https://www.insidehousing.co.uk/news/news/council-faces-high-court-challenge-over-crisis-payment-conditions-41619>> accessed 24 July 2016. and Mike Spencer, 'What Hope Has the Court of Appeal Left for Human Rights?' (Child Poverty Action Group 2014) <<http://www.cpag.org.uk/content/what-hope-has-court-appeal-left-human-rights>> accessed 24 July 2017.

circumstances advanced in the original application. The forms themselves, however, often force some consideration of conditionality or requisite evidence of compliance with certain conditions, in the course of filling out the form in the first instance application:



## Focus on Forms: Example Excerpts 6.4

### *Demands to substantiate conduct conditionality*

The DHP application forms frequently require applicants to indicate what they have done to ‘help themselves’ or to provide reasons for their inaction. These are generally broad questions which invite responses which address both capacity to mitigate one’s situation (for instance, the lack of available alternative properties or a lack of capacity to work) or reasons why the individual needs to remain in that specific property (because, for instance, it is significantly adapted and so on).

**Form source:** Doncaster Metropolitan Borough Council, ‘Application for Discretionary Housing Payment Support’ <<https://dmbcpublicwebsite.blob.core.windows.net/media/Default/CouncilTaxBenefits/Documents/Discretionary%20Housing%20Payment%20form.pdf>> accessed 24 July 2017.

What have you done to help yourself to resolve the difficulties you have in paying your rent? For example, have you tried to find smaller or more affordable accommodation, asked your landlord to reduce the rent, or sought help and advice with budgeting and managing your money? If you have not done anything to help yourself, please say why.

Doncaster’s form demonstrates the Janus-faced nature of the questions asked, with requests to either detail what you have done, or the reasons why you have not done anything. In common with the vast majority of Local Authorities, all re-applications are also assessed on the basis of this same form, meaning that this question must be answered by all re-applicants, regardless of the reason for their initial award (which may, for instance, be due to disabled adaptations made to the property).

**Form source:** Salford City Council, ‘Application for Discretionary Housing Payment Support’ <[http://www.salford.gov.uk/media/373766/discretionary\\_housing\\_payment\\_application.pdf](http://www.salford.gov.uk/media/373766/discretionary_housing_payment_application.pdf)> accessed 24 July 2017.

Please sign below to give us consent to contact Job Centre Plus to confirm your attendance on work related training / work experience

Your Signature: –

This requirement within Salford City Council’s form is on a page with a series of questions about conduct conditionality, including questions asking how many bids on alternative properties the applicant has made, and other steps they have taken to move to cheaper accommodation.

**Form source:** Hambleton District Council, ‘Application for Discretionary Housing Payment Support’ <[https://www.hambleton.gov.uk/downloads/file/540/dhp\\_form\\_2015](https://www.hambleton.gov.uk/downloads/file/540/dhp_form_2015)> accessed 24 July 2017.

Can you change your spending patterns on non-essential items? ie cigarettes, luxuries etc, in order to pay rent shortfall?

Are you taking any long-term action to help with the problems meeting your housing costs and if so, what action are you taking?

These two questions in Hambleton’s form sit alongside 15 others asking about the individual’s conduct and circumstances, including what the applicant has done to increase their hours at work or find a job, and whether they have considered letting their spare room(s) to a lodger.

The requirements outlined within the local authority responses to the DHP case studies, and the forms themselves, indicate the breadth of conduct which can require evidential substantiation from the applicant. Some are broad requests for an indication of activity taken to mitigate circumstances, imposing a ‘duty to help yourself’,<sup>92</sup> presupposing a particular conception of agency and personal responsibility.<sup>93</sup> This is reflected in Doncaster Council’s form in **Example Excerpts 6.4**, where applicants are asked both ‘What have you done to help yourself?’ and, inversely, ‘If you have not done anything to help yourself, please say why.’

Other approaches require the substantiation of specific conduct: how have you tried to increase your hours of work, have you cut down on non-essential expenditure, have you reduced travel costs? The requirement to seek work, or, if already employed, to seek more hours,<sup>94</sup> is a common feature in the DHP application forms and in the local authority case study responses. Strikingly, Salford’s DHP application form requires all applicants in receipt of Job Seeker’s Allowance to sign to give consent to the local authority to liaise with Job Centre Plus to confirm an individual’s participation in work-related activity.

This work-related conditionality, with associated evidential requirements, does not form part of key government claims about the efficacy of the SSSC. The government asserts, supported by the review of the policy undertaken by Clarke et al, that 20 per cent of those affected said they had ‘looked to earn more through employment ... as a result of the RSRS [removal of spare room subsidy]’.<sup>95</sup> It is assumed this is due to the imposition of the Housing Benefit penalty, according with the faith that a financial

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<sup>92</sup> Anne Daguette, ‘Welfare Reform in the United Kingdom: Helping or Forcing People Back into Work?’ in Anne Daguette (ed), *Active Labour Market Policies and Welfare Reform: Europe and the US in Comparative Perspective* (Palgrave Macmillan 2007) 68.

<sup>93</sup> Sharon Wright, ‘Welfare-to-Work, Agency and Personal Responsibility’ (2012) 41 *Journal of Social Policy* 309, 310.

<sup>94</sup> It is worth noting that approximately 15% of households affected by the SSSC have somebody in work. Those in receipt of any housing benefit are affected by the penalty. See DWP, ‘Evaluation of Removal of the Spare Room Subsidy: Final Report’ (Research Report No 913 2014) 51.

<sup>95</sup> This rose to 63% of those who had already identified themselves as being ‘unemployed and seeking work.’ See *ibid* 51.

sanction can ‘nudge’<sup>96</sup> claimants to address what is perceived as problematic conduct. The complicated dynamics presented here demonstrate that the position is likely to be more complicated, drawing local authorities and locally imposed (and enforced) conduct conditionality into the mitigation strand of the scheme.

The specific phenomenon of this work-related conduct conditionality within DHP awards also demonstrates an important problem of compound conditionality; namely, where one’s conduct within one strand of welfare provision is contaminant with another. Work-related conduct conditionality is already extensively practised under Job Seeker’s Allowance /Universal Credit,<sup>97</sup> with concerns already raised about the evidential basis for these decisions. As highlighted by Adler, 125,493 of those sanctioned in 2013 successfully challenged the decision on appeal.<sup>98</sup> Linking the exercise of conditionality within the Job Seeker’s Allowance /Universal Credit regime with work-related conduct conditionality within the DHP scheme demonstrates how one ‘regime of conditionality’ can ‘compound’ vulnerabilities already experienced elsewhere.<sup>99</sup>

Two potential scenarios can serve to demonstrate the problem. First, a recipient of Job Seeker’s Allowance may have work-related conduct conditionality imposed to assess a decision under the Discretionary Financial Assistance Regulations 2001, assessed through their compliance with work-related training parallel to the – otherwise wholly inconsequential – ‘work related requirements’<sup>100</sup> (as in Salford Council’s position, in Example Excerpts 5.4). Losing one means losing the other, despite both being statutory and intended to address completely disparate needs. Second, a recipient of Job Seekers’ Allowance, who may otherwise be meeting the evidential requirements imposed on them by Job Centre Plus for the continued receipt of their unemployment

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<sup>96</sup> Lowe and Meers (n 51) 62.

<sup>97</sup> For recent material on the lived-reality of this practice, see Sharon Wright and Alasdair Stewart, ‘First Wave Findings: Jobseekers’ (Welfare Conditionality 2016).

<sup>98</sup> Michael Adler, ‘A New Leviathan: Benefit Sanctions in the Twenty-First Century’ (2016) 43 *Journal of Law and Society* 195, 220.

<sup>99</sup> Del Roy Fletcher et al, ‘Gamers or Victims of the System? Welfare Reform, Cynical Manipulation and Vulnerability’ (2016) 24 *Journal of Poverty and Social Justice* 171.

<sup>100</sup> See s.49(3) Welfare Reform Act 2012 (replacing s.8 Jobseekers Act 1995).

benefits, may still be subjected to *additional* requirements to substantiate their job-search efforts in the DHP application process (as in the DHP case study responses, above), despite having met the evidential basis designed to ensure their engagement with work-related activity.

This striking position demonstrates the importance of the DHP application form as a knowledge format and its subsequent use and interpretation by the administrative officials who work with the information it provides. This parallel assessment of conduct conditionality, existing distinct from the mainstream benefits system and absent the associated regulatory control<sup>101</sup> or means of redress to a first-tier tribunal,<sup>102</sup> is shaped by these forms. Claimants are forced to address the issue in the manner outlined in the forms,<sup>103</sup> meet the evidential bar created and justify their conduct in relation to both the imposed conditionality and their own means.

A key consequence of the form itself acting as the means to communicate these requirements is that the evidential burdens are applied uniformly across all (re)applicants at the point they complete the form. The imposition of these obligations – particularly the requirement to demonstrate how an individual has changed their circumstances for the better, as required by some local authorities – posed particular problems for some participants with long-standing conditions (such as permanent disablement), who felt they were unable to argue their position within the confines of the forms. Participant 27 has a son with severe autism and suffers herself from a long-standing illness. Her argument for assistance was based on her son's use of the 'spare bedroom' as a sensory room, but, despite this, she remained subject to having to

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<sup>101</sup> For instance, under the Jobseekers Act 1995 and ch. 1 Welfare Reform Act 2012.

<sup>102</sup> S 1(a), para.6, Sch.7 Child Support, Pensions and Social Security Act 2000.

<sup>103</sup> As in the near-universal mantra present across DHP – and most other welfare benefits – application forms: 'You Must Complete All Sections of This Form.' To provide but a few examples, see Hartlepool Borough Council, 'Application for Discretionary Housing Payment Support' (no date) <[https://www.hartlepool.gov.uk/download/downloads/id/2132/application\\_for\\_discretionary\\_housing\\_payments.pdf](https://www.hartlepool.gov.uk/download/downloads/id/2132/application_for_discretionary_housing_payments.pdf)> accessed 24 July 2017; Chelmsford Council, 'Application for Discretionary Housing Payment Support' (no date) <<http://www.chelmsford.gov.uk/sites/chelmsford.gov.uk/files/files/files/documents/files/DHP%20Application%20Form.pdf>> accessed 24 July 2017.

substantiate efforts she had taken to improve her circumstances when re-applying for DHP assistance. She saw the form as being inadequate to provide the information she wanted to communicate, suggesting the staff should ‘come round here and see how we live’:

I know some people are taking the piss, and there are others that are genuine. And I felt I was being got at. That’s how I felt. I was being got at because of my circumstances. I used to say, come round here and see how we live. Come round here and see. But they don’t ... **Participant 27**

Participant 10, who suffers from spina-bifida,<sup>104</sup> was repeatedly required in the forms to account for her circumstances at the re-application stage, including action she had taken to improve her circumstances. Given the permanency of her condition, the forms did not allow her to adequately outline her circumstances; instead, she had to address these requirements – however superfluous to her own individual case – each time she applied. She saw this as a clearly disproportionate requirement:

What they need to understand, with the condition I’ve got ... [spina-bifida] ... it’s never, ever, going to get any better. It’s never going to improve, my situation, unless a miracle happens ... so, I mean it’s just daft when you get these forms. Like, they start off by saying – have your circumstances changed? – well, no. Then you go down the page they ask you virtually the same question in a round-about way – are you still disabled, what have you done? – it’s really stupid the way it’s done. I suppose they can’t be too careful. **Participant 10**

The limitations of applying blanket conditionality within the application forms lead to applicants trying to navigate the process by other means, such as calling the local authority or writing letters, to provide information which they could not communicate through the forms provided. Participant 11, who suffers from long-term health problems, called the local authority to explain why she could not meet the requirements imposed within the forms – in this case, bidding for alternative properties – after her application was rejected:

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<sup>104</sup> A permanent condition arising from the improper development of the spine, which can lead to life-long mobility problems and bowel incontinence.

I'm 100% truthful as a person, that's the way I choose to be ... I did make it clear that I was looking and looking and looking on these silly websites ... Well I was trying and trying ... I spoke to the man about the DHP – can you please pay it for me – at the council. A very nice gentlemen, a sensible age-group like us, not a kid in their twenties ... He said whilst I'm looking at your application, I can't make you any promises ... I did say in the first year, if you can't help me with it entirely, is there anyway you could help me some of it? You know, I did make that sort of offer, sort of plea. Please don't make me pay the £16, I've no idea how I'll manage. **Participant 11**

Others who contacted the authority directly were met with a more abrupt response, as was Participant 12's experience:

I actually phoned up [the LA] and said to them, look I've re-applied for my DHP, you know, and to be quite honest, the gentleman I was put through spoke to me like I was some kind of imbecile. He said, 'you do know it is discretionary', I said, yeah, I'm not thick! Speaking to me like I'm a child. **Participant 12**

The participants' experiences demonstrate that these evidential requirements to substantiate conditional elements within the application forms do not always accord with the information that the applicant is trying to communicate. A blanket 'duty to help yourself,'<sup>105</sup> resting on a certain conception of individual agency and personal responsibility,<sup>106</sup> sits awkwardly alongside tenants affected by the penalty who have long-term conditions or otherwise lack the capacity to meet conditional requirements, and those who are seeking support on the basis of the use of the spare room, where behavioural factors seem irrelevant to the information they are seeking to advance.

### **4.3.Room use**

The third cluster of evidential requirements focus on the use of the 'spare' bedroom. Though DHP forms almost always ask for details of room use, or allow space for the

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<sup>105</sup> Daguerre (n 92) 68.

<sup>106</sup> Wright (n 93) 310.

articulation of household configuration as the reason for applying for discretionary assistance, evidential requirements are generally limited to requests for supporting ‘medical evidence’. This arose on multiple occasions throughout the DHP case study responses in relation to Sarah and Ian’s cases:

Has he got medical evidence to show he needs a separate bedroom from his partner – we could consider a move to a 2 bed, if not a 1 bed. **Local Authority 32 (high spend)**

We would also look at the level of medical equipment needed in the property to see if a room disregard could be allowed if sufficient medical evidence is supplied. **Local Authority 27 (mid–high spend)**

We would request medical evidence for her son’s learning disabilities to see how severe they were. **Local Authority 29 (mid–high spend)**

The point to underscore is that the evidence requested here is not to ascertain a general level of disability or immobility, as handled elsewhere in the benefits system.<sup>107</sup> Rather, the evidence supplied is tied to the occupation of the property: why the disablement warrants ‘extra’ space, or to justify why the lifestyle advanced in the income/expenditure assessment does not meet the administrative worker’s view of ‘normal’ expenditure. Consequently, there is no passporting of provision; for instance, meeting a certain component of DLA/PIPs does not *prima facie* indicate that one has met the evidential basis to require a bedroom allowance above that permitted under the SSSC regulatory scheme.<sup>108</sup>

The forms themselves structure the provision of medical evidence in this same way:

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<sup>107</sup> For instance, as one may expect to consider entitlement under s.77(2) Welfare Reform Act 2012 for the determination of personal independence payment eligibility.

<sup>108</sup> Assuming that the household does not meet the threshold for the limited statutory exemptions (for instance, for adults requiring overnight care) built into Reg.B13(6) Housing Benefit Regulations 2006/213.

## Focus on Forms: Example Excerpts 6.5

### *Evidential requirements on the use of the 'spare' room*

The majority of Local Authority forms provide some space for detailing how the 'additional' room is used, or more broadly, how the home space is occupied. Those which do not address the issue directly roll room-use evidence into catch-all questions, such as 'Please explain your reasons for applying for a DHP award.' Space is often limited, the questions tend to presuppose only certain room uses (such as for storing medical equipment) and evidence is required. The two examples here demonstrate the approach taken by authorities who directly address this issue of room use.

**Form source:** Chelmsford City Council, 'Application for Discretionary Housing Payment Support'  
<<http://www.chelmsford.gov.uk/sites/default/files/documents/files/Application%20Form%20for%20Discretionary%20Housing%20Payments.doc>> accessed 24 July 2017.

**15. If you have been told you have more bedrooms than you need, tell us what this extra bedroom is used for, for example you may be a couple that cannot share because one of you is disabled. Please give us as much information as you can and provide supporting evidence**



Chelmsford asks the claimant to identify the 'extra' room and explain its use, with a *Carmichael*-class of adults unable to share by reason of disability highlighted as an example of a legitimate use of a bedroom. Supported evidence is required to substantiate any assertions. Although the question itself is fairly broad, this evidential requirement and the example given serve to frame the nature of this question to the applicant.

**Form source:** Haringey Council, 'Application for Discretionary Housing Payment Support'  
<[http://www.haringey.gov.uk/sites/haringeygovuk/files/982\\_4\\_dhp\\_form\\_a4\\_8pp\\_final\\_web.pdf](http://www.haringey.gov.uk/sites/haringeygovuk/files/982_4_dhp_form_a4_8pp_final_web.pdf)> accessed 24 July 2017.

**Are there medical reasons why you or your partner or any members of the household, including children, need a separate bedroom? Please provide details and original documentary evidence of the medical condition.**



Haringey's question is far more narrowly put, focusing exclusively on 'medical reasons' for additional bedrooms. Adjacent to this box is a series of tick-boxes asking the applicant about whether the applicant has external overnight carers who require additional room space and the frequency of their stays. Substantiating 'original documentary evidence' is required.



The framing of this evidential burden is significant as it requires tenants to substantiate what are perceived as non-standard living arrangements in the home, with the implicit assumption that non-conformity to the assumptions in the room standards will be due to a medical problem of some sort as opposed to other reasons.<sup>109</sup> Brown's analysis of what he describes as the 'sexual politics of austerity' demonstrates the problems in this assumption and associated evidential burden. Standard domestic arrangements – namely, partners sleeping in the same bed<sup>110</sup> – are deemed worthy of 'privacy and respect',<sup>111</sup> whereas non-standard arrangements are dismissed as 'spare, unoccupied, or vacant'.<sup>112</sup>

A further example is the room allocation for children in the household. Again, the route for the substantiation is through medical evidence, for instance, with local authorities requesting medical evidence to substantiate Julie's son's learning difficulties within the DHP vignette study.<sup>113</sup> Decisions about the domestic arrangement of bedrooms for children may not accord with the strict requirements of medical evidence. Children's use of bedroom space is something that is well established to be 'contextualised by a range of broader social and cultural processes',<sup>114</sup> and associated parental decisions on room allocations may be taken in the 'complex context of young people's uses of their bedrooms as spaces in the family home'.<sup>115</sup>

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<sup>109</sup> Under Reg.13D Housing Benefit Regulations 2006/213

<sup>110</sup> The regulations specify one bedroom for a couple (as defined under s.130E Social Security Contributions and Benefits Act 1992) under Reg.13D(3)(a) Housing Benefit Regulations 2006/213.

<sup>111</sup> Gavin Brown, 'Marriage and the Spare Bedroom: Exploring the Sexual Politics of Austerity' (2015) 14 ACME 985.

<sup>112</sup> Ibid.

<sup>113</sup> See p.243.

<sup>114</sup> Kate Bacon, 'Children's Use and Control of Bedroom Space' in *Families, Intergenerationality, and Peer Group Relations* (Geographies of Children and Young People, Springer 2016) 21.

<sup>115</sup> Sian Lincoln, "'My Bedroom is Me": Young People, Private Space, Consumption and the Family Home' in *Intimacies, Critical Consumption and Diverse Economies* (Palgrave Macmillan 2015) 88.

What medical evidence is in the context of domestic arrangements, or to what extent local authorities would consider the evidence provided as something linked to the need to occupy ‘extra’ space above the room standard, is not clear. An example of a potentially problematic area is mental health. Aside from studies which point to the importance of one’s own bedroom space as an ‘enabling place’<sup>116</sup> for those who suffer from certain forms of mental health problems, symptoms can often manifest themselves in more than simply the immediate occupation of bedrooms as places to sleep. For instance, Mervyn Drage – a claimant in *Carmichael*<sup>117</sup> – suffers from obsessive compulsive disorder, meaning all three of the bedrooms in his property are filled with papers and other items that he has accumulated.<sup>118</sup> The local authority granted a DHP for 6 months for one room.<sup>119</sup> The evidential basis for this decision is unclear, as is the treatment of evidence regarding mental health issues as against forms of physical disability.

#### **4.4.Open-ended evidential requests**

In addition to the specific requests for evidence outlined above, the forms often refer far more broadly to a request for ‘any evidence’ that could support a claim. These open-ended evidential requirements push the responsibility onto the claimants to identify and provide any information they deem to be relevant, whether or not it substantiates material already handled in the course of the DHP application form or it relates to information for which no explicit question existed. Open-ended requests for relevant evidence are not completely absent from other areas of social security within the UK. However, these are commonly subject to tighter regulatory control in a way is absent from the DHP application process. For instance, the ‘onus of proof rule’<sup>120</sup> in income support and Job Seeker’s Allowance claims requires applicants to provide evidence to substantiate assertions made in the course of the application, but this

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<sup>116</sup> Cameron Duff, ‘Exploring the Role of “Enabling Places” in Promoting Recovery from Mental Illness: A Qualitative Test of a Relational Model’ (2012) 18 *Health and Place* 1388, 1391.

<sup>117</sup> *Carmichael* (n 56).

<sup>118</sup> *Ibid* [5] (Appendix 1).

<sup>119</sup> *Ibid*.

<sup>120</sup> Reg 4(1B) Social Security (Claims and Payments) Regulations 1987/1968.

process is subject to tight statutory control. An individual can be exempted from the requirement if:<sup>121</sup> it is not reasonably practicable for the claimant to provide it;<sup>122</sup> the individual requires assistance to provide the evidence which is not forthcoming; or ‘sufficient information’ has already been provided.<sup>123</sup>

Such open-ended evidential requirements, existing neither with regulatory control nor access to a First-Tier Tribunal for redress,<sup>124</sup> are particularly problematic in a scheme designed to mitigate the impact of the SSSC (and other policies, such as the Benefit Cap and changes to LHA) on populations which may otherwise receive a statutory exemption. Rather than offering clear requirements for evidence required to substantiate eligibility criteria, their open-ended nature leads to a ‘problem of vagueness’<sup>125</sup> – where requirements placed on the applications are not known until it is too late to redress them.<sup>126</sup>

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<sup>121</sup> Ibid Reg.4(1B)(a)(i).

<sup>122</sup> Ibid Reg.4(1B)(a)(ii).

<sup>123</sup> Ibid Reg.4(1B)(e).

<sup>124</sup> As outlined in para.6(1)(b), Sch.7 Child Support, Pensions and Social Security Act 2000, where appeal rights to the First-Tier Tribunal do not apply, inter alia, for payments which fall outside of para.6(1)(a), Sch.7, but are not of a prescribed description (namely, discretionary benefits do not carry the appeal right in this context).

<sup>125</sup> John Denvir, ‘Controlling Welfare Bureaucracy’ (1974) 50 Notre Dame Law Review 457, 460.

<sup>126</sup> This problem is sometimes treated instead as one of policy implementation, with vague and unclear eligibility requirements being dismissed as part of the ‘black box’ effect present in welfare bureaucracies. For an example, see Evelyn Z Brodtkin, ‘Inside the Welfare Contract: Discretion and Accountability in State Welfare Administration’ (1997) 71 Social Service Review 1; and Dennis Palumbo and Donald Calista, *Implementation and the Policy Process: Opening Up the Black Box* (Contributions in political science, Greenwood Press 1990).

## Focus on Forms: Example Excerpts 6.6

### *Open-ended evidential requests*

On the front-page of DHP application forms or within enclosed explanatory notes, open-ended evidential requests – such as the excerpts below – are common. As they are not tied to specific questions or pieces of information, but instead refer to the application form as a whole, they potentially create a very sizable evidential burden on applicants; especially those who have detailed complicated circumstances when completing the form which do not lend themselves easily to documentary substantiation. Key sections of the forms below are highlighted in blue.

**Form source:** Bristol City Council, ‘Application for Discretionary Housing Payment Support’

<[https://www.bristol.gov.uk/documents/20182/34676/BD6112%20-](https://www.bristol.gov.uk/documents/20182/34676/BD6112%20-20Discretionary%20Housing%20Questionnaire_Jan2015.pdf/5351e00a-668f-4e5e-8bf6-8cd53c6418f1)

[20Discretionary%20Housing%20Questionnaire\\_Jan2015.pdf/5351e00a-668f-4e5e-8bf6-8cd53c6418f1](https://www.bristol.gov.uk/documents/20182/34676/BD6112%20-20Discretionary%20Housing%20Questionnaire_Jan2015.pdf/5351e00a-668f-4e5e-8bf6-8cd53c6418f1)>

accessed 24 July 2017.

*You must provide any information that is relevant to your claim to help us assess your entitlement and come to a decision. It would also help us better understand your DHP claim if you provide evidence of any circumstances you describe, for example: a letter from your doctor that confirms a medical condition or evidence of your foster care arrangements.*

The request for relevant information and evidence to substantiate circumstances described in the form have the potential to be very wide-ranging, especially as Bristol’s application form asks about the use of the spare room, the reasons for choosing the property, and 57 headings of income/expenditure.

**Form source:** Chelmsford Council, ‘Application for Discretionary Housing Payment Support’

<[http://www.chelmsford.gov.uk/sites/chelmsford.gov.uk/files/files/files/documents/files/DHP%20Application%](http://www.chelmsford.gov.uk/sites/chelmsford.gov.uk/files/files/files/documents/files/DHP%20Application%20Form.pdf)

[20Form.pdf](http://www.chelmsford.gov.uk/sites/chelmsford.gov.uk/files/files/files/documents/files/DHP%20Application%20Form.pdf)> accessed 24 July 2017.

### **Filling in the form**

**Give us as much information you can about why you cannot pay your rent or council tax. Send in any evidence that you think will help us make a decision. You may be asked to provide evidence in support of your application for Discretionary housing payment, we will write to you about this**

In their joint DHP/Council Tax Reduction Scheme form, Chelmsford makes the open-ended request for ‘any evidence’ that the applicant considers may help with their application, regardless of whether it accords with information provided within the form itself or not.

**Form source:** South Somerset District Council, ‘Application for Discretionary Housing Payment Support’

<[https://www.southsomerset.gov.uk/media/442944/discretionary\\_housing\\_paymentp.pdf](https://www.southsomerset.gov.uk/media/442944/discretionary_housing_paymentp.pdf)> accessed 24 July

2017.

**Please answer the questions on this form fully providing any evidence you have to support your application. Also please provide your bank statements for the last 9 weeks.**

South Somerset frames its open-ended evidential requirement as the need to ‘fully provid[e] any evidence’ to support assertions made in response to its 11 questions and 30 expenditure headings. It also requires bank statements for the last 9-week period. A small additional box is provided at the end of the form which asks ‘Is there any other information you would like to be considered?’

#### 4.5.Evidence check-lists

Though requests for supporting evidence are frequently made in the course of the questions asked in the forms themselves, sometimes they are accompanied by the requirement to complete an ‘evidence check list’. These are lists of different documents or areas to substantiate, accompanied with a tick box for the applicant to indicate their compliance. As they can serve to clarify relevant documentation required in a benefits application, they have been identified as best practice when used in the context of other benefits,<sup>127</sup> and as a means of assisting those affected by the SSSC in making DHP applications.<sup>128</sup> In practice, their use within the DHP application process is more complicated. **Example Excerpts 6.7** provides examples.

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<sup>127</sup> Improvement Service, ‘The Scottish Government Support Services Pilots’ (Scottish Government Support Services Pilots 2014) <[http://www.improvement.service.org.uk/documents/welfare\\_reform/key-learning-from-the-scottish-local-authority-pilots.pdf](http://www.improvement.service.org.uk/documents/welfare_reform/key-learning-from-the-scottish-local-authority-pilots.pdf)> accessed 24 July 2017.

<sup>128</sup> East Kent Housing, ‘Welfare Reform Strategy’ (2014) <<http://meetings.eastkenthousing.org.uk/mgconvert2pdf.aspx?id=76530>> accessed 24 July 2017.

## Focus on Forms: Example Excerpts 6.7

### Evidence checklists

**Form sources:** (right) Solihull Council, ‘Application for Discretionary housing Payment Support’ <[http://www.solihull.gov.uk/Portals/0/WelfareReforms/Discretionary\\_Grant\\_Application\\_Form.pdf](http://www.solihull.gov.uk/Portals/0/WelfareReforms/Discretionary_Grant_Application_Form.pdf)> accessed 24 July 2017; (left) Blaby District Council, ‘Application for Discretionary Housing Payment Support’ <<https://www.blaby.gov.uk/EasySiteWeb/GatewayLink.aspx?aId=10229>> accessed 24 July 2017.

The two examples to the right demonstrate varieties of ‘evidence checklist’ which are sometimes included as part of the DHP application form itself. These structured lists are not as common as the more general evidential requirements listed above, but when they do arise they serve to indicate the sizeable evidential burden placed on the applicants applying for support.

Aside from the more predictable requests to substantiate income (albeit ones which would overlap with obligations for the original housing benefit claim),<sup>1299</sup> both contain more problematic elements, such as wide-ranging ‘proof of expenditure’ including non-itemised ‘other expenditure’ or ‘evidence of other money paid out’. Solihull also requires ‘evidence of need’, with a broad range of illustrative examples – such as letters from support workers or health professionals – provided to indicate the type of evidence requested.

Both forms state that in order to comply, applicants must supply original copies of the relevant documents. Blaby District Council bluntly states its position at the top of the ‘Evidence check list’ page by stating: ‘If you do not show us all the proof we need we will not be able to process your request.’ It states that the sizable list – 23 separate items – is ‘not exhaustive’, expecting applicants to identify themselves where further evidence is required.

Section 4. EVIDENCE	
Please tick the boxes to tell us what you have provided. See original documents, not copies. If you are not sure please contact us for more information. If you request. The following is a list of documents that we need to process your request. If you are not sure please contact us for more information.	See original documents, not copies. If you are not sure please contact us for more information. If you request. The following is a list of documents that we need to process your request. If you are not sure please contact us for more information.
<b>Proof of Income</b>	Tick (✓)
Wages—payslips latest 2 if month	
Sick or maternity pay—payslips latest 2 if month	
Social Security Benefits—award letters	
Pensions—payslips showing or letters	
Maintenance or Child Support Allowance	
Proof other Income	
Bank statements evidencing the amount	
<b>Proof of Expenditure</b>	Tick (✓)
Proof of rent paid—receipts/rent book	
Proof of mortgage repayments and interest	
Utility Bills—Electric, Gas, Water, Council Tax	
Broadband/Satellite/Cable/Subscription	
Childcare costs	
Credit card repayments / Catalogue	
Motoring Expenses—Insurance documents	
Insurances—House, Life, medical	
Proof other expenditure	
Bank statements evidencing the amount	
<b>Proof of Debts</b>	Tick (✓)
Proof of Mortgage, second mortgage	
Proof rent Arrears—rent statements	
Loans—proof loan repayments, and interest	
Utility Debts—Proof of Gas Electric	
Maintenance arrears—Child Support	
Tax Bills - proof outstanding Tax on	
<b>Any Other Evidence Provided</b>	Tick (✓)

Evidence check list	
Please provide evidence relating to the items listed below. Evidence not included with this application for support will be rejected. Please do not send valuable items.	
We will take the details we need and process your request. If you are not sure please contact us for more information.	
By providing evidence that is factual and accurate you are helping us to process your request efficiently. Please note: this information is for your information only. We will not receive supporting evidence if you do not provide it. If we request further information we will be rejected. If we request further information we will be rejected. If we request further information we will be rejected.	
<b>Evidence of Identity</b>	<input type="checkbox"/>
Such as a birth certificate, passport, UK resident permit or recent gas or electricity bill. Provide evidence of these documents for each person living in the property.	
<b>Evidence of household expenditure</b>	<input type="checkbox"/>
The last two months bank statements, full bank statements, statements re purchase agreements, credit card statements, ISA's, stocks, post office account statements.	
<b>Evidence of earnings</b>	<input type="checkbox"/>
This means the last five payslips if you are paid every two weeks or every month. If you or your partner are self-employed provide accounts for the last financial year or 12 months, a summary of your trading.	
<b>Evidence of other income</b>	<input type="checkbox"/>
Such as pension slips from a previous employer, support agency letter. We also need you for board and lodgings and maintenance.	
<b>Evidence of benefits, allowances</b>	<input type="checkbox"/>
Such as award notices, letters from award notices for Tax Credits.	
<b>Evidence of other money paid out</b>	<input type="checkbox"/>
Such as letters about student grants from registered child carers, direct payments.	
<b>Evidence of need</b>	<input type="checkbox"/>
Such as letters of support from social workers, notes from GP's or hospitals; assessment reports from health and social care professionals about your health and needs; reports from engineers or repair services; correspondence from social, health and care professionals; inspection or safety check reports; residence by care homes, hospitals, accommodation; letters of support from support workers and other organisations.	

<sup>1299</sup>

See Reg.86(1) Housing Benefit Regulations 2006/213.

In addition to indicating the sheer breadth of the evidential burden placed on applicants for DHPs, these ‘evidence check-lists’ show the potential for elements of the knowledge-gathering exercise for a DHP decision – intended to be taken on a ‘case by case basis’<sup>130</sup> – to become ‘codified and proceduralised’.<sup>131</sup> As Evans argues, how the necessary ‘body of knowledge is formulated’ for decision-makers is important, with standardising processes such as check-lists serving to undermine ‘their claims to specific qualities and skills’.<sup>132</sup> The lists of evidential requirements detailed here, though demonstrating the broad evidential burden falling on applicants for assistance, are inherently limiting in their remit. Bank statements, broadly framed ‘evidence of need’, proof of expenditure and so on, require the applicant to comply with wide-ranging requests for documentation because *the form* demands it, not because it is pertinent to the basis of their claim for discretionary assistance. An individual’s bank statements are unlikely to assist a claimant applying for assistance whose case turns on the use of the spare room, for instance, because of its use for storing medical equipment.

These check-lists also demonstrate the capacity of overlapping evidential requirements to exacerbate the ‘cumulative impact’ inherent in the welfare reform agenda already detailed elsewhere throughout this thesis.<sup>133</sup> This impact is more than just financial; overlapping administrative requirements to repeatedly resubstantiate one’s identity, income or other information, in this instance both for the initial Housing Benefit claim<sup>134</sup> and then the subsequent DHP application, can erect barriers to establishing access to what has been described by Justice Phillips as an ‘integral part of [Housing Benefit] entitlements’.<sup>135</sup> Such ‘bureaucratic hurdles’,<sup>136</sup> such as the evidential burdens

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<sup>130</sup> DWP (n 41) 14.

