The Department for Work and Pensions

Proposed Draft Remedial Order to resolve an incompatibility under the European Convention on Human Rights (article 6(1)): The Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2018.

Presented to Parliament pursuant to Schedule 2 to the Human Rights Act 1998

Proposed Remedial Order to lie before both Houses of Parliament for 60 days, during which time representations may be made in accordance with Schedule 2 to the Human Rights Act 1998.

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Required Information (Paragraph 3(1)(a) of Schedule 2 to the Human Rights Act 1998)

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1. **Explanation of the incompatibility which the proposed Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2018 seeks to remove, including particulars of the relevant declaration, finding or order.**

   The Jobseekers (Back to Work Schemes) Act 2013 ("the 2013 Act") validates notifications and sanctions decisions made under the Jobseeker's Allowance (Employment, Skills and Enterprise Schemes) Regulations 2011 (SI 2011/917) ("the ESE Regulations"). The ESE Regulations were declared *ultra vires* in *R (on the application of Reilly and Wilson) v Secretary of State for Work and Pensions* [2013] EWCA Civ 66 ("Reilly No.1").

   In its judgment on 29th April 2016, in the case of *R (on the application of Reilly and another) 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 made a declaration under section 4 of the Human Rights Act 1998 that "the Jobseekers (Back to Work Schemes) Act 2013 is incompatible with Article 6(1) of the European Convention on Human Rights, as given effect by section 1 of the Human Rights Act 1998, to the extent set out in the judgment." The Court issued a Declaration of Incompatibility. All appellants had exhausted their rights of appeal or confirmed that they did not intend to appeal the decision by January 2017.

   In its judgment, the Court of Appeal found that the enactment of the 2013 Act gave rise to a breach of article 6(1) in the case of a plaintiff in the proceedings and "in the cases of all other JSA [Jobseeker's Allowance] claimants who had filed appeals against sanctions imposed under the 2011 Regulations prior to its [the 2013 Act's] coming into force." Without the effect of the 2013 Act, these claimants would have won their appeal when the ESE Regulations were declared *ultra vires*.

   The Declaration of Incompatibility affects a limited group of claimants: Jobseeker's Allowance claimants who had ongoing appeals against a sanction decision under the ESE Regulations and that appeal had not been finally determined, abandoned or withdrawn by 26 March 2013. The Department for Work and Pensions estimates that approximately 3789-4305 Jobseeker's Allowance claimants may fall into the scope of the Declaration of Incompatibility. Some of these individuals may now no longer be claiming Jobseeker's Allowance.

   The Declaration of Incompatibility does not have any impact on the continuing validity of the 2013 Act. The Court of Appeal found that the 2013 Act is effective in retrospectively validating the ESE Regulations, and notifications and sanctions made under these Regulations.

2. Reasons for proceeding under section 10 and making the Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2018.

The Secretary of State for Work and Pensions believes there are compelling reasons for using a non-urgent Remedial Order.

(i) Use of the Remedial Order procedure

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 for Work and Pensions estimates that approximately 3789-4305 Jobseeker's Allowance claimants may be affected by the Declaration of Incompatibility. Some of these individuals may now no longer be claiming benefit.

It is essential that the Government acts to ensure 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.

(ii) Use of the non-urgent procedure

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.

3. The reasons for making the Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2018 in the terms proposed.

The terms of the Declaration of Incompatibility are limited to Jobseeker's Allowance claimants who had an appeal of a sanction decision under the ESE Regulations in the tribunal system when the 2013 Act came into force on 26 March 2013, if that appeal had not been finally determined, abandoned or withdrawn. To restore their right to a fair hearing, the proposed draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2018 inserts section 1A into the 2013 Act. The effect of section 1A is that it requires the Secretary of State for Work and Pensions, Tribunal or Court to ignore the

effect of the 2013 Act for those Jobseeker's Allowance claimants who had filed an appeal against a sanction decision under the ESE Regulations by 26 March 2013, if that appeal had not been finally determined, abandoned or withdrawn by 26 March 2013. The Secretary of State for Work and Pensions, Tribunal or Court must find that the ESE Regulations were invalid and that the notices sent to Jobseeker's Allowance claimants advising them that they were required to take part in a programme within the Employment, Skills and Enterprise Scheme were inadequate. This allows the appeal to be decided in the claimants' favour. The Remedial Order 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.

