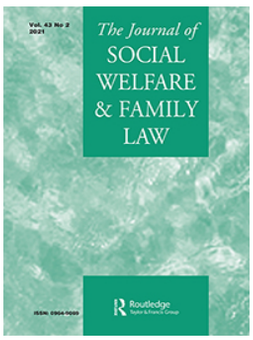
The ‘ideal’ homelessness law



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Journal of Social Welfare and Family Law

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/rjsf20

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To cite this article: Suzanne Fitzpatrick & Liz Davies (2021) The 'ideal' homelessness law: balancing 'rights centred' and 'professional-centred' social policy, Journal of Social Welfare and Family Law, 43:2, 175-197, DOI: 10.1080/09649069.2021.1917712

To link to this article: https://doi.org/10.1080/09649069.2021.1917712

Published online: 27 Apr 2021.

JOURNAL OF SOCIAL WELFARE AND FAMILY LAW
2021, VOL. 43, NO. 2, 175–197
https://doi.org/10.1080/09649069.2021.1917712

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The 'ideal' homelessness law: balancing 'rights centred' and 'professional-centred' social policy

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ABSTRACT

This paper sets out proposals for the 'ideal' legal framework to address homelessness in Great Britain (GB), with potential lessons for other countries seeking to pursue rights-based approaches in this field. Exploiting the 'natural experiment' conditions generated by post-devolution divergence in key aspects of homelessness law, the paper draws on legal and social scientific learning from England, Scotland and Wales, as well as internationally, to formulate proposals for the optimal rights-based model. We argue that an ideal statutory homelessness system, situated in a less than ideal welfare and housing context, requires a balance to be struck between a robust set of individually-enforceable entitlements, on the one hand, and scope for pro-active, flexible approaches on the part of housing practitioners, on the other. The ten core principles we advance would therefore aim to combine the best of 'professional-centred' and 'rights-centred' social policy approaches.

KEYWORDS

Homelessness; housing; rights; social policy; discretion; devolution; welfare

Introduction

In this paper we set out to propose the 'ideal' legal framework to address homelessness in Great Britain (GB), drawing on learning from across all three GB jurisdictions (England, Scotland and Wales),[1] as well as internationally, and attempt to encapsulate insights from both legal and social science scholarship.

The 'natural experiment' conditions generated by post-devolution divergence in the statutory homelessness framework, first established by the Housing (Homeless Persons) Act 1977, provides fertile territory for exploring what 'ideal' legal arrangements might look like in this field. Most notably, the 'priority need' criterion, which continues to limit access to accommodation for single homeless people in England and Wales, was fully abolished in Scotland by the end of December 2012.[2] New prevention-orientated homelessness legislation has now been implemented in both Wales (April 2015) and in England (April 2018), while a window has opened up to consider further legislative changes in Scotland following on from the recommendations of an Action Group established by the First Minister in October 2017 (Scottish Government 2018).

We begin our account by setting out the current context for homelessness in GB, as an understanding of the nature of the 'social evil' the legislation seeks to address is

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a necessary first step in constructing the optimal statutory system. Before describing the fundamentals of the 1977 legislative framework and evaluating its subsequent evolution in each GB jurisdiction, we ask ourselves the prior question: why do we think that the provision of enforceable individual rights might be a helpful means of addressing the issues homeless people face? Thereafter, we advance a series of principles that our analysis indicates should underpin the ideal homelessness law, melding the best from the current arrangements in England, Scotland and Wales, and indicating some new features too.

Our central contention is that an ideal statutory homelessness system requires a balance to be struck between a robust set of individually enforceable entitlements on the one hand, and scope for pro-active, problem-solving, flexible approaches on the part of housing practitioners, on the other. This need for balance, and to some extent trade-offs, between (strict) rules and (professional) discretion (Goodin 1986), informs the principles we present and defend in this paper.

The analysis underpinning this paper was undertaken as part of a commission by Crisis, the national homelessness charity, to contribute to their *'Plan to End Homelessness'*, developed to mark their 50th anniversary year (Downie *et al.* 2018). It was thus intended to scope out the optimal role that the law could play in delivering a wider vision to eliminate homelessness as a major social problem in GB. Our brief was to be ambitious, even idealistic, but not utopian, and we hope to have trod that delicate path successfully in constructing a proposed legal framework that we believe to be optimal within the resource and other structural constraints that are likely to persist for the foreseeable future.

This work was completed before the COVID-19 catastrophe impacted on the UK and the rest of the globe. In the UK, an extraordinary public-health orientated effort appears to have been successful in holding down infection rates to very low levels amongst homeless people (Fitzpatrick *et al.* 2020c). However, there are fears that the (understandable) emphasis given to immediate crisis response during the pandemic has undermined wider efforts to prevent and end homelessness, just when such efforts are most needed, given a likely post-pandemic 'spike' in homelessness levels as the impacts of the economic lockdown unfold. The massive disruption occasioned by the COVID-19 crisis also provides a window to reflect on the shape of homelessness services in the future. We hope that this paper can provide a constructive contribution to that debate.

Homelessness in GB

Contrary to what is often claimed by politicians,[3] the 'causes' of homelessness are actually pretty clear in GB:

> The most important driver of homelessness in all its forms is poverty ... Other drivers include availability and affordability of accommodation, the extent to which prevention measures are used, and the demographics of people experiencing homelessness. (Bramley 2017, p. 1)

While a range of health and support needs significantly contribute to homelessness risks, their explanatory power is much less than that of poverty, especially poverty experienced in childhood (Bramley and Fitzpatrick 2018). Likewise, while family networks provide

a protective 'buffer' for many, the statistical relationship between these social support factors and homelessness is weaker than that with material poverty. The odds of experiencing homelessness are higher for poorer people living in pressured housing market areas. There is a wealth of evidence that young people who have been in care as a child, and adults leaving institutional care, particularly prison, face massively disproportionate risks of homelessness (All-Party Parliamentary Group for Ending Homelessness 2017).

In England, growing housing market pressures meant that the numbers of households accepted by local authorities as 'statutorily homeless' rose sharply in the late 1990s and early 2000s (Fitzpatrick and Pawson 2016). These numbers peaked in 2003 before tumbling by a remarkable 70% over the next seven years after the then Labour Government steered local authorities towards the 'Housing Options' model of homelessness prevention. This involved local authorities offering households in housing crisis a range of services – such as rent deposit guarantees, mediation or debt advice – designed to prevent the need to make a statutory homelessness application (Pawson 2007). While there were fears that Housing Options was being used as a device by some English local authorities to engage in unlawful 'gatekeeping' (Alden 2015) – i.e. diverting potential homeless applicants away from claiming their legal entitlements – evaluative evidence indicated that at least some of this steep decline in statutory homelessness was attributable to genuine prevention (Pawson *et al.* 2007). Wales then introduced its own version of Housing Options and so too, some time later, did Scotland, with similarly dramatic results on the numbers of formal homelessness acceptances (see below).

Since the Coalition Government took office in 2010, statutory homelessness has again risen in England, with the overall numbers accepted by local authorities up by almost half (42%) between 2010 and 2018 (Fitzpatrick *et al.* 2019a). Rough sleeping has risen even more sharply over this period, with official estimates some 165% higher than in 2010 (Fitzpatrick *et al.* 2019a). In sharp contrast to England, both Scotland (Littlewood *et al.* 2017, Ahmed *et al.*2018) and Wales (Ahmed *et al.* 2018) have avoided significant increases in statutory homelessness in the post-2010 period. This diversity in GB homelessness trends in part reflects different policy choices, as discussed below, but also easier housing market conditions in Scotland in particular, which retains a larger social housing sector than either England or Wales (Stephens *et al.* 2019).

What has been particularly damaging in England in the post-2010 period has been the *combined* effect of cuts in the housing allowances available to low-income households, especially those living in the private rented sector, and sharply rising market rents in London and the South (National Audit Office 2017). Homelessness has thus increased rapidly in these pressurised areas, while staying quite stable, or even declining slightly, in the North of England, and private tenancy termination has accelerated disproportionately as a cause of statutory homelessness (Fitzpatrick *et al.* 2019a).

The arguments for and against rights-based approaches

Many would say that there is a prior question to be asked before considering the ideal statutory homelessness system: why frame homelessness policy in terms of individually-enforceable legal entitlements at all? After all, no other country in the world has anything equivalent. While in a few European states, and in a single jurisdiction in the US

(New York City), there is a right to emergency shelter, enforceable rights to settled housing are limited to the UK and, in a much more partial and ineffective way, France (Byrne and Culhane 2011, Fitzpatrick *et al.* 2014, Lévy-Vroelant 2015).

