Jobseekers (Back to Work Schemes) Bill 2012-13

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In *Reilly and Wilson v Secretary of State for Work and Pensions*, the Court of Appeal ruled on 12 February 2013 that 2011 Regulations underpinning some of the Government's back to work schemes – including its flagship Work Programme – were unlawful and must be quashed. Media attention focused on the issue of whether schemes breached Article 4 of the European Convention on Human Rights (forced labour), but the Court found against the DWP on the grounds that the regulations failed to provide sufficient information about the various back to work schemes, and that letters sent to claimants mandated to take part in the schemes gave insufficient information on their obligations and on the situations where sanctions would be applied.

DWP has requested permission to appeal to the Supreme Court, but in the meantime moved quickly to introduce the *Jobseeker's Allowance (Schemes for Assisting Persons to Obtain Employment Regulations 2013* to provide with immediate effect a legal framework for the schemes covered by the 2011 Regulations now quashed as a result of the judgment.

The *Jobseekers (Back to Work Schemes) Bill* had its First Reading on Wednesday 14 March and went through all its Commons Stages under an emergency "fast-track" procedure on Tuesday 19 March. The Bill – which has retrospective effect – covers cases where claimants were sanctioned for a failure to comply with a requirement under the 2011 Regulations, or where there was a failure but a decision to impose a sanction has not yet been made. Once enacted, it would not be possible to challenge a decision to impose a sanction solely on the grounds that the 2011 Regulations were invalid, or that notices to claimants were inadequate, notwithstanding the Court of Appeal judgment. The Government says the legislation is necessary to avoid a potential liability of up to £130 million, and to ensure that those sanctioned do not receive an unfair advantage over "compliant" claimants. The judgment potentially affects over 300,000 sanction decisions, of which around 95% were for failures to participate in the Work Programme.

The Bill received a Second Reading in the Commons by 277 votes to 57. The Opposition abstained, but a number of Labour backbenchers voted against the Bill.

Following discussions with the Opposition front bench, the Government tabled two amendments to the Bill at Commons Committee Stage:

- To put beyond doubt that claimants will still be able to appeal a sanction on grounds other than those covered by the Court of Appeal judgment; and
- To provide for an independent review of the operation of the benefit sanctions affected by the provisions in the Bill.

The amendments were agreed, and the Bill received a Third Reading by 263 votes to 52. The Opposition abstained, but again a number of Labour backbenchers votes against the Bill.

On 21 March the House of Lords Constitution Committee published its report on the Bill. The Committee was "unable to agree with the Government's assessment that it was necessary for the Bill to be fast-tracked" and stated that it was incumbent upon the Government to explain why it had made this choice and rejected other options. It also concluded that, in scrutinising the Bill, the House of Lords would want to consider "whether retrospectively confirming penalties on individuals who, according to judicial decision, have not transgressed any lawful rule is constitutionally appropriate in terms of the rule of law."

At Second Reading in the Lords on 21 March, the Opposition tabled an amendment deploring "the Government's incompetence" which led the tabling of a Bill with retrospective effect, and the need to introduce fast-track legislation in spite of the Constitution Committee's concerns, and seeking various assurances about appeal rights and the terms of reference for the independent review. The amendment was defeated by 140 votes to 106, and the Bill received a Second Reading. However, in the course of the debate a number of powerful speeches were given critical of the Government. The Crossbencher Lord Pannick concluded that there was "no justification whatever" for fast-tracking, and that the Bill "offends against a basic constitutional principle that people should be penalised only for contravening what was at the time of their act or omission a valid legal requirement."

The Bill is due to have its remaining stages in the Lords on Monday 25 March.

Separate Library briefings are available on *Retrospective legislation* and *Fast-track legislation.* Another briefing gives a list of expedited bills since 1979.

Contents

1 The Court of Appeal judgment

On 12 February 2013 the Court of Appeal gave its judgment in *Reilly and Wilson v Secretary of State for Work and Pensions*.[1] The judicial review concerned two individuals in receipt of Jobseeker's Allowance – Caitlin Reilly and James Wilson. Ms Reilly had, against her wishes, worked for two weeks in a branch of the retail chain Poundland, as part of the "sector based work academies" programme. Mr Wilson had refused to participate in the "Community Action Programme", which provided work experience placements lasting up to 26 weeks. Both schemes were introduced under the *Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011*[2] ("the ESE Regulations"). The regulations were made under section 17A of the *Jobseekers Act 1995*, which was inserted by the *Welfare Reform Act 2009*. Further details of these are other schemes introduced under the ESE Regulations are given in the appendix to this note.

In the High Court, the applicants had challenged the ESE Regulations on a number of grounds:

1. That the scheme named in the 2011 Regulations was beyond the powers of section 17A of the *Jobseekers Act 1995*; in other words, the Regulations did not comply with the requirements of the Act.

2. The Regulations could not be enforced in the absence of a published policy in relation to them.

3. Notices to individuals mandated to take part in schemes were inadequate.

4. (As an independent ground, and also in support of the other grounds) The Regulations conflict with Article 4(2) of the European Convention on Human Rights (ECHR), which provides, subject to exceptions, that "No one shall be required to perform forced or compulsory labour."

Media coverage concentrated on the issue of whether back to work schemes breached Article 4(2) of the ECHR. However, in the Court of Appeal it was not argued that Parliament could not establish back to work schemes involving unpaid work. The issue at stake was whether the schemes themselves had lawful authority. In his judgment Lord Justice Pill stated:

> 65. I do not consider that ground 4 [compatibility with Article 4(2)] adds anything independently of grounds 2 and 3 in this case. [For the appellants] Miss Lieven conceded that, had the appellants been made aware of the detail of what they were required to do, and had they agreed to do it, the arrangements made were not beyond the powers of the Act. It was not submitted that either of the arrangements proposed to the appellants was beyond the powers of the 1995 Act. There is no rationality challenge and it is not submitted that the Act is incompatible with the Convention. Given arrangements properly made under the Act, article 4 would not be engaged.

As regards the other grounds, the Court of Appeal rejected the argument that the ESE Regulations could not be enforced in the absence of a published policy on relation to them.

However, it found against the Department for Work and Pensions on the remaining two grounds:

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1 *R (on the application of Reilly and another) v Secretary of State for Work and Pensions* [2013] EWCA Civ 66

2 SI 2011/917

- The ESE Regulations failed to describe in sufficient detail the schemes in sufficient detail, as required by the primary legislation. As a result, the Regulations were unlawful and should be quashed.

- The notices sent to claimants failed to comply with statutory requirements that claimants must be made aware of their obligations and on the situations where sanctions would be applied.

