



## **DOCTORAL THESIS**

### **Poor citizens**

### **social security law and the unemployed 1979 - 2012**

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# **Poor Citizens: Social Security Law and the Unemployed 1979 - 2012**

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*April 2018*

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**Abstract**

The rights-based principle of entitlement to social security as an inherent feature of social citizenship has been weakened by the welfare reforms asserted by each successive government administration since 1979. Rather than seek to ensure the efficient distribution of benefit, which can provide a minimum standard of economic security, the social security system seeks to shape the behaviour and conduct of those who are out of work. The contemporary system of entitlement seeks to condition claimants to participate in the paid labour market by prioritising the classic liberal doctrines of individual responsibility and obligation. This thesis addresses the manifestation of this trajectory through an examination of the politico-legal context which has underpinned the assent of social security legislation from 1979 – 2012 through the synthesis of a rich collection of primary and secondary sources. It provides an important account of the parliamentary negotiation process which precedes the passing of social security law and as such provides a critical and original insight into the intersection between politics and the law.



**Acronyms and abbreviations**

BA – Benefits Agency

BBC – British Broadcasting Corporation

CAB – Citizens Advice Bureau

CPAG – Child Poverty Action Group

CPS – Centre for Policy Studies

CSJ – Centre for Social Justice

DHP – Discretionary Housing Payment

DSS – Department of Social Security

DWP – Department for Work and Pensions

ECHR – European Convention on Human Rights/Convention for the Protection of Human Rights

ES – Employment Service

ESA – Employment and Support Allowance

EZ – Employment Zone

FC – Family Credit

HC Deb – House of Commons Debate

HL Deb – House of Lords Debate

IFS – Institute for Fiscal Studies

IB – Incapacity Benefit

IS – Income Support

HC – House of Commons

HL – House of Lords

IEA – Institute for Economic Affairs

IT – Information technology

JRF – Joseph Rowntree Foundation

JSA – Jobseeker’s allowance

MP – Member of Parliament

MR – Mandatory Reconsideration

NAO – National Audit Office

PIP – Personal Independence Payment

PSI – Policy Studies Institute

SB – Supplementary Benefit

SBC – Supplementary Benefit Commission

SF – Social Fund

SJPG – Social Justice Policy Group

SPA – Social Policy Association

SSAC – Social Security Advisory Committee

UB – Unemployment Benefit

UC – Universal Credit

WCA – Work Capability Assessment

WP – Work Programme

WRPA 1999 – Welfare Reform and Pensions Act 1999

WRA 2007 – Welfare Reform Act 2007

WRA 2009 – Welfare Reform Act 2009

WRA 2012 – Welfare Reform Act 2012

WTC – Working Tax Credit

**Access to Contents**

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# **PART 1: Theorising Social Citizenship**





## Chapter 1: Introduction

The legislative landscape over the last forty years provides an appropriate prism through which to examine the changing relationship between government and law-making, and social security legislation offers a unique insight into this symbiotic relationship. Contemporary governments increasingly enshrine policies into legislation that are based upon popular assumption and rhetoric, despite a proclaimed preference for evidence-based policies. While these drivers need not be mutually exclusive, where evidence gives way to ideologically informed populism the outcomes for 'unpopular' causes can be problematic. In many ways, the wide-scale welfare reform agenda undertaken by the UK Coalition government from 2010-15 and then by the Conservative government from 2015 onwards exemplifies this approach, as this thesis will demonstrate. This ideologically-driven political approach to the growing body of social security law has been on an upward trajectory for quite some time and has had significant implications for the unemployed citizen.

The issue of public spending on maintaining a safety net for those in need is a commitment that will always garner political debate. Reform of the 'welfare system' through the tightening and widening of eligibility rules – particularly via the intensification of conditionality - is often pinpointed in electoral campaigns as the key to decreasing the overall level of unemployment.<sup>1</sup> The implication of this argument is to elevate the view that unemployment is a personal problem which is the individual responsibility of the social security claimant, rather than a structural problem that the government has responsibility to address. During the time period examined by this thesis (1979-2012) there has been an increasing shift from an approach based upon the duty of state to support its citizens in times of need to a position concerned with the enforcement of a citizen's obligation to join the paid labour market. The focus of contemporary governments in the UK, Europe, the United States and elsewhere has been to activate unemployed claimants into work through the use of a mix of carrots (work incentives such as in-work credits or income disregards) and sticks (benefit sanctions in the case of non-compliance with work-related activities and close monitoring of claimants to ensure they comply with

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<sup>1</sup> Peter Dwyer and Nick Ellison, 'Work and Welfare: the rights and responsibilities of unemployment in the UK', in Marco Guigni and Paul Statham (eds.) *The Politics of Unemployment in Europe: Policy Issues and Collective Action* (Ashgate, 2009) pp. 53 – 66

activation measures).<sup>2</sup> Access to social rights have become predicated on providing claimants with the right to reasonable access to social security benefits<sup>3</sup> rather than unconditional access.<sup>4</sup>

The unemployed claimant is required to enter into a contractual agreement with the Department of Work and Pensions as their absence from the paid labour market is deemed unacceptable and worthy of management and control.<sup>5</sup> If that unemployed claimant fails to meet the terms of the contractual agreement they face a penalty in the form of a benefit sanction. The current treatment of the unemployed in the UK is set in a context of a long-drawn-out disassociation from the post-war interpretation of the welfare state as an institute designed to alleviate poverty and hardship, soften the sharp edge of capitalism and foster solidarity between fellow citizens. The idea of citizenship has been central to both the development of the welfare state, under William Beveridge's blue-print, but also to the critique of how social security has adhered to or departed from these underlying objectives. The thesis will examine the relationship of the modern social security system with these objectives, providing a new interpretation of the socio-legal and political development of social security law between 1979 – 2012. It will analyse the important intersections between politics and the law through an examination of developing legislative trends and their implication for a rights-based interpretation of social citizenship in particular.

Accordingly, this thesis provides a detailed and inter-disciplinary account of the theoretical, political and social influences on the development of social security law and policy since 1979. It provides an important account of the main legislative developments over the last four decades, tracing the political negotiation process that has underpinned each major piece of legislation throughout the parliamentary

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<sup>2</sup> Anne Daguere and David Etherington, *Welfare and Active Labour Market Policies in the UK: The Coalition Government Approach* in Hugh Bochel and Martin Powell, *The Coalition Government and Social Policy: Restructuring the Welfare State* (Policy Press, 2016), p. 201

<sup>3</sup> Social security is a devolved issue in NI, so claimants engage with the Department for Communities, formerly DSD. This thesis refers to DWP throughout the thesis for three reasons First, for the bulk of the time under examination in this thesis, NI was under direct rule and so the DWP was the department that determined policy, and secondly that even where devolved social security powers were operated in NI they were done on the basis of parity, and NI effectively replicated the policy and legislative developments in GB. Finally, the thesis takes a view of legislation from Westminster and accordingly attention focuses on the Cabinet Minister responsible for Social Security at Whitehall  
Neville Harris, 'Conditional Rights, Benefit Reform and Drug Users: Reducing Dependency?' *Journal of Law and Society*, 37 (2), pp. 223 – 36

<sup>5</sup> Mark Freedland and Desmond King, 'Contractual Governance and Illiberal Contracts: Some Problems of Contractualism as an Instrument of Behaviour Management by Agencies of Government (2003) *Cambridge Journal of Economics*, 27, pp. 465 – 477, p. 465

process. It begins its social narrative in 1974 when Britain faced a series of economic crises which led to significant challenge to Britain's continuing reliance on the Keynesian consensus. It was a period during which the Conservatives sought to regroup to consider their future direction. By 1979, when Margaret Thatcher became Prime Minister, the neoliberal scene was set thanks to the key influencers like Keith Joseph, who alongside Thatcher, set up the Centre for Policy Studies (CPS). It was during this period that the ideological seeds that have influenced the development of the social security system over the next forty years were sown. The thesis examines the development of the social security system from this point until the passing of the Welfare Reform Act 2012 (WRA, 2012), which the then Secretary of State for Work and Pensions, Iain Duncan Smith, hailed as the 'biggest shake up of the system for 60 years'.<sup>6</sup>

The implementation of the measures flowing from the WRA 2012 are beginning to embed themselves in this 'new' social security system and their full impact is not yet fully known. This thesis does not attempt to assess that impact but establishes the politico-legal context in which such reforms came into being, and which will continue to influence their impact as the changes are rolled-out. That development can be traced through to further primary legislation since the WRA 2012, which is beyond the remit of this thesis, but offers an additional critical opportunity to develop the trajectory mapped out in this thesis. In brief, the Welfare Reform and Work Act 2016 further decreases social security provision through more regressive measures that dictate the maximum amount of benefit a claimant can receive, including through highly controversial measures such as the 'two-child limit' for entitlement to Child Tax Credit and Universal Credit and the abolition of the 'work related activity component' in Employment Support Allowance.<sup>7</sup> There is certainly scope to conduct further research on the latest changes to the system and indeed the implications for the preservation of social rights, and it is hoped that this thesis will provide a foundational framework from which further evaluation can be developed. Contextualising the analytical approach to social security is the political and legal challenge to the Marshallian interpretation of social citizenship, which prioritises a universal right to economic welfare and security, interpreted in this thesis (as in the

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<sup>6</sup> Iain Duncan Smith, Welfare Reform Bill: restoring the welfare system to make work pay (DWP Press Release, 17 February 2011)

<sup>7</sup> See Welfare Reform and Work Act 2016, Ch. 7 (Explanatory Notes)

academic literature that supports it) as social security entitlements.<sup>8</sup> Chapter two explores how T.H. Marshall's identification of the concept of social citizenship, developed in the 1950s, continued to develop. As discussed in detail in the pages that follow, the ascendancy of neo-liberal Conservatism in the 1970's and 1980's led to a surge in the value placed on individualism and the requirement that people strive to become 'active citizens'.<sup>9</sup> As such, in order to claim social security entitlement, citizens have increasingly become subject to conditional obligations that seek to positively shape individual behaviour.

In order to interpret this shifting trajectory the thesis further links the erosion of rights based entitlement to the rise of a number of other ideologically driven philosophies which have emerged in line with the evolution of modern capitalism and the shifting socio-economic landscape in western democracies:<sup>10</sup> for example, the emergence of what Offe termed 'administrative-re-commodification' which speaks to contemporary governments' efforts to activate claimants through welfare-to-work programmes.<sup>11</sup> Activation is commonly achieved through the contractual engagement of social security claimants in 'quasi-markets' which seeks to ensure the unemployed are work ready.

This phenomenon links to the rise of New Public Management (NPM) which has developed a significant role in shaping the modern governance of welfare. The dominance of NPM has contributed to the habitual use of contractual arrangements in determining the relationship between the government and the citizen.<sup>12</sup> All-in-all the thesis places the contextual development of the contemporary social security system within a rich theoretical terrain which seeks to determine the content of ideological concepts and their role in influencing welfare reform in the period under examination.

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<sup>8</sup> TH Marshall, 'Citizenship and social class' in TH Marshall and T Bottomore, *Citizenship and Social Class* (London: Pluto, 1992)

<sup>9</sup> See for example, Dawn Oliver, 'Active Citizenship in the 1990's (1991) Parliamentary Affairs

<sup>10</sup> See chapter 2

<sup>11</sup> See Claus Offe, *Contradictions of the Welfare State* (Hutchinson, 1984)

<sup>12</sup> See for example, Michael Barzelay, *Breaking Through Bureaucracy: A New Vision for Managing Government* (University of California Press, 1992); Rune Ervik, Nanna Kildal and Even Nilssen (eds.) *New Contractualism in European Welfare State Policies* (Ashgate, 2015)

***Thesis Aims and Objectives:***

It is the central aim of the thesis to evaluate whether the political drive since 1979 has been to create a social security system which seeks to recondition the out-of-work to be economically self-sufficient.

To meet this aim, the thesis investigates the vital distinction between the essence of the politics that informed the post-war settlement and those that currently dictate the treatment of those who are out of work. The thesis examines the divergence from TH Marshall's rights-based understanding of social citizenship, which is based on his analysis of the development of citizenship rights in Britain during the first half of the twentieth century, towards the current conceptualisation of citizenship, which has been shaped by neo-liberal, communitarian and managerial perspectives on social security, that see rights predicated on responsibilities. The thesis concentrates on the changing conditions for those who are unemployed: those who are need of state security but who are not discharging their responsibility as active worker citizens. This involves an examination of the government's move towards the enforced participation of the unemployed in the labour market through legal and administrative contractualism, which dictates that claimants must fulfil increasingly onerous conditions before they are provided with an inadequate entitlement to reach an acceptable standard of living. The thesis will further examine the rise of penalties for those who do not adapt their behaviour in order to conform to the stock image of the active citizen.

Central to this exploration is the analysis of developing legislative trends which reflect the increasing political powers of the Secretary of State for Work and Pensions to dictate the direction of social security law by way of the enactment of skeleton primary legislation and the subsequent introduction of frequently amended secondary legislation. This will provide an important insight into how politics intersects with the development of legislation and its implications for the unemployed claimant.

***Research questions***

In order to meet the aims and objectives outlined the thesis is framed around the following research questions:

1. To what extent have contemporary interpretations of social citizenship moved away from T.H. Marshall's post-war rights-based model of social citizenship?

This question focuses on the shifting approach to the design of the social security system over the last 40 plus years. The author uses T.H. Marshall's theory of social citizenship as a base from which to explore the erosion of the principle that every individual should be entitled to a 'modicum of economic welfare and security'.

2. To what extent has political ideology, as espoused by the three main government administrations from 1979-2012, influenced contemporary interpretations of social citizenship?

This question seeks to tease out the philosophical and ideological influences on each government administration in the UK between 1979 – 2012 and assess the implications of the manifestation of such political ideologies on T.H. Marshall's interpretation of social citizenship. It also seeks to determine how political ideology has shaped contemporary interpretations of social citizenship and focuses on providing an analysis of the trajectory of change in relation to social citizenship.

3. How has the intersection of politics and the law impacted on the development of social security legislation?

This question focuses on providing an analysis of how political ideology, and political rhetoric often espoused in the House of Commons, has shaped the development of social security legislation (primary and secondary). It also provides an opportunity to examine the role of common law in shaping the development of law and the challenges faced by judges when forced to consider the government's allocation of public funds.

4. What legislative trends have emerged in the development of social security law and what are the possible implications for unemployed claimants?

The previous research questions are designed to lead to this final question, which focuses on providing an examination of legislative trends, which have manifested as a result of the increasingly politicised ideological drive in the development of social security law. The legislative trends identified attribute

additional decision making powers to the Secretary of State for Work and Pensions and erode the democratic decision making power of parliament. Social security legislation has changed repeatedly and rapidly in the course of the period under examination to keep pace with the changing interpretations of social citizenship which has had significant implications for the government's treatment of the unemployed. The thesis will assess the increasing responsibilities that the unemployed claimant must fulfil before receiving access to social security entitlement and more specifically, the legislative framework that provides for such a conditional approach.

***Importance and Contribution of the Research:***

Social security law remains an academic discipline which is relatively neglected. This is despite the fact that this highly regulated system of benefit entitlement and administration supports 20 million claimants in Britain – 6.8 million of whom are of working-age<sup>13</sup> – and generates considerable legal complexity. A hugely significant proportion of citizens engage with the social security system across their lifetimes and are subject to conditions of eligibility and bureaucratic administrative processes, providing an abundance of legal issues for academic lawyers to get their teeth into. This is not to say the subject area is completely neglected: there is a relatively small-pool of instrumental researchers who have built significant contributions to legal knowledge.<sup>14</sup> . The ambition of this thesis is to give something back to the scholars who have helped develop the field within and beyond law, building on their original contributions to knowledge and providing a new dimension to their work.

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<sup>13</sup> Department for Work and Pensions, Quarterly Benefits Summary (21 February 2018) < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/682581/dwp-quarterly-benefits-summary-february-2018.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/682581/dwp-quarterly-benefits-summary-february-2018.pdf)> (accessed, March 2018)

<sup>14</sup> The author is in the desirable position whereby her primary supervisor, Professor Gráinne McKeever is an important contributor to the field and whose work and passion has provided significant motivation for the content which follows. See for example, Gráinne McKeever, 'Legislative scrutiny, co-ordination and the Social Security Advisory Committee: from system coherence to Scottish devolution (2016) *Journal of Social Security Law* 23(3), pp. 126-149; Gráinne McKeever, 'Balancing rights and responsibilities: the case of social security fraud' (2009) *Journal of Social Security Law*, 16(3), pp. 139-168; , Gráinne McKeever, 'Social Security as a Criminal Sanction' (2010) *Journal of Social Welfare and Family Law* 26 (1), pp. 1-16 and the many 'news' articles provided in her role as assistant editor of the *Journal of Social Security Law*. Other key contributors include Some of the key socio-legal contributors who have greatly resourced the knowledge base for the research include, Professor Michael Adler, Professor Neville Harris, Professor Nick Wikeley, Simon Rahilly, Dr Emma Laurie, Dr Mark Simpson, Dr Philip M. Larkin, Dr Chris Grover, Dr Anne Dagurerre, and Professor Roy Sainsbury.



Happily, beyond the relative paucity of legal scholarship lies a further rich source of social security scholarship from social policy, public policy, economics and political science. This thesis synthesises a large volume of material from across social science disciplines in order to provide a rich and detailed account of the development of social security law between 1979 – 2012. The narrative provides a double-pronged approach to the analysis of each UK government administration's time in power. First, providing a detailed account of the social, economic, theoretical and political context of welfare reform and secondly providing an intricate analysis of how the context has translated into the development of social security legislation through a detailed examination of the main pieces of primary and secondary legislation. There has not been an academic resource that brings together a collective analysis of the reforms to social security, placing them within a socio-legal and political context, since the publication of Neville Harris' 'Social Security Law in Context' which ends at the year 2000, when the New Labour government were still in power.<sup>15</sup> This thesis adopts a similar approach to Harris, taking a view of the entire period (1974 – 2012) and contextualising the legislative developments within the context of changing political influences.

Enriching the narrative is an integrated analyses of primary sources including hours of parliamentary debates in the House of Commons and parliamentary Committees. The thesis draws on a rich vein of parliamentary reporting, including Select Committee reports, government commissioned research reports, political manifestos and the critical responses provided to the government by the Social Security Advisory Committee (SSAC). The integration of primary sources provides a unique insight into the shifting and politically driven re-interpretation of social citizenship. This methodology provides a valuable sub-text to the socio-legal and political analysis of social security policy and legislation provided by academics and policy experts. There is limited research in the field of social security law which provides such a detailed insight into the parliamentary process and therefore the synthesis of this political material, alongside academic scholarship and legal analysis offers an original contribution to understanding the critical intersection between politics and the law.

Furthermore, there has been limited analysis on the influence of individual personalities who have shaped the direction of welfare reform and the subsequent legislation. This thesis has focused on the integral role played by such key political

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<sup>15</sup> Neville Harris, *Social Security Law in Context* (Oxford University Press, 2000)

figures: Margaret Thatcher's right hand man, and founder of the Centre for Policy Studies, Sir Keith Joseph; New Labour's Chancellor of the Exchequer, Gordon Brown; and the Coalition Government's Secretary of State for Work and Pensions, Iain Duncan-Smith. Each of these men have made a significant impact on the ideological direction of welfare reform, as this thesis demonstrates. Where possible the thesis has drawn parallels between the approaches of these political elites – particularly notable in this regard are the similarities between the mind-set and ideological approach of Keith Joseph and Iain Duncan-Smith as discussed in Chapter 9.

In theoretical terms, the thesis articulates the continued relevance of Marshall's promotion of the individual's social right to social security entitlement that is entirely distinct from ideological motivations to reform social security, building on and developing academic scholarship in this area. It is accepted by the author that we exist in an entirely different era from the 1950's when Marshall's thesis was popularised, and indeed it is also accepted that his account is not without its flaws, such as its failure to recognise women and children.<sup>16</sup> However, by demonstrating how far the polity have moved from this central moral principle of basic social rights in its administration of the contemporary social security system the thesis underlines the need for a collective advocacy of a return to a system which does not stigmatise those who must rely on public funds. Marshall's vision of social citizenship has achieved significant staying power due to its capacity to provide a framework which promotes entitlement while acknowledging the importance of responsibility.<sup>17</sup> The thesis demonstrates this critical theory through the examination of social security entitlements for the unemployed, culminating in the examination of Universal Credit, which itself embodies the zenith of forty years of ideologically driven reform that has sought to responsabilise the unemployed citizen.

### ***Structure of the Thesis***

The thesis is divided into five parts. As well as the current Chapter, Part 1 also provides a critical overview of the theoretical landscape which informs the contemporary concept of social citizenship. Part 2 of the thesis examines the period 1974 to 1997. Chapter 3 analyses the retreat from the Keynesian economic consensus which prioritises the achievement of full-employment and the subsequent

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<sup>16</sup> Ruth Lister, *Citizenship: feminist perspectives* (Palgrave, 2003)

<sup>17</sup> Ciara Fitzpatrick, Grainne McKeever and Mark Simpson, 'Conditionality, discretion and T.H Marshall's 'right to welfare' (forthcoming, 2020) *Journal of Social Welfare and Family Law*.

ascendency of the neoliberal approach. The latter ideology interpreted Beveridge's influence as denying a role for competition and the market, and thus sought to promote the classic liberal notions of individual responsibility and self-discipline. There is a specific focus on the role of Sir Keith Joseph and the CPS in the development of the Thatcherite agenda, and a nod to parallel developments in social security, namely the establishment of the Supplementary Benefits Commission which under the leadership of David Donnison sought to minimise discretion in the decision making process. The second part of the chapter looks to the considerable programme of welfare reform undertaken by Secretary of State, Norman Fowler in 1985 and subsequent regulatory reforms implemented by John Moore which reflected the influence of neoliberal scholars such as Charles Murray. The author undertakes a critical analysis of the reforms, paying particular attention to their ability to increase the Thatcher government's capacity to control the behaviour of claimants. Chapter 4 draws on the theory identified to analyse the Major government's introduction of Jobseekers Allowance, which marked the arrival of conditionality in primary legislation. The author draws on political commentary, parliamentary contributions and reaction to the proposals from charitable organisations and the SSAC to provide an important insight into the developing legislative trends identified in the new measures, such as the laying of 'skeleton legislation', which would underscore the modern claiming process for the unemployed.

Part 3 focuses on the New Labour administration, stretching from 1997 to 2010. Chapter 5 examines the ideological drivers underpinning New Labour's approach to welfare reform. There is a particular focus on Anthony Giddens construction of a 'third way' and consequently its bearing on the development of social security policy and legislation. Chapter 5 also addresses the problem of growing complexity and the implication for governance of the social security system. Again, the chapter points to the further entrenchment of regulatory power and in turn its effect on the daily administration of welfare. It is asserted that by the end of New Labour's tenure it was becoming clearer that social security rules and processes were a reflection of political ideology rather than simply seeking to effect a fair and efficient service to claimants exercising their social right to claim benefits. Chapter 6, 7 and 8 encompasses a detailed legislative analysis which aims to place the frequency of reform of welfare into its socio-legal and political context in order to reveal the disparity between New Labour's relatively narrow parameters for reform and the increasing volume of delegated rules. As well as an examination of the primary legislation passed which

includes the Welfare Reform and Pensions Act 1999, the Welfare Reform Act 2007 and the Welfare Reform Act 2009, the author attempts to piece together the interim regulatory reforms relating to the unemployed. There is also an examination of the administration's activation attempts, including the well-known New Deal programmes. Integrated into the narrative of both chapters in this section is a theoretical commentary which identifies the implications of the measures for the Marshallian brand of social citizenship.

Part 4 examines the Coalition era, which the Conservatives and Liberal Democrats held power from 2010 - 2015. Elected in the midst of a crippling world economic recession the Conservative-Liberal Democrat government were responsible for making the 'longest, deepest sustained period of cuts to public services spending at least since the second world war' in the name of cutting the fiscal deficit.<sup>18</sup> The main casualty was, and remains, the social security budget. Chapter 9 and 10 detail the political and ideological environment which produced the WRA 2012. Chapter 9 examines the political and moral influence of Iain Duncan-Smith and his think-tank the Centre for Social Justice on the development of social security policy and legislation. As noted above, the author draws comparisons with the ideological principles asserted by Keith Joseph, Margaret Thatcher and the CPS and declares the ideological direction of the Conservative-led Coalition as a 'new dawn for the new right'. Chapter 10 examines the genesis of Universal Credit (UC) in the context of major cuts to social security and the subsequent implications for the governance of the new system of benefits. The narrative is underpinned by a continued commentary on the disintegrating role of social citizenship in the provision of welfare rights to unemployed claimants. There is also an assessment of the consequential function of social control in managing those not in paid work - specifically the meteoric rise in benefit sanctions that occurred during the Coalition era. In a similar vein to Chapter 6, 7 and 8 in the New Labour section, Chapter 11 and 12 analyses the parliamentary and legislative process encasing the Coalition's activation regime and the passing of the WRA 2012. It seeks to determine whether the contemporary social security system has changed to such an extent that it no longer can be said to encompass Marshall's principle that social provision should provide a minimum level of economic welfare and security for all.<sup>19</sup> Part 5 consists of the conclusion which reviews the culmination of the politically based legislative trends developed

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<sup>18</sup> Institute for Fiscal Studies director Robert Chote made this comment following the publication of the emergency budget

<sup>19</sup> Marshall above, n. 8

throughout the tenure of the three political administrations under discussion and the implications for the trajectory of social citizenship.

### ***Approach to the Research***

The research approach for this thesis developed organically. The author had initially set out on a journey towards qualitative research focusing on the implications of Universal Credit on women in Northern Ireland, but due to political stagnation and the subsequent delay to the roll-out of the new working-age benefit, the empirical base from which to examine this issue was not available. While this was initially frustrating, it provided an opportunity to consider the basis on which Universal Credit was being developed and the fundamental underpinnings of social security that had led to this legislation. The political stasis in Northern Ireland that delayed by three years the introduction of legislation for Universal Credit here generated questions about how social security was being used to re-frame long standing political differences, in a polity where social policy had previously failed to be a dominant force for legislative reform.<sup>20</sup> The exploration of why social security policy was being resisted or shaped in the way that it was provided a bridge between the original research focus and the new research questions. Welfare reform became a mask for political disputes on traditional party lines in Northern Ireland but these superficial differences revealed in Northern Ireland political objections to the proposed Welfare Reform Bill (2012-15) prompted an examination of the development of social security law that had led to the confrontational position represented by the highly conditional Welfare Reform Act 2012. This in turn provided a critical focus to examine the core issue examined by this thesis of the intersection of law and politics that opened up research questions beyond both the Welfare Reform Act 2012 and the localised difficulties with agreeing on welfare reform. Fundamental questions were raised about the extent to which the 2012 legislation was connected to core concerns with social citizenship, the influence of politics more generally on social security developments as well as examining the specific issue of how the unemployed were impacted by legislative developments to manage their detachment from the welfare state.

This new focus meant that there was no restriction on the reading material digested by the author, covering modern and historical socio-legal texts and journals, social policy, political science and sociology. It was this interdisciplinary examination from

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<sup>20</sup> Ann Marie Gray and Derek Birrell, Coalition Government in Northern Ireland: Social Policy and the Lowest Common Denominator (2012) *Social Policy and Society*, 11 (1) pp. 15-25

the relatively simple starting point of reading widely on issues relevant to how social security was perceived politically, that piqued a curiosity in examining the increasing political impetus driving of welfare reform and consequently the propensity of ideologically driven rhetoric to influence legislation.<sup>21</sup> As well as looking to secondary sources, as detailed below, the author exploited Hansard debates as a primary source. It is in parliament where law is made and it is the primary site of intersection between the political and the legal. It is from here that political ideology transfers to rhetoric, and where rhetoric can be seen to directly influence the development of social security legislation. Exploration of Hansard and Select Committee transcripts provided a rich seam of primary material which greatly enriches the secondary source material and provides the foundation of a methodological approach which can be further be refined and applied to future research.

In the round, it can be said that the research approach adopted for the thesis is socio-legal, based on the central principle that law and society are inextricably tied.<sup>22</sup> This rationale remained constant throughout the research process, as it was only through a detailed understanding of the social, economic and political context that the author could develop an insightful and useful analysis of social security legislation introduced between 1979 – 2012. In tandem, the analysis of the primary and secondary legislation provides an equally valuable picture of the social context, for contained in the smallest detail of social security regulations are the real-life implications of what maybe conceived as mere legal technicality.<sup>23</sup> This core starting point has been strengthened by the ‘epistemological pluralism’ present in the socio-legal approach which provided ample space for the author to draw from a number of theories and social science disciplines to study the legislative process and its implications for the social rights of the unemployed.<sup>24</sup> This is reflected in the

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<sup>21</sup> Particularly notable are the insights of Nicholas Timmins, whose comprehensive analysis documented in *The Five Giants: A Biography of the Welfare State* has provided a vital insight into the political development of the social security system Nicholas Timmins, *The Five Giants: A Biography of the Welfare State* (William Collins, 2017)

<sup>22</sup> Dennis Galligan, ‘Legal Theory and Empirical Research’ in Peter Cane and Herbert M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010)

<sup>23</sup> See Roger Cotterell, ‘Why Legal Ideas Be Interpreted Sociologically?’ (1998) *Journal of Law and Society* (25), p. 175 and Jed Meers, *Reconceptualising Home: A Study of the UK Bedroom Tax* (PhD Thesis: University of York, 2018), p. 223

<sup>24</sup> Mariana Valverde, ‘Time Thickens, Takes on Flesh’: Spatiotemporal Dynamics in Law’ in Iru Braverman et al (eds), *The Expanding Species of Law: A Timely Geography* (Stanford University Press, 2014) p. 54 as cited by Meers, n. 23 above, p. 224.

structure of the thesis, whereby each government administration from 1979 - 2012 is examined through two separate yet interconnected lenses. The first part of the analysis focuses on the social, political and economic context of reform, while the second part drills down into the legislative process – focusing on the outcome of parliamentary process on the development and passing of social security legislation. In this way, the dual analysis exemplifies a socio-legal research approach.

### ***Scope of the Research***

The author contained the scope of the research to examine the development of social security policy and legislation in the UK. There are two main reasons for this decision. First, an examination of the UK welfare state fits appropriately with choice of Marshall as the theoretical anchor for the thesis, as his interpretation of the development of social citizenship is based on the genesis of the British welfare state and the legislation which indicated the development of social rights in the 19<sup>th</sup> and 20<sup>th</sup> Century.<sup>25</sup> As explained above, the author has used Marshall's depiction as a baseline from which to examine the changing interpretation of social citizenship from 1979 – the beginning of the 'new right project of the 1980's' which, as Lister argues, sought to undermine the post-war concept of citizenship as rights – through to the 21<sup>st</sup> Century whereby social rights have arguably been eroded beyond the point of recognition.<sup>26</sup> The focus on the UK system of social security allowed the author to contribute to the academic analysis of the 'post-Marshallian' trajectory of social citizenship which flows from Marshall's own chronological analysis.

Second, the author sought to focus on the influence of political ideology on primary and secondary legislation, the latter has become the key instrument for the implementation of a system of conditional entitlement for the unemployed.<sup>27</sup> The author's analysis of secondary legislation provides important evidence of the influence that political ideology has on the development of social security law. For example, the frequently amended nature of secondary legislation pointed to the increasing rate at which the government has sought to tighten conditionality requirements for claimants who are out of work. Understanding the parliamentary procedures underpinning this process required detailed attention and space for examination and offers an original contribution to research through a detailed

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<sup>25</sup> Marshall, n. 8 above

<sup>26</sup> Ruth Lister, *The Exclusive Society. Citizenship and the Poor* (CPAG, 1990), p. 22.

<sup>27</sup> McKeever, n. 14 above

analysis of major contemporary legislative trends in social security law. Thus, the author chose to limit the scope of the research to legislative developments coming from Westminster.

The author acknowledges the value of alternative approaches, and thus the limitations of focusing solely on the legislative process in the UK. There is likely to be value, for example, in the development of a comparative framework, which might consider the simultaneous influence of political ideology on social security law in a comparable state that has had, in a similar vein, sought to condition its unemployed citizens.<sup>28</sup> This method would equally establish a picture of social security development in the United Kingdom which could provide an important insight on the implications for the unemployed and how they differ from other states. The trade-off, however, would have been the detailed analysis of UK legislative developments, particularly at the micro-level of social security regulations. It was this exercise that effectively exposed the manifestation of legislative trends which provide evidence of the increasing correlation between political ideology and the trajectory of social security law, which has shown a steady move away from TH Marshall's post-war interpretation of social rights.

The author chose to focus on the 'unemployed' which is in itself very much a socio-political construct which has been subject changing interpretation over the last forty years. As Whiteside explains, the term unemployment reflects 'normative political ideologies about how labour markets should operate – and, thereby, the treatment of those who cannot find work'.<sup>29</sup> This thesis shows the expansion of contemporary government's interpretation of who is considered to be unemployed and who requires intervention to ensure co-operation with the paid labour market. Through the course of the period under examination in this thesis, the Jobseekers Act 1995, was primarily introduced to exert increasing conditional requirements on jobseekers, this activation approach was eventually expanded (in great part through secondary

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<sup>28</sup> See for example, Jochen Clasen and Nico A. Siegel, *Investigating Welfare State Change: The 'Dependent Variable Problem' in Comparative Analysis* (Edward Elgar, 2007); Julia Griggs and Martin Evans, 'Sanctions with Conditional Benefits Systems: A Review of Evidence' (JRF, 2010) <<https://www.jrf.org.uk/sites/default/files/jrf/migrated/files/conditional-benefit-systems-full.pdf>> (accessed, October 2018); Evelyn Z. Brodtkin and Gregory Marston, *Work and the Welfare State* (Georgetown University Press, 2013); Anja Eleveld, 'Work-Related Sanctions in European Welfare States: An Incentive to Work or a Violation of Minimum Subsistence Rights?' (2016) Access Europe Research Paper (2016/01); Michael Adler and Lars Inge Terum 'Austerity, conditionality and litigation in six European nations' in Stefano Civitarese Matteucci and Simon Halliday, *Social Rights in Europe in an Age of Austerity* (Routledge, 2017)

<sup>29</sup> Noel Whiteside, *Constructing Unemployment: Britain and France in Historical Perspective* (2014) *Social Policy and Administration*, 48 (1), pp. 67-85, p. 68



legislation) to those who were incapacitated and disabled, to lone parents and carers of young children, to older workers and most recently through the Welfare Reform Act 2012 to those who are already working part-time in the formal labour market.

### ***Contribution of Primary Sources***

‘The history of parliamentary debates is similar to the description given of the history of a newspaper. The first day it is read with eagerness, the next day it is thrown away; after the lapse of some years it is worth its weight in gold. The (ancient) volumes of Hansard, imperfect as they are, are often intensely interesting reading for the light they throw on dead statesmen, or past conditions of society, legislation and controversies’.<sup>30</sup>

*Lord Cadogan, 1888.*

The above comment captures the importance of primary resources produced by parliament to the analysis within the thesis. The time spent sifting through parliamentary transcripts was invaluable in understanding the political and ideological drivers of social security policy and legislation. Not only does the narrative contained in parliamentary papers provide significant insight into the presence and extent of ideology in the law-making process, but it also provides a snapshot of the social, political and economic context which produced the conditions for the development of legislation which has sought to responsibiize the unemployed citizen. There was not much that the author did not look at in terms of the parliamentary process. However, particularly important were the parliamentary debates, Committee meetings and parliamentary submissions pertaining to the primary legislation under examination in the thesis.<sup>31</sup> There was comparatively less focus on written and oral parliamentary questions, with the main focus being on live exchanges between political contemporaries in parliament and at Select Committee meetings. Live exchanges take place in less controlled environments and thus arguably provide a greater insight into politicians’ views and the extent that they have been influenced by pervasive ideology.

The commentary and responses of the Social Security Advisory Committee (SSAC) and the House of Lords Delegated Powers and Regulatory Reform Committee as well

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<sup>30</sup> Lord Privy Seal, in a draft report submitted to the Joint Committee of the British Parliament on Debates and Proceedings in Parliament. Lords Sessional Papers, XV, 1888

<sup>31</sup>The Social Security Act 1986; The Jobseekers Act 1995; The Welfare Reform and Pensions Act 1999; The Welfare Reform Act 2007; The Welfare Reform Act 2009; The Welfare Reform Act 2012

as government commissioned research papers have played an invaluable role in understanding the scope and implications of statutory instruments which contain much of the operational detail encompassed in the changes to social security over the period under examination. The author relied quite extensively on the reports and responses of the SSAC, mainly down to its unique responsibility to perform a mandatory scrutiny of most of proposed regulations that underpin the social security system.<sup>32</sup> This provided the author with important details of secondary legislation, much of which was not subject to the formal parliamentary scrutiny in the House of Commons and thus was not recorded elsewhere. This primary resource was crucial in supporting the author to identify and analyse the growing propensity of the government's bestowal of legislative power to the Secretary of State of Work and Pensions and the implication of this for the development of social security law.

The author focuses specifically on the implications of the government's rhetorical and ideological position for the unemployed and so in the course of examining primary resources attention was placed on the concepts and terminology identified by academic literature as characterising the trajectory of change for this particular group. The author developed a bank of key search terms which allowed an efficient identification and sift through transcripts, papers and government research reports.<sup>33</sup>

### ***Primary Sources Pre-2007***

For the examinations of the parliamentary reform pre-2007 the Hansard archive site was used, which provides the public with access to digitised editions of Commons and Lords debates from 1803 – 2005.<sup>34</sup> As well as providing a library of full sitting day transcripts, the archive site provides a number of useful filter functions. For example, the author was able to select a particular decade to focus on, from which point it is possible to filter again to focus on a particular year and month. The ability to enter search terms in the parameters of the selected timeframe – this subsequently provides all of the contributions from MPs (including written and oral questions) where the search term is mentioned. In addition, it provides a list of those politicians who have most frequently used the terms and a number denoting how many times it

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<sup>32</sup> Social Security Advisory Committee, 'Our Responsibilities' <https://www.gov.uk/government/organisations/social-security-advisory-committee/about#our-responsibilities> (accessed, October 2018)

<sup>33</sup> Key search terms included: conditionality; contract; Jobseekers Allowance; activation; employment; incapacity; sanctions; regulations; work; means-tested and eligibility

<sup>34</sup> Hansard 1803 – 2005, <<http://hansard.millbanksystems.com/>>

has been cited. It is also possible to search for the contributions made by particular politicians, enabling a strategic focus on those politicians that the literature identified as being key figures in the parliamentary process and important architects in the process of welfare reform. The author was also able to access research reports commissioned by the Department of Work and Pensions via the National Archives (1990 – 2013), which provide access to all published reports by year.<sup>35</sup>

This resource includes a search bar for key words, and provides a function to identify reports organised by subject. Access to this online resource was particularly useful in understanding the key political drivers behind secondary legislation between the period of the Welfare Reform and Pensions Act 1999 and the Welfare Reform Act 2007. During this period conditionality measures were predominantly passed at Secretary of State level through the insertion of supplementary legislation. The measures were often road-tested via the introduction of pilot programmes. The author was able to access the pilot scheme evaluation reports which included important insights into the government's rationale for initiating the schemes and the consequent activation regulations which resulted. Access to this resource was particularly important in developing an understanding of the road to the WRA 2007, alongside the scrutiny of regulations published by the SSAC. Furthermore, the author was able to access budget speeches made pre-2010 via the National Archives.<sup>36</sup> The budget proclamations are usually where the Chancellor of the Exchequer provides details of the scope of welfare reform during the next parliamentary year. This source was particularly instructive in the examination of the predominant role played by Gordon Brown in the shaping of social security policy and legislation, as discussed further in Chapter 5.

The analysis of the primary legislation benefited from consultation responses from welfare organisations and policy think tanks. It was much easier to access such responses online for the purposes of later legislation (generally post-1999). In regards to the early legislation, such as the Social Security Act 1986, the narrative benefited greatly from printed pamphlets published by welfare organisations such as the Child Poverty Action Group (CPAG) and Youthaid which provided responses to

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<sup>35</sup> The National Archives, Department for Work and Pensions, Research Papers 1990 – 2013 <<http://webarchive.nationalarchives.gov.uk/20130314010347/http://research.dwp.gov.uk/asd/asd5/rrs-index.asp>> (archived 14 March 2013)

<sup>36</sup> The National Archives, HM Treasury, Budget speeches 1999 – 2010 <[http://webarchive.nationalarchives.gov.uk/20100407170757/http://www.hm-treasury.gov.uk/bud\\_budget98\\_speech.htm](http://webarchive.nationalarchives.gov.uk/20100407170757/http://www.hm-treasury.gov.uk/bud_budget98_speech.htm)> (archived 7 April 2010)

the reform proposals contained in the government Green Paper and depicted the implications of the trajectory of the social security policy for benefit claimants at that time.<sup>37</sup> The author was able to access many of these primary resources in the university library and by using interlibrary loans. Also integral for the earlier years under examination were printed versions of SSAC reports (which were not available online).<sup>38</sup> While the author has endeavoured to encompass a large volume of literature and response from a variety of organisations, it is important to acknowledge that narrative from other key voices has undoubtedly been missed. In respect of earlier legislative, a key reason for omissions were the difficulties associated with forming a complete picture of those organisations who has produced responses. A systematic approach to key word searches in relevant library databases, and cross-referencing from non-academic literature, including from policy think tanks and political manifestos, identified the main sources drawn on for this thesis. This further allowed the author to search for references to organisations in Hansard, and identify where politicians had used organisations responses to support their own arguments, but inevitably there will be omissions in the huge landscape of literature that provides insight into the research questions. In particular, the absence of examination of important voices, particularly those in the third-sector, such as the Trade Union Congress, Oxfam, Save the Children, Scope, CBI, and left leaning influential think tanks such as the Institute for Public Policy Research arguably did not gain the prominence that they could have in the thesis. These omissions are not deliberate or intentional, but inadvertent and unfortunate.

### ***Primary Sources Post-2007***

In relation to the WRA 2007, WRA 2009 and WRA 2012, the author accessed parliamentary transcripts via the Westminster parliament website ([www.parliament.uk](http://www.parliament.uk)). This provided access to the transcripts pertaining to each stage of the welfare reform Bill under examination. The author systematically went through each transcript (at all levels of scrutiny) copying and pasting the most relevant contributions to the subject of the unemployed into a new word document. Following this step, the author went through the word document and manually coded the contributions into significant themes. For example, identifying evidence of the

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<sup>37</sup> For example, *Changed Priorities ahead? CPAG's Evidence to the Social Security Reviews* (CPAG, 1984); Claire Horton, *Nothing Like a Job* (Youthaid, 1985); Janet Allbeson, 'Seen but not heard: Young People' in Sue Ward (Ed.) *DHSS in Crisis* (CPAG, 1985)

<sup>38</sup> For example, SSAC, *Fourth Report*, (HMSO, 1985); SSAC, *Report on the Draft Social Fund Manual* (HMSO, 1987)

legislative trends and political responses to their development – such as MPs citing the ‘skeleton’ nature of the bill, the justification for which was often the flexibility that such an approach provided to swiftly implement further reform. This stage of analysis also allowed the author to identify the significant Members of Parliament who sought to shape or influence the bill and the level of oppositional rhetoric from the back benches. Examining the political rhetoric using this method provided the author with an effective way to interpret how Marshall’s concept of social citizenship was being slowly eroded by the activation and conditionality agenda pushed forth by contemporary governments.

Chapter 9 provides a comparative analysis of the influence on policy and legislation of Keith Joseph’s and Margaret Thatcher’s think tank, Centre for Policy Studies (CPS) and Iain Duncan Smith’s Centre for Social Justice (CSJ). The thesis’ examination of the period since 1979 provided the author with an opportunity to understand the effectiveness of the think tank model for the Conservative party in particular and how it used it as an instrument to influence public and political opinion and more specifically, the shared character traits between Keith Joseph and Iain Duncan Smith. The author was particularly struck by the similarities in the political importance of the CPS in the period following the economic crisis in the early 1970’s and the run-up to the 1979 General Election and the importance of the CSJ following the economic crash in 2008 and in the run up to the 2010 General Election and felt it provided a further contribution to the analysis of the general trajectory of change for the unemployed. This is not to say that think tanks did not play the same role in influencing the policy and legislation espoused by the Labour party in the period 1997-2010, for example the influence of the Institute for Public Policy Research (IPPR), which was launched in 1988 to challenge the CPS and other neo-liberal think tanks which set the policy agenda in the 1980’s and which produced notable Labour leaders such as Ed Milliband.<sup>39</sup> Future research will provide the opportunity to explore the influence of think tanks across the period.

Subsequent to developing a narrative of the political process, the author developed a legislative analysis by supplementing the commentary from MPs with further detail found in the Green/White papers, responses of third-sector organisations, SSAC response papers and academic literature. Increased digitisation in the new millennium has expanded the volume of government resource now available online.

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<sup>39</sup> Path to Influence: The think tanks, *The Guardian*, (London, 30 June 2002)  
<<https://www.theguardian.com/politics/2002/jun/30/uk.thinktanks>>

The research benefits from the provision of decision-maker guidance for frontline workers in DWP, from Freedom of Information requests (made by others) pertaining to new regulations published on the internet, and government circulars published on the introduction of new reforms and deposited papers placed in the commons library by Ministers, mainly in response to parliamentary questions.<sup>40</sup> Newspaper articles also made a valuable contribution to the author's interpretation of key parliamentary moments and how the outcome of such moments impacted the development of legislation. Also important was the examination of the primary legislation as provided by [legislation.gov.uk](http://legislation.gov.uk), the attached explanatory notes and the schedule of regulations relating to each Bill.

### ***Secondary Sources***

As detailed above, the author has drawn on a wide range of secondary sources which have significantly enriched the research. This includes books and journals from diverse disciplines. As well as material relating to social security law and administrative justice and welfare governance the author has perused secondary sources on 20<sup>th</sup> Century history, political biographies and auto-biographies, political articles, social policy books and journals (which were accessed through a number of journal databases<sup>41</sup>), as well as texts on sociological theory. The sources have been accessed via the University library, the British Library and by way of inter-library loans and were identified by exploring library databases through the use of keywords.<sup>42</sup> Of particular importance is the *Journal of Social Security Law* (published three times a year) which provides an up to date commentary on the latest legislative developments in relation to changes to primary legislations and amendments to regulations.<sup>43</sup> Of note is the 'editorial' section which provides a broad overview of the period since the previous publication and the 'legislative comment' section which details the changes made in primary and secondary legislation. The latter section was vital in understanding the intricate detail and implications of reform and often helped the author to identify the chronology of legislative measures. The author established

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<sup>40</sup> UK Parliament, Deposited Papers <  
[https://www.parliament.uk/business/publications/business-papers/commons/deposited-papers/?fd=2016-10-01&td=2016-11-01&search\\_term=Department+for+Work+and+Pensions&itemId=119004#toggle-778](https://www.parliament.uk/business/publications/business-papers/commons/deposited-papers/?fd=2016-10-01&td=2016-11-01&search_term=Department+for+Work+and+Pensions&itemId=119004#toggle-778)>

<sup>41</sup> Westlaw; Cambridge Journals; Hein Online; Wiley online library; Oxford journals

<sup>42</sup> Key words such as social security; social security law; unemployed; unemployment; conditionality; sanctions; contractual; ideology; welfare reform; Conservatives; New Labour, social citizenship; citizenship and social control. These word were also joined together using the word 'and'.

<sup>43</sup> Published by Sweet and Maxwell and edited by Professor Neville Harris

a membership with the Social Policy Association which includes access to the Social Policy Review.<sup>44</sup> Published annually, it provides a detailed overview of developments in social policy ensuring a more comprehensive overview of the relevant landscape.

Given the vast volume of policy and legislative change, it would have been impossible for the author to attempt to detail every single change relating to social security provision for the out-of-work. This speaks to the legislative trend whereby the vast bulk of legislation is passed in the form of regulations issued by the Secretary of State. As an issue of practicality, this has created a volume of legislation that it is not possible to analyse within the confines of this thesis. More fundamentally, however, it has increasingly become the case that the substantive nature and extent of the intended policy change only becomes clear when the regulations have practically embedded over a period of time.<sup>45</sup> Nonetheless, there is considerable value in charting the key legislative measures that give legislative intent to the ideological drive to make the safety net of social security increasingly conditional on the demonstrable value of the citizen as worker. The piecing together of major regulatory change into a chronological timeline was challenging and arduous.

The fragmented nature of changes to social security therefore creates complexity in the system for lawyers who are trying to understand its intricacies and implications and more importantly for citizens who are trying to navigate a too often difficult path to entitlement. It may be that this maze of complexity has contributed to a general lack of legal academic interest but it has provided a relatively untapped resource which this thesis has sought to exploit, to contribute to the leading scholarship in social security law and policy.

### ***Limitations of the Research Approach***

The main limitation is the human error that resulted in missing some important contributions to the debate, inclusion of which may have further enriched the overall narrative. While no research method is perfect, it remains the case that there are more sources available than have been evidenced, and even though some of these will have had relatively minor impact on the analysis, the haunting question of what was missed remains. The analysis itself was done without any software analysis tools,

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<sup>44</sup> Published by Policy Press

<sup>45</sup> Gráinne McKeever, 'Legislative scrutiny, co-ordination and the Social Security Advisory Committee: from system coherence to Scottish devolution (2016) *Journal of Social Security Law* 23(3), pp. 126-149, and p. 129

such as NVivo, which may have impacted detrimentally on the potential to identify literature gaps or thematic insights.

A further limitation was the relatively narrow theoretical approach. The author sought to provide a wide-ranging account of the theoretical interpretation of citizenship by Marshall and post-Marshall. However, the narrative overwhelmingly linked policy and legislative change back to Marshall's theoretical standpoint. The thesis may have benefited from a more sophisticated approach which examined and integrated the post-Marshall landscape detailed in chapter 2 and may have enhanced the concluding chapter.

Finally, the thesis may have benefited from a closer analysis of the intersection between politics and the law in the context of the courts and tribunal system. There have been a number of legal challenges to welfare reform which provide important insight into the judiciary's role in the legislative process. It would be interesting and enlightening to embark on a greater comparison of the intersections in both contexts.

### ***Conclusion***

The thesis provides an important interpretation of the theory of social citizenship as applied through a legislative model of social security, which as evidenced through analysis of primary and secondary social security legislation since 1979, has increasingly been influenced by political ideology, rather than shaped according to evidence of poverty and need. There has been a progressive move towards embedding statutory provision which prioritises the importance of formal and full-time attachment to the labour market - this has resulted in an erosion of the government's responsibility to provide entitlement to social security rights for the citizen who is not in employment. The research approach adopted provides an original contribution to socio-legal scholarship, as it employs a method through which to examine the trajectory towards increasing obligations placed upon social security claimants based on an analysis of the prevailing socio-political context and relevant parliamentary proceedings and the implications for resultant legislation. This included an examination of the constantly evolving web of social security regulations which provide an accessible statutory instrument through which the Secretary of State for Work and Pensions can assume greater law making powers effectively circumventing the scrutiny of the House of Commons and ultimately resulting in a contemporary social security system divorced from ensuring that every citizen is



provided with a modicum of economic welfare. Chapter 2 provides the theoretical framework for the socio-political and legislative analysis which follows.

## Chapter 2: Theories of citizenship for the unemployed

### *Introduction*

The concept of citizenship has been described as enjoying ‘something of a renaissance’ in the late 1980’s.<sup>1</sup> In fact, Ruth Lister introduces her 1989 monograph ‘Citizenship and the Poor’ (written for CPAG) by reasoning that the re-emergence of the language of citizenship was prompted by the need to ‘challenge the dominant language of consumerism and enterprise’ under the Thatcher government.<sup>2</sup> As Faulks notes, ‘citizenship has an almost universal appeal’.<sup>3</sup> Both the left and the right, and indeed the centre ground are able to use the language of citizenship to support their political and legislative aims. Liberals understand citizenship as a tool that provides space to the individual to pursue their interests free from interference.<sup>4</sup> Rights in their political form also enable the individual to contribute to the construction of governmental institutions, thus as a concept it can be characterised as ‘an inherently relational idea that entails cooperation between individuals and in the running of their lives’ – in other words, citizenship entails duties and obligations.<sup>5</sup> Therefore, as Fitzpatrick muses ‘citizenship, along with the nation, provides a putative fusion of these oppositions. It exists in-between the universal and the particular.<sup>6</sup> And as in between these contraries, citizenship can never be settled or resolved’.<sup>7</sup> This chapter will not profess to resolve the many contradictions that the language of citizenship imbues. Nonetheless, it will seek to examine the concept of citizenship, with a view to identifying the changed nature of the institutional vision of reciprocal duties and obligations between the unemployed citizen and the state.

The theoretical basis identified in this chapter informs the conceptual and political interpretation of citizenship throughout the remainder of the thesis. The neo-liberal Conservative interpretation of citizenship has largely dislodged Marshall’s rights based interpretation which is underpinned by the principle that every individual is entitled to a modicum of economic welfare in favour of an emphasis on individual

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<sup>1</sup> David Taylor, ‘Citizenship and Social Power’ (1989) *Critical Social Policy* 9 (26), p 19

<sup>2</sup> Ruth Lister, *The Exclusive Society: Citizenship and the Poor* (CPAG, 1990), p 1

<sup>3</sup> Keith Faulks, *Citizenship* (Routledge, 2000), p 1

<sup>4</sup> *Ibid*, p 2

<sup>5</sup> *Ibid*

<sup>6</sup> Peter Fitzpatrick, ‘Marks of Exclusion: (De)constructing Citizenship’ in J.P Gardner (ed), *Citizenship: The White Paper* (The British Institute of International and Comparative Law, 1997), p 197. Fitzpatrick notes the ‘etymological associations between their particular and universal dimensions’. He comments that the ‘particular’ invokes citizenship as a marker of a contained community.

<sup>7</sup> *Ibid*, p 198

responsibility where every individual is responsible for their own economic welfare and should only rely upon the government for support if they are unable to carry out any paid employment. The new 'active' brand of citizenship was instrumental in shaping the introduction of the Jobseekers Act 1995 – the main feature of the Chapter 4. The late 1980's also witnessed a brief counter-attack from the centre-left faction of the Labour Party, who sought to promote its own interpretation of the factors which excluded the unemployed 'underclass' from enjoying the 'incorporating force' of citizenship.<sup>8</sup> However, this attempt at reinvigorating the post-war collectivist spirit soon evaporated in favour of a new consensus underpinned by a philosophy christened the 'Third Way'.<sup>9</sup> Its main driver was Tony Blair who was elected Prime Minister after seventeen years of neo-liberal conservatism. Blair and his gurus adopted a number of ideas, culminating in the adoption of 'the third way'. The genesis of the third way has been an important element in the evolution of the Labour party's contemporary policy approach and will be discussed in detail in Chapter 5.<sup>10</sup> The consideration of the changing philosophical positions of the two dominant political parties in Great Britain will support a unique and interesting analysis of social security law passed in the 1990's and 2000's.

The foundation of this Chapter's analysis will be TH Marshall's classification of citizenship. As McKeever argues, it 'provides a broad umbrella through which legal, social, economic, political and criminological issues can be considered'.<sup>11</sup> The legal viewpoint pivots on Marshall's three separate categories of rights, which are correspondent with three aspects of citizenship – political rights, civil rights and social rights.<sup>12</sup> Such rights are critical to the creation of the social security system not only because they provide the framework that substantively dictates the state's relationship to the individual, but also because they provide the basis of rhetorical claims which drive much of the debate, and arguably resistance over welfare provision.<sup>13</sup> As McKeever further notes, the equal weighting of social citizenship with civil and political citizenship and its definition by Marshall as, at least, 'the right to a modicum of economic welfare and security' and at best to 'live the life of a civilised being according to the standards prevailing in society', provides a central focus for

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<sup>8</sup> Frank Field, *Losing Out: Emergence of Britain's Underclass* (Blackwell, 1989)

<sup>9</sup> Ruth Lister, 'Citizenship, Exclusion and "the Third Way" in Social Security Reform: Reflections on TH Marshall' (2000), *Journal of Social Security Law* 7 (2), pp 70-87, p 77

<sup>10</sup> *Ibid*

<sup>11</sup> Grainne McKeever, *Accessing Social Citizenship* (PhD thesis, 2013), p 7

<sup>12</sup> *Ibid*

<sup>13</sup> Hartley Dean, *Welfare Rights and Social Policy* (Prentice Hall, 2002), p 3

law on the question of an individual's entitlement to state welfare and in turn the state's obligations to provide social protection.<sup>14</sup> This central contention is hedged by the other perspectives (civil and political) and thus sets the parameters for the wide breadth of interpretation as will be discussed below.

***Marshall's Interpretation of the Rights and Responsibilities of Citizenship***

'Citizenship is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed'.

TH Marshall, 1950

Marshall articulated his account of citizenship in his crucial essay 'Citizenship and Social class'.<sup>15</sup> It has been said that the continuing prominence of Marshall's schema can be best understood by way of an exploration of the analytical and historical meanings of citizenship as 'membership' of a given community.<sup>16</sup> Furthermore, based on the interests and perspectives of 'modern sociology', and as relayed above, Marshall did not confine these meanings to a set of legal and political rights, nor to a particular 'public space of participation'; he placed them in the wider settings of society's institutional and cultural traditions, of which the inclusiveness and universality of the Beveridgean welfare state was a distinct influence.<sup>17</sup> It has been asserted that Marshall can be 'acknowledged as coming up with that rare thing: a truly theoretical standpoint from which to understand a social phenomenon',<sup>18</sup> namely a liberal response to the problematic relationship between the formal framework of political democracy and the social consequence of capitalism as an economic system.<sup>19</sup>

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<sup>14</sup> McKeever, n. 11 above, p 7

<sup>15</sup> TH Marshall, 'Citizenship and Social Class' in TH Marshall and Thomas Bottomore (eds), *Citizenship and Social Class* (Pluto, 1992)

<sup>16</sup> The modern use of the term citizenship is linked to classical Greece. There the citizen, the *politis*, is a member of the *polis*, usually interpreted as city. *Politis* is connected (in Aristotle), to *isotis* – equality. 'The Citizen participates in the polis on a basis of equality with all other citizens. This equality, supposedly, supersedes all pre-existent affiliations to the effect that citizens stand in a relation of unencumbered autonomy'. Thus the 'city' is a place of abstracted notion which opposed the particular ties of family and clan. The term 'civil' seeks to oppose all types of 'natural affiliation'. Fitzpatrick, n. 6 above, p 198

<sup>17</sup> See Ursula Vogel and Michael Moran, *The Frontiers of Citizenship* (Macmillan, 1991), p 2 and Neville Harris, *Social Security Law in Context* (Oxford University Press, 2000), p 22

<sup>18</sup> Keith Faulks, *Citizenship in Modern Britain* (Edinburgh University Press, 1998), p 31; see also Michael Mann, 'Ruling Class and Citizenship' (1987) *Sociology* 21 (3), pp 339-340

<sup>19</sup> Bryan S. Turner, 'Contemporary Problems in the Theory of Citizenship' in Bryan S. Turner (ed), *Citizenship and Social Theory* (Sage, 1993), p 6

He explained that citizenship is based on civil rights (those rights which provide for equality before the law and access to legal remedies), political rights (those relating to voting and democratic rights) and social rights (rights to welfare). He claimed that civil and political rights, which emerged in the late nineteenth century had not brought about any real reductions in social inequality. Civil rights 'gave legal powers whose use was drastically curtailed by class prejudice and lack of economic opportunity' and political rights 'gave potential power whose exercise demanded experience, organisation and a change of ideas as to the proper functions of government'.<sup>20</sup> These rights, Marshall explained, had 'helped to guide progress into the path that led directly to the egalitarian policies of the twentieth century'.<sup>21</sup> As the twentieth century progressed and a more egalitarian society developed, social rights were incorporated into the status of citizenship, including 'a universal right to real income which is not proportionate to the market value of the claimant'.<sup>22</sup> Although, such an analysis could be construed as over-generalised, it does not detract from Marshall's prominent conclusion, that social inequalities based on class divisions have been ameliorated through the development of citizenship, and that full citizenship requires three components – civil, political and social rights.<sup>23</sup>

Marshall saw social rights – the right to welfare – as integral to the social integration of each individual. However, he also recognised the tension between his idea of citizenship as an egalitarian concept and capitalism, which accepted social and economic inequalities. Writing in his essay, he said 'in the twentieth century citizenship and the capitalist class system have been at war.'<sup>24</sup> Yet, he concluded that the two systems could exist side by side as the principles underpinning citizenship could alleviate the inequalities resulting from the operation of capitalist markets. The institutional means through which the conflict between both concepts could be resolved was the post-war welfare state,<sup>25</sup> as Beveridge's institutional framework would allow for the modification of the worst excesses of the market.<sup>26</sup> Marshall, emphasised that he envisioned a very clear role for the citizen in increasing the 'the sum total of welfare' and the experience of its benefits for the masses. Although, there can be no doubt that Marshall sought to promote the existence of rights - in tandem

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<sup>20</sup> Marshall, n. 15 above, p 27

<sup>21</sup> Ibid

<sup>22</sup> Ibid, p 28

<sup>23</sup> Dean, n. 13 above, p 4

<sup>24</sup> Marshall, n. 15 above, p 68

<sup>25</sup> TH Marshall, 'Citizenship and Social Class' in *Sociology at the Crossroads* (Heinemann, 1963)

<sup>26</sup> Faulks, n. 18 above, p 40

with this, he stressed that the claim to welfare rights, and the expectation that social and economic progress would be continuous is dependent on the people who entertain such expectations 'being ready to work for it'. He continues by asserting that the individual's 'right to welfare is the right to their fair share of the individual enjoyment of the fruits of their collective labour'.<sup>27</sup> This message is etched in the image of the citizen at the centre of contemporary western social democracies as 'an economically employed member of the society who is able to discharge duties to a household in return for which he (or less frequently she) is the recipient of social rights, welfare benefits, and unemployment payments and service supplements'.<sup>28</sup> As may be expected, this image is congruent with Beveridge's 1942 vision of welfare, which invested strongly in the notion of a 'free society' and its working relationship with the market economy. He intended his system of social insurance to be financed by compulsory contributions from workers and employers and available only to contributors.<sup>29</sup> Therefore, its claim to being a (relatively) universal system was dependent upon the achievement of (relatively) full employment in the labour market.<sup>30</sup> Beveridge intended the national insurance system to provide a minimum income to all contributors, which could act as a base on which individuals could build their own market driven insurance and pension arrangements. Crucially, he assumed that his intentions would act as an incentive for contributors to individually provide for themselves.<sup>31</sup> Nonetheless, scepticism towards Beveridge's approach was voiced early on, with noted Fabians Beatrice and Sidney Webb identifying an apparent imbalance between rights and responsibilities in the Beveridge proposals.

'The fact that sick and unemployed persons were entitled to incomes without any corresponding obligation to get well and keep well, or to seek and keep employment, seemed likely to us to encourage malingering and a disinclination to work for their livelihood'.<sup>32</sup>

This stance may reflect an early degree of ignorance from the 'left-collectivists' about Beveridge's recognition of the intended role for 'major non-state sectors – namely the

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<sup>27</sup> TH Marshall, 'The Right to Welfare' in Noel Timms and David Watson, *Talking About Welfare* (Routledge & Kegan Paul, 1979), p 63

<sup>28</sup> Turner, n. 19 above, p 11

<sup>29</sup> Although he accepted that the education and health systems should be financed mainly from general taxation, and universally acceptable to all. Sir William Beveridge, *Social Insurance and Allied Services*, (HMSO, 1942), p 11, para 20; p 12, para 24

<sup>30</sup> Ibid, p 12, para 22; Sir William Beveridge, *Full Employment in a Free Society* (2<sup>nd</sup> Edn) (Allen and Unwin, 1960)

<sup>31</sup> Beveridge, n. 29 above, p 8, para 6

<sup>32</sup> Beatrice Webb, *Our Partnership* (Longman, 1948), p 479

capitalist economy' in the distribution of welfare, which he expanded upon subsequent to the 1942 report.<sup>33</sup> Equally, it may reflect an 'assumption' similar to Marshalls, that individuals will be incentivised to work in exchange for the entitlement to rights.<sup>34</sup> This assumption will be explored in more detail, in the next Chapter – more specifically, the rights political redefinition of rights and duties and its increasing propensity for a rhetorical emphasis on obligations.<sup>35</sup>

Marshall can be said to have developed Beveridge's position on the architecture of the relationship between the state and the market in later work, particularly through the concept of the 'hyphenated society'. The hyphenated society denotes 'democratic-welfare-capitalism', whereby 'the parts are meaningless except in their relationship with one another'.<sup>36</sup> On this premise, if too much emphasis is being placed on our rights as producers and consumers and not enough on our rights, such as social rights to social provision, there arises an imbalance between the civil and social components of citizenship, and arguably creates a potential threat to social stability.<sup>37</sup> Indeed, and perhaps in anticipation of his later model of 'hyphenation', Marshall referred to the tension between individual claims to welfare and collective interests. He argued that the state owed a responsibility to society as a whole and it followed that individual rights had to be subordinate to national needs.<sup>38</sup> Thus, as Harris maintains, Marshall,

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<sup>33</sup> Maurice Roche, *Rethinking Citizenship: Welfare, Ideology and Change in Modern Society* (Polity Press, 1992), pp 26-27. Beveridge expanded his overall conception for welfare in two subsequent reports 'Full employment in a Free Society (1944) and Voluntary Action (1948) – he emphasised the potential for a co-operative relationship between the state and civil society – resulting in his version of 'welfare-pluralism' or the 'social division of welfare' (Titmuss, 1958). He proposed policies to promote the effective functioning of the labour market to counter regional inequalities – this was part of his overall vision of the welfare state, and the use of state as a vehicle to accelerate the capitalist economy's distribution of welfare through its labour and consumer markets. Roche claims it seems to have been assumed by Beveridge that the state could, as a secondary matter, exercise some control over these effects. In 'Full Employment in a Free Society', Beveridge characterised the state as an 'enabler, educator and moderator of non-state welfare' and amplified the assumptions noted earlier about private insurance and self-provision in the 1942 report. By 1948, this idea was developed further again, where Beveridge commended the virtues of philanthropy and mutual aid – however, by the 1940's it became clear that the previous role of voluntary action was severely eroded by the combined effects of state-organised, market based insurance

<sup>34</sup> Marshall, n. 27 above, p 59; Martin Roche, *Rethinking Citizenship: Welfare, Ideology and Change in Modern Society* (Polity Press, 1992), p 124

<sup>35</sup> Jorgen Gould Andersen, 'Changing Labour Markets, Unemployment and Unemployment Policies in a Citizenship Perspective' in Jorgen Gould Andersen, Jochen Clasen, Wim van Oorschot and Knut Halvorsen (eds), *Europe's New State of Welfare: Unemployment, Employment Policies and Citizenship* (The Policy Press, 2002), p 13

<sup>36</sup> TH Marshall, *The Right to Welfare and Other Essays* (Heinemann, 1981), p 128

<sup>37</sup> Hartley Dean, *Welfare Law and Citizenship* (Harvester Wheatsheaf, 1996), p 7

<sup>38</sup> Marshall, n. 15 above, pp 27-28; also Harris, n. 17 above, p 22

like Beveridge believed in the notion of universal welfare as a key element of the citizenship paradigm.<sup>39</sup>

Although Marshall acknowledged in his essay 'our system is frankly a socialist system', Faulks argues that it is not socialism that he envisaged, but a 'capitalist system with a citizen's face'.<sup>40</sup> Dean supports this contention, citing Marshall's obvious reference to his namesake, Alfred Marshall, a 19<sup>th</sup> Century economist, who foresaw equality of opportunities and lifestyle, rather than a material equality of incomes or wealth. He believed technological advances would ameliorate the arduous nature of manual labour, while compulsory education would civilise the working classes.<sup>41</sup> Similarly, a central contention of Marshall is that 'equality of status is more important than equality of income'.<sup>42</sup> In his essay, Marshall establishes that with the post-war inception of the welfare state the concept of citizenship as a rounded and meaningful status was complete. Social rights had effectively legitimised liberal society by ensuring that, although social inequality continued to exist, it was relegated to the less important area of consumption – and that social rights had thereby 'civilised' the impact of the market.<sup>43</sup> Marshall points to the rise of paid incomes, the growth of savings and the success of mass production as enabling wealth and social power, not only through progressive systems of tax, but also in other notable areas of social life, such as legal aid.<sup>44</sup> Through such developments, Marshall observed the dissolution of the importance of class, and the surge of the language of social justice in the market place. This latter point comes with the discernable proviso – that social rights and the welfare state must be 'paid for' literally by tax revenues from a prosperous and fully functioning economy.<sup>45</sup> Thus it must be 'paid for' morally and politically via the duties of 'industrial citizenship' incumbent on workers and trade unions – for example trade unions must refrain from initiating unofficial strikes, in return for the rights that liberal society has granted to them.<sup>46</sup> Therefore, and as

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<sup>39</sup> Ibid

<sup>40</sup> Faulks, n. 18 above, p 40

<sup>41</sup> Alfred Marshall 1873, was cited in Marshall, n. 15 above; '...whether...the amelioration of the working classes has limits beyond which it cannot pass...[or] whether progress may go on steadily, if slowly, till by occupation at least, every man is a gentleman'. See, Dean, n. 37 above, p 4. On the vital importance of Education, Marshall said: 'Education is not only something to which every citizen has a right; it a process by which citizens are made'. Marshall, n. 27 above, p 59

<sup>42</sup> Marshall, n. 15 above, p 33

<sup>43</sup> Faulks, n.18 above, p 40

<sup>44</sup> Ibid

<sup>45</sup> Marshall, n. 15 above, p 135

<sup>46</sup> Roche, n. 33 above, p 20; Faulks, n. 18 above, p 41



outlined above, citizenship rights, particularly social rights are to be reciprocated and 'paid for' by the citizen's duty to work.<sup>47</sup> Apart from this proviso (albeit, a crucial one) Marshall's interpretation of citizenship prioritises the development of rights rather than duties. Indeed, as Marshall stated shortly before his death in 1981, 'the old morality stressed obligations more than rights; in the new it is the opposite. It is the nature of the polity and of the economy to foster this change'.<sup>48</sup> Marshall implicitly argues that the 'hyphenated' society, an institutional mixture of democracy, welfare state and capitalist economy, offers a version of citizenship that allows for equal participation in the market, and therefore as society becomes more civilised and just, it fosters more sociable behaviour, extinguishing the grounds for social conflict. He believed that the emergence of social rights indicated the extent to which laissez-faire capitalism had been superseded, and the result would be a society based on status and desert rather than contract and mere good fortune.<sup>49</sup>

'Social rights in their modern form imply an invasion of contract by status, the subordination of market price to social justice, the replacement of the free bargain by the declaration of rights'.<sup>50</sup>

Marshall's latter contention has provoked significant debate in recent years, as social conservatives and communitarians in particular have argued strongly that Marshall and his contemporaries post-war, libertarian emphasis on the rights of individuals has had a detrimental effect on the quality of citizenship.<sup>51</sup> Critics of liberalism have suggested that the 'second wave' exponents of citizenship's individualist attitude to democracy and citizenship do not adequately consider communal principles, but rather further self-interest.<sup>52</sup> Contesting Marshall's view, Selbourne argues that equal rights, without regard to desert or merit are a 'false equality' that cannot serve the well-being of the civic moral order as a whole'.<sup>53</sup> For Selbourne, the nub of the problem is the connection of political rights with social rights and its capacity to destroy the end of service associated with participation. Political rights provide the ability to express the popular sovereignty upon which the community is based, and

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<sup>47</sup> Roche, n. 33 above, p 20

<sup>48</sup> Marshall, n. 36 above, p 175

<sup>49</sup> Hartley Dean, n. 13 above, p 5

<sup>50</sup> Marshall, n. 36 above, p 40

<sup>51</sup> Faulks, n. 3 above, p 69

<sup>52</sup> See Raymond Plant, 'Citizenship Rights and Socialism' (Fabian Society, College Hill Press, 1988), pp 14-15 <

<http://digital.library.lse.ac.uk/objects/lse:cik348biq/read/single#page/16/mode/2up> >

(accessed 26 October 2016)

<sup>53</sup> David Selbourne, *The Principle of Duty* (Faber and Faber, 1994), p 61

as such are rooted to the modern state. Whereas social duty should be linked to the performance of certain obligations.<sup>54</sup> In response to the ‘relative-one sidedness’ of the welfare state settlement based on social rights, and the perceived erosion of ‘moral order’,<sup>55</sup> Conservative and Labour governments since 1979 have graduated steadily to conditional welfare. In the process, citizenship is (or arguably has been) being redefined from attributing unconditional rights to being expressly linked to contractual duties.<sup>56</sup> However, as indicated by Dahrendorf, this shift is inherently problematic. He argues that rights cannot be equally exchanged with obligations, as citizenship is a social contract; while work is a private contract. Social citizenship (such as political citizenship) is a non-economic, unconditional status.<sup>57</sup> Therefore, the operation of workfare enables social rights to be rendered as marketable commodities – in other words offered for sale. Political theorists from the right such as Mead and Murray,<sup>58</sup> and communitarian writers such as Etzioni stress that in order to sustain a claim to social rights, individuals must be prepared to accept responsibilities to preserve the community.<sup>59</sup> This debate has clear parallels with Esping-Andersen’s interpretation of the Marxist thesis of de-commodification.

The next section will address the shifting theoretical position of social rights within the larger framework of developed welfare states, and will address Esping-Andersen’s characterisation of rights as being ‘de-commodified’. This chapter seeks to understand better the changing nature of social rights, in accordance with the evolution of modern capitalism and the changing socio-economic contexts. As Dean

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<sup>54</sup> Faulks, n. 3, p 70

<sup>55</sup> Roche, n. 33 above, p 31. A central risk is said to be the potential erosion of a collective sense of the moral character of participation in the welfare state by subsequent generations to those who shouldered significant sacrifice during the Second World War and the Great Depression. Moral action is philosophically assumed to derive from the ontological given of human freedom, which assumes that moral action involves choice and thus implies an independent agency capable of choosing. It also entails notions of wilful reciprocity between individuals involved in moral action, and of the logical and practical connection between rights and duties in moral experience. It can be argued that the welfare state, as it was conceived, appeared to promote a rights-based and relatively duty-free and un-reciprocal conception of citizenship. If this is the case, it can similarly be argued that it has risked an abatement of the moral autonomy of those dependent on it. This has been characterised as ‘de-moralisation’ among citizens and the citizen community

<sup>56</sup> Lister, n. 2 above, p 11

<sup>57</sup> Ralf Dahrendorf, ‘Citizenship and Social Class’ in Martin Bulmer and Anthony Rees, *Citizenship Today: The Contemporary Relevance of T.H. Marshall* (UCL Press, 1996), pp 32-33

<sup>58</sup> Lawrence Mead, *Beyond Entitlement* (Free Press, 1986); Charles Murray, *Charles Murray and The Underclass* (Institute of Economic Affairs, 1996)

<sup>59</sup> Mead, n. 58 above; Amitai Etzioni, *The Moral Dimension: Towards a New Economics* (Free Press, 1988); Amitai Etzioni, *The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda* (Crown, 1993)

asserts, social rights were invented as ‘creatures of capitalism’<sup>60</sup> and they will ultimately survive as it continues to augment - the key questions are, in what form? And at what cost? Particularly for the unemployed, who are generally perceived not to be holding up their side of the bargain, in terms of the responsibility to work.

### ***The Changing Nature of Social Rights: De-Commodification***

It seems reasonable to say that Marshall’s ‘Citizenship and Social Class’ discussion embodies the spirit of Britain’s post-war welfare statism. It provides a version of the ‘conventional wisdom’ about citizenship clearly <sup>61</sup> – in so far as it documents the introduction of social legislation, that extended ‘positive’ rights of citizenship, based on substantive rights to the provision of goods and services necessary for human well-being.<sup>62</sup> Indeed, Marshall’s ideas provided poverty campaigners with the ammunition needed to challenge the traditional distinction within the social security system between national insurance benefits, and means-tested national assistance. The former perceived to be ‘earned’ by claimants by virtue of their contributions and were the subject of rights enshrined in primary and secondary legislation, while payment of the latter was subject to the discretion of the National Assistance Board.

The poverty lobby ridiculed the discretionary elements of welfare as a cloak for arbitrary decision making that denoted a distinction between the ‘deserving’ and ‘undeserving poor’, whereas, as they perceived it, rule based entitlement as providing ‘clear and legally enforceable rights’.<sup>63</sup> It emerged at the beginning of what is commonly referred to as the ‘Golden Age’, the post-war period which immediately preceded the ‘crisis years’ of the 1970’s, and the subsequent collapse of the Keynesian consensus. Western Europe enjoyed economic growth, low unemployment rates, and the establishment of strong and centralised systems of industrial relations.<sup>64</sup> The

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<sup>60</sup> Hartley Dean, *Social Rights and Human Welfare* (Routledge, 2015) p 11

<sup>61</sup> Roche, n. 33 above, p 21

<sup>62</sup> Civil and Political right are based on ‘negative’ or formal rights, such as freedom of movement. Dean, n. 60 above, p 11

<sup>63</sup> See Charles Reich, ‘The New Property’ (1964) *Yale Law Journal* 73, pp 733-787 and Charles Reich, ‘Individual Rights and Social Welfare: The Emerging Legal Issues’ (1965) *Yale Law Journal* 74, pp 1245-1257; John Baldwin, Nicholas Wikeley and Richard Young, *Judging Social Security: Adjudication of Claims for Benefit in Britain* (Clarendon, 1992), p 8. Baldwin et al argue that although it appeared that the poverty lobby’s campaign had garnered success when supplementary benefit (which made entitlement to basic rate) a statutory right. However, they maintain that the shift in emphasis from discretion to regulation may have more to do with administrative convenience, and reducing expenditure, than trying to make the system fairer to claimants.

<sup>64</sup> From 1948 to 1973, Britain experienced a sustained period of economic growth, averaging around 2.8 per cent a year. Nicholas Timmins, *The Five Giants: A Biography of the Welfare State* (Harper Collins, 2001), p 179. See generally, Evelyne Huber and John Stephens, *Development*

unions would routinely restrain wage demands based on the delivery of an expanded, more egalitarian state provision of goods and services, and lower commodity prices. At the same time, governments could stimulate the economy through fiscal policies designed to maintain high employment levels.<sup>65</sup> The context of expanding economies added positive weight to the idea of social citizenship as being at the very core of the welfare state.<sup>66</sup> As Timmins observes, purveyors of the post-war welfare state recognised its ability to shift resources from the better off to the less well off. This order, kindled ‘widespread vested interest – or to put it more kindly, a mutual interest – in the welfare state’.<sup>67</sup> Social rights were granted the status of rights, which dictated that benefits should be universal, solidaristic, and generally not based on previous earnings or work performance. However, as Handler claims the ‘practice never met the aims of the theory’, a contention that will be explored below and throughout the thesis.<sup>68</sup>

Although, it must be recognised that different countries have different social, cultural and economic circumstances, that have imparted distinct approaches to welfare, it may equally be contended that in many cases a ‘parallel development’ process existed in the creation of ‘exemplary welfare states’. As denoted by Esping-Andersen, and as alluded to by Marshall, there emerged an important commonality between them – the granting of rights – ‘social rights are given the legal and practical status of property rights’.<sup>69</sup> In other words, it is an ‘expression in legal form of the logic of individual ownership’. Dean recognises that such a formulation may seem ‘bizarre’.<sup>70</sup> Many claimants of welfare are property-less and their ‘rights’ to social security benefits, for example, are governed specifically by legislation. However, despite this apparent anomaly, granted all of the conditions of a specified social benefit are met, such

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*and Crisis of Welfare State: Parties and Policies in Global Markets* (Chicago University Press, 2001)

<sup>65</sup> Joel Handler, *Social Citizenship and Workfare in the United States and Western Europe* (Cambridge University Press, 2004), p 90-91

<sup>66</sup> Gosta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton University Press, 1990), p 22

<sup>67</sup> Timmins n. 64 above, p 163

<sup>68</sup> Handler, n. 65 above, p 91

<sup>69</sup> Esping-Andersen, n. 66 above, p 22. It is important to note the jurisprudential influence of Hegel in this context, who provided a clear interpretation of ‘law’ and of ‘rights’ under liberal governance. He argued that rights are not bestowed and they do not reside ‘naturally’ to the individual subject: ‘Right is...the immediate embodiment which freedom gives itself as an immediate way, i.e. possession which is property ownership’. Georg Hegel, *The Philosophy of Right* (Batoche Books, 2001), p 57. See also Bob Fine, *Democracy and the Rule of Law: Liberal ideals and Marxist critiques* (Pluto Press, 1984), p 57; Dean, n. 37 above, p 21

<sup>70</sup> Dean, n. 37 above, p 21

benefits are provided as an entitlement rather than as a gift.<sup>71</sup> It follows that the principles that give rise to that entitlement are expected to operate with indifference to the personality and status of the recipients as denoted by the rights within the liberal definition of the rule of law.<sup>72</sup>

As Esping-Andersen argues, because social rights are based on 'citizenship rather than performance, they will entail a de-commodification of the status of individuals vis-à-vis the market'.<sup>73</sup> De-commodification is 'the degree to which (welfare states) permit people to make their living standards independent of pure market forces. It is in this sense that social rights diminish citizen's rights as commodities'.<sup>74</sup> Nonetheless, and as Esping-Andersen conceded, welfare benefits are never high enough to offer an alternative to work.<sup>75</sup> Furthermore, if benefits are tied to labour-market participation, for example through insurance contributions, individuals are required to work. In other words, there is no real alternative to the market.<sup>76</sup>

The bones of Esping-Andersen's thesis can be said to derive from Polanyi's (1944) analysis that unlike other commodities, labour power cannot be abstracted from its owner.<sup>77</sup> Furthermore, it depends on the health and well-being of its owner. Where it is viable for owners to withhold ordinary commodities from sale until the price is right, the owners of labour power cannot do so unless they can obtain an alternative form of subsistence. In effect, only if the worker can find a purchaser for his or her labour power, 'a capitalist entrepreneur', can secure the means to subsist. From the capitalist standpoint, if the worker fails to gain employment s/he is 'unreal' lacking any significance.<sup>78</sup> However, if labour power is to be traded as a commodity on the market, certain conditions must be met, such as the introduction of non-commodified support systems, including social security, healthcare and education – arguably, therefore, social rights are a pre-condition of the commodification of labour power.<sup>79</sup> Therefore, Offe claims that Polanyi's argument offers a clear contradiction of Marshall's theory, as he suggests that 'welfare' is not a late development within

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<sup>71</sup> Ibid

<sup>72</sup> Ibid

<sup>73</sup> Esping-Andersen, n. 66 above, p 3

<sup>74</sup> Ibid

<sup>75</sup> Ibid, p 23

<sup>76</sup> Handler, n. 65 above, p 91; See also Graham Room, 'Commodification and de-commodification: A Developmental Technique' (2000) *Policy and Politics* 28 (3), pp 331-351

<sup>77</sup> Dean, n. 37 above, p 19

<sup>78</sup> Room, n. 77 above, p 332

<sup>79</sup> Dean, n. 37 above, p 19; Dean, n. 60 above, p 11; Claus Offe, *Contradictions of the Welfare State* (Hutchinson, 1984), p 263

capitalist societies or something that comes into being for philanthropic reasons after a time of the absolute exploitation of labour power. Rather, 'welfare' institutions are a pre-condition of the commodification of labour power'.<sup>80</sup> Or, to put it another way; the effective development of substantive social rights was as necessary to the development of capitalism, as the development of formal civil and political rights.<sup>81</sup> Ashford maintains that 'pull theories' emphasise the influence of market forces in determining the appropriate supply of social services.<sup>82</sup> This theory offers a 'functionalist explanation' that essentially relies on the specification of need that social and political actors assume to be the responsibility of welfare states.<sup>83</sup> Demand theories have meritorious qualities; however, they are often silent on the differences and complexities that arise from varied successes and failures and mixed governmental responses to social change.<sup>84</sup> Van Kersbergen and Vis point to the 'power resources' approach as assuming a critique of functionalist accounts. This approach dictates that socially (unions) and politically (political parties) the organised interests, particularly of wage earners, struggled to communicate their demands as issues that ought to be the responsibility of the welfare state.<sup>85</sup>

The power resources approach recognises that welfare state development is 'likely to reflect class-related distributive conflict and partisan politics'.<sup>86</sup> This acknowledges the relationship between socio-economic class and the patterns of life course risks (such as employment and sickness) and the implications for individuals who are disparately placed within socio-economic structures. The approach hinges on distributive conflicts between class, life-course risks and resources, so that individuals with higher life-course risks tend to have less resources to cope with risks, which subsequently generates greater potential for class based action.<sup>87</sup> Therefore, political parties who garner the support of individuals who rely primarily on human capital/labour power are expected to act as protagonists of welfare state

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<sup>80</sup> Offe, n. 79 above, p 263

<sup>81</sup> Dean, n. 60 above, p 12

<sup>82</sup> A developmental 'pull' denotes the need for intervention and the social and political 'push' indicates a thrust towards welfare state expansion. See, Keesvan Kersbergen and Barbara Vis, *Comparative Welfare State Politics: Development, Opportunities and Reform* (Cambridge University Press, 2013), p 48

<sup>83</sup> Ibid

<sup>84</sup> Anne Digby, *British Welfare Policy: Workhouse to Workfare* (Faber and Faber, 1989), p 10

<sup>85</sup> van Kersbergen and Vis, n. 82 above, p 48

<sup>86</sup> Walter Korpi, 'Power Resources and Employer-Centred Approaches in Explanations of Welfare States and Varieties of Capitalism: Protagonists, Consenters, and Antagonists' (2006) *World Politics* 58 (2), pp 167-206, p 168

<sup>87</sup> Ibid

development through their influence to modify conditions and outcomes related to the market. Therefore, it fits with the development of Marshall's interpretation of social citizenship – which seeks to provide those individuals exposed to more risks, with the power to claim rights from the state, should they succumb to life-course uncertainties.<sup>88</sup> As indirectly intimated by Offe, the critical problem with the power resources approach is that the power of the wage earners movement cannot be linked directly to the origins of Welfare provision.<sup>89</sup> For example, Bismark, the 'pioneer' of compulsory social insurance was a 'conservative state builder', concerned with the management of the sub-units of the state, not a social reformer, concerned about the welfare of industrial workers. In France, resistance to state involvement in welfare provision determined the continuing prominence of voluntary and municipal provision, and in Britain, the Poor Laws were supplemented by charitable provision, employer's schemes, and eventually social insurance in the early twentieth century. Indeed, it is important to note, the contention that at the centre of the development of early social insurance systems was the intention to maximise labour market participation.<sup>90</sup> Ultimately, as highlighted by Digby, reasons for welfare expansion, and the early bestowal of social rights, occurred because of diverse reasons – economic, social and political factors came into play.<sup>91</sup>

However, it remains credible to assert that although socialists were not the prime catalysts for reform, they were still 'pushing for reforms in the context of pulling societal needs'. Therefore, the early origins of social rights cannot be discussed without at least some reference to the influence of socialists or the social democratic labour movement.<sup>92</sup> Indeed, Korpi maintains the crux of the power relations approach is the principle that employment relations and labour markets determine to a large extent social stratification in society. He claims 'in labour markets and in employment relations, actors engage in two basic types of power resources: economic assets and labour power, or human capital'.<sup>93</sup> In regard to Polanyi and Esping-Andersen's interpretation, Korpi emphasises that: 'unlike human capital, economic resources can be divested from their owners, and transferred to other actors with the result that economic resources are typically concentrated to a much

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<sup>88</sup> Ibid

<sup>89</sup> van Kersbergen and Vis, n. 82 above, p 48

<sup>90</sup> Handler, n. 65 above, p 91

<sup>91</sup> Digby, n. 85 above, p 11

<sup>92</sup> van Kersbergen and Vis, n. 82 above, p 48

<sup>93</sup> Korpi, n. 86 above, p 172

higher degree than is human capital'.<sup>94</sup> In other words, in employment relationships, individual employees are generally subordinate to employers who ultimately derive their power from control over various forms of capital. As, Esping-Andersen argues, a similar system of stratification underpins the development of welfare states. Handler, highlights a modern example, by referring to the changing US welfare state, where the 'process of categorization served to distinguish the deserving poor from the undeserving poor'.<sup>95</sup> The same conclusion can be applied to the contemporary development of the British welfare state, where the use of means-tested benefits, low rates of entitlement and strict conditions are used to partition groups of claimants.

