Law Society of Scotland

Consultation Response

Benefit Sanctions Inquiry

21 May 2018

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession

We have a statutory duty to work in the public interest[1], a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom governments, parliaments, wider stakeholders and our membership.

Our Administrative Justice committee welcomes the opportunity to respond to the Work and Pensions Committee's call for evidence on the use of benefit sanctions and its impact on social security claimants in Scotland.

General Comments

We welcome the Committee's inquiry into the use of sanctions in relation to out-of-work benefits in the light of increasing evidence that their widespread application is leading to severe hardship to some of the most vulnerable members of society. Moreover, the Society believes that the existing means of challenging a decision to impose a sanction, by way of mandatory reconsideration (MR) followed by a right of appeal to the First-tier Tribunal, are neither sufficiently effective nor speedy enough to be regarded as satisfactory means of redress. We also believe that the DWP urgently needs to put in place an effective mechanism for monitoring the quality of decision-making right across all of its operations and should also undertake a review of the decision making training it provides to its staff.

The right to social security is affirmed as a human right in a number of international instruments, including the Council of Europe's Code of Social Security, Article 12 of the European Social Charter, Article 34 of the EU Charter of Fundamental Rights, the International Labour Organisation Convention No. 102 and General Comment 19 of the UN Committee on Economic, Social and Cultural Rights. Indeed, the recently passed Social Security (Scotland) Bill, Royal Assent currently awaiting, expresses this in statute. Section 1(b) of the Bill states that "social security is itself a human right and essential to the realisation of other human rights". In addition, the principles established by the Bill include social security being an investment in the people of Scotland, that the dignity of individuals is to be at the heart of the Scottish social security system, and that the Scottish social security system is to contribute to reducing poverty in Scotland, This

[1] Solicitors (Scotland) Act section 1

articulation of principles is novel for social security legislation in the UK and may ultimately see a very different environment for entitlement to and decision-making around benefits in Scotland.

There has been significant debate around the degree to which social security benefits and sanctions engage issues around human rights. The courts have recognised a degree of conditionality around entitlement to benefits. In *R. (on the application of Reilly) v Secretary of State for Work and Pensions*[2], for instance, the Supreme Court determined that a directed period of unpaid work did not violate the claimant's human rights around slavery and enforced labour (Article 4 of the European Convention on Human Rights).

Commentators such as Dr David Webster have argued, however, that the conditionality regime is "deliberately designed to reduce people without other resources to complete destitution"[3]. Article 1 of the First Protocol, around the right to property, Article 3, around the prohibition on torture, inhuman and degrading treatment, and Article 8, around the right to family life, may not directly protect against situations of extreme financial hardship.

Deprivation of resources can amount to a breach of Article 3 of the Convention, as was found in *R (Limbuela) v Secretary of State for the Home Department*[4]. This case involved applicants for asylum who, on account of not submitting applications as soon as practical on arrival within the UK, were denied access to support under section 95 of the Immigration and Asylum Act 1999. The House of Lords considered that destitution in these circumstances could amount to inhuman and degrading treatment contrary to Article 3 of the European Convention. Lord Bingham discussed the circumstances in which such a breach might occur:

> "…[W]hen it appears on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life. Many factors may affect that judgment, including age, gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation…
>
> It is not in my opinion possible to formulate any simple test applicable in all cases. But if there were persuasive evidence that a late applicant was obliged to sleep in the street, save perhaps for a short and foreseeably finite period, or was seriously hungry, or unable to satisfy the most basic requirements of hygiene, the threshold would, in the ordinary way, be crossed."

The circumstances relating to benefit sanction may rarely be as extreme as for late asylum applicants. Benefit sanctions do not affect entitlement to housing benefit, so the prospect of homelessness is less

[2] [2013] UKSC 68

[3] Dr David Webster, *Independent review of Jobseeker's Allowance (JSA) sanctions for claimants failing to take part in back to work schemes* (http://www.cpag.org.uk/sites/default/files/uploads/CPAG-David-Webster-submission-Oakley-review-Jan-14_0.pdf)

4 [2005] 3 W.L.R. 1014

likely; though housing benefit may not cover full rent costs. Unlike asylum applicants, benefit claimants are not prohibited from employment. Hardship payments are available, though there may be some delay before these are processed and received, and many claimants are referred to food banks; though some of these have restrictions on the number of food parcels applicants can receive. In broad policy terms, the type of destitution described in *Limbuela* is unlikely, though individual cases may, in the words of Lord Bingham, engage considerations around "age, gender, mental and physical health and condition, any facilities or sources of support available". We also note that the fact this government policy may not breach human rights in general is, at least in part, contingent on the contribution of the third sector through this widespread provision of foodbanks.