On the former, Lord Justice Pill held:

> …I am unable to conclude that the statutory requirement for the Regulations to make provision for schemes of a prescribed description is met in regulations 2 and 3 of the 2011 Regulations. Simply to give a scheme a name cannot, in context, be treated as a prescribed description of a scheme in which claimants may be required to participate, within section 17A(1) [of the *Jobseekers Act 1995*].[3]

With regard to notices, Lord Justice Pill stated:

> Claimants must be made aware of their obligations and of the circumstances in which, and the manner in which, sanctions will be applied.[4]

1.1 Responses

A press release issued by Public Interest Lawyers, the appellants' solicitors, said that the Court of Appeal's ruling was "a huge setback for the Department for Work and Pensions (DWP) whose flagship reforms have been beset with problems since their inception." It continued:

> The effect of the judgment is that all those people who have been sanctioned by having their jobseeker's allowance withdrawn for non-compliance with the Back to Work Schemes affected will be entitled to reclaim their benefits. And until new regulations are enacted with proper Parliamentary approval nobody can be compelled to participate on the schemes.[5]

The press release added:

> The result is that over the past two years the Government has unlawfully required tens of thousands of unemployed people to work without pay and unlawfully stripped thousands more of their subsistence benefits.
>
> The case has revealed the chaos and confusion at the heart of the DWP who have set up a web of schemes and sanctions so complex that their own jobcentre advisers are failing to implement them correctly. It has shown that the basic requirements of fairness dictated by Parliament, such as providing people with a clear explanation of what they are being asked to do, why they are being asked to do it and what the consequences are if they fail to do it, have not been complied with by the DWP.
>
> **What Next?**
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> Tessa Gregory, solicitor, Public Interest Lawyers states:

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3 Paragraph 51 of the judgment

4 Paragraph 63 of the judgment

5 Public Interest Lawyers press release, *Court of Appeal Rules that the Government's "Back to Work" Regulations are Unlawful and Must Be Quashed*, 12 February 2013

"*Today's judgment sends Iain Duncan Smith back to the drawing board to make fresh Regulations which are fair and comply with the Court's ruling. Until that time nobody can be lawfully forced to participate in schemes affected such as the Work Programme and the Community Action Programme. All of those who have been stripped of their benefits have a right to claim the money back that has been unlawfully taken away from them from the DWP.*

The case has revealed that the Department of Work and Pensions was going behind Parliament's back and failing to obtain Parliamentary approval for the various mandatory work schemes that it was introducing. It also reveals a lack of transparency and fairness in the implementation of these schemes. The Claimants had no information about what could be required of them under the back to work schemes. The Court of Appeal has affirmed the basic constitutional principle that everyone has a right to know and understand why sanctions are being the threatened and imposed against them"[6]

For the Government, the Minister for Employment, Mark Hoban, issued a Written Ministerial Statement immediately following the Court of Appeal's judgment:

> **The Minister of State, Department for Work and Pensions (Mr Mark Hoban):** The Court of Appeal has today ruled that the Government's back to work schemes do not breach article 4 of the European convention on human rights.
>
> While the judgment supports the principle and policy of our employment schemes, and acknowledges the care and resources we have dedicated to implementing them, the Court of Appeal has ruled that the Jobseeker's Allowance (Employment, Skills and Enterprise) Regulations 2011 ("the ESE regulations") do not describe the employment schemes to which they apply, as is required by the primary legislation. The Court of Appeal has therefore held the ESE regulations to be ultra vires and quashed them.
>
> We are seeking permission to appeal against the Court of Appeal's judgment and, if permission is granted, we will take our case to the Supreme Court. As we are currently seeking permission to appeal, claimants who have already served a sanction will not be able to appeal on the basis of the Court's decision until our appeal is heard. We are considering a range of options to ensure we do not have to repay these sanctions.
>
> Today we intend to lay new regulations, which will come into force immediately and enable us to continue to refer jobseekers allowance claimants to our employment schemes and to provide the best chance for people to find employment.[7]

On 19 February the Child Poverty Action Group wrote to the Department for Work and Pensions drawing attention to an internal DWP circular issued following the Court of Appeal ruling which, CPAG said, "inaccurately tells staff that claimants who have been sanctioned do not have a right of appeal while the case is being considered by the Supreme Court." The CPAG website gives further details and a summary of the DWP's response:

> ### 19 Feb 2013: CPAG writes to correct misleading advice to Job Centre staff
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> CPAG has seen a copy of a DWP circular sent to Job Centre Plus staff on implementing the Reilly and Wilson judgment. This inaccurately tells staff that claimants who have been sanctioned do not have a right of appeal while the case is

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6 Ibid.

7 HC Deb 12 February 2013 c42WMS

being considered by the Supreme Court. This is not only misleading, but could lead to people losing their right to appeal against a sanction altogether.

CPAG's solicitor has written to the DWP requesting that this advice to DWP staff be corrected: claimants are of course entitled to make appeals against sanction decisions on the basis of the Court's decision. The deadline for appealing is one month, which can be extended by an additional 12 months where it is fair and just to do so. However, the Secretary of State does have powers to stay any appeal while the Supreme Court case is ongoing.

A copy of CPAG's letter can be downloaded from the link on the right of the page.

5 March 2013: reply received from DWP

The DWP has responded to our letter. They advise that the document which was issued on 12 Feb 2013 was an internal news article to DWP staff on the impact of the Court of Appeal judgment in *Reilly and Wilson v DWP* and that it is not guidance that would be relied upon by DWP staff when advising claimants of their appeal rights.

The letter goes on to confirm that the document issued on 12 Feb 2013 has now been overtaken by internal communications and formal guidance issued to DWP staff which correctly states that claimants can appeal their sanction decision following the Court of Appeal judgment but that their appeal may be delayed pending any application for leave to appeal to the Supreme Court that DWP may choose to make and, if successful, any subsequent appeal.[8]

2 Emergency regulations

In response to the Court of Appeal judgment, the DWP laid before Parliament the *Jobseeker's Allowance (Schemes for Assisting Persons to Obtain Employment Regulations 2013*[9] to provide a legal framework for the schemes covered by the 2011 Regulations now quashed as a result of the Court of Appeal's judgment. The regulations came into force with immediate effect, rather than after having been laid before Parliament for 21 days as is the usual practice. The DWP's *Explanatory Memorandum* accompanying the Regulations explained:

> This is because it is essential that the DWP is able to continue to mandate claimants to take part in the schemes to which the Regulations apply, which were previously covered by the 2011 regulations. In particular:
>
> - the principles of conditionality are fundamental to JSA, and to the Department's employment schemes. Losing the ability to mandate, even temporarily, would seriously undermine the operation of these employment schemes and the quality of support that the Department is able to offer;
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> - we need to be able to reassure providers that their programmes will continue to be backed by mandation. If providers lose the ability to mandate, then this will jeopardise their ability to achieve both outcomes and outcome payments, and would potentially have adverse consequences for participants on the schemes;

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8 CPAG, *Court of Appeal strikes down Work Programme Regulations*, accessed 15 March 2013

9 SI 2013/276

- bringing regulations in with immediate effect minimises the risk of administrative confusion and complexity for Jobcentre Plus staff, for providers and for claimants.[10]

Further information was given to DWP staff in the form of a Decision Maker's Guide Memorandum, *JSA and schemes for assisting persons to obtain employment*, issued in February 2013.[11]

3 The Bill

The *Jobseekers (Back to Work Schemes) Bill* had its First Reading on Thursday 14 March and is due to go through all its Commons Stages under an emergency "fast-track" procedure on Tuesday 19 March. It is not yet known what arrangements will apply for consideration of the Bill in the Lords (assuming it is passed by the Commons).

Explanatory Notes and an *Impact Assessment* have been published alongside the Bill.

The *Explanatory Notes* give the following overview of the Bill:

> 9. The Bill has been introduced to avoid the need to repay claimants who have been sanctioned for failure to comply with requirements under the ESE Regulations and to be able to impose sanctions where decisions have been put on hold since the decision of the High Court or Court of Appeal. If this were to happen, the cost to the taxpayer is estimated to be up to £130 million.
>
> 10. The effect of the Bill will be that any decision to sanction a claimant for failures to comply with the ESE Regulations cannot be challenged on the grounds that the ESE Regulations were invalid or the notices given under them inadequate, notwithstanding the Court of Appeal's judgment. This is to ensure that the Government is not faced with the situation whereby jobseekers previously sanctioned (or to be sanctioned) for non-compliance under the ESE Regulations can receive an unfair advantage over compliant claimants.
>
> 11. The Bill also addresses the risk that previous notifications to claimants made under the MWA [Mandatory Work Activity] Regulations, which contain the same notification provisions as the ESE Regulations, may also be open to challenge on the basis of the Court of Appeal's judgement.

