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Discretion as blame avoidance: Passing the buck to local authorities in 'welfare reform'

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Abstract: This paper argues that central governments can avoid blame for cuts to social security by transferring discretionary powers to local authorities. When making reductions to entitlements, conferring discretion avoids delineating the boundary of who is affected, allowing: for conflicts at the heart of policy formation to be deliberately fudged; decisions to be shielded from the gaze of the public and the courts; and responsibility for the impact of budget reductions to be externalised. Using three 'welfare reforms' in the UK as examples – the council tax reduction scheme, discretionary housing payments, and local welfare assistance schemes – four 'blame avoidance' functions of conferring discretion are proposed.

Keywords: Discretion, welfare reform, blame avoidance, local authorities, discretionary housing payments, local welfare assistance schemes, council tax reduction schemes

Word count: 8,418 (10,017 inc. list of references).

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Introduction

The delegation of discretion to local authorities is a useful tool for Governments and legislatures wrestling with the vast complexity of social security schema. Done well, local discretionary decisions – as opposed to tightly prescribed statutory schemes – can individualise service provision, correct for deficiencies in rules-based reasoning, and help to manage the 'case by case' complexities that arise when the Byzantine social security system meets the reality of day-to-day lives (Molander, 2016, 10-12). Debates have therefore focused on discretion as an implementation issue – such as in the vast literature on street-level bureaucracy in welfare administration (Hupe et al, 2013, 11-23) – or on the balance between rights and discretion in the welfare state – catalysed by Titmuss' early work (1971) and Dworkin's infamous metaphor of discretion as the 'hole in the doughnut' (Sainsbury, 2008, 327-328).

This paper argues that conferring discretion to local authorities can serve as a means to an end unconcerned with effective social security provision: avoiding blame for the impacts of Government social security policy. By delegating discretion down to local authorities, executing a 'cut and devolve' approach, the UK Government has avoided delineating the boundaries of those impacted by key elements of its 'welfare reform' agenda (namely, benefit cuts) in legislation and passed responsibility for the impact of reductions downwards to local government in the grip of a funding crisis. Conflicts at the heart of flagship policies stemming from the Welfare Reform Act 2012 and the Welfare Reform and Work Act 2016 can consequently be 'deliberately fudged' (Prosser, 1981, 150).

The argument is put in three sections. The first reflects on the evergreen nature of debates on the role of discretion and outlines three established rationales for central governments to confer discretion to local authorities in the context of social security provision, arguing that there is an additional fourth rationale: blame avoidance. The second examines this rationale in more detail, outlining four key functions of 'buck-passing' in social security reform. Finally, the paper turns to some specific examples in England to illustrate the arguments made throughout:

the Council Tax Reduction Scheme (CTRS), Discretionary Housing Payments (DHPs), and Local Welfare Assistance schemes.

1. What is the rationale for conferring discretion in social security provision?

Discretion is an evergreen problem in social security. A layer of discretionary provision floating over a more legally secure – though for many insufficient – minimum core has long been of varying scale and importance in the British welfare state. A 'dual approach', providing weekly supplements or lump-sum payments alongside base-level core provision, has persisted in one form or another from the Unemployment Assistance Scheme in 1934 until the abolition of the Social Fund in 2013 (Walker, 2015, 45-48). Concerns about the conferral and exercise of discretion are equally as longstanding. The pages of the early editions of the Journal of Social Welfare Law read as a veritable "who's who" of social security academia raising concerns over the balance of discretion within the social security system. Lister's blistering critique of the 'increasing imbalance' (Lister, 1978, 139) between the base-scale and discretionary additions in the Supplementary Benefits Scheme is followed by Bull's warning on the 'heavy reliance on discretionary extras' (Bull, 1980, 83) and Loveland's criticism of the 'slow, error-prone and inconsistent' blend of 'rules ... and discretionary powers' in the provision of housing benefit (Loveland, 1987, 216). The series of chapters focused on discretion under the Supplementary Benefits Scheme in Adler and Bradley's edited collection, in particular Wilding's (1976, 55) and Hodge's (1976, 65), are testament to the rich lineage of 'relentlessly debat[ing] discretion' (Bull, 1980, 65) which forebear the arguments which follow.

These longstanding concerns generally either criticise discretion as being a source of 'potential arbitrariness and therefore injustice' in the provision of social security (Sainsbury, 2008, 328), or focus on how to 'distinguis[h] those needs which can usefully be expressed in the form of a universal entitlement' against those 'better provided for in a general discretionary power' (Wilding, 1976, 56). In other words, research on discretion does more than focus on empirical claims about *how* discretionary decision-making is done, but also *why* its role can be defensible. Dean's work on the 'dichotomous nature' of social rights highlights this tension between 'providing entitlement' on the one hand, and the requirement to 'subject people to discretion' on the other (Dean, 2015, 46-47). The enduring nature of the questions posted in HLA Hart's essay on discretion – thought to be lost, but unearthed and published in 2013 – are testament

to this longstanding concern when he asks: under what conditions do we tolerate discretion, and why? (Hart, 2013, 652).

There are multiple overlapping rationales for conferring discretion onto local authorities in the administration of the welfare state that can justify 'tolerating' those perceived dangers of arbitrariness or inequity in provision. Governments and legislatures tasked with creating statutory schemes to administer social security are faced with two interfacing monoliths: the vast 'extrinsic complexity' of the welfare system (Harris, 2013, 60-67), and the intricacies of household circumstances it must account for. Discretion has long been a valuable tool for policymakers to manage this complexity, providing the opportunity to enhance the 'responsiveness and adaptability' (Young, 1981, 33) of intricate welfare bureaucracies. The motivations and justifications for adopting discretionary approaches to the provision of welfare support, however, are more than just pragmatism. I argue that there are four distinct rationales for adopting discretionary approaches to welfare provision.

