

Loaves and Fishes

A Response to the Consultation on Discretionary Housing Payments (from the perspective of the chronically sick and disabled claimant affected by the ‘bedroom tax’)

Introduction

In a recent case at the Court of Appeal the purpose and limitations of Discretionary Housing Payments (DHP) were discussed in some detail. In outlining the requirements of a disabled tenant it was argued that such a tenant:

needs to have a reasonable degree of assurance that he will be able to pay the rent for the foreseeable future and that he will not be left at the mercy of short-term fluctuations in the amount of his housing-related benefits

It was explained that one of the appellants, a severely disabled man, had relied upon DHPs to make up his rent but the awards had been short-term, unreliable, inconsistent and frequently did not cover the shortfall, leaving the tenant in a perpetual state of insecurity regarding his housing situation. The need for assurance, then, had most definitely *not* been met by DHPs.

Two important questions arose from the Court of Appeal hearing; firstly, whether or not DHPs were an adequate means of support for disabled people in the first place and, secondly, whether their existence was being used as a justification for discrimination.

Whilst the above case was concerned with regulations as they apply to tenants in the private rented sector the discriminatory argument also pertains in the social sector; indeed the rules regarding size criteria were amended in April 2011 to allow for a room for an overnight carer in recognition of one of the objections brought by the case.

However, despite this single exemption for an overnight carer, there remain many examples of tenants living in the social sector who, whilst they may not need overnight care are, by any reasonable agreed definition, disabled and yet will fall foul of the new regulations regarding size criteria and will be applying to the DHP fund as their only source of relief from extreme hardship.

It appears that in the new draft guidelines, not only are DHPs being seen as an essential top-up (or mop-up) of the results of the governments welfare reforms but their existence is being promoted as a justification and mitigation of those reforms in the first place. The addition of 25 million to the

fund to help 35,000 wheelchair users in adapted homes ignores the Department of Work and Pension's own Equality Impact Statement that 420,000 sick and disabled tenants will be affected by the size criteria.

It is misleading to assume that all those who will suffer from the reforms will find remedy and relief from the DHP fund: there will be many who cannot and the government is being disingenuous by not addressing the very real hardship that will occur when the reality of the limitations of DHP are fully realised next year.

There is also a degree of misinformation in the assertion, found in the DHP guidelines that, in respect of the size criteria:

We expect that most claimants affected by this measure will find ways of making up the shortfall themselves, in order to remain in their existing home

In a study by the Cambridge Centre for Housing and Planning Research, 52% of those tenants affected made it clear that they would find it 'very difficult' to find that shortfall and they would probably cut down on essential expenditure such as food and household bills in order to prevent the accumulation of arrears. This group were not advised of DHPs in the study; when they *are* made aware this will increase the expected level of applications far beyond DWP current estimates. Furthermore, the initial figures are probably an underestimation of the problem and many more than 52% will face hardship as the reality of the reform kicks in.

Taking this into consideration, it appears that the assumption that most tenants can be left to cover the shortfall without support is a misreading of the facts and is worrying in terms of the preparedness of the administrators of DHP for an unprecedented influx of applications from tenants affected by the size criteria.

Since the onset of the recession there has been huge pressure on Local Authority budgets and the scope to support long-term DHP customers has become increasingly difficult. When asked, following the 2010 review, how they might alter their spending on awards 69% of LAs said they would make shorter awards; only 1% said they would make more awards to the 'needy and vulnerable'.

As a result of the government's reforms, however, traditionally understood definitions of needy groups will be placed under considerable pressure as large volumes of claimants, new to the concept of DHPs, find themselves suddenly classified as being at risk of rent arrears.

DHP's have, historically, largely been concerned with plugging one-off 'income shocks', predominately in the private sector, where allocation and availability are not significant issues. The social sector, despite its problems, provides tenants with stability, consistency, security and value for money; 45% of the tenants affected by the measure have been in their current home for 10 years or more. The majority of disabled tenants also live in the social sector. The private sector is, by contrast, short-term, profit based, insecure and prone to crises. DHPs function best as a short-term fund for this short-term sector. They are also an expensive method of delivering assistance, being labour intensive, complex to administer and requiring frequent reassessment.

