Under-occupation of social housing: Housing Benefit entitlement

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Section Social Policy Section

Social landlords have long had an interest in tackling under-occupation in order to achieve the best use of their housing stock. Landlords have developed incentive schemes to encourage tenants to relocate to smaller properties; however, as a general rule, they do not have the power to force social tenants to move against their will.

The Government has used powers contained in the *Welfare Reform Act 2012* to provide that, from 1 April 2013, working-age social tenants in receipt of Housing Benefit will experience a reduction in their benefit entitlement if they live in housing that is deemed to be too large for their needs. The main exception to this is households who are not of working-age. Restrictions on entitlement to Housing Benefit based on the size of the accommodation occupied have applied to claimants living in privately rented housing since 1989 (Schedule 3 to the *Rent Officers (Additional Function) Order 1989*).

The draft *Housing Benefit (Amendment) Regulations 2012* were laid on 28 June 2012. They were subject to the "affirmative" procedure so had to be approved by both Houses of Parliament before they could come into force. The regulations were considered in Grand Committee in the House of Lords on 15 October 2012 and approved by the House of Lords on 6 November. The First Delegated Legislation Committee considered the regulations on 16 October 2012. A deferred division on the regulations took place in the Commons on 24 October 2012 where they were approved by 260 votes to 206. Statutory Instrument 2012/3040 is now in force.

The DWP published guidance on the size criteria in Housing Benefit/Council Tax Benefit Circular A4/2012. Further guidance, following the Secretary of State's announcement of additional exemptions on 12 March 2013, can be found in HB/CTB Circulars U2/2012 and A10/2013.

The policy is highly controversial and has been labelled the "bedroom tax". Amendments to the *Welfare Reform Bill* were secured during its passage through the House of Lords but they were not agreed by the House of Commons and did not survive into the final Act.

This note provides information on under-occupation in the social rented sector, explains the potential impact of the policy and possible responses by landlords and tenants. The Chartered Institute of Housing has published *Making it fit: a guide to preparing for the social sector size criteria for social landlords* and a *guide to reducing under-occupancy*.

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1 Why does under-occupation arise?

Under-occupation arises where a household lives in a property that is deemed to be too large for its needs. It is usually defined in terms of excess bedrooms.

The classic cause of under-occupation is older tenants/couples remaining in their home after their children have grown up and left. Family breakdown can also result in under-occupation.

Some social landlords, particularly in areas with less demand for social housing, create under-occupation on initial allocation, i.e. they offer a household a larger property than they need. This may arise because of a mismatch between the size of properties available and households in need of housing or the landlord may wish to support parents with children who

do not reside with them permanently. The allocation policy may also anticipate increases in family size – thus reducing the pressure for future transfer requests.

Research carried out by the Cambridge Centre for Housing and Planning Research (CCHPR) for the Housing Futures Network indicates that a substantial number of under-occupying households do not regard themselves as such. Their "spare" bedrooms are used by children (irrespective of age and gender) who have their own rooms. A number of couples sleep in separate bedrooms. Spare bedrooms are used when children visit at weekends as part of a shared parenting arrangement; rooms are also used for storing disability related equipment.[1]

Social landlords have tended to focus on tackling under-occupation amongst elderly tenants. This generally takes the form of an incentive to move and assistance with removal costs.[2] Good practice guidance on managing under-occupation was published by the then Government in April 2000 *Managing under-occupation: A guide to good practice in social housing*. The Tenant Services Authority (TSA) and DCLG published a new guide to tackling overcrowding and under-occupation, *Overcrowding and Under-Occupation: Self-Assessment for Social Landlords,* in October 2009. In 2007 the Labour Government allocated funding to 38 pathfinder areas to devise solutions to tackle overcrowding – this work also included a focus on under-occupation and a report on progress is contained in the TSA/DCLG's 2009 paper.

The key message from landlords who have been active in this area seems to be that cash incentives are largely irrelevant in most cases. What is important, and leads to successful moves, is the provision of the right support and finding the right property.

The CCHPR concludes that successful schemes to reduce under-occupation "generally only manage to move a very small proportion of all under-occupiers each year. The main reason for this is that most do not want to leave the homes they are settled in."[3]

2 The rationale for Government intervention

Two key reasons for the introduction of size criteria, and associated limitations in Housing Benefit entitlement in the social rented sector, have been advanced by the Government; namely, the need to reduce expenditure on Housing Benefit and the desire to secure behaviour changes amongst social housing tenants:

> At October 2010, there were 3.3m Housing Benefit claimants living in the social rented sector. Claimants in the social rented sector made up approximately 69% of all Housing Benefit claimants. The overall cost of Housing Benefit needs to be controlled, and reduced in order to tackle the budget deficit. This measure is part of the effort to contain Housing Benefit expenditure.
>
> There is currently little reason for Housing Benefit claimants in the social rented sector to move from accommodation which is too large for their needs. The match between the size of accommodation and the household is irrelevant for calculating Housing Benefit entitlement for the vast majority of these Housing Benefit claimants. This could be seen as inequitable when compared with the operation of Housing Benefit in the

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1 Cambridge Centre for Housing and Planning Research, *Under-occupation and the new policy framework* December 2011

2 CCHPR, *Under-occupation in North Hertfordshire*, March 2011

3 Cambridge Centre for Housing and Planning Research, *Under-occupation and the new policy framework* December 2011

> private rented sector. It is unfair to allow tenants in the social rented sector to enjoy more spacious accommodation than they could justify if they were on Housing Benefit in the private rented sector. In these circumstances it would be reasonable for under-occupying claimants in the social rented sector to make some contribution towards the more generously-sized accommodation.
>
> [...]
>
> The high proportion of tenants in receipt of Housing Benefit means that it has the potential to influence the behaviour and actions of many tenants and landlords. It is this role that the introduction of the size criteria intends to capitalise on, providing support where accommodation is suitable for the needs of the tenant; and providing an economic incentive for tenants to move to smaller properties where their accommodation is considered larger than necessary to meet their needs and those of their household.
>
> Housing Benefit claimants in the social rented sector will face similar choices to their counterparts in the private rented sector: Tenants will be able to choose whether to occupy appropriately sized accommodation, or pay towards accommodation which is larger than the needs of their household. Where the choice is to move, the lower rent will help to provide an additional work incentive, and enable claimants to 'float off' Housing Benefit at lower income levels.[4]

Lord Freud justified the measure during the passage of the *Welfare Reform Act* through Parliament:

> I remind noble Lords of the core argumentation. We do not think that taxpayers should be expected to meet the cost of somewhere approaching 1 million spare bedrooms, a cost of around £0.5 billion every year. Clearly this is unfair, or certainly different, to those in the private rented sector who receive benefits based on their household need.[5]

It is clear from the February 2012 *Impact Assessment* that the desired savings in Housing Benefit expenditure will only be realised in full if social tenants do not seek to move from the homes they are under-occupying:

> Estimates of Housing Benefit savings are based upon the current profile of tenants in the social rented sector, with little tenant mobility assumed. If a significant number of tenants wished to move, this would reduce direct savings and place extra demands on social landlords.[6]

Further questions were raised around the impact on Housing Benefit expenditure of social tenants moving into smaller private rented accommodation given that rents are higher in that sector.

The Government rejected this proposition:

> Some in this House, and indeed in the other place, have suggested that we should perhaps abandon this measure altogether as it will not deliver savings if substantial numbers of tenants move into the private sector. I assure noble Lords that if that really were the case, we would not be implementing this change. It is important to look at the bigger picture. If there were movement into the private rented sector, that would free

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4 DWP, *Impact Assessment*, 16 February 2012
5 HL Deb 14 February 2012 c706
6 DWP, *Impact Assessment*, 16 February 2012

> up accommodation in the social rented sector, enabling it to be let to others who may otherwise have been renting privately. Alternatively, it could be offered to people who are currently placed in often expensive temporary accommodation. So, while I can understand how some may conclude that this measure would result in an increase in housing benefit expenditure, I firmly believe that it will achieve precisely the opposite as the effects ripple outward.[7]

The *Impact Assessment* (updated June 2012) estimates that £480m in savings will result from this measure in 2013/14. The *Equality Impact Assessment* on the measure was also updated in June 2012.

