



Cowan, D. (2019). Reducing homelessness or re-ordering the deckchairs? *Modern Law Review*, 82(1), 105-128.
<https://doi.org/10.1111/1468-2230.12390>

Peer reviewed version

Link to published version (if available):
[10.1111/1468-2230.12390](https://doi.org/10.1111/1468-2230.12390)

[Link to publication record in Explore Bristol Research](#)
PDF-document

This is the author accepted manuscript (AAM). The final published version (version of record) is available online via Wiley at <https://onlinelibrary.wiley.com/doi/full/10.1111/1468-2230.12390>. Please refer to any applicable terms of use of the publisher.

University of Bristol - Explore Bristol Research

General rights

This document is made available in accordance with publisher policies. Please cite only the published version using the reference above. Full terms of use are available:
<http://www.bristol.ac.uk/red/research-policy/pure/user-guides/ebr-terms/>

Reducing homelessness or re-ordering the deckchairs?

Dave Cowan¹

On the 40th anniversary of the enactment of the Housing (Homeless Persons) Act 1977, the Homelessness Reduction Act 2017 passed in to law, and came in to effect on 2nd April 2018. Both were private members' Bills, sponsored by Stephen Ross MP and Bob Blackman MP, but their passage through Parliament could not have been more different – the 1977 Act was heavily contested and amended during its passage; the 2017 Act was a cross-party affair, together with an interest group coalition, although, in tune with modern Parliamentary practice, there were 21 government amendments on third reading in the House of Commons.

There have been amendments to the 1977 Act over the years (indeed, it can now be found in Part 7, Housing Act 1996), but its basic structure remained in place.² The 2017 Act, however, has made significant alterations both in form and substance, amidst a declaration that there must be nothing less than a “culture change” among local housing authorities implementing it (and, more broadly, certain specified public authorities).³ It has been accompanied by replacement quasi-legislation – statutory instruments and a new Code of Guidance⁴ – and an early application of the “burdens principle” (that additional burdens placed on local authorities should be met with additional resources for them – in this case an underwhelming £61 million⁵).

Officially, statutory homelessness has reduced considerably since its high point in 2003 (when 296,970 households applied for homelessness assistance, and 135,590 were accepted by local housing

¹ University of Bristol & Associate Tenant, Doughty Street Chambers. The author is grateful to colleagues in Doughty Street Chambers for their assistance, especially Dominic Preston and Marisa Cohen who led a discussion on the 2017 Act. I am also grateful to Helen Carr and Antonia Layard for comment and inspiration.

² P. Cloke, P. Milbourne & R. Widdowfield, “Change but no change: Dealing with homelessness under the 1996 Housing Act”, (2000) 15(5) *Housing Studies* 739.

³ 2nd Reading, HC Debs, vol 616, col 544, Bob Blackman (28th October 2016).

⁴ Homelessness (Review Procedures etc) Regulations 2018, SI 2018/223; Homelessness Code of Guidance for Local Authorities (MHCLG, 2018).

⁵ HL Debs, vol 779, col 495, Lord Best (24th February 2017).

authorities for the main housing duty), although it has been growing again since 2010.⁶ In 2017, provisionally, 112,200 households made applications, and 57,890 were accepted.⁷ The decline in applications and acceptances is not due to a decline in homelessness households but a change in the focus of homelessness service towards prevention.⁸ The reasons why households become homeless have also changed, from relationship breakdown being the predominant factor to the ending of an assured shorthold tenancy accounting for around 30 *per cent* of total applications.⁹ There has been widespread concern about households being provided temporary and more long-term accommodation out of area, as well as issues with the quality of the temporary accommodation provided, in satisfaction of duties owed to homeless households.¹⁰

The aim of the 2017 Act to “reduce” homelessness is more likely to hide long-term systemic issues in the housing system. As was continually noted in Parliamentary debates (both in 1976-7 and 2016-7), neither Act affects the shortage of low cost private or social housing, which is sometimes described as a “crisis”.¹¹ This means that the 2017 Act’s significant alterations are likely to result in a re-ordering of the deckchairs on the Titanic of housing policy.

After a brief summary of the development of the 1977 Act over the last 40 years, the first section provides a retrospective – a biography - of the Act. It is argued that the 1977 Act was both out of time and out of place, and became more so over the years. The 1977 Act and its successors now can be seen as being implemented in what became an excessively juridified environment, imposing obligations based on an imaginary of housing tenure that was already outdated by 1977. From whatever political or intellectual position one considered it, the Act was regarded as problematic. This

⁶ MHCLG, *Statutory Homelessness and Prevention and Relief, October to December (Q4) 2017: England*, Housing Statistical Release, 22nd March 2018, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/692938/Statutory_Homelessness_and_Prevention_and_Relief_Statistical_Release_Oct_to_Dec_2017.pdf (last checked, 8th May 2018); Live Tables on Homelessness, Table 770, available at <https://www.gov.uk/government/statistical-data-sets/live-tables-on-homelessness> (last accessed, 29th June 2018).

⁷ *Id*, Table 770.

⁸ See H. Pawson, “Local authority homelessness prevention in England: Empowering consumers or denying rights?”, (2007) 22(6) *Housing Studies* 867.

⁹ Live Tables on Homelessness, Table 774, available at <https://www.gov.uk/government/statistical-data-sets/live-tables-on-homelessness> (last accessed, 29th June 2018).

¹⁰ See L. Fisher, “Over 55,000 homeless families forced to move”, *The Times*, 7th May 2018; A. Gregory & C. Miller, “Cost of temporary housing has risen 1,000% in Theresa May’s constituency”, *Daily Mirror* 7th May 2018.

¹¹ Paul Channon, on 2nd Reading of the 1977 Bill, said, “Whether or not the Bill is passed, I hope no one believes that it will create one more house or flat to house anyone who is homeless. It may or may not help, but it will not create extra resources”: HC Debs, Vol 926, col 911 (18th February 1977); Blackman noted on 2nd Reading of the 2016 Bill, “The Bill does not deal with supply, but that is an important issue. It is clear that we need to increase the supply of affordable homes right across the country, but particularly in London”: HC Debs, Vol 616, Col 543 (28th October 2016).

runs counter to one discursive narrative about the 1977 Act as a high point of political intervention in the housing settlement.¹²

The 2017 Act alters the 1977 Act, placing obligations on local authorities which mean that the law that has grown up around the key concepts since 1977 will become largely redundant. Instead, there is a focus on prevention and relief. These obligations are noted in the second section, which highlights how the 2017 Act seeks to achieve its objectives. In the following section, I analyse the effect of the 2017 Act, making three central points: it has ushered in a form of neo-liberal government of the homeless; the understanding of the household seeking assistance has fundamentally altered, from passive applicant to active citizen; the private rented market provides the sole mechanism for performing the duties but remains problematic.

The Housing (Homeless Persons) Act 1977 – A biography

Development

As Sheldon *et al* suggest, all legislation has a contextual, cultural and contingent biography.¹³ The 1977 Act represented a series of pragmatic compromises,¹⁴ such that the final version bore little resemblance to its original draft, with added conditions for assistance (referred to by early critics as “obstacles”¹⁵) which reflected a history of Poor Law assistance.¹⁶ It required an application for homelessness assistance, and for the local authority to decide on whether they owed the applicant a graduated series of duties, depending on whether the applicant was homeless, in priority need, and not intentionally homeless.¹⁷ An applicant who crossed these obstacles was owed the main housing duty (a duty on the local authority to provide long-term accommodation), unless the local authority decided that the applicant had a local connection with another authority (and not with their area) and referred the applicant to that other local authority. One key element of the 1977 Act was a desire to

¹² See D. Cowan, *Housing Law and Policy* (Cambridge UP, 2011), ch 6.

¹³ S. Sheldon, G. Davis, J. O’Neill, and C. Parker, “The Abortion Act 1967: A biography”, (forthcoming) *Legal Studies*.

¹⁴ The best discussion of these compromises can be found in I. Loveland, *Housing Homeless Persons: Administrative Law and the Administrative Process* (OUP, 1995), ch 2.

¹⁵ P. Watchman and P. Robson, “The homeless persons obstacle race”, (1981) *Journal of Social Welfare Law* 1 (Pt I), 65 (Pt II).

¹⁶ See R. Cranston, *Legal Foundations of the Welfare State* (Weidenfeld & Nicolson, 1985).

¹⁷ For discussion of the original Act, see R. Carnwath, *Guide to the Housing (Homeless Persons) Act 1977* (Knight & Co, 1978); M. Partington, *Housing (Homeless Persons) Act 1977* (Sweet & Maxwell, 1978).

avoid families being split so provision was made for the local authority to make its consideration and owe its duties to the applicant and their household.¹⁸

Part of the legal history of the 1977 Act involved the highest courts providing narrow interpretations of the Act's provisions and duties.¹⁹ One such early judicial intervention was when the House of Lords provided a narrow interpretation of "accommodation", which restricted the ambit of the legislation.²⁰ That interpretation led to the first Parliamentary amendment: if accommodation is not "reasonable to continue to occupy", then a person is homeless; and the duty was amended to provide "suitable" accommodation.²¹ Even these amendments were interpreted narrowly to give local authorities room to manoeuvre.²² As regards the priority need obstacle, single applicants must demonstrate that they are "vulnerable" for a particular or "other special" reason.²³ Following a period of settled law,²⁴ that has been interpreted as meaning that the person must be "significantly more vulnerable than an ordinary person when homeless",²⁵ a phrase of transparent difficulty but which underpins nearly all the categories of priority need.²⁶

Although the ideas underpinning the "back to basics"²⁷ approach in the early 1990s were said to be in tension with the 1977 Act,²⁸ that Act was largely re-enacted in the Housing Act 1996. Nevertheless, that Act also substantially reduced the rights of the homeless. An additional criterion was added –

¹⁸ Although, where families had already split, the duties are owed to one side only: *Holmes-Moorhouse v Richmond LBC* [2009] 1 WLR 413.

