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The *Welfare Reform Bill*

Bill 208 of 2005-06

The *Welfare Reform Bill* was presented on 4 July 2006 and the Second Reading debate is scheduled for 24 July. The Bill makes provision for a new benefit – the Employment and Support Allowance (ESA) – to replace incapacity benefits from 2008. Part 2 will facilitate the national roll-out of a Local Housing Allowance (LHA) for private tenants; the LHA has been piloted in several authorities since 2003. Other measures will allow a pilot scheme to be established under which Housing Benefit sanctions will apply to people evicted for anti-social behaviour who refuse to engage in a rehabilitation programme. Further provisions in the Bill relate to the administration of social security, including measures to enable the sharing of social security information between the Department for Work and Pensions and local authorities, new powers for local authorities to investigate and prosecute fraud involving national benefits, and an extension of the 'two strikes and you're out' rules under which benefits can be withdrawn from people convicted of repeat benefit fraud. There are also minor amendments to legislation concerning bereavement benefits, Disability Living Allowance, the Social Fund, Vaccine Damage Payments and compensation for pneumoconiosis and related conditions.

Steven Kennedy and Wendy Wilson

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Summary of main points

The *Welfare Reform Bill* was presented on 4 July 2006 and the Second Reading debate is scheduled for 24 July. The Bill makes provision for a new benefit – the Employment and Support Allowance (ESA) – to replace incapacity benefits from 2008. The Housing Benefit and Council Tax provisions will facilitate the national roll-out of a simpler way of calculating the housing costs that Housing Benefit will meet for tenants living in the deregulated private rented sector (i.e. the local housing allowance, LHA). Measures will allow for a pilot scheme to be established using Housing Benefit as a sanction against people who have been evicted for anti-social behaviour and who refuse to engage in a rehabilitation programme. The Secretary of State will gain a power to prescribe that payments of Housing Benefit should be made direct to claimants living in the social housing sector in certain circumstances. Further provisions in the Bill relate to the administration of social security, including measures to enable the sharing of social security information between the Department for Work and Pensions and local authorities, new powers for local authorities to investigate and prosecute fraud involving national benefits, and an extension of the 'two strikes and you're out' rules under which benefits can be withdrawn from people convicted of repeat benefit fraud. There are also minor amendments to legislation concerning bereavement benefits, Disability Living Allowance, the Social Fund, Vaccine Damage Payments and compensation for pneumoconiosis and related conditions.

In October 2003 a series of pilot projects – Pathways to Work – was launched in parts of Great Britain to test a range of measures to help people claiming incapacity benefits return to work. Further major changes to incapacity benefits were announced in the DWP *Five Year Strategy* published in February 2005, after months of speculation in the press about the Government's intentions. The May 2005 Queen's Speech announced that a *Welfare Reform Bill* would be introduced to implement the proposals, following a Green Paper expected that Autumn. In the event the Green Paper, *A new deal for welfare: Empowering people to work*, was not published until January 2006. The Government published a report on the consultation on 19 June, together with a response to the Work and Pensions Committee's report on *Incapacity Benefits and Pathways to Work*, which had been published on 6 May. A new benefit structure was only one of the measures in the Green Paper aimed at ill or disabled people. Other proposals included measures to improve workplace health and the management of sickness absence, initiatives aimed at encouraging GPs to support and advise their patients on their fitness to work, piloting employment advisers in GP surgeries, and reform of Statutory Sick Pay. It also announced a 'Cities Strategy' under which consortia are to be invited to bid for funding to tackle labour market disadvantage in areas with high numbers of workless people.

The Employment and Support Allowance (ESA) incorporates both a contributory allowance and a means-tested allowance. A person may be entitled to ESA by satisfying either National Insurance contribution conditions (similar to those currently for Incapacity Benefit) or a means test (similar to Income Support), and being assessed as having a capability for work that is so limited by their physical or mental condition that it is not reasonable to require them to work. This 'limited capability for work' test will take place during an initial 13-week 'assessment phase'. A further test will also be conducted during this period to determine whether their capability is limited to the extent that it is not reasonable for them to engage in 'work-related activity'. The decisions will be based, as now, on medical evidence from the

claimant and their GP and from DWP doctors, which may be documentary evidence, or evidence gathered at a medical examination. Details of the 'limited capability for work' and 'limited capability for work-related activity' tests are to be specified in regulations. The Department has set up working groups and consultation groups to advise on the content of the new tests. These are expected to report to Ministers in September 2006.

Following the 'assessment phase', claimants will become entitled to either the 'support component' or the 'work-related activity component', depending on whether they are judged as having limited capability for work-related activity. Those judged to have limited capability for work-related activity will not be required to engage in such activity and should receive a higher rate of benefit than the current long-term rate of Incapacity Benefit. The Department envisages that the 'support component' group will be much smaller than the existing group exempt from the Personal Capability Assessment for incapacity benefits.

Those judged not to have limited capability for work-related activity will be subject to 'work-related conditionality'. This means that access to the higher rate of benefit may be conditional on participation in work-focused health-related assessments, work-focused interviews, agreeing an action plan, or undertaking work-related activity such as work trials or training. The Green Paper envisaged that conditionality would initially only extend to taking part in work-focused interviews – the Bill would allow conditionality to be extended in time to include actual participation in work-related activity.

Failure to undertake such assessments, interviews or activities as required, without 'good cause', may result in benefit being reduced ('sanctioned'). For claimants deemed not to be fulfilling their responsibilities, their benefit would be reduced in a series of 'slices', ultimately to a level equivalent to the basic Jobseeker's Allowance.

To date, few organisations have responded in detail to the provisions in the Bill, but in responses to the Green Paper and to the Work and Pensions Committee inquiry many organisations, while supporting the general principle of providing greater support to people who can move into work, expressed concerns about increased compulsion and the imposition of benefit sanctions. There was strong opposition to the proposed two tier benefit structure, and doubts have been voiced about whether a test can, in fact, be devised to distinguish fairly between those for whom work-related activity is appropriate and those for whom it would be unreasonable. Questions have also been raised about whether the Department is committing sufficient resources to the programme and to the national rollout of Pathways to Work, and about whether there are enough job vacancies in the relevant parts of the country. It has also been argued that greater attention needs to be paid to employer attitudes and to the need to provide greater support for people with health conditions and disabilities to remain in work.

The Green Paper included controversial proposals for greater involvement of voluntary-sector and private providers in the national rollout of Pathways to Work. The Bill makes provision for allowing private and voluntary sector contractors to deliver certain aspects of the new ESA regime, and to make decisions regarding sanctions. In response to the Green Paper, some organisations voiced concerns about the involvement of outside contractors in the delivery of the Government's welfare reforms, particularly given the proposal to use outcome-based payments to 'incentivise' providers.

Part 2 of the Bill concerns Housing Benefit (HB) and Council Tax Benefit (CTB). The Government has been piloting a simpler way of calculating the housing costs that HB will meet for tenants living in the deregulated private rented sector (i.e. the local housing allowance, LHA) in several local authority areas since November 2003. The LHA bases housing support payments on a system of standard maximum allowances, varying according to the size of the household and location of the property in which they live. The LHA approach removes the need for Rent Officers to consider whether the eligible rent of each individual claimant (with some exceptions) is appropriate for the particular area or property and the claimant's particular needs. Additionally, the LHA pilot authorities pay any benefit due to the tenant rather than to the landlord in most cases.

In the January 2006 Green Paper the Government said that it intended to use the LHA approach for private sector tenants nationally. After receiving responses to the Green Paper the Government reiterated its intention to rollout the LHA for private sector tenants with amendments to certain aspects of the scheme. Initially it is intended that the rollout will apply only to new claimants; the scheme will be reviewed after two years and a decision will be taken at that point as to whether existing HB claimants should be transferred onto the LHA.

The Pathfinder authorities have amassed a great deal of evidence on the progress of the LHA pilot schemes. It is generally accepted that the pilot schemes have worked well; there is support amongst local authorities and other housing bodies for a fairer and more transparent HB that also supports financial inclusion and tenant choice. Private landlords are less convinced by the scheme, particularly the requirement that HB is paid direct to tenants in most cases.

The Government has decided not to take forward legislation to introduce the LHA for social tenants "at this stage" but the Bill does provide a power for the Secretary of State to prescribe that payments of Housing Benefit should be made direct to claimants living in the social housing sector in certain circumstances. This is a significant change as local authorities (who also administer HB) do not pay HB to their own tenants; instead they rebate or offset it against the tenant's rent liability. The aim behind this provision is to encourage social tenants to take greater personal responsibility for managing their own rent payments.

The Bill provides for a further pilot scheme to be established that would involve using the withdrawal of HB as a sanction against households who have been evicted for anti-social behaviour (ASB) and who refuse to engage in a rehabilitation programme. Previous proposals to use HB as a sanction against ASB have met with significant resistance, particularly from social landlords, on the grounds that reducing or removing entitlement to HB would penalise them by increasing rent arrears and reducing their revenue – with the side effect that this would have on the provision of other services. It is accepted that the Bill's provisions would place less of a burden on landlords than previous proposals but there are still concerns about whether this is an appropriate measure given that many of the households affected may contain children or vulnerable adults who may end up as homeless.

Other HB/CTB measures would provide for a simpler method of making extended payments of benefit to people who take up work; extend the information available to Rent Officers when carrying out their HB functions; extend the information supplied by Rent Officers to the Secretary of State; and provide for greater flexibility for the Secretary of State in respect of

the range of reports that could be used to trigger the issue of directions requiring local authorities to improve their administration of HB.

At the time of writing there has been little comment on the provisions in Parts 3 and 4 of the Bill relating to social security administration and miscellaneous changes respectively.

Most of the measures in the Bill extend to Great Britain; the *Explanatory Notes* indicate the exceptions. It is intended that a Northern Ireland Welfare Reform Order, containing provisions corresponding to those in the Bill, will be made.

CONTENTS

I Part 1: Replacement of incapacity benefits

A. The current framework

1. Overview

The current system of financial support for people who find themselves unable to work because of illness of disability is complicated. Most employees who are unable to work will be entitled to **Statutory Sick Pay (SSP)**, a flat rate benefit paid by employers for a maximum of 28 weeks. If the person is still incapable of work after 28 weeks they may claim **Incapacity Benefit**, provided they have paid or been credited with sufficient National Insurance contributions. If the person has insufficient National Insurance contributions they may instead be able to claim means-tested **Income Support**. People may also be able to get Income Support to top-up their Incapacity Benefit if they have no other income.

Incapacity Benefit and/or Income Support may also be paid in the first 28 weeks if the person is not entitled to SSP.

A fourth, non-contributory, benefit exists: **Severe Disablement Allowance (SDA)**. SDA was available to people who were at least 80 per cent disabled, or whose incapacity began before they reached the age of 20. SDA was abolished for new claims after April 2001, but around 280,000 existing recipients continue to receive it. Most of those still in receipt of SDA also receive an Income Support top-up.

For the first 28 weeks, incapacity for work is determined by the **Own Occupation Test**. This is a test which looks at whether ill health or disability stops a person from doing their normal job. A certificate from a medical practitioner (usually the person's own General Practitioner) is normally sufficient to satisfy the test. After a person has been incapable of work for 28 weeks they are required to satisfy a different test, the **Personal Capability Assessment (PCA)**. This test looks beyond ability to perform the normal occupation to look at the extent to which a person's condition affects their ability to do a range of everyday work-related activities.

People who are incapable of work may also claim **Disability Living Allowance (DLA)** if they have additional care and/or mobility needs as a result of disability. DLA is non-means-tested, non-contributory and non-taxable. However, a person does not have to be incapable of work to be entitled to DLA.

2. The benefits in detail

a. Statutory Sick Pay

Statutory Sick Pay (SSP) is a flat rate benefit (currently £70.05 a week) paid by employers to employees who are sick and unable to work. It is paid regardless of any other income a person might have and is not dependent upon them having paid National Insurance contributions. SSP is treated like any other earnings for tax purposes. Even though SSP is administered by employers through the payroll, it is a state benefit and is quite separate from any sick pay entitlement an employee might be contractually entitled to. Many employers pay occupational sick pay on top of SSP.

To receive SSP a person must:

- be aged between 16 and 65;
- be an employee;
- earn at least the lower threshold which makes a person liable for National Insurance contributions (£84 a week for the tax year 2006-07);
- have been off work due to sickness for at least four days; and
- not be on strike.

Those not entitled to SSP will therefore include the self-employed, employed earners earning less than £84 a week, and people who have only recently become unemployed or those whose contracts ended while they were sick. Some people in these situations may however be able to claim Incapacity Benefit from the outset. Those who do receive SSP may transfer to Incapacity Benefit if they are still incapable of work after 28 weeks.

b. Incapacity Benefit

Incapacity Benefit (IB) was introduced in April 1995. There are three rates of IB which vary depending on how long the person has spent on the benefit, adding in any time spent on SSP:

- the short-term lower rate (currently £59.20 a week) for the first 28 weeks of incapacity
- the short-term higher rate (currently £70.05 a week) from 29 to 52 weeks of incapacity
- the long-term rate (currently £78.50 a week) after 52 weeks

The rate of long-term IB is higher for people incapacitated at younger ages (special additions are payable to people who became incapable of work before they reached 35, or when they were 35-44).

Further additions can be payable where the person claiming has an adult dependant. People who were getting Incapacity Benefit before 6 April 2003 may also be able to claim increases in respect of dependent children, but for new claims since that date support for dependent children has been provided separately via the Child Tax Credit.

Incapacity Benefit is taxable for the short-term higher and long-term rates. Long-term Incapacity Benefit is not payable after the person reaches the age at which they may claim the State Retirement Pension (currently 60 for a woman, 65 for a man).

IB is not affected by other income and capital apart from occupational or private pensions (and payments from the Pension Protection Fund). If a person receives a regular pension payment, IB is reduced by 50 per cent of the excess pension over £85 a week.

To be entitled to Incapacity Benefit, a person must generally satisfy the National Insurance contribution conditions.[1] Since 6 April 2001 these have been that the person:

- had paid Class 1 (employed) or Class 2 (self-employed) contributions on earnings equal to 25 times the National Insurance Lower Earnings Limit (LEL) in one of the last three complete tax years before the year the claim was made; and
- had Class 1 or Class 2 contributions or credits equivalent to 50 times the LEL in both the last two tax years.

People who satisfy the relevant medical test but who have insufficient NICs get National Insurance credits only, but they may be able to claim Income Support (see below). People may also be able to get Income Support to top-up their IB where they have no other income.

c. Income Support

Income Support is a non-taxable, non-contributory, means-tested benefit for people who have insufficient money to live on. The main groups who claim Income Support are people who are unable to work due to sickness or disability, lone parents, and those looking after someone who is elderly, sick or disabled. Claimants do not have to be available for or actively seeking work[2], and must work less than 16 hours a week. Any other income the person receives will reduce the amount of IS payable, although earnings of up to £20 a week may be disregarded. Benefit is also reduced if a person has capital above a certain limit.

Where the claimant has a partner, the claim for benefit must be submitted on behalf of the couple and the benefit calculation will take into account the needs and resources of both partners. Special additions may be paid for those who are disabled or carers. Some claimants continue to receive support for dependent children with their benefit, but this is being replaced by the Child Tax Credit. The remaining families still receiving assistance for their children via Income Support are expected to be 'migrated' to the Child Tax Credit by December 2006.

3. Determining incapacity for work

a. The Own Occupation Test

The Own Occupation Test is used to determine whether a person is incapable of work for the first 28 weeks of incapacity for work, where the person was previously in work; otherwise the Personal Capability Assessment is used (see below).

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1 There are special rules which enable people who became incapable of work early in life to gain entitlement to benefit without having to satisfy the contribution conditions. The 'youth provisions' – introduced when Severe Disablement Benefit was abolished for new claims from April 2001 - recognise that some people may not have been able to work and hence build up the necessary National Insurance contributions for benefit.

2 People claiming the benefit for ordinary unemployed people, Jobseeker's Allowance, must satisfy these requirements

The Own Occupation Test assesses whether a person is incapable 'by reason of some specific disease or bodily or mental disablement' of doing the work which they could reasonably be expected to do in the course of their occupation. Normally, the Department for Work and Pensions (DWP) accepts a person's statement and a statement from their GP as proof that they are incapable of work. However, they can demand a second opinion and may ask the person to attend a medical examination by a DWP doctor.

b. The Personal Capability Assessment

The Personal Capability Assessment (PCA) must be satisfied after 28 weeks of incapacity, or from the outset for claimants not subject to the Own Occupation Test. The November 2002 Green Paper, *Pathways to work: Helping people into employment*[3] summarised the PCA process as follows:

> The PCA is the medical test which is used to decide entitlement to longer-term state incapacity benefits. In contrast to the Own Occupation Test, it looks beyond ability to perform the normal occupation to look at the extent to which a person's condition affects their ability to do a range of everyday work-related activities covering:
>
> - physical functions such as walking, bending and kneeling, sitting in a chair;
> - sensory functions such as ability to speak, hear or see; and
> - mental functions such as interacting with others and coping with pressure.
>
> Approved doctors working on behalf of the Department for Work and Pensions assess the extent to which a person's health condition impairs their ability to perform any of these key activities. A person satisfies the PCA if their ability to perform any individual activity is seriously curtailed (for example they cannot walk more than 50 metres without stopping, they cannot turn the pages of a book). Alternatively the PCA can be satisfied if there is a lesser degree of impairment across a number of activities (for example a person cannot stand up without holding onto something and cannot see well enough to recognise someone at 15 metres). It can also take account of the combined effect of mental and physical health problems.
>
> Importantly, the PCA is not a test that distinguishes between people who can and cannot work. Rather it draws a line between people who should not be expected to seek work in return for benefit (those satisfying the PCA who stay on IB) and those who can be expected to do so (who need to move back to work or claim Jobseeker's Allowance).
>
> Around 20–25 per cent of people on IB have very severe medical problems and are completely exempt from the PCA process. This group includes, for example, those who are already in receipt of Disability Living Allowance (DLA) highest rate care, those with terminal illnesses, and those with severe conditions like tetraplegia, chronic degenerative disease and schizophrenia.

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[3] Cm 5690

The PCA process requires the collection of evidence to inform the decision-making process and will involve some or all of:

- a request for information from the doctor issuing sickness certificates;
- in most cases, the completion of a detailed questionnaire by the claimant about the impact of their condition on the work-related activities;
- consideration of the paper evidence by an approved doctor to decide whether the claimant's self-assessment is supported by the medical evidence (paper scrutiny); and
- in about a third of cases, where further evidence is required, a face-to-face medical examination with an approved doctor.

In certain parts of the country, approved doctors completing face-to-face medical examinations also complete a Capability Report. This Report contains additional information unrelated to PCA entitlement issues; it identifies the remaining work-related capabilities an individual has and provides advice on possible workplace adjustments. This Report is sent to the person's personal adviser and is used to focus discussions about returning to work.

Approved doctors provide medical advice in relation to the PCA to a Jobcentre Plus decision-maker who makes the final decision on benefit entitlement. Because of the need to collect sufficient evidence, the entire PCA process can take some time to complete. In the meantime, incapacity benefits can be put into payment supported by evidence from the patient's own doctor.

Where a person does satisfy the test, a date will be set for a further PCA to identify whether a person's condition has improved. Usually this is at an interval of between 3 and 18 months, depending when a change might be expected. Even where significant change is unlikely, cases need to be checked periodically. Procedures were standardised in May 2001 so that all cases going through the PCA are scheduled for consideration of a further test at least after 3 or 5 years – except for a small number of people with severe conditions where this would be considered inappropriate.[4]

Further information can be found in the booklet *A guide to Incapacity Benefit – The Personal Capability Assessment*, available at the Jobcentre Plus website.[5]

4. Work-focused interviews

Work-focused interviews (WFIs) were first proposed as part of the 'single work-focused gateway', piloted as part of ONE[6], and are in the process of being introduced through Jobcentre Plus. WFIs are for working age claimants of certain benefits who are not required to meet the labour market conditions for Jobseeker's Allowance. Powers to make WFIs compulsory were introduced by the *Welfare Reform and Pensions Act 1999*. Since October 2001, WFIs have been compulsory for working age claimants of Income

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4 *Ibid.*, Annex A, pp56-57

5 IB214JP June 2006: http://www.jobcentreplus.gov.uk/JCP/stellent/groups/jcp/documents/websitecontent/dev_012320.pdf

6 ONE was the name given to the single work-focused gateway following a 're-branding' exercise in 1999

Support, Incapacity Benefit and Severe Disablement Allowance in Jobcentre Plus areas.[7] People claiming on grounds of incapacity for work are required to attend a WFI on making a new claim, and at least every three years thereafter.[8]

The intention of the work-focused interview is to bring the claimant into a job-focused environment and encourage job-seeking activity or take-up of training and to let people know about the financial support available. From 31 October 2005 the timing of the first interview for people claiming Incapacity Benefit or Income Support[9] was moved back to eight weeks after the initial date of claim. Claimants of incapacity benefits are now required to help the personal adviser complete an 'action plan' on steps they would be willing to take to enhance their job prospects. Taking part in an interview is a condition of continuing to receive the full amount of benefit, but any action beyond attending the interview and helping complete the action plan is, for the moment, entirely voluntary. Claimants are not required to follow the action plan.

A more intensive WFI regime exists in Pathways to Work areas (see section I.B.3 below).

5. Benefit flexibilities and work incentives

There are a number of measures which exist to encourage people on incapacity benefits to move into paid work. These include measures which allow people to engage in some paid work without losing their entitlement to benefit (such as the 'Permitted Work Rules'), 'linking rules' which allow people to reclaim benefit at the previous level without having to satisfy a qualifying period if the job does not work out, and measures to provide financial support both when starting work and in the longer term (such as the Job Grant, Housing Benefit extended payments, Mortgage Interest Run-On, and the Working Tax Credit). Further details of these measures and other forms of support available to people on incapacity benefits via Jobcentre Plus and the New Deal for Disabled People are provided in Annex B of the November 2002 *Pathways to work* Green Paper.[10]

In his Budget Statement on 16 March 2005 the Chancellor announced changes to the Incapacity Benefit 'linking rules' from October 2006. The new rules will provide for:

- automatic application – claimants who have to return to benefit from work because of incapacity will be able to establish their entitlement to the previous higher rate of benefit at the point of reclaiming;
- an extended linking rule period – there will be a single linking rule period of 104 weeks for all people leaving a higher rate of incapacity benefits for work; and
- immediate re-qualification for the linking rules on a return to benefit – claimants who move back onto benefit from work via the linking rules will be able to re-qualify immediately for the linking rules if they successfully return to work, rather than first having to spend 28 weeks on benefit.

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7 It is expected that work-focused interview programme will apply nationally by March 2006
8 *Social Security (Jobcentre Plus Interviews) Regulations* SI 2001/3210
9 As noted above, SDA was abolished for new claims from April 2001
10 Cm 5690, November 2002

Further details are provided in paragraphs 4.23-4.25 of the Budget Report.[11]

6. Statistics[12]

a. Claimants and trends

At February 2005 there were just over 2.6 million claimants of incapacity benefits in Great Britain. The total can be broken down as follows:[13]

Incapacity Benefit only	1,167,000
Incapacity Benefit and Income Support	287,000
National Insurance credits only	135,000
National Insurance credits and Income Support	789,000
Severe Disablement Allowance only	64,000
Severe Disablement Allowance and Income Support	187,000

Only around half of those on incapacity benefits were therefore actually in receipt of Incapacity Benefit itself.

Just over 1.2 million of those in receipt of an incapacity benefit (IB, IB credits, IS on grounds of incapacity for work, and SDA) at February 2005 were also receiving Disability Living Allowance.[14]

In addition to the 2.6 million receiving incapacity benefits at February 2005, there were also 116,000 disabled people receiving Income Support but not also receiving IB, IB credits or SDA.[15]

Table 1 below and the accompanying figure show how the incapacity benefits caseload has changed since 1979. Between 1979 and the mid-1990s the number of working age claimants of incapacity benefits increased from around 0.7 million to around 2.5 million. After then growth slowed, and the caseload fell by over 50,000 in the year to November 2005.

The Department has recently published forecasts of the IB/SDA caseload for years up to 2019-2020.[16] The forecasts, which assume a one-third rollout of Pathways to Work and do not take account of the measures in the Bill or in the May 2006 Pensions White Paper[17], show the incapacity benefits caseload falling from its current level of 2.71 million (using the Department's measure) to a low of 2.35 million in 2014-15, before increasing again to 2.47 million by 2019-20.

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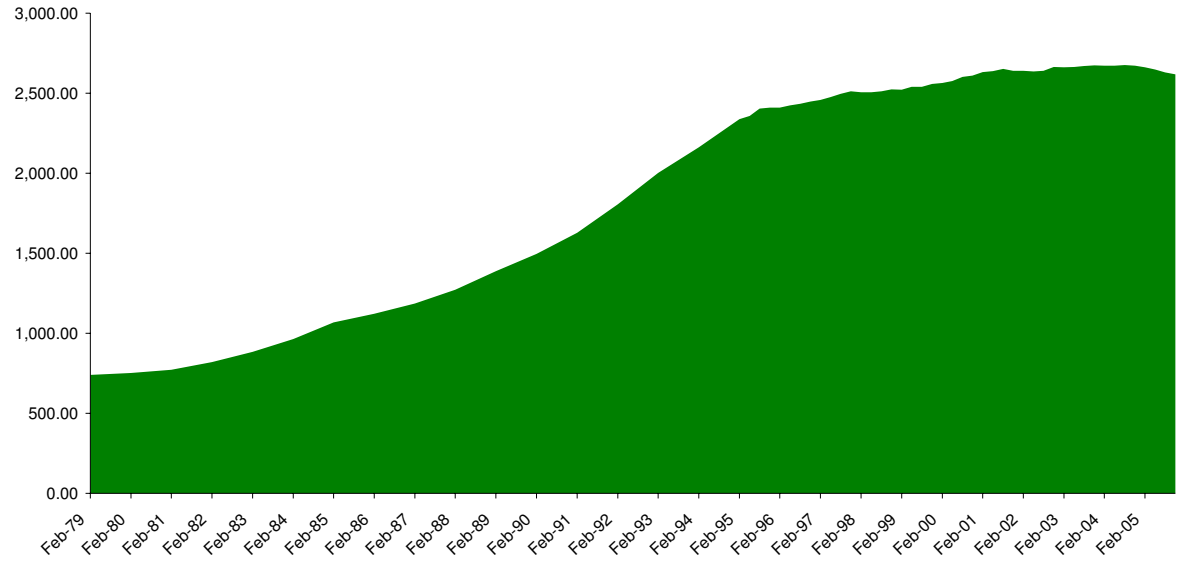
11 HC 372 2004-05
12 Statistics provided by Ross Young and Richard Cracknell, Social and General Statistics Section
13 Derived from DWP *Client Group Analysis: Quarterly Bulletin on the Population of Working Age on Key Benefits – February 2005*, Tables 4.3a and 4.5
14 *ibid.* Table 4.5
15 *ibid.* Table 4.6
16 HC Deb 16 June 2006 cc1475-1476w
17 *Security in retirement: towards a new pensions system*, Cm 6841

Table 1: Incapacity Benefit and Severe Disablement Allowance claimants (excluding IB short-term lower rate), 1979 to 2005 - Great Britain

	000s
Date	Claimants
February 1979	740.88
February 1980	752.20
February 1981	772.78
February 1982	821.14
February 1983	884.94
February 1984	964.17
February 1985	1,066.72
February 1986	1,120.68
February 1987	1,185.51
February 1988	1,272.77
February 1989	1,386.99
February 1990	1,495.34
February 1991	1,627.98
February 1992	1,805.17
February 1993	2,002.02
February 1994	2,162.75
February 1995	2,338.71
November 1995	2,408.27
November 1996	2,447.17
November 1997	2,510.97
November 1998	2,522.90
November 1999	2,558.29
November 2000	2,610.02
November 2001	2,639.62
November 2002	2,662.23
November 2003	2,673.27
November 2004	2,672.07
November 2005	2,617.65

Source: DWP Work and Pensions Longitudinal Study

Claimants of Incapacity Benefit and Severe Disablement Allowance (or pre-1995 equivalent benefits) (excluding IB short-term lower rate), 1979 to 2005: Great Britain



b. Reasons for incapacity

While the overall number of claimants of incapacity benefits is only slightly higher than 10 years ago, the profile of their diagnoses is somewhat different. Of the 2.5 million claimants in November 2005[18], just under 1 million, nearly 40 per cent, were recorded as having a mental or behavioural disorder as the cause of their incapacity. Ten years earlier, there were just over half a million in the same category, representing 21 per cent of claimants.

