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Awarding Discretionary Housing Payments: Constraints of time, conditionality and the assessment of income/expenditure

Jed Meers[1]

Discretionary payments; Discrimination; Housing benefit; Local authorities' powers and duties; Application forms

As the Discretionary Housing Payment scheme (DHPs) continues to shoulder the considerable burden of mitigating reductions to housing benefit, this paper focuses on how the local authorities tasked with their allocation award these payments. Drawing on a small-scale vignette study with eighteen local authorities and excerpts from an analysis of 242 DHP application forms, it outlines three key problems: the time-limited nature of awards, deficiencies in the assessment of applicant income/expenditure, and the attachment of conduct conditionality to the renewal of awards. These problems in the administration of DHPs add further weight to arguments that this layer of discretionary support is deficient in adequately mitigating shortfalls in housing benefit.

The disaster at Grenfell Tower – in which 71 people lost their lives – will be etched in the minds of the public for the years and decades to come. As argued in a dedicated edition of the Journal of Housing Law, it serves as a microcosm for a coterie of failures: of regulation, governance and resource allocation.[2] As the task of relocating the survivors and those displaced continues, this dreadful event continues to set deficiencies into sharp relief, including the one tackled in this paper. Due to the dearth of suitable alterative accommodation, households relocated following the disaster are at risk of suffering sizeable shortfalls between their rent

[1] The author would like to thank Judge Nicholas Wikeley for his helpful comments on an earlier iteration of this paper, and two anonymous reviewers for their valuable input on the submitted version.

[2] Andrew Arden, 'Grenfell Tower: The Greatest Failure' (2017) 20 Journal of Housing Law 97.

and housing benefit or – as widely reported[3] – could face the imposition of the 'removal of the spare room subsidy', widely known as the 'bedroom tax', or the 'benefit cap.'

So, what was the government's solution to this problem? The answer lies in a circular issued by the DWP.[4] It states that 'former residents' of Grenfell Tower should be 'regarded as a priority when considering applications' for discretionary housing payments.[5] The scheme has been returned to frequently in parliamentary debates on Grenfell Tower, with the government underscoring the availability of these 'extra discretionary payments' for those affected.[6]

It has become a Government reflex to refer to this discretionary pot in the face of adversity. Any problem with a shortfall of housing benefit – the insufficiency of local housing allowance,[7] benefit cap,[8] bedroom tax,[9] or the costs of temporary accommodation[10] – can all be shouldered by this layer of discretionary provision where Local authorities 'top-up' housing benefit on a 'case by case basis'.[11] It is situated as a panacean scheme, now a familiar fixture in the provision of housing benefit in the UK, with – at the time of writing – over £900million having been allocated to Local authorities by the Department of Work and Pensions since 2011,[12] with the devolved Government contributing tens of millions more in Scotland.[13]

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[3] See: Sophie Barnes, 'Grenfell Residents Forced to Move Home Could Be Hit by Bedroom Tax' *Inside Housing* (23 June 2017) <https://www.insidehousing.co.uk/home/grenfell-residents-forced-to-move-home-could-be-hit-by-bedroom-tax-51140> accessed 10 November 2017.; and Charles White, 'Grenfell Tower Victims Could Be Stung by "Bedroom Tax" after Being Rehoused' *The Metro* (24 June 2017) <http://metro.co.uk/2017/06/24/grenfell-tower-victims-could-be-stung-by-bedroom-tax-after-being-rehoused-6731737/#ixzz4qfTU55Qu> accessed 10 November 2017.

[4] Department for Work and Pensions, 'Housing Benefit Urgent Bulletin - Discretionary Housing Payments: Royal Borough of Kensington and Chelsea Grenfell Tower Fire' <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/621451/u3-2017.pdf> accessed 10 November 2017.

[5] ibid.

[6] HL Deb 5 July 2017, vol.783, col.885.

[7] HC Deb, 11 December 2017, q.118030.

[8] HC Deb, 14 July 2017, q.5069.

[9] HC Deb, 5 March 2018, q.130950.

[10] HC Deb, 30 October 2017, vol.630, col.560.

[11] Department for Work and Pensions, 'DWP' (2016) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/524321/discretionary-housing-payments-guide.pdf> accessed 16 December 2017. 14.

[12] HC Deb 27th March 2018, vol 626, col 230

[13] For a more detailed assessment of the Scottish Government and DHP funds especially there use to obviate the 'bedroom tax' policy, ,see: Mark Stephens, 'Social Rented Housing in the (DIS)United Kingdom: Can Different Social Housing Regime Types Exist within the Same Nation State?' [2017] Urban Research & Practice 1, 17.

This paper focuses on three key problems in the administration of DHPs: (i) time constraints on awards, (ii) the treatment of income and expenditure, and (iii) the imposition of conditionality. A detailed overview of the DHP scheme itself or a more general criticism of its structural place in the modern UK welfare state is not provided here. These broader issues and the scheme's underpinning regulations have been dealt with elsewhere in this journal,[14] and with reference to key cases, particularly *R (on the application of Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58.[15] For the purposes of this paper, it suffices to note that local authorities are provided with an annual DHP budget by the Department for Work and Pensions and – in common with most local authority schemes – concerns have been raised about the adequacy of this funding.[16] Local authorities are put in the difficult position of being tasked with mitigating a whole series of reductions to housing benefit with a relatively small pot of centrally allocated cash; topping this up from other funds is difficult given current constraints on local government expenditure.

Although this narrower focus may appear to be of comparatively niche interest, understanding common problems in the award of DHPs is important not just for the hundreds of thousands of tenants affected,[17] but also for social security lawyers more generally. The prominent role of these payments in the welfare reform agenda has bled into a series of high-profile judicial review challenges. Most recently, judgments in *R. (on the application of DA) v Secretary of State for Work and Pensions* [2018] EWCA Civ 504[18] and *Secretary of State for Work and*

[14] Jed Meers, 'Panacean Payments: The role of discretionary housing payments in the welfare reform agenda' (2015) Journal of Social Security Law 22(3), 115-129.

[15] A majority of the UKSC drew a distinction between those claimants with a 'transparent medical need for an additional bedroom' and a broader class for whom it was reasonable to 'be considered on an individual basis under the DHP scheme'. The availability of DHPs were, therefore, central to the decision. See: Jed Meers, 'The bedroom tax in the Supreme Court: implications of the judgment' (2017) Journal of Poverty and Social Justice 25(22) 181-187.

[16] See: Work and Pensions Select Committee, 'The Local Welfare Safety Net' (2016) <http://www.publications.parliament.uk/pa/cm201516/cmselect/cmworpen/373/37302.htm> accessed 1 November 2017. 40.