Some have argued that enforceable legal rights can contribute to the juridification of welfare, such that social policy becomes over-legalised, encouraging a defensive, process-orientated mindset on the part of housing practitioners (Dean 2002). Others contend that enforceable legal rights direct power and resources into the hands of the legal profession and away from service provision (De Wispelaere and Walsh 2007), prompting a reliance on litigation rather than consensus as a means of resolving difficulties (Kirp 1982). Still others highlight the practical difficulties faced by disadvantaged service users in realising their statutory entitlements (Goodin 1986).

Against this, international comparisons indicate that enforceable statutory rights have some formidable advantages. For a start, they help to counter the well-documented tendency for social landlords to exclude low-income and/or vulnerable households from their properties when such rights are absent (Fitzpatrick and Stephens 2007, Pleace *et al.* 2012). Moreover, such rights create, at least potentially, a progressive counter-hierarchy of power, giving homeless people an enforceable 'right of action' against those charged with assisting them, should they fail in their responsibilities (Kenna 2005). Receiving housing assistance as a matter of right, rather than as a matter of professional discretion, may help to safeguard the self-respect of those who may otherwise be made to feel like humiliated supplicants receiving *'semi-charitable handouts'* (Donnison 1977; see also Watts 2014; Fitzpatrick *et al.* 2020b).

In 1966, the Ken Loach film Cathy Come Home eloquently portrayed what can happen when homeless people are dependent on discretionary powers exercised by local authorities, rather than having statutory entitlements. It showed a system infused by decision-making based on moralising value-judgements, resulting in separating families (initially separating father from mother and children and subsequently removing children from mother). The film led directly to the establishment of Crisis a year later in 1967, and helped to foster the environment that led eventually to the passage of the Housing (Homeless Persons) Act 1977 a decade later. Broadcast at a time of fervent interest in the 'rediscovery of poverty' (Abel-Smith and Townsend 1965), and faith in state-based solutions, the profound and long-lasting impact of Cathy Come Home on the British social policy psyche is remarkable. Equally remarkable is the fact that the internationally unique safety represented by the 1977 Act has now survived over 40 years of Conservative, Labour and Coalition Governments; almost the last pillar standing of an otherwise long since abandoned post-war consensus on welfare (Fitzpatrick and Pawson 2016).

It may nonetheless be reasonably argued that such 'selective' legal rights to housing represent a sub-optimal response to homelessness. Better, some would say, to have a 'universalistic' housing policy, complemented by a more generous welfare system, that enables people to secure their own housing in a 'unitary' rental market rather than rely on targeted homelessness assistance (Bengtsson 2001). Such universalistic systems of state intervention are argued not only to avoid stigma, but also to be more resilient in the face of budgetary and political pressures, since they do not draw the same clear demarcation line between 'us' (the taxpayers) and 'them' (the welfare recipients) (Hoggett *et al.* 2013).

Leaving to one side contentious debates about whether such universalistic welfare systems are necessarily more progressive (or indeed resilient) than selective ones (Gugushvili and Hirsch 2014), it is certainly the case that those European countries which manage to maintain low levels of homelessness in the absence of enforceable legal rights enjoy higher levels of welfare protection than in the UK (Benjaminsen and Bastholm Andrade 2015). But the fact of the matter is that the UK welfare system has been highly reliant on means-testing and targeting for most of the post-war period and that is very unlikely to change in the foreseeable future (Watts and Fitzpatrick 2018). On the contrary, the austerity-driven welfare reforms pursued by the post-2010 Westminster Governments are institutionalising an ever more conditional, ungenerous and narrowly-focused social security system in the UK (Dwyer and Wright 2014).

Were we to abandon targeted legal protections for homeless people, a more likely scenario than embracing the Scandinavian universalistic model (which is in any case often less 'inclusive' than is supposed (Fitzpatrick and Stephens 2014)), would be that we would move closer to the highly residualised public housing and welfare system in the US, with its mass levels of 'unsheltered' homelessness amongst poorer families as well as single people (Toro *et al.* 2007).

The fundamentals of the statutory homelessness system

A great deal of ink has been spilled on how this unique statutory homelessness system emerged in the UK. Certainly, the political momentum generated by Cathy Come Home, and the lobbying efforts of a consortium of high-profile charities, was crucial (Somerville 1994). But so too, it has been argued, was the sympathetic support of senior civil servants and Government Ministers who became convinced that local authorities had to be required to treat homeless households 'decently' (Fitzpatrick and Pawson 2016). In the end it was a Liberal MP, Stephen Ross, who sponsored a Private Members Bill, for which the Government made time as a condition of the Lib-Lab pact, that saw the homelessness legislation pass into law.

The Housing (Homeless Persons) Act 1977 was undoubtedly a major step forward in the legal protection of homeless people. In essence, it provided that local authorities must ensure that accommodation is made available to certain categories of homeless people, mainly families with children and 'vulnerable' adults.[4] The long-term accommodation provided under this legislation usually took the form of council housing, with homeless households being added to list of households to which 'reasonable preference' had to be given in allocations.[5] Local authorities were obliged to provide 'suitable' temporary accommodation to qualifying households until such time as settled accommodation could be secured.[6]

Strictly speaking, the 1977 homelessness legislation did not create *rights* – rather it imposed *duties* on local housing authorities once certain conditions were triggered. However, the critical point is that these duties are precise enough to allow legal recourse to individuals whom local housing authorities fail in their duty (i.e. it gives them 'title and interest' or 'standing' to bring a legal claim). Where an applicant disagrees with a local housing authority's interpretation of the legal framework, he or she has recourse to the courts which will determine disputes over points of law. The 'individually enforceable rights' that are the corollary of these local housing authority duties are far more

practically impactful than the constitutional or other abstract 'rights to housing' common in continental Europe and elsewhere (Fitzpatrick *et al.* 2014).

The international uniqueness of the 1977 Act has already been remarked upon. There are a couple of other key features with regard to its expansiveness that are worth dwelling on. First, the definition of homelessness it employed is exceptionally wide. You are deemed legally homeless in GB if you have no accommodation in which it is 'reasonable' to expect you to live together with your family.[7] Second, local housing authority obligations are not limited to those immediately homeless, but include people likely to become homeless in the near future (historically, 28 days, though this has now been extended to 56 days).[8] Thus, many of those accepted by GB local housing authorities under the homelessness legislation have never actually been without any form of accommodation, and only a very small minority have slept rough.

However, there were also significant limitations to the scope of the 1977 Act. Most importantly, only those homeless households in 'priority need' were legally entitled to accommodation.[9] This meant mainly families with children. Childless adults were included only where they were deemed to be 'vulnerable' by a local housing authority: a test which can be extremely narrowly interpreted. The inadequacy of the vulnerability test was set out by Baroness Hale in 2015 in Hotak v Southwark LBC:

> . . . we had reached the point where decision-makers were saying, of people who clearly had serious mental or physical disabilities, that 'you are not vulnerable, because you are no more vulnerable than the usual run of street homeless people in our locality' . . . The problem, of course, is that we are all to some extent at risk of harm from being without accommodation – women perhaps more than men, but it is easy to understand how rapidly even the strongest person is likely to decline if left without anywhere to live . . . [10]

Other limitations included the requirement that even these priority need groups be blameless for their predicament. People who were deemed to have become homeless 'intentionally' were entitled to, at best, very short-term accommodation intended to act as a safety net whilst they found their own accommodation.[11] The intentionality test is only met where a local housing authority concludes that an applicant has behaved in a way that is 'deliberate', so as to have caused him or her to cease to occupy accommodation which was available and reasonable to continue to occupy.[12] It was designed to address the 'moral hazard' associated with people rendering themselves homeless, or colluding with others to have themselves defined as homeless, in order to gain preference in the 'queue' for social housing (Fitzpatrick and Pleace 2011). However, the interpretation of the word 'deliberate' by both local authorities and the courts has become harsher over time, and now includes behaviour that many would consider to be feckless or foolish, rather than deliberate.[13]

In addition, local housing authorities were able to transfer the rehousing duty to other councils on 'local connection' grounds.[14] It has long been suggested anecdotally that the local connection rules act as an initial screening mechanism by local housing authorities. The legislation is clear that this practice should not occur: an applicant can only be referred under local connection to a different local housing authority once all the statutory inquiries have been undertaken, and even then only if the main housing duty to accommodate is owed.[15]

People who are not 'eligible' for assistance due to their immigration status are also not entitled to any help under the homelessness legislation anywhere in GB, even if they have a priority need.[16]

Once the local housing authority has determined whether it owes a duty to secure accommodation, how it performs that duty is largely a matter for the local housing authority provided that (as a bottom line) the accommodation secured is 'suitable' for the applicant.[17] It is well established in case-law that 'suitable' means that the accommodation must be suitable for the specific needs of that individual applicant, and of his or her household.[18]

If at the end of this process an applicant is not accommodated under homelessness duties,[19] and has children, or has need for care, and is unable to find their own accommodation, he or she can ask children's or adult services to assess the needs of the children or of the person needing care, including any need for accommodation, and to provide services to meet any assessed need.[20] It is rare, but not necessarily unlawful, for children's services to conclude that accommodation will be offered to a child and not to his or her parent, thus separating children from their parents.[21]

Despite the enforceable nature of the homelessness duties on local housing authorities, there are many questions that arise during the process of an application for homelessness assistance in respect of which there is only limited legal redress. It is for the local housing authority to determine factual questions (are you homeless? etc). More significantly, it is for the authority to make an evaluative judgement of conditions such as 'vulnerability' (Hunter *et al.* 2016, Loveland 2017) and 'suitability'.

