**HOUSING LAW PRACTITIONERS ASSOCIATION**

**20 MARCH 2013**

**THE IMPACT OF BENEFIT REFORM:**

**THE CHANGES TO THE HOUSING BENEFIT SCHEME**

**Introduction**

In the 2010 Emergency Budget and Spending Review, a raft of measures to cut HB expenditure was announced, directed at cutting HB in both the private rented sector (Local Housing Allowance (“LHA”)) and the social rented sector.

These changes are introduced largely in 2 tranches: those commencing in April 2011 and those commencing in April 2013. Also, in due course, we will see the commencement of the wholesale change to the welfare benefits scheme with the roll out of Universal Credit (not dealt with in detail in this paper).

1. **The April 2011 changes to LHA (HB in the private rented sector)**

1.1. LHA is a method of calculating the amount of HB to which a person is entitled in private sector accommodation. The rent officer sets the LHA for each size category of dwelling in each “*broad rental market area*”. Originally the LHA was set at the *median rent* for the relevant broad rental market area.

1.2. Amendments to the HB Regs 2006 and the Rent Officers (HB Functions) Order 1997, introduced by the *HB (Amendment) Regs 2010 SI No. 2835* and *the Rent Officer (HB Functions) Amendment Order 2010 SI No. 2836,* in force from 18 March/1 April 2011, had had the following effect:

* The **maximum size category of dwelling for which LHA is awarded was reduced from 5 to 4 bedrooms**, and the provision that allowed local authorities to request an LHA determination for dwellings larger than the maximum was removed (Reg 13D(2)(c));
* **LHA rates were set at the 30th percentile of rents** in each broad rental market area, rather than at the median;
* **LHA was capped at the following weekly rates**, if lower than the 30th percentile rent:

£250 for a 1 bedroom property; £290 for a 2 bedroom property; £340 for a 3 bedroom property; £400 for a 4 bedroom property.

As to the number of bedrooms a claimant is entitled to, see **reg 13D (3)** which tells us that a claimant of LHA is entitled to one bedroom for each of the following categories of occupier:

1. *A couple (within the meaning of Part 7 of the Social Security Contributions and Benefits Act 1992)*
2. *A person who is not a child*
3. *2 children of the same sex*
4. *2 children who are less than 10 years old*
5. *A child*

*and one additional bedroom in any case where the claimant or the claimant’s partner is a person who requires overnight care (or in any case where both of them are).*

(The caps and the reduction in the maximum size category were challenged without success in ***CPAG v Secretary of State for Work and Pensions [2011] EWHC 2616*** *(Admin), 13 October 2011.)*

* A claimant’s **entitlement to keep up to £15** of their LHA, where the amount of LHA to which he/she was entitled was greater than the rent, was **removed** (by amendment to reg 13D);
* The entitlement to one extra bedroom where the claimant or the claimant’s partner is “**a person who requires overnight care**” was introduced (see reg 13D(3) above).

The definition of such a person (“P”) was inserted at reg 2(1) HB Regs 2006:

*a person who*

1. *is in receipt of attendance allowance;*
2. *is in receipt of the care component of disability living allowance at the highest or middle rate prescribed in accordance with s 72(3) of the Act; or*
3. *although not satisfying either paragraph (i) or (ii) above has provided the relevant authority with such certificates, documents, information or evidence as are sufficient to satisfy the authority that P requires overnight care; and*

*(b) whom the relevant authority is satisfied reasonably requires and has in fact arranged that one or more people who do not occupy as their home the dwelling to which the claim or aware for housing benefit relates should*

*(i) be engaged in providing overnight care for P;*

*(ii) regularly stay overnight at the dwelling for that purpose; and*

*(iii)be provided with the use of a bedroom in that dwelling additional to those used by the persons who occupy the dwelling as their home, but in a case where P is treated as occupying a dwelling which P does not actually occupy, paragraph (b)(ii) and (iii) are to be treated as satisfied where the relevant authority is satisfied that the dwelling contains such an additional bedroom and that P did or will reasonably so require and so arrange at such time as P actually occupied or occupies the dwelling.*