By contrast, delivering a rent rebate to disabled tenants already has the infrastructure in place, via qualifying benefits, and would be simpler to absorb into universal credit, not least because certain disabled claimants will be exempt from the household benefit cap.

The differences, then, are apparent in the two systems of housing tenure. But there are further differences in the needs and rights of sick and disabled tenants to those of the normative 'working age' tenant who the government hopes to influence through the changes. It is revealing that the DWP is pursuing active labour market policies with groups who would normally require a degree of either flexibility or exemption from such an approach. This is not about 'protecting' the disabled from responsibilities but it is about respecting real differences and inequalities.

It is also of great concern that the definition of disability-related need covered by the DHP targeted funding is too narrow, relying as it does on the existence of significant adaptations in the tenant's home. Further issue is taken with the lack of a piloted study to assess probable areas of concern and to prepare all involved in the changes for some of the possible problems they will incur.

It is my contention that shifting responsibility onto DHPs to make up shortfalls in rent from the social sector is fraught with problems and is especially not suited to the needs of chronically sick and disabled tenants in the longer term and will result in considerable distress and hardship.

Rhetoric from the government around 'affordability' fails to understand the reasons people find themselves in larger social sector housing. This is not a result of choice, as it may be in the private sector, it is often the result of *lack* of choice. With restrictions due to size criteria the disabled tenant will find their choices eroded once more and, if unsuccessful in applying for DHP, they will not even have the right of appeal; a further erosion of their choice and independence.

For chronically sick and disabled tenants the reliance upon a discretionary fund can only be seen as what the U.N. Committee on Economic Social and Cultural Rights deems a *retrogressive* measure, involving, as it surely will, a general decline in living and housing conditions which can be directly attributable to government policy.

It has also been well-documented that the increase in funding made available to DHP has been achieved by increasing the average single room tax to £14 from initial calculations of £13. That claimants will be in the position of applying for help from a fund made up from money directly deducted from their own benefits appears morally questionable to say the least.

Furthermore it seems likely that the predictable consequences of these reforms are not compatible with Disability Equality Duty or the Human Rights Act and will cause disabled people considerable suffering and loss of control.

For this reason, and those laid out below, I contend that the Discretionary Housing Payment Fund, as a form of help for disabled people, is not fit for that particular purpose and there should be an amendment to the regulations to exempt this group from the size criteria in the first instance and therefore from subsequent reliance upon this fund.

1. Is the guidance clear on how DHPs can be used and who will be eligible from April 2013?

Eligibility appears to depend partly on a process of eliminating other options, how far the tenant is deemed to need that help, whether they can use part of their existing income and whether the decision maker 'may or may not decide to disregard income from disability-related benefits'.

There is a lack of guidance about how much of those disability benefits can be disregarded and the fact that it may be at the discretion of the decision maker is extremely worrying for the claimant as there is no certainty or consistency built into the system.

Indeed, under existing guidelines decision makers are encouraged to urge claimants to try and find the shortfall from existing income, savings, relatives etc and there is no recourse to a notion of protected income or even how much that protected income might be.

This could very easily lead to a state of affairs whereby the benefits of tenants are scrutinised by decision makers and recommendations for budgeting are made which are insensitive and ill-informed about the additional expense of disability. It would be of great concern if vulnerable tenants were encouraged to modify their expenditure in ways which were beneficial for the LA budget rather than their own needs.

One of the Court of Appeal Judges in the case above voiced similar concerns regarding the decision-making process declaring:

It would be wrong, in principle, in my judgement, to regard subsistence benefits as being notionally available...to go towards meeting the shortfall between housing-related benefits and the rent (he) had to pay

The percentages applicable in the size criteria are 14% for one extra room and 25% for two. However, these percentages, when transferred in real terms to a claimant's benefits could amount, on a conservative estimate, to between £16 to £25 per week lost from a £96 per week ESA entitlement.

There is currently very low awareness among social sector tenants of the existence and purpose of DHPs. Indeed, there is a lack of awareness amongst all tenant groups which partly explains recent revelations regarding the underuse and underpayment of DHPs by LAs. DWP figures show that in 2011/12 £8.4 million meant for DHPs was not allocated by LAs.