<sup>131</sup> Tony Evans, *Professional Discretion in Welfare Services: Beyond Street-Level Bureaucracy* (Routledge 2016) 61.

<sup>132</sup> Ibid.

<sup>133</sup> See p.410.

<sup>134</sup> For the statutory footing of this assessment under housing benefit, see s.130(1) and (3) Social Security Contributions and Benefits Act 1992.

<sup>135</sup> *Hardy* (n 15) [48] (per Phillips J).

<sup>136</sup> Lorne Sossin, ‘Boldly Going Where No Law Has Gone Before: Call Centres, Intake Scripts, Database Fields and Discretionary Justice in Social Welfare’ (2004) 42 *Osgoode Hall Law Journal* 363, 365.

imposed within these ‘evidence check-lists’, can effectively serve as ‘*de facto* disentitlement’,<sup>137</sup> where claims go unsubmitted due to the necessary documentation not being available or potentially engaged in parallel application elsewhere.<sup>138</sup>

These check-lists demonstrate the sizable and repetitive evidential burden placed on applicants, which can serve to exacerbate ‘applicant fatigue’.<sup>139</sup> The problem has been developed by Cowan and Halliday in the context of homelessness decision-making, where they highlight that the phenomenon is ‘not simply a product of individual vulnerability’, but can instead be ‘exacerbated by perceived delay in, or complexity of, the bureaucratic process’.<sup>140</sup> In this context, therefore, these evidential requirements to substantiate need or other concomitant issues (such as room use) can themselves discourage those very applicants they are seeking to identify. The issue is, however, even more acute within the DHP process given the time-limited nature of awards; instead of navigating multiple layers of administration, tenants must persistently renavigate the same administrative requirements at the end of each time period.

Participants who had already completed the form and provided the necessary evidence then were loath to undertake the same process again at a future date – especially if their original application had been rejected or only awarded for a very short period. Participant 4 was particularly aggrieved after having gone to such lengths to provide the required documentation (in this case, evidence of her outgoings) to support her application to later be rejected. When asked if she would apply again, she replied:

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<sup>137</sup> Ibid.

<sup>138</sup> As has been documented in the case of EU migrant access to the benefits system, even the issue of documents being held by one arm of government (for instance, to substantiate immigration status at the Home Office), while another (such as the DWP for the purposes of substantiating a benefit claim) requires the same documentation. In such circumstances, these ‘administrative hurdles’ can prove completely insurmountable. See, Charlotte O’Brien, ‘The Pillory, the Precipice and the Slippery Slope: The Profound Effects of the UK’s Legal Reform Programme Targeting EU Migrants’ (2015) 37 *Journal of Social Welfare and Family Law* 111, 126.

<sup>139</sup> David Cowan and Simon Halliday, *The Appeal of Internal Review: Law, Administrative Justice and the (non-)Emergence of Disputes* (Hart 2003) 138.

<sup>140</sup> Ibid 140.



I don't know. I'm the sort of the person who doesn't like to apply for help as then you sit and you wait, and it might be bad news again. You get told 'this is going to help, this is going to help' then when it happens, it's a no-no, and it sets you back to where you were originally. So it's something that I might consider and that I might not consider. **Participant 4**

These repeated evidential requirements contribute to the development of this applicant fatigue. In contrast to Cowan and Halliday's discussion of pursuing claims through 'several stages',<sup>141</sup> the issue here is rather having to repeatedly evidence the same stage – with the same DHP application form – at repeated intervals.

### **5. Folding work: forms constraining the client's activity**

Though greatly under-researched, the design of application forms for accessing welfare benefits or other forms of state/local-level welfare support is central to both the process of applying for assistance – in so far as the information contained within them forms the basis for the administrative decision on eligibility – and the experience of those who complete them – in so far as they are the format through which they are required to communicate the necessary knowledge for the decision. How a form is structured and formatted can serve to 'constrain the client's activity'.<sup>142</sup> Preformulated answers or limited options, such as predetermined check-lists, through to the physical space accorded to responses, can serve to contribute to the 'packing of the client's case',<sup>143</sup> or what Grabham describes as 'folding work'.<sup>144</sup> As a 'necessarily interactive'<sup>145</sup> feature of claiming welfare assistance, the application forms are designed to 'elicit' responses which 'they can shape but not wholly control'.<sup>146</sup> The structure and content of DHP application forms is therefore important when considering the processing of the knowledge it contains by the administrative workers

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<sup>141</sup> Ibid.

<sup>142</sup> Sarangi and Slembrouck (n 22) 129.

<sup>143</sup> Ibid.

<sup>144</sup> Grabham (n 7).

<sup>145</sup> Don Brenneis, 'Reforming Promise' in Annelise Riles (ed), *Documents: Artifacts of Modern Knowledge* (University of Michigan Press 2006) 42.

<sup>146</sup> Ibid.

and the way in which the applicants themselves may be limited or controlled by the confines of the design and questions asked (or those which go unasked).

The DHP application forms by definition engage in this ‘packing’ exercise; their design is intended to provide a knowledge format for what is perceived as necessary information and, as a consequence, inevitably guides the applicant’s responses. There are specific examples, however, which indicate the importance of this practice; in particular, how the forms predetermine the time periods for which DHPs will be awarded. Many application forms provide a bespoke checklist, providing definitive intervals for support, such as ‘4 weeks or 8 weeks’, or/in addition to imposing maximum time-limits, most commonly, 26 weeks (see **Example Excerpts 6.8**).

The imposition of these limits sits awkwardly alongside the judicial and political roles ascribed to the payments and has concerned the courts dealing with appeals to other reforms, such as the Benefit Cap.<sup>147</sup> The courts have been preoccupied with the stability with which DHPs are paid to those who may otherwise face unlawful interference with their ECHR rights. This is not only in the remit of the sequence of cases based on A1P1 (right to property)/Art.8 (right to respect for private and family life) and Art.14 (prohibition of discrimination) outlined in the course of this thesis, where the importance of DHPs to provide ‘suitable assurance of present and future payments in appropriate circumstances’<sup>148</sup> has been repeatedly underscored for those with disabilities affected by the SSSC. More broadly, there is an implicit faith in appeals that award periods are not arbitrary, but instead based on identified need. In *R (on the application of Cotton) v Secretary of State for Work and Pensions* [2014] EWHC 3437 (Admin), as the claimants were in receipt of DHP monies, their Art.8

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<sup>147</sup> See in particular the recent appeal to the lower Benefit Cap in *R (on the application of DA and others) v Secretary of State for Work and Pensions* [2017] EWHC 1446 (Admin), where efforts from the claimant’s solicitors to examine the longevity of awards were assessed by the court: ‘The solicitor has also made enquiries of local authorities about their practices in dealing with DHPs. Of the 235 who responded, none had ever made a permanent award nor had any agreed to make a payment before a tenancy commenced.’: [28] (Collins J).

<sup>148</sup> *Rutherford v Secretary of State for Work and Pensions* [2014] EWHC 1631 (Admin) at [48] (per Stuart-Smith J)

right (right to respect for private and family life)<sup>149</sup> was held not be interfered with, both due to their ongoing receipt of DHPs and the ‘high threshold’<sup>150</sup> imposed by Art.8 ECHR. The court observed, however, that interference may arise ‘at the point when the loss of their home becomes a real and immediate prospect’<sup>151</sup> with ‘the probability ... that DHPs would in fact be made by a claimant’s local authority’ if ‘something more were to exist in any particular case’.<sup>152</sup> It is difficult to see how arbitrary cut-off periods imposed within these awards – requiring repeat applications with the potential imposition of conditionality before re-approval – adheres to the expectation that awards would be made to address the time period of need, rather than a time period imposed *a priori* by the application form.

Adherence to the political position and that implied by local authority guidance is more nuanced. Government ministers have repeatedly underscored that DHPs ‘can be made available for long-term or indefinite periods for disabled people’<sup>153</sup> and that ‘the guidance is clear that LAs can consider making long term or indefinite awards for disabled people’.<sup>154</sup> The DHP guidance itself states that there is ‘no limit’ on the length of awards – and with concomitant reasoning, no minimum – with a ‘time-limited’ award possibly being appropriate where ‘an impending change of circumstances will result in an increase in benefit’.<sup>155</sup> Here, the knowledge format of the application form is breaking this implied link between circumstance and the award; applicants are required to articulate their position within the check-box confines imposed, even if this presupposes a time-period for assistance which does not accord with their circumstances.

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<sup>149</sup> Art.8 ECHR

<sup>150</sup> Cotton (n 76) [55] (per Males J).

<sup>151</sup> Ibid [30] (per Males J).

<sup>152</sup> Ibid [51] (per Males J).

<sup>153</sup> HC Deb, 13 March 2014, vol.577, col.405.

<sup>154</sup> HC Deb, 10 March 2014, vol.577, col.16W.

<sup>155</sup> DWP (n 41) 19.

## Focus on Forms: Example Excerpts 6.8

### Imposed time limits

It is common for the forms to explicitly impose certain time restrictions within the questions themselves, generally through providing a series of limited (and seemingly arbitrary) payment increments offering most applicants a Hobson's choice. There are three principal approaches within the sample, each presented below.

**Form source:** Teinbridge Borough Council, 'Application for Discretionary Housing Payment Support' <<https://www.teinbridge.gov.uk/CHttpHandler.ashx?id=30155&p=0>> accessed 24 July 2017.

**Please tell us how long you need this help for**

4 weeks       8 weeks       12 weeks       26 weeks

26 weeks is the maximum time for an award – if you require DHP after this time you will have to make a new claim and it will be dependant on your circumstances.

The first approach is the imposition of a maximum award length. Teinbridge Borough Council's application form imposes a definitive cut-off of 26 weeks for DHP support. The form itself prevents applicants from claiming for a longer period. Those requiring further support have to re-apply using exactly the same form, with further awards consequently also limited to a 26-week period.

**Form source:** Doncaster Metropolitan Borough Council, 'Application for Discretionary Housing Payment Support' <<https://dmbcpublicwebsite.blob.core.windows.net/media/Default/CouncilTaxBenefits/Documents/Discretionary%20Housing%20Payment%20form.pdf>> accessed 24 July 2017.

**Please tell us how long you need extra help with your rent for.**

4 weeks       8 weeks       12 weeks       26 Weeks

If longer than 26 weeks please tell us how long and why this would help:

The second approach is to provide some indicative time increments and ask the applicant to substantiate their reasons for requiring a longer term award. Doncaster Metropolitan Borough Council's application form adopts this approach. The space provided to explain longer-term needs is tightly limited to a box just a few centimetres in height.

**Form source:** Rother District Council, 'Application for Discretionary Housing Payment Support' <[http://www.rother.gov.uk/media/pdf/b/m/discretionary\\_housing\\_payment\\_April\\_2013.pdf](http://www.rother.gov.uk/media/pdf/b/m/discretionary_housing_payment_April_2013.pdf)> accessed 24 July 2017.

The Council considers that the DHP scheme should be primarily seen as a short term emergency fund. It should not be considered as a permanent way around any current or future entitlement restrictions set out within the Housing Benefit legislation. There is a legal limit on the amount Councils can pay in Discretionary Housing Payments each year for people in their area. This means that not everyone who claims will receive a payment. Rother District Council will operate the DHP Scheme so that those they consider most in need will receive a payment.

The final approach – as exhibited by Rother District Council – is to build in a warning at the start of the form, situating later questions within the expectation that awards will be 'short term'. The Example Excerpts 5.12 provides further instances of this.

Tenants constantly underscored the problems that these time-limited awards caused, especially as they were required to repeatedly submit the same application forms for assistance on a rolling basis at the end of these predetermined periods, often having to resubmit supporting evidence as well. The associated uncertainty was the cause of a sizable amount of stress for many participants:

When it was 6 months you were always thinking about it. Are we going to get the money or not? You're stressing out. What if we don't get that money, you know what I mean? **Participant 6**

... when you make the application, it did cause tremendous – for me and everyone else – stress and worry, because the first year they took very long to process your application because they were inundated ... having to provide all the evidence to back up the application ... and then next year you have to go through all the worry again, because you don't know if it's going to continue. **Participant 11**

Some participants were confused by the imposition of time-limits within the forms, particularly when they had permanent conditions or had made their application for DHP support on the basis of sizable disability adaptations to their property, such as through-floor lifts:

It's discrimination. The woman at [the local authority], I don't know if she's still there, said to me that you have to apply every year, because you don't get it for more than that. But I couldn't, well, if they know I'm in this situation with this long term stuff, why don't they just continue it? How are my circumstances going to change, unless I win the lottery? Obviously I'd move out here immediately then! **Participant 9**

I mean it's one thing for the form, to do it once. But when they keep asking you the same question, posed differently, it's practically the same question you think why can't they take it as read. I'm never going to walk, never going to be able to go up the stairs, so, you know, I say again, I'm stuffed whatever I say. It's not going to work. **Participant 10**

This problem comes back to the contention made at the start of this chapter: looking at the outcome of the DHP and retrofitting it to the claimant circumstances is too late.<sup>156</sup> These time-limits are not imposed within the internal guidance offered to local authority workers or elsewhere, instead they are outlined and communicated to the tenant in the physical application form itself. Applicants are constrained to articulating their case within the confines of the check-boxes and time-limits offered to them.

A further example of how the physical form can ‘package’ the claimants is through check-lists requiring applicants to self-categorise themselves within the confines specified. The excerpts produced below demonstrate the form this takes; applicants are asked to tick the relevant categories to which they belong, and to elaborate – often within a very tight space – on their membership of it. A lay reader may initially be struck by the haphazard arrangement of the different options presented, with little obvious connection between the different items, and missing categories which would appear to be obviously warranted (for instance, if ‘short-term’ problems are a relevant category, why not ‘long-term’?). As Valverde has described it, the ‘particular items mentioned’ and the design of the forms in these categorising check-lists suffer from a ‘transparent arbitrariness’,<sup>157</sup> a problem perhaps best illustrated by Lichfield District Council’s limit of ticking a maximum of ‘up to 2 boxes’ detailed in **Example Excerpts 6.9** – a requirement imposed for no apparent reason. Problems of arbitrariness within the welfare system are nothing new;<sup>158</sup> first-wave findings by the Welfare

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<sup>156</sup> See Hoag (n 17) 86, discussed in the introduction.

<sup>157</sup> Valverde (n 19) 174.

<sup>158</sup> The issue of seemingly arbitrary requirements in the administration of welfare has been subject to longstanding analysis, particularly in the context of asserting welfare rights by purging ‘arbitrary administration’ or the capacity of arbitrary requirements to ‘truncate support’ provided by the state: William Simon, ‘The Invention and Reinvention of Welfare Rights’ (1985) 44 Maryland Law Review 1, 3; Elizabeth Segal and Keith Kilty (eds), ‘Safety and Self-Sufficiency: Rhetoric and Reality in the Lives of Welfare Recipients’ in *The Promise of Welfare Reform: Political Rhetoric and the Reality of Poverty in the Twenty-First Century* (Routledge 2012) 183.

Conditionality project have recently underscored the arbitrary nature of requirements for support as a ‘recurring theme’.<sup>159</sup>

This practice demonstrates that the DHP application forms are not ‘transparent media’ designed to passively communicate the basis of the individual’s application. Instead, they actively ‘project and make persons’.<sup>160</sup> The limited options offered restrict how the applicant can make their case for remaining in the property and require that they articulate it through the confines imposed by the form. For instance, instead of asking if the applicant wishes to stay in the area due to family or social ties, the excerpt from Birmingham City Council’s application form, detailed in Example Excerpts 5.9, instead provides the option, ‘living in this area means a better chance of obtaining or retaining employment’. In organising and limiting responses in this way, the forms force responses through a filter of this ‘presupposed’ person<sup>161</sup> and prevent any representation of the applicants’ true circumstances in a ‘one size-fits-all document’.<sup>162</sup>

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<sup>159</sup> See Del Roy Fletcher, ‘First Wave Findings: Offenders’ (Welfare Conditionality 2016) <<http://www.welfareconditionality.ac.uk/wp-content/uploads/2016/05/WelCond-findings-offenders-May16.pdf>> accessed 24 July 2017.

<sup>160</sup> Marie-Andrée Jacob, ‘Form-Made Persons: Consent Forms as Consent’s Blind Spot’ (2007) 30 *PolAR: Political and Legal Anthropology Review* 249, 255.

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.* 254.

## Focus on Forms: Example Excerpts 6.9

### Self-classification

Though most DHP application forms implicitly require applicants to classify themselves in response to leading questions about circumstances, some Local Authorities explicitly require applicants to place themselves within predetermined categories.

**Form source:** Lichfield District Council, 'Application for Discretionary Housing Payment Support' <<https://www.lichfielddc.gov.uk/Residents/Benefits/Downloads/Discretionary-housing-payments-application-form.doc>> accessed 24 July 2017.

<b>Circumstance – tick up to 2 boxes</b>	<input checked="" type="checkbox"/>	<b>Additional information If you need more space for your answers please use section 4</b>
The property is significantly adapted for disablement needs of someone in the household.		Please describe the adaptations that have been carried out.

The table in Litchfield District Council's form provides a series of nine separate categories – such as being affected by welfare reform – with the applicant asked to classify themselves using the tick-box column and then expand on their reasons in the column on the right-hand side or in a subsequent text box titled 'Other information' (referred to above as 'section 4'). For an unspecified reason (and seemingly in a way which is completely arbitrary), there is a limit imposed of two categories – if applicants considered themselves to fall into more, they would have to choose what they considered the most important to communicate to the Local Authority.

**Form source:** Birmingham City Council, 'Application for Discretionary Housing Payment Support' <[https://www.birmingham.gov.uk/download/downloads/id/4381/application\\_for\\_housing\\_and\\_council\\_tax\\_discretionary\\_pay.pdf](https://www.birmingham.gov.uk/download/downloads/id/4381/application_for_housing_and_council_tax_discretionary_pay.pdf)> accessed 24 July 2017.

**Which of the following categories apply to you? You may tick more than one box.**

You need short term help to move into longer term housing of a good standard of repair.

Living in this area means a better chance of retaining or obtaining employment.

You have short term problems that you cannot deal with at the moment.

You have debt problems.

You need help or guidance to find out what other benefits you may be entitled to.

**Please state the reason(s) why you fall into one of the above categories:**

Birmingham City Council provides a smaller number of categories with a separate box for outlining the reasons for self-classification. In addition to these categories, the form provides limited space within its initial pages for describing general circumstances. The role or importance of these categories, therefore, is not clear to whoever is filling in the form.



A second example of how these graphical features can shape responses is the physical space accorded to the questions posed in the forms, particularly for the open-ended questions. The layout of these elements and ‘limited space’ can ‘constrain’ the ability of a client to ‘tell a whole story’.<sup>163</sup> The forms in **Example Excerpts 6.10** provide a clear illustration of this problem.<sup>164</sup> Claimants are expected to advance their case and outline their circumstances in clearly insufficient physical space.

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<sup>163</sup> Sarangi and Slembrouck (n 22) 129.

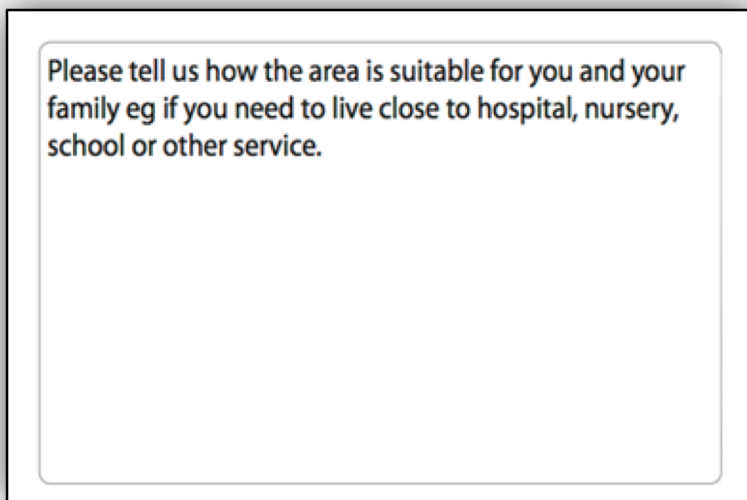
<sup>164</sup> It is worth noting that these application form extracts have both been reproduced in the same size as the original, and they were print copy forms (namely, these are not boxes in which the applicant types a response which might stretch beyond the boundaries of the box; they are intended to be completed by hand).

## Focus on Forms: Example Excerpts 6.10

*Space allocated for answers*

In addition to the provision of hard copies by post or at Local Authority/housing association offices, the majority of DHP application forms are made available through a pdf file, to be completed either by hand or using a pdf editor. Unlike online forms (or the more limited instances in which a Word document is supplied), applicants cannot stretch the confines of the space provided. Instead, they are limited by the physical size of the boxes or number of dotted lines accorded for specific questions in the forms. This varies substantially and can be incredibly limited. Two examples can serve to illustrate this.

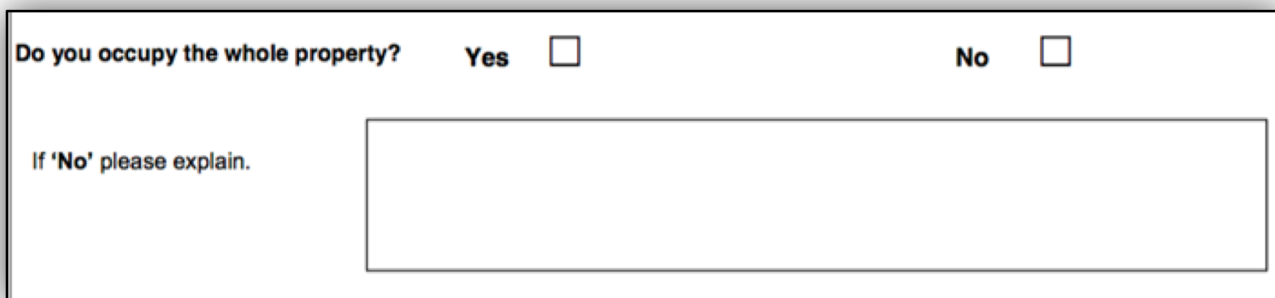
**Form source:** Burnley Council, 'Application for Discretionary Housing Payment Support' <<http://www.burnley.gov.uk/sites/default/files/Discretionary%20Housing%20Payments%20application%20form.pdf>> accessed 24 July 2017.



Please tell us how the area is suitable for you and your family eg if you need to live close to hospital, nursery, school or other service.

Responses to Burnley Council's potentially wide-ranging question about the suitability of the area in which the property is located, which may deal with issues important to the applicant and warrant significant elaboration, is limited to a box 9.5 cm by 4 cm in size. Other significant questions, such as the reasons for choosing the property, are accorded equally limited space. The form cannot be completed electronically by typing into the box – applicants are required to print the form out and complete it by hand.

**Form source:** North Norfolk Council, 'Application for Discretionary Housing Payment Support' <[http://www.north-norfolk.gov.uk/files/Claim\\_form\\_for\\_Discretionary\\_Housing\\_Payment.pdf](http://www.north-norfolk.gov.uk/files/Claim_form_for_Discretionary_Housing_Payment.pdf)> accessed 24 July 2017.



Do you occupy the whole property?    Yes        No   

If 'No' please explain.

North Norfolk's question on the occupation of the property – the only space provided on the application form to detail living arrangements, is limited to a 14.5 cm by 2 cm box. In common with Burnley Council's form, this too cannot be completed by typing into the box – responses must be handwritten in the very tight confines of the space provided.

Here, applicants are asked to put forward relevant information on potentially heavily nuanced considerations – their reasons for wanting to remain in the current property or why the rooms in their home are used in a way discordant with the Housing Benefit Regulations 2006 – in an extremely confined space. This space is important; as argued by Singh, ‘empty boxes and blank spaces’ can ‘possess the capacity to propel’<sup>165</sup> the claimant in a certain way, communicating the relative importance of certain questions or dictating the limits of the amount of information which can be advanced.

The structure of these DHP application forms and their procedural requirements also serve to force the tenants to present information on specific issues which they may not otherwise consider relevant. With these administrative forms serving to ‘propel’<sup>166</sup> the direction of a client’s activity in a certain direction, they do so both in terms of imposing the areas on which evidence or other material has to be presented and determining the way in which this information is requested of the applicant. As Valverde argues, the solutions required – in this case, client responses – follow the format in which the problems are organised – in this case, the presentation of the questions asked in the application forms.<sup>167</sup>

The forms in **Example Excerpts 6.11** demonstrate two particularly common aspects of this practice, where responses are required to indicate both information about selling belongings or assets and details on the potential for financial support or alternative accommodation offered by family and friends. These questions are asked of all the authority’s applicants, including at reapplication, without any framing or guidance; what belongings are reasonable (or not) to sell, the permanency or nature of support from family and friends expected, or how this information correlates with the details provided through any income/expenditure assessment are not outlined. The specific inclusion of these questions is not isolated; it is a fairly frequent requirement in DHP applications. By way of illustration, 105 DHP application forms of the 242 sample specifically asked about potential support from friends and family.

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<sup>165</sup> Rashmee Singh, “‘Please Check the Appropriate Box’”: Documents and the Governance of Domestic Violence’ (2016) 42(2) Law and Social Inquiry 509.

<sup>166</sup> Ibid.

<sup>167</sup> Valverde (n 19) 161.

These are symptomatic examples as they serve as counterparts to two key elements of DHP mitigation: the assessment of the household unit contained within the home, as opposed to broader support networks; and the short-term nature of mitigation within the SSSC scheme. On the former, the underpinning s.69(1) Child Support, Pensions and Social Security Act 2000 and Reg.5 Discretionary Financial Assistance Regulations 2001 situate DHPs as statutorily parasitic on the payment of Housing Benefit.<sup>168</sup> Notwithstanding its more problematic treatment in other respects, the DHP scheme's dependency on this foundational connection with the Housing Benefit regulations leads to its articulation in the courts as a parallel function of the mainstream Housing Benefit system, serving as an 'additional benefit'<sup>169</sup> forming an 'integral part of housing benefit entitlements.'<sup>170</sup> By requesting specific information on the capacity of those outside of the eligible household, DHP applications stretch beyond this remit into other aspects of the individual's day-to-day life.

Drawing on Valverde, these questions within the application forms construct the 'problem' and 'solution' inversely.<sup>171</sup> The financial or in-kind support of family or friends and the sale or pawning of personal belongings are, sadly, widespread symptoms of living on low-incomes.<sup>172</sup> This is particularly so for those who are subject to a sudden or unpredictable fall in income (as occasioned by the SSSC penalty or the

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<sup>168</sup> Given the range of complications which can arise through change of circumstances, this is perhaps a misleadingly straightforward assertion – see the attempts to get 'common-sense to prevail' (para.31) in a case involving two homes in *Birmingham City Council v IB* [2009] UKUT 116 (AAC). Though the statutory basis for housing benefit eligibility, and its subsequent interpretation at the tribunal level, is clearly situated at this level, see s.130(1)(a) Social Security Contributions and Benefits Act 1992 and Reg.7(1)–(2) Housing Benefit Regulations 2006.

<sup>169</sup> *R (On application of Hurley and others) v Secretary of State for Work and Pensions* [2015] EWHC 3382 (Admin) [6] (per Collins J).

<sup>170</sup> *Hardy* (n 42). [48] (per Phillips J).

<sup>171</sup> Valverde (n 19). 161

<sup>172</sup> See Eileen Herden, Anne Power and Bert Provan, 'Is Welfare Reform Working? Impacts on Working Age Tenants' (South West Housing Associations Influence and Leadership Organisation 2015) <<http://sticerd.lse.ac.uk/dps/case/cr/casereport90.pdf>> accessed 24 July 2017 and Ruth Patrick, 'Rhetoric and Reality: Exploring Lived Experiences of Welfare Reform under the Coalition' in Liam Foster et al (eds), *In Defence of Welfare 2* (Policy Press 2015) 25.

fluctuation in DHP mitigation from it) as households adopt a ‘variety of strategies’ to fight to ‘maintain their housing’.<sup>173</sup> Those households with a disabled member are also particularly susceptible, with the Household Expenditure Survey indicating that there is ‘a substantial increase in the incidence of ... having to sell or pawn things, or seek help from others’ where there is a disabled member of a household.<sup>174</sup> This activity can have serious consequences on an individual’s housing security. Borrowing money from friends or family and pawning or selling items are indicative of what Chamberlain and Johnson describe as the ‘housing crisis pathway’, placing a household at risk of homelessness.<sup>175</sup>

So, when the form requires claimants to indicate any belongings they have to sell or family and friends they can draw on for support, the *problem* – the reliance on these precarious forms of financial provision to maintain one’s housing – is constructed as a *solution* to the individual’s current insecure housing arrangements. Tenants cannot inverse this construction by framing their reliance on others for support, or a necessity to otherwise sell belongings, as a problem indicating a requirement for support for its own right; the knowledge format of the application form requires them to engage with these practices as potential solutions to their predicament.

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<sup>173</sup> Chris Chamberlain and Guy Johnson, ‘Pathways into Adult Homelessness’ (2013) 49 *Journal of Sociology* 60, 64.

<sup>174</sup> Peter Saunders, ‘Disability, Poverty and Living Standards: Reviewing Australian Evidence and Policies’ in Caroline Glendinning and Peter Kemp (eds), *Cash and Care: Policy Challenges in the Welfare State* (Policy Press 2006) 73.

<sup>175</sup> Chamberlain and Johnson (n 170) 64.

## Focus on Forms: Example Excerpts 6.11

### *Forcing consideration of specific issues*

With the majority of DHP application forms consisting of a series of compulsory questions (almost always accompanied by an income/expenditure assessment – see Example Excerpts 5.2 above) – in their choice of questions, the forms themselves can force the consideration of certain issues which may not otherwise be considered relevant. Two particularly pertinent examples are questions about the sale of belongings or the capacity of family members to assist.

**Form source:** Harrow Council, ‘Application for Discretionary Housing Payment Support’ <[http://www.harrow.gov.uk/download/id/3477/discretionary\\_housing\\_payment\\_application\\_form](http://www.harrow.gov.uk/download/id/3477/discretionary_housing_payment_application_form)> accessed 24 July 2017.

20. Do you have any belongings that you could sell to help with your expenses? Yes  No

If yes, please give details?

**Form source:** Harlow Council, ‘Application for Discretionary Housing Payment Support’ <<http://www.harlow.gov.uk/sites/harlow.gov.uk/files/Discretionary%20Housing%20Payments%20form%209%202.pdf>> accessed 24 July 2017.

14. Have you sold any assets, property or belongings to help pay the rent or do you have any that you could sell? Yes  No

If YES, please give details.

Both Harrow Council and Harlow Council explicitly ask applicants to provide details of saleable belongings, stretching the assessment of means outside of the confines of the income/expenditure tables. Other Local Authorities – such as Corby Council – are less direct, and instead ask questions about assets, such as the make, year and value of vehicles.

**Form source:** Burnley Council, ‘Application for Discretionary Housing Payment Support’ <<http://www.burnley.gov.uk/sites/default/files/Discretiponary%20Housing%20Payments%20application%20form.pdf>> accessed 24 July 2017.

Could you live with relatives or friends?  YES  NO

If no, please give reason.

**Form source:** Eden Council, ‘DHPs’ <[www.eden.gov.uk/EasySiteWeb/GatewayLink.aspx?allId=4059](http://www.eden.gov.uk/EasySiteWeb/GatewayLink.aspx?allId=4059)> accessed 24 July 2017.

7. Do you have any relatives or friends who could help you out? Could they provide you with accommodation, if only temporarily? Could they, or anyone who lives with you, help you with the rent/council tax or any other household bills?

A second area of questioning is the role of family and friends. Burnley Borough Council asks the applicant to indicate whether they could assist with living arrangements while Eden District Council also asks about the potential financial support. Both provide limited space to provide explanatory reasons for why this may not be possible.

## 6. Initial conclusions and relation to the broader DHP scheme

The contribution of this chapter has been to analyse the key ‘knowledge format’<sup>176</sup> at play within the SSSC scheme: the DHP application forms. They are the means by which an individual applicant navigates the parallel system for support, laid out under the Discretionary Financial Assistance Regulations 2001, via the information they try to convey in order to receive mitigation – the use of their spare room, the modest nature of their lifestyle and associated financial need, the reasons why they need to remain where they live – which is ‘folded’<sup>177</sup> and ‘packaged’<sup>178</sup> within the confines of the physical application forms used by local authorities.

But how does a focus on this DHP application process and the associated forms, seemingly narrow elements of the overall SSSC scheme, build on the theoretical arguments made in the first half of this thesis? The arguments in this chapter can be packaged together into the structural problem – the lack of fit between the knowledge format and the structure of the SSSC policy – and the epistemic problem – the expectation of knowledge held by the local authority workers and the affected tenants themselves. In tying together the arguments made in this chapter, each will be considered in turn.

### *1.1. The structural problem: an awkwardness of fit*

The first problem is the ‘awkwardness of fit’<sup>179</sup> between the DHP application forms and the structural position they occupy in the SSSC scheme. Put another way, when analysing these payments as knowledge format, it becomes clear that their rationale at the national level does not easily accord with their use at the local level. As argued by others, utilising a similar theoretical approach to this study, there is no ‘overarching

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<sup>176</sup> Valverde (n 19).

<sup>177</sup> Grabham (n 7).

<sup>178</sup> Sarangi and Slembrouck (n 22) 129.

<sup>179</sup> Fleur Johns, ‘Global Governance through the Pairing of List and Algorithm’ (2016) 34 *Environment and Planning D: Society and Space* 126, 137.

commonality of outlook'<sup>180</sup> between the knowledge format – the DHP application forms – and their justification at the central government level.

This 'awkwardness of fit' problem has been tackled implicitly in the sizable literature preoccupied with 'welfare bureaucracy', without explicitly acknowledging the role specific knowledge formats can play. The focus is generally on the 'inherent disjuncture'<sup>181</sup> which can occur between policy design, administrative practices and the experiences of those on the receiving end of the policies themselves. Usually framed by setting 'formal policy ... abstractions'<sup>182</sup> against an equally abstracted layer of bureaucratic 'office culture ... or ideology',<sup>183</sup> the problem is articulated as one of the 'capacity of bureaucratic functions' to respond to a politically determined direction,<sup>184</sup> with the wholesome initial intent being 'refracted'<sup>185</sup> or 'bent to purposes other than those that policymakers anticipated'.<sup>186</sup> These ideas have been considered alongside the complexities of an increasingly decentralised welfare system. Herd et al's analysis of the Ontario regional government's self-proclaimed 'common sense revolution', and the importance of 'active local regimes'<sup>187</sup> to shape its meaning, demonstrates that administrative practices are not 'simply concerned with implementation'.<sup>188</sup> Likewise, Hasenfeld's 'Russian nested doll' theoretical

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<sup>180</sup> Ibid.