The first opportunity for challenge is for an applicant to request an internal review of any decisions that he or she disagrees with.[22] A reviews officer can come to a different decision to the first decision-maker on the same set of facts. However, the review process is not independent, and not all of a local housing authority's decisions can be subject to an internal review.

Once the internal review process is completed, the only redress for an applicant who disagrees with the review decision is to appeal to the County Court on a point of law, in England and Wales.[23] In Scotland, the redress is a 'judicial review' of the lawfulness of the local authority's decision-making, and this is also the only redress in England and Wales in relation to decisions where there is no right to request a review.[24] Both judicial review claims and appeals on a point of law, can only overturn decisions on grounds such as 'manifest unreasonableness' or taking into account 'irrelevant factors'.[25] These are useful tools in administrative law, in that they regulate good decision-making. However, they are limited in their scope: judges cannot overturn a decision simply because they disagree with the conclusion, there must be an error of law in the reasoning or an abuse of discretion; and, where decisions are overturned, the local housing authority simply has to reconsider its earlier decision, without falling into the same error of law.

A further weakness of the 1977 Act was its narrow focus on resolving housing duties, to the neglect of any wider support needs that some homeless households may have. Moreover, the Act was very much crisis-focussed – targeting situations where homelessness had already occurred or was imminent – rather than facilitating more upstream forms of prevention with groups known to be at high risk. Both these points are linked to the vague and, for practical purposes, unenforceable nature of the general duties across GB for other public bodies, such as social services, health and criminal justice services, to

provide 'reasonable assistance' to local authorities in the discharge of their homelessness duties.

Evolving divergence in GB homelessness laws

We consider below how the legal framework has evolved in each GB country since 1977, highlighting its current strengths and weaknesses, and taking a broadly chronological approach to when the most significant changes were made.

Scotland

The first specifically Scottish piece of legislation governing homelessness was the Housing (Scotland) Act 1987, Part 2, which remains in force and contains the legal framework for homelessness duties and powers on Scottish local authorities. However, Scotland's legal and policy framework first diverged significantly from the rest of the UK with the Housing (Scotland) Act 2001 which introduced new duties on local authorities to provide temporary accommodation for non-priority homeless households, and extended the relevant period for being categorised as 'threatened with homelessness' from 28 days to 2 months.[26] Arising directly from the work of the Scottish Government appointed 'Homelessness Task Force' (Pawson and Davidson 2008), the 2001 Act also imposed obligations on housing associations to give 'reasonable preference' to all homeless households in their allocations policies and, through 'Section 5 referrals', to provide accommodation within six weeks for statutorily homeless households referred to them by the relevant local authority.[27]

The dominance of the centre-Left within the Scottish political establishment, together with a relatively large social housing sector, at least as compared with England, were key factors enabling fairly easy passage of the 2001 Act through the Scottish Parliament (Fitzpatrick 2004). These same factors enabled even more radical reforms to be introduced in the Homelessness Etc. (Scotland) Act 2003, which ushered in the gradual expansion and eventual abolition of the 'priority need' criterion by the end of December 2012.[28] The 2003 Act also provided for a significant softening of the impact of the 'intentionality' criterion, giving local authorities discretion on whether to investigate whether a household had brought about their own homelessness, and also providing that some form of accommodation and any necessary housing support services were made available to those found to be intentionally homeless.[29] It also made allowance for the Scottish Government to suspend the operation of the 'local connection' referral rules.[30] Some of those amendments have now been brought into force[31] following the recommendations of a 'Homelessness and Rough Sleeping Action Group' established by the Scottish Government (2018). This means that Scottish local authorities now have a power, not a duty, to investigate intentionality. It was also expected that Scottish Ministers would use their newly commenced powers to make an order modifying the operation of the local connection referral rules, but at the time of writing this was still being consulted upon. A duty to assess and meet the housing support needs of statutorily homeless households was introduced by the Housing (Scotland) Act 2010,[32] with the relevant provisions commencing in June 2013.

The clear strength of the Scottish system is the (almost) universal right to settled housing for all homeless people and it has (rightly) been internationally lauded for this reason (Tars and Egleson 2009, Byrne and Culhane 2011). In particular, the removal of priority need has undoubtedly led to much better treatment of single homeless people by Scottish local authorities (Mackie and Thomas 2014) and is very likely related to the overall decline in rough sleeping noted above.

However, across Scotland, growing demand pressures, coupled with a reduction in the number of social lets available, presented challenges in delivering this 'universal rights' model. The number of households living in temporary accommodation almost trebled in Scotland between 2001 and 2011 (Fitzpatrick *et al.* 2019b), and the proportion of new social landlord lettings absorbed by statutorily homeless households almost doubled (Stephens *et al.* 2019).

Consequently, from 2010 onwards, the Scottish Government promoted 'non-statutory' prevention measures along the lines of the English 'Housing Options' approach in an effort to reduce 'statutory demand' and meet the 2012 commitment. There was a consequent sharp drop in homelessness applications and acceptances and, as in England, this prompted concerns about 'gatekeeping' in certain local authority areas (Scottish Housing Regulator 2014). However, the available data indicates that a relatively 'light touch' version of Housing Options is still generally deployed in Scotland, often limited to active information and signposting, and frequently culminating in a statutory homelessness application. Notably, there appears to be far less use of the private rented sector to prevent or resolve homelessness in Scotland than in England (Fitzpatrick *et al.* 2019b). A Prevention Review Group, convened by Crisis, on the invitation of the Scottish Government, was charged with bringing forward recommendations to develop more robust duties on local authorities and other public bodies to prevent homelessness (Reid 2021).

Wales

Making early use of enhanced devolutionary powers, the first ever Welsh Housing Bill was introduced to the National Assembly for Wales in November 2013, and was subsequently passed as the Housing (Wales) Act 2014 (HWA 2014). Part 2 of the HWA, which came into force in April 2015, was based on the recommendations of a Welsh Government-funded review of the existing homelessness legislation in Wales (Mackie *et al.* 2012).

Taking on board the core recommendations of this research-based review, the emphasis in the 2014 Act was on earlier intervention and assistance tailored towards the specific needs of households who are 'threatened with homelessness' within 56 days.[33] This 'preventative' assistance is available to all eligible households who are homeless or threatened with homelessness, regardless of priority need.[34] For all eligible households who are already homeless when they approach the local authority, or whose homelessness cannot be prevented, local authorities have to take 'reasonable steps' to 'relieve' their homelessness, with the interventions that local authorities ought to have available set out in the accompanying Code of Guidance.[35]

If the 'relief' efforts to find alternative accommodation do not succeed, only households with priority need are then entitled to have housing secured by the local housing

authority (either in the private rented sector or in social housing).[36] Crucially, though, applicants who *'unreasonably fail to cooperate'* with the prevention or relief assistance, or refuse a suitable offer of accommodation, may not progress to this final statutory duty.[37]

Nearly three years after implementation of this new Welsh approach an independent evaluation found:

> The overwhelming consensus is that the new statutory homelessness framework ushered in by the Act has had an array of positive impacts. It has helped to shift the culture of local authorities towards a more preventative, person-centred and outcome-focused approach, which has meant a much-improved service response to tackling homelessness. The official statistical returns bear this out, with almost two-thirds of households threatened with homelessness having it prevented and two-fifths of homeless households being relieved of homelessness (Ahmed *et al.* 2018, p. 207).

