

## **Workfare in 21<sup>st</sup> century Britain**

### ***The erosion of rights to social assistance***

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## **Executive summary**

### **Background**

This report is part of an ESRC funded research which analyses the evolution of welfare reform in the US and the UK. The report focuses on the decision making processes behind the expansion of workfare schemes and benefit sanctions endorsed by the coalition government (2010/present), especially:

- The Mandatory Work Activity and Employment, Skills and Enterprise Scheme Regulations (ESE 2011)
- The benefit sanctions regime under the Welfare Reform Act 2012
- The Job Seekers Back to Work Schemes (emergency retroactive legislation introduced in March 2013).

The aim of the research was to identify the legal and political arguments that justify the reframing of welfare rights as conditional. The interview schedule included questions regarding the evolution of workfare schemes as well as questions regarding the degree of political consensus between Labour and Coalition government actors (with an assessment of Labour and current government policies).

### **Methodology**

The researchers conducted 34 semi-directed interviews with a variety of stakeholders who played a role in the agenda setting process (government actors represented by the Department for Work and Pensions, DWP), Members of Parliament (Work and Pensions Select Committee, the Joint Committee on Human Rights), members of the Social Security Advisory Committee (SSAC). As can be ascertained from interviews with the

Guardian, this newspaper played a key role in certain phases of the public policy debate, especially on two occasions: the coverage of the work for your benefit schemes and the controversy surrounding the implantation of unofficial targets for benefit sanctions. Interviews were also conducted with Public Interest Lawyers, the law firm which represented jobseekers claimants in a dispute over workfare schemes. Departmental lawyers acting on behalf of the government predictably declined to be interviewed. Finally, representatives from the voluntary sector and charities involved in policy consultation were also interviewed, notably representatives from Gingerbread (single parent families), Disability Rights, MIND, trade unions (Public Sector Commercial Services Union), the Local Government Association (LGA), the Child Poverty Action Group (CPAG), Citizens Advice Bureau (CAB).

## **Key findings**

- 1- One of the main goals of welfare reform and especially benefit sanctions is to deter the vast majority of the working age population from making claims on social security, with means tested benefits being the main targets for spending cuts. There is thus a need to increase the stigma attached to benefit claim. It is in this context that social security is increasingly portrayed as an illegitimate burden on society as a whole.
- 2- In order to legitimize these cuts, the coalition government has called back the spectre of the 'moral underclass'. Under this vision, poverty and unemployment are being caused by individual failings such as alcohol and drug addiction, chaotic lifestyles, idleness and lack of purpose (dissolution). To address these issues a strong focus is being

placed on stable relationships and family life as opposed to ‘the poverty plus a pound approach’ that characterized the Labour government approach. The Secretary of State for Work and Pensions Ian Duncan Smith has said that ‘Marriage should be supported and encouraged’. This agenda resembles American welfare reform in the 1990s, which aimed to end the dependence of needy parents on government benefits by promoting job preparation, work and marriage

- 3- There is also an emphasis on claimants having to work for their benefits as part of a ‘contract’ with the taxpayer. The idea is quite simple: since we all have to work for our money, so should benefit claimants. If they fail to abide by the terms of this workfare contract, they enjoy an ‘unfair advantage’ compared to the hard working majority
- 4- The coalition government has endorsed a traditional New Paternalist approach, based on the idea that the Department for Work and Pension (DWP) knows better than benefit claimants what is good for them. There has always been a view in the DWP that some benefit claimants are playing up the system, but it has now been clearly articulated.
- 5- This philosophy has justified the introduction of a harsher conditionality regime that strictly mirrors ‘life in the real world’. In 2011 a new set of regulations were introduced that considerably expanded the scope of previously modest workfare schemes
- 6- In December 2011 claimants who had been sanctioned for failure to participate in work-related schemes under the 2011 Regulations or who worked against their wishes sought judicial review by way of an order to quash the Regulations and some schemes made under it. The case is known as *Reilly (and Wilson) vs Secretary of State for Work and Pensions*.
- 7- What appeared to be a relatively minor technical point has caused

the government a great degree of political embarrassment. In particular, the DWP had to spell out the political vision behind the workfare schemes. In February 2012 opposition to the schemes was portrayed by then Employment Minister Chris Grayling as a conspiracy of the left leaning media (mainly the Guardian) and Trotskyists.

- 8- As the government lost their case in the Court of Appeal in February 2013 they finally introduced emergency retroactive legislation in March 2013 to avoid being liable for paying compensation to sanctioned JSA claimants. By that time ministers were clearly exasperated and IDS described claimants who had sought to challenge benefit sanctions as ‘messaging around’
- 9- The Labour party leadership failed to take advantage of the catalogue of mistakes made by the coalition government. They accepted the budgetary case for the retroactive legislation. The government argued that in an age of austerity it was impossible to pay back 130 million of JSA benefits. In fact, this figure was grossly inflated but by accepting the premise of the emergency timetabling Labour was immediately put on the back foot and did not secure any fundamental concessions in return of their cooperation with the government
- 10- The courts have reacted in a fashion that was not anticipated by the government. This also explains why the coalition government is looking to ways into which they could replace the Human Rights Act with a UK Bills of Rights, and are on the record for criticising interference from the European Court of Justice as well as the European Court of Human Rights (conclusion).



## Introduction and methodology

This report is part of an ESRC funded research which analyses the evolution of welfare reform in the US and the UK. It is argued that workfare policies represent a test case for exploring the redefinition of socio-economic rights in the early 21st century, when rights-based entitlements are being increasingly replaced with conditional rights dependent on the fulfilment of obligations. The research explores the socio-legal constructs that justify this rebalancing of rights and responsibilities in two mature liberal welfare states, the US and the UK. The report summarises the provisional findings regarding welfare to work in the UK, with a particular focus on the decision making processes behind the expansion of workfare schemes endorsed by the coalition government (2010/present).

Trickey and Walker (2001) define workfare as ‘a programme or scheme that requires people to work in return for social assistance benefits’. Noncompliance with work requirements carries the risk of loss of benefits, a temporary withdrawal of benefits or a reduction in benefits (Trickey and Walker, 2001, p. 203). In practice, most sanctions entail a temporary reduction of benefits (up to three years in the UK since the Welfare Reform Act 2012). The intention is to send a clear message according to which non-compliance will not be tolerated and will have serious negative financial consequences. Workfare policies, with their reliance on compulsion, carry strong authoritarian and disciplinary tendencies. Their explicit aim is to modify individual behaviour through the use of persuasion and coercion. Workfare policies also entail a strict emphasis on work rather than training or other forms of activation (Trickey and Walker, 2001, p. 203). Indeed, workfare schemes are firmly rooted in a Work First Approach based on the need to get benefit claimants into paid employment as quickly as possible. Workfare includes mandatory participation in a variety of work-training-rehabilitation

activities to accelerate movement from benefit to self-support (Wiseman, 2001, p. 215).

This report limits its analysis to the Work Benefit Schemes introduced by the Welfare Reform Act 2009 as well as the Mandatory Work Activity and Employment, Skills and Enterprise Scheme Regulations (ESE 2011), the benefit sanctions regime under the Welfare Reform Act 2012, and the Job Seekers Back to Work Schemes (emergency retroactive legislation introduced in March 2013).

This work does not analyse in great detail the decision making process behind Universal Credit (Welfare Reform 2012) especially the policies around making work pay, benefit caps, erosion of hardship provisions, and the migration of Incapacity Benefit (IB) claimants (sick and disabled people) to Employment and Support Allowance (ESA). The reasons for focusing on work for your benefit schemes as part are twofold:

First, this particular ESRC project falls within the field of socio-legal studies and has been funded under this particular stream. We therefore made a strategic decision to focus on litigation cases as they were the most relevant for understanding the socio-legal implications of the shift towards workfare and conditionality in the British social security system. There have been no legal challenges to Universal credit rolls out simply because, in contrast to work for your benefit schemes and the new sanctions regime which is part of Universal Credit Reform (Welfare Reform Act 2012), the unification of the main means-tested benefits has not been implemented yet. In short, while we know a lot about the potential scenarios for winners and losers under Universal Credit reforms (a single working age benefit with strong elements of in work conditionality and make work pay), these remain for the most part conjectural, prospective statements, which is not the focus of this report.

The report aims to address the following questions:

- 1- What are the legal and political arguments that justify the reframing of welfare rights as conditional?
- 2- Who are the actors who support the shift towards conditionality? To what extent do the Conservative-led government coalition reforms have displayed a pattern of rupture and continuity with Labour government policies?
- 3- What are the areas of consensus/fundamental disagreement between various policy actors?

The report provides a provisional analysis of some of the key findings of the UK study carried out between November 2013 and early February 2014. The research focused almost exclusively on the decision making process at the central government level and is not directly concerned with implementation and delivery issues. The researchers used a qualitative case study approach based on documentary analysis and a total of 34 semi-directed interviews with a variety of stakeholders who played a role in the agenda setting process (government actors represented by the Department for Work and Pensions, DWP), Members of Parliament (Work and Pensions Select Committee, the Joint Committee on Human Rights), members of the Social Security Advisory Committee (SSAC). As can be ascertained from interviews with the Guardian, the newspaper played a key role in certain phases of the public policy debate, especially on two occasions: the coverage of the work for your benefit schemes and the controversy surrounding the implantation of unofficial targets for benefit sanctions. Interviews were also conducted with Public Interest Lawyers, the law firm which represented jobseekers claimants in a dispute over workfare schemes. Departmental lawyers acting on behalf of the government predictably declined to be interviewed. Finally, representatives from the voluntary sector and charities involved in policy consultation were also interviewed, notably representatives from Gingerbread (single parent families), Disability Rights, MIND, trade unions (Public Sector Commercial Services Union), the Local Government Association (LGA), the Child Poverty

Action Group (CPAG), Citizens Advice Bureau (CAB). The interview schedule included questions regarding the evolution of workfare schemes, as well as questions regarding the degree of political consensus between Labour and coalition government actors (with an assessment of Labour and current government policies).

The weight of the data analysis was devoted to the responses provided by policymakers and decision makers as well as government and parliamentary experts, because they were directly involved in the decision making and agenda setting process, to a much greater extent than charities and voluntary organisations. The interview data were complemented by an analysis of government and parliamentary research reports (DWP, SSAC, Work and Pensions Select Committee, House of Commons Library), as well as news stories. The documentary analysis helped design key questions in relation to debates and controversies surrounding the adoption and expansion of workfare schemes. The objective was to identify the legal and political arguments as well as the twists and turns in the decision making process surrounding workfare and benefit sanctions schemes.

The report is divided into six sections. First, we provide an historical account of working age means-tested social assistance up to the mid-1990s. Second, we analyse the legacy of the Labour government (1997-2010), both in terms of the protection against the risk of unemployment (income maintenance) and in relation to state obligations regarding the provision of support services for helping people getting access to the world of work. In particular, we analyse the key characteristics of a contractarian model of welfare, with its emphasis on mutual obligations. Third, we provide a brief outline of the coalition government main welfare to work reforms (Work Programme, extension of conditionality requirements to single parents and disabled people, workfare schemes and benefit sanctions). Fourth, we identify continuities and breaks between Labour and coalition government policies. Fifth, we explore the politics of an ongoing litigation case around workfare schemes referred to as

political messaging through the courts. Sixth, we conclude by spelling out the implications of the ongoing workfare reforms for the British social security system. Support through the provision of labour market services has declined, though this is part of a general trend across the OECD - this should be confirmed by the OECD Employment report 2014 and also an OCED report on activation policies in the UK, to be published in July 2014. However, there is a substantive body of case law that limits the government room for manoeuvre in terms of doing away with individual rights to social assistance. It must be noted, however, that parliamentary oversight has not played a major role in the passage of the statutory instruments (mainly Regulations). There has been much more scrutiny regarding the adoption of statutes such as the Welfare Reform Act 2012, but because most of the coalition government programme has been adopted through regulations and guidance, the latter being by definition not subjected to any degree of parliamentary scrutiny, the Executive has been able to defuse many of the objections that could have been raised as a matter of principle by the Opposition.

## **I- British social security: tensions around means-testing and decision making**

We briefly recapitulate the history of the post-welfare state settlement with its emphasis on 'passive citizenship', which is one of the main justifications for the rediscovery of a contractual model of welfare in the 1990s. We then describe the key characteristics of a contractual welfare model which is often described as a balancing act between rights and responsibilities, with a greater emphasis on individual responsibilities on both moral and economic grounds (the spiralling cost of means-tested benefits is routinely invoked to justify the drafting of rules leading to cuts in social and labour market services).

### **I-I The post-war welfare settlement: Beveridge and beyond**

The post-war welfare settlement in the UK was characterised by an endorsement of a Marshallian philosophy of universal social rights (Marshall, 1949; King and Waldron, 1988; White, 2000). Marshall argued that social rights coincided with the advent of a modern welfare state concerned with the equalisation of conditions and status, as opposed to the strict equalisation of income. Social rights in this sense were not only necessary to ensure full and effective participation in civic society; they were also constitutive of modern citizenship (King and Waldron, 1988, p. 424). The exercise of civil and political rights - right to vote, freedom of expression, freedom of movement - 'is dependent on welfare if these rights are to be more than formal and remote guarantees' (Harris, 2000, p. 23).