<sup>181</sup> Yeheskel Hasenfeld, 'Organizational Responses to Social Policy: The Case of Welfare Reform' (2010) 34 *Administration in Social Work* 148, 164.

<sup>182</sup> Brodtkin (n 125) 24.

<sup>183</sup> Ibid.

<sup>184</sup> Lael R Keiser, 'State Bureaucratic Discretion and the Administration of Social Welfare Programs: The Case of Social Security Disability' (1999) 9 *Journal of Public Administration Research and Theory* 87, 100.

<sup>185</sup> Reuel Schiller, "'Saint George and the Dragon": Courts and the Development of the Administrative State in Twentieth-Century America' (no date) 17 *Journal of Policy History* 110, 117.

<sup>186</sup> Ann Chih Lin, *Reform in the Making: The Implementation of Social Policy in Prison* (Princeton University Press 2002) 162.

<sup>187</sup> Dean Herd et al, 'Rituals of Degradation: Administration as Policy in the Ontario Works Programme' (2005) 39 *Social Policy and Administration* 65, 75.

<sup>188</sup> Ibid 66.



framework has the policy design as its outer shell, working downwards to the ‘worker–client interaction’ and ‘policy outcomes’ at its core.<sup>189</sup>

The focus here is instead on the mismatch between the DHP application forms as a knowledge format and their structural position in the SSSC scheme. There are two strands to the DHP application formats developed above which illustrate this point. The first is the basis for the design of the format itself. Within judicial review challenges, the DHP scheme possesses an odd Janus-face. Within the high-profile judicial review challenges to Reg.B13 Housing Benefit Regulations 2006, one would be forgiven for thinking that the finite nature of the DHP pot is not a particularly egregious issue. Indeed, throughout the judicial review challenges, the evolving size of the overall budget was perceived as a positive attribute,<sup>190</sup> especially its capacity to be ‘topped up’ by the DWP.<sup>191</sup> The government response<sup>192</sup> to the DWP Select Committee’s concerns about the adequacy of DHPs repeatedly underscores additional financial contributions, the evolving nature of the overall budget and the provision of extra funds to account for further reforms.<sup>193</sup>

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<sup>189</sup> Hasenfeld (n 178) 149.

<sup>190</sup> *R. (on the application of MA) v Secretary of State for Work and Pensions* [2014] EWCA Civ 13; [2014] PTSR 584 [22]–[24], [32], [72] (per Dyson MR).

<sup>191</sup> *Cotton* (n 76) [27] per (Males J).

<sup>192</sup> It is worth restating here that the government position concerns principally England and Wales. The significance of national governments in rendering differential DHP support demonstrates the importance of this ‘overarching rationale’ problem: Scotland has effectively exempted those affected by the SSSC through the use of DHPs, while Wales considered doing the same but decided against it on the basis of financial and ‘consistency’ concerns. For more information on both divergent approaches, see Tom Mullen, ‘Devolution of Social Security’ [2016] *Edinburgh Law Review* 382, 382; and Stephen McKay and Karen Rowlingson, ‘Social Security under the Coalition and Conservatives: Shredding the System for People of Working Age; Privileging Pensioners’ in Hugh Bochel and Martin Powell (eds), *The Coalition Government and Social Policy: Restructuring the Welfare State* (Policy Press 2016) 337.

<sup>193</sup> Work and Pensions Select Committee, ‘The Local Welfare Safety Net’ (2016) <<http://www.publications.parliament.uk/pa/cm201516/cmselect/cmworpen/373/37302.htm>> accessed 24 July 2017, paras. 33, 19, 23 and 34).

The function of the forms, rather than dividing up a scarce resource, has been articulated by both government rhetoric and within these judicial review challenges as meeting an objective demand to assist those who need to stay in their properties. In his arguments to the Supreme Court in *Carmichael v Secretary of State for Work and Pensions*,<sup>194</sup> Eadie QC went as far to suggest that the ‘discretionary’ element of DHPs ‘conceals the true nature of the beast’.<sup>195</sup> Instead, local authorities are operating under the narrower rubric of applying the mitigation process for those in greatest need of their current accommodation.

In judicial review challenges to local authority DHP decision-making, however, the ‘limited funds available to meet all shortfalls’<sup>196</sup> and the impossibility of being able to ‘meet every claim’<sup>197</sup> have been underscored. The formation of the initial pot itself has been subjected to increased scrutiny, with ‘additional funding’<sup>198</sup> allocated under the DHP formula for certain issues – such as meeting the needs of those with disabilities – being considered by the courts.

Even a cursory glance at DHP application forms suggests the reality is more complex than either of these Janus-faces implies. Local authorities are evidently working within the confines of the budgets allocated by the DWP and this leads both to the omnipresent income and expenditure formulations discussed above and the emphasis on the ‘short-term’ nature of DHP awards. This arose in the data collected in response to the case studies:

Our award letters always advise that DHP is not intended as a long term solution and should not be relied upon if the situation has little chance of improving.

**Local Authority 27 (mid–high spend)**

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<sup>194</sup> *Carmichael* (n 56).

<sup>195</sup> See recording of the hearing available at UK Supreme Court, ‘01 Mar 2016 – Morning – Part 4 of 6 – R (on the Application of Carmichael and Rourke) (Formerly Known as MA and Others) (Appellants) v Secretary of State for Work and Pensions (Respondent)’ <: <https://www.supremecourt.uk/cases/uksc-2014-0125.html>> accessed 24 July 2017.

<sup>196</sup> Halvai (n 5) [29].

<sup>197</sup> Ibid.

<sup>198</sup> *Hardy* (n 15) [62].

The award letter would make it clear that DHP is a short term solution and that she needs to take action to prevent eviction ... **Local Authority 25 (mid–high spend)**

One of the most prevalent examples is the explicit statement within DHP application forms that the payments are ‘temporary’, ‘short-term’ or otherwise time-limited, even if the circumstances of the applicants remain the same. Written evidence presented to the Supreme Court in *MA* attempted to quantify this problem, with Mike Spencer of CPAG stating that 42 per cent of authorities state payments are only ‘short-term’, while 23 per cent state a specific finite term for each award made (for instance, 6 months).<sup>199</sup> The analysis above of the form-imposed time limits, especially the check-boxes limiting the time increments available for application, demonstrate this problem. **Example Excerpts 6.12** provide some further illustrations within the forms’ explanatory notes:

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<sup>199</sup> Thanks to Mike Spencer and Sophie Earnshaw of the Child Poverty Action Group for sharing with me these data from their own efforts with application forms.

## Focus on Forms: Example Excerpts 6.12

*Explicit reference to the DHP scheme limitations*

In common with most benefit applications, DHP forms generally start with explanatory notes situating the questions in the form in context. Within the sample application forms, these initial notes almost always refer to the limitations of the DHP Scheme. Two examples are provided below, with the relevant sections highlighted in blue.

**Form source:** Royal Borough of Kensington and Chelsea, 'Application for Discretionary Housing Payment Support' <<https://www.rbkc.gov.uk/pdf/Discretionary%20Housing%20Payment%20claim%20formv1.pdf>> accessed 24 July 2017.

The Royal Borough of Kensington and Chelsea has a limited amount of money that can be used to help residents whose housing/council tax benefit has been restricted. If you are receiving either Housing or Council Tax benefit and you are not getting your full rent or council tax paid, then you might qualify for a discretionary housing payment.

The scheme is not part of the benefits system and all awards are made at the Council's discretion. To be eligible you must be in receipt of housing/council tax benefit and you will also need to show that your circumstances are exceptional.

Please note these payments are normally only awarded for a limited period of between 2 to 6 months and cannot be relied upon to solve long term housing difficulties.

It is important to give as much information as possible in support of your application. If you wish to apply, return the completed form, along with any supporting evidence, within one month.

The Royal Borough of Kensington and Chelsea begins the form by referring specifically to the limited money, the distinction between DHPs and the benefit system, and the limited periods granted for awards (with a maximum of 6 months). It underscores that the payments are not for dealing with 'long term housing difficulties' and states – in contradiction to cases such as *R (on the application of Hardy) v Sandwell MBC* [2015] EWHC 890 (Admin)<sup>200</sup> – that the payments are 'not part of the benefits system'.

**Form source:** Castle Point Borough Council, 'Application for Discretionary Housing Payment Support' <<https://www.castlepoint.gov.uk/discretionary-housing-payments>> accessed 24 July 2017.

We will only award a Discretionary Housing Payment for a short period of time and then you will have to re-apply. We cannot guarantee that you will get anything in the future, even if you get a Discretionary Housing Payment this time and your circumstances stay the same. We will take into account any action you take to reduce your need for a DHP. A DHP should be seen as short-term help and should not be relied upon as it is not guaranteed. If you wish to see the law or the council's policy about Discretionary Housing Payments, this is available during our normal opening hours. Please ask.

Castlepoint Borough Council explicitly refers to the disassociation between the continuing payment of DHPs and the continuation of individual circumstances, highlighting how action to 'reduce your need' is a relevant consideration. It underscores that the payments are 'short term' and 'should not be relied upon'.

<sup>200</sup>

See *Hardy* (n 15) [48] (Phillips J): 'I am satisfied that DHPs form an integral part of HB entitlements for disabled applicants and that they have at least a legitimate expectation that they will be used to supplement a shortfall in HB which would otherwise be unlawful.'

## 6.1.Lack of transparency

The second key point, which follows from this lack of an overarching rationale for the forms, is that there is a distinct lack of transparency within the DHP application process. This is important to emphasise, as the sheer length and detail provided in the forms themselves may give an incorrect impression of overall transparency. Documents can play a central role as the means by which processes of resource allocation are rendered transparent, with ‘the re-working of forms [often being] in part an attempt to force transparency’.<sup>201</sup> Nowhere is this more so than in the allocation of public funds. Many local authority DHP policies – and sometimes the application forms themselves<sup>202</sup> – cite the importance of a ‘transparent approach’,<sup>203</sup> with government guidance underscoring the need for ‘transparent’ administration and ‘clear information’.<sup>204</sup> When an ‘overarching rationale’ is lacking, securing such transparency is problematic; working to render one form of lawful authority ‘transparent’, may only reveal it is ‘inextricably entangled with authority produced elsewhere’.<sup>205</sup>

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<sup>201</sup> Brenneis (n 143) 43.

<sup>202</sup> For an example, see Conwy County Council, ‘Discretionary Housing Payments Leaflet and Application Form’ (2016) <[http://www.conwy.gov.uk/upload/public/attachments/662/Conwy\\_DHP.pdf](http://www.conwy.gov.uk/upload/public/attachments/662/Conwy_DHP.pdf)> accessed 24 July 2017.

<sup>203</sup> Some reference to the importance of a ‘transparent’ approach to DHP awards is seemingly an innate proclivity of local authority DHP policies. For examples, see: Tendring District Council, ‘Discretionary Housing Payments (DHP) Policy’ (2013) <<http://www.tendringdc.gov.uk/sites/default/files/benefits-calculao/Discretionary%20Housing%20Payments%20Policy.pdf>> accessed 24 July 2017; Eastleigh Council, ‘Housing Benefit: Discretionary Housing Payments – Report of the Head of Revenue and Benefits’ (2013) <<https://www.eastleigh.gov.uk/media/34519/DHP-Policy.pdf>> accessed 24 July 2017; Newport Council, ‘Discretionary Housing Payments’ (2015) <<http://www.newport.gov.uk/documents/Council-Tax-Benefits/Discretionary-Housing-Payments-Policy-EN.pdf>> accessed 24 July 2017; Durham County Council, ‘Discretionary Housing Payments (DHPs)’ (2016) <<http://www.durham.gov.uk/media/4005/Discretionary-Housing-Payment-Policy/pdf/DiscretionaryHousingPaymentPolicy.pdf>> accessed 24 July 2017.

<sup>204</sup> DWP (n 41) 19, 42–43.

<sup>205</sup> Johns (n 176) 141.

This problem particularly manifests itself in the DHP context. The government position – that local authorities are ‘best placed’<sup>206</sup> to target DHP funds – disaccords with the local authority position – that they are constrained by the financial reality imposed at the national level.<sup>207</sup> Making the application process transparent does not deal with those ‘authorities produced elsewhere’,<sup>208</sup> for instance: the setting of the budget at national level,<sup>209</sup> the design of the algorithm which allocates money to local authorities,<sup>210</sup> or the relationship between DHP guidance and local authority decision-making. The importance ascribed to this ‘transparency’ also presupposes that ‘there will be something substantive, meaningful and determinative to disclose’.<sup>211</sup> A fully transparent DHP application process can only reveal so much for the reasons discussed in this chapter and in the theoretical framework which preceded it; the framework makes inherent appeals to ‘common knowledge’, which transparency does nothing to disclose.

## 6.2. Epistemic obligations

The analysis of the knowledge format here not only demonstrates a problem in terms of the structural placement of discretion within the SSSC, it also indicates the extent

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<sup>206</sup> HC Deb, 23 February 2016, vol.606, col.21WH

<sup>207</sup> For example, see the Local Government Association’s response to the Local Government Finance Settlement 2015, where inadequacy of DHP funding is explicitly singled out: Local Government Association, ‘LGA Response to the Local Government Finance Settlement’ (2015) <[http://www.local.gov.uk/media-releases/-/journal\\_content/56/10180/6967973/NEWS](http://www.local.gov.uk/media-releases/-/journal_content/56/10180/6967973/NEWS)> accessed 24 July 2017.

<sup>208</sup> Johns (n 176) 141.

<sup>209</sup> There is no specific rationale outlined for the totals arrived at for the DHP budget, though the government often release ‘top-up’ funds. The basis of the £800 million DHP application figure for the course of the 2015–20 parliament has not been articulated: *Summer Budget 2015 (July 8, 2015)*, HC 264 of Session 2015–16 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/443232/50325\\_Summer\\_Budget\\_15\\_Web\\_Accessible.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/443232/50325_Summer_Budget_15_Web_Accessible.pdf)> accessed 24 July 2017.

<sup>210</sup> The exact algorithm is not disclosed, but housing benefit circulars suggest that the DWP allocates the DHP monies from the nationally identified pot total in line with a formula directly proportionate with various welfare reform impact measures and previous base-line DHP expenditure. See HB Circular S1/2015.

<sup>211</sup> Johns (n 176) 142.

of the epistemic obligations the scheme places on the tenants themselves and the local authority workers tasked with processing the applications.

Local authority workers are expected to be able to effectively interpret the information provided within the forms. The best examples above are the detailed income/expenditure tables, as indicated in Example Excerpts 5.2; some with over 100 individual itemised areas for the applicant to complete and evidence. local authority guidance, as reproduced above following a series of FOIs, demonstrates little in the way of local authority level guidance to assist.

The flipside of the demands made of the local authorities is the resulting demands made of the applicants themselves. There are numerous examples within the forms of applicants being expected to know the apposite information to communicate to the local authority; the elements of their lives which best evidence the case for them to remain in their homes. The best examples are those open-ended elements – either relating to income/expenditure requests in Example Excerpts 5.1, or even broader open-ended evidential requests in Example Excerpts 5.6. Requirements to substantiate detailed information – such as ‘please tell us how the area is suitable to you and your family’ (Example Excerpts 5.10) – within very tight space limitations, force applicants to carefully choose the most relevant information to put forward to the local authority.

Most fundamentally of all, applicants are required to communicate their home interest through the confines of these forms, all the while being shaped and limited by their content. Whether it is pre-determined time increments for support, woefully small spaces being provided for answers to broad-ranging questions, or tick boxes requiring the claimant to self-classify their circumstances, these application forms operate as the key ‘knowledge format’ in the SSSC policy framework.

In conclusion, this chapter has provided a detailed analysis of DHP application forms and outlined their importance as a ‘knowledge format’ in the overall SSSC scheme. Drawing on the two strands of data, the tenant interviews and local authority responses to the DHP vignettes, alongside some example form excerpts to illustrate key issues, it has argued that the ‘knowledge format’ of these applications is a key component of the functioning of the SSSC policy.





# Death, disability and lifestyle: Appeals to a common knowledge of home

## Chapter Seven

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DMIST

MONDAY 16.03.2015 DAILY MIRROR 7



**MEMORIES** Carol Hall's rented house  
**EXCLUSIVE**

BY JEREMY ARMSTRONG

**AFTER the agony of losing her son in horrific circumstances, grieving Carol Hall now faces being forced out of the home which holds so many treasured memories.**

Carol shared the rented property with her beloved Scott for 21 years before he was beaten by two vicious yobs and died of a brain haemorrhage, aged 28.

With her son gone, the heartbroken mum has fallen victim to the Tories' cruel Bedroom Tax, meaning her housing benefit is being cut as the three-bedroom semi is considered too big for her.

The sandwich shop worker had already lost carer's allowance for her disabled son and can no longer afford to stay in the home she loves.

Carol, 56, said: "I was full-time carer for Scott and was paid to look after him. "I supplemented that income with a part-time job in a sandwich bar to make ends meet."

"But Scott's death obviously means that carer's allowance has been taken



**SHOCK** Mirror report on the court case away and the wages from the sandwich shop do not cover the rent and bills.

"The last straw was being hit by the Bedroom Tax.

"My allowance was enough to cover it but now it is crippling me and I have no choice but to move."

She added: "I am struggling with losing Scott but now losing my home is more than I can bear."

It is the latest blow for Carol, who lost her son in July and saw his attackers walk free last week.

Scott died 11 days after he was punched to the ground and kicked by two 15-year-old yobs.

But the youths were not charged with unlawfully killing him because his injuries could not be directly linked to the assault. After his death, one of the teenage thugs boasted on Facebook of being a "full-time killer". But both attackers were spared prison and given referral orders after admitting assault causing actual bodily harm.

Carol, of Framwellgate Moor, Co Durham, earns £65 a week, topped up

# LOSING SCOTT AND MY HOME IS MORE THAN I CAN BEAR...



**FINAL STRAW** Carol with Zoe & picture of son Scott



**BEATEN** Scott Hall died days after assault

**“She wants to stay in the house surrounded by memories of her son**

**ZOE HALL DAUGHTER OF HEARTBROKEN CAROL**

by £72.40-a-week employment support allowance. After Scott's death she lost £61.35-a-week carer's allowance. She was given a year's grace on the Bedroom Tax, but from July will lose £25 a week in housing benefit due to two spare rooms.

Carol has also received a discretionary housing award, which is a temporary payment for people struggling with rent, but that ends next month. It means she

will have no choice but to move out. Daughter Zoe, 25, who works as a carer, added: "It is heartbreaking. Mum wants to stay in the house surrounded by memories of Scott. This is where we grew up and it is special to her but she is now going to lose it."

"She sits with no heating. I have given her fleeces to help keep her warm. Mum devoted her life to Scott, she does not deserve to find herself in this position."

Durham City Housing Association, which owns Carol's home, declined to

comment on her case. Yesterday a Department for Work and Pensions spokesman said: "Our sympathy is with the family of Mr Hall. The removal of the spare bedroom subsidy does not apply for a year when there is bereavement. Discretionary housing payments may also be available to help families through such difficult times."

Tragic Scott was left disabled by a freak injury when he was 10 after a football hit him in the face as he watched

**Bedroom Tax is new blow for mum of street attack victim**

an amateur match. His condition, Rasmussen's syndrome, affected his balance, speech and the way he walked.

Magistrates heard he was trying to get away from the youths when he was punched to the ground and kicked.

He spent the final days of his life in a state of terror after being traumatised by the attack. Nine days after the assault, he suffered the bleed to his brain, which went on to kill him two days later.

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**VOICE OF THE MIRROR: PAGE 8**

**Picture:** A feature in the *Mirror* newspaper outlining the case of Carol Hall. One year after her son was murdered, his room was subsequently subject to the SSSC penalty.

## 1. Introduction

This chapter focuses on three issues that arose in tenant interviews: death, lifestyle, and disability. The vignettes presented to the local authorities, outlined in more detail in Chapter Five,<sup>1</sup> were each designed to draw the administrative worker's attention to these difficult areas and were based on the experiences of tenants spoken to throughout this study. Suzanne's partner passing, Julie's smoking habit, and Ian's undefined disability, all require administrative workers tasked with processing DHP applications to assess their relevance to these individuals' continued occupation of the home.

Chapter 6 focused on format: how DHP application forms shape the way in which affected tenants apply for support. The completed forms, however, do not say enough on their own in the vast majority of applications. What death, lifestyle and disability have in common is that they all lack a definitive content. There is no 'exhaustive list of indicators'<sup>2</sup> you can place in an application form to determine whether someone should remain in their home to grieve the death of a family member.<sup>3</sup> Although disability is widely (and prescriptively) defined elsewhere in the benefits system,<sup>4</sup> it is a different matter altogether to assess how the extent of a disability affects the use of the space in the home, and if so, whether it is to a sufficient degree to occasion ongoing assistance. Whether elements of a claimant's lifestyle – where they eat, what they buy, their habits and vices – should be a relevant consideration when assessing the occupation of the property cannot be subject to a predetermined 'clear checklist'.<sup>5</sup>

The importance of the home to Suzanne's ongoing grieving, the relevance of Julie's lifestyle, or the severity of Ian's disability, all require more than a simple administrative assessment, such as appraising eligibility and evidential requirements or drawing on clearly defined internal guidance; those familiar 'administrative

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<sup>1</sup> See p.243.

<sup>2</sup> Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton University Press 2003) 22.

<sup>3</sup> Though some application forms do ask about grief, as discussed below.

<sup>4</sup> See, for instance, the scoring for daily living and mobility components in Regs.3–11 Social Security (Personal Independence Payment) Regulations 2013/377.

<sup>5</sup> Valverde (n 2) 22.

knowledges<sup>6</sup> that are ordinarily argued to dominate local authority decision-making. A local authority worker faced with these cases needs something else. As described by Valverde, they must ‘supplement the checklist’<sup>7</sup> with appeals to common sense and common knowledge.<sup>8</sup> Put another way, the figures presented in an income/expenditure form, or responses written into the mishmash of application-form boxes, are not enough in their own right; the local authority administrative staff processing these decisions have to draw on their own knowledge to make a decision about the applicant’s ongoing occupation of the property.

The key argument of this chapter, therefore, is that the SSSC scheme requires local authority workers to make problematic appeals to ‘common knowledge’ when assessing whether those claimants making DHP applications need to stay in their home. In other words, the epistemic discretion granted to local authority workers under the SSSC framework assumes a ‘common knowledge of home’ that simply does not exist. Before expanding this argument with reference to the three vignette-based studies, it is important to unpack this argument slightly to clarify why this appeal to ‘common knowledge’ is important in the context of the SSSC.

### **1.1. Why is common knowledge important?**

Local authority decisions on DHP payments are not arbitrary benefit awards paid with reference to an abstract assessment of need. At their core, they are about sustaining occupation of the home. This point is explicitly emphasised by Justice Phillips in

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<sup>6</sup> Ibid 227.

<sup>7</sup> Valverde (n 2) 178.

<sup>8</sup> The conceptual status of ‘common knowledge’ or ‘common sense’ within legal studies is not settled. Increasingly, the terms are used to denote appeals to wider forms of knowledge that can appear within doctrinal material, such as certain principles or facts being described as ‘self-evident’ even when no evidence on the matter has been brought before the court. For analysis of the ongoing debates and examples of how this problem has been approached from across disciplines, see: Joost Breuker and Rinke Hoekstra, ‘Core Concepts of Law: Taking Common Sense Seriously’ in Achille C Varzi and Laure Vieu (eds), *Formal Ontology in Information Systems* (IOS Press 2004) 210; Charles L Barzun, ‘Common Sense and Legal Science’ (2004) 90 *Virginia Law Review* 1051; Terry Maroney, ‘Emotional Common Sense as Constitutional Law’ (2009) 62 *Vanderbilt Law Review* 851.

*Hardy* when he situates their payment within the ambit of Art.8 ECHR,<sup>9</sup> a point ‘accepted unhesitatingly’<sup>10</sup> by the UKSC in the majority judgment in *Carmichael*.<sup>11</sup> Grieving is only relevant if it requires your continued occupation of the property; disability is not prima facie sufficient until it affects your use of the space; and should a claimant’s lifestyle be considered in the award of a DHP, it is being tied inexorably to their occupation of the home.

The government, in designing the SSSC scheme, makes an ‘epistemic assumption’<sup>12</sup> that local authorities can make these decisions about the continued occupation of the home ‘based on their local knowledge’<sup>13</sup> to ‘get the funds to the right people’<sup>14</sup> and ‘deal with cases in which they think the specific circumstances are appropriate’.<sup>15</sup> These ‘kind of hard cases’ which are ‘so hard to define in statute’,<sup>16</sup> have been left for local authorities to determine. Whether it is a victim of domestic violence,<sup>17</sup> the joint care of children,<sup>18</sup> or indeed the death of a family member,<sup>19</sup> local authorities are

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<sup>9</sup> *R (on the application of Hardy) v Sandwell Metropolitan Borough Council* [2015] EWHC 890 (Admin) [52] (per Phillips J).

<sup>10</sup> Tom Royston and Charlotte O’Brien, “‘Ironic and Inexplicable’ Contours of Legislation Breach Human Rights: “Bedroom Tax” Unlawful Where Fails to Provide for Clear Disability Related Bedroom Needs’ (2017) 24 *Journal of Social Security Law* D11.

<sup>11</sup> It is also worth noting the unanimous position of the court in *Carmichael* that Art.8 was engaged across the claimants in addition to A1P1. See: *R (on the application of Carmichael and Rourke) v Secretary of State for Work and Pensions* [2016] UKSC 58, [3], [49], [60] (per Toulson L).

<sup>12</sup> Anders Molander, Harald Grimen and Erik Oddvar Eriksen, ‘Professional Discretion and Accountability in the Welfare State’ (2012) 29 *Journal of Applied Philosophy* 214, 219. See the more detailed discussion at p.126.

<sup>13</sup> HL Deb, 28 January 2014, c1072.

<sup>14</sup> Ibid.

<sup>15</sup> HC Deb, 15 January 2015, c1006.

<sup>16</sup> HL Deb, 25 January 2016, c1131.

<sup>17</sup> As with *A* in *R (on the application of Carmichael and Rourke) v Secretary of State for Work and Pensions* [2016] UKSC 58, [7] Appendix 1

<sup>18</sup> As with *R (on the application of Cotton) v Secretary of State for Work and Pensions* [2014] EWHC 3437 (Admin), [6]–[18] (Males J).

<sup>19</sup> This issue was explicitly raised by Yvonne Fovargue MP in a parliamentary debate on the SSSC policy in April 2013. She detailed the circumstances of one her constituents which mirrors some key elements of Suzanne’s story, with a partner’s passing and a memorial

expected to be able to adequately assess the merits of the DHP claim; the same ‘imaginary administrative decisions’ that have occupied the courts in the SSSC challenges.<sup>20</sup>

The expectation that administrative workers assessing DHP applications possess this knowledge needs scrutiny. In the same way that Valverde interrogates the declaration that city councillors have knowledge of ‘the streets’, the expectation that local authorities can identify ‘appropriate circumstances’ for a DHP award is a ‘knowledge move’ that justifies their role in the SSSC framework.<sup>21</sup> This is an ascription of a form of ‘common knowledge’, where administrative workers are expected to know how to differentiate between these different claims for support to remain in the property.<sup>22</sup>

The problem is that this common knowledge does not exist. It is a ‘legal fiction’.<sup>23</sup> As will be apparent from the examples detailed below, the same three vignettes prompted a wide range of responses from participant authorities. Some considered grieving important, others not. The relevance of smoking or the extent of disability varied across the sample. As argued by Valverde, this form of imputed common knowledge is ‘nothing but a dream’, but one that is often necessary to ensure officials can effectively discharge their role and for ‘judicial decision-making’.<sup>24</sup> The expectation, as for the unsuccessful parties in *Carmichael*,<sup>25</sup> is that local authorities can consider

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having been situated in the garden of the property. The response from Esther McVey MP was – perhaps unsurprisingly – that ‘the trebling of the discretionary payment’ will help to ensure it ‘goes to the right people’. See: HC Deb, 23 April 2013, c.258WH.

<sup>20</sup> Alan Brady, *Proportionality and Deference Under the UK Human Rights Act: An Institutionally Sensitive Approach* (Cambridge University Press 2012) 18.

<sup>21</sup> See Valverde’s analysis of ‘transmuting jurisdiction into knowledge’ at: Mariana Valverde, ‘Theoretical and Methodological Issues in the Study of Legal Knowledge Practices’ in Martha Merrill Umphrey (ed), *How Law Knows* (Stanford University Press 2007) 88–9.

<sup>22</sup> Valverde (n 2) 21.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid 27.

<sup>25</sup> Namely, Mr Daly, Mr Drage, JD, Richard Rouke and ‘A’ – all of whom the court was satisfied could be reasonably considered under the DHP scheme. See, *R (on the application of Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58, [51]– [55], [62] (per Toulson L).

their cases with reference to this common knowledge, being able to identify the extent to which factors are relevant for the individual applicant's ongoing occupation of the property. Each of the examples below – grieving, disability and the assessment of lifestyle – demonstrates that this is a problematic assumption.

## 2. Grieving and the home

Suzanne's vignette – presented to the local authorities through the online platform – considers a particularly acute issue demanding the administrative worker's attention: the death of a family member and the grieving which results.<sup>26</sup> Death and grieving have been frequently linked to the SSSC policy. Numerous media reports have associated the policy with deaths and suicides,<sup>27</sup> and a striking number of these provide examples of the penalty being applied to grieving households due to rooms – following the death of their occupant – being treated as 'spare' under Reg.B13.<sup>28</sup>

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<sup>26</sup> See Chapter Five for details of the DHP case studies.

<sup>27</sup> Individual cases have been repeatedly raised before Parliament. See, for instance: HC Deb, 17 December 2014, c1450. The relationship between the policy and self-harm and suicide has been explored elsewhere: Maria Barnes et al, 'Understanding Vulnerability to Self-Harm in Times of Economic Hardship and Austerity: A Qualitative Study' (2016) 6 *BMJ Open* 1, 4–7.

<sup>28</sup> The volume of these incidences being reported suggests that it is far from an isolated incidence. For instance, see: James McCarthy, 'Grieving Mum Forced to Pay Bedroom Tax after Disabled Son Died – and Council "Won't Move Her"' *The Mirror* (12 July 2015) <<http://www.mirror.co.uk/news/uk-news/grieving-mum-forced-pay-bedroom-6052586>> accessed 19 December 2017; Jon Lockett, 'Grieving Dad of Teen Killed in Head-on Crash Forced to Pay Bedroom Tax on Son's Empty Room' *The Sun* (5 August 2016) <<https://www.thesun.co.uk/news/1543340/grieving-dad-of-teen-killed-in-head-on-crash-forced-to-pay-bedroom-tax-on-sons-empty-room/>> accessed 19 December 2017; Linzi Watson, 'Grieving Family Faced "Bedroom Tax" Benefit Cut' *Evening Times* (26 April 2013) <[http://www.eveningtimes.co.uk/news/13254777.Grieving\\_family\\_faced\\_\\_bedroom\\_tax\\_\\_benefit\\_cut/?ref=arc](http://www.eveningtimes.co.uk/news/13254777.Grieving_family_faced__bedroom_tax__benefit_cut/?ref=arc)> accessed 19 December 2017; James McCarthy, 'Disabled Royston and Mum Julie Ordered to Pay Bedroom Tax on Spare Room after Son Died Because Moving Them Would Cost Too Much' *Wales Online* (11 July 2015) <<http://www.walesonline.co.uk/news/wales-news/disabled-royston-mum-julie-ordered-9636517>> accessed 19 December 2017; 'Grieving Parents Fight Tax Change' *Hartlepool*

On the facts presented, Suzanne lives alone in a three-bedroom property. Her partner passed away the year before the SSSC was in force and his ashes are buried in the garden of the home. She is falling into arrears by virtue of not being able to afford the penalty for under-occupation, but is refusing to look for alternative accommodation.

The supporting regulations have envisaged how the penalty may interface with death in the home. They provide some transitional protection, although the effective discharge of the statutory scheme by the Housing Benefit authority responsible is another matter.<sup>29</sup> Under Reg.13ZA Housing Benefit Regulations 2006, if a claimant is continuing to occupy accommodation in which a ‘linked person’ has died, the maximum rent which applied before the death continues to do so for 12 months.<sup>30</sup> A ‘linked person’ includes, for these purposes, a member of the person’s ‘family’,<sup>31</sup> or a relative of the claimant or their partner who occupied the same dwelling.<sup>32</sup> It is worth noting that under the ‘housing element’ of Universal Credit, this transitional protection is limited to just three months.<sup>33</sup>

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*Mail* (26 January 2013) <<http://www.hartlepoolmail.co.uk/news/grieving-parents-fight-tax-change-1-5356160>> accessed 19 December 2017.

<sup>29</sup> There are many reported instances where the bedroom tax has been incorrectly applied almost immediately after a family member passed away. For an example, see: Charlotte Cox and Todd Fitzgerald, ‘Dad Hit by Bedroom Tax on Dead Son’s Empty Room’ *Manchester Evening News* (2 August 2016) <<http://www.manchestereveningnews.co.uk/news/greater-manchester-news/dad-hit-bedroom-tax-dead-11696046>> accessed 19 December 2017.

<sup>30</sup> See 13ZA(1)(a)–(c) Housing Benefit Regulations 2006

<sup>31</sup> The root definition of which is contained in s.137(1) Social Security Contributions and Benefits Act 1992.

<sup>32</sup> There are a number of associated complexities with this – such as the meaning of having occupied the ‘same dwelling’ – namely, it is not necessary for the deceased individual to have necessarily resided with the claimant (if they were, for example, living in the same building on a joint tenancy). It is outside of the scope of the analysis here to provide a detailed analysis of these provisions, suffice to say that it is not as clear cut as it may first appear.