Therefore, as Marx contested, for human capital to become a significant power, collective action is necessary, requiring the working class to become conscious of its interests, its needs and be prepared to engage.<sup>96</sup> Nonetheless, there is recognition that socialists have never managed to mobilise an electoral majority<sup>97</sup> – and there has been, by and large, a widespread retreat of the socialist and labour movement. Therefore, in order to implement any kind of social policy successfully, socialists require the support of another class, of other social organisations and political parties to support the goals of social justice and de-commodification.<sup>98</sup>

### ***The Three Worlds of Welfare***

It is arguable that Esping-Andersen's construction of the de-commodification argument offers a compelling degree of clarity on the contemporary development of welfare states, as he operationalizes the concepts of commodification and de-commodification, particularly the extent to which de-commodification is achieved through the 20<sup>th</sup> Century welfare state system.<sup>99</sup> He argues that 'the history of

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<sup>94</sup> Ibid

<sup>95</sup> Handler, n. 65 above, p 91

<sup>96</sup> Concept of Human Development according to Karl Marx world outlook has its roots in early work, 'Economic and Philosophic Manuscript' (1844) and later developed in his major works 'Manifesto of the Communist Party (Jointly with Friedrich Engels) (1848). See, Lal Basu, Ratan, 'Human development according to Adam Smith and Karl Marx,' (2007) Culture Mandala: The Bulletin of the Centre for East-West Cultural and Economic Studies: 7 (2), Article 7.

<sup>97</sup> See generally, Adam Przeworski and John Sprague, *Paper Stones: A History of Electoral Socialism* (Chicago University Press, 1986) and also Gerald Friedman 'Labour Unions and Economic History' in Robert Whaples and Randall E. Parker, *Handbook of Modern Economic History* (Routledge, 2013), p 236

<sup>98</sup> van Kersbergen and Vis, n. 82 above, p 48. Handler notes, that it important to note that despite the strength of trade unions, the left parties (advocates of an expansive welfare state), the left parties were required to form alliances or coalitions with other classes in order to establish a welfare state. See, Handler, n. 65 above, p 94

<sup>99</sup> Room, n. 76 above, p 332



political class coalitions (is) the most decisive cause of welfare state variations'.<sup>100</sup> Esping-Andersen sets out three types of response to the de-commodification process, based on the three varying conceptions of social rights, in terms of the classical paradigms of socialism, conservatism and liberalism.<sup>101</sup>

As discussed above, the socialist/social democratic approach (such as is found in Scandinavia) resists commodification, on the basis that it bolsters class exploitation. This approach prioritises 'rights' in an effort to decrease stigmatising conditions and encourage equality.<sup>102</sup> There is a deliberate attempt to minimise means-tested assistance, and curtail the growth of the private insurance market. However, the 'most salient characteristic' of the social democratic regimes is the emphasis on the value of work. Full-employment becomes a necessity on the basis that social democratic welfare states are very expensive; therefore, there must be a maximum of tax revenues and a minimum of social costs – i.e.) few citizens claiming state benefits.<sup>103</sup> The Conservative approach defies commodification, as it undermines traditional authority. Therefore, this approach supports 'rights' in a paternalistic sense, for example – imposing obligations on employers to look after their workers; supporting the needs of the traditional family or from the interception of the state with the tone of paternal authoritarianism (e.g. the introduction of compulsory insurance schemes).<sup>104</sup> It adopts a passive approach to labour-market regulation, and favours state intervention only to help the family take care of its members. Women are generally discouraged from working, social insurance tends to exclude non-working wives and family benefits encourage motherhood.<sup>105</sup> The liberal approach welcomes commodification and seeks only to intervene on the condition that it will assist the process or correct market failures. Such an approach favours 'rights' of a strict conditional nature (e.g. means-tested social assistance schemes). The concern of liberal states with the disincentive effects of welfare, is that the provision of social assistance is generally stigmatised. Therefore, the market is encouraged by the low minimum benefit, and it is conventional for better off individuals to seek support

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<sup>100</sup> Esping-Andersen, n. 66 above, p 1

<sup>101</sup> Ibid, p 22; see also, Gosta Esping-Andersen, *Social Foundations of the Postindustrial Economies* (Oxford University Press, 1999). In his 1999 work, Esping-Andersen continued to make a distinction between Liberal, Conservative and Social Democratic Welfare States. Esping-Andersen, examined the possibility of Antipodean and Mediterranean welfare state, but concluded that his 1990 typology remained the most applicable

<sup>102</sup> Dean, n. 37 above, p 20

<sup>103</sup> Esping-Andersen, n. 66 above, pp 28-29 and pp 78-81

<sup>104</sup> Dean, n. 37 above, p 20

<sup>105</sup> Esping-Andersen, n. 66 above, pp 28-29 and pp 83-84

from private insurance provision. The liberal welfare state seeks justification in the theory that poverty is the fault of the individual, not the system. It supports the idea that those who are able to work, should work, and for those who cannot work, family members, religious institutions or charitable organisations should assume responsibility. State provided social insurance ensures assistance based on employment and contributions to incentivise the maintenance of work. Nonetheless, businesses came to advocate the existence of a universal, relatively generous old-age pension as a way to replace older workers and to mitigate competition. Therefore, even for liberals, social protection allays some of the adverse effects of the labour market.<sup>106</sup> The crux of Esping-Andersen's 'three worlds' is the contention that all welfare state regimes are compromises between these competing notions of what welfare rights should achieve.<sup>107</sup>

The degree of de-commodification depends on the adequacy and the conditions of the social security benefit. Esping-Andersen maintains that by the late 1960's and early 1970's (the 'autumn' of the Golden Age) that some states neared de-commodification.<sup>108</sup> However, by the latter part of the 1970's, a combination of forces such as the ascendancy of neo-liberal ideologies, economic crisis and globalisation, an increasingly aged population and changing family structures have provoked sustained welfare crisis for capitalist welfare states.<sup>109</sup> Such emerging challenges to the economic and political authority have produced two distinct hurdles for capitalist governments. They must effectively advance the international competitiveness of their economy in a more globalized world, while maintaining the support of those voters who prioritise a more extensive welfare state. Response to these hurdles have determined two general policy solutions. First, welfare aims must be advanced by policies and legislation that increase the quality and availability of labour through incentives and investments. Simultaneously, it must respond to the demands of citizens in a cost effective way.<sup>110</sup> Interpreting, the already palpable decline in the sanctity of welfare state provision in the early 1980's, Claus Offe offered a position, which is evocative of Esping-Andersen's pivotal thesis. Adopting a more structuralist

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<sup>106</sup> Ibid, pp 41-44

<sup>107</sup> Dean, n. 37 above, p 20

<sup>108</sup> Esping-Andersen, n. 66 above, p 22

<sup>109</sup> See Esping-Andersen, *Why We Need a New Welfare State* (Oxford University Press, 2002); Paul Pierson, 'Investigating the Welfare State at the Century's End' in Paul Pierson (ed), *The New Politics of the Welfare State* (2001, Oxford University Press), p 13; Evelyn Huber and John Stephens, *Development and Crisis of the Welfare State: Parties and Policies in Global Markets* (University of Chicago Press, 2001); Handler, n. 65 above; Dean, n. 60 above, p 13

<sup>110</sup> Peter Taylor-Gooby, *Reframing Social Citizenship* (Oxford University Press, 2009), p 34

emphasis, Offe argues that advanced capitalist societies face a paralysis of the commodity forms, due to the competing tendencies toward commodification and de-commodification. In this context, a return to laissez-faire or a widespread expansion of the welfare state is perceived to be tenable by citizens who increasingly assume a broadening spectrum of interests - for example, taxpayers, who wish to see the tax-bill contained. Service-users demand high quality services that can adequately meet current social needs. Increasingly confident consumers, demand services that are respondent to individual needs. The other influential stakeholders, namely social partners, business and labour share a common interest in economic prosperity, while workers are likely to be concerned about the job supply, labour conditions, and the stringency of incentives, and employers in labour costs and the potential for profitability.<sup>111</sup>

### ***Administrative re-commodification and Contractualising Welfare States***

Offe identifies the basis of contemporary welfare state policies to be 'administrative re-commodification'. He anticipates the use of administrative power of government to sustain the commodity form, which may be realised by regulating the self-destructive tendencies of market competition, by investing in the supply side of the economy (education, training, communication systems etc) and by introducing new forms of joint-decision making and funds (which Offe terms neo-corporatism).<sup>112</sup> Indeed, recent challenges have resulted in more support for education and upskilling, and the mobilisation of as many people as possible into the workforce, with efforts to contain spending and improve efficiency, while attempting to answer pressure to ensure that services are a sufficient quality. As, Offe predicted, the response has included a marked increase (from the 1980's) in the introduction of a range of initiatives to improve the productive capacity of the workforce through access to training and education, and to increase the proportion of people engaging in paid employment, through 'welfare to work' programmes.<sup>113</sup> As Dean maintains, some elements of 'administrative re-commodification' are evident in British social policy, while others are conspicuously so, as will be examined in relation to the introduction and development of the conditions attached to Job Seekers Allowance (JSA).<sup>114</sup>

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<sup>111</sup> Ibid

<sup>112</sup> Offe, n. 79 above, p 122

<sup>113</sup> Taylor-Gooby, n. 110 above, p 34

<sup>114</sup> Dean, n. 37 above, p 20

Paradoxically, welfare rights are no less bureaucratically administrative in nature – in fact the system under which benefits operate under in the UK has become too complicated for efficient administration, and for ordinary citizens to understand.<sup>115</sup> Administrative power has become more technical in nature, rather than political. Sitton interprets this, as being due to a lack of class consensus, and thus as Offe suggests, the state's relative autonomy threatens to become absolute, as the state is compelled to call on its own administrative creativity for productive policies.<sup>116</sup> Foucault also expounds the development of state administrative powers, through his analysis of power relations, which he argues occur independently from class structure, and integrate mechanisms of surveillance and control, which individualise and discipline the subject.<sup>117</sup> Subsequently, the rise of state administrative processes in modern social security systems has been associated with a consistent transition from coercive to more sophisticated forms of discipline.<sup>118</sup> Dean maintains that administrative re-commodification has principally manifested through two processes: a shift to welfare pluralism, and the growth of new public management (NPM) processes. Both outcomes have varied materialisations in different welfare state regimes.<sup>119</sup>

Neo-liberal discourse perpetuated by new-right administrations fit comfortably with principles underpinning welfare pluralism, or the 'mixed economy of welfare'.<sup>120</sup> First, there is acknowledgement that family, neighbourhood, employers and other institutions, in addition to government contribute to welfare provision for individuals in advanced societies.<sup>121</sup> The second aspect uses the 'mixed economy' perspective prescriptively.<sup>122</sup> Based on this view, Judge, described as being pro-market, refers to Weale's claim for the primacy of liberty as the basis of good political arrangements, and Rawls' maximin criterion and the inclusion of pragmatism as the best combination of welfare agencies.<sup>123</sup> Judge comes to the conclusion that the best

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<sup>115</sup> See, Dean, n. 60 above, p 13; Neville Harris, *Law in a Complex State: Complexity in the Law and Structure of Welfare* (Hart Publishing, 2013), p 13

<sup>116</sup> See, John Sitton, *Recent Marxian Theory: Class Formation and Social Conflict in Contemporary Capitalism* (State University of New York, 1996), p 115; Offe, n. 79 above, p 123

<sup>117</sup> Michel Foucault, *Discipline & Punish: The Birth of the Prison* (Vintage Books, 1977)

<sup>118</sup> Hartley Dean, *Social Security and Social Control* (Routledge, 1991); Also, Dean, n. 37 above

<sup>119</sup> Dean, n. 60 above, p 13

<sup>120</sup> Peter Taylor-Gooby, 'Current Developments in the Sociology of Welfare' (1989) *The British Journal of Sociology* 40 (4), p 638

<sup>121</sup> *Ibid*, p 639

<sup>122</sup> *Ibid*

<sup>123</sup> Taylor, n. 1 above, p 25; See Ken Judge and Martin Knapp, 'Efficiency in the Production of Welfare' in Rudolf Klein and Michael O' Higgins (eds), *The Future of Welfare* (Routledge, 1985); Paul Spicker, *Social Policy: Theory and Practice* (Policy Press, 2014), pp 257-58

overall approach is an integrative one,<sup>124</sup> that obtains an appropriate balance between guaranteed minima for all and the opportunity to maximise individual autonomy and foster economic growth, which requires cut-backs in direct state provision'.<sup>125</sup> Left-leaning thinkers have conveyed some similar sentiments, such as Titmuss who emphasised the importance of the voluntary sector and its ability to advance altruism,<sup>126</sup> and indeed more recently, the 'Blairite gurus'<sup>127</sup> who emphasised the importance of citizenship based on mutual responsibility.<sup>128</sup> Thus it may be rational to argue that administrative re-commodification in this form, represents an awkward compromise between free-market liberalism and state protectionism, which is reinforced by an advancing technocratic approach to governance where systems of NPM play a distinct role.<sup>129</sup>

Western governments have increasingly implemented NPM techniques drawn from the private sector, in order to decentralise management within public services and effectively to increase the use of market and competition in the provision of public services.<sup>130</sup> The technique has been interpreted as a response to the perceived weakness in the traditional bureaucratic paradigm of public administration.<sup>131</sup> Christensen and Laegried note the main characteristics of NPM to encompass a management style that allows for discretionary control of organisations by persons who are freely permitted to manage defined standards of performance; dictate and

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<sup>124</sup> Taylor, n. 1 above, pp 25-26. Taylor, argues that the 'concept of integration' should be approached with caution as it is clear that there are practical ways in which welfare policy have failed to 'integrate' many sections of a differentiated 'collectively' both formally.

<sup>125</sup> Ken Judge, 'The British Welfare State in Transition' in Robert Friedman, Neil Gilbert and Moshe Sherer (eds), *Modern Welfare States* (Wheatsheaf, 1987), pp 1-43; See also, Albert Weale, *Political Theory and Social Policy* (Croom Helm, 1984)

<sup>126</sup> Richard Titmuss, *The Gift Relationship: From Human Blood to Social Policy* (Penguin, 1970), p 292

<sup>127</sup> See, David Willets MP, *Blair's Gurus* (CPS, 1996)

<sup>128</sup> See also Chapter 5 for a fulsome discussion of the influence of gurus such as Anthony Giddens and Patrick Diamond

<sup>129</sup> Hartley Dean, Jean-Michel Bonvin, Pascale Vielle and Nicolas Farvaque, 'Developing Capabilities and Rights in Welfare-to-Work Policies' (2005) *European Societies* 7 (1), pp 3-26, p 5

<sup>130</sup> George A. Larbi, 'The New Public Management Approach', Discussion Paper 112 (UNRISD, September 1999), p 1. See also, Gerry Stoker, 'Public Value Management: A New Narrative for Networked Governance?' (2006) *American Review of Public Administration* 36 (1), pp 41-57; Rune Ervik, Nanna Kildal and Even Nilssen (eds), *New Contractualism in European Welfare State Policies* (Ashgate, 2015), pp 1-10

<sup>131</sup> Janine O'Flynn, 'From New Public Management to Public Value: Pragmatic Change and Managerial Implications' (2007) *Australian Journal of Public Administration* 66 (3), pp 353-366

maintain high output levels; increase competition; contracts; devolution; customer service focus and private sector administration.<sup>132</sup>

In relation to the modern administration of the welfare state, the state is designed to be a market based delivery system and the citizen is perceived to be the customer. Gilmour noted that ‘Thatcherites see the world as a prolonged pursuit of groceries whereby people choose education from Tesco and local government from Sainsbury’s’. Obvious parallels can be drawn between Gilmour’s analogy and Olsen’s model of democracy and administrative control, which he termed ‘the supermarket state’.<sup>133</sup> The model attributes to the government a service provision role, with an emphasis on efficiency and good quality, while individuals are perceived as consumers. At the centre of Olsen’s model is the idea that the public can manipulate the state as foreign consumers rather than as political citizens. The underlying ideal upholds consumerism not ‘participatory democracy’, where the citizen is characterised as an individual consumer, not politicised or mobilised.<sup>134</sup> These concepts can be identified in the ‘The Citizen’s Charter’. Introduced at the beginning of John Major’s premiership as Conservative Prime Minister. Dean maintains that it equated to an attempt at redefining welfare citizenship, through the affirmation of right-wing initiatives (such as privatisation) that had begun in the previous era.<sup>135</sup> It can also be argued that it determined the beginning of a marked expansion of a managerialist approach, whereby the government controls and directs reform based on an ‘assumptive world of policy making, in which rational actor theories provide the background to implementation, recognition of problems and assessment of success’.<sup>136</sup>

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<sup>132</sup> Tom Christensen and Per Laegried, ‘New Public Management Puzzles of Democracy and the Influence of Citizens’ (2002) *Journal of Political Philosophy* 10 (3), pp 267-295

<sup>133</sup> John P. Olsen, ‘Administrative Reform and Theories of Organizations’ in Colin Campbell and Guy B. Peters (eds), *Organizing Governance: Governing Organizations* (University of Pittsburgh Press, 1988), p 280

<sup>134</sup> Ibid. See also, John Mullen, ‘John Major’s Citizens Charter - fifteen years later’ (1991) < [http://www.academia.edu/852747/doc\\_full\\_text\\_John\\_Majors\\_Citizens\\_Charter\\_Fifteen\\_years\\_later](http://www.academia.edu/852747/doc_full_text_John_Majors_Citizens_Charter_Fifteen_years_later) > (accessed 14 March 2016)

<sup>135</sup> A notable outcome of the implementation of the Charter, was an uncoupling of the administration from political processes – reflected in the creation of a semi-autonomous executive Benefits Agency – and a new vulnerability for social security claimants who became responsible for getting the best out of the system. Hartley Dean, ‘Managing Risk by Controlling Behaviour: Social Security and the Erosion of Welfare Citizenship’ in Peter Taylor-Gooby (ed), *Risk, Trust and Welfare* (Macmillan, 2000), p 54

<sup>136</sup> Taylor-Gooby, n. 111 above, p 119. See also, Peter Taylor-Gooby, ‘Assumptive Worlds and Images of Welfare’ (2008) *Social Policy and Society* 8 (3), pp 1-17

At the core of the genesis of the Citizen's Charter<sup>137</sup> was a recognition that there was need for a platform from which the Conservative Party could address the somewhat uneasy marriage between privatisation and public services.<sup>138</sup> The naming process attached to the policy is particularly telling. Hogg and Hill recall how the Prime Minister's Policy Unit was attracted by the idea of a 'contract' between government and people. They eventually settled on the word 'charter', which they perceived as 'less legalistic'. They dismissed 'customer' and 'consumer' as 'narrow, technocratic words' and eventually opted for 'Citizen's Charter'.<sup>139</sup> The scenario described above may appear, as a seemingly innocent naming exercise, yet the combination of ideas that underpinned this lunchtime conversation are significant. Mullen points to the position of the apostrophe (Citizen's Charter, not Citizens' Charter) as a clear indication of its intention to offer individual redress and quality of service, rather than invoking the involvement of organised civil society in the conception and management of public services.<sup>140</sup> The preface of the Citizen's Charter stated that 'citizenship is about our responsibilities...as well as our entitlements'<sup>141</sup>, indicating a greater emphasis on the responsibilities of citizenship. As Harris claims, the notion of 'active citizenship'<sup>142</sup> alters the relationship between the citizen and the welfare state as the individual becomes practically and symbolically responsible, as competent consumers, for getting the best out of the system.<sup>143</sup> Therefore, consumer-citizenship

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<sup>137</sup> HM Government, *The Citizen's Charter* (White Paper, Cm 1599, 1991). Measures introduced included agreed performance targets that public service providers were bound to comply with, complaints were to be addressed in a timely manner and redress was to be provided where appropriate. Charter marks (which could be held for three years) were to be awarded to public service organisations that were deemed to have delivered services to the highest standards

<sup>138</sup> Sarah Hogg and Jonathan Hill, *Too Close to Call: Power and Politics – John Major at No. 10* (Little, Brown and Company, 1995), p 93. Sarah Hogg was recruited to the Policy Unit from the Daily Telegraph, Nick True was recruited on the basis of his experience as Junior Minister at the Department of Social Security, where he also became a Special Adviser.

<sup>139</sup> *Ibid*, p 94

<sup>140</sup> Mullen, n. 134 above

<sup>141</sup> HM Government, n. 137 above

<sup>142</sup> The Commission on Citizenship was set up in December 1988 to 'consider how to best encourage, develop and recognise 'Active Citizenship'. The Conservative's concept of Active Citizenship represented a dissent from the participation and rights harmonies coming from the left, and it emphasised the importance of self-help, and work. It was promoted primarily by MP Douglas Hurd in order to 'complement the enterprise culture' and promote the value of voluntary public service (in the form of charitable giving and voluntary service). See Douglas Hurd, 'Freedom will flourish where citizens accept responsibilities' (Independent, London, 13 September 1989); Anthony Quinton, 'Citizens to the bureaucades!' (The Times, London, 8 October 1988); Derek Heater, *Citizenship in Britain: A History* (Edinburgh University Press, 2006), p 208; Faulks, n. 18 above, p 128; Lister, n. 2 above, pp 14 -15

<sup>143</sup> See, Harris, n. 17 above, p 27 and Hartley Dean 'Undermining Social Citizenship: The Counterproductive Effects of Behavioural Controls in Social Security Administration' (Conference Paper, Second International Conference on Social Security 22-28 January 1998), p 3

rights are largely based on the exercise of choice, with an emphasis on individual involvement, and a corresponding increase in accountability for the provider.<sup>144</sup> However, a notable problem with placing more emphasis on the individual to act on his/her own behalf is the assumption that all individuals have the capacity and equality of opportunity to participate in the processes involved. However, in reality the poor are often disadvantaged, as they are often the people least able to participate in their own interest, and for this reason, it is arguable that consumer-citizenship has the ability to widen social divisions and increase inequality levels, which subsequently works against the intended purpose of social citizenship rights.<sup>145</sup>

Furthermore, there is a general perception that the government's promotion of active citizenship, poses a threat to the social element of citizenship guaranteed by the welfare state as conceptualised by Marshall, due to the decline in the role of the state as provider.<sup>146</sup> Indeed, Barzelay argues that the individual's relationship with the state has become 'mutually adjustive' in that the providers' main purpose is to meet the users' needs.<sup>147</sup> If this is the case, a contractual arrangement may be perceived as a way to increase efficiency in service provision and as a liberal tool for enhancing customers' influence in the process of service provision.<sup>148</sup> Therefore, in this context, a hierarchical social policy, that formulates legal rights can be considered inefficient to the needs of so-called individual 'customers' as the provision of good quality service is based on a close and mutual relationship between the service provider and the receiver. Yeatman and Owler maintain that contractualising this relationship is pivotal to the provision of effective service delivery, as the process of making a contract serves to make 'the service delivery relationship subject to a process of negotiated agreement between service deliverer and client'.<sup>149</sup>

Yeatman has expressed the contention that contractualism forms a significant role in the operation of contemporary welfare states as '...the increasingly influential idea that services should be designed around the needs of individuals, not the other way

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<sup>144</sup> Harris, n. 17 above, p 27

<sup>145</sup> See Peter Golding (ed), *Excluding the Poor* (CPAG, 1986); Lister, n. 2 above; Julian Le Grand, 'The State of Welfare' in John Hills (ed), *The State of Welfare: The Welfare State in Britain since 1984* (Clarendon Press, 1991), pp 358-360; Harris, n. 17 above, p 28

<sup>146</sup> Dawn Oliver, *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship* (Open University Press, 1991), p 35

<sup>147</sup> Michael Barzelay, *Breaking Through Bureaucracy: A New Vision for Managing Government* (University of California Press, 1992), p 110

<sup>148</sup> Ervik, Kildal and Nilssen, n. 130 above, p 7

<sup>149</sup> Anna Yeatman and Kathryn Owler, 'The Role of Democratisation of Social Delivery' (2001) *Law in Context* 18 (2), pp 34-56, p 37



around'.<sup>150</sup> In other words, the operation of social services should be based on a negotiated agreement between two parties rather than being founded on 'top-down' bureaucratic rules. This leads Ervic *et al* to link the principles of NPM with the 'new-contractualism in the welfare state' as a form of liberal response to the paternalistic and inefficient operation of the social security system.<sup>151</sup> However, Goodin explains how it is easy to *construe* welfare 'contracts', 'compacts' and 'activation agreements', which are used as a means of extracting a commitment from individuals to support themselves through work, as being a 'matter of mutual obligation' and 'fair reciprocity'.<sup>152</sup> He maintains that at a basic level, it is based on the premise that people work for a living, so why should the poor be any different. It is normal to work for a paycheck, so why should it not be normal to work for a dole payment. A corollary of this principle is 'no work, no pay',<sup>153</sup> a view that Lister claims maintains an 'exclusive rather than inclusive version of citizenship', as only activity in the public sphere will be recognised as work: 'by and large, governments prefer not to quantify what goes on in the privacy of the home; it does not count'.<sup>154</sup> Furthermore, Goodin argues that fair reciprocity does not necessarily mean that everyone has the same duties (to work for a living) and rights (to get paid only if you work). Nor does it require that we do the same thing for one another at the same time as one another. It is conceivable for us to discharge obligations by helping one another in various ways at various times. It follows, that what Goodin terms 'synchronous mutual obligation', underpins the delivery of modern workfare programmes, is, in his opinion a 'curious and uncommon' form of reciprocity.<sup>155</sup> In short, it functions adversely as 'mutual insurance' - the standard manifestation of mutualism in the social security system - which supports an arrangement whereby each comes to the aid of another when it is required, with the strong supporting the weak. The synchronous model demands

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<sup>150</sup> Anna Yeatman, 'Interpreting Contemporary Contractualism' in Mitchell Dean and Barry Hidness (eds), *Governing Australia: Studies of Contemporary Rationalities of Government* (Cambridge University Press: 1998) p 228

<sup>151</sup> Ervic, Kildal and Nilssen, n. 130 above, p 7

<sup>152</sup> Robert E Goodin, 'Structure of Mutual Obligation' (2002) *Journal of Social Policy* 31 (3), pp 579-596, p 579

<sup>153</sup> *Ibid*

<sup>154</sup> Ruth Lister, *The Female Citizen* (Liverpool: University of Liverpool, 1989), p 16. As cited by Harris, n. 17 above, p 28. See also, Lister, n. 2 above, p 12

<sup>155</sup> Goodin equates this form of reciprocity to that used by loan sharks, central to which is immediate matching payment or repayment from someone who is obviously not, just now, in any position to match or repay. See Goodin, n. 152 above, 592

repayment from the weak, when they are weak', which ultimately results in the enforcement of relations of social subordination.<sup>156</sup>

Other scholars define the salience of contractualism, by its capacity to redefine the relationship between the citizen and the state by placing emphasis on its propensity to change individual behaviour.<sup>157</sup> King and Freedland broadly determine contractual arrangements that are designed to control problematic individuals as 'behaviour management contracts'.<sup>158</sup> Dwyer claims the result of their implementation, is a form of citizenship framed around the logic of individualised responsibility whereby 'the right to claim welfare is directly linked to, specified and socially valorised prior contributions; an understanding that undermines the value and legitimacy of certain other contributions, while emphasising the validity of paid employment, as central to definitions of citizenship'.<sup>159</sup> Therefore, and paradoxically, the liberal concept of the contract, which is purportedly intended to enhance the power of citizens at the expense of the administrators of the welfare state, has been integrated into social security provision.<sup>160</sup> Thus developing a system that King and Freedland maintain, uses contracts as instruments of illiberal policy – which are often 'couched in avowedly liberal forms'.<sup>161</sup> It has largely manifested via the principle of conditionality, which holds that eligibility to certain basic welfare entitlements

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<sup>156</sup> Ibid, p. 582, 586, 590, 592

<sup>157</sup> See for example, Handler, n. 65 above; Jochen Clasen and Daniel Clegg 'Levels and Levers of Conditionality: Measuring Change Within Welfare States' in Jochen Clasen and Nico A. Siegel (eds), *Investigating Welfare State Change: the 'Dependent Variable Problem' in Comparative Analysis* (Edward Elgar, 2007), p. 174; Commonwealth of Australia, *Changing Behaviour: A Public Policy Perspective* (Australian Public Services Commission, 2007); Geoff Mulgan, 'Influencing Behaviour to Improve Health and Wellbeing: an Independent Report' (HMSO, 2010); Dale Southerton, Andrew McMeekin and David Evans, *International review of behaviour change initiatives* (Scottish Government, 2011); Sigrid Betzelt and Silke Bothfield (eds), *Activation and Labour Market Reforms in Europe: Challenges to Social Citizenship* (Palgrave, 2011)

<sup>158</sup> Mark Freedland and Desmond King, 'Contractual Governance and Illiberal Contracts: Some Problems of Contractualism as an Instrument of Behaviour Management by Agencies of Government' (2003) *Cambridge Journal of Economics* 27, pp 465–477, p 466

<sup>159</sup> Peter Dwyer, 'Citizenship, Conduct and Conditionality: Sanction and Support in the 21st-Century UK Welfare State' in Menno Fenger, John Hudson and Catherine Needham (eds), *Social Policy Review 28: Analysis and Debate in Social Policy 2016* (Policy Press, 2016), p 42; See also, Taylor-Gooby, n. 110 above, p 117, and Ruth Lister, 'The Age of Social Responsibility in the 21st Century' in Chris Holden, Majella Kilkey and Gaby Ramia (eds), *Social Policy Review* 23 (Policy Press, 2011)

<sup>160</sup> Ervik, Kildal and Nilssen, n. 130 above, p 7

<sup>161</sup> Freedland and King, n. 158 above, p 466

should be dependent on an individual first satisfying specified duties or agreeable patterns of behaviour.<sup>162</sup>

Such contractual/quasi contractual measures, which governments have increasingly used to 're-write the terms of the welfare contract'<sup>163</sup> arguably represent a more subtle way of controlling individual conduct than bureaucracy and professionalism, and thus contribute to an erosion of legal rights, and legal security of the social security claimants exposed to them.<sup>164</sup> Although eligibility conditions have long formed part of the terms of social provision, 'conditions of conduct', that is 'behavioural requirements and constraints imposed on different kinds of benefit recipients' are a modern phenomenon.<sup>165</sup> Furthermore, it represents an example of where the government has elected to 'clothe' a relationship that is not from the outset derived from a contract or even an agreement between two mutual signatories, but rather emanates from the particular powers and duties of the public authority in question (DWP) vis-à-vis the benefit claimant – the person to whom their their duties exist. It follows that the public authority (DWP) and the benefit claimant are expected to use this quasi-contractual form to identify the framework within which the public authority will use to control the behaviour of the client. However, the government does not generally identify such relationships as being primarily disciplinary.<sup>166</sup>

### **Conclusion**

The central aim of the thesis is to demonstrate that the political drive since 1979 has been to create a social security system which seeks to re-condition the out-of-work to be economically self-sufficient in order to deliver savings to the fiscal budget and to the taxpayer in an era of globalisation. However, that is not to say that Beveridge's social security system and Marshall's theoretical interpretation of its effect upon the nature of social relations were in themselves political. The view that the out-of-work should be granted a minimum level of wealth and security on the basis of citizenship

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<sup>162</sup> Alan Deacon, 'Justifying Workfare: the Historical Context of Workfare Debates' in Michael White (ed), *Unemployment and Public Policy in a Changing Labour Market* (PSI, 1994); see also Peter Dwyer, *Welfare Rights and Responsibilities: Contesting Social Citizenship* (The Policy Press, 2000), p 129 and Peter Dwyer, *Understanding Social Citizenship: Themes and Perspectives for Policy and Practice* (2nd edition) (Policy Press, 2010)

<sup>163</sup> Rhiannon Buck, Ceri J. Philips, Chris J. Main, Maria C. Barnes, Mansel Aylward and Gordon Wadell *Conditionality in Context: Incapacity Benefit, Discussion Paper* (University of Bath, 2006), p 1

<sup>164</sup> Even Nilssen and Nanna Kildal, 'New Contractualism in Social Policy and the Norwegian Fight against Poverty and Social Exclusion' (2009) *Ethics and Social Welfare* 3 (3), pp 303-31, p 317

<sup>165</sup> Clasen and Clegg, n. 157 above, p 174

<sup>166</sup> Freedland and King, n. 158 above, p 466

was created in the context of the creation of a ‘new world order’, one that could ‘deliver a lasting and prosperous peace’ which would insure basic human needs via collective provision.<sup>167</sup> This thesis seeks to both interrogate and emphasise the vital distinction between the essence of the politics that informed the post-war settlement and those that currently dictate the treatment of those who are out-of-work.

Marshall asserted the importance of statutory rights and protection for those who could not contribute to the market. As Esping-Anderson determined, this means that citizens are not forced to meet all their needs by way of securing a market wage. The risks associated with market participation, such as sickness, unemployment, injury, old-age and caring responsibilities, are alleviated through a collective pooling of risks – referred to as the ‘de-commodification of labour’, as outlined above.<sup>168</sup> As Marshall understood, it is this process which can alleviate the inequality associated by the operation of the capitalist system,<sup>169</sup> whereas today’s dominant political class assert the requirement that the individual should contribute to the market by way of undertaking full-time employment.

It is the gap that emerges between Marshall’s rights-based understanding of citizenship, premised on his analysis of the development of social citizenship during the first half of the twentieth century, and the current conceptualisation of citizenship, shaped by communitarian and managerial perspectives on citizenship that see rights predicated on responsibilities, that the thesis examines for those citizens who fall between this gap – those in need of state security but not discharging their ‘responsibility’ as active worker-citizens. Marshall’s view of citizenship was deficient in many ways, primarily in his gender-blind approach that fed from Beveridge’s patriarchal assumption that women’s inclusion within the welfare state was by virtue of their role as dependants and/or carers, and an abject failure to view women as citizens in their own right.<sup>170</sup> His theory fails other tests as well: the exclusion of children as citizens, his exclusively anglo-centric focus, the narrow view of ‘state’ that fails today’s global analysis. His theory is not romanticised here but acknowledging its failures does not undermine the value that his conceptualisation

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<sup>167</sup> Andrew Gamble, *Can the Welfare State Survive?* (Polity Press, 2016), p 26

<sup>168</sup> Esping-Anderson, n. 66 above, p 27

<sup>169</sup> Dean, n. 13 above, p 4

<sup>170</sup> Ruth Lister, *Citizenship: Feminist Perspectives* (Palgrave Macmillan, 2003); Susan Pedersen, ‘Gender, Welfare, and Citizenship in Britain during the Great War’ (1990) *The American Historical Review* 95 (4), pp 983-1006

brings to our understanding of the fragile balance between citizen's rights and responsibilities.

Marshall did not ignore citizen responsibilities. He understood the contribution that citizens should make to their communities. But he saw the value in their participation in a wider context than budgetary or economic effectiveness. Most significantly, he recognised the democratic rights of individuals to participate as full citizens. It is this ideal that serves as the benchmark for citizen participation in the modern welfare state. Contemporary governments in western welfare states are likely to guarantee participation through the enforcement of a culture of administrative contractualism, which dictates that claimants must fulfil increasingly onerous conditions before they are provided with an inadequate entitlement to reach an acceptable standard of living.<sup>171</sup> Those who do not adapt their behaviour in order conform to the stock image of the active citizen and who fail to fulfil the terms of the social security contract are punished and excluded from what has been increasingly portrayed as the privilege of state support. This distinction has called into question the very survival of the welfare state.

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<sup>171</sup> Freeland and King, n. 158 above, p 466

## **PART 2: The Conservative Government 1979-1997**



### **Chapter 3: The early Trajectory of Change: Social Security System and provision for the Unemployed 1974-1990**

#### ***Introduction***

The fabric of British society changed significantly from the beginning of the 1970's to the close of the 1980's, a change that was arguably exemplified by notable adjustments in the architecture of the Welfare State, and more specifically changes in the nature of welfare provision and political attitudes towards the unemployed.

The beginning of the 1970's brought economic turmoil which led to contested political views on the continued use of the Keynesian economic consensus (characterised principally by an adherence to the goal of achieving full-employment) and space was created for the advocacy of a different ideology, the monetarist neo-liberal approach. The espousers of Neo-liberalism, dubbed the 'New Right', saw Beveridge's influence as thwarting a role for competition and the market, and sought, to promote the classic liberal notions of individual responsibility and self-discipline as both social and economic remedies. When Margaret Thatcher, a passionate 'new right' supporter was elevated to the position of Prime Minister, she, backed by her party, sought to give neo-liberal ideology legislative legs. At the heart of the subsequent welfare reform lay the notion that the 'energetic and successful' should be rewarded, while the idle should be 'punished'.<sup>1</sup> This reward-punishment axis was regarded, at the individual level, as a kind of engine for success, and therefore at the societal level (seen ultimately as a collection of individuals) as an engine for economic growth. Correspondingly, anything that mitigated the punishment of failure was seen as economically damaging. Norman Fowler's 1985 reforms to social security introduced activation measures which sought to emphasise that the only route to prosperity was paid employment. Further emphasis was placed on means-testing to ensure that the most 'deserving' claimants were protected, while the unemployed became subject to increased discretionary decision making and 'conditionality' ie; measures seeking to ensure that claimants accepted and met specified duties, and achieved desired patterns of behaviour, to entitle them to receive unemployment benefit.<sup>2</sup>

Connected to this series of dynamics sits the growth of the welfare rights movement. Detailed below is the notable growth in organisations who, in response to welfare

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<sup>1</sup> Vic George and Paul Wilding, *Welfare and Ideology* (Harvester Wheatsheaf, 1994), p 30

<sup>2</sup> Peter Dwyer, *Welfare Rights and Responsibilities: Contesting Social Citizenship* (Policy Press, 2000), p 129



change, sought to uphold and protect the principles enshrined in the Beveridge report, and support claimants through the growing myriad of means-tested benefits. Such organisations also sought, and continue to seek, to ensure that claimants from disadvantaged areas have the legal means to access their entitlements, via representation at social security tribunals and by exerting ‘pressure through law’ ie; using legal techniques to achieve collective objectives.<sup>3</sup>

This chapter begins with an examination of the series of events and dynamics that led to the prominence of neo-liberal ideology. It looks to parallel developments in social security, including the role of the Supplementary Benefits Commission (SBC), and the subsequent formation of the SSAC. It also addresses the emergence of organisations concerned with welfare rights, such as the Child Poverty Action Group (CPAG) and the Legal Action Group (LAG). This is followed by an examination of the Thatcher administration’s treatment of the unemployed, with a specific focus on the welfare reforms executed by Norman Fowler and John Moore (Thatcher’s Secretaries of State for Social Security). A focus on the reactions by welfare rights advocates to the reforms, particularly those related to the 1986-89 legislative reforms to social security law, and an examination of the emergence of contested issues for social security claimants, will shed light on the complex negotiation process between politics and social policy leading to the eventual creation of the law. This analysis will identify as crucial the context of an ideological shift refiguring the appropriate relationship between the state and social security claimants - in terms of the increasing neo-liberal emphasis in the development of social policy, the reaffirmation of the classical liberal notion of individual responsibility, the emergence of conditionality - and arguably the use of legal reform as an instrument of social control.<sup>4</sup>

The recently established SSAC played a pivotal role in the negotiation process, by way of its responses to the Fowler proposals, in its position as an independent scrutinising body, and in its consultative role, which permitted it to gather the views of other pressure groups outside the immediate realms of government.<sup>5</sup> Third sector groups

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<sup>3</sup> Carol Harlow and Richard Rawlings, *Pressure Through Law* (Routledge, 1992), p 1

<sup>4</sup> Stanley Cohen and Andrew Scull, ‘Introduction: Social Control in History and Sociology’ in Stanley Cohen and Andrew Scull (eds), *Social Control and the State* (Basil Blackwell, 1983), p 3

<sup>5</sup> See, Michael Bett, CBE, ‘The Role of the Social Security Advisory Committee’ (1994) *The Journal of Social Security Law* 1(3), pp 105-109

such as CPAG, Youthaid, and the CAB<sup>6</sup> also responded independently to government reform, and when appropriate such organisations worked together to create far-reaching sites of resistance to ‘prevent the severe erosion by Conservative governments of universalist social security in favour of ‘selectivism’ (targeting).<sup>7</sup> The chapter concludes with a consideration of the reforms as an indicator of increasing governmental and legal social control.

### ***1974 – 1979: The turning point and the implications for Social Security in Britain***

#### ***The Economic Downturn***

Historian Tony Judt writes that ‘Within three years of the end of the most prosperous decade in recorded history (1960’s), the post-war economic boom was over. Western Europe’s ‘thirty glorious years’ gave way to an age of monetary inflation and declining growth rates, accompanied by widespread unemployment and social discontent’.<sup>8</sup> It is in this decade, the 1970’s, where the thesis begins its socio-legal narrative: specifically in 1974, the year in which Harold Wilson was returned as the leader of a minority Labour government. A mere five years later, Labour would be ‘swept from power’ following the ‘winter of discontent’.<sup>9</sup> The 1970’s saw an ideological battle

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<sup>6</sup> Throughout the 1980s the CAB increased efforts to raise the profile of social policy work across the organisation and area social policy groups began to emerge. In addition to discussing priorities, groups met with local service providers or agencies to influence policies and practices in their areas. In 1980, CAB produced its first ‘Information retrieval bulletin’, the forerunner of the ‘Social Policy bulletin’. By 1983 the then Minister of State for Consumer Affairs expressed concern about the alleged ‘politicisation’ of the CAB National Organisation. However, the Lovelock review found that the policy aim was ‘proper and useful’ and that the service would be ‘open to criticism if it did not undertake this work’. Subsequently, in 1985, CAB created a new department, Policy, Comment and Development Division – incorporating information retrieval, research and development, press and publicity and parliamentary liaison. See, Citizens Advice Bureau, *The Story of Influence* (CAB, 2009), p 36 < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/225910/09\\_Story\\_of\\_influence.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/225910/09_Story_of_influence.pdf) > (accessed 18 August 2016); See also, Douglas Lovelock, *Review of National Association of Citizens’ Advice Bureau* (Cm 9131, HMSO, 1984)

<sup>7</sup>The ‘Social Security Consortium’ for example reflected an impressive combination of welfare rights workers, social services directors and social workers, academic researchers and other professionals who had been involved in lobbying the government during the passage of the (Social Security) Bill’. Trevor Buck, *The Social Fund: Law and Practice* (Sweet and Maxwell, 2000), p 33. ‘Targeting’ denotes the new, more positive-sounding, term for means testing, espoused by a government very sensitive to language: Thatcher banned the words ‘poverty’ and ‘inequality’ from official discourse. See, Pat Thane and Ruth Davidson, *The Child Poverty Action Group: 1965 to 2015* (CPAG, 2016), p 9

<sup>8</sup> Tony Judt, *Postwar: A History of Europe Since 1945* (William Heinemann, 2005), p 453

<sup>9</sup> Nicholas Timmins, *The Five Giants: A Biography of the Welfare State* (Harper Collins, 2001), p 312

unleashed between the Keynesians and neo-liberals in much of the developed world.<sup>10</sup>

Both sides offered economic arguments to support their claims. The Keynesians (and proponents of Beveridge) - whose creation of a welfare settlement was made possible by the imperatives of World War II, which effectively tore up pre-war structures by the roots - claimed that high wages, full employment and the welfare state had bolstered consumer demand which in turn had fuelled expansion. Therefore, they believed that pumping more demand into the economy would ensure an end to economic depressions. On the other hand, neo-liberals argued that the post-war economic consensus and politics prevented the control of inflation and cost-cutting in both government and in the private sector, thus preventing profits, the 'real motor of economic growth in a capitalist economy', from rising; a claim which the Keynesians denied.<sup>11</sup>

Labour's term in office (1974-1979) coincided with a period of economic slump which reduced industrial production in the 'developed market economies'.<sup>12</sup> It took until 1976 for Labour to take seriously the extent of the dangers threatening the national economy.<sup>13</sup> The borrowing requirement had grown to £12 billion in the UK, by 1975, and the government lost the confidence of the world's financial markets.<sup>14</sup> By 28 September 1976, the pound, which in March 1974 had been worth \$2.30, was down below \$1.70.<sup>15</sup> On 29 September 1976, the Chancellor of the Exchequer, Denis Healey, applied to the International Monetary Fund (IMF) for a £2.3 billion loan to save sterling.<sup>16</sup>

Meanwhile, James Callaghan, former Labour Foreign Secretary, was preparing to make his first speech as Prime Minister.<sup>17</sup> He used the opportunity to announce a formal break with Keynesianism. As the Prime Minister took the podium,

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<sup>10</sup> In the UK the latter faction claimed victory when Margaret Thatcher was elected Conservative Prime Minister on the basis of a manifesto that was centred on neo-liberal principles. Both sides offered economic arguments to support their claims. See, Eric Hobsbawm, *Age of Extremes: The Short Twentieth Century 1914-1991* (Abacus, 1994), p 409

<sup>11</sup> Ibid

<sup>12</sup> Alec Cairncross, *The British Economy since 1954* (Blackwell, 1993), p 183

<sup>13</sup> Ibid

<sup>14</sup> Cairncross, n 11 above, p 184

<sup>15</sup> Timmins, n 9 above, p 312

<sup>16</sup> Ibid

<sup>17</sup> Ibid: James Callaghan replaced Harold Wilson suddenly resigned as Prime Minister in 1976

unemployment stood at 6.1 percent;<sup>18</sup> by the end of the decade it was more than twice what it had been at any point since the decade began. He told delegates that:

‘We used to think that you could spend your way out of recession and increase employment by cutting taxes and boosting Government spending. I tell you in all candour that option no longer exists, and that insofar as it ever did exist, it only worked on each occasion since the war by injecting a bigger dose of inflation into the economy, followed by a higher level of unemployment as the next step. High inflation followed by higher unemployment...that is the history of the past twenty years.’<sup>19</sup>

Callaghan’s speech indicated an acknowledgement that, in a shifting world market of floating exchange rates<sup>20</sup> and excessive inflation<sup>21</sup>, reliance on Keynesian economics alone was no longer enough.<sup>22</sup> Still, in the absence of an obvious alternative route, Labour continued on a familiar path by putting into motion interventionist policies which sought to stabilise failing industries, spending substantial amounts of money in the process.<sup>23</sup> Labour also poured billions of pounds into employment support, often through the Manpower Services Commission, and appointed the Employment Service to oversee the Industrial Training Boards which facilitated the Temporary Employment Subsidy, the Job Release Scheme, and the Youth Opportunities Programme, each created, according to Timmins, ‘on the increasingly unsustainable assumption that excess unemployment had been caused by the recession’.<sup>24</sup> It was

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<sup>18</sup> James Denman and Paul McDonald, ‘Unemployment Statistics from 1881 to the Present Day’ (ONS, 1996)

<sup>19</sup> James Callaghan, Labour Party Annual Conference Report (1976), p 18

<sup>20</sup> On August 15<sup>th</sup> 1971, US President Richard Nixon announced that his country was abandoning the system of fixed exchange rates. The US dollar would float against other currencies. According to Judt (n 6, above, p 454) this decision was based on the huge military burden of the Vietnam War and a growing US Federal budget deficit. The dollar was tied to a gold standard, and there was growing fear in government that foreign holders of US currency (including Europe’s central banks) would seek to exchange their dollars for gold, draining American reserves. The British Pound was floated in 1972. At a conference in Paris, in March 1973 arrangements were made to put in place a new floated system.

<sup>21</sup> Ibid: The liberalisation of the international monetary system resulted in inflation. In an effort to head off the anticipated downturn, European governments adopted reflationary policies: allowing credit to ease, domestic prices to rise, and their own currencies to fall. This did not go as planned, owing to the uncertainty produced by America’s retreat from a dollar-denominated system; which international agreements on floating-rate regimes were unable to restrain. The UK average rate of inflation was 15.6 percent, but in its worst year, 1975, the British inflation rate exceeded 24 percent

<sup>22</sup> Timmins, n. 9 above, p 313

<sup>23</sup> In fact, between 1970-71 and 1975-76, government expenditure on ‘trade, industry and employment’ increased from £1,800,400,000 to £ 2,586,600,000, an increase of 44%

<sup>24</sup> Timmins, n. 9 above, p 351

estimated that by 1978 such schemes were keeping up to 400,000 people off the unemployment total.<sup>25</sup>

### ***The Supplementary Benefits Commission***

In terms of Social Security Provision for the unemployed, Barbara Castle attempted to revive the Supplementary Benefits Commission (SBC).<sup>26</sup> David Donnison, an academic, who had been appointed by the Conservative Secretary of State for Social Services, Keith Joseph, in 1973 to replace Richard Titmuss as deputy Chairman, used his new position as Chair to launch a review of Supplementary Benefit (SB) which had grown to become 'a massive scheme which nearly one-tenth of the British people depended on for at least part of their income'.<sup>27</sup> Prior to the appointment of Donnison, the SBC's role was recognised as administrative, rather than advisory. Its main function was the formulation of policies relating to only the discretionary part of the scheme. However, by the end of its mandate it was a highly respected 'outspoken and crusading body'<sup>28</sup> that published several reports on specific aspects of the scheme which made recommendations for reform.<sup>29</sup> Indeed in its fifth and final annual report it began by asserting that the SBC 'have been able to express our views on various aspects of social policy which affect people who may claim supplementary benefit or family income supplement', and continued by emphasising that 'the views emphasised are our own and do not represent government policy'.<sup>30</sup> The expanding role of the SBC from 1975 to its demise in 1980 is particularly interesting, as its positioning as an 'advisory body'<sup>31</sup> can be interpreted as precursor to the evolution of the Social Security Advisory Committee (SSAC) (established 1980) an independent

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<sup>25</sup> Ibid

<sup>26</sup> The Supplementary Benefits origins go back to the Poor Law Commission which was established to oversee the new poor law authorities. In 1934, against the backdrop of the depression, which was bankrupting the most impoverished poor law authorities, parliament set up the Unemployment Assistance Board to provide a national, uniform system of relief for unemployed people who had run out of insurance benefits. In 1940/41 this Board's responsibilities were extended to supplement pensions and to cover needs arising from WWII. In 1948, the local authorities' remaining powers of relief were taken over by the National Assistance Board. In 1966 the National Assistance Board was replaced by the Supplementary Benefits Commission – which was dissolved in 1980. David Donnison, *The Politics of Poverty* (Martin Robertson, 1982), p 13-14

<sup>27</sup> Ibid, p 44. Donnison was appointed on 1 October 1975. He shares his experiences and view of the system at the time in his book '*The Politics of Poverty*' which provides a detailed account of the political environment that the social security system operated within

<sup>28</sup> Anthony Ogus and Eric M. Barendt, *The Law of Social Security* (Butterworths, 1982), p 543-547

<sup>29</sup> James Logie, 'The Social Security Advisory Committee' (1989) *Social Policy and Administration* 23 (3), p 248-261

<sup>30</sup> Supplementary Benefits Commission, 'Report of the Supplementary Benefits Commission' (For the year ended 31 December 1979), (Cm 8003, HMSO, 1980), p 10

<sup>31</sup> Ibid

arms-length body that provides a 'unique oversight role' of the social security system.<sup>32</sup>

The development of Supplementary Benefit, on which many unemployed people relied, was inherently problematic. The 1966 switch to a rights-based system for the provision of the basic benefit had left extra weekly and one-off payments as discretionary. But the judgements on discretionary decisions were appealable and this in itself, coupled with 'people's increasing willingness to demand their rights', led to more than half of claimants receiving exceptional one-off payments by 1975.<sup>33</sup> In an effort to maintain fairness across the system, each unique decision on a particular case admitted a new rule for staff to follow. Thus, 'the book of rules which every National Assistance Board member could carry around in his pocket had grown into several mass volumes, so often amended and so complicated that even the staff could not understand them'.<sup>34</sup> Offices under excessive pressure tended not to refer to the growing rule book at all and relied on 'local rules of thumb'.<sup>35</sup> Donnison said the interaction of the cumulative problems led 'the system to chaos'.<sup>36</sup>

Donnison with the support of David Ennals - the future second permanent secretary at the Department for Health and Social Services (DHSS) - and Geoffrey Otton embarked on a five year public campaign (1975 -1980) for a simpler system, based on legal entitlement, which would remove most of the remaining discretion.<sup>37</sup> Timmins comments that the parallel report, prepared by DHSS entitled '*Social Assistance*' 'starkly marked the changing - and increasingly defeated - climate of the times'.<sup>38</sup> In the context of continuing restraint on public expenditure, it confirmed there was no chance of finding the massive sums required for National Insurance benefits or the services that would be required to reduce the number of Supplementary benefit claimants. The report concluded that the most realistic prospect was 'to fit the scheme to its mass role of coping with millions of claimants in

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<sup>32</sup> Gráinne McKeever, 'Legislative Scrutiny, Co-ordination and the Social Security Advisory Committee: from System Coherence to Scottish Devolution (2016) *Journal of Social Security Law* 23 (3), pp 126-149, p 127

<sup>33</sup> Donnison, n. 26 above, p 41

<sup>34</sup> *Ibid*, p 43

<sup>35</sup> *Ibid*

<sup>36</sup> *Ibid*

<sup>37</sup> Donnison was supported in his campaign by the support of David Ennals (Labour Secretary of State for Social Services from 1976 to 1979) and Geoffrey Otton (Chief Advisor of the Supplementary Benefits Commission)

<sup>38</sup> Donnison, n. 26 above, p 43

known and readily defined categories for the future'.<sup>39</sup> Meanwhile, the SBC sought improved Child Benefit, a higher rate of benefit for the long-term unemployed, and the regular six-monthly lump sum that would replace most discretionary grants.<sup>40</sup> Ultimately, the SBC's recommendations were not adopted;<sup>41</sup> rather, the newly elected Conservative government published a White Paper in 1979 that specified the introduction of regulations which would dictate 'what expenses will be covered by the scale rates, what additional expenses will be provided for, and the circumstances for which discretionary payments will be allowed'.<sup>42</sup> The changes were implemented by the Social Security Act 1980 and the regulations made under it. The purposes for which the lump sum payments could be made and the reasons for which they could not be made, were set out in the Supplementary Benefit (Single Payment) and the Supplementary Benefit (Urgent Cases) regulations which would be applied by 'supplementary benefit officers' who were no longer agents of the SBC, but who represented the DHSS. It was suggested by Mesher, that this shift in decision-making responsibility would lead to tighter control of the conditions of entitlement.<sup>43</sup> Lynes and Drabble concur with Mesher in their view that the 'regulations were, and were clearly intended to be, restrictive, limiting the power to make lump-sum payments to specified circumstances and making them subject to numerous conditions'.<sup>44</sup> However, they also noted the fact that they also conferred a legal entitlement to such payments wherever those circumstances existed and the prescribed conditions were satisfied. The conversion of a myriad of discretionary payments into legal entitlement was an 'open invitation' to the growing welfare rights movement to undertake organised 'take up' campaigns.<sup>45</sup>

Ultimately, the Social Security Act 1980 brought the principal function of the SBC to an end, and the government abolished it. The SSAC was established in its place and

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<sup>39</sup> Department of Health and Social Security, *Social Assistance: A Review of the Supplementary Benefits Scheme in Great Britain* (HMSO, 1978), p 5

<sup>40</sup> Timmins, n. 9 above, p 350

<sup>41</sup> *Ibid* - The scheme of recommendations published by the Supplementary Benefit Scheme were largely reformed. They did not achieve the higher long-term rate of benefits for the unemployed – or twice-yearly lump-sum grants for all claimants. Child- benefits suffered a cut in real value. Nothing was done to increase opportunities for work, which the Supplementary Benefit Commission (SBC) considered to be their first priority

<sup>42</sup> Department of Health and Social Security, *Reform of the Supplementary Benefits Scheme* (Cm 7773, HMSO, 1979), p 2 and p 5

<sup>43</sup> John Mesher, 'The 1980 Social Security Legislation: The Great Welfare Chainsaw Massacre' (1981) *British Journal of Law and Society* 8 (1), pp 119–127, p 122

<sup>44</sup> Tony Lynes and Richard Drabble, 'The Social Fund – Discretion or Control?' (1989) *Public Law*, pp 297-322, p 297, p 298

<sup>45</sup> *Ibid*

was granted jurisdiction to review social security regulations that made up the entire social security system.<sup>46</sup> Unlike the operation of the SBC, the SSAC was not charged with any administrative or executive powers. Rather its primary responsibility would be to make proposals for social security regulations.<sup>47</sup> The SSAC assumed a ‘consultative role’, providing those groups affected by social security proposals with an opportunity to provide additional views and expertise that would be subsequently considered as part of the Committee’s scrutiny process.<sup>48</sup> The intermediary link provided by the SSAC, between government and groups and/or organisations with a vested interest in social security issues has proven significant, particularly in the context of the rapidly changing nature of social security provision.

As Donnison’s commission worked, negative public and political feeling towards those without employment continued to increase and stories of social security fraud increasingly penetrated the walls of the House of Commons and occupied the pages of the UK press.<sup>49</sup> Ill-feeling towards rising unemployment, spending cuts, and inflation contributed to the traction building around a different economic consensus; an alternative to Keynesian-style interventionism.

### ***The Growing Influence of ‘New Right’ Neo-liberalism and the Parallel Resistance***

The ideas of Neo-liberal Conservatism began to permeate Conservative policy throughout the 1970’s, thus beginning a ‘counter’-revolution’ which sought to create a more individualistic, entrepreneurial, property-owning society in which any

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<sup>46</sup> In line with the government’s policy of reducing the number of advisory committees, the establishment of SSAC also abolished the need to the National Insurance Advisory Committee (NIAC). Logie, n. 29 above, p 250

<sup>47</sup> Ibid: ‘When the Secretary of State proposed to make regulations under the social security legislation, he must refer the proposals to the Committee. It must then make a report on them, making such recommendations as it considers appropriate. The Secretary of State must then prepare a response to this report, stating the extent to which he has given effect to the Committee’s recommendations and, in so far as he has not done so, the reasons why not. When the regulations are laid before parliament for its approval, the report and response must be laid along with them’. Anthony Ogus details the Committee’s advice function in ‘SSAC as an Independent Advisory Body: its Role and Influence on Policy Making’ (1998) *Journal of Social Security Law* 5 (4), pp 156-174, p 156

<sup>48</sup> Ibid

<sup>49</sup> Ibid. Donnison writes in detail about public and political feeling towards the unemployed throughout the 1970’s; see Donnison, n. 26 above, pp 67-75; Iain Sprout MP, a Tory backbencher who represented Aberdeen South, led an unrelenting ‘campaign’ on social security fraud and benefit provision to the unemployed. An example of his common sentiment was recorded in parliament in August 1976. He said “that the attitude he (David Ennals) and his out-of-touch advisers are displaying has allowed the social security system to become one of the biggest rackets in this country today—cheating the honest taxpayer and cheating the truly deserving cases” HC Deb, 4 August 1976, Vol. 916, cc 1716-1725



remaining embers of socialism would be effectively doused.<sup>50</sup> In the early 1970's, however, as Edward Heath's Conservative government followed a well-trodden path of Keynesian policy, neo-liberal Conservatives felt bereft of a senior party figure to promote their cause. The person who would fulfil this role came in the 'somewhat unlikely' shape of Sir Keith Joseph.<sup>51</sup> Following the Conservative party's defeat in the 1974 election, Joseph sought to restore his relationships with leading neo-liberal advocates such as Alfred Sherman,<sup>52</sup> Alan Waters and Ralph Harris. As Heath entered into opposition (1974), Joseph agreed to argue the case for monetarism and the free market within the Conservative Party and pressed for a re-examination of economic policy within the shadow cabinet.<sup>53</sup> Faced with considerable difficulty in convincing fellow members to adopt a new economic and social consensus, Joseph decided (following consultation with Sherman) to establish a new think tank, the Centre for Policy Studies (CPS) in June 1974. Joseph was Chair, Margaret Thatcher was appointed Vice-Chair and Sherman assumed the post of Director of Studies.

In parallel to the Conservative's move towards neo-liberalism, was the steady growth of the welfare rights movement. The Child Poverty Action Group (CPAG), Shelter, and the Disablement Income Group (DIS) among other organisations 'emerged from increasing awareness of the inadequacies of the welfare state' throughout the late

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<sup>50</sup> Robert M Page, *Clear Blue Water? The Conservative Party and the Welfare State since 1940* (Policy Press, 2015), p 77-78. Page writes that 'the perceived failure of the Heath government to move in the neo-liberal Conservative direction outlined in the 1970 General Election manifesto led many of those on the right to campaign more vigorously for the party to abandon the post-war drift towards collectivism'. There was growing discontent on the right of the party when Heath's government (1970-1974) did follow the path of neo-liberalism, and subsequent pressure groups/organisations were set up such as; the 'Economic Dining Club' in 1972 (Nicholas Ridley, Jock Bruce-Gardyne and John Biffen); the 'Selsdon Group' (Lord Coleraine, Nicholas Ridley and Ronald Bell); the 'Bow Group' chaired by Peter Lilley. Furthermore, the Institute for Economic Affairs (IEA) (Arthur Seldon) and a group of economic 'monetarists' including Alan Walters and Brian Griffiths supported the neo-liberal cause. Notably, Walters and Griffiths published a 'Memorial to the Prime Minister' in 1973, suggesting that the Heath government's expansionary policies would lead to higher inflation and an unsustainable current account deficit. See also Richard Cockett, *Thinking the Unthinkable: Think-Tanks and the Economic Counter Revolution 1931-1983* (Fontana Press, 1995), p 200-202

<sup>51</sup> Page, n. 50, p 79

<sup>52</sup> Alfred Sherman was previously a member of the Communist Party and acted as a gunner in the Spanish Civil War. He later read economics at LSE, and following WWII took a tour of recently 'communized' Yugoslavia as an interpreter for a National Union of Students delegation. It was during this trip that he questioned Communist Orthodoxy and came to the conclusion that the key principle of 'freedom' was being failed by socialism in practice, and the 'freedom' for the masses was more likely to be found under economic liberalism. See Cockett, n. 50 above, p 231-232

<sup>53</sup> *Ibid*, p 235: Keith Joseph was overlooked as Shadow Chancellor and instead the position went to Robert Carr

1960's and 1970's.<sup>54</sup> There was an acknowledgement that there was an unmet need for legal services particularly in deprived areas, where it was unusual to find a solicitor's office.<sup>55</sup> Moreover, the 'flood of new legislation and administrative decisions' connected with means-tested benefits contributed to a broadening background of growing bureaucratic control and ignited action from welfare pressure groups which identified the increased need for a place(s) for which people who were affected could seek help.<sup>56</sup>

This motivated the shift of advocacy groups away from the use of the 'Fabian style of lobbying' (seeking to influence through the use of information and rational argument) towards the use of legal techniques to secure given objectives.<sup>57</sup> CPAG development epitomises this shift.<sup>58</sup> It saw its role as lobbying central government and using the media to exert pressure. By the early 1970's its role had expanded to assisting with benefit appeals and supporting people on low incomes to make use of the legal system by helping them to access legal aid. In early 1970 the Citizen's Rights Office (CRO) was opened to promote the legal work and played a major role in CPAG activities. CRO supported the growing number of CPAG branches across the country in informing people of their welfare rights and supporting appeals – for example Supplementary Benefit tribunals, since no legal aid was available for this purpose and appeals could be expensive.<sup>59</sup> Other organisations had also mobilised to make the law a more effective tool to deal with the consequences of poverty and unemployment. The Legal Action Group (LAG), formed in 1972, created a further outlet for free legal advice. By the latter part of the decade, it had recorded over one hundred centres mostly in deprived urban areas.<sup>60</sup> The centres were usually established by 'community-minded lawyers' and staffed by them on a part-time basis. Many centres arranged for representation at tribunal hearings and some obtained Law Society waivers allowing volunteer solicitors to carry out work on cases from their own offices. However, the LAG acknowledged that the service could not be comprehensive due to the voluntary nature of its existence.<sup>61</sup> The shortcomings led to the expansion of the network of law

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<sup>54</sup> Pat Thane and Ruth Davidson, *The Child Poverty Action Group: 1965 to 2015* (CPAG, 2016), p 9

<sup>55</sup> Lord Chancellor's Advisory Committee on Legal Aid (1976)

<sup>56</sup> National Consumer Council, *The Fourth Right of Citizenship: A Review of Local Advice Services* (1978), p 17

<sup>57</sup> Harlow and Rawlings, n. 3 above, p 3

<sup>58</sup> Ibid, p 14. The Scottish Child Poverty Action Group was established in May 1968 and a semi-autonomous Northern Ireland group in 1968

<sup>59</sup> Ibid, p 12-13

<sup>60</sup> Legal Action Group, 'Legal Advice Centres – an Explosion' (1972)

<sup>61</sup> Ibid

centres. Law centres are staffed by salaried solicitors who are able to advertise the services they can offer free of charge. By the end of the 1970's there were twenty six recorded across the UK.<sup>62</sup> Law centres cultivated close relationships with other advice bodies such as the Citizens Advice Bureaux (CAB) who would refer clients to avail of the centres' specialised legal expertise.<sup>63</sup> In fact, some CAB branches employed full-time salaried solicitors<sup>64</sup>, and increased the scope of its training to allow volunteers to allow them to represent users at tribunals.<sup>65</sup>

By the mid-1970's CPAG had influenced some local authorities to establish Welfare Rights Advisers<sup>66</sup> and it played a role in bringing together the local authority Welfare Rights Services in the National Welfare Rights Officers' Group<sup>67</sup>. By the end of the 1970's, CPAG had put into motion an overt test case strategy (under the direction of the group's solicitor Henry Hodge) which was conceived as an effective adjunct to its campaigning work.<sup>68</sup> This latter point is important in the context of CPAG's difficult relationship with the government – stemming in part from CPAG's role in challenging government and local authority decisions – and is particularly the case in regard to its relationship with the Conservative Party, who were not as open to the group's lobbying efforts.<sup>69</sup> In the early 1970's CPAG had particular issues with Sir Keith Joseph, who as Secretary of State for Social Services (1970-74) developed a controversial view of the reasons for poverty and deprivation.

Joseph was establishing the CPS as the crucible of the neo-liberal revolution – it quickly became a meeting place where those interested in changing the party's

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<sup>62</sup> National Consumer Council, n. 56 above, p 36

<sup>63</sup> Ibid, p 41

<sup>64</sup> By 1976 there was up to 4,000 solicitors on the CAB rota. See, Report of the Law Society, *26<sup>th</sup> Legal Aid Annual Reports 1975-76* (HMSO, 1976)

<sup>65</sup> Ibid, p 17. The reports notes that (in the 1978) the CAB was acknowledged as the first thought of many of those that needed advice and information of whatever kind

<sup>66</sup> The first appointed Welfare Rights Adviser was Tony Lynes, an academic at London School of Economics (LSE), then an adviser to the Minister of Social Security and a founder member of CPAG (previously the full-time Secretary).

<sup>67</sup> Now the National Association of Welfare Rights Adviers (NAWRA)

<sup>68</sup> Prosser analysed CPAG's test case strategy in 1982 and concluded that a 'test case is not always clear...and may assume importance only in retrospect or by chance'. CPAG now define a test case as a case 'where the outcome will have significance not only for the person bringing it but for others too. It seeks a ruling on an untested point of law or seeks to overturn a prevailing judicial interpretation'. See Tony Prosser, *Test Cases for the Poor: Legal Techniques and the Politics of Social Welfare* (CPAG, 1982), p 84 and Roger Smith, 'Experience in England and Wales: Test Case Strategies, Public Interest Litigation, the Human Rights Act and Legal NGOs' (2003) < [http://www.essex.ac.uk/armedcon/story\\_id/000696.pdf](http://www.essex.ac.uk/armedcon/story_id/000696.pdf) > (accessed 20 August 2016)

<sup>69</sup> Harlow and Rawlings, n. 3 above, p 151

thinking could meet to discuss their ideas.<sup>70</sup> In order to promote the group's establishment, Joseph delivered a series of speeches on economic and social policy at Upminster (22 June 1974), where he exclaimed that the UK was now 'more Socialist in many ways than any other country outside the communist bloc – in the size of public sector, the range of controls and the telescoping of net income'.<sup>71</sup> Addressing social services, he said that 'we seem to have generated more problems than we have solved'. Page reasons that by arguing that he and his party were somewhat responsible for 'betraying the nation', Joseph was clearly indicating his abandonment of the One Nation Conservative Clause.<sup>72</sup> Cockett adds that the political dimension of this speech made it exceptionally forceful, as it was the first time a senior Conservative minister accepted that both political parties were responsible for those Keynesian, interventionist policies which purportedly led to Britain's crisis of the mid-1970s.<sup>73</sup>

Public outcry due to a speech Joseph made at Edgbaston effectively precluded him from becoming the next leader of the Conservatives.<sup>74</sup> This prominent speech outlined in full Joseph's interpretation of the 'Tory approach to life and society', emphasising the value of 'liberties, decentralised power, individual responsibility and interdependence'.<sup>75</sup> However, it was the speech's closing section that caused greatest shock, where Joseph elected to use a misrepresentation of an article published by Margaret and Arthur Wynn in CPAG's journal, *Poverty* to claim the existence of a threat to the British 'human stock' due to the 'high and rising proportion of children being born to mothers least fitted to bring children into the world'.<sup>76</sup> CPAG's Frank

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<sup>70</sup> John Campbell, *Margaret Thatcher. Volume One: The Grocer's Daughter* (Jonathan Cape, 2000), p 266

<sup>71</sup> Cited in Cockett, n. 50 above, p 163

<sup>72</sup> Page, n. 50 above, p 80. The 'One Nation Group' was formed by a group of nine newly elected Conservative MPs following the party's 1950 election defeat (including Edward Heath, Iain Macleod, Angus Maude and Enoch Powell), see, Page, n. 50 above, p 27. In relation to benefit provision the opening paragraph of *One Nation* reads '...We believe that we must first help those in need. Socialists believe that the state should provide an average standard. We believe that we should provide a minimum standard, above which people should be free to rise as far as their industry, their thrift, their ability or their genius may take them', see Ian Macleod and Angus Maude, *One Nation: A Tory Approach to Social Problems* (Conservative Political Centre, 1950), p 9

<sup>73</sup> Cockett, n. 50 above, p 241

<sup>74</sup> Keith Joseph, Speech to the Edgbaston Conservative Constituency Association (Grand Hotel, Birmingham, 19<sup>th</sup> October 1974) < [www.margaretthatcher.org/document/101830](http://www.margaretthatcher.org/document/101830) > (accessed 15 February 2016)

<sup>75</sup> Ibid

<sup>76</sup> Ibid: 'The balance of our population, our human stock is threatened. A recent article in *Poverty*, published by the Child Poverty Action Group, showed that a high and rising proportion of children are being born to mothers least fitted to bring children into the world and bring them up. They are born to mother who were first pregnant in adolescence in social

Field, delivered a measured, yet angry response claiming that the speech 'bore all the marks of attempting to unleash a national backlash against the poor'.<sup>77</sup> Furthermore, Joseph's actions in the aftermath of Edgbaston raised serious questions over his suitability to lead the party, which in due time provided Margaret Thatcher with the chance to thwart Heath's hopes to remain in post.<sup>78</sup> In the Tory leadership contest of 1975 Thatcher triumphed over Heath in the first ballot, providing a sufficient platform from which to see off new challengers and was announced as the party leader in February 1975.<sup>79</sup> In the run up to the general election the Conservatives focused most of their campaign on the economic rather than the social realm. The passages on social security within their election manifesto reflected much of what was documented in the party's neo-liberal inspired policy document entitled *The Right Approach*.<sup>80</sup> They promised the introduction of tax-credits 'as and when resources become available'. In the meantime, they would strive to 'simplify the system, restore the incentive to work and bring more effective help to those in need'. These proposals were starkly in contrast to those outlined by CPAG who called for a return to full employment<sup>81</sup> and in the context of a falling income tax threshold they also sought to substitute a single child benefit for family allowances and child tax allowances. This became a central campaigning issue for CPAG at the time, who

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classes 4 and 5. Many of these girls are unmarried, many are deserted or divorced or soon will be. Some are of low intelligence, most of low educational attainment. They are unlikely to be able to give children the stable emotional background, the consistent combination of love and firmness which are more important than riches. They are producing problem children, the future unmarried mothers, delinquents, denizens of our borstals, sub-normal educational establishments, prisons, hostels for drifters. Yet these mothers, the under-twenties in many cases, single parents, from classes 4 and 5, are now producing a third of all births. A high proportion of these births are a tragedy for the mother, the child and for us'

<sup>77</sup> Frank Field was Director of CPAG, 1969-1979. He is cited by in Andrew Denham and Mark Garnett, *Keith Joseph* (Routledge, 2001), p 269

<sup>78</sup> A particularly erratic episode included a televised clash with Ludovik Kennedy (writer and broadcaster); also the media's exploitation of an interview with the Observer's Polly Toynbee and an 'unflattering' interview with ITV's Llew Gardner and a piece in *Private Eye* (18 October 1974). See Denham and Garnett, n. 77 above, p 272-273

<sup>79</sup> Thatcher emerged with the support of 130 MPs on the first ballot compared with 119 for Heath. The other challengers she eradicated included Willie Whitelaw, Geoffrey Howe, Jim Prior and John Peyton

<sup>80</sup> A Policy document printed on the eve of the Conservative Party Conference. Conservative Central Office, *The Right Approach*, (Conservative Central Office, 1976). The document indicated that the Party planned to pursue a neo-liberal Conservative economic and social agenda. It argued that it was time to reverse the socialist advance in British society in which high levels of public spending and redistributive taxation had delivered 'neither equality of prosperity - only inflation, unemployment and growing bureaucratic threats to individual liberties'. A neo-liberal Conservative government would support policies designed to promote 'individual freedom and responsibility'. < <http://margaretthatcher.org/document/109439> > (accessed 18 February 2016)

<sup>81</sup> See Ruth Lister and Frank Field, *Wasted Labour: A Call for Action on Unemployment* (CPAG, 1978)

sought to increase the taxation of the better off and raise the incomes of low paid families.<sup>82</sup> The 1976 opinion polls suggested that Thatcher was on track to take power from Labour; until Labour's opinion poll revival which occurred as a result of the Liberal-Labour pact in March 1977. However the 'winter of discontent'<sup>83</sup>, a Shakespearian phrase used by Callaghan to characterise the 'industrial and social chaos of 1978-79' coupled with Callaghan's hesitation to call an election swayed the majority to vote for Thatcher to become Britain's first female Prime Minister in 1979.<sup>84</sup>

### ***1979 – 1990 Social Security and the Unemployed in Thatcher's Britain***

Thatcherite policies effected significant changes in British society and institutions. It was a period that was characterised by an attempt to resurrect the free market in the late twentieth century as part of a wider effort to modernise the British economy.<sup>85</sup> Thatcher and her administration mobilised voters behind key policies such as reducing trade union power,<sup>86</sup> removing council houses from municipal ownership<sup>87</sup>

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<sup>82</sup> Thane and Davidson, n. 54 above, p 21-22. Following an intense and long negotiation process with the Labour Government, and pressure from women's organisations, the Church of England Synods and importantly the Trade Unions, James Callaghan, conceded to phase in child benefit from 1977, to reach £4 per child by 1979. CPAG worked on this campaign and others throughout the 1970's and strengthened its links with other groups including Shelter, One Parent Families, Age Concern, Citizens Advice Bureau and the Heating Action Group. New organisations also emerged which were closely associated with CPAG including the Low Pay Unit and Family Rights Group.

<sup>83</sup> The 'winter of discontent' started in November when workers at Ford won a 17 per cent pay increase in breach of the government's pay policy. The government sought to use sanctions against Ford and were defeated by the House of Commons on the issue, narrowly surviving a vote of confidence the next day. Since it was felt that the pay policy lacked the necessary support workers felt compelled to strike for pay beyond the limits set and a long series of strikes ensued. See, Cairncross, n. 12 above, p 223-24

<sup>84</sup> Andrew Marr, *A History of Modern Britain* (Pan Books, 2007), p 373

<sup>85</sup> John Gray, *False Dawn: The Delusions of Global Capitalism* (Granta, 2002), p 24

<sup>86</sup> *Ibid*, p 27: Rather than assuming responsibility for ensuring full employment, the Thatcher Government introduced a framework of rules and regulations to support the labour market to self-regulate. Employment law was reformed; reflecting the American labour market, which promoted high levels of mobility, downward flexibility of wages and low costs for employers and weakening the power and influence of intermediary institutions such a trade unions and professional associations

<sup>87</sup> The Thatcher administration introduced legislation (Housing Act 1980) which allowed council home tenants the 'right to buy' (RTB) the property they inhabited at discounted prices (up to a maximum of 50%). The legislation included the right of a Minister to intervene if a local council if a local council refused to sell (see Ray Forrest and Alan Murie 'Residualisation and Council Housing' (1983) *Journal of Social Policy* 12 (4), pp. 453-468; Sarah Blandy and Caroline Hunter 'The Right to Buy: Examination of an Exercise of Allocating, Shifting and Re-branding Risks' (2013) *Critical Social Policy* 33 (1), pp. 17-36, and *Norwich City Council v. Secretary of State for the Environment [1982] 1 All ER 737*). RTB is often hailed as one of the biggest Conservative success stories, as over two million houses have been purchased since 1979 (John Blundell, *Margaret Thatcher: A Portrait of the Iron Lady* (Algora, 2008), p 112; Gray, n. 85 above, p 30). However, it has been argued that the scheme significantly inflated the cost of housing provision and perpetuated the 'dependency culture' as - spending on housing

and lowering direct taxes – enabling her to win three successive elections. Many of the developments and subsequent implications are beyond the remit of this thesis which considers the impact that the persual of neo-liberal conservatism had on the growing number of unemployed; and for the development of social security policy and legislation.

