

# Closing the Door on the Law

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## ***The Implications for Chronically Sick and Disabled Tenants of the Housing Benefit (Amendment) Regulations 2012***

### **Introduction**

It has long been recognised that, in the words of the late Lord Morris:

**‘The ordinary living expenditure of the chronically sick and disabled person is affected by costs which do not fall on others.’<sup>1</sup> (Morris 1970)**

Indeed, it was reassuring to note that the current Government also recognise these considerations and intend to exempt people in receipt of Employment and Support Allowance (ESA) (Support) and Disability Living Allowance (DLA)/Personal Independence Payment (PIP) from the imminent household benefit cap due to

**‘the additional financial costs that can arise from disability and that disabled people will have less scope to alter their spending patterns or reduce their housing costs.’<sup>2</sup> (DWP 2012)**

But the new draft Housing Benefit Regulations under scrutiny afford *no such protection* and whereas the Government *has* recognised the needs of disabled people in the exemption from the benefit cap they have ***failed to apply the same considerations in the drafting of the under-occupation measure.***

The policy arguments have been well-documented and amendments were won in the Lords then overturned in the Commons.

This briefing is not just about the policy: it asks that attention is brought to the legal shortcomings and consequences arising from the draft Amendment and recommends that, because of these consequences, it be withdrawn and rewritten.

### **A Disability Issue**

The DWP Equality Impact Assessment<sup>3</sup> (updated June 2012) clearly shows the disproportionate effect the size criteria measure will have upon sick and disabled tenants. 420,000 of the total 660,000 households affected contain a family member with a disability (based on Equality Act definitions of disability). Some housing charities put the figure even higher at 72% of the total.<sup>4</sup> (Affinity Sutton 2012)

This makes the Housing Benefit (Amendment) Regulations 2012 irreducibly a 'disability issue' and it is of great concern that it has not been properly addressed or assessed as such.

The additional £25 million allocated to the Discretionary Housing Payment Fund (DHP) for 35,000 tenants with homes adapted for wheelchair access is meagre mitigation for the 420,000 disabled tenants affected.

Long-established definitions of disability do not merely depend upon the presence of adaptations, nor the outward appearance of any functional disability per se. No amount of short-term funding can take the place of properly targeted exemptions for vulnerable groups.

Under the proposed measure **all disabled tenants other than those who need overnight care from a non-resident carer** will lose a percentage of their rent if they have more bedrooms than they 'need'.

It is clear that the Government, in its drafting of these regulations, have not only failed to account for the different needs of sick and disabled people (or legal definitions of disability), they have also produced a piece of legislation which ignores fundamental principles of human rights, disability equality and protection under the law.

This Amendment will result in poverty, arrears and homelessness for sick and disabled people. It breaches human rights law and must be withdrawn.

## **The Burnip Case**

The draft regulation is seriously undermined by the standing judgements of what has become known as the **Burnip case**<sup>5</sup>, in which three separate appellants challenged the existing law on housing benefit as it related at that time to the private rented sector.

In that case the Court of Appeal considered whether the application of the bedroom rule in the housing benefit regulations with regard to private rented accommodation discriminated against those who needed an extra bedroom for a carer or because their children could not share a room because of disability.

The rules regarding need for overnight care have since been altered and the new Amendment for social sector housing includes the only exemption for that purpose.

The case brought under consideration whether the bedroom rule was discriminatory under Article 14 of the European Convention on Human Rights (ECHR); and, if so, whether there was any objective and reasonable justification for its discriminatory effect. The question arose as to whether the rules had a disparate adverse impact on disabled people or failed to take account of the differences between disabled and non-disabled people.

Moreover, Justice Henderson made three crucial points which also have bearing upon the consideration of the draft Amendments:

Firstly, that Incapacity Benefit (IB) and DLA (or ESA and PIP) are designed to meet ordinary living expenses and **not** intended to meet housing needs and

**'It would be wrong, in principle, to regard those subsistence benefits as being notionally available to him to go towards meeting the shortfall between his housing-related benefits and the rent he had to pay.'** (para 45, Burnip)

Secondly, that Discretionary Housing Payments **were not** a complete or satisfactory answer to the problem as they were awarded on a short-term basis and frequently did not even cover the shortfall. At the time of the hearing in the Court of Appeal Ian Burnip was also engaged in three simultaneous Judicial Reviews arising from contentious Discretionary Housing Payment decisions by his Local Authority. It is worth noting that a Judicial Review can only assess the correctness of the decision making process; there is **no right to appeal** the decision (not to award a discretionary housing payment) on its merits.

Finally, the difficulty in finding appropriate accommodation and the need, in some cases, for adaptations mean that it is essential (not least for the cost to the local authority) that accommodation is secure and paid for in the long term and that disabled tenants are given:

**'A reasonable degree of assurance that [they] will be able to pay the rent for the foreseeable future, and will not be left at the mercy of short-term fluctuations in the amount of housing –related benefits.'** (para 47, Burnip)

The considerations and rulings of this case form the basis and backdrop of the argument for the annulment or withdrawal of the draft Housing Benefit (Amendment) Regulations 2012.