It is unclear whether this human rights approach to social security, combined with the principles-based approach articulated in the Social Security (Scotland) Bill, will see a radically divergent approach in Scotland, whether in assessment, review of decision-making or appeal. Breach of the principles in the Bill, as section 1A notes, does not give rise to a legal action in itself, though courts may have regard to the principles in their deliberations more generally. The charter required by the Bill, and the Social Security Commissioners established by the Bill, must also have regard to these principles. More generally, the Scottish Government has also indicated its intention to implement the socio-economic duty under the Equalities Act, with the Scottish Social Security Agency one of the public bodies subject to this duty[5].

The Committee has invited views on the following questions:

1. To what extent is the current sanctions regime achieving its policy objectives?

'Conditionality' has been a key aspect of out-of-work benefits for over four decades. Claimants are required to prove that they are making sufficient efforts to actively seek work as part of the condition of receiving out-of-work benefits, including Jobseekers Allowance (JSA), Employment & Support Allowance (ESA), Income Support (IS) and Universal Credit (UC). Over the years, the extent to which sanctions have been actively applied has varied, partly dependent on the state of the employment market at any particular point in time, which in recent years has shown a decline in the numbers of unemployed and increasing numbers of available jobs and partly on developments in government policy. Increases to the levels of sanction

[5] Scottish Government, *Consultation on the Socio-Economic Duty: Analysis of Responses*, 20 November 2017 (http://www.gov.scot/Resource/0052/00527914.pdf)

permissible[6] and the increasing prevalence of sanctions overall led to a situation in which benefit sanctions exceeded the number of fines imposed in the criminal courts[7].

The Welfare Reform Act 2012 introduced the concept of the *'claimant commitment'* in connection with claims for out- of-work benefits, including powers to make regulations to establish a variety of different sanctions of varying degrees of severity and length for failure to comply with the conditions of entitlement for receiving relevant benefits. The penal effects of sanctions, which have been felt more keenly in recent years, were further exacerbated by the removal in 2013 of an immediate right of appeal to an independent tribunal and the introduction of a mandatory reconsideration process. Moreover, and perhaps tellingly in retrospect, the 2012 Act repealed section 81 of the Social Security Act 1998, which required the Secretary of State to report on standards of decision making and to lay his reports before both Houses of Parliament. Following the abolition of the former Chief Adjudication Officer in the 1998 Act, whose role was to keep under review the system of adjudication by adjudication officers and to report annually to the Secretary of State on standards of adjudication, no alternative means of independently monitoring the quality of the department's decision making has been put in place. This absence of independent scrutiny, we would suggest, has contributed to some of the highest success rates in respect of cases going to appeal. In Scotland at the present time, around 70% of PIP appeals are successful on appeal. This begs the question of how many of those people who did not appeal, for whatever reason, might have been successful had they done so? In 2016, around 50,000 sanctions appeals were allowed by tribunals, even after having gone through the mandatory reconsideration process. All of this would tend to suggest that the quality of decision making in DWP should be a matter of considerable concern.

The extent to which the current sanctions regime is achieving its policy objectives depends both on what those objectives are and on how one measures success. If one looks solely at the increased numbers of claimants being penalised for infractions of varying degrees of seriousness, this might be viewed by some as the regime achieving its policy objectives. But that would mean taking the objective as absolute compliance with the bureaucratic process, which in turn would seem quite disproportionate. However, one also needs to consider whether decisions to impose sanctions are being taken fairly, accurately and consistently across the country, the answer to which, anecdotally at least, would appear to be no.

2. Is the current evidence base adequate and if not, what information, data and research are required?

It is a matter of considerable regret that the government has failed to conduct research, both into the effectiveness of sanctions in getting benefit recipients back into sustainable work and into the hardship that sanctions cause to those affected by them. The National Audit Office roundly criticised the department for

[6] For instance, the minimum sanction period became 4 weeks for minor offences and 13 weeks for more serious offences. The maximum sanction period became 156 weeks (3 years).