### ***The Fowler Reforms***

Rapidly rising unemployment was one of the over-arching headlines of the 1980's.<sup>88</sup> There was the complete cessation of the political adherence to the Keynesian principle of achieving full employment and the disappearance of traditional industries continued unabated.<sup>89</sup> The government's compulsion to cut public expenditure and the Conservative commitment to a free-market economy<sup>90</sup> and privatisation contributed to the increasing demand for social security provision.<sup>91</sup> The Thatcher administration pushed to 'remould the ideological base' of the economics of the welfare state, and in particular portrayed the provision of social

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benefit during 1996-97 was estimated at over £11 billion, which is 1.5 per cent of Britain's gross domestic product and over ten times the total cost of housing benefits from 1979-1980. Public expenditure on the provision of social housing was replaced many times over, by rent rebates and assistance with mortgage payments. Furthermore, Hill said that the privatisation of social housing created geographical and social polarisation, as it became associated with only the poorest (Editorial, *Financial Times*, London, 27 August 1996); John Hills, 'Thatcherism, New Labour and the Welfare State' (Centre for Analysis of Social Exclusion, LSE, 1998), p 18

<sup>88</sup> Neville Harris, *Social Security Law in Context* (Oxford University Press, 2000), p 120. In the mid-1980's, the official count of unemployment in Britain was over 3 million – representing an increase of about 2 million in a single decade. For detailed discussion on unemployment in the 1980's see Noel Whiteside, *Bad Times: Unemployment in British Social and Political History* (Faber and Faber, 1991), pp 1–20

<sup>89</sup> Notable is the government's showdown with the National Union of Miners (NUM). Milne explains that the government followed what became known as the 'Ridley formula' to defeat the miners. This involved the 'build-up of coal stocks and imports, the encouragement of non-union road hauliers to move the coal, the rapid introduction of dual coal-oil firing at all power stations, the withdrawal of social security benefits from strikers' families and the creation of a large, mobile squad of police'. Following the announcement of a number of pit closures, the NUM leader, Arthur Scargill called a national strike in March 1984 – without a ballot, contrary to the Trade Union Act of 1984. This led to the removal of union funds that thwarted the NUMs ability to provide long-term financial support to those taking part in strike action. NUM was unable to win, despite significant support from the public. Its inability to garner support from the Labour Party, the Trade Union Congress and the formation of a breakaway union weakened NUMs chance of victory. Page writes that the Conservative-led triumph 'signified a watershed in British industrial relations'. The days lost to industrial action fell rapidly, union membership declined and the political influence of trade unions lessened significantly. See Seumas Milne, *The Enemy Within*, (Verso, 2004), p 9; Page, n. 50 above, p 95; David Taylor, 'Living with Unemployment' in Alan Walker and Carol Walker (eds), *The Growing Divide: A Social Audit 1979 – 1987* (CPAG, 1987), p 71

<sup>90</sup> Gray, n. 85 above, p 27

<sup>91</sup> Two thirds of all households were recorded to claims some form of social security benefit. Ros Franey, *Past Caring: The Government's Plans for Pensions and Social Security* (GLC Welfare Rights and Child Poverty Action Group, 1985), p 4

security to the unemployed as unnecessarily burdensome. As early as 1982, the Conservatives sought to decrease support for the unemployed – two early and notable changes were the abolition of the earnings related supplement and the taxation of unemployment benefit.<sup>92</sup> By 1984, according to the Government, it was costing too much to meet such demand.<sup>93</sup> It was also claimed that help was not being directed at those who needed it most and the system had grown to be administratively too complex to be efficient.<sup>94</sup> Thus, in April, Norman Fowler, Thatcher's Secretary of State for Health and Social Security, launched what he termed 'the biggest review since Beveridge' of the welfare state and top of the list was the social security system.<sup>95</sup> Notably, the review did not dedicate a separate area of review to the unemployed, however this did not impede reform over the years that followed<sup>96</sup>.

The subsequent Green Paper put forward three main objectives for reform. First, the system should be capable of meeting genuine need. Secondly, reform had to be in line with the government's overall ambitions for the economy and so the tax burden created by social security expenditure would have to be contained to avoid damaging the prospects for economic growth.<sup>97</sup> Finally, the system required simplification.<sup>98</sup> Simplification was a priority, with emphasis on 'reasonable support for all with the minimum of complication' rather than 'detailed needs testing'.<sup>99</sup> Underpinning all of the reforms was the government's intention to create a system based on partnership between the individual and the state.<sup>100</sup> These objectives reflect the government's commitment to moving policy and legislation in a neo-liberal direction,<sup>101</sup> and

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<sup>92</sup> Nick Wikeley, 'Unemployment Benefit, the State and the Labour Market' (1989) *Journal of Law and Society* 16 (3), p 291

<sup>93</sup> Secretary of State for Social Services, '*Reform of Social Security*' (Green Paper, Cmnd, 9157, HMSO, 1985), Vol. 1, para 1.1

<sup>94</sup> *Ibid*, para 1.2

<sup>95</sup> Secretary of State for Health and Social Security, Norman Fowler, *Social Security Review*, HC Deb, 3 June 1985, Vol. 80, cc 34-51

<sup>96</sup> Joan Brown, *Victims or Villains? Social Security Benefits in Unemployment* (PSI, 1990), p 153

<sup>97</sup> In this context the Government saw a 'clear continuing role for unemployment benefit as a contributory, national insurance benefit'. Secretary of State for Social Services, Green Paper, n. 93 above, p 37

<sup>98</sup> These aims largely reflected the aims for social security set forth in the Conservative's 1979 election manifesto. See p 10 of this chapter

<sup>99</sup> Secretary of State for Social Services, Green Paper, n. 93 above, para. 6.4

<sup>100</sup> Norman Fowler, Secretary of State, Health and Social Security, HC Deb, 3 June 1985, Vol. 80, cc 34-51

<sup>101</sup> Secretary of State for Social Services, Green Paper, n.93 above (1985) contains figures which provide the background to the aims. They show that the proportion of gross domestic product taken up by social security since the introduction of National Insurance had risen from 4.7% to 11.1% and 17% of this spending went toward dealing with unemployment. See,



demonstrate a sharp contrast with the Labour government's policy objectives for social security which were laid out a mere decade before.<sup>102</sup>

The SSAC communicated immediate concern that:

'The process of review was subject to the constraint that any change must be made within the present overall level of social security expenditure...(but) there was no cheap route to simplification, which is the main route desired both by users and observers of the social security system'.<sup>103</sup>

Similar concern was shared by the Child Poverty Action Group (CPAG) who asserted that Fowler's proposal that the reform should be cost limited to match the cost of the existent social security system was virtually impossible and that reform under such terms would result in excessive cuts to claimant provision.<sup>104</sup> They went further by asserting that the reforms were the product of 'political choice' rather than economic necessity, and fitted neatly with 'the government's strategies for social change', which on the basis of the objectives outlined in the Green Paper implied that replacement rates should be reduced, to provide the unemployed with a greater incentive to re-join the labour force and that means-testing should be increased to ensure support is targeted thus reducing the cost of the overall social security system.<sup>105</sup> Harris acknowledges that the government's commitment to 'target the resources we have more effectively'<sup>106</sup> was particularly contentious as it involved 'redistribution

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Lydia Morris and Trevor Lleyellyn, *Social Security Provision for the Unemployed: A Report for the Social Security Advisory Committee* (HMSO, 1991), p 46

<sup>102</sup> The Labour government laid it aims out in the 1975 Social Security Pensions Act (DHSS, 1974), where it pledged to end dependence on means-tested supplementary benefit and 'bring security at the end of working life'. The proposals would 'provide earnings-related pensions...fully protected against inflation', and were designed to 'help particularly the lower paid' (i.e. would be redistributive). A further claim was that there would be equality for women. The government based its commitment on the belief on adherence to a 'high and stable level of employment' (Ministry of Reconstruction, 1944). See Nicholas Barr and Fiona Coulter, 'Social Security: Solution or Problem?' in John Hills (ed), *The State of Welfare: The Welfare State in Britain since 1974* (Clarendon Press, 1990), p 276–277

<sup>103</sup> Social Security Advisory Committee, *Third Report of the Social Security Advisory Committee 1984* (HMSO, 1985a), p 4

<sup>104</sup> CPAG asserted that the 'financial ceiling imposed' failed to take into account the reductions in the social security budget since 1979, which by 1984 amounted to £6.5 billion (The Times, London, 25 June 1984). Furthermore, CPAG pointed to the failure of the reforms to consider the government's decision to break the link between increases in average earnings and the uprating of long-term benefits. They also drew attention to the amount that the government attributed to income taxation changes (£4.17 billion) of which the 44 per cent of went to the top 1 per cent of tax payers (HC Debate, 4 April 1984, cc 542-4). See, Sue Ward (ed), *DHSS in Crisis* (CPAG, 1985), p 145 (Appendix)

<sup>105</sup> Barr and Coulter, n. 102 above, p 277

<sup>106</sup> Secretary of State for Social Services, n. 93 above, para 6.3.

between different groups of people'.<sup>107</sup> Fowler pressed ahead with reform, citing concerns about public spending levels, and the relationship between the tax and social security system – proposing that benefits to low income households should allow for the amount of tax being paid, thus lessening the effects of the poverty trap<sup>108</sup>. Yet, the suggestion of eliminating the poverty trap by doubling child benefit was rejected as 'too costly and wasteful' and rather was substituted by the introduction of a new Family Credit (FC) scheme (in replacement of Family Income Support), which maintained the prevailing basis of entitlement.<sup>109</sup> This, together with the restructuring of Income Support (IS) to replace SB and the introduction of the Social Fund (SF) for the administration of additional payments are the changes that caused the most concern and for the unemployed.

### ***The Introduction of Family Credit and Income Support***

FC was introduced to replace FIS<sup>110</sup> and was intended to lessen the effect of 'poverty and unemployment traps'<sup>111</sup>. In line with the overall objectives for reform, the government wanted to ensure that the operation of the social security system was reconciled with the government's overall objectives for the economy and thus a situation where 'people believe themselves to be better off out of work than in work' was construed as a major obstacle<sup>112</sup>. Thus FC was to be set at a higher level than FIS which would in part compensate for the loss of free school meals and milk.<sup>113</sup> Furthermore, less hours of work were required to qualify for FC (a reduction from thirty hours to twenty-four for all claimants) and the cut off point for capital was to be increased to £6,000 rather than the existing £3,000 limit which was in place for FIS. Furthermore, entitlement would run for twenty-six weeks instead of fifty and

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<sup>107</sup> Harris, n. 88 above, p 121

<sup>108</sup> Ibid, p 48

<sup>109</sup> Throughout the next three years the rate of benefit was actually frozen

<sup>110</sup> The family would receive an amount which was calculated on the basis of family size, and which when combined with child benefit entitlement, would ensure that 'earnings above the income support level for a couple, a family with children would not be worse off in work'. (Green Paper (1985), Vol. 2, para 4.47). If the family's net income was above the prescribed threshold, the maximum credit would be reduced by a percentage of the amount by which that net income exceeded the threshold. Below the threshold the family would receive maximum credit. Net rather than gross would be considered, so that the benefit could not be reduced by an amount greater than in any increase in earnings.

<sup>111</sup> The poverty and unemployment trap occurs in a situation where unemployed claimants are 'trapped' in an economic sense of being no better off, or perhaps worse off, in (low-paid) employment rather than being in receipt of benefits. See, Harris, n. 88 above, p 48

<sup>112</sup> Secretary of State for Social Services, Green Paper, n. 93 above, p 3

<sup>113</sup> The SSAC pointed out that there was no guarantee that the compensation intended to cover the loss of free school meals and milk would be spent on such. See, SSAC, *Fifth Report* (HMSO, 1987)

earnings would be assessed over a five week period.<sup>114</sup> The SSAC broadly welcomed the introduction of FC, however, some commentators identified flaws in the government's claims that the worst effects of the poverty trap would be removed and the unemployed would be incentivised to find work.<sup>115</sup> It was suggested that although the number of people who found they were better off not working would decrease, many more families would be forced onto the 'poverty plateau'<sup>116</sup> losing eighty per cent of any additional earnings.<sup>117</sup> And in truth, although the government anticipated a greater take-up of FC, based plainly on FC's more generous levels, Parker's calculations revealed that the replacement ratio (i.e. the relation of benefit to earned income) in the reformed benefit system for earnings at 65% of average manual earnings<sup>118</sup>, which the SSAC asserted reinforced the argument that the solution to addressing the unemployment trap lies in 'improving income from paid employment rather than reducing benefit'.<sup>119</sup>

An issue that fuelled particular resistance at the time was the proposal in the Green Paper that payment of FC be made through the wage, in effect acting like a state subsidy for low pay.<sup>120</sup> The proposal was considered an appropriate way to maintain an incentive to work and was regarded as a sizeable step towards the integration of the tax and benefits systems.<sup>121</sup> However, such a step seemed counter-intuitive considering that just two percent of responses to the Green Paper supported payment of FC via the wage packet, with the vast majority of respondents (88 percent) opposing the proposal due to a general feeling that that 'the well-being of... children could be adversely affected' by such a development.<sup>122</sup> Indeed, evidence began to emerge in the latter part of the 1980's which revealed evidence of gendered

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<sup>114</sup> See SSAC, *Fourth Report* (HMSO, 1985), para 5.5

<sup>115</sup> SSAC, *Fourth Report*, Ch. 5

<sup>116</sup> National Council for One Parent Families, *The Insecurity System* (NCOPE, 1985), para 3.5; Institute of Fiscal Studies, *1985 Benefit Reviews: The Effects of the Proposals* (IFS, 1985), Table 1.10; Richard Berthoud, *The Examination of Social Security* (PSI, 1986), pp. 21-23

<sup>117</sup> Harris, n. 88 above, p 125

<sup>118</sup> See Hermione Parker, *Effects of Mr John Moore's April 1988 Benefit Changes on the Disposable Incomes and Work Incentives of Low Income, Working Age Families*, Welfare State Programme Research Note No. 10 (LSE, 1988) – Parker suggests that a ratio of 70% is too high, because work expenses must be allowed for. However, for married couples with children the replacement ratio varies from 84% to 96%, depending on the numbers and ages of children and level of rent

<sup>119</sup> Morris and Lywellan, n. 101 above, p 53

<sup>120</sup> Franey, n. 91 above, p 22

<sup>121</sup> House of Commons Social Services Committee Report, *First Report from the Social Service Committee, Session 1986-86: Reform of Social Security*, (No. 180, HMSO, 1986), para 53

<sup>122</sup> Response to the Green Paper, 'Family Credit', p 1 (NA BN/133/220), as cited by Chris Grover, *Understanding Changes to Tax Credits: Historical and Policy Dimensions of Wage Supplements in Britain* (Allen Unwin, 2015), p 30

inequalities in the distribution of power and resources.<sup>123</sup> Nonetheless, despite the obvious resistance to the possibility of the payment of FC via the wage packet, the government remained relatively steadfast in its position. The subsequent White Paper offered counter arguments to the view that household income distribution was gendered and asserted (on the basis of classic liberal ideas)<sup>124</sup> – that it did ‘not accept the proposition that... those in full time work on low earnings cannot be trusted to allocate their other resources responsibly within the family and must have the state do it for them.’<sup>125</sup> Nonetheless, the Committee stages of the Bill were heavily underscored with protests that revolved around the issues associated with the potential gendered distribution of FC, not only from ‘Left leaning and socially liberal actors and organisations, but also from the Right’.<sup>126</sup> In the Commons, Robin Squire a Conservative MP is noted as saying a ‘wide range of organisations, many of which are traditionally seen as supporters or at least friendly to our party, are hostile to this proposal.’<sup>127</sup> Sustained resistance to the payment of FC through the wage packet eventually succeeded, with the final legislation dictating that payment should be made by order book to the nominated parent. Thus, the ‘political choice’ of the Conservative government was defeated through a mix of strong and united opposition from its own Party benches, the opposition benches, and from business

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<sup>123</sup> See, Fran Bennett, ‘Researching Within-Household Distribution: Overview, Developments, Debates, and Methodological Challenges’ (2013) *Journal of Marriage and Family* 75, pp 582–597, p 582; Jan Pahl, *Money and Marriage* (Macmillan, 1989); Lydia Morris, *The Workings of the Household* (Policy Press, 1989); Lydia Morris and Sally Ruane, *Household Finance Management and the Labour Market* (Gower, 1989); Elaine Kempson and Claire Whyley, *Kept out or Opted Out? Understanding and Combating Financial Exclusion* (Policy Press, 1994), p 116; Carolyn Volger, ‘Money in the Household’ in Michael Anderson, Frank Bechhofer and Johnathan Gershuny (eds), *The Social and Political Economy of the Household* (Oxford, 1994), p 241, as cited in Ruth Lister, *Poverty* (Polity Press, 2004), p 57; Carole Burgoyne, Victoria Clarke, Janet Reibstein, and Ann Mary Edmunds, ‘All my Worldly Goods I Share with You? Managing Money at the Transition to Heterosexual Marriage’ (2006) *The Sociological Review* 54, pp 619–637, p 619

<sup>124</sup> Grover, n. 122 above, p 30

<sup>125</sup> Secretary of State for Social Services, *The Reform of Social Security. A Programme for Action* (White Paper, Cmnd 9691, HMSO, 1985), para 3.77

<sup>126</sup> Grover, n. 122 above, p 30

<sup>127</sup> Robin Squire (Conservative, Hornchurch), HC Debate, 19 May 1986, Vol. 98, cc 136–137. Squire summarises the responses from a number of organisations opposed to the payment of FC via the wage packet, such as the National Association of Citizens Advice Bureaux and the National Council of Women of Great Britain and The National Federation of Women’s Institutes. He also pointed to the anticipated administrative burden that would fall upon employers should the proposals be implemented and referred to the resistance from the Confederation of British Industry, The Institute of Directors and the National Union of Farmers cc 135 – 137. See also representation from, members of the Labour opposition (Jeremy Corbyn (Labour, Islington North) HC Deb, 19 May 1986, Vol. 98, cc 144–145, and Jo Richardson (Labour, Barking), HC Deb, 19 May 1986, Vol. 98, c 147) and the Social Democratic opposition (for example, Charles Kennedy (Ross, Skye and Lochaber), HC Deb, 18 June 1985, Vol. 81, cc 161–162)

and civil society groups and organisations. The intense negotiation process identified evidence of how such an approach can influence the law making process. However, such 'Fabian' style negotiation can arguably only go so far, in shaping political attitudes and influencing the trajectory of social policy. For example, a key aim behind the FC wage supplement proposal - that the 'long-term objective should be to restore the wage packet to the full role of income support for the family'<sup>128</sup> - did not change, and the government subsequently succeeded in asserting its intention to 'bring home the fact that the wage is the primary means of support' via alternative legislative measures<sup>129</sup>.

### ***The Introduction of Income Support***

Weekly SB would be replaced by a new benefit 'Income Support' (IS). The government reflected that the experience of establishing a rule-based system in 1980 had demonstrated how difficult it was to 'administer provisions on a mass scale, both responding to individual need and avoiding cumbersome and controversial rules on the limits to help'.<sup>130</sup> Throughout the Green Paper the Conservatives communicated their desire for a means-tested form of assistance that was easier to administer and which would target resources on needs more effectively.<sup>131</sup> It was also claimed that IS would secure greater fairness between those on benefit and those in low-paid employment and would provide a base for calculating entitlement to other income related benefits.<sup>132</sup> The level of IS would be determined 'essentially by age and family responsibilities'.<sup>133</sup> Thus, categorisations would be developed on the basis of wide assumptions about differing levels of need, rather than an attempt to connect entitlement to actual requirements.<sup>134</sup> Thus, hours in paid employment of the claimant and (where appropriate) the spouse would determine eligibility - though those families with children would claim FC instead. A couple would be permitted to claim IS if they worked fewer than 24 hours per week, thus removing the anomaly

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<sup>128</sup> Review of benefits for children and young people. CYPR, Summary of Options, para 15 (National Archives, BN/133/17)

<sup>129</sup> Briefing for MISC 111 - 6 February 1985. Social security review proposals, flag N (National Archives BN/133/197)

<sup>130</sup> Secretary of State for Social Services, '*Reform of Social Security*' (Green Paper, Cmnd 9518, HMSO, 1985), vol. 2, para 2.64

<sup>131</sup> Harris, n. 88 above, p 126

<sup>132</sup> Secretary of State for Social Services, Green Paper, n. 130 above, para 2.70. The capital disregard for claimants rose to £3000 and the earnings' disregards increased from £4 to £5 per week which included work expenses, and for couple with children, who were unemployed for two years. See, Morris and Llewellyn, n 101 above, p 46

<sup>133</sup> Secretary of State for Social Services, Green Paper, n. 93 above, para 9,6

<sup>134</sup> Harris, n. 88 above, p 127

whereby benefit could supplement the full-time wage of a claimant's partner but not of the claimant of him/herself. The SSAC outlined that a reduction in the number of hours it was possible to work and still claim IS meant that some people would lose entitlement to benefit altogether.<sup>135</sup> The absence of figures in the Green Paper made it difficult to foresee the implications of the Conservatives proposals would have on claimants benefit levels, but what was quite clear was that young people, and childless couples would lose out, while families with young children would gain.<sup>136</sup>

There was concern that a move to broad categories, for example the imposition of the age twenty-five dividing line (which replaced the householder/non-householder distinction)<sup>137</sup> would make the system less responsive to individual needs.<sup>138</sup> In fact, during the legislative process, there were indications that the government intended to cease independent entitlement for sixteen and seventeen year olds in the context of the relatively recent development of the Youth Training Scheme, which aimed to guarantee a place on a training scheme for all school leavers.<sup>139</sup> Opposition was fierce from the SSAC, Youthaid<sup>140</sup>, and others, with CPAG claiming that the government's proposals intended to 'get young people off benefits and into low-paid jobs',<sup>141</sup> and to force those who were unemployed to live at home with their parents, regardless of

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<sup>135</sup> SSAC, *Fourth Report* (HMSO, 1985), p 27

<sup>136</sup> *Ibid*; It was proposed that help would be directed at families with children through the payment of a standard family premium. Lone parents would receive in addition a lone-parent premium

<sup>137</sup> The Select Committee regarded the age twenty-five dividing line as being 'inevitably arbitrary' and pointed to the fact that 30% of claimants in the under twenty-five received the householder rate of supplementary benefit. See *Seventh Report, Session 1984/85, The Government's Green Paper 'Reform of Social Security'* (HMSO, 1985), para 35

<sup>138</sup> *Ibid*, para 34

<sup>139</sup> The Youth Training Scheme (YTS) came into operation in September 1983, in replacement of the Youth Opportunities Programme (YOP), and would operate under 'controversial terms'. In a bid to provide a disincentive to 16 year olds thinking of refusing or giving up an YTS place, the government introduced the 'work-shy penalty' of a 40 per cent reduction in benefit for six weeks for 16 year olds who opted out of an YTS placement. It was possible to do this under existing legislation. The Secretary of State announced that the YTS was 'for the purpose of becoming or keeping fit for entry into, or return to, regular employment' (see Section 20, Social Security Act 1975). Allbeson argues that this indicates the extension of the 'old 'work shy' penalty, used against the unemployed since 1911 (s87 (2) National Insurance Act 1911) to 16 year olds'. See, Janet Allbeson, 'Seen But Not Heard: Young People' in Ward, n. 104 above, p 88

<sup>140</sup> See, Claire Horton, *Nothing Like a Job* (Youthaid, 1985), p 43. Horton focused on the one in ten young people who did not assume a place on the YTS

<sup>141</sup> Chancellor Lawson was reported in September 1984 to be 'planning a package of job creation measures aimed at keeping wage rates down to provide more low paid jobs particularly for the young' (The Observer, London, 31 September 1984), as cited by Allbeson, n. 139, p 90. See also, Franey, n. 91 above, p 26, and CPAG, 1984: *Changed Priorities Ahead? CPAG's Evidence to the Social Security Reviews* (CPAG, 1984), Part 1, para 7.4-7.9

their circumstances.<sup>142</sup> The SSAC shared similar views, expressing their general dissatisfaction at the use of age as a proxy definition for household status, arguing that the 'provision either imposes hardship or prolongs dependence on parents'.<sup>143</sup> The importance of 'family influence' is highlighted by Allbeson as one of the key philosophies behind the Conservative's approach to young people.<sup>144</sup> She supports this view with evidence of leaks to the Guardian from the Cabinet's Family Policy Group in February 1983 which revealed the government sought to look 'at what could be done to encourage families – in the widest sense – to reassume...responsibility for the disabled, elderly [and] unemployed 16-year-olds'.<sup>145</sup> In the subsequent course of oral evidence to Members of Parliament, Parry Roger from Youthaid interprets the rationalising of benefit to young people as a Conservative attempt to assert an element of financial control, as he commented that giving a teenager too much money can make him/her 'a good deal less susceptible to parental influence [and] to the family environment, than in the present situation'.<sup>146</sup> Roger's comment adds to the view that the Conservatives sought to re-establish the idea of the family as a single interdependent unit, which is particularly relevant in view of the Conservatives' overall ambition to lessen the pervasiveness of state welfare, and encourage individual responsibility. It is interesting that those who could be depicted as being on the cusp of adulthood were not considered ready to stand-alone and thus elements of control - such as parental control, or social control inflicted by a lack of access to monetary means - were effected to discourage young people moving from school to the dole queue.<sup>147</sup>

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<sup>142</sup> Allbeson, n. 139 above, p 89

<sup>143</sup> Morris and Llewellyn, n. 101 above, p 47 – The SSAC expressed concern over the minority of single people under 25 who are single or joint householders and those few 16 or 17 year olds unable to live at home and also unable to take up a place on the YTS. See also, Carey Oppenheim, 'The New Social Security Act' in *Poverty No. 69* (CPAG, 1988); Richard Berthoud, *The Reform of Social Security* (PSI, 1985), p 20

<sup>144</sup> Allbeson, n. 139 above, pp 86–87

<sup>145</sup> *The Guardian*, 17 February 1983 as cited in Allbeson, n. 139 above, p 87. Allbeson also cites Margaret Thatcher who said: 'It really has been my dream to have unemployment not an option for the young, so that they either stay at school or go into further education, or into a job, or into some form of training. It has been my dream that unemployment should not be an option...It's too easy for some of them, straight out of school, to go straight on social security at the age of 16. They like it, they have a lot of money and some of them, learn a way of life they should never have a chance to learn' (as quoted by the Daily Express, London, 15 June 1983)

<sup>146</sup> Comments by Parry Rogers in the course of oral evidence being given by Youthaid, 13 August 1984 as cited by Allbeson, n. 139 above, p 98

<sup>147</sup> Harris, n. 88 above, p 339

The government's case temporarily gave way and the minister confirmed that sixteen and seventeen year olds would be eligible for IS in their own right.<sup>148</sup> A proposed amendment to the Social Security Bill, to set the minimum age of entitlement to income support at eighteen, was defeated in Standing Committee by twenty-five votes to one. However, in June 1987, following the general election, and the beginning of Thatcher's third term, plans for removing entitlement to most-under eighteen years olds was announced and brought into effect in 1988 via amendments to the Social Security Act 1986.<sup>149</sup> Therefore, despite ardent resistance from welfare advocates (and the SSAC) the government ensured that it advanced its social goals and asserted its legislative power to do so, which clearly reveals the limited influence of third-sector organisations and indeed the SSAC. A further observation is the contrast in the negotiation process immediately outlined above and that for the case of FC remaining separate from the wage packet. It seems that the former case maintained greater long-term bargaining power. Perhaps this is because in the latter, unemployed youth were consistently portrayed as both a 'threat and a scapegoat' and accordingly subject to the 'severest of sanctions or disincentives'.<sup>150</sup> Furthermore, employers and employer's bodies communicated ardent dissent to the payment of FC via the wage packet, on the basis of 'the additional administrative burden' that would be imposed by the reform.<sup>151</sup> Employer's views were apparently attributed more weight, particularly by those 'New Right' Conservatives who relied on the unifying power of the market, and thus needed to keep employers onside.<sup>152</sup> Moreover, political interest in the young is traditionally impeded due to their inability to vote and as a group they

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<sup>148</sup>Secretary of State for Social Services, Green Paper, n. 93 above, para 9.27

<sup>149</sup> SSA 1986, S.20(3)(a), as amended by the SSA 1988

<sup>150</sup> Hartley Dean, *Social Security and Social Control* (Routledge, 1991), p 184

<sup>151</sup> HC Debate, 19 May 1986, Vol. 98, cc 134–136. The Institute of Directors (IoD) said: 'Our one concern with the proposal for family credit to be paid through the employee's pay packet is the additional administrative burden this may place on employers' and the Confederation of British Industry (CBI) said "The CBI does not consider that it is essential or appropriate for the proposed family credit to be paid by employers. Members do not believe the 'pay packet' is the proper vehicle for social security benefits; it is more appropriate for social security benefits be paid separately to wages and identified as money paid by the Government ... Under this proposal there would be no great administrative saving to the Government as the DHSS would undertake assessment of entitlement. Indeed, there would therefore be a duplication of effort' and the National Federation of Self-Employed and Small Businesses said 'From the employer's point of view, the fact that women do not receive the benefit and that child benefit may decrease will do nothing to increase the harmony of employee employer relationships when employers are responsible for meeting part of the needs of the family. In view of the above, we therefore see the proposed family credit benefit as a retrograde step for both employees and employers alike ... it will just complicate the employment relationship'

<sup>152</sup> See Michael Novak, *Morality, Capitalism and Democracy* (Institute of Economic Affairs, 1990), p. 14 and also David Willets, *Modern Conservatism* (Penguin, 1992), p 174 and p 184



are 'an easy target' as they are less likely to mobilise and challenge government response to rising unemployment levels.<sup>153</sup>

### ***The Discretionary Social Fund***

The Social Fund (SF) was considered as perhaps the most radical of the Fowler reforms, in the main because exceptional needs payments, which were issued as single payments under SB (grants) were replaced by loans, and the SF was to be cash-limited.<sup>154</sup> Furthermore, the SF incorporated an element of discretion, which places it in a different category of the social security system which is generally 'governed by elaborate statutory provisions leaving little room for discretion'.<sup>155</sup>

Introducing the SF proposals to the Commons on 28 January, 1986, Fowler said:

'The aim of the fund is that we should be able to respond to individual needs and circumstances. It seems to us that it is not possible to achieve that aim within the context of a detailed regulatory structure – like that for Income Support – which is linked to the formal adjudication system. Instead Social Fund Officers will have the flexibility that a regulatory structure will deny'.<sup>156</sup>

Interpreting Fowler's intentions, Buck writes that the government sought to remove some of the difficult areas of decision-making by introducing more 'routine criteria', with the aim of decreasing expenditure on single payments.<sup>157</sup> Indeed, it was recognised in the White Paper, that the formulation of detailed eligibility rules and qualification rules set out in regulations could be an important method of budgetary control.<sup>158</sup> Mesher notes, that the changes 'did show that control could be exercised by limiting eligibility criteria'.<sup>159</sup> The SSAC concluded that the government's emphasis on budgetary aspects in relation to the SF surpassed what was permitted in the legislation, which led the Chairman of the SSAC to write to Fowler in order to make abundantly clear that 'the decision to proceed with the SF substantially as planned is without (our) support'. CPAG referenced the 'government's own SSAC' position in its response to the Green Paper citing the body's recognition that 'there might be room

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<sup>153</sup> Allbeson, n. 139 above, pp 86–91

<sup>154</sup> It was limited in size and had an annual budget. Secretary of State for Social Services, Green Paper, n. 93 above para 9.8.

<sup>155</sup> Lynes and Drabble, n. 44 above, p 297

<sup>156</sup> Norman Fowler, Secretary of State for Health and Social Security, HC Debate, 28 January 1986, Vol. 90, cc 826-827

<sup>157</sup> Buck, n. 7 above, p 33

<sup>158</sup> *Ibid*, p. 34. See Secretary of State for Social Services, n. 125 above, para. 4.38, p. 42

<sup>159</sup> John Mesher, 'The Legal Structure of the Social Fund' in Michael Freeman (ed), *Critical Issues in Welfare Law* (Stevens, 1990), pp 35-37

for a discretionary scheme – but only as a back up to a system of regular bonuses for all claimants and the continuation of payments for the crises of life'<sup>160</sup>. CPAG outlined particular concern for families with children who received five-sixths of Single Payments and would be forced to pay for one-off needs out of a weekly benefit of questionable adequacy.<sup>161</sup> The SSAC recommended that single payment expenditure for 1985-86 (£335m) would be the minimum amount required to finance the SF.<sup>162</sup> Yet, the national budget for the first year of operation (1988-1989) was £203m.<sup>163</sup>

Unemployed provision would be provided through the discretionary SF in the form of an interest-free loan,<sup>164</sup> which would be paid to applicants directly, and repayment would be collected out of subsequent IS benefits.<sup>165</sup> It was argued that this method of recovery would remove the 'inequity' between the unemployed and those in work, as the latter would be expected to borrow privately in the event that they could not effectively budget their wages; while the former were awarded a grant.<sup>166</sup> Budgeting loans would be made available to claimants who faced difficulties in meeting the cost of items they would normally be expected to pay for out of their weekly income such as major household items and large bills.<sup>167</sup> To be eligible for a budgeting loan the claimant had to be in receipt of income support for at least six months, which the SSAC claimed would adversely affect those facing financial stress at the beginning of the unemployment period as they adjust to a lower income, and they were also mindful of those who experienced frequent spells of unemployment, broken up by insecure employment.<sup>168</sup> Crisis loans were available to meet emergencies which could not have been foreseen by the claimant, such as flood or fire damage. Eligibility for these payments did not require the claimant to receive a weekly benefit. All loans under the

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<sup>160</sup> See Franey, n. 91 above, p. 28; See also, SSAC, *Fourth Report*, (HMSO, 1985), p 31

<sup>161</sup> See Oppenheim, n. 143 above

<sup>162</sup> SSAC, *Report on the Draft Social Fund Manual* (HMSO, 1987)

<sup>163</sup> Buck, n. 7 above, p 34

<sup>164</sup> It was 'conceded' by the government that maternity and funeral expenses would be allocated by way of statutory instrument/regulations and determinations of these payments were to be made in the usual way by adjudication officers with a right of appeal to SSATs and then if necessary to the Social Security Commissioners – therefore, although they would be called 'social fund payments' they would essentially be non-discretionary benefits. See Buck, n. 7 above, p 31-33

<sup>165</sup> 'Unless the social fund officer determines otherwise' and there was a permissive power conferred on the Secretary of State to 'give directions as to the manner in which a review of a determination under this section is to be conducted'. Social Security Bill 1986, (1986, H.C. 59), CL. 33 (12)

<sup>166</sup> Secretary of State for Social Services, Green Paper (1985), n. 130 above, para 2.104

<sup>167</sup> *Ibid*

<sup>168</sup> Morris and Llewellyn, n. 101 above, p 50

social fund would be administered by specialist SF officers in local DHSS offices. There are three controversial aspects to administration of the scheme.<sup>169</sup>

Firstly, and as alluded to above, the fact that there was a budget limit imposed by the Secretary of State. Each local office was allocated a monthly amount to attribute to loans and when the fund ran out, claimants in need faced the possibility of having their case refused – no matter how strong it was.<sup>170</sup> Yet, others rebutted the simplistic nature of criticism based purely on the cash-limited nature of the social fund. For example, Howells noted ‘the idea of an unlimited budget is illusory and the advantage to welfare campaigners of a fixed budget is that it exposes the government of the day to some considerable political risk since they are forced to put a price tag on their own concern for the poor’.<sup>171</sup> At the nub of much of the concern was not merely that needs would go unmet through exhaustion of the budget, but that the budget would ‘act as a real constraint on the exercise of discretion.’<sup>172</sup>

Discretion after all formed the basis of the new system, replacing the complicated regulation-based structure that characterised the single payments system.<sup>173</sup> This second aspect led some commentators to claim that the system had regressed from regulations to the discretionary system observable in Britain before 1980.<sup>174</sup> However as Harris explains, there were crucial differences.<sup>175</sup> As detailed above, there was a budget, which was unprecedented.<sup>176</sup> The legal structure was much tighter, as the social fund had a specific set of statutory criteria as a framework within which discretion was required to be exercised by DHSS officers when determining an application.<sup>177</sup> Indeed, Buck explains that it is particularly notable that rules

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<sup>169</sup> Harris, n. 88 above, p 133

<sup>170</sup> Norman Johnson, *Reconstructing the Welfare State: A Decade of Change 1980 – 1990* (Harvester Wheatsheaf, 1990), p 43

<sup>171</sup> Grace Howells, ‘Social Fund Budgeting Loans – Social and Civil Justice? (1990) *Civil Justice Quarterly* 9, pp 118–138, p 124–125

<sup>172</sup> Robert Walker and Dorothy Lawton, ‘The Social Fund as an Exercise in Resource Allocation’ (1989) *Public Administration* 67 (3), pp 295–317, p 300

<sup>173</sup> Harris, n. 88 above, p 132

<sup>174</sup> Walker and Lawton, n 172 above, p 299; Johnson, n. 170 above, p 42

<sup>175</sup> Harris, n. 88 above, p 133

<sup>176</sup> In neither the Green Paper nor the White Paper did the government give an indication of the size of the fund and how it would be allocated to local offices. See Harris, n. 88 above, p 133–134

<sup>177</sup> See generally, Mesher, n. 159 above, pp 35–37; and *R v Secretary of State for Social Services and Social Fund Inspector, ex p. Stitt, Sherwin and Roberts* (February 21, 1990), D.C. pp 16–22 and 23–28. The Courts ruled that directions are binding but guidance is not. Guidance is to be taken into account, but cannot compel a particular decision. The guidance was declared unlawful as it was written in the mandatory language of direction rather than in the language of guidance. The primary legislation was amended to give the Secretary of State an express power to issue directions with respect to the control and management of

concerning eligibility, qualification, exclusions, and maximum and minimum capital rules were all set out in the social fund directions issued by the Secretary of State, whereas the legal provision regulating the exercise of ‘discretion’ was retained in the primary legislation.<sup>178</sup> In practice, this meant that officers administering the discretionary fund were bound by the statutory criteria, but were also obliged to adhere to a set of directions laid down by the Secretary of State when determining an application. The directions operated in a similar way to regulations, by imposing stringent limits to officer’s discretion – for example, prohibiting the award of a SF payment to an applicant within twenty-six weeks of a previous award, aside from exceptional prescribed circumstances and excluding a list of expenditure needs from the scope of budgeting needs.<sup>179</sup> Officers sought guidance from the *Social Fund Manual*, which detailed priorities for various payments and other information such as the factors which would determine the extent of an applicant’s ability to repay a loan. Thus, as Harris argues, the potential of the Secretary of State’s guidance to constrain the exercise of discretion is clear – as officers (and inspectors) were obliged to take account of it.<sup>180</sup>

There was widespread opposition to the idea of a discretionary SF and the government made some concessions as a result.<sup>181</sup> It was the act of proceeding with ‘the chosen methodology of directions and guidance in preference to statutory instruments’ that indisputably highlights a direct intersection between social security law and the state executive - a feature that was swiftly to become commonplace in the development of modern social security policy and legislation.<sup>182</sup> Buck concludes that the policymaker’s decision to proceed by direction rather than regulation was ‘largely presentational’ as both form binding codes, which the courts are bound to construe.<sup>183</sup> Nevertheless, some informative differences are highlighted – principally,

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the budgets. Under this power the Secretary of State issued directions 40-42 which require that the budget must not be exceeded

<sup>178</sup> Buck, n. 7 above, p 34; also see 140(1)(2) and (5) of the SSCBA 1992

<sup>179</sup> Harris, n. 8 above, p 135

<sup>180</sup> *Ibid*

<sup>181</sup> Three major modifications were made to the legal structure of the SF, amending the original bill. First maternity and funeral expenses were to be prescribed by regulations and decisions on this payments were to be made in the usual way by adjudication officers with a right of appeal to SSATs/Social Security Commissioners. Second, the government accepted the need for a third stage of review ‘outside the normal chain of management’ and thus introduced proposals for a separate body of social fund inspectors on the report stage of the Bill. Third, a new section was inserted setting out the role of the Social Fund Commissioner to be appointed by the Secretary of State (SSA 1986, s.35). See Buck, n. 7 above, pp 31-32

<sup>182</sup> *Ibid*, p 124

<sup>183</sup> *Ibid*, p 306

that the Secretary of State's directions are exempt from parliamentary scrutiny. Under the SB Scheme (1980-1988), regulations dealing with weekly requirements and single payments were subject to the closest form of parliamentary scrutiny accorded to statutory instruments, the affirmative resolution procedure.<sup>184</sup> Whereas, the only form of parliamentary scrutiny the Secretary of State is subject to is the statutory duty to present an annual report on the SF to both houses.<sup>185</sup> Thus, as Butler-Sloss LJ noted in one judgment, Parliament appeared to have conferred 'unrestricted powers to the executive to decide what categories of need qualify for consideration'.<sup>186</sup> This created cause for judicial unease with Purchas LJ commenting that:

'...the limit to which the construction exercise can be so effected is that where ambiguity is detected the courts will lean against an interpretation which would have the effect of granting to the executive unbridled powers to pass subordinate powers of this kind'.<sup>187</sup>

However as it was determined that the intention of Section 138 (1)(b) of the Social Security Contributions and Benefits Act 1992 was 'clear and unambiguous' and thus an exercise directed at cutting down the Secretary of States powers could not be performed.<sup>188</sup> Nonetheless, Buck argues that the early SF judgments, particularly Woolf L.J.s 'guideline' judgment, did cause 'pause for thought for the Secretary of State and his successors' as Ministers came to the realisation that the making of directions 'might well strike a nerve with those whose duty it was to safeguard legal and constitutional *mores*'.<sup>189</sup> The importance of the judiciary's authority to express 'constitutional objections' is heightened by the absence of a formal consultation

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<sup>184</sup> The regulations could not be made unless a draft had been laid before Parliament and approved by a resolution of each House. It was held, in *R. v. Secretary of State for Social Services, ex parte London Borough of Camden*, that the requirement was mandatory, so that regulations purportedly made in breach of the requirement would be invalid and of no effect

<sup>185</sup> SSA 1992, s. 167 (6)

<sup>186</sup> *R v Secretary of State for Social Services and the Social Fund Inspector, ex p. Stitt (No.1)*, July 3, 1990, CA, p 15F

<sup>187</sup> *R v Secretary of State for Social Services and the Social Fund Inspector, ex p. Stitt (No.1)*, July 3, 1990, CA, p 7C-D. Woolf concluded that the Secretary of State did have the power to frame directions in wide terms, including power to exclude whole categories of need for the control and management of the SF. The mandatory tone of budget tone of budget allocation was deemed unlawful, which caused the announcement of an increase of £12m in the gross budget for 1990/91. See, Trevor Buck, *Judicial Review and Social Welfare* (Pinter, 1998), p 122

<sup>188</sup> Buck, n. 187 above, p 125

<sup>189</sup> *Ibid*

process for the effecting of the Secretary of State's directions and the inability of the SSAC to scrutinise them.<sup>190</sup>

Finally, it has been contended that the government's will to advance the authority of the directions was underscored by the desire to introduce flexibility into the scheme. Such a desire does not sit comfortably with the substitution of directions with statutory regulation, as it entails the transfer to the SF of the 'adjudication machinery' of the social security system, specifically rights of appeal to social security tribunals and commissioners. Therefore, it comes as no surprise that some Ministers identified the decision to create the framework of the SF by direction and guidance, without formal parliamentary control with the decision against introducing an independent appeal process.<sup>191</sup> The Minister, Tony Newton said in the Commons:

'We would do no service to the strength and public standing of the existing appeal tribunals if we asked them to do two entirely different jobs at the same time--first, to apply faithfully regulations passed by Parliament to facts about a claimant's position and, secondly, to act within directions and guidelines laid down not by Parliament but by the Secretary of State.'<sup>192</sup>

The replacement of the right to an independent appeal by a system of internal review is the third controversial aspect of the SF.<sup>193</sup> Nearly all Social Security Appeal Tribunal cases for SB related to single payments (one in four appeals succeeded), thus this change would have a significant impact upon a great number of claimants.<sup>194</sup> The change was perhaps inevitable considering the imposition of the social fund budget.<sup>195</sup> Dean comments that the credence of the independent appeals tribunal could have been undermined, should it have been constrained by the budget set in each local office; while at the same time if the tribunal was able to ignore such budgets it would 'dilute the potentially punitive impact of the social fund'.<sup>196</sup> Yet, some argued that the discretionary mechanism in the social fund made it particularly important that there exist an independent right to appeal - the Council of Tribunals is recorded

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<sup>190</sup> Ibid

<sup>191</sup> Lynes and Drabbe, n. 44 above, p 306

<sup>192</sup> Ibid; see also HC Debate, 10 April 1986, Standing Committee B, cl 1300

<sup>193</sup> Secretary of State for Social Services, Green Paper, n. 93 above, para 2.110

<sup>194</sup> See Nick Wikeley, 'The Future of Social Security Appeal Tribunals' (1987) Family Law 17, pp 133-135

<sup>195</sup> Harris, n. 88 above, p 137

<sup>196</sup> Dean, n. 150 above, p 168

as calling the move ‘misconceived’.<sup>197</sup> Eventually, the Social Security Bill was amended to provide for a third level of review by a ‘social fund inspector’,<sup>198</sup> who would be a member of a body of inspectors (later part of the Independent Review Service) appointed by the new Social Fund Commissioner.<sup>199</sup> Despite this move, critics remained unconvinced by the removal of the appeals tribunal.<sup>200</sup>

### ***The Moore Reforms***

Writing in CPAG’s *Poverty Pamphlet 59* in 1983, Ruth Lister and Paul Wilding concluded that:

‘It is the poor who suffer most from the ideological parts of Thatcherism, branding them as feckless and fraudulent, poor because of characteristics rather than because of circumstances’.<sup>201</sup>

This early statement accurately predicts the approach to benefit provision for the unemployed of John Moore, Margaret Thatcher’s Secretary of State for Social Security as she embarked upon her third and final term in government, beginning in 1987.<sup>202</sup> Moore’s<sup>203</sup> first public statement as Minister was ‘by far the starkest statement from a spending Minister of the right’s belief that the welfare state had created a culture of dependency’.<sup>204</sup> It was evidentially influenced by the work of the conservative political scientist Charles Murray, who argued that welfare programmes created various ‘perverse incentives’ which, directly or indirectly made things worse.<sup>205</sup> Moore declared that for more than a quarter of a century ‘under the guise of

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<sup>197</sup> See Michael Rowell and Ashley Wilton, ‘Supplementary Benefit and the Green Paper’ [1986] *Journal Social Welfare Law* 8 (1), pp 14-30, p 30; Special Report of the Council of Tribunals (HMSO, 1985)

<sup>198</sup> Social Security Act 1986, s. 34

<sup>199</sup> *Ibid*, s. 35

<sup>200</sup> Martin Partington, ‘Adjudication and the Social Fund: Some Preliminary Observations’ (1986) *Legal Action* 10-11; SSAC, *Report on the Draft Fund Manual* (SSAC, 1987), para 45; and Helen Bolderson, ‘The Right to Appeal and the Social Fund’ (1988) *Journal of Law and Society* 15, pp 279-292

<sup>201</sup> Ruth Lister and Paul Wilding, ‘Conclusion: the Verdict on Thatcherism’ in David Bull and Paul Wilding, *Thatcherism and the Poor*, (CPAG, 1983), p 75

<sup>202</sup> The message in Lister and Wilding’s observation captures the spirit of much contemporary welfare reform

<sup>203</sup> Moore had been painted in the media as Margaret Thatcher’s ‘heir apparent’. A former junior Treasury Minister and Secretary of State for Transport, Moore was a self-made son of a publican and a waitress. He was an LSE Graduate and a Kennedy Scholar. He spent time in the United States as a financial analyst. See Timmins, n. 9 above, p 445

<sup>204</sup> *Ibid*

<sup>205</sup> Charles Murray, *Losing Ground: American Social Policy 1950 – 1980* (Basic Books, 1984) Murray visited in London in 1987 and met with Department of Health and Social Security, treasury officials and members of the Prime Ministers Policy Unit and contributed a series of influential papers to the press

compassion, people were encouraged to see themselves as victims of circumstance, mere putty in the grip of giant forces beyond their control.' Welfare recipients, he argued, needed to be moved away from dependence and towards independence'.<sup>206</sup> Timmins comments that although the rhetoric he used was grand, detail on how he would achieve this was scant.<sup>207</sup> Support for Moore's ideas came from most of the British press who bolstered the image of the 'undeserving' unemployed. An obvious consequence of this was that campaign groups found it increasingly hard to influence and lobby for change. An example, is CPAG's effort to form a working group of journalists to present a fairer image of poverty – only two showed up.<sup>208</sup>

Meanwhile, in the US, there were indications that the government was answering the rhetoric of Murray and his contemporaries by introducing measures to encourage independence among lone parents in the Aid to Families with Dependent Children (AFDC, 1988). Claimants would be granted income support and access to social services on the condition that they fulfilled certain obligations which were designed to support self-sufficiency. Bettina Cass described this arrangement as the 'work/welfare' contract model.<sup>209</sup> This model replaced the concept of entitlement by the concept of a 'contract' in which the 'emphasis was on compulsion, on the enforcement of work requirements in return for benefits'.<sup>210</sup> This approach implemented measures such as ensuring that entitlement rates are lower than the wages available to those in the lowest paid work. At the core of its implementation, is the attempt to change individual behaviour. For example, by reducing benefits for lone parents, unemployment will become a less attractive proposition compelling them to take work, live with their parents or find a new partner.<sup>211</sup> This model is keen to target support at specific groups and stresses that individuals have to accept certain responsibilities in the return for the right to specified benefits and services.<sup>212</sup> The Moore reforms in particular signified the beginning of a new era in the British social security system – an era firmly underscored by obligation and responsibility.

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<sup>206</sup> John Moore in a speech cited by Timmins, n. 9 above, p 446

<sup>207</sup> *Ibid*

<sup>208</sup> Thane and Davidson, n. 54 above, p 28

<sup>209</sup> Bettina Cass, 'Expanding the Concept of Social Justice: Implications for Social Security', in Michael Adler, Colin Bell, Jochen Clasen and Adrian Sinfield, *The Sociology of Social Security* (Edinburgh University Press, 1991), p 28

<sup>210</sup> *Ibid*

<sup>211</sup> Michael Adler, 'The Justice Implication of 'Activation Policies' in the UK' in Sara Stendhal, Thomas Erhag and Stamatia Devetzi (eds), in *A European Work-First Welfare State* (University of Goteburg, 2008), p 103

<sup>212</sup> Dwyer, n. 2 above, p 129



Through the vehicle of The Social Security Act 1989, Moore tightened up the availability for work test and introduced further initiatives to promote employment. A more comprehensive process was introduced following a government review in 1988 that concluded that the existing questionnaire claimants were required to complete to detail their availability for work was easily evaded by those who wished to abuse the system.<sup>213</sup> Thus, a more detailed questionnaire was designed to 'ensure claimants are really looking for work and are not restricting their choice of jobs' and was introduced for both initial claims and six month reviews.<sup>214</sup> As Wikeley pointed out, such a measure exploits the 'popular mythology' of benefit fraud.<sup>215</sup> This was part of the introduction of a separate statutory instrument that obligated claimants of the unemployed entitlement of income support to be 'actively' seeking work – to 'remedy perceived gaps in the availability condition, namely that that there was no requirement for the unemployed to look for a job actively (as opposed to passively waiting for work to be offered to them)'.<sup>216</sup> This was not a new phenomenon; the Conservatives' introduction of such an obligation could be linked to the 'genuinely seeking whole time employment' condition of the 1920's.<sup>217</sup> The condition was abolished in the 1930's when it was deemed ineffective by government.<sup>218</sup> Beveridge has been quoted as expressing the hope that it would not arise from 'its dishonoured grave'.<sup>219</sup> Yet, introduced to the British social security system in 1989; its underlying principle has been established as one of the lynchpins of contemporary legislative measures to ensure that employment is the primary mechanism by which individuals earn income. In addition, claimants who had been unemployed for six months were subject to participate in a 'voluntary' Restart interview, in which they were given advice and information about training and encouraged to agree on steps that would get them back into work.<sup>220</sup> Those claimants who were unemployed for two years were liable to requests to take part in a 'Restart Course' designed to increase job search activity. Benefit sanctions were imposed on those who did not attend when

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<sup>213</sup> Department for Education and Employment, *Training for Employment*, (Cm 316, HMSO, 1988), para 7.14

<sup>214</sup> *Ibid*

<sup>215</sup> Wikeley, n. 92 above, p 299

<sup>216</sup> As part of the Unemployment Benefit Scheme. Department for Education and Employment, *Training for Employment*, (Cm 316, HMSO, 1988), ch. 7, pp 33-36; See also Laura Lundy, 'Social Security and Unemployment' in Harris, n. 88 above, p 300

<sup>217</sup> Unemployment Insurance Act 1921, s. 3(3)(b)

<sup>218</sup> Report of the Committee on the Procedure and Evidence for the Determination of Claims of Unemployment Insurance Benefit, (Cm 3415, HMSO, 1929), para 35-44

<sup>219</sup> William Beveridge, *Unemployment – A Problem of Industry* (1930), p 280

<sup>220</sup> Adler, n. 211 above, p 103

the course was made compulsory.<sup>221</sup> Writing for CPAG in 1987, Taylor likened the 'Restart Programme' to the Manpower Service Commission's adoption of 'many elements of American Workfare'.<sup>222</sup> The early definition of workfare refers to the 'requiring of unpaid work in exchange for welfare benefits'.<sup>223</sup> By the end of the 1980's this was widened to include 'a variety of job related activities that may be required as a condition of social assistance'.<sup>224</sup> Thus Taylor's observation is substantiated on the basis that the options that were introduced for unemployment claimants,<sup>225</sup> 'changes the nature of the welfare bargain...by conditioning welfare receipt on an active programme of self-support'.<sup>226</sup> As Wiseman continues, 'willingness to participate in such efforts in effect becomes a test of need for public assistance'.<sup>227</sup> Nonetheless, although elements of Workfare could be identified in Moore's reforms – Restart was not publically recognised as a 'formal' Workfare scheme, and on the contrary the Conservative benches denied its implementation of Workfare principles.<sup>228</sup>

Although measures to decrease benefit dependency throughout the 1980's, represent a more pronounced indictment of the impact of social security system on society in recent decades, Harris argues that it represents 'a continuity in the history of the welfare state', which extends back through the household means-test of the 1930's, the workhouse system and the Speenhamland system of the eighteenth and nineteenth centuries.<sup>229</sup> It is on that basis that this chapter seeks to assert, that the seeds of the political orthodoxy which have incrementally led to the modern prominence of *conditionality* were planted in the 1970's - whilst remaining mindful

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<sup>221</sup> It became compulsory in 1990. Julia Lourie, Business and Transport Section, 'Employment Schemes for the Unemployed' Research Paper 96/66 (HOCL, 1996), p 18

<sup>222</sup> Taylor, n. 89 above, p 80

<sup>223</sup> Patricia M. Evans, 'From Workfare to the Social Contract: Implications for Canada of Recent US Welfare Reform, (1993) < <http://qed.econ.queensu.ca/pub/cpp/March1993/Evans.pdf>> (accessed August 2016)

<sup>224</sup> Ibid. See also, Joel Handler and Yesheskel Hassenfeld, *The Moral Construction of Poverty: Welfare Reform in America* (Sage, 1991), and Michael Wiseman, 'Workfare and Welfare Reform' in Harrell Rogers (ed), *Beyond Welfare: New Approaches to Problems of Poverty in America* (M.E Sharpe, 1988), pp 14-38

<sup>225</sup> Once called for a Restart interview claimants were given a list of options which included attending a job interview, attending an interview for a place on the Community Programme, Jobstart (a financial initiative to accept a low paid job), the New Workers Scheme (a subsidy to employers to offer new work), attendance at a Jobclub (help with job applications), beginning a Restart course (a 're-motivation' course) and the Job Training Scheme

<sup>226</sup> Wiseman, n. 224 above, p 22

<sup>227</sup> Ibid

<sup>228</sup> The Prime Minister, Margaret Thatcher, HC Deb, 23 April 1987, Vol. 114, c 787; Nicholas Scott (Minister of State for Social Security), HC Deb, 10 January 1989, Vol. 144, c 786

<sup>229</sup> Harris, n. 88 above, p 55

that earlier political and social forces which give birth to the welfare state remain highly influential and are embedded in contemporary social security arrangements. For example, the Thatcher administration's increased emphasis on the use of contractual measures for the unemployed echo poor law initiatives, this is particularly exemplified in the re-introduction of the 'actively seeking work' requirement.<sup>230</sup> From the beginning of the contributory unemployment benefit scheme in 1911 – unemployed persons could be disqualified from benefit if they 'left work without good cause'; they were dismissed as a result of 'misconduct' or they refused to accept.<sup>231</sup> This demonstrates further continuity with social security policy of the past, and is an indication that policies towards the unemployed have always involved a mixture of help and control.<sup>232</sup> Nonetheless, by the end of the 1980's the emphasis on control was more prevalent, as the passive approach often associated with the Beveridge gave way to an more overtly active approach.<sup>233</sup> Arguably, this shifting approach has accommodated the exercise of greater social control by the government via the social security system. In this context social control is taken to 'mean the encouragement or enforcement of particular patterns of behaviour'.<sup>234</sup> Such patterns of behaviour are often enforced by legal means. The law is considered as an instrument of 'formal' social control, and has been characterised by Davis as involving, ' (1) explicit rules of conduct, (2) planned rules of sanctions to support the rules, and (3) designated officials to interpret and enforce the rules, and often to make them'.<sup>235</sup> By the end of the 1980's there was evidence that the social control element in social security had intensified. For example, it is possible to apply all of the Davis' characteristics to the re-introduction of the 'actively seeking work' principle, which sought to test the availability of the claimant and their willingness to work.<sup>236</sup> The 1989 legislation essentially sought to ensure claimants maintained an active approach to employment and thus introduced the condition that the claimant demonstrate the steps they had taken to secure paid work. On such an occasion where the claimant was judged to be unwilling to work, they were eligible to be

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<sup>230</sup> Amir Paz-fuchs, *Welfare to Work: Conditional Rights in Social Policy* (Oxford University Press, 2008), p 107

<sup>231</sup> National Insurance Act 1911

<sup>232</sup> Adler, n 211 above, p 99

<sup>233</sup> *Ibid*, p 102. Adler argues that the post-war social security system was designed to respond to the circumstances of people's lives but not to influence them

<sup>234</sup> Paul Spicker, *Poverty and Social Security* (Routledge, 1993), p 108

<sup>235</sup> James. F Davis, 'Law as a Type of Social Control' in James F. Davis et al (ed), *Society and the Law: New Meanings for an Old Profession* (Free Press, 1962), pp 39-63

<sup>236</sup> The 'work' which a claimant is required to actively seek could be defined in such a way as to prohibit excessive restrictions being imposed upon claimants. See Laura Lundy, 'From Welfare to Work? Social Security and the Unemployed' in Harris, n. 88 above, pp 296-300

sanctioned.<sup>237</sup> The punishment dealt, was an immediate disqualification from unemployment benefit. As discussed above, in 1990 it became compulsory to participate in the Restart course if it was recommended - failure to do so also incurred a sanction, in the form of disqualification from provision. The interpretation of the rules, and enforcement of punishment was delegated to a DHSS adjudication officer. As Vago notes, control through the law is 'seldom exercised by the use of positive sanctions or rewards' and state control is 'primarily, but not exclusively' exercised through the use of threat of punishment to regulate the behaviour of citizens.<sup>238</sup> This is emphasised by Harris who concurs that 'the notion of social control implies not only discouragement, or enforcement of particular forms of behaviour, as noted above, but more particularly a deliberate and systematic attempt by government or the administration to achieve particular social goals'.<sup>239</sup> A further example is the introduction of the SF. Social Control in this instance arises from the exercise of administrative discretion and decision making, underpinned by legal rules and official policy.<sup>240</sup> A loan could be denied where it was considered that support could and should, for example, be obtained from a family member or voluntary organisation rather than from the SF.<sup>241</sup> This succeeded in emphasising the importance of individual responsibility and reciprocity,<sup>242</sup> There are further forms of social control which may be associated with social security, however those outlined illustrate clearly the social and economic sanctions which operate against the unemployed. The sanctions represent the 'stick' while the receipt of benefit represents the 'carrot'.<sup>243</sup>

### **Conclusion**

'The ultimate effect of measures depends on the small print of regulations or conditions rather than on the broad principles enunciated with euphoria and self-satisfaction by the politicians'.<sup>244</sup>

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<sup>237</sup> As the proposals moved through parliament, a provision was added which increased the maximum disqualification period from six weeks to thirteen weeks for those who did not align with the governments regulations. There was no prior discussion of this proposal, which was passed in Committee Stage following three hours of consideration. See, Wikeley, n. 92 above, p 301, and SSA 1986, S. 43(2)-(3). The Secretary of State then acquired a power to effect further changes to this limit by statutory instrument and by 1988 the limit was extended to 26 weeks; Unemployment Benefit (Disqualification Period) Order 1988 (S.1. 1988 No. 487)

<sup>238</sup> Steven Vago, *Law and Society* (Ninth edition, Pearson, 2009), p 207

<sup>239</sup> Harris, n. 88 above, p 18

<sup>240</sup> *Ibid*, p 19

<sup>241</sup> *Ibid*.

<sup>242</sup> Harris, n. 88 above, p 148

<sup>243</sup> Dean, n. 150 above, p 18

<sup>244</sup> Paul Wilding, 'Richard Titmuss and Social Welfare' (1976) *Social and Economic Administration* 10 (3), p 150

In some ways Wilding's observation, which references the views of Richard Titmuss, goes to the crux of the reality of the reforms made in the 1970's and 1980's, and it undoubtedly provides credence to Richard Berthoud's comment to *The Times* that claims that the outcomes represented fundamental change were 'grossly exaggerated'.<sup>245</sup> However, it is argued here that the culmination of measures outlined in this chapter represents a stark and symbolic departure from the principles which had underpinned the development of the post-war social security system. The 1980's saw a further erosion of the principle of collective insurance against risk - the basis of contributory benefit and Beveridge's attempt to 'guarantee the income needed for subsistence in all normal cases'.<sup>246</sup> Rather, and as affirmed by the SSAC, there was growing dependence on means-tested benefits, which was effected to 'top-up inadequate payments of insurance benefit'. Means-testing increasingly sought to respond to increased levels of long-term unemployment and youth unemployment and resulted in a large number of unemployed with no entitlement. Therefore, whilst Fowler's Green Paper commits to Beveridge's concept of 'twin pillars' which recognises the responsibility of both the state and the individual's capacity to be self-reliant, it fails to recognise Beveridge's principle that unemployment benefit should be unlimited.<sup>247</sup>

Furthermore, the Conservative emphasis on 'targeting' or 'selectivism' which has inevitably increased the level of means-testing, a process that CPAG has deemed to be complicated and costly to administer, arguably counters the government's aim of simplification. This conflict was acknowledged by Archy Kirkwood MP who during a 1986 debate on the Bill said:

'Better targeting needs to take account of individual need and to be done well needs extra resources, especially if the system at the same time is to become more simple'.<sup>248</sup>

This statement brings two distinct issues to the fore. Firstly, and as the SSAC duly pointed out - simplification 'means standardisation', and if the risk of underpaying some is to be avoided, the highest level of need must be accommodated, not the average level. As CPAG emphasised, such an approach would require additional spending, yet

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<sup>245</sup> Berthoud authored the Policy Studies Institute study on the Fowler reforms; (The Times, London, 28 January 1986) (author of the PSI study on the Fowler reforms)

<sup>246</sup> William Beveridge, Inter-departmental Committee on Social Insurance and Allied Services, *Social Insurance and Allied Services* (Cm 6404, 1942), para 23

<sup>247</sup> Morris and Llewellyn, n. 101 above, p 55; See also Franey, n. 91 above, p 13

<sup>248</sup> HC Debate, 20 May 1986, c 271

the government elected to limit its focus to the redistribution of a static resource for social security – thus income is redistributed amongst the poor, without consideration of the benefits directed at the better off by way of taxes, or a possible increase of public expenditure on assistance. Such a conclusion allows scope to argue that ‘while governments seem relatively comfortable supporting the powerful and ‘nudging’ the middle class, they show persistent tendencies to direct harsher treatment at the poor or disadvantaged’. Thus, Harrison and Sanders suggest that there is in effect ‘an ongoing social division of social control, albeit with considerable complexities’.<sup>249</sup> Indeed, Dean argues that claimants have effectively been partitioned as a member of a highly specific group or status category.<sup>250</sup>

The 1980’s evolution of a partnership between the re-installment of discretion and the burgeoning of complex legal rules by way of statutory regulation and direction arguably created a more complex social security system, and thus further undermined Fowler’s call for simplification. Discretion has the potential to increase responsiveness, and ‘is often associated with increased costs and complexity’<sup>251</sup> as officials are able to take account of a range of factors when deciding on the entitlement of an individual claimant, which is arguably a more onerous process than following determined rules.<sup>252</sup> As, was the case following the reforms made in the 1980’s, the issue of discretion became associated with the involvement of the courts and judges as a result of legal challenge – this in turn produced additional complexity because of the ‘overlay of judicial guidance on issues of uncertainty’.<sup>253</sup> Nonetheless, as Harris details, such factors ‘are equally associated with the application of detailed legal rules’ which resulted in a large volume of appeals. Furthermore, and as discussed in detail above, the directions associated with the SF, and to some extent, social security regulations are not subject to the same level of parliamentary scrutiny as primary legislation which allows individual Ministers to assume more discretionary power. A development that has, on occasion, led to complex negotiations with the judiciary. The effect of frequently changing and amended rules, particularly in relation to means-tested benefits, actually causes considerable

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<sup>249</sup> Malcolm Harrison and Teela Sanders, *Social Policies and Social Control* (Policy Press, 2016), p 11

<sup>250</sup> Dean, n. 150 above, p 187

<sup>251</sup> Cathleen J Jewell, ‘Assessing Need in the United States, Germany and Sweden: The Organisation of Welfare Casework and the Potential for Responsiveness in the “Three Worlds”’ (2007) *Law and Policy* 29 (3), p 381

<sup>252</sup> Neville Harris, *Law in a Complex State: Complexity and the Law and Structure of Welfare* (Hart Publishing, 2013), p 6

<sup>253</sup> *Ibid*

confusion, as can be clearly identified as a characteristic of the (earlier) system of Supplementary Benefits.

The emphasis on removing the 'unemployment and poverty trap' demonstrated the Thatcherite compulsion to restore incentives by reducing assistance and increasing controls for unemployed claimants; evidencing the early influence of the principle of conditionality.<sup>254</sup> Conditionality is defined by the notion that eligibility for certain, publicly provided welfare entitlements should be dependent on the individual agreeing to accepting and meeting specific compulsory duties and achieving desirable patterns of behaviour.<sup>255</sup> From the latter stages of Thatcher's premiership conditionality gained greater prominence in policy aimed at addressing unemployment and welfare dependency as the Conservative's leadership continued into the 1990's. As Oliver emphasised the focus turned to the 'active involvement demanded of claimants, who can no longer be considered the passive recipients of public largesse'.<sup>256</sup> The conditions or obligations comprising this active engagement represent essentially a detailed and complex set of contractual terms on which the state undertakes to support individuals and the breach of which results in such support being withdrawn.

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<sup>254</sup> Dean, n. 150 above, p 183

<sup>255</sup> Dwyer, n. 2 above

<sup>256</sup> Dawn Oliver, *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship* (Open University Press, 1991), p 32

## Chapter 4: Giving 'new right' Ideology Legislative Legs: The Jobseekers Allowance Act 1995

### *Introduction*

The 'political renaissance of the language of citizenship' in Britain in the late 1980s and early 1990's largely reflected what was occurring in the rest of Europe. Nonetheless, as Lister argues, its re-emergence took on a particular resonance in the UK, which was described as the 'chief European testing ground for new right theory'<sup>1</sup> – acting as a conduit for new right ideas as they travelled across the Atlantic, on the back of an influx of broader global shifts and economic trends.<sup>2</sup>

In search of a response to the Thatcherite subversion of the post-war concept of citizenship as rights in favour of a principle constructed around the primacy of obligation and individual responsibility, the centre-left sought to regenerate the idea that citizenship entitlements should guarantee rights. In addition, they wanted to emphasise the importance of achieving a balance between 'the individual and the social dimension of citizenship' and to assert the interdependence of both aspects.<sup>3</sup> At the forefront of the left's efforts were welfare rights organisations and advocates, keeping prominent the notion of welfare as a right.<sup>4</sup> The years leading to Thatcher's downfall witnessed the rapid advancement of welfare rights within Labour-controlled local authorities, who eventually recognised its potential for counterbalancing the policies and practices of the central state.<sup>5</sup> The political challenge constituted by welfare-as-rights created a platform from which the Marshallian concept of citizenship could be recognised as essential in approaching state welfare provision.<sup>6</sup> However, as noted in Chapter 2, as the fabric of the left's main political anchor, the Labour Party, changed, following the election of Tony Blair as party leader, so did its philosophy.

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<sup>1</sup> David Marquand, 'Civic Republicans and Liberal Individualists: The Case of Britain (1991) *Archive Européenne de Sociologie* XXXII, p 329

<sup>2</sup> Ruth Lister, 'Citizenship, Exclusion and "the Third Way" in Social Security Reform: Reflections on TH Marshall' (2000) *Journal of Social Security Law* 7 (2), pp 70-87, p 77

<sup>3</sup> Stuart Hall and David Held, 'Left and Rights', *Marxism Today*, (June 1989). One of the main vehicles for this purpose was Charter 88, < <http://action.unlockdemocracy.org.uk/pages/the-original-charter-88> > (accessed 4 March 2016), the focus of which was on the notion of bottom up power and on its 'active mode' of political participation, not to be confused with Hurd's 'active citizen'. See, Ruth Lister, *The Exclusive Society: Citizenship and the Poor* (CPAG, 1990), p 23

<sup>4</sup> David Taylor, 'Citizenship and Social Power' (1989) *Critical Social Policy* 9 (26), p 25

<sup>5</sup> Pete Alcock, 'Why Citizenship and Welfare Rights Offer New Hope for New Welfare in Britain' (1989) *Critical Social Policy* 9 (26), p 35

<sup>6</sup> *Ibid*, p 37



This chapter will assess the Conservative's introduction of the Jobseekers Act 1995 – the 'new right's last major move in terms of social security law before they were relegated to the opposition benches. In relation to the governance of the social security system and the management of unemployed populations the Jobseekers Agreement marks a climactic development in the intensification of conditionality, and the altering nature of the requirements attached to citizenship through the use of contractual measures. The new form of contract for social security entitlement provided for a standardisation of specific behavioural instruments. This general model has endured to the present and thus provides a significant indication of the implication of the Thatcher-administration's concerted 'ideological attack on the social democratic concept of citizenship'.<sup>7</sup> Indeed, the passing of JSA into the statute books points to a growing acceptance of individualist ('self-improvement'), and consumerist approaches to social security by political elites.<sup>8</sup>

### ***A Conduit to the Introduction of JSA? The Political Landscape***

The Conservative party's first post-election conference (9 October 1992) witnessed a discordant break from the tune of passionate Conservatism that John Major had played in the initial period as Margaret Thatcher's replacement.<sup>9</sup> In his speech, the newly elected Prime Minister took aim at 'sponging' new age travellers, a group that Peter Lilley<sup>10</sup>, the newly appointed Secretary of State for Social Security, also targeted for ridicule.<sup>11</sup> The tone adopted strongly suggested Major's intention to maintain 'the Thatcherite vision between state and citizen'.<sup>12</sup> Lilley delivered an overtly negative

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<sup>7</sup> Lister, n. 2 above, p 77

<sup>8</sup> Alan Deacon, 'Editorial Introduction' in Frank Field, *Stakeholder Welfare* (IEA, 1996), pp 1-6; See also, Frank Field, *Making Welfare Work: Reconstructing Welfare for the Millennium* (Transaction, 1995)

<sup>9</sup> Margaret Thatcher resigned from her position as Prime Minister on 22 November 1990

<sup>10</sup> Peter Lilley was Parliamentary Private Secretary to the Chancellor of the Exchequer, Nigel Lawson (1984-1987). His first ministerial appointment was as Economic Secretary to the Treasury (June 1987), then Financial Secretary to the Treasury (July 1989). He joined Mrs Thatcher's Cabinet as Secretary of State for Trade and Industry 1990-1992 and served as Secretary of State for Social Security 1992-1997, see < <http://www.peterlilley.co.uk/about.php> > (accessed 4 April 2016); Described as a 'known Thatcherite Right-winger' in Nicholas Timmins, *The Five Giants: A Biography of the Welfare State* (Harper Collins, 2001), p 523

<sup>11</sup> John Major's Speech to the 1992 Conservative Party Conference, (Brighton, 9<sup>th</sup> October 1992) < <http://www.johnmajor.co.uk/page1208.html> > (accessed 5 April 2016). New Age Travellers is a term used to describe festivalgoers, and travellers (previously referred to as Gypsies). See, Trevor Buck, 'New Age Travellers: Actively Seeking Work' (1993) *Industrial Law Journal* 22 (3)

<sup>12</sup> Keith Faulks, *Citizenship in Modern Britain* (Edinburgh University Press, 1998), p 93. There is broad acknowledgement that Major sought to consolidate Thatcherism, rather than introducing his own 'ism'. See; Dennis Kavanagh, 'A Major Agenda?' in Dennis Kavanagh and Anthony Seldon, *The Major Effect* (Macmillan, 1994), p 9; Peter Dorey (ed), *The Major*

indictment of benefit claimants, as he boldly announced that he was ‘closing down the something for nothing society’.<sup>13</sup> In his speech (an infamous rendition of the song ‘*I’ve got a little list*’, adapted from a Gilbert and Sullivan Opera, ‘The Mikado’) he referred to ‘bogus asylum seekers’, ‘councillors who claim the dole to run left wing campaigns’, ‘young ladies who get pregnant to jump the housing queue’ and ‘dads who won’t support the ladies they have ‘kissed’.<sup>14</sup>

Shortly afterwards, Michael Portillo, who was appointed Chief Secretary to the Treasury, announced a long-term review of social policy and the level of public spending, which was to begin in 1993 and take two years to complete.<sup>15</sup> Lilley, unusually for a spending minister, pledged his support for Portillo’s endeavour and committed to ‘doing his utmost to cooperate and fundamentally re-think the role of social security’.<sup>16</sup> However, according to Timmins, Lilley was shrewder than his crude party conference speeches and neo-liberal rhetoric would lead his colleagues and opponents to believe.<sup>17</sup> In the Mais lecture in 1993, he laid out the principles that he had developed for social security – many of which remain significant.<sup>18</sup> He confirmed that he planned to cut ‘erupting’ expenditure, as per the expectations of his

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*Premiership* (Macmillan, 1999), p 3; Steve Ludlum and Martin J Smith, *Contemporary British Conservatism* (Macmillan, 1995), p 279

<sup>13</sup> Secretary of State for Social Security, Peter Lilley, Speech to the Conservative party Conference 1992, ‘I’ve Got a Little List’ (Brighton, 9<sup>th</sup> October 1992) < <https://www.youtube.com/watch?v=FOx8q3eGq3g> > (accessed 14 April 2016)

<sup>14</sup> *Ibid*

<sup>15</sup> This review was carried out in the context of a projected £50 billion budget deficit in 1993, that had been prompted by Britain’s decision to withdraw from the Exchange Rate Mechanism on ‘Black Monday’ (16 September 1992), during which £15 billion worth of reserves were used up in what ended up a fruitless attempt to protect the value of the pound. See, Robert M. Page, *Clear Blue Water? The Conservative Party and the Welfare State Since 1940* (Policy Press, 2015), p 110

<sup>16</sup> Howard Glennerster, ‘Health and Social Policy’ in Kavanagh and Seldon, n. 12 above, p 319

<sup>17</sup> Lilley was intellectually able with a background in statistics, which meant that he really understood the numbers. Although at the beginning of his tenure as Secretary of State for Social Security he was perceived to be shy and lacking the necessary negotiating skills, he was soon to become a formidable operator. Anne Bothwell, who became Lilley’s permanent secretary in 1995, said that ‘you didn’t feel that other people in government messed with Lilley’. She said the Treasury ‘always pushed right up to the line. That’s their job. But if Lilley said it couldn’t be done, then the Treasury, in the end, didn’t mess with him. No one was going to kill the goose that was laying the golden eggs, in terms of restraining the budget – including the Treasury’ (Nicholas Timmins interview with Dame Anne Bothwell, 28 September 2000) See, Timmins, n. 10 above, p 524. For interesting insight into Lilley see also, Mark Lawson, ‘The Making of Blue Peter: In the Last Two Years, Peter Lilley has Shot from Obscurity to Euro-baiting Stardom at Tory Party Conferences. Is the Minister who Begat the Child Support Agency as Right as he’s Painted?’ (Independent, London, 2 April 1994) < <http://www.independent.co.uk/arts-entertainment/the-making-of-blue-peter-in-the-last-two-years-peter-lilley-has-shot-from-obscurity-to-euro-baiting-1367591.html> > (accessed 14 April 2016)

<sup>18</sup> Peter Lilley, ‘Benefits and costs: Securing the future of the social security’ The Mais Lecture (London, 23 June 1993)

department. Yet, he was against cutting benefit rates. 'Generous provision for the poor', he said 'has always been a Tory ideal'.<sup>19</sup> He upheld this stance, when during his first spending round in 1992, he was faced with pressure from the Treasury to uprate benefits by less than inflation, which would make a significant saving. Lilley believed that 'cutting the social security system was not to grind the faces of the poor'. Benefits 'don't enable people to live the life of Riley', if there was a problem it was that 'benefits were going to people that didn't need them'. He believed there was two ways to tackle this problem. 'Restrict the numbers entitled, or remove the need in the first place – either by self-provision or by creating jobs and incentives to take them'.<sup>20</sup>

It was in this context, and with the backdrop of the recently introduced Citizen's Charter, that the Prime Minister allegedly asked the Secretaries of State of Social Security and Employment to consider ways that improved services could be provided to the unemployed.<sup>21</sup> A White paper was subsequently published in 1994, laying out the main aims behind the introduction of Jobseekers Allowance (JSA), which would replace Unemployment Benefit (UB) and Income Support (IS) for claimants seeking work. Replacing the two schemes with a single benefit, was considered an opportunity to depart from the confusion surrounding the claimant's eligibility for both, or two different benefits (UB and IS) which were based on different principles (one a contributory benefit as of right, the other means-tested), each with its own set of rules, and administered by different bodies (the Employment Service (ES) and the Benefits Agency (BA)). JSA is thus a single benefit, containing both a contributory and a means-tested component, with shared rules on such key conditions as labour market tests, the treatment of earnings and days of benefit payment, and claimants dealing (so far as possible) with a single office.<sup>22</sup> The government conveyed its intention to improve the operation of the labour market by providing support for people in their search for work, while ensuring that they fulfilled the required conditions for receipt of benefit. It also sought to streamline the administration of

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<sup>19</sup> Independent (London, 11<sup>th</sup> May 1992)

<sup>20</sup> Combination of an interview between Nicholas Timmins and Peter Lilley on 13 September 2000 and Independent, 22<sup>nd</sup> May 1995. Lilley faced this battle each year, for five years, and each year he won with a few minor exceptions. Although, he largely refused to cut benefit, he still effectively curbed a rise in spending. He did this by working through the system, sector by sector. He attempted, as far as possible to use Newton's law, changing benefits to affect future claimants rather than current ones, and sought areas that could be privatised. He reasoned that unemployment could not be privatised, because as a group they faced a greater risk of disadvantage. See, Timmins, n. 10 above, p 524-525

<sup>21</sup> Department of Social Security, *The Quarterly Magazine of the DSS 10* (1995)

<sup>22</sup> David Bonner, 'Jobseeker's Allowance: An Uneasy Hybrid' (1996) *Journal of Social Security Law* 3 (4), pp 165-184

benefits by way of closer targeting through a regime that ‘more effectively helps people back into work’. Finally, it identified a need to improve the service to unemployed, through the introduction of a ‘simpler, clearer, more consistent’ benefit structure.<sup>23</sup>

JSA was a shrewd move for Major’s government, as it was anticipated to succeed in cutting benefit expenditure, with the added possibility of a decrease in administrative expenditure through the unification of two benefits (IS and UB). It was estimated that there would be an overall reduction of £140 million in benefit expenditure in the 1996-97 period and £270 million in 1997-98.<sup>24</sup> The savings resulting from the reduction of contributory-based entitlement from twelve months to six months provided an impressive reduction of £70 million and £180 million respectively for these years.<sup>25</sup> As highlighted by Buck, the potential saving that could be generated from the six month cut in benefit was so compelling that the government opted to enforce it from April 1996, rather than from the deferred date of the widespread implementation of JSA in October 1996.<sup>26</sup> Although in theory, was reasonable to expect the unification of two benefits to achieve significant administrative savings – the maintenance of Income Support (IS) for those not required to meet market labour conditions of benefit, and the administrative costs of introducing and managing the contribution-based (JSA(C)) and income-based jobseeker’s allowance (JSA(IB)) could be high.<sup>27</sup> The Conservative benches broadly understood the advantages of JSA to be the tightening of labour market conditions for entitlement, specifically the addition of the condition that jobseekers sign a jobseeker’s agreement combined with

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<sup>23</sup> Jobseeker’s Allowance, (Cm 2687, HMSO, 1994), para 1.5

<sup>24</sup> The Financial Memorandum of the Jobseekers Bill; HC (Bill 5), December 1, 1995

<sup>25</sup> Hansard, HC, Written Answers, Vol. 251, cols 535-536 (December 12, 1994) (breakdown of JSA savings on benefit expenditure). It was estimated that 165,000 claimants at any one point in time would lose entitlement to UB, of which 70,000 would not be entitled to IS; Hansard, HC, Written Answers, Vol. 251, cols 373-374 (December 8, 1994)

<sup>26</sup> Due to the deferral of JSA and changes to the transitional protection offered, these estimates of savings were subsequently revised downwards but they still represent significant direct savings. Overall savings of £60 million and £240 million for 1996-1997 and 1997-1998 respectively; see Hansard, HC, Written Answers, Vol. 274, col 560 (March 26, 1996). The savings from the six months’ benefit cut were revised to £30 million and £145 million for these two years respectively; see Hansard, HC, Written Answers, Vol. 272, cols 725-726 (February 29, 1996), as cited by Trevor Buck, ‘Jobseekers Allowance: Policy Perspectives’ (1996) *Journal of Social Security Law* 3 (4), pp 149-164, p 150; See also, “It seems that the carrot part of the package is to be delayed until October but the stick part is to be introduced six months before that—in April. So much for the package”, Baroness Hollis of Heigham (Labour), HL Deb, 23 May 1995, Vol. 564, cc 922-930, c 922

<sup>27</sup> The administrative costs of introducing JSA had been estimated to cost £100 million; see Hansard, HC, Written Answers, Vol. 274, col 560 (March 26, 1996). There will be no job cuts or surplus staff in the Benefits Agency (BA) as a result of the implementation of JSA; Hansard, HC, Written Answers, Vol. 273, col 76 (March 4, 1996), as cited by Buck, n. 26 above, p 150

the 'new coercive' device of a jobseeker's direction, which provided the frontline adviser with the power to stipulate a certain course of action to improve the claimants chance of getting a job, and the extension of benefit sanctions – presented as a required step in deterring the workshy.<sup>28</sup> Critics of the approach identified the arsenal of measures introduced as more akin to 'a new poor law', which emphasised that provision for the state should not remove the incentive for the claimant to find or retain employment.<sup>29</sup> The 'crudest weapon...which might be employed to achieve this objective is to make the relief conditional upon institutionalised work'.<sup>30</sup> The introduction of the Act in October 1996 represented a watershed moment in the government's efforts to ensure that the recipients of social security continue to look for work. This political position is exemplified in Lilley's comments in the commons:

'...We have the power to require job seekers to make an effort to seek work, to train and thereby to maintain contact with the world of work. That is right; taxpayers expect something in return and there is nothing wrong in principle with requiring greater effort on *any front* from those seeking work.'<sup>31</sup>

A telling phrase in this passage is 'requiring effort on *any front* from those seeking work'. For example, Wikeley drew attention to a particularly 'peculiar' feature introduced by JSA, which vested power in the Secretary of State to prescribe circumstances relating to a claimants behaviour or appearance in in which the steps a claimant takes to meet the condition of 'actively seeking employment' are to be disregarded.<sup>32</sup> This provision, contained in s 7(3) of the Jobseekers Act, provides an early indication of the developing propensity of the social security system's capacity to dictate appropriate claimant behaviour, and subsequently enforce compliance with required job search activity. However, at the time of its introduction, the instrument's political justification was far from clear. From the outset of the JSA proposals, the rationale was clothed in general terms around the need to deal with the claimant who 'behaves or presents himself in such a way as deliberately to

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<sup>28</sup> The Conservative Research Department's magazine, *Politics Today* [January 1995] headlined the tougher benefit penalties introduced with JSA as 'Sanctions on the work-shy'; TUC, Jobseeker's Allowance: A TUC Briefing, Congress House, February 1996, (para. 42) as cited by Buck, n. 26 above, p 150; See also, Hansard, Robert Hughes (Consevative, Harrow West) HC Deb, 17 January 1996, Vol. 269, cc 744-798, c 766-768; Donald Derwar (Labour Aberdeen South), HC Deb, 10 January 1995, Vol. 252, cc 47-123, c 114

<sup>29</sup> Laura Lundy, 'From Welfare to Work? Social Security and Unemployment' in Neville Harris, *Social Security Law in Context* (Oxford University Press, 2000), p 291

<sup>30</sup> Ibid

<sup>31</sup> Peter Lilley, Secretary of State for Social Security, HC Deb, 24 October 1994 Vol. 248, col 638

<sup>32</sup> Nick Wikeley, 'The Jobseekers Act 1995: What the Unemployed Need is a Good Haircut...' (1996) *Industrial Law Journal* 23 (1)

extinguish his chance of receiving offers of employment'.<sup>33</sup> Wikeley mused that such terms 'can be seen as a variant on the well-worn theme of scroungers milking the benefit system'.<sup>34</sup> Indeed, the parliamentary Under-Secretary of State for Social Security declared (on the Bill's first reading), 'the work-shy are unknown in quantity, but they are thought to be one in six claimants'.<sup>35</sup> No source was attributed to this accusation, which if correct would undoubtedly bring the purpose of the actively seeking work requirement (introduced in 1989) into question.<sup>36</sup>

There was considerable disapproval of the Bill from organisations concerned with welfare rights,<sup>37</sup> which centred broadly around three fundamental changes that the Act would implement.<sup>38</sup> The main bones of contention included the restriction of entitlement to contributory based JSA to six months (compared to a maximum of 12 months with unemployment benefit), the introduction of lower benefit rates for 18-24 year olds, and the imposition of the jobseeker's agreement.<sup>39</sup> Furthermore, two distinct legal points interfaced with the political issues outlined above. First, the growing unease connected with delegated ministerial power in social security legislation.<sup>40</sup> Secondly, the introduction of the Jobseekers Act included a power to enable the 'piloting' of social security schemes. The previous chapter detailed the implications of the Secretary of State's power to provide 'directions and guidance' in the administration of the Social Fund – a principal claim was that this advance, in many ways by-passed the process of political negotiation, as the directions were exempt from parliamentary scrutiny. Thus, increased powers lay directly with the

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<sup>33</sup> Department for Social Security, Explanatory Notes on Clauses, Clause 6(3))

<sup>34</sup> Wikeley, n. 32 above

<sup>35</sup> Rogers Evans MP (Conservative, Monmouth), HC Deb, 10 January 1995, Vol. 252, col 119

<sup>36</sup> The Jobseekers Act also gives an employment officer the power to issue a 'jobseeker's direction', the sanction for non-compliance being two weeks' loss of benefit, or four weeks in the case of a further breach (section 19((2) and (5)(a)). In December 1995 the Jobseeker's Allowance Regulations 1996 were issued in draft. Regulation 18(4) stipulates that specific circumstances should be disregarded for the purposes of actively seeking employment (unless they were due to reasons beyond the claimant's control) - Regulation 18(4)(c) stipulates that where by his behaviour or appearance he otherwise undermined his prospects of securing the employment in question. Wikeley argues that this is much more much more problematic than the others because it is imprecisely drafted and thus provides more scope for subjective and potentially arbitrary decision making. See, Wikeley, n. 32 above

<sup>37</sup> Donald Dewar MP (Labour, Aberdeen South), HC Deb, 10 January 1995, Vol. 252, col 114; Alan Howarth MP (Conservative, Stratford-on-Avon), HC Deb, 10 January 1995, Vol. 252, col 80

<sup>38</sup> Donald Dewar (Labour, Aberdeen South), HC Deb, 10 January 1995, Vol. 252, col 114; Alan Howarth MP (Conservative, Stratford-on-Avon), HC Deb, 10 January 1995, Vol. 252, col 80

<sup>39</sup> See generally, David Piachaud 'The Growth of Means-Testing' in Alan Walker and Carol Walker, *Britain Divided: The Growth of Social Exclusion in the 1980's and 1990's* (CPAG, 1997)

<sup>40</sup> Buck, n. 26 above, p 151: It 'contained an impressive number of powers to create delegated legislation'

State Executive, which attains the ability to determine its own interpretation of levels of need as well as dictating suitable levels of conditionality in selected pilot areas.