There appears to be a lack of understanding on the side of both the tenant and the decision makers as to the scope and applicability of DHPs. Certainly social sector tenants are particularly unaware, having had little need of them historically. Chronically sick and disabled people, moreover, have

traditionally enjoyed guaranteed support when it came to their housing costs in the social sector and would have had limited, or no, need for help to make up shortfalls in rent.

There has also been little or no information about how to claim a DHP in any of the literature distributed by HAs informing tenants of the upcoming changes, despite it being a practice in DHP decision-making to ask the tenant to liaise quite closely with their landlord and with the landlord supporting their application for help.

The leaflet template on the DWP website which is meant as a guide for LAs in producing their own promotional material, mentions no other disabled groups than those with significantly adapted homes. This would certainly deter most disabled people *without* adapted homes from applying for help as they would have the impression they would not be successful. There is the concern that LAs, under immense financial pressure to keep within budget, might be inclined to under-advertise DHPs at the very point where maximum exposure is needed to educate the claimant.

Where there is knowledge on the part of the HA there is also the assumption, as reported by tenants, that a chronically sick or disabled tenant would *surely* be entitled to help as they fall into a protected group. This sits alongside the tenants own assumptions based upon the same, long-held certainty, that a vulnerable person would definitely be helped.

This, of course, cannot be said with any certainty at all when it comes to claiming for help from a DHP and their discretionary function. The very notion of discretion runs counter to any set ideas of guaranteed entitlement and would be deemed fettering of discretion.

The assumption of help for the most vulnerable is further confused by the fact that receipt of certain disability benefits will exempt some tenants entirely from the household benefit cap. Paradoxically, in the Explanatory Memorandum for the Benefit Cap the reason for exempting people in receipt of DLA/PIP and the Support element of ESA is explained thus:

additional financial costs..can arise from disability and..disabled people will have less scope to alter their spending patterns *or reduce their housing costs.*

This recognition of the limits of disability benefits, and the demands on those benefits, on the one hand, is contrary to the advice given in the guidelines where decision makers are given total discretion about whether to disregard them on the other.

Where eligibility is targeted, as in the case of those with significantly adapted homes, there remains the issue of how this will be measured and assessed. The terms are vague and inexact in an area where exactitude is perhaps needed from the claimant's perspective but legally denied. It is outside the scope of the DHP to determine precise qualifying requirements for assistance and it is this which will cause the most distress and confusion for sick and disabled tenants who know, without doubt, about their own disability and should not have to further prove it for housing needs and yet may find, even though they may be severely ill or disabled there is no entitlement to help. If help is given it may not meet the full shortfall or it may be for 12 weeks and then not renewed: a continual crisis situation which tenants in social sector housing are not used to having to cope with.

Many tenants with long term, progressive conditions may, at some future point, require adaptations to be made to their existing homes, adaptations which may not be in place at the time of claiming assistance. They may also at some future point require overnight care, which would of course exempt them from the bedroom tax for one room. These are projected considerations which, whilst they may not be predicted exactly, may be assumed to be the case at some point for those suffering from degenerative conditions.

This notion is covered under the definition of disability under the law. Indeed, the DWP's own figure of 420,000 disabled tenants to be affected by the size criteria relies upon the commonly accepted definition of disability as being a group which includes cases who do not currently have difficulty with daily activities but who have in the past, or are expected to in the future, or would do if they were not able to control symptoms with medication.

It is clear, then, that a definition of disability which relies on a significant degree of existing adaptation takes no account of the potential for future change in the tenant's requirements and is contrary to current equality legislation.

Furthermore, all tenants have, in one way or another, significantly adapted homes; they are adapted to them and their needs. They may have spent large sums modifying a property, never thinking they would face being priced out.

The uncertainty around eligibility is a retrogressive step which puts the claimant in a measurably worse position than before.

Tenants with severe long term illness or disability are not best served by a fund which provokes stress and instability by being repeatedly reviewed or allocated on a fixed rate, short term basis. Problems with the existing WCA process, whereby claimants are in a cycle of review, appeal, review, have given rise to much opposition for similar reasons and have justifiably been challenged.