The first three draw on Molander's admirably concise outline of what he argues are the justifications for the use of discretion in the administration of social entitlement (Molander, 2016, 10-12). Each warrants an examination with reference to the UK welfare state here, before turning to what I argue is the fourth, additional justification which – for reasons which will become clear – is not explicitly adopted by Governments as the reasoning behind discretionary provision, but is nevertheless evidenced in swathes of recent 'welfare reforms'.

1.1. Correcting deficiencies in rule-based reasoning

Although there is a sizeable philosophical lineage to arguments over rules being 'shot through with discretion' (Black, 1997, 52), the principle here can be put briefly: the application of a general rule in legislation or guidance requires discretionary judgement to apply it to a totality of cases. An applicant's own circumstances may not be dealt with explicitly by a rule or envisaged at the point of its drafting, yet a discretionary judgment can still exercise a decision.

For example, an applicant for housing benefit must be 'occupying [the] dwelling as his home' (Reg. 7 Housing Benefit Regulations 2006/213). There is a detailed statutory scheme and Government guidance to assist in the rule's interpretation by the authority, yet it is not difficult to envisage circumstances – especially where an applicant has other accommodation overseas or complicated personal relationships to be accounted for under Reg.7(1)-(2) – where aligning lived reality with the detailed statutory prescription and its accompanying guidance warrants the exercise of discretionary judgement. The devolved administration of the housing benefit

scheme and its application procedures (Reg. 89), allows for local authorities to account for such variations in circumstances when designing their discharge of these statutory criteria (Seddon and O'Donovan, 2013, 11-16).

1.2.Discretion as a necessary to manage complexity

For the second justification, the argument goes that discretion arises as a necessary consequence of complexity (Molander, 2016, 12). As rule-based systems have a bounded rationality, in some cases rules and their accompanying guidance cannot create conditions for good judgement. In such instances, discretionary judgements – even if tied to broad guidelines – are the only route for securing the best outcomes. This justification characterises the Government's approach to DHPs, where the difficulties of delineating an exhaustive set of circumstances in underpinning legislation is underscored, instead relying 'very heavily on discretionary housing payments to ensure that we have a way of dealing with the difficulties and challenges faced by particular groups and families' (HL Deb, 2 July 2013, v746 c1077). Put another way, the complexity of the problem faced by the drafters of legislation means pre-determining exhaustive rules is difficult, ineffective or impossible. Discretion can meet this challenge by avoiding delineation altogether.

1.3. Individualising service provision

The final justification advanced by Molander is that, in some forms of 'human processing', discretion is required to individualise service provision (Molander, 2016, 12). In other words, discretion is not a corrective to bright line rules, but instead serves its own purpose by allowing 'flexibility and sensitivity' in their application (ibid). This justification can be aligned with the calls for 'individualised justice' that dominated early debates on discretion in the welfare state (Titmus, 1971, 131). The argument is that even the most rigid schemes of universal provision require some 'flexible, individualised' elements to ensure effective and just administration; there is something intrinsic to welfare provision which makes taking account of individual circumstances a key element of securing justice (ibid).

This thinking is perhaps best illustrated by current arguments over the failure to effectively individuate work search/job-related conditions or the imposition of sanctions on those on out-of-work benefits. A key recommendation of the wide-ranging ESRC Welfare Conditionality project has been more effective use of the 'easements' available to work coaches to ensure 'search requirements [are] appropriate to each individual's personal and changing circumstances' (Dwyer, 2018, 12), and Adler has argued that the application of benefit

sanctions in some instances is the 'unreasonable' application of discretionary judgement (Adler, 2018, 133). The merits of 'personalisation' are frequently echoed by Governments across the world as part of the 'modernisation agenda' in the delivery of welfare services (Birrell and Gray, 2017, 238).

1.4. The fourth rationale: Blame avoidance

These three justifications all look to the value of discretion as a tool in the effective implementation of social security schema or as something which arises as the inevitable consequence of deficiencies in general rules. If these debates over the effective use of discretionary decision-making are evergreen, however, so too are those over the 'austerity agenda' and 'welfare reform'. As Blyth argues, waves of austerity have followed crisis-after-crisis since the 1930s and its 'luster has yet to fade' (Blyth, 2013, 98). Those Governments and legislatures tasked with attempting to restructure programmes to reduce expenditure on social welfare are faced with more than a problem of effective implementation; they face complex political conflicts which go far beyond a binary of arguing either for the 'status quo' or for 'dismant[ling] social protections' (Pierson, 1998, 554). Here, discretion can serve a purpose beyond simply improving the delivery of social entitlement or mitigating inherent limitations of rule-based systems.

I argue that there is an additional justification for adopting a discretionary approach which is not focused on effective administration at all, nor used publicly to defend policy rationales: the use of discretion to avoid delineating social entitlements and consequently to avoid blame for restructuring social security programmes. In other words, discretion can be used to circumvent conflicts over who is affected by a particular welfare reform or is entitled to additional support, pushing highly controversial decisions down to local authorities and thus working to avoid responsibility for their effects. The buck can be passed downwards, deliberately avoiding both the original decision and blame or accountability for the (likely politically challenging) impact which follows.