The number of 'priority need' households assisted under the final 'duty to secure accommodation' is thus much lower than statutory homeless 'acceptance' levels under the pre-2015 system. The success of the prevention and relief models also means that the 'becoming homeless intentionally' test has become of far less significance than was previously the case, because it could only be applied to an applicant who has a priority need and where relief efforts have been unsuccessful.[38] Until 2019, councils could choose whether or not they applied the intentionally test.[39] From 2 December 2019, local authorities in Wales have a duty to provide accommodation for intentionally homeless families, young people aged under 21 or under 25 if they have been in care, unless they have previously been found to be intentionally homeless in the past five years.[40] Given the prevention and relief models, these expanded accommodation duties may not result in much greater accommodation burdens on councils.

The HWA 2014 Act appears to have brought about much better service response to single homeless people in particular, albeit that variations in service outcome remained across Wales (Mackie *et al.* 2017b).

However, even under this new, much more inclusive, statutory model, there remain substantial groups for whom this system fails to yield a resolution. This includes 'non-priority' households for whom relief efforts are unsuccessful, and who do not then qualify for the main housing duty (mainly single people), and cases which fall out of the system specifically due to 'non-cooperation'. Moreover, street homelessness has risen in Wales and it is said to be 'universally recognised' across local authorities and service providers that rough sleepers have benefited least from the new legislation (Ahmed *et al.* 2018). In September 2017, the Welsh Government announced more funding for local authorities to tackle rough sleeping, and an independent 'Homelessness Action Group' was established in summer 2019 with a specific focus on early action on rough sleeping.

England

Broadly speaking, the approach applied in Wales since April 2015 was introduced in England on 3 April 2018, when amendments inserted into Housing Act 1996 (Part 7) by the Homelessness Reduction Act 2017 (HRA 2017) came into force.[41] Like the original homelessness legislation, the 2017 Act started life as a Private Members Bill, albeit this time sponsored by a backbench MP from the ruling party. The Theresa May-led

Conservative administration, stung by mounting criticisms of its *'light touch'* approach to a growing homelessness crisis (National Audit Office 2017; Fitzpatrick et al., 2020b), supported the passage of the Act, committing £72.7million in 'new burdens' funding for its implementation. While it is too early to comment on the practical effect of the changes ushered in by the HRA (an official evaluation is ongoing), it is possible to make an in-principle assessment of its key characteristics and at least some of its likely effects[42]

The HRA 2017, like its progenitor Welsh legislation, attempts to promote earlier intervention, with the definition of 'threatened with homelessness' expanded,[43] and the introduction of new prevention[44] and relief[45] duties that take no account of priority need status or intentionality. As in Wales, duties to accommodate after the relief duty has come to an end are still only owed to priority need applicants. There is also a duty to draw up a 'personalised housing plan' which should be agreed with the applicant if possible, containing the steps that the local housing authority will take to help the applicant keep, or find, accommodation and the steps that the applicant agrees to take, or is told by the local housing authority would be reasonable for him or her to take.[46]

It remains to be seen what effect the power under this new English legislation for local authorities to discharge their prevention and relief duties on the grounds that someone has 'deliberately and unreasonably refused to cooperate' will have.[47] The wording of the statute, together with the Code of Guidance, makes it clear that the bar is set high, higher than in Wales. An applicant must be acting deliberately, not foolishly.[48] Unlike in Wales, even applicants who have deliberately and unreasonably refused to co-operate will be entitled to accommodation if they have a priority need and have not become homeless intentionally, albeit that the minimum tenancy length for discharge of duty will be six, not 12 months as in the main discharge of duty.[49]

One particular aspect of gatekeeping (Alden 2015) addressed by the HRA 2017 is the widespread failure to take applications for homelessness assistance from private tenants who have been served with a 's.21 notice',[50] giving them two months to leave the property. The HRA 2017 prescribes that someone who has been served with a valid s.21 notice is threatened with homelessness, and so the duties to carry out an assessment of his or her case, draw up a personalised plan and engage in prevention activities will apply.[51]

However, even post HRA 2017, significant weaknesses remain in the English statutory safety net. Most significantly, there are no plans to abolish the priority need test, as has already happened in Scotland. While, unlike in Wales, there are no plans to limit the scope of the 'intentionality' test in the case of families with children in England, the test becomes of less significance, since it does not apply at the prevention or relief stage. However, when it comes to the 'final' duty to secure accommodation for priority need applicants, the test remains relevant.[52]

There is nothing on the HRA 2017 to change the widely reported practice of councils using 'local connection' (unlawfully) as an initial filtering device to deter applications. Indeed, the fact that the relief duty that precedes the main rehousing duty can be referred under local connection may mean that applicants are even more frequently turned away and told to apply to a different local housing authority without all the statutory inquiries being undertaken.[53]

As in Wales, there remain no enforceable legal duties to accommodate (even temporarily) those who are sleeping rough, unless there is reason to believe that person may

be 'vulnerable' in the very strict terms discussed above. This makes the English and Welsh legal safety net weaker in this specific respect than several other European countries (Fitzpatrick *et al.* 2009).

Finally, a concern in London in particular has been the widespread use of B&B as emergency accommodation. Secondary legislation provides that B&B is not suitable for applicants with family commitments,[54] and can only be used in exceptional circumstances, and even then only for a maximum period of six weeks.[55] However, the acute shortage of emergency accommodation in the capital has led local authorities to flout these regulations, prompting findings of maladministration by the Ombudsman (Local Government and Social Care Ombudsman 2017b).

Principles: the foundations of an ideal homelessness system

Drawing together the learning from across England, Scotland and Wales, and taking on board lessons from international comparisons, we would argue that the following core principles should underpin the ideal statutory homelessness system in GB. Bearing in mind the devolved nature of homelessness powers and duties post-1999, we indicate the extent to which changes are required to move closer to this ideal in each of the three constituent jurisdictions.

Principle 1: For households who face the imminent threat of homelessness, *robust and universal prevention duties* should require local authorities to take 'all reasonable steps' to avert or resolve their housing crisis. These *reasonable steps should be specified in legislation, and enforceable, but leave scope for a range of appropriate options to be considered in light of individual circumstances and preferences.*

England and Wales have clearly done most to satisfy this principle thus far,[56] while Scotland still lacks a robust preventative duty or anything amounting to enforceable 'reasonable steps' (though the Prevention Review Group mentioned above has made proposals in this area (Reid 2021)). Across GB, these crisis-focussed prevention duties should, ideally, be embedded in a wider systemic approach that includes more 'upstream' forms of prevention targeted on groups that we know to be at high risk (Fitzpatrick *et al.* 2019c), linked to a 'duty to prevent' enforced on key public agencies (see below).

Principle 2: Where reasonable steps to prevent homelessness are unsuccessful, *a complete statutory safety net providing access to suitable settled accommodation* must extend across all homeless people regardless of their household type or level of 'vulnerability', with temporary accommodation provided in the interim. This means that the priority need criterion must be abolished, as has already happened in Scotland, but not in England and Wales.

Crucially, however, the form of settled accommodation that local authorities can use to 'relieve' homelessness should be broadly drawn, so long as it is 'suitable', and can reasonably be argued to be offered on terms equivalent to those enjoyed by the broader population, e.g. with regard to tenancy length. Scope should also be allowed for discharge of duty into innovative forms of accommodation, such as supported lodgings (Watts and Blenkinsopp 2018), in appropriate cases, or to return to the family home or other previous accommodation, where mediation or other efforts ensure that this is available and reasonable to occupy.

This breadth of discharge options helps to promote a 'problem solving' and flexible ethos, and is also pragmatic: even in the ideal homelessness system, it will never be possible to deliver the 'perfect' housing outcome as desired by every applicant, and expectations must be managed. Scotland has the furthest to travel in providing for flexible discharge options to local authorities, having nothing equivalent to the homelessness 'relief' duties that now pertain in England and Wales.

Principle 3(a): This broadening of the range of discharge options open to local authorities will *weaken but not sever the link between homelessness duties and social housing allocations*. Statutorily homeless people should continue to receive reasonable preference in council housing allocations, and better monitoring of the delivery of this is required post the 2011 Localism Act in England (subsequent to which there is evidence of some local authorities routinely and unlawfully excluding statutorily homeless households from their housing lists).[57] Housing associations in England and Wales should be required to give homeless households 'reasonable preference' in their allocation policies, as is already the case in Scotland.

Principle 3(b): *Intentionality should be abolished in its current form*. The current intentionality test goes far beyond what is required to control any plausible 'perverse incentive' to access homelessness assistance in order to gain unwarranted preference in social housing allocations (Fitzpatrick and Pleace 2011). Under our revised scheme, households found to *'deliberately manipulate'* the homelessness system would receive no *additional* preference in social housing allocations because of their statutory homeless status. This test would have no bearing on any other homelessness-related entitlements. Note that this proposal departs radically from the new legal arrangements in Scotland and in Wales to narrow the scope and/or soften the impact of intentionality, as it focuses much more tightly on the specific 'mischief' that intentionality was always intended to address.