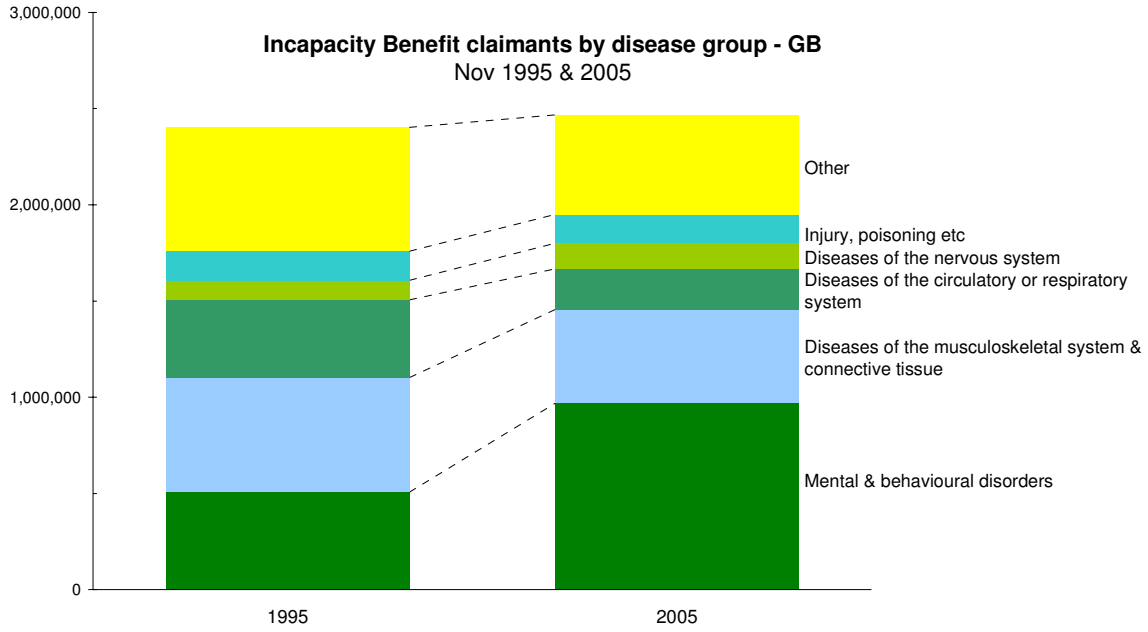
Table 2: Incapacity Benefit claimants 1995 and 2005 by disease group - Great Britain

November/000s

Diagnosis group (ICD summary code)	1995		2005	
		%		%
Mental or behavioural disorders	506,600	*21%*	968,890	*39%*
Diseases of the musculoskeletal system and connective tissue	594,400	*25%*	486,590	*20%*
Diseases of the circulatory or respiratory system	405,200	*17%*	212,040	*9%*
Diseases of the nervous system	100,900	*4%*	132,530	*5%*
Injury, poisoning etc	150,800	*6%*	149,690	*6%*
Other	644,400	*27%*	516,450	*21%*
Total	*2,402,300*	*100%*	*2,466,190*	*100%*

Source: DWP Tabulation tool http://www.dwp.gov.uk/asd/tabtool.asp

[18] This figure, and the analyses presented in this section, exclude people claiming Severe Disablement Allowance



B. Development of incapacity benefits

1. The introduction of Incapacity Benefit

Incapacity Benefit was introduced in April 1995 to replace Sickness Benefit and Invalidity Benefit (IVB). This section outlines the background to the changes and the debates which took place.

By the early 1990s the Conservative Government was becoming concerned with the continuing growth in expenditure on social security benefits, and Invalidity Benefit in particular.[19] Between 1977 and 1995, the number of people receiving IVB increased from 505,000 to 1.77 million, and expenditure on IVB rose in real terms from £678 million in 1971-72 to £7.75 billion in 1994-95 (1995-96 prices). By 1994, spending on IVB was increasing faster than spending on any other contributory benefit.[20]

The reasons for the growth of IVB were the subject of vigorous public debate at the time. The growth was variously attributed to an increase in the numbers 'feigning illness', to doctors in areas of high unemployment becoming more inclined to 'sign people off' as incapable of work, and even to an alleged deliberate policy of encouraging people to claim IVB instead of Unemployment Benefit to keep the unemployment figures down.[21] Research by the Policy Studies Institute in 1993 suggested that most of the increase

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19 See for example the Department of Social Security report *The growth of social security*, 1993

20 Social Security Committee, *Incapacity Benefit*, 12 March 1997, HC80 1996-97, Memorandum submitted by the Department of Social Security, 6 November 1996, para 1

21 In relation to the latter suggested explanation, see Polly Toynbee, 'Huge carrot, tiny twig: The Government's macho posturing on incapacity benefits masks the reality – a decent and effective policy', *The Guardian*, 4 February 2005

was, in fact, due to people over pension age claiming IVB instead of their pension (for tax reasons), the increasing number of women in the labour market, and the gradual increase in the number of disabled people in the relevant age groups.[22] As far as the remainder of the increase was concerned, the PSI report argued that there was 'virtually no direct evidence that the threshold between being judged 'fit for work' and 'incapable' [had] changed over the years'.[23] There was, however, some evidence that the chances of future employment had deteriorated for those moving on to IVB. The report observed:

> What seems to have happened is that there has been a fairly constant number of people having to leave work on health grounds over the years. But as the labour market has tightened, they have found it more and more difficult to get back into work. This leads to what the DSS policy paper refers to as a 'ratchet' effect. The number of invalidity benefit claimants rises when unemployment goes up; but does not fall when unemployment goes down.
>
> This explanation for the increasing cost of IVB lies in the economy as a whole, and in the hiring and firing practices of employers, rather than in a change in the behaviour of individual claimants or their doctors. The increase has not been caused by excessive ease of entry to the system, but by difficulty of exit. What is perceived as a problem for the government (increased costs) may actually be a problem for the claimants (inability to find appropriate work).
>
> The underlying difficulty is in defining what is meant by 'incapable of work'. Clearly some disabled people could not possibly sell their labour. But there are two other groups of people for whom the answer is not so clear. One consists of those who might work if the opportunity arose, but whose chances of actually being offered employment in the current or immediately foreseeable state of the labour market are very small indeed. The other consists of those people who, though they may have some functional impairment, consider themselves as capable of work as anyone else; but they are consistently rejected by employers because they do not fit in with the firm's work practices. Both of these groups may be capable of work in the most literal interpretation of the phrase, but their disability prevents them from working. Should they be entitled to invalidity benefit? Or should they be labelled unemployed, expected to live on the lower-level short-term benefits, and asked to demonstrate that they are actively seeking work?[24]

The Government agreed that the rising caseload was mainly due to people remaining on benefit, rather than an increased number of new claimants. However, it also argued that successive case law had diluted the test of incapacity for work. In the Second Reading debate on the *Social Security (Incapacity for Work) Bill 1999/94*, the then Secretary of State for Social Security, Peter Lilley, argued:

> According to the statute, sickness and invalidity benefits were originally intended for those people who,

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22 Richard Berthoud, *Invalidity Benefit: Where will the savings come from?*, PSI Research Briefing, June 1993, pp5-6

23 *ibid.*

24 *ibid.*

> "by reason of some specific disease or bodily or mental disablement",
>
> were unable to undertake work. However, successive commissioner rulings and court case law have resulted in non-medical factors being taken into account. As a result, the rules have been progressively widened and complicated.
>
> General practitioners have the job of assessing whether their patients are medically too unfit to work and are therefore entitled to the benefit. That has always put GPs in an invidious position. *[Hon. Members :-- "Hear, hear."]*
>
> On the one hand, they have an obligation to their patient ; on the other, they have to act as gatekeeper for the social security system. That job has become harder as the definition of incapacity has become fuzzier.
>
> Our research has shown that GPs are far from sure about what the legal position is or whether their decisions conform with it. An independent study conducted by Weekly Monitor found that two thirds of the GPs surveyed had issued medical certificates to people who were either not sick at all or not sick enough to be incapable of work.
>
> We should not blame doctors for that situation. It is up to Parliament to resolve their conflict of interest and to clarify law. Until we do so, access to the benefit will remain haphazard, controls will be lax and the system will be open to abuse. [25]

The Government pointed to research it had commissioned which raised concerns about the role of GPs as 'gatekeepers' to the Invalidity Benefit system:

> The research [on the growth of IVB] also showed that General Practitioners were concerned about their role as 'gatekeepers' of the benefit. General Practitioners' responsibilities to decide on a patient's long-term incapacity for work caused tensions in their relationship with their patients. Many of the General Practitioners interviewed were reluctant to contradict patients who claimed to be unfit for work. In addition, many did not feel qualified to make judgements on a person's capacity for all types of work, as opposed to the patient's regular occupation. Some General Practitioners allowed themselves to be influenced by local labour market conditions in deciding whether to issue a medical certificate in the longer term. The overall result was inconsistent application of Departmental guidance on incapacity and unequal access to benefit.[26]

The *Social Security (Incapacity for Work) Act 1994* replaced Invalidity Benefit and Sickness Benefit with a single Incapacity Benefit from 13 April 1995. The key elements of the reforms were:

- The new All Work Test, carried out by specially trained doctors working for Benefits Agency Medical Services, was introduced to assess more objectively a claimant's capacity for work. The Test assessed capacity for work by determining

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[25] HC Deb 24 January 1994 cc36-37

[26] Social Security Committee, *Incapacity Benefit*, 12 March 1997, HC80 1996-97, Memorandum submitted by the Department of Social Security, 6 November 1996, para 4

the degree to which physical and/or mental impairment affected a person's ability to perform a range of work-related activities.

- The introduction of the Own Occupation Test for claimants not receiving Statutory Sick Pay from an employer, but who had a recognised former occupation. The test applied to these claimants for the first 28 weeks of their claim.

- Rates of benefit were designed to ensure that SSP claimants did not suffer a reduction in benefit income on moving on to Incapacity Benefit.

- A higher rate of Incapacity Benefit became payable after 52 weeks, in order to focus support on the long-term sick.

- The abolition of the earnings-related Additional Pension, as this often duplicated private provision such as occupational pensions.

- The cessation of Incapacity Benefit at pension age for new claimants; and

- Incapacity Benefit became taxable for new claimants, in line with Government policy to tax income replacement benefits.[27]

Transitional arrangements were put in place to protect the entitlement of existing IVB claimants, but for new claimants Incapacity Benefit was less generous than its predecessor.

Further background to the 1995 changes is given in Library Research Paper 94/13, *The Social Security (Incapacity for Work) Bill 1993/94*.

2. The *Welfare Reform and Pensions Act 1999*

The incoming Labour Government signaled its intention to further reform the system of incapacity benefits in the October 1998 Green Paper, *A new contract for welfare: support for disabled people*[28]:

> The benefit system is failing to deliver. People who could work are too often consigned to a life on benefits; those who satisfy the 'All Work Test' for incapacity benefits are effectively written off and given no help to make the most of their potential. In some areas, the system has drifted away from its purpose: benefit is going to some people for whom it was not intended, while others are missing out. The system does not adequately recognise the greater needs of those disabled early in life of the most severely disabled people on the lowest incomes.
>
> We propose to tackle these problems, modernizing a system which still dates back in part to before the Second World War. We need to reform, but we also

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27 *Ibid.* para 7
28 Cm 4103

> need to protect those who depend on benefits for their income. We will ensure that, at the point of change, no one loses from the reforms we are making.[29]

The subsequent *Welfare Reform and Pensions Bill 1998/99* contained various changes to incapacity benefits including:

- The introduction of compulsory 'work-focused interviews' for claimants;
- The replacement of the All Work Test with the 'Personal Capability Assessment';
- Tighter contribution conditions for Incapacity Benefit linking entitlement with a more recent work record than had previously been required;
- Provision for Incapacity Benefit to be reduced where the claimant was also receiving an occupational or personal pension; and
- The abolition of Severe Disablement Allowance and the introduction of new rules enabling young people incapacitated early in life to become entitled to Incapacity Benefit without having to satisfy the usual contribution conditions.

Further background to the changes is given in Library Research Paper 99/19, *Welfare Reform and Pensions Bill*. Some of the provisions in the Bill proved highly controversial, provoking backbench rebellions in both the Commons and the Lords on the proposals for tighter contribution conditions, the abatement of Incapacity Benefit for those in receipt of pensions, and the abolition of SDA. The Government responded by making concessions in the first two areas.

3. Pathways to Work

In November 2002 the Department for Work and Pensions published a Green Paper, *Pathways to Work: Helping people into employment*, which outlined a range of proposals to provide more effective support to people claiming incapacity benefits to help them return to work.[30] The Government's *Response and action plan*, published on 10 June 2003 following consultation, noted that the 'tone and approach' of the Green Paper had been broadly welcomed by a wide range of organisations.[31] Pilot projects began in three areas in Great Britain in October 2003, and pilots in a further four areas started in April 2004. Further extensions were announced subsequently, and the January 2006 Green Paper, *A new deal for welfare: Empowering people to work*, announced that Pathways to Work would be 'rolled out' across the country by 2008.[32] The schedule for the rollout was announced in a DWP press notice on 4 July 2006.[33]

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29 *ibid.* paras 3-4
30 Cm 5690
31 Cm 5830, 10 June 2003
32 Cm 6730
33 DWP press notice, *Hutton: Welfare Reform Bill will break down barriers to work*, 4 July 2006

The following extract from an evaluation report summarises the policy background to Pathways to Work and lists the various elements being piloted: [34]

> **Incapacity Benefit Reforms and the policy context**
>
> 1.2 The Government's welfare to work programmes have sought to improve the lives of long-term unemployed people. However, despite the introduction of interventions like the New Deal for Disabled People (NDDP), aimed specifically at people with a health condition or disability, who currently do not actively participate in the labour market, the number of people on IB has continued to slowly increase. IB customers make up the largest group of economically inactive people in Britain with 2.7 million people of working age currently receiving IB. This number has grown significantly since the 1970s.
>
> 1.3 The new IB Reforms are central to the Government's aim of reducing the rates of customers moving onto, and remaining on IB. The new package is intended to re-focus customers on the prospects of returning to work through a combination of work focused interviews. The main elements of the reforms are as follows:
>
> - New IB customers making fresh claims are required to take part in a **work focused interview (WFI)** 8 weeks into their claim (rather than at the outset of their claim, which is the case for current IB customers in Jobcentre Plus areas); most will then be required to undertake a series of five further mandatory WFIs at roughly monthly intervals. Through WFIs, customers are actively encouraged to consider the possibility of a return to work and discuss issues regarding benefit, work-focused activity, financial support, training and programmes with their Personal Adviser.
>
> - **New specialist adviser teams** of specially trained **IB Personal Advisers** (IBPAs), as well as Disability Employment Advisers (DEAs) and Work Psychologists, have been set up to advise and support people directly.
>
> - The **timing of the medical assessment process** for new claims (the Personal Capability Assessment (PCA)) has been closely linked to the WFIs to allow for more rapid decision making around benefit eligibility and earlier access to capability reports from medical assessors. A key aim is to ensure that WFIs can be conducted without uncertainty over the PCA being a distraction for the customer.
>
> - A **Choices package** of interventions offers people a range of provision to support their return to work. The package consists of easier access to existing programmes, such as NDDP, Work Preparation and Work-Based Learning for Adults. The package also includes new work-focused **condition management programmes** developed jointly between Jobcentre Plus and local NHS providers.

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[34] S Dickens, A Mowlam and K Woodfield, *Incapacity Benefit Reforms – the Personal Adviser Role & Practices*, report prepared by the National Centre for Social Research for the Department for Work and Pensions, November 2004

- **A Return To Work Credit** (RTWC) of £40 per week for a maximum of 52 weeks is available to those returning to or finding work, of 16 hours or more, where their gross earnings are less than £15,000 a year.

- An **Advisers' Discretion Fund** (ADF) is at the disposal of IBPAs to enable them to make awards of up to £300 per customer to support activities that can improve the likelihood of a person finding or taking up a job (for example through the purchase of new clothes to attend interviews).

- Only those identified as those having the most severe functional limitations (i.e. PCA exempt) and those identified through a **screening tool**, as least likely to need additional help will not be required to attend additional interviews, although these IB customers can request such interviews on a voluntary basis. All IB customers in the pilot areas have equal, voluntary, access to the Choices Package, the RTWC and the ADF.

The Pathways to Work pilots are still continuing, but the Government believes that the results so far are 'very encouraging'.[35] The 2006 Budget Report noted that:

> The OECD has described Pathways to Work as a considerable success, and this success is demonstrated by such evidence as:
>
> - an increase of around 8 percentage points in the off-flow from incapacity benefits after six months of a claim;
> - by October 2005, there had been over 21,000 job entries through the Pathways to Work pilots;
> - following the initial Work Focused Interview (WFI), over 20 per cent of claimants have taken up elements of the Choices package, with over 8,000 referrals to the new Condition Management Programmes; and
> - nearly 10 per cent of participants in the pilots are longer-term claimants who were not required to participate in the programme, but volunteered to take part after hearing about the support on offer. In February 2005, the Government extended a mandatory WFI regime to some existing claimants, alongside a new Job Preparation Premium of £20 per week to encourage steps towards finding work.[36]

In late 2004, however, with the Pathways to Work pilots still at an early stage, there was press speculation about discussions within Government regarding further reform of Incapacity Benefit. Reports appeared in the press suggesting that the Government was considering reducing the long-term rate of Incapacity Benefit, introducing mandatory 'back to work plans', or involving DWP staff at an earlier stage of claims.[37]

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35 Cm 6730 January 2006, p17

36 *Budget 2006*, HC 968 2005-06, 22 March 2006, para 4.20

37 See for example 'New work and pensions chief to face pressure over benefits', *Financial Times*, 8 September 2004; 'Curb sickness benefit cheats, Blair is urged', *The Times*, 14 September 2004; 'Blair to act on sickness benefit', *Daily Telegraph,* 14 September 2004

On 24 January 2005 the then Minister for Disabled People, Maria Eagle, said the Government would shortly be publishing details of its "longer-term ambitions for incapacity benefits" in its Five Year Strategy[38]

4. The Government's Five Year Strategy

The *Department for Work and Pensions Five Year Strategy: Opportunity and security throughout life*, was published on 2 February 2005.[39] Announcing the publication to the House, the then Secretary of State for Work and Pensions, Alan Johnson, said that the Government would "implement a radically reformed incapacity benefit so that, like pathways, it focuses on what people can do rather than on what they cannot".[40] He continued:

> …the current incapacity benefit system is anomalous. Incapacity benefit classifies those receiving it as incapable of working, even before they have a formal medical examination. When they have the examination—the personal capability assessment—those who are entitled get no appraisal of their likely future ability to return to work. Furthermore, no distinction is made between terminal cancer and back pain. There are few incentives in the system to encourage those with more manageable conditions to consider their potential for work. Indeed, the benefit increases with time, thus creating an incentive to stay on it for longer.
>
> Our five-year strategy sets out a better model for new claimants of the benefit. It represents the biggest change in benefit for sick and disabled people since Beveridge.
>
> Our reforms will offer more support and help than is currently available for those with the most severe health problems and impairments, while ensuring that there are clear rewards for moving into work, and that the financial risks of trying out a job are minimised. In future, there will be an initial holding benefit—at jobseeker's allowance rate—payable until the personal capability assessment has been completed, which should be within 12 weeks.
>
> This assessment will become the gateway to the new benefits, accompanied by an employment and support assessment which will provide a fuller evaluation of potential work capacity. The assessment will lead to one of two allowances. The majority will receive a rehabilitation support allowance, which will require claimants to engage in work-focused interviews, in return for which they will receive a conditional extra payment. At the interview, claimants will agree an action plan, and fulfilment of the plan will lead to a further conditional payment.
>
> Recipients who co-operate fully will get more than the current long-term rate of incapacity benefit, but any who completely decline to engage will receive only the holding benefit minimum. Those with the most severe health conditions or disabilities will receive a disability and sickness allowance. Far from having their benefits cut, those recipients would get more money because they are at most risk of persistent poverty. But we are not writing anyone off, so their engagement

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38 HC Deb 24 January 2005 c 58w
39 Cm 6447
40 HC Deb 2 February 2006 cc842

> in some work-focused interviews would be encouraged, in line with the pathways to work programme. [41]

The Government's goal was to have the 'main elements' of the system in place for new claimants by 2008.[42]

The chapter in the *Five Year Strategy* document which set out the proposed benefit structure also contained related proposals for promoting healthier workplaces, enhancing the role of employers, more active support from GPs and from the NHS, and disability rights.

5. The January 2006 Green Paper

The Green Paper, *A new deal for welfare: Empowering people to work*[43], was published on 24 January 2006. It stated that, while the Government had made progress since 1997 in reforming welfare and increasing employment, further reforms were necessary to 'break down the barriers that prevent many from fulfilling their potential, barriers that impede social mobility and, through worklessness and economic inactivity, consign people to poverty and disadvantage.' This required a move away from the 'old model of dispensing benefits and move further in the direction of enabling people to achieve a better life'. The Government had a responsibility to act, but it also required a 'clear response from individual citizens themselves: they need to meet their responsibility to take the necessary steps to re-enter the labour market when they have a level of capacity and capability that makes this possible.' The central message in the Green Paper was 'work is the best route out of poverty'.[44]

The Green Paper set out the Government's 'aspiration' of achieving an employment rate of 80 per cent of the working-age population. This would be achieved by:

- reducing by 1 million the number on incapacity benefits;
- helping 300,000 lone parents into work; and
- increasing by 1 million the number of older workers

These targets, acording to the Green Paper, could only be achieved by reforming the welfare system to create a framework of rights and responsibilities.

With regard to ill or disabled people, the Green Paper stated that although measures such as the New Deal for Disabled People and Pathways to Work had been successful, more fundamental problems remained. Little was done to prevent people from moving onto incapacity benefits, and the 'gateway' was poorly managed, with claimants receiving benefits before satisfying the main medical test. Benefits trapped people into dependency, and the higher rate of Incapacity Benefit for long-term claimants created perverse incentives. Furthermore, little was expected of claimants, and little support was offered to help them return to work either.

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41 HC Deb 2 February 2006 cc842-843
42 Cm 6447, February 2005, p49
43 Cm 6730
44 *ibid.*, p2

The Green Paper set out a range of proposals aimed at:

- reducing the number of people who leave the workplace due to illness;
- increasing the number leaving benefits; and
- better addressing the needs of all those on benefit

To reduce the numbers moving onto incapacity benefits, the Green Paper proposed:

- Initiatives to improve workplace health, including better access to occupational health support and more effective management of sickness absence

- Reforming the 'gateway' to incapacity benefits, by transforming the Personal Capability Assessment to focus on capability for work rather than just entitlement to benefit, ensuring no one is entitled to benefit until they have completed the PCA, reviewing the mental health component of the PCA, and modernising processes to make the system more efficient and reduce the number of appeals

- Introducing incentives for GPs and primary care teams to focus on interventions to help people return to work, piloting employment advisers in GP surgeries, promoting good practice in sickness certification and revising the format of the medical certificate, and reforming Statutory Sick Pay.

To increase the numbers leaving incapacity benefits and returning to work, the Green Paper proposed:

- Increased support for individual claimants, with a 'tailored, active system that addresses each individual's capacity'

- Extending Pathways to Work across the country by 2008, to be delivered in the new areas by private or voluntary sector providers paid by results

- Introducing a new 'Employment and Support Allowance' from 2008 to replace incapacity benefits

Claimants of the new benefit, except those with the most severe disabilities and health conditions, would be required to participate in work-focused interviews, produce action plans and (eventually, as resources became available) engage in work-related activity, or see their benefit level reduced. Non-compliance would result in benefit being reduced in 'slices', ultimately to the level of Jobseeker's Allowance.

Those with the most severe conditions would not be subject to conditionality (but would be able to access support on a voluntary basis), and would receive a higher rate of benefit than they do now. However, this group would differ from the current 'PCA exempt' group – individuals would be identified according to the impact of their condition on their ability to function, not by simply being diagnosed as having a particular condition.

Existing claimants would remain on their current benefits and their benefit levels would be protected. However, the Green Paper proposed to take a 'more proactive' approach with existing claimants, involving work-focused interviews (some compulsory), more frequent PCA re-assessments and more regular checking of entitlement generally.

The consultation period ended on 21 April 2006.

6. Work and Pension Committee report

On 6 May 2006 the Work and Pensions Committee published its report on *Incapacity Benefits and Pathways to Work*.[45] The Committee had begun its inquiry in July 2005 in anticipation of the expected Green Paper 'to examine the Government's strategy to help more disabled people move into employment through a reformed system of incapacity benefits and the lessons learned from the Pathways to Work pilot schemes'. The summary from the report is given below:

> Incapacity benefits are now claimed by 2.7 million people. Many of those claiming incapacity benefits want to work but require appropriate support to enable them to do so. In January 2006, the Government published its Green Paper on welfare reform which puts forward its proposals for helping more ill or disabled people move into employment.
>
> The Green Paper sets out the Government's aspiration to reduce the number of people claiming incapacity benefits by one million within a decade. We welcome this bold aim - the current system has long required improvements to assist ill or disabled people entering, and remaining in, employment. However, the Government will need to invest effort and resources, particularly over the next few years, if its reform programme is to be successful. The Government has not fulfilled its commitment to produce forecasts of the incapacity benefits caseload to 2016 and should do so immediately. Clarification of the baseline by which this aim will be measured is also urgently required.
>
> The Green Paper sets out a wide-ranging strategy to reduce the incapacity benefits caseload. Yet there is a distinct lack of detail about most aspects of the reforms that leaves much to be decided. The Department must ensure that it maintains ongoing dialogue with all key stakeholders during the process of making these decisions. This is particularly important when redesigning the gateway onto incapacity benefits - the Personal Capability Assessment (PCA). We welcome the proposals to shift eligibility criteria in the reformed PCA towards the capabilities of the claimant rather than just entitlement to benefits. Yet the Department must ensure that disability organisations have as great a role in the redesign as health professionals so that the reformed PCA takes into account the complexity of ill or disabled people's lives, especially those with fluctuating or mental health conditions.
>
> The Green Paper also proposes to replace the current incapacity benefits with a new Employment and Support Allowance (ESA), paid to most people in return for attending work-focused interviews and agreeing an action plan. Those with more severe illnesses or disabilities will have no conditions attached to receipt of their

[45] HC 616 2005-06

benefit, which will be paid at a higher rate. We are very concerned that, by introducing a two-tier system, the new ESA will introduce further complexity to an already confusing incapacity benefits system. Apparently little consideration has been given to the IT systems, risks and other resources required to administer a two-tier system properly. These need to be clarified. In any case, all levels of the ESA, including the 'holding benefit', should be set and uprated at levels which ensure an adequate benefit rate for new claimants.

Pathways to Work is the flagship of the Government's efforts to help more disabled people move into work and elements such as the Condition Management Programme and the Return to Work credit are particularly helpful. Incapacity Benefits Personal Advisers (IBPAs) play a key role in delivering Pathways and the majority do it well. However, they require improved training to deliver a better service, particularly on handling clients with mental health conditions, and may benefit from the sharing of best practice.

The Government plans to roll out Pathways to Work nationally in 2008 alongside the introduction of the new ESA. This will encompass a new approach, delivered primarily by the private and voluntary sectors, that will test a range of 'work-related activities' and increase the requirements that ill or disabled people will be required to fulfil. The Committee welcomes this new approach. However, where services are being delivered by external providers the judgment of whether to administer a benefit sanction must rest with a DWP decision-maker. The proposal to utilise outcome-based funding for service providers is welcome, although contracts must reward providers for a range of outcomes to ensure that focus is not skewed towards helping those who are already closest to the labour market. Outcome-based contracts should also reward cases where job retention lasts for at least 12 months.

We are concerned that existing claimants of incapacity benefits are in danger of being left behind as the new benefit is introduced and Pathways to Work rolls out nationwide. It is crucial that they are able to access the full range of support available to help them move into work if they wish. We recommend that the Department publishes a date by which existing claimants will be included in the Pathways programme.

£360 million has been allocated for the national roll-out of Pathways to Work. There are widespread concerns that this may not be sufficient without services being watered down. A more transparent outline of the proposed funding allocation for Pathways is required and the Department needs to work closely with the Treasury to ensure that sufficient funds are available. In addition we are concerned that there may be a capacity problem with the numbers of trained Cognitive Behavioural Therapists, or other appropriate therapists, when Pathways is rolled out to the rest of the country.

Finally, employers are a crucial part of the required efforts to help more disabled people move into sustainable employment, yet have been largely overlooked in the Green Paper. The Department, and its service providers, need to actively promote incapacity benefits claimants to employers and strive to change the misconceptions that many employers have about disabled people and the requirements of the Disability Discrimination Act. Particular attention should be

> given to employers' attitudes towards employing those with mental health conditions. The public sector should take a lead in this.[46]

The Committee received a large number of submissions from pressure groups, private and voluntary sector organisations, health bodies and employers.[47] The responses of organisations to specific proposals in the Green Paper are discussed in Section C below.