The Beveridge report (1942) proposed the creation of a national system of universal insurance based on a full employment model. The broad labourmarket insurance principle was central to Beveridge's vision,

supplemented by a means-tested safety net (Alcock, 1997 quoted in Harris, 2000, p. 89). As a result, there were both elements of a universal model of welfare and a duty to contribute through insurance payments. Although Beveridge established the government's duty to provide for social security, one of the guiding principles of the report was the cooperation between the state and the citizen.

The third principle is that social security must be achieved by cooperation between the State and the individual. The State should offer security for service and contribution. The State in organising security should not stifle incentive, opportunity, responsibility, in establishing a national minimum it should leave room and encouragement for voluntary action by each individual to provide more than that minimum for himself and his family (Beveridge, 1942, p. 6–7).

In this respect, the notion of mutual obligations was already at the heart of the contribution principle, based on the idea that “benefits in return of contributions rather than free allowances from the State is what the people of Britain desire” (Beveridge, 1942, p. 12). Beveridge also recommended that those who had been unemployed for a certain period should be required, as a condition of continued benefit, to attend a work or training centre, such attendance being designed as a means of preventing habituation to idleness and as a means of improving capacity for earnings. Beveridge stipulated that the government had a duty to secure full employment. The welfare state was clearly built around the principle of engagement into paid work which was seen as an individual obligation whilst it was the state's duty to maintain and secure full employment, at least in normal times (unemployment for more than 26 weeks had to be avoided, also because it would place an unsupportable burden on the insurance fund).

Beveridge also recommended that social assistance should remain locally administered on the basis of need and examination of means (the National Assistance Act came into force in 1948). The National Assistance Board had a duty to assist persons in Great Britain who were without resources to meet their requirements, or whose resources had to be supplemented to meet their requirements (Harris, 2000, p. 107). Means-tested social assistance was seen as a subsidiary scheme to social security, which would naturally disappear over time, but this simply did not happen. Indeed, as unemployment benefit was of limited duration (12 months), many people fell through the social insurance net and claimed social assistance.

In the 1960s, the rediscovery of poverty coupled with problems of low take up of national assistance and stigma was a contributing factor to the creation in 1966 of the Supplementary Benefit Scheme administered by the Supplementary Benefit Commission (SBC). The SBC came under the responsibility of the New Ministry of social Security, which administered unemployment insurance benefits.

Instead of strengthening the insurance principle that had been at the heart of Beveridge's vision, the Labour government chose to expand national assistance. This represented a historical point of departure that would prove very difficult to reverse. The SBC had discretionary powers which considerably limited the extent to which individuals could claim supplementary benefits as by definition there is an inverse relationship between the degree of administrative discretion and citizen rights.

At the time, as noted by Harris (2000, p. 108), administrative discretion was justified on the grounds that it would enable officials to target individuals in greatest need. It was during the late 1960 to the late 1970s that the debate regarding administrative discretion was at its highest. Means-tested benefits attributed on the grounds of need had been historically subject to greater



administrative discretion than contribution-based entitlements. As noted by Adler, unemployment assistance tribunals lacked the independence of national insurance tribunals, and since there was no further right of appeal, their decision was final (Adler, 2008, p. 120). This was criticised in the 1970s when public welfare based entitlements were seen to be elevated to the same status as private law rights, referred to as property rights (Harris, 2000, p. 37). This debate originated in the US in the 1960s in the wake of the civil rights movement and the War on Poverty, and inspired similar developments in the UK, as reflected by the creation of the CPAG in 1965.

The welfare rights movement refers “to the activity of ensuring that individuals are aware of and claiming all benefits they are entitled to. More broadly, it can be seen as embodying the principle of entitlements to benefits itself – rights of citizenship embodied in and delivered through the social security system, whatever the basis of benefits” (Griggs and Bennet, 2009, p. 12). In the late 1970s, there was a high volume of successful claimant appeals against exceptional needs payments (ENPs) and exceptional circumstances payments (ECAs). This high volume of appeals clogged up the tribunal system and prompted the revision of the SB scheme so as to determine clearly defined areas of legal entitlements. The Social Security Act 1980 and its set of regulations introduced more detailed prescriptions regarding the precise circumstances in which weekly additions to benefits could be made (Harris, 2000, p. 111). Moreover, under the Health and Social Services and Social Security Act (HASSASSA) 1983, the principle of independent adjudication was extended to social assistance.

To sum up, as means-tested benefits expanded, they were incorporated in a clearer legal framework with less scope for discretion and error and were thus aligned to the contributory benefits regime. Nevertheless, means-tested benefits administered on the basis of demonstrable need continued to be the poor relation of the social security system, which is precisely one of the

reasons why governments regardless of their political orientations sought to expand the scope of means-tested income maintenance as opposed to contributory-based benefits.

## **I-2 Towards a new welfare contract: the 1980s-1990s**

In the 1980s successive Conservative governments attempted to change public perceptions of benefit recipients, with a renewed emphasis on welfare dependency and benefit fraud. Public discourses casted a shadow on the moral character of the unemployed, portraying them either as lacking energy or as plainly dishonest. The incoming secretary of state for social security in his first speech (1988) declared: 'welfare recipients need to be moved away from dependence and into independence', (quoted by Timmins, 1996, p. 448). Moreover, the fight against welfare fraud became a dominant theme. The Conservatives used a populist rhetoric that enhanced the divisions between the hard working majority and the 'work-shy'. The objective was to stigmatise benefit claimants, thus legitimising the introduction of stricter conditionality regimes and benefit cuts.

The 'tightening of the screw' in the 1980s /1990s, culminating in the JSA 1995 stipulation that claimants have to be 'actively looking for work' represents to a large extent a resurrection of the 'genuinely seeking work rule' for those claiming unemployment benefits under the National Insurance Act of 1921, when claimants were obliged to accept any work paying a fair wage. This clause was dropped in 1931 following a 1930 report which concluded that the test was not working (Lundy, 2000, p. 301). Attempts to change behaviour claimants through social security rules (sticks) are thus not new, but the problem lies in the enforceability of those rules. In fact, in the 1920s, as in 1995 and as of now, the notion of voluntary unemployment was used as a moral justification for the introduction of tougher labour market conditions. In 1923, the Minister of Labour argued in favour of tough new labour

conditions on the basis that ‘the administration of benefit should not be allowed to fall into disrepute owing to benefits being paid to persons who are not really doing their utmost to secure work’ (cited by Deacon, 1976, p. 299).

Under the JSA, the Employment Officer had to monitor the steps taken by the jobseeker to obtain employment. In 1995, the legislator had to strike a balance between asking claimants to be immediately available for work, and claimant’s rights to negotiate restrictions on their availability for work (disabilities, caring responsibilities, location of available jobs, the number of hours a claimant might be deemed available for work, etc., as detailed by a complex set of JSA Regulations and additional guidance). The rule of thumb, however, is that after six months of unemployment benefit claimants had to be prepared to broaden their horizons or ‘lower their sights’ (Lundy, 2000, p. 299).

The social security reforms of the 1990s added complexity to an already opaque system, thus increasing the potential for fraud and error (comparison has been made with tax law, one of the most complex domains of legislation)(King, 2012). One of the main purposes of the JSA was to simplify the architecture of social security law and to streamline benefits administration by improving claimant compliance and partially removing the distinction between means-tested claimants and those claiming against contribution records. In practice, the exact opposite happened following pressures from the Opposition regarding the availability to work rule. Pressures from Labour especially in the House of Lords resulted in the insertion of several restrictions on labour market conditions. This resulted in a ‘legislative swirl of social security sections’ (Fulbrook, 1995, p. 395).

In addition, because there had been a move away from the contribution-based insurance principle which was slightly more straightforward than a meanstested principle focused on greater targeting, the list of mitigating

circumstances (prescriptions) that the legislator and policy maker had to take into account when drafting statutes and regulations made the task of assessing eligibility under a range of individualised circumstances even more complicated. This in turn further added to the burden of administering welfare benefits.

The move towards increased compulsion coincided with the phasing out of demand side approaches which focused on the creation of temporary employment opportunities in order to address the issue of a cyclical jobs shortage (Peck, 2001, p. 265). Conservative policies consisted in the implementation of a strategy of labour market deregulation which helped business in keeping low wages, not only to avoid inflationary pressures, but also to maintain the profitability of UK capital. By the mid-1980s, labour market programmes were based on workforce preparation. The aim of employment policies was to produce a better disciplined, cheaper work force (Marsh, 1992, p. 174). In this context, much of the controversy between trade unions and governments focused on workfare and compulsion, the trade unions holding to the idea that participation in labour market programmes should be voluntary. However, they were gradually marginalised in the policymaking process to the benefit of business interests (Marsh, 1992; Grant, 2000, p. 3). Active labour market programmes increasingly relied on subsidising low paid jobs in the service economy, either directly through the development of hiring subsidies for low-paid workers, or indirectly through the expansion of in work benefits.

## **2- The Labour government legacy (1997-2010)**

Three main trends can be identified regarding the definition of socioeconomic rights - here mainly defined as rights to social assistance or minimum living

standards. The Human Rights Act (HRA 1998) officially recognised the European Convention on Human Rights (ECHR 1950), thus expanding the scope for judicial reviews challenging the legality of administrative decisions, including those related to social security. Second, Labour sought to increase the level of administrative discretion enjoyed by frontline professionals in the DWP as part as a drive to reduce the volume of appeals. Third, Labour took active labour market policies to a new level; access to social benefits became conditional on the ability to participate in paid employment, with the exception of the most severely incapacitated.

## **2-1 The Human Rights Act and the Social Security Act 1998**

The HRA (1998) incorporated the main provisions of the ECHR into domestic law. Although the Convention does not have provisions that are directly related to social security, the fact that secondary legislation is amenable to challenge for inconsistency with the convention has already expanded the scope for judicial challenges, especially under judicial review proceedings (Harris, 2000, p. 32–33). Judicial review is a type of court proceeding in which a judge reviews the lawfulness of a decision or action made by a public body.

The HRA makes the rights contained in the ECHR legally enforceable in the UK. Under section 2 of the HRA the courts must take into account any relevant decisions of the European Court of Human Rights when considering human rights issues. This has extended the scope for judicial reviews and complaints. However, in the the area of social security, these requirements have not been as onerous on the government as other areas of the law (civil and political rights), mainly because the ECHR does not directly incorporate socio-economic rights and distinguishes three categories of rights (see Ministry of Justice, 2006, p. 3-4). As a result, social assistance benefits can

only be considered as property rights under Article 1 Protocol 1 of the convention and as such are considered as qualified rights which are susceptible of being balanced with wider community or state interest (Ministry of Justice, 2006). This is thus relatively easy for a government to justify doing away these rights if there is significant cost to the public purse.

Section 3 of the HRA requires laws to be interpreted so as to be compatible with human rights. The government must issue of declaration of compatibility with the HRA. If a law cannot be interpreted to make it human rights compliant, the courts can make 'declarations of incompatibility' (section 4 of the HRA). Judges can overturn secondary legislation (regulations) but not statutes (primary legislation) (see Kings, 2012, p. 172, and Harris, 2000, p. 32).

If a declaration of incompatibility is made, the government can then decide whether to amend the legislation in order to make it compatible with human rights. But there is absolutely no obligation for the government to do so, although a declaration of incompatibility with the HRA can be politically embarrassing for the government.

Alongside the HRA, another important reform was the change in the structure of the social security tribunals. Section 1 of the Social Security Act 1998 transferred responsibility for decision making from adjudication officers to the Secretary of State. Before the 1998 reforms, decisions regarding legal entitlements to benefits or child support were made by adjudication officers or child support officers, under the authority of the statutorily independent Chief Adjudication Officer, whereas administrative decisions (such as those concerned with information collection) were taken under the authority of the Secretary of State.

Arguments in favour of the reform was that it would help create to create a simplified and efficient system, which was expected to improve decision

making accuracy (Parliament. House of Commons Work and Pensions Committee, 2010, p. 5–6). The main concern regarding the reforms was the loss of independence regarding the administration of claims and appeals, which according to opponents of the reform resulted in an overall deterioration in the quality of the decision-making process. There was an overall concern with the lack of checks and balances on standards of decision-making by the DWP, as well as a concern that decision makers were overworked, badly qualified and trained. Moreover, the Secretary of State had failed to produce an annual report on the quality of the decision making process, as he was instructed under the 1998 Social Security Act. In sum, there had been widespread concern that the quality of decision-making had not been significantly improved; resulting instead in a managerial approach to decision making which systematically undermined claimants' capabilities to effectively challenge incorrect decisions. The reforms also introduced the abolition of lay members of tribunals, with the exception of specialist non-lawyer members to sit on panels in disability or child support cases. This was seen as problematic as claimants generally found lay members more approachable than lawyers (Harris, 2013, p. 159).

Labour policies oscillated between on the one hand, a more formal recognition of rights, as made possible by the HRA; and, on the other and, increased scope for professional discretion. One of key explicit objectives of the Social Security Act was to introduce greater flexibility in the law in order to provide personalized support to benefit claimants. It was also aimed at reducing the number of appeals through a rationalization of the decision making process.