It may be argued, that in order to develop social security law, the result of the political negotiation process between societal pulls (such as those established by welfare organisations) and the government's economic and social objectives, must culminate in an outcome, which sustains support for the resultant law inside and outside the realms of Westminster. However, the cost of reaching such a goal often manifests in the absence of any coherent approach to the reform of social security.<sup>41</sup> Baldwin, Wikeley and Young assert that frequent amendments to statutory instruments governing the detailed benefit rules are characterised both by their narrow objectives and obscure drafting, thus requiring additional amendments as inadequacies and inefficiencies in earlier legislation become apparent.<sup>42</sup> The case of recent social security law-making, challenges further the existing concerns about government accountability – due to its piecemeal development, and the apparent parliamentary 'scrutiny-gap'.<sup>43</sup>

### ***The 'Skeleton Bill' Appears from the Executive closet***

The House of Lords Scrutiny Committee (exceptionally) issued two reports to deal with the Jobseekers Bill, principally concluding that it was that it was a 'skeleton bill'.<sup>44</sup> It also rather dramatically proclaimed that the Bill's provision on the parliamentary control of delegated legislation 'is the utmost complex the Committee has come across since our establishment'.<sup>45</sup> Indeed, such was the volume of delegated power, that Conservative backbencher Alan Howarth claimed that provision of wide powers in the Act would allow any government to give in to the attractions of 'ad-hocery' in its social security policy.<sup>46</sup> Nonetheless, this practice, which generally shields

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<sup>41</sup> John Baldwin, Nicholas Wikeley and Richard Young, *Judging Social Security: The Adjudication of Claims for Benefit in Britain* (Clarendon Press, 1992), p 13

<sup>42</sup> Ibid

<sup>43</sup> Buck, n. 26 above, p 151; See generally, Gráinne McKeever, 'Legislative Scrutiny, Co-ordination and the Social Security Advisory Committee: from System Coherence to Scottish Devolution' (2016) *Journal of Social Security Law* 23 (3), pp 126-149

<sup>44</sup> These are set out in Annex A in House of Lords Select Committee on Scrutiny of Delegated Powers: Interim Report, H.L. 50, 1994-1995, and see House of Lords Select Committee on Scrutiny of Delegated Powers: Further Report, H.L. 54, 1994-1995, (para 4). Skeleton bills 'are little more than authority for Ministers to determine the policy and to legislate to give effect to it', in House of Lords, First Report, Select Committee on the Scrutiny of Delegated Powers, H.L. 57, 1992-1993, para 28

<sup>45</sup> Ibid, para. 8

<sup>46</sup> Alan Howarth (Conservative, Stratford-on-Avon) (he defected from the Conservative Party October 1995 and joined the Labour Party) stated, "The Bill would effectively give the

amendments from both sides of the house, has been firmly embedded into contemporary social security arrangements and has become an established legislative trend: as Ogus commented there has been an ‘increasing tendency for legislation to be passed in skeletal form, leaving most of the rules to be prescribed in statutory instruments.’<sup>47</sup> It may be argued that this is because the parliamentary timetable is ill-equipped to provide full scrutiny of the legislation in full.<sup>48</sup> However, it is more likely because it provides the government with political flexibility, allowing it to respond to the social climate, and facilitates the unequivocal determination of policy and the avoidance of parliamentary criticism from the opposition benches and/or the Party’s own backbenches.<sup>49</sup> The main exception permitting amendments principally results from a recommendation made by a Regulatory Reform Committee – as happened in the case of the Jobseekers Bill – as the arguments presented by the Select Committee were compelling enough to ensure that clause 6 of the Bill be committed to Parliament, thus making the regulations subject to the affirmative procedure.<sup>50</sup> This outcome ensured that, sections 6-8 provided further detail on the scope of powers regulating the conditions of ‘availability’ and ‘actively seeking work’, and the provision of evidence and information.<sup>51</sup>

The JSA legislation also introduced, for the first time, the power to pilot social security schemes – again this power was not contained in the primary Act, nonetheless more guaranteed safeguards were put in place, for example, to ensure the regulations attached were made subject to the affirmative resolution procedure.<sup>52</sup> It was determined that the pilot could only be introduced with a view to establishing whether a proposed scheme would work as a work incentive. The operation of a pilot was not permitted to reduce the relevant benefit rate, and it would be limited to twelve months, with an extension granted only by way of parliamentary approval. A notable scheme that sought to use the power to pilot, came in the form of ‘Project Work’ where a claimant who was unemployed for two or more years (aged 18 but under 51) on IS/JSA may be required to attend a work placement for thirteen weeks

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Government carte blanche to determine policy as they will. Is it right for Parliament to delegate law-making powers so extensively?” HC Deb, 26 June 1995, Vol. 262, col 600

<sup>47</sup> Anthony Ogus, ‘SSAC as an Independent Advisory Body: its Role and Influence on Policymaking’ (1998) *Journal of Social Security Law* 5 (4), pp 156-174, p 168

<sup>48</sup> McKeever, n. 43 above, p 129

<sup>49</sup> Ibid

<sup>50</sup> Robert Blackburn and Andrew Kennon (eds), *Parliament: Functions, Practice and Procedures* (Sweet and Maxwell, 2003), s. 6-166, p 347

<sup>51</sup> Buck, n. 26 above, pp 149-164

<sup>52</sup> Interim Report, n. 44 above, Annex A, para 108, p 151



under another scheme created under the Jobseekers Act.<sup>53</sup> In the context of this chapter, the evaluation of 'Project Work' offers noteworthy views on early perceptions of conditionality; it reports that 'there was, (however), widespread and persistent opposition to the idea that people should be *'forced'* to work in order to continue receipt of benefit.<sup>54</sup> As such, it may be interpreted that there was a perception that people were being involuntarily entered into a contract, with terms that were not mutually negotiated. Claimants who did not attend a work placement would be sanctioned. Furthermore, it includes pointed criticism at the 'lack of choice of work placements'.<sup>55</sup> As Buck maintains, one can identify the need to exercise experimentation in the context of managing huge social security budgets, in order to determine the qualification of a clear legal basis for policy implementation.<sup>56</sup> From, 1997 the sharp rise in the use of piloting in the UK led to a call for their methods and fitness for purpose to be evaluated.<sup>57</sup> The resulting report recommended 'more and better use of pilots to test the impact of policies before national roll out', which subsequently led to the establishment of a panel of enquiry to consider the future of pilots.<sup>58</sup> The introduction of pilot schemes in government policy making initiated issues around citizenship entitlement – more specifically, questions around whether it is equitable to produce differentials in benefit administration structures/ and or amounts in different parts of the country.<sup>59</sup> Equally, is it conducive to citizenship to expect a differentiation in claimant conditions? In the absence of adequate independent monitoring, pilot schemes could be used as a useful foundation for government strategists to promote unpopular or ill-conceived policy options.

### ***Further Erosion of National Insurance Principle***

As outlined in Chapter 3 the 1980's witnessed a serious erosion of one of Beveridge's theoretical foundation stones - the principle of collective insurance against risk. The

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<sup>53</sup> See, White Paper, para 3.3; See the Jobseeker's Allowance (Pilot Scheme) Regulations 1996 (S.I. 1996 No. 1307), applying to JSA the Income Support (Pilot Scheme) Regulations 1996 (S.I. 1996 No. 1252) with respect to Project Work, and Employment Programme. See also, Jane Ritchie and Robin Legard, *The First Project Work Pilots: A Qualitative Evaluation* (DfEE Publications, September 1997), p 2 < <http://webarchive.nationalarchives.gov.uk/20130401151715/http://www.education.gov.uk/publications/eOrderingDownload/RB30.pdf> > (accessed 16 November 2016)

<sup>54</sup> Ibid

<sup>55</sup> Ibid

<sup>56</sup> Buck, n. 26 above, p 153

<sup>57</sup> Performance and Innovation Unit Report, *Adding it Up: Improving Analysis and Modelling in Central Government* (Cabinet Office, 2000)

<sup>58</sup> Roger Jowell, *Trying it Out: The Role of Pilots in Policymaking*, Report of a Review of Government Pilots (Cabinet Office, 2003)

<sup>59</sup> Buck, n. 26 above, p 153

introduction of the Jobseekers Act weakened contributory benefits to the point where they now represent a minority form of social security provision. Today, most claimants receive means-tested assistance.<sup>60</sup> In contrast to its predecessor UB, people who made National Insurance contributions, are now entitled to receive JSA on a non-means tested basis for six months, rather than the 12 months previously permitted.<sup>61</sup> It is argued that the decrease to six months, coupled with the increasing cost of insurance contributions, directly impinges on the social citizenship contract containing the insurance principle between the individual and the state.<sup>62</sup> Social security contributions are habitually considered to be little more than another form of taxation, rather than the basis of a contractual agreement of state support at an adequate level.<sup>63</sup> Piachaud, writing for CPAG, concluded that the weakening of the insurance principle may have been more tolerable, had there been a consistent approach toward the entire social security system – with all social security benefits income tested, rather than targeting the low paid and unemployed – the impact of means-testing may have been more equitably shared. Therefore, it becomes more difficult to avoid the contention that the ‘more politically vulnerable and expendable’ have been selected for harsh treatment in order to curb public expenditure and limit any potential political damage.<sup>64</sup> In this context, it is important to acknowledge, that those of pension age have not experienced the same shift towards means-testing (however many pensioners rely on income related benefits).<sup>65</sup> It has been suggested, that this direction in policy established ‘negative and directive labour market activation’.<sup>66</sup> Taylor-Gooby has argued that the Conservative government’s amalgamation of insurance and mean-tested unemployment benefits in the Jobseekers Act, time limited for six months, was a significant contributor in the general movement towards introducing short-term benefits for those capable of

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<sup>60</sup> Harris, n. 29 above. In 1978/79 means-tested benefits accounted for 17 per cent of benefit expenditure. By 1996 this figure had risen to 35.6 per cent. HC, Written Answers, 17 June 1996, Vol. 279, col 334. Benefit up-rating policy, which has focused on breaking the link between benefits and earnings and adjusting rates to prices instead, has also had a major contribution to make in the new structural realignment in the system. See, Jonathan Bradshaw and Tony Lynes, *Benefit Uprating Policy and Living Standards* (SPRU, 1995)

<sup>61</sup> Timmins, n. 10 above, p 528; Page, n. 15 above, p 110; Dan Finn, ‘The Job Seekers Allowance – Workfare and the Stricter Benefit Regime’ (1995) *Capital and Class*, p 7

<sup>62</sup> Buck, n. 26 above, p 153 e.g. “If this were a private contract, people would be able to enforce their rights in the courts. The courts would say that breaking the contract was improper behaviour. But we have a sovereign body here in the Chamber; the Government control the Chamber, and can therefore break their word”. Frank Field (Labour, Birkenhead) HC Deb, 17 January 1996, Vol. 271, col 783

<sup>63</sup> Harris, n. 29 above, p 166

<sup>64</sup> Piachaud, n. 39 above, p 80

<sup>65</sup> *Ibid*, see also Harris, n. 29 above, p 166

<sup>66</sup> Peter Taylor-Gooby, *Reframing Social Citizenship* (Oxford University Press, 2009), p 116

work, at a rate below wage inflation, with strengthened conditionality at the centre of entitlement in order to 'sharpen work incentives'.<sup>67</sup> Nevertheless, Pichaud (writing in 1997) argued that overall incentives were not improved, due to an increased dependence on IS, which he claimed resulted in little or no gain from any extra earnings or from any income from savings or occupational pension, since 1979.<sup>68</sup>

The Government remained unflinching in its intention, and in its power to alter the terms of contributions. It defended its position by appealing to those citizens who bought into the idea of the 'undeserving poor', by claiming that the change would largely ease the taxpayer burden.<sup>69</sup> Frank Field, who remains a steadfast advocate of 'putting the contributory principle back at the heart of the welfare state'<sup>70</sup>, said in the Commons that:

'...the arrangements in the regulations to alter the national insurance fund should be likened to a breach of contract ... It is the classic model of the private provision of a personal pension--someone pays in contributions for a certain period and at the end takes out of the fund what has been paid in, with the ability to sue if that amount is not actually paid ....'<sup>71</sup>

In response the Parliamentary Under Secretary for Social Security, Roger Evans exclaimed that

'We are entitled by Act and statutory instrument to alter the arrangements for the national insurance fund. I reject the moral charge that what we are doing is dishonourable. It may be a matter of controversy, but it is a perfectly acceptable action for a Government, of any persuasion, to take from time to time'.<sup>72</sup>

This exchange demonstrates the extent of Executive power to alter the terms of the welfare contract on the basis of their own political aims and objectives. As reflected by Frank Field, the Conservative government quite swiftly eroded the terms associated with contributory entitlement, a principle which Beveridge viewed as one of the main pillars of the social security contract. This very sharply demonstrates the

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<sup>67</sup> Ibid

<sup>68</sup> Pichaud, n. 39 above, p 80

<sup>69</sup> Peter Lilley, Secretary of State for Social Security, HC Deb, 28 February 1995, Vol. 255, cc 859-900, c 861

<sup>70</sup> National Insurance remains a campaigning issue for Frank Field, see < <http://www.frankfield.co.uk/campaigns/national-insurance.aspx> > (accessed 28 April 2018)

<sup>71</sup> Frank Field (Labour, Birkenhead) HC Deb, 17 January 1996, Vol. 271, col 781

<sup>72</sup> Roger Evans, Parliamentary Under-Secretary of State for Social Security, HC Deb, 17 January 1996, Vol. 271, col 783

decisive political turn from Marshall's brand of social citizenship which prioritised collective insurance against risk rather than mean-tested assistance.

JSA also removed the extra support component for a dependant partner, and the rates aligned with those for income support, meaning that those from 18-24 were entitled to less than those over 25 – thus further reducing provision for younger people, who were notable casualties of the Fowler reforms. The age-dividing (introduced with IS) line that was built into income and contributory based JSA, which resulted in young people aged under twenty-five receiving a 'non-householder rate' even if they were living independently (earning twenty per cent less per week). This serves to further emphasise the vulnerability of this group as an easy target for government cuts. Consequently, young unemployed people have been subject to longer periods of dependence on their families, and their ambiguity (as neither dependent children nor independent adults) enforced.<sup>73</sup>

Furthermore, changes to benefits for the disabled brought cause for concern, specifically due to the stricter tests introduced by Incapacity Benefit (IB), which was intended to reduce the number of claimants by introducing a single benefit with more restrictive qualifying criteria that sought to establish a link with the world of work.<sup>74</sup> It became apparent that disabled persons were more likely to find themselves in a position where they would have to sign on as unemployed, and their incapacity to work could therefore result in failure to meet the conditions in the Jobseekers Agreement. Buck concluded that although 'physical or mental limitations' must be considered by the officer in determining whether any particular step in actively seeking work is acceptable<sup>75</sup>, the provisions dealing with restrictions on availability do not expressly refer to the disabled, and indeed the burden of proof therefore fell on the claimant to meet the proviso that 'he can show reasonable prospects of securing employment notwithstanding those restrictions'.<sup>76</sup>

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<sup>73</sup> See, Hartley Dean, 'Underclass or Undermined? Young People and Social Citizenship' in Robert Macdonald (ed), *Youth, the 'Underclass' and Social Exclusion* (Routledge, 1997), p 55-69

<sup>74</sup> Grainne McKeever, 'Welfare to Work for the (In) Capacitated - The Reform of Incapacity Benefit' (2000) *Industrial Law Journal* 29, p 145

<sup>75</sup> Jobseeker's Allowance Regulations 1996 (S.I. 1996 No. 207), reg. 18(3)(b). Buck, n. 26 above, p 155

<sup>76</sup> Regulation 13(3) provides some protection however, in that restrictions should be "reasonable in the light of his physical or mental condition"

### ***Administering JSA: A New Form of Welfare Governance***

As outlined in the previous chapter, the Conservative era under Thatcher saw definitive moves towards conditionality in the social security system, such as the statutory instrument introduced by Secretary of State for Social Security John Moore in 1989 to require that a claimant must be 'actively' seeking work.<sup>77</sup> Prior to this, the Employment Secretary, Lord Young introduced Restart in 1986, which was a course for people who'd been out of work for a year, and was then quite quickly expanded to cover those who'd been unemployed for six months. It was a voluntary scheme until the enactment of the Social Security Act 1989, when it became statutorily bound to the 'actively seeking work' clause.<sup>78</sup> A new framework was provided for employment services which provided for a set of compulsory interviews linked with the Restart course.<sup>79</sup> The process began with the first application for benefit, when the claimant and the 'new claimant adviser' agreed a number of steps, setting out a 'back to work' plan detailing how the claimant will look for work. Failure to find work committed the claimant to attend follow up interviews after thirteen weeks, and then after twenty-six weeks, fifty-two, seventy-eight weeks and then after 104 weeks of unemployment, the claimant could be required to attend a one week Restart course. Failure to attend the course without good cause incurred a forty per cent cut in benefit payment. This process formed the basis for the development of the Jobseekers Agreement, which was designed to 'build on the strengths' of the 'back to work' plan, and it was introduced via the Jobseekers Act.<sup>80</sup>

### ***The Jobseekers Agreement***

The jobseekers agreement is a particular innovation of the Jobseekers Act 1995.<sup>81</sup> As detailed above, employment plans ('back to work plans') existed before the legislation. However, the Jobseekers Act elevated the written agreement, which must be signed off by an employment officer, to the level of a mandatory condition for the receipt of benefit.<sup>82</sup> It was designed to extract information on the hours the claimant was prepared to work per week, including a breakdown per day; restrictions placed on the work the claimant is prepared to take up; the types of jobs sought, the steps

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<sup>77</sup> As part of the Unemployment Benefit Scheme. Department for Education and Employment, Training for Employment, (Cm. 316, HMSO, 1988), ch. 7, pp 33-36

<sup>78</sup> Desmond King, *Actively Seeking Work? The Politics of Unemployment and Welfare Policy in the United States and Great Britain* (Chicago University Press, 1995), p 173

<sup>79</sup> Julia Lourie, Business and Transport Section, 'Employment Schemes for the Unemployed' Research Paper 96/66 (HOCL, 1996), p 18

<sup>80</sup> Department of Employment/DSS, Jobseekers Allowance (Cm 2687, HMSO, 1995), para 2.11

<sup>81</sup> Amir Paz-Fuchs, *Welfare to Work* (Oxford University Press, 2008), p 128

<sup>82</sup> Jobseekers Act 1995, s. 1 (2)(b)

that will be taken to actively seek work, and the details of any permitted period if there is one.<sup>83</sup> The employment officer signed the agreement on the condition that the claimant agreed to being available and actively seeking work.<sup>84</sup> The employment officer subsequently organised and conducted a short review to ascertain the claimant's progress towards finding employment, and to check their compliance with the jobseekers agreement when the claimant attended to sign on. Following thirteen weeks, the claimant was required to attend a full advisory meeting, where the agreement was revisited.<sup>85</sup> If the employment officer was dissatisfied with the claimant's efforts, s/he had the authority to issue a jobseekers direction, outlining a specific course of action to increase the claimant's chances of employment.<sup>86</sup> This may include a direction to apply for a particular job, send curriculum vitae to specified employers, or to take certain steps to improve behaviour. A direction could also obligate a claimant to sign up for specified training and employment programmes.

The direction was initially developed to be applied as a last resort, to be issued when a claimant has persistently failed to make reasonable attempts to get back to work.<sup>87</sup> The power to issue directions was the proverbial stick used to beat the claimant into compliance, since failure to meet the conditions might result in the imposition of a benefit sanction, which disqualified a claimant from benefit receipt for a minimum period of one week and a maximum of twenty-six weeks.<sup>88</sup> The jobseekers agreement is a clear demonstration of the contractarian approach to welfare. By signing the agreement, the claimant is providing written confirmation that they understand their side of the arrangement.<sup>89</sup> Yet, as discussed in the previous chapter, the notion of a free contract between equal partners is not possible in this situation.<sup>90</sup> As Fulbrook determined 'there seems to be little leeway here for a 'meeting of minds' but rather

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<sup>83</sup> To be effective, the agreement must be signed by the permitted period. JSA Regs 1996, reg 31

<sup>84</sup> Jobseekers Act 1995, s. 9. If the employment officer is not satisfied, she should pass the proposed agreement to the Secretary of State's official, who will make a judgement on the rationality of the claimants dispute, or if the claimant is proposing an alternative, whether the claimant would qualify as actively seeking work. The official is required to make a decision within 14 days. If the claimant is dissatisfied with the outcome, she can ask for it to be reviewed by a different official, after which there is a right of appeal to a tribunal: Jobseekers Act 1995, s 9 (6)-(7)

<sup>85</sup> Restart interviews also take place following 6, 12, 18 and 24 months

<sup>86</sup> Jobseekers Act 1995, s. 19 (10)(b)

<sup>87</sup> Department for Employment, *Employment Service Guidance*, Interviewing Policy Volume, ch. 5, para 4

<sup>88</sup> Jobseekers Act 1995 s 19 (2)

<sup>89</sup> Lundy, n. 29 above, p 304

<sup>90</sup> Joel Handler, *Social Citizenship and Workfare in the United States and Western Europe* (Cambridge University Press, 2004), p 90-91

more the concept of ‘take it or leave it’.<sup>91</sup> The same view was shared by Alan Howarth MP, when he exclaimed in the commons that he’d never encountered ‘...an agreement or a contract that falls to be arbitrated by one of the parties to it and under which one party can impose penalties’. He said to term such a document as an ‘agreement’ is ‘an abuse of language and an abuse of power’.<sup>92</sup> As Lundy commented, ‘the officials hand which shakes on this agreement is truly a glove of velvet masking a fist of steel, since failure to sign the agreement will result in the claimant being denied benefit’.<sup>93</sup> The potential loss of benefit undoubtedly has the power to influence the claimant’s actions, which could be construed as a form of duress, rather than the outwardly intended aim – which places co-operation with the terms of the agreement at the centre of the process to gaining employment. Thus the introduction of the Jobseekers Agreement provided a new mechanism to police the claimant’s availability and active work search.<sup>94</sup> Ian McCartney MP, Labour’s employment spokesperson, outwardly condemned it as punitive, exclaiming that ‘we reject the JSA and all that it stands for...we will get rid of it.’<sup>95</sup> Of course no such thing was to happen, as the introduction of the ‘New Deal’ under Tony Blair’s Labour government sought to charge the jobseekers agreement with policing the condition-based part of entitlement.<sup>96</sup>

### ***Available for Work***

The requirement to be available for work, and the requirement to be actively seeking work, form the work test, which exists to compel the claimant to seek employment expediently. The requirement that claimants be available for work has been present in the social security system since the early twentieth century. The National Insurance Act 1911, required claimants to prove that they were ‘capable of work but unable to obtain suitable employment’.<sup>97</sup> Fast-forward eighty five years and the requirement that claimants of income-based JSA be available for employment, remains prominent, as a reflection of the traditional concern that benefit only be paid to those who are involuntarily unemployed, or as it is more commonly interpreted, to those who are deserving of it.<sup>98</sup> As referenced in the last chapter, the availability for work condition, can be traced back to the Conservative’s ‘genuinely seeking whole

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<sup>91</sup> Julian Fulbrook, ‘The Jobseekers Act 1995: Consolidation with a Sting of Contractual Compliance’ (1995) *Industrial Law Journal* 24 (4), 395-401

<sup>92</sup> Ian McCartney (Labour, Makerfield), HC Deb, 26 June 1995, Vol. 262, c 600

<sup>93</sup> Lundy, n. 29 above, p 304

<sup>94</sup> *Ibid*

<sup>95</sup> Ian McCartney (Labour, Makerfield) HC Deb, 17 January 1996, c 765

<sup>96</sup> Lundy, n. 29 above, p 305

<sup>97</sup> National Insurance Act 1911, s. 86 (3)

<sup>98</sup> Paz-Fuchs, n. 81 above, p 126

time employment' criteria which was introduced following a 'sudden and dangerous rise in unemployment in the 1920's'.<sup>99</sup> The new condition seemed to require that a claimant look for work, even if there was none available.<sup>100</sup> Following sustained pressure from opposed parties, including the Trade Union movement, the condition was repealed in 1930.<sup>101</sup> The National Insurance Act 1946, introduced the question of whether claimants were 'available for employment', and indeed whether there was a reasonable prospect of finding employment, the claimant held themselves out to be available.<sup>102</sup> This resulted in some claimants deviating from the route to employment by placing restrictions on their availability.<sup>103</sup> Thus the National Insurance Advisory Committee (NIAC)<sup>104</sup> recommended the introduction of a regulation which limited the restrictions a claimant might put on his or her availability.<sup>105</sup> The operation of this law was critically examined in 1980 by a joint Department of Employment and Department of Health and Social Security (DHSS) team.<sup>106</sup> They concluded that the 'availability' condition was too vague, and therefore led to too much discretion, and as a result its administration was inefficient. It was recommended that more specific rules should be formulated.<sup>107</sup> As discussed briefly in the previous chapter, the government responded by tightening the administrative requirements, rather than making a change to the law. They introduced necessary questionnaires that the claimant was required to complete upon first signing on, and then every six months thereafter. The questionnaires were designed to clarify and reinforce the terms on which the claimant was prepared to accept work.<sup>108</sup>

The Jobseekers Act enshrines the basic principle of being available for work in primary legislation – effectively codifying principles developed in earlier case law.<sup>109</sup> It dictates that 'a person is available for employment if he is willing and able to immediately take up any employed earner's employment.'<sup>110</sup> Though the provision

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<sup>99</sup> Unemployment Insurance Act (UIA) 1921, s 3 (3)(b); (UIA 1921); UIA (No 2) 1924, s 3 (1)

<sup>100</sup> Nick Wikeley and Anthony Ogus, *The Law of Social Security* (Reed Elsevier, 2002), p 340

<sup>101</sup> Unemployment Insurance Act 1930, s. 6

<sup>102</sup> National Insurance Act 1946, s. 11 (2)(a)(i)

<sup>103</sup> Wikeley and Ogus, n. 100 above, p 341; See particularly R (U) 12/52 (T)

<sup>104</sup> National Infrastructure Advisory Council, *Report on the Availability Question* (Cm 8894, 1953)

<sup>105</sup> SI 1955/143

<sup>106</sup> Report of Joint Department of Employment/Department of Health and Social Security, Rayner Scrutiny, *Payment of Benefits to Unemployed People* (1980)

<sup>107</sup> *Ibid*, para 4.54–4.55

<sup>108</sup> White Paper, Training for Employment (Cm 316, 1988), para 7.13ff. See also Joan Brown, 'Victims or Villains? Social Security Benefits in Unemployment' (Policy Studies Institute, 1990), pp 188-201

<sup>109</sup> Wikeley and Ogus, n. 100 above, p 341. See R (U) 1/53

<sup>110</sup> Jobseekers Act 1995, s 6(1)



states that a person must accept any employment, there is provision in the Jobseekers Act that narrows the scope of this requirement. During the 'permitted period', which runs from week one to week thirteen, a claimant may limit the search for employment to her usual occupation at the level of remuneration she is accustomed to receive.<sup>111</sup> Following the permitted period, the claimant must be available to accept any job offer.<sup>112</sup> This provision recognises the claimant's employment aspirations, yet encompasses the need to prioritise practical limitations, and in the case that the two cannot be satisfied, the former consideration will be compromised.<sup>113</sup> In addition, the legislation provides regulations for a claimant who seeks to limit her availability and not lose entitlement, dependent on certain circumstances. Wikeley and Ogus explain that the starting point is that claimants must be ready to take up employment both of 'at least 40 hours a week' and also 'of less than forty hours a week', subject to any such restrictions.<sup>114</sup> This means that claimants must be prepared to take on full time employment, but must not refuse options of part-time work. Yet, a claimant can reasonably refuse part-time work of less than twenty-four hours, therefore escaping the imposition of a benefit sanction, so presumably the same lower limit should apply in this context.<sup>115</sup> Restrictions are acceptable if a claimant can provide evidence that the prospect of achieving employment will not be impinged, notwithstanding these restrictions.<sup>116</sup> Undoubtedly, given the criteria in applying this concept, the longer the duration of the unemployment, the more challenging it will be for claimants to demonstrate that there is a reasonable prospect securing employment, despite the restrictions imposed.<sup>117</sup> The regulations provided for specific limits for those with religious convictions, mental or physical disabilities and caring responsibilities.<sup>118</sup> For example, primary carers may reduce their availability to less than forty hours per week, on the condition they are available for as many hours as their caring responsibilities permit, and in any case for no less than sixteen hours.<sup>119</sup> Finally,

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<sup>111</sup> Detailed in the Jobseekers Agreement – SI 1996/207 reg 31(f)

<sup>112</sup> JSA regulations provide the criteria that determine the length of permitted period, including the type of usual occupation, the duration of last occupation, the length of training that person has undergone and the availability and location of employment in that occupation

<sup>113</sup> Paz-Fuchs, n. 81 above, p 126

<sup>114</sup> SI 1996/207, reg 6. See Wikeley and Ogus, n. 100 above, p 342

<sup>115</sup> SI 1996/207, Reg 72 (5A). The lower limit is sixteen hours per week in the case where a claimant has been permitted to limit availability to less than twenty-four hours per week, on account of for example, caring responsibilities. See Wikeley and Ogus, n. 100 above, p 342

<sup>116</sup> SI 1996/207, reg 8

<sup>117</sup> Wikeley and Ogus, n. 100 above, p 342

<sup>118</sup> Jobseekers Act 1995, s. 6(2); SI 1996/207, reg. 13(2), 13(3), 13(4)

<sup>119</sup> SI 1996/207, reg. 13(4). 'Caring responsibilities are defined in reg. 4. In determining availability for work, consideration must be given to the particular hours and days spent

claimants were provided with the ability to place restrictions on the nature of employment, periods of availability, and localities of work concerned as well as levels of pay for a period of six months.<sup>120</sup> When the actively seeking work condition was introduced, some commentators disputed its purpose, given the operation of the availability test.<sup>121</sup> However, as Lundy remarked the ‘converse could be true’, as the actively-seeking work test could be reformulated to consider essential aspects of availability. It could arguably suffice as a stand-alone mechanism to test the claimant’s willingness to work.<sup>122</sup>

### ***Actively Seeking Work***

The ‘actively seeking work’ requirement discussed in Chapter 3, was introduced in 1989 in order to ensure claimants took decisive action to find employment, rather than waiting for work to be offered to them. Indeed, the White Papers (published 1988 and 1990) dedicate an entire chapter to the question of availability for work and underscore the need for statutory requirements to prevent fraud and abuse.<sup>123</sup> The 1988 White paper pins inadequate job searching activity to rising unemployment.<sup>124</sup> Like the availability requirement, the actively seeking work clause can be traced back to the ‘genuinely seeking employment’ test of the 1920’s.<sup>125</sup> It is argued in the previous chapter that the re-introduction of the need for claimants to provide evidence of reasonable steps to find employment, represents a key milestone in the development of the contemporary concept of conditionality. The Jobseekers Act 1995 carried the requirement over, and tightened the rules further in the JSA scheme. The Act declares ‘a person is actively seeking employment in any week if he takes in that week such steps as he can reasonably be expected to take in order to have the best prospect of securing employment’.<sup>126</sup> This formulation shows a subtle shift in wording from the previous conception, which referred to the ‘best prospects

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caring, whether the caring work is shared with another person, and the age, physical and mental ability of the person being cared for. See SI 1996/207, reg. 13(5)

<sup>120</sup> Jobseekers Act 1995, s. 6(3); SI 1996/207, reg. 9

<sup>121</sup> Buck, n. 11 above, p 229; and see also Buck’s earlier article ‘Actively Seeking Work’ (1989) *Industrial Law Journal* 18 (4), pp 258-65, p 259

<sup>122</sup> Lundy, n. 29 above, p 300

<sup>123</sup> Department of Employment, ‘Training for Employment’ (Cm 316, 1988); Department of Employment, ‘Employment for the 1990’s’ (Cm 540, HMSO, 1988). See also, Nick Wikeley, ‘Unemployment Benefit, the State and the Labour Market’ (1989) *Journal of Law and Society* 16 (3), pp 291-309, p 299

<sup>124</sup> Department of Employment, ‘Employment for the 1990’s’ (Cm 540, 1988)

<sup>125</sup> Unemployment Insurance Act (UIA) 1921, s 3 (3)(b); (UIA 1921); UIA (No 2) 1924, s. 3 (1). See also Buck, n 121 above, p 259; For a detailed comparative study see King, n. 78 above

<sup>126</sup> Jobseekers Act 1995, s 7(1)

of receiving offers of employment'.<sup>127</sup> The semantic change further emphasises the responsibility on the claimant to take positive action to earn their entitlement to social citizenship entitlement.<sup>128</sup> Such positive action was defined in the regulations, as reasonable steps and included: oral and written applications, seeking information for advertisements, employers and employment agencies; registration with an employment agency; and the appointment of a third party to assist.<sup>129</sup> It was generally expected that a claimant make more than one step per week<sup>130</sup>, with the exception that there may be occasions where one step per week is all that is reasonable for the person in question to have completed.<sup>131</sup> It is the responsibility of the adjudication officer to determine if the claimant has taken reasonable steps, and in making such a decision will pay due regard to all the relevant circumstances.<sup>132</sup>

It was recognised that the condition was open to abuse by the claimant who did not want to seek employment, and thus the government decided to make provision under which a claimant's acts could be disregarded.<sup>133</sup> These provisions were developed to remove entitlement where the claimant's behaviour is such that is 'actively militates against finding work'.<sup>134</sup> The first provision, is where he or she has acted in a violent manner. The second is where they have deliberately ruined an application form. The third and arguably the most controversial is where 'by his behaviour or appearance he otherwise undermined his prospects of securing the employment in question'.<sup>135</sup> This provision served to compound negative political and public feeling about the appearance and the behaviour of the unemployed and serves to reinforce the notion

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<sup>127</sup> Wikeley and Ogus, n. 100 above, p 348

<sup>128</sup> In this context, actively seeking employment can include steps to secure self-employment (JA 1995, s 7 (8) and SI 1996/207, regs. 18 (3) (i), 19(1) (r) and 20 (2), (3)). A week is interpreted as a 'benefit week' (SI 1996/207, regs. 1 (3) and 4)), which means that the test requires to be satisfied in respect of the two periods of seven days (including Sundays) ending in the day in the fortnight on which the claimant signs on. See Wikeley and Ogus, n. 100 above, p 348

<sup>129</sup> SI 1996/207, reg. 18 (2)

<sup>130</sup> SI 1996/207, reg. 18 (1)

<sup>131</sup> SI 1996/207, reg. 18 (1)

<sup>132</sup> SI 1996/207, reg. 18 (3) In particular: the claimant's skills, qualifications, abilities and physical or mental limitations; the person's work experience and the duration of his or her unemployment; any steps taken in previous week; the availability and location of vacancies; and engagement in activities or training which may enable the claimant to be deemed available for employment

<sup>133</sup> Department of Employment/Department of Social Security, *Jobseekers Allowance* (Cm 2687, HMSO, 1995), para 4.13

<sup>134</sup> *Ibid*

<sup>135</sup> Jobseekers Act 1995, s. 7 (3), SI 1996/207 reg. 18

that unemployment is solely the fault of the claimant rather than the constraints of the labour market.<sup>136</sup>

The key difficulty that Lundy outlays in regard to the actively seeking work requirement is its enforcement. It is not reasonable for a decision maker to judge the claimant's efforts without being physically present at an interview, or by inspecting an application before submission.<sup>137</sup> This was one of the key reasons that the genuinely-seeking-work condition of the 1920's was abandoned as it was too difficult to prove 'genuineness' on the part of the claimant.<sup>138</sup> In the same way, an effective legislative means of enforcing 'activeness' is nigh on impossible.<sup>139</sup> If a claimant refuses or fails to apply for a job offered to her by an employment officer without good cause, then they could be issued with a sanction, ranging from a disqualification period of one week to twenty-six weeks.<sup>140</sup> Regulations provided that claimants have adequate cause for declining a job if it, inter alia, included less than twenty-four hours work per week.<sup>141</sup> In contrast to provision pre-1989, however, any matter relating to remuneration may not be considered automatically as 'good cause'.<sup>142</sup> Furthermore, a claim could not be considered 'good cause' in the situation where a claimant refuses a job on the basis that they would be financially worse off.<sup>143</sup> Also, it has not considered 'good cause' if the claimant refuses a position based on locality - if it is less than one hour away.<sup>144</sup> Finally, the regulations also detail considerations that are relevant when deciding what constitutes 'good cause' and include: significant harm to health, serious religious or conscientious objection, caring responsibilities and expenses that constitute an 'unreasonably high proportion' of expected earnings.<sup>145</sup>

Jobseekers Allowance, along with the introduction of Incapacity Benefit, represented the 'first fruits of Portillo's fundamental review'.<sup>146</sup> It was estimated that savings from both measures would amount to £2.5 billion over three years, although in reality they

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<sup>136</sup> Lundy, n. 29 above, p 302. See also, Wikeley, n. 32 above

<sup>137</sup> Lundy, n. 29 above, p 302

<sup>138</sup> Department for Work and Pensions, Report of the Committee on the Procedure and Evidence for the Determination of Claims of Unemployment Insurance Benefit (Cm 3415, HMSO, 1929), para 41. The Committee suggested that adequate protection to the fund was afforded by a disqualification for those refusing offers of suitable employment (para. 43)

<sup>139</sup> Lundy, n. 29 above, p 302

<sup>140</sup> Jobseekers Act 1995, s 16 (6)

<sup>141</sup> SI 1996/207 reg. 5A

<sup>142</sup> Jobseekers Act 1995, s 19 (6)

<sup>143</sup> SI 1996/207 reg. 72 (6) (a)

<sup>144</sup> SI 1996/207 reg. 72 (6) (b) although this does not mean if it takes more than one hour cause is established

<sup>145</sup> SI 1996/207 reg. 72 (2), 72 (3)

<sup>146</sup> Timmins, n. 10 above, p 529

took longer to deliver. Over the same period benefit expenditure was expected to cost £240 billion. So, while both measures intensified conditionality measures, and were expected to deliver significant savings over time, in the short term they amounted to barely a one percent reduction in benefit spending.<sup>147</sup>

Alongside the changes in social security outlined in detail above, came the introduction of a series of welfare-to-work measures, which were expressly aimed at encouraging the unemployed into work. Examples included making family credit more generous, the introduction of a 'back to work bonus' which allowed the unemployed to build up credit if they worked part-time before finding full-time employment, also measures to allow means-tested, out-of-work benefits to continue for some weeks into employment in order to ease the transition and a year's national insurance holiday for employers who took on someone out of work for two years. It was estimated that these measures would cut spending by £6 billion a year by the turn of the century, thus reducing the forecast bill from £103 billion to £95 billion by the year 2000.<sup>148</sup> By 1996, Peter Lilley was able to publish forecasts showing that social security was set to grow below the rate of the economy as a whole for the first time since the war.<sup>149</sup>

### **Conclusion**

The above examination of the provisions of the JSA Act 1995 contemplates the extent to which the Conservative government were prepared to make rights, and the receipt of benefit, conditional on accepting certain patterns of behaviour or additional responsibilities.<sup>150</sup> As detailed, the 1980's introduced measures to make the payment of benefits dependant on claimants meeting certain obligations, such as compulsory attendance of 'restart' interviews, and more stringent eligibility criteria. Meanwhile, levels of benefit were reduced, as were the circumstances that individuals were eligible to make a claim. The 1990's brought a consolidation of these principles through the introduction of the Jobseekers Act, by the imposition of the jobseekers agreement, and the tightening of the work tests; the requirement to be 'available for work' and 'actively seeking work'. In this way, the Jobseekers Act can be construed as a watershed moment which represented a definitive turn from Marshall's assertion that social citizenship prioritised the development of rights rather than duties. As,

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<sup>147</sup> Ibid

<sup>148</sup> Ibid

<sup>149</sup> Department of Social Security, *Departmental Report, 1996-7 to 1998-1999*, p 13

<sup>150</sup> Peter Dwyer, *Welfare Rights and Responsibilities: Contesting Social Citizenship* (Policy Press, 2000), p 70

Marshall asserted in 1981 'it is the nature of the polity and of the economy to foster this change'.<sup>151</sup> Unfortunately, rather than foster and maintain the sanctity of rights-based entitlement, the Thatcher and Major governments sought to undermine it. Central to its efforts was political rhetoric which sought to vilify the unemployed as a drain on public resources and on deserved taxpayer's hard earned wages.

Also important were the legislative methods which the government was prepared to use in order to achieve its aims, for example via the discharge of skeleton legislation which provided the Executive with greater power to frequently amend the terms of the social security contract and easily assert further conditionality requirements. Furthermore, as identified above, via the increased frequency of pilot programmes permitted the government to trial employment programmes and introduce diversity across a system which was intended by Beveridge to guarantee uniformity and provide equal access to entitlement for all claimants. Instructive here is Section 7 (1) of JSA 1995 and Regulation 18 in the subsequent Statutory Instrument (SI 1996/207) which formalised within legislation the prioritisation of political ideology over practicality. The powers of the Secretary of State, enabled through this piece of secondary legislation, were to determine the 'genuineness' of a claimant's attempts to actively seek work. What had been rejected at the start of the 20<sup>th</sup> century as being 'an impossible task'<sup>152</sup> had become a legal requirement for the unemployed to prove. This thesis does not review the status of citizenship in the 1920s when the test of 'genuineness' for the unemployed was being considered, but it does recognise that the question of whether to prove genuineness was then resolved in favour of the practical arguments against being able to do this. By 1995, however, the political conditions were such that the practical objections were outweighed by the ideological ones which saw unemployed citizens as obliged to demonstrate their genuine entitlement, regardless of the conceptual or operational barriers to how this might be done. Citizenship is a malleable concept, but under Marshall's conceptualisation social rights were core for all citizens, including the unemployed. The calibration of citizen duties and obligations which are underscored by the neoliberal principle of personal responsibility to the extent that out-of-work citizens must prove the 'high

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<sup>151</sup> TH Marshall, *The Right to Welfare and Other Essays* (Heinemann, 1981), p 175

<sup>152</sup> Depart for Work and Pensions, Report of the Committee on the Procedure and Evidence for the Determination of Claims of Unemployment Insurance Benefit (Cm 3415, HMSO, 1929), para 41

on impossible' has the potential to weaken the core of citizenship, leaving the concept and the citizens poorer.

Following the successful passing of Jobseekers Allowance into the statute books, the Conservatives sought to continue their journey along the neo-liberal path, and this was reaffirmed in the party's general election manifesto of 1997. Once again it committed itself to continued promotion of the free market, low taxes, privatisation, deregulation, minimum inflation, and law and order. They promised a more affordable and efficient social security system.<sup>153</sup> However, the British public's political preference was shifting towards a 'New Labour' led by a charismatic visionary called Tony Blair. His 1996 conference speech summed up the mood of the nation, as he declared 'Enough is enough. Be done. Be done'.<sup>154</sup> For social security, they had developed a policy entitled the 'New Deal' - a phrase consciously echoing Roosevelt's 1930's New Deal, implemented to bring hope to a time of crisis. However, this clever reference should not be misinterpreted as a plan to suddenly reignite the collectivist post-war spirit - at the centre of the New Deal stood the principles of responsibility and obligation. The operation of the contemporary welfare state is dictated largely by wider economic forces. In this regard, New Labour would face the same problems as their predecessors. The double-pronged problem involved the requirement that the nation state advance its international competitiveness while sustaining the prosperity of the electorate who valued extensive mass provision.<sup>155</sup> New Labour's answer was an endorsement of a 'third way' which emphasised social investment while promoting social justice. Gamble explains that Blair's government accepted many of the domestic neo-liberal reforms undertaken during the 1980's, while maintaining high levels of spending on maintaining the welfare state.<sup>156</sup>

The Conservatives secured just 30.2% of the popular vote in 1997, haemorrhaging 182 seats in the process. It was the biggest swing to an opposition party since Labour's post-war landslide in 1945.<sup>157</sup> The next two chapters will examine New Labour's period in government. Chapter 5 focuses on the ideological motivations directing the government's reform to the social security system. The reader can expect a particular focus on the influence of the 'third way', and its implication for the development of social security policy and legislation and indeed for the consequent

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<sup>153</sup> Iain Dale, *Conservative Party General Election Manifestos, 1900 - 1997* (Routledge, 2000)

<sup>154</sup> Timmins, n. 10 above, p 554

<sup>155</sup> Taylor-Gooby, n. 66 above, p 34

<sup>156</sup> Andrew Gamble, *Can the Welfare State Survive?* (Polity Press, 2016), p 28

<sup>157</sup> Page, n. 15 above, p 114

administration of new measures. The chapter will also address the ramifications of the 'third way' for the continuing relevance of Marshall's brand of social citizenship. Chapter 6 provides a detailed legislative narrative which includes an analysis of the New Deal programmes.





**PART 3: New Labour's  
Approach to Social Security  
1997 - 2010**



## Chapter 5: A 'New' Social Contract

### *Introduction*

'The new welfare state must encourage work, not dependency'.<sup>1</sup> From the outset of its election campaign New Labour made a commitment to rebuild the welfare state around work, where opportunity would be linked with responsibility, and where the 'option of staying on full benefit and doing nothing will cease to exist'.<sup>2</sup> At the centre of its agenda existed a reconceptualization of citizenship. As Anthony Giddens (one of Britain's modern political theorists, a Professor of Sociology) espoused, the 'third way' meant that there ought to be 'no rights without responsibilities.' This sentiment was to be a cornerstone for 'the new politics' of New Labour, who would seek to ensure that the social security system did not prevent an active search for work.<sup>3</sup> Giddens attributes primacy to the concept of responsibilities as a response to three sets of interlinked social changes, namely: globalisation, the emergence of the 'knowledge economy' and what Giddens terms the 'reflexivity of citizens'. Citizen reflexivity is delineated by a 'proliferation of lifestyles' and refers generally to the drift of individual behaviour away from the stronghold of tradition and custom in structuring activities.<sup>4</sup> Consequently, Giddens maintains individuals are faced with the task of interpreting a 'swirl of information in deciding how to act'. Therefore New Labour understood there to be a requirement to create 'a new contract between the individual and the state', in order to counter the growing deference towards authority and the pre-established symbols of such authority.<sup>5</sup> One of the legislative manifestations of this position was Labour's denunciation of 'welfare dependency', and subsequent efforts to eradicate its perceived existence by developing claimants' employability skills, through the use of a series of sticks (benefit sanctions in the

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<sup>1</sup> Tony Blair, Leader's Speech, Labour Party Annual Conference, Brighton 1997

<sup>2</sup> Lord Haskel, HL Deb, 5 March 1997, Vol. 578, cc 1841-1914, c1879

<sup>3</sup> Anthony Giddens, *The Third Way: The Renewal of Social Democracy* (Polity Press, 1998), p 65

<sup>4</sup> Giddens maintains that reflexivity - a characteristic of late-modern societies, 'extends to the core of the self'. He argues that identity can no longer be seen as 'something that is just given' but as 'something that has to be routinely created and structured in the reflexive activities of the individual'. This process is predicated on the notion that societies no longer provide stable 'anchor points' for self. Society and self are both 'in flux' which is why Giddens asserts that 'the altered self has to be explored and constructed as part of a reflexive process of connecting personal and social change. See, Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late-Modern Age* (Polity Press, 1991), p 32, 33 and 52

<sup>5</sup> Anthony Giddens, 'Forward' in Matt Beech and Simon Lee, *Ten Years of New Labour* (Palgrave Macmillan, 2008), p 12-13

circumstance of non-compliance with conditional requirements) and carrots (work incentives).<sup>6</sup>

This chapter provides a legal, ideological and political analysis of the broad approach of New Labour to social security in the period 1997 - 2010. There will be a particular focus on the intersections between the politics of welfare reform and the subsequent development of the law. This will encompass an examination of the presence of the 'third way', its influence on policy and the development of social security law. Furthermore, the chapter will seek to contribute to the already advanced contention that New Labour's allocation of expanding emphasis upon individual obligation, and its tendency to promote forced labour market participation, has replaced the universal provision of benefits which characterises the Marshallian approach to social citizenship. It is argued that the New Labour government's heightened role in ensuring efficiency and individual obligation resulted in a focus on controlling the behaviour of the welfare claimant through a reconstruction of social citizenship which emphasises the value of work and proper conduct. This discernible shift triggered a number of wide-ranging implications for On one hand, the government sought to advocate de-centralisation through the development of inclusive policy processes, for example through its emphasis on the community as a viable solution to social problems the front-line administration of social security in Britain., and its resolution to allow private sector firms to deliver the 'New Deal' and other employment programmes. On the other hand however, its enactment of a more inclusive policy process was matched by the exercise of greater government control over party and government policy. Thus, Newman concludes 'alongside the partial decentralisation, the Labour administration was characterised by a clear recentralisation of political control'.<sup>7</sup>

This trajectory is particularly evident in the actions of the Labour Chancellor Gordon Brown, who shifted the Treasury's agenda from macro-economics to one where it increasingly became the central department for domestic policy, shaping welfare

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<sup>6</sup> Anne Daguere, 'The Unemployed and the Moral Case for Benefit Sanctions' (2015) *Journal of Social Security Law* 22 (3), p 134; See also, Michael Adler, 'The Justice Implication of 'Activation Policies' in the UK' in Thomas Erhag, Sara Stendhal and Stamatia Devetzi (eds), *A European Work-First Welfare State* (University of Goteburg, 2008), pp 95-131; Sharon Wright, 'The Administration of Transformation: a Case Study of Implementing Welfare Reform in the UK' in Paul Henman and Menno Fenger, *Administering Welfare Reform: International Transformations in Welfare Governance* (Policy Press, 2006), p 162

<sup>7</sup> Janet Newman, *Modernising Governance: New Labour, Policy and Society* (Sage, 2001), p 163

reform, tax and benefit changes.<sup>8</sup> Philip Gould, a close advisor of Blair's, maintained that Brown went into government with a 'dynamic' view of the relationship between public and private – his great passions were the creation of employment and the elimination of poverty, which Gould claimed Brown saw in a distinctive light.<sup>9</sup> Brown sought to create an 'enabling state' by focusing on enterprise and the creation of opportunity, while resolving to transform welfare through a focus on 'work and independence'.<sup>10</sup> In this shaping of the contemporary concept of citizenship, the individual is supposed to be involved actively in the production of social welfare and to participate in decision-making processes. In exchange, the welfare state is expected to enable all citizens to participate actively and to take responsibility for themselves providing a framework of infrastructure and services that offsets unequal opportunity structures. Thus the coercive aspects of the paradigm shift play a less central role than in the workfare approach. Consistent with this conceptualisation, Brown said:

'...to the unemployed who can work: we will meet our responsibility to ensure that there are job opportunities and the chance to learn new skills. You must now meet your responsibility — to earn a wage'.<sup>11</sup>

Paid work was to be encouraged in three main ways – by incrementally increasing the responsibilities for different groups of unemployed; making work pay (ensuring the levels of income were high enough to make paid work worthwhile), incentivising work via the introduction of tax credits, and developing human capital through targeted assistance to find jobs, which included the development of employment and training opportunities which linked participation to entitlement.<sup>12</sup>

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<sup>8</sup> Nicholas Timmins, *The Five Giants: A Biography of the Welfare State* (Harper Collins, 2001), p 607

<sup>9</sup> Philip Gould, *The Unfinished Revolution: How New Labour Changed British Politics Forever* (Abacus, 2011), p 423

<sup>10</sup> See generally, Giddens, n. 3 above; Neil Gilbert, *Transformation of the Welfare State: The Silent Surrender of Public Responsibility* (Oxford University Press, 2002); Neil Gilbert and Barbara Gilbert, *The Enabling State: Modern Welfare Capitalism in America* (Oxford University Press, 1989); and Irene Dingley, 'Between Workfare and Enablement – The different Paths to Transformation of the Welfare State: A Comparative Analysis of Activating Labour Market Policies' (2007) *European Journal of Political Research* 46, pp 823–851

<sup>11</sup> Gordon Brown, Speech to East London Partnership, 29 February 2000, as cited by Mike Brewer, Tom Clark and Matthew Wakefield, 'Social Security in the UK under New Labour: What Did the Third Way Mean for Welfare Reform?' (2002) *Fiscal Studies* 23 (4), pp 505–537, p 511

<sup>12</sup> *Ibid.* Brewer, Clark, and Wakefield outline two main ways that Labour encouraged the unemployed to assume paid work, I have added the latter point, as it can be argued that it also played a key role in supporting Labour's promotion of paid work. See also, Neville Harris,

In this context, it can be argued that the New Labour administration brought more aspects of Offe's anticipation of 'administrative-re-commodification' to life than its predecessors.<sup>13</sup> By the end of its thirteen year tenure, the majority of the working-age claimant population were contractually bound to partake in quasi-markets, in the form of work focused programmes, operated (by and large) by organisations in the private sector. New Labour sought to contain spending, increase efficiency and competitiveness, while cutting costs, primarily through the introduction of policies based on conditional entitlement, which assumed a central role in the ongoing realignment of the welfare contract between the individual and the state.<sup>14</sup>

Linked to this is the idea of coercive and direct forms of administrative and legalistic forms of control which can be identified in the making and implementation of modern social security legislation: for example, the further emergence of a trend whereby the detailed rules that determine the operation of the system are prescribed in statutory instruments which follow increasingly broad and permissive primary legislation.<sup>15</sup> The trend towards using delegated powers embedded itself further during Labour's time in government. As Robson claims, the 'administration of social security is highly politicized. It is a direct reflection of the government's political agenda'.<sup>16</sup> Invariably, this manifested with the Government assuming a greater role in the daily administration of welfare, which was reflected in the increased responsibilities placed on frontline staff in the Jobcentre to ensure the compliance of the claimants they processed. Social security rules and processes have come to reflect political ideology rather than simply effect efficient service delivery of benefits and associated services to claimants. In a sense political intent from Executive level has progressively encroached upon the legislative authority of parliament.<sup>17</sup> The political advantage of this situation is that regulatory changes are far from accessible, as rules are

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'Editorial: New Labour and Social Security - the Long and the Short of it (2010) *Journal of Social Security Law* 17 (3), p 135

<sup>13</sup> Claus Offe, *Contradictions of the Welfare State* (Hutchinson, 1984)

<sup>14</sup> Peter Dwyer, 'Creeping Conditionality in the UK: From Welfare Rights to Conditional Entitlements' (2004) *The Canadian Journal of Sociology* 29 (2), pp 265-287, p 279; See generally, Ruth Lister, 'Social Citizenship in New Labour's New "Active" Welfare State: The Case of the United Kingdom' in Adalbert Evers and Anne-Marie Guillemard (eds), *Social Policy and Citizenship: The Changing Landscape* (Oxford University Press, 2013)

<sup>15</sup> Anthony Ogus, 'SSAC as an Independent Advisory Body: its Role and Influence on Policymaking' (1998) *Journal of Social Security Law* 5 (4), pp 156-174, p 168

<sup>16</sup> Peter Robson, 'Judicial Review and Social Security' in Trevor Buck, *Judicial Review and Social Welfare* (Pinter, 1998), p 105

<sup>17</sup> Gráinne McKeever, 'Legislative Scrutiny, Co-ordination and the Social Security Advisory Committee: from System Coherence to Scottish Devolution' (2016) *Journal of Social Security Law* 23 (3), pp 126-149

transmitted in ‘arcane and often impenetrable language’, with decisions diffused in statutory instruments, in terms that those searching for political intent are less likely to find.<sup>18</sup> Black appears to echo this sentiment, albeit her comment is directed at an administrative, rather than a political level as she observes that rules may not always be clear or easily intelligible to administrators or citizens, and thus their complexity may increase the uncertainty that greater prescription was intending to minimise<sup>19</sup> – essentially emphasising the irony in the government’s frequent claims that the reforms it makes are seeking to achieve the ultimate goal of simplifying welfare.

### ***New Labour’s Approach to the Welfare State***

New Labour’s 1997 election manifesto featured the rather bold statement that it would be ‘the party of welfare reform’ – and indeed, it is arguable that by the end of its thirteen years in power, the Blair/Brown government had succeeded in reforming the public psyche, firmly embedding the third-way notion that unemployment entitlement should only be provided on the condition that claimants must do ‘something for something’.<sup>20</sup> This chapter will examine New Labour’s overall approach to reform of the social security system via two main, broad themes, which naturally intertwine at various points. First, Labour’s propensity to push a ‘modernisation’ or reform agenda while contending with growing administrative complexity<sup>21</sup>. And secondly, the chapter will examine aspects of the new philosophy which significantly underpinned much of Labour’s legislative reform, namely ‘the third way’ which sought to ‘empower citizens as part of a reformed citizen’s contract’.<sup>22</sup> In this context, it will examine the often contradictory approach that New Labour’s interpretation of twenty-first century citizenship had upon welfare governance. For example, Blair, is noted as proclaiming that with partnership ‘out

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<sup>18</sup> Robson, n. 16 above

<sup>19</sup> Julia Black, *Rules and Regulators* (Clarendon Press, 1997), p. 25, as cited by Neville Harris, *Law in a Complex State: Complexity in the Law and Structure of Welfare* (Hart Publishing, 2013), p 7

<sup>20</sup> New Labour, *Ambitions for Britain* (Party Manifesto, 2001), p 27

<sup>21</sup> Tony Blair, Leader’s Speech, Labour Party Annual Conference, Brighton 1997 – the leader said ‘You can have the education revolution, the health revolution, the welfare revolution. But it means hard choices. It means us all getting involved. And it means modernisation. And we need to bring a change to the way we treat each other. I tell you: a decent society is not based on rights. It is based on duty. Our duty to each other. To all should be given opportunity, from all responsibility demanded.’ See also, New Labour, n. 20 above, ‘We will continue to modernise the operation of the benefits system so that, if people can work, we help them to do so, and stop them slipping from lack of work to inability to work.’ And also, Labour Party, *Britain Forward Not Back* (The Labour Party Manifesto, 2005), p 6

<sup>22</sup> Giddens, n. 3 above



goes the Big State. In comes the Enabling State'.<sup>23</sup> Miliband characterised the enabling state as a *leaner* state, in which 'brokerage' and 'regulating' as well as 'enabling' are to be asserted ahead of 'providing'.<sup>24</sup> While partnership is not a new idea, under Newman's analysis of New Labour's modernising agenda partnership it became a 'further dispersal of power and penetration of state power', as local stakeholders, community groups and business organisations developed more direct relationships with the government, through a greater inclusion in political process, which subsequently became a means of carrying out the government's agenda.<sup>25</sup> Lister maintained that Labour's emphasis on this nature of 'joined up government' diverted attention from the need for systematic change.<sup>26</sup> Another example that is linked to the concept of partnership is New Labour's focus on 'social inclusion' which relied overtly on the medium of paid work.<sup>27</sup> The government perceived its role as promoting (not necessarily creating) job opportunities; conditionality entered the equation in the government's assertion that certain duties are owed in return for the 'opportunities'.<sup>28</sup> Hale argues it is unfair to characterise this relationship as reciprocal, or mutual, as such relationships are most frequently forged between individuals or groups of roughly equal power and status, not as in New Labour's characterisation, between the individual and the state – thus Blair's reference to 'the government...acting as community' is 'at best disingenuous'.<sup>29</sup> As suggested by Harris, 'a contractual, reciprocal notion of welfare may reinforce a new moral basis for social security'.<sup>30</sup>

The new moral basis is premised on increased citizen obligation, yet the obligation of the state to maintain the unemployed has been incrementally eroded. Thus, it can be

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<sup>23</sup> Tony Blair, Speech to Labour Party Conference, (October, 2002) Blackpool < <http://www.labour.org/uk/tbconfspeech/> > (accessed 14 March 2017); See also, Tony Blair, 'My Vision for Britain' (The Observer, 10 November, 2002) < <https://www.theguardian.com/politics/2002/nov/10/queensspeech2002.tonyblair> > (accessed 14 March 2017)

<sup>24</sup> David Miliband, 'This is the Modern World' (2002) *Fabian Review* 111 (4), pp 11-13

<sup>25</sup> Janet Newman, *Modernising Governance* (Sage, 2001), p 125

<sup>26</sup> Ruth Lister, 'Investing in the Citizen-workers of the Future: Transformations in Citizenship and the State under New Labour' (2003) *Social Policy and Administration* 37 (5), pp 427-443, p 428

<sup>27</sup> Sarah Hale, *Blair's Community* (Manchester University Press, 2006), p 26

<sup>28</sup> *Ibid.* Hale points to an exemplifies the point by pointing to a quote from Tony Blair: 'If we invest so as to give the unemployed person the chance of a job, then they have the responsibility to take it or lose benefit' as cited in Labour Party, *Building the Future Together: Labour's policies for partnership between Government and the Voluntary Sector* (Labour Party, 1997), p 6

<sup>29</sup> Hale, n. 27 above, p 27

<sup>30</sup> Neville Harris, *Social Security Law in Context* (Oxford University Press, 2000), p 38

said that the concept of responsabilization in citizen/state relations has been adopted to suit the state at considerable cost to the citizen.<sup>31</sup> Claimants are unable to exert any control over the terms and conditions set out or to selectively respond to the disproportionate emphasis on, and expansion of, the obligations of citizenship and the dilution of concepts like 'rights'.<sup>32</sup> This standpoint has contributed to the development of a social security system which seeks to use the contract as an instrument of illiberal policy – that can often be 'couched in avowedly liberal forms'.<sup>33</sup> It can be argued that New Labour elected to 'clothe' the relationship between the citizen and the state, as not deriving from an agreement between two mutual signatories, but a relationship that emanates directly from the duties of DWP vis-à-vis the benefit claimant. What follows, is the expectation that DWP implements a quasi-contractual approach to identify the framework within which the behaviour of the claimant can be controlled by government. However, the government does not generally identify such relationships as being primarily disciplinary.<sup>34</sup>

Harris and Wikeley optimistically laid out their interpretation of 'modernisation' at the beginning of New Labour's tenure.<sup>35</sup> They agreed that if effective modernisation of the social security system is to be achieved, and if modernisation was to signify real improvement rather than selective rationalisation, a broad principled approach would be required – which depended upon an appropriate level of strength to withstand the predominance of economic priorities.<sup>36</sup> From the very outset this task would prove very difficult for New Labour, as the government made a commitment to deliver its manifesto pledges within the confines of Conservative initiated spending plans.<sup>37</sup> Harris and Wikeley further asserted that modernisation of social security can occur on two levels. First it can undertake to ensure that the pattern of entitlement that has been enshrined in law is administered and adjudicated more fairly. For example, initial decisions should be made more quickly and accurately, so that a

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<sup>31</sup> Grainne McKeever, 'Social Security as a Criminal Sanction' (2004) *Journal of Social Welfare and Family Law* 26 (1), pp 1-16, p 10

<sup>32</sup> *Ibid*

<sup>33</sup> Mark Freedland and Desmond King, 'Contractual Governance and Illiberal Contracts: some Problems of Contractualism as an Instrument of Behaviour Management by Agencies of Government' (2003) *Cambridge Journal of Economics* 27, pp 465-477, p 466

<sup>34</sup> *Ibid*

<sup>35</sup> Neville Harris and Nick Wikeley, 'Modernisation of Social Security' (1997) *Journal of Social Security Law* 4 (3), pp 93-94

<sup>36</sup> *Ibid*, p 94

<sup>37</sup> Timmins, n. 8 above, p 555; also Stephen Driver and Luke Martell, *New Labour* (Polity Press, 2006) p 94. In simple terms, Labour's social policy plans would not involve any new money (not from higher income tax rates), except for the much talked about 'windfall tax' on the privatized utilities, which would pay for Labour's New Deal welfare to work programme

higher proportion of claimants are enabled to access their due entitlement, and in the course of this process unnecessary costs should be minimised. As will be evidenced below, a clear stumbling block to achieving fast and efficient decision making and indeed adjudication is complexity in the system.<sup>38</sup> Secondly, modernisation can seek to ensure that the rules of entitlement are fairer and aligned more closely with the prevailing social circumstances. Reform of this nature may, for example, consider the root cause of youth unemployment, and could more effectively address the problems of lone parents who want to work.<sup>39</sup> A barrier in this regard was the government's drive to maintain efficiencies and an unwillingness to invest time and money into examining such root causes.

The question that naturally follows is: can it be argued that New Labour evidenced a broad principled approach to reform of the social security system? It arguably homogenised the concept of an 'active' welfare state, which prioritises the value of work to every citizen (including those with disabilities) and to society.<sup>40</sup> Indeed, by 2001, most of those not in work or in full time education were in one of the New Deal programmes, which sought to offer more targeted support to claimants to find employment, introduced time-limits, education and work options, and sanctions for non-compliance.<sup>41</sup> New Labour created a more complex system, predicated by an increased volume of delegated legislation, which was underpinned by the idea that the responsible citizen is required to engage in paid employment. It followed that central government assumed a more prominent role in ensuring operational efficiencies by asserting the primacy of individual obligation<sup>42</sup> Therefore, it is clear

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<sup>38</sup> Gamble and Thomas comment that: 'Increased complexity is one of the most striking characteristics of contemporary governance'. See Andrew Gamble and Robert Thomas, 'The Changing Context of Governance' in Michael Adler (ed), *Administrative Justice in Context* (Hart Publishing, 2010), p 6

<sup>39</sup> Harris and Wikeley, n. 35 above

<sup>40</sup> Alan Deacon, 'Justifying Workfare: the Historical Context of Workfare Debates' in Michael White (ed), *Unemployment and Public Policy in a Changing Labour Market* (PSI, 1994); William Walters, 'The Active Society: New Designs for Social Policy' (1997) *Politics and Policy* 25 (3), pp 221-234; Ruth Lister, 'The Age of Responsibility: Social Policy and Citizenship in the Early 21<sup>st</sup> Century' in Chris Holden, Majella Kilkey and Gaby Ramia (eds), *Social Policy Review* 23 (SPA, 2011); Peter Dwyer, 'Citizenship, Conduct and Conditionality: Sanction and Support in the 21<sup>st</sup>-Century UK Welfare State' in Menno Fenger, John Hudson and Catherine Needham (eds), *Social Policy Review* 28 (SPA, 2016), pp 41-62

<sup>41</sup> Stephen Driver, 'New Labour and Social Policy' in Matt Beech and Simon Lee (eds), *Ten Years of New Labour* (Palgrave Macmillan), p 53

<sup>42</sup> John Flint 'Subversive Subjects and Conditional, Earned and Denied Citizenship' in Marian Barnes and David Prior (eds), *Subversive Citizens: Power, Agency and Resistance in Public Services* (Policy Press, 2009), pp 83-98. Flint highlights a difference between 'conditional' and 'earned' citizenship. Conditional citizenship refers to 'pre-existing being rescinded as a result of inappropriate conduct', p 89

that Labour's 'modernisations' did not embody the preferred form outlined by Harris and Wikelely, but rather they followed a relentless path towards newer forms of social control packaged in the guise of an 'enabling state'.<sup>43</sup>

***New Labour's Modernisation Agenda and the issue of complexity: Balancing 'Rights and Responsibilities'***

It is accepted that the principal source of complexity in the social security system is its design.<sup>44</sup> Its wide-ranging, often inter-related provisions are further complicated via frequently amended rule-based benefits and tax credit schemes, many of which are based around assessment of a diverse range of needs through means-testing (as detailed below in relation to non-contributory JSA).<sup>45</sup> New Labour's introduction of tax credits further added to the complexity mix – for example tax credits may be considered income for the purposes of some income-related benefits, and some aspects of means-tested benefit have been transferred into the tax credits system (i.e. the replacement of child allowances under the income support scheme with child tax credits).<sup>46</sup> As identified by the House of Commons Work and Pensions Committee in its report on Benefits Simplification in 2007 the system's complexity 'reflects, to some degree, the circumstances it is dealing with ... contingencies that can be difficult to identify or classify, such as work status, personal relationships and disability ... changing circumstances'.<sup>47</sup> Labour's relative failure in respect of minimising complexity may be attributed to the social security system's continued propensity to monopolise huge amounts of public expenditure: the significant level of financial commitment makes social security vulnerable to both economic pressures and ideological forces aimed at limiting the role of the state.<sup>48</sup> Therefore, it becomes increasingly questionable whether Harris' and Wikeley's vision for a strong principled approach that can withstand economic priorities is ever achievable.

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<sup>43</sup> Tony Blair, Speech to Labour Party Conference, Blackpool, (October, 2002) < <http://www.labour.org/uk/tbconfspeech/> > (accessed 15 January 2017), and Tony Blair, 'My Vision for Britain' (The Observer, London, November 2002) as cited by Lister, n. 26 above

<sup>44</sup> Neville Harris, 'Complexity in the Law and Administration of Social Security: Is it Really a Problem?' (2015) *Journal of Social Welfare and Family Law* 37 (2), p 210; Harris, n. 19 above, p 60; Paul Spicker, 'Five Types of Complexity' (2005) *Benefits* 5 (6); National Audit Office, Department for Work and Pensions: *Dealing with the Complexity of the Benefits System* (HC 592, HMSO, 2005); National Audit Office, *Means Testing: Report by the Comptroller and Auditor General* (HC1464, HMSO, 2011)

<sup>45</sup> Harris, n. 44 above, p 210, 'Means-testing is used to assess needs and circumstances in a way that enables support to be targeted'

<sup>46</sup> Harris, n. 19 above, p 61

<sup>47</sup> House of Commons Work and Pensions Committee, *Seventh Report Session 2006–07, Benefits Simplification Vol. 1* (HC 463-I, HMSO, 2007)

<sup>48</sup> Harris, n. 19 above, p 9

Meaningful modernisation cannot be achieved by way of an ideological vehicle alone (in Labour's case, the third way). This is particularly true of legislative reform in the realm of social security, due to the nature of this particular body of law. It consists of a complex network of primary and subordinate legislation and case law, which form a huge web that can never be fully dismantled.<sup>49</sup> The relationship between a given social philosophy and the law is examined by Calvert, who explains that in the context that 'the prevailing social philosophy is not necessarily either homogenous or static', and in this regard the law is an inefficient instrument of implementation, as 'the wheels of law grind exceedingly slow' and once a rule is introduced it tends to calcify the social policy it implements, for it does not fall into disuse with the policy which it gives birth, but endures until positively thrust aside.<sup>50</sup> Indeed, as Gamble and Thomas note, because the Conservatives governed for so long (18 years), it provided ample time for cumulative incremental change, so by the time Major departed office, many of the changes were so deeply embedded that it would have been difficult for any successor government to change, even if it wanted to.<sup>51</sup> The Blair government was in a position where it felt compelled to accept some of the neo-liberal reforms introduced by Thatcherism, which had garnered considerable public support, while not turning away from the key tenets of social democracy.

If the post-war Keynesian welfare state goes to the heart of collectivism, then the period since 1979 represents the resurgence of individualism.<sup>52</sup> It follows that where once the state provided the basis on which social relations were formed, by 1997 the market had progressively usurped this role. Labour had to adapt to this political and social situation, and reappraised its traditional understanding of a society based on a hierarchical, bureaucratic state and universal welfare. Richards and Smith argues that whatever the importance of the notion of the third way, it is clear that Labour's readjustment process involved the embrace of a more flexible approach to 'solving

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<sup>49</sup> Nick Wikeley and Anthony Ogus, *The Law of Social Security* (Fifth Edition, Butterworths, 2002)

<sup>50</sup> Harry Calvert, *Social Security Law* (Sweet and Maxwell, 1977), p 2

<sup>51</sup> Gamble and Thomas, n. 38 above, p 11; See also p 13, 'Thatcherite reforms laid the foundation for a British version of the developmental state or competition state, only fully realised under the Blair Government, which achieved economic success to make the British economy the best in the OECD'

<sup>52</sup> David Richards and Martin J. Smith, 'The 'Hybrid State': Labour's Response to the Challenge of Governance' in Steve Ludlam and Martin J. Smith, *Governing as New Labour: Policy and Politics under Blair* (Palgrave Macmillan, 2004), p 110

societal ills', than the traditional left's state-centred, top-down solution.<sup>53</sup> Yet, the key question is whether Labour's approach to welfare reform did demonstrate 'a more flexible approach', or whether similar to its approach to complexity, it administered a piecemeal attempt. Some areas of welfare provision were de-centralised (employment support), while other areas experienced tightening control and increased bureaucracy (welfare administration). In short, it is hard to discern whether Labour had an over-arching approach, or rather whether they simply sought to share the burden of administration.

As referenced above, modernisation cannot be achieved without due attention being given to the incremental construction of the social security system and the underlying policy that dictates its evolution, for example the growing ascendancy of means-testing. Means-tested benefits by their very nature are targeted on those whose individual circumstances entitle them to some degree of provision. While it has been acknowledged that the rules that seek to apply diverse levels of support dependent on categories that are particularly complicated under the UK system, experience worldwide indicates that social assistance schemes are designed to allocate resources to citizens systematically on an individualised basis in accordance with a broad spectrum of need.<sup>54</sup> Therefore, it becomes plausible to assert that meaningful modernisation is impossible without systematic simplification that would strive to dilute rather than eradicate some of the complexity that beguiles the system, and thus alleviate the significant confusion for claimants, advisers, and indeed the judiciary. However, in reality government policy has tended to address the negative aspects of complexity through structural reforms that seek to support the administration of the system, and claimants' active interaction with it, rather than attempting to address the internal complexities within the framework of rules governing entitlement.<sup>55</sup> A weighted preference to the former approach can lead to simplification becoming an instrument which can restrict entitlement, and result in a less generous framework

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<sup>53</sup> Ibid, p 109

<sup>54</sup> Neville Harris, 'Simplification of Social Security: the International Experience (2008) *Journal of Social Security Law* 15 (1), p 14. The means-test/social assistance approach accepts that deprivation of income and other resources constitutes the greatest need on which the social security system should concentrate. It is underpinned by concern that social security expenditure (which involves a large degree of redistribution) should be limited to cases of demonstrated need and the conditions for should be kept within carefully observed limits. See, Andrew Dilnot, John Anderson Kay and Nick Morris, *The Reform of Social Security* (Oxford University Press, 1984), pp. 113-118; Department of Social Security, Green Paper, Reform of Social Security (1985) vol. 1, para. 6.3; Wikeley and Ogus, n. 49 above, p 19

<sup>55</sup> Harris, n. 44 above, p 223

overall. As Harris maintains, there remains a necessity for the prescription of the diverse circumstances and needs to which a welfare system is expected to be responsive, and the level of provision that will attach to them. To that end, it should be recognised that both complexity and simplicity can operate as rationing devices, but can also serve justice demands. The key is achieving a rationalised balance that can target individual needs (complex situations) while ensuring efficient access to entitlement (simplicity). A detrimental situation occurs when simplicity reaches too far, disregarding the complexities of some claimants lives.<sup>56</sup> Increased conditionality and the intensification of behaviourist techniques are arguably examples of pervasive government ideology encroaching upon just entitlement, as will be further discussed below.

Complexity can also occur due to amendments to the legislation governing a particular benefit, which may in turn incur the need for consequential changes to inter-related ('passporting') provisions to another benefit or tax credit. For example, New Labour's introduction of tax credits has been acknowledged as adding complexity to the system due to features such as the substitution of income as tax credits for the purposes of some income-related benefits, and the transfer of some means-tested benefits have been dissolved into the tax credits system (i.e. the replacement of child allowances under the income support scheme with child credits). In addition, there exists a 'jurisdictional division' within the system, as DWP administers most welfare benefits, while HMRC administers tax credits and local authorities have responsibility for the administration of housing benefit. Therefore, a decision of one of the administrative agencies can have implications for another - they may be required to share information and claimants may have to interact with more than one agency in relation to a single claim.<sup>57</sup>

The government acknowledged the importance of developing an accessible system for claimants, as determined by one of its 'principles' in the 1998 Green Paper. It

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<sup>56</sup> Ibid

<sup>57</sup> Harris, n. 19 above, p 60–61. See also, Neville Harris, 'People want a "simpler, less changeable" Tax Credits and Benefits System and Better Trained and more Knowledgeable Staff: JRF research' (2008) *Journal of Social Security Law* 15 (4), pp 120-122, and Dan Finn, Danielle Mason, Nilufer Rahim and Jo Casebourne, *Problems in the Delivery of Benefits, Tax Credits and Employment Services* (JRF, 2008) < <https://www.jrf.org.uk/report/problems-delivery-benefits-tax-credits-and-employment-services> > (accessed 15 January 2017)

aspired to ensure that welfare is 'flexible, efficient and easy for people to use',<sup>58</sup> and a system that has 'clear gateways to benefit'.<sup>59</sup> However, it is apparent that New Labour's modernisation attempts (like previous governments) failed to undertake work on the basic functional architecture of the social security system.<sup>60</sup> The National Audit Office (NAO), which comprehensively examined complexity in the benefit system, commented that 'no government is in the position of being able to start again and design an entirely new system with the intricacies and difficulties removed...the current system is an accumulation of successive government actions'.<sup>61</sup>

The 2005 NAO<sup>62</sup> report coupled with the 2006 report from the PAC<sup>63</sup> signified a turning point for government action. It became increasingly apparent that the growing problem of complexity affected benefit administration well beyond central government. Furthermore, it was reported by the Public Accounts Committee (PAC) that DWP had recorded high levels of error on decisions for particular benefits.<sup>64</sup> The Administrative Justice and Tribunals Council (AJTC) submitted that complex legislation, including the rules of particular benefits coupled with the complicated arrangements for review, revision and reconsideration of decisions has resulted in misunderstanding.<sup>65</sup> Indeed, officials have struggled to get decisions 'right first time',<sup>66</sup> thus contradicting the AJTC's position,<sup>66</sup> that 'right first time' is the right way forward 'morally, logistically and financially'.<sup>67</sup> This AJTC aim seems even more unattainable in the context that administrators often face the prospect of navigating through up to almost 9,000 pages of decision-making guidance spread across at least

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<sup>58</sup> Department of Social Security, *New Ambitions for Our Country: A New Contract for Welfare* (Cm 3805, HMSO, 1998), p 71, as cited by Neville Harris and Nick Wikeley, 'Labour's Decade of Welfare Reform' (2007) *Journal of Social Security Law* 14 (3), p 10

<sup>59</sup> *Ibid*, p 109

<sup>60</sup> *Ibid*

<sup>61</sup> National Audit Office, n. 44 above, para 2.7

<sup>62</sup> National Audit Office, n. 44 above; House of Commons Committee of Public Accounts, *Thirty-sixth Report, Session 2005-06, Tackling the Complexity of the Benefits System* (HC 765, HMSO, 2006)

<sup>63</sup> House of Commons Committee of Public Accounts, n. 63 above

<sup>64</sup> House of Commons Committee of Public Accounts, *Twelfth Report, Session 2003-04, Improving the Quality of Benefit Decisions and Reporting on Performance* (HMSO, 2004), para 4

<sup>65</sup> House of Commons Work and Pensions Committee, 'Decision Making and Appeals in the Benefit System, Memorandum submitted by the Administrative Justice and Tribunals Council' (DM 32, Ev. 147), para 18

<sup>66</sup> Administrative Justice and Tribunals Council, *Securing Fairness and Redress: Administrative Justice at Risk?* (October, 2011), para 37

<sup>67</sup> *Ibid*, para 94



14 separate manuals<sup>68</sup>, undoubtedly delaying the processing of claims.<sup>69</sup> Indeed, the government has acknowledged that the system's complexity 'generates inefficiency'.<sup>70</sup> Furthermore, complexity is regarded as increasing the susceptibility of the system to fraud: opportunistic rule-breaking can thrive in complex systems'.<sup>71</sup> The Public Accounts Committee concluded decisively that the complexity of the benefits system must be reduced if there is to be sustained progress in reducing fraud. They argued that 'reducing complexity would help in restricting fraudsters to exploit the confusion faced by many claimants about their obligations and entitlement, and also in reducing the propensity for errors by departmental staff in paying benefits'.<sup>72</sup>

It was recognised by the government that complexity presented a sizeable barrier to unemployed claimants properly understanding their obligations to seek work.<sup>73</sup> The NAO found that the ingrained complexity of benefit rules and the claims process has caused considerable uncertainty and confusion among the public.<sup>74</sup> Harris emphasises the importance of scrutinising complexity through a 'non-governmental lens' not just because of its general social impact but also because perceptions of individual complexity are subjective and can vary according to a claimant's background and perspective.<sup>75</sup> The implications of complexity for benefit claimants are viewed differently according to divergent priorities. Advocates who strongly identify with Marshall's emphasis on the right to welfare, see complexity as a significant impediment to eligible individuals who have cause to engage with the benefits system, causing a direct impingement upon social participation – a key element of citizenship<sup>76</sup> – whereas those, such as Tony Blair, who characterised worklessness as a detachment from full citizenship<sup>77</sup> are more likely to see complexity as an impediment to economic prosperity. The latter position is implicitly linked to Giddens' 'new style' social democracy, with its overt emphasis on equality

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<sup>68</sup> David Martin, *Benefit Simplification: How and Why it Must be Done* (Centre for Policy Studies, 2009), p 5

<sup>69</sup> Harris, n. 19 above, p 16

<sup>70</sup> Department for Work and Pensions, *Universal Credit: Welfare that Works* (Cm 7957, HMSO, 2010), Ch. 1, para 20

<sup>71</sup> HM Government, *Tackling Fraud and Error in Government: A Report of the Fraud, Error and Debt Taskforce* (Cabinet Office, 2012), p 36

<sup>72</sup> House of Commons Committee of Public Accounts, *Tackling Benefit Fraud 2002-03* (HC 488, HMSO, 2003), p. 4.

