

EXPLANATORY MEMORANDUM TO
THE PROPOSED JOBSEEKERS (BACK TO WORK SCHEMES) ACT 2013
(REMEDIAL) ORDER 2018

[2018] 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 resolves the Court of Appeal’s ruling 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 that the Jobseekers (Back to Work Schemes) Act 2013 (“the 2013 Act”) is incompatible with article 6 (the right to a fair hearing) of the European Convention on Human Rights.
- 2.2 The Declaration of Incompatibility affects a limited group of claimants: those who had lodged an appeal of a sanction decision that had been made under the Jobseeker’s Allowance (Employment, Skills and Enterprise Schemes) Regulations 2011 (“ESE Regulations”) whose appeal had not been finally determined, abandoned or withdrawn by 26 March 2013 (the date the 2013 Act came into force). The Remedial Order restores their right to a fair hearing by enabling their appeal to be successful and gives the Secretary of State for Work and Pensions the power to revise or supersede the sanction decision in these cases.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and is not a financial instrument that relates exclusively to England, Wales and Northern Ireland.

4. Legislative Context

- 4.1 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”) on 12 February 2013. The 2013 Act also validated notification requirements under the Jobseeker’s Allowance (Mandatory Work Activity Scheme) Regulations 2011.
- 4.2 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 made under the ESE Regulations. 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 effectively retrospectively validated all notifications and sanctions decisions made under the ESE Regulations.

- 4.3 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.
- 4.4 The Secretary of State for Work and Pensions believes there are compelling reasons for using a non-urgent Remedial Order. 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. The Department estimates that between 3789 and 4305 Jobseeker’s Allowance claimants may be affected by the Declaration of Incompatibility. Some may no longer be claiming benefit. It is essential that the Government acts so that both claimants and former claimants receive the payment to which they are legally entitled. There are no appropriate Bills planned that could accommodate this specific legal objective and remedy this incompatibility in the near future. There is very limited space available in the Parliamentary timetable for a bespoke Bill that adds in a single clause to address the Declaration of Incompatibility. Therefore, using the Remedial Order to insert a new clause into the 2013 Act will achieve a change in the law more quickly than primary legislation to allow the affected individuals to receive the payment to which they are entitled.
- 4.5 The Secretary of State believes that using a non-urgent Remedial Order is appropriate in this case because it maintains the position that the urgent procedure is used only for the most pressing cases. The number of claimants whose rights are affected by the Declaration of Incompatibility cannot increase; those affected had an appeal in the Tribunal system of a sanction decision under the ESE Regulations on 26 March 2013. The 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. Using the non-urgent Remedial Order process also allows time for proper Parliamentary scrutiny.

5. Extent and Territorial Application

- 5.1 The territorial application of this instrument is England, Scotland and Wales.

6. European Convention on Human Rights

- 6.1 The Secretary of State for the Department for Work and Pensions, The Rt. Hon. Esther McVey 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 2018 are compatible with the Convention rights.”

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 2013 Act was introduced to protect public funds when the ESE Regulations were declared *ultra vires* by the Court of Appeal in Reilly No.1. The ESE Regulations underpinned a range of programmes to help claimants gain employment. Claimants could be referred for a benefit sanction decision if they failed to participate in these programmes without a good reason. When the ESE Regulations were declared *ultra vires*, 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 potential Government liability was estimated at up to £130 million. Therefore, to restore the original policy intent, the 2013 Act was introduced to retrospectively validate the notifications and sanction decisions made under the ESE Regulations.
- 7.3 Following an application for judicial review and a series of other legal challenges to the 2013 Act joined in Reilly No.2, the Court of Appeal found that the 2013 Act is effective in retrospectively validating the ESE Regulations, the notifications and sanctions made under these 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 of claimants who had an appeal of a sanction decision (made under the ESE Regulations) still in the Tribunal system when the Act came into force on 26 March 2013. Without the effect of the 2013 Act, these claimants would have won their appeal when the ESE Regulations were declared *ultra vires*; 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).
- 7.5 The Declaration of Incompatibility does not have any impact on the continuing validity of the 2013 Act. It affects a limited group of claimants, some of whom may now no longer be claiming benefit. The Department for Work and Pensions currently estimates that c.3789-4305 Jobseeker’s Allowance claimants may be affected by the Declaration of Incompatibility.
- 7.6 The Government takes a breach of the European Convention of Human Rights seriously and is of the view that such instances should be remedied as soon as possible. There is no administrative remedy available. An amendment to the 2013 Act is therefore required.
- 7.7 To meet the Government’s international obligations under the European Convention on Human Rights, the Remedial Order restores the right to a fair hearing by amending the 2013 Act so that it does not apply to Jobseeker’s Allowance claimants who still had an appeal of a sanction decision under the ESE Regulations in the Tribunal

system when the Act came into force. It allows the appeal to be decided in their favour. It also gives the Secretary of State for Work and Pensions the power to revise or supersede the sanction decision in these cases. This will allow the Department for Work and Pensions to pay the sanctioned benefit amount, without the claimants having to progress their appeals through the Tribunal system.

- 7.8 The Department for Work and Pensions will ensure that individuals in scope of the Remedial Order are correctly identified and receive the payment to which they are legally entitled once the Remedial Order comes into effect.
- 7.9 The 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.

Consolidation

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

8. Consultation outcome

- 8.1 No formal consultation has been undertaken with the affected individuals. The Declaration of Incompatibility does not have any impact on the continuing validity of the 2013 Act. The Remedial Order does not affect benefit conditionality policy or the underpinning legislation which applies to Jobseeker's Allowance, Employment and Support Allowance, Income Support or Universal Credit claimants.
- 8.2 The Remedial Order will be laid before Parliament for an initial period of 60 days, during which Members of both Houses and other stakeholders may comment and make representations to the Department for Work and Pensions on the proposed Remedial Order. The Joint Committee on Human Rights will also scrutinise the order, take views from stakeholders and advise Government and Parliament on the appropriateness of the order. The Department will consider any representations made, review the advice of the Joint Committee on Human Rights and respond. The Order will then be laid for a further period of 60 days after which time, if approved, it will come into force.

9. Guidance

- 9.1 Once the Remedial Order comes into effect, the Department will provide internal guidance for staff to enable them to correctly identify and make the decision to pay the correct benefit amount to all the affected claimants and former claimants.

10. Impact

- 10.1 There is no impact on business, charities or voluntary bodies.
- 10.2 There is an impact on the public sector.
- 10.3 The Remedial Order restores claimants' right to a fair hearing and gives the Secretary of State for Work and Pensions the power to revise or supersede the sanction decision where the claimant had an appeal of a sanction decision (made under the ESE Regulations) still in the Tribunal system on 26 March 2013. This will allow the Department for Work and Pensions to pay the sanctioned benefit amount, without the claimants having to progress their appeals through the Tribunal system. This will reduce the administrative burden on the Tribunal system.

10.4 The expenditure to pay the benefit amount withdrawn through the sanction decision to these individuals falls below the £3 million threshold for a formal Impact Assessment. The estimated cost is £1.69-1.87 million. Therefore, a formal Economic Impact Assessment has not been prepared for this instrument.

11. Regulating small business

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

12. Monitoring & review

12.1 The Department will monitor and review the process of payment of the sanctioned benefit to ensure that individuals in scope of the 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.

13. Contact

13.1 Laura Smethurst at the Department for Work and Pensions can answer any queries regarding the instrument. Telephone: 0207 449 7499 or email: Laura.Smethurst@dpw.gsi.gov.uk