7. Government response to the consultation and to the Committee

The Government's response to the Work and Pensions Committee report, together with its report on the Green Paper consultation, was published on 19 June 2006.[48]

The consultation report summarised responses to the Green Paper's proposals in relation to ill or disabled people as follows:

> Strong support was shown for reforming the current incapacity benefits regime and for extending Pathways to Work.
>
> The current medical assessment (the Personal Capability Assessment) needs to be more effective at gathering evidence, resolving disputes (new evidence and appeals), assessing mental health impairment, assessing those with fluctuating conditions and assessing those with learning disabilities.
>
> There was concern that the adoption of Jobseeker's Allowance rates in the Employment and Support Allowance will penalise disabled young people (often those with the most severe disabilities) and their families because of the age differentiations between those aged under 18 and those aged 18–24 within the Jobseeker's Allowance regime.
>
> There was strong opposition to the proposal for a two-tiered Employment and Support Allowance on the basis that defining a boundary between the two components would be very difficult and would create an incentive to demonstrate incapacity on a par with existing arrangements – there was a strong preference for tailored conditionality (action plans based upon the circumstances of the individual).
>
> There was support for a review of the existing arrangements for people trying work while remaining in receipt of benefits (including permitted work arrangements), people who are only able to work short hours and people moving into employment (including structured advice on in-work benefits when people make a claim to benefit, alignment with Housing Benefit support and improved financial incentives for people starting work).
>
> There was strong support for Access to Work and a call to extend financial support for workplace adaptations for people undertaking work placements and voluntary activities).

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46 HC 616-I 2005-06, pp5-6

47 See HC 616 volumes II and III

48 Department for Work and Pensions, *Report on Incapacity Benefits and Pathways to Work: Reply by the Government*, Cm 6868; DWP, *A new deal for welfare: Empowering people to work: Consultation report*, Cm 6859: http://www.dwp.gov.uk/aboutus/welfarereform/

> There was a mixed response as to how support might be extended to existing claimants – with support for the proposal that engagement be voluntary, but some Local Authorities called for resources to be targeted at existing claimants.
>
> There was strong support for developing links with employers (through awareness-raising campaigns and strengthened legislation and financial incentives, including National Insurance 'holidays').
>
> There was concern that the Pathways to Work support package must respond to the needs of those with mental health conditions and those with learning disabilities.
>
> There was concern about contracting methodology (particularly the impact of outcome-based funding) and whether this would exclude smaller voluntary sector organisations. There was also some anxiety about maintaining national standards while encouraging local flexibility.[49]

In its reponse, the Government said that it accepted the need to review the Personal Capability Assessment to transform it into a 'fair and robust' process that reflected the latest evidence and caused as little distress as possible to claimants, and that it had therefore established a number of review groups to look into various aspects of assessment.

The Government understood concerns about the adequacy of the basic ESA benefit, but said that aligning it with Jobseeker's Allowance was a key element of its plans for benefit simplification. It did however agree that after the assessment phase all claimants, regardless of age, should be entitled to the same rate of benefit (under its original proposals young people would have received a lower rate), and that young people would be able to gain entitlement to contributory ESA without having to satisfy the normal National Insurance contribution conditions, as is the case now with Incapacity Benefit.

In response to criticisms about the two-tier structure of the ESA, the Government said it was important to make a clear distinction between people who could engage in an activity and those who could not. It envisaged that the 'support group' who would not be subject to conditionality would be much smaller than the existing group exempt from the PCA.

In the light of responses to the consultation, the Government decided that existing claimants of incapacity benefits would now be 'migrated' across to the Employment and Support Allowance. However, their existing benefit levels would still be protected.[50]

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[49] Cm 6859 pp14-19
[50] *ibid*., pp20-21

C. Part 1 of the Bill

1. Background and rationale

The *Regulatory Impact Assessment* outlines the policy background to the measures in Part 1 of the Bill and the rationale for them as follows:

> The proportion of the working age population in receipt of incapacity benefits (or previous equivalents) has increased from around 3% in the 1960s to over 7% today. Much of the increase occurred between the late 1970s and mid-1990s when the caseload rose from 0.7 million to 2.6 million. Since then caseload growth has slowed and after over two decades of substantial growth, in the last year overall numbers have fallen by 61,000 to 2.71 million.
>
> The increase in the caseload between the 1970s and the mid-1990s is largely explained by decline in the proportion of claimants that leave within the first 18 months and consequently increasing numbers of the caseload with long durations. Currently, just over half of the caseload has been on benefit for more than 5 years. It is clear that to reduce the caseload our strategy must focus on improving the rate at which people leave incapacity benefits. Further reductions in inflows will also contribute to lowering the numbers.
>
> Risks (rationale)
>
> Since 1997, we have introduced significant innovations, such as the New Deal for Disabled People and Pathways to Work. However, fundamental issues remain:
>
> - Little is done to prevent people moving onto incapacity benefits.
> - The gateway to benefits is poorly managed – with claimants receiving incapacity benefits before satisfying the main medical test.
> - Benefits trap people into a lifetime of dependency – the longer a person remains on benefits, the less chance they have of leaving.
> - There are perverse benefits incentives – paying more the longer people claim.
> - Almost nothing is expected of claimants – and little support is offered. Those who try to plan their return to work through volunteering and training feel that they run the risk of proving themselves capable of work and therefore losing their entitlement.
> - The very name of incapacity benefits sends a signal that a person is incapable and that there is nothing that can be done to help get them back into the labour market.
>
> The success of Pathways to Work has demonstrated that, with the right help and support, many people on incapacity benefits can move back into work. By helping people who are economically inactive and extending opportunities to many of those traditionally seen as outside the labour market we will increase the labour supply – crucial at a time when the working age population is no longer growing. In the short term, this will enable us to sustain economic growth at good levels without sparking inflation and in the longer term, this will be essential to cope with the challenges presented by an ageing population. As a result, this programme of

> reform should deliver long-term fiscal savings, more than offsetting the initial investment, and yield significant economic and social benefits.[51]

The *Regulatory Impact Assessment* proceeds to outline the Government's case for rolling out Pathways to Work nationally while also introducing the new Employment Support Allowance (ESA), as opposed to other options (i.e. doing nothing, implementing ESA without rolling out Pathways to Work, and rolling out Pathways but not reforming incapacity benefits):

> The implications of **doing nothing** are well established and have not changed since the publication of the Green Paper. Doing nothing is certainly the easier and cheaper option, but we do not believe it is acceptable to write off millions of people in this way.
>
> Implementing **ESA without Pathways to Work**. This option would be substantially cheaper than other options (see costs section below) but would be considerably less effective and could pose substantial risks. In particular, imposing additional conditionality without also providing the full range of support services would not be very effective; it would give little prospect of achieving the aspiration of one million fewer people on incapacity benefits because it's unlikely to increase off-flows and therefore will also not generate such substantial fiscal savings.
>
> Continuing to roll out **Pathways to Work, but without reforming the benefit**. A 'no legislation' option would not rule out changes to incapacity benefits. Whilst we would be able to provide more help to voluntary participants, our ability to engage with all our customers would be restricted severely. We would also fail to tackle many of the inherent problems within the benefit system outlined in the 'risks' section on page 13.
>
> **Rollout Pathways to Work and replace incapacity benefits with the Employment and Support Allowance**. This option would ensure that our approach is based on the correct balance of rights and responsibilities and alleviates the problems outlined in the partial solutions already outlined. Modernising the benefit system would mean providing an integrated 'one stop' which complements the Pathways to Work programme and encourages people to make the most of their talents.
>
> The way that the welfare state interacts with people who are claiming benefits because of a disability or health condition needs to change. Building on the success of the Pathways to Work pilots, we need to engage with people to support those who are able to work back into employment and use employer resources and expertise to improve access to job vacancies. To do that, we need to reform both the benefit and the services on offer.
>
> Having consulted the public and considered the options, the Government has decided to implement option 4; to rollout Pathways to Work across the country by 2008 and to replace incapacity benefits with a new Employment and Support Allowance. This will ensure that we maximise the chances of achieving our

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[51] *Welfare Reform Bill 2006 – Regulatory Impact Assessment*, July 2006, pp13-15

> aspiration of one million fewer on Incapacity Benefits, thus delivering substantial economic and social benefits.[52]

Part 1 of the Bill makes provision for the Employment and Support Allowance to replace incapacity benefits from 2008. Many of the provisions replicate existing provisions for Incapacity Benefit and Income Support, but the legislation governing the ESA is entirely freestanding.

The Bill contains extensive regulation-making powers, and much of the detail is not yet available. During Work and Pensions Questions on 10 July 2006, David Heath asked the Minister for Employment and Welfare Reform, Jim Murphy, about the availability of draft regulations:

> **Mr. David Heath (Somerton and Frome) (LD):** Whether we look at the Bill in electronic form or on paper, there are key areas that we cannot read simply because they have not been included. Examples include the proposals to withhold benefits from those who do not comply with its conditions, and the regulations that will follow in statutory instruments. Does the Minister agree that, if the House is to understand fully what the Bill is about, it is important to publish those regulations—at least in draft form—before the Bill's Second Reading?
>
> **Mr. Murphy:** The hon. Gentleman is right to say that an awful lot of the detail of the Welfare Reform Bill will, rightly, be set out in regulations. We intend to publish many of the key regulations in time for its Committee stage, as has been common practice with many other important pieces of social security legislation.[53]

Of the regulations to be made under the Bill, only two (the first set of regulations under clause 12, and regulations under clause 18(1)) are to be affirmative instruments.

The Bill itself, together with the accompanying *Explanatory Notes* and *Regulatory Impact Assessment*, is available at the DWP website.[54] The January 2006 Green Paper and the Government's report on the consultation can also be found there, as can its response to the Work and Pensions Committee report.

2. The Employment and Support Allowance

Clauses 1-7 of the Bill are concerned with entitlement to the Employment and Support Allowance (ESA), and calculation of the amount payable. These and related clauses are outlined below.

a. Conditions of entitlement

Clause 1 sets out the basic conditions of entitlement to the benefit. Subsection (3) states that a claimant must:

- Have limited capability for work;

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52 *ibid.*, pp15-16
53 HC Deb 10 July 2006 c1102
54 http://www.dwp.gov.uk/aboutus/welfarereform/

- Be at least 16 years old;
- Have not reached pensionable age;
- Be in Great Britain;
- Not be entitled to Income Support; and
- Not be entitled to Jobseeker's Allowance (and not be a member of a couple entitled to joint-claim JSA).

Subsection (4) states that a person has 'limited capability for work' if:

> (a) his capability for work is limited by his physical or mental condition, and
>
> (b) the limitation is such that it is not reasonable to require him to work.

Further provision regarding the test of 'limited capability for work' is in clause 8.

Subsection (2) states that a claimant must also satisfy either the National Insurance contribution conditions in **Part 1 of Schedule 1**, or the income-related tests in **Part 2 of Schedule 1**, to be entitled to an ESA. This reflects the fact that, as with Jobseeker's Allowance, there is both a contributory allowance and a means-tested allowance within the same benefit.[55] The contribution conditions mirror the existing conditions for Incapacity Benefit and, as with IB, there are provisions enabling young people to gain entitlement to the contributory benefit without having to satisfy the usual contribution conditions, where they would otherwise not have the opportunity to build up a sufficient contribution record. The income-related tests in Part 2 of Schedule 1 are based on the existing rules for Income Support.

Clause 20 provides that **Schedule 2** has effect. The Schedule contains various supplementary provisions relating to the ESA. Paragraph 1 states that regulations may make provision for a person to be treated as having (or not having) limited capability for work, in prescribed circumstances. The regulations may also prescribe circumstances where the question of whether a person has limited capability for work is to be determined afresh. Paragraph 9 contains equivalent provisions in relation to 'limited capability for work-related activity' (see the discussion on clauses 2 and 3 below).

Clause 17 states that regulations may prescribe circumstances in which a person may be disqualified from receiving ESA for up to six weeks. This may happen if a person has limited capability for work through their own misconduct; or because they remain someone with limited capability for work through failure, without good cause, to follow medical advice; or because they fail, without good cause, 'to observe any prescribed rules of behaviour' (subsection (1)(c)). Similar provisions currently exist in section 171E of the *Social Security Contributions and Benefits Act 1992*.[56]

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[55] Clause 24 states that payments of contributory ESA will be funded from the National Insurance Fund, while means-tested ESA will be funded out of the Consolidated Fund

[56] Regulation 18 of the *Social Security (Incapacity for Work) (General) Regulations 1995* (SI 1995/311), made under s171E of the 1992 Act, provides for disqualification from incapacity benefit through misconduct etc. The regulations do not however further define 'good cause', as s171E allows

Clause 19 provides for the interaction between ESA and Statutory Sick Pay (SSP), Statutory Maternity Pay (SMP) and Statutory Adoption Pay (SAP). A person cannot be entitled to ESA and SSP at the same time. Contributory ESA is not payable with SMP or SAP, except as regulations may provide.

b. Calculation of the amount

Clauses 2 and 3 specify how the amount of contributory ESA is to be calculated. Clause 2(1) provides that the total payable is 'such amount as may be prescribed', plus either the support component or the work-related activity component (if the relevant conditions of entitlement are satisfied), minus 'prescribed deductions' for payments mentioned in clause 3. The *Explanatory Notes* state that it is expected that the basic amount will be age-related along the lines of contribution-based Jobseeker's Allowance during the initial assessment phase, but paid at the same rate regardless of age thereafter.[57]

Subsections (2) and (3) of clause 2 are concerned with the conditions of entitlement to the 'support component' and the 'work-related activity component' respectively. Neither is payable during the 'assessment phase'. The Government proposes that the assessment phase will last 13 weeks, but the precise length is to be determined by regulations.

To be entitled to the **support component**, a person must have limited capability for work-related activity, and satisfy such other conditions as may be prescribed. A person has 'limited capability for work-related activity' if:

> (a) his capability for work-related activity is limited by his physical or mental condition, and
>
> (b) the limitation is such that it is not reasonable to require him to undertake such activity.[58]

Those not judged to have limited capability for work-related activity are entitled to the **work-related activity component**, provided they also satisfy such other conditions as may be prescribed.

The 'prescribed deductions' mentioned in clause 3 include pension payments, periodic payments from the Pension Protection Fund, and 'payments of a prescribed description made to a person who is a member of, or has been appointed to, a prescribed body carrying out public functions'. The *Explanatory Notes* state that the intention is to replicate the existing treatment of pension payments and local councillors' allowances for Incapacity Benefit purposes.[59]

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57 Bill 208-EN, para 51. Contribution-based JSA is currently £34.60 a week for claimants under 18, £45.50 a week for those aged 18-24, and £57.45 for those aged 25 or over

58 Clause 2(5). See also clause 9

59 Bill 208-EN, para 53

Clause 4 sets out how the amount of means-tested ESA is to be calculated. The rules are similar to those for Income Support. Each claimant has an 'applicable amount' which depends on their circumstances, and the amount payable is either that amount or, where the claimant has other income but less than the applicable amount, the difference. The rates, additions, and premiums used to calculate a person's applicable amount are to be prescribed in regulations. The Government envisages that the regulations will prescribe amounts equivalent to the current enhanced disability, severe disability and carer premiums payable with Income Support, and that additions will be included for other items currently covered by Income Support, such as mortgage interest payments.[60]

After the assessment phase, a person's applicable amount will include a work-related activity component or a support component, provided they satisfy the relevant conditions of entitlement.

Subsection (3) provides that in prescribed cases, a person's applicable amount is nil. The *Explanatory Notes* state that the intention is to replicate the existing provisions in Income Support whereby, for example, certain prisoners, or members of religious orders who are fully maintained by their order, have a nil applicable amount.

The *Explanatory Notes* state that for contributory and means-tested ESA, clauses 2(4)(b) and 4(6)(b) would allow backdated payments of the work-related or support component to the end of the 13th week of the claim, where the assessment phase lasts longer than 13 weeks.[61]

The amount of the work-related activity component and support component of the contributory or means-tested ESA is to be set out in regulations.[62]

Clause 16 provides for the Secretary of State to set out in regulations how income and capital is to be calculated for the purposes of determining whether a person is entitled to the ESA, and if so, how much. The regulations will be based on the existing provisions for Income Support as set out in the *Income Support (General) Regulations 1987* (SI 1987/1967).[63] The intention is that the capital limits will be the same as those for Income Support, and 'tariff income' will be £1 a week for every £250 of capital, as with Income Support.[64] It is also intended that the regulations will incorporate the existing provisions in Income Support regarding unacceptable deprivation of income or capital.[65] Under these provisions, for example, a claimant who has disposed of capital solely or mainly to secure or increase their entitlement to benefit may be treated as still possessing it.

Clause 5 provides for the situation where a person would be entitled to means-tested ESA after the assessment phase, when either the work-related activity or support component comes into payment, but whose income exceeds their applicable amount for

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60 Bill 208-EN, paras 56-57
61 Bill 208-EN, para 60
62 Clauses 2(4)(c) and 4(6)(c)
63 Bill 208-EN, para 105
64 This means that for every £250 of capital, and income of £1 a week is assumed for benefit purposes
65 Bill 208-EN, para 108

the assessment phase. Regulations will allow claims to be accepted for means-tested ESA for awards that only come into force at a later date.

Clause 6 provides for the amount payable where a person is entitled to both a contributory and a means-tested ESA. It provides, for example, that where a person's entitlement to contributory ESA is less than their applicable amount and they have no other income, the contributory ESA can be 'topped up' to the level of the applicable amount. The provisions mirror those under which people currently in receipt of Incapacity Benefit may receive an Income Support top-up.

Clause 7 provides that an ESA shall not be payable if the weekly amount is below a prescribed minimum. The *Explanatory Notes* envisage that this will be 10 pence.[66] Again, equivalent powers exist in current social security legislation.

Paragraph 8 of Schedule 3 provides that contributory ESA is to be taxable in the same way as Incapacity Benefit.

In evidence to the Work and Pensions Committee inquiry, organisations including the Disability Alliance and the TUC raised concerns about the proposal to fix the 'basic' element of the Employment and Support Allowance at Jobseeker's Allowance levels. It was pointed out that, for people who had previously been in receipt of Statutory Sick Pay, moving onto the ESA would result in a significant drop in income (SSP is currently £70.05 a week, while JSA for someone aged 25 or over is £57.45, and lower for younger age groups).[67]

The Work and Pensions Committee recommended that the basic rate of ESA be set at a level comparable with SSP, to 'ensure a more consistent income for ill and disabled people'.[68] In its response, the Government said:

> Setting this rate higher than the basic rate of Jobseeker's Allowance would create an incentive for people to move from Jobseeker's Allowance to Employment and Support Allowance in these early months of their health condition or disability. While the Government wants people to be on the most appropriate benefit for them, it does not want to encourage people to move away from Jobseeker's Allowance – and therefore further from the labour market.[69]

3. Assessing capability for work and work-related activity

The assessment of 'limited capability for work' and 'limited capability for work-related activity' are crucial to the new benefit. All claimants of ESA must have a 'limited capability for work', but only those judged to have a 'limited capability for work-related activity' will not be required to undertake further activities to remain entitled to the higher rate of benefit.

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66 Bill 208-EN, para 65
67 HC 616-I 2005-06, para 142
68 *ibid.*, para 145
69 Cm 6861 June 2006, para 36

Clause 8 provides for a system for determining 'limited capability for work' to be set out in regulations. The regulations may also provide that a person is treated as not having limited capability for work if they fail, without good cause, to provide information or evidence requested, or to provide it in the manner requested, or to attend a medical examination when required to do so. Similar provisions currently exist for incapacity benefits.[70]

Clause 9 provides for regulations setting out how 'limited capability for work-related activity' is to be determined. A person's capability for work-related activity must be limited by their physical and mental condition, and the limitation must be such that it is not reasonable to require them to undertake such activity (subsection (1)). This is the test which will determine whether a claimant is entitled to either the work-related activity component, or the support component. It also, therefore, determines whether the claimant will be subject to conditionality and possible sanctions. As with clause 8, the regulations may provide that people failing, without good cause, to comply with certain requirements may be treated as not having limited capability for work-related activity.

For the meaning of 'work-related activity', see the discussion on clause 12 below.

The Work and Pensions Committee noted that while the responses it had received following the publication of the Green Paper could be described as 'cautiously welcoming' the proposals to reform the Personal Capability Assessment, several witnesses had pointed out that the lack of detail in the Green Paper made specific comment difficult. It commented, however, that 'basing eligibility for incapacity benefits on an assessment of people's capability for work rather than on the severity of their impairment marks a significant shift in the gateway to incapacity benefits'.[71] In evidence to the Committee, organisations argued that the new test should take into account a variety of factors including a person's education and employment background, their aspirations and expectations, and local employment opportunities. Mental Health organisations argued that the test should also take into account the particular disadvantages faced by those with mental health conditions.

The Committee's report stated:

> 98. The Committee welcomes the shift in eligibility criteria that the reformed Personal Capability Assessment will bring. However, the absence of detail in the Green Paper suggests that the Department has not made much progress in redesigning the PCA. This makes it difficult to consider how the reformed system will work in practice as we do not know what the new assessment will contain. We recommend that the Department carefully considers the evidence received during this inquiry, its own consultation, and the findings from the Pathways evaluation to ensure that the new assessment takes account of the complexity and reality of disabled people's lives, as well as the social elements of their disability, rather than simply whether they are entitled to benefit. [72]

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70 See sections 171A and 171C of the *Social Security Contributions and Benefits Act 1992*
71 HC 616-I 2005-06, paras 83-84
72 *ibid.*

The Committee emphasised the need for the review of the PCA mental health component to take account of the views of people with mental health problems, their carers and organisations representing them, and for any new component to be properly piloted. It also voiced concerns about whether the short timeframe for the new assessments was realistic, about how they would take account of people with fluctuating conditions, and about the quality of medical assessments currently carried out. It concluded:

> 137. The Committee acknowledges the importance of involving all stakeholders in reforming all aspects of the Personal Capability Assessment (PCA) and welcomes the Government's commitment in the Green Paper to do so. We are not, however, content with the process that we understand the Department has now begun. Disability organisations as well as medical experts must play a key role in advising the Department on the content and delivery of the PCA, the 'reserved circumstances' group and the reform of the appeals process and we recommend that they are included in all discussions with the Department, and not merely consulted as a secondary process. We are also concerned by the delay in producing detail on the PCA and recommend that the Department produces a possible model for the reformed PCA as soon as possible. Once the Department has completed its work on redesigning the PCA we intend to examine whether it is satisfactory or not.[73]

In its response to the Committee published on 19 June, the Government said that a 'comprehensive review' of the PCA was underway, considering the assessment of both physical function and mental health, evidence gathering, the new work-focused assessment, and ways to reduce both the number of appeals and the number of decisions overturned at appeal.[74] It added:

> Given the limited time available to carry out the review of the PCA, the detailed work is being taken forward by a number of small groups, comprising mainly medical, healthcare and other technical experts. However, the Department wants to involve as many stakeholders as possible and so has set up two consultative groups – one focused specifically on mental health – comprising stakeholder experts from a wide range of disability organisations. These groups are operating in collaboration with the technical working groups, with members of the consultative groups participating in the working group meetings and members of the working groups participating in consultative group meetings. In this way, both groups are fully involved at all stages of the review and all members are able to input directly into the development of recommendations for change.
>
> The working groups are due to report to DWP Ministers by September 2006, after which there will be a period for piloting the revised PCA.[75]

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73 *ibid.*

74 Department for Work and Pensions, *Report on Incapacity Benefits and Pathways to Work: Reply by the Government*, Cm 6861, p4

75 *ibid.* p8

4. Conditionality

Clauses 10-14 contain the key provisions on 'work-related conditionality' - the things recipients of the Employment and Support Allowance not in the 'support group' may be required to do in order to remain entitled to benefit paid in full. These include:

- 'Work-focused health-related assessments' by health professionals to provide additional information about the claimant's functional capacity (see clause 10);

- 'Work-focused interviews' (WFIs) where claimants will be required to discuss what steps they can take to move back to work. They may also be asked to assist in drawing up an 'action plan' of work-related activity, but they would not be obliged to follow it (see clause 11); and

- 'Work-related activity'. This is activity which increases the likelihood of the claimant getting a job. It might include work trials, training, job search assistance, or involvement in activities to stabilise health conditions (clause 12).

It appears that, initially at least, conditionality will only extend to participation in work-focused interviews. However, the Bill allows for conditionality to be extended to work-related activity at some point in the future, 'as resources allow'.[76] The *Explanatory Notes* state that the number and frequency of work-focused interviews could also be varied in the future.[77]

Clause 22(6) provides that regulations made under clauses 10-14 may make provision which applies only in relation to an area or areas specified in the regulations. The rules regarding 'work-related conditionality' may, therefore, vary from one part of the country to another.

Clause 10 provides that regulations may require a claimant not in the support group to take part in one or more 'work-focused health-related assessment' as a condition of receiving the full rate of benefit (subsection (1)). These are defined as assessments by health care professionals for the purpose of assessing the extent to which a person still has capability for work, the extent to which his capability for work may be improved by taking steps in relation to his physical or mental condition, and 'such other matters relating to his physical or mental condition and the likelihood of his obtaining or remaining in work or being able to do so, as may be prescribed' (subsection (7)).

The *Explanatory Notes* state that it is intended that an assessment will be carried out at the same time as the assessments of limited capability for work and for work-related activity during the initial 13-week assessment phase.[78] However, until the assessment phase is complete it will not be known whether the claimant is to be allocated to the support group or to the work-related activity group.

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[76] Bill 208-EN, para 13
[77] *ibid.*
[78] Bill 208-EN, para 73

Details of the nature and content of work-focused health-related assessments are to be set out in regulations. The regulations may make provision for reducing the amount of ESA payable where a claimant fails, without good cause, to take part in an assessment. The amount by which an allowance is to be reduced, and the duration of the reduction, is also to be set out in regulations.

Clause 11 provides that regulations may require claimants not in the support group to take part in one or more work-focused interview (WFI) as a condition of receiving the full rate of benefit. The *Explanatory Notes* state that it is intended that there would also be an interview during the assessment phase. They add:

> This interview would have the purpose of, where appropriate, explaining the benefit and conditionality regime to the claimant and helping them think about what activities they may want to do to help them return to work.[79]

It is intended that regulations will allow the requirement to attend this initial WFI to be waived for those with serious health conditions who may be in the support group after the assessment phase.[80]

The *Explanatory Notes* state that the regulations would provide for a series of regular WFIs after the assessment phase for claimants entitled to the work-related activity component of ESA, and for flexibility regarding when and where they are to take place. This might include WFIs taking place in the claimant's home.[81]

Failure to attend and/or participate in a WFI, without 'good cause', may result in a reduction in benefit. The *Explanatory Notes* add:

> Additionally, it is intended that where work-related activity becomes mandatory for certain claimants in receipt of the work-related activity component, regulations would require a claimant to discuss the relevant work-related activity that they had undertaken.[82]

Regulations under subsection (6) provide for waivers and deferrals of WFIs. The *Explanatory Notes* state that these may be considered in light of the claimant's health condition, or other circumstances such as transport difficulties.[83]

Clause 13 provides for regulations to prescribe circumstances where an 'action plan' is to be drawn up for a person not in the support group who is required to attend work-focused interviews. The form, content and arrangements for reviewing and updating action plans are to be specified in regulations (subsection (2)).

The *Explanatory Notes* state:

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79 Bill 208-EN, para 78
80 *ibid.*
81 Bill 208-EN, para 79
82 Bill 208-EN, para 81
83 Bill 208-EN, para 83

> 91. Regulations made under *subsection (1)* are expected to provide that the action plan should include a summary of the discussion that took place during the work-focused interview. In a situation where participation in work-related activity is not required under regulations, then the action plan would set out possible steps a claimant could consider taking to assist them in returning to work.
>
> 92. Where appropriate, it is intended that the action plan would include steps that, if the claimant undertook them, would satisfy the work-related activity requirement under clause 12.
>
> 93. It is not intended that the claimant would be required by regulations to undertake specific steps in the action plan, even when participation in work-related activity was required. A claimant could still satisfy the work-related activity requirement by undertaking other activity.
>
> 94. Regulations provided for under *subsection (4)* are likely to provide that a claimant should be able to ask for their action plan to be reconsidered. This would be in order to resolve situations where a claimant believed the steps included were, or had become, inappropriate or that other steps, not agreed at the work-focused interview, should be included. The action plan would then be reconsidered in a set period of time. It is not intended, in a situation where a claimant asks for a reconsideration of the action plan, that requirements under regulations to undertake work-related activity would be waived or deferred.[84]

Clause 12 provides that regulations – which unlike those under clauses 10 and 11 will be subject to the affirmative procedure - may require claimants not in the support group to undertake 'work-related activity' as a condition of receiving the full rate of benefit. 'Work-related activity' is 'activity which makes it more likely that the person will obtain or remain in work or be able to do so' (subsection (7)). As noted above, the Government has said that, initially, claimants would not be subject to this requirement, but that it intends to extend conditionality to include work-related activity as resources permit. The requirement would apply for a set period of time following the completion of the assessment phase.[85]

Regulations under clause 12 may specify the amount of work-related activity a person will be required to undertake, how it is to be decided whether the person has met the requirement, and the evidence they need to provide (subsection (2)). Failure to comply with the requirement, without 'good cause', may result in a reduction in benefit, the amount and duration of the reduction to be specified in the regulations (subsection (4)). The regulations may provide for circumstances where a person may not be required to satisfy the requirements (subsection (6)).