<sup>73</sup> Department for Work and Pensions, *A New Deal for Welfare* (HMSO, 2006), p 92

<sup>74</sup> National Audit Office, n. 44 above, p 5

<sup>75</sup> Harris, n. 19 above, p 16

<sup>76</sup> *Ibid*

<sup>77</sup> Tony Blair, Speech at the Aylesbury Estate, Southwark, June 2 1997

of opportunity, rather than a commitment to 'egalitarianism of outcome'.<sup>78</sup> In effect, Giddens tempered the new right's focus on individualism by complementing it with a 'communitarian counterweight'<sup>79</sup> which takes the form that there should be no rights without responsibilities. This principle is linked to Giddens' argument that 'with expanding individualism should come an increase in individual obligations'.<sup>80</sup> Mullender interprets this to mean that those rights that make it possible for a person to give expression to his or her individual identity should be exercised in ways that are sensitive to the interests of others.<sup>81</sup> A commitment to the classical social democratic principle that the equal worth of all persons should be recognised remains identifiable in the third way doctrine.<sup>82</sup> Nonetheless its presence is adapted to recognise cognizance of current political realities, which offers some rationale to Giddens', and indeed to Blair and Brown's promotion of equality of opportunity rather than equality of outcome, and also speaks to New Labour's increasingly residual approach to welfare, particularly in the latter years of its administration.<sup>83</sup>

Lister asserts that New Labour's shift towards social inclusion was characterised by the redistribution of opportunities through education and other forms of investment in human capital. New Labour believed that such investment had the capacity to achieve greater *future* prosperity over the traditional form of redistribution through the tax-benefit system, which is designed to achieve greater *current* equality of income. This futurist orientation stands at the heart of the 'social investment state'<sup>84</sup> and indeed at the centre of the de-commodified state. Notably, Powell asserts that New Labour's 'diverse but inclusive society'<sup>85</sup> is egalitarian enough to be socially inclusive and therefore does not demonstrate a radical break from the Marshallian view of social citizenship which focuses on status rather than outcome, and on horizontal rather than vertical equality.<sup>86</sup> Indeed, readiness for work has always been a central tenet in Marshall's interpretation of social citizenship. The radical shift has

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<sup>78</sup> Anthony Giddens, *The Third Way and its Critics* (Polity Press, 2000), p 53 and p 88

<sup>79</sup> Richard Mullender, 'Theorizing the Third Way: Qualified Consequentialism, the Proportionality Principle, and the New Democracy' (2000) *Journal of Law and Society* 27 (4), p 497

<sup>80</sup> Giddens, n. 3 above, p 65

<sup>81</sup> Mullender, n. 79 above, p 497

<sup>82</sup> Giddens, n. 3 above, p 69; See also Tony Blair, *The Third Way: New Politics for the New Century* (Fabian Society, 1998), p 3

<sup>83</sup> Blair, n. 82 above, p 26

<sup>84</sup> Ruth Lister, n. 14 above, p 126

<sup>85</sup> Blair, n. 82 above

<sup>86</sup> Martin Powell, 'The Hidden History of Social Citizenship' (2002) *Citizenship Studies*, p 6; See also Ruth Levitas, *The Inclusive Society?* (Macmillan, 1998), pp 63-67

occurred in the polity's emphasis on the level of obligation that the individual must meet in order to secure entitlement to welfare, where the pre-1979 system placed more onus on the provision of rights.

New Labour's conflation of complexity in the social security system with a denial of equality of opportunity is quite explicitly demonstrated in its (2006) Green Paper, 'A New Deal for Welfare: Empowering People to Work':

'The present benefits system for people of working age is too complex. The many rules make sense in isolation but together they make for a confusing and incoherent picture. This complexity makes it hard for benefit claimants to understand their rights and responsibilities, and hard for staff and advisers for staff to help people get their correct entitlements'.

New Labour's first stated concern in the Green Paper refers to the complexity of the benefits system acting as a barrier to claimants obtaining employment – which effectively counteracts the third way philosophy of advocating a framework which ensures individuals are enabled to access opportunities to flourish. The multiplicity of benefit rates, entitlement rules, application processes and interactions with the wage system may contribute to a claimant's uncertainty of benefit eligibility if the employment is short lived, and may improve the likelihood of a claimant remaining in the system for a protracted period, for example to receive a higher long term rate.<sup>87</sup> Linked to this, has been a general failure of claimants to meet their obligation to report relevant changes in personal circumstances<sup>88</sup>, which often result in overpayments, which are recoverable,<sup>89</sup> as well as underpayments – both administrative oversights can lead to greater hardship for claimants.<sup>90</sup> It's interesting to note that until recently, the Government admitted that the DWP instituted a target

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<sup>87</sup>Department for Work and Pensions, *A New Deal for Welfare: Empowering People to Work* Cm 6730 (HMSO, 2006)

<sup>88</sup> Michelle Boath and Helen Wilkinson, *Achieving Good Reporting of Changes in Circumstances*, DWP Research Report No. 457 (Corporate Document Services, 2007), p 10; See also, Geoff Fimister, John Harvey, William Lovell, David Sands, Ryszard Zaluski-Zaluczkowski and Figen Deviren, *Reporting Changes in Circumstances: Factors Affecting the Behaviours of Benefit Claimants*, DWP Research Report No. 544 (HMSO, 2009), p 3, p 12 and p 13. It was found in the 2009 report that the reporting/non-reporting of changes of circumstance is a major concern for benefit administrators amongst local authorities and was estimated to be responsible for between 30 and 90 percent of workload.

<sup>89</sup> Harris, n. 19 above, p 16

<sup>90</sup> Fimister, Harvey, Lovell, Sands, Zaluski-Zaluczkowski and Deviren, n. 87 above, p 14. Age Concern Yorkshire town said that they came across many more underpayments and the Yorkshire Town advice agencies said that underpayments often came to light at the '11<sup>th</sup> hour', during repossession or eviction proceedings

for reducing benefit overpayment, but not for reducing underpayments thus further indicating the government's overall determination to reduce costs.<sup>91</sup>

New Labour's main policy response to complexity was to establish the Benefit Simplification Unit (BSU) in 2005, which undertook to publish annual 'simplification plans'.<sup>92</sup> It also committed to publishing an intra-departmental simplification practice guide in 2006, which detailed a format for proposals, which made it a requirement to provide a rationale for change which would result in increased complexity. Changes also had to be explained when put before the SSAC.<sup>93</sup> Notably, this process was developed in an attempt to avoid further complexity, rather than initiating a meaningful attempt to reform current labyrinth provision.<sup>94</sup> Its main enforcement mechanism was to require any policy submissions that sought to effect change, be referred to the BSU before being put to Minister.<sup>95</sup> The BSU, and its work on the practice guide was lauded by government as having 'made a real difference' as simplification 'was now receiving greater prominence in DWP policy and delivery decisions than ever before'.<sup>96</sup> In 2007 a revised version of the practice guide extended the requirement for the provision of explanation required from those proposing changes. For example, detail would have to be given as to why a less complex alternative was not elected. If the BSU disagreed with a proposed change, it would respond with simpler options, and the proposer would subsequently be required to justify why the BSU's alternative was not progressed.<sup>97</sup> In the context of Labour's previous inaction on the issue of benefit simplification, the BSU's activity suggests that the administration was committed to ensuring the delivery of widespread simplification. Nonetheless, as Harris points out, the House of Commons Work and

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<sup>91</sup> See also, House of Commons Work and Pensions Committee, Benefit Delivery: Government Response on the Committee's Fourth Report of Session 2015-16 (Third Special Report of Session 2016-17) (House of Commons, July 2016), p 4. Underpayments totalled £1.5 billion, or 0.9% of benefit expenditure, in 2014-15. It was subsequently confirmed by the DWP Permanent Secretary Robert Deveruex that DWP would introduce a target for underpayments to less than 0.5% by the end of parliament. See, Commons Select Committee, 'Benefit underpayments target welcomed by Committee' (Parliament UK, 5 August 2016) < <http://www.parliament.uk/business/committees/committees-a-z/commons-select/work-and-pensions-committee/news-parliament-2015/benefit-underpayments-letter-16-17/> > (accessed 21 January 2017)

<sup>92</sup> It was a small unit, in 2007 it had four full time staff with contributions from two civil servants. House of Commons Work and Pensions Committee, n.47 above, para 63

<sup>93</sup> Department for Work and Pensions, Benefit Simplification Unit, *Simplification Guide to Best Practice* (DWP, 2006)

<sup>94</sup> Harris, n. 19 above, p 18

<sup>95</sup> Benefit Simplification Unit, n. 92 above, p 11

<sup>96</sup> Benefit Simplification Unit, *Simplification Guide to Best Practice* (Revised) (DWP, 2007), p 2 (Foreword)

<sup>97</sup> Ibid

Pensions Committee remained unconvinced, despite the commissioning of 'customer-focused' proposals for simplification reforms.<sup>98</sup> It noted in its 2007 report, 'Benefit Simplification', that there was 'a lack of vision and drive within DWP and across Government to simplify the benefit system', and while it was acknowledged that the BSU was trying to halt the introduction of further complexity that 'this was a very long way from having a plan to systematically introduce simplification'.<sup>99</sup> The Government rejected the Committee's position, claiming that simplification was playing a 'crucial role' in its 'ambitious programme of welfare reform'.<sup>100</sup> Furthermore, it insisted that DWP was 'devoting more resource and attention to this issue than for many years', but ultimately, it was unable to rebut the conclusion that it had failed to develop a coherent simplification strategy.<sup>101</sup> The same report also highlighted the possibility of the introduction of 'working age benefits' or a 'single working age benefit'.<sup>102</sup> Ultimately, New Labour didn't take the 'radical' route towards a single working age benefit, however there was a definite move, and a clear commitment by government towards rationalising working age benefits, the impetus for which significantly derived from the Freud Report<sup>103</sup> – for example, through the introduction of ESA which was actually considered to have increased complexity.<sup>104</sup>

It has also been agreed that the design of respective welfare benefits contribute to the system's overall complexity. A look at the process for claiming JSA provides an effective example of the underlying cause of such a complex design, which in many ways reflects the government's attempts at responding to competing social and political aims. The end result is often a culmination of misunderstanding for both the

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<sup>98</sup> Sue Royston, *Benefits Simplification and the Customer* (DWP/BSU, 2007)

<sup>99</sup> Work and Pensions Committee, *Benefits Simplification* (2006-07, HC 461-I)

<sup>100</sup> Work and Pensions Committee, *Benefits Simplification: Governments Response to the Committee's Seventh Report of Session 2006-07* (HC 1054, 2007), para 7

<sup>101</sup> Harris, n. 19 above, p 19

<sup>102</sup> Work and Pensions Committee, n. 99 above, p 17; See also, Neville Harris, 'Government's Response to Select Committee Report on Benefits Simplification' (2008) *Journal of Social Security Law* 15 (1), p 8-9; Roy Sainsbury and Kate Stanley delivered a notable proposal for a single working-age benefit in place of out-of-work benefits, including incapacity benefits, which was driven significantly by the need for simplification. See, Roy Sainsbury and Kate Stanley, 'One for All: Active Welfare State and the Single Working Age Benefit' (Institute for Public Policy Research, 2007)

<sup>103</sup> David Freud, *Reducing Dependency Increasing Opportunity: Options for the Future of Welfare to Work* (Corporate Document Services, 2007), p 100-105. Freud identified three possible models for working age benefits: separate benefits with a common rate; one benefit with a single rate; and one benefit with short-term and long-term rates

<sup>104</sup> See, Jonathan Shaw (Labour, Chatham and Aylesford), HC Deb, 2 March 2010, Vol. 506, col 1026W; See also Department for Work and Pensions, *Departmental Report 2009* (Cm 7594, HMSO, 2009), para 25, as cited in Harris, n. 19 above, p 20

provider and the receiver.<sup>105</sup> A newly unemployed person is still likely to seek contribution-based JSA (pending the full roll-out of Universal Credit (UC)), which was introduced by John Major's government in 1996. Entitlement to this benefit (and indeed to ESA) is based on conditions related to the payment of national insurance contributions. The system will seek to identify whether those conditions have been met, which is in itself a complex process, as contribution records span a number of years.<sup>106</sup> Consideration must also be given to contributions made by the claimant's spouse, which adds further complexity to the process.<sup>107</sup> If it is found that the individual does not have the required contribution record, or indeed if their contributory entitlement period of six months has expired, the claimant will be required to claim means-tested benefit, in this case income-based JSA. The provision of this benefit is based on the individual's needs, and will take into account a broad spectrum of issues related to the claimant's family status, health, their reliability as a tenant, the extent of any other sources of income, such as savings, capital etc. Harris maintains that the design of means-tested provision presents policy makers with challenging trade-offs.<sup>108</sup> For example, they may be required to decide between tighter targeting of benefits (which can be related to greater complexity) and other impacts such as take-up levels, administrative costs and incentives to work.<sup>109</sup> The SSAC has commented that the continuing complexity of the legislation in this field reflects, 'the underlying complexity of the policies it expresses'.<sup>110</sup> A broad policy aim that New Labour appeared to pursue is the provision of support only to those who

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<sup>105</sup> See Spicker, n. 44 above

<sup>106</sup> Only class 1 contributions will allow for entitlement to contribution based JSA. Contributions can be credited in a number of circumstances, for example during periods of entitlement to JSA, or to ESA. The contribution conditions are based on an 'earnings factor', which is the total amount of earnings below a prescribed upper limit on which class 1 contributions have been paid. To claim Contributory based JSA, the claimant must have 1) paid during at least one of the two preceding two tax years, contributions on earnings equal to 26 times the prescribed 'Lower Earnings Limit' (LEL) for the year in question, which means that a total of 26 weeks paid work must have occurred during one of those two tax years; and 2) have been credited with contributions which together produce an earnings factor which represents at least 50 times the LEL in each of the preceding two tax years before the current benefit year. The benefit years generally begins the first Sunday in January for the next 52 weeks; while the tax year runs from 6 April until the next 5 April. See the *Jobseekers Act 1995*, s. 2; *The Jobseekers Allowance Regulations 1996* (SI 1996/207) (JSA Regulations 1996) reg. 45A, or *Jobseeker's Allowance Regulations 2013* (SI 2013/378) reg. 34; and the Social Security (Contributions Conditions for Jobseekers Allowance and Employment Support Allowance) Regulations 2010 (SI 2010/2446) (as amended). As cited by Harris, n. 19 above, p 38

<sup>107</sup> National Audit Office, n. 44 above, para 2.10

<sup>108</sup> Harris, n. 19 above

<sup>109</sup> National Audit Office, *Means Testing Report by the Comptroller and Auditor General* (2010-12), (HC 1464, HMSO, 2011), p 24

<sup>110</sup> Social Security Advisory Committee, *Twentieth Report: 2007* (Corporate Document Services, 2007) para 1.19

have become unemployed involuntarily and to exert pressure on claimants to seek and secure paid work. In this context, the increased focus on conditional entitlements may be construed as less politically contentious than re-drawing the eligibility criteria to remove certain categories of claimants. Of course failure to comply with the conditions can lead to a fixed-period sanction, involving loss of benefit for four weeks or longer.<sup>111</sup> CPAG argue that the sanctioning regime itself is responsible for 'a great deal of complexity in the system' and provides an additional source of misunderstanding for claimants.<sup>112</sup>

The above examination of New Labour's approach to complexity indicates that policy has a tendency to focus on addressing complexity where it interferes with a claimant's active engagement with the labour market. The government's regulatory intervention in this regard is to ensure the unemployed can fulfil their responsibility to work, thus fulfilling the obligations of modern citizenship. The pattern of increasing complexity in the social security system can be associated with the increasing pervasiveness in regulation in all modern economies.<sup>113</sup> As determined by Black; 'regulation is the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour-modification'.<sup>114</sup> As Prosser argues, this definition underpins the 'plurality of different regulatory objectives', which go beyond the commonly-cited market-failure rationale for regulation.<sup>115</sup> It is arguable that Black's definition emphasises the increasing propensity for government to dictate acceptable citizen behaviour and its subsequent power to develop rules and regulation to help ensure compliance. There is less emphasis on ensuring that the development of rules of entitlement are aligned with prevailing social circumstances and will permit fair and expedient entitlement – which resolutely undermines Harris and Wikeley's vision of meaningful modernisation. New Labour's failure to adopt a

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<sup>111</sup> *Jobseeker's Act 1995*, ss 19A and 19B (inserted by the Welfare Reform Act 2012, s 46 (1)) and either (i) the JSA Regulations 1996, regs 69A, 69B and 70 as inserted or substituted by the Jobseeker's Allowance (Sanctions) (Amendment) Regulations 2012 (SI 2012/2568) or (ii) the JSA Regulations 2013, part 3

<sup>112</sup> Child Poverty Action Group, 'No One Written Off: Response to the July 2008 Green Paper' (CPAG, 2008), p 29

<sup>113</sup> Tony Prosser, 'Regulation and Social Solidarity' (2006) *Journal of Law and Society* 33 (3), pp 364-387

<sup>114</sup> Julia Black, *Critical Reflections on Regulation*, CARR Discussion Papers, DP 4, Centre for Analysis of Risk and Regulation (LSE, 2002)

<sup>115</sup> See, Tony Prosser, n. 112 above, p 370; also Anthony Ogus, *Regulation: Legal Form and Economic Theory* (Clarendon Press, 1994)

whole system approach has contributed to growing confusion and caution for decision makers, claimants, and, as will be examined below, the judiciary who are more likely to struggle to determine legal accountability.

***The legal response to Complexity and Administering Justice***

Harris maintains that the nature of rules governing entitlement and administration, embodies the kind of distinctions that are required to target support (via means testing). The nature of the rule making process makes the overall scale of delegated legislative activity in this field probably unequalled in any other field of governance.<sup>116</sup> The power the government has to bring such volumes of legal changes into effect, has long prompted concern. As pointed out by Sainsbury, issues of social security in recent years, such as how much of the country's resources should be devoted to the system's administration, and who should monitor the standards on decision making and how appeals should be handled have all become political questions.<sup>117</sup> It follows that there will inevitably exist tensions in a mass scheme, where a balance must be struck between individualised justice and maintaining operating costs within acceptable limits.<sup>118</sup> The implication of this trade-off is the preclusion of discussion about the problems and shortcomings of decision making which undoubtedly leads to the prioritisation of administrative efficiency, over individualised justice.<sup>119</sup> Laurie maintains the former succeeds in achieving primacy through the use of 'bright line' rules; which are rules that have been formulated with ease of administration in mind.<sup>120</sup>

The axis where the bright line exists, between the interest of the state and those of the individual where resource allocation is at issue, is commonly viewed as an area where judges are reluctant to intervene, on the basis that it is for parliament to decide how public funds should be distributed.<sup>121</sup> As Kavanagh maintains: 'Judges are neither well placed nor qualified to have an overview of an area of law that may require radical policy change ... they are ill-equipped to make decisions of general

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<sup>116</sup> Harris, n. 19 above, p 9

<sup>117</sup> Roy Sainsbury, 'Social Security Decision Making and Appeals' in Harris, n. 30 above, p 229-230

<sup>118</sup> See generally Emma Laurie, 'Judicial Responses to Bright Line Rules in Social Security: In Search of Principle' (2009) *Modern Law Review* 72 (3), pp. 384-411, and Jerry L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (Yale University Press, 1983)

<sup>119</sup> Sainsbury, n. 116 above, p 230

<sup>120</sup> Laurie, n. 117 above, p 384

<sup>121</sup> See, for example, *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595; [2002] QB 48 at [69] (Lord Woolf CJ)



policy that may require the reconciliation and balancing of a broad range of conflicting interests and viewpoints.<sup>122</sup> While this may be true, the judiciary has acknowledged the importance of an effective social security system. As Baroness Hale has stated:

'benefits are there to guard against the eventualities which make it difficult for people to be self-sufficient...it is in our interest that the system be well designed and well administered so that everyone receives what they are properly entitled to, neither more nor less'.<sup>123</sup>

Again, a salient sticking point here is inherent complexity. Maurice Kay LJ summed up the dynamics effectively when he commented:

'In the field of social security, primary and secondary legislation are notoriously labyrinth. Sometimes the substantive entitlement to a statutory benefit is clothed in complexity and can only be determined after an interpretive journey that few are equipped to travel'.<sup>124</sup>

A possible implication is that the judiciary's role in carrying out an external check on the government in regards to the making of social security law has become much more onerous in recent years.

Complexity is not an issue limited to the rules governing substantive entitlement to benefit, it persistently seeps into the procedures and structures involved in the administration and adjudication of claims.<sup>125</sup> Indeed, it has been argued that the

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<sup>122</sup> Aileen Kavanagh, 'The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998' (2004) *Oxford Journal of Legal Studies* 24, p 259; See, for example, *Stewart v Secretary of State for Social Security* [2011] EWCA Civ 907, in which the Court of Appeal concluded that it did not wish to 'expose the court to the charge that it is trespassing in territory in an area of social policy that is properly the preserve of the legislature' (Sir Henry Brooke giving only the substantive judgement, at para 35). Also, *Stec v United Kingdom* (Application Nos 65731/01 and 65900/01) para 52: 'A wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy...Because of their direct knowledge of their society and its needs, the authorities are better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is manifestly without reasonable foundation'. In *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63 [54] and [56], Lord Neuberger maintained that social policy was 'an area where a wide measure of appreciation is accorded...to the state' by the Strasbourg court and that a court should be very slow to substitute its view for that of the executive'

<sup>123</sup> *Hinchy v Secretary of State for Work and Pensions* [2005] UKHL 16, para 48

<sup>124</sup> *Secretary of State for Work and Pensions v Morina and Anr* [2007] EWCA Civ 749 [1]

<sup>125</sup> *Harris*, n. 44 above, p 223

salience of 'bureaucratic rationality' in a social security system increasingly based on bright-line rules has effectively reduced the scope for the delivery of fairness, and 'moral judgement' the primary aim of which is to provide a full and equal opportunity to obtain one's entitlements'.<sup>126</sup> The arguments typically made in support of bright-line rules are that their ease of application leads to consistent decision making and the minimisation of operating costs, allowing scarce public resources to be used on substantive benefits rather than on administration – such stability is increasingly appealing in the midst of a complex system.<sup>127</sup> Furthermore, it also appeals to the judiciary's traditionally timorous relationship with parliamentary law makers.

The character of bright-line rules reinforces the post-war prominence of Jerry Mashaw's bureaucratic rationality model of administrative justice<sup>128</sup>, which arguably functions in the spirit of Offe's theory of administrative re-commodification, in that it commands accuracy and efficiency, policy implementation, a hierarchical approach and information processing.<sup>129</sup> Indeed it follows that Mashaw's model sits quite comfortably with New Public Management (NPM) techniques which prioritise values of economy, efficiency and effectiveness.<sup>130</sup> That said, Harris identifies a recent and partial shift towards Mawshaw's model of professional judgement – a process underscored by the authorising value of 'service'.<sup>131</sup> Two areas in particular have been associated with the shift. The health assessment for incapacity benefits and the enforcement of 'activation' conditions.<sup>132</sup> Adler further progresses the debate, as he maintains that the bureaucratic and professional (and indeed moral or as Adler terms 'legal') models have in recent years been challenged by a managerialist model, which

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<sup>126</sup> Jerry L. Mawshaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (Yale University Press, 1983). Mawshaw identifies three systems of administrative justice in his pioneering investigation into the American Disability Insurance Scheme: 'Bureaucratic rationality', 'professional judgement' and 'moral judgement'. Mashaw's other model of administrative justice is the 'moral judgement model'. This model's primary goal is conflict resolution, and rests on the value of fairness. This model is associated with courts and tribunals as neutral decision makers. See also Trevor Buck, David Bonner and Roy Sainsbury, *Making Social Security Law: The Role and Work of the Social Security and Child Support Commissioner* (Ashgate, 2005), p 220

<sup>127</sup> Laurie, n. 117 above, p 387

<sup>128</sup> Jerry L. Mawshaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (Yale University Press, 1983). See also, Emma Laurie, 'Judicial Responses to Bright Line Rules in Social Security: In Search of Principle' (2009) *Modern Law Review* (72, 3) p. 387. See also, Michael Adler, 'A Socio-Legal Approach to Administrative Justice' (2003) *Law and Policy* 25 (4), pp 323-352. Adler claims that 'administrative justice' refers to the principles that can be used to evaluate the justice inherent in administrative decision making'

<sup>129</sup> Mawshaw, n. 125 above, p 31

<sup>130</sup> Carol Harlow and Richard Rawlings, *Law and Administration* (Second Edition, Butterworths, 1997), p 131

<sup>131</sup> Harris, n. 19 above, p 79; See, Jerry L. Mawshaw, n. 125 above

<sup>132</sup> Harris, n. 19 above, p 79

is more intimately associated with the rise of NPM.<sup>133</sup> Adler's proposition sits neatly with the argument that NPM has 'spread its tentacles into every part of the public sector', leading to the operation of a more intrusive and interventionist state in many spheres, including social security where the prevalence of NPM has led to struggles for power and control.<sup>134</sup> In this context, it has been argued that the judiciary have somewhat paradoxically presented a general deference, even in cases in which the rules establish 'broad brush distinctions', which can give rise to unfairness.<sup>135</sup> However, there is also evidence that complexity can push judicial decision making in a different direction as judges seek creative solutions to cases that are inherently difficult to solve correctly.<sup>136</sup> At the beginning of New Labour's tenure, Harlow and Rawling's identified a measure of increased judicial activism, and a greater flexibility of response.<sup>137</sup> However, as Adler concludes, such developments still leave swathes of administrative decisions unprotected by courts.<sup>138</sup>

It is worth mentioning at this point, the New Labour Executive's at times fractious relationship with the judiciary. This is relatively unsurprising when one considers the significant structural changes that occurred during its mandate, namely the introduction of the Constitutional Reform Act (CRA) and the legal implications attached to the Human Rights Act (HRA).<sup>139</sup> The Lord Chief Justice at the time was recorded as announcing that 'we, as judges are now patently freestanding. The division in our powers is quite clear'.<sup>140</sup> This position brought with it some inevitable tensions which Lord Mackay maintained were acceptable and indeed 'healthy' in view of the judiciary being called to adjudicate under the judicial review procedure.<sup>141</sup>

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<sup>133</sup> See Adler, n. 127 above, p 334. Adler develops Jerry L. Mashaw's system, through the identification of managerial, consumerist and market models of administrative justice, which he argues when combined together provide a good account of NPM. Adler adds the proviso that they 'need not be combined in this way, and each of the models is sometimes encountered on its own and not in combination with the others'

<sup>134</sup> Gamble and Thomas, n. 38 above, p 13; and also Adler, n. 127 above, p 334

<sup>135</sup> Harris, n. 19 above, p 80

<sup>136</sup> *Ibid*, p 81. An example is *Moyna v Social Security Commissioner* [2003] UKHL 44; [2003] 1 WLR 1929

<sup>137</sup> Harlow and Rawlings, n. 129 above, p 516

<sup>138</sup> Adler, n. 127 above, p 326

<sup>139</sup> Lord Mackay of Clashfern (Q. 165) in House of Lords, Select Committee on the Constitution, 6<sup>th</sup> Report of the Session 2006-07: Relations between the Executive, the Judiciary and Parliament (HL 151, HMSO, 2007)

<sup>140</sup> The Lord Philips of Worth Matravers, Appendix 8 (Q. 3) in House of Lords, Select Committee on the Constitution, 6<sup>th</sup> Report of the Session 2006-07: Relations between the Executive, the Judiciary and Parliament, (HL 151, HMSO, 2007)

<sup>141</sup> Lord Mackay of Clashfern (Q. 165) in House of Lords, Select Committee on the Constitution, 6<sup>th</sup> Report of the Session 2006-07: Relations between the executive, the judiciary and Parliament, HL 151 (HMSO, 2007).

Larkin found that some judges are more amenable to protecting welfare benefits through the medium of the HRA than others.<sup>142</sup> Indeed, one leading judge, Lord Sumption outlined the perils of finding declarations of incompatibility on matters of socio-economic policy. In his view (and seemingly the view of much of the judiciary), such issues belong with the purview of the elected legislature<sup>143</sup> which supports Baldwin, Wikeley and Young's general assertion that since the British Constitution remains unwritten, the courts remain wedded to the doctrine of the supremacy of Parliament, and thus 'the rule of law offers only an uncertain and contingent protection for the substantive and procedural rights of claimants'.<sup>144</sup> The end result is that welfare claimants arguably remain more vulnerable to the harsher implications of government ideology. Critics of the constitutional reform programme assert that the British government ultimately remains highly centralised due to the remaining customs of the dominant executive.<sup>145</sup>

Unemployment benefit's design has been incrementally altered in the last twenty years to ensure support only to those claimants who can provide evidence that they are doing everything possible to limit their welfare dependency. This in turn aids the state in making savings on welfare. At the same time, it is imperative that when determining individual entitlement, the relevant issues are assessed in a consistent way, since the system also aims to provide distributive justice between people in like circumstances.<sup>146</sup> This is where the function of bureaucratic and legal frameworks, as discussed above, become particularly important, as collectively they must ensure that decisions can be justified as being consistent and not arbitrary, while ensuring that individual circumstances are properly responded to.<sup>147</sup> It appears that an aggravating factor for the efficient administration of the social security system in this regard occurred in the context of the developing prominence of NPM techniques and their interaction with an administrative system that has had a long-rooted hierarchical function. Newman asserts an 'unstable settlement' developed between bureau

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<sup>142</sup> See, Philip M. Larkin, 'Delineating the Gulf between Human Rights Jurisprudence and Legislative Austerity: the Judicial Entrenchment of "Less-Eligibility"' (2016) *Journal of Social Security Law* 23 (1), pp 42-63, p 43

<sup>143</sup> Lord Sumption, *The Limits of Law* (20 November 2013), the 27th Sultan Azlan Shah Lecture, as cited in Larkin, n. 141 above, p 43

<sup>144</sup> John Baldwin, Nicholas Wikeley and Richard Young, *Judging Social Security: The Adjudication of Claims for Benefit in Britain* (Clarendon Press, 1992), p 21

<sup>145</sup> Gamble and Thomas, n. 38 above, p 13

<sup>146</sup> Harris, n. 19 above, p 41

<sup>147</sup> See Christopher J. Jewell, 'Assessing Need in the United States, Germany, and Sweden: The Organization of Welfare Casework and the Potential for Responsiveness in the 'Three Worlds'' (2007) *Law and Policy* 29 (3), p 380-381

professional power and new managerialism.<sup>148</sup> Indeed, as reflected in the delivery of JSA, there appears to be a significant and ongoing 'negotiation process' between the bureaucratic and consumerist models of accountability, between political centralisation and managerial devolution.

### **Conclusion**

New Labour's social security reforms are characterised by the structural and cultural shifts that they undertook to implement in the provision of welfare. The initiatives that they pursued were founded on an accelerated emphasis on reciprocity in the form of a 'new social contract' between the citizen and the state.<sup>149</sup> Giddens and Diamond articulated the new contractual terms under the banner of 'New Egalitarianism' which

'...ties rights to corresponding responsibilities. The new egalitarianism thus introduces elements of conditionality into the means-tested welfare system. Benefits depend not only on a person's needs but also on his or her behaviour'.<sup>150</sup>

As Vike asserts, Giddens and Diamond (and New Labour) view 'unconditionalised claims' as an element of 'welfare' that compromises the morale of marginalised populations. It is therefore assumed that people seeking social security require government institutions (political elites) to dictate conditions to ensure that they recognise their responsibilities as citizens.<sup>151</sup> In the crudest sense, this ideology asserts that, as a condition of eligibility, the state may legitimately enforce the citizen's responsibilities – in the case of an unemployed claimant, this will involve the responsibility to work or at least to engage in active job search activities and training. Far from instituting greater simplicity into an increasingly complex system, New Labour added to the labyrinth by introducing new and distinct procedures, for example the Tax Credits system. In addition, it was often the case that existing rules and regulations were amended by way of Statutory Instrument as part of the government's objective of tightening eligibility criteria to ensure that only those who were most in need could access provision, as will be analysed in detail in the following chapters. The government's subsequent response to the increased complexity that it created was to respond to only the most negative aspects through structural reforms

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<sup>148</sup> Newman, n. 7 above, p 31

<sup>149</sup> Anthony Giddens and Patrick Diamond, *The New Egalitarianism* (Polity Press, 2005)

<sup>150</sup> *Ibid*, p 107

<sup>151</sup> Halvard Vike, *Politics and Bureaucracy in the Norwegian Welfare State: An Anthropological Approach* (Palgrave Macmillan, 2018), p 77

that sought to support the administration of the system, and claimants' active interaction with it, rather than attempting to address the internal complexities within the framework of growing entitlement. This approach speaks to the government's failure to direct its 'modernisation agenda' towards the aim of creating a more efficient, fair and accurate system, and rather underscores the government's reliance of the political philosophy of the third way's responsabilisation message in designing its reform programme. This ultimately resulted in a missed opportunity to instil a 'broad principled approach' that claimants, politicians, administrators and the judiciary could more easily comprehend and support. The judiciary descended further into the black hole of social security regulations which, for the most part, led to adjudication based on bright-line rules, which have been identified as reducing the scope for fairness and moral judgement. Ultimately, the courts remain wedded to the doctrine of the supremacy of Parliament, and thus the rule of law offers only an uncertain and contingent protection for the substantive and procedural rights of claimants.

Overall, the development of social security policy under New Labour was informed by notions of citizenship that had seeded themselves throughout the previous Conservative administrations, which took a view of the citizen as, at worst, a market-based commodity and, at best, a would-be-worker whose obligations precede his or her social citizenship rights. The 'sticks' and 'carrots' of social citizenship became synonymous with mandatory labour market participation, and the assertion of state authority, weighing the obligations of citizenship more heavily than the rights. This increasing emphasis on individual responsibility, manifested through complex legislation, had the effect of increasing the state's responsibility to ensure the individual was compliant, generating further insecurity for social security claimants. Social security policy driven by the ideology of the 'third way' embedded the pattern of escalating individual citizen-claimant responsibilities, and obscured the focus on citizens' rights to social security. Chapter 6, 7 and 8 explore/s the key legislation that gave life to this pattern and that further embeds the trajectory of social citizenship for the unemployed where the higher degree of regulating citizens' obligations became the route by which access to citizens' rights might be granted



## Chapter 6: The New Deal and the Welfare Reform and Pensions Act 1999

### *Introduction*

When Jobseekers Allowance was introduced the Conservative government asserted that: ‘those who can play an active role in the labour market should receive support when they are genuinely unable to find a job, but not when they have no intention of looking for one.’<sup>1</sup> In a similar vein, one of New Labour’s key principles in relation to the unemployed was that the ‘the new welfare state should help and encourage people of working age to work where they are capable of doing so’<sup>2</sup> a sentiment which was crudely condensed into the motto ‘work for those who can, security for those who cannot’.<sup>3</sup> The challenge faced by politicians was translating this relatively narrow policy focus into workable legislation that could be applied to the diverse nature of claimants’ individual situations. As determined in the last chapter, the system’s overall complexity reflects the circumstances that it is routinely required to deal with and the contingencies that can be difficult to classify, such as work status, personal relationships and disability.<sup>4</sup> In this context, the relatively narrow focus of New Labour’s activation policy, which encompassed a mixed approach, sought to balance qualifications and incentives with conditions and sanctions, an approach that could be problematic. In the latter years of the Labour government, there was a clear shift towards policies that sought to provide the ‘stick’ in the form of mandatory work activation measures. Regulations introduced to underpin the operation of new work programmes enormously increased the conditionality a claimant would be required to fulfil before receiving support, with less attention being afforded to the ‘carrot’ in the form of work incentives.

The problematic nature of such a narrow approach was brought into sharp focus following the global financial crisis in 2008 which reverberated strongly in Britain. The ‘creeping conditionality’<sup>5</sup> which commenced its ascent in rhetoric in 1974, and in policy by 1979 altered in pace as the sand timer ran down to the 2010 election. Political consensus grew on the shape of narrowly conceived welfare reform policies

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<sup>1</sup> Department of Employment/DSS, *Jobseeker’s Allowance* (HMSO, Cm 2687, 1995), para 1.6

<sup>2</sup> Department of Social Security, *A New Contract for Welfare: The Gateway to Work*, (HMSO, Cm 4102, 1998), ch. 1, para 7

<sup>3</sup> *Ibid*, ch. 1, para 7

<sup>4</sup> House of Commons Work and Pensions Committee, *Seventh Report Session 2006–07, Benefits Simplification Vol. 1 (HC 463-I)* (HMSO, 2007).

<sup>5</sup> See, Peter Dwyer, ‘Creeping Conditionality in the UK: From Welfare Rights to Conditional Entitlements?’ (2004) *The Canadian Journal of Sociology / Cahiers Canadiens de Sociologie* 29, pp 265-287



which were underpinned by increased compulsion and a punitive response to non-compliance. As detailed throughout the thesis, the legislation promoting the conditional approach was characterised by a swirl of social security regulations introduced by way of Statutory Instrument.<sup>6</sup> The justification for this approach was based on successive governments' gradual reinterpretation of social citizenship from an emphasis on the importance of the individual's universal access to rights to the premise that an individual must be compliant in obtaining or actively seeking remunerative employment to access rights and entitlements. The 're-visioning' of the welfare contract has been exemplified by the resolute trend of the 'layering' of conditions by way of frequent welfare reform legislation which has culminated in a series of sometimes insurmountable hurdles for those who are capable of working yet find themselves needing to claim from the state.<sup>7</sup> This trend has been buttressed by a shift in political language from 'rights' towards the concept of 'employment assistance' and 'support'.<sup>8</sup> It is on this basis that this chapter continues the thesis' examination of the trajectory of social security legislation directed at the unemployed - as it continues its migration from seeking to support the achievement of greater economic equality in society for individuals and families to increasing punishment for those who do not comply with 'civic mores' by ensuring an expedient return to work.<sup>9</sup> The chapter will also seek to place the frequent nature of welfare reform into its socio-legal and political context in order to reveal the disparity between New Labour's relatively narrow focus towards welfare reform and the increasing volume of delegated rules. The substantive legislative measures introduced by New Labour which intensified the use of conditionality and the state's efforts to 'responsibilise' and control the behaviour of the unemployed was The Welfare Reform and Pensions Act 1999, The Welfare Reform Act 2007 and the Welfare Reform Act 2009. This chapter focuses on the 1999 Act while the 2007 and 2009 Acts are analysed in Chapter 7 and 8.

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<sup>6</sup> Julian Fullbrook, 'The Jobseekers Act 1995: Consolidation with a Sting of Contractual Compliance' (1995) *Industrial Law Journal* 24, pp 395-401, p 395

<sup>7</sup> Laura Lundy, 'From Welfare to Work? Social Security and Unemployment' in Neville Harris, *Social Security Law in Context* (Oxford, 2000), p 295; See also, Ruth Patrick, 'All in it Together? Disabled People, the Coalition and Welfare to Work (2012) *Journal of Poverty and Social Justice* 20, pp 307-322

<sup>8</sup> Emma Carmel and Theodoros Papadopoulos, 'The New Governance of Social Security in Britain' in Jane Millar (ed), *Understanding Social Security: Issues for Policy and Practice* (Policy Press, 2003)

<sup>9</sup> See Philip M. Larkin, 'The Criminalization of Social Security Law: Towards a Punitive Welfare State?' (2007) *Journal of Law and Society* 34 (3), pp 295-320

In the interim periods the government, through the Secretary of State for Work and Pensions, used its powers to pass delegated legislation to quietly further its policy agenda. As well as analysing the major legislative instruments, this and the following chapter/s will attempt to piece together, and appropriately contextualise the emergence of supplementary regulations which were in most cases ideologically driven and developed to tighten and or increase existing levels of conditionality in social security legislation. This chapter begins with an examination of New Labour's prominent 'New Deal' programmes which commenced almost immediately following the party's long-awaited return to office. The programmes sought to target certain categories of benefit claimants to take them out of long-term unemployment and back to work. The programmes, often changed and re-launched remained a key part of Labour's programme of activation to the end of its mandate in 2010.

### ***The New Deal***

The New Deal, which was to be funded by New Labour's windfall tax, formed the centrepiece of its 1997 election manifesto and provided an early indication of the party's intention to promote an active welfare system.<sup>10</sup> The pilots promptly commenced in January 1998, and the scheme went national in April, less than a year after New Labour came to power. The series of measures introduced by the New Deal were particularly significant as they 'involve(d) a radical paradigm shift' influenced by the American 'workfare' approach<sup>11</sup> and centred on Giddens' assertion that 'there ought to be no rights without responsibilities'.<sup>12</sup> The proposals set out initially to target young claimants (18-24 years olds), lone parents, the disabled and those over 25 who had been unemployed for two years back into work. It was compulsory for those between age 18-24 who had been unemployed for six months and those over 25 who had been unemployed for two years. Participation in the New Deal for the disabled and lone-parents was voluntary, however by the end of the New Labour administration, participation conditions for both of these groups were tightened, as will be detailed below. Following the 1999 budget, the programme was also extended to partners of the unemployed and the over 50's. The first stage of the programme

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<sup>10</sup> £5.2 billion was raised via the windfall tax. The majority of this was earmarked for the delivery of the New Deal, however £1.3 billion of it went into capital to tackle the maintenance backlog in schools. See, Nicholas Timmins, *The Five Giants: A Biography of the Welfare State* (Harper Collins, 2001), p 564

<sup>11</sup> Anne Daguere, 'Importing Workfare: Policy Transfer of Social and Labour Market Policies for the USA to Britain under New Labour' (2004) *Social Policy and Administration* 38 (1), pp 41-56, p 42

<sup>12</sup> Anthony Giddens, *The Third Way* (Polity Press, 1998), p 65

was known as the 'gateway' period, which was intended to provide claimants with an initial period of intensive counselling advice and guidance. During this time the claimant was allocated a Personal Adviser who was responsible for carrying out an interview and drawing up a New Deal action plan outlining realistic employment goals. Claimants were not required to sign this action plan, however the jobseekers agreement was integrated into the New Deal measures. New Labour expected the majority of participants to have achieved employed status before the end of the Gateway period. Failing this, the claimant was required to participate in one of four options based on the discretion of the claimant's Personal Adviser. The four New Deal options were full-time education or training for up to twelve months during which the participant received an allowance equivalent to JSA; a job with an employer who was subsidised for six months; voluntary work for six months during which the claimant received an allowance equivalent to JSA along with a grant of £400. The final option involved six months work with the Environmental Taskforce for which the claimant would receive an allowance equivalent to JSA along with a £400 grant.<sup>13</sup> At the end of the option, if the claimant had not found employment they could resume claiming JSA, but would normally be required to participate in a 'follow-through' period where they would be subject to further intervention from their Adviser.

On announcing the New Deal Plans as part of New Labour's first budget, the Chancellor Gordon Brown said:

'With those new opportunities for young people come new responsibilities. There will be no fifth option--to stay at home on full benefit. So when they sign on for benefit, they will be signing up for work. Benefits will be cut if young people refuse to take up the opportunities'.<sup>14</sup>

The sanctions for non-participation were no different than those enforced by the Jobseekers Regulations introduced in 1996 and were extended to the New Deal in order to further emphasise the requirement that claimants must fulfil their prescribed obligations in order to receive assistance. Those, who without good cause refused a place or an option, or who left, or failed to attend a placement, or who lost the placement due to misconduct, would be subject to a sanction of loss of benefit for two weeks. If there was a subsequent failure to comply within twelve months of the

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<sup>13</sup> JSA Regs 1996, reg. 75(1)(a)(ii) (for the employment option, voluntary section option and environment task force option) and reg. 75(1)(b)(ii) (for the full-time education and training option)

<sup>14</sup> HC Deb, 2 July 1997, cc 308-309

previous sanction, the sanction would total four weeks.<sup>15</sup> Indeed, as the New Deal consisted predominantly of employment and training schemes, there was no need to introduce new legislation. The conditions attached were not classed as separate and were bolted into the existing provisions on training and employment programmes.<sup>16</sup> However, a key stipulation was that New Deal participants were granted restricted access to hardship payments (generally comprising income-based JSA reduced by 40 per cent of the single person's allowance), than was usual for other compulsory training programmes.<sup>17</sup> This was a clear indication of New Labour's propensity to increase the pressure for claimants to comply. It also pointed to the Labour government's preparedness to punish those who did not increase their chances of finding work. The government subsequently introduced regulations which would enable those who refused to participate in a New Deal option three times to be sanctioned for twenty six weeks.<sup>18</sup> Those who, following the imposition of the sanction, resumed their New Deal option, would be eligible for income-based JSA paid under section 20(4) of the Jobseekers Act 1995.<sup>19</sup>

The 'New Deal' received a cautious welcome by groups working with the unemployed as it included attractive features that in part derived from a strong welfarist tradition, such as the emphasis on individual support and the additional investment that was attributed to the scheme. However as Tonge comments, the paradox in Labour's 'attempt to bring the state back in' to the development of wide-reaching employment policy was contained within its use of an economic, ideological and institutional framework which made the achievement of employment goals difficult to obtain

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<sup>15</sup> Section 19 of the Jobseeker's Act 1995

<sup>16</sup> Tim Jarvis, *Welfare-to-Work: The New Deal: Research Paper 97/118* (HMSO, 1997), *Welfare Reform and Pensions Bill, Explanatory Notes*, p 5 < <https://www.publications.parliament.uk/pa/ld199899/ldbills/062/en/99062x-i.htm> > (accessed 16 April 2017)

<sup>17</sup> Claimants subject to New Deal sanctions could only claim hardship payments if they fell into specified category of claimants considered to be vulnerable: JSA Regs 1996, reg 140 (4A). A young person who was deemed to be in a vulnerable group was not eligible for a hardship payment during the first two weeks of a sanction period.

<sup>18</sup> Neville Harris, 'New Deal: Proposed tightening of JSA sanctions for New Deal (18-24) non-compliance' (1999) *Journal of Social Security Law* 6 (4), pp 147-148

<sup>19</sup> Hardship payments were for vulnerable groups subject to sanctions, as before. For those subject to a new 26 weeks sanction who are not in the defined vulnerable groups, the Government proposed that hardship payments would be made available in limited circumstances--where a sanction period is still operative beyond the date on which the young person has returned and completed his or her New Deal option. However, a young person who is in a vulnerable group will not be eligible for a hardship payment during the first two weeks of a sanction period: this is a standard rule in relation to JSA.

without a degree of compulsion.<sup>20</sup> Ultimately however, it was the extent of coercion that marked the New Deal rather than the job creation measures. New Labour's approach to employment was dominated by a core set of assumptions – namely, the dominance of training as an employment solution, the need for market flexibility in the context of an increasingly globalised world, and the need for coercion in order to respond to 'voluntary' unemployment.<sup>21</sup> Underlying this position is a growing a 'moral agenda' which stresses the importance of labour discipline, that demonstrates strong continuity with the post-Keynesianism position adopted by the Conservatives.<sup>22</sup>

The New Deal partnerships which were forged with companies who had signed up to participate did include greater protections than previous placements such as the Youth Training Scheme, which was considered to be inadequately resourced and open to employer exploitation. Employers' participation in the New Deal was conditioned upon the requirement to treat participants in the same way as other employees and to endeavour to employ them at the end of the subsidised period subject to the New Deal participant's competence and commitment. It is notable that New Labour's 'introduction' of national employment subsidies adopted a key part of the approach taken by Major in the latter years of the Conservative administration. The Conservative's 'Project Work' contained the features of the intensive job search, compulsory work or training, national insurance holidays for employers and employer subsidies, as replicated in the New Deal. One of the novel aspects of New Labour's New Deal was the scale of its roll out, which dwarfed previous efforts, such as 'Project Work'. However, generally, the Conservatives demonstrated restraint when it came to the commitment to a 'hard workfare' approach. As outlined in Chapter 3 and 4, although elements of workfare could be identified in the Conservatives 'Restart' initiative it ultimately fell short of being formally recognised as such.<sup>23</sup> The same cannot be said of New Labour's approach to employment policy, as the basic premise of workfare – that is the provision of benefits conditional upon the demonstration of a willingness to work - was explicitly present in the New Deal for young people and for the long-term unemployed.

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<sup>20</sup> Jonathan Tonge, 'New Packing, old deal? New Labour and Employment Policy Innovation' (1999) *Critical Social Policy* 19 (2), pp 217–232

<sup>21</sup> *Ibid*, p 220

<sup>22</sup> Michael Lavalette and Gerry Mooney, 'New Labour, new Moralism: the Welfare Politics and Ideology of New Labour under Blair (1999) *International Socialism Journal* 85, pp 27-48

<sup>23</sup> See Chapter 1

In order to liberalise and indeed soften its introduction New Labour linked New Deal with the provision of a choice between work and education/training. This illusion of choice coupled with the delivery of a minimum wage communicated the promise of a more positive labour market.<sup>24</sup> New Labour's conditioning of benefit on the commitment to education/work diverged from the Conservatives in that it was less predicated on bringing down the unemployment figures and instead was a reflection of an increasing political consensus that training and employment offers the best solution to long-term unemployment.<sup>25</sup> This shifting consensus can be attributed to a sense of resignation in relation to the continued structural complication attached to removing people from the unemployment register and directly into full-time remunerative employment.

Fulbrook drew attention to the fact that even at the 'height of the economic cycle' in Britain in February 1999, nearly 6.1 million people or 17 percent of the working age population were on at least one key benefit.<sup>26</sup> Furthermore, although there was a fall in the volume of unemployed claimants, the proportion of individuals receiving at least one of the main sickness and disability benefits continued to grow – as of February 1999, this group contained 2.9 million people. The same set of statistics also showed a high proportion of 'long-stay' claimants. Half of those claiming at least one key benefit were also doing so three years before.<sup>27</sup> Such evidence provided credence to some commentators' views that New Labour's achievement of a fall in unemployment had been achieved by the transfer of people into benefit categories where they had less incentive to work 'and were less likely to be chased by officialdom to look for jobs'.<sup>28</sup> This was reinforced by research from Beatty and Fothergill who asserted that the differential rate between Jobseekers Allowance and Incapacity Benefit created an incentive for some long-term unemployed claimants to secure a move across into the latter more generous claimant category.<sup>29</sup> This nature

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<sup>24</sup> Tonge, n. 20 above, p 222

<sup>25</sup> Ibid

<sup>26</sup> Julian Fulbrook, 'New Labour's Welfare Reform: Anything New?' (2001) *Modern Law Review* 64, p 249

<sup>27</sup> Department of Social Security, Client Group Analysis: Quarterly Bulletin on the Population of Working Age on Key Benefits, as cited by Fulbrook, n. 26 above, p 249

<sup>28</sup> *The Economist*, 1 December 1999, as cited by Fulbrook, n. 26 above, p 250

<sup>29</sup> Christina Beatty and Stephen Fothergill, 'Incapacity Benefit and Unemployment' (July 1999) Centre for Regional Economic Social Research < <https://www4.shu.ac.uk/research/cresr/sites/shu.ac.uk/files/incapacity-benefit-and-unemployment.pdf> > (accessed 18 April 2017). The authors emphasised they were not suggesting the presence of benefit fraud, but that the description of some of the health problems as being incapacitating 'in the sense of rendering the individual entirely incapable of unemployment' should be questioned

of criticism arguably contributed to New Labour's extension of compulsion to other groups – such as the disabled, chronically ill, lone parents and over-50's. However, it was with this move that the mantra of 'welfare to work' became much more problematic, particularly for those 'old Labour' members who saw New Labour's approach to the disabled as a betrayal of the party's long engrained principles.<sup>30</sup>

### ***The Politics of the Welfare Reform and Pensions Act 1999***

New Labour's first attempt at introducing primary legislation intended to reform the social security system was enacted in the context of significant 'internal party dissension'.<sup>31</sup> The 1999 Welfare Reform and Pensions Bill was subject to repeated rebellions from Labour backbenchers. Yet, such level of discord was distilled from the official DSS press release marking the Bill's Royal Assent on 12 November 1999, which saw the resultant Act heralded by the Secretary of State as forming 'a key element of the Government's modernisation of the welfare system to encourage work for those who can and provide security for those who cannot'.<sup>32</sup> Labour's Frank Field was unconvinced of the direction of the Bill, despite his authorship of the Secretary of State's quotation on the spirit of the legislation and New Labour's long-term approach to welfare reform. Field, the MP who Tony Blair asked to 'think the unthinkable' as Minister of Welfare Reform mused that 'New Labour came to power committed to transform welfare'.<sup>33</sup> Such critical commentary came following Field's dramatic resignation from his post as Minister of Welfare Reform due to his fractious relationship with Labour colleague and Secretary for Social Security, Harriet Harman (his partner in the then Department for Social Security), and frustration that the practical outworking's of his thinking on welfare reform had been stymied.<sup>34</sup> Brown and Field's views of welfare were frankly incompatible. Field sought to re-build social insurance in the private-sector via mutuals, creating funds in which everyone would have a stake. Those who could afford it would be required to pay in for themselves and the state would pay in for those who could not afford the contributions. Essentially, he wanted to implement a new form of universalism that would encourage work. His plans were not cheap – the DSS confirmed such plans would cost

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<sup>30</sup> Frank Pakenham (7<sup>th</sup> Earl of Longford) HL Deb, 10 June 1999, Vol. 601, cc 1561-1652, c 1623. "...But it would be a betrayal of the principles of old Labour if the poorest and most vulnerable people in our society—the disabled, some 300,000 of them—were penalised at a time when this country is becoming richer and richer"

<sup>31</sup> Fulbrook, n. 26 above, p 243

<sup>32</sup> Department of Social Security Press Release 99/279

<sup>33</sup> See generally, Jay Rayner, 'Frank Field: Still Thinking the Unthinkable' *The Guardian* (London, 2 July 2006)

<sup>34</sup> Timmins, n. 10 above, p 569

around £10 billion annually – whereas Brown’s plans sought to utilise the existing system. Demonstrating an element of continuity with the Conservative approach, Brown sought to increase targeting and deliver an expansion of means-testing. His method diverged starkly from Field’s, as he was committed to the extension of tax-credits in order to ensure that work paid, and that a significant degree of distribution could be achieved over time.<sup>35</sup> Field made it very clear that he was deeply opposed to the means-tests which he believed had a corrosive effect on behaviour.<sup>36</sup> Blair had been convinced by Field’s ability to communicate the ‘rights and responsibilities’ rhetoric and his vocalization of his intolerance of benefit fraud – an issue he garnered support for from fellow Labour members on the backbenches. The cumulative effect of Field’s influence succeeded in buffering New Labour’s agenda for social security in the run up to the election and therefore diametric opposition to Brown’s was potentially overlooked by the future Prime Minister.<sup>37</sup> It is possible that if Field had been able to realise his vision that the contemporary version of social citizenship would have been much closer to what Beveridge intended – a system that prioritises a system of social insurance to mitigate risk.

Following Labour’s election in 1997, Brown swiftly activated his own sweeping agenda when he commissioned Martin Taylor, the head of Barclay’s Bank, to look at the process of streamlining tax and benefits, a primary sign that the Chancellor intended to take the reins in regard to social security policy, despite Field’s particular appointment. Brown revealed the introduction of a raft of measures in the run up to the 1998 budget, including Working Families Tax Credit which would replace Family Credit - it would be paid directly through the pay packet rather than being claimed by the mother, and would be ‘appreciably more generous’ to reinforce the idea of the rewards that could be reaped by way of work. In addition, he sought the abolition of national insurance contributions for the lowest paid (which made recruitment more attractive to employers), and he established the path towards a minimum wage which was to be set at £3.60 per hour (less for the young). Through his attempts to make work pay Brown asserted in his budget speech in March 1999 that ‘those with an offer

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<sup>35</sup> Ibid, p 562

<sup>36</sup> 'Whatever has gone before, I won't give up. I will be extremely vocal. The benefits culture in this country must be changed. It rots people, it destroys their sense of responsibility to their family, it kills their will to work, it pays for them to be dishonest. It's also a moral issue because the benefits system affects how people behave. Would we have so many single mothers if the system didn't actively assist them in their situation?' *The People*, 2 August 1998

<sup>37</sup> Timmins, n. 10 above, p 562



of work can have no excuse for staying at home on benefits'.<sup>38</sup> It is not quite clear when Blair decided that a change of leadership was required at DSS. By the reshuffle in July 1998 Harman was moved following a significant and badly handled dissension over a proposed cut to benefit for lone-parents.<sup>39</sup> Field had resigned, re-positioning himself as a stark critic of Labour's approach to welfare. He re-joined the bevy of backbenchers who were disaffected by the nature of Labour's modernisation agenda – including Baroness Barbara Castle of Blackburn, the former Secretary of State for Social Services.<sup>40</sup>

Alistair Darling was chosen to replace both Field and Harman. He conveniently hailed from Brown's Treasury where he acted as Chief Secretary, and had had ample time to examine the various options at the Chancellor's disposal since New Labour assumed power. He very evidently spoke Brown's language. For example, upon a challenge from Professor Ruth Lister and others, in relation to the further erosion of the Beveridgean principle of collective insurance he confidently echoed Brown's stance on a need for greater targeting:

'We must concentrate effort to those who need the most help: three million people workless for more than two years; the 1 in 5 children living in households where no one works; the many children who leave school with no qualifications; pensioners isolated within their own communities. Today the important difference in social security systems is not whether they are insurance based or means tested, but whether or not they provide enough help to get to people back to work and improve their lives'.<sup>41</sup>

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<sup>38</sup> Chancellor of the Exchequer, Gordon Brown, *The Chancellor's 1998 Budget Speech* (17 March 1998) <

[http://webarchive.nationalarchives.gov.uk/20100407010852/http://www.hm-treasury.gov.uk/bud\\_budget98\\_speech.htm](http://webarchive.nationalarchives.gov.uk/20100407010852/http://www.hm-treasury.gov.uk/bud_budget98_speech.htm) > (accessed 4 May 2017)

<sup>39</sup> Peter Lilley, Harman's predecessor left in situ the requirement for cuts to housing benefit and lone-parents premium. Both cuts were embedded into the Conservative spending plans that Labour had committed to honouring on their ascent to power. Brown's insistence that New Labour lived up to its promise of being the party of welfare reform led to Harman being subject to the choice of dropping one of the cuts. She decided to drop the housing benefit reduction which she deemed to have the potential to cause mayhem in the housing market. When the move was presented in the Commons forty-seven Labour MPs voted against with thirteen more abstaining. In real terms the cut was not that significant - £60 million in the first year and approximately £300 million over parliament (it would later be revealed that parliament would underspend £560 million in its first year and £2 billion in its first two years

<sup>40</sup> Baroness Castle of Blackburn frequently attacked New Labour's approach to reform of the social security system for what she saw as a lack of commitment to pensioners and the disabled. See for example: HL Deb, 10 June 1999, Vol. 601, cc 1561-1652, c 1595; HL Deb, 13 July 1999, Vol. 604, cc 177-244, c 187

<sup>41</sup> The Guardian, 16 June 1999

The proposals that would eventually form the Welfare Reform and Pensions Act 1999 mapped out a series of reforms on pensions, bereavement benefits, incapacity benefits, Disability Living Allowance and work incentives. The implementation of the measures in their totality signalled a turning point for the Labour party's approach to social security, and it was one which was plainly marked by the departure of Field, and Blair's ultimate decision to trust in his Chancellor's vision. Universalism in social security was dying, and Field was the last Labour Minister to invest in a version of it, albeit a version with different methods to the high tax, high spend model.<sup>42</sup> As outlined in previous chapters, the rapidly widening income inequalities of the 1980's and 1990's had contributed to the elimination of the opportunity to effectively modify or rebuild universal, non-means tested benefit in a 'golden age' way. Prevalent was the argument that in the context of income distribution widening, universal benefits would go to those who didn't need them – thus it was concluded by New Labour that extending 'old-fashioned' universalism was an idea that was dead in the water.<sup>43</sup> The ferocity of Labour's turning point was very slightly curbed before the commencement of the Welfare Reform and Pension Act 1999, due to the extent of the backbench revolt over a number of measures which led to a few concessions in relation to the means test for Incapacity Benefit (IB) and the tightening of contribution conditions.<sup>44</sup>

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<sup>42</sup> Timmins, n. 10 above, p 574

<sup>43</sup> Mike Brewer, Tom Clark and Matthew Wakefield, 'Social Security under New Labour: What did the Third Way mean for Welfare Reform?' (IFS, 2002), p 11 < <https://www.ifs.org.uk/conferences/socsec/clark.pdf> > (accessed 15 April 2017); See also, Daniel Wincott, 'Images of Welfare in Law and Society: The British Welfare State in Comparative Perspective' (2011) *Journal of Law and Society* 38 (3), p 362, who argues that the significance of Labour's changing approach to a universalist approach to social security provision was ameliorated by its use the 'triangulation' tactic: the adoption of a traditionally Conservative (anti) welfare discourses which allowed it to accommodate protection against attack. Wincott's analysis of political cartoons in Labour's first term suggests that this tactic enjoyed relative success

<sup>44</sup> The government eventually agreed that the means-testing provision for Incapacity Benefit would not be activated until a claimant's occupational or private pension reached £85 per week rather than the initial proposal of £50 per week. To claim IB claimants were required to establish a recent connection with paid employment. Entitlement required necessary contributions were met. The government's compromise in relation to contributions involved claimants paying national insurance contributions for one of the three years previous to their benefit claim, rather than one of the previous two years as was first proposed. When incapacitated claimants who had been employed for 21 weeks preceding their claim were required to demonstrate an inability to perform that specific type of work by participating in the 'own occupation test' which applied to the first 28 weeks of incapacity. Thereafter and for those whom the 'own occupation test' could not be applied, claimants would be required to satisfy the All Work Test. See, Grainne McKeever, 'Welfare to Work for the (In) Capacitated – The Reform of Incapacity Benefit' (2000) *Industrial Law Journal* 29 (2), pp 145–166, p 146

***WRPA 1999 and the Unemployed: 'Work for those who can and security for those who can't'?***

In terms of the unemployed, the most significant measure introduced by the Act was perhaps the introduction of the 'single gateway' to the benefits system, which was piloted successfully in several parts of Britain. Introducing the 'one service' to the Lords, Baroness Hollis personified its arrival with the view that:

'For years too many people have been written off, or written themselves off, and been resigned to a lifetime on benefit; and too many children growing up in workless households have come to expect nothing better for themselves'.<sup>45</sup>

In New Labour's view the introduction a new statutory framework for the introduction of a 'work-focused interview'<sup>46</sup> as a condition of entitlement for *all* working-age people entering into the benefits system (including those claiming incapacity benefit and disability benefit) would tackle 'that poverty of expectation'.<sup>47</sup> Baroness Hollis was eager to guarantee that nothing in the legislation would 'force *anyone* to take a job or follow a particular course of action', which on the surface spoke sympathetically to the latter half of New Labour's mantra of 'work for those who can and security for those can't'.<sup>48</sup> However, the Parliamentary Under-Secretary of State for Social Security was undoubtedly aware of her audience and the overwhelming requirement to win them over. After all, she was responsible for outlining the governments planned extension of the principle of 'work for those who can' to people who were found incapable of work.<sup>49</sup>

New Labour's introduction of conditionality into the provision of IB acutely illustrated its longer-term aspirations in relation to reducing social security expenditure by moving claimants from benefit to work. Early indications of such included its recognition of a '*need*' to 'modernise IB to take account of people's ability

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<sup>45</sup> Baroness Hollis of Heigham, HL Deb, 10 June 1999, Vol. 601, cc 1561-1652, 1563

<sup>46</sup> ss. 57-58 Welfare Reform and Pensions Act 1999

<sup>47</sup> Baroness Hollis of Heigham, HL Deb, 10 June 1999, Vol. 601, cc 1561-1652, 1563

<sup>48</sup> Baroness Hollis of Heigham, HL Deb, 10 June 1999, Vol. 601, cc 1561-1652, 1564

<sup>49</sup> Grainne McKeever, 'Welfare to Work for the (In) Capacitated - The Reform of Incapacity Benefit' (2000) *Industrial Law Journal* 29 (2), pp. 145 - 166, p. 166. The Social Security Contributions and Benefits Act 1992 established two types of IB - short and long-term, as well as creating three different levels of benefit (s. 30B(2)). Claimants were first awarded benefit at a lower rate for a short term of 28 weeks. Following that period and on the condition they satisfied the 'All Work Test' (AWT) payment would be made at the higher rate of short-term IB (30A (4) and 30B (2)). When the claimant had been on benefits for 52 weeks he/she became entitled to long-term IB paid at the highest rate (30 A (5)).

and desire to work'.<sup>50</sup> This standpoint reflected the appetite of many claimants who sought a return to work on the condition that the government provided for them when they could not meet their own aspirations - a position which demonstrated a certain measure of common ground between the government and claimants.<sup>51</sup> However, the Act's introduction of a 'rebranded' 'All Work Test' (AWT)<sup>52</sup> - christened the 'Personal Capability Assessment' (PCA)<sup>53</sup> which provided the Secretary of State with the power to prescribe a repeat PCA within specified intervals indicated a clear undermining of Baroness Hollis' claim that the legislation would not force a particular course of action. On the contrary, such a measure quite blatantly advanced the government's work focused agenda and frustrated the guarantee of security of entitlement.

In many ways the Work Focused Interview (WFI) exemplified New Labour's brand of social citizenship. The process, which formed the centrepiece of the 'one service' presented an opportunity for the government to emphasise the jobseeker's responsibility to find work, and for claimants who were sick, disabled, or lone parents, a responsibility to consider their capacity to work before claiming benefits (aided by the intervention of a Personal Adviser).<sup>54</sup> At the same time, it also attempted to provide equality of access in relation to the provision of information on available employment, education opportunities and benefit entitlement rights for those claimants who were assessed not to be 'job ready' but in need of encouragement to seek employment. It is important to note that although *all* claimants received work

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<sup>50</sup> Department for Work and Pensions, *A New Contract for Welfare: Principles into Practice*, (CM 4101, HMSO, 1998), Ch. 5, para 2

<sup>51</sup> McKeever, n. 44 above, pp 147-149; See also, Julia Loumidis, Rachel Youngs, Carli Lessof and Bruce Stafford, 'New Deal for Disabled People: National Survey of Incapacity Benefits Claimants (DWP Research Report 160, 2001). It found that Financial reasons were the most common explanation for why incapacity related benefit recipients closer to the labour market wanted paid work (74 per cent). Work also provided a means of occupying their time and opportunities for social interaction (62 per cent) and self-respect (40 per cent)

<sup>52</sup> The AWT examined a claimant's capacity to carry out specified work-related tasks such as bending, lifting, carrying, walking, coping with pressure and interacting with people. Scores were allocated under 'descriptors' and benefit was awarded to a claimant who scored 15 points on the groups of satisfying physical disability descriptors, 10 points on the grounds of satisfying mental disability descriptors or 15 points for a combination of both sets of descriptors. Those who did not meet the 15 point threshold would not qualify for Incapacity Benefit

<sup>53</sup> The Personal Capability Assessment brought in an additional feature whereby claimant's capabilities, as well as their physical and mental limitations would be assessed. It was the only distinguishing feature which set it apart from the All Work Test

<sup>54</sup> See, *Welfare Reform and Pensions Bill, Explanatory Notes* < <https://www.publications.parliament.uk/pa/ld199899/ldbills/062/en/99062x-i.htm> > (accessed 10 May 2017); See also, Department for Work and Pensions Research Report No 183, *Final Effects of ONE* (HMSO, 2003)

related advice, those who were incapacitated and felt unable to seek employment were not formally obliged to follow through on the advice of a Personal Adviser - without fear of repercussion.<sup>55</sup> However, this particular situation could never last as New Labour's pendulum undoubtedly swung further towards emphasising that the labour market provided the only way out of poverty.<sup>56</sup> In keeping with this priority, provision of benefit could be jeopardised if the jobseeker demonstrated 'wilful non-compliance' with the process. This essentially involved either three refusals to turn up for interview, or failure to co-operate. Co-operation encompassed a requirement to attend the jobcentre at a specified time as well as the requirement to provide necessary information such as education, qualifications and any perceived barriers to work.<sup>57</sup>

New Labour expected positive results from the 'one service' project. Its over-arching objective included a rise in the level of sustainable employment via the transferral of more benefit recipients from welfare to work.<sup>58</sup> The Department's final evaluation of the service in 2003 found that the pilot had failed to meet this objective.<sup>59</sup> The recently rebranded Department for Work and Pensions put this down to the 'intractable nature of securing employment for many benefit recipients'.<sup>60</sup> The main gain which DWP maintained it derived from the 'one service' project was how to develop, and subsequently implement the Jobcentre Plus service on a nationwide basis. Critically, the national roll out of Jobcentre Plus occurred in 2001 and 2002, before the results of the evaluation were known, which led the Public Accounts Committee to conclude that DWP would be required to carefully consider the 'adequacy' of the arrangements for getting benefit claimants into work.<sup>61</sup>

Two further work-focused measures introduced by the Welfare Reform and Pensions Act 1999 were the requirement that young couples without children make joint

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<sup>55</sup> McKeever, n. 44 above, p 154

<sup>56</sup> See for example, HM Treasury / Department for Work and Pensions, *Ending Child Poverty: Everybody's Business* (March, 2008), p 3 < <http://www.bristol.ac.uk/poverty/downloads/keyofficialdocuments/Ending%20Child%20Poverty.pdf> > (accessed 11 April 2017). 'The government firmly believes that work is the most sustainable route out of poverty'

<sup>57</sup> McKeever, n. 44 above, p 154

<sup>58</sup> Department for Work and Pensions Research Report No 183, *Final Effects of ONE*, (HMSO, 2003), p 238

<sup>59</sup> *Ibid*, p 259

<sup>60</sup> Select Committee on Public Accounts, *Sixteenth Report* < <https://www.publications.parliament.uk/pa/cm200203/cmselect/cmpubacc/170/17005.htm#n13> > (accessed 17 May 2017)

<sup>61</sup> *Ibid*

claims for JSA<sup>62</sup> and the introduction of provisions for the implementation of Employment Zones (EZs) which extended the power of the government to commence pilot schemes in designated areas where special benefit rules could be applied.<sup>63</sup> The former measure made it a requirement for each individual in a couple to satisfy the labour market conditions of entitlement to JSA. This made it mandatory for both partners to participate in the services provided by the 'one service' and provided equal access to employment programmes such as the New Deal. While New Labour appeared to extend its 'equality of opportunity' approach to both individuals in a claiming couple, with the Chancellor asserting that the measures evidenced a big step towards greater equality for women,<sup>64</sup> in real terms, they failed to alter the administrative process to mirror greater equality of access to provision. As Morris asserts, the way benefits are calculated for couples means that one has to be dependent on the other. The system not only assumes that a couple can manage on less than two single individuals, but it also assumes that the money will be shared.<sup>65</sup> This position reveals a 'curious blind spot' in relation to gender issues on the part of the government. New Labour's (and later the Coalition Government) failed to see the contradiction in imposing conditionality on partners who have no right to receive benefit themselves, as their partners receive a dependant's addition on their behalf.<sup>66</sup> Restricting a partner's access to their own benefit conflicts with the focus on the individual in activation policies.<sup>67</sup> A 1998 DSS research report found that the maintenance of the established arrangement reflected 'state recognition and validation of the role of males as head of the household'.<sup>68</sup> The latter measure, the introduction of (fully fledged) Employment Zones (EZs) was intended to support the establishment of the 'one service' to emphasise the idea that any financial support via the social security system would be accompanied by a focus on gaining paid

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<sup>62</sup> S. 59 and Schedule 7, Welfare Reform and Pensions Act 1999

<sup>63</sup> S. 60, Welfare Reform and Pensions Act 1999

<sup>64</sup> Chancellor of the Exchequer, Gordon Brown, *The Chancellor's 1998 Budget Speech* (17 March 1998) < [http://webarchive.nationalarchives.gov.uk/20100407010852/http://www.hm-treasury.gov.uk/bud\\_budget98\\_speech.htm](http://webarchive.nationalarchives.gov.uk/20100407010852/http://www.hm-treasury.gov.uk/bud_budget98_speech.htm) > (accessed 18 May 2017)

<sup>65</sup> Anne Morris, 'Couples and Benefit Claims: a Comment on Relying on the State, Relying on Each Other' (2000) *Journal of Social Security Law* 7 (4), pp 228-241, p 239

<sup>66</sup> Fran Bennett, 'Celebrating Sixty Years of the Welfare State?' (CPAG, 2008), p 15 < [http://cpag.org.uk/sites/default/files/welfare\\_state.pdf](http://cpag.org.uk/sites/default/files/welfare_state.pdf) > (accessed 20 May 2017)

<sup>67</sup> Fran Bennett and Mary Daly, *Poverty through a Gender Lens: Evidence and Policy Review on Gender and Poverty* (JRF, 2014), p 71; See also, Jo Ingold, 'An International Comparison of Approaches to Assisting Partnered Women into Work', Working Paper 101, (DWP, 2013)

<sup>68</sup> Dawn Snape, Donna Molloy and Marion Kumar, 'Relying on The State, Relying on Each Other' (DSS Research Report No. 103, 1998)

employment.<sup>69</sup> The first incarnation of EZs initially operated in small localities experiencing high concentrations of long-term unemployment and were by local multi-agency partnerships of public and voluntary sector organisations and were characterised by voluntary participation of unemployed adults aged 25 or over and offered a choice of training, work experience and intermediate labour market employment opportunities. However, the 'Fully Fledged' EZs which were legislated for in the Welfare and Pensions Act 'bore little resemblance to the prototypes'. The post-2000 EZs focused on introducing the operation of non-state organisations into the provision of employment services and were characterised by mandatory participation and output-related incentives. These features undermined the 'voluntaristic, human capital and social welfarist elements' of the prototypes. It is likely that the fully fledged EZs were shaped by New Labour's modernisation agenda.<sup>70</sup>

### **Conclusion**

This first major legislative push was a clear sign by New Labour on how social citizenship was to be understood. The values that were to be conveyed were individual responsibility, obligations to the community, the need for cost-effectiveness in the social security budget and overcoming the moral hazard that the provision of out-of-work benefits presents. The steps taken were presented as support mechanisms to enable individuals to become independent from the welfare state and therefore to become full citizens by contributing to the market economy through paid work, even if this was to be mandatory and even if the payment was the social security provision for those unable to secure work for themselves. As Chapter 2 sets out, social rights were not removed but were being diluted and the history and context of the Welfare Reform and Pensions Act 1999 shows how the legislation enabled this reorientation of what citizens could expect from the welfare state.

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<sup>69</sup> Sharon Wright, 'Activation and Citizenship for UK Lone Parents' in Sigrid Betzelt and Silke Bothfeld (eds), *Activation and Labour Market Reforms in Europe: Challenges to Social Citizenship* (Palgrave, 2011), p 66

<sup>70</sup> EZs were effectively a precursor for the creation of Jobcentre Plus in 2002, which formalised the integration of benefit administration and employment support. This organisational change (discussed in detail in the previous chapter) can be said to have reinforced New Labour's legislative reforms which sought to re-position public employment services along work first principles, which instituted higher levels of conditionality in return for access to employment advice and support. EZs became a vehicle for mobilising passive benefit spend for active labour market measures. See, Rita Griffiths and Stuart Durkin, *Synthesising the evidence on Employment Zones* (DWP Research Report No 449, 2007), p 13

The final shape of the Welfare Reform and Pensions Act 1999 provides an effective micro-lens through which to examine New Labour's early agenda for the unemployed and the administration of the social security system. It very clearly demonstrated the administration's ambitions to ensure the prioritisation of work via a significant intensification of the legislative trajectory of conditionality – particularly through its extension of mandatory conditions for the sick and disabled. With the Chancellor at the helm of welfare reform, the legislative outworking of policy reflected wider fiscal initiatives and a final betrayal of the national insurance principle which led to the symbolic off-loading of Frank Field to the backbenches. Brown's burgeoning focus was on developing incentives for employers and employees through the provision of targeted means-tested tax credits. The re-election of Labour in June 2001 led to an active galvanisation and expansion of its conditional approach to social security, as the following chapter details.





## **Chapter 7: The Welfare Reform Act 2007**

### ***The (delegated) road to the Welfare Reform Act 2007***

New Labour's second term in government (2001 – 2005) was relatively quiet in terms of primary social security legislation. Nonetheless, the Secretary of State for Work and Pensions took fulsome advantage of delegated powers. Broadly, New Labour sought to further tighten regulations for jobseekers, instituting a measured yet palpable increase in conditionality. The government's approach in this regard was relatively piecemeal. The consequence of this has significance, both for this thesis and for the transparency of the welfare reform project that New Labour were pursuing. The haphazard approach to implementing legislative reforms to cover the changing conditions of out of work benefits has created substantial difficulties in building a rounded picture of the implications of the amendments for the unemployed. Indeed, it is likely that much of the reform undertaken in this period escaped the notice of the general population and the media as the amended legislation was not subject to parliamentary scrutiny. New approaches were road-tested via the introduction of pilot employment programmes which acted as an important precursor to social security legislation. The combination of regulatory amendments and the resultant employment initiatives during this period formed a decisive series of road signs towards the introduction of the watershed Welfare Reform Act 2007. This chapter follows this journey to the implementation of the Welfare Reform Act 2007, identifying not just the visible road signs of increased conditionality but the groundwork that was laid to take welfare reform in this direction.

