An Analysis of the Current Legal Framework for Social Housing in England and Wales and the Application of Moral Desert

Thesis submitted in accordance with the requirements of the University of Liverpool for the degree of Doctor in Philosophy by Malavai Nicholas Quinn Hood-Fredriksen

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Thesis Abstract

The central contention of this thesis is the current method used by the legal framework uses the concept of a philosophical, moral desert in order to determine eligibility for social housing. It will argue that using such a concept to classify social housing eligibility is flawed for three reasons. Firstly, because it introduces the idea that housing is a reward.

Secondly, because where housing is being used as a reward for the deserving, there will be questions about an applicant's worth that takes such judgements beyond the idea of eligibility and into areas of morality. This has allowed the development of increasingly sophisticated tools used to determine a candidate's worth that are continuously assessed throughout the lifetime of the tenancy.

Thirdly, because of its intrinsic links to ideas of fairness and of societal notions of right and wrong, where people getting what they deserve is seen as a form of justice, there is a sense that this system is also just. In other words, when someone who is unworthy is potentially made homeless by refusal of the greatest housing duty, this is somehow justice.

In order to support this argument, this thesis will present a case study that aims highlight the impact of the changes to the legal framework by examining vulnerable tenants. The aim is to paint a more complete picture for this group, demonstrating the issues of using housing as a reward, and a detailed assessment of a candidate's worth.

Chapter 1
Introduction

Over the last ten years, the government has made several legislative and policy changes that have potentially far-reaching consequences for a significant proportion of tenants in social housing, as well as those who hope to be housed.

A central contention in this thesis is the current method used by the legal framework uses deservingness, or the concept of a philosophical, moral desert in order to determine eligibility for social housing. It will argue that using such a concept to classify social housing eligibility is flawed for three reasons. Firstly, because it introduces the idea that housing is a reward, rather than a necessity, which is a form of conditionality. Secondly, because where housing is being used as a reward for the deserving, there will be questions about an applicant's worth that takes such judgements beyond the idea of eligibility and into areas of morality. Linking eligibility to a moral judgement about an applicant's worth is exacerbating homelessness and adding an unnecessary burden to some social housing tenants. Finally, because of its intrinsic links to ideas of fairness and of societal notions of right and wrong, where people getting what they deserve is seen as a form of justice, there is a sense that this system is also just. In other words, when someone who is unworthy is potentially made homeless by refusal of the greatest housing duty, that this is somehow justice. While social housing has been explored many times, there is more to say in this area.

This thesis will argue that the question of a candidate's worthiness is not simply judged during the application process, it is continuously assessed throughout the lifetime of the tenancy. This assertion will be deconstructed in a series of three stages, each of which has associated laws allowing those who

fall below the required standard of behaviour to have their application refused or be evicted from their properties.

Finally, this thesis will present a case study that demonstrates some of the issues raised. This case study will examine the vulnerable as an example of a group on whom the legal framework is placing a potential extra burden. The case study will also consider how other changes to the legal framework, such as cuts in legal aid to social housing cases are further affecting vulnerable tenants. The aim is to paint a more complete picture for this group, demonstrating the issues of using housing as a reward, and a detailed assessment of a candidate's worth.

Research Questions and Methodology

During the initial research and review phase of this thesis, the Localism Act 2011 had recently come into force in England. It became apparent this Act was going to have serious consequences for social housing tenants. The fact that the government was making changes did not seem that surprising, waiting lists had grown exponentially nearly doubling in size from just over 1 million in 1997 to 1.824 million in 2011[1] . Changes had to be made to cut waiting lists and make the job of the councils easier. However, with the passage of the Welfare Reform Act 2012, a pattern of terminology started to emerge and increasingly terms like "deserving" and "fair" were prominent in policy documents and discussions of additional changes.

First and foremost, this thesis wanted to explore if deservingness was being used in housing decisions, and if it was, was there a group whose situation would be worsened by its use. The first part of this question required a review

[1] Shelter Housing Databank: Households on council waiting lists in England from 1997-2018. Found at: https://england.shelter.org.uk/professional_resources/housing_databank/results?area_selection=64&data_selection=A6&selected_min=1997&selected_max=2018

of the legal framework, case law and associated literature, followed by an examination of how any recent changes might further restrict access to social housing. Next, there was consideration of the historic use of deservingness and an analysis of its potential current use, which includes an argument that the current use of these terms has its roots in Victorian ideas on poverty, some espoused by Jeremy Bentham. In order to discuss this fully there is an examination of the so-called Great Influencers of the 1790s, such as Thomas Malthus, whose ideas helped shape the Victorian poor laws. Finally, a "case study" would show the impact by example, which required selecting a group of social housing tenants to evaluate. In the end, it was decided that the vulnerable[2] would be a good group to select as they are well represented in social housing with 50% of current social housing households having at least one disabled member[3] and they as a group would have people who fit the current criteria of deservingness and those who did not without necessarily being considered unworthy of housing[4].

The questions in this thesis required an analysis of doctrinal law and public policy. However, in order to gain a complete picture, this thesis will also reflect on the overarching themes from other disciplines, especially when considering the issues raised by the use of deservingness, or the concept of a philosophical desert with social housing decisions[5].

Thesis Outline

Following from this introduction, Chapter 2 will first consider the importance of social housing. Next, it will thoroughly review the legal framework on

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2 For a discussion of the definition of vulnerable please see further in this chapter: Defining Vulnerability at 32. The definition of vulnerable is discussed again in more detail in Chapter 6.

3 Paraphrased from Equality and Human Rights Commission, 'Being Disabled in Britain – A Journey Less Equal' April 2017 at 70. Found at: https://www.equalityhumanrights.com/sites/default/files/being-disabled-in-britain.pdf

4 See later in the Chapter: The Subject: Who is Worthy? Below at 25.

5 See Defining Deserving and the Concept of Desert at 24

social housing, including relevant case law, from the Housing Act 1996 then a section on each piece of pertinent legislation that has been passed since. It will also introduce behaviour orders, for example the anti-social behaviour order, as they form an important part of the discussion to follow.

Chapter 3 will give a detailed analysis of the historical basis of deservingness, charting its use from the middle ages until present day. It will specifically consider the changes between the Tudor era ideas of deservingness and the Victorian by examining the great influencers of the 1790s, considering the roles of men like Thomas Malthus and Jeremy Bentham. Further, it will examine the historical basis for modern deservingness and the links between public perception and policy. Next, it will consider the issues with the use of a moral desert and concepts of justice in housing, examining the morality of applicants and the links between housing need and deservingness.

This will lead to Chapter 4, which examines the current criteria of deservingness, before considering the way the Localism Act 2011 and Welfare Reform Act 2012 are enforcing the concept of the deserving poor in the social housing legal framework. Within each of these sections will be discussions of the statutory provisions and consideration of how they interact with ideas such as conditionality and housing need. It will then consider the desert basis of fairness and how that engages with debates on individual responsibility and the nuances of conditionality and anti-social behaviour. It will then consider potential ways that deservingness is being removed, analysing the Homelessness Reduction Act 2017 and the Housing First approach.

This leads onto Chapter 5, which will posit how deservingness is assessed, arguing it is a continuous assessment that begins during the application process and runs right up to renewal in a cyclical manner. This chapter breaks down this assessment into three stages, considering the relevant black letter law for each stage and examining how it might lead to evictions and

repossessions when tenants fail, usually, to be well behaved. Behaviour is established in Chapter 3 as one of the current criteria of deservingness, along with being working (status). Finally, it considers the issues of the bedroom tax, universal credit and rent arrears, positing that a combination of these factors is leading more social tenants to struggle to keep their tenancies by making it more difficult to pay rent.

The case study on the vulnerable is last and constitutes Chapter 6, which will highlight the impact of the changes to the legal framework by examining vulnerable tenants. This requires a detailed consideration of the legal definition of "vulnerable" in terms of housing from s.189(c) of the Housing Act 1996 and the associated case law. This chapter will also look at the wider definitions of the term beyond the discussion later in this introduction. It will consider common issues of vulnerable tenants including a lack of suitable properties in order to highlight the problems specifically associated with this group. It will then examine the legal framework and the issues associated with social housing. Finally, it will look at the use of conditionality and vulnerability and engage with a discussion of housing need.

In conclusion, Chapter 7 will suggest this thesis is a call to arms, that is has highlighted a real and serious issue with using deservingness with social housing, suggesting that major reforms are required. Further, it will posit that the impact to vulnerable tenants is problematic and that, even should one disagree with the root cause of these issues, that they remain and need to be solved regardless of the underlying source.

This chapter will now consider the importance of the concept of home before moving on to define some terms used throughout the thesis.

The Concept of Home

One of the reasons social housing is important is because it provides a home for people who might not otherwise be able to afford one. This section will explore why the concept of home is so vital to us as human beings. In other words, why the space a tenant occupies is not simply about the provision of bricks and mortar. There is a sense of a home as a place where a person lives, sometimes in a family group or a romantic relationship. Yet this definition focuses heavily as the home as a place, but the concept of home is much more nuanced, as Douglas asserts:

> Home is located in space, but it is not necessarily a fixed space. It does not need bricks and mortar, it can be a wagon, a caravan, a boat, or a tent. It need not be a large space, but space there must be, for home starts by bringing some space under control. Having shelter is not having a home, nor is having a house, nor is home the same as household. For a home neither the space nor its appurtenances have to be fixed...[6]

"An Englishman's house is his castle" as the saying goes, and for most people there is a sentimental attachment to the place in which they live that is more to do with a feeling, a sense of "hygge"[7]. In fact, Brink[8] argues that historically the concept of home has a link with affection using examples from the etymology of the word itself[9]. He goes on to assert that the home was "not limited to the exclusively physical habitation itself, but include[d] concepts of dwelling and affection"[10]. Yet this amorphous concept is also part of a legal framework, both for homeowners and social tenants, or private tenants:

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6 M. Douglas, 'The Idea of a Home: A Kind of Space' (1991) 58(1) Social Research 287 at 289.

7 Hygge is a Scandinavian concept that has become more well known in England. The word has no one single translation, but is to do with comfort and safety. A Norwegian described it as "a comfort, like a warm blanket and a hot chocolate in front of a fire with family or loved ones. Cosy, safe and warm, nice..."

8 S. Brink, 'Home: The Term and Concept from a Linguistic and Settlement-Historic Viewpoint', in Benjamin (ed) *The Home: Words, Interpretations, Meanings and Environments* First Edition, Avebury 1995 at 17-24.

9 Specifically, he mentions German, Old English and Greek which all have references to love, affection and even sexual intercourse entwined with their words for home.

10 D. Benjamin (ed), *The Home: Words, Interpretations, Meanings and Environments*, First Edition, Avebury 1995 at 285.

> All of us - even the truly homeless - live somewhere, and each therefore stands in some relation to land as owner-occupier, tenant, licensee or squatter. In this way land law impinges on a vast area of social orderings and expectations, and exerts a fundamental influence upon the lifestyles of ordinary people.[11]

This can create difficulties. The law is precise, but the concept of home and people's understanding of their rights is not, as is regularly demonstrated in family home scenarios within the law of Equity[12]. As Fox states:

> The conceptual challenge [for lawyers] in relation to home is to unravel the enigmatic 'x factor'. In short, the x factor represents the social, psychological, and cultural values which a physical structure acquires through use *as a home*.[13]

One of the qualities that has repeatedly emerged from empirical research into "the home" is the idea of the home as a centre for self-identity[14]. In fact, Després argues that "after the body itself, the home is seen as the most powerful extension of the psyche"[15] with the furnishings, decorations and other interior design choices all reflecting the occupant's sense of self. This is an argument that Tucker also espouses:

> Home is where we could or can be ourselves, feel at ease, secure, able to express ourselves freely and fully, whether we have actually been there or not. Home is the reflection of our subjectivity in the world. Home is the environment that allows us to fulfil our unique selves through interaction with the world. Home as the environment that allows us to be ourselves, allows us to be homely. Since in a home environment we can express our true identity, home is the source of home truth. Home may be an emotional environment, a culture, a geographical location, a political system, a historical time and place etc., and a combination of all the above.[16]

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11 K. Gray et al., *Real Property and Real People: Principles of Land Law*, First Edition, Butterworths 1981 at 4.

12 Hence the "invention" of the Constructive Trust of Common Intention from *Lloyds Bank plc v Rosset* [1990] UKHL 144.

13 L. Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (2002) 29(4) Journal of Law and Society, 580-610 at 590.

14 Paraphrased *ibid*.

15 C. Després, 'The Meaning of Home: Literature Review and Directions for Future Research and Theoretical Development' (1991) 8(2) Journal of Architectural and Planning Research 96-115 at 100.

16 A. Tucker, 'In Search of Home' (1994) 11(2) Journal of Applied Philosophy 181-187 at 184.

This means that home is wrapped up not only with safety but also with our very sense of self, the very nature of our identities. When a home is taken away, the person involved is likely to take it personally, and to feel the loss deeply.

The law tends to see the home from the rather detached notion of a personal, equitable or legal right over a parcel of land. The layperson, alternatively, sees their fee simple absolute in possession, or tenancy, or licence as the place where they raised their children, said goodbye to a loved one, or simply as the collection of the memories they have about their home and about who they are when they are there. To many, losing a home means losing a part of yourself in the process.

Defining Poverty

There are a few issues around a unified definition of poverty, with some academics arguing:

> Each [of the three approaches to defining poverty address] different questions and none, of itself, has provided—nor, it is argued, could ever provide—an objective definition of poverty.[17]

The issue is that the word itself is both subjective and emotive:

> How we define poverty is critical to political, policy and academic debates about the concept. It is bound up with explanations and has implications for *solutions*. Value judgements are involved. Definition thus has to be understood as a political as well as a social scientific act and as such has often been the source of controversy.[18]

There are serious issues defining who is poor, especially surrounding what factors should be considered and what measures should be used[19]. There are also issues of comparison, for example a poor person in the United Kingdom

[17] D. Piachaud, 'Problems in the Definition and Measurement of Poverty' April 1987, 16(2) Jnl Soc. Pol. at 147.

[18] R. Lister, *Poverty*, First Edition, Policy Press, Cambridge 2004 at 12.

[19] See V. Lang et al, 'Defining and Measuring Poverty and Inequality Post-2015', (2015) 27 J. Int. Dev 399 and C. Oya, 'Who Counts? Challenges and biases in defining 'households' in research on poverty', (2015) Vol. 7, No. 3 Journal of Development Effectiveness 336.

might be much better off financially than a poor person in a third world country, making a global definition more problematic. Further, there is how poverty is measured: should there be a focus on income or living standards, and should there be a broad or narrow approach.

Yet despite the continued struggle for a cohesive definition, there are still many favoured by different organisations and academic articles. For example, the United Nations defined overall poverty as including:

> ...a lack of income and productive resources sufficient to ensure sustainable livelihoods; hunger and malnutrition; ill health; limited or lack of access to education and other basic services; increased morbidity and mortality from illness; homelessness and inadequate housing; unsafe environments; and social discrimination and exclusion. It is also characterized by a lack of participation in decision-making and in civil, social and cultural life.[20]

This very broad definition has been subject to critique from various quarters as such approaches run "the danger of losing sight of the distinctive "core notion of poverty"[21]. Alternatively, the Joseph Rowntree Foundation (JRF) gives a much more basic and conceptually narrow definition of poverty as being:

> When a person's resources (mainly their material resources) are not sufficient to meet their minimum needs (including social participation).[22]

More simply put, "poverty is about lacking the resources to participate fully in society, [which in the UK] depends heavily on one's income"[23]. Finally, Sen argued that poverty was "capability deprivation":

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[20] United Nations, *World Summit for Social Development Programme of Action - Chapter 2*. Found at: http://www.un.org/esa/socdev/wssd/text-version/agreements/poach2.htm

[21] Nolan et al, *Resources, Deprivation and Poverty*, First Edition, Clarendon Press, Oxford 1996 at 193.

[22] C. Goulden et al., 'JRF Programme Paper - A Definition of Poverty', The Joseph Rowntree Foundation, September 2014 at 3. Found at: https://www.jrf.org.uk/file/45780/download?token=NkTSFAsD&filetype=download

[23] T. MacInnes et al., 'Monitoring Poverty and Social Exclusion 2014' (2014) New Policy Institute at 14. Found at: https://www.jrf.org.uk/file/45988/download?token=uEb8BqzS&filetype=download

> Sen explicitly urges a redefinition of poverty as capability deprivation, given that low income or lack of wealth are just some of many different ways in which human beings can suffer capability deprivation. Sen argues that this change 'does not involve any denial of the sensible view that low income is clearly one of the major causes of poverty, since lack of income can be a principal reason for a person's capability deprivation' (Sen, 1999, p. 87).[24]

All of these definitions touch on the lack of income to meet basic needs, but also try and include other factors such as social exclusion. Social exclusion is defined as a situation where members of society are unable to participate fully in relationships, activities available to the majority of people in society[25], in this case because of their poverty. This is a serious issue that can have a huge negative effect on those experiencing hardship[26].

There are other factors that are important when defining poverty, usefully laid out by the JRF paper. Firstly, poverty is dynamic, it is a changing condition that may be "temporary, recurrent or persistent over longer periods"[27]. Further, individual poverty is not the same as household or family poverty and both must be addressed adequately:

> It cannot be assumed that resources are shared evenly; for example, research suggests women can get less than a fair share while children's needs are often prioritised.[28]

This thesis will adopt the simplest definition of poverty that of lacking the resources to participate fully in society. While this might seem to be overly simplistic, in terms of the discussion to follow there is no real need to delve more deeply into the issues surrounding defining and measuring poverty.

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[24] J. Wolff et. al, 'A Philosophical Review of Poverty' Report by the Joseph Rowntree Foundation, June 2015 at 25. Found at: https://www.jrf.org.uk/file/47483/download?token=Ov853xwH&filetype=full-report

[25] R. Levitas et al., 'The Multi-dimensional Analysis of Social Exclusion' for the Department for Communities and Local Government (Social Exclusion Unit) 2007 at 9.

[26] D. Gordon et al. for the Joseph Rowntree Foundation, 'Poverty and Social Exclusion in Britain', Joseph Rowntree Foundation 2000.

[27] *Supra* n.22 at 5.

[28] *Supra* n.22 at 6.

Housing and Poverty

Having a home, however, comes with its own set of problems; holding onto the important concept imbued in bricks and mortar comes at a cost. Housing is in crisis and rents are rising[29]. This is another reason why social housing is such an important resource, it helps those on low incomes find some stability in their lives. It gives them a place to call home beyond the confines of being a homeowner, and fosters a sense of community. Without social housing many more households would end up poor, because, as rents rise, there is an established link between housing and poverty.

A study conducted for the Joseph Rowntree Foundation (JRF) looked at the interconnectivity of poverty, material deprivation, and housing in order to determine if there should be greater recognition of those links when determining who is "poor". One of the interesting discoveries the JRF study made is that:

> Poverty rates vary by region, but the impact of housing costs is very marked. Before housing costs are considered, poverty rates in London are the lowest for any region except the South East. However, poverty rates almost double in London when poverty induced by housing cost is considered. An extra 3.1 million people in the UK are in poverty after their housing costs have been paid. One million of these are in London, reflecting its high housing costs. Nearly half of housing association tenants in London are in poverty AHC, despite their below-market rents[30]

This indicates that the cost of housing can make a massive difference between a household living in poverty, and one that does not. The lower rental costs of social housing tend to ease and address some of those issues, but there are issues. First, even with lower rents, an Oxford Study found nearly a quarter of

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[29] See Shelter and the Shelter Commission on the Future of Social Housing, 'Building Our Future - A Vision for Social Housing' January 2019 at 38 and 43. Found at: https://england.shelter.org.uk/__data/assets/pdf_file/0005/1642613/Shelter_UK_-_A_vision_for_social_housing_full_interactive_report.pdf

[30] R. Tunstall et al., 'The Links between Housing and Poverty: An Evidence Review', on behalf of the Joseph Rowntree Foundation, 5th April 2013 at 34. Found at: https://www.jrf.org.uk/file/43609/download?token=ytPqwTsI&filetype=full-report

social tenants at foodbanks found meeting their rent "very difficult"[31]. Additionally, the JRF study discovered that 29% of tenants in social housing are in poverty before taking in account their housing costs, but that rises to 43% after[32], which is a significant difference:

> Therefore, the housing system, including Housing Benefit, housing costs and tenure, all play a very important part in the level of income remaining after housing costs, particularly for workless households, people in London and the South East, minority ethnic people, single people and renters. This housing-cost-induced poverty has an impact on people's standard of living.[33]

This chapter has already discussed the meaning of "home" and the emotive nature of discussions of law and policy surrounding anything that is so personal and important. Yet it is just as important to acknowledge the difficulties that people in poverty can have with their home and retaining it. The link between housing and poverty has been reinforced by a recent study by Oxford University that discovered that among Food Bank users, affording rents was a source of issue for a significant number:

> Paying rent was also a struggle for many households. [21.3% of social tenants and 34.8% of private tenants found their rent "very difficult" to afford] … We divide[d] households [living in rented accommodation who struggle to pay their rent] into those living in socially-rented accommodation and those living in privately-rented accommodation. The latter group more frequently reported difficulty, but many households living in both housing types were struggling to afford their rents.[34]

This means over a fifth of social tenants and over a third of private rented tenants are struggling to meet their rent. For those in social tenancies, any rent arrears can well cause a household to lose their eligibility for a social tenancy,

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31 R. Loopstra et al., 'Financial insecurity, food insecurity, and disability: The profile of people receiving emergency food assistance from The Trussell Trust Foodbank Network in Britain' June 2017 at 36. Found at: https://www.trusselltrust.org/wp-content/uploads/sites/2/2017/07/OU_Report_final_01_08_online2.pdf

32 *Supra* n.30 at 5.

33 *Supra* n.30 at 37.

34 *Supra* n.31.

or even lead to an eviction, trapping some in a worry cycle of poverty, and worse potential homelessness due to rent arrears.

There is evidence that poverty that can certainly by exacerbated by a lack of affordable housing. In fact, the issue with the modern use of the term "affordable housing" is that it is not entirely accurate. The coalition government, during the 2010 spending review, new "affordable housing" that has been built of late allows rents to be up to 80% of the market rate[35], as opposed to around 50% on average for a social rent[36] and is considered an "intermediate rent"[37]. This means that in many instances, especially in London, but likely in other areas in the South East especially, "affordable housing" will not be in reach of many of the poorest people who currently rely on social tenancies. This is borne out by the statistics, according to the Joseph Rowntree Foundation analysis of affordable rents when compared to social rents:

> Affordable Rents for typical two-bed properties work out at 30% more expensive than social rents. On average this is £1,400 per year. Affordable Rents are more expensive throughout England, but the difference is noticeably bigger in Southern Regions. Yorkshire and the Humber is the region with the smallest difference between the types of rent at £650 per year, in the South East this is £2,000 per year and in London it's £3,350 per year. There are ten London boroughs where the difference is over £5,000. … The cost of renting in the social housing sector has steadily increased in recent years, as existing rents rose, and many new lettings are at higher market-linked 'Affordable Rents'.[38]

This demonstrates that even within social housing, the use of affordable rents is affecting the affordability of those properties for some tenants.

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35 W. Wilson and C. Barton, 'What is affordable housing?' House of Commons Library Briefing Paper, Paper Number 07747, 20 May 2019, at 6. Found at: http://researchbriefings.files.parliament.uk/documents/CBP-7747/CBP-7747.pdf

36 *Ibid* at 3.

37 *Ibid* at 6.

38 *Ibid*.

Before moving onto the next chapter that will explain the legal framework for social housing in detail, it is first important to consider the terminology that will be used throughout this thesis.

The Rise of Working Poverty

While the absolute rise is poverty is "virtually unchanged"[39] for 2019 according to the Institute for Fiscal Studies Report, however, the percentage of those households are both poor and working has increased by 10 percentage points with more working households (58%) in poverty than workless households:

> Those in working households make up just under 60% of those in headline income poverty, but slightly (2–7 percentage points) less of those in more severe forms of poverty. However, they are accounting for a growing fraction of both: between 2004–05 and 2017–18, the share of those in headline poverty that are in working households grew by 10 percentage points (from 48% to 58%), and for severe poverty it grew by 5–26 percentage points (depending on the measure).[40]

These figures are supported by a similar report from the Joseph Rowntree Foundation (JRF). Their report from December 2018 indicates the number of working poor are "higher than at any time in the last 20 years"[41]:

> A working-age adult in poverty is now more likely to be in a working family than a non-working family. Increasing in-work poverty over the past 20 years has altered the composition of working-age poverty. Three-fifths of the people in this age group who are in poverty now live in a family where someone is in employment. Nearly half are, themselves, working. This contrasts with two decades earlier, when more than two-thirds of working-age people in poverty were non-workers. At that time, a focus on

[39] P. Bourquin et al., 'Living standards, poverty and inequality in the UK: 2019' The Institute for Fiscal Studies Report, June 2019 at 29. Found at: https://www.ifs.org.uk/uploads/R157-Living-Standards-Poverty-and-Inequality-2019.pdf

[40] *Ibid* at 53.

[41] Joseph Rowntree Foundation Analysis Unit, 'UK Poverty 2018', December 2018, at 4. Found at: https://www.jrf.org.uk/report/uk-poverty-2018

> increasing employment led to a decrease of 2 percentage points in the poverty rate in the five years to 2001/02.[42]

While the report posits that the marked increase over the last five years in working poverty is likely to be caused by the changes made to benefits and tax credits for working parents, this deals with the increase in poverty only, not the longer-term causes of poverty. The links between insecure jobs for minimum wage, but with insecure hours and recurrent cycles of poverty seem to be fairly established:

> The predominant experience of our interviewees was of recurrent poverty – of moving in and out of low-paying jobs but never moving far from poverty. Even occasional 'escapes' from poverty were temporary, reflecting the insecurity of the jobs they got; our interviewees usually did not move far above the poverty line, reflecting the low-paid employment most accessed. ... People in this situation sometimes seemed to face deep hardship and what might be described as extreme poverty. Welfare benefit payments do not take into account debts that people may have to pay out from benefits.[43]

There is an indication that recent changes to social housing law strongly favour those who are employed, both in terms of eligibility and renewal (see Chapter 4). This means, if the results of this study are accurate and more widely applicable, then awarding the working poor social housing tenancies will come with its own set of problems. It might well remove the use of social housing as a "safety net" for those in desperate need, and instead social tenancies might focus more on housing the working poor. This is likely to increase homelessness, by pushing those on benefits out onto the streets in favour of those in work. As they would be considered deserving enough to qualify, by working, but poor or recurrently poor enough to be unable to afford to buy a house or even rent in the private sector. This is because private

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42 *Ibid* at 34.

43 T. Shildrick et al., 'The low-pay, no-pay cycle - Understanding Recurrent Poverty' The Joseph Rowntree Foundation, November 2010 at 6. Found at: https://www.jrf.org.uk/report/low-pay-no-pay-cycle-understanding-recurrent-poverty

rents around the country on the increase[44] which means more and more people are struggling with their housing costs.

There is also an indication that benefits provided by the government are not of great assistance to the working poor when they are in need:

> We found little evidence that the 'safety net' provided by benefits (in that rent was paid and some income at least was guaranteed) was a major barrier to the unemployed seeking jobs. Indeed, many participants were resistant to claiming welfare benefits and the welfare system was experienced as slow, inefficient and demeaning.[45]

Now, social housing is not specifically mentioned here, so it is possible that those who are lucky enough to have a social tenancy do find that the lower rents help them manage their finances. However, the replacement of the tenancy for life by flexible tenancies, brought about by the Localism Act 2011, might also put low paid workers in a more precarious position during times of financial hardship, as not paying rent is a factor taken into consideration for non-renewal of a flexible tenancy. Yet if they are in a cycle of poverty and they lose their social tenancy, they are unlikely to be able to find suitable accommodation.

Recent Changes in Public Attitude to Poverty

Yet there is some statistical evidence that shows attitudes are changing. The British Social Attitude Survey, released in July of 2018, indicates a softening of attitudes to people on benefits and the working poor. For a start, 77% of respondents agreed that employers should pay a living wage, in other words, paying their employees enough to cover the basic costs of living. Less than one fifth (18%) felt that employees are responsible for finding a job that covers

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[44] According to Shelter, the charity, "private rents rose 60% faster than wages across England between 2011-2017". Shelter, 'Rentquake: Change in private rents from 2011 to 2017'. Found at: https://england.shelter.org.uk/support_us/campaigns/rising_rents

[45] *Supra* n.43 at 6.

their basic costs[46]. Following on from that, when asked about the minimum wage, 71% of respondents felt it needed to be increased and few (1%) felt it should be lowered[47]. There is also support for the government supplementing the income of low-wage families:

> …a majority (58%) feel that the government should top up the wages of working couples with children. A substantial majority (70%) feel the government should top up the wages of working lone parents. However, there is less public support for working couples without children having their low wages topped up by the state (31%). Here, the dominant view is that working couples without children are responsible for "look[ing] after themselves as best they can" (56%). These responses suggest that support for topping up low wages is closely associated with children, a position that is consistent with attitudes to welfare overall …[48]

Additionally, the survey found that just over half (56%) felt that most unemployed people could get a job if they "really wanted to"[49]. Benefits for single adults are still unpopular, but there has been a shift in attitudes, which might yield positive results to the poor:

> … attitudes towards benefits for the unemployed have always been sterner relative to other groups. However, in 2017 one fifth (20%) support higher benefits for the unemployed. While this may seem a fairly low level of public support, it is the highest proportion since 2002, suggesting British attitudes towards the unemployed are softening.[50]

There seems to be a similar shift in attitudes to those who are classed as "disabled people who cannot work", or the vulnerable. In 1999, the percentage of people who said the government should spend more on the disabled was 72% but showed a steady decrease over the next few years, bottoming out in 2011 at 53%. In the latest survey the number was 67% meaning the dip of the

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46 N. Kelley, British Social Attitude Survey 35: Chapter 'Work and Welfare' July 2018 at 12. Found at: http://www.bsa.natcen.ac.uk/media/39254/bsa35_work.pdf

47 *Supra* n.46 at 13.

48 *Supra* n.46 at 13-14.

49 *Supra* n.46 at 15.

50 *Supra* n.46 at 15.

intervening years had almost fully recovered to the 1999 percent[51]. This does seem to indicate that the attitudes to claiming benefits are indeed softening across the board. The survey also considers the attitudes about benefits overall, not just on those receiving them:

> We also ask whether they agree or disagree with the following statements:
>
> - "If welfare benefits weren't so generous, people would learn to stand on their own two feet"
> - "Cutting welfare benefits would damage too many people's lives"
>
> In 2001, approximately two-fifths (39%) of people agreed that the generosity of welfare benefits creates dependence… This rose steadily over the decade to just under three-fifths (55%) in 2010. For the duration of the coalition government (2010-2015) the proportion of the public agreeing with this statement appeared relatively stable. However, in the last two years there has been a marked drop in support for this statement. In 2017 only two-fifths (43%) agree… Over the same time period, we can see a corresponding change in the proportion who are concerned about the impact of cuts to welfare on people's lives. In 2001, three-fifths (58%) of people felt that cutting benefits would damage too many people's lives. This proportion fell steadily to two-fifths (42%) in 2011. However in the last couple of years there has been a sharp rise in the proportion of people who agree with this statement, highlighting a possible tipping point in public attitudes towards welfare spending cuts.[52]

Once again, the statistics indicate a change in attitudes of the public on the generosity of the benefits system, with the number nearly the same as that from 2001. One clear message from the survey is that the public strongly believe that "work should pay, and pay enough to meet a basic standard of living"[53].

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51 *Supra* n.46 at 25.
52 *Supra* n.46 at 16.
53 *Supra* n.46 at 18.

Defining Destitution

A study of destitution by the Joseph Rowntree Foundation (JRF) defines destitution as follows:

> People are destitute if:
>
> a) They, or their children, have lacked two or more of these six essentials over the past month, because they cannot afford them:
>
> - shelter (have slept rough for one or more nights)
> - food (have had fewer than two meals a day for two or more days)
> - heating their home (have been unable to do this for five or more days)
> - lighting their home (have been unable to do this for five or more days)
> - clothing and footwear (appropriate for weather)
> - basic toiletries (soap, shampoo, toothpaste, toothbrush).
>
> OR
>
> b) Their income is so extremely low that they are unable to purchase these essentials for themselves.[54]

This definition tries to capture a situation so desperate that a family or person is unable to afford the absolute essentials that allow them the basic and minimal subsistence.

It should also be noted that there is a legal definition of the term "destitute" that specifically applies to asylum seekers. Under s.95(1) of the Immigration and Asylum Act 1999 the Secretary of State may provide support for asylum seekers and their dependants who are destitute or are likely to become destitute within the prescribed period[55]. Section 95(3)-(4) defines destitute:

> (3) For the purposes of this section, a person is destitute if—

[54] S. Fitzpatrick et al., 'Destitution in the UK' The Joseph Rowntree Foundation, April 2016 at 2. Found at: https://www.jrf.org.uk/report/destitution-uk

[55] Regulation 7 of the Asylum Support Regulations 2000 defines that period as 14 calendar days beginning with the day on which that question is to be determined.

(a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); or
(b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs.

(4) If a person has dependants, subsection (3) is to be read as if the references to him were references to him and his dependants taken together.

Section 98 of the Immigration and Asylum Act 1999 allows support to be granted to those who are awaiting a decision under s.95(1). Where an asylum seeker's claim has failed, they may apply for support under s.4 of the 1999 Act. In order to qualify for this support, they must meet the criteria outlined in ss.3(1)-(2) of the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005, which is the same as that outlined above. For the purposes of this thesis, the definition is not particularly relevant, but for the sake of completeness, it should be acknowledged. It is also interesting to note how much narrower this test is than that provided by the Joseph Rowntree Foundation. The 2016 report by the JRF discovered that:

> Using the results of our survey to adjust for consistency a secondary data-based national predictive index, we estimated that there were at least 184,500 households destitute and in touch with voluntary sector crisis services in a typical week in the UK in 2015. Our annual estimate, subject to additional provisos, is that 668,000 households, containing 1,252,000 people, of whom 312,000 were children, were destitute and in contact with these services during 2015. Both these weekly and annual estimates are conservative, based on a strict application of our definition and focused exclusively on those cases that come to the attention of voluntary sector crisis services.[56]

An updated version of the report, published in mid-2018, indicates the numbers have worsened since then[57]:

> We estimate that approximately 1,550,000 people, 365,000 of them children, were destitute in UK at some point in 2017. This estimate focuses exclusively on people in touch with crisis services whose

[56] *Supra* n.54 at 2-3.
[57] The report states that destitution has declined 25% since 2015, however the numbers confusingly do not seem to indicate this is the case.

> circumstances fitted a strict definition of destitution [at footnote 54]… While some groups of migrants face disproportionate risks of destitution, 75% of those destitute in the UK in 2017 were born here. The highest risks of destitution are faced by single men aged under 35. Destitution or severe poverty are both extremely rare in the 65-plus age group. Two-thirds of destitute households live in their own house or flat, with the remaining one-third staying in some form of temporary or shared accommodation or sleeping rough. Most of those with their own *accommodation live in social housing (60%)*, 35% are in the private rented sector, while home-ownership is a rarity (3%). Destitution is clustered in northern cities with a history of de-industrialisation, and in several London boroughs. [emphasis added][58]

As this report indicates that 60% of the destitute households live in social housing, the thesis would be incomplete without a consideration of destitution as a separate status, apart from poverty. It is to be expected that those in social housing are likely to be poor, or unemployed or perhaps both, but the idea that people can be housed and still destitute is rather discouraging. The study also found that:

> Disability and ill-health are common complicating factors. Housing Benefit restrictions mean that people have to 'top up' rental payments from their (already inadequate) subsistence benefits, intended to cover other necessities, such as food and fuel.[59]

This suggests that those who would be likely to be considered vulnerable in terms of this thesis might find themselves in a worse position financially because of their particular physiological or mental illness. In fact, health problems of some variety were the second most reported type of issue (43% mentioned these) that respondents listed as a potential route into destitution. Mental health issues were the most commonly cited (34% versus 21%) within the subset of health issues[60].

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58 S. Fitzpatrick et al., 'Destitution in the UK' The Joseph Rowntree Foundation, February 2018 at 2-3. Found at: https://www.jrf.org.uk/file/51558/download?token=SasLBzPB&filetype=full-report

59 *Supra* n.58 at 3.

60 *Supra* n.58 at 27.

Another factor specifically mentioned was 'eviction and housing problems'[61], meaning that housing is playing a role, as is vulnerability in the likelihood for a person (or household) to end up destitute. One quoted respondent specifically mentions the 'Bedroom Tax' (from the Welfare Reform Act 2012)[62]:

> "I'm making up the rent arrears, as well as paying Bedroom Tax, which is £17 a week. Straight away £44 goes out of our benefits to Bedroom Tax and arrears…. We moved into the food bank a few weeks ago…. The reason why we started going was because I'd been really poorly and hospitalised, and then I moved away...for six months to a residential programme to recover. I had my PIP [Personal Independence Payment] stopped, and we can barely afford to get by, we couldn't afford to live... we're paying this Bedroom Tax…It was just all a nightmare…"
> Female, 25–45, UK-other[63]

As this thesis examines both the legal framework of social housing and the impact of changes to certain groups, including the vulnerable, the inclusion of destitution as well as poverty in the definitions and discussion seems not just academically rigorous, but vital to the understanding of the situation that has been created by housing policy in England today[64].

Defining Fairness

The definition of fairness can be problematic. On the one hand, fairness can mean equality and on the other it can mean being just or appropriate yet acting a manner that is equal is not necessarily just or appropriate. A paper on this subject defined fair and fairness in a more nuanced way, breaking the meaning down into three closely related statements:

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61 *Ibid*.

62 Social tenants lose part of their housing benefit for any empty bedroom in their property. The "bedroom tax" was introduced by the Regulation B13 of the Housing Benefit Regulations 2006 (SI 2006/213), and the Welfare Reform Act 2012 s.11 coupled with The Housing Benefit (Amendment) Regulations 2012 (SI 2012/3040) s.5.

63 *Supra* n.58 at 29.

64 The 2018 report specifically mentions restrictions to housing benefits, the welfare reform since 2010 as potential causes to destitution.

1) Fairness is about equality — a fair division of a cake is an equal division.
2) Fairness is about proportionality — a fair allocation (say, of tax obligation) is a proportionate allocation (say, proportionate to ability to pay).
3) Fairness is about proportionality to action (desert) — a fair allocation is one in which people receive in proportion to what they have done (punishment to bad action; reward to good action, effort, length of work, contribution to success of an enterprise, etc.).[65]

Within these definitions, there is the issue of an inherent contradiction between the meanings, which the author acknowledges:

> This is an area of interesting clash between the proportionate desert and equality concepts of fairness. For there to be proportionate desert, there must be inequality.[66]

There is some indication that public perception of the term "fair" is significantly less nuanced and is intermingled with the idea of deserving. An empirical study on fairness by YouGov discovered that public opinion on fairness also indicates that the third statement above, on proportionality to action (or the proportionate desert), is strongly favoured over equality:

> The majority of people think that fairness is mainly a question of people getting what they deserve, rather than being about equal treatment. This is true of voters of all the main parties. 63% of people say that "fairness is about getting what you deserve", while just 26% say that "fairness is about equality". In other words, people's idea of fairness is strongly reciprocal – something for something.[67]

It is this type of definition, based on deserving that is more closely in line with the term discussed here. Fairness will be discussed in Chapter 4.

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65 A. Lilico, 'On Fairness' The Policy Exchange Research Note February 2011 at 5. Found at: http://www.policyexchange.org.uk/publications/category/item/on-fairness-2?category_id=24

66 *Ibid* at 30.

67 N. O'Brien, 'Just Deserts? Attitudes towards Fairness, Poverty and Welfare Reform' The Policy Exchange Research Note April 2011 at 1. Found at: http://www.policyexchange.org.uk/images/publications/just%20deserts%20-%20apr%2011.pdf

Defining Deserving and the Concept of Desert

Deservingness is usually thought of in terms of being worthy, or related concepts such as merit. However, these definitions are overly simplistic. All of them consider being deserving to mean "deserving of a reward" with also acknowledging that it could just as easily mean "deserving of a punishment". For example, if someone commits a murder, they are deserving of a penalty for that crime (in whatever form is considered acceptable in that society). So, it is as much possible to be deserving of a reward, there must be at least a basic realisation that a person can also deserve punishment, or some form of negative consequence of an action. However, this thesis will be mainly considering the idea of being deserving as a reward.

Deservingness also has close ties to a concept found in philosophy: desert. The Stanford Encyclopedia of Philosophy explains the concept of philosophical desert as follows:

> The concept of desert is deeply entrenched in everyday morality. We say that effort deserves success, wrongdoing deserves punishment, innocent suffering deserves sympathy or compensation, virtue deserves happiness, and so on. We think that the getting of what's deserved is just, and that failure to receive what's deserved is unjust. We also believe it's good that a person gets what she deserves, and bad that she doesn't — even if she deserves something bad, like punishment. We assume, too, that it's wrong to treat people better or worse than they deserve, and right to treat them according to their deserts. In these and other ways, the notion of desert pervades our ethical lives.[68]

In order to see how this concept of desert is linked with deservingness, it is necessary to deconstruct desert into its parts:

> Consider some ordinary desert claims:
>
> - Hans deserves praise in virtue of his efforts.

[68] O. McLeod, 'Desert', The Stanford Encyclopedia of Philosophy (Fall 2008 Edition), Edward N. Zalta (ed.). Found at: https://plato.stanford.edu/archives/fall2008/entries/desert/

- Because of her outstanding scholarly contributions, Nkechi deserves promotion to full professor.
- Financial compensation is what the innocent victims of September 11 deserve.

These desert claims have several things in common: each involves a deserving subject (Hans, Nkechi, innocent victims), a deserved object (praise, promotion, compensation) and a desert basis (effort, contribution, innocent suffering). This suggests that desert itself is a three-place relation that holds among a subject, an object, and a basis.[69]

In other words, desert is made up of three component parts. Firstly, the subject who is usually a person[70], and for the purposes of this thesis will be considered as a person or a family unit (i.e. a household). Secondly, is the object (a desert) given to this person or family as a reward or punishment, as Feldman and Skow state:

> Desert claims also typically involve a desert. This is the thing that the deserver is said to deserve.[71]

In terms of this thesis, the desert, or object, will be a social housing tenancy. Finally, there is a basis for this action, a reason that the person is receiving this object, which in this thesis is to do with fairness. The first two components will be considered in more detail in Chapters 3 and 4, the final one is considered in Chapter 4.

The Subject: Who is Worthy?

There are basic ideas of deservingness and desert on which most people agree, as Kagan states:

> Some people are more deserving than others. That is, we can rank people (at least, in principle) in terms of how deserving they are: some are more deserving, and others less so. Somewhat more precisely, people differ in terms of their moral worth, and by virtue

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69 *Ibid*.

70 Although it is possible for an object to be deserving, the debate on this subject is far beyond the remit of this thesis.

71 F. Feldman et al., 'Desert – 3. Deservers, Desert, and Desert Bases', The Stanford Encyclopedia of Philosophy (Winter 2016 Edition), Edward N. Zalta (ed.). Found at: https://plato.stanford.edu/entries/desert/#Bases

> of those differences in moral worth they differ as well in terms of what they deserve.[72]

An example of this type of thinking can be applied to way the public view welfare. As previously stated, the public view of state-funded aid to the poor is partly affected by the giver's perceptions of the recipient:

> ... characteristics of the recipient of aid, particularly whether that person is or is not perceived as a deserving member of society, are also key determinants of prosocial reactions.[73]

In other words, many people would like to see only people who deserve it get aid from the government if they are poor. This seems like a straightforward idea that most people would find agreeable; public money should go to those who deserve it, those who are considered worthy.

However, this basic principle that those who are worthy being deserving of a reward is not without fundamental issues of definition:

> We can agree, perhaps, that your "moral worth" determines your level of desert, but it isn't at all obvious what, exactly, affects your level of moral worth. Is it, for example, a matter of your intentions? Your motives? Your character traits? Are your fantasies relevant, or only acts of will? Does your moral worth depend, at least in part, on what it is that you do? Does it make a difference whether you succeed or fail? Is effort all that counts?[74]

When discussing state aid the two concurrent studies by Applebaum[75] concluded that responsibility and fault seem to affect the type of aid considered as appropriate[76]. This means there is generally a relationship between who is considered worthy of state aid and the subject's personal responsibility for their poverty. Responsibility for poverty in these studies looked at three different scenarios:

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72 S. Kagan, *The Geometry of Desert*, Oxford University Press 2012 at 5.

73 B. Weiner et al., 'An Attributional Analysis of Reactions to Poverty: The Political Ideology of the Giver and the Perceived Morality of the Receiver' (2011) 15(2) Personality and Social Psychology Review 199 at 209.

74 *Supra* n.72 at 6.

75 L. Appelbaum, 'The Influence of Perceived Deservingness on Policy Decisions Regarding Aid to the Poor' (2001) Vol. 22, No. 3 Political Psychology 419 at 431.

76 *Ibid* at 437-438.

> The case files offered one of three agents of responsibility for the target's poverty: The target was individually responsible for his or her poverty (e.g., the target was offered a job, but decided not to take it); society was responsible for his or her poverty (e.g., the target was fired because of budget cutbacks) …; or a sociocultural explanation was offered (e.g., the target had no role models and as a result never learned the appropriate behavior to keep a job, for instance, arriving at work on time)…[77]

The 2018 British Attitudes Survey concluded that just over half (56%)[78] of the public felt "that most unemployed people could find a job if they really wanted to, compared with less than a fifth (18%) who disagree"[79]. Additionally, many people consider those living in poverty to be, at least, partly responsible for their situation[80], and therefore likely to be considered less worthy. It is possible the widespread misconceptions about poverty and the media hype about "scroungers" mentioned previously have contributed to this public belief[81] and shaped policy in the area of social housing. This is because the views of the wider public, as previously discussed, link directly to policies enacted, and there is clear evidence that such a belief is fairly widespread.

Deservingness in terms of social housing will be considered in detail in Chapter 3, this section has more aimed to highlight the issues with such definitions and how a seemingly simple statement such as "only those who deserve it should get a reward" is much more nuanced and problematic than it first appears.

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77 *Supra* n.75 at 433.

78 *Supra* n.46 at 15.

79 *Ibid*.

80 E. Clery, 'Public attitudes to poverty and welfare, 1983 - 201: Analysis using British Social Attitudes data' report prepared for the Joseph Rowntree Foundation, April 2013 at 18. Found at: http://www.natcen.ac.uk/media/137637/poverty-and-welfare.pdf

81 D. Maddox, 'Tough benefits cap stops scroungers claiming thousands of pounds' The Express, 3 February 2017. Found at: https://www.express.co.uk/news/uk/762423/benefits-caps-cheats-stop-success-household-claims-department-for-work-and-pensions

The Object: Housing as a Reward

The concept of desert also involves an object, or reward, that the subject deserves[82]. This could be a positive reward, such as praise, a prize or compensation (to link to the examples from footnote 69), but could also be a negative punishment or consequence such as a fine, time in prison or a low mark. Some moral philosophers take the formulation of an object further than material things and into the more conceptual areas of happiness (or conversely unhappiness):

> Some hold that greater virtue[83] means only that you deserve greater praise, or perhaps greater admiration. (Similarly, greater vice might mean that you deserve more blame, or condemnation.) But many people, I imagine, will be drawn to the thought that those who are more deserving literally deserve to be better off. That is, according to this widely accepted view, the relevant reward magnitude is well-being.[84]

When applied specifically to the subject at hand, the idea of being housed, having a home (a social tenancy) contributes to the well-being of those who receive one. Therefore, for the purposes of this thesis, the desert (a social housing tenancy) will be considered to be a reward, because a social tenancy is a positive that contributes to the wellbeing of an applicant (and their family). However, this begs the fundamental question: should being housed be considered a reward?

Housing is considered by the United Nations[85] to be a basic human right[86], it was also enshrined in the International Covenant on Economic, Social and

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82 Paraphrased from *supra* n.71.

83 Kagan uses the term "virtue" because he believes that "virtue does in fact constitute at least a large part of the basis for desert". However, he also stipulates that he is using this term as a slight oversimplification: "when I write about someone being at a higher or lower level of virtue (or vice) I simply mean someone with a higher or lower level of whatever it is that constitutes the correct basis of someone being more or less deserving." See *supra* n.74 at 6-7.

84 *Supra* n.74 at 8.

85 The United Nations has also included housing in their Convention on the Rights of the Child Article 27(3). Found at: https://www.ohchr.org/en/professionalinterest/pages/crc.aspx

86 Article 25 of the United Nations Universal Declaration of Human Rights. Found at: http://www.un.org/en/universal-declaration-human-rights/

Cultural Rights[87] to which the United Kingdom is a signatory. The UN Committee on Economic, Social and Cultural Rights also "underlined that the right to adequate housing should not be interpreted narrowly"[88]. Despite there being no specific Article enshrining this right into the European Convention on Human Rights (ECHR), there have been areas where the ECHR has been successfully engaged in English courts for the purposes of housing[89]. For example, the case of *R (ex parte Bernard) v Enfield London Borough Council*[90], a severely disabled woman who could not access most of the property or the bathroom, which left her doubly incontinent, was considered to be a breach of Article 8, with Sullivan J. stating:

> I accept the defendant's submission that not every breach of duty under section 21 of the 1948 Act will result in a breach of Article 8. Respect for private and family life does not require the state to provide every one of its citizens with a house: see the decision of Jackson J in Morris v LB Newham [2002] EWHC 1262 (Admin) paragraphs 59 to 62. However, those entitled to care under section 21 are a particularly vulnerable group. Positive measures have to be taken (by way of community care facilities) to enable them to enjoy, so far as possible, a normal private and family life.[91]

This decision was reviewed and affirmed by the Court of Appeal in *Anufrijeva and another v Southwark LBC*[92]. Generally, however, these cases turn on very individual circumstances and even the most unfavourable situation might not see a breach of Article 8[93]. As Sullivan J. stated, Article 8 of the ECHR does not require the state to house all its citizens. So, there is a tension between the idea

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87 Article 11(1). Found at: https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx

88 United Nations, 'Fact Sheet No. 21(Rev 1): The Right to Adequate Housing' at 3. Found at: https://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf

89 Most specifically Articles 3 and 8, see: *Anufrijeva and another v Southwark LBC; R (on the application of N) v Secretary of State for the Home Department; R (on the application of M) v Secretary of State for the Home Department* [2003] EWCA Civ 1406. This case specifically involved families and the welfare of children.

90 [2002] EWHC 2282 Admin.

91 *Ibid* at [32].

92 *Supra* n.89 at [43].

93 See: *R (on the application of McDonagh) v Enfield LBC* [2018] EWHC 1287 (Admin) where the court held there was no breach of Article 8 by the authority where a disabled young man could not use the toilet or bathroom in his accommodation for more than two years.

of housing as a fundamental right and the reality, which is that housing can be a right, but it is not guaranteed. If one can agree that housing is considered generally necessary for most people, there is still an issue of something so basic and necessary being used as a desert/reward for citizens considered to be deserving.

The Issues within the Context of Housing

There is a fundamental issue of using deservingness in the context of housing because both deservingness and the concept of desert have intrinsic ties to concepts of justice. As Mill states:

> …it is universally considered just that each person should obtain that (whether good or evil) which he deserves; and unjust that he should obtain a good, or be made to undergo an evil, which he does not deserve. This is, perhaps, the clearest and most emphatic form in which the idea of justice is conceived by the general mind.[94]

Therefore, a desert becomes not only about what a person deserves but their treatment becomes linked to wider concepts of justice, of fairness, of societal notions of right and wrong. When coupled with social housing outcomes, the system becomes problematic because applying morality and justice to applicants leads to a number of issues. Firstly, that the applicant themselves will have their character scrutinised for worthiness, and virtue, making them a subject of a subjective, moral judgment rather than one based in law. Secondly, that the provision of housing is not a norm, it is a reward. And finally, it normalises such use. In other words, using concepts of worthiness and rewarding the deserving with a housing tenancy is just, right, and fair. Whether one is comfortable with the first, the second and third should give pause.

[94] J.S. Mill, *Utilitarianism* Third Edition, Longman, Green, Reader and Dyer 1867 at 66-67.

Regardless of housing as a basic human right, it is a basic human need. There is plenty of research demonstrating issues of being homeless[95]. For example, in a survey, 63% of street homeless interviewed felt that safety and violence were the biggest problem facing rough sleepers[96]. According to another study carried out for Crisis 77% (353 out of 458) respondents had been a victim of anti-social behaviour or crime in the past year[97]:

> ... almost half (45%/206) of current or recent rough sleepers surveyed said they had been intimidated, or threatened with violence or force. Thirty per cent (31%/141) had had things thrown at them and in seven per cent (33) of cases rough sleepers had been urinated on. ... Members of the public, who the survey respondents did not know, were the leading perpetrators of incidences of violence and abuse.[98]

For people in temporary accommodation, it tends to be more indirect issues that affect their health and wellbeing, as opposed to direct physical violence. Research conducted by Shelter found:

> Almost half (49 per cent) of households said that their health had suffered due to living in temporary accommodation. More than half (56 per cent) said that they were suffering from depression. The survey results show that the longer respondents have been living in temporary accommodation, the greater their health problems become and the worse they feel their health has become as a result of living in temporary accommodation.[99]

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[95] Homelessness is a spectrum. The most extreme version is street homelessness, also called sleeping rough, but there are other forms such as "sofa surfing" and living in temporary accommodation such as hostels, bed and breakfasts, or night shelters.

[96] B. Rice et al, 'Reaching Out' Prepared for Shelter with data collected by Shelter, and Broadway at 18-19. Found at: http://england.shelter.org.uk/__data/assets/pdf_file/0019/66412/1385_Reaching_Out_report_FIN_Lo.pdf

[97] B. Saunders et al., '"It's no life at all" Rough sleepers' experiences of violence and abuse on the streets of England and Wales' Prepared for Crisis December 2016 at 6. Found at: https://www.yhne.org.uk/wp-content/uploads/Its-no-life-at-all.pdf

[98] *Ibid*.

[99] F. Mitchell, 'Living in Limbo - Survey of Homeless Households Living in Temporary Accommodation' Report prepared for Shelter, June 2004 at 22. Found at: http://england.shelter.org.uk/__data/assets/pdf_file/0012/40116/Living_in_Limbo.pdf

This is especially true of children in temporary accommodation whose physical and mental health suffer in temporary accommodation[100]. In a recent empirical study, Shelter found that 90% of parents reported their children had suffered because of being housed in temporary accommodation[101].

With this is mind, the idea of housing as a reward for virtuosity, and that somehow this outcome is desirable, that is it justice that the system works in this way should give one pause. This is the basic issue of using the concept of desert with housing. The blanket statements people generally agree with about deserving rewards, become a more problematic and nuanced argument about morality, justice and societal norms than about the issues of people needing a place to live. That, in itself, is cause for concern.

Defining Vulnerability

Vulnerability is a very general term, but has a specific use and meaning within the legal framework when one is considering access to social housing. In terms of this thesis, vulnerability should really be read as "vulnerable with regards to access to social housing", but for brevity it will simply be shortened to vulnerable, or vulnerability.

> Considering the ubiquity of the term "vulnerable", one would presume that it had a clear-cut definition that was widely understood. However, this seems not to be the case. For a start, the term is used across several different legal disciplines and in a number of different ways, for example in terms of medical law, it can refer to someone who lacks capacity[102].

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100 Shelter, ''We've got no home': The experiences of homeless children in emergency accommodation' December 2017 at 1. Found at: https://england.shelter.org.uk/__data/assets/pdf_file/0008/1471067/2017_Christmas_investigation_report.pdf

101 S. Credland, 'Sick and tired - The impact of temporary accommodation on the health of homeless families' Report prepared for Shelter, December 2004, at 13. Found at: http://england.shelter.org.uk/__data/assets/pdf_file/0009/48465/Research_report_Sick_and_Tired_Dec_2004.pdf

102 See the Mental Capacity Act 2005.

Even within the confines of housing law, the definition of the term is also problematic as there are various groups that could be defined as "vulnerable" and there is no unambiguous definition of the term given in housing-related statute. Being able accurately to identify groups or individuals who are vulnerable is vitally important:

> Theorizing and then identifying vulnerability allows us to focus explicitly, and therefore carefully, on the identification of situations or contexts in which vulnerability justifies a social response. That is a question of policy.[103]

Because vulnerability and discussions of it are limited to Chapter 6, a fuller definition discussion, both for the legal and social concepts of vulnerability, can be found there.

Conclusion

This chapter has considered how important social housing is to our society and how, when it fails, people end up poorer or homeless.

Social housing is important, as Terrie Alafat, the Chief Executive of the Chartered Institute of Housing, stated:

> The role of social housing is absolutely crucial. It provides a home for people who cannot otherwise access one, something which in the midst of our housing crisis is as important as ever.[104]

The publication of the government Green Paper[105], and the cross-party Shelter report[106] on social housing makes this thesis timely and topical. Former Prime

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[103] I. Hall, 'Mental Capacity in the (Civil) Law: Capacity, Autonomy, and Vulnerability' (2012) 58:1 McGill Law Journal 61 at 92.

[104] T. Alafat, 'We must ensure social housing is a central pillar of society' Inside Housing Comment 26 June 2018. Found at: https://www.insidehousing.co.uk/comment/comment/we-must-ensure-social-housing-is-a-central-pillar-of-society-56900

[105] Ministry of Housing, Communities & Local Government, 'A new deal for social housing' August 2018, CM9671. Found at: https://www.gov.uk/government/consultations/a-new-deal-for-social-housing

[106] Shelter and the Shelter Commission on the Future of Social Housing, 'Building Our Future - A Vision for Social Housing' January 2019. Found at: https://england.shelter.org.uk/__data/assets/pdf_file/0005/1642613/Shelter_UK_-_A_vision_for_social_housing_full_interactive_report.pdf

Minster Theresa May vowed personally to solve the housing crisis[107] and May's government pledged to halve the number of rough sleepers by 2022 and eliminate the problem entirely by 2027[108], although it is unclear if Boris Johnson's newly elected government intends to honour this pledge. His comments in the Queen's Speech of December 2019 outlined changes to landlord and tenant rights, but omitted mention of homelessness or social housing. However, this area of law and policy is still part of an ongoing debate about the welfare state and the solution to the growing problems with lack of social housing stock, benefit reform, and homelessness.

[107] J. Watts, 'Theresa May promises to personally solve UK housing crisis' The Independent, 15 November 2017. Found at: https://www.independent.co.uk/news/uk/politics/theresa-may-housing-crisis-mission-latest-uk-shortage-crisis-homes-a8057046.html

[108] Government Press Release: 'Government to lead national effort to end rough sleeping' 30 November 2017. Found at: https://www.gov.uk/government/news/government-to-lead-national-effort-to-end-rough-sleeping

Chapter 2

An Introduction to Social Housing and the Legal Framework

This chapter aims to explain the complicated area of social housing. Initially, it will consider the importance of social housing. It will look at the main statutes to give the reader a fair grounding in the legal framework. To achieve this, it will examine both the statute and the case law in detail, including recent changes such as the Homelessness Reduction Act 2017. Finally, it will consider behavioural orders, as they too have a place in determining eligibility for social housing.

Why Social Housing Matters

Social housing is generally seen as the tenancy of last resort[1], yet it is an absolute necessity in England today. For a start, the rents of social housing are significantly lower, as a Shelter report states:

> Social housing is designed to be affordable for those who need it, including people on low incomes and those who rely on benefits…[2]

The reason that the social sector is such a necessity is a culmination of factors that have led to higher housing costs, and an explosion of private rented tenancies thus higher private rents. The cost of housing has risen faster than

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1 See the comments of Stuart Davies, the divisional director at Sovereign Housing to The Chartered Institute of Housing, found at: http://www.cih.org/news-article/display/vpathDCR/templatedata/cih/news-article/data/Social_housing_must_not_be_seen_as_a_place_of_last_resort
See also, Sebert Cox's comment piece for Inside Housing, found at: https://www.insidehousing.co.uk/comment/comment/social-housing-is-tarnished-as-a-term-so-lets-avoid-the-labels-62835

2 Shelter and the Shelter Commission on the Future of Social Housing, 'Building Our Future - A Vision for Social Housing' January 2019 at 43. Found at: https://england.shelter.org.uk/__data/assets/pdf_file/0005/1642613/Shelter_UK_-_A_vision_for_social_housing_full_interactive_report.pdf

incomes[3] this is partly due to a lack of supply, which has led to several changes to the way people in England are housed:

> For decades, not enough housing of any type has been built in England to keep up with the growing population. Along with other factors, more competition for the homes that are available has driven up house prices. It has made buying a home unachievable for more and more people. And it has made life very difficult for many on low incomes.[4]

In fact, the cost of buying an average house was 8 times the average wage in 2017, in 1997 it was 3.5 times the average wage[5]. This has led to a decline in home ownership with more and more people unable to afford either a deposit or a mortgage. According to Shelter, by 2016/17 the rate of homeownership had dropped to 63%, from a peak of 71% in 2003[6]. This decline has led, in turn, to a rise in the private rental sector (PRS):

> The number of households renting privately more than doubled over the twenty years from 1997 to 2016/17, rising from 2.1 million households to 4.7 million.10 This has prompted a generational shift in the way people in England are housed. … As fewer people are able to move into home ownership or social housing, households renting privately are increasingly older, and families with children. In just the time since 2003, the proportion of families living in a private rented home has trebled – a quarter of all families now rent privately.[7]

The expansion of the private rented market has led to higher rents in the sector, with the amount of government subsidies being spent more than doubling from £4 billion to over £10 billion in a decade (to 2011/12)[8]. Housing costs for the PRS has left many struggling, with 41% of household income

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3 *Supra* n.2 at 38 and 74.
4 *Supra* n.2 at 37.
5 *Supra* n.2 at 74.
6 *Supra* n.2 at 74.
7 *Supra* n.2 at 77 and 79.
8 *Supra* n.2 at 79.

being spent on private rents[9]. In fact, some tenants are having to cut back in other areas:

> No wonder then that the majority (57%) of private renters say they struggle to cover housing costs. This compares to 40% of social renters and 42% of owner-occupiers. Almost two-thirds of private renters have no savings at all, meaning they have no economic security and are unlikely to be able to afford unexpected rent increases. Some cut back elsewhere – one in five private renters cut back on food to pay the rent.[10]

There are also issues with access for those on low incomes in the private sector, according to Clarke et al. for the Joseph Rowntree Foundation:

> There are also problems of access. While the growth in the private rented sector ought, in principle, to present growing opportunities for people to find a new home, this is not always the case for low-income households. Recent research found that 'half of all local authorities, and virtually all in London, described it as "very difficult" to assist their applicants into private rental tenancies. These difficulties were attributed to the combined effects of rising rents and welfare benefit restrictions, particularly frozen Local Housing Allowance rates'…[11]

Therefore, it is unlikely that those on very low incomes will be unable to afford private rents, with a study by Shelter discovering that in 67% of the country, a low-wage household could not afford the private rent on a "typical home"[12] without housing benefit[13]. This makes social housing a necessity for many low-income groups. This is especially true for those on benefits who face

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9 Compared with 31% for social renters and 19% for mortgages. Ministry of Housing, Communities and Local Government, 'English Housing Survey, Headline Report, 2016-2017' January 2018 at 16. Found at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705821/2016-17_EHS_Headline_Report.pdf

10 *Supra* n.2 at 38.

11 A. Clarke et al., 'Using incentives to improve the private rented sector: three costed proposals' The Joseph Rowntree Foundation, March 2018 at 2. Found at : https://www.jrf.org.uk/report/using-incentives-improve-private-rented-sector-three-costed-proposals

12 The report refers to this as an "average two bed private rent".

13 Shelter, 'Private renting unaffordable for working families on low wages in 67% of the country' posted 09 July 2019. Found at: https://england.shelter.org.uk/media/press_releases/articles/private_renting_unaffordable_for_working_families_on_low_wages_in_67_of_the_country

discrimination in the private rented sector. A report by Shelter and the National Housing Federation states over four in ten (43%) of private landlords have an outright ban with another six in ten (60%) saying they preferred not to rent to tenants on housing benefit[14]. In other words, a lack of supply, rising costs in the private rented sector will see those on the lowest incomes priced out of the market completely, and even if an applicant found an appropriately priced property, there is discrimination against those on housing benefits. This means that for some renters, housing in the private sector is completely unattainable, making social housing essential.

This is similarly the case with "affordable housing", which is classed as social housing but allows authorities to charge up to 80% of the market rent. According to Shelter:

> Since 2011, rather than only funding social housing, the new definition of 'affordable housing' has broadened what government funds, so that it now includes less affordable tenures such as shared ownership and 'affordable rent' – as well as traditional social housing at social rents. These rents are not affordable. 'Affordable rents' for typical two-bed properties work out at 30% more expensive than social rents, amounting to £1,400 more per year on average. As pointed out by organisations such as SHOUT, the London Tenants Federation, and Levitt Bernstein, these rent levels are completely out of reach for most people who are eligible for social housing.[15]

This means that social housing of the more traditional type is the only solution for certain households on low incomes.

Further, access to social housing has become increasingly restricted as stock has dwindled, according to Shelter:

> …as the number of social homes has reduced, new social lettings have become restricted – meaning that only a small proportion of

[14] Shelter and National Housing Federation Report, 'Stop DSS Discrimination Ending prejudice against renters on housing benefit' August 2018 at 9. Found at: https://england.shelter.org.uk/__data/assets/pdf_file/0009/1581687/Stop_DSS_Discrimination_-_Ending_prejudice_against_renters_on_housing_benefit.pdf

[15] *Supra* n.2 at 95.

> those who need a social home get one. Last year only 177,166 households moved into social housing. Of whom 30% had been homeless. The rest were either renting privately, living with family or in another housing set-up.[16]

The statistics for social lettings have flattened out from a nearly continuous fall, according to the Ministry of Housing, Communities and Local Government report:

> In 2018/19, there were 314,000 new social housing lettings, a 0.3% or 1,000 lets increase from the previous year. This flattening in the trend ends the continued fall from the peak of 396,000 new social housing lettings in 2013/14 (a 21% decrease). New social housing lettings comprise part of the social rental sector:
>
> - Only 8% of the 4.1 million social properties in England were let to new tenants during the year.
> - Only 8% of the 4.0 million households in social housing in 2018/19 were in a new letting (i.e. moving into the sector or transferring/renewing an existing tenancy).
> - 17% of households in England live in social housing as a whole[17]

There is also a downward trend in the number of people accessing social housing:

> The 314,000 households with a new social housing letting in 2018/19 equated to approximately 564,00 people – or 1 in 97 people in England. The number of tenants entering social housing has decreased by more than 162,000 (22%) since 2014/15.[18]

There have been decreases in terms of homeless and tenants who were previously in temporary accommodation in new social housing:

> Around 7,000 households were rough sleeping immediately prior to their new social housing letting (2% of all lettings in 2018/19), with another 35,000 in temporary accommodation (11%) and 67,000 living with friends and family (21%). Over the past decade:

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16 *Supra* n.2 at 37.