Clause 14 provides that the Secretary of State may, in the case of a person required to undertake work-related activity, direct that a specific activity does not count as work-related activity. The *Explanatory Notes* state that 'this is intended to stop claimants seeking to satisfy the requirement to undertake work-related activity by undertaking

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[84] Bill 208-EN
[85] Bill 208-EN, para 84

activity that is considered inappropriate for their circumstances'.[86] Regulations may make provisions for directions to be appealable (subsection (14)).

The January 2006 Green Paper gave the following examples of work-related activities that it considered might be suitable for inclusion in action plans, although it emphasised that the list was neither exhaustive nor prescriptive:

> Work tasters
> - Work trials
> - Voluntary work
> - Permitted work
> - Preparation for self-employment
>
> Managing health into work
> - Condition management programmes
> - Progress to Work programme
> - NHS Expert Patients programmes
>
> Improving employability
> - Undertaking a basic skills programme
> - Over-50s 'confidence in working' programme
> - Jobcentre Plus or external training programmes
>
> Jobsearch assistance
> - New Deal for Disabled People Job Brokers
> - Additional support from other specialist Jobcentre Plus advisers, such as Disability Employment Advisers, New Deal 50 plus, New Deal for Lone Parents, or similar external programmes
> - Independent job searches
>
> Stabilising life
> - Activities to stabilise health conditions (including mental health problems), for example use of cognitive behavioural therapy
> - Assessing childcare options
> - Managing financial situation
> - Stabilising housing situation[87]

The Work and Pensions Committee report stated that the issue of compulsory work-related activity was mentioned frequently in the evidence it received, with different views being expressed:

> Those representing ill or disabled people were broadly against the imposition of compulsory work-related activity and benefit sanctions. CPAG, for example, argued that claimants should be given a choice whether or not to engage in work-focused activities and their decision should not jeopardise their incapacity benefit. Disability Alliance stated:

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[86] Bill 208-EN, para 95
[87] See Cm 6730, p43

> "We are opposed to any further conditionality or sanctions being applied to sick or disabled people. We believe making interviews, work-related activity and action plans compulsory is unnecessary, potentially unworkable and likely to lead to hardship."

165. On the other hand, evidence from employment service providers tended to be more positive. The Wise Group said that it would be:

> "wrong to assume that compulsory participation in work-focused support will incite a hostile response from claimants; for some people this may actually provide the impetus they need to instigate a return to the labour market. Mandatory programmes can be helpful in terms of incentivising people who have been economically inactive for a long time and who are demoralised, isolated or lacking in confidence."

166. Looking specifically at the Green Paper proposals, Andrew Harrop from Age Concern warned:

> "there needs to be quite a lot of caution in going beyond the Pathways to Work model into compulsory activity as opposed to compulsory interviews. […] people are so different in their needs at different stages of their claim, with different levels of incapacity and the different distance from retirement, that to expect everyone to be mandated on to programmes and in what the Green Paper says it could be mandated to a specific activity, that is clearly not going to be very productive or good value for money, because if people do not feel able and ready to be part of that activity it will not deliver results for them."

167. Richard Exell, Senior Policy Officer at the TUC, made an interesting point:

> "We know, from lots of experience now with active labour market programmes, that people do become more likely to get jobs when they become the centre of attention for Jobcentre Plus. Simply spending more time with a group of people does have an effect on getting more and more of them into jobs."

168. This begs the question, is further compulsion necessary? Several of those submitting evidence pointed to the quote often made by Government, that one million disabled people want to work, and queried, if this is the case why was compulsion needed?

169. Dave Simmonds of CESI said:

> "there would be grave concerns if the positive features within the Green Paper were overshadowed by both arguments about the level of conditionality as well as what we would consider to be an inappropriate diversion of resources into managing what would be inevitably a very difficult sanctions regime to police […]"

170. He went on to argue that evidence suggested that it would be more worthwhile putting further effort into conveying a positive message of what support is available to help disabled people move into work rather than using more compulsion - in other words, using more carrot and less stick. On a similar issue, Rethink argued that media messages about conditionality put out by the DWP press office compounded anxiety for those with mental health conditions.

> 171. Much of the evidence we received argued that conditionality was particularly inappropriate for claimants with mental health conditions and fluctuating conditions. Mind warned that it could cause deterioration in health and distress and might lead to claimants taking up unsuitable work. Rethink pointed out that conditionality was particularly unhelpful for those with severe mental illness, many of whom would have experienced compulsory treatment in hospital. They also stressed that sanctions were also unnecessary as people with mental illness already had the highest 'want to work' rate of any disability group - yet they also have the lowest employment rate of any group of disabled people, with just 24% in employment.
>
> 172. The Sainsbury Centre for Mental Health took a different view. They supported the levels of conditionality in the Pathways pilots, accepting that some conditionality was needed in order "to get people who had given up hope to start thinking seriously about work" and that the current levels of compulsion were "perceived as supportive."[88]

The Work and Pensions Committee made no specific recommendations with regard to the range of work-related activities suggested by the Department in the Green Paper, but it did have concerns about how conditionality might be enforced, about the support available to people, and about training and guidance for staff:

> 179. The Committee has no objections to the list of work-related activities in the Green Paper: the range is suitably varied and covers activities that may be regarded as a useful stepping stone to work. However, the Department should develop a strategy to ensure that all disabled people, including groups such as people with learning disabilities, deaf and blind people have full access to the range of services offered. We are also concerned that the Department is intending to extend compulsion beyond attendance at work-focused interviews without adequate training or evidence-based guidance for Incapacity Benefit Personal Advisers (IBPAs) in distinguishing claimants who are 'unwilling' to participate from those who are 'unable'. As the evidence shows that many existing incapacity benefits claimants are volunteering to participate in Pathways to Work without compulsion, we are concerned that without adequate IBPA training and clear guidance, increased compulsion could damage both the relationship of trust between IBPAs and their clients and the reputation of the Pathways programme itself. We recommend that the Department further explore involving a wider group of trained professionals to assist personal advisers in the important role that they play. [89]

In its response, the Government said that training for Incapacity Benefit Personal Advisers had been 'thoroughly reviewed and reworked' over the previous year, and would be continuously reviewed and improved as part of the preparation for the introduction of the Employment and Support Allowance. It also stated that IBPAs were supported by Disability Employment Advisers (DEAs), whose training had also been

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88 HC 616-I 2005-06, paras 164-172

89 *ibid.*, original emphasis

reviewed and revised in 2005. DEAs could, in turn, draw on the expertise of work psychologists.[90]

5. Contracting out

Clause 15 allows the Secretary of State to contract out functions relating to conditionality. This would enable private and voluntary sector organisations to deliver important aspects of the new Employment and Support Allowance regime, including making decisions about sanctions for non-compliance.

Clause 15(1) provides that the Secretary of State may authorise others to exercise certain functions. Those functions are:

- Conducting 'work-focused interviews' under clause 11;
- Providing 'action plans' under clause 13; and
- Giving 'directions' under clause 14

Subsection (2) further provides that regulations may allow the Secretary of State to authorise others to exercise any of the functions conferred or imposed on him by regulations made under clauses 10 to 14.

The January 2006 Green Paper announced that private and voluntary sector providers would be invited to deliver Pathways to Work provision in new areas as the Pathways programme is rolled out across the country.[91] The Green Paper noted that Jobcentre Plus already has contracts with a range of private and voluntary sector organisations to deliver welfare to work services, and that the approach had brought 'unprecedented levels of individual choice into the system'.[92]

a. Existing involvement of the private and voluntary sector in DWP programmes[93]

Existing Welfare to Work provision within individual programmes is commonly delivered by the private and voluntary sectors under contract to the DWP. In addition to this, the DWP has trialed more extensive involvement of these sectors through Employment Zones, Action Teams for Jobs, and the New Deal for Disabled People (NDDP).

Employment Zones are designated areas of high long-term unemployment that have the flexibility to use existing funding to help eligible long-term unemployed people to return to, and retain, work. Private, public and voluntary sector organisations are able to bid for contracts to deliver Employment Zone provision. There are currently 13 Employment Zones in operation. The programme was initially introduced for long-term unemployed people aged 25 or over (replacing New Deal 25 Plus provision in these

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90 Cm 6861 19 June 2006 pp10-11
91 Cm 6730, chapter 5
92 *ibid*., p74
93 This section is by Ed Beale, Economic Policy and Statistics Section

areas), but it has since been extended to young people aged 18 to 24 years, who have already participated on New Deal for Young People, and lone parents.[94]

Providers of Employment Zones are paid as participants progress through the programme, and they also receive additional payments for achieving performance targets. Notably, a November 2003 research report found that 28 per cent of Employment Zone participants surveyed had started a job of 16 hours or more per week, compared with 17 per cent of New Deal 25 Plus participants surveyed.[95] The report went on to conclude that:[96]

> The evaluation has demonstrated that Employment Zones significantly increased the chances of participants gaining paid work compared to what would have been the case if New Deal 25 Plus had been the programme operating in these areas. The difference was most apparent within about the first year after referral. After that, the difference was smaller, but the participants in Employment Zones remained significantly more likely to have had full-time jobs about 18-20 months after becoming eligible.

Action Teams for Jobs aim to increase employment rates among disadvantaged groups in deprived areas (specifically long-term unemployed and inactive people); they currently operate in 65 areas of the UK chosen because they have high unemployment and low employment rates and a high proportion of people from ethnic minority backgrounds. The programme is voluntary and works on an outreach basis using discretionary funding to provide flexible and targeted assistance to help individuals overcome any problems they face finding employment. 40 of the 64 Action Teams are led by Jobcentre Plus. The other 24 are private sector led. The programme is due to finish in September 2006.

Regarding performance, an Institute for Employment Studies research report published in March 2006 found that:[97]

> […] there are differences in the achievement of targets between the Private Sector Led (PSL) teams and Jobcentre Plus led teams. Overall, PSL teams did not meet their target number of job entries (achieving 78 per cent overall), and were just slightly under the 70:30 split, with 69 per cent of job entries for people not claiming JSA. Taken as a whole, the Jobcentre Plus led Action Teams over-achieved their job entry target by 40 per cent, and also achieved their 70:30 split, with 74 per cent of job entries for people not claiming JSA.
>
> […] Of the clients that Jobcentre Plus helped to find work, 24 per cent were claiming JSA, compared to 31 per cent of PSL led team's clients … when compared to PSL teams, Jobcentre Plus led teams secured job entries for a

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94 This help is available instead of New Deal for Lone Parents in the London Employment Zones. Outside London each contractor in the Employment Zone provides the service to lone parents. Or lone parents can choose to receive help through New Deal for Lone Parents.

95 National Centre for Social Research, *Evaluation of Employment Zones*, DWP Research Report No 176, November 2003, p82

96 *ibid.*, p18

97 Institute for Employment Studies, *Review of Action Teams for Jobs*, DWP Research Report No 328, March 2006, pp63-65

> greater proportion of clients claiming Income support (IS) and Incapacity Benefit (IB), and were less likely to place clients into work who were not claiming any benefit.

However, the report did go on to state that:[98]

> Examining data for Action Teams as a whole relating to April 2004 to March 2005, 31 per cent of clients that teams had contact with were helped into work. This ratio is slightly higher for PSL teams who helped 37 per cent of their contacts into work compared to 28 per cent of Jobcentre Plus teams. PSL clients may have been more job-ready or it may be to do with the extent of employer linkages which are often strong in PSL organisations.

The **New Deal for Disabled People** (NDDP) is targeted specifically at people with disabilities and long-term health problems, particularly those receiving benefits on the grounds of incapacity for work. Individuals with learning difficulties or disabilities are also eligible for help via the NDDP.

The programme is delivered to customers through individual Job Broker organisations across Great Britain. Organisations securing Job Broker contracts include voluntary, private sector and public sector organisations. Job Brokers are paid based on progress through the programme and also upon participants gaining 'sustained' employment.

There have been a range of research reports published analysing NDDP. A report published in February 2005 found that:[99]

> Job Broker interventions had clearly had a significant impact at the level of individual customers. Employers highlighted the confidence-raising aspects of the Job Brokers' work, together with their support following recruitment as having been key to some of the successful placements. Some of the appointments would not have been made without the support of the Job Broker.
>
> […] The impact of the programme seems to have been greatest where Job Brokers could put forward a supply of suitably skilled customers to employers with high staff turnovers or regular vacancies. In these cases, it was the skills of the potential recruits, rather than the fact that they have a health condition or disability that attracted the employer. In this way, non-traditional employers of disabled people and people with health conditions were growing a more diverse workforce as a result of NDDP.

However, a report published four months later, in June 2005, stated:[100]

> […] the need [of Job Brokers] to achieve outcomes and specifically, for some, to meet the 25 per cent conversion target, impacted on their ability to meet the

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98 *ibid*., p67

99 Institute for Employment Studies, *Employers and the New Deal for Disabled People - Qualitative research, Wave 2*, DWP Research Report No 231, February 2005, p15

100 Centre for Research in Social Policy, Social Policy Research Unit and the National Centre for Social Research, *New Deal for Disabled People: An in-depth study of Job Broker service delivery*, DWP Research Report No 246, June 2005, p69

> needs of all clients. It was seen to impact on the level of contact advisers had with clients, and the extent to which they provided the various service components … While services varied and some clearly did provide intensive support over a longer period, it would appear that it was the support (in terms of type and level) required by clients who were furthest from work that was neglected where choices about allocation of resources had to be made.

This report concluded that:[101]

> […] what works lies in the ability of Job Broker services to identify the needs of clients, for them to be matched with an appropriate Job Broker service and with the right types and levels of support, and to maintain effective relations and communication with clients … the diversity of clients' needs suggests that a single type of organisation will never be sufficient … Relationships between Job Brokers and Jobcentre Plus are likely to be key to the success of NDDP, and as well as drawing on the professionalism of Job Brokers and Jobcentre Plus staff, might be supported by dissemination of examples of good and effective practice … Job Brokers have established themselves as important contributors to the aims of NDDP through the provision of services that can complement and add capacity to what is provided through existing Jobcentre Plus programmes and contracts.

An earlier report published in September 2004 found that participants' commitment to finding work improved upon registering with a Job Broker. One month prior to registration 33 per cent of participants were either in work or actively looking for work, but five to six months later this had increased to 71 per cent.[102]

b. Private and voluntary sector involvement in Pathways to Work

Chapter 5 of the January 2006 Green Paper announced that private and voluntary sector providers would be invited to deliver Pathways to Work in new areas as the programme is rolled out across the country:

> The Government wants to ensure that service providers are given sufficient flexibility and discretion to tailor its policies to suit the specific needs of individuals and employers they serve. We want to draw on the wealth of experience of those working in other sectors, and we are looking for greater involvement on the part of voluntary-sector and private providers in the future reform agenda. They are often best placed to support our clients, particularly those with a health condition or a disability, by providing the specialist services they need.
>
> Building on the success with the New Deal for Disabled People and other initiatives, we wish to develop further our services for incapacity benefits claimants. We will therefore invite new voluntary-sector and private providers to manage Pathways to Work in new areas. This will allow new and innovative approaches to be tested. We will need to ensure that support of sufficient quality is available to a wide range of claimants, delivered with maximum flexibility. Our objective will be to focus providers on improving job entry and retention, rather

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[101] *ibid.*, p10
[102] DWP, *New Deal for Disabled People (NDDP): first synthesis report*, September 2004

> than simply asking them to replicate existing Pathways to Work provision. We hope that such contracts will be in place from 2007.[103]

The Green Paper also floated the idea of 'outcome-based payments [to] meet the challenges of delivering Pathways to Work'.[104]

The Government proposes that from October 2007, private and voluntary sector providers will begin to deliver Pathways to Work services, extending to the remaining 60 per cent of new and repeat claimants of incapacity benefits by April 2008.[105]

c. Responses to the Green Paper proposals

The Work and Pensions Committee inquiry into Incapacity Benefits and Pathways to work considered the Government's proposals for private and voluntary sector involvement in Pathways to Work in detail.[106] Some of the organisations which gave evidence to the inquiry were supportive of the proposal, believing that private and voluntary sector providers could achieve higher job entry rates than Jobcentre Plus. Existing private sector providers of services for Jobcentre Plus pointed out that claimants were often more willing to engage with private and voluntary sector organisations than with Jobcentre Plus, perceiving them as less 'threatening'. Other organisations, including Mencap, RNIB and RNID, also felt that they were better placed than Jobcentre Plus to deliver certain services, given their knowledge and sensitivity to the needs of their respective client groups. However, many organisations voiced unease at the prospect of administering sanctions, pointing out that the possibility of sanctions would cloud the relationship between the adviser and client. Others had more fundamental objections, arguing that voluntary organisations purporting to champion the needs of particular groups would face inevitable conflicts of interest in administering a system involving sanctions. Some organisations questioned whether it was appropriate for them to have any involvement in regulating benefit. The Child Poverty Action Group has a number of concerns about the proposals, including the possibility that it might result in a 'postcode lottery', the threat to voluntary sector's independence and ability to innovate, problems with accountability and issues surrounding inspection and monitoring.[107] At a more practical level, doubts have been raised about whether the voluntary sector has the necessary coverage or capacity to deliver services to the extent the Government envisages.

The Work and Pensions Committee commented:

> 302. The Committee welcomes the involvement of the private and voluntary sectors in delivering aspects of the reform programme, including work-related activity programmes and work-focused interviews, recognising both the potential benefits and some of the risks. We are aware that there may be difficulties for some voluntary organisations, due to coverage, capacity issues or potentially

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[103] Cm 6730, p75
[104] *ibid.*, p76
[105] HC Deb 4 July 2006 cc33-35WS
[106] HC 616-I 2005-06, pp73-80
[107] Gabrielle Preston, *A route out of poverty? Disabled people, work and welfare reform*, CPAG, June 2006, p115

> conflicting roles. However, the requirement to deliver sanctions for non-compliance is more complicated. The Committee recommends that the decision of whether to administer a benefit sanction should rest with a DWP decision-maker rather than a contracted service provider. The Department should carefully consider the views of private and voluntary sector service providers received during its consultation on this issue. [108]

In its response published on 19 June 2006, the Government welcomed the Committee's support for private and voluntary sector involvement in welfare reform. It added:

> The Government recognises the complexity of the issues involved in establishing the most appropriate roles for the different sectors – public, private and voluntary – that will be operating in partnership in delivering welfare reform. Many considered and detailed representations have been received from stakeholders on where to draw the boundaries between providers and DWP in relation to administering specific aspects of the new benefit, but there is no clear consensus on this.
>
> In the roll-out of Pathways to Work in the period to 2008, decisions on sanctions will continue to rest with DWP decision makers, although DWP would not wish to rule out the possibility of revisiting these arrangements.[109]

Particular concerns have been voiced about the proposal to use outcome-based funding arrangements for private and voluntary sector providers. In evidence to the Work and Pensions Committee inquiry, some organisations warned that outcome-based funding might give providers an incentive to concentrate help on claimants closer to the labour market, or lead to people being forced into unsuitable jobs.[110] The Committee's report commented:

> 309. We welcome the Department's commitment to extend outcome-based funding, but believe it needs to consider carefully how best to progress with such funding to ensure that all providers - private and voluntary sector - do not skew their focus towards helping into work those who are already closer to the labour market. Providers must receive payments that recognise the ongoing support needed, not only to move a disabled person into work, but also to ensure their jobs are sustained. We recommend that the contracts reward providers for a range of outcomes leading up to and including job entry and that job retention for at least 12 months is rewarded. [111]

The Department responded:

> The Department recognises the Committee's concerns in relation to the risks associated with an outcome-based funding model and is currently working to minimise those risks as the funding model and procurement strategy are developed. The Department's approach will be informed by the outcome-related

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[108] HC 616-I 2005-06, p78, original emphasis
[109] Cm 6861, paras 83-84
[110] HC 616-I 2005-06, pp79-80
[111] *ibid.*

> funding pilots currently running in New Deal for Young People contracts in Kent, the Black Country and Scotland.
>
> The Department will announce the detail of its plans as soon as it is able to, but the aim is to ensure that contract structures do not lead to the introduction of perverse incentives that could have unwanted impacts, while avoiding creating overly complex monitoring systems and over-specification within contracts.
>
> In setting the appropriate period for sustainment, a balance needs to be struck between desirable simplicity of having standard arrangements and wanting to encourage and monitor sustainment over as long a period as possible within the practicalities of contracted provision.[112]

In a press notice issued on 3 July 2006, the public sector trade union PCS warned that there was a real danger that the Government's plans to increase the role of the private and voluntary sector in the provision of public services would mean a "step back to a model of pre-war welfare provision".[113] Citing new research commissioned by the union[114], its General Secretary, Mark Serwotka, said there was "little evidence supporting the claim that the third sector has a superior record in delivering services compared to the public sector".

6. Pilot schemes

Clause 18 provides for pilot schemes running for up to two years to operate in relation to any regulations under the *Social Security Administration Act 1992* which relate to the Employment and Support Allowance, as well as any regulations under Part 1 in the Bill, except regulations under clauses 3, 8 and 9. Clauses 8 and 9 cover the assessment of limited capability for work, and limited capability for work-related activity, respectively.

In its response to the Work and Pensions Committee, the Department stated that, once the working groups currently reviewing the Personal Capability Assessment (PCA) had reported to Ministers, there would be an opportunity to pilot the revised test.[115] It is understood that this refers to informal piloting or "dummy runs" of new tests alongside the existing PCA, rather than a full-scale pilot to determine actual benefit entitlement for claimants. The RNIB is 'extremely concerned' that the Government is not intending to pilot the new tests, arguing that the dummy runs being proposed are 'totally inadequate' given that there will be a substantial change in the way entitlement is determined.[116]

The *Explanatory Notes* state:

> It is intended to rollout full conditionality linked to participation in work related activity as resources allow. It is envisaged that in time pilot schemes may operate

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[112] Cm 6861, paras 85-87

[113] PCS press notice, *Public Sector Reform Could Lead To Pre-War Welfare Provision*, 3 July 2006: http://www.pcs.org.uk/Templates/Internal.asp?NodeID=903413

[114] Steve Davies, *Third sector provision of employment-related services: A report for the Public and Commercial Services Union*, Cardiff School of Social Sciences, June 2006

[115] Cm 6861, June 2006, para 32

[116] RNIB, *Welfare Reform Bill – RNIB's concerns*, 14 July 2006

> to explore different variations of the conditionality regime in order to understand what works best to help employment and support allowance claimants to work.[117]

Clause 18(3) provides that pilot schemes may only be initiated for the purposes of ascertaining whether provisions will facilitate or encourage claimants to obtain or remain in work.

Subsection (5) provides that pilot schemes may apply to different geographical areas or types of claimant, or to persons selected according to prescribed criteria or on a sampling basis.

Any regulations under clause 18(1) are to be affirmative instruments (clause 23(1)).

7. Existing claimants of incapacity benefits

The January 2006 Green Paper stated that the new benefit regime would apply only to new claimants from the date of introduction of the Employment and Support Allowance. However, it also proposed 'more proactive' engagement with existing incapacity benefits claimants:

> 23 Existing claimants will remain on their existing benefits. However, many have potentially manageable conditions which may have changed or improved while they have been on benefits. We propose to work more proactively with this group of people, balancing their responsibilities to prepare for a return to work with the need to treat them fairly.
>
> 24 We will:
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> - protect the level of benefits of existing claimants but will encourage them, as in the Pathways to Work pilots now, to volunteer for the help available to return to work;
> - ensure that existing claimants are having regular Personal Capability Assessment re-assessments;
> - ensure that claimants each have a work-focused interview and develop a personal action plan over the next few years, so that they are clear about what help is available;
> - establish a unit to undertake periodic checks of those claiming benefits to confirm ongoing eligibility, seeking renewed medical evidence as appropriate;
> - pilot a new initiative that will provide a leadership role for cities in tackling worklessness; and
> - protect the level of benefits payment should people enter work and find that they need to return to benefits.[118]

In a written answer on 22 March 2006 the then Work and Pensions Minister, Margaret Hodge, said that consideration was however still being given to whether existing claimants would participate in the revised Personal Capability Assessment.[119]

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[117] Bill 208-EN, para 113
[118] Cm 6730 January 2006
[119] HC Deb 22 March 2006 cc412-413w

In evidence submitted to the Work and Pensions Committee inquiry, some organisations argued that it would be unfair to offer different services, apply different conditions and provide different levels of benefits to claimants in effectively similar circumstances.[120]

In its report on the Green Paper consultation, the Department acknowledged that its proposals on how to support existing claimants had received a mixed response:

> We have listened to views about existing incapacity benefits claimants and have decided that they will be migrated across to the Employment and Support Allowance in time. This is to bring all claimants under the same system, helping to smooth the administration of the new benefit and reduce dual-system complexity. And, as has been the case in all of the original seven Pathways to Work pilots from their inception, anyone already on incapacity benefits may volunteer for the support we offer. We intend, as resources allow, to require all existing claimants to complete an action plan and participate in a minimum number of work-focused interviews. The evaluation of interventions with existing claimants in the original seven Pathways to Work pilot districts will help inform our approach in this area. However, we will ensure that existing claimants' benefit levels will be protected.[121]

Clause 26 of the Bill introduces **Schedule 4**, which contains transitional provisions for existing claimants of incapacity benefits. Paragraph 6 provides for regulations to make provision for the migration of existing incapacity benefits claimants onto the Employment and Support Allowance. The *Explanatory Notes* state:

> These regulations could provide both for voluntary migration, in prescribed circumstances, or mandatory migration. Regulations could prescribe the timing, conditions, kind and amount of any such entitlement to an employment and support allowance in such cases. Regulations could also make provision for determining whether a claimant has limited capability for work-related activity (i.e. that they would be entitled to the support component of an employment and support allowance).[122]

8. Costs

The Department has made no specific statement on the proposed benefit rates for the Employment and Support Allowance. In addition, as noted above, it proposes that certain elements of the proposed new regime will be only be introduced as resources allow. The *Regulatory Impact Assessment* is, therefore, somewhat vague on the expected costs of the measures in Part 1 of the Bill:

> Our initial estimates suggest the annual cost of a national Pathways service would be in the region of £148m.
>
> DWP has identified an additional £360 million from within its resource allocations for SR04 [the 2004 Spending Review]. The £360m covers a range of welfare

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[120] HC 616-I 2005-06, para 187
[121] Cm 6859 June 2006, p21
[122] Bill 208-EN, para 307

> reforms as set out in the Green Paper but will fund primarily the rollout of Pathways to Work in 2006-7 and 2007-8. Beyond 2007-8 we are working through the implications of the CSR settlement for DWP to establish the required resourcing position across the CSR period to 2011.
>
> The funding has been drawn from the budgets provided to the Department through the 2004 Spending Review settlement that covered the financial years 2005/06 to 2007/08. The Departmental Report 2005 (Cm 6539 published in June 2005) contains details of the Department's spending plans for these years.
>
> The overall cost of moving to the new Employment and Support Allowance will be dependent on where the benefit rate is set. In addition, it is likely that there will be implementation and IT costs incurred during the transition; again, these costs will vary depending on the agreed solution.[123]

II Part 2: Housing Benefit and Council Tax Benefit

Part 2 of the Bill will facilitate the national roll-out of a Local Housing Allowance (LHA) for private tenants which will change the basis on which their maximum Housing Benefit (HB) is calculated. Other measures will allow a pilot scheme to be established under which HB sanctions will apply to people evicted for anti-social behaviour who refuse to engage in a rehabilitation programme.

The Bill also provides for a simpler method of making extended payments of benefit to people who take up work; extend the information available to Rent Officers when carrying out their HB functions; extend the information supplied by Rent Officers to the Secretary of State; and provide for greater flexibility for the Secretary of State in respect of the range of reports that could be used to trigger the issue of directions requiring local authorities to improve their administration of HB.

A. The Local housing allowance (LHA)

1. Introduction

The local housing allowance (LHA) bases housing support payments on a system of standard maximum allowances, varying according to the size of the household and location of the property in which they live. The LHA approach removes the need for Rent Officers[124] to consider whether the eligible rent of each individual claimant (with some exceptions) is appropriate for the particular area or property and the claimant's particular needs.

The Government has been piloting the LHA approach to calculating the housing costs that HB will meet for tenants living in the deregulated private rented sector[125] in several

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123 *Welfare Reform Bill 2006 – Regulatory Impact Assessment*, July 2006, p19

124 The Rent Service is a government agency providing a rental valuation service to local authorities in England, supplying them with a range of valuations to assist them in settling claims for housing benefit.