[17] The last available statistics on the total numbers of awards, indicate that 392,453 payments were made in 2013/14. See: David Evans, 'Use of Discretionary Housing Payments' (Department for Work and Pensions 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/322455/use-of-discretionary-housing-payments-june-2014.pdf> accessed 10 November 2017.

[18] See, in particular, [117] of Sir Patrick Elias' lead judgment for an assessment of the relevance of the DHP scheme.

Pensions v Carmichael [2018] EWCA Civ 548[19] which are both likely to go on appeal to the UKSC. Aside from the Department for Work and Pensions' own evaluation of the 'bedroom tax' policy,[20] and a study stretching back to 2005,[21] little is known about the administration of this important discretionary support.

The argument here starts by outlining a small-scale vignette study with eighteen local authorities and the assessment of DHP application forms that support the later analysis. The three key problems in the award of DHPs identified here – constraints of time, in the assessment of income/expenditure, and of the imposition of conditionality – are dealt with in turn.

1. Outline of the empirical work

The administration of DHPs is notoriously ambiguous.[22] Stretching to 54 pages and subject to regular updates, the scheme's accompanying guidance manual may give the initial impression of a clearly delineated scheme. The guidance itself, however, consists of general procedural requirements, such as to 'on a case by case basis hav[e] regard to the purpose of…disability related benefits'[23] or that 'regard should be given to the Supreme Court's judgment in *Rutherford*'[24] sitting alongside broad statements of discretion, such as 'LAs may interpret the phrase ['further financial assistance'] however they wish, taking into consideration the claimant's financial circumstances and any other relevant factors'.[25]

[19] The *Carmichael* family's receipt of DHPs was found to distinguish their case from the decision of the UKSC in *Mathieson v Secretary of State for Work and Pensions* [2016] UKSC 58. See [49] per LJ Flaux and [103]-[104] per LJ Leggatt.

[20] Department for Work and Pensions, 'Evaluation of Removal of the Spare Room Subsidy: Final Report' (2014) <http://www.cchpr.landecon.cam.ac.uk/Projects/Start-Year/2013/Spare-Room-Subsidy-Household-Benefit-Cap/Final-Report> accessed 10 December 2017.

[21] Bruce Walker and Pat Niner, 'The Use of Discretion in a Rule-Bound Service: Housing Benefit Administration and the Introduction of Discretionary Housing Payments in Great Britain' (2005) 83 Public Administration 47.

[22] For example, see the repeated reference by witnesses to the Department of Work and Pensions Committee to the 'postcode lottery' of DHP availability at the local authority level: Work and Pensions Select Committee, 'The Local Welfare Safety Net' (2016) <http://www.publications.parliament.uk/pa/cm201516/cmselect/cmworpen/373/37302.htm> accessed 1 November 2017. 40.

[23] Department for Work and Pensions, 'DWP' (n 10). 14.

[24] ibid. 33.

[25] ibid. 6.

The cases and the guidance themselves, therefore, can only reveal so much about the operation of the scheme. In order to better substantiate the problems identified below, the analysis draws on an online vignette study with eighteen English Local authorities conducted in 2015. In summary, participants involved in processing DHP applications were presented with three fictitious vignettes – intended to be 'plausible, short and concrete'[26] – via an online platform. Each was a tenant affected by the 'bedroom tax' penalty applying for a DHP payment: 'Ian' required an extra room to store disability equipment but was able to service the penalty from his Disability Living Allowance; 'Julie' wanted to remain in her home due to her son's learning difficulties and her mother visiting, and spends more than £30 per week on cigarettes; and 'Suzanne' wanted to remain in her home following the death of a family member.

Participating authorities were asked to consider whether they would be likely to award a DHP in each scenario and why, with a prompt to detail the likely length of any award period, any conditions they would attach to its payment, or any further information not outlined in the scenario that they would require. The response excerpts below do not distinguish between these three scenarios; the focus is instead on some of the more general findings on the approach Local authorities took to the award of payments.

As a central part of the procedure of applying for support, excerpts from blank DHP application forms are also drawn on throughout. A total of 242 DHP application forms were collated in support of this research. The intention is not to use these materials as part of a systemic evaluation or other formal methodological approach rooted in semiotics or a similar technique,[27] but instead to simply explore how some of the problems identified below materialise in this key part of the application process. Beginning with a list of all 348 English and Welsh Local Authorities which provide DHP returns to the Department for Work and Pensions,[28] the researcher visited the authority's website and searched for their DHP application form. A total of 242 could be identified in this way and were analysed.

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[26] Philip Leith, 'A Note on Using Vignettes in Socio-Legal Research' (2013) 19 European Journal of Current Legal Issues <http://webjcli.org/article/view/267/374> accessed 2 January 2017.

[27] For a discussion of these, see Paul Atkinson and Amanda Coffey, 'Analysing Documentary Realities', *Qualitative Research* (3rd edn, SAGE Publications 2011).and Betsy Cullum-Swan and Peter Manning, 'Narrative, Content, and Semiotic Analysis' in Norman Denzin and Yvonna Lincoln (eds), *Handbook of Qualitative Research* (SAGE Publications 1994).

[28] In other words, these are the Local Authorities within England and Wales that administer DHP awards for claimants in their geographical area, are provided an initial allocated budget to do so by the DWP, and provide

2. Time constraints on awards

The Government has ascribed the DHP regime with two conflicting characteristics: reliability and flexibility [29] The Courts have oscillated between concerns about the 'unpredictable…duration'[30] of these 'short term, temporary'[31] awards, and a recognition that they offer the 'benefit of flexibility'[32] for local authorities in applying their 'broad discretion'[33] under the regulations. This Janus-face is apparent in the recent judgment in *DA*, where Sir Patrick Elias recognises the responsiveness of DHPs to a 'range of factors which may vary from household to household' [34] over concerns in the earlier instance decision that 'no permanent awards were made' and 'short term payments give those affected no peace of mind.'[35]

The duration of DHP awards, and in particular the scarcity of permanent awards,[36] is therefore an acute issue. Government ministers have repeatedly underscored that DHPs 'can be made

returns information – the amount of overall expenditure and awards breakdown – every six months to the DWP. For an interactive list of these authorities, see: Jed Meers, 'Discretionary Housing Payment Expenditure 2015/16' <http://socialrights.co.uk/project/blog/discretionary-housing-payment-expenditure/> accessed 2 December 2017.

[29] For an example of these two characteristics being tied together, see Appendix 2 of Lord Toulson's lead judgment in *Carmichael,* where the Government outlines how they expect 'DHP to come into effect' to deal with the 'very varied effect' on individuals effected by the 'bedroom tax', or Lord Toulson's assessment of the 'benefit of flexibility' of the payments highlighted in the earlier instance decision. *R (on the application of Carmichael and Rourke) v Secretary of State for Work and Pensions* [2016] UKSC 58 [21] (per L Toulson). For a more detailed analysis of these conflicting principles, see: Meers (n 13 above) 125-126.

