

**From Intent to Implementation: An empirical socio-legal  
analysis of 'reasonable steps' in the Housing (Wales) Act 2014**

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## Abstract

The Housing (Wales) Act 2014 requires that Local Authorities take ‘reasonable steps’ to help prevent or relieve the homelessness of assistance applicants. These provisions are widely praised, held to be innovative, and are considered a cornerstone of the shift towards a prevention and early intervention homelessness policy in Wales. The ‘reasonable steps’ duty requires an amount of prevention or relief assistance for all homelessness applicants, but also affords a degree of freedom to Local Authorities when prescribing ‘steps’ which they deem most likely to achieve a successful intervention. After seven years of implementation of the legislation, there has been very little scrutiny of this fundamental provision by policy and legal scholars. This thesis is the first empirical investigation of the intention, interpretation, and application of ‘reasonable steps,’ and considers the law and policy objectives by investigating the provisions from policy development through to implementation.

The thesis takes a mixed-method approach. First, qualitative methods are used to unearth the policy intent of reasonable steps, as well as explore the front-line implementation of the legislation. The pre-legislation (intention) phase of reasonable steps is situated within Kingdon’s Multiple Streams Model, which focusses on the debate of policy alternatives in this early stage of the policy process. Findings relating to the front-line implementation of reasonable steps are explained by using Lipsky’s Street-level Bureaucracy theory, which focusses on the amendment of policy by implementing agents in response to various pressures and influences. Second, and in the absence of any case law in this context, a doctrinal analysis defines how the courts may interpret and scrutinise reasonable steps in practice in the event of a legal challenge.

This study identified that the reasonable steps duty was to be broadly interpreted to support a flexible and collaborative approach in service provision, and that a failure of the provider to take this approach could be challenged in the courts. However, the research also identified a number of ways in which the practical implementation of the legislation deviates from this intent.

This thesis argues that the duty to take reasonable steps may have shifted to the applicants themselves, and that whilst litigation may be an effective way to rectify this deviation from intent, it is unlikely to arise in practice. This is, in part, a consequence of the many barriers to rights access which service users face in a homelessness context. To add to these barriers, the thesis argues that the statutory phrase 'reasonable steps' itself serves to significantly limit the chance of litigation arising, as the courts are unlikely to interfere in Local Authority decisions except in the most extreme circumstances.

As the first empirical socio-legal analysis of reasonable steps, this thesis delivers a valuable and important insight into the pioneering legislation, mapping the journey of the law from inception through to application. The thesis makes useful contributions to key literatures in the field of policy implementation, and offers a number of practical recommendations which, if implemented, could more closely align practical application with the original intent of policymakers.

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# Chapter 1: Introduction

The Housing (Wales) Act 2014 compels Local Authorities to take ‘reasonable steps’ to help prevent or relieve the homelessness of applicants. These provisions are widely praised, held to be innovative, and are considered to be a cornerstone of the signposted shift in Welsh homelessness policy towards prevention and early intervention. Despite the importance and perceived innovation, reasonable steps in this context has received very little academic attention. This thesis is the first empirical investigation of the ambition, interpretation, and application of reasonable steps in the Housing (Wales) Act 2014 using a mixed method approach, drawing on both doctrinal and qualitative methods. The thesis will consider the implementation of the law against the policy objectives which drove it. Reasonable steps is examined at multiple levels of the implementation process, from the intentions of policymakers, to Local Authorities and the courts. This introductory chapter provides an overview of the legislation and justifies the need for investigation. The research questions are then introduced, and an overview of the thesis structure is provided. This chapter concludes with a brief summary of the key findings and the original contributions made.

## 1.1 Reasonable steps in the Housing (Wales) Act 2014

Over the past few decades, Local Authorities in England and Wales have evolved a ‘housing options’ approach to homelessness assistance. This focus shifts emphasis away from provision of accommodation, and more towards a broader ‘cooperative’ and prevention-based support service.<sup>1</sup> Despite some criticism and accusations of increased gatekeeping,<sup>2</sup> this approach has been widely accepted by policy makers as a successful one, with a noteworthy observable decrease in the number of applicants requiring homelessness assistance.<sup>3</sup> The Housing (Wales)

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<sup>1</sup> Volker Busch-Geertsema and Suzanne Fitzpatrick, ‘Effective homelessness prevention? Explaining reductions in homelessness in Germany and England’ (2008) *European Journal of Homelessness* 2

<sup>2</sup> HAL Pawson, ‘Local authority homelessness prevention in England: empowering consumers or denying rights?’ (2007) *Housing Studies* 22 6 867

<sup>3</sup> Suzanne Fitzpatrick and Nicholas Pleace, ‘The statutory homelessness system in England: A fair and effective rights-based model?’ (2012) *Housing Studies* 27 2 232



Act 2014 arose from the combination of a number of factors. Firstly, there was an increase in legislative competency in Wales. The formal separation of the Assembly from the Welsh Government,<sup>4</sup> and a referendum granting primary legislative powers in certain areas, led to the publication of a comprehensive and ambitious program for legal change.<sup>5</sup> Housing was identified as a priority within the program, and consultation began on a new Housing Bill,<sup>6</sup> which acknowledged perceived weaknesses in the existing legal framework.<sup>7</sup> There had also been a firm political desire to promote preventative measures in homelessness assistance,<sup>8</sup> which was clearly expressed in the 2009 'Ten Year Plan'<sup>9</sup> to tackle homelessness. The plan signalled a distinct pledge to a shift away from reactive homelessness services, and towards an early intervention and prevention policy. Within the Plan, the Welsh Government also committed to a comprehensive legislative review,<sup>10</sup> which resulted in the publication of a number of separate studies used to guide the development of new homelessness legislation.<sup>11</sup> As a result of this legislative review, and in line with sign-posted policy goals, the Housing (Wales) Act 2014 (HWA) grants a legal right to a minimum level of assistance to all homelessness applicants, with a particular emphasis on early intervention and prevention

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<sup>4</sup> Government of Wales Act 2006

<sup>5</sup> Welsh Government, *The Welsh Government's Legislative Programme 2011 – 2016* National Assembly for Wales Commission 2011

<sup>6</sup> Ibid, p30

<sup>7</sup> Welsh Government, *Homes for Wales: A White Paper for Better Lives and Communities* Welsh Government 2012

<sup>8</sup> Peter MacKie, Ian Thomas, and Jennie Bibbings, 'Homelessness prevention: Reflecting on a year of pioneering Welsh legislation in practice' (2017) *European Journal of Homelessness* 11 1 81

<sup>9</sup> Welsh Assembly Government, 'Ten-year homelessness plan for Wales: 2009–2019' [2009] Cardiff, Welsh Government

<sup>10</sup> Ibid, 26

<sup>11</sup> Peter Mackie and Simon Hoffman, 'Homelessness legislation in Wales: stakeholder perspectives on potential improvements' [2011] Cardiff, Welsh Government; Suzanne Fitzpatrick, Sarah Johnsen, and Beth Watts, 'International homelessness policy review: A report to inform the review of homelessness legislation in Wales' [2012] Cardiff, Welsh Government; Peter Mackie, Ian Thomas and Kate Hodgson, 'Impact analysis of homelessness legislation in Wales: a report to inform the review of homelessness legislation in Wales' [2012a] Cardiff, Welsh Government; Peter Mackie, Suzanne Fitzpatrick, Tamsin Stirling, Sarah Johnsen, and Simon Hoffman, 'Options for an Improved Homelessness Legislative Framework in Wales' [2012b] Cardiff, Welsh Government; Peter Mackie, Ian Thomas, Suzanne Fitzpatrick, Tamsin Stirling, Sarah Johnsen, and Simon Hoffman, 'Assessing the impacts of proposed changes to homelessness legislation in Wales: a report to inform the review of homelessness legislation in Wales' [2012c] Cardiff, Welsh Government

strategies. The relevant sections came into force in April 2015, and enshrining these rights in law has widely been seen as an innovative and significant step, placing new legal obligations on Local Authorities to action this policy and to work closely with service users who, by definition, are in some form of personal crisis.<sup>12</sup>

The legal guarantee of a minimum level of homelessness assistance is a key component of the perceived innovation within the Housing (Wales) Act 2014,<sup>13</sup> and is central to the intended shift towards a prevention focussed homelessness policy.<sup>14</sup> The Act contains legislative provisions that grant service users the right to this support, whilst simultaneously allowing for flexibility in the use of department resources, thus maintaining the ability for housing department staff to ‘individualise’ homelessness assistance.<sup>15</sup> The relevant sections require the authority to ‘help to secure’ the provision, or maintain availability of, suitable accommodation. ‘Help to secure’ is defined as taking ‘reasonable steps’ to assist. The sections state: -

**S 65 - Meaning of help to secure**

Where a local housing authority is required by this Chapter to help to secure (rather than “to secure”) that suitable accommodation is available, or does not cease to be available, for occupation by an applicant, the authority—

(a) is required to take *reasonable steps* to help, having regard (among other things) to the need to make the best use of the authority’s resources.

**S 66 - Duty to help to prevent an applicant from becoming homeless**

(1) A local housing authority must help to secure that suitable accommodation does not cease to be available for occupation by an applicant if the authority is satisfied that the applicant is—

- (a) threatened with homelessness, and
- (b) eligible for help.

**S 73 - Duty to help to secure accommodation for homeless applicants**

(1) A local housing authority must help to secure that suitable accommodation is available for occupation by an applicant, if the authority is satisfied that the applicant is—

- (a) homeless, and
- (b) eligible for help.

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<sup>12</sup> Welsh Assembly Government, ‘Code of Guidance to Local Authorities on the Allocation of Accommodation and Homelessness’ [2016]

<sup>13</sup> Ibid

<sup>14</sup> Peter MacKie, Ian Thomas, and Jennie Bibbings, ‘Homelessness prevention: Reflecting on a year of pioneering Welsh legislation in practice’ (2017) *European Journal of Homelessness* 11 1 81

<sup>15</sup> Welsh Assembly Government (n 9)

Local Authorities are therefore required to take ‘reasonable steps’ to help prevent or relieve homelessness for service users found to be at threat and eligible for assistance.<sup>16</sup>

Complemented by a comprehensive Code of Guidance,<sup>17</sup> the Act compels homelessness officers to deploy departmental resources and support mechanisms as needed, in any given case, to maximise the likelihood for successful prevention of (s 66), or relief from (s 73), a homelessness situation.<sup>18</sup> The legal requirement for reasonable steps in any given situation affords a large degree of discretion and flexibility to expert Local Authority staff in this challenging task.

Crucially, as a result of these sections, this undertaking is now a legal obligation for Welsh Local Authorities, and thus a legal right for homelessness assistance applicants. This ‘innovative’ legal right to a minimum amount of early intervention homelessness assistance is almost unique on the global stage,<sup>19</sup> and is a direct extension of a UK-wide statutory support framework first adopted over forty years ago with the passing of the Housing (Homeless Persons Act) 1977. Under the Housing (Wales) Act, the legal requirement that Local Authorities take reasonable steps to prevent or relieve homelessness extends this older, and broader, rights-based approach to service delivery.

The statute also enshrined a legal right to challenge the provisions. Section 73, and a number of others,<sup>20</sup> are subject to section 85 of the Act, which grants applicants the legal right to request an internal review of relevant Local Authority decisions relating to their assistance application, including the delivery of ‘reasonable steps.’ If the original decision is upheld upon an internal review, and a relevant point of law remains contentious, section 88 allows for a review of the

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<sup>16</sup> Housing (Wales) Act 2014, Ss 66, 73

<sup>17</sup> Welsh Assembly Government (n 12)

<sup>18</sup> Welsh Assembly Government (n 12), [5.15], [5.16]

<sup>19</sup> Other than the UK, an ‘enforceable’ rights framework to housing for the homeless exists in France.

See DALO (Droit au Logement Opposable/Enforceable Right to Housing) laws originally enacted in 2007

<sup>20</sup> In addition to ‘reasonable steps’ taken under s 73, s 85 of HWA allows service users to request an internal review of decisions involving their eligibility for help, the ending of a duty owed, and the suitability of any accommodation offered when that duty is discharged

decision in the County Court. Subsequent challenges may be made thereafter in certain circumstances<sup>21</sup> by application to higher courts within the standard judicial review procedure. Judicial review is a High Court function, and is the process by which an individual may seek legal remedy in dealings with any public body providing a public utility.<sup>22</sup> In this context, judicial review may be applied for on the grounds that Local Authorities have acted unfairly, abused their legal powers, or failed to meet their legal obligations. A legal challenge of the application of the reasonable steps provisions within the HWA would ultimately be subject to this process.

## 1.2 The need for research

These extended provisions within the Housing (Wales) Act have been widely lauded since their introduction in April 2015. Mackie *et al* published a positive early review of the legislation, highlighting that “[b]y bringing prevention services into the statutory framework, for the first time people will be able to challenge [their] local authority for failing to take steps to help prevent homelessness.”<sup>23</sup> More recently, a published report detailing an extensive empirical investigation by Public Health Wales has stated that this legislation is ‘leading the way’ by showing that ‘a legal right to assistance is an effective driver for change.’<sup>24</sup> Prominent statements have also been made in the media, hailing legislators as ‘pioneers’ for ensuring that ‘Welsh local authorities [now] have a statutory duty to prevent homelessness.’<sup>25</sup> The Guardian

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<sup>21</sup> According to the Civil Procedure Rules 52.7, an appeal of a county court decision may only advance if it considers a significant point of law and has a high probability of success. See section below ‘Challenging Reasonable Steps’

<sup>22</sup> Marc Hertog and Simon Halliday (eds), ‘Judicial Review and Bureaucratic Impact’ (2004) Cambridge Studies in Law Society, p104

<sup>23</sup> Peter K Mackie, Ian Thomas, and Jennie Bibbings, ‘Homelessness prevention: reflecting on a year of pioneering Welsh legislation in practice’ (2017) *European Journal of Homelessness* 11 1 81, p85, 86

<sup>24</sup> Charlotte N B Grey and Louise Woodfine, ‘Voices of those with lived experiences of homelessness and adversity in Wales: informing prevention and response’ (2019) Cardiff, Public Health Wales NHS Trust, p8

<sup>25</sup> Simon Brandon, Welsh Lessons on Halting Homelessness, *Inside Housing*, available at <https://www.insidehousing.co.uk/insight/insight/welsh-lessons-on-halting-homelessness-55832> accessed 16 February 2021

has proclaimed the move to be ‘trailblazing,’<sup>26</sup> reporting widely on the innovation that Welsh legislation, for the first time, ‘places Local Authorities under a legal duty to help prevent homelessness and help find accommodation for everyone who seeks assistance.’<sup>27</sup> This admiration is, perhaps, justified. Performance statistics<sup>28</sup> reported by Welsh Local Authorities since the adoption of the legislation demonstrate some level of success across Wales as a whole. Though success rates under the legislation vary quite considerably between authorities, some have consistently reported prevention of homelessness for over 70% of applicant households who approached them for assistance.

However, despite some authorities reporting success, Welsh Government statistics show a marked rise in homelessness assistance applications in recent years across Wales.<sup>29</sup> Within a year of the legislation being enacted, Shelter Cymru, together with the Oak Foundation, carried out research to serve as an initial review of the implementation of the reasonable steps provisions. The resulting report found that despite evidence of some good practice, many applicants were left feeling ‘adrift’ and ‘in limbo.’<sup>30</sup> The publication, which includes contributions from 50 service users across Wales, highlights a significant disparity in service levels both between, and within, Local Authorities. The report details evidence of overly generic support, an overreliance on guiding applicants towards accommodation in the private rental sector, and an underuse of available ‘tailored’ interventions such as mediation, debt advice, and guidance on benefit entitlement.<sup>31</sup> In October 2021, the Public Services Ombudsman

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<sup>26</sup> Kate Murray, Welsh law shows that early support prevents homelessness, *The Guardian*, available at <https://www.theguardian.com/society/2016/apr/26/welsh-law-early-support-prevents-homelessness-crisis> accessed 16 February 2021

<sup>27</sup> Peter Mackie, Welsh homelessness reforms show the way for England and Northern Ireland, *The Guardian*, available at <https://www.theguardian.com/society/2016/mar/15/welsh-reforms-on-homelessness-england-northern-ireland> accessed 16 February 2021

<sup>28</sup> Homelessness prevention and relief statistics are publicly available at [www.statswales.gov.wales](http://www.statswales.gov.wales)

<sup>29</sup> Homelessness prevention and relief statistics are publicly available at [www.statswales.gov.wales](http://www.statswales.gov.wales)

<sup>30</sup> Shelter Cymru, Reasonable steps: experiences of homelessness services under the Housing (Wales) Act 2014 [2016], p5 available at <https://www.sheltercymru.org.uk/wp-content/uploads/2015/02/Reasonable-Steps.pdf> accessed 2 February 2020

<sup>31</sup> Ibid, p6

conducted a review of homelessness services under the Act.<sup>32</sup> The resulting publication suggests ‘systemic maladministration’<sup>33</sup> in a number of areas of the legislation and statutory guidance, including missed time limits, failures to take account of relevant information and, once again, the provision of overly generic and ‘untailed’ support. Though critical of homelessness services in general, unlike the earlier study, the Ombudsman report does not specifically investigate or address the practical application of reasonable steps.

Taken together, the praise and criticisms present a conflicted picture. It could be the case that the use of the word ‘reasonable’ in itself facilitates a large degree of variability in service levels. The term is used within the legislation to compel an amount of assistance to all applicants without stifling the creativity of experienced housing officers, allowing for flexibility within service delivery to account for the wide variance in individual circumstances faced by applicants. The dictionary definition of ‘reasonable’ includes ‘using good judgment,’ and ‘fair and practical,’ but also ‘neither too large nor too small,’<sup>34</sup> and there are well established arguments that legislative language which is overly vague or discretionary threatens the certainty which the law should provide.<sup>35</sup> In keeping with these arguments, and specifically for reasonable steps, concerns were raised during a comprehensive consultation stage that the proposed provisions may create uncertainty for Local Authorities and service users.<sup>36</sup> When asked to comment on the draft Housing (Wales) Bill, Shelter Cymru and the Law Society felt that the term reasonable steps was ‘overly vague,’ and that the wording may raise difficulties for claimants seeking to challenge and uphold their legal rights.<sup>37</sup> The Committee recommended within the report, in agreement with responses from the Law Society, Shelter Cymru, and Conwy County Borough Council, that a ‘clear picture’ of what reasonable steps

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<sup>32</sup> Public Services Ombudsman for Wales, Homelessness Reviewed: an open door to positive change [2021] available at <https://www.ombudsman.wales/wp-content/uploads/2021/10/Homelessness-Reviewed-an-open-door-to-positive-change.pdf> accessed 16 July 2022

<sup>33</sup> Ibid, p15

<sup>34</sup> Cambridge Dictionary available at <https://dictionary.cambridge.org/dictionary/english/reasonable>

<sup>35</sup> Tom Bingham, The Rule of Law (2010), Penguin, ch4; Albert Venn Dicey and Emlyn Capel Stewart Wade, Introduction to the Study of the Law of the Constitution (1964) London, Macmillan

<sup>36</sup> National Assembly for Wales, Communities, Equality and Local Government Committee, Housing (Wales) Bill, Stage 1 Committee Report, March 2014

<sup>37</sup> Ibid, p48

should mean in practice would be critical to the success of the policy.<sup>38</sup> Concerned with uncertainty and the possibility of inconsistent application of reasonable steps, the committee sought clarification from Carl Sergeant AM, the then Minister for Housing and Regeneration:

*“We asked the Minister what the term ‘help to secure’ (reasonable steps) would mean in practice, and how he would ensure its consistent interpretation across local housing authorities in Wales. Responding to this, he explained that authorities would be expected to work with applicants ‘to identify why [they] are at risk of homelessness and how these risks can be addressed. They will also need to work with the applicant to identify options for resolving their housing problem and do everything they reasonably can to help them retain or find accommodation.’”<sup>39</sup>*

This response remains unhelpful, as the uncertainty inherent within ‘reasonableness’ remains. Aside from the ambiguity of how reasonable steps should be applied in practice, it is also necessary to directly address concerns raised within the aforementioned policy reviews. Systemic maladministration, over-reliance on the private rental sector, and generic or untailored support are in direct contrast to the policy goals so widely acclaimed. If these failings are truly occurring in practice, and as reasonable steps is a challengeable legal right, we might expect to see an accompanying body of case law developing alongside the policy implementation. It may be presumed that reasonable steps, being incorrectly implemented, should have set into motion a series of legal challenges and adaptations in homelessness assistance procedures, which at once refine the ‘legal’ meaning of reasonable steps, and clarify the precise nature of the obligation for Local Authorities and the rights of applicants. But in practice this legal right to challenge is not being used. Direct challenges made under the whole legislative framework are incredibly rare, and there has been no litigation on reasonable steps since inception in April 2015.

Despite being widely praised and held to be innovative, reasonable steps in the Housing (Wales) Act 2014 has received very little academic attention. This thesis, as the first empirical investigation into reasonable steps in this context, makes an important contribution to the

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<sup>38</sup> National Assembly for Wales (n36), p49

<sup>39</sup> Ibid

understanding of the implementation of the legislation. The thesis not only investigates the interpretation and application of reasonable steps at the point of service delivery, but also considers the term from a legal perspective. This is a vital contribution, as the innovation associated with reasonable steps arises from the decision to enshrine the right within legislation.

### 1.3 Research questions

This thesis examines the interpretation and application of reasonable steps both in law and at the point of implementation. In considering these elements, there is focus on the intentions behind reasonable steps, and the extent to which those intentions are being realised in practice. The research provides an empirical account of the original intention of reasonable steps and how that intention is realised at the point of application, as well as addresses gaps in knowledge around the 'legal' definition of the legislation given that the provisions are yet to be subject to a legal challenge. With no case law on reasonable steps to date, findings afford a degree of insight into how the courts would approach the provisions in the event of litigation arising. As law and policy needed to be considered together, and a mixed methods approach would be used, I sought to answer the following three research questions: -

1. *What was the policy intent behind the reasonable steps legislation?*
2. *With reference to the policy intent, how is reasonable steps interpreted and applied in practice by local authorities and the courts?*
3. *In the front-line implementation of reasonable steps, what impediments to challenge exist to potentially contribute to the absence of case law?*

A full explanation and justification of these research questions is provided here. Each research question is addressed separately, and in turn.

1. *What was the policy intent behind the reasonable steps legislation?*

Before investigating the practical implementation of reasonable steps, this first research question concerns unearthing and clarifying the policy goals behind the legislation. As discussed above, the provisions have received no academic attention, and this element of the Housing



(Wales) Act 2014 was seen as a cornerstone of the then new legislation. The phrase reasonable steps is the keystone phrase in the new prevention policy, as well as the foundation of the discretion inherent in front line implementation. This question seeks to outline, as accurately as possible, what the phrase was intended to mean, what policymakers sought to achieve, and why they chose legislation to drive the relevant policy goals. Previous studies of implementation have provided rich insight into such elements by examining early stages of the policy process,<sup>40</sup> and scholars have argued that, in policy backed by legislation, enforcement of the desired objectives is a key factor in achieving policy aims.<sup>41</sup> In a specific homelessness context, research examining front-line decision-making has engaged in policy analysis as a precursory step before fieldwork.<sup>42</sup> Given the importance of the policy goals behind reasonable steps, the lack of academic attention to date, and the need for a comparator against implementation, unearthing these policy objective is a crucial first step in this research.

2. *With reference to the policy intent, how is reasonable steps interpreted and applied in practice by local authorities and the courts?*

This question concerns the interpretation and implementation of reasonable steps at the front line, and in the courts. The absence of an empirical account of reasonable steps, and the fact that there is no available case law in this context, leaves uncertainty for both applicants and local authorities on the precise nature of reasonable steps as a right and a duty. Previous

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<sup>40</sup> John W Kingdon, *Agendas, alternatives and public policies, updated edition*, Pearson 2010; Eric Macnaughton, Geoffrey Nelson, and Paula Goering, 'Bringing politics and evidence together: policy entrepreneurship and the conception of the At Home/Chez Soi Housing First Initiative for addressing homelessness and mental illness in Canada' (2013) *Social Science & Medicine* 82 100; Robin Ray, 'Analysis of pregnancy anti-discrimination policy in Kentucky: Application of Kingdon's multiple streams framework' (2020) *Policy, Politics, & Nursing Practice* 21 4 244

<sup>41</sup> Janet M Lum, 'The federal Employment Equity Act: goals vs. implementation' (1995) *Canadian Public Administration* 38 1 45; Kenneth J Meier and Deborah R McFarlane, 'Statutory coherence and policy implementation: The case of family planning' (1995) *Journal of Public Policy* 15 3 281; Carol Agocs, 'Canada's employment equity legislation and policy, 1987-2000: The gap between policy and practice' (2002) *International Journal of Manpower* 23 3 256

<sup>42</sup> Ian Loveland, *Housing homeless persons: administrative law and the administrative process* Clarendon Press 1995

research has consistently demonstrated the impact of front-line factors on decision-making,<sup>43</sup> showing how these elements can significantly affect policy implementation. The ‘legal right’ to reasonable steps was advanced by the Welsh Government as an innovative driver for a shift towards a prevention policy. Where legislation underpins policy goals in a homelessness context, research has shown how discretionary legislative terms, coupled with front-line factors, can produce undesirable consequences for applicants.<sup>44</sup> These studies frequently complement their qualitative analysis with a legal overview of the legislation under investigation. Other scholars have argued that statutory construction and legal enforcement can have effects on policy success.<sup>45</sup>

3. *In the front-line implementation of reasonable steps, what impediments to challenge exist to potentially contribute to the absence of case law?*

The discussion above which outlines the need to answer research questions one and two may be consolidated here in relation to the third. Reasonable steps was advanced by the Welsh Government as an innovative legal right, intended to drive a policy shift. The studies cited above have shown that firstly, front-line influences can significantly affect implementation, secondly, that this has been observed in a homelessness context, and thirdly, that legal

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<sup>43</sup> Bryan Glastonbury, *Homeless near a thousand homes: A study of families without homes in South Wales and the West of England* Allen and Unwin 1971; Michael Lipsky, *Street-level bureaucracy: Dilemmas of the individual in public service*, Russell Sage Foundation, 2010; Katherine Levine Einstein and David M Glick, ‘Does race affect access to government services? An experiment exploring street-level bureaucrats and access to public housing’ (2017) *American Journal of Political Science* 61 1 100

<sup>44</sup> Ian Loveland, *Housing homeless persons: administrative law and the administrative process* Clarendon Press 1995; David Cowan and Simon Halliday, *The appeal of internal review: law, administrative justice, and the (non-) emergence of disputes*, Hart 2003; Simon Halliday, *Judicial review and compliance with administrative law* Hart 2004; Joanne Bretherton, Caroline Hunter and Sarah Johnsen, ‘You can judge them on how they look...: Homelessness Officers, Medical Evidence and Decision-Making in England’ (2013) *European Journal of Homelessness* 7 1 69

<sup>45</sup> Helen Ingram and Anne Schneider, ‘Improving implementation through framing smarter statutes’ (1990) *Journal of public policy* 10 1 67; Kenneth J Meier and Deborah R McFarlane, ‘Statutory coherence and policy implementation: The case of family planning’ (1995) *Journal of Public Policy* 15 3 281; Carol Agocs, ‘Canada’s employment equity legislation and policy, 1987-2000: The gap between policy and practice’ (2002) *International Journal of Manpower* 23 3 256

enforcement has been argued to be central to policy success. These factors, along with the lack of legal challenges to reasonable steps, raises questions as to whether elements of front-line implementation may be inhibiting the chances of legal challenge, and thus serving as a barrier for applicants.

## 1.4 Thesis structure

To understand the interpretation and implementation of reasonable steps, it was vital to first understand the policy intention behind the use of the term. A policy reunion thus provides the foundation for this thesis, which provides a detailed insight into the policy intentions and how the provisions were intended to work in practice. Results from this analysis were taken forward and used as a comparator against findings from fieldwork undertaken to investigate the actual front-line implementation of reasonable steps. In the absence of any specific legal challenges, a doctrinal analysis of existing case law on reasonableness and reasonable steps arrived at a 'legal' definition of reasonable steps in this context, and thus allowing this definition to also be compared and contrasted with policy intentions. The structure of the thesis is as follows: -

Chapter 2 begins with an overview of the literature relating to policy implementation, with a particular focus on the arguments regarding policy direction. Some theorists favour a view that policy is 'driven' from the 'top-down,' where others believe it is more guided from the 'bottom-up.' These perspectives are considered, and it is argued that elements of both proved beneficial considerations in the context of this thesis. Subsequent sections discuss Lipsky's Street Level Bureaucracy theory as a suitable framework to help explain empirical findings arising from front-line research. Chapter 3 contains an overview of methods used in the investigation. A combination of doctrinal and qualitative methods was deemed the most suitable approach to address the research questions. The chapter contains a full discussion of the benefits and limitations of the approach, explains and justifies the chosen methods, and provides details on participant selection, data collection, and analysis. The chapter concludes with a discussion on ethical considerations and the potential limitations of the chosen methodology.

Chapter 4 responds to the first research question, and presents the empirical findings gathered from a 'policy reunion' on reasonable steps. This session was used to provide a first-hand account from policymakers involved in formulating the legislation, and unearths key aims they sought to address with the provisions. Participants were also asked to clarify how they envisioned reasonable steps working in practice. Elements explored here include where the phrase 'reasonable steps' originated, why legislation was specifically chosen as a means to drive the chosen policy goals, and what exactly it sought to achieve. The chapter presents a clear picture of the intentions behind reasonable steps which served as a comparator within subsequent chapters which explore the practical application both at the front line and within law. Findings show that policymakers clearly intended to place a legal duty upon Local Authorities with the intention that this could be challenged by applicants. The legislation was to ensure resources were directed towards prevention and early intervention in line with policy objectives.

Chapter 5 addresses the 'front-line' element of the second research question, as well as the third research question. In relation to the second research question, the chapter argues that the duty to take reasonable steps may have shifted to applicants themselves. Findings from interviews with Local Authority staff and management display a variability in the interpretation of reasonable steps, and suggest that elements of operational delivery place an especially strong emphasis on requiring the applicant to demonstrate the 'steps' they take to cooperate in the process. Lipsky's Street Level Bureaucracy theory is drawn upon to help explain and understand the empirical findings. Regarding research question three, a number of factors present at the point of implementation are presented as potential barriers to the legal challenge of reasonable steps. Evidence presented indicates an aversion to litigation on the part of local authorities, the prevalence of 'informal' dispute resolution, and a failure to adequately inform applicants of their legal rights.

Turning to the 'legal' element of the second research question, and in the absence of any case law on reasonable steps, Chapter 6 presents a doctrinal analysis of existing case law to clarify how the legislation would be viewed by the courts in the event that a challenge did take place.

It is argued that a legal challenge may be the most expedient way to address the disparity in implementation outlined within chapter 5, and that if applicants did overcome the contextual barriers to challenge presented at the close of that chapter, the choice of the legislative phrase ‘reasonable steps’ itself includes its own limitations to judicial scrutiny. The chapter focusses on the threshold for unreasonable behaviour in public law, concluding that the judiciary will only intervene in the most extreme circumstances. The findings show that this high threshold for unreasonableness results in a low level of scrutiny employed by the courts in normal circumstances, but that this level of scrutiny is adaptable depending on context. The chapter concludes with a number of practical suggestions which could allow the courts to more closely scrutinise the decision-making procedure of a reasonable steps case, which may prove beneficial to claimants seeking a review of the steps taken by Local Authorities relating to their case.

The thesis concludes in Chapter 7 by directly addressing the research questions, consolidating findings, and detailing the original contributions made by the research. The chapter concludes with a discussion on the limitations of the research and chosen methods, along with recommendations for further study.

In summary, ‘reasonable steps’ is a vague term, and despite some success in raising prevention rates and positive observations of the principles upon which the provisions are built, criticisms of the implementation of the legislation in practice have added to concerns surrounding disparity in its interpretation. Homelessness prevention is a cornerstone of the Housing (Wales) Act 2014, and clarity is urgently needed regarding how reasonable steps is being interpreted and applied in practice, and to what extent implementation matches the intentions behind the legislation. Homelessness remains high on the political agenda, and prevention is likely to become more embedded as a policy goal. The case for clarity on reasonable steps is further strengthened as the legislative process detailed above has been reproduced verbatim in England within the Homelessness Reduction Act 2017.<sup>46</sup> There are also urgent questions

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<sup>46</sup> Homelessness Reduction Act 2017, Ss 4(2), 5(2)

remaining around the status of reasonable steps as a practical legal right, as despite consistent claims of maladministration and poor implementation, there have been no legal challenges. The absence of judicial scrutiny of the 'legal' definition of reasonable sustains the uncertainty in the duties and standards for implementation, and results in a lack of clarity for Local Authorities on their legal responsibilities. For applicants themselves, uncertainty remains regarding the precise nature of their legal rights.

In addition to providing the first empirical account of reasonable steps in practice, this thesis makes a number of valuable original contributions. Combining qualitative and doctrinal methods allowed for a more comprehensive investigation of policy driven by legislation, making a methodological contribution to research seeking similar aims in the fields of policy implementation and socio-legal research. The use of a policy reunion, an emerging method in policy analysis, provides a unique first-hand account of the policy process of reasonable steps resulting in insight not obtainable from secondary data. Acquiring this data is time sensitive, as policymakers inevitably move on to other roles, or may struggle to recollect key information over time. The transcript and reported findings from this session, along with data collected from Local Authority staff, will be useful for informing a review of the legislation, or future policy decisions in a similar context. The research contributes to established bodies of literature on policy implementation, street level bureaucracy theory, and access to justice. In the absence of case law, the doctrinal analysis has clarified how the courts would define reasonable steps and scrutinise a review in practice. Findings from the thesis have resulted in a number of practical recommendations which, if realised, would likely bring the implementation of reasonable steps more in line with the aims of policymakers.

The next chapter consists of a literature review of publications and research within which this thesis is situated. The chapter opens with an outline of arguments concerning policy implementation and policy direction, arguing that the consideration of both is most suitable to this investigation. Subsequent sections include an analysis of Lipsky's street level bureaucracy framework, and its suitability as a heuristic tool to help explain empirical findings relating to the

front-line implementation of reasonable steps. The chapter concludes with a discussion the place of law in driving policy, and the importance of monitoring and enforcing such legislation.

## Chapter 2: Literature Review

*“It is now generally accepted that the policy process is a messy affair, and to view central government as the primary determinant of policy outcomes from inception to implementation is flawed. Most scholars now agree that in respect of social policy issues, effective research must evaluate the aggregate influences manifest at the frontline.”<sup>1</sup>*

In researching reasonable steps, its’ intentions, and practical implementation, this thesis draws on literature within the field of policy implementation. As the thesis is focused on two distinct features of reasonable steps (namely the intentions behind it and its’ practical implementation), existing policy implementation frameworks are used as tools to help situate and explain empirical findings. Part 1 of this chapter offers a brief overview of the literature concerning the complex policy implementation landscape, which is necessary to situate the subsequent discussion of the two frameworks drawn upon within the thesis. A review of policy implementation literature finds the field split into two major schools.<sup>2</sup> Some scholars perceive policy being implemented from the ‘top-down,’ and thus view the policy creators themselves as central, focussing attention on researching factors at that level. Second, and less concerned with central factors, ‘bottom-up’ theorists advocate for decentring the policy goal to examine interactions between actors at the point of implementation. Both viewpoints are considered within this thesis.

First, and presented in part 2 of this chapter, John Kingdon’s Multiple Streams Model<sup>3</sup> (MSM) is discussed as a suitable lens through which to view findings relating to the first research objective of unearthing the policy intentions behind reasonable steps. Unlike Kingdon, many policy implementation frameworks take the statutory language itself as the starting point and neglect the ‘pre-legislation’ phase of the policy process.<sup>4</sup> By contrast, the MSM accounts for this

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<sup>1</sup> Sarah Alden, ‘Discretion on the frontline: The street level bureaucrat in English statutory homelessness services (2015) *Social Policy and Society* 14 1 63, p64 (emphasis added)

<sup>2</sup> Richard E Matland, ‘Synthesizing the implementation literature: The ambiguity-conflict model of policy implementation (1995) *Journal of public administration research and theory* 5 2 145

<sup>3</sup> John W Kingdon, *Agendas, alternatives and public policies, updated edition*, Pearson 2010

<sup>4</sup> Richard E Matland (n 2), p147



phase, labelling it 'alternative specification,' where proposed policy solutions are researched, considered, and debated. The individuals involved in this process are identified as 'policy entrepreneurs,' and may include subject specific experts, academics, researchers, and civil servants. Second, and presented in part 3 of this chapter, Michael Lipsky's Street-Level Bureaucracy Theory<sup>5</sup> is a useful heuristic aid when seeking to explain findings relating to the second research objective; the practical implementation of reasonable steps. An analysis of Lipsky's theory is followed by a presentation of literature which has demonstrated changes in front-line practice in response to a number of pressures, which have ultimately amounted to policy being driven from the 'bottom-up.' Unlike Kingdon's multiple streams 'model,' street-level bureaucracy is a 'theory.' Though the terms are often used interchangeably, a model simplifies an entity to allow description, whereas a theory 'tells us what to look for and how to explain what we find.'<sup>6</sup> To address the first research question, the MSM is used to better understand and describe the pre-legislation phase of the policy development process. In addressing the second research objective, Lipsky's theoretical framework is used to explain findings relating to front-line implementation of reasonable steps. Part 3 concludes with a discussion of studies conducted in the field of homelessness decision-making, demonstrating the value in considering front-line influences in the implementation of law.

This chapter closes with part 4, which demonstrates the effect law can have on the policy implementation process. Research has shown that the way statutes are constructed can undermine policy goals, as some have been found to lack clear objectives or sufficient flexibility. Some legislation has been described as 'toothless,' and lacking the provisions for adequate enforcement. Furthermore, where enforcement is provided in a statute, failure to use these provisions has been argued to significantly reduce the chance of policy objectives being realised in practice. The effects legislation can have on achieving policy goals thus add importance to the doctrinal analysis of reasonable steps in chapter 6 of the thesis.

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<sup>5</sup> Michael Lipsky, *Street-level bureaucracy: Dilemmas of the individual in public service*, Russell Sage Foundation, 2010

<sup>6</sup> Paul Cairney, *Understanding public policy: theories and issues* Bloomsbury Publishing 2019, p24-25

## 2.1 Policy implementation – An overview

To situate the key frameworks used within the thesis, it is first necessary to present an overview of the field of policy implementation. The research field grew to prominence with rising concern about the effectiveness of public policy.<sup>7</sup> Blankenburg (1985)<sup>8</sup> summarises the overarching goal upon which policy scholars are typically focussed: -

*“policymakers have to anticipate problems of implementation, and they look to political analyses in order to be able to foresee likely shifts and problems in this process. This is how the need for “implementation research” has been conceived: a case of scientific development stimulated by the interaction of scientists with government bureaucrats. The subject of “implementation” has been introduced by policymakers confronted with the pragmatic problem of how to make their intentions effective. “Implementation” now serves as a catchword attracting contributions from a number of academic fields of specialization: policy process analysis, sociology of organizations, impact measurement, policy evaluation, and others.”<sup>9</sup>*

A review of policy implementation literature finds the field split into two major schools.<sup>10</sup> First, the ‘top-down’ school perceives the policy creators themselves as central, focussing attention on researching factors at that level. Top-down theorists start at a policy decision, and thus ‘centrally located actors are seen as most relevant to producing the desired [policy] effects.’<sup>11</sup> The view that policy implementation is driven in this way is characteristic of early research in the field,<sup>12</sup> which focussed on explaining policy failure from the perspective of central

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<sup>7</sup> Per Nilsen, Christian Ståhl, Kerstin Roback, and Paul Cairney, ‘Never the twain shall meet? A comparison of implementation science and policy implementation research’ (2013) *Implementation Science* 8 1 1

<sup>8</sup> Erhard Blankenburg, ‘The waning of legality in the concept of policy implementation’ (1985) *Law & Policy* 7 4 481

<sup>9</sup> *Ibid*, p482

<sup>10</sup> Richard E Matland (n 2)

<sup>11</sup> Richard E Matland (n 2), p146

<sup>12</sup> Jerome Murphy, ‘Title I of ESEA: The politics of implementing federal education reform’ (1971) *Harvard Educational Review* 41 1 35; Jill Schofield, ‘Time for a revival? Public policy implementation: a review of the literature and an agenda for future research’ (2001) *International Journal of Management Reviews* 3 3 245

government or policy creators.<sup>13</sup> Mazmanian and Sabatier (1980)<sup>14</sup> present an early example of a comprehensive top down framework for analysing policy implementation. Drawing on earlier attempts by scholars of the top down school, the authors published a framework which allowed examination of a policy decision (usually in the form of legislation) ordered by central government which sought to change behaviours of 'field-level bureaucrats.'<sup>15</sup> Their framework was influential among policy scholars at that time, as it not only allowed for policy intent to be analysed against outcomes, but also offered some practical guidance for policymakers when considering implementation strategies.<sup>16</sup> The advice included constructing legislation with clear objectives, and structuring the implementation process in such a way that 'gives implementing agencies sufficient jurisdictions over target groups.'<sup>17</sup>

As the field advanced, scholars naturally turned their attention away from the specifics of legislation and central government actors, and more towards an examination of policy 'from the target population and the service deliverers'<sup>18</sup> viewpoint. Scholars adopting this bottom-up perspective thus decentred the policy or legislation itself as the object of analysis and focussed more on interactions within the implementing organisations.<sup>19</sup> A typical example of this shift in perspective may be found in Hull and Hjern (1982)<sup>20</sup> and their analysis of performance assistance structures made available to small businesses. Policy goals and legislation are not the object of investigation, rather, the authors conducted semi-structured interviews with actors at a number of firms, 'snowballing' analysis beyond those companies and into their wider support networks. This enabled a 'locally focussed' analysis of the efficacy of assistance structures and

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<sup>13</sup> Per Nilsen and others (n 7), p2

<sup>14</sup> Paul Sabatier and Daniel Mazmanian, 'The implementation of public policy: A framework of analysis' (1980) *Policy studies journal* 8 4 538

<sup>15</sup> *Ibid*, p539

<sup>16</sup> Richard E Matland (n 2)

<sup>17</sup> Paul Sabatier and Daniel Mazmanian (n 14), p554

<sup>18</sup> Richard E Matland (n 2), p148

<sup>19</sup> Paul A Sabatier, 'Top-down and bottom-up approaches to implementation research: a critical analysis and suggested synthesis' (1986) *Journal of public policy* 6 1 21

<sup>20</sup> Chris Hull and Benny Hjern, 'Helping small firms grow: an implementation analysis of small firm assistance structures' (1982) *European Journal of Political Research* 10 2 187

explained differences between them in terms of success rates.<sup>21</sup> Unlike typical top-down studies (which tend to focus on one unit of analysis) the authors replicated their research at numerous sites to facilitate comparison. This adds confidence to generalisability of data and enables a degree of triangulation.

To note a few similarities, scholars from both schools favour qualitative methods (though some top-down research includes a quantitative element), and both recognise the highly complex and variable nature of policy implementation. Each school, however, criticised the other for not considering the opposing perspective. This ‘messy affair’ of policy implementation led to a scholarly reconciliation of the two schools in the form of synthesised models, which sought to consider the aggregate influences in the inception and development of social policy.<sup>22</sup> Consolidated frameworks are complex, and combine top-down and bottom-up aspects to view policy implementation as a continuous and non-linear process. For example, Goggin *et al* (1990)<sup>23</sup> advance a ‘communications model’ which integrates many elements of the frameworks discussed above but extends them to consider the dynamic interaction between central and local government. Their model includes consideration of ‘feedback loops’ which they argue is crucial to facilitating longitudinal study and tracking policy developments over time. In another highly popular example,<sup>24</sup> Matland’s conflict-ambiguity framework<sup>25</sup> divides implementation between the national, institutional, and local levels, and explains the process on a sliding axis. Analysis at multiple levels of policy implementation, and a focus on the theoretical significance of conflict and ambiguity and their variability, is argued to be an appropriate reconciliation of top-down and bottom-up perspectives.<sup>26</sup>

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<sup>21</sup> Ibid

<sup>22</sup> Sarah Alden (n 1), p64

<sup>23</sup> Malcolm L Goggin, Ann Bowman, James P Lester, and Laurence O’Toole, *Implementation theory and practice*, Scott Foresman 1990

<sup>24</sup> Bob Hudson, David Hunter, and Stephen Peckham, ‘Policy failure and the policy-implementation gap: can policy support programs help?’ (2019) *Policy design and practice* 2 1 1

<sup>25</sup> Richard E Matland (n 2)

<sup>26</sup> Ibid, p145

To add to the complexity, there is an established body of literature<sup>27</sup> which tracks the development of the use of metaphor in these theoretical frameworks, such as policy ‘stages,’ ‘cycles’ (or a cycling of stages), and ‘streams’ (independent elements in various states of coupling). Particularly characteristic of early top-down implementation research, ‘stage’ frameworks, which view policymaking as a linear and sequential process, demonstrate an extremely wide variance in the proposed number of stages and their focus. In an early example, Lasswell (1956)<sup>28</sup> advocates a seven-stage framework (intelligence, promotion, prescription, invocation, application, termination, appraisal), whereas Brewer (1974),<sup>29</sup> explicitly draws on Lasswell for his framework,<sup>30</sup> but opts for just six stages (initiation, estimation, selection, implementation, evaluation, termination). From the bottom-up school, Rose (1973)<sup>31</sup> gives more explanatory labels to his stages, such as ‘the advancement of demands’<sup>32</sup> and ‘the production of outputs,’<sup>33</sup> but extends their number to twelve. More recently, Dror’s (2017)<sup>34</sup> hybrid model first distinguishes three stages, namely metapolicy-making, policymaking, and post policymaking, and then precedes to outline between five and seven sub-stages within each, leaving a total of eighteen. Aside from the complexity of some of these models, critics of

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<sup>27</sup> Garry Brewer, ‘The policy sciences emerge: To nurture and structure a discipline’ (1974) *Policy Sciences* 239; Peter DeLeon, ‘The stages approach to the policy process: What has it done? Where is it going’ (1999) *Theories of the policy process* 1 19 19; Paul Burton, ‘Modernising the policy process: making policy research more significant?’ (2006) *Policy studies* 27 3 173; Christopher Weible, Tanya Heikkila, Peter DeLeon and Paul A Sabatier, ‘Understanding and influencing the policy process’ (2012) *Policy sciences* 45 1 1; Nikolaos Zahariadis, ‘The multiple streams framework: Structure, limitations, prospects’ in Christopher Weible and Paul Sabatier (eds) *Theories of the policy process*, Routledge 2019, p65

<sup>28</sup> Harold Dwight Lasswell, *The decision process: Seven categories of functional analysis*. Bureau of Governmental Research, University of Maryland, 1956

<sup>29</sup> Garry Brewer, ‘The policy sciences emerge: To nurture and structure a discipline’ (1974) *Policy Sciences* 5 239

<sup>30</sup> *Ibid*, p239

<sup>31</sup> Richard Rose, ‘Comparing public policy: an overview’ (1973) *European journal of political research* 1 1 67

<sup>32</sup> *Ibid*, p77

<sup>33</sup> Richard Rose (n 31), p80

<sup>34</sup> Yehezkel Dror, *Public Policymaking: Re-examined* Routledge 2017

the 'policy stages heuristic'<sup>35</sup> more generally have labelled it inaccurate and unrealistic.<sup>36</sup> Policy stage frameworks all share the fundamental presupposition that policymaking has a clear beginning and end. To address this issue, policy cycle models emerged to better represent the policy process as one in perpetuity, and like Matland, have used a cyclical metaphor to take account of policy 'feedback loops.'<sup>37</sup> Others, such as 'Punctuated Equilibrium Theory' seek to further extend the stages model to account for the various rates at which change occurs by accounting for sudden, dramatic, and long-lasting policy changes.<sup>38</sup> These too have been criticised for being unrealistic<sup>39</sup> and idealistic.<sup>40</sup>

The above discussion demonstrates the overwhelming amount of literature concerning the examination of policy implementation, and the highly developed nature of contemporary synthesised models make them inherently complex and demanding to apply.<sup>41</sup> The remainder of this chapter outlines the suitability of the frameworks chosen for use as heuristic tools within this thesis to help explain and situate empirical findings. As Zahariadis (2013)<sup>42</sup> argues, a chosen framework should make their assumptions explicit, identify important variables, and be a suitable fit to the object under investigation. In the context of this thesis, the complexities of the wider policy arena, and the interactions between its actors, institutions, and collaborative partnerships are not a focus of the research objectives. For example, it is beyond the scope of

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<sup>35</sup> Guy Peters and Jon Pierre (eds), *Handbook of public policy* Sage Publications 2006, p17

<sup>36</sup> Charles Edward Lindblom, *The policy-making process* Prentice-Hall 1968; Robert Nakamura, 'The textbook policy process and implementation research' (1987) *Review of Policy Research* 7 1 142; Paul A Sabatier and Hank C Jenkins-Smith (eds), *Policy Change and Learning: An Advocacy Coalition Approach* Westview Press 1993; Edward Woodhouse and Charles E Lindblom, *The policy-making process* Prentice-Hall 1993

<sup>37</sup> Paul Pierson, 'Policy feedbacks and political change: Contrasting Reagan and Thatcher's pension-reform initiatives' (1992) *Studies in American Political Development* 6 2 359; Paul Pierson, 'When effect becomes cause: Policy feedback and political change' (1993) *World politics* 45 4 595

<sup>38</sup> James Gustave Speth, *Punctuated equilibrium and the dynamics of US environmental policy* Yale University Press 2008

<sup>39</sup> Hal Colebatch (ed), *Beyond the policy cycle: the policy process in Australia* Routledge 2020

<sup>40</sup> Werner Jann and Kai Wegrich, *Theories of the policy cycle* (2007) *Handbook of public policy analysis: Theory, politics, and methods* 125 43

<sup>41</sup> Harald Saetren, 'Implementing the third generation research paradigm in policy implementation research: An empirical assessment' (2014) *Public Policy and Administration* 29 2 84

<sup>42</sup> Nikolaos Zahariadis, 'Building better theoretical frameworks of the European Union's policy process' (2013) *Journal of European Public Policy* 20 6 807, p808

the thesis to seek a full examination of the specific roles of this myriad of actors and institutions, nor is the research concerned with analysing policy cycles of reasonable steps and uncovering tensions between local and central government. The empirical findings presented within the thesis arose from very specific but important areas of the reasonable steps policy landscape, and the wider implementation literature described above was interrogated to select the most suitable frameworks to explain those findings. The first of these, Kingdon's Multiple Streams Model<sup>43</sup> (MSM), is discussed below, and subsequently used in chapter 4 when presenting findings from the policy reunion.

## 2.2 Kingdon's Multiple Streams Model

Kingdon's MSM uses the metaphor of converging 'streams' to represent the policy process. Rather than a linear or cyclical process, Kingdon views the development of policy as the merging of these different streams. First, the *problem* stream is in constant flow with difficulties which need to be addressed. This may include widespread societal problems, perceived worsening performance in any given policy area, or urgent and sudden disasters. Second, the *politics* stream consists of politicians and political parties, and includes the consideration of manifesto promises, media interviews and legislative proposals advanced in response to public mood. Third, the *policy* stream is the hidden part of the process, where potential policy solutions are researched, debated, and assessed by subject specific experts. Kingdon is most concerned with the timing of policy interventions and uses the analogy to represent the convergence (and possible disconnect) of the three streams, demonstrating how problems may be met by political motivation to solve them at a given moment in time. In short, a policy 'window of opportunity' opens up when the three streams align. Kingdon's MSM is an example of a hybrid model, accounting for the possible consideration of central factors as well as the interactions between implementing agencies. The model contains a number of innovations<sup>44</sup> which make it particularly suitable for explaining the origins of reasonable steps as a legislative

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<sup>43</sup> John W Kingdon (n 3)

<sup>44</sup> Steven J Balla, Martin Lodge, and Edward C Page (eds), *The Oxford handbook of classics in public policy and administration* Oxford University Press 2015

measure to drive policy. The most notable, perhaps, is the focus on those elements which precede the legislation itself. Matland (1995) notes that, unlike Kingdon, many frameworks 'take the statutory language as their starting point [and fail] to consider the significance of actions taken earlier in the policymaking process.'<sup>45</sup>

As a second innovation, Kingdon specifies the early stage described above as 'alternative specification,' where proposed policy solutions are researched, considered, and debated. The individuals involved in this process are labelled 'policy entrepreneurs,' which may include subject specific experts, academics, researchers, and civil servants. The first research question requires an investigation and unearthing of the intentions behind reasonable steps, including considerations such as what the policy intent was, why legislation was chosen to drive it, what it sought to achieve, and how it was intended to be applied in practice. Some clarification of these elements is central to providing a comparator on which to base the analysis of the implementation of the policy and the law that seeks to drive it. In short, Kingdon's model allows for the consideration of the factors which preceded the legislation itself. Some recent studies applying the MSM have demonstrated the importance of this 'hidden' process and its' impact on policy implementation.

For example, O'Sullivan and Lussier-Duynstee (2006)<sup>46</sup> advanced a health-based argument to call for urgent action on addressing youth homelessness in America. The authors proposed drawing on the MSM to 'reframe' youth homelessness in the policy arena, and called for community nurses and health professionals to form a coalition of policy entrepreneurs to help redefine and reframe the problem of adolescent homelessness for policymakers.<sup>47</sup> More recently, though again in the area of public health, Culp-Roche and Adegboyega (2016)<sup>48</sup> use the MSM to analyse the implementation of legislation seeking to allow unlicensed school staff

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<sup>45</sup> Richard E Matland (n 2), p147

<sup>46</sup> Joanne O'Sullivan and Patricia Lussier-Duynstee, 'Adolescent homelessness, nursing, and public health policy' (2006) *Policy, Politics, & Nursing Practice* 7 1 73

<sup>47</sup> <sup>47</sup> Ibid, p76

<sup>48</sup> Amanda Culp-Roche and Adebola Adegboyega, 'Analysis of Kentucky's law protecting the rights of schoolchildren with type 1 diabetes mellitus: application of Kingdon's policy stream model' (2016) *Policy, Politics, & Nursing Practice* 17 1 5



to assist students with diabetes care. Their analysis of the policy stream and alternative specification process that preceded the legislation demonstrates that although the proposed Bill had support from politically powerful groups, it was resisted by associations representing the 'front-line' actors such as school nurses and teachers.<sup>49</sup> The Bill was passed, but the insight gained from the pre-legislation phase highlights that the only alternative to the proposed legislation was deemed to be an increase in funding and provision of more nurses in education settings.<sup>50</sup>

In a recent example, and again in the US, Ray (2020)<sup>51</sup> applied the MSM to recent legislation seeking to strengthen support for pregnant women in the workplace. The new legislation placed a legal duty on employers to make 'reasonable accommodations' for pregnant workers. Their analysis of the policy stream in this case again highlighted the strong support for the policy objectives from organisations such as equal justice groups, Planned Parenthood, and religious associations,<sup>52</sup> and a comprehensive consultation was undertaken. In recognising the 'vital' need to clarify the term 'reasonable accommodations,' practical examples of the term were presented on the face of the legislation, which includes 'frequent or longer breaks, time off to recover from childbirth, appropriate seating, modified work schedule, and transfer to a less hazardous or less strenuous working position.'<sup>53</sup> The author hypothesises, however, that due to the legislation, 'employees may lose their jobs more frequently due to employers' fear of complaints or litigation for failure to provide reasonable accommodations.'<sup>54</sup> The use of the MSM highlighted the multiple policy alternatives available and debated in the pre-legislation phase, whilst uncovering some unintended consequences of the chosen policy goals.