I will come to some specific examples of this within the UK 'welfare reform' agenda shortly, but – as this claim is a central argument of this paper – it is worth unpacking this 'blame avoidance' rationale in more detail. A good starting point is Prosser's earlier work on the 'politics of discretion', focused on the Supplementary Benefits scheme and the antecedent Unemployment Assistance Board. It has aged brilliantly. His arguments against 'black box' approaches to the analysis of discretion foreshadow much of the debate that Lipsky's influential

work on street-level bureaucracy would catalyse. The thrust of his position is that discretion can serve a 'political function' to 'disguise conflicting purposes behind both legislation and administration' – or, to put it pithily, can 'deliberately fudg[e]' conflicts (Prosser, 1981, 150). Drawing on the Unemployment Assistance Board of the 1930s in particular, he argues that discretion can work to 'disguise the issue of benefit reductions', by pointing to the 'discretion to increase allowances' (ibid, 151-160) by decentralised agencies or local government.

This insight echoes the broader literature on 'blame avoidance' in the design and implementation of policy, focused chiefly on legislative delegation of discretion to bureaucrats (horizontal delegation of discretion) as opposed to centralised delegation to decentralised government (vertical delegation of discretion). Two key principles emerge out of this sizeable literature that are relevant for our purposes. Policy-makers are more likely to search for blame avoidance strategies: (i) where reforms are viewed as particularly hazardous to electoral prospects, or in other words are 'politically costly choices' (Weaver, 1986, 385); and/or (ii) where agreement in the legislature is politically problematic due to high levels of 'policy conflict' (Huber and Shipan, 2002, 215). The difficulties in teasing out a 'shared rhetorical position' (Hayton and McEnhill, 2014, 102) in the formation of the Coalition's Welfare Reform Act 2012 attests to both having motivated the design of flagship reforms in the UK, such as the so-called 'bedroom tax' and benefit cap.

Others have tied these arguments down to demonstrate how Governments employ 'blame avoidance' strategies when reducing social security payments in the name of welfare reform. Dwyer has argued that blame is often attributed to the claimants themselves (Dwyer, 2004, 266), in a similar way to ongoing debates on 'responsibilisation' in the 'welfare reform' agenda (Patrick, 2012, 6-7; Donoghue, 2013, 88). Pierson, on whom Dwyer draws in his analysis, suggests that advocates of welfare retrenchment will try to 'lower the visibility of reforms', to avoid blame for any ill-effects which result (Pierson, 1996, 147).

I argue that the most effective blame avoidance strategy employed by the Government, in terms of dealing with both a hazardous set of social security reductions and high levels of policy conflict, has been to utilise the 'fudging' political function of discretion by requiring local authorities to mitigate reforms and providing discretionary powers to top-up core benefits. As opposed to discretion being used to resolve a 'technical inability to frame rules' it therefore becomes justified as a result of its function in 'blurring political issues and disguising the necessity of choosing between different policies' (Prosser, 1981, 169).

2. The appeal of 'blame avoidance': The four functions of buck-passing

Before outlining the functions of 'buck-passing' which this blame avoidance rationale passports, my argument needs qualifying in two respects. First, I am mindful of Strong's criticisms of presenting 'place as passive, apolitical and submissive to the 'downloading' of austerity' (Strong, 2018). To argue that the incorporation of discretionary decision-making at the local level serves functions for the national polity is not to make the empirical claims that these operate equally across localities and/or are incapable of being resisted. Responses by local authorities to budget reductions has a keen geographical edge; both in terms of the extent of impact and equality of outcomes (see a symposium dedicated to the issue in Local Government Studies: Bailey et al, 2015). Likewise, complex geographies of contestation – such as food banks, highlighted by Strong (2018) as a form of local agency and analysed in Garthwaite's seminal work in the pages of this journal (2016) – underscore that the local level is not a passive receptacle for the functions outlined below or the "austerity agenda" more broadly.

Second, my argument does not go as far as to map these functions onto the neoliberal project. Peck's work on "austerity urbanism" aligns the project of delivering cuts to the local state as a core component of "neoliberal austerity" eloquently (Peck, 2012, 651). Others have employed his work to analyse cuts to local government and how they align with "the regressive logic of austerity urbanism" (Hastings et al, 2017). Although the functions I outline below "off-load externalities" onto the local level in the same way analysed by Peck (2012, 651), the focus is more narrowly on the implications of adopting this fourth 'blame avoidance' rationale for conferring discretion in social security schema. The argument here does not carry these as inevitable consequences or specific motivations of the UK Government in adopting their 'welfare reform' programme. Instead, I group together empirical possibilities with what could be the implicit reasons for designing policy schema under the fourth rationale. In an effort to cover both in parallel, I refer to them as "functions" of buck-passing (as opposed to "logics" or "results" etc).

The first of these functions is *anti-juridification*. Here, judicial oversight of reform is restricted via re-locating the decision at the local level. Academic attention on 'juridification' has focused on the evolving trend in European welfare states towards formalised, individual rights (Aasen et al, 2014). In the context of welfare reform, juridification processes have generally been

analysed in one of two ways; with a focus on the complexity it engenders – the 'quality and quantity' of legislation (Harris, 2013, 247-248) – or on enforcement and redress – the extent of the 'legal basis of rights to welfare' (Dean, 2013, 157). The argument goes that complicated patchworks of underpinning legislation or tightly prescribed statutory entitlements engender judicial power at the expense of political and administrative institutions (Magnussen and Nilssen, 2013, 243).

Within the UK, conferring discretion to local authorities restricts judicial oversight. Statutorily prescribed benefits usually carry a right to appeal to the First-Tier Tribunal, where disputes can be resolved and decisions set-aside by a judge (see s.12 Social Security Act 1998). Although access to legal aid is extremely limited (see s.10 Legal Aid, Sentencing and Punishment of Offenders Act 2012), the tribunal route provides an easier and more holistic means of address than a reliance on lodging a judicial review challenge – with all of the limitations and difficulties this brings with it (for a detailed overview, see Palmer, 2007, 151-196) – in the administrative courts.