1.3. **The *Burnip* litigation, overnight carers and children with disabilities in need of separate bedrooms**

The much welcomed overnight carer amendment referred to above was introduced whilst the very issue of the lack of entitlement to an extra bedroom for people who had a special need for one was being litigated in 3 cases which eventually reached the Court of Appeal:

***Burnip v (1) Birmingham C.C. (2) Secretary of State for Work and Pensions; Trengove (as personal representative of the estate of Lucy Trengove) v Walsall MC (2) Secretary of State for Work and Pensions; Gorry v (1)( Wiltshire Council (2) Secretary of State for Work and Pensions and Equality and Human Rights Commission (intervener) [2012] EWCA Civ 629*** *(15 May 2012)*

Two of the appellants (Mr Burnip and the late Lucy Trengove) were severely disabled and assessed as needing the presence of full-time carers overnight. The third appellant (Mr Gorry) was the father of 2 disabled daughters: one who had Down’s syndrome and the other spina bifida, and who, because of their disabilities, could not share a bedroom. The appellants relied on *Thlimmenos v Greece (2001) 31 EHRR 15; App No 34369/97, 6 April 2000* to argue that there was a positive obligation on the state to make provision to cater for the significant differences between a severely disabled person and an able-bodied person. The Court of Appeal agreed. It declared that the statutory criteria that prescribed the number of bedrooms for a claimant of HB in the private rented sector were discriminatory under Article 14 ECHR on the grounds of disability, because they did not make any allowance for the essential housing needs of severely disabled people, and the secretary of state had failed to establish any objective justification for the discriminatory effect (para 24).

The CA decision represents a major step forwards in the application of human rights law in the sphere of welfare benefits. The Secretary of State sought to appeal to the Supreme Court.

However, having already met the issue raised by Mr Burnip and Ms Trengove by its April 2011 amendment to the HB Regs on overnight carers (although not conceding the legal argument in the case), on 13 March 2013, the Secretary of State announced that the appeal to the Supreme Court is no longer being pursued and the **DWP issued the following guidance in its urgent bulletin HB/CTB U2/2013:**

 “6. *This means* ***that from the date of the Court of Appeal judgment on 15 May 2012, local authorities (LAs) should allow and extra bedroom for children who are unable to share because of their severe disabilities following the guidelines set out in paragraphs 7 – 10 below.***

 7*. When a claimant says that their children are unable to share a bedroom, it will be for LAs to satisfy themselves that this is the case, for example, a claim is likely to be supported by medical evidence and many children are likely to be in receipt of Disability Living Allowance (DLA) for their medical condition. In addition LAs must consider not only the nature and severity of the disability but also the nature and frequency of care required during the night, and the extent and regularity of the disturbance to the sleep of the child who would normally be required to share the bedroom. In all cases this will come down to a matter of judgment on the facts of each individual case.*

 *8. It should be noted that the judgment does not provide for an extra bedroom in other circumstances, for example, where the claimant is one of a couple who is unable to share a bedroom or where an extra room is required for equipment connected with their disability.*

 *9. ……*

 *10. The Court of Appeal judgment is now considered to be case-law and as such LAs are legally bound to apply the judgment.*

 *11. The judgment* ***applies to both LHA size criteria and the reduction of the spare room subsidy*** *which applies from 1 April 2013*.”

2. **From January 2012 the LHA shared accommodation rate was extended to single claimants under 35s**

2.1. The *HB (Amendment) Regs 2011 SI No. 1736*, in force from 1 January 2012, extended the definition of “*young individual*” in the HB Regs 2006 to include single claimants who are under 35, rather than just those under 25 as previously. The effect is that where a person falls within the definition of “*young individual*”, and has no non-dependant residing with him/her, his/her HB is limited to the rate applicable to accommodation which consists of one bedroom with other shared accommodation, rather than the rate applicable to one-bedroom, self-contained accommodation, unless s/he qualifies for an exemption (reg 13D(2)(a)).