<sup>33</sup> See s.37 Universal Credit Regulations 2013/376. This reduction has come under sustained criticism by bereavement charities, for instance, see: Charlie Cooper, ‘The Bedroom Tax on Bereavement: Grieving Families to Face Spare-Room Benefit Cut within Three Months’ *The Independent* (9 January 2014) <<http://www.independent.co.uk/life-style/health-and->

Death and practices of grieving, particularly of family members, are frequently analysed using the concept of home.<sup>34</sup> Finch and Hayes go as far as to ask whether ‘the home dies with the person’.<sup>35</sup> Marcus dedicates a whole section of her influential *House as Mirror of Self* to the ‘death of a partner and attachment to home’.<sup>36</sup> Before turning to the authority responses and the interview data on which the scenario is based, it is important to highlight two key aspects within the literature on death and grieving. The first is the spatial dimensions of grieving practices and the associated importance of the home. This strand of the death studies literature is concerned principally (but not exclusively) with the ‘the ritual creation and maintenance of personal and social memories of the dead to serve the needs and interests of the living’.<sup>37</sup> Within these processes, the home itself can often be central to ensuring that grieving is not ‘suppressed or truncated’<sup>38</sup> or as something redefined ‘across its symbolic, psychological and physical constructs’.<sup>39</sup> Part of this can be the ‘deeply personal choices’ or ‘aspirations to situate the dead in an ideal environment’, for instance, ‘ashes scattered in a cherished domestic garden’;<sup>40</sup> the decision which forms the basis of this scenario.

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families/health-news/the-bedroom-tax-on-bereavement-grieving-families-to-face-spare-room-benefit-cut-within-three-months-9047658.html> accessed 19 December 2017.

<sup>34</sup> For a concise overview, of theoretical approaches to how ‘the home itself has to be reconstructed’ following death, see either: Christine Milligan et al, ‘Unpacking the Impact of Older Adults’ Home Death on Family Care-Givers’ Experiences of Home’ (2016) 38 *Health and Place* 103, 104; or Annika Jonsson and Tony Walter, ‘Continuing Bonds and Place’ [2017] *Death Studies* 1, 4.

<sup>35</sup> See in particular Janet Finch and Lynn Hayes, ‘Inheritance, Death and the Concept of the Home’ (1994) 28 *Sociology* 417, 431.

<sup>36</sup> Claire Marcus, *House As a Mirror of Self: Exploring the Deeper Meaning of Home* (Nicolas-Hays 2006) 6.

<sup>37</sup> Aubrey Cannon, ‘Spatial Narratives of Death, Memory, and Transcendence’ (2002) 11 *Archeological Papers of the American Anthropological Association* 191.

<sup>38</sup> Marcus (n 36).

<sup>39</sup> Susan Thompson, ‘Home and Loss: Renegotiating Meanings of Home in the Wake of Relationship Breakdown’ (2007) 10 *M/C Journal* <<http://journal.media-culture.org.au/0708/07-thompson.php>> accessed 31 December 2017.

<sup>40</sup> Avril Maddrell, ‘Mapping Grief. A Conceptual Framework for Understanding the Spatial Dimensions of Bereavement, Mourning and Remembrance’ (2016) 17 *Social and Cultural Geography* 166, 175.



The second is the difficulty of communicating these grieving practices. Although those who are grieving may take comfort from the feelings of familiarity and memories in their homes, or feel a presence of their lost loved one, these experiences are not of the kind that lend themselves easily to rational determination and communication to an administrative worker. Indeed, the very ‘essentially contested’ nature of analysing these experiences was the focus of Chapter Two. In common with Lipman’s analysis of ‘haunted homes’, the experiences here are about a ‘sense’ or feeling about a place, where people ‘just know’ the presence of their loved one is there.<sup>41</sup> It is not ‘rational’ knowledge. It is what she describes as ‘non-analytical’;<sup>42</sup> the sort of knowledge that is difficult to communicate and evidence. These diffuse feelings, tied to the home, are not easy to articulate through the confines of a DHP application form, nor are they capable of easy cogent assessment by an administrative worker. Suzanne’s scenario, however, forces the rationalisation of this experience of grief, with the home made an integral part of this through the burying of the ashes in the garden.

There is no reference to death or handling bereavement in the DWP DHP guidance. Many DHP policies at the local authority level refer to dying, such as Durham Council’s policy of ascribing a ‘priority’ to households where a member – in a somewhat odd turn of phrase – has an ‘expected death within 12 months’.<sup>43</sup> More commonly, households are referred to as being ‘eligible’ or in a ‘priority group’ if they are ‘able to prove ... personal exceptional circumstances, for example the bereavement of a close relative’.<sup>44</sup> Following the arguments made in Chapter Six on the importance of application forms, it is worth also providing an outline of how these forms ask about death. Although the approach varies, **Example Excerpts 7.1** provides an overview,

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<sup>41</sup> Caron Lipman, *Co-Habiting with Ghosts: Knowledge, Experience, Belief and the Domestic Uncanny* (Ashgate 2014) 145.

<sup>42</sup> Ibid 145.

<sup>43</sup> Durham Council, ‘Discretionary Housing Payments Policy’ (2016) <<http://www.durham.gov.uk/media/4005/Discretionary-Housing-Payment-Policy/pdf/DiscretionaryHousingPaymentPolicy.pdf>> accessed 19 December 2017, 11.

<sup>44</sup> Derby City Council, ‘Discretionary Housing Payment Policy’ <<http://www.derby.gov.uk/media/derbycitycouncil/contentassets/documents/policiesandguidance/DerbyCityCouncil-Discretionary-Housing-Payment-Policy-2015.pdf>> accessed 19 December 2017.

with many of the forms limiting themselves to a fairly narrow interpretation based on the applicability of the Reg.13ZA transitional protection, with the 12-month window repeatedly being relied upon.

## Focus on Forms: Example Excerpts 7.1

### Death and DHP application forms

There are a broad range of approaches to dealing with death in the DHP application forms. The approach represented by Flintshire's question is the most common, with a 12-month time scale imposed – presumably for the purposes of identifying households under the ambit of Reg.13ZA Housing Benefit Regulations – and a small amount of space for elaboration.

**Form source:** Flintshire County Council, 'Discretionary Housing Payment Application'

<<http://www.flintshire.gov.uk/en/PDFFiles/Benefits/DHP-Form-Standard.pdf>> accessed 19 December 2017.

19 Has there been a death in your household in the past 12 months? If **yes** - please give details. No  Yes

A smaller minority of authorities explicitly state that the Reg.13ZA exemption is the reason for including the question, indicating to the claimant that this narrow exemption is the ground for any decision taken on the information they provide in the box.

**Form source:** Doncaster Council, 'Discretionary Housing Payment Application Form' <<https://goo.gl/fSPnTE>> accessed 19 December 2017.

Has anyone who lived with you died within the last 12 months? If yes, please tell us here who has died and how they were related to you. (We ask this question because it may mean you are entitled to extra Housing Benefit temporarily.)

Those local authorities which do not include a dedicated question on death will often include it as an example of information to provide in a broader question about circumstances. The meaning of 'recent' and the extent to which any bereavement – such as those outside the home – may be relevant, is left to the claimant applying for support.

**Form source:** Leicester City Council, 'Apply for a Discretionary Housing Payment'

<<http://www.leicester.gov.uk/media/176996/council-tax-discretionary-relief-claim-form.pdf>> accessed 19 December 2017.

Do you have exceptional reasons why you cannot move?

i.e. severe illness or recent bereavement. Yes  No

A minority approach to assessing bereavement in the forms is to provide check-box options, as Welwyn Hatfield Borough Council does below. Here, a simple 'yes' or 'no' is provided, with no space for elaboration, no indication of how the information will be used, or what the meaning of 'recent' might be.

**Form source:** Welwyn Hatfield Borough Council, 'Discretionary Housing Payments'

<<http://www.welhat.gov.uk/CHttpHandler.ashx?id=8123&p=0>> accessed 19 December 2017.

7. Has there been a recent death in your household?

Yes

No

Within the local authority vignette responses there are clear efforts to ascribe some value to the grieving process in the scenario as being relevant to the ongoing occupation of the home. Rather than providing a permanent award, there is an understanding that some additional time to grieve may be appropriate, and this is tied to a (seemingly, fairly arbitrary) time period:

... I would pay this customer for 6–9 months. It is still a relatively short amount of time since the customer's trauma and therefore I believe that some short term support is justifiable. The award letter would make it clear that DHP is a short term solution and that she needs to take action to prevent eviction, be it managing income more effectively, increasing income (from benefits or employment) or looking for a smaller property. **Local Authority 25 (mid–high spend)**

Other authorities, although emphasising that they were 'sympathetic' or 'understood' the predicament, were less convinced on the timeframe. The facts of the scenario imply that it has been around three years since Suzanne's partner died, with other local authorities considering that this was not a sufficiently serious reason for remaining in the property:

Whilst we would be sympathetic towards her due to the death of her partner (based on the details given it appears he died 3 years earlier), we would advise her in an award letter that she must seek help/advice re moving. **Local Authority 32 (high spend)**

A minority approach was to tie support to dealing with the grief. **Local Authority 27** suggested that the claimant consider counselling with a view to this supporting her in a subsequent decision to downsize. Importantly, ongoing support would be conditional on attempting to address the issue:

It is also worth considering that [the claimant] is struggling over the loss of her husband then she may benefit from counselling as this may enable her to move on and then consider downsizing? We would give a short full award of 12–16 weeks in order for [the claimant] to consider her options ... If no progress is

made we would be unlikely to award again ... **Local Authority 27 (mid–high spend)**

Conversely, a third of the local authorities were less sympathetic. They did not consider the current grieving process outlined in the scenario as a sufficiently significant factor to influence their decision. In their view:

If she has no intention of moving however then there is no point putting an award in place. **Local Authority 22 (mid–low spend)**

She needs to increase her income or move. **Local Authority 20 (mid–high spend)**

These local authority responses can be set against the interview data on which the scenario is broadly based. The facts of **Participant 6's** case involve the suicide of his adult son the year the SSSC came into force. The room he had been occupying – the home's 'box-room' – was then subject to the penalty. For reasons that are unclear, although possible to speculate on using the facts provided,<sup>45</sup> there was no transitional protection provided under Reg.13ZA. He was in receipt of a DHP award for the first year (2013/14), after which the payment was reduced by half, leaving a partial deduction in Housing Benefit. Although the suicide itself did not occur at the property, the home serves an important function for the family in remembering and grieving over their son:

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<sup>45</sup> Although the participant could not recall the exact dates, it appears his son may have temporarily moved out a matter of days before the SSSC penalty came into force, so would not be considered as 'occupying the dwelling as his home' under Reg.13ZA(2)(a) Housing Benefit Regulations 2006 SI/2006/213. It is not clear the extent to which he may have counted as 'temporarily absent' for the determination of the maximum rent, as in *SK v South Hams District Council (HB)* [2010] UKUT 129 (AAC), where 'a positive intention to return ... must be required, not a mere floating possibility of return on some eventualities' [34] (per Mesher J).

... we were unaware that he was in dark place, you know? He was depressed and all that, and we didn't know. And he took his own life.

... He had the spare room, the box room, at the time. And he was 30 odd years of age, he'd lived here all his life. That was a couple of years back, when the bedroom tax started up ... So the stress, and I waited months for [the DHP money] to come through. The stresses of this and the bedroom tax and one thing or another ...

To be honest with you, all my sons have grown up in this house. You know what I mean? And we've laid our roots over 40 years, same house. My children have all been born here. My boy's ashes are buried in the back garden, and that would upset my wife more than anything, you know? As I say, our roots are where we live. **Participant 6**

This is an extreme example of both the impact of the SSSC penalty and the nature of the problems facing administrative workers in having to assess, and apportion appropriate weight to, an individual's personal circumstances. There is no consistency in approach, even with the same root scenario. The status of grieving is unclear; some authorities recognise the difficulties and importance of grief and death to the home, while others disregard it altogether. **Participant 6** successfully received a full award for his first year, reduced to a partial award at the time of his interview. For him and his family, the severity of their situation has not diminished over this time and, as with Suzanne's vignette, they do not see themselves leaving the property under any circumstances and the participant still talks of his son 'staying with him' there.

Other examples arose in the sample. **Participant 28's** case does not deal with a death, but instead another kind of loss. Before the SSSC penalty came into force, he had lived at his three-bedroom property with his wife and young daughter. Following a separation from his wife in 2012, she took their daughter to live elsewhere in Europe without his consent, or for a period, even his knowledge. At the time of interview, he was engaged in a legal process to regain custody.<sup>46</sup> The room his daughter occupied,

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<sup>46</sup> The legal process has been focused on returning his daughter to the UK, principally involving the exercise of Council Regulation (EC) No 2201/2003. There is a High Court judgment pertaining to his case which more clearly outlines the facts. Although – in common

alongside the other 'box' room, is classed as spare under Reg.B13 and, as a result, he is subject to a 25% penalty. Based on these circumstances, he was in receipt of a DHP for the first year of the penalty (2013/14), but at the time of the interview this had not been renewed. His daughter's room, which had remained unchanged since she left, and the possessions within the home, were of particular importance to him:

The room is still as it is when my daughter left. Her toys, her wardrobe and her books are all still there. Everything is as it is when she left. It is full of memories for me. It's a part of my head and my heart in that room, because when I see it I remember my daughter and I think more of her. You can see sometimes her toys around here. I have left everything of hers as it is ... I say I'm not moving anything because I love her. When I see her things, although it hurts me, it makes me feel as if she is still with me. She will be seven this November ... **Participant 28**

He considered the existing arrangement temporary, keeping the room in its current state both as a memory of his daughter and as a home ready for her return. As part of what he described as his ongoing 'legal procedures', he required space for any possible homecoming, should he be successful in securing her return to the UK:

This is not an extra bedroom for me now. It could change at any time. I wish tomorrow I could see her and sort it and have access to my daughter.

**Participant 28**

He was frustrated with the local authority's reluctance to consider his circumstances as being sufficient to occasion a renewal of the DHP award. He felt unable to communicate the importance of his situation to the administrative workers:

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with most decisions of this nature – the parties have been anonymised, I have decided against referencing it here. Much of the information it contains is not germane for our purposes and it is important to avoid any possible indirect inference of the participant's identity by those who may be familiar with the case.

They are not considering people's circumstances. I understand, one person living in a three bedroom place is not fair ... They need to consider people's circumstances. It shouldn't be applied to everybody ... I would not leave here under any circumstances. My situation is not clear, I am in a dark place and I do not know what will happen. I don't know when I will see my daughter – I have pressed all of the buttons to try and find my daughter ... **Participant 28**

Of course, these experiences of loss in the home can differ markedly between individuals. **Participant 19** was affected by the SSSC after her daughter was taken into care, leaving her two-bedroom home under-occupied and with a resulting 14% penalty. Understandably, she did not want to discuss these circumstances in detail, instead referring to it only as a 'difficult' and 'stressful' time. For her, she did not want to stay in the property at all, as it was simply serving to remind her of this difficult time of her life. The spare room was not in use: 'in all honestly, once no one was in there, that's how it stayed'.

She decided to apply for a DHP based on her circumstances to help buy her time to try to downsize, prioritising her experiences with her daughter in the application instead of focusing on the search for other properties. For her, this was part of knowing 'what to do ... what to say'. Although stating that the room was 'spare' moments beforehand, for the purposes of the application she understood it could be framed differently:

**Interviewer:** Was that application successful?

**Participant:** Most it was, yeah, because of my circumstances ... It was stressful. Was it a spare room? You know what I mean? For someone else it would have been quite difficult ... Knowing where to go, what to ask, who to talk to, what to say... **Participant 19**

These diffuse experiences of grieving, loss and death all relate to the broader home studies literature outlined in Chapter Two. One approach could be to draw on this material to argue that the importance of memories attached to the home – be it in the context of grief, loss or just day-to-day life – is not sufficiently reflected in the policy framework. There would be a sizable literature to utilise to do so. Indeed, Porteous and Smith associated their widely cited term for the destruction of home – 'domicide' –



with a sub-term focused explicitly on memory – ‘memoricide’ – indicating how the former is often a ‘physical prop’ for the latter.<sup>47</sup> More generally, numerous studies highlight the significance of memories to the home over the lifecourse with reference to ‘varying kinship and household configurations’,<sup>48</sup> memory as a ‘place’ in its own right,<sup>49</sup> or with more specific reference to the importance of possessions in the home.<sup>50</sup>

Notwithstanding this complexity, however, these data demonstrate that local authorities will come to a conclusion by assessing what the administrative officer considers the relevance and extent of the grieving against the individual’s continuing occupation of the home. Some considered the time elapsed since the death too long; others had more sympathy for Suzanne’s current predicament. The participants in this study who had their own experiences of loss all spoke of the difficulty of communicating this to the local authority and – at the time of the interview – none were in receipt of a full DHP award.

### 3. Constructing disability

With two-thirds of tenants affected by the SSSC policy having some form of disability, the identification of households requiring additional support to remain in their home is a central function of the DHP scheme.<sup>51</sup> This section is not focused on what

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<sup>47</sup> Douglas Porteous, ‘Domicide: The Destruction of Home’ in David Benjamin (ed), *The Home: Words, Interpretations, Meanings, and Environments* (Ashgate 1995) 97.

<sup>48</sup> Shelley Mallett, ‘Understanding Home: A Critical Review of the Literature’ (2004) 52 *The Sociological Review* 62, 70.

<sup>49</sup> Peter King, ‘Memory and Exile: Time and Place in Tarkovsky’s *Mirror*’ (2008) 25 *Housing, Theory and Society* 66, 73.

<sup>50</sup> Jean-Sébastien Marcoux, ‘The Refurbishment of Memory’ in Daniel Miller (ed), *Home Possessions: Material Culture behind Closed Doors* (Bloomsbury Academic 2001) 69.

<sup>51</sup> DWP, ‘Housing Benefit: Size Criteria for People Renting in the Social Rented Sector: Equality Impact Assessment’ (2012)  
<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/220154/eia-social-sector-housing-under-occupation-wr2011.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/220154/eia-social-sector-housing-under-occupation-wr2011.pdf)> accessed 19 December 2017, [43]–[44]. Two-thirds of affected tenants have a ‘Disability Discrimination Act recognised disability’ – namely, under s.1 of the Disability Discrimination Act 1995, someone who ‘has

constitutes such a disablement or how this affects the use of the property; it is not a ‘disability studies’<sup>52</sup> assessment per se. Instead, the analysis here draws on the vignette data to demonstrate how local authority workers draw on perceived ‘common knowledge’ in their assessment of this need.

In the vignette presented to participants, Ian has a disability and is under-occupying by two bedrooms. The facts presented to the authorities are deliberately vague about his exact ailments; there is no individual label or diagnosis applied to his experience in order to illicit the information the authority would require in their assessment. The only definitive information is that he receives the lower-rate mobility component of DLA, which implies that the evidential bar laid out in Reg.12 Social Security (Disability Living Allowance) Regulations 1991/2890 has been passed.<sup>53</sup> He lives with his partner in a three-bedroom property but due to ‘difficulties sleeping’ is unable to share a bedroom with his wife.<sup>54</sup> The third room is used to ‘store a small amount of medical equipment to assist with Ian’s mobility’, which includes ‘crutches’. The scenario states that his income and expenditure assessment indicates around £30 per week of unspent income before the SSSC deduction is taken into account.<sup>55</sup> With the implication that he is receiving a lower-rate mobility component, this infers an income – at the time the vignette board was in operation – of at least £21.80 per week from

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a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities’.

<sup>52</sup> For a far broader exploration of what ‘disability studies’ is, and approaches subsumed within it, see: Dan Goodley, *Disability Studies: An Interdisciplinary Introduction* (SAGE Publications 2010).

<sup>53</sup> In particular that the individual has a sufficiently acute mobility problem that they require guidance and supervision most of the time when moving outdoors in unfamiliar places, an evidential bar which is already tied to place and the home. For the underpinning regulation, see: Reg.12(1)(a)(ii) Social Security (Disability Living Allowance) Regulations 1991/2890.

<sup>54</sup> This is a vague and unsubstantiated echo of the problem faced by the *Carmichael* class of tenant, where Mrs Carmichael was unable to ‘share a bedroom with her husband because of her disabilities’: *R (on the application of Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58 [44] (per Toulson L).

<sup>55</sup> This aspect of the scenario is intended to trigger consideration of the *Sandwell* litigation – namely, is it reasonable for an individual to pay for the SSSC penalty out of benefits they are receiving to assist in the mitigation of their disability?

disability benefits,<sup>56</sup> with the concomitant insinuation that some of this ‘excess’ income is constituted from these disability benefits.

Before turning to the data, it is worth underscoring that discernment of the level of a disability within the SSSC regulations exists parallel to, but distinct from, the evidential and substantive requirements of the relevant disability benefits legislation. The benefits system is, of course, heavily interdependent: for instance, the introduction of PIPs has the potential to generate ‘knock on effects’<sup>57</sup> in the determination of carers allowance, which may in turn affect the usage of rooms within a property pursuant to Reg.B13.<sup>58</sup> The difference here, however, is that the de facto assessment of disability under PIP or DLA does not correspond to assistance by way of a DHP. Being disabled is not enough on its own. The question is instead drawn into the home, with the assessment focused on whether the extent of the disability justifies sustaining the ongoing occupation of the property.

Without the backstop of these parallel regulations, it is important to emphasise the sheer complexity of adequately determining disability-related needs. This is underscored in the sizable literature on social constructions of disability, with authors arguing that the practice of ‘assessing’ the extent of disability-related need invariably features both social and spatial considerations,<sup>59</sup> or that particularly individualistic approaches, which have characterised the approach often taken in the design of welfare provision within the UK, should be rejected.<sup>60</sup> For our purposes, there are two issues which arose in the data: space and money. How affected tenants with a disability use

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<sup>56</sup> DWP, ‘Disability Living Allowance (DLA) for Adults’ (Gov.uk, 1 July 2016) <<https://www.gov.uk/dla-disability-living-allowance-benefit/what-youll-get>> accessed 19 December 2017.

<sup>57</sup> Fran Bennett, ‘Universal Credit: Overview and General Implications’ in Majella Kilkey, Gaby Ramia and Kevin Farnsworth (eds), *Social Policy Review: Analysis and Debate in Social Policy* (Policy Press 2012) 23.

<sup>58</sup> Problems generated as a result of the cumulative impact of reforms are dealt with in Chapter Eight at p.384.

<sup>59</sup> Michael Dear and others, ‘Seeing People Differently: The Sociospatial Construction of Disability’ (1997) 15 *Environment and Planning D: Society and Space* 455.

<sup>60</sup> Mike Oliver, ‘Social Policy and Disability: Some Theoretical Issues’ (1986) 1 *Disability, Handicap and Society* 5, 16.

the bedrooms in the property, and the extent to which it results from their disability, is an important consideration for local authorities determining a DHP award. Even more controversial is the treatment of money from disability benefits, and the extent to which this can or should be used to service the SSSC penalty.<sup>61</sup>

### 3.1. Use of the space

Explicit decisions about the extent of an individual's disablement, and resulting eligibility or merit for support, emerged in the local authority responses to Ian's case. This was particularly in the context of the use of the 'spare' room, with authorities asking for more details regarding its use:

We would also look at the level of medical equipment needed in the property to see if a room disregard could be allowed if sufficient medical evidence is supplied. Crutches on their own would not be enough. **Local Authority 27 (mid–high spend)**

... the level of disability does not sound as though they need the 3rd bedroom, so if they don't want to carry on paying the shortfall they would have to downsize. Our claim form asks this, so we would give advice based on this.

**Local Authority 20 (mid–high spend)**

The necessary severity of disablement required to attain a DHP award, and the extent to which it needs to be connected to the space, was an enigma to many of the participants engaged in applications within the sample. Participant 16's property had been adapted for her disability, with 'hand rails everywhere [and] a longer bath fitted', due to a spinal injury. She was confused about the 'levels' of disability required, which seemed to change sporadically:

Errm ... no, I wish they would use something else [other than DHPs]. Because it's quite worrying ... They change their mind so quickly when

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<sup>61</sup> This issue was the subject of the decision in *R (on the application of Hardy) v Sandwell Metropolitan Borough Council* [2015] EWHC 890 (Admin), on which far more below.

you've got a disability! I had a doctor's letter with it as well so now I've got to go and keep getting that re-produced ... It is a worrying ... err ... if you know what I mean? If it's not one thing it's another ... they turn around and say 'no', but you have got all the disability levels and things, it's quite worrying. **Participant 16**

Others had their support cut for no clear reason. Participant 7, who has mobility problems, care needs, and is, in her words 'registered disabled', had a full DHP award for part of the first year of the penalty, which was subsequently reduced:

I had full bedroom tax paid for a while, then the last two years, I pay half of the bedroom tax and then they pay half. I've not been given a reason, I just assumed that half was all I was entitled to! To be honest, I was quite surprised when I applied for it again – with the lady from welfare benefits – that I even got it for a second time. **Participant 7**

In addition to this ongoing uncertainty over 'eligibility' or 'disability levels' for support, there were two sets of circumstances within the sample that were particularly problematic: the treatment of mental health as against physical health difficulties, and problems associated with particularly erratic or changeable medical conditions, for which snap-shot assessments are ill-suited. **Participant 17** had suffered a brain haemorrhage before the imposition of the SSSC and faced a 'nine year recovery period'. Although awarded a full DHP for the first year of the SSSC, this was subsequently reduced by half:

From what I remember, then it ran out, we reapplied, and we were told that you only get the full discretionary for one period. Then I had to pay, I was still on housing benefit, because it's a nine year recovery so I'm not ready to return to work yet, but after that I had to pay a contribution to the bedroom tax out of my benefits, which isn't very much. I was only getting £72 something a week, and they wanted me to pay for two bedrooms out of that. **Participant 17**

She felt that her symptoms had not been adequately considered in comparison to those with more obviously ‘physical’ ailments:

No, I wasn’t physically affected. It was other stuff, like forward planning. My problems aren’t physical, my problems are mental. Stress and planning, that sort of thing ... But that’s what I’m saying ... they don’t think about people like me. They put everyone in same box. They need to be a little bit more aware of why people are in the situation to be claiming housing benefit ... now I’m in a position where I’ve got no choice and I’m being kicked up the bum. It’s not right, it’s not fair. **Participant 17**

The side-lining of mental health problems and their bearing on the home is an unsightly feature of the SSSC framework. It is perhaps best reflected in the Supreme Court’s dismissal of Mr Drage’s claim in *Carmichael* as not possessing a ‘transparent medical need for an additional bedroom’,<sup>62</sup> notwithstanding that his occupation of the space ‘is no doubt connected to his mental illness’.<sup>63</sup> This is despite both the importance of stable home environments to those with particular mental health problems and evidence of the propensity of the SSSC penalty to aggravate these symptoms.<sup>64</sup>

**Participant 18**’s experiences demonstrate the problems and stresses associated with particularly changeable conditions. She lives in a three-bedroom property with her son and daughter, both of whom are under 10 years old. Although Reg.B13 requires both to share a bedroom, her son suffers from nephrotic syndrome and as a result is unable

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<sup>62</sup> *R (on the application of Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58, [42] (per Toulson L).

<sup>63</sup> *Ibid* [52] (per Toulson L).

<sup>64</sup> See: Suzanne Moffatt et al, ‘A Qualitative Study of the Impact of the UK “Bedroom Tax”’ (2016) 38 *Journal of Public Health* 197, 200; and Kate Mattheys, ‘The Coalition, Austerity and Mental Health’ (2015) 30 *Disability and Society* 475. For a brief summary of the research, see: Suzanne Moffatt et al, ‘Public Health Implications of UK Welfare Reform: Qualitative Research in a North East England Community’ (2014) 24 *European Journal of Public Health* 83.

to share with his sister. This may appear to be a standard *Gorry* class of claimant,<sup>65</sup> but the family's circumstances fall outside of the more tightly drawn exemption for 'a child who cannot share a bedroom' under Reg.B13(5)(ba) Housing Benefit Regulations 2006. The definition of the exempted class, provided in Reg.2(1), requires that the child is in receipt of the DLA care component at the middle or high rate;<sup>66</sup> here this was not the case.<sup>67</sup> Consequently, **Participant 18** was reliant on arguing her case to the local authority for DHP mitigation.

Although she had been successful in doing so at the time of the interview, she was concerned about the erratic nature of her son's condition. The extent of his symptoms can vary dramatically, with him feeling well for short to medium periods and then becoming ill again quickly, and she was worried that this could cause problems with the assessment of her ongoing DHP award:

I didn't actually end up paying the bedroom tax, I got it on health grounds. I got it paid for me ... [We applied for a DHP] then I had to get a letter from my GP ... my son's got nephrotic syndrome, so his immune system is very low. So he needs his own room ... It was a bit, like, obviously, because he was getting better, it was a bit like 'oh dear are they still going to do it, are they not going to do it?' And things like that ... We had to get new evidence every time we put the application in, we had to send them new evidence.

### **Participant 18**

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<sup>65</sup> Namely, children unable to share a bedroom by reason of a disability. For an outline of the factual matrix before the court in the case, see: *Gorry v Wiltshire Council, Secretary of State for Work and Pensions* [2012] EWCA Civ 629, [1] (per Kay L).

<sup>66</sup> Under s.72 Social Security Contributions and Benefits Act 1992.

<sup>67</sup> The potential for these individuals to fall through the gaps was raised at length by the Social Security Advisory Committee. See points 1–3 of: Social Security Advisory Committee, 'Report on the Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments)' (2013) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/264025/9780108560064.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264025/9780108560064.pdf)> accessed 19 December 2017.

As outlined in Chapter Three, the ‘flexible’ and ‘responsive’ nature of DHPs, particularly for those ‘of whom it cannot be said with confidence how long their disability-related needs will persist’,<sup>68</sup> has been a key argument for their use put forward by the DWP and recognised in the courts.<sup>69</sup> In practice, the experiences of participants in this study suggest the assessment of disability in the home is either taken as a ‘snap-shot’ whenever the renewal period happens to fall, or is seemingly focused on those physical conditions which are more amendable to evidential substantiation or result in tangible (or preferably, expensive) disability adaptations.

### **3.2. Treatment of income from disability benefits and associated expenditure**

The treatment of income from disability benefits is a particularly egregious problem within the SSSC policy framework. After even a cursory glance at their underpinning regulations, it is clear that DLA, or its eventual successor PIP, is intended to be spent on the costs of disability, not penalties such as the SSSC.<sup>70</sup> Sadly, this has had to be repeatedly established by the courts, most notably in *Burnip*, concerning DLA being used to supplement shortfalls in LHA, and in the SSSC-focused case of *Sandwell*, where the court considered the assessment of DLA by local authorities in DHP award-making.

As a form of benefit intended ‘explicitly to help offset the extra costs of disability’,<sup>71</sup> the practice of assessing DLA as income when determining eligibility for a DHP award was held to be unjustified indirect *Thilmennos* discrimination. The key section for our purposes here is the description of the practice undertaken by Sandwell council

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<sup>68</sup> *R (on the application of MA and others) v Secretary of State for Work and Pensions* [2014] EWCA Civ 13 [74] (per Dyson MR).

<sup>69</sup> See p.189.

<sup>70</sup> Indeed, the intention of DLA and PIP to be a ‘cash contribution towards the extra costs of needs arising from an impairment or health condition’ was the focus of the equality impact assessment looking at the former’s eventual replacement with the latter. See: DWP, ‘Disability Living Allowance Reform: Equality Impact Assessment’ (2011) <<http://www.parliament.uk/documents/impact-assessments/IA11-022BD.pdf>> accessed 19 December 2017, at [1].

<sup>71</sup> Merry Cross, ‘Demonised, Impoverished and Now Forced into Isolation: The Fate of Disabled People under Austerity’ (2013) 28 *Disability and Society* 719.



deemed unlawfully discriminatory contrary to Art.14 (with A1P1 Right to Property) by the court:

... the council's approach 'is to look at the applicant's income and outgoings globally', excluding only DLA(m). Mr Dunn explains that the council considers this approach to be fair and compliant with the spirit of the DHP guidance ... because the council also takes into account disability-related expenditure ... and does not require the applicants with disabilities prove any of their expenses. (para. 39 per Phillips J)

Despite this clear legal position, reflected in the DWP DHP guidance,<sup>72</sup> the majority of local authorities in the sample for this study were reliant on using income and expenditure accounts as a proxy for 'reasonable' levels of 'disability related expenditure'. Generally, authorities used the level of these expenses as an indication of overall disability, and/or offset these expenses against the levels of disability benefits received:

... in checking the I&E details, we would ensure that any disability related expenditure was taken into account. We would include DLA as income, although often when exploring related expenditure, we find that this is higher than the amount of DLA awarded. **Local Authority 35 (mid-low spend)**

... within income and expenditure assessment we would include the DLA income. This is because we would also include the potential higher expenditure for their medical/care needs within the assessment. **Local Authority 28 (mid-low spend)**

The customers dla would not be taken in to account however any disability related costs that do not exceed the dla award would not be considered as part of his expenditure. **Local Authority 26 (mid-high spend)**

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<sup>72</sup> DWP, 'Discretionary Housing Payments Guidance Manual: Including Local Authority Good Practice Guide' (n 70), at [3.9].

The approach adopted by Sandwell Council in this instance, and the majority of local authorities in the research sample, follows this pattern of using expenditure information as a proxy for assessing disability. In the responses to the vignette exercise, authorities repeatedly identified *Sandwell* as the basis of a change of internal policy, although the position advanced by many was incongruous. The response from **Local Authority 16** provides the clearest example of the contradiction at the heart of this approach. The administrative worker stated that DLA would not be considered as income, before immediately going on to state that due to the ‘available income’ an award would not be made:

We would not take his DLA into account following Sandwell case, and therefore we would not make an award as he has available income and is not proving he is in hardship. **Local Authority 16 (mid–high spend)**

The treatment of income from disability benefits and associated expenditure is an ongoing problem. Repeatedly, local authority DHP policy documents echo the same tautology of setting disability income against ‘details of any disability related expenses’ as ‘the claimant is expected to have listed their disability related outgoings’.<sup>73</sup> The Local Authority and Social Care Ombudsman has considered the practice on numerous occasions, deciding it allows a ‘balanced picture of an applicant’s circumstances’.<sup>74</sup> The approach has also been the subject of multiple FOI requests at Wirral Council,<sup>75</sup> where leaked emails following an internal audit indicate

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<sup>73</sup> Halton Borough Council, ‘Discretionary Housing Payment Scheme’  
<<http://councillors.halton.gov.uk/documents/s32193/Draft%20DHP%20guidance%20Final.pdf>> accessed 19 December 2017.