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<sup>49</sup> Ibid, p9

<sup>50</sup> Amanda Culp-Roche and Adebola Adegboyega (n 48), p10

<sup>51</sup> Robin Ray, 'Analysis of pregnancy anti-discrimination policy in Kentucky: Application of Kingdon's multiple streams framework' (2020) *Policy, Politics, & Nursing Practice* 21 4 244

<sup>52</sup> Ibid, p248

<sup>53</sup> Robin Ray (n 51), p244

<sup>54</sup> Robin Ray (n 51), p250

Macnaughton *et al* (2013)<sup>55</sup> tracks the inception and motivation to implement a Housing First initiative in Canada to address homelessness before hosting the 2010 Vancouver Olympic games. The research noted entrepreneurship in the successful implementation of the policy, drawing particular attention to the problem being framed as one rooted in mental health, and subsequent 'team working' among policy entrepreneurs within the policy stream.<sup>56</sup> The author notes that these teams, as Kingdon suggests, are repositories of skills and information which each member can draw upon to reach consensus and 'articulate a more coherent approach for moving forward.'<sup>57</sup> Again, in a homelessness context, in his analysis of the implementation of Housing First in the US, Lucas (2018)<sup>58</sup> emphasises the importance of the evidence base arising from policy entrepreneurs. He argues that expert groups can represent a valuable source of heterogeneous resources and knowledge for policymakers.<sup>59</sup> Kingdon's model allowed these authors to highlight the importance of the role of policy entrepreneurs in the process, as well as underline the significance of shared expert knowledge within the development of policy implementation.

In summary, the literature demonstrates the important contributions made by expert policy advisors in Kingdon's policy stream. Identified as the more 'hidden' area of policy implementation, this is where alternatives are researched, debated, and decided. It is necessary to consider this stage of the policy process when examining the policy intent behind reasonable steps when answering the first research question. Unlike many other frameworks,<sup>60</sup> Kingdon's model accounts for this important and influential 'pre-legislation' phase of policy development and implementation. The next part of the chapter will address the street-level bureaucracy literature, as the second theory used in the thesis used to help explain empirical findings.

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<sup>55</sup> Eric Macnaughton, Geoffrey Nelson, and Paula Goering, 'Bringing politics and evidence together: policy entrepreneurship and the conception of the At Home/Chez Soi Housing First Initiative for addressing homelessness and mental illness in Canada' (2013) *Social Science & Medicine* 82 100

<sup>56</sup> *Ibid*, p105

<sup>57</sup> Eric Macnaughton and others (n 55), p105

<sup>58</sup> David S Lucas, 'Evidence-based policy as public entrepreneurship' (2018) *Public Management Review* 20 11 1602

<sup>59</sup> *Ibid*, p1608

<sup>60</sup> Jeremy Kendall, 'The mainstreaming of the third sector into public policy in England in the late 1990s: whys and wherefores' (2000) *Policy & politics* 28 4 541

## 2.3 Street-level Bureaucracy Theory

Michael Lipsky sought to shift attention from the drafting of broad public policies by central government and proposed examining the 'front line' of that policy delivery.<sup>61</sup> His revolutionary publication in 1980<sup>62</sup> characterised street-level bureaucracy theory, which contends that the various pressures experienced by front-line staff significantly influence how they exercise their discretion. Lipsky's work has acted as a springboard to a now 'classic scholarly theme in the study of public administration.'<sup>63</sup> Street-level bureaucracy theory has become a major influence within the political sciences,<sup>64</sup> and it is argued here that Lipsky's framework is suitable for use as a heuristic tool to help explain empirical findings relating to the front-line application of reasonable steps within this study. Housing Officers responsible for implementing reasonable steps are prime examples of street-level bureaucrats; using discretionary powers, on a case-by-case basis, to allocate public resources to assist homelessness applicants. The literature discussed at the close of this section demonstrates the many factors which can influence decision-making and thus, policy implementation, at the front line of service delivery.

### 2.3.1 Core arguments

In broad terms, street-level bureaucracies are defined as 'agencies whose workers interact with, and have wide discretion over, the dispensation of benefits or the allocation of public sanctions.'<sup>65</sup> Those workers are the street-level bureaucrats who, according to the theory, ultimately drive public policy. Lipsky contends that these 'front line' staff operate on the border between the state and the individual, with relative autonomy from managerial authority, and are inclined to use their discretionary powers to regulate their workload. Lipsky identifies

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<sup>61</sup> Michael Lipsky, 'Street-level bureaucracy and the analysis of urban reform' (1976) *Urban Affairs Quarterly* 6 4 391

<sup>62</sup> Michael Lipsky (n 5)

<sup>63</sup> Peter Hupe and Michael Hill, 'Street-Level bureaucracy and public accountability' (2007) *Public administration* 85 2 279, p280

<sup>64</sup> Robert Durant (ed), *The Oxford handbook of American bureaucracy* Oxford University Press 2010

<sup>65</sup> Michael Lipsky (n 5), pxi

'coping mechanisms' that these employees deploy to do this, which broadly entails developing patterns of practice routines and stereotyping. This compartmentalises their duties (and their clients) to limit demands on both their time, and departmental resources.<sup>66</sup> Lipsky's theory seeks to explain why these deviations in practice occur. In this respect, he addresses a key criticism directed at the bottom-up perspective; that they typically lack the ability to explain what influenced the process and why the identified deviation occurred.<sup>67</sup>

Street-level bureaucracy theory is centred around the hypothesis that the use of front-line discretion serves to drive policy from the 'bottom-up.' Although Lipsky was not the first to consider external pressures affecting the use of administrative discretion,<sup>68</sup> his publication, with its applicability to a wide range of administrative settings, led to a stream of research which had sought to 'decentre' government policy implementation in favour a focus on the use of discretion by front-line workers. As discussed in part 1 of this chapter, this ran counter to traditional notions of 'top-down' policy direction which worked on the assumption that; 'through laws and statutes, politicians are able to control bureaucrats by specifying the details of implementation, thus assuring consistent implementation.'<sup>69</sup> For popularising counter voices to this view, Lipsky has been labelled as the founding father of the bottom-up perspective.<sup>70</sup>

As discussed in Chapter 1, the reasonable steps provisions within the Housing (Wales) Act 2014 may be seen as a cornerstone of the Welsh Government's homelessness prevention policy. It is thus argued here that street-level bureaucracy, with its focus on policy direction and implementation, was suited to providing valuable clarity on identified deviations in implementation, and why they may occur in practice. Furthermore, Housing Officers applying

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<sup>66</sup> Michael Lipsky (n 5), p82

<sup>67</sup> Jill Schofield, 'Time for a revival? Public policy implementation: a review of the literature and an agenda for future research' (2001) *International Journal of Management Reviews* 3 3 245

<sup>68</sup> Kenneth Culp Davis, 'Discretionary justice' (1970) *Journal of Legal Education* 23 1 56-62; Chris Argyris, *Integrating the Individual and the Organization* Routledge 2017

<sup>69</sup> Edward Long and Aimee L Franklin, 'The paradox of implementing the government Performance and Results Act: top-down direction for bottom-up implementation' (2004) *Public Administration Review* 64 3 309, p309

<sup>70</sup> Michael Hill and Peter Hupe, *Implementing public policy: An introduction to the study of operational governance* Sage 2014

the provisions may be viewed as 'textbook' street-level bureaucrats, using significant discretionary powers to balance policy goals with busy workloads and finite resources. The interaction of these factors is central to street-level bureaucracy studies, and the theory fits well with the front-line element of the second research question, which seeks to investigate the practical implementation of reasonable steps.

### 2.3.2 Key criticisms

Contemporary reviews<sup>71</sup> of Lipsky's volume were generally positive, labelling it as 'provocative,' and 'full of marvellous insights.'<sup>72</sup> Yates (1982) states that it is 'an excellent book [which] makes one think hard... about a crucial element of the policymaking process.'<sup>73</sup> Despite being well received, there are criticisms in the literature. Lipsky is accused of not sufficiently considering, in both a narrow and broad sense, the organisational structure in which his observations are situated. In a *micro* context, Lipsky fails to consider the 'political alienation' which the street-level bureaucrat may experience by being subject to the 'deliberate policies of the organisational elites.'<sup>74</sup> Some examples given by Lipsky, such as street-level bureaucrats limiting access to services by reducing opening hours, or raising the cost of food stamps, are more organisational decisions than individual uses of discretion.<sup>75</sup> Conversely, and in a *macro* sense, Lipsky has much to say on the distribution of resources,<sup>76</sup> but fails to adequately consider the

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<sup>71</sup> Yehekel Hasenfeld, 'Michael Lipsky - Street-Level Bureaucracy: Dilemmas of the Individual in Public Services (Book Review)' (1981) *Social Service Review* 55 1 155; Warren Magnusson, 'Street-Level Bureaucracy: Dilemmas of the Individual in Public Services, Michael Lipsky New York: Russell Sage Foundation, (1981) *Canadian Journal of Political Science* 14 1 213; Fred Goldner, 'Review Article: Street-Level Bureaucracy' (1982) *Administrative Science Quarterly* 27 153; Douglas Yates, 'Street-Level Bureaucracy: Dilemmas of the Individual in Public Services' (1982) *American Political Science Review* 76 1 145

<sup>72</sup> Yehekel Hasenfeld, 'Michael Lipsky - Street-Level Bureaucracy: Dilemmas of the Individual in Public Services (Book Review)' (1981) *Social Service Review* 55 1 155, p156

<sup>73</sup> Douglas Yates, 'Street-Level Bureaucracy: Dilemmas of the Individual in Public Services' (1982) *American Political Science Review* 76 1 145, p146

<sup>74</sup> Yehekel Hasenfeld (n 72), p156

<sup>75</sup> Ibid

<sup>76</sup> Michael Lipsky (n 5)

variance in the amount of resources available within different bureaucracies, and the influence this may have on the broad theory of front line behaviour.<sup>77</sup>

Criticism of Lipsky's framework is not common in the literature, but where it does arise, it centres around its applicability in a modern context. 'His analysis, critics argue, belongs to a gentler age, before the rise of management power and strategies within... welfare organisations'.<sup>78</sup> It is further contended that since the publication of Lipsky's book in 1980, at least within the broader area of social work literature, there has been an increase in the external scrutiny of the public sector, which serves as a driver for managerial interference.<sup>79</sup> This criticism has been countered, however, with the argument that while increased managerial and academic scrutiny may curb extreme abuses of discretionary power, it is not sufficient to significantly impact the existence of discretion embedded in front line organisations.<sup>80</sup>

Ultimately, Lipsky offers no real solutions to the interference of the numerous factors he identifies on front line decision-making. He offers some general preliminary measures that could mitigate the effects, such as staff development, incentives, and peer support initiatives, but these actions are unlikely to significantly impact the nuanced, deep-rooted, and complex interferences on the use of discretion by street-level bureaucrats. He concedes that to change these effects, significant social action would be required in a macro sense, when he states that 'the restructuring of street-level bureaucracies is unlikely to take place in the absence of a broad movement for social change and economic justice.'<sup>81</sup> The highly contextual nature of the theory means that great care should be taken when attempting to draw wide-reaching

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<sup>77</sup> Yeheskel Hasenfeld (n 72), p156

<sup>78</sup> Tony Evans, 'Professionals, managers and discretion: Critiquing street-level bureaucracy' (2010) *The British Journal of Social Work* 41 2 368, p370

<sup>79</sup> David Howe, 'Knowledge, power and the shape of social work practice' in Martin Davies (ed), *The sociology of social work* Routledge 1991; Ian Taylor and Josie Kelly, 'Professionals, discretion and public sector reform in the UK: re-visiting Lipsky' (2006) *International Journal of Public Sector Management* 19 7 629

<sup>80</sup> Bob Hudson, 'Michael Lipsky and street level bureaucracy: a neglected perspective' in Len Barton (ed), *Disability and Dependency* Routledge 1989, p41

<sup>81</sup> Michael Lipsky (n 5) p60

conclusions from empirical data. The concept of street-level bureaucracy does not apply evenly in all contexts, and Lipsky himself warns against generalisation when he states that: -

*“[I]t is to be expected that an elaboration of central tendencies such as the description of street-level bureaucracy cannot apply evenly to all the cases from which the generalizations are drawn.”<sup>82</sup>*

Despite the criticism and limitations of street-level bureaucracy, it is argued here that it fits the objectives of this thesis well. The second research question asks how reasonable steps is implemented in practice. Given the discretion inherent in the legislation, and the commonly observed influences on front-line behaviour, it is argued here that Lipsky’s theory is a valuable heuristic tool. To contextualise these elements and strengthen this argument, the following section contains a discussion on previous studies of homelessness decision-making. These sociolegal studies often consist of a combination of doctrinal and qualitative methods. Those discussed below have adopted Lipsky’s approach of considering front-line influences on homelessness decision-making. The findings frequently align with Lipsky’s theory, and demonstrate how these front-line pressures can affect the implementation of homelessness law.

### 2.3.3 Front-line discretion in homelessness decision-making

This section closes the above overview of street-level bureaucracy theory by discussing the consideration of front-line influences in studies of homelessness decision-making. As outlined above, Lipsky’s core argument is that discretion present at the front line allows workers to adapt practice in various ways, and in response to a wide variety of factors. These adaptations ultimately lead to the driving of policy from the bottom up. Lipsky’s theory is one of policymaking, but his emphasis on the factors influencing the use of front-line discretion in the policy process has been influential in socio-legal studies, which have sought to examine the interpretation and application of homelessness law. The objective of these studies is to extend

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<sup>82</sup> Michael Lipsky (n 5), pxvi

more traditional legal research by examining the law in action,<sup>83</sup> by decentering legislation and exploring the contexts within which the law is experienced in everyday life.<sup>84</sup>

The broad terrain of housing law has particularly close ties to policy,<sup>85</sup> and the domestic homelessness framework is cast in particularly 'discretion-laden' terms.<sup>86</sup> These discretionary provisions are therefore frequently interpreted and applied by front-line workers, who are besieged by resource demands and beset by individual subjectivity. Researchers seeking to decentre homelessness law have, perhaps unsurprisingly, followed Lipsky's approach by considering the impact of front-line factors when examining the legislation 'in action.' In doing so, they have often confirmed key elements of Lipsky's theory at work, and provide justification for the use of Lipsky's theory in answering the second research question.

Loveland (1995)<sup>87</sup> recognises the close link between homelessness policy and the associated domestic legal framework. In his study of the implementation of homelessness provisions within the Housing Act 1985, he advocates for a precursory consideration of the policy goals and debates behind the legislation due to its' many discretionary elements. To this end, and relevant to this thesis, he includes an examination of the law in its' 'pre-legislative' form, outlining its' development, and scrutinising associated policy documents. He argues that this is key to acquiring the most comprehensive understanding of the effect of legislation in practice, as simply analysing an Act's text fails to allow for the possibility that the wishes of the legislature may have been misconveyed.<sup>88</sup> Loveland states that: -

*"Public lawyers, whether engaged in black letter or socio-legal analyses of government behaviour, should not invariably presume that a legislature has adequately expressed its preferred policy objectives in statutory form. Confusion, uncertainty, or just plain*

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<sup>83</sup> Dermot Feenan, *Exploring the 'socio' of socio-legal studies* Macmillan Education UK 2013

<sup>84</sup> Patricia Ewick and Susan S Silbey, *The common place of law: Stories from everyday life* University of Chicago Press 1998

<sup>85</sup> David Cowan, *Housing law and policy* Cambridge University Press 2011

<sup>86</sup> Ian Loveland, *Housing homeless persons: administrative law and the administrative process* Clarendon Press 1995, p1

<sup>87</sup> Ibid

<sup>88</sup> Ian Loveland (n92), p68-69



*incompetence are rarely assumed to be active ingredients within the law-making recipe.*"<sup>89</sup>

Aside from the possible confusion, uncertainty, or incompetence in the law-making process, Loveland explores the context within which the law is interpreted and applied at the front line by observing the use of discretion in three separate local authorities. Many elements of Lipsky's theory are reported to be influential on the use of the legislative discretion. Staff in all three authorities suggested that organisational difficulties and resource demands impacted decision-making.<sup>90</sup> Furthermore, and directly confirming Lipsky's observations, Loveland found that individual staff informally amended working procedures<sup>91</sup> based on their 'gut feeling' of applicants in relation to their behaviour and status.<sup>92</sup>

Cowan and Halliday (2003)<sup>93</sup> called for more attention to be given to the internal review procedure under the homelessness provisions contained within Part VII of the Housing Act 1996. Section 202<sup>94</sup> of this Act grants aggrieved applicants the right to request an internal review of their negative decision. The authors' research in two English housing departments combined ethnography and interviews to explore why welfare applicants often failed to challenge negative decisions using this internal review procedure. In this exploratory study, the authors draw on literature from a wide range of disciplines as heuristic aids to analyse the perspectives of both bureaucracy and citizen. Ethnographic observations included recording of daily departmental routines, staff meetings, and client-officer interactions, and it is here where the influence of Lipsky's approach is most evident. Highlighting significant influences on the use of discretion, the findings confirm a number of Lipsky's key arguments. A wide variation in the way officers approached applicants was highlighted, and individuals were seen to be pre-judged

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<sup>89</sup> Ibid, p5

<sup>90</sup> Ibid, p155

<sup>91</sup> Aside from confirming Lipsky's argument in the policy implementation arena, here Loveland also confirmed similar empirical findings found in Michael J Hill, 'The exercise of discretion in the National Assistance Board' (1969) *Public Administration* 47 1 75; Ian Loveland, 'Policing welfare: Local authority responses to claimant fraud in the housing benefit scheme' (1989) *Journal of Law and Society* 16 187

<sup>92</sup> Ian Loveland (n92), p146

<sup>93</sup> David Cowan and Simon Halliday, *The appeal of internal review: law, administrative justice, and the (non-) emergence of disputes*, Hart 2003

<sup>94</sup> Subsequently amended by the Homelessness Reduction Act 2017

based on a notion of 'gut feeling.'<sup>95</sup> Managing client expectation along with gatekeeping were identified themes within these interactions.<sup>96</sup> The staff interviews compellingly demonstrate an example of Lipsky's notion of 'practice routines,' by describing a department-level procedure of pre-interview checks of an 'exclusions database.' This database held details of previously challenging clients, and checking applicants against this list could save the bureaucracy from rehousing these problematic individuals. Extending Lipsky, however, Cowan and Halliday offer more insight into the role of management in the exercise of front-line discretion, drawing attention to the level of procedural control by senior staff, such as overriding the exclusions list, or disciplining workers for not checking it.<sup>97</sup>

Moving from front-line review to case law, Halliday (2004)<sup>98</sup> focussed on the relationship between judicial review judgments and street-level bureaucracies. More specifically, the author investigated three local authority Homeless Person's Units (HPU's) in order to explore the factors which mediate the influence of judicial review decisions on administrative conduct.<sup>99</sup> Decision-making practices within these departments (which had all been the subject of judicial review litigation) were investigated to explore their use of discretion to understand how those legal decisions interacted with existing pressures at the front line. Though considering the pre-legislative policy analysis to a lesser degree than Loveland, directly relevant to the methodology of this thesis is Halliday's strong focus on decided homelessness cases. He includes a comprehensive doctrinal analysis of judicial review judgments to help contextualise the qualitative findings.

Halliday develops a framework for researching and analysing the regulatory capacity of judicial review. The framework allows for the consideration of the legal knowledge, conscientiousness, and competence of decision-makers, alongside the prevalence of law in the decision-making environment under observation. It is here where Lipsky's notion is most evident, as street-level

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<sup>95</sup> David Cowan and Simon Halliday (n99), p49

<sup>96</sup> Ibid, p63-64, 81

<sup>97</sup> Ibid, p43-46

<sup>98</sup> Simon Halliday, *Judicial review and compliance with administrative law* Hart 2004

<sup>99</sup> Ibid, p4

bureaucracy theory is directly cited by Halliday in what he identifies as ‘cultures of suspicion,’ and highlights how the subjectivity in individual officer’s opinions of service users can guide front line decisions. Aside from this, the author also identifies other relevant influences, such as management control over resources, excessive workloads, and disillusioned and demoralised staff.<sup>100</sup> Again there is evidence of a practice routine, with staff informally limiting temporary accommodation offers to just one, in an effort to deter applicants who were not ‘literally homeless.’<sup>101</sup>

More recently, studies of homelessness decision-making have directly drawn on street-level bureaucracy theory in examining the front-line influences on the use of discretion. Alden (2015)<sup>102</sup> applies Lipsky’s theory to statutory homelessness services in England, reporting that uses of discretion were found to be the result of departmental pressures around targets and resource management, and workers in Authorities with fewer housing options experienced greater pressure to preserve resources; a theme confirmed in similar studies.<sup>103</sup> On this issue, Housing Officers stated that temporary accommodation dictated how they used the legislation (the Housing Act 1996 in this instance.)<sup>104</sup> The preservation of resources was openly discussed by many Officers, who associated ‘harsh’ decision-making with this goal specifically; low resources led to qualifying applicants being discouraged in their application or, in some cases, turned away entirely: -

*“You are trying not to let them make a presentation, simply because we don’t have enough temporary accommodation... I have got into a situation where I am turning around and saying to people, you’re priority need, you fit the criteria, go away, I have got nothing for you.”<sup>105</sup>*

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<sup>100</sup> Simon Halliday (n 104), p42, 44, 59

<sup>101</sup> Ibid, p49

<sup>102</sup> Sarah Alden (n 1)

<sup>103</sup> Pat Niner, *Homelessness in nine local authorities: Case studies of policy and practice* HM Stationery Office 1989; Paul Cloke, Paul Milbourne, and Rebekah Widdowfield, *Change but no change: Dealing with Homelessness under the 1996 Housing Act* (2000) *Housing Studies* 15 5 739; Graham Bowpitt, Peter Dwyer, Eva Sundin, and Mark Weinstein, ‘Places of sanctuary for ‘the undeserving? Homeless people’s day centres and the problem of conditionality’ (2014) *British Journal of Social Work* 44 5 1251

<sup>104</sup> Sarah Alden (n 1)

<sup>105</sup> Sarah Alden (n 1), p69

Whilst this study used the street-level bureaucracy framework to investigate the application of broad homelessness provisions within the Housing Act (1996), Bretherton *et al* (2013)<sup>106</sup> focussed specifically on one small, but highly consequential provision; the interpretation of 'vulnerable' applicants in 'priority need'. Under the Housing Act 1996, in order to qualify for the full assistance duty,<sup>107</sup> an applicant must be deemed eligible,<sup>108</sup> genuinely homeless<sup>109</sup> unintentionally,<sup>110</sup> and in 'priority need.'<sup>111</sup> Categories considered to be priority need are listed in s 189(1) of the Act, and include prison leavers, those with dependent children, those with a disability and 'vulnerable persons.'<sup>112</sup> The authors placed particular attention on the interpretation of the word 'vulnerable.' Findings display clear evidence of Lipsky's theory in action, in particular the use of discretionary powers in the formulation of 'practice routines,' and constructing images of 'undeserving' (or in this case, 'not vulnerable') applicants. For example, on the issue of first impressions, a Housing Officer states: -

*"He himself didn't...seem like he was a vulnerable person 'cos he was talkative, the way he was dressed, his behaviour, everything, he never showed any signs of any form of mental health issues whatsoever."*<sup>113</sup>

Additionally, the authors report the use of discretionary powers to amend practice in response to a general suspicion towards evidence presented by General Practitioners. Housing Officers would frequently challenge or overturn GP assessments if they had deemed a client 'vulnerable,' but very rarely questioned medical guidance finding an applicant 'not vulnerable.'<sup>114</sup> Most strikingly, perhaps, was the development of practices that included the use of medicine dosage to determine vulnerability, along with medical knowledge taken from

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<sup>106</sup> Joanne Bretherton, Caroline Hunter and Sarah Johnsen, 'You can judge them on how they look...: Homelessness Officers, Medical Evidence and Decision-Making in England' (2013) *European Journal of Homelessness* 7 1 69

<sup>107</sup> Housing Act 1996, s 193

<sup>108</sup> *Ibid*, s 185

<sup>109</sup> Housing Act 1996, s 175

<sup>110</sup> Housing Act 1996, s 191

<sup>111</sup> Housing Act 1996, s 189

<sup>112</sup> Housing Act 1996, s 189(1)(c)

<sup>113</sup> Joanne Bretherton and others (n 114), p80

<sup>114</sup> Joanne Bretherton and others (n 114), p83

Google; this by non-medically trained housing staff.<sup>115</sup> The authors found that internet listings of medicine dosage, and the 'gut feeling' of officers, superseded the advice of trained medical professionals when they sought to determine the vulnerability of an applicant.<sup>116</sup>

In summary, it is argued that Lipsky's theory is a valuable heuristic tool in answering the second research question, which calls for the investigation of the implementation of reasonable steps. Housing Officers in this context are street-level bureaucrats, deploying public resources in response to applications for homelessness assistance. Reasonable steps itself is inherently discretionary, and provides a high degree of flexibility to front-line staff when implementing the legislation and associated policy goals. The literature discussed above demonstrates the variety of factors which can influence the use of discretion, such as resources, workload pressures, applicant characteristics, and the individual perception of those service users held by Local Authority staff. These have been shown to affect decision making to such an extent that the impact on policy implementation is significant. The influence of Lipsky's approach, and a focus on front-line influences, has been of value in previous studies of homelessness decision-making. These studies have consistently corroborated key elements of street-level bureaucracy theory.

The concluding part of this chapter presents a review of policy implementation literature which specifically concerned the role of legislation in the process. The need for a doctrinal account of reasonable steps is strengthened considering the effect legislation itself can have on the policy implementation process.

## 2.4 Law in policy implementation

Blankenburg (1985)<sup>117</sup> notes that law and policy are closely interrelated, differing by degree rather than in sharp contrast. Policymakers may use legislation to achieve objectives, and lawmakers may design their legislation with policy goals in mind. On the place of law in the

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<sup>115</sup> Joanne Bretherton and others (n 114), p86

<sup>116</sup> Ibid

<sup>117</sup> Erhard Blankenburg, 'The waning of legality in the concept of policy implementation' (1985) *Law & Policy* 7 4 481

policy process, Mehde (2006)<sup>118</sup> argues that ‘reforms in local government often follow decisions that are taken by central governments. To initiate these changes, law is the most important mechanism.’<sup>119</sup> This closing part of the chapter will expand upon the policy implementation elements considered above and present a discussion on the place of law in the policy process. Implementation studies have highlighted problems relating to the use of law to drive policy objectives, which largely fall within two categories. First, the construction of the legislation itself can detract from the achievement of policy objectives, as statutes have been held to be too vague, lack clarity in implementation rules, or not adequately fit the context of the policy landscape they seek to influence. Second, the failure to enforce the legislation which seeks to drive policy implementation has been found to jeopardise the chances of that policy succeeding in practice. This section thus presents the policy implementation literature that advances these arguments, and findings from the below studies justify the need to answer the second and third research questions. Reasonable steps is a justiciable right, yet there has been no litigation to date. The studies below indicate that inherent barriers to challengeability, whether they be due to court interpretation or front-line influences, may be having an impact on the success or failure of the policy goals behind reasonable steps.

#### 2.4.1 Statutory construction, toothless legislation, and lack of enforcement

Ingram and Schneider (1990)<sup>120</sup> argue that ‘flawed statutes are the source of many implementation problems,’<sup>121</sup> and advocate for more consideration of the effects of statute design on the policy process. The authors claim that statutes are often so vague or contradictory that they have little impact in driving policy goals.<sup>122</sup> Traditional studies of policy implementation employing frameworks such as Kingon and Lipsky, they argue, are limited by failing to consider or adequately appreciate the role of law in the policy process. They state: -

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<sup>118</sup> Veith Mehde, ‘Steering, supporting, enabling: The role of law in local government reforms’ (2006) *Law & Policy* 28 2 164

<sup>119</sup> *Ibid*

<sup>120</sup> Helen Ingram and Anne Schneider, ‘Improving implementation through framing smarter statutes’ (1990) *Journal of public policy* 10 1 67

<sup>121</sup> *Ibid*, p67

<sup>122</sup> Helen Ingram and Anne Schneider (n 128), p70

*“Administrative structure is important, but it must be considered along with other aspects of policy, including the goals chosen and the tools selected to motivate targets to act in concert with that goal”<sup>123</sup>*

It has been claimed that, where law is intended to drive policy, coherent statutes are more likely to achieve policy objectives.<sup>124</sup> Meir and McFarlane (1995)<sup>125</sup> note that clear and precise objectives outlined in legislation is one of many factors which constitute as coherence. Other factors may include the precise ranking of legislative goals, adequate description of the problem it seeks to solve, and the inclusion of legislative flexibility which allows implementers to adapt to varying circumstances.<sup>126</sup> The authors analyse various family planning legislation in the US to test whether more coherent statutes are more or less likely to achieve policy objectives. Their findings plainly support the hypothesis that clearer legislation is more successful in achieving positive results, and they conclude that ‘not only can legislators influence policy outputs, but the language they use to write legislation will affect the policy's outcome.’<sup>127</sup>

Aside from the coherence of statutes, some scholars have criticised legislation for lacking the provisions to adequately enforce policy objectives,<sup>128</sup> while others have noted that a reluctance to use enforcement where it is available can jeopardise policy success.<sup>129</sup> For example,

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<sup>123</sup> Helen Ingram and Anne Schneider (n 128), p69

<sup>124</sup> Daniel A Mazmanian and Paul A Sabatier, *Implementation and Public Policy with a New Postscript* University Press of America 1989; Deborah R McFarlane, 'Testing the Statutory Coherence Hypothesis: The Implementation of Federal Family Planning Policy in the States' (1989) *Administration and Society* 20 395

<sup>125</sup> Kenneth J Meier and Deborah R McFarlane, 'Statutory coherence and policy implementation: The case of family planning' (1995) *Journal of Public Policy* 15 3 281

<sup>126</sup> *Ibid*, p282

<sup>127</sup> Kenneth J Meier and Deborah R McFarlane (n 133), p294

<sup>128</sup> Valerie Braithwaite, 'The Australian government's affirmative action legislation: Achieving social change through human resource management' (1993) *Law & Policy* 15 4 327

<sup>129</sup> Karen J Hoare, Jane Mills, and Karen Francis, 'The role of Government policy in supporting nurse-led care in general practice in the United Kingdom, New Zealand and Australia: an adapted realist review' (2012) *Journal of advanced Nursing* 68 5 963; Rosa Lau, Fiona Stevenson, Bie Nio Ong, Krysia Dziedzic, Shaun Treweek, Sandra Eldridge, Hazel Everitt, 'Achieving change in primary care—causes of the evidence to practice gap: systematic reviews of reviews' (2015) *Implementation Science* 11 1

Braithwaite (1993)<sup>130</sup> examined the implementation of affirmative action policy in Australia, primarily concerned with the factors which predict compliance. She notes that the legislation which underpinned the policy lacked sanctioning options, deeming it to be a ‘toothless tiger,’<sup>131</sup> arguing that compliance with affirmative action policy was best predicted by innovations within human resource departments, and that the ‘toothless’ legislation had minimal effect.

Agocs (2002)<sup>132</sup> reviewed the progress of Canada’s implementation of policies to address systemic discrimination in employment, drawing on academic commentary and data collected pursuant to the functioning of the federal Employment Equity Act (1986), which sought to promote employment equity for marginalised groups. The author noted limited results under the legislative framework, and presented contrasting arguments found in the literature which attribute the perceived limited success to both the structure of the legislation itself and the way it is practically implemented. Despite noting that some analysis has focussed on arguments that the legislation placed an over-reliance on the collection of employment data which was often unavailable or inaccurate,<sup>133</sup> Agocs gives far more credence to the second stream of criticism. She argues that the policy goals behind the legislation are fundamentally sound, but that there is a lack of meaningful legal sanctions for non-compliance for some objectives, and where these sanctions exist, they are hampered by resource limitations.<sup>134</sup> In final analysis, Agoc concludes that: -

*“The lack of results stems from a failure of employers to implement the Act, and of government to enforce it and hold employers accountable for lack of compliance... The requirements of the Act are not being put into practice. [Ultimately,] the gap between policy and practice may be traced to the lack of political will to provide adequate legislative and administrative provisions for enforcement and compliance...”<sup>135</sup>*

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<sup>130</sup> Valerie Braithwaite (n 136)

<sup>131</sup> Ibid, p329

<sup>132</sup> Carol Agocs, ‘Canada’s employment equity legislation and policy, 1987-2000: The gap between policy and practice’ (2002) International Journal of Manpower 23 3 256

<sup>133</sup> Janet M Lum, ‘The federal Employment Equity Act: goals vs. implementation’ (1995) Canadian Public Administration 38 1 45

<sup>134</sup> Carol Agocs (n 140), p272

<sup>135</sup> Carol Agocs (n 140), p270



In a systematic review of published studies of policy development in nurse-led care, Hoare *et al* (2012)<sup>136</sup> sought to highlight similarities and differences between implementation in the UK, Australia, and New Zealand. The authors argue that legislative initiatives in the UK, not present within the other two countries, were key to driving initiatives in domestic nurse-led care.<sup>137</sup> In a study using similar methods, Lau *et al* (2015)<sup>138</sup> comprises of a comprehensive systematic review of existing reviews examining the implementation gap of primary care intervention policies globally. The authors synthesised evidence from 70 existing reviews which presented findings on the perceived 'evidence to practice gap' of primary care initiatives, highlighting potential 'barriers and facilitators' to policy implementation as common themes within these studies. Many elements were identified as having a significant impact on effective policy implementation, including organisational culture (cooperative working), stakeholder 'buy in,' resource availability, and technology;<sup>139</sup> the authors also noted that the use of legislation to drive initiatives was often found to be a 'potent activator' to achieving policy aims.<sup>140</sup> Legislative drivers were found to be most effective where the new initiatives were subject to high levels of public support, were a close fit to existing legislative frameworks, and backed by codes of guidance. They were found more likely to succeed where stakeholders were involved in implementation and decision-making early in the policy implementation process. Conversely, legislative measures had the potential to act as barriers to implementation if they were vague or lacked 'stated goals and objectives to reflect priorities.'<sup>141</sup>

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<sup>136</sup> Karen J Hoare, Jane Mills, and Karen Francis, 'The role of Government policy in supporting nurse-led care in general practice in the United Kingdom, New Zealand and Australia: an adapted realist review' (2012) *Journal of advanced Nursing* 68 5 963

<sup>137</sup> *Ibid*, p970

<sup>138</sup> Rosa Lau, Fiona Stevenson, Bie Nio Ong, Krysia Dziedzic, Shaun Treweek, Sandra Eldridge, Hazel Everitt, 'Achieving change in primary care—causes of the evidence to practice gap: systematic reviews of reviews' (2015) *Implementation Science* 11 1, p31

<sup>139</sup> *Ibid*

<sup>140</sup> Rosa Lau and others (n 146), p5

<sup>141</sup> *Ibid*

Wilson *et al* (2012)<sup>142</sup> studied the effectiveness of environmental policy implementation of small and medium sized enterprises. In a qualitative analysis examining the enforcement of associated environmental legislation, the authors found that many businesses had no knowledge of the legislation and those that were aware of it claimed to have little understanding.<sup>143</sup> Unsurprisingly, this was largely attributed to the lack of enforcement of the legislation which drove environmental policy. Very few of the participating businesses had experienced sanctions for malpractice or heard of such enforcement occurring within the sector at large.<sup>144</sup>

Rispel and Moorman (2010)<sup>145</sup> examined the role of legislation in driving South African policy initiatives across a number of sectors linked to public health and safety, including tobacco consumption, provision of medicine, social housing, and social development. As above, legislation as an implementation tool was deemed to be a key component of an 'enabling' environment in terms of policy implementation across these areas. The authors, however, note that perceivable flaws in policy implementation are primarily driven by poor timing and a failure to engage key stakeholders responsible for actioning the relevant policies. They also conclude that successful policy implementation rates would be significantly improved with an increase in monitoring and evaluation, thus holding those stakeholders more accountable for achieving policy objectives.<sup>146</sup>

In summary, the literature discussed above demonstrates the impact which legislation itself can have on the success of policy implementation. Statutes which are vague in the terminology they use, that lack clarity in their provisions, or that are 'toothless' in practical terms, have been argued to jeopardise the implementation of the policy goals they seek to drive. Where

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<sup>142</sup> Christopher D H Wilson, Ian David Williams, and Simon Kemp, 'An evaluation of the impact and effectiveness of environmental legislation in small and medium-sized enterprises: Experiences from the UK' (2012) *Business Strategy and the Environment* 21 3 141

<sup>143</sup> *Ibid*, p148

<sup>144</sup> Christopher D H Wilson and others, (n 150), p149-151

<sup>145</sup> Laetitia Rispel and Julia Moorman, 'Health legislation and policy: context, process and progress' (2010) *South African health review* 127 141

<sup>146</sup> *Ibid*, p141

enforcement is adequately provided for in the statute, a failure to use it has also been deemed to add to the risk of policy failure.

## 2.5 Chapter summary

This chapter has introduced two separate frameworks taken from the available policy implementation literature, which are used in chapters 4 and 5 to help explain empirical findings relating to research questions one and two. There are an overwhelming number of available lenses through which to view these findings, and the use of those chosen frameworks has been justified here.

First, it has been argued that Kingdon's Multiple Streams Model is well suited to addressing the first research question and investigating the policy intent behind reasonable steps. The model, unlike many other available frameworks, accounts for the important and hidden 'pre-legislation' stage of the policy implementation process. The literature demonstrates the potential importance of policy entrepreneurs and their contributions in the consideration and debate of policy alternatives. Second, as a framework based on a differing view of policy direction, Lipsky's street-level bureaucracy theory serves as a suitable heuristic aid when explaining empirical findings gathered in relation to the second research question, and the front-line implementation of reasonable steps. Again, research has shown that front-line staff, with sufficient discretionary powers, can amend practice in service delivery in response to wide range of factors. These changes in practice have been found to be consequential and give weight to Lipsky's central argument that policy can be significantly changed within implementing organisations. Lipsky's approach has been influential in studies of homelessness decision-making. Housing officers are textbook street-level bureaucrats, and the domestic homelessness framework contains many discretionary elements.

Finally, studies of the use of law in policy implementation further justify the need to examine the reasonable steps legislation more closely as per the second and third research questions. There has been no case law on reasonable steps, and it has been demonstrated that the way a statute is constructed and enforced can impact policy goals in practice. Having discussed the

frameworks used within the thesis, and the increased importance on the examination of the legislation itself, the next chapter will present the research methodology, describing the combination of qualitative and doctrinal methods chosen to best address the research questions.

## Chapter 3: Methodology

The preceding chapter has justified the combination of both ‘top down’ and ‘bottom up’ theories of policy implementation in the context of this study. Elements of both approaches are required to best explain the specific components of the intention and implementation of reasonable steps, and thus address the research questions as comprehensively as possible. This chapter presents the research methods and methodology which, in keeping with studies commonly found in the socio-legal tradition, includes a combination of doctrinal legal research and qualitative methods. A policy reunion attended by participants involved in the formulation of reasonable steps provided a unique first-hand account of the origins of the policy, why legislation was chosen to drive it, the problems it seeks to solve, and how policymakers intended it to function in practice. The origins of, and intentions behind, reasonable steps served as a comparator to front-line data, which consists of semi-structured interviews with Local Authority staff and management. These interviews provide an insight into the application of reasonable steps in practice and facilitated a comparison between the intention of the policy makers and the interpretation and application of the policy (and thus the law) at the front-line.

As discussed within the opening paragraphs of Chapter 1, there is no case law on the interpretation of reasonable steps in this statutory context. This legal understanding is crucial to providing a standard for the application of reasonable steps. In an effort to fill this gap in knowledge, a doctrinal analysis was undertaken to evaluate how the courts could interpret reasonable steps in practice, were a legal challenge to arise. These findings help clarify the precise nature of the legal rights and responsibilities of applicants and Local Authorities respectively. The combination of both doctrinal and qualitative methods facilitates a detailed understanding of the development of reasonable steps, from intent through to practical implementation within Local Authorities and the courts. Though the results of the methods provide a rich and detailed understanding, qualitative and doctrinal approaches are distinct, and the methods are presented separately. The following sections provide an explanation and justification of the research approach, including the choice of methods, participant selection,

data collection, and analysis. The ethical considerations raised by fieldwork are also discussed. The chapter concludes with a summary and brief evaluation of the chosen methodology.

It is important to note that, unlike many studies situated within a homelessness context, I am not primarily concerned with the specific outcome of the assistance application made by the service user, or in other words, how practically 'effective' reasonable steps is in terms of providing successful outcomes. As stated within Chapter 1, the primary goals of this study are to investigate the implementation of reasonable steps in relation to intentions, to highlight disparity, and to explore the lack of legal challenges. The reasonable steps provisions are a key component of the current Welsh homelessness policy which centres on prevention and early intervention initiatives. The discretionary nature of reasonable steps makes the application of the provision susceptible to structural and individual influences which may potentially lead to differences in the application of the legislation between Local Authorities or individual decision-makers, or result in implementation which deviates from policy intent. Furthermore, and in addition to these considerations, the scarcity of legal challenges to the implementation of the legislative provisions leaves questions around how effective they are as a legal right and how the provision of legal reasonable steps should be interpreted.

### 3.1 Introduction: Research philosophy, design, and qualitative methods

It is first necessary to declare the philosophical underpinnings of the research by discussing ontology (the nature of reality) and epistemology (how we can understand that reality).<sup>1</sup>

#### 3.1.1 Ontology

Sitting at one extreme of the ontological spectrum, objectivism holds that there is the existence of a firm and objective reality independent of individual interpretation.<sup>2</sup> Grounded in positivism, an objectivist ontology suggests that 'all knowledge about the world... is derived

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<sup>1</sup> Jane Mills and Melanie Birks, *Qualitative methodology: A practical guide*, Sage 2014

<sup>2</sup> Hashil Al-Saadi, 'Demystifying Ontology and Epistemology in research methods' (2014) Research gate 1

through the senses,<sup>3</sup> basing evidence on direct observation. In contrast, and at the other extreme of the spectrum, constructionist ontology rejects objectivism by claiming that our understanding of the world should not be limited to what is objectively observable, and that it is our understanding of reflections on events that constitute our subjective realities.<sup>4</sup> Sitting somewhere between these two positions (though closer to constructionism) is critical realism. Taking components from both ontological approaches critical realism, with its association with a search for causation, 'helps researchers to explain social events and suggest practical and policy recommendations to address social problems.'<sup>5</sup> This perspective, with a consideration of both objective and subjective elements, suits the aims of this thesis.

A central point of suitability for a critical realist approach in this research is that rather than claim that no entity exists without identification (extreme objectivist), or the denial of an existence of an objective reality (extreme constructionist), it allows for the possibility that an entity *can* exist.<sup>6</sup> This means that if objective phenomena can exist independently of observation, it therefore allows for an objective reality which sits independently of subjective interpretation. A study of the implementation of reasonable steps in practice requires the consideration of influences on the use of discretion, as well as the interpretation of the provisions at multiple levels. Despite this element of subjectivity, there are realities which exist independent of this which need to be considered. For example, aside from the law itself, there are department level policies in place which guide the processing of individuals through their assistance applications. Additionally, there are inevitably structural resource constraints which will limit choices at the front-line. The interplay between structure and agency and the observable and unobservable influences which are central to the critical realist approach is important in the context of this study, and in addressing the specific research objectives.

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<sup>3</sup> Jane Ritchie, Jane Lewis, Carol McNaughton Nicholls, and Rachel Ormston, (eds), *Qualitative research practice: A guide for social science students and researchers*, Sage 2019, p9

<sup>4</sup> Ibid, p12

<sup>5</sup> Amber J Fletcher, 'Applying critical realism in qualitative research: methodology meets method' (2017) *International journal of social research methodology* 20 2, p181

<sup>6</sup> Steve Fleetwood, 'An ontology for organization and management studies' (2004) *Critical realist applications in organisation and management studies* 27

### 3.1.2 Epistemology

Epistemological positions again exist on a sliding scale. On one hand, positivist epistemology aligns with objectivism in that it claims knowledge is hard, tangible, and objective.<sup>7</sup> Positivist epistemology thus sees the acquisition of knowledge as a gathering of facts, that these facts exist in isolation from values and as such, objective and 'value-free' research is possible.<sup>8</sup> In a rejection of the positivist position, I do not believe that in the context of this study there is one 'true' and naturally occurring objective reality, nor the existence of truly 'value free' research.<sup>9</sup> It follows that my epistemological position is interpretive, and remains aligned with the chosen ontology, theoretical framework, and broad research paradigm. The interpretivist position, sitting opposite positivism, seeks to 'develop an understanding of social life and discover how people construct meaning in natural settings.'<sup>10</sup> In this approach, meaning is socially constructed, and there is a fundamental consideration of the impact of personal meaningful experience and values both in research participants and the researcher themselves.<sup>11</sup> Interpretivist epistemology is based on assumptions that understanding is subjective and unique, and that knowledge is produced by 'exploring and understanding the social world of [participants].'<sup>12</sup> Individual perceptions of reasonable steps is a key element of implementation, and as the sole researcher, I am inevitably approaching these questions from a position of preconception and with a background in legal studies and homelessness charities. It will be my interpretation of gathered data on participant experience that ultimately gives their perceptions 'meaning' within findings. I attempted to keep my past personal and professional experiences at the forefront when conducting research and analysing data, regularly reflecting on these throughout the process.<sup>13</sup>

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<sup>7</sup> Hashil Al-Saadi (n 2)

<sup>8</sup> Jerry W Willis, Muktha Jost, and Rema Nilakanta, *Foundations of qualitative research: Interpretive and critical approaches*, Sage 2007

<sup>9</sup> George Ritzer (ed), *Encyclopaedia of social theory*, Sage 2004

<sup>10</sup> William Lawrence Neuman, *Social Research Methods: Qualitative and Quantitative Approaches*: Pearson New International Edition, Pearson Education Limited 2014, p104

<sup>11</sup> Ibid, p103

<sup>12</sup> Hashil Al-Saadi (n 2), p7

<sup>13</sup> Andrew Gary Darwin Holmes, 'Researcher Positionality-A Consideration of Its Influence and Place in Qualitative Research-A New Researcher Guide' (2020) *Shanlax International Journal of Education* 8 4 1



### 3.1.3 Research design

In the interest of clarity, and as two distinct methods were used to address the research questions, the remainder of this chapter is split into two main parts. As a qualitative approach is used to unearth the policy intent behind reasonable steps and investigate its' practical implementation at the front line, these methods will be discussed below in part 2. In the absence of case law on reasonable steps, and in addressing research question 2, part 3 details the use of doctrinal methods to explore how the courts would interpret and apply the legislation in the event of litigation arising.

### 3.1.4 Qualitative methods

Kirk and Miller (1986) state that qualitative research methods: -

*"...fundamentally depend on watching people in their own territory and interacting with them in their own language, on their own terms. As identified with sociology, cultural anthropology, and political science, among other disciplines, qualitative research has been seen to be 'naturalistic,' 'ethnographic,' and participatory."*<sup>14</sup>

Qualitative research 'refers to the meanings, concepts, definitions, characteristics, metaphors, symbols, and descriptions of things,'<sup>15</sup> which 'allow researchers to share in the understandings and perceptions of others, and to explore how people structure and give meanings to their daily lives.'<sup>16</sup> We have seen from the street-level bureaucracy literature, that front-line workers making discretionary decisions in the context of public service delivery can be influenced by a wide variety of structural and individual factors. We have also seen that, as a result of the wide variance of individual experience and perception, these studies use qualitative methods (often thematic interviews/focus groups, and/or observations) to attempt to identify and understand these influences. In keeping with these studies, a qualitative element within the thesis

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<sup>14</sup> Jerome Kirk and Marc Louis Miller, *Reliability and validity in qualitative research*, Sage 1986, p9

<sup>15</sup> Bruce Lawrence Berg and Howard Lune, *Qualitative research methods for the social sciences*, Eighth Edition, Pearson 2014, p3

<sup>16</sup> Ibid, p8

facilitated the gathering of a first-hand account of the developments and understanding of reasonable steps from policymakers, and thus accurately document the intended application of the legislation. In exploring the front-line implementation of reasonable steps, qualitative methods enabled the consideration of nuances in individual conceptualisations of reasonable steps, along with individual resource constraints, and potential influences on the use of discretion when implementing the policy. In short, a qualitative approach provided a rich and detailed account of the intention behind the use of 'reasonable steps' and the front-line application of the legislation through the lens of the participants.<sup>17</sup>

Though suitable to the research aims and context of this study, qualitative methods may inevitably draw criticisms from the positivist position in the sense that they may appear overly subjective.<sup>18</sup> Kvale and Brinkmann (2009),<sup>19</sup> however, argue that these methods have the unique advantage of 'letting the investigated object speak,'<sup>20</sup> which was central to this research. Ultimately, the research methodology should be suitable to address the aims of the research, and will inevitably direct the methods used in data collection.<sup>21</sup> This chapter concludes with a more comprehensive discussion on socio-legal research, but for present purposes it is also briefly worth noting the significant value qualitative research can bring to legal studies. Reasonable steps drives a policy goal, but ultimately it is enshrined in law. This element of the thesis is then, at its core, a study of the application of law in practice. It is a project very much in the 'textbook' socio-legal tradition. A contextual investigation, using qualitative methods, not only allows for a full exploration in addressing the research objectives, but adds a deeper dimension to the practical implementation of a new legislative approach to homelessness assistance. Using multiple Local Authorities in a case study approach allowed

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<sup>17</sup> Jan Gregar, *Research design (qualitative, quantitative and mixed methods approaches)* Sage 1994

<sup>18</sup> Sarah J Tracy, *Qualitative research methods: Collecting evidence, crafting analysis, communicating impact*, John Wiley & Sons 2019

<sup>19</sup> Steinar Kvale and Svend Brinkmann, *Interviews: Learning the craft of qualitative research interviewing* Sage 2009

<sup>20</sup> *Ibid*, p242

<sup>21</sup> Jane Mills and Melanie Birks (n 1)

further insight into the variability in the application of reasonable steps, and the various factors which can influence decision-making at the front-line.

### 3.2 The policy reunion

The first research question calls for an investigation of the policy intent behind reasonable steps. Only the individuals who developed the policy and the statutory framework know the origins of the 'reasonable steps' provisions. Thus, to obtain a first-hand account, a policy reunion session was held with a number of participants who were all directly involved in the formulation of both the policy objectives of reasonable steps, as well as the legislation which enshrined the policy. The policy reunion as a research method is typically used within the policymaking and governance context. On their website, the Institute for Government describe the intentions of a policy reunion to include discussions on 'how the policy was developed, [how] critical decisions were made,' as well as to 'draw out lessons for present-day policymakers.'<sup>22</sup> For the purposes of the thesis, and in response to the lack of detailed specific literature on policy reunions as a research method, this session was approached as a focus group for the purposes of methodology. Morgan (1996) defines focus groups as 'a research technique that collects data through group interaction on a topic determined by the researcher.'<sup>23</sup> They are a 'used for generating information on collective views, and the meanings that lie behind those views.'<sup>24</sup> Thus, the policy reunion focus group approach was appropriate to address the first research question, and understand the policy intentions of those who developed the reasonable steps provisions.

The choice to conduct the session with participants collectively (rather than individual interviews) was largely based on the importance I attached to the group interaction. Despite some drawbacks of this approach, such as a potential for limiting time for individual members

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<sup>22</sup> Institute for Government, Policy Reunion: Pensions Commission [2010] available at <https://www.instituteforgovernment.org.uk/news/in-the-press/policy-reunion-pensions-commission> accessed on 15 August 2021

<sup>23</sup> David L Morgan, *Focus groups as qualitative research Vol 16*, Sage 1996, p6

<sup>24</sup> Paul Gill, Kate Stewart, Elizabeth Treasure, and Barbara Chadwick, 'Methods of data collection in qualitative research: interviews and focus groups' (2008) *British dental journal* 204 6, 291, p293

to provide specific data, or the lesser degree of control for the interviewer,<sup>25</sup> I felt it important to let the group speak among themselves in a dynamic way. This was deemed to be an important factor, as it would facilitate a discussion from both complementary and contrasting perspectives and allow for a more comprehensive shared understanding of reasonable steps to develop within the data.<sup>26</sup>

I chose not to set a rigid questionnaire for the session and had instead divided the set time into four broad themes based on the research questions and the policy development process, including; intention (e.g. why the term reasonable was chosen and what it sought to achieve), meaning (were there any concerns around misinterpretation), practical application (e.g. how it was intended to work in practice), and challenge (the groups intentions around how the legal right was to work in practice). Without specific questions, giving the group more control over the session allowed room for them to share experiences on the themes relevant to reasonable steps. This approach has been described as being ‘especially useful in exploratory research in which the researcher may not initially even know what questions to ask.’<sup>27</sup> It allowed space and time to explore emergent themes and ideas, and encouraged the participants to highlight the factors that they thought were most important or relevant, giving them the opportunity to share recollections collectively.

### 3.2.1 Policy reunion ‘talking points’

I split the two-hour session into four broad sections which were intended to facilitate discussion on topics which would most likely be relevant to the research objectives. I had identified a number of questions within each section that were important in addressing the first research question and monitored the discussion closely to ensure the group had addressed these elements. The four ‘talking points’ included the overall intention of reasonable steps, its definition, the intended application, and elements of its status as a legal right. Though not

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<sup>25</sup> William J McDonald, ‘Focus group research dynamics and reporting: an examination of research objectives and moderator influences’ (1993) *Journal of the Academy of Marketing Science* 21 2 161

<sup>26</sup> Monique Hennink, Inge Hutter, and Ajay Bailey, *Qualitative research methods*, Sage 2020

<sup>27</sup> David L Morgan (n 23), p11

directly asked, I did have a list of potential probe questions under each section which were identified as specific points of interest. I monitored the discussion to ensure these elements were addressed by the group during their discussion.

### 3.2.2 Participant recruitment

As a highly collaborative endeavour, reasonable steps was shaped by representatives from a number of different sectors, and I tried to replicate this as best as possible by recruiting members of the policy reunion in line with this scope. As a consequence, six participants contributed to the policy reunion, with at least one member being a representative from Welsh Government, Local Authorities, academia, and the charity and freelance policy consultancy sectors. Participants had previously worked together on developing reasonable steps and were collectively part of a group of people responsible for proposing, researching, and debating the formulation of the policy and legislation. Four of the participants had also subsequently worked together on the statutory guidance issued alongside the Housing (Wales) Act 2014.

In terms of recruitment, one of my PhD supervisors, who had worked on the development of the Housing (Wales) Act 2014, provided an initial point of contact to connect with members of the reasonable steps development group, and an email was sent to each individual separately to explain the research and invite them to participate. Ethical considerations are covered in a section separately towards the end of this chapter, but those that agreed were sent participant information sheets and consent forms to sign, and participants were randomly numbered one through six for the purposes of transcription. The session was held remotely over Microsoft Teams, and in line with the agreement on the participant consent forms, the session was recorded but subsequently transcribed (and original recording deleted) within two weeks. As remote video conferences were also used for one-to-one interviews, a full discussion of this method is included in the following section on front-line fieldwork.