3 Housing Benefit: defining under-occupation and who is affected

The *Housing Benefit (Amendment) Regulations 2012* provide that the under-occupation restriction will not apply where:

a. the tenancy is an excluded tenancy defined in paragraphs 4-12 of Schedule 2 to the *Housing Benefit Regulations 2006;*

b. the charge is a mooring charge for houseboats or a pitch fee for a mobile home or caravan;

c. where the claimant or the claimant's partner has attained the qualifying age for state Pension Credit or where both have attained that age (see section **3.2** below); and

d. where the dwelling is temporary accommodation.[8]

Under-occupation restrictions on Housing Benefit also do not apply to shared owners.[9]

3.1 What is a bedroom & how many are allowed?

Historically, social housing tenants have enjoyed long-term security of tenure and have not faced penalties such as Housing Benefit restrictions or forced moves to smaller accommodation when their families have grown up and moved out. Since 1 April 2013 this no longer applies to under-occupying social tenants of **working-age.**

In the social housing sector from 1 April 2013 one bedroom is allowed for each person or couple living as part of the household with the following exceptions:

- a child of 15 or under is expected to share with another child of the same gender; and
- a child of 9 or under is expected to share with one other child aged 9 or under, regardless of gender.

No exemption or account is taken of children whose main residence is elsewhere.[10]

A bedroom is allowed for a non-resident carer where they provide overnight care for the Housing Benefit claimant or their partner (also see section **3.4** below).

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7 HL Deb 29 February 2012 c1370

8 Defined in paragraph 4 of the draft regulations as accommodation made available by a local authority to homeless households.

9 People who own a share of their home and pay rent on the remaining share.

10 Explanatory cover note by the Department of Work and Pensions, 2012

On 12 March 2013 the Secretary of State, Iain Duncan Smith, announced further exemptions for approved foster carers and parents with an adult son or daughter serving in the armed forces (see sections **3.7** and **3.8** for more information).[11]

This definition of under-occupation replicates the size criteria applied to tenants in private rented housing who are in receipt of Housing Benefit.

The explanatory notes to the regulations refer to the fact that no definition of a bedroom is contained therein:

> No definition of a bedroom is included in the Regulations but in general we shall rely on the landlord to advise on the number of bedrooms in a property and this is normally stated on the tenancy agreement. We shall consider whether any clarification is required in guidance.[12]

The issue of bedroom sizes and suitability for sharing was raised during the Committee stage of the *Welfare Reform Bill* in the House of Lords. There is concern that while some bedrooms will accommodate two children sharing, others will not. The National Housing Federation, commenting on the draft regulations, said:

> Some bedrooms will be able to accommodate two 15-year-old boys, for example, but some will not. A three-bedroom house with three large bedrooms might be appropriate for a couple and four children. But a three-bedroom house with one large double room and two small bedrooms suitable only for single occupancy might be appropriate only for a couple and two children.
>
> Where a property has two single bedrooms alongside a double, it would not be appropriate for a landlord to re-designate a three-bedroom house as a two-bed, and absorb the consequent reduction in rent. This is because each bedroom would still be in use. There would be no under-occupation and no spare bedroom. In such circumstances, landlords should be able to use their discretion to say whether the property in question is an appropriate size for such a household, and therefore whether a particular household is in fact under-occupying for the purposes of the size criteria. They should be given the flexibility to reflect particular family circumstances.
>
> If the property was in the private sector then the size of the bedrooms would be reflected in the overall rent for the property. This is not the case in the social sector where landlords have to set rents according to a rigid formula. The flexibility that we propose would allow the policy to be applied in a much more appropriate way that reflects the actual physical space that a family has to live in.[13]

The issue was raised again by Stephen Timms in the First Delegated Legislation Committee[14] and during the Lords consideration of the draft regulations. Lord Freud responded:

> As regards the issue of room sizes, raised by the noble Lords, Lord McKenzie and Lord Best, and whether there should be an adjustment for single bedrooms, we wanted to keep the system simple and did not want to introduce something that might require landlords to go around measuring rooms. Indeed, the stakeholders, including the National Housing Federation, have welcomed that. It is therefore up to landlords and tenants to decide between them whether a property is appropriate for their needs.

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[11] HC Deb 12 March 2013 WS
[12] Explanatory cover note by the Department of Work and Pensions, 2012
[13] NHF, *Comments on the draft size criteria regulations*, 2012
[14] First Delegated Legislation Committee, 16 October 2012, c18

> When it comes to designation of what exactly constitutes a property, it is up to landlords take that decision. They are unlikely to do that on a wholesale basis, but there will be individual properties where it makes sense for landlords to redesignate them as not being appropriate. There may be an individual property for which it is straightforward to do that. To be honest, we are not expecting there to be a massive effect, but there may be some instances of that.[15]

In January 2013 Knowsley Housing Trust announced an intention to reclassify 566 of its 2 and 3 bed homes as smaller units at a cost of around £250,000 in annual rental income. The CEO said that this was about charging the correct rent levels for the properties concerned rather than a direct response to the under-occupation measure.[16]

In February 2013 *The Herald Scotland* reported that the Glasgow Advice Agency (a consortium of consumer assistance bodies) had obtained an opinion from Jonathan Mitchell QC on the possibility of challenging the under-occupation measure on the grounds that the regulations do not contain a definition of a bedroom. The article states:

> The only guidance uncovered was in the Rent Officer Handbook produced by HM Revenue & Customs, which "makes the important point that actual use by an actual household is usually critical".
>
> Mr Mitchell said it would be "going wrong in law" if a local authority determined every room that could possibly be slept in was classified as a bedroom, whatever its characteristics or use.
>
> He added: "It may be that tenants should be advised that the particular use they make of rooms may have consequences for their benefit.
>
> "If, for example, a family with a disabled child allows him or her to use the living room as a bedroom, this may result in the property being determined to have one more bedroom than before, just as turning a bedroom into a therapy or care room, or a study or playroom, may result in a reduction in the number of bedrooms determined."[17]

It has been claimed that section 326 of the *Housing Act 1985* makes it unlawful to define a room of less than 50 square feet as a bedroom. Part 10 of the 1985 Act sets out the statutory overcrowding standard.[18] Section 326 provides that, when assessing whether or not a household is statutorily overcrowded using the space standard, rooms of less than 50 square feet should be disregarded and rooms of between 50 and 70 square feet should be treated as accommodating half a person. Arguably the space standard is only relevant to the assessment of statutory overcrowding – there is no automatic read across from this standard to the assessment of under-occupation in the social or private rented sectors. The National Housing Federation has commented on the rumour that rooms under 70 square feet should not be counted for the purposes of the social sector size criteria – the NHF's comments can be viewed online here.

3.2 What is working-age?

Working-age is defined as those below the qualifying age for Pension Credit. Pension Credit age is currently (April 2013) around age 61 (claimants can calculate the age at which

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15 HC Deb 6 November 2012 c971

16 *Inside Housing,* "Tenants avoid bedroom tax after Knowsley reclassifies homes," 15 February 2013

17 *The Herald*, "100,000 Scots could cash in on bedroom tax loophole", 16 February 2013

18 For more information on the overcrowding standard see Library note SN/SP/1013

they reach the qualifying age for Pension Credit by checking their date of birth against a DWP table) The qualifying age is set to rise in line with the women's state pension age until equalisation with men is achieved in 2018. There are further proposals to increase the state pension age for everyone to 66 by October 2020; it is likely that Pension Credit age will follow this, resulting in more households affected by the under-occupation provisions.

As noted above, the regulations make it clear that where the claimant *or* the claimant's partner has attained the qualifying age for state Pension Credit, or where both have attained that age, the under-occupation restriction does not apply.