The Bill extends to England, Wales and Scotland only.

The schemes covered by the Bill include:

- Work Programme
- Sector-based work academies
- New Enterprise Allowance
- Day One Support for Young People
- Derbyshire Mandatory Youth Activity Programme
- Full-time Training Flexibility
- Skills conditionality
- Mandatory Work Activity
- Community Action Programme

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[10] Para 3.1
[11] DWP Memo DMG 04/13

Of these, all but Mandatory Work Activity were covered by the 2011 ESE Regulations. The Community Action Programme ceased in July 2012. Further details of the schemes are given in Appendix 1 of this note. Statistics on referrals to and participants in the principal schemes are given in Appendix 2.

The Bill consists of two clauses.

Clause 1(1) provides that the 2011 ESE Regulations are to be treated "for all purposes" as regulations that were made under section 17A of the *Jobseekers Act 1995*. This gives effect to the ESE Regulations from 20 May 2011 (the day specified in the regulations), despite the Court of Appeal judgment.

Subsections (4) and (5) provide that notices to claimants under regulation 4 of the ESE Regulations which gave information on what participants in schemes were required to do, and the consequences of not participating as required, are to be regarded as valid **even if they did not give the degree of detail required by the High Court judgment**.

Subsections (7) to (9) make equivalent provision as regards notices for people who were required to participate in Mandatory Work Activity.

Other provisions in clause 1 provide that sanctions imposed on jobseekers for failure to participate in one of the programmes are to be treated as lawfully imposed, if the **only** grounds for challenging them would be that the ESE Regulations were invalid, or notices inadequate. This includes cases where failures occurred before 22 October 2012 but a decision to sanction was put on hold (or "stockpiled") because of the High Court judgment.

The *Explanatory Notes* state:

> 41. The impact upon individuals is that JSA claimants who have not complied with requirements under the ESE Regulations will not be repaid sanctioned benefits as they might expect following the judgment or may have a sanction imposed. The Bill effectively restores the status quo to a situation before the High Court and Court of Appeal judgments. Once the Bill is enacted, claimants who might have appealed against previous sanction decisions on the grounds upheld by the Judicial Review will be unable to do so. Sanctions imposed under the impugned legislation can continue and sanctions decisions currently stayed can be made in accordance with the original intent of the legislation. This is to ensure that the Government is not faced with the situation whereby jobseekers who failed to comply with their requirements and were sanctioned under the quashed ESE Regulations can receive an advantage over claimants who have complied with their requirements and is necessary to safeguard the economic interests of the state.

The *Impact Assessment* for the Bill states, without the legislation, that the total amount that might need to be repaid to individuals who were or will be subject to a sanction could be up to £130 million, although this is the upper end of the range (the actual amount is estimated at between £110 million and £130 million). The *Impact Assessment* comments:

> A retrospective transfer of public money to this group of claimants would represent poor value to the taxpayer and will not help those unemployed enter employment. Many of the individuals who would gain from such a payment may now be in work, and so funds intended to support the unemployed would be diverted elsewhere.

It adds:

> If the Department cannot make these retrospective changes, then further reductions in benefits might be required in order to find the money to repay the sanctions.[12]

The following table – which includes figures from the *Impact Assessment* – gives the DWP's estimates of the number of individuals affected, the number of sanctions, and the amount of benefit withheld. It covers both schemes under the ESE Regulations, and Mandatory Work Activity. The amounts quoted only cover the cost of reimbursing those who were sanctioned; it does not any additional administrative or legal costs that might be incurred by DWP.

	Sanctions (000s)	**Individuals affected (000s)**	**Average value of sanctions per individual (£)**	**Total value (£)**
ESE sanctions issued [1]	221-259	136-159	590-620	80-99
ESE sanction decisions stockpiled	59	59	340-360	20-21
MWA sanctions issued [1]	10	10	780-810	8
MWA sanction decisions stockpiled	4	4	740-760	3
Total [2]	**294-332**	**208-231**	**530-570**	**110-130**

Notes:

1. Includes both "live" and "expired" sanctions.
2. The total number of individuals assumes that the three groups are mutually exclusive. Given it is likely that there will be some overlap between the groups, the total number of individuals affected will be an overestimate with the consequence that the total average value will be an underestimate.

Source: *Impact Assessment*, paras 10, 11. See also Annex A of the *Impact Assessment* on methodology and sources.

The *Impact Assessment* states that 95% of ESE sanctions were for failing to participate in the Work Programme and that most of the rest of ESE sanctions were for failing to participate in Skills Conditionality.[13]

3.1 Fast-track procedure

The Bill is to go through all its Commons Stages on Tuesday 19 March. The *Explanatory Notes* include a section which sets out why the Government belies "fast-tracking" is justified:

> **Why is fast-tracking necessary?**
>
> 13. The Department will be seeking permission to appeal the Court of Appeal's judgment. If permission to appeal to the Supreme Court is not granted, or the Supreme Court finds against the Department, primary legislation would be needed to ensure that

[12] Paras 7,8
[13] Annex A, para 15

the Government does not have to make repayments to (and can impose sanctions where decisions have been stayed, on) all claimants who failed to take part in programmes comprised in the ESE Regulations. Fast-tracking the Bill is necessary in order to provide certainty and thus safeguard the Government's position.

14. It is the Department's view that emergency primary legislation is necessary. As soon as the litigation ends the Government would incur the above mentioned liability. The only way to ensure that the Department does not have to make any sanction repayments and can impose sanctions where decisions have been stockpiled, is to press ahead with emergency legislation.

What is the justification for fast-tracking each element of the Bill?

15. Fast-tracking is necessary to safeguard against the risk of having to repay sanctions to claimants, and of losing the ability to impose sanctions where decisions have been stockpiled, in the event of permission to appeal being refused and to provide certainty.

What efforts have been made to ensure the amount of time made available for parliamentary scrutiny has been maximised?

16. The Bill is being published on the same day it is introduced.

To what extent have interested parties and outside groups been given an opportunity to influence the policy proposal?

17. The legislation does not change the underlying policy. It restores the policy intention of the ESE Regulations and the intended effectiveness of the notices given under **them. There is therefore no need for an external consultation to be considered.**

Does the Bill include a sunset clause (as well as any appropriate renewal procedure)? If not, why does the Government judge that this is not appropriate?

18. The Bill does not include a sunset clause because the legislation is retrospective.

Are mechanisms for effective post legislative scrutiny and review in place? If not, why does the Government judge their inclusion is not appropriate?

19. The legislation is immediate and retrospective. The impact of the Bill will be immediately clear.

Has an assessment been made as to whether existing legislation is sufficient to deal with any or all the issues in question?

20. Yes. The existing powers to make secondary legislation do not allow the Department to make retrospective provision that is comparable to what was contained in the ESE Regulations, or is an altered version of what was contained in the ESE Regulations, or that would validate notices given under them. There are also no powers that could be relied on to enable the Department to withhold refunds once the litigation process has ended. Nor are there other powers the Department could rely on to continue staying sanctions decisions or appeals after that point.

Have the relevant Parliamentary committees been given the opportunity to scrutinise the legislation?