17 Ministry of Housing, Communities and Local Government, 'Social Housing Lettings: April 2018 to March 2019, England' Responsible Statistician: Rachel Worledge, January 20 2020, at 3. Found at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/861471/Social_Housing_Lettings_in_England_April_2018_to_March_2019.pdf

18 *Ibid* at 12.

- The total number of households getting new social housing letting in the year fell by 67,000.[19]

These statistics demonstrate more accurately the picture of accessing social housing, which has fallen over the last decade, but shows some signs of flattening out in the latest numbers. This might indicate that there are changes in this sector, but without more information it is too early to tell. However, access to social housing has become increasingly difficult for all potential new tenants.

The Housing Act 1996

This Act is one of the main pieces of legislation that concerns access to social housing. There are several different duties that a local authority might owe to applicants in terms of housing. This can range from no duty, or a minimal duty of offering some advice and assistance all the way to offering a secured tenancy in a vacant property. The advice or assistance most often takes the form of free literature on the prevention of homelessness[20], use of the council premises[21], or appropriate steps that an applicant might take. The type of duty owed will depend on the applicant. Should the applicant meet the stringent statutory tests laid out in the Housing Act 1996[22].

Where a housing authority thinks that a person is homeless or is threatened with becoming homeless, they can undertake a Part 7 (of the Housing Act 1996) Assessment[23]. In order to qualify for the greatest duty by the local authority, often referred to as a main housing duty under s.193 of the Housing Act 1996[24], the applicant must be eligible for assistance, homeless, possess a local connection, be in priority need and not be intentionally homeless[25]. These

[19] *Ibid* at 14.
[20] This duty is by virtue of s.179(1) of the Housing Act 1996.
[21] S.179(3) of the Housing Act 1996.
[22] And other Acts that amend it.
[23] S.184 Housing Act 1996.
[24] Offers made under s.193 are referred to as a Part 6 offer of accommodation.
[25] S.193 Housing Act 1996.

prerequisites for the greatest housing duty are very similar to those from the Housing (Homeless Persons) Act 1977, which required an applicant to be homeless, or threatened with homelessness as defined in s.1 of the Act. Applicants also had to be in priority need, defined in s.2, and not be intentionally homeless, as defined by s.4(2)(b). Anyone not in priority need or intentionally homeless were to be given "advice and appropriate assistance" as stated in s.4(2). Finally, s.5(1) required a local connection to the area, defined by s.18, otherwise the local authority was subject to no duty under the act. Other than the requirement of being eligible for assistance, the requirements for housing duty have not really changed, with certain areas being repeated with some additions but very few changes.

For an applicant who fails one of these tests, there are other duties, but which is used depends on which test was failed. An applicant who is in priority need but intentionally homeless, therefore failing the "not intentionally homeless" criterion, s.190(2) requires the local authority to provide short term accommodation. If an applicant is homeless and in apparent priority need, s.188(1) requires the local authority to provide temporary accommodation while the authority decides if the applicant is owed a further duty under Part 7. If an applicant is deemed not to be in priority need, then the council must provide "advice and assistance" from s.179, as described above.

One important change in the law on Part 7 comes with the Homelessness (Suitability of Accommodation) (England) Order 2012. Section 3 of the Order does not include private accommodation, which means that homeless applicants can no longer refuse a place in private rented accommodation. Previously, applicants could choose to stay in temporary housing and wait to be put on the council tenant list.

Eligible for Assistance

Sections 185-186 of the Housing Act 1996 outline what is meant by "eligible for assistance". The basic rule is British and Irish citizens who have not lived aboard in the past two years are automatically eligible[26].

S.185(2) specifically excludes "persons from abroad subject to immigration control"[27], this also includes anyone who is excluded from housing benefit by s.115 of the Immigration and Asylum Act 1999, s. 115(9) of the same Act also defines a person subject to immigration control.

Section 186 continues to explain that an Asylum Seeker not already excluded by s.185 is not eligible if "he has any accommodation in the [UK], however temporary...". However, it should be noted these sections do not apply to those who have been granted refugee status or nationals of an EEA state[28], meaning such individuals are still considered to be eligible and can pass a Part 7 assessment where the other criteria are met.

Homeless

Homelessness is defined in s.175 of the Housing Act 1996 with ss.176-178 acting as supplementary definitions of terms in s.175. This section has recently been amended and has an additional subsection from the Homelessness Reduction Act 2017 that covers those who are threatened with homelessness.

Requiring a person to have accommodation which is "reasonable for him to continue to occupy" from s.175(3) was considered by the Court of Appeal in *Maloba v Waltham Forest*[29] where the claimant, a British citizen, had accommodation in Uganda and was therefore ruled as not being homeless.

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[26] Although, be aware of the Localism Act 2011 on prescribing classes of applicant.

[27] Defined in s.13(2) of the Asylum and Immigration Act 1996 as "a person who under the 1971 Act requires leave to enter or remain in the United Kingdom (whether or not such leave has been given)". This is likely to change upon the United Kingdom's withdrawal from the European Union.

[28] EEA nationals are explicitly removed by s.115(9) of the Asylum and Immigration Act 1999.

[29] [2008] 1 WLR 2079.

This was dismissed by the court which held that the council had adopted an unreasonably restrictive approach by trying to interpret 175(1), specifically the provision "available in the UK or elsewhere" without considering 175(3); as Toulson LJ held:

> But that argument is a non sequitur. It conflates two separate questions—first, whether accommodation was available for the claimant's occupation and, secondly, whether it was reasonable to expect him to occupy it.[30]

The criterion "available for occupation" (in s.175(1)) is also further defined by s.176, which states that this term must also include any person who normally resides or might reasonably be expected to reside with him.

Further, the phrase "reasonable for him to continue to occupy" is defined more closely by s.177. This includes domestic and other types of violence (e.g. neighbour and racial harassment[31]) as concrete examples of accommodation it is not reasonable to continue to occupy[32]. However, the statutory definition of violence from s.177(1A) still came under judicial scrutiny in *Yemshaw v Hounslow LBC*[33] where the Supreme Court overturned the more restrictive interpretation of the word "violence" to include various types of threatening and abusive behaviour (including those in this case).

Further it was held that the test for violence remains objective (the view of the objective outsider) but applied to the particulars of the case[34] including circumstances and personalities[35]. Those escaping violence are also considered

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30 *Ibid* at [61].

31 *Hussain v LB Waltham Forest* [2015] EWCA Civ 14, where the Court of Appeal held that racial abuse and anti-social behaviour by a neighbour constituted "other violence".

32 Section 177(1A) was inserted by s.10(1) of the Homelessness Act 2002 and specifically defines "violence".

33 [2011] 1 WLR 433.

34 In the *Yemshaw* case, a married woman left the marital home for fear of being hit, although her spouse never threatened to do so. The officers decided she did not fall under s.177 as homeless because her husband had never threatened to hit her or had actually done so.

35 Paraphrased *supra* n.33 at [36].

vulnerable (and therefore in priority need – see below) by virtue of s.6 of the Homelessness (Priority Need for Accommodation) (England) Order 2002.

A Local Connection

The term "local connection" is defined in s.199 of the Housing Act 1996, but is more or less taken verbatim from s.18 of the Housing (Homeless Persons) Act 1977. It is mainly concerned with residence, education and family connections to the area (and therefore housing association) specified.

The term "normally resident" in s.199(1)(a) was considered by the House of Lords in *Mohamed v Hammersmith and Fulham LBC*[36] where the Court held that interim accommodation could constitute a normal residence for the purposes of establishing a local connection for the purposes of s.199(1)(a). The Homelessness Reduction Act 2017 has also extended the term local connection. Section 8 of the Act now includes children who are care leavers[37] as able to establish a local connection with the area in which they lived in care.

In Priority Need - Why Vulnerability Matters in Allocations

Four types of person are identified by s.189 of the Housing Act 1996 as being in priority need: a pregnant woman (and those who live with her), those with dependent children, the vulnerable and the homeless (or threatened with homelessness due to a disaster).

Other groups have been added by the Homelessness (Priority Need for Accommodation) (England) Order 2002 including children (16-17), although they cannot hold a legal estate in land. The Order also widened the term "vulnerable" by including those who are over 21 and have some form of

[36] [2002] 1 A.C. 547, see specifically Lord Slynn at [20]-[21].
[37] As defined in Section 23A of the Children Act 1989.

institutional background; those who have been fostered (s.5(1)), former members of the Armed Forces (s.5(2)), persons who have served some form of custodial sentence (s.5(3)), and those fleeing violence (s.6). Finally, the statute includes a wider and more general category in s.189(1)(c) for those who are vulnerable for "other special reason", which according to the statutory guidance should be assessed on the specific merits of each case[38]. However, the guidance also gives some (non-exhaustive) examples such as those with HIV/AIDS or AIDS-related complications, those fleeing harassment and those who have been granted refugee status[39].

The initial decision (termed "a s.184 decision") on an applicant's status as being in priority need[40] is subject to a review under s.202 of the Housing Act 1996. This review is carried out internally by the council or local authority[41], and the applicant will receive a decision[42], usually a letter, based on the s.202 decision on their status, where they are found not to be in priority need they can appeal[43] within 21 days[44]. This appeal is to a county court on a point of law under s.204(1)(b) of the Housing Act 1996. The Court of Appeal in the recent case of *Al Ahmed v London Borough of Tower Hamlets*[45] overturned the

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38 Department for Local Government and Communities, 'Homelessness Code of Guidance for Local Authorities', July 2006, at 10.30 at 91. Found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/7841/152056.pdf

39 *Ibid* at 10.32, 10.34-.35 at 91-92.

40 Section 202(1) allows for reviews of any of the criteria not just in priority need, so if the applicant has a local connection, is eligible for assistance, or is intentionally homeless as well. This section has also been amended by s.9(2) of the Homelessness Reduction Act 2017, which also allows reviews of the steps or actions to prevent homelessness or where an applicant has been notified of their unreasonable refusal to cooperate – see Sections 193B/C - Refusal to Co-operate at 31.

41 Loveland considers that the s.202 review is a misnomer as it is "in effect a de novo decision on entitlement which must take into account all currently prevailing matters". See I. Loveland, 'Changing the meaning of 'vulnerable' under the homelessness legislation?' (2017) 39(3) J. Soc. Wel. & Fam. L. 298 at 299.

42 S.203(3) of the Housing Act 1996.

43 S.204 allows for appeals and reviews of decisions beyond those on an applicant being in priority need, however, regardless of which part of a decision an applicant wishes to have reviewed, it must be on a point of law.

44 S.204(2) of the Housing Act 1996.

45 (2020) EWCA Civ 51.

judgement of the lower court. It held that, on the matter of the 21-day appeal time limit for s.204, applicants who are seeking legal aid/representation might be considered a good reason, although the exact "circumstances will need to be examined with care"[46].

It should be noted that s.3 the Homelessness Reduction Act 2017[47] requires local authorities to assess *all* eligible applicants[48] who are homeless or threatened with homelessness[49] without reference to their being in priority need or they are intentionally homeless. All applicants now must be informed in writing of the assessment that has been made[50]. However, there is still a difference between a duty to assess and a duty to accommodate. There is a history of case law surrounding what constitutes a statutorily vulnerable person that began with Hobhouse LJ in *R v Camden LBC ex parte Pereira*[51] and has been settled by the Supreme Court in *Hotak v London Borough of Southwark*[52]. This will be discussed in Chapter 6.

Intentionally Homeless

Where an applicant is intentionally homeless but is also in priority need, s.190(2)(a) of the Housing Act 1996 sets out the duty owed[53] as securing accommodation for their occupation for a time that gives the applicant a "reasonable opportunity" to secure something more permanent. It also states that "advice and assistance" should be provided with attempts to find accommodation. The criteria for becoming intentionally homeless are defined

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46 *Ibid* per Sir Stephen Richards at [35]. He warned the judgment is not a "carte blanche to delay".

47 Adding s.189A of the Housing Act 1996.

48 This is according to the definition of eligible ss185-186 of the Housing Act 1996. See the definition under Eligible for Assistance at 8.

49 s.189A(1)(a)-(b).

50 s.189A(3).

51 [1998] 31 HLR 317.

52 [2015] UKSC 30. However, also see *Panayiotou v London Borough of Waltham Forest* (2017) EWCA Civ 1624 on "significantly more vulnerable", and *Guiste v Lambeth LBC* (2019) EWCA Civ 1758 on the ordinary person. These are covered in Chapter 6.

53 Be aware that this is amended by the Homelessness Reduction Act 2017 so this duty begins once the 56 day buffer set out in s.5 HRA has ended.

in s.191 and have been described as "gobbledegook"[54]. In fact, the wording of the statute is so unclear, Brightman LJ in *Dyson v Kerrier DC*[55] had to alter the verb tenses of s.191(1) to make it intelligible. The basic guidance given by Shelter (a homeless charity) is that the council can decide someone is intentionally homeless where they satisfy all four of the following criteria:

1. you deliberately did (or didn't do) something
2. that caused you to leave accommodation
3. which you could otherwise have stayed in, and
4. it would have been reasonable for you to stay there.[56]

The Homelessness Reduction Act 2017 (HRA), which amended the Housing Act 1996 gives councils a statutory duty to applicants who are intentionally homeless to assess and provide a written plan to assist the applicant[57]. The HRA has also added a 56-day buffer for authorities to "take reasonable steps" to help the homeless secure accommodation.

Cowan asserts that the best way to understand this section is through examples some of which are paraphrased here[58]. The first two deal with applicants who voluntarily leave their accommodation either to move from secure to less secure (*Dyson v Kerrier*[59]) or before possession proceedings and against advice (*Din v Wandsworth LBC*[60]).

The next two examples concern mortgages, so is if an applicant is evicted after deliberately accruing rent or mortgage arrears (*Robinson v Torbay BC*[61]) that are within their control[62] or overextends themselves financially, even if this

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54 D. Cowan (ed), *The Housing Act 1996: A Practical Guide*, Jordans 1996 at 167.
55 [1980] 1 WLR 1205.
56 Shelter Website - Intentional Homelessness. Found at: http://england.shelter.org.uk/get_advice/homelessness/help_from_the_council_when_homeless/intentional_homelessness
57 S.189A of the Housing Act 1996, inserted by s.3 of the Homelessness Reduction Act 2017.
58 *Supra* n.54 at 167-168.
59 *Supra* n.55.
60 [1983] 1 AC 657.
61 [1982] 1 All ER 726.
62 *Supra* n.38 at 11.17 at 99.

overextension is caused by the loss of a job (*Watchman v Ipswich BC*[63]). Finally, where the person concerned commits a serious criminal offence that would be likely to incur a long prison sentence (*R v Hounslow LBC ex parte R*[64]) where "ceasing to occupy the accommodation could reasonably have been regarded at the time as a likely consequence of committing the offence"[65]. The statutory guidance goes on to give other examples, such as where a person threatened with violence does not take steps to mitigate that threat as not being a situation that would be considered intentionally homeless[66]. The statute also considers that people who act in good faith are not intentionally homeless, even if their particular actions were ill-advised. In *Ugiagbe v Southwark LBC*[67] where Lloyd LJ, in the Court of Appeal, held that:

> It seems to me that the use of the phrase "good faith" carries a connotation of some kind of impropriety, or some element of misuse or abuse of the legislation.[68]

This is supported by the statutory guidance which considers someone who has acted in good faith, but with "imprudence of lack of foresight"[69], or when under duress cannot be considered to be acting deliberately for the purposes of intentional homelessness. The finding of intentional homelessness is very circumstance-specific and while general themes emerge, it can be a difficult area to judge in borderline cases.

The Localism Act 2011

The Localism Act 2011 is the first of the statutes that require discussion. Its introduction was supposed to return the power of decision making on local housing matters to the authorities, who were the best placed to deal with

63 [2007] HLR 33.
64 (1997) 29 HLR 939.
65 *Supra* n.38 at 11.15 at 98.
66 *Supra* n.38 at 11.13 at 98.
67 [2009] HLR 35.
68 *Ibid* at [27].
69 *Supra* n.38 at 11.17 at 99.

them. The Act itself made significant changes to eligibility and priority. It also effectively removed the lifetime tenancy for most new tenancies, introducing the "flexible tenancy" in its place.

Sections 146 and 147 – Eligibility and Priority

Section 146 of the Localism Act 2011[70] (LA) enables local authorities to qualify or disqualify specific "classes" of people from their eligibility criteria. Additionally, this section allows the Secretary of State to prescribe specific classes of people and criteria for local housing authorities when determining eligibility[71] and especially mentions "other classes of persons from abroad"[72].

Restricting who is eligible by qualifying and disqualifying classes of applicant[73] is not a completely new concept. In fact, it was previously enacted in the Housing Act 1996, which originally granted local authorities the same power, but it was removed by the Homelessness Act 2002. One of the reasons for the removal in 2002 was that "some local housing authorities adopted numerous classes of excluded applicant including some very dubious definitions."[74]

Section 147(4) of the LA 2011[75] requires every local authority to have an allocation scheme and a procedure[76] that will determine the priorities for allocating social housing. Section 147(4)[77] also requires authorities to give a reasonable preference to applicants who fit certain criteria:

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70 Inserting s.160ZA into the Housing Act 1996.
71 S.146(1) of the Localism Act 2011 adding s.160ZA(8) of the Housing Act 1996.
72 S.160ZA(4) of the Housing Act 1996.
73 S.146 of the LA 2011.
74 T. Baldwin, 'The Localism Act 2011: will it lead to fair allocation of social housing to local people in most need?' (2012) 15(1) Journal of Housing Law 16 at 17.
75 Inserts 166A into the Housing Act 1996
76 166A(1) states that "For this purpose "procedure" includes all aspects of the allocation process, including the persons or descriptions of persons by whom decisions are taken."
77 Inserts section 166A(3) into the Housing Act 1996.

(a) the homeless within the meaning of Part 7 (of the Housing Act 1996)[78]
(b) people owed a duty under either the Housing Act 1985 or 1996, which consists of varying historical types of homelessness from previous definitions that might still apply to certain people
(c) those currently occupying insanitary or overcrowded housing and those living in other "unsatisfactory housing conditions"
(d) people who need to move for medical or welfare grounds, including disability
(e) to prevent hardship

Additionally, section 147(4)[79] allows authorities to apply supplementary criteria to applicants who fall into a reasonable preference category in order to determine their priority for access to housing[80], this is discussed in Chapter 4. The section itself gives some examples such as a local connection[81], financial resources and behaviour of the applicant, but the statutory guidance makes it clear that the list is non-exhaustive and "authorities may take into account other factors instead or as well as these"[82].

As the Housing Act 1996 and homelessness has been discussed above, the next sections will move onto the other groups given priority. Only some of these terms have been defined in the Act including those who are homeless (defined in ss.175-178 of the Housing Act 1996[83]) and those living in overcrowded housing (ss. 324-326 of the Housing Act 1985). Many other terms are not

[78] Any application on this basis also requires the applicant to meet all five criteria of Part 7. The applicant must be eligible for assistance, homeless, possess a local connection, not be intentionally homeless and be considered "in priority need". This is discussed earlier, see The Housing Act 1996 at 6.
[79] Inserts section 166A(5) into the Housing Act 1996.
[80] Manchester City Council, 'Part VI Allocations Scheme Implemented 21 February 2011 with amendments approved by the Council and Partners as at 20 February 2015', Version 3.2 at 12. Found at: http://www.manchester.gov.uk/download/downloads/id/20290/allocations_scheme_updated_april_2015.pdf
[81] As defined by s.199 of the Housing Act 1996. See A Local Connection at 10.
[82] Communities and Local Government, 'Allocation of accommodation: guidance for local housing authorities in England', June 2012, at [4.15] at 20. Found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/5918/2171391.pdf
[83] See section on Homeless at 8.

legally defined, however a non-exhaustive list of examples is provided in the statutory guidance; these including insanitary, unsatisfactory, and both (d) and (e).

Insanitary, Overcrowded or Unsatisfactory Housing

"Insanitary" and "unsatisfactory" have no statutory definition, but both are mentioned in the statutory guidance. Annex 1 of the guidance gives examples such as lacking an indoor kitchen or toilet, cold/hot water, electricity/gas or adequate heating or having to share living room, bathroom/WC and kitchen[84].

The term "overcrowded" has a statutory definition in ss. 324-326 of the Housing Act 1985, which can occur in two ways by room or by space. According to s.325 overcrowding by room occurs when the number of rooms and the number of people for those rooms creates a situation where two people of the opposite gender who are not living together as husband and wife, who are over the age of 10, must sleep in the same room[85].

Overcrowding by space in s.326 is more complicated and involves determining the maximum number of people allowed in relation to the number of rooms or the amount of square feet (tables are provided in the legislation for the purpose). However, the statutory guidance indicates that local housing authorities should adopt the bedroom standard as a minimum for the statutory overcrowding criterion to be met[86]. It was also held by the Court of Appeal in *Elrify v Westminster CC*[87] that s.326 requires both tables to be considered when making a decision, especially where those numbers do not agree as it can lead to different accommodation decisions[88]. Further, the

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84 Communities and Local Government, 'Allocation of accommodation: guidance for local housing authorities in England', June 2012 at 31.

85 Where room is defined as a bedroom or living room by virtue s.325(2)(b).

86 *Supra* n.84 at 4.8 at 18.

87 [2007] HLR 36.

88 *Ibid* per May LJ at [25]-[27].

Court of Appeal in *Harouki v Kensington and Chelsea Royal LBC*[89], held that a family living in overcrowded conditions could not be considered homeless and that, because of the circumstances in the borough, the family would be required to wait their turn to be re-housed.

Medical or Welfare Grounds

Again, there is no statutory definition of these criteria, but there is some explanation in the statutory guidance that indicates this criterion can be used by both physical and learning disability and applies to those who need to move because of "their disability or access needs"[90]. It goes on to give examples of welfare grounds that include creating a stable life for those leaving care or a drugs/alcohol recovery programme, foster carers and those who cannot find their own accommodation, such as those with learning difficulties.

The guidance also makes it clear that this list of examples is illustrative and not exhaustive, allowing additional categories of person to use this criterion. There are further examples provided in Annex 1 including infirmity, chronic or progressive medical conditions, need to give/receive care, need for improved heating, sheltered housing or ground floor accommodation on medical grounds[91].

Prevention of Hardship

This is also covered in the statutory guidance but has no formal definition. The category includes people who need to give or receive care, take up a job, education or training opportunity[92]. However, no further explanations or examples are provided.

89 [2008] 1 WLR 797.
90 *Supra* n.84 at 4.9 at 19.
91 *Supra* n.84 at 31.
92 *Supra* n.84 at 4.11 at 19.

Section 154 - Flexible Tenancies

Section 154 of the Localism Act 2011[93] limits the terms of social tenants and effectively removes the tenancy for life for new tenants. Most terms offered by councils are five years, although they can be as short as two years[94]. Additionally, many tenants will start out under an "introductory tenancy" for the first year of their flexible tenancy. This year acts as a probationary period for new tenants and the terms under the introductory tenancy tend to make evicting tenants who breach their tenancy agreements much easier[95].

This change could have some positive benefits, in that there will be more tenancies available as fewer tenants will be offered permanent accommodation, which should help reduce waiting lists[96]. This appears to be working, the waiting lists for the year ending March 2014, which are the latest figures available, have dropped to:

> ...1.37 million households on local authority waiting lists on 1 April 2014, a decrease of 19 per cent on the 1.69 million on 1 April 2013.[97]

Most importantly this section allows councils the choice not to renew flexible tenancies, usually for those who have not behaved in an acceptable way.

The types of behaviour that might qualify are very similar to the statutory grounds that may lead to a court order for possession, where the tenant is evicted from their social property. These are listed in Schedule 2 of the Housing Act 1985[98], ground number 2 allows an authority to seek possession where a tenant or visitor causes a nuisance or annoyance, or has been

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93 This section adds s.107A to the Housing Act 1985.

94 S.107A(2)(a) of the Housing Act 1985.

95 Shelter, 'Introductory Council Tenancies'. Found at: http://england.shelter.org.uk/get_advice/social_housing/about_council_housing/introductory_council_tenancies

96 B. Lund, *Understanding Housing Policy*, Second Edition, The Policy Press 2011 at 139.

97 Department for Communities and Local Government, 'Local authority housing statistics: year ending March 2014', published 11 December 2014 at 1. Found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/385091/Local_authority_housing_statistics_-_year_ending_March_2014.pdf

98 As amended by s.144 of the Housing Act 1996.

convicted of using the dwelling for immoral or illegal purposes. This will be examined more in the next chapter. Additionally, anti-social behaviour can lead to a demotion order, which is a type of probationary tenancy. Such tenancies allow local housing providers to replace the existing tenancy with one that removes the right to buy and the security of tenure for a year. Demotion orders will be covered in more detail in Chapter 5.

The Welfare Reform Act 2012

Another significant change in legislation is the introduction of the spare bedroom subsidy (dubbed "the bedroom tax" by the Labour and in the press), where social tenants lose part of their housing benefit for any empty bedroom in their property. The "bedroom tax" was introduced by the Regulation B13 of the Housing Benefit Regulations 2006 (SI 2006/213), and the Welfare Reform Act 2012 s.11 coupled with The Housing Benefit (Amendment) Regulations 2012 (SI 2012/3040) B13 s.5. The regulations identify exactly who is entitled to their own bedroom, as follows:

> (5) The claimant is entitled to one bedroom for each of the following categories of person …—
> (za) a member of a couple who cannot share a bedroom;
> (zb) a member of a couple who can share a bedroom[99]
> (a) a couple (within the meaning of Part 7 of the Act);
> (b) a person who is not a child;
> (ba) a child who cannot share a bedroom, or a member of a couple who cannot share a bedroom[100];
> (c) two children of the same sex;
> (d) two children who are less than 10 years old;
> (e) a child,

Any tenants who exceed this, so for example where a couple had a three bedroom house for themselves and two boys, they would be deemed to be

[99] Inserted by regulation 4(3) Housing Benefit and Universal Credit (Size Criteria)(Miscellaneous Amendment) Regulations 2017 SI 2017/213 after the decision in *R (on the application of Carmichael and Rourke) (formerly known as MA and others) v Secretary of State for Work and Pensions* [2016] UKSC 58.

[100] *Ibid*.

under occupying because same-sex siblings are not entitled to their own bedroom, unless one of them fell under B13 s.5(ba) and could not share a bedroom. Section 3 of the Regulations also outline the exact cut in benefit under occupiers will lose: 14% for one bedroom or 25% for two or more.

The first case to come to court challenging the bedroom tax was the joint appeal of *Burnip v Birmingham City Council* (*Burnip and Gorry*)[101]. The court agreed that the bedroom tax discriminated against the claimants[102], and this led to the government amending the provisions with the Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations 2013 s.3(a). This inserted B13 s.5(ba), which is included above, and s.6 into the regulation on needing overnight care[103].

Subsequently, several other families with disabled members decided to challenge the bedroom tax on the grounds of discrimination both in terms of the Equality Act 2010 and the European Convention on Human Rights (ECHR)[104]. The cases are covered in detail in Chapter 6, but the case of *R (on the application of Carmichael and Rourke) (formerly known as MA and others) v Secretary of State for Work and Pensions* led to further amendments. These are included in Regulation 4(3) Housing Benefit and Universal Credit (Size Criteria)(Miscellaneous Amendment) Regulations 2017 SI 2017/213, which inserted B13 s.5(za)-(zb), changed B13 s.6(a) and added s.6(ab), included above[105].

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101 See also, *Trengove v Walsall Metropolitan Borough Council and another*, *Gorry v Wiltshire Council and another (Equality and Human Rights Commission intervening)* [2012] EWCA Civ 629.

102 Summarised by Lord Toulson in *R (on the application of Carmichael and Rourke) (formerly known as MA and others) v Secretary of State for Work and Pensions* [2016] UKSC 58 at [20]. See also Henderson J. *supra* n.101 at 140.

103 *Supra* n.99.

104 Articles 8 and 14.

105 It also inserted "or a member of a couple who cannot share a bedroom" into B13 5(ba).

The Housing and Planning Act 2016

In April/May of 2016, the government passed the Housing and Planning Act 2016 (HPA), which has, amongst other measures, extended a provision from the Localism Act 2011, the discretion on local authorities to offer a lifetime tenancy.

It has also introduced a system by which tenants who earn over a certain amount will be expected to pay a market rent. Whereas, under the Localism Act 2011, the provision was discretionary on the local authority whether to offer a fixed (flexible tenancy of a fixed term) or a lifetime term, Schedule 7(4)[106] makes it mandatory for local housing authorities to offer fixed term only for new tenants. This removes virtually any local authority discretion over the provision of tenancy type, except under very specific circumstances, all new tenancies must be fixed term only.

Sections 81A(1)-(3) of the Housing Act 1985 (as inserted by HPA 2016 Schedule 7(4)) states that these fixed term tenancies should be from 2 up to a maximum of 10 years, or where a child under 9 years old is resident, the tenancy can continue until that child turns 19. Further, s.81A(4) requires that any secure tenancy granted in breach of subsection (1) will be converted into a fixed term tenancy of 5 years. There are a very limited set of circumstances where an authority can grant an "old-style English secure tenancy", which are laid out in s.81B of the Housing Act 1985. The removal of the local authority's power to grant a lifetime tenancy nullifies some of the positive effects the government touted for the Localism Act 2011; namely giving the power back to those best placed to make an informed decision - the local authorities[107]. The sections limiting council powers to grant lifetime tenancies are not currently in force.

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[106] Inserts section 81A-D into the Housing Act 1985.

[107] Department for Communities and Local Government, 'A Plain English Guide to the Localism Act', November 2011 at 4. Found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/5959/1896534.pdf

Further, according in a green paper published by the government in August 2018:

> We have listened carefully to the views and concerns of residents and have decided not to implement the provisions in the Housing and Planning Act 2016 at this time.[108]

However, saying the curbs on flexible tenancies will not be used "at this time" is not a definitive statement that suggests never. These sections have not been repealed and it is perfectly possible that they could be implemented at some later date.

The Homelessness Reduction Act 2017

This Act aims to place additional duties on local councils to prevent homelessness. The purpose of this legislation is to "put homelessness prevention first", and includes an increased duty on authorities to provide advice and information to those who are at risk of homelessness in an effort to reduce the number of people on the streets. There is some hope that this Act might make some positive changes for those who are homeless or threatened with homelessness by increasing the duties local authorities owe applicants in such situations.

It also includes a duty on the councils to try and prevent homelessness by earlier intervention and doubling the number of days from 28 to 56 that a household can be considered "threatened with homelessness"[109]. The three of the most significant changes, in terms of housing law, come from ss. 3-5, which add sections 189A, 195 and 189B respectively, to the Housing Act 1996. There is also the addition of section 7, adding s.193A to the Housing Act, which is by far the most controversial of the measures.

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[108] Ministry of Housing, Communities & Local Government, 'A new deal for social housing' August 2018, CM9671 at [186] at 65. Found at: https://www.gov.uk/government/consultations/a-new-deal-for-social-housing

[109] Section 1 of the Homelessness Reduction Act that amends s.175 of the Housing Act 1996.

Section 189A - Duty of Assessment and a Care Plan

Section 3 adds a new duty of assessment to councils and other local authorities for applicants who are homeless or are threatened with homelessness. Every applicant who is eligible, regardless of priority need or intentional homelessness[110] must be assessed and provided with a plan in writing, as laid out in s.189A(3). Section 2 requires this assessment to include the circumstances of the applicant, their housing needs, and what support is necessary. Section 4 requires the council, once the assessment has been made, to attempt to agree with the applicant the steps the applicant and the authority need to take to help them retain suitable accommodation.

Where an agreement is reached that also must be "recorded in writing" by the local authority[111]. Should no agreement be reached between the two parties, then the authority must have a written record that includes why there was no agreement, any steps the authority consider reasonable for the applicant to take, and any steps the authority will take. These records can also include advice that the authority considers appropriate[112]. Whether an agreement is reached, the applicant is entitled to a copy of the written record by virtue of section 8.

Section 195 - Duties where Homelessness is Threatened

Section 4 HRA adds a duty on councils to attempt to prevent those threatened with homelessness from becoming homeless. Like s.189A, there is no reference to being in priority need or whether the applicant is becoming homeless intentionally, the only requirements from 195(1) are that the applicant is

[110] See sections In Priority Need - Why Vulnerability Matters in Allocations at 10, and Intentionally Homeless at 13.
[111] S.189A(5) HRA 2017.
[112] S.7 HRA 2017.

"threatened with homelessness" and eligible. Where the applicant meets these criteria, 195(2) requires the authority to take reasonable steps to accommodate the applicant[113].

The first place a local authority should look is to any 189A assessment that has been carried out previously. It is perfectly possible that "reasonable steps" could end in an offer of accommodation, but nowhere in the statute is that requirement made clear, which means it is likely that the advice/agreement and advice from the s.189A assessment will be sufficient "reasonable steps".

However, it is not entirely clear, although it would seem unlikely that any court would try and interpret "reasonable steps" to mean "provide accommodation". The draft statutory guidance offers some considerations when defining what constitutes "reasonable steps":

> Personalised housing plans should be realistic, taking account of local housing markets and the availability of relevant support services, as well as the applicant's individual needs and wishes. For example, a plan which limited the search for accommodation to a small geographic area where the applicant would like to live would be unlikely to be reasonable if there was little prospect of finding housing there that they could afford. The plan might instead enable the applicant to review accommodation prices in their preferred areas as well as extending their home search to more affordable areas and property types. In their interactions with applicants, housing authorities are encouraged to provide sufficient information and advice to encourage informed and realistic choices to be identified and agreed for inclusion in the plan.[114]

The guidance also mentions several examples:

> The Secretary of State expects the type of reasonable steps a housing authority might take to prevent or relieve homeless to include but not be limited to the following, irrespective of whether the applicant may have a priority need or be homeless intentionally:

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[113] S.4(2) of the HRA 2017 modifying s.195(2) of the Housing Act 1996.

[114] Department for Local Government and Communities - Draft Homelessness Code of Guidance for Local Authorities, October 2017, at 11.20, at 84. Found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/652343/Draft_Homelessness_Code_of_Guidance.pdf

a. attempting mediation/conciliation where an applicant is threatened with parent/family exclusion,
b. assessing whether applicants with rent arrears might be entitled to Discretionary Housing Payment,
c. providing support to applicants, whether financial or otherwise, to access private rented accommodation,
d. assisting people at risk of violence and abuse wishing to stay safely in their home through provision of 'sanctuary' or other measures,
e. helping to secure or securing an immediate safe place to stay for people who are sleeping rough or at high risk of sleeping rough.[115]

Sections 195(5) HPA 2017 state that the duty is terminated when any of the following, defined in s.195(8), have been satisfied, these include where the applicant has suitable accommodation, or a reasonable prospect, the applicant has become homeless[116], or intentionally homeless and where the applicant has refused an offer of suitable accommodation[117]. This duty will also come to an end with an applicant's "deliberate and unreasonable refusal to co-operate" as described in s.7 HPA 2017[118], discussed below on page 29. Notice must be given to the applicant in writing, but should such a notice not be received the requirement of writing can be satisfied by making the notice available in the offices of the authority for a reasonable period[119].

Section 189B - Duties Owed to the Homeless

Section 5 adds an additional duty available to all applicants who are homeless and eligible for assistance[120], including those who previously qualified under s.195, as explained above. This duty is described in section 189B(2), which

[115] *Ibid* at 11.23, at 85.
[116] Where the applicant has become homeless, the duty of the council becomes that under s.189B.
[117] This is not a complete list, see Section 195(8) of the Homelessness Reduction Act 2017.
[118] Adding s.193A to the Housing Act 1996.
[119] S.195(9) HRA 2017.
[120] S.189B(1) HRA 2017.

requires the authority to take reasonable steps to help the applicant for at least six months. This duty has caveats, s.189B(4) states:

> Where the authority—
>
> (a) are satisfied that the applicant has a priority need, and
>
> (b) are not satisfied that the applicant became homeless intentionally, the duty under subsection (2) comes to an end at the end of the period of 56 days beginning with the day the authority are first satisfied as mentioned in subsection (1).

This means that there is now a 56-day buffer before the s.193 Housing Act 1996 duty to accommodate becomes an issue for the applicant. Remember that under s.193, the applicant must meet five criteria, they must be: eligible for assistance, homeless, possess a local connection, be in priority need and not be intentionally homeless[121]. It is important to note that the clock on the 56-day buffer starts when the local authority is satisfied that the applicant is homeless and eligible for assistance, not when the requirements of priority need and unintentionally homeless are met.

This means, for applicants who might be new to the local authority and therefore have no s.184[122] or s.189A assessment, councils can carry out the investigations on priority need and intentional homelessness during that 56-day window. This, in turn, will slow down the process of taking "reasonable steps to secure accommodation" duty and could end it all together, should an applicant not meet the priority need and not intentionally homeless criteria.

Whereas for applicants who were threatened with homelessness, thereby caught by s.195, and have since become homeless, those investigations should have already been carried out and the local authority should have a clear picture about the needs of the applicant and their status. This means the local authority have the entire 56 days to try and secure accommodation for the

[121] S.193 Housing Act 1996.

[122] of the Housing Act 1996.

applicant if they are in priority need and they have not become homeless intentionally.

Section 189B(5) states that the duty is ended where certain criteria are met, and that the applicant must be notified, in writing[123], that this has occurred. As with s.195, should such a notice not be received, the requirement of writing can be satisfied by making the notice available in the offices of the authority for a reasonable period[124].

When the duty comes to an end, the authority is required by virtue of 189B(6), to inform the applicant which circumstances apply and inform them that they can request a review of the decision. The criteria for ending the duty are defined in 189B(7), are met. These are similar to s.195(8) and include where the applicant has suitable accommodation, or a reasonable prospect, the applicant has become intentionally homeless and where the applicant has refused an offer of suitable accommodation or is no longer eligible for assistance[125].

Section 189B(9) also allows the 189B(2) duty to be ended by the authority with an applicant's "deliberate and unreasonable refusal to co-operate" as described in s.7 HPA 2017[126], discussed below on page 29. For those who are in priority need but intentionally homeless the HPA 2017 has amended s.190 of the Housing Act 1996 so that the s.190(2)(a)-(b) duty[127] commences after the 189B(2) duty comes to an end, which does extend the period of potential help/accommodation from a local authority for those particular applicants.

123 The requirement of writing is set out in Section 189A(8).
124 *Ibid*.
125 This is not a complete list, see Section 189B(7) of the Homelessness Reduction Act 2017.
126 Adding s.193A to the Housing Act 1996.
127 To "secure that accommodation is available for his occupation for such period as they consider will give him a reasonable opportunity of securing accommodation for his occupation" and provide advice.

It is very difficult to determine what "reasonable steps" would be; according to Peaker, it seems likely that the wording of this duty will " be up for early challenges [in the courts]"[128]. It is possible that such a measure will reduce homelessness for a short time, i.e. the 56-day buffer, for some applicants, namely those who are not found to be in priority need. The duty for this group of people remains the same: advice and assistance in their attempts to secure accommodation[129].

Section 193A - Refusal of an Offer of Accommodation

Where an applicant is owed a duty under s.189B(2)[130] and they refuse a final accommodation offer or a Part 6 offer[131], then the duty comes to an end and no duty under s.193 (the main housing duty), which offers a 12 month term, can apply[132]. This can only happen where an applicant has been informed of their right to review and the consequences of their refusal[133]. Section 193A(4) states that an offer is considered a final accommodation offer if the offer is for an assured shorthold tenancy made by a private landlord, it is made with the approval of the authority, and for a fixed term of at least six months.

A Part 6 offer is exactly what it sounds like, an offer of accommodation made in writing under Part 6 of the Housing Act 1996 that states it is such an offer. Such accommodation must be considered "suitable", by virtue of s.193A(6) HPA, and the local authority must ensure applicants are not under a

[128] Peaker, 'A Bluffers Guide to the Homeless Reduction Act 2017' Nearly Legal – Housing Law News and Comment. Posted on 14 May 2017 and found at: https://nearlylegal.co.uk/2017/05/bluffers-guide-homeless-reduction-act-2017/

[129] By virtue of s.190(3) of the Housing Act 1996.

[130] S.193A(1)(a) HRA 2017.

[131] S.193A(b)(i)-(ii) HRA 2017.

[132] S.193(3) HRA 2017.

[133] S. 193A(1) HRA 2017.

contractual obligation of a current tenancy before they must take up the council's offer[134]. According to the Policy Fact Sheet this measure hopes to:

> ... encourage those who are homeless or at risk of becoming homeless to take responsibility for working proactively with their LHA to resolve the problem as soon as possible.
> The Government does not wish to create challenges for vulnerable people who may have difficulty in participating in the homeless prevention activities of their LHA. We believe that this measure is a fair approach. The aim is that plans will be agreed and will contain actions that the person applying for help can reasonably be expected to achieve.[135]

This means that where an applicant refuses either type of accommodation, if the above criteria are met, the local authority's duty to them comes to an end and they are, more or less, accepting their fate as being homeless. This is not necessarily unreasonable, considering the housing shortage, to expect those in such desperate need to take up any accommodation offered. This seems to be taking steps to ensure that this is, in fact, what occurs.

Sections 193B/C - Refusal to Co-operate

These sections were the most hotly debated during the Act's time as a bill[136] with the Rt. Hon. Bob Blackman describing the measures as "tough love"[137] on applicants.

Section 193B sets out the definition of "deliberate and unreasonable refusal to co-operate", and 193C explains the consequences to applicants to fall foul of s.193B. In summary, should an applicant be deemed as refusing to co-operate under s.193B, having received a written warning, either of the larger duties,

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134 S.193A(7)(a)-(b) HRA 2017.

135 Department for Communities & Local Government, 'Policy Fact Sheet: Non-Cooperation (Updated following amendments in the Commons)' at 2. Found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/592998/170206_-_Policy_Fact_Sheets_-_Non-Cooperation.pdf

136 See the debate on 18th January 2017 at 10:30am in a Public Bill Committee: https://www.theyworkforyou.com/pbc/2016-17/Homelessness_Reduction_Bill/06-0_2017-01-18a.139.4

137 *Ibid*, found at: https://www.theyworkforyou.com/pbc/2016-17/Homelessness_Reduction_Bill/06-0_2017-01-18a.141.1

under 195(2) or 189B(2), come to an end[138]. In other words, whether the applicant is threatened with homelessness or is actually homeless, if they are considered to be unreasonably refusing to co-operate and have been warned with no change in behaviour, the council's duty ends and this will usually mean any hope of securing accommodation. Such a decision, however, must be taken in light of the particular circumstances and needs of the applicant[139]. It should be noted that where an applicant is homeless, eligible for assistance, has a priority need and is not intentionally homeless, by virtue of 193C(4):

> Section 193 (the main housing duty) does not apply, but the authority must secure that accommodation is available for occupation by the applicant.

So, it is possible for some applicants, who meet these very stringent requirements to secure accommodation, but that they are removed from the main housing duty under s.193[140]. This duty ends by virtue of s.193C(5), where an applicant ceases to be eligible, becomes intentionally homeless, accepts an offer of an assured tenancy, or voluntarily ceases to occupy accommodation that was made available for them. None of which seems particularly unreasonable. Those who are not eligible would not be owed a statutory duty at all, and should the applicant cease to occupy the property there is no reason for the local authority to continue their efforts. Considering the housing shortage this seems to be a sensible approach to this additional duty.

Section 193B(2) defines the behaviour that will lead to the local authority's duties coming to an end:

> (2) A local housing authority may give a notice to an applicant under this subsection if the authority consider that the applicant has deliberately and unreasonably refused to take any step—
>
> (a) that the applicant agreed to take under subsection (4) of section 189A, or

[138] S.193C(2) HRA 2017.
[139] S.193B(6) HRA 2017.
[140] Without the additional local connection, they would fail a Part 6 assessment regardless.

(b) that was recorded by the authority under subsection (6)(b) of that section.

When deciding if an applicant has been unreasonable the council must look at the "particular circumstances and needs of the applicant (whether identified in the authority's assessment of the applicant's case under section 189A or not)"[141]. It seems likely that this will help those with learning disabilities or people who, for whatever reason, might struggle making these decisions from facing serious consequences with regards to their housing situation.

Additionally, before the council can discharge its duty under this section, it must first issue a warning to the applicant[142] and subsequently wait a reasonable period[143]. The requirements for the warning are set out in 193B(5):

(5) A "relevant warning" means a notice—
  (a) given by the authority to the applicant after the applicant has deliberately and unreasonably refused to take any step—
    (i) that the applicant agreed to take under subsection (4) of section 189A, or
    (ii) that was recorded by the authority under subsection (6)(b) of that section,
  (b) that warns the applicant that, if the applicant should deliberately and unreasonably refuse to take any such step after receiving the notice, the authority intend to give notice to the applicant under subsection (2), and
  (c) that explains the consequences of such a notice being given to the applicant.

So, when considering an applicant's behaviour and given all their personal circumstances, a local authority can issue a warning and, should the behaviour continue, the duty to that applicant ends.

There are potential issues here, for example what constitutes "unreasonable refusal" and, as Peaker states, it seems likely that such a requirement will see

[141] S.193B(6) HRA 2017.
[142] S.193B(4)(a) HRA 2017.
[143] S.193B(4)(b) HRA 2017.

an early legal challenge[144]. Additionally, the statutory guidance is clear that this measure should not be used lightly:

> Housing authorities should make reasonable efforts to obtain the co-operation of the applicant, including seeking to understand the reasons for their lack of cooperation, before invoking and during the use of section 193B. Where an applicant appears not to be co-operating the housing authority should review their assessment of the applicant's case and the appropriateness of the steps in the personalised housing plan (section 189A(9)) and explain the consequences of not co-operating before issuing a warning under section 193B(4).[145]

The guidance also lays out some additional considerations for the local authority before ending the duty.

> The housing authority should be satisfied of the following before ending the prevention or relief duty under sections 193B and 193C:
> a. The steps recorded in the applicant's personalised housing plan are reasonable in the context of the applicant's particular circumstances and needs;
> b. The applicant understands what is required of them in order to fulfil the reasonable steps, and is therefore in a position to make a deliberate refusal;
> c. The applicant is not refusing to co-operate as a result of a mental illness or other health need, for which they are not being provided with support, or because of a difficulty in communicating;
> d. The applicant's refusal to co-operate with any step was unreasonable in the context of their particular circumstances and needs. For example, if they prioritised attending a Jobcentre or medical appointment, or fulfilling a caring responsibility, above viewing a property, did they inform the housing authority and was their decision unreasonable given the relative consequences of failing to undertake one or the other action.[146]

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144 *Supra* n.128.

145 Department for Local Government and Communities - Draft Homelessness Code of Guidance for Local Authorities, October 2017, at 14.48, at 99. Found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/652343/Draft_Homelessness_Code_of_Guidance.pdf

146 *Ibid* at 14.51, at 100.

It is also clear from the Act itself and the guidance that such a decision must be taken in light of the particular circumstances and needs of the applicant[147]. Again, the guidance gives some indication how and when this provision should be used:

> If the applicant is 'street homeless' or insecurely housed ('sofa surfing') the housing authority should take into account any particular difficulties they may have in managing communications and appointments when considering if failure to co-operate is deliberate and unreasonable.[148]

It is, perhaps disappointing to see such an emphasis on "street homeless" without mentioning terms like "vulnerable" or "mentally ill" as these types of applicants could also have similar issues when it comes to their behaviour.

The general feeling, so far, is that many of these changes could be positive for the reduction of homelessness, but there is concern from local authorities about funding for these additional checks and additional duties[149]. An issue also highlighted by Shelter, the charity for the homeless, which also feels that more needs to be done by the government to make this Act effective:

> To be truly effective, these new duties must be underpinned by Government strategy and policies to provide suitable, stable and sustainable tenancies. Otherwise, there could be unintended consequences, such as 'gate-keeping' of services, unlawful decisions and repeat homelessness.
> Despite having clear legal entitlements to assistance under the current legislation, we regularly see people who qualify for assistance (for example visibly pregnant women or other vulnerable adults) who approach local authorities, but come away without an application for assistance being taken.[150]

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147 S.193B(6) HRA 2017.

148 *Supra* n.145 at 14.50, at 99.

149 See J. O'Neill, 'The Homelessness Reduction Act 2017, initial thoughts'. Found at: http://www.magdalenchambers.co.uk/the-homelessness-reduction-act-2017-initial-thoughts/

150 Shelter, 'Homelessness Reduction Bill: Report and Third Reading', at 3-4. Found at: https://england.shelter.org.uk/__data/assets/pdf_file/0020/1323155/Homelessness_Reduction_Bill_-_Report_Stage.pdf

Without housing stock to house those in need, there is little to no point giving them more statutory rights, or local authorities more duties. Especially where there is insufficient funding available for local authorities to implement the changes effectively. This has been echoed by respondents in the Homelessness Monitor: England, 2019[151]. As Clive Betts, the Chair of the Communities and Local Government Committee stated:

> The draft code was broadly welcomed but we heard from witnesses that, while the guidance is written to the letter of the law, it was not in the spirit of the law. They told us the guidance could do more to encourage a culture change within housing authorities to prevent homelessness early on. In London, we heard there could be a funding gap of £67million a year for the implementation of the Homelessness Reduction Act…[152]

The changes brought about by the HRA have been somewhat mixed as indicated by statistics from the Homelessness Monitor. This is the first Monitor released since the HRA came into force, with data collection taking place about six months after. There have been some positive indicators, such as 62% of local authority respondents indicating the Act had led to a "more person-centred approach"[153], however, some felt more negatively with 23% reporting "little positive effect"[154]. There is likely to be better information with the next Monitor, as the HRA will have been in force for longer, and housing providers will have had more time to implement the changes. Still, it is worth noting that 65% of local authorities reported positive impacts of the

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151 S. Fitzpatrick, 'The homelessness monitor: England 2019' Report Prepared for Crisis, May 2019 at 32. Found at: https://www.crisis.org.uk/media/240419/the_homelessness_monitor_england_2019.pdf

152 Commons Select Committee, 'Government must review draft Homelessness Code of Guidance', 12 December, 2017. Found at: https://www.parliament.uk/business/committees/committees-a-z/commons-select/communities-and-local-government-committee/news-parliament-2017/homelessness-code-of-guidance-correspondence-17-19/

153 *Supra* n.151 at xxi.

154 *Supra* n.151 at xxi.

Homelessness Reduction Act 2017 for single people[155], and 42% reported benefits to rough sleepers[156].

Behavioural Orders

Another change that the Localism Act 2011 permits the use of allocations schemes to enforce a standard of behaviour from social tenants. For example, as previously explained, ss. 146 and 154 of the Localism Act 2011 allow councils to make ineligible or refuse to renew an existing flexible tenancy of any applicant/tenant, or member of their household, who has been found guilty of some form of unacceptable behaviour. Bracknell Forest Council describes this behaviour as:

> Where the applicant or a member of the household is considered to be guilty of unacceptable behaviour serious enough to make them unsuitable to be a tenant and at the time of application for housing they are still considered unsuitable to be a tenant by reason of that behaviour.[157]

One type of unacceptable behaviour is where any behaviour order has been issued against an applicant or member of their household. Below each type is described in more detail.

The Anti-Social Behaviour Order (ASBO)

The ASBO was introduced in s.1 of the Crime and Disorder Act 1998, and then widened by the Police Reform Act 2002, which included a change that registered social landlords could apply for such an order. An ASBO is an order lasting a minimum of two years that can be given to anyone over the age of 10 for a variety of anti-social behaviour. The Act defines anti social behaviour very widely as acting "in a manner that caused or was likely to cause

[155] *Supra* n.151 at 30.
[156] *Supra* n.151 at 30.
[157] Bracknell Forest Council, 'Housing Allocations Policy', Welfare and Housing Services at 3. Found at: https://www.bfcmychoice.org.uk/Data/Pub/PublicWebsite/ImageLibrary/Housing%20Allocations%20Policy%202016%20-%20Web%20Version.pdf

harassment, alarm or distress to one or more persons not of the same household as himself"[158] and can include:

- graffiti – which can on its own make even the tidiest urban spaces look squalid
- abusive and intimidating language, too often directed at minorities
- excessive noise, particularly late at night
- fouling the street with litter
- drunken behaviour in the streets, and the mess it creates
- dealing drugs, with all the problems to which it gives rise.[159]

The evidence used to decide if a person has behaved in an anti-social way can be hearsay and is judged on the lower standard of proof of the balance of probabilities, rather than the criminal standard of beyond a reasonable doubt. The terms of the order can include a curfew, excluding the person from associating with certain individuals or in certain areas. Breaching the order can result in a fine or up to 5 years in prison (adult) or 24 months in a detention centre (young offenders).

The Acceptable Behaviour Contract (ABC)

An ABC, on the other hand, is a less punitive version of the ASBO with no formal statutory basis. Originally, they were only available to young people between the ages of 10-18, but are now being used with adults as well. They were first introduced by Islington Borough Council to combat "problem youths".

Generally, the person voluntarily signs a contract with a local agency, such as the local police, the housing department, the registered social landlord, or school. This contract states that the party will refrain from certain anti-social behaviours. Consequences of breaches can include a meeting where the terms

[158] Section 1(1)(a) of the Crime and Disorder Act 1998.

[159] Home Office, 'A Guide to Anti-Social Behaviour Orders and Acceptable Behaviour Contracts', Published by Home Office Communication Directorate, March 2003, at 5. Found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/219663/asbos9.pdf

are re-iterated or, for serious and repeated breaches, the police or local authority can seek an ASBO[160] or even an order of possession for social housing, although such serious consequences generally have to be stated in the contract itself[161]. The Home Office reports ABCs have been used to tackle a variety of anti-social behaviour including verbal abuse, graffiti, begging, joy riding and kerb-crawling[162]. It also points out that an ASBO is more appropriate for more "serious and persistent" offences[163], so an ABC will only be used in certain circumstances. However an imposition of such an order can still result in an order for possession for social housing, a fairly serious consequence for a group of behaviours generally deemed less serious than those required for an ASBO.

The Injunction to Prevent Nuisance and Annoyance (IPNA)

The IPNA is a civil remedy introduced by the Anti-social Behaviour, Crime and Policing Act 2014 (ASBCP 2014). It has been described "as super-punitive ASBO which will be easier to obtain for even more broadly defined behaviour"[164]. There are special provisions included in s.13 of the 2014 Act that allow one of the conditions of the IPNA to be exclusion from the injunctee's property, however this provision only applies to social tenants. Breaches of IPNAs, and the newly created Criminal Behaviour Orders (see s.22-25 of the ASBCP 2014) may result in the respondent being found in contempt of court leading to imprisonment or a fine. Additionally, Part V of the ASBCP 2014 will require a mandatory possession order for both secure and assured tenants, so

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160 The Tameside Citizen – 'A Guide to Acceptable Behaviour Contracts (ABCs)'. Found at: http://www.tameside.gov.uk/communitysafety/abc

161 Home Office, 'A Guide to Anti-Social Behaviour Orders and Acceptable Behaviour Contracts', Published by Home Office Communication Directorate, March 2003, at 52.

162 *Ibid* at 52-53.

163 *Ibid* at 56.

164 Liberty, Liberty's Response to the Home Office's Proposals on More Effective Responses to Anti-Social Behaviour (London: Liberty, 2011), at 15.

this applies to *all* tenants not just those in social housing. There are also little or no grounds to appeal such a decision, apart from a breach of the injunctee's convention rights. This came under trenchant criticism from the Law Society:

> The removal of judicial discretion and the protection of due process in any circumstances has to be justified, and we believe that the justification has not been made out.[165]

As the number of people with learning difficulties or mental health issues comprise such a significant proportion of those subject to ASBOs, it seems likely that this trend will continue with IPNAs.

Public Spaces Protection Order (PSPO)

Finally, there is the PSPO, which was introduced by s.59 of the Anti-social Behaviour, Crime and Policing Act 2014. This order is a new type of geographical control that can restrict actions in areas controlled by an authority. In other words, an order will make certain, defined behaviour within a specific area, and also at specific times[166] by categories of person[167], an offence that can attract a fine or prosecution[168].

When defining behaviour that might fall foul of a PSPO, the guidance for Councils suggests the activities subject to an order must meet certain criteria:

> Under section 59 of the 2014 Act, local authorities must be satisfied on reasonable grounds that the activity subject to an Order:
> - has a detrimental effect on the quality of life of those in the locality (or it is likely that activities will take place and have such an effect)
> - is (or is likely to be) persistent or continuing in nature
> - is (or is likely to be) unreasonable

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165 The Law Society, 'Home Affairs Committee Call for Evidence - Draft Anti-Social Behaviour Bill', Submitted January 2013, at 2, Paragraph [6]. Found at: http://www.lawsociety.org.uk/representation/policy-discussion/draft-anti-social-behaviour-bill-law-society-written-evidence/

166 S.59(6)(b) Anti-social Behaviour, Crime and Policing Act 2014 (ASBCP 2014).

167 S.59(6)(a) ASBCP 2014.

168 S.67(2) ASBCP 2014.

- justifies the restrictions being imposed.[169]

It also must not interfere with the rights of citizens under Article 10 or 11 of the European Convention on Human Rights that protects freedom of expression and assembly/association.

Conclusion

As becomes clear, this is a complex framework. Its key provisions focus on access to social housing: the Housing Act 1996 determines who is owed the greatest housing duty. The Localism Act 2011 focuses more on eligibility and priority between applicants, allowing local authorities more say over how their stock is allocated. The Homelessness Reduction Act 2017 was implemented to help identify those in crisis earlier with the intention that early intervention would lead to fewer people losing a tenancy. The other provisions covered, such as the Welfare Reform Act 2012 and the various behavioural orders can interact with social housing in various ways, such as defining who might be evicted and the reasons for those evictions. The next chapter will consider how this legal framework restricts access to social housing and whether it is really based on the idea of "need" or if there are other factors that require consideration.

[169] Local Government Association, 'Public Spaces Protection Orders: Guidance for Councils', February 2018, at 6. Found at: https://www.local.gov.uk/sites/default/files/documents/10.21%20PSPO%20guidance_06_1.pdf

Chapter 3

The History and Development of Access to Social Housing

This chapter will examine the history of poverty relief and access to social housing. It will trace the history of the law from the middle ages where the poor were first categorised to modern day.

This will lead to an examination of the great influencers of the 1790s and how their beliefs, and the wider societal beliefs were used to shape the law and change it from the Tudor to the Victorian. This will include a discussion of the historical basis for the modern laws which will be discussed in Chapter 4 by contrasting the paternalism of Wailes, Zwingli with the more modern thinkers like Eden and Jeremy Bentham.

Finally, it will consider the issues the philosophical desert and housing by considering the moralising of applicants and the links between housing need and reward.

The Middle Ages and the Tudor Era (1300 – 1601)

The classification of the poor in statute can be traced as far back as 1388, when the Statute of Laborers[1] was passed, which recognised there was a subsection of the poor who were unable to work – the impotent poor. This statute allowed those classed as impotent poor to beg. Yet there was still issue with who was classed as impotent and the worry that some beggars were not unable to work, but simply unwilling, as the Statute of Laborers 1349[2] stated:

[1] Richard II c. 3, 4, and 7. It should be noted that the slightly earlier Statute of Laborers 1349 is generally considered to be the initiation of poor relief on a national level (see Kunze at n.4).

[2] 23 Edw. III.

> Item, because that many valiant beggars, as long as they may live of begging, do refuse to labor, giving themselves to idleness and vice, and sometime to theft and other abominations; none upon the said pain of imprisonment shall, under the color of pity or alms, give any thing to such, which may labor, or presume to favor them toward their desires, so that thereby they may be compelled to labor for their necessary living.[3]

This is, more or less, a description of the idle, or undeserving poor, written by King Edward III to his sheriffs from nearly 700 years ago. During the Middle Ages, the system for poor relief was generally disorganised and tended to be strict. According to Kunze:

> Before 1536 the English government approached the problems of vagrancy and poverty in a punitive and repressive framework, while the Church and other institutions provided indiscriminate and unorganized charity. This can be clearly seen in the early statutes which dealt with the problems of laborers – employment, vagabondage, and poverty.[4]

It would be over 100 years before any further changes would be made to the law, when the Vagabond and Beggars Act[5] was passed in 1495, which set out:

> Vagabonds, idle and suspected persons shall be set in the stocks for three days and three nights and have none other sustenance but bread and water and then shall be put out of Town. Every beggar suitable to work shall resort to the Hundred where he last dwelled, is best known, or was born and there remain upon the pain aforesaid.[6]

This was problematic, as Kunze opines, as no definition of "vagabond" that would distinguish those who were too ill to work, therefore the impotent poor, was included, meaning that this applied equally to all, regardless of ability to work[7].

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[3] Ordinance of Laborers, 1349 transcribed to HTML from White, Albert Beebe and Wallace Notestein, eds. Source Problems in English History. New York: Harper and Brothers Publishers, 1915. Found at: https://sourcebooks.fordham.edu/seth/ordinance-labourers.asp

[4] N. Kunze, 'The Origins of Modern Social Legislation: The Henrician Poor Law of 1536' (1971) Vol. 3(1 Spring) Albion: A Quarterly Journal Concerned with British Studies 9 at 9.

[5] 11 Henry VII c. 2.

[6] T. Nail, *The Figure of the Migrant*, First Edition, Stanford University Press 2015 at 72.

[7] *Supra* n.4 at 10.

During the reign of Henry VIII, there were a number of social issues and circumstances, such as poor harvests, that led to more reforms to laws relating to vagrancy and poverty. Despite only being passed five years apart, one statute in 1531[8] and one in 1536[9], Kunze argues that they could not be more different:

> The two Henrician poor laws differ radically from one another. While the act of 1531 continued the same repressive policies of earlier statutes, the act of 1536 introduced a positive program for the relief of economic and social distress.[10]

However, the first did make the first distinctions, in a more modern sense, between those who could work and were "idle" by refusing to work, and those who could not because of illness or infirmity:

> The act of 1531, unlike its predecessors, did make a distinction between the impotent poor who needed relief and the able-bodied poor who refused to seek work. It directed the justice of the peace and the mayors to provide the impotent poor with licenses, which enabled them to beg within a specified area.[11]

However, as Pound points out, there was "…no provision whatsoever for the man who desperately desired to be employed but had no job to go to"[12]. Additionally, the treatment of those who were considered to be idle and not impotent was severe:

> This act continued to use repression as a cure for the problem of unemployment. The able-bodied unemployed were to be brought to the market place by the justices and "there to be tyed to the end of a Carte naked and be beten wyth Whyppes thoroughe oute the same Market Towne or other place tyll his Body be blody by reason of suche whyppyng."[13]

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8 Statute Punishment of Beggars and Vagabonds 1531 Henry VIII 22 c 12.

9 27 Hen VIII c. 25.

10 *Supra* n.4 at 10.

11 *Ibid*.

12 J. Pound, *Poverty and Vagrancy in Tudor England (Seminar Studies)*, Second Edition (Kindle Edition), Routledge/Taylor and Francis, London, 1986 page 42 (kindle location 989).

13 *Ibid*. See also J. Briggs, *Crime and Punishment In England: An Introductory History*, First Edition, UCL Press, London 1996 at 64.

However, this was to change a few years later with the Act for Punishment of Sturdy Vagabonds and Beggars in 1536[14]. One of the most notable changes this Act made was the assignment of the Church parish as administrator for poor relief. This is a system that continued under the Elizabethan Poor Laws, and in some ways with the use of the local connection requirement, could be argued is still in use today. This Act abolished the 1531 system of licences for begging and created a system that recorded relief funds, allowing surplus from richer parishes to be passed to poorer ones. This Act under the reign of Henry VIII was revolutionary, according to Kunze, while also providing the foundation for future poor laws:

> The statute of 1536 thus signalled a dramatic break in poor law policy. The act established the parish as the unit of local government for poor law administration; it attempted to end the practice of indiscriminate charity; it specified the method of collecting alms; it established procedures for the accurate recording of relief funds, and it anticipated the future development of paid public welfare workers.[15]

It did contain, however, a continuation of the earlier corporal punishments for idle vagabonds, whipping for the first offence and removal of the right ear for the second.

In the statutes that followed, many different punishments for idleness were used, and often quickly abandoned, for example in the Vagrancy Act 1547[16] the punishment for refusal to work was two years' slavery, which would be increased to life for the first escape attempt. This was repealed two years later with the Poor Law of 1549[17], which also reinstated whipping for vagrancy. Later, the 1572 Act for the Punishment of Vagabonds and for Relief of the Poor and Impotent[18] added ear-boring to the punishment, which would take place

[14] 27 Hen VIII c. 25.
[15] *Supra* n.4 at 13.
[16] 1 Edw. VI c. 3.
[17] 63 &4 Edward VI c. 1.
[18] 14 Eliz. I c. 5.

before the whipping. This practice involved a hot iron, an inch in diameter that was used to burn through the right ear[19]. Repeat offenders could be imprisoned or even executed. This was not repealed for over twenty-five years by the Act for the Punishment of Rogues, Vagabonds and Sturdy Beggars in 1598[20]. However, Kunze considers that whipping, while seemingly perhaps shocking to modern sentiments, really needs to be considered as a punishment of its time[21]:

> Although the statute of 1536 has often been criticized for its severity regarding the punishment of vagrants, its punishments do not seem to be overly harsh when viewed within the framework of sixteenth-century English life. It continued the tradition established by the earlier statutes of laborers in using the threats of the criminal law to suppress beggars.[22]

This is supported by Davies who suggests:

> The fear of the social consequences of idleness, the increasingly practical attitude to alms-giving, the emphasis on the Christian duty of making the unwilling work, explain the harshness of the vagrancy laws in general.[23]

So, there must be a consideration of the historical place of whipping and other corporal punishments that contextualise what seem to be extremely harsh measures.

At the same time, as the statute changed the repealed the punishments for beggars, other changes to poor relief were being made that were more positive. For example, the Poor Act of 1552[24] under Edward VI started registers kept in each parish as an official record of those deemed poor. It also allowed the parish to appoint additional staff to help collect and distribute alms to

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19 R. Jütte, *Poverty and Deviance in Early Modern Europe*, First Edition, Cambridge University Press, Cambridge 1994 at 164.

20 39 Eliz. I c. 4.

21 C.S.L. Davies refers to whipping of vagabonds and the idle as "the accepted doctrine of the age". C. Davies, 'Slavery and Protector Somerset; the Vagrancy Act of 1547' (1966) Vol. 19(3) The Economic History Review, New Series 533 at 539.

22 *Supra* n.4 at 13.

23 *Supra* n.21 at 545.

24 5&6 Edw. VI c. 2.

those poor registered under the system. This positive change continued under Elizabeth I with the 1563 Act for the Relief of the Poor[25]. This allowed Justices of the Peace to raise funds for the relief of poverty from the Church Parish residents, as long as they had the ability to pay. Those who refused could be fined or even imprisoned.