The DWP's explanatory cover note to the draft regulations provides the following guidance:

> The deduction applies to working age claimants only, and so whether someone is affected by the application of size criteria in the social rented sector will be linked to the qualifying age for Pension Credit which, for both men and women is linked to women's State Pension age.
>
> Until April 2010, working age included cases where both the claimant (and any partner) was under the age of 60. By 2020, legislation currently provides that the relevant age threshold will be 66 (in line with changes in the State Pension age for women, and entitlement to the guarantee element of State Pension Credit). The Autumn Statement on 29 November 2011 announced the intention to increase this to 67 by 2028.
>
> Housing Benefit claims from those claimants who have reached the qualifying age for state pension credit will be unaffected by this measure at the point that the size criteria changes are introduced from 1 April 2013. Couples not affected by this change at the point of introduction will be those where either the claimant *or* their partner has reached the qualifying age for state pension credit. (New Reg A13(2)(c)).[19]

The National Housing Federation asked for further clarification in light of changes that the Universal Credit will introduce:

> From October 2013, when Universal Credit is introduced, if either member in a couple is under the qualifying age for Pension Credit then the couple will be 'treated as working age'. This means they would be expected to claim the Universal Credit, and would therefore be subject to the size criteria. However, it is not clear what will happen to couples who begin to straddle the Pension Credit age after April 2013 but before the Universal Credit is introduced from October 2013. We would like clarification on this issue, in the regulations if necessary. Further to that, what happens when a household with one partner over the Pension Credit age and another under it, who would be exempt if they claimed Pension Credit prior to October 2013, claims it for the first time after October 2013?[20]

The DWP has confirmed that for mixed age couples, both need to be over the Pension Credit age to be exempt from the size criteria when Universal Credit is introduced. However, there will be protection where one is already in receipt of Pension Credit.[21] The Minister, Steve Webb, was questioned on this during consideration of the draft regulations by the First Delegated Legislation Committee:

> **Stephen Timms:** I think the Minister has given a clear answer to my question, but I would like to be absolutely clear. Is he saying that what he describes as a mixed-age

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[19] Explanatory cover note by the Department of Work and Pensions, 2012
[20] NHF, *Comments on the draft size criteria regulations*, 2012
[21] See section 8 of this note.

> couple will not suffer the under-occupancy penalty prior to the introduction of universal credit, but they will afterwards. Is that right?
>
> **Steve Webb:** More or less, so they will not suffer it prior to universal credit; if they are already in the system and protected by the time universal credit comes in, we will not go back, as it were, unless there is a major change of circumstance, but future claims will be treated in the opposite way.[22]

The Universal Credit is being rolled out gradually from April 2013. Full migration of existing claimants to Universal Credit is not expected to be complete until 2017.

The DWP has published specific guidance on the implementation of the under-occupation deduction in respect of joint tenants: HB A12/2013.

3.3 How much Housing Benefit will be lost?

As noted above, the Housing Benefit restrictions for under-occupation only apply to **working-age** claimants.

Affected tenants face a reduction in their eligible rent for Housing Benefit purposes of 14% for one additional (spare) bedroom and 25% where there are two or more additional (spare) bedrooms. The Government decided to implement a percentage reduction in order to take account of different rent levels in different areas.[23]

Working tenants on a low income who receive Housing Benefit will also experience a percentage reduction in their eligible rent – as a result some will 'float off' Housing Benefit altogether. For example:

1. Jack is on jobseeker's allowance (JSA) of £56.25 per week and lives alone in a 2 bedroom property. He currently gets all his rent of £55 per week paid by Housing Benefit. From April 2013 his Housing Benefit will be reduced by 14% of £55 so he will have to pay £7.70 per week from his JSA.

2. Jill and her partner work and get partial Housing Benefit of £10 per week. They live next door to Jack and have the same size house with the same rent. Their Housing Benefit will also be reduced b-y £7.70 per week.

The explanatory cover note to the draft regulations provides the following examples of how the deduction operates:

> The deduction will apply to the total eligible rent including any eligible service charges. For example a couple living in a three bedroom property with two children aged one and three:
>
> Rent = £60 plus service charges of £20. £5 of the service charge is ineligible so total eligible rent = £75. They are deemed to be under occupying by one bedroom so a 14% reduction of £10.50 is applied to the eligible rent of £75 resulting in Housing Benefit entitlement of £64.50.
>
> In cases of joint tenants the eligible rent is apportioned appropriately between the tenants after the percentage reduction has been applied. For example three individuals jointly responsible for rent live in a four bedroom property. Total eligible rent =£100. A 14% under occupancy reduction is made and then the rent is apportioned £100 -£14, divided by 3 = £28.67.

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[22] First Delegated Legislation Committee, 16 October 2012, c23-4

[23] DWP, *Impact Assessment*, 16 February 2012

> Apportionment will apply even if the case is made that the under occupation is applicable to one of the other tenants. For example a four bedroom house is occupied by a single person and a lone parent and her daughter. The lone parent is the claimant and has an agreed responsibility for half the rent and therefore maintains that she is not under occupying. Total eligible rent = £65, less the 14% reduction of £9.10 = £55.90 and application of the apportionment of 50% = £27.95 Housing Benefit.[24]

The *Impact Assessment* on the under-occupation provisions (updated in June 2012) estimated the number of affected claimants:

> The introduction of the size criteria is likely to affect an estimated 660,000 Housing Benefit claimants living in the social rented sector at the time of its introduction in 2013/14. This is approximately 31% of all working age Housing Benefit claimants living in social housing. At the time of its introduction each claimant will see an estimated average reduction in Housing Benefit of approximately £14 per week, taking into account forecast increases in social sector rents.
>
> As the qualifying age for State Pension Credit increases, the number of claimants affected is also likely to increase, assuming no other changes to the caseload.[25]

The majority (around 81%) of under-occupying social tenants of working-age are believed to have one spare bedroom:

Under occupation of accommodation by	Estimated Number of affected Claimants	Percentage of affected Claimants	Average Weekly Housing Benefit loss per affected Claimant (2013/14)
1 bedroom	540,000	81%	£12
2 or more bedrooms	120,000	19%	£22
ALL BEDROOMS	**660,000***	**100%**	**£14**

Source: Policy Simulation Model, using 2009/10 reference data from the Family Resource Survey. *Total numbers do not sum because of independent rounding.

65% of claimants are expected to experience a benefit reduction of less than £15 per week at 2013/14 prices. Around 40,000 claimants in receipt of partial Housing Benefit are expected to lose their entitlement altogether.[26]

There are regional variations in the number of affected tenants. A higher percentage of tenants are affected in Wales and the north east and north west of England than in London and the south east.[27] Research carried out by the Cambridge Centre for Housing and Planning Research (CCHRP) for the Housing Futures Network, *Under-occupation and the Housing Benefit Reforms: Four local case studies* (January 2012) concluded that affected households will face "severe hardship":

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24 Explanatory cover note by the Department of Work and Pensions, 2012
25 DWP, *Impact Assessment*, (revised) 28 June 2012
26 *ibid*
27 *ibid*

> From the survey, an estimated 42% of tenants consider that they are likely to fail to pay their rent. This would translate into an **annual loss of rental income** to the main social landlords in each of the four neighbourhoods of between **£12,000** (in Lee, in Lewisham) and **£61,000** (in Low Ford in Sunderland). In reality, landlords will not allow tenants to build up arrears forever and will eventually have to evict tenants who cannot or will not pay. HFN members' data on the costs of evictions suggest that the **cost of evicting** even a third of those who think they are unlikely to pay (less than one in six of all affected tenants) would cost over **£420,000 across the 4 case study neighbourhoods.**
>
> Even if all tenants were to pay the shortfall, the total amount of money removed from the local economy would be between £29,000 and £150,000 per year for each of these four neighbourhoods, for HFN members' tenants alone.[28]

The National Housing Federation asked for a commitment that the rates of reduction will not be increased "if the size criteria measure fails to generate the savings expected."[29]

The National Audit Office's (NAO) report, *Managing the impact of Housing Benefit reform,*[30] pointed out that the DWP's impact assessments "are necessarily narrowly focused at this stage and do not reflect the full scale of potential impacts from the reforms."[31]

3.4 Disabled occupants

As noted in section **3.1**, disabled tenants, who require an additional bedroom for a non-resident carer who provides overnight care for the Housing Benefit claimant or their partner, will not experience a Housing Benefit reduction.