[30] *Burnip v Birmingham City* Council [2012] EWCA Civ 629 [46] (per J Maurice Kay).

[31] *R (on the application of Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58 [77] (per LJ Hale).

[32] Ibid. [21] (per LJ Toulson).

[33] *R. (on the application of Cotton) v Secretary of State for Work and Pensions* [2014] EWHC 3437 (Admin) [20], [22] (per Justice Males).

[34] *R (on the application of DA and others) v Secretary of State for Work and Pensions* [2017] EWHC 1446 (Admin) [117] (per Sir Elias)

[35] Ibid. [77] (per Sir Elias), quoting in part the judgment of Justice Collins in, *R (on the application of DA and others) v Secretary of State for Work and Pensions* [2017] EWHC 1446 (Admin) [28] (per Justice Collins).

[36] As outlined by Justice Collins in the earlier instance decision, the instructing solicitor, Rebekah Carrier of Hopkin Murray Beskine, 'made enquiries of local authorities about their practices in dealing with DHPs. Of the 235 who responded, none had ever made a permanent award' *R (on the application of DA and others) v Secretary of State for Work and Pensions* [2017] EWHC 1446 (Admin) [28] (Justice Collins).

available for long-term or indefinite periods for disabled people'.[37]The DHP guidance itself states that there is 'no limit' on the length of awards and inversely, no minimum.[38]

In practice, it appears that the administration of DHPs does not fall at either end of this flexibility/reliability spectrum. Instead, awards are generally made on a rolling basis with reference to fixed time increments – generally enforced within the applications forms themselves – with permanent awards either few and far between, or in the case of some local authorities, an administrative impossibility. These seemingly arbitrary time constraints frequently arose in response to the vignettes, with participants referring to set award periods, generally between 12 and 26 weeks: the same increments (3 months and 6 months respectively) that arose within the Department for Work and Pensions' evaluation of the 'bedroom tax'.[39] These were described variously as 'typical', 'initial' or 'short term' awards:

> A typical award would be an award of 12 weeks of the full shortfall in Rent only. This would then give her time to amend her financial hardship. i.e seeking new employment, reducing none essential expenditure, cutting down/quitting the cigarettes or looking to source a 2 bedroom property so she would not be effected (sic) by the bedroom tax.

Limits on award periods are often explicitly outlined in publicly facing local authority DHP policies, such as Eastbourne Borough Council's 'maximum 26 weeks'[40] or Sunderland City Council's 20 weeks for an initial application and 'up to 13 weeks' for subsequent renewals.[41] In response to the vignettes, a minority of authorities qualified similar set periods by indicating the length of award could vary relative to money left in the DHP pot. One authority explicitly stated that concerns over 'budget restrictions' would be a relevant factor in determining the length of any award:

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[37]HC Deb, 13 March 2014, vol.577, col.405. See also the minister's claim days earlier that 'the guidance is clear that LAs can consider making long term or indefinite awards for disabled people', HC Deb, 10 March 2014, vol.577, col.16W.

[38]Department for Work and Pensions, 'DWP' (n 10).19.

[39] Department for Work and Pensions, 'Evaluation of Removal of the Spare Room Subsidy: Final Report' (n 18). 42.

[40] Eastbourne Council, 'Discretionary Housing Payments (DHP) Policy' <http://democracy.eastbourne.gov.uk/Data/EBC%20Cabinet/20130529/Agenda/161%20disc%20housing%20payments%20app%201.pdf> accessed 31 March 2018.

[41] Sunderland City Council, 'Frequently Asked Questions about Discretionary Housing Payments (DHPs)' <https://www.sunderland.gov.uk/media/19422/Frequently-Asked-Questions-about-DHP/pdf/DMF10-CInfo1-FAQs_about_DHPs.pdf> accessed 31 March 2018.

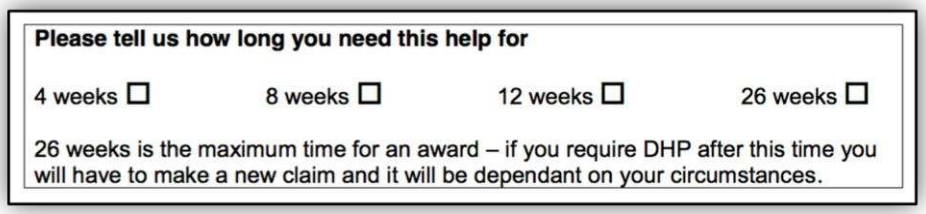
> If other reasonable expenditure exceeded her income we would award a full/partial DHP for 13-20 weeks pending (sic) on time of year and budget restrictions.

Those familiar with the DHP application processes will likely recognise these time increments from the application forms themselves. Claimants are often forced to choose specific, pre-determined periods of support at the point of application (e.g. 6 weeks, 13 weeks, etc), with checklists or closed questions constraining their ability to even *apply* for longer term support, let alone attain it. These time increments are, therefore, often an administrative creature which exists before a local authority worker has even begun to exercise their discretion over any award, packaging the applicant into these slots which dictates the later assessment. **Figure One** provides some example excerpts from a series of application forms to illustrate the problem.

Figure One: DHP application form excerpts
Imposed time limits

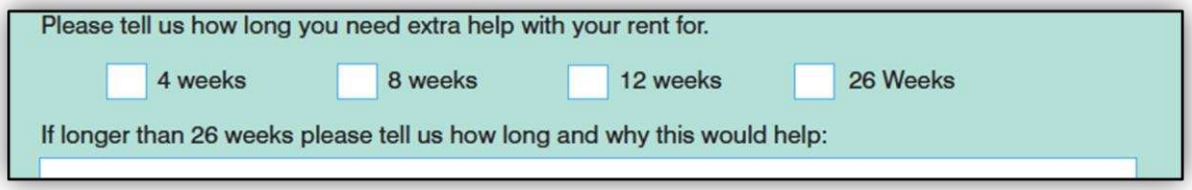
There are three principal approaches to limiting the time periods of application, each depicted below.

Form source: Teinbridge Borough Council, 'Application for Discretionary Housing Payment Support' (2017).



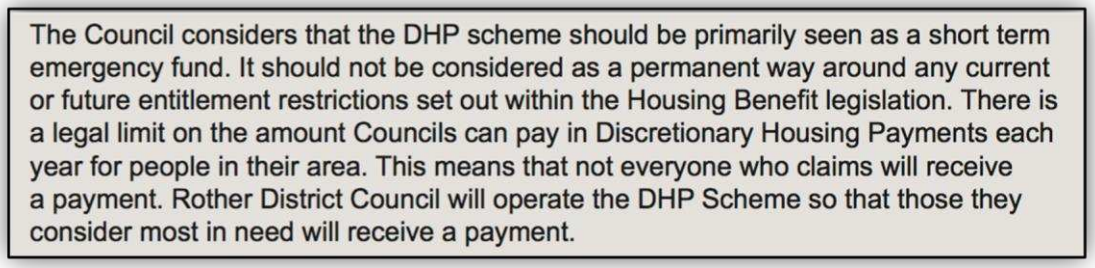
The first approach is the imposition of a maximum award length. Teinbridge Borough Council's application form imposes a definitive cut-off of 26 weeks for DHP support. The form itself prevents applicants from claiming for a longer period. Those requiring further support have to re-apply using exactly the same form, with further awards consequently also limited to a 26-week period.