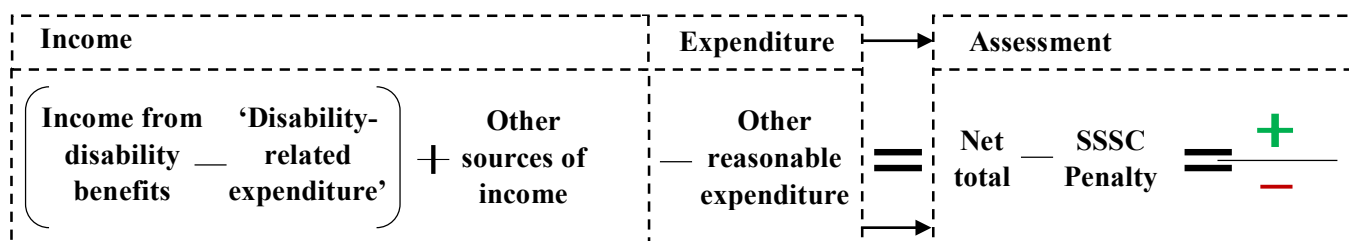
<sup>74</sup> Local Government and Social Care Ombudsman, ‘Trafford Council (13 008 196)’  
<<http://www.lgo.org.uk/decisions/benefits-and-tax/housing-benefit-and-council-tax-benefit/13-008-196>> accessed 19 December 2017.

<sup>75</sup> Paul Cardin, ‘FOI Request “Benefit: Discretionary Housing Payments”’  
<[https://www.whatdotheyknow.com/request/benefit\\_discretionary\\_housing\\_pa?nocache=incoming-974362](https://www.whatdotheyknow.com/request/benefit_discretionary_housing_pa?nocache=incoming-974362)> accessed 19 December 2017.

that the authority was non-compliant with *Sandwell* for 18 months following the decision.<sup>76</sup>

Although most local authorities did not explicitly include DLA income in assessments, others did include the DLA income offset against disability-related expenditure, or some disregarded DLA income but also disregarded expenditure that could reasonably be met by DLA. The net effect of both approaches is the same: benefits received for disability-related costs are matched against requisite outgoings, with space to consider their relevance or reasonableness. **Figure 7.1** depicts how these assessments of income function.

**Figure 7.1:** Graphical depiction of the treatment of DLA and other income received from disability benefits within the DHP rubric.



The output of this approach is often the same as the one lamented in *Sandwell* – tenants in receipt of DLA face paying a proportion of their penalty with income from disability benefits. Indeed, participants in the study were actively using their DLA income to supplement the penalty:

I don't like to apply, but if I have to I will. At the same time, if I didn't get it, I'd pay it out of my DWP money anyway. I don't want to move, I want to stay where I am. I'm happy. I'd find a way of paying it.

[I get DLA], I spend a bit of that on the tax, or I've had to. **Participant 7**

The point to underscore here is not the lawfulness of this widespread practice; *Sandwell* indicates that an approach which considers DLA income as part of an

<sup>76</sup> Paul Cardin, 'Picture of Surjit Tour Redacted Email' <<https://wirralinittogether.files.wordpress.com/2017/04/picture-of-surjit-tour-redacted-email-dated-31-10-20161.jpg>> accessed 19 December 2017.

affordability assessment, even if offset against expenditure, is not permitted.<sup>77</sup> Instead, it is to demonstrate that a local authority's publicly declared position of not assessing disability benefits as income does not deal with the problem. Instead of assessing income and expenditure as for other applicants, it simply introduces an additional question for the administrative worker of whether the disability expenditure itself is 'reasonable', or, indeed, what they consider disability-related or non-disability-related expenditure.

#### **4. Lifestyle and habits: smoking and unreasonable expenditure**

Julie's case study is designed partly to bring the assessment of 'habit and lifestyle'<sup>78</sup> directly into the focus of the local authority, principally by explicitly drawing attention to Julie's smoking and its associated costs. The scenario details that she lives in a three-bedroom property with her son who has 'significant learning difficulties' but does not require 'overnight care'. The costs of her smoking are set into sharp relief by placing the total SSSC penalty at £15 per week and going on to indicate that 'her income and expenditure account demonstrates that she spends £30+ a week on cigarettes'. Consequently, the vignette leaves the local authority to consider how this practice should affect her ongoing occupation of the property.

It is worth noting that the SSSC and smoking have an unusual affiliation. North Lincolnshire Council's widely publicised practice of denying DHPs to those who smoke or have satellite television<sup>79</sup> – perhaps a contributing factor to them routinely

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<sup>77</sup> See Jed Meers, 'Going Cap in Hand: Challenges to the Benefit Cap and Local Authority Discretionary Housing Payment Policy' [2015] *Journal of Housing Law* 73.

<sup>78</sup> Valverde (n 2) 226.

<sup>79</sup> See: BBC News, 'No Change on North Lincolnshire Housing Grant Ban for Smokers' *BBC News Online* (2 December 2013) <<http://www.bbc.co.uk/news/uk-england-humber-25154871>> accessed 19 December 2017; and Peter Apps, 'Council Denies Hardship Funds to Smokers' *Inside Housing* (London, 6 December 2013) <<https://www.insidehousing.co.uk/news/news/council-denies-hardship-funds-to-smokers-38077>> accessed 19 December 2017.

spending a measly proportion of their DHP budget allocation, just 16% in 2015/16<sup>80</sup> – is perhaps the best-known example, but it is certainly not alone.<sup>81</sup> Homeless Link raised concerns about the practice, stating that: ‘subjective policies such as these fail to treat people as individuals and are based upon arbitrary value judgments’.<sup>82</sup> These ‘vices’ have been identified by housing associations and others as areas of unnecessary expenditure which should be considered by tenants in the face of reductions to welfare programmes. As a stark example of this, **Figure 7.2** depicts an excerpt from an Eastland Homes tenant newsletter:

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<sup>80</sup> Jed Meers, ‘Discretionary Housing Payment Expenditure 2015/16’  
<<http://socialrights.co.uk/project/blog/discretionary-housing-payment-expenditure/>>  
accessed 19 December 2017.

<sup>81</sup> DWP, ‘Evaluation of Removal of the Spare Room Subsidy: Final Report’ (2014)  
<<http://www.cchpr.landecon.cam.ac.uk/Projects/Start-Year/2013/Spare-Room-Subsidy-Household-Benefit-Cap/Final-Report>> accessed 19 December 2017, 44. Within the early days of the SSSC, before the Scottish government supplemented DHP provision, Edinburgh City Council adopted the same policy, see: Emily Dugan, ‘Council denies help to people who spend on luxuries’ *The Independent* (London, 2013)  
<<http://www.independent.co.uk/news/uk/politics/council-denies-help-to-people-who-spend-on-luxuries-8782746.html>> accessed 19 December 2017.

<sup>82</sup> Work and Pensions Select Committee, *Local Welfare Safety Net : Evidence – Homelessness Link* (HC 2015–16, LCW0019) Available at  
<<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/work-and-pensions-committee/local-welfare-safety-net/written/23634.html>> accessed 19 December 2017.

**Figure 7.2:** Eastland Homes Newsletter (Spring 2013), Eastland Homes Available at: <[http://www.eastlandshomes.co.uk/files/ART28\\_1788%20-%20StreetsAhead\\_Issue%2041\\_web.pdf](http://www.eastlandshomes.co.uk/files/ART28_1788%20-%20StreetsAhead_Issue%2041_web.pdf)> accessed 1 March 2017.



The sheer volume of academic material which specifically refers to smoking by welfare claimants is striking. There is an association with smoking as an ‘unhealthy consumption’ trope central to discourses on the so-called ‘underclass’,<sup>83</sup> or as part of the ‘moral evaluation’ of ‘shirkers’ against ‘strivers’ based on their ‘ways of living’.<sup>84</sup> As argued by Graham, ‘the image of the smoker lurks within such pejorative terms as “welfare mother” in the US and “chav” in the UK’.<sup>85</sup> Others have referred to the practice as part of implicit ‘citizenship codes’<sup>86</sup> or as tied to social responsibility and ideals of self-control,<sup>87</sup> with those ‘on welfare [viewed as] having insufficient resolve, knowledge, and will-power to conform’<sup>88</sup> or possessing ‘ostensible signs of a lack of

<sup>83</sup> Anna Fohrbeck, Andreas Hirseland and Philipp Ramos Lobato, ‘How Benefits Recipients Perceive Themselves Through the Lens of the Mass Media – Some Observations from Germany’ (2014) 19 *Sociological Research Online* 9.

<sup>84</sup> Gill Valentine and Catherine Harris, ‘Strivers vs Skivers: Class Prejudice and the Demonisation of Dependency in Everyday Life’ (5) 53 *Geoforum* 84, 91.

<sup>85</sup> Hilary Graham, ‘Smoking, Stigma and Social Class’ (2011) 41 *Journal of Social Policy* 83, 93.

<sup>86</sup> Sukhwant Dhaliwal and Kirsten Forkert, ‘Deserving and Undeserving Migrants’ (2016) 61 *Soundings: A Journal of Politics and Culture* 49, 55.

<sup>87</sup> Colleen Reid and Carol Herbert, ‘“Welfare Moms and Welfare Bums”: Revisiting Poverty as a Social Determinant of Health’ (2005) 14 *Health Sociology Review* 161, 164.

<sup>88</sup> *Ibid.*

self-discipline’.<sup>89</sup> Whether an individual was a smoker was seen as sufficiently significant to be controlled for in Dunn et al’s study on attitudes to work,<sup>90</sup> and has been analysed as a form of ‘coping strategy’ for those living in poverty.<sup>91</sup>

The problem here, as ably demonstrated by Eastland Home’s newsletter in **Figure 7.2**, is that the assessment of Julie’s smoking in this scenario constitutes an integral part of the household’s continued occupation of the home; as the newsletter states (somewhat vulgarly), ‘non-essential items won’t matter if you lose your home’. This is not an assessment of the cost of smoking per se,<sup>92</sup> instead the practice is a ‘habit’ indicative of a certain lifestyle. Put another way, the position is this: if your home really mattered that much to you, you would cut back on these vices to save it.

There are, therefore, important considerations on nature and extent. As argued by Leitzel, characteristics of vice are unlikely to apply to ‘occasional indulgers’,<sup>93</sup> nor do they ‘consist of isolated acts’<sup>94</sup> – there is a space in between, where its extent can serve as an indicative heuristic of the individual’s ‘lifestyle’. Put another way, smoking one cigarette does not make an individual a smoker – it is about identifying a pattern of behaviour, generally from the income/expenditure tables and associated evidence. As indicated in a response from a mid-spend local authority:

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<sup>89</sup> Sanford Schram, *After Welfare: The Culture of Postindustrial Social Policy* (New York University Press 2000) 67.

<sup>90</sup> Andrew Dunn, Maria T Grasso and Clare Saunders, ‘Unemployment and Attitudes to Work: Asking the “Right” Question’ (2014) 28 *Work, Employment and Society* 904, 916.

<sup>91</sup> See: Vicky Cattell, ‘Poor People, Poor Places, and Poor Health: The Mediating Role of Social Networks and Social Capital’ (2001) 52 *Social Science and Medicine* 1501, 1509; and Simon J Williams, ‘Theorising Class, Health and Lifestyles: Can Bourdieu Help Us?’ (1995) 17 *Sociology of Health and Illness* 577, 579.

<sup>92</sup> Studies of deprivation consistently point to the fallacy of eliminating ‘non-essential’ expenditure as a means for addressing insufficient levels of state assistance; as argued by Mack and Lansley, those who spend ‘a small proportion of their income on goods that are not essential, whether cigarettes or the other “non-necessities” identified, does not make their lack of necessities any less of a deprivation’. See: Joanna Mack and Stewart Lansley, *Poor Britain* (Routledge 1985) 125.

<sup>93</sup> Jim Leitzel, *Regulating Vice: Misguided Prohibitions and Realistic Controls* (Cambridge University Press 2007) 6.

<sup>94</sup> Valverde (n 2) 15.

We would ask for a full breakdown of her income and expenditure to establish if she could afford the shortfall herself. Her expenditure on cigarettes would probably not be allowed in full. We would also consider other ‘unnecessary’ expenditure such as a cable TV, mobile phone etc. We would ask for the last two months bank statements as evidence of her lifestyle – are there regular payments to Starbucks, McDonald’s etc. **Local Authority 30 (low-spend)**

Here, the administrative worker is directly assessing these ‘intermediate categories’ of ‘habit’ and ‘lifestyle’.<sup>95</sup> what is necessary and unnecessary, what is a reasonable level of expenditure or not for a recipient of assistance with Housing Benefit, what are indicators of a positive or negative ‘lifestyle’. The decision is in the ‘messy causal, space of desires, inclinations and the like’,<sup>96</sup> where ‘expert scientific knowledges are rarely determinative’.<sup>97</sup>

Expenditure on cigarettes or payments to McDonald’s do not indicate, by themselves at least, that an individual should be denied assistance; the decision is more nuanced and is dependent on their behaviour. As indicated in two further responses to Julie’s case study:

[We] would also discuss if [the claimant] felt the spending on cigarettes was acceptable, they may wish to consider getting help to stop or change to using e-cigarettes in order to reduce the £30 per week spend ... If [the claimant] then re-applies for further assistance she would need to show supporting evidence of the steps taken to improve her circumstances. **Local Authority 27 (low-spend)**

We ... expect customers to meet priority expenses first before meeting other expenses (such as cigarettes) so we would be unlikely to include the expenditure on these items in our income and expenditure check ... We may therefore

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<sup>95</sup> Ibid 226.

<sup>96</sup> Sylvie Delacroix, ‘Law’s “Inherent Moral Risk” and the Two-way Relationship between Law and Habits’ (Society of Legal Scholars 2016)  
<<http://slspaperbank.co.uk/oxford2016/jurisprudence/laws-inherent-moral-risk-and-the-two-way-relationship-between-law-and-habits/>> accessed 14 September 2016

<sup>97</sup> Valverde (n 2) 18.



suggest that she considers reducing her expenditure on cigarettes and any other non-priority expenses ... depending on how the conversation goes and if the customer advises that she has been trying to give up cigarettes ... **Local Authority 12 (mid–low spend)**

This two-pronged approach to the assessment of ‘lifestyle’, where appropriate behaviour is evaluated not only in terms of its own acceptability, but also with regards to steps taken to address or mitigate it, is symptomatic of the association of welfare recipients and certain ‘lifestyles’ in political rhetoric and popular discourse.<sup>98</sup> This has become what Jensen describes as ‘welfare common-sense’.<sup>99</sup> From George Osbourne’s suggestion that ‘welfare is a lifestyle choice’,<sup>100</sup> or Iain Duncan Smith’s broader argument that worklessness has become ‘ingrained’ with a ‘cultural pressure to conform to this lifestyle’,<sup>101</sup> the idea that welfare recipients engage with a certain ‘lifestyle’ has become so entrenched within popular discourse that stakeholders have been found to describe the ‘disabled lifestyles’ of those on DLA, and welfare recipients themselves accord negative lifestyles to others.<sup>102</sup>

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<sup>98</sup> For example, much has been written about one particular UK television programme which purports to depict the realities of living on welfare benefits: *Benefits Street*. The discord between the representation and reality, and associated public reactions, have been analysed elsewhere (see Robert MacDonald, Tracy Shildrick and Andy Furlong, “‘Benefits Street’ and the Myth of Workless Communities” (2014) 19 *Sociological Research Online* 1; Paul Baker and Tony McEnery, ‘Who Benefits When Discourse Gets Democratised? Analysing a Twitter Corpus around the British Benefits Street Debate’ in Paul Baker and Tony McEnery (eds), *Corpora and Discourse Studies: Integrating Discourse and Corpora* (Palgrave Macmillan UK 2015); Katherine Runswick-Cole and Dan Goodley, ‘DisPovertyPorn: Benefits Street and the Dis/Ability Paradox’ (2015) 30 *Disability and Society* 645.

<sup>99</sup> Tracey Jensen, ‘Welfare Commonsense, Poverty Porn and Doxosophy’ (2014) 19 *Sociological Research Online* 3.

<sup>100</sup> Kayleigh Garthwaite, “‘The Language of Shirkers and Scroungers?’ Talking about Illness, Disability and Coalition Welfare Reform’ (2011) 26 *Disability and Society* 369, 371.

<sup>101</sup> Robert Walker and Elaine Chase, ‘Separating the Sheep from the Goats: Tackling Poverty in Britain for over Four Centuries’ in Erika Gubrium, Sony Pellissery and Ivar Lodemel (eds), *The Shame of It: Global Perspectives on Anti-Poverty Policies* (Policy Press 2014) 150.

<sup>102</sup> Welfare Conditionality Project, ‘First Wave Findings: Jobseekers’  
<<http://www.welfareconditionality.ac.uk/wp-content/uploads/2016/05/WelCond-findings-jobseekers-May16.pdf>> accessed 10 September 2016.

Within these DHP applications, income and expenditure accounts are used as a proxy to indicate aspects of such lifestyles.<sup>103</sup> Further responses to Julie’s case study indicate this approach:

The household expenditure would also be compared to the Figures provided by the Money Advice Trust for the size of household. Any significant deviation from these figures would be explored with the customer. **Local Authority 35 (mid–low spend)**

... we would need to know the full details of her income and expenditure. Certainly a large expense of £30 per week on cigarettes would be relevant and may be brought up as an area where potential savings could be made, but we would want to consider her overall expenditure ... **Local Authority 10 (mid–low spend)**

These responses indicate what Valverde describes as the ‘shadowy realm’ between isolated ‘acts’ on the one hand – such as smoking a cigarette or buying fast food – and a ‘disciplinary world’ of an associated ‘lifestyle’ or ‘identity’ on the other.<sup>104</sup> Navigating between the two, deciding when expenditure is reasonable in the context or not, requires an assessment of relevance of these factors by the local authority worker for the individual’s ongoing occupation of the home. This invariably has to draw on the ‘common knowledge’ expected of them: how much spending on cigarettes is too much and when is smoking permissible, if at all?

Participants frequently lamented this level of intrusion, or ‘having to explain my life away’,<sup>105</sup> and recognised how their lifestyle was being subject to assessment by the local authority. Participant 14 had noted a shift in the application form away from his income and expenditure and towards whether he was ‘deserving’ of the bedroom:

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<sup>103</sup> The specific designs and processing function of the forms is assessed in more detail below.

<sup>104</sup> Valverde (n 2) 16.

<sup>105</sup> Participant 30 speaking about his repeated applications for DHP support.

Yeah, they changed the sheet haven't they? Or changed the form? The first couple of years, the first couple of times, it was based on your income. The last one, the bird at [the HA] told me the emphasis was more about whether I was deserving to have the bedroom ... I don't know whether it's to do with the Government or whether it's to do with [the LA], I don't know ... the last one that was filled in, the emphasis was more about whether you were deserving of it, not whether you can afford it? **Participant 14**

On further investigation, the application form from **Participant 14**'s local authority had not changed since the imposition of the penalty. The shift in focus was on the interpretation of information – the income/expenditure accounts, questions about use of the space, interpretation of evidence such as bank statements – which had shifted the participant's perception of the application as dealing with whether he 'deserved' the bedroom or not.

Participant 8 had a similar view, feeling that the reality of his life was not being considered by the local authority:

Well every year without fail, they always says to us, well they're not giving as many this year as they were last year. And, you know, that just puts more stress on [my wife] because of the MS, because MS is set off by stress ... And all you see are all these things on television about how people who are on benefits are living a life of luxury and all the rest of it, and you think – I wish! Come see how we have to live. **Participant 8**

**Participant 8** shared a familiar sentiment that this assessment of their lifestyle was misguided, or framed through a prism of how those on benefits live 'a life of luxury'. In common with other participants, exasperated, they spoke of wanting the local authority to go to their home and 'see how we have to live'.

## 5. Conclusions

The three examples above all demonstrate what happens in the determination of DHP support when the application form ends and ‘common knowledge’ steps in. As argued by Valverde, ‘this knowledge rarely gets named’,<sup>106</sup> with scholars subsuming it into discussions about policy implementation or the black-box of discretion. The extent to which grieving should be relevant when considering the ongoing occupation of the property differed between authorities. So too did the assessment of Ian’s disability or the treatment of ‘reasonable’ or ‘unreasonable’ expenditure on disabilities, or the controversial assessment of lifestyle, vice and habit which has received such a high profile in the media.

In the role they have been accorded in the SSSC scheme, subject to detailed analysis in Chapters Three and Four, I argue that local authorities are expected to exercise their discretion with reference to a ‘common knowledge of home’. As identified by Valverde, this is an important ‘knowledge move’.<sup>107</sup> The expectation that local authority administrative workers will be able to assess the relevance of any issue they are presented with against the applicant’s ongoing occupation of the property is taken for granted in the *epistemic* discretion accorded to them under the SSSC framework. When the UKSC in *Carmichael* refers to the circumstances of Mr Daly, Mr Drage, JD, Richard Rouke and ‘A’ being reasonably considered under the DHP scheme, it mirrors the sentiment of the government that local authorities can take these decisions ‘based on their local knowledge’<sup>108</sup> to ‘get the funds to the right people’,<sup>109</sup> and ‘deal with cases in which they think the specific circumstances are appropriate’.<sup>110</sup>

Instead, we see that these administrators are taking decisions that have little to do with any idea of localism or particular administrative knowledges at all. Instead they are ‘empowered’<sup>111</sup> to give common knowledge assessments of disabilities, the

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<sup>106</sup> Valverde (n 2) 225.

<sup>107</sup> Mariana Valverde (n 21) 88–9.

<sup>108</sup> HL Deb, 28 January 2014, c1072.

<sup>109</sup> HL Deb, 28 January 2014, c1072.

<sup>110</sup> HC Deb, 15 January 2015, c1006.

<sup>111</sup> Valverde (n 2) 20.

importance of grieving, and the relevance of lifestyle – all with reference to assessment of whether to support the individual’s ongoing occupation of the property. I argue that the data in this study suggests that this ‘common knowledge’, implicitly appealed to in the DHP scheme, does not exist – as argued by Valverde, it is merely a ‘legal fiction’.<sup>112</sup>

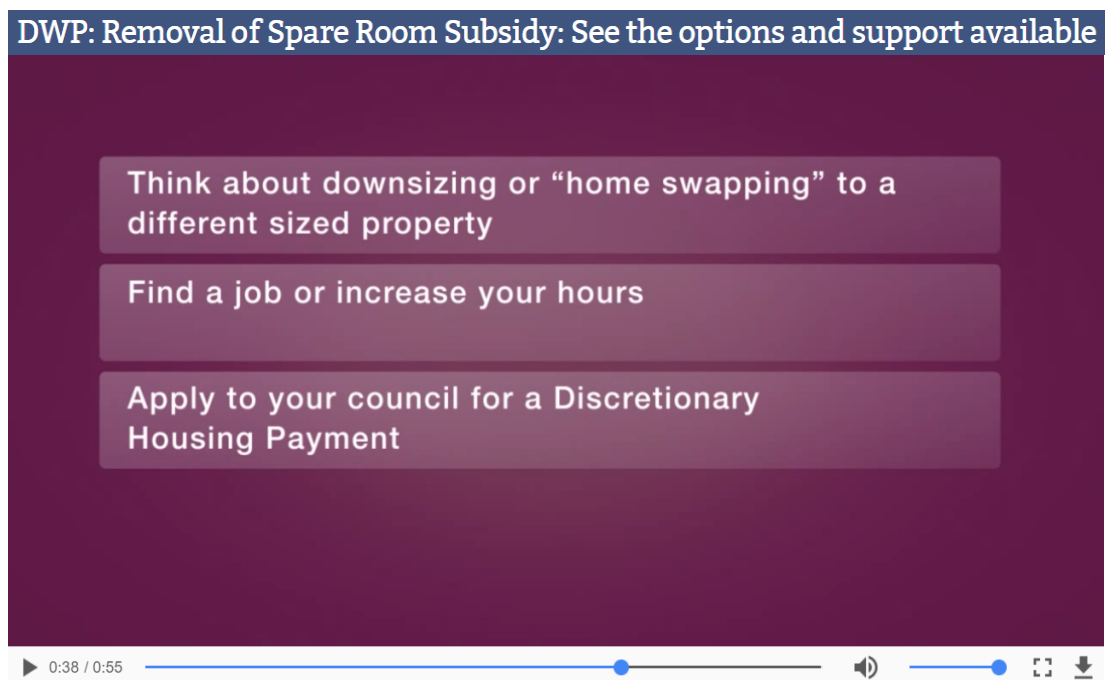
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<sup>112</sup> Ibid 21.



# Should I stay or should I go? The ‘duty to know’ of tenants affected by the SSSC

## Chapter Eight



**Source:** Department for Work and Pensions, ‘DWP: Removal of Spare Room Subsidy: See the options and support available’ <<http://webarchive.nationalarchives.gov.uk/video/workandpensions/3VXp7YksQ6Q>> accessed 24 April 2017.

## 1. ‘Should I stay or should I go?’

The title of one of the first research reports published on the SSSC – Aragon Housing’s ‘Should I stay or should I go?’<sup>1</sup> – speaks to the expectation that the imposition of the penalty will induce those affected to reconsider their housing circumstances. The government has referred repeatedly to the ‘behaviour trip-change’<sup>2</sup> it anticipates, with the policy expected to exert a ‘sizeable influence on the behaviour of tenants’.<sup>3</sup> Put another way, the SSSC is presented as if it were ‘not a sanction’,<sup>4</sup> but instead designed to effect a decision on the part of the tenant. The principle is a simple one, imbued with the logic of the ‘largely untested assumptions’<sup>5</sup> found throughout the welfare reform agenda: if you really value your home that much, then you will pay to stay. If not, then clearly it not a necessity for you: ‘it is their choice’.<sup>6</sup> This is the core logic of the penalty, analysis of which is generally relegated to the language of ‘behavioural responses’.<sup>7</sup>

This chapter draws on the theoretical arguments already made to assert that this perspective is misguided. To assume that the SSSC penalty can effect a reappraisal of home interests in this way is to make a series of assumptions which are questioned by the data collected in this study. There are three hurdles which I argue it does not pass. The first is the expectation that all affected tenants can appraise their home interest against the imposition of an arbitrary financial penalty. I argue that this is a ‘knowledge move’ which places an impossible epistemological demand – or to use Valverde’s

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<sup>1</sup> Arragon Housing, ‘Should I Stay or Should I Go? The First 100 Days of the Bedroom Tax’ (2013) <<http://www.24housing.co.uk/yournews/100-days-of-the-bedroom-tax/>> accessed 21 September 2017.

<sup>2</sup> DWP, ‘Housing Benefit: Size Criteria for People Renting in the Social Rented Sector: Equality Impact Assessment’ (2012) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/220154/eia-social-sector-housing-under-occupation-wr2011.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/220154/eia-social-sector-housing-under-occupation-wr2011.pdf)> accessed 21 September 2017, [16].

<sup>3</sup> Ibid at [16].

<sup>4</sup> HL Deb, 29 January 2014, vol751 col1207.

<sup>5</sup> Sharon Wright, ‘Welfare-to-Work, Agency and Personal Responsibility’ (2012) 41 *Journal of Social Policy* 309.

<sup>6</sup> HC Deb, 23 April 2013, vol561 col51.

<sup>7</sup> HL Deb, 28 July 2014, vol755 col254W.



terminology, a ‘duty to know’<sup>8</sup> – on many of those subject to the SSSC penalty.<sup>9</sup> In other words, despite being expected to do so, an affected tenant’s home interest is not capable of being reduced down to a fungible entity to be set against a weekly cash loss. Fundamentally, I argue that there is a difference between *choosing* to move or remain in the property and being *forced* out.

The second is the expectation that the SSSC effects a linear impact on affected tenants; in other words, the imposition of the financial penalty under Reg.B13 must be recognisable on its own terms by affected tenants. The SSSC is rarely the only welfare reform demanding the tenant’s attention. A coterie of other policies, ranging from the replacement of Council Tax Benefit with the Council Tax Reduction Scheme (CTRS)<sup>10</sup> through to the abolition of Education Maintenance Allowance,<sup>11</sup> have all broken the linear link between the SSSC penalty and the tenants it affects. Many of the participants in this study were unable to confirm the level of the penalty, or subsumed its effects into larger ‘bills’ or fused it with other payments, particularly of Council Tax.

Third, there is the important issue of some tenants being absolved from this decision, either temporarily or by statutory exemption. They have either successfully gained (likely brief) respite as a result of a DHP, or fall into the limited exempted classes

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<sup>8</sup> Mariana Valverde, ‘Theoretical and Methodological Issues in the Study of Legal Knowledge Practices’ in Martha Merrill Umphrey (ed), *How Law Knows* (Stanford University Press 2007) 89–90; Mariana Valverde, *Law’s Dream of a Common Knowledge* (Princeton University Press 2003) 170–2.

<sup>9</sup> See Mariana Valverde, ‘Theoretical and Methodological Issues’ (n 8) 89–90.

<sup>10</sup> Indeed, the particularly overlapping constituency affected by the abolition of Council Tax Benefit is considered in some detail within the House of Commons Library Briefing: Wendy Wilson, ‘Impact of the Under-Occupation Deduction from Housing Benefit (Social Rented Housing)’ (2016) <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06896>> accessed 21 September 2017. 18-19.

<sup>11</sup> See O’Hara’s description of the SSSC penalty and the abolition of Education Maintenance Allowance as a ‘double whammy for the poorest’: Mary O’Hara, *Austerity Bites: A Journey to the Sharp End of Cuts in the UK* (Policy Press 2014) 60.

within the underpinning Reg.B13.<sup>12</sup> Where to draw the line between those who are reliant on the DHP scheme for mitigation and those exempted through Reg.B13 itself is a distinction which is integral both to the operation of the SSSC and the basis of all of the judicial review challenges against it.<sup>13</sup> The SSSC framework mandates that the tenants themselves engage in this exercise, requiring them to consider whether they are worthy of mitigation under the DHP scheme or not. In the interviews, participants repeatedly returned to what they perceived as problems with the issue of ‘exemptions’ and classes of affected tenants requiring differential treatment, often identifying people ‘in their position’ as warranting exclusion from the scheme.

Each of these three key elements of the ‘should I stay or should I go’ problem is dealt with in turn in this chapter: the expectations made of tenants; the associated complications of cumulative impact of welfare reforms; and the dividing line of exempted classes.

## **2. The duty to know: imperative knowledge under the SSSC**

The SSSC evaluation reports, commissioned by the DWP and undertaken by the Cambridge Centre for Housing and Planning Research, asked affected tenants via a survey to indicate their reasons for staying in the property or deciding to move elsewhere.<sup>14</sup> Although a useful exercise in assessing their respective priorities, the

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<sup>12</sup> See p.50.

<sup>13</sup> This is a consequence of the constraints inherent in judicial review challenges to legislation – especially that concerning welfare reform, where there is a heavy reliance on discrimination-based challenges under Art.14, generally tied with A1P1, or, to a lesser extent, Art.8. For a more detailed discussion of this, see: Jed Meers, ‘Shifting the Place of Social Security: Welfare Reform and Social Rights under the Coalition Government’s Austerity Programme’ (2015) <[socialrights.co.uk/project/uk-welfare-reform/](http://socialrights.co.uk/project/uk-welfare-reform/)> accessed 14 August 2017

<sup>14</sup> See DWP, ‘Evaluation of Removal of the Spare Room Subsidy: Interim Report’ (2014) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/329948/rr882-evaluation-of-removal-of-the-spare-room-subsidy.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/329948/rr882-evaluation-of-removal-of-the-spare-room-subsidy.pdf)> accessed 21 September 2017; and DWP, ‘Evaluation of Removal of the Spare Room Subsidy: Final Report’ (2014) <<http://www.cchpr.landecon.cam.ac.uk/Projects/Start-Year/2013/Spare-Room-Subsidy-Household-Benefit-Cap/Final-Report>> accessed 21 September 2017.

options presented to them imbue the logic of Gurney's 'checklist'<sup>15</sup> approach to assessing home meanings discussed in Chapter Two.<sup>16</sup> Participants were asked about attachment to their home, the neighbourhood, family, suitability, time at the property, and so on,<sup>17</sup> finding – perhaps as would be expected – that 'emotional attachment to homes' were central to the decision, especially among those 'who had lived in their home for many years'.<sup>18</sup>

The approach Clarke et al adopt takes for granted the key problem I put forward in this section. By asking about these different elements – which draw on those 'concept of home' descriptors employed in the literature and discussed in Chapter Two – as reasons for remaining in the property, it is assumed that the weighing of their home against the SSSC penalty is the decision those affected are taking. Put another way, the implication is that those without such ties to their property, acting rationally, would attempt to move and those with stronger ties would decide to pay-to-stay. The DWP impact assessment could not be clearer in its intentions. The penalty is designed to exert a 'sizeable influence on the behaviour of tenants', still seeking to 'provide support where accommodation is suitable for the needs', but providing an incentive 'to move to smaller properties where their accommodation is considered larger than necessary'.<sup>19</sup> Parliamentary debates are particularly instructive here. In response to stories of acute circumstances caused by the imposition of the penalty, a common response from the Conservative benches – particularly in the earlier days of the penalty – was 'it is their choice'.<sup>20</sup> Affected tenants are expected to balance the value of their home to themselves against the penalty, arriving at the sensible conclusion.

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<sup>15</sup> Craig Gurney, *The Meaning of Home in the Decade of Owner Occupation* (University of Bristol School for Advanced Urban Studies, 1990) 33.

<sup>16</sup> See p.72.

<sup>17</sup> See DWP, 'Evaluation of Removal of the Spare Room Subsidy: Final Report' (n 14) 84; DWP, 'Evaluation of Removal of the Spare Room Subsidy: Interim Report' (n 14) 60.

<sup>18</sup> DWP, 'Evaluation of Removal of the Spare Room Subsidy: Final Report' (n 14) 85.

<sup>19</sup> DWP, 'Housing Benefit: Size Criteria for People Renting in the Social Rented Sector: Equality Impact Assessment' (n 2) at [16].

<sup>20</sup> HC Deb, 23 April 2013, vol561 col51.