The decisions of local authorities to make discretionary awards out of a cash budget fall outside of the tribunal's jurisdiction and are far harder to challenge. The Government avoids having to delineate those entitled to support in underpinning regulations – thus limiting judicial oversight of their content and administration – and applicants are reliant on general public law and Human Rights Act 1998 grounds to challenge the exercise of discretion by local authorities via judicial review, a reliance which is all the more acute given the paucity of funding following the legal aid scheme's 'attack on judicial review' challenges (Sommerlad, 2018, 295). Challenges to the underpinning regulations focus on the transfer of decision-making power, not the impact of the policy (Meers, 2018, 123-125, 133-137), and judicially reviewing each misbehaving local authority imposes an impossible burden on both applicants and the welfare advice sector. The cumulative effect is that social security schema with an emphasis on conferring discretion can be – somewhat counter intuitively - shielded from judicial oversight relative to those based on delineated requirements.

The second function is *residualising fiscal control.* This arises as the central government devolves responsibility for decisions down to local authorities while simultaneously setting the fiscal parameters in which their discretion is exercised. This 'cut-and-devolve' approach has characterised the policies stemming from the Welfare Reform Act 2012 and Welfare Reform and Work Act 2016, with the tying of 'localism' and 'austerity' gaining analytical purchase

elsewhere as ‘sink or swim localism’ (Lowndes and Pratchett, 2012, 21) or ‘austerity-localism’ (Featherstone et al, 2013, 177). This problem is often framed in the context of ‘fiscal equivalence’: local authorities being expected to fulfil functions otherwise provided by central government, without the concomitant financial support to do so (Schwab et al, 2017).

Here, the conferral of discretion – badged with ‘localism’ rhetoric rooted in local authorities being ‘best placed’ to make decisions (HC Deb 19 April 2018 c135717W) – is not an end in itself, it is instead merely a means for delivering a different end: austerity. The ‘fetishisation’ (Featherstone et al, 2012, 177) of localism in some areas of social security reform is not tied to the inherent value of local decision-making, but instead its function in delivering savings to central government budgets.

Retaining this residual fiscal control also allows central Governments to take credit for ‘savings’ to welfare expenditure that they may consider electorally beneficial, while avoiding or blurring responsibility for the negative externalities they generate. Although attitudinal data on welfare reform programmes in the UK (and elsewhere) is mixed, it is clear that there is support for reductions in expenditure on certain classes of claimant among sections of the electorate (Humpage, 2015). This function allows central Governments to proclaim that savings have been made, without having to delineate clearly where such savings have landed.

This leads to the third function: *externalising responsibility.* There is an assumption that because the most immediate impacts of reducing social security expenditure are discernible at the local level, solutions to them are best served at that level too. This fails to recognise the problematic political asymmetry between the two. By reducing central expenditure and pushing decisions downwards, governments can ‘externalise responsibility’ (Lowndes and Pratchett, 2012, 38) for the impacts of spending reductions, while local authorities find themselves in a ‘political cul-de-sac’ (Gaffikin, 2015, 35) unable to change their fundamental basis. Prosser illustrates this problem when he refers to the power of centrally determined rules as ‘political shields’; a local authority taking an unpopular decision can use the common riposte, ‘I’d like to help you, but I’m bound by this rule’ (Prosser, 1981, 166). Where discretion is conferred, this shield slips and leaves the local authority exposed to responsibility for the effects of centrally determined policy.

This function is situated in longstanding debates on territorial governance which distinguish between political and administrative devolution and the resulting asymmetry between institutions (Loughlin, 2007, 393-395). Here, administrative responsibility – delivering central

government cuts – is framed as the devolution of political power – a 'localised' approach to welfare reform. Local authorities cannot themselves change the content of the underpinning regulations and the political composition of councillors may fundamentally disagree with the policies, yet they are ascribed responsibility for their practical implementation and consequently at least some of their effects.

The final function I advance here exists before the policy's implementation: to *ease the passage of legislation.* The conferral of discretion serves a legislative purpose, allowing deficiencies in regulations to be placated by referring to overarching discretionary mitigation at the local level. Studies of bureaucracy have examined the costs to the 'legislative capacity' of politicians in parliamentary models adopting statutes which confer low-levels of discretion to bureaucrats (see Huber and Shipan, 2002, 97-103), arguing that detailed, prescriptive instruments are more difficult to pass than those which transfer discretion to other actors. There is a small but longstanding literature which analyses how legislators can delegate discretion to maximise their own benefit from regulation (particularly in terms of electoral prospects) and 'dilute' the costs that their constituents attribute to legislative action (see McCubbins, 1985, 723). Here, it is the ability to disguise those costs, particularly in the highly contested field of 'welfare reform', which assists in passing legislation that may otherwise prove too contentious.

This function applies to the passage of the Welfare Reform Act 2012 and the Welfare Reform and Work Act 2016. The specific policy examples this paper turns to – particularly the DHP scheme to mitigate housing benefit reductions – were returned to frequently in the passing of the legislation. That classes of claimant who were not exempted from reductions in the regulations could consequently be serviced through discretionary funds at the local authority has been a recurrent reflex of Government ministers, leading Baroness Lister to remark with regards to the Local Welfare Assistance Scheme, 'Ah, my Lords, the Pontius Pilate response' (HL Deb, 11 December 2017, v787, c1370).