2.2. There are a number of exemptions including for people who:

- have lived in hostels for homeless people, domestic violence refuges, or drug rehabilitation hostels for three months or more before moving to the private rented sector – the three months does not have to be continuous, can be in any number of hostels and does not have to be immediately before you claimed housing benefit .You must also have been offered and received resettlement support.

- have left prison and your housing has been arranged under the Multi Agency Public Protection Arrangements (MAPPA) – for managing the risk posed by sexual and violent offenders.

 (See the HB Regs 2006, reg 2(1), (1A) and (1C) for the full details of the exemptions to the shared room rate.)

2.3. Crisis reports that the since the extension of the shared accommodation rate and the first round of LHA cuts single people on benefits experience greater difficulty finding accommodation and advisors working in schemes for the single homeless are struggling to find accommodation for those only entitled to the shared accommodation rate.[[1]](#footnote-1)

**3. The April 2013 changes to LHA**

3.1. The Welfare Reform Act 2012 received Royal Assent on 8 March 2012 and introduced powers to make further changes to the HB scheme as well as being the vehicle for introducing Universal Credit.

3.2. Changes to the HB Regs 2006 and Rent Officers (HB Functions) Order 1997 by virtue of the *HB (Amendment) Regs 2012 SI No. 3040* (made under s 69 WRA 2012) and the *Rent Officers (HB Functions) (Amendment) Order 2012 SI No. 646* have introduced the **uprating of LHA in line with the consumer price index (“CPI”) from 1 April 2013**.

3.3. For each broad market rental area, the rent officer will determine the LHA rate for each size category of dwelling annually within 20 days of the publication of the CPI in September each year. The LHA is **the lower** of the rent at the 30th percentile of listed rents or the previous year’s LHA increased by reference to the CPI. These amendments also had the effect that LHA rates were frozen from April 2012 in readiness for the April 2013 uprating by reference to the CPI.

3.4. As a result, the relationship between HB and actual rents i predicted to become increasingly remote, making rented property increasingly less available for those reliant on HB. **The *National Audit Office*** published a report (“***Managing the Impact of HB Reform*”,** 1 November 2012) predicting that uprating HB by the CPI rather than local rent inflation could cause a shortfall in affordable accommodation for HB claimants in 36% of local authority areas in England by 2017.

3.5. In ***R (Zacchaeus 2000 Trust) v Secretary of State for Work and Pensions*** [2013] EWHC 233 (Admin), Underhill J, 15 February 2013, the anti-poverty charity brought a challenge to the Rent Officers (Housing Benefit Functions) (Amendment) Order 2012 (which provides for uprating of LHA in line with the CPI) alleging it was ultra vires the legislative housing and benefits regime, and that the Secretary of State in making it acted breach of section149 of the Equality Act 2010 (the public sector equality duty). The case focused on the disadvantages that the widening gap between rents and HB would cause to people with disabilities, children of school age and ethnic minority families. The claim failed, although not without criticism by the court of the quality of the Equality Impact Assessment preceding the changes to the HB scheme.

**4. The April 2013 changes in the social rented sector: size criteria restrictions for working-age claimants**

(also known as “***the bedroom tax***” or “***the removal of the spare room subsidy***”)

* 1. Amendments to the HB Regs 2006 introduced by the *HB (Amendment) Regs 2012 SI No 3040* introduce size criteria into the assessment of HB in the social rented sector with effect from 1 Aprl 2013.
	2. What are the government’s aims? To help contain expenditure; to introduce greater parity with the private rented sector(the same size criteria apply as for LHA); to strengthen work incentives among people of working age; to make better use of available housing stock; to increase mobility in the social rented sector.[[2]](#footnote-2)
	3. How are the changes introduced? A new reg A13 to HB Regs 2006 provides that where there is no requirement to refer the case to the rent officer or for a LHA to be calculated (these being applicable to private sector cases), subject to certain exceptions, the authority must determine the “*maximum rent (social sector)*”. That is to be determined in accordance with a new reg B13.
	4. New reg B13 provides that the claimant is entitled to 1 bedroom for each of the categories of person whom the relevant authority is satisfied occupies the claimant’s dwelling as their home which are set out in reg B13 and which are identical to the categories in reg 13D(3) in respect of LHA, including the entitlement to an additional bedroom where a person requires overnight care.
	5. New reg B13 further provides that if the claimant has **one bedroom in excess of the number allowed, 14% of the rent is deducted** for the purposes of calculating HB entitlement, and if the claimant has **2 or more bedrooms in excess of the number allowed, 25% of the rent is deducted**.
	6. **Protected periods**: there will be a protected period of 13 weeks for claimants who previously have not been awarded HB in the last 52 weeks and who were able to meet their rent when they entered into it; there will be a protected period after the death of household member for 12 months in defined circumstances (new reg 12BA).