This section challenges the fundamental basis of this assumption. Although affected tenants are expected to make this assessment, I argue that, in fact, home interests are incapable of being weighed against the imposition of the SSSC penalty. To borrow Valverde's terms, it is an 'imputed knowledge'<sup>21</sup> or a 'duty to know'<sup>22</sup> that they cannot fulfil. By using a financial penalty delivered through Housing Benefit, the SSSC requires affected tenants to (i) consider the value of the home to themselves and to (ii) weigh it against the imposition of this financial penalty or to articulate their requirement for a DHP. In other words, the importance of the home is relegated to an independent variable, a mere factor to influence their decision in response to the financial penalty. Their home becomes part of a fixed 'order of preferences',<sup>23</sup> where it can be set against other fixed preferences – such as keeping a child in the same school, maintaining caring arrangements, the utility gained by having (comparatively) more money, and so on – in a rational assessment by the individual affected tenant.<sup>24</sup> I argue that this is an unrealistic expectation; home meanings are incapable of being reduced and 'known' in this way.

The analysis is grouped into three areas: the family, spatial ties to the property itself and – to adopt the term frequently employed throughout debates on the SSSC – the 'downsizers'.<sup>25</sup>

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<sup>21</sup> Valverde, 'Law's dream of a common knowledge' (n 8) 26–7, 163.

<sup>22</sup> Ibid 26–27.

<sup>23</sup> Peter Wagner, 'The Bird in Hand: Rational Choice – the Default Mode of Social Theorizing' in Margaret Archer and Jonathan Tritter (eds), *Rational Choice Theory: Resisting Colonisation* (Routledge 2000) 19.

<sup>24</sup> For more information on this sort of approach, see: Margaret Archer, 'Homo Economicus, Homo Sociologicus and Homo Sentiens' in Margaret Archer and Jonathan Tritter (eds), *Rational Choice Theory: Resisting Colonisation* (Routledge 2000) 36–56.

<sup>25</sup> Identifying 'downsizers' has become a term of art in SSSC discourse: DWP, 'Evaluation of Removal of the Spare Room Subsidy: Final Report' (n 14) 19–20; Adam Park and Friederike Ziegler, 'A Home for Life? A Critical Perspective on Housing Choice for "Downsizers" in the UK' (2016) 9 AMPS 1, 4.

## 2.1. The importance of family

The logic of the penalty assumes that this decision-making capacity is rooted within the individual affected tenant. An assumption that these preferences are ‘internal to each agent’<sup>26</sup> is central, otherwise a decision maximising utility cannot be effectively taken.<sup>27</sup> This situates day-to-day decision-making in the home as the output of ‘atomistic individuals’,<sup>28</sup> neglecting the potential for decisions to be heavily intertwined with other household members.<sup>29</sup> However, a clear theme in the participant data is the impossibility of reducing complex familial considerations at the household level to be considered against the imposition of the SSSC penalty. Tenants found themselves ‘stuck’; they may individually wish to move elsewhere, but could not on account of the effect it would have on other family members, either living in the property with them or elsewhere.

**Participant 35**’s situation is an example of this problem. She is a single mother of two children living in a three-bedroom property. Her daughter moved out shortly after the imposition of the SSSC, and her son – who has severe autism and requires her day-to-day support – remains in the property.<sup>30</sup> Consequently, under Reg.B13, she is

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<sup>26</sup> Carol Wolkowitz, ‘Decision-Making as a Process over Time: The Careers of Home-Located Workers’ in Margaret Archer and Jonathan Tritter (eds), *Rational Choice Theory: Resisting Colonisation* (Routledge 2000) 167.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid 172.

<sup>29</sup> There is a far broader literature, principally in behavioural economics, which explores these issues. The intractability of household-level decision-making, despite the best efforts of algorithm designers, is a common theme. For an outline of the extensive independent variables fed into such analysis, see Miguel Székely and Orazio Attanasio, *Family in Flux* (University of Washington Press 2003) 4–16. For a broader outline of the approach, see: Graziella Bertocchi, Marianna Brunetti and Costanza Torricelli, ‘Who Holds the Purse Strings within the Household? The Determinants of Intra-Family Decision Making’ (2014) 101 *Journal of Economic Behavior and Organization* 65.

<sup>30</sup> There is some limited research which specifically assesses the importance of the home for children with autism, and particularly how the use of the home by the parents (or other care-givers) and their child can ‘differ in important ways’ to children who do not have autism. See: Jennifer Sarrett, ‘Custodial Homes, Therapeutic Homes, and Parental Acceptance’ (2015) 39 *Culture, Medicine, and Psychiatry* 254, 270.

underoccupying by one bedroom and faces a 14% penalty on her eligible rent. She was already struggling financially before the imposition of the penalty, with her situation getting worse. She had applied for a DHP, which was awarded by the local authority on the condition of signing up to ‘Home Swapper’<sup>31</sup> – a common conditional requirement imposed on DHP awards.<sup>32</sup> After complying for a period of time, she discussed the issue with her son and decided to deregister from the platform and consequently forfeit the DHP payment upon renewal:

And because my son was special needs he wouldn’t move. I was on the homeswap, but ‘I don’t want to move’ he said and I need to think of him ... He said if you get a new place I’m not moving with you. **Participant 35**

When pushed on whether she is intending to stay in the property long-term, notwithstanding a lack of DHP or any other form of support, she continued:

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<sup>31</sup> An online platform ran by the private company *Housing Partners*, designed to match tenants in the social rented sector seeking a mutual exchange. Other Housing Association-specific platforms exist, but HomeSwapper operates nationwide. See:

<https://www.homeswapper.co.uk/> accessed 21 September 2017.

<sup>32</sup> For instance, DHP application forms often specifically ask applicants about their membership of the HomeSwapper platform, or require confirmation of their membership reference number. For examples, see: Swindon Council, ‘Discretionary Housing Payment Application’ [http://www.swindon.gov.uk/download/downloads/id/641/form\\_discretionary\\_housing\\_payments\\_application.pdf](http://www.swindon.gov.uk/download/downloads/id/641/form_discretionary_housing_payments_application.pdf) accessed 10 September 2016.; City of London, ‘Application for Discretionary Housing Payment Support’ <https://www.cityoflondon.gov.uk/services/housing/Documents/discretionary-housing-payment.pdf> accessed 21 September 2017.; East Lindsey District Council, ‘Discretionary Housing Payment Checklist’ <https://www.cityoflondon.gov.uk/services/housing/Documents/discretionary-housing-payment.pdf> accessed 21 September 2017. The DWP commissioned analysis of the SSSC refers not only to engagement with nationwide platforms like HomeSwapper being part of DHP conditionality, but also to evidence being asked of specific Housing Associations to substantiate engagement with similar small-scale platforms they run in-house, see: DWP, ‘Evaluation of Removal of the Spare Room Subsidy: Final Report’ (n 14) 43.

I've have had to. My son, he won't move. They would have had to carry him out, he wouldn't have moved. With autism, they like routine.

### **Participant 35**

Simply because the penalty has been applied and the tenant has subsequently remained in the property does not mean that **Participant 35** has exercised any 'choice' in response to the penalty. Previous analyses have drawn on home-based perspectives to argue that individuals will choose to 'stay and pay ... [in] family homes'<sup>33</sup> or, as argued by McCoy, take the decision which ensures that the 'children's wellbeing is at an optimum despite the [SSSC] policy'.<sup>34</sup> Instead, I argue that **Participant 35** considers that she has no other option because her son's refusal to consent to a move cannot be weighed against an arbitrary financial figure.

The importance of this family connection, and the way in which it creates problems for the expectation that tenants will assess their home interest against the penalty, stretches outside of the confines of the immediate household. Although living alone for the purposes of Reg.B13, **Participant 9** framed his reasons for staying in the home entirely around his current family circumstances. He had separated from his wife and she had taken custody of their children. The 'unoccupied' bedroom space was used when the children visited and intermittently to assist with the care of his mother:

... what happened was that my wife left me, took my kids away and so then, the kids room is there for them, and sometimes my mother comes to stay so it's there for her, and sometimes my sister comes to stay. My mother's been here for a few days and then my sister comes to take her

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<sup>33</sup> Kelly Ann Bogue, 'Precarious Social Housing: Reforming Policy, Changing Culture. An Ethnographic Case Study of the Impact of the "Bedroom Tax"' (University of Manchester 2016) <[https://www.research.manchester.ac.uk/portal/files/54590911/FULL\\_TEXT.PDF](https://www.research.manchester.ac.uk/portal/files/54590911/FULL_TEXT.PDF)> accessed 21 September 2017, 114–18.

<sup>34</sup> Lauren Katy McCoy, 'From a Lone Mother's Perspective: An in-Depth Case Study on the Psychosocial Impacts of the "Bedroom Tax" in the UK' (University of Manchester 2016) <[https://www.research.manchester.ac.uk/portal/files/57430758/FULL\\_TEXT.PDF](https://www.research.manchester.ac.uk/portal/files/57430758/FULL_TEXT.PDF)> accessed 21 September 2017, 113.

back. So obviously I need that room for her – she’s 78 now – so obviously she needs that, so there’s a reason for it ... **Participant 9**

He went on to specifically criticise the impact of the SSSC policy on families, seeing the imposition of the penalty as an agenda to ‘break up the family unit’:

What it’s trying to do, it’s trying to break up families for some reason ... it seems like an agenda to break up the family unit. And the Government say, we want to keep families together. It’s bullshit! **Participant 9**

There are numerous similar examples throughout the other interviews, perhaps most notably in the cases of **Participant 28** and **Participant 6** detailed in Chapter Seven.<sup>35</sup> On the DWP case-load flows, these participants look like success stories; they are taking the sensible decision, deciding that the importance of the home to their family outweighs the penalty. Though, as described by Valverde, the ‘epistemological work’<sup>36</sup> expected of them – namely balancing their home interest against the penalty – is simply not what participants in this study were doing. For these participants, this was not a choice exercised in the face of the penalty, but instead they had made the assessment that no such choice existed at all.

## 2.2. Tied to the space: the importance of the physical property

The second key assumption in the logic of the SSSC penalty is that the home interests of the individual tenants making this decision are fungible.<sup>37</sup> In other words, they are not inextricably tied to the physical property, but are instead capable of exchange or

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<sup>35</sup> See a discussion of these participant’s stories in the context of grieving in the home at p.358.

<sup>36</sup> Valverde, ‘Law’s dream of a common knowledge’ (n 8) 146.

<sup>37</sup> The divide between ‘fungible’ and ‘personal’ property has been the source of extensive analysis elsewhere, particularly in American property law scholarship with reference to Radin’s ‘Personhood theory’. The use of the term in this context is more modest, referring to a non-fixed assessment of home interests, rather than these broader arguments about the categorisation of people’s relationships with property. For an outline and critique of Radin’s material on ‘fungible’ property, see: Benjamin Barros, ‘Legal Questions for the Psychology of Home’ (2009) 83 *Tulane Law Review* 645, 653.



replacement and of comparison to each other.<sup>38</sup> Tenants are expected in response to the SSSC penalty to appraise different elements of their home interest against one another and set this against a financial sanction designed to influence this process – as inferred in Clarke et al’s evaluation.<sup>39</sup> The data questions this assumption. Instead, participants’ home interests were often tied to the physical property itself.

Perhaps the most notable example is **Participant 13**, who suffers from a series of cognition problems and has had complications following associated brain surgery. She is not particularly fond of her home and it is in a poor location for her family who live ‘miles and miles’ away. Though there are some modest adaptations – such as grab rails and a bath lift – to assist with the symptoms of her health problems, her key concern is remaining in the same physical space:

It’s a struggle. I have to stay exactly where I am ... There’s no way [I’d move]. I’d be a prisoner in my own home. This is the thing ... I’m left with a fear of going places I don’t know. I can’t even go into, you know, one of these large shops in [the local town centre], the big department stores. I can’t go in them, because I can never reverse a journey round to get back out again ... I’m ready for the knackers-yard! **Participant 13**

She is in receipt of some partial assistance from DHPs (though at the time of interview was approaching the reapplication date), but pays £20 per month of the SSSC penalty. She is struggling to meet this payment:

I ended up, you know, getting one of those nasty letters, you know, saying you hadn’t paid ... I haven’t done it yet because I just cannot afford it. I know it’s only £5 per week, but it’s a lot of money. **Participant 13**

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<sup>38</sup> For an existing critique of rational theory approaches to the home, drawing on these same arguments, see: Cecilie Juul Jørgensen, ‘The Space of the Family: Emotions, Economy and Materiality in Homeownership’ (2016) 33 *Housing, Theory and Society* 98.

<sup>39</sup> See DWP, ‘Evaluation of Removal of the Spare Room Subsidy: Final Report’ (n 7) 84; DWP, ‘Evaluation of Removal of the Spare Room Subsidy: Interim Report’ (n 7) 60.

Here, the penalty is clearly not capable of affecting the decision to move; she is staying put regardless of the financial consequences. Although the SSSC is often derided by the judiciary as being ‘commonly, if inaccurately, called the Bedroom Tax’,<sup>40</sup> the effect of the penalty here is exactly that – she is paying the reduced penalty *ad infinitum*, notwithstanding any future increase in her overall contribution following the reassessment of her DHP award.

Other examples of this same problem, though in the context of a different analytical focus, are discussed in the previous chapter.<sup>41</sup> **Participant 6** and his wife’s circumstances, where his son’s ashes are buried in the garden of the property, or **Participant 28** who has kept his daughter’s room ready for her following her abduction to Spain by his ex-partner, both demonstrate the fallacy of trying to package a home interest into an entity which can be set against the imposition of the SSSC penalty where the physical property itself is of such importance. This is more than just saying that the policy should take account of home interests more effectively, it is instead to argue that the expectation that affected tenants can weigh their home interest against the penalty in these circumstances is misguided.

### 2.3. The ‘downsizers’

There is a difference between *choosing* to move and being *forced* to move; a distinction set into sharp relief by the ‘downsizers’ in the participant sample. As outlined earlier in this thesis, although the exact rate of downsizing as a result of the penalty is not universally agreed,<sup>42</sup> it appears only a relatively small number of affected tenants have been able to downsize; estimated as being no more than 8% of households between

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<sup>40</sup> *R (on the application of A) v Secretary of State for Work and Pensions* [2015] EWCA Civ 772.

<sup>41</sup> See p.358.

<sup>42</sup> The Department for Local Communities and Government CORE Data (COntinuous REcording of Lettings and Sales in Social Housing in England) is not comprehensive, omitting Wales and any mutual exchanges. Estimates are therefore based on landlord surveys, where the reasons for moving may not be accurately recorded (if at all), hence making SSSC imposed moves more difficult to differentiate from general stock churn. See: DWP, ‘Evaluation of Removal of the Spare Room Subsidy: Final Report’ (n 14) 73–4.

the policy's introduction in April 2013 and April 2015.<sup>43</sup> Their mere existence would seem to undermine my position. For these households, one could assume *prima facie* that a decision was clearly taken to weigh their current home interest against the imposition of the penalty, with the latter usurping the former. For them, the policy worked; it 'got the downsizing'.<sup>44</sup>

There are, however, five participants within this study who had moved properties between the imposition of the SSSC penalty and the time of the interview, or to adopt the language of the government, are the sample's 'downsizers'.<sup>45</sup> All of these households had: (i) been underoccupying pursuant to Reg.B13 by two bedrooms with a 25% SSSC penalty; and (ii) moved to an alternative property where they were underoccupying by one bedroom with a resulting 14% penalty. Consequently, they had not moved themselves outside of the ambit of the regulations, but had rather simply shifted themselves from Reg.13(3)(b) to the less severe Reg.13(3)(a) penalty.

On paper, these participants represent a successful outcome. It is the policy 'working in practice'.<sup>46</sup> Theirs and similar cases, being reflected in the DWP statistics, are used to justify the ongoing imposition of the policy and support an optimistic tone on downsizing reflected in statements by government ministers suggesting that 'more want to do so and the process is continuing'.<sup>47</sup> An efficient move through the sector supports the idea that those 'largely untested assumptions'<sup>48</sup> about the behaviour of those affected by these welfare reforms have come to fruition, with those affected being able to weigh their home interest against the 'compulsion and incentive'<sup>49</sup> of the SSSC policy.

The data collected in this study, however, suggests otherwise. What emerges is a central distinction between a decision to relocate arising from choice and one arising

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<sup>43</sup> Ibid 72.

<sup>44</sup> HL Deb 17 October 2016, vol774, col2118.

<sup>45</sup> DWP, 'Evaluation of Removal of the Spare Room Subsidy: Final Report' (n 14) 67.

<sup>46</sup> See HL Deb, 31 October 2013, vol748, col1723.

<sup>47</sup> HL Deb, 20 January 2016, vol768, col759.

<sup>48</sup> Wright (n 5) 309.

<sup>49</sup> Ibid 310.

from constraint.<sup>50</sup> To characterise these decisions as a choice resulting from an assessment of the home interest against the penalty would be misguided: these tenants are not fulfilling the epistemological demands outlined above. Instead, these participants felt as if they had no choice at all; they moved out of desperation, considering they that had no other option.

**Participant 36**, who suffers from mobility problems and is in receipt of the lower-rate mobility component of DLA, had moved to a two-bedroom property less than a year after the SSSC came into force. She had originally received a DHP to cover the entirety of the shortfall for the first 6 months of its application, but was unable to afford the payments when this elapsed and was concerned that no such support would be available the following year. She considered herself ‘forced out’ of her home:

I was forced to move out because of it ... the DHP was only awarded for 6 months and then it was ‘over to you madam!’ ... I would have incurred that expense and then possibly next year not received any of that help, as who knows what we would have been facing. None of us know at the moment. It’s been forced on me ... I’m probably in your mum’s age group, who would want to downsize against their wishes? Do you see what I mean? **Participant 36**

The decision to move had not been a carefully considered one. Far from weighing her interests against the penalty, the Housing Association had instead offered a ‘take it or leave it’ chance at a property transfer elsewhere in London, and asked her to decide there and then:

And to be honest, I’m still ... it happened so quickly because you know what it’s like with landlords, it all happens so quickly. I haven’t really had chance to take in what’s happened. This is the shock ... you’ve got to make

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<sup>50</sup> This distinction has been repeatedly drawn upon within the literature on residential mobility, particularly in the inverse circumstances of individuals being ‘stuck’ in certain locales. For a particularly influential contribution which draws on this division, see: Rory Coulter, Maarten van Ham and Allan M Findlay, ‘Re-Thinking Residential Mobility’ (2015) 40 *Progress in Human Geography* 352, 363.

an instant decision, you can't think about it for a day or two. **Participant 36**

After having lived at the property for a number of months at the time of the interview, she was reflecting on its suitability for her. It is a second floor flat with no lift access and without the capacity for family members – who all live far outside of London – to stay overnight as was the case at her previous property:

I had to speak to my mother the other day and I said, 'You do realise what I've done ...' I've got two staircases to come up and a spinal injury which is getting worse ... And, you know, I don't know in the years to come whether the spine will just mean that ... with how this affects my legs so badly ... I'm in constant pain as we speak, because this move had injured the spine problem so badly ... So I've been badly affected by the whole thing ... And I don't think the people [David Cameron] wanted to move have moved. Not he wanted to be moved. Or they are going to end up like me, trying to solve the problem, but are going to end up, in all truthfulness, having taken the wrong place. **Participant 36**

**Participant 38** was also living in a three-bedroom house, in this case with her partner. They live in a small town with all of their family – three children and six grandchildren – living very close by. By pure happenstance, a two-bedroom property on the same street became available a matter of months after the SSSC penalty was introduced. Though they were initially determined not to leave their home, **Participant 38** feared there would be no other options other than to face eviction or move out of the area:

We were determined then that we weren't going to move, there were no way we were moving. It were my house. The stress of it all were making me poorly. The thoughts of being taken away from my family and everything ... If I had to move from here to another estate I'd be completely isolated. I'd have nobody, because my daughter doesn't drive and she has three kids at school here. She's a widow, and it's difficult for her – she needs the family around ... A man from [the Housing

Association] said we could get a swap in two weeks, that was our only option. **Participant 38**

This was not a decision based on the rational assessment of their home interest weighed against the imposition of the penalty. Instead, it was a decision taken in fear of the alternative and without adequate time to properly contemplate. They felt a sense of regret at moving,<sup>51</sup> even though their previous property was very close to their new home:

... it was the expense and the upset and the leaving of things behind. We go round there now, and we get upset when we see the house. We have moved literally just round the corner. **Participant 38**

The participant was coming to terms with the impact of their new housing arrangement on their family life:

We can't have family dinners anymore, and they're upset about that. We've borrowed a picnic table from my sister, we can sit on floor. We used to do Christmas round here but we won't manage that this year.

**Participant 38**

**Participant 17's** circumstances demonstrate this same point. At the time of the interview, she had very recently moved into her new property, having left her home of 30 years. She had been working full-time until shortly after the SSSC came into force when she suffered a brain haemorrhage. She was deemed to be underoccupying by two bedrooms under the Reg.B13 room standard and, despite struggling to service the penalty, was desperate to stay in her home:

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<sup>51</sup> A finding supported by the work of Fitzpatrick and Watts on the introduction of Fixed-Term Tenancies. They found that those who had moved on to these following the SSSC penalty had expressed disquiet at their decision, with one participant stating that her partner was 'living on his nerves now, thinking what's going to happen at the end of the five years': Suzanne Fitzpatrick and Beth Watts, 'Initial Findings: Fixed-term Tenancies in Social Housing' (Welfare Conditionality 2016) <<http://www.welfareconditionality.ac.uk/wp-content/uploads/2016/03/SocialtenantsWelCond.pdf>> accessed 21 September 2017.

Out of £70 off a week, it was a lot to find. The thing was, I'd lived in that house for like 30 odd years, raised my family in it, and then with having the brain haemorrhage, and the struggles like the day-to-day struggles, I have to have somewhere that's familiar to me? Having lived there for 30 odd years, my only safe haven was my home. This is going to make me emotional because it always does ... it's just that this wasn't the right time for me to be moving house. **Participant 17**

She felt that she was not in control of the decision to move, feeling pressured into it by her housing association and the desperation and uncertainty she felt about her future at the property:

It came to a point where I wasn't in a position to be choosing when I was told 'now', and that wasn't good for me ... My hospital were not very happy that I was doing it, but I wasn't in the position not to ... But they don't single out people like me. Everyone is labelled the same. Everyone is made to follow the same rules. Even I know it's set me back. I mentioned it to my kids, and they said 'well we didn't want to say anything mum, but you've gone backwards.' But that's what I'm saying about the Government, they don't think about people like me. They put everyone in same box. They need to be a little bit more aware of why people are in the situation to be claiming housing benefit. **Participant 17**

She felt she had been forced to give up her home of 30 years, moving to a new property that she considered to be 'disgusting':

So you know, doing this, and the house I moved into, not being funny, but it's a shit hole ... The people who moved out were disgusting, so my sons had to come in and try and decorate it just so it's clean ... I gave up a nice home, they walked into my home and said 'oh this is so lovely' and I walked into theirs and said 'this is disgusting'. **Participant 17**

Although these cases may appear to be success stories on an internal DWP spreadsheet, the participants who downsized in this study had not considered a detailed assessment of their home interest against the financial penalty. Instead, they felt forced out of their homes and often expressed regret.

#### **2.4. The duty to know: a summary**

This section has made two interlinked arguments. The SSSC penalty (i) expects tenants to ‘know’ their home interest and to set this against the imposition of the penalty, making a ‘choice’ of whether to stay or leave the property, and (ii) this expectation – in Valverde’s terms, the ‘duty to know’ – cannot be fulfilled by the affected tenants. The home interest is not reducible in this way. The participants outlined in this section all test this argument; those with complicated familial considerations, spatial needs, and those who want to move but cannot, all demonstrate how this ‘choice’ based on one’s home interest is a fallacy. It transpires that those cases that would be noted in DWP statistics as a success – the ‘downsizers’ – turn out to be no such thing. Instead of setting a fungible home interest against the imposition of a penalty, participants felt forced out of their homes, stating that they were faced with no other choice or did not have the time to make a considered decision.

This data could be usefully analysed by drawing on perspectives within the home studies literature, particularly those focusing on ‘domicide’, ‘forced evictions’ and so on. Such an analysis would underscore the negative implications of the imposition of the SSSC penalty on the ‘concept of home’ of the affected individual, assessing the measure as an act of intentional ‘domicide’, as in Nowicki’s work,<sup>52</sup> or as a problem of the ‘balance struck’ between the measure and the ‘meaning of home’, as the proposal was described by Fox O’Mahony.<sup>53</sup> These are all useful analyses. With this approach, instead of having the concept of home as its analytical starting point, it starts

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<sup>52</sup> Mel Nowicki, ‘Domicide and the Coalition: Austerity, Citizenship and Moralities of Forced Eviction in Inner London’ in Katherine Brickell, Melissa Fernández Arrigoitia and Alexander Vasudevan (eds), *Geographies of Forced Eviction: Dispossession, Violence, Resistance* (Palgrave Macmillan 2017) 121.

<sup>53</sup> Lorna Fox O’Mahony, ‘The Meaning of Home: From Theory to Practice’ (2013) 5 *International Journal of Law in the Built Environment* 156, 159.



with the expectations made of tenants and the extent to which these are realisable. The data collected here suggests that tenants are not capable of weighing their home interest against the imposition of the financial penalty, as is assumed of them under the SSSC policy framework.

### 3. The problem of cumulative impact

Given the belief in the capacity of this sanction to force ‘behaviour change’,<sup>54</sup> one of the most striking elements from the interview transcripts is how few tenants were able to state with any confidence the amount deducted from their Housing Benefit under the SSSC. Almost three-quarters could not provide a figure for how much they were paying, instead referring to a loose approximation, lumping multiple reforms together, or being unable to state any figure at all:

No I haven’t a clue. I pay something at the end of the month. I don’t know exactly, I’m a bit thick like that! **Participant 10**

I’m not too sure. I’m not too sure at all. Because ... err ... because with the rent and that lot I’m not sure if it was an extra 14 pounds or so?

**Participant 4**

This problem was complicated further when asked about discretionary mitigation under the DHP scheme. The level of claimants’ knowledge about DHP availability was explored through a claimant survey in the DWP-funded review of the SSSC, with 66% of respondents having ‘heard of discretionary housing payments’.<sup>55</sup> However, in practice, the participant’s knowledge in the interviews was not as clear cut. Although the majority of participants knew about the availability of DHPs, they did not always know them by the precise term ‘discretionary housing payments’ or about the status of any award that they currently received. Participants often knew they had received a DHP at some point, but did not always know when and how much for, or they knew they were in receipt of some form of partial financial assistance, but did not know the reason why:

I don’t actually know to be honest, I’m a bit dyslexic and because, like, I have benefits going through the system, what actually happens is they

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<sup>54</sup> HC Deb, 10 June 2015, vol596cW.

<sup>55</sup> In Clarke et al’s study, affected tenants were asked if they had ‘heard of Discretionary Housing Payments’ see: DWP, ‘Evaluation of Removal of the Spare Room Subsidy: Final Report’ (n 14) 54.

actually pay, like the rent and so-fourth, and I get bills for water rates, because obviously it's all separated, and it's complicated. **Participant 5**

Yeah I think so. To be honest with you, I think I get so much off it. I still have to pay some, like my water rates and that. There's still something I've got to pay towards it. **Participant 6**

I would argue this is not, as the rhetoric around Universal Credit in particular may suggest,<sup>56</sup> due to a lack of budgeting control by the tenants themselves. Indeed, as discussed in Chapter Six, many of those interviewed were able to survive on low incomes by virtue of very careful budgeting and management of their finances.<sup>57</sup> The problem is more complicated. The SSSC is not the only reform occupying their thoughts. It is merely a high-profile contender in a farrago of welfare reforms and other policy changes, each overlapping across the others, and some more obvious in their impact than others. As argued by Powell, Housing Benefit reforms 'cannot be seen in isolation from other welfare reforms'<sup>58</sup> with the process of identifying individual impacts being difficult for 'researchers to disentangle'.<sup>59</sup> The extent of this enmeshment is perhaps best indicated by the Treasury's repeated refusal to undertake any cumulative impact assessment of welfare reforms.<sup>60</sup>

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<sup>56</sup> See the language used at paras [12]–[13] of the Universal Credit White Paper: DWP, *Universal Credit: Welfare that Works* (White Paper, Cm 7957, 2010). For a more detailed assessment of the basis for adopting monthly payments and some initial indication of their impact, see Sam Royston, 'Understanding Universal Credit' (2012) 20(1) *Journal of Poverty and Social Justice* 69, 82.

<sup>57</sup> See p.266.

<sup>58</sup> Ryan Powell, 'Housing Benefit Reform and the Private Rented Sector in the UK: On the Deleterious Effects of Short-Term, Ideological "Knowledge"' (2015) 32 *Housing, Theory and Society* 320, 325.

<sup>59</sup> *Ibid.*

<sup>60</sup> See a discussion of the Treasury's stated reasons for refusal to undertake a cumulative impact assessment and criticism of it by the Equality and Human Rights Commission: House of Lords Select Committee on the Equality Act and Disability, *The Equality Act 2010: The Impact on Disabled People* (House of Lords, HL Paper 117, 2016) at [367].

The most notable example of this is the abolition of Council Tax Benefit and its replacement with the local authority-administered CTRS under the Council Tax Reduction Schemes (Prescribed Requirements) (England) Regulations 2012/2885.<sup>61</sup> All of the participants in the sample had been affected by the removal of Council Tax Benefit, and all were now paying a proportion of Council Tax under their local authority's CTRS. In adopting the same 'cut and devolve' approach to welfare reform as exhibited in the SSSC, applicants are required to apply to their local authority for support with their Council Tax,<sup>62</sup> though the legal context for appealing these decisions is more complex than is the case for DHPs.<sup>63</sup>

Tenants spoke repeatedly about the overlapping nature of these reforms, with Council Tax payments weighing heavily on their minds, particularly due to local authorities being quick to issue 'really threatening letters'<sup>64</sup> when tenants fell into arrears, even when awaiting the outcome of an application for a CTRS payment. Tenants often

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<sup>61</sup> Further regulations deal with its implementation in Wales and Scotland, and the burdens on local authorities to have adopted their own scheme within the transition timeframe, with the old Council Tax Benefit eligibility rules applying as a default option if an adequate replacement had not been made, see: Council Tax Reduction Schemes (Default Scheme) (England) Regulations 2012/2886.

<sup>62</sup> Despite a dearth of academic literature examining the issue, these CTRSs have frequently come before the courts, most notably in the Supreme Court decision in *R. (on the application of Moseley) v Haringey LBC* [2014] UKSC 56, where the local authority's characterisation of reductions as an 'inevitable consequence of the Government's funding cuts' was seen not to comply with their duties to consult on the scheme's formation ([42] (per Lord Reed)). More recent judicial reviews have attempted to (unsuccessfully) challenge the basis of the CTRS schemes themselves, for example, see: *Turner v South Cambridgeshire DC* [2016] EWHC 1017 (Admin), or more successfully, use procedural tools such as the PSED to challenge the account of their impact, see: *R (Logan) v Havering London Borough Council* [2015] EWHC 3193 (Admin).

<sup>63</sup> There is more scope to challenge decisions in made by local authorities on their CTRSs. Unlike DHPs – which do not carry an appeal right to the First-Tier Tribunal – under s.16(1) Local Government Finance Act 1992, individuals can challenge the 'calculation' of their Council Tax liability (and consequently, the level of their CTRS award) in the Valuation Tribunal. For a fuller explanation, see: *SC v East Riding of Yorkshire Council* [2004] Valuation Tribunal M11

<sup>64</sup> A view expressed by **Participant 29**.

spoke of this reform alongside their experiences of the SSSC, especially when asked about how they were managing paying the penalty:

Well I'd probably have to starve to death, because you know there's this council tax crap as well flying about ... I get no help, I can get taken to court for it. They don't want to listen ... I can't afford it ... shoving more fines and money and debt on me is somehow going to make me pay what I don't have. **Participant 14**

Yeah, [the Housing Association supported] me. With my medical problems as well. And I know I'm paying some council tax as well. I'm not very up on it, I know I should be, but I'm not. **Participant 10**

**Participant 27** only ever spoke of his (numerous) DHP awards as sitting alongside 'Council Tax shortfall' payments; when asked for the value of his DHP he always included his CTRS payment alongside it. He was particularly confused about the relationship between the two. As indicative of their interdependence, he had previously received decisions on both awards within the same envelope:

The second DHP when I was here, and that was awarded at £11.99 a week, including council tax shortfall at £3.98. They're separate but they come together, though they come now in separate envelopes! **Participant 29**

Other participants spoke of the SSSC penalty and other reforms as a composite 'bill' payable at fortnightly or monthly increments. It was no different in this respect than paying for utilities; participants spoke of putting money aside for 'bills' which included the costs associated with welfare reforms, with any mitigation – through DHPs or other schemes<sup>65</sup> – contributing to reducing this amalgamated financial burden:

Yeah, I try to make sure I get the bills paid ... It's like ... I have to think about my future and try to save a little bit, and I think well this is what

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<sup>65</sup> For instance, the Local Welfare Assistance Scheme and the CTRS.

I've got to play with, and this is the bill money, and that sort of thing ...  
So every fortnight when I get paid, I try to pay the balance of the  
outstanding amount ... Whether I'm in arrears or not I don't know.

**Participant 5**

[the SSSC penalty is] errr ... about £8.50 per week, or £30 a fortnight for  
everything, then I get a DHP that makes up some of shortfall.

**Participant 7**

The effect of any DHPs (or potentially other discretionary mitigation for particular reforms) therefore serves a function far removed from that envisaged under the Discretionary Financial Assistance Regulations 2001. Instead tenants come to rely on them to mitigate the package of reforms as a whole, not just the Housing Benefit element.

Participants also raised other intersecting welfare reforms which were administered by central government. At the time of interview, two participants were anticipating or awaiting the results of a Work Capability Assessment for Employment Support Allowance (support group rate),<sup>66</sup> which was spoken of alongside the pressures of applying for DHPs and the impact of the SSSC:

The beginning of every year is always a stress for us because everything has to be done at the same time, we have to reapply for everything over again. We're still waiting to hear about our – that thing that used to be ATOS – we still don't know if she's going to get called in for an assessment or whatever. We don't even know where we stand with that.

**Participant 8**

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<sup>66</sup> For more information on the troubled history of Work Capability Assessments and criticisms of their design, see: Jon Warren, Kayleigh Garthwaite and Clare Bamba, 'After Atos Healthcare: Is the Employment and Support Allowance Fit for Purpose and Does the Work Capability Assessment Have a Future?' (2014) 29 *Disability and Society* 1319; Timmins' assessment of the 'sea of troubles' associated with the policy: Nicholas Timmins, 'The Coalition and Society (IV): Welfare' in Antony Seldon and Mike Finn (eds), *The Coalition Effect, 2010–2015* (Cambridge University Press 2015) 317, 337.