¹⁹ See, for example, the interpretation of "intentional homelessness" in *Dyson v Kerrier DC* [1980] 1 WLR 1205, made more complicated by the Supreme Court decision in *Haile v Waltham Forest LBC* [2015] UKSC 34, [2015] AC 1471.

²⁰ *R v Hillingdon LBC ex p Puhlhofer* [1986] AC 484, 517 – Lord Brightman said, "... Parliament plainly, and wisely, placed no qualifying adjective before the word 'accommodation' ... What is properly regarded as accommodation is a question of fact to be decided by the local authority. There are no rules"; see now, *R v Brent LBC ex p Awua* [1996] AC 55; *Birmingham City Council v Ali* [2009] UKHL 36; [2009] WLR 1506.

²¹ Housing and Planning Act 1986, s 14; see now Housing Act 1996, s 175.

²² *Harouki v Kensington and Chelsea RLBC* [2007] EWCA Civ 1000; [2008] 1 WLR 797; *Temur v London Borough of Hackney* [2014] EWCA Civ 877; *Poshteh v Kensington and Chelsea RLBC* [2011] UKSC 37, [2011] AC 624.

²³ S. 189(1)(c).

²⁴ *R v Camden LBC ex p Pereira* (1999) 31 HLR 317.

²⁵ *Hotak v Southwark LBC* [2015] UKSC 30, [2016] AC 811; see the almost inevitable clarifications provided in *Panayiotou v Waltham-Forest LBC* [2017] EWCA Civ 1624, and *Freeman-Roach v Rother DC* [2018] EWCA Civ 368.

²⁶ These were extended by the Homelessness (Priority Need for Accommodation) (England) Order 2002, SI 2002/2051.

²⁷ The "back to basics" policy-making approach in the John Major government emphasised personal responsibility and self-reliance. In the specific context of homelessness, those values were translated into a moral campaign aimed at combating teenage females becoming pregnant to take advantage of the legislation. For example, at the 1993 Conservative conference, the then housing minister suggested that young "never marrieds" became single mothers in order to gain priority access to council housing.

²⁸ See I. Loveland, "Cathy Sod off! The end of the homelessness legislation?", (1994) 16(4) *JSWFL* 367; P. Somerville, "The making and unmaking of homelessness legislation", in S. Hutson & D. Clapham (eds), *Homelessness: Public Policies and Private troubles* (Cassell, 1999).

“eligibility” – to stop “persons from abroad” from accessing homelessness duties.²⁹ The other central change was that local authorities were required to consider the availability of private rented sector accommodation in satisfaction of the main housing duty. The main housing duty was also altered so that it was to last for two years only, as opposed to being long-term.³⁰ A peripheral alteration was the enactment of a “right of review” of adverse decisions,³¹ which reflected pre-existing practice as well as being thought to reduce the numbers of appeals against decisions (which henceforth were to the County Court on a point of law,³² as opposed to judicial review).³³ Subsequently, under New Labour, the Homelessness Act 2002 removed the time limit on the main housing duty, and turned the duty to provide private rented accommodation in to a power (with additional protections for the homeless household).³⁴ The Coalition government, however, undid the Homelessness Act’s alterations regarding the use of private rented accommodation, which was turned back in to a mechanism for ending the duty in the Localism Act 2011.³⁵

By the mid-2000s, further issues began to be openly discussed. The first concerned “out-of-area” placements of households, a matter tentatively resolved by quasi-legislation together with the Supreme Court in 2015 by the requirement on local authorities to justify their out-of-area offer.³⁶ The second issue was over what was termed “gatekeeping” – diverting potentially homeless applicants away from the service – effectively seeking to absolve the local authority from adopting any duty at all.³⁷ This issue was not resolved, but was in tension with what came to be known as the homelessness prevention agenda.³⁸ That agenda was expressed through what was originally known as the “Harrow Model” and then the “Housing Options” approach – on presenting to a local authority, the authority

²⁹ Ss 185-7; Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 SI 2006/1294.

³⁰ Ss 193 & 209. The reduction in the duty reflected a belief that homelessness was a temporary issue which could be resolved with temporary accommodation, and not by successful applicants “jumping the housing queue” – see DoE, *Access to Local Authority and Housing Association Tenancies* (HMSO, 1994), paras 6.1-7.

³¹ S. 202.

³² S. 204.

³³ P. Niner, *Homelessness in Nine Local Authorities: Case Studies of Policy and Practice* (HMSO, 1989); DoE, *Access to Local Authority and Housing Association Tenancies*, London: HMSO.

³⁴ Ss 6, 7 & 9.

³⁵ Ss 148-9.

³⁶ Homelessness (Suitability of Accommodation) (England) Order 2012 SI 2012/2601, reg 2; Supplementary Guidance on the homelessness changes in the Localism Act 2011 and on the Homelessness (Suitability of Accommodation) (England) Order 2012 (DCLG, 2012); *Nzolameso v Westminster CC* [2015] UKSC 22, [2015] 2 All ER 942 – following her refusal of the out-of area accommodation, Ms Nzolameso’s five children were taken into care – see *R(N) v Westminster City Council* [2015] EWHC 799 (Admin).

³⁷ *R(Kelly & Mehari) v Birmingham CC* [2009] EWHC 3240 (Admin); *R(Khazai) v Birmingham CC* [2010] EWHC 2576 (Admin); gatekeeping had been discussed in the literature in the 1990s: P. Lidstone, “Rationing housing to the homeless applicant”, (1994) 9(4) *Housing Studies* 459; P. Carlen, “The governance of homelessness: Legality, lore and lexicon in the agency-maintenance of youth homelessness”, (1994) 41 *Critical Social Policy* 18.

³⁸ ODPM, *Sustainable Communities: Settled Homes, Changing Lives – A Strategy for Tackling Homelessness* (ODPM, 2005).

would advise the applicant of their housing options.³⁹ The third issue was over the meaning and effect of “domestic violence” and “other violence” (a phrase inserted by the Homelessness Act 2002) which were described as “a ‘deeming’ or a ‘pass-porting’ provision”.⁴⁰ The resolution of that problem by the House of Lords led to a textbook mischief rule interpretation of the phrase as encompassing psychological and emotional abuse.⁴¹

As this doctrinal legal biography demonstrates, the contours of each of the key criteria for homelessness assistance and the main housing duty have been contested on a regular basis. The judicial contestation has been in spite of various judicial pronouncements about the “prolific use” of the courts to challenge decisions,⁴² as well as regular reminders and rejoinders that “nitpicking” challenges will not succeed.⁴³ One author, reflecting on this legal contestation, has referred to a “cadre of legal engineers who have become more professional and possibly insular as a result. In many cases now, usually lengthy decisions are not written for the applicant, who has sought assistance, but for the primary audience of lawyers and courts”.⁴⁴ This sense in which decision-making takes place in an increasingly rarefied, juridified and adversarial environment⁴⁵ - almost entirely removed from the applicant themselves who has become incidental to the decision-making story - runs counter to the notion of administrative review. As Andy Slaughter MP put it, “Review decisions have become something of an art in local authorities. Highly experienced housing officers seem to spend their entire lives constantly writing reviews of homelessness decisions”.⁴⁶

³⁹ The models and their contradictions are explored in H. Pawson, “Local authority homelessness prevention in England: Empowering consumers or denying rights?”, (2007) 22(6) *Housing Studies* 867.

⁴⁰ *Yemshaw v Hounslow LBC* [2011] UKSC 3, [2011] 1 WLR 433, [7], Baroness Hale, an expression which is not entirely accurate as a single person survivor of domestic abuse must still be regarded as “vulnerable”.

⁴¹ *Id*, leading to DCLG, *Supplementary Guidance on Domestic Abuse and Homelessness* (DCLG, 2014).

⁴² *Puhlhofer*, *op cit* n 20; cf M. Sunkin, “What is happening to applications for judicial review?”, (1987) 60(3) *Modern Law Review* 432.

⁴³ *Holmes-Moorhouse v Richmond-Upon-Thames LBC* [2009] 1 WLR 413, [50], Lord Neuberger.

⁴⁴ D. Cowan, “The judicialization of homelessness law: A study of Regulation 8(2), Allocation of Housing and Homelessness (Review Procedures) Regulations 1999”, [2016] *Public Law* 235, 236.

⁴⁵ The leading text (which includes discussion of social housing allocation) runs to 1171 pages of text with 33 pages in its table of cases: J. Luba, L. Davies & C. Johnston, *Housing Allocation and Homelessness: Law and Practice*, 4th ed (Jordan, 2016).

⁴⁶ Public Bill Committee, 3rd Sitting, col 48 (7th December 2016).