21. If possible, a draft of the Bill will have been made available to the Work and Pensions Select Committee, though the emergency nature of the Bill means the

> Committee would be unable to report before introduction. The non-Parliamentary Social Security Advisory Committee is also being kept informed.

The Constitution Committee of the House of Lords undertook an inquiry into fast-track legislation in the 2008-09 Session. Library briefing SN05256, *Fast-track legislation*, looks at the issues surrounding fast-track legislation identified by the Committee and the Committee's recommendations for improving the process. The note also records the Government's response to the report, including how the Government informs Parliament of the reasons for fast-tracking bills. The note also looks at what happened to bills fast-tracked since the Constitution Committee's report.

The Constitution Committee's report on the *Jobseekers (Back to Work Schemes) Bill* is covered in Part 6 below.

3.2 Compatibility with the European Convention on Human Rights

The Secretary of State has made a statement that, in his view, the provisions are compatible with the European Convention on Human Rights. The *Explanatory Notes* do however include some discussion of the potential human rights implications of the Bill:

> 43. In the event that it were to be considered that the proposed legislation interfered with property rights under Article 1 of Protocol 1 of the ECHR, the Government considers that any such interference is justified as there are compelling public interest reasons for doing so, given the significant cost to the public purse of repaying previously sanctioned benefits, and as the aim of the proposed legislation is intended to restore the law to that which Parliament intended.
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> 44.A claimant might also argue that legislation which removes their right to a a refund of sanctioned benefits, or allows the Secretary of State to impose a sanction, notwithstanding the Court of Appeal's decision, is a breach of their right of access to court under ECHR Article 6.
>
> 45. If no legal claim has been brought on the grounds that the ESE Regulations are ultra vires and/or that the notice issued under them is non-compliant prior to the enactment of the proposed legislation, the Government considers that Article 6 is not engaged at all since the claim to entitlement to benefit, and any dispute regarding a benefit decision thereon which would require access to the courts, remains hypothetical.
>
> 46. Similarly, for cases where the Secretary of State has not yet made a sanction decision, the Government considers that Article 6 will not be engaged as there will be no potential dispute about the right - the effect of the legislation will be that there can be no right to object to the sanction on the notice or vires grounds.
>
> 47. Even if the proposed legislation would interfere with a right of access to court, the Government considers that the interference is justified for similar reasons as for Article 1 of Protocol 1.
>
> 48. These issues were considered in *Stran Greek Refineries and Stratis Andreadis v Greece* (09.12.1994) and *National & Provincial Building Societies v UK* (23.10.1997). As with that latter case, the legislation would have the effect of closing a loophole in order to give effect to the original intention of Parliament, which is not disputed.

4 Reactions and comment

The Bill was only published on 14 March and to date has received little comment. A report in the *Guardian* on 15 March includes quotes from Tessa Gregory from Public Interest Lawyers, who represented the appellants throughout the judicial review, and from the campaigning group Boycott Workfare:

> Tessa Gregory from Public Interest Lawyers, who successfully represented Reilly and Wilson at the court of appeal, said the legislation smacked of desperation.
>
> "The emergency bill is a repugnant attempt by the secretary of state for work and pensions to avoid his legal obligation to repay the thousands of jobseekers, who like my client Jamieson Wilson, have been unlawfully and unfairly stripped of their subsistence benefits.
>
> "The use of retrospective legislation, which is being fast-tracked through parliament, smacks of desperation. It undermines the rule of law and means that Iain Duncan Smith is once again seeking to avoid proper parliamentary scrutiny of his actions.
>
> "It is time for his department to admit that maladministration and injustice costs. In light of the bill we are considering what further legal action we can take on behalf of our clients."
>
> A spokesperson for Boycott Workfare, a grassroots organisation that has campaigned to stop forced unpaid work schemes, said the move was disgusting. They added that they were shocked that Labour was supporting the move.
>
> "This is almost unbelievably disgusting. They [the DWP] broke the law, now they want to retroactively change the law so that they didn't break the law in order to keep £130m out of the pockets of some of the poorest people in the country.
>
> "The high court found workfare unlawful precisely because people had no way of knowing the rules that applied. It shows an incredible level of arrogance and disregard for the poorest to now attempt to backdate laws to challenge this ruling."[14]

The Public and Commercial Services Union argues:

> The bill would set a dangerous precedent if passed – sending the message that when citizens defeat the government in court, it can overturn the court ruling retrospectively with primary legislation – effectively making the government above the law.[15]

If the Bill is enacted, it is not clear what would happen in the case of those who have successfully appealed decisions to impose sanctions. It appears that there have already been successful appeals against sanction decisions at First Tier Tribunals, following the Court of Appeal judgment.

4.1 Article by Liam Byrne

On Monday 18 March, the Shadow Secretary of State for Work and Pensions, Liam Byrne, posted an article on the website Labourlist.org setting out his party's position on the Bill:

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14 "DWP seeks law change to avoid benefit repayments after Poundland ruling: Lawyer for Cait Reilly and Jamieson Wilson, who won court battle over unpaid work, condemns 'repugnant' emergency law", *The Guardian*, 15 March 2013

15 PCS website, *Ask your MP to stop the government changing the law on workfare*, downloaded 18 March 2013

Our young people need a real chance to work in a real job paying a real wage

March 18, 2013 5:11 pm

Iain Duncan Smith's incompetence has turned his back to work schemes into a West Coast Mainline-style disaster – and put £130 million of public money at risk.

Buried amidst a Court of Appeal judgement handed down to the DWP in February was the little noticed news that Mr Duncan Smith's department was so inept that it managed to muck up the drafting of its own regulations by not putting in enough detail. The Court struck down the regulations – and if the Supreme Court refuses the department leave to appeal in a few weeks time the DWP might be on the hook to pay back every sanction levied since 2011. There is probably no way the Department could re-pay the money without making heavy new benefit cuts this year.

Let's be very clear. This is incompetence on a truly monumental scale – from a Department that has given us a Work Programme that is worse than doing nothing, a bedroom tax that might cost more than it saves, and Universal Credit which is fast descending into Universal Chaos.

Labour has always supported work experience. As someone who started work in MacDonald's and has done every job under the sun from sweeping floors in warehouses, selling photocopiers, unloading fishing boats to starting a hi-tech business, I happen to believe that the work ethic has got to be at the heart of welfare reform. But, I'm very firmly of the view that what our young people need today is a real choice and a real chance to work in a real job paying a real wage.

That's why Labour will demand amendments to the Government's bill to introduce a Real Jobs Guarantee for young people; a job for six months, with job search and training thrown in.

I know there are businesses who want to support us in our fight for youth jobs. As I've gone round the country with Labour's Youth Jobs Taskforce, set up at our last conference and which brings together the 10 councils – all Labour – where youth unemployment is highest, I've met business leader after business leader who wants to help tackle the youth jobs crisis in their city. But businesses aren't charities. They need a little help. And that's the why we need a bank bonus tax to oil the wheels. As the MP who represents the constituency with the highest youth unemployment in Britain, I know that when 30 people are chasing every job – as is the case in Hodge Hill – there are simply not enough jobs to go round. And that's why we need an awful lot more than work experience.

We won't be voting for a bill that is rammed through the House at lightening [sic] speed. It was DWP's rush to put in place their regulations that caused this mess in the first place. What's more I'll be insisting on crucial concessions to the Bill. Ministers must guarantee that appeal rights are protected for JSA claimants who have been wrongly sanctioned. Ministers must launch an independent review of the sanctions regime with an urgent report to parliament.