3. Three English examples

In the UK, the 'welfare reform' agenda from the 2010 Coalition Government onwards exhibits an odd Janus-face: an emphasis on 'simplification/centralisation' in some reforms, notably Universal Credit, and clear 'growing complexity/localisation' for others (McKay and Rowlingson, 2016, 190). Although the focus here is on three key examples of the latter, it is important to acknowledge that the dynamics of these reforms are complex and far from clearly

delineated, particularly those stemming from the Welfare Reform Act 2012 formulated in the Coalition years (Hayton and McEnhill, 2014, 102).

In addition to the complexities of the motivations behind the 2012 Act, these three reforms all sit within a far broader programme of heavy reductions to local authority grants. Local authorities in England have faced fiscal decimation since the 2008 financial crisis, though the extent of impact has a keen geographic edge. Gray and Barford's work provides an assessment of the impact a decade on, suggesting that real-terms cuts to service provision between 2009/10 to 2016/17 have varied between authorities from 46% to 1.6% (Gray and Barford, 2018, 551). These discretionary pots below all sit within this demanding and variant local government fiscal environment.

With this context in mind, the three schemes dealt with below – the abolition of council tax benefit, the DHP scheme, and the replacement of the discretionary Social Fund with Local Welfare Assistance Schemes – all exhibit the blame avoidance functions of conferring discretion detailed above. Each will be dealt with in turn.

3.1.Localising council tax support

The abolition of council tax benefit and its replacement with the local authority administered and designed CTRS is an exercise in the externalisation of responsibility *par excellence*. Under s.33(1)(e) of the Welfare Reform Act 2012, the Government laid regulations to abolish council tax benefit, with provision for the new scheme made in ss.9-16 Local Government Finance Act 2012. As opposed to the pre-existing centrally funded scheme with tightly delineated eligibility requirements, the new CTRS is designed at the discretion of local authorities under some prescribed requirements, chiefly securing provision for pensioners, set out in the Council Tax Reduction Schemes (Prescribed Requirements) (England) Regulations 2012 (SI 2885). This conferral of discretion is – perhaps unsurprisingly – accompanied by a reduction in funding relative to the previous scheme. English local authorities received 10% less than the forecast expenditure for 2013/14, and this baseline has since been subsumed into the new business rates retention system, with no direct allocation of funds from central Government provision of the CTRS.[i]

The Government's justification for the devolution of support includes giving local authorities 'a greater stake in the economic future of their local area' and reinforcing the 'drive for greater local financial accountability and decision-making' (Department for Communities and Local Government, 2011). In the context of a reduction in funding of £420 million per annum,

Government ministers emphasised in the course of debates on the underpinning regulations that local authorities could 'tailor schemes to suit local circumstances' and 'choose to draw resources from other parts of income streams' (HC Deb, 31 January 2012, c774). When faced with subsequent questions on the adequacy of funding or the impact of changes to the scheme, the government has responded by referring to the broad discretionary power given to local authorities, underscoring that 'these are local schemes and it is for local authorities to consider the effect on specific groups of council tax payers' (HL Deb, 18 June 2015, cHL291W).

The blame avoiding effect of conferring discretion over the design of CTRSs is demonstrated aptly by the Supreme Court's consideration of the London Borough of Haringey's scheme in *R (on the application of Moseley) v London Borough of Haringey* [2014] UKSC 56. The facts and decision in case exhibit how the creation of the CTRS serves the functions outlined above, *externalising responsibility* for the impacts of abolishing council tax benefit, limiting judicial oversight of the central scheme at the expense of local authorities (*anti-juridification*) while allowing the central government to achieve their budget cut (*residualising fiscal control).* The abolition of Council Tax Benefit put severe strain on Haringey LBC's finances. If they were to provide relief at the equivalent level as centrally administered before April 2013 – or would be provided under the 'default scheme' outlined in the Council Tax Reduction Schemes (Default Scheme) (England) Regulations 2012 (SI 2012/2886) – they would face an effective budget shortfall of 'about 17–18%' because of a trend towards more households in the authority's area becoming eligible for council tax relief under the old scheme. Put another way, although the 10% reduction in the 2013-14 budget is based on the previous year's allocation, the real term cuts facing Local Authorities in the provision of council tax may in fact be far larger.

In discharging their duty to consult on the formation of the CTRS scheme under Schedule 1A to the Local Government Finance Act 1992 (amended by Paragraph 1 of Schedule 4(1) of the Local Government Finance Act 2012), Haringey sent a letter to all 36,000 households who were eligible for the predecessor council tax benefit. This began by drawing a clear conduit between a reduction in the money provided by central Government and the pending reductions in council tax assistance. For a reader familiar with the cuts to council tax provision and the funding environment faced by local authorities, it may appear to be an uncontroversial statement of the situation:

> At present the Government gives us the money we need to fund council tax benefit in Haringey. We will receive much less money for the new scheme and once we factor in

> the increasing number of people claiming benefit and the cost of protecting our pensioners, we estimate the shortfall could be as much as £5-7m.
>
> **This means that the introduction of a local council tax reduction scheme in Haringey will directly affect the assistance provided to anyone below pensionable age that currently involves council tax benefit.** (emphasis in the original) (para. 17).

In a similar vein, an accompanying booklet entitled 'The Government is abolishing Council Tax Benefit' stated that:

> 'Early estimates suggest that the cut will leave Haringey with an actual shortfall in funding of around 20%. This means Haringey claimants will lose on average approximately £1 in every £5 of support they currently receive in Council Tax Benefit.' (para 19).