4.5. **Exceptions (reg A13 (2) – (4))**

- **People who have reached pension age:** the rules do not apply “where the claimant or the claimant’s partner has attained the qualifying age for state pension credit, or where both have attained that age”;

- **Some types of non-mainstream accommodation**: certain excluded tenancies that are not with a registered housing association (HB Regs 2006, Schedule 2), shared ownership tenancies, mooring charges for houseboats, site charges for caravans or mobile homes;

- **Shared ownership tenancies;**

- **Some types of temporary accommodation provided under Housing Act 1996 Part 7 or to prevent homelessness.**

 4.6. **Supported (“exempt”) accommodation**

 The size criteria will not apply to this type of accommodation which is defined for HB purposes as provided by a non-metropolitan county council in England, a housing association, a registered charity or voluntary organisation where that body or person acting on its behalf also provides the claimant with care, support or supervision as set out in para 4, Sched 3 to the HB and Council Tax (Consequential Provisions) Regs 2006.

* 1. The government made an **additional £30 million available in Discretionary Housing Payment funding from 2013/4** specifically to help 2 groups affected by the size criteria for social sector tenants rules: people who live in accommodation substantially adapted for them or someone in their household because of a disability and foster carers (as foster children were originally not to included when calculating the bedroom entitlement).
	2. However, **the government recently changed its mind on foster carers and armed forces personnel.** On 12 March 2013 it announced the intention to lay amending regulations to allow an additional room where claimants are foster carers and where adult children are in the Armed Forced but continue to live with parents.[[3]](#footnote-3)
	3. **The judicial review of the social sector size criteria regulations**: 10 claimants who each have an established need for an extra bedroom are challenging the regulations in a judicial review, with a hearing in May 2013.[[4]](#footnote-4)
	4. The DWP has issued **guidance** to local authorities on the changes in HB/CTB A4/2012 (now to be read in the light of the concessions referred to above).

**5. The Benefit Cap from April 2013 – initial implementation of the cap by reducing HB entitlement**

* 1. S 96 WRA 2012 provided the power for the introduction of a benefit cap. Initially the cap will be applied by local authorities reducing a claimant’s HB, until the introduction of Universal Credit, when the cap will be applied by the DWP as part of the Universal Credit calculation. Universal Credit will be phased in over a number of years, and the benefit cap will be implemented via the administration of HB until then.
	2. From 15 April 2013 the cap will be rolled out in 4 local authority areas – Bromley, Croydon, Enfield and Haringey. The national roll-out will start from 15 July 2013 aiming to cover all relevant households by the end of September 2013.[[5]](#footnote-5)
	3. *The* *Benefit Cap (HB) Regs 2012 SI No. 2994* provide that
* the cap will apply to working age people and will restrict the total amount of welfare benefits to £350 per week for a single claimant who is not responsible for a child or young person and £500 per week in any other case;
* it will not apply where the claimant is or claimant and the claimant’s partner are jointly entitled to Working Tax Credit;
* it will not apply during a period of grace of 39 weeks in a case where the claimant or claimant’s partner was in work for 50 out of 52 weeks before this work ended and was not entitled to IS, JSA or ESA;
* it will not apply to people who receive ESA with a support component, attendance allowance, industrial injuries benefit or a war pension or DLA or have responsibility for a child or young person who receives DLA;
* where the cap would reduce a person’s HB to below 50p the local authority must leave this entitlement in place so that a claimant could apply for a DHP;
	1. The DWP in its “Benefits Cap Factsheet” predicted that 56,000 households will be affected, with the average weekly benefit loss being £93 and applying mostly to families with children.