### 3.2.3 Data analysis

The session lasted for two hours and ten minutes and yielded a lot of data. The discussion was framed by the 'talking points' but was not limited to these areas. Themes emerged during the discussions, and these were explored. Though there are many available analytical methods for qualitative data,<sup>28</sup> I felt that the thematic analysis of coded data to be the best suited to address the research question, which facilitated identification and analysis of both expected and unexpected themes in the data. Thematic analysis, as a foundational technique in qualitative research, allows for the identification, analysis, and reporting of patterns within data.<sup>29</sup> These patterns can then be interpreted and reported in line with the topic of investigation and the identified research questions.<sup>30</sup> Working through the data in this way, in keeping with a more abductive approach to research, allowed for continuous movement between the data and literature to help make sense of findings. Braun and Clarke (2006)<sup>31</sup> highlight that this manner of exploration can not only facilitate the development of 'core themes,' but also allow space for rich data to emerge from individuals. The analysis identified areas of consensus on the development and intention of the reasonable steps provisions, and this shared understanding added a degree of confidence to the reliability in addressing the origin and intentions of the policy aims and associated legislation.

I adopted an abductive approach using the data as the starting point and drawing on the six-stage framework for conducting thematic analysis, developed by Braun and Clarke. The familiarisation stage (1) was relatively straightforward and consisted of the transcription of the recording (which I did) and a thorough reading of the data, avoiding the temptation to 'skip

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<sup>28</sup> Uwe Flick (ed), *The SAGE handbook of qualitative data analysis*, Sage 2013

<sup>29</sup> Virginia Braun and Victoria Clarke, 'Using thematic analysis in psychology' (2006) *Qualitative research in psychology* 3 2, 77

<sup>30</sup> Richard E Boyatzis, *Transforming qualitative information: Thematic analysis and code development*, Sage 1998

<sup>31</sup> Virginia Braun and Victoria Clarke (n 29)

over' parts of the transcript and began making notes on possible codes, treating familiarisation as an interpretive endeavour. Stage (2) involved solidifying codes as the transcript was re-read multiple times. In practical terms I did this electronically using a combination of manual notes and the NVivo software program. Saldana (2015) defines a code as 'a word or short phrase that symbolically assigns a summative, salient, essence capturing and/or evocative attribute for a portion of language based or visual data.'<sup>32</sup> There is of course an element of subjectivity when 'symbolically' assigning 'essence capturing' codes, and this will depend on not only the specific research questions, but also the individual judgment and preconceptions of the researcher.<sup>33</sup> Sipe (2004) sums up coding as the creation of 'conceptual categories,' and states that 'all coding is a judgment call, and as such opens up possibilities, but [inevitably] obscures other potential alternatives.'<sup>34</sup>

The coding process was time-consuming, but was greatly helped by maintaining a focus on the research objective in question. This process is best illustrated by the use of a practical example. To begin to identify themes on the goal of discovering the intended understanding of reasonable steps, phrases such as 'we hoped Local Authorities would just do their best,' 'act in a way that is not unreasonable,' and 'act with empathy,' were assigned the code 'subjective intention.' As the primary goal of the policy reunion was to uncover a detailed picture and shared understanding from participants on the intentions behind reasonable steps, codes could be used to readily identify repetition or consistency. The frequency with which individual codes appeared allowed for the construction of 'themes' (stage 3) relevant to the research questions. To continue the above example, phrases coded as 'subjective' could be taken together to form the theme 'wide interpretation' for the intended use of reasonable steps.

Stages 4 and 5 of Braun and Clarke's framework involve the reviewing, defining, re-defining, and final naming of themes. These steps are intended for use when there are large amounts of data to consider across a wide variety of groups. Although the transcript proved to be rich with

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<sup>32</sup> Johnny Saldaña, *The Coding Manual for Qualitative Researchers*, Sage 2015

<sup>33</sup> Patricia Adler and Peter Adler, *Membership roles in field research Vol 6*, Sage 1987

<sup>34</sup> Lawrence R Sipe, 'Developing conceptual categories in classroom descriptive research: Some problems and possibilities' (2004) *Anthropology & Education Quarterly* 35 4 472, p482

potential data, it was only one transcript of which I was well-familiar, and I had a clear goal of achieving a consolidated picture of reasonable steps from the six participants. Stages 4 and 5 were more important when analysing the individual interview transcripts from the interviews of Local Authority staff and are thus discussed in more detail in the following section covering individual interviews. Braun and Clarke label their final stage (6) as ‘producing the report,’ which they say involves ‘selection of vivid, compelling extract examples... relating back to the research questions.’<sup>35</sup> Following this framework ultimately led to a clear picture of reasonable steps built on these ‘compelling extract examples’ which could be taken forward as a comparator in subsequent chapters.

In summary, this section has justified and described the use of a ‘policy reunion’ with some members of a team of individuals who helped develop reasonable steps. This session was used to answer the first research question, and address some key questions around the origin of the terminology, what it sought to achieve, why it was enshrined in law, and ultimately, how the group envisaged the practical implementation of reasonable steps at the front line. These elements could then be taken forward and compared the actual front-line implementation of the policy and the workings of the law in practice. The next section will largely follow the structure used here to discuss the use of interviews with actors at the front-line, who practically interpret and apply reasonable steps in their daily roles.

### 3.3 Investigating front-line elements

Having gained first-hand insight into the aims of and intentions behind reasonable steps in response to the first research question, to address the other research questions this intention needed to be compared and contrasted with the practical implementation of the provisions. To investigate practical implementation, semi-structured interviews with Housing Officers and managers provided data on how these front-line actors viewed and applied reasonable steps. Methods used for this element of the thesis are discussed here.

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<sup>35</sup> Virginia Braun and Victoria Clarke (n 29), p87



### 3.3.1 Considering multiple sites

Exploring potential consistency and variability in the implementation of reasonable steps between Local Authorities required the study of multiple sites. A case study is a 'general term for the exploration of an individual, group, or phenomenon... including a process or event in a particular institution.'<sup>36</sup> In this research it was presumed that case studies of the working of the legislation within separate Authorities would facilitate the emergence of potential elements of disparity (or indeed similarity) in interpretation during the application of the legislative provisions, as well as uncover department specific (as well as individual) working practices or procedures which demonstrate the use of discretion inherent within the legislative language. Research on policy implementation and street level bureaucracy commonly take account of multiple case studies, as this allows for the emergence of compared and contrasted themes around individual and group data. In short, these methods facilitate the investigation of the many dynamic and subjective factors which have been found within the literature to influence working practices and the use of discretion. Before explaining site selection criteria, it is necessary to consider these strengths, along with some inherent challenges to this selection process when using a qualitative case study approach.

The benefits of a case study approach become apparent when a deeper analysis is required than typical what, where, or who questions.<sup>37</sup> Crucially for this study, and highlighting the key benefits for other investigations, a case study approach allows phenomena to be explored in context, when there is no clear boundary between the phenomenon itself and the context in which it occurs.<sup>38</sup> Embedded case studies, which identify multiple sub-units of analysis within each case, allow for consideration of multi-level internal perspectives, allowing the researcher to consider 'not just the voice and perspective of the actors, but also of the relevant groups of actors and the interaction between them.'<sup>39</sup> In the context of this study, and guided by themes

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<sup>36</sup> Adrijana Biba Starman, 'The case study as a type of qualitative research' (2013) *Journal of Contemporary Educational Studies* 64 1, p31

<sup>37</sup> Jennifer Rowley, 'Using case studies in research' (2002) *Management research news* 25 1 16

<sup>38</sup> Robert K Yin, *Case study research: Design and methods Vol 5*, Sage 2013, p13

<sup>39</sup> Winston Tellis, 'Application of a case study methodology' (1997) *The qualitative report* 3 3 1, p2

within the literature, these case specific sub-units of analysis include both management and front-line staff. Though it is not a requirement that more than one case study be carried out for a project, I have chosen to do so to provide a richer understanding of the implementation of reasonable steps. Single case studies are akin to individual experiments and are most suited where the case is special or unique.<sup>40</sup> The legislative provisions are being applied across all Welsh Local Authorities, and including multiple sites allowed for a comparison between them to identify any possible disparity in interpretation or working procedures. Another key benefit of including multiple Authorities was the ability to provide a degree of data triangulation to address a common criticism of a case study approach, that data gathered do not adequately represent 'reality.'<sup>41</sup> Triangulating data helps address this criticism, by allowing a degree of corroboration for findings.

Aside from internal validity of data, external validity (or generalisation), researcher influence (bias), and lack of theoretical grounding are all common criticisms of qualitative case studies.<sup>42</sup> Generalisation relevant to qualitative case studies, according to Yin (2003),<sup>43</sup> is not the *statistical* generalisation typically desirable from quantitative studies (i.e., making wider generalisations from large samples of statistical data). Rather, qualitative case study generalisation should be more accurately labelled as *analytical* generalisation, whereby the replication of findings in two or more cases can display replication and corroborate hypotheses or elements of an underlying theory. Furthermore, and to address issues of underlying theoretical grounding, findings from this research are explained by well-established bodies of literature. This theoretical grounding has been clearly defined in the previous chapters and has been argued to be a suitable basis for addressing the research questions.

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<sup>40</sup> Pamela Baxter and Susan Jack, 'Qualitative case study methodology: Study design and implementation for novice researchers' (2008) *The qualitative report* 13 4 544

<sup>41</sup> Mats Alvesson, 'Methodology for close up studies—struggling with closeness and closure' (2003) *Higher education* 46 2 167

<sup>42</sup> Jane Ritchie and others (n 3)

<sup>43</sup> Robert K Yin (n 38)

It is necessary to address some general criticisms of selection criteria within qualitative research which are relevant here. The selection criteria for case study sites and the 'sub-categories' of interest within them is a common cause for concern in the literature.<sup>44</sup> Selection of 'cases' (in context, study sites) has been criticised as often being based on convenience rather than a systematic process.<sup>45</sup> To expand, there is a possibility of choosing objects of study for arbitrary or unmethodical reasons. For example, a site may be known to be small and perceived to be an easy option to gather data, or may be within a convenient geographical location. These case study objects could, therefore, be chosen based on the researcher's personal interests. To address this concern in relation to this thesis, there is no requirement necessarily to approach site selection objectively in order to choose a 'typical example' of a Local Authority. There were systematic selection criteria attached to this study (discussed below) to maximise data in response to the specific research aims, but even if there were no such criteria, all Authorities in Wales are using the same legislative provisions in the same legal framework. What is important is that chosen sites are suitable places for answering the research questions.<sup>46</sup> On this point, and regarding the actual process of site selection in qualitative embedded case studies, Diefenbach (2009)<sup>47</sup> states: -

*"[Sites] are suitable if they can provide the objects of reasoning as well as all relevant criteria and circumstances (e.g. cultural background, institutions) that are needed to be taken into account in order to investigate the research problem appropriately. It is the unit of investigation that counts, not the way it was identified."*<sup>48</sup>

Having discussed the suitability of a qualitative, comparative case study approach to the research objectives, the following section will, for context, outline local authority performance under the legislation, before detailing site selection for fieldwork. A more thorough discussion

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<sup>44</sup> Thomas Diefenbach, 'Are case studies more than sophisticated storytelling? Methodological problems of qualitative empirical research mainly based on semi-structured interviews' (2009) *Quality & Quantity* 43 6, p875

<sup>45</sup> Rosaline S Barbour, 'The newfound credibility of qualitative research? Tales of technical essentialism and co-option' (2003) *Qualitative Health Research* 13 7 1019

<sup>46</sup> Roland W Scholtz and Olaf Tietje, *Embedded case study methods: Integrating quantitative and qualitative knowledge*, Sage 2002

<sup>47</sup> Thomas Diefenbach (n 44), p875

<sup>48</sup> Thomas Diefenbach (n 44), p879

on chosen methods, and their value in this context, is included within subsequent sections. Ethical considerations are not discussed in the immediate paragraphs below but are instead considered separately towards the end of this part of the chapter.

### 3.3.2 Contextual background: Local authority statistics

For context to the discussion below on participating departments, this section will first provide an overview of the performance of local authorities in implementing Part II of the Housing (Wales) Act 2014. General statistics relating to performance rates and applicant numbers are considered, as are those relating specifically to Sections 66 and 73, which contain the reasonable steps duties to prevent and relieve homelessness respectively. As described in Chapter 1, the legislation itself was passed with great fanfare,<sup>49</sup> and the promotion of a new, trailblazing legal right to all applicants seeking homelessness assistance. The Welsh Government had high hopes for the new legislative framework and the homelessness prevention policy which underpinned it, setting and publishing a prevention target of 70%.<sup>50</sup>

The Welsh Government distribute publicly available performance statistics<sup>51</sup> covering many aspects of the homelessness framework, beginning at the point at which the legislation was enacted in 2015. The data currently collected is not comparable to data which may exist under the old framework due to the significant changes made both procedurally and legally. The Welsh Government state that any comparison would be widely inaccurate, as the scope of

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<sup>49</sup> Simon Brandon, Welsh Lessons on Halting Homelessness, *Inside Housing*, available at <https://www.insidehousing.co.uk/insight/insight/welsh-lessons-on-halting-homelessness-55832> accessed 16 February 2021; Kate Murray, Welsh law shows that early support prevents homelessness, *The Guardian*, available at <https://www.theguardian.com/society/2016/apr/26/welsh-law-early-support-prevents-homelessness-crisis> accessed 16 February 2021; Peter Mackie, Welsh homelessness reforms show the way for England and Northern Ireland, *The Guardian*, available at <https://www.theguardian.com/society/2016/mar/15/welsh-reforms-on-homelessness-england-northern-ireland> accessed 16 February 2021

<sup>50</sup> Welsh Assembly Government, 'Ten-year homelessness plan for Wales: 2009–2019' [2009] Cardiff, Welsh Government

<sup>51</sup> Available at <[www.statswales.gov.wales](http://www.statswales.gov.wales)>

assistance was expanded, and time limits were increased from 28 to 56 days.<sup>52</sup> Data presented here includes the first four years available, and provides a picture of applicant numbers and local authority performance for the period leading up to fieldwork. Therefore, financial years 2015 through 2019 are considered.

Across the four years, and across Wales, the number of households receiving assistance under the framework remained largely consistent. In 2015/2016, there were 22,260 households assisted, with between 29 and 31,000 each year thereafter. Applicant numbers have remained consistent, and it is likely that the lower figure for the first year reflects the fact that the framework was not fully embedded, and there may have been reporting errors as the legislation began to be implemented. Again, across Wales, local authorities achieved a successful homelessness prevention or relief outcome in 40 to 45% of cases, with the success rate rising very slightly year on year between 2015 and 2019. Perhaps unsurprisingly, there is a stark difference across Wales between success rates for prevention and relief. It is logically easier to prevent a crisis situation than solve one. Across all local authorities for this period, a successful prevention was recorded in 65% of cases under Section 66, and just 42% under Section 73 for homelessness relief.

Although taken together, the overall successful performance under the legislation is remarkably consistent, there is variability between the local authorities themselves. For example, for year 2018/19, the most successful overall authority was Vale of Glamorgan who assisted 339 applicants for prevention achieving success in 82% of cases, and accepted a relief duty for 315 households reporting success for 61% of those. Conversely, for the same period, Torfaen assisted 138 and 120 households for prevention and relief, reporting success in 54% and 15% of cases respectively. Of course, it should be noted that the number of applicant households can differ extensively between geographical areas. For example, for the same year, Cardiff assisted the highest number of households at a total of 897, with Anglesey assisting just 36.

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<sup>52</sup> Statistics for Wales, 'Statutory Homelessness – Legislative changes from 27 April 2015' Knowledge & Analytical Services Welsh Government 23 September 2015

### 3.3.3 Site selection and recruitment of Local Authorities

As previously discussed, all Local Authorities in Wales are interpreting and applying the legislation, and consequently all were potentially suitable objects for investigating the implementation of reasonable steps. Having made this point, however, in the interest of maximising potential findings for addressing research objectives, I decided to focus attention on those Authorities that had received the highest number of internal review requests from applicants in relation to the reasonable steps provided during their applications for homelessness assistance. Under the legislation,<sup>53</sup> those applicants that contest certain elements of the handling of their case, including whether or not reasonable steps were provided, may refer their grievances to a senior officer within their Local Authority for review.

Internal review (or mandatory reconsideration)<sup>54</sup> thus provides a mechanism through which aggrieved applicants can challenge negative decisions; they effectively serve as the 'gateway' to the appeals process.<sup>55</sup> This procedure has been held to be an under-researched area,<sup>56</sup> but studies that have been undertaken have consistently reported that the broad use of internal review is surprisingly low.<sup>57</sup> Internal review requests were, however, deemed to be a suitable metric on which to focus when identifying sites for fieldwork, as a high number of applicant reviews may be indicative of a contentious application of reasonable steps in a given Local Authority.

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<sup>53</sup> Housing (Wales) Act 2014, s 85

<sup>54</sup> Caroline Hunter, David Cowan, Abi Dymond, and Simon Halliday, 'Reconsidering mandatory reconsideration' Public Law 2017 215 (2017)

<sup>55</sup> David Cowan, Simon Halliday, and Caroline Hunter, 'Gatekeeping administrative justice? The case of homelessness internal reviews' Journal of Housing Law 16(6) 122 (2012)

<sup>56</sup> Ibid

<sup>57</sup> Simon Halliday, 'Internal review and administrative justice: some evidence and research questions from homelessness decision-making' The Journal of Social Welfare & Family Law 23 4 473 (2001); Caroline Hunter, 'Homelessness, internal reviews, and Article 6 of the ECHR' Journal of Housing Law 5 38 (2002); David Cowan and Simon Halliday, *The Appeal of Internal Review: Law, Administrative Justice and the (non-) emergence of disputes* Hart Publishing 2003; David Cowan, Simon Halliday, and Caroline Hunter, 'Gatekeeping administrative justice? The case of homelessness internal reviews' Journal of Housing Law 16(6) 122 (2012); Caroline Hunter, David Cowan, Abi Dymond, and Simon Halliday, 'Reconsidering mandatory reconsideration' Public Law 2017 215 (2017)

Although Welsh Government do publish data on the performance of all Local Authority housing departments, including number of homelessness applications and the associated success rates, the number of internal review requests (and the reasons for them) are not publicly reported. To obtain these figures, a freedom of information request was sent to all 22 Local Authorities in Wales. Freedom of information data may of course contain inaccuracies and/or omissions. As the appeal data is not required for wider publication, all Authorities employ different methods and degrees of recording regarding internal review appeals made under the legislation. Also, as these responses are compiled and processed by individual members of staff, there may be a degree of human error in data compilation. The impact of these issues for the purposes of the thesis is relatively minor, however. As highlighted above, this is not primarily a quantitative study of application outcomes, and all Local Authorities would qualify as suitable study sites. The FOI data was merely employed as a potentially helpful indicator as to the possibility of a contentious application of reasonable steps.

For context, the overall response from the FOI confirms findings in earlier research, namely that they reviews are relatively rare and barely proceed to litigation, but have a relatively high rate of success when they are requested.<sup>58</sup> The number of review requests reported in the FOI is generally low, but can vary widely between authorities. Across Wales, and between 2015 and 2019, there were a total of 1,542 reviews requested, with 39% of these being successful. Cardiff received 782 of these, which was by far the highest number of review requests. Of these, 389 (50%) were successful. In contrast, Denbeighshire reported just 8, overturning their original decisions in 4 of these cases. Across this same period, of the 1,542 requests in Wales, only 2 advanced to county court stage. These two reviews concerned decisions made in areas of the legal framework outside of reasonable steps in Caerphilly and Powys. In both cases the court upheld the original decisions of the respective reviewing officers.

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<sup>58</sup> Ibid

In the response to the FOI sent to the 22 Welsh Local Authorities, only two confirmed that they had received review requests specifically for reasonable steps since the provisions came into force in April 2015. I sent an email to senior staff within these two departments with an explanation of the research and inviting them to participate. Following advice from supervisors, and in an effort to gain the participation of more Authorities and gather more data, an identical invitation to participate was also sent via email to the remaining 20 authorities. Of these, only one agreed, with most others citing significant pressures faced within their departments as a result of the Covid-19 pandemic. I received no response from the remainder. Data from three study sites are included within the thesis, with two of these having received a review request from applicants challenging the Authority’s application of reasonable steps. Participating authorities therefore break down as follows: -

Applicant Appeal	Participated	Declined	No Response
Yes	2	0	0
No	1	8	11

The three participating Local Authorities were assigned identifiers LA1 through LA3.<sup>59</sup> In the interest of providing context to the inclusion of these sites within the thesis, this section will close with a statistical overview of the sites sampled. To preserve anonymity of research participants, I will identify the number of Local Authority households in categories of 50,000. For the same reason, when discussing applicant numbers, I will report the figures in groups of 100.

Taking data from the Welsh Government 2011 census,<sup>60</sup> in Wales there are just over 1.3 million households occupied by at least one person. Sites LA1 and LA2 would be classified as medium sized authorities, both recording between 50 and 100,000 occupied households. LA3 would be classified as a small authority, with between 0 and 50,000 occupied households.

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<sup>59</sup> This element is expanded upon below within the overview of participating staff in each site.

<sup>60</sup> Available at <[www.statswales.gov.uk/census/2011](http://www.statswales.gov.uk/census/2011)>



In terms of applicant numbers, for the year 2018/2019, LA1 assisted between 200 and 300 households, LA2 between 0 and 100, and LA3 between 100 and 200. LA1 and LA2 reported a prevention success rate of over 70%, whereas LA3 reported less than 60%. For homelessness relief under S 73, LA1 and LA2 reported success between 40 and 50% of times, whilst LA3 reported under 30%. All three participating authorities had less than 5 individuals occupying full time housing officer roles who were solely committed to delivering homelessness assistance.<sup>61</sup> LA1 was the only one of the three which employed an individual in a supervisory role, who only dealt with the most complex cases. To round off the statistical background for sampled sites, in response to the FOI on internal reviews LA1 received 6 requests and overturned 4, LA2 received 15 and overturned 2. LA3 had received the highest number of requests of those sampled for the thesis, reporting 37 requests and overturning just 3 of these.

A more complete breakdown of the number of staff participating in the research is included below in the following discussion on interviews.

### 3.3.3 Interviews

'An interview is a conversation that has a structure and a purpose.'<sup>62</sup> Used widely in qualitative research, interviews may be approached in three fundamental ways; unstructured (using open-ended questions), structured (using strictly standardised questions), and semi-structured (questions are pre-determined but open ended).<sup>63</sup> I felt that using unstructured interviews with front-line staff, though flexible, would impact the consistency of the data to such an extent that analysis comparing data between Local Authorities and individual staff would be unfeasible. Structured interviews were also rejected, but for opposing reasons. It was important to allow individuals to develop their own narratives of reasonable steps, to gather data on how the participants understood and applied the legislation. I therefore chose to use semi-structured interviews here, as they not only allowed for more control over the topics discussed than

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<sup>61</sup> The role of housing officers is explained further below.

<sup>62</sup> Svend Brinkmann and Steinar Kvale, *Interviews: Learning the craft of qualitative research interviewing*, Sage 2015, p5

<sup>63</sup> Lisa M Given (ed), *The Sage encyclopaedia of qualitative research methods* Sage 2008

unstructured interviews, but also avoided the limited range of responses associated with structured interviews.<sup>64</sup> It was important to keep participants focussed on elements of reasonable steps that would help address the second research question, but equally important to allow them the flexibility to give their individual accounts of working with the provisions. This importance for 'individual' level data was also the main reason for rejecting the use of focus groups here, which are more suited to obtaining 'collective views.'<sup>65</sup>

I had originally planned to conduct these interviews in person, but instead took the decision to use Microsoft Teams due to the legal restrictions on close contact imposed in March 2020 as a result of the Covid-19 pandemic. It has been noted that research design can often be found in need of adaptation in response to unforeseen challenges.<sup>66</sup> Furthermore, virtual interviews have been recognised as a valid mitigation to the loss of non-verbal data commonly associated with remote interview methods.<sup>67</sup> The main disadvantage of virtual interviews has been noted to be the potential to exclude many prospective recruits, with the technology required to participate being seen as a significant barrier for some.<sup>68</sup> I felt that these drawbacks were less of a concern here as Local Authorities had, at the time fieldwork was conducted, moved all of their internal and external meetings online. I felt that rather than hinder participation, a virtual approach would in many ways be preferable to in person interviews, as the method would be far more flexible and convenient to Local Authority staff who were, at that time, facing significant operational difficulties during the pandemic.

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<sup>64</sup> Ibid, p810

<sup>65</sup> Paul Gill, Kate Stewart, Elizabeth Treasure, and Barbara Chadwick, 'Methods of data collection in qualitative research: interviews and focus groups' (2008) *British dental journal* 204 6 291

<sup>66</sup> Lisa Webley, 'Qualitative approaches to empirical legal research' (2010) *The Oxford handbook of empirical legal research* 927, p927

<sup>67</sup> Valeria Lo Iacono, Paul Symonds, and David HK Brown, 'Skype as a tool for qualitative research interviews' (2016) *Sociological research online* 21 2 103

<sup>68</sup> Hannah Deakin and Kelly Wakefield, 'Skype interviewing: Reflections of two PhD researchers' (2014) *Qualitative research* 14 5 603

### 3.3.4 Participant selection

Participant selection began with an email sent to the housing department managers within the Local Authorities that had agreed to participate. This email included my contact details, a participant information document, and a request that those who wish to be interviewed contact me to arrange a Microsoft Teams appointment. Those that contacted me were then sent consent forms to read through and sign before the interview took place. As discussed above, three Local Authorities agreed to take part in the research, and a breakdown of participants for each Authority included: -

<b><u>Local Authority 1</u></b>	<b><u>Local Authority 2</u></b>	<b><u>Local Authority 3</u></b>
Manager (LA1 M)	Manager (LA2 M)	Manager (LA3 M)
Supervisor (LA1 S)		Housing Officer (LA3 H1)
Housing Officer (LA1 H1)		Housing Officer (LA3 H2)
Housing Officer (LA1 H2)		Housing Officer (LA3 H3)
Housing Officer (LA1 H3)		

In an effort to help the analysis of data, participants were assigned identifiers which enabled them to be grouped according to which Authority they belonged. In addition to the above, and following the completion of this stage of fieldwork, an opportunity arose to also interview another participant involved in the instruction program distributed for reasonable steps and the legislative framework. This individual worked as part of a team who delivered two-day training sessions to staff from all Local Authorities covering the major elements of the Housing (Wales) Act, and allowed for some insight into the transference of reasonable steps from policy-makers to front-line staff. This individual is a professional housing law training provider, so was also able to provide some depth of insight into the status of reasonable steps as a legal right and responsibility.

### 3.3.5 Interview format

As discussed above, all interviews took place remotely over Microsoft Teams, and lasted around one hour each. Upon securing participation from staff members, the initial interview for each Authority was conducted with the manager. This allowed me to obtain some contextual insight on the department, how it operated, how reasonable steps applied within it, and any geographical or resource-based idiosyncrasies which existed. For this reason, manager interview schedules differed slightly from those used with Housing Officer interviews, and the background information provided by management helped to contextualise responses given within the subsequent staff interviews. In keeping with a semi-structured approach, interview schedules used an open questioning format, but (as with the policy reunion) I was able to keep some element of control of the direction of the interview by ensuring some key themes were covered which related to the research objectives. These included the meaning and application of reasonable steps, for example, questions asked included ‘what does reasonable steps mean to you?’ and ‘what barriers exist which you feel hinder your ability to deliver reasonable steps?’ This kept participants ‘on track’ whilst allowing them to provide individualised, rich, and contextualised answers.<sup>69</sup> As with the policy reunion, and in keeping with assurances made on consent forms, recorded interviews were transcribed and deleted within two weeks.

### 3.3.6 Data analysis

For data analysis, I again used approaches described by Saldana (2015)<sup>70</sup> for coding qualitative data, and Braun and Clarke (2006)<sup>71</sup> for thematically organising those codes. Unlike the policy reunion, this phase of fieldwork yielded 11 separate transcripts, meaning that the ‘familiarisation’ stage of analysis took far longer. Transcripts were first coded individually, allowing for the emergence of themes at a participant specific level. These were then grouped in a number of ways to allow for the comparison of the interpretation and application of

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<sup>69</sup> Svend Brinkmann and Steinar Kvale (n 62)

<sup>70</sup> Johnny Saldaña (n 32)

<sup>71</sup> Virginia Braun and Victoria Clarke (n 29)

reasonable steps between managers, front-line staff, and at a Local Authority level. Again, manual methods along with the NVivo software were used for these steps. Upon the emergence of potential themes, I reviewed these manually, as the data produced a high degree of consistency in a number of aspects relevant to the research objectives, as well as a number of elements raised within the policy reunion session. For example, it was here that a close association between reasonable steps and procedural measures such as the use of Personal Housing Plans became evident, and inconsistencies emerged between staff and management on the intentions behind the provisions. Extracts demonstrating these elements could then be grouped, chosen, and presented within the relevant chapter as per Stage 6 of Braun and Clarke's framework. Elements of front-line application could then be compared to the intentions of reasonable steps uncovered in the policy reunion session.

To summarise, this section has discussed methods used to address the second research question, and investigate the 'front-line' implementation of reasonable steps. Semi-structured interviews with front-line staff and department managers allowed for reasonable steps to be examined at multiple levels within multiple groups. Comparing the interpretation and application of reasonable steps between both individuals and Local Authority housing departments yielded data not only on the variability in individual conceptions of reasonable steps and the use of discretion, but also allowed for some more generalisable conclusions to be drawn on the broader implementation of the provisions. The next section will discuss the ethical considerations attached to these elements of fieldwork. Later sections will go on to discuss methods used to address the investigation of the 'legal' definition of reasonable steps in relation to that element of research question 2, and address the uncertainty around its status as a practical legal right for applicants.

### 3.4 Ethical considerations of the qualitative research element

The project secured ethical approval from the School of Law and Politics ethics committee on 1<sup>st</sup> February 2021 (SREC-091220-02). This section will outline the measures taken to address ethical concerns regarding the qualitative element of the study. Fieldwork involved interviews

with front-line staff, as well as a focus group with policymakers. For this process, I specifically considered mitigating the potential harm that could arise in the areas of informed consent, anonymity, and secure handling of data. These are considered separately here. This section closes with a discussion on my own positionality and how this might have affected the research. Additionally, the direction of the qualitative methodology was significantly impacted by the pandemic and associated restrictions; this impact and the subsequent amendments to the research plan are also outlined.

### 3.4.1 Informed consent

The mere signing of a consent form is not a guarantee that an individual has fully understood all relevant aspects of the research and consented to participating.<sup>72</sup> Failure to not only read but also fully comprehend consent forms is a common occurrence in the social sciences.<sup>73</sup> It follows that careful 'emphasis [should be] placed on whether participants actually read, understand, and retain their content.'<sup>74</sup>

Clear transparency concerning research aims and the use of data was a key consideration for securing adequately informed consent for research participants. A clear, concise, and thorough but uncomplicated explanation of these was carefully drafted in both research proposals and consent forms. Copies of these documents were circulated electronically to participants a number of weeks before interviews took place, giving individuals plenty of time to read them and ask any questions regarding their content. As a further safeguard, I went over these documents with participants immediately prior to their interviews to check their understanding. I emphasised their right to withdraw at any time without explanation and confirmed the arrangements for anonymity and responsible handling of provided data.

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<sup>72</sup> Robert Dingwall, 'Ethics and ethnography' (1980) *The sociological review* 28 4 871

<sup>73</sup> Leanne Stunkel, Meredith Benson, Louise McLellan, Ninet Sinaii, Gabriella Bedarida, Ezekiel Emanuel, and Christine Grady, 'Comprehension and informed consent: assessing the effect of a short consent form' (2010) *IRB* 32 4, p1

<sup>74</sup> Evan K Perrault and David M Keating, 'Seeking ways to inform the uninformed: Improving the informed consent process in online social science research' (2018) *Journal of Empirical Research on Human Research Ethics* 13 1 50, p50

### 3.4.2 Anonymity

Typical steps taken to address confidentiality during qualitative research include redacting collected data by removing identifying characteristics, and adequate protection of transcripts, notes, and recordings.<sup>75</sup> Knowing that participants were all working in the same sector, I attached great importance to carefully handling data to minimise the danger of identifying applicants. This importance is further emphasised in my view, as I interviewed management and staff from the same Local Authorities, I wanted staff to feel as comfortable as possible with the opportunity to share potentially sensitive insights. For these reasons, and in line with commitments made on consent forms, participating Authorities were first given anonymous identifiers. The participants were also assigned identifiers, and transcripts were carefully read in order to redact any identifying characteristics as far as possible. These included, for example, the use of specific names of other staff, the names of Authority specific initiatives, and exact length of service.

Anonymity was equally important in the policy reunion for the same reasons given above. Though participants did of course know of each other, it was important that they were not identifiable in the transcript or the thesis itself. To address this, participants were again given anonymous identifiers and the transcript was carefully redacted to remove identifying characteristics of members of the group to minimise the risk of deductive disclosure.

### 3.4.3 Handling of data

As per consent forms, remote sessions were initially recorded. Within two weeks these were transcribed and redacted for data analysis. Original electronic recordings were deleted to secure external confidentiality.<sup>76</sup> Complying with data protection legislation, transcripts are stored remotely on secure University servers, and no copies are held on any personal devices.

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<sup>75</sup> Benjamin Saunders, Jenny Kitzinger, and Celia Kitzinger, 'Anonymising interview data: Challenges and compromise in practice' (2015) *Qualitative research* 15 5 616

<sup>76</sup> Martin Tolich, 'Internal confidentiality: When confidentiality assurances fail relational informants' (2004) *Qualitative sociology* 27 1 101

### 3.4.4 Positionality

It is important to contextualise this qualitative element of the thesis with an overview of my own place in the process. Massoud (2022)<sup>77</sup> defines positionality as ‘the disclosure of how an author’s racial, gender, class, or other self-identifications, experiences, and privileges influence research methods.’<sup>78</sup> Despite arguing that including such personal accounts in research publications can disproportionately place minorities in a vulnerable position, the author advocates for expressions of researcher positionality. He claims that, in recognising the non-existence of truly value-free research, they are an important tool to help readers contextualise and connect with the work at an intellectual, professional, and personal level.<sup>79</sup> Positionality statements can contextualise the direction the research has taken, highlighting how the researcher’s social capital and personal background has shaped field access, field dynamics, and data analysis.<sup>80</sup>

I approached this research with an existing background in homelessness support. For many years, and until recently, I have been a regular volunteer at a small local homelessness shelter. I have also previously been employed by a large homelessness charity as a Research Officer, required to regularly interview service users and organisation employees to assess the effectiveness of long-term funded homelessness assistance projects. I consequently approached the research with extensive experience in both interviewing actors in this sector and building rapport with research participants. Part II of the Housing (Wales) Act 2014 was enacted during my time as a Research Officer and I had, by this time, completed an LLB. The legislation itself was eagerly anticipated by the wider homelessness sector, with the reasonable steps provision widely perceived to be a highlight in seeking practical changes to homelessness services. My legal studies, coupled with my comprehensive experience and understanding of the complex difficulties commonly faced by service users, led me to begin questioning how

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<sup>77</sup> Mark Fathi Massoud, ‘The price of positionality: assessing the benefits and burdens of self-identification in research methods’ (2022) *Journal of Law and Society* 49 S64-S86

<sup>78</sup> *Ibid*, p64

<sup>79</sup> *Ibid*, p68

<sup>80</sup> Victoria Reyes, ‘Ethnographic toolkit: Strategic positionality and researchers’ visible and invisible tools in field research’ (2020) *Ethnography* 21 2 220, p149



practically effective these new legal rights might be for this social group. This curiosity, set at an early stage, motivated the exploration of the legislation in practice.

Unlike positivist research, which largely seeks to omit researcher influence on data collection and findings, interpretive approaches should recognise that the social characteristics and personal experiences of the researcher inevitably impact the research process.<sup>81</sup> These influences should therefore remain present reflexively in the mind of the researcher as the work progresses, and not mere retrospective 'reflection.'<sup>82</sup> I therefore endeavoured to remain mindful of my place in the research process, and I recognise that my own opinions, education, and past employment in the sector could lead to biases and privileges. Aside from the motivation to investigate the subject, my previous experience of fieldwork in the sector would have impacted access to participants and what insights those participants deemed relevant or proper to share.<sup>83</sup> My worldview and experience would have affected fieldwork, data analysis, and how the findings were presented, by impacting the language used in questions and follow up probes.<sup>84</sup> I also remained particularly reflexive throughout the process on my background with service users, as I have inevitably disproportionately encountered those who have received negative or contentious outcomes from homelessness services.<sup>85</sup> Disclosing and remaining conscious of these potential influences throughout the process of research, interpretation, and reporting, helps maximise the reliability and validity of findings.<sup>86</sup>

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<sup>81</sup> Jennifer E Hoolachan, 'Ethnography and homelessness research' *International Journal of Housing Policy* 16 1 (2016) 31, p36

<sup>82</sup> Rachel Shaw, 'Embedding reflexivity within experiential qualitative psychology' *Qualitative research in psychology* 7 3 (2010) 233

<sup>83</sup> Linda Finlay, 'Outing' the researcher: The provenance, process, and practice of reflexivity' *Qualitative health research* 12 4 (2002) 531

<sup>84</sup> Roni Berger, 'Now I see it, now I don't: Researcher's position and reflexivity in qualitative research' *Qualitative research* 15 2 (2015) 219

<sup>85</sup> Nikki Hayfield and Caroline Huxley, 'Insider and outsider perspectives: Reflections on researcher identities in research with lesbian and bisexual women' *Qualitative research in psychology* 12 2 (2015) 91

<sup>86</sup> Margaret D Lecompte and Judith Preissle Goetz, 'Problems of reliability and validity in ethnographic research' *Review of educational research* 52 1 (1982) 31

### 3.4.5 Covid-19 impact

In closing this section of the chapter, the significant impact of the Covid-19 pandemic on the direction of the research should be noted. The initial planned methodology for this project took inspiration from a number of socio legal publications in the field of homelessness decision-making,<sup>87</sup> and thus included fieldwork with service users as well as housing department staff. I had secured access to the physical department space of a number of authorities and had permission to directly observe housing need assessment meetings with service users. I hoped to use this direct interaction with service users to request their participation and recruit them for follow-up interviews. I felt that a rich insight into the practical implementation of reasonable steps could be gained from direct observation of officer-client interactions, in addition to interviews with those actors involved in that process. Repeating this approach in multiple departments would also facilitate the comparative advantage of case study approaches described above. The first national Covid restrictions were enforced shortly before this fieldwork was due to take place.

With a strict lockdown imposed, all housing departments in Wales ceased homelessness prevention work overnight and refocussed their resources towards placing all applicants in temporary accommodation in order to restrict the spread of the virus. A number of authorities who had originally agreed to participate in the research withdrew their consent, as the physical departments closed down and staff began working remotely whilst facing an unprecedented sudden increase in demand on their resources. I reflected on the work completed to that point and attended a number of seminars arranged by the ESRC, which aimed to help doctoral students reframe their planned research. Whilst the doctrinal element remained unchanged, I

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<sup>87</sup> Influences on the originally planned research methodology include many publications which I felt demonstrated the rich insight obtainable by gathering data from multiple front-line actors and direct observations. Notable examples include Peter Robson and Mark Poustie, *Homeless people and the law 3<sup>rd</sup> Edition*, Butterworths 1996; Ian Loveland, *Housing homeless persons: administrative law and the administrative process*, Clarendon Press 1995; Austin Sarat, '*... The Law is All Over: Power, resistance and the legal consciousness of the welfare poor*' Routledge 2006; Joanne Bretherton, Caroline Hunter, and Sarah Johnsen, 'You can judge them on how they look...': Homelessness officers, medical evidence and decision-making in England' *European Journal of Homelessness* 7 1 (2013) 69

decided to address the disruption caused by the pandemic by refocussing the qualitative component of the project away from service users and direct observation, and towards the early development of the law and the policy goals which underpinned it. In short, the policy reunion was arranged in response to this shift in focus, and I remained fortunate that some authorities were still willing to make housing staff available for interviews. The restrictions on face-to-face interactions at that time meant that this fieldwork needed to be conducted remotely.

This section has discussed the ethical considerations of this element of the thesis, then presented a discussion of my own positionality, and the potential influence of this on the direction and completion of the research. The significant difficulties faced as a result of the pandemic have also been documented here, as has their influence on the direction of the qualitative component of the thesis. Unlike this qualitative component, due to the 'desk-based' nature of the method, the doctrinal element of the research remained unaffected by this disruption. This element is discussed in subsequent sections.

### 3.5 Doctrinal methods

As stated in Chapter 1, despite being described as an innovative legal right for applicants, there have been no legal challenges to reasonable steps since the legislation came into force in April 2015. To address the 'courts' element of the second research question, which concerns the practical implementation of reasonable steps, and in the absence of any litigation of the provisions in this context, it was necessary to employ doctrinal methods to understand how the courts may interpret and apply the legislation in the event of a legal challenge. The doctrinal chapter (6) is focussed on two key questions, what is the legal threshold for reasonable steps, and how would the courts scrutinise Local Authority actions in practice? Uncovering the legal definition and application of reasonable steps was a crucial step in testing the legal implementation against the intent of policymakers and answering this element of the second research question. This proved to be a considerable task. Although no specific case law exists on reasonable steps in this context, there is of course an enormous amount on the broad terms

of ‘reasonableness’ and ‘unreasonableness’ in the actions of public authorities providing public functions. Before describing the methods used in more detail, the following part of this section will discuss doctrinal analysis and social science methods within socio-legal studies.

### 3.5.1 Doctrinal analysis

Doctrinal analysis has been described as the ‘traditional’ form of legal scholarship<sup>88</sup> characterised by the use of exclusively internal sources. Ibbetson (2003)<sup>89</sup> draws a helpful distinction between ‘internal’ and ‘external’ approaches to legal studies, which is beneficial for situating traditional doctrinal studies within the former. He writes: -

*“The former (doctrinal studies), we might say, is the [study] of lawyers' law, of legal rules and principles. Its sources are predominantly those that are thrown up by the legal process: principally statutes and decided cases, supplemented where possible with lawyers' literature expounding the rules and occasionally reflecting on them. The latter is the [study] of the law in practice, of legal institutions at work in society rather than legal rules existing in a social, economic, and political vacuum.”<sup>90</sup>*

Doctrinal analysis is therefore characterised by the use of *internal* sources, primarily case law and statute. Predominantly, these studies consist of a close analysis of these legal sources to identify principles, and attempt to understand how they fit together to ‘draw out the patterns of normative understanding that enable us to see the wood and the trees together.’<sup>91</sup> The clarification that is sought from deep analysis of appellate opinion and other high case law, for example, provides opportunities for the doctrinal analyst to clarify ‘legal’ meanings, identify ambiguity, expose inconsistency, and develop distinctions<sup>92</sup> within the law.

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<sup>88</sup> Richard A Posner, ‘The present situation in legal scholarship’ (1981) *The Yale Law Journal* 90 5 1113

<sup>89</sup> Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of Legal Studies*, Oxford University Press 2003, p863

<sup>90</sup> *Ibid*, p864

<sup>91</sup> Christopher McCrudden, ‘Legal research and the social sciences’ (2006) *Law Quarterly Review* 122(Oct) 632, p 634.

<sup>92</sup> Richard A Posner (n 76), p1113

Van Hoecke (2011)<sup>93</sup> advances a number of conceptual lenses through which to view the doctrinal method based on the ambitions behind the analysis and the preconceptions of the researcher.<sup>94</sup> This includes, for example, viewing the doctrinal method as an ‘argumentative discipline,’ with the goal of answering a concrete legal question or solving a specific case. In another example, the author describes viewing legal analysis as an ‘axiomatic discipline,’ seeing law as an exact science. At the extreme of this view, some optimistic scholars have (unsuccessfully) attempted to encode all law into a formal logic and computer programs. I view the doctrinal endeavours of this thesis somewhere between two other conceptualisations described by Van Hoecke, namely a *hermeneutic discipline*, and an *empirical discipline*. I approached the endeavour hermeneutically, in the sense that I solely utilised texts and written documents as research objects and interpreted them. Although this grounded the doctrinal method, there was of course also a strong empirical element. Aside from the close association with the qualitative component of the thesis, and in line with the empirical conceptualisation, I needed to put my interpretations into context and propose the approach that courts might take under certain conditions. It is important, however, to note the limits to empirically testing my doctrinal conclusions. Legal arguments are rarely fundamentally right or wrong and are thus not always empirically testable; rather they are frequently either more, or less, convincing.

The ‘internal’ focus of doctrinal analysis has given rise to the criticism that it is closed, overly descriptive or explanatory, and exclusively concerns the ‘dry, mechanical application of rules.’<sup>95</sup> It has been described as ‘mere scholarship’, in the sense that it is distinct from actual ‘research.’<sup>96</sup> Despite these criticisms, doctrinal analysis is widely considered to be a crucial component in empirical legal studies. It can, and should, form the basis of all legal research

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<sup>93</sup> Mark Van Hoecke (ed), *Methodologies of legal research: which kind of method for what kind of discipline?* Bloomsbury Publishing 2011

<sup>94</sup> Ibid, p4-11

<sup>95</sup> Douglas W Vick, ‘Interdisciplinarity and the Discipline of Law’ (2004) *Journal of Law and Society* 31 2 163, p179

<sup>96</sup> Roger Cotterrell, ‘Why must legal ideas be interpreted sociologically’ (1998) *Journal of law and society* 25 2 171

endeavours.<sup>97</sup> Watkins & Burton (2017)<sup>98</sup> advance this argument, casting doctrinal analysis as a crucial foundational step, necessary for validating any empirical investigation. They state that: -

*“Valid research is built on sound foundations, so before embarking on any theoretical critique of the law or empirical study about the law in operation, it is incumbent on the researcher to verify the authority and status of the legal doctrine being examined.”<sup>99</sup>*

Doctrinal research thus ‘constitutes the foundation or starting point of most legal research projects,’<sup>100</sup> and the following section will provide some detail on the methodological approach taken when analysing reasonable steps. The need to include a doctrinal analysis of reasonable steps within this thesis arises as a result of its proposed status as a legal right. The requirement for reasonable steps in law is a new approach to homelessness support, and its’ legal status needed to be understood in addition to its practical implementation. Furthermore, and as a more pressing and practical issue, the lack of case law on reasonable steps in context leaves uncertainty for applicants and Local Authorities alike.

### 3.5.2 Case selection and analysis

I approached the doctrinal process with an overarching central question; ‘how would the courts interpret and apply reasonable steps in the event of a legal challenge’? Following guidance in Knight and Ruddock (2009)<sup>101</sup> and Van Hoeke (2011),<sup>102</sup> having clarified the specific research questions of the doctrinal analysis, I gathered relevant case law in a wide context. Once specific legal principles were identified (such as the circumstances which may alter levels of judicial scrutiny) I was able to conclude the likelihood that they would logically transpose to the context of reasonable steps in the Housing (Wales) Act 2014.

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<sup>97</sup> Susan Bartie, ‘The lingering core of legal scholarship’ (2010) *Legal Studies* 30 3 345

<sup>98</sup> Dawn Watkins and Mandy Burton (eds) *Research methods in law*, Routledge 2017

<sup>99</sup> *Ibid*, p10

<sup>100</sup> Dawn Watkins and Mandy Burton eds (n 86), p38

<sup>101</sup> Andrew Knight and Les Ruddock (eds) *Advanced research methods in the built environment*, John Wiley & Sons 2009

<sup>102</sup> Mark Van Hoecke (ed) (n 81)

With the absence of contextual case law on reasonable steps I began by investigating the broad concept of 'reasonableness' in a public law context. I used electronic legal databases such as Westlaw and Lexis to search decisions from the highest domestic authority available over the past 20 years, in this case the UK Supreme Court and House of Lords, on public law reasonableness. I found it easier to analyse the documents manually rather than use a software package. Although a lot of case law exists, it yielded no clear or obvious themes, and I expanded the searches to the lower Courts. Again, reasonableness existed within the case law, but there was nothing specifically identifiable regarding the components upon which the concept was built. Changing my approach, I expanded my search criteria to include much older case law.

My approach in widening the search to historical cases on reasonableness in this context was influenced by Chesterman (1997).<sup>103</sup> The author attempts the daunting task of tying the historical relationship between equity and the common law with what he describes as the 'conflicting' objectives of law; namely 'assuring social stability' and promoting 'individual justice.'<sup>104</sup> Within the first part of his thesis, Chesterman provides a historical doctrinal account of the developing relationship (and ultimate fusion) of common law and equity systems, using statute and case law to identify some broad themes which he takes forward. Although not quite as comprehensive a topic as equity or common law, 'reasonableness' is nevertheless a wide-reaching and consequential legal standard. Beginning to view reasonableness in a broader way, though difficult, did provide the legal principles on which I needed to focus; including for example unreasonableness as 'malice,' 'cruelty,' and 'malevolence.' These factors were tested in the more modern cases and were either implicitly or explicitly identified within the judgments.

A similar method was used to select homelessness cases. I again used Westlaw and Lexis to search homelessness decisions, focussing first on high authority. Using the citations in the judgments, as well as following the 'cited by' function, allowed me to piece together the

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<sup>103</sup> Simon Chesterman, 'Beyond Fusion Fallacy: The Transformation of Equity and Derrida's 'The Force of Law' (1997) *Journal of Law and Society* 24 3 350

<sup>104</sup> Simon Chesterman (n 91), p50

development of principles within the case law. I was able to identify legal principles and find common threads through these cases, gradually narrowing my focus to case law on 'reasonable steps' in judicial review cases in the area of selective licencing. This is a close statutory context to the Housing (Wales) Act, and I was able to meet the research objective and outline how the courts would interpret and apply reasonable steps in the Housing (Wales) Act 2014.

In summary, this section has discussed doctrinal methods as a useful, if not vital, component in empirical legal studies, and outlined its' use within the thesis. In the absence of specific case law on reasonable steps, the doctrinal component of the thesis clarified the way in which the courts may interpret and apply reasonable steps in practice in response to the 'courts' element of the second research question. By focussing on the threshold for unreasonableness, and level of scrutiny the courts would employ when judging the actions of Local Authorities, the findings allow for a degree of comparison with policy intent in line with the research questions. This chapter has described the methods used within the thesis as a whole, and argued that combining this doctrinal account with qualitative methods provides a more complete picture of reasonable steps in practice. The next chapter is the first of three empirical chapters included in the thesis and presents the findings from the policy reunion. In doing so, the policy intent behind reasonable steps is uncovered in line with the first research question. Subsequent chapters take this intent forward as a comparator when investigating the implementation of reasonable steps by Local Authorities and the courts.



## Chapter 4 - The Origin and Intentions of Reasonable Steps

*The opportunity to reform our homelessness legislation and to place prevention at its heart has considerable potential to mitigate the increases in homelessness. We will be the first part of the UK to refocus our homelessness legislation on prevention. Despite the considerable good work that has been done on prevention, current law does not encourage intervention early enough.*

**Welsh Government, Homes for Wales White Paper, 2012**

Kingdon's Multiple Streams Model (MSM)<sup>1</sup> has developed as a principal tool for the analysis of the policy process in multi-level governance. The initial empirically grounded study of the policy process in the US has, since publication, been adapted to explain the development of a phenomenally wide range of policy goals across the world.<sup>2</sup> These innovations arose from one central question to which Kingdon sought an answer; 'what makes people in and around government attend, at any given time, to some subjects and not to others?'<sup>3</sup> The development of reasonable steps within the Housing (Wales) Act contains situational and simultaneous elements not usually explained in depth within typical studies of policy development.

Reasonable steps emerged against a backdrop of strong political will, rising homelessness figures, newly devolved law-making powers, and an active and collaborative national housing and homelessness sector. As discussed in Chapter 2, there are a number of unique innovations within the multiple streams framework which account for these specific nuances.

First, the MSM facilitates the simultaneous consideration of multiple levels of policy formation, from inception to implementation. With the aim of extending pre-existing models towards investigating the *timing* of policy creation, Kingdon advances the analogy of the opportune convergence of the three 'streams' of *problems*, *politics*, and *policy*. In short, the 'problems' stream is described as being in a state of constant flow. It may consist of ongoing societal problems or a drawn-out deterioration in performance statistics, or conversely, urgent or

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<sup>1</sup> John W Kingdon, *Agendas, alternatives and public policies, updated edition*, Pearson 2010

<sup>2</sup> Paul Cairney and Michael D Jones, 'Kingdon's multiple streams approach: what is the empirical impact of this universal theory' (2016) *Policy studies journal* 44 1 37

<sup>3</sup> John W Kingdon (n 1), p1

sudden issues and disasters. Either way, these are described as ‘focusing events’ which capture public attention. The ‘politics’ stream consists of politicians, political parties, and their priorities. It is here that the agenda is set, and advertised with manifesto pledges, media interviews, and legislative proposals which respond to public mood and convey the will to solve a particular problem with a policy. Finally, and in contrast to this public spectacle of the ‘politics’ stream, the ‘policy’ stream is invisible. It is here where, behind the scenes, solutions to problems are introduced, argued, and assessed by subject specific experts, members of the policy community, and academics. Kingdon argues that impractical, unsuitable, and unfavoured measures fall away here to leave the chosen method of addressing policy goals. The individuals and organisations occupying the policy stream are highly influential on outcomes and are thus labelled ‘policy entrepreneurs.’

Second, and aside from the widely applicable three streams model, Kingdon advances another key innovation, far less cited, which fits the context of reasonable steps well. His framework explicitly delineates between the processes of ‘agenda-setting’ and ‘alternative specification.’ Setting an item on the agenda firmly belongs in the ‘politics’ stream, and is an ability reserved for high status politicians and civil servants, in other words, for the few. In contrast, ‘alternative specification,’ as a function of the ‘policy’ stream, is where practical solutions emerge. Kingdon argues that policy entrepreneurs and experts may work behind the scenes, sometimes for years, trying to get their chosen topic of expertise on the policy agenda unsuccessfully, that is until the agenda-setter synchronises their own motivation. Likewise, the policy entrepreneur’s interest in the topic remains long after the item has left the agenda, and a viable solution been implemented.

This chapter is presented in response to the first research question, which asks; what was the policy intent behind the reasonable steps legislation? The opening part of this chapter will first outline the origin of reasonable steps, and will, using Kingdon’s Multiple Streams Framework, provide an overview of the problem and politics streams in context. Subsequently, given the nature of this study, significant focus will then be placed on the policy stream and the ‘alternative specification’ process within. A number of sources will be drawn upon here to detail

the stages of the development of reasonable steps, including policy formulation and legislative drafting literature, legislative reviews, and consultation responses. The second part of this chapter will expand upon this background, and primarily draw on interview data, including contributions from a focus group in the form of a 'policy reunion.' Participants may be viewed as the 'policy entrepreneurs' of reasonable steps, whose contributions offer an insight into some of the contextual factors present within the policy stream and the process of alternative specification, as well as reveal their intended vision for the interpretation and practical application of reasonable steps. The chapter concludes at the point of policy implementation within the Housing (Wales) Act, with a clear picture of the proposed meaning and intended use of reasonable steps, which can be taken forward in further chapters as a comparator when investigating the practical implementation of the provisions.