As they stand the proposed Housing Benefit (Amendment) Regulations constitute a failure to make an exception from a policy of general application for sick and disabled tenants and the reliance upon DHPs **does not amount to proportionate justification** for the consequent discrimination and disadvantage suffered.

Unless the Amendments are withdrawn, to be appropriately rewritten, the Government will be in the unprecedented, and highly controversial, position of attempting to **erase all reliable safeguards against rent arrears, eviction and homelessness for chronically sick and disabled tenants** affected by the size criteria. No other Government has ever dismantled fundamental protection for a vulnerable group in this way.

## The Reason for the Measure

The stated objectives of the 'under-occupation' measure are to

- Reduce the housing benefit bill
- Incentivise work behaviour
- Encourage movement in the sector (to free up larger homes for overcrowded families)
- Ensure parity with the private sector in the choices tenants make about affordability

Once it was made clear, from the Government's own Equality Impact Assessment, that the ostensibly neutral under-occupation policy would **disproportionately affect chronically sick and disabled tenants** then steps should have been taken to ensure the burden would not also be disproportionate in its effects upon the living standards of that group and that they had the means to absorb the financial impact of a loss of benefit.

Under **Article 14 of the European Convention on Human Rights (ECHR)** a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group.

It is noted that in the Draft Statutory Instrument and the Explanatory Memorandum no explicit reference is made to the disproportionate effect of the measure upon disabled people. Whilst the concerns of some groups are noted there is no explicit acknowledgement that the savings outcome essentially depends on reducing benefit for a protected group.

Apart from allocating an additional amount to the DHP fund the Government **have not ameliorated the impact** in a way which would provide the reliable support the Judges in the Burnip case identified as being crucial to the well-being and fundamental rights of chronically sick and disabled tenants.

## Tenant Distress

Early evidence indicates that tenants are already experiencing considerable fear and uncertainty, with many tenants reporting a concomitant decline in their physical and mental health.

Tenants are very aware of the intrinsic unfairness of the measure; that it is inherently contradictory and dependent on them not moving; that it is morally wrong in that they are being effectively 'punished' for something which is not their fault; and that, most importantly, their inability to work due to illness or disability is being used to marginalise and impoverish them.

The innate contradictions of the measure are being left for the tenant to absorb whilst Housing Associations (HA's) have retrenched to consider how to best manage declining revenue. Early research by the Cambridge Centre of Housing and Planning Research indicated that 52% of tenants would find it extremely difficult to manage the shortfall and would have to cut back on essentials such as food and heating<sup>6</sup> (CCHPR 2011). This data was gathered before the continuing economic crisis deepened and the percentage struggling will undoubtedly rise following the further cuts in benefits next year.

The percentages of the rent payable may seem small but 25% of the rent could be as much as £30 per week in some cases; this, in turn, translates to almost a third of weekly benefit income of £97 ESA (Work Related Activity Group). But *any* additional pressure on benefit income is unsustainable.

The restriction of benefit available for rent, and the threat of eviction, transforms people's relationship with their homes and their housing provider, and fundamentally impacts upon every area of their life and community.

The only official Government remedy is the Discretionary Housing Payment fund (DHP).

## Discretionary Housing Payments (DHP)

The consultation on the new DHP guidelines concluded in August and the results have not yet been made public. But the National Housing Federation, in its response to the consultation, expressed their concern about the

**'Government's decision to deal with the majority of hard cases through temporary discretionary support from a budget-limited fund rather than through exclusions or exemptions from benefit cuts.'**<sup>7</sup> (Tate, NHF 2012, para 6.3, page 8)

It is upon this limited, discretionary resource that the justification for the legislation is precariously balanced. The 7<sup>th</sup> Report of the Secondary Legislation Scrutiny Committee<sup>8</sup> highlights the additional funds allocated to DHPs but asks the House to note that the money is not 'ring-fenced' (paras 14-15).

In fact the money *cannot be* ring-fenced. To do so would be legally unsafe, against the discretionary principle, and would be deemed 'fettering' discretion. This translates, for the tenant, to ***no award*** being safe or guaranteed.

**No matter how great the need there is no automatic eligibility for DHP and there is no right of appeal.**

The awards in the Burnip case had been short-term, unreliable, and frequently did not cover the shortfall, leaving the tenant in a perpetual state of insecurity regarding his housing situation. The unpredictability inherent in a fund which cannot be specifically targeted leads

to an unacceptable state of affairs for a chronically sick or disabled tenant and, as Justice Henderson, remarked

**‘Housing, by its very nature is likely to be a long term commitment... a disabled person needs to have a reasonable degree of assurance that he will be able to pay the rent for the foreseeable future.’** (para 47, Burnip)

The stark reality is that an award from the DHP fund will be the only remedy standing between the sick and disabled tenant and rent arrears.