In 1572 the Vagabonds Act[26] which introduced a poor tax to help those who were infirm. It also continued to emphasise the importance of the parish:

> … the statute of 1572 provides (but only if there are in any place surplus funds after the needs have been met of the impotent poor) that the Justices may "place and settle to work the rogues and vagabonds", either born within the county, or being three years resident therein, "there to be holden to work to get their livings and to live and be sustained only upon their labour and travail ".[27]

The Act of 1576 for Setting of the Poor on Work, and For the Avoiding of Idleness[28] was the beginning of change in Tudor England:

> The Act of 1576 indicates the beginning of a great change of thought and policy. Legislators have given up the idea that the existence of masterless men is entirely owing to the idleness and wickedness of the men themselves; they provide materials for employment and Houses of Correction and so recognize that the evil was partly caused by a want of training and by a want of work.[29]

Although this is disputed by historians, as some feel that the 1576 law build on the foundation of the 1536 laws enacted under Henry VIII[30]. Slack considers:

> If Wolsey was the founder of Tudor paternalism, Thomas Cromwell gave it its statutory expression. … Thomas Cromwell's statute of 1536 went much further [than previous Acts]. The

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25 5 Eliz. I c. 3.

26 14 Eliz. I c. 5.

27 B. Webb et al., English Local Government: English Poor Law History: Part I. the Old Poor Law, 1922 Online Edition, pages 52-53. Found at: https://archive.org/stream/in.ernet.dli.2015.126286/2015.126286.English-Poor-Law-History-Part-1the-Old-Poor-Law_djvu.txt

28 18 Eliz. I c. 3.

29 E.M. Leonard, *An Early History of English Poor Relief*, First Paperback Edition, Cambridge University Press, Cambridge 2013 pages 79-80.

30 See, for example, *supra* n.4.

> original bill, probably based on a scheme by William Marshall, provided for public works for vagabonds and even perhaps an income tax to finance them. It would have given a directing hand to a central 'council', and it proved too much for the Reformation Parliament. … The statute lapsed soon after it was passed, but it defined the strategy for the future: work as well as punishment for the idle and able-bodied poor; cash payments to those who could not work; and, as a consequence, a ban on begging and casual almsgiving.[31]

Thus, while the Elizabethan attitudes remained harsh for the idle poor, in other words, those who could work but were unwilling, it significantly softened for the impotent poor, who were too young, old, or sick to work.

The Act of 1576 also required towns to create stocks of provisions such as hemp, wool and iron for poor people to use in work. It also allowed for the creation of "houses of correction" for those who refused to work, which many consider the precursors to Victorian workhouses. As Slack states:

> There were also clauses [in the 1572 Act] punishing vagrants and providing work for them; and these were supported in 1576 by the introduction of stocks of materials on which the poor should be employed and country houses of correction for the incarceration of the incorrigible.[32]

Then came the 1598 Act for the Relief of the Poor[33], which was largely a restatement of many of the Acts that had come before, however, it does also continue the softening attitude of the law to the poor in general. As Pound argues:

> … it did gather together the experience of a century of trial and error, a century in which men's opinions had become progressively more humane and their minds receptive to the arguments of the politicians, whether those arguments stemmed from a cold appraisal of the facts or from a genuine desire to improve the lot of those whose sufferings were greatest.[34]

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31 P. Slack, *The English poor law, 1531-1782*, First University of Cambridge Press Edition, University of Cambridge Press 1995 page 9.

32 *Ibid* at 10.

33 39 Eliz. 1 c. 3.

34 *Supra* n.12 at 52 (kindle location 1210).

This Act restated, in part various acts already mentioned, for example the Act of 1536 where the parish was mainly in control of poor relief and set out the duties of an overseer (Act of 1552) and his staff. It included taxation, which had been introduced in the Act of 1572, to help pay for this relief of the poor and penalties, including prison for those who refused, the money was then used to help the poor:

> The funds obtained were to be used specifically for poor relief, including the provision of suitable dwelling places for the destitute and the relief of prisoners in the King's Bench and Marshalsea. Where necessary, support was to be given to such almshouses as might need aid in each county.[35]

The Act also required the overseers to keep accounts, again this is an inclusion from the 1552 Act, which had to be submitted to two justices of the peace on a yearly basis. The Act also had provisions for the children of the poor – allowing an overseer, with the consent of two justices of the peace, to set them to work as apprentices with boys committed until 24 and girls until 21. Following closely, the 1601 Act for the Relief of the Poor[36] (the Poor Act) was nearly identical to the 1598 Act, but with some minor amendments, and really, according to Pound:

> This Act [of 1598], having carefully defined responsibility for both the unemployed and unemployable poor, remained in force, in all essentials, for almost 250 years. The Statute of 1601 which followed it was, in fact, a re-enactment of that of 1597–8, with slight alterations.[37]

For example, the Act of 1601 allowed apprenticed girls to be released from their apprenticeship if they married before the age of 21, but really both Acts largely built on those that had come before. This demonstrates a change in the overall attitude to the poor during the Tudor period that was set out in 1536,

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35 *Supra* n.12 at 53 (kindle location 1216).
36 43 Eliz. I c.2.
37 *Supra* n.34 at 53 (locations 1223-1230).

although that Act was not successfully passed by Parliament (see footnote 31) and successfully completed with the passage of the 1598 Act.

The Georgian Era (1601 – 1830)

The first important piece of legislation is one that helped determine responsibility for poor relief among the parishes from which a pauper might claim, which has parallels with the modern requirements of a local connection. The Poor Relief Act of 1662[38], also called the Settlement Act, or Settlement and Removal Act, established the settled parish of anyone claiming poor relief and allowed for the removal from another parish back to the settled parish should the applicant claim from the wrong place:

> The original statute of 1662 was essential an Act for Removal. Newcomers thought 'likely to be chargeable' to a parish could be removed by two justices of the peace, provided that complaint was made against them within 40 days of arrival, and provided that they had not rented a house worth £10 a year or more. This was a clear attempt to limit a parish's responsibilities…[39]

However, newcomers to a parish who carried a certificate of settlement, whereby their settled parish acknowledged responsibility for them, could be allowed to stay in a new parish without being removed. The 40-day limit only began when a migrant worker gave notice to the parish and where no notice was given, they could be removed at any time. This changed by the Act for Supplying the Defects of the Former Laws for the Settlement of the Poor[40] where a migrant who paid local rates, or worked in the parish for a year, either as an apprentice or servant, could earn settlement in their new parish. It is still a subject of debate as to whether the requirements of settlement were a positive or negative, but Slack sets out both sides:

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[38] 14 Car 2 c 12.
[39] *Supra* n.31 at 28.
[40] 3 William & Mary c. 11.

> First, it is argued it created an expensive bureaucratic maze, an unnecessary burden alike on justices of the peace, parish officers and the poor. Secondly, it is said that this heavyweight bureaucracy was a harmful brake on mobility, hampering the movement of population from areas where labour was in surplus to areas where it was required…Yet it also had advantages from the point of view of the poor; provided they had an acknowledged settlement, they had an entitlement to relief. …the law recognised that they had a settlement somewhere and their parish, once identified, could be compelled to support them. A modern study of the working of the law concludes that it acted as a useful cushion, allowing parishes to control mobility but not preventing it, giving the poor local attachments, but allowing them some opportunity to establish themselves elsewhere (Taylor, 1976….).[41]

Thus, there is really no clear consensus on the impact of the use of settlement in the maintenance of the poor in early Georgian England.

It is likely the beginning of this shift in policy was with the Act for amending the Laws relating to the Settlement, Imployment, and Relief of the Poor 1722-1723[42], also known as the Knatchbull Act after its sponsor, Sir Edward Knatchbull. This act allowed parishes to build workhouses individually, or with a number of parishes combining to share costs. Poor relief could also be contracted out to a private institution, or "farmed out", to obtain their relief.

Additionally, those refusing to enter a workhouse would lose the right to any other poor relief that would be granted by the parish, as Section IV of the statute states:

> …and in case any poor Person or Persons … shall refuse to be lodged, kept or maintained in such House or Houses, such poor Person or Persons so refusing shall be put out of the Book or Books where the Names of the Persons, who ought to receive Collection in the said Parish, Town, Township or Place, are to be registred, and shall not be entitled to ask or receive Collection or Relief from the Churchwardens and Overseers of the Poor of the same Parish, Town or Township…

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41 *Supra* n.31 at 29-30.

42 9 Geo I Cap VII.

Known as the "workhouse test" this system would become a fulcrum of the later Victorian laws. During this era, however, the use of this section of the statute was rare, as was the banding together of parishes to build a workhouse. Most of the workhouses built were erected by single parishes and "amounted to little more than poorhouses, housing a small number of mostly aged paupers."[43] Far more common was the so-called "farming out" of paupers to private contractors as it was less costly and eased some of the administrative burdens associated with poor relief. However, the establishments were generally poorly managed and a distance from the pauper's settled parish, making the system considerably less comfortable for them.

The Knatchbull Act is noteworthy, also, in terms of a shift in attitudes, and evidence of a firmer approach to poverty, as Speck advances:

> These schemes [of constructing workhouses] reflect a hardening of attitudes towards the poor. The act of 1723 fits in with a whole range of other measures adopted in the 1720s which demonstrate a more ruthless approach to social problems on the part of the ruling class. … The administration of the poor law was tightened up, with the excuse that it had kept the poor idle but in the interests of reducing the amount spent on poor relief. The springs of private charity also began to run out. Indiscriminate almsgiving was deplored by such writers as Defoe and Addison as a misplaced paternalism which aggravated rather than relieved poverty.[44]

This change in attitudes seems to have been heavily influenced by the popular thinking of the time on the use of free market economics, as argued by Brundage:

> …by the early eighteenth century attitudes towards the poor were beginning to harden in some quarters, as reflected in the views of commentators like John Locke, Bernard Mandeville, and Daniel Defoe. Labourers, increasingly seen as lazy, shiftless, and dissolute, could only be kept to their tasks by the relentless pressure of necessity. England's mandatory system of poor relief was,

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43 A. Brundage, *The English Poor Laws, 1700-1930*, Palgrave Press, New York, 2002 at 12.

44 W.A. Speck, *Stability and Strife England, 1714-1760*, Harvard University Press, Cambridge MA, 1977 at 78-79.

> therefore, potentially subversive of the wholesome discipline of the unfettered market. In such circumstances, the deterrent aspect of the workhouse came to the fore, and seemed an effective safeguard against the utter breakdown of labour discipline.[45]

In terms of policy the Knatchbull Act was a significant moment:

> The implications of this policy shift are far-reaching. Under its operation, poor law officials no longer needed to inquire into an applicant's character or situation. An 'offer of the house' would function as a self-acting test of destitution, a doctrine in tune with an advancing free market ethos.[46]

So, while it is true that in terms of actual impact, the workhouse test and use of such institutions was relatively rare, this act was the foundation on which the rise of the workhouse could take place. Moreover, it marks an important moment where the thinking and theories of free market economics started to have a more significant impact on the lawmakers of the time.

The next significant Act was that presented by Thomas Gilbert MP in 1782, and became known as Gilbert's Act. This act, again, overhauled the system of relief provided to the poor and allowed parishes to form poor law unions allowing them to build and maintain workhouses. However, these workhouses were for the only for the old, young and the sick with no room given to able-bodied paupers. The local parish was made responsible for the able-bodied, either by finding them work or providing them with outdoor relief. This statute was largely successful, according to Brundage, "by the eve of the New Poor Law [in 1832] 924 parishes, almost all of them rural, had combined themselves into 67 Gilbert Act unions"[47].

By the 1790s wages were depressed but prices continued to rise leading to more employed households in poverty. While Parliament was deadlocked on this point, a more local approach was taken to granting extra allowances above the wages these households received. As no national system was devised,

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45 *Supra* n.43 at 11-12.
46 *Supra* n.43 page 12.
47 *Supra* n.43 page 21.

many parish overseers took it upon themselves to decide how much additional money to give to those who were struggling. The most famous of these local systems was developed in 1795 in Berkshire by justices who met at the Pelican Inn in Speemhamland near Newbury. This became known as the Speenhamland system:

> Forced to deal with unprecedented pauperism and the clear inability of labourers' families to subsist on the going wages of the area, the magistrates drew up an elaborate sliding scale of poor relief benefits… [Based on the price of a gallon loaf of bread, it] … was later worked up in a tabular fashion so that overseers had only to consult a printed table to determine the precise amount of the family dole for any combination of bread price, wage level, and family size.[48]

The system devised was as follows:

> … when the Gallon Loaf of Second Flour, Weighing 8lb. 11ozs. [3.9 kg] shall cost 1s. then every poor and industrious man shall have for his own support 3s. weekly, either produced by his own or his family's labour, or an allowance from the poor rates, and for the support of his wife and every other of his family, 1s. 6d. When the Gallon Loaf shall cost 1s. 4d., then every poor and industrious man shall have 4s. weekly for his own, and 1s. and 10d. for the support of every other of his family. And so in proportion, as the price of bread rise or falls (that is to say) 3d. to the man, and 1d. to every other of the family, on every 1d. which the loaf rise above 1s.[49]

The Speenhamland scales were just one in a number of similar systems, with others being drawn up even earlier in Oxfordshire, and Dorsetshire and many other rural communities. However, it was the Speenhamland system that became the most widely known, and was heavily criticised for nearly its entire lifespan:

> Criticism of the system was persistent from the time of its inception to its final demise in 1834. Shortly after it became effective, [Sir Frederic Morton] Eden wrote that the principal beneficiaries of

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[48] *Supra* n.43 at 28.

[49] M. Bloy, 'The Speenhamland System', The Victorian Web, found at: http://www.victorianweb.org/history/poorlaw/speen.html but checked against that found in *supra* n.43 at 28.

> Speenhamland were the employers of agricultural labor. Instead of having to pay decent wages they had shunted much of the actual subsistence requirements of their employees to the taxes paid by all ratepayers, including "those who were in many instances not employers of any labourer." Wages would have gone up, Eden was convinced, had the supplementation scheme not been adopted. As early as 1797 he declared that in Berkshire "it rarely happens that a labourer supports himself, wife and children without applying for parochial aid.[50]

In fact, William Cobbett an English journalist, political reformer who thought himself a champion of traditional rural society in the face of the Industrial Revolution, wrote a first-hand account of his rides through areas affected by the Speenhamland system[51]. In this account from his newspaper, Cobbett, gives a first-hand account of the people he encountered:

> The labourers seem miserably poor. Their dwellings are little better than pig-beds, and their looks indicate that their food is not nearly equal to that of a pig. Their wretched hovels are stuck upon little bits of ground on the road side, where the space has been wider than any road demanded. … In my whole life I never saw human wretchedness equal to this…[52]

However, Brundage is not as convinced by the critique:

> In an important sense, the Speenhamland system rapidly became a bogeyman whose true dimensions were more modest than reformers and many later historians were willing to acknowledge. Far from being a pervasive form of poor relief, it was applied only in certain districts and only at certain times of the year.[53]

Yet in terms of policy and in the debates yet to come the Speenhamland system was important:

> In another sense, however, Speenhamland was indeed critical, both because it reflected how 'modernizing' market conditions impacted

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50 M. Speizman, 'Speenhamland: An Experiment in Guaranteed Income', (Mar. 1996) 40:1 Social Service Review 44 at 47.

51 Speizman states that while the Speenhamland system was adopted by nearly all counties, "it was to be important only in the agricultural South". *Ibid* at 46.

52 W. Cobbett, 'Cobbett's Weekly Register – Volume 40 Including the time between July the 21st, and December the 29th, 1821" Published by John M. Cobbett, 1 Clement's Inn, 1921, entry from November 17th, 1821 at 1208.

53 *Supra* n.43 at 29.

> upon the poor laws, and because it was a major factor in the grand clash of ideas about poverty and poor relief that marked the 1790s.[54]

The Great Influencers of the 1790s

One thing, however, is irrefutable, the late Georgian period, and most specifically the 1790s, would in many ways set the stage for what would follow during the Victorian era, not only in terms of the way poverty was viewed, but in terms of how the legal framework dealt with the administration of the poor. In fact, Dean[55] has argued that the prevailing theories and the influence of some of the writers and other great influencers of the 1790s, such as economists and philosophers, "witnessed the formulation of the modern concept of poverty"[56]. This argument is bolstered by Cowan, who specifically considers the stigma that modern poverty still carries with it:

> The ideology underlying the stigma applied to recipients [by the 'new' Poor Law and use of the workhouse] has never been entirely removed and the metaphorical effect can be similar.[57]

Therefore, while the 1790s remained under the Tudor poor laws that had been in force since 1598 and 1601, this was a fundamentally important time for the discourse on poverty and on the rise of the free market. This is because during this period, several influential thinkers and writers began to publish and debate their theories. Those theories would go on to help change the state of poor relief during the Victorian era, but also the modern ideas of poverty that are still used today[58]. For example, Adam Smith's Wealth of Nations advocated the removal of all obstacles to free trade. However, Smith had a rather sympathetic approach to poor relief, which was not shared by some of

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54 *Supra* n.43 at 29.

55 See M. Dean, *The Constitution of Poverty: toward a genealogy of liberal governance,* Routledge, London 1991.

56 A. Brundage, *The English Poor Laws, 1700-1930*, Palgrave Press, New York, 2002 at 36.

57 D. Cowan, *Housing Law and Policy*, First Edition, Cambridge University Press, Cambridge, 2011 at 147.

58 For more on this, see The Historical Foundation at 31 and Justice and the Philosophical Desert - The Issues with Deservingness at 46.

his most passionate followers, such as Edmund Burke. In his memorandum of 1795, entitled Thoughts and Details on Scarcity:

> …he vigorously embraced an unfettered free-trade capitalism and denounced the woeful error of the allowance system. Nor was Speenhamland simply an aberration of an otherwise wholesome law: mandatory relief itself was iniquitous and destructive of social order… His fear of the labouring classes, fuelled by the spectacle of bloody revolution in France and its all too likely exporting to England, made Burke a leading advocate of harshness towards the poor.[59]

However, by far the most influential writer of this time was Thomas Malthus, who, like Burke, was hugely critical of the old poor laws (i.e. the laws passed in 1598/1601). In his essay of 1798, he stated:

> To remedy the frequent distresses of the common people, the poor laws of England have been instituted; but it is to be feared, that though they may have alleviated a little the intensity of individual misfortune, they have spread the general evil over a much larger surface. It is a subject often started in conversation and mentioned always as a matter of great surprise that, notwithstanding the immense sum that is annually collected for the poor in England, there is still so much distress among them. Some think that the money must be embezzled, others that the church-wardens and overseers consume the greater part of it in dinners. All agree that somehow or other it must be very ill-managed. In short the fact that nearly three millions are collected annually for the poor and yet that their distresses are not removed is the subject of continual astonishment.[60]

In other words, the poor law was considered by Malthus to be inefficient, encouraging of laziness and greed, and ineffective at "solving" poverty. His essay was considered not only a reply to the essay of William Godwin entitled Concerning Human Justice (1793), but also more roundly a critique of Adam Smith's ideas of all classes making material progress. Thus, the stage was set

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[59] *Supra* n.43 at 31.

[60] T. Malthus, 'An Essay on the Principle of Population - An Essay on the Principle of Population, as it Affects the Future Improvement of Society with Remarks on the Speculations of Mr. Godwin, M. Condorcet, and Other Writers.' Printed for J. Johnson, in St. Paul's Church-Yard, London, 1798 at 24. Found at: http://www.esp.org/books/malthus/population/malthus.pdf

for the most significant changes to the poor laws, which would start with a Commission set up in 1832 and end with the New Poor Law.

The Victorian Era (1830 – 1901)

The next series of policy changes to relief for the poor started in the 1830s with the Poor Law Commission of 1832. This Commission was investigating the current system of Poor Law Administration, and the use of the Speenhamland system, and was tasked with making recommendations for improvements. This commission shows another marked change in policy:

> Because the subsidization of wages seemed only to depress and corrupt the workers, the commission's principal object was to remove the relief system from the operation of the labor market. The recommendation to confine able-bodied relief to "well-regulated" workhouses was intended specifically to extricate labor from the throes of a system that destroyed incentive, discouraged efficiency, and extinguished ambition. Severing public aid from private employment, in conjunction with a substantial degree of stringency in the administration of that aid, promised effectively to deter the workers from resorting to the parish for support; this in turn would expose them to the rigors of open competition for employment.[61]

The feeling is once implemented this new, more strict system:

> … would foster the full range of economic virtues in each worker, and individual self-interest would thereby be enlisted in the fight to release the productive energies of a population that had been foolishly insulated from the "natural" struggle for subsistence. The expected results pointed to a spectacular transformation in the condition of the laboring poor: the greater industry of independent labor would augment employers' profits, which then would create a larger wages fund; at the same time, the increased efficiency of labor would provide sufficient motivation for the hiring of more workers, such demand necessarily resulting in higher wages.[62]

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[61] P. Dunkley, 'Whigs and Paupers: The Reform of the English Poor Laws, 1830-1834', (Spring, 1981) 20:2 Journal of British Studies 124 at 135.

[62] *Ibid*.

These assumptions were based on the prevailing economic theories of the 1790s, as discussed in the previous section. Thomas Mathus "profoundly influenced the thinking of his contemporaries"[63], and his theories on the old poor laws producing surplus labour, and thus poverty which was part of the driving force of the reforms and recommendations made by the commission:

> The Poor Law Commission of 1832 has been belabored, undoubtedly with justice, for approaching its investigations with an a priori attitude. In their report the Commissioners, steeped in the classical economic theories of Malthus and Ricardo, found exactly what they were looking for: that the prevailing Poor Law system, in particular wage-supplementation, was responsible for gross immorality and was destroying the character and resource fulness of the English laboring classes.[64]

However, some academics feel the Report itself and part of its goal, to solve the issues of Speenhamland is overstated, with Speizman contending:

> The importance of this Report may long have been overestimated since, as has been pointed out recently, the "Speenhamland System as such had generally disappeared by 1832, even in the South." Evidently, the commissioners were flaying a dead horse to achieve their objective of revising the Poor Law to accord with their economic and social views and to re-emphasize deterrence as the principal objective of relief.[65]

In other words, these changes were guided by Victorian ideas of poverty being rooted in idleness, therefore receiving relief was a matter of shame or disgrace:

> The Poor Law Commission ... may have hesitated before repeating the Malthusian dictat that 'dependent poverty ought to be held as disgraceful' but they were always happy to consider that individual cases of pauperism were associated with feckless, idle or improvident behaviour...[66]

The commission's recommendations resulted in the Poor Law Amendment Act of 1834[67], which ostensibly prohibited outdoor relief, yet a system of quasi-

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63 *Ibid* at 430.

64 *Supra* n.50 at 49-50.

65 *Supra* n.50 at 50.

66 P. Carter, 'Joseph Bramley of East Stoke, Nottinghamshire: A Late Victim of Crusade against Outdoor Relief' (2014) 17:1 Family and Community History 36.

67 4 & 5 Will. 4 c. 76.

outdoor relief (non-resident payments) evolved where the poor were not taken to workhouses if their settlement parish agreed to pay for them. Contemporaneous accounts demonstrate that, despite this, the law was still controversial with Benjamin Disraeli claiming:

> [The 1834 Act] went on the principle that relief to the poor is a charity. I maintain that it is a right . . . I consider that this Act has disgraced the country more than any other upon record. Both a moral crime and a political blunder, it announces to the world that in England poverty is a crime.[68]

The system of non-resident payments continued during this period until the Union Chargeability Act 1965[69], which removed all the powers of settlement from the parishes and "transferred them to the guardians [of the workhouses] and the poor law unions".[70]

These Acts of 1834 and 1865 became about controlling the poor by restricting relief for the able-bodied poor, but not necessarily the sick and infirm, to workhouses, removing the right to seek relief by other means (e.g. outdoor relief)[71].

Workhouses had deliberately horrific conditions and required labour in exchange for relief, so it was felt that only those who were poor yet willing to work would be desperate enough to enter a workhouse:

> The classification and separation of paupers, the imposition of strict rules and the overbearing monotony of day-to-day life in the workhouse were central facets of this deterrent policy... The choice apparently open to paupers was either to accept what was on offer or to seek assistance elsewhere, a choice which for many was tantamount to choosing whether to eat or starve.[72]

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68 W.F. Monneypenny et al, *The Life of Benjamin Disraeli, Earl of Beaconsfield*, Online Edition, The Macmillian Company 1910 at 374. E-book found at: http://www.archive.org/stream/lifeofbenjamindi01mony/lifeofbenjamindi01mony_djvu.txt

69 28 & 29 Vict., c. 79 (1864).

70 L. Charlesworth, 'The poor law: a modern legal analysis' (1999) 6(2) J.S.S.L. 79 at 90.

71 *Ibid* at 88-89.

72 D. Green, 'Pauper protests: power and resistance in early nineteenth-century London workhouses' (2006) 31:2 Social History 137.

Workhouses were meant to act as a deterrent, encouraging the poor to change their behaviour to avoid them, reinforcing the notion of the poor being (at least partly) responsible for their own misery.

Thus, after this Act those who were willing and able to work were forced to classify themselves by their willingness to enter into a workhouse. Those who were deserving of help would enter and those who were not would refuse. However, there is an indication that this is not what actually happened and that it was actually the sick poor who suffered because of the change in the law:

> The operation of the New Poor Law [Poor Law Amendment Act of 1834] did not, however, turn out the way its founders had intended. Three years after the implementation of the Poor Law Amendment Act, returns from the Poor Law Unions to the new national Poor Law Board indicate that the workhouses were relieving not the indolent able-bodied [the "idle poor"], but rather the aged, the sick, and the physically and mentally disabled.[73]

This trend continued throughout the latter years of the nineteenth century, an economic downturn and a continuing change in attitude to the poor led to "a crusade" for further tightening of the policy surrounding poor relief:

> George Goschen, the last president of the Poor Law Board, claimed the poor had abused the system. He... set the 'crusade' in motion in an 1869 circular, since known as the Goschen Minute. He called for strict delineation between the deserving and undeserving poor[74]

This "crusade" most affected those who were not able-bodied, as they could still qualify for outdoor relief. While the law remained the same, the policy shifted to the disadvantage of those who were still able to avoid the harsh conditions in the workhouses – the "sick poor". This era saw a similar shift in

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[73] D. Wright, *Mental Disability in Victorian England: The Earlswood Asylum 1847-1901*, First Edition, Oxford University Press 2001 at 14.

[74] K. Price, ''Where is the Fault?': The Starvation of Edward Cooper at the Isle of Wight Workhouse in 1877' (2013) 26:1 The History of Social Medicine 21 at 25.

public opinion whereby those on benefits were generally viewed as feckless, lazy or "trying to play the system" in some way.

The Modern Era

This section will be broken down into two distinct eras, first the end of the Victorian Era from 1901 until 1970, and then the modern era post 1970. The latter will focus more on the change in the policy surrounding social housing and welfare and the increased use of conditionality and morality in the discourse.

The Early Modern Era (1901-1970)

This concept of the deserving and undeserving was consistently used as little as one hundred years ago. Between the two great wars, changes to conditions and tenure in housing was considerable, but not made readily available to the working class:

> Even when the Wheatley Act[75] allowed rate fund contributions, designed to moderate rents, and open the way for lower-income households, the tradition of paternalistic landlordism operated against the worst-off families. The Poor Law tradition of deserving and undeserving poor was very much alive and kicking in the allocation and management of the new council housing.[76]

Some of the issues during this era was the devastating effect of World War I, a rapid growth in population, slum clearances and a stagnation in new builds. It was not really until after World War II that the idea of the welfare state took root and policies based on this idea of state aid for the poor really came into focus. This was, in part, thanks to the Beveridge Report of 1942[77], which attacked five social ills (or five giants) - want, squalor, disease, ignorance and idleness. The report aimed to take a more holistic view of these ills and

[75] Another name for the Housing Act of 1924.
[76] S. Lowe, *The Housing Debate*, First Edition, Policy Press 2011 at 71.
[77] The 1942 Report on Social Insurance and Allied Services by William Beveridge.

provide a comprehensive state led remedy, so a welfare state, rather than disparate programmes aimed at one particular issue within society:

> In other words, what was proposed by Beveridge was a 'welfare state', rather than disconnected welfare policies. Arguably, the key theme of this approach was its emphasis on social rights as a consequence of citizenship.[78]

This led to rafts of reforms to education, income support and, of course, the National Health Service. Like previous periods the thinking of the day was influenced by the particular characteristics of the time. Post-war Britain had very low unemployment, in fact in 1942 the yearly unemployment average was 0.8% and never got above 5% in the next 20 years[79]. As the war had taken many men's lives, and there was a greater need for manufacturing, there was near universal employment. There was also a great societal want for change, as Lowe states:

> It is quite a challenge at this distance in time to appreciate just how strong the mood was for the use of state intervention and for fundamental change to pre-war society. People had been asked to 'pull together' during the war and there was a strong expectation that because the state had run the war, so it should spearhead peacetime reform. … As with social policy, much of what happened was a continuation of wartime practice that had marked the break with the much more market-orientated approaches of the pre-war governments…[80]

During this time society wished to sweep away the past, and there was a move to make society fairer and more equal. Churchill, during his wartime broadcast of 1943, according to Timmins:

> … [Churchill] promised 'national compulsory insurance for all classes for all purposes from the cradle to the grave'. It was, he said, 'a real opportunity for what I once called "bringing the magic of averages to the rescue of the millions".' To that he added the

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78 *Supra* n.76 at 80.

79 J. Denman et al., 'Unemployment statistics from 1881 to the present day' Labour Market Statistics Group, Central Statistical Office, Prepared by the Government Statistical Service, Table 1 (1996) Volume 104 (Jan) Labour Market Trends 5-18 at 7.

80 *Supra* n.76 at 81.

> abolition of unemployment. 'We cannot have a band of drones in our midst, whether they come from the ancient aristocracy or the modern plutocracy or the ordinary type of pub-crawler', and the voice of Keynes could be heard in Churchill stating that government action could be 'turned on or off as circumstances require' to control unemployment. There was, he accepted, 'a broadening field for State ownership and enterprise' and his vision included a housing drive, educational reform, and much expanded health and welfare services. 'Here let me say there is no finer investment for any community than putting milk into babies.'[81]

This challenged ideas of deservingness and justice and moved the system to benefits/poor relief as a right for everyone and administered centrally. Just like everyone had "pulled together" as Lowe stated, so to would that spirit be extended beyond the war and into a new movement for a modern society. One of the underlying requirements was a minimum standard of living for everyone in society, which represented a huge departure from the Victorian ideas of the workhouse:

> As early as April 1942, a Home Intelligence report noted: 'Sir William Beveridge's proposals for an "all-in" social security scheme are said to be popular', and by the autumn Home Intelligence was recording that: 'Three years ago, the term social security was almost unknown to the public as a whole. It now appears to be generally accepted as an urgent post-war need. It is commonly defined as "a decent minimum standard of living for all".'[82]

Thus, deservingness was swept aside in the aims of this egalitarian society where everyone was given a minimum standard regardless of their status as "deserving".

During this time housing was especially problematic, as aerial bombardments and a lack of new builds had created a housing crisis, as Timmins states:

> BRITAIN EMERGED from the war with 200,000 houses destroyed, another 250,000 so badly knocked about that they could not be lived

[81] N. Timmins, *The Five Giants [New Edition]: A Biography of the Welfare State*, HarperCollins Publishers, 2017, Kindle Edition at kindle location 1258 of 19323.

[82] *Ibid* at kindle location 1123 of 19323.

> in and a similar number severely damaged. Millions of men and women were about to come home, and the marriage and birth rates were rising fast. The pre-war building labour force of a million men had fallen to a third of this number, mainly concentrated in south-east England in the path of the flying bomb and rocket attacks. … in England and Wales 71,000 houses had been requisitioned [for office use] by local authorities.'[83]

Post-war housing was very strictly controlled, so that 80% of new houses were allocated to council housing and not the private market[84]. Aneurin Bevan, who in 1945 was in charge of the housing programme:

> ...favoured local authorities as house-builders because they were, in his words, 'plannable instruments' and could meet, in a direct manner, the needs of poor people for homes to rent.[85]

This gradually declined and the Labour government of 1964-70 intended to split new builds between social and private sectors evenly 50/50. Despite this change, there was still a huge number of the population living in social tenancies, in fact in the 1970s it is estimated nearly a third of the population rented a council house.

The Modern Era (Post 1970)

It was in the 1970s that, many argue, the modern welfare state in Britain emerged:

> The post-war welfare state was dynamic and there was a certain amount of change in all services, but there is widespread agreement in the academic literature that the mid-1970s was a watershed, marking a crisis and a transition to the construction of a new, modernized welfare state. One way of looking at this is to say that in the face of profound economic, social and political change the three post-war settlements have been substantially renegotiated.[86]

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83 *Ibid* at kindle locations 3093-3100 of 19323.

84 *Supra* n.76 at 102.

85 B. Lund, *Understanding Housing Policy*, Second Edition, The Policy Press 2011 at 53.

86 P. Malpass, 'Fifty Years of British Housing Policy: Leaving or Leading the Welfare State?' (2004) 4:2 European Journal of Housing Policy 209 at 213.

This included housing, with the election of Margaret Thatcher in 1979[87]. During this time social housing began to become what Malpass calls "residualized" whereby it is seen more for the poor and vulnerable[88]. According to Fitzpatrick et al.:

> This shift was associated with the post-1970 emergence of a needs-based social housing allocation system, including the establishment of priority access to social housing for statutorily homeless households (Fitzpatrick & Stephens, 1999). Alongside this, and arguably even more important, was the exit of better-off social tenants via Right-to-Buy, in the context of a substantial overall contraction in the size of the sector.[89]

The contraction of social housing with right-to-buy is considered in more detail in the next section.

However, the most interesting and relevant changes began about thirty years ago. It was the late 1990s that should really be considered the beginning of the formation, at least, of the modern criteria of deservingness. During this time there was an increased focus on tackling anti-social behaviour, as Cowan considers:

> Increasingly, social housing management has been reconfigured with specific teams designed to deliver an ASB strategy…, in conjunction with other organisations through multi-agency partnerships, … in their governance of populations…[90]

This started with the passage of the Housing Act 1996, as the Welfare Conditionality Project's final report noted:

> The erosion of the security of tenure of English social tenants first began with the introduction, in 1996, of 'probationary' tenancies by the then Conservative Government, which meant that full security of tenure could be delayed for new social tenants (for up to 18 months), and then by the implementation of 'demoted' tenancies in

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87 See *ibid* at 219.

88 *Supra* n.86 at 221.

89 Fitzpatrick et al., 'Conditionality Briefing: Social Housing' Welfare Conditionality Project – Economic and Social Research Council, September 2014, at 2. Found at: https://pureapps2.hw.ac.uk/ws/portalfiles/portal/7537719/Briefing_SocialHousing_14.09.10_FINAL.pdf

90 *Supra* n.57 at 357.

> 2003, by the then Labour Government, which reduced security for existing tenants subject to behavioural concerns.[91]

When New Labour came to power in 1997, their so-called "Third Way" considered responsibility, community and citizenship as a large focus for necessary changes, as Flint and Nixon state:

> The defining element of New Labour's Third Way is the identification of community as both the location and processes of governance (Rose, 2001). The communitarian underpinnings of community governance define individuals by their irrevocable membership of local (spatially defined) communities, imbuing them with a series of duties and obligations to their neighbours and communities. … Thus civil conduct is related to establishing a self-governing citizenship that plays out at collective levels through constructing self-governing communities…[92]

This led to what Deacon describes as a more "moralistic approach" to welfare and its recipients:

> New Labour claims to have replaced the excessive structuralism of the earlier period with a more balanced and more nuanced analysis that acknowledges the continuing importance of social and economic inequalities, but also recognises the role played by the choices, lifestyles and culture of the poor themselves. This has led in turn to an explicit rejection of the non-judgementalism that underpinned the earlier rhetoric about welfare rights, and the adoption of a more moralistic approach that emphasises the obligations and responsibilities of those who receive welfare…[93]

The Coalition Government subsequently changed the rhetoric in post 2010:

> Under the post-2010 UK Coalition Government, the rhetoric of consumer choice for social tenants has largely been dropped, with a much stronger emphasis on the primary role of social housing as meeting 'genuine' or 'crisis' needs, intrinsic to which is the shift from indefinite to fixed-term tenancies …[94]

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91 Welfare Conditionality Project, 'Final Findings Report: Welfare Conditionality Project 2013-2018' Economic and Social Research Council, June 2018 at 12. Found at: http://www.welfareconditionality.ac.uk/wp-content/uploads/2018/06/40475_Welfare-Conditionality_Report_complete-v3.pdf

92 J. Flint et al., 'Governing Neighbours: Anti-social Behaviour Orders and New Forms of Regulating Conduct in the UK' (2006) Vol. 43 (Nos 5/6) Urban Studies 939 at 941.

93 A. Deacon, 'Justifying conditionality: the case of anti-social tenants', (2004) 19:6 Housing Studies 911 at 912.

94 *Supra* n.89 at 2.

Despite the passage of the Housing Act 1996 and the introduction of demotion orders with the Anti-social Behaviour Act 2003, it was really the passage of the Localism Act 2011 that was the start of the biggest raft of changes that constitutes not only modern policy on social housing, but helps define modern deservingness. The Localism Act and the subsequent Acts and their role in deservingness will be considered in more detail in Chapter 4.

The Erosion of Social Housing

It was not until the late 1970s and the early 1980s, when the Right to Buy scheme began to change the face of housing, leading to the decline of the use of social housing and the rise of a nation of homeowners:

> In 1980, local councils provided rental accommodations for nearly 31% of the nation's households. By 2008, the figure was only 16%.[95]

This change was aided by the Housing Act 1980, which made some serious changes to the way social tenants were treated with regards to their tenancies:

> Local authority tenants became 'secure tenants' with a clearer set of rights regarding possession. People who had been 'secure tenants' for three years (later reduced to two) were given an additional individual right to purchase their homes at a substantial discount on its market value: 33% for three years' tenancy rising by 1% per year to a 50% maximum.[96]

This was combined by a restriction on eligibility for housing benefit, reducing the threshold from 110% of male gross earnings in 1983 to 50% in 1988[97]. At the same time changes were made to encourage private landlords, such as tax breaks and the removal of rent controls. These policies combined led to a decline in the social sector, as more people bought their council properties, and some were sold to private individuals. This trend has continued to the present and, according to the English Housing Survey of 2012-2013:

> ...the private rented sector overtook the social rented sector to become the second largest tenure in England... Overall, 65% or 14.3

[95] *Supra* n.76 at 125.
[96] *Supra* n.85 at 63.
[97] *Ibid*.

> million were owner occupiers, 18% (4.0 million) were private renters and 17% (3.7 million) were social renters[98]

This means, as the numbers demonstrate, that more households rent from private landlords than local housing authorities or other providers of social housing. With this erosion of the use of social housing came a change in attitudes, as Malpass argues:

> The current role and state of social housing, and policy responses to it, are revealing of changes in the welfare state over the last fifty years. Then a council house was a desirable acquisition, a prize to be cherished and a sign of social inclusion. Public housing was a tenure for the social mainstream.
> Now, however, 'To many, social renting has become a symbol of failure in a consumer society – a tenure of last resort' (Taylor 1998: 820). In other words, social renting is now a sign of social exclusion. This is of interest in that fifty years ago writers such as Marshall (1950) and Titmuss (1958) were arguing that the post-war welfare state was about extending citizenship, and that it gave citizens the right to use public services with 'no sense of inferiority, pauperism, shame or stigma . . . no attribution that one was becoming a public burden'. More recent discussions of social exclusion (Room 1991) have continued to employ the same idea, but it is clear that in contemporary Britain the definition of citizenship has altered and that, at least as far as residualized public services are concerned, to be dependent on such services is to be identified as one of the excluded.[99]

As of 2015 the number of people who live in privately rented accommodation had doubled since 2002[100]. The survey also noted an increase in housing benefit among both social and private renters. As the housing crisis deepened, the decline in available social tenancies led to longer waiting lists for available

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98 Department for Communities and Local Government, 'English Housing Survey - Headline Report 2012-13' February 2014 at 10. Found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284648/English_Housing_Survey_Headline_Report_2012-13.pdf

99 *Supra* n.86 at 221-222.

100 F. Albanese, 'The single biggest cause of homelessness - Homelessness in Numbers Briefing #1' prepared for the Homeless Link, 24 June 2015. Found at: https://www.homeless.org.uk/connect/blogs/2015/jun/24/single-biggest-cause-of-homelessness-homelessnessinnumbers

properties with the lists peaking around 2012[101]. So, with supply far outreaching demand, there was then a lot of added pressure on the government to cut waiting lists. During a time of austerity, the government was unable or unwilling to fund new social housing builds, there was no chance of creating more supply to meet the demand, therefore the Localism Act 2011 changed the criteria for eligibility to make it stricter. This had far-ranging consequences on waiting lists, but also on the number of homeless:

> The Localism Act 2011 has also enabled local authorities in England to impose restrictions on who qualifies for access to social housing in their area, and many councils appear to be making robust use of these new powers to significantly restrict access to their waiting lists. Reasons for disqualification from housing waiting lists were reported to include insufficient local connection (with residence requirements of two to five years imposed), lack of engagement in work-related activities, a history of anti-social behaviour, and rent or Council Tax arrears.[102]

Additionally, the Localism Act 2011 has cut the length of tenancies, removing the tenancy for life and introducing flexible tenancies, in an attempt to address these issues, which has led to a further restriction of access to social housing. As previously discussed, not only has the law restricted access to social housing by making eligibility more difficult, but also through limiting the length of a tenancy.

The combination of the changes in public perception of the poor, and these very difficult conditions created by the housing crisis has led to a reassessment of who should be given priority for social housing. The general feeling in public discourse on who should receive government help in housing, as well

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[101] Graph entitled 'Households on local authority waiting lists' in Department for Communities and Local Government, 'Local authority housing statistics: year ending March 2014', published 11 December 2014 on at 6. Found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/385091/Local_authority_housing_statistics_-_year_ending_March_2014.pdf

[102] S. Fitzpatrick et al., 'The Homelessness Monitor: England 2015', for Crisis, February 2015 on at 14. Found at: https://www.crisis.org.uk/media/237031/the_homelessness_monitor_england_2015.pdf

as other pillars of the welfare state, has turned from "those in need" to "those who deserve it" and the law attempts to determine a set of criteria for those who should be considered deserving. The confluence of housing need and deservingness will be considered later in this chapter. While deservingness has been in and out of popularity, the policy changes brought about by the Localism Act 2011 and a number of statutes that followed, has brought this concept once again to the fore. This will be considered in more detail in the next chapter.

The Criteria of Deservingness

The criteria that are currently emphasised in the legal framework are status and behaviour. While the criteria have been in development since the 1990s, but refer to standards imposed since the passage of the Localism Act 2011 and subsequent acts.

The details linking behaviour to the legal framework will be covered in detail in the next chapter. However, in order to move the discussion on deservingness forward, it is necessary to explain, briefly. Status refers to employment, willingness to work, having a local connection or contribute to the local community in some other way (through volunteering or fostering). In fact, the emphasis on employment in governmental policy was highlighted in a Parliament briefing paper on under occupation:

> Creating an incentive for benefit recipients to return to work or increase their working hours is central to the Government's welfare reform agenda.[103]

The second of the two elements, behaviour, relates to conforming to an acceptable standard of conduct, for example, by not behaving in an anti-social way or causing nuisance to others. There is also a focus on deserving being

[103] W. Wilson, Briefing Paper No. 06272, 'Under-occupying Social Housing: Housing Benefit Entitlement' House of Commons Library, 15 March 2012 at 4.4 at 41. Found at: http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06272#fullreport

something that one earns through action, so working or behaving appropriately; there is an argument to be made that it is not simply something one is, it is something that one earns by doing. Further, there is an indication that the modern criteria are taking the examination of deservingness further by requiring deservingness in the past, present and future. This will be explored in more detail in Chapter 5.

The Historical Foundation of the Criteria

The examination of the historical developments of both deservingness and attitudes to the poor show that there are overall attitudes that are generally delineated by era (see footnote 44) from Tudor and Reformation paternalism and Christian duty, the Georgian era where the foundations for the great nineteenth century changes to poor relief were formulated and later enacted during the Victorian era.

The Tudors and early Stuarts took a more paternalistic view, of certain classes of the poor – the impotent rather than those terms "vagabond", although they too had moral justifications against idleness and the workshy[104]. As Slack states:

> It was generally accepted in the latter seventeenth and eighteenth centuries that the poor had a right to relief in cases of extreme necessity, or 'indigency', as it came to be termed. It was even more generally agreed that this right had become a legal entitlement under the Elizabethan statutes.[105]

In other words, the poor were thought of as having a right to some relief, albeit usually the impotent poor. Slack identifies three main elements, which when combined explain this paternalism in the Old Poor Laws:

> Humanist attitudes towards social welfare had three elements which – in different combinations – continued to influence social policy throughout our period. First, there was Christian charity … but it should be directed to particular rational ends, not indulged

[104] See footnote 31 at 7
[105] *Supra* n.31 at27-28.

> in simply for the salvation or self-satisfaction of the donor. Secondly, the aim should be reform, and particularly moral reform [of the poor]. This was also an old theme, familiar in medieval sermons against idleness…Finally, reform should be carried out by public authority, and it should be thorough. Governments not only had a duty to engage in social engineering, but engineering was also possible. There was a new optimism about what government could achieve and that included the elimination of poverty.[106]

Yet idleness was not universally applied to "the poor". The use of defining groups of poor makes this clear. The laws differentiated between the old and infirm, or very young, who were considered worthy of poor relief from the parish, and those who were considered the idle poor, or vagabonds, who were generally considered to be lazy and lawless who were often whipped, but could also be incarcerated.

This thinking was not unique to England but more a product of the Reformation. In fact, Huldrych Zwingli, the Founder of the Swiss Reformed Church and an important contemporary of Martin Luthor wrote in his Ordinance for Zurich of 1525:

> The following types of poor persons and country folk are not to be given alms: any persons, whether men or women, of whom it is known that they spend all their days in luxury and idleness and will not work, but frequent public-houses, drinking places and haunts of ill-repute…... But to the following folk poor relief shall be distributed, the pious, respectable, poor citizens.[107]

Yet according to Wailes, Zwingli was also someone who also believed that relief of the poor was a Christian duty:

> …Zwingli had preached emphatically of the close link between Christian love and poor relief; "to care for the poor effectively was to make visible the Christian love of brother"…[108]

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[106] *Supra* n.31 at 6-7.

[107] Translation found in P. Spicker, *Stigma and social welfare Stigma and social welfare* First Published by Croom Helm, 1984, Second Edition (Online) from 2011 at 10. Found at: https://www.academia.edu/35474649/Stigma_and_social_welfare_Stigma_and_social_welfare_Stigma_and_social_welfare_Stigma_and_social_welfare

[108] S. Wailes, *The Rich Man and Lazarus on the Reformation Stage: A Contribution to the Social History of German Drama* Associated University Presses, London 1997 at 90.

This Reformation paternalism viewed the local parish as the public body responsible for providing those who could not provide for themselves:

> Under the Tudors and early Stuarts a paternalistic attitude had prevailed, institutionalizing public charity with the poor laws and conspicuously bestowing private charities. Under the later Stuarts, and especially under the early Hanoverians, a less philanthropic attitude was adopted.[109]

As the quote indicates, the more paternalistic attitudes hardened during the Georgian Era and led to an overhaul of the Old Poor Laws (of 1598 and 1601) in 1823, as has already been discussed. The great writers of the time, like Thomas Malthus and Edmund Burke (see footnote 59) advocated a much harsher treatment of the poor. Similarly, Joseph Townsend another well-known Georgian writer, geologist and medical doctor, was highly critical of the Elizabethan Poor Laws in his Dissertation on the Poor Laws of 1786:

> Here [the clergy] see helpless infancy and decrepit age, the widow and the orphan, some requiring food, and others physic; all in such numbers, that no private fortune can supply their wants. Such scenes are more distressing, when, as it sometimes happens, the suffering objects have been distinguished for industry, honesty, and sobriety. The laws indeed have made provision for their relief, and the contributions are more than liberal. which are collected for their support; but then, the laws being inadequate to the purposes for which they were designed, and the money collected being universally misapplied, the provision, which was originally made for industry in distress, does little more than give encouragement to idleness and vice. … These laws, so beautiful in theory, promote the evils they mean to remedy, and aggravate the distress they were intended to relieve.[110]

This quote demonstrates that Townsend was also critical of the poor as a group with no differentiation between impotent or "workshy". He indicates the funds, even though seeing those "distinguished for industry, honesty, and sobriety" are universally misapplied. In other words, there should be no poor

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[109] *Supra* n.44 at 78.

[110] J. Townsend, 'A Dissertation on the Poor Laws by a Well-Wisher to Mankind 1786' Republished London, Printed for Ridgways, 170, Piccadilly, 1817, Section I, at 1-2.

relief for anyone regardless of their situation. His belief in the workings of the free market simply make it worse for those in that unfortunate situation by aggravating "the evils they mean to remedy". Townsend also contends that there are the laws of nature, where some are lower in the social order than others, and that hunger and honest work will bring happiness and peace to this class:

> It seems to be a law of nature, that the poor should be to a certain degree improvident, that there may always be some to fulfil the most servile, the most sordid, and the most ignoble offices in the community. … When hunger is either felt or feared, the desire of obtaining bread will quietly dispose the mind to undergo the greatest hardships, and will sweeten the severest labours. The peasant with a sickle in his hand is happier than the prince upon his throne. … [111]

Again, Townsend, like many thinkers of the time looked to the free market and this new economic science, rather than the old and inefficient laws to solve some societal ills. The more sympathetic approach taken by Adam Smith in his Wealth of Nations was eschewed in favour of a harsher tone with contemporaries such as Edmund Burke taking Townsend's ideas even further, as Brundage states:

> The only solution, for Townsend and the increasing numbers who considered their views grounded in science, was the abolition of mandatory assessment and relief [of the poor]. Only then could the wholesome discipline of the market take effect, bringing the poor face to face with harsh economic realities and the necessity of developing the qualities of character to survive. … like Townsend, in regard to the poor laws he [Edmund Burke] inverted Smith's sympathetic approach. He also continued the process of further abstracting the lower orders into a commodity, stripped of all individuality.[112]

These views were extended by Sir Frederic Morten Eden who, in his book State of the Poor of 1797, argued:

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111 *Ibid* at Section VII, at 39-40.

112 *Supra* n.43 at 31.

> To invest a public body with a part of that stock, which, for the safe of profit, sets the greater part of useful labour in motion, seems indeed repugnant to the sound principles of political economy. The capital stock of every society, if left to it's free course, will be divided among different employments, in the proportion that is most agreeable to the public interest, by the private views of individuals. When it is thus employed, it will accumulate: and it is it's accumulation only, which can afford regular and progressive employment to industry. Projects, which, without increasing the demand for any article of consumption, interfere with established manufacturers, and oblige the fair trader … to enter into competition with the parish…[113]

In other words, the giving out of poor relief was stifling the market and actually reducing wages. This new sense of the science of economics even found its way into the theological theories of the day. The Georgian Era also saw a change in the way Christianity viewed the poor, that, again, looked more to free market trade and away from the more Reformation-based feelings of Christian charity, and moral reform for the idle:

> Such traditional Christian injunctions on the duty to care for the poor, found also in the works of the great eighteenth-century theologian William Paley, carried less and less weight. Part of the reason is that the sons of the gentry had been imbibing at English universities a new theology that scoffed at Paley's notion that the poor were vested with 'natural rights'. In the influential teaching and writing of Edward Copleston of Oriel College, Oxford, the design of Providence was rather to be looked for in the working of the market and the principle of population.[114]

These new theories and their increasing popularity helped change the views of society on poverty and the place of the poor. No longer was there a right to poor relief for those incapable of work, for that in itself was harming the free market and the wages of workers. It was an inefficient system that hurt those it was trying to help, and it needed to be overhauled.

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[113] Sir F.M. Eden, *The State of the Poor Volume One*, A Facsimile of the 1797 Edition, Frank Cass & Co. Ltd., London 1966 at 468.

[114] *Supra* n.43 at 47.

This entire position was greatly influenced by the moral philosopher Jeremy Bentham, whose position on work and on poverty, were instrumental in the rise of the workhouse[115]. As Cowan states:

> The 'new' Poor Law, designed by Bentham's disciple, Edwin Chadwick, stigmatised the poor through the workhouse which operated as a disciplining device for those both inside as well as outside its walls.[116]

Despite this fact, Bentham was not an advocate of Townsend or of Malthus's want to abolish the poor laws completely, his thinking on poverty was very much influenced by his ideas on justice and on utilitarian philosophy:

> Bentham argued neither for the abolition of relief, nor for the limitation of the poor rates. It was basic to his writings on the poor laws that relief should be available to those who required it. No such entitlement however, could be derived from a natural right to the means of subsistence. Not only was the concept of a natural right anathema to Bentham, but its specific application to the distribution of the means of subsistence would be self-defeating, in so far as the motive force to the production of such means depended precisely on the spur of necessity.[117]

Rather, he had his own rather more original and radical ideas:

> If Malthus represented at least a partial repudiation of the Enlightenment, Bentham seemed to embody it; he was the quintessential English *philosophe*. A rigorous and unconventional thinker, eccentric in appearance and manner, he inspired a small band of followers, known as the Philosophical Radicals, who made it their mission to change English laws and institutions. … The cold, searching glare of reason was turned upon the most hallowed institutions: the common law, criminal law, the judiciary, prisons, educations, and the poor laws.[118]

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115 See *supra* n.43 at 34.

116 *Supra* n.57 at 147.

117 M. Quinn, 'Jeremy Bentham on the Relief of Indigence: An Exercise in Applied Philosophy' (1994) Volume 6(1) Utilitas 81 at 83.

118 *Supra* n.43 at 33-34.

He went on to distil the arguments of Townsend and his fellow abolitionists[119] who wished to abolish poor relief down into the basic premise, which was little to do with anything more than saving money:

> Some have maintained that there should be no provision at the expence of government by law for the poor, or at least that whatever the existing provision be any where, it should not be permitted to encrease. Ask the reason, it turns ultimately upon nothing but the magnitude of the present expence: for as to idleness on one part, it is no otherwise an evil than in as far as it necessitates expence on the other.
> Bentham's own answer to the question was explicit:
> In a civilised political community, it is neither consistent with common humanity, nor public security, that any individual should, for want of any of the necessaries of life be left to perish outright.[120]

Yet Bentham was careful in defining the terms he used, and he felt that there was a distinction to be made between poverty and indigence. Poverty, he posited, was the natural state of mankind where in order to relieve that poverty one was forced to exchange labour for wages, as he stated "the unchangeable lot of man"[121]. On the other hand, indigence was caused by the lack of a living (subsistence) from that labour. This could happen in two main ways, the first being where a person was unable to labour (because of age, disease or infirmity), or where a person's labour was insufficient. According to Quinn, Bentham felt:

> The notion of relieving poverty was for Bentham a self-evident absurdity, the relevant question related to responsibility of government for the relief of indigence, for the provision of subsistence to those who without such provision would starve to death. Neither Townsend nor the advocates of the freezing of relief expenditure posed this question so bluntly, and, as Bentham observes, their implicit answers to it were shot through with ambivalence and prevarication.[122]

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[119] 'Abolitionist' referring to the abolishment of the old Poor Laws and not abolishing slavery. Contemporaries of Townsend have been mentioned such as Malthus, and Burke.
[120] Quoted in *supra* n.117 at 84.
[121] Quoted in *supra* n.117 at 83.
[122] *Supra* n.117 at 84.

So, while it seems likely that Bentham was a proponent for relief of indigence, he was also trying to reconcile ideas of justice, which briefly summed up are:

> …the whole fabric of felicity is erected in large degree, on the incentive given to labour by the promise of the enjoyment of its fruits. Justice demands that with regard to 'two members of the community, equally innocent and equally deserving, not connected by any domestic tie, one shall not be compelled to part with the fruits of his own labour, without absolute necessity, for the benefit of another'.[123]

He also saw little purpose in attempting to distinguish between the deserving and undeserving poor, which led to several issues:

> Bentham denied even the government should try to discriminate between the deserving and the reprobate. There was only the indigent, henceforth to be distinguished from the mass of the ordinary poor who subsisted by their labour. … Since all those without resources were to be relieved regardless of character, it was critically important to devise a system that would not operate as an inducement for the poor to cease working and join the indigent.[124]

This would also resolve the needs of justice by ensuring only those who were actually in need of relief received it. Again, this idea is explored again later in this chapter[125].

Bentham redesigned the workhouses based on an idea of his brother Samuel, who had designed an efficient system in Russia which Bentham dubbed the Panopticon. He was enthusiastic about the ability of this new design to solve a multitude of ills:

> Morals reformed - health preserved - industry invigorated instruction diffused - public burthens lightened - Economy seated, as it were, upon a rock - the gordian knot of the Poor-Laws are not cut, but untied - all by a simple idea in Architecture![126]

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123 *Supra* n.117 at 91.

124 *Supra* n.43 at 34-35.

125 See Justice and the Philosophical Desert - The Issues with Deservingness on at 46.

126 J. Bentham, *Panopticon: The Inspection House*, Kindle Edition of CreateSpace Independent Publishing Platform (8 Oct. 2017) at 3 (kindle location 501).

And indeed, Bentham's designs would have a "significant influence"[127] over designs of Victorian workhouses. Remember, the Victorian criteria seems to focus solely on willingness to work, especially towards to latter years of the nineteenth century, regardless of ability. Further, the Victorians saw poverty as a whole being akin to idleness or some form of moral weakness and therefore attached more of a stigma to poverty relief[128]. This is a change from the Reformation thinking of certain types of poor being deserving by virtue of being unable to work (the impotent poor). The Victorian requirements thus become clearer. In order to weed out bogus claims or those who were not genuinely in need, claimants worked in order to obtain poor relief. While Bentham himself might have eschewed ideas of deservingness, there is an argument that really by considering the necessity to separate bogus claims and idleness from those in need, he was still applying the requirements of deservingness, simply by action. In other words, the use of the workhouse was about actions that made a person deserving, such as entering a such a horrific place where inmates would earn less than even the poorest labourer[129].

By the late Victorian era, there was nearly complete erosion of the idea of the sick poor, those who would now be likely to be considered vulnerable, being considered "deserving" with many being incarcerated in the workhouse "idiot" ward:

> His incarceration stemmed from the altered landscape of welfare between the 1870s and 1890s. It was a time when civil servants and local health and welfare administrators encouraged a 'crusading' mentality against what they and their contemporaries considered to be wasteful and undeserving welfare recipients.[130]

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127 *Supra* n.43 at 35.

128 See, for example: P. Carter, 'Joseph Bramley of East Stoke, Nottinghamshire: A Late Victim of Crusade against Outdoor Relief' (2014) 17:1 Family and Community History 36.

129 *Supra* n.73.

130 K. Price, ''Where is the Fault?': The Starvation of Edward Cooper at the Isle of Wight Workhouse in 1877' (2013) 26:1 Social History of Medicine 21 at 24.

In fact, it is estimated that 20-25% of pauper lunatics were incarcerated in workhouses rather than an asylum during the 19th century[131]. The rest tended to be sent to a lunatic asylum[132] or were cared for by family members, however most family were unable to claim any aid for the care they provided. This meant if they were poor themselves, they would have to have their loved ones put into the workhouse, rather than care for them themselves. Between 1850 and 1890 the percentage of persons deemed insane who were awarded outdoor relief (i.e. relief for care in the home, rather than in the workhouse) fell from about 25% to 6%[133]. This removal of the sick poor from consideration does seem to contradict Bentham's idea of justice, as he explicitly talks of "equally deserving" being an important factor (see footnote 123), also he takes into account those unable to work:

> Bentham imposes conditions on the receipt of relief, namely 'working, up to the extent of his ability, and in any manner not inconsistent with the regard due to health and life', and submitting to the determination of government as to the place where that work is to be performed and relief administered.[134]

So those who are sick and unable to work should not discount them from relief, yet that appears to be what happened. It does show that while Bentham's theories helped shape the use of the workhouses, there were departures from them. Still, his influence on the use of justice, coupled with the works of Malthus and other of the great influencers has certainly shaped modern poverty a great deal, as previously stated.

There are similarities of the modern criteria with Elizabethan concepts, such as behaviour, as it should be remembered that the Tudors would incarcerate

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131 E.D. Meyers, 'Workhouse or asylum: The nineteenth century battle for the care of the pauper insane' (1998) 22(9) Psychiatric Bulletin 575 at 575.

132 C. Smith, 'Family, Community and the Victorian Asylum: A Case Study of the Northampton General Lunatic Asylum and Its Pauper Lunatics' (2006) 9/2 Family & Community History 109 – 124.

133 *Supra* n.130 at 28.

134 *Supra* n.117 at 89.

sturdy beggars and vagabonds, it was built firmly into the legal framework of the time. However, modern deservingness, like modern poverty, have more in common with the Victorian where good behaviour and status were both enforced by the workhouse. This is a natural extension of Dean's and Cowan's arguments on modern poverty and its related stigma (see footnotes 55 and 57) being founded very much in the great influencers of the 1790s and the enactment of the new Poor Law.

Public Perception of Deservingness and Policy

In order properly to understand why the modern criteria have developed in this way, it is important to comprehend two important and interconnected links. First, between the public perception of poverty and deservingness, and then how those perceptions are used to shape government policy. This is not a new development, but as was made clear in the earlier sections of this chapter, has been part of the historical developments on poverty and deservingness since, at least the 1100s.

There is a strong indication that the public's perception of appropriate levels of aid to the poor is affected not only by the personal beliefs of the giver, but also by the giver's perceptions of the recipient:

> ... it is not only the morality of the potential help giver that determines prosocial behavior. Rather, characteristics of the recipient of aid, particularly whether that person is or is not perceived as a deserving member of society, are also key determinants of prosocial reactions.[135]

Similarly, two empirical psychological studies investigated the link between poverty relief policy decision-making and deservingness. Both studies asked participants to pretend they were members of a legislative body and asked to indicate how likely they would be to recommend one of 13 hypothetical

[135] B. Weiner et al., 'An Attributional Analysis of Reactions to Poverty: The Political Ideology of the Giver and the Perceived Morality of the Receiver' (2011) 15(2) Personality and Social Psychology Review 199 at 209.

policies on poverty relief. The first study specifically looked at the influence of perceived deservingness and concluded that it had "a significant effect ... on the likelihood of recommending liberal policies to aid the poor"[136]. This means that groups who were considered deserving are offered more generous relief to their situation than those who are not. Study 2 then examined certain factors that might distinguish deserving from undeserving.

The specific factors used were race, behaviour[137] and responsibility for poverty[138]. In a study of nearly 1,000 individuals the only factor which proved significant in deciding on deservingness was the individual's responsibility for their poverty. In other words, participants were considerably more likely to recommend a conservative aid policy when an individual was considered responsible for their poverty and therefore undeserving than those who were not. It is not unreasonable to infer from these conclusions that societal views on the causes of poverty potentially have a significant effect on policy decisions made *about* poverty.

These findings are supported by historical evidence, for example the Goschen "crusade" that began in 1869. It was during this so-called crusade that policy shifted to the disadvantage of those who were still able to avoid the harsh conditions in the workhouses – the "sick poor". This was an area, which it has been argued, was not intended to be covered by the statutes of 1834 or 1865:

> The policy [from 1870 to 1890] intentionally took a heavy, broad-brush stroke to all areas of outdoor relief—including medical relief. In contrast, the original creators of the new poor law had not intended it to be applied towards the sick poor.[139]

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136 L. Appelbaum, 'The Influence of Perceived Deservingness on Policy Decisions Regarding Aid to the Poor' (2001) Vol. 22, No. 3 Political Psychology 419 at 431.

137 The paper uses the phrase "whether mainstream norms are followed".

138 *Ibid* at 431-432.

139 K. Price, ''Where is the Fault?': The Starvation of Edward Cooper at the Isle of Wight Workhouse in 1877' (2013) 26:1 The History of Social Medicine 21 at 25.

This change in policy, in some ways, echo the policy statements behind the recent changes to welfare and social housing, such as the Localism Act 2011 and the Welfare Reform Act 2012:

> It was a period which embraced a cynicism towards welfare recipients, shrunk access to vital benefits, and scrutinised claims for medical welfare...By the mid-1870s, there was an almost universal belief that welfare was a loophole for over-generous and indiscriminate relief. The 'crusade' had fed into the nation's wider concerns about welfare expenditure...[140]

There is an argument to be made that deservingness in public policy and legislation is directly linked to the public's view of poverty and the poor most likely stirred by the popular press. There is certainly research supporting the idea that public attitude towards poverty has changed:

> Perceptions of the causes of poverty have evolved to some extent, with increased support for an individualistic explanation and a decline in the view that poverty results from injustice in society.[141]

In other words, there is an increase in the belief that the poor are generally responsible for their own situation, not simply unlucky and that those who live on benefits are lazy and unwilling to find work. The negative attitudes and the resentment of the poor is fuelled by the media, who use the term "benefits scrounger" usually followed by a story about a couple with children who do not work and are able to afford "luxuries"[142]. For example, this article from 2017 from the Express Newspaper:

> Tough benefits cap stops *scroungers claiming thousands of pounds*
> A MAJOR crackdown on *benefits scroungers* has stopped almost 200 households claiming the equivalent of £57,000 a year from the taxpayer. The new figures released by ministers shows that since the benefits cap was introduced in 2013 thousands of people *who*

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[140] *Ibid* at 26.

[141] E. Clery, 'Public attitudes to poverty and welfare, 1983 - 201: Analysis using British Social Attitudes data' report prepared for the Joseph Rowntree Foundation, April 2013 at 18. Found at: http://www.natcen.ac.uk/media/137637/poverty-and-welfare.pdf

[142] There are numerous examples in various newspapers, see The Sun entitled 'Help us stop £1.5bn benefits scroungers'. Found at: http://www.thesun.co.uk/sol/homepage/features/3091717/The-Sun-declares-war-on-Britains-benefits-culture.html

> *had been living off the state have been forced to get a job*. The Department for Work and Pensions estimates that 26,000 households which were jobless in 2013 now have at least one adult in employment. Despite the *huge success in tackling the "something for nothing" scrounger culture*, Labour has vowed to end the benefits cap. … At the time of its introduction it was claimed by ministers that some families *received more than £100,000 a year in benefits to pay for prized city centre properties in London*. It is understood that 170 of the households were on £68,000 - almost three times the average wage - costing the taxpayer £11 million annually... "We are creating a country which works for everyone, and the lower cap *ensures the system remains fair* to both the taxpayers who pay for it and to those people who need it." (emphasis added throughout)[143]

Everything in this article seems to indicate that those who are on benefits should not be, and that it is unfair for people on benefits to be living in "prized city centre properties in London", touching on the resentment some of the public feel with the idea that a social house is "nicer" or better located than theirs. Their logic is why should those who do not work be entitled to more money than the average wage, or a property in a better area, when the recipients have done nothing to earn or "deserve" these advantages?

This harkens back to the Victorian ideas of workhouses, where the conditions were as deliberately horrific and designed to act as a deterrent, the logic being that only those who were desperate would enter a workhouse. Today the reasoning seems more that if you give a "benefit scrounger" something nice for free it discourages them from getting a job. Articles such as these criticise an "entitlement culture", some going so far as to blame it on "welfarism"[144].

