

EXPLANATORY MEMORANDUM TO
THE JOBSEEKERS (BACK TO WORK SCHEMES) ACT 2013 (REMEDIAL)
ORDER 2019

2019 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 The Remedial Order amends the Jobseekers (Back to Work Schemes) Act 2013 (the 2013 Act). The 2013 Act can be found at <http://www.legislation.gov.uk/ukpga/2013/17/contents>. The 2013 Act retrospectively validated sanction decisions and notifications issued under the Jobseeker’s Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 (“ESE Regulations; <http://www.legislation.gov.uk/uksi/2011/917/contents/made>” and retrospectively validated defective notifications made under the Jobseeker’s Allowance (Mandatory Work Activity) Regulations 2011 (“MWA Regulations”: <https://www.legislation.gov.uk/uksi/2011/688/contents>).
- 2.2 In *R (Reilly & Hewstone) v Secretary of State for Work & Pensions; Jeffrey and Others v Secretary of State for Work & Pensions* [2016] EWCA Civ 413 (“Reilly No.2”): [https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2016/413.html&query=\(Reilly\)+AND+\(Hewstone\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2016/413.html&query=(Reilly)+AND+(Hewstone)), the Court of Appeal found that the 2013 Act was incompatible with Article 6 (the right to a fair hearing) of the European Convention on Human Rights (ECHR) and issued a Declaration of Incompatibility. The Declaration of Incompatibility relates to claimants who had an undetermined appeal still in the Tribunal system on the 26 March 2013, the date the Act came into force.
- 2.3 The Remedial Order will restore the right to a fair hearing for this group of claimants. It gives the Courts the power to find in the claimant’s favour. It also provides the Secretary of State for Work and Pensions with the power to revise or supersede sanction decisions in these cases and pay the affected individuals the amount to which they will then become legally entitled.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 The territorial application of this instrument includes Scotland.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England, Scotland and Wales.

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5. European Convention on Human Rights

5.1 The Secretary of State for Work and Pensions, The Rt. Hon. Amber Rudd MP has made the following statement regarding Human Rights:

“In my view the provisions of the Jobseeker’s (Back to Work Schemes) Act 2013 (Remedial) Order 2019 are compatible with the Convention rights.”

6. Legislative Context

6.1 The 2013 Act validates notifications and sanction decisions made under the ESE Regulations. These regulations were declared ultra vires by the Court of Appeal in R (on the application of Reilly and Wilson) v Secretary of State for Work and Pensions [2013] EWCA Civ 66 (“Reilly No.1”); <https://www.judiciary.uk/judgments/reilly-wilson-v-secretary-state-120213/> on 12 February 2013.

6.2 The 2013 Act also validated notifications under the MWA Regulations, which contained the same notification provisions as the ESE Regulations. Arguably, some of the notifications given to claimants under the MWA Regulations, requiring their participation in the Mandatory Work Activity Scheme, did not meet the requirements set out in the MWA Regulations.

6.3 Following an application for judicial review and a series of other legal challenges to the 2013 Act, joined in R (Reilly & Hewstone) v Secretary of State for Work & Pensions; Jeffrey and Others v Secretary of State for Work & Pensions [2016] EWCA Civ 413 (“Reilly No.2”), the Court of Appeal found that the 2013 Act gave rise to a breach of article 6(1) (the right to a fair hearing) of Jobseeker’s Allowance claimants who had an undetermined appeal against a sanction decision at the date when the 2013 Act came into force. The Declaration of Incompatibility does not have any effect on the continuing validity of the 2013 Act. The Court of Appeal ruled that the 2013 Act was effective in retrospectively validating the notifications and sanction decisions.

6.4 Section 10 of the Human Rights Act 1998 allows a Remedial Order (a form of secondary legislation) to be used to amend an Act of Parliament where there is an incompatibility between domestic law and a right under the European Convention on Human Rights. This can be used if there are compelling reasons to depart from the constitutional ideal that primary legislation should be amended by primary legislation.