[7] Michael Adler, *A New Leviathan: Benefit Sanctions in the Twenty-first Century*, November 2016

these failures in its 2016 report, *Benefit Sanctions*[8]. We suggest that it would also be useful to find out more about the reasons why so many sanction decisions are being overturned on appeal and why, apparently, no feedback lessons are being learned by decision makers from the outcome of successful appeals (acknowledging that decisions of the First-tier Tribunal do not create case-law in the same way as decisions of the Upper Tribunal).

Though there has not been government-led research around the impact of benefit sanctions, there has been independent research, much of which has been critical around current sanctions policy. Notably, the WelCond project, involving the Universities of York, Glasgow, Sheffield, Salford, Sheffield Hallam and Heriot-Watt, analysed the effectiveness, impact and ethics of welfare conditionality from 2013-2018[9]. The results of this research suggest that sanctions are not assisting in modifying behaviour, not succeeding in assisting claimants, for instance, in returning to work, that effective support services are not being provided to claimants, and that the impact of the sanctions regime is particularly detrimental to vulnerable groups.

The impact of the sanctions regime on vulnerable groups may benefit from further study. Research by Aaron Reeves and Rachel Loopstra highlights the correlation between vulnerable claimants and the use of benefit sanctions[10]. Data that would help to understand the ways in which claimants may struggle to meet directions, whether because of language barriers, care responsibilities, disability or other factors would allow for more flexible approaches to assist and support benefit claimants.

3. What improvements to sanctions policy could be made to achieve its objectives better?

First and foremost, there must be greater clarity as to what the objectives are. Are they to secure absolute compliance with the bureaucratic process, or are they to discourage the truly recalcitrant? Decision makers need better guidance on the application of sanctions. This should include guidance on how to apply sanctions more fairly and consistently across a range of different scenarios. A better system of sanction warning notices would be helpful, particularly in order to avoid sanctions being applied in a knee-jerk fashion for a first-time offence and/or for a particularly minor infraction such as turning up five minutes late for an appointment. It would also be useful to re-examine the extent to which success rates at appeal hearings continue to be linked to whether or not the appellant attends the hearing, either on their own and/or with a representative. This could be easily established from data which the First-tier Tribunal already routinely collects. Previous studies have demonstrated that the likelihood of success increases incrementally according to whether the appellant attends alone or is accompanied by a representative. Appellants who do not attend their hearing have the least likelihood of being successful at appeal and this

[8] National Audit Office, *Benefit Sanctions*, November 2016 (https://www.nao.org.uk/wp-content/uploads/2016/11/Benefit-sanctions.pdf)

[9] http://www.welfareconditionality.ac.uk/

[10] Aaron Reeves and Rachel Loopstra, *'Set up to fail'? How welfare conditionality undermines citizenship for vulnerable groups*, Social Policy and Society. ISSN 1475-7464 (http://eprints.lse.ac.uk/67724/7/Reeves_Set%20up%20to%20fail_2016.pdf)

message ought to be communicated clearly to the public. Those who receive independent advice and representation have significantly more positive outcomes still, whether at a tribunal or, as recent research suggests, also at mandatory reconsideration stage[11]. The impact of the sanctions regime, along with some of the other more draconian welfare reform changes of recent years, have fostered a hostile environment in the delivery of welfare benefits and the emergence of a caustic relationship between DWP and its customers. The welfare benefits system ought more properly to be more caring and supportive in relation to its customers. As part of this approach, the severity of sanctions could be reduced so that, instead of depriving claimants of all their benefit, claimants are deprived of a fixed amount or a proportion of their benefit; and that the minimum and maximum duration of sanctions is reduced, potentially returning to the pre-2013 maximum levels of sanction.

4. Could a challenge period and/or a system of warnings for a first time sanctionable offence be beneficial? If so, how could they be implemented?

We believe that a more transparent approach to the potential deployment of sanctions would lead to better outcomes for both citizen and state. Both the proposal for a challenge period and a system of warnings for a first time offence would be welcomed. These would materially assist in preventing sanctions being imposed in a knee-jerk fashion and provide the opportunity for claimants to explain the reason for their failure to comply with whatever requirement has allegedly been breached. Claimants could be issued with a warning before a sanction is imposed, as recommended in each of the recent reports on benefit sanctions, i.e. by the House of Commons Work and Pensions Committee, the National Audit Office and the House of Commons Public Accounts Committee. Claimants could be given an opportunity to attend a hearing before a sanction is imposed. Claimants could be presented with the evidence on which the case for imposing sanctions is based and allowed to challenge it. A system of referral to independent advice, particularly for the most vulnerable claimants, would promote more effective outcomes and better decision-making. We believe these options could be implemented quickly and easily. Details of how these should be implemented should be contained in guidance to decision makers.