There are no exemptions for other disabled tenants/occupants. The Government has made additional funding for Discretionary Housing Payments available for disabled people who live in significantly adapted accommodation (see section **4.1** below). The Minister, Steve Webb, provided the following explanation of the Government's position:

> Trying to define in legislation that this or that type of adaptation was or was not exempt was very complex. Rather than having a blanket exemption simply for a ramp or a stair rail, we have allocated money to local authorities, which broadly matches what we think would be the cost of protecting people in the circumstances that the hon. Gentleman has described – for example, a wheelchair user who has had significant adaptations made.[32]

It is clear from the DWP's *Equality Impact Assessment* on the under-occupation measure that a higher proportion of households containing a disabled person are likely to be affected.[33] Measures in the *Welfare Reform Bill* were considered by the Joint Committee on Human Rights; the Committee's conclusions can found in its 21st Report. The Committee identified some potential for discriminatory outcomes in relation to disabled occupants in social housing:

> 1.64 The proportion of disabled claimants affected by the measure is higher than for non-disabled claimants.[42] The National Housing Federation estimates that about 108,000 tenants in social rented properties adapted specifically for their needs are

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28 CCHRP, *Under-occupation and the Housing Benefit Reforms: Four local case studies,* January 2012
29 NHF, *Comments on the draft size criteria regulations*, 2012
30 HC 681, Session 2012-13, 1 November 2012
31 *Ibid* para 16
32 First Delegated Legislation Committee, 16 October 2012, c7
33 See paras 42-47 of the *Equality Impact Assessment*.

> likely to be affected by the introduction of the size criteria to restrict housing benefit.[43] If such tenants were forced to move into properties unsuited to their needs this might risk breaching their Article 8 rights to respect for private or family life[44] as well as being potentially discriminatory.
>
> 1.65 The Government has indicated that it is prepared to look at exemptions for individuals who are disabled, where their homes have been subject to extensive adaptations.[45] However, this would not address the disruption to patterns of caring and support networks which can be vital.
>
> 1.66 **We recommend allowing some additional discretion to exempt disabled people facing exceptional hardship from the under-occupation provisions.**[34]

In a unanimous ruling on 15 May 2012 the Court of Appeal held that the size criteria in the current Housing Benefit regulations (which apply to claimants living in private rented housing) discriminates against disabled people by not allowing an additional room where the disabled person has a carer,[35] or where two children cannot share a room because of disability.

Lord Justice Maurice Kay said:

> The case for the appellants is not that the statutory criteria amount to indirect discrimination against the disabled. It is that, in one way or another, they have a disparate adverse impact on the disabled or fail to take account of the differences between the disabled and the able-bodied. In their skeleton argument and oral submissions, counsel for the appellants describe these ways of putting their case as 'complementary and overlapping' rather than mutually exclusive. (paragraph 10)

He went on to hold that the claimants had established a 'prima facie' case of discrimination for the purposes of Article 14 of the European Convention on Human Rights, and agreed with Mr Justice Henderson that the Secretary of State had failed to establish objective and reasonable justification for the discriminatory effect of the statutory criteria.

Having granted declaratory relief, Lord Justice Maurice Kay left it to the Secretary of State to decide on the rectification of discrimination in the three cases. Commentators noted that the judgement could have significant implications for the application of benefit restrictions for disabled people.[36] The DWP applied to the Supreme Court for permission to appeal against the decision of the Court of Appeal; permission was granted on 30 October 2012. However, on 12 March 2013 the Secretary of State announced that the appeal would not be pursued – the implications for disabled children who are unable to share a room as a result of their disabilities are explained below:

> For children with severe disabilities where they are unable to share a bedroom (Gorry), the department chose to appeal the decision to the Supreme Court on the grounds that the use of the size criteria was not discriminatory or in any case could be justified.
>
> The Secretary of State has today clarified the position regarding disabled children and has decided not to pursue the appeal further.
>
> **This means that from the date of the Court of Appeal judgment on 15 May 2012, local authorities (LAs) should allow an extra bedroom for children who are**

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34 HL Paper 233/HC 1704, 12 December 2011

35 The rules were amended from April 2011 to allow a room for a non-resident overnight carer. The Burnip and Trengrove cases concerned this issue.

36 *Inside Housing,* "Judgement to force changes to benefit rules", 15 May 2012

> **unable to share because of their severe disabilities following the guidelines as set out in paragraphs 7 to 10 below.**
>
> 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 judgement on facts of each individual case.
>
> **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.**
>
> [...]
>
> The Court of Appeal judgment is now considered to be **case law** and as such LAs are legally bound to apply the judgment.
>
> The judgment applies to both the LHA size criteria and the reduction of the spare room subsidy which applies from 1 April 2013.[37]

On 4 March *Inside Housing* reported that a group of ten disabled and vulnerable children had launched a legal challenge against the under-occupation measure. The children concerned would be expected to share a room with their siblings from April 2013 despite all having been assessed as needing their own room due to their disabilities, or because they are at risk of violence from a sibling, or because of the trauma they have experienced as a result of abuse and domestic violence.[38] The Government's announcement on 12 March 2013 means that the disabled children assessed as needing their own room may not be affected by the under-occupation provisions as long as their local authorities are satisfied that they are, in fact, unable to share a bedroom.

Ten cases concerning the under-occupation deduction are due to be heard in the High Court over three days from 15 May 2013. These cases include disabled adults who claim they are unable to share a bedroom:

> The cases lodged by disabled adults include one relating to Charlotte Carmichael and her husband Jayson. She sleeps on a hospital mattress to ease bed sores caused by her spina bifida, while he uses a single bed in their smaller second room. But from April the new regulations would mean that they are under-occupying their specially adapted flat in Southport, Merseyside.[39]

Additional information can be found on the website of law firm Leigh Day.

In the Written Ministerial Statement of 12 March 2013 Iain Duncan Smith said:

> Going forward I will continue to closely monitor and adjust the implementation of the policy, including an independent evaluation by Ipsos MORI, the Cambridge Centre for Housing and Planning Research and the Institute For Fiscal Studies to ensure that the

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[37] HB/CTB Bulletin U2/2013

[38] *Inside Housing,* 'Children launch legal challenge to 'bedroom tax', 4 March 2013

[39] *Guardian*, "Children's rights cited in legal challenge launched against 'bedroom tax'", 5 March 2013

> needs of these groups [*disabled people in substantially adapted accommodation and those with long-term medical conditions that create difficulties in sharing a bedroom*] are effectively addressed in the longer term.[40]

3.5 Shared care of children

Housing Benefit/Council Tax Benefit Circular A4/2012 contains the following guidance on cases where the care of children is shared between separated parents:

> Where parents who don't live together have shared care of their children the children are only treated as living with the parent that is treated as responsible for them and provides their main home. For a person to be treated as responsible for a child or young person, the child or young person must normally be living with that person. If a child or young person spends equal amounts of time in different households, or there is a question as to whom they normally live with, they will be treated as living with the person who is receiving child benefit for them. This is consistent with those living in the private rented sector.

On 21 March 2013 *Inside Housing* reported that Liberty would be seeking judicial review of the under-occupation provisions on behalf of three families:

- Simon Cohen, from Gloucestershire, whose 12-year-old son lives with him four days a week in his two-bedroom house. Under the scheme his son will not be considered part of his household – his room will therefore be deemed 'unoccupied'.
- Mark Hutchinson, from Derbyshire, whose seven-year-old daughter and eight-year-old stepson reside with him at weekends and during school holidays.
- Kim Cotton, from Hampshire, whose eleven-year-old daughter and eight-year-old son live with her every other week.[41]

Liberty is arguing that the provisions are discriminatory and are in breach of the European Convention on Human Rights.

3.6 Sheltered and supported housing

During debate on the *Welfare Reform Bill* in the House of Lords, Lord Freud stated, with reference to supported and sheltered housing that "we envisage that people in this type of accommodation will not be affected by the size criteria."[42]

Housing Benefit/Council Tax Benefit Circular A4/2012 advises:

> The size criteria rules will not be applied to those in supported 'exempt' accommodation. This is a particular type of supported accommodation defined for Housing Benefit purposes as accommodation provided by a non-metropolitan county council in England, a housing association, a registered charity or voluntary organisation where that body or a person acting on its behalf also provides the claimant with care, support or supervision as set out in paragraph 4 of Schedule 3 to the Consequential Provisions Regulations 2006.

