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The United Kingdom

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In assessing the aims behind one of the most controversial planks of the UK Coalition Government's welfare reform agenda – a housing benefit penalty for under-occupation, commonly known as the "bedroom tax" - Laws LJ stated that in addition to the perceived imperative of saving public funds, the change was also seeking to "shift the place of social security support in society."[1] There was no elaboration by the court on what was meant by this "shift:" whether it was from the national to the local,[2] of responsibility and risk to the individual and household level,[3] in the perceived meaning of "fairness,"[3] or to a smaller state. [4] It was merely an indication that there was something more to the "core augmentation"[5] of the "mantra of austerity"[6] than simply saving money.

This chapter is focused on how the courts have engaged with this "shift" in the UK. What emerges demonstrates the complexity and inherent limitations in the UK constitutional context. The courts have struggled to delineate their role in the wake of this austerity-induced shift, with the intensity of proportionality review proving an almost insurmountable bar to many claimants' challenges. The twin-gears of a "cut-and-devolve" approach, where

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[1] *R (MA & others) v The Secretary of State for Work and Pensions [2013] EWHC 2213*. [58] (per Laws LJ)
[2] Patricia Kennett and others, 'Recession, Austerity and the "Great Risk Shift": Local Government and Household Impacts and Responses in Bristol and Liverpool' (2015) 41 Local Government Studies 622. 623
[3] ibid. 640
[3] Helen Carr and Dave Cowan, 'The Social Tenant, the Law and the UK's Politics of Austerity' (2015) 5 Oñati Socio-legal Series. 83
[4] Martin Smith and Rhonda Jones, 'From Big Society to Small State: Conservatism and the Privatisation of Government' (2015) 10 British Politics 226. 227
[5] HL Deb, 14 February 2012, c705
[6] Paul O'Connell, 'Let Them Eat Cake: Socio-Economic Rights in an Age of Austerity', *Human Rights and Public*
Finance: Budgets and the Promotion of Economic and Social Rights (Bloomsbury Publishing 2014). 60

central budgets are reduced and responsibility for provision pushed downwards to local government, introduces complicated multi-level considerations as the welfare reform agenda becomes fragmented across institutions. Deficiencies elsewhere lead to an over-reliance on limited procedural obligations, which prove ineffective to deal with the complicated cumulative effect of large-scale welfare reform programmes. The legal challenges to reforms in the Welfare Reform Act 2012, which provide the focus of the discussion which follows, demonstrate how these issues, amongst others, render many of the public law tools available to claimants challenging such policies largely blunt.

Given the space available, the discussion here is far from comprehensive. Instead, this chapter focuses on some of the key issues which have arisen in legal challenges to the Welfare Reform Act 2012. It is in two sections. The first provides a concise overview of the UK constitutional context, the motivations for reform, and the importance of (and associated problems with) "localism." The second outlines themes which emerge from the case law: (i) the reliance on procedural challenges under equality obligations – particularly the Public Sector Equality Duty (PSED) – in the appeals, (ii) the increasing importance of discretionary mitigation mechanisms as opposed to statutory exemptions, and how their role in a number of flagship reforms raises questions about the ability of discretion at the local authority level to sit alongside austerity at the central level, and (iii) the over-reliance and inherent limitations of discrimination challenges to assert social rights.

Section One: Preliminary Issues – The UK Constitution and the Welfare Reform Agenda

Before turning to an overview of the welfare reform agenda and its accompanying legal challenges, it is important to first provide some constitutional context. To attempt to capture the UK constitution is a "treacherous affair"[7] and many efforts begin by outlining the ongoing disagreements over even its basic components.[8] As it is uncodified and comprised of conventions, statutes and principles stretching from the 13th Century to the modern day, it does not easily lend itself to summary. The focus of this section is far more modest. It seeks to

[7] Grégoire Webber, 'Eulogy for the Constitution That Was' (2014) 12 International Journal of Constitutional Law 468. 470

[8] Douglas Vick, 'The Human Rights Act and the British Constitution' (2002) 37 Texas International Law Journal. 477

outline the two elements of the UK constitutional settlement which are of particular importance when looking at challenges to welfare reform measures: the incorporation of the ECHR into domestic law under the Human Rights Act 1998,[9] and the tribunal system of redress and its relationship with judicial review.

The majority of the discussion in this chapter focuses on challenges brought via judicial review, and consequently it is worth briefly setting these cases within the broader appeals framework in the UK. There are separate tiers of Courts within the UK system, and the nature of each of their "constitutional functions" [10] has become increasingly fragmented as the work-load has been shared between them. At the lower end of the system are the statutorily created tribunal courts (the First Tier Tribunal and Upper Tier Tribunal), [11] and at the higher end the High Court, Court of Appeal, and finally the Supreme Court. The bulk of judicial oversight in social security cases is serviced by the lower end tribunals. Social security payments have their own chamber – the Social Entitlement Chamber – where first instance appeals can be heard by (relatively) specialist judges, and the workload tends to be sizable, with 507,131 cases lodged in 2012-13 following the introduction of the Welfare Reform Act 2012. [12] This right to appeal exists for *most* decisions made by the two administering government departments – the Department for Work and Pensions (DWP) and Her Majesty's Revenue and Customs (HMRC) – and by local authorities in their administrative social security functions, but this right is a statutory creation [13] and some "benefits" (notably DHPs discussed elsewhere) fall outside of its scope.

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[9] See s.3 Human Rights Act 1998, which requires the Courts to read primary and subordinate legislation in a way which is compatible with convention rights.

[10] Sarah Nason, 'The Administrative Court, the Upper Tribunal and Permission to Seek Judicial Review' (2012) 21 Nottingham Law Journal. 13

[11] See Tribunals, Courts and Enforcement Act 2007

[12] Jeremy Sullivan, 'Senior President of Tribunals' Annual Report' (2015) <https://www.judiciary.gov.uk/wpcontent/uploads/2015/02/senior_president_of_tribunals_annual_report_2015_final.pdf>.

[13] For example, see: Schedule 7, para 6 Child Support, Pensions and Social Security Act 2000; Schedule 2 Social Security Act 1998; and Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013/381

The FTT considers issues of both law and fact,[14] and its decisions can be appealed only on an "error of law"[15] to the UTT. In some limited circumstances, the UTT can exercise judicial review functions akin to that of the High Court, but this is principally limited to immigration cases. There is a right to appeal from UTT decisions up to the Court of Appeal. For cases without a route for appeal, challenges can be made to decisions by public bodies, and secondary legislation itself, in the High Court under judicial review. This is a route mandated by common-law, with some imposed procedural requirements under the Civil Procedure Rules.

Judicial review challenges form the bulk of cases under consideration here. There are numerous grounds under which a claimant can bring a challenge: illegality, irrationality, procedural impropriety and legitimate expectation. The bulk of the cases below – and in challenges to welfare reforms more generally – are focused on the "illegality" ground, particularly with reference to the procedural duties on public sector decision makers under Equality Act 2010 and on the compatibility of administrative action and/or secondary legislation with the ECHR articles as domesticated under the Human Rights Act 1998. As a relatively tight statutory duty, the former is outlined with reference to specific cases below, but the latter warrants some discussion here; particularly with reference to the exercise of proportionality.