Place and time: An appraisal

Formed at a time when discretion was in vogue,⁴⁷ and in the dying embers of central-local government consensus,⁴⁸ it is argued in this part that, despite its totemic significance both on the political left and right, the 1977 Act was out of place and out of time (even though it was updated over the years).

For some on the left, it introduced an unwanted focus on housing need in the allocation of social housing. Most recently in this vein, Boughton has argued that “the wholesale shift to a needs-based system marked by the [1977 Act] changed things radically”, producing a lowering of status of residents and paradoxically contributing to the marginalisation of social housing as a tenure.⁴⁹ Peter Malpass referred to its effect as “strengthen[ing] the tide of residualization”.⁵⁰ It is the case that other factors contributed to that lowering of status, but the 1977 Act can be regarded as part of a set of processes with that outcome.⁵¹ For example, understandings of “problem estates”, deprivation, and criminogenic housing pre-dated the 1977 Act, but this cluster of concerns returned in the early 1990s.⁵²

On the other hand, the political right argued that the legislation prioritised the wrong people – lines were drawn between the apparently undeserving pregnant teenagers and the deserving households who waited until they had appropriate accommodation before starting a family.⁵³ This prioritisation of the wrong people was in tune with the then in-vogue underclass theory that “social incentives” combined to produce moral deviance.⁵⁴ The lack of evidence for this assertion that households acted

⁴⁷ I. Loveland, “Square pegs, round holes: The ‘right’ to council housing in the post-war era’, (1992) 19(2) *Journal of Law and Society* 339.

⁴⁸ M. Loughlin, *Local Government in the Modern State* (Sweet & Maxwell, 1986).

⁴⁹ J. Boughton, *Municipal Dreams: The Rise and Fall of Council Housing* (Verso, 2018), 215 & 256-7; cf S. Fitzpatrick & M. Stephens, “Homelessness, need and desert in the allocation of social housing”, (1999) 14(4) *Housing Studies* 413.

⁵⁰ *Housing and the Welfare State: The Development of Housing Policy in Britain* (Palgrave MacMillan, 2005), 114; see also, P. King, *Housing Policy transformed: The Right to Buy and the Desire to Own* (Policy Press, 2010), 71-81, where a similar point is made in the context of the right to buy.

⁵¹ See, R. Forrest & A. Murie, *Selling the Welfare State: The Privatisation of Public Housing* (Routledge, 1990), ch 4.

⁵² See, for example, A. Bottoms & P. Wiles, “Housing tenure and residential community crime careers in Britain”, in A. Reiss, and M. Tonry (eds), *Crime and Justice: A Review of Research – Communities and Crime*, (University of Chicago Press, 1986); D. Page, *Building for Communities*, (Joseph Rowntree Foundation, 1993); DoE, *Anti-social Behaviour on Council Estates: A Consultation Paper on Probationary Tenancies* (DoE, 1995).

⁵³ See, in particular, DoE, *Access to Local Authority and Housing Association Tenancies* (HMSO, 1994); K. Jacobs, T. Manzi & J. Kemeny, “Power, discursive space and institutional practices in the construction of housing problems”, (2003) 18(4) *Housing Studies* 429; *id*, “The struggle to define homelessness: A constructivist approach”, in S. Hutson & D. Clapham (eds), *Homelessness: Public Policies and Private Troubles* (Continuum, 1999).

⁵⁴ C. Murray, *The Underclass* (IEA, 1990), 31.

on the “perverse incentives” did not seem to affect either its presentation or continuing discursive prevalence.⁵⁵

These different ways of problematising local authority duties to homeless households can be seen as broadly aligned discursive narratives about the purpose(s) of social housing. These purposes(s) have been re-shaped over the lifetime of the legislation. In 1977, the idea of meeting housing need in the long-term through the provision of council housing was both prevalent but, in retrospect, in its death-throes.⁵⁶ The Central Housing Advisory Committee report on housing allocation in 1969 was written at its near zenith in a period of over-supply of council housing; but, by 1977, it was already in decline as far as housebuilding was concerned.⁵⁷ The critique of council housing – that it was paternalistic, inefficient and socialised – had taken root,⁵⁸ and both Tories and Labour were drawing up plans for its sale.⁵⁹

As Cole and Furbey have memorably put it, the first Thatcher government produced a narrative designed “to consolidate the move from a crisis *of* council housing to a crisis *in* council housing”.⁶⁰ The right to buy effected a large-scale residualisation of council housing, and further marginalisation of its housed population;⁶¹ that population had greater security of tenure, including rights to double succession.⁶² The decline in council housing provision, the rise of housing associations and a new species of “social housing” in a mixed economy of provision,⁶³ provided an entirely new environment within which the homelessness legislation was located and its duties satisfied. The shift in subsidy from bricks and mortar to personal subsidy led to a decline in construction of social housing from the

⁵⁵ “The English family homelessness survey uncovered no evidence of the type of widespread abuse of the homelessness system that would justify bringing its overall fairness (legitimacy) into question. On the contrary, all of the indications are that it addresses the main ‘social evil’ that it was intended to remedy”: Fitzpatrick & Pleace, S. Fitzpatrick & N. Pleace, “Statutory homelessness in England: A fair and effective rights-based model?”, (2012) 27(2) *Housing Studies* 232, 247.

⁵⁶ See CHAC, *Council Housing Purposes, Procedures and Priorities* (HMSO, 1969); DoE, *Housing Policy: A Consultative Document*, Cmnd 6851 (HMSO, 1977); A. Murie, P. Niner & C. Watson, *Housing Policy and the Housing System* (Allen & Unwin, 1976).

⁵⁷ See D. Cowan & A. Marsh, “A perennial problem? On underoccupation in English council housing”, forthcoming, *Housing Studies*.

⁵⁸ For discussion, see I. Cole & R. Furbey, *The Eclipse of Council Housing* (Routledge, 1994).

⁵⁹ Birmingham CC, under the Tories, had been engaging in a sales policy for some time: A. Murie, *The Sale of Council Houses: A Study in Social Policy*, CURS Occasional Paper No 35 (University of Birmingham, 1975); Labour plans can be found in the National Archive, Prem 16/930; Tory plans were well-known and were a feature of Thatcher’s rise to power.

⁶⁰ Op cit n 58, 212.

⁶¹ R. Forrest & A. Murie, *Selling the Welfare State: The Privatization of Public Housing* (Routledge, 1990).

⁶² Housing Act 1980, Part 4; I. Loveland, op cit n 47.

⁶³ See, generally, P. Malpass, *Housing Associations and Housing Policy: A Historical Perspective* (MacMillan, 2000); M. McDermont, *Governing, Independence, and Expertise: The Business of Housing Associations* (Hart Publishing, 2010).

1980s.⁶⁴ The development of a mixed funding capital regime – state grant mixed with private finance – for the construction of housing association properties has indelibly altered the affordability of social housing, its management, and entrepreneurial outlook.⁶⁵

From around the mid-2000s, renewed vigour was given over to considering the purpose of social housing.⁶⁶ However, from 2011, this reconsideration took on a rather different form.⁶⁷ Fixed term tenancies at an “affordable” rent (80 per cent of market rent) have become an important part of the new terrain, on which the funding and business models of the sector is now built.⁶⁸ As Fitzpatrick and Pawson have suggested, there has been a shift from the provision of permanent housing for households in need, to an “ambulance service” providing short-term housing to meet short-term emergencies,⁶⁹ a shift which has placed some providers and the government at odds.⁷⁰

Alongside this new mixed economy of provision, the growth of the private rented sector has been one of the stories of housing tenure development in the last 40 years.⁷¹ It seems almost implausible now that, in the 1970s, it was assumed that the private rented sector was a historical remnant which would die off, not being “... an appropriate activity for private enterprise”.⁷² The sector began to grow in the 1990s, following various incentives, rent deregulation and the large-scale removal of security of tenure.⁷³ However, the most significant intervention came from beyond the state by the introduction of the “buy to let” mortgage.⁷⁴ Roughly 20 *per cent* of households in England now rent privately, as opposed to 12 *per cent* in 1977.⁷⁵ Over the years, concerns about quality and market-level rents have led to a shift in narrative, the production of the “rogue landlord” (an apparently bad apple) but, until

⁶⁴ For discussion, see P. Malpass, *Reshaping Housing Policy: Subsidies, Rents and Residualisation* (Routledge, 1990).

⁶⁵ See T. Manzi & N. Morrison, “Risk, commercialism and social purpose: Repositioning the English housing association sector”, forthcoming, *Urban Studies*; R. Walker, “The changing management of social housing: the impact of externalisation and managerialisation”, (2000) 15(2) *Housing Studies* 281.

⁶⁶ J. Hills, *Ends and Means: The Future Role of Social Housing in England*, CASE Report No.34 (LSE, 2007); M. Cave, *Every Tenant Matters: A Review of Social Housing Regulation* (London: CLG, 2007); DCLG, *Delivering Housing and Regeneration: Communities England and the Future of Social Housing Regulation* (DCLG, 2007)

⁶⁷ DCLG, *Local Decisions: A Fairer Future for Housing*, (CLG, 2011); Localism Act 2011; Homes and Communities Agency, *Affordable Homes Programme 2011 to 2015: Guidance and Allocations*, (HCA, 2011).