The dilemma the government faces underlines the intellectual bankruptcy of their position. Their Work Programme is failing. Very few people I meet have every heard of their much vaunted Youth Contract. Yet our young people are hungry for work. When I organised a jobs fair for local young people in my constituency, they were queuing round the block long, long before we opened the doors.

> All over Britain today, it's Labour councils leading the fight all over Britain for youth jobs.
>
> Look at the Glasgow Guarantee. Or Get Bradford Working. Or Liverpool Futures. Or the Greater Manchester Commitment to Youth Employment. Or the new youth employment commission in Birmingham. We believe that the best thing you can give someone is chance. And that's what we'll be fighting for in parliament this week.

5 Commons Stages

The Bill went through all its Commons Stages on the floor of the House on 19 March.[16]

In the short debate on the programme motion, the Opposition Work and Pensions Spokesman Stephen Timms said:

> We find ourselves in a deeply unsatisfactory situation with the Bill and, indeed, the programme motion. We do not quite know what happened between the court case and the decision that prompted the measure. My right hon. Friend the Member for Birmingham, Hodge Hill (Mr Byrne) and I were told about the problem a couple of weeks ago; there was a three-week gap when we did not know what was happening. The House of Lords Constitution Committee will, I believe, opine on the measure tomorrow, but equally we do not want to risk an additional £130 million cut to benefit spending over the period ahead, particularly not on a day on which it has emerged that the Government want to cut £2.5 billion from spending across Government, some of it doubtless from the budget of the Minister and his right hon. Friend the Secretary of State. Nor do we want to be in a position in which people who were sanctioned months ago—in many cases, well over a year ago—have to be refunded because of the appalling mess that the Government have got themselves into.
>
> The way forward proposed by the Bill and the programme motion is deeply unsatisfactory, but it is less bad than the alternatives, and for that reason I shall not urge my hon. Friends to oppose it.[17]

At Second Reading, the Minister for Mark Hoban, said that the Government was seeking leave to appeal to the Supreme Court. He continued:

> We are hopeful that we will obtain permission and that we will win our appeal. There is, however, no guarantee that we will be granted permission to appeal, or that we would win the appeal. Were that to happen, claimants who have been subject to a sanction for failing to take part in the schemes would be entitled to a refund of that sanction. It would also mean that we had no power to impose sanctions in relation to failures under the ESE regulations, in cases where no sanction decision has yet been taken—the so-called stockpiled cases. If that were to happen, the cost to the taxpayer would be up to £130 million.
>
> It is vital that, in the present economic climate, the public purse be protected from such claims. The Bill will ensure that the taxpayer does not have to repay benefits lost by claimants who have failed to participate in employment programmes, and can properly impose sanctions for such failures. It would be unacceptable for claimants who have

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16 HC Deb 19 March 2013 cc822-899

17 Ibid. c825

> failed to take all reasonable steps to increase their chances of finding work to receive an undeserved windfall payment.[18]

Mr Hoban thanked the Opposition front bench for their co-operation:

> I would like to put it on record that I am grateful for the constructive way in which the right hon. Members for Birmingham, Hodge Hill (Mr Byrne) and for East Ham have approached this topic. In supporting the Bill, they have allowed us to expedite its progress, thus safeguarding taxpayers' money.
>
> Following discussions last week with the shadow Secretary of State, the right hon. Member for Birmingham, Hodge Hill, we will be proposing two Government amendments in Committee. The first will reiterate in the Bill that a claimant's appeal rights against a sanction decision remain unchanged in all matters, apart from those covered by the High Court and Court of Appeal judgments. For example, when a claimant felt that they had good cause for not participating in one of these schemes, they would still be able to appeal to the first tier tribunal on the basis of good cause. That is a helpful reconfirmation of the right of claimants to appeal. Similarly, the Bill will not overturn appeals that have succeeded on the basis of good cause.
>
> […]
>
> The second Government amendment that we will bring forward in Committee will require the Secretary of State to appoint an independent person to carry out a review of the operation of the sanctions validated by this legislation during the first 12 months after Royal Assent. That review will report as soon as possible after the 12-month period, and the report will be laid before Parliament. I hope that these assurances are satisfactory.[19]

For the Opposition, the shadow Secretary of State for Work and Pensions, Liam Byrne, said that it was a "very dark day form the once-proud DWP" and said there were "a huge number of questions that the Secretary of State must now answer." He continued:

> If this were the only recent example of such incompetence by a Government Department, we might look on it more sympathetically, but all of us clearly remember the west coast main line debacle that cost taxpayers so much money and all of us remember that the Department for Transport responded by appointing an independent reviewer to get to the bottom of exactly what went wrong and how so much public money was put at risk. That is the response we must see now from the DWP. There must be an independent inquiry into how the Department got this so badly wrong.[20]

Mr Byrne continued:

> The Secretary of State was given the judgment by the Court of Appeal on 12 February. Weeks later, there was the request for urgent legislation, please. That is highly unsatisfactory. Tests for retrospective legislation have been repeatedly set out in this House and the other place. Tomorrow, the Lords' Constitution Committee will opine on this Bill. I suspect it will have harsh things to say about its rushed nature which, because it is retrospective and set to a fast timetable, represents the worst of all worlds.

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18 Ibid. c831
19 Ibid. cc832-833
20 Ibid. c835

> The Secretary of State will be aware, like me, of the principles set down by the Constitution Committee in its 15th report, where it opines on fast-track legislation. There is a need to maintain clear, transparent parliamentary scrutiny, and to maintain "good law". The right of interested parties to put forward views must be observed. There is a need to ensure that legislation is a proportionate, justified and appropriate response, and is set out so that fundamental constitutional rights are not jeopardised. Crucially, the policy-making process within Government should be transparent. I look forward to hearing how any one of those principles is honoured by the process before us. The test is all the sharper, in that the Secretary of State is in this pickle because he rushed the legislation, against the recommendation of his advisers.
>
> The test for fast-tracked retrospective legislation is the toughest of all. It was a principle the Lords set down in their report on criminal evidence legislation in 2008, which said:
>
> "Legislation to make lawful an action that was done without legal authority…needs to be scrutinised carefully."
>
> My concern is that this timetable does not deliver that.[21]

5.1 Committee Stage

At Committee stage, the Minister, Mark Hoban, introduced the New Clause making provision for the independent review:

> The new clause provides for a report on the operation of benefit sanctions affected by the provisions of the Bill. Again, I thank the right hon. Members for East Ham (Stephen Timms) and for Birmingham, Hodge Hill (Mr Byrne) for their constructive approach to the Bill. We discussed this topic with them as we drew up the Bill. After our discussions, we decided to bring forward the new clause to satisfy the concerns of the right hon. Member for East Ham to provide for an independent report on the operation of benefit sanctions subject to the provisions in the Bill.
>
> The new clause requires the Secretary of State to appoint an independent person to prepare a report on the operation of the provisions relating to benefit sanctions during the first year after the Bill has come into force. The report must be prepared as soon as reasonably practicable after the end of that period.
>
> Subsection (3) requires the Secretary of State to lay a copy of the resulting report before Parliament, which meets the right hon. Gentleman's requests. It is important to say that as a Department, we keep the functioning of sanctions under review. A number of comments on that were made on Second Reading. It is important to ensure that sanctions are applied fairly and consistently across Jobcentre Plus. It is an important part of the regime, so the sanction should be credible, and something that we keep under review.[22]

For the Opposition, Stephen Timms set a number of questions and issues he thought the independent review should address. These included:[23]

- The need for precise figures on sanctions
- How many of those sanctioned requested reconsideration and/or appealed the decision

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[21] Ibid. c835
[22] Ibid. c878
[23] Ibid. cc881-883

- Whether the reconsideration and appeal system was working properly
- How many of those sanctioned were in receipt of Employment and Support Allowance
- How many and what proportion of sanctions were initiated by Work Programme providers, rather than Jobcentre Plus
- The extent to which people understood the reasons why they had been sanctioned
- The role if managers in promoting sanctions and influencing sanctioning rates
- What alternative means of support people sanctioned had recourse to, eg food banks
- How "hardship provision" for those subject to a sanction was working in practice
- Whether, and the extent to which, sanctions were effective in changing people's behaviour in the way intended.