Human Rights Act 1998: Proportionality and Judicial Humility

A fundamental element of the UK constitutional position, particularly in the context of challenging welfare reforms, is the incorporation of the ECHR articles into domestic law under the Human Rights Act 1998. Its introduction allowed for positive rights-based challenges against public authorities under judicial review for the first time. This development, however, raises complications. In the UK, there is not an "ex-ante" [16] framework for assessing unconstitutional behaviour by constitutional actors, and the

[14] s.12(8)(a) Social Security Act 1998
[15] s.11 TCEA 2007
[16] Mark Elliott, 'The Principle of Parliamentary Sovereignity in Legal, Constitutional, and Political Perspective', *The Changing Constitution* (8th Edition, OUP 2015).28

incorporation of a statute which encroaches into this territory has the potential to clash with the great weight ascribed to the principle of "parliamentary sovereignty"; particularly the importance of avoiding the (unelected) judiciary striking down legislation put forward by a democratically elected legislature.[17]

As a consequence of this, the desire to champion the ECHR rights domestically has been "tempered by an equally forceful desire not to overstep the proper boundaries of judicial power." In other words, in not wishing to overstep their constitutional role, Courts should be "properly humble about [their] own capacities."[18] This is explicit for qualified rights under the convention, with Articles 8-11 allowing for their breach if it can be justified as "necessary in a democratic society," and other articles – for our purposes, particularly the Article 14 Prohibition of Discrimination – are subject to a "proportionality" assessment, which determines whether the interference with a convention right is justified. The principle is well-established and its logic "impeccable"[20] and largely uncontroversial – the problems arise when the courts come to apply its constitutive stages.

Proportionality review is a "structured mechanism"[19] which asks the Court to consider four key questions: (i) whether the measure adopted pursues a legitimate aim, (ii) whether there is a rational connection between the aim pursued and policy adopted, (iii) whether the aim could have been achieved using a less intrusive measure, and (iv) whether, on balance, the benefits of achieving the aim by the measure outweigh the dis-benefits resulting from the restriction of the relevant protected right.[20]

Importantly, the severity of the test applied can differ depending on the issue at hand and the institution(s) involved, for perfectly valid reasons of "institutional competence and democratic legitimacy." [21] In the context of social security benefits, this has led to the

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[17] Alison Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart 2009). 19

[18] *R (Lord Carlile of Berriew and others)* v *Secretary of State for the Home Department* [2014] UKSC 60 (per Lady Hale) [105] [20]

The Rt Hon Lady Justice Arden DBE and Lady Justice Arden, 'Proportionality: The Way Ahead?' [2013] Public Law 498.

[19] Alan Brady, *Proportionality and Deference Under the UK Human Rights Act: An Institutionally Sensitive Approach* (Cambridge University Press 2012). 6

[20] Frankie McCarthy, 'Human Rights, Property and the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill in the Supreme Court' [2015] Edinburgh Law Review 373. 375

[21] Brady (n 20). 246

application of the deferential "manifestly without reasonable foundation" test to the first three elements of the proportionality exercise outlined above; namely, the aim pursued and its connection to the measure, and the intrusiveness of the policy relative to alternative options must not be "manifestly without reasonable foundation." The final question, which calls on the court to balance the interests of the community against any interference with protected rights, does not lend itself to a varying intensity of review – instead "all relevant interests fall to be weighed and balanced."[24]

As will become apparent in the discussion below, despite the clarity of the test and its supporting case law, proportionality review has been poorly applied throughout successive judicial review challenges to welfare reforms. This is for two key reasons. The test has often been applied without the institutional sensitivity required to adequately assess multi-level decision making,[25] for instance, assessing the legitimacy of a policy aim is more problematic in (the very common) cases where local authorities are acting under a statutory obligation. The aim of the policy ((i) above) is with the government, but the means of implementing it ((ii) and (iii) above) is with the local authority. Second, following this first point, difficulties in undertaking the review often results in the Court simply asking whether the policy itself is "manifestly without reasonable foundation." This is a different test, far more akin to a *Wednesbury* unreasonableness articulation of irrationality,[26] which fundamentally avoids the reasoning demanded by proportionality review. As a central plank of judicial review challenges, these issues are revisited below.

The Welfare Reform Programme: Motivations and Key Policies

Having provided a primer on the relevant constitutional elements, this section now turns to the 2010 Coalition Government's welfare reform programme. It does not intend to give a complete account of the 2010 UK Coalition Government's welfare reform agenda. To do so would leave room for little else. Instead, it highlights some of the key reforms within the Welfare Reform Act 2012 which underpin the discussion which follows, and briefly assesses the Government's stated motivations for reform. Even the objectives articulated by the ministers responsible for the policies, however, can lack clarity or appear contradictory, with the Act adhering to what Vieira and Pinto call the "new politics of welfare reform"[27] – a

complicated, intricate, and often self-contradicting set of ideological assumptions and political motivations which have provided the context for changes in welfare policy.

[24] *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3 [52] (per Mance LJ)
[25] Brady (n 20). 18 [26] For a detailed assessment of the differences between the two, see: Anne Davies and Jack Williams, 'Proportionality in English Law', *The Judge and the Proportionate Use of Discretion* (Routledge 2016). 73
[27] Mónica Brito Vieira and Pedro Ramos Pinto, 'Understanding the New Politics of Welfare Reform' 61 Political Studies 474

Despite difficulties in teasing out a "shared rhetorical position" on welfare policy, [22] the Coalition Government was clear that the "core argumentation" behind the reforms in the Welfare Reform Act 2012 was "austerity" in response to the global financial crisis. Its measures were designed to reduce expenditure on welfare payments by £19 billion a year across the 2010-2015 Parliamentary term, with – excluding changes to the state pension – "few stones left unturned."[23] There were multiple changes to housing benefit, both by tenants claiming in the private rented sector (under Local Housing Allowance (LHA)) and the social rented sector, with new caps, penalties and changes to uprating introduced affecting hundreds of thousands of households. Disability benefits were also subject to sizable retrenchment, [24] with the replacement of the UK's principle disability benefit, Disability Living Allowance (DLA), with a "more rigorously tested" Personal Independence Payment (PIP).[25] A "benefit cap" was introduced for all claimants receiving working-age benefits (excluding disability benefits), set at £500 per week for couples and families, and £350 for single people[26] – though this has since been reduced in the Welfare Reform and Work Bill 2015. This has been coupled with a heavily increased sanctions programme (of up to 3 years of social security support withdrawal) for

[22] Richard Hayton and Libby McEnhill, 'Rhetoric and Morality - How the coalition justifies welfare policy' in Judi Atkins and others (eds), *Rhetoric in British Politics and Society* (Palgrave MacMillian 2014) 102
[23] 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 & Policy Online. 50
[24] For a more detailed discussion of the impact of Welfare Reform Act 2012 reforms to those with disabilities, see Neville Harris, 'Welfare Reform and the Shifting Threshold of Support for Disabled People' (2014) 77 The Modern Law Review 888. 926
[25] Kayleigh Garthwaite, 'Fear of the Brown Envelope: Exploring Welfare Reform with Long-Term Sickness Benefits Recipients' (2014) 48 Social Policy & Administration 782. 784
[26] See s.96 Welfare Reform Act 2012

those claiming unemployment benefits who do not meet the requirements of their personalised "claimant commitments," such as non-attendance at interviews.[27]

Some of these reforms are still ongoing; chiefly the fundamental re-packaging of multiple inwork and out-of-work benefits (Housing Benefit, income-based Jobseeker's Allowance and Employment and Support Allowance, Income Support, Working Tax Credits, and Child Tax Credits) and other payments, such as child care subsidies, into one, "simplified" payment under Universal Credit.[28] The policy is the "centrepiece" of the Government's "make work pay" agenda,[29] and is designed to simplify the benefits system,[30] increase the financial incentives to work, and save money –estimated at £2.7 billion per year due to reduced administration costs and lower unemployment.[37] The new benefit is currently being rolled out in pathfinder areas using a "lobster pot" principle, where simple cases (principally, single unemployed individuals) are taken onto the scheme, and remain on it as their circumstances change.[31] It is due to rolled out for availability at all job centres by spring 2016.[32]

Before turning to some of the issues which have arisen in the challenges to these reforms, it is worth noting three key things about the motivations behind the Welfare Reform Act 2012.

