These notes refer to the Jobseekers (Back to Work Schemes) Bill as brought from the House of Commons on 19th March 2013 [HL Bill 91]

JOBSEEKERS (BACK TO WORK SCHEMES) BILL

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Jobseekers (Back to Work Schemes) Bill as brought from the House of Commons on 19th March 2013. They have been prepared by the Department for Work and Pensions in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.

2. The notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. Where a clause or part of a clause does not seem to require any explanation or comment, none is given.

BACKGROUND

3. The Jobseekers (Back to Work Schemes) Bill is necessary to preserve the position under legislation relating to employment programmes, such as the Government's 'Work Programme', which has been the subject of an adverse Court of Appeal judgment. The effect of this judgment would be that the Government would incur a liability of up to an estimated £130 million, in repaying claimants who have been sanctioned for failing to comply with the ESE Regulations and in not being able to impose sanctions for past failures where decisions have not yet been made. The Bill secures that the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 (S.I. 2011/917 - the 'ESE Regulations'), relating to participation in these employment programmes, are effective and provides that notices, served under those Regulations informing claimants of requirements as to participation and about consequences of failing to meet requirements, were effective.

4. Under the ESE Regulations, failures to comply led to non-payment of jobseeker's allowance for periods of 2, 4 or 26 weeks (depending on the number of failures). A 26 week sanction could be shortened to 4 weeks once a claimant complied with the ESE Regulations. These provisions were replaced by a new sanctions regime, under regulations made under section 19A of the Jobseekers Act 1995 (c.18), inserted by the Welfare Reform Act 2012 (c.5) from 22nd October 2012. The provisions are in regulation 69A of the Jobseeker's Allowance Regulations 1996 (S.I. 1996/207, as amended by the Jobseeker's Allowance (Sanctions)

(Amendment) Regulations 2012 ("the 2012 Regulations" – S.I. 2012/2568) and provide for a 4 or 13 week reduction in the award (the full amount of the personal allowance), depending on the number of failures.

5. The ESE Regulations were quashed by the Court of Appeal on 12 February 2013 in the case of *R (on the application of Reilly and Wilson) vs Secretary of State for Work and Pensions* ([2013] EWCA Civ 66) on the ground that the Regulations did not contain an appropriate description of the Employment, Skills and Enterprise Scheme ("the ESE Scheme"). The Court also held that the notices sent to claimants advising them that they were required to take part in a programme within the ESE Scheme did not comply with the requirements of regulation 4 of the ESE Regulations. The effect of the Court's judgment is that the Department for Work and Pensions had no right to impose a sanction on claimants who had failed to meet their requirements. The Court nonetheless upheld the general policy principle of the employment programmes comprised in the ESE Regulations and also ruled that they did not breach Article 4(2) of the European Convention on Human Rights (prohibiting forced or compulsory labour).

6. The Bill will affect claimants where sanctions have been applied for failures to comply with the ESE Regulations. It also affects cases where the claimant has failed to comply with a requirement of the ESE Regulations but a decision to impose a sanction has not yet been taken. Once enacted, it will ensure that any such decisions cannot be challenged on the grounds that the ESE Regulations were invalid or the notices inadequate, notwithstanding the Court of Appeal's judgment. Therefore benefit sanctions already imposed or to be imposed will stand. The Bill's impact assessment details the estimated cost to the taxpayer if the provisions in the Bill are not enacted.

7. Following the Court of Appeal judgment, the ESE Regulations have been replaced by the Jobseeker's Allowance (Schemes for Assisting Persons to Obtain Employment) Regulations 2013 – S.I. 2013/276 ("the SAPOE Regulations"), which came into effect on 12th February 2013. The Bill provides that the ESE Regulations are treated as revoked by the SAPOE Regulations.

8. The Bill also deals with the similar notification requirements under the Jobseeker's Allowance (Mandatory Work Activity Scheme) Regulations 2011 (S.I. 2011/688 – "the MWA Regulations"), to pre-empt the risk of legal challenge to notices given under those Regulations on the basis of the Court's judgment.