## Using disability benefits to pay rent

It was made clear in the Judge’s decision in the Burnip ruling that

**‘It is necessary to draw a clear distinction between benefits claimed for subsistence, and those which he was entitled to claim in respect of his housing needs. His incapacity benefit and disability living allowance were intended to meet his ordinary living expenses...they were not intended to help with his housing needs.’** (para 45, Burnip).

In the new DHP guidelines, the DWP states

**‘We expect that most claimants affected by this measure will find ways of making up the shortfall themselves, in order to remain in their existing home.’**<sup>9</sup> (DHP guidance 2013, para 2.2, page 25)

Indeed, under existing guidelines decision makers are encouraged to urge claimants to try and find the shortfall from existing income, savings, and relatives.

There is *no* recourse to a notion of protected or applicable income or even how much that protected income might be. The decision makers’ guidelines allow them considerable, and worrying, discretion to decide *whether or not* to ‘disregard income from disability-related benefits’ (DHP draft guidance 2013, para 3.9, page 10).

This is contrary to recent observations in the Burnip case which clearly argued ***against the notion of disability benefits being available for housing costs*** and would be contrary to traditional notions of applicable income.

This is an unacceptable situation for vulnerable claimants and could very easily lead to a state of affairs whereby the benefits of tenants are scrutinised by decision makers and recommendations for budgeting are made which are insensitive and ill-informed about the additional expense of disability.

With DHP funding being of a short-term nature it is highly likely that disability benefits will have to be used in most cases to cover rent either temporarily or long term as, no matter

what the tenant's level of sickness or disability, there can be no guaranteed entitlement to DHP. As remarked in Burnip:

**'They (DHPs) cannot come anywhere near providing an adequate justification for the discrimination.'** (para 46, Burnip).

## Consequences of the Measure

There has *never* been a Government benefits policy which

- Will result in disability benefits being used to pay hitherto rebated rent
- Conflates different benefits and affords ***no right to protected income***
- Allows for ***no meaningful exemptions*** other than a small minority needing constant overnight care
- Provides ***no transitional protection*** whatsoever
- Is retrospective as it applies to existing tenancies despite the tenant having made no change to their circumstances
- Has a proven disproportionate effect on sick and disabled people yet fails to address ***the indirect discrimination*** of the measure
- Relies upon a discretionary fund with ***no automatic entitlement based on need***
- Allows ***no right of appeal*** for decisions not to award discretionary housing payment
- Leaves sick and disabled people with Judicial Review as their only means to argue against non-award of DHP: a remedy not based on the merits of the case but the *process* of the decision making
- Provides ***no other alternative*** source of funding to DHP for sick and disabled tenants unable to work, borrow money or take in a lodger
- Relies on a behavioural change as its mark of success which makes no acknowledgement of the differences and needs of the majority group affected and is therefore ***indirectly discriminatory***.
- Is ***retrogressive*** insofar as tenants affected will be in a measurably worse position
- The burden imposed upon sick and disabled tenants ***is not proportionate to the aims of the measure***

The Government have consistently refused to carry out a full assessment of the cumulative impact of all the benefit losses affecting sick and disabled people. There is sufficient existing evidence to suggest that people are already facing serious hardship, even before more cuts are imposed next year:

**'We have seen evidence of declining mental health, exacerbated by fear for the future, of physical and emotional strain... and most of all, we are seeing it become increasingly difficult for disabled people to participate in everyday family and civic life.'**<sup>10</sup> (Wood, Demos 2012, Foreword by Richard Hawkes, page 9)

The isolation and despair, as a direct result of Government policies, will only get worse if tenant stability is under threat and people have to consider moving from their established communities and networks of formal and informal support.

The Joint Committee on Human Rights, upon considering the measure recommended:

**‘Allowing some additional discretion to exempt disabled people facing exceptional hardship from... the provisions concerning under-occupation of social housing.’<sup>11</sup> (21<sup>st</sup> report, December 2011, page 4, second paragraph)**

As they stand, the size criteria changes in the draft Housing Benefit Regulations:

- Are contrary to Article 1 (Protocol 1) of the European Convention of Human Rights (ECHR)
- Are contrary to Articles 3, 8 and 14 of the ECHR
- Are contrary to Article 11 of the International Covenant on Economic Social and Cultural Rights (ICESCR)
- Are contrary to Articles 4, 19 and 28 of the UN Convention on the Rights of Persons with Disabilities. (UNCRPD)
- Provoke a retrogressive outcome under the terms of the UNCRPD
- Are contrary to protections under the Equality Act
- Are contrary to decisions and judicial opinion in the Burnip case

## Conclusion

It is inexcusable for any Government to attempt to remove legal safeguards and protections from its citizens.

In consequence, the Draft Order to amend the Housing Benefit Regulations should be abandoned unless and until specific measures are put in place protecting chronically sick and disabled tenants from the inevitable risk of rent arrears, homelessness and destitution.

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