The National Housing Federation has expressed concerns about this approach:

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40 HC Deb 12 March 2013 cc9-10WS
41 *Inside Housing*, "Bedroom tax faces second legal challenge," 21 March 2013
42 HL Deb 18 October 2011 GC102

> ... we are concerned that using the definition of 'exempt accommodation' to define these properties will not produce the result intended by Lord Freud. The DWP's recent consultation on housing costs within supported and sheltered housing set out the need to reform the system, including the definition of exempt accommodation. The current definition does not fit with the practice in the housing association sector over recent years of separating out the contracting of support and care from the landlord. This definition was never intended to be used to cover the whole of the supported and sheltered housing sector and is inappropriate for this use. Some schemes might be deemed to fall outside the definition because the support and care service is provided, under contract with the local authority, by a provider distinct from the landlord.
>
> At present very little social sector supported and sheltered housing is flagged as 'exempt accommodation' by housing benefit staff because the rents are not considered excessive. The recent DWP research report[6] confirms this. Therefore using the definition of 'exempt accommodation' to define supported and sheltered housing, in relation to the size criteria, will result in extra work for local authorities in assessing claims and potential legal challenges to local decisions. For these reasons we believe the definition is unworkable.
>
> Registered Providers in England with stock over 1,000 units must complete a statistical return giving rent and service charge levels for supported and general needs housing. The Regulatory Statistical Return of March 2011 reports 424,053 units of accommodation for supported housing owned by registered housing associations. The housing sector continues to use the definition of supported and sheltered housing contained in Housing Corporation guidance[43] and records figures on the numbers of units in the annual RSR to the regulator.[44]

The issue was raised during consideration of the draft regulations by the First Delegated Legislation Committee – Steve Webb said:

> There is a difference between sheltered accommodation and supported accommodation. Obviously many people in sheltered accommodation are over pension age so none of these rules would apply. We are not planning to change the definitions but initially help towards housing costs will be broadly met as now, so under DWP legislation and delivered through housing benefit teams. For the longer term—I think this might be helpful—we are looking at a localised funding mechanism. We are talking to the Department for Communities and Local Government and the devolved Administrations. We are continuing with the definition of exempt accommodation, not a broader interpretation of supported housing. But we are talking to local authorities about how best we take this forward.[45]

3.7 Foster carers and adoptive parents

The original regulations did not exempt foster carers and those who keep a spare bedroom in expectation of a foster child placement from the under-occupation restrictions. Instead, the Government made an additional £5m available for Discretionary Housing Payments to assist this group.[46] Information on Discretionary Housing Payments can be found in section **4.1** (below).

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[43] Housing Corporation Circular 03/04. The term 'supported housing' applies to purpose designed housing or housing designated for a particular client group .

[44] NHF, *Comments on the draft size criteria regulations*, 2012

[45] First Delegated Legislation Committee, 16 October 2012, c28

[46] HB/CTB Circular A4/2012

However, in a Written Ministerial Statement on 12 March 2013, Iain Duncan Smith announced that the regulations would be amended to allow an additional room for approved foster carers:

> **The Secretary of State for Work and Pensions (Rt. Hon. Iain Duncan Smith MP):** I am pleased to announce that we intend to lay amending regulations to clarify the size criteria rules for two specific groups of Housing Benefit recipient, Foster Carers and Armed Forces personnel
> People who are approved foster carers will be allowed an additional room, whether or not a child has been placed with them or they are between placements, so long as they have fostered a child, or become an approved foster carer in the last 12 months.[47]

The *Housing Benefit (Amendment) Regulations 2013* (SI 2013/665) were laid before Parliament on 21 March 2013 and came into force on 1 April 2013. Housing/Council Tax Benefit Circular A10/2013 provides the following guidance on circumstances in which foster carers in social rented housing will be exempt from an under-occupation deduction:

> Where a claimant or partner who is an approved foster carer (or a formal kinship carer in Scotland) one extra bedroom will be allowed under the size criteria rules for use by a foster child or children, in both the private and social rented sectors.
>
> One extra bedroom will apply to:
>
> - Approved foster carers (or kinship carers in Scotland) who have a child placed with them
> - Approved foster carers who are between placements but only for a period of up to 52 consecutive weeks from the date of the last placement
> - Newly approved foster carers but only for a period of up to 52 consecutive weeks from the date of the approval, if no child is placed with them during that period.
>
> For approved foster carers in the social rented sector, a reduction for under-occupation will not be made in respect of the one additional bedroom for the foster child or children.
>
> The claimant must have a bedroom in their home which is in addition to those occupied by their household, for the additional room to be allowed in the size criteria
>
> If the claimant requires more than one additional room for foster children, they can apply for additional support with their housing costs through Discretionary Housing Payments (DHP).
>
> An extra bedroom will not be provided for prospective foster carers until they are approved; however people going through the approval process will need to show that they have a spare room available. DHPs can be used to provide support in the interim period.
>
> The claimant or partner will receive a letter confirming their approval from the social worker responsible for their assessment. Local authorities (LAs) must be satisfied that all appropriate evidence is in place before allowing the additional room.
>
> If the claimant or partner ceases to be an approved foster carer or their approval is revoked, the additional room will cease to apply to the size criteria.

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[47] HC Deb 12 March 2013 cc9-10WS

> Foster children will continue to be excluded from the HB assessment which means that a personal allowance is not awarded in respect of them and fostering allowance will still be fully disregarded as income.
>
> It does not apply to special guardianships, as these children are currently treated as a member of the household and are therefore already included in the size criteria assessment.

In England foster parents are 'approved' under regulation 27 of the *Fostering Services (England) Regulations 2011* and in Wales under regulation 28 of the *Fostering Services (Wales) Regulations 2003.* In Scotland the relevant legislation is regulation 10 (kinship carers) or regulation 22 (foster carers) of the *Looked After Children (Scotland) Regulations 2009.*

Housing/Council Tax Benefit Circular A10/2013 also provides guidance on the treatment of approved or prospective adoptive parents:

> People going through the approval process to become adoptive parents will need to show that they have a spare room to be approved. Until the child forms part of the household, the additional room will not apply to the size criteria. DHPs can be used to provide support in the interim period.
>
> Where a child is placed with a claimant prior to an adoption order being made, that child is not treated as a member of the household until the adoption is approved. For the period that the child is not a member of the household, one extra bedroom will be allowed in the same way as it is for foster children.

3.8 Temporary absences from home (students, armed forces personnel)

Housing Benefit entitlement isl not be affected where under-occupation arises as a result of certain temporary absences. Housing Benefit/Council Tax Benefit Circular A4/2012 contains the following guidance:

> My child is away at university, can I keep their room for when they are home in the holidays?
>
> The new size limit rules do not allow for this, unless the absence is temporary (less than thirteen weeks or 52 weeks for students) and the young person concerned intends to return home.

The Minister, Steve Webb, was asked about the impact of temporary absences during consideration of the *Draft Housing Benefit (Amendment) Regulations 2012* by the First Delegated Legislation Committee on 16 October 2012 - the Minister said:

> The right hon. Gentleman also asked about the example of students who move away from home temporarily. I will reassure him that temporary absences of up to 13 weeks will have no impact on under-occupation. That would cover, for example, a student who intended to return home during something like a holiday break; or someone who perhaps went into a care home for a trial period and then came back. We recognise that there will be short-term periods when there is a spare bedroom and in those circumstances we will not immediately come in and cut Housing Benefit.[48]

The potential impact of the under-occupation measure on the families of service personnel also attracted attention, for example where a member of the services who normally lives with his/her parents is absent while training for a period of time, or is posted abroad. The length of

[48] First Delegated Legislation Committee, 16 October 2012, c24

training courses for the three services varies but some do take longer than 13 weeks. The standard tour length is six months for Army and Royal Navy personnel and four months for Royal Air Force personnel (within all theatres).[49] The impact on the Housing Benefit entitlement of families with children in the armed forces who normally live at home was raised several times in the House.[50]

On 12 March 2013 the Secretary of State made the following announcement in respect of armed forces personnel:

> Adult children who are in the Armed Forces but who continue to live with parents will be treated as continuing to live at home, even when deployed on operations. This means that the size criteria rules will not be applied to the room normally occupied by the member of the Armed Forces if they intend to return home. In addition Housing Benefit recipients will not be subject to a non-dependent deduction, i.e. the amount that those who are working are expected to contribute to the household expenses, until an adult child returns home.
>
> The intent of the policy was that by using Discretionary Housing Payments, the estimated 5,000 foster carers and rather fewer Armed Forces personnel groups would be protected. We have agreed with local authority organisations improved arrangements through these regulations that puts these protections beyond doubt.
>
> The changes will apply to tenants in both the social and private rented sectors.[51]

The *Housing Benefit (Amendment) Regulations 2013* (SI 2013/665) provide for these changes in the treatment of families of armed forces personnel. Housing/Council Tax Benefit Circular A10/2013 provides the following guidance for local authorities:

> Adult children who are in the armed forces but who continue to live with parents, will be treated as continuing to live at home (for the purposes of applying the size criteria), when deployed on operations. In addition, the non-dependant deduction should be removed and only reinstated when they return home.
>
> Member of the Armed Services means a member of the Naval Service, British Army or Royal Air Force of the Crown or members of the Reserve Forces.
>
> An adult child means sons, daughters, step-sons or step-daughters of the claimant or partner.
>
> For claimants in the social rented sector, a reduction for under-occupation will not be made in respect of the bedroom of the relevant non dependants but may apply if the claimant has other spare rooms.
>
> The adult son or daughter must have been a non-dependant before deployment on operations (although a deduction may not have been applied, for example where the claimant is blind) and there must be an intention to return to live with their parents.
>
> On ‘operations’ does not necessarily mean away from the United Kingdom, just away from the home they normally occupy. It will also cover pre-deployment training and post operation leave (which is described as "normalisation"). For example, Royal Air Force personnel with immediate response duties who are based away from home for four months or where members of the armed forces were deployed to assist with the Olympics.

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[49] HC Deb 30 October 2006 c100W
[50] HC Deb 21 November 2012 cc653–654
[51] HC Deb 12 March 2013 cc9-10WS

> The LA should be satisfied that the adult son or daughter has been deployed on operations. If the adult son or daughter is already away on deployment when a new claim for HB is made, the claimant will be able to obtain a letter from the son or daughter's chain of command in the armed forces, confirming the deployment.

3.9 Separated couples living together

The issue of how authorities should treat ex-partners who have remained living in the same home after separating was addressed in the PQ reproduced below:

> **Alan Johnson:** To ask the Secretary of State for Work and Pensions what his policy is on couples with a spare room who legally separate in regard to the under-occupancy penalty
>
> **Steve Webb:** A couple is entitled to claim housing benefit for one bedroom. When a couple separates, both members will usually live in separate accommodation and be subject to the size criteria rules as single individuals.
>
> In the event that they continue to reside in the same property, the local authority would be required to consider whether they are indeed not living together as husband and wife, or civil partners, but as single individuals.
>
> There is no single factor on which the local authority will base its decision. However, it will take into account (but not limit consideration to) factors such as the existence of a shared household, financial arrangements, and responsibility for children.
>
> It is the responsibility of the local authority to make a decision based on the individual circumstances of each case.[52]

3.10 Bereavement, temporary protection and reporting changes of circumstances

Protection (for up to 52 weeks) applies to ensure that tenants who are recently bereaved do not experience an immediate reduction in their Housing Benefit entitlement.[53] There is also 13 weeks of protection where the tenant could previously afford the rent and Housing Benefit has not been claimed in the last 52 weeks.

The onus is on Housing Benefit claimants to report their household circumstances.[54] However, the DWP has amended the data sharing regulations to allow for local authorities and registered providers of social housing (includes housing associations) to share information in order to identify under-occupying claimants. The *Social Security (Information-sharing in relation to Welfare Services etc.) Regulations 2012* came into force on 2 July 2012.

4 The options for tenants

Under-occupying social housing tenants (of working-age) in receipt of Housing Benefit will experience a shortfall between their rent levels and the Housing Benefit they receive. They will have the option of remaining in their homes and meeting the shortfall from other income (this may be benefit income) or may seek a move to smaller accommodation in the social or private rented sectors.

One possibility, and a concern of social landlords, is that the measure will result in increased rent arrears and the eviction of affected households resulting in costly homeless applications.

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[52] HC Deb 15 April 2013 c233W
[53] HL Deb 29 February 2012 c1371
[54] HL Deb 14 February 2012 c707

Lord Freud, speaking in the House of Lords, said that the Government "will also look at ways of minimising the risk of claimants falling into arrears. No one wants this to happen. Landlords have a key role to play and we are looking at how to support them in that role, and how to help them manage the possible risks."[55] Steve Webb said "the point of the policy is not for people to be evicted, which would raise costs for the Exchequer and for the individual, but to ensure that existing housing stock is fully occupied."[56] He went on to state that households who do become homeless as a result of a Housing Benefit restriction should not be treated as intentionally homeless:

> **Steve Webb:** 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.[57]

Research carried out by the CCHRP found 52% of tenants surveyed said that they would find it "very difficult" to make up the shortfall while 31% said it would be "fairly difficult."[58]

Research by the same body for the Housing Futures Network, *Under-occupation and the Housing Benefit Reforms: Four local case studies* (January 2012), found that "around a third of affected tenants would seek to move to somewhere smaller" but "relatively few" affected households will choose to move into the private rented sector, although this may change in time.

4.1 Discretionary Housing Payments

One option for claimants experiencing a shortfall is to apply to the local authority for a Discretionary Housing Payment (DHP). To qualify for a DHP the only requirement is that there must be a shortfall between benefit being paid and the rent, but the council will usually take into account special circumstances that contribute to financial difficulties.

Local authorities are not under any duty to make a discretionary housing payment – they are generally not paid in perpetuity. *The Discretionary Housing Payments Guidance Manual and good practice guide for local authorities* was updated and reissued in April 2013. Housing Benefit Circular A11/2013 provides additional information and guidance for authorities on recording how DHPs are used to support people affected by welfare reforms.

A PQ from 2008 explains how funds for these payments are usually allocated:

> **Mr. Plaskitt:** The discretionary housing payment fund is allocated to each local authority based on the mid-point between the amount they were allocated and the amount they actually spent in the previous full financial year (e.g. the 2008-09 allocation was calculated using 2006-07 data, as this was the most recent full financial year data that was available at the time of calculation).
>
> Any remaining funding is then distributed across local authorities based on their annually managed expenditure, and their average rent restrictions. 50 per cent. of the remaining funding is allocated based on each local authority's proportion of overall

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55 HL Deb 14 February 2012 c707
56 HC Deb 27 February 2013 c343
57 HC Deb 27 February 2013 c345
58 Cambridge Centre for Housing and Planning Research, *Under-occupation and the new policy framework* December 2011

> annually managed expenditure, and the remaining 50 per cent. of the funding is allocated based on each local authority's average rent restrictions.[59]

In order to mitigate the impact of some of the reductions to Housing Benefit entitlement the Government has increased the funding available for DHPs:

	2012/13	**2013/14**	**2014/15**
Baseline funding	£20m	£20m	£20m
LHA reforms	£40m	£40m	£40m
Social size criteria		£30m	£30m
Benefit cap		(Up to) £65m	(Up to) £35m
Total	**£60m**	**£155m**	**£125m**

Local authorities are permitted to contribute two and a half times the Government contribution to DHPs. The distribution of DHP funding in 2012/13 is set out in DWP HB/CTB Circular S10/2011 (revised). DHP funding allocations for 2013/14 are set out in HB/CTB S1/2013.