While the media is not necessarily representative of actual views of the British public, such negative stances are supported by empirical research by the

[143] D. Maddox, 'Tough benefits cap stops scroungers claiming thousands of pounds' The Express, 3 February 2017. Found at: https://www.express.co.uk/news/uk/762423/benefits-caps-cheats-stop-success-household-claims-department-for-work-and-pensions

[144] G. Adams, 'The truth about Benefits Street 'scrounger' Mark Thomas by his grandparents' The Daily Mail, 24 Jan 2014. Found at: http://www.dailymail.co.uk/news/article-2545571/The-truth-Benefits-Street-Scroungers-Mark-Thomas-grandparents.html

Joseph Rowntree Foundation (JRF), which discovered, during a discussion group, that:

> ... pervading every discussion of poverty was the attitude that many people who may be considered to be living in poverty were nevertheless undeserving of support as they themselves were responsible for their situation. The main subject of these discussions was people who chose not to work or who had the wrong financial priorities, buying luxury goods before essential ones and also getting into debt to fund non-essential spending. Stories of families who could not afford to buy enough food but would always have new phones and televisions were discussed in every group.[145]

This idea of the poor being somehow at fault for their poverty is a common belief according to the same JRF research:

> Participants in qualitative research conducted as part of the PIPI programme painted a picture of a country where opportunities existed for those willing and able to take them, but with a welfare system to support those who could not do so. This meant that poverty, insofar as participants believed it existed at all, tended to be viewed as something experienced either by 'skivers' who chose to live that way or the 'deserving poor', who experienced poverty due to events outside their control such as ill-health or redundancy. The idea of a person who was willing and able to take the opportunities available to them – in terms of employment and also support from the state – but who still found themselves in poverty was difficult to comprehend; indeed, they doubted that such a person existed.[146]

This demonstrates that the public struggle with the more nuanced issues around poverty, making the issue of deserving and undeserving quite straightforward. However, that is far from the reality experienced by many people, where many shades of grey between the two are their reality.

It is possible that the reason for the change in attitudes goes further than media, however. Similarly to the late 19th century when there was an

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[145] S. Hall et al., 'Public Attitudes Towards Poverty' report prepared for the Joseph Rowntree Foundation, September 2014 at 24. Found at: http://www.jrf.org.uk/publications/public-attitudes-towards-poverty

[146] *Ibid* at 10.

economic downturn, the hardening of public opinion to the poor might be attributable, in part, to the global financial crisis. Again, there is empirical evidence to support this assertion:

> Moreover, there are no clear patterns of change in the views of different social classes, suggesting changing economic circumstances exert an impact on attitudes to poverty across society, not just among those most likely to be affected by them.[147]

Whatever the cause, there is a persuasive body of evidence that demonstrates points of view of the public towards the causes of poverty have changed to view those who are poor as more responsible for their situation. This, in turn, is helping to shape public policy surrounding poverty relief, including in the area of social housing.

Justice and the Philosophical Desert - The Issues with Deservingness

The unfortunate truth is a system for deciding who should qualify for a social tenancy is necessary; there is a housing crisis and a dearth of social housing tenancies. Something had to be done to prevent the waiting lists from growing out of all proportion, cuts had to made somehow and a system had to be devised to decide who should be eligible for a tenancy. The legislation is carrying forward a task that many would argue is necessary, cutting social housing waiting lists and making people accept that they cannot simply "cherry pick" where they want to live if they have been accepted.

However, as stated in the introduction, there is a fundamental issue of using deservingness in the context of housing because both deservingness and the concept of the desert have intrinsic ties to concepts of justice. This link is considered at length by moral philosophers, including John Stuart Mill, who was heavily influenced in his beliefs by Jeremy Bentham. He states in his book:

[147] *Supra* n.141.

> …it is universally considered just that each person should obtain that (whether good or evil) which he deserves; and unjust that he should obtain a good, or be made to undergo an evil, which he does not deserve. This is, perhaps, the clearest and most emphatic form in which the idea of justice is conceived by the general mind.[148]

Therefore, a desert becomes not only about what a person deserves but their treatment becomes linked to wider concepts of justice, of fairness, of societal notions of right and wrong. This is something which Bentham addressed in his discussions of reforming the Old Poor Laws (from 1598/1601), according to Quinn:

> There are two elements to the injustice of relieving the indigent at the expense of the labouring poor[149]. In the first place, it is unjust, in the common sense of just, for people to receive relief without obligation while others, in order to feed themselves, are obliged to work. The injustice is compounded if the industrious are obliged not only to work hard enough to feed themselves, but harder still in order that a surplus should be available to enable the idle to be fed.[150]

In Bentham's own words:

> There then would the process of injustice be carrying on at both ends: while on the one hand men are rewarded, if not for not working, at any rate without working, on the other hand, the working hands, if not punished in point of intention, are made to suffer as men suffer who are punished, for the benefit of those who are enabled to reap enjoyment otherwise than through work.[151]

This type of reasoning is the basis for many newspaper articles on the unfairness, and therefore injustice, of high living standards of people on benefits potentially used to stoke popular ideas of the "benefits scrounger". It is also one of the reasons that many consider Bentham to be the influential to this day[152]. When coupled with social housing outcomes, using deservingness

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148 J.S. Mill, *Utilitarianism*, Third Edition, Longman, Green, Reader and Dyer 1867 at 66-67.

149 Keep in mind Bentham and Quinn do not use this term in the modern sense to mean "the working poor", see Bentham's definition of poverty, which summarised is "anyone who needs to work to obtain sustenance" at footnote 121 at 37.

150 *Supra* n.117 at 91.

151 J. Bentham quoted in *supra* n.117 at 91.

152 See Dean at footnote 55 and Cowan at footnotes 57 and 116.

as a system becomes problematic because it is essentially applying morality and justice to applicants. This, in turn, leads to several issues – the implied necessity of the morality of the applicant, using housing as a reward rather than as a need, and finally that this system is fair and a matter of justice. In other words, that housing as a reward for some criteria of deservingness is a fair and just outcome. The first two of these will be considered immediately in an overall sense and then again in Chapter 4 when considering the legislation itself. The final issue will be considered in the next chapter to sit alongside a closer look at the legal framework[153].

The Morality of Applicants

The first issue with using deservingness is regarding the applicant for a social tenancy. Where there is a system with a limited resource, and that resource is to be distributed, choosing who should be eligible based on the idea that some people deserve said benefit more than others could be argued makes sense. Yet, when discussing deservingness and fairness, it is difficult to understand how one would apply either a criterion to a person, yet the application of morality to social housing or other social welfare, as has been discussed, has a long history, as Cowan contends:

> The history of social housing can be written as a history of the control and correction of morals, its provision being regarded (certainly by the Victorians philanthropists) as a means of reforming the souls of the poor…[154]

By linking justice and fairness to housing outcomes, the applicant themselves will have their character scrutinised for worthiness, and virtue, making them a focus of a subjective, moral judgment.

As discussed in the introduction, there is a link between morality and deservingness, as Kagan states:

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153 See Fairness as a Desert Basis in Chapter 4.

154 *Supra* n.57 at 357.

> Some people are more deserving than others. That is, we can rank people (at least, in principle) in terms of how deserving they are: some are more deserving, and others less so. Somewhat more precisely, people differ in terms of their moral worth, and by virtue of those differences in moral worth they differ as well in terms of what they deserve.[155]

An example of this type of thinking can be applied to way the public view welfare. As previously stated, the public view of state-funded aid to the poor is partly affected by the giver's perceptions of the recipient:

> ... characteristics of the recipient of aid, particularly whether that person is or is not perceived as a deserving member of society, are also key determinants of prosocial reactions.[156]

In other words, many people would like to see only people who deserve it get aid from the government if they are poor. This seems like a straightforward idea that most people would find agreeable; public money should go to those who deserve it, those who are considered worthy.

However, this basic principle that those who are worthy being deserving of a reward is not without fundamental issues of definition:

> We can agree, perhaps, that your "moral worth" determines your level of desert, but it isn't at all obvious what, exactly, affects your level of moral worth. Is it, for example, a matter of your intentions? Your motives? Your character traits? Are your fantasies relevant, or only acts of will? Does your moral worth depend, at least in part, on what it is that you do? Does it make a difference whether you succeed or fail? Is effort all that counts?[157]

When discussing state aid the two concurrent studies by Applebaum[158] concluded:

> The determination of fault for poverty may play an important role in discussions around welfare policies. When the recipients of aid are seen as not responsible for their poverty, more generous aid

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155 S. Kagan, *The Geometry of Desert*, Oxford University Press 2012 at 5.

156 B. Weiner et al., 'An Attributional Analysis of Reactions to Poverty: The Political Ideology of the Giver and the Perceived Morality of the Receiver' (2011) 15(2) Personality and Social Psychology Review 199 at 209.

157 *Supra* n.155 at 6.

158 L. Appelbaum, 'The Influence of Perceived Deservingness on Policy Decisions Regarding Aid to the Poor' (2001) Vol. 22, No. 3 Political Psychology 419 at 431.

> policies may be recommended and widely accepted. On the other hand, if the recipients of aid are judged to be responsible for their poverty, then more restrictive policies that offer less direct aid and require poor people to find a way to lift themselves out of poverty may be considered appropriate.[159]

This means there is generally a relationship between who is considered worthy of state aid and the subject's personal responsibility for their poverty. Responsibility for poverty in these studies looked at three different scenarios:

> The case files offered one of three agents of responsibility for the target's poverty: The target was individually responsible for his or her poverty (e.g., the target was offered a job, but decided not to take it); society was responsible for his or her poverty (e.g., the target was fired because of budget cutbacks) …; or a sociocultural explanation was offered (e.g., the target had no role models and as a result never learned the appropriate behavior to keep a job, for instance, arriving at work on time)…[160]

To apply this to the public outlook on poverty, the 2018 British Attitudes Survey concluded that just over half (56%)[161] of the public felt "that most unemployed people could find a job if they really wanted to, compared with less than a fifth (18%) who disagree"[162].

As has been discussed already in this chapter, many people consider those living in poverty to be, at least, partly responsible for their situation (see footnote 141), and therefore likely to be considered less worthy. It is possible the widespread misconceptions about poverty and the media hype about "scroungers" mentioned previously have contributed to this public belief (see footnote 143) and shaped policy in the area of social housing. This is because the views of the wider public, as previously discussed, link directly to policies

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159 *Ibid* at 437-438.

160 *Supra* n.158 at 433.

161 N. Kelley, British Social Attitude Survey 35: Chapter 'Work and Welfare' July 2018 at 15. Found at: http://www.bsa.natcen.ac.uk/media/39254/bsa35_work.pdf

162 *Ibid*.

enacted, and there is clear evidence that such a belief is prevalent, although there is some evidence of a shift away from this[163].

An example of the issues considering moral worth of a candidate are demonstrated by considering the case of "Theo"[164] a 17-year-old with complex issues who was given a tent by the local council, then housed in a caravan. During this time, he was sexually assaulted. By the time he was housed, he had to be detained under the Mental Health Act as he was emaciated, psychotic and hearing voices. "Theo" had to spend nearly a year in a psychiatric hospital recovering. His story was told to the BBC:

> [the Local Government and Social Care Ombudsman for England, Michael King] says the council failed to properly consider the risks Theo faced. "This is one of the most extreme cases I've seen in 14 years in the Ombudsman's service," … He added: "What we saw in the council's records was them *taking a moral judgement and blaming [Theo] for some of the choices he'd made...* And it's incumbent on the local authority to actually step in and help in that situation and take the bigger view. "He was homeless and he had a history of mental health problems and he was very vulnerable. He reported sexual assault, reported loneliness, he reported suicidal feelings. I mean, there was warning sign after warning sign, which the council should have acted on." [emphasis added][165]

This young man was put into a dangerous situation and left there with little recourse. The council's reasoning was based on a moral judgement, on the idea that "Theo" deserved what had happened to him because of his poor choices and drug use, this was highlighted by the summary of the judgment from the Ombudsman:

> Throughout the Ombudsman's report, evidence suggests the council tried to place responsibility for the situation on the boy, because of his actions, rather than provide the right support to a

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163 See *ibid* especially at 15-18 on the changing attitudes to unemployment/benefits.

164 Theo and Rose are pseudonyms used by the BBC to protect the anonymity of the parties affected by the story. The Local Government and Social Care Ombudsman refers to "Theo" as Mr. B and "Rose" as Ms. C. (Report reference number 17 005 652 see footnote 167).

165 BBC Stories, 'Why did the council 'house' me in a tent?' 30 October 2018. Found at: https://www.bbc.co.uk/news/stories-460205302

> vulnerable child who was suffering from drug addiction and mental ill health.[166]

This can be confirmed from the Ombudsman's final report:

> Mr B ["Theo"] asked again on 9 August, 12 August and 14 August 2016 for accommodation. By the second date, he also reported his tent was leaking and he had no food. But the Council records state Mrs C was told, "I emphasised the importance of [Mr B] taking some responsibility for his behaviour". She was also told "these decisions are being taken at senior management level."…They [responses given] also show it declined to offer accommodation on 12 August 2016, when Mr B was street homeless because his tent was leaking. Instead, the Council told Mrs C that Mr B was responsible for his situation. This was fault.[167]

The council has since apologised to both "Theo" and his mother for the situation in which he found himself. Obviously, this is an extreme example of the pitfalls of morality in housing decisions, but the fact that it happened at all should perhaps give pause. Examining a candidate's moral worth is problematic, even if one takes away the consequences in this case, which were severe, and looks at the fact that a young man was denied housing because he was not considered worthy. Housing is considered by the United Nations[168] to be a basic human right[169], it was also enshrined in the International Covenant on Economic, Social and Cultural Rights[170] to which the United Kingdom is a signatory. Yet it seems as though it is being used more as a reward to those who conform to certain moral standards. The use of housing as a reward will now be considered in more detail.

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166 Local Government and Social Care Ombudsman, 'Cornwall Council leaves homeless teenager in a tent', 30 October, 2018. Found at: https://www.lgo.org.uk/information-centre/news/2018/oct/cornwall-council-leaves-homeless-teenager-in-a-tent

167 Local Government and Social Care Ombudsman Report - Investigation into a complaint against Cornwall Council. Reference number: 17 005 652. 31 August, 2018, at 12 at paragraphs 65 and 66. Found at: https://www.lgo.org.uk/assets/attach/4454/Cornwall.pdf

168 The United Nations has also included housing in their Convention on the Rights of the Child Article 27(3). Found at: https://www.ohchr.org/en/professionalinterest/pages/crc.aspx

169 Article 25 of the United Nations Universal Declaration of Human Rights. Found at: http://www.un.org/en/universal-declaration-human-rights/

170 Article 11(1). Found at: https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx

Housing Need and Deservingness – The Use of Conditionality

The second issue with using deservingness is that housing becomes a reward for an applicant who is deemed morally worthy of it. This is a piece of the three parts of desert claims: a subject, an object (or reward) and a basis. This concept was explained fully in the introduction to this thesis, but as a recap:

> Consider some ordinary desert claims:
>
> - Hans deserves praise in virtue of his efforts.
> - Because of her outstanding scholarly contributions, Nkechi deserves promotion to full professor.
> - Financial compensation is what the innocent victims of September 11 deserve.
>
> These desert claims have several things in common: each involves a deserving subject (Hans, Nkechi, innocent victims), a deserved object (praise, promotion, compensation) and a desert basis (effort, contribution, innocent suffering). This suggests that desert itself is a three-place relation that holds among a subject, an object, and a basis.[171]

As the previous section dealt with the desert subject and the use of a moral judgment as a basis, this is now about the object (reward): housing, and why using housing in this way is problematic. The use of any type of social benefit as a reward for certain types of behaviour or an adherence to a specific morality is known as welfare conditionality. According to the Welfare Conditionality Project's final report:

> Welfare conditionality links eligibility for collectively provided welfare benefits and services to recipients' specified compulsory responsibilities or particular patterns of behaviour. It has been a key element of welfare state reform in many nations since the mid-1990s.[172]

[171] O. McLeod, 'Desert', The Stanford Encyclopedia of Philosophy (Fall 2008 Edition), Edward N. Zalta (ed.). Found at: https://plato.stanford.edu/archives/fall2008/entries/desert/

[172] *Supra* n.91 at 7.

Such welfare benefits can include the provision of social housing, which is specifically mentioned in the report itself, but is also considered by Flint et al. to be an important area for conditionality:

> Social housing provides the most obvious site for this conditionality, given that it is the least universal pillar of the welfare state and has therefore been most subject to rationing and the application of eligibility criteria based on assessments of individual conduct.[173]

However, there is a tension between conditionality (or reward) and need, whereby one can sometimes preclude the other. Obviously, there will be cases where someone is in need and also considered morally "worthy" of a reward, but there will be times when this is not the case. For example, think of "Theo" and his situation as outlined above. He had the need for housing, but he was not considered to the morally worthy. So, it is possible for the lack of a philosophical desert or deservingness to cancel out actual need, as Flint et al. indicate:

> One dimension of the contemporary regulation of conduct is the greater use of conditionality in welfare provision which reconfigures the primary purpose of welfare from determining need or entitlement to one of changing the behaviour of recipients…[174]

This can mean that the more conditionality is applied to a benefit, the more it is seen as a "reward" for certain types of behaviour, the less it can be seen purely as dealing with the need of an applicant. Some see this use of conditionality as a positive, for example Deacon whose pluralist justification specifically to anti-social behaviour and housing is neatly summed up as follows:

> The claim that someone's right to housing is balanced by an obligation not to abuse that housing is one that accords with basic sentiments of fairness and reciprocity. Similarly it is scarcely unreasonable to require someone to attend classes or participate in

[173] *Supra* n.92 at 951.
[174] *Supra* n.92 at 951.

> a project that will equip them with the skills to maintain a tenancy and create an environment in which their children can flourish. In the case of anti-social behaviour, however, the most compelling justification is to be found in the mutualist argument that public policy has to reaffirm and enforce the obligation to show respect and regard for the needs of others.[175]

In other words, poor behaviour has consequences and that acting in a certain way is part of a social agreement of all citizens. Again, Deacon draws on the notion of fairness to justify this stance. Fairness and its intrinsic connection to justice, as has been discussed, links back to arguments about morality and the moral worth of the subject of the desert.

Prima facie, this seems logical – people who act poorly should not be given a precious resource when many others who are not anti-social are waiting for it. It is part of their obligation as citizens and adults to realise poor action or negative behaviour will have consequences. This also brings social housing into line with the requirements of tenants in private housing. However, social housing is distinct and separate to the private rented sector, and addresses a need that the private sector cannot as previously discussed in Chapter 2[176].

It is also noteworthy that private sector tenants who can afford to are able to move on to a new landlord with very little in the way of history following them. Even if they have been a problem tenant, private landlords do not necessarily have the resources to discover this. Social housing, as Cowan notes, has a raft of multi-agency partnerships[177], all designed to help regulate anti-social behaviour in social housing. This is not the case in the private rented sector (PRS). Those with no criminal convictions who can afford the rent and deposit are likely to be able to find a willing private landlord. This is not the case in social housing, where any history of anti-social behaviour or rent arrears can exclude an application for a tenancy. Generally, private

[175] *Supra* n.93 at 923-924.
[176] See Chapter 2 Section Why Social Housing Matters.
[177] *Supra* n.90.

landlords are interested in tenants paying their rent[178], not if they are a good and worthy person. Additionally, unlike in social housing, currently, private landlords can remove their tenants in a "no fault" eviction. This type of eviction comes from section 21 of the Housing Act 1988, which allows landlords to evict tenants for no reason after the expiry of the fixed term of the tenancy, when it becomes a periodic tenancy. These are often referred to as "no fault evictions" because there does not need to be a breach of the tenancy agreement for it to come to an end[179].

Despite the arguments for, there are issues with the use of conditionality with housing, especially in the area of anti-social behaviour. There is evidence of a link between anti-social behaviour orders, such as ASBOs and ABCs, and Attention Deficit and Hyperactivity Disorder (ADHD) in children[180]. This is covered in greater detail in the next chapter, and in Chapter 6. There is also evidence of a gender bias in dealing with anti-social behaviour, a study by Spinney et al. discovered:

> An examination of the multi-layered reality of ASB [anti-social behaviour] exposes the way in which ASB is gendered as a site where women are simultaneously characterised as victims and villains, responsible adults and dysfunctional parents, active citizens and outsiders; subjects and objects of abuse. … A clear gender bias was apparent in the population of families referred to IFSPs [Intensive Family Support Projects] with 68% of

[178] According to the English Private Landlord Survey 2018, 46% of private landlords did so because they preferred property to other types of investments, 44% did so to contribute to their pensions but only 4% let property as a full-time business. Ministry of Housing, Communities and Local Government, 'English Private Landlord Survey 2018' January 2019 at 6. Found at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/775002/EPLS_main_report.pdf

[179] There are plans to repeal no fault evictions with a consultation period ending on October 12th, 2019.

[180] See C. Hunter et al., 'Disabled people's experiences of anti-social behaviour and harassment in social housing: a critical review' Report prepared for the Disability Rights Commission, August 2007 at 9, and 94. Found at: http://shura.shu.ac.uk/800/1/ASBO_Final_Report.pdf

> families, most of which contained three or more children, headed by lone parent women; …[181]

This is supported by an earlier empirical study by Hunter and Nixon uncovered:

> Further analysis of the sample revealed a second distinctive feature: women-headed households were disproportionately represented in the sample with over half (58%) of the sample consisting of lone women-headed households. Of this group of women headed households, four-fifths (77%) were lone mothers with sole responsibility for the their children…[182]

Part of this type of bias is caused by narrowly construed ideas of motherhood rooted in Victorian ideals, as Carr argues:

> Victorian constructions of gender meant that the father functioned in the public sphere and was a conduit between the public realm and the private life of the family whilst the mother took prime responsibility for the home. Failure to appropriately socialise children and run a good home made her a 'bad mother'.[183]

There is a dearth of data regarding the use of behaviour orders against black and other ethnic minorities[184], with most practitioners interviewed indicating:

> When asked during our interviews whether they thought that ASBOs affected black and minority ethnic people differently, practitioners would often respond that it is their perception that ASBOs are used mainly to deal with stereotypical 'white, working-class, yob behaviour'. If true, this would suggest a disproportionate use of ASBOs towards white people.[185]

So, Deacon's original argument which advocates responsibility and based on notions of fairness, which again is rooted in the ideas of the philosophical

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[181] A. Spinney, 'The Gendered Nature of Policy Discourse: Patriarchy, Pathology or is there a Third Way?', Paper presented at the ENHR conference "Housing in an expanding Europe: theory, policy, participation and implementation" Ljubljana, Slovenia, 2 - 5 July 2006 at 3. Found at: https://www.enhr.net/documents/2006%20Slovenia/W08_Hunter.pdf

[182] C. Hunter and J. Nixon, 'Taking the blame and losing the home: women and anti-social behaviour' (2001) 23:4 The Journal of Social Welfare & Family Law 395 at 398.

[183] H. Carr, 'Women's Work: locating gender in the discourse of anti-social behaviour' in Hilary Lim and Anne Bottomly (eds) *Feminist Perspectives on Land Law*, Routledge, London, 2007 at 124

[184] See S. Isal, 'Equal Respect – ASBOs and Race Equality' A report prepared for Runnymede Trust, a race equality think tank, October 2006 at 16-19.

[185] *Ibid* at 19-20.

desert, and justice, fails to consider the biased nature of anti-social behaviour orders and enforcement. Again, this highlights the issues of using desert when applied to housing, the ideas of fairness and justice with which most people agree, lacks a nuanced approach to the subject of behaviour, yet seems persuasive without all the facts. There is no doubt that, all things being equal, people should behave properly and that there is a sense of justice knowing that people who perpetrate anti-social behaviour do see some downside to their poor conduct. However, upon a closer inspection, the idea that a single mother is a bad mother and her children are less well behaved, or that a child with ADHD who might not be able to control themselves should be subject to punitive measures that could result in homelessness for the entire household does not seem to be particularly fair, or just.

The final issue with the use of conditionality is to do with effectiveness at changing behaviour:

> There is little evidence that welfare conditionality within social housing (for example, the use of fixed term or probationary tenancies linked to behavioural requirements) was effective in changing the behaviour of social tenants other than in relatively minor ways (such as, some may be less likely to invest in home improvements). There was very little support for the notion that renewal of tenancies should be linked to job search or volunteering activities.[186]

The study did find that the use of Family Intervention Projects (FIPs) were effective in reducing Anti-Social Behaviour (ASB), but the inclusion of conditionality undermined some progress:

> During the period of the study, positive and significant behaviour change (including reductions in ASB and school truancy, better crisis management, improved parenting and enhanced self-confidence and health) were evidenced by the majority of respondents in the ASB/FIPs group; who routinely acknowledged a need for interventions to tackle ASB including their own. …

[186] *Supra* n.91 at 22.

> The intensive, holistic and personalised support made available through FIPs was directly linked to positive changes in behaviour and circumstances. However, the gains achieved were often subsequently undermined by welfare conditionality within a benefit system built around depersonalised sanctions and lacking support.[187]

Now, this conditionality was more to do with benefits sanctions and not directly linked to housing, but this, coupled with the findings on probationary tenancies and behaviour is telling. There seems to be little evidence that punitive means of enforcing a standard of behaviour is particularly effective in combatting it[188]. In fact, it seemed to be that the Family Intervention Projects, were the most effective way of combatting anti-social behaviour. It seems rather incongruous to continue to use a system that is supposed to improve behaviour of social tenants if it does not. When combined with evidence that there is bias in the way anti-social behaviour is handled, the system that seems fair and right, not only looks unfair, but also ineffective.

Regardless of housing as a basic human right, it is a basic human need, above and beyond the idea of housing need as a separate socio-legal concept. Being homeless has deleterious effects[189], this applies to both street homeless[190] and

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187 *Supra* n.91 at 21.

188 Results from an empirical study on flexible tenancies had preliminary findings that were quite mixed. Some respondents felt that rent arrears were paid back more quickly, others felt that the use of fixed term tenancies had little positive effect on tenant behaviour. See B. Watts et al., 'Fixed Term Tenancies: Revealing Divergent Views on the Purpose of Social Housing' Part of the Welfare Conditionality Project, July 2018 at 13-15. Found at: https://pureapps2.hw.ac.uk/ws/portalfiles/portal/22902499/FTT_Report_July2018_WEB_2.pdf

189 Homelessness is a spectrum. The most extreme version is street homelessness, also called sleeping rough, but there are other forms such as "sofa surfing" and living in temporary accommodation such as hostels, bed and breakfasts, or night shelters.

190 According to a study carried out for Crisis 77% (353 out of 458) respondents had been a victim of anti-social behaviour or crime in the past year. B. Saunders et al., '"It's no life at all" Rough sleepers' experiences of violence and abuse on the streets of England and Wales' Prepared for Crisis December 2016 at 6. Found at: https://www.yhne.org.uk/wp-content/uploads/Its-no-life-at-all.pdf

to those living in temporary accommodation[191], most especially children[192]. With this is mind, the idea of housing as a reward for virtuosity, and that somehow this outcome is desirable, that is it justice, that the system works in this way should give one pause. This is the basic issue of using the concept of desert with housing. The blanket statements people generally agree with about deserving rewards, become a more problematic and nuanced argument about morality, justice and societal norms than about the issues of people needing a place to live. There will be more discussion of need linked to the legislation in terms of conditionality in the next chapter.

Conclusion

This chapter has traced the history of deservingness and considered some of the laws that have governed the poor from the middle ages to modern day. Specifically, it has focused on the way public perceptions and those who influence those perceptions drive policy. It considered how thinkers and writers such as Malthus and Bentham introduced morality and concepts of justice into poverty discourse, and how that some of this reasoning is still used today.

This chapter argued that the public perception of poverty and deservingness play a huge role in informing policy and therefore law. It has charted the fundamental underpinnings of current deservingness as rooted in some of these Victorian ideas, as put forward by Jeremy Bentham, specifically the ideas

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191 A study by Shelter discovered 49% of households in temporary accommodation had experienced worse health, and 56% reported they had depression. F. Mitchell, 'Living In Limbo - Survey of Homeless Households Living in Temporary Accommodation' Report prepared for Shelter, June 2004 at 22. Found at: http://england.shelter.org.uk/__data/assets/pdf_file/0012/40116/Living_in_Limbo.pdf

192 A Shelter study on Children in Temporary Accommodation found that 90% of parents reported their children had been negatively affected by being in temporary accommodation. S. Credland, 'Sick and tired - The impact of temporary accommodation on the health of homeless families' Report prepared for Shelter, December 2004, at 13. Found at: http://england.shelter.org.uk/__data/assets/pdf_file/0009/48465/Research_report_Sick_and_Tired_Dec_2004.pdf

regarding justice. This has led onto a discussion of the issues using a philosophical desert and housing. Specifically, the use of consideration of the morality of the applicants and the way housing is being used as a reward. For the latter, this included an in-depth discussion on housing need and how there is tension between the two concepts as not everyone who needs housing might be considered worthy of it. This discussion on housing need will be advanced more in the next chapter with specific consideration of each piece of legislation.

Finally, this chapter has located modern deservingness as starting in the 1990s, but that the evolution of the concept has started most recently with the Localism Act 2011 and subsequent legislation, which will now be considered in more detail.

Chapter 4

The Use of Deservingness in the Legal Framework

As has been discussed in both the introduction and the previous chapter, the philosophical desert is organised around three central features: the subject of the desert, the object given as a reward, and the basis for the desert. Chapter 3 discussed the issues with attempting to judge the morality of an applicant and the use of housing as a reward (or object of a philosophical desert). This chapter will look specifically at the Localism Act 2011, the Welfare Reform Act 2012 and how these statutes are using the current criteria of deservingness. It will also examine the tension between housing need and conditionality, arguing that both move the position of social housing away from need and towards reward. It will then consider the desert basis used for these changes in public policy – fairness. In other words, it is somehow "fairer" for all in society if only those who are deserving of government help receive it. Finally, it will consider the positives and issues with the Housing First system, which contravenes deservingness, considering housing as a right, not a reward.

Deservingness and the Localism Act 2011

The Localism Act 2011 was passed to devolve powers to local communities and give "more control over housing and planning decisions"[1]. The Act introduced a General Power of Competence to local authorities, which "gives councils the same broad powers as an individual to do anything unless it is prohibited by statute"[2]. It also allows councils to apply to the Secretary of State

[1] Parliament Website, 'Localism Act 2011'. Found at: https://services.parliament.uk/bills/2010-11/localism.html

[2] The Local Government Association Website, 'An Introduction to the Localism Act'. Found at: https://www.local.gov.uk/introduction-localism-act

to manage high priority public functions, which the Local Government Association feels:

> This provision offers a significant opportunity to ensure decision-making is devolved to the lowest appropriate level, and result in more locally responsive public services.[3]

This section will consider the current criteria of deservingness and its relation to sections of the localism act on eligibility, priority and then on the introduction of flexible tenancies.

Eligibility and Priority (ss. 146 and 147)

As discussed in detail in Chapter 2, Section 146 of the Localism Act 2011[4] enables local authorities to qualify or disqualify specific "classes" of people from their eligibility criteria, including those with a local connection. Further, section 147(4) of the Localism Act 2011[5] requires every local authority to have an allocation scheme and a procedure[6] that will determine the priorities for allocating social housing. Section 147(4)[7] also requires authorities to give a reasonable preference to certain applicants, as discussed later. A combination of ss.146 and 147 of the Localism Act 2011 is being used by authorities to reinforce both elements in the modern concept of deservingness (i.e. status and behaviour). It is in examining the actual supplementary criteria adopted by authorities, however, that it becomes much more apparent.

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3 *Ibid*.
4 Inserting s.160ZA into the Housing Act 1996.
5 Inserts 166A into the Housing Act 1996
6 166A(1) states that "For this purpose "procedure" includes all aspects of the allocation process, including the persons or descriptions of persons by whom decisions are taken."
7 166A(3) of the Housing Act 1996.

Current Criteria for a Desert Object - Behaviour

One of the most common[8] statutory[9] reasons rendering applicants ineligible for social housing is in situations where the applicant (or member of their household) has been found guilty of some form of "unacceptable behaviour". This is outlined in the statutory guidance:

> However, authorities may wish to adopt criteria which would disqualify individuals who satisfy the reasonable preference requirements. This could be the case, for example, if applicants are *disqualified on a ground of anti-social behaviour*. [emphasis added][10]

The rules on unacceptable behaviour apply twice, once in terms of eligibility for social housing under s.146 and once under the additional priority criteria in the allocation scheme under s.147(4). This means, essentially, that many local authorities can make people with a history of "unacceptable behaviour" ineligible. Further, if their behaviour is perhaps not ideal but not severe enough to render them ineligible, their priority can be lowered.

It should be noted applicants have the right to a review of housing decisions by way of s.202 of the Housing Act 1996. Section 202(1)(a)-(b) allows for a review of eligibility for assistance[11] and what duties might be owed to the applicant. They must request this review within 21 days of receiving their decision letter from the authority[12]. However, the right to appeal does not

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8 Shelter website - 'Who gets social housing?' Found at: http://england.shelter.org.uk/campaigns/why_we_campaign/Improving_social_housing/who_gets_social_housing

9 S.160A(7) of the Housing Act 1996 with "unacceptable behaviour" being loosely defined in s.160A(8).

10 Communities and Local Government, 'Allocation of accommodation: guidance for local housing authorities in England' June 2012, at [3.21] at 14. Found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/5918/2171391.pdf

11 Section 202(1) allows for reviews of any of the criteria, so in priority need, a local connection, is eligible for assistance, or is intentionally homeless. Applicants can also request a review of the discharge of the housing duty, and the suitability of the accommodation. This section has also been amended by s.9(2) of the Homelessness Reduction Act 2017, which also allows reviews of the steps or actions to prevent homelessness or where an applicant has been notified of their unreasonable refusal to cooperate

12 Section 202(3) of the Housing Act 1996.

mean that everyone does or is aware they are able. Cowan and Halliday et al.[13] outlined a number of barriers to the internal appeals process:

> These barriers were said to include: ignorance of the right to review; scepticism about internal review; a rule-bound image of decision-making; applicant fatigue; satisfaction with a negative decision (i.e. non-aggrieved); does not want/need long-term housing.[14]

If the review is not found in their favour, an applicant can further appeal. However, this appeal is to a county court on a point of law under s.204(1)(b) of the Housing Act 1996. There, too, can be issues, for example an applicant having to appear as a litigant in person[15].

Such behaviour typically includes imposition of a behaviour order, such as a Criminal Behaviour Order (CBO), Acceptable Behaviour Contract or Injunction to Prevent Nuisance and Annoyance (IPNA), but could also include the breach of a previous tenancy agreement, violence against member of the household or others in the community[16], rent arrears[17] or any other ground found in Part I Schedule 2 of the Housing Act 1985, apart from ground 8[18].

An ABC is the most minimal of the orders and is only available to young people between the ages of 10-18. Generally, the young person voluntarily signs a contract stating they will refrain from certain anti-social behaviours.

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13 D. Cowan and S. Halliday et al., *The Appeal of Internal Review: Law, Administrative Justice and the (Non-)emergence of Disputes*, Hart Publishing, Oxford 2003, specifically see Chapter 5, at 111-148.

14 D. Cowan, *Housing Law and Policy*, First Edition, Cambridge University Press, Cambridge 2011 at 175.

15 See for example: *London Borough of Hamlets v Al Ahmed* (2019) EWHC 749 (QB). Note Peaker's case commentary on the issues of litigants in person grasping the intricacies of the review procedures or the significance of some of the regulations seems to him rather "far-fetched". Found on his blog: https://nearlylegal.co.uk/2019/03/out-of-time-homelessness-appeals-trying-to-find-representation-not-good-enough-reason/

16 For example, Manchester City Council, 'Part VI Allocations Scheme Implemented 21 February 2011 with amendments approved by the Council and Partners as of 20 February 2015' Version 3.2 at 20. Found at: http://www.manchester.gov.uk/download/downloads/id/20290/allocations_scheme_updated_april_2015.pdf

17 For example, Southwark Council, 'A summary of our housing allocation scheme' at 14-15. Found at: http://www.southwark.gov.uk/download/downloads/id/10917/housing_allocations_policy

18 S.160A(8) Housing Act 1996.

Consequences of breaches can include a meeting where the terms are re-iterated or, for serious and repeated breaches, the police or local authority can seek a more serious order, such as an IPNA[19]. However, a Home Office Fact sheet on IPNAs also states:

> While in most cases we would expect informal measures (such as acceptable behaviour contracts) to be considered before the use of the new injunction, we do not want to fetter professionals' discretion. We support professionals using their experience to deal with problems in the way that best meets the needs of victims. If the injunction is the right first step in the circumstances, professionals should be able to use it straightaway.[20]

The Anti-Social Behaviour Order (ASBO) has been replaced with the Injunction to Prevent Nuisance and Annoyance (IPNA); a civil remedy introduced by the Anti-social Behaviour, Crime and Policing Act 2014. It has been described "as super-punitive ASBO which will be easier to obtain for even more broadly defined behaviour"[21], and has a minimum age 10. This means children as young as 10 can be found in contempt of court. In fact, the majority of ASBOs for six years to 2004 where given to those under the age of 21, as Flint and Nixon recount:

> Young people were not initially perceived as a target group (Burney, 2002), but have in practice become the dominant target population. Between 1999 and 2004, 74 per cent of ASBOs were issued against under 21s and 49 per cent were issued against children aged 10– 17 years[22]

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19 The Tameside Citizen – 'A Guide to Acceptable Behaviour Contracts (ABCs)'. Found at: http://www.tameside.gov.uk/communitysafety/abc

20 Home Office, 'Anti-social Behaviour, Crime and Policing Bill Fact sheet: Replacing the ASBO (Parts 1 and 2)' October 2013 at [10] at 2. Found at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/251312/01_Factsheet_Replacing_the_ASBO_-_updated_for_Lords.pdf

21 Liberty, 'Liberty's Response to the Home Office's Proposals on More Effective Responses to Anti-Social Behaviour' June 2011 at 15. Found at: https://www.libertyhumanrights.org.uk/sites/default/files/liberty-s-response-to-the-home-office-s-consultation-on-more-effective-respo.pdf

22 J. Flint et al., 'Governing Neighbours: Anti-social Behaviour Orders and New Forms of Regulating Conduct in the UK' (2006) Vol. 43 (Nos 5/6) Urban Studies 939 at 944.

Additionally, there has been research that indicates ASBOs are more often used with tenants of social housing:

> In theory, both ABCs and ASBOs can be used on a cross-tenure basis, but in practice they tend to be used predominantly with tenants living in social housing. In order to address the problem of anti-social behaviour in areas containing owner occupied or private rented housing there is a need for the relevant Partnership to do so expressly, and to take a proactive approach to ensure that the focus of interventions are not solely on areas of social, and particularly local authority, rented housing.[23]

As it is a civil order it is based on the lower standard of proof of "on the balance of probabilities" as opposed to the criminal "beyond a reasonable doubt". It was based on a previous type of behaviour order, that, according to the Home Office Fact Sheet:

> It is modelled on the existing Anti-social Behaviour Injunction (ASBI), which has been used successfully by social landlords for over a decade to deal with ASB [anti-social behaviour], but can be applied for by a wider range of agencies. It will replace the ASBI and several other tools designed to deal with anti-social individuals including: ASBOs on application, Drinking Banning Orders (DBO) on application, intervention orders and individual support orders.[24]

For those over the age of 18 there is no minimum or maximum time limit for which an injunction can be sought, but for under 18s there is a maximum of 12 months. One difference between an IPNA and an ASBO is the inclusion of positive requirements, such as seeking treatment for an addiction, anger management or counselling. Breaches of IPNAs may result in the respondent being found in contempt of court leading to imprisonment or a fine. Further, a breach of an IPNA can lead to eviction as breaching this injunction is the second[25] of the five conditions set out in S.84A of the Housing Act 1985[26]. The

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[23] J. Nixon et al., 'Tackling Anti-Social Behaviour in Mixed Tenure Areas' Office of the Deputy Prime Minister, March 2003 at 10. Found at: https://webarchive.nationalarchives.gov.uk/20120919172439/http://www.communities.gov.uk/documents/housing/pdf/138706.pdf

[24] Supra n.20 at [5] at 1-2.

[25] S.84A(4) of the Anti-social Behaviour, Crime and Policing Act 2014.

[26] Inserted by s.94 of the Anti-social Behaviour, Crime and Policing Act 2014.

maximum penalty is two years in prison for anyone over the age of 18 and a three-month detention order for anyone between 14-17.

The most serious type of behaviour order[27], the criminal behaviour order (CBO) is only available if the person has been convicted of a criminal offence, which means that the greater burden of "beyond a reasonable doubt" must be applied in a court before such an order may be sought. According to Shelter:

> A CBO can be made only in addition to a sentence imposed against that person, or an order discharging such person conditionally, if the court:
>
> - is satisfied, beyond reasonable doubt, that such person has engaged in behaviour that caused or was likely to cause harassment, alarm or distress to any person, and
> - considers that the making of the CBO will help in preventing that person from engaging in such behaviour.
>
> The fact that the first condition for making a CBO is satisfied does not mean that the court must necessarily make the order; it is a matter of judgment for the court to decide if the making of the CBO will help in preventing the perpetrator from engaging in antisocial behaviour and, although the court should proceed with caution because such orders 'are not lightly to be imposed'…[28]

Like the IPNA, a CBO may be imposed on anyone over the age of criminal responsibility, which is currently 10 years of age.

> The automatic reporting restrictions of certain information, which normally applies in legal proceedings for offenders aged under 18, does not apply in CBO hearings. However, the courts will have discretion to apply reporting restrictions in both CBO applications and CBO breach proceedings. This allows the court to decide whether it is right to name a young person when issuing an order. Such decisions are rare, but we recognise that it may be necessary, in some circumstances, to help in enforcing the order and to protect victims and communities.[29]

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[27] Additionally, there is the Public Space Protection Order, which can be used for actions in public spaces. This was also introduced by Anti-social Behaviour, Crime and Policing Act 2014 s.59.

[28] Shelter Legal Website, 'Criminal behaviour orders'. Found at: http://england.shelter.org.uk/legal/harassment_and_antisocial_behaviour/harassment_and_antisocial_behaviour/community-based_orders

[29] Supra n.20 at [16] at 3.

This means that youth offenders, who are automatically shielded from being named, can have their anonymity removed if the court feels that it is necessary. As CBOs are for the most serious offenders, for those under 18 they can be imposed for 1-3 years, and there is no maximum length for an adult, but it must be reviewed on a yearly basis. Breaching a CBO, as the third of the five conditions[30], is also a mandatory ground for possession S.84A of the Housing Act 1985[31].

This means, in order to be eligible for social housing, applicants must have a historical and current record of good behaviour. Moreover, in the case of any behaviour orders, such eligibility can be removed by the actions of a single member of a household based on hearsay evidence and judged on a lower judicial standard. It also means that tenants who have already secured accommodation can be evicted should any of these orders be breached. There are those who argue this requirement of acceptable behaviour goes further and is "being used as a form of punishment for criminal activity"[32].

By linking eligibility to acceptable behaviour, the law seems to be indicating that in order to qualify for help, an applicant and their household must conform to a standard of behaviour of a good tenant thus making them deserving of social housing. While it is not unreasonable for the council or local housing authority to want to house and keep tenants who will not be nuisance neighbours and who pay their rent, there are issues with this to be addressed. Firstly, there are several studies that indicate that people with learning disabilities, especially youngsters, are also disproportionately subject

30 S.84A(5) of the Anti-social Behaviour, Crime and Policing Act 2014.
31 Inserted by s.94 of the Anti-social Behaviour, Crime and Policing Act 2014.
32 A. Arden et al., 'Social housing and the 'deserving poor'' 22 January 2013. Found at: http://laghousinglaw.com/2013/01/22/social-housing-the-deserving-poor/

to some form of behaviour order[33], sometimes because of behaviours linked directly to their condition[34].

A study found that this was also the case with Acceptable Behaviour Contracts (ABCs)[35], which are a type of measure put in place before/instead of an IPNA. Although there are several conditions mentioned, the most prevalent by far is Attention Deficit and Hyperactivity Disorder (ADHD). The study concludes:

> There is some reliable evidence which suggests that disabled people living in social housing, particularly those with learning difficulties or mental health problems, comprise a significant proportion of those individuals who are subject to interventions designed to tackle antisocial behaviour...[36]

This means an entire household could potentially face homelessness, or eviction, because a child has a condition they cannot control and has been subject to a form of behavioural control:

> ...it is increasingly clear that the withdrawal of social housing is being used as a form of punishment for criminal activity, even though the offence may be wholly unconnected with housing matters, and even though it inflicts the punishment on the family as a whole...[37]

While there are good reasons for excluding tenants, who are guilty of unacceptable behaviour, there is the issue of what happens to them once they are excluded. It is any more acceptable for people who have mental health or other issues to be living as street homeless? Unfortunately, there are no easy answers for problem tenants or the councils who house them.

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33 *Ibid*.

34 National Association of Probation Officers (NAPO), Anti-Social Behaviour Orders—Analysis of the First Six Years, Written Evidence Submitted to the Home Affairs Select Committee, January 2005. Found at: http://www.publications.parliament.uk/pa/cm200405/cmselect/cmhaff/80/80we20.htm.

35 Stephen and Squires, 'Community Safety, Enforcement and Acceptable Behaviour Contracts: An Evaluation of the Word of the Community Safety Team in the East Brighton 'New Deal for Communities' Area' Health and Social Policy Research Centre at University of Brighton, September 2005.

36 C. Hunter et al., 'Disabled people's experiences of anti-social behaviour and harassment in social housing: a critical review' Report prepared for the Disability Rights Commission, August 2007 at 94. Found at: http://shura.shu.ac.uk/800/1/ASBO_Final_Report.pdf

37 *Supra* n.32.

There are some councils however, who will re-consider applications from those with a record of unacceptable behaviour who can demonstrate they have changed. For example, Manchester City Council in their allocations policy state:

> Applicants classified as being ineligible through "unacceptable behaviour" can make an application for accommodation in the future if they can demonstrate a changed pattern of behaviour. It is for the Council to determine whether the changed behaviour claimed makes the applicant eligible under the Scheme.[38]

Despite this, there is an argument that such requirements are another evolution of "deservingness", in other words those who are well behaved are deserving of help. This is one way that the Localism Act 2011 is not only reintroducing the concept of the deserving poor, but evolving it to include acceptable behaviour, both past and present.

Current Criteria for a Desert Object - Status

The second basis for claims of deservingness is status. Often status refers to working status, but can also include things like the status of having a local connection, being a foster parent, or contributing in other ways, for example volunteering, in the local community. Take this example from Newham Council:

> In 2012 we became one of the first councils in the country to recognise employment and contribution to the community in our allocations scheme [for social housing]. ... Our allocations scheme is rewarding residents working on low incomes, as well as creating mixed communities where work is the norm.[39]

However, it is employment and the local connection that are the most prevalent. For example, Central Bedfordshire council, which is outside of

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[38] *Supra* n.74 at 21.

[39] Newham Council, 'National Crisis, Local Action: Making a real difference in housing' at 8. Found at: http://www.newham.gov.uk/Documents/Misc/NationalCrisisLocalAction.pdf

London itself[40] has an employment priority for its allocation scheme, this means that:

> The Allocations Scheme incentivises employment as a way of lifting people out of the benefits cap rules. Once applicants have bid for a property, those in employment will be shortlisted above those not in employment, within bands.[41]

It can be argued that authorities within London (and Greater London) might have different priorities to those outside, because of population density and increased demand for housing in those areas. This does not seem to be the case, however, Manchester and Liverpool[42], which are well outside London both have allocations schemes, which favour those in employment:

> We want to encourage people, who can, to work and want to raise levels of aspiration and ambition. We will offer increased priority to applicants who are working and who are therefore making a contribution to Manchester's economy.[43]

In fact, the statutory guidance on social housing allocations states:

> ...the Government believes that it is appropriate, proportionate and in the public interest to restrict access in this way, to ensure that, as far as possible, sufficient affordable housing is available *for those amongst the local population who are on low incomes* or otherwise disadvantaged [in affordable housing]. [emphasis added][44]

This would seem to indicate that this agenda for preferential treatment to those who are employed goes beyond any one council, but is in fact a Government policy being enacted by legislation and enforced by local authorities.

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40 But part of Greater London.

41 Central Bedfordshire Council, 'Housing Allocations Scheme - Frequently Asked Questions' at 4. Found at: http://www.centralbedfordshire.gov.uk/Images/Housing-Allocation-FAQ_tcm6-58792.pdf

42 Liverpool City Council, 'PROPERTY POOL PLUS - Sub Regional Choice Based Lettings Allocations Scheme' October 2018 at 2. Found at: https://liverpool.gov.uk/media/9110/ppp-policy-291018.docx

43 *Supra* n.76 at 58.

44 Department for Communities and Local Government, 'Providing social housing for local people Statutory guidance on social housing allocations for local authorities in England' December 2013, at [12] at 5. Found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/269035/131219_circular_for_pdf.pdf

There is some evidence that, in London at least, there is an increasing tension between the vulnerable[45] and the working poor. For example, Newham council is critical of the use of the "vulnerable" label for eligibility and moreover touches on this tension in some of its documentation:

> Unfortunately, in the past allocations have created a race to the bottom where people are encouraged to emphasise their vulnerability. Not only does this mean that growing numbers of people living in social housing are unemployed – risking the creation of a culture of worklessness in some areas – but it also creates tension with those in work on low wages....[46]

Similarly, the Manchester allocations policy makes specific mention of disqualifying vulnerable applicants from certain areas and in certain conditions to ensure estates have a sustainable and mixed community:

> Manchester City Council reserves the right to apply restrictive labelling in order to identify suitable applicants in particular circumstances... Restrictions on lettings to vulnerable households where there are already a concentration of supported tenants/residents.[47]

These real-world examples demonstrate clearly the argument that the Localism Act 2011 seeks to reinforce the criteria of the deserving poor by focusing priority on those who are employed or providing other types of contribution, for example by fostering or volunteering or those who have a local connection.

The Localism Act 2011 emphasizes that deservingness is something that applicants earn by action and contribution, or residence, rather than a passive state of being such as those who would be considered the "sick poor". This harkens back to the Victorian criteria of willingness to work regardless of ability. In fact, in the statutory guidance on social housing allocations states:

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45 The definition of vulnerability, both legal and in the wider context, is explained in detail in the introduction and Chapter 2.

46 *Supra* n.39 at 8.

47 *Supra* n.74 at 74.

> The Government has made clear that we expect social homes to go to people who *genuinely need and deserve them*. That is why the Localism Act has maintained the protection provided by the statutory reasonable preference criteria which ensure that priority for social housing continues to be given to those in the greatest housing need. [emphasis added][48]

The changes brought about by the Localism Act also mean that it will be much harder for those who are unemployed to find a tenancy in social housing. Further, with little or no consideration of those who are physically or mentally incapable of working, it will become increasingly difficult for that group to meet the minimum requirements of being "deserving" of help. This validates the assertion that statute is reinforcing the criteria of the deserving poor - those who are employed or volunteering or contributing to the community are, by definition, going to be considered more deserving than those who are unemployed. Sections 146 and 147 of the Localism Act 2011 are reinforcing criteria associated with the deserving poor. Through the application of eligibility and priority to those deemed to be worthy, or "deserving" of help with specific emphasis on active contribution and good behaviour in the past and present.

Flexible Tenancies (s.154)

Section 154 of the Localism Act 2011[49] limits the terms of social tenants and effectively removes the tenancy for life for new tenants. Most terms offered by councils are five years, although they can be as short as two years[50]. Additionally, many tenants will start out under an "introductory tenancy" for the first year of their flexible tenancy. This year acts as a probationary period

[48] *Supra* n.44 at [6] at 4.
[49] This section adds s.107A to the Housing Act 1985.
[50] S.107A(2)(a) of the Housing Act 1985.

for new tenants and the terms under the introductory tenancy tend to make evicting tenants who breach their tenancy agreements much easier[51].

The introduction of the flexible tenancy has been described as the "nail in the coffin" for the historic purpose[52] of social housing. This conclusion was also argued by Fitzpatrick et al.:

> We argue that security of tenure is not only a crucial housing attribute, as experienced by many social housing tenants and other housing 'user' groups, but also a critical concept in understanding the role of the social rented sector, and more specifically whether it has a 'safety net' or 'ambulance' function.[53]

This change could have some positive benefits, in that there will be more tenancies available as fewer tenants will be offered permanent accommodation, which should help reduce waiting lists[54]. This appears to be working, the waiting lists for the year ending March 2014, which are the latest figures available, have dropped to:

> ...1.37 million households on local authority waiting lists on 1 April 2014, a decrease of 19 per cent on the 1.69 million on 1 April 2013.[55]

Most importantly this section allows councils the choice not to renew flexible tenancies, usually for those who have not behaved in an acceptable way.

Although the focus is less on status and more on behaviour, it seems likely that employment status would be a factor through paying rent and thus not breaching a tenancy agreement. There is certainly an argument here that the additional check on a tenant, for example to ensure they still require the tenancy, is not unreasonable. With the social rented sector in decline and

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51 Shelter, 'Introductory Council Tenancies'. Found at: http://england.shelter.org.uk/get_advice/social_housing/about_council_housing/introductory_council_tenancies

52 S. Lowe, *The Housing Debate*, First Edition, Policy Press 2011 at 128.

53 S. Fitzpatrick et al., 'Ending Security of Tenure for Social Renters: Transitioning to 'Ambulance Service' Social Housing?' (2014) 29:5 Housing Studies 597 at 611.

54 B. Lund, *Understanding Housing Policy*, Second Edition, The Policy Press 2011 at 139.

55 Department for Communities and Local Government, 'Local authority housing statistics: year ending March 2014'published 11 December 2014 at 1. Found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/385091/Local_authority_housing_statistics_-_year_ending_March_2014.pdf

waiting lists still very long, local authorities must ensure that those who no longer need to be in a social housing tenancy are moved to make room for those who do. There are serious questions as to the efficacy of plans to free up social homes for impoverished tenants by using flexible tenancies for better off households who will move on, as well as a number of other concerns:

> In practice, however, the scope for freeing up space in UK social housing through ejection of 'better off' tenants has been demonstrated to be extremely limited (Fitzpatrick & Pawson, 2013). A range of other objections have also been raised to the removal of social tenants' tenure security, including work disincentive effects, concerns about community destabilisation, and the potential for negative impacts on social tenants' psychological well-being.[56]

However, the requirements of paying rent and being employed are only two of a much larger number of factors taken into account. It is with these factors that the problems really start, because they focus much more heavily on behaviour of the tenant and less on the whether a tenant is able and secure enough financially to move to the private rented sector.

Some types of behaviour that are likely to cause a flexible tenancy not to be renewed include, more or less, the same type of behaviour as would prevent an application for a tenancy from being accepted. Additionally, the types of behaviour that might qualify are very similar to the statutory grounds that may lead to a court order for possession, where the tenant is evicted from their social property. These are listed in Schedule 2 of the Housing Act 1985[57], ground number 2 allows an authority to seek possession where:

> The tenant or a person residing in or visiting the dwelling-house—
> (a) has been guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing, visiting or otherwise engaging in a lawful activity in the locality, or
> (b) has been convicted of—

[56] *Supra* n.118 at 5.

[57] As amended by s.144 of the Housing Act 1996.

(i) using the dwelling-house or allowing it to be used for immoral or illegal purposes, or
(ii) an arrestable offence committed in, or in the locality of, the dwelling-house.

If one compares this wording with the specific paragraphs from Southwark Council Tenant's Handbook that relate to the behaviour of their tenants, there is a great deal of similarity:

> Your tenancy agreement says that you must not:
> - Do anything which causes nuisance, annoyance, offence, distress or alarm to other tenants or their family, lodgers or visitors; or
> - Damage any property, fixtures or fittings belonging to us or to our tenants and their families.[58]

Southwark also gives a non-exhaustive list of examples of behaviour that would cause nuisance and annoyance that includes:

> ... playing music, TV or radio too loudly, DIY at anti social hours, dogs barking, offensive drunkenness and shouting or loud arguments (often involving foul language) and slamming doors, and playing ball games close to people's homes...[59]

It is also interesting to note that incidents of anti-social behaviour can also lead to a demotion order, which was introduced by the Anti-social Behaviour Act 2003 sections 14[60] and 15[61]. This is another type of probationary tenancy and allows local housing providers to replace the existing tenancy with one that removes the right to buy and the security of tenure for a year. Once again, this demonstrates that the legal framework for social housing and governmental policy are not necessarily focusing on the status of an individual in terms of needing a social tenancy, but rather on whether their behaviour is indicative that they no longer deserve a tenancy for reasons other than need[62]. This concentration on behaviour indicates that councils are not making deserving

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58 Southwark Council Tenant's Handbook Chapter 'Respecting Others' at 98. Found at: https://www.southwark.gov.uk/housing/council-tenants-services/tenants-handbook?chapter=2
59 *Ibid* at 109-111.
60 Inserts section 82A into the Housing Act 1985
61 Inserts section 20B into the Housing Act 1988.
62 See Flexible Tenancies at 31

an ambulatory status in order to free up tenancies to those who still need them from those who are in a stable financial position. Instead they are interested in ensuring social tenants conform to ideals of "good behaviour" and by so doing remain deserving of their social tenancy. Once again, this demonstrates that recent legislation is applying a form of conditionality that considers housing as a reward.

While it seems unlikely that one incidence of this type would be enough to end a flexible tenancy, Southwark is keen to emphasise the fact that they operate "a zero-tolerance approach towards behaviour that impacts negatively on people or the environment"[63]. Additionally, the behaviour would be enough, statutorily to be grounds for a possession order[64]. Local authorities are focusing more heavily on acceptable behaviour and while that does include some areas of financial stability it is far, far wider than that. It considers anti-social behaviour or several other types of behaviour that might "cause a nuisance and annoyance", which is another criterion of deserving - being well behaved. Attaching a moral judgment about a household to their application, as was discussed in Chapter 3, has a number of issues associated with it, including gender bias and the use of conditionality, which can directly contravene need. Again, by linking justice and fairness to housing outcomes, the applicant themselves will have their character scrutinised for worthiness, and virtue, making them a focus of a subjective, moral judgment.

It is possible that all new tenancies will be flexible tenancies in the future, if Chapter 6 of the Housing and Planning Act 2016 (HPA) is implemented. This Chapter has extended a provision from s.154 of the Localism Act 2011 - the flexible tenancy. Under the Localism Act 2011 the provision was discretionary

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63 *Ibid*.

64 Courts are required to consider if it is reasonable to grant the order for possession in cases involving ground 2. However, the Anti-social Behaviour Act 2003 s.16 also requires the courts to consider the effect on the victims of the anti-social behaviour.

on the local authority whether to offer a fixed (flexible tenancy of a fixed term) or a lifetime term. Ss.118-121 of the HPA, however, makes it mandatory for local housing authorities to offer fixed term only for new tenancies. Currently, this part of the Housing and Planning Act 2016 is not in force, and the government confirmed in a green paper in August 2018:

> We have listened carefully to the views and concerns of residents and have decided not to implement the provisions in the Housing and Planning Act 2016 at this time.[65]

However, saying the curbs on flexible tenancies will not be used "at this time" is not a definitive statement that suggests never. These sections have not been repealed and it is perfectly possible that they could be implemented at some later date. If these sections did come into force, all discretion over flexible tenancies would be eliminated, meaning that all tenancies going forward will be flexible only. This will ensure that every tenant will, at some point, have to renew their lease and will become more subject to the continuous cycle of assessment, discussed in detail in the next chapter.

The passage of the Secure Tenancies (Victims of Domestic Abuse) Act 2018[66] gives some hope to those who are victims of domestic abuse with s.1 of the Act requiring old-style tenancies to be granted where the tenant had a qualifying tenancy[67] at another dwelling, the person was a victim of domestic abuse carried out by another person[68], and the new tenancy is granted for reasons connected to that abuse[69]. Lord Porter, chairman of the Local Government Association, argued that the bill should be extended protecting vulnerable tenants of all types not just those who are fleeing domestic

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65 Ministry of Housing, Communities & Local Government, 'A new deal for social housing' August 2018, CM9671 at [186] at 65. Found at: https://www.gov.uk/government/consultations/a-new-deal-for-social-housing

66 Amending the Housing Act 1985, adding S.81B.

67 Section 1(2C) defines this.

68 Section 1(2)(b)(i).

69 Section 1(2)(b)(ii).

violence. In fact, during the debate in the House of Lords, Lord Shipley opined:

> The Bill could also be an opportunity to give councils the power to set their own categories for granting lifetime tenancies to other vulnerable tenants. Councils are currently the only landlords who issue secure, lifetime tenancies, but their ability to offer the right tenancies for some vulnerable tenants is too restricted. ... This Bill at least provides the necessary assurance for those who are victims of domestic violence, but what about others who are deemed vulnerable?[70]

However, those measures did not make it into the final statute, which opted to protect victims of domestic abuse only. While this is still positive for those who find themselves in that unfortunate situation, it is a setback in terms of protections for other vulnerable groups. Yet, it is possible that the available local council discretion will mean vulnerable tenants are granted lifetime tenancies instead of flexible. That, in itself, is also a positive step in terms of ensuring those who are least able to cope with the labyrinthine housing system are mainly protected from losing their tenancy or being asked to move.

There are questions about how this will affect housing need and the tensions between need and conditionality, which was discussed briefly in Chapter 3. This will be explored more in the next section.

Housing Need and the Localism Act

When considering who needs a social tenancy, the immediate answer is likely to be "the homeless". However, homelessness has dramatically increased in the last decade. If, instead as this thesis argues, more about ensuring only those who are perceived as "deserving" receive a tenancy, then the additional criteria would be more geared to favour those specific types of people. Thus,

[70] Secure Tenancies (Victims of Domestic Abuse) Bill [HL] - Second Reading, Part of the debate – in the House of Lords at 4:34 pm on 9th January 2018. Found at: https://www.theyworkforyou.com/lords/?id=2018-01-09a.153.0

looking at the requirements of status (i.e. working) and/or good behaviour, the criteria themselves seem to indicate a much narrower focus. This indicates that it is not on those who are homeless and require shelter, but those who are working and will act lawfully who also happen to need a place to live and cannot afford a private tenancy. The most obvious group of people who qualify here would be the working poor. Rather than housing the very poorest or the ones who are most in need, it is becoming clearer if one examines the eligibility criteria, that social housing is considered to be for the well-behaved working poor. This indicates that continued eligibility for social housing is not only based on financial need, it is a far more nuanced and less clear definition that is responding to larger changes in society.

The previous chapter introduced the idea of welfare conditionality, which links concepts like responsibility and behaviour as a way of determining eligibility for benefits. As the Welfare Conditionality final report states:

> Welfare conditionality links eligibility for collectively provided welfare benefits and services to recipients' specified compulsory responsibilities or particular patterns of behaviour. It has been a key element of welfare state reform in many nations since the mid-1990s.[71]

This idea of conditionality, again, links back to deservingness through the subject – the use of housing as a reward. In other words, applicants who behave in a certain way or have attracted a particular status (i.e. working, having a local connection, etc.) are rewarded with housing. Conditionality sits rather uncomfortably with housing need, because while it is possible to be considered "worthy" and need housing, not everyone who needs housing will be worthy. Take, for example, the young man "Theo" mentioned in the previous chapter. He was homeless, he needed a place to live, yet he was not

[71] Welfare Conditionality Project, 'Final Findings Report: Welfare Conditionality Project 2013-2018' Economic and Social Research Council, June 2018 at 7. Found at: http://www.welfareconditionality.ac.uk/wp-content/uploads/2018/06/40475_Welfare-Conditionality_Report_complete-v3.pdf

considered worthy and ended up living in a tent. This means that there is a tension between housing need and the use of conditionality.

This section will look at the measures introduced by the Localism Act 2011 and how they connect to conditionality. First, it will consider the reasonable preference criteria and the limits of the use of conditionality. It will then examine the use of allocations policies, the local connection requirement and flexible tenancies.

The Reasonable Preference Criteria

Section 147(4)[72] of the Localism Act 2011 also requires authorities to give a reasonable preference to applicants who fit certain criteria, as discussed in Chapter 2. Additionally, section 147(4)[73] allows authorities to apply supplementary criteria to applicants who fall into a reasonable preference category in order to determine their priority for access to housing[74]. The section itself gives some examples such as a local connection[75], financial resources and behaviour of the applicant, but the statutory guidance makes it clear that the list is non-exhaustive and "authorities may take into account other factors instead or as well as these"[76]. This means, in effect, that even within a sub-class of people to whom the local authority must give a reasonable preference, priority will be awarded to those who fit certain criteria that will be determined by the authority themselves.

Yet retention of the reasonable preference criteria after the introduction of the Localism Act, is not necessarily a positive, as Fitzpatrick states:

> While the retention of the 'reasonable preference' criteria should mean that a predominant needs focus is maintained in allocations, there is clearly the potential for local authorities to exclude

[72] Inserts section 166A(3) into the Housing Act 1996.
[73] 166A(5) of the Housing Act 1996.
[74] *Supra* n.16 at 12.
[75] As defined by s.199 of the Housing Act 1996.
[76] *Supra* n.10 at [4.15] at 20.

> households who, if they were permitted to join the waiting list, would be entitled to such a preference.[77]

A number of cases have been heard which specifically consider the reasonable preference criteria and the Localism Act 2011. In the first, *R (Jakimaviciute) v Hammersmith & Fulham*[78], the Court of Appeal held that a homeless woman in temporary accommodation could not be removed from the housing register for lack of a local connection because she was considered to meet the reasonable preference criteria. In his judgment Richards LJ stated:

> In my judgment, those two grounds are both well founded. The disqualification effected by paragraph 2.14(d) [of Ealing Council's allocation policy] is fundamentally at odds with the requirement under section 166A(3)(b) to frame a scheme so as to secure that reasonable preference is given to people who are owed a housing duty under one of the provisions of Part 7. The great majority of people within that class, far from being given any preference, are excluded altogether from consideration for housing accommodation under the Scheme; and they are excluded for a reason that cannot sit with Parliament's decision to define the section 166A(3)(b) class as it did. It does not assist the Council to point to the fact that the only people to whom housing accommodation may be allocated under the Scheme are people within the section 166A(3) classes. It is the exclusion of a large proportion of one of those classes that causes the problem. Nor do I accept that the power to effect such an exclusion is inherent in the flexibility allowed to an authority in securing that reasonable preference is given.[79]

This means that authorities cannot try and bypass the statutory reasonable preference criteria when disqualifying applicants, a very positive development for those who qualify on those criteria. Similarly, in 2015 another judicial review was brought by a survivor of domestic violence living in temporary accommodation, who received a letter indicating she no longer qualified because she had not been resident in the London Borough of Ealing

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77 Fitzpatrick et al., 'The homelessness monitor: England 2015 ', Prepared for Crisis and the JRF, February 2015 at 63. Found at: https://www.crisis.org.uk/media/237031/the_homelessness_monitor_england_2015.pdf

78 [2014] EWCA Civ 1438.