Firstly, "austerity" is not the only explicit factor behind its implementation; the economic principles behind austerity are invariably accompanied by the political promotion of individual responsibility for welfare provision.[33] The reforms follow the green paper "21st Century Welfare"[34] and the white paper "Universal Credit: Welfare that Works"[35] which both

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[27] 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.
[28] Philip M Larkin, 'The New Puritanism: The Resurgence of Contractarian Citizenship in Common Law Welfare States' (2014) 41 Journal of Law and Society 227. 250
[29] Christina Beatty, Steve Fothergill and Donald Houston, 'The Impact of the UK's Disability Benefit Reforms', *Disability Benefits, Welfare Reform and Employment Policy*, vol (eds) Colin Lindsay and Donald Houston. 148
[30] Larkin (n 33). 250 [37]
Helen Kowalewska, 'Diminishing Returns: Lone Mothers' Financial Work Incentives and Incomes under the Coalition' (2015) FirstView Social Policy and Society 1.
[31] HL Deb, 18 June 2014, c907
[32] HC Deb, 6 July 2015, cW
[33] Kevin Farnsworth and Zoë Irving, 'Varieties of Crisis, Varieties of Austerity: Social Policy in Challenging Times' 20 Journal of Poverty and Social Justice 133. 134
[34] st
Department of Work and Pensions, '21 Century Welfare' (2010) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181139/21st-centurywelfare_1_.pdf> accessed 25 June 2015.
[35] Department of Work and Pensions, 'Universal Credit: Welfare that Works' (2010)

underscore ideological motivations distinct from simply furthering austerity with welfare reforms. Instead they seek to dis-incentivise what is perceived as a national problem of "benefit dependency"[36] and facilitate an "activation turn" in welfare policy.[37]

Secondly, many of the welfare reforms, or mechanisms designed to mitigate them, are administered or implemented at the Local Authority level.[38] This has led to austerity being tied with "localism," or the more short-lived idea of the "Big Society,"[39] which prioritise local authority and community decision-making over that of central government. In the context of welfare reform, however, this can prove problematic – especially at a time when new responsibilities are given alongside tighter budgets. Some argue this renders any premise of real local decision-making "hollow,"[40] and it raises some particular problems in legal appeals, as discussed below.

Finally, it is worth noting that the package of policy changes in the Welfare Reform Act 2012 overlap and intersect in complicated ways – both in how they function, and their overall impact on those affected by them. By way of illustration, there were 20 individual equality impact assessments for the Welfare Reform Act 2012 alone; each of which detailing potential issues for protected groups connected to their own constituent provision, but neglecting completely to assess how they may link together in the patchwork of reforms as a whole.[41] This cumulative impact problem is discussed in more detail with reference to procedural challenges below.

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181145/universal-creditfull-document.pdf> accessed 25 June 2015.

[36] Peter Dwyer and Sharon Wright, 'Universal Credit, Ubiquitous Conditionality and Its Implications for Social Citizenship' (2014) 22 Journal of Poverty and Social Justice 27. 33

[37] Mark Simpson and Mark Simpson, '"Designed to Reduce People...to Complete Destitution": Human Dignity in the Active Welfare State' [2015] European Human Rights Law Review 66. 70

[38] Erika Kispeter and Sue Yeandle, 'Local Welfare Policy in a Centralised Governance System: Childcare and Eldercare Services in a Period of Rapid Change in Leeds', *Local Welfare Policy Making in European Cities* (Springer 2015). 107

[39] Smith and Jones (n 5).

[40] Erika Kispeter and Sue Yeandle (n 44). 104

[41] For access to these documents, see https://www.gov.uk/government/collections/welfare-reform-act-2012equality-impact-assessments

Interrogating Localism: An extension of "austerity localism"

As outlined above, the welfare reform agenda in the UK has been characterised by a "cut and devolve" approach; namely, reducing centrally administered budgets for programmes or individual social security payments, and then placing the onus on local authorities or other decentralised bodies to manage or mitigate the impact.[42] This approach has a clear rationale embedded in the "localism" discourse.[50] 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 approach, however, warrants examination, particularly when "localism" becomes tied to an "austerity" programme – described elsewhere as "sink or swim localism"[43] or "austeritylocalism."[44] There are many implications of this hybrid approach, but within the focus of this chapter there are four key problems of this "fetishisation" [45] 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"[54] for the impacts of spending reductions, while Local Authorities find themselves in a "political cul-de-sac,"[46] unable to change their fundamental basis. The contradiction between these two political scales can serve to distance the "electoral

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[42] See the discussion of the Independent Living Fund and the Council Tax Reduction Scheme outlined elsewhere in this chapter. [50]
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

[43] Vivien Lowndes and Lawrence Pratchett, 'Local Governance under the Coalition Government: Austerity, Localism and the "Big Society"' (2012) 38 Local Government Studies 21.

[44] David Featherstone and others, 'Progressive Localism and the Construction of Political Alternatives' (2012) 37 Transactions of the Institute of British Geographers 177.

[45] ibid.

[54] Lowndes and Pratchett (n 50).

[46] Frank Gaffikin, 'Paradoxes in Local Planning in Contested Societies', *Reconsidering Localism* (Routledge 2015). [56]
John Huber and Charles Shipan, *Deliberate Discretion?: The Institutional Foundations of Bureaucratic Autonomy* (Cambridge University Press 2002). 2

connection" between the voters and those with responsibility for policy[56] - in other words, it places responsibility for controversial policies on Local Authorities who are not politically responsible for their implementation or design.

Second, in shifting this responsibility to the local level, it may be that that this guise of "localism" is not "politically innocent" [47] – 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 local authority levels 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." [48] This process has had explicit attention elsewhere, particularly in the "blame avoidance" literature, which argues that in the exercise of welfare retrenchment, governments will attempt to "minimise" the visibility of reform in its legislative design.[49]

Third, and linked to this second issue, this view of how discretion fits into the delivery of the austerity agenda requires a new approach than that offered by the "conventional view"[60] of public law approaches, which often regard discretion through the (in)famous Dworkin analogy of the "hole in the doughnut,"[50] or as a "black box" through which public law rights are "refracted."[51] Both of these perspectives understand discretion through the structural position it occupies in the delivery of determined policy aims; either discretion is *pari passu* with rules with both negatively correlated with each other, or discretion distorts the intention behind the rules which bring it into being. The first two points above highlight how this structural view of discretion becomes unsettled in this "localism-austerity" context, where

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[47] Featherstone and others (n 51). 178

[48] Tony Prosser, 'The Politics of Discretion: Aspects of Discretionary Power in the Supplementary Benefits Scheme', *Discretion and Welfare* (Heinemann 1981). 150

[49] Giuliano Bonoli, 'Blame Avoidance and Credit Claiming Revisited', *The Politics of the New Welfare State* (2012). 93 60

Anna Pratt and Lorne Sossin, 'A Brief Introduction of the Puzzle of Discretion' (2009) 24 301.

[50] Dworkin, *Taking Rights Seriously* (Bloomsbury Publishing 2013) 31

[51] Tony Prosser (n 57). 150 63

Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill [2015] UKSC 3 [52] (per Mance LJ)

discretion's role is not relative to its legislative purpose, but instead avoids the articulation of that purpose altogether.

Fourth, these issues pose particular problems for the Courts when assessing proportionality in human rights based challenges. The proportionality exercise demands, *inter alia,* that "weighing all relevant factors, the measure adopted achieves a fair or proportionate balance between the public interest being promoted and the other interests involved."[63] Within this "austerity localism" context, however, this balancing exercise cannot operate on a common scale; namely, it shifts the focus away from the justification of the policy, and towards a justification of localism. Put another way, the Government is granted deference for its own decision-making, even when this decision is to push responsibility downwards to local authorities. This leads to the deferential tests discussed elsewhere in this chapter – principally the "manifestly without reasonable foundation" bar – being applied *not* to the potential discrimination by the policy itself, but instead the mechanism of pushing the decision downwards.