BILL OVERVIEW

9. The Bill has been introduced to avoid the need to repay claimants who have been sanctioned for failure to comply with requirements under the ESE Regulations and to be able to impose sanctions where decisions have been put on hold since the decision of the High

Court or Court of Appeal. If sanctions had to be repaid / could not be imposed, the cost to the taxpayer is estimated to be up to £130 million.

10. The effect of the Bill will be that any decision to sanction a claimant for failures to comply with the ESE Regulations cannot be challenged on the grounds that the ESE Regulations were invalid or the notices given under them inadequate, notwithstanding the Court of Appeal's judgment. This is to ensure that the Government is not faced with the situation whereby jobseekers previously sanctioned (or to be sanctioned) for non-compliance under the ESE Regulations can receive an unfair advantage over compliant claimants.

11. The Bill also addresses the risk that previous notifications to claimants made under the MWA Regulations, which contain the same notification provisions as the ESE Regulations, may also be open to challenge on the basis of the Court of Appeal's judgment.

FAST-TRACK LEGISLATION

12. In their report on *Fast-track Legislation: Constitutional Implications and Safeguards*[1], the House of Lords Select Committee on the Constitution recommended that the Government should provide more information as to why a piece of legislation should be fast-tracked.[2]

Why is fast-tracking necessary?

13. The Department will be seeking permission to appeal the Court of Appeal's judgment. If permission to appeal to the Supreme Court is not granted, or the Supreme Court finds against the Department, primary legislation would be needed to ensure that the Government does not have to make repayments to (and can impose sanctions where decisions have been stayed, on) all claimants who failed to take part in programmes comprised in the ESE Regulations. Fast-tracking the Bill is necessary in order to provide certainty and thus safeguard the Government's position.

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

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

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

[1] House of Lords' Constitution Committee, 15th report of session 2008/09, HL paper 116-I.
[2] House of Lords' Constitution Committee, 15th report of session 2008/09, HL paper 116-I, para. 186.

What efforts have been made to ensure the amount of time made available for parliamentary scrutiny has been maximised?
16. The Bill was published on the same day it was introduced.

To what extent have interested parties and outside groups been given an opportunity to influence the policy proposal?
17. The legislation does not change the underlying policy. It restores the policy intention of the ESE Regulations and the intended effectiveness of the notices given under them. There is therefore no need for an external consultation to be considered.

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

Are mechanisms for effective post legislative scrutiny and review in place? If not, why does the Government judge their inclusion is not appropriate?
19. The legislation is immediate and retrospective. The impact of the Bill will be immediately clear.

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

Have the relevant Parliamentary committees been given the opportunity to scrutinise the legislation?
21. The Bill and Explanatory Notes were sent to the Chair of the Work and Pensions Select Committee upon introduction in the Commons. The emergency nature of the Bill means the Committee was unable to report upon the draft legislation before introduction. The non-Parliamentary Social Security Advisory Committee is also being kept informed.

TERRITORIAL EXTENT

22. This Bill extends to England, Wales and Scotland.

Territorial application: Wales
23. The Bill's effect in Wales is the same as in England. The Bill contains no provisions that relate exclusively to Wales, or affect the National Assembly for Wales.

Territorial application: Scotland

24. The Bill's effect in Scotland is the same as in England. The Bill does not contain any provisions falling within the terms of the Sewel Convention. Because the Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament, if there are amendments relating to such matters which trigger the Convention, the consent of the Scottish Parliament will be sought for them.

Territorial application: Northern Ireland

25. The Bill does not extend to Northern Ireland. Social security in Northern Ireland is a devolved matter.

COMMENTARY ON CLAUSES

Clause 1

26. *Subsection (1)* provides that the ESE Regulations are to be treated for all purposes as regulations that were made under section 17A of the Jobseekers Act 1995 and other provisions cited in the preamble to the regulations and that came into force on 20th May 2011 (the day specified in the regulations). This gives effect to the ESE Regulations despite the Court of Appeal judgment.

27. *Subsection (2)* provides that the ESE Scheme mentioned in the ESE Regulations is to be treated as a scheme within section 17A of the Jobseekers Act 1995 until the coming into force of the SAPOE Regulations.