From this documentation, it is clear that Haringey LBC dismissed options for absorbing these cuts from elsewhere (for instance, by reducing services in other areas or raising the council tax levy on households). Instead, it was suggested that the benefit levels be reduced relative to the cuts made, effectively passing on the Government reductions and leading to cuts of between 18% and 22% per annum for remaining recipients after exempting certain populations (such as pensioners and those with disabilities unable to work) (para.9).

The drawing of this causal inference troubled the court. The design of the CTRS scheme in Haringey passed on the budget cut from central Government but 'the reduction in government funding did not inevitably have that effect' (para. 19). Haringey could have, theoretically at least, drawn money from elsewhere in their reduced budgets to service additional council tax relief. By drawing a conduit between the cuts to the provision of council tax relief and the associated reduction in the CTRS, the local authority had presented the reduction as inevitable and therefore 'disguised the choice made by Haringey itself' (para. 42).

This is buck-passing in action. By conferring Haringey LBC the discretion to design the CTRS and supplement with (non-existent) additional funds, alongside a duty contained in the amended 1992 Act to consult on the changes, the decision to reduce expenditure on council tax relief is no longer that of central Government: it is Haringey's. The Government have externalised responsibility for the cuts. The Court determined that to present reductions in support as a direct result of Government cuts is to 'disguise' the authority's choice; notwithstanding that the reductions are the result of Government policy to significantly reduce

funding *(residual fiscal control).* The challenges railing against this policy have been to its discharge at the local authority level – the eligibility requirements for local schemes or the exercise of the consultation requirements in particular[ii] – as opposed to challenges to the root legislation, and therefore Government policy, itself (*anti-juridification).*

3.2.Discretionary Housing Payments

DHPs are discretionary 'top-up' payments made to anyone in receipt of housing benefit. They now play a central role in the British social security system and form the principal means of mitigation for most households affected by reductions to housing benefit stemming from the Welfare Reform Act 2012 and Welfare Reform and Work Act 2016 – most notably, the 'benefit cap,' the so-called 'bedroom tax', and caps to Local Housing Allowance. From a small-scale discretionary fund, accounting for approximately £20 million per annum of expenditure across the UK in 2001/2002 (Leicester and Shaw, 2003, p. 5), the same regulations now shoulder over £1 billion of expenditure over the course of this Parliament (HC Deb 22 June 2017, vol.626, col.230). No longer focused simply 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. Their significance is unlikely to fade given the repeated emphasis by the government on their availability and capacity to shoulder upcoming reforms (HC Deb 22 June 2017, vol.626, col.230).

The Government retains residual control over their financing in England and Wales, with the Department for Work and Pensions allocating an annual budget – calculated with reference to a centralised formula – to Local Authorities across the United Kingdom[iii] to provide DHPs to those in receipt of housing benefit who require additional assistance to meet their housing costs. The most recent annual allocation – 2018/19 – totalled £153 million, notionally split between mitigating LHA reforms (£27 million), the 'bedroom tax' (£54 million), the benefit cap (£54 million) and 'baseline funding' (£18 million) – the amount effectively rolled over from before the Welfare Reform Act 2012 suite of reforms (House of Commons Library, 2018, 5). Local authorities are not, however, required to ring-fence specific expenditure to any of these areas. Instead, the underpinning Discretionary Financial Assistance Regulations 2001/1167 provide a broad discretion to local authorities in making awards, with three key limitations: (i) payments can only be made to those receiving Housing Benefit or the 'relevant award of universal credit' (ostensibly the 'housing element', Reg. 2(1)(a)), (ii) 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' (Reg. 2(1)(b)), and (iii) payments cannot cover certain exempted areas, such as benefit sanctions, increases in rent due to arrears or service charges (Reg. 3).

The adoption of this 'DHP strategy' was sold as part of the Coalition government's effort to avoid 'standing back and imposing something' on local authorities (Work and Pensions Committee, 2014). Ministers have been at pains to emphasise that the payments are discretionary – repeatedly returning to the response that 'the clue is in the title' (HC Deb, 26 March 2013, c473WH, HC Deb 25 Nov 2013, v571, c13) – repeatedly expressing an eagerness for local authorities to decide when to make awards with reference to 'local issues' (HC Deb 25 2013, v559, c976W). The Department for Work and Pensions' guidance underscores that the payments are 'first and foremost ... a discretionary scheme' (Department for Work and Pensions, 2018), with the only prescriptive requirements echoing 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 disability benefits (ibid). 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 (2013).

The emphasis on local authority discretion situates the availability of these payments as a veritable panacea within the UK social security system. Anyone faced with a shortfall in housing benefit for whatever reason should apply to their local authority for support: if it is not forthcoming, that is the exercise of local discretion, not the inevitable result of government policy. Their availability provides an easy rote response for Government ministers faced with criticisms of high profile housing benefit reforms in Parliament, easing passage of underpinning legislation. This is perhaps best illustrated in parliamentary debates on the impact of the 'bedroom tax'. The availability of DHPs has been invoked by government ministers as a catch-all for all circumstances not dealt with in the regulations. To give but a few examples of many, the availability of the payments has been used to justify the impact of measures on victims of domestic violence (HC Deb, 21 November 2016, Cw), lone-parent households (HC Deb, 14 November 2016, Cw), care leavers (HL Deb, 18 October 2016, v774, c23WS), families with severely disabled children (HC Deb, 4 May 2016, Cw), people with disabilities, jobseekers

and those on low incomes (HC Deb 22 June 2017, v626, c230). More recently, their availability has even been used to placate concerns in Parliament that victims of the Grenfell fire may be affected by the 'bedroom tax' or 'benefit cap' upon relocation (HL Deb 5 July 2017, vol.783, col.885). In all circumstances the argument is the same: a statutory exemption is not necessary as local discretion exists to award a DHP.