Form source: Doncaster Metropolitan Borough Council, 'Application for Discretionary Housing Payment Support' (2017).



The second approach is to provide some indicative time increments and ask the applicant to substantiate their reasons for requiring a longer term award. Doncaster Metropolitan Borough Council's application form adopts this approach. The space provided to explain longer-term needs is tightly limited to a box just a few centimetres in height.

Form source: Rother District Council, 'Application for Discretionary Housing Payment Support' (2017).



The final approach – as exhibited by Rother District Council – is to build in a warning at the start of the form, situating later questions within the expectation that awards will be 'short term'.

Here, the confines of the application form itself is breaking this implied link between the circumstance and the award; applicants are required to articulate their position within the check-box confines imposed, even if this presupposes a time-period for assistance which does not accord with their circumstances. In the examples in Figure One, applicants are either unable to apply for support for longer than 26 weeks, or have to specifically justify why they require a longer period of support in response to an open-ended question in a tightly confined box.

At the point of communicating the DHP award decision, local authorities were keen to underscore the payments' temporary nature and reiterate that future receipt of this money could not be relied upon. Although unprompted on the matter, participant authorities raised this practice – especially the inclusion of this warning within award letters – when outlining time periods for support:

> Our award letters always advise that DHP is not intended as a long term solution and should not be relied upon if the situation has little chance of improving.

> The award letter would make it clear that DHP is a short term solution and that she needs to take action to prevent eviction, be it managing income more effectively, increasing income (from benefits or employment) or looking for a smaller property.

These fixed increments of support – enforced in DHP application forms – and the emphasis on their being temporary – underscored in the award letters – sit oddly alongside the role accorded to DHPs by the Government as flexible, and if necessary permanent, mitigation of housing benefit deductions. The evidence here points to a scheme where the length of awards is dictated by administrative constraints rather than as a result of a broad discretion applied on a case-by-case basis to individual applicants.

3. Assessment of income and expenditure

The detailed assessment of an individual's income and expenditure is unsurprisingly not specific to the DHP scheme. Though not particularly common in the mainstream benefits

system,[42] it is seen elsewhere in the determination of support at the local level. For instance, when assessing whether an applicant is intentionally homeless for the purposes of being owed a housing duty under Part VII Housing Act 1996, it is not unusual to undertake an income and expenditure assessment of a similar variety as seen within the DHP application process to assess the 'affordability' of the accommodation vacated.[43]

However, as a scheme that is characterised as an 'integral part of [housing benefit] entitlements'[44] for claimants who may otherwise face unlawful discrimination, this additional assessment of an applicant's financial means has drawn criticism. This is Lady Hale's concern when she describes the DHP scheme as a 'stricter means test'[45] running parallel to the mainstream Housing Benefit determination under s.130 Social Security Contributions and Benefits Act 1992. The problem is a straightforward one: those who satisfy financial eligibility for housing benefit have to meet an additional, higher bar to attain support which would not exist if their claimant class were statutorily exempt from a reduction in housing benefit.

Those with experience of the DHP application process will be familiar with the long, detailed income and expenditure tables which are wide-spread across application forms. Pre-determined areas of itemised expenditure require input from the applicant, often broken down into average weekly spend. Figure Two provides some example excerpts to give an indication of the areas of expenditure listed in these forms and how the tables are generally formatted.

[42] Determinations for welfare benefits are usually means-tested solely on the basis of income and capital, without accounting for the level or reasonableness of expenditure. See, for instance, the discussion of the confines of income and capital assessments in *R v SBC ex parte Singer* [1973] 1 WLR 713.

[43] For an example of a case which turned on the income and expenditure information in this context, see *Terryann Samuels v Birmingham City Council* [2015] EWCA Civ 1051, where the appellants described the interpretation of the income/expenditure information by the local authority as 'laughable' [15] (per J+LJ Richards). Another example can be seen in *Khadra Farah v the Mayor and Burgesses of the London Borough of Hillingdon* [2014] EWCA Civ 359, where the local authority asserted that the accommodation was affordable as 'some items in [the claimant's] weekly expenditure [were] exaggerated for a family of 4 with 3 children being under the age of 11' [9] (per J Patten).

[44] *R (on the application of Michael Hardy) v Sandwell Metropolitan Borough Council v Zacchaeus 2000 Trust* [2015] EWHC 890.[48] (per J Phillips).

[45] *Carmichael* (n 27) [77] (per LJ Hale).

Figure Two: DHP application form excerpts
Income and expenditure tables

There is not space here to reproduce some of these income and expenditure tables in full. Here, some example headings are provided to give an indication of the sorts of information requests these forms make of the applicants.

Form source: Doncaster Metropolitan Borough Council, 'Application for Discretionary Housing Payment Support' (2017).

Essential Spending	£ Weekly Amount	For official use

Doncaster's DHP form provides a total of 72 suggested areas of 'essential spending' within its income/expenditure assessment. The excerpt above displays the column headers, with all 72 items requiring a 'weekly amount'. The parallel column labelled 'For official use' indicates to the applicant that these figures will be subsequently assessed by an administrative worker. Groups of expenditure are pulled together, such as under the 'Housekeeping' heading below:

Housekeeping		
Food including bread and milk		
Cleaning and toiletries		
Newspapers and magazines		
Cigarettes, tobacco and sweets		
Alcohol		
Laundry and dry cleaning		
Clothing and footwear		
Nappies and baby items		
Pet food		

Form source: Taunton Deane Borough Council, 'Application for Discretionary Housing Payment Support' (2017).

	OTHER EXPENDITURE			
75	Health (dentist, glasses, prescriptions)	£	every	
76	Repairs (incl. window cleaning, maintenance)	£	every	
77	Hairdressing / haircuts	£	every	
78	Cable, satellite and Internet	£	every	
79	TV, video and other appliance rental	£	every	
80	School meals & meals at work	£	every	
81	Pocket money and school trips	£	every	
82	Lottery and pools etc.	£	every	
83	Hobbies, leisure, sport (inc l. pubs, gym)	£	every	
84	Gifts (Christmas, birthdays, charity etc)	£	every	
85	Vet Bills and insurance	£	every	

Taunton Deane's form has 101 income/expenditure headings, grouped in a similar way to Doncaster's. The column to the right hand side provides limited space for the applicants to provide 'notes' to expand on their answers, however, this is limited to the (incredibly) tight confines of the table.