### ***A 'More Intensive' regime for Jobseekers***

In November 2003, amendment regulations were referred to the Social Security Advisory Committee (SSAC) alongside a memorandum entitled 'Jobseeker's Allowance (Amendment) Regulations 2003--More Intensive Jobseeker's Allowance Regime'.<sup>1</sup> The amendments were directed at claimants in receipt of JSA in excess of three months to help them 'get jobs more quickly' and to ensure fewer claimants moved towards long term unemployment. Regulation 18 of the Jobseekers Regulations 1996 was amended to require claimants to take a minimum of three steps per week to find work (previously set at two steps).<sup>2</sup>

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<sup>1</sup> Social Security Advisory Committee, *The draft Jobseeker's Allowance (Amendment) Regulations 2004* (Cm 6145, 2004)

<sup>2</sup> See, Social Security Advisory Committee, *Jobseekers Allowance Regulations 1996* (HMSO, 1996)

The SSAC said of the measure:

'Many of the suitable steps exemplified in the regulations can normally be carried out only once; for example preparing a CV, registering with an employment agency, and seeking specialist advice. In effect, the change would simply mean that people would be expected to apply for more jobs each week. Applying for jobs in an unstructured, unsupported way may not be the best method for getting people with fairly entrenched problems back to work more quickly.'<sup>3</sup>

The regulations were then presented to the Standing Committee on Delegated Legislation on 29 March 2004 (and were subsequently rolled out on 19 April 2004) by the Parliamentary Under-Secretary of State for Work and Pensions, Chris Pond MP. Committee member and Liberal Democrat MP, Steve Webb, who described the government's measures as 'turning the screw a little bit more', asserted that:

'Certain themes have started to emerge. The general tendency is to propose a statutory instrument that introduces new penal sanctions on the unemployment and, usually, to do so in defiance of the expert opinion of the SSAC'.<sup>4</sup>

This may have been in reference to the SSAC's concluding recommendation that the government pilot its proposed scheme – which was invariably rejected by the Secretary of State.<sup>5</sup>

The Trades Union Congress (TUC) questioned the amendment's emphasis on quantity rather than quality. It expressed reservations that a claimant should be penalised for spending time on a single, well thought out approach to a company, than for two or three random applications which fulfilled the required conditions.<sup>6</sup> The government believed that most people would be unaffected by this requirement as they already took three steps a week to find employment. Pond asserted that the

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<sup>3</sup> Social Security Advisory Committee, n. 1 above

<sup>4</sup> Steve Webb MP (Liberal Democrats), 'Draft Jobseeker's Allowance (Amendment) Regulations 2004, Fourth Standing Committee on Delegated Legislation' (March 29, 2004) col 7  
<https://www.publications.parliament.uk/pa/cm200304/cmstand/deleg4/st040329/40329s02.htm> > (accessed 23 May 2017)

<sup>5</sup> See, Social Security Advisory Committee, n. 3 above

<sup>6</sup> Trade Union Congress, 'Traipsing After a Job: Why the Government's Plans to Change the Jobseeker's Allowance Rules are Unfair and Won't Work' (February, 2004), p 14

regulations were intended to ensure that the minority who failed to maximise their opportunities could no longer do so.<sup>7</sup>

The amendments also provided that during the first 13 weeks of entitlement to JSA the jobseeker would not be able to claim 'good cause' for failing to carry out a jobseekers direction, or for refusing to accept an officially notified employment opportunity on the basis that the travelling time is less than one hour and thirty minutes (increased from 1 hour) after 13 weeks of claiming.<sup>8</sup> Issues underlined by the SSAC and the TUC, and indeed from members of the Standing Committee in relation to the increased travel time, included the potential for claimants to incur additional expense, the expectation that a claimant should carry out a roundtrip for up to three hours for poorly paid work, and the unreliability of public transport, particularly in rural areas.<sup>9</sup> In response the government claimed that Decision Makers would be responsible for making a judgement on the reasonableness of the length of journey a claimant should make for gainful employment which would take into consideration the circumstances of particular individuals and whether the cost involved was unreasonable in relation to net pay.<sup>10</sup> Once again, this brings into focus the enhanced role for the Adviser in the administration of benefits and the increased role for discretion, which came into play in this instance due to uncertainties which are not accommodated in the amended rules.<sup>11</sup> A further amendment which did not make it to the statute book was the suggestion that jobseekers sign on every week for six weeks following their 13 week review.<sup>12</sup> DWP anchored the amendments on the assertion that after three months of unemployment it becomes progressively more difficult to find work. The memorandum referred to research evidence on the effects

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<sup>7</sup> Chris Pond (Labour), 'Draft Jobseeker's Allowance (Amendment) Regulations 2004, Fourth Standing Committee on Delegated Legislation' (March 29, 2004) col 4 < [https://www.publications.parliament.uk/pa/cm200304/cmstand/deleg4/st040329/40329\\_s02.htm](https://www.publications.parliament.uk/pa/cm200304/cmstand/deleg4/st040329/40329_s02.htm) > (accessed 23 May 2017)

<sup>8</sup> See, Reg. 72 (6)(b) Jobseekers Allowance Regulations 1996

<sup>9</sup> See particularly the contributions from Iain Coleman MP (Labour) at col 13-14, Frank Roy (Labour) at col 14, and Tony Banks (Labour) col 15, 'Draft Jobseeker's Allowance (Amendment) Regulations 2004, Fourth Standing Committee on Delegated Legislation' (March 29, 2004) < [https://www.publications.parliament.uk/pa/cm200304/cmstand/deleg4/st040329/40329\\_s02.htm](https://www.publications.parliament.uk/pa/cm200304/cmstand/deleg4/st040329/40329_s02.htm) > (accessed 23 May 2017)

<sup>10</sup> Pond, n. 7 above, col 15

<sup>11</sup> Kenneth Davis, 'Discretionary Justice' (Louisiana State University, 1966), as cited by Paul Spicker, *How Social Security Works: An Introduction to Benefits in Britain* (Policy Press, 2011), p 110

<sup>12</sup> Absent from the Amendment of the Jobseekers Allowance Regulations 1996 as originally made < <http://www.legislation.gov.uk/uksi/2004/1008/regulation/2/made> > (accessed 24 May 2017)

of the introduction of JSA in 1996 in relation to periods of unemployment and cited the experience of international activation strategies to demonstrate the benefits of a more 'active benefit regime'.<sup>13</sup>

New Labour's pursuit of active job-seeking behaviour was also reflected in changes made to the New Deal post 2001. The government quite quickly realised that the New Deal for Long-Term Unemployed People over 25 (New Deal 25+) was not working as well as expected. Therefore, in April 2001 it was reformed to provide the 25-49 age group with access to the intensive 'Gateway' period which focused more on building a relationship between the Personal Adviser and the claimant.<sup>14</sup> This was followed by an 'Intensive Activity Period' which initially focused on intensive job search activity, confidence building, counselling and advice leading to the consideration of training options similar to those available to New Deal participants under 25. In April 2004, the period of the minimum option was reduced to 13 weeks (from 26 weeks) in an effort to improve the flexibility of the programme and to allow the participants to undertake more than one training option.<sup>15</sup> Lindsay noted that this move, six years into the delivery of the New Deal, represented the decreasing importance of the 'employment option' or subsidised work option and rather than more focus on carrying out job search activity.<sup>16</sup> By way of reform the government effectively acknowledged that the 'standard' New Deal activation model had reached its 'logical conclusion'.<sup>17</sup> Indeed, Anthony Giddens and Patrick Diamond asserted that New Labour should return to its founding principle of fighting poverty by raising taxes on the rich. They argued for a tax on capital transfers by the wealthy and the lifting of the ceiling on national insurance contributions, asserting that 'the haphazard if successful' anti-poverty agenda of Labour's first two terms, which stressed the need to get the poor into work may have reached the end of its life.<sup>18</sup> It is asserted by Lister

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<sup>13</sup> Neville Harris, 'Amendment of Jobseeker's Allowance Regulations' (2004) *Journal of Social Security Law* 11 (2), pp 56-57; See also, Pond, n. 7 above, col 16-17

<sup>14</sup> Chancellor of the Exchequer, Gordon Brown, 'The Chancellor's Budget Speech' (March 7, 2001) < [http://webarchive.nationalarchives.gov.uk/20100407010852/http://www.hm-treasury.gov.uk/bud\\_bud01\\_chapter\\_4.htm](http://webarchive.nationalarchives.gov.uk/20100407010852/http://www.hm-treasury.gov.uk/bud_bud01_chapter_4.htm) > (accessed 20 May 2017)

<sup>15</sup> Ibid. See also, Bruce Stafford and Karen Stafford, *Reforming the Public Sector: Personalised Activation Services in the UK* (Nottingham ePrints, 2007), p 19 < <https://core.ac.uk/download/pdf/97887.pdf> > (accessed 20 May 2017)

<sup>16</sup> Colin Lindsay, 'The United Kingdom's 'Work First' Welfare State and Activation Regimes in Europe' in Amparo Serrano Pascual and Lars Magnusson (eds), *Reshaping Welfare States and Activation Regimes in Europe* (Peter Lang, 2007), p 45

<sup>17</sup> Ibid, p 44

<sup>18</sup> Patrick Wintour, 'Labour Gurus Call for Return to Egalitarianism' (The Guardian, London, 25 May 2005), p 13. Patrick Diamond was a former special adviser to the Prime Minister Tony Blair. Diamond and Giddens called for a 'New Egalitarianism' which offered an alternative to the model of opportunity espoused by New Labourites

that Diamond and Giddens reverted to a traditional case for egalitarianism by way of their argument that it is impossible for individuals to fulfil their full potential if social and economic starting points are grossly unequal.<sup>19</sup> Yet, contrary to the view of the party's one-time 'gurus', New Labour continued to embrace and enhance its activation strategies. It seemed as though the party was of the mind that it had trodden too far down a relatively successful road to turn back.

The government brought about new reform of welfare-to-work policies, such as the New Deal, to ensure that they could target smaller local areas which had been identified as having a high concentration of 'worklessness' by increasing the flexibility and accessibility of employment programmes.<sup>20</sup> This agenda, claimed Lindsay, produced policy programmes which were 'defined by a combination of client-centred individual support and strong compulsion'.<sup>21</sup> Indeed, DWP asserted that 'there may be links between the working of the welfare state and the degree of inactivity amongst these groups',<sup>22</sup> with the argument being that if you do not look for work you are unlikely to find work.<sup>23</sup> It is this principle that arguably informed the government's second and third term approach to its welfare to work strategy. The measures and the language used to describe their commencement encompassed a growing endorsement of conditionality.

This approach was reflected in the 'Building on New Deal' (BoND) prototypes, launched in October 2005 which encased further reform of New Labour's flagship programme.<sup>24</sup> Reflective of Lindsay's assertion, the revamp pivoted on three core principles: a national framework for rights and responsibilities via a more accessible New Deal;<sup>25</sup> greater local flexibility, devolution and discretion by way of a New Deal

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<sup>19</sup> See, Anthony Giddens and Patrick Diamond, *The New Egalitarianism* (Polity, 2005), p 105; See also Ruth Lister, *Understanding Theories and Concepts in Social Policy* (Policy Press, 2010), p 240-241

<sup>20</sup> Worklessness is defined as detachment from the formal labour market in particular areas, and among particular groups. Workless individuals include individuals who are unemployed and claiming unemployment benefits, individuals who are economically inactive and eligible for inactive benefits (who may or may not be claiming them), and individuals who are working exclusively in the informal economy (who may or may not be also claiming benefits). See, Helen Ritchie, Jo Casebourne and Jo Rick, 'Understanding Workless People and Communities: A Literature Review' (DWP, Research Report 255, 2005), p 2

<sup>21</sup> Lindsay, n. 16 above, p 45

<sup>22</sup> House of Commons Work and Pensions Committee, *The Government's Employment Strategy: Third Report of the Session 2006-07* (HMSO, 2007), p 19

<sup>23</sup> Ibid

<sup>24</sup> See, The Secretary of State for Work and Pensions, Andrew Smith, *Building on New Deal: Local Solutions Meeting Individual Needs* (DWP, 2005), p 15

<sup>25</sup> Which would continue to include mandatory participation for 18-24 year olds unemployed at 6 months and the 25-49 age group at 18 months, but also offering services on a voluntary

menu of 'mix and match' options in place of the rigid training options offered since the programme's inception in 1998; and finally accountability, targets and contestability through the provision of Personal Adviser access to Discretionary Funds that could be used to provide 'early help' to any job seekers judged to be in need of additional help.<sup>26</sup> This latter principle also planned for increased competition at local and regional level via the delegation of power to district managers who would be able to choose to outsource services normally provided by Jobcentre Plus.<sup>27</sup> However, by June 2006 (following the publication of the New Deal Green Paper in January 2006) the BoND pilots were suspended due to financial constraints and in favour of increased compulsion. However DWP did maintain a commitment to the BoND principle that job seekers should not be 'slotted into existing...standard provision if it is not appropriate'.<sup>28</sup>

There was a roll out of the flexible menu of New Deal options which embraced an individualised approach. Professor Paul Gregg strongly advocated this model so that 'the support package to help the individual back to work is tailored to fit that individual's needs and is not driven by the rules of the system'.<sup>29</sup> However, Gregg failed to acknowledge that rules are designed to specify the basis of entitlement and subsequently form the legal framework which must ensure consistency and equal treatment between claimants in like circumstances.<sup>30</sup> Thus, in regards to the institution of a more flexible approach it is crucial to strike a balance to ensure that every claimant can access their social citizenship rights equally.

The House of Commons Committee for Work and Pensions gave its support to the flexible approach in relation to the provision of employment support, stating: 'more flexibility is needed to allow the New Deals to respond effectively to individual needs

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basis to those aged 25 and over at 6 months, and to particularly vulnerable groups at any time during their unemployment. The increasing use of mandatory WFI's for lone-parents (upon claiming and at 3 and 6 months, annually for those with children under 14, and every 3 months for those with children over 14) and those claiming sickness related benefits and the expansion of the 'Pathways to Work' programme which provided for mandatory WFI's and specialist provision from the New Deal suite of services and the newly-developed work focused rehabilitative health services

<sup>26</sup> The use and scale of the Adviser Discretion Fund was slowly reduced. Work and Pensions Committee, *Second Report of Session 2005-6, The Efficiency Savings Programme in Jobcentre Plus*, (HC 834, HMSO, 2006), pp 3-4

<sup>27</sup> The government acknowledged that flexible funding would be subject to tight controls

<sup>28</sup> Secretary for Work and Pensions, Alan Johnson, *Opportunity for All: Sixth Annual Report* (Cm 6239, 2004), p 20

<sup>29</sup> House of Commons Work and Pensions Committee, n. 22 above, p 19

<sup>30</sup> Neville Harris, *Law in a Complex State: Complexity in the Law and Structure of the Welfare State* (Hart Publishing, 2013), p 78

and circumstances'.<sup>31</sup> It is arguable that the call for more flexibility mirrored the growing requirement for different groups of claimants to meet varying degrees of compulsion, and indeed the growing consensus that social citizenship could only be granted on the condition that the individual attained the politically prescribed level of work focused activity deemed appropriate for their assumed ability or indeed, for the incapacitated and disabled, their assessed ability. Furthermore, with the focus shifting to flexibility in the New Deal, it became clear that the programme which set out in 1998 with a clear 'real work' focus through the provision of a period of employment at a reasonable 'rate for the job' had been denigrated to the provision of lower value, time-limited training programmes. It was asserted that further flexibility undermined the quality of the training experience for many, and it acted as a further subversion of the employment option.<sup>32</sup> Ultimately, the New Deal programmes were renovated to embed further levels of conditionality. Nonetheless, in keeping with its third way principles, and to off-set the significant increase in conditionality the government continued to perpetuate the idea that training and employment offered the most effective way of building an individual's capacity to reach their full potential in relation to finding employment.

For recipients of Incapacity Benefit, the government ramped up its commitment to finding routes for claimants to get back to work. The 'Pathways to Work' programme was tested in seven new deal delivery areas under the direction of the Incapacity Benefit Work-focused Interview Regulations 2003. The scheme was described as a 'new intervention regime to activate peoples' aspirations to return to work' and was directed at claimants of IB or IS on the grounds of disability.<sup>33</sup> The regulations contained changes designed to increase the rate at which IB claimants returned to work and represented a progression of the activation provisions contained in the Welfare Reform and Pensions Act 1999. The regulations made provision for a WFI to take place in the eighth week of the claim, rather than at the beginning to allow the claimant's health a stabilisation period. Following this the claimant was subject to five mandatory WFI's.<sup>34</sup> There was provision for a waiver of the requirement to attend a WFI, where a Personal Adviser determined that the interview would not be of

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<sup>31</sup> House of Commons Work and Pensions Committee, n. 22 above, p 8

<sup>32</sup> Lindsay, n. 16 above, p 47

<sup>33</sup> The Secretary of State for Work and Pensions, Andrew Smith, n. 24 above, p 16

<sup>34</sup> Two groups of claimants were exempt from the regime – those exempt from the PCA (4(1)), and those assessed as likely to be on IB for a short period of time (6). WFI's were carried out by IB Personal Advisers (IBPAs). Those deemed exempt from undertaking mandatory WFI's could volunteer to participate in Pathway support. See, Helen Bewley, Richard Dorsett and Getinet Haile, 'The Impact of Pathways to Work' (DWP, Research Report No. 425, 2007), p 8



assistance to a claimant or appropriate in the claimant's circumstances.<sup>35</sup> Provision was made for the reduction of benefit (by 20 per cent of the IS personal allowance rate for a person aged 25 or over) for those failing, without good cause, to participate in a WFI, and it incorporated a right of appeal over 'good cause' and supersession decisions. The pilot programme introduced a 'Return to Work Credit' (RTWC) which was payable for up to 52 weeks at the rate of £40 per week provided employment was a minimum of 16 hours per week, and earnings were below £15,000 per year.<sup>36</sup>

As Harris noted, it was clear that DWP sought to reinforce the message that claimants should not assume long term entitlement to IB based on the Personal Capability Assessment (PCA).<sup>37</sup> The changes were underpinned by the idea that early intervention would reduce the incidence of 'prolonged benefit dependency'.<sup>38</sup> Personal Advisers were tasked with emphasising that satisfying the PCA did not necessarily mean that the claimant was not incapable of *any* work.<sup>39</sup> The SSAC, while commending certain aspects of the Pathway approach, expressed concerns about some of the most disadvantaged and vulnerable people in society being compelled to participate in the compulsory procedures outlined.<sup>40</sup> The Committee suggested amending the requirement that a claimant answer questions based on his or her opinion on the extent to which his or her medical condition restricted their ability to gain employment, on the basis that some claimants may fear that their responses could be used as evidence in assessing their entitlement to benefit. It also raised a concern that it created a new level of conditionality for claimants who would be required to provide further evidence in order to satisfy the conditions attached to their claim. The government refused to amend this provision, and it remained steadfast on its tight time limit for not attending a WFI (set at five days, but at one month where new facts emerged for showing good cause). However, it did agree to amend the non-exhaustive list of features (reg. 11) that had to be taken into account

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<sup>35</sup> Social Security (Incapacity Benefit Work-focused Interviews) Regulations 2003 (Cm 2439, 2003)

<sup>36</sup> At the point the New Deal 50-plus employment credit had been incorporated into Working Tax Credit (WTC), and so persons in the pilot areas were eligible to receive it and RTWC. RTWC was disregarded for the purposes of Child Tax Credit, income support, housing benefit and council tax benefit (including, in each case, a partner's benefit). See, Neville Harris, 'From Incapacity to Work: Pilot Reforms' (2003) *Journal of Social Security Law* 10 (4), pp 158-159

<sup>37</sup> *Ibid*, p 159

<sup>38</sup> Bewley, Dorsett and Haile, n. 34 above, p 7

<sup>39</sup> Working Age Benefits Division Strategy Group, *Explanatory Memorandum to the Social Security Advisory Committee* (DWP, 2003), para 28 (Emphasis added)

<sup>40</sup> Social Security Advisory Committee, *Report on the [Draft] Social Security (Incapacity Benefit Work-focused Interviews) Regulations 2003* (Cm 5969, 2003) (incorporating the Government's reply)

in determining whether a person had good cause for refusing/failing to take part in an interview. The government subsequently included the situation where a person's failure was due to a relapsed mental health condition, based on the SSAC's concern that the regulations should integrate safeguards for those claimants whose condition had a fluctuating effect on their capabilities to participate in a WFI. Crucially, the SSAC emphasised the importance of the subjection of the pilots to a rigorous evaluation process that incorporated the claimant's views as to whether they felt they were treated fairly and sympathetically.<sup>41</sup> The government did commission a number of evaluations on the results suggested that Pathways had a positive impact on employment, producing an increase in exits from Incapacity Benefit of around 9%.<sup>42</sup> By December 2006, the Pathways programme had been expanded to cover 40% of the country and was introduced nationwide under the Welfare Reform Act 2007 as part of the new benefit Employment and Support Allowance (ESA).<sup>43</sup>

The Minister's foreword in the 2006 Green Paper 'A new deal for welfare: Empowering people to work' captures the double-pronged approach to New Labour's version of the 21<sup>st</sup> Century welfare state:

'It (the welfare state) must focus its energy on tackling poverty and social exclusion. Society has a responsibility to support those unable to support themselves. It should help support people in acquiring the new skills they need for the jobs of the future. It must help UK companies succeed in the new global economy'.<sup>44</sup>

The green paper, which Hutton positioned as the beginning of discussions on the future of welfare reform, emphasised the importance of training individuals to acquire the skills required for a globalised world. In this way, the government

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<sup>41</sup> Ibid. See also, Neville Harris, 'Welfare to Work for Incapacity Benefit' (2004) *Journal of Social Security Law* 11 (1), pp 6-7

<sup>42</sup> See particularly, Stuart Adam, Carl Emmerson, Christine Frayne and Alissa Goodman, *Early Quantitative Evidence on the Impact of the Pathways to Work Pilots* (DWP, Research Report No. 354, 2006) and National Centre for Social Research, *Incapacity Benefit Reforms – Early findings from Qualitative Research* (DWP, Report No. W202, 2004). The former report effectively affirmed the results of the latter report

<sup>43</sup> The Work and Pensions Committee published its report on Incapacity Benefits and Pathways to Work on 6 May 2006. The inquiry begun in July 2005 in anticipation of the Green Paper 'to examine the Government's strategy to help more disabled people move into employment through a reformed system of incapacity benefits and the lessons learned from the Pathways to Work pilot schemes'. See, Work and Pensions Committee, *Incapacity Benefits and Pathways to Work* (HC 616, 2005-06, 2006)

<sup>44</sup> Department for Work and Pensions, *A new deal for welfare: Empowering people to work* (Cm 6730, 2006)

affirmed that its first principle was ‘ensuring citizens have the right to enter the world of work’.<sup>45</sup> This speaks to New Labour’s elevated emphasis on the ‘supply side’ of employment – sustainable and rewarding employment as a result of the efforts of individuals to acquire skills rather than the product of a labour market where opportunities are consistently available.<sup>46</sup> It is also evidence of the continued shift away from Marshall’s contention that access to social rights – the right to welfare – is an integral component in the social integration of individuals. Rather, the focus was on the power of work as providing a route to social inclusion, which pointedly sums up the purpose of New Labour’s delegated reforms detailed above, and the principles underpinning the Welfare Reform Act 2007.

### ***The Welfare Reform Act 2007***

The Green Paper ‘A new deal for welfare: Empowering people to work’ detailed the proposals for a new benefit - Employment and Support Allowance (ESA) which would replace Incapacity Benefit and Income Support, paid on the grounds of incapacity for new claimants. The introduction of the benefit was a response to the growing number of IB claimants. In July 2006, the IB claimant count was 2.68 million, around half of whom were over 50 – one million more than were claiming benefit two decades before.<sup>47</sup> As indicated above, the Act effectively legislated for the wide-scale introduction of a version of the Pathways to Work Programme. Claimants would receive their benefit on condition that they undertook a series of WFIs, agreed an action plan, and agreed to participate in some form of work-related activity. The Green Paper also outlined the government’s plan to reduce the new benefit in a series of slices, to the level of JSA for those claimants who failed to fulfil agreed responsibilities. For those with the most severe health conditions or disabilities, it was proposed that the benefit be provided without conditionality, and the level would be increased above the current provision.<sup>48</sup> It is these measures, contained in Part 1 of the Act that this section will focus on. The analysis will point to the growing political consensus that by engaging in paid employment, disadvantaged sections of the

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<sup>45</sup> Ibid, p 2

<sup>46</sup> Lindsay, n. 16 above, p 47

<sup>47</sup> (The Times, London, 5 July 2006). This figure was even higher in other parts of the UK, in particular parts of Scotland, the north of England, Wales, and Northern Ireland. In north and west Belfast, for example, it was estimated that over one in six adults of working age were in receipt of IB, while a staggering 27% of the Northern Ireland working age population was economically inactive at the end of 2007, as compared to an average of 20% for England and Scotland, *The Irish News* (Belfast, 3 December 2007). As cited by Philip Larkin, ‘Incapacity, the Labour Market and Social Security: Coercion into ‘Positive’ Citizenship’ (2011) *Modern Language Review* 74 (3), pp 385-409, p 392

<sup>48</sup> Department for Work and Pensions, n. 44 above, p 4

community could be empowered to achieve a level of 'active citizenship' equal to that of their more affluent counterparts.<sup>49</sup> It is also noted, that following in the vein of the Welfare Reform and Pensions Act 1999, the Welfare Reform Act allowed considerable scope for the Secretary of State to initiate subsequent regulations in the form of delegated legislation – for example, it allowed for the flexible adjustments of the level of work-related activity required as a condition of entitlement, the details of which will be discussed below.

In its response to the Green Paper, the Joseph Rowntree Foundation (JRF) emphasised the imminent risk of focusing excessively on moving people into work as an anti-poverty measure, rather than focusing on the incomes of those that remain in low-paid and temporary part-time jobs. JRF also highlighted concern that benefit regimes were progressively accorded an insufficient understanding of the complex nature of employability which had the consequence of instilling a narrow approach on those with disablements and mental health issues.<sup>50</sup> Other responses to the Green Paper, and to the Work and Pensions Committee inquiries, expressed particular concerns around the increased conditionality and the imposition of benefit sanctions on recipients of ESA.<sup>51</sup> The then director general of Age Concern (now Age UK) protested that the package of measures risked failing the over 50's. He pointed to evidence that showed 'that existing pilots are not working for people over 50' and that 'unless the support on offer actually works, it is wrong to require people to participate or pay them lower in the expectation that they will find jobs'.<sup>52</sup> In addition, Sane, a mental health charity, were concerned that tougher techniques could be counterproductive and that 'a sense of threat could trigger individuals living on a

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<sup>49</sup> Larkin, n. 47 above, p 394

<sup>50</sup> Joseph Rowntree Foundation, 'Response to the Government Consultation on the Green Paper: A New Deal for Welfare: Empowering People to Work' (JRF, April 2006), p 3

<sup>51</sup> Steven Kennedy and Wendy Wilson, 'The Welfare Reform Bill' (Bill 208 of 2005-06), (House of Commons Library Research Paper 06/39, 19 July, 2006). See for example, Social Care Institute for Excellence (SCIE) Consultation Response, 'A New Deal for Welfare: Empowering People to Work' (21 April 2006) 'SCIE is concerned about the apparently punitive element of the proposals, especially the reduction of benefit where an individual does not comply with their action plan' < <http://www.scie.org.uk/publications/consultation/welfarereform.pdf?res=true> > (accessed 2 June 2017), p 1; Department for Work and Pensions, The Government's Green Paper, 'A New Deal for Welfare: Empowering People to Work' and the Work and Pensions Select Committee report on 'Incapacity Benefits and Pathways to Work' received responses from over 600 organisations (6 May 2016) < [http://webarchive.nationalarchives.gov.uk/+http://www.dwp.gov.uk/welfarereform/legislation\\_green\\_paper.asp](http://webarchive.nationalarchives.gov.uk/+http://www.dwp.gov.uk/welfarereform/legislation_green_paper.asp) > (accessed 2 June 2017)

<sup>52</sup> David Hencke, 'Welfare Bill Plans to take 1 million Off Incapacity Benefit' (The Guardian, London, 5 July 2006)

fragile balance into relapse'.<sup>53</sup> There was also considerable opposition to the proposed two tier benefit structure of individuals who were deemed incapable of no work and those who were deemed to be capable of 'work-related activity', and doubts were expressed about whether a test could fairly determine who should be compelled to carry out work-related activity and who is deemed unfit to do so. For example, JRF asserted that the 'distinction between the work-ready and those eligible for support seems both an unhelpful and potentially unrealistic dichotomy' as those who are deemed 'work ready' are stigmatised and penalised, while those with severe impairments who may be - or may become capable of work are dismissed.<sup>54</sup> However, the government insisted that it needed to make a distinction between people who could engage in activity and those who could not.<sup>55</sup> The Green Paper also included proposals for the greater involvement of the voluntary sector as well as private providers in the roll out of Pathways to Work, and the Bill made provision for allowing contractors to deliver parts of the ESA regime, including the ability to make decisions regarding sanctions. This latter measure elicited concern about the involvement of external contractors in the delivery of the government's plans, particularly in the context of the proposal to use outcome-based payments to 'incentivise' providers.<sup>56</sup> This particular measure demonstrated the government's continued commitment to providing a diverse market place for the provision of welfare, however as discussed in the last chapter, this developing approach had significant implications for claimants. The expansion of a mixed-economy showed particular acceleration between 2007 – 2010, and with this growth emerged a growing concern that those individuals with the most complex employment needs were not sufficiently provided for.<sup>57</sup>

Despite the visible presence of legitimate concerns from charitable organisations and academics, there appeared to be a considerable measure of political consensus in

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<sup>53</sup> BBC News, 'Ministers Unveil Overhaul', 4 July 2006

<sup>54</sup> Joseph Rowntree Foundation, n. 50 above, p 20

<sup>55</sup> Department for Work and Pensions, *Report on Incapacity Benefits and Pathways to Work: Reply by the Government* (Cm 6868, 2006); Department for Work and Pensions, *A new deal for welfare: Empowering People to Work: Consultation report* (Cm 6859, 2007)

<sup>56</sup> Kennedy and Wilson, n. 51 above, p 4

<sup>57</sup> Christopher Damn described the period of 2007-2010 as 'The third wave – a commissioning Tsunami'. See, Christopher Damn, *The Third Sector Delivering Employment Services: an Evidence Review* (Third Sector Research Centre, January 2012), p 7

support of the proposals.<sup>58</sup> The Act passed through parliament with relatively little fuss.<sup>59</sup> Larkin offers up a number of useful reasons for the limited noise.<sup>60</sup> Most likely is that the public were accustomed to New Labour introducing measures which strode away from legitimising the financial desirability of national-insurance based benefits. It is also possible that claimants and onlookers alike, were more conscious and accepting of the notion that the social security system is used to induce a politically prescribed pattern of citizen behaviour. One cannot ignore the fact that the British public were increasingly subscribing to the reliable capacity of legislative measures to ensure those 'who are really capable of work, whether they are in receipt of IB or not, should be compelled to do so'.<sup>61</sup> There was also the matter of the protracted lead-up period preceding the legislation which provided the government with ample time to influence the public, and indeed its own back-benches, in relation to its wish to push employment to 80% and the need to reduce IB claimants by 1 million. Major changes to IB were announced in DWP's five year strategy published in February 2005, and following the general election the introduction of a Welfare Reform Bill was formally announced in the Queens Speech. The Green Paper was expected swiftly following the announcement, however a considerable settling in period was facilitated during which the government weighed up its options. It is purported that John Hutton wrote to 100 MPs with the highest IB caseloads in their constituencies (almost all of them Labour), putting the case for reform. By the time the Green Paper was published on 24 January 2006, the ideas were relatively familiar. Following the consultation period, the government responded to controversies which had the potential to cause revolt – for example, DWP scrapped its proposal to introduce lower rates for younger ESA claimants.<sup>62</sup>

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<sup>58</sup> See for example, Matthew Tempest, 'Muted Support for Welfare Reform', (The Guardian, London, 27 January 2006) "...there was a surprisingly muted reaction from Labour backbenchers in the Commons"

<sup>59</sup> In 1999, 67 Labour MP's voted against cuts to Incapacity Benefit – see above for more detailed commentary

<sup>60</sup> Larkin, n. 47 above, p 395

<sup>61</sup> Ibid. In recent years the media has played a key role in perpetuating stigma of benefit claimants. See, Ben Baumberg, Kate Bell and Declan Gaffney, with Rachel Deacon, Clancy Hood and Daniel Sage, 'Benefits Stigma in Britain' (Elizabeth Finn Care commissioned research) (2012) < <https://www.turn2us-2938.cdn.hybridcloudspan.com/T2UWebsite/media/Documents/Benefits-Stigma-in-Britain.pdf> > (accessed 3 June 2017); See also, Peter Dorey, 'A Poverty of Imagination: Blaming the Poor for Inequality' (2010) *The Political Quarterly* 81 (3), pp 333-343; and Daniel Sage, 'Fair Conditions and Fair Consequences? Exploring New Labour, Welfare Contractualism and Social Attitudes' (2012) *Social Policy and Society* 11 (3), pp 359-373

<sup>62</sup> See, Alex Brazier, Susanna Kalitowski and Gemma Rosenblatt, 'Law in the Making: A Discussion Paper' (Hansard Society, 2007) <

The course of reform that was not changed, however, was how the detail would be provided and implemented. This mirrored the increasingly consistent trajectory of contemporary social security legislation which set out the overall legislative framework on the face of the bill, leaving scope for the Secretary of State to prescribe matters of detail by way of regulation. Thus, in effect, MPs in the Commons subscribed to the broad principles outlined by the legislation without being able to anticipate accurately what delegated measures the Secretary of State might enact. Indeed, in the course of the Welfare Reform Bill debate in the Commons, Danny Alexander said ‘Despite the long wait, the Bill gives every impression of being rushed in some respects. Huge chunks of important policy detail are relegated to secondary legislation’.<sup>63</sup> This thesis has found that the volume of delegated legislation in relation to social security has steadily increased since the late 1980’s. New Labour appears to have been particularly adept at using Statutory Instruments which lent themselves to the introduction of numerous pilot employment schemes.<sup>64</sup> Crucially, and as outlined by Page ‘it is undoubtedly true that the great mass of Statutory Instruments remain obscure and escape major political controversy’, this appears to be the case even where the provisions introduce measures which directly affect the conditions attached to entitlement.<sup>65</sup>

The Bill’s easy passage lay in great contrast to the legislative road travelled by the Welfare Reform and Pensions Act 1999. Frank Field, who was perhaps the government’s most critical commentator at that time had, by 2006, assumed an apparent level apathy towards the proposals and did not feature prominently in the Commons debates on the Bill. Nonetheless, he was noted in the press as expressing his disappointment at the government’s ‘lack of courage’ as he called for a Clinton style time-limit on the number of year’s people can claim welfare benefits.<sup>66</sup> In

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[https://assets.contentful.com/u1rlvvbs33ri/5FMjYXiGjeGml2088sguqW/4e7135647f482fb658176eb95b72e529/Publication\\_Law-in-the-Making-A-discussion-paper-2007.pdf](https://assets.contentful.com/u1rlvvbs33ri/5FMjYXiGjeGml2088sguqW/4e7135647f482fb658176eb95b72e529/Publication_Law-in-the-Making-A-discussion-paper-2007.pdf) > (accessed 17 June 2017), and Depart for Work and Pensions, n. 55 above, (Cm 6868, 2006), para 34. It was also decided that existing IB claimants would be moved to ESA at protected benefit rates. See, Cm 6859, para 20-21

<sup>63</sup> HC Deb, Vol. 449, col 649, 24 July 2006

<sup>64</sup> A key reference point is, Cabinet Office, *Trying it out: The Role of ‘Pilots’ in policy-making* (Government Chief Social Researcher’s Office, 2003)

<sup>65</sup> Edward Page, *Governing by Numbers: Delegated Legislation and Everyday Policymaking* (Hart Publishing, 2001), p 4

<sup>66</sup> See Field’s comments to Julia Hartley Brewer, ‘Field’s Welfare Plea’ (Sunday Express, London, 27 August 2006). The Personal Responsibility and Work Opportunity Reconciliation Act 1996 which was signed into statute by then president Bill Clinton introduced a five-year (maximum) lifetime limit on the number of years claimants can claim from the state. States has the power to adjust the limits, and may did, to as little as two years. See also, Frank Field MP Press Release, ‘Balanced Migration’ (10 November 2008) <

general, there was a high level of political consensus around the direction of the welfare reforms reflected throughout the parliamentary process. The Conservatives and Liberal Democrats (who would soon partner in government) broadly supported the principles underpinning the reform.<sup>67</sup> Such consensus was later quite strikingly indicated by Freud's easy defection from Labour to the Conservative opposition where his policies found similar if not a higher level of support.

The main areas of political dispute related to questions around how the various schemes contained within the clauses would be organised. There was an important concern raised in regard to the scheme's treatment of IB claimants when they entered employment. For example, Labour's Geraldine Smith asserted that the public sector would be required to play a role in helping certain categories of claimants into work, but also noted the challenges for private companies with small workforces around employing someone who had been receiving IB, who may require time off due to ongoing health difficulties.<sup>68</sup> This comment goes to the heart of an issue that was not widely covered throughout the scrutiny period – the extent that the legislation could accommodate IB claimants who had made the transition back to work. Secondly, it highlighted the government's reliance on the possibility that the private sector could be flexible and accommodating for people with or recovering from incapacity. Larkin cites the inability of the government to influence private sector practice and the subsequent ignorance of legislators in identifying ways to guarantee private sector flexibility.<sup>69</sup> Indeed, Hutton acknowledged it was a 'genuine problem' that could not be remedied by way of a 'quick legislative fix' and admitted that the welfare reform legislation contained no provision to tackle the problem directly.<sup>70</sup> This brings to the fore a major sticking point in the government's rhetoric around the importance of getting those with a disability back into the work place. The lack of any genuine effort

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<http://www.frankfield.co.uk/latest-news/news.aspx?p=102212> > (accessed 4 June 2017). As Co-Chair of 'Cross Party Group on Balanced Migration', Field sought a tougher immigration process

<sup>67</sup> Philip Hammond MP (Conservative, Runnymede and Weybridge) said: "As the Secretary of State knows, we are generally supportive of the overall structure that was put forward in the Green Paper proposals and of which the Bill is an integral part". HC Deb, 24 July 2006, col 633. See also Danny Alexander (Liberal Democrat, Inverness, Nairn, Badenoch and Strathspey): "The objective of the Bill is to help more people off incapacity benefit and into work. We support that objective. I hope that the Bill will receive its Second Reading tonight, so that it can proceed to Committee and the issues and flaws that I have identified can be addressed". HC Deb, 24 July 2006, col 657. See also, BBC News, 'Radical Welfare Reform Detailed' (London, 24 July 2006) < [http://news.bbc.co.uk/1/hi/uk\\_politics/5211656.stm](http://news.bbc.co.uk/1/hi/uk_politics/5211656.stm) > (accessed 28 May 2017)

<sup>68</sup> HC Deb, Vol. 449, col 619, 24 July 2006, as cited by Larkin, n 47 above, p 397

<sup>69</sup> Larkin, n. 47 above, p 397

<sup>70</sup> HC Deb, Vol. 449, col 620, 24 July 2006



to achieve mutual co-operation between employers, employees and the government is instructive. Such co-operation was more visible in the earliest New Deal programmes which sought to actively incentivise and recruit employers to extend employment opportunities to participants. While not specifically articulated, it is arguable that the comparative lack of focus on the provision of employment from the private sector was due to the much increased emphasis on the supply-side of employment – where the claimant was tasked with bearing more responsibility for being ‘job ready’ and subsequently seeking out appropriate employment. The legislation here was not led by principles of social citizenship but rather reflected the changing interpretation of citizenship rights, which adopts a managerial process that obscures the responsibility of the state to make citizens secure, and obliges the citizen to activate their own social citizenship. It is certainly possible to see this as the inevitable consequence of the government’s strategic approach to welfare reform, but it also a product of reactive policies that see the need for cost-effectiveness as a priority to reinforce the public message that individuals must assume more of the risks of unemployment in order to incentivise their ‘return’ to independence from the state.

### ***The Freud Review***

Rather than pausing to reflect on whether the reforms were succeeding even by their own measure, the pace of welfare reform continued at some speed. The committee scrutiny of The Welfare Bill concluded on the 30<sup>th</sup> of November 2006. In December 2006, John Hutton, still the Secretary of State for Work and Pensions made a speech laying out the administration’s plans for more welfare reform<sup>71</sup> As well as a new leader and Prime Minister, Gordon Brown, the party anticipated ‘big economic and social changes’. Hutton re-iterated the message communicated in his Green Paper – the requirement that the individual be ‘empowered’ to work. Appropriating language more befitting of ‘old Labour’ he claimed that the welfare approach of the previous ten years represented a modern reflection of the ‘original welfare state’, in that it sought to organise a social security system that does not ‘stifle incentive, opportunity, [or] responsibility’.<sup>72</sup> Perhaps his reference to old collectivist values was an attempt to cloak a growing and over-arching political contention that the onus of

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<sup>71</sup> Secretary of State for Work and Pensions, John Hutton, ‘Welfare Reform: 10 Years On, 10 Years Ahead’, speech at the Institute for Public Policy Research event, ‘Welfare Reform: 10 Years On, 10 Years Ahead’, (18 December, 2006)

<sup>72</sup> Quotation from William Beveridge’s 1944 White paper, *Social Insurance Part I* (White Paper, Cm 6550, 1944)

worklessness must be progressively attributed to the individual – a philosophy which is more commonly associated with neo-liberal conservatism. This advancing position is particularly clear in Hutton’s reference to the ‘can work, won’t work culture’, a phrase which pays heed to the Conservative’s claim of a ‘dependency culture’. Both concepts reinforce stereotypes of the wilful rejection of paid work, despite having the capacity for it. Workless people became equated with those who refused to work, ignoring any evidence that there may be few jobs to apply for, the complex barriers for work that individuals may face, including various and multiple forms of discrimination, and the value of unpaid care work.<sup>73</sup>

Providing a clear insight into the nature of developing policy on the horizon, Hutton said that welfare reform must encompass ‘more active steps to get back into the labour market. More involvement in programmes that could increase the prospect of getting a job. And for those who won’t do so, then there should be consequences including less benefit or no benefit at all’.<sup>74</sup> Grover characterises this challenge as the ‘sustainability of employment’. Hutton’s concern in this regard was with what economists describe as ‘churning’ between unemployment and short of periods of paid employment.<sup>75</sup> In order to address such challenges, Hutton claimed that DWP needed to launch a ‘wide-ranging review of [its] welfare to work strategy’ that would interrogate three main issues: the design of welfare to work policies, possibilities for local devolution of welfare to provide ‘employment services to some of our most disadvantaged communities’ and the delivery of welfare, in particular developing more effective markets in the delivery of employment services.<sup>76</sup>

The person who would lead and report on this review was David Freud – an ex-journalist at the financial times and a city banker in the 1980’s and 1990’s. He was approached by the then Prime Minister, Tony Blair and thereafter apparently produced a first draft of his welfare to work report after just three weeks, with the final report delivered 10 weeks later in March 2007.<sup>77</sup> It was reported in the media

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<sup>73</sup> Chris Grover, ‘The Freud Report on the Future of Welfare to Work’ (2007) *Critical Social Policy* 27 (4), pp 534–545

<sup>74</sup> Hutton, above n. 71, pp 3-6

<sup>75</sup> *Ibid*; See also, Grover, above n. 73, p 535-536

<sup>76</sup> *Ibid*

<sup>77</sup> Lord Skelmersdale (Conservative) said of the quick turnaround: ‘I rather wonder whether a report commissioned in December and produced at the beginning of March, effectively 10 weeks’ work at the maximum, really represents strategic thinking when compared with, say, the report of the noble Lord, Lord Turner, on pensions. That took from December 2002 to April 2004, and that was only the first report. The second one was not published until the following year’. *HL Deb*, Vol 690 Col. 44, 5 March 2007

that the report entitled 'Reducing dependency, increasing opportunity: options for the future of welfare to work' launched a game of 'political football' between the Prime Minister and Gordon Brown, the then Chancellor and soon-to-be leader. Reportedly, Tony Blair wanted Freud's contribution to form part of his legacy, whereas Brown did not want it as an inheritance and did all he could to emasculate its proposals.<sup>78</sup> This account conflicts with the government's immediate public support for Freud's proposals. The Chancellor was subsequently quoted in a national newspaper exclaiming: 'This starts a new phase of welfare reform which I will champion.'<sup>79</sup>

The terms of reference for the review were:

'To review progress on the Welfare to Work programme since 1997, taking account of the evidence from the UK and international experience, and make policy recommendations on how the Government can build on its success in using policies such as the New Deal to continue to reduce inactivity and in-work poverty, and meet the Government's 80% employment aspiration'.<sup>80</sup>

The terms of reference for the review were relatively narrow. The emphasis was solely on the out-of-work aspects of welfare to work policies. The Freud report overwhelmingly focused on hardening the stick with minimal attention directed towards the 'carrot' in the form of the 'making work pay' strategy which was underpinned by the National Minimum Wage and tax credits. Grover argues that this is particularly odd in the context of New Labour's assertion that the 'carrot' of tax credits had the required propensity to alleviate in-work poverty. However, rather than giving due attention to in-work poverty, the report addressed the challenges impeding the government from their attempt to satisfy an 80 per cent employment

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<sup>78</sup> Rachel Sylvester and Alice Thomson, 'Welfare is a Mess, says adviser David Freud' (The Telegraph, London, 2 February 2008) < <http://www.telegraph.co.uk/news/politics/1577313/Welfare-is-a-mess-says-adviser-David-Freud.html> > (accessed 3 June 2017); See also, Peter Osborne, 'Lord Freud: the Man who Saved the Welfare System' (The Spectator, London, 28 March 2015) < <https://www.spectator.co.uk/2015/03/lord-freud-the-man-who-saved-the-welfare-system> > (accessed 4 June 2017)

<sup>79</sup> Will Woodward, 'Blueprint for Big Welfare Shakeup gets Backing of Blair and Brown' (The Guardian, London, 6 March 2007)

<sup>80</sup> David Freud, 'Reducing Dependency, Increasing Opportunity: Options for the Future of Welfare to Work', An independent report to the Department for Work and Pensions (DWP, 2007), p 1

rate, by focusing on how out-of-work benefits might be reformed to tackle worklessness among what Freud termed the 'hard to help'.<sup>81</sup>

The report recommended that DWP develop a funding approach, which would incorporate an even greater reliance on the private and voluntary sector, surpassing its plans that were currently contained in the Welfare Reform Bill. Private contractors would be heavily incentivised to improve their performance and focus on getting the long-term unemployed to work. It was concluded that Jobcentre Plus should take responsibility for those claimants 'closer to the Labour market'. Crucially, Freud recommended that 'the rights and responsibilities of all benefit recipients should be brought more closely into line', by maintaining the levels of conditionality for those on JSA, and by 'increasing and aligning the conditionality that is expected of people who are currently on 'inactive benefits'.<sup>82</sup> Achieving this aim would involve the abolition of the New Deal for young People. Sick and disabled claimants would be required to report to 'Jobcentre Plus' for an initial 'assessment phase' of the new benefit, ESA, followed by interventions from the private sector. Lone mothers would be required to claim JSA when their youngest child reached age 12 (rather than 16), and they would be required to participate in regular WFIs.<sup>83</sup> The report also proposed a single system of welfare benefits for those of working age who are capable of work.<sup>84</sup>

Unfortunately, a fullsome analysis of the Freud Report is beyond the scope of this chapter, as it seeks to focus on the legislative provision. However, it is helpful to mention that aside from a brief reference to the Organization for Economic Cooperation and Development's (OECD's) framework for understanding labour market performance (which includes locating the 'appropriate macro-economic policy'), the report focused on the issue of unemployment as being a consequence of cultural, spatial or personal failings – which again emphasises New Labour's commitment to supply-side economics in the labour market and pointed to the absence of evidence based policy making.<sup>85</sup> Freud largely based his recommendations on the premise that by adjusting the levels of conditionality in tandem with measures

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<sup>81</sup> Grover, n. 73 above, pp 538-539. The 'hard to help' workless include disabled people, lone parents (90% of which are female), black and minority ethnic people, and those who are described as having few skills

<sup>82</sup> Freud, n. 80 above, p 1 and p 4

<sup>83</sup> From 30 April 2007, lone parents in receipt of Income Support whose youngest child was 5 or over was required to take part in a WFI every six months. From 28 April 2008, lone parents with children under 5 were subject to a six monthly WFI (Social Security (Work-Focused Interviews for Lone Parents) Amendment Regulations 2007 (SI 1034/2007))

<sup>84</sup> Freud, n. 80 above, pp 99-107

<sup>85</sup> Grover, n. 73 above, p 540

aimed at removing obvious barriers to work (namely, work opportunities that fit around family commitments), should theoretically as well as practically ensure individuals have no reason not to enter paid employment. This approach elicited a considerable volume of concern from the voluntary sector and advocate groups, for example Gingerbread, who asserted:

‘A punitive approach would only impact badly on youngsters in one parent families - many of whom have already lost one parent - while alienating work-ready lone parents from the voluntary New Deal scheme which is doubling parents' chances of finding work. It is extremely worrying that the Government is imposing new requirements on parents without detailing any additional form of support’.<sup>86</sup>

Although the government endorsed Freud's assumptions, it was too late for his recommendations to bear any influence on the impending Welfare Reform Act 2007 which gained royal assent on 3 May 2007. However, their absence in statutory terms on this occasion did not indicate the departure of Freud's ideas from the reform agenda. He was asked by the subsequent Secretary of State for Work and Pensions, James Purnell MP, to advise on what would become the Welfare Reform Act 2009. However, in what was construed as a blow to Labour, Freud defected to the Conservatives a short time later to act as Shadow Welfare Minister, serving under the Shadow Secretary for Work and Pensions, Theresa May MP, who supported Freud's position on welfare privatisation.<sup>87</sup>

### ***The legislative provisions in the Welfare Reform Act 2007***

Part 1 of the WRA 2007 provided for Employment and Support Allowance (ESA), which replaced both IB and IS paid on the basis of incapacity, for new claimants (from 27 October 2008).<sup>88</sup> It was stated that all existing IB claimants would be migrated to

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<sup>86</sup> Chris Pond, Chief Executive, One Parent Families / Gingerbread press release, July 2007. Pond is responding to the Green Paper, 'In Work, Better Off: Next Steps to Full Employment' (Department for Work and Pensions, 2007) which builds on the Freud Report on Lisa Harker's work on child poverty, and on the Leitch Review on skills. See, Lisa Harker, 'Delivering on Child Poverty: What Would it Take?' (DWP, 2006) and Lord Alexander Leitch, 'Prosperity For All in the Global Economy - World Class Skills' (DWP, 2006)

<sup>87</sup> Gaby Hinsliff, 'Labour's Welfare Reform Chief Defects to the Conservatives' (The Guardian, London 15 February 2009)

<sup>88</sup> Other proposals included the national roll out of the Local Housing Allowance (LHA), a new way of calculating maximum housing benefit (Part 2, S. 30) and a housing benefit sanction for anti-social behaviour (Part 2, S. 31); loss of benefit for commission of benefit offences (Part 3) - measures which firmly point to further forms of conditionality entering the social security system. It also provided benefits for widows and widowers (Part 4, S. 50-51). This move also saw another client group removed from IS, thus transforming it into a residual benefit

ESA over time.<sup>89</sup> Part 1 of the Act, also provided the statutory framework under which new ESA claimants were to be subject to work-focused health-related assessments, WFIs, and work-related activities, with the prospect of sanctions for non-compliance.<sup>90</sup> However, the fine detail of the measures were predominantly contained in the subsequent Employment Support Allowance Regulations 2008<sup>91</sup>, which will be discussed below. The central tenet of the Welfare Reform Act 2007 and the corresponding regulations is the increased focus on the requirements and responsibilities which are to be imposed on individuals who would have previously claimed IB.<sup>92</sup>

Part 1, Section 1 of the Act outlines the basis of entitlement to ESA, which similar to JSA, has a contributory and non-contributory component, which effectively replaced IB and the incapacity component of IS.<sup>93</sup> ESA can be accessed by an individual currently in employment following the exhaustion of Statutory Sick Pay, and it can be claimed by the self-employed and the unemployed. Those claiming JSA are able to access ESA after the permitted period under the JSA regime during which claimants can maintain JSA despite incapacity for work.<sup>94</sup> Subsection 1(3) lists the basic conditions for ESA, which are in themselves relatively uncontroversial. The non-contributory form of the benefit is made available for those claimants under 25 who

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<sup>89</sup> 'Existing customers' (those already in receipt of IB/IS, or whose claim for a new spell of incapacity can be back-dated to a time of incapacity for work prior to commencement, or whose claim is backdated to a day pre-commencement) were able to retain entitlement after the appointed day, but would subsequently lose it following when the relevant period incapacity concluded without the ability linking to another which started prior to commencement. WRA 2007 Sch.3 paras 5 and 12 deprive the effect of SSCBA 1992 ss.30A to 30E (incapacity benefit) and 171A-171G (incapacity for work). See, David Bonner, 'Employment and Support Allowance: Helping the Sick and Disabled to Return to Work?' (2008) *Journal of Social Security Law* 15 (4), pp 123-150, p 123

<sup>90</sup> See particularly, Part 1, S. 8-13

<sup>91</sup> SI 2008/794 – There are 169 regulations across nine schedules. The Welfare Reform Act (WRA) 2007 dictates whether a person's capability for work is limited by his physical or mental condition and, if so, whether the limitation is such that it is not reasonable to require him to work, is to be determined in accordance with regulations. ESA Regulations 2008 reg. 19(1) elaborates that this is to be determined on the basis of a limited capability for work assessment (WCA), that is by: "[A]n assessment of the extent to which a claimant who has some specific disease or bodily or mental disablement is capable of performing the activities prescribed in Schedule 2 or is incapable by reason of such disease or bodily or mental disablement of performing those activities."

<sup>92</sup> Larkin, n. 47 above, p 398

<sup>93</sup> See, Nick Wikeley and Emma Laurie, *Welfare Reform Act 2007 Annotated Legislation* (Sweet and Maxwell, 2007). Despite the level of conditionality in the legislation, claimants are still liable to contribute the same number of national insurance contributions

<sup>94</sup> WRA 2007 s.1(3)(f); see Jobseekers Act 1995 s.1(2)(f) Sch. 1, para 2; Jobseeker's Allowance Regulations 1996 (SI 1996/207) reg. 55. And note prospective amendments to the Jobseekers Act 1995 in WRA 2007 Sch. 3, para 12. See, Bonner, n. 89 above, p 124

become incapacitated before they have had the chance to make the necessary contributions.

The work related aims of the legislation come to the fore in Sections 8 and 9 which set out the concepts of 'limited capability for work' and 'limited capability for work related activity'.<sup>95</sup> Both concepts encase the idea that a claimant should focus on work or work related activity they are able to undertake rather than the limits that incapacity or disability puts on their abilities. Corresponding with this aim, the Work Capability Assessment (WCA), which encompasses three elements, is different from the PCA, in that it attempts to undertake a 'more positive assessment' by integrating the possibility of participation in work-related activity with a view to encouraging a future return to work.<sup>96</sup> Section 8(2) sets out in skeleton form that regulations would define the specifics of the test that would be used to determine whether a claimant has limited capability for work. Section 9(1) also provides for subsequent regulations to specify the test for the assessment of limited capability for work related activity. Although similarities can be drawn between the outline of both provisions, it is important to recognise the distinction.<sup>97</sup> Those who are determined to have 'limited capability for work related activity' are therefore excluded from the 'support group' and are not subject to the implicit conditions imposed upon claimants placed in this category. They are also exempt from sanctions.<sup>98</sup> A claimant who is deemed to have limited capacity for work-related activity is entitled to the support component of ESA, thus attaining a higher level of benefit. This structure reflects the introduction of the 'two-tier' system that was criticised in many quarters, as the Act effectively introduced levels of capacity which dictate the volume of labour market participation

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<sup>95</sup> The definition of 'limited capacity for work' is provided in s 1(4), detailing that a person may have limited capacity for work if his or her ability to work is limited by his or her physical or mental condition which means that it is 'not reasonable' for him or her to be required to work.

<sup>96</sup> The WCA was developed to assess three integral elements of limited capability for work and limited capability for work related activity and the additional category of work-focused health related assessment. The first element deals with basic entitlements to ESA; the second determines whether a claimant will receive either the support component or the work related activity component; and the third seeks to identify the existing capacities that a claimant might have and furthermore, how they might develop them and eventually use them. See generally, Bonner, n. 89 above, pp 130-131; It is noted by Bonner that the new arrangements for determining capability for work are based on the findings published in the Department for Work and Pensions, *Working Paper Transformation of the Personal Capability Assessment: Report of the Physical and Mental Health Technical Working Groups* (DWP, September 2006). Baroness Morgan of Drefelin provided details of the three element WCA at the HL Deb, Vol. 689, col GC178 (28 February 2007), as cited by Larkin, n. 47 above, p 398

<sup>97</sup> Larkin, n. 47 above, p 399

<sup>98</sup> The outline of what the support group entails is set out in 24(2) and the concept of 'limited capability for work-related activity' is set out in s 2(5)

required from the claimant, with claimants on both levels being treated accordingly. Other sections of the Act provided for administrative requirements – for example the amount of contributory allowance, the income-based allowance, or a combination of both to be provided to claimants.<sup>99</sup> It was fixed that both forms of ESA would be set at the same rate, despite the fact that contributory ESA does not provide a passport to other benefit unlike income related ESA.<sup>100</sup> Child Poverty Action Group (CPAG) and other welfare organisations were vocal in their criticism of the ESA rates, which in some cases offered lower weekly payments than IB.<sup>101</sup>

The majority of ESA claimants are bound to comply with the first element of the WCA, which is the assessment of limited capability via a face to face process. Testing was to be carried out at an earlier point than would have been common for an IB claimant, with DWP asserting that ‘the starting point for assessment will be that the overwhelming majority of customers are capable of some work, given the right support’.<sup>102</sup> All new claimants are placed in an ‘assessment phase’ which normally runs for 13 weeks from the first date of entitlement.<sup>103</sup> This procedure is contained in the Employment and Support Regulations 2008 which provide for the exemptions of certain categories of people from the WCA test. The list of exemptions is considerably narrower than the exemptions provided in the IB Personal Capability Assessment (PCA) on the basis that the government was keen to ensure that the majority of claimants could undertake the conditions inherent in the ‘work-related activity’ category.<sup>104</sup> All those assessed as exempt were precluded from the information

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<sup>99</sup> See, Section 2 for contributory allowance levels; income based allowance is dealt with in s 4 of the Act and Section 6 outlines that If the claimant is eligible for housing costs and other support, then a combination of both forms of ESA will be payable

<sup>100</sup> ESA (SI 2008/794) Sch. 4. The rates of benefit are prescribed by the new regulations (in Sch. 4). As with IB, deductions from the contributory allowance will occur in some cases: for example, if any occupational pension is payable to the claimant and it exceeds £85 per week, 50 per cent of the excess above that amount is to be deducted from a contributory ESA allowance (reg. 74).

<sup>101</sup> Neville Harris, ‘Employment and Support Allowance Regulations 2008’ (2008) *Journal of Social Security Law* 15 (3), pp 83-87, p 87

<sup>102</sup> Depart for Work and Pensions, ‘Employment and Support Allowance Regulations 2008: Equality Impact Assessment in Explanatory Memorandum to Employment and Support Allowance Regulations 2008’ (SI 2008/794) and the ‘Employment and Support Allowance (Transitional Provisions) Regulations 2008’ (SI 2008/795), p 19

<sup>103</sup> Or until such later date when any appeal about a decision which embodies a determination about limited capacity for work is determined by a tribunal. ESA (SI 2008/794) Regs. 4 and 6 and the WRA 2007 Act 24 (2)(a)

<sup>104</sup> Bonner, n. 89 above, p 131. The exemptions for those claiming IB, from the PCA included, for example, those receiving the highest rate care component of DLA; those assessed for SDA or Industrial Injuries Disablement Benefit purposes as 80 per cent disabled; those terminally ill with a progressive disease; paraplegics and tetraplegics; and those registered blind. Those in that exempt group were also exempt from the information and evidence gathering



gathering requirements laid down by the WCA, and decision-makers were provided with the discretion as to whether individuals in certain cases should fill out the questionnaire, or provide additional information outside the remit of the Medical Evidence Examinations.<sup>105</sup> Commonly, most claimants were required to complete the questionnaire and were subject to the medical examination. Failure to comply, without good cause was sanctioned by treating the claimant as not having limited capability for work, and benefit would be denied.<sup>106</sup>

Simply put, the WCA can be characterised as a more rigorous version of the PCA test, introduced by the Welfare Reform and Pensions Act 1999, with the concept of limited capability for work examined by way of a redefined list of activities and descriptors, and an appropriate score provided on the basis of these.<sup>107</sup> The change to the WCA ensured that the descriptors and scores remained relevant to the nature of disabling conditions in the contemporary labour market by ensuring the ‘the activities assessed and the score allocated accurately reflect the level of functional limitation at which it is unreasonable to require a person to engage in work’.<sup>108</sup> Therefore, the policy sought to refocus the physical descriptors to ‘better reflect the activities felt to be most relevant to capacity for work – those activities that an employer might reasonably expect of his workforce’.<sup>109</sup> Policymakers identified the requirement to modernise the WCA to reflect the needs of a changing labour market. Inability to perform a certain

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processes (e.g. the PCA questionnaire). In contrast those who were exempt from the WCA are much fewer, the terminally ill; those receiving treatment by way of intravenous, intraperitoneal or intrathecal chemotherapy; those excluded or prevented from working as a carrier, or having been in contact with a case of relevant disease; and pregnant women at a certain stage in pregnancy or where there is a serious risk of damage to their or their unborn child's health if they do not refrain from work (reg. 21); Hospital in-patients (reg. 25); and persons undergoing or recovering from certain regular treatments (e.g. plasmapheresis, radio therapy, dialysis, parenteral nutrition) for at least two days a week (reg. 26) are also treated as having limited capability for work

<sup>105</sup> ESA Regulations 2008 (SI 2008/794) reg. 21 (3)

<sup>106</sup> ESA Regulations 2008 (SI 2008/794) regs. 22, 23. Regulation 24 sets out a non-exhaustive list of factors relevant to “good cause” (whether, at the relevant time the claimant was outside Great Britain), Claimant's state of health and the nature of any disability the Claimant has

<sup>107</sup> Larkin, n. 47 above, p 399. The descriptors are contained in Schedule 2 to the ESA regulations, 11 of which deal with physical impairments, involving the ability to walk, walk with a stick, bending, kneeling, standing, reaching as well as hearing and vision. See, SI 2008/794, Sch 2. Other physical bodily functions in Schedule 2 include continence, picking up objects, manual dexterity, and the ability to remain conscious during waking moments. Bonner notes the DWP's Health and Wellbeing Directorate reformulated some of the activities and descriptors to slight reduce the stringency of the original requirements, for example, as regards walking, distances were raised from 30m to 50m as regards the 15 point descriptor, and from 50m to 100m in respect of the nine point descriptor. See, Department for Work and Pensions, n. 96 above, p 11

<sup>108</sup> *Ibid*, p 3

<sup>109</sup> *Ibid*, p 14

task must be a result of a specific physical or mental health condition. The scoring system of the former PCA was also tightened to make it more difficult to attain the points necessary to be deemed not fit to work.<sup>110</sup> This move led to ridicule from groups such as the Disability Rights Consortium which considered the removal of the lower scores (3 points) in the PCA were not evidence based, and without consideration of the potential impact on claimants.<sup>111</sup>

Developing a test that could determine mental capability for work based functions created a significant challenge for legislators who sought to reform the requirements for IB claimants. The context for reform was the fact that 41% of IB claimants were deemed unfit for work due to some form of mental incapacity. Politicians agreed that those unfit for work due to mental health issues or disability were not being adequately supported by the social security system. It was believed that the increased state support, coupled with medical advances, could empower those on IB to get back to work. There was also a feeling that the existing exemption for those with severe learning disabilities or autism heightened their isolation, thus precluding them from achieving their full potential as earners and citizens.<sup>112</sup>

In a similar vein the WCA modified the health component of the PCA. The assessment contains ten different tasks, each allocated a score designed to encompass a reliable assessment of the claimant's mental function.<sup>113</sup> Meeting the requirement for limited capability for work entitles the claimant to the basic rate of ESA. Whether a claimant will be entitled to additional components will depend on whether it is concluded that they have limited capacity for work related activity. The process for discerning this question is more stringent than the WCA, and requires the claimant to participate in a further set of tests, which make up the Work Related Activity Assessment. A person is determined to have such limited capability when by reason of the claimant's

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<sup>110</sup> The ability to score three (as on the former PCA) have now been abolished (six points is now the lowest score attainable), and those descriptors which registered difficulties 'sometimes' with, for example, walking more than 50 metres without stopping, have also been removed from the scoring process. The new WCA requires 'repeatedly stopping' during a 50-metre walk before any score is awarded.

<sup>111</sup> Disability Rights Consortium, *The New Personal Capability Assessment* (Briefing of February 2007), p 10

<sup>112</sup> David Bonner, Ian Hooker and Robin White, *Social Security Legislation 2007: Non Means-Tested Benefits Vol. 1* (Sweet and Maxwell, 2007), p 9, as cited by Larkin, n. 47 above, p 401

<sup>113</sup> ESA Regulations 2008 (SI 2008/794), Sch. 2 Part 2. These 10 activities cover learning or comprehension in the completion of simple tasks, awareness and hazard, memory and concentration, execution of everyday tasks, initiating and sustaining personal action (organisation and problem solving), coping with changes in routine, and coping with people and social situations

physical or mental condition, at least one of the range of descriptors in Schedule 3 to the Employment and Support Regulations 2008 applies to him or her.<sup>114</sup> Unlike the WCA, the requirements contained in the Schedule are not based on a points system, and provide for different categories of exemption from the WCA, but involve a similar range of information gathering and medical examination requirements.<sup>115</sup> Schedule 3 contains 11 activities, which encompass a broad level of capability in order to ensure that the volume of claimants removed from the group required to carry out work-related activity is limited.<sup>116</sup> Those who satisfied the test outlined would be placed in the support group, and entitled to the support component without having to satisfy work-related conditions.<sup>117</sup> Those who were unable to establish limited capability for work related activity would receive the work-related activity component, and as a result be expected to comply in one or more WFI's with a view to assessing their future prospects of obtaining or remaining in employment.<sup>118</sup> Thereafter, the intention was to prepare those who were expected to be able to return to work in the short or medium term for doing so by including in their action plan activities such as a work trial or voluntary work as well as job search.<sup>119</sup>

### ***The aftermath of the Welfare Reform Act 2007***

The WRA 2007 sought to decrease the bounds of the definition of 'incapacity for work' and expand the reach of the citizen-as-worker approach. The move towards greater conditionality was couched among a rights-based rhetoric rather than ventilating any concerns around this as an exclusionary vision of citizenship. The legislative model was supported by way of the government's emphasis on the right to work for disabled people. As the Secretary of State John Hutton said the approach 'marks a major shift away from the established orthodoxy of welfare provision...which always treated functional limitations as automatically disqualifying people from the world of

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<sup>114</sup> Welfare Reform Act 2007, s 9; ESA Regulations (SI 2008/794), reg. 34(l)

<sup>115</sup> For example, pregnant women who will not be adversely affected by work-related activity, and those who are receiving hospital treatment or certain regular treatments such as dialysis will not be protected from undergoing the assessment for work-related activity. ESA Regulations 2008 (SI 2008/794), regs. 20, 25, and 26. See also, ESA Regulations 2008 (SI 2008/794) regs. 36-39

<sup>116</sup> These activities include walking or moving on level ground, rising from a sitting position and transferring from one seated position to another, picking up and moving or transferring by means of upper body and arms, reaching, manual dexterity, continence, maintaining personal hygiene, eating and drinking, learning or comprehension in the completion of tasks, planning personal action, and communication: see Sch 3

<sup>117</sup> Those on the support component may choose voluntarily to participate in the work-related activity programmes.

<sup>118</sup> ESA Regulations (SI 2008/794), reg. 47(1) and reg. 55

<sup>119</sup> Harris, n. 101 above, pp 83-87, p 86

work'.<sup>120</sup> Simultaneously the government sought to even more firmly establish work as a route out of poverty and work as a primary tool for combatting social exclusion, an ambition which appeared to have achieved political consensus across the House of Commons. The regulatory framework supported this conclusion, as the WCA and capability for work-related activity test constituted a more demanding set of obstacles for those wishing to claim ESA.<sup>121</sup>

The overwhelming, critical response to the new process was antipathy, as it became very evident that WCA failed to sufficiently acknowledge the complexity of conditions that preclude people from engaging in the labour market. Ben Baumberg sums up the position of the majority of critics of WCA:

‘Despite its name, the WCA simply does not assess claimants’ capability for work. It assigns points to functional impairments, but never considers whether there are any actual jobs that a claimant could do. Nor does it directly consider whether a person can undertake work-related activity, or the employment support that a person might need. It is a standardised test, but one that consistently measures the wrong thing’.<sup>122</sup>

Initially, it was found that the WCA and the assessment for work-related activity was interpreted to ensure that the vast majority of claimants fell within the ‘fit for work’ category due to their failure to ‘pass’ the limited capacity for work test. Larkin highlights that after just one year of its operation, 66 per cent of ESA claimants were judged as being fit for work, with the decision of the department being upheld in 62 per cent of appeals.<sup>123</sup> Thus, despite concerns that too many ESA claimants would be placed in the work-related activity group, what actually followed was that a large majority of claimants were deemed to be outside the scope of ESA altogether and instead were entitled to claim JSA. This outcome was condemned by Professor Paul Gregg, who played a key role in the work orientated redesign of IB. He asserted that the eventual movement of claimants who have claimed IB for years onto JSA was a ‘ridiculous’ proposition, and subsequently suggested postponing the extension of ESA

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<sup>120</sup> John Hutton, Secretary of State for Work and Pensions, HC Deb, 24 July 2006, Welfare Reform Bill

<sup>121</sup> Larkin n. 47 above, p 402

<sup>122</sup> Ben Baumberg, ‘What Is Incapacity?’ (2014) Demos Quarterly 3

<sup>123</sup> Larkin, n. 47 above, p 403. See also, Department for Work and Pensions, Work Capability Assessment Statistical Release (January 2010), para 3 < <http://research.dwp.gov.uk/asd/workingage/esa.wca/esa-wca.19012010.pdf> > (accessed 7 January 2018)

until what he termed 'serious errors' in the assessment process were rectified.<sup>124</sup> However, changes in 2011 and 2013 which sought to increase the numbers of claimants entering the support group altered this picture. By 2013, 33 per cent of claimants were found fit for work, 23 per cent were placed in the WRAG and 44 per cent in the support group.<sup>125</sup> A further factor in this shift was the increased use of the discretionary special circumstances regulation, where people are determined to be at a substantial risk of harm if found fit for work.<sup>126</sup> This ultimately led to an increase in the Treasury's budget-by-budget estimates of spending on ESA, which subsequently resulted in the enforcement of government cuts in an effort to contain spending, the culmination of which are recent and severe cuts to provision for those placed in the WRAG.<sup>127</sup>

There was an increase in people with Parkinson's disease, Multiple Sclerosis and severe mental illness deemed fit to work since the Welfare Reform Act was activated in October 2008. According to CAB, this situation arose due to the closed questions on the medical assessment form which did not provide space for people to detail their illness at any length, but which simply required negative or affirmative replies about whether they can stand, sit or walk a prescribed distance.<sup>128</sup> Although the government has made a number of small changes to alter this situation (for example, making changes to the format of the ESA50 form), it remains the prevailing view of commentators that the WCA frequently fails people with mental illnesses and long-term disabilities.<sup>129</sup> This is despite the publication of the first (of three) independent review of the ESA system, carried out for the government by Malcolm Harrington in

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<sup>124</sup> See Paul Gregg, 'Osborne's Haste Will Undermine Incapacity Benefit Reform' (The Guardian, London, 6 July 2010)

<sup>125</sup> Ben Baumberg, Jon Warren, Kayleigh Garthwaite and Clare Bamba, 'Rethinking the Work Capability Assessment' (Demos, 2015), p 32

<sup>126</sup> The use of this regulation increased from 2–3 per cent of all completed assessments in 2009 to over 20 per cent of completed assessments in mid-2013; see also Paul Litchfield, 'An Independent Review of the Work Capability Assessment' (HMSO, 2013), pp 36–38

<sup>127</sup> Individuals who claim ESA after 3 April 2017 and who are placed in the WRAG will receive an allowance which is the equivalent of the current level of JSA (£73.10 a week). The equivalent element in Universal Credit has also been abolished. This involves reduction of £29.05 a week (2017-18 rates). See, Steven Kennedy, Chris Murphy, Richard Keen and Alex Bate, 'Abolition of the ESA Work Related Activity Component', Briefing Paper CBP 7649 (House of Commons Library, 7 March 2017); Welfare Reform and Work Act 2016, s 15 and s 16

<sup>128</sup> Sue Royston, CAB Briefing, 'Not Working: CAB Evidence on the ESA Work Capability Assessment' (March 2010)

<sup>129</sup> See, Department for Work and Pensions, Annex A and Annex B of Government's response to the *Independent Review of the Work Capability Assessment – Year Five* (Cm 9014, HMSO, 2015), p 32 for a summary of the changes to the related ESA paperwork for claimants

November 2010 which led to an acknowledgement by the new Coalition government that there was a need to make the process fairer and more effective (although with little subsequent progress on redesigning the process).<sup>130</sup> In its 2012 response to Harrington's third review of WCA, the government supported the principle that the existing process 'remains a valid concept for assessing...eligibility' and 'that there is no evidence to suggest that the system is fundamentally unsound'.<sup>131</sup> A further two reviews were carried out in 2014 and 2015 by Dr Paul Litchfield who further asserted 'Work and the workforce are going through a period of unprecedented change and it must be questionable whether an assessment designed in the early part of this century will best meet society's needs in its third decade'.<sup>132</sup> Despite this, the status quo has largely remained and the government has largely continued its stand-off approach in regard to implementing a re-design of the process.<sup>133</sup>

Both Harrington and Litchfield, as well as CAB and the Spartacus Network of disabled people have outlined the benefits of moving towards for a 'real-world' type of test, reflecting the everyday lives of individuals. The main problem with this approach is that there is no clear outline of what this would resemble.<sup>134</sup> Berthoud produced an analysis of the issues associated with such an approach for CAB, but stopped short at describing what the practicalities of such a test would be. Therefore, the WCA appears to be here to stay for the foreseeable future, particularly in the context of a returned (albeit minority) Conservative government as of June 2017. The direct implication of this is the maintenance of a process that does not assess people's capacity for work and consequently the government remains wedded to Webb's (1912) notion that

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<sup>130</sup> See the Introduction from the Secretary of State for Work and Pensions, Iain Duncan Smith MP in Martin Harrington, *An Independent Review of the Work Capability Assessment* (HMSO, 2010); Martin Harrington, *An Independent Review of the Work Capability Assessment: Year Two* (HMSO, 2011); Martin Harrington, *An Independent Review of the Work Capability Assessment: Year Three* (HMSO, 2012)

<sup>131</sup> See the summary of the government's response in Martin Harrington, *An Independent Review of the Work Capability Assessment: Year three* (HMSO, 2012), p 5

<sup>132</sup> Litchfield, n. 126 above

<sup>133</sup> See Annex A and Annex B of DWP, Government's response to the *Independent Review of the Work Capability Assessment – Year Five* (Cm 9014, 2015)

<sup>134</sup> Baumberg, Warren, Garthwaite Bambra, n. 125 above, p 26. See also, Spartacus Network, *Beyond the Barriers: A Spartacus Network Report into Employment Support Allowance, the Work Programme and Recommendations for a New System of Support* (2014) and also Sue Royston, 'CAB Briefing, Not Working: CAB Evidence on the ESA Work Capability Assessment' (March 2010)

people who are 'incapable of any work whatsoever' can only mean they are 'literally unconscious or asleep'.<sup>135</sup>

### **Conclusion**

The WRA 2007 was particularly significant as it considerably extended the scope of contractualism for those unable to work due to a period of incapacity or disability, transforming those protected citizens who deserved security into out-of-work citizens who had responsibility for their own security. The measures emanate from what Fitzpatrick terms a 'fourth attempt' by government since the 1980's, to construct a politics of welfare obligation, which centres citizenship upon the principles of duty, obligation and personal responsibility. This so-called fourth approach follows the 'conservative', the 'communitarian' and the 'third way' approaches which eventually became jaded and in need of reinvention. The fourth attempt more veraciously links duty to equality through a contemporary version of the principle of reciprocity which integrated principles of traditional social democracy with the new politics of obligation.<sup>136</sup> Its working relies heavily upon 'real contractualism' or 'real communitarianism' which dictates that 'citizens who actually claim the share of the social produce necessary available to them under these institutions have an obligation to make a decent productive contribution, proportional to ability, to the community in return'.<sup>137</sup> A further leap towards contractualism contributed to the continuing erosion of Marshall's rights based foundation in favour of a conditional base for the provision of social security, which consequently advanced the evolving interpretation of citizenship and with it, the changing archetypical views of the actors involved.<sup>138</sup> This position is tied up with parallel discussions on the unintended and often corrupting consequences related to the government's delivery of social policies. For example, Le Grand's early view was that a future Labour government should utilise quasi-markets in the delivery of welfare in order to introduce individual choice and effort.<sup>139</sup> It has been asserted that

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<sup>135</sup> Cited in Jackie Gulland, "'Excessive Sickness Claims': Controlling Sickness and Incapacity Benefits in the Early 20th Century', paper presented to the Social Policy Association annual conference (Lincoln, 2011)

<sup>136</sup> Tony Fitzpatrick, 'The Fourth Attempt to Construct a Politics of Welfare Obligations' (2005) *Policy and Politics* 33, p 15

<sup>137</sup> Stuart White, *The Civic Minimum* (Oxford University Press, 2003), p 18

<sup>138</sup> Sage, n. 61 above, p 360

<sup>139</sup> Julian Le Grand, 'Rethinking Welfare: A Case for Quasi-Markets' in Ben Pimlott, Anthony Wright, Tony Flower (eds), *The Alternatives: Politics for a Change* (Allen & Co, 1990), p 85; See also, Michael Sandel, *What Money Can't Buy: The Moral Limits of Markets* (Tanner Lectures on Human Values, 1998) and Richard Titmuss, *The Gift Relationship: From Human Blood to Social Policy* (Allen & Unwin, 1970)

such an approach, which is characterised by conditionality, brings back to life an old 'liberal contractarian framework' which reignites 'individualistic ideas about the causes of and solutions to poverty'.<sup>140</sup>

While it may be argued that New Labour's strategy initially unfolded as a meaningful attempt at a reciprocal relationship with the citizen, in that the unemployed claimant was offered support and employment opportunities in return for the fulfilment of specified obligations, (for example through the New Deal programme) in the latter years of its premiership there was a greater emphasis on the exercise of personal responsibility and punishment for incidents of non-compliance, in an effort to enforce 'positive' citizenship.<sup>141</sup> Far from a progressive approach, New Labour's added reliance on contractualism reinforces the notion that 'economically inactive people are lazy, and react rationally to the availability of social security benefits by either making themselves inactive, or prolonging their inactivity'.<sup>142</sup> The WRA 2007 introduced a coercive element to social security entitlement which is directed at those who have adopted incapacity as a reason not to work. As asserted by Larkin, the legislation undoubtedly draws attention to issues relating to the contemporary concept of citizenship. What is not clear at this point is whether citizenship is so entangled with the requirement to work, that those who do not engage in the labour market are perceived as 'somehow lesser or second class citizens' – an outcome which New Labour failed to counter.<sup>143</sup> The 2007 Act offers a microcosmic view of future welfare reform, where modernisation increasingly equates to a time-worn view that the individual should assume responsibility for their economic prosperity, and that the state must enforce stringent limitations on the support it provides to citizens. Two further and substantial pieces of primary legislation illuminate this perspective: the Welfare Reform Act 2009, the last of New Labour's welfare reforms, and the Welfare Reform Act 2012, the point at which the Conservative-Liberal Democrat Coalition government assume the mantle of redefining social citizenship. The following chapter explores the last Act of Labour's legacy

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<sup>140</sup> See, Desmond King, *In the Name of Liberalism: Illiberal Social Policy in the USA and Britain* (Oxford University Press, 1999); Emma Heron and Peter Dwyer, 'Doing the Right Thing: Labour's Attempt to Forge a New Welfare Deal Between the Individual and the State' (1999) *Social Policy and Administration* 33 (1), pp 91–104, p 101

<sup>141</sup> Larkin, n. 47 above, p 409

<sup>142</sup> Chris Grover and John Stewart, 'Modernizing Social Security? Labour and its Welfare-to-Work Strategy' (2000) *Social Policy and Administration* 34, p 236

<sup>143</sup> Larkin, n. 47 above, p 409





## Chapter 8: The Welfare Reform Act 2009

### *Introduction*

New Labour had moved from Tony Blair's third way to Gordon Brown's 'fourth attempt',<sup>1</sup> drawing social citizenship further away from an inherently rights-based concept to a contractually conceived 'positive citizenship' that accelerated the activation of the out of work citizen to realise their contractual obligations on which their access to social security relied. The last piece of welfare reform legislation for the Labour government was the Welfare Reform Act 2009, which continued to establish this pattern of responsabilisation, with the increasingly demanding and punitive conditions of social security receipt often buried in the detail of legislative amendments that flowed from a more apparently benign Act. The economic context, however, had changed and the global economic crash solidified much of the support for measures designed to target state support to those who demonstrated their willingness to discharge their responsibilities as labour market commodities. The central message did not change: social security recipients had long since understood that out of work benefits were conditional on efforts to secure work, but the extent to which the creeping conditionality reached was not immediately apparent, and the devilish detail was not one that the many of the public, or parliamentarians, displayed particular interest in. Despite the considerable political challenges that Brown faced as Prime Minister, welfare reform presented relatively few obstacles.

### *Political Consensus on the need for Further Reform*

'The winds of change never cease to blow across the social security system'.<sup>2</sup>

It seems apt to refer to earliest insights of Harris and Wikeley as we begin an examination of the New Labour government's last major piece of welfare reform legislation. In the first editorial of 2009, Harris reflected on the 15 years of the *Journal of Social Security Law's* analysis of the field, and quite rightly predicted the 'circumstances may be ripe, both politically and economically, for a more comprehensive change to the social security system'.<sup>3</sup> Harris' inkling was informed by increasing signs that the non-incumbent Conservatives would seek to make 'significant welfare reform' a major part of its election manifesto in the context that

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<sup>1</sup> Tony Fitzpatrick, 'The Fourth Attempt to Construct a Politics of Welfare Obligations' (2005) *Policy and Politics* 33, p 15

<sup>2</sup> Nick Wikeley and Neville Harris, 'Editorial: Public Policy, Social Security' (1994) *Journal of Social Security Law* 1 (1), pp 1-2

<sup>3</sup> Neville Harris, 'Editorial: Change' (2009) *Journal of Social Security Law* 16 (1), pp 1-2

such reform is ‘increasingly seen as having considerable political currency’.<sup>4</sup> As detailed throughout this chapter, New Labour, which at the beginning of its tenure professed itself to be the ‘party of welfare reform’ established a sense of momentum towards change in the contemporary conception of social citizenship – for example, through its introduction of ESA.