During the passage of the *Welfare Reform Act 2012* through Parliament several amendments were proposed in an attempt to secure exemptions from the under-occupation provisions for various groups, including disabled tenants of adapted properties and foster carers. Baroness Wilkins drew attention to the 21st Report of the Joint Committee on Human Rights in which it considered the *Welfare Reform Bill* and recommended "additional discretion to exempt disabled people facing exceptional hardship from the under-occupation provisions."[60]

At that time the Government resisted amendments to the Bill but announced an additional £30m (annually from 2013/14) for DHPs aimed at two groups:

- £25m for disabled people who live in significantly adapted accommodation to enable them to remain in their existing homes (see section **3.4** above); and
- £5m for foster carers who need to keep an extra room for when they are in between fostering.[61]

The Government thinks that this £30m will help around 40,000 cases based on an average reduction of £14 per week. It is based on a group of 35,000 potentially affected claimants who are wheelchair users and who live in adapted accommodation and an estimate of around 5,000 foster carers (note that approved foster carers with one spare room were subsequently exempted from the size criteria). Lord Freud said the sum available would be kept under review.[62] DHPs are not ring-fenced for particular groups:

> ...we have allocated money to local authorities to reflect the two key groups that came up in debates in this House, but we have not ring-fenced the money. That is the

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59 HC Deb 29 September 2008 c2380W
60 HL Deb 14 December 2011 c1312
61 See section **3.7** on the exemption of approved foster carers – announced on 12 March 2013
62 HL Deb 14 February 2012 c720

> important point. We have indicated two groups who clearly have a strong case for discretionary support. But the key word is "discretionary". Therefore a local authority will be able to take the discretionary payments for the social housing under-occupation, the discretionary payments for the private sector rent 30% rule and the discretionary payments associated with the benefit cap. All of those things will come together and will be a discretionary pot for a local authority to tailor to their local and individual needs. We recognise that every constituency is different, which is why we are giving local authorities, such as his, the flexibility to use that money to meet individual local circumstances.[63]

Lord Freud has been unable to provide assurances on the level of DHP funding as part of the next Spending Review.[64] The National Audit Office's (NAO) report, *Managing the impact of Housing Benefit reform*[65] is critical of how the level of DHP funding has been determined:

> Over the Spending Review period the Department has set aside up to £390 million of funding for Discretionary Housing Payments for local authorities to tackle transitional consequences of reforms. Funding can also be topped up by local authorities. It is not clear how the overall level of funding has been determined or whether it is likely to be sufficient to tackle the effects of reforms. The total amount represents six per cent of the total savings expected from the Housing Benefit reforms over the Spending Review period, or around £200 per household affected.[66]

The NAO called for clarification on the process for determining levels of DHP funding, a review of their allocation to authorities, and improved understanding on how DHPs are used. The DWP has said it will require authorities to monitor how DHPs are used:

> Where a DHP has been made to a claimant affected by one of the three policy changes set out above, LAs will be required to record this and provide a twice yearly return to DWP. The guidance manual provides further details on the type of information LAs should record and how this information will be collected.[67]

The additional funding for DHPs in 2013/14 in respect of the under-occupancy measure for England accounts for about 6% of the aggregate loss of benefit to households estimated to be under-occupying in the social rented sector.[68]

HB/CTB Circular A4/2012 referred to the possibility of claimants applying for DHPs in advance:

> You may decide it is helpful to allow claimants to apply for DHPs in advance (once regulations relating to the changes have been made in Parliament). This will help alleviate uncertainty for some claimants and allow those going through assessment to become foster carers to provide the necessary assurances to social services that they will have the additional room required. You may then decide to inform the claimant of an award that could start at a future date, subject to any subsequent change in circumstances.

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63 First Delegated Legislation Committee, 16 October 2012, c27
64 HL Deb 15 October 2012 GC487
65 HC 681, Session 2012-13, 1 November 2012
66 *Ibid,* para 20
67 DWP Consultation exercise August 2012
68 HC Deb 4 March 2013 c883-4W

4.2 Moving to a smaller home

The Government sees potential in the under-occupation measure to improve levels of mobility within the social housing sector:

> We in the House have had many discussions about the behavioural response of claimants to the measure. Clearly it is too soon to know what they will do. Some may decide to downsize. Others will decide to continue to live where they are and to cover the shortfall through other means. One thing that is interesting and different about the social housing sector is how little mobility there is. The figure runs at around 5 per cent per annum. The size criterion is potentially the kind of thing that will start to make people think about what accommodation they need to live in, and how much they can afford. If it does, it will start to free up properties for the 250,000 or so families who are living in overcrowded accommodation, as well as for those living in expensive temporary accommodation. One could see it as a nudge to help drive some of the outcomes intended to be realised through the Localism Act, which will allow landlords to use their existing housing stock more efficiently.[69]

However, social landlords have raised significant concerns over their ability to offer alternative accommodation of a suitable size to the affected tenants. Coast and Country Housing Association was reported in *Inside Housing* (June 2012) as having 2,500 tenants affected by the under-occupation measure but only 16 one-bed properties in which to place them.[70] The *Impact Assessment* acknowledges this issue:

> According to estimates from DCLG there is a surplus of 3 bedroom properties, based on the profile of existing working-age tenants in receipt of Housing Benefit, and a lack of 1 bedroom accommodation in the social sector. In many areas this mismatch could mean that there are insufficient properties to enable tenants to move to accommodation of an appropriate size even if tenants wished to move and landlords were able to facilitate this movement. In these circumstances individuals may have to look further afield for appropriately sized accommodation or move to the private sector, otherwise they shall need to meet the shortfall through other means such as employment, using savings or by taking in a lodger or sub-tenant.

Some social landlords are pooling their homes in order to increase the chances of securing a move for tenants requiring smaller accommodation.[71] Fifteen social landlords are considering the development of a national mobility scheme to assist households affected by welfare reform – press reports indicate that CLG may part fund such a scheme.[72]

The Government's *Allocation of accommodation: Guidance for local housing authorities in England* (June 2012) stresses the importance of authorities prioritising transfer applications from under-occupying tenants who are prepared to downsize:

> **1.7** Authorities should consider the importance of giving social tenants who under-occupy their accommodation appropriate priority for a transfer. This will be important in light of the measure in the Welfare Reform Act 2012 which will reduce Housing Benefit entitlement for working age social sector tenants who under-occupy their property (measured in accordance with the Local Housing Allowance size criteria) from April 2013. Authorities should also consider whether there are other provisions that might make it more difficult for under-occupiers to move, such as a prohibition against

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69 HL Deb 14 February 2012 c706

70 *Inside Housing*, "Landlord can't rehouse 'bedroom tax' families", 18 June 2012

71 *Inside Housing,* "West midlands landlords pool homes to avoid bedroom tax," 8 June 2012

72 *Inside Housing,* "Home swap service to tackle welfare reform," 22 February 2013

> tenants with minor rent arrears transferring, and the scope for removing or revising these in relation to under-occupiers.

4.3 Taking in a lodger

During the Lords debate on the Bill Lord Freud raised the possibility of tenants taking in lodgers to avoid the under-occupation restrictions:

> One thing that people will be able to do is offer spare rooms to lodgers, which in some cases will be a sensible option. There will be a double benefit from that, certainly before universal credit comes in, because the room will not be considered to be a spare room, and the first £20 of weekly income from the lodger will be disregarded when calculating benefit entitlement. There has been misunderstanding and confusion about taking in lodgers. The confusion is between what a lodger is and what subletting is. It is worth pointing out that all social tenant residents can apply to their social landlord for permission to take in a lodger. We will expect social landlords to take a pretty liberal line on this. Some may have a policy not to allow it, but they will have a keen interest in reviewing the position, given the context of what we are doing here.
>
> We are emphasising the point to social landlords as part of our implementation work. The Chartered Institute of Housing is developing a toolkit for the implementation of the measure that will include this advice.[73]

The CIH's toolkit has been published: *Making it fit: a guide to preparing for the social sector size criteria for social landlords*.

HB/CTB Circular A4/2012 makes it clear that, until Universal Credit is introduced, lodgers are allowed a room under the size criteria:

> When assessing the make-up of the household for the purposes of determining how many rooms are required, any boarder or lodger will be taken into account. Therefore in a three bedroom house with a couple, their child and a lodger, the claimant would not be considered to be under-occupying and there would be no reduction in Housing Benefit due to under-occupancy.