**6. Housing costs under Universal Credit – the Direct Payment Demonstration Projects**

6.1. Under Universal Credit, housing costs are to be paid by **monthly payments direct to claimants**.

6.2. Thedemonstration projects are being conducted in 6 areas in England and Wales involving local authorities and housing associations, and including Southwark Council and Family Mosaic London.

The projects are aimed to investigate how much support tenants will need, what exemptions are needed or provisions for switching back to payments to the landlords when the tenant gets into arrears. The government is indicating that there will be exemptions.[[6]](#footnote-6)

The experience of Southwark Council has been that by December 2012 arrears in the pilot stood at 12 per cent as opposed to a benchmark of 2 per cent for council tenants where HB was paid to the landlord. It reported that the same level of arrears if applied across the council would mean a debt of £14 million on its annual rents receipts and a “big hole” in the council’s ability to maintain, clean and repair its properties.[[7]](#footnote-7)

Ipsos MORI research found that 78% of housing associations anticipate a fall in rental income as a result of this change in payment method.[[8]](#footnote-8)

**7. The increase in funding for Discretionary Housing Payments (DHPs)**

7.1. Whereas annual funding for DHPs was £20 million until April 2011, it was increased to £30 million for 2011/12 and for 2012/3 to 60 million. For 2012/14, £155 million will be available.[[9]](#footnote-9)

7.2. Whereas the government has stated that certain amounts of DHP funding are aimed at specific groups e.g. disabled people who live in significantly adapted properties, the DWP guidance confirms that it is for local authorities to apply their discretion as to who should receive payments.[[10]](#footnote-10)

7.3. In its response to the consultation on the DHP guidance manual [[11]](#footnote-11)the DWP reminds authorities that DHPs may be awarded for a short period or for an indefinite period until the claimant’s circumstances change. “*We recognise that some groups, such as disabled people living in adapted accommodation and foster carers, may continue to require additional financial support beyond 2014/5 and we will look closely at how that support is maintained, whether by DHPs or by some other means*”.

**8. What will the issues be in housing law practice?**

**8.1. Housing people out-of-area**

For example, it is reported that Camden Council is planning to place 700 households out of the area and is looking for affordable properties as far afield as Bradford, Birmingham and Leicester.[[12]](#footnote-12)

In view of the new “private rented sector offer” introduced by the Localism Act 2011 as a means of final discharge of the main housing duty, local authorities will be looking for affordable private sector accommodation for homeless households which they may not be able to find within their own district.

In this context, the issue of suitability will arise where an out of borough placement is contemplated (see the *Homelessness (Suitability of Accommodation)(England) Order 2012,* and the *Supplementary Guidance on the Homelessness Changes in the Localism Act 2011* which emphasises the need to strive to secure accommodation where a person was previously living, and near to the local authority district, if it is not possible to secure it in the district).

**8.2. Social housing tenants facing re-possession on grounds of rent arrears**

- It is reported that at least one council has pledged not to evict tenants who accrue arrears due to the shortfall caused by the size criteria if tenants are doing all they can to avoid falling into arrears, and that other councils are considering such a policy (see Inside Housing.co.uk, 19 March 2013). However, it is clear that any such policy could at best be only short term.

- The National Housing Federation has published “Making it Fit: A guide to preparing for the social sector size criteria”, providing advice to social landlords on good practice including as regards **tenants’ options when facing the shortfall**, that “*an open and honest discussion with affected tenants will involve explaining and discussing all the available options including:*

*• making up the shortfall from benefit or other income*

*• looking for work which would bring in income to bridge the benefit gap*

*• transferring to a smaller property within your stock*

*• transferring to a smaller property with another social landlord*

*• doing a mutual exchange with another tenant, either within your stock or with another provider*

*• moving to a smaller home in the private rented sector*

*• taking in a lodger to help with the costs*.”