Often, there is an unclear dividing line between talk of 'exemptions' and the availability of DHPs; the opportunity of applying for the latter being construed as the former. The most high-profile example is that of the then Prime Minister David Cameron's response in Prime Minister's Questions to a question about disabled individuals not being exempted from the 'bedroom tax': 'the right hon. Gentleman is completely wrong, because anyone with severely disabled children is exempt from the spare room subsidy' (HC Deb, 6 March 2013, c952). 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' (HC Deb, 22 April 2013, c700W). Importantly, these populations are not automatically statutorily exempted, but are instead (in most circumstances) reliant on the DHP process.

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 (Department for Work and Pensions, 2012), Social Security Advisory Committee (Social Security Advisory Committee, 2015), and the House of Commons Work and Pensions Committee (Work and Pensions Committee, 2014) have all been vocal on the budget's apparent arbitrariness and insufficiency. 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 (Department for Work and Pensions, 2012) – 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' (Social Security Advisory Committee, 2015). It is perhaps surprising, therefore, that not all local authorities spend the entirety of their DHP budgets; 33% of authorities spend less than 95% of their DWP allocation (Department for Work and Pensions, 2018). Though local variations in the implementation of the scheme – both in terms of its administration and attachment of conditionality to awards – makes drawing conclusions from this variation in expenditure particularly challenging (Meers, 2015, 122-126).

The availability of these payments not only works to externalise responsibility while retaining residual fiscal control and to ease the passage of legislation, they also serve the *anti-juridication* function too. The Courts have returned frequently to the availability of the payments in judicial review challenges to key housing benefit reforms – particularly the 'benefit cap' and so-called 'bedroom tax.' The Supreme Court's decision on the latter in *R. (on the application of Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58 illustrates this well. In assessing whether the claimants – in this case, those with disabilities affected by the 'bedroom tax' – had been unlawfully discriminated against, the Court's focus was inevitably structural: whether there was a justification for treating alike cases separately under the regulations and if the use of the DHP scheme for others was reasonable. The bulk of the claimants were unsuccessful as the Court determined that the 'Secretary of State's decision to structure the scheme as he did was reasonable' (para. 41). By conferring discretionary space, the question is whether the decision to adopt the discretionary approach can be justified, not the impacts on or classes of claimants affected.

3.3.Closure of the Discretionary Social Fund

The Welfare Reform Act 2012 heralded not only a series of significant benefit reductions and abolitions, but also a transfer in responsibility for meeting needs arising from personal crises or community care costs from central to local government. The Social Fund, formed in 1988 in the wake of the Fowler reviews of the social security system, operated in two streams: the discretionary social fund (comprised of community care grants (CCGs), and budgeting and crisis loans), and the administration of sure start maternity grants, funeral payments and the far more widespread winter fuel payments. The former stream concerned itself with either non-repayable grants for those under 'exceptional pressure', generally to support individuals returning to the community from institutional care (CCGs), or re-payable loans to assist with 'lumpy' expenditure or those facing unforeseen emergencies. It is these discretionary awards which garnered particular attention in the formation of the Welfare Reform Act 2012.

The centralised administration of the fund – processed across twenty 'benefit delivery centres' across the UK (Grover, 2012, 355) – was critiqued by Secretary of State for Work and Pensions Iain Duncan Smith as 'complex, over-centralised, poorly targeted and failing those it is meant to help the most' (House of Commons Library, 2013). Although the rhetoric was focused on providing 'flexibility' to support those 'in greatest need according to local circumstances'

(House of Commons Library, 2013), the key implicit message was that the scheme was costing too much (Grover, 2012, 355).

As a result, CCGs and crisis loans were ended, with budgeting loans rolled into a new nationally administered system for benefit on-set support. The cash for the abolished elements was then pushed downwards to local authorities – approximately £200 million per annum across the UK. The regulatory context is simple to summarise: this money is not ring-fenced for local welfare assistance functions and there are no constraints on how it is spent other than the general bounds of public law.

The Government have argued continually that this is not a cost-saving measure; the money spent on the old scheme is simply being re-oriented via local authorities to improve the quality of provision. There are two problems with this claim. First, as highlighted by the Centre for Responsible Credit, it is reliant on a partial reading of the Social Fund expenditure statistics. Compared to low-spending years expenditure is broadly equivalent, but not compared to high-spending periods. For instance, taking 2010/11 expenditure, the DWP budget for local welfare schemes in 2013/14 was 39% lower (Gibbons, 2015, 26), marking a significant reduction in total support Second, it is important to note this non-ring-fenced cash is being devolved to local authorities at the same time as their budgets are being savaged with average reductions of 37% (Comptroller and Auditor General, 2016). To describe the fiscal environment for local authorities as challenging would be to understate the intense challenges they face. Lowndes and Gardner's description of local government being subject to 'super austerity', where cuts year-on-year compound previous reductions, underscores the acute financial pressure (Lowndes and Gardner, 2016). Any devolution of cash – especially that not ring-fenced or subject to any statutory control – is likely to find itself subject to multiple competing pressures in such a constrained fiscal environment. To describe it as equivalent provision to a centralised scheme is to ignore completely these parallel budget cuts.

Instead of a focus on fiscal savings – with the problems with that claim detailed above in mind – the Government has instead argued that the devolution of the scheme is instead to improve the quality of the discretionary decision-making. The familiar tropes of local authorities being 'best placed to decide how to target flexible help' (HC Deb 19 April 2018 c 135717W) and are those 'who understand their communities and who are best placed to make the right call' (HL Deb, 20 November 2017, cW), are used to justify the transfer of a nationally administered scheme to become 'ultimately a matter for local discretion' (HL Deb, 20 November 2017, cW).