125 These tenants are generally assured or assured shorthold tenants who rent from a private landlord and pay a market rent.

local authority areas since November 2003. In the LHA pilot authorities any HB due is paid direct to the tenant rather than to the landlord in most cases.

In the January 2006 Green Paper, *A new deal for welfare: Empowering people to work,* the Government said that it intended to use the LHA approach for private sector tenants nationally. After receiving responses to the Green Paper the Government reiterated its intention to roll-out the LHA for private sector tenants nationally, with amendments to certain aspects of the scheme.[126] Initially it is intended to roll-out the LHA to new claimants only; the scheme will be reviewed after two years and a decision will be taken at that point as to whether existing HB claimants should be transferred onto the LHA. The sections below (**1-7**) set out the background to clause 27 of the Bill.

2. The existing Housing Benefit scheme

HB is a non-contributory means tested benefit that is administered by local authorities and is paid to eligible tenants who live in the social and private rented sectors. The structure of the HB scheme is closely linked to that of the Income Support scheme. The basic levels of personal allowances for the two schemes (and that of Jobseeker's Allowance) are the same (with some exceptions); these allowances vary depending on the age and composition of the household applying for benefit.

The detailed provisions of the HB scheme are set out in the *Housing Benefit Regulations 2006* (SI 2006/213), the *Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations* (SI 2006/214), the *Rent Officers (Housing Benefit Functions) Order 1997* (SI 1997/1984), and the parallel *Rent Officers (Housing Benefit Functions) (Scotland) Order 1997* (SI 1997/1995).

Entitlement to HB is calculated by comparing the needs and resources of the household, taking their liability for rent payments into account. In calculating household net income the HB scheme provides for the disregard of some types of income (or a proportion of that income). Households in receipt of Income Support or income-based Jobseeker's Allowance, or who have an assessed net income at or below the Income Support threshold, receive maximum assistance. This may be equal to 100% of their eligible rent, less any deductions that have been made for non-dependents living in the household.

This '100% approach' is heavily modified in the UK for private sector tenants. Since the deregulation of private sector rents in 1989, Rent Officers have played a role in ensuring that HB neither fuels rent increases nor enables people to live in more expensive private sector accommodation than they could otherwise afford. A series of regulations has provided that, in specified circumstances, the amount of rent used to calculate entitlement to HB can be limited: this can result in claimants experiencing a 'shortfall' between their HB entitlement and their rent level.[127]

For households with net incomes above the level of their personal allowances (after taking any income disregards into account) their level of HB entitlement is reduced by

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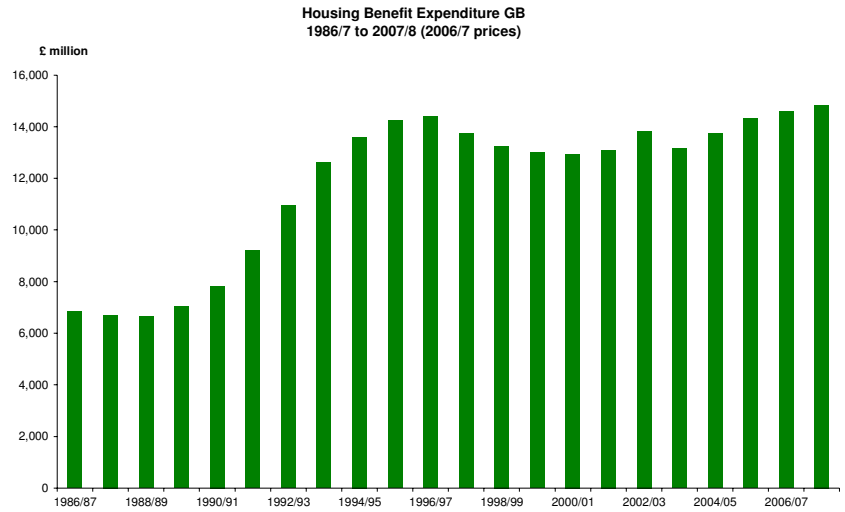
[126] *A new deal for Welfare: Empowering people to work,* Consultation Report, DWP, June 2006, p.48

[127] For example, claimants may not receive HB to cover the full rent charge if they live in accommodation that is deemed to be too large for their needs.

65% of the difference. Households with capital above £16,000 are ineligible for HB. Households with capital above £6,000 but less than £16,000 are deemed to have a 'tariff' income from this capital of £1 per week for each £250 of capital above that level.[128]

3. Housing Benefit expenditure[129]

Spending on Housing Benefit grew strongly following the changes to rent policy introduced by the *1988 Housing Act* and the *Local Government and Housing Act 1989*. The Conservative Government reduced subsidies to social landlords and put greater emphasis on rents as a source of income. This had the effect of shifting social landlords from a reliance on direct subsidy to greater dependence on their tenants' entitlement to Housing Benefit. Between 1988/9 and 1994/5 spending on Housing Benefit roughly doubled in real terms from £6.7 billion to £13.6 billion (2006/7 prices).



Housing Benefit expenditure peaked in 1996/7 and fell in real terms as unemployment went down and moves were made to encourage people on benefit, such as lone parents, into work. In the last few years, spending has been rising; Housing Benefit expenditure of £14.6 billion in 2006/7 is just higher than its previous 1996/7 peak.

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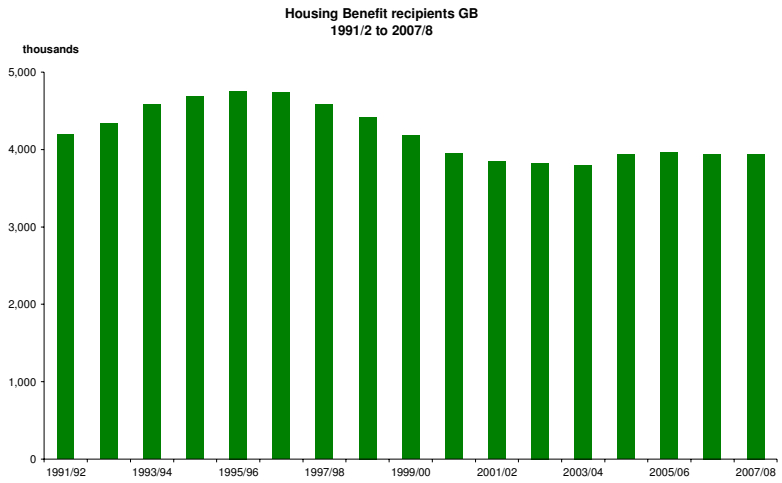
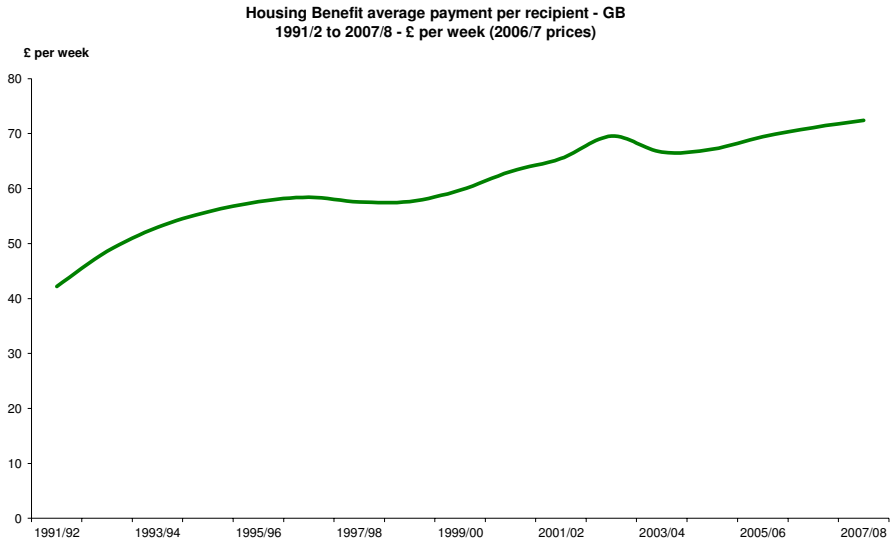
[128] Modified capital rules apply to people aged over 60.

[129] All figures for Great Britain, taken from DWP Benefit Expenditure and Caseload Tables - www.dwp.gov.uk/asd/asd4/medium_term.asp



While the numbers receiving Housing Benefit have remained fairly constant there has been an increase in the average housing benefit payment. In 1997/8 the average Housing Benefit payment was £58 per week (in 2006/7 prices). In 2006/7 this was £71 per week, a real terms increase of 21%.



Average Housing Benefit payments vary across the country – reflecting differences in rents. In London, the region with the highest average payments, the average Housing Benefit payment was £99 per week. In Scotland, the region with the lowest average, the equivalent figure was £49 per week.[130]

[130] Source: DWP *Housing Benefit & Council Tax Benefit Quarterly Summary Statistics: November 2005* www.dwp.gov.uk/asd/hbctb.asp

4. Problems with the current Housing Benefit scheme

Studies into the HB system have highlighted a number of problems with its operation. Peter Kemp's 1998 report, *Housing Benefit: Time for Reform*, suggested that the HB system suffered from four major problems, namely:

- **Work disincentives**: HB plays an important part in the "poverty trap" through the withdrawal of benefit as income rises.
- **Shopping incentives**: HB recipients are fully insulated from changes in their rent levels. There is an argument, therefore, that the scheme gives recipients no incentive to shop around for cheap accommodation, bargain with their landlords to achieve lower rents, or move to smaller accommodation if their present accommodation is larger than they need.
- **Equity between tenants**: Changes to HB (mainly in 1996 and 1997) largely affected private tenants renting on assured and assured shorthold tenancies. Two systems of HB have emerged in an *ad hoc* way, one for recipients living in the deregulated private rental market and one for all other recipients. It is argued that this has created a lack of equity between these two groups of tenants.
- **Administration**: Research has found significant variation in the quality of HB administration between different local authorities. The difficulties surrounding HB administration have been identified as creating significant problems for tenants and their landlords, particularly in the private rental market.

The Government's April 2000 Housing Green Paper, *Quality and Choice – a decent home for all,* endorsed the need for a benefit that enables people on low incomes to afford reasonable accommodation but went on to list a number of '"well-known" problems with the HB scheme:

> - "Delivery of Housing Benefit is complex, confusing and time consuming. Claimants are usually required to complete more than one claim form and attend more than one office if they want to claim Housing Benefit along with other social security benefits. Information Technology links between the different organisations are often poor and can be non-existent. In addition, when a rent officer determination is involved it can significantly add to the time it takes to assess a claim;
> - The benefit rules are complex. Claimants don't understand them and often don't know what benefit rules apply to them and what support they might be entitled to;
> - The performance of Local Authorities is inconsistent. 409 local authorities administer the national Housing Benefit scheme. The Audit Commission suggests that only 56% of local authorities in England and Wales administer benefits efficiently;
> - All this administrative hassle and delay can leave claimants with worrying rent arrears, or worse, risk of eviction - pensioners in particular can be worried unnecessarily about their housing at a time when they should be feeling secure in their homes. Landlords can be left with cash flow problems and concerns about renting to Housing Benefit claimants;
> - Housing Benefit fraud and error costs some £840m each year. Fraudulent behaviour by claimants (and some landlords) takes money out of the system which should be spent helping those who need it most - pensioners and children - or on investing in our schools and hospitals.

> Some local authorities make every effort to prevent, detect and punish fraudsters, but others are not doing enough;
> - For those of working age Housing Benefit can act as a barrier which deters people from getting into jobs. Many claimants simply do not know that they can still get help with their housing costs if they move into low paid work. Others are reluctant to risk taking up work - particularly where it is temporary or casual - because of the potential wait involved in re-claiming if the job ends;
> - Housing Benefit can be exploited by landlords. Some unscrupulous landlords charge high rents for poor quality housing paid for by Housing Benefit; and
> - Housing Benefit takes away responsibility from claimants. Housing Benefit gives tenants little interest in the rent - provided it does not exceed local limits it can be reimbursed in full, often directly to the landlord. This means that some tenants are not even aware of how much rent is being paid."[131]

It is not universally accepted that the current HB system discourages claimants from taking up work and encourages them to rent more expensive property than they need. In *Falling Short: the CAB case for housing benefit reform,* the National Association of Citizens Advice Bureaux (NACAB) argued that the scheme is too complex for most claimants to be able to calculate whether or not they would be better off in work. NACAB also said the conditions for claiming Jobseeker's Allowance prevent claimants who are able to work from having the option of refusing to take up work. NACAB pointed out that any work disincentive effect that might exist is irrelevant to the claimants who are pensioners (42.5% of HB claimants at the time the report was written).[132]

In its 1999 report NACAB concluded that the rent restriction rules are "a very effective deterrent for private tenants seeking to rent expensive property." Rather than encouraging tenants to rent expensive properties, on the basis of evidence collected by CABs at that time, NACAB argued:

> The current HB scheme is too often failing in its primary purpose - to provide tenants on low incomes with the means to pay their rent and avoid housing debt and homelessness. The result has been many private landlords refusing to let to people on housing benefit, and increasing levels of rent arrears and possession proceedings in the social rented sector.[133]

In *Shopping Incentives and Housing Benefit Reform* (2000), Peter Kemp also concluded that there was little evidence in practice that "upmarketing" was widespread but he went on to suggest that this was not a good reason for retaining a system in which tenants are fully insulated from market signals:

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[131] *Quality and Choice- a decent home for all,* para 11.4 Accessible online at: www.communities.gov.uk/pub/243/QualityandchoiceadecenthomeforallTheHousingGreenPaperprintedPDF594Kb_id1150243.pdf

[132] NACAB, *Falling Short: the CAB case for housing benefit reform,* June 1999

[133] *ibid*

> "It is difficult to justify a situation where one of the reasons why abuse of the scheme is limited is the lack of information among most recipients about how the scheme works."[134]

5. The October 2002 announcement: establishing the LHA pilots

The April 2000 Green Paper, *Quality and Choice – a decent home for all,* set out a range of options for improving the HB scheme based around the existing structure. The Housing Policy Statement issued in December 2000, *The Way Forward for Housing,* stated that there had been "widespread acceptance" amongst respondents to the analysis of HB in the Green Paper and the need for reform. Respondents felt that the priority should be given to the administration of HB; support was forthcoming for longer-term structural reform but views varied on when it should take place and in what form.[135]

Despite the Housing Policy Statement's apparent rejection of structural reform in the near future, on 17 October 2002 the then Secretary of State for Work and Pensions, Andrew Smith, announced what he referred to as "the biggest reform in Housing Benefit since the benefit began."[136] In *Building Choice and Responsibility: a radical agenda for Housing Benefit*, the Government set out its intention to introduce a flat-rate local housing allowance, initially in the deregulated private rented sector, based on area and family size. The LHA is currently being piloted in eighteen Pathfinder Authorities; the Government has said that the evaluation of these pilots will inform the development of LHA for national roll-out.

The original Pathfinder Authorities involved in the LHA pilot were: Brighton & Hove City Council; City of Edinburgh; County Borough of Conwy; Leeds City Council; London Borough of Lewisham; North East Lincolshire; Teinbridge District Council; Blackpool Borough Council and Coventry City Council.

Andrew Smith explained the factors that were taken into account in selecting the Pathfinder areas:

> **Andrew Smith**: In order to ensure a robust evaluation of the standard local housing allowance scheme, we have drawn up a list of key factors against which Pathfinders should be chosen. This includes a broad range of housing and labour market conditions in England, Wales and Scotland.
>
> The Pathfinder areas will represent variety in market and economic activity and will represent a range of high, medium and low house prices and rental values. They include a mixture of rural, urban, suburban and city areas. They will also provide a sufficient sample size, as those taking part must have a caseload of at least 2,500 claimants in the de-regulated Private Rented Sector, of whom at least 1,600 must have claimed under the rent rules introduced in 1996 and 1997.

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[134] Joseph Rowntree Foundation & the Chartered Institute of Housing, 2000
[135] *The Way Forward for Housing,* December 2000, paras 10.2-10.4
[136] DWP press release, *Biggest Change in Housing Benefit since 1988: Smith,* 17 October 2002

> Further conditions affecting the choice of Pathfinder areas include the current state of Housing Benefit administration, the capacity of IT systems, and the need to avoid those local authorities already piloting other Government initiatives.[137]

The *Housing Benefit (General) (Local Housing Allowance) Amendment Regulations 2003* (SI 2003/2398) and the *Rent Officers (Housing Benefit Functions) (Local Housing Allowance) Amendment Order 2003* (SI 2003/2398) were laid on 24 September 2003. The first of the pilots, Blackpool, started on 17 November 2003 and the remaining eight started on dates between November 2003 and February 2004. On 14 September 2004 the Government announced the extension of the LHA pilot scheme to a further nine Pathfinder areas after having secured additional finance in the March 2004 Budget settlement. The new Pathfinder local authorities are: Argyll & Bute; East Riding of Yorkshire; Guildford; Norwich; Pembrokeshire; Salford; S. Norfolk; St. Helens and Wandsworth.[138] Regulations allowing the extension of the LHA pilot scheme to these authorities were laid in 2005.[139]

In the Pathfinder Authorities HB allowances are based on rents in the local market and are calculated by local Rent Officers. The rent allowances "aim to reflect market conditions and reflect rents in the middle of the market."[140] The allowances are published so that tenants and landlords know in advance how much of their rent will be met by HB in that particular area. Claimants are able to keep the difference between their LHA payments and their rent costs if any excess arises, while tenants who live in accommodation with rents higher than the LHA for their household size and composition must fund any shortfall themselves. Direct payments of HB to landlords in the Pathfinder areas has ceased except where vulnerable tenants have limited ability to manage their own affairs or where substantial arrears have built up.

Detailed information on the operation of the LHA can be found in the DWP's *Housing Benefit Local Housing Allowance Guidance Manual* which can be located online at: www.dwp.gov.uk/housingbenefit/lha/guidance-manual-inc-amdt4.pdf

The Pathfinder Authorities are still responsible for administering HB to tenants of social landlords and private tenants unaffected by the LHA under the existing HB scheme.

6. The aims of the LHA

a. A simpler, fairer system

It is widely accepted by local authorities and bodies advising claimants that the current HB system is complex and that this contributes to poor administration.[141] The scheme takes account of household income and also highly variable housing costs; the need to

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137 HC Deb 23 October 2002 c315W

138 DWP Press Release, 'Changing lives for the better with new housing support,' 14 September 2004: www.dwp.gov.uk/mediacentre/pressreleases/2004/sept/additional9-1409.asp

139 SI 2005/236 & SI 2005/238

140 *Building Choice and Responsibility: a radical agenda for Housing Benefit,* DWP, October 2002, para 6.9 www.dwp.gov.uk/housingbenefit/publications/2002/building_choice/prospectus.pdf

141 Efforts have been made to improve the administration of the scheme – see *A new deal for Welfare: Empowering people to work,* DWP, January 2006, p.84

report changes in income, savings and rent means that HB administration is "prone to fraud and error."[142]

The Government argues that paying the same level of allowance to tenants with similar circumstances within the same area will produce a fairer and more transparent system enabling tenants to trade between the quality and price of their accommodation:

> "A clear and transparent set of allowance rates helps tenants (and landlords) know how much financial help is available from the state. Tenants are able to compare how much support is available towards their housing costs in different areas and for different property sizes."[143]

The removal of the need to refer individual rents to Rent Officers would, it was hoped, speed up the claims process.

b. Personal responsibility

As noted above, in the Pathfinder areas there has been a move away from paying HB direct to landlords. This has proved to be one of the more controversial aspects of the HB reforms. The Government argues that ending direct payments will increase the personal responsibility of claimants. Safeguards have been kept for vulnerable claimants and for landlords where tenants fall into arrears.

As a general rule, under the current system HB is paid direct to claimants except where they request that it is paid direct to the landlord. In some circumstances HB must be paid direct to the landlord, e.g. where there are more than eight weeks arrears of rent outstanding.

It has increasingly become the norm for landlords to require tenants who are claiming HB to agree to the benefit being paid direct to them as a condition of granting the tenancy.[144] The January 2006 Welfare Reform Green Paper states that 60% of private sector tenants in receipt of HB currently have these payments sent direct to their landlords. It is hoped that direct payment to tenants will encourage claimants to budget and assist in developing skills needed for moving into work.

c. Choice for tenants

Tenants who rent a property at below the standard allowance or who move to a cheaper property in the local area, or who negotiate to keep the rent below the LHA, are allowed to keep the difference between the rent charged and the allowance paid. Thus in theory, tenants have a choice of paying more (out of their own income) for larger/higher quality accommodation or living in smaller accommodation and retaining a percentage of the housing allowance. The Government argues that this will give tenants more choice.

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[142] *Building Choice and Responsibility: a radical agenda for Housing Benefit,* DWP, October 2002, para 4.3
[143] *A new deal for Welfare: Empowering people to work,* DWP, January 2006, p.85
[144] HC Deb 7 November 2002 c635W

d. Improved administration and reduced barriers to work

The Government's position is that for working-age tenants the LHA provides greater certainty on what help is available when in or out of work. This is because the maximum HB available in a particular location for a given household size and composition is published and openly available. This transparency, the Government argues, can aid the ability of people to move between areas and jobs. Also, a simpler system can speed up processing times giving claimants and their landlords more faith in the system thus making claimants more willing to move into work on the grounds that any 'in-work' HB will be paid promptly.

e. Financial inclusion

Finally, the Government wants people to have their HB paid into a bank account and to set up a standing order to pay the rent to their landlord: "This has the advantage of being a safe and secure method of payment and provides certainty for landlords that rent will be paid."[145]

7. LHA pilots: evaluating progress

The original Pathfinders are subject to a full (ongoing) evaluation by a consortium of leading research universities with experience in this field. The consortium is looking at the effect of the LHA on claimants, landlords, councils and is also looking at changes in Housing and Labour markets. To date eight reports have been published:

- *Evaluating the Local Housing Allowance Pathfinders,* 2004, this describes the policy background to the LHA and contains an explanation of the evaluation process.[146]
- *The Nine LHA Pathfinder Areas: a summary of the baseline position before the introduction of the LHA,* 2004, provides a summary of the baseline position in regard to HB in the original Pathfinder areas before the introduction of the LHA.[147]
- *Delivering the LHA: A summary of the early experiences of implementing the LHA in the nine Pathfinder areas, 2*005; a report on the experiences of those involved in delivering the LHA six months after implementation.[148]
- *Claiming Housing Benefit in the Private Rented Sector,* 2005.[149]
- *Landlords and Agents in the Private Rented Sector,* 2005, [150] this report, and the one above, outlined the key findings of surveys of HB claimants and landlords in the Pathfinders prior to, and immediately after, the authorities went live with the LHA.

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[145] *A new deal for Welfare: Empowering people to work,* DWP, January 2006, p.85
[146] See Evaluating the Local Housing Allowance Pathfinders, DWP, www.dwp.gov.uk/housingbenefit/lha/evaluation/2004/pathfinder_intro_1.pdf
[147] The Nine LHA Pathfinder Areas: a baseline report, DWP, www.dwp.gov.uk/housingbenefit/lha/evaluation/2004/pathfinder_areas_2.pdf
[148] www.dwp.gov.uk/housingbenefit/lha/evaluation/2005/delivering_lha.pdf
[149] DWP 2004, www.dwp.gov.uk/housingbenefit/lha/evaluation/2005/lha3-baseline-claim-survey.pdf
[150] DWP 2005, www.dwp.gov.uk/housingbenefit/lha/evaluation/2005/lha4_landlords.pdf

- *Receiving the LHA: claimants' early experiences of the LHA in the nine Pathfinder areas,* 2005.[151]
- *Working with the LHA: A summary of landlord and agents' early experiences of the LHA in the nine Pathfinder areas,* 2005.[152]
- *15 Months On: An interim evaluation of running the LHA in the nine Pathfinder areas, February 2006.*[153]

The following three sections summarise the findings in *Receiving the LHA: claimants' early experiences of the LHA in the nine Pathfinder areas, Working with the LHA: A summary of landlord and agents' early experiences of the LHA in the nine Pathfinder areas* and *15 Months On: An interim evaluation of running the LHA in the nine Pathfinder areas.*

Claimants' experiences:
The consortium's research found little evidence at the six month stage of the LHA of it facilitating moves to different accommodation amongst claimants. The main reason cited for this was the lack of availability of suitable affordable housing in the private rented sector.[154] The study found an increased propensity amongst landlords in the Pathfinder areas to ask for a deposit from prospective tenants who would be claiming HB:

> "The survey showed an increase since the introduction of LHA in the number of claimants who were required to pay a deposit from two-thirds (66 per cent) of claimants who moved into their current accommodation before LHA was introduced to three-quarters (75 per cent) of those who moved into their accommodation after the introduction of LHA. Raising the money to pay a deposit was seen as the biggest single difficulty in moving by several of the claimants in the face-to-face interviews."

The possibility of shortfalls arising between HB and the claimant's acutal rent level appeared not to have presented significant problems in the Pathfinder areas:

> "Claimants in the Pathfinders are more likely to have had an excess between their LHA entitlement and rent than a shortfall. Across all Pathfinders over one-half (57 per cent) of claimants have an excess compared to nearly two-fifths (39 per cent) of claimants who had a shortfall. However, the situation in individual Pathfinders varies. For example, three quarters of claimants in Lewisham and Edinburgh have an excess but claimants in North-East Lincolnshire, Blackpool and Conwy were more likely to face a shortfall.
>
> Those entitled to more rooms according to the LHA size criteria are less likely to face a shortfall, as there is more scope for them to be over-occupying accommodation. Average shortfalls tended to be higher in areas where average rents are higher, for example, in Lewisham (£2) and Brighton & Hove (£19), and lower where average rents are lower, in North-East Lincolnshire (£11). Similarly

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151 www.dwp.gov.uk/housingbenefit/lha/evaluation/2005/lha6-receiving.pdf
152 www.dwp.gov.uk/housingbenefit/lha/evaluation/2005/LHA_report_summary_7_final.pdf
153 www.dwp.gov.uk/housingbenefit/lha/evaluation/2006/evaluation.pdf
154 *Receiving the LHA: claimants' early experiences of the LHA in the nine Pathfinder areas,* DWP, 2005

> there are higher average excesses in areas with higher rents, (Lewisham, Brighton & Hove and Edinburgh) and lower average amounts in lower average rent areas, for example, just £8 in North-East Lincolnshire.
>
> The percentage of claimants experiencing a shortfall and the average shortfall amount has fallen in Pathfinder areas, after the introduction of the LHA. The removal of property specific restrictions means we would expect the percentage of claimants with a shortfall to decrease because of this. How shortfalls have been affected by the LHA will form an important part of the LHA evaluation as it progresses."

The study also found no significant increase in rent arrears arising out of the direct payment of HB to claimants in the Pathfinder areas:

> "In the face-to-face interviews the issue of responsibility was also raised when claimants expressed reservations about the ability of 'others' to cope with the responsibility of direct payments and paying rent. However, the face-to-face interviews show that claimants prioritise paying rent above other outgoings and there was no evidence of claimants spending their Housing Benefit on anything other than rent. However, it must be recognised that this is relatively early in the evaluation, and further waves of fieldwork will reveal how people have coped in the longer-term. Furthermore, most interviews were conducted before Christmas (which was seen as a risky period), and there were no examples of unexpected financial demands which could put pressure on claimants' resources.
>
> The incidence of rent arrears amongst survey respondents was low, at this early stage of the evaluation. Across all Pathfinder areas, nearly nine in ten claimants had been up-to-date with their rent for the last 12 months."

There was some evidence that rents had increased in the Pathfinder areas but it was noted that given the number of market forces at work it was difficult to isolate the precise influence of the LHA:

> "DWP Management Information data show that across the Pathfinders, rents seem to have risen by 4% on average. The survey of claimants on the LHA found that approximately one in six claimants had had a rent increase since LHA was introduced in their area. This was also influenced by how long the LHA had been in operation, with claimants in some of the earlier Pathfinders more likely to have had a rent increase.
>
> In the face-to-face interviews there was evidence of rents rising to, and above, LHA levels. Claimants' uncertainty about receiving an excess occasionally resulted in an increase to the LHA rate. Where tenants had been subject to a rent increase, it seems as though any negotiation over the increase with their landlord is very uncommon at the moment, with less than one in ten of survey respondents trying to negotiate."

There was no evidence of the LHA having had a significant impact on work incentives amongst claimants:

> "Although an understanding of how LHA works is crucial if it is to act as a work incentive, the face-to-face interviews show the LHA is not always understood. While some claimants understood that Housing Benefit under LHA is means-

tested against earnings and that working would mean a decrease in Housing Benefit, others assumed benefit would stop completely once they started work.

Although most claimants said that LHA itself had not made a difference to whether they worked or not, several of the claimants in the face-to-face interviews had calculated the amount they would need to earn in order to compensate for lost benefits. Some said they had been unable to find employment with adequate wages to compensate for lost benefits. In addition, many of the claimants who were working, found it difficult to calculate the amount they would be better/worse off through changing the number of hours they worked."