- The DWP provides a similar list of tenants’ options: move, take a boarder/lodger, have non-dependants contribute more, move into work/increase hours, apply for a DHP. See HB/CTB Circular A4/2012. This provides a fact sheet on “Renting out your Spare room” including the need to check carefully the effect of additional income on benefit income.

- There may be a basis for a claimant to **challenge the HB authority’s decision** to apply the size criteria so as to restrict their HB in the specific circumstances of their case, whether by appeal or “any time revision” on grounds of official error. However, in the meantime there will be a shortfall in the HB and rent arrears accruing unless a means of paying in the interim can be found.

- As regards determining **how many bedrooms** there are in a given property, the government has said that “*the number of bedrooms is a matter between landlord and tenant*” (Steve Webb M.P. in answer to a written Parliamentary Question, reported on www.rightsnet.org.uk, 13 March 2013). However, landlord and tenant may not agree. See on the subject of disputes over whether a room is a bedroom, the discussion on the Nearly Legal website “Room without review: Thoughts on tackling bedroom tax”, 11 February 2013.

* 1. **Homelessness arising as a result of a reduction in benefit**

The Minister, Steve Webb MP:

“*If I may, I shall respond to the Chairman of the Select Committee, who made an important point about those who are “intentionally homeless”. Although it is for local authorities to make decisions on homelessness applications as they do now, under current statutory homelessness legislation****, if the only reason for the person’s homelessness is a reduction in benefit that is outside their control they should not be considered intentionally homeless*** *by the local authority. I can put that on the record and hope it is helpful*.”

HC Deb 27 February 2013 c345.

Bethan Harris

Garden Court Chambers

20th March 2013

Information available from the National Audit Office on the aims and effects of the HB reforms

* the DWP forecasts that, in the absence of reforms, HB spending would rise to £23.9 billion in real terms by 2014-15;
* the DWP expects that, as a result of reforms, real expenditure on HB will fall to around £21.6 billion by 2014-15, saving around £2.3 billion per year;
* the reforms will result in around 2 million households receiving lower benefits, with a smaller number of households receiving substantially less;
* the Department's impact assessments estimate that 1.4 million claimants in the private rented sector will be affected by changes to local housing allowance;
* in the social rented sector, 660,000 claimants with one or more extra bedrooms could lose between 14 per cent and 25 per cent of their housing benefit (an average loss of £14 a week);
* the overall benefit cap will affect 56,000 households losing on average £91 per week.

(See the NAO website, at <http://www.nao.org.uk/>, Managing the Impact of HB reform, November 2012.)

1. Crisis’ response to the Communities and Local Government Select Committee Inquiry on the PRS, January 2013 [↑](#footnote-ref-1)
2. Summarised in the explanatory memorandum to SI 2012 No. 3040 [↑](#footnote-ref-2)
3. DWP Written Ministerial Statement on Housing Benefit Reform, 12 March 2013 [↑](#footnote-ref-3)
4. For summaries of the facts of each of the 10 cases see the Hopkins Murray Beskine website. [↑](#footnote-ref-4)
5. Housing Benefit Direct, Issue 135, March 2013, DWP [↑](#footnote-ref-5)
6. Early Findings of the Direct Payment Demonstration Projects, 17 December 2012, DWP website [↑](#footnote-ref-6)
7. Guardian.co.uk, 19 February 2013 [↑](#footnote-ref-7)
8. Ipsos MORI Social Research Institute, Impact of Welfare Reform on Housing Associations – 2012 Baseline Report, January 2013 [↑](#footnote-ref-8)
9. HB/CTB S1/2013 (DWP Circular) [↑](#footnote-ref-9)
10. As above [↑](#footnote-ref-10)
11. DWP response to the consultation on the DHP guidance manual, December 2012 [↑](#footnote-ref-11)
12. Guardian.co.uk and [www.rightsnet.org.uk](http://www.rightsnet.org.uk), 14 February2013 [↑](#footnote-ref-12)