Principle 4: *Local connection should cease to be a bar to assistance*. In proposing this, we fully accept that there is a need to distribute fairly the burden of tackling homelessness between local authorities. However, there are better ways to manage this necessity than the current crude local connection rules which, though they are intended simply to determine which local authorities have a duty to provide settled housing, are in practice often used (unlawfully) as an initial 'gatekeeping' filter.

There are a number of (non-mutually exclusive) potential ways forward. These include suspending the local connection criterion, but making provision for its reapplication by statutory instrument for specific local authority areas suffering undue pressure as a result of net inward migration of applicants. This is effectively the option now available to Scottish Ministers in the newly commenced provisions of the Homelessness etc (Scotland) Act 2003. Extending the statutory definition of the current local connection rules to be more realistic about how and when people have established a local connection[58] or encouraging, through the Codes of Guidance, local authorities to co-operate with each other in local connection referrals, would also help.

Principle 5. *Appropriate provision must be made for households which remain homeless after exhausting their entitlements under the homelessness statutory framework*, particularly families with dependent children. If households refuse suitable offers of accommodation made to them by a local housing authority then there comes a point where that authority's duty towards them is discharged, and it is possible that they may remain homeless.

However, children at risk of homelessness must be protected from the consequences of their parents' decisions, however ill-judged. The Children Act 1989, Social Services and Well-being (Wales) Act 2014 and Children and Young People (Scotland) Act 2014 should be amended to make it clear that, in these circumstances, children's services will keep the family together and, where the children are at risk of homelessness, will provide accommodation for the whole of the family.[59] For vulnerable single homeless people, similarly, strengthening of the duties of adult social care services will be key (see further below). There should also be appropriate opportunity to make a fresh application for homelessness assistance.[60]

Principle 6(a): *Local housing authorities should have a duty to provide 'housing support' in relevant cases*, and **Principle 6(b)** *other public bodies should have robust duties to both 'prevent homelessness'* (see above) *and to cooperate with local housing authorities in relieving homelessness e.g. by providing relevant health and social care support services.*

All relevant forms of support should form part of the 'personalised plans' required by the recent legislation in England and guidance in Wales (there is no equivalent requirement as yet in Scotland). These plans should extend beyond 'housing support' to health, social care and other support needs in relevant cases, while bearing in mind that not all statutory homeless households have additional support needs.

Scotland already has in place an explicit housing support duty,[61] while in Wales[62] and England[63] the relevant duty is limited to making an assessment of support needs. A statutory duty to meet housing support needs would be especially beneficial in England, where the provision of housing support services has been cut by around two-thirds since 2010 (Hastings *et al.* 2015).

Cooperation duties were somewhat strengthened in Wales in the HWA 2014 in relation to social landlords and children's and adult's services,[64] while the HRA 2017 has imposed on public authorities a new 'duty to refer' those at risk of homelessness to local housing authorities.[65] However, statutory duties to both prevent and alleviate homelessness on the part of other public bodies are likely to be more effective if embedded in the core legislative frameworks that structure how these bodies operate rather than 'isolated' within homelessness legislation to which they may pay little regard. Key here would be homelessness-related duties integrated into social services/social work services, health, and criminal justice legislative frameworks.

Principle 7: There should be a *robust but proportionate regulation, monitoring and inspection regime* of local authorities' and other public bodies' discharge of their duties under this legislation. The Scottish Housing Regulator (2014) has played a key (albeit reducing) role in the monitoring and inspection of homelessness services in Scotland that could be looked to as a starting point in building a model for the rest of GB. In England and Wales, the scrutiny role is, in effect, performed by the relevant Ombudsmen who

issue reports, as well as determining individual complaints of maladministration (Local Government and Social Care Ombudsman 2017a). However, this is not the same as regulation. A regulatory role, preferably with a rolling programme of inspection and periodic thematic reports, would play an even more crucial role in England where there are a large number of local authorities and it is difficult for central Government to keep a grip on what is happening across the country. This regulatory role also becomes more important in direct proportion to the amount of flexibility that local authorities are allowed in discharge of their statutory duties, to ensure that these flexibilities are deployed appropriately. It should further play a role in regulating housing associations to ensure effective co-operation with local housing authorities in the discharge of statutory homelessness functions.

Principle 8: *There should also be a more open system of individual reviews and appeals*. If our recommendations were adopted, there would be fewer challenges to local housing authority decision-making, since everyone would be entitled to some form of accommodation. It would follow that such disputes as might arise would be over the suitability of the accommodation offered. Where there are disputes, however, there should be an opportunity for review to a body independent from the local authority, e.g. a first-tier tribunal or separate statutory body, that has competency to consider factual issues and not be confined to considering issues of law. The availability of good free or means-tested housing advice is essential, and allows for applicants to have be aware of the realistic options, to be well informed and, when they do have to challenge decisions, to do so well.

Principle 9: Increasingly with the advent of Housing Options, and certainly under the ideal homelessness system, frontline homelessness officers would be expected to develop new problem solving, person-centred and creative approaches which take quite a different skillset to that of routine statutory assessments. *An ongoing emphasis on professional training and skills development amongst frontline homelessness workers is essential to the successful implementation of progressive legislation* (Mackie *et al*., 2017b).

Principle 10: Changes in immigration legislation, with impacts in the housing, social welfare and employment spheres, have created a *'hostile'* environment for certain groups of migrants to the UK (Hill 2017). At the very least, *minimum subsistence benefits and basic accommodation must be made available to all regardless of immigration status*.

Conclusions

In their classic textbook, *Law and Administration*, Harlow and Rawlings (2009) open with the claim that '*Behind every theory of administrative law there lies a theory of the state*' (p.1). We are kindred spirits with those they characterise as 'green light' theorists, who tend to optimism about the potential for the state (in this case local government) to intervene benignly to protect the well-being of its most disadvantaged citizens. But at the same time, we see a pivotal role for the courts, or other appropriate adjudicators, in holding local authorities to account for their administrative decision making, through the enforcement of carefully delimited, democratically-endorsed, individual statutory rights

(Fitzpatrick *et al.* 2014). We side with those who favour statutory entitlements not just in homelessness, but in social welfare more generally (Donnison 1977), on grounds of user empowerment, dignity and justice (Watts 2014).

We also take the view, however, that significant space needs to be reserved for professional judgement and flexibility in finding the right bespoke housing solution for each statutory homeless household. We would argue that housing's peculiar character as a *'complex and unique commodity'* (Clapham 2018), a geographically fixed and (usually) indivisible good, to which people attach a great deal of their personal identity as their 'home' (Easthope 2004), means that a different balance needs to be struck between fixed entitlements and professional judgment in this field as compared with uniform and fungible goods such as social security cash transfers. But this professional judgment should be exercised in partnership with households which are homeless or at risk, rather than done 'to' them or 'for' them, as in traditional and discredited paternalistic welfare models (Gregory 2015). At its best, the 'personal housing plan' now incorporated into the English legislation and Welsh guidance should provide a vehicle for this 'co-production' of resolutions of housing crises.

Writing in the educational field, David Kirp (1982) postulated that it was always necessary to choose between 'professional-centred' and 'rights-centred' conceptions of 'good social policy'. However, our contention is that it is possible to meld the best of both of these worlds within the ideal statutory homelessness system. Drawing on the lessons provided by the 'natural experiment' that post-devolution divergence has provided, we have argued that the ideal statutory homelessness system would include an overwhelming emphasis on robust and pro-active forms of prevention, and only in circumstances where this fails would a 'backstop' universal safety net of entitlement to settled housing need to be utilised. This system would give broad flexibility to local authorities over 'suitable' discharge options, and would also recognise the need to minimise the inevitable 'moral hazard' associated with any needs-based systems, via provisions designed specifically to deal with 'deliberate manipulation'. We envisage homelessness rights being enforced through an independent, impartial and accessible system alongside robust regulation and inspection of general standards, and see obligations imposed not just on local housing authorities but also on social services, health, justice and other public authority colleagues and on housing associations. This system would offer far fewer opportunities for punitive or harsh judgements, be more effective and just, yet still allow scope to manage applicants' expectations and ensure fair access to social housing for other (non-homeless) groups.

Such an ideal homelessness system clearly requires a range of conditions to operate optimally (Cowan 2019). Most significantly, it requires a major programme of reinvestment in social housing for those on low incomes, especially in the pressurised markets in the south of England. As is documented above, welfare changes mean that private rented sector tenancies are increasingly out of reach for low-income households (NAO, 2017), and there is evidence that some social landlords are reluctant to let to tenants in receipt of benefits (Greaves 2017). The slashing of local government budgets in England since 2010 have, like welfare reform, hit the poorest parts of the country hardest (Beatty and Fothergill 2016), and disproportionately impacted on council spending on housing and housing support (Hastings *et al.* 2015).