These long, detailed tables and the characterisation of the application process as a 'stricter means test' sits oddly alongside the wide discretion conferred to authorities under Reg.6(1) Discretionary Financial Assistance Regulations 2001. The determination of an award cannot be a means test in any robust capacity, as a local authority which imposed income/expenditure cut-offs would likely be unlawfully fettering their discretion. Indeed, Walker and Niner's early study on DHPs, shortly after the scheme's introduction, indicated that benefit managers were well aware of the risks of 'specifying the criteria for DHP in any detail' for this reason.[46] In practice, the assessment of DHP awards is far from simply subtracting expenditure from income and appraising the result. In response to the vignettes, local authorities were actively assessing the basis or reasonableness of declared expenditure. Those long tables for inputting income/expenditure in application forms and requests for associated evidence, are not just used to compute an overall figure, but also as a proxy for assessing the validity of lifestyle decisions or reckless spending.

The gathering of this information appeared to be more than the 'information bingeing'[47] which so often characterises local authority assessment of need. This was apparent in response to Suzanne's vignette, where authorities were concerned with her expenditure on cigarettes and other possible discretionary areas of spending which may not have been declared in the application form; what they termed 'evidence of her lifestyle':

> We would ask for a full breakdown of [the case study claimant's] income and expenditure to establish if she could afford the shortfall herself. Her expenditure on cigarettes would probably not be allowed in full. We would also consider other 'unnecessary' expenditure such as a cable TV, mobile phone etc. We would ask for the last two months bank statements as evidence of her lifestyle - are there regular payments to Starbucks, Mcdonalds etc.

The importance of assessing how the money was being spent was wide-spread, with authorities referring repeatedly to a detailed examination of the applicant's outgoings. Authorities sometimes tied this assessment to a guideline daily allowance or reference figure to assist them in determining overall financial need:

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[46] Walker and Niner (n 19). 60.

[47] See David Cowan and Simon Halliday, *The Appeal of Internal Review: Law, Administrative Justice and the (Non-) Emergence of Disputes* (Hart 2003). 61.

> I would request a full breakdown of [the case study's] income and expenditure, firstly to ascertain exactly what she is spending her money on - our DHP forms request this info anyway and we would also ask for bank stats to support her application. I would calculate her finances taking into account her priority debts and allowing a small amount for day to day expenses.

In addition to often detailed income/expenditure tables within the application forms themselves, requests for bank statements were common – often stretching over multiple months – to both substantiate claims in the application form and to identify undeclared areas of discretionary expenditure:

> 8 weeks up to date statements would be required for all bank, building society and post office accounts the customer has. This information is requested as it can often show additional expenditure the customer has not listed on occasions bank statements have shown capital the customer has not declared. The customer has 14 days to provide this information.

This assessment of income and expenditure raises a series of problems. The approach taken by local authorities effectively provides a snap-shot of an applicant's finances over a modest period of time; in the DHP form it is the time of application, or over the course of a month or two where substantiating bank statements are required. That this will be indicative of need assumes that household finances are managed in a linear and consistent fashion. This does not accord with what is known about how expenditure is managed in the home. The Joseph Rowntree Foundation's report examining destitution in the UK[48] highlights how households living on low levels of income – including those out-of-work or in part-time work in receipt of housing benefit – often had a 'limited degree of choice' over their expenditure patterns, particularly where deductions had been made to benefit levels or when certain expenditure had to be prioritised over day-to-day living costs, such as travel costs to attend GP or hospital appointments.[49] Aside from these problems of unpredictability, the research also underscores the non-linear way in which low-income populations often exercise purchasing power, for

[48] Suzanne Fitzpatrick and others, 'Destitution in the UK' (The Joseph Rowntree Foundation 2016) <https://www.jrf.org.uk/report/destitution-uk>.

[49] ibid. 36.

instance, by stocking up on goods in some weeks to take advantage of cost-efficiencies and, consequently, spending less in subsequent weeks.[50] More broadly, research has repeatedly underscored the temporal dynamics of expenditure in low-income households, with standard income and expenditure accounts often fluctuating between 'negative' and 'positive' results over short periods of time, with snapshot assessments not accounting for these fluctuations inherent in the challenges of living on low incomes.[51]

These income and expenditure tables or tied evidential requirements also fail to account for the varied ways in which expenditure is managed or delegated at the household level. As an example, spending diary analysis has demonstrated the difficulty of accounting for the extra costs of disability – an area of particular importance, due to the emphasis within the DHP guidance on accounting for costs 'committed to … liabilities associated with disability'[52] and the widespread practice of local authorities 'tak[ing] into account disability-related expenditure'.[53] For low-income households, however, the true costs of disability may not easily present themselves through an income and expenditure analysis. Instead, they can be 'constrained by income',[54] with household-level absorption in other areas of spending; for instance, higher levels of expenditure on food from members of the household with a disability may be 'offset [by] reductions in spending on food for other members of the household'.[55]

The unpredictability of expenditure for households with disabled members was explicitly considered by the court when assessing the treatment of DLA as income under DHP award decisions in *R (on the application of Hardy) v Sandwell Metropolitan Borough Council* [2015] EWHC 890 (Admin). Justice Phillips determined that 'the pattern of expenditure of a disabled person may well be different and more difficult to predict than that of an applicant without a disability',[56] partly due to the problem that the 'needs of the disabled may not be consistent or regular and may require considerable one-off expenditure'.[57] This problem with *expenditure*

[50] ibid. 51.
[51] Mike Brewer, Alissa Goodman and Andrew Leicester, *Household Spending in Britain: What Can It Teach Us about Poverty?* (Policy Press 2006).21.
[52] Department for Work and Pensions, 'DWP' (n 10).
[53] *Hardy* (n 41) [39] (per J Phillips).
[54] Alison Matthews, Great Britain Department of Social Security and Philip Truscott, *Disability, Household Income and Expenditure: A Follow up Survey of Disabled Adults in the Family Expenditure Survey* (HMSO 1990) 31.
[55] ibid. 29.
[56] *Hardy* (n 43).[5] (per J Phillips).
[57] ibid.

was addressed through a decision based on *income*; namely, that DLA should not be treated as income for the purposes of a DHP assessment.

More fundamentally, however, as argued by Hirsch and Hill across a series of studies stemming from the Minimum Income Standard research programme, expenditure-based models relying on appraisal – what do you spend? – as opposed to budget standard models – what do you need to spend? – do not take into account unmet need for any classes of tenant affected by the 'bedroom tax', notwithstanding the acuteness of the issue for households with a disabled member.[58] The use of the income/expenditure tables as a proxy for lifestyle or need is therefore problematic; they may not indicate actual expenditure, nor accurately present actual need.