28. *Subsection (3)* provides that the programmes listed in regulation 3(2) to (8) of the SAPOE Regulations and the Community Action Programme (CAP) are to be treated as having been, until the coming into force of the SAPOE Regulations, programmes of activities that are part of the ESE Scheme. CAP is mentioned because it is a programme that operated in the past but was no longer operating when the SAPOE Regulations were made. This complements subsection (2) to ensure that there can be no dispute that these programmes were within the scope of the ESE Regulations.

29. *Subsection (4)* provides that a notice given for the purposes of regulation 4 of the ESE Regulations (requirement to participate and notification) is to be treated as a notice that complies with regulation 4(2)(c) (details of what a person is required to do by way of participation in the scheme) if it referred to the ESE Scheme or a programme treated as part of it. This means that where the notice to a participant gave details as to what the participant is required to do which did not meet the degree of detail required by the Court of Appeal judgment, the notice is nonetheless regarded as valid.

30. *Subsection (5)* provides that a notice given for the purposes of regulation 4 of the ESE Regulations is to be treated as a notice that complies with regulation 4(2)(e) (information

about the consequences of failing to participate) if it described an effect on payments of jobseeker's allowance as a consequence, or possible consequence or not participating as required. As with participation under subsection (4), this means that where the notice to a participant gave details as to sanctions which did not meet the degree of detail required by the Court of Appeal judgment, the notice is nonetheless regarded as valid.

31. *Subsection (6)* provides that regulation 4(3) of the ESE Regulations (notice of changes in what a person is required to do by way of a participation in a scheme) is to be treated as if it required that the participant, who has already received a notice under regulation 4(1) or 4(3), be notified of changes only where changes have been made to the details given in an earlier notice.

32. The MWA Regulations make the same provision about notices as the ESE Regulations. *Subsections (7) to (9)* make comparable provision for notices under the MWA Regulations as subsections (4) to (6) for the ESE Regulations.

33. *Subsection (10)* provides that the provisions relating to the imposition of penalties (sanctions) under both the ESE Regulations and the MWA Regulations, which had effect prior to the changes made by the 2012 Regulations on 22nd October 2012, are to continue to have effect after that time in relation to failures to comply with those Regulations that occurred, or began to occur, before that time. The main effect of this subsection is that in cases where the failure occurred before 22nd October 2012, but a decision to sanction has been put on hold because of the High Court judgment (in practice, cases where failures occurred before the High Court judgment), a sanction can be imposed in accordance with the sanctions provisions in the ESE Regulations or the MWA Regulations as they were originally made. *Subsection (11)* defines terms used in subsection (10).

34. *Subsection (12)* provides that a sanction imposed on a jobseeker for failing to participate in one of the programmes, whether before or after the coming into force of the Bill, is to be treated as lawfully imposed if the only grounds for treating it as unlawfully imposed are removed by subsections (1) to (10) of this clause.

35. *Subsection (13)* provides that subsection (12) does not affect a person's ability to challenge a decision to impose a sanction by reference to grounds other than those which were removed by subsections (1) to (10). This applies to applications for a decision to be revised or superseded under section 9 or 10 respectively of the Social Security Act 1998 and appeals under section 12 of that Act.

36. *Subsection (14)* provides for the ESE Regulations to be treated as revoked by the SAPOE Regulations with effect from 12th February 2013, the date the SAPOE Regulations came into force, subject to the savings made by subsection (10). This ensures that the two sets of Regulations do not operate at the same time whilst leaving unaffected the provisions relating to sanctions for failures that occurred, or began to occur, before 22nd October 2012, saved by subsection (10).

Clause 2

37. *Clause 2* requires the Secretary of State to appoint an independent person to prepare a report on the operation of the provisions relating to benefit sanctions during the first year after the Bill comes into force. These are sanctions that, but for the provisions in clause 1, would not be (or would not have been) lawfully imposed on a person. The report must be prepared as soon as reasonably practicable after the end of this period. *Subsection (3)* requires the Secretary of State to lay a copy of the resulting report before Parliament.

FINANCIAL EFFECTS OF THE BILL

Benefit and tax credit expenditure

38. The Bill is not intended to cause Government expenditure.

Administrative costs

39. The Bill is not expected to result in any additional administrative costs to Government, except for the costs of producing the report under clause 2.