This approach demonstrates the conferral of discretion at the local authority level as blame avoidance in two key ways. First, the devolved cash is tied to an extremely broadly stated purpose of supporting 'local welfare needs' (HC Deb 19 April 2018 c 135717W). In his letter to local authorities outlining the changes and the scope of the allocated budgets, Steve Webb MP stated that the Government 'expect[s] the funding to be concentrated on those facing the greatest difficultly in managing their income and to enable a more flexible response to unavoidable need', summarising the broad-brush discretion as follows: 'in short, the funding is to allow you to give flexible help to those in genuine need' (Webb, 2012). This catch-all obligation has even been articulated as being commensurate with the s.2 Local Government Act 2000 power for local authorities to 'promote well-being' in their area (HL Deb, 20 November 2017, cW). This significant shift externalises responsibility by implying that those in need of welfare assistance – and particularly those who have not received equivalent provision following the closure of the Social Fund – face this as a result of a failure of local authority discretionary decision-making, not as a result of central government policy.

Second, by neglecting to impose either statutory constraints on expenditure or anything in the way of reporting obligations, the Government abdicates blame for a lack of financial provision to meet local needs while retaining a 'saving' to the central budgets. The expenditure reduction has been achieved without the accountability for the subsequent lack of provision. The reflex of Government ministers to refer to problems with local welfare assistance as due to 'local spending decisions' is what Lister derides as the 'Pontius Pilate response' (HL Deb, 11 December 2017, v787, c1370) – by refusing to track the expenditure of allocated funds, the Government can wash their hands of deficiencies in local authority schemes. This response persists in the face of compelling evidence that local welfare assistance schemes are under acute threat. The Centre for Responsible Credit has found that as of September 2017, 26 local authorities had closed their schemes completely, and a further 41 had cut spending by over 60% relative to the previous year (Gibbons, 2017).

4. Conclusion

The fundamental argument of this paper has been that conferring discretion to local authorities can serve as a form of blame avoidance. It can externalise responsibility for decisions while allowing central government to retain residual financial control, ease the passage of otherwise unpalatable legislation and work to limit judicial oversight of central government activity. These buck-passing functions are an additional rationale for utilising discretionary decision-

making which has nothing to do with the efficacy of the resulting decisions, but is instead focused on avoiding the delineation of those affected by reforms and the responsibility for impacts. To use Prosser's phrasing, it can 'deliberately fudge' problematic conflicts. I will not restate the building-blocks of the argument here, but will instead reflect on three key implications of the blame avoiding functions of conferring discretion.

If the arguments advanced above are correct, then moving away from a localised welfare approach – or at least towards a more effective localised welfare approach – is not dependent on convincing the Government that current approaches are ineffective in administering social entitlement. That is not the rationale behind the design of the policy schema that underlie them. The central Government will be reluctant to reform as it would involve delineating the impact of welfare reductions. To underpin support or exemptions for certain classes of claimant via legislation is to define who is affected: who will lose their homes because of the benefit cap, or freezes to Local Housing Allowance? Criticisms of the deficiency in local provision therefore need to be coupled with explicit criticisms of trying to avoid blame for the impacts of centrally imposed budget reductions.

The second issue flows from the first. Many criticisms of these discretionary schemes have focused on the unsatisfactory provision of cash, looking at the size and calculation of the discretionary pot. Criticisms by the National Audit Office and the Welsh Affairs Committee of the localised approached to mitigating reductions to housing benefit echo this approach, focusing on the lack of monitoring functions and how centrally allocated cash is calculated (Department for Work and Pensions, 2012; Welsh Affairs Committee, 2013). Criticisms of the size of these pots need to be accompanied with an assessment of the classes of claimants who are not receiving awards. This allows for an interrogation of the 'fudging' effect of conferring discretion in the passing of legislation. If groups that have been highlighted in the legislative process as being important benefices of this discretionary support (such as victims of domestic violence or people with disabilities) are not receiving it, this lends weight to the argument for reform in a way that headline spending does not.

The final point concerns cumulative impact. This paper has dealt with three key reforms, but there are others too – most notably the closure of the Independent Living Fund (see Porter and Shakespeare, 2016). These overlapping reforms have a compounding effect. Claimants engaging with one scheme are likely to encounter another. This is particularly true of DHPs and the CTRS. Deficiencies in one can increase reliance on another scheme, or administrative

and financial problems in one local authority, as the claimant will be applying to the same for all of them, can impact on the availability of support across multiple schemes.

To acknowledge the 'blame avoidance' rationale for conferring discretion is to ensure that the four functions of buck-passing can be interrogated and that our own analyses of the welfare state do not fall prey to them. An examination of the transfer of discretionary decision-making in the design of social security schema should not be limited to a critique of its efficacy in delivering social entitlement or implementing policy. Interrogating this blame avoidance rationale allows for broader functions that conferring discretion can serve – particularly in the context of making cuts to social entitlement – for Governments and legislatures.

Notes

[i] The position differs for Scotland and Wales, where the devolved governments did not pass on the 10% reduction directly to local authorities.
[ii] Other key cases on the scheme include *R. (on the application of Logan) v Havering LBC* [2015] EWHC 3193 (Admin) and *South Tyneside Council v Aitken* [2014] EWHC 4163 (Admin).
[iii] In Scotland, DHPs are a devolved matter and the mechanics of the scheme are different. Here, the Scottish Government provides additional funds to local authorities over and above those issued by the UK Government's Department for Work and Pensions.

Conflict of interest

The author declares that there is no conflict of interest.

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