Treatment of disability benefits as income

The treatment of income from disability benefits warrants separate attention here. After even a cursory glance at their underpinning regulations, it is clear that Disability Living Allowance (DLA), or its eventual successor Personal Independence Payments (PIP), is intended to be spent on the costs of disability, not penalties such as the 'bedroom tax'.[59] Sadly, this has had to be repeatedly established by the courts, most notably in *Burnip v Birmingham City Council* [2012] EWCA Civ 629*,* which concerned DLA being used to supplement shortfalls in Local Housing Allowance, and in the 'bedroom tax'-focused case of *R (on the application of Michael Hardy) v Sandwell Metropolitan Borough Council* [2015] EWHC 890*,* where the court considered the assessment of DLA by local authorities in DHP award-making.

As a form of benefit intended 'explicitly to help offset the extra costs of disability',[60] the practice of assessing DLA as income when determining eligibility for a DHP award was held to be unjustified indirect *Thilmennos* discrimination. The key section for our purposes here is

[58] Donald Hirsch and Katherine Hill, 'The Additional Cost of Disability: A New Measure and Its Application to Sensory Impairment' (2016) 31 Disability & Society 897. 900.

[59] Indeed, the intention of DLA and PIP to be a 'cash contribution towards the extra costs of needs arising from an impairment or health condition' was the focus of the equality impact assessment looking at the former's eventual replacement with the latter. See: Department for Work and Pensions, 'Discretionary Housing Payments Guidance Manual: Including local authority Good Practice Guide' (2016) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/576787/discretionary-housing-payments-guide.pdf> accessed 10 January 2017. at [1].

[60] Merry Cross, 'Demonised, Impoverished and Now Forced into Isolation: The Fate of Disabled People under Austerity' (2013) 28 Disability & Society 719.

the description of the practice undertaken by Sandwell council deemed unlawfully discriminatory contrary to Art.14 (taken with A1P1 Right to Property) by the court:

> … the council's approach 'is to look at the applicant's income and outgoings globally', excluding only DLA(m). Mr Dunn explains that the council considers this approach to be fair and compliant with the spirit of the DHP guidance … because the council also takes into account disability-related expenditure … and does not require the applicants with disabilities prove any of their expenses. (para. 39 per Phillips J)

Despite this clear legal position, reflected in the Department for Work and Pensions' DHP guidance,[61] the majority of local authorities in the sample for this study were reliant on using income and expenditure accounts as a proxy for 'reasonable' levels of 'disability related expenditure'. Generally, authorities used the level of these expenses as an indication of overall disability, and/or offset these expenses against the levels of disability benefits received:

> … in checking the I&E details, we would ensure that any disability related expenditure was taken into account. We would include DLA as income, although often when exploring related expenditure, we find that this is higher than the amount of DLA awarded.

> … within income and expenditure assessment we would include the DLA income. This is because we would also include the potential higher expenditure for their medical/care needs within the assessment.

The approach adopted by Sandwell Council in this instance, and the majority of local authorities in the research sample, follows this pattern of using expenditure information as a proxy for assessing disability. In the responses to the vignette exercise, authorities repeatedly identified *Sandwell* as the basis of a change of internal policy, although the position advanced by many was incongruous. The response below provides the clearest example of the contradiction at the heart of this approach. The administrative worker stated that DLA would

[61] Department for Work and Pensions, 'Discretionary Housing Payments Guidance Manual: Including Local Authority Good Practice Guide' (n 55).at [3.9].

not be considered as income, before immediately going on to state that due to the 'available income' – made possible only by disregarding disability related expenditure – an award would not be made:

> We would not take his DLA into account following Sandwell case, and therefore we would not make an award as he has available income and is not proving he is in hardship.

The treatment of income from disability benefits and associated expenditure is an ongoing problem. Repeatedly, local authority DHP policy documents echo the same tautology of setting disability income against 'details of any disability related expenses' as 'the claimant is expected to have listed their disability related outgoings'.[62] The local authority and Social Care Ombudsman has considered the practice on numerous occasions, deciding it allows a 'balanced picture of an applicant's circumstances'.[63]

Although most local authorities did not explicitly include DLA income in assessments, others did include the DLA income offset against disability-related expenditure, or some disregarded DLA income but also disregarded expenditure that could reasonably be met by DLA. The net effect of both approaches is the same: benefits received for disability-related costs are matched against requisite outgoings, with space to consider their relevance or reasonableness.

The output of this approach is often the same as the one lamented in *Sandwell* – tenants in receipt of DLA face a disadvantage when subject to this means testing exercise, or at worst, face paying a proportion of their penalty with income from their disability benefits Instead of assessing income and expenditure as for other applicants, it simply introduces an additional question for the administrative worker of whether the disability expenditure itself is 'reasonable', or, indeed, what they consider disability-related or non-disability-related expenditure.

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[62] Halton Borough Council, 'Discretionary Housing Payment Scheme' <http://councillors.halton.gov.uk/documents/s32193/Draft%20DHP%20guidance%20Final.pdf> accessed 7 September 2017.

[63] Local Government & Social Care Ombudsman, 'Trafford Council (13 008 196)' <http://www.lgo.org.uk/decisions/benefits-and-tax/housing-benefit-and-council-tax-benefit/13-008-196> accessed 7 September 2017.

4. Imposition of conduct conditionality

The imposition of 'conduct conditionality'[64] is widespread in the practice of awarding DHPs.[65] Conditions levied are often tied with associated evidential requirements, particularly in repeat applications, to demonstrate that they have been discharged by the applicant. The failure to meet these accompanying requirements can serve, *prima facie*, to prevent further awards being granted. Internal local authority documents have described the imposition of conditionality in this fashion as 'similar to the "claimant commitment"' within Job Seeker's Allowance/Universal Credit,[66] and as 'good practice'.[67] This is not without problems: it could be argued that evidential requirements to demonstrate compliance with imposed conditionality are stretching what is permitted by the DHP regulatory scheme.

The underpinning regulations, under Reg.7 Discretionary Financial Assistance Regulations 2001 (SI 2001/1167), allow for the 'provision of information' by an applicant on the 'particulars of the grounds of claim or, as the case may be, particulars of the grounds for a review',[68] which is likely to cover income/expenditure information, but not further evidential requirements on other indirectly associated activity. The practice has come close to being directly considered by the courts. Permission was granted for a judicial review challenge to Westminster Council's practice of requiring evidence of claimants having effectively sought work and searched for a more affordable property. Though, as with many judicial review challenges to such discretionary schemes, the challenge was settled before the full hearing.[69]

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[64] For more information on the growth of this form of welfare conditionality and its manifestation in the UK welfare system, see Beth Watts, 'Welfare Sanctions and Conditionality in the UK' (The Joseph Rowntree Foundation 2014) <https://www.jrf.org.uk/report/welfare-sanctions-and-conditionality-uk>.