Mr Timms added:

> I hope that, with the endorsement of the Minister, the independent reviewer will take a thorough look at all 10 questions over the next 12 months and come back to us with some answers. If the reviewer does that, the independent review will be one valuable initiative that has come out of this debacle of the Government's making.[24]

6 Lords Constitution Committee report

The Lords Constitution Committee's report on the Bill was published on 21 March.[25] The Committee considered the appropriateness of both the "fast-track" procedure for the Bill, and of its retrospective effect.

With regard to fast-tracking, the Committee noted that, as with the as with the *Police (Detention and Bail) Act 2011*, this Bill seeks retrospectively to overturn a judgment which is itself under appeal to a higher court. In that case, the Committee had said that this was "highly unusual" to ask Parliament to legislate in such circumstances, and that it raised ""difficult issues of constitutional principle as regards both the separation of powers and the rule of law."

The Committee's report continues (original emphasis):

> 10. In the case of the Police (Detention and Bail) Act 2011 the Government made two observations justifying, in their view, the use of fast-track legislation to overturn a court judgment that was itself under appeal. The first was that, in that instance, the legislation in question merely restored the status quo ante and did not deprive anyone of a right on which they had relied. [15] The second was that the legislation was necessary because of "a compelling operational requirement to act as quickly as possible to restore the law", meaning that it was "not possible" to await the outcome of the appeal. [16] Neither of these reasons applies to the Jobseekers (Back to Work Schemes) Bill. Unlike the 2011 Act, the present Bill does deprive individuals of a right: namely, the right not to have unlawful financial sanctions imposed upon them. And, again unlike the 2011 Act, there is in this instance no compelling operational

[24] Ibid. c883
[25] *Jobseekers (Back to Work Schemes) Bill*, HL 155 2012-13

requirement for Parliament retrospectively to amend the law. New Regulations have already amended the law prospectively, [17] and any retrospective effect of the Court of Appeal's judgment in the *Reilly and Wilson* case is suspended pending the Government's application for permission to appeal to the Supreme Court. [18]

11. **For these reasons, we are unable to agree with the Government's assessment that it was necessary for the Bill to be fast-tracked.** We note that the judgment of the Court of Appeal was handed down on 12 February 2013. The new Regulations referred to in the previous paragraph were laid by the Government at 6.15 pm that day and came into force at 6.45 pm that day. Yet it then took the Government four weeks to introduce the Jobseekers (Back to Work Schemes) Bill into Parliament. It is not clear why the Bill should be timetabled to complete its parliamentary passage in three sitting days when the Government allowed themselves four weeks to introduce it.

12. In a written statement made on 12 February the Minister stated that "we are considering a range of options to ensure that we do not have to repay" the sanctions which, in the judgment of the Court of Appeal, had been unlawfully imposed.[19] Given that a range of options was under consideration, it is incumbent upon the Government to explain to Parliament why they have chosen to proceed by means of fast-track legislation and to reject the alternative options.

On the retrospective effect of the legislation, the Committee's report state (original emphasis):

14. Such provision engages the cardinal rule of law principle that individuals may be punished or penalised only for contravening what was at the time a valid legal requirement. According to the doctrine of the sovereignty of Parliament, retrospective legislation is lawful. Nonetheless, from a constitutional point of view it should wherever possible be avoided, since the law should so far as possible be clear, accessible and predictable. This applies to civil penalties as well as criminal offences. In the words of the late Lord Bingham of Cornhill. [21]

> "If anyone—you or I—is to be penalised it must not be for breaking some rule dreamt up by an ingenious minister or official … It must be for a proven breach of the established law of the land."
>
> [Tom Bingham, The Rule of Law (Allen Lane, 2010), pp 3-4]

15. **In scrutinising this Bill, the House will wish to consider whether retrospectively confirming penalties on individuals who, according to judicial decision, have not transgressed any lawful rule is constitutionally appropriate in terms of the rule of law.**

A press release announcing the publication of the report includes a quote from the Committee's Chair:

Commenting, Baroness Jay of Paddington, chairman of the House of Lords Constitution Committee, said:

"The Government have not made the case as to why the Jobseekers Bill must pass through Parliament so quickly. The Government are planning to appeal to the Supreme Court, so why can't they await the conclusion of that process before proposing further legislation?

"We also question the retrospective nature of what is proposed. A principle of British law is that penalties should not be introduced retrospectively for something that was not an offence at the time it was committed. The House of Lords will want to consider

> whether jobseekers who were denied benefits under unlawful rules should now be pursued by the state."[26]

7 Lords Second Reading

At Second Reading, the Opposition tabled an amendment to the motion that the Bill be read a second time (a "regret motion"):

> At end to insert "but that this House deplores the Government's incompetence in failing to provide sufficient information about its back to work schemes, which led to the need to introduce legislation with retrospective effect; deplores the need to introduce fast-track legislation when it took the Government four weeks to introduce the Jobseekers (Back to Work Schemes) Bill into Parliament and in spite of the Constitution Committee's ongoing concerns about the fast-tracking of legislation; seeks assurances that the appeals process will be robust, speedy and efficient, and that the criteria of the independent report to be prepared under clause 2 will be strengthened to include greater details regarding the number of sanctions, the nature of those affected, the appeals process, the support available to those affected and the effectiveness of the hardship and mitigation provisions; and further seeks assurances that adequate legal advice will be provided to those affected by the introduction of this legislation".[27]

The Crossbench Peer and Member of the Lords Constitution Committee, Lord Pannick, said:

> My Lords, this Bill contravenes two fundamental constitutional principles. First, it is being fast-tracked through Parliament when there is no justification whatever for doing so. Secondly, the Bill breaches the fundamental constitutional principle that penalties should not be imposed on persons by reason of conduct that was lawful at the time of their action. Of course, Parliament may do whatever it likes-Parliament is sovereign-but the Bill is, I regret to say, an abuse of power that brings no credit whatever on this Government.[28]

With regard to fast-tracking, Lord Pannick noted that it had taken the Government four weeks to inform Parliament of its intentions, following the Court of Appeal judgment on 12 February. He also noted that there was no need for urgency given that social security legislation does not oblige the Secretary of State to reimburse anyone subject to a sanction pending the application for permission to appeal to the Supreme Court. Furthermore, the Government had not requested that the application to the Supreme Court be "expedited", as it was entitled to do. He continued:

> We have the quite remarkable situation that the Minister is asking Parliament to fast-track this legislation, with all the detriments that that involves, even though there is no urgency at all in that he has no duty to pay up £130 million, or whatever the figure is, while an appeal is pending, and even though he has taken four weeks to prepare the legislation, and while he is conducting the appeal proceedings in the most leisurely manner possible. Therefore, there has been a distinct lack of urgency by Ministers in bringing the legislative proposals before Parliament and no urgency whatever in the Government's approach to the appeal in the Supreme Court. The only expedition or emergency is here in Parliament, denying us a proper opportunity to reflect on and

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[26] Constitution Committee's press release, *Lords Constitution Committee questions hurried and retrospective Jobseekers Bill*

[27] HL Deb 21 March 2013 cc732-733

[28] Ibid. c739

debate the legislative proposals in a properly informed manner. Reference has already been made to the report of your Lordships' Constitution Committee. When we considered the Bill, we set out the circumstances and concluded at paragraph 11:

> "For these reasons, we are unable to agree with the Government's assessment that it was necessary for the Bill to be fast-tracked".