This results in judgments which are dominated by the consideration of "imaginary administrative decisions"[52] 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.[65] This approach at best abates the intensity of the proportionality review, and at worst, renders the bar so high as to be almost unassailable.

These four issues do not mean that "localism" is always problematic or misguided. Instead, it simply highlights that the current constitutional protections within the UK are illequipped 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

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[52] Brady (n 20). 18 [65]
See *Rutherford* [46] (per Stuart-Smith J), - *The Queen on the application of A v The Secretary of State for Work and Pensions [2015] EWHC 159 (Admin)* [65] (per Worcester HHJ), *MA* [82] (per Dyson MR)

to the "administrative constitution," [53] 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.

Section Two: Assessing themes in the legal challenges

Procedural Challenges and the Importance of Cumulative Impact

Given the clear focus of the reforms on those in receipt of certain benefits – especially housing and disability benefits – they overlap with each other within certain constituencies of claimants to create a complicated cumulative impact. This has the potential to exasperate the severity of the reforms for certain populations; particularly those with disabilities who live in social housing, who are both disproportionately affected by social security and housing benefit reforms, [54] and also less likely to be able to affect a change in their circumstances by, for instance, finding work or moving property.[55]

This cumulative impact causes problems for the Courts, particularly when assessing procedural obligations on the Government, such as the Public Sector Equality Duty (PSED).[56] The picture is complicated by two further factors.

Firstly, overlapping reforms can cause problems in the utilisation of discretionary mitigation mechanisms (principally in the form of DHPs, discussed in more detail below). The "cutand-devolve" approach prioritises localised discretionary pots of financial assistance over centrally determined exemptions; however, the cumulative impact of reforms can lead to

[53] Tony Prosser, 'Constitutionalising Austerity in Europe' [2015] Public Law 111. 112
[54] Simon Duffy, 'A fair society? How the cuts target disabled people' (2013) <http://www.centreforwelfarereform.org/uploads/attachment/354/a-fair-society.pdf> accessed 25 June 2015.
[55] Social Security Advisory Committee, 'The Cumulative Impact of Welfare Reform' (2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324059/ssac_occasional_paper_12_report.pdf> accessed 25 June 2015. 30
[56] S.149 Equality Act 2010

difficulties in both determining the severity and case of a claimant's need, and also the sufficiency of budgets allocated for such mitigation.

This complexity is worsened as a result of the austerity agenda stretching across multiple departments. As outlined in the first section of this report, cuts made elsewhere in government can spill into the same households affected by welfare reforms. A good example can be seen in the scrapping of Educational Maintenance Allowance; a payment of up to £30 per week for students aged 16-18 in full-time education from low-income families. O'Hara highlights how this measure disproportionately affects the same constituency of claimants as the SSSC, adding a further annual loss to the household of £1,260.[57] Moreover, this effect can be seen in the operation of mitigation mechanisms as well. Ongoing research by Lupton has identified that teachers at schools in areas with particularly low socio-economic indicators, are utilising Pupil Premium[71] funds to provide support to families affected by welfare reform measures, which has included buying food and providing clothing.[58] This demonstrates how the changes induced by welfare reform measures can alter the context in which other reforms – many with aims not connected to welfare reform at all, like the Pupil Premium – operate.

The Public Sector Equality Duty

Before turning to the inability of the procedural obligations to deal with the problem of compound impact, it is worth first outlining the nature, and limits, of the duty in two key cases appealing high profile welfare reforms. Under the PSED, set out in s.149 Equality Act 2010, all public bodies must in the exercise of their functions "have due regard to the need to:" (i) eliminate discrimination to those with protected characteristics (such as gender, race, and

[57] Ibid [71]

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

[58] 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-childrenand-schools/> accessed 29 May 2015.

having a disability)[59], (ii) advance equality of opportunity, and (iii) foster good relations between those with a protected characteristic, and those without.

There is a sizable body of case law, described in *Bracking* as "two lever arch files"[60] worth, which has built up around the interpretation of this duty. These do not warrant detailed consideration here. It is important, however, to note the emphasis given by the Courts on the existence of an "important evidential element"[61] which can demonstrate the "recording of steps taken by the decision maker to meet their statutory requirements," and that the minister must "assess the risk and extent of any adverse impact."[62] This does not have to be in the form of a formal equality impact assessment, but the Courts will assess whether there has been compliance as matter of fact, with close scrutiny of evidence put before them.[77]
The duty has been described as being of "incredible importance in preventing the full burden of austerity being carried by the most vulnerable in society,"[63] and a "heavy burden upon public authorities"[64] – however, it still suffers from severe limitations in the context of challenging welfare reform packages.

Though it is regularly bolted-on to other challenges, the judicial review appeals which followed the closure of the Independent Living Fund (ILF) provide a particularly notable example of the problem at hand .Before its closure, and despite a complex history, the ILF worked with local authorities to provide care packages for people with disabilities totally £360million per annum.[65] In *R. (on the application of Bracking)* v *Secretary of State for Work and Pensions*[66] the decision to dissolve the fund, cut the budget, and transfer the remaining money to local authorities to administer (though not in a ring-fenced way) was challenged under the

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[59] S.149(7) Equality Act 2010
[60] *R. (on the application of Bracking) v Secretary of State for Work and Pensions [2013] EWCA Civ 1345* [25] (per LJ McCombe)
[61] ibid
[62] ibid
[77] Tom Hickman and Tom Hickman, 'Too Hot, Too Cold or Just Right? The Development of the Public Sector Equality Duties in Administrative Law' [2013] Public Law 325. 339
[63] Helen Carr, 'The Public Sector Equality Duty – a Mainstay of Justice in an Age of Austerity' (2014) 36 Journal of Social Welfare and Family Law 208. 210
[64] *Bracking* (n 73 above) [59] (per McCombe LJ)
[65] R. (on the application of Bracking) v Secretary of State for Work and Pensions [2013] EWHC 897 (Admin) [5] (per Blake J)
[66] [2013] EWCA Civ 1345

PSED. The Court considered that the "true message"[67] of a prior consultation on the impact of this decision had not been communicated to the minister, the impact had consequently not been properly considered, and the PSED not met.

This judgment is often heralded to as an example of the high bar that the PSED places on decision-makers.[68] In his judgment, McCombe LJ underscored that the duty is a heavy burden upon public authorities,"[69] and there was a duty to provide "hard evidence"[70] that it had been sufficiently discharged. Indeed, he went as far to suggest that issues of equality should be "placed at the centre of formulation of policy" if and when they arise.[71]

The closure of the fund provides an ideal case study to examine the PSED as, following the judgment of the Court, a new minister was appointed and the same decision was taken again. Many of the same claimants and mostly the same lawyers, brought a challenge on this second decision to close the fund in *R (on the application of Aspinall, Pepper and others)* v *Secretary of State for Work and Pensions*.[72] Effectively, the same legal argument was re-run as

the "Minister was no better informed about those matters this time round than his predecessor was."[73]

The issue before the Court was a fairly routine application of a narrow PSED consideration: did the minister "have sufficient material before him to be able to truly appreciate the implications of closing the ILF for those most likely to be affected by its closure."[74] The Court was satisfied that "it was certainly not a tick-box exercise" conducted in a legal or factual vacuum'[75] and the criticisms that were levied at the use of this material in *Bracking* were not held to be applicable here, and the particular focus on the narrower ground of the Minister