Local authorities also have to operate within this environment dominated by overlapping, cumulative impacts. For instance, with reference to Suzanne’s DHP vignette, local authorities were sometimes keen to explore ‘if an application for PIP is a possibility’<sup>67</sup> or if Ian’s partner in the DHP vignette may become eligible for ‘PIP for daily living’.<sup>68</sup> Their DHP award or associated requirements (for instance, engaging with their benefits support team) therefore also becomes tangled in more complicated cumulative welfare reform arrangements.<sup>69</sup>

To illustrate the sheer breadth and complexity of cumulative impact throughout the sample without having to take the reader to quotes illustrating each individual reform, **Figure 8.1** plots the myriad of policies introduced or implemented across the research period which arose in the course of participant interviews. These are split into policies which can be characterised as forming part of the welfare reform agenda, and those which are not directly part of this agenda, but were raised by participants (such as the scrapping of Educational Maintenance Allowance). Overlapping discretionary mitigation encountered by participants – such as foodbank vouchers or other local authority support – are detailed at the top of the diagram. Even as a partial picture of total reforms, **Figure 8.1** demonstrates how any impact of the SSSC is far from being linear because the policy is enmeshed in a complex web of welfare reforms and policy changes.

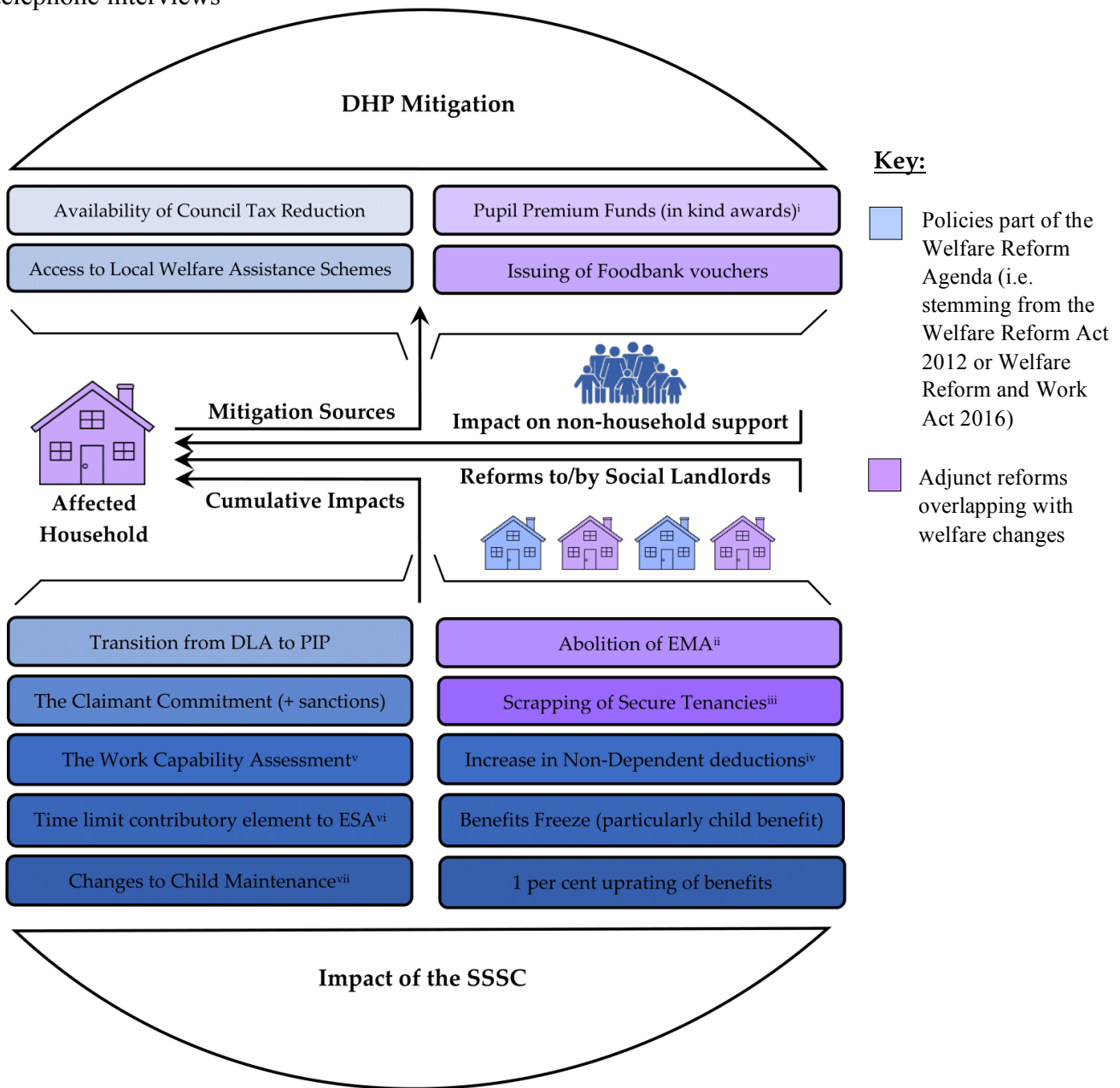
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<sup>67</sup> **Local Authority 29.**

<sup>68</sup> **Local Authority 12.**

<sup>69</sup> In these cases, the Secretary of State’s specifications on Reg.4 Personal Independence Payment (Transitional Provisions) Regulations 2013/387. The section of the transitional PIP regulations which governs the eligibility of individuals to apply for PIP support if they are currently in receipt of DLA but have not received notification under Reg.3(1) Personal Independence Payment (Transitional Provisions) Regulations 2013/387, or are not in receipt of DLA, but wish to apply direct for PIP under Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013/380.

**Figure 8.1:** A diagram illustrating the overlapping reforms stated by participants in the telephone interviews



**Notes:**

- i. For a discussion of the overlap, see: Ruth Lupton, ‘What Is the Impact of the “Bedroom Tax” on Children and Schools?’ (15 April 2014) <http://blog.policy.manchester.ac.uk/featured/2014/04/what-is-the-impact-of-the-bedroom-tax-on-children-and-schools/> accessed 21 September 2017.
- ii. A means-tested termly allowance of between £10–£30 per week for 16- to 19-year-olds who stay in further education; this is still paid in Scotland and Wales.
- iii. For a summary, see: Suzanne Fitzpatrick and Beth Watts, ‘Initial Findings: Fixed-term Tenancies in Social Housing’ (Welfare Conditionality 2016) <<http://www.welfareconditionality.ac.uk/wp-content/uploads/2016/03/SocialtenantsWelCond.pdf>> accessed 21 September 2017.
- iv. See s.74(1)–(2) Housing Benefit Regulations 2006/213
- v. See Reg.15 and Reg.30 Employment and Support Allowance Regulations 2013/379.
- vi. See s.51 Welfare Reform Act 2012.
- vii. Namely, the ending of Child Support Agency payment arrangements, see: Gov.uk, ‘Child Support Agency (CSA) arrangements are ending’ <<https://www.gov.uk/csa-changes>> accessed 21 September 2017.



### 3.1. Why does cumulative impact matter?

This cumulative impact problem is of particular interest for two reasons. It means that assessing the impact of the SSSC on tenants' housing decision making – 'Should I stay or should I go?'<sup>70</sup> – is not as linear as would be assumed from the government's impact assessments. Even before one considers other difficulties over the (in)ability to move to smaller properties,<sup>71</sup> the overlapping nexus of welfare reforms faced by the participants means that teasing out the impact of the SSSC on its own terms is difficult. The fragmentation of the SSSC's effects as it overlaps with other reforms is therefore a key problem for a policy which, on the face of it, is designed to effect a 'behaviour trip-change'<sup>72</sup> via tenants setting their home interest against this financial penalty.

The second key problem is that the courts are completely incapable of assessing this cumulative impact, or holding it to account through judicial review processes or the First-Tier Tribunal; a problem repeatedly highlighted by the Equality and Human Rights Commission as being 'substantial and widespread'.<sup>73</sup> Policies are assessed on their own stated terms, however incongruous they may be, or however substantial their overlapping impact. As argued by Heffernan et al, 'the more bricks there are in the state edifice ... the more immune it is to challenge'.<sup>74</sup>

This has tangible implications on the ability of the courts to truly reflect the impact of the SSSC on the tenants concerned and their home interests. In *Cotton*, where the claimants had 'secondary' caring responsibility for their children but did not receive an additional bedroom under Reg.B13,<sup>75</sup> the court determined that there had been no

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<sup>70</sup> Affinity Sutton (n 1 above).

<sup>71</sup> This is, of course, a very well-documented issue with the SSSC policy and is discussed in more detail below. An overview of the striking lack of associated churn can be seen at: DWP, 'Evaluation of Removal of the Spare Room Subsidy: Final Report' (n 14) 72.

<sup>72</sup> HL Deb, 29 January 2014, vol751, col1207.

<sup>73</sup> Declan Gaffney, 'Retrenchment, Reform, Continuity: Welfare under the Coalition' (2015) 231 National Institute Economic Review R44, 49.

<sup>74</sup> Tracy Heffernan, Fay Faraday and Peter Rosenthal, 'Fighting for the Right to Housing in Canada' (2015) 24 Journal of Law and Social Policy 10, 44.

<sup>75</sup> The problem of shared care arrangements has arisen in other cases, particularly at the First Tier Tribunal and Upper Tier Tribunal, where the interaction in this context between s.130 of

interference with Art.8 (right to respect for home and family life) as ‘something more would be needed to reach the high threshold’.<sup>76</sup> In any event, the court determined that, ‘if something more were to exist’, the ‘probability is that DHPs would in fact be made’.<sup>77</sup>

The issue, of course, is that ‘something more’ *does* exist. The participant data in this study, and quantitative assessments of the cumulative impacts of the UK government’s welfare reforms undertaken elsewhere,<sup>78</sup> demonstrate that the mischief of Reg.B13 does not operate in isolation; it effects a constituency of claimants who are by definition affected by other key reforms.<sup>79</sup> Moreover, the court’s solution – the

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the Social Security Contributions and Benefits Act 1992 and Reg.B13 has been repeatedly considered. The most notable decision aside from *Cotton* is *Secretary of State for Work and Pensions v MM and Northumberland County Council* (HB) [2015] UKUT 624 (AAC) (10 November 2015), where the *Cotton* position was applied to a similar factual scenario between the children’s mother and their grandparents.

<sup>76</sup> *R (on Application of Cotton) v Secretary of State for Work and Pensions* [2014] EWHC 3437 (Admin).

<sup>77</sup> *Ibid* [51] (per Males J).

<sup>78</sup> See Equality and Human Rights Commission, ‘Cumulative Impact Assessment’ (2014) <[http://www.equalityhumanrights.com/sites/default/files/publication\\_pdf/Cumulative%20Impact%20Assessment%20executive%20summary%2030-07-14%20%282%29.pdf](http://www.equalityhumanrights.com/sites/default/files/publication_pdf/Cumulative%20Impact%20Assessment%20executive%20summary%2030-07-14%20%282%29.pdf)> accessed 10 November 2017; Social Security Advisory Committee, ‘The Cumulative Impact of Welfare Reform’ <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/324059/ssac\\_occasional\\_paper\\_12\\_report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324059/ssac_occasional_paper_12_report.pdf)> accessed 21 September 2017; Children’s Commissioner, ‘A Child Rights Impact Assessment of Budget Decisions’ (2015) <<http://www.childrenscommissioner.gov.uk/publications/child-rights-impact-assessment-budget-decisions-including-2013-budget-and-cumulative-0>> accessed 10 November 2017; Contact a Family, ‘The Cumulative Effect – The impact of welfare reforms on families with disabled children now and for future generations to come’ (2012) <[http://www.cafamily.org.uk/media/533778/the\\_cumulative\\_effect\\_briefing.pdf](http://www.cafamily.org.uk/media/533778/the_cumulative_effect_briefing.pdf)> accessed 21 September 2017; and Scottish Parliament Welfare Reform Committee, ‘The Cumulative Impact of Welfare Reform on Households in Scotland’ (2015) <[http://www.parliament.scot/S4\\_Welfare\\_Reform\\_Committee/Reports/wrr-15-01w.pdf](http://www.parliament.scot/S4_Welfare_Reform_Committee/Reports/wrr-15-01w.pdf)> accessed 21 September 2017.

<sup>79</sup> Namely, at the very least, they will be affected by the freeze to working age benefits.

‘probability’ of a DHP award being made – is itself limited to covering the effects of changes to Housing Benefit,<sup>80</sup> not mitigating these broader impacts.

#### **4. Categorisation and participant perspectives on exemptions**

As discussed in detail in Chapter Four,<sup>81</sup> the government’s approach has been to exempt certain classes of tenant affected by the SSSC within Reg.B13 Housing Benefit Regulations 2006. There are, therefore, groups whose home interests are prima facie protected or who are allocated additional space under the size criteria by virtue of their membership of a particular claimant class, sometimes connected to their use of the property itself – such as children who cannot share a room by reason of disability,<sup>82</sup> or (some) adults who require overnight care<sup>83</sup> – or connected to more general living arrangements, such as household members who are absent due to employment in the armed forces and ‘intend to resume occupying the dwelling as their home’ when they return from operations.<sup>84</sup>

The important structural issue of these exemptions is therefore a central part of delineating – at least at the first instance and notwithstanding the availability (or lack thereof) of DHPs – those whose home interests are accorded particular protection or not. Studies examining the SSSC and the home have focused on this regulatory function, with Greenstein et al arguing that the room standards and these built-in exemptions ‘transform the concept of home into a measurable space that can be flexibly divided and segmented’ and construct ‘the kind of family forms and ties that may be considered essential’.<sup>85</sup> This is plainly true of the regulations when viewed on their own terms. Indeed, Reg.B13 explicitly refers to ‘categories of person’ that the local authority should be satisfied ‘occupy the dwelling as their

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<sup>80</sup> As laid out in Reg.3–5 Discretionary Financial Assistance Regulations 2006.

<sup>81</sup> See p.197.

<sup>82</sup> 5(ba) Reg.B13 Housing Benefit Regulations 2006.

<sup>83</sup> 6(a) Reg.B13 Housing Benefit Regulations 2006.

<sup>84</sup> 8(a)–(c) Reg.B13 Housing Benefit Regulations 2006.

<sup>85</sup> Anat Greenstein et al, ‘Construction and Deconstruction of “Family” by the “Bedroom Tax”’ (2016) 11 British Politics 508.

home'.<sup>86</sup> The data collected in this study suggest, however, that the importance of delineating certain classes of claimant affected by the policy which warrant differential treatment is an issue with which the participants are actively engaged. The SSSC policy forces affected tenants to consider their own place within these different classes of tenant. They are under a 'duty to know' whether they are of a class which warrants mitigation, both in terms of knowing whether to make a DHP application and then how to present their predicament in the way which is most likely to secure assistance.

Indeed, unprompted, participants themselves explicitly used the language of 'exemption' and referred to specific groups of tenants whom they deemed to have a sufficient prima facie home interest to warrant differential treatment. Strikingly, they rarely rallied against the policy as a whole. Instead, they spoke of 'fitting into' these categories, or of the need to have certain classes of affected tenant exempted from the impact of the policy. **Participant 27**, who himself suffered from mobility issues and was in receipt of Employment Support Allowance (in the Work-Related Activity Group), argued that:

It would be nice if people on certain benefits, on disabilities or whatever, if they could make them exempt, I would very much like that. If you've proven that you fit into the category or whatever, I would prefer that to DHPs because there would be less faffing about. ... I've had 8 so far, I should think it would be easier for them just to make me exempt ... Perhaps it would be better if I was just put into a certain category, into a band of people who are exempt. **Participant 29**

**Participant 7** was actively lobbying her Labour MP to argue for an exemption from the policy for those on 'long term sick'; a class of affected tenant she had identified herself as belonging to. She had organised a meeting to discuss an exemption for this category with him, which was taking place on the date of the telephone interview:

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<sup>86</sup> Reg.B13(5) Housing Benefit Regulations 2006.

I've just been sorting this out because I've got an MP coming actually ... because I am registered disabled. I'm capable, don't get me wrong, but there are a couple of things I can't do ... Well I contacted him ages ago and then he forgot all about it! Then he contacted me on Facebook yesterday. He's actually coming down tonight ... because I'm on long term sick, I shouldn't have to have this bedroom tax thing. **Participant 7**

Others were angry at the lack of consideration the policy displayed for certain categories of tenants with exceptionally acute circumstances and, in particular, what they perceived as a lack of regard paid by politicians to these groups. **Participant 11** recalled watching Esther McVey<sup>87</sup> responding to questions in the House of Commons, where members were describing the circumstances of constituents affected by the SSSC. She was concerned at the lack of consideration the Minister gave to people who fell into certain a 'group':

And that Esther McVey, I have got to mention her, I was changing channels during this whole saga this last couple of years, and I pressed the wrong button – I meant to go to BBC News and I went to BBC Parliament – and the MPs were standing up ... they're reading out these letters from people whose circumstances are even worse than mine, because perhaps they're in a group with terminal illnesses, and when she stood up, she goes, well you can keep reading all your letters all you like ... One person read out the letter, and they said, well that person has since died. You know, so it was very serious matters being discussed. **Participant 11**

**Participant 11's** concern at the lack of regard paid to people in certain circumstances is particularly notable given the weight ascribed to the parliamentary

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<sup>87</sup> Then the Minister of State for Employment in the DWP, who had been a particularly prominent defender of the SSSC on news outlets and in Parliament. See: George Eaton, 'Esther McVey Flounders as Bedroom Tax Failure Becomes Clear' *New Statesman* (28 March 2014) <<http://www.newstatesman.com/politics/2014/03/esther-mcvey-flounders-bedroom-tax-failure-becomes-clear>> accessed 21 September 2017.

debates in the course of SSSC litigation, specifically where certain classes of claimant were ‘drawn to the attention of Parliament, and ... Parliament nevertheless voted to approve the Regulations’.<sup>88</sup> The participants in this study – rather than directly critiquing the SSSC policy per se – were engaging in this same structural debate on where the policy impact should lie, highlighting specific groups or those with particular circumstances which warrant exemption. So, while these regulations clearly do work in the way described by Greenstein et al to divide and segment home interests on their own terms, tenants themselves were engaging in a similar exercise in segmentation and division.<sup>89</sup>

Ordinarily, tenants identified themselves as being a member of a particular group which warranted exemption, even if the policy were to affect others belonging to different groups by reason of their circumstances. **Participant 9** spoke of groups with medical requirements for additional space, of which he considered himself a member:

I feel sorry for some of these poor people, who are in wheelchairs etc, who are then taxed for their spare room. That’s disgusting. I’ve got health conditions as well, I need to have a C-Pac machine as well, for an anatomical problem, and my life could be cut short by the condition – I’ve got something called severe sleep apnoea and I get very tired. The thing is, other people are worse than me obviously, but ... I can just about survive on what I’ve got. **Participant 9**

**Participant 27** was more direct with their assessment of where this dividing line should lie:

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<sup>88</sup> *R (On the Application of A) v The Secretary of State for Work and Pensions* [2014] EWHC 3437 (Admin), [45] (per Males J). This issue is discussed in more detail in Chapter Four within the discussion of ‘Interrogating localism’, especially with regard to concerns about the caution the judiciary should exercise in utilising these discretionary materials in their decision-making. See Hayley Hooper, ‘The Use of Parliamentary Materials by Courts in Proportionality Judgments’ in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015) 371.

<sup>89</sup> Greenstein et al (n 85).

... there are some people out there who, sorry to say it, take the piss ...  
and then there are some people who are completely genuine like me.

**Participant 27**

The participants' active consideration of their circumstances bears a striking resemblance to that undertaken by the courts, particularly the point of distinction drawn by the UKSC in *Carmichael*<sup>90</sup> between tenants with a 'transparent medical need for an additional bedroom' and those without,<sup>91</sup> avoiding the clunkier and more logically problematic approach based on the delineation of the affected class which dominated earlier instance appeals.<sup>92</sup> The extent and nature of the 'medical need' – for instance, its application to mental health problems<sup>93</sup> or the necessary severity of physical ailment – was a factor frequently raised by participants.<sup>94</sup> The important 'transparent' qualifier is perhaps the judicial equivalent of identifying a point of distinction between those who 'take the piss' and those 'who are completely genuine'.<sup>95</sup>

The interview data demonstrate how the government's effort to 'deliberat[y] fudg[e]' the conflicts at the heart of the SSSC filters down to those affected by the policy. Participants – although unprompted on the matter – discussed and outlined classes of affected tenants warranting exemption or spoke in terms of 'groups' who should avoid the impact of the penalty rather than rallying against the policy as a

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<sup>90</sup> *R (on the application of Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58.

<sup>91</sup> Ibid [42] (per Toulson L).

<sup>92</sup> See the discussion of the problems associated with the identification of proxies in Chapter Four see p.197.

<sup>93</sup> Indeed, the distinction is used to separate out *Mr Drage's* claim from the *Rutherfords* and *Carmichael: Carmichael* [52].

<sup>94</sup> This is of more than academic interest. In their obligation to act in accordance with Convention rights under s.6(3)(a) Human Rights Act 1998, I would argue that tribunals would have to consider this distinction to those appealing the application of the SSSC under Reg.B13 in a Housing Benefit award under para.6(1)(a), Sch.7 Child Support, Pensions and Social Security Act 1990.

<sup>95</sup> Participant 27.

whole. What the data also effectively demonstrates is that this dividing line is completely unknowable. No tenant can discern at the point of a DHP application whether they are in a claimant class that warrants assistance or not. In the same way, the UKSC point of distinction in *Carmichael* of a ‘transparent medical need for an additional bedroom’<sup>96</sup> could arguably apply to many of the affected tenants in this study.

## 5. Conclusion

Although this may appear to be a fairly wide-ranging chapter, its arguments have all been focused tightly on the key logic of the SSSC penalty: to incentivise downsizing for those who do not ‘need the extra space’ in their current home. The data collected in the course of this study undermines the key mechanics behind this intention. Like the home studies theorists analysed in Chapter Two, tenants affected by the SSSC penalty cannot distil their home interest down to a fungible entity capable of being set against the imposition of a fixed penalty. A ‘choice’ based on such an expectation is a fallacy. Those ‘downsizers’ – widely heralded by the government as an indication of the policy’s success – do not, at least in this study, arise from such a sober appraisal, but instead out of having ‘no choice’. The effects of the penalty itself are fragmented through a coterie of other reforms, with the majority of the affected tenants in this study unable to confirm the total cost of the penalty or having fused its costs with other reforms, particularly the abolition of Council Tax Benefit.

Delineating those classes of tenant which should be exempted from the policy – a process which is so integral both to the operation of the scheme and the legal challenges against it – is an exercise undertaken by the affected tenants themselves. Many considered themselves to fall into groups which should be subject to exemption and engaged in a similar process of differentiation as seen in the judicial review challenges themselves.

In concluding the arguments in this chapter, there are three further points worth underscoring. I argue that Valverde’s analysis of the ‘duty to know’ can be usefully

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<sup>96</sup> *Carmichael* [42] (per Toulson L).



employed to analyse the expectations of tenants affected by the SSSC penalty. The expectation of knowledge is generally conceptualised as conferring capital of some description; be it ‘symbolic, juridical or other invisible forms’.<sup>97</sup> It is, in simple terms, a positive thing that benefits the heritor. For the tenants affected by the SSSC penalty, this could not be further from the case. This duty is a burden. They are expected to compartmentalise and weigh their home interest against the penalty and, regardless of the circumstances, the resulting decision is relegated to one of three outcomes someone who has decided to ‘pay-to-stay’; has successfully ‘downsized’; or is of an appropriate class for exemption or mitigation, via the regulations or DHPs respectively.

Second, it is important to distinguish how the analysis here differs from other approaches within the home studies literature. The data presented above could be usefully analysed through a perspective rooted in the ‘concept of home’ literature, focusing on how the policy itself does not adequately account for home meanings<sup>98</sup> or its impact on those social practices which are analysed as interrelated around the home, conceptualised either as ‘home-unmaking’ or ‘domicide’. Instead of taking the ‘concept of home’ as its analytical starting point, this chapter starts with the ‘knowledge moves’ – especially the epistemological obligations the policy places on affected tenants. This allows this chapter to demonstrate how the policy is not only flawed in terms of its impact on the ‘home’ of those affected – be it articulated as ‘striking at the very notion of home’ or otherwise – but is also flawed on its own terms, the expectations it makes of tenants, and the assumption of a linear impact.

Third, despite government pronouncements to the contrary,<sup>99</sup> there is a distinct lack of ‘choice’ faced by tenants affected by the penalty. Indeed, the disconnect between government expectations of choice and the reality of living under the welfare reform agenda has been repeatedly underscored by the courts. Perhaps most notably by Justice Collins in *DA*, stating that the Benefit Cap offers ‘no question of real choice’<sup>100</sup> and

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<sup>97</sup> Valverde (n 8) 146.

<sup>98</sup> Lorna Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart 2007) 523–4.

<sup>99</sup> HC Deb, 23 April 2013, vol561, col51; HL Deb, 28 July 2014, vol755, col254W.

<sup>100</sup> *R (on the application of DA and others) v Secretary of State for Work and Pensions* [2017] EWHC 1446 (Admin) [30] (per Collins J).

that suggesting it did was ‘offensive’<sup>101</sup> to the claimants, or, in Lady Hale’s minority judgment in *Carmichael*, underscoring that A’s housing circumstances were not ‘her choice’.<sup>102</sup> This is not just in terms of the well-established lack of alternative accommodation. The findings in this chapter underscore how the weight of cumulative impact and the complexities of people’s housing circumstances often force them into taking decisions around which they feel they have no choice at all.

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<sup>101</sup> Ibid.

<sup>102</sup> *Carmichael* [76] (per Hale LJ).

# **Conclusions**

## Chapter Nine

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## 1. Wrapping up the story

This thesis began with a summary of the story it sought to tell. In the course of the research, it was not always clear where it was going; few assumed that the SSSC would survive largely intact for so long, nor was the central role to be played by the DHP scheme immediately apparent. In drawing this thesis to a close, this concluding section is not a restatement of the study or a chapter-by-chapter replay of the key arguments made. Many of the lamentable elements of the SSSC I have identified throughout this thesis have been well documented elsewhere, including in other PhD theses,<sup>1</sup> and do not warrant further repetition here. Instead, the aim is to summarise concisely the key original findings of this thesis, underscoring its main contributions and limitations.

The analysis is split into sections that cut across the research questions and key arguments outlined in Chapter One and that have informed the focus of this thesis. It starts with an assessment of the key empirical findings from the two qualitative strands: the online local authority vignette board and the tenant telephone interviews. It then goes on to consider the main theoretical and methodological findings of the study before summarising the main contributions and limitations of the thesis. The analysis then closes by looking forward to potential avenues for further research and exploring how the arguments made throughout are likely to apply to an evolving policy environment.

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<sup>1</sup> See: Kelly Ann Bogue, 'Precarious Social Housing: Reforming Policy, Changing Culture. An Ethnographic Case Study of the Impact of the "Bedroom Tax"' (University of Manchester 2016)  
<[https://www.research.manchester.ac.uk/portal/files/54590911/FULL\\_TEXT.PDF](https://www.research.manchester.ac.uk/portal/files/54590911/FULL_TEXT.PDF)> accessed 21 September 2017; Lauren Katy McCoy, 'From a Lone Mother's Perspective: An in-Depth Case Study on the Psychosocial Impacts of the "Bedroom Tax" in the UK' (University of Manchester 2016)  
<[https://www.research.manchester.ac.uk/portal/files/57430758/FULL\\_TEXT.PDF](https://www.research.manchester.ac.uk/portal/files/57430758/FULL_TEXT.PDF)> accessed 21 September 2017. For a summary of some of Nowicki's PhD findings, see: Mel Nowicki, 'Domicide and the Coalition: Austerity, Citizenship and Moralities of Forced Eviction in Inner London' in Katherine Brickell, Melissa Fernández Arrigoitia and Alexander Vasudevan (eds), *Geographies of Forced Eviction: Dispossession, Violence, Resistance* (Palgrave Macmillan 2017) 133.

## 2. Key empirical findings

Forming generalisable empirical findings has not been the aim of this project. Those in search of them are well served by the DWP's own evaluation of the SSSC, undertaken by Clarke et al, which far surpasses the scale of the research presented here.<sup>2</sup> However, even within the confines of this narrower study, the data collected and analysed in the course of this thesis does point to a series of empirical conclusions about the operation of the SSSC 'scheme as a whole'<sup>3</sup> which are worth detailing here. These fall into three areas: the insufficiency of the DHP scheme; the problem of DHP application forms; and the decisions made by tenants in response to the penalty.

### 2.1. The insufficiency of the DHP scheme

A key argument made repeatedly in this thesis is that the DHP scheme is integral to the operation of the SSSC. There are a series of de facto insufficiencies I put forward based on currently available evidence in Chapter Four, in particular: the woeful inadequacy of current funding provided for the scheme given the burden the payments shoulder in the welfare reform agenda; the geographical divergences between authorities – referred to elsewhere as a 'post-code lottery'<sup>4</sup> – and the lack of justification for these; and the inability of the courts to adequately grasp how the scheme functions and its limitations.

There are three findings in particular – drawn from the vignette and tenant interview empirical strands – which are worth highlighting here. First, the application of additional criteria to the award of DHPs which appear to sit outside the ambit of the

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<sup>2</sup> Department for Work and Pensions, 'Evaluation of Removal of the Spare Room Subsidy: Final Report' (2014) <<http://www.cchpr.landecon.cam.ac.uk/Projects/Start-Year/2013/Spare-Room-Subsidy-Household-Benefit-Cap/Final-Report>> accessed 21 September 2017.

<sup>3</sup> As the combined effect of Reg.B13 Housing Benefit Regulations 2006 and the Discretionary Financial Assistance Regulations 2001 are referred to repeatedly as by the courts. See: *R (Hardy) v Sandwell Metropolitan Borough Council* [2015] EWHC 890 (Admin) [26] (per Phillips J); and *R (on the application of Rutherford) v Secretary of State for Work and Pensions* [2014] EWHC 1631 (Admin), [44] (per Stuart-Smith J).

<sup>4</sup> Richard Machin, 'Discretionary Payment Scheme Is No Answer to Bedroom Tax Discrimination' [2015] Legal Action 14.

Discretionary Financial Assistance Regulations 2001. Generally articulated as forming a ‘stricter means test’,<sup>5</sup> the data here points to the wide application of additional conditions – such as appraising the spending detailed in bank statements – through to the attachment of conditions – such as requiring households to have signed up to HomeSwapper or an equivalent scheme.

Second are the disadvantages faced by those with disabilities within the DHP application process. Notwithstanding the empirical work for this thesis being undertaken in the wake of the decision in *R (on the application of Hardy) v Sandwell Metropolitan Borough Council*,<sup>6</sup> as detailed across Chapters Six and Seven, local authorities often explicitly or implicitly expected shortfalls in benefits to be accounted for through DLA/PIP, and no authorities or tenants within the sample referred to indefinite awards. If local authorities did not include DLA income in their assessment, they often discounted expenditure that the claimant could reasonably have met with this money – leading to a similar net outcome.<sup>7</sup> The extent to which an individual’s disability presented a need to remain in the property, or indeed the extent to which certain expenditure was attributable to it, was not assessed by local authorities with reference to any benchmark, as is the case throughout the mainstream benefits system. Instead, local authority participants were making the assessment with reference to a general common knowledge of the extent to which the individual circumstances of the tenants occasioned additional support to keep them in their homes.<sup>8</sup>

Third is the lack of security engendered by these payments. Tenants referred to the rigmarole of repeatedly applying for support – sometimes as often as every three months – and local authorities frequently adopting maximum award periods. This was far more than an inconvenience; having to substantiate time-and-time again their occupation of the home was the cause of acute stress for many participants.<sup>9</sup> Across the sample, partial DHP support was increasingly common, with many who had

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<sup>5</sup> *R (on the application of Carmichael and Rourke) (formerly known as MA and Others) v Secretary of State for Work and Pensions* [2016] UKSC 58 [77] (per Hale L)

<sup>6</sup> [2015] EWHC 890 (Admin).

<sup>7</sup> See p.376.

<sup>8</sup> See p.388.

<sup>9</sup> See p.329.

previously been in receipt of a full award being demoted to 50% or less of the total shortfall.

## 2.2. DHP application forms

I have argued that DHP application forms are of theoretical, and increasingly legal, importance.<sup>10</sup> The data suggests that, in addition to these broader issues, the design of these forms is – in its own right – a problem facing tenants applying for support. The focused analysis of application forms has not garnered any sustained attention in the academic literature,<sup>11</sup> but these documents form the sole focus of Chapter Six. Long and seemingly arbitrary income and expenditure tables, some detailing up to 102 itemised areas of spending, are adopted by some local authorities. Others choose small empty boxes, expecting affected tenants to detail their own narrative through the confines of the space provided. Overarching evidential requirements, often requiring the substantiation of expenditure or evidence to demonstrate meeting conditional requirements, create a documentary bar where the claimant cannot submit the form until further documents have been attained and processed. The questions on the forms themselves shape and constrain the ability of claimants to articulate their home interest, and most perniciously and widespread of all, tick-boxes and checklists enforce predetermined time increments for future support.

These forms are the prime exhibit of the Janus-faced nature of DHP provision. Central government argues that the payments are designed to meet an objective need, with James Eadie QC going as far as to suggest that the ‘discretionary’ element of DHPs

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<sup>10</sup> See the use of Harrogate Council’s DHP application form in *Carmichael* and their subsequent assessment in *Halvai*. See, respectively: UK Supreme Court, ‘02 Mar 2016 – Afternoon Session – Part 6 of 6 – *R (on the Application of Carmichael and Rourke) (formerly known as MA and Others) (Appellants) v Secretary of State for Work and Pensions (Respondent)*’ <<https://www.supremecourt.uk/watch/uksc-2014-0125/020316-pm.html>> at 1:37:25 accessed 1 May 2017; *R (on the application of Halvai) v London Borough of Hammersmith and Fulham* [2017] EWHC 802 (Admin) [33] (per Cockerill J).