## 2-2- Active labour market reforms

In 1997 the Labour government pledged to rebuild the welfare state around work. The denunciation of welfare dependency, the need to develop people's employability through the right balance of sticks (benefit sanction in case of non-compliance with programme requirements) and carrots (work incentives) featured prominently on the legislative agenda in 1997. The denunciation of welfare fraud was also part of the rights and responsibilities rhetoric. The Green Paper "A new Contract for Welfare" stated that "fraud costs the taxpayer an estimated £ 4 billion every year - enough to give every family with children an extra £10 a week" (DSS, 1998, p. 12). Idleness was to be eliminated unless the unemployed and/or the inactive had a very compelling reason for not working, such as disability or major caring responsibilities. The social pact between the government and the people was defined in terms of contractual obligations. In the words of Anthony Giddens, there should be 'no rights without responsibilities' (1998, p. 65). Tony Blair and the Labour party modernisers were keen to distance themselves from 'early Left thinking' in which the 'language of responsibility [was] spoken far less fluently' than that of rights. Tony Blair argued for a two-way covenant of duties between society and citizens which 'allows us to be much tougher and hard-headed in the rules we apply; and how we apply them' (Blair, 1995).

The rhetoric of rights and responsibilities was also closely associated with the emphasis on paid work as the best way to combat poverty (Holmwood, 2000; Deacon, 1997, 2000, 2002; Dolowitz, 2000; King, 1999; King and WickhamJones, 1999; Daguerre and Taylor-Gooby, 2004; Daguerre, 2004). This new philosophy was most clearly articulated under the New Deal programmes in 1997-1998. The New Deal entailed a combination of work incentives, compulsory training and work-related programmes for young



people and the long-term unemployed, and use of benefit sanctions in case of noncompliance with programmes requirements. The New Deal for Young People (NDYP) consisted of three stages. The first, the 'gateway period' of four months provided individual 'intensive' job search assistance. There was a target of 40 per cent of gateway participants who were to find unsubsidised employment at this stage. Others were transferred to one of the four 'options' which lasted 6 months (second phase). These consisted of subsidised work in either the private or the public sector, participation in education or training and the option of becoming self-employed. Unlike any previous programmes, the take-up of one of the four options was compulsory for all benefit claimants: there was no fifth option, that is, to stay on benefits.

Between 2005 and 2010, there was an acceleration of the reform process which resulted in an overhaul of the benefit system resulting in the extension of work related activities to new categories of claimants, mainly disabled/sick people and single parents. As unemployment decreased in the late 1990s, the government focused on economic inactivity: the proportion of the working age population in receipt of IB had increased from around 3% in the 1960s to over 7% in the late 1990s (approximately 2.6 million people). The New Deal gradually involved the implementation of a more stringent regime of workrelated activities for IB claimants and single parents. In April 2002, all lone parents were required to attend annual work-focused interviews before applying for Income Support (see box 1 on increased conditionality for lone parents).

## **Box I Key Dates for Employment Programmes and Work**

### **Requirements for lone parents in Great Britain**

- *July 1997*: New Deal for Lone Parents (NDLP) is piloted in eight areas.
- *October 1998*: NDLP is implemented nationwide
- *October 1999*: 'One' pilot programme combines Employment Service and Benefit Agency offices.
- *April 2001*: Initial rollout of Work Focused Interviews (WFIs) linked with promotion of NDLP.
- *March 2002*: Jobcentre Plus (JCP) offices start opening phase (national network of modernised offices completed in 2008). New Income Support claimants are required to attend WFIs.
- *October 2003*: Pilot of Employment Retention and Advancement (ERA) programme for lone parents and some other groups starts in selected offices.
- *April 2004*: Requirement to participate in WFIs is extended to IS claimants with children aged under 5.
- New Deal for (non-working) Partners of the Unemployed requires mandatory interviews for new and existing claimants.
- *October 2004*: Lone parent IS claimants are required to come in for quarterly WFIs
- *October 2006*: New Deal Plus for Lone Parents introduced
  
- *March 2007*: David Freud completes DWP commissioned independent report calling for requirement to work to be extended to lone parents on IS with children over five.

- *July 2007*: Publication of the ‘Green Paper’ on welfare reform – ‘In Work, Better Off’ – which proposes measures to get more parents into work, including requirement that lone parents should seek work when their youngest child reaches age seven.
  - *December 2007*: Publication of ‘White Paper’ - ‘Ready for Work: Full Employment in Our Generation’ – which sets out the government strategy to improve employment assistance and begin to move lone parents with children aged over five from IS to Jobseekers Allowance
  - *October 2008 -2009\**: Phase 1 migration of lone parents to JSA and other benefits commences for those with a youngest child aged over 12 years.
  - *October 2009 -2010\**: Phase 1 migration of lone parents to JSA and other benefits commences for those with a youngest child aged over 10 years.
  - *October 2010 -2011\**: Phase 1 migration of lone parents to JSA and other benefits commences for those with a youngest child aged over 7 years.
  - *June 2010*: New Government announces that the changes will be extended to cover lone parents with a youngest child aged at least five, and expected to implement the change from 2012.
- Source: (Finn, 2011)

The other strand of welfare reform consisted in extending conditionality requirements to disabled/sick people. People on incapacity benefits had to attend work-focused interviews as a condition of benefit receipt (see box 2). The Green paper Empowering people to work (DWP, 2006) set out the Government’s aspiration of achieving an employment rate of 80% of the

working age population with the targets of reducing by 1 million the number on incapacity benefits and helping 300,000 single parents into work. To increase the numbers leaving incapacity benefits and returning to work, the Green Paper proposed the introduction of a new Employment and Support Allowance from 2008 to replace Incapacity Benefits. The Green Paper introduced a two-tiered system that distinguished between severely disabled and temporarily unfit to work individuals. New benefit claimants, except those with the most severe disabilities and health conditions, were required to participate in work focused interviews, produce action plans and engage in work-related activities, or see their benefit level reduced. Non-compliance would result in benefit being reduced in slices, ultimately to the level of Jobseeker's Allowance. The Green Paper proposals were included in the Welfare Reform Bill 2006, which became an Act in May 2007.

One of the reasons why the 'disability lobby' endorsed ESA (DWP, 2006) was that the Labour government insisted that people deemed capable of work related activity would receive personalised, adequate support. Moreover, the government emphasised that they were rolling out an approach based on a social model of disability focused on removing structural barriers to employment, with the aim of empowering IB claimants (DWP, 2006; Daguerre, 2007; Spartacus Network, 2014, p. 58). The Pathways to Work programme recognised the importance of ill health in creating barriers to work by promoting partnership working between Job Centre Plus and local NHS bodies to provide Condition Management programmes for those with long-term health conditions (Morris, 2011, p. 8). The programme also created additional financial incentives for a return to work. All in all, although Pathway to Work had disappointing job outcomes and was found to be poor value for money, the programme was underpinned by a supportive approach (Barnes and Sissons, 2013, p. 73).

## **Box 2 Disability Benefits: chronology of reforms**

*1998:* New Deal for Disabled People (NDPP) pilot

*2001:* National roll out of NDDP

*2002:* Green Paper 'Pathways to Work'; emphasis on 'positive conditionality'. New claimants to be subjected to a series of 5 interviews with IB personal advisers

*2005:* DWP Five Year Strategy: plan to reduce the number of IB claimants by one million over a 10 years period; claimants to receive an initial holding benefit on the lower JSA rate before satisfying the Personal Capacity Assessment (PCA); PCA becomes the gateway for benefits. Obligation to engage in Work Focused Interviews (WFIs) and in work related activities

*July 2006* Welfare Reform Bill presented to Parliament – proposed the replacement of IB with ESA by 2008.

*2007:* Welfare Reform Act WCA. ESA replaces IB (both contributory IB and IS on the grounds of incapacity). Provides support to people whose disability or health condition means they have limited capability to work

*July 2008:* Green Paper No One written off

*December 2008:* Gregg review: Realising Potential proposes to divide all benefit claimants into 3 groups, a Work-Ready Group (assessed as being immediately 'job ready' and should make a prompt return to work), a Progression to Work Group – for people where an immediate return to work is not appropriate: Work Related Activity Group (WRAG), and a No Conditionality Group.

*2009:* Welfare Reform Act

The Welfare Reform Act 2009 restricted the coverage of IS and IB with a view of abolishing this type of benefit altogether in order to submit the vast majority of claimants to the more stringent conditionality rules that traditionally applied to JSA. People who had been previously considered to be outside the labour market and exempt from work requirements (people with a illness, disability, or care responsibility, especially lone parents) were to be treated as part of the economically active population.

IB is traditionally determined within a framework of rules and without a specific limit on budgets. Two sets of rules determine the eligibility: a test of incapacity to work and an assessment of benefit eligibility, based either on national insurance contributions or on means-testing. The WCA devised in 2007-2008 led to a reduction in the range of conditions which enabled people to qualify for IB. It basically restricted eligibility criteria for IB receipt and introduced a kind of employability test (Gulland, 2013, p. 71–73).

The WCA is a functional assessment based on the premise that eligibility should not be determined by the description of a person's disability or health condition but rather on how their ability to function is affected, which may vary considerably between individuals with the same diagnosis. There are extra conditions associated with claiming ESA. Claimants can be placed in the Work Related Activity Group (WRAG) in case they are unwell but may still be able to do some work. Claimants are expected to attend a work-focused interview and training, and will have regular reassessments to decide if they should claim JSA instead of ESA. Once placed in the Support Group claimants do not have to attend work-focused interviews and training unless they would like to.

The DWP reassesses claims to check health problems with respect to being moved to the WRAG or onto JSA. The welfare Reform Act 2009 realised the vision of the Gregg report (2008) according to which conditionality (the principle that entitlement to benefits should be dependent on satisfying certain conditions) should be extended to the vast majority of the working age

population so that virtually no one may claim benefits without taking active steps to address their barriers to work. The aim was to establish a personalised conditionality regime where the support to enable people to return to the labour market. The legislation was couched in a strong personal responsibility language with the key notion that there was a need for a much clearer sanction regime for those who failed to attend an interview or failed to sign on without a good reason.

These changes to entitlement rules through the WCA were accompanied by an escalation of benefit sanctions. Sanctions through loss of benefits had been in effect since the introduction of JSA in 1996, when claimants could be denied up to 2 weeks benefits or 4 weeks for repeat offences. But these sanctions were applied through terminating the JSA claim, forcing the individuals to begin the application process again, resulting in a high administrative cost for the DWP (Barker and Lamble, 2009, p. 4). The Welfare Reform Act 2009 intended to make the sanctions system more consistent, automatic and escalating: missing a mandatory appointment resulted in a benefit sanction no fewer than one full week and subsequent failures in a two weeks sanctions. Those who failed to comply without good cause could see their benefit stopped for between one and 26 weeks (Barker and Lamble, 2009, p. 4, CPAG, 2010). The legislation introduced new sanctions for JSA claimants, notably in case of violence against JobCentre Plus staff. The Act also made provisions for problem drug users involving compulsion to declare a drug problem and follow a rehabilitation plan (Griggs and Bennet, 2009, p. 30).

In addition, the Act introduced a compulsory 'work for your benefit' (work or work-related activity) schemes for long-term jobseeker's allowance (JSA) claimants to be piloted from November 2010. The Act allowed regulations to provide that claimants were required to undertake 'work, or work-related activity, during any prescribed period with a view to improving their prospects of obtaining employment.' The Jobseeker's Allowance (Work for your Benefit Pilot Scheme) Regulations 2010 (S.I. 2010/1222) were approved in draft by

each House of Parliament in March 2010 and were made on 7 April 2010. They allowed the Secretary of State to select claimants in pilot areas for participation in the scheme if they met specified conditions. The explanatory memorandum to the Work for Your Benefit Scheme (WfYB scheme) stated: “the scheme will consist of work experience and job search support for up to six months, delivered by organisations through contract with the DWP. This aims to help those furthest from the labour market develop work habits and routines, giving them experience of work in order to increase their employability” (DWP, 2010). The scheme was aimed at the long term unemployed, i.e. individuals who had been on the Flexible New Deal for at least 12 months. The explicit objective was to improve employability for those who had the greatest barriers to work. It was couched in a relatively supportive language for claimants although failure to comply could lead to a referral for a benefit sanction of up to 26 weeks (a clear escalation of the sanction regime).

The direction of travel under Labour has been quite clear: an increased reliance on compulsion and benefit sanctions. James Purnell declared in February 2008 that “for the small number of people who refuse to take up the opportunities available, we will be looking at how we can develop a strict sanctions regime, including either cuts in benefits or an option of permanent work for benefits... if you can work you should work, and that will be a condition of getting benefits” (Purnell cited in Driver, 2009, p. 77)). This emphasis on the obligation to take up work as a condition for receiving benefits echoed a speech made by the future PM David Cameron when describing the Conservative welfare contract:

We're going to change the whole way welfare is done in this country so everyone takes responsibility and plays their part. This is our new welfare contract: do the right thing and we will back you all the way. But fail to take responsibility – and the free ride is over. (Conservative party, 2010).



What is remarkable is that, the recession of 2008-2009 had not shaken administrative elites dominant belief system based on the primacy of individual characteristics for explaining economic inactivity. This formed the core of the activation policy paradigm (Hall, 1993). In interviews conducted in March 2010, DWP officials firmly maintained that individual characteristics explained the persistence of unemployment and economic inactivity: “Our view is that regional differences in the distribution of economic inactivity are explained by the individual characteristics of the people living there. Economic inactivity is explained not by a lack of demand but by individual characteristics, and the recession has not modified the distribution of unemployment”. Senior civil servants also believed that “if people are not active it is because they are not looking for work.”