However, these malign contextual factors are no excuse for not moving forward with the improvements that can be made now. We know from previous rough sleeping initiatives across GB (Mackie *et al.*, 2017a), and more recent experiences of legislative strengthening in Wales and England, that much that is worthwhile on homelessness can be achieved even in a difficult or deteriorating structural context. Every lever possible at our disposal in driving down homelessness must be seized. The law is one such crucial lever. With calls for the establishment of 'rights-based' systems to address homelessness across much of the rest of the developed world (Fitzpatrick and Stephens 2007), and the UK statutory homelessness system, especially its Scottish variant, often looked upon with envy by activists elsewhere (Tars and Egleson 2009), it is hoped that the lessons gleaned from this cross-GB comparison may have resonance beyond the three jurisdictions focussed upon in this paper.

Notes

1. While we do make reference to some points and literature that is UK-wide in the course of this paper, its main scope is confined to GB given the specificities of the situation in Northern Ireland, see Fitzpatrick *et al.* (2020a).
2. Currently contained at s.189(1) and Homelessness (Priority Need for Accommodation) Order 2002, SI 2002/2051 for England; s.70 Housing (Wales) Act 2014 for Wales; ss 4–6 Homelessness etc. (Scotland) Act 2003.
3. See, for example, this UK Parliamentary debate HC Deb 28 October 2016 vol 616 cc540-609.
4. Originally enacted at s.2 Housing (Homeless Persons) Act 1977. Now at s.189(1) and Homelessness (Priority Need for Accommodation) Order 2002, SI 2002/2051 for England; s.70 Housing (Wales) Act 2014 for Wales; ss 4–6 Homelessness etc. (Scotland) Act 2003.
5. Originally at s.6(2) Housing (Homeless Persons) Act 1977, amending Housing Act 1957 (England and Wales) and Housing (Scotland) Act 1966 (Scotland). Now at Housing Act 1996, s 166A(3)(b) (England); Housing Act 1996 s 167(2)(b) (Wales); Housing (Scotland) Act 1987, s 20(1ZA)(a) (Scotland).
6. Housing (Homeless Persons) Act 1977 applied to England, Wales from 1 December 1977 and to Scotland from 1 April 1978. In England and Wales it was repealed, and its provisions incorporated into Part III Housing Act 1985, a consolidating Act, with effect from 1 April 1986. It was further amended by Housing and Planning Act 1986, s 14(2). In relation to Scotland, Part III Housing Act 1985 was repealed and substituted by Part 2 Housing (Scotland) Act 1987, which remains in force and has subsequently been amended. In relation to England and Wales, Part III Housing Act 1985 was repealed and substituted by Part 7 Housing Act 1996, with effect from February 1997. Part 7 Housing Act 1996 has subsequently been amended. It remains in force in England, and has been mostly recently amended by Homelessness Reduction Act 2017, in force for applications for homelessness assistance made on or after 3 April 2018. Part 7 Housing Act 1996 was repealed in relation to Wales and the Part 2 Housing (Wales) Act 2014 came into effect for applications for homelessness assistance made on or after 27 April 2015. Save where the reference is to earlier provisions only, reference will be made to the current legislation in force: Part 7 Housing Act 1996 as amended for England; Part 2 Housing (Scotland) Act 1987 as amended for Scotland Part 2 Housing (Wales) Act 2014 for Wales.
7. Housing Act 1996, ss175–176 (England); Housing (Wales) Act 2014, ss55-56; Housing (Scotland) Act 1987, s24.
8. Housing Act 1996, s 175(4) (England); Housing (Wales) Act 2014, s. 55(4); Housing (Scotland) Act 1987, s 24(4) (Scotland).

9. Currently at Housing Act 1996, s189(1) and Homelessness (Priority Need for Accommodation) (England) Order 2002, SI 2002/2051; Housing (Wales) Act 2014, s70; Housing (Scotland) Act 1987, s25, now repealed.
10. Hotak v Southwark LBC [2015] UKSC 30, [2016] AC 811, SC, per Baroness Hale at [93]. (see also Loveland 2017).
11. Housing Act 1996, s190; Housing (Wales) Act 2014, s68(5); Housing (Scotland) Act 1987, s31(3).
12. Housing Act 1996, s191; Housing (Wales) Act 2014, s77; Housing (Scotland) Act 1987, s26. Note that the duty on local authorities to assess intentionality has now been converted to a power in Scotland by the Homelessness etc. (Scotland) Act 2003 (Commencement No. 4) Order 2019. In Wales, the issue of intentionality no longer applies where the applicant has a priority need by virtue of pregnancy, children, is aged under 21 or is aged under 25 and is a care leaver (s.75(3) Housing (Wales) Act 2014). See the current leading case: Haile v Waltham Forest LBC [2015] UKSC 34, [2015] AC 34, SC.
13. Some examples of decisions by local housing authorities that might be considered to be harsh, but were upheld as lawful by the Courts include: a young person excluded from the parental home for breach of rules: Denton v Southwark LBC [2007] EWCA Civ 623, [2008] HLR 11, CA; loss of private tenancy for rent arrears accrued as a result of failure to budget: Balog v Birmingham City Council [2013] EWCA Civ 1582, [2014] HLR 14, CA; and travelling from Belgium to Birmingham in the hope of finding a job and therefore accommodation: Aw-Aden v Birmingham City Council [2005] EWCA Civ 1834, CA.
14. Currently at Housing Act 1996, s198; Housing (Wales) Act 2014, s80; Housing (Scotland) Act 1987, s33. Note that the coming into force of the Homelessness etc. (Scotland) Act 2003 (Commencement No. 4) Order 2019 on 7 November 2019 gave Ministers powers to restrict the operation of the local connection referral rules in Scotland.
15. From April 2018, local housing authorities in England also have a power to refer the relief duty under local connection: s.198(A1) Housing Act 1996.
16. Housing Act 1996, s185; Housing (Wales) Act 2014, s61 and Sched 2; Immigration and Asylum Act 1999, s119.
17. Housing Act 1996, s206(1); Housing (Wales) Act 2014, ss68 and 75; Housing (Scotland) Act 1987, s35.
18. R v Brent London Borough Council ex parte Omar (1991) 23 HLR 446, QBD.
19. Because the applicant is not eligible for assistance, or has been found to have become homeless intentionally, or has refused an offer of suitable accommodation.
20. Children Act 1989, s17 and Care Act 2014, s18; Social Services and Well-being (Wales) Act 2014, ss35 and 37; Social Work (Scotland) Act 1968, s12 and Children (Scotland) Act 1995, s22.
21. R (G) v Barnet LBC [2003] UKHL 57, [2004] 2 AC 208, HL.
22. Housing Act 1996, s202(1); Housing (Wales) Act 2014, s85(1); Housing (Scotland) Act 1987, s35A. Prior to February 1997, and the introduction of Housing Act 1996, there was no right to request a review and no subsequent appeal to the County Court. Any challenges were by way of judicial review.
23. Housing Act 1996, s204; Housing (Wales) Act 2014, s86.
24. The decisions which carry a right to request a review are listed at Housing Act 1996, s 202 and Housing (Wales) Act 2014, s 85. Any decision made by a local housing authority that is not contained in those lists can only be challenged by judicial review.
25. In Runa Begum v Tower Hamlets LBC [2003] UKHL 5, [2003] 2 AC 430, HL, Lord Bingham said: '*Although the county court's jurisdiction is appellate, it is in substance the same as that of the High Court in judicial review: Nipa Begum v Tower Hamlets London Borough Council [2000] 1 WLR 306. Thus the court may not only quash the authority's decision under section 204(3) if it is held to be vitiated by legal misdirection or procedural impropriety or unfairness or bias or irrationality or bad faith but also if there is no evidence to support factual findings made or they are plainly untenable or (Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC*

1014, 1030, per Scarman LJ) if the decision-maker is shown to have misunderstood or been ignorant of an established and relevant fact' [7]. Those principles were said to have been '*settled*' by the Runa Begum case in the recent Supreme Court authority of Poshteh v Kensington & Chelsea RLBC [2017] UKSC 36, [2017] A.C. 624, per Lord Carnwath JSC [42].