Landlord/agents' experiences:

The consortium's research found, from a landlord/agent's point of view, (*Working with the LHA: A summary of landlord and agents' early experiences of the LHA in the nine Pathfinder areas*) the early experiences of the LHA appeared to be slightly more problematic:

"Since the baseline survey, fewer corporate and individual/couple landlords were letting to LHA tenants, lettings had reduced by 24 per cent and fourteen per cent respectively. However, portfolio sizes had not changed substantially.

- The majority of respondents (88 per cent) had not changed the way in which they set the rent; in the small minority of cases where change had taken place, the rent had been increased. Similarly, the majority of landlords and letting agents (73 per cent) had not changed the *frequency* with which they collected the rent. However, where a change had taken place more collections were now taking place more frequently.
- With regard to tenants on LHA, rent collection methods varied widely by landlord type. Corporate landlords and letting agents made much higher use of standing orders and direct debits: 63 per cent of corporate LHA lettings and 59 per cent of letting agent lettings made use of these methods. For individuals/couples landlords, a higher proportion of LHA tenants paid their rent in person, or by cash or cheque into their landlord's bank account.
- Overall, fewest problems with rent collection were reported when payments were made from the local authority to the landlord or letting agent. It was notable that even where standing orders or direct debits were set up through bank accounts, landlords and agents reported difficulties, particularly with the timing of payments.
- Seventy-two per cent of all respondents reported some experience of rent arrears over the last three years and of these, 68 per cent of landlords and letting agents deemed tenants in receipt of Housing Benefit (HB) more likely to fall into arrears than non-HB tenants.
- One third of landlords said that their management and maintenance costs had increased since the introduction of LHA. Rent collection was mentioned by 59 per cent as one cause, but 46 per cent also noted maintenance and repair costs, and the need to upgrade the standard of accommodation. However, 99 per cent of letting agents had not increased their fees for managing LHA tenancies.
- Twenty-two per cent of landlords and letting agents said that, because of the LHA, they had not renewed existing LHA tenancies, and 28 per cent had not let any new tenancies to LHA tenants. Fifty-five per cent said that in the future, because of LHA, they were much less likely to let to tenants in receipt of HB. The principal reasons given in all cases were experience

> of rent arrears and the cessation of payments of benefit to the landlord or letting agent."[155]

Prior to the LHA's introduction in the Pathfinder areas the National Federation of Residential Landlords warned that the removal of direct payments to landlords would deter them from letting to HB claimants:

> "Nobody's been consulted as landlords on this. Landlords who aren't allowed to have the rent direct, where they can have a choice, will not accept housing benefit tenants and therefore the choice to tenants will go down."[156]

The Association of Residential Letting Agents (ARLA) also pointed out that rules that allow councils to claw back HB overpayments from landlords, and the fact that HB would still be paid in arrears in the pilot areas, would act as major deterrents to private landlords.[157]

Delivering the LHA:

The most recent report from the consortium, *15 Months On: An interim evaluation of running the LHA in the nine Pathfinder areas* (February 2006) evaluated the impacts of the LHA on organisations and agencies involved in delivering the LHA scheme.[158] The main findings are summarised below.

The requirement that LHA should normally be paid direct to the claimant is being met; between 76% and 94% of claimants across the nine original Pathfinder Authorities are receiving payments direct. The majority of payments being made direct to landlords are being made on grounds of the tenant's vulnerability. Pathfinders vary in the way they collect evidence of claimants' vulnerability; there is an issue around gathering 'sufficient proof' of a claimant's vulnerability where s/he is not known to, or registered with, a support agency. Claimants who are deemed to be vulnerable are required to have their status reviewed; the report highlights the variations in approach to this between the Pathfinders and indicates that the process of carrying out reviews may have significant resource implications.

The majority of claimants on LHA now have bank accounts. The report states that few Pathfinders report widespread on-going problems in this respect; this is attributed to significant efforts made by HB sections and money advice services in the Pathfinder areas.

Landlords were very concerned that the direct payment of LHA would lead tenants not to pass on payments to them, resulting in arrears. In one Pathfinder area cases of arrears have risen but only a minority of direct payments to landlords in the Pathfinders are being made on the grounds of arrears. This has led the authors to conclude that "non-

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155 *Working with the LHA: A summary of landlord and agents' early experiences of the LHA in the nine Pathfinder areas,* DWP, 2005, www.dwp.gov.uk/housingbenefit/lha/evaluation/2005/LHA_report_summary_7_final.pdf

156 'Curbs to rent direct will deter private landlords', *Inside Housing,* 8 November 2002

157 'Incentives to shake-up benefit', *Inside Housing,* 18 October 2002

158 www.dwp.gov.uk/housingbenefit/lha/evaluation/2006/evaluation.pdf

payment of rent does not appear, after 15 months of the LHA, to be a problem affecting a large number of claimants or their landlords." However, the evaluation report does not take account of cases where claimants have accrued arrears but whose landlords have not informed the HB service of this. On-going work with landlords and claimants is expected to provide a clearer picture on arrears. While homelessness applications in the Pathfinder areas have increased over the period the majority of participants are not of the opinion that this is due to the LHA regime. There is some evidence to suggest that the LHA is making it easier to assist homeless people find accommodation in the private rented sector as it provides a level of certainty. Most homelessness services have negotiated with their HB services to provide a guarantee of direct payment to landlords at least for a limited period.

The HB service in the Pathfinders is believed to be being delivered successfully for the majority of claims. IT problems have been experienced ranging from 'acute to the minor' and some Pathfinder Authorities have suggested that the level of resources needed to support LHA implementation had been "seriously underestimated." The Pathfinders have seen improvements in HB processing times that are greater than those seen across all local authorities over the period.

Most Pathfinders have reported an increase in the level and/or number of overpayments and the rate at which these are being reclaimed "appears to be falling." This is thought to be because of the difficulties associated with reclaiming from tenants rather than landlords and the smaller amounts that can be reclaimed from tenants.

Rent Officers have felt a major impact on their work as a result of the LHA. Significant effort has been put into gathering and validating market evidence for use in setting LHA rates; LHA rates are reviewed monthly. There have been some difficulties in getting evidence for some property types, e.g. single rooms with shared facilities, and controversy has arisen where rates have been reduced. Rent Officers participating in the evaluation said that their decisions were correct and defensible.

In regard to work incentives, the evaluation report found that there was no evidence of what effect, if any, the LHA is having on employment decisions:

> "One officer believed that the effects of the LHA in their location were so small – affecting the better off calculation by only £5-£10 – that it was of little significance in the claiming/working decision. Others simply do not know if it is affecting such decisions."[159]

8. Clause 27 & comment

The detailed rules on how the LHA is set will be contained in secondary legislation, as is the case under the current HB regime. The Explanatory Notes to the Bill state that Clause 27 will provide for powers that are more specifically appropriate for the LHA approach to determining a claimant's maximum Housing Benefit with a view to facilitating the roll-out of the LHA nationally across the private rented sector.[160]

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[159] *ibid* p.39
[160] Bill 208-EN, para 131

Section 130(4) of the *1992 Social Security Contributions and Benefits Act* would be replaced with a new section under which a claimant's Appropriate Maximum Housing Benefit (AMHB) would be determined. Regulations will specify the detail of AMHB determinations. These determinations may be property specific (as under the existing HB scheme) or generic as under the LHA scheme. Regulations will specify that certain cases must be referred to a Rent Officer for a property specific determination; this will affect cases that are exempt from the LHA.

There is support amongst local authorities and other housing bodies, such as the Chartered Institute of Housing (CIH), for the objectives behind the LHA:

> "CIH supported the concept of LHA pathfinders in the private sector. As a policy initiative these have been a great success. Not only have they provided a template for the non-pathfinder authorities as how to make the changeover smoothly they have helped build confidence in the reforms with all the relevant stakeholders."[161]

> "We welcome the development of proposals for a Local Housing Allowance to provide a fairer and more transparent system, which also supports financial inclusion and tenant choice." Housing Corporation[162]

Subsection (5) of clause 27 would provide for a claimant's HB to exceed their rent liability if their appropriate LHA rate is higher than their actual rent liability. The Welfare Reform Green Paper asked for views on a proposal to cap the amount of HB that claimants can receive in excess of their rent levels:

> "In some areas, claimants are able to receive large cash sums over and above the amount they need to pay their rent. There is a concern that this is fundamentally unfair and that it could have serious implications for work incentives."[163]

Respondents appreciated the need to restrict LHA gains but expressed concern over the additional complexity that a capping regime would add to the scheme. The Association of London Government said: "It is disappointing that the DWP is proposing to cap excess allowances … [as this] introduces a level of complexity and makes the scheme less transparent."[164] The Government has said that it intends to implement a £15 cap on the LHA that tenants can receive above their rent level.[165]

Subsection (3) of clause 27 would provide a power to prescribe when authorities must review a HB award. The Explanatory Notes state that this will allow an authority to apply a new LHA rate each year to ensure that claimants' awards are updated.[166]

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[161] CIH's response to the Welfare Reform Green Paper, April 2006: www.cih.org/display.php?db=policies&id=646
[162] *A new deal for Welfare: Empowering people to work,* consultation report, DWP, June 2006, p.44
[163] *A new deal for Welfare: Empowering people to work,* DWP, January 2006
[164] *A new deal for Welfare: Empowering people to work,* Consultation Report, DWP, June 2006, p.45
[165] *ibid* p.48
[166] Bill 208-EN, para 137

The Welfare Reform Green Paper also asked for views on proposals to base the LHA on the number of bedrooms in a property rather than the rooms suitable for living in. This attracted broad agreement from respondents, as did a proposal to base LHA rates on the median of local rents rather than the mid-point:

> "CIH supports this proposal. We agree that the current structure of the LHA (and the local reference rent) can create problems for tenants looking for property in some areas where the distribution of rents is such that the majority of properties have rents which lie beyond the mid-point. We agree that at least half the properties in the broad rental market area should be available at rents which are at or below the level of the LHA."[167]

However, the Child Poverty Action Group's response to the Bill expresses reservations over proposed changes to the size criteria:

> "The DWP's proposal to change the size criteria is not entirely clear, it seems to be to count only the number of bedrooms claimants need and exclude living rooms. We strongly oppose any further limitations on size criteria, which could result in families living in unacceptably overcrowded accommodation with no communal space for family life. The size criteria are too inflexible and there should be an element of discretion for special needs, for example couples or children who cannot share a bedroom for medical reasons should be allowed an extra room."[168]

The Department received mixed views on the question of whether the LHA should be rolled-out to new claimants only. The report on consultation states that the LHA will be rolled-out as described in the Green Paper; the scheme will be reviewed after two years and at that point a decision will be taken as to whether existing HB claimants should be transferred onto the LHA.[169]

In five of the Pathfinder areas Citizens Advice Bureaux have been contracted to provide money management support for claimants to help them cope with the move to the LHA. In November 2005 Citizens Advice published, *Early Days: CAB evidence on the Local Housing Allowance,* which attributed the relatively smooth implementation of the LHA to the fact that there were no losers at the point of change and to the funding of a dedicated money advice service for LHA claimants. Citizens Advice has said that it would be very concerned if either of these two elements were compromised in any future national roll-out: "Indeed as the DWP evaluation has been based on these elements being in place, it would be unsafe to generalize the findings to a less well resourced situation."

The report highlights some specific concerns, summarised below, that Citizens Advice would like to see addressed before the LHA is rolled out nationally:

- Under 25s receive a lower 'shared room rate' under the LHA scheme which continues, albeit in a modified form, the principle of the Single Room Rent

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[167] CIH's response to the Welfare Reform Green Paper, April 2006
[168] CPAG's Second Reading Briefing on the Welfare Reform Bill, July 2006
[169] *A new deal for Welfare: Empowering people to work,* Consultation Report, DWP, June 2006, p.48

provisions of the general HB scheme. Citizens Advice would like to see this aspect of the LHA scrapped in order to improve the ability of under 25s to access suitable private rented accommodation.

- The fact that landlords are increasingly asking for deposits in the Pathfinder areas, presumably to protect themselves from non-payment of rent, has led Citizens Advice to call for the new mandatory deposit scheme (due to be implemented in April 2007) to be 'well embedded' before the LHA is rolled out.
- There is a call for the DWP to work with HM Treasury and the Financial Inclusion Taskforce to overcome difficulties claimants have in opening bank accounts.
- Citizens advice would also like to see local authorities being given responsibility for a pro-active approach to identifying vulnerable claimants and a definition of vulnerability "which enables HB departments to reach a decision without demands being made on already hard pressed health and social care workers."

Safeguards to protect vulnerable claimants (i.e. maintenance of direct payments to landlords) have been applied to around 15% of tenants in the pathfinder areas. The Bill's Regulatory Impact Assessment states that this could increase authorities' administration costs but there would be an expected off-set by other 'administrative easements' associated with the simplification of the scheme.[170]

The Child Poverty Action Group's (CPAG) response to the Bill raises similar concerns to those of Citizens Advice; it also questions the lack of an appeal against the level at which LHAs are set:

> "There is no right of appeal against LHA levels and there is no claimant involvement in the levels at which they are set. Concerns have been raised that the broad rental market areas are too widely-drawn, bringing the LHA level down and there is no effective means by which claimants can challenge this. Greater accountability and judicial scrutiny of the operation of the regulations would help to ensure the rules are fairly and consistently applied in different areas."[171]

The Regulatory Impact Assessment states that private landlords have expressed their opposition to making payments to tenants: "not only would their rent now not be guaranteed if tenants fall into arrears, they would also incur additional rent collection costs."[172] The likely cost of defaults to landlords is estimated to be between £2.5-£4 million a year once the LHA has been rolled-out to all private tenants; representing £5 per tenant receiving the LHA.[173] On rent collection costs, the Government argues that these are a legitimate responsibility of landlords – the additional rent collection and rent management costs for landlords are estimated to be in the region of £4 to £6 million a year; representing a cost to landlords of £7 per tenant per year.[174] It is intended that the national LHA scheme will take landlords' concerns into account by including discretionary and mandatory safeguards to enable local authorities to make payments direct to landlords where appropriate.

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[170] *Welfare Reform Bill: Regulatory Impact Assessment,* p.31
[171] CPAG's *Second Reading Briefing on the Welfare Reform Bill*, July 2006
[172] *Welfare Reform Bill: Regulatory Impact Assessment,* p.28
[173] *ibid* p.32
[174] *ibid*

B. Loss of Housing Benefit following eviction for anti-social behaviour

1. Background

The possibility of using HB withdrawal as a sanction for anti-social behaviour (ASB) has been discussed over a long period. Frank Field's Private Members Bill, *Housing Benefit (Withholding of Payment) Bill* (Bill 102 of 2001-02), would have provided for HB to be withheld from a claimant for up to twelve months where in any three year period they, or any individual living with them, had been convicted on two or more occasions of anti-social behaviour by a magistrates' court. Although the Government said it was sympathetic to the Bill's objectives, ultimately it ran out of time in the 2001/02 parliamentary session.[175] The Government subsequently consulted on potential Housing Benefit sanctions in 2003 and announced its conclusions in December of that year:

> **The Parliamentary Under-Secretary of State for Work and Pensions (Chris Pond):** The outcome of the consultation on housing benefit sanctions for anti-social behaviour was published today. An analysis of the responses has been placed in the Library and also a copy put on the DWP website at: http://www.dwp.gov.uk/consultations/2003/index.asp.
>
> Tackling anti-social behaviour is a priority for the Government. It blights communities and can undermine the regeneration of the most disadvantaged areas, creating an environment where crime takes hold.
>
> When my right hon. Friend the Secretary of State for Work and Pensions consulted on a housing benefit sanction between May and August 2003, he received 487 responses from a wide range of organisations and members of the public. One of the responses included a petition from the constituents of Paisley South. If the signatories are counted as individual responses the final number of responses was 698. Everyone who responded agreed that anti-social behaviour must be stopped. Victims and local people in particular were supportive of the proposed measures, though concerns were expressed by a large number of respondents about whether the measures would be workable or effective.
>
> In the light of these concerns, particularly from local authorities, who play a key role in preventing and dealing with anti-social behaviour and also both private and registered social landlords, we have decided not to proceed with a housing benefit sanction at this time.[176]

In the *Respect Action Plan* (January 2006) the Government outlined further policy proposals aimed at tackling anti-social behaviour (ASB).[177] In addition to ASB sanctions the Plan focused on the causes of ASB and methods to get people to change and improve their behaviour. In regard to housing, the Plan referred to successful projects, such as the Dundee Families Project, which has prevented a number of families from

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[175] For more information on this Bill see Library Standard Note SN/SP/1897, *Housing Benefit (Withholding of Payment) Bill,* last updated July 2002

[176] HC Deb 10 December 2003 c10WS

[177] http://www.homeoffice.gov.uk/documents/respect-action-plan?view=Binary

being evicted or being made the subject of Anti-Social Behaviour Orders (ASBOs). The Plan set out the intention to extend these types of projects:

> "We want to build on these successful approaches and roll out these projects in areas where anti-social behaviour is most acute as part of a long-term cross-Government strategy for dealing with problem families. The projects will vary, covering a spectrum from key workers who carry out outreach with families in their own homes, to those that work with families in a residential setting. They will be delivered by both voluntary and statutory agencies by workers with a range of professional backgrounds."[178]

In addition to announcing the establishment of a national network of intensive family support schemes and the development of a cross-Government strategy to tackle the most challenging families, the Plan said that the Government was considering ways in which they could encourage people who exhibit ASB to take part in these schemes:

> "We are also considering how to encourage those involved in persistent anti-social behaviour to engage with intensive family support. One option would be to introduce sanctions for those people who have been evicted for anti-social behaviour and then refuse to take up offers of help. Sanctions could include financial penalties or housing benefit measures. This would provide a very strong incentive to encourage these households to undertake rehabilitation when they have refused other offers of help."[179]

Subsequently on 5 June 2006 the Secretary of State, John Hutton, announced that a pilot scheme "that ensures that people who are evicted as a result of anti-social behaviour undertake rehabilitation" would be established:

> "The new measure will sanction housing benefit where a person has been evicted for anti-social behaviour and refuses to address their behaviour using the support and help offered to them. This measure is not about changing the eviction process but about getting people to change their behaviour and will only operate where the household has chosen not to co-operate."[180]

The DWP press notice set out how the proposed pilot scheme would operate:

- "If a household is evicted on grounds of anti-social behaviour, the members of the household concerned will be offered appropriate rehabilitation. The rehabilitation will be provided through existing services.
- If the household does not engage with the referral and rehabilitation process a Local Authority will be able to issue a "warning notice" if it considers it to be appropriate. This will ask the household to engage with the rehabilitation.
- If the household does not comply, without good cause, with the "warning notice", that household will be sanctioned when they claim Housing Benefit.

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[178] *ibid* p.22
[179] *ibid* p.23
[180] DWP Press Release, *Action to tackle nuisance neighbours,* 5 June 2006,

- The sanction will increase incrementally: a 10% loss of benefit for 4 weeks, 20% for a further 4 weeks and then a total removal for up to 5 years if they do not co-operate. Lower rates will apply to those in hardship. Those people who are sanctioned will have the right to appeal to the Tribunal Service.
- The offer of support can be accepted at any stage in this process, at which point the benefit payment would be reinstated."[181]

These proposals differ significantly from earlier attempts to use HB as a sanction against ASB, such as those contained in the *Housing Benefit (Withholding of Payment) Bill.* In particular, those affected will already have been evicted for ASB and will not face HB reductions if they engage in a rehabilitation programme.

The Government's intention is to start the pilots in 2007 in around ten local authorities. The pilots will last for two years. A post pilot review will take place before a decision is taken to roll-out the measure nationally.[182]

The Department for Communities and Local Government estimates that in England and Wales a maximum of 1,500 tenants are evicted for anti-social behaviour each year. In Scotland the estimated figure is around 40. There is no information collected on the number of private sector tenants evicted for ASB as it is presumed that their landlords tend to use other grounds for eviction. The Bill's Regulatory Impact Assessment states that 'the measure is not likely to impact significantly on business, the public sector, charities, the voluntary sector or on a specific sector or sectors of the community.'[183]

2. Clause 28

Clause 28 would insert new sections into the *1992 Social Security Contributions and Benefits Act* to implement the scheme described above.

Where certain conditions are met local authorities will be able to reduce the amount of HB payable to a claimant or refuse payment altogether. The claimant will have to have been evicted by a court order gained on the grounds of anti-social or criminal behaviour. New section 130C will list the relevant court orders under the various Housing and Rent Acts. [184] Before reducing or refusing HB entitlement the authority will have to have served a written notice on the claimant warning them that if they fail to engage in a rehabilitation programme their HB may be affected. Continued failure to engage in a rehabilitation programme without good cause will give the authority the option of using this HB sanction against the claimant.[185] A slightly different warning system will operate in Scotland. Matters to be taken into account when deciding whether or not a claimant has 'good cause' will be prescribed. Claimants will be able to be paid HB where the sanction has been applied in prescribed circumstances, e.g. where they make a successful application for the relevant order for possession to be set aside.

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[181] *ibid*
[182] *Welfare Reform Bill: Regulatory Impact Assessment,* p.57
[183] *ibid* p.45
[184] The sanction will not apply where suspended, stayed or sisted (Scotland) possession orders are granted with conditions attached.
[185] The sanction will be tenure neutral; it will cover both private rented and social sector tenancies.

The Government does not intend to legislate for how the offer of rehabilitation will operate. An example of how it *could* work is given in the Regulatory Impact Assessment accompanying the Bill:

> - "In **every** case where a possession order has been made on the grounds of ASB, the intention is that the tenant should attend an initial meeting where they will be given the chance to discuss their position and engage with rehabilitation services. At the same time they will be told that they could be sanctioned if they do not.
> - If they agree to co-operate, then a package of rehabilitation will be drawn up, ideally co-ordinated by a key worker taking into account the needs of the whole family and the community. It will be delivered with no further involvement of benefit sanctions.
> - However, if they refuse to co-operate, the local authority will have to decide if a sanction would be an appropriate tool in their case. The authority would take into account the circumstances of those involved and their needs, such as whether the person involved had mental health issues and needed to be referred to specialist services, or whether instead another tool such as an ASBO or Individual Support Order would be more effective. The local authority would also consider the impact of a sanction on the person and any family members, especially if there are children in the family.
> - If they decide that a sanction is appropriate, the local authority can issue a "sanction warning". This will explain what they need to do to be treated as complying. Refusal to comply with the warning will lead to a benefit sanction if benefit is in payment already or is subsequently claimed."[186]

Reductions in HB would be phased in so that HB entitlement would be removed entirely after 8 weeks. Entitlement could continue to be removed for up to 5 years unless the authority considers that the sanction is no longer appropriate. If the sanction is lifted at any point within the 5 year period it could be restarted if the claimant fails to comply with a further warning notice (or requirement in Scotland).

Regulations relating to the rate of HB reduction and regulations varying what constitutes a relevant order for possession will have to be approved by both Houses of Parliament.

New information sharing powers would be introduced relating to the issuing of relevant orders for possession. Courts, or others who may be aware of such an order e.g. a landlord or local authority (in England and Wales), would be required to notify the Secretary of State when a relevant order for possession is made. This will not apply in Scotland. In turn the Secretary of State would be able to provide this information to a relevant local authority providing rehabilitation services. Regulations would allow the sharing of relevant information within and between authorities administering HB and those providing rehabilitation services for purposes relating to HB administration and the provision of rehabilitation services. Legislation in Scotland already allows such information sharing.

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[186] *Welfare Reform Bill: Regulatory Impact Assessment,* p.47

Appeals against the imposition of HB sanctions would be made in the normal way to the Tribunals Service; this is already provided for in Social Security legislation.

The Regulatory Impact Assessment estimates that piloting the sanction in up to 10 local authorities for two years will cost £467,000 in respect of implementation and running costs and £200,000 in respect of evaluation.[187]

3. Comment

Previous proposals to use HB as a sanction against ASB (see section **B.1** above) have met with significant resistance, particularly from social landlords, on the grounds that reducing or removing entitlement to HB would penalise them by increasing rent arrears and reducing their revenue. Increased rent arrears would lead to more evictions which, in turn, would interfere with the work of social landlords and specialist support agencies to help individuals address their problematic behaviour.[188] There have also been concerns that HB restrictions would run counter to efforts to reduce homelessness, promote a healthy private rented sector and simplify HB.

The provisions of the Bill differ from previous proposals as only those who have actually been evicted for ASB would be affected; the primary objective of the HB sanction would be to encourage claimants 'to take steps to address the underlying causes of their behaviour.'[189] The Regulatory Impact Assessment states that the measure is not intended as a primary way of tackling problem behaviour 'but rather is a measure that will complement earlier interventions.'[190]

There is recognition that clause 28 would place less of a burden on social landlords than previous proposals:

> "In comparison to similar schemes proposed previously to link anti-social behaviour with housing benefit these proposals appear to impose far less of a burden on local councils as the number of cases for reduction should be very few."[191]

Nevertheless, early responses from the social landlord sector are generally not supportive. The Social Landlords Crime and Nuisance Group (SLCNG), which comprises more than 260 member organisations in England and Wales, including local authorities, registered social landlords (RSLs), Arm's Length Management Organisations, and tenants' groups, "remains to be convinced that the new proposal is workable in practical terms."[192] The SLCNG's points are summarised below:

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187 *Welfare Reform Bill: Regulatory Impact Assessment,* p.51

188 Letter from the chief executives of the Chartered Institute of Housing and the National Housing Federation, the chairman of the Local Government Association's Housing Executive and Shelter's director of policy to Malcolm Wicks on the subject of the *Housing Benefit (Withholding of Payment)* Bill, 2002

189 *Welfare Reform Bill: Regulatory Impact Assessment,* p.44

190 *ibid*

191 *The Local Government Association's response to the Welfare Reform Bill,* 5 July 2006

192 SLCNG's draft response to the stakeholder letter 'Housing Benefit sanction for anti-social behaviour', July 2006

- Post eviction is not the best time to try and engage ex-tenants in improving their behaviour. They often leave prior to eviction and it could be difficult for the local authority to gain/retain contact. There is a feeling that identification of support needs should have occurred long before eviction. The possibility of demoting the tenancy (for local authority and RSL tenants only) should be used as an incentive to improve behaviour.
- Households that are evicted for anti-social behaviour are likely to be deemed to be intentionally homeless and, therefore, the local authorities will have no duty to secure permanent accommodation for them. This will also make it difficult to sustain contact. Intentionally homeless households might find themselves in private rented accommodation, the reduction/removal of HB is likely to result in rent arrears and might place vulnerable children or adults at risk of eviction again. In turn this might give rise to authorities' social services departments having a duty to assist, e.g. to take children into care. The Regulatory Impact Assessment recognises that it might be hard for intentionally homeless households to access private sector accommodation but argues: 'as this is due to a refusal to co-operate with the local authority where there is clearly a need to do so, the ability to improve their position and secure benefit is clearly in the claimant's own hands.[193] The Assessment also states that safeguards will be built into the process to protect vulnerable adults and children; hardship provisions will apply so that the level of sanction will be reduced where families meet hardship criteria, such as having children in the family.[194] The Government does not envisage that the measure will increase the number of children being taken into care.
- The sanction can only be applied to low-income households in receipt of HB. Households that exhibit ASB but who do not claim HB will not be penalised.
- There is concern that the rehabilitation projects will not be in operation if/when the HB sanction goes live.
- Some respondents have suggested that anti-social households will not care about the removal of HB as this simply results in a debt to the landlord. There is a suggestion that more personal benefits could be targeted such as Income Support or Jobseeker's Allllowance which will not have the effect of 'punishing' landlords. [195]

The SLCNG concludes:

> "We think it would be more sensible to wait until the level of engagement of the rolled out "national network of intensive family support schemes" has been achieved to see if there is still an intractable group who refuse engagement. If there remains a hard core of families who continue to refuse engagement it may be that it would be worth piloting the sanctions at that time."[196]

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[193] *Welfare Reform Bill: Regulatory Impact Assessment,* p.53
[194] *ibid*
[195] SLCNG's draft response to the stakeholder letter *Housing Benefit sanction for anti-social behaviour*, July 2006
[196] *ibid*

The National Housing Federation, which represents England's 1,400 RSLs is opposed to using HB as a sanction to tackle ASB. Danny Friedman, director of policy at the Federation, has said:

> "We have long argued that withdrawing housing benefit as an anti-social behaviour sanction, even in extreme circumstances, is more likely to compound problems than provide an effective deterrent. Far from encouraging inclusion, this runs the risk of further entrenching social exclusion, and exacerbating the problems of families in crisis.
>
> Although the housing benefit system is improving, it is ill-equipped to deal with the strain of added bureaucracy. Currently, more than half of local authorities are meeting the national performance standards. This new sanctions regime would set performance back, and defeat the Governments aims of simplifying and streamlining the benefits system.
>
> The proposal also unfairly equates nuisance behaviour with people living in rented housing. Home owners are just as capable of anti-social behaviour, so it is disappointing that the Government is singling out tenants."[197]

This opposition is echoed in the Child Poverty Action Group's response to the Bill:

> "CPAG strongly opposes plans to sanction HB for anti-social behaviour and deeply regrets the Government's decision to resurrect the idea. The purpose of welfare benefits is to provide a safety net, and they should not be used as a tool for punishment or coercion. Similar proposals were made in the green paper on housing; "Quality and Choice; a Decent Home for All" published in 2000. They were dropped in the face of widespread opposition. Most of the concerns raised then will still be relevant.
>
> Although we accept that anti-social behaviour causes significant problems for many people and victims are often themselves living in poverty, these proposals do nothing to engage with or address the root causes of problematic behaviour. These proposals could result in families with children being made street homeless, or children being taken into care. There is no protection for the children of claimants judged to be anti-social either from social stigma or from the poverty these proposals will cause. There is no requirement in the Bill for the interests of children affected to be considered when sanctions are applied.
>
> …The Bill's explanatory note at para 24 states that people who are sanctioned would have a right of appeal. But this appears only to relate to the lifting of the sanction and not to the decision to impose a sanction in the first place. This needs to be clarified, as the prospect of sanctions being applied to claimants, with no effective means of challenge is deeply worrying."[198]

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[197] National Housing Federation's response to clause 28 of the *Welfare Reform Bill*, July 2006
[198] CPAG's *Second Reading Briefing on the Welfare Reform Bill*, July 2006

C. Housing Benefit and Council Tax Benefit for persons taking up employment

1. Background

Under the existing Housing Benefit (HB) Council Tax Benefit (CTB) scheme, extended payments of these benefits are available in certain circumstances where a claimant begins work or increases their hours of work or wages. The aim of the extended payment scheme, under which these benefits are paid at the same rate as the claimant was receiving in the week before taking up work, is to bridge the gap between leaving benefits and receiving their first pay packet. Extended payments are made for a 4-week period.[199]

The current scheme requires that claimants who have qualified for 4-week extended payments must submit a fresh claim in order to obtain any in-work entitlement to HB or CTB. This is necessary because their 'normal' HB/CTB award is ended when they meet the criteria to enable payment of extended benefits.