Economic inactivity was portrayed as a behavioural problem rather than a demand-side issue due to the lack of job offers. It seemed clear, too, that reforms had been pursued mainly on the grounds of cost savings to the Exchequer, with a view of reducing social expenditure on out of work benefits, especially as the bulk of social expenditure was devoted to old age benefits and health care. This concern underpinned the inclusion of the vast majority of benefit claimants into a much more stringent conditionality regime, that of JSA. The dominant view was that JSA represented “an effective regime for moving people into employment because you are required to do it. Our approach is to generalise JSA and introduce flexibility.” In sum, British policymakers had subscribed to an individualised contractual consensus according to which individuals have a personal responsibility to get into paid work, with more limited access to public funds.

### **3- The coalition government welfare reforms**

The reforms since 2010 have aimed to streamline services provided for unemployed people, simplifying the benefit system accompanied by a raft of conditionality rules and sanctions as part of a greater disciplinary regime.

#### **3-1 The Work Programme (WP)**

The principal aim of the WP is to move more people off benefits into work in order to combat ‘benefit dependency’, which is seen as the main cause of poverty – and this entails a more disciplinary and intensively focused conditionality regime. The WP supports people claiming income-related JSA rather than contribution-based ESA. Initially new benefit claimants are ‘processed’ by Jobcentre Plus whilst the WP is designed for those groups who are longer termed unemployed. The welfare to work model involves two assessments. One is for people on sickness benefits known as the WCA which assesses whether people are capable of undertaking work. The WCA is a tough medical test; it has a points based system and assesses what activities the claimant is capable of undertaking (see below). The second, used by WP providers is the Customer Assessment Tool (CAT) to identify barriers to work and appropriate services to overcome these barriers for those customers coming on to the WP.

The WP is emblematic of the governmental strategy of opening up the public sector to the market. Prime contractors (generally the private sector) are appointed to deliver in localities (contract areas) on the basis of plans and strategies which are generally negotiated directly between the contractor and DWP. The WP extends the contracting model and delivery and the role of private providers in the delivery of previous welfare to work programmes (Crighton, Turok and Leleux, 2009). There are 18 contracting areas in England

Wales and Scotland with the size of the areas varying. Wales and Scotland represent single contract areas. The first key aspect of the WP model is that local partners are not involved in commissioning which was an important feature of the City Strategy Pathfinder that was implemented under the Labour Government. Second, the choice of contractors and contracting framework involves negotiating with 'prime' contractors (to last for a period of 5- 7 years) who are deliberately chosen in terms of their size, turnover as well as their 'capacity to deliver.' The prime contractors are then expected to sub contract to other providers – public, private or voluntary sector. There is a 'black box' approach whereby the prime contractor decides the delivery model and interventions are 'personalised' to the needs of job seekers. Providers are funded on payments by results basis structured in relation to initial attachment to the programme, job outcomes, job sustainability with additional payments made for higher performing contractors.

### **3-2 Workfare schemes: Mandatory Work Activity and ESE Regulations**

In 2011 the coalition government introduced new workfare schemes, namely the Jobseeker's Allowance (Mandatory Work Activity Scheme) Regulations, the Jobseekers Allowance (Employment, Skills and Enterprise) Regs 2011, which replaced the Jobseekers Allowance Work for Your Benefit Scheme Regs 2010 introduced as part of the Welfare Reform Act 2009.

The purpose of the Mandatory Work Activity Regulations was

... to target the small number of customers who do enough to meet the conditions of their claim while at the same time continually failing to demonstrate the focus and discipline that is a key requirement of finding, securing and retaining employment. We expect the majority of

these customers to be referred during the pre-Work Programme stage of their customer journey. These customers will be referred to a four week period of activity, with the aim of helping them develop those crucial disciplines associated with full time employment, while at the same time making a contribution to their community.’ (DWP, 2011).

Moreover, advisers were given considerable discretion in selecting the participants who showed the following characteristics over a period of time:

- tends to take no personal responsibility for job search activity,
- waits to be organised/contacted;
- reluctant to make speculative approaches, follow up advice or job leads;
- regularly fails to attend appointments and interviews on time;
- has little or no recent work experience;
- limited awareness of the types of support available to help them with their job search; and
- has no realistic appreciation of employer attitudes or requirements.

The SSAC raised several concerns regarding the Mandatory Work Activity programme. We cannot provide an exhaustive list, but for the purpose of this report it is worth mentioning four key objections.

1- Mandatory work activity Regs introduced a new set of conditionality requirements that amended the body of case law regarding what actively seeking work actually means. Indeed, it was assumed that some claimants just ‘did enough’ to comply with the ‘actively looking for work’ rule but in practice did not enough to find work;

- 2- Extreme discretion of personal advisers since Regulations failed to describe the prescribed circumstances of ‘good cause’ for not complying; discretion could lead to arbitrary decision-making especially in a context where decision makers had set ‘benchmarks’ (not targets) for sanctions; Proportionality of the sanctions, as a failure to participate in a four weeks programme could result in a sanction of 13 weeks (3 months) for the first failure;
- 3- Concerns that employers could develop an opportunistic behaviour using workfare placements instead of regular workers (known as the displacement effect);
- 4- Lack of guidance regarding expectations of contracted out organisations taking such placements (health and safety, type of work that the referred jobseeker will be required to do), an approach that applied to the entire WP rules for employers contracted out under the scheme.

In addition to the Mandatory Work Activity schemes new programmes were also created under Employment, Skills and Enterprise Scheme Regulations 2011 (“ESES”), including the “sector-based work academy scheme” (“SBWA scheme”), a short-term scheme aimed at employable individuals, and the Community Action Programme (“CAP”) aimed at the very long-term unemployed. The schemes were designed to assist claimants of job-seeker’s allowance (“JSA”) to obtain employment or self-employment.

### **3-3 Increased conditionality requirements**

#### *Claimant commitment*

Every IS, JSA and ESA claimant is to have a claimant commitment as a condition of entitlement. The commitment sets out the general expectations on each benefit claimant; the requirements placed upon them and will also be clear about the consequences for the claimant of failing to meet these agreed standards.

The claimant commitment represents a revamped version of the Job Seeker Agreement, and is supposedly negotiated between personal advisers, now referred to as work coaches, and benefit claimants. The idea is to agree a personal plan outlining what the claimant will do as part of the commitment for giving themselves the best chance of finding work. Once again, the key objective is to provide personalised support. However, it must be noted that the claimant commitment, despite the emphasis on ownership of the part of the individual, can be reviewed and updated as the DWP thinks fit (CPAG, 2014, p. 1064–1065).

Claimants will normally have to accept a claimant commitment instead of a jobseeker's agreement, as a condition of entitlement, which will include details of their availability for work and work-seeking activity.

Claimant agreements for all benefits will include (Simmons, 2011):

- Participation in '*work-focused interviews*' to assess work prospects and identify activities, training and work opportunities to enhance the claimant's job prospects. The rules are likely to be similar to those currently in place, but interviews may be arranged more frequently;
- '*work preparation*', which is specified activity aimed at increasing the likelihood of obtaining paid work (or more or better-paid work), including attending skills assessments, participating in training, work experience, a work placement or an employment programme, drawing up a business plan, and 'improving personal presentation.' A work placement will include

‘mandatory work activity’ for jobseekers, comprising four weeks’ unpaid work. The government has also introduced compulsory community work (for at least 26 weeks) for jobseekers who have been on the WP for two years or more;

- *‘work search’*, which is ‘all reasonable action’ and specified activity to obtain paid work (or more or better-paid work) including looking and applying for jobs, drawing up a CV, and registering with an employment agency. The default requirement will be that claimants must ‘treat looking for work as their full-time job’ and look for any full-time work paying at least the minimum wage within 90 minutes of their home. Where this is not appropriate, however, claimants will be able to narrow their work search in accordance with their claimant commitment (see below);
- *‘work availability’*, which is a declared ability and willingness to immediately take up paid work (or more or better-paid work). The default requirement will mirror the ‘work search’ requirement (i.e., availability for full-time work within 90 minutes’ travelling time), with exceptions for certain claimants who will be able to restrict their availability in specified circumstances

#### *Dispensations*

The following groups will be required to attend *work-focused interviews only*:

- claimants responsible for a child aged over one and under five (lone parents or the main carer in a couple);
- foster carers with a foster child under 16, or under 18 in exceptional circumstances (lone parents or the main carer in a couple, unless, exceptionally, both partners need to provide care).

*Work preparation and work-focused interviews only*

Claimants with limited capability for work, as assessed by the WCA, will fall into this group. As of now, they must prepare for work, but cannot be required to look for, or take up, a job. They are also exempt from compulsory mandatory work activity (four weeks' unpaid work).

*Subject to all work-related requirements*

All other claimants will be subject to all the work-related requirements, including attending work-focused interviews, work preparation (including mandatory work activity and community work), work search and work availability. This will apply to jobseekers, those in work under the 'conditionality threshold' and claimants with a youngest child over five.

As currently, certain claimants in specified circumstances will be allowed to restrict their work search and availability, including:

- those previously employed with a 'good work history', who can be allowed up to 13 weeks to look for similar employment only;
- lone parents with a child aged five to 12 (or older in exceptional circumstances), who can restrict their work search and availability to fit in with school hours and the availability and affordability of childcare (particularly in school holidays);
- couples with a child under 13, who can be allowed similar restrictions (either the main carer, or both partners if they are collectively available for sufficient hours);
- carers and those with a health condition, who can restrict their availability and work search to fit in with their limitations;



- claimants on maternity and paternity leave, in prison, in approved training, or subject to temporary circumstances which would make it unreasonable for them to look, or be available, for work

### **3-4 Escalation of sanctions**

Sanctions, in the form of loss of benefit are enhanced under the Welfare Reform Act 2012. The intention is to provide a ‘clear and strong’ sanctions regime, which will be easy to understand and explain, and which will “incentivise claimants to meet their responsibilities.”

There are higher, medium and lower level sanctions largely based on the length of period imposed on the sanctions. The new sanctions were first applied to JSA claimants (as of October 2012). The Welfare Reform Act 2012 creates a new section of the Jobseekers Act (section 19), along with an additional section 19A, 19B and 19C. Section 19 provides for higher level sanctions where the claimant fails to comply with the labour market and employment-related conditions laid out in section 19 of the Jobseekers Act (Williams, 2012). Higher level sanctions apply when a claimant:

- loses employment through misconduct;
- leaves work voluntarily;
- refuses to take up or apply for a job notified by the DWP;
- neglects to avail her/himself of a reason-able chance of a job;
- fails to participate in a prescribed course.

A series of escalating sanctions will apply:

- 13 weeks for the first failure;

- 26 weeks for a second failure, within 52 weeks of a previous failure;
- three years for a third failure, within 52 weeks of the most recent failure

The second set of sanctions is applied to claimants who fail to meet the conditions in Section 19A of the Jobseekers Act. These include where the claimant:

- fails to sign on as required;
- fails to attend an interview at DWP when notified to do so;
- fails to participate in a prescribed course;
- fails to carry out a reasonable jobseeker's direction;
- fails to take up a training scheme or employment programme when notified, gives up a place on such a course or programme without good reason, or loses a place on such a course or programme due to misconduct.

Again the sanctions applied can escalate due to repeated failures. The sanctions are:

- four weeks for a first failure;
- 13 weeks for a second failure, within 52 weeks of a previous failure.

Failures within two weeks of the failure that resulted in the current sanction being applied do not result in additional or escalating sanctions.

### **3-5 Additional burdens on welfare claimants: administration of claims and appeals**

Universal Credit reforms have placed additional burdens on lodging claims and appeals. Most of the analysis below is based on Harris (2013) as well as various relevant sections of the latest edition of the Welfare Benefit and tax credits handbook (CPAG 2014).

First, under Universal Credit people will have to make their claims online, which can pose problems for certain categories of vulnerable claimants.

Second, time limits have been established with more restrictive rules for backdating a claim, and regulations are much less detailed as to the circumstances under which late claiming can be justified, which increases the potential for administrative discretion.

Third, waiting days periods have been increased from 3 to 7 for both ESA and JSA claimants, which can have a negative impact on disabled claimants.

Fourth, additional hurdles have been added for benefit claimants who wish to challenge a decision, as these claimants can only make an appeal when they have been through a reconsideration procedure as part of an escalating dispute process. The mandatory reconsideration process is designed to increase the proportion of disputes resolved without an appeal. If the 'customer' disagrees with a decision, he/she has to write to ask for a reconsideration of the decision before being allowed to lodge an appeal directly with the Her Majesty Courts & Tribunals Service (HMCT).

Prior to 2012, any appeals were always referred back to the decision maker, but this was done informally, without the claimant having to formally ask for a

reconsideration of the decision. Currently there are no time limits for the decision maker to issue a reconsideration but the unhappy customer has one month to ask for a mandatory reconsideration. In fact, the main rationale for the reform is to reduce the volume of successful appeals around ESA, which concerns the vast majority of appeals. As the CPAG explains:

Claimants will be without the benefit claimed pending the outcome of their request for a mandatory reconsideration. In ESA cases (currently the majority of appeals), it remains that ESA pending appeal is only payable when an appeal has been made – i.e., not while a mandatory reconsideration is pending. The very real concern is that many claimants will abandon their dispute because of the simple need to sustain themselves and their families. (CPAG, 2013)

## **4- Continuities and breaks with Labour welfare reform schemes**

### **4-1 Continuities**

In practice, most of the coalition government reforms build upon the Labour government reforms as they entail 1- a sustained and continuing reduction in the IB population, 2- the generalisation of work for your benefit schemes (introduced in 2009, but only on a pilot basis,) and 3- the escalation of benefit sanctions under the Welfare Reform Act 2012.