<sup>11</sup> Indeed, the only study I could identify which does any such analysis is: Srikant Sarangi and Stefaan Slembrouck, *Language, Bureaucracy, and Social Control* (Real Language Series, Longman 1996) 41–43, 127–30, 131–7.

‘conceals the true nature of the beast’.<sup>12</sup> On the other, applicants are forced to translate their home interest through the forms’ patchwork of conditions and constraints, often communicating to the applicant that the payments are ‘not part of the benefits system’, are something to be ‘seen as short term help’ and are paid from a ‘limited amount of money’.<sup>13</sup>

### 2.3. Decisions made by tenants in response to the penalty

There are a number of studies which have focused on the effect of the SSSC penalty on the behaviour of the tenants affected – the so-called ‘Should I stay or should I go?’ question<sup>14</sup> – or have highlighted the sheer lack of any alternative housing options.<sup>15</sup> Generally, these ask about the benefits of the home and then set this against the housing decision. This is best illustrated by Clarke et al’s leading review of the policy, discussed in Chapter Eight, which asks participants questions about their attachment to the home, the neighbourhood, family, suitability, time at the property, and so on,<sup>16</sup> before concluding that ‘emotional attachment to homes’ was central to the decision, especially among those ‘who had lived in their home for many years’.<sup>17</sup>

In Chapter Eight, this thesis presented an analysis from a different angle, instead drawing on the empirical data collected to argue that those affected by the policy do not feel that they are making any such ‘decision’ or face any ‘choice’ at all. Of the

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<sup>12</sup> See recording of the hearing available at UK Supreme Court, ‘01 Mar 2016 – Morning – Part 4 of 6 – *R (on the Application of Carmichael and Rourke) (Formerly Known as MA and Others) (Appellants) v Secretary of State for Work and Pensions (Respondent)*’ <<https://www.supremecourt.uk/cases/uksc-2014-0125.html>> accessed 21 September 2017.

<sup>13</sup> See Focus on Forms: Example Excerpts 6.12 following the discussion at: p.318.

<sup>14</sup> See Arragon Housing, ‘Should I Stay or Should I Go? The First 100 Days of the Bedroom Tax’ (2013) <<http://www.24housing.co.uk/yournews/100-days-of-the-bedroom-tax/>> accessed 21 September 2017.

<sup>15</sup> For a good summary of the evidence on this, see: Robin Milne and Kenneth Gibb, ‘Using Economic Analysis to Increase Civic Engagement’ (2016) 11 Contemporary Social Science 79, 84–5.

<sup>16</sup> See Department for Work and Pensions, ‘Evaluation of Removal of the Spare Room Subsidy: Final Report’ (n 2) 84.

<sup>17</sup> Ibid 85.



participants in this study, there was no discussion of balancing the value of their home to themselves against this arbitrary financial penalty. Instead, many felt stuck where they were, considered that they faced no choice at all, or were constrained by the needs of others in the household or family outside of it.

### 3. The key theoretical findings

#### 3.1. The concept of home as essentially contested

A key theoretical argument made throughout this thesis is that the growing number of theorists active in the home studies literature can usefully consider the ‘concept of home’ as essentially contested. As I was at pains to underscore in Chapter Two, this is not a criticism of research which draws on the sizable home studies literature. Instead, I argue that this scholarship should recognise the limitations of analyses which either compare a policy or legal framework with a reified ‘concept of home’, assess its impact on an individual’s ‘concept of home’, or sit somewhere in between with a focus on the process by which ‘components of home’ are ‘divested, damaged or even destroyed’<sup>18</sup> by policies such as the SSSC.

Building on these arguments, this thesis has applied an approach which moves away from a focus on *a* concept of home and towards drawing on Valverde to assess how the home features in the ‘technologies of knowledge’<sup>19</sup> – often described here as the ‘knowledge moves’<sup>20</sup> – in the SSSC.<sup>21</sup> In other words, this thesis is not interested in making the SSSC take better account of or move closer to the sub-elements of home that theorists identify (such as security, identity, and so on), or in assessing the policy’s

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<sup>18</sup> Richard Baxter and Katherine Brickell, ‘For Home Unmaking’ (2014) 11 *Home Cultures* 133, 134.

<sup>19</sup> Mariana Valverde, ‘Theoretical and Methodological Issues in the Study of Legal Knowledge Practices’ in Martha Merrill Umphrey (ed), *How Law Knows* (Stanford University Press 2007) 83.

<sup>20</sup> Ibid.

<sup>21</sup> The analysis in the later chapters is a contribution to the ‘dialogue’ called for by Valverde on these ‘knowledge moves’ in law and policy frameworks. See: *ibid.* 84.

impact on this ‘concept of home’. Instead, it has focused on how knowledge about the home is assessed and assumed by those in the SSSC framework.

The three preceding analysis chapters demonstrate how this scrutiny can expose elements of the SSSC that are of real interest in the assessment of a ‘concept of home’, but would have otherwise gone underexplored or neglected altogether. In other words, the limitations of the SSSC scheme and the DHP process tied to it identified in this thesis can be conceptualised as much as a *home* problem as they can be using other concepts – such as conditionality, rights, citizenship or many others commonly adopted in the analysis of welfare reforms.

I have argued in Chapter Six that claimants are heavily constrained in their efforts to communicate their home interest by the form and content of DHP application forms. They are forced to translate the value of their home to them through a coterie of questions, with long income/expenditure tables being used as a proxy to ascertain key information. Chapter Seven exposes the ‘common knowledge of home’ expected of those administrative workers assessing the applications who have to know the extent to which grieving, disability and lifestyle are relevant in the assessment of the applicant’s need to stay in the home. Chapter Eight focuses on the ‘duty to know’ imposed on tenants affected by the SSSC, which expects them to assess staying in their home against this arbitrary financial penalty.

The findings of these chapters demonstrate the value of a more flexible approach to studying the concept of home. Some readers may not be convinced of the utility of my analysis in these chapters, in which case, I would argue that the implications I identify of the concept of home’s essentially contested status stand regardless. Namely, that recognising the home’s status as an essentially contested concept:

1. helps to combat criticism of the concept of home’s ambiguity;
2. recognises how there can be multiple divergent but equally valid interpretations of the concept;
3. highlights how researchers utilising the concept of home often have to evaluate its internal elements – such as security, identity, territory – in the same way that anyone does, so a reflexive account of this process is preferable; and

4. underscores that researchers should present their arguments in a way that recognises the concept of home's essentially contested status and avoid using language that implies otherwise.

Much progress has been made in response to Fox O'Mahony's scholarly 'call to arms' to progress the development of a 'concept of home'.<sup>22</sup> Fundamentally, my arguments on the concept's essentially contested status are a fresh 'call to arms' for these same scholars. Acknowledgment of the concept's essentially contested status will help to deal with the criticism that these conceptual debates are just an 'academic concern'<sup>23</sup> and provide the opportunity to adopt the concept more flexibility to interrogate underexplored elements of law and policy frameworks; for example, in this thesis, how knowledge about the home is assessed and assumed of those in the SSSC policy framework.

### **3.2. A distinction between structural and epistemic discretion**

The problem of discretion has been unavoidable for this thesis. As frequently lamented by government ministers, when it comes to DHPs the 'clue is in the title'.<sup>24</sup> This thesis has sought to adopt a theoretical approach to discretion that does not crowd out the analysis focused on the home outlined above, whilst still allowing key tenets of the SSSC scheme – particularly the justification for placing discretionary mitigation at the local level – to be examined critically. To achieve this, I have argued that an analytical distinction can be usefully drawn between *structural* and *epistemic* discretion.

The *structural* elements of discretion – the decision to 'exempt' some in Reg.B13 but not others, the design and funding of the DHP scheme, and so on – can still be interrogated alongside those *epistemic* elements – the expectations of local authority knowledge on claimants' home interests, the tying of their decisions to vague notions

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<sup>22</sup> Lorna Fox O'Mahony, 'The Meaning of Home: From Theory to Practice' (2013) 5 International Journal of Law in the Built Environment 156, 157.

<sup>23</sup> Chris Bevan, 'Challenging "Home" as a Concept in Modern Property Law: Lessons from the Supreme Court Post Stack and Jones' in Warren Barr (ed), *Modern Studies in Property Law*, vol. 8 (Hart 2015) 205.

<sup>24</sup> See HC Deb, 26 March 2013, c473WH; and HC Deb 25 Nov 2013, vol.571, col.13.

of ‘localism’ and ‘austerity’, and all those other ‘knowledge moves’<sup>25</sup> on the home which can be analysed following the arguments put forward in Chapter Two.

Analysis drawing on these two elements has demonstrated how the government’s justification of the structural placement of this DHP layer – the localism/austerity hybrid – sits at odds with the reality of the decisions and knowledge expected of administrative workers tasked with these decisions. I argue that there is a ‘common knowledge of home’ expected of those processing these decisions which simply does not exist; local authorities are lumped with taking decisions about people’s occupation of their homes in way which has nothing to do with ‘localism’ at all. I also argue that this approach allows the government to flagrantly avoid any serious delineation of who is and is not affected by the policy, instead pushing responsibility down to the local level while retaining control of the financing of this discretionary layer of mitigation. In other words, the government has ensured – perhaps in a way which is not politically innocent – that conflicts around this controversial policy can be ‘deliberately fudged’.<sup>26</sup>

#### **4. Methodological approach**

The use of semi-structured telephone interviews within the tenant-focused empirical strand is not particularly noteworthy; they are a frequently adopted staple in social sciences research. It is hoped, however, that findings on the second vignette-based strand have the potential to offer specific methodological assistance to future researchers. The use of vignette studies is widespread, but the coupling of a vignette response with a forum design to be distributed online is less frequently adopted, especially in research with local authorities. This approach is particularly useful for those projects that require particular geographical reach across participants or lack the funds necessary to undertake face-to-face research of this kind.

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<sup>25</sup> Valverde (n 19) 82.

<sup>26</sup> Tony Prosser, ‘The Politics of Discretion: Aspects of Discretionary Power in the Supplementary Benefits Scheme’, *Discretion and Welfare* (Heinemann 1981) 150.

In addition to stress-testing this approach, on a more granular level, in order to ensure ethical compliance (and to undertake the research within its limited budget) it was necessary to build a bespoke online platform for delivering the vignettes and managing responses. This secured ethical approval from the University of York and operated successfully in the course of the empirical work. At the time of writing, I intend to develop this platform for future free use by other researchers seeking to adopt a similar methodology in their own work.

## **5. The contribution**

### **5.1. Limitations**

As is the nature of doctoral study, I have developed as a researcher across the course of compiling this thesis. As a result, if I were to do it again I would go about it quite differently. There are evidently methodological limitations in the approach I adopt. The findings detailed above are based on a small set of telephone interviews and an online vignette study with local authorities. Both are limited in scope: the former restricted to attaining a ‘snap-shot’ impression of the claimants’ circumstances without the benefit of a home visit; the latter neglecting entirely the role of the application forms that I later learnt are so important. Although I have outlined a series of findings above – particularly on the DHP scheme – that are intended to inform scholars and practitioners engaging with the SSSC and other reforms to Housing Benefit,<sup>27</sup> I cannot claim that these are generalisable. This study is chiefly an exploratory theoretical one, not a robust empirical analysis of the SSSC.

Perhaps the more pressing limitation is the material I have left out. Although the thesis starts with some broad-ranging theoretical arguments on the concepts of home and discretion, their application in the latter half is narrow in scope. Even in the confined context of the SSSC policy, there are a number of important issues omitted from the analysis: the lineage behind current conceptions of ‘under-occupation’; the construction of the home under the Reg.B13 room standard; the meaning of a ‘bedroom’ within a coterie of First Tier and Upper Tier Tribunal challenges; or the

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<sup>27</sup> Principally the ‘Benefit Cap’ and restrictions to LHA.

impact and extent of evictions from the policy. Although I hope to have sufficiently justified the focus of this thesis, it is admittedly a narrow one.

## 5.2. What does this study contribute?

The findings in this thesis clearly add to the chorus of SSSC disapproval. There are now many such studies, and indeed a number of PhD theses, that attack the shortcomings of this lamentable policy. This swell of research on the policy does mean, however, that more is needed to demonstrate a ‘substantial original contribution to knowledge and understanding’.<sup>28</sup> As prefaced in the introduction to this study, the findings I outline above contribute to ‘knowledge and understanding’ in three areas.

First, I have put the argument to scholars working in the home studies literature that the ‘concept of home’ is essentially contested. In Chapter Two I outline the practical implications of this argument for scholars drawing on the ‘concept of home’ in their own work and argue for a more flexible theoretical approach rooted in Valverde’s work on the sociology of knowledge. On its own terms, this is an original argument that I hope is of value to those currently writing on the home.

Applying a distinction between structural and epistemic discretion in the context of welfare administration is not an original contribution. Towards the later stages of this thesis, Molander published a monograph arguing in detail for a similar approach.<sup>29</sup> Through building on this theoretical argument, however, this thesis does present an original detailed analysis of the DHP scheme, highlighting its deficiencies, damaging association with ‘austerity-localism’, and drawing on empirical data to demonstrate its central role in the SSSC policy framework and associated failures. My arguments have been the first sustained interrogation of the DHP scheme and how the government

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<sup>28</sup> University of York, ‘Examination for the Degree of MPhil, PhD and EngD’ <<https://www.york.ac.uk/about/departments/support-and-admin/student-services/exams/examiners/phd/>> accessed 21 September 2017.

<sup>29</sup> See Anders Molander, *Discretion in the Welfare State: Social Rights and Professional Judgment* (Routledge 2016). Its publication at least gave me cause to consider that this idea has traction.

hides behind its cloak to fudge problems at the heart of the SSSC policy and avoid delineating the extent of its impact.

Finally, in applying the theoretical arguments made in the first half, the later analysis chapters scrutinise aspects of the SSSC scheme that have been neglected or omitted altogether from existing studies. The role and importance of DHP application forms, the assumption of the ‘common knowledge’ of administrative workers processing applications, and the incongruous ‘duty to know’ placed on affected tenants have all been analysed in detail for the first time.

## **6. Looking forward: what needs to be done?**

### **6.1. Avenues for further research**

Given the emphasis I place on it throughout, it will come as little surprise to the reader that I consider the DHP scheme to warrant significant further study. If anything is to come of this study, I would hope it is more work on what is – in my view – one of the most under-analysed shifts in the modern welfare state. This is both in terms of its *structural* and *epistemic* role in the current UK welfare state. Structurally, the sheer breadth of the burden these discretionary payments are carrying needs to be interrogated in more detail than was possible in the confines of this thesis. not only in terms of future academic work assessing deficiencies in administration and funding, but in research in government or advisory bodies. Indeed, I would argue for the Social Security Advisory Committee to assume the role originally mooted for it as an independent auditor of the DWP DHP budget allocations.

In terms of the epistemic elements of the scheme, assumptions about how local authorities make these discretionary awards, particularly how they manage increasing demand between different reforms, needs further interrogation. The knowledge practices at play, what knowledge administrative workers draw upon in their decisions, how the relevant documentation shapes and constrains this, and what the basis of those judgements in ‘difficult cases’ actually are remain important issues to consider to effectively hold the government’s use of this scheme as veritable panacea to account.

Finally, I would argue the same approach to the ‘concept of home’ adopted in this thesis could be usefully utilised in future research within the home studies literature. Instead of focusing on taking ‘a measure of the occupier’s interest in the property as a home’,<sup>30</sup> analysing the ‘impact’ of a measure on the occupier’s home, or looking at the process of homemaking, in certain contexts it may be helpful to adopt a more flexible approach which analyses how the home can feature in those ‘knowledge moves’<sup>31</sup> outlined by Valverde and analysed in this thesis. Examples could include applications for support from homeless applicants under Part VII Housing Act 1996, the assessment of suitability of currently occupied accommodation, or – outside of social security and the welfare state – areas such as compulsory purchase orders or eminent domain practices.

## 6.2. Changes in the policy environment

The perils of looking forward in the current political environment are perhaps all too obvious. As detailed within the ‘research process’ chapter of this thesis, the viability of the SSSC itself has been at issue throughout the course of this research; there was a very real prospect of the policy being scrapped in the middle of this project.<sup>32</sup> Its future under a minority Conservative Government is far from certain.<sup>33</sup> What appears fairly clear, however, is that the future role of DHPs and their role in mitigating lower Housing Benefit levels – be it through the SSSC or otherwise – is set to stay.

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<sup>30</sup> Lorna Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart 2007) 524.

<sup>31</sup> Valverde (n 19) 83.

<sup>32</sup> The repeal of the policy was a key plank of Labour’s 2015 election campaign, see: Jon Stone, ‘Labour Would Scrap the Bedroom Tax from Day One of a Miliband Government, Party Says’ *The Independent* (1 May 2015) <<http://www.independent.co.uk/news/uk/politics/generalelection/labour-would-scrap-the-bedroom-tax-from-day-one-of-a-miliband-government-party-says-10219896.html>> accessed 21 September 2017.

<sup>33</sup> The Labour Party has pledged to ‘fight in Parliament to get the Bedroom Tax scrapped’, with its public appeal attaining over 209,000 signatures at the time of writing. See: The Labour Party, ‘Go on the Record against the Bedroom Tax’ *Labour.org.uk* (2017) <<https://donation.labour.org.uk/index.php/site/bedroom-tax>> accessed 30 August 2017.



With respect to the current minority Conservative Government, there are two reasons for this. First, the arguments made in this thesis do not start and end with the SSSC. The room standard laid out in Reg.B13 Housing Benefit Regulations 2006 carries through to the Universal Credit scheme. The same penalty structure applies for under-occupation, fixed at 14% or 25% of the housing element,<sup>34</sup> as does (almost entirely) the same room standard.<sup>35</sup> The findings this thesis makes on the SSSC policy therefore apply to the ongoing roll-out of the Universal Credit scheme.

Many of the reductions garnered by the welfare reform agenda are yet to come. The availability of DHP mitigation in particular is likely to become even more central, both as ongoing reforms endure and further down the pipeline. The working-age benefits freeze will lead to higher and higher differentials between Housing Benefit and rents, culminating in significant losses, estimated as being up to £100 per month for many affected households – perhaps higher if inflation continues to rise.<sup>36</sup> As things stand, in 2019/20, LHA will still be set at the same level of the 30th percentile of market rents in September 2015 (not adjusted for inflation); a differential that the DHP scheme alone is tasked with mitigating.<sup>37</sup>

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<sup>34</sup> See para.36, Sch.4 Universal Credit Regulations 2013/376.

<sup>35</sup> See paras.9–12, Sch.4 Universal Credit Regulations 2013/376. The only discernible difference is a more restrictive interpretation of the exemption for overnight care. Under para.12(3), paras. 9–12, Schedule 4 Universal Credit Regulations 2013/376, the authority must be satisfied that the claimant: (i) requires overnight care, *and* (ii) is in receipt of middle or higher rate DLA (or the PIP equivalent), whereas, under the current regime, it is sufficient for the claimant to simply prove the former, under Reg.B13(6)(a)–(ab) Housing Benefit Regulations 2006/213.

<sup>36</sup> Jenny Pennington and Heather Spurr, ‘Analysis: Local Housing Allowance Freeze’ (Shelter 2017)  
<[https://england.shelter.org.uk/\\_data/assets/pdf\\_file/0020/1349012/Final\\_LHA\\_analysis.pdf](https://england.shelter.org.uk/_data/assets/pdf_file/0020/1349012/Final_LHA_analysis.pdf)> accessed 10 August 2017.

<sup>37</sup> Jenny Pennington and Heather Spurr, ‘Analysis: Local Housing Allowance Freeze’ (Shelter 2017)  
<[https://england.shelter.org.uk/\\_data/assets/pdf\\_file/0020/1349012/Final\\_LHA\\_analysis.pdf](https://england.shelter.org.uk/_data/assets/pdf_file/0020/1349012/Final_LHA_analysis.pdf)> accessed 21 September 2017.

Should the political position change, the formation of a new Labour Government may not in of itself lead to any fundamental shift to this base position. The 2017 election manifesto committed the party to merely a ‘review of cuts’ in the Universal Credit scheme, with £2billion set aside to deal with more than £8billion-worth of upcoming reductions alone<sup>38</sup> – notwithstanding reversing those already underway. Labour has publicly and unequivocally committed to the abolition of the SSSC policy, though – importantly in my view – its manifesto costings include the reclaiming of DHP funds associated with its mitigation,<sup>39</sup> suggesting that an increase in DHP financing to mitigate other reforms may not be forthcoming. As the SSSC itself continues to limp on, many of the problems identified in this thesis look set to stay.

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<sup>38</sup> David Finch, ‘Still Just about Managing? Pre-Election Briefing on the Main Political Parties’ Welfare Policies’ (Resolution Foundation 2017)  
<<http://www.resolutionfoundation.org/app/uploads/2017/05/Still-just-about-managing.pdf>>  
accessed 21 September 2017.

<sup>39</sup> The Labour Party, ‘Funding Britain’s Future’ (Labour.org.uk 2017)  
<<http://www.labour.org.uk/page/-/Images/manifesto-2017/Funding%20Britain%27s%20Future.PDF>> accessed 30 August 2017.

## Appendix A

### Technical note: calculation of DHP load

This note provides an account of how the figures for total SSSC, Benefit Cap and LHA relative reductions were calculated for **Figure 4.1**.

#### SSSC costs

Estimates of total monthly Housing Benefit reductions as a result of the SSSC were calculated for between May 2013 and April 2016. These statistics were taken from the SHBE which details local authority returns data for the second Thursday of each month. Due to the divergence in DHP budgeting and use with the SSSC between Scotland and England/Wales, Scotland households were removed from the caseload.

To construct an overall estimated reduction amount, the (i) total number of households for which the SSSC has been applied (the reduction count) and the (ii) mean of the weekly penalty applied were multiplied together and uprated to provide a monthly figure. This produced an estimated total SSSC reduction amount per month across England and Wales.

This figure is lower than the initial DWP modelling suggests, which pointed to savings of £480million per annum. Statements by the government on the total savings have broadly aligned with this figure, with ministers arguing in 2016 that ‘since we introduced the policy, it has saved over £1.5 billion’.<sup>1</sup> The total figure more closely aligns with Tunstall’s own estimate, based on a re-assessment of the DWP figures for the 2013/14 financial year, of £320million per annum<sup>2</sup> – particularly when adjusted for later financial years for the reduction in total households affected by the SSSC by 2015/16, down from 547,341 in April 2013 to 419,069 in April 2015 respectively.

#### Benefit Cap costs

A similar process was undertaken using the SHBE case load figures for the original – namely, the Welfare Reform Act 2012 – Benefit Cap. Two types of data detailed in the figures: cumulative caseload and point-in-time caseload. The cumulative capped households figure, as of February 2017, stood at 133,802 with a mean reduction of £54.48. As the cumulative figure, this total represents all households affected by the cap since its introduction in July 2013, with off-flows not accounted for.

To provide an estimate of the total monthly reduction imposed by the Benefit Cap, the point-in-time caseload figures each month between May 2013 and April 2016 were

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<sup>1</sup> See HC Deb 14 November 2016, vol617 col23.

<sup>2</sup> Becky Tunstall, ‘Testing DWP’s Assessment of the Impact of the Social Rented Sector Size Criterion on Housing Benefit Costs and Other Factors’ (Centre for Housing Policy 2013) <<http://www.york.ac.uk/media/chp/documents/2013/Testing%20DWP%20Assessment%20of%20Impact%20of%20SRS%20Size%20Criterion%20on%20HB%20Costs%20University%20of%20York.pdf>> accessed 1 December 2016.

multiplied by the total mean amount of benefit capped per week. The average weekly amount was updated to provide an estimated monthly figure. There are sizable variations in the numbers affected month-to-month, given significant on-flows and off-flows within each year. The DWP analysis smooths the effect of these reforms within their own impact assessment,<sup>3</sup> but the variation is clear from the live monthly caseload figures.

These figures do not include the changes made to the Benefit Cap under the Welfare Reform and Work Act 2016, which introduced a significant reduction in the total cap from £26,000 (£18,200 for single people) to £23,000 in London (£15,410 for single people) and £20,000 outside of London (£13,400 for single people). Within the Statsexplore tables, these indicate very significant on-flows of up to 20,020 additionally affected households in January 2017 alone, in a total of 51,007. These are not included within the analysis here, as due to the lag in SHBE extracts becoming available, at the time of writing only two months of on-flow months were made available for analysis.

### **Local Housing Allowance**

The LHA reductions are more difficult to accurately model. The key figure is the differential between the *ex-ante* benefit and actual rent costs. The latter is difficult to definitively assess and the former has been subjected to a series of (sometimes intersecting) reforms for the 2015/16 financial year: (i) changing the calculation of the allowance from the 50th percentile of local market rents to the 30th percentile; (ii) capping rates by property size and scrapping the five-bedroom rate; (iii) reducing levels of uprating; (iv) removing the £15 excess incentive where a lower rent is found; and (v) raising the age at which the lowest Shared Accommodation Rate applies from 25 to 35-years-old. Other measures, principally the freeze to working-age benefits, will have additional impact into 2016/17 and onwards.

The original DWP Impact Assessment calculated the total mean impact across all LHA claimants for the 2011/12 financial year at -£12 week, relative to pre-reform levels.<sup>4</sup> An independent impact assessment undertaken by the Cambridge Centre for Housing and Planning Research and subsequent analysis designed to track impact 11 months after the introduction of the reforms commissioned by the DWP,<sup>5</sup> both place the mean

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<sup>3</sup> Department for Work and Pensions, 'Welfare Reform and Work Bill: Impact Assessment for the Benefit Cap' (2015) <<https://www.gov.uk/government/publications/local-housing-allowance-monitoring-the-impact-of-changes>> accessed 8 January 2017; and Alex Fenton, 'How will changes to Local Housing Allowance affect low-income tenants in private rented housing?' (CCHPR, 2010)

<sup>4</sup> See Department for Work and Pensions (n 3); and Alex Fenton, 'How will changes to Local Housing Allowance affect low-income tenants in private rented housing?' (CCHPR, 2010) <[https://england.shelter.org.uk/\\_data/assets/pdf\\_file/0016/290041/CCHPR\\_final\\_for\\_web\\_2.pdf](https://england.shelter.org.uk/_data/assets/pdf_file/0016/290041/CCHPR_final_for_web_2.pdf)> accessed 8 November 2017.

<sup>5</sup> Department for Work and Pensions, 'The Impact of Recent Reforms to Local Housing Allowances: Summary of Key Findings' (2014)

net differential lower: at -£11.38 per week<sup>6</sup> and -£6.06 per week respectively.<sup>7</sup> The latter analysis includes estimated rent reductions (either by way of renegotiation, market pressures, and so on) of approximately £0.79 per week.

The DWP assessment was used as the basis of the calculation of net differentials in order to: (i) provide a conservative estimate; and (ii) account for possible adjustments following the immediate introduction of the initial suite of reforms. This information clearly omits any of the more recent changes, particularly the freeze until 2019/20 – recent analysis by Shelter suggests that this will lead to a very significant increase in differentials, perhaps as much as £500 per month in high-demand areas.<sup>8</sup>

In order to calculate the total net reduction figure, the numbers of households claiming Housing Benefit in the private rented sector between April 2015 and April 2016 were taken from DWP Statsexplore. A mean monthly figure was calculated for across the year (1,513,412) which was then multiplied by the average net reduction. This came to an overall weekly differential total of £9,171,275.21. This was multiplied by 52 to give the final figure of £476,906,310.66.

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<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/329902/rr874-lha-impact-of-recent-reforms-summary.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/329902/rr874-lha-impact-of-recent-reforms-summary.pdf)> accessed 8 January 2017.

<sup>6</sup> Ibid 16.

<sup>7</sup> Fenton (n 4).

<sup>8</sup> Shelter, 'Method note: What could be the impact of freezing local housing allowance for four years - and who might be left out in the cold?' (2015)

<[https://england.shelter.org.uk/\\_data/assets/pdf\\_file/0003/1197309/2015\\_10\\_20\\_The\\_impact\\_of\\_freezing\\_LHA\\_method\\_note.pdf](https://england.shelter.org.uk/_data/assets/pdf_file/0003/1197309/2015_10_20_The_impact_of_freezing_LHA_method_note.pdf)> accessed 8 January 2017.

## Appendix B

### Consent form when logging onto the DHP vignette platform

# Discretionary Housing Payments

*A Research Project at York Law School*

[Home](#) [Help](#)



## Welcome to the research site

Thank you for logging into the Discretionary Housing Payment Research website.

In April 2013 the Coalition Government introduced a series of welfare reforms – one of the most controversial being the Social Sector Size Criteria, commonly known as the ‘bed-room tax.’ This benefit penalty is affecting many tens of thousands of tenants in the social rented sector across the country, and its implementation has fuelled debates how the law affects those living in social housing. This research forms part of a broader study attempting to challenge these challenges.

### **Procedure:**

The research consists of an online discussion board, with three different motifs of example DHP applications. Please view the video below for information on how to participate.

[The video demonstrates how the discussion board works (see Appendix B for print screen examples), alongside the three key posting rules: (i) no identifying information should be put in the posts, (ii) civility towards other participants, and (iii) that all posts/replies are moderated before being published. The amount of time anticipated for each participant (approximately one hour) is also outlined].

### **Statement of Confidentiality:**

Your participation in this research is entirely confidential, and a number of steps have been taken to ensure that you cannot be identified:

1. The data from the discussion board will be encrypted and stored electronically at the University of York in a password protected file on a secure system.
2. The data will be held no longer than until the end of the calendar year in 2019.
3. **Under no circumstances** will names, addresses or information which could identify you be used in any publication or presentation resulting from the research.
4. Only the researcher and potentially in some circumstances their supervisor (Professor Caroline Hunter) will ever have access to, or see, the discussion board material.
5. Your contact details or any other information about you will not be retained.

### **Voluntary Participation**

Your participation in this research is entirely voluntary. It is important to note that:

1. Taking part is entirely your choice.

2. You are free to not answer anything on the board.
3. You are free to withdraw at any time without saying why.
4. The housing manager who referred you, or anyone else, will not be informed if you do not participate.

**Contact**

This research forms part of an ESRC funded project being undertaken by Jed Meers at the University of York. If you have any questions before participating, or during the research, please email Jed at: [jed.meers@york.ac.uk](mailto:jed.meers@york.ac.uk).

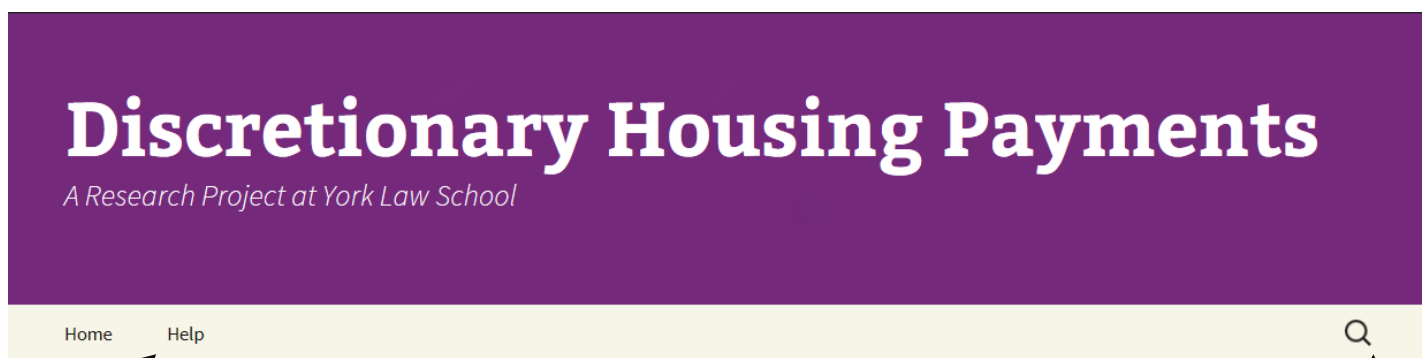
**By Clicking 'I agree' below:**

1. I confirm I have been sent this login to participate in the study, and am currently a member of staff at a Local Authority – or contracted organisation – who works on the processing of Discretionary Housing Payment applications.
2. I confirm that I have read and understand the information above. I have had the opportunity to consider the information, ask questions and have had these answered satisfactorily.
3. I understand that my participation is voluntary and that I am free to withdraw at any time, without giving any reason.
4. I understand that any information given by me may be used in future reports, articles or presentations by the research team.
5. I understand that my name, address, local authority, or any other identifying information will not appear in any reports, articles or presentations disseminating this research.
6. I agree to take part in the above study.

**I agree – I do not agree**

## Appendix C

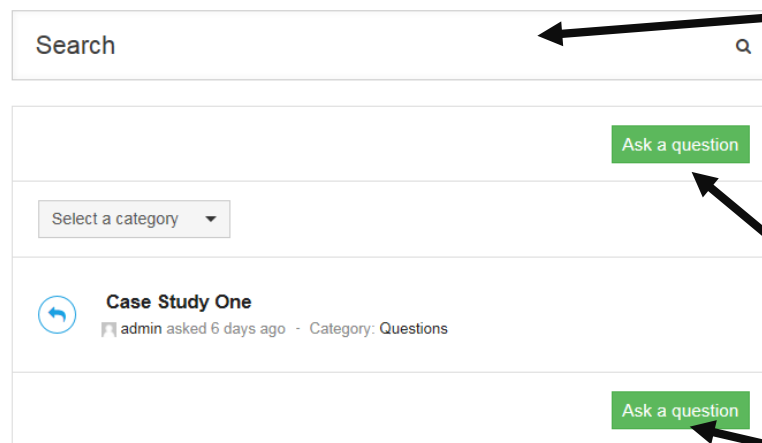
### Annotated DHP Discussion Board pages



The help page details the instructional video.



## The Discussion Board



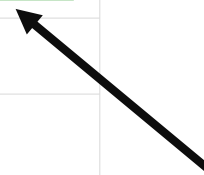
The three motifs will display here.



The search function allows the participant to jump to a specific answer they, or someone else, has made (if for instance, they login and wish to go straight to a particular area).



The 'Ask a Question' button allows the participant to send a question straight to the researcher.





The 200 word motif will go here.

The motif will be detailed here (approximately 200 words).

**1 answer**

In our local authority...example answer here.



#1

Write a reply...

Notify me of follow-up comments by email.

Notify me of new posts by email.

Participants can respond to other answers using the reply function.

Participants can set email alerts for if people reply to their answers or other responses.

### Answer this Question

The main answer from participants is entered here.

**B** *I* ABC ABC

P

Add answer Save draft

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