26. Housing (Scotland) Act 2001, s3.
27. Though note that various issues have been identified with the operation of these Section 5 referrals in practice (see Britain *et al.* 2009).
28. Homelessness (Abolition of Priority Need Test) (Scotland) Order 2012.
29. Homelessness etc. (Scotland) Act 2003, ss4-6.
30. Homelessness etc. (Scotland) Act 2003, s8.
31. Homelessness etc. (Scotland) Act 2003 (Commencement No. 4) Order 2019.
32. The duty is contained in Section 32B of the Housing (Scotland) Act 1987, as amended.
33. Thus extending the relevant period from 28 days to 56 days, matching the 2001 extension in Scotland: Housing (Wales) Act 2014, s 55(4).
34. HWA 2014, s66; Allocation of Accommodation and Homelessness Code of Guidance for Local Authorities, Welsh Government (2016) Chapter 12.
35. HWA 2014, s73; Welsh Government (2016) Chapter 13.
36. HWA 2014, s75.
37. HWA 2014, ss74(5), 75(1) and 79(5).
38. HWA 2014 s.75(2).
39. HWA 2014, s78; Homelessness (Intentionality) (Specified Categories) (Wales) Regulations SI 2015/1265 (W.85),
40. Housing (Wales) Act 2014, s 75(3), brought into effect by Housing (Wales) Act 2014 (Commencement No 10) Order 2019, SI 2019/1479.
41. From 3 April 2018, for applications for homelessness assistance made to local housing authorities in England: Homelessness Reduction Act 2017 (Commencement and Transitional and Savings Provisions) Regulations 2018, SI 2018/167, Article 3.
42. There is an ongoing inquiry by the Housing, Communities and Local Government Select Committee in Parliament. In addition, it is possible to extrapolate from the homelessness statistics (Homelessness Statistics, MHCLG). They show that significant numbers of people who do not have a priority need are being owed the prevention or relief duties and that between 40% – 58% of people owed one of those duties were then provided with accommodation (Davies *et al.* 2019).
43. Housing Act 1996, s175(4) and (5): increasing the period from 28 days to 56 days, and providing that an applicant is deemed to be threatened with homelessness if he or she has been served with a valid Housing Act 1988, s 21 notice.
44. Housing Act 1996, s195(2).
45. Housing Act 1996, s189B(2).
46. Housing Act 1996, s189A.This is a stronger commitment than in Wales, where there is an obligation to carry out an assessment of the applicant's case (Housing (Wales) Act s 62) but the personalised housing plan is contained only in the Welsh Code (para 10.19 and Annexe 17).
47. Housing Act 1996, s 193B(2).
48. Housing Act 1996, s193B, Ministry of Housing, Communities and Local Government (2018), paras 14.49–14.59.
49. Housing Act 1996, s193C.
50. Housing Act 1996, s21.
51. Housing Act 1996, s175(5), as inserted by HRA 2017.
52. Housing Act 1996, s190(2)(a) as amended.
53. Housing Act 1996, s198(A1) as inserted by HRA 2017.
54. Art 3 Homelessness (Suitability of Accommodation) (England) Order 2003, SI 20,003/3326.
55. Art 4 Homelessness (Suitability of Accommodation) (England) Order 2003, SI 20,003/3326.
56. Housing Act 1996, ss189B(2) and 195(2); Housing (Wales) Act 2014, ss 66 and 73.

57. See R (Jakimaviciute) v Hammersmith & Fulham LBC [2014] EWCA Civ 1438, [2015] HLR 5, CA; and R (Alemi) v Westminster City Council [2015] EWHC 1765, [2015] PTSR 1339, Admin Ct.
58. Housing Act 1996, s199; Housing (Wales) Act 2014, s81; Housing (Scotland) Act 1987, s27.
59. Such accommodation need not be long-term accommodation. This principle envisages that children's services ensure that suitable emergency accommodation remains available whilst it works with the family in order to find and keep longer-term suitable accommodation.
60. The current test for acceptance of a new application is that there are new factual circumstances that were not present when the previous application was disposed of: Begum v Tower Hamlets LBC [2005] EWCA Civ, 340, [2005] 1 WLR 2103, CA; R (Hoyte) v Southwark LBC [2016] EWHC 1665, [2016] HLR 35, Admin Ct.
61. Housing (Scotland) Act 1987, s32B as inserted by Housing (Scotland) Act 2010.
62. HWA 2014, s62(5)(c).
63. Housing Act 1996, s189A(2)(c), as inserted by HRA 2017.
64. HWA 2014, s95.
65. Housing Act 1996, s213(b), as inserted by HRA 2017. The list of specified public authorities includes prisons, hospitals, the DWP, social services and education authorities. The highest number of referrals are being made by the National Probation Service and by Jobcentre plus (Homelessness Statistics, MHCLG, https://www.gov.uk/government/collections/homelessness-statistics [accessed 27 January 2020].

Acknowledgments

We are indebted to Crisis, and particularly Matt Downie, for giving us the opportunity to undertake this fascinating piece of work. We are very grateful for the detailed, thoughtful and challenging comments we received on draft versions of the paper from Professor Mike Adler, Professor Glen Bramley, Tessa Buchanan, Professor Sarah Johnsen, Connor Johnston, Dr Peter Mackie, Neil Morland, Professor Tom Mullen, Professor Mark Stephens, Tamsin Stirling and Dr Beth Watts. Their generous contribution of both time and ideas has made this a much better paper than it would otherwise have been. Any errors and all opinions remain ours alone and should not be taken to reflect the views of Crisis or any of the individuals who commented on the paper.

Disclosure statement

No potential conflict of interest was reported by the author(s).

Funding

The analysis underpinning this paper was undertaken as part of a commission by Crisis, the national homelessness charity, in 2018.

References

Abel-Smith, B. and Townsend, P. (1965) *The Poor and the Poorest*. Occasional Papers in Social Administration 17. London: Bell.

Ahmed, M., Wilding, A., Gibbons, K., Jones, M., Rogers, I. & Madoc-Jones, I., 2018. *Post-implementation Evaluation of Part 2 of the Housing Act (Wales) 2014: Final Report*. Cardiff. Welsh Government.

Alden, S., 2015. On the frontline: the gatekeeper in statutory homelessness services. *Housing Studies*, 30, 924–941. doi:10.1080/02673037.2014.991380

All-Party Parliamentary Group for Ending Homelessness, 2017. *Homelessness Prevention for Care Leavers, Prison Leavers and Survivors of Domestic Violence*. London. APPG.
Beatty, C. and Fothergill, S., 2016. *The Uneven Impact of Welfare Reform: the Financial Losses to Places and People*. Sheffield. Sheffield Hallam University.
Bengtsson, B., 2001. Housing as a social right: implications for welfare state theory. *Scandinavian Political Studies*, 24, 255–275. doi:10.1111/1467-9477.00056
Benjaminsen, L. and Bastholm Andrade, S., 2015. Testing a typology of homelessness across welfare regimes: shelter use in Denmark and the USA. *Housing Studies*, 30, 858–876. doi:10.1080/02673037.2014.982517
Bramley, G., 2017. *Homelessness Projections: Core Homelessness in Great Britain*. London. Crisis.
Bramley, G. and Fitzpatrick, S., 2018. Homelessness in the UK: who is most at risk? *Housing Studies*, 33, 96–116. doi:10.1080/02673037.2017.1344957
Britain, A., *et al*., 2009. *Review of Section 5 of the Housing (Scotland) Act 2001*. Edinburgh. Scottish Government.
Byrne, T. and Culhane, D.P., 2011. The right to housing: an effective means for addressing homelessness? *University of Pennsylvania Journal of Law and Social Change*, 14, 379–390.
Clapham, D., 2018. Housing theory, housing research and housing policy. *Housing, Theory and Society*, 35, 163–177. doi:10.1080/14036096.2017.1366937
Cowan, D., 2019. Reducing homelessness or re-ordering the deckchairs? *Modern Law Review*, 82, 105–128. doi:10.1111/1468-2230.12390
Davies, L., Johnston, C., and Buchanan, T., "Homelessness Reduction Act 2017: one year on". *Legal Action*, July/August 2019.
De Wispelaere, J. and Walsh, J., 2007. Disability rights in Ireland: chronicle of a missed opportunity. *Irish Political Studies*, 22, 517–543. doi:10.1080/07907180701699265
Dean, H., 2002. *Welfare Rights and Social Policy*. Harlow: Pearson Education Limited.
Donnison, D., 1977. Against discretion. *New Society*, 41, 534–536.
Downie, M., *et al*., 2018. *Everybody In: How to End Homelessness in Great Britain*. London: Crisis.
Dwyer, P. and Wright, S., 2014. Universal Credit, ubiquitous conditionality and its implications for social citizenship. *Journal of Poverty and Social Justice*, 22, 27–35. doi:10.1332/175982714X13875305151043
Easthope, H., 2004. A place called home. *Housing, Theory and Society*, 21, 128–138. doi:10.1080/14036090410021360
Fitzpatrick, S., 2004. Homelessness policy in Scotland. *In*: D. Sim, ed.. *Housing and Public Policy in Scotland*. Coventry: CiH. 183–198.
Fitzpatrick, S., *et al*., 2019a. *The Homelessness Monitor: England 2019*. London. Crisis.
Fitzpatrick, S., *et al*., 2019b. *The Homelessness Monitor: Scotland 2019*. London. Crisis.
Fitzpatrick, S., *et al*., 2020a. *The Homelessness Monitor: Northern Ireland 2020*. London. Crisis.
Fitzpatrick, S., Bengtsson, B., and Watts, B., 2014. Rights to housing: reviewing the terrain and exploring a way forward. *Housing, Theory and Society*, 31, 447–463. doi:10.1080/14036096.2014.923506
Fitzpatrick, S., Mackie, P., and Wood, J., 2019c. *Homelessness Prevention in the UK: pPolicy Briefing*. CaCHE. UK Collaborative Centre for Housing Evidence (CaCHE).
Fitzpatrick, S. and Pawson, H., 2016. Fifty years since Cathy Come Home: critical reflections on the UK homelessness safety net. *International Journal of Housing Policy*, 16, 543–555. doi:10.1080/14616718.2016.1230962
Fitzpatrick, S., Pawson, H., and Watts, B. (2020b) *The limits of localism: a decade of disaster on homelessness in England*, Policy and Politics. https://doi.org/10.1332/030557320X15857338944387
Fitzpatrick, S. and Pleace, N., 2011. The statutory homelessness system in England: a fair and effective rights-based model? *Housing Studies*, 27, 232–251. doi:10.1080/02673037.2012.632622
Fitzpatrick, S., Quilgars, D., and Pleace, N., 2009. *Homelessness in the UK: Problems and Solutions*: Chartered Institute of Housing.
Fitzpatrick, S. and Stephens, M., 2007. *An International Review of Homelessness and Social Housing Policy*. London. Communities and Local Government.