#### ***4-1-1 Transfer of disabled people towards ESA***

Despite continuing controversy, the government has pushed ahead with reform, including the reassessment of 1.5 million IB claimants from 2010 to 2014. The outcome of reassessments of the first 600 000 people has been that over 30% of IB claimants were assessed as fit for work, 41% allocated to the Work-related Activity Group and 27% to the unconditional Support Group, although the proportion finally assessed as fit for work is likely be lower due to decisions on appeal (OECD, 2013, p. 146).

#### ***4-1-2 Escalation of benefit sanctions: a work first consensus***

The government's welfare and active labour market policies reforms display a remarkable element of continuity with the previous Labour government in relation to the need for a much more stringent and clearer sanction regime. This message was already key to the Gregg report (2008) which found that sanctions were needed to underpin the obligations of claimants, and aimed to deal more effectively with repeat offenders by introducing a clear and simple

sanction-escalation procedure for failure to attend an interview or appointment without good cause (Adler, 2013, p. 237).

Reflecting on the conditionality and benefit sanctions agenda, DWP interviewees with a longstanding experience of both Labour and coalition governments pointed to a broad political consensus on the need for sanctions as part of an effective conditionality regime:

There is general agreement that a regime that doesn't have sanctions is unlikely to be as effective as a regime that does. I would say I've not come across a minister who has got a problem with that or a different view from that. <sup>iii</sup>

Another interviewee stated:

I guess there is a long term drive to activate more people and broadly because activation works in terms of getting people off benefit and into employment. So what has happened over quite a long time frame now is that more people have been brought in to active regimes and in particular in to a work search regime so you have a long term strategy of lone parent obligations, reducing the age at which the youngest child of a lone parent has to look for work. There is the IB ESA reassessment obviously as well.<sup>iv</sup>

Another civil servant in the DWP when asked to point out to differences between Labour and Conservative approaches to conditionality emphasised continuity between the two governments:

It has changed a little bit but not as much as people would think. When I speak to friends and they say, oh it must be terrible working for a Conservative government. They got rid of the Future Jobs Fund which was a guaranteed job scheme. The philosophy has not really changed that much. I think it was going that way anyway. Conditionality and

sanctions were getting tougher and it has got tougher but I think if Labour had won again they probably would be quite tough. Would they get rid of all the mandatory stuff? I don't think so. They wouldn't get rid of sanctions. They might change it a little bit but they wouldn't, no<sup>v</sup>.

A member of the SSAC pointed out to an international consensus around the use of sanctions to change people's behaviour:

I guess there is an international consensus that putting requirements on job seekers is effective for moving people off benefits of course there are questions about the level of conditionality versus how that is targeted and what-have-you but there is a broad consensus that the work first approach/conditionality is broadly effective and achieving an aim of getting people off benefits<sup>vi</sup>.

This view was also shared by members of the Work and Pensions Select Committee:

Most of our witnesses accept the rights and responsibilities framework, so sanctions are part of it<sup>vii</sup>.

Reflecting on the evolution of welfare to work programmes since the coalition government came to power in May 2010, members of Parliament from the Labour party agree that there has been an acceleration but point out that Labour had planted the seeds of a harsher benefit sanction regime:

I'd probably say an acceleration( ...)I was quite critical of the Labour government's reforms and it seems to me it has almost given permission to this government to then go even further and so making sanctions or extending conditionality, deepening conditionality and implementing much more punitive sanctions. So there has definitely been a step change but it was already going in that direction<sup>viii</sup>.

This view is echoed by another Labour MP: “There’s a consensus across the political divide around sanctions.”<sup>ix</sup>

## **4-2 Differences and breaks**

This being said, some differences remain between the Labour and the Conservative policies: 1- a resurrection of the moral underclass discourse focusing on individual causes of poverty, 2- a new fairness agenda: benefit claim as an ‘unfair’ advantage, 3- more aggressive political narratives around the need for tougher benefit sanctions.

### ***4-2-1 The resurrection of the moral underclass discourse***

Much of the philosophy underpinning the Conservative welfare to work programme represents a resurrection of the moral underclass discourse which portrays poverty and unemployment as being caused by individual behaviour such as alcohol and drug addiction, chaotic lifestyles, and lack of purpose (dissolution). The structural causes of poverty such as lack of available jobs in the aftermath of the recession tend to be overlooked or marginalized, or, when they are identified as collective social issues, they are immediately attributed to the failure of the welfare state which has focused on income transfer rather than employment promotion.

This agenda is driven by the Secretary of State for Work and Pensions Iain Duncan Smith (IDS), former leader of the Conservative Party and founder of the think tank Centre for Social Justice (2004). The CSJ was commissioned in 2006 by David Cameron to examine the causes of poverty in the UK. The report *Breakdown Britain* (Centre for Social Justice, 2006) was hailed as evidence-based and identified five ‘pathways to poverty’: family breakdown, educational failure, economic dependence, indebtedness and addiction.



This document is interesting because it sets out a ‘modern’ Conservative vision which draws on classic authors and political Conservative political figures such as Adam Smith (notion of relative poverty), Disraeli, and Churchill, whilst at the time paying tribute to the work of Guardian columnist Polly Toynbee (2003), the CPAG and John Hills report on economic inequality (Hills et al., 2010), all publications referred to by the document Breakdown Britain (Centre for Social Justice, 2006).

However, the document primarily gives a contemporary twist to the notion of an underclass culture based on drug/and alcohol addiction, the breakdown of marriage and family relationships, the rise of fatherless families and the lack of male role models for young people. It also embraces a pro-marriage stance. The report states:

We reject the comfortable mantra that policy can or should be wholly morally neutral on the grounds that this is unworkable in practice. ...The failure to form a durable bond between a mother and father often leads to welfare dependency. This report makes clear the extent to which families suffer financially after family breakdown... Family breakdown is both contributor to and a consequence of poverty and most other social problems (Centre for Social Justice, 2006, p. 29– 32).

Considerable attention is thus paid to ‘family breakdown’ summed up in three key words: dissolution, dysfunction, and ‘dad-lessness’ (Slater 2014). This is not radically new since the notion of a culture of worklessness has been around for a long time, especially the notion of intergenerational culture of poverty, as explained by a SSAC member:

I mean we certainly realised in this country that on the back of a couple of recessions in the 1980s and 1990s you were getting to a position where, not that you have regional pockets of greater worklessness but you were almost getting into generational worklessness and you had

characteristics of family groups where you had an entrenched problem.<sup>x</sup>

But it is also clear that moral arguments regarding intergenerational culture of worklessness have been embraced with a renewed vigour by the coalition government, as pointed out by Shildrick et al. (2012, p. 9). In this respect once again IDS has taken the lead on this approach, notably with the establishment of the working interdepartmental group on Social Justice. This working group can be seen as the coalition government equivalent of the Social Exclusion Unit set up by Tony Blair in 1997.

IDS is the chair of the committee and has spelled out a vision which is almost exclusively centred on the individual and the family, with a marked emphasis on the need to strengthen family life and stable relationships as the best way to provide children with a loving, stable environment. The aim is to deliver 'life change', because spending on benefits, referred to as 'poverty plus a pound' approach that characterised Labour antipoverty and social exclusion policies does not address the root cause of the problems, be it addiction, low expectations, and most importantly under IDS's vision, family breakdown. At the heart of IDS vision is a system of monitoring individual behaviour as early as possible in the life cycle, because 'prevention is better than cure':

This must be based on prevention throughout someone's life, intervening early to tackle the root causes of problems before they arise rather than waiting to treat the symptoms.

That starts with the family, the most important building block in a child's life. When families are strong and stable, so are children (Duncan Smith, 2012b).

The government has also endorsed a pro-marriage agenda:

Today we are sending out a clear message that stable families do matter. And at the heart of this, it means emphasising the

Government's support for marriage - we are clear in this strategy that marriage should be supported and encouraged (Duncan Smith, 2012b).

The emphasis on marriage has strong echoes with the American Healthy Marriage Initiative initiated by President Bush as part of the Temporary Assistance for Needy Families (TANF) reauthorization debate in 2002/2005 (Daguerre, 2007). Indeed, in the US, one of the goals of welfare reform in 1996 was to end the dependence of needy parents on government benefits by promoting job preparation, work and marriage. The idea was that lack of moral 'fibre' in deprived families where parents led chaotic lifestyles, with no male role models for fatherless young boys, allegedly resulted in a cycle of dislocation and benefit dependency. The role of the state was therefore to induce behavioural change by turning individual lives around, notably through marriage promotion, family preservation and work.

In this respect, the Conservative discourse clashes with a liberal approach referred to by IDS as 'the cloak of neutrality'. Indeed, one of the central tenets of political liberalism is that governments should restrain from promoting certain types of family formation over others.

Another basic assumption driving the push for tougher benefit sanctions is that there is a small minority of people who 'play up' the system. Both Labour and Conservatives policymakers have been feeding this line to the media, helping shaping a popular narrative which has become extremely difficult to challenge:

The tabloid press is kicking it up from the politicians as much as the other way around. Having both the main political parties with the same narrative, as you say, about we've got to be tough, that has helped drive the narrative in the popular press as well and you've probably seen that. Liam Byrne to a degree and certainly I mean I criticised him to his face a lot that he helped this drivers versus skivers narrative. It was him that started it actually I think and if he didn't start it he certainly perpetuated

it<sup>xi</sup>.

As one Labour MP acknowledged, this view is widespread among the public, including

... among people who are not that well off or that far away from the position themselves, they do say there is far too much spent on benefits. They've usually got an example to give you which isn't drawn from the newspapers but is drawn from their own observations and experience. They will say something along the lines of, you know, him down the road who is obviously on drugs or I see him going to the chemist's for his methadone and he seems to get his benefits without any trouble and he gets his rent paid and he gets his council tax paid and I can't get anything and it is not fair.<sup>xii</sup>

There is a strong disciplinary element in the welfare to work agenda, with a great degree of collective blame for those who have to rely on state help as the result of their alleged inability to manage their own lives. This is clearly driven by IDS, as explained by a DWP source:

Well primarily it comes from the top from the Prime Minister and the Secretary of State. Iain Duncan Smith, who you are probably well versed with, he set up the Centre for Social Justice ten years ago about the whole way benefits needed reforming, about personal responsibility and all those sorts of things<sup>xiii</sup>.

The idea according to which there is a minority who has been either playing or defrauding the system is quite widespread among both the wider public and political and administrative elites. A civil servant from the DWP explains:

I've been in Job Centres three or six months or a year and it is an amazing attitude of some claimants. They come in just demanding their money. So it is right to change that and to try and change their

perspective a little bit. You've got to do this. Why have you stopped my money? I demand that is my right that I should have this, this and this

xiv.

#### **4-2-2 Welfare benefits as an unfair advantage**

One of the fundamental tenets of the Conservative Welfare to work programme is the portrayal of income maintenance as a privilege or 'advantage' 'unfairly' enjoyed by claimants to the detriment of those who abide by the rules, i.e. taxpayers and full time workers who are not being helped with living costs. This representation of life on welfare as a lifestyle choice fundamentally different from the life of the general population represents the main moral justification for implementing a much stricter benefit sanction regime. This representation is particularly prevalent in the coalition government narrative and had no real equivalent under the previous government. This explains why Conservative Ministers have advocated the implementation of a conditionality regime that strictly mirrors 'life in the real world', especially employment contracts. In particular, Ministers holds that people on welfare should be subjected to exactly the same requirements and conditions as those who are in full time work by spelling out that individuals should spend up to 35 hours a week looking for work, because 35 hours a week is the average working week in the UK. This represents the personal philosophy of IDS as explained by interviewees in the DWP:

The Secretary of State has a philosophy about trying to make life on benefit as close as possible to employment...The claimant commitment fits in to that same philosophy which is linked to Universal Credit although it's now been rolled out for Job Seekers Allowance.

Well I think on the 35 hour issue I would say the main driver for raising that issue I think it is fair to say that it is Ministers. It is something, as I say, that Iain Duncan Smith feels quite strongly about

from a wider philosophical viewpoint I think and from which Chris Grayling, when he was the First Minister of Employment, obviously we've had a couple since, I think would generally feel people ought to be applying themselves as much as possible<sup>xv</sup>.

Another interviewee explains the rationale for a stricter compliance regime in terms of the need to use taxpayer money wisely under austerity measures so as to ensure that 'customers' do their utmost to make themselves available for work.

I would think the two main things for Chris Grayling, one, he felt the sanctions regime was insufficiently clear for claimants. He felt the whole system was very hard to present and not as clear as it might be. So his view would be if you want sanctions to influence behaviour one of the things you need is you need people to know what the consequences of actions would be.

...

The third sanction of three years, he came up with the view that he didn't expect many people to be sanctioned that long(...) So I suppose from his perspective he would either say that is a sufficiently long time to darn well make sure that if you've done it twice you ain't gonna do it a third time or if you do that must, in his view, indicate that as an individual you don't feel you need to rely on that benefit to get to you – for whatever reason that might be<sup>xvi</sup>.