The emphasis for much DHP decision making appears to be to encourage the tenant to move somewhere cheaper or ask the landlord for a rent reduction. This does not take into account the different relationship tenants have to their landlord in the social sector and the limited availability of stock.

Similarly, the model used of a tenant in an emergency does not apply; disabled social sector tenants facing a shortfall have not found themselves in an emergency due to any failing of their own, they *have not* taken on housing they could not afford, they *have not* in any way produced the context in which they require help, it has been thrust upon them. The whole language of DHPs fits very well with the private sector; temporary and occasional, and used by people who are passing through a certain stage in their accommodation history. But it is totally at odds with the language of the social sector which has always been about planning for families and neighbourhoods in the longer term.

Where there is conditionality for receiving an award, such as making a commitment to find somewhere cheaper to live, find a job, borrow money from friends and family it needs to be noted that most, if not all, these options are not only not available to chronically sick or disabled people, but nor should they be seen as the solution to a long term shortfall in rent.

In setting out the various groups LAs should consider the public law principle at issue and whether the decision has been made by reference to, and application of, a rigidly applied set of rules or criteria; if the size criteria element is targeted *only* to tenants with a disability who have significantly adapted homes then this is contrary to the discretionary principle.

Other medical circumstances cited concentrate on reasons for remaining in a particular area rather than what the consequences would be if help was not forthcoming. Whilst they cover some of the health related reasons for remaining in a home they avoid the obvious objection; a finite fund cannot help everyone who might have legitimate reasons for applying.

But, if simply being affected by the reforms in some way were to be sufficient to qualify then this would beg the question of why apply discretion in the first place? The existing system of exemption under housing benefit, and future exemption from the benefit cap itself, are surely sufficiently competent systems for such decision making.

Consequently, the rules around eligibility are not appropriate for the needs of chronically sick and disabled people as they introduce uncertainty and imprecision into accessing and retaining a basic need, housing.

2. Are the examples helpful in prioritising DHP?

Amongst the list of objectives, the notion of ‘helping those who are trying to help themselves’ is particularly pointless when it comes to assessing need for sick and disabled people. Is DHP a reward?

It is surely a flawed system which requires disabled people to battle with other groups for help with a primary need, housing, and on terms which do not recognise the *differences* inherent in their condition.

If decision makers and tenants are both left to assume that the only designator of disability that matters is having a significantly adapted home then there is the possibility that many others who do not fit this criteria will not apply for help and are left to struggle.

As has been pointed out, it makes no allowances for degenerative conditions where a tenant may be near to needing alterations, or will need them at some future time. There is also the real problem of tenants whose home, perhaps due mental health conditions, has become their only world. The mental distress caused to those tenants, for whom their home is their only safe place, cannot be underestimated if that home is under threat.

But how would a decision maker decide eligibility on other health grounds? This poses the question of evidence and puts the onus on the claimant to prove entitlement without them even knowing for sure what actually constitutes entitlement because the rules won’t allow it; a rather Kafkaesque scenario.

Adding to this the finite nature of the monies available it presents the possibility of large numbers of chronically sick and disabled people falling short of their rental income and going into arrears even if

they reach the criteria just because the fund has run dry. It is not acceptable that people who are part of a protected group should face such hardship. Nor is it acceptable for them to have to face such uncertainty as to their entitlement, this could be a cause of direct harm to some tenants.

The Government are merely covering the most obvious legal aspects of disability related housing need in terms of allowing an additional room for overnight care and targeting DHP to those with significantly adapted homes. This is echoed throughout the reforms as a whole where the definition of disability seems to be shrinking to fit the government's need to reduce the deficit. Such basic definitions of disability may be useful to balance the books but they do not concur with long established and hard won definitions of sickness and disability as they are enshrined in equality legislation and the Human Rights Act.

The issue is not simply whether a person's space can be said to be measurably adequate at the point of the start of the reforms; it is where that tenancy is pre-existing, and where, or until, a suitable alternative can be found, it is contrary and retrogressive to remove funds which had been used to cover a basic need. The availability of DHP for a few does not adequately compensate the many for what will be an inevitable decline in their fundamental standard of living and the basic human need for security.