I have explained to your Lordships why I take that view.

I ask the Minister to answer three questions on this topic. First, what is the urgency, given that the prospective regulations are in place and that while an application for appeal is pending there is no duty to pay out a single penny for the period prior to 12 February? Secondly, if this matter is so urgent, why did it take four weeks to bring the Bill before Parliament, and how can it possibly be justified to give Parliament only one week to consider the issues? Thirdly, if the matter is so urgent, why wait four weeks before seeking permission from the Supreme Court to appeal and why not seek an urgent hearing in the Supreme Court?[29]

Lord Pannick continued:

My second objection to this Bill-I shall be more speedy on this subject-is its substance. If the Secretary of State's appeal were to succeed, the problem would go away. Those denied benefits for the period up to 12 February were correctly denied benefit and they have no claim. But if the Supreme Court upholds the judgment of the Court of Appeal or if, as I suspect will happen if this Bill is enacted, the Government do not pursue an appeal, this Bill will impose a penalty on persons who acted lawfully under the law as it existed prior to 12 February. They are being penalised for refusing prior to 12 February to act in a manner in which they had no legal duty to act.

The Bill therefore offends against a basic constitutional principle that people should be penalised only for contravening what was at the time of their act or omission a valid legal requirement. If this Bill becomes law, Ms Reilly, the claimant in the case, and others will be penalised for failing to attend schemes when at the time of their refusal they had no legal obligation to do so. It is quite irrelevant that the people adversely affected are jobseekers. Indeed, one might think that if the victims are from the most disadvantaged section of society, it is all the more important to maintain basic elements of the rule of law.

I have seen a letter dated 18 March from the Minister to the noble Lord, Lord McKenzie, explaining the Government's position. For reasons I do not understand, the letter was not sent to the chairman of the Constitution Committee but we did receive it by a very indirect route. One sentence on page 2 of the letter, the substance of which was repeated today in the Minister's opening remarks, stands out. The Minister said:

> "It would ... be unfair if claimants who have failed to comply with requirements ... obtained an undeserved windfall payment".

The Minister repeated that language today.

That approach misses the central point which I have sought to emphasise. The claimants complied with all lawful requirements in existence at the date of their conduct. It may cost-who knows?-£130 million as a result. But I take the view-I hope that I am not the only noble Lord who takes the view-that the rule of law is simply priceless. One cannot put a price on complying with the rule of law and basic constitutional requirements.

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[29] Ibid. c741

> Your Lordships' Constitution Committee has drawn attention to these matters at paragraphs 13 and 14 of our report. At paragraph 15, we concluded:
>
> > "In scrutinising this Bill, the House will wish to consider whether retrospectively confirming penalties on individuals who, according to judicial decision, have not transgressed any lawful rule is constitutionally appropriate in terms of the rule of law".
>
> I would be assisted if the Minister would answer that point and would address the reasoning and the concern of the Constitution Committee.
>
> I am not impressed by the arguments that the legal defects identified by the Court of Appeal may have been technical in nature. That is quite irrelevant. The point is that the Court of Appeal found-this is the law unless overturned by the Supreme Court-that the regulations were unlawful and the people who failed to turn up for job schemes were acting perfectly lawfully under the law at that time.
>
> In conclusion, I say to your Lordships that there is no justification whatever for fast-tracking this Bill. Moreover, if that were not bad enough, its contents offend against a basic constitutional principle. I very much regret that this Government should see fit to bring forward such a legislative proposal. If the noble Lord, Lord McKenzie, chooses to divide the House on his Regret Motion, or perhaps more accurately his deplore Motion, he will have my support.

Replying for the Government, Lord Freud explained why the Government felt retrospective legislation was necessary:

> The Government respect the general principle that Parliament should not legislate to reverse the effects of court judgments on past cases unless the situation is exceptional. However, it is entirely proper to enact such legislation if there is compelling reason to do so. Perhaps I may spell out the three reasons which make this an exceptional case. First, there is significant money involved-£130 million-in very difficult, austere times. Secondly, the money would go to a group of people who neither expect nor deserve to obtain a windfall payment. These claimants knew exactly what was required of them. They failed to participate without good cause and were rightly sanctioned. Thirdly, this case is most unusual in terms of social security legislation.
>
> […]
>
> The third reason why this is exceptional is to do with the nature of social security legislation. In almost all cases regarding social security decisions, the decisions of a court or tribunal are only prospective in nature. That is because the most common way in which to challenge a social security decision, including the underlying regulations, is to bring an appeal to the First-tier Tribunal. If that happens, the normal route is followed and the decision of the tribunal will not have a retrospective effect because of Section 27 of the Social Security Act 1998. It is only because there is an anomaly in the text of Section 27 that it does not apply to judicial review cases. That is something that I suspect that this Government will come back to, to clear up. It is clear from Section 27 that Parliament recognised that wholesale retrospective disruption of the social security system was not desirable. That is even more true in a case like this, when the beneficiaries of that disruption are not deserving of the windfall that they would otherwise receive. That is why this is exceptional.[30]

On fast-tracking, Lord Freud said:

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[30] Ibid. cc754-755

> I turn to the reason why we need to fast-track the Bill. I want to respond to the rather witty way in which the noble Lord, Lord Pannick, put his view that there was no urgency by explaining to him and other noble Lords that we have applied for permission to appeal to the Supreme Court. If we are not given that permission to go ahead-and that could come out any day-we immediately become liable to pay back the sanction money of £130 million. That is why there is particular urgency and that is why we are fast-tracking this legislation. We need to provide certainty to taxpayers that we will not spend this money in this way, unnecessarily. The department will endeavour to process the stockpile cases in a robust, transparent and efficient manner. While there is clearly a trade-off between robustness and speed, we will aim to do that as practically as possible.
>
> **Lord Pannick:** I thank the Minister, who has been very kind. I have one more question for him. He says that it is necessary to have certainty, but why not wait until the Supreme Court rules? If the Government win, as they say they are so confident of doing, there is no problem. If they lose, they can bring emergency legislation before Parliament to clear up the matter in a few days before anyone could complain that they have not been paid out. Why not follow that route?
>
> **Lord Freud:** The moment that there is a ruling-if there were to be a ruling-against the department, we would be liable from that moment to repay. What would we do? Would we obfuscate, say that we could not pay and were dealing with the paper work while we put through emergency legislation? We would be obliged to make the payments from the moment when the ruling came through. That is what this is about. It is the reason why we are going ahead at this time and at this speed, which is clearly not something that we enjoy doing.[31]

Winding up for the Opposition, Lord McKenzie of Luton said:

> I am bound to say that we still feel that the Minister is largely in denial over various areas or lacking information. Asserting that something is something does not make it a reality. That is disappointing thus far. The phrase which we particularly object to is that there is somehow a group of people who do not deserve a windfall when what they have done is to comply with the law as it stands. That cannot be right.[32]

The Opposition's "regret motion" was defeated by 140 votes to 106, and the Bill received a Second Reading.