The disciplinary elements have also been escalated with relatively little explanation as to what is required on the part of Jobcentre plus: there seems to be a great amount of managerial discretion and little room for manoeuvre on the part of the claimant, based on the notion that personal advisors (now referred to as coaches) know better than customers what is appropriate for them in terms of job search.

So as well as helping people to look for work we are being quite directive in making them look for them because we are one of the only countries in the world in recession who have managed to keep unemployment falling which we are quite proud of but it is unusual (...)

We think, well we don't, the Secretary of State really believes that this works, this tightening up of the regime, making people more responsible is the way we can really help get benefits spend down but also make the economy more prosperous<sup>xvii</sup>.

In the words of another DWP civil servant:

Our view is, the government's view is if a Job Centre advisor thinks she should go on a course then you should go on it and they are the experts. Also we are paying that person benefits so they should be complying with what we think is good for them<sup>xviii</sup>.

There is a strong emphasis on compliance with relatively little explanation as to what can be expected in terms of support to back to work services (other than relatively cheap employability measures). This is implemented through the claimant commitment and a much widespread use of benefit sanctions, even prior to the implementation of the Welfare Reform Act 2012, as illustrated by table 1.

**Table 1: Adverse sanctions in year to September, 1999-2013**

| Year to September | Adverse sanction decisions, JSA claimants (thousands) | Adverse JSA sanctions as proportion of JSA claimant count |
|-------------------|---|---|
| 2001              | 280   | 2.6%  |
| 2002              | 270   | 2.7%  |
| 2003              | 260   | 2.6%  |
| 2004              | 230   | 2.5%  |
| 2005              | 240   | 2.6%  |
| 2006              | 240   | 2.4%  |
| 2007              | 320   | 3.3%  |
| 2008              | 340   | 3.9%  |
| 2009              | 400   | 2.7%  |
| 2010              | 610   | 3.7%  |
| 2011              | 710   | 4.5%  |
| 2012              | 750   | 4.4%  |
| 2013              | 870   | 5.5%  |

*Source Social Security Advisory Committee, 2014, p.13*



In Spring 2011, a Guardian reporter, John Domokos published a series of articles according to which JCP staff were set targets to issue benefit sanctions (Domokos, 2011). John Domokos directed a movie in which a whistleblower from JCP showed him an internal email according to which people in his office had to issue three sanctions referrals a week, which led to JCP staff identifying easy targets such as people with mental health conditions or learning difficulties:

He told me everything and he had evidence to prove it that in his Job Centre all staff were given a target of three people a week. It was in an email. The office was behind the target as an office so they were all told they had to get, from now on, three a week. He said that this led them to perverse kinds of behaviours with their clients and they'd end up trying to trick them in to falling short of the expectations so that they could sanction them. <sup>xix</sup>

The DWP initially denied the story:

Then the Department of Work and Pensions basically rubbished the story, they didn't engage with me when I was publishing it. They gave me a very brief statement saying no such thing happens. There were no minister interviews or anything.

Two weeks later we published another story saying that the Department of Work and Pensions admits that this is a problem that has happened in some offices which misunderstood. I can't remember the exact wording. It is in the article. They also sent an internal email out to all staff saying there is no target for sanctions and that you have to use your own judgement. <sup>xx</sup>

According to John Domokos, following the initial DWP clarification there was a relaxation of enforcement of JSA sanctions, and the debate on sanctions

targets quieted down. But it could only been a matter of time before it got picked up again as part of the news cycle, especially by a newspaper like the Guardian with a clear editorial line on welfare reform. This explains why in early March 2013 the story was picked up again by Patrick Wintour and John Domokos, both journalists, publishing a series of articles documenting the widespread use of targets and league tables regarding referrals for benefit sanctions.

Over the next two years it seems that ‘target culture’ let’s call it that got reintroduced or maybe it never went away.

As a result, Labour went on the offensive in the House of Commons asking for clarification on targets (Wintour, 2013; Domokos and Wintour, 2013). The DWP conducted an internal inquiry into the allegations on sanctions which found ‘no evidence of a secret national regime of targets or widespread secret imposition of local regimes to that effect. There is no national use of league tables. We found no evidence that people are being wrongly sanctioned as a consequence’(DWP, 2013a, p. 9). The report admits the existence of individual mistakes but states that most of the Guardian stories were published on the false assumption that advisers were directly applying sanctions, when in reality advisers only raised a doubt and referred to a team of decision makers who may or may not upheld the referral. In his report, Neil Couling noted that it was PCS, a staunch opponent of sanctions, which shared its stories on targets with Guardian reporters.

According to John Domokos, as a result of the negative publicity for the DWP JCP managers have become much more careful about what they say or write:

The only difference now is that people are very wary of writing anything down. A Job Centre manager has told me that they are very, very careful not to write things down now because of the stories that came

out initially. So nowadays the position of targets exists much more in a grey area<sup>xxi</sup>.

This view is confirmed by interviewees from PCS:

Our members have been told they should be upping the number of sanctions they are giving. We've been given evidence of that from a number of Job Centres which have appeared in the press. Management are very overzealous in trying to hit sanction targets possibly because they've been told your Job Centre has got a lower than average number of sanctions, we expect that to be higher in this language of expectations and if you look at the statistics the number of sanctions has rocketed.<sup>xxii</sup>

Although the DWP has been on the record to declare that performance targets do not exist, the issue of performance management is recurrent and has been raised again in the Work and Pensions Select Committee (Parliament. House of Commons, 2014). In the words of an interviewee from MIND:

So that kind of mentality of putting the onus of responsibility on the individual seems to be creeping in to every part of the benefit system and increasingly seems to be the only policy lever that politicians feel they have at their disposal. So when they feel that something needs to be done about benefit claimants it is a case of cranking up conditionality, cranking up sanctions and it just seems to be the only thing at hand<sup>xxiii</sup>.

#### ***4-2-3 The escalation of sanctions under the Welfare Reform Act 2012***

Although the drive for the adoption of a more stringent sanctions regime had been set up by the previous Labour government, especially following the

recommendations of the Gregg report, there is a real rupture between the benefit sanction regime prior to 2010 and the policy framework post 2012. Indeed, higher level sanctions represent a ‘very much more stringent sanctions regime than those previously applicable’ (Wood et al., 2013, p. 93). This explains why Labour moderately opposed the introduction of the three years sanction. During the Public Bill Committee proceedings in the House of Commons on the 26<sup>th</sup> of April 2011, Shadow Employment Secretary Stephens Timm asked Chris Grayling ‘to justify what most people would consider to be a pretty harsh proposal.’ Stephens Timm moved an opposition amendment to change the maximum sanction of three years to one year.

Chris Grayling explained that the higher level sanction was about sending a message to people ‘who have committed the most significant offence: those who refuse to apply for jobs that they are suited to do; those who wilfully turn down job offers and opportunities; and those who are referred to an activity as part of their job search but systematically refuse to turn up – again and again and again. There must be a point at which we turn round and say “No. That is not good enough”’. (Parliament. House of Commons, 2011)

In fact, the tougher sanction regime was presented as a measure which would affect very few welfare claimants and it was mainly used as a political message for those who were allegedly working on the side while collecting benefits. It is thus no coincidence that when Shadow Work and Pensions Secretary Liam Byrne summed up the opposition’s case against the Bill, he did not mention benefit sanctions. In the words of Dame Anne Begg, chair of the Work and Pensions Select Committee, ‘the government was delighted that the opposition was against them, even moderately, because they wanted to portray Labour as soft on welfare. So they did not really move at all’<sup>xxiv</sup>.

## **5- Emergency retroactive legislation: Reilly vs Secretary of State**

Section 17A of the 1995 Act, as inserted by the Welfare Reform Act 2009, provided that the Secretary of State could make regulations requiring JSA claimants in “prescribed circumstances” to participate in work or work-related schemes of a “prescribed description”. As we have seen, the coalition Government revoked the Work for your Benefit schemes introduced by the Labour government and adopted a set of regulations that considerably expanded the scope of previously modest workfare schemes (ESE and mandatory Work Activity 2011 Regs).

In December 2011 claimants who had been sanctioned for failure to participate in work-related schemes under the 2011 Regulations or who worked against their wishes sought judicial review by way of an order to quash the Regulations and some schemes made under it.

The case is known as *Reilly (and Wilson) vs Secretary of State for Work and Pensions*.

These decisions are important because they have caused political embarrassment to the DWP, especially to the Secretary of State, IDS. The government has pursued a strategy based on what we may refer to as ‘political messaging through the courts’, and has been adamant that there is no intention to refund those claimants who have appealed against the benefit sanctions. In a first section, we outline the different issues at stake during the legal proceedings and the outcomes it had regarding the rights of the jobseekers involved in this type of schemes. Second, we analyse the respective influence of the different actors in this case, in particular the media, and how these legal actions were part of a political and ideological battle on both sides.

## **5-1 The legal proceedings and the outcomes of Reilly v Secretary of State for Work and Pensions**

These judicial review proceedings were brought by Caitlin Reilly, who took part in the “sector-based work academy” against her wishes, and Jamieson Wilson, who refused to participate in the Community Action Programme after he was told that he had to clean furniture for 30 hours per week for six months without pay. Wilson’s jobseeker’s allowance was stopped for six months.

In August 2012 the High Court judge Mr. Justice Foskett found that the DWP failed to comply with the notice provisions of the regulation in both cases. In fact, the Secretary of State failed to give Wilson sufficiently detailed information about the consequences of a failure to participate in the scheme and in the case of Reilly, she did not receive any written notice at all. This was in principle a relatively minor, technical point as the first instance judge refused to consider the regulation itself as unlawful, and the DWP modified the defective notice letters. The Department began to stockpile decisions due to the *Reilly & Wilson* proceedings.

Public Interest Lawyers, the counsels for the two claimants, appealed the decision and referred the case to the Court of Appeal. While most of the media attention focused on the ground developed by the claimants that the schemes may be contrary to the prohibition of forced labour under article 4 of the ECHR the most important issue was whether the Regulations themselves were lawful, in as much as they respected Parliament intention in primary legislation (in this case the Job Seeker Act 1995 as amended by the Welfare Reform Act 2009). The Regulations were quashed by the Court of Appeal on 12 February 2013 on two grounds:

1. The ESE Regulations failed to describe in sufficient detail the schemes as required by primary legislation.

2. 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.

It is crucial to stress that, contrary to the first instance decision, the Court of Appeal found another ground against the DWP. As the government failed to describe the schemes as required by the 1995 Act, the regulations were unlawful because *ultra vires* (not as Parliament intended).

However, it should also be noted that the Court of Appeal dismissed the claimants' appeal on their two other grounds, namely that it was unlawful to enforce the Regulations in the absence of a published policy as to the nature of the relevant scheme and the circumstances in which individuals could be required to undertake unpaid work and that the Regulations were contrary to article 4 of the ECHR.

The implication of the judgment was that any individual sanctioned on the basis of the ESE regulations (now declared unlawful) would be entitled to claim back their JSA, a cost estimated at 130 million pounds at the time. Although the government immediately amended the Regulations in February 2013, they also introduced new legislation to eliminate the risk that previous notifications to claimants made under the Mandatory Work Activity Regulations, which contained the same notification provision as the ESE Regulations, may also be open to challenge on the basis of the Court of Appeal's judgment (DWP, 2013c, p. 8).

To avoid paying back the claimants the government introduced emergency retroactive legislation (Back to Work Act). As pointed out by the explanatory notes to the Back to Work Scheme Bill 2013 '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` (DWP, 2013c, p. 10).

Nevertheless, the Secretary of State immediately appealed the Court of Appeal's judgment and the claimants brought a cross-appeal on the two grounds which were unsuccessful in the Court of Appeal.

The Supreme Court, in October 2013, reversed in part the Court of Appeal's decision and rejected the Secretary of State's appeal. First of all, the Court had to deal with the question as to whether the emergency legislation had made the issues at stake merely academic.

Lord Neuberger of Abbotsbury PSC and Lord Toulouse JSC found that:

... it is rather unattractive for the executive to be taking up court time and public money to establish that a regulation is valid, when it has already taken up Parliamentary time to enact legislation which retrospectively validates the regulation.(para. 40).

But it still allowed the appeal because "the issue concerned was not the only point at stake in the appeal, the issue may be of some significance to the drafting of regulations generally, and the retrospectively validating legislation is under attack" (para. 41).

The Supreme Court had therefore to deal with the four issues on which the first instance judge and the Court of Appeal ruled. If they confirmed the ruling of the lower court in that it found that the Regulations were ultra vires and that there was a failure to give a proper notification to the claimants, their Lordship have accepted that as a matter of fairness, jobseekers should have "access to such information about the scheme as he or she may need in order to make informed and meaningful representation" (para. 65). This is justified by the "significant misery and suffering" which may "self-evidently [be] caused" by the "discontinuance or threat of discontinuance of jobseeker's allowance" (para.



64). But the impact of this right should be qualified as the Court refused to prescribe specific means of communication (para. 74) and made it clear that the notice given to the claimants will only be vitiated if the lack of information have "materially affected" them (para. 75). They thus need to demonstrate that it has "removed [their] opportunity of making representations which could have led to a different outcome" (para. 75).