To prioritise certain disabled groups above others, based upon objective classifications of housing type, fails to grasp the fundamental issue that if *all* disabled people *are not* prioritised they risk falling into arrears or suffering hardship. As DHPs can *only* prioritise, and awards made on a 'case by case' basis, they are fundamentally unsuited to the needs of tenants with a chronic illness or disability who form a protected group.

Huge pressure will be placed on DHP resources by other groups affected by welfare reforms, not least those affected by the benefit cap. Preventing homelessness on a large scale will become paramount and those affected by the size criteria will be left to find the shortfall themselves; they will struggle for priority in such a climate of desperation.

3. Would you like to see more or fewer examples?

From the perspective of the claimant more examples can only produce more 'competition' for a limited resource.

Whether there are more or less does not alter the basic problem that there is no automatic entitlement; a claimant may fall into one group or example yet still be denied help. The use of examples thus could be said to be misleading from a claimant's perspective.

Wide discretion is meaningless when the decision maker will inevitably face applications in far greater number than ever before. However wide the net, being finite, it cannot possibly save all those who fall into it.

All the decisions have to be made on their merits; a claimant cannot rely on their individual profile being in the guidelines and nor can the decision maker deny DHP if it *is not* one of those on the guidance list of groups: for the long term disabled this kind of vagueness, whilst legally sound, will be totally alien and confusing.

There is a risk that distribution of DHP will become a 'first come first served' system. With no mechanism in place to stagger applications, and claimants panicking as the real nature of a finite fund with no recourse to appeal sinks in, decision making will suffer and it will be a race to keep up with demand until the fund runs dry.

Discretion in these circumstances will be a luxury no-one can afford; literally. All new applicants will be equally worthy. All new applicants may be eligible under the guidelines. The level of hardship and need will be unprecedented. These will be claimants who are historically entitled to the most help, the most support and who have been shown, beyond doubt, to have the most need.

To have to suddenly give medical or health reasons to be entitled for help with rent would appear to be confusing two separate and distinct categories: housing and health. Indeed, many of the examples raise questions about how a circumstance might be adequately proven: the need for local support for example, or medical services, are categories which could cause great problems if the burden of proof lies with the claimant.

Moreover, it would be difficult to see how the need to remain in an area to access medical services would be prioritised over someone about to be made homeless due to the benefit cap.

Many groups will find their needs are not considered significant enough to merit help. For example, one group which has been shown to make up the largest sub-section of the disabled affected by size criteria is women in late middle-age, living alone, who have long-term, chronic illness.

The problems for this particular group in relocating after perhaps many years in a property are complex and multiple yet under the guidelines it will be difficult for such tenants to plead their case effectively. Where the application procedure demands evidence of a 'special circumstance' then lack of this could lead to automatic disqualification.

There could also be confusion where groups, especially the chronically sick and disabled, are used to producing evidence in support of claims for certain benefits and will now find that the rules are different and there is no right of appeal with DHPs. The 'merits' of their case will not be relevant, just the process by which the decision was made and this may lead to a sense of unfairness whereby claimants may be turned down and yet discover that their neighbour, possibly less disabled, has been successful. This has not been an issue previously where applications for help were individual,

unpredictable, and scattered around the borough. In the case of social sector tenants, however, there could be multiple applications at the same time from the same estate.

The grounds for the decision making could potentially appear inconsistent and iniquitous. Moreover, a claim may be successful initially and funds granted for 12 weeks but for it to not be renewed, leaving the tenant in a perpetual state of uncertainty.

Whilst the fund is no doubt useful in times of sudden crisis it is not suitable as a long term means of paying rental shortfall in the case of a long term sick or disabled person facing a crisis in their housing benefit possibly for the first time in their tenancy.

The confusion and distress this will cause the claimant will be immense, due in large part to the impossibility of providing the claimant with a logical and fair explanation as to why, although their situation has not changed, nor have they changed, they are now in trouble and must respond accordingly. The decision makers may well be on the receiving end of much claimant distress, a distress which is totally justified given that claimants are effectively being penalised for something which is outside of their control.