79 *Ibid* at [47].

for 5 years or more. The High Court in *R (on the application of HA) v London Borough of Ealing*[80] held that:

> The inability of the policy to identify those who meet the 166A(3) criteria but who do not fulfil the residency criteria highlights the consequences of the exceptionality provision. In this case, the Claimant's application was, on the evidence, automatically rejected because she did not meet the residency criteria. No consideration was given to the 166A(3) criteria under the exceptionality provision, nor could it be under the Defendant's policy. It is noteworthy that *in R. (Jakimaviciute) v. Hammersmith and Fulham LBC* and *R. (Hillsden) v. Epping Forest District Council* (ante) it was not argued that the exceptionality provision could save the authority's policy. Moreover, paragraph 21 of the 2013 Statutory Guidance identifies in the section dealing with the need for the provision of exceptions from a residency requirement that "In addition, authorities retain a discretion to deal with individual cases where there are exceptional circumstances." A distinction, therefore, is drawn between general exceptions for people in preference categories and individual applicants in exceptional circumstances. Although a residency requirement is an entirely appropriate and encouraged provision in relation to admission onto a social housing list, it must not preclude the class of people who fulfil the 'reasonable preference' criteria. The Defendant's policy does not provide for the giving of reasonable preference to prescribed categories of persons as required by section 166A(3) of the Act. In this respect the policy is unlawful.[81]

Peaker felt that the decision in *HA* was noteworthy in terms of councils attempting blanket applications of a local connection requirement that ignore the statutory reasonable preference criteria:

> This is a significant judgment, following clearly on from the decisions in *Jakimaviciute* and *Alemi*. While it is possible for a council to set a residence criteria for qualification to the housing list (at least so far), it is not lawful for that policy to exclude anyone who has a reasonable preference under s.166A(3) without adequate reason. A blanket residence test is highly unlikely to be lawful. And a 'exceptional circumstances' discretion is also unlikely to be enough, not least if, like Ealing, absolutely no attempt to discern if

[80] [2015] EWHC 2375 (Admin)

[81] *Ibid* at [22]-[23] per Mr. Justice Goss.

> circumstances might be exceptional was made at all. … the upshot is that Councils have to take 'reasonable preference' seriously again. No policy that has a blanket criteria that prevents those in a reason preference category from qualifying for the list will be likely to stand, or at least not without a personal reason (ASB, etc.). An 'exceptional circumstances' discretion will not be enough, as explored in this judgment.[82]

While this is a positive step to ensure the reasonable preference criteria are taken into account by local authorities, that does not mean that applicants within that category cannot be disqualified on other grounds. An applicant who has a reasonable preference but has a history of anti-social behaviour can still be excluded by a local authority. This means that even those who are considered to be in the greatest need through the use of these criteria have some conditionality applied. Conditionality considers a state benefit, in this case housing, as a reward or incentive for certain types of behaviour, such as those found in the current criteria of deservingness (working and good behaviour), as discussed in Chapter 3.

Eligibility - Allocation Policies

Allocations policies with strict eligibility criteria, like those introduced by the Localism Act 2011 also can form a basis for conditionality within social housing, in other words, social housing used as a reward. Again, this links back to the base nature of the philosophical desert, explained in the previous chapter: the deserving subject (an applicant), a deserved object (housing) and a basis for that desert. As Flint and Nixon argue:

> Governing access to social housing, through allocation policies, also provides a longstanding mechanism for linking entitlement to required conduct. Here, as with good neighbour agreements, we see contemporary developments that frame assessments about individuals' eligibility for social housing tenancies in relation to community impacts on the basis of future conduct and a civility

[82] G. Peaker, 'Wherever I lay my hat… Residence tests for allocation policies', published 09/08/2015 - The Nearly Legal: Housing Law News and Comments Blog. Found at: https://nearlylegal.co.uk/2015/08/wherever-i-lay-my-hat-residence-tests-for-allocation-policies/

> defined as much by required positive, proactive acts of citizenship and voluntary endeavour than by a more passive desistence from prohibited behaviour. Thus we find examples of social landlords introducing criteria into their allocation decisions including individuals 'attitudes to the area', their 'potential contribution to a stable community' and their 'likely levels of community involvement and participation'…[83]

This position is supported by Fitzpatrick et al.:

> Social housing is an important site for the governance of anti-social behaviour (ASB), as well as being a key arena for other forms of conditionality aimed at regulating the conduct of low-income populations. These housing-based forms of social control are typically exercised via tenancy agreements and allocations criteria, both of which have become potentially much more conditional in England as a result of the Localism Act 2011.[84]

So, the use of the eligibility criteria and allocations policies is one method that governments can begin to impose restrictions on housing places, allowing housing to become used as a reward. As already discussed, these criteria fall along the lines of status and behaviour. This means that those who need social housing will only be considered as eligible if they meet certain requirements for behaviour and/or status. There is empirical evidence from Crisis that the use of the eligibility criteria linked to the Localism Act, is excluding certain types of people, who might well have a housing need, but are still considered ineligible:

> While some of those being excluded from housing registers may have the resources to secure their own market housing and can be considered not to have a housing need, it is probable that many of those excluded do have a housing need, but do not meet the restricted eligibility criteria now set by many councils.115 The evidence presented below suggests a likelihood that this includes

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83 *Supra* n.22 at 951.

84 Fitzpatrick et al., 'Conditionality Briefing: Social Housing' Welfare Conditionality Project – Economic and Social Research Council, September 2014, at 1. Found at: https://pureapps2.hw.ac.uk/ws/portalfiles/portal/7537719/Briefing_SocialHousing_14.09.10_FINAL.pdf

> households without a local connection, people with a history of rent arrears and those with past criminal convictions.[85]

This type of conditionality will mean that those with housing need will not necessarily be considered eligible for housing, because of poor behaviour or the lack of employment or a local connection. The use of the local connection requirement has been particularly problematic and further erodes the argument that housing is allocated simply based on those who need it, as argued by Fitzpatrick et al.:

> Moreover, the Coalition Government has indicated that it would like to see a higher priority given in social lettings to ex-service personnel, working households and others making a 'community contribution' (DCLG, 2012). This implies a shift away from need and back towards behavioural forms of 'desert' in the allocation of, and retention of, social housing in England.[86]

Another way that eligibility has been cut, is through use of the local connection requirement.

The Local Connection

The Localism Act 2011, and more specifically the requirement of a local connection, has been described as "the biggest single factor" in the remarkable drop in waiting list numbers across England[87]. A government briefing paper comes to much the same conclusion, showing the drop in waiting list numbers after the introduction of the Localism Act 2011:

> The number of households on local authority waiting lists increased from 2001 onwards and peaked in 2012 at 1.85 million. The rise after 2001 can be explained by a requirement which was placed on local authorities to consider all applications, i.e. authorities' ability to impose blanket bans was removed. By 2017

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85 S. Rowe et al. for Crisis, 'Moving On: Improving access to housing for single homeless people in England' October 2017 at 48. Found at: https://www.crisis.org.uk/media/237833/moving_on_2017.pdf

86 *Supra* n.84 at 3-4.

87 D. Foster, 'Why council waiting lists are shrinking, despite more people in need of homes' The Guardian, 12 May 2016. Found at: https://www.theguardian.com/housing-network/2016/may/12/council-waiting-lists-shrinking-more-need-homes

> there were around 1.16 million households on waiting lists, a reduction of 38% compared to the 2012 peak.[88]

This reduction has only increased, as indicated from more recent figures provided by the Chartered Institute of Housing:

> Following the introduction of these new flexibilities, the number of households on waiting lists in England dropped, by 40 per cent, from its peak of 1.85 million in 2012 to 1.11 million in 2018 (MHCLG, 2019), even though real housing demand had risen during this period.[89]

However, while the Act helped reduce the number of people on the waiting lists, the use of the local connection criterion is not without its issues. Jon Sparkes the Chief Executive of Crisis, the homeless charity stated that restricting "eligibility for social housing is trapping more and more people in a cycle of homelessness that they have no route out of, and this just isn't right"[90]. There is mounting evidence from empirical research conducted by the Joseph Rowntree Foundation that the requirement of a local connection by residency in a borough for a certain amount of time is difficult for households in poverty[91]. It has also been noted that the local connection can have a deleterious effect on homeless people, who are more transient:

> Local connection criteria, and in particular, lengthy residence requirements, can particularly disadvantage groups in the population that are more transient. This might include homeless people who move to urban centres to find work and a supply of shared rental housing or to access hostels.[92]

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88 W. Wilson, 'Briefing Paper: Allocating social housing (England)', Number 06397, May 2018, at 17. Found at: http://researchbriefings.files.parliament.uk/documents/SN06397/SN06397.pdf

89 F. Greaves CIHCM, 'Rethinking Allocations' Report Prepared for the Chartered Institute of Housing, September 2019 at 21. Found at: http://www.cih.org/resources/Rethinking%20allocations.pdf

90 Falling through the cracks: New Crisis report reveals England's forgotten homeless people being denied access to housing. Found at: https://www.crisis.org.uk/about-us/latest-news/falling-through-the-cracks-new-crisis-report-reveals-england-s-forgotten-homeless-people-being-denied-access-to-housing/

91 A. Clarke et al., 'Poverty, evictions and forced moves' Joseph Rowntree Foundation, July 2017 at 38. Found at: https://www.jrf.org.uk/report/poverty-evictions-and-forced-moves

92 *Supra* n.85 at 55.

This is something that research by the Chartered Institute of Housing also noted with specific mention of the possibility that an applicant, especially from abroad, has no local connection anywhere:

> Local connection criteria can present an immediate barrier where those who are assessed as not having one are automatically disqualified from joining a scheme. Case law[93] has highlighted the potential discriminatory nature of a requirement that means some people from abroad will fail to develop a connection for some time, while having no connection whatsoever to any other local authority areas.[94]

Considering the use of a local connection or other residency requirements, with one council requiring 10 years period of residence[95]. In fact, a survey by the Chartered Institute of Housing discovered:

> 62 per cent of respondents to our sector survey include some form of residency requirement in their allocation policy and 34 per cent have both residency requirements and additional local connection criteria.[96]

A final issue with restricting access in this way could be problematic as, there might be an issue with how these eligible/ineligible classes will be decided upon and how this might impact those groups who are affected. As this part of the Localism Act is reverting the law to the same system as in the 1996 Act, all the issues associated with that must be revisited, as Cowan states:

> This return to the 1996 Act raises concerns that the problems experienced in the implementation of that Act will re-occur. Most local authorities excluded applications from those who did not have a local connection with the area; under eighteens; those with a history of ASB [anti-social behaviour]; and, in particular, those with previous rent arrears… Indeed, the pre-consultation paper

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93 *Supra* n.89 at 21.

94 The case referred to is *R (on the application of Ward & Ors) v The London Borough of Hillingdon & Ors* (2019) EWCA Civ 692 where the Court of Appeal made "a declaration that the impugned provisions of the policy constitute indirect discrimination against Irish Travellers and non-UK nationals which is unlawful unless justified" (at [111] per Lord Justice Lewison).

95 Hillingdon Council, who was the subject of the case above: see *ibid*.

96 *Supra* n.89 at 21.

> trailing of the proposals suggested that local connection was the prime motivation for these reforms…[97]

Additionally, there is evidence that under the 1996 Act there was a number of areas with poor practice. One survey conducted by the homelessness charity Shelter found that, in Tyne and Wear:

> The research reveals widespread poor practice and shows that a significant number of vulnerable people are being unfairly excluded from social rented housing in Tyne and Wear. Our evidence shows that, where exclusions were challenged (and where the outcome was known), more than half of the exclusions were overturned on appeal[98]

This could lead to local authorities removing or denying eligibility to those who might need a longer-term solution in terms of social housing in order to free up places for those who are likely to not need to renew a fixed term tenancy. Also, consider the cases mentioned above where councils had attempted to remove those with a reasonable preference because they did not meet the local connection test (see footnotes 78 and 80 on pages 22 and 23). While these cases both had satisfactory outcomes, the fact that there were authorities who had attempted to circumvent statute to disqualify people is indicative of a larger issue.

It is still perfectly possible that this is not necessarily a sinister plot to harm or exclude such people, but simply as a matter of expediency and enforcing a wider policy shift in priorities of allocations. Similarly, there is some sense in giving priority to those who are working or contributing to the community (through foster care or as a former member of the armed forces), rather than a jobless and vulnerable individual who might be a burden to the council and a problem to the neighbours. There is evidence that, in London at least, there is an increasing tension between the vulnerable and the working poor. For

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[97] *Supra* n.14 at 201.

[98] Shelter, "Exclusions in Tyne and Wear An investigation by Shelter's NEHAC into why applicants are excluded from social rented housing" April 2006. Found at: http://england.shelter.org.uk/__data/assets/pdf_file/0005/39506/20824.pdf

example, Newham council in London is critical of the use of the "vulnerable" label for eligibility and moreover touches on this tension:

> Unfortunately, in the past allocations have created a race to the bottom where people are encouraged to emphasise their vulnerability. Not only does this mean that growing numbers of people living in social housing are unemployed – risking the creation of a culture of worklessness in some areas – but it also creates tension with those in work on low wages....[99]

Local housing authorities are under enormous pressure with fewer social houses available and ever-growing waiting lists, there are bound to be competing interests and local authorities, as it can be seen, are acutely aware of such tensions in their own communities. For councils who are finding increased pressure from many different areas, in terms of reducing costs and making the system "fairer", this type of approach must be persuasive. However, there are issues surrounding the application of these measures:

> It is not clear from the legislation as to whether there is an obligation on local authorities to consult and produce an evidenced-based policy or whether there is to be completely free reign with the risk that policies will be formulated solely by reference to short-term political or fiscal motives with a disregard to promoting equality and giving priority to need for social housing for very vulnerable groups or to groups of persons for whom it is traditionally more difficult to find permanent accommodation.[100]

It should be noted that such decisions will be subject to judicial review and other public law principles and there is still some access to legal aid for some claims, although there are issues with access to justice for housing cases. For example, cuts to legal aid have led to "advice deserts" where there are simply no housing solicitors who specialise in housing and who accept legal aid. Law Society chief executive Catherine Dixon noted:

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[99] Newham Council, 'National Crisis, Local Action: Making a real difference in housing' at 8. Found at: https://www.newham.gov.uk/Documents/Misc/NationalCrisisLocalAction.pdf

[100] T. Baldwin, 'The Localism Act 2011: will it lead to fair allocation of social housing to local people in most need?' (2012) 15(1) Journal of Housing Law, 16 at 22.

> Advice on housing is vital for people who are facing eviction, the homeless and those renting a property in serious disrepair. Early legal advice on housing matters can make the difference between a family being made homeless or not.
> People who require legal aid advice for housing issues often need it urgently. Families are unable to access justice because they cannot afford to travel to see the one provider in their area who may be located long distances from where they live. Almost one third of legal aid areas in England and Wales have one, and in some cases, zero housing providers, including large, rural areas, such as Cornwall, Somerset and Central Wales.'[101]

This means that some families will be denied access to justice because they cannot travel to a solicitor who has the requisite legal knowledge and is available using legal aid. Further, if there is only one housing specialist in the area conflicts of interest can be created because one person/firm cannot represent both parties. So, where both parties might require legal aid, only one will be able to receive representation. Cuts to legal aid have also led to people having to act as a litigant in person (representing themselves), even those who have significant difficulties[102].

Flexible Tenancies

The use of flexible tenancies is often cited as an arena for arguments of the purpose of social housing, as Fitzpatrick and Watts argue:

> Debates on the mandatory extension of FTTs [fixed term tenancies] thus encapsulate two very different visions of who and what social housing is for. In the first, social housing is a short-term welfare intervention, subject to periodic means test to ensure that it is rigorously targeted at those in greatest need, and operates as a transitional 'springboard' to other tenures. In the second, it is a key mechanism for securing stable homes and communities for low-income groups, and a legitimate long-term 'tenure of destination'.

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[101] The Law Society, 'Lack of housing legal aid services is leading to nationwide advice deserts' 27 July 2016. Found at: http://www.lawsociety.org.uk/news/press-releases/lack-of-housing-legal-aid-services-is-leading-to-nationwide-advice-deserts/

[102] See for example the case of *Festival Housing Limited v Baker* [2017] EW Misc 4 (CC). Where the judge noted that Ms. Baker has difficulty reading and writing and a number of other issues that made her particularly vulnerable. He described the situation as "wholly unsatisfactory" (per Mackenzie J. at [8]).

> On one side, overriding priority is given to what is viewed as the efficient allocation of scarce resources, and on the other to the security of poor households.[103]

The use of fixed term tenancies is not necessarily a negative in terms of housing need, as such a measure could well help councils and other local authorities deploy their housing stock more effectively. Efficient use of stock is the most commonly stated reason for using flexible tenancies:

> Most important appears to be their anticipated potential to facilitate 'efficient use of stock', a factor identified as a 'main motivator' by 21 of the 22 LAs and three-quarters of HAs who use this form of tenancy and answered this question. Typical comments included that use of FTTs aimed to "optimize use of scarce housing stock" (LA, South East), "free up stock for appropriate use" (LA, South East) and "promote best use of our stock and ensure that properties were allocated to their fullest potential" (HA, West Midlands).[104]

Considering the lack of social housing this is not unreasonable. In fact, there is an argument that, in terms of reducing waiting lists and perhaps also relenting to social pressure from competing groups, local authorities might feel it is less prudent to house one applicant and their family for 10 years or more, when the same, precious space might be used to house 5 families over the same period; each for a two year fixed tenancy. Similarly, if a single person is occupying a three-bedroom house, the ability to move them into a smaller space and house a family of three or four is a better use of the space available and could have manifest benefits for all parties. In fact, this type of rationale was highlighted by some authorities, along with the idea that more flexibility will create a fairer system:

> The primary rationale underpinning this view was that FTTs promise to facilitate 'better' – even 'best' – use of stock, with this judgement primarily related to ensuring those in the most need can access housing for a short period, before moving on when income

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[103] S. Fitzpatrick et al., 'Competing visions: security of tenure and the welfarisation of English social housing' (2017) 38:8 Housing Studies 1021 at 1026.

[104] B. Watts et al., 'Fixed Term Tenancies: Revealing Divergent Views on the Purpose of Social Housing' Part of the Welfare Conditionality Project, July 2018 at 4. Found at: https://pureapps2.hw.ac.uk/ws/portalfiles/portal/22902499/FTT_Report_July2018_WEB_2.pdf

> rises or household size changes, making room for those newly in need. From this perspective, 'lifetime' tenancies granted irrespective of tenants changing circumstances are morally problematic, as they fail to 'track need' over the longer term, with some comments highlighting the unfairness of tenants under-occupying social housing stock while families are in need of such accommodation[105]

Again, this is not unreasonable. The fact is that there are few social housing places and there are certainly questions of the fairness of an under-occupying tenant remaining in a space designed for a family, when there are many families on a list waiting for such a property. The unfortunate truth is that the lack of stock has led housing providers to have to make these difficult decisions and there is a certain utilitarian clarity to a lack of available resources; housing the most people in the most efficient way is key. It is also notable that flexible tenancies are still usually more secure than a tenure offered in private rented accommodation. This, again, was highlighted as mostly positive in the research:

> "The customer base is changing and some new tenants are not concerned by FTTs [fixed term tenancies]. The biggest reason for homelessness in the local area is the ending of private tenancy and tenants value the certainty of a 5-year FTT compared to the offer from the PRS [private rented sector] which is usually much shorter." (HA, North West)[106]

So, allowing housing providers to use stock for those most in need, cutting under occupation and the fact that a typically 2-5-year flexible tenancy is still much better than the shorter terms offered by private landlords all seem to have benefits to tenants and authorities. Tenants, while less secure, still have some security and are in a better position than they would be in private accommodation. Authorities can ensure those who need the stock are able to access it and free up stock where possible, leading to greater efficiency. There should be no doubt that flexible tenancies can be viewed as a positive step in

[105] *Ibid* at 17.
[106] *Ibid* at 16.

social housing legislation. Yet there are issues. First that the system might not be effective. In fact, Fitzpatrick and Watts's research indicates that there are problems:

> However, by the time of our fieldwork, in 2014/2015, considerable disillusionment appeared to be setting in amongst these early adopter associations, in part because the arguments in favour of FTTs [fixed term tenancies] no longer appeared convincing. In particular, the critical lack of supply in pressured markets like London meant that there was seldom anywhere appropriate to move under-occupiers onto and, as associations were unprepared to make these households homeless at the expiry of their fixed term, the possibility for using FTTs to 'make the best use of stock' was minimal: 'Are we really going to put people on the street [just for under-occupying]?' (Senior housing manager).[107]

Despite this, a small number of respondents to an empirical study indicated some successes with a more efficient distribution of stock[108] both within and outside of London. Additionally, there are also some issues with the increased amount of administration that using flexible tenancies has created[109]. Still, a fair number of authorities felt there were positive results:

> Overall, HA [housing association] respondents were more positive than LA [local authority] respondents, with just over 40% saying FTTs had been 'somewhat' or 'very' effective, compared to only 3 of 15 LAs who answered this question.[110]

It was noted in the study, however, that the results from the respondents were seen as preliminary, as many authorities are still implementing flexible tenancies and a large number had never been renewed as the term had not come to an end. So, the findings of this study, while interesting, are not definitive.

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[107] *Supra* n.103 at 1029.
[108] *Supra* n.104 at 14.
[109] *Supra* n.104.
[110] *Supra* n.104 at 13.

One of the biggest potential issues of flexible tenancies is the increased use of conditionality that they allow. That is not to say that conditionality and security of tenure is new, it is not:

> …successive UK governments have sought to utilise enhanced conditionality within social housing tenancies to influence the behaviour of households considered 'anti-social', 'welfare dependent' or otherwise 'deviant'…[111]

The inclusion of flexible tenancies takes the ability to remove tenants from their social housing further than previous measures, which in turn leads to greater potential for conditionality, linking social housing tenure with good behaviour. A number of councils[112] and housing authorities[113] indicated anti-social or behaviour change as a factor when determining the policy of using flexible tenancies:

> FTTs as a 'tool' to influence the behaviour of tenants was identified as relevant by a handful of participating LAs, but was somewhat more influential for responding HAs, almost a quarter of whom identified some kind of behavioural agenda underpinning their use of FTTs. Some HAs described FTTs as enhancing their ability to "deal with ASB [Anti-Social Behaviour] or repeated failure to adhere to terms of tenancy" (LA, East of England) or "unauthorised subletting" (HA, multi-region) and providing "a stronger incentive to comply with tenancy conditions in all areas - rent arrears/ASB and others. Basically more tools in our arsenal all round" (HA, West Midlands).[114]

The implications for this could be damaging, allowing the legal framework to take the concept of a philosophical desert a great deal further than in the past:

> Fixed-term tenancies could therefore potentially be a powerful new tool for "disciplining the poor" (Marsh, 2013), but this does depend on the extent to which social landlords decide to adopt the fixed-term tenancy regime in practice, and how 'behaviourally-focused' the tenancy renewal criteria adopted at local level turn out to be.[115]

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111 *Supra* n.103 at 1022.
112 *Supra* n.104 states 18% of local authorities reported this motivation at 5.
113 *Supra* n.104 reported 23% of housing associations reported this motivation on at 5.
114 *Supra* n.104 at 6.
115 *Supra* n.86 at 3.

Further there are concerns over the way anti-social behaviour measures are issued and enforced, as was discussed in detail in Chapter 3. As a brief recap there is research that indicates an overrepresentation of single mother households, and children with conditions such as ADHD who become subject to some form of anti-social behaviour order or control. The efficacy of such a system with flexible tenancies is also preliminary for the reasons already stated. The Fitzpatrick study, however, indicates mixed results, with some authorities indicating that more rent arrears are being recovered[116], however some authorities found the opposite with few changes to tenant behaviour[117]. The results are far from definitive either way, and it is likely to be several more years before any statistically significant empirical data can be collected.

Flexible tenancies could bring positives and see more housing allocated based on need with a greater and more efficient use of stock. However, it also allows for the greater use of conditionality, making the implications of its implementation far from clear:

> The implications of these combined changes for 'conditionality' in social housing in England are complex. Ending security of tenure for new social tenants is ostensibly aimed at ensuring the efficient allocation of scarce housing to those most in need, but at the same time social landlords are being encouraged to give longer tenancies to employed people or those who contribute positively to their neighbourhoods (DCLG, 2010).[118]

Finally, there is an argument that the use of fixed term tenancies, again, demonstrates a larger shift in policy towards state benefits that emphasise personal responsibility, as highlighted by Fitzpatrick and Watts:

> Equally, it may be argued that the actual (dis)benefits of FTTs are in reality of little import in this policy landscape. What may be more significant is that the ending of security of tenure for social tenants fits symbolically with a broader 'reframing of the relationship between state and citizen' (Flint, 2015, p. 41), within which

[116] *Supra* n.104 at 13-14.
[117] *Supra* n.104 at 14-15.
[118] *Supra* n.86 at 3-4.

> overwhelming emphasis is given to citizen self-reliance, such that interventions to assist disadvantaged groups are considered legitimate only where they are both time-limited and designed to offer 'a hand up, not a hand out' (Robinson & Walshaw, 2014). This normative stance, linked to the 'welfare dependency' argument highlighted above, is driven by the conviction that poverty is largely the product of personal conduct not income distribution, and that welfare safety nets, particularly cash transfers, are part of the problem not the solution…[119]

These arguments are reminiscent of those made by Malthus and the influencers of the 1790s, that the system itself creates laziness and inefficiency. The focus on personal responsibility is also a theme that links to arguments about fairness. As discussed in Chapter 3, aid often depends on the giver's perceptions about the beneficiary – the more responsible a beneficiary is thought to be for their situation, the less generous the aid tends to be[120]. So, a link between personal conduct and the "hand up not hand out" system of conditionality makes sense, and is in itself a reinforcement of the idea that only those who deserve aid should receive it.

Deservingness and the Welfare Reform Act 2012 – the Removal of the Spare Bedroom Subsidy

There are other areas of social housing law where the impact of deservingness can be seen. For example, s.5 of the Welfare Reform Act 2012 has removed the spare bedroom subsidy (dubbed "the bedroom tax" by the Labour and in the press), where social tenants lose part of their housing benefit for any empty bedroom in their property. There have been several legal challenges made by households with disabled members, however, but these will be discussed at

[119] S. Fitzpatrick et al., 'Competing visions: security of tenure and the welfarisation of English social housing' (2017) 38:8 Housing Studies 1021 at 1034.

[120] B. Weiner et al., 'An Attributional Analysis of Reactions to Poverty: The Political Ideology of the Giver and the Perceived Morality of the Receiver' (2011) 15(2) Personality and Social Psychology Review 199.

length in Chapter 6 as it is relevant specifically to those termed vulnerable. The aim of this change, according to the government Good Practice Guide was:

> The specific policy aims of RSRS [removal of the spare bedroom subsidy] are to:
>
> - save around £500 million a year for the last two years of the current Parliament
> - introduce parity of treatment between the private and social rented sectors, with claimants in the social sector having to make similar decisions to those in the private sector about affordability
> - ensure that HB [housing benefit] in the social rented sector only meets the cost of accommodation appropriate to a household's needs
> - encourage more effective use of social housing stock
> - strengthen work incentives for working age people living in social rented housing.[121]

It is arguable that some of these goals are positive – for example the efficient use of housing stock. As has been previously stated, there is an argument that a single person under occupying a large, family property should move into a smaller property. However, there is an issue with this, the lack of properties, which will be covered in more detail later in this section. There is no indication that the policy was mean to penalise those who live in social housing, considering the lack of social housing, under-occupancy is an issue that requires redress. It is perfectly possible some of what follows are unintended consequences of a policy that was either ill thought out, or badly implemented. It is noteworthy, however, that one of the stated aims of the bedroom tax is to incentivise work, which feeds directly into one of the identified modern criteria of deservingness: working and status.

[121] Government Publication, 'Removal of the Spare Room Subsidy Good Practice Guide 2014: Findings and lessons learned from the Discretionary Housing Payments Reserve funding bidding scheme' July 2014 at 3-4. Found at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/329912/rsrs-good-practice-guide.pdf

The bedroom tax was introduced by the Welfare Reform Act 2012 s.11 coupled with The Housing Benefit (Amendment) Regulations 2012 s.5(5). The regulations identify exactly who is entitled to their own bedroom, as follows:

> (5) The claimant is entitled to one bedroom for each of the following categories of person whom the relevant authority is satisfied occupies the claimant's dwelling as their home (and each person shall come within the first category only which is applicable)—
>
> (a) a couple (within the meaning of Part 7 of the Act);
> (b) a person who is not a child;
> (c) two children of the same sex;
> (d) two children who are less than 10 years old;
> (e) a child,
>
> and one additional bedroom in any case where the claimant or the claimant's partner is a person who requires overnight care...

Any tenants who exceed this, so for example where a couple had a three-bedroom house for themselves and two boys, they would be deemed to be under occupying because same-sex siblings are not entitled to their own bedroom. The Regulations also outline the exact cut in benefit under occupiers will lose: 14% for one bedroom or 25% for two or more.

One of the main issues with the bedroom tax is the lack of smaller properties. The Coast and Country housing association in the North East reported it had 2,500 tenants who were classed as under occupying their accommodation and 16 smaller homes in which to re-house them[122]. Research suggests that there have also been issues finding smaller properties in London[123]. Interestingly the Impact Assessment prepared by the DWP also acknowledged that availability of smaller properties was likely to be an issue:

> According to estimates from DCLG there is a surplus of three bedroom properties, based on the profile of existing working age tenants in receipt of Housing Benefit, and a lack of one bedroom accommodation in the social sector. In many areas this mismatch

[122] T. Lloyd, 'Landlord can't rehouse 'bedroom tax' families' 18 June 2012 in Inside Housing. Found at: http://www.insidehousing.co.uk/6522385.article?PageNo=1&SortOrder=dateadded&PageSize=10#comments

[123] See the quote *supra* n.107.

> could mean that there are insufficient properties to enable tenants to move to accommodation of an appropriate size even if tenants wished to move and landlords were able to facilitate this movement.[124]

The result of this is that there are tenants who are forced, through a lack of other options, to stay in more expensive and larger housing with no way of preventing themselves from under occupying.

The Criteria of Deservingness

The link between the bedroom tax and the criteria of deservingness is, perhaps, less obvious than with the Localism Act 2011, but remains an undercurrent regardless. In terms of behaviour, there is an indication that the bedroom tax is being used for this reason, as a Parliamentary research briefing note states:

> In addition to reducing expenditure on HB [Housing Benefit], the measure is aimed at securing behaviour changes amongst social housing tenants.[125]

Although there is no indication in the document exactly what type of behaviour or the types of changes the measure is hoping to secure. However, one of the explicitly stated aims of the removal of the spare bedroom subsidy is "to strengthen work incentives"[126]. This indicates that the Welfare Reform Act 2012 focuses more on the status element of the modern criteria, which relates to being able or willing to work, or contribute in some way. For example, the Regulations were amended[127] exclude foster carers and those

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[124] Impact Assessment, Title: Housing Benefit: Under occupation of social housing. Updated 28 June 2012 at [38]. Found at: www.dwp.gov.uk/docs/social-sector-housing-under-occupation-wr2011-ia.pdf

[125] House of Parliament Research Briefing by W. Wilson and R. McInnes, 'The impact of the under-occupation deduction from Housing Benefit (social rented housing)' 15 December 2014, Standard note: SN/SP/6896, at 1. Found at: http:/www.parliament.uk/briefing-papers/SN06272.pdf

[126] *Supra* n.121.

[127] The Regulations also disqualify disabled children who cannot share bedrooms. This change was made after a court challenge in *Burnip v Birmingham City Council* [2012] EWCA Civ 629 where the court upheld the claim that the spare bedroom subsidy was discriminatory.

who are serving in the armed forces, but live at home[128] - the latter two have already been identified as "deserving" in terms of other policy documents[129] for the Localism Act 2011. More importantly, however, is the continued emphasis on work; it was suggested by the Minister of State for Pensions:

> …many of the people we are talking about - over 100,000 - are in work. So they could, for example, work a bit more and simply pay the shortfall. We're talking on average £14 or £15 a week. So three hours at the minimum wage would pay the shortfall then he can keep the spare bedroom...[130]

This sentiment was echoed by Lord Freud during a debate in the House of Lords who suggested:

> Those who can must look for a job. Those who are in work can increase earnings by getting more hours. We have discussed taking in a lodger, moving to a smaller property or moving into the private rented sector.[131]

These alternatives are reproduced, more or less verbatim, in a Parliament briefing paper under the heading "Options for Tenants"[132].

In other words, those who are classed as under occupying their social accommodation, and who cannot move or unwilling to take in a lodger, can "earn" the extra room without being affected by the bedroom tax by working more hours. This directly links to the idea of a philosophical desert and housing as a reward. If a tenant works longer hours to pay for the extra room, then they deserve it. The room is their reward for additional work. Lord Freud

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128 Smith, Written Ministerial Statement - The Department for Work and Pensions Housing Benefit reform. Tuesday 12 March 2013. Found at: http://www.parliament.uk/documents/commons-vote-office/March-2013/12-3-13/6.WorkandPensions-HousingBenefitreform.pdf

129 *Ibid* at 22-24.

130 BBC News, 'Work longer to keep spare room, says pensions minister' BBC, 7 February 2013. Found at: http://www.bbc.co.uk/news/uk-politics-21366303

131 House of Lords Debate 14 February 2012 Column 722 of the Lords Hansard text Part 0002. Found at: http://www.publications.parliament.uk/pa/ld201212/ldhansrd/text/120214-0002.htm

132 W. Wilson, Briefing Paper No. 06272, 'Under-occupying Social Housing: Housing Benefit Entitlement' House of Commons Library, 15 March 2012 at [4.2]-[4.4] at 39-41. Found at: http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06272#fullreport

indicated there was evidence that those affected would seek to redress the cut in benefits this way:

> …just a few hours' work may help some of those affected cover the shortfall... Recent research from the Housing Futures Network showed that almost 30 per cent of claimants affected would look at increasing their earnings through work.[133]

Real Life Reform Report 6 also suggests that this is the case amongst tenants in social housing. In fact, 69.2% of part-time, employed households in the study are seeking to increase their hours; this has increased from 50% in Report 5 (October, 2014) and 37.5% at the beginning of the study in September, 2013[134]. Despite this, it is unclear how many households, especially those on zero-hours contracts or other low paid work would be able to achieve this. Additionally, there is no indication from the Real Life Reform reports that more households are able to find secure and permanent employment. In Report 6, for example, of the 23.5% of households that are currently employed:

> ... fewer than 1 in 5 are in full-time work, this being the lowest level recorded since the study started and the culmination of a downward trend in full-time employment since round three.[135]

This would seem to indicate that those in social housing, in the North especially[136], are having a harder time securing a permanent job, which could indicate it is not a lack of motivation but a lack of jobs that is the issue.

Again, this draws back to the ideas of the three criteria of the philosophical desert: the subject (tenant), object (extra room) and desert basis (extra work). The basis of this change appears to be based on the notion that it is fairer. The

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133 House of Lords Debate 14 February 2012 Columns 706-707 of the Lords Hansard text Part 0001. Found at: http://www.publications.parliament.uk/pa/ld201212/ldhansrd/text/120214-0001.htm

134 Northern Housing Consortium and York University, Real Life Reform Report 6 March 2015 at 34. Found at: http://www.northern-consortium.org.uk/wp-content/uploads/real-life-reform/RLR-6.pdf.

135 *Ibid* at 32.

136 It should be noted that at 32 of Report 6 indicates that the drop in employment overall should be seen "against a backdrop of higher unemployment in the North compared to the UK average."

policy aim was to "introduce a parity of treatment" between social housing and those in the private rented sector. Again, on the surface this seems persuasive. If someone who is a private tenant pays more for an extra room, why should a social tenant be exempt? However, the nuance is lacking and there are issues with implementation. There are not enough smaller properties for those unable or unwilling to work more, meaning some will be given no choice. Additionally, there are issues for disabled and other vulnerable tenants that have led to a number of cases, some of which have reached the Supreme Court, these will be discussed in Chapter 6. The links between fairness and deservingness are discussed in more detail below.

Housing Need and the Welfare Reform Act

There is some indication that the removal of the spare bedroom subsidy introduced by the Welfare Reform Act 2012 has had an impact on the way social housing is allocated. According to an empirical study by the Chartered Institute of Housing:

> Our research highlighted the impact that the bedroom tax is having on approaches to allocating social homes. The sector survey found that the bedroom tax is a significant factor in 79 per cent of respondents' approaches to allocations and workshop discussions revealed that the rules have created affordability issues across the country. The effects of these issues are felt most significantly in Northern regions experiencing low demand or where there is a mismatch of available properties and the types of homes people want or need. Discussions also highlighted that, Discretionary Housing Payments (DHPs) are not an adequate mitigating measure, due to the scheme's short-term and discretionary nature, so some Northern organisations are accepting that some rents will not be fully covered…[137]

This could well affect housing need, as those who might require a larger property for perfectly legitimate reasons might still fall foul of the "bedroom

[137] *Supra* n.89 at 10.

tax". This issue of affordability seems to be improving in the private rented sector, as the Crisis Homelessness Monitor for England 2019 states:

> Private rents appear to be falling in real terms across the country as a whole, but rising in London. Affordability in the sector as a whole appears to be improving, and repossessions falling. However, the medium-term shift towards private renting (only marginally reversed in the last year) has exposed many more low-income households to higher housing costs, a smaller proportion of which are protected through LHA/UC [local housing allowance/universal credit].[138]

This demonstrates that affordability is a consideration across private and social rented sectors, which could have an impact on housing need. However, it is difficult to say that considerations of affordability are really outside the remit of this thesis with its focus more on deservingness and conditionality. This is much less clear cut than the potential use of conditionality with the Localism Act 2011, as discussed previously.

There are two ways that the Welfare Reform Act 2012 and issues of affordability could be said to be moving away from housing need and into a more conditional approach and both involve impacts with the Localism Act 2011. The first of these impacts revolves around rent arrears, the links between the bedroom tax and rent arrears are covered extensively in the next chapter[139]. According to Shelter, the reduction of housing benefit has led to increases in this area:

> An evaluation of the 'bedroom tax' found that more than half of affected renters were in rent arrears one year on from the introduction of the policy. Three out of every four households affected (76%) had to cut back on food.[140]

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[138] S. Fitzpatrick, 'The homelessness monitor: England 2019' Report Prepared for Crisis, May 2019 at 26. Found at: https://www.crisis.org.uk/media/240419/the_homelessness_monitor_england_2019.pdf

[139] See Chapter 5 - Issues with the Bedroom Tax, Universal Credit and Rent Arrears.

[140] Shelter and the Shelter Commission on the Future of Social Housing, 'Building Our Future - A Vision for Social Housing' January 2019 at 43. Found at: https://england.shelter.org.uk/__data/assets/pdf_file/0005/1642613/Shelter_UK_-_A_vision_for_social_housing_full_interactive_report.pdf

This means that, as part of the morality of applicants, that was covered in Chapter 3, rent arrears can be viewed as a form of unacceptable behaviour for which a household might lose their social tenancy, or be ineligible to apply. While there is nothing wrong with expecting tenants, private or social, to pay their rent on time, penalising them for under-occupying and then penalising them again for rent arrears seems problematic. There is a difference between a household wantonly not paying their bills, and being irresponsible and being unable to move to a smaller property[141]. Again, this demonstrates a lack of refinement around Deacon's argument of individual responsibility and good behaviour.

The second of these impacts involve social tenants who are under-occupying moved into a smaller property, only to be put onto a flexible tenancy:

> A number of people who were prompted to move from a permanent to a FTT as a result of the so-called 'Bedroom Tax' (a restriction in the Housing Benefit paid to those viewed as under-occupying their social housing) were particularly unhappy…[142]

In these instances, there is some issue as all the previous concerns about using flexible tenancies apply to a household who had previously been exempt. However, it is unclear how many households this might apply to, but the fact it applies to any seems problematic. Changing tenancy types for those who move, which allows a better use of social housing feels rather like a punishment. Even if the move was to avoid losing part of the tenant's housing benefit, making tenants less secure for their under-occupation does not seem just or fair.

If one is to argue this from a philosophical desert perspective, then downsizing should mean that the tenants who do so are able to stay on their current tenancy type, rewarding those who are working with a housing association to

[141] There is a lack of available smaller properties for tenants who wish to move. See Chapter 5.
[142] *Supra* n.104 at 1032.

make more efficient use of its stock. Migrating secure tenants to a flexible tenancy is likely to dissuade those who might be able to afford the reduction in housing benefit from moving. This means that only those who cannot afford the reduction in benefits will downsize. Instead of rewarding a good behaviour, it is penalising those with little choice.

The Use of Fairness

There is some indication that the restriction of access to social housing and the use of deservingness in the legal framework is being justified with the term "fairness". The term was specifically defined in the introduction, as was the way fairness and deservingness are intermingled, where getting what "you deserve" is viewed as fair, and equality is not. The use of fairness as a justification for policy changes has become commonplace. For example, David Cameron, in his speech to the Conservative Conference in 2010 stated:

> Fairness means giving people what they deserve – and what people deserve depends on how they behave.[143]

It is also explicitly cited in government policy documents on the Localism Act 2011[144]:

> The Act enables local authorities to make their own decisions to adapt housing provision to local needs, and make the system fairer and more effective.[145]

The term is also used to justify the introduction of flexible tenancies, another part of the Localism Act 2011:

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143 D. Cameron's Speech to the Conservative Party Conference 2010. Full text found at: http://www.telegraph.co.uk/news/politics/david-cameron/8046342/David-Camerons-Conservative-conference-speech-in-full.html

144 Department for Communities and Local Government, 'A Plain English Guide to the Localism Act' November 2011 at 15. Found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/5959/1896534.pdf

145 *Ibid* at 19.

> More flexible tenancies will allow social landlords to manage their social homes more effectively and fairly, and deliver better results for local communities.[146]

Another example of the use of fairness as a policy justification can be seen at footnote number 121, where the removal of the spare bedroom subsidy, from the Welfare Reform Act 2012 was deemed as bringing social housing into parity with the private rented sector.

It has also been mentioned in relation to the Housing and Planning Act 2016, which contains a provision known as "pay to stay" whereby higher income earners are expected to pay market rents for their social tenancies:

> Former Chancellor George Osborne announced a compulsory scheme in his July 2015 Budget, with the government saying it was unfair for hardworking people to be "subsidising the lifestyles of those on higher than average incomes".[147]

Additionally, the title of the policy document on the Act is "Making sure housing support is fair and affordable"[148].

Fairness is also present in policy documentation proposing the selling off expensive social housing in order to raise money to build new houses[149]; part of the justification for this suggestion is that it is 'fairer' because social tenants will be treated "like everyone else"[150]. While there might be merit in the proposal itself, the language demonstrates the continued link between fairness

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146 *Ibid* at 16.

147 BBC News, 'Pay to stay' social housing plan dropped' 21 November 2016. Found at: http://www.bbc.co.uk/news/uk-politics-38058402

148 Online document found at: https://www.gov.uk/government/policies/simplifying-the-welfare-system-and-making-sure-work-pays/supporting-pages/making-sure-housing-support-is-fair-and-affordable

149 This policy has now been enacted in ss.69-79 of the Housing and Planning Act 2016, which adds a duty for local authorities to consider selling vacant higher value properties. However, due to a great deal of criticism from many different sectors, the plans were put on hold until April 2018, then later dropped (see *supra* n.65 at 8). However, the Housing and Planning Act 2016 has not been repealed, the government is choosing not to use these provisions, meaning there is still a possibility that they can be used at some later date.

150 A. Morton, 'Ending Expensive Social Tenancies - Fairness, higher growth and more homes' The Policy Exchange 2012 at 32. Found at: http://www.policyexchange.org.uk/images/publications/ending%20expensive%20social%20tenancies.pdf

and deserving, the wider concept of a philosophical desert and justice, which seems to be shaping legislation and policy in social housing. In this case such inclusion seems unnecessary. Arguing that more families could be housed in the new properties built, therefore shortening waiting lists and helping more people in need is highly persuasive and requires no embellishment. The addition of arguing it was somehow fairer that social tenants did not have access to properties worth more than £1 million seems gratuitous.

The idea of conditional welfare is persuasive as prima facie it does seem to be fairer. For example, Deacon and the idea of responsibility[151] - that the receipt of aid is conditional on certain obligations of the beneficiaries of such aid. There is certainly an argument for expecting a certain standard of behaviour from tenants, this could be used more widely. For example, where members of a household are not looking for work/in work or are not performing an adequate community role[152]:

> Once we have moved away from the principle of a tenancy which cannot normally be ended save when there is either some default which relates to "tenant-like" behaviour or an identifiable need for particular types of housing, we move directly to powers which allow local authorities an extraordinary degree of "judgmental" discretion.[153]

In fact, this type of allocation scheme is specifically highlighted by Newham council in its documentation on housing allocations:

> Newham has been at the forefront of the campaign to make housing allocations fairer. ... In 2012 we became one of the first councils in the country to recognise employment and contribution to the community in our allocations scheme [for social housing]. ... Our allocations scheme is rewarding residents working on low incomes, as well as creating mixed communities where work is the norm. [154]

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151 A. Deacon, 'Justifying conditionality: the case of anti-social tenants', (2004) 19:6 Housing Studies 911.

152 Arden and Hunter, 'Editorial - For whom is social housing?' (2011) 14(5) JHL at 97.

153 *Ibid.*

154 *Supra* n.46 at 8.

The repeated use of fairness in policy documentation as an apparent justification for many of these shifts in the legislation, again, links back to the concepts of deservingness and the philosophical desert. A desert becomes not only about what a person deserves but their treatment becomes linked to wider concepts of justice, of fairness, of societal notions of right and wrong. The link between behaviour and deservingness is a form of conditionality that can directly contravene housing need, which was discussed at length in Chapter 3, and again earlier in this chapter.

Negating Deservingness – The Homelessness Reduction Act 2017

As discussed in Chapter 2, this Act aims to place additional duties on local councils to prevent homelessness. The purpose of this legislation is to "put homelessness prevention first", and includes an increased duty on authorities to provide advice and information to those who are at risk of homelessness in an effort to reduce the number of people on the streets. Section 3 adds a new duty of assessment to councils and other local authorities for applicants who are homeless or are threatened with homelessness. Section 4 of the Homelessness Reduction Act (HRA) adds a duty on councils to attempt to prevent those threatened with homelessness from becoming homeless. Both sections apply to every applicant who is eligible, regardless of priority need or intentional homelessness[155].

This means that any other eligibility based on good behaviour or status is completely avoided and the local authority must assess applicants and produce a care plan. Once this assessment has been made, the local authority must attempt to agree with the applicant the steps the applicant and the authority need to take to help them retain suitable accommodation. Where an

[155] See Chapter 6.

applicant is threatened with homelessness, the authority must take "reasonable steps" to help the applicant secure accommodation[156]. The HRA has seen some early successes according to the Homelessness Monitor 2019 with 65% of local authorities reported positive impacts of the Act for single people[157], and 42% reported benefits to rough sleepers[158].

However, there are issues with suggesting that the HRA negates deservingness completely. For a start, if an applicant is housed in social housing, they are still subject to the same rules, meaning the continuous cycle of assessment applies[159]. In other words, should an applicant be housed because of the HRA then breach their tenancy agreement through non-payment of rent, or some form of anti-social behaviour they will still find themselves in a potentially demoted tenancy, subject to a behaviour order, or removed from their tenancy. Further, when their fixed term tenancy comes to an end, it might not be renewed. There is currently little data on how many people access housing services thanks to the HRA are then given a social tenancy, so it is difficult to know how common such a situation is. There is potential here, however, for the HRA to negate deservingness in a very positive way. Until the Act has been in force longer and more data is collected, it is difficult to tell, however. As the reasonable preference criteria require the homeless to be considered differently, as discussed earlier in this chapter, but these requirements are still subject to other factors such as behaviour and local connection (see footnotes 74 and 75).

This could end with people in cyclical homelessness where they are eligible for housing because of the added duties from the HRA, but unable to hold

156 S.4(2) HRA 2017 modifying s.195(2) of the Housing Act 1996.

157 S. Fitzpatrick, 'The homelessness monitor: England 2019' Report Prepared for Crisis, May 2019 at 30. Found at: https://www.crisis.org.uk/media/240419/the_homelessness_monitor_england_2019.pdf

158 *Ibid*.

159 The continuous cycle of assessment is discussed in Chapter 5.

onto a tenancy, either because such a tenancy is in the private rented sector and is not renewed, or the applicant has other issues that prevent them remaining in a social tenancy. There has also been some research indicating that local authorities are still turning applicants away, despite the statutory duties:

> Following the introduction of the Act last year, local housing authorities must now take reasonable steps to help any eligible person secure accommodation – regardless of whether they're in priority need or not. However, as we've heard from young people at Centrepoint, this is not always the case in practice. … At our round table event, a Centrepoint resident shared his first-hand experience of seeking homelessness support last summer. Despite the new legislation, when he approached the local housing authority he was told he was not in 'priority need'.[160]

For those threatened with homelessness, the definition in the statute "if it is likely that he will become homeless within 56 days"[161] which is an increase from the former 28 days. Section 175(5) also makes clear that where a valid notice under s.21 of the Housing Act 1988 , which is an order for possession, has been given and it will expire within 56 days, that this also constitutes a person threatened with homelessness. However, the s.21 notice must be valid for s.175(5) to apply, and the validity of these notices is extremely complicated[162]. As mentioned previously, the authority must take "reasonable steps" to help any applicant threatened with homelessness to secure accommodation. There is little guidance, however, to what constitutes reasonable steps, and according to Peaker, it seems likely that the wording of this duty will "be up for early challenges [in the courts]"[163]. Further, there is a

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160 Centrepoint Website: The Homelessness Reduction Act: One Year On. Found at: https://centrepoint.org.uk/about-us/blog/the-homelessness-reduction-act-one-year-on/

161 S.175(4) HRA 2017.

162 See, for example, Peaker's comments on the number of professionals who struggle with the validity of s.21 notices. G. Peaker, 'Section 21 Flowchart". Found at: https://nearlylegal.co.uk/section-21-flowchart/

163 Peaker, 'A Bluffers Guide to the Homeless Reduction Act 2017' Nearly Legal – Housing Law News and Comment. Posted on 14/05/2017 and found at: https://nearlylegal.co.uk/2017/05/bluffers-guide-homeless-reduction-act-2017/.

large gap between requiring an authority to take reasonable steps and an actual duty to provide accommodation. It is perfectly possible that "reasonable steps" could end in an offer of accommodation, but nowhere in the statute is that requirement made clear, which means it is likely that the advice/agreement and advice from the s.189A assessment will be sufficient. This means that while the HRA might help some homeless applicants get into accommodation, it is by no means a removal of the behaviour or status requirements imposed by the legal framework.

Negating Deservingness – Housing First

While the English legal framework generally seems to support the deserving model of housing with a reward for certain behaviours or status, this is not the only paradigm being used for housing in England today. There is a system of housing allocation that generally bypasses the issues caused by deservingness called Housing First. This system is usually implemented for homeless people who have complex needs, which often means mental health issues, substance abuse issues or a combination of both (for example "Theo" from the previous chapter would be likely to considered to have complex needs).

Housing first is a model that was first developed in New York in 1992 by the Pathways to Housing organisation. It is currently in use in several European countries including Denmark, France, and Finland; a country that is experiencing a decline in their homelessness numbers making it unique in Europe[164]. It is being trailed in England in London, Greater Manchester, Newcastle and some parts of the midlands. The Housing First model operates on a very simple principle and one that avoids ideas of housing as a reward or a philosophical desert, and instead, returns to the principles of housing as a right:

[164] Y-Säätiö, 'Housing First in Finland'. Found at: https://ysaatio.fi/en/housing-first-finland

> The overall philosophy of Housing First is to provide a stable, independent home and intensive personalised support and case management to homeless people with multiple and complex needs. Housing is seen as a human right by Housing First services. There are no conditions around 'housing readiness' before providing someone with a home; rather, secure housing is viewed as a stable platform from which other issues can be addressed. Housing First is a different model because it provides housing 'first', as a matter of right, rather than 'last' or as a reward.[165]

Thus, the requirements of deservingness are circumvented with the approach focussing on providing a home as the first step towards recovery, rather than requiring recovery as a pre-requisite to being housed. As a model, it is the very antithesis of the use of a philosophical desert.

Homelessness in this England has reached crisis proportions, with some minor improvements in some areas:

> The Autumn 2018 rough sleeper enumeration marked the first reduction in the national total for a decade. Notwithstanding that the England-wide total remained 165 per cent higher than in 2010, it fell back by 2 per cent on 2017. At the same time, however, a drop was recorded in only one of England's four broad regions the (largely non-metropolitan) South. Here, recorded rough sleepers were 19 per cent fewer in number in Autumn 2018 than a year previously. In the other three broad regions, rough sleeping continued to increase in 2018 – by 13 per cent in London, by 28 per cent in the Midlands and by 7 per cent in the North. Numbers rose substantially in the core cities of both Manchester (by 31%) and Birmingham (by 60%)…[166]

The use of Housing First is persuasive as the model has been highly successful, according to research conducted at the University of York and internationally:

> The evidence that Housing First ends homelessness – among homeless people with high and complex needs – is strong. The evidence is also international, and this is an important point, because Housing First has worked in [a number of cities internationally] … alongside the successful use in the Danish,

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[165] Homelessness Link, 'Housing First in England – the Principles' 2016 at 2. Found at: https://www.homeless.org.uk/sites/default/files/site-attachments/Housing%20First%20in%20England%20The%20Principles.pdf

[166] *Supra* n.138 at xv.

> Finnish, French and Canadian national homelessness strategies and evidence of reductions of 'chronic' homelessness, particularly among veteran groups in the USA. The literature on Housing First – particularly on the Canadian At Home/Chez Soi programme – is extensive.[167]

In fact, Pleace specifically mentions housing models that set behavioural requirements, conditionality, which would be an examination into the morality of the applicant, as a limit to solving chronic, long term homelessness:

> Evidence that accommodation-based services that have strict rules, i.e. operate an *inflexible, 'zero tolerance'* policy around drug and alcohol use, *require* engagement with treatment and *set strict requirements around behaviour*, only achieve mixed results. These services use a strict, inflexible set of criteria to determine if someone has been made 'housing ready'. … Homeless people with complex needs are often unable and/or unwilling to comply with strict requirements in respect of abstinence from drugs and alcohol, treatment compliance and expectations around behavioural change, often within a framework that medicalises homelessness (i.e. sees homelessness as resulting simply from psychiatric or physical health problems), or at least partially 'blames' homeless people for their own situation[168]

Theresa May's Government pledged to halve rough sleeping by 2022 and end it by 2027[169], and this system has been included in the government's latest Rough Sleeping Strategy:

> For people with complex needs we have already shown our commitment to Housing First by announcing £28 million of funding for three pilots. International evidence shows this could be a vital tool to meet the needs of people sleeping rough with

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[167] N. Pleace, 'Using Housing First in Integrated Homelessness Strategies - A Review of the Evidence' Centre for Housing Policy at the University of York, February 2018 at 24. Found at: https://www.mungos.org/wp-content/uploads/2018/02/ST_Mungos_HousingFirst_Report_2018.pdf

[168] *Ibid* at 12.

[169] Ministry of Housing, Communities and Local Government, 'Rough Sleeping Strategy: August 2018' CM9685 at 8. Found at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/733421/Rough-Sleeping-Strategy_WEB.pdf

> complex needs and we are keen to learn more about how this could work on a larger scale, within the UK's housing system.[170]

There are indications that the Housing First system is effective in reducing recidivism among former offenders. A housing feasibility study carried out for the implementation of Housing First in Liverpool found that implementations in Calgary, Canada, in the Netherlands and more locally in Manchester found successes in reducing anti-social behaviour, reoffending and led to better community integration[171]. These numbers are borne out by results from pilot schemes run in England, which concluded in 2015. A survey of 60 users reported the following results[172]:

Issue	Percent Reported one year before HF	Percent Reported as HF users
Bad or Very Bad Physical Health	43%	28%
Bad or Very Bad Mental Health	52%	18%
Familial Contact (Daily/Weekly/ Monthly)	25%	75%
Involvement in ASB	78%	53%

Table 1

Generally, this system has a high success rate. Research by Bretherton et al. concluded that, on average, Housing First has been approximately 80% effective. This means typical results show that 8 out of every 10 people housed using the Housing First model remain housed for at least a year[173]. The success rate for the more traditional model tend to be between 55-80%, according to a

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170 *Ibid* at 55.

171 I. Blood et al., 'Housing First Feasibility Study for the Liverpool City Region' Report Prepared for Crisis, July 2017 at 102. Found at: https://www.crisis.org.uk/media/237545/housing_first_feasibility_study_for_the_liverpool_city_region_2017.pdf

172 *Ibid* at 38. Results have been tabulated for ease of reading.

173 Bretherton, J. et al., 'Housing First in England: An Evaluation of Nine Services' Centre for Housing Policy at the University of York, February 2015 at 29-30. Found at: https://www.york.ac.uk/media/chp/documents/2015/Housing%20First%20England%20Report%20February%202015.pdf

governmental briefing paper[174]. These figures, again, are confirmed more internationally, with similar successes in Denmark:

> The first stage of the Danish Homelessness Strategy from 2009-2013 was one of the first large-scale Housing First programmes in Europe and housed more than 1,000 people, the intensive case management versions of Housing First reported a 74 per cent housing retention rate, with a 95 per cent rate being achieved by assertive community treatment models of Housing First…[175]

So, it is clear for certain groups with complex needs, this system can be very effective at reducing homelessness, reoffending and anti-social behaviour, all of which are good first steps in reintegration into the community.

Issues with Housing First

While Housing First is successful for combating certain types of homelessness, it is not necessarily a homelessness panacea – there are a number of issues. Firstly, it is not a complete housing solution, this was noted by a government briefing paper:

> HF is targeted at homeless individuals with multiple complex and persistent needs; it is not designed to replace all homelessness services but can supplement existing strategies.[176]

Secondly, it only applies to those homeless people who have multiple and complex needs. An implementation study concluded that the first cohort in England, Scotland and Wales should be homeless and have multiple or complex support requirements, or a combination:

> Given that we are looking for those with the highest levels of need, we have included only those with some history of mental health issues, substance misuse and offending behaviour. However, we recognise that there is a distinction between the number and severity of needs, so in practice a person with two out of the three needs may have a higher level of need than a person with all three.

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174 A. Bellis et al., 'Housing First: tackling homelessness for those with complex needs' House of Commons Briefing Paper Number 08368, 17 July 2018 at 18. Found at: http://researchbriefings.files.parliament.uk/documents/CBP-8368/CBP-8368.pdf

175 *Supra* n.171 at 38.

176 *Supra* n.174 at 11.

> In practice, we would not necessarily recommend that people are only eligible for Housing First if they have all three of these needs, but for the purposes of our high level, data-based estimate, this was felt to the best available proxy.[177]

This is only a proportion of the homelessness population, and is much more prevalent among rough sleepers, with a study by Shelter discovering many rough sleepers had complex needs, with 30% identifying four or more issues[178]. A study by Homelessness Link discovered a quarter of their interviewees had high complexity, all were hard drug users[179]. The Hard Edges study found approximately 58,000 people who experienced all three of their disadvantage domains (homelessness, offending, and substance misuse)[180]. Further, Housing First does not always cater for young people[181] but there is a risk that without programmes that are specifically targeted at their needs, for example providing education or training, younger homeless people with complex needs might not get the most out of the programme or be excluded all together. A study by Bretherson and Pleace also discovered that women were under-represented in Housing First (just over a quarter), which might lead to a system that caters more for male homeless people than female:

> … there is growing evidence that women's experience of homelessness often differs from that of men, and the suitability of

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177 I. Blood et al., 'Implementing Housing First across England, Scotland and Wales' Report prepared for Crisis and Homeless Link, August 2018, at 20. Found at: https://www.crisis.org.uk/media/239451/implementing_housing_first_across_england_scotland_and_wales_2018.pdf

178 Public Health England, 'Evidence review: Adults with complex needs (with a particular focus on street begging and street sleeping)' January 2018 at 37. Found at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/680010/evidence_review_adults_with_complex_needs.pdf

179 T. McDonagh, 'Tackling homelessness and exclusion: Understanding complex lives' Homelessness Link and the Joseph Rowntree Foundation, September 2011 at 7. Found at: https://www.homeless.org.uk/sites/default/files/site-attachments/Roundup_2715_Homelessness_aw.pdf

180 G. Bramley et al., 'Hard Edges Mapping severe and multiple disadvantage: England' Report prepared for the Lankelly Chase Foundation 2015 at 13.

13. Found at: https://lankellychase.org.uk/wp-content/uploads/2015/07/Hard-Edges-Mapping-SMD-2015.pdf

181 Although there are a few Housing First projects that are specifically targeting younger people. For example, a pilot set up in Edinburgh. See *supra* n.177 at 17.

> Housing First for women, including why women were not more strongly represented among Housing First service users, should be further investigated.[182]

Additionally, there is almost no mention of catering specifically to ethnic minorities, or LGBTQI+ people in most of the literature. In the Liverpool Feasibility study, an ethnic breakdown of the respondents showed an overwhelming majority were white British (55/73 or just over 75%)[183]. It is not clear the exact number of homeless people who would be eligible for Housing First, but it will certainly lead to its own form of exclusion.

Thirdly, is a matter of resources. There are arguments for[184] and against[185] Housing First as a cost-saving measure, as part of the requirement for a faithful model requires each case worker to have a much smaller case load, therefore requiring an outlay of additional funds. There are indications that this saves money in the long term because of better health, re-offending, and ASB outcomes as well as paying rent. However, this is far from clear cut, it is mentioned here for the sake of completeness. Additionally, there is the issue of available properties, England is in the middle of a housing crisis and there might not always be stock available for systems such as this. This was noted in a study by the Homelessness Link:

> By far the biggest barrier is access to suitable properties and accommodation. This included securing social housing either through the LA or registered provider and persuading them to be flexible with their allocations policy. This was not only in areas where housing was in short supply such as Brighton or London but

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182 *Supra* n.173 at 74.

183 However, see a successful implementation and study from Toronto with a Housing First adaptation for ethnic minorities, with a focus on anti-racism and anti-oppression principles. V. Stergiopoulos et al., 'The effectiveness of a Housing First adaptation for ethnic minority groups: findings of a pragmatic randomized controlled trial' (2016) 16 BMC Public Health 1110.

184 A summary of the literature on this point with footnotes is presented in the government briefing paper, see *supra* n. n.174 at 20-24.

185 Issues with the assertions on cost-saving are also presented in the briefing paper, see *supra* n. n.174 at 24-25.

> also where providers were struggling to access social housing from local registered providers.[186]

Therefore, there is likely to be several issues securing stock for Housing First initiatives.

Finally, there is the effectiveness of Housing First at tackling the complex needs of its users, such as substance abuse. Table 1 on page 55 shows improvement in all sections, which is corroborated by a study by the Homelessness Link[187]. However, some papers have questioned the results of the system, based on the fact tenants in the American Housing First programmes had a lower severity addiction, which might make this solution inappropriate for those with more severe or persistent addictions:

> In short, the Housing First and voucher trials appear to have recruited severely mentally ill homeless persons whose addiction severity at housing entry was lower than what is seen among many homeless persons. That majorities in some studies were nevertheless labelled as substance abusers (based on case manager assessment or old records) … could reflect remission achieved before the clients ever entered housing, or misclassification. We suggest that for homeless individuals with a prominent and active problem of addiction, the data on Housing First are mixed and unsettled.[188]

There is an abundance of evidence to indicate that the system allows stability to its users, which is a positive, but that does not necessarily lead to economic integration or social inclusion[189]. In sum, Housing First is an effective solution at combatting homelessness, however, it is not without limitations.

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[186] Homeless Link, ''Housing First' or 'Housing Led'? The current picture of Housing First in England' Homeless Link Policy and Research Team, June 2015 at 18. Found at: https://www.homeless.org.uk/sites/default/files/site-attachments/Housing%20First%20or%20Housing%20Led.pdf

[187] *Ibid*.

[188] S.G. Kertesz et al., 'Housing First for Homeless Persons with Active Addiction: Are We Overreaching?' (2009) 87(2) Milbank Quarterly 495 at 519.

[189] See *supra* n.173 at 41-44.

Housing First and Deservingness

The Housing First paradigm completely removes the concept of the philosophical desert from housing decisions. No longer is there a requirement for a certain level of behaviour, and housing is no longer viewed as a reward. This seems to lead to positive outcomes and improvements for those who qualify for the programme. Housing First demonstrates that a system which does not view the relationship as one of responsibilities can lead to positive housing outcomes, especially for those who have disengaged and/or have complex needs regarding addiction and mental health. However, as has been discussed, there are issues. One of them being that Housing First itself requires a certain type of individual, and those individuals are overwhelmingly male, white, and over the age of 20. There is also the issue of giving resources, which are very limited, to those with complex needs, when there are many people who are homeless and considered "housing ready". The issue of fairness was highlighted in roundtable discussions in the Homeless Link study:

> Most of the discussion centred on the eligibility criteria for Housing First. There were concerns about the 'fairness' of who could access Housing First. A lot of service users felt that the focus on chronically homeless people with complex needs was discriminatory against other people in homelessness services who had proved they were ready for independent accommodation but could not move on because of blockages in the current system and lack of affordable move on options.[190]

Again, notions of societal justice and fairness are brought to the fore. It is a shame that anyone has to be homeless in a first world country like England, but where there is a dearth of available properties, this will always be the case. It is questionable whether prioritising those with complex needs over those without is justifiable when the resources are so very limited. Despite this, Housing First provides a positive example of good housing outcomes without the need of moral judgments of applicants. Whether it is a system that should

[190] *Supra* n.186 at 21.

be widely implemented is far from clear, but as a system that moves towards housing as a right, it is possibly a paradigm that should be copied and more widely applied in different housing situations, including the current legal framework.

Conclusion

Over the past decade, changes to the legal framework have created a system that enforces concepts of the philosophical desert for housing. Where the morality of applicants, in terms of their behaviour and status, form the current criteria of deservingness. Where these criteria are met, an applicant is rewarded with a flexible tenancy. The desert basis for such a system is that it is fairer, that responsibility and obligation of individual action is rewarded with state aid. In a system with a limited resource, such as housing, this system must be persuasive, as must the basis that it is fairer. This chapter has linked the modern criteria of deservingness with specific pieces of legislation, demonstrating that both the Localism Act 2011 and the Welfare Reform Act 2012 have elements that enforce standards of behaviour and encourage the status of working (or in fact other types of community contribution such as fostering and volunteer work).

However, there are issues. The use of such conditionality can directly affect the idea that housing is allocated based on need, as has been argued throughout this chapter and the previous one. This chapter has looked specifically at the Localism Act 2011, noting that the local connection requirement has had a significant impact in terms of housing eligibility in England. Additionally, it has highlighted that the reasonable preference criteria can still be disqualified should their behaviour fall short of that required by an allocations policy. Note that many authorities now operate a "zero tolerance" policy in terms of anti-social behaviour. While conditionality

was less an issue with the Welfare Reform Act 2012, there is still some areas where the two intersect. For example, where a secured tenant is moved to a flexible tenancy when downsizing, and the large proportion of vulnerable households who have been affected, a point which will be discussed in more detail in Chapter 6.

Finally, this chapter considered the housing system called Housing First, which considers housing a right and not a reward. There are many positives to such a system, however, it is not a homelessness panacea. There are questions about eligibility, as women, minorities and young people are under-represented in Housing First schemes. Additionally, there are issues of cost and availability of housing stock. Finally, there is a serious issue of fairness, and that is really about who should be prioritised in terms of the limited stock of social housing. Removing deservingness in Housing First does demonstrate a successful housing system without the need for a philosophical desert, yet the fact is that with so many homeless deciding those with multiple, complex needs should be the focus of the rehousing effort is problematic.