[65] For more information on the growth of this form of welfare conditionality and its manifestation in the UK welfare system, see ibid.

[66] City of Lincoln Council, 'Discretionary Housing Payment Policy' (2015) <http://democratic.lincoln.gov.uk/documents/s21329/Discretionary%20Housing%20Payments%20Policy.pdf> accessed 1 November 2017.

[67] Reading Borough Council, 'Discretionary Housing Payment Policy' (2015) <http://www.reading.gov.uk/media/5808/RBCDHPPolicy2016-17-2/pdf/RBC_DHP_Policy_2016-17_(2).pdf> accessed 1 November 2017.

[68] See Reg.7 Discretionary Financial Assistance Regulations 2001 (SI 2001/1167) and also the antecedent s.69(2)(f) Child Support, Pensions and Social Security Act 2000.

[69] See Heather Spurr, 'Council Faces High Court Challenge over Crisis Payment Conditions' *Inside Housing* (2014) <http://www.insidehousing.co.uk/council-faces-high-court-challenge-over-crisis-payment-conditions/7006341.article> accessed 1 November 2017. and Mike Spencer, 'What Hope Has the Court of Appeal Left for Human Rights?' *Child Poverty Action Group* (2014) <http://www.cpag.org.uk/content/what-hope-has-court-appeal-left-human-rights> accessed 1 November 2017.

Notwithstanding these problems, the imposition of evidential requirements to demonstrate compliance with conditionality is widespread in the DHP applications process and, often, the conduct mandated can be very specific. Excerpts from the local authorities' case study responses can serve to illustrate the approach taken at the point of a prospective original award to mandate conditions on any future reapplication:

> If a further application was made, it is then we would want to see evidence of the jobs she has applied for, efforts to downsize, the cuts she has made in expenditure. If she hasn't taken up on any of our advice/guidance it is very unlikely another award would be granted despite her struggling to afford her shortfall.

The local authority refers here to a wide-range of conduct – job applications, downsizing, general reductions in expenditure – and significantly, the onus is on the applicant to satisfy the authority at the point of reapplication that they have met the associated criteria. This emphasis on providing evidence of action or compliance with guidance tied to the DHP award was widespread in the sample:

> I would make it clear to the customer that we would need to see evidence of what action she has taken, should she make another application.

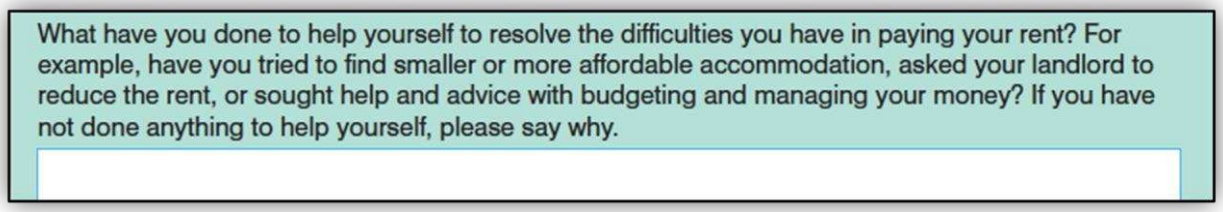
> If [the claimant] then re-applies for further assistance she would need to show supporting evidence of the steps taken to improve her circumstances. Further awards would be reduced or refused if no progress was being made.

Evidence of this imposition of conditionality can be seen in the DHP application forms, as detailed in Figure Three.

Figure Three: DHP application form excerpts
Demands to substantiate conduct conditionality

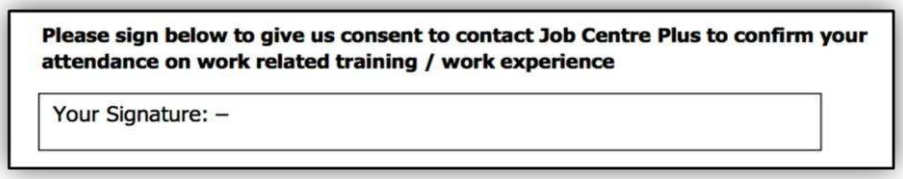
The DHP application forms frequently require applicants to indicate what they have done to 'help themselves' or to provide reasons for their inaction.

Form source: Doncaster Metropolitan Borough Council, 'Application for Discretionary Housing Payment Support' (2017).



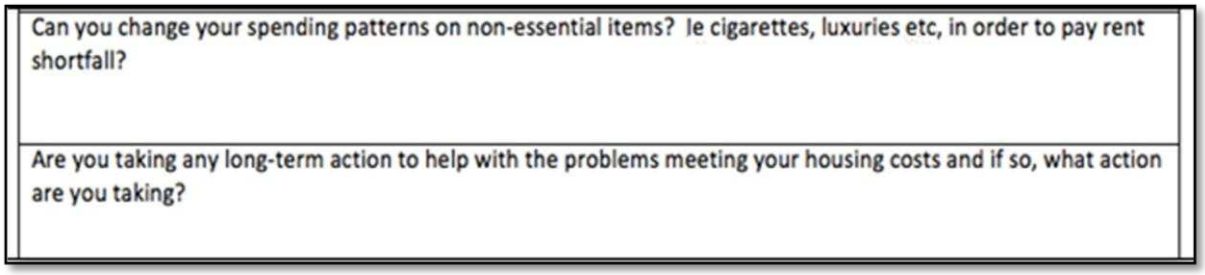
Doncaster's form demonstrates the Janus-faced nature of the questions asked, with requests to either detail what you have done, or the reasons why you have not done anything. In common with the vast majority of Local authorities, all re-applications are also assessed on the basis on this same form, meaning that this question must be answered by all re-applicants, regardless of the reason for their initial award (which may, for instance, be due to disabled adaptations made to the property).

Form source: Salford City Council, 'Application for Discretionary Housing Payment Support' (2017).



This requirement within Salford City Council's form is on a page with a series of questions about conduct conditionality, including questions asking how many bids on alternative properties the applicant has made, and other steps they have taken to move to cheaper accommodation.

Form source: Hambleton District Council, 'Application for Discretionary Housing Payment Support' (2017.



These two questions in Hambleton's form sit alongside 15 others asking about the individual's conduct and circumstances, including what the applicant has done to increase their hours at work or find a job, and whether they have considered letting their spare room(s) to a lodger.

The requirements outlined within the local authority responses to the DHP case studies and these form excerpts, indicate the breadth of conduct which can require evidential substantiation from the applicant. Some are broad requests for an indication of activity taken to mitigate circumstances, imposing a 'duty to help yourself',[70] pre-supposing a particular conception of agency and personal responsibility.[71] This is reflected in Doncaster Council's form in Figure Three, where applicants are asked both 'what have you done to help yourself?' and, inversely, 'if you have not done anything to help yourself, please say why.'