#### 4.1 Problems, politics, and prevention: Addressing homelessness in Wales with legislative powers

Although empirical findings are largely situated within Kingdon's policy stream, for the sake of unity it is necessary, albeit in a cursory way, to first place these elements within the wider contextual landscape. This section will therefore seek a starting point in which to locate the alternative specification process of reasonable steps by describing the problem and politics streams into which it merged. As discussed above, the multiple streams framework was originally intended to explain agenda-setting within the US, but the ability to consider each stream as independent elements has facilitated the study of their confluence and uncoupling within an exceptionally diverse range of settings.<sup>4</sup> Studies have inevitably therefore sought to circumnavigate many problem streams, from forestry policy,<sup>5</sup> gender policy,<sup>6</sup> tobacco<sup>7</sup> and

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<sup>4</sup> Christina Boswell and Eugénia Rodrigues, 'Policies, politics and organisational problems: multiple streams and the implementation of targets in UK government' (2016) *Policy & Politics* 44 4 507, p507

<sup>5</sup> Jessica E Boscarino, 'Surfing for problems: Advocacy group strategy in US forestry policy' (2009) *Policy Studies Journal* 37 3 415

<sup>6</sup> Daniel Béland, 'Gender, ideational analysis, and social policy' (2009) *Social Politics* 16 4 558

<sup>7</sup> Bossman E Asare and Donley T Studlar, 'Lesson-drawing and public policy: second hand smoking restrictions in Scotland and England' (2009) *Policy Studies* 30 3 365; Paul Cairney, 'The role of ideas in policy transfer: the case of UK smoking bans since devolution' (2009) *Journal of European public policy* 16 3 471; Paul Cairney and Mikine Yamazaki, 'A comparison of tobacco policy in the UK and Japan:

alcohol<sup>8</sup> controls, and childhood diabetes,<sup>9</sup> through to items that are consistently high on contemporary government policy agendas such as foreign policy,<sup>10</sup> environmental policy,<sup>11</sup> and climate change.<sup>12</sup> The vast number of multiple streams studies on homelessness<sup>13</sup> are indicative of its constancy on policy agendas globally, and place it firmly within the latter category. In other words, homelessness has been, and remains, a persistent element of global problem streams.

The case is such in Wales. Homelessness has remained a consistent difficulty, with the problem and politics streams being largely in a state of convergence at least since the election of the first National Assembly.<sup>14</sup> In 2003, the Welsh Assembly became the first within the UK to compose a

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if the scientific evidence is identical, why is there a major difference in policy?' (2018) *Journal of Comparative Policy Analysis: Research and Practice* 20 3 253

<sup>8</sup> Matthew Lesch and Jim McCambridge, 'Reconceptualising the study of alcohol policy decision-making: the contribution of political science' (2021) *Addiction Research & Theory* 29 5 427

<sup>9</sup> Amanda Culp-Roche and Adebola Adegboyega, 'Analysis of Kentucky's law protecting the rights of schoolchildren with type 1 diabetes mellitus: application of Kingdon's policy stream model' (2016) *Policy, Politics, & Nursing Practice* 17 1 5; Shanaz Taghizadeh, Rahim Khodayari-Zarnaq, and Mahdiah Abbasalizad Farhangi, 'Childhood obesity prevention policies in Iran: a policy analysis of agenda-setting using Kingdon's multiple streams' (2021) *BMC paediatrics* 21 1 1

<sup>10</sup> Rick Travis and Nikolaos Zahariadis, 'A multiple streams model of US foreign aid policy' (2002) *Policy Studies Journal* 30 4 495

<sup>11</sup> Marc V Simon and Les R Alm, 'Policy windows and two-level games: explaining the passage of acid-rain legislation in the Clean Air Act of 1990' (1995) *Environment and Planning C: Government and Policy* 13 4 459

<sup>12</sup> Sarah Louise Nash and Reinhard Steurer, 'Climate Change Acts in Scotland, Austria, Denmark and Sweden: the role of discourse and deliberation' (2021) *Climate Policy* 21 9 1120; Amandine Orsini, Loïc Cobut, and Maxime Gaborit, 'Climate change acts non-adoption as potential for renewed expertise and climate activism: the Belgian case' (2021) *Climate Policy* 21 9 1205; Diarmuid Torney, 'If at first you don't succeed: the development of climate change legislation in Ireland' (2017) *Irish Political Studies* 32 2 247

<sup>13</sup> See, for example: Brendan Clifford, Andrew Wilson, and Patrick Harris, 'Homelessness, health and the policy process: a literature review' (2019) *Health Policy* 123 11 1125; David S Lucas, 'Evidence-based policy as public entrepreneurship' (2018) *Public Management Review* 20 11 1602; Eric Macnaughton, Geoffrey Nelson, and Paula Goering, 'Bringing politics and evidence together: policy entrepreneurship and the conception of the At Home/Chez Soi Housing First Initiative for addressing homelessness and mental illness in Canada' (2013) *Social Science & Medicine* 82 100; Joanne O'Sullivan and Patricia Lussier-Duynstee, 'Adolescent homelessness, nursing, and public health policy' (2006) *Policy, Politics, & Nursing Practice* 7 1 73; Renée Smith-Maddox, Lauren E. Brown, Stacy Kratz, and Richard Newmyer, 'Developing a Policy Advocacy Practice for Preventing and Ending Homelessness' (2020) *Journal of Social Work Education* 56 1 4

<sup>14</sup> Government of Wales Act 1998

strategy to address homelessness, re-publishing and updating policy aims at a number of stages,<sup>15</sup> and arriving in 2009 with a 'Ten Year Plan'<sup>16</sup> to tackle the issue. This plan signalled a distinct commitment to a shift away from reactive homelessness services, and towards a broader early intervention and prevention policy. It also committed to a comprehensive review of the then current legislative framework.<sup>17</sup> Perhaps to add to the problem stream, the review<sup>18</sup> found that existing legislation was not being interpreted and applied in a uniform way across Wales, and that it led to the allocation of resources based on bureaucratic processing rather than individual need. The report also found that existing legislation did not sufficiently support the desired homelessness prevention initiatives. This shift in focus is an important one. Homelessness was a persistent element of the problem stream, but it is here that prevention as a firm policy goal enters the politics stream.<sup>19</sup>

Prevention and early intervention as policy goals are intuitively appealing; and have been met with significant support within a wide array of policy areas.<sup>20</sup> The same is true for homelessness,<sup>21</sup> though calls for a preventative approach to address the problem were nothing

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<sup>15</sup> Welsh Assembly, *National Homelessness Strategy for Wales*, Welsh Assembly [2006]

<sup>16</sup> Welsh Assembly Government, *Ten-year homelessness plan for Wales: 2009–2019* Cardiff, Welsh Government 2009

<sup>17</sup>Ibid, p26

<sup>18</sup> Mackie, Peter, Ian Thomas, and Kate Hodgson, 'Impact analysis of existing homelessness legislation in Wales' (2012) Cardiff, Welsh Government

<sup>19</sup> Peter Mackie, Ian Thomas, and Jennie Bibbings, 'Homelessness prevention: reflecting on a year of pioneering Welsh legislation in practice' (2017) *European Journal of Homelessness* 11 1 81

<sup>20</sup> Juliette Astrup, 'Knife Crime: Where's the Public Health Approach?' (2019) *Community Practitioner* 92 6 14, p14; Geoff Lindsay and Steve Strand, 'Evaluation of the national roll-out of parenting programmes across England: the parenting early intervention programme (PEIP)' (2013) *BMC Public Health* 13 1 1; Stephen Malden, Adrienne R Hughes, Ann-Marie Gibson, Farid Bardid, Odysseas Androustos, Marieke De Craemer, Yannis Manios, Carolyn Summerbell, Greet Cardon, and John J Reilly, 'Adapting the Toy Box obesity prevention intervention for use in Scottish preschools: protocol for a feasibility cluster randomised controlled trial' (2018) *BMJ* 8 10

<sup>21</sup> Volker Busch-Geertsema and Suzanne Fitzpatrick, 'Effective homelessness prevention? Explaining reductions in homelessness in Germany and England' (2008) *European Journal of Homelessness* 2; Dennis P Culhane, Stephen Metraux, and Thomas Byrne, 'A prevention-centered approach to homelessness assistance: a paradigm shift?' (2011) *Housing Policy Debate* 21 2 295; Catherine Maher and Mike Allen, 'What is preventing us from preventing homelessness? A review of the Irish National Preventative Strategy' (2014) *European Journal of Homelessness* 8 2; Cameron Parsell and Greg Marston, 'Beyond the 'at risk' individual: Housing and the eradication of poverty to prevent homelessness' (2012) *Australian Journal of Public Administration* 71 1 33

new. Lindblom (1991)<sup>22</sup> argues that ‘as long as there are substantial new entries into homelessness, helping only the already homeless cannot significantly reduce the size of the problem.’<sup>23</sup> Since this publication, studies have advanced arguments for the benefits of pursuing prevention initiatives in homelessness support, most notably cost effectiveness,<sup>24</sup> though to a lesser extent, the benefits of early intervention for individual dignity and reduced suffering which come with a preventative approach.<sup>25</sup> Despite some criticism of prevention policies, such as their potential to foster a selective and individualistic service delivery,<sup>26</sup> the Ten Year Plan stated that ‘prevention should be the primary aim of all strategies and service planning to tackle homelessness,’<sup>27</sup> explicitly embracing the paradigm shift, and clearly signposting a desired pursuit of the benefits within the politics stream. As such, although preventative interventions were already somewhat present within some areas of front-line service delivery, prevention was now placed at the top of a list of policy goals within the plan, which also included individual centred services, equality of access, and cooperative working.<sup>28</sup>

The heightened political motivation to prioritise homelessness prevention coincided with an increase in legislative competency. The Government of Wales Act 2006 formally separated the Assembly from the Welsh Government, clarifying the roles of the executive and legislature whilst granting the power to pass Assembly Measures in the devolved areas listed under Schedule 7, including housing. Legislative powers were further increased following a referendum in 2011, with the Welsh Government now possessing the authority to pass primary

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<sup>22</sup> Eric N Lindblom, ‘Toward a comprehensive homelessness-prevention strategy’ (1991) Housing Policy Debate 2 3 957

<sup>23</sup> Eric N Lindblom, ‘Toward a comprehensive homelessness-prevention strategy’ (1991) Housing Policy Debate 2 3 957, p957

<sup>24</sup> Volker Busch-Geertsema and Suzanne Fitzpatrick (n 21); Cameron Parsell and Greg Marston (n 21)

<sup>25</sup> Maureen Crane, Anthony M Warnes, and Ruby Fu, ‘Developing homelessness prevention practice: combining research evidence and professional knowledge’ (2006) Health & social care in the community 14 2 156; Kenneth R Wireman, ‘Preventing homelessness: A consumer perspective’ (2007) The Journal of Primary Prevention 28 3 205

<sup>26</sup> Peter Mackie, ‘Homelessness prevention and the Welsh legal duty: lessons for international policies’ (2015) Housing Studies 30 1 40, p44.

<sup>27</sup> Welsh Assembly Government (n 16), p3

<sup>28</sup> Ibid, p1

legislation within those areas.<sup>29</sup> Four months later, the Welsh Government published a comprehensive legislative programme,<sup>30</sup> which included the intention to begin consultation on a new 'Housing Bill' to 'implement manifesto commitments including tackling homelessness.'<sup>31</sup> The resulting document, entitled 'Homes for Wales: A White Paper for Better Lives and Communities,'<sup>32</sup> acknowledged the identified weaknesses within the then present legislative framework, and sought to prioritise homelessness prevention within a new Housing Act. The White Paper signalled the intention to build on perceived successes of the provision of haphazard and informal prevention initiatives by granting service users the legal right to promptly delivered preventative interventions.<sup>33</sup> Furthermore, the White Paper intended that the new legal framework would directly address the issue of disparity in service levels, and states: -

*"People... can find themselves treated in different ways by different local authorities and even in some instances, by different officers. This is wrong. People should be able to receive consistently good services and expect to have the law applied in a consistent way in all parts of Wales."*<sup>34</sup>

The aspiration to address these issues within the White Paper gives rise to the first use of the word 'reasonable' in this context, and the inception of what would become 'reasonable steps' within the Housing (Wales) Act itself. The document makes a number of references to this new legal obligation, intending that it be a duty on the part of Local Authorities to take 'all reasonable steps,' more specifically, 'all reasonable steps to achieve a suitable housing solution for all households which are homeless or threatened with homelessness.'<sup>35</sup> It is stated that accompanying statutory guidance should be comprehensive, including details of a 'minimum

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<sup>29</sup> UK Government, *Devolution Settlement: Wales* UK Government available at <https://www.gov.uk/guidance/devolution-settlement-wales#the-government-of-wales-acts> accessed 18/11/21

<sup>30</sup> Welsh Government, *The Welsh Government's Legislative Programme 2011 – 2016* National Assembly for Wales Commission 2011

<sup>31</sup> Ibid, p30

<sup>32</sup> Welsh Government, *Homes for Wales: A White Paper for Better Lives and Communities* Welsh Government 2012

<sup>33</sup> Ibid, [8.35]

<sup>34</sup> Welsh Government (n 32), [8.16-8.17]

<sup>35</sup> Welsh Government (n 32), [8.44]

set of interventions that a Local Authority must consider in its attempts to provide a housing solution,<sup>36</sup> and that appeal mechanisms should be in place ‘to enable households to challenge whether or not a Local Authority has acted in compliance with the duty to take all reasonable steps.’<sup>37</sup> To address homelessness within the problem stream, the White Paper clearly signposts the priorities of the politics stream; the intention was to strengthen perceived weaknesses in existing legislation, bring prevention into a new legislative framework, and give service users an enforceable legal right to ‘all reasonable steps’ in homelessness assistance.

There are three identifiable areas of disparity between the intentions outlined above and the manner in which reasonable steps eventually appears on the face of the first draft of the Bill, and ultimately, the Act itself. First, the intention for ‘all reasonable steps’ was changed to just ‘reasonable steps,’ significantly widening interpretation and reducing the amount of assistance required from Local Authorities. Second, and contrary to specific aims of the policy, the legal right to prevention assistance specifically is reduced on the face of the Act. Applicants have the legislative right to request an internal review of reasonable steps taken in homelessness relief, but not prevention.<sup>38</sup> Third, although the accompanying guidance is comprehensive when describing the scope of interventions which should be made available to applicants, it does not firmly require these as a minimum. On the face of the Code of Guidance, many examples of reasonable steps are suggested as a baseline standard, but the requirement is not that these ‘must’ or ‘should’ be made available, but that they ‘ought.’<sup>39</sup>

The political intent behind reasonable steps is evident to some degree in the White Paper and legislative programme, but there are questions raised by the disparity between the political will outlined above and the resulting legislative framework which cannot be fully explored using secondary evidence. Primarily drawing on findings from a focus group with policy

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<sup>36</sup> Welsh Government (n 32), [8.49]

<sup>37</sup> Welsh Government (n 32), [8.51]

<sup>38</sup> Housing (Wales) Act 2014, s 85

<sup>39</sup> Welsh Government, *Code of Guidance for Local Authorities on the Allocation of Accommodation and Homelessness* Cardiff, Welsh Government 2016, [12.13]



entrepreneurs, the following section of this chapter will provide a more detailed account of the status of reasonable steps within the policy stream specifically, and in doing so, address these areas of disparity. This will be followed by an outline of how reasonable steps developed as a legislative concept, what it was intended to mean, and how it should be applied in practice. This insight will be used as a starting point when exploring the practical application of the provisions in later chapters. The process described below provides depth to key developments in reasonable steps from conception to the publication of the White Paper, and through to the first draft of the Bill.

## 4.2 Reasonable steps in the policy stream

The previous section has, for context, briefly described both homelessness as an ongoing problem, and the intentions within the politics stream to address this problem by enshrining a right to prevention assistance within a new legislative framework. It is necessary to build upon these elements and provide a deeper analysis of the original policy intent behind the inclusion of reasonable steps in the statute. With the aim of meeting this objective, a policy reunion was conducted with a number of individuals who were members of a group of ‘policy entrepreneurs’ behind the inception of reasonable steps. The participants were part of a team tasked with researching, discussing, debating, and recommending measures and approaches for the successful achievement of policy aims within the then new legislation. As such, they were all directly and collectively involved in the ‘alternative specification’ process behind reasonable steps, and thus played a significant role in the formulation of Part II of the Housing (Wales) Act 2014 and the attached Code of Guidance. The participants were all representatives from a cross section of sectors involved in the translation of policy into legislation, including a current representative of Welsh Government, a senior member of Local Authority management, an academic representative, a freelance housing policy consultant, as well as a manager and legal advisor from the charity sector. Though the intentions behind reasonable steps emerging from the politics stream have been documented above and demonstrate a clear desire to provide a legislative right to homelessness assistance, findings from the policy reunion provide a further unique insight into the subsequent policy stream of the implementation process. Findings from

the policy reunion are presented in subsequent sections, and will detail, in turn, the insight gained from the group on all key aspects of reasonable steps relating to this thesis; including what the term sought to achieve, why it was chosen, and why it was deemed important to use law as a vehicle to drive the policy. Six participants attended the policy reunion, and for the purposes of anonymity, were assigned identifiers from Attendee 1 (A1) through Attendee 6 (A6).

#### 4.2.1 Why reasonable steps?

Several factors influenced the inclusion of the specific phrase ‘reasonable steps’ in the final legislation. The phrase has a long history in the context of homelessness. It was present in, though not central to, the provision of homelessness services long before the Housing (Wales) Act. In its first iteration, the Housing Act 1996 included a requirement<sup>40</sup> that Local Authorities take reasonable steps to help stop the cease of accommodation, but only for those applicants found to be in priority need. This limitation had inevitably narrowed the application of assistance significantly, restricting the right to reasonable steps to those in the most vulnerable of situations.<sup>41</sup> Participant 4 stated that ‘the logical... extension... was to carry that forward, but crucially to make it more inclusive... for those not in priority.’<sup>42</sup> The new provisions therefore sought to widen the old duty, and take an existing legal concept into a new context.<sup>43</sup> One central advantage of using the phrase was a common understanding, as articulated by Participant 3 when stating that a ‘concept that had been used within the housing and homelessness world was drawn upon... because... at least there [would be] some shared understanding of what was meant.’<sup>44</sup> ‘It was important that it was a concept that already existed in homelessness... in the Local Authority context.’<sup>45</sup> The presumption that there would

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<sup>40</sup> Housing Act 1996, s 195(2) as originally enacted. Subsequently amended.

<sup>41</sup> The concept of priority need has been central to the provision of homelessness services. There are a number of qualifying characteristics to satisfy the priority need test, including pregnant women, those with dependent children, and ‘vulnerable persons.’ Full definitions for priority need categories may be found in the Housing Act 1996 s 189 for England, and the Housing (Wales) Act 2014 s 70 for Wales.

<sup>42</sup> A4, p2

<sup>43</sup> A3, p3

<sup>44</sup> A3, p10

<sup>45</sup> A3, p3

be an interpretative familiarity among Local Authority staff was echoed by another participant, who specifically drew attention to the inclusion of 'reasonableness' within the pre-HWA housing law framework, citing the areas of continued occupation<sup>46</sup> and tenant abandonment<sup>47</sup> as examples.<sup>48</sup> As such, the historical relationship and the familiarity ensured that the term was a consistent part of the policy development discourse, as highlighted by Participant 1 who specifically recalled a legally qualified member of the research team (not present at the focus group) first suggesting the use of the phrase 'reasonable steps;' it was suspected that 'it would have [already] been in the back of [their] mind.'<sup>49</sup> The group had a shared desire to expand the reach and content of the pre-existing concept of reasonable steps, which was hoped to serve as a guide to good practice in the allocation of resources with clear acknowledgment of the wide variation in available Local Authority resources.

Under the pre-HWA framework, some Local Authorities had naturally developed comprehensive homelessness prevention strategies, but for those that had not, the inclusion of a requirement for reasonable steps in prevention was to be a statement of intent that a minimum level of service should be provided.<sup>50</sup> The group had acknowledged the potential for discrimination in the provision of services under the Housing Act 1996, which was highlighted within a legislative review commissioned by the Welsh Government.<sup>51</sup> They hoped to directly address this potential problem with the new legislation, by constructing a more inclusive duty. In the following extract, Participant 4 outlines the requirement for a 'rights-based [and] meaningful'<sup>52</sup> level of assistance for all applicants: -

*"The point was that in some authorities there was a lot being done for some groups and very little being done for others... and [we were bringing in] this concept of providing a rights-based approach to homelessness assistance that [states] you will receive a level of*

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<sup>46</sup> Housing Act 1996, s 177

<sup>47</sup> Protection From Eviction Act 1977, s 1(2)

<sup>48</sup> A4, p9

<sup>49</sup> A1, p2

<sup>50</sup> A2, p3

<sup>51</sup> Peter Mackie, Ian Thomas, and Kate Hodgson, 'Impact analysis of existing homelessness legislation in Wales' (2012) Cardiff, Welsh Government

<sup>52</sup> A4, p4

*assistance.... non specified, granted, but it would be reasonable. And the local authority would have to take steps to try and help you resolve your situation regardless of whether or not you were vulnerable, if you had children or not... that for me was always where we were coming from was that there was this... discriminatory service in some aspects of the legislation.”<sup>53</sup>*

In addition to signposting the expectation that a minimum level of assistance would be required for all applicants, the group asserted that the term reasonable steps would also accommodate the wide variance in Local Authority resource levels. On the one hand, it facilitated the provision of a duty which was flexible and adaptable to a broad variety of circumstances, a characteristic which was welcomed by Local Authorities during the consultation stage.<sup>54</sup> On the other, this same adaptability, coupled with the contextual nature of the duty, meant that those Local Authorities which were under-resourced would not be placed under undue pressure to meet a precise level of assistance under the new legislation.<sup>55</sup> In addition to the inherent flexibility, another core element of reasonable steps was the need to impose a minimum standard of assistance to every applicant. The following section will outline why legislation was chosen as a tool to drive these policy objectives.

#### 4.2.2 Why legislation?

It is therefore clear that this new legal duty, arose from the direct intention that a rights-based legal approach would positively address an existing discriminatory service.<sup>56</sup> Furthermore, previous consultation and the aforementioned comprehensive legislative review had resulted in a clear request from the sector that prevention specifically should be brought into the new legal framework.<sup>57</sup> The consultation documents for the Housing (Wales) Act noted that all respondents supported a legislative driver for the policy objectives.<sup>58</sup> Within the policy reunion, and specifically relating to the aim of consolidating service levels between authorities, law was

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<sup>53</sup> Ibid

<sup>54</sup> A1, p4

<sup>55</sup> A2, p3

<sup>56</sup> A4, p4

<sup>57</sup> A1, p2

<sup>58</sup> National Assembly for Wales Communities, Equality and Local Government Committee, *Housing (Wales) Bill, Stage 1 Committee Report* National Assembly for Wales 2014, p47

viewed as a way of emphasising the importance of this goal. The group agreed that ‘the law was primarily used... to drive up standards, particularly in those authorities where there was no prevention going on or they weren't working with single person households.’<sup>59</sup> Participant 3 stated that legislation encompassing prevention would focus attention on recording performance, and that enshrining the obligation in law was: -

*“legitimising what [local authorities] were doing already, and recognising that in the statistics as well in terms of what was captured in the number of people they were helping. But for others it was shifting the line of expectation to saying... [do not exclude] people at the front end of things through priority need, local connections, and all that stuff. I suppose it's a clear line in the sand from Welsh government about the expectation.”<sup>60</sup>*

Aside from this central goal to improve standards in lagging authorities and provide some consolidation in service levels across Wales, the group attached significant importance to the new legal right for ensuring the direction of Local Authority attention towards the provision of adequate resources. At the time of drafting, austerity measures had significantly impacted department budgets, and there was a perception among policy makers that unless a legal duty existed, homelessness assistance (and particularly prevention) would not receive an appropriate amount of resource.<sup>61</sup> The perception was that ‘Local Authorities, where they have particular duties, will put resources into delivering and meeting those duties,’<sup>62</sup> and ‘if you bring [prevention] into the law then... it is going to happen. Whereas if we don't, there's a real fear that this is the bit that will get less and less rather than more and more.’<sup>63</sup> In terms of general resources, one participant emphasised that the law would impact funding as well as organisational focus, stating that ‘having something as a statutory function directs attention. It directs people. It directs resources... it directs financial resources.’<sup>64</sup> Thus, the weight of duty

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<sup>59</sup> A1, p19

<sup>60</sup> A3, p4

<sup>61</sup> A1, p4

<sup>62</sup> A4, p4

<sup>63</sup> A4, p4

<sup>64</sup> A3, p4

attached to a legal and therefore enforceable right was held to be a significant factor in directing Local Authority attention and resources in service delivery.

As outlined above, a key disparity between the policy idea made clear during the consultation stage and resulting legislation was the loss of a singular legal duty to help prevent homelessness. On this point, initial intent gave way early in the drafting procedure, as the process of placing a new, wider reasonable steps duty into legislation raised difficulties when policy goals collided with the practicalities of legal drafting. Reflecting on these difficulties, one group member summarised the process: -

*“I guess policy folk write policy instructions for the housing lawyers. The housing lawyers write legislative instructions for Legislative Counsel, and the Legislative Counsel team draft the law, you know? So there's plenty of opportunities for things getting lost in translation.”<sup>65</sup>*

The main ‘loss in translation’ was the division of the single intended legal duty on prevention, largely due to the practicalities of demarcating legal obligations. What began as a duty for reasonable steps to help in homelessness prevention became two duties; to help prevent homelessness,<sup>66</sup> and help to secure<sup>67</sup> accommodation. The phrase ‘reasonable steps’ was then written into a separate section,<sup>68</sup> and used as a definition for those two duties. One group member summarised this by stating: -

*“We left it as an instruction on reasonable steps and it went off into the Welsh Government ether and it came back divided into two... prevention and relief. Because we imagined it as one prevention duty and it came back, and it wasn't [one] duty to take reasonable steps. It was two separate duties, a duty to help to secure and a duty to secure... it took those two pathways. [We] kind of put everything into the Welsh Government box and that's what popped out... So that was an interesting point... I don't know what happened in the box.”<sup>69</sup>*

During the process, and within the ‘Welsh Government box,’ it was reported that: -

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<sup>65</sup> A3, p10

<sup>66</sup> Housing (Wales) Act 2014, s 66

<sup>67</sup> Ibid, s 73

<sup>68</sup> Housing (Wales) Act 2014, s 65

<sup>69</sup> A1, p8

*“One of the questions the lawyers kept asking was ‘so what is this duty going to be, and how does it come to an end?’... That was something they were very exercised on... how a local authority could say well, we fulfilled our duty [and] that it wasn't an open-ended thing.”<sup>70</sup>*

The lawyers of the Office of Legislative Counsel referred to in the above statement were tasked with considering how to practically embed the policy aims within legislation, a process which can result in a shift from original policy design.<sup>71</sup> A clear idea may not be easily expressed in words, and if not drafted effectively, a good policy can become a bad law and lead to a highly consequential ambiguity, vagueness, or obscurity.<sup>72</sup> Turnbull (1986)<sup>73</sup> summarises the difficulties inherent within this process by stating that: -

*“When legislation is drafted... the drafter has to try to give effect to instructions, to imagine all possible contingencies and to anticipate all possible misunderstandings. Then [the] work has to stand for years.”<sup>74</sup>*

The Welsh Office of Legislative Counsel describe their work as an ‘art not a science,’ but do draft legislation based on a number of guiding principles.<sup>75</sup> Laws, they say, should be clear, accessible, explicit, and strike a balance between simplicity and precision.<sup>76</sup> It should be practical, and account for various audiences who are subject to the law, as well as those who administer and apply it.<sup>77</sup> The original proposition for a single prevention duty was thus deemed to be practically ‘unworkable [and] full of loopholes.’<sup>78</sup> Prevention and relief are, of course, responses to two distinct situations, so in a legal sense there needed to be clear prompts by which to shift between duties for an applicant moving from a position of threatened homelessness, and into an actual loss of secure accommodation (i.e. a failure in

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<sup>70</sup> A3, p2

<sup>71</sup> A4, p9

<sup>72</sup> Vcrac Crabbe, ‘The ethics of legislative drafting’ (2010) Commonwealth Law Bulletin 36 1 11, p1

<sup>73</sup> I M L Turnbull, ‘Problems of Legislative Drafting’ (1986) Statute Law Review 7 2, p67

<sup>74</sup> Ibid, p77

<sup>75</sup> Welsh Government, *Writing Laws for Wales: A guide to legislative drafting*, Cardiff, Welsh Government 2019

<sup>76</sup> Ibid, p5

<sup>77</sup> Ibid

<sup>78</sup> A4, p9

prevention). The now recognisable three-stage process<sup>79</sup> emerged as a result, guiding applicants from reasonable steps to prevention in section 66, through to reasonable steps to relief (s 73), and on to the ‘final’ duty to provide accommodation under section 75: -

*“What became section 73 [arose] as a consequence of needing to have triggers to end the particular duties. So, you know, once prevention had failed, we didn't have a relatively straightforward process to then pick up the next stage for when somebody is actually homeless... Whilst it may have made things overly bureaucratic, it was a logical sequence of events that was relatively easy for people to follow.”<sup>80</sup>*

In a separate, yet related, departure from the intention of a single challengeable duty to prevent,<sup>81</sup> it is notable that applicants may challenge a Local Authority on whether reasonable steps were taken in the homelessness relief duty under section 73, but not for the prevention duty specifically.<sup>82</sup> On this point, participants were largely in agreement that a right to challenge reasonable steps for prevention was not omitted intentionally, but they ‘naively’ thought that ‘all the Local Authorities would be doing everything they possibly could.’<sup>83</sup> Having said this, none of them explicitly stated that an amendment in the form of allowing a prevention challenge would be desirable, as it may ‘raise more questions,’<sup>84</sup> and may not ‘make a difference in practice.’<sup>85</sup> A distinction was drawn between the prevention and relief duties in relation to statutory requirements around timing. The section 66 duty to help prevent is open, and ends when either accommodation is secured or lost, moving the applicant to the next stage. The challengeable steps taken under the section 73 duty are subject to a 56-day time limit, and the reason for granting the right to challenge those steps was to ensure that ‘Local Authorities actually [did] something over that 56-day period... not just [sat] back and [waited] for the clock to tick down and move somebody into the third stage.’<sup>86</sup> It appears that the

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<sup>79</sup> Peter Mackie, Ian Thomas, and Jennie Bibbings, ‘Homelessness prevention: reflecting on a year of pioneering Welsh legislation in practice’ (2017) *European Journal of Homelessness* 11 1 81

<sup>80</sup> A4, p8

<sup>81</sup> A1, p2

<sup>82</sup> Housing (Wales) Act 2014, s 85

<sup>83</sup> A4, p23

<sup>84</sup> Ibid

<sup>85</sup> A5, p24

<sup>86</sup> A4, p23



inclusion of a right to challenge reasonable steps was primarily focused here on guiding Local Authority action, rather than granting a practical appeal mechanism to applicants.

Taken together, and on the subject of the disparity described above, one member of the group described the initial surprise of viewing the first draft, and reconciling that variance with the nuances of the drafting process: -

*“I remember the first draft coming back, looking at it and thinking oh my God, that's not what we meant at all...<sup>87</sup> [We] kind of went [gesture of shock] and kind of knew something had changed... So the law is very precise. It's a truism that we're writing... legislation is a very precise thing. So, you have this general concept about prevention of homelessness which everyone said they wanted... in a real collective sense, you know, yes, we want to do more on prevention of homelessness. As soon as you get into the precision of it, and the detail of it, you know, there are lots of different viewpoints.”<sup>88</sup>*

The group discussed their vision for reasonable steps at some length and provided insight into how that meaning was intended to transfer to practical implementation. These elements are outlined in the following section.

### 4.3 The meaning of reasonable steps

It was acknowledged that reasonable steps ‘is a very difficult area to define.’<sup>89</sup> At inception, the team considered taking a prescriptive approach to the definition of reasonable steps, and mooted the prospect of legislating for a ‘check-list’ system to formally act as a required minimum level of assistance resources. Ultimately, however, the flexibility of the term was deemed more important, allowing for the adaptation required to respond to the wide variety of issues which applicants face.<sup>90</sup> In the end, there was a hope that Local Authorities would ‘do their best,’ act with ‘empathy’ based on their professional judgment,<sup>91</sup> and not in a way that is unreasonable: -

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<sup>87</sup> A3, p9

<sup>88</sup> A3, p10

<sup>89</sup> A2, p6

<sup>90</sup> Ibid; A4, p10

<sup>91</sup> A2, p6; A4, p10

*“It was more about, well, you know, you need to act in a way that is not unreasonable... And I think we can all imagine what it would be like to act unreasonably, particularly when working with homeless people or people threatened with homelessness.”<sup>92</sup>*

These initial definitions, using terms such as ‘empathy’ and ‘not unreasonable’ remain vague and undetailed. Acknowledging this indeterminacy, and in line with the intentions of the White Paper, the team placed significant importance on the Code of Guidance<sup>93</sup> as a means to communicate what they believed to be a minimum standard of assistance measures. The group worked hard to provide, within the Code, a comprehensive picture of what reasonable steps should look like in practice: -

*“[W]e did produce a lot of guidance. We were very conscious that a lot of this was new and so War and Peace was produced. It was very long guidance. It was knowingly very long, but it was intended to say look this whole idea of reasonable steps is new, and whilst we might not have had great advice from legal team about what that would require, in the statutory guidance we really did try to spell out, you know. Here’s in very practical terms what this might look like... we spent a while talking about principles in the guidance and I don’t know how common that was in other legislation, but there was a real effort to write it out in case there was any confusion, or people like us left the industry and others forgot where this came from.”<sup>94</sup>*

In an effort to strike a balance between the need for flexibility and a prescriptive approach described at the opening of this section, the Code lists a large number of example prevention initiatives which local authorities ‘ought’ to have in place as a minimum set of available interventions.<sup>95</sup> Importantly, the Code states that this should not be viewed as an exhaustive list, and that it is paramount that the authority considers the individual needs of every applicant.<sup>96</sup> Therefore, in keeping with the substantial detail included in the Guidance as a whole, each of the twenty-two suggestions within this list are accompanied by a short paragraph expanding on what each measure should consist of. Having chosen to reject strictly prescriptive measures in the legislation itself, the detail included in the guidance was

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<sup>92</sup> A4, p10

<sup>93</sup> Welsh Assembly Government (n 39)

<sup>94</sup> A1, p11

<sup>95</sup> Welsh Assembly Government (n 39), [12.13]

<sup>96</sup> Ibid

intentionally comprehensive, and sought to drive the intended standard of reasonable steps. The measures suggested were chosen and included in response to findings from existing homelessness studies: -

*"[I]t wasn't it like it was just left as reasonable steps off you go, it's the law, you know, let the courts decide. That might be where it ended up. There were lots of discussions... We talked at length in the statutory guidance group about the different types of individual households that were going to be presenting, because we have quite a lot of evidence there, and that's why you see a list of reasonable steps, things that you ought to consider, and there's quite a long list and they match up against the sorts of triggers and drivers of homelessness."<sup>97</sup>*

Furthermore, the Code was seen as an opportunity to simplify the legislative provisions, in an effort to mitigate the risk that the complexities of the new framework may undermine the intended message: -

*"[W]hat people hated was having the law, you know, it says this, [it says] that, refer to paragraph x and so on... so the relevant piece of legislation was reproduced in plain English. What did that [provision] mean, and then give examples... really practical examples."<sup>98</sup>*

In addition to the comprehensive Code of Guidance, perceptions of the intended meaning of reasonable steps arose in the context of discussions concerning Local Authority resource levels, as well as current practice. Here, Participant 3 raises the point that authorities should use available additional funding to set the bar for a minimum level of assistance; a point agreed on by participant 2: -

*"I mean, you really would think given that the legislation enables you to discharge your duty into the private [rented] sector, and that the money has been allocated to local authorities, that there would be rent in advance and bonds available for everyone as a minimum... just as a minimum to enable that access."<sup>99</sup>*

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<sup>97</sup> A1, p6-7

<sup>98</sup> A3, p11

<sup>99</sup> A3, p21

*“We've been given quite a lot of money, so as a standard everybody should have the right to access to the private rented sector financed. That should be a minimum, shouldn't it?”<sup>100</sup>*

In terms of meaning, it is clear that reasonable steps was intended to have a wide interpretation, and there was an expectation that Local Authorities would be doing everything they could to assist applicants. This preconceived notion of a wide interpretation of reasonable steps in turn highlights the intended practical application, as the group raised a number of concerns regarding the way the policy has developed at the front-line. All participants were still heavily involved in the homelessness sector in Wales, and in broad terms, there was some trepidation that reasonable steps may be applied too narrowly in practice.

Specifically, the team discussed the various ‘cultures’ displayed across Local Authorities. Participants expressed disappointment that some authorities were apparently not closely following the attached statutory guidance, which they had deliberately tried to make as comprehensive and ‘practically useful’ as possible,<sup>101</sup> and they conveyed regret that the phrase ‘*ought* to have available’ was chosen when listing the minimum level of assistance options, over the more direct word *must*.<sup>102</sup> It was felt that the word *ought* was too flexible in practice, and did not convey strongly enough the minimum expected level of assistance under reasonable steps.

As discussed at the opening of this chapter, reasonable steps was partly intended to address perceptions of discriminatory homelessness services,<sup>103</sup> and this is perceived to have not been achieved in practice. Previous service levels were described as ‘pretty shocking’<sup>104</sup> in certain areas, and concerns were expressed that standards may not have been raised across all authorities as intended. Ultimately, differential practice may remain an issue.<sup>105</sup> This may still

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<sup>100</sup> A2, p20

<sup>101</sup> A3, p25

<sup>102</sup> A1, p7

<sup>103</sup> A4, p4

<sup>104</sup> A2, p5

<sup>105</sup> A3, p4

be driven, in part, by the unavoidable variance in resource levels,<sup>106</sup> but in addition to this, some Local Authorities are perceived to be approaching the duties more ‘seriously’ than others. Those which approach the legislation as more of a ‘corporate priority will [allocate] money and people... [whilst] some will only do the bare minimum.’<sup>107</sup> To clarify, ‘different authorities will [still] place different priorities on homelessness.’<sup>108</sup> Those authorities not seen to be doing enough were described as displaying ‘wilful blindness... [and] justifying approaches which are completely unacceptable.’<sup>109</sup> In this respect, it is acknowledged that there may have been an element of naivety at the inception of reasonable steps in thinking that ‘all Local Authorities would be doing everything they possibly could’<sup>110</sup> to assist applicants: -

*“I think we were a very well-intentioned group of people that thought we were really doing our best, and I think we were. I don't think there's any accounting for people's interpretation of what we were trying to achieve...<sup>111</sup> But you can start off with intentions, [then] through the process itself of making legislation, and then certainly through implementation, you can end up in quite a different place from the intent, you know?”<sup>112</sup>*

#### 4.4 Chapter summary

The closing lines within the above quotation largely summarise this chapter. Homelessness, as a dominant component of the problem stream, was deemed to be best addressed by legislating for a shift towards a more formalised preventative approach, and placing a legal duty upon Local Authorities whilst granting an enforceable legal right for applicants. A new legal right to a meaningful amount of prevention assistance was intended to drive up standards and consolidate service levels by directing attention and resources towards the desired policy objective. ‘Reasonable steps’ was chosen due to the perception that there was a pre-existing level of shared understanding of the meaning, and it had been identified as an area primed for

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<sup>106</sup> A5, p5; A6, p5

<sup>107</sup> A3, p11

<sup>108</sup> Ibid

<sup>109</sup> A3, p24

<sup>110</sup> A4, p23

<sup>111</sup> A2, p24

<sup>112</sup> A3, p26

expansion (from the limiting the effect of the Priority Need test) in order to address concerns that service levels had become too discriminatory under the 1996 Act. Local Authorities would now have a wider duty, but that duty would be adaptable enough to provide flexibility in operational delivery, and yet be contextual enough that under-resourced authorities would not be over-burdened.

Enshrining reasonable steps within law was a direct response to both a comprehensive legislative review and calls from the politics stream to place prevention within a new statutory framework. There was a direct intention to implement a rights-based approach to service delivery in this regard. Furthermore, law was seen as a way of legitimising good practice and securing the formal recording of performance in terms of homelessness prevention and relief statistics. It was noted that Local Authorities would be encouraged to address these new legal duties appropriately, securing ongoing funding and direction of operational resources.

Within the policy stream, where alternative approaches to addressing objectives were debated, the implementation of the intended meaning of reasonable steps was encumbered initially by the practicalities of enshrining the policy objectives within legislation. Splitting the duty between prevention and relief addressed the need to signpost clear stages on which to base the start and end of various legal obligations in relation to the specific circumstances of each case. Despite a clear intent to produce an enforceable legal right to prevention, this element of the staged process remains unchallengeable under the legislation. With the option of prescriptive legislative assistance measures rejected in favour of flexibility, the Code of Guidance was highlighted as a means to communicate the intended message. Within the Code, an extensive (but non-exhaustive) list serves as a 'bare minimum' standard of potential measures, though authorities are advised that these only 'ought' to be made available.

Finally, and in broader terms, there is concern that the disparity in service levels between authorities which the legislation sought to remedy may still be apparent. Variability in available resources may still contribute to this, but there were also fears expressed that some departments are approaching the legal obligations seriously, and as a corporate responsibility,

while others may display ‘wilful blindness’ in justifying approaches which the group felt to be unacceptable. Taken together, the findings from the policy reunion reveal not only a clear picture of the intent behind reasonable steps, but also demonstrate that the multi-faceted nature of front-line interpretation and application may potentially lead to significant ‘mission drift.’

This chapter addressed the first research question, and provides a lens through which to view findings in subsequent chapters. The chapter opened by providing an overview of the evolution of reasonable steps from the policy objectives outlined in the Ten-Year Plan, through to the consultation stages for the Housing (Wales) Act 2014. Kingdon’s Multiple Streams Model of policy implementation was a useful tool for explaining and situating these early developments and their place within broader aims of the Act. These developments occurred in Kingdon’s ‘politics stream.’ Remaining within the framework, but instead within the ‘policy’ stream, the second part of this chapter has presented evidence gathered from a policy reunion with a number of the ‘policy entrepreneurs’ of reasonable steps. Findings represent a unique account of the ‘alternative specification’ process which resulted in reasonable steps as it finally appeared in the resulting legislation. To conclude this chapter, reasonable steps was intended as a legal duty for Local Authorities to provide a comprehensive minimum standard of homelessness assistance, equally applied, that could be legally challenged by applicants. The following chapters will, in turn, compare these policy intentions with the practical implementation of reasonable steps as a legal obligation for Local Authorities, and as legal right for applicants.

## Chapter 5: - Reasonable Steps at the Front Line

*"[Reasonable steps is] a partnership effort between the Local Authority and the customer... we will help you with your housing options, but it is a two-way street... We're here as an advisor and helper but if you're able and well enough to do things yourself we will expect you to take reasonable steps, because that's what it says on the tin. I think that's been well understood."*<sup>1</sup>

**Manager, Local Authority 2**

This chapter is focussed on the front-line implementation of reasonable steps. The second research question asks how reasonable steps is implemented in practice. Studies have consistently demonstrated how front-line influences can affect implementation,<sup>2</sup> including specifically in previous research into homelessness decision-making.<sup>3</sup> The third research question is also addressed here and, considering the findings from those studies, asks how elements of front-line practice may be contributing to the lack of challenges under the legislation. Chapter 4 highlighted that a challengeable legal right to reasonable steps was a key policy goal, and studies have demonstrated how a lack of enforcement can impact successful policy change.<sup>4</sup>

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<sup>1</sup> LA2 M, p1

<sup>2</sup> Bryan Glastonbury, *Homeless near a thousand homes: A study of families without homes in South Wales and the West of England* Allen and Unwin 1971; Michael Lipsky, *Street-level bureaucracy: Dilemmas of the individual in public service*, Russell Sage Foundation, 2010; Katherine Levine Einstein and David M Glick, 'Does race affect access to government services? An experiment exploring street-level bureaucrats and access to public housing' (2017) *American Journal of Political Science* 61 1 100

<sup>3</sup> Ian Loveland, *Housing homeless persons: administrative law and the administrative process* Clarendon Press 1995; David Cowan and Simon Halliday, *The appeal of internal review: law, administrative justice, and the (non-) emergence of disputes*, Hart 2003; Simon Halliday, *Judicial review and compliance with administrative law* Hart 2004; Joanne Bretherton, Caroline Hunter and Sarah Johnsen, 'You can judge them on how they look...: Homelessness Officers, Medical Evidence and Decision-Making in England' (2013) *European Journal of Homelessness* 7 1 69

<sup>4</sup> Janet M Lum, 'The federal Employment Equity Act: goals vs. implementation' (1995) *Canadian Public Administration* 38 1 45; Kenneth J Meier and Deborah R McFarlane, 'Statutory coherence and policy implementation: The case of family planning' (1995) *Journal of Public Policy* 15 3 281; Carol Agocs, 'Canada's employment equity legislation and policy, 1987-2000: The gap between policy and practice' (2002) *International Journal of Manpower* 23 3 256



The preceding chapter has provided a first-hand account of reasonable steps gathered directly from participants involved in the formulation of the provisions. Reasonable steps was intended to be interpreted widely, providing for a comprehensive level of assistance whilst allowing staff the flexibility to assign resources as required and do ‘everything they possibly could’<sup>5</sup> to assist applicants. The motivation behind enshrining reasonable steps in law was to place a legal duty upon Local Authorities, increase and unify assistance standards, and direct resources towards prevention-based initiatives. The language used was intentionally flexible, and sought to facilitate innovation within service delivery. To turn attention to the practical application of reasonable steps, it is argued within this chapter that there has been significant ‘mission drift’<sup>6</sup> as the policy goals have been communicated to and interpreted by Local Authority housing departments. Interview data and extracts from the Housing (Wales) Act legislative guidance are drawn upon here to demonstrate the disparity between the intentions of policymakers and the practical implementation of the provisions and argue that a legal challenge would be an expedient way to rectify these discrepancies.

The chapter discusses the way in which this deviation from policy occurs at the front line and draws on Lipsky’s street-level bureaucracy theory as a tool to help explain how and why this may have occurred in practice. The evidence presented here suggests that the burden of reasonable steps has been unintentionally placed upon the applicants themselves, and that the concept of reasonable steps may have been inadvertently conflated with other areas of the legal framework. To add to this, there is strong evidence from Housing Officer interviews that in practical application, the procedural use of ‘Personal Housing Plans’<sup>7</sup> have afforded these officers an opportunity to monitor and enforce client cooperation. This is in direct opposition to the intentions of policymakers, who sought to place the burden for reasonable steps solely upon Local Authorities. In another deviation from policy intent, and in relation to the third research question, evidence is presented here which suggests that certain elements in the

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<sup>5</sup> A4, p23

<sup>6</sup> Ibid, p21

<sup>7</sup> Personal Housing Plans are discussed in depth below. The PHP is a document compiled at application between the Housing Officer and applicant, and lists the ‘steps’ that both parties agree to take.

practical implementation of reasonable steps serve to impede the intended challengeable legal right.

The chapter begins in part 1 with an overview of the policy communication and the intended 'correct' use of Personal Housing Plans as a procedural tool to support the intentions of the law, and draws on evidence gathered from policymakers and the legal training facilitator, as well as sections of the Code of Guidance. Part 1 thus sets the background for the remainder of the chapter, and is focussed on the content and nature of the policy message delivered to front-line staff. Interview data is then presented within part 2 to demonstrate how that message was received by those tasked with implementing the policy, and highlights the various ways in which reasonable steps is interpreted by these individuals. There is evidence that managers and front-line staff may view reasonable steps differently, and the part concludes by using findings to address arguments within the literature that criticise Lipsky's theory for being obsolete in a modern context due to management influence. Having presented evidence in part 2 that suggests Housing Officers interpret reasonable steps counter to policy and legislative intentions, part 3 draws on Lipsky's framework to help demonstrate how and why this interpretation may impact implementation. The chapter then closes by turning to the third research question in part 4, which presents evidence that front-line practice may be limiting the chance of legal challenge. Findings suggest that authorities may be failing to adequately explain to applicants the nature of their rights, and are actively avoiding litigation.

## 5.1 Communicating intent: The code of guidance, staff training, and the personal housing plan

This opening part of the chapter will provide an overview of the way in which the policy intent unearthed within the policy reunion was communicated to those tasked with implementing reasonable steps. The first section discusses both the Code of Guidance<sup>8</sup> and staff training sessions delivered to Local Authority staff at the time the legislation was implemented. The

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<sup>8</sup> Welsh Assembly Government, 'Code of Guidance to Local Authorities on the Allocation of Accommodation and Homelessness' [2016]

second part of the section has the same objective, but is specifically focussed upon the Personal Housing Plan as a recommended tool to achieve policy aims. As the Personal Housing Plan is perceived as almost synonymous with reasonable steps by Housing Officers, and thus features extensively within interview data, it is necessary to address these elements before presenting data on the practical interpretation and application of reasonable steps within parts 2 and 3 of this chapter.

### 5.1.1 Communicating policy intent

As outlined within the policy reunion, the Code of Guidance<sup>9</sup> attached to the Housing (Wales) Act was viewed as an effective way to communicate the message behind reasonable steps and its' intended application. The Code is incredibly comprehensive, and Part 2 specifically contains guidance on all aspects of homelessness service delivery under the Act. These include chapters covering eligibility for assistance,<sup>10</sup> the attached assessment duties,<sup>11</sup> and the applicant's right to reviews and appeals.<sup>12</sup> The guidance relating to the application of reasonable steps is primarily contained within Chapter 12 of the Code, and explicitly seeks to drive the emphasis on a flexible, cooperative, and tailored approach. The section of the Code emphasises the key policy aim of homelessness prevention and highlights the perceived long-term benefits of prevention initiatives.<sup>13</sup> In doing so, the move to a more cooperative approach in formulating and delivering tailored initiatives is emphasised,<sup>14</sup> and taken together, may be presented as evidence that the intention behind the policy (as detailed within the previous chapter) was accurately presented within the guidance document. Regarding specific reasonable steps, the Code significantly expands upon examples of initiatives offered within s 64 of the Act itself, and includes a list of 22 interventions which 'Local Authorities *ought* to have in place as a minimum.'<sup>15</sup> Each is accompanied by examples, and they include accommodation focussed

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<sup>9</sup> Ibid, Ch7

<sup>10</sup> Ibid

<sup>11</sup> Welsh Assembly Government (n 8), [10]

<sup>12</sup> Welsh Assembly Government (n 8), [20]

<sup>13</sup> Welsh Assembly Government (n 8), [12.1-12.2]

<sup>14</sup> Welsh Assembly Government (n 8), [12.5-12.6]

<sup>15</sup> Welsh Assembly Government (n 8), [12.13] (emphasis added).

measures (such as emergency accommodation and resources within the private rental sector), 'individual' interventions (such as support for addiction, debt, and domestic violence issues), financial assistance, and joint-working initiatives.<sup>16</sup> The goal of flexibility is achieved within the Code by the use of the phrase '*ought to have in place,*' and further emphasised with the advice that these possible interventions are: -

*"by no means an exhaustive list, nor [are they] a prescriptive set of minimum interventions to be offered to each applicant. Local Authorities are expected to consider the most appropriate intervention or range of interventions on a case-by-case basis, which are most likely to result in a positive outcome."*<sup>17</sup>

Contributions from the legal Training Provider indicate that the intended interpretation of reasonable steps, along with the key policy objectives, were also emphasised within staff training sessions. These sessions were large in scale, and unusual in the sense that they were especially funded by the Welsh Government to help guide the implementation of the legislation by clearly outlining the policy objectives behind it.<sup>18</sup> The sessions were delivered across two days towards the end of 2014, focussed on the application of the then new legislation, and were attended by staff representing all 22 Welsh Local Authorities.<sup>19</sup> The Training Provider describes an innovative approach to these sessions, which were deliberately designed to foster a more cooperative attitude to service delivery and a stronger emphasis on homelessness prevention. For example, the training, led by Welsh Government, was also delivered and attended by representatives from the Welsh Local Government Association and Shelter Cymru. Involving other key stakeholders in the process was intended to signal a move away from the divisions created under the previous legislation, and towards a partnership approach: -

*"[We were used to] people being in opposition, and I think they were saying let's get everyone in a room and run training at the same time and everyone learn together. That's demonstrating how we're intending to move things forward."*<sup>20</sup>

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<sup>16</sup> Ibid

<sup>17</sup> Welsh Assembly Government (n 8), [12.9]

<sup>18</sup> Levelling Up, Housing and Communities Committee, 'Crisis' written evidence on the Homelessness Code of Guidance for the CLG Select Committee December 2017

<sup>19</sup> TP, p1

<sup>20</sup> Ibid

The focus on promoting a new cooperative approach within training was equally matched with dissuasion from formal routes of challenging Local Authority decisions under the legislation. During the sessions, it was emphasised that informal dispute resolution should be prioritised over requesting reviews and engaging the legal process for challenge: -

*“Reviews and appeals were framed as inherently bad things... why can't you sort this out between you?... I know that there was a lot being said about trying to have informal routes if people are unhappy.”<sup>21</sup>*

Aside from dissuasion from legal challenges and the promotion of cooperative working, the heightened emphasis on homelessness prevention as a policy goal also directly affected the structure of these training sessions. Adversarial elements of the old legislation such as priority need and intentionality decisions, although carried forward within the Housing (Wales) Act, were presented as somewhat secondary to prevention work during staff training.<sup>22</sup> These ‘test based’ elements of the framework were intentionally presented on the second day of the training, which in turn placed the spotlight on the importance of individualised support and the innovative use of reasonable steps. The Training Provider summarised the emphasis on prevention by stating that: -

*“very deliberately, changes to priority need and intentionality... were all done on the second day. That stuff was back ended. A very deliberate decision was made that day one would be setting out the assessment process, reasonable steps, and the homelessness prevention duty... The emphasis was very much on look, applicants are going to have more of an active process... the prevention and relief duty is going to make a difference for this person, so you might never need to get to the stage where you’re making substantial priority need and intentionality decisions... that was the message.”<sup>23</sup>*

Just as the Code of Guidance includes exemplars for reasonable steps, the intended wide interpretation of the provisions was communicated during the training by using examples and case studies.<sup>24</sup> Again, as with the Code of Guidance, strong emphasis was placed on the idea

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<sup>21</sup> TP, p11

<sup>22</sup> TP, p1

<sup>23</sup> Ibid

<sup>24</sup> TP, p4

that, whilst covering these examples, the suggested interventions should in no way be seen as an exhaustive list.<sup>25</sup> The prevention duty appears to have been framed during training as a step towards a re-imagining of the role of Housing Officer, and a new approach to tailoring and individualising support on a case-by-case basis: -

*"[I]t was being suggested that housing officers could be quite creative in terms of what they were doing... this is an opportunity to be a bit novel and to think of what you can do to sort someone's situation out... The role of an assessing officer might alter in a sense that rather than just [saying to them] your job is assessing someone against a set of tests, that it could be more interesting than that... it's more of a resolutive problem solver... So potentially the role would be a lot more interesting."*<sup>26</sup>

Reasonable steps was presented as the vehicle by which the new approach to service delivery should be driven. The Training Provider recalled that emphasis was placed on a thorough and tailored assessment of applicant requirements, and that meaningful reasonable steps should inevitably follow the assessment of both housing and support needs.<sup>27</sup> The policy reunion findings, introduced within the previous chapter, discussed the intention of a more active role for applicants themselves within the process, and this aspect appears to have been a key element on day one of the training sessions. In carrying out a thorough assessment and formulating a list of reasonable steps, trainees were reminded of the importance of requiring input and full cooperation from the applicant: -

*"[T]he emphasis was that the assessment process in deciding reasonable steps was going to be more of a holistic approach to an applicant, and it was going to be more of a two-way process... the applicant would be required to be doing something as part of their of their application, rather than be just passive... because before... their job was to sit there whilst the local authority assessed them."*<sup>28</sup>

In summary, and aligning with key themes identified within the previous chapter relating to reasonable steps and the associated focus on homelessness prevention, the Code of Guidance comprehensively communicates the prioritisation of a flexible, holistic, and tailored approach

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<sup>25</sup> TP, p3-4

<sup>26</sup> TP, p4

<sup>27</sup> TP, p3; TP, p6

<sup>28</sup> TP, p4-5

to service delivery. By offering examples of assistance measures that Local Authorities 'ought' to have available, the Code stops short of prescribing a strict minimum set of available resources. The emphasis is on a wide interpretation of reasonable steps, directing housing departments towards deploying available resources, on a case-by-case basis, to best serve the specific situation of a given applicant and increase the likelihood of a positive outcome. Contributions from the Training Provider indicate that these key elements were also carried through the training sessions delivered to staff in all Welsh Local Authorities. The sessions were deliberately structured in a manner which signposted a new approach under the then new legislation, with attendees from all major stakeholders learning collectively. Furthermore, the adversarial or 'test-based' elements of the framework (such as intentionality and priority need) were deliberately framed as secondary to the formulation of effective reasonable steps following on from a thorough assessment of applicant needs. In emphasising cooperative working, engaging the legal routes to challenge and appeal were held to be undesirable. Crucially, this cooperation would extend to the applicants themselves, and service users would be viewed as active participants in the process and required to not be mere 'passive' observers to the progress of their applications. The strong emphasis on cooperative working and dissuasion from legal routes of challenge may have inadvertently downplayed the central policy aim of reasonable steps; to place a legal duty upon Local Authorities and thus provide a challengeable legal right for applicants.