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[67] Ibid [42] (per McCombe LJ)
[68] Helen Carr, 'The Public Sector Equality Duty – a Mainstay of Justice in an Age of Austerity' (2014) 36 Journal of Social Welfare and Family Law 208. 210
[69] Ibid [59] (per McCombe LJ)
[70] Ibid [64] (per McCombe LJ)
[71] Ibid [59] (per McCombe LJ)
[72] [2014] EWHC 4134 (Admin)
[73] ibid [47] (per Andrews J)
[74] ibid [47] (per Andrews J)
[75] ibid [48] (per Andrews J)

requiring more information to adequately discharge his duty – particularly on the numbers who would be affected – was dismissed categorically by the Court.[76] Indeed, Andrews J suggested that "short of going down the pilot scheme route…there was nothing that he could have done that would have left him any better informed than the results of the consultation did."[77] On the specific point raised by the claimants of knowing the numbers of people affected in more detail, it was held that "[the minister] did not need to know precisely how many of them were likely to be affected or to carry out a quantitative assessment of the impact. It sufficed that he knew, as he did, that the impact would be substantial and significant."[78]

The unsuccessful challenges in *Aspinal*[79] - and in cases dealing with other reforms, such as *Zacchaeus 2000 Trust*[80] - demonstrate the heavy limitations on a procedural duty to challenge welfare reforms. In *Aspinal*,[81] the same decision was taken as in *Bracking*, with broadly the same evidence, but with the supporting documentation re-drafted to meet the requirements of the PSED. As highlighted by the court, the minister did not need to know how many people would be affected; simply that a lot of people would be affected badly.[82]

Consequently, these procedural duties are a sizable administrative burden, but are often relegated to a test of administrative competence rather than whether issues of equality were "placed at the centre of formulation of policy."[83] This is perhaps to be expected of what is, by its very nature, a *procedural* duty. However, in light of the issue of the cumulative nature of welfare reform programmes, there are further problems with a reliance on procedural challenges.

Firstly, as has been the case in all of the PSED challenges following the Welfare Reform Act 2012, any potential adverse impact is assessed on the policy's own terms. No attempt has been

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[76] ibid [123] (per Andrews J)
[77] ibid [124] (per Andrews J)
[78] ibid [130] (per Andrews J)
[79] *Aspinal* (n 89 above)
[80] *Zacchaeus* (n 97 above)
[81] *Aspinal* (n 89 above)
[82] Ibid [130] (per Andrews J)
[83] *Bracking* (n 73 above) [59] (per McCombe LJ)

made by the Government to undertake a cumulative impact assessment for those with protected characteristics – such as those with disabilities – for the reforms dealt with in this chapter.[84] Despite undertaking analysis on the distributional effects of multiple policies across household income distributions,[85] even if one is able to focus down on narrow ranges of income, pockets of compound impact can be easily lost given its concentration on a number of relatively small constituencies who may not be easily identified by income alone.[86] Indeed, research by the Equality and Human Rights Commission, which has attempted to address this lacuna, suggests that the cumulative impact of welfare reform is "substantial and widespread."[87]

The inability of individual equality impact assessments to sufficiently address risks of adverse impacts has been highlighted elsewhere. Shandu and Stephenson have seen this same problem in their assessment of equality impact assessments at the local government level,[88] and the Social Security Advisory Committee have recommended that some form of cumulative impact assessments are introduced for some populations affected by welfare reforms, so potential adverse impacts can be addressed, "particularly to the most vulnerable claimants."[89] The Parliamentary Joint Committee on Human Rights, following submissions made on the UN Convention on the Rights of Persons with Disabilities and the UN Convention on the Rights of the Child, have themselves also called for a unified assessment of the likely cumulative impact of the welfare reforms,[90] following the Equality and Human

[84] Alan Roulstone, 'Personal Independence Payments, Welfare Reform and the Shrinking Disability Category' (2015) 30 Disability & Society 673. 683
[85] 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> accessed 25 June 2015. 10
[86] Declan Gaffney, 'Retrenchment, Reform, Continuity: Welfare under the Coalition' (2015) 231 National Institute Economic Review R44. 49
[87] ibid. 49
[88] Kalwinder Sandhu and Mary-Ann Stephenson, 'Layers of Inequality: A Human Rights and Equality Impact Assessment of the Public Spending Cuts on Black Asian and Minority Ethnic Women in Coventry' (2015) 109 Fem Rev 169. 174
[89] 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> accessed 25 June 2015. 10
[90] Equality and Human Rights Commission, 'Briefing to the Joint Committee on Human Rights on the UK's compliance with the UN Convention on the Rights of the Child' (2015) <http://www.parliament.uk/documents/joint-committees/humanrights/EHRC_briefing_on_the_CRC_050215.pdf> accessed 20th June 2015

Rights Commission describing a single department being responsible for monitoring and assessing the cumulative impact of spending review and budget decisions as "vital."[91]

The appeals for impact to be addressed more adequately resulted in a petition calling for a cumulative impact assessment for welfare reforms on people with disabilities being debated in parliament.[92] The Government position is that a "cumulative impact assessment would be so complex and subject to so many variables that it would be meaningless."[93] It is suggested here that there are two problems with this assertion. Firstly, the argument here is not that the cumulative effect of *all* government welfare reforms on those with protected characteristics should be considered in detail. Instead, it is suggested that the interdependency of certain aspects of the welfare reform package is so great, that at least some consideration of their interaction must be warranted in order to assess the potential for adverse impact. For example, in separate judicial review challenges to the SSSC, Benefit Cap, and changes to Local Housing Allowance, when assessing justification of the regulations, the existence of DHPs were considered alongside that of the benefit reductions – in other words, the issue of justification was assessed on the "scheme as a whole."[94] When satellite schemes are integral to the functioning of the policy consideration, limiting assessments to the impact of one policy simply on its own terms is clearly insufficient.

Secondly, it would simply be necessary for the Government to *consider* the cumulative impact, by exploring potential overlaps between policies and the consequent risk for those with protected characteristics, not to "produce the perfect study."[95] Other organisations have already produced cumulative impact reports of their own, for example: the Equality and

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[91] Equality and Human Rights Commission, 'Future Fair Financial Decision-Making' (2015) <http://www.equalityhumanrights.com/sites/default/files/publication_pdf/Future%20Fair%20Financial%20Decision-Making.pdf> accessed 20th June 2015

[92] For more information on the petition, see: Karen Machin, Rosemary O'Neill and Pat Onions, 'Pat's Petition: A New Approach to Online Campaigning' (2014) 24 Groupwork 9.

[93] HC Deb, 10 July 2013, c413

[94] *MA* (n 1 above) [40] (per Dyson MR).

[95] 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> accessed 25 June 2015

Human Rights Commission;[96] the Children's Commissioner;[97] Contact a Family;[98] and the Scottish Parliament's Welfare Reform Committee.[99] As suggested by the Social Security Advisory Committee, "such methodological problems [are not] insurmountable to the extent that headline findings cannot be produced."[100]

The Importance of Discretion: The Rise of Discretionary Housing Payments

One of the most notable features of the current welfare reform programme has been its dependence on discretionary forms of mitigation as opposed to statutory exemptions. This has been principally in the form of Discretionary Housing Payments (DHPs); a previously "very small"[101] scale form of discretionary relief distinct from the benefits system introduced in 2001. The growing expectations of these payments to mitigate the impact of changes to social security,[102] and the associated burden they have shouldered in legal appeals,[103] has led to their use growing dramatically from approximately 2,000 awards annually in 2002/3,[104] to more than 390,000 in 2013/14.[105]

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[96] 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> accessed 24th June 2015

[97] Children's Commissioner, 'A Child Rights Impact Assessment of Budget Decisions' (2015) <http://www.childrenscommissioner.gov.uk/publications/child-rights-impact-assessment-budget-decisionsincluding-2013-budget-and-cumulative-0> accessed 24th June 2015

[98] 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> accessed 24th June 2015

[99] Scottish Parliament Welfare Reform Committee, 'The Cumulative Impact of Welfare Reform on Households in Scotland' (2015) <http://www.shu.ac.uk/research/cresr/sites/shu.ac.uk/files/cumulative-impact-welfarereform-households-scotland.pdf> accessed 24th June 2015

[100] 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> accessed 25 June 2015. 10

[101] Peter Kemp, *Housing Allowances in Comparative Perspective* (Policy Press 2007) 113.