This chapter has demonstrated the issues surrounding the use of philosophical desert in housing and the fact that its removal can still lead to positive housing outcomes. The next chapter will consider the way the legal framework allows the modern criteria of deservingness to be continually assessed.

Chapter 5
The Continuous Cycle of Assessment

This chapter will examine the way the legal framework evaluates applicants and tenants, arguing that the law now allows a continuous cycle of assessment. The application of the modern criteria within the legal framework allows the examination of deservingness of a subject in the past, present and future. In other words, once a tenant has passed the initial checks, their deservingness will continue to be assessed throughout the lifetime of the tenancy, and again when their flexible tenancy ends to ensure that they remain deserving of a renewal. Should their behaviour fall short, a possession order can be sought, for example a breach of an Injunction to Prevent Nuisance and Annoyance[1]. In other words, tenants can be removed from their properties during their tenancies should their behaviour fall short of an acceptable standard.

It is possible to argue that the number of checks and re-checks means that "deserving" is merely an ambulatory status, in other words that changes in circumstances can lead to a change in the tenant's deservingness with regards to social housing. This is certainly true for certain scenarios, for example a lodger in a charitable housing situation, in a shelter for example, who finds work and can support his or herself should then be asked to move into a different housing situation in order to free up that place for someone else who is in need. However, it is questionable that it should apply more widely than that. It is possible that by having these additional checks throughout the life of the tenancy, the law is simply trying to ensure that precious social tenancies are not being kept by people who are no longer in need of them, allowing an

[1] Part V of the Anti-social Behaviour, Crime and Policing Act 2014 requires a mandatory possession order for both secure and assured tenants.

efficient use of stock. If that were the case, then that would seem to be the correct approach - when resources are scarce then only those who need them most should continue to be eligible to receive them. As the introduction of fixed term tenancies, as discussed in Chapter 4, is being used in this way, continuously assessing applicants would seem to be more about ensuring the subject of the moral desert remains worthy.

The continuous cycle is a tool that, much like Samuel Bentham's panopticon, allows increased scrutiny of those in social housing – the subject of a moral desert. The concept of a moral desert is made of up three basic parts: a subject, an object (or reward) and a basis, as explained fully in the introduction to this thesis, and again in Chapters 3 and 4.

By linking justice and fairness to housing outcomes, the applicant themselves will have their character scrutinised for worthiness, and virtue, making them a focus of a subjective, moral judgment. Where they are deemed worthy, they will be rewarded with housing (the object of the moral desert). The link between a moral desert and the continuous cycle of assessment is to do with the subject of the desert claim. In other words, the continuous cycle of assessment allows the worthiness of the subject to be continuously monitored. This, in turn, allows conditionality to be taken further, with breaches resulting in the potential loss of a social tenancy and possible homelessness.

This continuous cycle takes place in three stages: before granting the tenancy, during the lifetime of that tenancy, and should the tenant wish to renew it that aims to ensure those who live in social housing do not merely start out as deserving but remain so.

Assessing Deservingness

The statutes passed in the last decade or so have created a system by which the morality of social tenants and applicants for tenancies can be monitored continuously (i.e. throughout the lifetime of the tenancy). As explained in Chapter 3, the Victorians introduced workhouses where, in order to receive poverty relief, inmates were expected to work.

The Victorian workhouses were promoted by the philosopher Jeremy Bentham. The panopticon, developed by Samuel Bentham, was seen by his brother Jeremy as the solution to a multitude of ills, including the design of the Victorian workhouses:

> A system of well-regulated Panopticon workhouses, he [Jeremy Bentham] claimed, could be made to realize a profit, and thus social peace could be maintained, poor rates lowered, and degraded characters reformed, all by a combination of the proper architecture and administrative arrangements.[2]

In fact, Bentham's ideas would have a "significant influence"[3] over designs of Victorian workhouses. As explained in Chapter 3, Bentham felt that there was no need to distinguish between the deserving and undeserving, focusing instead on the idea of indigence:

> Bentham denied even the government should try to discriminate between the deserving and the reprobate. There was only the indigent, henceforth to be distinguished from the mass of the ordinary poor who subsisted by their labour. … Since all those without resources were to be relieved regardless of character, it was critically important to devise a system that would not operate as an inducement for the poor to cease working and join the indigent.[4]

Therefore, the entire purpose of the workhouse was to ensure that those who were given poor relief worked for that relief. These closed communities were closely monitored by various officers of the workhouse itself. Most work was

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2 A. Brundage, *The English Poor Laws, 1700-1930*, Palgrave Press, New York, 2002 at 36.
3 *Ibid* at 35.
4 *Ibid* at 34-35.

conducted under some sort of supervisor, so that the inmates were seen to be working and behaving according to the rules of the workhouse itself. Punishments for infractions could often be severe. The workhouse allowed the poor to be monitored continually, both in terms of their behaviour and their status (i.e. if they were working). In fact, in terms of status, neglecting work was often an offence that was punishable under the workhouse's own rules[5]. This section will argue that the law has created a similar situation for modern social housing. This allows local councils to monitor the deservingness of their applicants or tenants (i.e. the subject of the moral desert) throughout the lifetime of the tenancy in a continuous cycle of assessment. This means from the time of application until the tenancy comes to an end, councils are able to insist on a standard of behaviour from their tenants (behaviour being one of the criteria of deservingness). Where an applicant's or a tenant's behaviour is deemed unacceptable, the council can refuse their application, order the possession of their tenancy or simply refuse to renew it. This continuous assessment is achieved in three separate stages.

Stage One is during the application process, when a person or household first applies to the council for a social tenancy. This first stage can also apply[6] where, by virtue of the Homelessness Reduction Act 2017, applicants who are homeless or are threatened with homelessness[7] and are owed a duty by the local authority. While applying for a social home, there are specific eligibility criteria that councils consider. During this phase, councils may disqualify people who have some history of "unacceptable behaviour", who have rent arrears or who are not currently working all of which show the applicant to

[5] The Peel Web - Workhouse rules, Parliamentary Papers, 1842, XIX, pp.42-3. Found at: http://www.historyhome.co.uk/peel/poorlaw/ruleswh.htm

[6] Now that the Homelessness Reduction Act 2017 has come into force.

[7] Sections 195 and 189B of the Homelessness Reduction Act 2017 imposes a duty on any applicant who is eligible must take reasonable steps to provide accommodation.

be "undeserving". This can also apply, where an applicant is deemed to be refusing to cooperate a council's duty can come to an end[8].

Stage Two occurs once an applicant has been granted a social tenancy. The law allows two types of orders, a demotion, and a possession order to be granted for that tenancy should the tenants behaviour fall below the acceptable norm. Demotion orders allow councils to remove a secured tenancy for a probationary tenancy as a deterrent for further infractions. Possession orders, on the other hand, allow the council to seek possession of the property bringing the tenancy to an end.

Stage Three, which is the final stage, is at the end of the term of a flexible tenancy when it comes up for renewal. Again, any rent arrears or poor behaviour can prevent the renewal of a tenancy thus preventing the tenant from continuing their possession of the property.

Stage One – The Application Phase

This stage is during initial contact with the local authority. This occurs either when a household applies for a social tenancy, or when a household is owed a duty by the local council as laid out by the provisions in the Homelessness Reduction Act 2017[9] - homeless or threatened with homelessness. During this phase "deservingness" can be linked to both status and behaviour, depending on the situation.

Eligibility for a Social Tenancy

As mentioned earlier in this thesis, s.146 of the Localism Act 2011[10] enables local authorities to qualify or disqualify specific "classes" of people from their eligibility criteria. Additionally, this section allows the Secretary of State to

[8] Section 193 of the Homelessness Reduction Act 2017.
[9] Section 3 of the Homelessness Reduction Act 2017 requires local authorities to assess all eligible applicants who are homeless or threatened with homelessness
[10] Inserting s.160ZA into the Housing Act 1996.

prescribe specific classes of people and criteria for local housing authorities when determining eligibility[11] and especially mentions "other classes of persons from abroad"[12].

Section 147(4) of the Localism Act 2011[13] requires every local authority to have an allocation scheme and a procedure[14] that will determine the priorities for allocating social housing. This section[15] also requires authorities to give a reasonable preference to applicants who fit certain criteria. These include the homeless, those living in unsanitary or overcrowded conditions and applicants who need to move for medical or other welfare grounds[16]. Authorities are also allowed[17] to apply supplementary criteria to applicants who fall into a reasonable preference category in order to determine their priority for access to housing[18]. There are some examples within the section itself such as a local connection[19], financial resources and behaviour of the applicant, but the statutory guidance makes it clear that the list is non-exhaustive and "authorities may take into account other factors instead or as well as these"[20].

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11 S.146(1) of the Localism Act 2011 adding s.160ZA(8) of the Housing Act 1996.

12 S.160ZA(4) of the Housing Act 1996.

13 Inserts 166A into the Housing Act 1996

14 166A(1) states that "For this purpose "procedure" includes all aspects of the allocation process, including the persons or descriptions of persons by whom decisions are taken."

15 166A(3) of the Housing Act 1996.

16 Only some of these terms have been defined in the Act including those who are homeless (defined in ss.175-178 of the Housing Act 1996) and those living in overcrowded housing (ss. 324-326 of the Housing Act 1985). Many other terms are not legally defined, however a non-exhaustive list of examples is provided in the statutory guidance; these including insanitary, unsatisfactory, and both (d) and (e).

17 166A(5) of the Housing Act 1996.

18 Manchester City Council, 'Part VI Allocations Scheme Implemented 21 February 2011 with amendments approved by the Council and Partners as of 20 February 2015' Version 3.2 at 12. Found at: http://www.manchester.gov.uk/download/downloads/id/20290/allocations_scheme_updated_april_2015.pdf

19 As defined by s.199 of the Housing Act 1996.

20 Communities and Local Government, 'Allocation of accommodation: guidance for local housing authorities in England' June 2012, at [4.15] at 20. Found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/5918/2171391.pdf

This means, in effect, that even within a sub-class of people to whom the local authority must give a reasonable preference, priority will be awarded to those who fit certain criteria that will be determined by the authority themselves. One of the most common[21] statutory[22] of these makes applicants ineligible where the applicant (or member of their household) has been found guilty of some form of "unacceptable behaviour".

The rules on unacceptable behaviour apply twice, once in terms of eligibility for social housing under s.146 and once under the additional priority criteria in the allocation scheme under s.147(4). This means that many local authorities can make people with a history of "unacceptable behaviour" ineligible. Further, if their behaviour is perhaps not ideal but not severe enough to render them ineligible, their priority can be lowered. Such behaviour typically includes imposition of a behaviour order, such as a now defunct Anti-social Behaviour Order (ASBO), Acceptable Behaviour Contract or Injunction to Prevent Nuisance and Annoyance (IPNA), but could also include the breach of a previous tenancy agreement, violence against member of the household or others in the community[23], rent arrears[24] or any other ground found in Part I Schedule 2 of the Housing Act 1985, apart from ground 8[25].

In other words, in order to be eligible for social housing applicants must have a historical and current record of good behaviour. Moreover, in the case of behaviour orders, such eligibility can be removed by the actions of a single member of a household based on hearsay evidence and often judged on a

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21 Shelter website - 'Who gets social housing?' Found at: http://england.shelter.org.uk/campaigns/why_we_campaign/Improving_social_housing/who_gets_social_housing

22 S.160A(7) of the Housing Act 1996 with "unacceptable behaviour" being loosely defined in s.160A(8).

23 Manchester City Council *supra* n.18 at 20.

24 Southwark Council, 'A summary of our housing allocation scheme' at 14-15. Found at: http://www.southwark.gov.uk/download/downloads/id/10917/housing_allocations_policy

25 S.160A(8) Housing Act 1996.

lower judicial standard[26]. There is an argument that such requirements are another evolution of "deservingness", in other words those who are well behaved are deserving of help.

Another common criterion being used by authorities is employment. There is an agenda for preferential treatment to those who are employed that goes beyond any one council, but is in fact a Government policy being enacted by legislation and enforced by local authorities. The Localism Act 2011 emphasizes that deservingness is something that applicants earn by action and contribution, rather than a passive state of being such as those who would be considered the "sick poor". This harkens back to the Victorian criteria of willingness to work regardless of ability as described in Chapter 3. These changes mean that it will be much harder for those who are unemployed to find a tenancy in social housing. Further, with little or no consideration of those who are physically or mentally incapable of working, it will become increasingly difficult for that group to meet the minimum requirements of being "deserving" of help as will be discussed in Chapter 5.

Refusal of an Offer of Accommodation

The Homelessness Reduction Act 2017 (HRA) aims to "put homelessness prevention first", and includes an increased duty on authorities to provide advice and information to those who are at risk of homelessness in an effort to reduce the number of people on the streets. However, it also has specific provisions for those who refuse an accommodation offer.

It also includes a duty on the councils to try and prevent homelessness by earlier intervention and doubling the number of days from 28 to 56 that a household can be considered "threatened with homelessness"[27]. This would aid at risk households, according to the Economist:

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[26] Criminal Behaviour Orders require a prosecution of a criminal offence before being applicable.

[27] Section 1 of the Homelessness Reduction Act that amends s.175 of the Housing Act 1996.

> It would involve councils negotiating with landlords, helping people to reorganise their finances and finding a way to keep them in their homes long before the bailiffs arrive. The bill's supporters say any extra costs will still be much cheaper than providing temporary accommodation once a family is kicked out.[28]

However, Peaker asserts:

> ... this does NOT amount to the end of councils' frequent practice of insisting that tenants await possession proceedings, possession order and sometimes even a date for execution of warrant before they will be considered to be homeless. ... However, while being 'threatened with homelessness' triggers the 56 day prevention and help duty … the new s.195(6) [of the Act] means that the prevention duty will continue for longer than 56 days if the applicant remains in the property, unless terminated for some other reason.[29]

Where an applicant is owed a duty under s.189B(2)[30] HRA and they refuse a final accommodation offer or a Part 6[31] offer[32], then the duty comes to an end and no duty under s.193 (the main housing duty), which offers a 12-month term, can apply[33]. This can only happen where an applicant has been informed of their right to review and the consequences of their refusal[34].

Section 193A(4) states that an offer is considered a final accommodation offer if the following criteria are met:

> (a) it is an offer of an assured shorthold tenancy made by a private landlord to the applicant in relation to any accommodation which is, or may become, available for the applicant's occupation,
> (b) it is made, with the approval of the authority, in pursuance of arrangements made by the authority in the discharge of their duty under section 189B(2), and

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28 The Economist, 'The homelessness crisis - An ever growing problem' 3 December 2016. Found at: http://www.economist.com/news/britain/21711052-even-numbers-sleeping-rough-rise-so-does-public-spending-temporary-accommodation?fsrc=scn/fb/te/bl/ed/anevergrowingproblem

29 Peaker, 'A Bluffers Guide to the Homeless Reduction Act 2017' Nearly Legal – Housing Law News and Comment. Posted on 14/05/2017 and found at: https://nearlylegal.co.uk/2017/05/bluffers-guide-homeless-reduction-act-2017/.

30 S.193A(1)(a) Homelessness Reduction Act 2017 (HRA).

31 A Part 6 offer is exactly what it sounds like, an offer of accommodation made in writing under Part 6 of the Housing Act 1996 that states it is such an offer.

32 S.193A(b)(i)-(ii) HRA 2017.

33 S.193(3) HRA 2017.

34 S. 193A(1) HRA 2017.

(c) the tenancy being offered is a fixed term tenancy (within the meaning of Part 1 of the Housing Act 1988) for a period of at least 6 months.

Any offered accommodation must be considered "suitable", by virtue of s.193A(6) HRA, and the local authority must ensure applicants are not under a contractual obligation of a current tenancy before they take up the council's offer[35]. According to the Policy Fact Sheet this measure hopes to:

> ... encourage those who are homeless or at risk of becoming homeless to take responsibility for working proactively with their LHA to resolve the problem as soon as possible.
> The Government does not wish to create challenges for vulnerable people who may have difficulty in participating in the homeless prevention activities of their LHA. We believe that this measure is a fair approach. The aim is that plans will be agreed and will contain actions that the person applying for help can reasonably be expected to achieve.[36]

This means that where an applicant refuses either type of accommodation, if the above criteria are met, the local authority's duty to them comes to an end. This is not necessarily unreasonable, considering the housing shortage, to expect those in need to take up any accommodation offered, even if such accommodation is outside the applicant's local area. This problem is seen in areas of high demand, such as London. Offers of accommodation can be made not just to private lets, but also in areas far away from the applicant's local area. This is supported by research by the Legal Action Group:

> The research found that nearly 2,500 households were given offers of private sector discharge across London in 2016: 20 per cent of these offers were in another London borough to where the homeless duty was owed and 15 per cent of the offers were for private tenancies outside London (meaning 341 homeless households could have been forced out of London in just one year). Although the total numbers are similar to our previous research

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35 S.193A(7)(a)-(b) HRA 2017.

36 Department for Communities & Local Government, 'Policy Fact Sheet: Non-Cooperation (Updated following amendments in the Commons)' at 2. Found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/592998/170206_-_Policy_Fact_Sheets_-_Non-Cooperation.pdf

> two years ago, the number of councils using private sector discharges and out-of-London tenancies has increased (from 18 to 23 and 12 to 18 respectively). However, it is still a handful of councils (namely Brent, Enfield and Newham) which are making the majority of private sector offers (1,736).[37]

For example, in 2017, Brent Council several homeless families from London were offered property in Birmingham, which was far away from education and work for the family in question[38]. This type of offer could fall foul of the Supreme Court judgment in *Nzolameso v Westminster City Council*[39], where the court held:

> The effect, therefore, is that local authorities have a statutory duty to accommodate within their area so far as this is reasonably practicable. "Reasonable practicability" imports a stronger duty than simply being reasonable. But if it is not reasonably practicable to accommodate "in borough", they must generally, and where possible, try to place the household as close as possible to where they were previously living.[40]

This case was considering temporary accommodation, but the court held that it applied to cases of out of city offers in *RB v London Borough of Brent*[41] with Mr. Recorder Wilson noting in his judgment:

> …it seems to me inescapable that in cases of far away placements, the test should also include some consideration of the timescale within which more suitable accommodation might be found.[42]

However, as discussed above there is evidence that several London boroughs are still practicing this type of offer of accommodation.

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37 I. Köksal et al., 'Private sector discharge: a tool to force homeless families out of London?' Legal Action Group June 2017. Found at: https://www.lag.org.uk/article/201800/private-sector-discharge--a-tool-to-force-homeless-families-out-of-london-

38 *RB v London Borough of Brent* Unreported. Hearing Date: 10th October 2016. Found at: https://www.gardencourtchambers.co.uk/wp-content/uploads/2017/03/Barakate-2.3.2017-Final.pdf

39 [2015] UKSC 22.

40 *Ibid* per Lady Hale at [19].

41 *Supra* n.38.

42 *Supra* n.38 at [27].

Refusal to Cooperate

There are provisions in the HRA that consider a refusal to cooperate with local authorities. Section 193B sets out the definition of "deliberate and unreasonable refusal to co-operate", and 193C explains the consequences to applicants to fall foul of s.193B. Section 193C applies to both duties owed by the local authority under the HRA 2017, i.e. households who are homeless and those threatened with homelessness. As discussed in Chapter 2, Section 193B(2)-(4) outlines the definition of "refusal to cooperate". Section 189A requires every applicant who is eligible, regardless of priority need or intentional homelessness[43] to be assessed and provided with a plan in writing, as laid out in s.189A(3). Section 189A(4) requires the council, once the assessment has been made, to attempt to agree with the applicant the following:

> (a) any steps the applicant is to be required to take for the purposes of securing that the applicant and any other relevant persons have and are able to retain suitable accommodation, and
> (b) the steps the authority are to take under this Part for those purposes.

Where an agreement is reached that also must be "recorded in writing"[44] by the local authority[45]. Therefore, anything recorded under s.189A(4)(a) will be taken into consideration when deciding if an applicant falls foul of refusing to cooperate.

There are potential issues here, for example what constitutes "unreasonable refusal" and, as Peaker states, it seems likely that such a requirement will see

[43] See Chapter 2.
[44] Whether an agreement is reached, the applicant is entitled to a copy of the written record by virtue of section 8.
[45] S.189A(5) of the Homelessness Reduction Act 2017.

an early legal challenge[46]. The Code of Guidance offers the following advice on "unreasonable refusal":

> The housing authority should be satisfied of the following before ending the prevention or relief duty under sections 193B and 193C:
> a. the steps recorded in the applicant's personalised housing plan are reasonable in the context of the applicant's particular circumstances and needs;
> b. the applicant understands what is required of them in order to fulfil the reasonable steps, and is therefore in a position to make a deliberate refusal;
> c. the applicant is not refusing to co-operate as a result of a mental illness or other health need, for which they are not being provided with support, or because of a difficulty in communicating;
> d. the applicant's refusal to co-operate with any step was deliberate and unreasonable in the context of their particular circumstances and needs. For example, if they prioritised attending a Jobcentre or medical appointment, or fulfilling a caring responsibility, above viewing a property, this is unlikely to constitute a deliberate and unreasonable refusal to cooperate. However, if the applicant persistently failed to attend property viewings or appointments without good reason; or they actively refused to engage with activity required to help them secure accommodation, then this might be considered deliberate and unreasonable refusal to cooperate.[47]

Once an authority deems that an applicant's behaviour meets these specific criteria, section 193C applies, as discussed in Chapter 2.

So, if an applicant be deemed as refusing to co-operate under s.193B, having received a written warning, either of the larger duties, under 195(2) or 189B(2), come to an end[48]. In other words, whether the applicant is threatened with

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[46] Peaker, 'A Bluffers Guide to the Homeless Reduction Act 2017' Nearly Legal – Housing Law News and Comment. Posted on 14 May 2017 and found at: https://nearlylegal.co.uk/2017/05/bluffers-guide-homeless-reduction-act-2017/.

[47] Department for Local Government and Communities - Homelessness Code of Guidance for Local Authorities, February 2018, at 14.53 at 106. Found at: https://assets.publishing.service.gov.uk/media/5a969da940f0b67aa5087b93/Homelessness_code_of_guidance.pdf

[48] S.193C(2) HRA 2017.

homelessness or is actually homeless, where they are considered to be unreasonably refusing to co-operate and have been warned with no change in behaviour, the council's duty ends, and this will usually mean any hope of securing accommodation. Such a decision, however, must be taken in light of the particular circumstances and needs of the applicant[49].

The most controversial issue with the new provision is 193C(4), where applicants who are deemed to be refusing to co-operate, but who also meet the very stringent requirements to secure accommodation, are removed from the main housing duty under s.193[50]. This means, the seemingly poor behaviour of an applicant can lead them no longer being eligible for the main housing duty, which tends to be the best route to a shorthold tenancy. However, the statutory guidance is very clear that this measure should not be used lightly or excessively:

> Housing authorities should make reasonable efforts to obtain the co-operation of the applicant, including seeking to understand the reasons for their lack of cooperation, before invoking and during the use of section 193B. Where an applicant appears not to be co-operating the housing authority should review their assessment of the applicant's case and the appropriateness of the steps in the personalised housing plan (section 189A(9)) and explain the consequences of not co-operating before issuing a warning under section 193B(4).[51]

Additionally, the guidance also lays out some additional considerations for the local authority before ending the duty (see footnote 47 above). It is also clear from the Act itself and the guidance that such a decision must be taken considering the particular circumstances and needs of the applicant[52]. Again,

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49 S.193B(6) HRA 2017.

50 Without the additional local connection, they would fail a Part 6 assessment regardless.

51 Department for Local Government and Communities - Draft Homelessness Code of Guidance for Local Authorities, October 2017, at 14.48, at 99. Found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/652343/Draft_Homelessness_Code_of_Guidance.pdf

52 S.193B(6) HRA 2017.

the guidance gives some indication how and when this provision should be used:

> If the applicant is 'street homeless' or insecurely housed ('sofa surfing') the housing authority should take into account any particular difficulties they may have in managing communications and appointments when considering if failure to co-operate is deliberate and unreasonable.[53]

It is, perhaps disappointing to see such an emphasis on "street homeless" without mentioning terms like "vulnerable" or "mentally ill" as these types of applicants could also have similar issues when it comes to their behaviour. It seems unwise to limit these comments to those who are street homeless, as the issue of mental illness certainly is wider than that particular population.

This new provision for refusal to co-operate fits in well with the status of deserving linked to behaviour and with the changing nature of social housing. In order to be "deserving" of a social tenancy, the applicants must be well behaved, and this now includes co-operating with the local authority during the application process. So, for those who are homeless or threatened with homelessness, there is already a multi-faceted check on their behaviour. They must be preferably employed, with no behaviour orders, or rent arrears and be seen to be co-operating with the local authority trying to house them.

While there are good and practical reasons to expect applicants who have agreed to undertake certain steps to do so, applying such a broad stroke approach to this area is concerning. There could be many reasons that an applicant is not conforming to agreed norms and practices. The Act does seem to take this fact into consideration by requiring the council to bear in mind the "particular circumstances" of the applicant. It seems possible that such a trend can only continue with deciding if an applicant's refusal to co-operate is reasonable, even bearing in mind their particular circumstances.

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[53] *Supra* n.51 at 14.50 at 99.

Additionally, it is an established fact that housing officers and councils are already struggling to deal with their current housing workload. Adding pressure to this system with these new provisions can only add to the burden and cost. In fact, Clive Betts, Chair of the Communities and Local Government Committee, has indicated there could be a funding gap of £67 million in London alone as councils try and implement the HRA 2017[54]. Housing officers do a very difficult job under increasingly challenging conditions, this Act is likely only to add their burdens. With more work and less funding and the reality that housing officers already make snap judgements about applicants, one can only wonder how much more difficult their job will be.

During Stage 1, however an applicant begins the process of acquiring a social tenancy, they must ensure that they are eligible, and these requirements now include being, preferably working, but if not well behaved and cooperative with the local authority. This demonstrates that during the start of a potential tenancy, applicants must ensure they are considered "deserving" of help.

Stage Two - During the Lifetime of the Tenancy

Once a tenancy has been granted, there are still methods by which a tenancy can be repossessed by the council on the order of a court. While there is nothing inherently bad about councils being able to reclaim valuable social tenancies at a time where there is a housing crisis, some of the grounds focus heavily the behavioural criterion of deservingness. In other words, if tenants are not well behaved then their social tenancy can be taken from them during the lifetime of that tenancy.

[54] Commons Select Committee, 'Government must review draft Homelessness Code of Guidance' 12 December 2017. Found at: https://www.parliament.uk/business/committees/committees-a-z/commons-select/communities-and-local-government-committee/news-parliament-2017/homelessness-code-of-guidance-correspondence-17-19/

Introductory Tenancies

When a tenant is accepted for a social housing tenancy, many will start out in a much less secure position thanks to the use of introductory tenancies[55]. Typically, the trial period for this sort of tenancy is 12 months[56], but the local authority can extend it for another six[57] as long as the landlord has conformed to certain requirements[58]. Extensions generally happen if a tenant has broken the conditions of their tenancy agreement[59], but the council is not willing to evict the household, instead allowing them to show an improvement in behaviour. Common tenancy conditions revolve around paying rent and acceptable behaviour, for example Islington council sets out theirs as follows:

> Our tenancy conditions say that tenants must:
>
> - Have consideration for people living around them
> - Pay their rent on time
> - Look after their home
> - Keep to all other tenancy conditions
>
> It is important that tenants keep to the tenancy conditions. We believe that introductory tenancies will help us get this message across. It also means we can act quickly to end tenancies when people break the tenancy conditions.[60]

If the tenant's behaviour improves, then at the end of the trial period they will be granted either a flexible or secure tenancy. If not, the council will start proceedings to evict the tenants, thus bringing their introductory tenancy to an end with no offer of a more permanent tenancy. In order to evict, the council will send a notice to the tenant, often called a s.128 (of the Housing Act 1996) notice, that it intends to start possession proceedings against them. This

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55 S.124 of the Housing Act 1996.
56 S.125(2) of the Housing Act 1996.
57 S.125A(1) of the Housing Act 1996, inserted by s.197(3) of the Housing Act 2004.
58 As set out in ss.125A(2)-(3) of the Housing Act 1996.
59 This reason was given by Islington Council in their pamphlet on introductory tenancies. Islington LBC, 'Introductory Tenancies Factsheet' at 1. Found at: https://www.islington.gov.uk/~/media/sharepoint-lists/public-records/housing/information/factsheets/20162017/20161026introductorytenanciesfactsheet.pdf
60 *Ibid* at 2.

notice must outline the reasons that the authority wishes to end the tenancy and give at least four weeks' notice.

According to Shelter, the Homelessness Charity, common reasons for evictions from an introductory tenancy are:

- causing a nuisance to neighbours
- failure to pay the rent
- not paying any water or heating charges included in your rent[61]

However, these reasons are likely to include any serious breach of the tenancy agreement, which vary from council to council, but typically include the provisions outlined above around paying rent and good behaviour. As long as the local authority has followed the correct statutory procedure, is it very likely that the court will grant a possession order for the property. There are, however, exceptional circumstances when the court granting an order of possession would be disproportionate (to the legitimate aim)[62]. This was considered by the Court of Appeal in *R (on the application of JL) v Secretary of State for Defence*[63], where Lord Justice Briggs stated:

> But there will be exceptional cases, and the present is a very unusual but powerful example, where the raising of Article 8 rights at the enforcement stage will not be an abuse. The obvious example is where there is a fundamental change in the occupant's personal circumstances after the making of the possession order but before its enforcement. The example canvassed during the hearing of this appeal was that of the diagnosis of an incurable illness for the first time after the making of the possession order, making it disproportionate for the public authority to evict the occupant before he or she could be allowed to die peacefully at home.[64]

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61 Shelter, 'Eviction of introductory council tenants' last updated 13 April 2017. Found at: https://england.shelter.org.uk/housing_advice/eviction/eviction_of_introductory_council_tenants

62 Protecting the tenant's Article 8 rights to home and family life from the European Convention on Human Rights.

63 [2013] EWCA Civ 449.

64 *Ibid* at [41].

However, it is clear that such cases are very unusual and that, in most circumstances, an order for possession will be granted. Such orders may also be denied by the court for procedural errors made, for example where the section 128 notice is somehow faulty, where the reasons for the eviction are inadequate. This was considered by the House of Lords in *South Bucks District Council and another v Porter*[65] with Lord Brown summing up the requirements for decision letters:

> The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. … Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.[66]

So, as long as the council or housing authority follows the correct statutory procedure it is highly likely that a tenant will be evicted, and their social accommodation possessed. This, once again, demonstrates a facet of the continuous cycle of assessment where a new tenant can be given a trial/introductory tenancy that can be, in general, easily repossessed should that tenant fail to abide by the tenancy conditions, some of which fall within the criteria of modern deservingness.

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65 [2004] UKHL 33

66 *Ibid* at [36].

Statutory Grounds for Possession

There are statutory grounds that may lead to a court order for possession, where the tenant is evicted from their social house. These are listed in Schedule 2 of the Housing Act 1985[67], ground number 2 allows an authority to seek possession where:

> The tenant or a person residing in or visiting the dwelling-house—
>
> (a) has been guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing, visiting or otherwise engaging in a lawful activity in the locality,
>
> (aa) has been guilty of conduct causing or likely to cause a nuisance or annoyance to the landlord of the dwelling-house, or a person employed (whether or not by the landlord) in connection with the exercise of the landlord's housing management functions, and that is directly or indirectly related to or affects those functions,] or
>
> (b) has been convicted of—
>
> (i) using the dwelling-house or allowing it to be used for immoral or illegal purposes, or
>
> (ii) an indictable offence committed in, or in the locality of, the dwelling-house.

S.99(1) of the Anti-Social, Crime and Policing Act 2014 also added Ground 2ZA to the Housing Act 1985, as follows:

> The tenant or an adult residing in the dwelling-house has been convicted of an indictable offence which took place during, and at the scene of, a riot in the United Kingdom.
>
> " adult " means a person aged 18 or over;
>
> " indictable offence " does not include an offence that is triable only summarily by virtue of section 22 of the Magistrates' Courts Act 1980 (either way offences where value involved is small);
>
> " riot " is to be construed in accordance with section 1 of the Public Order Act 1986.
>
> This Ground applies only in relation to dwelling-houses in England

This demonstrates that there is a link between "good behaviour", which is one of the criteria of deservingness, and keeping a flexible tenancy. The legal framework is set up to punish those whose behaviour falls below a certain

[67] As amended by s.144 of the Housing Act 1996.

standard. It is not unreasonable to want your tenants to behave in a certain way, and not cause a nuisance to their neighbours, but it also indicates that keeping a place in social accommodation is about more than the need to be housed. Additionally, there are issues specific to groups such as the vulnerable where their behaviour might be from a root cause other than the want to cause a nuisance, such as a serious mental illness (see Chapter 5). Yet there is evidence that few local authorities look at the root causes of these behavioural issues when considering punitive measures against tenants. There is also an argument that these checks on behaviour will help the vulnerable as there is empirical evidence that disabled people face more harassment than non-disabled people. This is discussed in detail in Chapter 5. However, there is a lack of research in this area, so it is difficult to tell if the vulnerable, as a group, are more helped or harmed by these measures. It is likely that some individuals will benefit, and some will not. However, the loss of a tenancy seems a severe consequence to a vulnerable individual whose behaviour is due to their condition and perhaps beyond their control, rather than a wilful flouting of the rules.

No longer are the poor and needy deserving of a social house because they are poor, they must also ensure that they are well behaved and there are checks specifically on social tenants during their tenancies. This, once again, lends weight to the argument that being deserving is not just about starting out deserving, but that it is a status that is continually checked to ensure that only those who conform remain.

Injunction to Prevent Nuisance and Annoyance

The Injunction to Prevent Nuisance and Annoyance (IPNA) is a civil remedy introduced by the Anti-social Behaviour, Crime and Policing Act 2014. It has been described "as super-punitive ASBO which will be easier to obtain for

even more broadly defined behaviour"[68]. S.94 in Part V of the ASBCP 2014[69] will require a mandatory possession order for both secure and assured tenants, so this applies to *all* tenants not just those in social housing. This section sets out five conditions that allow the court to make an order for possession. Condition one is where the tenant being convicted of a serious offence which was committed near the dwelling, or against the landlord or other resident[70]. Condition two involves a tenant or visitor has breaching an injunction but with certain conditions imposed on the breach[71]. Condition three is where a tenant or visiting has breached a criminal behaviour order, again, with certain conditions imposed such as locality[72]. Condition four involves the property itself being subject to a closure order under s.80 of the ASBCP 2014 or access to the dwelling is prohibited for a continuous period of more than 48 hours[73]. Finally, condition five is that a tenant or visitor has been convicted of a statutory nuisance under s.80(4) of the Environmental Protection Act 1990 (breach of abatement notice in relation to statutory nuisance), or s.82(8) of that Act (breach of court order to abate statutory nuisance etc.) with conditions regarding the noise emitted[74]. S.84A(8) concludes that the conditions cannot be met where there is an outstanding appeal which has not been finally determined, or where an appeal has led to an order being overturned. Where these conditions are met, the court can seek an order for possession of a secured tenancy. There are also little or no grounds to appeal such a decision, apart from a breach of the injunctee's convention rights. This came under trenchant criticism from the Law Society:

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68 Liberty, Liberty's Response to the Home Office's Proposals on More Effective Responses to Anti-Social Behaviour (London: Liberty, 2011), p.15.
69 Inserting s.84A into the Housing Act 1985.
70 S. 84A(3) of the Housing Act 1985 as inserted by s.94 of the ASBCP 2014.
71 S. 84A(4) of the Housing Act 1985.
72 S. 84A(5) of the Housing Act 1985.
73 S. 84A(6) of the Housing Act 1985.
74 S. 84A(7) of the Housing Act 1985.

> The removal of judicial discretion and the protection of due process in any circumstances has to be justified, and we believe that the justification has not been made out.[75]

There are, however, special provisions included in s.13 of the 2014 Act that allow one of the conditions of the IPNA to be exclusion from the injunctee's property, however this provision only applies to social tenants. This has led to alarm in the academic community:

> Targeting only social housing fits with the governing philosophy of the three major political parties, which is that such tenants are welfare recipients whose benefits, including access to housing, are conditional on them behaving responsibly.[76]

One thing seems fairly clear that if applicants hope to be eligible for social housing then they and members of their household must be well behaved.

This, once again, links to the idea that social tenants should be solely comprised of the "deserving poor" and that there are now legislative tests that help impose this policy. It also can restrict access to social housing by removing/evicting those who breach the injunction. While this does not necessarily seem unreasonable and could actually solve some of the issues in council estates, there must also be the question of how far such action will go? Will there be exceptions for children, for example, who have Attention Deficit and Hyperactivity Disorder? These children might not be able to control their behaviour and are already subject to a disproportionate number of control orders of various types (as the Anti-Social Behaviour Order is now defunct)[77]. As the number of people with learning difficulties or mental health issues

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[75] The Law Society, 'Home Affairs Committee Call for Evidence - Draft Anti-Social Behaviour Bill' Submitted January 2013, at [6] at 2. Found at: http://www.lawsociety.org.uk/representation/policy-discussion/draft-anti-social-behaviour-bill-law-society-written-evidence/

[76] Brown, 'Legislative Comment - Replacing the ASBO with the injunction to prevent nuisance and annoyance: a plea for legislative scrutiny and amendment' (2013) 8 Crim LR 623-639 at 627.

[77] British Institute for Brain Injured Children (BIBIC), 'Ain't Misbehavin': Young People with Learning and Communication Difficulties and Anti-Social Behaviour' November 2005, at 6.

comprise such a significant proportion of those subject to control orders, it seems likely that this trend will continue with IPNAs.

This demonstrates a close link between good behaviour, one of the types of deservingness, and a social tenancy. Where there has been a breach of an IPNA, the court can seek possession during the lifetime of that tenancy meaning that tenants who fall short of the criterion of good behaviour can have seen their social house repossessed. This is yet another check on the criteria of deservingness, which lends credence to the idea that the status of social housing tenants is continually assessed throughout the lifetime of the tenancy (this being in Stage 2).

Demotion Orders

Incidents of anti-social behaviour can also lead to a demotion order, which was introduced by the Anti-social Behaviour Act 2003 sections 14[78] and 15[79]. This is another type of probationary tenancy and allows local housing providers to replace the existing tenancy with one that removes the right to buy and the security of tenure for a year. Once the year has passed:

> ...if the landlord is satisfied with the tenant's conduct, [the tenancy] will revert back to either an assured tenancy ... or a secure tenancy... The period of demotion can be extended in certain circumstances.[80]

Hence it is not enough to be deserving of help in order to qualify for social housing, through eligibility and allocation; tenants must remain deserving by conforming to certain standards of behaviour throughout the lifetime of their tenancies. Secure tenancies, i.e. those granted for life, can also be subject to a demotion order for serious anti-social behaviour of members of the household as was part of the facts of *Manchester City Council v Pinnock*[81], where the local

[78] Inserts section 82A into the Housing Act 1985

[79] Inserts section 20B into the Housing Act 1988.

[80] W. Wilson, House of Parliament Research Briefing SN/SP/264, 'Anti-social behaviour in social housing (England)' House of Commons Library, March 3 2015 at [3.4] at 9.

[81] [2010] UKSC 45.

authority had sought possession, but at first instance the recorder chose instead to issue a demotion of tenancy order. Thus, even those with "old style" tenancies can still find that their behaviour causes a demotion or even possession based on the criteria of deservingness. This creates a continuous cycle of assessment that seeks not only to enforce the criteria of the deserving at the application stage, but during the tenancy itself.

The Southwark Council website also states that it "...will usually consider antisocial behaviour as seriously breaking your tenancy agreement"[82], so there is every indication that infractions of the rules of behaviour are dealt with rather harshly. This means that a few infractions might well result in a tenant being evicted from their tenancy, as stated earlier, most especially if it is an introductory tenancy.

It is important to note that if these criteria were more to do with need, and the ability of the household to sustain itself outside of a social tenancy, this would be far less problematic. With long waiting lists, local authorities should be checking to ensure that those who no longer require social housing are moved into the private rented sector.

Penalising "High Income" Earners

Section 80 of the Housing and Planning Act 2016 (HPA) mandates social tenants who are considered to be "high income" to pay a higher rent that can be equal to the market rate for their social tenancies. Currently, the threshold for "high income" is a household income of more than £40,000 in London and £31,000 elsewhere in the country. Part of the rationale for this move was to ensure that social housing was kept for those on a low income. As Housing Minister Gavin Barwell stated:

[82] Southwark Council website – 'Antisocial Behaviour - Your Responsibilities'. Found at: http://www.southwark.gov.uk/info/200027/council_tenant_information/658/antisocial_behaviour

> This will mean tenancies are periodically reviewed "to ensure tenants still need a socially rented home", he said, with councils told to prioritise lower-income households[83].

However, this aspect of the HPA was very controversial in terms of its effect on tenants, the idea of it discouraging social tenants from working, and its administrative practicalities. In the end, the government had to backtrack their original plans to force all local authorities to implement "pay to stay" and instead make it at the discretion of local authorities. This provision shows the limit of deservingness, where a tenant is employed, but deemed to be "too successful" to be considered truly deserving. It also demonstrates another facet of the continuous assessment, where social tenants in areas who have chosen to implement "pay to stay" could see their rents change very drastically if they fall outside the "low paid worker" criteria.

However, just as interesting is part of the reasoning for the change in the government policy to make "pay to stay" discretionary. Critique of pay to stay was seen from many different areas - politicians, think tanks, social tenants, and a bipartisan group in the House of Lords. One commonality in their critique was the fact this change would penalise people with social tenancies who are working:

> During the legislation's passage in parliament UNISON expressed concern that 'Pay to Stay' will make social housing too expensive for social housing tenants. The 'higher income' earners that the policy targets are already priced out of the market because of high housing costs, and therefore forcing them to pay market rent may expose them to unnecessary financial hardship and poverty. Tenants affected by the policy will be worried about rent hikes, eviction, and *being penalised for working hard as a better paid job could mean paying a higher rent*.[84] [emphasis added]

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[83] BBC News, 'Pay to stay' social housing plan dropped' 21 November 2016. Found at: http://www.bbc.co.uk/news/uk-politics-38058402

[84] Unison Briefing, 'The Housing and Planning Act 2016' at 2. Found at: https://www.unison.org.uk/content/uploads/2016/08/Housing-and-Planning-Act-2016-FINAL.pdf

This was echoed by Peter Box, housing spokesman at the Local Government Association:

> "A couple with three children earning £15,000 each a year cannot be defined as high income. Pay to stay needs to be voluntary for councils, as it will be for housing associations. This flexibility [of voluntary implementation] is essential to allow us to protect social housing tenants and avoid the unintended consequence of hard-working families being penalised, people being disincentivised to work and earn more and key workers, such as nurses, teachers or social workers, having to move out of their local area."[85]

As is clear many of the critics argued the same thing - do not punish workers by increasing their rents. It can, therefore, be argued that being given the status of "working" is the ultimate form of deserving if you are living in a social tenancy. If a governmental policy is seen to punish working social tenants, it comes under so much critique and even an attack in the House of Lords the government is forced to make changes.

This section, once again, shows that there is a continual assessment of deservingness that continues beyond the initial application process and into the lifetime of the tenancy itself. This means should a tenant's behaviour fall short of the expected norms, for example where a member of the household is given an ASBO, or an IPNA, the local authority can seek to demote their tenancy or end it all together, depending on the severity of the infraction. Additionally, there is an indication that most councils[86] and housing associations[87] are taking a "zero tolerance" approach to anti-social behaviour, which is being facilitated by statute, so it is likely that punitive measures are more likely to be severe. It also means that, should a household lose their social tenancy, they will be likely to be disqualified from applying elsewhere.

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[85] T. Helm, ''Pay to stay' trap will force working families out of council homes' The Guardian, 6 February 2016. Found at: https://www.theguardian.com/society/2016/feb/06/pay-stay-rules-families-council-homes-private-sector-rent

[86] Southwark Council's policies explained in Chapter 3 and later in this chapter at footnote 91.

[87] City West Housing Trust's, a housing trust in the North West of England, policies on behaviour: https://www.citywesthousingtrust.org.uk/anti-social-behaviour-policy

Stage Three - Renewal of an Existing Tenancy

This section will demonstrate it is not enough to start out deserving of a social tenancy. Thanks to the legal framework for social housing, social tenants must now remain deserving to continue to occupy their social accommodation. This section will focus on the final stage when a tenancy comes to an end and the occupant is attempting to renew their lease.

Flexible Tenancies

Section 154 of the Localism Act 2011[88] limits the terms of social tenants and effectively removes the tenancy for life for new tenants, although it is at the discretion of the local authority to offer a flexible or "old style" tenancy to applicants. Most terms offered by councils are five years, although they can be as short as two years[89].

Under the provisions, councils have the choice not to renew flexible tenancies, usually for those who have not behaved in an acceptable way. Thus, creating part of a continuous cycle of assessment on deservingness where not only must an applicant for social housing start out adhering to the criteria of deservingness, but remain so when their tenancy is renewed. The focus here is much more on behaviour. Some types of behaviour that are likely to cause a flexible tenancy not to be renewed include, more or less, the same type of behaviour as would prevent an application for a tenancy from being accepted or could see a repossession order sought during the lifetime of the tenancy. These include any one of the behaviour orders, discussed above, that can be sought against the tenant or any member of the tenant's household, rent arrears or other breach of the tenancy agreement.

[88] This section adds s.107A to the Housing Act 1985.
[89] S.107A(2)(a) of the Housing Act 1985.

As a reminder, the types of behaviour that might qualify are very similar to the statutory grounds that may lead to a court order for possession, where the tenant is evicted from their social house. As a reminder, Schedule 2 of the Housing Act 1985[90], ground number 2 allows an authority to seek possession where:

> The tenant or a person residing in or visiting the dwelling-house—
> (a) has been guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing, visiting or otherwise engaging in a lawful activity in the locality, or
> (b) has been convicted of—
> (i) using the dwelling-house or allowing it to be used for immoral or illegal purposes, or
> (ii) an arrestable offence committed in, or in the locality of, the dwelling-house.

If one compares this wording with the specific paragraphs from Southwark Council that relate to the behaviour of their tenants, there is a great deal of similarity:

> Your tenancy agreement says that you must not:
> - Do anything which causes nuisance, annoyance, offence, distress or alarm to other tenants or their family, lodgers or visitors; or
> - Damage any property, fixtures or fittings belonging to us or to our tenants and their families.[91]

Southwark also gives a non-exhaustive list of examples of behaviour that would cause nuisance and annoyance that includes:

> ... playing music, TV or radio too loudly, DIY at anti-social hours, dogs barking, offensive drunkenness and shouting or loud arguments (often involving foul language) and slamming doors, and playing ball games close to people's homes...[92]

While it seems unlikely that one incidence of this type would be enough to end a flexible tenancy, Southwark is keen to emphasise the fact that they

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[90] As amended by s.144 of the Housing Act 1996.

[91] Southwark Council website – 'Antisocial Behaviour - Your Responsibilities'. Found at: http://www.southwark.gov.uk/info/200027/council_tenant_information/658/antisocial_behaviour

[92] *Ibid*.

operate "a zero-tolerance approach towards behaviour that impacts negatively on people or the environment"[93]. Additionally, the behaviour would be enough, statutorily to be grounds for a possession order[94]. Local authorities are focusing more heavily on acceptable behaviour and while that does include some areas of financial stability it is far, far wider than that. It takes into account anti-social behaviour or several other types of behaviour that might "cause a nuisance and annoyance", which is another status of being "deserving", being well behaved.

The introduction of the flexible tenancy gives local authorities more control over this continuous assessment ensuring that there is a Stage Three. Where the tenancy comes to an end, the applicant's deservingness, including that of all members of the household can once again be assessed and any infractions could mean a denial of renewal. As previously stated, it is not unreasonable to expect any tenant to be held up to a certain level of behaviour, but zero tolerance policies mean that where the behaviour has a root cause in a mental illness or a form of disability such as ADHD there are no longer shades of grey to the application of the rules. See Chapters 3 and 4 for more information on the link between ADHD and behavioural controls. Likewise, gender bias in the application of anti-social behaviour controls cannot be ignored when a family might lose their tenancy and end up homeless. For a discussion of gender bias, see Chapter 3. Attaching worthiness about a household to their application for housing is unreasonable and flawed. As discussed in Chapter 3, evaluating the deservingness of a subject has inherent flaws, which can lead to unfairness and enhanced conditionality in social housing.

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93 *Ibid*.

94 Courts are required to consider if it is reasonable to grant the order for possession in cases involving ground 2. However, the Anti-social Behaviour Act 2003 s.16 also requires the courts to consider the effect on the victims of the anti-social behaviour.

There is an argument that the ability to end a social tenancy brings them into line with the private rented sector. In fact, currently, private landlords can remove their tenants in a "no fault" eviction for any reason, making the situation for private tenants potentially worse. This type of eviction comes from section 21 of the Housing Act 1988, which allows landlords to evict tenants for no reason after the expiry of the fixed term of the tenancy, when it becomes a periodic tenancy. These are often referred to as "no fault evictions" because there does not need to be a breach of the tenancy agreement for it to come to an end. However, the use s.21 evictions might be coming to an end. There are plans to repeal no fault evictions with a consultation period ending on October 12th, 2019.

A government briefing paper has suggested that, with the abolition of no-fault evictions, there will be additional grounds added for landlords seeking a notice of intention to seek possession[95]. The three new grounds are where the landlord needs the property for a family member, where they wish to sell the property and where a tenant is preventing them[96] from a maintenance of safety standards[97]. So, while it is possible to argue that it is worse for those in the private rented sector (PRS), it is likely that the s.21 evictions will be repealed. Putting those in social housing and in privately rented accommodation on par with each other in terms of evictions.

As previously mentioned, social housing is different to that in the private rented sector. The emphasis in the PRS is much more to do with affordability. It is likely that any tenant regardless of previous behaviour will be able to find a new tenancy if they have sufficient funds, as was discussed in detail in Chapter 3. Yes, private landlords can carry out a limited range of checks on

[95] Section 8 of the Housing Act 1988.
[96] This amends ground 13 of Schedule 2 of the Housing Act 1988.
[97] W. Wilson, 'The End of 'no-fault' section 21 evictions' Briefing paper number 8658, 27 September 2019 at 22. Found at: http://researchbriefings.files.parliament.uk/documents/CBP-8658/CBP-8658.pdf

the suitability of applicants, but it is difficult for them to ensure these references are accurate. Social housing has a raft of multi-agency partnerships all designed to help regulate anti-social behaviour in social housing, as Cowan states:

> Increasingly, social housing management has been reconfigured with specific teams designed to deliver an ASB strategy…, in conjunction with other organisations through multi-agency partnerships, … in their governance of populations…[98]

This means that poor behaviour is much more likely to be an issue to those seeking a social tenancy. Those with no criminal convictions who can afford the rent and deposit are likely to be able to find a willing private landlord. Generally, private landlords are interested in tenants paying their rent[99], not if they are worthy. As there is no market replacement, there is a different impact on those who can afford to rent in the PRS than those in the social sector, who might be priced out of the area in which they live and be unable to secure any other accommodation of either type.

There is also the possibility that the government will decide to implement Chapter 6 of the Housing and Planning Act 2016 (HPA). This act has extended a provision from s.154 of the Localism Act 2011 - the flexible tenancy. Under the Localism Act 2011 the provision was discretionary on the local authority whether to offer a fixed (flexible tenancy of a fixed term) or a lifetime term. Ss.118-121 of the HPA, however, would make it mandatory for local housing authorities to offer fixed term only for new tenancies (see Chapter 3). This means that flexible tenancies should be between 2-10 years, except where a

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98 D. Cowan, *Housing Law and Policy*, First Edition, Cambridge University Press, Cambridge 2011 at 357.

99 According to the English Private Landlord Survey 2018, 46% of private landlords did so because they preferred property to other types of investments, 44% did so to contribute to their pensions but only 4% let property as a full-time business. Ministry of Housing, Communities and Local Government, 'English Private Landlord Survey 2018' January 2019 at 6. Found at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/775002/EPLS_main_report.pdf

child under 9 lives in the property. Additionally, any secured tenancy granted in breach of 81A(1), will become a fixed term tenancy of 5 years. This effectively ends any discretion local authorities had to grant secure tenancies under the Localism Act 2011, except under tightly controlled circumstances outlined in s.81B of the HPA. This means that the only time an old-style secured tenancy can be granted is to replace one that already existed and that the tenant is not to be treated as a new tenant by applying to move to new accommodation. However, these provisions are not currently in force and the government has stated it has no plans to do so "at this time"[100].

Still, the very fact such a provision exists should be considered a worrisome development for not only local authority discretion by social tenancies overall. By passing legislation that removes the discretion local authorities have regarding the use of flexible tenancies for new social tenants, the government would be ensuring that all tenancies going forward will be flexible only. Without the discretion at the direct contact/local level, the government would be effectively saying to local authorities that a more "one size fits all" approach should be taken to deservingness regardless of the personal circumstances of the individuals involved. Those circumstances would be known to a local authority. The addition of this provision into the HPA is a rather startling departure from the aims of the Localism Act 2011, which was to give "new freedoms" to "allow councils to better manage their waiting lists and promote mobility for existing social tenants"[101]. It indicates that the government, a mere five years later, wants the option to adopt a more paternalistic approach to the lack of affordable housing.

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[100] Ministry of Housing, Communities & Local Government, 'A new deal for social housing' August 2018, CM9671 at [186] at 65. Found at: https://www.gov.uk/government/consultations/a-new-deal-for-social-housing

[101] *Supra* n.20 at 4.

This section has demonstrated that there is a final stage in this continuous assessment of deservingness that occurs when one flexible tenancy has finished, and another is being sought by tenants already known to the authority. In this way, the legal framework surrounding social housing is not only supporting the re-emergence of the deserving poor but expanding and evolving it to a continuous cycle of assessment throughout the lifetime of a social tenancy. The fact that local authorities had been loath to use the flexible tenancy system and that the Housing and Planning Act 2016 is effectively taking away their choice indicates that this re-emergence is not as a reaction to the needs of local authorities, but a policy from the national government who seeks to enforce a policy which might be impractical based on spurious ideas circulated by the media about a "benefits culture".

Issues with the Bedroom Tax, Universal Credit and Rent Arrears

A further method the legislation uses to ensure good behaviour is through payment of rent, as any rent arrears can result in a flexible tenancy renewal being denied, or a household applying in a new area being classed as ineligible. Again, this is not unreasonable, councils and local housing authorities should require that social tenants pay their rent and do so on time.

There is, however, another consideration to be considered that has put increasing pressure on the finances of low-income households; the so-called bedroom tax. Unfortunately, the bedroom tax can leave social tenants in a situation where they are unable to pay their rent, or other bills, because part of their benefit has been withheld for under occupation. Many of those who are under occupying are willing to move to smaller properties, but none are available, Coast and Country housing association in the North East reported it had 2,500 tenants who were classed as under occupying their

accommodation and 16 smaller homes in which to re-house them[102]. Interestingly the Impact Assessment prepared by the DWP also acknowledged that availability of smaller properties was likely to be an issue:

> According to estimates from DCLG there is a surplus of three bedroom properties, based on the profile of existing working age tenants in receipt of Housing Benefit, and a lack of one bedroom accommodation in the social sector. In many areas this mismatch could mean that there are insufficient properties to enable tenants to move to accommodation of an appropriate size even if tenants wished to move and landlords were able to facilitate this movement.[103]

The result of this is that there are tenants who are forced, through a lack of other options, to say in more expensive and larger housing with no way of preventing themselves from under occupying. There is evidence that many choose to forego other things in order to cover the shortfall in housing benefit, with some ending up using food banks because they cannot afford their rent and enough food[104]. It is inevitable that under occupying tenants will end up in rent arrears because they cannot afford their housing costs. This, in turn, could end up with them losing or being made ineligible for social housing by falling foul of the acceptable behaviour rules for minor amounts of rent arrears when their flexible tenancies come up for renewal. Additionally, there is concern from several different groups that there will be unfortunate long-term effects on a large proportion of social tenants. For example, Coast and County housing association stated it was worried that:

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[102] T. Lloyd, 'Landlord can't rehouse 'bedroom tax' families' 18 June 2012 in Inside Housing. Found at: http://www.insidehousing.co.uk/6522385.article?PageNo=1&SortOrder=dateadded&PageSize=10#comments

[103] Impact Assessment, Title: Housing Benefit: Under occupation of social housing. Updated 28 June 2012 at [38]. Found at: www.dwp.gov.uk/docs/social-sector-housing-under-occupation-wr2011-ia.pdf

[104] N. Cooper et al, 'Below the Breadline - The Relentless Rise of Food Poverty in Britain' Oxfam The Trussell Trust and Church Action on Poverty, 15 June at 15. Found at: http://policy-practice.oxfam.org.uk/publications/below-the-breadline-the-relentless-rise-of-food-poverty-in-britain-317730

> ... its tenants could be driven into poverty as a result of housing benefit cuts for under-occupation despite a lack of smaller homes.[105]

Some local authorities sought novel solutions to help their tenants being caught in these situations. One system was to increase the number of homes reclassified to be "smaller" properties, such as Leeds:

> Leeds Council has also redesignated 856 homes, including 341 five bedroom properties downsized to four bedroom, 398 three bedroom to two bedroom and 126 two bedroom to one bedroom homes.[106]

This move was followed by councils in Nottingham, North Lanarkshire and Liverpool some of whom were planning to reclassify their properties without reference to the bedroom tax[107], some whose plans were a direct result of it.

The situation for those who are caught under occupying could be serious. If there are no smaller properties for the household, then they are stuck in a situation not of their own making where they could end up owing rent and therefore will not be able to renew their flexible tenancies all because their benefits have been cut without a suitable alternative being offered. This example shows one of the issues deserving being linked to good behaviour.

Where a system has a household trapped in a larger property for a lack of smaller ones, and is actively penalising said household by withholding part of its benefits, it seems grossly unfair then to call rent arrears caused by this situation "bad behaviour" and the household undeserving. There is a nuance to the situations of many social tenants which is not being considered by these sweeping generalisations on behaviour. Not everyone who owes rent arrears is a bad tenant, some owe because of a system that is setting them up to fail, as demonstrated above. Similarly, not everyone who has a behaviour order is

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105 *Ibid*.

106 Child Poverty Action Group, 'Responding to the under-occupation penalty/bedroom tax'. Found at: http://www.cpag.org.uk/cpla/responding-bedroom-tax

107 W. Wilson, 'Under-occupying social housing: Housing Benefit entitlement' Parliament Briefing Paper 06272, 1 November 2019 at 41-42. Found at: http://researchbriefings.files.parliament.uk/documents/SN06272/SN06272.pdf

a bad tenant. Some ASBOs are issued because the offended has a mental illness (or a member of their household has attention deficit hyperactivity disorder) and their behaviour is driven by factors other than being bad neighbours or wishing to harass anyone. As was demonstrated in Chapter 3, anti-social orders also have a gender bias with female-led households being disproportionately represented, according to a study by Hunter and Nixon[108]. Yet there is little or no discretion at either local or national level for a subtler approach to these issues, leaving councils to try an implement other solutions, for example the reclassification of bedrooms, to help tenants caught by the tax.

There is also evidence that the government's "flagship programme" for state benefits, called Universal Credit, is leading to increased rent arrears and worries of homelessness among the working poor[109]. Keep in mind that, thanks to the continuous assessment, those with rental arrears will be disqualified from new social tenancies. According to an investigation carried out by the BBC, based on freedom of information requests:

> More than 70% of council tenants in London on Universal Credit are in rent arrears, the BBC has found. Universal Credit, the government's flagship new benefit scheme, has been rolled out in eight London boroughs. As of January nearly 10,000 council tenants claiming Universal Credit owed money for rent. … It takes at least six weeks for a household to receive their first payment after applying and some claimants have had to wait up to 12 weeks to begin receiving regular payments.[110]

This was broken down by Borough as follows: 81% in Tower Hamlets, 77% in Southwark, 76% in Hammersmith and Fulham and 74% in Croydon[111]. By July of 2018, Housing Federations across Britain were calling on the government to

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[108] C. Hunter and J. Nixon, 'Taking the blame and losing the home: women and anti-social behaviour' (2001) 23:4 The Journal of Social Welfare & Family Law 395 at 398.

[109] See House of Commons Committee of Public Accounts, 'Universal Credit Sixty-Fourth Report of Session 2017–19' HC1183, House of Commons, Published 26 October 2018 at 12. Found at: https://publications.parliament.uk/pa/cm201719/cmselect/cmpubacc/1183/1183.pdf

[110] BBC News, 'Universal Credit leaves thousands of Londoners in rent arrears' 28 February 2018. Found at: https://www.bbc.co.uk/news/uk-england-london-43226487

[111] *Ibid*.

reform Universal Credit as arrears nationwide hit £24 million[112]. So, it seems likely that even those not affected by the bedroom tax could find themselves in rent arrears because of the effects of the new benefits system rolled out by the government. The Commons Public Accounts Select Committee published a report confirming that the roll out of Universal Credit is, in fact, leading to increased rent arrears, and by extension, increased evictions:

> We heard from Newcastle City Council that claimants going onto Universal Credit face increased rent arrears. Leicester City Council added that it had seen two eviction notices within the three weeks of Universal Credit full service being rolled out. This is supported by recent surveys covering the social housing sector, which found that almost three-quarters of Universal Credit tenants are in arrears compared to just over one quarter of other tenants.[113]

Thus, the situation worsens for those receiving housing benefits, making a situation that was already difficult nearly untenable.

Conclusion

Legislation introduced over the last decade has brought out the modern criteria of deservingness – good behaviour and being in work. The idea that social tenants must conform to standards of behaviour in the past, present and future has created a continuous cycle of assessment, where the tenant must start out deserving and remain so throughout the lifetime of the tenancy. This is checked at three stages application, during the tenancy, and then again when the tenancy is up for renewal. More than anything the continuous cycle of assessment allows the use of enhanced conditionality, where the morality of a tenant or an applicant is under constant scrutiny.

The case study in the next chapter will look specifically at the issues of the vulnerable, and the impact these changes have had as a way of illustrating the

[112] N. Barker, 'UK housing bodies warn Universal Credit is 'flawed' and 'causing suffering'' Inside Housing 10 July 2018. Found at: https://www.insidehousing.co.uk/news/news/uk-housing-bodies-warn-universal-credit-is-flawed-and-causing-suffering-57143

[113] Supra n.109 at [12] at 12.

more extreme problems. For example, the use of "zero tolerance" policies can disproportionately affect those with mental illness or other disabilities that might make their behaviour erratic.

Chapter 6

Case Study: Impact on the Vulnerable

This chapter seeks to explore the impact of the issues highlighted in this thesis by examining one group in a case study – the vulnerable. The first thing this chapter will do is define vulnerable in detail both in terms of the legal framework and the wider context beyond the law. Next, it will outline the specific issues faced by the vulnerable in terms of poverty and destitution and then those specific to housing. It will go on to examine how the legal framework affects vulnerable groups, including a consideration of cuts to legal aid. Next, it will consider how vulnerability interacts with housing need, and conditionality. Finally, it will assess specific issues of the criteria of deservingness and vulnerable groups.

Issues of Terminology - Disability vs. Vulnerability

The term disability is defined by Section 6(1)(a)-(b) of the Equality Act 2010 as:

(1) A person (P) has a disability if—
  (a) P has a physical or mental impairment, and
  (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

On the other hand, the definition of vulnerable, in terms of eligibility for social housing, is found in s.189(1)(c) of the Housing Act 1996, which states that an applicant is in priority need if they are:

> ...a person who is vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason, or with whom such a person resides or might reasonably be expected to reside...

From this it seems clear that a person who is disabled is a subset of the broader term vulnerable, however in terms of actual eligibility those who are disabled might find themselves not vulnerable enough to access social housing.

Several empirical studies, as well as government policy documents[1], use the term nearly interchangeably[2], and this is continued here as the differences between someone who is physically disabled and has a mental illness is not necessarily great in terms of housing statistics.

The Legal Framework and Vulnerability - In Priority Need

As discussed in Chapter 2, if a housing authority thinks that a person is homeless or is threatened with becoming homeless, they can undertake a Part 7 (of the Housing Act 1996) Assessment[3]. In order to qualify for the greatest duty by the local authority, often referred to as a main housing duty under s.193 of the Housing Act 1996[4], the applicant must be eligible for assistance, homeless, possess a local connection, be in priority need and not be intentionally homeless[5].

Four types of person are identified by s.189 of the Housing Act 1996 as being in priority need: a pregnant woman (and those who live with her), those with dependent children, the vulnerable and the homeless (or threatened with homelessness due to a disaster)[6].

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1 See K. Brown, 'Re-moralising 'vulnerability'' (2013) Vol.6 - Issue 1 People, Place & Policy Online. Found at: http://extra.shu.ac.uk/ppp-online/re-moralising-vulnerability-2/

2 See, for example, Hunter et al., 'Disabled people's experiences of antisocial behaviour and harassment in social housing: a critical review', The Disability Rights Commission with Sheffield Hallam University, August 2007.

3 S.184 Housing Act 1996.

4 Offers made under s.193 are referred to as a Part 6 offer of accommodation.

5 S.193 Housing Act 1996.

6 Other groups have been added by the Homelessness (Priority Need for Accommodation) (England) Order 2002.

Pereira - A Problematic Interpretation of Vulnerable

Vulnerable in terms of the Act was defined by Hobhouse LJ in *R v Camden LBC ex parte Pereira*[7] as a person who is:

> ...when homeless, less able to fend for himself than an ordinary homeless person so that injury or detriment to him will result when a less vulnerable man would be able to cope without harmful effects. ... The assessment is a composite one but there must be this risk of injury or detriment. If there is not this risk, the person will not be vulnerable.[8]

Hunter describes this test, often referred to as the *Pereira* test, as establishing when "making a decision about vulnerability, the authority must look forward to the future, i.e. it is an assessment of risk"[9]. The *Pereira* test was refined in *Osmani v Camden LBC*[10] where Auld LJ in the Court of Appeal drew several important conclusions on the *Pereira* case and s.189(1)(c). Firstly, that the definition given in *Pereira* is a judicial guide and not a statutory formulation. Secondly, that a person is vulnerable where he would be less able to care for himself than an "ordinary homeless person" and would therefore suffer greater harm. Thirdly, that this test does not require the vulnerable person to be less able to find accommodation than the so-called "ordinary homeless person". Fourthly, the test is a single one with two parts (a "composite test") – that the person is less able than an ordinary person to fend for himself and that this lack of ability will result in more harm. Fifthly, that the test revolves around the applicant becoming homeless and should not rely on his ability to fend for himself while still housed. Finally, that although medical experts'

7 (1999) 31 HLR 317.
8 *Ibid* at 330.
9 Hunter, 'Denying the severity of mental health problems to deny rights to the homeless' (2007) Vol.2 - Issue 1 People, Place & Policy Online 17 at 19. Found at: http://extra.shu.ac.uk/ppp-online/wp-content/uploads/2013/06/severity_mental_health_rights_homeless.pdf
10 [2005] HLR 22.

opinions should be sought after and considered, it is ultimately up to the local authority and not the expert to determine vulnerability in these cases[11].