Fitzpatrick, S. and Stephens, M., 2014. Welfare regimes, social values and homelessness: comparing responses to marginalised groups in six European countries. *Housing Studies*, 29, 215–234. doi:10.1080/02673037.2014.848265

Fitzpatrick, S., Watts, B., and Sims, R., 2020c. *Homelessness Monitor England 2020: COVID-19 Crisis Response Briefing*. London: Crisis.

Goodin, R.E., 1986. Welfare, rights and discretion. *Oxford Journal of Legal Studies*, 6, 232–261. doi:10.1093/ojls/6.2.232

Greaves, F., 2017. *Tackling Homelessness Together: the Importance of Local Authorities and Housing Associations Working in Partnership*. Online. Joseph Rowntree Foundation.

Gregory, J., 2015. Engineering compassion: the institutional structure of virtue. *Journal of Social Policy*, 44, 339–356. doi:10.1017/S004727941400083X

Gugushvili, D. and Hirsch, D., 2014. *Means-testing or Universalism: what Strategies Best Address Poverty? A Review Contributing to Joseph Rowntree Foundation's Development of an Anti-poverty Strategy*. Loughborough. Joseph Rowntree Foundation.

Harlow, C. and Rawlings, R., 2009. *Law and Administration*. Cambridge: Cambridge University Press.

Hastings, A., *et al.*, 2015. *The Cost of the Cuts: the Impact on Local Government and Poorer Communities*. York. Joseph Rowntree Foundation.

Hill, A., 2017. Hostile environment: the hardline Home Office policy tearing families apart. *The Guardian*. 28th November.

Hoggett, P., Wilkinson, H., and Beedell, P., 2013. Fairness and the politics of resentment. *Journal of Social Policy*, 42, 567–585. doi:10.1017/S0047279413000056

Hunter, C., *et al.*, 2016. Legal compliance in street-level bureaucracy: a study of UK housing officers. *Journal of Law and Policy*, 38, 81–95. doi:10.1111/lapo.12049

Kenna, P., 2005. *Housing Rights and Human Rights*. Brussels: FEANTSA.

Kirp, D., 1982. Professionalization as a policy choice: British special education in comparative perspective. *World Politics*, 34, 137–174. doi:10.2307/2010261

Lévy-Vroelant, C., 2015. The right to housing in France: still a long way to go from intention to implementation. *Journal of Law and Social Policy*, 24, 88–108.

Littlewood, M., *et al.*, 2017. *Eradicating 'core homelessness' in Scotland's four largest cities*. Edinburgh. Heriot-Watt University.

Local Government and Social Care Ombudsman, 2017a. *Changing Face of Homelessness Highlighted in the Ombudsman Report* [online]. Local Government & Social Care Ombudsman. Available from: https://www.lgo.org.uk/information-centre/news/2017/dec/changing-face-of-homelessness-highlighted-in-ombudsman-report [Accessed Access Date]

Local Government and Social Care Ombudsman, 2017b. *Still No Place like Home? Councils' Continuing Use of Unsuitable Bed and Breakfast Accommodation for Families*. Coventry. Local Government and Social Care Ombudsman.

Loveland, I., 2017. Changing the meaning of 'vulnerable' under the homelessness legislation? *Journal of Social Welfare and Family Law*, 39, 298–315. doi:10.1080/09649069.2017.1344387

Mackie, P., *et al.*, 2012. *Options for an Improved Homelessness Legislative Framework in Wales*. Cardiff: Welsh Government.

Mackie, P., Johnsen, S., and Wood, J., 2017a. *Ending Rough Sleeping: What Works? An International Evidence Review*. London: Crisis.

Mackie, P. and Thomas, I., 2014. *Nations Apart? Experiences of Single Homeless People across Great Britain*. London. Crisis.

Mackie, P., Thomas, I., and Bibbings, J., 2017b. Homelessness prevention: reflecting on a year of pioneering Welsh legislation in practice. *European Journal of Homelessness*, 11, 81–107.

Ministry of Housing, Communities and Local Government, 2018. *Homelessness Code of Guidance for Local Authorities*. London: MHCLG.

National Audit Office, 2017. *Homelessness: Report by Comptroller and Auditor-General Department for Communities and Local Government*. NAO: London.

Pawson, H., *et al.*, 2007. *Evaluating Homelessness Prevention*. London: Communities and Local Government.

Pawson, H., 2007. Local authority homelessness prevention in England: empowering consumers or denying rights? *Housing Studies*, 22, 867–884. doi:10.1080/02673030701387572

Pawson, H. and Davidson, E., 2008. Radically divergent? Homelessness policy and practice in post-devolution Scotland. *European Journal of Homelessness*, 8, 39–60.

Pleace, N., Teller, N., and Quilgars, D., 2012. *Social Housing Allocation and Homelessness: EOH Comparative Studies on Homelessness 1*. Brussels. FEANTSA.

Reid, B. (2021) *Preventing Homelessness in Scotland. Recommendations for Legal Duties to Prevent Homelessness. A Report from the Prevention Review Group*. Edinburgh: Crisis.

Scottish Government, 2018. *Homelessness and Rough Sleeping Action Group: Final Recommendations Report*. Edinburgh: Scottish Government.

Scottish Housing Regulator, 2014. *Housing Options in Scotland: a Thematic Inquiry*. Online

Somerville, P., 1994. Homelessness policy in Britain. *Policy & Politics*, 22 (3), 163–178. doi:10.1332/030557394782453654

Stephens, M., *et al*., 2019. *UK Housing Review 2019*. Coventry: Chartered Institute of Housing.

Tars, E.S. and Egleson, C., 2009. Great Scot! The Scottish Plan to end homelessness and lessons for the Housing Rights Movement in the United States. *Georgetown Journal on Poverty Law & Policy*, 16, 187–216.

Toro, P.A., *et al*., 2007. Homelessness in Europe and the United States: a comparison of prevalence and public opinion. *Journal of Social Issues*, 63, 505–524. doi:10.1111/j.1540-4560.2007.00521.x

Watts, B., 2014. Homelessness, empowerment and self-reliance in Scotland and Ireland: the impact of legal rights to housing for homeless people. *Journal of Social Policy*, 43, 793–810. doi:10.1017/S0047279414000282

Watts, B. and Blenkinsopp, J., 2018. *Supported Lodgings: Exploring the Feasibility of Long-term Community Hosting as a Response to Youth Homelessness in Scotland*. Edinburgh. Shelter Scotland.

Watts, B. and Fitzpatrick, S., 2018. *Welfare Conditionality*. Abingdon: Routledge.

Welsh Government, 2016. *Code of Guidance for Local Authorities on the Allocation of Accommodation and Homelessness*.