6.5 The Secretary of State for Work and Pensions believes there are compelling reasons for using a non-urgent Remedial Order and that the amendments proposed in the Remedial Order are necessary to remove the incompatibility identified by the Court of Appeal. The Government takes a breach of the European Convention on Human Rights seriously and is of the view that such instances should be remedied as soon as possible. The Court of Appeal judgment in Reilly No. 2 was handed down on 29 April 2016; all of the appellants had either exhausted their right of appeal or confirmed that they did not intend to appeal the decision by January 2017. Some of the claimants affected by the Declaration of Incompatibility have been waiting for their appeal to be decided since 2012. Some may no longer be claiming benefit. There are no appropriate Bills planned that could accommodate this specific legal objective and remedy this incompatibility. Using the Remedial Order to insert new provisions into

the 2013 Act will achieve a change in the law to restore the right to a fair hearing to the affected individuals.

- 6.6 The Secretary of State believes that using a non-urgent Remedial Order is appropriate in this case. Using the non-urgent Remedial Order process allows time for proper Parliamentary scrutiny.

7. Policy background

What is being done and why?

- 7.1 The Remedial Order is designed to resolve the Court of Appeal's ruling in Reilly No. 2 that the 2013 Act is incompatible with Article 6 (the right to a fair hearing) of the European Convention on Human Rights.
- 7.2 The ESE and MWA Regulations underpinned programmes to support claimants into employment. Claimants could be referred for a benefit sanction decision if they failed to participate in these programmes without good reason. When the ESE Regulations were declared *ultra vires*, in Reilly No.1, any sanction decision made under these regulations between 2011 and 2013 became invalid, and the Department for Work and Pensions would have had to pay claimants the benefit amounts that had been withheld. The 2013 Act retrospectively validated sanction decisions and notifications issued under the ESE Regulations. It also retrospectively validated notifications made under the MWA Regulations because these contain the same notification provisions as the ESE Regulations. There was a risk that notifications to claimants made under the MWA Regulations were open to challenge on the basis of the Court of Appeal's judgment in Reilly No.1 which, in addition to finding that the ESE Regulations were *ultra vires*, also found that letters sent to claimants requiring them to participate in an employment programme under the ESE Regulations did not comply with the notification requirements set out in the Regulations. Without the 2013 Act, the potential Government liability to repay sanctions under the ESE and MWA Regulations was estimated to be up to £130 million.
- 7.3 Following an application for judicial review and a series of other legal challenges to the 2013 Act that were joined in Reilly No.2, the Court of Appeal found that the 2013 Act is effective in retrospectively validating notifications and sanction decisions made under the ESE Regulations and MWA Regulations. The 2013 Act has, therefore, successfully restored the policy intent and protected the majority of the Government's potential liability.
- 7.4 However, the Court of Appeal also ruled that the 2013 Act breached the right to a fair hearing for claimants who had an appeal of a sanction decision still in the Tribunal system when the Act came into force on 26 March 2013. Without the retrospective validation of the notification and sanction decisions by the 2013 Act, these claimants would have won their appeal and, as a result, the benefit amount sanctioned that was the subject of their appeal would have to be paid. The Court of Appeal issued a Declaration of Incompatibility with the European Convention on Human Rights, article 6(1) (right to a fair trial).
- 7.5 In accordance with paragraph 3(1) of Schedule 2 to the Human Rights Act 1998 (<https://www.legislation.gov.uk/ukpga/1998/42/contents>) a proposed draft Remedial Order was laid for a 60 sitting-day period on 28 June 2018, to allow for Members of both Houses and other stakeholders to make representations. The proposal was tightly

focused: it restored the right to a fair hearing in the ESE Regulation cases that were specifically examined by the Court of Appeal.

- 7.6 The Secretary of State for Work and Pensions fully considered all the representations received on the proposal in preparing the draft Order for affirmative resolution (see Section 10 below).
- 7.7 An Upper Tribunal judge had raised whether a claimant who appealed a sanction decision under the MWA Regulations and had a defective notification would also benefit from the draft Remedial Order.
- 7.8 The Court of Appeal's ruling was that the 2013 Act was incompatible with the right to a fair hearing for claimants who had already appealed their sanction decision when the Act came into effect. The Secretary of State therefore decided that, although the Court specifically examined the facts in ESE cases, in order to remove the incompatibility, the draft Order should include the small number of MWA appeal cases whose right to a fair hearing is arguably also affected by the 2013 Act.
- 7.9 The revised draft Remedial Order therefore affects a small group of Jobseeker's Allowance claimants:
- who had lodged an appeal of a sanction decision that had been made for failing to comply with the ESE Regulations; or
 - who had lodged an appeal of a sanction decision that had been made for failing to comply with the MWA Regulations where the claimant received a notification that was validated by the 2013 Act;
- if their appeal had not been finally determined, abandoned or withdrawn by 26 March 2013.
- 7.10 It gives the Courts the power to disregard the effect of the Act in these specific appeals and also gives the Secretary of State the power to revise and supersede sanction decisions where possible, so that the claimant no longer has to progress the appeal through the Tribunal system.
- 7.11 The draft Remedial Order does not have an effect on any other sanction decisions for Jobseeker's Allowance, Employment and Support Allowance, Income Support or Universal Credit claimants.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act