### 5.1.2 The intended application of the personal housing plan

Within the policy reunion, participants raised concerns around the possible misuse of the Personal Housing Plan (PHP) in practice. Interviews with Housing Officers demonstrated that staff interpreted reasonable steps to closely align with the use of the PHP. This section will outline the intended use of the Personal Housing Plan, from where the procedure originated, and what issues it sought to address. The section again draws on contributions from policymakers, the training facilitator, and the legislative guidance to highlight these intentions.

During the assistance process, the PHP acts as ‘a live log of things that Local Authorities are doing,’<sup>29</sup> but is also used to record and update actions required on the part of the applicant themselves; it records the ‘reasonable steps’ agreed between the two parties. Though not a specific requirement of the legislation, the PHP ‘was very much front and centre of the Code of Guidance in terms of... operational delivery,’<sup>30</sup> and was originally considered to be a good practice tool by policymakers. The Code of Guidance states that while the use of a Personal Housing Plan is not a legal requirement,<sup>31</sup> it is a recommended approach to delivering reasonable steps: -

*“The assessment should be designed to engage the service user in the process. It should reflect their own views and understanding as participation tends to encourage individuals to take more ownership and responsibility for decisions that are made. The Welsh Government recommends the use of a personal housing plan which details the applicant’s desired outcome, the housing support needs of the applicant, the reasonable steps to be taken and an agreement on the actions the applicant and the Local Authority, or an organisation on behalf of the Local Authority, are expected to undertake.”<sup>32</sup>*

From the applicants’ perspective, and in keeping with the quote from the Code of Guidance above, the PHP approach was also seen by members of the policy reunion as a way of providing transparency and accountability in operational delivery.<sup>33</sup> Incorporating a live log of reasonable steps in which the applicant is actively and consistently involved was seen as a way of addressing the perceived power imbalance between the service provider and the resource poor individual.<sup>34</sup> The PHP, as the only stage in the process where the applicant’s ‘voice’ could be heard, was intended to be used to record what they would like to achieve from the process: -

*“[W]e talk[ed] about the voice of the applicant and that they [should] get some control and choice... very much in keeping with Welsh Government and citizen centred services and that idea. The only point at which the applicant's voice was meant to appear on that [PHP] was what would you like from this? What are you after? Obviously, you have*

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<sup>29</sup> A4, p16

<sup>30</sup> Ibid

<sup>31</sup> Welsh Assembly Government (n 8), [12:17]

<sup>32</sup> Welsh Assembly Government (n 8), [10:33]

<sup>33</sup> A3, p17-18

<sup>34</sup> Ibid



*housing support needs but what would you like from this? And that there is then a discussion that [says], right, [so] here are the steps that we agreed the Local Authority will take. That was how it was envisaged.”<sup>35</sup>*

As reasonable steps could be contested under the legislation, the PHP was also intended to serve as an evidence base for Local Authorities, allowing them the ability to demonstrate the progress of the steps chosen in the event of a potential legal challenge.<sup>36</sup> Concerns were raised within the policy reunion, however, that the PHP was potentially being used to record and monitor the steps which the applicant themselves had agreed to take. There were concerns that these were being recorded as *applicant* reasonable steps, and any failures to meet those steps were resulting in decisions to end their legal assistance duty based on ‘non-cooperation.’ To use the full statutory term, ‘*unreasonably failing to co-operate with the authority*’<sup>37</sup> was reportedly being used in conjunction with the PHP, with the plan possibly being used to evidence the *unreasonableness* of the applicant. This had been witnessed first-hand by one policy reunion participant: -

*“[I have had the opportunity to sit in] with customers having that kind of initial assessment, the section 62 assessment. In some it was even described to the customer like that, we're going to do something called reasonable steps. So I'm going to do some things and you're going to do some things... I'm sitting there unable to interject. [Some feedback has been given to managers in the past] you know, maybe there is more training needs. The PHP is not intended to be like a job centre diary... it was meant to ensure that the Local Authority was actually going to provide some form of meaningful help to people.”<sup>38</sup>*

The concern, therefore, was that Local Authorities, using the Personal Housing Plan as a ‘Job Centre diary,’ could effectively monitor the ‘cooperation’ of the applicant and ultimately use the legislation to close the case and cease assistance for non-cooperation. The ability for the Local Authority to end their duty based upon the applicant’s unreasonable failure to cooperate was a last-minute addition to the framework, appearing as the final provision in section 79.<sup>39</sup> As

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<sup>35</sup> A1, p17

<sup>36</sup> A4, p16

<sup>37</sup> Housing (Wales) Act 2014, s 79

<sup>38</sup> A4, p15

<sup>39</sup> A4, p14

another example of the difficulties that can arise when translating policy into legislation, the need for a legislative provision to end the duty of reasonable steps for an uncooperative applicant arose in order to prevent individuals from doing nothing to help their own situation, whilst passively waiting to naturally move through the duties of the framework and obtain the 'golden ticket' of an offer for accommodation.<sup>40</sup> There was a legislative need to encourage applicants to accept reasonable offers of assistance, and it was reported that non-cooperation was only to be used in those exceptionally rare circumstances: -

*"It became very clear in terms of that pathway that I referred to earlier, those stages, that there was potential there for a Local Authority to make... above and beyond efforts with an individual... and the household being able to essentially kind of... I have to choose my words carefully here... kind of coast through the different stages without any [engagement] whatsoever... [and] wilfully not wanting to do any of the stuff that maybe would prevent their homelessness, [then] subsequently get to the final stage of the legislation having had lots of opportunity. Having had lots of resource put their way, but then still getting that final assessment for the Golden Ticket... the access to social housing... I can say this from where I sat, it was never really intended to be used. It was always there as a backup."<sup>41</sup>*

There appears to be a conflation between two separate functions of the legislation, brought together within the PHP, and perhaps arising from the fact that the concept of 'reasonableness' is being used within both. It was reiterated at numerous points throughout the policy reunion session by all participants that the duty to take reasonable steps was firmly on the Local Authority. In practice however, driven by the term 'unreasonable failure to co-operate,' it may be that the consideration of applicant reasonable steps has unintentionally become a central concept within the operational delivery of the legal framework. The concerns raised by participants in the policy group were echoed by the Training Provider. During their interview, they recalled conveying the recommendation from Welsh Government that a Personal Housing Plan approach be used, and that an example plan was even utilised during the training sessions in 2015<sup>42</sup> in an attempt to demonstrate that 'reasonable steps was the thing that Local

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<sup>40</sup> Ibid

<sup>41</sup> A4, p14

<sup>42</sup> TP, p5

Authorities were supposed to be doing.<sup>43</sup> They also recalled, however, that during a round of ‘refresher’ training delivered to all Authorities in 2018, again facilitated by representatives from key stakeholder agencies, in which they specifically addressed: -

*“one of the concerns [which] was about reasonable steps... that the applicant was being asked to do too much and Local Authorities were not necessarily taking on enough responsibility in terms of reasonable steps. I think there was a position or a concern that applicants were being asked to do too much.”<sup>44</sup>*

In summary, the Personal Housing Plan was promoted as a good practice tool by policymakers, intended to record what applicants wanted from the process and give them a ‘voice’ to address a perceived power imbalance. For Local Authorities, the PHP could be used as a live log of the reasonable steps agreed between the parties and could be regularly updated and monitored as the case progressed. Ultimately, this record could be used by Local Authorities to demonstrate the measures taken within the assistance application in the event of a legal challenge. The legislative need for applicants to ‘reasonably’ cooperate within the process was a late addition to the legal framework, only to be used in the rare instances of applicants remaining completely passive, refusing to engage with ‘reasonable’ assistance measures, and waiting for the final duty of provision of accommodation to be triggered.<sup>45</sup> Though formulated as a safeguard, the ability for Local Authorities to end their duty to an applicant who ‘unreasonably failed to cooperate’ was not intended to be used. The concept of ‘reasonableness’ used in both elements may have led to their conflation in front-line implementation, and concerns were raised by policy reunion participants that the PHP was unintentionally being used to record and monitor the levels of cooperation demonstrated by the applicants themselves. The training facilitator confirmed that this was a potential issue, which was directly addressed within secondary staff training sessions delivered in 2018.

This part of the chapter has first outlined the way in which the intended policy goals driving reasonable steps were communicated to those tasked with implementation. Furthermore, it

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<sup>43</sup> TP, p6

<sup>44</sup> TP, p5

<sup>45</sup> A4, p14

has been necessary to outline the Personal Housing Plan and its intended use here, before presenting findings from front-line staff, as their interpretation of reasonable steps and the way the policy is implemented were directly linked to the use of these plans. Having outlined the PHP, and how the policy message of reasonable steps was delivered, the next section demonstrates the way that message was received at the point of implementation. There is evidence that Personal Housing Plans, and therefore the reasonable steps policy itself, are not being applied in the manner intended.

## 5.2 The interpretation of reasonable steps

This part of the chapter will draw on interview data to demonstrate how the policy message described above was received at the front-line. Interview participants were all individuals employed within Welsh Local Authority housing departments and comprised of 3 managers along with a total of 9 Housing Officers, working across 3 different Local Authorities. Housing Officers were responsible for processing assistance applications from the initial needs assessment interview with the applicant through to prescribing reasonable steps and monitoring their progress. The managers were responsible for overseeing teams of Housing Officers and monitoring their success rates, along with resource availability and trends of resource demand. Interviews were semi-structured and focussed on themes such as the meaning of reasonable steps, attitudes to the legislation, practical implementation, and perception of applicants.

Evidence presented here will demonstrate how staff interpret reasonable steps and suggests that there may be some inconsistency in interpretation between management and those at the front-line. The first section outlines management perceptions, before moving on in section 2 to discuss how Housing Officers appear to have interpreted reasonable steps. Having outlined these perceptions and the ways in which they appear to differ, this part concludes with a discussion on a key criticism of Lipsky's street-level bureaucracy theory; that management influence is so prevalent in a modern context that front-line staff are denied the autonomy required to display elements of the theory.

### 5.2.1 Management interpretation: 'Just doing everything possible'<sup>46</sup>

All participants were directly asked to describe what they felt reasonable steps meant. Three of the four interviewed who held managerial or supervisory roles describe reasonable steps largely in keeping with the intentions behind the policy outlined in the previous chapter, and therefore those emphasised within the Code of Guidance. These more senior members of staff frame reasonable steps as a duty to shape support in a 'meaningful' way which increases the likelihood of a positive resolution for applicants. For example, a senior member of staff at Local Authority 1 emphasised the importance of fairness,<sup>47</sup> and a tailored approach to service delivery.<sup>48</sup> This participant stated that 'reasonable steps... is just doing everything possible that you can do to prevent homelessness for that individual,'<sup>49</sup> and that: -

*"when... an individual presents to us at homeless, it's what actions we take either to prevent the homelessness at that time or [address] any issues that they may be facing in respect to their housing circumstances."*<sup>50</sup>

Another senior member of staff at this same Authority outlined reasonable steps by emphasising many of the same points, stating that: -

*"reasonable steps in my eyes are the steps we need to take to resolve someone's housing situation really, that you know in terms of what is a reasonable step, it's quite varied to be honest... I think it should be tailored to the individual initially and then obviously looking at the steps we can take to try and resolve their housing situation."*<sup>51</sup>

Likewise, a manager at Local Authority 3 stated that 'for us, it's anything that can prevent that person from becoming homeless and assisting that placement... we'll try and be as creative as we can within our boundaries.'<sup>52</sup> Again, themes of creativity and tailored support are mentioned, and this participant clearly frames reasonable steps further in line with the

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<sup>46</sup> LA1 M, p1

<sup>47</sup> LA1 M, p5

<sup>48</sup> LA1 M, p2-3

<sup>49</sup> LA1 M, p1

<sup>50</sup> Ibid

<sup>51</sup> LA1 S, p1

<sup>52</sup> LA3 M, p1

intentions behind the policy by signalling an ownership of the duty on the part of the Local Authority, and states that ‘we ask ourselves what can we do to try and resolve our persons housing need? What steps do we need to take to do that?’<sup>53</sup>

It is important to highlight here that one of the four participants occupying senior roles within departments did not describe reasonable steps in line with the others outlined above. This manager, from Local Authority 2, placed significant responsibility on applicants when discussing reasonable steps, labelling this shift as a welcome addition. When asked to outline reasonable steps, unlike other senior staff members at other Authorities, they responded by stating it is: -

*“[m]ore of a partnership effort between the local authority and the customer... we will help you with your housing options, but it is a two-way street... that's my understanding of reasonable steps... to set out clearly the understandings both for what we'll do and what the customer will do... and I think that was a welcome addition... now it's evened it out a little bit to say well, we're here as an advisor and helper but if you're able and well enough to do things yourself we will expect you to take reasonable steps, because that's what it says on the tin. I think that's been well understood.”<sup>54</sup>*

The contributions provided by the Manager of Local Authority 2 are in stark contrast to other participants occupying senior roles. Manager 2 places great emphasis on the responsibility of applicants in the process. The theme of applicant responsibility for reasonable steps is also dominant within contributions made by front-line staff, who all framed reasonable steps in the same manner, and primarily more of a ‘two-way street.’ In doing so, Housing Officers placed a strong emphasis on applicant responsibility for reasonable steps, and firmly articulated a requirement for cooperation from those seeking assistance. Taken together, and in a significant move away from the intentions behind the policy, Housing Officers appear shift the burden of the duty of reasonable steps towards the applicants themselves, and closely link its implementation to the use of the Personal Housing Plan. This evidence is presented in the following paragraphs.

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<sup>53</sup> LA1 S, p5 (emphasis added)

<sup>54</sup> LA2 M, p1

### 5.2.2 Housing Officer interpretation: 'The stuff they need to do'<sup>55</sup>

During interviews, all Housing Officers discussed reasonable steps and the Personal Housing Plan as a joint endeavour, but frequently and strongly emphasised the role of the applicant themselves in the process. Asked to outline reasonable steps, an Officer at Local Authority 1 describes the legislative concept as 'very black and white,'<sup>56</sup> and a 'framework... for us both (Housing Officer and applicant) to resolve somebody's homelessness situation... [it's saying to them] this is what we can provide [for you], so this is what *you* need to work with.'<sup>57</sup> Another Officer, from Local Authority 3, explains that 'it's the reasonable steps that the Local Authority take, but then there's also the reasonable steps we *put on* the individual as well.'<sup>58</sup> This participant describes the Personal Housing Plan as 'task orientated,' and a signal to applicants that says 'these are the reasonable steps that both you and I are [going to] take going forward.'<sup>59</sup> In an extreme example of a shift in burden, another Officer based at Local Authority 3 directly places the responsibility for reasonable steps on service users, describing reasonable steps as 'putting steps in place not just for the applicant, but for the Housing Officer as well.'<sup>60</sup> A different Officer from the same authority states that 'for me it's just to ensure that we're doing everything we can possible and that they're doing everything they can possible,'<sup>61</sup> describing the process as: -

*"...sort of that joint working between us as the housing officers and them as the client... and I try to make that clear when I speak to people that... we set out this personal housing plan with the reasonable steps in that indicate what we can do and what you can do as a client, that hopefully what we can both do together can then alleviate whatever pressure they're under with their housing."<sup>62</sup>*

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<sup>55</sup> LA1 H3, p1

<sup>56</sup> LA1 H2, p1

<sup>57</sup> Ibid (emphasis added)

<sup>58</sup> LA3 H2, p1 (emphasis added)

<sup>59</sup> LA3 H2, p5

<sup>60</sup> LA3 H3, p1

<sup>61</sup> LA3 H1, p1

<sup>62</sup> Ibid

A separate Officer from Local Authority 1 also discusses reasonable steps in the context of the PHP as collaborative and shared process, but emphasised the tasks required of the applicant, as the Officer stated that: -

*“So my interpretation of reasonable steps... we work with the applicant towards a Personal Housing Plan. So for every applicant... we, together..., will devise a [PHP] and on there will be the reasonable steps that we both need to work towards. There’s the stuff they need to do.”<sup>63</sup>*

This same participant, when discussing the difficulties of assisting prison leavers, states that in this situation there is an attempt to compile the PHP prior to release so that they know beforehand ‘what they need to do,’<sup>64</sup> thus reframing the narrative from one of collaboration, to a mandate for the applicant. When prompted to give an illustration of reasonable steps commonly used on Personal Housing Plans, the Officer, in the following quotation, then provides examples of the kind of steps that are often ‘issued.’ Notably, they are all steps required of the applicant: -

*“reasonable steps then can just be something as basic as engaging with the Probation Officer on the day of release, or engaging with the support worker... obviously they’re being released, they also need to reinstate their benefits and things like that which can have an impact then [if] you want to place them in temporary accommodation. They need their benefits.”<sup>65</sup>*

The hint at disparity in the way in which reasonable steps is perceived between management and Housing Officers may have some relevance to a key criticism of Lipsky within the literature. There are arguments that the street-level bureaucracy framework is obsolete in a modern context, as the increase in the prevalence of targets and performance monitoring result in management control overriding aspects of front-line implementation.<sup>66</sup> If this were the case, it

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<sup>63</sup> LA1 H3, p1

<sup>64</sup> LA1 H2, p2

<sup>65</sup> Ibid

<sup>66</sup> David Howe, ‘Knowledge, power and the shape of social work practice’ in *The Sociology of Social Work*, London, Routledge (1991), p202; Ian Taylor and Josie Kelly, ‘Professionals, discretion and public sector reform in the UK: re-visiting Lipsky’ (2006) *International Journal of Public Sector Management* 19 7 629; Tony Evans, ‘Professionals, managers and discretion: Critiquing street-level bureaucracy’ (2010) *The British Journal of Social Work* 41 2 368



raises questions given that the conceptualisation of reasonable steps displayed by management above does not appear to have been imparted upon their staff. This part of the chapter closes with the next section by providing an overview of the evidence gathered during interviews relating to management monitoring in relation to these arguments.

### 5.2.3 Management monitoring: Street-level bureaucracies in a modern context

Before examining the perceived shift in applicant responsibility detailed above in greater depth, a few observations should be made regarding this key criticism of Lipsky's framework. Some have argued that it is obsolete and was written at a time when supervision of front-line work by the agency itself was far less common. Lipsky himself, writing in 1980, states: -

*"Job performance in street-level bureaucracies is extremely difficult to measure. The many implications of this statement include the facts that these agencies are not self-corrective, and the definition of adequate performance is highly politicised."*<sup>67</sup>

It is contended that, contrary to this statement, modern management techniques, technology, and state-level scrutiny of policy and the resources behind them choke discretion from front-line staff.<sup>68</sup> Evidence from interviews in this thesis suggests that there may be some merit to these arguments. Managers and Housing Officers alike were quick to point to the perception that in the day-to-day role, front-line workers had complete discretion on the allocation of reasonable steps. Commonly described by staff as '100% discretion',<sup>69</sup> and in service delivery having 'pretty much full scope',<sup>70</sup> these same participants nevertheless describe a strict process of resource allocation, whereby a number of 'steps' need to be 'signed off' and thus authorised by management.<sup>71</sup> For example, when allocating financial payments or housing stock, one Officer stated that 'at that point the manager says, OK, let me look at the case just to make sure you've done everything you can.'<sup>72</sup> In broad terms, the discretion with which Housing Officers

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<sup>67</sup> Michael Lipsky, *Street-level bureaucracy: Dilemmas of the individual in public service*, Russell Sage Foundation, 2010, p48

<sup>68</sup> David Howe (n 62); Ian Taylor and Josie Kelly (n 62); Tony Evans (n 62)

<sup>69</sup> LA1 M, p8; LA1 H1, p9; LA1 H2, p8; LA3 M, p2; LA3 H1, p5

<sup>70</sup> LA2 M, p6

<sup>71</sup> All transcripts discuss the authorisation of steps by management.

<sup>72</sup> LA1 H1, p10

prescribe reasonable steps, though claimed to be absolute is, in reality, closely monitored and controlled.

Monitoring in general is a key theme present in interview data. Managers talked of comprehensive computer programs, allowing them to track the use and availability of resources,<sup>73</sup> as well as the performance of employees; as the manager of Local Authority 2 states, 'I love data.'<sup>74</sup> Departments can identify perceived trends in resource use and success rates, and highlight gaps where more resource may be needed in certain areas.<sup>75</sup> The monitoring of implementation was thus described as critical to meeting a number of key performance indicators set both within the agency itself and by Welsh Government. For front-line staff, underperforming in relation to these targets can be consequential. The Manager at Local Authority 1 stated that after a review of staff performance data: -

*"One early intervention officer wasn't particularly doing what they needed to do, or particularly doing it that well, so we were having a lot more people come through the system than we anticipated. So I went back to the team to ask the question why. They advised me they didn't have confidence in that person. They didn't like the kind of referral pathway. They didn't think referrals were picked up that quickly, so we did a quick review. I got rid of that person and started all over again."<sup>76</sup>*

Besides benefits for management and potential pitfalls for Officers, front-line staff discussed the use of these systems to record progress, timings, and relationships with external stakeholders involved in the delivery of reasonable steps, all managed from a central 'dashboard.' The system could be accessed by multiple users at once, and served as a convenient way to manage caseloads.<sup>77</sup> Aside from this convenience, some front-line staff also treated the system as a key way to 'demonstrate'<sup>78</sup> what they were doing and serve as an evidence base for steps taken in service delivery.<sup>79</sup> This 'evidence base' was framed as a

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<sup>73</sup> LA1 M; LA2 M; LA3 M

<sup>74</sup> LA 2 M, p3

<sup>75</sup> LA1 S, p2

<sup>76</sup> LA1 M, p9

<sup>77</sup> LA3 H1, p2; LA3 H2, p3

<sup>78</sup> LA1 S, p2

<sup>79</sup> LA1 H1, p1

defence against potential challenge, as well as a convenient way for front-line Officers to track applicant progress through the system and monitor the timely completion of the steps required of them.<sup>80</sup>

To summarise, there is clear evidence of significant levels of management scrutiny within service delivery in this context. Contrary to claims that this scrutiny renders Lipsky's theory obsolete, as the preceding sections have shown, there is also evidence that managers do not impose their interpretation of reasonable steps upon the staff in their departments. Again, despite the prevalence of management scrutiny, and again in support of Lipsky, the final part of this chapter argues that the level of responsibility attributed to applicants for reasonable steps by Housing Officers has led to implementation processes which run counter to the intentions of policymakers. Part 3 will therefore describe how the shift in burden to applicants for reasonable steps impacts the implementation of the policy within the use of Personal Housing Plans, and uses elements of Lipsky's street-level bureaucracy theory to help explain why this may have occurred in practice.

### 5.3 Reasonable steps and the street-level bureaucrat

Lipsky defines street-level bureaucracies as 'agencies whose workers interact with and have wide discretion over the dispensation of benefits or the allocation of public sanctions.'<sup>81</sup> It is on the workers themselves where Lipsky focusses his attention, as they occupy the 'front-line,' at the border between state resources and the individual, and may use the flexibility inherent within their roles to amend practices and essentially drive policy from the 'bottom-up.'<sup>82</sup> Housing Officers implementing reasonable steps are textbook street-level bureaucrats. They are responsible for processing applicants through the agency, using discretionary powers (in this case granted by statute) to deploy scarce resources and best serve those seeking state funded support. They are busy and encounter a wide variety of individuals in various states of need and vulnerability. In focussing on the way in which these individuals carry out their roles,

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<sup>80</sup> LA1 H1, p3; LA3 H1, p4, p15

<sup>81</sup> Michael Lipsky (n 67), pxi

<sup>82</sup> Michael Lipsky (n 67)

Lipsky identifies many elements of the nature of front-line work. Street-level bureaucrats, he claims, commonly focus attention on rationing service and protecting resources, as well as themselves, from client pressures,<sup>83</sup> and amend practice at the front line to protect themselves and the bureaucracy. They tend to accept limitations as fixed,<sup>84</sup> often refusing to make exceptions by using rationalisations such as 'that's the way things are,' and 'it's the law.'<sup>85</sup> Lipsky emphasises that these working patterns are mostly unconscious, and they are psychologically defended by workers who view their adaptations as 'necessary mechanisms' for coping with resource demands, as well as a 'functional requirement of doing the job in the first place.'<sup>86</sup>

Lipsky's framework is used within this part of the chapter as an interpretive tool to help explain how the framing of reasonable steps by Housing Officers as an applicant duty may have impacted elements of front-line implementation. The framework is also used to expand on why this shift in burden may be viewed as so extreme, as the misuse of the PHP evident within interview findings shows that, in line with Lipsky's theory, this practice serves to solve a number of operational problems for Housing Officers. The evidence presented below suggests that a shift in burden of reasonable steps to the applicant, and closely monitoring their engagement with these steps, enables a degree of control in securing client cooperation in the process; this is a crucial element of achieving a successful outcome to an assistance application. Thus, Part 3 argues that an applicant focus within the PHP represents an extreme example of a developed routine of practice which directly addresses the operational problem of uncooperative applicants. Ultimately, this is in direct opposition to the policy intentions of reasonable steps described within part 1 of this chapter and outlined within the policy reunion. The evidence is presented below alongside contributions from Lipsky's publication, and some of the many studies available in the literature which have used this theory and noted similar occurrences.

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<sup>83</sup> Michael Lipsky (n 67), p133

<sup>84</sup> Michael Lipsky (n 67), p144

<sup>85</sup> Michael Lipsky (n 67), p149

<sup>86</sup> Michael Lipsky (n 67), p140

### 5.3.1 The PHP: 'Practice routines' and the problem of uncooperative applicants

Central to Lipsky's argument, is the claim that street-level bureaucrats may adapt working practices to address various difficulties in processing clients.<sup>87</sup> He labels this phenomenon as '*routinization*,' which develops whereby 'coping mechanisms' are created to regulate workload by evolving patterns of practice routines and stereotyping.<sup>88</sup> There must first be a problem which the mode of practice addresses, and the developed way of working may become so engrained that they are unintentionally seen by staff as primary core departmental functions.<sup>89</sup> Lipsky writes that: -

*"Workers appear to feel that their jobs require the routines. In some street-level bureaucracies, routines of practice become so dominant that workers seek to negotiate the routines rather than to obtain the objective for which routines were presumably developed."*<sup>90</sup>

As a central component of Lipsky's theory, practice routines are a common theme within street-level bureaucracy studies, displaying instances of front-line staff engraining working practices to address a difficulty of the role or secure an operational need.<sup>91</sup> In a UK welfare provision setting, staff have been found to develop routines to subvert management scrutiny,<sup>92</sup> expedite case processing,<sup>93</sup> protect department resources,<sup>94</sup> and help make difficult discretionary judgments.<sup>95</sup> For Housing Officers in the context of this thesis, the routinisation of a focus on

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<sup>87</sup> Michael Lipsky (n 67), p82

<sup>88</sup> Ibid

<sup>89</sup> Michael Lipsky (n 67), p54

<sup>90</sup> Michael Lipsky (n 67), p149

<sup>91</sup> Marcia Meyers, Bonnie Glaser, and Karin Mac Donald, 'On the front lines of welfare delivery: Are workers implementing policy reforms?' (1998) *Journal of Policy Analysis and Management* 17 1 1, p17; Vincent Dubois, *The bureaucrat and the poor: Encounters in French welfare offices*, Routledge 2016; Paul Henman and Greg Marston, 'The social division of welfare surveillance' (2008) *Journal of Social Policy* 37 2 187

<sup>92</sup> Sharon Elizabeth Wright, 'Confronting unemployment in a street-level bureaucracy: Jobcentre staff and client perspectives' (2003) PhD Thesis, Sterling University

<sup>93</sup> Aimee Grant, 'Welfare reform, increased conditionality and discretion: Jobcentre Plus advisers' experiences of targets and sanctions' (2013) *Journal of Poverty and Social Justice* 21 2 165

<sup>94</sup> Sarah Alden, 'Discretion on the frontline: The street level bureaucrat in English statutory homelessness services' (2015) *Social Policy and Society* 14 1 63, p69

<sup>95</sup> Del Roy Fletcher, 'Welfare reform, Jobcentre Plus and the street-level bureaucracy: towards inconsistent and discriminatory welfare for severely disadvantaged groups?' (2011) *Social policy and*

applicant reasonable steps helps address the issue of client control. The problem to be solved is the uncooperative applicant. The shift in focus to applicant responsibility for reasonable steps is counter to key policy intentions, and may have been driven by the message delivered in training around the desire to engage applicants more actively in the process. In shifting this burden, Housing Officers not only benefit from protecting limited departmental resources, but also gain the utility to address the significant problem of securing and monitoring applicant cooperation. In this context, applicants deemed to be non-compliant face the threat of having support withdrawn for unreasonably failing to cooperate, in other words, for 'unreasonableness.' Lipsky identifies client control as a core necessity within street level bureaucracies, and it is common to find various methods developing within departments to obtain and maintain cooperation. He states: -

*"Where the clients' cooperation is necessary for the bureaucrats to function smoothly- that is, where failure to cooperate, out of anger or ignorance, is likely to impede bureaucratic functioning, the bureaucracy has a stake in teaching clients what is expected of them."<sup>96</sup>... [They] reprimand or otherwise sanction deviance from acceptable standards of client behaviour. They dominate their interactions with clients. They cue and otherwise teach clients to behave "properly." They structure work patterns to maximize control over clients independent of any policy objectives."<sup>97</sup>*

Lipsky argues that client control materialises within street level bureaucracies in two main ways, either *utilitarian* compliance, which is achieved due to control over the resources which the client desires, or *coercive* compliance, which is achieved by force or the threat of force.<sup>98</sup> In the context of reasonable steps and the Personal Housing Plan, applicant cooperation is secured by the use of both forms. Utilitarian in the sense that applicants have no other option but to apply to the Authority for assistance, and coercive due to the threat of ending their support due to lack of cooperation. In composing the Personal Housing Plan and allocating reasonable steps for applicants to take, Housing Officers have been shown to frequently

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Society 10 4 445; Joanne Bretherton, Caroline Hunter, and Sarah Johnsen, 'You can judge them on how they look: Homelessness Officers, Medical Evidence and Decision-Making in England' (2013) *European Journal of Homelessness* 7 1 69

<sup>96</sup> Michael Lipsky (n 67), p62

<sup>97</sup> Michael Lipsky (n 67), p58

<sup>98</sup> Michael Lipsky (n 67), p42

manage client expectations. By managing expectation early in the process, Officers can further limit potential future difficulties with non-compliant applicants, as Lipsky states, in doing so, disruptive, antagonistic, or uncooperative client behaviour is discouraged before it surfaces.<sup>99</sup>

During interviews for this thesis, Housing Officers frequently claimed that difficulty with applicants was the main challenge they faced in their day-to-day roles, and that uncooperative or apathetic clients made the job considerably harder. The cooperation of applicants is of course often a vital element of a successful intervention, but front-line staff frequently spoke negatively of service users, highlighting the difficulty of gaining ‘buy in’<sup>100</sup> from them and obtaining their cooperation. Applicants were described as using support resources as ‘a crutch,’<sup>101</sup> and being ‘unwilling to take initiative themselves.’<sup>102</sup> There appears to be a widely held perception that individuals are ‘only interested in accommodation,’<sup>103</sup> and generally lack the knowledge of the intentions behind the reasonable steps provisions.<sup>104</sup> Where reasonable steps is explained to them, applicants were perceived to have a limited motivation to engage in ‘their’ reasonable steps.<sup>105</sup>

Negative conceptualisations and suspicion of welfare claimants are a common occurrence in the literature, and touch on themes of victim blaming and individualised judgments of (un)deserving clients. Glastonbury (1971)<sup>106</sup> notes, in his early study of homeless families, that Housing Officers formed strong opinions of the ‘worthiness’ of these individuals, blaming them for their own situation based on perceptions of laziness and indecency.<sup>107</sup> On victim blaming, Lipsky writes: -

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<sup>99</sup> Michael Lipsky (n 67), p61

<sup>100</sup> LA1 H3, p6

<sup>101</sup> LA1 H1, p8

<sup>102</sup> Ibid, p11

<sup>103</sup> LA1 M, p13; LA1 H1, p14; LA1 H2, p4; LA 3 H1, p2; LA 3 H2, p4

<sup>104</sup> LA1 H1, p14; LA1 H2, p11; LA1 H3 p4; LA3 H3, p4; LA3 H2, p5.

<sup>105</sup> LA1 H3, p6

<sup>106</sup> Bryan Glastonbury, *Homeless near a thousand homes: A study of families without homes in South Wales and the West of England*, Allen and Unwin 1971

<sup>107</sup> Ibid, p106

*“Perhaps the most familiar syndrome of private reconceptions of clients concerns locating responsibility for client difficulties... There are many examples of blaming the victim. Chronically unemployed men are described as shiftless and unwilling to work when their situations might be attributed to the structure of employment and previous job availability... Blaming clients for failing to keep appointments protects street-level bureaucrats from the possibility that prior interviews have discouraged or alienated them.”<sup>108</sup>*

One Officer describes numerous occasions of having applicants tear up reasonable steps plans in front of them.<sup>109</sup> During interviews, staff found these problems to be a significant burden, leading them to feel that they have to ‘coax’<sup>110</sup> applicants through the process, and ‘sell reasonable steps to them.’<sup>111</sup> One stated that if clients consistently engaged with the process and made the effort, ‘they would see progress.’<sup>112</sup> An Officer at Local Authority 1 questioned current policy goals in the context of difficult applicants, and asks: -

*“[I]s it client centred? I definitely don't think it is... it's client centred maybe for people like us. So if we do get a letter, we do read it. But these are people who don't turn it up to appointments or read anything. They don't open anything. They come to me for help... it's just not realistic, is it?”<sup>113</sup>*

Outside of these Housing Officers, only the Manager of Local Authority 2 conveyed a similar negative opinion of applicants, stating that ‘[often when] you dig a little bit deeper... they could resource themselves... they could find solutions themselves.’<sup>114</sup>

An Officer at Local Authority 1 discussed difficult applicants in relation to the Personal Housing Plan, raising the importance of gaining their cooperation and ‘complying’ with their reasonable steps under their own initiative: -

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<sup>108</sup> Michael Lipsky (n 67), p152-153

<sup>109</sup> LA1 H3, p5

<sup>110</sup> LA1 H1, p6, p14; LA3 H1, p4; LA3 H2, p5

<sup>111</sup> LA1 H1, p5

<sup>112</sup> LA1 H3, p5

<sup>113</sup> LA1 H1, p15

<sup>114</sup> LA2 M, p5



*“They don't want to take the initiative themselves. They come to me because they expect me to house them...<sup>115</sup> So it's normally a lot of coaxing. A lot of coaxing our end to get an outcome. I explain to them you're not gonna get an outcome unless you do [take these steps], unless you look at everything. The job is spent majority of the time coaxing people to do their reasonable steps. It's a reality check for them.<sup>116</sup>”*

The same Officer goes on to describe monitoring and maintaining levels of applicant cooperation as the case progresses, stating that ‘it's always a battle... you have the battle with the PHP, and they do reluctantly agree, and then it's the battle throughout the case of [getting them to do] what they agreed to on day one.’<sup>117</sup> Another Officer from the same Authority echoes this view, closely tying the success of a case to applicants engaging with the steps required of them within the PHP: -

*“If each reasonable step was worked towards like it should be, and they did engage,... I'm not saying it would happen overnight, but they would see progression. The fact is that when their reasonable steps are worked towards and met then there's progression at the end of it. It just takes a bit more time than people expect and so it's important to keep track of what they're doing.”<sup>118</sup>*

At Local Authority 3, one Officer was of the belief that composing a Personal Housing Plan and requiring reasonable steps from applicants was a legislative requirement,<sup>119</sup> and should be used to ensure that those steps are used to progress the case positively.<sup>120</sup> This participant described the formulation of reasonable steps in the Personal Housing Plan as being made easier on an IT system, again placing a significant responsibility on applicants and highlighting the importance of monitoring: -

*“We've got a PHP template on [the IT system]... If I've created a task [such as] please apply for social housing... or please let me know any more medical conditions that you haven't disclosed... they [can] log on their online portal and see their tasks on there...”*

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<sup>115</sup> LA1 H1, p11

<sup>116</sup> LA1 H1, p6

<sup>117</sup> Ibid

<sup>118</sup> LA1 H3, p5

<sup>119</sup> LA3 H3, p2

<sup>120</sup> Ibid, p1

*they can actually log on and amend it, they can say I've done it, or I don't understand. So they're able to see, right, OK, I now need to consider this or do this.<sup>121</sup>*

The Officer also stated that the interactivity afforded by IT system has not only helped monitoring from the Local Authority perspective,<sup>122</sup> but has also led to better engagement and cooperation from applicants.<sup>123</sup> They went on, however, to describe the consequences for service users who did disengage with the process and become uncooperative in addressing the reasonable steps allocate to them within their PHP: -

*"I don't know if this is good on our behalf, but if somebody is not engaging with their Personal Housing Plan we do normally have those conversations with them, especially if it's more of an essential step [they haven't completed. `We'll say] this step will benefit you, please make sure you do it. We do send out this warning letter... saying please make sure you engage with your Personal Housing Plan. They are there to benefit you and help you in terms of your housing going forward and we don't want to have to end our duty."<sup>124</sup>*

Another Officer at Local Authority 3 gives a similar account, again discussing the ease with which staff can keep track of applicant cooperation electronically: -

*"We input the personal housing plan and the reasonable steps on the system and review it on an ongoing basis. There's timescales on there that let us know when the time is up for certain steps that we put in and then we can phone them and chase them up.<sup>125</sup> The system tells us how many cases we've got, what state they're in, and how many steps are overdue. That's how we monitor it."<sup>126</sup>*

Once again, when asked what the consequences might be for applicants perceived to be uncooperative, this Officer explains that a warning letter will precede a termination of the legal duty for unreasonable failure to cooperate: -

*"I will look at doing a warning letter then saying, you know, you're not engaging with reasonable steps in your Personal Housing Plan. We would outline in the letter why it's*

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<sup>121</sup> LA3 H1, p3

<sup>122</sup> LA3 H3, p9

<sup>123</sup> Ibid

<sup>124</sup> LA3 H3, p4-5

<sup>125</sup> LA3 H1, p5

<sup>126</sup> LA3 H1, p4

*so important to engage with that... that it would help them with their housing situation. Give them another opportunity and then If they fail to engage after that, you know, we'll look to end and our duty and close them.<sup>127</sup>"*

The above findings appear to demonstrate a shift in burden for reasonable steps from the authority to the applicant. Personal Housing Plans, contrary to their intended use as a client focussed assistance aid, appear to be used to monitor the reasonable steps required on the applicant. This is in direct opposition to policy intent. Lipsky's theory has been drawn upon to help explain why this may have occurred in practice. A culture of cooperation and applicant participation may have been misunderstood in part. The statutory phrase 'unreasonable failure to cooperate' may have been conflated with reasonable steps, as the concept of reasonableness is used in both terms. The shift in burden may be an example of a 'practice routine,' to secure client cooperation with the bureaucratic process. Clients who do not comply by working towards their reasonable steps can find themselves threatened with a termination of duty for non-cooperation. Having outlined findings on the implementation of reasonable steps, the closing section of this chapter now turns to the third research question, and presents a number of factors in implementation which may be contributing to the lack of legal challenges to reasonable steps.

#### 5.4 Impeding challenge in implementation

This section presents findings directly relating to the third research question, and considers the impediments to challenge present in the front-line implementation of reasonable steps. Participants in the policy reunion stated a clear intent that reasonable steps be subject to a legal challenge if the need arose in practice.<sup>128</sup> During interviews, participants were asked to comment on the absence of case law, and the elements discussed here specifically relate to Local Authority working practices in the implementation of the legislation. The findings presented in this section are thus context specific, and they inevitably sit within a wider landscape which is beyond the scope of the thesis. The structural access to justice barriers

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<sup>127</sup> LA3 H1, p3

<sup>128</sup> A1, p19

which vulnerable applicants face are well documented, and include broad cuts to legal aid budgets and a scarcity of legal advice.<sup>129</sup> Individual level barriers have also been found to be significant. Vulnerable citizens have a disproportionately low level of rights knowledge,<sup>130</sup> and this is particularly true of those seeking to navigate homelessness law.<sup>131</sup> Other research has highlighted variability in the level of willingness that welfare recipients display to engage their legal rights.<sup>132</sup> It has been argued that providing legal rights to these individuals does so to those 'who are least likely to use them.'<sup>133</sup>

With this broad landscape in mind, the specific front-line factors which may inhibit reasonable steps litigation are considered here separately and in turn across three sub-sections.

Collectively, findings indicate that policy messages emphasised within the Code of Guidance and delivered during staff training sessions may, in practice, serve to create a culture which limits conflict with applicants. These developments appear to align with the intent of

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<sup>129</sup> For notable examples in context, see: Debra Morris and Warren Barr, 'The impact of cuts in legal aid funding on charities' (2013) *Journal of Social Welfare and Family Law* 35 1 79; Andrew BurrIDGE and Nick Gill, 'Conveyor-belt justice: Precarity, access to justice, and uneven geographies of legal aid in UK asylum appeals' (2017) *Antipode* 49 1 23; Daniel Newman and Jon Robins, 'Justice in a time of austerity: the lives of people already struggling are made much harder by cuts to legal aid' (2021) *British Politics and Policy at LSE*; Jennifer Sigafoos and James Organ, 'What about the poor people's rights?' The dismantling of social citizenship through access to justice and welfare reform policy' (2021) *Journal of Law and Society* 48 3 362

<sup>130</sup> Roderick A Macdonald, Access to Civil Justice, in Peter Cane and Herbert Kritzer (eds) *The Oxford Handbook of Empirical Legal Research*, Oxford University Press 2012; Alexy Buck, Pascoe Pleasence, and Nigel J Balmer, 'Do citizens know how to deal with legal issues? Some empirical insights' (2008) *Journal of social policy* 37 4 661; Catrina Denvir, Nigel J Balmer, and Pascoe Pleasence (n 39); OECD, Equal Access to Justice, Expert Roundtable Background Notes, Paris, 2015 available at <https://www.oecd.org/gov/Equal-Access-Justice-Roundtable-background-note.pdf> accessed on 27 November 2021; Association of Consumer Support Organisations, *Simplifying Access to Justice for Vulnerable Consumers* 2021 available at <<https://acso.org.uk/sites/default/files/media/files/simplifying-access-justice-vulnerable-consumers.pdf>>

<sup>131</sup> Nigel J Balmer, Alexy Buck, Ash Patel, Catrina Denvir, and Pascoe Pleasence, *Knowledge, Capability and the Experience of Rights Problems*, London, Public Legal Education Network 2010

<sup>132</sup> Austin Sarat, 'The law is all over: power, resistance and the legal consciousness of the welfare poor' (1990) *Yale Journal of Law & Humanities* 2 343; Patricia Ewick and Susan S Silbey, *The common place of law: Stories from everyday life*, University of Chicago Press 1998; Dave Cowan, 'Legal consciousness: some observations' (2004) *The Modern Law Review* 67 6 928

<sup>133</sup> Robt E Goodin, 'Welfare, rights and discretion' (1986) *Oxford Journal of Legal Studies* 6 232

policymakers to a large extent. However, other issues raised do not align, as there is evidence that Local Authorities could be failing to adequately explain the legislation to service users, whilst actively avoiding engagement with challenges to their delivery of reasonable steps.

#### 5.4.1 Non-adversarial implementation

During interviews, Housing Officers frequently discussed their focus on managing client expectations<sup>134</sup> and some directly linked this approach to fostering less adversarial relationships with service users. Managing client expectation early in the process, they felt, helped promote a cooperative working relationship, thus leading directly to a reduced likelihood of legal challenges arising.<sup>135</sup> It was stated that decisions on reasonable steps are conducted with the applicant in person, allowing them to scrutinise the housing support plans as they are composed.<sup>136</sup> Other participants stated that if there are any subsequent disagreements, they are frequently handled by ‘having a conversation with clients first.’<sup>137</sup> This was presented as a key strategy at Local Authority 3, the Manager there stated: -

*“I think it's right they do have the right to challenge, and I think it's absolutely fair, but it's the expectations of the individual which causes issues... so we manage the expectation before it gets to that stage.”<sup>138</sup>*

The ‘less adversarial’ approach to applicants is likely a direct result of the policy message delivered by Welsh Government; that goal was specifically noted within the policy reunion. The training provider highlighted the emphasis given to cooperation and a less adversarial attitude to service delivery.<sup>139</sup> Officers reported a more informal working arrangement with support agencies as well, having ‘lots of discussions off the books,’<sup>140</sup> and ‘over coffee.’<sup>141</sup> The legal training provider also recalled that reviews and appeals were framed within the training

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<sup>134</sup> LA1 H1; LA1 H3; LA3 H1; LA3 H3

<sup>135</sup> LA1 M,2p; LA1 S, p4; LA1 H2, p7; LA3 M, p4; LA 3 H1, p8, p10

<sup>136</sup> LA3 H3, p4

<sup>137</sup> LA3 H1, p8; LA1 H1, p5; LA1 H2, p7

<sup>138</sup> LA3 M, p4

<sup>139</sup> TP, p1, p2, p4

<sup>140</sup> LA1 H1, p6

<sup>141</sup> LA1 M, p11

sessions as an inherently bad thing in relation to cooperative working, and that issues and problems would preferably 'be resolved locally.'<sup>142</sup> Housing Officers confirmed this, commenting that the new legislation was perceived as being structured in a less adversarial manner than the outgoing framework. The Manager of Local Authority 2 welcomed the new approach, in contrast to past instances of receiving last minute correspondence from third party assistance providers threatening legal action: -

*"It takes a lot more to get to an adversarial formal stage than it did, which is to be welcomed. The old legislation lent itself to a very adversarial approach between the local authority trying to do its best and CAB or Shelter, perhaps, challenging that on somebody's behalf... Before the Act came in, very often we would get what we used to call a 'high noon' letter from their solicitor saying accommodate this person by 12:00 tomorrow or we're going for judicial review... and that just did nobody any good apart from got peoples backs up."*<sup>143</sup>

The emphasis on cooperation, collaboration, and a less adversarial approach to service delivery was identified as a key aim of policymakers, and thus these elements appeared prominently within the Code of Guidance and training sessions. Participants felt that this new approach was in itself an impediment to legal challenges arising. Again, relating to front-line practice, these participants also felt that the right to reasonable steps was ineffectively communicated to applicants, thus further reducing the chance of litigation arising.

#### 5.4.2 Formal language and the non-communication of rights

Interviews highlighted a possible failure on the part of Local Authorities to effectively communicate the right of legal challenge to service users. A number of Officers stated that they did not prioritise clearly explaining the nature of reasonable steps as a legal right to applicants.<sup>144</sup> The Manager of Local Authority 1 directly acknowledged this. When asked why they thought nobody had engaged a legal challenge to date they stated: -

*"I guess... we just don't make it very clear that you can challenge that sort of thing if I'm being honest."*<sup>145</sup>

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<sup>142</sup> TP, p11

<sup>143</sup> LA2 M, p4

<sup>144</sup> LA1 H1; LA1 H2; LA3 H2; LA3 H3

<sup>145</sup> LA1 M, p5

When asked to expand on their responsibility for communicating the right to challenge, Officers often responded by stating that department documentation handed to applicants contained ‘all the details they need.’<sup>146</sup> As discussion of the documentation advanced, the same staff raised the complex nature of this material, conveying doubts as to how clearly it was structured and worded. They claimed that the documents inevitably contain a high degree of ‘legal jargon’ as a ‘necessary evil.’<sup>147</sup> When discussing documentation, an Officer based at Local Authority 1 gave a direct example of the barriers which vulnerable service users faced in the process, stating that individuals who approach the Authority were often unable to read or write: -

*“lots of people... they're really great at looking as if they're skimming over the information and they can sign this and that... you wouldn't look at their signature and think, oh, they can't read... because it's just rehearsed. It's practiced.”<sup>148</sup>*

Balmer *et al* cite the provision of ‘plain English’ correspondence as a critical element in communicating legal rights to vulnerable citizens,<sup>149</sup> but when asked about the reasonable steps correspondence, an Officer at Local Authority 3 claimed that there is ‘so much jargon in there that they would just look at it and cast it to one side.’<sup>150</sup> An Officer at Local Authority 1 acknowledged that more could be done to help clients understand the paperwork,<sup>151</sup> and another stated that: -

*“these letters that we send are quite heavy reading for some people, you know, we're putting sections of the law in them because we have to.”<sup>152</sup>*

The failure to inform applicants of their legal rights or provide plain language written explanation are facets of front-line service delivery, as is the culture of a non-adversarial approach. Participants also described how a lack of departmental resources impacted the

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<sup>146</sup> LA1: H1; LA1 H3; LA3 H1

<sup>147</sup> LA1 H1, p8

<sup>148</sup> LA1 H2, p4

<sup>149</sup> Nigel J Balmer and others (n 131), p23

<sup>150</sup> LA3 H2, p5

<sup>151</sup> LA1 H2, p4

<sup>152</sup> LA3 H1, p8

implementation of the legislation, as pressures on staff time and authority budgets led directly to the avoidance of legal conflict.

### 5.4.3 Deliberate avoidance of litigation

Participants explained that a lack of resources has directly led to an avoidance of litigation in challenges made under the legal framework. The Manager of Local Authority 1, for example, described a general aversion to litigation within the department based not only on the spirit of cooperation, but also the inevitable resource demands which a court case entails. Litigation was actively avoided due to the time and money involved in defending their actions in court: -

*“I think, you know what, this battle isn't worth fighting. We will always back down for want of a better word, or turn a decision around... As resource is getting tighter and tighter, you know, sometimes you've gotta go with what you've gotta go with.”<sup>153</sup>*

When directly asked why they thought the number of official challenges were low, an Officer at Local Authority 1 responded by stating: -

*“This might be controversial... we're so busy... Sometimes that one challenge case that comes in, is it really worth the fight? And it's just... OK, Let's just cave in. I know that happens a lot with us.”<sup>154</sup>*

Again, this Housing Officer links the theme of cooperation and resources, by describing an aversion to litigation due to the impact on time, money, and what is deemed to be best for the service user: -

*“When we do get the odd one [where] they do challenge, we do end up just giving in normally... saying OK, the workload is so high, it's not worth the battle sometimes, you know? It's difficult for us as case officers as well, because sometimes you just don't wanna lose the trust of the client. So it does normally end up going in their favour. I'd say we get very, very few that we can't avoid; very few that we ever push on or go through any sort of formal challenge on.”<sup>155</sup>*

The Manager from Local Authority 2 echoed the sentiment: -

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<sup>153</sup> LA1 M, p11

<sup>154</sup> LA1 H1, p4

<sup>155</sup> LA1 H1, p5



*“It does tie up a lot of senior officer time reviewing it in the first place, then there’s the legal costs if it goes that far, and you think well what for? What does the person want? they still want a house; they still want a flat. Keep working on that rather than the he said, she said. It’s much better to just pick up the phone and give some compromise rather than receive a legal letter.”<sup>156</sup>*

Avoidance of litigation, the poor communication of rights, and a fostered culture of cooperation were highlighted as contributory factors to the lack of case law on reasonable steps. These elements all directly concern the procedural (or front line) implementation of the legislation. Firstly, as outlined in the previous chapter, a cooperative and non-adversarial approach to service delivery was a key desire of policymakers. However, failure to effectively communicate rights to individuals, and ‘backing down’ against formal challenges, are elements that do not align with policy intent. Policymakers intended that reasonable steps be challenged in practice if necessary, and that service delivery be applicant focussed and individualised. These impediments to legal challenge in implementation are an important consideration, as studies have shown that legal enforcement is a key component in the achievement of policy objectives driven by legislation.<sup>157</sup>

The findings also corroborate observations from earlier socio-legal studies in homelessness decision-making, which have noted the difficulties applicants can have as a result of complex paperwork and remaining unaware of the nature of their rights.<sup>158</sup>

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<sup>156</sup> LA2 M, p4-5

<sup>157</sup> Karen J Hoare, Jane Mills, and Karen Francis, ‘The role of Government policy in supporting nurse-led care in general practice in the United Kingdom, New Zealand and Australia: an adapted realist review’ (2012) *Journal of advanced Nursing* 68 5 963; Rosa Lau, Fiona Stevenson, Bie Nio Ong, Krysia Dziedzic, Shaun Treweek, Sandra Eldridge, Hazel Everitt, ‘Achieving change in primary care—causes of the evidence to practice gap: systematic reviews of reviews’ (2015) *Implementation Science* 11 1

<sup>158</sup> David Cowan and Simon Halliday, *The appeal of internal review: law, administrative justice, and the (non-) emergence of disputes*, Hart 2003; Simon Halliday, *Judicial review and compliance with administrative law* Hart 2004; Caroline Hunter, ‘Denying the severity of mental health problems to deny rights to the homeless’ 2(1) *People, Place and Policy Online* 2(1) (2007)

## 5.5 Chapter summary

This chapter has been focussed on elements of the implementation of reasonable steps in comparison to policy objectives uncovered within Chapter 4. Part 1 of this chapter demonstrated that clear attempts were made to communicate these policy objectives to front-line staff. In line with policy goals, the Code of Guidance and staff training sessions prioritised flexibility, cooperation, and a wide conceptualisation of reasonable steps. Staff were encouraged to tailor support to individuals and include them more in the assistance process. The Personal Housing Plan was promoted as a tool to achieve these aims and facilitate the application of the law in line with these policy objectives. Part 2 focussed on how this message was received at the front line, and presented evidence which suggests that managers may have been more receptive to efforts made to communicate policy objectives. Two of the three managers interviewed appear to closely align their interpretation of reasonable steps with this message. In contrast, Housing Officers view reasonable steps as a 'two-way street,' and emphasise the applicant's role in the process. In a deviation from the policy message, they appear to place the burden of reasonable steps upon these individuals to a large extent. Taken together the evidence suggests management, despite closely monitoring front-line services, have not conveyed their perception of reasonable steps to Housing Officers working in their departments. This inconsistency arises despite criticisms that Lipsky's theory is rendered obsolete in a modern context due to management influence.