EFFECTS OF THE BILL ON PUBLIC SERVICE MANPOWER

40. The Bill is not expected to have an effect on public service staffing levels.

SUMMARY OF THE IMPACT ASSESSMENT

41. An Impact Assessment of the Bill was published on 14th March 2013 and is available from the Department for Work and Pensions website at: http://www.dwp.gov.uk/docs/jobseekers-back-to-work-schemes-bill-impact-assessment.pdf .

Impact on Government

42. The effect of the Bill is to ensure that the Government does not need to make repayments where sanctions were imposed for failures to comply with the ESE Regulations and can impose sanctions where decisions have been stockpiled. The Bill is intended to save unforeseen welfare expenditure of up to £130 million.

Impacts on Individuals

43. The impact upon individuals is that jobseeker's allowance claimants who have not complied with requirements under the ESE Regulations will not be repaid sanctioned benefits as they might expect following the judgment or may have a sanction imposed. The Bill effectively restores the status quo to a situation before the High Court and Court of Appeal judgments. Once the Bill is enacted, claimants who might have appealed against previous sanction decisions on the grounds upheld by the Judicial Review will be unable to do so.

Sanctions imposed under the impugned legislation can continue and sanctions decisions currently stayed can be made in accordance with the original intent of the legislation. This is to ensure that the Government is not faced with the situation whereby jobseekers who failed to comply with their requirements and were sanctioned under the quashed ESE Regulations can receive an advantage over claimants who have complied with their requirements and is necessary to safeguard the economic interests of the state.

EUROPEAN CONVENTION ON HUMAN RIGHTS

44. The Government considers that the Jobseekers (Back to Work Schemes) Bill is compatible with the European Convention on Human Rights ("the ECHR"). Accordingly, the Minister in charge of the Bill, Lord Freud, has made a statement under section 19(1)(a) of the Human Rights Act 1998 to this effect.

45. In the event that it were to be considered that the proposed legislation interfered with property rights under Article 1 of Protocol 1 of the ECHR, the Government considers that any such interference is justified as there are compelling public interest reasons for doing so, given the significant cost to the public purse of repaying previously sanctioned benefits, and as the aim of the proposed legislation is intended to restore the law to that which Parliament intended.

46. A claimant might also argue that legislation which removes their right to a refund of sanctioned benefits, or allows the Secretary of State to impose a sanction, notwithstanding the Court of Appeal's decision, is a breach of their right of access to court under ECHR Article 6.

47. If no legal claim has been brought on the grounds that the ESE Regulations are ultra vires and/or that the notice issued under them is non-compliant prior to the enactment of the proposed legislation, the Government considers that Article 6 is not engaged at all since the claim to entitlement to benefit, and any dispute regarding a benefit decision thereon which would require access to the courts, remains hypothetical.

48. Similarly, for cases where the Secretary of State has not yet made a sanction decision, the Government considers that Article 6 will not be engaged as there will be no potential dispute about the right – the effect of the legislation will be that there can be no right to object to the sanction on the notice or vires grounds.

49. Even if the proposed legislation would interfere with a right of access to court, the Government considers that the interference is justified for similar reasons as for Article 1 of Protocol 1.

50. These issues were considered in *Stran Greek Refineries and Stratis Andreadis v Greece* ([1998] 25 EHRR 127) and *National & Provincial Building Societies v UK* ([1998]

HRCD 35). As with that latter case, the legislation would have the effect of closing a loophole in order to give effect to the original intention of Parliament, which is not disputed.

TRANSPOSITION NOTES

51. None of the measures in this Bill has any effect on or is affected by any European Directive.

COMMENCEMENT

52. All clauses of the Bill come into force on the day the Act is passed.

JOBSEEKERS
(BACK TO WORK SCHEMES) BILL

EXPLANATORY NOTES

These notes refer to the Jobseekers (Back to Work Schemes) Bill as brought from the House of Commons on 19th March 2013 [HL Bill 91]

Order to be Printed, 19th March 2013

PUBLISHED BY AUTHORITY OF THE HOUSE OF LORDS

LONDON – THE STATIONERY OFFICE LIMITED

Printed in the United Kingdom by
The Stationery Office Limited

£x.00

HL Bill 91—EN 55/2