2. Clauses 29-31

These clauses would provide for a simpler method of making extended payments and would remove the need for claimants who qualify for 4-week extended payments to make a new benefit claim for in-work HB or CTB.

Clause 29 will 'recast' the underpinning powers for extended payments. As with the current scheme, the detailed provisions of the scheme will be contained in regulations.

The extended payment would be paid by the authority in which the claimant was living just before they took up work; the move into employment (and entitlement to an extended payment) would be treated like a change of circumstances in a continuing award. The amount of the extended payment would be the higher of the out of work HB/CTB they were receiving or their in-work entitlement to HB/CTB. The Explanatory Notes to the Bill state that this will ensure that the claimant is entitled to *at least* the amount of HB/CTB they were receiving before they started work or increased their income from work.[200]

Where a claimant moves to a new authority to take up work the amount of the extended payment would be the amount of their out of work HB/CTB entitlement. In contrast to the current scheme it would be paid by the original local authority and they would not need to make a new claim in order to receive it, although there will still be a requirement for certain notifications to be made to the local authority. This will avoid the claimant having to re-claim any balance of their extended payment after moving. However, if a claimant believes that their in-work HB/CTB entitlement would exceed their extended payment entitlement they will need to claim in-work HB/CTB from their new local authority. In

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[199] Information on the extended payments scheme can be found on the DWP website at: www.dwp.gov.uk/lifeevent/benefits/ep-hb-ctb-jsa-is.asp

[200] Bill 208-EN para 173

these circumstances the new authority will pay as HB/CTB (not as an extended payment) the amount by which the in-work HB/CTB exceeds the extended payment.

In some cases where a claimant moves during the extended payment period the amount payable by the new local authority could be reduced to nil. The Explanatory Notes state that this will cover cases where the extended payment from authority 'A' is greater than the entitlement of the claimant in authority 'B', for example, because s/he has moved to a lower rent area or now has non-dependents living with them.[201]

Clause 30 would allow the Secretary of State to prescribe in regulations modifications to the HB/CTB provisions in the *Social Security Administration Act 1992,* or subordinate legislation made in pursuance of that Act, which are considered to be required in relation to extended payments. The Explanatory Notes give an example of a modification that has been deemed necessary:

> "In particular, modifications made under subsection (1) (b) allow in cases where someone moves local authority area during the prescribed extended payment period, and they normally have their benefit paid in the form of a rent or council tax rebate, that the former local authority can make payments directly to the new local authority. The intention is that the secondary legislation under these subsections would avoid disrupting the normal method of benefit payment, and where appropriate, would complement the payment provisions under the new local housing allowance arrangements."[202]

Clause 31 provides specific details on the interpretation of terms used in clauses 29 and 30.

At the time of writing no comments had been received on clauses 29-31.

D. Information relating to Housing Benefit

As part of their functions under section 122 of the *Housing Act 1996* Rent Officers collect information about the private rented sector in order to enable them to make case specific HB determinations and generic Local Housing Allowance (LHA) determinations. In carrying out this role Rent Officers are required to exclude rents that are met by Housing Benefit from their market evidence database to ensure that HB payments do not 'drive the levels at which individual or generic determinations are made, and thus drive HB expenditure.'[203]

Currently regulations only require local authorities to provide information to Rent Officers in relation to a particular claim. Clause 32 of the Bill will allow the Secretary of State to prescribe that local authorities must provide as much information as is 'necessary or expedient' to enable them to carry out their HB functions:

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[201] *ibid* para 175
[202] *ibid* para 178
[203] *ibid* para 182

> "Local authorities would be required, for example, to provide information about local housing allowance cases, as well as the individual cases they still have to refer to the rent officer. This would ensure that rent officers can identify housing benefit properties that are not referred to them when the local housing allowance applies."[204]

At the time of writing no comment on clause 32 had been received.

E. Supply of information by Rent Officers

Clause 33 would insert a new section into the *1992 Social Security Administration Act* to 'establish a clear gateway for the transfer of information from Rent Officers to the DWP.'[205] The new section would provide the Secretary of State with a power to require Rent Officers to provide HB information to him or someone providing services to him in a prescribed manner and form. The Explanatory Notes to the Bill state that this information will be used for social security purposes with examples:

> - "to monitor determinations made for the housing benefit cases that are referred to rent officers;
> - carry out policy analysis - for example on the impact of any future changes to the way the local housing allowance is set; and
> - use the information for benefit expenditure forecasts."[206]

At the time of writing no comment on clause 33 had been received.

F. Payment of Housing Benefit

1. Background

The vast majority of HB claimants (3.16 million) in the UK live in the social rented sector in accommodation provided by RSLs and local authorities. Local authorities (who also administer HB) do not pay HB to their own tenants; instead they rebate or offset it against the tenant's rent liability. Most RSLs require their tenants to request direct payment of HB by the local authority to them.

In *Building Choice and Responsibility: A Radical Agenda for Housing Benefit,*[207] the Government set out a commitment to test the extension of the Local Housing Allowance (LHA)[208] to tenants in the social housing sector. Respondents to the consultation paper, *A new deal for Welfare: Empowering people to work,*[209] highlighted several difficulties associated with this:

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[204] *ibid* para 183
[205] *ibid* para 187
[206] *ibid* para 188
[207] DWP, October 2002
[208] See section **II.A** of this paper for more information on the LHA
[209] DWP, January 2006

> "We believe that as a general principle, the LHA approach should be extended to the social sector. However, a range of complex issues need to be addressed when considering how this might be achieved …" Housing Corporation
>
> "Although we support the principle of extended LHA to the social housing sector, we believe that any roll-out must proceed with extreme caution. The relatively high proportion of … vulnerable people in social housing could result in widespread financial instability for both tenants and landlords." Tenant Participation Advisory Service
>
> "In terms of the flat-rate element of LHA, Citizens Advice can see no merit in introducing this in the social rented sector …" Citizens Advice
> "We are strongly against introducing a flat-rate for the social sector." Shelter
>
> "The introduction of LHA would have serious negative consequences for the sector." Council of Mortgage Lenders[210]

In the light of responses received the Government decided not to take forward legislation to introduce the LHA for social tenants 'at this stage.'[211] This has been welcomed by the social housing sector. However, there is a desire to improve work incentives amongst social sector tenants and, as with private tenants, the Government wants to encourage tenants to take greater personal responsibility for managing their own rent payments. The objective of clause 34 of the Bill is 'to provide powers to extend financial responsibility to tenants in the social rented sector.'[212]

2. Clause 34 & comment

Section 134 of the *Social Security Administration Act 1992* and the HB rules require that HB payments in the social sector must take the form of a rent rebate where the local authority administering HB is also the claimant's landlord. In other cases, e.g. payments to RSL tenants, HB must take the form of a rent allowance. Where the authority is not the landlord it must pay the claimant or someone on his/her behalf (such as a landlord). Regulations set out the circumstances in which payment must or may be made to someone other than the claimant.

Clause 34 would amend section 134 of the *Social Security Administration Act 1992* to allow for regulations to be made specifying the manner in which payment of HB must be made. The Explanatory Notes to the Bill state that this would, for example, 'enable secondary legislation to prescribe when payment is to be made directly to the claimant, or to someone on their behalf or in respect of the liability the claimant has; or by rebating the claimant's rent account; or by a combination of these methods.'[213] This will enable the Secretary of State to ensure that payments of HB are made direct to claimants even in respect of local authority tenants. The aims of allowing for direct payments to claimants in the social housing sector are the same as those in the private rented sector (currently being piloted in 18 local authorities, see sections **A.5** & **A.6** above) i.e. to

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[210] *A new deal for Welfare: Empowering people to work,* consultation report, DWP, June 2006, p.46
[211] *Welfare Reform Bill: Regulatory Impact Assessment,* p.41
[212] *ibid* p.41
[213] Bill 208-EN, para 190

increase the personal responsibility of claimants for their rent payments and to promote financial inclusion:

> "Some social sector tenants who claim Housing Benefit take little, if any, responsibility for paying their rent and some remain unaware of how much their rent actually is. This encourages a culture of benefit dependency and can leave tenants uncertain about the impact that taking a job or moving home might have on their finances. Helping tenants to take on the responsibility of budgeting for and paying their rent themselves (e.g. through a bank account) can help bridge the transition into work, when paying at least a part of their rent themselves is likely to be necessary. To minimise the risk that vulnerable people could be faced with eviction, as a result of falling into rent arrears, any scheme would contain safeguards to protect against this."[214]

The Regulatory Impact Assessment on the Bill states that the detailed rules and regulations related to this measure 'will be developed by working with social housing providers and other stakeholders to ensure that risks are fully identified and managed.'[215]

It is recognised that the ending of direct HB payments to landlords in the social rented sector could have significant implications in terms of systems and dealing with rent arrears. Housing commentators gave a mixed response to this proposal in the Welfare Reform Green Paper:

> "A voluntary approach should be taken to the promotion of direct payments to tenants." Citizens Advice

> "We believe that the way to achieve personal responsibility is through financial inclusion initiatives, not by withdrawing choice over how tenants pay their rent." National Housing Federation

> "… suggest that some form of pilot scheme be introduced to examine the effect of a benefit direct scheme within the social sector." Local Government Association[216]

Specific issues referred to in the Regulatory Impact Assessment include:

- The need for local authorities and RSLs to make arrangements to collect rent payments which will impact on administration costs.
- The potential for higher levels of arrears in the sector. This could result in higher borrowing costs for RSLs as they borrow against the certainty of revenue from HB. Representatives of the Council of Mortgage Lenders have indicated that lenders might take the reform of HB into account in future lending decisions to RSLs.
- A higher number of tenants in receipt of HB in the social rented sector are likely to be vulnerable and systems will need to be in place to identify and assess claimants' suitability to receive HB direct.

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[214] *Welfare Reform Bill: Regulatory Impact Assessment,* p.42
[215] *ibid* p.42
[216] *A new deal for Welfare: Empowering people to work,* consultation report, DWP, June 2006, p.47

- RSLs might benefit from a lower burden in terms of the recovery of HB overpayments as these would be recovered from tenants rather that RSL landlords.[217]

The Regulatory Impact Assessment states that the precise costs and benefits of this measure cannot be summarised at this stage as the details of an appropriate approach "are yet to be developed." The intention is to fully engage stakeholders in policy development.[218]

G. Duty to send inspection reports to the Secretary of State

Clause 35 and 36 are concerned with arrangements for improving the administration of HB and CTB by local authorities.

Clause 35 would amend the *1999 Local Government Act* to enable the Auditor General for Wales to send copies of Best Value reports relating to HB/CTB administration to the Secretary of State.

H. Directions by the Secretary of State

Currently under the *1992 Social Security Administration Act* the Secretary of State can authorise persons to report to him on local authorities' administration of HB and CTB, particularly in relation to their performance on the detection and prevention of fraud. The Benefit Fraud Inspectorate (BFI) is the only 'person' so authorised. After receiving a report from the BFI the Secretary of State must send the local authority a copy; the authority can submit its proposals for improving its performance. The Secretary of State, after considering the report and any local authority response, may give directions as to the standards the authority is expected to attain in a given timescale.

Clause 36 would allow the Secretary of State to use his powers of direction in relation to public interest reports and Best Value reports referred to him by the Controller of Audit in Scotland. The Explanatory Notes state that this restores the previous legislative position in relation to public interest reports that was 'inadvertently broken' by the *Local Government Scotland Act 2003.*[219] Similarly subsection (3) would add Best Value reports referred by the Auditor General for Wales to the list of reports on which the Secretary of State can issue directions.

Currently local authorities do not *have* to respond to an invitation to submit proposals for improvement after receiving a copy of a BFI report. Clause 36 would enable the Secretary of State to require an authority to respond and would also give the Secretary of State power to specify information required from the authority. Authorities would have not less than one month to submit a response. The purpose of these changes is to improve the information available on which a decision to issue directions is based. The Secretary of State would gain the power to direct a local authority to take any action

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[217] *Welfare Reform Bill: Regulatory Impact Assessment,* p.43
[218] *ibid*
[219] Bill 208-EN para 197

thought necessary or expedient to improve its performance within a given timescale. Where there are serious concerns in respect of an administration matter, e.g. where no counter fraud strategy exists, and no standard can be specified, subsection (3B) would give the Secretary of State power to issue a direction in these cases.

Subsection (8) would introduce a new consultation stage to enable an authority to comment on proposed directions before they are issued. This stage could be omitted where there is an urgent need.

A new section 139DA would be added to the *1992 Social Security Administration Act* by subsection (9) which would enable the Secretary of State to revoke a direction where he thinks it necessary to do so.

At the time of writing no comment on clauses 35 and 36 had been received.

III Part 3: Social security administration

A. Sharing of social security information

Clauses 38-40 are concerned with the sharing of information relating to social security benefit claims between the Department for Work and Pensions and local authorities. The intention is to 'support joint working arrangements and improve the take-up and delivery of benefits and other services'.[220] A detailed explanation of the purpose of the changes and their rationale is given in the *Explanatory Notes*.[221]

Section 7A of the *Social Security Administration Act 1992* currently enables claims for certain benefits administered by the DWP to be submitted to local authorities, and for claims for Housing Benefit and Council Tax Benefit to be made to the DWP. It also permits the DWP and local authorities to collect and forward information and evidence for each other's respective benefits. The *Explanatory Notes* state however that the provisions in section 7A are limited in a number of respects:

> …the current provisions exclude English county councils because they only apply to local authorities who administer housing benefit and council tax benefit. They also make no specific provision for local authorities to use social security information they hold to promote the take up of benefits other than housing benefit and council tax benefit. And, current powers do not expressly permit relevant authorities to verify claims-related evidence and information on behalf of other relevant authorities.[222]

The *Explanatory Notes* state that **clause 38** would extend the provisions by:

- including the English County Councils as relevant authorities able to receive prescribed benefit claims, including housing benefit and council tax benefit claims, on behalf of the Department for Work and Pensions;

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[220] *Explanatory Notes*, Bill 208-EN, para 26
[221] paras 205-224
[222] Bill 208-EN, para 206

- enabling local authorities (and English county councils that do not administer housing benefit and council tax benefit) to encourage people to claim benefits administered by the Department, as well as housing benefit and council tax benefit;

- ensuring that information and evidence obtained for one income-related benefit can be used in connection with a claim to another income-related benefit; and

- ensuring that information and evidence provided to a relevant authority on a claim for one benefit can be verified, forwarded to and used by the administering authority, without the need for further verification, in connection with a claim to another benefit.[223]

Clause 38 amends section 7A of the *Social Security Administration Act 1992* and inserts a new section 7B. The *Explanatory Notes* state that the new section 7B would enable local authorities to promote the take-up of benefits administered by the DWP, and give an example:

> This clause, through the inclusion of a new section 7B to the Social Security Administration Act, enables local authorities and English county councils to promote take up of benefits administered by the Secretary of State. As an example, the clause enables a local authority to use information obtained on a claim for housing benefit or council tax benefit to pre-populate a claim form for pension credit (which is administered by the Secretary of State). This partly completed form could then be submitted to the claimant to encourage them to apply for pension credit.[224]

The new section 7B makes no specific mention of promoting take-up of benefits, however. Subsection (1) enables a relevant authority to use for a 'relevant purpose any social security information which it holds'. A 'relevant purpose' is to be prescribed in regulations and must relate to a claim which is made or could be made for a 'specified benefit' (subsection (3)). 'Specified benefits' are to be specified in regulations (subsection (5)). The *Explanatory Notes* comment that 'This power broadens the boundaries governing authorities' use of the information that they hold'.[225]

'Social security information' means information relating to social security, child support or War Pensions; and also evidence obtained in connection with a claim for or an award of a specified benefit (new section 7B subsection (4)).

Clause 39 is concerned with the exchange of information between the DWP and local authorities, and among local authorities, for benefit purposes and for purposes connected with the provision of 'welfare services'.

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[223] Bill 208-EN, para 207
[224] Bill 208-EN, para 209
[225] Bill 208-EN, para 211

The *Explanatory Notes* state that the provisions relate to the Supporting People programme. Supporting People is a policy and funding framework for housing support services for vulnerable people that became operational on 1 April 2003. The programme brought together several funding streams into a single Supporting People grant. The Department of Communities and Local Government allocates this grant to Administering Authorities (unitary authorities and counties in two tier areas). These authorities are responsible for administering the programme within their local areas by contracting with local providers and partner organisations for the provision of Supporting People services. A commissioning body (a partnership of local housing, social care, health and probationary statutory services) sits above each administering authority and plays a key role in advising and approving a Supporting People strategy.

The Government's explanatory leaflet *What is Supporting People?* describes housing related support as follows:

> The primary purpose of housing related support is to develop and sustain an individual's capacity to live independently in their accommodation. Some examples of housing related support services include enabling individuals to access their correct benefit entitlement, ensuring they have the correct skills to maintain a tenancy, advising on home improvements and accessing a community service alarm. Other services include a home visit for a short period each week or an on-site full-time support worker for a long period of time.
>
> A range of services and activities can be tailored to an individual's specific needs.
>
> Support services can be categorised as 'short-term' and 'long-term' in accordance to their aims and objectives. Short term schemes last for up to two years with the intention of moving an individual on to independent living or increasing the ability to live independently. Long-term services are on a continuous basis and are often characterised as open-ended.
>
> All short-term housing related support services are free. Charges are only applicable to people in long term services who can afford to pay, following an assessment of their financial circumstance. Those who cannot afford to pay are eligible to claim a subsidy from their local authority. [226]

The *Explanatory Notes* state:

> Those in receipt of certain income-related benefits automatically qualify under the Supporting People means-test to receive assistance with charges for these services. The Bill would enable the Department for Work and Pensions and local authorities to confirm to the Supporting People team of a local authority whether a person is in receipt of one of these benefits, without that Supporting People team having first to obtain that person's consent. It would also enable Supporting People teams to provide certain information to local authorities to assist with the administration of housing benefit, for example to help identify where it would be appropriate to make payments of housing benefit to the landlord rather than to a claimant. These information exchanges would only be permissible for limited

[226] http://www.spkweb.org.uk/NR/rdonlyres/06E6FD41-4804-4B78-BDD9-343EC58117A2/4165/WhatisSuppPeopleLP.pdf

> purposes. If a person is a certain person within a Supporting People team or a Supporting People service provider, he would commit a criminal offence if he discloses, without lawful authority, information supplied to him by virtue of one of these powers.[227]

Further detailed explanation of the information flows clause 39 would permit, and the expected benefits, is given in paragraphs 215-221 of the *Explanatory Notes*.

Clause 39 does not itself include specific reference to Supporting People (although it repeals certain existing provisions relating to information sharing for Supporting People purposes in the *Local Government Act 2000* – see subsection (11)).

Subsection (1) provides that information relating to means-tested benefits and welfare services may be supplied to persons specified in subsection (4) for-

> …purposes connected with the application of grant paid under a relevant enactment towards expenditure incurred by the recipient of the grant—
>
> (a) in providing, or contributing to the provision of, welfare services, or
>
> (b) in connection with such welfare services.

The persons specified in subsection (4) include the Secretary of State and persons providing services to the Secretary of State; authorities administering Housing Benefit, persons authorised to exercise functions of such authorities relating to Housing Benefit, and persons providing authorities with services relating to Housing Benefit; and local authorities receiving a grant as mentioned in subsection (1), persons authorised to exercise functions of such authorities relating to grants, and people providing services to such authorities relating to this function.

'Relevant enactments' are to be specified by order (subsection (7)).

'Welfare services' includes 'services which provide support, assistance, advice or counselling to individuals with particular needs' (subsection (10)).

Subsection (2) provides that information relating to means-tested benefits or welfare services held for a 'prescribed purpose' by those persons other than the Secretary of State and those providing services to him mentioned in subsection (4) may be used by them for another prescribed purpose, or provided to another such person for use in relation with the same or another prescribed purpose'. A 'prescribed purpose' is a purpose relating to Housing Benefit or welfare services, as prescribed in regulations (subsection (8)).

Subsection (5) provides that local authorities receiving a grant as mentioned in subsection (1), persons authorised to exercise functions of such authorities relating to grants, and people providing services to such authorities relating to this function, may supply information to a person who provides qualifying welfare services. 'Qualifying welfare services' are services a local authority pays for or contributes to out of grants mentioned in subsection (1).

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[227] Bill 208-EN, para 214

Clause 40 40 makes it an offence for a person to disclose without lawful authority information received by virtue of clause 39. The *Explanatory Notes* state that the clause does not cover relevant persons in the DWP and local authority benefit teams since there is an existing unlawful disclosure provision covering them in section 123 of the *Social Security Administration Act 1992*. Subsections (3) to (6) follow the wording of the corresponding provisions in section 123 of the 1992 Act.

B. Recovery of overpayments

Section 71(1) of the *Social Security Administration Act 1992* provides that the Secretary of State is entitled to recover an overpayment of benefit caused by a 'misrepresentation or failure to disclose a material fact'. In a Social Security Commissioner's decision in 1996, it was, however, decided that, given the wording of section 71(5) of the 1992 Act, overpayments arising under section 71(1) could be recovered only where a decision to revise the award of benefit and a decision that an amount was recoverable had been made at the same time.[228]

The then Conservative Government decided that this would not be administratively practical and introduced legislation – the *Social Security (Overpayments) Bill 1996-96* – to allow the decision on recoverability to be made separately from the decision to revise the award of benefit.[229]

The amendment to section 71 as a result of the 1996 Act, however, left section 71(5) intact in respect of subsection (4), which allows the Secretary of State to recover overpayments which are 'materially due' to the way in which the direct payment system for benefits operates.[230] This might include, for example, where a claimant informs the DWP of a change in their circumstances reducing their award but the Department cannot adjust the payment in time because it is after the cut-off date for altering a payment via credit transfer, or because the system is not functioning properly. Another example would be where the system itself causes duplicate payments to be made.

In a decision issued in January 2002[231], a Social Security Commissioner held that, in the light of the previous Commissioner's decision which prompted the changes to the legislation in 1996, an overpayment coming within the scope of section 71(4) of the 1992 Act could be recovered only if the decision changing the award and the decision on recovery had been taken at the same time.

Clause 41 removes this requirement. It amends section 71 of the *Social Security Administration Act 1992* so that the necessary decisions can be made separately.

Clause 42 makes the corresponding changes in respect of Child Benefit and Guardian's Allowance in Northern Ireland. This is necessary because neither benefit is devolved to

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[228] CIS/451/1995, 18 March 1996
[229] See the Second Reading Debate at HC Deb 3 July 1996 cc 1011-1012
[230] Regulation 11 *Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988*, SI 1988/664
[231] CIB/1012/2001, 7 January 2002

Northern Ireland. Her Majesty's Revenue and Customs are responsible for administering Child Benefit and Guardian's Allowance throughout the whole of the United Kingdom.

C. Local authority powers in relation to benefit fraud

Clauses 43-45 relate to local authority powers to investigate and prosecute benefit fraud. The intention is to provide a clear legal framework enabling local authorities to investigate and prosecute offences relating to national benefits (i.e. benefits administered by the Department for Work and Pensions). The Government estimates that around 50 per cent of fraud involving a local benefit also involves fraud against a national benefit.[232]

Local authorities had, for a number of years, investigated fraud against national benefits administered by the DWP, but in 2000 Runnymede Borough Council obtained legal advice which suggested that there were, in fact, severe limits on local authority powers in this area. The DWP subsequently sought its own opinion from John Howell QC. The 'Howell Opinion' largely confirmed that obtained by Runnymede.

On 10 March 2005 the DWP published a consultation paper on how to proceed in the light of the Howell Opinion.[233] The following extract gives further background:

> 3.6 Whilst there is no explicit restriction in statute preventing a local authority from investigating offences against national benefits, a number of authorities began to feel that such a restriction might be implied because of the way that the Social Security Administration Act 1992 (hereafter, 'the Administration Act') and the Local Government Acts were worded. In particular, Runnymede Borough Council instructed an eminent Queen's Counsel (QC) to survey the nature and extent of the powers available to local authorities to investigate and prosecute offences against national benefits. Delivering his opinion in May 2000, John Cavanagh QC suggested that there were elements of doubt about the legal authority of a local authority to investigate and/or prosecute offences against benefits other than HB and CTB. DWP then sought its own opinion and instructed John Howell QC to consider a similar question. When received, the 'Howell Opinion' agreed, in general terms, with that of Cavanagh.
>
> **The Howell Opinion**
>
> 3.7 Howell's Opinion was generally that:
>
> - local authorities are not able to prosecute fraud in respect of any benefit other than HB or CTB. Their competence to prosecute benefit offences does not extend to DWP administered benefits and it is unlikely that the law allows them to investigate fraud against DWP administered benefits either. This will still be the case where there appears to be fraud against both a local and national benefit; and

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[232] Bill 208-EN, para 229

[233] DWP, *Local Authority investigative Powers Regulatory Reform Order: A consultation document on proposed changes to the powers of local authorities to investigate and prosecutr benefit fraud*, March 2005

- DWP may supply only such information to a local authority as is required for the administration of HB/CTB. DWP may not disclose information to local authorities for the investigation of national benefit offences.[234]

The consultation paper stated that the Howell Opinion made effective joint working between the DWP and local authorities more difficult:

> 3.11 The statutory framework outlined in the Howell Opinion makes effective joint working between DWP and local authorities more difficult. Firstly, the framework obstructs a shared strategic vision because it places limits on the types of offence that a local authority can investigate when compared to DWP. The strategic goals of a local authority will then always be more narrowly defined than will those of DWP. Secondly, it requires that frontline local authority investigators bring an inferior set of powers to joint operations when compared to those of DWP investigators and they will need to withdraw from an operation when it appears that it is moving into areas not related to local benefits. Thirdly, it places limits on the types of strategic and operational intelligence that may be shared between DWP and local authorities. DWP is permitted to obtain information from a local authority that relates to any social security matter. In return, DWP can disclose to a local authority only such information as relates to the administration of local benefits.
>
> 3.12 This framework requires that each agency accept a number of inefficiencies when conducting joint investigations. For example, there will be a need for duplicated file preparation that would not be required if the investigation were conducted by a single agency. These proposals will facilitate effective joint working and will create a framework where certain forms of inefficient joint investigations are no longer required.[235]

The consultation document stated that the Government had considered three options for dealing with this situation:

- Doing nothing;
- Issuing instructions to local authorities that all cases involving fraud against both national and local benefits should be handed over to the DWP to investigate; or
- Amending primary legislation to provide local authorities with a power to investigate and prosecute offences against national benefits alongside the investigation and prosecution of local benefit offences.