9. Consolidation

- 9.1 An informal consolidated text will be available to the public free of charge via the National Archives website: <http://www.legislation.gov.uk/>

10. Consultation outcome

- 10.1 The proposed draft Remedial Order was laid for 60 sitting-days on 28 June 2018 to enable representations from Members of both Houses and other stakeholders.
- 10.2 The Joint Committee on Human Rights scrutinised the proposed draft Order, sought views from stakeholders and advised Government and Parliament on the

appropriateness of the proposed draft Order and published its Report on 31 October 2018. The JCHR report can be found at <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1451/145102.htm>

- 10.3 The Department received few representations directly from stakeholders: a letter from the chair of the Work and Pensions Select Committee (WPSC), and a number of Freedom of Information Requests. These asked for clarification on scope of the draft Order, the number of individuals affected and costs. In an Upper Tribunal case a judge also raised whether a small group of MWA cases with defective notifications who had a live appeal in the Tribunal system when the 2013 Act came into effect would also benefit from the proposed draft Remedial Order. The Secretary of State decided to revise the proposed draft to take account of the effect of the 2013 Act on these cases.
- 10.4 The Government Response to representations received is laid in Parliament with the draft Remedial Order in accordance with paragraph 3(2) of Schedule 2 to the Human Rights Act 1998.

11. Guidance

- 11.1 The Department will provide internal guidance for staff, so that when the Remedial Order comes into effect, they will be able to identify the relevant individuals wherever possible, revise or supersede the relevant sanction decision and pay the correct amount the individual will then become legally entitled to.

12. Impact

- 12.1 There is no impact on business, charities or voluntary bodies.
- 12.2 There is no significant impact on the public sector.
- 12.3 The draft Remedial Order is intended to reduce the administrative burden on the Tribunal system. It provides the Secretary of State with the powers to revise or supersede sanction decisions in the relevant cases, wherever this is possible. This will allow the Department for Work and Pensions to pay the sanctioned benefit amount to most of the affected individuals, so that they no longer have to progress their appeal(s) through the Tribunal system. It also gives the Court or Tribunal the power to find in a claimant's favour.
- 12.4 The expenditure falls below the £3 million threshold for a formal Impact Assessment. Therefore, a formal Economic Impact Assessment has not been prepared for this instrument. Initial management information suggests that between 2,594 and 5,009 individuals had a live appeal when the 2013 Act came into force and may be eligible for a payment when the draft Remedial Order comes into effect. The estimated AME cost is between £0.9m and £1.86m. This is a broad estimate and subject to change as the relevant cases are identified and examined: the draft Remedial Order applies in very specific circumstances. The Department will monitor and review costs once the draft Remedial Order comes into effect.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 The Department will monitor and review the process of payment of the sanctioned benefit to ensure that individuals in scope of the draft Remedial Order are correctly identified, whether they are still claiming benefit or not, and receive the payment to which they are entitled once the Remedial Order comes into effect. This will be undertaken through an exercise to meet the principles and guidance set out in the Legislative Entitlement and Administrative Practices Report 1979.

15. Contact

- 15.1 Laura Smethurst at the Department for Work and Pensions can be contacted with any queries regarding the instrument. Telephone: 0207 449 7499 or email: laura.smethurst@dwp.gov.uk
- 15.2 Victoria Hogan, Deputy Director for Labour Market Policy, at the Department for Work and Pensions can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Rt. Hon. Amber Rudd MP at the Department for Work and Pensions can confirm that this Explanatory Memorandum meets the required standard.