[102] Simon Rahilly, 'The Election of a Coalition Government and an Austerity Budget' (2010) 17 Journal of Social Security Law 207.

[103] Grainne McKeever, 'Social Sector Size Criteria' (2015) 22 Journal of Social Security Law 13.

[104] Andrew Leicester and Jonathan Shaw, 'A Survey of the UK Benefits System' (2003) <http://www.ifs.org.uk/ff/benefitsurvey.pdf> accessed 19 April 2015.

[105] David Evans, 'Use of Discretionary Housing Payments' (2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/322455/use-ofdiscretionary-housing-payments-june-2014.pdf> accessed 19 April 2015.

In the Coalition Government's effort to avoid "standing back and imposing something,"[106] this "DHP strategy"[107] has introduced a layer of administrative discretion. DHPs have become the only viable mitigating mechanism for many of those affected by the Coalition Government's flagship welfare reforms, particularly the SSSC, the Benefit Cap, and changes to Local Housing Allowance. Following the Conservative Government's budget on 8th July 2015, their use is set to grow further, with £800million earmarked for DHPs across the course of the next Parliament.[108]

The payments have proven to be essential for the continued legality of the SSSC and the benefit cap, but the case law itself produces an inherent irony. The underpinning regulations grant few statutory exemptions, seemingly in a bid to avoid enforceable legal rights and consequent "juridification of welfare,"[109] however the courts have carved a function for DHPs which attempts to re-create the effect of such statutory exemptions in certain circumstances.

The section details the role of these payments in three sections. The first looks at the underpinning DHP regulations and how the scheme has evolved since its inception in 2001. The second looks at the way in which the Courts have treated the payments, particularly as a source of justification for otherwise unlawful discrimination. The final section makes some conclusions about their future judicial scrutiny, drawing on recent case law.

The evolution of the scheme: The introduction of DHPs

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[106] 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, last accessed 19 April 2015.

[107] Oral Evidence taken before the Work and Pensions Committee (12 February 2014), Q 490, <http://data.parliament.uk/writtenevidence/WrittenEvidence.svc/EvidenceHtml/6101>; HC 720 of 2013-14, last accessed 19 April 2015.

[108] 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>; HC 264 of 2015-16, last accessed 8 July 2015.

[109] 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

In common with most of the social security system, the DHP scheme does not lend itself easily to a clear and concise description. Mummery LJ remarked of its under-pinning regulations that "I would not award it the top prize in a competition for plain English."[110] Most of the relevant statutory provisions, however, can be found within the Discretionary Financial Assistance Regulations 2001, [111][112] which outlines the features of and eligibility requirements for the payments, and the Discretionary Housing Payments (Grants) Order 2001,[113][114] which details how local authorities can claim the cost of DHPs back from central Government. In summary, the DWP provides an initial allocation of funds to Local Authorities based on a series of welfare reform impact measures and data on previous baseline DHP expenditure,[115] which the Local Authority can then award to claimants who are in receipt of housing benefit and apply for support with their rent.

There are two areas of statutory control on this process. Firstly, there are limits on the amount of money which can be spent by the local authority on awarding DHPs. Aside from their initial allocation by the DWP,[116] local authorities can top-up the DHP funds available using their own finances, but only to 2.5 times the original allocation. Secondly, awards can only be made to those receiving housing benefit to assist with rent or "housing costs,"[117] they cannot exceed the eligible rent for the property[118] or cover certain statutorily exempted areas, such as benefit sanctions or service charges.[119] Aside from this local authorities are left largely 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 distinct from the payment of housing benefit. Though there is a right to a written decision with stated reasons[120] and to seek review,[121] the payments fall

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[110] *R (Gargett)* v *Lambeth London Borough Council* [2008] EWCA Civ 1450 [16] (per Mummery LJ).
[111]
[112]
[113]
[114]
[115] See HB Circular S1/2015.
[116] Reg.2 Discretionary Housing Payments (Grants) Order 2001/2340.
[117] *Gargett* (n 142 above)
[118] See regs.12-12D of the Housing Benefit Regulations 2006/213.
[119] Reg. 3 Discretionary Financial Assistance Regulations 2001/1167.
[120] See reg.6 of the Discretionary Financial Assistance Regulations 2001 (SI 2001/1167).
[121] See reg.8 of the Discretionary Financial Assistance Regulations 2001 (SI 2001/1167).

outside of para.6 of schedule 7 to the Child Support, Pensions and Social Act 2000 and are therefore outside of the jurisdiction of a First-tier Tribunal.[122]

Panacean Payments: The treatment of DHPs in case-law

Despite being introduced in 2001, there has been a number of legal challenges to DHPs which have attempted to clarify their function, especially regarding their role in the assessment of proportionality and adherence to equality duties.[123] This section focuses more tightly on their role in response to reforms in the Welfare Reform Act 2012, and particularly the SSSC, where cases have been dominated with the consideration of these payments. Indeed, Dyson MR in *R. (On the Application of MA)* v *Secretary of State for Work and Pensions*[124] indicates that "if read in isolation and without regard to the DHP scheme [the SSSC] plainly discriminates" [125] against the disabled, so it is necessary to analyse "the scheme as a whole."[126]

The cases have turned principally on familiar arguments around discrimination using Article 1 of the First Protocol (right to property), which is now well established as including housing benefit,[127] or Article 8 (right to respect for the home), to leverage the Article 14 (prohibition of discrimination). There are four key elements which unite the cases on how indirect discrimination can be "justified" through the presence of DHPs.

Firstly, there is a common recognition that the adoption of DHPs as opposed to a statutory exemption is about more than simply servicing "austerity;" the courts instead accept that there is an ideological undercurrent which informs the changes. This is reflected in the title to this chapter, which echoes the assertion by LJ Laws that the intention of the SSSC is, in part, to

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[122] This issue was considered as part of an appeal to the Upper Tribunal in EA v Southampton CC [2012] UKUT 381 AAC.
[123] For instance, see CPAG v Secretary of State for Work and Pensions [2011] EWHC 2616 (Admin), and R (Zacchaeus 2000 Trust) v Secretary of State for Work and Pensions [2013] EWCA Civ 1202.
[124] [2014] EWCA Civ 13.
[125] ibid [39] (per Dyson MR).
[126] ibid [40] (per Dyson MR).
[127] See *R (RJM)* v *Secretary of State for Work and Pensions* [2008] UKHL 63.

"shift the place of social security in society."[128] This is important, as discriminatory treatment is difficult to justify solely for the purposes of saving money,[129] so aligning the policy scheme with other more loosely defined aims - such as localism[130] and the "social and political" aspects of the austerity agenda[131] - helps to provide further supplementary aims.

This bleeds into the second key issue of the welfare reform agenda being "unquestionably"[132] sited within the rubric of "high policy,"[133] which leads to the application of the deferential "manifestly without reasonable foundation" test [134]. This "strong deferential tenor"[135] sets an incredibly high bar for the claimants to pass, as the Court has to be satisfied that there is a "serious flaw" in the scheme which produces a discriminatory effect.[136]

Thirdly, DHPs are considered to align with these high policy aims by demonstrating characteristics which advance the vague notions of "localism"[137] and "austerity"[138] tied to the reforms, being described as exhibiting an element of "local accountability,"[139] flexibility in responding to changing needs (such as variability in severity of disability),[140] and being responsive to ongoing evaluation in their ability to be "topped up"[141] as required by the DWP.