According to Tessa Gregory, counsel from Public Interest Lawyers (Gregory 2013 p.7-8), this requirement could give new grounds on which claimants could seek repayment of their benefits but much uncertainty remains regarding the need to prove that the lack of information has caused a prejudice but also in regard of the party on which the burden of proof should lie (Gregory considers that it should be on the DWP).

The last issue was whether the ESES schemes could constitute a breach of article 4 of the ECHR which provides that "no one shall be required to perform forced or compulsory labour" (art. 4(2)). This question is solved in an authoritative way by the Supreme Court which recalled, based on the interpretation of the ECHR *Van Der Musselle*, that the concept of exploitation lays at the heart of article 4. The court held that the provision of a conditional benefit of that kind [the JSA] comes nowhere close to the type of exploitative conduct at which article 4 is aimed" (para. 83) and it is therefore compatible with the convention.

Even after the ruling of the Supreme Court, it would be wrong to consider that the legal actions in relation to the 'back-to-work' schemes have come to an end. Indeed, Public Interest lawyers have been granted permission to challenge the legality of the 2013 emergency legislation in the High Court.

Judicial review proceedings were brought on behalf of Caitlin Reilly and Daniel Hewston (who was not a party in *Reilly 1*) on the ground that the Jobseekers

(Back to Work Schemes) Act 2013 was incompatible with their rights under article 6 of the ECHR and article 1 of the first protocol to the ECHR (A1 P1).

The protection of the right to a fair trial is at the heart of art. 6 and is one of the most prolific areas of litigation in the European Court of Human Rights. It states in its first paragraph that:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. (...)

The claimants considered that the Government's statutory intervention in the ongoing legal proceedings was affecting their right to a fair determination of their rights.

In July 2014, the Administrative court found that although Parliament is not precluded to adopt retrospective legislation in civil matters to affect rights arising from existing laws, the principles of fair trial and equality of arms protected by art. 6 of the Convention "precludes any interference by the legislature... with the administration of justice designed to influence the judicial determination of a dispute" (Mrs Justice Lang, para. 81, quoting the case *Zielinski v France* (2001)).

It could only be justified on "compelling grounds of the general interest" (*ibis in idem*) which the Government failed to demonstrate in this case. The Court therefore found a violation of the claimants' rights under art. 6(1) of the ECHR.

Daniel Hewston also applied for a declaration of incompatibility under A1 P1, which provides that:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. (...)

The claimant who refused to participate in the BtW schemes was sanctioned and his JSA payments were stopped. The Court found that this did not amount to a deprivation of an existing possession because the sanction was not a revocation of benefits previously received. Therefore, the Court considered that there was no violation of A1 P1 in relation to Mr Hewston (Ms Reilly was not sanctioned).

The claimants' counsel "called for the millions of pounds unlawfully withheld from benefit claimants--potentially £130m--to be repaid" (LNB News, 2014). Predictably the government appealed the High Court's decision. The case should be heard by the Court of Appeal between June and March 2015.

## **5-2 Political messaging through the courts**

The Reilly case was political from the start; indeed, it came to pre-eminence because of the efforts of several actors, all deeply critical of the government's workfare agenda. The media, especially the Guardian, played an important part in this process. During the autumn of 2011, Shiv Malik, a Guardian reporter, tried to find evidence of people working for free for Sainsbury and other major retail stores under the government workfare programmes.

The Guardian put out a form asking people who had experience about working in the government working schemes. Cait Reilly contacted us, I wrote that up a few weeks later, there were a thousand comments. We put her in touch with lawyers <sup>xxxi</sup>.

Cait Reilly thought she could complain under art.4 of the ECHR (prohibition of forced labour). She was referred, together with Jamie Wilson, to Public Interest Lawyers. The firm worked on a judicial review case and sought to get funding from the Legal Services Commission. This was unsuccessful in the first instance, as the first Legal Services Commission Panel rejected the application for funding the judicial review proceedings, but Public Interest Lawyers appealed to a Special Review Panel and it got approved.

The litigation proceedings and the media pressure following protests organised by organisations such as Boycott Workfare and Right to Work against the government schemes became tangled at this stage, which is perhaps the key for understanding the government apparent intransigence. Indeed, the workfare schemes became unpopular as it transpired - sometimes wrongly- that big retail stores and chains could have jobseekers work for them for free under the Work Experience Scheme.

The exact chronology of events is as follows:

- *16 February 2012*: Tesco drops job for benefit advert posted on website of Job Center Plus in Suffolk (IT error by JCP) (BBC News, 2012a)
- *18 February 2012*: Protest at Tesco store near Portcullis House erupts causing the store to close for an hour (BBC News, 2012b)
- *20 February 2012*: IDS portrays critics of the government schemes as modern-day Luddites who will stop at nothing in their attempts to mislead the public on this issue (Duncan Smith, 2012a),
- *20 February 2012*: Chris Grayling defends work experience scheme from 'negative headlines' and insists he won't be rushed into a decision as Tesco indicates that they ask the government to clarify the nature of the

work experience scheme and drop the compulsory element. (Wintour, 2012)

- *21st February 2012*: Work experience schemes in disarray. (Malik, Wintour and Ball, 2012)
- *29 February 2012*: Chris Grayling bows to pressure from employers and makes work experience scheme entirely voluntary, so benefit sanctions are dropped except in cases of gross misconduct (Watt, Wintour and Malik, 2012)
- *29 February 2012*: David Cameron declares in the Commons that "I think it is time that businesses in Britain, and from everyone in Britain, who wants to see people have work experience, stand up against the Trotskyites of the Right to Work campaign and perhaps recognise the deafening silence we have had from the party opposite." (Jones, 2012)

As explained by Shiv Malik:

So this is now February 2012 and Chris Grayling had to then face Tesco and basically had a private meeting with them. This is about March now, so this is February 21st – March 3rd because I remember that I had to write it on my birthday while I was away, was that day the government made the scheme totally voluntary. So you've got that timeline of November with Cait's story going all the way to February then 2012 with Tesco saying, right you've got to sort this out and the government saying, fine we will sort it then <sup>xxxii</sup>.

Big firms pulled out of the scheme partly because of ethical reasons and partly because it was bad for their corporate reputation. At this point it became untenable to safeguard the original policy intentions, which was clearly, in this case, to compel jobseekers to participate in work experience schemes. The

DWP, under instructions from Chris Grayling, amended the programme so as to make it voluntary: this U-turn can be interpreted as a loss of face for the government. Indeed, a DWP source explains:

Despite the best efforts, I think the team here were working with the employers already on the scheme trying to shore them up and give them confidence to try and stay with the scheme. The decision was taken to make it completely voluntary so you can turn up, give it a couple of days and if you don't like it you can just pull out. <sup>xxxiii</sup>

It is therefore not coincidental that the government, after having had to compromise on a key aspect of its workfare agenda, was adamant that it would not be allowed to lose face again on benefit sanctions and compulsion. The government - especially IDS - wanted to make it absolutely obvious that under no circumstances would they agree to repay the claimants' benefits after the Court of Appeal's judgment. At this stage, the issue was no longer about enforcing behavioural change through social security rules: it was about sending a clear political message to claimants and welfare right campaigners that they should do what they were told. The exact words of the Secretary of State when addressing his opponent in the House of Commons were:

... if the Gentleman supports the idea that people who have been mandated to do work, should take jobs and do work experience once they have volunteered without messing around otherwise they lose their benefit, I hope that we can look forward to his supporting the legislation that will ensure that we do not have to pay out money against a judgment that we never anticipated. (HC Deb, 11 March 2013, c19)

In this speech, benefit claimants who either exercised or could decide to use their right to appeal an administrative decision were portrayed as 'messing around'. This language was never challenged by the opposition. In fact, because the Labour party leadership was afraid of giving ammunition to the coalition

government should it not be seen as being equally tough on benefit claimants, the Shadow Work and Pensions Secretary of State Liam Byrne was on record in the House of Commons to support the need for sanctions:

Liam Byrne: 'May I start by thanking the Secretary of State for briefing me and my right hon. Friend the Member for East Ham (Stephen Timms) on his plans for urgent legislation, about which his Department has commented in *The Daily Telegraph* this morning? Both he and I believe that sanctions are vital to give back-to-work programmes their bite. (HC Deb 11 March 2013, col 1)

Ministers told civil servants that they did not want to pay back sanctioned claimants, so their advice was to introduce emergency legislation to effectively cancel the effects of the Court of Appeal decision, as explained by one DWP source:

We advised Ministers that – I mean their instruction was that they don't want to repay any money and 100% be as safe as possible and so we advised that the only way to do that is to pass emergency legislation in that parliamentary session which meant on an emergency basis which meant agreeing with the opposition <sup>xxxiv</sup>.

The opposition had to agree to the emergency timetabling, in exchange of which Labour obtained a small concession from Ministers, which mainly consisted in the setting up of an independent review on benefit sanctions. As explained by the DWP:

So for the opposition to agree to the emergency timetabling we had to do two concessions. One was just on the face of the Bill saying people's right to appeal isn't affected by this Bill which was the case anyway. The second one was there would be an independent review in to the operation of benefit sanctions. We agreed to that but we did it via a

government amendment in the House of Commons. So rather than agree let the opposition write the amendment, we wrote the amendment and so we put it that it states that the Secretary of State has to employ an independent person to carry out a review in to the operation of sanctions affected by the Job Seekers Act. So that is only sanctions about back to work schemes not ESA sanctions or other actively seeking sanctions <sup>xxxv</sup>.

Labour abstained on the grounds that the emergency legislation was less bad than the other alternatives. Stephen Timms, Shadow Employment Secretary, declared:

We find ourselves in a deeply unsatisfactory situation with the Bill and, indeed, the programme motion... 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.... 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. (HC Deb 19 March 2013, c825)

Liam Byrne pointed out that the Labour Party agreed with the imposition of sanctions, and that Parliament had the power to sanction jobseekers since 1911. He also insisted that the retroactive legislation was absolutely not 'retrospective legalisation of workfare'. Our decision not to support the Bill in the Commons, but to abstain was 'very, very difficult.'(Byrne, 2013). A total of 43 Labour MPs rebelled against the whip and opposed the Bill, and even those who abstained as directed by the leadership felt deeply uneasy:

I still think we've jumped in the wrong direction. My own personal view in terms of that particular decision and I think that we should have



taken a different, I mean not that – I mean we did the thing that nobody gives you any credit for which is the abstention stuff but I don't think we spent enough time thinking about it. xxxvi.

What Liam Byrne described as a major concession was in fact almost entirely controlled by the government. In this instance Marc Hoban deployed a great deal of political skill in the negotiations with Liam Byrne and Stephen Timms by repeatedly defeating amendments that tried to broaden the scope of the review, in particular assessing the issue of effectiveness of sanctions as well as the problem of targets.

One Labour member explained:

Yes well I would say that was a more cock-up than anything but I can't say more than that I'm afraid. We had an amendment in the Lords which set out very clearly what we thought should be in the review. The Minister had had an oral question about sanctions and he was saying it was all in the review, it's in the review and of course it's not in the review at all because the review is very, very narrow as you know

xxxvii.

The terms of reference for the review were narrowly defined so that issues regarding fairness, proportionality and potential hardship were eliminated from the debate. In fact, the terms of the review were set up so that they exclusively dealt with procedural matters and issues of administrative justice regarding the clarity of communications given to benefit claimants:

That was a clear ministerial steer because obviously there was a very political media narrative around sanctions. It is just that they didn't want something that potentially could be embarrassing for the department. So it would be, for them, almost a pointless review to look into the fairness attitude. What is important to them is that we make sure the

process is right and that claimants clearly understand what they have to do, what they are required to do, how they can appeal, all the help that they can get and that the process is fair. xxxviii.

The impact assessment of the Bill gave the following estimates regarding the number of adverse decisions and sanctions issued under the ESE and Mandatory Work Activity Regulations:

|  | <b>Individuals<br/>(000s)</b> | <b>Total value<br/>(£m)</b> | <b>Average value<br/>(£)</b> |
|--|-------------------------------|-----------------------------|------------------------------|
| <b>ESE sanctions<br/>issued*</b>                 | 136-159                       | 80-99                       | 590-620                      |
| <b>ESE sanction<br/>decisions<br/>stockpiled</b> | 59                            | 20-21                       | 340-360                      |
| <b>MWA sanctions<br/>issued</b>                  | 10                            | 8                           | 780-810                      |
| <b>MWA sanction<br/>decisions<br/>stockpiled</b> | 4                             | 3                           | 740-760                      |
| <b>Total**</b>                                   | 208-231                       | 110-130                     | 530-570                      |

Source: Impact Assessment (DWP, 2013b)

In fact, this was an overestimate and as of January 2014, there were unofficially less than 50 000 cases. However, the DWP did not respond to a request for information regarding the number of adverse decisions and appeals in late May 2014.

What is unusual in this case is that Ministers were adamant that they were not going to repay the claimants. In fact, the DWP could have made a special case to cancel the adverse decisions, but they chose not to, again on the basis of instructions from Ministers.

Perhaps operationally it probably would have been easier just to cancel the decision just to get rid of them all and certainly people in operations wanted us to do that but in strategy there was no rationale for cancelling, for making special allowances on these cases <sup>xxxix</sup>.