⁶⁸ Manzi & Morrison, op cit n 65.

⁶⁹ S. Fitzpatrick & H. Pawson, H. “Ending security of tenure for social renters: Transitioning to ‘ambulance service’ social housing?”, (2014) 29(5) *Housing Studies* 597;

⁷⁰ S. Fitzpatrick & B. Watts, “Competing visions: Security of tenure and the welfarisation of English social housing”, (2017) 32(8) *Housing Studies* 1021.

⁷¹ P. Kemp, “Private renting after the global financial crisis”, (2015) 30(4) *Housing Studies* 601.

⁷² F. Berry, *Housing: The Great British Failure* (Croom Helm, 1974).

⁷³ J. Morgan, “The casualization of housing”, (1996) 18(4) *JSWFL* 445.

⁷⁴ Kemp, op cit n 71.

⁷⁵ MHCLG, Dwelling Stock: By tenure, England (historical series), Table 104, available at <https://www.gov.uk/government/statistical-data-sets/live-tables-on-dwelling-stock-including-vacants> (last accessed 22nd June 2018).

Corbyn, no political will to alter the settled state of the sector.⁷⁶ The outcome of benefit reforms – the overall benefit cap and linking personal subsidy entitlement to a “local housing allowance” – has been that large swathes of the sector in some areas, notably London, have become unaffordable for many low and no income households, or that such households are using a greater proportion of their income on this housing.⁷⁷ One further shift that has become apparent is the diversification of housing associations into the provision of private rented housing, a shift that has become more apparent following welfare reform and government-led rent reductions in the social sector.⁷⁸

The growth in private renting has altered the main cause of homelessness. The most common cause from around 2012 has been the end of an assured shorthold tenancy.⁷⁹ The underlying issue is now the affordability of private renting in a market where tenant subsidy (housing benefit) has reduced and private rents are increasing.⁸⁰ Further, it was well-known anecdotally that a practice had developed among some authorities not to accept an application for homelessness assistance until the day on which bailiffs actually executed a warrant for possession of a property, or to advise applicants to remain in their rented accommodation until the warrant was executed.⁸¹

The final aspect of place and time to which reference must be made has been the outcomes of devolution of housing policy and law. Devolution has proved to be not just a good in and of itself, but a laboratory of social and legal change.⁸² By no means does Westminster lead the way; indeed, quite the reverse has turned out to be the case with radical interventions in housing law and policy made

⁷⁶ J. Rugg & D. Rhodes, “‘Between a rock and a hard place’: The failure to agree on regulation for the private rented sector in England”, (2003) 18(6) *Housing Studies* 937; *id*, *The Private Rented Sector: Its Contribution and Potential*, (University of York, 2008); DCLG, *The Private Rented Sector: Professionalism and Quality*, The Government Response to the Rugg Review, Consultation (DCLG, 2009); cf Law Commission, *Renting Homes: The Final Report*, Volume 1: Report, LC 297 (Law Commission, 2006). There has been much talk about longer tenancies, but this is more a matter of government incentive than legislative obligation: DCLG, *Fixing our Broken Housing Market* (DCLG, 2017), 3.23.

⁷⁷ C. Beatty & S. Fothergill, *The Uneven Impact of Welfare Reform* (Sheffield Hallam University, 2016); E. Sanderson & I. Wilson, “Does locality make a difference? The impact of housing allowance reforms on private landlords”, (2017) 32(7) *Housing Studies* 948; K. Croucher, D. Quilgars & A. Dyke, *Housing and Life Experiences: Making a Home on a Low Income* (JRF, 2018).

⁷⁸ N. Morrison, “Institutional logics and organisational hybridity: English housing associations’ diversification into the private rented sector”, (2016) 31(8) *Housing Studies* 897.

⁷⁹ MHCLG, *Statutory Homelessness and Prevention and Relief, October to December (Q4) 2017: England*, Housing Statistical Release, 22nd March 2018, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/692938/Statutory_Homelessness_and_Prevention_and_Relief_Statistical_Release_Oct_to_Dec_2017.pdf (last accessed 22nd June 2018), Chart 4; Communities and Local Government Select Committee, *Homelessness: Third Report of Sessions 2016-17*, HC 40 (House of Commons, 2016), ch 3.

⁸⁰ *Id*, 8.

⁸¹ Crisis, *The Homelessness Legislation: An Independent Review of the Legal Duties Owed to Homeless People* (Crisis, 2015), 22-3; Communities and Local Government Select Committee, *op cit* n 79, para 45.

⁸² T. Moore, “The convergence, divergence and changing geography of regulation in the UK’s private rented sector”, (2017) 17(3) *International Journal of Housing Policy* 444.

by the devolved governments;⁸³ Westminster has been in stasis, seemingly fixated on a policy which has been concerned only with ownership.⁸⁴ Major interventions and changes to homelessness law have been made in Wales and Scotland. Wales has focused on homelessness prevention, creating prevention duties and help to secure accommodation;⁸⁵ Scotland has abolished priority need.⁸⁶ The 2017 Act was, in fact, designed to build on both Welsh and Scottish legislative interventions (and, in Wales' case, does so explicitly⁸⁷).

Further critiques

In this section, I draw attention to three different sets of critiques of homelessness law: feminist, race and socio-legal scholarship. Feminist scholars have been particularly critical of the legislative responses to homelessness. Watson, for example, argued that female homelessness was most often hidden, and experienced differently from male homelessness.⁸⁸ A particular focus of feminist scholarship around homelessness has been in connection with domestic violence. Although women as mothers have a special claim to assistance,⁸⁹ conversely the legislation requires single applicants (including survivors of domestic violence) to demonstrate their "vulnerability" - re-enforcing a social disempowerment narrative with a claim to rights.⁹⁰ Further, there have been concerns that supporting survivors of domestic violence rather than directing action against the perpetrator meant that domestic abuse was unchallenged.⁹¹ In 2002, the definition of vulnerability was expanded to include "A person who is vulnerable as a result of ceasing to occupy accommodation by reason of violence from another person or threats of violence from another person which are likely to be carried out".⁹²

⁸³ In Wales, see the Housing (Wales) Act 2014 and Renting Homes (Wales) Act 2016; in Scotland, see for example, Homelessness etc (Scotland) Act 2003, Housing (Scotland) Act 2014, Private Housing (Tenancies) (Scotland) Act 2016.

⁸⁴ See, for example, R. Tunstall, *The Coalitions' Record on Housing: Policy, Spending and Outcomes 2010-2015*, Social Policy in a Cold Climate Working Paper 18, (University of York, 2015).

⁸⁵ Housing (Wales) Act 2014, Part 2; P. Mackie, "Homelessness prevention and the Welsh legal duty: Lessons for international policies", (2015) 30(1) *Housing Studies* 40.

⁸⁶ Homelessness (Scotland) Act 2003; The Homelessness (Abolition of Priority Need Test) (Scotland) Order 2012, SI 2012/330.

⁸⁷ 2nd Reading, HC Debs, vol 616, col 542, Blackman (28th October 2016).

⁸⁸ S. Watson & H. Austerberry, *Housing and Homelessness: A Feminist Perspective* (Routledge & Kegan Paul, 1986).

⁸⁹ J. Neale, "Theorising homelessness: Contemporary sociological and feminist perspectives", in R. Burrows, N. Pleace & D. Quilgars, *Homelessness and Social Policy* (Routledge, 1997), 41.

⁹⁰ See D. Engel, "Law in the domains of everyday life: The construction of community and difference", in A. Sarat & T. Kearns (eds), *Law in Everyday Life* (University of Michigan Press, 1995), 146.

⁹¹ E. Malos & G. Hague, "Women, housing, homelessness and domestic violence", (1997) 20(3) *Women's Studies International Forum* 397.

⁹² Homelessness (Priority Need for Accommodation) (England) Order 2002, SI 2002/2051, ord. 6. The statistics maintained on decision-making, oddly, have a separate category for "domestic violence", but include those households found to be in priority need under this Order under the category of "other": Live Tables on

However, it remains the case that there is limited support and accommodation available to women escaping domestic violence,⁹³ and concern that this extended definition has not impacted on local authority decision-making.⁹⁴

Following early studies demonstrating structural racism in homelessness services, as well as the intervention of the Commission for Racial Equality in the 1980s,⁹⁵ race scholars have continued to demonstrate how the subtle processes of housing need disproportionately affect persons of colour. It was said that survivors of racial harassment turned their anger on local authorities' decision-making.⁹⁶ One study sought to appreciate why Black and Minority Ethnic households had worse housing outcomes than other households in two local authorities, even though those authorities had anti-racism policy commitments to counter officer discretion. The authors found, first, that households who were most in need and could not wait for the better stock to become available would accept the worse quality stock; and Black and Minority Ethnic households were disproportionately among those most in need and homeless: "It was as if the financial logic of the homelessness crisis had, in spite of the efforts of the departments themselves, been able to work its way through the system".⁹⁷ This point – about the external effects of the housing crisis on particular already disadvantaged households – is made equally strongly by Carr and Binger, who argue that the legislation: "morphed into a flimsy welfare safety net, which, although it prevents children sleeping on streets, does little to guarantee a sufficient supply of decent, secure and affordable housing and condemns women and children to months and even years in bed and breakfast or other unsuitable temporary accommodation".⁹⁸

Socio-legal scholarship has been fostered by a decision-making environment in which the wide discretion available to decision-makers has been hemmed in to an extent by case law and guidance. One important stream of studies has concerned the impact of law on the exercise of discretion at the "sharp end" of practice.⁹⁹ For example, in a 1995 classic socio-legal study of decision-making in three

Homelessness, Table 773, <https://www.gov.uk/government/statistical-data-sets/live-tables-on-homelessness> (last accessed, 29th June 2018).