The 2009 legislation continued the New Labour government’s activation agenda. In words that closely echoed those of the Conservative Secretary of State for Health and Social Security, Norman Fowler - James Purnell, (Labour’s Secretary of State for Work and Pensions) underlined the spirit of the legislation as he introduced it to the House of Commons:

‘The Bill is intended to renew the partnership between the state and the individual by ensuring that virtually everyone on benefits is preparing for work, so that support is matched with responsibility’.<sup>5</sup>

As discussed above there appeared to be a clear and a growing consensus between the two main parties on the direction of welfare reform. This trend continued in relation to the 2009 WRA. Take for example the comments of the newly appointed Shadow Secretary of State for Work and Pensions, Theresa May MP, during the first debate on the Bill in the House, where she expressed pleasure that so many Conservative ideas had been adopted.<sup>6</sup> Furthermore, there was public recognition offered by James Purnell, that the government had adopted policy ideas from a report published by the Centre for Social Justice, a think tank established by the former Conservative Party leader and future Conservative Secretary for Work and Pensions, Iain Duncan Smith MP:<sup>7</sup>

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<sup>4</sup> Ibid

<sup>5</sup> See, Norman Fowler, Secretary of State, Health and Social Security, HC Deb, 03 June 1985, Vol. 80, cc 34-51; James Purnell, Secretary of State for Work and Pensions, HC Deb, 27 January 2009, Vol. 487, col 181

<sup>6</sup> Theresa May (Conservative, Maidenhead) HC Deb, 27 January 2009, Vol. 487, col 197 She also said: ‘Real progressives—like the Secretary of State and me—know that we need to reform welfare so that we can help people to help themselves. That is why we Conservatives support this Bill. As it passes through Parliament, the Secretary of State will come under great pressure from many of his colleagues to backtrack. In those circumstances, we will support him if he stands firm, but I shall certainly be watching over his shoulder to ensure that he does so. If he does not, hon. Members can rest assured that he and his colleagues will be replaced by a Conservative Government who will be utterly determined to introduce real welfare reform and to get Britain working’ (col 204)

<sup>7</sup> See Debbie Scott and Dr Stephen Brien, ‘Economic Dependency and Worklessness’ (Centre for Social Justice, July 2007)

'Indeed, I believe that the right hon. Gentleman, in his report from the Centre for Social Justice, said that workless parents should have to come in for interviews and undertake preparation for work. That is the policy that we are proposing in the Bill... We have read it and learned from the bits that we think would work'.<sup>8</sup>

The economic context in which this legislation was passed is particularly important. Britain faced a fiscal deficit as a result of the world economic recession, which began in 2008. DWP figures in December 2008 showed that the number claiming JSA in November 2009 had increased by over 250,000 from the previous year. In response the government announced that it would increase jobcentre staff by 6,000 and would make available an additional £1.3 billion to welfare to work services. In his foreword to the White Paper 'Raising expectations and increasing support: reforming welfare for the future' (published in December, 2008), the Prime Minister, Gordon Brown defended the party's continuing commitment to welfare reform. He asserted that this stage in welfare reform sought to move towards 'a system that offers more support but that expects more in return' on the basis that 'in the face of challenging economic circumstances [the changes] will bring the advantages of work to more people than ever before'.<sup>9</sup> Indeed, on the occasion of the Second reading of the Bill, James Purnell argued that it was appropriate to continue with reform, as 'it would be wrong to abandon people'. He contended that failure to invest in helping people back into work would result in a passive welfare state. Theresa May also commented that:

'I believe that it is right to press on with reforms. They have been needed for over a decade, and the Secretary of State's predecessors in the role have failed, often at the first hurdle. I am delighted to observe that the Secretary of State is not so faint of heart. His determination is, I believe, even more necessary now than it has been in the past 12 years of Labour government, precisely because we are experiencing an economic downturn'.<sup>10</sup>

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<sup>8</sup> James Purnell, Secretary of State for Work and Pensions, HC Deb, 27 January 2009, Vol. 487, col 197

<sup>9</sup> Department for Work and Pensions, *Raising expectations and increasing support: reforming welfare for the future* (HMSO, 2008)

<sup>10</sup> Theresa May (Conservative, Maidenhead) HC Deb, 27 January 2009, Vol. 487, col 197

This was a recurring theme throughout the scrutiny period and represented a further point of agreement across the political spectrum.<sup>11</sup>

In his own foreword to the White Paper, the Secretary of State asserted that the incoming legislation represented the ‘third phase’ of the government’s reform programme and was premised on the idea that ‘no one should be left behind’. Despite the apparent tone of egalitarianism that this phrase may evoke, the government’s plans involved the non-negotiable requirement that every individual ‘take up the support we know helps people to overcome barriers to work’.<sup>12</sup> Such policies were underpinned by the centrality of sanctions for ensuring claimants were available for work, actively looked for work and complied with the requirements imposed by public employment services.<sup>13</sup> Purnell offered an insight into the government’s accelerating reliance on the disciplinary value of sanctions in a 2008 speech:

‘For the small number of people who refuse to take up the opportunities available, we will be looking at how we can develop a strict sanctions regime, including either cuts in benefits or an option of permanent work for benefits ... if you can work you should work, and that will be a condition of getting benefits.’<sup>14</sup>

As will be detailed below, the government created a sharper edge, with the enactment of the 2009 legislation, by which those who did not comply with the activation regime could be more easily punished. Underlying this strategy was the consensus that there was a need for a much clearer sanction regime for those who failed to attend an interview or failed to sign on without a good cause.<sup>15</sup> At the heart of the policies which formed the Act lay the recommendations made by the Freud Report and, more

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<sup>11</sup> A dissenting voice came from Frank Field MP who asserted that although he saw the necessity to continue with welfare reform, he did not believe that it should take the form of the proposed Bill. He emphasised the requirement to retain current job positions and the need to increase JSA for those who are made redundant as a result of the recession. He emphasised the need to focus on unemployed people under 25 and advocated for the return of the ‘community work programme’ and he expressed reservations that lone mothers should be sanctioned in the context that ‘the unemployment figures since the downturn started show that women have been losing jobs at twice the rate of men’. He concluded by asserting: ‘I shall end as I began, by saying that the Bill, which was drafted in an age of an ever-expanding job market, is no longer relevant in the economic hurricane that is beginning to affect our constituents’. Frank Field MP (Labour, Birkenhead) HC Deb, 27 January 2009, Vol. 487, cc 224-225

<sup>12</sup> Department for Work and Pensions, n. 9 above, (Ministerial Foreword)

<sup>13</sup> Anne Daguere, ‘The Unemployed and the Moral Case for Benefit Sanctions’ (2015) *Journal of Social Security Law* 22 (3), pp 130-153, p 130

<sup>14</sup> James Purnell, cited by Steven Driver, ‘Work to be done? Welfare Reform from Blair to Brown’ (2009) *Policy Studies* 69, p 77

<sup>15</sup> Daguere, n. 13 above, p 136

overtly, the Gregg Review. The government set out to implement the Freud report in full, including piloting his 'invest to save' strategy, where private and voluntary providers avail of future benefit spending to fund more up front investments to get more people to work.<sup>16</sup> In terms of the Gregg Review, the legislation was strongly influenced by Professor Gregg's vision of a welfare state where everyone is either looking for work or preparing for work.<sup>17</sup> The result was legislation couched in language insistent on promoting a strong sense of personal responsibility.<sup>18</sup>

### ***The Welfare Reform Bill and its Passage***

In reality the measures stemming from Welfare Reform Bill 2009 did not have time to bed into the social security system. A mere six months later, Labour conceded power following the 2010 General Election. In this context, the passage of the Bill provides a detailed understanding of political thought at the time that supported the shifting concept of social citizenship, which elides with the approach of the 2010 Conservative-Liberal Democrat Coalition government. The Bill introduced measures for reform applicable to four substantive areas – first, reform of social security, which was based on the concept of a more personalised system which included the elevation and alignment of the sanctioning regime for non-compliance. As James Purnell had stated, 'The benefits system is not there for people to stay on benefits but to help them to get back into work'.<sup>19</sup> It was proposed that the claimant be responsible for devising an individualised action plan along with their Personal Adviser, and as well as attending interviews, claimants would be required to carry out work related activity. This extended to lone parents and those on ESA. The government also committed to retesting everyone on IB to ensure that they were on the right benefit, and if they were not, they would be consigned to JSA (Part 1).<sup>20</sup> This chapter focuses on the parliamentary scrutiny of measures related to the 'deepening' and 'widening' of conditionality for those not working, which were primarily contained in Part 1 of the

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<sup>16</sup> Department for Work and Pensions, n. 12 above, p 8

<sup>17</sup> See Professor Paul Gregg, *Realising Potential: A Vision for Personalised Conditionality and Support* (An independent report to the Department for Work and Pensions, 2008), p 7

<sup>18</sup> Daguerre, n. 13 above, p 136

<sup>19</sup> James Purnell, Secretary of State for Work and Pensions, HC Deb, 27 January 2009, Vol. 487, col 189

<sup>20</sup> The Bill also proposed the enhancement of rights for disabled claimants to have more control over access to services, for example, by providing them with the right to control the support they receive and the power to decide how it is spent (Part 2). Third, proposals were included to ensure absent parents paid child maintenance (Part 3); and finally, measures to include the names of both parents on birth registration forms (Part 4). See, Simon Rahilly, 'Legislative comment: Welfare Reform Bill' (2009) *Journal of Social Security Law* 16 (3), pp 111-112

Bill.<sup>21</sup> Some notable measures are the mandatory 'work for your benefit' schemes which were introduced as pilot schemes in 2010; 'progression to work' conditions which were introduced for lone parents (and partners) who had children between 3 and 6;<sup>22</sup> and powers for mandatory directions to be issued to those in receipt of ESA to undertake specific work related activity and the extension of WFIs for those over 60.

There were additional measures in the Bill that also raised questions about how social citizenship for social security claimants was conceived. The legislation contained powers to require drug users, and those dealing with alcohol addiction to attend rehabilitation programmes and for those suspected of addiction to undergo drug tests, a measure perceived by many politicians and commentators to be rather controversial.<sup>23</sup> The Bill altered the conditions of entitlement for ESA. It was proposed that a member of a couple would be unable to claim income-based ESA if their partner met eligibility for JSA. Furthermore, it also proposed the alignment of contribution conditions for ESA and JSA, to ensure that only the previous two tax years before the relevant benefit year could be considered for the first contribution condition, and it was proposed that the earnings factor require a minimum of 26 weeks of paid employment. The government were also to be given the power to abolish IS. Furthermore, the Bill contained provisions to increase sanctions in the event of fraud, and made reforms to the Social Fund, including inserting the power to

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<sup>21</sup> Department for Work and Pensions, n. 12 above, pp 8-9

<sup>22</sup> It is important to note the Social Security (Lone Parents and Miscellaneous Amendments) Regulations 2008 which established that from 2010, lone parents with a youngest child aged 7 or over would no longer be entitled to IS on the grounds of being a lone parent. Those able to take up paid employment could claim JSA and those with a disability or health condition could claim ESA. It should also be noted that the SSAC did not agree with the 2008 regulations due to 'the concerns members had about the appropriateness of the JSA regime and increased conditionality for lone parents'. See, SSAC, 'The Social Security (Lone Parents and Miscellaneous Amendments) Regulations 2008' (HMSO, October 2008) < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/243361/7480.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243361/7480.pdf) > (accessed 4 June 2017)

<sup>23</sup> For example see, Steve Webb MP (Liberal Democrat, Northavon), HC Deb, Vol. 487, col 211 (January 27, 2009) and also John Mason (SNP, Glasgow, East). HC Deb, Vol. 487, col 196 (January 27, 2009); John Mann (Labour, Bassetlaw) HC Deb, Vol. 487, col 195 (January 27, 2009) 'The Secretary of State is trying for the first time to define in legislation drug addiction, which the Home Office has never attempted to do, and drug treatment, which the Department of Health has never attempted to define in British legislation before. As with many first drafts, will my right hon. Friend give close consideration to the detail of schedule 3, and perhaps tear it up and write it again in a coherent way'. See Neville Harris, 'Conditional Rights, Benefit Reform, and Drug Users: Reducing Dependency?' (2010) *Journal of Law and Society* 37 (2), pp 233-263

outsource loans.<sup>24</sup> While each of these measures has an inevitable impact on social citizenship, this chapter focuses on the political and parliamentary consensus that had been reached by 2009, that enabled the smooth passage of the 2009 Act.

Analysis of the Green Paper along with the subsequent parliamentary process, (particularly the Second Reading of the Bill and the Committee Stages) reveals a measure of consistency with the debates on the WRA 2007, with cross-party support for measures which could be construed as ‘empowering’ people who are sick and disabled, as well as lone parents, to enter the labour market.<sup>25</sup> This interpretation developed by the government was amplified and to an extent made more urgent in the context of the economic downturn. However, important and unanswered questions from the 2007 process remained, for example the issue of how the government could and should fulfil employment retention needs. John Robertson, a Labour MP maintained that the issue of retention should be written into the Bill, to assert more onus on employers to keep people in work, while Terry Rooney MP, (the Chair of the Work and Pensions Committee) pointed to the fact that 40 percent of all new incapacity benefit claims were made by people who left work due to mental health problems, underlining the outstanding need to make sure that claimants, particularly those with mental illness, received support after they get back to work to help them remain in their jobs.<sup>26</sup> Retaining people in employment was also emphasised in the context of escalating redundancies due to the economic downturn.<sup>27</sup>

It was questioned whether the Bill had ‘come at the wrong stage of the economic cycle’ and if there were sufficient jobs available in the labour market for claimants to apply to, and consequently, whether increased conditionality was an appropriate response in the prevailing circumstances.<sup>28</sup> There was particular concern voiced

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<sup>24</sup> The Government confirmed that there no interest charges (HC Deb, Vol. 487, col 213 (January 27, 2009))

<sup>25</sup> Department for Work and Pensions, *No One Written Off: Reforming Welfare to Reward Responsibility* (Green Paper, Cm 7363, HMSO, 2009)

<sup>26</sup> John Robertson MP (Labour, Glasgow, North West) HC Deb, 27 January 2009, Vol. 487, col 189 and also Terry Rooney (Labour, Bradford North) HC Deb, 27 January 2009, Vol. 487, col 203; John Robertson MP served as Private Secretary to the Secretary of State for Work and Pensions, Yvette Cooper MP (June 2009 – May 2010)

<sup>27</sup> Peter Bone (Conservative, Wellingborough) HC Deb, 27 January 2009, Vol. 487, col 233

<sup>28</sup> Charles Walker (Conservative, Broxborne) HC Deb, 27 January 2009, Vol. 487, col 218; Peter Bone (Conservative, Wellingborough), HC Deb, 27 January 2009, Vol. 487, col 203; Charles John Mason (SNP, Glasgow East) HC Deb, 27 January 2009, Vol. 487, col 226: ‘The question that has just been asked, however, is: are the jobs actually out there? This seems a strange time to introduce this legislation. It might have worked two years ago, but this is surely the wrong time for it... If people are on an income that is above the minimum, we could make that



about the inclusion of coercive measures for lone parents. Notable in this regard were the contributions of Steve Webb, the Liberal Democrat Shadow Secretary of State for Work and Pensions, who focused his points on the government's increasingly conditional approach.

'...the environment envisaged by the Bill is one of coercion and conditionality. He (the Secretary of State for Work and Pensions, James Purnell) spoke about personalised conditionality. That was the jargon phrase that he used. My party has grave concerns about pressurising lone parents with young children into paid work when they would not otherwise choose to take up paid work'.<sup>29</sup>

Webb's sentiments spilled into the evidence sessions before the Public Bills Committee. Fiona Weir, Chief Executive of Gingerbread, an advocacy organisation for lone-parents, expressed specific concern about 'the shift from incentives towards an approach that is very much based around compulsion'. She also communicated the organisation's concern in relation to the level and kind of discretionary powers awarded to advisers and suggested that they could be detrimental to building 'the kind of relationship that is needed...to encourage people back into work'. Indeed, throughout the parliamentary process, many Committee members made reference to the elevated role of frontline workers in Jobcentre Plus, and indeed their capability and capacity to deal with the expanding requirements of claimants.<sup>30</sup> Weir also provided support for the view that job retention remained an issue by outlining that, although the job entry rate for lone parents was good, 29 per cent of those who entered the work place were claiming IS within a year. Therefore, as Gingerbread maintained, the excessive pursuance of a 'work first approach' could risk getting claimants into a cycle of low paid jobs, where they fell into the benefits system, into

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extra bit conditional. Surely, however, in a civilised society, we cannot make the minimum conditional'

<sup>29</sup> Steve Webb (Liberal Democrats, Northavon) HC Deb, 27 January 2009, Vol. 487, cc 209-213. It's important to note that the Liberal Democrats did not oppose the Bill on the basis of 'the provisions on disabled people. We do not want to stand in the way of the chunk of measures that will enable and empower disabled people'. Frank Field MP (Labour, Birkenhead) HC Deb, 27 January 2009, Vol. 487, cc 209-213. 'The unemployment figures since the downturn started show that women have been losing jobs at twice the rate of men. It will be much more difficult for single mothers to gain jobs in the new world which we are entering... if we are considering sanctions, surely they should be linked to those who do not have family responsibilities, who have never worked and for whom we should provide an actual job'. See also, Katy Clark (Labour, North Ayrshire and Arran) HC Deb, 27 January 2009, Vol. 487, cc 258-259, 'I consider it unacceptable for sanctions to be imposed on the parents of younger children who are unable to carry out the work-related activity proposed in the Bill. The only effect would be an increase in poverty among both women and children'

<sup>30</sup> See generally the written and oral evidence provided to the Public Bills Committee, Welfare Reform Bill

debt and would be more likely to suffer subsequent problems which are not associated with sustainable longer-term work opportunities.<sup>31</sup> CPAG contributed its views in relation to the expanding nature of the sanction regime – focusing particularly on the impact upon those groups who were previously excluded from conditionality policies – ‘people who have had health conditions and child care responsibilities, and lone parents’. CPAG’s Welfare Rights Specialist, Eddy Graham, asserted that the ‘impact of substantial cuts in benefit on those groups is bound to be greater than on those on jobseeker’s allowance, 80 or 90 per cent of whom leave the benefit within six months anyway’. CPAG emphasised the additional hardship caused by the worsening economic conditions and the insufficient level of benefits which ensured increasing numbers of recipients remained trapped below the poverty line.<sup>32</sup> However, CPAG’s latter concerns were disputed by Professor Gregg, who asserted during his oral evidence session, that his approach sought to engage the claimant as an individual, rather than pursuing the traditional model for ‘job-ready jobseekers’ which ‘often does not fit for those who are not job ready’<sup>33</sup>

It appears that much of the nuance of Professor Gregg’s integrated and ‘flexible’ approach, was missed and subsequently misinterpreted by the legislation. As indicated by the political response to the Draft Bill and the concerns outlined by organisations such as CPAG and Gingerbread, the government adopted a traditional rule based approach, which, in crude terms, expanded mandatory conditions to a great number of claimants. Ann McKechin MP, the Parliamentary Under-Secretary of State for Scotland, underscored this when she explained the government’s ‘basic approach’ as encompassing

‘...A contract between the applicant and the state and if one obeys the rules, no sanctions will be applied. It is not unreasonable for us to insist that people should

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<sup>31</sup> Fiona Weir, (Chief Executive, Gingerbread) Evidence to the Public Bills Committee, Welfare Reform Bill, 10 February 2009

<sup>32</sup> Eddy Graham (Welfare Rights Specialist) Evidence to the Public Bills Committee, Welfare Reform Bill 10 February 2009

<sup>33</sup> Professor Paul Gregg, Evidence to the Public Bills Committee, Welfare Reform Bill, 10 February 2009: ‘We need a subtler approach that is more about engaging with the individual, talking to them about where they want to go and then trying to deliver it, which has a parallel with advocacy. In a sense, I would like to lodge that as an opening statement because it tries to bring those two parts together and I want to make sure that that has got through. I feel that that second part was often missed in some of the discussions that I overheard.’ Quite surprisingly, Professor Gregg told the committee that he had not read the Bill, and therefore was not in a position to comment if his intentions had effectively translated into the draft Bill.

obey reasonable rules that are set down, with appropriate provisions to consider people's individual circumstances and also offer people a route out of work'.<sup>34</sup>

Indeed, Theresa May underlined the mandatory nature of the proposed changes on behalf of the opposition when underlining the requirement for lone parents to engage in 'work related activity'. She highlighted the paradoxical claim that the government would work in partnership with lone parents, while the same government was seeking the legal power to direct them to engage in activities that they have not agreed upon under partnership. May's comment brings sharply into focus the illiberal nature of the contemporary welfare contract.<sup>35</sup>

In line with the thesis' recognition of the growing volume of delegated legislation which in many ways defines the shape of contemporary welfare reform, its significant presence in the 2009 legislation was noted as a matter of concern by a number of contributors during the passage of the Bill. Theresa May highlighted Mencap's response, which outlined that 'some of the most crucial aspects of the government's welfare reform agenda will be brought into legislation by regulations which have not been written nor debated by parliament, rather than primary legislation'. The charity counted 387 references to regulations, across 114 pages which equates to three references per page.<sup>36</sup> A similar concern was shared by the charity Mind, and Steve Webb made reference to the view of the CPAG who characterised the Bill as 'not so much skeletal as invertebrate'.<sup>37</sup>

During CPAG's evidence session with the Public Bill Committee, its witness, Eddy Graham, pointed to the fact that at the same stage of the Welfare Reform Bill 2007, there existed an extensive set of draft regulations. A colleague Tim Nichols, added that in the context that so much of the legislation would be dictated by regulation, there

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<sup>34</sup> Ann McKechin (the Parliamentary Under-Secretary of State for Scotland) Evidence to the Public Bills Committee, Welfare Reform Bill, 3 March 2009. John Mason (SNP, Glasgow East) responded 'I must confess to disappointment at the Minister's harsh tone. If there had been a bit of sympathy, I would have been a bit more supportive. The contract is an interesting idea. If we enter employment, we clearly have a contract with employer and we have to fulfil certain conditions, but there has to be a minimum standard in a civilised society below which we do not fall. Even our prisoners are entitled to certain levels of food and benefit. Our children should also be entitled to such benefits. While I am happy to accept that the wording of the new clauses is not entirely perfect, I am not happy to withdraw new clause 6

<sup>35</sup> Theresa May (Conservative, Maidenhead) HC Deb, 27 January 2009, Vol. 487, col 201-204; Mark Freedland and Desmond King, 'Contractual Governance and Illiberal Contracts: Some Problems of Contractualism as an Instrument of Behaviour Management by Agencies of Government' (2003) *Cambridge Journal of Economics* 27, pp 465-477, p 466

<sup>36</sup> Theresa May (Conservative, Maidenhead) HC Deb, 27 January 2009, Vol. 487, col 203

<sup>37</sup> Steve Webb (Liberal Democrats, Northavon) HC Deb, 27 January 2009, Vol. 487, col 208

were concerns around the amount of scrutiny time that had been provided for committee consideration of the Bill. The previous 2007 Bill allowed for twelve sittings, following the evidence sessions, whereas on the occasion of the 2009 Bill the sittings were halved to six.<sup>38</sup> Scottish Labour member, Katy Clark, hinted at the hypocrisy of James Purnell's assertion that the Bill would guarantee transparency. She took particular issue with the potential for the ability of governments of a 'different political persuasion' to bring in regulations through a similar mechanism, albeit at a later date, which parliament will not have voted upon.<sup>39</sup> Webb tentatively linked the predominance of regulations with the New Labour's incremental approach to the development of social security law, pointing out that the government's multiple reform processes had contributed to the system's increasing complexity. Notably, Duncan Smith laid the responsibility for the expanding complexity at the feet of an individual, the then Chancellor, Gordon Brown:

'People have produced what might be called comprehensive reform packages, but they were thrown out because the then Chancellor, now the Prime Minister, was intent on a very narrow form of change that made things intensely complex'.<sup>40</sup>

The Minister for Employment and Welfare Reform, Tony McNulty, who wound up the debate, promised that the government would, as far as possible provide 'at least a draft outline of the direction of travel of the regulations ready for the Committee'.<sup>41</sup> However, McNulty failed to deliver on this promise. It was not until the afternoon session of the 5<sup>th</sup> Committee sitting on 24 February – at which point there was only 4 Committee sessions remaining - that McNulty provided something in the way of regulations.<sup>42</sup>

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<sup>38</sup> Eddy Graham (Welfare Rights Specialist) and Tim Nichols (Press and Parliamentary Officer), Evidence to the Public Bills Committee, Welfare Reform Bill, 10 February 2009

<sup>39</sup> Katy Clark (Labour, North Ayrshire and Arran), HC Deb, 27 January 2009, Vol. 487, cc 258-259; also see comments from James Clappison (Conservative, Hertsmere) HC Deb, 27 January 2009, Vol. 487, col 264

<sup>40</sup> Iain Duncan Smith (Conservative, Chingford and Woodford Green) HC Deb, 27 January 2009, Vol. 487, col 208

<sup>41</sup> Tony McNulty, HC Deb, 27 January 2009, Vol. 487, col 267

<sup>42</sup> McNulty told the Public Bills Committee on 25 February 2009 that 'Allegedly...there is a rather thick—for which I apologise—compendium, as promised, of where there will be regulations or a regulation-making power throughout the Bill. Where possible, the compendium contains at least the outline of what those regulations will include. I do not doubt that it will find its way to a pile, either close to members of the Committee or otherwise, at some stage this morning. I apologise that it is tedious and very detailed, but the Committee will know that it is one of those areas of legislation—not dissimilar to immigration—where there is a massive pile of regulation and rules alongside primary legislation'

The 6<sup>th</sup> and 7<sup>th</sup> Committee sittings commenced on 26 February following an interval of just one day, which arguably did not provide members with sufficient time to make sense of the large volume of detail provided before commencing with the planned consideration of amendments. Furthermore, it may be argued that the absence of regulatory detail detracted from the member's ability to develop fully substantive amendments. In summing up the first Commons debate, and the entire Committee Stage, one can argue that it passed with minimal dissent, and as a result the draft legislation returned to the floor of the Commons for the third reading without the endorsement of any amendments. This was in part due to notable control exerted by central government. Paul Rowan (Liberal Democrat) commented that the Public Bill Committee for Welfare Reform was the most top-heavy Committee that he'd served on in terms of Ministers and ex-Ministers. Rowan quite rightly predicted that when the debate returned back to the Floor of the House, that the mood would not be quite so consensual.<sup>43</sup>

### ***From Consensus to Rebellion***

The Report Stage of the Bill was certainly dramatic, in fact it saw the joint-largest rebellion of the parliamentary session. First, Dr Lynn Jones (Labour, Birmingham, Selly Oak) tabled a clause that sought to remove the provision of a 'younger rate' of provision for JSA, which was supported by 30 Labour colleagues.<sup>44</sup> John McDonnell MP followed suit with a large group of amendments and new clauses. The most notable, which McDonnell pressed to a vote, were the amendments (11-14 and 16) which sought to make 'workfare voluntary' (referring to the 'work for benefit'

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<sup>43</sup> Paul Rowan (Liberal Democrat, Rochdale) Evidence to the Public Bills Committee, Welfare Reform Bill, 3 March 2009; Ann McKechn (Parliamentary Under-Secretary of State for Scotland), Tony McNulty (Minister for Employment and Welfare Reform) Jonathan Shaw, (Parliamentary Under-Secretary of State for Work and Pensions) Kitty Ussher (Parliamentary Under-Secretary of State for Work and Pensions) Gordon Banks (Labour, Ochil and South Perthshire) (Formerly Parliamentary Private Secretary from May 2006- Jan 2009 to James Purnell), Helen Jones (Labour, Warrington North) Assistant Whip, HM Treasury), James Plaskitt, (Labour, Warwick and Leamington) Parliamentary Under-Secretary, Department for Work and Pensions (11 May 2005 to 6 Oct 2008. Another member of note is Peter Lilley who was the Conservative Secretary of State for Social Security, 1992-1997. 7 out of the 9 Labour MPs who served on the Committee held relevant ministerial positions

<sup>44</sup> In support of her amendment Lynne Jones MP cited Gordon Brown's Maiden Speech to Parliament in 1983 in which he referred to the inadequate level of unemployment benefit (at the time it was £26 per week): "The debate about the so-called unemployed trap, and the so-called incentives that it is claimed will be needed to get the unemployed back to work, is designed to obscure what everyone knows. If there are no jobs, no amount of poverty and no degree of destitution will create jobs where none exist." See, HC Deb, Vol. 46, c 1242, 27 July 1983; See Div. 74 was voted for by 30 Labour MPs. HC Deb, Welfare Reform Bill (17 March 2009)

pilots).<sup>45</sup> Furthermore, McDonnell and 28 of his Labour colleagues voted for amendment 35 tabled by frontbench Conservative MP James Clappison which proposed the exemption of lone parents with a child under five from work-related activities.<sup>46</sup> McDonnell made a series of cutting speeches which undermined the government's position. Notable and controversial, was his use of the word 'workfare' when introducing his amendments. During the first reading of the Bill, James Purnell assured the House that the 'work for benefit' pilots did not constitute workfare. At that time, Purnell asserted that 'workfare is a system whereby people are punished and distanced from the labour market by removing their entitlement to work search and by stigmatising them.'<sup>47</sup> By using the contested term in his speech, McDonnell effectively indicated that in his view, the measures enshrined in the legislation equated to the 'work for benefit' regime outlined by Purnell. Writing for the Guardian on the day of the Third reading of the Bill, McDonnell asserted that:

'The "work for benefits" scheme contained in the legislation would force long-term unemployed people (disproportionately with disabilities, ethnic minorities and, increasingly, lone parents) to work for their benefits. This workfare scheme would oblige claimants to work for £1.73 an hour'.<sup>48</sup>

Meanwhile on the floor of the Commons, McDonnell added that at the heart of the mandatory scheme was the government's wish to sanction those who did not comply by removing their benefits. He espoused concern that such sanctions effectively introduce new stigma to the process, as support, advice and assistance are not offered on a voluntary basis, but on a forced basis which immediately stigmatise the claimant as workshy or a scrounger.<sup>49</sup> McDonnell's view was shared by the SSAC, with the then Chair Sir Richard Tilt submitting that 'We (the SSAC) have seen no evidence to suggest that any of the contemporary 'workfare' models are likely to be effective in Great

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<sup>45</sup> Div. 75 was voted for by 26 Labour MPs. HC Deb, 17 March 2009, Welfare Reform Bill

<sup>46</sup> Div. 76 was voted for by 29 Labour MPs. HC Deb, 17 March 2009, Welfare Reform Bill

<sup>47</sup> James Purnell, HC Deb, 27 January 2009, Vol. 487, col 192; James Purnell made this response in answer to a question from Russell Brown (Labour, Dumfries and Galloway): "On the work for benefit pilots, will the Secretary of State assure the House that he is not introducing workfare in this country?"

<sup>48</sup> John McDonnell MP, 'New Labour's Twin Obsessions' (The Guardian, London, 17 March 2009) McDonnell asserted New Labour's twin obsessions as getting lone parents back to work and privatisation. See also, Neil Clark, 'The Party has Lost its Soul' (The Newstatesman, London, 23 April 2009). The latter article refers to the resignation of Labour MP Alice Mahon who noted in her resignations letter 'John McDonnell was magnificent, but what I thought was deeply depressing was that - apart from Lynne Jones - there were hardly any Labour women MPs attending the debates and opposing the bill'

<sup>49</sup> John McDonnell (Labour, Hayes and Harlington) HC Deb, 17 March 2009, Vol. 489, col 795

Britain', and that such schemes would create additional stigma for the long term unemployed.<sup>50</sup> Furthermore, McDonnell provided evidence from a report written on behalf of DWP by the Centre for Regional Economic and Social Research which examined workfare in the US, Canada and Australia. The report concluded that there was little evidence that workfare increases the likelihood of finding work. It also found that it can reduce employment prospects by limiting the time available for job search activity. The research also found workfare to be 'least effective in getting people into jobs in weak labour markets where unemployment is high'.<sup>51</sup> The Labour MP asserted that the report effectively supported the scenario that the country found itself in, with unemployment in excess of 2 million, with the prospect of a further million people being added to the register by the end of 2009.<sup>52</sup> It was also noted that one of the so-called architects of the WRB, David Freud, was not an advocate of the workfare approach.<sup>53</sup>

New Labour's Tony Rooney (Chair of the Work and Pensions Select Committee) countered his colleague's views by stressing that the 'work for your benefit' proposal would not take effect until claimants had been on benefits for two years and essentially that there must come a point when, for the benefit of the unemployed claimant and the taxpayer, the government must adopt a different approach.<sup>54</sup> He argued that the provision of six weeks of work experience, for four days a week, with the other day allowed for work searches could not be equated to the American concept of workfare which is activated from day one of a claim.<sup>55</sup> Ultimately, both Labour members objections, and the amendment put forward by James Clappison failed.<sup>56</sup> Closing the debate, James Purnell defiantly claimed that the government

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<sup>50</sup> As quoted by John McDonnell (Labour, Hayes and Harlington) HC Deb, 17 March 2009, Vol. 489, col 796

<sup>51</sup> Ibid. See also the report, Richard Crisp and Del Roy Fletcher, *A Comparative Review of Workfare Programmes in the United States, Canada and Australia* (HMSO, 2008), pp 1-2

<sup>52</sup> John McDonnell (Labour, Hayes and Harlington) HC Deb, 17 March 2009, Vol. 489, col 796

<sup>53</sup> John McDonnell (Labour, Hayes and Harlington) HC Deb, 17 March 2009, Vol. 489, col 796

<sup>54</sup> Terry Rooney (Labour, Bradford North) HC Deb, 17 March 2009, Vol. 489, col 821

<sup>55</sup> Div. 74 (Lynne Jones, Labour) The House divided Ayes 85 / Noes 408. Div. 75 (John McDonnell, Labour) The House divided Ayes 76 / Noes 396. Div. 76 (James Clappison, Conservative) The House divided Ayes 217 / Noes 260. One Labour amendment was successful. John Robertson (Glasgow North West) and Anne Begg (Aberdeen South) pushed forward a new clause (10) to amend the Social Security Contributions and Benefits Act 1992 so that a blind person could qualify for the higher-rate mobility component of the disability living allowance

<sup>56</sup> Div. 76 (James Clappison, Conservative) The House divided Ayes 217 / Noes 260. James Purnell was clearly unsettled by the Conservatives amendment. He said 'The right hon. Lady's party has just voted against it in the last Division. I do not know what planet she is on—it is quite extraordinary. The test of whether the Opposition support the Bill is whether they vote for it. How could it be less complicated?' HC Deb, 17 March 2009, Vol. 489, col 868

'believe in the welfare state' that embodies 'the conviction that we are more than just self-interested individuals, that there is such a thing as society and that we judge the moral value of a society by how it treats its poorest citizens'. He claimed that the Bill was directed squarely at that principle. However, the principle that Purnell referred to did not involve a commitment to provide a universal right to welfare, but to further the development of an active welfare state that 'rests on a belief that work will always be the best route out of poverty, the best way for people to achieve their aspirations and the best hope that the next generation will do better than the last.'<sup>57</sup> Nonetheless, it very soon became evident that Purnell did not have confidence that New Labour could effectively deliver the welfare state that was envisaged above. On 4 June 2009, at the moment the polls closed on the European elections, he tendered a letter of resignation to Gordon Brown which he asked the Prime Minister to stand aside to quell the chances of a Conservative victory in the next General Election.<sup>58</sup>

Political commentators characterised Purnell as a fiercely loyal 'Blairite' and pointed to his evident loss of confidence in Brown's ability to develop 'sufficiently clear domestic policy' and his disenchantment with the Prime Minister's emphasis on 'constructing political dividing lines with the Tories' which have the potential to alienate the electorate as key reasons for the Secretary of States departure.<sup>59</sup> In a piece for *The Times* penned in 2010, Purnell submitted that he suggested a version of 'Universal Credit' to Brown who rebuked the idea for fear that there would be losers. Brown's rejection allegedly convinced Purnell 'that there was no point in staying inside government to try to influence him'.<sup>60</sup> In the same article Purnell said that there had grown 'a covert consensus' on welfare in Britain, with most politicians in agreement that 'it must be supportive enough, otherwise poverty becomes a trap; but it must be tough enough or the support itself becomes a trap'.<sup>61</sup> Purnell's replacement,

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<sup>57</sup> Terry Rooney (Labour, Bradford North) HC Deb, 17 March 2009, Vol. 489, col 864

<sup>58</sup> "This moment calls for stronger regulation, an active state, better public services, an open democracy. It calls for a Government that measures itself by how it treats the poorest in society. Those are our values, not David Cameron's" (*The Telegraph*, London, 4 June 2009). David Cameron MP was appointed to the position of leader of the opposition in December 2005

<sup>59</sup> Allegra Stratton and Patrick Wintour, 'James Purnell Quits Cabinet and Calls on Gordon Brown to Stand Aside Now' (*The Guardian*, London, 5 June 2009). Tony McNulty, the Secretary of State for Employment and Welfare Reform at DWP resigned over controversy over his parliamentary expenses. See, 'Tony McNulty Resigns after Expenses Shame' (*The Telegraph*, London, 5 June 2009)

<sup>60</sup> James Purnell, 'Labour Wanted These Welfare Reforms Too' (*The Times*, London, 9 November 2010). See also, George Eaton, 'James Purnell: I Could Have Been Iain Duncan Smith' (*The New Statesman*, London, 9 November 2010)

<sup>61</sup> Purnell, n. 59 above



who was charged with completing the work on the 2009 Welfare Reform legislation was Yvette Cooper MP.

A number of developments occurred as the legislation moved through the House of Lords. It was confirmed that the amendments to the Social Fund would involve a reduction in the right to review, due to the move to allow external creditors to provide loans – the external creditors were considered exempt from being part of the fund and claimants would be directed to the Financial Service Ombudsman, which would extend considerably the waiting time for redress.<sup>62</sup> It was also determined that the National Minimum wage would not be applied to ‘work for your benefits’ programme, as claimants were ultimately considered to be in receipt of government support throughout their participation in the scheme which was designed to provide work experience and improve claimant employability.<sup>63</sup> In April 2009, a new four-stage jobseekers regime was introduced – stage one was known as a ‘self-managed job search’ applied for the initial 13-weeks of a claim. This period encompassed mandatory ‘back to work sessions’ which imparted advice to claimant about their job search. The next stage, which encompassed the following 13 weeks of claim was entitled ‘directed job search’, which required a revised jobseeker’s agreement to be drawn up which specified additional mandatory activity. Stage three was activated after six months (or immediately for those identified as requiring additional support to return to work). A detailed action plan with integrated mandatory activity, enforceable by way of jobseekers directions was drawn up and agreed with a jobcentre adviser. The fourth stage occurred following a further six months on JSA, and required the claimant to participate in the Flexible New Deal (FND) (launched in the autumn 2009). The FND was designated as a 12 month programme, but could be extended for a further six months.<sup>64</sup> Following the national roll out of the four-stage process, DWP released a report which evaluated its introduction in four pilot

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<sup>62</sup> See contribution from Baroness Murphy (Crossbench) HL Debs, 29 April 2009, Vol. 710, col 297. Other changes activated before the Royal Assent of the WRB 2009 included the limit on the number of crisis loans permitted – from 6 April 2009 only one crisis loan could be awarded for living expenses unless a further emergency puts the claimant’s health and safety at risk. There was a reduction in the right to a formal interview following a review request. From 27 April 2009, the number of crisis loans awarded for living expenses was limited to three in a rolling 12 month period, and claimants would now be required to attend an interview prior to their third claim. See, Simon Rahilly, Legislative Comment: Welfare Reform (2009) *Journal of Social Security Law* 16 (4), pp 176-178

<sup>63</sup> Tony McNulty, HC Written Answers, 20 April 2009, Vol. 491, col 135

<sup>64</sup> See the explainer, Department for Work and Pensions, Response to Freedom of Information Request, Jobseekers regime and Flexible New Deal (JRFND) stages (April 2009) < <https://www.whatdotheyknow.com/request/212819/response/522313/attach/4/132F96D0.pdf> > (accessed 1 July 2017) for a detailed outline

jobseeker areas, and concluded that there were few positive outcomes from the staged regimes and that there was a need for more training, better understanding and better communication in Jobcentre Plus offices.<sup>65</sup>

### ***Changing the face of the Bill***

Rahilly suggests that Yvette Cooper's influence was evident in a number of 'family friendly' measures announced in the summer of 2009 – she announced that in selected areas from 2010, lone parents would be entitled to earn up to £50 per week without it affecting their benefits. Secondly, it was confirmed (following the success of the Conservative amendment in the House of Commons) that lone parents with children under the age of seven would not be required to look for work and those with children under the age of three would not be required to undertake activity to prepare them for work in the future. It was also accepted that Personal Advisers would be required to take into account the well-being of the children and the availability of childcare in helping lone parents prepare for work. Finally, it was determined that parents claiming JSA would be exempt from a requirement to seek work for three months after domestic violence.<sup>66</sup>

The Parliamentary Joint Committee on Human Rights expressed its concern that some of the proposals in the Welfare Reform Bill contravened the European Convention on Human Rights.<sup>67</sup> They wrote to the Minister (James Purnell) to raise 'several significant' issues in respect of work-related activities; the 'work for your benefit' regime; work-related activities; conditionality and drug and alcohol dependency; contracting out and personalisation, individual budgets and disabled people – evidently, the Joint Committee expressed concern about the bulk of the main proposals set out in the Bill.<sup>68</sup> In relation to the first three issues, the Committee mimicked many of the concerns expressed during the Bill's passage through the House of Commons. In terms of human rights norms, there was concern that the

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<sup>65</sup> Anne Bellis, Jane Ashton and Sara Dewson, 'Jobseekers Regime Test Site Evaluation: Qualitative Research' (DWP Research Report No.580, 2009)

<sup>66</sup> Rahilly, n. 61 above, pp 176-178

<sup>67</sup> Human Rights Joint Committee, Legal Scrutiny: Welfare Reform Bill; Apprenticeships, Skills, Children and Learning Bill; Health Bill (HMSO, 29 April 2009) < <https://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/78/7804.htm> > (accessed 19 July 2017)

<sup>68</sup> Legislative Scrutiny: Welfare Reform Bill; Apprenticeships, Skills, Children and Learning Bill; Health Bill - Human Rights Joint Committee (29 April 2009) < <https://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/78/7804.htm> > (accessed 19 July 2017); Note that the Joint Committee received a response from Secretary of State James Purnell on 19 March 2009

proposals could be implemented in a way that could lead to incompatibility with the right to respect for private life in Article 8 (ECHR) and possibly the right to be free from inhuman and degrading treatment in Article 3 ECHR and the right to enjoy those Convention rights without unjustified discrimination (Article 14 in conjunction with Articles 8 and 3 ECHR). The Committee was unable to be definitive about the human rights implications of the Bill due to the scrutiny limitations attached to a skeleton Bill – it did have access to the same detailed delegated power memorandum as the Public Bills Committee, and while they found this helpful, they asserted that it remained difficult to scrutinise proposed safeguards for their impact on individual human rights.<sup>69</sup> For example, in relation to the ‘work for your benefit’ proposals the Bill as presented to the Committee enabled the Secretary of State to set up a hardship fund, but did not require him to do so.<sup>70</sup> Furthermore, it allowed for the Secretary of State to set conditions for the hardship payments, as well as the relevant amounts, but it did not specify any further information.<sup>71</sup> In this context, the Committee recommended that ‘where safeguards are relevant to the government’s view on human rights compatibility, those safeguards should be published on the face of the Bill’. Where the government’s view on compatibility relies on safeguards to be provided in the form of secondary legislation, the Committee recommended that the draft regulations be published with the Bill, or at the minimum the government should provide explanatory material alongside the Bill detailing the safeguards it proposes to provide.<sup>72</sup>

It is also notable that the Committee outlined its concern in relation to the claims made by NGOs and Members of the House of Commons that the government ignored its own evidence that provided that the proposed ‘workfare’ proposals would not encourage people back to work, and were not compatible with prevailing economic conditions. It was emphasised that where the government is developing changes to

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<sup>69</sup> Ibid

<sup>70</sup> Welfare Reform Bill, Clause 1(8), 17A (8)

<sup>71</sup> Welfare Reform Bill, Clause 1(8), 17B (1). The Joint Committee acknowledged the decision of the government to provide more information on each of the proposed safeguards in the detailed delegated powers memorandum. The Government responded that it intended to model its hardship provisions on existing hardship provisions, which would exclude all but those in a ‘vulnerable group’. It explained that the pilot regulations would contain certain circumstances which would provide an automatic good cause for failure to participate and will provide Job Centre Plus decision makers with flexibility to take decisions in relation to each individual’s circumstances

<sup>72</sup> Human Rights Joint Committee, Legislative Scrutiny: Welfare Reform Bill; Apprenticeships, Skills, Children and Learning Bill; Health Bill - (29 April 2009), <<https://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/78/7804.htm>> (accessed 19 July 2017)

welfare provision, which are required to meet the right to social security and the right to an adequate standard of living that they should be supported by evidence and comparative research.<sup>73</sup>

Concerns in relation to lone parents and their responsibility to engage in 'work related activity' and indeed the repercussions if they failed to do so, continued to be a key focus of political debate right up to the point of Royal Assent. On 10 November the House of Commons carried out its considerations of the amendments laid down by the House of Lords. The newly appointed Minister of State for Work and Pensions, Jim Knight MP, disputed amendment 2 carried forward by the other House that would amend the Bill so that sanctions could not be imposed upon a 'single' parent in receipt of IS with a child under five if they failed to undertake work-related activity. He stated that he did not think that such an amendment would achieve the purpose intended, and that by providing an amendment in lieu of that from the other house that would maintain the emphasis on its two key principles, namely that work is the best route out of poverty, and that parents, especially lone parents, must be allowed to fulfil their responsibilities to their children.<sup>74</sup> Knight maintained that an absent parent could use the measure as an excuse to avoid getting back to work. Thus the government remained steadfast that the parent should commence compliance with the conditionality regime at the point of the child's third birthday, as it would 'allow them to gradually build their confidence and skills at a pace that suits them over four years' rather than cramming work-related activity into a shorter time period.<sup>75</sup> Knight proceeded to quote from a speech that David Cameron's delivered that morning at the Hugo Young Memorial Lecture:

'the first step is to redistribute power and control from the central state and its agencies to individuals and local communities. That way we can create the opportunity for people to take responsibility'.<sup>76</sup>

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<sup>73</sup> Ibid. The Joint Committee noted the government's decision to pilot its 'Work for your benefit' programme before its proposals were rolled out on a wider scale

<sup>74</sup> Jim Knight (Minister of State for Work and Pensions), HC Deb, 10 November 2009, Vol. 499, col 172

<sup>75</sup> Ibid

<sup>76</sup> Knight quoted from David Cameron's speech on 10 November 2009 at the sixth annual Hugo Young memorial lecture. The full speech can be accessed here < <http://conservative-speeches.sayit.mysociety.org/speech/601246> > (accessed 22 July 2017). For a summary see Andrew Sparrow, 'Tories Want to Create 'Big Society', says David Cameron' (The Guardian, London, 10 November 2009). See also, David Cameron, 'Big Society Can Fight Poverty. Big Government Just Fuels It' (The Guardian, London, 10 November 2009)

He quipped that if this position earnestly equated to the Conservative's new views on tackling poverty, that they had no choice but to support the government amendment as work-related activity for lone parents of children aged three to five is associated with, in the words of Cameron, 'the opportunity for people to take responsibility'. He also asserted that the Conservatives indicated their agreement with the implementation of sanctions in respect of failure to attend work-focused interviews with parents whose youngest children are from three to five years olds.<sup>77</sup>

In place of the Lord's amendment, the government proposed that all work-related activities, where they relate to lone parents with children under seven, be brought back to the House for further 'affirmative debate' before being rolled out nationally, which would serve to reassure the Members that passing the Bill would not preclude further debate about work-related activity for this group. Regulations made within five years of Royal Assent would be required to come back to both Houses for consideration.<sup>78</sup> The government's substitute amendment faced dissent from the House. The Conservative spokesperson for Work and Pensions, Jim Clappison MP, asserted that his party continued to broadly support the Bill, but supported Lord Freud's amendment on the basis that parents with pre-school aged children should not face the prospect of sanctions.<sup>79</sup> It is again notable that the government faced significant dissent from its own benches, with Diane Abbott asserting that 'affirmative resolution procedures are invariably not worth the paper they are written on', and that by the time the matter in question returns to the House, the details of the original debate are forgotten and the votes are inevitably whipped. It was further established that the affirmative resolution procedure would relate solely to the regulations, and not to the issue of sanctions. Abbott fiercely disputed the government's justification of its position and claimed that at the heart of the measures lay the 'government's wish to coerce a residual group of young women, who probably do not have the skills and almost certainly have very little education, back to work'. She further claimed that the government's statistics on the availability of child care were 'fantasy' and that it would be considerably more difficult for a mother who has a child or children who

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<sup>77</sup> Jim Knight (Minister of State for Work and Pensions), HC Deb, 10 November 2009, Vol. 499, cc 172-173

<sup>78</sup> Jim Knight (Minister of State for Work and Pensions), HC Deb, 10 November 2009, Vol. 499, cc 173-174

<sup>79</sup> Jim Clappison (Conservative spokesperson for Work and Pensions) HC Deb, 10 November 2009, Vol. 499, col 177

become poorly or have children who suffer from a chronic condition to sustain permanent employment.<sup>80</sup>

Meanwhile another Labour backbencher John Grogan questioned the government's position on account that the Lord's amendment had been brought forward by Lord Freud, whose hard-line position had contributed to his defection to the Conservatives. He asserted that the government proposal was 'cold, austere' and 'unworthy of the Secretary of State and the Minister'.<sup>81</sup> Labour's Lynne Jones, a consistent Labour dissenter, quoted DWP's five-year strategy that was published in 2005 and demanded to know what had changed since then:

'We think it would be wrong simply to move lone parents from Income Support onto the Jobseeker's Allowance regime: an unrestricted requirement to search for work is inappropriate, given the complex and difficult circumstances many lone parents face. We think such an approach would be expensive, unfair and ineffectual.'<sup>82</sup>

She asserted that the New Labour government were facing increasing pressure to respond to 'the Daily Mail-type agenda' that suggests that lone parents and other groups of claimants, such as those who are incapacitated, are 'somehow feckless and living the life of Riley while the state pays them luxurious benefits'. She cited statistics which suggested that 19 per cent of lone parent whose youngest child is over 11 were claiming income support, of whom 25 per cent were caring for a disabled child, and 28 per cent of parents had a disability themselves.<sup>83</sup> The government's alternative amendment 2(a), which proposed that a single parent in receipt of Income Support with a child under 5 should not be subject to a sanction, if they do not undertake work-related activity, was narrowly passed, and was subsequently agreed upon in the House of Lords.<sup>84</sup> However, notable were Lord Freud's comments that if the Conservatives were in power in six months' time, that 'lone parents with children under five will not face financial sanctions as a result of the progression-to-work

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<sup>80</sup> Diane Abbott (Labour, Hackney) HC Deb, 10 November 2009, Vol. 499, col 177, and cc 185-186

<sup>81</sup> John Grogan (Labour, Selby) HC Deb, 10 November 2009, Vol. 499, cc 180-181

<sup>82</sup> Lynne Jones (Labour, Birmingham Selly Oak) HC Deb, 10 November 2009, Vol. 499, col 186

<sup>83</sup> Lynne Jones (Labour, Birmingham Selly Oak) HC Deb, 10 November 2009, Vol. 499, cc 186-187. See also, Department for Work and Pensions, 'Five Year Strategy: Opportunity and Security Throughout Life' (HMSO, 2005)

<sup>84</sup> Div. 245 (re. Amendment 2) The House divided: Ayes 286 / Noes 236. Anne McGuire (Labour, Stirling) was the only Labour colleague to fully support Jim Knight's position

regime, which of course turned out not have become the case.<sup>85</sup> The Welfare Reform Bill gained the status of Royal Assent on 12 November 2009.

### ***Labour Party Politics***

The passage of the WRB 2009 coincided with a period of great uncertainty for New Labour. The Party was attempting to survive and navigate its way through economic turmoil of epic proportions and required a prime minister who could lead from the front. Surprisingly, despite his dominant persona as Chancellor of the Exchequer, Gordon Brown seemingly failed to unite his party under clear ideas and values that could succeed in directing policies in a practical sense.<sup>86</sup> Although it was acknowledged that the economic crisis was connected to the global economic cycle and as such it could not be pinned on the head of any one national government it was inevitable that Gordon Brown would face questions about his approach to the financial sector while at the Treasury, particularly his 'light touch' strategy in relation to intervention and regulation.<sup>87</sup> A further factor that aided to the sense of doubt encasing Brown's leadership was an early but major faux-pas whereby Brown reneged on the opportunity to seal Labour's continued position by holding a general election.<sup>88</sup> This episode created space for David Cameron, the leader of the opposition to label the Prime Minister as a 'bottler' – a term that Brown found hard to shake off, and his apparent lack of confidence in his government's record and ideological footing shaped the minds of not just the British electorate, but also his party colleagues.<sup>89</sup>

In the Blairite wing of the party, there existed persistent conversations about possible replacements for Brown, and a number of public expressions of growing disquiet at the Prime Minister's refusal to accede.<sup>90</sup> It can be asserted that the external party pressures exacted themselves on the government's approach to the parliamentary process in regard to the WRB, and in a more general sense its overall approach to the development of social security legislation particularly in its last two years of government. A top-line example was the resignation of James Purnell from his

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<sup>85</sup> Lord Freud (Conservative Shadow Minister for Welfare Reform) HL Deb, Vol. 714, col 908

<sup>86</sup> Matt Beech, 'A Puzzle of Ideas and Policy: Gordon Brown as Prime Minister' (2009) *Journal of Policy Studies* 30 (1), pp 5-16

<sup>87</sup> See Gordon Brown, Speech at the Lord Mayor's banquet, London, 21 June 2006

<sup>88</sup> Andrew Rawnsley 'They Will Call Him Bottler Brown and it is Going to Hurt' (The Guardian, London, 7 October 2007)

<sup>89</sup> David Cameron, Prime Minister's Questions, House of Commons, 10 October 2007

<sup>90</sup> Particularly notable is this piece from Brown's Foreign Secretary, David Miliband, 'Against All Odds We Can Still Win On a Platform of Change' (The Guardian, London, 29 July 2008)

position as Secretary of State for Work and Pensions half way through the scrutiny process, and indeed the resignation of Tony McNulty, due to controversy around his parliamentary expenses. More insightful examples have emerged through a close examination of the debates in both the House of Commons and the House of Lords. There were occasions, some of which are outlined above, when it was apparent that the government surpassed what may be considered a reasonable level of energy expended at ensuring the support of the opposition, and instead its contributions crossed over into the realms of seeking to placate the Conservative party's neoliberal view that work is the best route out of poverty and moreover that it was subsequently implementing the 'correct' approach to welfare in the midst of the economic crisis.

In the case of the exchanges outlined above, in relation to lone-parents, this strategy well and truly backfired, as the Conservatives under the stewardship of Lord Freud took the opportunity to push-back and simultaneously be recognised as more sympathetic to the needs of claimants.<sup>91</sup> Furthermore, and as noted in detail above, New Labour's strictly active approach to social security served to isolate those traditionalists in the Labour party who retained more Marshallian views on social citizenship, and prioritised the claimant's right to welfare more urgently in the midst of an economic crisis. By the end of 2009 New Labour found themselves in an increasingly unstable position with declining popularity. It seemed that the government had gone as far as its roots would allow it to in terms of welfare reform, whereas for the Conservatives there existed significantly more mileage to effectively pick up where New Labour left off – by repackaging its approach in narrower terms with fewer concessionary measures. Cameron outlined his welfare contract in barely two lines: '...do the right thing and we will back you all the way. But fail to take responsibility – and the free ride is over'.<sup>92</sup>

### ***Conclusion: The End of New Labour***

The 2010 General Election ended New Labour's 13 year tenure in office, its powers to further drive reform to social security system quelled, as it was now demoted to the backseat where options to dictate the direction of travel were significantly limited. Under Gordon Brown's leadership, the party polled 29.7 per cent of the vote.

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<sup>91</sup> Lord Freud stated during the final exchanges on the Bill that 'It is clear that this amendment has become something of a political game for the Government. They cannot accept this simple, unambiguous proposal because it came from our Benches, and for no other reason'. HL Deb, Vol. 714, col 908

<sup>92</sup> David Cameron, 'Ending the Free Ride For Those Who Fail to Take Responsibility' (Conservative Party, 2010) <  
<http://www.parliamenttoday.com/free/viewnews.html?id=44325> > (accessed 22 July 2017)



After 1983, this was the worst Labour result at a General Election since 1918.<sup>93</sup> Brown stepped down and was replaced by Ed Miliband, who audaciously asserted that ‘The era of New Labour has passed. A new generation has taken over’.<sup>94</sup> Similarly, the Conservative Party promoted the idea that ‘now New Labour is dead’.<sup>95</sup> When one scratches off this rhetoric, it becomes clear that although the electoral death knell rang for Labour on 6 May 2010, its influence remained. Indeed, Prabhakar highlights that David Cameron commented in 2005 that he was the genuine heir to Blair, and that some of his ideas were evidently adopted by the Coalition government.<sup>96</sup> The Cameron-Clegg administration went so far as asking key figures from the Labour party to play an advisory role – for example Frank Field, Alan Milburn and Lord Hutton provided expertise on pensions, welfare and social mobility.<sup>97</sup> Moreover, former special Advisers to New Labour accepted positions within the Coalition Government, for example Richard Reeves who was an adviser to Frank Field when he was Minister for Welfare Reform and of course as noted above, David Freud defected to the blue benches to act as shadow Minister for Welfare Reform and remained an instrumental figure in DWP until his retirement in 2016. Both of these appointments reinforce the idea that by the end of New Labour’s period in government, they had established an even greater level of consensus than existed in 1997 at the end of the Conservative’s 18 year reign. Of course, the existence of continuity is not a new phenomenon. As Harris remarks, ‘there is a clearly a strong case for taking the long view when analysing social and economic policy reform’ and from such a view it can be asserted unequivocally that post-1997 reforms can be regarded as continuing the key principles established in the preceding Conservative years with measures being pursued with increased vigour: the commitment to activate the unemployed, the development of employment and training programmes and conditional measures that link participation to entitlement – or opportunity to responsibility in the effort to prevent welfare dependency.<sup>98</sup> The push towards a system of tax credits which

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<sup>93</sup> John Curtice, Steve Fisher and Robert Ford, ‘Appendix 2: An Analysis of the Results’ in Dennis Kavanagh and Philip Cowley, *The British General Election of 2010* (Palgrave Macmillan, 2010), pp 385-426

<sup>94</sup> Andrew Porter and Robert Winnett, ‘Ed Milliband: New Labour is Dead’ (The Telegraph, London, 8 November 2010)

<sup>95</sup> William Hague, ‘New Labour is Dead’ Speech to the Conservative Party Conference, 3 October 2010

<sup>96</sup> Rajiv Prabhakar, ‘What is the Legacy of New Labour?’ in Simon Lee and Matt Beech (eds), *The Cameron-Clegg Coalition: Coalition Politics in an Age of Austerity* (Palgrave Macmillan, 2011), p 25

<sup>97</sup> Ibid

<sup>98</sup> Neville Harris, ‘New Labour and Social Security - The Long and the Short of it’ (2010) *Journal of Social Security Law* 17 (3), pp 135-136

would provide greater incentives to work, and the extension of conditionality to those claimants formerly precluded on the basis of sickness, disability or their lone-parent status.

Key benefits such as Jobseekers Allowance, Disability Living Allowance and the Social Fund which were created before 1997 (notwithstanding the power in the Welfare Reform Act 2009 to abolish IS) were still in place when New Labour departed office, although, it is important to note that there have been significant changes to the structure and the emphasis of the benefit system, for example the introduction of ESA under the Welfare Reform Act 2007.<sup>99</sup> Indeed, the introduction of additional work activation measures serves to contribute to the contention shared in the introduction to this chapter, namely that Labour's reform agenda narrowed considerably from encompassing a balance of carrots in the form of incentives and voluntary support and sticks in the form of mandatory activity and sanctions for non-compliance to an overt focus on the latter.

Although support has been increased in the tax system and generosity can be identified in the provision of winter fuel allowances and pensions, for working-age claimants' income support and housing benefit entitlement became considerably more restricted. This brings into focus the thesis' conclusion at the end of Chapter 3. The activation by government of an ideological agenda will inevitably create winners and losers. As Harris asserts in the case of New Labour 'the beneficiaries or victims of a sharpening of the dividing line that was implicit in the policy principle of "work for those who can; security for those who cannot"' was advanced in the government's 1998 Green Paper.<sup>100</sup> It is contended here that Labour's stark categorical approach to the distinction between the 'deserving' claimant in the form of those clearly unable to work and the 'undeserving' claimant in the form of those who willingly resigned themselves to a life of 'worklessness' succeeded in more clearly targeting the section of the population who could viably fall victim to the Coalition's efforts to decrease the economic deficit, with minimal public outcry, as it was firmly established by New Labour that 'work is the best route out of poverty' and thus the perceived need for a strong welfare state was considerably weakened.

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<sup>99</sup> Ibid

<sup>100</sup> Ibid. See also, Secretary of State for Social Security and Minister for Welfare Reform, *New Ambitions for Our Country: A New Contract for Welfare* (Cm 3805, 1998), foreword by Tony Blair PM, p iii

Ultimately, despite the notable and on occasion fundamental changes across a range of benefits, New Labour's reforms were predominantly built around the framework that was already in place, in a way that was consistent with its welfare activation and poverty reduction ideals. Ultimately, the Labour government did not 'think the unthinkable' and the social security system was not significantly restructured. As noted in the previous chapter, the enormous complexity of the system and interdependency of different parts make true transformation realistically achievable only over a considerable period of time, and although New Labour made an attempt to simplify the system, they inadvertently increased its complexity by way of its overt reliance on delegated legislation. This form of law making related to its focus on the way that social security is delivered, through the constant modernisation and frequent restructuring of services, the increasing personalisation of support, and plans to involve private bodies and voluntary organisations in delivering welfare to work.

More perniciously, the failure to ventilate the arguments for many of the measures implemented through secondary legislation, through pilot measures and through discretionary decision making, further undermined the democracy of social citizenship. The detail of social security was not understood or examined by many, and so the headline messages were more easily controlled by those whose political agendas were shaped by crude responses to citizen demands for cost-effective state support. The idea that the individual should be held responsible, and punished for failures to attend fully to their obligations, generated very little controversy and apparently little sympathy. The success of the idea, handed like a baton between Labour, Conservatives and Liberal Democrats, led to the continued erosion of the rights of social security claimants to assert and enjoy full citizenship. The platform on which the Coalition government built subsequent welfare reforms had been strengthened considerably by the Labour government, and the Welfare Reform Act 2012 was the inevitable successor to the contract-based citizenship that Labour's legislation had embedded.

# **PART 4: Social Security under the Coalition Government 2010-2015**



## Chapter 9: A New Dawn for the New Right

‘...the main burden of deficit reduction [would be] borne by reduced spending rather than increased taxes’.

Cabinet Office 2010

### **Introduction**

It took just ‘five famous days’ in May 2010 for the head of the Conservative Party, David Cameron, and the head of the Liberal Democrat Party, Nick Clegg, to come to an agreement to form a government.<sup>1</sup> The outcome of the negotiations? A Coalition Programme for Government<sup>2</sup> strongly rooted to the commitment of the new Chancellor, George Osborne, to ‘move away from an economic model that was based on unsustainable private and public debt’.<sup>3</sup> Although it was not immediately clear, a major casualty of George Osborne’s commitment to reduced spending would be the social security budget. The deep and searing pain of the cuts would continue to be felt overwhelmingly by working-aged claimants. In some ways, this sequence of events is comparable to the thesis’ opening chapter which detailed the aftermath of the financial crisis of the 1970’s, when the British welfare state became the casualty of economic retrenchment.<sup>4</sup> The coalition, much like the Thatcher government, promoted the need to cut the government deficit, reduce public spending, progress privatisation and shrink the size of the public sector. It is evident that both administrations prioritised economic matters at the expense of social issues. The provision of social security has been characterised by both governments as a burden, and contrary to the efficiencies of the market. The Coalition’s adoption of this position worked against previous attempts by the New Labour government who sought to increase ‘equality of opportunity’ and the incentive to gain employment through policy initiatives, for example, ‘making work pay’. As Squires argues, this version of economic liberalism asserts that inequality serves as an incentive in a market economy and what the poorest need most is not social security, but rather order,

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<sup>1</sup> Nicholas Timmins, ‘The Coalition and Society (IV): Welfare’, in Anthony Seldon and Mike Finn (eds), *The Coalition Effect 2010 – 2015* (Cambridge University Press, 2015), p 323. See also, *Coalition Agreement for Stability and Reform* (Cabinet Office, May 2010)

<sup>2</sup> HM Government, *The Coalition: Our Programme for Government* (HMSO, 2010) < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/83820/coalition\\_programme\\_for\\_government.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/83820/coalition_programme_for_government.pdf) > (accessed 3 March 2018)

<sup>3</sup> George Osborne, ‘A new economic model’ (Mais Lecture, 24 February 2010) < <http://conservative-speeches.sayit.mysociety.org/speech/601526> > (Accessed 24 August 2017)

<sup>4</sup> Neville Harris, *Social Security Law in Context* (Oxford University Press, 2000), p 116

discipline and a healthy respect for the work ethic.<sup>5</sup> It is an approach which clearly contravenes Marshall's vision of the right to welfare as an amelioration of social inequalities based on class divisions and suggests a sharp retraction to an older morality which stressed obligations more than rights.<sup>6</sup>

The main purpose of this chapter is to set the political and ideological scene for the final chapters of the thesis which will analyse the parliamentary road to, and legislative measures enshrined in, the Welfare Reform Act 2012 and accompanying regulations. This chapter examines and develops an understanding of the political and moral influence of Iain Duncan Smith and his think-tank the CSJ on the development of social security legislation. In doing so, it will draw comparisons with the ideological principles which were espoused by Keith Joseph, Margaret Thatcher and their influential think tank, the CPS. This will support a continued commentary on the disintegrating role of social citizenship in the provision of welfare rights to unemployed claimants and will assess the consequential function of social control in managing those not in paid work - specifically the significant rise in benefit sanctions that occurred following the election of the coalition. Furthermore, following on from Part 3 of the thesis, the chapter will consider the effect of the introduction of Universal Credit (UC) and its potential to mitigate the issues caused by the system's complexity. In parallel with this it will consider the implications of austerity for the Conservative's approach to welfare governance. The chapter focuses predominantly on the role of the Conservatives in the Coalition partnership, as it was clearly case that Conservative ministers who took the lead in DWP.

The insistence of the coalition that Britain embrace an 'age of austerity' contributed to wider public acceptance that the unemployed were detached from the labour market due to personal failings. This reinforced support for the resurgence of neoliberal Conservative ideologies in the development of legislative reform. The agenda at DWP was led by the previous leader of the Conservatives, Iain Duncan Smith, who after his 'Easterhouse epiphany' established the Centre for Social Justice (CSJ) in 2004, some thirty years after Keith Joseph and Margaret Thatcher founded the influential Centre for Policy Studies (CPS).<sup>7</sup> Like the CPS, the CSJ think-tank

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<sup>5</sup> Peter Squires, 'The coalition and criminal justice' in Hugh Bochel and Martin Powell (eds), *The Coalition Government and Social Policy: Restructuring the Welfare State* (Policy Press, 2016), p 290

<sup>6</sup> Hartley Dean, *Welfare Rights and Social Policy* (Prentice Hall, 2002) p 4; see also, TH Marshall, *The Right to Welfare and Other Essays* (Heinemann, 1981), p 175

<sup>7</sup> The 'Easterhouse epiphany' relates to Iain Duncan Smith's visit to Easterhouse estate in Glasgow, where he was both shocked and inspired. His then adviser Tim Mongomerie, said

produced publications to influence government policy. In 2009, the CSJ published a blueprint for 'Dynamic Benefits' which first made the case for a 'universal' benefit to 'create a simpler, more cost effective system that provides greater rewards for work'.<sup>8</sup> In the same report Iain Duncan Smith pointed to an 'emerging underclass' who were trapped by 'dependency and left behind by society'.<sup>9</sup> Upon Duncan Smith's appointment as Secretary of State for Work and Pensions, he and his departmental team sought to realise his blueprint. His considerable reform of the social security system was significantly underpinned by the long-established social control function of the welfare state, which seeks to influence the way that people behave through the 'encouragement or enforcement of patterns of behaviour'.<sup>10</sup> As detailed throughout the thesis, the adoption of this method by governments is not a new phenomenon - it has a history stretching back to Elizabethan times. However, what set the Coalition's approach apart from previous British administrations such as New Labour, was the sheer intensity and the widespread use of legislative measures which sought to transform the behaviour of individuals with a lifestyle regarded as being at odds with the moral obligations of citizenship and incompatible with the fulfilment of social and economic goals.<sup>11</sup> One of the most notable measures in relation to controlling and punishing the unemployed was what David Webster termed the 'great sanctions campaign' whereby sanctions applied to unemployed claimants for non-compliance with the 'claimant commitment' peaked at over one million in 2013.<sup>12</sup>

The primary piece of legislation that enshrined the approach outlined in 'Dynamic Benefits' was the Welfare Reform Act 2012 (WRA 2012). It introduced Universal Credit, a single benefit which merged six working age benefits. As detailed in Part 3 of this thesis, the idea of a single working age benefit had been floated before, during New Labour's tenure. However, a lack of substantive detail and the financial crisis

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that 'something suddenly clicked. He realised here was his personal mission and a mission for the Tory party' See, 'Profile: Work and Pensions Secretary Iain Duncan Smith' BBC (18 March 2016) < <http://www.bbc.co.uk/news/uk-politics-35848899> > (accessed 25 August 2017)

<sup>8</sup> See, Iain Duncan Smith, 'The CSJ Story' < <http://www.centreforsocialjustice.org.uk/about/story> > (accessed 25 August 2017) See generally, The Centre for Social Justice, *Dynamic Benefits: Towards Welfare that Works* (September, 2009) < <http://www.centreforsocialjustice.org.uk/core/wp-content/uploads/2016/08/CSJ-dynamic-benefits.pdf> > (accessed 25 August 2017)

<sup>9</sup> The Centre for Social Justice, *Dynamic Benefits: Towards Welfare that Works* (September, 2009) < <http://www.centreforsocialjustice.org.uk/core/wp-content/uploads/2016/08/CSJ-dynamic-benefits.pdf> > (accessed 25 August 2017), p 4

<sup>10</sup> Paul Spiker, *Poverty and Social Security* (1993), p 107-108

<sup>11</sup> Neville Harris, 'Conditional Rights, Benefit Reform, and Drug Users: Reducing Dependency?' (2010) *Journal of Law and Society* 37 (2), pp 233-263, p 233

<sup>12</sup> Patrick Butler, 'David Webster: Benefit sanctions should be a thing of the past' *The Guardian* (London, 1 August 2017)



forced the idea into the realms of being a ‘long-term ambition’.<sup>13</sup> It was reignited by the CSJ and adopted by the coalition government following its election in 2010 in the context that ‘the greater simplicity of the Universal Credit system will lead to a streamlined administration, which we anticipate will lead to savings of more than £0.5 billion a year’. This statement brings neatly into focus the pervasiveness of the coalition’s determination to reduce public expenditure. Equating simplicity with savings reflected an increasing political consensus that complexity in social security acts as an impediment to economic prosperity, rather than an obstacle to social participation which is a key pre-requisite of the achievement of social citizenship rights.<sup>14</sup> It is argued here that this agenda had a clear impact on the Coalition government’s approach to the governance of welfare administration. There existed some continuity with New Labour, such as its preference for market-like mechanisms, decentralisation and a general preference for top-down policy making from the centre. However, unlike Gordon Brown when he acted as Chancellor, George Osborne did not play the same pivotal role in the creation of social policy. He did, however, mercilessly control the purse-strings, which heavily affected Duncan Smith’s policy ambitions and outcomes.

***In the Long Shadow of Thatcher and Joseph? Conservative Ideology, Iain Duncan Smith, and the CSJ***

Duncan-Smith commented during one of his first press interviews as Conservative Party leader in 2001 that ‘we have allowed ourselves to be characterised as a party that literally knew the cost of everything and the value of nothing’<sup>15</sup> – a perception that he claimed he was determined to change. This did not necessarily mean a break from Thatcherism, but it would require modernisation:

‘Thatcherism is a valuable part of our past. You don’t reject it - you learn from it...But the battles are different. In the 1970’s, the economy was shot to hell, the trade unions were over powerful, state-owned industries had encroached into areas they shouldn’t. Now the challenge is to take on public services’.<sup>16</sup>

Bale comments that this statement highlights the fundamental problem with Duncan Smith’s approach as it represented not a ‘transcendence of Thatcherism but a desire

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<sup>13</sup> Department for Work and Pensions, *Raising Expectations and Increasing Support: Reforming Welfare for the Future* (Cm 7506, 2008)

<sup>14</sup> See chapter 5

<sup>15</sup> See Rachel Sylvester and George Jones, ‘The navel-gazing is over’ *The Telegraph* (London, 5 December 2001).

<sup>16</sup> *Ibid*

to resume where it left off'.<sup>17</sup> In essence, this insight goes to the heart of the 'quiet man's' political ideology and provides an acute account of how his early sympathetic view of more disadvantaged groups in society moved rapidly to the political and legislative entrenchment, and arguably the expansion of integral tenets of Thatcherism. An examination of Duncan-Smith's spell as Party leader, his subsequent establishment of the CSJ and the role this played in David Cameron's efforts to reposition the Conservative Party as they headed towards the 2010 General election will be instructive in understanding better the coalition's approach to social security during its time in government.<sup>18</sup> It also provides a further insight to the extent that the New Right's interpretation of social citizenship featured in the Coalition's treatment of the unemployed.

In a political episode that Peter Snowdon terms 'the Peasants' Revolt', IDS successfully 'courted the right' of the party to ascend to the position of Tory leader in 2001, seeing off opposition from party stalwarts Michael Portillo and Kenneth Clarke.<sup>19</sup> Duncan Smith's campaign was enhanced by an endorsement from Thatcher, who remarked that IDS would restore the party's 'faith and fortunes'. Yet an endorsement from Thatcher failed to bestow adequate good fortune upon IDS, who was not to endure long as party leader before his return to the relative obscurity of the backbenches – but not for long. Duncan Smith would have a 'second coming', becoming instrumental in Cameron's pitch that 'British Society is Broken' which would ultimately regain him the respect of his party colleagues.<sup>20</sup>

It was during his 'tortured tenure' as leader that he experienced a calling to help society's most vulnerable. Duncan-Smith's new head of strategy, Dominic Cummings, who previously led the Conservative's campaign against joining the European currency, claimed that the public found the Conservative party immoral and

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<sup>17</sup> Tim Bale, *The Conservative Party: From Thatcher to Cameron* (Polity Press, 2011), p 147

<sup>18</sup> See generally, Richard Hayton and Timothy Heppell, 'The Quiet Man of British Politics: the Rise, Fall and significance of Iain Duncan Smith' (2010) *Parliamentary Affairs* 63 (3), pp 425-445

<sup>19</sup> Michael Portillo was knocked out in the second round of voting (53) after losing out to Iain Duncan Smith who triumphed by just one vote (54). Kenneth Clarke topped the poll with 59. Despite Clarke's parliamentary lead, the nationwide membership voted for Iain Duncan Smith to lead the party. Following the result Portillo elected to leave frontline politics. Peter Snowden suggest that 'his prescription for a modernised party, forcing it to accept social change, was simply too bitter a pill for them to swallow'. See, Peter Snowdon, *Back from the Brink: The Extraordinary Fall and Rise of the Conservative Party* (HarperPress, 2010), p 81

<sup>20</sup> Stephen Driver, 'Fixing Our Broken Society: David Cameron's Post-Thatcherite Social Policy' in Simon Lee and Matt Beech (eds), *The Conservatives Under David Cameron: Built to Last?* (Palgrave, 2009), p 88

incompetent with little regard to issues that mattered to members of the public. In March 2002, he sent a memo to Iain Duncan Smith and his Shadow Cabinet which proposed a campaign that focused on 'why public services are failing the most vulnerable'. This appealed to the leader's catholic faith, and he accordingly adopted 'helping the vulnerable' as the theme for the party's spring forum. This series of events coincided with Duncan Smith's Damascene visit to the Easterhouse and Gallowgate areas of Glasgow, which contained some of the most deprived areas of the country in February, before the forum.<sup>21</sup> The Tory delegation was hosted by a local grassroots organisation, FARE (Family Action Rogerfield and Easterhouse) co-founded by a former academic Bob Holman, who at the time was informed that the party's motive for the visit was an interest in 'compassionate conservatism'.<sup>22</sup> Holman, himself a devout Christian, acted as Duncan Smith's personal guide, taking him around the estate and then showing him the projects that FARE had established. After the visit, Holman remarked that he 'was impressed by his willingness to take local residents seriously...a politician who almost wept at the plight of the poor'.<sup>23</sup> Duncan Smith characterised his visit as being transformative:

'Standing in the middle of an estate like Easterhouse, you know it was built after the war for a purpose, only to see this wrecked and dreadful set-up today, with families locked into generational breakdown, poverty, drug addiction and so on. And that really does confront you with the thought that we did this—we built the brave new world, and look where it's gone. It was a sort of Damascene point. It's not that I wasn't thinking about these things before, but after Easterhouse I saw that we had to do something about it'.<sup>24</sup>

These words impressed Holman, and many others on the left who saw an earnest determination to address the past Conservative social policy failures. As Slater suggests, his use of the phrase 'we did this' can be inferred as a reference to the unequal legacy of Thatcherism, which 'at best showed disregard for serious questions concerning poverty and social justice, and at worst, contempt'.<sup>25</sup> Slater's

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<sup>21</sup> The visit was organised by his advisers Rick Nye and Tim Montgomerie, a Conservative Activist who was leading the Conservative Christian Fellowship.

<sup>22</sup> Snowdon, n. 19 above, p 92. See also, Polly Toynbee, 'Iain Duncan Smith's second epiphany: from compassion to brutality' *The Guardian* (London, 8 November 2013)

<sup>23</sup> Bob Holman, 'I thought I knew Iain Duncan Smith' *The Guardian* (London, 12 November 2010)

<sup>24</sup> Iain Duncan Smith quoted by John Derbyshire in, 'Poor relations' *New Statesman* (1 March 2010)

<sup>25</sup> Tom Slater, 'The Myth of 'Broken Britain: The Myth of 'Broken Britain' Welfare Reform and the Production of Ignorance' (2012) *Antipode* (46) 4, pp 948-969, p 949

interpretation is supported by Rosemary Dixon, Chief Executive of FARE who said that she has no doubt that on first meeting Duncan-Smith that he was genuinely concerned for the community and how their lives had been impacted by previous government policies and claimed that 'he stood up and apologized for what the Thatcher years did to Scotland'.<sup>26</sup> Ten years later the same Bob Holman would write in *The Guardian* that 'Duncan Smith is 'paradox personified'. 'He wept at the plight of the poor yet now hands out punishments that must bring tears to their eyes'.<sup>27</sup> The question that many commentators have since mused upon is: what caused Iain Duncan Smith to go from a champion of the poor to a stark critic of Britain's dependency culture? Holman suggested that the Chancellor's instruction to make mounting cuts shattered Duncan Smith's main welfare objective, and therefore the punishments thrust upon the 'work-shy' were designed to divert attention from the huge cuts that he had no choice but to make.<sup>28</sup> Osborne's persistent demands for cuts to welfare certainly goes some way to explaining Duncan-Smith's attitude shift.

### ***Social Citizenship in Austerity***

It is important to acknowledge that Osborne's own manner of advance was not solely based on his prerogative as Chancellor and was significantly influenced by a global retrenchment of welfare states. Indeed, Gamble has argued that the survival of the welfare state has been placed in infinite peril due to the financial crisis.<sup>29</sup> He goes on to assert that coalition's broad response to challenges, in the wake of the financial crisis, was much like the rest of Europe's, where a politics of austerity became commonplace.<sup>30</sup> This approach pressed for fiscal consolidation, and cutting back on public spending, particularly welfare budgets. Furthermore, as Gamble concedes at the point of economic and financial crisis, old stigmas and moral dividing lines are quickly revived including the traditional discourse of the deserving and undeserving poor, but may also come re-packaged in a contemporary form as politicians distinguish between 'strivers and shirkers, or between makers and takers'.<sup>31</sup> This is reflected in Iain Duncan-Smith's (later) assertion that, in the context of the need to

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<sup>26</sup> Rosemary Nixon in conversation with Stuart Rodger 'Revisiting Easterhouse, home of Iain Duncan Smith's 'epiphany' (16 March 2016) < <https://www.opendemocracy.net/uk/stuart-rodger/revisiting-easterhouse-home-of-iain-duncan-smiths-epiphany> > (accessed 26 August 2017)

<sup>27</sup> Holman, n. 23 above

<sup>28</sup> Ibid

<sup>29</sup> Andrew Gamble, *Can the Welfare State Survive?* (Polity, 2016), p 5

<sup>30</sup> Ibid, See also Mark Blyth, *Austerity: The History of a Dangerous Idea* (Oxford University Press, 2013)

<sup>31</sup> Ibid, p 34

cut the United Kingdom's deficit, welfare reform should encompass 'cutting the cost of social failure' in tandem with transforming the life of those on benefits. The 'Claimant Commitment' which is required to be signed by the unemployed claimant and which deliberately reflects 'a contract of employment' is characterised by an enforcement mechanism for an 'unequivocal' deal – whereby 'claimants owe a responsibility to the taxpayer: in return for support, and where they are able, they must do their bit to find work'.<sup>32</sup> Thus, the good citizen is overwhelmingly viewed as economically self-sufficient and there is no entitlement to public assistance.<sup>33</sup>

Such an approach brings to mind Titmuss's distinction between residual and institutional welfare states. The residual welfare state intervenes as a mechanism of last resort, when family and the market fail to meet an individual's immediate needs. Its intervention is therefore limited to 'deserving' groups, whereas the institutional welfare state is universalistic in nature, and extends its commitment to all citizens.<sup>34</sup> Although this model is inherently ideal, it can help to explain the transitions in the provision of welfare to able-bodied unemployed throughout the duration of the social security system.<sup>35</sup> Although the distinction between the 'deserving' and 'undeserving' poor was never eradicated from these social security programmes, the conditions placed on eligibility for benefits are increasingly strict in contemporary programmes, means-testing presents a serious obstacles to obtaining relief and the programmes have become significantly less universal in nature. The culmination of such characteristics alongside the maintenance of low benefit levels and social stigma attached to being a claimants, succeeds in framing the need for social security as the safety net of last resort, thus increasing commodification and compelling all, but the most desperate and unable to participate in the market.<sup>36</sup>

The political and social context in which T.H. Marshall espoused the importance of universalism contrasts sharply with the period in which the Coalition government came to power. By 2010 New Labour and the Conservatives had both demonstrated

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<sup>32</sup> Iain Duncan-Smith, 'Speech on Welfare Reform' Centre for Social Justice, London < <https://blogs.spectator.co.uk/2014/01/iain-duncan-smiths-speech-on-welfare-reform-full-text/> > (accessed 12 December 2017)

<sup>33</sup> Anne Daguerre and David Etherington, 'Welfare and Active labour market policies in the UK: the coalition government approach' in Hugh Bochel and Martin Powell, *The Coalition and Government Policy: Restructuring the Welfare State* (Policy Press, 2016), p. 203.

<sup>34</sup> Richard Titmuss, 'Developing Social Policy in Conditions of Rapid Change' in Brian Abel-Smith and Kay Titmuss (eds), *The Philosophy of Welfare: Selected Writings of Richard Titmuss* (Routledge, 1987), p 254, p 262

<sup>35</sup> Amir Paz-Fuchs, *Welfare to Work* (Oxford University Press, 2008), p 16

<sup>36</sup> Ibid; See also, Gosta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity, 1990), p 13

their agreement on the need for an 'active welfare state' which would instil a sense of responsibility in claimants. As Lawrence Mead asserted, 'only those who bear obligations can truly appropriate their rights',<sup>37</sup> whereas Marshall's theory of citizenship was developed during what Timmins terms 'The Age of Optimism' – a time when both Labour and the Conservatives had reached a different consensus. A time when the democratic left, including Marshall believed the idea that both democracy and capitalism could co-exist: that access to social rights would ameliorate the excesses of the market, and that its energies could be channelled in a means that would benefit rather than undermine social cohesion. At the same time, the right accepted the need for high and progressive taxes to embed the welfare state as an acceptable compromise.<sup>38</sup> Indeed, Timmins asserts that even if the Conservatives had been elected in 1945, and notwithstanding that the benefit levels may have been less generous, the broad structure of the welfare state was unlikely to have been much different. The insurance base was acceptable to the Conservatives in a post-war coalition, and there is nothing to suggest that the system would have been more selective, or less universal, than it was under Labour.<sup>39</sup>

Perhaps most crucially, and as detailed in Chapter 2, Marshall's thesis relied on the fulfilment of full employment, which in the period of 1945-51 led to the attainment of significant gains in living standards.<sup>40</sup> As detailed in Chapter 3, the challenges to this doctrine emerged in the 1970's which produced higher inflation, low growth and stagflation. The context which contributed to the production of Marshall's theory was in flux, as domestic political conflict intensified, which brought to the fore different theoretical viewpoints to the fore of the Conservative Party such as that of Friedrich Hayek who outlined the risk that state provision posed to individual liberty. As noted throughout this chapter, it was such views that influenced the thoughts of Keith Joseph and Margaret Thatcher who instigated a new brand of conservatism – which Iain Duncan-Smith, alongside David Cameron, re-ignited most fervently in the aftermath of the financial crisis in 2008. Thus it seems plausible to assert that Duncan-Smith's initial 'helping the vulnerable' rhetoric, espoused when he was leader of the party, was not a natural fit with the stock political response following the recession, and thus his mission rapidly became a mission to help the vulnerable

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<sup>37</sup> Lawrence Mead, *Beyond Entitlement: The Social Obligations of Citizenship* (Free Press, 1987), p 257

<sup>38</sup> Gamble, n. 29 above, p 21

<sup>39</sup> Nicholas Timmins, *The Five Giants: A Biography of the Welfare State* (William Collins, 2017), p 161

<sup>40</sup> Anne Digby, *British Welfare Policy: Workhouse to Workfare* (Faber and Faber, 1989), p 51

help themselves.<sup>41</sup> The gut instincts that Iain Duncan Smith displayed for Bob Holman and others to see at Easterhouse on that damp February morning may have been a display of personal vulnerability rather than a long-term, political commitment to helping the poor. Indeed, reflecting on the event eight years later Iain Duncan Smith claimed that the visit served to bring into sharp focus ideas he already had.<sup>42</sup>

### ***Iain Duncan Smith's ill-fated spell as Party Leader***

Eight months after his visit to Easterhouse and to coincide with the annual Party conference, Duncan-Smith's Policy Unit published a pamphlet entitled 'Leadership with a purpose: A better tomorrow'.<sup>43</sup> Far from suggesting a retreat from the counter revolution that began in the Thatcher era, it outwardly acknowledged the success that Thatcher governments had achieved in delivering economic prosperity by adhering to neo-liberal policy advice contained in 'The Right Approach' in the mid-1970's, and asserted its relevance for creating a 'better society'.<sup>44</sup> It was claimed that New Labour's promise to transform society had failed and it fell to the Conservatives to tackle the 'five contemporary 'giants' that posed a threat to British society' which included rising crime, inadequate healthcare, failing schools, child poverty and growing dependency on the state. It was asserted by the Duncan Smith-led opposition, that the slaying of these modern giants did not require the creation of a welfare state, but instead its reform. While it was accepted that public funding of services would still be required, it was argued that there should exist more diverse forms of delivery involving greater reliance on the private and voluntary sectors – policy suggestions which would later take centre stage in 'Cameron's' concept of the 'Big Society'.<sup>45</sup> This social agenda was unveiled in the context of increased public spending by New Labour and consequently did nothing to dispel the Conservative image as the 'nasty party'.<sup>46</sup> A rightward tilt, led by Duncan Smith, which deemed the

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<sup>41</sup> Snowden relays how many in the party were sceptical about Duncan-Smith's 'Helping the Vulnerable' stance. See Snowden, n. 19 above, p 93

<sup>42</sup> Andrew Anthony, 'The Second Coming of Iain Duncan Smith' *The Observer* (London, 29 June 2008)

<sup>43</sup> Conservative Policy Unit, *Leadership with a Purpose: A better tomorrow* (2002) The pamphlet was intended to be an indicator of Duncan Smith's social agenda. It developed some of the ideas contained in a number of publications by younger Conservative modernisers. See for example, Edward Vaisey, Nicholas Boles and Michael Gove, *A blue tomorrow* (Politicos, 2002)

<sup>44</sup> Ibid

<sup>45</sup> Robert M. Page, *Clear Blue Water? The Conservative Party and the Welfare State since 1940* (Policy Press, 2015), p 123

<sup>46</sup> At the 2002 Conservative Party Conference, the newly appointed Chair of the Party Theresa May delivered an infamous speech where she declared that Conservatives had to stop the internal feuding, face up to the fact that they were seen as the 'nasty party', and commit to embracing 21<sup>st</sup> Century Britain instead of hankering after 'some mythical place called middle

United Kingdom's ongoing attachment to state provision as unsustainable was, in Bale's opinion, 'foolish or at least foolhardy', as it served to completely undermine Duncan Smith's efforts to convince the electorate he was creating a new brand of 'compassionate conservatism'. Such an observation arguably provides an early glimpse of Iain Duncan Smith's enduring paradoxical political interpretation of social citizenship, as he attempted to 'have it both ways', appeasing the traditionalists, while seeking a way to connect with modernisers and left-leaners, by reassuring people that no one would be 'left behind', while at the same time remaining wedded to rolling back the state and rewarding those who sought independence from relying on the same state.<sup>47</sup> Far from appealing to the poorest in society, many of the flagship policies appeared to be directed at affluent voters who would appreciate private support subsidised by the state.<sup>48</sup>

Duncan-Smith's party struggled to connect with his mixed messaging. Bale remarks that his lack of discipline and consistency in projecting his 'message of change' was either due to the fact that he didn't believe in wholesale change or because he felt he couldn't hold onto his job without throwing an occasional bone to the right of the party.<sup>49</sup> Duncan-Smith's endeavours were further jeopardised by his poor performances at the dispatch box which lacked vigour and charisma.<sup>50</sup> As Snowden observes, many of the party may not have got what Duncan-Smith was trying to do and that 'forging such a different agenda would require deft communication skills which he lacked'.<sup>51</sup> By the time of the Conservative's 2003 annual conference most of the party were completely convinced that IDS had to go.<sup>52</sup> The leader was eventually forced to secure a vote of confidence from his parliamentary colleagues after 25 Conservative MPs exercised a newly introduced right to call for a leadership contest in the autumn of 2003. Although Duncan-Smith managed to obtain 75 votes, he was

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England'. See, Tim Bale, *The Conservative Party: From Thatcher to Cameron* (Polity, 2010), p 164

<sup>47</sup> Ibid, p 148 and p 165.