Part 3 has argued that the apparent shift in burden to the applicant materialises in the way the Personal Housing Plan is applied at the front line, and explored how and why this may have occurred in practice. Staff appear to routinely use the plans to list and monitor the reasonable steps which the Officer has requested from the applicant, using (or at least threatening to use) their right to end the assistance duty for non-cooperation in certain instances if these are not met. This is in direct opposition to the policy goals defined within the previous chapter. With the PHP, the intent for collaboration and cooperation is achieved, though, rather than empowering individuals, it emerges in practice as coercion. There are a number of reasons why

this may have occurred. Firstly, the emphasis placed on cooperation and applicant participation may have been misunderstood by staff, and there may have been some conflation with the statutory phrase ‘unreasonable failure to cooperate.’ The concept of reasonableness used in both may have in part exacerbated the confusion. To facilitate a deeper exploration, Lipsky’s framework was used here to show that such changes in practice can occur in certain circumstances. The applicant focus within the PHP may be an example of a practice routine, developed to help address the significant problem of securing client cooperation. The direct opposition to policy intent renders this an extreme example of such a routine, and was perhaps made so extreme by the contributing factors of the aforementioned confusions in the policy message. Ultimately, the burden for reasonable steps appears to have tipped too far to the applicant, leaving them with a duty to complete ‘their reasonable steps.’ This is a deviation from policy intent so significant it is in direct opposition. Reasonable steps was intended to be a Local Authority duty.

The chapter closed in part 4 by addressing the third research question, with evidence for the existence of impediments to legal challenge at the front line. In implementation, there exists a culture of non-adversarial working which aligns with policy intent. Running against this intent, however, is ineffective communication with applicants regarding their legal rights, and a general approach of avoidance of litigation. This conflicts with the policy objectives outlined in the previous chapter, as during the policy reunion, participants emphasised that the legislative right for applicants was a key element in the desired policy objectives.<sup>159</sup> The next chapter presents a key argument of this thesis relating to the challenge of reasonable steps in context. If the front-line impediments to challenge discussed above were to be overcome, the legislative phrase ‘reasonable steps’ itself serves to limit the chances of litigation arising. To advance this argument, and in the absence of specific case law on reasonable steps, the next chapter presents a doctrinal analysis of the term in public law and examines both the threshold for unreasonableness and the level of scrutiny the courts may employ in the event of litigation. The

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<sup>159</sup> A4, p13; A1, p18

next chapter, therefore, addresses the 'legal' element of the second research question, and concerns the application of reasonable steps in the courts.



## Chapter 6: Doctrinal Analysis – Reasonable Steps and the Courts

*The court should decide what is reasonable ultimately. We can say what we think is reasonable, or you can put something in the Code of Guidance, but it will be for the courts to decide... of course that hasn't happened, has it.”<sup>1</sup>*

This chapter addresses the second research question, which asks how reasonable steps is interpreted and applied in practice. Previous chapters have outlined the intentions behind reasonable steps and demonstrated that, in a deviation from those intentions, the duty to take reasonable steps appears have shifted away from Local Authorities and onto applicants themselves. This thesis argues that a legal challenge to implementation would serve to rectify this disparity. Regarding legal challenge, the preceding chapter presented findings suggesting a number of potential impediments to litigation of reasonable steps in practical implementation, which may contribute to the lack of case law and the unlikelihood of a challenge arising in practice. The contents of this chapter are presented as the final, and perhaps most insurmountable, barrier for applicants seeking to enforce their legal rights. Ultimately, it is argued here the use of the phrase ‘reasonable steps’ as a policy choice invokes long held and deeply rooted legal principles which bind the courts when judging the reasonableness of public authority actions. If impediments to legal challenge present in front-line implementation were removed, applicants would still be highly unlikely to first secure, and subsequently succeed in, a legal challenge in the absence of an extreme derogation of duty on the part of the Local Authority. To make this argument, and in the absence of specific case law on reasonable steps in this context, this chapter presents a doctrinal analysis of the reasonableness principle and its application in decided cases to clarify how the courts would interpret, apply, and scrutinise the legislation in practice. The chapter is comprised of four parts.

Part one is introductory, and first presents a reminder of the relevant legislative provisions of the Housing (Wales) Act 2014, including the duty to take reasonable steps and those sections which provide applicants with the statutory right of challenge. As the duty to take reasonable

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<sup>1</sup> A5, p6

steps is split between the goals of homelessness prevention and relief, the route to challenge for each differs. Though the means of challenging these separate provisions vary, the ultimate remedy for both is judicial review. As the High Court function which concerns the judicial oversight of public authority decisions, judicial review is introduced in more depth, including an overview of characteristics of the procedure which present their own difficulties for potential claimants.

Part two departs from the context of the Housing (Wales) Act 2014 and the specific reasonable steps duties to trace the development of the reasonableness principle, focussing on the factors which the courts consider when judging the reasonableness of public authority decisions. A doctrinal account of early case law through to more contemporary judgments, tracks the shift in judicial focus away from a requirement of reasonableness through to accountability for unreasonableness, and highlights a key factor inherent in public law. The courts, though required to oversee the legality of public authority decisions, are extremely reluctant to intervene in all but the most extreme errors made under discretionary powers granted by statute. The judiciary have consistently recognised their inevitable lack of expertise in specific areas of governance, along with their constitutional limitations regarding interference with statutory decision-making powers. This is highly consequential for potential claimants in a reasonable steps review, as it places a fundamental high threshold to demonstrate errors and limits the court's ability to scrutinise decisions when undertaking judicial review. The part subsequently discusses the lead case on unreasonableness, *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*,<sup>2</sup> and addresses its' use as a ground for judicial review.

Part three outlines the contemporary application of the *Wednesbury* standard, and demonstrates that the courts, when looking to identify unreasonableness, will vary their level of scrutiny in this endeavour in certain circumstances. This variability in levels of judicial scrutiny, and the factors which enable that variability, are the focus of this part of the chapter. Standard *Wednesbury* review is subject to low intensity of scrutiny, but this may increase in

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<sup>2</sup> [1948] 1 KB 223

cases labelled as deserving of ‘anxious scrutiny’ where a human rights component is engaged. In cases of anxious scrutiny, burden of proof moves from the claimant to the defending authority and allows the court more scope to fully consider the merits of a decision. These elements are then applied to recent judicial review judgments in homelessness cases, finding that although the homelessness framework does not normally give rise to the justification for anxious scrutiny, recent cases demonstrate instances where these limitations may be reduced, and afford the judiciary a more rigorous level of scrutiny. Given the importance attached by the policy team outlined in Chapter 4 to the Code of Guidance as a way of driving reasonable steps, part four of this chapter provides a doctrinal account of the role of guidance in homelessness cases.

This chapter argues that the legislative phrase ‘reasonable steps’ itself serves as a factor to limit the chance of a challenge arising. The courts are reluctant to scrutinise the use of statutory decision-making powers, and thus, only qualify behaviour as ‘unreasonable’ in the most extreme circumstances; they will not overly-scrutinise in looking to identify it. However, a doctrinal account finds that these inherent barriers may be relaxed in some circumstances, where the courts could apply a more rigorous level of scrutiny to local authority decisions. Part one, below, provides a background to these arguments by offering a reminder of the relevant legislation and a discussion on the nature of the duty to take reasonable steps. Due to the importance attached to creating a challengeable right to reasonable steps outlined in Chapter 4, this part concludes with an outline of the routes of challenge available to applicants.

## 6.1 Background: Doctrinal analysis, duties, and routes to challenge

This opening part of the chapter is introductory, and provides an overview of the relevant legislative provisions concerning the reasonable steps duties and the associated routes to challenge. As the ultimate remedy for claimants, the judicial review procedure is also discussed, along with characteristics of the process which serve as factors which may limit the chance of litigation on reasonable steps in the context of this thesis. Before outlining these elements, this



section begins below by revisiting the need for this element of the research, and discussing the use of doctrinal analysis as a tool to complement qualitative studies.

### 6.1.1 Doctrinal analysis

This chapter addresses the ‘legal’ element of the second research question, which asks how reasonable steps is applied in practice. In the absence of any case law on reasonable steps, the doctrinal account presented here seeks to scrutinise existing case law to offer some insight into the likely judicial application of the term if a challenge were to arise. A legal right to challenge for applicants was described in chapter 4 as a key policy aim behind the legislation, and a lack of enforcement has been described in the literature<sup>3</sup> as an important contributory factor in policy failure. A doctrinal account of reasonable steps, it is argued, is of even greater importance, given the potential deviations in policy intent evident from the literature,<sup>4</sup> and described in chapter 5.

Furthermore, doctrinal analysis, as the ‘traditional’ form of legal scholarship,<sup>5</sup> has been advocated as a necessary task in all legal research endeavours, and should be used to clarify the precise nature of the law under investigation.<sup>6</sup> The analysis presented here thus complements the qualitative element of the research outlined in Chapters 4 and 5 and is argued to be a valuable addition to the insight into the reasonable steps provisions. This is an especially important contribution, as a challengeable right for individuals was of such importance to

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<sup>3</sup> See for example: Janet M Lum, ‘The federal Employment Equity Act: goals vs. implementation’ (1995) *Canadian Public Administration* 38 1 45; Kenneth J Meier and Deborah R McFarlane, ‘Statutory coherence and policy implementation: The case of family planning’ (1995) *Journal of Public Policy* 15 3 281; Carol Agocs, ‘Canada’s employment equity legislation and policy, 1987-2000: The gap between policy and practice’ (2002) *International Journal of Manpower* 23 3 256

<sup>4</sup> Bryan Glastonbury, *Homeless near a thousand homes: A study of families without homes in South Wales and the West of England* Allen and Unwin 1971; Michael Lipsky, *Street-level bureaucracy: Dilemmas of the individual in public service*, Russell Sage Foundation, 2010; Katherine Levine Einstein and David M Glick, ‘Does race affect access to government services? An experiment exploring street-level bureaucrats and access to public housing’ (2017) *American Journal of Political Science* 61 1 100

<sup>5</sup> Richard A Posner, ‘The present situation in legal scholarship’ (1981) *The Yale Law Journal* 90 5 1113

<sup>6</sup> Susan Bartie, ‘The lingering core of legal scholarship’ (2010) *Legal Studies* 30 3 345

policymakers, and the lack of case law leaves uncertainty in the nature of the right and duty for applicants and local authorities respectively. Doctrinal methods can be used to clarify law, identify ambiguity, expose inconsistency, and develop distinctions<sup>7</sup> in order to help see ‘the wood and the trees together.’<sup>8</sup>

In an identified doctrinal approach, the case law examined here is taken from the highest available authority, and thus scrutinises Supreme Court and Court of Appeal judgments where possible.<sup>9</sup> Taking the initial starting point of a wide legal context, themes are gradually narrowed throughout the chapter, and converge on homelessness law in line with the context of the thesis.<sup>10</sup> Although there are various conceptual lenses through which to view doctrinal methods, it is approached here hermeneutically, as judgment texts are solely used as research documents to identify themes relevant to the research question.

Having reiterated the importance of the doctrinal element of the thesis, this introductory section of the chapter will next reintroduce the statutory provisions under investigation, and offer some discussion on the nature of the reasonable steps duty.

### 6.1.2 The legislative framework and the duty to take reasonable steps

During the policy reunion, policymakers clearly expressed the intention to implement a legal guarantee of a meaningful level of homelessness assistance within the Housing (Wales) Act.<sup>11</sup> The resulting reasonable steps provisions are a key component of the perceived innovation within the legislation,<sup>12</sup> and are described as being central to the intended shift towards a

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<sup>7</sup> Richard A Posner, ‘The present situation in legal scholarship’ (1981) *The Yale Law Journal* 90 5 1113

<sup>8</sup> Christopher McCrudden, ‘Legal research and the social sciences’ (2006) *Law Quarterly Review* 122(Oct) 632, p634.

<sup>9</sup> Andrew Knight and Les Ruddock (eds) *Advanced research methods in the built environment*, John Wiley & Sons 2009

<sup>10</sup> Mark Van Hoecke (ed), *Methodologies of legal research: which kind of method for what kind of discipline?* Bloomsbury Publishing 2011

<sup>11</sup> A4, p5

<sup>12</sup> Welsh Assembly Government, ‘Code of Guidance to Local Authorities on the Allocation of Accommodation and Homelessness’ [2016]

prevention based homelessness policy.<sup>13</sup> The Act contains legislative provisions that grant service users this support, whilst simultaneously allowing discretionary powers in the use of department resources to housing department staff to ‘individualise’ homelessness assistance.<sup>14</sup> The relevant sections require the Local Authority to ‘help to secure’ the provision or maintained availability of suitable accommodation. ‘Help to secure’ is defined as taking ‘reasonable steps’ to assist. The sections state: -

**S 65 - Meaning of help to secure**

Where a local housing authority is required by this Chapter to help to secure (rather than “to secure”) that suitable accommodation is available, or does not cease to be available, for occupation by an applicant, the authority—

(a) is required to take *reasonable steps* to help, having regard (among other things) to the need to make the best use of the authority’s resources;

**S 66 - Duty to help to prevent an applicant from becoming homeless**

(1) A local housing authority must help to secure that suitable accommodation does not cease to be available for occupation by an applicant if the authority is satisfied that the applicant is—

(a) threatened with homelessness, and  
(b) eligible for help.

**S 73 - Duty to help to secure accommodation for homeless applicants**

(1) A local housing authority must help to secure that suitable accommodation is available for occupation by an applicant, if the authority is satisfied that the applicant is—

(a) homeless, and  
(b) eligible for help.

The reasonable steps provisions as they appear on the face of the legislation are inherently discretionary, aimed at mandating an amount of assistance to achieve a specified target, whilst remaining flexible enough to adapt assistance to the wide range of difficulties applicant face. Broad duties such as reasonable steps, which place an obligation upon public authorities to achieve a goal, have become increasingly common.<sup>15</sup> Their discretionary and flexible construction means they stand apart from other statutory duties, which may be *specifically*

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<sup>13</sup> Peter MacKie, Ian Thomas, and Jennie Bibbings, ‘Homelessness prevention: Reflecting on a year of pioneering Welsh legislation in practice’ (2017) *European Journal of Homelessness* 11 1 81

<sup>14</sup> Welsh Assembly Government (n 12)

<sup>15</sup> Catherine Callaghan, ‘*What is a Target Duty?*’ *Judicial Review* 5 3 184 (2000)

‘operational’ or ‘procedural.’<sup>16</sup> Callaghan (2000) provides an overview of this type of duty, highlighting that the courts label them as ‘target duties.’<sup>17</sup> The author states that these duties have a number of unique characteristics. They are aspirational, and the court’s use of the analogy of a target is not viewed as one to be hit, rather it is a target to merely be aimed at. Failure to achieve that target without more than aiming at it does not constitute a breach of the duty. A target duty, therefore, ‘does not create an absolute obligation’ upon an authority, it instead creates an obligation for it to ‘do its best.’<sup>18</sup> They are broadly framed to benefit the public at large, and do not create justiciable rights for individuals.<sup>19</sup>

In the Welsh context, and with strong relevance to this thesis, an example of a target duty can be found in the Wellbeing of Future Generations Act 2015 (WFGA). The Act broadly makes provisions requiring public bodies to pursue and promote ongoing economic, cultural, and environmental well-being. Section 3(2)(b) of the Act requires ‘reasonable steps’ in the pursuit of a target; section 3 is structured as follows: -

**S 3 - Well-being duty on public bodies**

(1) Each public body must carry out sustainable development.

(2) The action a public body takes in carrying out sustainable development must include  
(a) setting and publishing objectives (“well-being objectives”) that are designed to maximise its contribution to achieving each of the well-being goals, and  
(b) taking reasonable steps in exercising its functions to meet those objectives.

Reasonable steps within the HWA 2014 and WFGA 2015 are strikingly similar. Both are broad, non-prescriptive, and discretionary; they are duties requiring a best effort and specify a target to be aimed at, ‘help’ to prevent or relieve homelessness on the one hand, meeting well-being objectives on the other. One key difference, however, is that a duty to meet well-being objectives is, as Callaghan identifies, one which is owed to the population at large. The Housing (Wales) Act duties to take reasonable steps in homelessness assistance are directly framed

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<sup>16</sup> Colin T Reid, ‘A new sort of duty? The significance of “outcome” duties in the climate change and child poverty acts’ Public law 4 749 (2012), p2-3

<sup>17</sup> *R v Inner London Education Authority ex p Ali* (1990) 2 Admin LR 822

<sup>18</sup> *R v Radio Authority ex p Bull* [1998] QB 294 at 309

<sup>19</sup> Catherine Callaghan (n 15), p185

towards individual applicants, and are backed by a statutory right of challenge. Unlike orthodox target duties, these elements clearly signpost the intention to create an individual level justiciable right for homelessness applicants.

In another possible distinction, there is case law to suggest that Acts containing target duties also contain statutory powers for the relevant Secretary of State to oversee public authority actions in pursuit of the target. In the WFGA 2015, these are included in Part III. There are no such powers included in the HWA 2014. It is important to note, however, that though this is the orthodox approach, there is also case law to suggest that target duties can exist within legislation which does not grant the default ministerial oversight powers.<sup>20</sup> This is therefore not a firm rule *per se*. Despite this, and the stark similarities listed above, the individual level rights granted by the reasonable steps provisions within HWA, along with the statutory right to challenge, would likely lead the court to distinguish them from the commonly accepted definition of a target duty.

Though unlikely to be viewed by the courts as a target duty, reasonable steps in the Housing (Wales) Act remains broad and difficult to define in the absence of case law. Significant clarification did, however, emerge from the policy reunion discussed in Chapter 4, which highlighted the key policy goal of enshrining a legally enforceable right for individuals. On the potential for challenging broadly framed duties, Wade and Forsyth (2009)<sup>21</sup> state: -

“Parliament has become fond of imposing duties of a kind which, since they are of a general and indefinite character, are perhaps to be considered as political duties rather than as legal duties which a court could enforce... as soon as duties become sufficiently specific, the courts do not shrink from enforcing them.”<sup>22</sup>

As discussed in Chapter 4, the specific start and end triggers for the reasonable steps duties resulted in the need to split them between assistance in homelessness prevention and relief, with different routes to challenge for each. These are explained below, and provide context for

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<sup>20</sup> *R v London Borough of Islington ex p Rixon* QB 17 [1996]; For discussion see Catherine Callaghan (n 1), p185

<sup>21</sup> Christopher F Forsyth and William Wade, *Administrative Law* Oxford University Press 2014

<sup>22</sup> *Ibid*, p498

the discussions throughout the chapter regarding the proposed treatment of the provisions by the courts.

### 6.1.3 A challengeable right

The duty to take reasonable steps is split between homelessness prevention support (s66) and homelessness relief support (s73). As outlined in the policy reunion, the framework evolved in this way during the drafting stage, as clarity was needed on the precise circumstances in which the duties would begin and end.<sup>23</sup> If reasonable steps taken to prevent homelessness under s66 are unsuccessful, an eligible applicant would automatically transfer to the right to reasonable steps in homelessness relief under s73. The routes to a legal challenge of reasonable steps differ between these two sections.

First, the legislation stipulates a clear route to challenge for reasonable steps taken under Section 73. This section, along with a number of others,<sup>24</sup> is subject to Section 85 of the Act, which grants applicants the statutory right to request an internal review of relevant Local Authority decisions relating to the reasonable steps provided during their assistance application.<sup>25</sup> On receiving such a request, the Local Authority must appoint an Officer not involved in the original decision to review the case for any deficiency or irregularity in the decision itself or the procedure by which it was made.<sup>26</sup> If the Local Authority then uphold their original decision but the applicant remains dissatisfied, they may appeal any point of law arising from the review in county court.<sup>27</sup> County court decisions may then advance to the standard judicial review process. Judicial review is discussed more comprehensively below, but for present purposes it is important to note that the internal review and county court stages, prescribed by statute, may not be bypassed.

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<sup>23</sup> A4, p8-9

<sup>24</sup> In addition to 'reasonable steps' taken under s 73, s 85 of HWA allows service users to request an internal review of decisions involving their eligibility for help, the ending of a duty owed, and the suitability of any accommodation offered when that duty is discharged.

<sup>25</sup> Housing (Wales) Act 2014, s 85(2)

<sup>26</sup> Welsh Government, *The Homelessness (Review Procedure) (Wales) Regulations* Welsh Government [2015], s 5(2)

<sup>27</sup> Housing (Wales) Act 2014, s 88

Unlike Section 73, the duty to take reasonable steps in prevention under section 66 is not subject to the preliminary stages of internal review or the statutory right to a county court appeal under Section 88. As prevention of homelessness was cited as a cornerstone of the Housing (Wales) Act, the absence of the internal review and court appeal stages for the prevention duty was directly addressed within the policy reunion. Participants did not recall consciously omitting the right to review and county court appeal for the prevention duty,<sup>28</sup> but raised the uncertainty inherent in the concept of prevention itself as a particular difficulty in this regard. One participant felt that, given the ambiguity, it was not possible to firmly set a time limit in which to achieve prevention and end the duty. In contrast, there is a statutory time limit of 56 days attached to the section 73 relief duty. Ultimately, for applicants seeking to challenge the reasonable steps prescribed to them under Section 66, in the absence of a statutory right to internal review and county court appeal, they must apply directly for a judicial review.

#### 6.1.4 The judicial review procedure

Judicial review, as the ultimate remedy for challenging reasonable steps, is the process by which an individual may seek legal challenge in dealings with public authorities.<sup>29</sup> The process is defined in the Civil Procedure Rules as ‘a claim to review the lawfulness of (i) an enactment; or (ii) a decision, action or failure to act in relation to the exercise of a public function.’<sup>30</sup> Judicial review is traditionally focussed on the way in which a decision was made by a public authority (in this case Local Authorities), and not the decision itself.<sup>31</sup> To understand this, a distinction must be drawn between the separate functions of review and appeal. Judicial review is not an appeal process; the court cannot substitute its own decision in place of one it disagrees with.

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<sup>28</sup> A4 p23

<sup>29</sup> Marc Hertog and Simon Halliday (eds), *Judicial Review and Bureaucratic Impact* (eds) Cambridge Studies in Law and Society 2004, p104

<sup>30</sup> Civil Procedure Rules: Part 54.1(2)(a)

<sup>31</sup> Stanley Alexander De Smith, Harry Woolf, and Jeffrey Jowell, *Judicial review of administrative action* Stevens 1959

Rather, it is a *review* of the legality of the decision-making process itself which is the focus.<sup>32</sup> Most successful judicial reviews result in the court mandating that the public authority retakes the decision in a more appropriate manner.<sup>33</sup> This of course leaves the option for the decision-maker to still arrive at the original outcome.

The primary focus on the legality of the decision-making procedure itself is a necessary limitation of judicial power for two key reasons, as outlined by Elliot and Thomas (2011).<sup>34</sup> First, the institutional capacity of the court is limited. It may make judgments on the legality of procedures on grounds such as procedural fairness or irrationality but would inevitably lack the expertise to assess the factual merits under dispute within a claim. Second, and perhaps more importantly, there is the element of democratic legitimacy. The decision-maker, with discretionary powers granted by Parliament, must ultimately retain that discretion to arrive at whatever decision they choose, providing their decision was made lawfully.<sup>35</sup>

In a notoriously high barrier for potential claimants,<sup>36</sup> they must first pass the 'permission stage' to secure a judicial review hearing. The claimant must demonstrate that there has been an administrative act that has been corrupted by at least one of the following three grounds; illegality (such as acting outside of granted powers or making errors in law), irrationality (such as considering irrelevant factors or acting unreasonably), and procedural impropriety (procedural errors or breaching principles of natural justice).<sup>37</sup> The judicial review procedure is governed by sections of the Senior Courts Act (1981)<sup>38</sup> and Part 54 of the Civil Procedure Rules, which require that claimants must obtain leave from a judge that they have an arguable case

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<sup>32</sup> There are a number of instances where the reviewing court can interrogate the decision-making process more deeply. These are discussed in later sections of this chapter.

<sup>33</sup> Mark Elliot and Robert Thomas, *Public Law* Oxford University Press 2011

<sup>34</sup> *Ibid*

<sup>35</sup> Mark Elliot and Robert Thomas (n 33), p491

<sup>36</sup> Ian Turner, 'Judicial review, irrationality, and the legitimacy of merits-review' (2008) *Liverpool Law Review* 29 3 309

<sup>37</sup> These grounds and the potential to use them in reasonable steps claims are discussed in depth later in this chapter.

<sup>38</sup> Senior Courts Act (1981), s 31



with the likelihood of a 'substantially different outcome.'<sup>39</sup> They must have exhausted all other remedies, have a 'sufficient interest'<sup>40</sup> in the application, and make that application within three months of the disputed decision being made.<sup>41</sup>

As the final remedy for challenging reasonable steps, passing the permission stage and securing a judicial review presents a significant difficulty for potential claimants. They must satisfy all elements required to secure a hearing, including demonstrating an arguable case with the presence of a breach of the relevant grounds, having exhausted all other remedies, and within a strict time limit. Due to the inevitable lack of expertise on areas of public administration, along with the need to respect the democratic limitations of the judiciary when scrutinising statutory powers of discretion, the courts traditionally limit their examination to the decision-making procedure itself. Judicial review is not an appeal process, and as such, the courts cannot substitute a public authority decision with its own. Judicial reviews are uncommon, and only 10% of all claims pass the permission stage and reach a final hearing.<sup>42</sup>

These elements apply to all judicial review claims, but are discussed more comprehensively in the context of reasonable steps throughout this chapter. Despite the barriers to securing a judicial review hearing, and though none have arisen for reasonable steps, later parts of this chapter focus heavily on judicial review cases in other areas of homelessness law. Before this, the following part of the chapter departs from the specific context of the thesis to clarify the threshold for unreasonableness in the review of public authority decisions. To achieve this, a doctrinal account of the development of public law reasonableness is undertaken, displaying a shift in judicial focus away from a requirement that public authority decisions should be reasonable, and towards an accountability for unreasonableness. Unreasonableness is ultimately associated with extreme misuse of discretionary power and irrationality. This high

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<sup>39</sup> See Senior Courts Act (1981), s 31, amended in part by Criminal Justice and Courts Act 2015, s 84

<sup>40</sup> Senior Courts Act (1981), s 31

<sup>41</sup> Civil Procedure Rules, Part 54.5.

<sup>42</sup> Lucinda Platt, Maurice Sunkin, and Kerman Calvo, 'Judicial review litigation as an incentive to change in local authority public services in England and Wales' (2010) *Journal of Public Administration Research and Theory* 20 2 243

threshold has been described as notoriously difficult to satisfy,<sup>43</sup> and exists as a fundamental difficulty for prospective claimants in a reasonable steps challenge.

## 6.2 Identifying unreasonableness

In the absence of case law on reasonable steps, and as the first stage in understanding how the courts may consider the term, this part of the chapter will define the legal threshold for unreasonableness in a public law context. This threshold, which sets the point at which judicial intervention may be justified, is incredibly high and longstanding. This part of the chapter therefore moves away from reasonable steps and the housing (Wales) Act to present a doctrinal account of the development of this threshold to understand how it would be applied in the context of reasonable steps.

### 6.2.1 A high threshold

In the sphere of public law, it has been argued that ‘no principle is as conceptually muddled as the principle that the decisions of public officials should be reasonable.’<sup>44</sup> In seeking to ensure that public authorities use their decision-making powers reasonably, the judiciary has historically upheld this necessity alongside the no less important requirement of respecting their constitutional limitations.<sup>45</sup> The previous section outlined how this conflict in principles is manifest in the limitations of the courts when engaging in judicial review; it is a clash of fundamental principles which is an inherent part of public law. Murphy (2008)<sup>46</sup> argues that: -

*“Administrative law is difficult because it reflects a tension between two fundamental impulses that pull in opposite directions. Effective government requires the allocation of discretionary power to agency officials. For agency governance to be legitimate,*

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<sup>43</sup> Daniel Wei L Wang, ‘From *Wednesbury* Unreasonableness to Accountability for Reasonableness’ (2017) Cambridge Law Journal 76 3 642

<sup>44</sup> Tom R Hickman, ‘The reasonableness principle: Reassessing its place in the public sphere’ (2004) The Cambridge Law Journal 63 1 166, p166

<sup>45</sup> Christopher Forsyth, *The golden metwand and the crooked cord: essays on public law in honour of Sir William Wade QC* Oxford University Press 1998

<sup>46</sup> Richard Murphy, ‘Eight Things Americans Can’t Figure Out About Controlling Administrative Power’ (2008) Administrative Law Review 60

*however, administrative law must find ways to mediate this power, but not too much, [to save] robbing agencies of their effectiveness.”<sup>47</sup>*

The reasonableness principle has this conflict at the heart of its development. At its earliest manifestation,<sup>48</sup> in the judgment of *Rooke’s Case*<sup>49</sup> (1597), Sir Edward Coke outlined the ‘*Rooke’s ratio*,’ by firmly stating that the discretion of public authorities should be ‘limited, and bound with the rule of reason and law.’<sup>50</sup> Subsequent cases have highlighted factors which influence the courts judgment of the use of discretion by public authorities, and refined the principle by taking the focus away from a mandate for reasonableness, towards an accountability for ‘unreasonableness.’ For example, the *Rooke’s ratio* was applied almost 20 years later in *Hetley v. Boyer*,<sup>51</sup> when the commissioners of sewers for Northampton had levied charges upon a whole village but nominated one landowner (Hetley) to pay for works completed, forcing him to sell cattle to settle the debt. When he refused, the commissioners ordered him detained. Applying *Rooke*, the court held that the statutory phrase “left to their discretion” should be interpreted as “sound discretion bound with reason.”<sup>52</sup> It was thus deemed by the court to be ‘unreasonable’ to make one person responsible for the debt, and having him imprisoned not only contravened the statute and the reasonableness principle, but also ‘appeared an apparent malice.’<sup>53</sup> This judgment not only reaffirms the *Rooke’s ratio* and its narrow conception, but also builds on it. Not only should discretionary reasoning granted by statute be sound, ‘unreasonable’ behaviour will be identifiably malicious, vindictive, or tyrannical.

Further clarification of unreasonableness arose in a successful claim for damages against the commissioners for paving in *Leader v. Moxon*.<sup>54</sup> The defendant Authority were granted

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<sup>47</sup> Ibid, p1

<sup>48</sup> Eric C Ip, ‘Taking a ‘Hard Look’ at ‘Irrationality’: Substantive Review of Administrative Discretion in the US and UK Supreme Courts’ (2014) Oxford Journal of Legal Studies 34 3 481

<sup>49</sup> (1597) Co Rep 99b; 77 ER 209

<sup>50</sup> (1597) Co Rep 99b; 77 ER 209, [2]

<sup>51</sup> (1614) Cro Jac 336 79 ER 287

<sup>52</sup> (1614) Cro Jac 336 79 ER 287, [2]

<sup>53</sup> (1614) Cro Jac 336 79 ER 287, [3]

<sup>54</sup> (1773) 2 BI W 924; 96 ER 546

statutory discretion to address nuisances, obstructions and annoyances with the powers to “pave, repair, sink, or alter... in such a manner as the commissioners see fit.”<sup>55</sup> On request from a number of residents, the Authority raised the level of the street by six feet, blocking the claimant’s front door and ground floor windows in the process. The judgment held that “the commissioners had grossly exceeded their powers, which must have a reasonable construction. Their discretion is not arbitrary, but must be limited by reason and law.”<sup>56</sup> Once again, the court used the reasonableness principle to fetter the statutory discretionary power of a public authority. In addition to the requirements that discretionary power should be enacted with sound reason and devoid of malice, it should not be grossly misused. This case also contains early evidence of the importance of statutory intention when judging the reasonableness of public authority decisions.

Whilst illustrating the extreme circumstances which characterise unreasonableness, and thus setting a high bar for judicial intervention, early judgments also demonstrate the importance of judicial respect for discretionary powers granted by statute. As an example, and a few short years before *Leader*, in *R v Askew*,<sup>57</sup> the court affirmed the high threshold for intervention, stating that the use of discretion should not be ‘arbitrary, capricious, biased, or warped by resentment.’<sup>58</sup> Nevertheless, it was stated that ‘the judgment and discretion... is trusted to the [decision maker] and this Court will not take it from them, nor interrupt them in the due and proper exercise of it.’<sup>59</sup> This conflict, integral to public law,<sup>60</sup> has been consistently recognised by the courts, with the leading citation on its consequences for judging unreasonableness arising in the case of *R v. Boundary Commission for England*: -<sup>61</sup>

*"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public*

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<sup>55</sup> (1773) , BI W 924 96 ER 546 p546

<sup>56</sup> *Ibid*, [926]

<sup>57</sup> (1768) 4 Burrow 2186; 98 ER 139

<sup>58</sup> *Ibid*, p141

<sup>59</sup> *Ibid*

<sup>60</sup> Richard Murphy, ‘Eight Things Americans Can’t Figure Out About Controlling Administrative Power’ (2008) *Administrative Law Review* 60

<sup>61</sup> [1983] 2 WLR 458, p626

*authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."*

These early cases demonstrate a fundamental judicial rejection of the concept of the absolute discretion of public authorities, setting a high threshold for intervention by protecting the citizen against the 'malicious,' 'arbitrary' or 'tyrannical' use of statutory discretionary power. In doing so the judgments identify factors which the court consider to be unreasonable, as well as display the conflict between this principle and the democratic legitimacy of the judiciary. In the quotation above, the judgment refers to the need for the court to apply an objective standard which recognises these conflicting principles. The objective standard to which the court alluded was already well established, and had arisen from what remains the leading case for courts judging the unreasonableness of public authority behaviour. In *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*,<sup>62</sup> Lord Greene famously stated, "if a decision on a competent matter is *so unreasonable that no reasonable authority* could have ever come to it, then the courts can interfere."<sup>63</sup> The *Wednesbury* standard, and its ultimate approval as a substantive category of judicial review, is outlined within the following section. The high threshold for judicial intervention remains, affirming that the courts will only intervene in the most severe circumstances. Furthermore, the *Wednesbury* judgment confirmed that the burden of proof in a judicial review for unreasonableness falls strictly on the claimant.<sup>64</sup> Just as a judicial review is extremely difficult to attain,<sup>65</sup> for potential claimants, *Wednesbury* unreasonableness is notoriously difficult to prove.<sup>66</sup>

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<sup>62</sup> [1948] 1 KB 223

<sup>63</sup> [1948] 1 KB 223, p230 (Emphasis added)

<sup>64</sup> Jefferey Jowell and Anthony Lester, 'Beyond *Wednesbury*: Substantive Principles of Administrative Law' (1987) Public law 3 368 p228

<sup>65</sup> Lucinda Platt, Maurice Sunkin, and Kerman Calvo, 'Judicial review litigation as an incentive to change in local authority public services in England and Wales' (2010) Journal of Public Administration Research and Theory 20 2 243

<sup>66</sup> Daniel Wei L Wang, 'From *Wednesbury* Unreasonableness to Accountability for Reasonableness' (2017) Cambridge Law Journal 76 3 642

### 6.2.2 Wednesbury unreasonableness

The *Wednesbury* formulation, at its core, maintains an acknowledgement of the need for legal scrutiny of public authority discretion whilst recognising the democratic limitations of the judiciary. It does so by preserving a high bar for judicial intervention. The court will only interfere with the discretionary judgments of public authorities in the most extreme circumstances. The *Wednesbury* case concerned a challenge to a public authority decision to grant a cinema a licence for Sunday performances on the condition that no children under the age of fifteen were to be admitted. It was held that the licensing authority had not acted unreasonably in the use of their discretionary powers, and that there were strict limitations on judicial interference in such decisions. The judgment is summarised: -

*“In considering whether an authority having so unlimited a power has acted unreasonably, the court is only entitled to investigate the action of the Authority with a view to seeing if it has taken into account any matters that ought not to be or disregarded matters that ought to be taken into account. The court cannot interfere as an appellate authority to override a decision of such an authority, but only as a judicial authority concerned to see whether it has contravened the law by acting in excess of its power.”<sup>67</sup>*

For the reasonableness principle, in addition to ensuring that the high threshold for judicial intervention remained in place, the above quotation may be explicitly interpreted to apply even further restriction. Should the courts now effectively be expressly limited to judging reasonableness with reference to the process or *procedure* by which the decision was made, and not the decision itself? This is in direct contrast to the early reasonableness cases discussed in the previous section, none of which, in their express rejection of absolute discretion, examined public authority procedures. Despite this possible interpretation, elsewhere in the judgment Lord Greene holds that the long-established factors which enable judicial intervention of unreasonableness evident in those cases (extreme behaviour such as malice and bad faith) will often be a factor in a public authority erring in the decision-making process itself.

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<sup>67</sup> [1948] 1 KB 223, p223

He also emphasises that the context of each case will be different, when he states, in fact, ‘all these things run into one another.’<sup>68</sup>

In limiting the courts interference to circumstances where a decision was ‘so unreasonable that no reasonable authority’ could have made it,<sup>69</sup> Lord Greene had recognised the long-standing principle of judicial deference to public authority discretion and had affirmed an objectively high threshold.<sup>70</sup> Judgments have, since the formulation of the standard, reaffirmed these limitations by restricting judicial interference to decisions found to be ‘perverse’ or ‘absurd,’<sup>71</sup> and where the decision maker has ‘acted in bad faith’ or even ‘taken leave of his senses.’<sup>72</sup> Unreasonable decisions have been said to be so obvious that they ‘jump off the page at you.’<sup>73</sup> In the *Wednesbury* judgment itself, Lord Greene cites an earlier example of unreasonableness as ‘a red haired teacher being dismissed for having red hair.’<sup>74</sup>

The significant increase in the prevalence of the exercise of discretionary power by public authorities during the twentieth century led to the *Wednesbury* formulation of reasonableness becoming the widely applicable standard,<sup>75</sup> though it has been the subject of noteworthy criticism. It has been contended that the *Wednesbury* construction is tautological, and the words ‘so unreasonable that no reasonable authority’ effectively sets that which one seeks to define as its own comparator. It is argued that this results in confusion and circular reasoning.<sup>76</sup> Perhaps more significantly, and from a more practical standpoint, it is argued that Lord Greene raised the bar to unrealistic levels for claimants seeking remedy.<sup>77</sup> Indeed, further difficulties

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<sup>68</sup> [1948] 1 KB 223, p229

<sup>69</sup> [1948] 1 KB 223, p230 (Emphasis added)

<sup>70</sup> Lord Greene drew on a number of earlier cases in the context of *Wednesbury* to arrive at the objective standard and justify the affirmation of a high threshold for judicial interference. See *London CC v Bermondsey Bioscope Co Ltd* [1911] 1 KB 445 (1910); *Theatre De Luxe (Halifax) Ltd v Gledhill* [1915] 2 KB 49 (1914); *Short v Poole Corp* [1926] Ch 66 (1925); *Roberts v Hopwood* [1925] AC 578 (1925)

<sup>71</sup> *R v Hillingdon LBC Exp Pulhofer* [1986] AC 484, p518

<sup>72</sup> *R v Secretary of State for the Environment Exp Nottinghamshire CC* [1986] AC 240, p247

<sup>73</sup> *R v Lord Chancellor Exp Maxwell* [1997] 1 WLR 104, p109

<sup>74</sup> [1948] 1 KB 223, p229; see also *Short v Poole Corporation* [1926], [26]

<sup>75</sup> Tom R Hickman (n 44), p169

<sup>76</sup> Daniel Wei L Wang (n 66)

<sup>77</sup> Jefferey Jowell and Anthony Lester (n 64)

arise for claimants as the requirement for extreme behaviour is supplemented by *Wednesbury*, as the judgment affirmed that the burden of proving unreasonableness in this context fell on the claimant, and that it was not for the authority to justify their decision.<sup>78</sup> On this point, calls for a reconsideration of the standard can be found even within case law. In *R v. Secretary of State for the Home Department Ex.p Daly*,<sup>79</sup> Lord Cooke stated the following: -

*“And I think that the day will come when it will be more widely recognised that [Wednesbury] was an unfortunately retrogressive decision in English administrative law, insofar as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation.”*<sup>80</sup>

In the 2003 Court of Appeal judgment on *R (Association of British Civilian Internees (Far East Region)) v. Secretary of State for Defence*,<sup>81</sup> Dyson LJ stated that: -

*“we have difficulty in seeing what justification there now is for retaining the Wednesbury test... But we consider that it is not for this court to perform its burial rites. The continuing existence of the Wednesbury test has been acknowledged by the House of Lords on more than one occasion.”*<sup>82</sup>

Within a few months of this apparent invitation to perform *Wednesbury*'s 'burial rites,' the House of Lords explicitly refused to toll the bell, with Lord Walker stating that 'for all its defects, [it has] the advantage of simplicity.'<sup>83</sup> Despite *Wednesbury*'s tautological construction being labelled as confusing by some academics,<sup>84</sup> from the courts perspective Lord Walker arguably makes a valid point. The 'simplicity' of the core *Wednesbury* principle may arise from the strict boundaries it imposes on judicial interference; as in early reasonableness case law, it is only acceptable in the most extreme circumstances.

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<sup>78</sup> Ibid, p228

<sup>79</sup> [2001] UKHL 26

<sup>80</sup> [2001] UKHL 26, [32]

<sup>81</sup> [2003] EWCA Civ 473

<sup>82</sup> [2003] EWCA Civ 473, [34–35]

<sup>83</sup> *R (Pro-life Alliance) v BBC* [2003] UKHL 23, [144]

<sup>84</sup> Daniel Wei L Wang (n 66)



### 6.2.3 Unreasonableness as irrationality: A substantive ground for judicial review

If the *Wednesbury* formulation ultimately provides an umbrella standard for justifying judicial intervention, significant clarification came from Lord Diplock in the *GCHQ*<sup>85</sup> case, in the form of categories of judicial review. It is often stated that the judicial review process is not concerned with the decision itself, only the decision-making procedure.<sup>86</sup> Lord Diplock labels this as ‘procedural impropriety.’<sup>87</sup> In reality however *Wednesbury* demonstrated that, albeit in extreme circumstances, the courts may well be concerned with the substance of a decision as well as the process by which it arose. *GCHQ* effectively recast the *Wednesbury* notions of divergence from law and divergence from principle into ‘illegality’ and ‘irrationality’ respectively.<sup>88</sup> Lord Diplock directly ties ‘irrationality’ to *Wednesbury* unreasonableness, effectively making it a category of judicial review in its own right.<sup>89</sup> The following explanation of ‘irrationality’ in *GCHQ*, however, did nothing to lower the high threshold of *Wednesbury* for any prospective claimants seeking remedy: -

*“By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness." It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”*<sup>90</sup>

*Wednesbury* unreasonableness, or its ‘stepchild’ irrationality<sup>91</sup> sets a high standard for justification of judicial intervention. Early case law applying the reasonableness principle, though highly critical of the notion of absolute discretion, only displays judicial intervention in extreme circumstances concerning gross misuse of power, malice, and bad faith. Where Lord Greene considers that errors in the decision-making procedure will inevitably ‘run into’ these historical conceptions of extreme behaviour, Lord Diplock separates them. In this respect, the reasoning in *GCHQ* is a significant step. It set unreasonableness (or irrationality) as its own

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<sup>85</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374

<sup>86</sup> Tom R Hickman (n 44), p169

<sup>87</sup> *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, p411

<sup>88</sup> *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, p410

<sup>89</sup> Ibid

<sup>90</sup> *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374

<sup>91</sup> Jeffrey Jowell, ‘In the Shadow of *Wednesbury*’ (1997) *Judicial Review* 2 2 75

ground for judicial review, whilst recognising that claims may not be strictly limited to breaches of the decision-making procedure. In doing this, however, Lord Diplock stopped short of lowering the threshold for judicial intervention; ‘irrationality’ review still required the claimant to demonstrate the existence of a decision which outrageously defied logic.

In summary, due to the judicial reluctance for interference in the use of statutory discretion, the courts will only interfere in the most extreme circumstances. The Wednesbury principle, therefore, associates unreasonableness with extreme behaviour. Historical Wednesbury decisions could only consider whether a decision itself was malicious, absurd, or perverse. In *GCHQ*, unreasonableness was tied to an irrationality of the decision-making procedure itself and was confirmed as a ground for judicial review in its own right, though the high threshold remained. In modern application in judicial review, the courts will vary their level of scrutiny when looking for unreasonableness in a decision-making procedure, based on the context of the case in question. Though the court has traditionally restricted its level of scrutiny when seeking to identify unreasonableness, this restriction may be relaxed in cases which engage a human rights element. Such cases allow for a deeper review of the merits of a decision-making procedure, and are thus deemed cases of ‘anxious scrutiny.’ Laws LJ encapsulated this notion in *R v. Secretary of State for Education and Employment Ex.p Begbie*,<sup>92</sup> when he stated: -

*“[reasonableness is] a spectrum, not a single point... It is now well established that the Wednesbury principle itself constitutes a sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake.”*

Having identified the factors which influence the court when scrutinising public authority decisions, the following part of the chapter will focus on the level of scrutiny employed to achieve this aim. At the outset, the elements which facilitate an anxious scrutiny review are clarified, before specifically placing these in the context of homelessness cases.

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<sup>92</sup> [2000] 1 WLR 1115, p1130

### 6.3 Judicial review of merits: The 'anxious scrutiny' of unreasonableness

This part of the chapter is focussed on how rigorously the courts scrutinise public authority decisions when looking for the extreme behaviour associated with unreasonableness outlined above. The opening section discusses the notion of anxious scrutiny, the term given to a case involving a human rights element and clarifies relevant characteristics of such cases. First, unlike a traditional review of unreasonableness, the burden of proof is on the defending Authority to justify the alleged rights infringement. Second, in looking for unreasonableness, the courts may scrutinise the decision in question more closely, and are able to consider its' merits. Having identified these elements, the part concludes with a doctrinal analysis of decided cases in a homelessness context. It is concluded that, although the homelessness framework is not deemed to give rise to human rights considerations, recent Supreme Court authority may have allowed a deeper level of scrutiny without the shift in burden of proof. Thus, in terms of scrutiny level, homelessness cases sit somewhere between a traditional *Wednesbury* review and that of anxious scrutiny. A stronger consideration of a right to housing would further benefit claimants by shifting burden of proof to the Authority.

#### 6.3.1 A contextual level of scrutiny

The standard level of scrutiny associated with reviews concerning judicial review claims for unreasonableness is low. Just as *Wednesbury* sets a high threshold for judicial interference due to the democratic position of the judiciary, for the same reason, the default level of scrutiny in the review of public authority decisions is minimal.<sup>93</sup> The courts will not engage in a thorough review of the merits of the decision-making process. In such cases, the burden of proof falls firmly on the claimant to demonstrate the existence of unreasonableness, a fact that has been labelled as a significant disadvantage for potential claimants.<sup>94</sup>

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<sup>93</sup> Harry Woolf, S A De Smith, Jeffrey L Jowell, A P Le Sueur, Catherine M Donnelly: *De Smith's Judicial Review* Sweet & Maxwell 2007, [11-097]

<sup>94</sup> Andrew Le Sueur, 'The rise and ruin of unreasonableness?' (2005) *Judicial Review* 10 1 32, p32

In *Bugdaycay v Secretary of State for the Home Department*,<sup>95</sup> however, Lord Bridge affirmed the notion that, in cases concerning a human rights element, the courts may look deeper into the merits of a Local Authority decision. labelled this more rigorous analysis as ‘anxious scrutiny.’ He states: -

*“The limitations on the scope of [judicial review] are well known and need not be restated here. Within those limitations the court must, I think, be entitled to subject an administrative decision to the more rigorous examination. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.”*<sup>96</sup>

An anxious scrutiny approach extends the ability of the court to examine the merits of a Local Authority decision. Another important characteristic of a case deemed to warrant anxious scrutiny is that, unlike standard *Wednesbury* cases, the burden of proof falls upon the Local Authority to justify their decision in respect of the argued rights infringement.<sup>97</sup> In *R v. Ministry of Defence Ex.p Smith*,<sup>98</sup> the House of Lords confirmed that in cases involving a deeper (anxious) scrutiny, the courts will require more ‘by way of justification before it is satisfied that the decision is reasonable.’<sup>99</sup> A few years later, in another example, the Court of Appeal held in *R v. Lord Saville of Newdigate Ex.p B*<sup>100</sup> that a right to life consideration required anxious scrutiny and thus, ‘it is not open to the decision-maker to risk interfering with fundamental rights in the absence of compelling justification.’<sup>101</sup>

The question of human rights considerations regarding the provision of housing must thus be addressed before placing these elements in a homelessness context. Some challenges to local authority homelessness decisions under the Housing Act 1996 have attempted to introduce a Convention rights element for consideration within domestic courts. These challenges have

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<sup>95</sup> [1987] AC 514

<sup>96</sup> [1987] AC 514, p531

<sup>97</sup> Ian Turner (n 36)

<sup>98</sup> [1996] QB 517

<sup>99</sup> [1996] QB 517, p554

<sup>100</sup> [2000] 1 WLR 1855

<sup>101</sup> *R v Lord Saville of Newdigate Exp A* [2000] 1 WLR 1855 at [37]

proven unsuccessful. In *Morris v Newham LBC*<sup>102</sup> a claim for damages under Article 8 (the right to private and family life) against the Local Authority, for failure to provide adequate accommodation under a homelessness application, was refused. It was held that Article 8 does not impose a duty upon a Local Authority to ‘provide a home to a homeless person,’ and that although homelessness may be a factor in a claim under Article 8, it ‘cannot found such a claim.’<sup>103</sup> A year later, and considering a specific right to housing, the Court of Appeal held in *Anufrijeva v Southwark LBC*<sup>104</sup> that ‘we are not aware of any case where the Court of Human Rights has held a state in breach of the Convention for failure to provide housing to a certain standard, or for failure to provide welfare support.’<sup>105</sup>

The Supreme Court recently considered the extent of duties owed to homelessness applicants under the Convention in *Poshteh v Kensington and Chelsea RLBC*.<sup>106</sup> The question for the Court was whether the duties imposed by the Housing Act 1996 gave rise to civil rights or obligations under Article 6 (right to fair hearing). The Court had already considered the issue in *Ali v Birmingham City Council*,<sup>107</sup> holding that it did not, citing as its reason concerns over judicialisation of the welfare services, and thus confirming a judicial reluctance to interfere in such matters.

The European Court of Human Rights (ECtHR) had disagreed with the Supreme Court’s decision in *Ali*.<sup>108</sup> The claimant was held to have a legally enforceable right to assistance (within domestic law) by virtue of S.193 of the Housing Act 1996, and as such, although the provision of this assistance was conditional and subject to discretionary judgment, the section did engage Article 6(1) (fair hearing before an independent and impartial tribunal).<sup>109</sup> Ultimately in *Poshteh*, however, the Supreme Court unanimously followed its own precedent from *Ali*,

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<sup>102</sup> [2002] EWHC 1262 (Admin)

<sup>103</sup> [2002] EWHC 1262 (Admin), [59].

<sup>104</sup> [2003] EWCA Civ 1406

<sup>105</sup> [2003] EWCA Civ 1406, [25]

<sup>106</sup> [2017] UKSC 36

<sup>107</sup> [2010] UKSC 8

<sup>108</sup> *Ali v United Kingdom* (40378/10) (2016) 63 EHRR 20

<sup>109</sup> *Ibid*, [58]

rejecting the judgment of the ECtHR and reaffirming the domestic position. Despite the criticism of the ECtHR, homelessness cases would not normally give rise to human rights considerations regarding the provision of adequate housing, failing to provide welfare support, or the right to fair hearing.

In summary, a human rights consideration allows the court to engage in anxious scrutiny of the decision in question. Although the requirement of the existence of extreme behaviour still exists as a prerequisite to determining unreasonableness, unlike standard *Wednesbury* challenges, anxious scrutiny allows a deeper judicial analysis of the merits of the decision-making procedure. As another important characteristic, and again unlike standard *Wednesbury*, the burden of proof shifts from the claimant to the decision-maker to justify their decision to the court. The courts have expressly refused to give weight to a human right to housing when deciding homelessness cases, meaning that a standard level of scrutiny is employed, and leaves the burden of proof on the claimant. Having identified these elements, the next section will apply them in a doctrinal analysis of decided cases in a homelessness context, to clarify the level of scrutiny a reviewing court would apply to a reasonableness challenge in this context.

### 6.3.2 Homelessness cases: Introduction

This section presents a doctrinal analysis of decided homelessness cases to clarify reviewing court's treatment of homelessness cases. The cases discussed here involve judicial reviews of Local Authority decisions made in undertaking their statutory duties to provide homelessness assistance under the Housing (Homeless Persons) Act 1977, and the subsequent updated provisions within the Housing Act 1996. The Housing (Wales) Act 2014, as the object of focus within this thesis, is a direct extension of this legislative framework. As such, it is a suitable context in which to investigate how reviewing courts may scrutinise a reasonable steps review in practice.

These cases are all judicial reviews of Local Authority decisions made under the domestic homelessness legislative framework and were chosen on this basis. In the absence of litigation on reasonable steps these cases provide a useful insight. The findings show that early case law,

from high authority, introduced barriers to potential claimants, and rejected anxious scrutiny of homelessness cases on the basis that they did not engage a sufficient human rights element. There is thus a clear reluctance on the part of the judiciary to overly scrutinise Local Authority decisions. More recently, however, reviewing courts appear to have relaxed these restrictions to some extent, leaving the most current cases scrutinised at a level somewhere between standard *Wednesbury* and anxious scrutiny. It is argued that a stronger judicial consideration of a right to housing would further lift the restrictions on potential claimants.

### 6.3.3 Reviewing courts and homelessness cases: A doctrinal analysis

At the time the notion of anxious scrutiny gained recognition in cases engaging a human rights element,<sup>110</sup> in the homelessness challenge *R v Hillingdon London Borough Council ex p. Puhlhofer*,<sup>111</sup> the House of Lords considered an appeal concerning the suitability of accommodation provided by Hillingdon BC. It was argued that substandard living arrangements provided did not qualify as ‘accommodation’ under the Housing (Homeless Persons) Act 1977. The appeal was dismissed, and though the case specifically concerned the interpretation of what constituted ‘accommodation’ under the Act, Lord Brightman raised concerns within the judgment about the rising prevalence of judicial review claims against Local Authorities in their implementation of the legislation. He emphasised the need to minimise judicial interference in the decisions made by virtue of statutory powers, and strongly affirming this concerning homelessness cases. He states: -

*“My Lords, I am troubled at the prolific use of judicial review for the purpose of challenging the performance by local authorities of their functions under the Act of 1977. Parliament intended the local authority to be the judge of fact... I think that great restraint should be exercised in giving leave to proceed by judicial review... Where the existence or non-existence of a fact is left to the judgment and discretion of a public body... it is the duty of the court to leave the [use of discretion] to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely.”<sup>112</sup>*

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<sup>110</sup> *Bugdaycay* formally recognised a deeper level of scrutiny a few months after the House of Lords decision in *Puhlhofer*.