⁹³ Communities and Local Government Select Committee, *op cit* n 79, paras 77-80.

⁹⁴ C. Miles & K. Smith, *Nowhere to Turn*, 2018 (Women's Aid, 2018), 14-8.

⁹⁵ For discussion, see L. Bonnerjea & J. Lawton, *Homelessness in Brent* (PSI, 1987); Commission for Racial Equality, *Homelessness and Discrimination* (CRE, 1988); S. Smith, *The Politics of 'Race' and Residence* (Polity, 1990); N. Ginsburg & S. Watson, "Issues of Race and Gender Facing Housing Policy", in J. Birchall (ed.), *Housing Policy in the 1990s* (Routledge, 1992); J. Henderson & V. Karn, *Race, Class and State Housing* (Gower, 1987).

⁹⁶ J. Cooper & T. Qureshi, "Violence, racial harassment and council tenants" (1998) 3(4) *Housing Studies* 241.

⁹⁷ S. Jeffers & P. Hoggett, "Like counting deckchairs on the Titanic: A study of institutional racism and housing allocations in Haringey and Lambeth", (1995) 10(3) *Housing Studies* 325, 327.

⁹⁸ "The Housing (Homeless Persons) Act 1977", in R. Auchmuty, *Women's Legal Landmarks: Celebrating 100 Years of Women and Law in the UK and Ireland* (Hart, forthcoming).

⁹⁹ See I. Loveland, "Administrative law, administrative processes, and the housing of homeless persons" (1991) 13(1) *Journal of Social Welfare Law* 4.

local authority homeless persons units, Loveland found that the law was an intruder in the administrative arena. Decision-making took account of the supply of accommodation locally, but other variables mattered just as much.¹⁰⁰ Halliday has developed explanations for institutional racism and what he terms “legal conscientiousness” – seeking understandings of the factors which influence administrative decision-makers’ use of formal law - around broader studies of the “impact” of case law.¹⁰¹ Bretherton *et al* have developed appreciations of the role of external medical evidence in homelessness decision-making.¹⁰² There have been outstanding cross-disciplinary studies of decision-making, developing Lipsky’s understandings of street-level bureaucracy.¹⁰³ Research into the use of judicial review has countered judicial observations about the overuse of judicial review proceedings, and has demonstrated issues in the use of the administrative review process.¹⁰⁴ It can be said, truly, that there can be few better researched areas of the social welfare system than homelessness decision-making.

The Homelessness Reduction Act 2017

Homelessness law does not “fit” with the quite dramatically altered post-1977 environment. As suggested above, for different reasons, it was out of time and out of place, as well as being the subject of critique in terms of its structure and implementation. In this section, I outline the key provisions of the new Act, highlighting interpretative issues as well as how it updates the legislation (which it simply amends). Bob Blackman, although the Bill’s pilot, was not its progenitor. Its ideas derive from an independent review organised by the charity, Crisis, and the Communities and Local Government

¹⁰⁰ I. Loveland, *op cit* n 14.

¹⁰¹ S. Halliday, “Institutional racism in bureaucratic decision-making: A case study in the administration of homelessness law”, (2000) 27(3) *Journal of Law and Society* 449; *Judicial Review and Compliance with Administrative Law*, (Hart, 2004).

¹⁰² J. Bretherton, C. Hunter & S. Johnsen, “‘You can judge them on how they look ...’: Homelessness officers, medical evidence and decision-making in England”, (2013) 7(1) *European Journal of Homelessness* 69.

¹⁰³ P. Lidstone, “Rationing housing to the homeless applicant”, (1994) 9(4) *Housing Studies* 459; S. Alden, “On the frontline: The gatekeeper in statutory homelessness services”, (2015) 30(6) *Housing Studies* 924; H. Cramer, “Informal and gendered practices in a homeless persons unit”, (2005) 20(5) *Housing Studies* 737.

¹⁰⁴ Respectively: M. Sunkin, “What is happening to applications for judicial review?”, (1987) 60(3) *Modern Law Review* 432; D. Cowan *et al*, “Reconsidering mandatory reconsideration” [2017] *PL* 215; D. Cowan, S. Halliday & C. Hunter, “Adjudicating the implementation of homelessness law: The promise of socio-legal studies” (2006) 21(3) *Housing Studies* 381.

Select Committee report into homelessness.¹⁰⁵ It owes a particular debt to the focus on prevention in the Housing (Wales) Act 2014.¹⁰⁶

There are five key ideas in the 2017 Act: persons threatened with homelessness should receive proper advice;¹⁰⁷ a duty is placed on specified public authorities to refer applicants to housing authorities (“the referral duty”);¹⁰⁸ local authorities are to work with applicants to create a plan of action following an assessment;¹⁰⁹ local authorities have a duty to prevent homelessness (“the prevent duty”)¹¹⁰ - this new duty is accompanied by a wider definition of a household “threatened with homelessness”;¹¹¹ local authorities have a duty to relieve homelessness (“the relief duty”).¹¹² Each is now taken in turn.

First, the statutory duty to provide advice and information about homelessness and its prevention has been a mainstay of the legislation over the years.¹¹³ It has provided the statutory basis for the homelessness prevention agenda. However, it has also been the basis for lip service compliance, with weak oversight.¹¹⁴ Section 2 strengthens the duty to provide advisory services, which must now be particularly designed to meet the needs of a range of specified persons, whether or not they are in priority need (undoing the previous limitation). Rather than providing out of date lists of private accommodation, the underlying premise is that “detailed advice and information” will be provided with the objective of preventing homelessness.¹¹⁵ The principal significance of this provision is that it provides further impetus for the housing options approach.

The second key idea is that, where “a person in England in relation to whom the authority exercises functions is or may be homeless or threatened with homelessness”, a specified public authority must notify the person’s nominated local authority provided that the person agrees. This well-intentioned section is designed to ensure that the person is referred to the right body for homelessness assistance. It is likely that the “notification” of such referral will constitute an “application”, thereby causing the

¹⁰⁵ Crisis, *op cit* n 81, with a Bill settled by Liz Davies of Counsel; and *Homelessness: Third Report of Sessions 2016-17*, HC 40 (House of Commons, 2016), of which Blackman was a member.

¹⁰⁶ See ss 64-9, Housing (Wales) Act 2014; 2nd Reading, HC Debs, vol. 616, col 542, Blackman (28th October 2016).

¹⁰⁷ S. 2, substituting s. 179.

¹⁰⁸ S. 10, inserting s. 213B.

¹⁰⁹ S. 3, inserting s. 189A.

¹¹⁰ S. 4, substituting s 195.

¹¹¹ S. 1, substituting s. 175.

¹¹² S. 5, inserting s. 189B

¹¹³ S. 179.

¹¹⁴ Crisis, *op cit* n 81, 14-5.

¹¹⁵ Public Bill committee, 2nd Sitting, col 9 (30th November 2016); “It should not be a basic service where someone turns up and has a look at a computer; it should be individual and with people who have been trained with this in mind”: col 12.

various duties to commence on referral.¹¹⁶ It also seems likely that the meaning of “notification” will be a live issue once again. It has been assumed that notification meant receipt, and potentially might extend to any person in the local housing authority.¹¹⁷ The person can nominate *any* local authority in England, whether or not they have a local connection with that authority. This is a far-reaching duty, but does reflect an applicant’s previous ability to “forum shop”.¹¹⁸ Further, the list of specified public authorities ranges across A&E departments to discharge from inpatient care, Jobcentre Plus, prisons, social services, probation.¹¹⁹ As Blackman put it, this duty is about referral by those public bodies to the “specialist” agency: “This [Bill] is a sea change and a cultural change, and it will take place across public services”.¹²⁰ The extent to which that occurs will become apparent following implementation and creates the potential for those specified public authorities to be challenged in public law for a failure to refer, including the payment of damages, or face an Ombudsman intervention.

The third key idea is a personalised assessment and planning duty. These arise where a local housing authority is satisfied that an applicant is homeless or threatened with homelessness, and eligible for assistance. None of the new duties on local housing authorities apply to excluded persons from abroad. The assessment precedes the plan because the aim is to tailor the plan to the individual circumstances of the applicant. Therefore, the assessment is of the circumstances that caused the homelessness, the housing needs of the applicant, as well as the support necessary for the applicant and their household “... to be able to have and retain suitable accommodation”.¹²¹ This must be notified to the applicant. Following that assessment, the authority and the applicant must try to reach an agreement about any steps the applicant is required to take to secure and retain suitable accommodation, and the steps the authority are to undertake for that purpose. Where agreement is

¹¹⁶ *Edwards v Birmingham CC* [2016] EWHC 173 (Admin); the code takes a different view, suggesting that a referral will not constitute an application: para 4.19-20. The code’s view is unlikely to withstand much judicial scrutiny and is in tension with para 18.5.