The sanction decision has been delayed for more than a year because of the court cases. As the CAB stated in its submission in January 2014 to the independent review into sanctions decisions issued by Matthew Oakley

This stockpile developed over the course of the last year whilst the Government faced a court case about back to work schemes. This led to a delay in making decisions about sanctions for people were on back-to-work schemes. Looking at our qualitative data it appears that this stockpile was addressed between July and October 2013 (CAB, 2014, p. 20–21).

From a claimants' point of view, the link between the alleged failure that led to a referral for a sanction and the actual outcome (decision) has become extremely tenuous. A DWP source said: "It is unfortunate that the sanction decision is so far after the failure to participate because it is maybe not really changing claimant behaviour" <sup>xxxiv</sup>.

The CAB (2014, p. 20) explains further that they have seen numerous instances of people who were on back-to-work schemes seeking advice about a sanction that had been applied for alleged compliance failures going back as far as 14 months.

There is therefore a complete disconnect between the action that allegedly triggered the initial referral to the decision maker and the actual outcome. That claimants should be able to clearly understand and identify the reasons for why they have been subjected to a benefit sanction is central to the idea of using social security law as a mechanism for triggering behaviour change through greater compliance with work related requirements. This is clearly not what's happened as the result of the court case: on the contrary, claimants appear to be utterly confused as to why they have been sanctioned, thus contradicting the stated policy intent regarding behaviour change through an escalating sanction regime.

We can therefore write with some confidence that the Reilly vs Wilson has long ceased to be about enforcing behavioural change but has instead formed part of a ideologically and politically driven agenda put forward by Ministers who do not want to be seen as backing down at a time when 'the tough on welfare' message is getting a lot of popular traction:

There is clearly a strong, political support and voters support for cracking down on benefit scroungers or stuff that plays very well on the front of right leaning newspapers and clearly occasional opinion polling shows these are very popular sentiments and actions to be expressing on all sides and certainly not just amongst Conservative voters. It is very strong in Labour voters too. They are very easy headlines to get <sup>31</sup>.

However, this strategy of political messaging through the courts has to some extent backfired with the ruling of the Supreme Court.

Concerning the ongoing litigation in regard of the judicial review of the emergency retroactive legislation, the Government is still using the 'unfair advantage' argument to justify its statute. Nevertheless, this argument does not seem extremely convincing according to social security lawyers:

Who knows that argument might prevail in the court but as a lawyer there are some cases where you'd rather be arguing your own case than arguing the government's and there are other times when the government has a stronger argument than you do.

Well I'd rather be arguing that point from the claimant's point of view in legal terms than I would from the government's but I could turn out to be entirely wrong and the courts might take a completely different view.

## 6- Discussion and conclusions

From the mid-1980s onwards, the UK social security system became increasingly residual in nature, with the language of contracts pervading most areas of welfare, as evidenced by the creation of JSA in 1995-1996. In particular, the availability for work rule was replaced by the 'actively looking for work' rule as part of the JSA. It was also at this time that a cross-party consensus emerged concerning the need to move away from a passive welfare system based on entitlement to benefits - which, as we have seen, had never been unconditional - to an active welfare model based on responsibilities, encapsulated in the notion of the moral obligations of citizenship. Schematically, one can distinguish a right wing and left-centre version of the contract-based approach to social security. Under the contractual approach, social rights depend on the capacity of the benefit claimant to compensate for his/her inability to contribute to the community as a whole through taxation by agreeing to take a series of steps geared towards a quick reintegration/integration in the paid labour market (Harris, 2000). The centre left version of this approach emphasises that letting 'people languish on a life of benefits' is neither morally nor economically sound, and that benefit claimants can be actually empowered by making the best use of their capacities provided they are given the right incentives and support. This has been described as 'positive conditionality' or 'nice' activation.

As was the case in the welfare right movement in the 1960s, much of the centre-left version of welfare reform was initiated in the US and copycatted US New Democrats thinking. The role of the state as employer of last resort is actually one of the most debated and controversial elements of welfare to work and the contractual approach. Indeed, the right to work was first advocated by French socialist utopian Louis Blanc. Article 24 of the Universal Declaration of

Human Rights (1948) states: 'Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment'. If we are to think of a contractual duty to work or participate in work for your benefit schemes as part of an agreement between the state and the citizen, how can we ensure that citizen responsibilities are actually matched by government duties? In fact, this is problematic for six main reasons (and the list is not exhaustive):

- 1- At a time when the government is contracting out most of its employment and training services to private organisations under a black box model, how can the state actually control the contracted out parties so as to ensure that there is no moral hazard on the part of private organisations and/or semi-public bodies? The notion that major retailers could actually get free labour is a very emotional issue that has been exploited by anti-welfare cut activists with some level of success.
- 2- One of the main objections to the state stepping in as employer of last resort - irrespective of the illiberal nature of the contract between state and citizen- is whether it is actually economically sustainable or cost effective. The political Right's answer to this question is traditionally that only private sector jobs can be considered to be real jobs.
- 3- However, 'while the right to work is established as a human right, its availability as a social citizenship right may not necessarily or unequivocally be guaranteed' (Dean, 2014). Not only is the right to work less protected by human rights international frameworks, it is also not part of social citizenship rights, and as a result cannot give rise to an enforceable claim against the state.
- 4- The language of rights is fraught with political and ideological ambiguities, especially in relation to socio-economic rights, which have rarely been considered to be full and enforceable legal entitlements, as

opposed to *prima facie* rights (Hickman, 2012). Socio-economic rights are often referred to as 'positive rights' which establish a duty upon another to act, and thus entail allotment of funds to carry out the duty (Paz-Fuchs, 2008, p. 21). Rules determine the conditions of entitlement to a benefit: contribution in the case of unemployment insurance, needs in the case of social assistance (with calculations as to what a minimum standard of living should be).

- 5- Another problem with the contractarian approach to welfare is that it presupposes that the citizen-claimant engages in a meaningful contract. This aspect of the debate is at the core of the objections developed by Freedland and King (2003). If the claimant fails to engage in job seeking activities, the personal adviser can use directions as - in theory- last resort instruments to enforce compliance (for instance by requiring that the claimant enrolls in a training programme or sends his/her CV to a particular employer). Ultimately, there is a clear unbalance of power between the contracting parties since failure to comply with the directions can result in disqualifications.
- 6- A further issue is whether increased conditionality requirements are 'balanced' or complemented with the provision of relevant services and support for people who have multiple barriers to work, as well as the nature of the labour market itself in terms of offering 'viable' and 'sustainable' jobs (Griggs and Evans, 2010). Successive UK Government's whilst giving more priority to employment and active labour market policies actually spend considerably less per GDP than comparator countries. The proportion of public expenditure per GDP invested in active labour market programmes is 0.34% which is below the EU average of 0.78% (European Commission, 2013). There is a paradox here since the unemployment rate now stands at 6.9% of the adult working population according to the Office for



National Statistics. Clearly, and contrary to what had been predicted during the Great Recession of 2008/2009, there has been no unemployment crisis despite a very low level of spending on active labour market policies. This state of affairs stands in sharp contrast to the previous recessions of the 1980s and 1990s, where a deliberate policy choice was made to maintain low inflation rates with high unemployment being seen as a price worth paying. The puzzle of low spending on ALMPS and low unemployment rate (6.9%, a rate similar to the US unemployment rate of 6.3%) is explained by the nature of the UK labour market, where the vast majority of jobs tend to be in the low-paid, low-skilled sector, and where competition at the lower end of the labour market is particularly fierce, enabling to keep wages low. Self-employment, underemployment, insecure jobs as represented by the spread of zero hours contract have become structural characteristics of the UK labour market, and this has been accentuated by the Great Recession.

In conclusion, there is both a pattern of rupture and continuity between Labour and coalition Programme welfare to work policies. It was under the Labour government that principles of conditionality were extended to the economically inactive (lone parents and people on IB) who had been previously exempted from work related activities and job search requirements. However, there was definitely more of a supportive approach towards benefit claimants (Lone Parent personal advisers, return to work credit under Pathways to Work and the Job Guarantee in the recession of 2008-2009).

By contrast, the coalition government has promoted the shift towards a residual model of welfare where primacy is given to family, voluntary, and market-based services. Under this model, the state intervenes as a solution of

last resort, when there is an acute breakdown in the natural resources of welfare (the family, the voluntary sector, or the market). The residual model is based on the identification of need, with state help targeted at the most needy and kept to a minimum. The state is not regarded as having any redistributive function and there is a strong emphasis on private solution to poverty (Harris, 2000, p. 8).

That the coalition government is trying to restrict even further the definition of need should not come as a surprise; in fact, needs-based entitlements are more vulnerable to cuts, especially as the government attempts to portray an increasing number of sick/ disabled/ economically inactive people as neither truly needy nor worthy of state support, thus conflating need and moral worth. Welfare recipients also represent a weak welfare constituency (Pierson, 1994) which makes them a primary target for budgetary cuts. Portraying benefit claimants as undeserving/and or not truly disadvantaged individuals who have not contributed to the social security system either through taxation or insurance is part of a political strategy that has been used in the US in the 1990s when AFDC claimants (Aid to Families with Dependent Children were referred to as Cadillac Queens by Ronald Reagan), leading Bill Clinton on the campaign trail in 1992 to promise 'to end welfare as we know it' (Daguerre, 2007, 2008).

The coalition government is endorsing a traditional New Paternalist approach, based on the idea that the government knows better than benefit claimants what is good for them and enable them to act on their deeper preferences, which is to find paid work. Indeed, "paternalistic intervention is justified 'on behalf of an individual's interests when their right to choose leads them to engage in self-destructive behaviour or make decisions that may be seriously detrimental to their life prospects or irreversible" (Yeatman, 2000, p. 171).

There has always been a view in the DWP that some benefit claimants are playing up the system, but it's been clearly articulated now. What emerges under the WP, the escalating sanctions regime, is the image of an authoritarian workfare state which delegates much of its sanctioning powers to contracted out welfare to work providers, while at the same time eroding some of the support services that are at the heart of active labour market policies. Welfare beneficiaries are being subjected to increased monitoring and surveillance, in what appears to be an unbalanced welfare contract. As MacLeavy observes:

The allotment of state resources to encouraging work through these programmes serves to discipline citizens in politically and economically expedient ways...Austerity, in this sense, provides a means of legitimating the coalition government's arrangements to expand programmes to orientate state assistance towards work, which increases levels of state control over welfare recipients' lives, at the same time as dampening public expectations regarding citizenship entitlements  
(MacLeavy, 2011, p. 362–363)

Taken together the cumulative impact of the reforms - benefit caps, higher benefit sanctions, changes in benefit rules and conditions of entitlement, accelerated migration of IB claimants onto ESA through the WCA, and additional requirements for benefit claimants - corresponds to a recasting of the UK welfare state, with an erosion in terms of substantive social rights, both through statutes, regulations and policy implementation.

The government obligations in terms of providing social assistance to claimants have not, however, been fundamentally affected, at least not in matters of procedural rights. Indeed, it would be too simplistic to interpret the evolution of the social security system as a story of steady erosion of individual entitlements to social assistance, especially since the implementation of the

HRA (O'cinneide, 2012). For instance regulations must be compatible with respect for private and family life (art.8), right to a fair and public hearing (article 6), freedom from discrimination (art.14). Of course there is a higher litigation threshold (for instance property rights under Protocol 1 art 1 of the ECHR are always examined in conjunction with article 14, discrimination), and any government can invoke cost to the public purse to restrict the peaceful enjoyment of possessions), but the body of case law does constrain the government's capacity to do as it pleases when it comes to changing rules to social security.

This explains why the legislator needs to make a decision when drafting new statutes or regulations about potential litigation costs, as pointed out by the Ministry of Justice in its guidance (Ministry of Justice, 2010) Litigation risks include: complexity (the more obtuse an area of the law is, the greater the risk of confusion and error when adding a new provision, thus increasing litigation risks), issues over allocation of resources (any rules which modifies conditions of entitlement is likely to be challenged by interests groups and NGOs), the political salience of an issue, and discretion ('the more discretion the decision maker has, the more potential scope there is to challenge a decision': cited by (Harris, 2013, p. 6)). Issues of judicial discretion also come into play, and one of the ways in which policymakers can limit the scope of judicial discretion (again for purposes of limiting litigation costs) is to issue copious volumes of guidance that the courts have to take into consideration even though they are not legally binding. Social security law remains the most litigated area of the domestic law of social rights (King, 2012, p. 49).

Indeed, although the coalition government has tried to put additional hurdles for a claimant (the mandatory reconsideration before appeal), citizens still have access to redress and remedies when they believe that their rights have been

trampled upon. Citizens can pursue several avenues when seeking remedies: they can lodge an appeal to the social entitlement chamber (this is known as individual redress), complain to the parliamentary ombudsman (which is competent for handling cases of maladministration), or have their case taken by solicitors to issue judicial review proceeding.

This is what happened in the Reilly case, and courts have reacted in a fashion that was not anticipated by the government. This also explains why the coalition government is looking to ways into which they could replace the HRA with a UK Bills of Rights, and are on the record for criticising interference from the European Court of Justice as well as the European Court of Human Rights.

As a member of the Joint Committee of Human Rights explains:

It is interesting and this is one of my other general comments I was going to make is that the most hard edged legal resistances to these trends tend to be around procedural things. So they tend to be Appeal of Rights, Right of Fair Hearing generally speaking because of the softness of the underlying rights<sup>xv</sup>.

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