Annex A

Draft Order laid before Parliament under paragraph 3(1)(a) of Schedule 2 to the Human Rights Act 1998 and subsequently under paragraph 2(a) of that Schedule, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2018 No.

SOCIAL SECURITY

The Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2018

Made - - - -	***
Coming into force - -	***

The Jobseekers (Back to Work Schemes) Act 2013(**1**) has been declared(**2**) under section 4 of the Human Rights Act 1998(**3**) to be incompatible with a Convention right(**4**).

The Secretary of State considers that there are compelling reasons for proceeding by way of remedial order(**5**) to make such amendments to the Jobseekers (Back to Work Schemes) Act 2013 as she considers necessary to remove the incompatibility.

In accordance with paragraph 2(a) of Schedule 2 to the Human Rights Act 1998, a draft of this instrument was laid before Parliament and was approved by resolution of each House of Parliament, a document containing a draft of this instrument having previously been laid before Parliament in accordance with paragraph 3(1)(a) of that Schedule.

Accordingly, the Secretary of State makes the following Order in the exercise of the powers conferred by section 10(2) of, and paragraph 1(1), (2) and (3) of Schedule 2 to, the Human Rights Act 1998.

Citation, commencement and extent

1.—(1) This Order may be cited as the Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2018 and comes into force on the day after the day on which it is made.

(2) This Order extends to England and Wales and Scotland.

(**1**) 2013 c. 17.
(**2**) By the Court of Appeal in the case of *R (on the application of Reilly and another) v Secretary of State for Work & Pensions; Jeffrey and others v Secretary of State for Work Pensions* [2016] EWCA Civ 413.
(**3**) 1998 c. 42.
(**4**) *See* section 1 of the Human Rights Act 1998 for the definition of "the Convention rights" and section 21(1) of that Act for the definition of "the Convention".
(**5**) *See* section 21(1) of the Human Rights Act 1998 for the definition of "remedial order".

Amendment of the Jobseekers (Back to Work Schemes) Act 2013

2. In the Jobseekers (Back to Work Schemes) Act 2013, after section 1 (regulations and notices requiring participation in a scheme) insert—

"**1A Certain appeals against penalties under the 2011 Regulations**

(1) This section applies where—

(a) the Secretary of State has made a decision imposing on a claimant for jobseeker's allowance a penalty for failing to comply with the 2011 Regulations ("the penalty decision"), and

(b) the claimant lodged an appeal against the penalty decision before 26 March 2013, and the appeal had not been finally determined, abandoned or withdrawn before 26 March 2013.

(2) If the Secretary of State revises the penalty decision under section 9 of the Social Security Act 1998, in making the revised decision, the Secretary of State must disregard subsections (1) to (6) of section 1 of this Act and subsection (12) of section 1 so far as it relates to those subsections.

(3) Subsection (4) applies where a tribunal has decided the appeal before this section comes into force.

(4) In a case where the tribunal decided to uphold the penalty decision (in whole or in part), the Secretary of State must make a decision superseding the tribunal's decision.

(5) In making a superseding decision under subsection (4), the Secretary of State must disregard subsections (1) to (6) of section 1 and subsection (12) of section 1 so far as it relates to those subsections.

(6) Section 10(1)(b) of the Social Security Act 1998 (power of the Secretary of State to supersede a tribunal decision) does not apply in a case where subsection (4) applies.

(7) A superseding decision made under subsection (4) is to be treated for all purposes as if it were a superseding decision made under section 10 of the Social Security Act 1998.