4. What do you think of the monitoring arrangements?

According to the DWP, the “future reaction of claimants is unknown”. There certainly appears to be a knowledge gap on both the side of the claimant and that of policy makers. Currently many tenants are unaware of the availability of DHPs and the draft guidelines indicate a lack of official awareness of the scale of the size criteria problem.

It is disappointing and possibly negligent that there has been no pilot study to assess the potential impact of the coming challenges faced by claimants and LAs alike. It is also extremely worrying that the draft guidelines promote the view that applications from those affected by the size criteria will be minimal.

There seems to be an expectation that tenants affected by the size criteria will make up the shortfall themselves and this assumption could easily translate into a reluctance to award to this group.

Without a pilot study, and with no real impact assessment done by any LAs, the monitoring will soon demonstrate the fundamental weaknesses in the system and will perhaps also reveal unknown consequences.

What we do already know, that many vulnerable people will be thrust into a world of insecurity, debt and hardship, should be relayed back to those in government at the earliest possible opportunity.

Advice given to decision makers in the draft guidelines regarding assisting tenants to find alternatives to DHPs such as negotiating a lower rent take no account of the completely different culture and relationship of the social sector tenant to their housing association landlord.

It will be fairly obvious early on that the policy cannot be sustained in its present state and waiting to draw conclusions until 2015 is political foot dragging. Nor will the policy need time to bear fruit and thus need longer before conclusions can be drawn; once you have set a group of the most vulnerable on the road to further poverty their situation does not improve. It just gets worse. Arrears pile up, essential bills go unpaid, family life breaks down, and the ultimate cost to the public purse will continue to rise.

For the chronically sick and disabled tenant the additional toll on health and well-being will be incalculable.

For the decision makers and the LAs there will be confusion, judicial reviews, and probably overworked colleagues facing pressure and hostility from distraught claimants. DHP allocation will change from a short term response to a sudden 'income shock' to become instead the long-term alleviation of the effects of welfare reform.

Conclusion

The government have grossly misjudged their reliance on DHP. They are using it to justify and ameliorate the worst effects of their reforms. It will do neither.

Far more tenants affected by the size criteria will apply for DHP than has been expected or budgeted for and the majority of those tenants will have unrealistic expectations which will be dashed.

The majority of those affected fall into the category of chronically sick or disabled and the inevitable decline in their living standards, and the implicit discrimination of a measure which disproportionately affects this group, cannot be justified by relying on the existence of DHPs as a compensatory measure.

Given the past underperformance of LAs in distributing DHPs it seems fair to doubt the ability of the system to cope with the administrative upheaval which will ensue in April 2013.

The definitions of disability-related entitlement are vague, necessarily opaque in an area which denies exactitude, and thus are open to challenge. The contradiction in policy whereby a disabled claimant will be exempt from the benefit cap but not the bedroom tax introduces inconsistency and confusion into the entire system.

The increase in funds to DHP will fall far short of what is required, as the government is well aware. The deficit is being recovered via reductions in benefit of the very poorest in our communities. An estimated 500 million will come directly from the pockets of tenants.

Furthermore, DHPs are being used insidiously as an instrument which changes the very nature and principle of social housing and secure, long term tenancies.

The use of DHP not only reflects tenant instability it produces and perpetuates it.

Moreover, the function of DHP is radically altered from being a short term emergency fund into something it was never intended to be; a welfare reform hardship fund.

The interim, highly variable nature of DHPs, with many claimants left disappointed, is reminiscent of a raffle where you take your chances but only a few can go home with a prize.

But this is a totally unacceptable way to treat chronically sick or disabled members of society in the twenty first century; if they don't win the raffle, they risk having no home to go back to at all.

It is well known that of all the difficulties people face in life they are least able to survive if their housing security is put at risk.

For chronically sick and disabled people this is one reform too far, it provokes a retrogressive outcome, and I urge all involved to reconsider the terms of the legislation and grant exemption from the bedroom tax for this group so that the human tragedies which will surely unfold can be halted before they begin.

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