¹¹⁷ Hitherto, the question of notification has been addressed in relation to the applicant and has been taken to include their solicitor: *Dharmaraj v Hounslow LBC* [2011] EWCA Civ 312. In the past, it has been said that knowledge of other parts of a local housing authority (eg allocations) that a person is homeless will result in an application being made at that point: *Kelly and Mehari*, op cit n 37. Arguably, under s. 10, there will be no notification without information about how the person may be contacted by the local housing authority: s. 213B(2)(b). The code also suggests that a referral must include “the agreed reason for referral”: para 4.13. On the face of s. 213B, this additional requirement is unclear.

¹¹⁸ *R v Newham LBC ex p Tower Hamlets LBC* [1992] 2 All ER 767; as the Minister, Marcus Jones MP put it, “That mirrors the judgment that an applicant would make in other circumstances when applying for help independently”: Public Bill Committee, 5th Sitting, col 109 (11th January 2017).

¹¹⁹ Homelessness (Review Procedure etc) Regulations 2018, SI 2018/223, reg 10 and Schedule.

¹²⁰ Public Bill Committee, 5th Sitting, col 103 (11th January 2017); the clause was regarded by the Minister as being the “first step to a more co-operative and effective relationship between local housing authorities and public sector partners”: *id*, col 111.

¹²¹ S. 189A(2).

reached, that must be recorded in writing;¹²² where there is no agreement, the reasons for disagreement must be recorded along with the steps “the authority consider it would be reasonable”¹²³ for the applicant to take, and the steps the authority is to take. The written record must be given to the applicant.¹²⁴ The authority must keep the personalised plan under review and notify the applicant of any changes to it.¹²⁵ If an applicant ultimately is found to be intentionally homeless, then the authority must have regard to this assessment.¹²⁶

The definition of “threatened with homelessness”, which was limited to being threatened within 28 days, has been extended to 56 days or where there has been a valid section 21 notice¹²⁷ to determine an assured shorthold tenancy which will expire in 56 days.¹²⁸ This substitution is a significant achievement, designed to combat the problem that many authorities would require applicants to wait until a private landlord obtained a possession order which had been executed by the bailiffs. This substitution can be seen in one sense as an olive branch to private landlords (who, as will be demonstrated below, are likely to be the central players in the accommodation duties); but it can also be seen as in tune with the duties in the Bill, particularly the desire to resolve potential homelessness before it arises. It does not apply (oddly) to those served with a notice to determine the tenancy on a mandatory ground (such as rent arrears), apparently because the tenant can challenge such a notice.¹²⁹ And there can be no doubt that it will lead to wrangling as to whether a section 21 notice is “valid”, with attendant use of court time.¹³⁰

The fourth key idea is the prevent duty. This duty arises where the applicant is threatened with homelessness and eligible.¹³¹ The duty is to “... take reasonable steps to help the applicant secure that accommodation does not cease to be available for the applicant’s occupation”.¹³² This duty extends the previous duty to those threatened with homelessness by applying irrespective of whether an

¹²² S. 189A(5).

¹²³ S. 189A(6).

¹²⁴ S. 189A(8).

¹²⁵ S. 189A(8)-(11).

¹²⁶ S. 190(4).

¹²⁷ That is, a notice under s. 21, Housing Act 1988 to determine an assured shorthold tenancy after either two months or eight weeks; at the end of that period, the tenancy becomes a contractual tenancy which can only be determined by court order, in the absence of surrender.

¹²⁸ S. 1, substituting s. 175(4)-(5).

¹²⁹ Public Bill Committee, 7th Sitting, col 161, Marcus Jones MP (18th January 2017).

¹³⁰ The validity of such notices is now dependent on a range of requirements, including relating to the protection of tenancy deposits and licensing requirements under the Housing Act 2010, as well as energy performance and gas safety certificates (Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations 2015, SI 2015/1646, reg. 2); on the latter, see the note of the county court decision in *Caridon Property Ltd v Shooltz*, 2nd February 2018, at <https://nearlylegal.co.uk/2018/02/i-can-serve-gas-safety-certificates/> (last accessed 26th June 2018).

¹³¹ S. 195(1).

¹³² S. 195(2).

applicant is in priority need or intentionally homeless. The duty only ends following the authority serving a notice (which they have a power to do) on one of seven grounds. Those grounds include that the applicant has suitable accommodation for at least six months (but not more than 12 months);¹³³ the applicant is homeless;¹³⁴ the applicant has refused an offer of suitable accommodation and, on the date of that refusal, the accommodation would have been available for at least six months.¹³⁵ The applicant also has the right to request that the authority review their decision to end the duty.¹³⁶

The fifth key idea - the relief duty - is of a rather different order from the above. Where the authority are satisfied that an applicant is homeless and eligible, the relief duty applies.¹³⁷ The relief duty is that, other than where they refer the applicant to a different authority, the authority to which the application was made "... must take reasonable steps to help the applicant to secure that suitable accommodation becomes available for the applicant's occupation" for at least six months or less than 12 months.¹³⁸ This duty can also be brought to an end by written notice for similar reasons to the prevent duty,¹³⁹ with the addition that the applicant has made themselves homeless intentionally from the accommodation made available to them in satisfaction of the relief duty.¹⁴⁰ The particular innovation is that the local connection provisions apply to this duty (as opposed to applying only to the main housing duty).¹⁴¹ The relief duty ceases when the authority to which the application was made "notify an applicant that they intend to notify or have notified another local housing authority in England ... of their opinion that the conditions are met" for a local connection referral.¹⁴² This awkwardly expressed provision will be important because the duties cease at that point, unless the first authority "have reason to believe" that the applicant has a priority need.¹⁴³ There is a right of an applicant to request a review of the notice ending the relief duty and the referral.

Perhaps the most important mechanism for ending the duty is where the applicant, having been informed of the consequences of refusal and their right of review, refuses a "final accommodation

¹³³ S. 195(8)(a).

¹³⁴ S. 195(8)(c) – ie the prevent duty has been unsuccessful.

¹³⁵ S. 195(8)(d) - there does not appear to be any other penalty where the applicant refuses the offer.

¹³⁶ S. 202(1)(bc).

¹³⁷ S. 189B(1).

¹³⁸ S. 189B(2).

¹³⁹ S. 189B(5)-(8). It is also brought to an end where the authority find that they owe the main housing duty to the applicant (s. 189B(4)). The relief duty is tied in to the other duties, such that they generally do not start until the relief duty has come to an end.

¹⁴⁰ S. 189B(7)(d).

¹⁴¹ The Act extends local connection in respect of "former relevant children", ie children who were in care, and makes particular provision for children in care: s. 8, amending s. 199.

¹⁴² S. 199A(1).

¹⁴³ S. 199A(2) – in which case the original authority must secure accommodation until the applicant is notified that the conditions for referral are met.

offer” or an offer from the waiting list.¹⁴⁴ A final accommodation offer is an offer of a six month assured shorthold tenancy from a private landlord made in satisfaction of the relief duty.¹⁴⁵ The most important consequence of this refusal is that, even if the applicant crosses all the other obstacles, the main housing duty (which is more extensive than the “final accommodation offer”) is disapplied.¹⁴⁶ A rational authority is likely to ensure that all accommodation offered under the relief duty is a final accommodation offer because, if the applicant accepts the offer, the authority’s duty is absolved as the applicant is no longer homeless;¹⁴⁷ or, if the applicant refuses, the authority is absolved from the main housing duty (although it appears that the authority will still have to make a decision on the criteria). This statutory position substantiates the argument that the relief duty is likely to be the most significant step in the process. In any event, as the main housing duty is not dissimilar from the final accommodation offer – the provision of private rented sector accommodation, albeit the main housing duty is for a longer period with certain protections on re-application¹⁴⁸ – there will be little point in proceeding to make decisions on the application against the other criteria.

A further way in which the prevent and relief duties might come to an end is where the authority gives a notice to the applicant if it considers “that the applicant has deliberately and unreasonably refused to take any step” under the personalised plan.¹⁴⁹ The clause was characterised by Blackman as “tough love” because there are responsibilities on the applicant to co-operate with the authority and this provision operates as a sanction.¹⁵⁰ This cessation is hedged around with various provisos – the authority must have given the applicant a warning, and reasonableness is related to “the particular circumstances and needs of the applicant”.¹⁵¹ Blackman said: “... we want to ensure the bar is sufficiently high so the local authorities do not disadvantage applicants, but at the same time make it clear to them that they have to co-operate with the local authority that is assisting them in alleviating their homelessness or threat of homelessness”.¹⁵² Even then, although the main housing duty does not apply, the authority must secure that accommodation is available for occupation by the household.¹⁵³ The sure prediction is that the hedging and continuing duty will make this mechanism unpopular, especially in more hard-pressed authorities.

¹⁴⁴ S. 193A(1)-(2).

¹⁴⁵ S. 193A(4).

¹⁴⁶ S. 193A(3).

¹⁴⁷ *Temur*, op cit n 22.

¹⁴⁸ S. 193(7AA).

¹⁴⁹ S. 193B(2).

¹⁵⁰ Public Bill Committee, 6th Sitting, col 141 (18th January 2017).

¹⁵¹ S. 193B(4)-(5) and (6) respectively.

¹⁵² Op cit n 150.

¹⁵³ S. 193C(4), subject to that duty ending in certain circumstances: s. 193C(5)-(9).