The Department considered that doing nothing would be undesirable since local authorities would face 'legislative and resource burdens' and the legal uncertainty over their powers would continue. Handing over all mixed benefit cases to the DWP would reduce local authorities' workloads, but went against the principle that the capacity to investigate and prosecute benefit fraud was an integral component of the strategy to deliver secure benefit administration. It proposed, therefore, amending primary legislation to give local authorities a clear set of powers to investigate and prosecute fraud against national benefits. The Government proposed to do this via a Regulatory

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[234] *ibid*., pp19-20
[235] *ibid*., pp21-22

Reform Order (RRO). The consultation sought views on its proposals, on the implications for local authorities, and on the effects on the rights and freedoms of individuals.

The Department published a summary of responses to the consultation paper on 18 July 2005.[236] The paper concluded:

> The Regulatory Reform Act would allow the powers of local authorities to be extended in the way proposed in the consultation exercise, but only where this was shown to reduce burdens associated with the exercise of their existing activity of investigating or prosecuting HB or CTB fraud. A RRO would provide a power to investigate and prosecute fraud against DWP-administered benefits but only where there were implications for the investigation and prosecution of HB or CTB offences. This means that local authorities would need to decide, ultimately to the satisfaction of the courts, that it was easier for them to tackle the overall fraud against the wider benefit system rather than the HB or CTB fraud alone. If they were unable to demonstrate this, then they would have no power to investigate or prosecute offences against DWP- administered benefits. Given the requirements of the Regulatory Reform Act, local authorities would be required to desist from investigating such cases if it was discovered that no HB or CTB offence had actually taken place.
>
> Considering the responses to the consultation document, the Department's view is that the limitations imposed by using a RRO would unreasonably restrict the activities of local authorities and would not permit them to make use of the new powers with the freedom and flexibility that they require. By using a RRO, local authorities would be empowered to tackle fraud against DWP administered benefits only where it would make the investigation or prosecution of HB or CTB fraud easier. Despite the clear benefits arising from these proposals, it is not clear that local authorities could make use of the new powers with confidence given the nature of this specific limitation.
>
> We have, therefore, concluded that a RRO is not the best vehicle for delivering the legislative changes we propose and have decided not to continue with this option. The Department is actively exploring alternative legislative options to resolving the issue and remains committed to delivering a prompt yet comprehensive solution.[237]

A Written Ministerial Statement, also on 18 July, announced that the legislative changes would be made alongside the wider reforms to Housing Benefit announced in the Queen's Speech.[238]

Clause 43 amends section 110A of the *Social Security Administration Act 1992* to give local authorities powers to investigate fraud concerning benefits administered by the Department for Work and Pensions. It provides that local authority 'authorised officers'

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[236] *Local Authority investigative powers: regulatory reform order: Summary of responses*: http://www.dwp.gov.uk/consultations/2005/hbsd/response-hbsd.pdf

[237] *ibid.*, p10

[238] HC Deb 18 July 2005 cc50-51WS

may obtain information from entities such as employers, pension providers, financial services companies, utilities and educational providers for the purpose of:

- Ascertaining whether a person is in fact entitled to a social security benefit;
- Ascertaining whether benefit legislation has been contravened; and
- Preventing, detecting or securing evidence of benefit offences

Section 110 of the 1992 Act currently provides that local authority authorised officers have such powers, but only in relation to Housing Benefit and Council Tax Benefit.

Subsection (3) allows the Secretary of State to prescribe in regulations conditions local authorities must satisfy to make use of the powers listed above. The *Explanatory Notes* state that this enables the Secretary of State to 'limit the powers in a way that ensures that only certain benefit offences may be investigated and to provide safeguards against misuse'.[239]

Clause 44 inserts a new section 116A into the *Social Security Administration Act 1992* which creates a new power enabling local authorities administering Housing Benefit or Council Tax Benefit to prosecute offences concerning 'relevant social security benefits' as defined in section 121DA of the 1992 Act. The new powers apply in England and Wales only, since in Scotland the Procurator Fiscal is responsible for the prosecution of offences.

Subsection (3) allows the Secretary of State to prescribe in regulations that certain conditions must be satisfied before a local authority can bring proceedings relating to national benefits. The *Explanatory Notes* state:

> These conditions allow safeguards to be put in place to ensure that the authority's powers are not misused and permit the Secretary of State to prevent the prosecution of certain cases on an individual basis. For example, the Secretary of State would be able to require that local authorities abide by nationally recognised standards when prosecuting national benefit offences, such as the evidential and public interest tests in the Code for Crown Prosecutors. He will be able to prevent a local authority prosecuting specified offences if he considers the nature of the case to be particularly sensitive. He will also be able to withdraw the powers of local authorities to prosecute national benefit offences where he considers that they have misused, or are likely to misuse, those powers. In situations where the local authority ceased to satisfy the prescribed conditions, the Secretary of State will have a power to continue with the prosecution himself rather than see the charges dropped.[240]

Clause 45 amends the information-sharing provisions in the *Social Security Administration Act 1992* to enable the transfer of information between the Secretary of State and local authorities, and between local authorities. Subsection (1) enables the Secretary of State to disclose to local authorities information relating to national benefit

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[239] Bill 208-EN, para 236
[240] Bill 208-EN, para 238

fraud investigations and prosecutions, but it does not allow him to supply information for purposes other than local authority investigations and prosecutions of benefit offences.

Subsection (2) further amends section 122D of the 1992 Act to enable the Secretary of State to require a local authority to provide him with information obtained during investigations or prosecutions of benefit offences. The *Explanatory Notes* state that this would allow the Secretary of State 'to obtain information relating to national benefit fraud investigations that would be relevant to the Secretary of State in preparing future policy and expenditure estimates for national benefits, but which the Secretary of State could not currently obtain'.[241]

Subsection (3) removes the current restriction in section 122E of the 1992 Act which means that local authorities can only share information relating to Housing Benefit and Council Tax Benefit. It extends the powers of local authorities to share information with other local authorities for puposes relating to benefit offences more generally. The *Explanatory Notes* state that without this amendment, local authorities could conduct joint investigations into Housing Benefit fraud, but could not work together to investigate national benefit offences because they could not share information relating to those offences.[242]

At the time of writing, there has been very little comment about clauses 43 to 45 of the Bill. The Local Government Association's short response to the Bill states that 'effective powers to tackle cases of benefit fraud would be useful tools for councils'.[243]

D. Loss of benefit for repeat fraud: 'two strikes'

The *Social Security Fraud Act 2001*[244] made provision for benefits to be withdrawn or reduced where a person is convicted twice of benefit offences within three years. The provisions were introduced following the recommendation by Lord Grabiner in his March 2001 report on *The Informal Economy* that the Government consider the option of 'punishing persistent fraudsters by removing, or heavily reducing, their right to benefit for a specified period'.[245] Further background is given in Library Research Paper 01/32.[246] The detailed provisions are in the *Social Security (Loss of Benefit) Regulations 2001.*[247]

1. The current rules

Sections 7 of the *Social Security Fraud Act 2001* provides that if a person is convicted twice of benefit offences within three years then their benefit will be restricted if this is a

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241 Bill 208-EN, para 242
242 Bill 208-EN, para 243
243 LGA, *Welfare Reform Bill*, briefing 234, 5 July 2006: http://www.lga.gov.uk/Documents/Briefing/Welfare%20reform%20bill%20briefing.pdf
244 Sections 7-12
245 p iii
246 *The Social Security Fraud Bill 2000/2001*, 21 March 2001, pp 17-51
247 SI 2001/4022

'sanctionable' benefit. The list of sanctionable benefits (i.e. benefits that can be reduced or withdrawn) is wide-ranging and includes:

- Jobseeker's Allowance
- Incapacity benefit
- Bereavement benefits (but not the Bereavement Payment)
- Severe Disablement Allowance
- Carer's Allowance
- Industrial injuries benefits
- Income Support
- Housing Benefit
- Council Tax Benefit
- War pensions (but not Constant Attendance Allowance, Exceptionally Severe Disability Allowance, or the Mobility Supplement).[248]

Sanctionable benefits, other than means-tested benefits, are withdrawn for the period of the sanction. This is 13 weeks.[249] Income Support (IS) is reduced by an amount equivalent to 40 per cent of the single person's allowance, or 20 per cent where a member of the family is pregnant or seriously ill.[250] IS cannot be reduced below 10 pence per week to ensure continued entitlement to passported benefits. In addition, IS is not reduced where there is already a sanction in place for breach of a community sentence.[251] However, when the latter reduction ends, a fraud sanction may be applied.[252] There are special rules regarding joint claim JSA and 'persons in hardship'.

Regulations 17 and 18 of the *Social Security (Loss of Benefit) Regulations 2001* prescribe reductions of Housing Benefit and Council Tax Benefit where there is a repeat fraud conviction as described above. Benefit is again reduced by 40 per cent of the single person allowance, or 20 per cent where a person in the family is pregnant or seriously ill. However, these reductions do not apply where Income Support or income-based JSA is already in payment since the sanction will already have been applied to these benefits.

A 'benefit offence' is an offence committed since 1 April 2002 that was:

- in connection with a claim for a 'disqualifying benefit'; or
- in connection with the receipt or payment of an amount of a disqualifying benefit; or
- committed for the purpose of facilitating the commission (whether or not by the same person) of a benefit offence; or

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[248] Section 7(8) and section 8
[249] Section 7(6)
[250] Regulation 3 *The Social Security (Loss of Benefit) Regulations* SI 2001/4022
[251] *Ibid.* Regulation 3(4)
[252] *Ibid.* Regulation 3(5)

- consisting of an attempt or conspiracy to commit a benefit offence.[253]

'Disqualifying benefits' (i.e. benefits against which an offence may be committed) are listed in section 7(8) of the *Social Security Fraud Act 2001*. These are not necessarily benefits that can be reduced as a result of a fraud sanction, but other benefits (the sanctionable benefits) may be reduced where there is an offence against the disqualifying benefits. The list of disqualifying benefits is wide-ranging. Fraud in respect of virtually all social security benefits count for these purposes. The definition excludes only Maternity Allowance, Statutory Maternity Pay, Statutory Sick Pay and tax credits.

2. Extension of the period

Following the February 2003 National Audit Office report on *Tackling Benefit Fraud*[254] the Government launched an internal review of the entire benefit fraud sanctions regime. The review was concluded in September 2004, and one of its recommendations was that the 'two strikes' period should be extended so that two benefit offences committed within five years would result in a benefit sanction.[255]

Clause 46 extends the 'two strikes' period from the current three years to five years. Subsection (2) provides that the amendment is however disregarded when considering whether an offence committed before the date the clause comes into force was committed within the relevant period. For offences committed before the date the clause comes into force, the relevant period remains three years.

The *Regulatory Impact Assessment* summarises the available evidence so far on the impact of the 'two strikes' regime as follows:

> Although deterrent effects are difficult to quantify the current legislation is deemed to have had a positive effect on re-offending. Re-offending rates were not recorded prior to 2002, but analysis of the incidence of recidivism undertaken to support the introduction of the initial legislation predicted that loss of benefit provision would capture approximately 500 cases per year. Latest figures show that during the four-year period since legislation commenced only 260 cases have been dealt with under the legislation. The "Two strikes" letter issued following a first conviction of benefit fraud is intended to both warn of the consequences of further offences and add to the deterrent effect of a criminal conviction.[256]

The *Regulatory Impact Assessment* states that the extension of the period from three years to five years will 'build on this positive outcome'.[257] It states that the Department's benefit fraud investigators had been canvassed as part of the sanctions review and had pressed for the period to be extended to 10 years. It was thought however that this would be 'far too punitive'.[258] The Department considers that five years is the optimal

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253 Section 7(8) *The Social Security Fraud Act 2001*
254 HC 393 2002-03
255 *Welfare Reform Bill – Regulatory Impact Assessment*, p70
256 p71
257 *ibid.*
258 *ibid.*, p72

time period to make a 'substantial impact on the level of repeated fraud' and would also be in line with provisions in the *Rehabilitation of Offenders Act 1974*, where offences are spent after five years.[259] It estimates that the change might result in around 30-50 extra cases a year, but expects this figure to drop over time 'as the level of re-offending reduces'.[260]

At the time of writing there has been little comment on this provision in the Bill.

Some concerns have however been voiced about the general policy of using benefit sanctions to influence claimants' behaviour. The Social Security Advisory Committee (SSAC), in its 2003 annual stewardship report, commented:

> We are not, in principle, against social security benefit conditions being used to induce behavioural change, or to promote behaviours that are linked to particular policy outcomes. However, we believe that great care must be taken to ensure that the conditions fit well with the other policy objectives sought, that there are no adverse consequences that are disproportionate to the perceived benefits, that the approach taken is practical and workable, and that the outcomes are subject to the most rigorous measurement and evaluation.[261]

The SSAC's latest stewardship report states:

> We had observed that sanctions appeared to be poorly understood by benefit claimants and that certain groups (such as those with literacy problems, younger claimants, customers with mental health problems, and those from ethnic minorities) seem to be sanctioned more frequently than others. We have also observed that sanctions appear to be less effective in supporting and enforcing the Department's 'responsibilities' agenda than has been widely assumed. [262]

The SSAC awaited with interest the findings from further research but added:

> …our starting point for our further consideration of sanctions will be that sanctions and/or penalties that are intended to enforce benefit conditionality must be both comprehensible and transparent if they are to be fair and effective. To be fair, sanctions policy must balance the need to enforce the rules and the risk that sanctions may increase social exclusion.[263]

IV Part 4: Miscellaneous

A. Widowed Mother's and Widowed Parent's Allowance

Widowed Mother's Allowance (WMA) is a contributory benefit paid to widows with dependent children. From 9 April 2001 WMA was replaced by a new benefit - Widowed Parent's Allowance (WPA) - available to both widows and widowers (and, since 5

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[259] *ibid.*, p73
[260] *ibid.*, p74
[261] SSAC, *Sixteenth Report, April 2002 – July 2003*, para 1.18
[262] SSAC, *Eighteenth Report 2005*, para 1.22
[263] *ibid.*

December 2005, surviving civil partners) with dependent children. WMA continues to be paid however to widows whose husbands died before 9 April 2001.

To be entitled to either WMA or WPA, the person must usually be entitled to Child Benefit. A person is entitled to Child Benefit for a child if they are responsible for the child. A person is responsible for a child if the child lives with them, or if the child lives elsewhere but they contribute towards the cost of providing for the child at a rate not less than the rate of Child Benefit which is payable.[264]

The provisions in the *Social Security Contributions and Benefits Act 1992* governing entitlement to WMA and WPA state that a person entitled to Child Benefit for a child not living with them is only entitled to WMA or WPA if they are making a financial contribution towards the cost of providing for the child at a rate not less than the rate of Guardian's Allowance (currently £12.50 a week).[265] This contribution must be in addition to the contribution necessary to qualify for Child Benefit. According to the *Regulatory Impact Assessment*, this is an unintended consequence of amendments introduced by the *Tax Credits Act 2002* which were necessary because of the abolition of child dependency increases, which were payable with a number of non-means tested benefits including WMA and WPA.[266]

Clause 47 removes the requirement that widows with a dependent child not living with them must making an additional financial contribution of at least as much as Guardian's Allowance, on top of the contribution necessary for Child Benefit, to be entitled to WMA. **Clause 48** amends the provisions on entitlement to WPA in the same way.

B. Disability Living Allowance age conditions

Disability Living Allowance (DLA) is a non-means-tested, non-contributory, non-taxable benefit, which provides a weekly fixed sum for the purpose of assisting a claimant with the extra costs associated with disability. DLA has a mobility component and a care component. The mobility component – for help with walking difficulties – is paid at two different levels. The care component – for help with personal care needs – is paid at three levels.

The conditions of entitlement to the care and mobility components are set out in sections 72 and 73 respectively of the *Social Security Contributions and Benefits Act 1992*.

Section 72 provides that the entitlement conditions to the care components are modified where the claimant is under the age of 16. In particular, with regard to the lower rate care component, the test of whether the person could prepare a cooked meal for themselves if they have the ingredients does not apply. As far as the other tests are concerned, a person under 16 can only be entitled to a care component if their attention or supervision requirements are 'substantially in excess of the normal requirements' for someone of their age, or if they have substantial attention or supervision requirements

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[264] section 143(1) *Social Security Contributions and Benefits Act 1992*
[265] sections 37(2), 39A(3) and 77(5)
[266] p67

which younger children in normal physical and mental health may also have but which persons of their age and in normal physical and mental health would not have (subsection (6)). The extra test does not however apply to children who are terminally ill.

Section 73 provides that claimants under 16 are not entitled to the lower rate DLA mobility component unless they can show that, in addition to satisfying the condition that they are so severely disabled physically or mentally that they cannot walk outdoors without guidance or supervision from another person most of the time, they require substantially more guidance or supervision than a person of their age in normal physical and mental condition would, or children of the same age in normal physical and mental health would require such guidance or supervision (subsection (4)).

Clause 49 removes subsection (6) of section 72 of the 1992 Act and applies exactly the same modifications to the entitlement conditions for the care component but only if the person is under the age of 16 on the date when the award would begin and only in relation to any period up to and including the day before they reach 16.

Clause 50 makes equivalent amendments to the conditions of entitlement to the mobility component in section 73 of the 1992 Act.

C. Social Fund

The Social Fund was fully introduced from April 1988 by the *Social Security Act 1986*. Part of it covers payments including the Sure Start Maternity Grant, Funeral Payments, Winter Fuel Payments and Cold Weather Payments, which are paid according to provisions set down in regulations. The other part is the discretionary Social Fund, which is cash limited and provides grants and loans. The discretionary Social Fund provides:

- Community Care Grants
- Budgeting Loans; and
- Crisis Loans

Clause 51 is concerned with the rules governing decisions of applications for Budgeting Loans. Clause 52 is concerned with financial allocations for the discretionary Social Fund generally.

1. Budgeting Loans

For Community Care Grants and Crisis Loans, the decision maker exercises individual discretion when deciding applications. In Budgeting Loan cases however, the decision making has since 1999 been based on legally-binding, factual criteria rather then discretion. Although decisions are made legally by decision makers, decision making is largely an automated process, with weightings and awards calculated automatically by computer.

From April 2006 the decision-making process for Budgeting Loans was simplified further so that decisions are now determined by reference to a simple 'weighting' which depends on the applicant's circumstances, and the local budget.[267] The weightings are:

- One for a single person
- One and one-third, for couples without children
- Two and one-third, for families (including lone parents) with children

These changes mean that certain provisions in section 140 of the *Social Security Contributions and Benefits Act 1992* relating to decisions on Budgeting Loans are unnecessary. **Clause 51** amends paragraph (1A) of section 140 of the 1992 Act to remove a provision that states that Social Fund officers shall have regard to criteria other than the applicant's personal circumstances which may be specified by the Secretary of State. This is because the *Social Fund Directions* no longer contain such criteria.

Clause 51 also provides that the possibility that a third party may meet the need under consideration is no longer to be considered by Social Fund officers when making a decision on a Budgeting Loan application.

2. Allocations from the Social Fund

The funding framework for the discretionary Social Fund is set out in section 168 of the *Social Security Administration Act 1992*. Each Jobcentre Plus district is allocated a budget for grants and a separate budget for loans. Social Fund officers are required to have regard to the relevant local budget when deciding whether to make an award, and how much it should be.

Clause 52 amends section 168 of the 1992 Act to allow alternative approaches to allocating budgets. The *Explanatory Notes* state:

> The intention is that there should be flexibility as to how allocations are made and, in particular, it should be clear that it is open to the Secretary of State to make a single allocation from which loans may be made nationwide, or to make an allocation for loans to be paid from a regional centre or in respect of a particular type of loan or grant.[268]

The *Regulatory Impact Assessment* states that the amendments are intended to enable allocations to be made in a way which 'supports key organisational changes'[269] but gives no details of what changes are or might be under consideration.

D. Vaccine Damage Payments Act 1979

The *Vaccine Damage Payments Act 1979* provides tax-free lump sums of £100,000 for people who are (or were immediately before death) severely disabled as a result of

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[267] HC Deb 30 March 2006 cc111-112WS
[268] Bill 208-EN, para 254
[269] p68

vaccination against specific diseases. Since the scheme began, 920 payments have been made.[270]

Section 2(1)(a)(i) of the 1979 Act provides that payments are normally only made in respect of vaccinations carried out in the United Kingdom or Isle of Man. However, section 2(5) provides for regulations allowing payments where vaccinations are given abroad to members of Her Majesty's Forces and their families.

Clause 53 substitutes the regulation-making power in section 2(5) of the 1979 Act with one which allows the Secretary of State to provide that in certain circumstances the condition in section 2(1)(a) does not need to met in the case of vaccinations given under arrangements made by or on behalf of HM Forces, a specified Government department, or 'any other body so specified'. The *Explanatory Notes* state:

> This means the Secretary of State can provide that serving members of the Her Majesty's forces, specified Crown servants and other people posted abroad and members of their families will be entitled to claim compensation through the Vaccine Damage Payments Act 1979 for disablement resulting from vaccinations given under specified arrangements.[271]

The *Regulatory Impact Assessment* states that the provision would also cover categories such as 'those seconded or contracted to the Government, employees of public bodies and bodies associated with HM Forces, and their families'.[272]

The Department expects that the cost to public funds of this measure will be minimal. The *Regulatory Impact Assessment* states that since the inception of the scheme, only five claims have been received from members of HM Forces in respect of vaccinations given abroad, of which only one resulted in payment.[273]

The *Vaccine Damage Payments Act 1979* does not currently allow appeal tribunals in Northern Ireland to hear vaccine damage payments cases. The legislation does however allow tribunals in Great Britain to hear Northern Ireland cases.

Clause 54 amends the 1979 Act to provide for appeal tribunals in Northern Ireland to hear vaccine damage payments cases.

E. Compensation for pneumoconiosis etc

The *Pneumoconiosis etc (Workers' Compensation) Act 1979* provides compensation to people suffering from certain dust-related diseases, or their dependants, where the disease was the result of exposure to dust in the course of their employment, but they

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[270] *Welfare Reform Bill – Regulatory Impact* Assessment, p76
[271] para 256
[272] p76
[273] *ibid.*

are unable to claim damages from their employers because the employers have ceased business. The diseases include:

- diffuse mesothelioma
- pneumoconiosis (including silicosis, asbestosis, kaolinosis)
- diffuse pleural thickening
- primary carcinoma of the lung (only if accompanied by asbestosis or diffuse pleural thickening)
- byssinosis

Section 2(1) of the 1979 Act provides that to be entitled to compensation, all relevant employers must have ceased to carry on business. Section 2(3) defines 'relevant employer' as any person by whom the person suffering from the disease was employed at any time during the period which they were developing the disease and against whom they might have or might have had a claim for damages in respect of disablement.

The current Bill amends the 1979 Act to:

- Place on a statutory basis an existing 'administrative easement' to the 'relevant employer' conditions; and
- Bring it into line with the *Civil Partnership Act 2004*, and also amend the definition of 'dependant' so that people living together as husband and wife in Scotland are treated in the same way as those in England and Wales.

Clause 55 substitutes a new definition of 'relevant employer', which is set out in **Schedule 6**. This provides that certain periods are to be disregarded when determining whether there is a relevant employer:

- Periods of employment that ended more than 20 years before the date the person's claim for Industrial Injuries Disablement Benefit (IIDB) was determined (or in the case of a claim from a dependant, where no claim for IIDB was made, the date of the person's death); and
- For diffuse mesothelioma only, any employment which began not more than 15 years before that date.

Schedule 6 also provides that a person is not a relevant employer if, disregarding the periods mentioned above, the period during which they employed the person suffering from the disease:

- Did not exceed 12 months; and
- Did not exceed five years in total and does not represent more than 25 per cent of the total period during which the person was employed in a prescribed occupation (or seven years and not more than 20 per cent of the total period).

The *Regulatory Impact Assessment* states that the amendments 'incorporate a more practical version of the relevant employer condition that officials have been applying on an extra-statutory basis since 1980'.[274] In 2005-06, 2,093 claims were paid, of which 1,575 were paid outside the legislation. Had the legislation been applied correctly, the total amount paid out in 2005-06 would have been £6.1 million rather than £24.7 million.[275]

Clause 56 amends the 1979 Act in line with the *Civil Partnerships Act 2004* and also provides for equal treatment of same sex couples who have not registered a civil partnership. In addition, it corrects an omission in the 1979 Act which means that it is more difficult for a person who lived with a sufferer as if they were husband and wife to make a claim in Scotland to make a claim, compared to people in identical circumstances in England and Wales.

F. Attendance Allowance and DLA for people in care homes

Currently, Attendance Allowance and the Disability Living Allowance care component are not payable after a person has been in certain accommodation for 28 days. The exclusion applies in the case of:

- Accommodation provided under Part III of the *National Assistance Act 1948*; paragraph 2 of Schedule 8 of the *National Health Service Act 1977*, Part IV if the *Social Work (Scotland) Act 1968*, or section 7 of the *Mental Health (Scotland) Act 1984*; or

- Accommodation, the cost of which is borne wholly or partly out of public or local funds in pursuance of the above enactments or any other enactment relating to persons under disability or to young persons or to education and training.[276]

Most people in care homes who receive any funding from a local authority will be caught by these rules, since the main powers to provide and fund placements are in Part III of the *National Assistance Act 1948* and Part IV if the *Social Work (Scotland) Act 1968*.

The *Explanatory Notes* explain the rationale behind these provisions as follows:

> Attendance allowance and disability living allowance are paid as a contribution towards the extra living costs of severely disabled people. People in care homes will normally have their disability-related needs (except mobility needs) met by the services provided by the home. To pay attendance allowance or the care component of disability living allowance when the costs of a person's care home accommodation (including board and personal care) are being met, in full or part, out of public funds - usually by a local authority - would amount to duplicate provision from public funds. Hence, in these circumstances, payment of attendance allowance and the care component of disability living allowance may be

[274] p64
[275] *ibid.*
[276] section 67(2) and 72(8) *Social Security Contributions and Benefits Act 1992*

> withdrawn once a person has been resident in a care home for more than four weeks.[277]

Clause 57 amends sections 67 and 72 of the 1992 Act by removing the references in the bullet points above and inserting a power to make regulations providing that Attendance Allowance or the DLA care component is not payable to a person 'who is a resident of a care home in circumstances in which any of the costs of any qualifying services provided for him are borne out of public or local funds under a specified enactment'.

A care home is 'an establishment that provides accommodation together with nursing or personal care'.

'Qualifying services' are:

- accommodation;
- board; and
- personal care

The *Regulatory Impact Assessment* states:

> This is a purely technical measure that has no impact on public expenditure, and will neither increase nor decrease the numbers of care home residents from whom payment of Attendance Allowance or the care component of Disability Living Allowance, are withdrawn.[278]

G. Independent Living Funds

The *Disability (Grants) Act 1993* provides that the Secretary of State (and the Department for Social Development in Northern Ireland) may make grants to the Independent Living (Extension) Fund and the Independent Living (1993) Fund. These two funds make payments to severely disabled people to pay for care to help them live independently in their own homes. They are Government funded, but are independent discretionary trust funds. The Independent Living (Extension) Fund exists to maintain payments made under the system which existed until 1993 and cannot accept new applications. The Independent Living (1993) Fund works in conjunction with local authorities to draw up joint care packages, which may comprise services and/or direct payments from the local authority, and cash payments from the fund.

The *Explanatory Notes* state that the two funds are being replaced by a single fund known as the Independent Living Fund (2006).[279]

Clause 58 amends the *Disability (Grants) Act 1993* to change references to the existing funds to new fund. This is necessary to allow the Secretary of State and the Department for Social Development to make grants to the new fund.

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[277] para 41
[278] p77
[279] Bill 208-EN, para 276

Subsection (3) also allows the Secretary of State by order made by (negative) statutory instrument to 'amend or revoke any enactment contained in subordinate legislation [...] if he considers it appropriate to do so in consequence of the amendments made by this section'. Subsection (4) gives an equivalent power to the Department for Social Development in Northern Ireland.

On 3 May 2006, the Minister for Disabled People, Anne McGuire, announced that consultants had been commissioned to conduct a strategic review of the Independent Living Funds.[280] The review is expected to report to Ministers by December 2006.[281] The terms of reference for the review have been placed in the Library.[282]

It is understood that the trustees of the Independent Living Funds will be making a formal announcement shortly on the setting up of the new fund. The trust deed for the new trust, which was drawn up on 10 April 2006, contains provisions which will allow it to be amended, with the Secretary of State's agreement, in the light of any recommendations of the review.

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[280] HC Deb 3 May 2006 cc61-62WS

[281] For further details dee DWP press notice, *Review of Independent Living Funds announced*, 3 May 2006: http://www.gnn.gov.uk/Content/Detail.asp?ReleaseID=198980&NewsAreaID=2
See also the Independent Living Funds website:
http://www.ilf.org.uk/news/new/ilf_review_update1/index.html

[282] *Terms of Reference – ILF Review 2006*, 5 May 2006, MGP 06/1115