Other approaches require the substantiation of specific conduct: how have you tried to increase your hours of work, have you cut down on non-essential expenditure, have you reduced travel costs? The requirement to seek work, or, if already employed, to seek more hours,[72] is a common feature in the DHP application forms and in the local authority vignette responses. Strikingly, as detailed in Figure Three Salford's DHP application form requires all applicants in receipt of Job Seeker's Allowance to sign to give consent to the local authority to liaise with Job Centre Plus to confirm an individual's participation in work-related activity.

The specific phenomenon of this work-related conduct conditionality within DHP awards also demonstrates an important problem of compound conditionality; namely, where one's conduct within one strand of welfare provision is contaminant with another. Work-related conduct conditionality is already extensively practised under Job Seeker's Allowance /Universal Credit,[73] with concerns already raised about the evidential basis for these decisions. As highlighted by Adler, 125,493 of those sanctioned in 2013 successfully challenged the decision on appeal.[74] Linking the exercise of conditionality within the Job Seeker's Allowance /Universal Credit regime with work-related conduct conditionality within the DHP scheme

[70] Anne Daguerre, 'Welfare Reform in the United Kingdom: Helping or Forcing People Back into Work?' in Anne Daguerre (ed), *Active Labour Market Policies and Welfare Reform: Europe and the US in Comparative Perspective* (Palgrave Macmillan UK 2007).68.

[71] Sharon Wright, 'Welfare-to-Work, Agency and Personal Responsibility' (2012) 41 Journal of Social Policy 309. 310.

[72] It is worth noting that approximately 15% of households affected by the 'bedroom tax' have somebody in work. Those in receipt of any housing benefit are affected by the penalty. See Department for Work and Pensions, 'Evaluation of Removal of the Spare Room Subsidy: Final Report' (n 18).51.

[73] For recent material on the lived-reality of this practice, see Sharon Wright and Alasdair Stewart, 'First Wave Findings: Jobseekers' (Welfare Conditionality 2016) <http://www.welfareconditionality.ac.uk/wp-content/uploads/2016/05/WelCond-findings-jobseekers-May16.pdf> accessed 1 November 2017.

[74] Michael Adler, 'A New Leviathan: Benefit Sanctions in the Twenty-First Century' (2016) 43 Journal of Law and Society 195., 220.

demonstrates how one 'regime of conditionality' can 'compound' vulnerabilities already experienced elsewhere.[75]

Two potential scenarios can serve to demonstrate the problem. First, a recipient of Job Seeker's Allowance may have work-related conduct conditionality imposed to assess a decision under the Discretionary Financial Assistance Regulations 2001, assessed through their compliance with work-related training parallel to the – otherwise wholly inconsequential – 'work related requirements'[76]. Losing one means losing the other. Second, a recipient of Job Seekers' Allowance, who may otherwise be meeting the evidential requirements imposed on them for the continued receipt of their unemployment benefits, may still be subjected to *additional* requirements to substantiate their job-search efforts in the DHP application process (as in the DHP case study responses, above), despite having met the evidential basis designed to ensure their engagement with work-related activity.

This striking position demonstrates the importance of this parallel assessment of conduct conditionality, existing distinct from the mainstream benefits system and absent the associated regulatory control[77] or means of redress to a first-tier tribunal.[78] This is particularly acute given the well-established difficulties in attaining legal aid to support judicial review action in the wake of the LASPO reforms.[79] Claimants are forced to address the issue in the manner outlined in the forms,[80] meet the evidential bar created and justify their conduct in relation to both the imposed conditionality and their own means.

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[75] Del Roy Fletcher and others, 'Gamers or Victims of the System? Welfare Reform, Cynical Manipulation and Vulnerability' 24 Journal of Poverty and Social Justice 171.

[76] See s.49(3) Welfare Reform Act 2012 (replacing s.8 Jobseekers Act 1995).

[77] For instance, under the Jobseekers Act 1995 and ch. 1 Welfare Reform Act 2012.

[78] S 1(a), para.6, Sch.7 Child Support, Pensions and Social Security Act 2000.

[79] For a detailed analysis of the impact of these reforms on access to justice, see: Sarah Moore and Alex Newbury, *Legal Aid in Crisis: Assessing the Impact of Reform* (Policy Press 2017).

[80] As in the near-universal mantra present across DHP – and most other welfare benefits – application forms: 'You Must Complete All Sections of This Form.' To provide but a few examples, see Hartlepool Borough Council, 'Application for Discretionary Housing Payment Support' (no date) <https://www.hartlepool.gov.uk/download/downloads/id/2132/application_for_discretionary_housing_payments.pdf;> accessed 14 November 2017; Chelmsford Council, 'Application for Discretionary Housing Payment Support' <http://www.chelmsford.gov.uk/sites/chelmsford.gov.uk/files/files/files/documents/files/DHP%20Application%20Form.pdf> 1 November 2017.

Conclusion

Despite the increasing importance of the DHP scheme, empirical work on the award of payments by local authorities has been limited to two studies, the Department for Work and Pensions' evaluation of the 'bedroom tax' policy,[81] and a modest study – also funded by the Department for Work and Pensions – conducted on the scheme in its far smaller beginnings following its introduction in 2002/3.[82] This paper has drawn on a small-scale vignette study with eighteen local authorities and an analysis of DHP application forms to highlight key problems with the award of DHPs in England.

The problems identified here detail a DHP scheme which is far from offering long-term support for those with shortfalls in housing benefit. Applicants are routinely constrained in their ability to apply for long-term support, instead often being forced to apply for predetermined time increments of assistance, generally between 13-26 weeks, before having to renew their applications. At the point of application, a snap-shot of the applicant's finances is assessed using often long tables with wide-ranging requests for evidential substantiation. The reasonableness of the applicant's expenditure is questioned and the assessment of income from any disability benefits – an issue already explicitly considered by the courts in *Sandwell* – is weighed against reasonable outgoings. Those who are fortunate to receive an award are likely to be required to adhere to certain conditions and evidence their compliance at the point of re-application; often a matter of months from their initial submission.

What emerges from these data is a scheme that is incapable of serving its ascribed role as a panacea for reductions to housing benefit. The Government should recognise that a claimant relying on the DHP scheme faces a rigmarole of repeat applications, the imposition of additional conditionality on awards, and an assessment of their relative deservingness for support. As a means of mitigating a plethora of reductions to housing benefit, the scheme is far from fit for purpose.

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[81] Department for Work and Pensions, 'Evaluation of Removal of the Spare Room Subsidy: Final Report' (n 18).

[82] Walker and Niner (n 19).