Perhaps more crucially, the court held that the *Pereira* test and the subsequent judgment in *Osmani* mean that authorities have a wide discretion in determining who is an "ordinary homeless person". As Auld LJ stated in *Osmani* the definition is a "necessarily imprecise exercise of comparison"[12] and that the ordinary homeless person might include those with drug use or mental health issues, as these are common problems faced by the homeless[13]; Arden LJ states:

> In any event the phrase used in the *Pereira* test is "ordinary homeless person", not ordinary person who is homeless. This is a deliberate choice of language which firmly indicates that the characteristics of a normal homeless person are those which are relevant for the purposes of the *Pereira* test.[14]

However, this has not always been helpful to applicants, for example in *Johnson v Solihull MBC*[15] where the Court of Appeal held that a heroin addict and repeat offender was not considered to be in priority need because his situation was not sufficiently serious, and therefore he failed the *Pereira* test. This is like the case of *R. (Yeter) v Enfield LBC*[16] where the court held that a refugee suffering from depression was not vulnerable, because being depressed is likely to be a feature of the ordinary homeless person. This type of reasoning was extended to Post Traumatic Stress Disorder (PTSD) by the Court of Appeal in *Kruja v Enfield LBC*[17], in this case the court was also keen to emphasise that the role of the courts in these cases was extremely limited.

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11 Paraphrased from *ibid* at [38]. For more on this, see the section Use of Medical Evidence at 30.
12 *Supra* n.10 at [38(4)].
13 *Supra* n.10 per Arden LJ at [18].
14 *Supra* n.10 at [20].
15 [2013] EWCA Civ 752.
16 [2002] EWHC 2185 (QB).
17 [2005] HLR 13.

However, such decisions have faced critique on the basis that this type of reasoning is especially detrimental to those with mental illness:

> The conclusion which can be taken from this, is that depression and PTSD are the lot of the ordinary homeless person. So it would seem that depression per se is not sufficient to make an applicant vulnerable as this is one of the normal vicissitudes of homelessness and a risk to be borne by the homeless without assistance from the state.[18]

Loveland also addressed the circular nature of the reasoning deployed by the Court in *Pereira*:

> What the passage [in *Pereira*] seems to be saying is that a person is vulnerable per s.189(1)(c) if she is more vulnerable than someone who is less vulnerable than she is.[19]

In fact, the relative complexity of the definition from *Pereira* had obfuscated the law to the point that:

> The statutory meaning of "vulnerability" is now so specialised that practitioners everywhere find it near impossible to explain to extremely vulnerable people in extremely vulnerable circumstances that they are not vulnerable for housing purposes.[20]

The test used in *Pereira* became ubiquitous, being quoted (without footnote) in the Government's Code of Guidance to Homelessness Legislation[21] and being "constantly invoked in s.202 decision letters"[22]. In essence, most authorities and housing officers treated the decision in *Pereira* as if it were "the law" in this area. This use of *Pereira* was criticised by Lord Neuberger:

> [*Pereira*] has been treated in some decisions of courts and reviewing officers almost as a statutory definition, when it was simply intended to be guidance to Camden housing authority as to how to

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18 *Supra* n.9 at 21.

19 I. Loveland, 'Changing the meaning of 'vulnerable' under the homelessness legislation?' (2017) 39(3) J. Soc. Wel. & Fam. L. 298 at 301.

20 I. Mason, 'Vulnerability and the *Pereira* Test' (2005) 8(4) Journal of Housing Law 55 at 58.

21 It appeared in both the 2003 and 2006 codes. See for example the Homelessness code of guidance for councils: July 2006 at [10.13] at 85. Please note this guidance is not the most up to date version. Found at: https://www.gov.uk/government/publications/homelessness-code-of-guidance-for-councils-july-2006

22 *Supra* n.19 at 300.

> approach Mr Pereira's application, which was being remitted for reconsideration.[23]

However, the Supreme Court offered clarification on this matter in 2015.

Hotak - A New Interpretation

The *Pereira* test was revisited by the Supreme Court in *Hotak v London Borough of Southwark*[24]. In his judgment Lord Neuberger was critical of the apparent circular logic in *Pereira*:

> Accordingly, I consider that the approach consistently adopted by the Court of Appeal that "vulnerable" in section 189(1)(c) connotes "significantly more vulnerable than ordinarily vulnerable" as a result of being rendered homeless, is correct. But that leaves open the question of the comparator group. In *Ex p Pereira* ... Hobhouse LJ suggested that the comparator was "the ordinary homeless person", which is, as I have mentioned, an uncharacteristically imprecise expression. It could mean (i) the ordinary person if rendered homeless, or (ii) the ordinary person who is actually homeless (a) viewed nationally, or (b) viewed by reference to the authority's experience. ... Accordingly, I consider that, in order to decide whether an applicant falls within section 189(1)(c), an authority or reviewing officer should compare him with an ordinary person, but an ordinary person if made homeless, not an ordinary actual homeless person.[25]

This interpretation is a startling departure from previous decisions, and appears to contradict Arden LJ's reasoning in *Osmani*[26]. On that basis, the decisions in *ex parte Yeter* and *Kruja* might well have been decided differently. As a result, the decision in *Hotak* has given commentators hope that more applicants will be considered vulnerable enough to be considered in priority need pursuant to s.189(1)(c):

> The notion of vulnerability is at root concerned with the likelihood of a homeless person suffering severe harm to his or her physical and mental health when homeless. ... One may expect the new comparator to result in some, perhaps many, homeless people who

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23 [2015] UKSC 30 at [49].
24 [2015] UKSC 30.
25 *Ibid* at [53] and [58].
26 *Supra* n.14.

> would not previously have been found vulnerable now to be so regarded.[27]

However, Loveland suggests that the decision in *Hotak*, while offering some hope that more applicants will qualify for the greatest housing duty under s.193, might also lead to a different set of difficulties for housing officers in practical application:

> One need not be a seer to envisage that applicants will find – in the aftermath of *Hotak* – a great many s.202 decisions on vulnerability by many local authorities which contain muddled, confusing and internally contradictory text. The rigour with which a court approaches the task of lending meaning to that text will have a very substantial impact on whether a particular vulnerability decision is found unlawful. … One might think 'rigour' would result in decisions that were defensible in 'technical' terms, and which did not contain 'inconsistencies', and thus that decisions which had those undesirable qualities could not be 'rigorous'. As it stands, para 79 of *Hotak* may turn out to be a source of some confusion. For this and the other reasons alluded to above, housing officers will likely find applying *Hotak* to be a substantial challenge.[28]

The Supreme Court also considered if the resources of the local council or authority should be taken into account when making a decision on vulnerability of an applicant. Lord Neuberger stated:

> … an authority's duty under Part VII of the 1996 Act is not to be influenced or affected by the resources available to the authority. Once they have determined the status of an applicant under Part VII of the 1996 Act, their duty to that applicant is as defined in the Act: the fact that the authority may be very short of money and/or available accommodation cannot in any way affect whether an applicant is in priority need. In so far as a balancing exercise between housing the homeless and conserving local authority resources is appropriate, it has been carried out by Parliament when enacting Part VII.[29]

Therefore, it is not considered appropriate for housing officers to consider the availability of accommodation when deciding on an applicant's vulnerability

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[27] I. Loveland, 'Case Comment - Affordability and intentional homelessness' (2016) 2 Conv. 146 at 147.

[28] *Supra* n.19 at 310-311.

[29] *Supra* n.24 at [39].

under s.189(1)(c) of the Housing Act 1996. This would seem to be a sensible decision on the basis it is the characteristics of the applicant that should be considered. However, the reasoning behind this by Lord Neuberger enters into discussions of Parliamentary sovereignty. In other words, if Parliament had wanted such considerations taken into account when deciding on vulnerability, then there would be text in s.189 that indicated as such. As there is nothing to indicate this in the wording of the Act, then adding or implying such wording would no longer be judicial interpretation. However, there is some indication that this reasoning is contradictory even within *Hotak* itself:

> Much the same view can be taken of another element of the judgement which seems to offer a perfectly clear rule for lower to courts to follow that makes absolutely no sense at all. … Constitutional traditionalists would no doubt applaud such Diceyan rigour [in Neuberger's reasoning]. And then scratch their heads in wondering how to reconcile this judicial deference to Parliament with the reasoning offered earlier in *Hotak* that tells us when Parliament used the word 'vulnerable' without giving any textual hint that that this concept embraced degrees of vulnerability and that only the **most** vulnerable people were **actually** vulnerable, it is that unspoken and unhinted at result that Parliament did indeed enact. We might stop scratching when we see that at various points in the Act 'resources' are identified as relevant considerations. It seems clear that in two of the 'gateway' questions it is quite proper for a council to take account of prevailing housing circumstances. That consideration is expressly identified as relevant in the statutory definition of 'homelessness'.[30]

However, as pre-*Hotak*, many s.202 decision letters contained reference to the resources available such considerations would now be unlawful in determining vulnerability. Again, this might signal a positive change for applicants who, under Pereira, might not have been considered vulnerable. Yet the potentially incoherent reasoning on this point might well make

[30] *Supra* n.19 at 306.

decisions more difficult for housing officers, and the explanations to applicants more labyrinthine.

Third Party Assistance and Vulnerability

There is little doubt that Mr. Hotak was vulnerable without the support of his brother. He has a measured IQ of 47, and required help with most of his day-to-day tasks such as washing, dressing and making meals for himself. Additionally, he has several other mental health issues including post-traumatic stress disorder[31]. The reason he was considered not to be in priority need by Southwark council was the fact his brother would support him even homeless, and therefore Mr. Hotak was not at more risk than an ordinary person. The s.202 letter the brothers received from Southwark stated:

> "[I]t is reasonable to expect a fit and healthy adult to attempt to house and support his brother whilst they are homeless together. In addition [Ezatullah Hotak] has confirmed that he currently looks after [his brother] and he would continue to do so if they were street homeless together."[32]

One of the questions the Supreme Court had to address was whether the support of a third party could prevent an otherwise vulnerable individual from being considered in priority need. The court held that the local authority was entitled to consider "other resources" available to the applicant when deciding if they are in priority need. Lord Neuberger reasoned:

> As explained in para 37 above, an applicant's vulnerability under section 189(1)(c) has to be assessed by reference to his situation if and when homeless. In other words, it is not so much a clinical assessment of his physical and mental ability (to use a shorthand expression): it is a contextual and practical assessment of his physical and mental ability if he is rendered homeless (which, as just explained, must be compared with the ability of an ordinary person if rendered homeless). The fact that it is a contextual and practical question points strongly in favour of the conclusion that, when deciding if he is "vulnerable", one must take into account

[31] *Supra* n.24 at [23].
[32] *Supra* n.24 at [26.iii].

> such services and support that would be available to the applicant if he were homeless.[33]

This reasoning seems rather inconsistent with the court's earlier approach to the question of local council resources during considerations on in priority need. As Loveland argues:

> This seems very curious, given the court's earlier insistence that a local authority could not take into account its own resources or the accommodation available to it when deciding if a person was vulnerable. Those matters - or the lack of them - would seem an essential element of the 'services and support' available. … The analytical incoherence, however, remains. Had the court limited its observations to support provided by an applicant's family members or close friends, it could be suggested that the use of the word 'contextual' in paragraph 62 [quoted here as footnote 33] remained tied to the applicant's personal circumstances, and did not extend to the broader housing/care facilities which were available to her; i.e. to the 'resources' which an earlier part of the judgement told us had no bearing on the vulnerability question. But the concept was not so limited. This evidently means that 'resources' are both relevant and not relevant to assessing vulnerability[34]

This critique does seem to hold merit, it is possible such points will confuse housing officers and other decision makers on exactly which resources are relevant and which are not. However, it is also possible local authorities will change the wording of their s.202 letters to indicate that an applicant has additional resources available specific to their disability/vulnerability, rather than considering the wider context of housing availability this will be sufficient to be considered lawful, for example the provision of charitable assistance to the applicant rather than a lack of available properties. It is also possible that allowing such considerations will render some of the potential positives of *Hotak* void; enabling local authorities to substitute one set of reasoning for another.

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33 *Supra* n.24 at [62].

34 *Supra* n.19 at 309.

There are also the wider implications of this reasoning where family members withdraw help, or support from a vulnerable person in order ostensibly to help them stay off the streets. This reasoning was mentioned specifically in the dissenting judgement by Lady Hale, who felt the affect would act as a "perverse incentive"[35]:

> I do not see how it can be consistent with the intention of the statute to take into account help which may be available from other members of the household … It is difficult to think that Parliament contemplated that the non-vulnerable could only apply on behalf of them both if he was not looking after the vulnerable one. Why on earth would Parliament want to give such a heartless person priority and priority over the person who was fulfilling his familial duties? … It is a point about the people whom Parliament is most likely to have wanted to single out as having a priority need. The section draws no distinction between those who are and those who are not providing help to their old or disabled house-mate, but if Parliament had wanted to distinguish between the two, it would surely have found the helpful one more worthy of priority than the unhelpful.[36]

Lady Hale also felt that the substantial modifications made in Hotak would mean that the council's decision in Mr. Hotak's case was not correct on certain points of law and that:

> … good reason to predict that, even taking into account his brother's help, the local authority would now conclude that Mr Hotak remained more vulnerable than an ordinary person.[37]

While there are points of Hotak that offer hope and clarification, there are also significant issues. While one could argue that taking into account the personal circumstances of the individual would include a consideration of their family support, and not the local authority's stock availability, there is the contentious issue of wider third-party support. It seems that Loveland's analysis might be correct that if Lord Neuberger had limited his comments

[35] *Supra* n.24 at [97].
[36] *Supra* n.24 at [96]-[97].
[37] *Supra* n.24 at [102].

only to the family of the applicant, then there is an argument for these factors being distinguishable. However, by including charities and other local authority support systems, there are questions as to why wider resources available to the applicant are included for one but not the other. The distinction here feels artificial at best.

The Use of Stock Phrases in Housing Decisions

It should be noted that the use of so-called stock phrases by local authorities in s.204 review letters was highlighted as an issue by Lord Neuberger:

> … certain expressions seem to have entered the vocabulary of those involved in homelessness issues, which can lead to difficulties when they are applied to strictly legal problems. In particular, for instance, "street homelessness" and "fend for oneself" are expressions which one finds, in one or more of the review letters in the present appeals. Such expressions may be useful in discussions, but they can be dangerous if employed in a document which is intended to have legal effect. There are obvious dangers of using such expressions. They may start to supplant the statutory test, which is normally inappropriate in principle, and, when they originate from a judgment, they may be apt for the particular case before the court, but not necessarily for the general run of cases. Additionally, they may mean different things to different people.[38]

Yet, according to Loveland the use of such phrases is de rigueur for most letters regarding housing decisions[39]. This issue has continued post-*Hotak*, according to Bell and Sahota:

> Local authorities across the country have seemed somewhat comfortable in couching their negative review decisions in a set of well-worn phrases but these recent decisions, along with other successful s 204 appeal decisions, cast doubt on the validity of doing so. In the absence of more authoritative court of appeal decisions, it is hoped that the successes in the county court can be relied upon when making review representations and arguing s 204 appeals in order to persuade local authorities to move to a more lawful approach to decision making. This may in turn lead to the types of decisions we envisaged post-*Hotak*. It is not enough simply

[38] *Supra* n.24 at [40].
[39] *Supra* n.19 at 300.

> to refer to medical adviser's decisions and to say that they "have considered all the available evidence" or to conclude that the applicant is not "significantly" more vulnerable than the ordinary person. Local authorities need to identify and engage with the actual narratives put before them rather than bring out stock responses not suited to the particular vulnerability being advanced by an individual applicant.[40]

It seems that many local authorities have replaced the wording pre-*Hotak* using *Pereira* with the new test in *Hotak* without necessarily engaging with it properly. In fact, in the next case, the local authority had continued to use *Pereira*-style reasoning when issuing a refusal. The use of such phrases can cut down on the work required to send out these letters, which is efficient, but might also increase the risk of the council erring in a point of law given the critique of their overuse in *Hotak*.

Post-Hotak: The Use of Pereira for S.204

Hotak has certainly influenced the decision-making process. In the case of *Hemley v Croydon London Borough Council*[41] a local authority appealed against a decision pursuant to s.204 of the Housing Act 1996. As previously stated, this section allows an applicant to appeal to a county court on a point of law. The applicant complained that the local authority had used the wrong test, the *Pereira* test, rather than the *Hotak* test in determining if they were in priority need. There was no contention that *Hotak* was the correct test to determine priority need, or that the new test had changed *Pereira*. However, the local authority claimed it did not matter because the decision would remain the same regardless of the test used.

The Court of Appeal held that it was not sufficiently certain that the same result would be achieved using *Hotak* as had been using *Pereira* and the local authority's appeal was dismissed. This provides some compelling evidence

[40] S. Bell et al., 'Serious Consequences' [2017] 167(7740) New Law Journal 11 at 12.
[41] Unreported; CA (Civ Div); 25 July 2017.

that authorities must exercise care and use the correct test when determining the vulnerability of an applicant. It is unclear if more applicants are considered to be vulnerable under *Hotak*, but *Hemley* does send signals to local authorities that they must use the correct test. Still there is the ever-present use of stock phrasing (see footnote 40) when dealing with applicants, which has continued post-*Hotak*.

Post-Hotak: Defining "Significantly"

As a reminder, Lord Neuberger in the *Hotak* case stated:

> Accordingly, I consider that the approach consistently adopted by the Court of Appeal that "vulnerable" in section 189(1)(c) connotes "significantly more vulnerable than ordinarily vulnerable" as a result of being rendered homeless, is correct.[42]

However, there was no further explanation from Lord Neuberger on what he meant by this, leaving many commentators in little doubt that "the meaning of "significantly" would be the next battlefield for priority need in homeless decisions"[43]. Two cases from the county court[44] had held that the term should be construed as analogous to "substantial" in the Equality Act 2010, with Recorder Hochauser QC stating in *Mohammed v Southwark LBC*[45]:

> The term 'significantly' in Lord Neuberger's judgment in *Hotak* should be construed by analogy with 'substantial' in Equality Act 2010, as meaning 'more than minor or trivial'.[46]

However, it was not until the case of *Panayiotou v London Borough of Waltham Forest*[47] *that it was considered by any higher court. In this case, the Court of Appeal*

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42 *Supra* n.23 at [53].

43 G. Peaker, 'Significantly more vulnerable – how much, or what kind?', published 23/10/2017 - The Nearly Legal: Housing Law News and Comments Blog. Found at: https://nearlylegal.co.uk/2017/10/significantly-vulnerable-much-kind/

44 See *Mohammed v Southwark LBC* (unreported) 18 December 2015 , County Court at Central London, and *Butt v Hackney LBC* (unreported) 26 February 2016 , County Court at Central London

45 *Ibid*.

46 G. Peaker, 'Vulnerability after *Hotak/Johnson/Kanu*', published 22/08/2016 - The Nearly Legal: Housing Law News and Comments Blog. Found at: https://nearlylegal.co.uk/2016/08/vulnerability-after-hotakjohnsonkanu/

47 (2017) EWCA Civ 1624.

decided that it did need to provide a more detailed explanation of Lord Neuberger's requirement for "significantly more vulnerable"[48]*, with* Lord Justice Lewison concluding:

> I do not, therefore consider that Lord Neuberger can have used "significantly" in such a way as to introduce for the first time a quantitative threshold, particularly in the light of his warning about glossing the statute. Rather, in my opinion, he was using the adverb in a qualitative sense. In other words, the question to be asked is whether, when compared to an ordinary person if made homeless, the applicant, in consequence of a characteristic within section 189 (1) (c), would suffer or be at risk of suffering harm or detriment which the ordinary person would not suffer or be at risk of suffering such that the harm or detriment would make a noticeable difference to his ability to deal with the consequences of homelessness. To put it another way, what Lord Neuberger must have meant was that an applicant would be vulnerable if he were at risk of more harm in a significant way. Whether the test is met in relation to any given set of facts is a question of evaluative judgment for the reviewer.[49]

He also considered the approach of the lower courts, interpreting significantly to be comparable with the term "substantial" from the Equality Act 2010 to be the wrong approach[50]. This has broadly been welcomed by commentators, with Peaker stating:

> The emphasis on the qualitative rather than quantitative nature of the evaluation is to be welcomed. Mr Perdios [a housing review officer whose decision was involved in the case] has been pushing his interpretation of 'significantly more vulnerable' for a couple of years. It has now been found to be wrong in principle. There will be a lot of homeless reviews tarnished by that approach. 'Significantly' is not 'more harm plus'. It is about the specifics of the individual's situation. No 'threshold' can be set, such as 'yes you are depressed, but you haven't actually tried to commit suicide', as per Mr Perdios and indeed Now Medical. The decision maker must

[48] Paraphrased *ibid* at [45] per Lewison LJ.
[49] *Ibid* at [64].
[50] *Ibid* at [56] - [58].

> deal with the actuality and qualitative characteristics of the applicant's situation.[51]

However, in a wider-ranging article on s.204, Madge considers that the law itself is failing the homeless, interestingly noting:

> Many people would consider that at least some of those who lost in the Court of Appeal were "deserving" homeless people who merited local authority accommodation, or better accommodation than that offered. In practice, the determination of facts and the decision-making power vested in local authorities is subject to minimal judicial scrutiny.[52]

Before concluding that amending s.204 allowing courts to review cases on the facts, rather than only on points of law might be a solution[53]. Subsequently, in *Rother DC v Freeman-Loach*[54] the Court of Appeal considered the contents of the s.204(a) letter, holding that:

> … so that the review decision cannot be faulted because it failed to define 'vulnerable' or 'significantly' or failed to list the attributes of the ordinary person if made homeless. … How much detail needs to be given of the reasons for the council's decision in a particular case depends on the circumstances of that case.[55]

Further, it considered that the onus falls on applicants when appealing against a decision:

> Accordingly, in the present context it is not for the reviewing officer to demonstrate positively that he has correctly understood the law. It is for the applicant to show that he has not. The reviewing officer is not writing an examination paper in housing law. Nor is he required to expound on the finer points of a decision of the Supreme Court. In *Hotak* itself there was no criticism of the review decision in Mr Johnson's case where the reviewing officer had used the adverb "significantly" without further elaboration.[56]

However, in terms of defining vulnerability there is little of note here, as post-*Hotak* and with the considerations of *Panayiotou* on the term significantly there

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51 *Supra* n.43.
52 N. Madge, 'Failing the homeless?', [2018] 21(6) Journal of Housing Law 119 at 126.
53 Paraphrased from *ibid*.
54 [2018] EWCA Civ 368.
55 *Ibid* at [35] per Rose J.
56 *Ibid* at [52] per Lewison LJ.

is little more to discuss. Yet the case is worthy of mention simply as a demonstration of the very high threshold an applicant has on having a housing decision reviewed by the courts. Again, this links back to the point made by Madge about minimal judicial scrutiny, most housing decisions will go unchallenged and with applicants having little recourse except on points of law.

More on the Ordinary Person and a Functionality Requirement?

Subsequently, *in Guiste v Lambeth LBC*[57], the Court of Appeal considered exactly who the *Hotak* ordinary person is in terms of their health:

> The *Hotak* comparison must therefore be made with an ordinary person who is in normal health and does not have hypoparathyroidism (or indeed any other physical or mental illness, or disability of the type that might render him vulnerable within the meaning of section 189(1)(c))…[58]

In other words, when comparing an applicant with the ordinary person if made homeless, the comparator is actually "the ordinary person who is in normal health (with no physical or mental illness or disability of the type that might render him vulnerable within the meaning of section 189(1)(c) if made homeless".

Additionally, Lambeth had argued that the judgment in *Panayiotou introduced a "functionality test". In that case, Lewison LJ had stated:*

> One of the themes that runs through previous decisions of this court is that there must be a causal link between the particular characteristic (old age, physical disability etc) and the effect of homelessness: in other words some kind of functionality requirement. We now know that the functionality is not an ability to "fend for oneself" nor an ability "to cope with homelessness without harm". But if it is not that, what is it? The nearest that Lord Neuberger came to providing an answer was in saying that section

[57] (2019) EWCA Civ 1758
[58] *Ibid* at [54] per Henderson LJ.

> 189 (1) (c) is concerned with: "an applicant's vulnerability if he is not provided with accommodation."[59]

This submission was not accepted in any way by the court, and Henderson LJ was firm in his rejection of it:

> I am unable to accept this submission, which would import an extra layer of complexity into a test which is already far from simple to expound. Lewison LJ's observations on functionality were made in the context that there must be a causal link between the particular characteristic relied on under section 189(1)(c) and the effect of homelessness. They were not in my judgment intended to introduce a new and additional test, over and above the requirement for a causal link between the relevant characteristic and the effect of being made homeless. Nor is it clear to me how this supposed further requirement should be formulated, or what the minimum ingredients of such functionality would be. Ms O'Brien [for Lambeth] provided us with a list of such factors in her oral submissions, while acknowledging that the precise content of the requirement would always depend on the circumstances of the case; but she was unable to cite any authority for this approach, apart from the passage in *Panayiotou* which, as I have explained, goes only to the question of causation.[60]

Again, this judgment is heartening news, although it was of surprise to some commentators that there was a requirement to reaffirm that the ordinary person if made homeless is healthy[61]. Further, the wholesale rejection of the idea of a functionality test on top of the vulnerability requirements should hopefully prevent other councils from making similar arguments in the future. Together, this case could improve the situation for those applicants attempting to be found to be in priority need through vulnerability within the meaning of s.189(1)(c).

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59 *Supra* n.47 at [35].

60 *Supra* n.117 at [69-70]

61 See Peaker's Comment: "It shows how far we have come in the jurisprudence on vulnerability (such that it is) that the Court of Appeal needed to re-affirm this, but there we go." Found at: https://nearlylegal.co.uk/2019/10/more-on-vulnerability/

Vulnerability as a Social Construct

While vulnerability has a specific use within social housing, there are also issues with the definition as a whole. In fact, some researchers have found that within the housing context that social housing providers sometimes struggled with understanding the term fully. This has, in turn, led to some confusion:

> Registered social landlords also tended to refer to "the vulnerable". This category always includes people with mental health problems, but does not always mention people with disabilities and only one specified learning disabilities.[62]

In fact, many scholarly works from other disciplines thematically link back to the lack of definition of vulnerability as problematic, many deal with the concept as a justification of applying societal norms through state intervention[63].

Others argue that the term also has apparent negative connotations including victimhood and helplessness, which lead to an "approach [that] invites objectionably paternalistic and coercive forms of intervention to protect those identified as vulnerable."[64] Virtually all deal with the idea of vulnerability and its relation to autonomy (and invulnerability), although there is a great deal of debate on how the terms should be construed. While some academics in fields such as psychology argue the two terms are antonyms[65], many in philosophy, sociology and law contend that this is an oversimplified view with the reality being a much more nuanced and complicated relationship[66]. A good example of this is Fineman's vulnerability thesis:

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62 *Ibid* at 42.

63 *Ibid* at 66.

64 C. Mackenzie, 'The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability' in C. Mackenzie, W. Rogers, S. Dodds (eds.) *Vulnerability: New Essays in Ethics and Feminist Philosophy* (New York 2014) at 33.

65 S. Murray et al., 'Commitment insurance: Compensating for the autonomy costs of interdependence in close relationships,' (2009) Vol.97 - Issue 2 Journal of Personality and Social Psychology at 256.

66 See, for example, J. Anderson, 'Autonomy and Vulnerability Entwined' in *supra* n.64 at 134.

> Vulnerability is posited as a fundamental characteristic that positions individuals in relation to each other as human beings and also suggests an appropriate relationship of shared responsibility as between state, societal institutions and individuals.[67]

Thus, everyone falls into the category of vulnerable and the more classical idea that only certain groups are classified as such is seen by Fineman as "pernicious"[68]. Firstly, because the classical view actually harms the very groups it is trying to protect by unduly focussing on their differences, rather than their similarities with the whole. Secondly, the idea damages those who fall outside the non-protected members of society because it "suggests some of us are not vulnerable"[69].

However, in practical terms, the Fineman thesis on vulnerability is not being used by the interpretation of statutory vulnerability as designed by the English courts in *Hotak*, or in fact the reasoning used in the European Court of Justice, although Peroni and Timmer feel there is no issue reconciling the two on a purely conceptual level[70]. In terms of this thesis, however, this is where the theoretical debate becomes increasingly problematic and unhelpful; it does not engage with the actual case law sufficiently.

Vulnerability is also used as a justification; the term continues to be used in policy and statute but can apply to a wide variety of groups and has been linked with the social construct of the "deserving" poor and "re-moralising social welfare"[71]. Brown points out that the former Coalition government uses the term often in their major policy announcements that affect social welfare:

> As spending cuts are made, drawing on notions of vulnerability offers a rhetorical means of reassuring the public that those who

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67 M. Fineman and A. Grear, 'Introduction - Vulnerability as Heuristic - An Invitation to Future Exploration' in M.A. Fineman and A. Grear (eds.) *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Anna Grear, Farnham 2013) at 2-3.

68 M. Fineman, 'Equality, Autonomy, and the Vulnerable Subject in Law and Politics' in *ibid* at 16.

69 *Ibid*.

70 L. Peroni & A. Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law' (2013) 11(4) Int J Constitutional Law 1056 at 1060.

71 *Supra* n.1.

> need and 'deserve' services the most will not be affected, thereby bolstering the moral and economic credentials of the government.[72]

Carr argues that using vulnerability for such distinctions is not only unhelpful, but socially divisive as it "can result in unseemly and unproductive competition for resources"[73] between groups and moreover the distinction can generate resentment between those who are not seen as vulnerable[74]. It seems likely that social landlords use this term mainly because it is used for eligibility and they are familiar with the statutory definition and even the judicial interpretation from *Pereira*[75] and *Hotak*[76]. Other potential reasons could be to help avoid a negative label being given, and perhaps in the hope of not causing offence.

In terms of this thesis, the terms are being interchangeably, which is admittedly imprecise. However, it is a "necessary evil" in terms of social housing, as Auld LJ stated in *Osmani v Camden LBC* the legal definition of vulnerability for social housing is a "necessarily imprecise exercise of comparison"[77]. In other words, the way statute has chosen to define the term "vulnerable" for access to social housing, and the way it has been interpreted by the courts is also imprecise. It is difficult to narrow the definition satisfactorily without straying too far from the meaning within the legal framework. Therefore, the interchangeability of the definitions, while imprecise, follows the law in this area.

Vulnerability and Poverty

Being disabled can lead to greater financial strain and lead households with vulnerable members into poverty. A report by the Equality and Human Rights

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72 *Ibid*.
73 H. Carr, 'Housing the Vulnerable Subject: The English Context' in *supra* n.67 at 108.
74 *Supra* n.67 at 15.
75 From *R v Camden LBC ex parte Pereira* (1999) 31 HLR 317.
76 From *Hotak v London Borough of Southwark* [2015] UKSC 30.
77 [2005] HLR 22 at [38(4)].

Commission highlighted that, even within working families, those with disabled members[78] were more likely to be considered in relative poverty[79]. These findings are substantiated by a later report by the Social Metrics Commission on poverty measures, which discovered:

> Accounts for the inescapable costs that some families face, which make them more likely than others to experience poverty. These include, the extra costs of disability, and costs of childcare and rental and mortgage costs … When considered as an average within net-income vigintiles, these effects are relatively small; the overall median level of net incomes falls by £14 a week. However, this change makes a much larger difference to the net incomes of families with a disabled person. The median value of net incomes for these families falls by £82 a week…[80]

Further, a study on material deprivation conducted by the Institute for Fiscal Studies concluded:

> Disabled households with incomes above the poverty line are still more likely to be deprived than the average household (including those in poverty).[81]

The report highlighted that this is likely caused by the additional costs faced by those who are disabled[82]. This means, in almost all measures of poverty disabled/vulnerable families are in a worse position than those who have no disabled members.

There is also evidence to support that more vulnerable people are destitute because of their ill health. Destitution has been defined, in a study by the Joseph Rowntree Foundation (JRF), as a situation where a person (or their

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78 Equality and Human Rights Commission, 'Being Disabled in Britain – A Journey Less Equal' April 2017 at 63. Found at: https://www.equalityhumanrights.com/sites/default/files/being-disabled-in-britain.pdf

79 This report considers those living below '60% of contemporary median income after housing costs' to be living in relative poverty.

80 Social Metric Commission, 'A new measure of poverty for the UK' September 2018 at 6, and 46-47. Found at: http://socialmetricscommission.org.uk/MEASURING-POVERTY-FULL_REPORT.pdf

81 C. Belfield, 'Living Standards, Poverty and Inequality in the UK: 2016' The Institute for Fiscal Studies at 76. Found at: https://www.ifs.org.uk/uploads/publications/comms/R117.pdf

82 *Supra* n.149 at 67.

children) have lacked two or more of the six essentials[83] over the past month because they were unable to afford them, or their income is so low they cannot purchase the essentials for themselves[84]. A further report published in mid-2018 discovered 60% of all the destitute lived in social housing[85]. The study also uncovered that nearly a third of all respondents reported "serious health problems" as being a factor that related to their destitution:

> Serious health problems were reported by a significant number of all destitute service users (29 per cent). … Long term mental health vulnerabilities (including schizophrenia, bi-polar disorder and severe anxiety disorders) and learning difficulties contributed to destitution among a few interviewees who struggled to cope effectively on a very low income…[86]

This demonstrates that vulnerable people can end up destitute partly because of their illness. Nearly a third of destitute respondents listed health as a factor that lead them into their current situation, which is an indication of the difficult position in which some vulnerable, social housing tenants find themselves, due to their health. This report also discovered that those who are ill can incur additional costs[87]. In fact, a report for the charity Muscular Dystrophy UK determined that many disabled people[88] are ending up in debt because their homes required adaptions that were either not covered by local authorities, or would cost significantly more than the means-tested grants they were awarded:

> Even families who qualified for the maximum £30,000 grant had to put forward additional money themselves. In some cases, the amount contributed by the family was nearly three the amount put forward by the council. For many of these families, this meant incurring huge personal debt, suffering long term financial

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83 The six essentials are: shelter, food, heating, lighting, clothing and basic toiletries. S. Fitzpatrick et al., 'Destitution in the UK' The Joseph Rowntree Foundation, April 2016 at 2. Found at: https://www.jrf.org.uk/report/destitution-uk

84 Paraphrased from *ibid*.

85 *Ibid* at 2-3.

86 *Supra* n.83 at 33.

87 *Supra* n.83 at 43.

88 This study concentrated on those with muscle wasting conditions.

> hardship or relying on the generosity of wider family members to see them through.[89]

Some respondents had spent their life savings and incurred debt on credit cards, re-mortgage their home, or just "made do" because they could not afford the adaptions they required. Additional costs associated with health either physical or mental can play a significant role in household destitution.

Housing Challenges Faced by the Vulnerable

In order to see the effects that the legal framework has on the vulnerable it is necessary to understand that they, as a group, face unique challenges to housing. It is impossible to discuss why losing a tenancy could be more problematic for a wheelchair user without understanding the context of that situation, where there is a lack of suitable accommodation available.

It is also important to note that stress, which can be caused by housing issues can exacerbate existing health conditions:

> Insecurity, displacement and housing conditions had an extremely destablising effect on people's mental health, as 89% mentioned worsening mental health as a result of their housing situation. Specifically, 66% mentioned worsening depression and 25% were suffering from insomnia. Most worryingly, in an open question about health 9% stated that they had suicidal thoughts and 9% mentioned self-harm. This compares with 4.3% of the general population reporting suicidal thoughts in the last year …[90]

This means that many of the difficulties that are described in this section will exacerbate the pre-existing conditions from which vulnerable people suffer.

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89 Muscular Dystrophy UK, 'Breaking point - The crisis in accessible housing and adaptations' September 2015 at 8. Found at: http://www.musculardystrophyuk.org/wp-content/uploads/2015/11/POL5-C-Housing-briefing-final.pdf

90 K. Hardy et al, 'Homelessness, health and housing - Participatory action research in East London' Sponsored by University of Leeds and the Feminist Review Trust, December 2016 at 5. Found at: http://www.e15report.org.uk/Resources/Downloads/E15_Final_report_PAR_in_East_London.pdf

Housing Accessibility for Physical Disabilities

According to a report by the Equalities and Human Rights Commission there is a "chronic shortage of accessible homes"[91] with only 7% of homes offering a minimal number of accessible features:

> Local authorities are not building enough accessible homes to meet demand. The number of disabled people is increasing; in 2016, there were an estimated 13.3 million disabled people in Britain, up from 11.9 million in 2013/14…Building regulations in England and Wales and, until recently, in Scotland have produced houses that are generally inaccessible, particularly for people who use wheelchairs. …Our survey of local authorities, undertaken as part of our evidential basis for the inquiry, found that the systems used to identify disabled people's requirements and deliver accessible houses are weak … Few local authorities across Britain set targets for accessible housing and many reported that developers are reluctant to build accessible houses, as they see them as less profitable. There is a notable exception to this in London, where higher accessible and adaptable standards have been the default for the last 10 years.[92]

To highlight the serious nature of this problem, a report by the Muscular Dystrophy UK, a charity raising awareness of the disease, found a number of examples of disabled people waiting for adapted homes with none available[93].

Similarly, wait times for adjustments to be made to less accessible homes such as grab rails, stair lifts and accessible bathroom facilities can be very long with the average being around 22 weeks eight weeks for a decision plus fourteen for the installation. However, that is just an average some local authorities wait times were over a year. This is an even bigger issue in private rented accommodation with many tenants finding landlords generally reluctant to allow adaptations to their properties[94]. The UN Committee on the Rights of

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91 Equalities and Human Rights Commission Report, 'Housing and Disabled People – Britain's Hidden Crisis: Executive Summary' Published May 2018 at 4. Found at: https://www.equalityhumanrights.com/sites/default/files/housing-and-disabled-people-britains-hidden-crisis-executive-summary.pdf

92 *Ibid*.

93 *Supra* n.89 at 11.

94 *Supra* n.89 at 6.

Persons with Disabilities felt that part of the issue with the lack of accessibility and advancement on the rights of disabled people was caused by austerity:

> The UN Committee highlighted specific concerns 'that austerity measures have hindered the advancement of accessibility', and concerns regarding 'the reduction in social protection schemes related to housing, household income and budgets for independent living'. … Reviews of other UN human rights mechanisms and processes have also called attention to problems with suitable housing and independent living for disabled people…[95]

The report goes on to state that 33% of disabled tenants in privately rented tenants, 20% of social housing tenants, and 14% of homeowners[96] live in unsuitable accommodation[97]. Unsuitable housing can affect the financial and emotional well-being of disabled people. It can also impact other areas of a person's life, such as their ability to keep a job. As working status is a way that those in social housing are viewed as deserving, this could be significant:

> Unmet need for accessible housing is associated with worse employment outcomes among working age adults. Controlling for other characteristics that we know are associated with the chances of being in work, … the research indicated that, people with unmet need for accessible housing are four times more likely to be unemployed or not seeking work because they are sick or disabled than those whose needs are met or who are disabled but do not need accessible housing. In depth interviews with disabled people shed light on why this might be, in particular the time-consuming and tiring process of completing everyday living tasks in an unsuitable home, or even such basic problems as being prevented from reliably leaving home by unpredictable lifts.[98]

As the government wishes to get more disabled people in work and the status of the working disabled being viewed as "deserving" is likely to be better, the

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95 Equalities and Human Rights Commission Report, 'Housing and Disabled People – Britain's Hidden Crisis: Full Report' Published May 2018 at 16. Found at: https://www.equalityhumanrights.com/sites/default/files/housing-and-disabled-people-britains-hidden-crisis-main-report.pdf

96 *Supra* n.95 at 17. The report lists 1/3 private tenants, 1/5 in social housing and 1/7 homeowners.

97 *Supra* n.95 at 22.

98 Habinteg and the Papworth Trust, 'The Hidden Housing Market - A new perspective on the market case for accessible homes' June 2017 at 18. Found at: https://www.habinteg.org.uk/reports-and-briefings/the-hidden-housing-market--1043

lack of suitable housing seems to contradict that. Providing accessible housing for such workers seems to be a key need that is not being met by social housing providers in terms of new or existing builds.

The lack of choice also affects the chances a disabled person will refuse accommodation that is not suitable:

> Residents [of temporary housing] also expressed a fear of turning down unsuitable accommodation, in case they were categorised as intentionally homeless[99] and left without further support from their local authority. Wheelchair users reported that they were terrified of being made homeless because none of their local hostels were wheelchair-accessible.[100]

Finally, the lack of suitable accommodation means that many applicants have long wait times to get a property:

> Our survey asked local authorities who held information on the accessibility of their housing provision to report the average length of time that disabled applicants spent on the housing register. Only 42 per cent of local authorities reported waiting times for disabled people. … Of those who were able to report on waiting times, the average length of time that disabled people waited was 25 months (EHRC, 2018a). We came across individuals who were waiting much longer, including one who was told that they could be waiting up to 10 years, and another who said that they had been waiting for 20 years.[101]

All of this indicates that those who are vulnerable due to their physical disability will face significant challenges in terms of choice, and suitability of their accommodation. While social landlords tend to be more understanding about adjustments, there is still a significant lack of choice for those who are disabled.

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99 To qualify for the greatest housing duty applicants must meet all five criteria of Part 7 of the Housing Act 1996. The applicant must be eligible for assistance, homeless, possess a local connection, not be intentionally homeless and be considered "in priority need".

100 *Supra* n.95 at 80.

101 *Supra* n.95 at 61.

Discrimination Against Those with Mental Illness

There appears to be several stigmas and negative stereotypes faced by people with mental health issues:

> "Mental health is really, I think, virtually ignored by social housing allocation policies. I think generally there's a feeling that people are at it and have got a doctor's letter because they're trying to work the system. Or even worse, there might be some kind of risk or danger to the other tenants. They might be a hoarder or they might have bi-polar, so obviously that means they're going to be an axe murderer. So there's lots of discrimination. I think people with mental health conditions are very powerless in the system." …[102]

It also means that sometimes the lack of a physical "symptom" of illness, those with mental health issues are deprioritised in favour of those with more "obvious" and evident physical needs, for example using a wheelchair[103]. This statement is supported by a study carried out by the University of York on the use of medical evidence in housing decisions. One interviewee, a housing officer stated:

> Your first interview is usually the most important. The first interview, how they [the applicant] present themselves, is very important and that kind of gives you your gut feeling of how you feel about his conditions. He himself didn't…seem like he was a vulnerable person 'cos he was talkative, the way he was dressed, his behaviour, everything, he never showed any signs of any form of mental health issues whatsoever.[104]

Another felt that someone who "knows the system", was able to reason, or showed signs of intelligence could not be vulnerable:

> … I mean him, even how he interacted in the interview, he didn't come across as like, like someone that was, you know what I mean, that was not intelligent. In fact he, he seemed quite intelligent and

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[102] *Supra* n.95 at 65.

[103] *Supra* n.95 at 65.

[104] Bretherton et al., ''You can judge them on how they look...' Homelessness Officers, Medical Evidence and Decision-Making in England' (2013) Vol.7 European Journal of Homelessness 69 at 80. Found at: https://www.feantsaresearch.org/download/jb_et_al_paper11208697831555751 39.pdf

> he seemed to know what, what he was talking about… I mean he's acknowledging that there are some issues in his life that he has to sort out. In my experience, I mean if you've got serious mental health issues, you wouldn't be able to have that, that, that sort of reasoning. He didn't present as vulnerable to me, to be honest….again he knew… the procedure in regards to approaching the Council and the kind of questions he would be asked.[105]

This indicates that there is some prejudice and stigma surrounding those with mental illness in finding them vulnerable. This is reinforced by findings of the Equality and Human Rights Commission's that concluded:

> Our inquiry revealed that there are particular and persistent barriers faced by people with mental health conditions, which impede their right to independent living. Individuals face a huge amount of stigma from housing providers because of misconceptions and stereotypes.[106]

Even once housed, there can be further issues. There is evidence that housing providers do not provide enough support to those with certain conditions:

> Disabled people, and in particular those with learning disabilities, sensory impairments or mental health conditions, report that they have difficulty getting adequate support from housing providers. This ranges from providers' reluctance to supply information in accessible formats, such as 'easy read', to a lack of specificity in advertisements for accessible properties, and a lack of assistance with applications. This includes tenancy agreements and correspondence from the landlord, which typically contains language that is legalistic and inaccessible to many people, including those with learning disabilities.[107]

The stigma of mental illness is not limited to social housing providers or housing officers, there is evidence from the mental health charity Mind, that those suffering from mental illness also encounter issues as private tenants[108].

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[105] *Ibid* at 80.

[106] *Supra* n.95 at 65.

[107] *Supra* n.95 at 72.

[108] Diggle, J. et al, 'Brick by Brick: A Review of Mental Health and Housing' Prepared for Mind, November 2017 at 25. Found at: https://www.mind.org.uk/media/17947884/20171115-brick-by-brick-final-low-res-pdf-plus-links.pdf

Like individuals with physical impairments, those with mental health issues quite often find that there are barriers to suitable housing. These barriers can delay discharge from hospitals or secure units, and can adversely affect their recovery trajectory:

> The "lack of suitable housing and/or housing support is the single largest cause of delayed discharge from acute in-patient wards" … Around 26 percent of delayed transfer of care from inpatient mental health settings are due to housing issues … Discharge to inappropriate accommodation harms recovery and is a major cause of readmission (Department of Health, 2010; 2011). Despite this, people are frequently discharged for logistical rather than health reasons (Browne, Hemsley, & St. John, 2008). … The lack of choice or control over the post-discharge housing situation compounds issues for those who are already disempowered by their period of hospitalisation (often under section) and other commonly associated issues, such as history of abuse…[109]

Whether mentally ill or physically disabled, the vulnerable can face a great deal of discrimination from housing officers and private landlords, which can add stress an exacerbate health issues as well as affect positive housing outcomes.

Use of Medical Evidence

When deciding it a person is considered vulnerable under s.189(1)(c) of the Housing Act 1996 there is often medical evidence submitted. Housing and homelessness officers are not medically trained and rely on the opinions of medical experts when making decisions about housing eligibility[110]. In fact, a study conducted by York University discovered that:

> Homelessness officers generally did not deviate from the advice given by advisors, particularly internal medical advisors. [As one officer stated]: I'm not in a position to obviously issue any information or recommendation from a medical point of view. So if we have a team of, you know, professional doctors and, and our

[109] *Ibid* at 23-24.
[110] *Supra* n.104 at 81-82.

> medical advisor as well saying that she's not vulnerable, there's not that much I can do to override that.[111]

This approach was considered by Sedley LJ as correct in *Shala v Birmingham City Council*[112]:

> It is entirely right that local authority officers, themselves without any medical expertise, should not be expected to make their own critical evaluation of applicants' medical evidence and should have access to specialist advice about it. What would not be acceptable is seeking out advisers to support a refusal of priority need housing wherever possible. … we agree, that care has to be taken by local authorities not to appear to be using professional medical advisers simply to provide or shore up reasons for a refusal.[113]

There was also the competition between the in-house medical advisor, or a third-party, private medical advice service the study termed "MedicReview" to protect the anonymity of the groups involved. These services were used by two of the three councils they interviewed (termed Northern town and London Borough). When using a third-party service, all documents collected would be faxed or emailed to the service, which would then respond with an assessment on the applicant's vulnerability. At no point did the third-party doctors ever carry out a face-to-face assessment of the applicant or examine them medically. Some housing officers expressed an amount of distrust of this service as decisions were often made within 24 hours and without any physical examination[114]. This practice was also highlighted as potentially problematic by Sedley LJ in *Shala*:

> Medical and other advisers, while it is not their task to take the local authority's decision for it, are helpful only to the extent that they furnish material within their professional competence which addresses issues which the local authority has to decide. … Absent an examination of the patient, his advice cannot itself ordinarily constitute expert evidence of the applicant's condition.[115]

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111 *Supra* n.104 at 82.
112 [2007] EWCA Civ 624.
113 *Ibid* at [19].
114 Paraphrased from *supra* n.104 at 82.
115 *Supra* n.112 at [21] and [22].

However, GP evidence submitted was also the subject of mistrust, mainly it seems because of the lack of knowledge of housing law:

> … it was generally felt that GPs tended to be 'on the side of' the applicant. There was a perception among homelessness officers that GPs often exaggerated their patients' conditions so as to enable an assessment of vulnerability. It was assumed that GPs did not understand vulnerability in the specific terms of the homelessness legislation; rather, their assessments were based on a far more generic definition of 'vulnerability'. Consequently, some homelessness officers thought that an assessment undertaken by internal medical assessors or MedicReview would be more objective and accurate, because it used the criteria within the homelessness legislation and case law to assess vulnerability.[116]

In fact, in Northern city, the distrust of GP evidence was high among the homelessness officers there. Further, GP evidence was often questioned where the applicant was stated as vulnerable, as opposed to rarely/never when the medical practitioner was in-house. Additionally, where the GP's findings were that the applicant was not vulnerable, that information was taken at face value and often included in the decision letter sent by the council. In general, it was the in-house medical officer whose opinion held the most weight, although not all councils have this service.

MedicReview was considered too negative and the lack of a physical examination and quick turnaround made their views suspicious. Likewise, the applicant's doctor (GP) was considered too subjective and lacking the specialist knowledge of housing law to make a proper decision. The issue of competing medical evidence was addressed by the Court of Appeal in *Guiste v Lambeth LBC*[117] where the use of in-house psychiatric advice provided by NowMedical contradicted the advice of an experienced consultant psychiatrist. The court held:

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[116] *Supra* n.104 at 83.

[117] (2019) EWCA Civ 1758

> This evidence, from a distinguished consultant psychiatrist, and directed to the key legal point in issue, could not in my view be disregarded, and if the review officer was going to depart from it, I think it was necessary for her to provide a rational explanation of why she was doing so. The difficulty which I have is that, even on a benevolent reading, I am unable to find any such rational explanation in the Review Decision. … If Ms Ubiam was intending to base her conclusion on the views of the two psychiatrists instructed by NowMedical, she needed to explain why their views should prevail over that of Dr Freedman, when they were less highly qualified that she is, and (more importantly) they had never met or interviewed Mr Guiste. Equally, I find it hard to see how Ms Ubiam could rationally have given more weight to the report of the consultation at St George's Hospital in September 2017 than to the more recent and much fuller report of Dr Freedman, which (unlike the earlier report) also focused on the critical question of the effect that homelessness would have on Mr Guiste's mental health.[118]

This amounted to an error of law and "a breach of the principles of rationality and fair decision-making"[119]. So, expert medical evidence should be given more weight than that of an in-house medical officer, or a decision is likely to be subject to a s.204[120] review.

In terms of the use of medical evidence in housing law, the York University study concluded that:

> … these cases do not simply involve the utilisation of in-house or external medical experts with little or no knowledge of the applicant seeking to give negative decisions. On the contrary, homelessness officers weigh up a range of complex (and sometimes contradictory) forms of evidence, which they seek to assess in terms of the authority and objectivity of the sources, when endeavouring to come to a defensible decision under the legislation.[121]

In other words, there is some indication that those with mental health issues can struggle to be considered vulnerable in terms of s.189(1)(c) of the Housing Act 1996. This is not the same as suggesting that the housing officers are not

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[118] *Ibid* at [64] per Henderson LJ.

[119] *Ibid* at [65].

[120] As explained in Chapter 2, applicants can appeal to a county court on a point of law under s.204(1)(b) of the Housing Act 1996.

[121] *Supra* n.104 at 87.

correctly applying the legislation, although there must be questions in terms of the *Guiste* case, but more highlighting an area where it is difficult for housing officers really to know how vulnerable an applicant is.

The Legal Framework and the Vulnerable

This section will explore how the various changes to the law have had a disproportionate effect on vulnerable tenants. The specific changes mentioned are from the Welfare Reform Act 2012 (the 'bedroom tax'), the Localism Act 2011 and the Housing and Planning Act 2016 (fixed term tenancies), and the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (the cuts to legal aid for many housing cases).

The Welfare Reform Act 2012 and the 'Bedroom Tax'

One of the number of changes made to the legal framework is the removal of the spare bedroom subsidy (dubbed "the bedroom tax" in the press), where social tenants lose part of their housing benefit for any empty bedroom in their property. This was introduced by the Welfare Reform Act 2012 coupled with The Housing Benefit (Amendment) Regulations 2012 s.5[122]. The provisions of the Welfare Reform Act are covered in detail in Chapter 2.

Subsequently, several families who were still affected by the regulations, most with disabled members, decided to challenge the bedroom tax on the grounds of discrimination both in terms of the Equality Act 2010 and the European Convention on Human Rights (ECHR)[123]. In *R. (on the application of MA) v Secretary of State for Work and Pensions*[124] and *R. (on the application of Cotton) v*

[122] These regulations were amended for disabled children who cannot share bedrooms after a court challenge in *Burnip v Birmingham City Council* [2012] EWCA Civ 629 where the court upheld the claim that the spare bedroom subsidy was discriminatory.

[123] Articles 8 and 14.

[124] [2014] EWCA Civ 13.

Secretary of State for Work and Pensions[125] the claimants, most of whom had households with disabled members, argued that the subsidy unlawfully discriminated against them.

Many of the families argued they required their extra bedroom, either because spouses were unable to sleep in the same room, because of equipment, or sometimes because overnight carers stayed at the property. All but one of these challenges were rejected by the lower courts, on the basis that the families receive the discretionary housing payment (DHP) and that being considered a reasonable justification for the discrimination. This was highlighted in *ex parte Cotton* by Males J.:

> A short answer to this claim is that as a result of the DHPs [discretionary housing payment] received by each of the claimants, which have completely compensated for the reduction in housing benefit paid to them ..., none of the claimants has suffered any interference with their family life capable of amounting to a breach of article 8.[126]

Similarly, in the *Rutherford v Secretary of State for Work and Pensions*[127] the claimants whose son is severely disabled and require an overnight career for him had their claims dismissed in the lower courts because they receive discretionary housing payment to cover the shortfall. Again, the court held that the continued payments of the DHP do not leave the claimants at a disadvantage and, in this case, there is no cause for concern that those payments will not continue[128]. Tellingly, however, the Mr Justice Stuart-Smith in his High Court ruling of the *Rutherford* case stated:

> I therefore conclude that there is at present adequate assurance that the Claimants will continue to benefit from awards of DHPs to plug the gap that would otherwise exist. If the scheme or other

[125] [2014] EWHC 3437.
[126] *Supra* n.125 at [30].
[127] [2014] EWHC 1631 (Admin).
[128] Paraphrased from *ibid* per Stuart-Smith J. at [53]-[54]

> circumstances were to change materially, different considerations might apply; but they do not apply now.[129]

This indicates that should the DHP be stopped or become unavailable, then it seems likely a further challenge on Article 14 ECHR grounds might well succeed; it also implies that the discretionary housing payment cannot be considered discretionary, at least for the Rutherfords[130]. This has led some to the conclusion that the reasoning in this case might give "a basis for judicial review of DHP where there is a potential article 14 argument"[131].

However, the *Rutherford* case on appeal, the Court of Appeal[132] overturned the first instance decision. As Lord Thomas CJ states:

> On the evidence before the court justifying the different treatment in reg.B13 of accommodation needed for carers of disabled adults and accommodation needed for carers of disabled children, the Secretary of State did not address how the distinction could be justified by reference to the best interests of a child as a primary consideration. He justified the distinction between making provision for a bedroom for disabled children but not for disabled adults by reference to the best interests of the child and explained the different treatment on that basis. On that basis, it seems to us very difficult to justify the treatment within the same regulation of carers for disabled children and disabled adults, where precisely the opposite result is achieved; provision for the carers of disabled adults but not for the carers of disabled children.[133]

He continued that on the issue of using DHPs:

> …We accept that DHPs were intended to provide the same sum of money, but we are not persuaded that this justifies the different treatment of children and adults in respect of the same essential need within the same regulation, as neither the regulation nor the policy behind the Regulations addressed the best interests of the child as a primary consideration.[134]

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129 *Ibid* at [54].

130 G. Peaker, 'An obligatory discretion?' 31 May 2014 - The Nearly Legal: Housing Law News and Comments Blog. Found at: http://nearlylegal.co.uk/blog/2014/05/an-obligatory-discretion/

131 *Ibid*.

132 *R. (Rutherford) v Secretary of State for Work and Pensions* [2016] EWCA Civ 29.

133 *Ibid* at [73].

134 *Ibid*.

The Secretary of State appealed against the decision in *Rutherford*, and all the cases were heard before the Supreme Court in a joint appeal in *R (on the application of Carmichael and Rourke) (formerly known as MA and others) v Secretary of State for Work and Pensions*[135] (hereafter *Carmichael*). In this case, the Supreme Court held that, in some of the appeals, the regulations did discriminate:

> There is no reasonable justification for these differences. The Court of Appeal in *MA* was persuaded (para 79) that there was an objective reasonable justification for treating Mrs Carmichael less favourably than a child in like circumstances, because the best interests of children are a primary consideration. I can see that there may be some respects in which differential treatment of children and adults regarding the occupation of bedrooms may have a sensible explanation. Expecting children to share a bedroom is not the same as expecting adults to do so. But I cannot, with respect, see a sensible reason for distinguishing between adult partners who cannot share a bedroom because of disability and children who cannot do so because of disability. And the same applies also to distinguishing between adults and children in need of an overnight carer.[136]

However, in the Supreme Court also distinguished these very narrow circumstances from those of another appellant, who needed his spare room to store medical equipment. The court held that the provision of DHP was sufficient in his individual case[137]. Meers, however, is unconvinced by this distinction, and argues:

> Both are transparent requirements for additional space which arise from a medical need; in both instances, the additional bedroom is that space. In the same way that medical equipment may be stored outside of the bedroom space, carers may be accommodated outside of the bedroom too. Why the former is treated as so opaque is not clear. The scope of a medical need in this context is also

[135] [2016] UKSC 58.
[136] *Ibid* per Lord Toulson at [44] - [46].
[137] See *ibid* per Lord Toulson at [54].

> unspecified. One would imagine that needs arising from mental health problems would be included.[138]

This critique is shared by Cousins who states:

> Approaching this case, there were a number of important issues of principle in relation to the interpretation of the HRA 1998 and the court (including those judges who dissented in part) has failed to answer any of them. … Although the court explicitly accepts (as it must) that "examples can be found of state benefit cases where European courts have spoken of a need for weighty reasons to justify discrimination", it obscurely states that "[n]one of [these cases] contain a statement of general principle inconsistent with *Humphreys*". It is unclear what (if anything) this is supposed to mean. The Supreme Court is applying an Alice in Wonderland approach where "Words mean what I say they mean".[139]

The Supreme Court has drawn these distinctions on the narrowest of margins and only where there were similar cases but with small factual differences already covered by the regulations. The ruling also seems to obfuscate the issue by adding no clear guidelines for others in a similar predicament. While this should provide comfort for those families whose disabilities fall under these narrow criteria, there will be many who are not helped and are still required to pay the spare bedroom subsidy. The effect of the *Carmichael* case was the passage of Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations 2017 (SI 2017/213), which came into effect on the 1st of April, 2017 and were not retrospective. More recently, the Supreme Court has considered the way *Carmichael* effects claims that predate the changes made by these non-retrospective regulations in *RR v Secretary of State for Work and Pensions*[140]. The court held unanimously:

> There is nothing unconstitutional about a public authority, court or tribunal disapplying a provision of subordinate legislation which would otherwise result in their acting incompatibly with a

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138 J. Meers, 'Discrimination and the "spare room subsidy": an analysis of Carmichael' (2017) 20(2) Journal of Housing Law 24 at 27.

139 M. Cousins, 'The bedroom tax and the Supreme Court: pragmatism over principle' (2017) 24(3) The Journal of Social Security Law 135 at 144-145.

140 [2019] UKSC 52.

> Convention right, where this is necessary in order to comply with the HRA [Human Rights Act]. Subordinate legislation is subordinate to the requirements of an Act of Parliament. The HRA is an Act of Parliament and its requirements are clear.[141]

This is good news for those claims still waiting to be heard who pre-date the regulations, meaning that the regulations will be disapplied for the 130 couples whose cases are still to be heard at tribunal[142].

However, there are still those, like Richard Rourke from *Carmichael*[143], who must rely on DHP. There are very few smaller properties available to those who wish to move, and for those who are disabled adapted properties are even more difficult to obtain. This puts some vulnerable tenants in a difficult position; if they cannot quality for DHP, and there is nowhere to move to, then they will have to do without a part of their housing benefit. Like able-bodied people caught by this regulation, many have tried to move to a smaller property, but a lack of suitable properties makes this difficult:

> A few interviewees had tried (unsuccessfully) to reduce unsustainable housing costs, including in one case by attempting to downsize to avoid the under-occupation penalty (the so-called 'bedroom tax')…[144]

There is evidence that the bedroom tax is pushing people further into debt, according to Shelter:

> An evaluation of the 'bedroom tax' found that more than half of affected renters were in rent arrears one year on from the introduction of the policy. Three out of every four households affected (76%) had to cut back on food.[145]

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141 *Ibid* at [27] and [30] per Lady Hale.

142 According to Leigh Day solicitors, found at: https://www.leighday.co.uk/News/2019/November-2019/Man-wins-Supreme-Court-bedroom-tax-case

143 *Supra* n.138.

144 *Supra* n.83 at 51.

145 Shelter and the Shelter Commission on the Future of Social Housing, 'Building Our Future - A Vision for Social Housing' January 2019 at 43. Found at: https://england.shelter.org.uk/__data/assets/pdf_file/0005/1642613/Shelter_UK_-_A_vision_for_social_housing_full_interactive_report.pdf

It has also pushed some tenants out of their adapted homes and into privately rented accommodation that is unsuitable for their needs.

Additionally, the zero tolerance measures imposed by councils on rent arrears, means vulnerable tenants who are unable to pay their rent, could be evicted, and their rent arrears history might prevent them from being able to apply for social housing. This could leave them homeless. There is evidence that the number of people who are vulnerable and homeless is rising. According to homelessness statistics from the Department for Communities and Local Government, those with mental illness who were accepted as being owed a duty due to priority need rose from 3,560 in 2010/11 to 5,460 in 2016/17. Similarly, those with physical disability rose from 2,960 to 4,380 in the same time period[146]. In a way this is positive, more vulnerable people are being accepted for the main homelessness duty, but it is also negative, in that they were homeless in the first place. The Homelessness Reduction Act 2017 has been designed to combat these situations with early intervention, and there is some indication that it is helping certain groups. According to the Homelessness Monitor 2019, 65% of local authorities reported positive impacts of the Act for single people[147], and 42% reported benefits to rough sleepers[148].

The Localism Act 2011 and Fixed Term Tenancies – Removing Housing Security

Similar to the issues with the bedroom tax, the fact that the vulnerable already struggle to find accommodation suitable for them can cause additional

146 Department for Communities and Local Government, 'Statutory homelessness and homelessness prevention and relief, January to March 2017, England' 22 June 2017, Sheet 773. Found at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/533113/Statutory_Homelessness_and_Prevention_and_Relief_Live_Tables_2016_Q1.xls

147 S. Fitzpatrick, 'The homelessness monitor: England 2019' Report Prepared for Crisis, May 2019 at 3o. Found at: https://www.crisis.org.uk/media/240419/the_homelessness_monitor_england_2019.pdf

148 *Ibid*.

hardship because of a lack of housing security. As discussed in Chapter 4, there is now a flexible tenancy available to councils, meaning that new tenancies are not for life, but often from between 2 and 5 years. This is still at the discretion of the local authority granting the tenancy, but flexible tenancies are in use in England today. It is possible that councils will renew the tenancy, but it is not guaranteed and is an added stressor the vulnerable do not need. As noted in an Equality and Human Rights Commission report:

> The Equality Impact Assessment on lifetime tenancies noted that fixed-term tenancies were a cause of considerable concern, especially to disabled people or people with health needs:
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> - Fifty per cent of existing households in social housing contained at least one disabled member. There was an expectation in the sector that those with longer-term needs (a disability or longterm condition) would be offered longer fixed-term tenancies of up to 10 years and a further social tenancy at the end of the fixed term, if their circumstances had not changed.[149]

While 10 years seems like a long time, it is still the removal of the security of a home. There is also the fact that those with long-term health problems will not be exempt from these renewal reviews:

> The government's insistence on reviewing everyone, even households with long-term health needs and disabilities, to see if their circumstances have changed seems unnecessary onerous and will cause bureaucratic cost for landlords and unnecessary stress for tenants.[150]

Considering the previous discussion in this chapter about the long waits and difficulties of disabled people finding suitable accommodation for their issues, the idea that a vulnerable person will only be offered fixed term tenancies seems problematic. For those whose conditions have a poor prognosis or who are unlikely ever to get well, removing the peace of mind of a secured lifetime tenancy, or at least one with a much longer fixed term (say 15 – 25 years) feels

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[149] *Supra* n.78 at 70.

[150] K. Webb, 'Fixed term tenancies failing on everyone's terms' Shelter Blog, 8 March 2016. Found at: http://blog.shelter.org.uk/2016/03/fixed-term-tenancies-failing-on-everyones-terms/

almost punitive. The process of renewing a tenancy is likely to add to the stress of not having secured housing, which, as already mentioned, can lead to exacerbating existing conditions. It could also mean that those whose homes have been adapted face starting again in a new property should they be required to move.

There is also the possibility that in the future the government will choose to implement the removal of the local authority discretion over flexible tenancies as contained in the Housing and Planning Act 2016. This removes virtually any local authority discretion over the provision of tenancy type, except under very specific circumstances, all new tenancies must be fixed term only. Sections 81A(1)-(3) of the Housing Act 1985 (as inserted by the Housing and Planning Act 2016 Schedule 7(4)) states that these fixed term tenancies should be from 2 up to a maximum of 10 years, or where a child under 9 years old is resident, the tenancy can continue until that child turns 19. Additionally, Schedule 7(4) makes it mandatory for local housing authorities to offer fixed term only for new tenants. S.81A(4) requires that any secure tenancy granted in breach of subsection (1) will be converted into a fixed term tenancy of 5 years. In a recent green paper, the government said they were not implementing these provisions "at this time"[151], however, there is still the possibility it will be implemented in the future, which would cause additional issues to the vulnerable.

The Cuts to Legal Aid – Removing Access to Justice

Cuts to legal aid were introduced in 2013 by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). Changes to civil legal aid means that housing cases have been removed except in matters regarding

[151] Ministry of Housing, Communities & Local Government, 'A new deal for social housing' August 2018, CM9671 at [186] at 65. Found at: https://www.gov.uk/government/consultations/a-new-deal-for-social-housing

homelessness or where the home is at immediate risk. The Ministry of Justice statistics show that housing cases receiving legal aid halved between 2012/13 and 2013/14 from 85,194 to 47,163 and continued to fall in subsequent years[152].