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[128] *MA* (n 1 above) [58] (per Laws LJ).
[129] C Tobler, *Indirect Discrimination: A Case Study Into the Development of the Legal Concept of Indirect Discrimination Under EC Law* (Intersentia 2005) 249.
[130] *MA* (n 1 above) [66] (per Dyson MR).
[131] *Rutherford v Secretary of State for Work and Pensions* [2014] EWHC 1631 (Admin) [61] (per Stuart-Smith J).
[132] *MA* (n 1 above) [54] (per Dyson MR).
[133] *MA* (n 1 above) [54] (per Dyson MR).
[134] *Rutherford* (n 161 above) [45] (per Stuart-Smith J)
[135] Jonas Christoffersen, *Fair Balance: A Study of Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009). 270
[136] *MA* (n 1 above) [54] (per Dyson MR).
[137] *MA* (n 1 above) [66] (per Dyson MR).
[138] See *MA* (n 1 above) [50] (per Dyson MR); and Rutherford (n 137 above) [61] (per Stuart-Smith J).
[139] Rutherford (n 161 above) [32] (per Stuart-Smith J).
[140] *MA* (n 1 above) [74] (per Dyson MR).
[141] *MA* (n 1 above) [72] (per Dyson MR).

These beneficial characteristics articulated by the DWP and in the latter case law sit at odds with the disparaging treatment given to them in the earlier case of *Burnip v Birmingham City Council*,[142] where the payments' temporary nature and consequent lack of reliability were given as reasons why they could not "come anywhere near providing an adequate justification for the discrimination" in cases involving children with disabilities being unable to share a room.[143] The *Burnip* treatment has been distinguished from the present policy environment on the basis that the overall DHP pot has been kept under review and has been increased, alongside the Welfare Reform Act reforms taking place in the 'shadow of the financial crisis.'[144]

Finally, following the interpretation in the later cases of *Rutherford*,[145] *Cotton*[146] and *A*,[147] it is clear that the justification of discrimination caused by the SSSC's current formation is dependent not only on the existence of the DHP scheme itself, but *also* on adequate assurances of the stability of the mitigation it provides in cases where there would otherwise be unlawful discrimination. Despite the "understandable anxiety [and] stress"[148] of making applications, or periods where the shortfall is not covered, "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."[149] This requirements sits awkwardly alongside the widespread recognition of local authorities that DHPs are "not intended as a long term solution,"[150] particularly for those affected by the socalled "bedroom tax."

Future Directions in the Judicial Treatment of DHPs

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[142] [2012] EWCA Civ 629
[143] Ibid [46] (per Henderson J).
[144] *MA* (n 1 above) [64] (per Dyson MR).
[145] Rutherford (n 161 above).
[146] *R. (on the application of Cotton)* v *Secretary of State for Work and Pensions* [2014] EWHC 3437 (Admin).
[147] *R. (on the application of A)* v *Secretary of State for Work and Pensions* [2015] EWHC 159 (Admin).
[148] *Cotton* (n 176 above) [30] (per Males J).
[149] *Rutherford* (n 161 above) [48] (per Stuart-Smith J).
[150] Department for Work and Pensions, Evaluation of Removal of the Spare Room Subsidy (Research Report No 913, 2015) 44.

In the majority of the case law following the Welfare Reform Act 2012, DHPs have been considered as part of the justification for other regulations – particularly the SSSC. However, the High Court has heard a judicial review of the application of DHPs themselves in *R. (on the application of Hardy)* v *Sandwell MBC*,[151] which dealt with the assessment of Disability Living Allowance/Personal Independence Payments (the principle disability benefits within the UK, with the former transitioning over to the latter) as income when applying for DHP applications.

This judgment is significant, as it highlights the potential for the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) to act as an interpretive guide to the application of Article 14 in cases involving DHPs. This is a significant development, particularly given the prevalence of disability amongst those affected by the measures DHPs seek to mitigate,[152] and the propensity of the UNCRDP to create a "heightened standard of scrutiny" [153] when considering discrimination against those with disabilities. With this in mind, there are three key points worth considering here.

First, *Hardy* held that DHPs engage the first part of the first protocol (right to property). Though it is clearly established that Housing Benefit falls under Art.1/1, DHPs have generally fallen outside of this definition as they are not a prescribed form of benefit.[154] The Court, however, highlighted the necessity of DHPs to ensure the legality of the SSSC, and as such they formed "an integral part of HB entitlements for disabled applicants," and they have "at least a legitimate expectation that they will be used to supplement a shortfall."[155] This demonstrates the sizable difference travelled from the *discretionary* scheme outlined above.

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[151] [2015] EWHC 890 (Admin).
[152] See Department for Work and Pensions, Evaluation of Removal of the Spare Room Subsidy (Research Report No 882, 2014) 39.
[153] Andrea Broderick, 'A Reflection on Substantive Equality Jurisprudence: The Standard of Scrutiny at the ECtHR for Differential Treatment of Roma and Persons with Disabilities' (2015) 15 International Journal of Discrimination and the Law 101. 115
[154] Under para.6(1) Schedule 7 of Child Support, Pensions and Social Security Act 2000.
[155] *Hardy* (n 205 above) [48] (per Phillip J).

The second key issue is how the United Nations Convention on the Rights of Persons with Disabilities, or the UN Convention on the Rights of the Child, can assist with the interpretation of discrimination and justification in the context of these discretionary payments. When assessing the justification of the "benefit cap" in *R. (on the application of JS)* v *Secretary of State for Work and Pensions*,[156] the Justices disagreed on the applicability of the United Nations Convention on the Rights of the Child as an interpretive guide to Article 14. The issue was the drawing of a conduit between the type of discrimination alleged and the party affected (a problem below in section four); with a majority of the Court deciding that the claimants could not justify using a treaty concerning one group (children) to assist in the interpretation of discrimination against another (women).[157]

However, it is clear that there is a link between any tenants with disabilities and the UNCRPD. This is underscored in *Burnip* with reference to the overall legislative scheme for Local Housing Allowance, where although the case turned on other grounds, Maurice J indicated that he would have been willing to use the UNCRPD as a guide for his interpretation of Art.14 and find in favour of the claimants on that basis.[158]

This could be significant in future appeals to the welfare measures contained within the Welfare Reform Act 2012 and the lowering of the benefit cap in the Welfare Reform and Work Bill 2015. Article 19 UNCRPD in particular offers the potential to "illuminate our approach to both discrimination and justification"[159] in cases involving housing benefit, given its focus on the right of those with disabilities to live independently and choose their place of residence on an equal basis to others.[160] Broderick goes as far as to suggest an eventual "fusion" between ECHR's treatment of disability discrimination and the norms of the UNCRPD,[161] and the majority position of the Supreme Court in *JS* demonstrates the important interpretative role the convention could play in future appeals to housing benefit changes.

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[156] [2015] UKSC 16
[157] ibid [119-130] (per Carnwarth LJ).
[158] *Burnip* (n 172 above) [22] (per Hendersen J).
[159] *Burnip* (n 172 above) [22] (per Hendersen J).
[160] Article 19 United Nations Convention on the Rights of Persons with Disabilities.
[161] Broderick (n 190 above) 116.

In the wake of the Welfare Reform and Work Bill 2015, DHPs look set to continue to play a central role in the delivery of ongoing reforms to welfare, and consequently, their lawfulness. The 2015 July Budget identified a total allocation of £800 million across the next parliament for DHPs, to "help ensure Local Authorities are able to protect the most vulnerable housing benefit claimants,"[162] and the flagship Universal Credit – gradually rolling out across the country - utilises DHPs as a form of discretionary mitigation. Their use as a means of mitigating the effects of the policy has broad support in the house; the argument has been more focused on the funding provided for them. Indeed, the Labour Party put forward an amendment to bill to require the Social Security Advisory Committee to review the DHP funding levels each year.[163] To what extent they can provide mitigation from reforms for vulnerable populations in the face of increasing expectations, remains to be seen, but DHPs are set to stay.