Lord Freud has announced that when Universal Credit is introduced the entire payment from a lodger will be disregarded.[74]

4.4 Re-designation of rooms

A further potential response of social landlords was highlighted by Lord Freud:

> One aspect that has not been explored in our debates is the response from social landlords. The rent they receive reflects the size of their property. If there were, for example, a very small room such as a box room that the landlord called a bedroom, they might reconsider, if they have not done so already, whether to count that room when deciding on the number of bedrooms that should be written into the tenancy, as well as on the rent associated with it. The designation of property size is another area where there may be flexibility. We are exploring this with social landlords as part of our implementation work.[75]

A survey conducted by *Inside Housing* has indicated that a majority of the largest social landlords in England are not considering the reclassification of their properties:

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[73] HL Deb 14 February 2012 c706
[74] HL Deb 15 October 2012 GC489
[75] HL Deb 14 February 2012 c707

> Out of 18 landlords contacted in a snap survey by Inside Housing, 13 said they were not planning to reclassify homes so tenants are no longer judged to have a spare room under the new rules, which come into effect next April. The resulting drop in rental income and concerns about existing loan agreements were cited as factors for not adopting the approach.[76]

In January 2013 Knowsley Housing Trust announced an intention to reclassify 566 of its 2 and 3 bed homes as smaller units at a cost of around £250,000 in annual rental income. The CEO said that this was about charging the correct rent levels for the properties concerned rather than a direct response to the under-occupation measure.[77]

4.5 Earning more money

Creating an incentive for benefit recipients to return to work or increase their working hours is central to the Government's welfare reform agenda. In respect of the under-occupation restrictions Lord Freud said:

> Just a few hours' work may help some of those affected cover the shortfall, particularly where there is a disregard such as the £25 weekly earnings disregard for lone parents in work.[78]

The CCHRP research for the Housing Futures Network found that tenants hoped to earn more money though those who were seeking work were doing so already:

> ...no one suggested that they would try to find a job or increase earnings as result of the HB reforms. The majority however considered themselves to be permanently outside of the workforce, suffering a variety of health difficulties such as arthritis, back problems and mental health difficulties. As most were within five or ten years of retirement, they did not envisage returning to work.[79]

5 What can landlords do?

The Chartered Institute of Housing (CIH) has published *Making it fit: a guide to preparing for the social sector size criteria for social landlords* and a *guide to reducing under-occupancy.*

The CCHPR identified some approaches that landlords could adopt to reduce the impact on tenants and rent collection levels.

- revise allocation policies to ensure that the initial allocation is at the bedroom standard for working-age households;
- inform tenants ahead of April 2013 to give them a chance to prepare and downsize where possible;
- review and publicise policies on taking in lodgers;
- have effective downsizing schemes in operation;

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[76] *Inside Housing,* "Landlords do not plan to reclassify their homes," 1 June 2012
[77] *Inside Housing,* "Tenants avoid bedroom tax after Knowsley reclassifies homes," 15 February 2013
[78] HL Deb 14 February 2012 c707
[79] Cambridge Centre for Housing and Planning Research, *Under-occupation and the new policy framework* December 2011

- have plans in place for tenants who fall into arrears as a result of the under-occupation restrictions.[80]

The DWP produced a toolkit, including model letters and factsheets, for local authorities to use as part of HB/CTB Circular A4/2012. This Circular set out the action that authorities should have taken prior to implementation in April 2013.

6 Evaluation & research

Implementation of the size criteria is subject to independent monitoring which will cover the impact of the measure on:

- supply issues;
- rural impacts;
- people unable to share rooms (couples, disabled children);
- vulnerable individuals;
- financial status of the landlord and tenant;
- health and well being; and
- family life, particularly where the family has multiple problems.

Initial findings are expected to be available in early 2014 with the final report in 2015.

The National Housing Federation has commissioned Ipsos MORI to carry out research into the impact of welfare reform on housing associations. A baseline report was published in January 2013 – the potential impact of the size criteria is covered in section 6.[81] Around 60% of housing associations expect the size criteria to have a significant impact on their businesses with rent arrears high on the list of expected outcomes. As part of this work Ipsos MORI has also published Regional welfare reform research summaries. Each summary covers:

- perceptions of the impact of welfare reform;
- potential impacts of the size criteria;
- household benefit cap and direct payment of benefit to tenants; and
- what housing associations are doing to prepare.

On the eve of implementation the NHF published *The Bedroom Tax: Some Home Truths*, in which several of the Government's claims about the under occupation measure are challenged. The main findings are listed below – overall it is claimed that the measure could result in increased costs to the taxpayer:

- there aren't enough smaller social homes available for everyone affected by the bedroom tax to be able to downsize;

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[80] *ibid*

[81] Ipsos MORI, *Impact of welfare reform on housing associations – 2012 baseline report*, January 2012

- if people move to the private sector the bill to the taxpayer could increase;
- if the disabled people affected by the bedroom tax move, it could cost millions in home adaptations; and
- in the North of England, under-occupation exceeds overcrowding by a ratio of 3:1, hitting these regions hardest.[82]

7 House of Lords amendments

As noted previously, the Housing Benefit restrictions for social tenants who are under-occupying are controversial and generated much debate as the Act progressed through Parliament. This section summarises the key amendments agreed by the House of Lords – the amendments did not survive into the final Act.

At Report Stage in the House of Lords a composite amendment was agreed (by 258 votes to 190) to provide that no under-occupation restriction would be applied where a tenant had not been offered suitable alternative accommodation. In addition, under-occupation would be defined by the DCLG's bedroom standard, a more generous standard than the DWP's size criteria as it allows for the existence of one spare bedroom.[83]

Financial privilege was invoked for all amendments agreed by the Lords following Government defeats. On 14 February 2012, during consideration of Commons amendments, Lord Best sought to achieve a compromise on under-occupation. He moved an amendment, to which the Lords agreed by 236 to 226 votes, which would have exempted certain social housing tenants, i.e. those not required to seek work, carers, people with disabilities, war widows and foster carers, from a reduction in Housing Benefit due to under-occupation where they had no more than one spare bedroom and where no alternative suitable accommodation was available.[84] He argued that the cost of this amendment would be around half of the amendment previously agreed at Lords Report Stage on 14 December 2011.

Lord Freud, for the Government, estimated that the amendment would still cost £100m "a lot of money in the present climate."[85]

The Commons rejected Lord Best's amendment on 21 February 2012 and the Lords once again considered the Bill on 29 February 2012. Lord Best moved a further amendment:

> The amendment places an obligation on the government to review the impact of the under-occupation penalty on the families concerned and on levels of poverty and homelessness; to calculate the cost to local authorities and housing associations; to look at whether levels of under-occupancy actually fall; and to consider other foreseeable and unforeseeable consequences. The exercise would begin six months after implementation of the provisions in the bill.[86]

Ultimately this amendment was withdrawn and the Bill completed its stages. Lord Freud said that the Government would "carry out research on this measure, once it has been introduced, to understand the effects of the changes, but I do not see the need to put that in the Bill.[87]

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82 NHF, *The Bedroom Tax: Some Home Truths*, March 2013
83 HL Deb 14 December 2011 cc1285-1310
84 HL Deb 14 February 2012 cc707-712
85 HL Deb 14 February 2012 cc721
86 HL Deb 29 February 2012 c1373
87 HL Deb 29 February 2012 c1382

8 Size criteria and Universal Credit

The DWP has produced a table showing some key differences between the implementation of the size criteria prior to and post introduction of Universal Credit. The Universal Credit is being phased in gradually from April 2013 (in certain pathfinder areas). Full migration of existing claimants to Universal Credit is not expected to be complete until 2017.

From April 2013	**Under Universal Credit**
Those over State Pension Credit age will not be affected, including where one member of a couple is below this age and one is over.	Mixed aged couples – both will need to be over pension age not to be affected by the size criteria. Where one is already in receipt of Pension Credit there will be protection.
Non-dependent deductions: six separate rates that vary by income. Under 25s on benefit are exempt.	There will be one flat-rate Housing Cost Contribution of around £65 per month. All under 21s will be exempt from this
Non-dependents: couples get one room between them. They pay a non-dependent deduction unless both are exempt.	Each adult non-dependent will be allowed a room – each will pay the Housing Cost Contribution unless exempt.
Sub-tenants and boarders are allowed a room. Their income is taken into account, subject to a disregard.	There will be no room allowed for sub-tenants and boarders. Any income received from sub-tenants or boarders will be subject to a 100% disregard.
In joint tenancy cases the under occupancy deduction can still apply.	Under occupancy deduction will not apply in joint tenancy cases.
Protection in the event of a death resulting in under-occupation for up to 52 weeks.	Benefits will run on for 3 months.
13 week protection where the tenant could previously afford the rent and Housing Benefit has not been claimed in the previous 52 weeks.	Size criteria will apply immediately.