(8) Subsection (9) applies where, after this section has come into force, a court or tribunal is considering—

(a) the appeal mentioned in subsection (1)(b),

(b) an appeal against a revised decision made under section 9 of the Social Security Act 1998 by virtue of subsection (2), or

(c) an appeal against a superseding decision made under subsection (4).

(9) In considering the appeal, the court or tribunal must disregard subsections (1) to (6) of section 1 and subsection (12) of section 1 so far as it relates to those subsections.

(10) A revised decision made by virtue of subsection (2) and a superseding decision made under subsection (4) are to be treated as having effect from the date on which the penalty decision had effect (other than for the purposes of any rule as to the time allowed for bringing an appeal).

(11) In this section—

"the 2011 Regulations" has the same meaning as in section 1;

"court" means the Court of Appeal, the Court of Session or the Supreme Court;

"tribunal" means the First-tier Tribunal or the Upper Tribunal.".

Esther McVey
One of Her Majesty's Principal Secretaries of State
Department for Work and Pensions

Date

EXPLANATORY NOTE

(This note is not part of the Order)

This Order amends the Jobseekers (Back to Work Schemes) Act 2013 ("the 2013 Act") to remedy the incompatibility of the 2013 Act with a Convention right. The 2013 Act removed what would otherwise have been a conclusive ground of appeal from Jobseeker's Allowance claimants ("JSA claimants") who had pending appeals against a penalty imposed for failing to comply with the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 ("the 2011 Regulations") at the time that the 2013 Act came into force. This Order extends to England and Wales and Scotland.

In the case of *R (on the application of Reilly and another) v Secretary of State for Work & Pensions; Jeffrey and others v Secretary of State for Work Pensions* [2016] EWCA Civ 413, the Court of Appeal on 29th April 2016 made a declaration under section 4 of the Human Rights Act 1998 that the 2013 Act is incompatible with article 6(1) of the European Convention on Human Rights, as given effect by section 1 of the Human Rights Act 1998, in the case of a claimant in the proceedings and "in the cases of all other JSA claimants who had filed appeals against sanctions imposed under the 2011 Regulations prior to its [the 2013 Act's] coming into force".

In order to remove the incompatibility, article 2 of this Order inserts section 1A into the 2013 Act.

In the case of appeals against a penalty imposed on a JSA claimant for a failure to comply with the 2011 Regulations (a "penalty decision") which were pending appeals as at 26th March 2013 the Secretary of State may revise the penalty decision and, if the Secretary of State does so, this must be done on the basis that the 2011 Regulations were invalid or the notices sent to JSA claimants advising them that they were required to take part in a programme within the Employment, Skills and Enterprise Scheme were inadequate. This is the effect of providing that the Secretary of State must disregard subsections (1) to (6) of section 1 and subsection (12), because these are the provisions of the 2013 Act that validate the 2011 Regulations and provide for the adequacy of the notices.

Where a tribunal has already heard an appeal against a penalty decision and upheld the sanction (in whole or part) by the time that this Order comes into force, the Secretary of State must supersede the tribunal's decision, on the same basis. This power of supersession is similar to an existing power in section 10 of the Social Security Act 1998, and a decision made under this power is treated for all purposes as if it had been made under section 10 of the Social Security Act 1998. Where the Secretary of State does not revise the penalty decision or supersede the tribunal's decision, or where a claimant appeals that revision or supersession, a court or tribunal is able to overturn the penalty decision on the same basis.

A revised penalty decision or superseded tribunal decision will enable the entire penalty imposed to be repaid. An appeal against a penalty decision which is revised will lapse as a result of section 9(6) of the Social Security Act 1998.

This Order has retrospective effect as allowed by paragraph 1(1)(b) of Schedule 2 to the Human Rights Act 1998. If the Secretary of State decides to revise the penalty decision, or supersedes the tribunal's decision, that revision of the penalty decision or supersession of the tribunal's decision will have effect from the date that is the first day on which the penalty decision had effect, being the first day that the claimant's benefit was sanctioned. This allows the entire sanction to be repaid.

A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary or public sectors is foreseen.

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