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[31] Ibid. cc755-756
[32] Ibid. c757

Appendix 1: The back to work schemes

The Bill covers schemes introduced under the *Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011*[33] ("the ESE Regulations"), as well as Mandatory Work Activity. The various schemes are described below.

- Work Programme
- Sector-based work academies
- New Enterprise Allowance
- Day One Support for Young People
- Derbyshire Mandatory Youth Activity Programme
- Full-time Training Flexibility
- Skills conditionality
- Mandatory Work Activity
- Community Action Programme

The schemes are intended to be appropriate for different groups of claimants, depending on their circumstances. Claimants are selected for participation in a scheme by a Jobcentre Plus adviser, and are required to participate by way of a notice. A Jobcentre Plus adviser or third party provider may then require participants to undertake specific activities relevant to the particular scheme.

Failure to participate in a scheme without good cause/good reason, such as failing to undertake an activity specified by a Jobcentre Plus adviser or a provider, may result in a benefit sanction, ie non-payment of benefit for a period. Under the ESE Regulations, failures to comply resulted in sanctions of 2, 4 or 26 weeks (depending on the number of failures), although a 26 week sanction could be reduced to 4 weeks if the claimant subsequently complied. From 22 October 2012 a new sanctions regime has applied. The regulations now provide for a 4 or 13 week reduction (by the full amount of the claimant's personal allowance), depending on the number of failures.

Work Programme

All jobseekers are referred on to the *Work Programme* after having claimed benefit for a set length of time. Providers have the freedom to decide what level of support is appropriate and reasonable in respect of each claimant, and to introduce their own ideas and strategies for helping people into employment (subject to certain minimum service delivery standards). Providers may mandate claimants to undertake particular activities, including skills training, work placements benefiting the community, and to apply for or take up work.

JSA claimants are referred to the Work Programme on a mandatory basis at different stages: claimants aged 18-24 are referred after claiming for 9 months; claimants aged 25 and over after 12 months; while some categories of claimant deemed at greater disadvantage may be referred after 3 months. Participation is also mandatory for some claimants of Employment and Support Allowance (ESA). Claimants stay on the Work Programme for up to two years.

Sector based work academies

Sector based work academies comprise training and work experience placements in a particular sector for a period of up to six weeks, followed by a job interview with an employer

[33] SI 2011/917 The regulation were made under section 17A of the *Jobseekers Act 1995*, which was inserted by the *Welfare Reform Act 2009*.

or support with the employer's application process. It is aimed at claimants who are considered relatively ready for employment, with no basic skills needs. Claimants' decision to participate in sector based work academies is voluntary, but attendance becomes mandatory once a claimant has accepted a place.

The scheme is based around actual job vacancies. Claimants may be referred at any point in their claim prior to referral to the Work Programme.

New Enterprise Allowance

The *New Enterprise Allowance* provides support to JSA claimants who wish to start their own business. Participants receive guidance from a volunteer business mentor, access to a loan to help with business start-up costs, and a weekly allowance for 26 weeks once they have stopped claiming JSA and started trading. Support is available from the start of an individual's claim, up to their referral to the Work Programme.

Day One Support for Young People

Day One Support for Young People aims to provide experience of employment to young people who have little "work history". Participants attend a work placement of benefit to the community for up to 30 hours a week and spend up to ten hours per week in supported job search, over a period of thirteen weeks. JSA claimants aged 18-24 are referred to the programme from the start of their claim if they have less than six months work history since leaving full-time education (including employment, voluntary work, internships and work experience).

The scheme is delivered by third party providers. It is currently running in North and South London over a period of eleven months from November 2012.

Derbyshire Mandatory Youth Activity Programme

The *Derbyshire Mandatory Youth Activity Programme* also aims to provide employment experience to young people with limited work history in Derbyshire Jobcentre Plus district. Participants are required to undertake a work-based activity of benefit to the community for 30 hours per week and spend at least six hours per week in supported job search, over a period of eight weeks. JSA claimants aged 18-24 may be referred to the scheme after having claimed for six months and participation is mandatory. The scheme is delivered by a third party provider and is running in 2012/13 and 2013/14.

Full time training flexibility

Full time training flexibility forms part of Jobcentre Plus support for JSA claimants who need to develop numeracy, literacy or general employability skills. Claimants who have been receiving JSA for at least six months may be mandated to undertake training of between 16 and 30 hours per week.

Skills conditionality

Skills conditionality allows claimants to be mandated to undertake training or another activity, where there is an identified skills need on behalf of the claimant.

Community Action Programme

The *Community Action Programme* involved work placements of up to 26 weeks for very long term JSA claimants, who had returned to Jobcentre Plus provision having completed the Flexible New Deal programme. Claimants were referred to the scheme on a mandatory basis.

The scheme was piloted in four Jobcentre Plus districts from November 2011 to July 2012, to investigate whether it might be a suitable support option for people who continue to claim JSA after two years on the Work Programme. It was delivered by third party providers and work placements had to be of benefit to the community.

Mandatory Work Activity

Mandatory Work Activity entails work placements of up to 30 hours a week lasting for four weeks. It is aimed at claimants who would benefit from establishing disciplines associated with employment.

Claimants are referred on a mandatory basis. Referral may be made at any point in an individual's claim, although in most cases it will be after the thirteenth week. Placements are sourced by third party providers and must benefit the local community.

The latest available statistics on the number of referrals to/participants in the principal schemes are given below.

Appendix 2: Statistics

Number of referrals to/participants in back-to-work schemes

Latest figures

	date range of data			Referrals	Attachments
Work Programme					
Totals	Jun 2011	to	Jul 2012	877,880	836,940
of which - benefit group					
JSA 18 to 24	Jun 2011	to	Jul 2012	176,680	168,160
JSA 25 and over	Jun 2011	to	Jul 2012	389,840	376,080
JSA Early Entrants	Jun 2011	to	Jul 2012	214,650	206,340
JSA Ex-Incapacity Benefit	Jun 2011	to	Jul 2012	6,320	5,930
ESA Volunteers	Jun 2011	to	Jul 2012	17,090	14,690
New ESA claimants	Jun 2011	to	Jul 2012	52,100	49,530
ESA Ex-Incapacity Benefit	Jun 2011	to	Jul 2012	9,450	8,640
IB/IS Volunteers	Jun 2011	to	Jul 2012	2,110	1,960
JSA Prison Leavers	Jun 2011	to	Jul 2012	9,640	5,600

	date range of data			Referrals	Starts
Skills Conditionality					
Initial Provider Interview (Eng)	Aug 2011	to	Aug 2012	182,780	67,270
Training (GB)	Aug 2011	to	Aug 2012	175,230	63,210
National Careers Service (Eng)	Aug 2011	to	Aug 2012	251,660	109,560
Madatory work activity	May 2011	to	Aug 2012	90,470	33,170
Work Experience	Jan 2011	to	Nov 2012	..	99,950
New Enterprise Allowance					
Mentor starts (GB)	Apr 2011	to	Nov 2012	..	31,540
Weekly Allowance starts (GB)	Apr 2011	to	Nov 2012	..	15,210
Sector-based work academy					
pre-employment training starts (Eng/Sco)	Aug 2011	to	Nov 2012	..	36,770

Note:
Some claimants may have been referred or started on more than one back-to-work scheme.
Attachments are the first engagement activity between the Work Programme provider and the participant as recorded on the payment administrative system.

Sources:
DWP Work Programme tabulation tool
DWP Mandatory Programmes Official Statistics
DWP Get Britain Working Measures Official Statistics

http://research.dwp.gov.uk/asd/asd1/pwp/index.php?page=pwp
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