Drawing Conduits: Protected Groups and the Reliance on Discrimination

As is clear from the discussion above, most of the challenges following the Welfare Reform Act 2012 have been facilitated by arguments based on equality and discrimination, either through procedural obligations such as those imposed by the Equality Act 2010, or through human rights protections under Article 14 (prohibition of discrimination). This approach can only assert the social rights of those who are in protected categories – either those with 'protected characteristics' under the Equality Act 2010,[164] or those which fall within Article 14 Human Rights Act 1998's predetermined statuses or the broader category of those with "other status."[165]

[162] 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>; HC 264 of 2015-16, last accessed 8 July 2015.
[163] HC Deb, 20 July 2015, c1269
[164] s.4 Equality Act 2010
[165] Which has included, for example, prisoners. See, SS v United Kingdom (2015) 61 E.H.R.R. SE3 [38]

Though this is of particular assistance when dealing with many of those who are affected by welfare reform programmes, especially claimants with disabilities, the necessity to draw a conduit between a protected group and those facing adverse impact in order to facilitate a challenge presents some problems. As is well established, the categories themselves are social constructs, and membership of them may be difficult to universally define by physical and societal parameters,[166] and those within it may not have a base of shared experience.[167] Others have criticised the homogenisation of certain groups, such as those with disabilities, into single groups with an associated single identity and set of problems.[168] Referred to by Vellani as the "tyranny of the category,"[169] pre-determined classifications like these struggle to deal with the complexity and intersectionality between these constructed groups.[170]

This problem can be seen in some of the cases discussed above. For instance, in *Zacchaeus 2000 Trust*[171] and *JS*[172], both judgments turned on the drawing of a conduit between the groups protected under the PSED or Article 14, and the negative impact complained of – the former concerned the protected characteristic of age and the impact of schoolchildren being forced to move schools, and the latter concerned a link between gender discrimination under Article 14 and the UNCRC. In both cases, the link could not be adequately drawn so both cases consequently failed.

The dependence on these procedural equality duties and anti-discrimination obligations runs the risk of giving "priority to groups who can congregate under a "status" label to the detriment of those living in poverty more generally."[186] The Coalition Government decided not to implement the softer requirement for public bodies to have "due regard" to socioeconomic disadvantage contained within the original formulation of the Equality Act

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[166] Beth Omansky Gordon and Karen E Rosenblum, 'Bringing Disability into the Sociological Frame: A Comparison of Disability with Race, Sex, and Sexual Orientation Statuses' (2001) 16 Disability & Society 5.
[167] Sarah Keenan, *Subversive Property: Law and the Production of Spaces of Belonging* (Routledge 2014). 18
[168] Nick Watson, 'Well, I Know This Is Going to Sound Very Strange to You, but I Don't See Myself as a Disabled Person: Identity and Disability' (2002) 17 Disability & Society 509. 511
[169] Fayyaz Vellani, *Understanding Disability Discrimination Law through Geography* (Ashgate 2013). 182
[170] Floya Anthias, 'Intersectional What? Social Divisions, Intersectionality and Levels of Analysis' (2013) 13 Ethnicities 3. 15
[171] *Zacchaeus* (n 97 above)
[172] *JS* (n 210 above) 186
Sandra Fredman, 'The Public Sector Equality Duty' (2011) 40 Industrial Law Journal 405.

2010 due to concerns it would be unnecessary "red tape,"[173] which follows the trend for legal protection from inequality for pre-determined statuses, but for socio-economic inequality to be "left to the welfare state."[174] Though it is clearly not for the courts to determine welfare state policy, this overreliance on limited statuses can prove particularly problematic as functions are decentralised as the potential for unequal impact is heightened.

Conclusions

The discussion above has attempted to summarise some of the key findings of the more detailed report which underpins it.[175] There are four key points worth emphasising in this concluding section.

Firstly, it is clear that the package of measures introduced in the Welfare Reform Act 2012, and those which have followed in the Welfare Reform and Work Bill 2015, are not justified solely by the demands of "austerity." Instead, throughout successive appeals, they are tied to other vehicular concepts,[176] such as "fairness" and "localism," which work to both ensure their ongoing legality and draw the decision making further into the "sphere of social policy." [191] These justifications can often be problematic and at times contradictory – particularly when budgets are cut at the same time responsibility is decentralised. This is not to say that these aims are not valid, or could not be nobly pursued by government. Indeed, the merits (or lack thereof) of austerity are well beyond the author's remit. Instead it is suggested that this lack of clarity contributes to social rights being unable to play a heavier role in this "tricky debate"[177] than they do at present.

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[173] James Hand, Bernard Davis and Charles Barker, 'The British Equality Act 2010 and the Foundations of Legal Knowledge' (2015) 41 Commonwealth Law Bulletin 3. 14

[174] Becci Burton, 'Neoliberalism and the Equality Act 2010: A Missed Opportunity for Gender Justice?' [2014] Industrial Law Journal 122. 138

[175] The full report is available at: www.socialrights.co.uk

[176] Carr and Cowan (n 4). 83 [191]
Philip Sales and Ben Hooper, 'Proportionality and the Form of Law' (2003) 119 Law Quarterly Review 426.

[177] Mary Dowell-Jones, 'The Economics of the Austerity Crisis: Unpicking Some Human Rights Arguments' (2015) 15 Human Rights Law Review 193. 210

Secondly, the dramatically increased role played by DHPs has been a central feature of the 2010 welfare reform programme, and the discretionary payments are set to continue to be the key mitigation mechanism for further reforms, such as the lowering of the benefit cap.[178] This extra layer of administrative discretion has been granted largely as an alternative to offering statutory exemptions to reforms, and as a consequence, political debates about those who should bear the weight of the welfare reform agenda has been blurred at the edges.[179] Their treatment by the courts has been problematic, with a series of arguably misguided assumptions about their efficacy leading to an assessment that they justify otherwise unlawfully discriminatory welfare reforms.

Thirdly, the heavy emphasis on procedural or discrimination-based challenges has led to a series of limitations, particularly in the assessment of cumulative impacts of welfare reforms, and problems associated with the categorisation of the disadvantaged. This approach comes at the expense of those who fall outside of protected categories, but nevertheless suffer unjust treatment. As the case-law continues to develop, more problems of this over-reliance are exposing themselves – particularly ongoing debates with treating eligibility requirements for discretionary assistance schemes (such as the council tax reduction scheme) as engaging A1P1.[180] More broadly, the difficulties of attempting to use human rights instruments as a means of offering proxy protection are increasingly being questioned.[181]

Finally, it is worth noting the direction of the "shift" this chapter has attempted to deal with. Many areas of potential reforms are conspicuous by their absence; for example, the welfare reform programme deals almost exclusively with working-age benefits – pension credit and related passported benefits for those in retirement have been exempted from the "austerity" reforms. Instead, the direction of the "shift" is focused on "responsibilising"[182] those out of work or in low-paid work, and introducing layers of further conditionality to enforce

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[178] See s.7 Welfare Reform and Work Bill 2015

[179] Tony Prosser, 'The Politics of Discretion: Aspects of Discretionary Power in the Supplementary Benefits Scheme', *Discretion and Welfare* (Heinemann 1981). 169

[180] R. (on the application of Logan) v Havering LBC [2015] EWHC 3193 (Admin) [34] (per Blake J)

[181] For a persuasive account of the problems associated with this, see: Philip Larkin, 'Delineating the Gulf Between Human Rights Jurisprudence and Legislative Authority' (2016) 23(1) Journal of Social Security Law 4263

[182] Stuart Lowe and Jed Meers, 'Responsibilisation of Everyday Life: Housing and Welfare State Change', *Social Policy Review 27* (Policy Press 2015). 55

adherence. It is a shift which has proven difficult to challenge using current public law tools, and one that is still ongoing.