These cuts to legal aid have led to "advice deserts" where there are simply no housing solicitors who specialise in housing and who accept legal aid. Law Society chief executive Catherine Dixon noted:

> Advice on housing is vital for people who are facing eviction, the homeless and those renting a property in serious disrepair. Early legal advice on housing matters can make the difference between a family being made homeless or not. People who require legal aid advice for housing issues often need it urgently. … Almost one third of legal aid areas in England and Wales have one, and in some cases, zero housing providers, including large, rural areas, such as Cornwall, Somerset and Central Wales.'[153]

This means that some families will be denied access to justice because they cannot travel to a solicitor who has the requisite legal knowledge and is available using legal aid. Further, if there is only one housing specialist in the area conflicts of interest can be created because one person/firm cannot represent both parties. So, where both parties might require legal aid, only one will be able to receive representation.

The Law Society is not the only area from which there has been critique. Many senior judges have also felt the need to speak out against the cuts. For example, the President of the Supreme Court, Lady Brenda Hale stated:

> "Clearly a review of LASPO is necessary because some of the cases from which legal services, publicly funded legal services were withdrawn were probably a false economy and so it needs a good look at. "One of the possible difficulties is that under the Act as it currently is, in most cases all publicly funded legal services are

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[152] L.L. Green et al., 'Justice in Freefall – A report on the decline of civil legal aid in England and Wales' Legal Action Group, December 2016 at 10. Found at: http://lag.live.godeltech.com/media/278391/december-january_lag_report.pdf

[153] The Law Society, 'Lack of housing legal aid services is leading to nationwide advice deserts' 27 July 2016. Found at: http://www.lawsociety.org.uk/news/press-releases/lack-of-housing-legal-aid-services-is-leading-to-nationwide-advice-deserts/

> withdrawn, not just representation in court, not just litigation services, but legal advice." She said "so many legal problems can be solved" by early advice in housing or divorce disputes.[154]

These thoughts were echoed by Mr Justice Bodey, a senior judge in the family courts, in his retirement speech who said it was "shaming"[155].The cuts in legal aid have been speculated to lead to an increase of miscarriages of justice[156], and led the poorest in society unable to find representation in legal matters and might end up representing themselves. As, in general, vulnerable people are less affluent, it is likely that as with so many changes to the legal framework they will be disproportionately affected by the cuts.

There is evidence that this is the reality for the vulnerable in English courts. A report by Amnesty International indicates that vulnerable people sometimes must represent themselves[157]. If a person lacks capacity how can they possibly be capable of representing themselves in a court of law? That vulnerable people are expected to represent themselves in any legal matter is problematic, in the difficult matters of housing law, it is, perhaps, more so. This point was mentioned by Sir Stephen Richards in *Al Ahmed v London Borough of Tower Hamlets*[158]:

> I have summarised the evidence placed before this court by Shelter. It presents a bleak picture of the difficulties faced by homelessness applicants in bringing an appeal under s.204 of the 1996 Act without legal advice and representation, and of the difficulties they

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154 N. Rose, 'Hale backs public funding for early legal advice while outlining concern over LSB reform plan' Legal Futures 6 October 2017. Found at: https://www.legalfutures.co.uk/latest-news/hale-backs-public-funding-early-legal-advice-outlining-concern-legal-services-board-reform-plan

155 KJ Smith Solicitors, 'Legal Aid Cuts Have 'Shaming' Impact Suggests Senior Judge' 20 October 2017. Found at: https://www.kjsmith.co.uk/blog/legal-aid-cuts-have-shaming-impact-suggests-senior-judge

156 Lord Dyson, Master of the Rolls, suggested this would be the case when giving evidence on the impact of cuts to legal aid. A position with which Sir James Munby president of the family division of the high court agreed. See O. Bowcott, 'Cuts in legal aid 'leading to miscarriages of justice'' The Guardian, 1 December 2014. Found at: https://www.theguardian.com/law/2014/dec/01/legal-aid-cuts-miscarriages-justice

157 Amnesty International, 'The Cuts that Hurt - The impact of legal aid cuts in England on access to justice' October 2016 page 43. Found at: https://www.amnesty.org.uk/files/aiuk_legal_aid_report.pdf

158 (2020) EWCA Civ 51.

> may face in finding someone to provide those services under legal aid, especially as a result of the post-LASPO shrinkage of the housing advice sector.[159]

This still happens in practice[160]. For example, in the case of *Festival Housing Limited v Baker*[161] a vulnerable woman, who allegedly breached the conditions of her injunction, was unable to secure the services of a solicitor because of a lack of legal aid. The sitting judge in this case stated his grave concerns at this state of affairs:

> I am disturbed and concerned that Ms Baker attends before me today without the assistance of any public funding or a solicitor. I am particularly concerned about that because on any view, Ms Baker is a fragile individual; has difficulty reading and writing; difficulty in understanding, though I have no evidence or indication to indicate to me that she lacks capacity to deal with matters. She is, however, a fragile and vulnerable individual and that makes it all the more regrettable that she has not got legal assistance. … It is wholly unsatisfactory that the system conspires against a vulnerable individual like this, so that she cannot get the legal aid and solicitor assistance that she really needs. It is in that background that I have had to consider very carefully whether it was right to proceed, in potential breach of Ms Baker's human rights, with a fair and proper hearing.[162]

He went on to note:

> This court has experienced, on more than one occasion, great difficulties in getting a solicitor who is prepared to deal with criminal legal aid for a committal in breach of Housing Act injunctions. It has proved somewhat difficult.[163]

Ms. Baker was sentenced to 24 weeks in prison for breaching an Injunction to Prevent Nuisance and Annoyance without any legal representative to defend her. This could be viewed as a violation of Ms. Baker's Article 6[164] right to a

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159 *Ibid* at [34].

160 See the original High Court decision of *London Borough of Hamlets v Al Ahmed* (2019) EWHC 749 (QB) where the court held a homeless applicant was not entitled to additional time to bring a s.204 appeal because of a lack of legal representation. This was overturned by the Court of Appeal, supra n.158.

161 [2017] EW Misc 4 (CC).

162 *Ibid* per Mackenzie J. at [2], [8]-[9].

163 *Ibid* at [7].

164 Of the European Convention on Human Rights.

fair trial. The combination of these three changes appear to be having an impact on the vulnerable.

Conditionality and Vulnerability

As argued in Chapter 3 there are issues with using deservingness in housing decisions, for two reasons. First, the morality of the applicant is scrutinised, which prima facie seems logical but is not without issue, and second housing becomes a reward, which is a form of conditionality. There is a tension between conditionality (or reward) and need, whereby one can sometimes preclude the other. Obviously, there will be cases where someone is in need and also considered morally "worthy" of a reward, but there will be times when this is not the case. So, it is possible for the lack of moral desert or deservingness to cancel out actual need, as Flint et al. indicate:

> One dimension of the contemporary regulation of conduct is the greater use of conditionality in welfare provision which reconfigures the primary purpose of welfare from determining need or entitlement to one of changing the behaviour of recipients…[165]

This can mean that the more conditionality is applied to a benefit, the more it is seen as a "reward" for certain types of behaviour, the less it can be seen purely as dealing with the need of an applicant. Further, as previously explained, there is a fundamental issue of using deservingness in the context of housing because both deservingness and the concept of desert have intrinsic ties to justice. Therefore, a desert becomes not only about what a person deserves but their treatment becomes linked to wider concepts of justice, of fairness, of societal notions of right and wrong. There are issues in the use of deservingness that directly affect vulnerable applicants, as discussed below.

[165] J. Flint et al., 'Governing Neighbours: Anti-social Behaviour Orders and New Forms of Regulating Conduct in the UK' (2006) Vol. 43 (Nos 5/6) Urban Studies 939 at 951.

Issues with Good Behaviour

One of the criteria of deservingness identified in Chapter 3 is behaviour. This relates to conforming to an acceptable standard of conduct, for example, by not behaving in an anti-social way or causing nuisance to others. In fact, one of the most common[166] statutory[167] reasons rendering applicants ineligible for social housing is in situations where the applicant (or member of their household) has been found guilty of some form of "unacceptable behaviour". This is outlined in the statutory guidance:

> However, authorities may wish to adopt criteria which would disqualify individuals who satisfy the reasonable preference requirements. This could be the case, for example, if applicants are disqualified on a ground of anti-social behaviour.[168]

This can also remove an applicant's reasonable preference, should they fall into that category, as discussed in Chapter 4. Such behaviour typically includes imposition of a behaviour order, such as a Criminal Behaviour Order (CBO), Acceptable Behaviour Contract or Injunction to Prevent Nuisance and Annoyance (IPNA)[169], but could also include the breach of a previous tenancy agreement, violence against member of the household or others in the

[166] Shelter website - 'Who gets social housing?' Found at: http://england.shelter.org.uk/campaigns/why_we_campaign/Improving_social_housing/who_gets_social_housing

[167] S.160A(7) of the Housing Act 1996 with "unacceptable behaviour" being loosely defined in s.160A(8).

[168] Communities and Local Government, 'Allocation of accommodation: guidance for local housing authorities in England' June 2012, at [3.21] at 14. Found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/5918/2171391.pdf

[169] See Chapter 2.

community[170], rent arrears[171] or any other ground found in Part I Schedule 2 of the Housing Act 1985, apart from ground 8[172].

There has been empirical research that demonstrates with some degree of certainty that the vulnerable are more likely to be subject to some form of control order than the non-vulnerable:

> There is some reliable evidence which suggests that disabled people living in social housing, particularly those with learning difficulties or mental health problems, comprise a significant proportion of those individuals who are subject to interventions designed to tackle anti-social behaviour … This was corroborated by housing staff and other stakeholders during the consultation phase of the review during which focus group participants recounted several anti-social behaviour cases which involved people with mental health problems and learning difficulties including ADHD, Asperger Syndrome (AS), schizophrenia, autism, brain injuries, and obsessive compulsive disorder (OCD). ADHD in particular, is emerging as a central issue in debates about disability and anti-social behaviour (Thapar et al, 2006) and, on the basis of our review, we can say with some degree of certainty that a large percentage of those subject to anti-social behaviour measures appear likely to have or be given a diagnosis of ADHD.[173]

The use of such orders can be especially difficult when they are applied to a child. For example, an acceptable behaviour contract (ABC)[174] being given to a child who is so severely dyslexic he cannot read or write:

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170 Manchester City Council, 'Part VI Allocations Scheme Implemented 21 February 2011 with amendments approved by the Council and Partners as of 20 February 2015' Version 3.2 at 20. Found at: http://www.manchester.gov.uk/download/downloads/id/20290/allocations_scheme_updated_april_2015.pdf.

171 Southwark Council, 'A summary of our housing allocation scheme' at 14-15. Found at: https://www.southwarkhomesearch.org.uk/Data/Pub/PublicWebsite/ImageLibrary/3889%20-%20Soutwark%20Allocations%20Policy.pdf

172 S.160A(8) Housing Act 1996.

173 C. Hunter et al., 'Disabled people's experiences of anti-social behaviour and harassment in social housing: a critical review' Disability Rights Commission, August 2007 at 9. Found at: http://shura.shu.ac.uk/800/1/ASBO_Final_Report.pdf

174 An acceptable behaviour contract is the most minimal of the orders and is only available to young people between the ages of 10-18. Generally, the young person voluntarily signs a contract stating they will refrain from certain anti-social behaviours.

> In another case, Stephens and Squires report an instance of a dyslexic boy who had been subject to an ABC and had not understood what he was signing as he could not read and write.
> "I can't read or write…They got me to sign this contract saying my family's be evicted if I didn't behave…I had to ask Mum after what that meant" (2003; 49)[175]

There are also issues with the new Injunction to Prevent Nuisance and Annoyance (IPNA). A report from the Children's Commissioner for England on the likely impact on the replacement of the anti-social behaviour order (ASBO) with the IPNA[176] states:

> There is evidence that a high proportion of young people receiving ASBOs [the precursor to the Injunction to Prevent Nuisance and Annoyance] either have mental health problems or an accepted learning difficulty. The Office of the Children's Commissioner's research on neurodisability and young people indicates that generalised learning disability is more prevalent amongst children in the youth justice system with research studies suggesting a prevalence of 23-32%, compared to 2-4% of the general population.[177]

The study concludes the Injunction to Prevent Nuisance and Annoyance was likely to lead to:

> Aspects of the Bill [now Act] are likely (other things being equal) to lead to modest increases in the number of children being subject to civil injunctions, more breaches of orders and injunctions, and more children being sent to custody.[178]

The report goes on to consider the consequences of breaches where a family could be evicted from their homes for behaviour of a child:

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175 *Supra* n.173 at 89.

176 The Anti-Social Behaviour Order (ASBO) was replaced with the Injunction to Prevent Nuisance and Annoyance (IPNA); a civil remedy introduced by the Anti-social Behaviour, Crime and Policing Act 2014. It has been described "as super-punitive ASBO which will be easier to obtain for even more broadly defined behaviour", and has a minimum age 10. See Chapter 3.

177 The Office of the Children's Commissioner, 'A Child Rights Impact Assessment of the Anti-Social Behaviour, Crime and Policing Bill (parts 1 - 6; part 9)' June 2013 at 13. Found at: https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/07/CRIA_ASB_Crime_and_Policing_Bill_June_2013.pdf

178 *Ibid* at 16.

> Nevertheless, there are significant concerns about this proposed measure:
>
> (i) where children are in breach of a civil injunction or criminal behaviour orders: there is a very real possibility of children as young as 10 years old and their family being made homeless as a consequence of original behaviour which was deemed to cause 'nuisance and annoyance'.[179]

This could mean that children who are cannot control their behaviour because of a learning difficulty are evicted from their tenancy. Whatever society might consider to be an appropriate measure for an adult, children with special needs should not be stigmatised and their entire family punished for behaviour they might be unable to control. While it is important that people feel safe in their communities, there seems to be an over-reliance on control orders rather than counselling to combat this idea of "problem children". This links back to narrowly construed ideas of motherhood rooted in Victorian ideals that were discussed in Chapter 3. Carr argues:

> Victorian constructions of gender meant that the father functioned in the public sphere and was a conduit between the public realm and the private life of the family whilst the mother took prime responsibility for the home. Failure to appropriately socialise children and run a good home made her a 'bad mother'.[180]

The application of this "ideal of motherhood" has potentially led to other issues as a study by Spinney et al. discovered:

> A clear gender bias was apparent in the population of families referred to IFSPs [Intensive Family Support Projects] with 68% of families, most of which contained three or more children, headed by lone parent women; …[181]

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[179] *Ibid* at 25.

[180] H. Carr, 'Women's Work: locating gender in the discourse of anti-social behaviour' in Hilary Lim and Anne Bottomly (eds) *Feminist Perspectives on Land Law*, Routledge, London, 2007 on at 124

[181] A. Spinney, 'The Gendered Nature of Policy Discourse: Patriarchy, Pathology or is there a Third Way?', Paper presented at the ENHR conference "Housing in an expanding Europe: theory, policy, participation and implementation" Ljubljana, Slovenia, 2 - 5 July 2006 at 3. Found at: https://www.enhr.net/documents/2006%20Slovenia/W08_Hunter.pdf

This is supported by an earlier empirical study by Hunter and Nixon uncovered:

> Further analysis of the sample revealed a second distinctive feature: women-headed households were disproportionately represented in the sample with over half (58%) of the sample consisting of lone women-headed households. Of this group of women headed households, four-fifths (77%) were lone mothers with sole responsibility for … their children…[182]

It is not just children with mental challenges and single mothers who face this kind of issue. There is also evidence from a report produced by Mind, a mental health charity, that the good behaviour requirements also affect those with mental health challenges:

> Anti-social behaviour enforcement by social landlords disproportionately affects people with mental health problems but rarely addresses the underlying causes of behaviour (Nixon et al., 2007). Landlords are also more likely to move to formal enforcement action more quickly if a resident has mental health problems (London Councils, 2014). This enforcement action itself can also exacerbate existing stigma and community tensions.[183]

This conclusion was also reported by the Equality and Human Rights Commission's study, which specifically mentions the legal framework:

> In addition, disabled people's organisations report that the changes brought in England under the *Localism Act 2011*, which enable housing providers to take *'good behaviour'* into account when assigning priority status to applicants, is having a disproportionate impact on individuals with mental health conditions, as housing providers frequently interpret behaviour as anti-social (wilfully or otherwise) rather than as being a result of those conditions. [emphasis added][184]

This means more vulnerable adults or households with a vulnerable member might be being denied social housing because of conditions they are unable to control. The Hunter study concluded the following:

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182 C. Hunter and J. Nixon, 'Taking the blame and losing the home: women and anti-social behaviour' (2001) 23:4 The Journal of Social Welfare & Family Law 395 at 398.

183 *Supra* n.108 at 25.

184 *Supra* n.95 at 66.

> While our findings are not conclusive, they do point to evidence that the subjects of anti-social behaviour interventions often have mental health problems, learning difficulties and neurological disorders. This raises crucial questions about the extent to which the use of potentially punitive control mechanisms among vulnerable individuals, many of whom are young people and children, can be justified. ASBOs in particular could have drastic impacts on disabled people by not only failing to address 'root causes' of disruptive behaviour, but the effects of employing a regulatory mechanism that can have exclusionary effects, and even result in a custodial sentence, may serve to exacerbate their problems.[185]

On the other hand, this is not to say that vulnerable people who pose a real threat should not have measures taken against them to ensure the safety of the community and their neighbours. There are vulnerable tenants whose behaviour is unacceptable, and a system should be in place to ensure that their neighbours are not forced to live in fear next to someone who is dangerous. For example, the brutal murder of a Kurdish refugee Kamil Ahmad by Jeffrey Barry, a paranoid schizophrenic. Mr. Ahmad was killed in the supported housing unit where both men resided. In this case Mr. Barry was released from a secured psychiatric unit contrary to the advice of the psychiatrists there because a mental health tribunal ruled that he should be discharged[186]. The Safeguarding Adults Board in Bristol concluded:

> The fatal assault on Kamil on the evening of 6th July could have been avoided. The decision to discharge Mr X by the Mental Health Tribunal was based on incomplete information. As a result, it foreshortened his compulsory treatment and reduced the time available for AWP to seek alternative accommodation for him and for Milestones Trust to commence eviction. … It would seem that the Tribunal did not follow the recommendations of the professionals involved and did not fully appreciate the significance

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185 *Supra* n.173 at 95.

186 Donna Ohdedar and Mark Dalton Independent Reviewers, 'Bristol Safeguarding Adults Board Safeguarding Adults Review Using the Significant Incident Learning Process of the Circumstances Concerning Kamil Ahmad and Mr X' May 2018 at [11.5-11.6] at 14 of 43. Found at: https://bristolsafeguarding.org/media/28657/kamil-ahmad-and-mr-x-sar-report-final-for-publication.pdf

> of the problems in the accommodation and the inherent risk of Mr X's return.[187]

The decision to discharge Mr. Barry was considered by the trial judge Mrs. Justice May as "nothing short of calamitous"[188]. Yet the case of Mr. Barry paints an extreme picture of a mental illness, and extremes make for easy decisions. There is no question Mr. Barry belonged in a secure mental hospital and not in a supported housing unit. Neighbours should not be left feeling threatened or abused, yet at the same time vulnerable people should not be given behaviour orders that do not consider the conditions they cannot control. Especially if this could have additional consequences for their housing situation.

Protecting the Vulnerable?

There is also an argument that the requirement for a standard of behaviour might help protect vulnerable people. There have been several studies that demonstrate that disabled people are much more likely to experience harassment than non-disabled people[189]. The number of hate crimes against all disabled people in 2017/18 rose by 33%[190] according to United Response, a charity which offers support to people with disabilities. A study conducted by Sheffield Hallam University and the Disability Rights Commission looked specifically at experiences of disabled people in social housing:

> The findings revealed the extent to which disabled people were subjected to many different forms of attack; including verbal attack (73%), physical attack (35%), harassment in the street (35%), having something stolen (18%), being spat on (15%) and having property damaged (12%). Although being frightened or attacked affected

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187 *Ibid* at [28.2] at 38 of 43.

188 ITV News, 'Schizophrenic patient Jeffrey Barry is jailed for 23 years for murder of refugee' 10 November, 2017. Found at: https://www.itv.com/news/2017-11-10/schizophrenic-patient-jeffrey-barry-is-jailed-for-life-for-murder-of-refugee/

189 See, for example, footnote 204 where a report by Scope discovered just over half (53%) of disabled workers had been subject to bulling or harassment at work because of their disability.

190 Based on a freedom of information request, there were 5,342 crimes in 2017/18 against 4,005 the previous year. Found at: https://www.unitedresponse.org.uk/News/disability-hate-crimes-england-wales-increase-new-police-figures?gclid=Cj0KCQiAq97uBRCwARIsADTziyZ-0nP6DKYgR0MH9Kpnv1ChvwhUMSF_ZUNcsdBNoUrBzdwG69Y63hYaAku4EALw_wcB

> disabled people with a range of different impairments, the statistics suggest that people with mental health problems (82%), learning difficulty/disability (63%) and visual impairments (57%) are at the greatest level of risk. The emotional impact of being frightened or attacked was often considerable. 77% of disabled people who reported being frightened or attacked were left feeling scared, with a further 68% feeling embarrassed or humiliated. Individuals made comments such as 'I'm afraid to go out on my own' and 'I froze inside'. For many disabled people 'hate crime is a feature of their day-to-day life...many people felt it was something that they had to live with on account of their disability'. Nearly a third of disabled people surveyed who were victims of hate crime experience attacks at least once a month.[191]

Although these statistics are a decade old, it is hard to believe that this type of harassment has ceased, given the rise in reporting of hate crimes against disabled people. As a significant proportion of disabled people live in social housing, it is therefore possible that the measures put in place to combat anti-social behaviour might protect them from these types of crime.

If local authorities are taking a zero tolerance and robust approach to poor behaviour, including causing "nuisance and annoyance", perhaps the beneficiaries of this policy will be the vulnerable. It is possible that part of the reason for the "increased reporting" in the last few years are a result of these changes. Unfortunately, there seems to have been no studies carried out to support or refute this theory. Using behaviour as a means of testing worthiness might offer protection to some vulnerable tenants while, at the same time, punishing others. This makes it extremely difficult to gage an overall effect of assessing behaviour in this manner. However, the cumulative negative effects that could end a tenancy, resulting in homelessness, and even prevent eligibility for future tenancies seems problematic for those whose behaviour is beyond their control due to an illness.

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[191] C. Hunter et al., 'Disabled people's experiences of anti-social behaviour and harassment in social housing: a critical review' Sheffield Hallam University and the Disability Rights Commission, August 2007 at 64. Found at: https://www4.shu.ac.uk/_assets/pdf/ceir-DRCASBOFinalReport.pdf

Issues with Employment

As argued in Chapter 3, it is those applicants who are working, regardless of their vulnerability who receive the greatest priority from Councils when it comes to social housing allocations. In fact, the statutory guidance issued by the government on social housing allocations states:

> ...the Government believes that it is appropriate, proportionate and in the public interest to restrict access in this way, to ensure that, as far as possible, sufficient affordable housing is available *for those amongst the local population who are on low incomes* or otherwise disadvantaged [in affordable housing]. [emphasis added][192]

In 2017, the government published their policy paper announcing their ambitious plan to see one million more disabled people in work by 2027[193]. There is still a disparity between vulnerable and employed and not vulnerable and employed is wide, the Equality and Human Rights Commission discovered:

> Between 2010/11 and 2015/16, there was an increase in the proportion of both disabled and non-disabled adults in employment. Despite this, the proportion of disabled adults in employment remained lower (47.6%) compared with that of non-disabled people (79.2%) in 2015/16, and the gap between these groups had widened since 2010/11. This is not the case across all impairment types, and for those with 'mental health conditions' and those with 'physical disabilities' the gap between them and non-disabled people had narrowed during this time. In 2015/16, the employment rate was lowest for those with 'learning difficulties or disabilities' (19.9%).[194]

The unemployment rate for those with severe mental health conditions is four times that of people with no mental health issues, and the rate for those with

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[192] Department for Communities and Local Government, 'Providing social housing for local people Statutory guidance on social housing allocations for local authorities in England' December 2013, at [12] at 5. Found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/269035/131219_circular_for_pdf.pdf

[193] Department for Work & Pensions and Department of Health, 'Improving Lives - The Future of Work, Health and Disability' CM9526 November 2017 at 9. Found at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/663399/improving-lives-the-future-of-work-health-and-disability.PDF

[194] *Supra* n.78 at 46.

more common mental health challenges is twice that of people with no issues[195]. There is also evidence that the vulnerable people who are in employment earn less than their non-vulnerable counterparts. The median hourly earnings for disabled[196] people were £9.85 in 2015-16, whereas for non-disabled people it was £11.41[197]. The study also noted:

> The pay gaps for those with physical impairments are substantial. Men with physical impairments experience pay gaps in the range of 15% to 28%, depending on the nature of the disability, and women with physical impairments experience pay gaps in the range of 8% to 18%. … Disabled people are more likely to be in low-paid jobs than non-disabled people: 30% of disabled men and 35% of disabled women are paid below the National Living Wage compared with 25% of non-disabled men and 29% of non-disabled women.[198]

So, there are fewer vulnerable people in employment, and even those who are there is a gap in expected earnings between disabled/vulnerable workers and their non-vulnerable counterparts.

However, the wage gap is not the only issue the vulnerable face when it comes to employment. In fact, the challenges start before an employee even reaches their place of business. A great deal of public transport, which is an important lifeline to many disabled/vulnerable people, is not either not accessible, or significantly less accessible. A government paper noted:

> Disability is a key characteristic that links to and determines travel behaviour, even when its relationships with other characteristics have been controlled for. Being disabled links with more negative or problematic experiences of travel, along with more limited perceptions of viable alternatives.[199]

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195 *Supra* n.78 at 48.

196 The Equality and Human Rights Commission report uses this term, whereas this thesis uses the term "vulnerable". These figures apply to people with both mental and physical issues and are being used interchangeably, to make the use of this report easier.

197 *Supra* n.78 at 51.

198 *Supra* n.78 at 52.

199 L. Butcher, 'Access to transport for disabled people' Briefing Paper Number CBP 601, 30 October, 2018 4-5. Found at: http://researchbriefings.files.parliament.uk/documents/SN00601/SN00601.pdf

There have been several high-profile incidents in recent years of disabled people being "forgotten" on trains[200], or worse. For example, Paralympian Anne Wafula Strike was forced to wet herself on a train because of a lack of a disabled toilet[201]. There are also barriers to accessibility in London where only just over a quarter (71 out of 270) tube stations are wheelchair accessible. Worse still, of those 71, 21 require ramps and staff assistance, meaning that stations a wheelchair user can use independently is 50 making the number less than 20%[202]. The act of getting to and from work is much more difficult, stressful and tiring for disabled/vulnerable transport users.

Additionally, there is evidence that employed disabled people face real barriers to promotion, assumptions about their disability, and discrimination in the workplace. For example, the Financial Times outlined the experiences of Yves Veulliet, a wheelchair user, who works for IBM. He once asked a hotel in Berlin to book him an accessible taxi to take him from the airport to the hotel. When he arrived at the airport, the hotel had booked an ambulance instead, and he was put in a position of arriving to meet clients in it:

> Mr Veulliet, who now leads IBM's global disability and inclusion work, uses the anecdote to illustrate what he calls "the medical model of disability", in which anyone with a disability is assumed to be fragile. Such assumptions can cause embarrassment and, more seriously, exclude people from roles they could competently fulfil.[203]

It is not just exclusion, disabled/vulnerable workers can face bullying at work. Just over half (53%) of disabled workers in a recent survey by Scope had been

[200] See A. Taylor, 'I was stranded on a train in a wheelchair' BBC News 1 May 2018. Found at: https://www.bbc.co.uk/news/uk-43969205

[201] BBC News, 'Paralympian tells of train toilet 'humiliation'' 3 January 2017. Found at: https://www.bbc.co.uk/news/uk-england-essex-38495184

[202] See Transport for London 'Wheelchair access & avoiding stairs'. Found at: https://tfl.gov.uk/transport-accessibility/wheelchair-access-and-avoiding-stairs

[203] A. Clegg, 'How to lift barriers for disabled employees' The Financial Times, 1 December 2016. Found at: https://www.ft.com/content/5278fad2-a061-11e6-891e-abe238dee8e2

subject to bulling or harassment at work because of their disability[204]. This assertion is supported by research by Scope, a disabled charity. In its report, it discovered:

> Several participants believed they had experienced unfair treatment at work as a result of telling their manager and colleagues that they are disabled. This included feeling that opportunities for progression had been passed over, or several cases of negative comments and abusive language being directed towards participants by colleagues.[205]

Behaviour such as this often extends out into life outside work, as is clear from the harassment statistics quoted earlier (see footnote 190). This partly explains why fewer disabled people are in work, although it must be said part of that will be those who are simply unable to work. For those who can, however, there is a gamut of barriers to being employed, from getting to work to the chances of promotion and equal pay. The Welfare Conditionality report discovered:

> Personal impairments, long-term physical and mental health conditions and wider discriminatory attitudes and practices, rather than individual attitudinal barriers, often posed significant obstacles to finding and sustaining paid work.[206]

According to Scope:

> In work disabled people are more than twice as likely to fall out of work than non-disabled people (10.1% of employed DP fall out of work compared to 3.8% of non-DP).[207]

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[204] Scope, 'Why we need to see changes in support for disabled people in work' Scope Blog, 14 February 2017. Found at: https://blog.scope.org.uk/2017/02/14/why-we-need-to-see-changes-in-support-for-disabled-people-in-work/?_ga=2.94263005.1176457573.1582572818-2095337156.1582572818

[205] M. Wilkes, 'Let's talk - Improving conversations about disability at work' Scope and Leigh Day, November 2017 at 24. Found at: https://www.scope.org.uk/scope/media/files/campaigns/lets-talk-report.pdf

[206] P. Dwyer et al., 'The Welfare Conditionality Project - Final findings: Disabled people' May 2018 at 3. Found at: http://www.welfareconditionality.ac.uk/wp-content/uploads/2018/05/40414-Disabled-people-web.pdf

[207] *Supra* n.204.

As being in work is the best possible position for an applicant (or tenant) of social housing, the fact that many vulnerable people are not and there are significant barriers to employment for them is problematic.

It seems probably that vulnerable applicants/tenants have additional issues with the criteria of deservingness that are less likely to affect their non-vulnerable counterparts. This means that in terms of applying conditionality to housing outcomes, the vulnerable are more likely to find themselves negatively affected by changes to the legal framework.

Conclusion

This chapter has considered the impact of the use of moral desert in housing outcomes on the vulnerable. Considering this group has more of an issue finding suitable property, and their conditions can cause barriers to employment, and cost additional money, the likelihood is that the impact will be greater. Vulnerable groups face a series of challenges that puts them in potentially more risk of losing their tenancy because of the use of deservingness and conditionality in the social housing legal framework.

In terms of anti-social behaviour, certain vulnerable groups, especially children with ADHD are disproportionately represented with applications for control orders, which could put their household's tenancy at risk. This type of conditionality is likely only to be enhanced by use of the continuous cycle of assessment. Similarly, the vulnerable are under-represented in employment because of several barriers, such as a lack of disability-friendly public transport and discrimination from employers. Combined with other factors such as conditions that cost additional money, and a lack of legal aid, vulnerable groups are likely to be in a much more precarious and difficult position when compared to their non-vulnerable compatriots.

Chapter 7
Conclusion

The introduction to this thesis contended that access to social housing relies on deservingness, or the concept of a philosophical, moral desert in order to determine eligibility. The effects of this system cannot be underestimated, in fact, a group of charities including those involved with housing, known as Just Fair, released a report in 2015 that concluded:

> The overall context for the enjoyment of the right to housing in England is one of crisis. Exceptionally high numbers of people are homeless, or vulnerable to homelessness. The current housing environment is characterised by profound issues of lack of supply, high and further increasing housing costs, cuts to social benefits and social housing, lack of security of tenure, and homes of such poor quality that they are unfit for habitation. These issues plague all of England's main housing tenure types: the owner occupied, the private rental, and the social housing sector. Housing insecurity affects not only people on low incomes, but broad swathes of the English population, who currently live in situations of insecurity and uncertainty. In this context of crisis, the government is manifestly failing to meet its obligations to ensure the right to housing of its population, so that everyone can enjoy a standard of living in homes that are adequate, safe, and secure.[1]

These are strong words, and, as this thesis has sought to argue, still rings true for social housing in 2020.

Deservingness in a Social Housing Context is Flawed

This thesis has suggested that using such a philosophical desert to classify social housing eligibility is flawed for three reasons. Firstly, because it introduces the idea that housing is a reward, rather than a necessity. This is a

[1] Just Fair, 'Protecting the Right to Housing in England: A Context of Crisis', London, Just Fair, 2015 at 44. Found at: http://justfair.org.uk/wp-content/uploads/2018/05/Protecting-the-rights-to-housing-in-England.pdf

form of conditionality, which uses social benefit as a reward for certain types of behaviour or an adherence to a specific morality. This can counter housing need. Such welfare benefits can include the provision of social housing, which is specifically mentioned in the report itself, but is also considered by Flint et al. to be an important area for conditionality:

> Social housing provides the most obvious site for this conditionality, given that it is the least universal pillar of the welfare state and has therefore been most subject to rationing and the application of eligibility criteria based on assessments of individual conduct.[2]

Yet housing need remains, the unfortunate truth is a system for deciding who should qualify for a social tenancy is necessary; there is a housing crisis and a dearth of social housing tenancies. This means cuts had to be made somewhere to prevent waiting lists from growing exponentially and ensuring there is some order and system for who gets social housing. While the legislation is carrying out a necessary task in terms of deciding on eligibility, the system is flawed using this type of conditionality. Moreover, there is a tension between conditionality (or reward) and need, whereby one can sometimes preclude the other. Obviously, there will be cases where someone is in need and also considered morally "worthy" of a reward, but there will be times when this is not the case. There are those who feel this type of approach to housing, especially when considering anti-social behaviour, is justified, as Deacon asserts:

> The claim that someone's right to housing is balanced by an obligation not to abuse that housing is one that accords with basic sentiments of fairness and reciprocity. Similarly it is scarcely unreasonable to require someone to attend classes or participate in a project that will equip them with the skills to maintain a tenancy and create an environment in which their children can flourish. In the case of anti-social behaviour, however, the most compelling justification is to be found in the mutualist argument that public

[2] J. Flint et al., 'Governing Neighbours: Anti-social Behaviour Orders and New Forms of Regulating Conduct in the UK' (2006) Vol. 43 (Nos 5/6) Urban Studies 939 at 951.

> policy has to reaffirm and enforce the obligation to show respect and regard for the needs of others.[3]

However, there is evidence that shows that such interventions can have both gender bias[4] and discriminate against those with certain mental health challenges[5]. There is also some evidence that the use of welfare conditionality to tackle anti-social behaviour is ineffective[6], and can undermine other types of interventions such as Family Intervention Projects (FIPs)[7].

In other words, Deacon's original argument which advocates responsibility and based on notions of fairness, which again is rooted in the ideas of the philosophical desert, and justice, fails to consider the biased nature of anti-social behaviour orders and enforcement. Again, this highlights the issues of using desert when applied to housing, the ideas of fairness and justice with which most people agree, lacks a nuanced approach to the subject of behaviour, yet seems persuasive without all the facts. There is no doubt that, all things being equal, people should behave properly and that there is a sense of justice knowing that people who perpetrate anti-social behaviour do see some downside to their poor conduct. However, upon a closer inspection, the idea that a single mother is a bad mother and her children are less well behaved. Or the idea that a child with ADHD who might not be able to control themselves should be subject to punitive measures that could result in

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3 A. Deacon, 'Justifying conditionality: the case of anti-social tenants', (2004) 19:6 Housing Studies 911 at 923-924.

4 See H. Carr, 'Women's Work: locating gender in the discourse of anti-social behaviour' in Hilary Lim and Anne Bottomly (eds) *Feminist Perspectives on Land Law*, Routledge, London, 2007 on page 124. See also: C. Hunter and J. Nixon, 'Taking the blame and losing the home: women and anti-social behaviour' (2001) 23:4 The Journal of Social Welfare & Family Law 395 at 398.

5 See C. Hunter et al., 'Disabled people's experiences of anti-social behaviour and harassment in social housing: a critical review' Report prepared for the Disability Rights Commission, August 2007 page 9, also page 94. Found at: http://shura.shu.ac.uk/800/1/ASBO_Final_Report.pdf

6 Welfare Conditionality Project, 'Final Findings Report: Welfare Conditionality Project 2013-2018' Economic and Social Research Council, June 2018 at 22. Found at: http://www.welfareconditionality.ac.uk/wp-content/uploads/2018/06/40475_Welfare-Conditionality_Report_complete-v3.pdf

7 *Ibid* at 21.

homelessness for the entire household does not seem to be particularly fair, or just. Further, if conditionality of this type is ineffective then part of the purpose of using such conditionality, to change negative behaviour, is moot.

The second issue is where a system uses housing as a reward for the deserving, there will be questions about an applicant's worth. This basic principle that those who are worthy being deserving of a reward is not without fundamental issues of definition, for example the lack of agreement on what counts towards moral worth[8].

By linking justice and fairness to housing outcomes, the applicant themselves will have their character scrutinised for worthiness, and virtue, making them a focus of a subjective, moral judgment. These moral judgments themselves can be problematic, as discussed above, where there is a gender bias against female-led households in terms of anti-social behaviour interventions. Part of the reasoning for this type of bias is narrowly construed ideas of motherhood rooted in Victorian ideals, as Carr argues:

> Victorian constructions of gender meant that the father functioned in the public sphere and was a conduit between the public realm and the private life of the family whilst the mother took prime responsibility for the home. Failure to appropriately socialise children and run a good home made her a 'bad mother'.[9]

Similarly, those with mental health issues are disproportionately affected by behaviour controls:

> There is some reliable evidence which suggests that disabled people living in social housing, particularly those with learning difficulties or mental health problems, comprise a significant proportion of those individuals who are subject to interventions designed to tackle anti-social behaviour …[10]

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8 S. Kagan, *The Geometry of Desert* (OUP 2012) at 6.

9 H. Carr, 'Women's Work: locating gender in the discourse of anti-social behaviour' in Hilary Lim and Anne Bottomly (eds) *Feminist Perspectives on Land Law*, Routledge, London, 2007 on page 124

10 C. Hunter et al., 'Disabled people's experiences of anti-social behaviour and harassment in social housing: a critical review' Report prepared for the Disability Rights Commission, August 2007 at 9. Found at: http://shura.shu.ac.uk/800/1/ASBO_Final_Report.pdf

There should be questions about the application of behaviour orders against those who are unable to control themselves, or who might not understand what they are doing is anti-social.

Deacon's assertions about responsibility and respect, until those terms are defined more clearly in terms of those who are vulnerable, there is an issue with referring to responsibility. Also, there should be questions raised about the way responsibility interacts with children, especially those who suffer from conditions such as ADHD. While it is not unreasonable to expect children to adhere to certain standards, the idea of making their household homeless due to their poor behaviour seems disproportionate. This idea of morality and responsibility starts to look tenuous when considered alongside mental illness or learning difficulties, or the idea of the "ideal Victorian" mother. Subjecting people to intense scrutiny for moral worth is problematic, for the reasons stated, but also because morality itself is a subjective term that will mean different things to different people.

Finally, because of its intrinsic links to ideas of fairness and of societal notions of right and wrong, where people getting what they deserve is seen as a form of justice, there is a sense that this system is also just. Many policy documents mention fairness, as have several politicians. For example, David Cameron, in his speech to the Conservative Conference in 2010 stated:

> Fairness means giving people what they deserve – and what people deserve depends on how they behave.[11]

Prima facie, this seems logical – people who act poorly should not be given a precious resource when many others who are not anti-social are waiting for it. It is part of their obligation as citizens and adults to realise poor action or negative behaviour will have consequences. However, it is also hugely

[11] D. Cameron's Speech to the Conservative Party Conference 2010. Full text found at: http://www.telegraph.co.uk/news/politics/david-cameron/8046342/David-Camerons-Conservative-conference-speech-in-full.html

reductive, lends itself to other forms of bias, and as has already been argued, lacks nuance.

The Legal Framework is Focussed on Behaviour and Status

The criteria that are currently emphasised in the legal framework, the modern criteria, seem to emphasise two elements: status and behaviour. While the criteria have been in development since the 1990s, but refer to standards imposed since the passage of the Localism Act 2011 and subsequent acts. Status refers to employment, willingness to work, having a local connection or contribute to the local community in some other way (through volunteering or fostering). In fact, the emphasis on employment in governmental policy was highlighted in a Parliament briefing paper on under occupation:

> Creating an incentive for benefit recipients to return to work or increase their working hours is central to the Government's welfare reform agenda.[12]

The second of the two elements, behaviour, relates to conforming to an acceptable standard of conduct, for example, by not behaving in an anti-social way or causing nuisance to others. There is also a focus on deserving being something that one earns through action, so working or behaving appropriately.

Section 146 of the Localism Act 2011[13] enables local authorities to qualify or disqualify specific "classes" of people from their eligibility criteria, including those with a local connection. Further, section 147(4) of the Localism Act 2011[14] requires every local authority to have an allocation scheme and a procedure[15]

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12 W. Wilson, Briefing Paper No. 06272, 'Under-occupying Social Housing: Housing Benefit Entitlement' House of Commons Library, 15 March 2012 at 4.4 at 41. Found at: http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06272#fullreport

13 Inserting s.160ZA into the Housing Act 1996.

14 Inserts 166A into the Housing Act 1996

15 166A(1) states that "For this purpose "procedure" includes all aspects of the allocation process, including the persons or descriptions of persons by whom decisions are taken."

that will determine the priorities for allocating social housing. A combination of these sections is being used by authorities to reinforce both elements in the modern concept of deservingness (i.e. status and behaviour).

There are also changes brought about by the Welfare Reform Act 2012. The link between the bedroom tax and the criteria of deservingness is, perhaps, less obvious than with the Localism Act 2011, but remains an undercurrent regardless. In terms of behaviour, there is an indication that the bedroom tax is being used for this reason[16].

Although there is no indication in the document exactly what type of behaviour or the types of changes the measure is hoping to secure. However, one of the explicitly stated aims of the removal of the spare bedroom subsidy is "to strengthen work incentives"[17]. This indicates that the Welfare Reform Act 2012 focuses more on the status element of the modern criteria, which relates to being able or willing to work, or contribute in some way.

Both Acts have created enhanced areas of deservingness and conditionality into the legal framework, for example as Fitzpatrick et al. argue:

> Social housing is an important site for the governance of anti-social behaviour (ASB), as well as being a key arena for other forms of conditionality aimed at regulating the conduct of low-income populations. These housing-based forms of social control are typically exercised via tenancy agreements and allocations criteria, both of which have become potentially much more conditional in England as a result of the Localism Act 2011.[18]

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16 House of Parliament Research Briefing by W. Wilson and R. McInnes, 'The impact of the under-occupation deduction from Housing Benefit (social rented housing)' 15 December 2014, Standard note: SN/SP/6896, page 1. Found at: http:/www.parliament.uk/briefing-papers/SN06272.pdf

17 Government Publication, 'Removal of the Spare Room Subsidy Good Practice Guide 2014: Findings and lessons learned from the Discretionary Housing Payments Reserve funding bidding scheme' July 2014 at 3-4. Found at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/329912/rsrs-good-practice-guide.pdf

18 Fitzpatrick et al., 'Conditionality Briefing: Social Housing' Welfare Conditionality Project – Economic and Social Research Council, September 2014, at 1. Found at: https://pureapps2.hw.ac.uk/ws/portalfiles/portal/7537719/Briefing_SocialHousing_14.09.10_FINAL.pdf

Similarly, the Welfare Reform Act 2012 is affecting rent arrears for tenants, according to Shelter:

> An evaluation of the 'bedroom tax' found that more than half of affected renters were in rent arrears one year on from the introduction of the policy. Three out of every four households affected (76%) had to cut back on food.[19]

This means that, as part of the morality of applicants rent arrears can be viewed as a form of unacceptable behaviour for which a household might lose their social tenancy or be ineligible to apply. While there is nothing wrong with expecting tenants, private or social, to pay their rent on time, penalising them for under-occupying and then penalising them again for rent arrears is problematic. There is a difference between a household being irresponsible and wantonly not paying their bills, and being unable to move to a smaller property.

There is a Historical Foundation for the Current Use of Deservingness

As was discussed in Chapter 3, classifying people has been part of aiding the poor right back to the Middle Ages and the Statute of Laborers 1349[20]. In fact, Dean[21] has argued that the prevailing theories and the influence of some of the writers and other great influencers of the 1790s, such as economists and philosophers, "witnessed the formulation of the modern concept of poverty"[22]. As Cowan contends:

> The history of social housing can be written as a history of the control and correction of morals, its provision being regarded

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19 Shelter and the Shelter Commission on the Future of Social Housing, 'Building Our Future - A Vision for Social Housing' January 2019 at 43. Found at: https://england.shelter.org.uk/__data/assets/pdf_file/0005/1642613/Shelter_UK_-_A_vision_for_social_housing_full_interactive_report.pdf

20 23 Edw. III.

21 See M. Dean, *The Constitution of Poverty: toward a genealogy of liberal governance,* Routledge, London 1991.

22 A. Brundage, *The English Poor Laws, 1700-1930*, Palgrave Press, New York, 2002 at 36.

> (certainly by the Victorians philanthropists) as a means of reforming the souls of the poor…[23]

Further, Cowan argues that:

> The ideology underlying the stigma applied to recipients [by the 'new' Poor Law and use of the workhouse] has never been entirely removed and the metaphorical effect can be similar.[24]

In its current form, the use of deservingness is heavily inspired by the Great Influencers, as this thesis calls them, of the 1790s, such as Thomas Malthus, Joseph Townsend and Edmund Burke. This change in attitudes seems to have been heavily influenced by the popular thinking of the time on the use of free market economics, as argued by Brundage:

> England's mandatory system of poor relief was, therefore, potentially subversive of the wholesome discipline of the unfettered market. In such circumstances, the deterrent aspect of the workhouse came to the fore, and seemed an effective safeguard against the utter breakdown of labour discipline.[25]

Many at the time, who were trying to change the Elizabethan Poor Laws of 1598 and 1601, argued that the laws as applied encouraged laziness, and were inefficient. For example, Townsend argued:

> The laws indeed have made provision for their relief, and the contributions are more than liberal. which are collected for their support; but then, the laws being inadequate to the purposes for which they were designed, and the money collected being universally misapplied, the provision, which was originally made for industry in distress, does little more than give encouragement to idleness and vice. … These laws, so beautiful in theory, promote the evils they mean to remedy, and aggravate the distress they were intended to relieve.[26]

In other words, these new theories and their increasing popularity helped change the views of society on poverty and the place of the poor. No longer

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[23] D. Cowan, *Housing Law and Policy*, First Edition, Cambridge University Press, Cambridge 2011 at 357.

[24] *Ibid* at 147.

[25] A. Brundage, *The English Poor Laws, 1700-1930*, Palgrave Press, New York, 2002 at 11-12.

[26] J. Townsend, 'A Dissertation on the Poor Laws by a Well-Wisher to Mankind 1786' Republished London, Printed for Ridgways, 170, Piccadilly, 1817, Section I, pages 1-2.

was there a right to poor relief for those incapable of work, for that in itself was harming the free market and the wages of workers. It was an inefficient system that hurt those it was trying to help, and it needed to be overhauled. This entire position was greatly bolstered by the father of modern utilitarianism, Jeremy Bentham, as Cowan argues:

> The 'new' Poor Law, designed by Bentham's disciple, Edwin Chadwick, stigmatised the poor through the workhouse which operated as a disciplining device for those both inside as well as outside its walls.[27]

Despite this fact, Bentham was not an advocate of Townsend or of Malthus's want to abolish the poor laws completely, his thinking on poverty was very much influenced by his ideas on justice and on utilitarian philosophy[28].

Bentham's designs of Victorian workhouses, based on his brother Samuel's ideas for a Russian prison, termed the Panopticon would have a "significant influence"[29] over designs of Victorian workhouses. Remember, the Victorian criteria seems to focus solely on willingness to work, especially towards to latter years of the nineteenth century, regardless of ability. Further, the Victorians saw poverty being akin to idleness or some form of moral weakness and therefore attached more of a stigma to poverty relief[30]. This is a change from the Reformation thinking of certain types of poor being deserving by virtue of being unable to work (the impotent poor).

There are similarities of the modern criteria with Elizabethan concepts, such as behaviour, as it should be remembered that the Tudors would incarcerate sturdy beggars and vagabonds, it was built firmly into the legal framework of the time. However, modern deservingness, like modern poverty, have more

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27 *Supra* n.23 at 147.

28 M. Quinn, 'Jeremy Bentham on the Relief of Indigence: An Exercise in Applied Philosophy' (1994) Volume 6(1) Utilitas 81 at 83.

29 *Supra* n.22 at 35.

30 See, for example: P. Carter, 'Joseph Bramley of East Stoke, Nottinghamshire: A Late Victim of Crusade against Outdoor Relief' (2014) 17:1 Family and Community History 36.

in common with the Victorian where good behaviour and status were both enforced by the workhouse. This is a natural extension of Dean's and Cowan's arguments on modern poverty and its related stigma being founded very much in the great influencers of the 1790s and the enactment of the new Poor Law.

Deservingness Disproportionately Burdens the Vulnerable

As discussed in Chapter 6, the challenges in housing that the vulnerable face tend to be greater than those of those who are not vulnerable. From getting adaptions made to the home, to discrimination faced by those with mental illness, there seems to be a range of areas where being vulnerable will made one's housing situation more difficult. In fact, the vulnerable tend to be poorer. This was highlighted in a report by the Equality and Human Rights Commission, which found, even within working families, those with disabled members were more likely to be considered in relative poverty[31].

When considering deservingness, again, the vulnerable face their own unique challenges. For example, there is evidence that the mentally ill are considered undeserving:

> "Mental health is really, I think, virtually ignored by social housing allocation policies. I think generally there's a feeling that people are at it and have got a doctor's letter because they're trying to work the system. Or even worse, there might be some kind of risk or danger to the other tenants." - Call-for-evidence respondent, disabled people's organisation [32]

The stereotype of people with serious mental illness seems to confuse the idea with intelligence. One housing officer interviewed for a study carried out by

[31] This report considers those living below "60% of contemporary median income after housing costs" to be living in relative poverty.

[32] Equalities and Human Rights Commission Report, 'Housing and Disabled People – Britain's Hidden Crisis: Full Report' Published May 2018 page 65. Found at: https://www.equalityhumanrights.com/sites/default/files/housing-and-disabled-people-britains-hidden-crisis-main-report.pdf

the University of York on the use of medical evidence in housing decisions stated:

> … I mean him, even how he interacted in the interview, he didn't come across as like, like someone that was, you know what I mean, that was not intelligent. In fact he, he seemed quite intelligent and he seemed to know what, what he was talking about… I mean he's acknowledging that there are some issues in his life that he has to sort out. In my experience, I mean if you've got serious mental health issues, you wouldn't be able to have that, that, that sort of reasoning. He didn't present as vulnerable to me, to be honest….again he knew… the procedure in regards to approaching the Council and the kind of questions he would be asked.[33]

Mental illness is not the same as intelligence or self-awareness. This entire statement represents the very worst of the stereotypes and misunderstandings that need to be avoided during housing decisions. Unfortunately, the study concluded this problem was more widespread than a few individuals:

> Our inquiry revealed that there are particular and persistent barriers faced by people with mental health conditions, which impede their right to independent living. Individuals face a huge amount of stigma from housing providers because of misconceptions and stereotypes.[34]

The unique situation a disabled person might find themselves in might also be the cause of added hardship thanks to several the measures passed in the last decade. The Welfare Reform Act 2012, which added the bedroom tax, has few exceptions for those who need additional rooms for medical purposes, and the Supreme Court in *R (on the application of Carmichael and Rourke) (formerly known as MA and others) v Secretary of State for Work and Pensions*[35] drew the lines on the narrowest margins with Meers questioning the reasoning as unclear:

> This need based distinction is not as clear as it first seems. … in both instances, the additional bedroom is that space. In the same way

[33] *Ibid* page 80.
[34] *Ibid*.
[35] [2016] UKSC 58.

> that medical equipment may be stored outside of the bedroom space, carers may be accommodated outside of the bedroom too. Why the former is treated as so opaque is not clear. The scope of a medical need in this context is also unspecified. One would imagine that needs arising from mental health problems would be included.[36]

So, the requirement for an extra bedroom for medical needs is not always enough to justify the need for another bedroom that would otherwise qualify for the "bedroom tax". Considering there is a lack of smaller properties, and a lack of adapted properties, potentially forcing vulnerable tenants out of their homes because they can no longer afford them is unacceptable.

Moreover, the legal framework is adding burdens to the vulnerable by focussing part of the criteria of deservingness on acceptable behaviour. There is an argument that such a requirement should protect some tenants, as disabled and other vulnerable people tend to be more subject to anti-social behaviour as discussed in Chapter 6. A study conducted by Sheffield Hallam University and the Disability Rights Commission looked specifically at experiences of disabled people in social housing:

> The findings revealed the extent to which disabled people were subjected to many different forms of attack; including verbal attack (73%), physical attack (35%), harassment in the street (35%), having something stolen (18%), being spat on (15%) and having property damaged (12%). … Nearly a third of disabled people surveyed who were victims of hate crime experience attacks at least once a month.[37]

So, in this way anti-social behaviour can be tackled against those who are vulnerable, protecting their rights and adding security. However, there seems to be little recent evidence to support or refute this idea.

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[36] J. Meers, 'Discrimination and the "spare room subsidy": an analysis of Carmichael' (2017) 20(2) Journal of Housing Law 24 page 27.

[37] C. Hunter et al., 'Disabled people's experiences of anti-social behaviour and harassment in social housing: a critical review' Sheffield Hallam University and the Disability Rights Commission, August 2007 page 64. Found at: https://www4.shu.ac.uk/_assets/pdf/ceir-DRCASBOFinalReport.pdf

Those who are likely to suffer are those who have mental illness or a disability that might cause anti-social-type behaviour but as a part of their condition. There has been empirical research conducted that demonstrates that the vulnerable are more likely to be subject to some form of control order than the non-vulnerable:

> There is some reliable evidence which suggests that disabled people living in social housing, particularly those with learning difficulties or mental health problems, comprise a significant proportion of those individuals who are subject to interventions designed to tackle anti-social behaviour (Dillane et al, 2001, Jones et al, 2005, Nixon et al, 2006). … on the basis of our review, we can say with some degree of certainty that a large percentage of those subject to anti-social behaviour measures appear likely to have or be given a diagnosis of ADHD.[38]

As the criminal age of responsibility is 10 years old, children can also be subject to control orders. As the good behaviour requirements for many social tenancies are not just for the named tenant(s) but any member of their family, it is possible a child with behavioural problems who is subject to a control order could be responsible for the eviction of their family. This was noted by the Office of the Children's Commissioner in a report on the Anti-Social Behaviour, Crime and Policing Bill, which introduced the Injunction to Prevent Nuisance and Annoyance:

> …where children are in breach of a civil injunction or criminal behaviour orders: there is a very real possibility of children as young as 10 years old and their family being made homeless as a consequence of original behaviour which was deemed to cause 'nuisance and annoyance'.[39]

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[38] The Office of the Children's Commissioner, 'A Child Rights Impact Assessment of the Anti-Social Behaviour, Crime and Policing Bill (parts 1 - 6; part 9)' June 2013 page 9. Found at: https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/07/CRIA_ASB_Crime_and_Policing_Bill_June_2013.pdf

[39] *Ibid* page 25.

There is evidence that this also applies to adults with mental illness, as concluded by the Equality and Human Rights Commission's study, which specifically mentions the legal framework:

> In addition, disabled people's organisations report that the changes brought in England under the Localism Act 2011, which enable housing providers to take 'good behaviour' into account when assigning priority status to applicants, is having a disproportionate impact on individuals with mental health conditions, as housing providers frequently interpret behaviour as anti-social (wilfully or otherwise) rather than as being a result of those conditions.[40]

This can create a situation where people with mental illness are further stigmatised legitimised by the state and the legal framework. Applications such as this may push marginalised groups of people into more dangerous situations, exacerbating their existing conditions, and impacting on their access to housing for reasons attributable to their mental health.

Whatever positive effects this might have for some vulnerable tenants, there are cumulative detrimental effects of deservingness should not be underestimated and might even cancel out any positives. From the stigma of being "deserving" when assessing vulnerability to the requirements of work, which some will find difficult if they are too ill, the negatives seem to outweigh the potential positives.

The Continuous Cycle of Assessment Enhances Conditionality

The Victorian workhouses were promoted by the philosopher Jeremy Bentham. The panopticon, developed by Samuel Bentham, was seen by his brother Jeremy as the solution to a multitude of ills, including the design of the Victorian workhouses:

[40] *Supra* n.32 page 66.

> A system of well-regulated Panopticon workhouses, he [Jeremy Bentham] claimed, could be made to realize a profit, and thus social peace could be maintained, poor rates lowered, and degraded characters reformed, all by a combination of the proper architecture and administrative arrangements.[41]

In fact, Bentham's ideas would have a "significant influence"[42] over designs of Victorian workhouses. As explained in Chapter 3, Bentham felt that there was no need to distinguish between the deserving and undeserving, focusing instead on the idea of indigence:

> Bentham denied even the government should try to discriminate between the deserving and the reprobate. There was only the indigent, henceforth to be distinguished from the mass of the ordinary poor who subsisted by their labour. … Since all those without resources were to be relieved regardless of character, it was critically important to devise a system that would not operate as an inducement for the poor to cease working and join the indigent.[43]

Therefore, the entire purpose of the workhouse was to ensure that those who were given poor relief worked for that relief. These closed communities were closely monitored by various officers of the workhouse itself. Most work was conducted under some sort of supervisor, so that the inmates were seen to be working and behaving according to the rules of the workhouse itself. Punishments for infractions could often be severe. The workhouse allowed the poor to be monitored continually, both in terms of their behaviour and their status (i.e. if they were working). In fact, in terms of status, neglecting work was often an offence that was punishable under workhouse rules[44].

It is possible that the law has created a similar situation for modern social housing. This allows local councils to monitor the deservingness of their applicants or tenants (i.e. the subject of the moral desert) throughout the lifetime of the tenancy in a continuous cycle of assessment. This means from

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41 A. Brundage, *The English Poor Laws, 1700-1930*, Palgrave Press, New York, 2002 page 36.
42 *Ibid* at 35.
43 *Ibid* at 34-35.
44 The Peel Web - Workhouse rules, Parliamentary Papers, 1842, XIX, pp.42-3. Found at: http://www.historyhome.co.uk/peel/poorlaw/ruleswh.htm

the time of application until the tenancy comes to an end, councils can insist on a standard of behaviour from their tenants. Where an applicant's or a tenant's behaviour is deemed unacceptable, the council can refuse their application, order the possession of their tenancy or simply refuse to renew it.

Legislation introduced over the last decade has brought out the modern criteria of deservingness – good behaviour and being in work. The idea that social tenants must conform to standards of behaviour in the past, present and future has created a continuous cycle of assessment, where the tenant must start out deserving and remain so throughout the lifetime of the tenancy. This is checked at three stages application, during the tenancy, and then again when the tenancy is up for renewal. More than anything the continuous cycle of assessment allows the use of enhanced conditionality, where the morality of a tenant or an applicant is under constant scrutiny. Additionally, there are no grey areas for those with mental illness or other disabilities that might make their behaviour erratic or problematic.

Social Housing Requires a More Holistic Reform

One of the main issues with some of the legislation regarding social housing passed since 2011 is it has been a reaction to the growing housing crisis. It is a fact that housing in Britain is in crisis. There are too few homes, the homes on the market, to buy or rent, are far too expensive and there are not enough new homes being built to meet the demand, either social or privately owned/rented. In almost fifteen years the waiting lists for social homes nearly doubled from 1,021,664 in 1997 to 1,813,559 in 2011[45] and demand far

[45] Ministry of Housing, Communities & Local Government, 'Live tables on rents, lettings and tenancies: Table 600: numbers of households on local authorities' housing waiting lists, by district, England, from 1997' Totals for England. Found at: https://www.gov.uk/government/statistical-data-sets/live-tables-on-rents-lettings-and-tenancies

outstripped supply, therefore action had to be taken. However, the issue is that policy which implements a reactionary system of allocations of social housing is likely to be problematic and have unintended consequences, such as the ones outlined in this thesis. The issues caused by these types of laws is nothing new and was even noted by Jeremy Bentham, although more to do with the criminal law during his time:

> For two general rules … in modern British legislation are: never to move a finger until your passions are inflamed, nor ever to look further than your nose. [46]

In Chapter 4, this thesis has demonstrated a link between the introduction of the Localism Act 2011, and the local connection requirements for eligibility and homelessness. There is mounting evidence from empirical research conducted by the Joseph Rowntree Foundation that the requirement of a local connection by residency in a borough for a certain amount of time is difficult for households in poverty[47] and can trap people in "a cycle of homelessness"[48]. This means that one of the potential unintended consequences of the Localism Act 2011 and the implementation of social housing allocations policies that address only the issues caused by the housing crisis is an increase in homelessness, although it should be noted the most cited reason for homelessness is eviction from a private tenancy[49].

There is no argument that the waiting lists needed to be cut, but that should have been achieved as a wider overhaul of the social housing system as a

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[46] G. Postema, *Bentham and the Common Law Tradition*, Clarendon Press, Oxford at 264.

[47] A. Clarke et al., 'Poverty, evictions and forced moves' Joseph Rowntree Foundation, July 2017 at 38. Found at: https://www.jrf.org.uk/report/poverty-evictions-and-forced-moves

[48] Jon Sparkes the Chief Executive of Crisis comments in Falling through the cracks: New Crisis report reveals England's forgotten homeless people being denied access to housing. Found at: https://www.crisis.org.uk/about-us/latest-news/falling-through-the-cracks-new-crisis-report-reveals-england-s-forgotten-homeless-people-being-denied-access-to-housing/

[49] 48.3% were because the landlord wanted to sell/re-let the property in Q2 2019. Ministry of Housing and Local Government, 'Statutory Homelessness, April to June (Q2) 2019: England at 11. Found at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/852953/Statutory_Homelessness_Statistical_Release_Apr-Jun_2019.pdf

whole, beyond a discreet change in allocations policies. The collective impact of this current system, with its reliance on conditionality and the philosophical desert, and the impact it is having on the vulnerable demonstrates its unsustainability. The focus on a reduction of waiting lists by restricting eligibility and overhauling allocations ignores larger issues of social housing such as the lack of funding and new builds, a necessary step if social housing is to continue to be a part of the welfare state.

What Happens Now?

There are significant hurdles to overcome in terms of the current housing crisis. One issue, as outlined above is housing as a reward. When housing is considered a right, the complex allocations schemes and their associated unintentional consequences are no longer necessary. One specific change to housing rights, as suggested by Shelter is increasing tenant's rights both in social housing and the private rented sector (PRS):

> We need to stop ignoring social renters and to properly consider what the future of social housing should look like. Too many social renters feel powerless and without a voice, so we make recommendations to improve regulations and support tenant voice. …Reforms are urgently needed to the private rented sector, but it is ultimately unfit to meet the needs of increasing numbers of people trapped renting privately. Only a good quality, reformed, and larger social housing sector can meet these needs.[50]

In terms of the PRS, many newspapers[51] and thinktanks[52] have looked to the Germany[53] as an example to be followed. The German private rented sector

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50 *Supra* n.19 at 211.

51 See, for example, The Economist, 'The horrible housing blunder - Home ownership is the West's biggest economic-policy mistake' January 16 2020 Edition. Found at: https://www.economist.com/leaders/2020/01/16/home-ownership-is-the-wests-biggest-economic-policy-mistake

52 B. Davies et al., 'Lessons from Germany: Tenant power in the rental market' Institute for Public Policy Research Report, January 2017. Found at: https://www.ippr.org/files/publications/pdf/lessons-from-germany-jan17.pdf

53 According to RentCal, the number of Germans who rent their properties sits at about 55%. The German Rental Market, found at: http://www.rentalcal.eu/the-german-rental-market. The

has a stable system with long-term tenancies[54] and system of enforceable rights for tenants[55], which lends itself to greater stability for the population overall. While suggesting an identical system would be an oversimplification, there are certainly lessons that can be learned from a system that goes further to protect tenant's rights and encourages a longer-term solutions for both parties.

It is generally agreed that more accommodation needs to be built in order to support the population. Shelter is a strong advocate of more social housing:

> Government should deliver enough social homes over the next 20 years for the 3.1 million households who will be failed by the market, providing both security for those in need, but also a step up for young families trying to get on and save for their future.[56]

It is, however, also in favour of increased regulation in the PRS, for example:

> The government should increase resources for local enforcement to tackle rogue landlords and poor conditions, in line with the growth in the number of private rented properties.[57]

The new government has taken steps to remove the no-fault evictions, but so far has made no mention of building new social housing. Boris Johnson's Queens Speech of December 2019 was deafeningly quiet on the matter, and it seems likely that, until Britain has left the European Union, many domestic policies of some urgency will be deprioritised. There is much work to be done in social housing policy, but it is currently unclear how much, if any, will be achieved. The Shelter report is curiously hopeful in tone, and it has an ambitious plan of change, but without money, backing from private industry and the government, it is largely unachievable. Perhaps once Brexit has been

Economist put it at 50% and the Institute for Public Policy Research at 40%. However, it is generally agreed that the PRS in Germany is the largest of any European country.

54 *Ibid* at 13.

55 *Ibid* at 23.

56 *Supra* n.19 at 215.

57 *Supra* n.19 at 215.

completed, the housing crisis will, once again, take a more important role in government agenda.

Final Thoughts

Social housing matters. That policy is enforcing damaging and antiquated ideas that have caused additional hardship to people who could ill afford more should be considered a national tragedy. England is in a housing and homelessness crisis and part of the reason is the changes made to the legal framework on social housing. The spectre of Victorian ideas of poverty, and applications of a philosophical desert has, perhaps unintentionally, influenced policy, politicians and the popular press in a way that has a deleterious effect.

The inescapable truth is that homelessness can happen to anyone. Yes, there are groups of people who are more likely to be in that position, but it is not just the poor who end up on the streets. Relationship breakdowns, pressures of the job, redundancy can all lead down a path that ends up in an eviction. Consider the different types of people named by the Bureau of Investigative Journalism in their report on homeless deaths in 2018:

> … some as young as 18 and some as old as 94. They included a former soldier, a quantum physicist, a travelling musician, a father of two who volunteered in his community, and a chatty Big Issue seller.[58]

Homeless people are not a homogenous group. Social housing is there to cushion the fall, to help those who need it. The idea that an applicant must deserve a home is problematic. No longer is having a home just about need, it is about desert, about somehow being worthy of something that many take for granted. This goes against the idea of the home as a basic right, something not to be aspired to, but that should be available to all. With limited social housing

[58] M. McClenaghan, '"A national scandal": 449 people died homeless in the last year' The Bureau of Investigative Journalism, 8 October 2018. Found at: https://www.thebureauinvestigates.com/stories/2018-10-08/homelessness-a-national-scandal

places, this is no longer possible, but there must be better ways to assign this precious resource, such as a consultation and eventual reform of the allocations process. A system that does not make moral judgments about the character of applicants, rewarding those deemed should be preferred over one that does.

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