Analysis

In this section, I argue that the 2017 Act has made fundamental changes to the mentality of government of the homeless. This mentality is now based on a neo-liberal political rationality in orientation, having shifted from the welfarist orientation underpinning the 1977 Act.¹⁵⁴ This is something of a grand claim about a 13 section private members' Bill, but I seek to substantiate that claim here through the discursive narratives of the Parliamentary debates, the changing understanding of the applicant, the conditionality inherent in the duties, and the reliance on a re-regulated private rented sector as a market for homeless persons' accommodation. I also argue that the critiques of homelessness will need to be re-thought.

It is regularly remarked that neo-liberalism, as a concept, has lost any persuasive explanatory power because of its over-worked and multiple meanings across different contexts.¹⁵⁵ Here, I am deliberately using it in the sense identified by Larner as "... both a political discourse about the nature of rule and a set of practices that facilitate the governing of individuals from a distance".¹⁵⁶ Further, "While on one hand neo-liberalism problematizes the state and is concerned to specify its limits through the invocation of individual choice, on the other hand it involves forms of governance that encourage both institutions and individuals to conform to the norms of the market".¹⁵⁷

Until the 2017 Act, applicants have been imagined in tune with a Fabian set of welfarist understandings as passive recipients of state welfare – on making an application, certain things happen (or should have happened) to them, from the provision of interim accommodation to a decision as to the duty owed, followed by the provision of that duty.¹⁵⁸ The re-imagination in the 2017 Act is of the applicant as a citizen-consumer, but one which also requires the tutelary gaze of the welfare state. Blackman was at great pains to stress the "culture change" required of both the citizen-applicant and the state acting through local housing authorities. As he put it, the aim is "to revolutionise the culture in local authorities and housing offices that provide a service. ... The aim of the Bill is, first and foremost, to ensure that no one, but no one, is turned away at the door".¹⁵⁹ But,

¹⁵⁴ Cf H. Carr & C. Hunter, "Managing vulnerability: Homelessness law and the interplay of the social, the political and the technical", (2008) 30(4) *JSWFL* 293.

¹⁵⁵ See, for example, J. Peck, *Constructions of Neoliberal Reason* (OUP, 2013); D. Harvey, *A Brief History of Neoliberalism* (OUP, 2007).

¹⁵⁶ W. Larner, "Neoliberalism: Policy, ideology, governmentality", (2000) 63(1) *Studies in Political Economy* 5, 6.

¹⁵⁷ *Id.*, 12.

¹⁵⁸ The duty has, often, been outsourced to other organisations or private landlords, going back at least to the early 1990s: University of Birmingham (1998) *How Local Authorities Used the Private Rented Sector Prior to the Housing Act 1996*, DETR Research Summary 86, London: DETR.

¹⁵⁹ 2nd Reading, HC Debs, vol 616, col 544 (28th October 2016).

it was also designed to “make[] sure that everyone takes an aspect of personal responsibility, so that people will be rewarded with good outcomes for co-operation and engagement with the process”.¹⁶⁰ The personalised plan is central to this process, in providing a range of actions, incentives to act, on both citizen-consumer and state. It provides “rewards” for both through securing the provision of accommodation and preventing or relieving homelessness.

Generally, the applicant is regarded as an active and willing participant in the planning and assessment process. As one MP put it, “It is crucial for the success of this legislation that households take their own steps and initiative to resolve their homelessness”.¹⁶¹ The personalised plan and the potentially far-reaching consequences of acting on it require action by the applicant, “thereby diverting more households from the crisis point”.¹⁶² The prevent duty – to take reasonable steps to secure that accommodation does not cease to be available for the applicant’s occupation – could, apparently be met through “the provision of debt counselling, the provision of tenancy support or help with family mediation”, again requiring an active and willing participant.¹⁶³ Almost inevitably, the context for this activity requirement is moralistic: “When people do not co-operate and behave unreasonably, it is not fair if others in desperate need and who are acting reasonably suffer – there will obviously be diminished efforts for them”.¹⁶⁴

The “tough love” towards homeless people dovetails with the emergence of a punitive welfarism, in which support is conditional on activity (most noticeable in relation to social security payments), and the role of the state is reconstituted as tutelary.¹⁶⁵ Although housing has been regarded as the “wobbly pillar” of the welfare state,¹⁶⁶ what has become ever more apparent is the way in which the welfare state has embraced housing, imposing the principles of conditionality on receipt of housing benefit, using it as a tool of financial inclusion, as well as casting homelessness as a symptom of individual failure.¹⁶⁷ The 2017 Act seeks to re-cast this approach from blame towards imagining the household as capable of being re-included, and the state’s role is to teach applicants the steps that

¹⁶⁰ *Id.* “We do not want people to sit back and wait for the local authority to do it for them; we want them to get on, do it for themselves and get help and advice from the local authority. That is what we want the Bill to achieve”: Public Bill Committee, 4th Sitting, col 88, Blackman (14th December 2016).

¹⁶¹ 2nd Reading, HC Debs, vol 616, col 560, Kelly Tolhurst MP (28th October 2016).

¹⁶² Public Bill Committee, 3rd Sitting, col 44 (7th December 2016).

¹⁶³ *Ibid*, col 56, Blackman.

¹⁶⁴ Public Bill Committee, 4th Sitting, col 75-6, Blackman (14th December 2016).

¹⁶⁵ L. Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity*, (Duke UP, 2009); DR Fletcher & J. Flint, “Welfare state and social conditionality: The folly of the tutelary state?”, (2018) forthcoming, *Critical Social Policy*; J. Flint, “Encounters with the centaur state: Advanced urban marginality and the practices and ethics of welfare sanctions regimes”, (2018) forthcoming, *Urban Studies*.

¹⁶⁶ See P. Malpass, “The wobbly pillar? Housing and the British postwar welfare state’, (2003) 32(4) *Journal of Social Policy* 589.

¹⁶⁷ See Fletcher & Flint, *op cit* n 165.

must be taken to retain or secure accommodation if they are unable to do so themselves.¹⁶⁸ As Rose puts it, the excluded are not “to be merely cast out” but become the subjects of “strategies that seek to reaffiliate [them, through a principle of activity, and to reattach them to the circuits of civility”].¹⁶⁹ Thus, once the citizen-applicant accepts personal responsibility, they “will be rewarded with good outcomes for co-operation and engagement with the process”.¹⁷⁰

This re-inclusion is also imagined as further precarious accommodation (an occupation agreement for between six and 12 months), a kind of legislative sleight of hand which recognises the always continuous precarity of the precariat.¹⁷¹ Consequently, I argue that the “attempt to inculcate self-blame and habituation to low-wage and insecure labour”¹⁷² through welfare reform has been extended to homelessness and the habituation of precarious housing as the norm.¹⁷³ The strategy of the 2017 Act is to reaffiliate the homeless within the private rented marketplace. There is a delicate balancing act here – after all, as noted above, ejection from that market is the principal cause of homelessness in the first place; at the same time, in the absence of available social housing, and other housing solutions, that sector is the only alternative. Rent regulation or increasing the minimum period of an assured shorthold tenancy were discounted. As the Minister put it, “Regulated rents made being a landlord not commercially viable for many property owners but since 1988 the private rented sector has increased steadily, growing from just over 9% of the market in 1988 to 19% today. The current framework strikes the right balance between the rights of landlords and tenants, and our efforts should be focused on encouraging a voluntary approach to longer tenancies for those who want them”.¹⁷⁴

The unanswered question concerns the sector’s financial viability for homeless households after welfare reform – as Lord Best, the Bill’s sponsor in the House of Lords, noted, “In its understandable but unrealistic efforts to cut the cost of the housing benefit, the DWP is busy undermining the efforts of the DCLG and local authorities and, indeed, of this new Bill”.¹⁷⁵ This is where the issues are likely

¹⁶⁸ For discussion on the relation between inclusion and exclusion, see N. Rose, “Government and control”, (2000) 40(2) *BJC* 321.

¹⁶⁹ N. Rose, “Government and control”, (2000) 40(2) *BJC* 321, 330.

¹⁷⁰ 2nd Reading, HC Debs, vol 616, col 544, Blackman (28th October 2016).

¹⁷¹ On this, see H. Carr, B. Edgeworth & C. Hunter, “Introducing precarisation: Contemporary understandings of law and the insecure home”, in H. Carr, B. Edgeworth & C. Hunter (eds), *Law and the Precarious Home: Socio-Legal Perspectives on the Home in Insecure Times* (Hart, 2018).

¹⁷² Fletcher & Flint, op cit n 165, 4.

¹⁷³ As the Chartered Institute of Housing, the standard-bearer for social housing, puts it, “We have an acute shortage of homes at rents that people on low incomes can afford and, in some parts of the country, even people on relatively high incomes are struggling to afford to buy or rent a home. Despite rising demand, there has been no significant increase in the supply of social housing for over a decade, and funding has been reduced”: *Rethinking Social Housing* (CIH, 2018), p 5.

¹⁷⁴ 3rd Reading, HC Debs, vol 620, col 574, Marcus Jones MP (27th January 2017).