<sup>111</sup> [1986] AC 484

<sup>112</sup> *Ibid*, p518

*Puhlhofer* had called for restraint when giving permission to claimants for judicial review, and affirmed the high *Wednesbury* threshold by requiring the demonstration of perversity. A number of years later, the House of Lords were met with the opportunity to revisit *Puhlhofer*, in the case of *Begum v. Tower Hamlets LBC*.<sup>113</sup> The court considered whether Article 6 of the Convention (the right to fair hearing) justified a deeper analysis of the decision-making process. In the judgment, Lord Bingham expressly rejected the use of anxious scrutiny, by stating: -

*"I can see no warrant for applying in this context notions of "anxious scrutiny" (Ex.p. Bugdaycay) or the enhanced approach to judicial review described by Lord Steyn in Daly. I would also demur at the suggestion of Laws LJ in the Court of Appeal in the present case... that the judge may subject the decision to "a close and rigorous analysis" if by that is meant an analysis closer or more rigorous than would ordinarily and properly be conducted by a careful and competent judge determining an application for judicial review."*<sup>114</sup>

Lord Hoffmann agreed that anxious scrutiny was inappropriate highlighting that, in the context of the case, the welfare framework did not give rise to a sufficient human rights element and justify more rigorous analysis by the court: -

*"When one is dealing with a welfare scheme which, in the particular case, does not engage human rights... then the intensity of review must depend upon what one considers to be most consistent with the statutory scheme..."*<sup>115</sup> *All that we are concerned with in this appeal is the requirements of article 6, which I do not think mandates a more intensive approach to judicial review of questions of fact... in a case like this, the courts should concede to Parliament."*<sup>116</sup>

The combined effect of *Puhlhofer* and *Begum* had confirmed that judicial review applications concerning homelessness legislation were to be granted reluctantly, and that those arising would be subject to a low level of scrutiny by the court. The effects of these judgments are evident in *R (on the application of Paul-Coker) v Southwark LBC*.<sup>117</sup> The claimant was a British

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<sup>113</sup> [2003] UKHL 5

<sup>114</sup> [2003] UKHL 5, [7]

<sup>115</sup> [2003] UKHL 5, [49]

<sup>116</sup> [2003] UKHL 5, [50]

<sup>117</sup> [2006] EWHC 497 (Admin)



national, born in Sierra Leone. She had moved to the UK as a child but ultimately returned abroad to live with her father following the separation of her parents, returning to the UK occasionally for prolonged periods of time. She returned to the UK permanently, and whilst living with a family member temporarily, she presented to the Council as homeless seeking assistance. The Authority refused on the grounds that she was not habitually resident within the UK, and a review of this decision had been unsuccessful. In the judgment on *Paul-Coker*, Forbes J acknowledges the 'limited nature' of the court's jurisdiction in line with *Puhlhofer*,<sup>118</sup> but noted that the decision letter made no reference to at all to what the court deemed to be highly relevant factors. For example, there was no consideration of the 'habitual residence test,' no acknowledgement of the long periods of time that the claimant had spent in the UK, or indeed, that she currently lived (and was educated) here. The complete absence of these factors in the claimant's decision letter was taken as clear evidence that the decision-making process was fundamentally flawed. Forbes J stated, 'it follows... that the decision... is one of those exceptional cases [that is] *Wednesbury* unreasonable and/or irrational.'<sup>119</sup> With a burden of proof to demonstrate the unreasonableness of the Local Authority, the claimant here had achieved a rare success. The court could only act given the extreme nature of the error in line with the *Wednesbury* principle, which was identifiable without a full consideration of the merits of the decision-making process.

A few years later, the difficulties for homelessness assistance claimants arising from *Puhlhofer* and *Begum* were arguably significantly exacerbated by the House of Lords in *Holmes-Moorhouse v Richmond upon Thames London Borough Council*.<sup>120</sup> The case concerned the extent of duties owed to the claimants regarding the provision of additional accommodation following a relationship breakdown. Within the judgment, however, Lord Neuberger comments on the level of criticism judges should deploy when examining the outcomes of contested internal review decisions. He clearly advocated for a non-critical approach, and notes the level

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<sup>118</sup> [2006] EWHC 497 (Admin), [13]

<sup>119</sup> [2006] EWHC 497 (Admin), [51]

<sup>120</sup> [2009] UKHL 7

of expertise of reviewing officers both in their professional capacity, and their legal capability.

He states: -

*“[A] judge should not adopt an unfair or unrealistic approach when considering or interpreting such review decisions... review decisions are prepared by housing officers, who occupy a post of considerable responsibility and who have substantial experience in the housing field, but they are not lawyers. It is not therefore appropriate to subject their decisions to the same sort of analysis as may be applied to a contract drafted by solicitors, to an Act of Parliament, or to a court's judgment... Accordingly, a benevolent approach should be adopted to the interpretation of review decisions. The court should not take too technical a view of the language used, or search for inconsistencies, or adopt a nit-picking approach, when confronted with an appeal against a review decision.”<sup>121</sup>*

This judgment added a further difficulty for judicial review claimants regarding homelessness decisions. *Puhlhofer* criticised the prevalence of judicial review claims on the homelessness framework, and affirmed the high bar of *Wednesbury* by requiring the presence of ‘perversity,’ the duty to prove which fell firmly on the claimant. *Begum* explicitly rejects the use of anxious scrutiny in such claims, holding that the welfare framework does not give rise to a significant human rights consideration. In *Holmes-Moorhouse*, Lord Neuberger emphasises that judges should not be overly critical, and thus take a ‘benevolent’ approach when scrutinising the decisions of Local Authority reviewing officers. Judicial reviews concerning the homelessness framework remained objectionable, and when granted, would be treated to a strict low level of scrutiny.<sup>122</sup>

Subsequently, some relaxation of these principles is observable in *Hotak v Southwark London Borough Council*.<sup>123</sup> The case is well known for setting the legal definition of ‘vulnerability’ as a category of priority need, but in the judgment, some of the restrictive principles outlined in the above cases were revisited. *Hotak* arguably represents the most apparent relaxation of the limitations on the judicial scrutiny of reviewing officer decisions when considering compliance

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<sup>121</sup> Ibid, [47-50] (emphasis added)

<sup>122</sup> For example, see *R (on the application of May) v Birmingham City Council* [2012] EWHC 1399 (Admin). Though the applicant succeeded, this was due to an extreme error in the *Wednesbury* sense, and the court did not engage in a close scrutiny of the decision-making process.

<sup>123</sup> [2015] UKSC 30

with the public sector equality duty. On this point, Lord Neuberger stated that protected characteristics should be approached with ‘rigour,’ and focussed upon ‘very sharply’ by reviewing officers when making decisions.<sup>124</sup> He rejected the argument that the PSED had no effect on how rigorous the court could be in their scrutiny of the decision.<sup>125</sup> On this point, he also revisited his own statement in *Holmes-Moorhouse* which called for restraint. In doing so, he stops short of overturning the rejection of ‘anxious scrutiny’ in *Begum*, but he may have paved the way for reviewing courts to more thoroughly scrutinise the merits of decision-making procedures in certain circumstances. He states: -

*“In Holmes-Moorhouse... I said that a “benevolent” and “not too technical” approach to section 202 review letters was appropriate, that one should not “search for inconsistencies,” and that immaterial errors should not have an invalidating effect. I strongly maintain those views, but they now have to be read in the light of... a case where the equality duty is engaged.”*<sup>126</sup>

The judgment in *Hotak* has been noted as a general exception,<sup>127</sup> and subsequent cases involving the scrutiny of compliance with the PSED may be interpreted as a return to the ‘benevolent’ approach in *Holmes-Moorhouse*. The Supreme Court judgment in *Poshteh*<sup>128</sup> closed the discussion in the preceding section of this chapter, as it affirmed that the homelessness framework would not engage convention rights. Another element of the case, however, concerned the extent to which the authority had complied with the PSED in their decision to end their duty to provide accommodation. On this element, the court upheld the decision of the reviewing officer, and highlighted that a rigorous analysis of the decision was inappropriate.<sup>129</sup> The judgment, referring back to *Holmes-Moorhouse*, warns against the adoption of an ‘over-zealous linguistic analysis’<sup>130</sup> of decisions when judging whether

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<sup>124</sup> [2015] UKSC 30, [78]

<sup>125</sup> *Ibid*, [79]

<sup>126</sup> [2015] UKSC 30, [79]

<sup>127</sup> Emma Laurie, ‘Homelessness and the ‘over-judicialisation’ of welfare’ (2021) *Legal Studies* 41 1 39

<sup>128</sup> *Poshteh v Royal Borough of Kensington and Chelsea* [2017] UKSC 36

<sup>129</sup> *Ibid*, [39]

<sup>130</sup> *Ibid*

authorities have complied with the equality duty. Following the judgment in *Poshteh*, the level of scrutiny adopted by the Court of Appeal in homelessness cases appears mixed.

For example, in *Hackney LBC v Haque*,<sup>131</sup> the local authority appealed against a decision that it had failed to comply with the PSED in a suitability decision. It was argued that the original judge had misinterpreted the ‘sharp focus’ requirement in *Hotak*. The Court of Appeal agreed, holding that ‘sharp focus’ did not mean that the specific consideration of Mr Haque’s vulnerabilities needed to be expressly stated.<sup>132</sup> It was stated that the original judge had erred by providing an ‘inappropriately rigid’<sup>133</sup> standard of compliance with the PSED. Adopting a less rigorous level of scrutiny, the Court held that, in the round, the review decision had met the authority’s obligations.<sup>134</sup> In stark contrast, the same court in *Lomax v Gosport BC*<sup>135</sup> attached a greater weight to the ‘sharp focus’ advocated in *Hotak*. In a rigorous scrutiny of the decision,<sup>136</sup> the Court of Appeal found the reasons given for the decision to be too broad, and thus did not demonstrate a ‘sharp focus’ on the additional needs of Ms Lomax.<sup>137</sup> In similar circumstances to *Lomax*, the Court of Appeal again employed a rigorous level of scrutiny in *Kannan v Newham LBC*,<sup>138</sup> stating that merely reciting the formula advanced in *Hotak* did not satisfy the requirements of the PSED.<sup>139</sup>

*Hotak* appears to have briefly relaxed the restriction on judicial enquiry in a homelessness context but, as per *Begum*, not to the full extent of anxious scrutiny. Since *Poshteh*, and specifically in homelessness cases involving the PSED, the Court of Appeal has scrutinised decisions with varying levels of rigour. The court recently addressed this mixed treatment in

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<sup>131</sup> [2017] EWCA Civ 4

<sup>132</sup> *Ibid*, [47]

<sup>133</sup> *Ibid*, [51]

<sup>134</sup> *Ibid*, [52-55]

<sup>135</sup> [2018] EWCA Civ 1846

<sup>136</sup> *Ibid*, [48-57]

<sup>137</sup> *Ibid*, [50]

<sup>138</sup> [2019] EWCA Civ 57

<sup>139</sup> *Ibid*, [23-24]

*Stephen McMahon v Watford Borough Council*.<sup>140</sup> A ‘benevolent’ level of scrutiny was employed and justified by citing the decisions of both *Poshteh* and *Holmes-Moorhouse*.<sup>141</sup> In *McMahon*, the Court of Appeal noted the more rigorous approach it had taken in the earlier cases of *Lomax* and *Kennan*,<sup>142</sup> stating that ‘the impact of the PSED is universal in application to the functions of public authorities, but its application will differ from case to case.’<sup>143</sup> Arguably, the rigour with which the courts can scrutinise homelessness decisions reached a pinnacle with the requirement for ‘sharp focus’ in *Hotak*, but *Poshteh* may have signalled a return to the ‘benevolent’ approach of *Holmes-Moorhouse*. The variability in the scrutiny employed by the courts in these cases demonstrate that concerns around the apparent ‘over judicialisation’ of welfare, and accordingly, the firm affirmation of *Wednesbury* in *Puhlhofer*, remain present in recent homelessness cases. Ultimately, the level of scrutiny employed by the courts in both *Wednesbury* review and cases considering the PSED are highly contextual and will ‘depend on the circumstances.’<sup>144</sup>

Recent homelessness cases which engage a human right element, but do not consider compliance with the Equality Act 2010 appear to sit somewhere between a low scrutiny *Wednesbury* challenge and anxious scrutiny. As outlined above, anxious scrutiny cases are characterised by the inclusion of a human rights consideration and a shift in burden of proof to the defending Authority to justify their decision. The following examples of recent homelessness reviews use *Wednesbury* terminology with burden of proof on the applicant. Perhaps due to the allowance of deeper scrutiny afforded by *Hotak*, however, they also demonstrate a deep review of the merits of the decision-making process in line with anxious scrutiny when a rights consideration is present.

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<sup>140</sup> [2020] EWCA Civ 497

<sup>141</sup> *Ibid*, [16-17]

<sup>142</sup> *Ibid*, [64]

<sup>143</sup> *Ibid*, citing McCombe LJ in *Powell v Dacorum BC* [2019] EWCA Civ 23, [44]

<sup>144</sup> *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514; *Stephen McMahon v Watford Borough Council* [2020] EWCA Civ 497

Homelessness cases without a human rights consideration are scrutinised in accordance with the pre-*Hotak* cases discussed above. For example, *Rother DC v. Freeman-Roach*<sup>145</sup> resulted in the reversal of a county court judgment which held Rother DC's review decision, and their refusal to provide interim accommodation, to be *Wednsbury* unreasonable. The Court of Appeal confirmed that the claimant retains burden of proof, stating that 'it is for the applicant to demonstrate an error of law, not the other way round.'<sup>146</sup> There is no engagement with a human rights question, and no deep scrutiny of the decision-making procedure. The judgment specifically follows *Holmes-Moorhouse* in rejecting a 'nit-picking approach,' stating that 'judges have consistently emphasised that the court must not be too zealous in the examination of a reviewing officer's decision.'<sup>147</sup>

In contrast, and as in *Hotak*, determination of vulnerability was a factor considered in *Eales v Havering LBC*.<sup>148</sup> A district judge had granted an order of possession, terminating the claimant's tenancy. The claimant suffered from a personality disorder exacerbated by drug and alcohol misuse. The anti-social behaviour of the claimant had caused her neighbours to file numerous complaints, and she had recently been found guilty of a racially aggravated offence. The Local Authority originally applied to the court for a possession order both in response to the anti-social behaviour, and to ensure maintained control over their housing stock. With burden of proof, the claimant argued in this case that her anti-social behaviour was a result of her disorder; that the Authority had erred in the factors they considered, acted in a discriminatory way, and had failed to follow their own policy by not referring her to a specialised Vulnerable Persons Panel. It was held that the district judge had been correct in granting the order and that the steps the Authority had taken were 'the minimum, and a proportionate means of achieving the legitimate aim.'<sup>149</sup> When finding in favour of the Authority, and perhaps owing to the claims of discrimination and failure to consider vulnerability, the court undertook a close scrutiny of the decision-making process. Paragraph [45] of the judgment concludes: -

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<sup>145</sup> [2018] EWCA Civ 368

<sup>146</sup> [2018] EWCA Civ 368, [56]

<sup>147</sup> [2018] EWCA Civ 368, [20]

<sup>148</sup> [2018] EWHC 2423 (QB)

<sup>149</sup> [2018] EWHC 2423 (QB), [46]

*“The district judge found against the appellant for obvious reasons. She'd breached her tenancy terms by serious anti-social behaviour... She had denied the breaches for no good reason for a long time. She wasn't at that stage genuinely remorseful. Her behaviour was exacerbated by drugs and alcohol and was not solely dependent upon her psychiatric condition which was an admitted disability. And whatever terms of an injunction might be imposed at that stage, the likelihood of similar incidents would not be much reduced. The claimant had the genuine proper twin aims and a policy to evict for violence. It had to have regards to its compliant tenants. He was aware, as am I, that the appellant had not at that stage taken timeous steps to address her addictions, and she had failed to engage properly with several agencies.”*

Similar judicial treatment may be found in *R (on the application of MIV) v. Newham LBC*.<sup>150</sup>

Burden of proof remained on the claimants, but a human rights consideration in this case may have allowed for a deep scrutiny of the merits of the decision-making procedure. The claimants were the parents of a 5-year-old boy. The family had no leave to remain within the UK. They were unemployed, facing eviction, and applied to the defendant authority for homelessness assistance. The Authority provided them with temporary accommodation, that being a single room in a shared dwelling, and tasked a social worker with carrying out a needs assessment on the child. That assessment found that, at least temporarily, an extra room in which the child could play would be 'beneficial but not essential.' The parents contested that; this decision was *Wednesbury* unreasonable, had led to the provision of unsuitable accommodation, and infringed the child's Article 8 rights. The claim was dismissed, stating that the child's right to family life was not even arguably affected as he had remained consistently secure within the family environment.<sup>151</sup> Regarding the challenge to the needs assessment, the Court held that it was not *Wednesbury* unreasonable. The reasons given for this decision stray well beyond the boundaries set by *Puhlhofer* and *Begum*, however, and into a review of merits. These reasons included; the speed with which the authority acted, the limitation of resources, the distance of the accommodation from the child's school, the schooling and extra support arrangements, as well as financial support for transport costs provided by the Local Authority. The Court

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<sup>150</sup> [2018] EWHC 3298 (Admin)

<sup>151</sup> [2018] EWHC 3298 (Admin), p102

concluded that property searches conducted ‘could have been broadened earlier’ but ‘bearing in mind all the circumstances, the defendant [authority’s] culpability [was] low.’<sup>152</sup>

In summary, *Puhlhofer*, *Begum*, and *Holmes-Moorhouse* presented significant difficulties for potential claimants. The combined effect of these cases amounted to a criticism of the perceived rise in judicial review claims made in relation to the statutory framework, an explicit rejection of anxious scrutiny in merits review, and the rejection of a critical approach to internal review decisions. It was affirmed that the difficult task of arguing *Wednesbury* unreasonableness fell on the claimant. Since *Hotak*, however, homelessness reviews demonstrate a relaxation of these restrictions to some extent where the case concerns an element of rights or protected characteristics under the Equality Act 2010. Although the burden of proof remains on the claimant, the standard restrictions to judicial scrutiny of merits appeared to briefly be lifted. *Poshteh* may have subsequently paved the way for a return to the ‘benevolent’ treatment of decision-making advocated in *Holmes-Moorhouse*, and *Haque* may have narrowed the interpretation of the ‘sharp focus’ requirement in *Hotak*. Homelessness cases that do not engage a human rights or equality duty consideration retain a high bar for judicial intervention, and include a low level of scrutiny. In these cases, the burden of proof remains on the applicant. Having provided an overview of case law in context, and as the Code of Guidance for the Housing (Wales) Act 2014 was intended to guide the practical implementation of reasonable steps, the following section will present a discussion on the role of such guidance in homelessness cases.

## 6.4 Codes of guidance in homelessness law

The preceding sections have examined the court’s interpretation of the standard for unreasonableness within the context of homelessness challenges under the Housing Act 1996, and outlined the levels of scrutiny that the courts will employ when examining decisions made in cases engaging both fundamental rights and the public sector equality duty. The overarching theme of these cases is the reluctance on the part of the judiciary to interfere with the

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<sup>152</sup> [2018] EWHC 3298 (Admin), p112



decision-making of local authorities. Despite this, the case law discussed above also demonstrates a variability in how rigorous the courts are in scrutinising these decisions, based on the context and facts of each case.

Chapter 5 outlined the importance of the role of the Code of Guidance<sup>153</sup> in the implementation of reasonable steps, describing how this document was intentionally comprehensive, and intended to guide decision-makers when implementing the legislation.<sup>154</sup> In an attempt to achieve this, the Code lists a large number of interventions which authorities 'ought' to have in place to set a unified minimum standard.<sup>155</sup> Given the importance of the Code to the implementation of reasonable steps, this section will first outline the role of this type of guidance in law, and conclude with an overview of cases concerning the judicial interpretation of homelessness guidance specifically.

#### 6.4.1 The role of guidance in homeless law

Codes of Guidance are an increasingly common form of 'soft law.'<sup>156</sup> Guidance may take many forms, but it is not intended to provide justiciable duties, nor enforceable rights to individuals.<sup>157</sup> Guidance is not law, and thus is not legally binding in the same sense as statutes or statutory instruments,<sup>158</sup> and it subsequently should not conflict with associated legislation.<sup>159</sup> Guidance, therefore, does not have a binding effect, and local authorities are free to depart from it, even substantially, if valid reasons for doing so are adequately demonstrated by the decision-maker.<sup>160</sup> This is due to the common practice of a 'parent Act' placing a statutory obligation on decision-makers to 'have regard' to the provisions within guidance

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<sup>153</sup> Welsh Assembly Government, 'Code of Guidance to Local Authorities on the Allocation of Accommodation and Homelessness' [2016]

<sup>154</sup> A1, p6-7

<sup>155</sup> Welsh Assembly Government, 'Code of Guidance to Local Authorities on the Allocation of Accommodation and Homelessness' [2016], [12.13]

<sup>156</sup> Daniel Greenberg, 'Overview of Quasi-legislation' Westlaw Insight [2023]

<sup>157</sup> Daniel Greenberg, 'Quasi-legislation: guidance' Westlaw Insight [2023]

<sup>158</sup> Peter Bartlett, 'The Code of Practice and the ambiguities of guidance' *Criminal Behaviour & Mental Health* 19 157 (2009)

<sup>159</sup> *R (Tower Hamlets) v Secretary of State* [1993] QB 632

<sup>160</sup> *R (X) v Tower Hamlets LBC* [2013] EWHC 480 (Admin), [15-17]

when carrying out their public functions.<sup>161</sup> Codes of guidance are intended to promote good practice, and the courts may consider them when required.<sup>162</sup> Though guidance has been deemed to be ‘guidance and not instruction,’ it should be nevertheless be treated with ‘careful consideration’ by decision-makers.<sup>163</sup> Given the high degree of discretion in the statutory homelessness framework, it is not surprising that courts have often been tasked with outlining the status and interpretation of the associated code of guidance. In this context specifically, it has been confirmed that decision-makers need to evidence a good reason in instances where they depart from codes of guidance.<sup>164</sup>

Before outlining the role of guidance in the interpretation of statutes, it is necessary to discuss the legal status of the duty for local authorities to have regard to it when making homelessness decisions. These cases all concern the contemporary versions of the Code of Guidance attached to the Housing Act 1996.<sup>165</sup>

The duty to have regard to guidance has been interpreted with some ‘benevolence’ in some instances. In *Ozbek (2006)*,<sup>166</sup> the authority appealed against a decision that it had erred in referring an applicant to another authority, having found no local connection. It had previously been successfully argued that the decision-maker had failed to take proper ‘due regard’ to the Secretary of State’s guidance. In the present case, the Court of Appeal overturned this decision, ruling that sufficient regard had been paid to relevant sections of the Code, and that local authorities should not be criticised for rigid decisions, if they remained open to the possibility of flexibility if it were it required in a particular case.<sup>167</sup> Likewise, in *Balog (2013)*,<sup>168</sup> a similar appeal arose following a decision that the authority had failed to adequately regard the Code

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<sup>161</sup> Such is the case for the Housing (Wales) Act 2014 guidance; see S 98 of the Act

<sup>162</sup> *Ibid*, p158

<sup>163</sup> *R (Munjaz) v Mersey Care NHS Trust (2005)* UKHL 58

<sup>164</sup> *R (Rixon) v Islington London Borough Council [1997]* ELR 66

<sup>165</sup> Department for Levelling Up, Housing and Communities, Homelessness Code of Guidance for Local Authorities Westminster Government 2018

<sup>166</sup> *Ozbek v Ipswich BC [2006]* EWCA Civ 534

<sup>167</sup> *Ibid*, [46]

<sup>168</sup> *Birmingham City Council v Michael Balog [2013]* EWCA Civ 1582

when finding an applicant intentionally homeless. Again, in this case the Court widely interpreted the duty to have regard to guidance. It was held that the duty was to have *regard* to the guidance, not to follow it explicitly,<sup>169</sup> and mere consideration of its contents was enough to satisfy the duty.<sup>170</sup> Statutory guidance was guidance, which may be departed from with good reason.<sup>171</sup> For these reasons, the appeal was successful, and the decision reinstated.

Whilst there is evidence of a generally wide judicial interpretation of the duty to regard guidance, the courts have, at times, found it not to have been met. An example may be found in *Farah v Hillingdon LBC* (2014).<sup>172</sup> In another intentionality decision, the appellant applicant was successful in arguing that Hillingdon LBC had failed to adequately pay regard to the Code of Guidance. Unlike the above cases, the reviewing officer was found here to have made no broad reference whatsoever to the Code in his decision letter. In the judgment, the Court of Appeal recognised that: -

*“it is neither realistic nor necessary to expect already burdened local authorities to identify each and every paragraph of the guidance they have taken into account or provide an over-detailed set of reasons for reaching their... conclusions.”*<sup>173</sup>

But where the applicant has provided specific justification, a review of these merits warrants a more detailed exposition of the decision-making process and adherence to the legislation and associated guidance.<sup>174</sup>

Likewise, in the Supreme Court judgment of *Nzolameso v Westminster City Council* (2015),<sup>175</sup> it was held that an authority had not given proper regard to the Code when providing out of borough accommodation. Upon challenge, the council had upheld their decision in an internal review, with this again being upheld by both the county court and Court of Appeal. The internal

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<sup>169</sup> Ibid, [25]

<sup>170</sup> Ibid, [32]

<sup>171</sup> Ibid, [16-20]

<sup>172</sup> EWCA Civ 359

<sup>173</sup> Ibid, [31]

<sup>174</sup> Ibid, [32]

<sup>175</sup> *Nzolameso v Westminster City Council* [2015] UKSC 22

review decision letter contained a standardised paragraph explaining that the out of borough offer was necessary given the severe shortage of local housing stock. The appeal was allowed and the decision quashed in the present case. The judgment criticised the lack of detail included in the reviewing officer's decision letter,<sup>176</sup> stating that it did not provide sufficient evidence that the decision-making process had included an adequate consideration of the requirement in the Code to consider 'more local alternative accommodation.' It was held that, without this detail, 'the court cannot know whether the authority have properly fulfilled their statutory obligations.'<sup>177</sup> The judgment, though acknowledging that an overly 'nit-picking' approach was inappropriate,<sup>178</sup> nevertheless criticised the highly benevolent approach previously taken by the county court and Court of Appeal.<sup>179</sup> The Court had examined the Code of Guidance, which advised that authorities should accommodate locally where 'reasonably practicable.'<sup>180</sup> This phrase was interpreted to be a 'stronger duty than simply being reasonable.'<sup>181</sup> Furthermore, the Secretary of State had complained that too much judicial deference to reviewing officer reasons when demonstrating regard to the legislation and associated guidance may 'immunise from judicial scrutiny the "automatic" housing of people far from their home district.'<sup>182</sup> This eventuality would run contrary to the intentions of the legislation.

To turn more specifically to the judicial interpretation of guidance, the earlier Court of Appeal Case of *Manchester City Council v Moran* (2008)<sup>183</sup> over-ruled a previous judgment, and in doing so, reinterpreting language used in the Code of Guidance. In *Moran*, the appellant local authority had found that the applicant could reasonably occupy a women's refuge, as it was classified as accommodation for the purposes of the legislation. She had been evicted from the refuge, and the authority had found her intentionally homeless. Based on the earlier reasoning

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<sup>176</sup> Ibid, [36]

<sup>177</sup> Ibid, [32]

<sup>178</sup> Ibid

<sup>179</sup> Ibid, [35]

<sup>180</sup> Ibid, [19]

<sup>181</sup> Ibid

<sup>182</sup> Ibid

<sup>183</sup> *Manchester City Council v Moran* [2008] EWCA Civ 378

in *Sidhu* (1982),<sup>184</sup> the authority was found to be in error, as occupants of a women's refuge should be deemed homeless, and it should thus be deemed 'unreasonable' for women to occupy a refuge in the medium to longer term.<sup>185</sup> In *Sidhu* it was noted that the existing Code of Guidance, though explicitly stating that refuges should be a short-term solution, grouped them with other temporary forms of accommodation such as direct access hostels and night shelters.<sup>186</sup> In *Moran*, This was held to be out of date, and misrepresented the then current role of women's refuges in the homelessness support framework. It was noted that when *Sidhu* was decided in 1982, the functions performed by women's refuges may have been far removed from their contemporary role in longer-term support, encouraging a renewed sense of security in the aftermath of an abusive relationship.<sup>187</sup> The judgment in *Sidhu* was consequently overruled, and the Court recommended that the Secretary of State revise the Code of Guidance to better reflect an up-to-date representation of the role of women's refuges.<sup>188</sup>

Again, in the Supreme Court, in *Yemshaw v Hounslow LBC* (2011)<sup>189</sup> the interpretation of the word 'violence' was considered in the context of the Housing Act 1996. The appellant had approached her local authority as homeless claiming that her current living conditions left her at risk of domestic violence. As no physical violence had occurred, the authority had refused to accept the duty. The homelessness Code of Guidance explicitly stated that the term violence should be interpreted widely,<sup>190</sup> but it had previously been successfully argued that an earlier version of the Code had given a different impression, and advocated a narrow definition requiring 'physical contact.'<sup>191</sup> In the present case, the term 'violence' was reinterpreted to reflect changing attitudes. The Supreme Court stated: -

*"it is not for government and official bodies to interpret the meaning of the words which Parliament has used. That role lies with the courts. And the courts recognise that, where*

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<sup>184</sup> *R v Ealing LBC Ex p Sidhu* (1982) 2 HLR 45

<sup>185</sup> *Ibid*, [14]

<sup>186</sup> *Ibid*, [41]

<sup>187</sup> *Ibid*, [44]

<sup>188</sup> *Ibid*, [45]

<sup>189</sup> *Yemshaw v Hounslow LBC* [2011] UKSC 3

<sup>190</sup> *Ibid*, [24]

<sup>191</sup> *Danesh v Kensington and Chelsea RLBC* [2006] EWCA Civ 1404, [18]

*Parliament uses a word such as “violence”, the factual circumstances to which it applies can develop and change over the years.”<sup>192</sup>*

The Court noted that the Code of Guidance could not affect the true construction of the statute, but unlike the statute, it had evolved over time to reflect changing social attitudes and is an important ‘living instrument, always speaking’ to statutory construction.<sup>193</sup> The Code, along with provisions of the subsequent Housing Act 1996, had reflected a change in the original meaning of violence in the Housing Homeless Persons Act 1977, which had previously viewed victims of domestic violence as ‘battered wives.’<sup>194</sup> The judgment states: -

*“... if the concept of violence includes other sorts of harmful or abusive behaviour, then the reference to threats is not redundant. Locking a person (including a child) within the home, or depriving a person of food or of the money to buy food, are not uncommon examples of the sort of abusive behaviour which is now recognised as domestic violence.”<sup>195</sup>*

Most recently, the Supreme Court in *Samuels v Birmingham City Council* (2019)<sup>196</sup> reiterated the message in *Yemshaw* that authorities should not impose their own interpretation of language used in the Code of Guidance, and that this is the role of the courts. The case concerned an appeal regarding the authority’s decision that found an applicant’s previous accommodation to be ‘affordable,’ thus finding her to be intentionally homeless. The authority had deemed Ms Samuels outgoings to be excessive in comparison to her income support payments. The Supreme Court referred to the Homelessness Code of Guidance which outlined a ‘recommendation’ that authorities regard accommodation as unaffordable if the applicant’s residual income would be less than the level of *income support*.<sup>197</sup> The Court inferred a wide interpretation to this guidance, as subsequent sections of the Code made reference to the need to take contextual circumstances into account, as well as a consideration of ‘benefits.’ It was thus determined that the Code of Guidance did not intend that only income support be

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<sup>192</sup> *Yemshaw v Hounslow LBC* n ??, [25]

<sup>193</sup> *Ibid*, [56]

<sup>194</sup> *Ibid*, [24]

<sup>195</sup> *Ibid*, [32]

<sup>196</sup> [2019] UKSC 28

<sup>197</sup> *Ibid*, [35]

considered, but that this would naturally extend to other benefits when determining affordability. The lack of a specific reference to child benefit, therefore, did not mean that it was irrelevant, and the authority should have weighed the outgoings against the combined income from all sources of benefits, not just income support. The appeal was allowed, and regarding the interpretation of guidance, it was stated that: -

*“The authority's duty to have regard to the Code does not require, or entitle, it to search for interpretations which are not clear on a natural reading of the wording, nor to assume a meaning of "income support" based on a previous version of benefits law.”<sup>198</sup>*

In summary, codes of guidance are not law, but they must be regarded. Authorities are free to depart from guidance if necessary, but the reasons for doing so should be valid and well demonstrated. Furthermore, interpreting guidance is a role for the courts. In homelessness cases, and regarding the duty upon authorities to have regard to the Homelessness Code of Guidance, *Ozbek*, *Balog*, *Farah*, and *Nzolameso* provide clarity. According to these cases, the judicial scrutiny of the duty to regard guidance will be undertaken with some benevolence. Providing the Code is broadly referenced in local authority decisions, then the duty has been met. There is no reason for decision-makers to explicitly reference precise provisions of the Code of Guidance, and decision-makers should not be overly-criticised if they show a willingness to approach each applicant flexibly. Where the duty has been found not to have been met, there exists a severe omission, where the decision-maker has failed to even reference the Code in a broad sense.

Regarding the interpretation of language used in the Code of Guidance, high authority has consistently confirmed that this is a function outside of the area of competence of local authorities, and is the role of the courts. *Nzolameso* is an example of judicial clarification of guidance language, in deeming ‘reasonably practicable’ to be a firmer duty than ‘reasonableness.’ *Moran*, *Yemshaw*, and *Samuels*, show the courts deeming the interpretation of guidance language to be incorrect, and redefining terms to better align with both legislative intent and the changing social climate. The importance of the role of the Code in these cases

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<sup>198</sup> Ibid, [31]

has been emphasized, as guidance may be more flexibly amended over time than statutes. Crucially, in redefining guidance, the courts are bound to adhere to the intentions of the legislation which underpins it.

For reasonable steps in the Housing (Wales) Act 2014, these cases add important clarification. The associated Welsh Minister's Code is loosely phrased, listing interventions which authorities 'ought' to consider when applying reasonable steps. In the event of a review, an officer would need only refer to the Code in general terms, and would not necessarily be required to cite specific sections. Though the possibility exists that, in the event of a challenge, the judiciary could interpret this provision more in line with the Act itself and the legislative intent, this is unlikely to occur in practice. Judicial interpretation of the Code would be underpinned by the adoption of a general benevolent approach. If the decision-maker had made reference to the Code, the courts would most likely be reluctant to interfere with the discretion afforded by the Act itself.

## 6.5 Chapter summary

This chapter has drawn on case law and commentary to demonstrate how the courts would interpret reasonable steps in practice. This has been achieved by employing a doctrinal analysis to clarify both the threshold for identifying a decision as unreasonable, and the level of scrutiny the courts will use in looking for potential unreasonableness in those decisions. Participants at the policy reunion articulated a clear desire to provide applicants with a legal and challengeable right to reasonable steps,<sup>199</sup> firmly specifying the intention that the steps taken should be 'enforceable,' 'helpful,' and 'meaningful.'<sup>200</sup> In answering this element of the second research question, which sought to examine the practical implementation of the law, the conclusion reached is that the narrow way in which courts would interpret reasonable steps is in direct contrast to these policy intentions. The case law discussed in this chapter demonstrates that

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<sup>199</sup> A1, p19

<sup>200</sup> A4, p9



notions of helpfulness and meaningfulness are far beyond the scope of judicial scrutiny in this context.

There are fundamental impediments to legal challenge in a public law context. A judicial review is generally difficult to achieve. Due to a limited expertise in local governance and, more importantly, democratic limitations, the judiciary are inherently reluctant to interfere in the decision-making of public authorities in their use of discretionary powers granted by statute. For this reason, judges use a low level of scrutiny when examining these decisions. In a closer context to the object of this thesis, this is particularly relevant in unreasonableness cases, where only the most extreme or absurd errors warrant judicial intervention. Unreasonableness in the *Wednesbury* sense remains a notoriously difficult hurdle for claimants seeking a review on these grounds. Having first clarified the factors which influence the courts when judging unreasonableness, this chapter turned attention to the level of scrutiny, identifying elements which may, in certain circumstances, lead to a more rigorous analysis of the merits of a decision-making process. Anxious scrutiny cases are characterised by a review of merits and a deeper judicial analysis, include the consideration of a human rights component, and move the burden of proof to one of justification on the part of the Local Authority.

An analysis of homelessness cases has demonstrated that the domestic statutory framework will not normally engage a human rights consideration, and as such, homelessness reviews of unreasonableness are subject to a low level of scrutiny with a burden of proof on the claimant. Recent judgments have demonstrated that where a rights or equality issue are concerned, the level of scrutiny can be deeper. Since the *Hotak* judgment, the reviewing courts appear to have, albeit briefly, employed a higher level of scrutiny when judging compliance with the public sector equality duty in the Equality Act 2010, although burden of proof remained upon the claimant in such cases. Ultimately, reasonable steps would likely be deemed to be highly contextual, and the judiciary would accordingly afford a high degree of discretion on the part of the decision-maker. Codes of guidance, though not law, are nevertheless viewed as important by the courts. The presence of comprehensive statutory guidance for the Housing (Wales) Act 2014 may be advantageous to claimants in this context. Firstly, the duty for authorities to have

regard to the guidance calls for the decision-maker to justify any deviation from it. Secondly, the Code may be used as an interpretative tool by the court in a reasonable steps case, though in doing so, would be bound to the provisions in the parent Act. The final chapter of the thesis follows and presents an overview and discussion of the findings here in relation to those presented in earlier chapters.

## Chapter 7: Conclusions

'Reasonable steps' was envisioned as the keystone of the pioneering Housing (Wales) Act 2014, yet after seven years of implementation of the legislation, there has been very little scrutiny of this fundamental provision by policy scholars, and none by legal scholars. In seeking to examine the extent to which reasonable steps is working as envisioned, this thesis uncovers the policy intentions behind the provisions and compares this intent with an exploration of the legislation in practice. Reasonable steps in practice is examined from both perspectives of front-line application by Local Authorities, and from the legal perception of the courts. The policy reunion provided a unique first-hand account of the intentions behind reasonable steps, what it sought to achieve, and how it was envisioned to function in practice. There was a clear intention to place a homelessness prevention duty within the Housing (Wales) Act 2014. The legislation was deliberately crafted to set a minimum standard of support assistance, promote cooperative working practices, and grant a legally enforceable right to prevention assistance for homelessness applicants. The phrase reasonable steps was chosen to facilitate flexibility in service delivery whilst providing that legal right, and was intended to be interpreted widely by Local Authorities. There was an expectancy that the support provided by Local Authorities should be holistic, tailored, and meaningful. Findings demonstrate, however, that in practice, and in a notable example of a deviation from policy intent, the responsibility for reasonable steps appears to have shifted to the applicants themselves. In another unintended consequence, doctrinal analysis shows that inclusion of the word 'reasonable' in this context serves as a fundamental barrier to applicants seeking to enforce their legal rights, by invoking legal principles which significantly limit the ability of the courts to intervene to potentially correct this deviation in application.

There are three parts to this concluding chapter. The first addresses the research questions in turn and summarises key findings relating to the intention of reasonable steps, and the nature of front line and legal implementation of the provisions. Part two summarises the empirical and methodological contributions, highlighting the extent to which findings add to debates in

existing key literatures. Part three concludes the chapter with a discussion on the limitations of the research and possible areas for further study.

## 7.1 Research questions

This part of the chapter presents key findings in relation to the following research questions. They are addressed separately and in turn.

1. *What was the policy intent behind the reasonable steps legislation?*
2. *With reference to the policy intent, how is reasonable steps interpreted and applied in practice by local authorities and the courts?*
3. *In the front-line implementation of reasonable steps, what impediments to challenge exist to potentially contribute to the absence of case law?*

### 7.1.1 Research question 1: Unearthing policy intent

This question, addressed in chapter 4 of this thesis, arose due to the lack of academic attention given to reasonable steps, and the importance of the provisions in achieving policy goals. Previous studies have been enriched with an examination of the early stages of policy-making,<sup>1</sup> and have identified instances of legislation failing to meet those policy objectives.<sup>2</sup> Before examining the implementation of reasonable steps by Local Authorities and the courts it was first necessary to clearly identify what the legislation intended to achieve and how it was envisioned by policymakers. To achieve this, a policy reunion was held with key stakeholders

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<sup>1</sup> John W Kingdon, *Agendas, alternatives and public policies, updated edition*, Pearson 2010; Eric Macnaughton, Geoffrey Nelson, and Paula Goering, 'Bringing politics and evidence together: policy entrepreneurship and the conception of the At Home/Chez Soi Housing First Initiative for addressing homelessness and mental illness in Canada' (2013) *Social Science & Medicine* 82 100; Robin Ray, 'Analysis of pregnancy anti-discrimination policy in Kentucky: Application of Kingdon's multiple streams framework' (2020) *Policy, Politics, & Nursing Practice* 21 4 244

<sup>2</sup> Janet M Lum, 'The federal Employment Equity Act: goals vs. implementation' (1995) *Canadian Public Administration* 38 1 45; Kenneth J Meier and Deborah R McFarlane, 'Statutory coherence and policy implementation: The case of family planning' (1995) *Journal of Public Policy* 15 3 281; Carol Agocs, 'Canada's employment equity legislation and policy, 1987-2000: The gap between policy and practice' (2002) *International Journal of Manpower* 23 3 256

involved in the development of the Housing (Wales) Act 2014. The policy reunion participants inhabit a unique position in the development of reasonable steps. Their involvement in the policy process is more 'hidden,' and their testimony is not available from secondary data. As such, Kingdon's multiple streams model<sup>3</sup> was used to help situate the findings within the policy process, as his framework allows for the consideration of input from 'policy entrepreneurs.' As the policy entrepreneurs of reasonable steps, participants were part of the 'alternative specification' process and were involved in researching and discussing the various ways in which the new law could meet policy objectives. The findings from the policy reunion provide a unique account of the alternative specification process of reasonable steps, and thus a clear understanding of how the legislation was foreseen to work in practice.

Participants described an overarching goal to place homelessness prevention within legislation, creating a legal duty for Local Authorities that could be enforced in the courts by applicants. The level of assistance required was to be 'meaningful,'<sup>4</sup> and enshrined within legislation to formalise a consolidation of service levels and direct attention and resources towards prevention and early intervention. The specific phrase of 'reasonableness' was chosen as it was a component of the existing legal framework, and thus would aid a shared understanding of the new legislation. The phrase 'reasonable steps' would also facilitate a high degree of flexibility in service delivery, allowing Local Authorities to respond accordingly to the high degree of variability present within homelessness assistance applications. Considering this flexibility, participants described a presumption that reasonable steps would be interpreted widely, result in a consistent level of helpful and meaningful assistance, and would lead to Local Authorities doing 'everything possible'<sup>5</sup> in any given case. Staff training and statutory guidance<sup>6</sup> accompanying the legislation were intended to communicate this message to front-line staff. Taken together, these findings provide crucial new insights into the policy intent behind

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<sup>3</sup> John W Kingdon, *Agendas, alternatives and public policies, updated edition*, Pearson 2010

<sup>4</sup> A4, p4

<sup>5</sup> Ibid, p23

<sup>6</sup> Welsh Assembly Government, 'Code of Guidance to Local Authorities on the Allocation of Accommodation and Homelessness' [2016]

reasonable steps, which was taken forward as a comparator when examining the practical implementation of the legislation.

### 7.1.2 Research question 2: Bureaucratic and judicial implementation

A combination of qualitative and doctrinal research methods are used in the thesis to examine the interpretation and application of reasonable steps within Local Authorities and the courts. The need to examine the interpretation and implementation of reasonable steps arose from a lack of case law, and the absence of an existing empirical account of the provisions. This results in uncertainty for both applicants and local authorities on the precise nature of reasonable steps as a right and a duty. Previous research has consistently demonstrated the significant impact of front-line factors on decision-making,<sup>7</sup> and policy change backed by law has been found to be hindered by unclear or unenforced legislation.<sup>8</sup> Furthermore, research on homelessness decision-making has highlighted that front-line influences can significantly impact the implementation of law, and result in the undesirable implementation of an intended policy.<sup>9</sup> Using a similar methodology to these studies, interviews with Housing Officers and management at three Local Authorities in Wales facilitated the exploration of the way in which these participants interpreted reasonable steps and applied it in practice. Additionally, and in the absence of case law on reasonable steps, a doctrinal analysis demonstrates how the courts

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<sup>7</sup> Bryan Glastonbury, *Homeless near a thousand homes: A study of families without homes in South Wales and the West of England* Allen and Unwin 1971; Michael Lipsky, *Street-level bureaucracy: Dilemmas of the individual in public service*, Russell Sage Foundation, 2010; Katherine Levine Einstein and David M Glick, 'Does race affect access to government services? An experiment exploring street-level bureaucrats and access to public housing' (2017) *American Journal of Political Science* 61 1 100

<sup>8</sup> Helen Ingram and Anne Schneider, 'Improving implementation through framing smarter statutes' (1990) *Journal of public policy* 10 1 67; Kenneth J Meier and Deborah R McFarlane, 'Statutory coherence and policy implementation: The case of family planning' (1995) *Journal of Public Policy* 15 3 281; Carol Agocs, 'Canada's employment equity legislation and policy, 1987-2000: The gap between policy and practice' (2002) *International Journal of Manpower* 23 3 256

<sup>9</sup> Ian Loveland, *Housing homeless persons: administrative law and the administrative process* Clarendon Press 1995; David Cowan and Simon Halliday, *The appeal of internal review: law, administrative justice, and the (non-) emergence of disputes*, Hart 2003; Simon Halliday, *Judicial review and compliance with administrative law* Hart 2004; Joanne Bretherton, Caroline Hunter and Sarah Johnsen, 'You can judge them on how they look...: Homelessness Officers, Medical Evidence and Decision-Making in England' (2013) *European Journal of Homelessness* 7 1 69

would interpret reasonable steps in the event of a legal challenge, and explains how a reviewing court might scrutinise the steps prescribed by Local Authorities. The front-line and legal implementation of reasonable steps is considered in turn within this section, and each is accompanied by findings relating to this implementation that suggests a deviation from the policy intent described above. First, the evidence suggests that a shift in the duty to take reasonable steps may have occurred at the front line. Second, the courts will not interfere in the decisions of Local Authorities except in the most extreme circumstances, and are not ordinarily permitted to comment on the merits of the reasonableness of steps, or judge the extent to which they are 'helpful' or 'meaningful.' Findings presented in this section have resulted in a number of significant contributions and recommendations, which are discussed separately later in the chapter.

#### *Reasonable steps at the 'front-line'*

The policy intentions behind reasonable steps were strongly communicated to those tasked with implementation. The statutory guidance accompanying the legislation is comprehensive, and contains many examples of assistance measures that local authorities 'ought' to make available to service users. Furthermore, training sessions delivered to local authority staff and management at the time the legislation was enacted were specifically planned and delivered in a manner which foregrounded policy objectives. During these training sessions, there was a strong focus on a wide interpretation of reasonable steps, the use of tailored and holistic support interventions, and an emphasis on including the applicants themselves in the process. Despite these measures taken to communicate intent, only two participants<sup>10</sup> (both managers) described reasonable steps in this way. Other front-line staff viewed reasonable steps either as a 'two-way street,' or as the sole responsibility of the applicant themselves. This perceived shift in burden is closely tied to the use of Personal Housing Plans (PHP) which, although not a legal requirement, have become instrumental to the front-line application of reasonable steps.

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<sup>10</sup> LA1 M; LA3 M

The PHP, as a joint venture between the assisting officer and applicant, was intended to encourage cooperation and serve as a 'live log' of reasonable steps taken during the assistance process. The use of a PHP in the implementation of the legislation was strongly encouraged, and promoted as a good practice tool by Welsh Government. Evidence presented within this thesis, however, indicates that the PHP has become a key procedural stage used to record the reasonable steps which the Local Authority requires the applicant themselves to take. In practice, although the PHP is a cooperative endeavour between the Housing Officer and the applicant, there is some evidence to suggest its' use in controlling client behaviour. Housing Officers appear to actively monitor applicants in this regard, using the plan to measure the extent to which they are cooperating in the process. Having outlined and evidenced *how* front-line implementation deviates from policy intent, Lipsky's street-level bureaucracy theory was used to offer some explanation as to *why* these deviations may occur in practice.

There are a number of factors which may have driven the above deviation from policy intent, and resulted in the burden to take reasonable steps being placed on the applicant. First, and to turn to the literature, Lipsky's central argument is that the discretion inherent in front-line roles can lead to changes in practice which may ultimately amount to a policy being driven from the 'bottom-up.'<sup>11</sup> Lipsky labels these changes as 'practice routines,' and argues that the driving force of their development is a problem which impedes the efficient running of the bureaucracy. Within Chapter 5 of this thesis, Housing Officers were reported to frequently discuss the need for client cooperation as a central factor in achieving a successful intervention<sup>12</sup> and ensure 'efficiency' is maintained. It was argued within that chapter that using the PHP to record and monitor the reasonable steps of applicants helps Housing Officers to maintain the cooperation of applicants. Participants often spoke of monitoring applicant reasonable steps, under the threat of ending their duty for 'non-cooperation.'<sup>13</sup> The literature contains examples of changes in practice to address operational difficulties, thus giving weight

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<sup>11</sup> Michael Lipsky, *Street-level bureaucracy: Dilemmas of the individual in public service*, Russell Sage Foundation, 2010, p82

<sup>12</sup> LA1 M, p13; LA1 H1, p5; LA1 H1, p8; LA1 H1, p11; LA1 H1, p14; LA1 H3, p5; LA1 H2, p2; LA1 H2, p4; LA3 H1, p4; LA3 H2, p5; LA3 H3, p4

<sup>13</sup> LA1 H1, p6, p14; LA1 H3, p5; LA3 H1, p3-5; LA3 H2, p5; LA3 H3, p4-5, p9



to these observations within the thesis. Such changes in practice have been noted in welfare services to maintain efficiency and address uncertainty in the decision-making procedure.<sup>14</sup> Furthermore, the need to maintain the ‘good behaviour’ of clients was noted by Lipsky,<sup>15</sup> and research has identified this need as a central component of effective case load management.<sup>16</sup> As the PHP has become integral to the front-line delivery of the legislation, the emphasis on the applicant reasonable steps stands in direct opposition to core policy objectives. Although the literature may help explain the shift to some extent, it is argued that factors specific to the context of reasonable steps and the way in which it is implemented has contributed to such a significant deviation from policy intent.

It is possible that the strong emphasis on certain policy aims within both the Code of Guidance and training sessions have unintentionally shaped a deviation in implementation. The Code places significant weight on collaboration and cooperation, and the training carried this message to staff, promoting the PHP as a practice tool to deliver reasonable steps. It was emphasised during training that, under the new legislation, the applicant would not be passive in the process, and should be encouraged to ‘collaborate’ in the creation of what many of the housing officers interviewed now call ‘reasonable steps plans.’ The emphasis on cooperation may have, in practice, merged with another area of the legislative framework; the ability for local authorities to end their legal duty to an applicant who is perceived to be ‘unreasonably failing to cooperate.’<sup>17</sup> The use of ‘reasonableness’ as a standard in both reasonable steps and unreasonable non-cooperation may in part have contributed to the perceived shift in burden in the PHP. Policymakers did not expect the non-cooperation clause to be used,<sup>18</sup> but included it

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<sup>14</sup> Joanne Bretherton, Caroline Hunter, and Sarah Johnsen, ‘You can judge them on how they look...: Homelessness Officers, Medical Evidence and Decision-Making in England’ (2013) *European Journal of Homelessness* 7 1 69; Aimee Grant, ‘Welfare reform, increased conditionality and discretion: Jobcentre Plus advisers’ experiences of targets and sanctions’ (2013) *Journal of Poverty and Social Justice* 21 2 165

<sup>15</sup> Michael Lipsky (n 11), p62

<sup>16</sup> Paul Henman and Greg Marston, ‘The social division of welfare surveillance’ (2008) *Journal of Social Policy* 37 2 187; Vincent Dubois, *The bureaucrat and the poor: Encounters in French welfare offices* Routledge 2016; Hans-Tore Hansen, Kjetil Lundberg, and Liv Johanne Syltevik, ‘Digitalization, street-level bureaucracy and welfare users’ experiences’ (2018) *Social Policy & Administration* 52 1 67

<sup>17</sup> Housing (Wales) Act 2014, s 79(5)

<sup>18</sup> A2

as a safeguard against opportunistic applicants seeking only the final stage of assistance; an accommodation offer. Crucially, though cooperation is important and may be expected of them, the legislation does not expressly place it as a duty upon applicants. This thesis has argued that a legal challenge to the implementation of reasonable steps would be the most expedient way to address and rectify the deviation from policy intent described here, and bring the duty to take reasonable steps back towards Local Authorities as policy makers intended.

### *Reasonable steps and the courts*

In the absence of case law, Chapter 6 used doctrinal methods to understand how the courts would approach reasonable steps in practice in the event of litigation. That chapter argues that the phrase ‘reasonable steps’ itself serves to limit the opportunity for litigation for a number of reasons. First, the courts maintain a strict high threshold for unreasonableness in a public law context. As a result, the judiciary will not interfere with the use of discretionary power granted by statute to a public body unless there is evidence of extreme errors on the part of the decision maker. The standard is set by the lead case of *Wednesbury*,<sup>19</sup> and it is difficult to overstate just how high the threshold for unreasonableness is in this context; for example, decisions must be found to be perverse, malicious, or non-sensical. Securing a judicial review of decisions is notoriously difficult for claimants, and rarely do they succeed.<sup>20</sup> During such challenges, the burden of proving unreasonableness falls to the claimant, and a reviewing court will not engage in a scrutiny of the merits of the decision in question. These difficulties suggest that the narrow way in which reasonable steps would be interpreted by the courts runs in direct opposition to the wide interpretation intended by policymakers. An applicant seeking a review of reasonable steps would have to overcome the barriers of securing a judicial review, and then demonstrate very extreme ‘unreasonableness’ in their case. Subsequently, the court will not scrutinise the decision making of the Authority in detail.

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<sup>19</sup> *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223

<sup>20</sup> Ian Turner, ‘Judicial review, irrationality, and the legitimacy of merits-review’ (2008) *Liverpool Law Review* 29 3 309

However, though the high threshold for unreasonableness remains, an analysis of case law identified a number of instances in which the court may scrutinise the merits of the Local Authority decision making process more closely. First, the presence of a human rights consideration engages the ‘anxious scrutiny’ of the decision, allowing the court to analyse more deeply, and shifting the burden of proof from claimants, and onto the Local Authority to justify the rights infringement of which they are accused. Although housing is confirmed as a human right in international law,<sup>21</sup> there is no remedy for aggrieved parties within this sphere. Domestic courts have expressly stated that welfare support does not typically give rise to a human rights consideration,<sup>22</sup> and domestic homelessness cases retain the high threshold of *Wednesbury* with a burden upon the claimant to prove unreasonableness. However, a doctrinal analysis of some of those homelessness cases uncovered a second way in which the courts may scrutinise the decision more intensely.

Since the judgment in *Hotak*,<sup>23</sup> where a rights or discrimination element arises within homelessness cases, the courts can scrutinise more closely the authority’s compliance with the public sector equality duty, though again the burden of proof remains on the claimant. In context, if a rights or discrimination element were present in a review of a reasonable steps decision, the courts could examine the merits of the steps prescribed; for example, what resources were available, to what extent those steps addressed the applicants’ difficulties, or what more could have been offered. This level of scrutiny may significantly benefit claimants asserting a failure in the application of reasonable steps, but judgments since *Hotak* may have signalled a return to the ‘benevolent’ approach advocated in *Holmes-Moorhouse*. Finally, the presence of the Code of Guidance attached to the Housing (Wales) Act 2014 may serve as a guide to the courts when deciding a reasonable steps case. The Code was intended to drive the desired implementation of the legislation, and the courts may refer to it in this regard. Codes of

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<sup>21</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 11

<sup>22</sup> *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406, [25]

<sup>23</sup> *Hotak v Southwark London Borough Council* [2015] UKSC 30

guidance are not law, but are deemed more than optional recommendations. An authority is free to depart from the Code but must demonstrate good reasons for doing so.