5. Are levels of discretion afforded to jobcentre staff appropriate?

We have no first-hand knowledge of what levels of discretion are generally afforded to jobcentre staff in these matters, or indeed whether, and if so to what extent. Applying discretion in decision making is covered more generally in the training DWP staff receive on taking decisions. The findings from the WelCond project suggest inconsistency in decision-making, particularly by replacement or stand-in work coaches taking a more stringent approach to a claimant and their circumstances. We understand that specific guidance is provided to jobcentre staff on directions, sanctions and client groups with protected

[11] Dave Cowan, Abi Dymond, Simon Halliday, Caroline Hunter, *Reconsidering Mandatory Reconsideration,* P.L. 2017, Apr, 215-234

characteristics, though as the research from Reeves and Loopstra indicates that these groups are still likelier to face sanctions, it does not appear that this is effective.

6. Are adequate protections in place for vulnerable claimants?

We are not aware that any special efforts are made to distinguish vulnerable claimants from those that are not, which is a matter of great concern in those cases where the imposition of a sanction leads to the complete withdrawal of benefit for a significant period of time. Moreover, the means of challenging decisions that are available to claimants are not sufficiently speedy, responsive or robust enough to be regarded as providing satisfactory protection to vulnerable claimants whose benefit has been reduced or withdrawn because of a sanction. There are no time limits for a mandatory reconsideration to be carried out by the DWP, whilst claimants have only one month within which to request an MR. In addition, the high success rates of cases that subsequently go forward to appeal would suggest that the MR process is neither sufficiently independent nor robust enough to be regarded as satisfactory. Added to that, the length of time it takes for an appeal to come to a hearing, over 6 months in most cases, is unsatisfactory from the perspective of claimants whose benefit has been reduced or withdrawn entirely. For those cases which are successful at appeal, claimants then face a further delay of four weeks or more until their benefit is reinstated and any arrears paid. This is wholly unacceptable, and we suggest that these cases should be given much greater priority to ensure that benefit that has been wrongly reduced or withdrawn is reinstated at the earliest possible opportunity.

7. What effect does sanctions policy have on other aspects of the benefits system and public services more widely? Are consequential policy changes required?

The operation of the current sanctions regime is widely regarded as grossly unfair and brings the benefits system into disrepute. There is little evidence that the operation of the current sanctions regime achieves its aim of encouraging truly recalcitrant claimants to make greater efforts to seek employment. Rather, it appears to be used as a blunt instrument to punish vulnerable claimants, often for minor infractions, without giving them any opportunity to explain their position. The current operation of the sanctions policy places additional burdens on local authorities, health services and the voluntary sector who have to deal with the resulting financial and social impacts on the lives of the individuals affected.

There is also the not insignificant cost to the taxpayer of dealing with the consequential appeals to the First-tier Tribunal, which in 2016-17 amounted to £103 million (which does not include the cost to the DWP of undertaking MR reviews). The potential financial savings to be made from getting more decisions right first time, or at least right at the mandatory reconsideration stage, should provide a compelling incentive to make the necessary policy changes.

The extent to which so many decisions are successful at appeal also raises obvious concerns about the quality of decision making within the DWP. Quite apart from the urgent need for independent monitoring of decision making standards, we would suggest that the department might also wish urgently to undertake a root and branch review of the training it provides to its staff on decision making.

8. To what extent have the recommendations of the Oakley review of Jobseekers Allowance sanctions improved the sanctions regime. Are there recommendations that have not been implemented that should be?

We are not in a position to comment.

Conclusion

It is clear that the current benefit sanctions regime is not working effectively. . In a benefits system predicated around the policy of conditionality, there needs to be power to make reasonable directions to claimants, and some sanction if these directions are not followed. Evidence shows that policy outcomes are not being achieved. Claimants are not being treated with dignity and respect. Best practice is not being developed through learning from appeal decisions. And, in some individual circumstances, human rights may be breached. There is an opportunity to create a better benefit system across the UK and also to learn from this experience as a new benefit system is currently developed in Scotland. We hope that our submission is helpful to the committee's scrutiny of the benefit sanction regime and, if helpful, would be happy to assist further.

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