¹⁷⁵ HL Debs, vol 779, col 497 (24th February 2017).

to arise after the 2017 Act. With large swathes of the sector unaffordable to households in receipt of social security, the reality for many households facing homelessness is likely to be banishment to out-of-area locations. As Mike Gapes MP put it, the Bill "... is gesture politics of the worst kind in that it wills the ends but does not provide the means. ... It will not provide any additional social housing or good quality private rented accommodation in my constituency".¹⁷⁶

Out-of-area placements may be justified by affordability concerns (accommodation cannot be suitable if it is unaffordable) or, more simply, the lack of available accommodation locally. So, for example, the London Borough of Brent's temporary accommodation policy notes that "... due to an acute shortage of affordable housing locally, and rising rental costs, an increasing number of households are likely to be placed outside the borough, as it will not be reasonably practicable to provide accommodation within Brent. The application of housing benefit caps, and introduction of the overall benefit cap from April 2013, has further restricted the number of properties that will be affordable to homeless households in Brent, and particularly larger families".¹⁷⁷ This is the new form of tutelary state, in which the household has hard choices to make between trying to find somewhere for themselves locally (which may well be unaffordable) or taking the authority's offer and severing ties with their locality. The developing law on out-of-area placements is likely to be tested further in relation to the 2017 Act duties.¹⁷⁸

In perhaps one of the biggest ironies of the 2017 Act, the private rented sector itself comes under the tutelary gaze of the state. As discussed above, the prevailing rhetoric has been that the sector has grown because of deregulation – that rhetoric was evident in the Parliamentary debates on the 2017 Act.¹⁷⁹ That narrative, like most totalising narratives, is problematic because part of the sector has been price-controlled by limitations on the amount of housing benefit to which individual households are entitled.¹⁸⁰ In any event, offers of private rented housing to homeless persons have been the subject of re-regulation to a degree well-above that ascribed to non-homeless households (whatever

¹⁷⁶ 2nd Reading, HC Debs, vol 616, col 565 (28th October 2016) - Gapes is MP for Ilford South in East London.

¹⁷⁷ Temporary Accommodation Placement Policy, available at <http://democracy.brent.gov.uk/documents/s28786/rg-temp-accommodation-dps-app1.pdf> (last accessed 29th June 2018).

¹⁷⁸ See *Nzolameso v Westminster CC* [2015] UKSC 22, [2015] 2 All ER 942.

¹⁷⁹ As Marcus Jones MP suggested, "Layering more regulation on to residential landlords will have the net effect of reducing supply. Many of our constituents rely on renting private properties, so we need to be very careful that the balance is right": Report Stage, HC Debs, vol 620, col 574 (27th January 2017).

¹⁸⁰ See, for example, CRESR, *Monitoring the Impact of Recent Measures Affecting Housing Benefit and Local Housing Allowances in the Private Rented Sector: The Response of Landlords* (DWP, 2014), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/329901/rr870-lha-impact-of-measures-affecting-private-rented-sector-response-of-landlords.pdf (last accessed 28th June 2018).

their income).¹⁸¹ That higher standard applies also to the new duties. The condition of the property is regulated - for example, electrical regulation, fire precautions (including in relation to furniture provided), carbon monoxide poisoning - as well as the identity of the landlord – who must be a “fit and proper person”, including matters such as conviction for certain sexual offences or whether that person has “contravened any provision of the law relating to housing (including landlord or tenant law)”.¹⁸²

This has offered the state a way of controlling and disciplining the apparent minority of landlords who are now termed “rogue landlords”, but only working through their own economic and behavioural choices. The focus on rogue landlords, who are the subject of other statutory controls, has been justified on the “bad apple” principle. As Will Quince MP put it, “Rogue landlords – I do not particularly like that term – are a small few, and they give most landlords, who are very good, a bad name. Nevertheless, we have to protect people from those few”.¹⁸³ It is those landlords who must make the choice, it seems, by contracting in to the regulation. There is no overt requirement on landlords to provide their accommodation to local authorities for the satisfaction of these duties, nor is there a requirement on them to provide longer tenancies at lower cost.¹⁸⁴ In succumbing to the power of the market, Blackman argued that the maximum 12 month period was required because, otherwise, “the problem would be lack of supply” as few private landlords were thought to be willing to subscribe to longer terms.¹⁸⁵ This demonstrates, perhaps, that the private rented sector was the tail that wagged the new duties.

It is in these contexts that the feminist, race, and socio-legal scholarship must be re-considered. It was noted above that homelessness decision-making has been one of the most researched areas of social welfare. Some of the findings from that research are bound to hold good – the 2017 Act can be seen as re-ordering the deckchairs, expanding the local state to outside areas. As a result, households that are in the most desperate need - those already disadvantaged in the housing, labour and welfare markets – are likely also to be the most dislocated.

¹⁸¹ Homelessness (Suitability of Accommodation) (England) Order 2012, SI 2012/2601, Reg 3.

¹⁸² Reg 3(e)(iii).

¹⁸³ Public Bill Committee, 6th Sitting, col 126 (18th January 2017).

¹⁸⁴ Amendments to the contrary were rejected on 3rd Reading: HC Debs, vol 620, col 552 (27th January 2017), proposed by Andy Slaughter MP.

¹⁸⁵ Public Bill Committee, 4th Sitting, col 86 (18th December 2016); cf the government’s own model assured shorthold tenancy which recommends a period of two years:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/695945/Model_Agreement_for_an_Assured_Shorthold_Tenancy_and_Accompanying_Guidance.pdf (last accessed 28th June 2018).

In terms of the criteria for assistance, the 2017 Act does nothing to the “vulnerability” criterion, so that survivors of domestic violence without children will still need to bring themselves within that framing of their “priority need”. However, the prevent and relief duties, as well as the personalised housing plan, operate irrespective of a household’s priority need. Consequently, there will be an urgent need for research to ascertain how authorities exercise their duties in domestic violence and other cases, especially where there is medical evidence of housing need (that may not previously have been sufficient to cross the vulnerability threshold). Considerable medical evidence used to be provided to local authorities, about which officers were said to express some scepticism,¹⁸⁶ but it cannot be said that this type and range of evidence is necessarily germane to the exercise of the new duties given that they operate irrespective of a household’s priority need. The question will often relate to the location of accommodation, to which at least some medical evidence is likely to be relevant. In order to provide the kind of holistic assessment envisaged by the personalised housing plan, authorities may need to streamline the organisation of their homelessness service.

Finally, administrative justice issues discussed in the literature will need to be re-thought. If there are fewer decisions against the criteria for assistance – because of the relief and prevention duties – then there will be fewer reviewable decisions, other than on the question of whether accommodation offered is suitable. With fewer reviewable decisions, there will be fewer County Court appeals. It may well be that, at least initially, the litigation focus will once again be judicial review of local housing authorities (as a failure to exercise the prevent and relief duties cannot be the subject of internal review, and so can only be challenged by way of judicial review). This will require further research (in the absence of government-maintained statistics on the use of internal reviews of homelessness decision-making), as well as officers’ original decisions both for quality and quantity. Assuming there are fewer reviewable decisions, the industry which currently exists around homelessness decision-making – external reviewers, medical advisors, lawyers and others – will also need to be re-shaped.

Conclusions

I have argued that the 2017 Act is a major re-writing of homelessness law, policy, and practice. It is both a culture change and a re-imagining of the role of – and relationships between – the state, applicant, and private sector. The legislation had been both out of time and place, and the 2017 Act undoubtedly updates it. There can be little surprise that, although a private members’ Bill, it had government and opposition support. Indeed, the 2017 Act can be seen as an achievement because

¹⁸⁶ Bretherton et al, *op cit* n102.

being homeless and eligible attracts the new duties - it diverts applicants for assistance away from the bureaucratic processes and doubly penalising vulnerability of the previous law.¹⁸⁷ However, the one thing that the 2017 Act does not do is “reduce” homelessness. It merely masks it through new duties, and it is through the exercise of those duties that this new relationship between citizen-consumer, the state, and the private sector becomes apparent. For the government, there is a further win with this system because, if one quantifies “homelessness” by statutory acceptances, as has been the case hitherto, they will be able to point to its reduction because those acceptances will be vastly reduced. Amid the inevitable back-slapping and praise, the category of the “hidden homeless” will be increasing.

Although one can predict further litigation because of the discretionary and uncertain ambit of its terms, as well as the results of unaffordability in the sector, much of the old law is likely to become redundant. A different version of gatekeeping has been hardwired in to the additional duties and terms of the 2017 Act. Once the prevent or relief duty has been satisfied by securing accommodation becomes available to the applicant, there will be limited appetite for continuing with the decision-making process to determine the other duties to applicants. Indeed, one can predict that there will be fewer review requests and County Court appeals will become largely academic once the prevent or relief duties have been satisfied. The principal area for legal challenge will turn to whether the authority is, or can be, satisfied that the applicant is homeless or threatened with homelessness, the basis for the duties under the 2017 Act, and the question of the suitability of accommodation sourced under the new duties. The only other point of proceeding through the decision-making process otherwise would be for the performance of the main housing duty, which, to all intents and purposes, is not dissimilar from the relief duty. There will be considerable scope for further research of decision-making as a result of these changes, and one must at least postulate that past research findings will be superseded because different influences (most notably, the supply of accommodation) will be foremost.

¹⁸⁷ Doubly penalising because the already vulnerable must recognise their vulnerability and persuade the authority of that as a matter of law.