### 7.1.3 Research question 3: Impediments to litigation at the front-line

Given the aforementioned studies showing how factors at the front-line can influence implementation,<sup>24</sup> and those arguing that enforcement is a key factor in policy success,<sup>25</sup> it was deemed important to explore how discretion at the front-line may be inhibiting legal challenges. During the policy reunion, participants clearly stated the intention to enshrine an enforceable right to reasonable steps within the Housing (Wales) Act 2014.<sup>26</sup> Accordingly, the legislation contains a right to internal review and, in certain circumstances, the right to petition the county court for further remedy.<sup>27</sup> The emergence of a legal right to reasonable steps has been recognised within the literature as innovative and highly significant in the development of homelessness law and policy,<sup>28</sup> and received commendation within the national press for its ‘pioneering’<sup>29</sup> and ‘trailblazing’<sup>30</sup> approach. Despite the well-publicised creation of this right,

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<sup>24</sup> Ian Loveland, *Housing homeless persons: administrative law and the administrative process* Clarendon Press 1995; David Cowan and Simon Halliday, *The appeal of internal review: law, administrative justice, and the (non-) emergence of disputes*, Hart 2003; Simon Halliday, *Judicial review and compliance with administrative law* Hart 2004; Joanne Bretherton, Caroline Hunter and Sarah Johnsen, ‘You can judge them on how they look...: Homelessness Officers, Medical Evidence and Decision-Making in England’ (2013) *European Journal of Homelessness* 7 1 69

<sup>25</sup> Janet M Lum, ‘The federal Employment Equity Act: goals vs. implementation’ (1995) *Canadian Public Administration* 38 1 45; Kenneth J Meier and Deborah R McFarlane, ‘Statutory coherence and policy implementation: The case of family planning’ (1995) *Journal of Public Policy* 15 3 281; Carol Agocs, ‘Canada’s employment equity legislation and policy, 1987-2000: The gap between policy and practice’ (2002) *International Journal of Manpower* 23 3 256

<sup>26</sup> A1, p2; A4, p4

<sup>27</sup> Housing (Wales) Act 2014, s 85

<sup>28</sup> Peter MacKie, Ian Thomas, and Jennie Bibbings, ‘Homelessness prevention: Reflecting on a year of pioneering Welsh legislation in practice’ (2017) *European Journal of Homelessness* 11 1 81, p85; Charlotte N B Grey and Louise Woodfine, *Voices of those with lived experiences of homelessness and adversity in Wales: informing prevention and response Cardiff*, Public Health Wales NHS Trust 2019

<sup>29</sup> Simon Brandon, Welsh Lessons on Halting Homelessness, *Inside Housing*, available at <https://www.insidehousing.co.uk/insight/insight/welsh-lessons-on-halting-homelessness-55832> accessed 16 February 2021

<sup>30</sup> Kate Murray, Welsh law shows that early support prevents homelessness, *The Guardian*, available at <https://www.theguardian.com/society/2016/apr/26/welsh-law-early-support-prevents-homelessness-crisis> accessed 16 February 2021

there have been no legal challenges made to reasonable steps since the inception of the legislation. To contribute to the deviation from policy intent described above, namely the intention to create a practically enforceable right, Chapter 5 closes by arguing that elements in front-line implementation may be exacerbating already existing wider barriers for applicants, and contributing to the absence of litigation on reasonable steps.

In presenting this evidence, that chapter sets the wider context within which those front-line barriers exist, and highlights the wider difficulties homelessness applicants face in accessing their legal rights. For example, the cuts in publicly funded legal aid have significantly reduced the amount of available legal advice providers,<sup>31</sup> and studies examining the societal effects of these reductions have highlighted their impact on vulnerable individuals seeking to access legal support resources.<sup>32</sup> Furthermore, other studies have highlighted that welfare applicants as a social group remain disproportionately unaware of their legal rights and routes to challenge.<sup>33</sup> This has been found particularly relevant to homelessness assistance applicants.<sup>34</sup>

In context, and to address research question 3 directly, participants raised a number of contextual factors relating to reasonable steps that may limit the chance of a challenge arising. Some claimed that a cooperative approach to working practices and efforts made to manage client expectations from the process led to a less adversarial relationship, and that grievances were often resolved informally.<sup>35</sup> This cooperative approach aligns with policy goals uncovered

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<sup>31</sup> Ministry of Justice, *User guide to legal Aid statistics, England & Wales*, London, Legal Aid Agency 2020

<sup>32</sup> Andrew Burrige and Nick Gill, 'Conveyor-belt justice: Precarity, access to justice, and uneven geographies of legal aid in UK asylum appeals' (2017) *Antipode* 49 1 23; Steven Truxal, 'Agents and Agency in the Face of Austerity and Brexit Uncertainty: the Case of Legal Aid' in Marius Guderjan, Hugh Mackay, and Gesa Stedman (eds) *Contested Britain: Brexit, Austerity and Agency*, Policy Press 2020

<sup>33</sup> Jo Casebourne, Jo Regan, Fiona Neathey, and Siobhan Tuohy, *Employment rights at work: survey of employees 2005* Department of Trade and industry 2006; Roderick A Macdonald, Access to Civil Justice in Peter Cane and Herbert Kritzer (eds) *The Oxford handbook of empirical legal research* Oxford University Press 2012; Association of Consumer Support Organisations, *Simplifying Access to Justice for Vulnerable Consumers* 2021 available at <https://acso.org.uk/sites/default/files/media/files/simplifying-access-justice-vulnerable-consumers.pdf> accessed 18 August 2022

<sup>34</sup> Nigel J Balmer, Alexy Buck, Ash Patel, Catrina Denvir, and Pascoe Pleasence, *Knowledge, Capability and the Experience of Rights Problems*, London, Public Legal Education Network 2010

<sup>35</sup> LA1 M, p2; LA1 S, p4; LA1 H2, p7; LA3 M, p4; LA 3 H1, p8, p10

during the policy reunion, but participants also raised some barriers to challenge which do not align. For example, it was claimed that Local Authorities and members of the legal profession may be actively avoiding litigation due to resource constraints and uncertainty in the precise legal definition of reasonable steps.<sup>36</sup> Furthermore, despite perceiving low levels of awareness among applicants, a number of officers also stated that little is done in practice to inform or educate those individuals on this right.<sup>37</sup>

In summary, this part of the Conclusions chapter has summarised the key findings of the thesis in relation to the research questions. In doing so, it is argued that the practical implementation of reasonable steps deviates from intent in a number of ways. First, the duty to take reasonable steps appears to have shifted to the applicants themselves. Second, the likelihood that a legal challenge will occur in practice is extremely low, raising questions around how practically enforceable the right to reasonable steps actually is. It is argued that a legal challenge would be the most efficient way to address the shift in burden identified at the front line. However, if applicants did overcome the structural and contextual barriers to legal challenge discussed at the close of Chapter 5, the phrase ‘reasonable steps’ in itself further limits the chance of litigation arising in practice (Chapter 6). Having addressed the research questions directly, the next part of this chapter details the original contributions arising from the thesis.

## 7.2 - Research contributions

The legal duty to take reasonable steps has been claimed to be pioneering, and held as a cornerstone of a homelessness policy shift driven by Part II of the Housing (Wales) Act 2014.<sup>38</sup> Despite this significance, it has received very little academic attention.<sup>39</sup> This thesis is the first empirical investigation of the ambition, interpretation, and application of reasonable steps in the Housing (Wales) Act 2014, drawing on both doctrinal and qualitative methods. This thesis

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<sup>36</sup> LA1 M, p11; LA1 H1, p4-5; LA2 M, p4-5; TP, p7, p11

<sup>37</sup> LA1 M, p5; LA1 H1; LA1 H2; LA3 H2; LA3 H3

<sup>38</sup> Peter K Mackie and others (n 22)

<sup>39</sup> Shelter Cymru, Reasonable steps: experiences of homelessness services under the Housing (Wales) Act 2014 [2016], p5 available at: <https://www.sheltercymru.org.uk/wp-content/uploads/2015/02/Reasonable-Steps.pdf> accessed 2 February 2020

makes a number of original context specific empirical contributions as well as a methodological innovation, and offers a contribution to key literatures. These are discussed separately here.

### 7.2.1 Empirical contributions

This thesis provides valuable context specific findings relating to reasonable steps, its implementation, and status as a legal right for applicants. As outlined within the thesis introduction, the key policy goals behind reasonable steps were well documented within the consultation stage of the legislation. This research has extended the publicly available understanding of these policy objectives with a qualitative exploration, by undertaking a policy reunion with participants directly involved in the process of transferring these goals into law. The transcript consists of a comprehensive record of the process, outlining many aspects of reasonable steps, such as the origins of the terminology, the problems it sought to address, and why legislation was a favoured means to drive the policy objectives. In addition to this, participants gave their own intended vision for reasonable steps, providing a clear comparator for front-line implementation. These insights are not available in secondary data, and may contribute to similar studies of homelessness policymaking in a Welsh context. Findings from this policy reunion may benefit Ministers, policymakers, lawyers, and legislative drafters when reasonable steps and the Housing (Wales) Act is itself formally reviewed.

The evidence gathered from Local Authority staff is also a useful empirical contribution. Given the little scholarly attention reasonable steps has received until this point, the insight gained into the disconnect between staff perceptions of reasonable steps and the intentions of policymakers are of value. To my knowledge, this data represents the first empirical account of reasonable steps working in practice and provides important detail on the nature of its' implementation.

In the same way, this first doctrinal work on reasonable steps in this context has demonstrated the threshold for judicial intervention in reasonable steps cases, as well as the level of scrutiny available to the court and in what circumstances this shifts. In the absence of any case law on

reasonable steps, there will inevitably be some uncertainty on the precise nature of the legal obligations and rights for Local Authorities and applicants respectively. This analysis has gone some way to address that gap in knowledge, and again may be of use to policymakers and legal professionals in the event of a legislative review. These findings may also be of value more broadly given that the same provisions are in force within the Homelessness Reduction Act 2017.

### 7.2.2 Methodological contributions

This research has combined qualitative and doctrinal methods to investigate the practical workings of reasonable steps in the Housing (Wales) Act 2014. Combining methods in this way allowed for a consideration of opposing perspectives relating to the direction of policy, and acknowledges the role of policymakers driving intentions down the implementation chain, whilst taking account of the ways in which front line delivery of that policy can push back against these intentions. Qualitative investigation can provide rich and context specific findings not available from secondary data, while a legal analysis provides some clarification to the way in which legislation seeking to drive policy objectives is or may be applied in practice.

The combination allowed for an understanding of the journey of reasonable steps from its' inception in the pre-legislation phase and through to practical implementation. The accompanying doctrinal account of the legislation, in the absence of case law, provided insight into the limitations of scrutiny by the courts. Combining methods in this way may be a useful approach for similar studies where policy and law are most significantly linked.

The use of a policy reunion as a method in the thesis also represents a significant contribution, as it allowed the subsequent investigation to be conducted against clearly defined policy goals. Policy reunions are used in the political sphere, but I argue they have much to offer as a research method, particularly in studies of policy implementation and policy evaluation. Gathering members of a team involved in the development of reasonable steps together and allowing them to discuss and share their recollections of the process resulted in rich findings not obtainable from secondary data. The transcript from the policy reunion stands as a record



of the debates behind reasonable steps, and documents valuable data which is time sensitive. The session was conducted a number of years after the policy debates, and it is inevitable that as time progresses further, participants may fail to recollect key information or move on to other roles in other sectors.

### 7.2.3 Contributions to key literatures

Beyond the empirical and methodological contributions, the thesis contributes to two key literatures. First, in relation to the policy and legislative *development* process, it adds to a growing evidence base on the application of Kingdon's Multiple Streams model. Unlike many other policy development frameworks,<sup>40</sup> Kingdon's MSM<sup>41</sup> places a particular focus on the 'hidden' early stage in the policy development process, emphasising the importance of 'alternative specification' and the role of 'policy entrepreneurs.' The policy reunion findings are a valuable contribution to the body of work applying Kingdon's model. Using Kingdon's framework allowed the excavation of 'hidden' policy discussions, or 'alternative specification,' and resulted in a unique understanding of reasonable steps upon which implementation could be critiqued. The policy reunion findings may be a valuable contribution to future research seeking to apply Kingdon's model in the context of homelessness policymaking in Wales, as they provide an account of policy development in the pre-legislation phase of implementation.

Second, on the issue of policy and legislative *implementation*, the thesis provides new insights on the role front-line workers through Lipsky's 'street-level bureaucracy theory. In a wide context, arguments have developed claiming that Lipsky's theory is all but obsolete in a modern context given the relatively recent increase in management scrutiny and performance targets.<sup>42</sup>

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<sup>40</sup> Charles Edward Lindblom, *The policy-making process* Prentice-Hall 1968; Robert Nakamura, 'The textbook policy process and implementation research' (1987) *Review of Policy Research* 7 1 142; Paul A Sabatier and Hank C Jenkins-Smith (eds), *Policy Change and Learning: An Advocacy Coalition Approach* Westview Press 1993; Edward Woodhouse and Charles E Lindblom, *The policy-making process* Prentice-Hall 1993; Guy Peters and Jon Pierre (eds), *Handbook of public policy* Sage Publications 2006

<sup>41</sup> John W Kingdon (n 1)

<sup>42</sup> David Howe, 'Knowledge, power and the shape of social work practice' in Martin Davies (ed), *The sociology of social work* Routledge 1991; Ian Taylor and Josie Kelly, 'Professionals, discretion and public sector reform in the UK: re-visiting Lipsky' (2006) *International Journal of Public Sector Management* 19

This increase in monitoring and scrutiny is observable in the findings here. During interviews for this thesis, management described a 'love'<sup>43</sup> of data, and the tools they use to monitor staff performance in securing positive outcomes and deploying scarce departmental resources.<sup>44</sup> Likewise, staff spoke of the scrutiny under which they deploy resources in their daily roles, especially when these measures place a financial burden upon the department.<sup>45</sup> Despite the perceived increase in monitoring, the shift in the burden of reasonable steps observable in the data suggests that freedom in service delivery at the front line is not completely eradicated, and staff certainly appear to feel that they have '100%' discretion in carrying out their work.<sup>46</sup> These findings provide a valuable contribution to the argument on the effects of monitoring on Lipsky's theory in a modern context, and indicate that, though these measures may have reduced the amount of front line discretion in some areas, sufficient levels still exist in certain contexts to facilitate changes in policy.

The most significant policy change in this context is an increase in burden upon the applicant for reasonable steps within the use of personal housing plans (PHP). Highlighting this also provides a contribution to the literature, as the evidence demonstrates some characteristics of a practice routine. These routines, developed at the front-line in response to a difficulty or problem inherent within service delivery, are a key element of Lipsky's theory,<sup>47</sup> and represent the root cause of his central thesis that such changes in practice can drive policy direction from the 'bottom up.'<sup>48</sup> The evidence presented in Chapter 5 demonstrates the difficulty in operational delivery which arises as a result of uncooperative applicants, and Housing Officers often spoke of monitoring applicant steps under the threat of ending the duty for non-cooperation. As such a central factor in Lipsky's theory itself, practice routines at the front line have been investigated and identified in many studies, including in the context of welfare

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7 629; Tony Evans, 'Professionals, managers and discretion: Critiquing street-level bureaucracy' (2010) *The British Journal of Social Work* 41 2 368

<sup>43</sup> LA 2 M, p3

<sup>44</sup> LA1 M; LA2 M; LA3 M

<sup>45</sup> All Housing Officer transcripts discuss the authorisation of steps by management.

<sup>46</sup> LA1 M1, p8; LA1 H1, p9; LA1 H2, p8; LA2 M, p6; LA3 M, p2; LA3 H1, p5

<sup>47</sup> Michael Lipsky (n 11), p82

<sup>48</sup> Michael Lipsky (n 11)

service delivery.<sup>49</sup> Unlike findings from many of these studies, which note subtle changes in practice such as standardised levels of client interaction<sup>50</sup> or the arbitrary consideration of irrelevant evidence,<sup>51</sup> the shift in burden within the PHP observed within this thesis perhaps represents a more extreme example. The additional focus on the applicants themselves may be seen as subtle when taken in isolation in terms of operational delivery. For example, personal housing plans are still used and monitored, and applicants have ease of access to them having been actively involved in their composition. What makes this shift in burden seem so extreme is that, in practice, it runs in direct opposition to the central goal of reasonable steps, namely to place the legal duty for reasonable steps upon Local Authorities. In this case, policy is not only changed, but is carried out in stark contrast to intentions. Reasonable steps was intended as a responsibility for the Local Authority, not the applicant.

In a final but potentially highly consequential contribution, this thesis offers a number of practical recommendations which may in part address the unintended consequences summarised at the opening of this chapter. These are outlined below.

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<sup>49</sup> Marcia Meyers, Bonnie Glaser, and Karin Mac Donald, 'On the front lines of welfare delivery: Are workers implementing policy reforms?' (1998) *Journal of Policy Analysis and Management* 17 1 1; Sharon Elizabeth Wright, 'Confronting unemployment in a street-level bureaucracy: Jobcentre staff and client perspectives' (2003) PhD Thesis, Sterling University; Del Roy Fletcher, 'Welfare reform, Jobcentre Plus and the street-level bureaucracy: towards inconsistent and discriminatory welfare for severely disadvantaged groups?' (2011) *Social policy and Society* 10 4 445; Joanne Bretherton, Caroline Hunter, and Sarah Johnsen, 'You can judge them on how they look: Homelessness Officers, Medical Evidence and Decision-Making in England' (2013) *European Journal of Homelessness* 7 1 69; Aimee Grant, 'Welfare reform, increased conditionality and discretion: Jobcentre Plus advisers' experiences of targets and sanctions' (2013) *Journal of Poverty and Social Justice* 21 2 165; Sarah Alden, 'Discretion on the frontline: The street level bureaucrat in English statutory homelessness services' (2015) *Social Policy and Society* 14 1 63

<sup>50</sup> Aimee Grant, 'Welfare reform, increased conditionality and discretion: Jobcentre Plus advisers' experiences of targets and sanctions' (2013) *Journal of Poverty and Social Justice* 21 2 165

<sup>51</sup> Joanne Bretherton, Caroline Hunter, and Sarah Johnsen, 'You can judge them on how they look: Homelessness Officers, Medical Evidence and Decision-Making in England' (2013) *European Journal of Homelessness* 7 1 69

## 7.3 Recommendations and further research

This final part of the chapter offers a number of practical recommendations which may bring the practical implementation of reasonable steps more in line with the aims of policymakers. The thesis identified two main deviations from intent. First, that the duty to take reasonable steps may have shifted to the applicant. Second, that contextual and legal factors combine to limit the chance of litigation on reasonable steps. The following recommendations focus on addressing these deviations.

### 7.3.1 Refocussing the duty

An updated training schedule for staff would be desirable. The major deviation from policy intent occurring at the front line appears to be the way in which the personal housing plan is utilised in service delivery. Given the scope of the investigation, it is not possible to know the extent to which the shift in burden is evident across all Authorities in Wales, however it may be beneficial to remind staff that the intention of reasonable steps is to ensure that the Local Authority is focussed on tailoring interventions and providing ‘meaningful’ assistance. Training should focus on the intentions behind the personal housing plan, which was to ensure the applicant had a record of the assistance measures offered, and could play a more active role in their application as it progressed. Furthermore, it should be emphasised that ending a duty for non-cooperation was seen by policy makers as a last resort. To avoid unintended practices becoming embedded, or developing as a result of new staff members over time, it may be useful to conduct sessions at regular intervals to remind Local Authorities of the intentions behind reasonable steps. These sessions may also be a useful opportunity for Local Authority staff to feed back on how the legislation is working in their areas, as well as share learning and experience.

To help facilitate a refocus of reasonable steps back to an authority duty, as well as maintain more consistent service level, a central regulator may be beneficial. It would not be difficult to

achieve this in practice, as reasonable steps are recorded on a case-by-case basis along with their effectiveness. Computer systems would enable a centralised remote monitoring of these elements, and may relieve department managers of some of their burdens in this regard. Monitoring reasonable steps more centrally would also have wider benefits, as resource and demand levels could be tracked at multiple levels, including nationally. This would provide data on trends and patterns geographically, and provide more accurate data on the success rates of individual interventions. It should be noted that the Public Services Ombudsman for Wales has made similar recommendations in the context of broad service delivery under the Housing (Wales) Act, though not addressing reasonable steps specifically.<sup>52</sup> Finally, a regulator would be in a position to hold Local Authorities to account regarding reasonable steps; this may be particularly helpful given the barriers to legal oversight evidenced within this thesis.

### 7.3.2 Reducing barriers to litigation

In terms of addressing the second deviation from policy intent, the legal right to reasonable steps may be made more accessible for applicants in a number of ways. Firstly, Codes of Guidance, though not law, have been deemed important enough to require a justification if authorities deviate from their provisions.<sup>53</sup> Authorities are often bound by statute to have regard to guidance, as is the case for reasonable steps in the Housing (Wales) Act. The existing Code of Guidance<sup>54</sup> for the Act is extensive, and contains a list of assistance measures which may be taken as examples of reasonable steps.<sup>55</sup> The Code presents these as examples of measures which authorities 'ought to have in place as a minimum.'<sup>56</sup> Ought is not a clear direction, and the duty to have regard to guidance is interpreted widely by the courts. If the provisions of the Code were solidified in a legislative measure such as statutory instrument,

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<sup>52</sup> The Public Services Ombudsman for Wales, *Homelessness Reviewed: an open door to positive change* [2021] available at <https://www.ombudsman.wales/wp-content/uploads/2021/10/Homelessness-Reviewed-an-open-door-to-positive-change.pdf>

<sup>53</sup> *R (Munjaz) v Mersey Care National Health Service Trust* [2006] 2 AC 148; *R (on the Application of Peat and Ors) v Hyndburn Borough Council* [2011] EWHC 1739 (Admin)

<sup>54</sup> Welsh Assembly Government (n 4)

<sup>55</sup> Welsh Assembly Government (n 4), [12:13]

<sup>56</sup> *Ibid*

local authorities would be bound to follow them. To further reduce uncertainty, the requirement could be amended to read ‘must have available,’ this would likely guarantee that each authority had at least a baseline level of available resources. If the Authority failed to make one of these interventions available, and applicant felt that reasonable steps were not taken in their case, a firm duty would exist to be scrutinised by the courts.

Chapter 6 also highlighted the high threshold for unreasonableness in the context of reasonable steps in the event of a review by the courts.<sup>57</sup> In normal circumstances, this is accompanied by a low level of judicial scrutiny and a burden of proof upon the claimant. It has been argued that this threshold, and the subsequent levels of scrutiny, are adaptable in certain circumstances.<sup>58</sup> The most significant of these circumstances is the presence of a fundamental rights consideration. Domestic courts have declined to acknowledge that European human rights provisions such as the right to private life (Article 8) and fair hearing (Article 6) give rise to obligations for welfare departments.<sup>59</sup> During the consultation stage for the Housing (Wales) Act, concerns were raised that the then proposed legislation missed a valuable opportunity to promote a firm rights-based approach.<sup>60</sup> The right to housing is expressly recognised in international law,<sup>61</sup> and a greater national recognition of this would likely result in the courts ability to employ ‘anxious scrutiny’ to the decision making process. This would benefit claimants by shifting the burden to one of justification on the part of the Local Authority, and facilitate a more thorough judicial scrutiny of the merits of the contested decision. It should be noted that Welsh Government have recently committed to considering proposals regarding implementing a right to adequate housing in Wales.<sup>62</sup>

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<sup>57</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* 1 KB 223

<sup>58</sup> *Budgaycay v Secretary of State for the Home Department* [1987] AC 514

<sup>59</sup> *Morris v Newham LBC* [2002] EWHC 1262 (Admin); *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406; *Poshteh v Kensington and Chelsea RLBC* [2017] UKSC 36

<sup>60</sup> National Assembly for Wales, *Communities, Equality and Local Government Committee, Housing (Wales) Bill Consultation*, response from Dr Simon Hoffman, National Assembly for Wales [2013]

<sup>61</sup> United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, (Updated), 1996, Article 11

<sup>62</sup> Alma Economics, *The right to adequate housing in Wales: cost-benefit analysis*, Commissioned by Tai Pawb, the Chartered Institute of Housing Cymru and Shelter Cymru September 2022 available at

To improve applicant knowledge and understanding it may be beneficial to add a more comprehensive procedure for educating applicants on reasonable steps at the point of their application and at the time the reasonable steps duty ends. Documents are given to individuals which cover these elements, but they are often unlikely to be read or adequately understood.<sup>63</sup> The provision of 'easy read' versions of documentation should be made available which includes a summary of the right to reasonable steps. Again, the Public Services Ombudsman raised this issue in relation to the framework as a whole.<sup>64</sup> A verbal overview of reasonable steps and the right to legal remedy should also be undertaken alongside the provision of clear information and guidance on where legal advice and funding may be obtained. The literature suggests that, at least for vulnerable groups, obtaining legal advice appears to largely mitigate gaps in legal knowledge.<sup>65</sup> On this point, and outside of reasonable steps, an obvious recommendation would be to increase the amount of legal aid made available to welfare service users.

### 7.3.3 Limitations and further research

To address a clear limitation, more participants would be necessary in order to increase levels of generalisability of findings. The fieldwork stage of the thesis was significantly impacted by the Covid-19 pandemic, which resulted in a number of Authorities that had agreed to contribute withdrawing from the process. Of those Authorities that remained involved, the number of staff available for interviews within those departments was reduced due to the disruption of lockdowns and significant increase in demand for services. As a result of the disruption, participation was only agreed by 3 Authorities. Of these 3, only 2 had Housing Officers available to attend interviews and provide contributions. Despite this, the research

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<https://www.taipawb.org/wp-content/uploads/2022/09/Alma-Economics-Back-the-Bill-Final-Phase-2-report.pdf> accessed December 15 2022

<sup>63</sup> David Cowan and Simon Halliday, *The appeal of internal review: law, administrative justice, and the (non-) emergence of disputes*, Hart 2003

<sup>64</sup> The Public Services Ombudsman for Wales (n 56)

<sup>65</sup> Nigel J Balmer and others (n 34), p58

produced interesting and potentially consequential findings which justify the need for further investigation. Repeating the study on a larger scale would be a natural extension in this regard.

Again, considering the research scope, and again as a result of the pandemic, there are no contributions from the applicants themselves. This is a notable omission in the final thesis. Interviews with applicants were planned, but ultimately not possible due to the lockdown arrangements and the temporary last-minute changes to Local Authority practice regarding service delivery. It is unfortunate that this data could not be gathered, as research has indicated that legal awareness, knowledge, and legal consciousness may be variable, and could impact their interaction with the legislation.<sup>66</sup> Applicants to welfare services have commonly been found to be vulnerable in multiple ways. The manner in which these individuals perceive and interact with the law is an important and under-researched topic, particularly in the context of vulnerable welfare recipients and homelessness law.

Due to the focus of the thesis, there is no consideration of the impact of the internal review procedure regarding reasonable steps as an accessible legal right. The Act grants the right to request internal review<sup>67</sup> of reasonable steps provided under section 73, but it is important to note that this stage then becomes a pre-requisite for court litigation. Some academic commentary has noted the increasing prevalence of this kind of administrative review, and highlighted that little is known about the process or its' effectiveness in practice.<sup>68</sup> The Law

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<sup>66</sup> Alexy Buck, Pascoe Pleasence, and Nigel J Balmer, 'Do citizens know how to deal with legal issues? Some empirical insights' (2008) *Journal of social policy* 37 4 661; Martin Gramatikov and Robert Benjamin Porter, 'Yes, I can: Subjective legal empowerment' (2010) *Georgetown Journal of Poverty Law and Policy* 18 2 169; Roderick A Macdonald, Access to Civil Justice, in Peter Cane and Herbert Kritzer (eds) *The Oxford Handbook of Empirical Legal Research*, Oxford University Press 2012; OECD, Equal Access to Justice, Expert Roundtable Background Notes, Paris, 2015 available at <https://www.oecd.org/gov/Equal-Access-Justice-Roundtable-background-note.pdf> accessed on 27 November 2021

<sup>67</sup> Housing (Wales) Act 2014, s 85

<sup>68</sup> Simon Halliday and David Cowan, *The appeal of internal review: law, administrative justice, and the (non-) emergence of disputes* Hart Publishing 2003



Commission have committed to a comprehensive investigation of this kind of internal review at a national level, with the planned project currently in the initiation stage.<sup>69</sup>

#### 7.3.4 Concluding statement

I would like to express my gratitude to the Local Authority staff and policy experts who gave their valuable time to contribute to this research. Fieldwork was undertaken in the height of the Covid-19 pandemic, and public services were temporarily thrown into uncertainty and under unprecedented pressure. I am incredibly grateful for their continued participation, particularly given the unusual and difficult circumstances faced at that time. The insight gained from their contributions have complemented my doctrinal work, and resulted in a new understanding of reasonable steps and the prevention and early intervention policy it drives. I hope this work will go on to inform further research into improving homelessness services in Wales and beyond.

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<sup>69</sup> The Law Commission, Thirteenth Programme of Law Reform 2017 available at <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/12/13th-Programme-of-Law-Reform.pdf> accessed on 28 December 2022

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## Appendix 1: FOI request and introduction emails

### FOI regarding reviews under Housing (Wales) Act 2014

Good morning,

I am a doctoral student based at Cardiff University School of Law and Politics. I would like to request the following information under the Freedom of Information Act 2000 in relation to homelessness reviews requested by virtue of s.85 of the Housing (Wales) Act 2014. Any information you provide will contribute to an ESRC funded PhD project aimed at analysing the current Welsh homelessness policy and legislative framework.

- How many homelessness reviews have been carried out in your local authority during the financial years 2015/16, 2016/17, 2017/18, 2018/19?
- How many reviews resulted in the original decision being overturned during the financial years 2015/16, 2016/17, 2017/18, 2018/19?
- Since April 2015, how many review requests received by your authority have advanced to county court litigation?
- Of those review decisions reaching the court stage, could you please provide any more details on the case. Eg. the date of the hearing / the court where the case was heard.
- Since April 2015, how many review requests has your authority received citing failure to take reasonable steps as the reason, and how many of these resulted in a successful outcome for the claimant?

### Local Authority Introduction Email

Good morning,

Apologies if I have sent this email to you in error. If this is the case I would be grateful if you could take the time to reply with the relevant email address or contact number.

To briefly introduce myself, my name is Kevin Williams and I am currently working on my PhD project, funded by the Economic and Social Research Council, and looking at the operation of the homelessness provisions within the Housing (Wales) Act 2014. I am based at Cardiff University School of Law and Politics, and as such I am interested in the operation of the provisions given the fact that they are specifically legislative in nature. A key focus of the project is the use of 'reasonable steps' in the legislative language. As you may be aware, the word 'reasonable' is a commonly used term throughout all legal practice areas, but 'reasonable steps' specifically is rare, and used almost exclusively within Welsh legislation. To date, there has been no analysis of the practical effect this terminology may have for service delivery in this context.

At present, I am looking to make contact and speak to senior members of staff within various Housing Solutions departments across Wales to firstly gather professional input into the actual practicalities of the study, especially in light of any new restrictions or procedures adopted by housing departments due to the current Covid 19 pandemic. Secondly, I would like to take the opportunity of an informal meeting to explain the aims of the study in more detail, and discuss your possible willingness to participate in the project once the data gathering stage begins.

Is this something that you could possibly help with, and could you spare some time in the future for a short virtual meeting or telephone call?

Many thanks for your time.

Best regards,

Kevin Williams



## Appendix 2: Participant information sheet and consent forms

### **PARTICIPANT INFORMATION SHEET**

#### **‘Reasonable Steps’ in Homelessness Prevention**

You are being invited to take part in a research project. Before you decide whether or not to take part, it is important for you to understand why the research is being undertaken and what it will involve. Please take time to read the following information carefully and discuss it with others, if you wish.

Thank you for reading this.

#### **What is the purpose of this research project?**

This research is being conducted as part of a PhD project under the supervision of Dr Rachel Cahill O’Callaghan of Cardiff University School of Law and Politics, and Dr Peter Mackie of the School of Geography and Planning. The Housing (Wales) Act 2014 includes a legal requirement that ‘reasonable steps’ be taken in the relationship between local authority departments providing homelessness assistance, and those individuals who apply for that assistance. The legislation is relatively new, and we know very little about how it is applied. This project aims to better understand how reasonable steps works in practice.

#### **Why have I been invited to take part?**

You have been invited to participate because you are, or have been, involved in the use of the legislation, and been party to the use of the term ‘reasonable steps’ in practice.

#### **Do I have to take part?**

No, your participation in this research project is entirely voluntary and it is up to you to decide whether or not to take part. If you decide to take part, we will discuss the research project with you to address any queries you may have, and ask you to sign a consent form. If you decide not to take part, you do not have to explain your reasons and it will not affect your legal rights. If you are, or have been, an applicant for assistance, your participation does not in any way affect your relationship with your local authority, or your status within any on going assistance application.

You are free to withdraw your consent to participate in the research project at any time, without giving a reason, even after signing the consent form. If you do wish to withdraw consent, you can do so by contacting myself or the School Ethics Committee at the email addresses provided below. In withdrawing consent, please be aware that to do so fully, this should be requested before the interview has concluded. After this time, it will not be possible to withdraw anonymised data where

identifiers have been irreversibly removed during the course of the research project. If you withdraw during the interview itself, the data you have provided to that point will be immediately destroyed.

### **What will taking part involve?**

You will be invited to participate in a short interview (30-40 minutes). You will be asked a series of questions that broadly cover your experiences and perceptions of the use of ‘reasonable steps’ in practice. To aid the researcher in organising findings, you will be asked whether or not you are comfortable with the interview session being recorded. Again, if you do not consent to this element, you may, of course, refuse without explanation.

### **Will I be paid for taking part?**

No. You should understand that any data you provide would be the result of a gesture of good will.

### **What are the possible benefits of taking part?**

There will be no direct advantages or benefits to you from taking part, but your contribution will provide an important contribution to an area where little is known, and help us better understand the effect that the legal provision of ‘reasonable steps’ is currently having on homelessness prevention.

### **What are the possible risks of taking part?**

There are no specific disadvantages attached to your participation, and any foreseeable risks are primarily linked to identifying you personally from your responses to questions, or your personal data being obtained by a third party. Issues of confidentiality are discussed below, along with actions being taken to mitigate the risks attached to this element.

### **Will my taking part in this research project be kept confidential?**

All information collected from (or about) you during the research project will be kept confidential and any personal information you provide will be managed in accordance with data protection legislation. Please see ‘What will happen to my Personal Data?’ (below) for further information.

### **What will happen to my Personal Data?**

In accordance with Article 6 of GDPR, your consent, along with necessity in carrying out a ‘public task,’ will form the lawful basis of the processing of your data. Interview recordings (if you have agreed to this step) and researcher notes will be stored electronically on secure University servers. No interview data (or personal details) will be held on personal devices. Within two working days of your participation, notes and interview recordings will be anonymised, transcribed, and originals erased. Information such as your name, location, date of birth, and contact details will not form part of the subsequent publications attached to the research. For the purposes of reporting your

responses from interviews, you will be allocated an anonymous individual project identifier. Although there may be a necessity to report your exact responses verbatim in the form of a quotation, every effort will be made to remove any personal identifiers that may have been included in your interview responses to mitigate the risk of indirect identification.

After two working days, therefore, the researcher will have anonymised all the personal data collected from or about you in connection with this research project, with the exception of your consent form. In accordance with S2.9 of Cardiff University's Research Records Retention Schedule, your consent form will be retained for a period of five years after the project's closure, and may be accessed by members of the research team and, where necessary, by members of the University's governance and audit teams or by regulatory authorities. Anonymised information will also be kept for the same period, but may be published in support of the research project and retained indefinitely, where it is likely to have continuing value for research purposes. Anonymised data may be shared with the UK Data Service, at the request of the funding body Economic and Social Research Council).

Cardiff University is the Data Controller and is committed to respecting and protecting your personal data in accordance with your expectations and Data Protection legislation. Further information about Data Protection, including:

- your rights
- the legal basis under which Cardiff University processes your personal data for research
- Cardiff University's Data Protection Policy
- how to contact the Cardiff University Data Protection Officer
- how to contact the Information Commissioner's Office

may be found at <https://www.cardiff.ac.uk/public-information/policies-and-procedures/data-protection>

If you cannot access these electronically for any reason, physical copies of the documents can be provided on request.

If you contribute, but subsequently choose to withdraw your consent, your contribution will be electronically erased, or (for example, in the case of a physically signed consent form) destroyed. Please note that it will not be possible to withdraw any anonymised data where identifiers have been irreversibly removed during the course of a research project, from the point at which it has been anonymised.

### **What happens to the data at the end of the research project?**

The information you provide will primarily be used as part of a PhD thesis, due to be submitted for consideration in late 2021. The findings arising from the PhD project may inform, and be included in, publications within academic journals and presentations at conferences. Research participants will not be identified in the PhD, or any subsequent report, publication or presentation.

### **What will happen to the results of the research project?**

The PhD is planned for final submission in late 2021. It is my intention to publish further using findings from this research, which may take the form of academic journal articles, books, book chapters, reports, and presented findings at conferences. Research participants will not be identified by name in any report, publication or presentation. Though your participation is anonymous, in an attempt to mitigate the danger of 'jigsaw identification,' redacted data will extend to any information that may reasonably lead to your identification within disseminated material.

### **What if there is a problem?**

If you wish to withdraw your consent for your participation, you can do so by contacting me on the details below. If you wish to complain, or have grounds for concerns about any aspect of the manner in which you have been approached or treated during the course of this research, please contact Dr Rachel Cahill O'Callaghan in the first instance using the details below. If your complaint is not managed to your satisfaction, please contact the Chair of the School ethics committee, Dr Roxanna Dehaghani, at LAWPL-Research@cardiff.ac.uk.

If you are harmed by taking part in this research project, there are no special compensation arrangements. If you are harmed due to someone's negligence, you may have grounds for legal action, but you may have to pay for it.

### **Who is organising and funding this research project?**

The research is organised by Kevin Williams, PhD candidate in Cardiff University School of Law and Politics. The project is supervised by Dr Rachel Cahill O'Callaghan in the School of Law and Politics, and Dr Peter Mackie in the School of Geography and Planning. The research is currently funded by the Economic and Social Research Council.

### **Who has reviewed this research project?**

This research project has been reviewed and given a favourable opinion by the Law and Politics School Research Ethics Committee, Cardiff University. The project was awarded ethical approval in January 2021 with the reference number **SREC/091220/02**.

### **Further information and contact details**

Should you have any questions relating to this research project, you may contact us during normal working hours:

Kevin Williams : [williamsk65@cardiff.ac.uk](mailto:williamsk65@cardiff.ac.uk)



**Thank you for considering to take part in this research project. If you decide to participate, you will be given a copy of the Participant Information Sheet and a signed consent form to keep for your records.**

## CONSENT FORM

Title of research project: **'Reasonable Steps' in Homelessness Prevention**

SREC reference and committee: **SREC/091220/02**

Name of Chief/Principal Investigator: Dr Rachel Cahill O'Callaghan [cahill-ocallaghanr@cardiff.ac.uk]

**Please  
initial box**

I confirm that I have read the information sheet provided to me for the above research project.	
I confirm that I have understood the information sheet provided to me for the above research project and that I have had the opportunity to ask questions and that these have been answered satisfactorily.	
I understand that my participation is voluntary and I am free to stop participating/withdraw consent at any point up until the conclusion of the interview, without giving a reason and without any adverse consequences.	
I consent to the processing of my personal information in the form of interview data for the purposes explained to me. I understand that such information will be held in accordance with all applicable data protection legislation and in strict confidence, unless disclosure is required by law or professional obligation.	
I understand who will have access to the personal information provided, how the data will be stored and what will happen to the data at the end of the research project.	
I understand that after the research project, anonymised data may be made publicly available via a data repository and may be used for purposes not related to this research project. I understand that it will not be possible to identify me from this data that is seen and used by other researchers, for ethically approved research projects, on the understanding that confidentiality will be maintained.  In some cases, archived data can be identifiable based on your statements or position (through, for example, jigsaw identification). I understand that whilst every effort will be made to ensure my anonymity, I may be identified because of, for example, my statements or position.	
I consent to being audio recorded/ video recorded for the purposes of the research project and I understand how it will be used in the research.	

I understand that anonymised excerpts and/or verbatim quotes from my interview may be used as part of the research publication. I understand that the researcher will take reasonable steps to minimise the risk of my being identified from anonymised excerpts.	
I understand how the findings and results of the research project will be written up and published.	
I agree to take part in this research project.	

\_\_\_\_\_

Name of participant (print)                      Date                      Signature

Name of person taking consent                      Date                      Signature  
(print)

\_\_\_\_\_

Role of person taking consent  
(print)

**THANK YOU FOR PARTICIPATING IN OUR RESEARCH**  
**YOU WILL BE GIVEN A COPY OF THIS CONSENT FORM TO KEEP**

## Remote Interview Participant Information / Consent

**Interviewee Name :**

**Date :**

**Time :**

The following script was read to the participant: -

My name is Kevin Williams, and I am a PhD student with Cardiff University School of Law and Politics. I would like to invite you to participate in a research project for my thesis, entitled “Reasonable Steps Towards Homelessness Prevention.” The project is currently funded by the Economic and Social Research Council. I am not affiliated with any local authority or homelessness assistance provider.

The Housing (Wales) Act 2014 includes a legal requirement that ‘reasonable steps’ be taken in the relationship between local authority departments providing homelessness assistance, and those individuals who apply for that assistance. The legislation is relatively new, and little is known about its’ day-to-day use. This project, therefore, aims to better understand the ‘real world’ workings of the legal term ‘reasonable steps.’ The thesis will be submitted in late 2021, and findings may inform future publications in academic journals and conference presentations.

Your participation in the project is entirely voluntary and you may withdraw your participation and inclusion in the project at any time by contacting me using the details provided below. Your participation, or refusal to participate, will in no way affect your relationship with the local authority in which you work, or in the case of service users, will in no way impact the status of your assistance application. If you choose to withdraw your consent, please be aware that it will not be possible to retract your contributions following the conclusion of the interview, as your data will be anonymised and you will not be identifiable. If you choose to withdraw consent during the interview itself, your data will be destroyed immediately. Your contributions will be made as a gesture of good will, and although you will not personally benefit from participation, the information you provide will be an important addition to an under-researched area that directly impacts homelessness prevention in Wales.

I would like to invite you to take part in a short interview (around 30-40 minutes) to discuss your experiences and perceptions having engaged with the legislation. Discussion will centre on the impact that legally provided ‘reasonable steps’ has on service delivery, rights for applicants, and responsibilities for local authority staff. In discussing your experiences under the legislation, I would

like to reiterate that you do not need to discuss anything that you are not 100% comfortable with, and you may completely withdraw from the process at any time without explanation or penalty.

Your personal details will remain completely confidential. Any recordings (if you consent to this) and subsequent documentation (such as transcriptions) will be held on a password protected Cardiff University secure server. I will not store any information on any personal device.

Information provided will be wholly anonymised before inclusion in the final PhD thesis and any subsequent academic publications or conference presentations. This includes your identity, as well as any details of your circumstances that may reasonably lead to you, or your respective local authority, being identified by name.

If you have any questions regarding the research, I can be contacted at [williamsk65@cardiff.ac.uk](mailto:williamsk65@cardiff.ac.uk).

If you have concerns about the way in which the research was conducted, you may contact the Chair of the School of Law and Politics Research Ethics Committee at [LAWPL-Research@cardiff.ac.uk](mailto:LAWPL-Research@cardiff.ac.uk).

### **Consent Statement**

Participant has read the Participant Information document, and had the opportunity to ask questions on its' content.

Participant understands who I am and what is expected of them.

Participant understands the nature and aims of the project.

Participant is aware that participation is voluntary and consent may be withdrawn at any time without penalty.

Participant is aware that participation/non participation holds no benefit/detriment to them personally.

Participant consents to recording of the interview.

Participant is satisfied that details will remain confidential.

Participant has relevant contact details to enquire/raise concerns regarding the research.

Participant is happy to proceed with the interview.

Signed by researcher:

Date:

## Appendix 3: Interview schedules

### Policy Reunion Themes and Questions

#### **Reasonable steps – Overall intention**

- How was the specific term reasonable steps chosen?
- Why was the specific term reasonable steps chosen? What was it trying to achieve?
- Why was it deemed important to achieve these objectives? What problem would ‘reasonable steps’ solve?
- What were seen to be the key advantages of using law to achieve these objectives?

#### **Reasonable steps – Meaning (discussion topics)**

- The meaning of reasonable steps when drafting the legislation. E.g. were you considering how much assistance a local authority should reasonably provide, or how much support an applicant should reasonably expect?
- Any uncertainty associated with the word reasonable, both in terms of legal rights and legal obligations?
- The word reasonable is far less uncertain in law, how was the legal definition of reasonable steps considered (e.g., what legal guidance informed the drafting process?)

#### **Reasonable steps – Practical application (discussion)**

- Any conscious effort to grant maximum discretion to local authorities / maximise assistance for applicants.
- Any measures to be taken to disseminate the key aspects of the legislation (for both local authorities and applicants).
- Any concerns during drafting that applicants wouldn’t engage, or local authorities would be over-burdened. Were any measures to address this discussed?
- The emphasis attached to the specific elements of the statutory guidance, and its importance to the framework.

#### **Reasonable steps – Legal challenge**

- Why do you think reasonable steps is not being challenged?
- Did anyone foresee that it wouldn’t be challenged?
- Was there an intention that legal challenge (internal review/case law) would inform local authorities on their application of reasonable steps?
- If the legislation followed a period of prevention based policymaking, why is RS in prevention not open to internal review / county court?

## Department Manager Schedule

A preliminary interview with a senior member of local authority staff responsible for the management of the relevant Housing Options department will be carried out. Key themes of investigation will include background information on department structure, approach to (and monitoring of) 'reasonable steps,' as well explicit (and hidden) controls on the discretionary element of the implementation of 'reasonable steps'. Each element and its' relevance is explained in turn below, and is followed by the relevant proposed questions relating to that theme.

### Interpretation of 'Reasonable Steps'

These opening questions focus directly on the broad research aims, asking managers what they perceive reasonable steps to mean, and whether the provisions being prescribed in challengeable legislation impacts service delivery.

What do you think 'reasonable steps' means?

- What is it trying to achieve?

Can you describe a typical case and the reasonable steps you might prescribe?

Taking this situation, what 'reasonable steps' would you prescribe that you feel would meet your obligation under the legislation?

### Challenge of reasonable steps

You can be legally challenged for the way in which you formulate and implement reasonable steps under the legislation. What impact does this have on the way you devise and deliver reasonable steps?

- Is this a concern? Do you consider it when implementing the legislation?
- Do you actively communicate with staff regarding the prospect of statutory challenges?
- Do you have any procedures designed to limit the number of statutory challenges you receive?

Despite this statutory right, the legislative challenge of reasonable steps very rarely happens. Do you know why?

### Department resources

This section will broadly investigate structural elements specific to the local authority, which may impact the application of 'reasonable steps.' Though the influencing factors traditionally associated with front line decision-making are arguably more 'individual,' there is a high probability that, in this context, situational elements may significantly affect application of the legislative provisions. Exploring these elements will allow for degrees of variation to emerge between the environments

within which each local authority operates. Along with information on available resources, staff levels, ranges of experience, and 'busyness' of the department, themes to explore under this section will include key partnerships with external service providers (such as debt management agencies or private rental agents). It may be that these factors reduce or confine the choice of resources used when formulating reasonable steps plans with applicants. Resources are an obvious area of variability between authorities, and key working relationships with external assistance or advice providers may be a contributory factor to the use of certain resources over others.

Could you briefly outline the structure of the housing department?

- How many housing officers?
- What is the general level of experience?
- How many cases does each officer manage at one time?
- Do any members of staff have particular areas of expertise?
- Is there a high/low turnover of staff?

Could you give an overall picture of the resources available to the department when formulating a reasonable steps plan?

- What resources (or possible 'steps') are available, and to what extent are they available?

Do you feel that you have sufficient available resources to provide reasonable steps?

Can you discuss any collaborative relationships you, as a local authority, currently have with local external agencies that can provide assistance to applicants?

- This may include agencies to which referrals are regularly made, or from which regular advice is sought when dealing with caseloads.

### Influences on the use of discretion

This section will explore the extent to which management and wider organisational procedure may impact front-line application of 'reasonable steps,' and the degree of variance in this impact between local authorities, by focussing on key factors identified within the literature. In addition to providing background information on these elements, discussions here will be important in informing further interviews with housing officers. As discussed within the literature review, the extent to which management and organisational constraints affect front-line use of discretion is contested, and appears confused within Lipsky's framework. It also remains an unexplored factor within the context of the Housing (Wales) Act, and 'reasonable steps' specifically. In a modern housing department addressing a multi-faceted and complex homelessness problem, with attached resource constraints and external pressures seeking to meet clear policy guidance, the impact of organisational monitoring and control on front-line staff may be significant. Key themes to investigate here will include monitoring of reasonable steps, resource levels, and general performance. Also, the dissemination of shared good practice, and the general awareness of on going challenges to the use of reasonable steps within the department may be relevant. Staff may, to a varying degree, feel



subject to excessive observation, or fear the repercussions of what management deem to be underperformance. Excessive monitoring may restrict (or drive) the use of discretion at the front line, and some staff may be more willing or able to adapt working practices to meet changes in the working environment.

How much discretion do housing officers have when formulating reasonable steps?

Are there any specific resources that you need to authorise the use of, before they are used in a reasonable steps plan?

How do you monitor each officer's performance in implementing reasonable steps?

- Do you monitor their use of resources?
- Do you monitor their rate of successful interventions?

Do you ask that housing officers feed back (in terms of the successful use of resources in reasonable steps) to either yourself or the department as a whole, in the interest of learning from collective experience?

- If so, how often does this occur?
- If not through official procedure, then to what extent do you think this may happen 'informally'?

Are the outcomes from applicant appeals discussed with either the officer in question (who handles the case at first instance), or the department as a whole?

- If so, how is this done?
- If so, how frequently does this occur?
- If not officially, then to what extent do you think this may happen 'informally'?

## Housing Officer Schedule

Interviews with housing officers, as the front-line decision-makers, will seek to not only investigate their perceptions of reasonable steps, but also additional potential influences on their day-to-day application of the legislation. Contributions to disparity in the use of the legislation may include; variation in the interpretation of 'reasonable steps,' variation in 'reasonable steps' taken in any given situation, and variance in decision-making influences. Potential front-line influences on decision-making will be explored, along with the practicalities of the formulation of reasonable steps plans.

### Interpretation of 'Reasonable Steps'

These opening questions focus directly on the broad research aims, asking Officers what they perceive reasonable steps to mean, and whether the provisions being prescribed in challengeable legislation impacts service delivery.

What do you think 'reasonable steps' means?

- What is it trying to achieve?

Can you describe a typical case and the reasonable steps you might prescribe?

Taking this situation, what 'reasonable steps' would you prescribe that you feel would meet your obligation under the legislation?

### Challenge of reasonable steps

You can be legally challenged for the way in which you formulate and implement reasonable steps under the legislation. What impact does this have on the way you devise and deliver reasonable steps?

- Is this a concern? Do you consider it when implementing the legislation?

Despite this statutory right, the legislative challenge of reasonable steps very rarely happens. Do you know why?

### Application of Reasonable Steps

This section will investigate the day-to-day process of decision-making from a procedural perspective. Participants will be broadly asked to discuss resource allocation in response to applicant needs. This will involve exploring what resources are available, and the given circumstances in which these resources are deployed. Formulation of reasonable steps plans occurs on each application, with assistance measures provided tailored to each individual, leaving potential influences on the allocation of resources highly consequential for applicants. Questions here will also explore the

amount of discretion officers feel they have in the application of reasonable steps, to provide a comparison to the manager's perceptions.

Can you describe the process involved in the formulation of the reasonable steps plan?

- How/when are the provisions explained to applicants?
- Are the steps explained? Are they 'negotiated'?
- Are the steps you prescribe in a given case ever subject to change, and if so, what is the procedure for this?

The phrase 'reasonable steps' intentionally allows a high degree of flexibility when prescribing assistance measures. How much freedom do you feel you have when deciding on reasonable steps for applicants?

- I.e. – How much discretion do you feel you have?

When choosing interventions as part of a reasonable steps plan, what factors do you most commonly consider?

- Resource levels, including time?
- Applicant requirements?
- Current caseload?
- Likelihood of success based on past experience?
- Do you ever discuss these factors with the applicant?
- Do you ever discuss these factors with other staff/management

### Influences on the use of discretion

'Individual' level factors identified within the literature may significantly impact the front-line application of reasonable steps. Here, participants will be asked to discuss elements commonly discussed within decision-making literature, such as levels of experience, response to monitoring, and willingness/ability to adapt in response to training and continuous good practice feedback. All of these elements are subject to a wide degree of variability, and may to changeable degrees, have an effect on the application of the legislative provisions in the 'real world.' Less experienced officers may approach the work differently, and be more receptive to management control, or reactive to the legal obligations. They may also be less skilled in assessing cases, or managing their time and department resources. Evidence of a willingness or ability to adapt to changing working conditions and taking on board good practice considerations is also important, as the application of the legislative provisions adapts to changes in working conditions or the 'structural' environment. Another element is the officer's knowledge of challenges to their decisions; they may approach their work against the backdrop of a legislative provision that provides for future scrutiny of their decision-making. To cross-reference the information gathered from management on monitoring, housing officers will be asked about how their performance is measured, and how these measures may impact the discretionary use of resources.

### *Length of service and background experience*

*[To maintain a logical structure in practice, this question on background and length of service will be asked at the opening of the interview. I have included it here on the schedule however, as the variability in responses to these factors have been specifically demonstrated to influence the use of discretion at the front-line]*

Can you briefly discuss your background in homelessness assistance?

- How long have you been a housing officer?
- Have you worked in homelessness for any other authority/organisation?
- Would you say you were specialised in any one specific area of homelessness assistance?

### *Management control/resource constraints*

What do you feel are, or would be, the most significant barriers to you meeting the level of assistance required by the reasonable steps provisions?

How often, during the average day/week, do you need to liaise with management or senior staff regarding the proposed assistance measures for applicants?

- If often, are there particular resources (steps) you need to get authorisation to use?
- How easy is it to obtain authorisation if required?

With a busy caseload, how have you learned to maximise your time?

- How big a factor is restricted time in daily workload?
- Do they use any 'tricks' (shortcuts)?
- If so, how often?
- If not, are practices 'restricted' in any way to limit flexibility?

### Perception of applicants

The relatively small amount of street-level bureaucracy literature published in the context of homelessness highlights preconceived perceptions of (un)deserving applicants as a significant element in the front-line application of rules and procedures. Again, variance in these perceptions may contribute to a disparity in the application of legislative provisions. Examples highlighted within the literature include forming perceptions of applicant 'vulnerability' based on past experience, and tailoring the extent of support in relation to perceived 'deservedness' of assistance. Another factor may be to what extent applicants are aware of their rights under the legislation, and the perception of their willingness or ability to exercise them. As perceptions of applicant vulnerability will be evident from responses to the vignettes above, these questions will focus on the latter.

Based on your practical experience, what characteristics identified in applicants can influence the formulation of their reasonable steps plan?

- Do some appear more willing to engage in the process?

Do applicants generally have a good knowledge of the reasonable steps provisions / statutory right to appeal reasonable steps?

- If not, do you explain it?
- Do you feel it is your duty to explain it?

Once applicants are aware of the reasonable steps legislation, do their expectations commonly align with your interpretation of the duty?

- Does this result in a 'negotiation'?
- Do you 'manage their expectations'? Do you feel obliged to do this?