<sup>48</sup> Ibid, p 165

<sup>49</sup> Ibid, p 169

<sup>50</sup> Ibid, p 155 and p 166; Page, n. 45 above, p 124; Snowden, n. 19 above, p 93-94

<sup>51</sup> Ibid, p 94

<sup>52</sup> Details emerged of a personal scandal for the party's leader, on the eve of the party conference. Duncan-Smith had allegedly paid his wife, Betsy, a salary from his parliamentary staffing allowance for diary and secretarial work. A former Central Office employee approached the media with apparently damning evidence that Betsy Duncan-Smith had carried out little or no work between September 2001 and December 2002 to justify her salary. A subsequent investigation by the Parliamentary Commissioner for Standards cleared the Duncan Smiths of all charges. See, Peter Snowden, n. 19 above, p 114



opposed by 90 of his colleagues.<sup>53</sup> The Conservatives had removed a leader who had been in office barely two years and was not permitted the opportunity to fight a general election. However, upon reflection of Iain Duncan-Smith's stint at the helm of the party, it can be argued that he established a rejuvenated interest in the less well off. As Hayton and Heppell assert, the ill-fated leader effectively brought about the party's shift towards pragmatic policy construction.<sup>54</sup> Furthermore, he created the basis for the development of the public services, social justice and poverty agenda that Cameron adopted in earnest to support his quest for electoral victory.<sup>55</sup>

### ***The Significance of the CSJ***

The think tank has been a weapon of neo-liberal combat since the early 1970's. As established in Chapter 3, the CPS played a crucial role in establishing an 'ideological fellowship' - a term which appropriately encapsulates how think tanks provided an institutional setting for like-minded neo-liberal political elites who felt supported and assured by the expertise that think tanks produced.<sup>56</sup> It is argued here, that the idea of an 'ideological fellowship' transcends the realms of the creation and sustenance of the 'counter-revolution' to the Keynesian consensus in the 1970's and assisted Iain Duncan Smith, through the Centre for Social Justice (CSJ), to compound and expand Thatcherite thinking, particularly on the question of social citizenship, in a contemporary policy environment.<sup>57</sup>

As Andrew Anthony points out 'Social Justice' is not a phrase that is normally associated with the Conservatives. It is perceived as a Labour concern and it is this reality that encouraged a shrewd Duncan Smith to choose it. He wanted get away from the idea that the Labour Party had a monopoly on progressive social policy.<sup>58</sup> Its co-founders were Tim Montgomerie, and Phillipa Stroud, who was appointed as the Centre's first Chief Executive. Although the CSJ declares itself to be a non-partisan think tank, its output has, on the whole, been congruent with David Cameron's social

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<sup>53</sup> Bale, n. 17 above, p 193

<sup>54</sup> Hayton and Heppell, n. 18 above, p 436

<sup>55</sup> Ibid, p 437; See also, Kieron O'Hara 'The Iron Man, Is Cameron True Blue?' (2007) Public Policy Research 14, pp 181-185; 'Breakthrough Britain: Ending the Costs of Social Breakdown', Report of the SJPG, 2007.

<sup>56</sup> Hartwig Pautz, 'The Think Tanks behind 'Cameronism'' (2013) *The British Journal of Politics and International Relations* 15, pp 362-377, p 362. See generally, Andrew Denham and Mark Garnett 'A "hollowed-out" tradition? British think-tanks in the 21st Century' in Diane Stone and Andrew Denham (eds), *Think-Tank Traditions: Policy Research and the Politics of Ideas* (Manchester University Press, 2004), pp 232-246

<sup>57</sup> Hayton and Heppell, n. 18 above, p 436

<sup>58</sup> Anthony, n. 42 above

policy aims.<sup>59</sup> Pautz comments that the CSJ allowed the Conservatives to develop their own ‘centre right profile’ in this policy field ‘to challenge Labour as the traditional guarantor of social justice’ and subsequently take advantage of the changing climate of opinion amongst the British public. Following Cameron’s election as party leader, Iain Duncan Smith was put in charge of one of six new policy groups, his being concerned primarily with Social Justice. Oliver Letwin claimed that the groups were aimed at ‘a real intellectual revival of Conservatism’<sup>60</sup>. However, Bale considered the reasoning of Stephen Dorrell, a Co-Chair of one of the groups, to be more plausible – it was not about ‘thinking the unthinkable’, but on re-establishing contact with people that the Tory party hadn’t been in serious contact with for years (academics, pressure groups and practitioners)’ and coming up with ideas that were electorally attractive.<sup>61</sup> It is arguable that the CSJ Social Policy Group was successful on both fronts. First, those traditionally critical of the Conservative’s position on poverty acknowledged its new commitment towards tackling poverty and inequality.<sup>62</sup> Second, its publications, most notably ‘Breakdown Britain’ and ‘Breakthrough Britain’ augmented Cameron’s pre-election claims about ‘Broken Britain’ and provided the leader with the space to have it both ways on poverty, unlike his predecessor Iain Duncan Smith. On the one hand, Cameron could point to the fact that his party was taking poverty seriously, while on the other hand he was able to endorse the ‘non-partisan’ conclusion that personal responsibility and stable family structures, rather than state help, should be at the heart of any strategy to tackle ‘Breakdown Britain’<sup>63</sup>

Iain Duncan Smith and the CSJ’s role in shaping the Conservative’s position on tackling unemployment is comparable to Keith Joseph and the CPS’s role in shaping the Thatcherite position on the same issue. The Social Justice Policy Group, which was administered by the CSJ, asserted that: ‘Our aim must be that every working-age adult capable of earning a decent living for themselves and their dependents must have the

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<sup>59</sup> Peter Dorey, *Policy Making in Britain* (Sage, 2014), p 5. See also, Peter Dorey and Mark Garnett, ‘No such thing as the “Big Society”?: The Conservative Party’s unnecessary search for “narrative” in the 2010 general election’ (2012) *British Politics* 7 (4), pp 389-417; Jason Edwards, *Retrieving the Big Society* (Wiley-Blackwell, 2012) and Jesse Norman, *The Big Society: The Anatomy of New Politics* (Buckingham Press, 2010)

<sup>60</sup> Oliver Letwin MP chaired the Conservative’s Party Policy Review 2005-2010. He is the son of two famous Conservative thinkers, William Letwin and Shirley Letwin

<sup>61</sup> Bale, n. 19 above, p 322

<sup>62</sup> Ruth Lister and Fran Bennett, ‘The new ‘champion of progressive ideals’? Cameron’s Conservative Party: poverty, family policy and welfare reform’ (2010) *Renewal* 18 (1/2), pp 84-109, who said ‘It is important to acknowledge the significance of the Tories’ new-found commitment to tackling poverty and inequality’.

<sup>63</sup> Timmins, n. 1 above, p 325; See also, Bale, n. 17 above, p 323

opportunity to do so'.<sup>64</sup> In a similar vein, Sir Keith Joseph had asserted that 'the cement of society is crumbling'.<sup>65</sup> The CPS and the CSJ saw those who were unemployed as undeserving of unconditional state support.<sup>66</sup> In this way, both think-tanks sought to develop policy and legislative reforms that were aimed at the 'fashioning of virtuous citizens out of benefit claimants'. As Larkin argues, far from representing a novel approach, the focus on the 'remoralisation' of individuals is a throwback to an older, regressive view of citizenship.<sup>67</sup>

Duncan-Smith was candid about his ideological affinity with Lord Joseph. He went as far as to admit that admiration for the CPS led him to establish his own think tank. He further professed (during his Keith Joseph memorial lecture) that:

'Sir Keith once said that ... 'the only really lasting help we can give to the poor is helping them to help themselves; to do the opposite, to create more dependence is to destroy them morally while throwing an unfair burden on society'.<sup>68</sup>

As discussed in Chapter 3, the CPS sought 'to argue to the case for monetarism and the free market within the Conservative Party and pressed for a re-examination of economic policy within the shadow cabinet'.<sup>69</sup> Much less discussed is the CPS's espousal of the case for traditional morality in the social sphere, which is not that surprising considering, for example, Margaret Thatcher's famous denial of the existence of 'society'.<sup>70</sup> Yet, far from viewing morality as representing a contradictory

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<sup>64</sup> SJPG, 'The state of the nation report: economic dependency' (October, 2006) < <https://www.centreforsocialjustice.org.uk/core/wp-content/uploads/2016/08/Breakdown-Britain.pdf> > (accessed 25 August 2017)

<sup>65</sup> Keith Joseph in conversation with Polly Toynbee, *New Statesman*, (London, 18 October 1974) as cited by Andrew Denham and Mark Garnett, *Keith Joseph* (Acumen, 2002), p 272

<sup>66</sup> In a notable speech Keith Joseph made at Preston's Bull and Royal Hotel on 5 September 1974, he commented that 'frictional' unemployment (those between jobs) 'merges into the voluntary, so the voluntary merges into what Keynes called "hard-core" and we sometimes call "unemployables." They are people who cannot obtain or hold down a job even if they try'. See, Keith Joseph, 'Inflation is Caused by Governments' speech < <http://www.margaretthatcher.org/document/110607> > (accessed 26 August 2017)

<sup>67</sup> Philip M Larkin, The New Puritanism: The Resurgence of Contractarian Citizenship in Common Law Welfare States (2014) *Journal of Law and Society* 41 (2), p 227-256, p 228; See also Amir Paz-Fuchs, *Welfare to Work: Conditional Rights in Social Policy* (Oxford University Press, 2008), p 10, where the author asserts that 'Welfare-to-work programmes in modern welfare states are a peculiar blend of old and new'

<sup>68</sup> Iain Duncan Smith, 'The 2011 Keith Joseph Memorial Lecture: Welfare Reform the wider context' (CPS, 2011)

<sup>69</sup> See Chapter 3

<sup>70</sup> Margaret Thatcher interview with Women's Own Magazine: 'I think we have gone through a period when too many children and people have been given to understand "I have a problem, it is the Government's job to cope with it!" or "I have a problem, I will go and get a grant to cope with it!" "I am homeless, the Government must house me!" and so they are casting their problems on society and who is society? There is no such thing! There are individual men and

position between economic liberty and social discipline, the CPS found them to be mutually reinforcing imperatives, with Joseph insistent that a free market can only work within a civilised ‘moral and legal framework’.<sup>71</sup> After all, creating a dynamic market economy was predicated on a particular set of moral values: independence from the state, individual responsibility, self-improvement, self-reliance and self-help. Joseph’s attempts at communicating a ‘new’ post-1974 ‘Tory approach to life and society’ caused significant controversy and effectively precluded him from becoming leader.<sup>72</sup> Particularly notable were his persistent views on the existence of a ‘cycle of deprivation’ which were significantly punctuated with the infamous assertion at Edgbaston that ‘the balance of our population, our human stock is threatened’ by illegitimate births.<sup>73</sup> As Denham and Garnett argue, Joseph was intimating that ‘some groups in society were just too poor to deserve treatment as individuals’, in other words, they were too poor to claim their rights to social citizenship.<sup>74</sup> This point effectively supports the primary argument outlined in Chapter 3, namely that the ideological seeds which would eventually lead to the ubiquity of the idea of a conditional welfare state, whereby claimants must fulfil moralistic virtues before laying claim to their rights as unemployed citizens, were sown in the 1970’s by neoliberal Conservatives, most notably the leadership of the CPS.<sup>75</sup>

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women and there are families and no government can do anything except through people and people look to themselves first’ Margaret Thatcher interview with *Women’s Own Magazine* (23 September 1987) < <https://www.margaretthatcher.org/document/106689> > (accessed 28 August 2017)

<sup>71</sup> Dorey, n. 59 above, p 48; See also, Denham and Garnett, n. 68 above, p 263

<sup>72</sup> Keith Joseph notably exclaimed that ‘It was only in April 1974 that I was converted to Conservatism. I had thought I was a Conservative but now see that I was not one at all’. See Keith Joseph, *Reversing the Trend* (Barry Rose Law, 1975)

<sup>73</sup> For a comprehensive commentary on Keith Joseph’s speech at Edgbaston see Denham and Garnett, n. 68 above, pp 267- 276. See also, Morrison Halcrow, *Keith Joseph: A Single Mind* (Macmillan, 1989), pp 81–87

<sup>74</sup> Denham and Garnett, n. 68 above, p 267

<sup>75</sup> Nicholas Ridley, a ministerial colleague of Thatcher asserted ‘The CPS became the furnace in which the new economics was forged. Margaret Thatcher and Keith Joseph were also helped by two other think tanks: the Institute of Economic Affairs...and the Adam Smith Institute...Nonetheless, it was the CPS which also closest to Margaret Thatcher and Keith Joseph, and from where most of their most formidable allies were drawn’. See Nicholas Ridley, *My Style of Government: The Thatcher Years* (Hutchinson, 1991), p 8; See also, Radhika Desai, ‘Second hand dealers in ideas: think tanks and Thatcherite hegemony’, (1994) *New Left Review* 203, pp 27-64; and Kenneth Baker, *The Turbulent Years: My Life in Politics* (Faber and Faber, 1993), p 162

At this point in history Great Britain wasn't adequately primed for such a stark economic or social message.<sup>76</sup> However, by 2004 - the year the CSJ came into being - the themes Joseph frequently covered had become the 'stock assumptions' of British politics and essential pre-requisites for a market economy: the overriding priority of controlling inflation, the dangers of state interference, the value of skilled managers, and the need to strengthen the family and raise educational standards.<sup>77</sup> In this context, Iain Duncan-Smith's stated objective for the CSJ, 'to develop new and innovative poverty-fighting solutions', becomes somewhat redundant. Indeed, as will be discussed below, the ideological insights perpetuated by the CSJ before the coalition came to power were not particularly 'new' or 'innovative' and focused predominantly on the well-established liberal view that dependence on the state is a result of individual failings.<sup>78</sup>

As detailed in Part 3, from New Labour's earliest days in government, it had resolved that the achievement of citizenship in the 'New Welfare State' would require those who were able, to work. Those who failed to fulfil this social obligation would, in the first instance, be 'activated' to do so, if they failed to co-operate with the measures devised to get them back to work, they would be punished for their perceived idleness.<sup>79</sup> Given the political consensus around this, it followed that the CSJ adopted the same central principle in its policy recommendations to the Conservative Party asserting that 'Clear work expectations must be attached to the receipt of benefits for people who can work'.<sup>80</sup> This reflects the idea that social rights are regarded as spreading increasing passivity and dependency among the poor due to the absence of obligation to participate in society.<sup>81</sup> Political economist, Simon Lee went as far to suggest that as Gordon Brown's political philosophy was more dependent on liberal political thinkers than social democratic thinkers - particularly towards the end of his

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<sup>76</sup> At the time, Keith Joseph made a point of informing his critics that the supportive response to his Edgbaston speech outnumbered the outraged by fourteen to one. Yet, the orator didn't acknowledge that by definition those who write to politicians in response to a speech are an unrepresentative sample of public opinion. Denham and Garnett, n. 68 above, p 268

<sup>77</sup> Ibid, Preface, Xii

<sup>78</sup> See for example, Lawrence Mead, *The Social Obligations of Citizenship* (Free Press, 1986), and Lawrence Mead, *Government Matters: Welfare Reform in Wisconsin* (Princeton University Press, 2004)

<sup>79</sup> See, Chapter 5

<sup>80</sup> SJPG, *Breakthrough Britain: Economic Dependency and Worklessness* (CSJ, 2007), p 7

<sup>81</sup> Will Kymlicka and Wayne Norman, 'Return of the Citizen: A Survey of Recent Work on Citizenship Theory' (1994) *Ethics* 104, pp 352-381, p 353. See also, Anne-Mette Magnussen and Even Nilssen, 'Juridification and the Construction of Social Citizenship' (2013) *Journal of Law and Society* 40 (2), pp 228-248, p 236

premiership – manifesting in the then Prime Minister sharing ideological ground with Thatcher and Joseph.<sup>82</sup>

Although there may be some merit in such an argument, Beech asserts that a full analysis of the competing political traditions affirm that Blair and Brown sought to take a centre-left approach.<sup>83</sup> Hickson supports this view, arguing that there should be no doubt that New Labour was more social democratic than neoliberal, due to their commitment to substantial increases in public expenditure – representing one of the largest sustained increases of any government since 1945. However, Hickson ultimately criticises New Labour for contributing to ‘substantive inequalities’ in income and wealth - increasing the gap between the richest and the poorest citizens, as the rich were not subject to income tax increases (top rate remained at 40%), which he concluded represented a slight to Labour’s egalitarian heritage and provides evidence in relation to the overall dominance of neoliberal thought.<sup>84</sup>

The Conservatives arguably used this reality to their advantage in terms of its aim to be an authoritative voice in the realms of social justice. In such a context, they were unable to avoid addressing the legacy of the Thatcher years. Under the Chairmanship of Iain Duncan Smith, the Social Justice Policy Group’s (SJPG) first report ‘Breakdown Britain’, acknowledged the failures of the Thatcher administration, illustrating the picture by citing that child poverty, on a relative measure, had rocketed from 12% in 1979 to 27% in 1992.<sup>85</sup> As Bennett and Lister concede this represented a significant moment.<sup>86</sup> However, the ‘Breakdown Britain’ authors failed to go as far as to accept

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<sup>82</sup> This assertion is based on Brown’s attitude to capitalism and more specifically, to the minimal regulation of the financial sector in the city of London. See Simon Lee, *Best for Britain? The Politics and Legacy of Gordon Brown* (Oneworld, 2007), pp 57-58

<sup>83</sup> Matt Beech, ‘A Puzzle of the ideas and policy: Gordon Brown as Prime Minister’ (2009) *Policy Studies* 30 (1), pp 5-16, p 10

<sup>84</sup> Kevin Hickson, ‘From them that hath: New Labour and the question of redistribution’ (2002) *The Catalyst Forum*. Hickson’s argument is posited in a series of journal articles which focus on the ideological character of New Labour through a comparative examination of Blair and Brown’s interpretation of social democracy with that of pre-war Labour thinker Antony Crosland. Hickson’s criticises New Labour for contributing to ‘substantive inequalities’ in income and wealth - accelerating the gap between the richest and the poorest citizens, as the rich have not been subject to income tax increases (top rate remained at 40%), which he concludes is a slight to Labour’s egalitarian heritage and provides evidence in relation to the dominance of neo-liberal thought. See, Kevin Hickson, ‘Equality’ in Raymond Plant, Matt Beech and Kevin Hickson (eds), *The struggle for Labour’s soul: understanding Labour’s political thought since 1945* (Routledge, 2004); Kevin Hickson, ‘Revisionism revisited: from Crosland to New Labour’ (2005) *Journal of Egalitarian Theory and Practice* 8 (3), pp 249-272; and Kevin Hickson, ‘Reply to Stephen Meredith: Mr Crosland’s nightmare? New Labour and equality in historical perspective’ (2007) *British Journal of Politics and International Relations* 9 (1), pp 165-168

<sup>85</sup> SJPG, n. 64 above, p 5

<sup>86</sup> Bennett and Lister, n. 62 above, p 86

responsibility for the Thatcher government's social, fiscal and economic policies. The most they conceded was that 'it would be wrong to deny that mistakes were made in response to the challenge' of rising poverty and inequality.<sup>87</sup> The SJPG report subsequently took the opportunity to highlight in much more detail New Labour's tolerance of poverty. Using data from the 1994/95 period through to 2004/2005 the report sought to demonstrate just 'how little the poverty rates have shifted' and on this basis accused the sitting administration as 'guilty not just of spin, but downright deception'.

David Cameron capitalised on the evidence provided by the SJPG and went a step further, as he declined to acknowledge the 1980's during his Hugo Young Lecture, where he traced poverty up to the late 1960's and then jumped to post-1997. He drew attention to widening inequality and the growing numbers in severe poverty.<sup>88</sup> In his party conference speech he went as far to ask 'who made the poorest poorer...Who made inequality greater? No, not the wicked Tories...you Labour; you're the ones that did this to our society'.<sup>89</sup> Such cynicism on Labour's performance could arguably be justified in the context of its steady and persistent erosion of collectivist social citizenship rights, however, as Bennett and Lister assert, Cameron's claim is 'breathtaking in its selective and misleading reading of recent history'.<sup>90</sup> The National Equality Panel's research shows that reforms since 1997 tended to reduce income inequality, while those in the earlier period tended to increase it.<sup>91</sup> Cameron appeared to enthusiastically adopt the SJPG's research, while subsequently selecting the angles that would succeed in scoring the most political support, particularly in the run up to the election. As Catherine Haddon remarks the SJPG's review was probably the most influential of the Conservative policy reviews (2005 – 2007) as it had 'an institution behind it to back up the ideas with depth and further research'.<sup>92</sup> This communication method became a common campaigning tool for the Conservatives, with a key example being Cameron's catch-all adoption of Iain Duncan Smith's assertion that

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<sup>87</sup> SJPG, n. 64 above, p 6. See also, Bennett and Lister, n. 62 above, p 86

<sup>88</sup> David Cameron, 'The Big Society' speech, Hugo Young Lecture, London, 10 November 2009

<sup>89</sup> David Cameron, Speech to the Conservative Party Spring Conference, Brighton, 28 February 2010 Cameron's point is further emphasised in a Conservative document entitled Labour's Two Nations. This sets out evidence, which, it claims 'proves that Britain is once more divided into two nations'. See, Conservative Party, *Labour's Two Nations* (Conservative Party, 2010)

<sup>90</sup> Bennett and Lister, n. 62 above, p 8

<sup>91</sup> National Equality Panel, *An Anatomy of Economic Inequality in the UK* (Government Equalities Office/CASE, 2010), p 399

<sup>92</sup> Catherine Haddon, *Making policy in opposition: the development of Universal Credit, 2005-2010* (Institute for Government, 2012), p 9

Britain was a 'broken society'.<sup>93</sup> Jill Kirby, the then Director of the CPS, maintained that Cameron's broken society message provided 'an important way of signalling his distance from Labour (who rejected the suggestion that British society is 'broken'), as well as from the free-market emphasis of the Thatcher years'.<sup>94</sup> In other words it provided a similar function to the third way – acting as a theoretical hook for the Conservative's social agenda.<sup>95</sup>

### ***The Pathways to Poverty***

The SJPG identified five 'pathways to poverty': family breakdown, educational failure, economic dependence, indebtedness and addictions (SJPG).<sup>96</sup> These five reasons, together with pessimistic accounts of crime, featured in Conservative representations of the problem of a 'broken society'. However, it was 'family breakdown' and 'economic dependency' that were most consistent in the party's 'diagnostic analyses of poverty'.<sup>97</sup> The idea of a 'broken society' was explicitly connected with the 'broken family', which had at its centre the well-established underclass thesis and could be associated with both poverty and 'welfare dependency'.<sup>98</sup>

'We have adopted an inclusive use of the term 'family breakdown' which can be summed up in three key words: dissolution, dysfunction, and 'dad-lessness'.<sup>99</sup>

In the forward to the CSJ's paper on the Family, Duncan Smith argues that 'the peculiarly high levels of family breakdown found in Britain are at the heart of social breakdown which is devastating our most deprived communities and fracturing British society in general'<sup>100</sup> Peck argues that Conservative think-tanks often 'portray themselves as lonely voices of reason, as principled outsiders in a corrupt, distracted, and wrongheaded world'. Slater contends that this is particularly evident in Breakdown Britain when it was asserted that the policy-making community has been

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<sup>93</sup> Andy Coulson, former editor of the News of the World was hired to be Cameron's Head of Communications and Planning (on a salary topping £275,000 a year). A profile published by The Telegraph described Coulson as a 'classic Thatcherite Tory with hard-line views on Europe, immigration and lower taxes', as well as law and order. Bale asserts that the catchphrase 'Broken Society' was given a 'sharper edge' by Coulson. See Bale, n. 17 above, p 336 and p 347

<sup>94</sup> Jill Kirby, 'From broken families to the broken society' (2009) *The Political Quarterly* 80 (2), pp 243-247, p 246

<sup>95</sup> Bennett and Lister, n. 62 above, p 88

<sup>96</sup> SJPG, n. 80 above, p 2

<sup>97</sup> Bennett and Lister, n. 62 above, p 86

<sup>98</sup> Tom Slater, 'From 'Criminality' to Marginality: Rioting Against a Broken State' (2011) *Human Geography* 3 (4)

<sup>99</sup> SJPG, *The State of the Nation Report: Fractured Families* (CSJ, 2006), p 9

<sup>100</sup> CSJ, *Green Paper on the Family* (CSJ, 2010)



reluctant to 'grasp the nettle' of family breakdown, was being more explicit about the benefits of marriages and committed relationships, and the merits of supporting and encouraging them.<sup>101</sup>

Such rhetoric has marked similarities to Keith Joseph's ideas on 'The Family', which he declared to be 'the basis sanctified by the main sources of our western religious traditions for the healthy development of children...Yet the family is under attack...there are many forces at work to discourage and distort priorities'.<sup>102</sup> It was under these auspices that Joseph introduced the concept of the 'cycle of deprivation'. He claimed that there was a 'positive association' between larger families at the bottom of the social ladder with 'delinquency, low intelligence and poor reading skills' - characteristics which were likely to push people into the 'cycle'.<sup>103</sup> Joseph's commitment to the importance of the family was long-running - during his time as Secretary of State for Health and Social Security he had surmised that 'the problems of the family seemed to underlie the full range of Britain's present difficulties, from social disorder to economic stagnation'.<sup>104</sup> He feared that the post-war generation lacked a 'sense of purpose and personal responsibility' and it was now they who were raising children.<sup>105</sup> As discussed in Chapter 3, research that Joseph himself commissioned on the cycle of deprivation concluded that 'familial continuity' was only part of the problem that Joseph had identified, and that more important were geographical factors, as well as emphasising that what really mattered was 'relative deprivation', a solution to which would require a significant rise in public expenditure.<sup>106</sup> Dismissing the research findings he himself commissioned, Joseph

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<sup>101</sup> Jamie Peck, 'Liberating the city: Between New York and New Orleans' (2006) *Urban Geography* (27), pp 681-783, p 682; SJPG, *Breakthrough Britain* (CJS, 2007), p 29; Slater, n. 98 above

<sup>102</sup> It's important to emphasise the role of subsequent new right thinkers in embedding paternalistic ideas about the family. Charles Murray, visited London and asserted to policy elites, journalists and think tank officials that the 'civilising force of marriage' should be the treatment for 'spreading disease' of an 'underclass' of single mothers and absent fathers. Charles Murray, *The Emerging British Underclass* (IEA, 1994), p 41. See also Loic Wacquant, *Prisons of Poverty* (University of Minnesota Press, 2009), pp 7-54. Notable in this context is a 2011 Father's Day column in *The Sunday Telegraph* penned by David Cameron: 'I also think we need to make Britain a genuinely hostile place for fathers who go AWOL. It's high time runaway dads were stigmatised, and the full force of shame was heaped upon them'. See David Cameron, 'Dad's gift to me was his optimism' *The Sunday Telegraph*, (London, 19 June 2011)

<sup>103</sup> Keith Joseph, Speech to the Pre-School Playgroups Association (29 June, 1972)

<sup>104</sup> Denham and Garnett, n. 68 above, p 221

<sup>105</sup> Keith Joseph, Third draft of report on Arts and Amenities, CRD 2/52/13, CPA, Bodleian Library (additional comments provided by Dr Richard Weights) *The Guardian* (London, 4 June 1973); also Denham and Garnett, n. 68 above, p 221

<sup>106</sup> Michael Rutter and Nicola Madge, *Cycles of Disadvantage: A Review of Research* (Heinemann, 1976), pp 325-327

underlined the need for additional studies – so at best the research introduced an element of complexity to Joseph’s ‘neat theory’ about the transmission of ‘disadvantage’.<sup>107</sup>

In a similar vein, the CSJ’s insistence that committed relationships, ‘in particular marriage’, encourages positive mental and physical health effects for adults and ‘the best outcomes for children’, has been challenged.<sup>108</sup> The CJS analysis is disputed by Bradshaw and Richardson who developed the UNICEF league table of child-wellbeing, pointing out that international comparisons do not show any clear relationship between ‘broken families’ and level of child well-being, but rather a link exists between well-being and inequality. Furthermore, it is concluded that child well-being tends to be greater where government spending on children and families is above average.<sup>109</sup> Joseph’s ‘cycle of deprivation’ concept is arguably even more visible in the SJPG’s contention that ‘the failure to form a durable bond between a mother and a father often leads to welfare dependency’.<sup>110</sup> Adopting language which could easily be associated with the New Right, Duncan Smith asserted that, ‘as the fabric of society crumbles at the margins what has been left behind is an underclass, where life is characterised by dependency, debt and family breakdown’.<sup>111</sup> Bennett and Lister contend that the concept of ‘welfare dependency’ is never defined, but simply assumed in Conservative policy documents – it is often simply used in relation to receipt of benefits for unemployed recipients of working age. It is the further use of the word ‘culture’ that ‘conflates receipt of benefits with a culture of dependency’ which heightens the term’s derogatory connotations.<sup>112</sup> For example, a Conservative policy document which cites long term unemployment figures reads: ‘almost five million people were claiming some form of out of work benefit and the bill for *this level of dependency* totals £346 billion for the last twelve years’.<sup>113</sup> The same document continues by denouncing the ‘culture of welfare dependency that drives

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<sup>107</sup> Denham and Garnett remark that that as a ‘final irritant’, the researchers Rutter and Madge used the word ‘disadvantage’ rather than Joseph’s ‘deprivation’. Differences in ideology and the methodology used meant that constructive dialogue was beyond the realm of possibility for Joseph and the researchers. See Denham and Garnett, n. 68 above, p 220 and p 224

<sup>108</sup> CSJ, Green Paper on the Family (CSJ, 2010) p. 9

<sup>109</sup> Jonathan Bradshaw and Dominic Richardson, ‘An index of child well-being in Europe’ (2009) Child

Indicators Research 2 (3), pp 319-351

<sup>110</sup> SJPG, Breakdown Britain: *Interim Report on the State of the Nation* (CJS, 2006), p 32

<sup>111</sup> SJPG, Breakthrough Britain, (CJS, 2007), p 3

<sup>112</sup> Bennett and Lister, n. 62 above, p 91

<sup>113</sup> Conservative Party, *Get Britain Working* (Conservative Party, 2009), p 4

intergenerational worklessness.<sup>114</sup> Another document went as far to assert that ‘it is our moral obligation to end the culture of long-term welfare dependency in Britain’ and ‘the time has come to put an end to deliberate worklessness’.<sup>115</sup> Particularly notable is the SJPG’s expansion of the term welfare dependency to incorporate those who are already in work: ‘dependency on out-of-work benefits has been replaced by dependency on tax credits’.<sup>116</sup> The ‘state of the nation’ report identifies ‘a dependency divide’ between the richest three-fifths of the population who are ‘overwhelmingly self-sufficient’ and the poorest fifth, for whom ‘welfare accounts for over half of all household income’, with the middle fifth an area of transition between these ‘two nations’.<sup>117</sup> Cameron adopted this viewpoint, declaring in his Scarman lecture that ‘getting into work means that you are more dependent than ever on the state’.<sup>118</sup>

The vivid re-emergence of the ‘welfare dependency’ thesis together with the Iain Duncan Smith’s references signal a clear reversion to the political rhetoric used in the 1980’s and early 1990’s.<sup>119</sup> As has been determined throughout the thesis, drawing distinctions between the deserving and undeserving poor, and elite discourses of a dependant underclass is not a new phenomenon, but is one that has undermined the development of social citizenship as a rights-based concept. The neo-liberal counter-revolution led by Joseph and others created intellectual space to openly discuss and develop support for behavioural explanations of poverty.<sup>120</sup> This has led to a re-shaping of the political response to poverty, which has been further buffered by the popularity of US new right thinkers such as Charles Murray and Lawrence Mead, who advocated new paternalistic approaches based on the close supervision of benefit claimants.<sup>121</sup> The consequence is that the provision of social security has been slowly, yet consistently recast as an active agent in the moulding of individuals to meet the needs of economic policy.<sup>122</sup>

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<sup>114</sup> Ibid, p 11

<sup>115</sup> Conservative Party, *Work for Welfare: REAL welfare reform to make British poverty history* (Conservative Party, 2008), p 11

<sup>116</sup> SJPG, n. 64 above, p 12

<sup>117</sup> Ibid, p 13

<sup>118</sup> David Cameron, Scarman Lecture, London, 24 November 2006

<sup>119</sup> Bennett and Lister, n. 62 above, p 91

<sup>120</sup> Hartley Dean and Peter Taylor-Gooby, *Dependency Culture: The Explosion of a Myth* (Harvester Wheatsheaf, 1992), p 30; Jay Wiggan, ‘Telling stories of 21st century welfare: The UK Coalition government and the neo-liberal discourse of worklessness and dependency’ (2012) *Critical Social Policy* 32 (3), pp 383-405, p 384

<sup>121</sup> Daguerre and Etherington, n. 33 above, p 212

<sup>122</sup> See, Vladimir Rys, *Reinventing Social Security Worldwide: Back to Essentials* (Policy Press, 2010)

The extent and influence of new-right principles in relation to the unemployed made it more difficult for New Labour to criticise the Conservative's policy direction, as both parties' views underwent significant convergence – as discussed in detail in the preceding section of this thesis. Despite this political convergence, however, there is a wealth of evidence rebuffing the discourse which attributes poverty to individual failings.<sup>123</sup> Such research may not have had much political purchase however: it is particularly interesting to note that there wasn't a single social scientist present on any of the CSJ working groups studying the five 'pathways to poverty'.<sup>124</sup> As a further example of the gap between evidence and policy, one comprehensive overview of British data concluded that there was little evidence to support the existence of a 'welfare class' based on either cultural or psychological dependency. The authors own view found that it did not feature strongly in the empirical research literature or in explanations for the growth in claimant numbers. The study found that unemployed and disabled claimants typically retain prior attachments to work, as do many lone parents, and that it is other barriers that prevent them from gaining employment.<sup>125</sup> A later study concluded decisively that 'conservative theories of a dangerous, welfare-dependent underclass are plainly, simply wrong'.<sup>126</sup>

### ***Persuading the Public***

In view of evidence which runs contrary to the 'Five pathways to poverty' discourse developed by the SJPG/CSJ, it becomes important to ask why it was accepted by not just David Cameron in his campaign efforts, but also by the British electorate. It is arguable that in re-shaping the narrative of both its own role in the development of the Conservative's position on poverty and inequality and its subsequent undermining of New Labour's statist approach to the same, the CSJ/SJPG's recommendations, which sought to re-shape a Conservative vision for social citizenship gained more credibility in the eyes of the public. In terms of the unemployed its solution remained broadly on the same trajectory as New Labour's,

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<sup>123</sup> See for example, Paul Spiker, *Poverty and the welfare state: Dispelling the myths* (Catalyst, 2002); Ruth Lister, *Poverty* (Polity Press, 2004); Pete Alcock, *Understanding Poverty* (Palgrave Macmillan, 2006); Joseph Rowntree Foundation, 'Reducing Poverty in the UK: a collection of evidence reviews' (JRF, 2014) < <https://www.jrf.org.uk/report/reducing-poverty-uk-collection-evidence-reviews> > (accessed 28 March 2014); Joseph Rowntree Foundation, 'UK Poverty: Causes, Costs and Solutions' (JRF, 2016) < <https://www.jrf.org.uk/report/uk-poverty-causes-costs-and-solutions> > (accessed 28 March 2018)

<sup>124</sup> Slater, n. 98 above

<sup>125</sup> See, Robert Walker and Marilyn Howard, *The Making of a Welfare Class?* (The Policy Press, 2000)

<sup>126</sup> Robert MacDonald and Jane Marsh, *Disconnected Youth? Growing up in Britain's Poor neighbourhoods* (Palgrave, 2005), pp 198-199

in that they concluded that it was necessary to activate the workless by increasing conditionality measures. Unlike New Labour – the CJS and later the Conservatives chose to ostentatiously promote underclass discourse as the main reason why significant levels of poverty persisted by pointing to the ‘completely non-financial aspects of poverty’.<sup>127</sup> In other words, it was claimed that New Labour sought to tackle the symptoms of poverty and not the root causes.<sup>128</sup> Speaking at the Keith Joseph Memorial Lecture, Duncan-Smith asserted that New Labour’s default position which involved ‘throwing money at the problem’ was unsustainable and that the government had to look beyond increasing the incomes of benefit claimants and get the ‘workless’ into employment by ensuring that support was matched by responsibilities ‘appropriately enforced’.<sup>129</sup> Wiggan argues that this approach gained additional momentum under the coalition government, as they sought to draw attention away from a ‘failing political economy’ in order to affirm ‘long-standing elite preferences for the hallmarks of neo-liberalism’ and they did so by repackaging such hallmarks as ‘bold new policy developments’.<sup>130</sup> This is demonstrated explicitly in Cameron’s assertion that inequality should not be entirely fixated on a mechanistic objective like reducing the gini co-efficient (the traditional financial measure of inequality) or on closing the gap between the top and the bottom.<sup>131</sup> This advance indicated that measuring income would not be a key tool in the government’s strategy for tackling poverty and inequality, which as well as reflecting a re-emergence of neo-liberal thought, it also points to its individualist diagnosis of causes of the problem and their prescription for dealing with it.<sup>132</sup> An external factor that aided Iain Duncan Smith’s efforts in re-shaping the social security agenda was the hardening of public attitudes to benefit recipients. The changing response to two questions that have been included regularly in the British Attitudes Survey since 1983 highlight this: whether benefits for unemployed people are too low and cause hardship - the

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<sup>127</sup> SJPG, n 64 above, p 19

<sup>128</sup> Bennett and Lister, n. 62 above, p 88. The Breakdown Britain Report pointed to Labour Alan Milburn critical stance to support its view that New Labour’s tax credits were not dealing with the root causes of poverty “...as Amartya Sen, winner of the Nobel Prize for economics, has noted, social inequality is best tackled and mobility best advanced if we tackle the root causes, not the symptoms. That must mean moving beyond simply correcting low wages and family poverty after the event, towards policies that spread opportunity and help people to realise their own aspirations for progress.” See, Alan Milburn, HC deb, 28 March 2006, col 710, as cited in SJPG, n 64 above, p 13

<sup>129</sup> Iain Duncan-Smith, The 2011 Keith Joseph Memorial Lecture: Welfare Reform the wider context (CPS, 15 March 2011)

<sup>130</sup> Wiggan, n. 120 above, p 385

<sup>131</sup> David Cameron, ‘The Big Society’, Hugo Young Lecture, London, 10 November 2009

<sup>132</sup> Bennett and Lister, n. 62 above, p 87

response to which fell from 46% in 1983 to 25% in 2014; to or whether they are too high and discourage work – the response increased from 35% to 42% in the same period.<sup>133</sup>

It is evident that the CJS, and more specifically the SJPG, was a significant influence for David Cameron, particularly as the Conservatives headed towards the 2010 election, in the same way that the CPS was a significant influence for Margaret Thatcher as she headed towards the 1979 election. This sort of partnership appears to work. Both think tanks popularised ‘a new version of an old thesis’, namely, ‘that many of the poor are poor because they do not conform with prevailing social values and needed to be disciplined or taught so to conform for their own good’.<sup>134</sup> As Peter Townsend said in 1974, this should be recognised as no more than ‘a piece of ideological special pleading’.<sup>135</sup> However, this ideological ‘pleading’ has prevailed in contemporary political discourse in relation to the modernisation of the welfare state. Keith Joseph’s speeches, and at times erratic tendencies earned him the nickname of the ‘mad-monk’ and precluded him from taking the reins as a leader of the party. However, it is undeniable that his intellectual prowess, formalised through the policy documents released by the CPS cemented his place in counter-revolutionary discourse.<sup>136</sup> Denham and Garnett submit that Joseph was a mixture of ‘enthusiasm, compassion, and ignorance on the subject of poverty’. And that following his ‘cycle of deprivation’ another ingredient was added: ‘a degree of confidence that he has something worthwhile to say about the plight of the poor, so long as he used a few eye catching-phrases to advertise his message’.<sup>137</sup> Modern think tanks, such as the CSJ have arguably adopted Joseph’s method and mastered them – crafting ‘decision-based evidence making’ and tailoring it to the needs of policy elites and politicians searching for accessible catchphrases to convince a ‘jaded electorate’.<sup>138</sup> In this way, right facing think tanks have become even more lethal ammunition for governments who seek to entrench market-led ideas. Iain Duncan-Smith, the self-professed Thatcherite, thrived in this environment. At the 2010 Conservative Party Conference, the New Work and Pensions Secretary was introduced as a ‘round peg in a round

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<sup>133</sup> Andrew Defty, ‘The coalition, social policy and public opinion’ in Hugh Bochell and Martin Powell (eds), *The Coalition Government and Social Policy: Restructuring State Welfare* (Policy Press, 2016), p 86 / figure 4.4

<sup>134</sup> Peter Townsend, ‘The Cycle of Deprivation – A Social Indictment’ 30 March 1974 (Townsend Papers)

<sup>135</sup> *Ibid*

<sup>136</sup> Denham and Garnett, n. 68 above, xiv

<sup>137</sup> *Ibid*, p 225

<sup>138</sup> Slater, n. 98 above

hole'<sup>139</sup> – he may have been a failure as party leader, but he had found his vocation as a welfare state moderniser.

### ***Conclusion***

The development of UC began with Iain Duncan-Smith's ideological motivations on his political journey from the leader of the Conservative Party to his role as founder of the Centre of Social Justice, all of which shaped his approach to welfare reform as the Secretary of State of Work and Pensions during the age of austerity. Rather than developing a genuine concern for the poor, Iain Duncan-Smith was much more concerned with convincing the electorate that it was necessary to control the poor. It is in that context that his visit to Easterhouse can be interpreted as affirming his neoliberal views rather than transforming them. This chapter has illustrated the commonalities between the role of the CPS and the CSJ, both of which played an integral role in influencing the social policy and rhetoric of the Conservatives in the run up to the 1979 and 2010 elections. At the centre of the CPS was Keith Joseph whose 'new right' views provided an almanac of material for Iain Duncan-Smith to draw upon when determining key messages for the CSJ. It was in this respect that the 'second-coming' of Duncan-Smith represented a 'new dawn for the new right'. Both think-tanks provided snappy soundbites largely based on well-established liberal ideas rather than on the basis of academic evidence – that were consequently monopolised by Thatcher and Cameron – the Prime Ministers in waiting.

However, it was not all plain sailing. Iain Duncan Smith's grand plans were beset with difficulties from the off-set. The Treasury insisted on making cuts, and the social security budget was identified as a consistent target. The well-worn individualist ideology that Duncan-Smith and the CSJ pushed, and Cameron proclaimed in speeches, seeped into the public psyche which arguably made the cutting process easier, and left Duncan Smith quite powerless. The following chapter tracks the development of UC through the austerity agenda that was controlled not by Duncan Smith but by the Treasury, over whom the Secretary of State for Work and Pensions had little influence.

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<sup>139</sup> BBC News, Profile: Iain Duncan-Smith < <http://www.bbc.co.uk/news/uk-politics-35848899> > (accessed 29 September 2017)

## Chapter 10: The Election of the Coalition Government in May 2010

### *Introduction*

The Conservatives dominated the opinion polls for much of 2008 and 2009; however in the months before the election, the gap between the Conservatives and Labour had narrowed and by the beginning of campaign period it was far from certain that the Conservatives would be able to secure an overall majority in the House of Commons. Nick Clegg who appeared on equal terms with both Gordon Brown and David Cameron, excelled in the televised debates and this led to a surge in popularity for the Liberal Democrats. Therefore, the final election result was not altogether surprising, with the Conservatives winning 36% of the vote and 307 seats (19 short of an overall majority), to Labour's 29% with 258 seats and the Liberal Democrats secured 23%, claiming 23 seats.<sup>1</sup> Bale comments that the result reflected the mood of the country: exasperated with Labour, not yet sure about the Tories, and intrigued but far from convinced about the Liberal Democrats.<sup>2</sup> It followed that on 7 May, David Cameron called a press conference following consultation with the Party and made what he termed a 'big, open, and comprehensive offer to the Liberal Democrats'.<sup>3</sup> Thus followed the famous 'five days in May' that resulted in the Conservative-Liberal Democrat coalition, an outcome that was barely mentioned before polling day.<sup>4</sup>

In terms of social security, the partners agreed to introduce the Work Programme, to set a date for bringing forward the pension age to 66.<sup>5</sup> The more detailed programme for government that emerged twelve days later included the very first hint of Universal Credit, whereby the government promised it would 'investigate how to simplify the benefits system in order to improve incentives to work'.<sup>6</sup> The Queen's Speech subsequently announced the introduction of a new Welfare Reform Bill to provide greater incentives to move from benefit to work, to simplify and streamline

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<sup>1</sup> Hugh Bochel and Martin Powell, 'The transformation of the welfare state? The Conservative-Liberal Democrat Coalition Government and Social Policy' in Hugh Bochel and Martin Powell (eds), *The Coalition Government and Social Policy: Restructuring the Welfare State* (Policy Press, 2016), p 6

<sup>2</sup> Tim Bale, *The Conservative Party: From Cameron to Thatcher* (Polity, 2010), p 397

<sup>3</sup> *Ibid*, p 398

<sup>4</sup> Ruth Fox, 'Five Days in May: A New Political Order Emerges' (2010) *Parliamentary Affairs* 63 (4), pp 607–622, p 607

<sup>5</sup> *Coalition Agreement for Stability and Reform* (HMSO, May 2010)

<sup>6</sup> HM Government, *The Coalition: Our Programme for Government* (2010) < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/83820/coalition\\_programme\\_for\\_government.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/83820/coalition_programme_for_government.pdf) > (accessed 28 September 2017), p 23. See also Nicholas Timmins, 'The coalition and society (IV): Welfare' in Anthony Seldon and Mike Finn (eds), *The Coalition Effect: 2010-2015* (Cambridge University Press, 2015), p 323



benefit administration, to address the long-standing problem of changes in circumstances and to take action on fraud and error.<sup>7</sup> Commentators initially concluded, that in terms of social security, the coalition government's initial plans suggested a trajectory of continuity with its predecessors rather than change.<sup>8</sup> At this point, the most drastic measure appeared to be the decision to scrap all New Labour's welfare to work programmes.<sup>9</sup>

The 'Quad' of David Cameron, George Osborne, Nick Clegg and Danny Alexander (Chief Secretary to the Treasury) was the main vehicle for dealing with contentious issues.<sup>10</sup> Where social policy, and public expenditure was concerned the Conservatives secured the major posts. Perhaps the most notable appointment was George Osborne who became Chancellor, and would assume a significant role in defining the shape of ensuing welfare reform. Iain Duncan Smith was appointed as the Work and Pensions Secretary. He would remain in post for the whole period of the coalition (and indeed into the next Conservative government). This level of political continuity in relation to social security stood in contrast to New Labour's secretaries of states in the same position as there were no fewer than eight from 2001 to 2010.<sup>11</sup> Liberal Democrat Steve Webb was appointed as pensions Minister.<sup>12</sup> Chris Grayling became the employment Minister, having spent a period as the Work and Pensions Spokesperson while serving the opposition. Lord Freud (David Freud) was charged with leading welfare reform. Commenting on the new team, The Telegraph said that it was a 'formidable team', showing that Cameron was 'tackling [welfare] head-on' in a way that 'will serve as a microcosm of the Coalition's success or failure'.<sup>13</sup> The appointments set out the key areas that the respective coalition partners would influence.<sup>14</sup> The Liberal Democrats would take the lead on pensions and the Conservatives would tackle the unemployed, with both taking responsibility

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<sup>7</sup> Prime Minister's Office, The Queens Speech, 25 May 2010

<sup>8</sup> Timmins, n. 6 above, p 323; Simon Rahilly, 'The election of a coalition government and an austerity budget' (2010) *Journal of Social Security Law* 17 (4), pp 207-209, p 207

<sup>9</sup> Timmins, n. 6 above, p 323

<sup>10</sup> Robert Hazell and Ben Yong, *Politics of Coalition: how the Conservative Liberal Democrat Government Works* (Hart Publishing 2012), p 7

<sup>11</sup> Stephen McKay and Karen Rowlingson, 'Social security under the coalition and the Conservatives: shredding system for people of working age; privileging pensioners' in Bochel and Powell, n 1 above, p 191

<sup>12</sup> Webb was previously a researcher for the Institute of Fiscal Studies (IFS) and a trained economist

<sup>13</sup> Telegraph View: 'The welfare of the nation rests in their hands' *The Telegraph* (London, 16 May 2010)

< <http://www.telegraph.co.uk/comment/telegraph-view/7729108/The-welfare-of-the-nation-rests-in-their-hands.html> > (accessed 28 October 2017)

<sup>14</sup> Nicholas Timmins, n. 6 above, p 324

for the deep cuts to follow – as above all both parties agreed that ‘the deficit reduction programme takes precedence over any other measures in this agreement’.<sup>15</sup>

***The Governance of Universal Credit: A solution to complexity?***

Iain Duncan-Smith arrived at DWP with the 2009 CSJ report, ‘Dynamic Benefits: Towards Welfare that Works’, with a message to his officials that its contents represented pretty much what he wanted to do.<sup>16</sup> This early outline for a ‘work focused benefit’ provided the blueprint for what the government determined as ‘the most significant change to the welfare system since the Beveridge reforms in 1947’, in the context of the ‘longest, deepest, sustained period of cuts to public services spending at least since World War II’.<sup>17</sup>

Chapter 5 explained that complexity in the social security system creates significant difficulties for both claimants and DWP staff. As previously noted, increasing complexity, particularly during the New Labour years, meant that claimants often had to contend with overlapping benefits, stemming from different sources; administration of JSA, disability benefits, and provision for lone parents managed by DWP; responsibility for housing and council tax payments with local authorities; and interaction required with HMRC for tax credits issues. Complex regulations dictated the level of benefit depending on the number of hours worked and it could take an advisor up to 45 minutes to make ‘a better off in work’ calculation. While the gains were important for most and ensured that work paid, for others they could be marginal. The interaction of the benefit and tax systems and the differing rates at which benefits were withdrawn as income rose could see people lose 90p and sometimes more of each extra pound earned. In 2010 around 600,000 people potentially faced such a reality, while over two million people faced marginal deduction rates, known as the taper, of more than 70p in the pound. As an extreme example, a single earner with two children on the national minimum wage could be less than £7 a week better off from working sixteen hours per week, before the travel costs of getting there. DWP asserted that ‘a system that produces this kind of a

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<sup>15</sup> HM Government, n. 6 above

<sup>16</sup> Centre for Social Justice, *Dynamic Benefits: Towards Welfare the Works* (September, 2009); Nicholas Timmins, n. 6 above, p 324

<sup>17</sup> Centre for Social Justice, n. 16 above; Department of Work and Pensions, *Universal Credit: Welfare that Works* (White Paper, Cm 7957, 2010), ch 7, p 58; Robert Chote, ‘UK faces deepest cuts to public services since WW2 – IFS’ *Reuters* (23 June 2010) <<http://uk.reuters.com/article/uk-britain-budget-ifs/uk-faces-deepest-cuts-to-public-services-since-ww2-ifs-idUKTRE65M2CU20100623>> (accessed 2 November 2017)

outcome cannot be right'.<sup>18</sup> This is the situation that UC was designed to rectify. The benefit, which would replace a number of means-tested benefits and tax credits, was designed to provide a simpler system that is easier to administer and which would provide greater encouragement for entrance to the workplace.<sup>19</sup>

An integration of the tax and benefits system to produce a single simple transaction for claimants has been referred to as the 'philosopher's stone of social security', and was coincidentally first attempted in the Great Britain in 1972 by none other than Keith Joseph (and the then Chancellor Anthony Barber) during his time as Minister for Health and Social Services, when a similar situation above prevailed.<sup>20</sup>

'As things are, a man who is receiving a family income supplement loses 50p in benefit if he increases his earnings by £1, and in some cases he may lose 35p\* as well in income tax and national insurance contribution, leaving him only 15p better off'.<sup>21</sup>

Joseph had introduced Family Income Supplement (FIS), the first benefit for the working poor since the Speenhamland system in 1970.<sup>22</sup> However, as indicated in the Green Paper, it was not as effective as he had hoped due to the high rate the benefit was 'clawed back' at, which often pushed families into a cycle of working poverty.<sup>23</sup> Joseph and Barber's aims were broadly similar to Iain Duncan-Smith's, in that they sought to 'reduce the dependency on means-tested benefits' and 'remove the disincentive that a return to work' may present.<sup>24</sup> The reforms were projected to cost £1.3 billion to implement, a cost that Barber was prepared to pay. The original tax credit scheme, uncompleted, fell with the government in 1974, but the Conservative government remained loyal to the principle of incentivising work and subsequently

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<sup>18</sup> Department of Work and Pensions, *21<sup>st</sup> Century Welfare* (Green Paper, Cm 7913, 2010), p 11

<sup>19</sup> Ibid; DWP, n. 17 above

<sup>20</sup> Nicholas Timmins, *Five Giants: A Biography of the Welfare State* (Harper Collins, 2001), p 289

<sup>21</sup> Chancellor of the Exchequer and Secretary of Health and Social Services, *Proposals for a Tax Credit System* (Green Paper, 1972)

<sup>22</sup> The Speenhamland magistrates' decision in the 1790s dictated that an allowance be provided on top of wages to workers on the edge of starvation. Smith explains that critics complained that farmers had no incentive to pay living wages, and labourers no incentive to work. Jeremy Smith, 'Poor law and bad law - the end of surcharge' (2000) 3 (3), 38-40, p 38

<sup>23</sup> Philip M. Larkin, 'Universal Credit, 'Positive Citizenship', and the Working Poor: Squaring the Eternal Circle?' (2018) *Modern Law Review* 81 (1), p 116

<sup>24</sup> Chancellor of the Exchequer and Secretary of Health and Social Services, n. 21 above; Timmins, n. 20 above, p 289

reshaped FIS, renaming it Family Credit (a precursor to Child Tax Credit and Working Family Tax Credit).<sup>25</sup>

The chief architect of Universal Credit, Iain Duncan-Smith, revived the idea of integrating the tax and benefits system, and attempted to give it legs as early as 1994, when he presented a policy proposal for an integrated benefit to then Conservative Secretary of State for Social Security Peter Lilley. Spelling out his plans in the *Daily Mail* he said:

‘There should be just one, income-assessed benefit, with all the relevant factors taken into account to cater for the needs of the individual and his family. This should be administered by one body, instead of the multitude of offices, each handling one type of benefit, we have now. It would be simpler to understand, cheaper to administer, and would help in the battle against fraud...The new benefit must also aim to make going back to work a more attractive option for the unemployed. The benefit should not be set too high and would need to be ‘tapered’ so that if people took jobs paying less than current benefits, they would not lose all their benefits immediately. The State would make up the difference between work income and social security income’.<sup>26</sup>

The two-pronged proposal detailed in *Dynamic Benefits* was eventually reduced to one working-age benefit – Universal Credit (UC).<sup>27</sup> UC combines and replaces working tax credit, child tax credit, housing benefit (HB), income support, income-based jobseeker’s allowance (JSA) and income-related employment and support allowance (ESA) to provide a single benefit which is administered by DWP, providing means-tested support to those both in and out of work. A number of existing payments for working age claimants will remain including, contribution-based JSA, contributory ESA, Attendance Allowance and Carer’s Allowance. The new benefit’s eventual and complete roll-out would dictate that administrative decisions in relation to social security which were previously made on behalf of the Secretary of State by the relevant DWP agencies (Jobcentre Plus and the Disability and Carers Service), with decisions on tax credits made by Her Majesty’s Revenue and Customs (HMRC) and those relating to housing benefit and council tax made by local authorities, are to

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<sup>25</sup> Timmins, n. 20 above, p 290

<sup>26</sup> *The Daily Mail* (London, 13 April 1994)

<sup>27</sup> This would allow the system to differentiate between work-focused benefits, receipt of which depends on conditional requirements such as attending interviews and job search activity and benefits designed to cover costs such as rents. Centre for Social Justice, n. 16 above, p 267

be combined and placed entirely in the hands of DWP. Council tax relief will remain the remit of the local authorities, as well as the administration of the Discretionary Housing Payments (DHPs) which will be discussed further below and in the final chapter.<sup>28</sup> The CSJ's, Economic Dependency Working Group concluded that simplification of the system would remove its 'structural propensity toward error'.<sup>29</sup> The Coalition government acknowledged that the trend of implementing piecemeal simplification could not adequately tackle complexity in the system. As referenced at the beginning of this chapter, it was asserted that implementing a simplified system could generate savings of up to £0.5 billion, which would, among other factors be achieved by a decrease in involvement of 'multiple agencies' in individual cases. The government sought to rectify a situation whereby 'complexity means that it is difficult for people to know what benefits and Tax Credits they can get', a situation which 'undermines trust in the system and stops people focusing on getting back to work'.<sup>30</sup> In its White Paper on UC, published in the latter part of 2010, the government argued that bringing different means-tested benefits, each governed by separate sets of detailed legal provisions, together into one scheme would also simplify the overall legal composition of social security, as would the bringing together of rules on factors that generate variations in support, for example on disability. Under the UC scheme, there are only two rates of additional support for people with disabilities, based on the individual's capacity to work, with the higher rate attainable for those with the most severe disabilities – in place of various separate and overlapping disability related additions in each of the diverse income-related benefits at present.<sup>31</sup>

### ***The Governance of 21<sup>st</sup> Century Welfare: Universal Credit***

The overwhelming motivation for UC is underlined by the desire to create a client experience that mimics paid employment.<sup>32</sup> This objective has manifested itself in an even greater push towards contractualism in the delivery and governance of welfare and has warranted a more intrusive experience for claimants – which is further described in the next chapter. This shift is largely underpinned by the government's

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<sup>28</sup> Neville Harris, *Law in a Complex State: Complexity in the Law and Structure of Welfare* (Hart Publishing, 2013), p 131; Simon Rahilly, 'Universal Credit' (2010) *Journal of Social Security Law* 18 (2), pp 61-63; See Jed Meers, 'UK' in Stefano Civitarese Matteucci, Simon Halliday (eds), *Social Rights in Europe in an Age of Austerity* (Routledge, 2017), ch 6

<sup>29</sup> Centre for Social Justice, n. 16 above, ch 15; Department for Work and Pensions, n. 18 above, ch 1, para 23

<sup>30</sup> Department for Work and Pensions, n. 18 above; See also, Harris, n. 28 above, p. 118.

<sup>31</sup> Harris, n. 28 above, p 118

<sup>32</sup> Fran Bennett and Jane Millar, 'Universal Credit: Assumptions, Contradictions and Virtual Reality' (2017) *Social Policy and Society* 16 (2), pp 169-182

increasing propensity towards controlling individual behaviour.<sup>33</sup> It has been asserted throughout the thesis that the journey towards a more punitive social security system, which places limited value on claimants' access to social rights has been long and measured. However, it was the coming of the Coalition government, against a backdrop of economic crisis that accelerated the conditional basis of the welfare state towards its pinnacle. The focus of the government from the moment it entered Whitehall, was the implementation of deficit reduction on a merciless scale, which included reducing the size of the civil service.<sup>34</sup> This called for a new brand of '21<sup>st</sup> Century Welfare' that would create a leaner system administered by a single government department.<sup>35</sup>

Delivering radical welfare reform in the context of fiscal consolidation undoubtedly posed a significant challenge. Between 2010 and 2015 the number of civil servants dropped by around 15 per cent (a reduction of 71,990 or since the spending review in 2010, when there were 478,130 civil servants).<sup>36</sup> One of the departments that experienced the greatest relative decline was the Department for Work and Pensions, which posed additional challenges for the delivery of welfare reform – for example, some advice agencies have encountered increasing numbers of claimants who require advice and support in negotiating the new benefits system, managing their debts and coping with poverty and hardship.<sup>37</sup> The devolution of more responsibility to civil society is reminiscent of the Conservative's enlisting of 'active citizens' in the late 1980's. As asserted in Chapter 2, this provides an alternative view of the capacity of the voluntary sector to reach parts of society that are considered beyond state provision, whereby, self-help and voluntarism integrate to 'civilise' the competition and rigour of market relations through concern for one's community.<sup>38</sup>

Similarly, and as detailed in Chapter 5, New Labour further developed the Conservatives' 'active citizenship' concept when they set out a strong narrative in favour of individual obligation and labour market participation based principally on

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<sup>33</sup> Ibid, p 176

<sup>34</sup> Peter Riddell, 'The Coalition and the Executive' in Seldon and Finn, n. 6 above, p 132

<sup>35</sup> Department for Work and Pensions, n. 18 above

<sup>36</sup> Emily Andrews, *Civil Service staff numbers under the Coalition government, 2010 to 2015*, The Institute for Government (London, 17 June 2015) <<https://www.instituteforgovernment.org.uk/blog/civil-service-staff-numbers-under-coalition-government-2010-2015>> (Accessed 24 October 2017)

<sup>37</sup> Chris Dearden, *The True Cost of Austerity: Evidence from Advice Nottingham* (Advice Nottingham, 2015) <<http://www.lawcentres.org.uk/asset/download/475>> (Accessed 29 October 2017)

<sup>38</sup> Derek Heater, *Citizenship in Britain: A History* (Edinburgh University Press, 2006), p 208; Keith Faulks, *Citizenship in Modern Britain* (Edinburgh University Press, 1998), p 128

Anthony Giddens' Third Way philosophy which emphasised equality of opportunity and the pursuit of social cohesion. Its approach to welfare was active rather than passive to facilitate flexible working, family life and a more confident and demanding public. An emphasis on targets and achieving an efficient level of service implied an increasingly individualised contractual basis for citizenship.<sup>39</sup> New Labour softened its obligation driven discourse by using the concept of 'community' to reintroduce notions of solidarity into the welfare arena in order to facilitate mutual support and individual responsibility for oneself and as well as for others to contribute to the fight against 'social exclusion'.<sup>40</sup> In the latter part of its tenure, against a background of growing political instability, it increasingly emphasised the necessity of maintaining paid employment for individuals to effectively negotiate their own route out of poverty and subsequently increased its focus on applying conditionality in order to coerce the individual's compliance in assuming its vision of an efficient citizen. The exercise of welfare governance under the Coalition government lacked the theoretical framework provided by Giddens. Instead, and as detailed above, it sought the guidance of right-leaning think tanks. The austerity narrative, with an 'emphasis almost entirely on lowering the deficit by reducing public expenditure rather than through increasing taxes' set the tone, with an emphasis on restricted budgets, particularly for social security provision and administration.<sup>41</sup> As Jed Meers suggests, rather than simply trying to create a conduit between government spending restrictions and social security (or indeed effect meaningful simplification), the Coalition's welfare reforms emphasised the;

'flowing undercurrent in the interface between government aims and the social security system which has shifted and is shifting the way in which those claiming benefits are conceptualised and managed in the growing effort to control those on the receiving end of the welfare state'.<sup>42</sup>

New Labour's employment policy is characterised by Bennett and Millar as a 'work is good for you' approach. Bennett and Miller, assert that this phrase appropriately acknowledges the 'work first' approach adopted in regard to its overarching

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<sup>39</sup> Peter Taylor-Gooby, *Reframing Social Citizenship* (Oxford University Press, 2009), p 118

<sup>40</sup> Stephen Driver and Luke Martell, *New Labour* (Polity Press, 2006), p 60

<sup>41</sup> Catherine Bochel, 'The Changing Governance of Social Policy' in Bochel and Powell, n. 2 above, p 60; See also, Rahilly, n. 28 above, p 61

<sup>42</sup> Jed Meers, *Shifting the Place of Social Security: Welfare Reform and Social Rights under the Coalition Government's Austerity Programme* (Italian Ministry of Education, Universities and Research/York Law School, 2015), p 13

employment policy and indeed the party's legislative agenda.<sup>43</sup> They contrast this with the current trajectory of social security policy for those of working aged, which they assert goes beyond that, as the Conservatives in particular believe that individuals 'should always be aiming to be independent of the state, not reliant upon it in any way', which is reflected in the fact that conditionality is also applicable to people who are in work and claiming state support in the form of, for example, working-tax credit (WTC).<sup>44</sup> DWP is currently developing an in-work service to offer support to UC claimants to explore how claimants can increase their earnings and become more independent.<sup>45</sup> However, DWP's vested interest in seeking to guarantee independence is contradicted by the government's exercise of increased control which is inherent in the design of UC. This in turn creates a paradoxical situation, as using wage supplements to help 'make work pay' and augmenting incentives in any circumstance extends state support into the working population – and thus undermines the original aim of creating a citizen who is completely independent of the state.<sup>46</sup>

The administration of UC is intended to mimic the wage system and thereby bring about behaviour that is seen as more appropriate to being in employment. As Bennett and Millar contend, the contradiction here, is that the level of intrusion and control embedded in the design are substantial and extend to more people and more aspects of their lives.<sup>47</sup> The government is enforcing this contradiction through its expansion of conditionality to those already in work who are earning less than a determined amount and significantly, also to partners with children.<sup>48</sup> It has been determined that the sanctions for failure to comply will affect the whole of the UC payment, not just the allowances for adults, as is currently the case. Although the reductions for non-compliance are applied only to the standard personal rate of UC, there is only one payment and so any reductions apply across the board. In this context, it becomes increasingly difficult to appreciate Iain Duncan-Smith's claim that 'at its heart Universal Credit is very simple', as welfare governance is moving beyond the realms

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<sup>43</sup> Fran Bennett and Jane Millar, 'Universal Credit: Assumptions, Contradictions and Virtual Reality' (2017) *Social Policy and Society* 16 (2), p 176; See also, Ruth Lister and Fran Bennett, 'The New 'Champion of Progressive Ideals'? Cameron's Conservative Party: Poverty, Family Policy and Welfare Reform' (2010) *Renewal* 18 (1), pp 84–109

<sup>44</sup> Bennett and Millar, n. 43 above, p 176

<sup>45</sup> See, Department for Work and Pensions, *Universal Credit at Work: Spring 2015* (DWP, 2015)

<sup>46</sup> Bennett and Millar, n. 43 above, p 176

<sup>47</sup> *Ibid*

<sup>48</sup> Fawcett Society, *Where's the Benefit? An Independent Inquiry into Women and Jobseeker's Allowance* (Fawcett Society, 2015)



of those who are unemployed and unable to work due to a temporary incapacity or long-term disability to those who have low-income jobs.<sup>49</sup> Imposing penalties on those already in work serves to introduce a highly counter-productive narrative. Those who are in paid employment are already fulfilling their work related citizenship obligations, therefore the expectation that they engage in additional conditional processes arguably serves to undermine the logic of UC in practice, as it re-categorises the previously respectable 'deserving' status of the low paid worker as 'undeserving', thus extending a sense of stigma to more people.<sup>50</sup> In-work conditionality effectively extinguishes the distinction between being 'in' and 'out' of work, and removes the legitimacy from the process of claiming tax credits to top up low-wages. Workers on a low income will effectively exist in a grey area between unemployment and full-time employment, in which the government has secured the legal power to intervene in their lives in order to coerce them from laying claim to the social rights vested in social security unless they fulfil their responsibilities.

***Universal Credit: The Answer to Complexity?***

Addressing the potential of UC to alleviate complexity, Harris asserts that there remain detailed rules on the conditions of entitlement for the benefit, and there has been no explicit commitment from the government to reform the manner that legislation is drafted. While merging means-tested benefits in the delivery of UC has the potential to reduce duplication and overlap, it is unlikely to result in much simplification, as the amount of information that is required when making the single UC claim remains significant.<sup>51</sup> Furthermore, the various factors that determine the level of claimant entitlement remain broad, therefore it is likely that the intrinsic complexity of individual rules, which stem from that diversity of circumstances and needs, is likely to remain.<sup>52</sup> All of this considered, Rahilly declared UC to be 'a bit of a misnomer'.<sup>53</sup> Despite its title evoking notions of Beveridge's universal flat-rate provision, UC is designed to intensify the targeting of support. It is a means-tested benefit, which merges the six main means-tested benefits, with other benefits

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<sup>49</sup> Bennett and Millar, n. 43 above, p 177; Department of Work and Pensions, n. 17 above, Foreword

<sup>50</sup> Fran Bennett, 'Universal Credit: Overview and Gender Implications' in Majella Kilkey, Gaby Ramia and Kevin Farnsworth (eds), *Social Policy Review 24: Analysis and Debate in Social Policy* (Policy Press, 2012), pp 15–34, p 18; See also, Peter Dwyer and Sharon Wright, 'Universal Credit, Ubiquitous Conditionality and its Implications for Social Citizenship' (2014) *Journal of Poverty and Social Justice* 22 (1), pp 27–35, p 31

<sup>51</sup> Harris, n. 28 above, p 127

<sup>52</sup> Ibid

<sup>53</sup> Rahilly, n. 28 above, p 61

remaining more or less in place.<sup>54</sup> On a general level, increasing the targeting of support by way of means-testing serves to make the entitlement process more complex. As discussed in Chapter 5, the introduction of more targeting, or narrowing the scope of the claimant's ability to claim, based significantly on their ability to work, does not necessarily translate into workable legislation, in the same way that reducing the number of separate rules into a single benefit does not necessarily equate to the achievement of a simplified system. Furthermore, as outlined in chapter 5, contemporary reforms to social security provision have shown that when structural simplification does occur, it has tended to rationalise provision and shift resources and indeed citizenship rights, away from the chosen group of claimants, whether directly, or as a result of a reduction in the benefit's sensitivity to individual circumstances. A clear example of this, which disadvantaged the unemployed, can be found in the introduction of the 'age-dividing line', which dictated that single claimants under 25 would receive a lower rate of Income Support Personal Allowance (introduced in 1987), and later Jobseekers Allowance (JSA) than their older counterparts. The rule was simpler than its predecessor, which sought to attribute rates of benefit on the basis of whether or not an individual was a 'householder', which required a range of factors to be considered such as the sharing of accommodation and contractual arrangements.<sup>55</sup> An example related to the recent changes can be found through an examination of the introduction of Personal Independence Payment (PIP) in place of Disability Living Allowance (DLA). The government asserted that DLA's '11 possible different rates of benefit...make the benefit difficult to administer'.<sup>56</sup> PIP includes fewer separate rates, and does not for example, offer the equivalent provision to that made by the lowest rate of the care component of DLA, which nearly 255,000 people received in 2012<sup>57</sup>, and it is on those grounds that it has been criticised for raising the threshold for entitlement.

Harris concludes that although structural change and the rationalisation of rules implemented by UC will mitigate some of the problems associated with complexity in the claiming process (due to a claimant's ability to make a single claim, governed by one set of rules), that the simplicity of the proposition has been tempered greatly by

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<sup>54</sup> Harris, n. 28 above, p 120

<sup>55</sup> See Neville Harris, *Social Security for Young People* (Aldershot, 1989), pp 74–76

<sup>56</sup> Department for Work and Pensions, *Disability Living Allowance* (Cm 7984, 2010), p 9

<sup>57</sup> Department for Work and Pensions, *Disability Living Allowance Reform: Equality Impact Assessment* (May, 2012) <  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/220151/eia-dla-reform-wr2011.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/220151/eia-dla-reform-wr2011.pdf) > (accessed March 2018)

peripheral administrative factors (for example, the responsibility of local authorities for council tax relief and DHPs). The House of Commons Communities and Local Government Committee concluded that having to make a claim for UC and a separate claim to a local authority for council tax relief will continue to ‘cause a level of confusion for claimants’.<sup>58</sup> Furthermore, since the beginning of the UC implementation process there has been a highly critical focus on the information technology (IT) infrastructure required to deliver the new benefit. The roll-out has been much slower than expected due in part to significant IT failings and spiralling costs, a factor that contributes to the elongation of the transitional period, which has added to existing confusion.<sup>59</sup> Additional complexity for some claimants has also arisen due to DWP’s insistence that the system should be ‘digital by default’, with the consequent expectation that claims will be made online.<sup>60</sup> This presents considerable barriers to many who are seeking to claim their social citizenship rights through the social security system. The House of Commons Work and Pensions Committee expressed its concern at this digital barrier, and emphasised the implications for ‘some vulnerable claimants’ who may not have internet access or the skills required to obtain their entitlement. The Committee’s report criticised the government’s failure to establish adequate ‘face-to-face support when making a claim for UC’.<sup>61</sup> The requirement to claim online, may also place additional cost burdens on claimants – with those without internet access in their homes required to travel to public libraries, advice agencies or the local jobcentre to make online claims.<sup>62</sup>

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<sup>58</sup> House of Commons Communities and Local Government Committee, *Implementation of Welfare Reform by Local Authorities* (2012–13, HC 833, HMSO, 2013), para 97

<sup>59</sup> See generally, House of Commons Public Accounts Select Committee, *Universal Credit: Progress Update, Forty-Second Report of Session 2014–15*, HC 810, (HMSO, 2015); House of Commons Work and Pensions Select Committee, *Universal Credit Implementation: Monitoring DWP’s Performance in 2012–13, Fifth Report*, Session 2013–14, HC 1209, (HMSO, 2014)

<sup>60</sup> Bennett and Millar, n. 32 above, p 170; Harris, n. 28 above, p 126; See also The Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Claims and Payment Regulations) 2013 (SI 2013/380) reg. 9 Sched 2. Claims are to be made by telephone only if they fall within ‘a class of case for which the Secretary of State accepts telephone claims or where, in other case, the ‘Secretary of State is willing to do so’. It is expected that even when made via the telephone an online claim will be prepared by the telephone agent: see Department of Work and Pensions, *Explanatory Memorandum for the Social Security Advisory Committee: Claims and Payment Regulations for the Universal Credit, Personal Independence Payment, Jobseekers Allowance (Contributory) and Employment and Support Allowance (Contributory)* (DWP, 2012), p 7

<sup>61</sup> House of Commons Work and Pensions Committee, *Universal Credit Implementation: Vulnerable Claimants* (2012–13, HC 576-I) para 29

<sup>62</sup> Harris, n. 28 above, p 126

A further intention of UC is to ‘minimise opportunities for fraud and error’.<sup>63</sup> It is hard to discern how this will be realised considering the extent of means-testing embedded in UC. The NAO, which examined the issue of complexity in significant detail, commented that ‘the sheer amount of information to be processed in the context of means-testing requires the Department to take certain statements on trust, which may persuade some that fraud is a risk worth taking.’<sup>64</sup> Indeed, HMRC has commented that the process involved in reporting a change of circumstance, are said to ‘encourage people to fall into fraud’.<sup>65</sup> McKeever argues that those engaging with the social security system do not have a sophisticated knowledge and thus only a very small fraction of people know how to manipulate the system for their own gain. Furthermore, evidence also shows that claimants are generally unwilling to engage with the system beyond ‘what is absolutely necessary to make their claim’.<sup>66</sup> The UC white paper accepts the NAO’s position that when applying the rules governing means-testing that administrators must ‘rely on people to let us know about their earnings, savings and non-financial circumstances...[which] creates opportunities for fraud and error’.<sup>67</sup> The government asserts that replacing numerous benefits with UC will drive down the level of complexity in the system, thus making it ‘much easier for recipients to understand and establish entitlement to payment, meaning much of the error which is currently caused by the complicated interactions between different benefits will be reduced’.<sup>68</sup> Furthermore, it is asserted that the use of an ‘integrated computer system with integrated processing teams’ will reduce fraud and error that is due to the current ‘complex interactions’ between such systems’.<sup>69</sup> It is also claimed that combining benefit/credit operations within a single organisation (DWP) will also avoid duplication of fraud and error policing.<sup>70</sup> However, as outlined by Bennett and Millar, the operation of UC as a monthly benefit, and the choice of a month as the key time period will have ‘significant consequences’.<sup>71</sup> Ministers, including Lord Freud, were convinced in 2013 that the development of what HMRC terms ‘Real Time Information’ (RTI) to record changes in wages more speedily, would ensure that UC

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<sup>63</sup> Department of Work and Pensions, n. 17 above, Foreword

<sup>64</sup> National Audit Office, *Department of Work and Pensions: Dealing with the Complexity in the Benefits System*, HC 592 (HMSO, 2005), para 3.9

<sup>65</sup> HM Revenue and Customs and the Department for Work and Pensions, *Tackling Fraud and Error in the Benefit and Tax Credit Systems* (HMRC, DWP, 2010), ch 2, para 8

<sup>66</sup> Grainne McKeever, ‘Balancing Rights and Responsibilities: The Case of Social Security Fraud’ (2009) *Journal of Social Security Law* 16 (3), pp 146-147

<sup>67</sup> Department for Work and Pensions, White Paper, ch 5, para 4

<sup>68</sup> *Ibid*, para 5

<sup>69</sup> *Ibid*, para 6

<sup>70</sup> *Ibid*, ch 4, para 32

<sup>71</sup> Bennett and Millar, n. 32 above, p 172

will be more responsive to people's real needs every month.<sup>72</sup> There is undoubtedly a need for improvement in relation to responsiveness, as illustrated by the modifications of tax credits in response to changing circumstances which can cause significant financial problems for claimants (as denoted above). However, the RTI for the purposes of UC only covers changes related to wages. Changes in income connected with tax credits can be multiple and frequently relate to other sources in addition to pay, for example, housing and the number of people in the household.<sup>73</sup> Miller and Ridge argue that 'the experience of the delivery of tax credits does not appear to have been fully taken into account and in particular the extent to which the Universal Credit system will have to cope with changes in circumstances seems to be somewhat underestimated'.<sup>74</sup> This observation not only undermines the government's confidence that UC will adequately simplify the current process, but it also undermines its own attempt to reduce fraud and error. As Baroness Hollis pointed out, '[i]t is fair to say that when we introduced the Tax Credits Bill we did not predict that 50 per cent of lone parents would undergo more than a dozen changes in circumstance a year.'<sup>75</sup>

Iain Duncan Smith's promise that UC would create a simpler system that would make it easier for people to get help has yet to come to pass. Its implementation has been beset with problems, with political support steadily waning. A particularly contentious feature of UC, which attracted substantial criticism was the inclusion of a seven day waiting period for which living and housing costs would not be reimbursed - on the basis that claimants should have earnings to fall back on.<sup>76</sup> On

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<sup>72</sup> Roy Sainsbury, 'Talking Universal Credit: in conversation with Lord Freud, Minister for Welfare Reform' (2014) *Journal of Poverty and Social Justice* 22 (1), pp 37-44

<sup>73</sup> John Hills, Rachel Smithies, and Abigail McKnight, *Tracking Income: How Working Families' Incomes Vary Through the Year*, CASE report 32, (Centre for Analysis of Social Exclusion, London School of Economics, 2006); See also, Jane Millar, 'Tax credits: a close-up view' (2011), *Journal of Poverty and Social Justice* 19 (1), pp 39-50

<sup>74</sup> Jane Millar and Tess Ridge, 'Written evidence', House of Commons Work and Pensions Committee White Paper on Universal Credit Oral and written evidence, HC 473, (HMSO, 2011), Ev 60, para 8 <  
<http://www.publications.parliament.uk/pa/cm201011/cmselect/cmworpen/743/743.pdf>

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<sup>75</sup> Ibid

<sup>76</sup> This measure was announced in 2013, but only came into statutory force in 2015. See, *Report by the Social Security Advisory Committee on The Universal Credit (Waiting Days) (Amendment) Regulations 2015 (S.I. 2015 No. 1362)*, Government Response (Para 11). <  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/434281/universal-credit-waiting-days-report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/434281/universal-credit-waiting-days-report.pdf) > (accessed 15 March 2018). The SSAC recommended that the proposal should not be implemented due to strong representations from organisations who outlined the scope of potential hardship. The extent of hardship was highlighted by the Financial Exclusion Committee, and the 7 day waiting period was eventually abolished by the Chancellor Philip Hammond in the process of the 2017. See,

top of this claimants face a further minimum wait of five additional weeks for their first UC payment.<sup>77</sup> This extended waiting period signifies a significant erosion of the social citizenship principle of providing a minimum level of economic welfare and security for all, as many claimants will have absolutely no monetary support during this time.<sup>78</sup> A claimant can apply for an Advance Payment (AP) to alleviate hardship during the wait, however many commentators have determined that the level of this payment is not substantial enough to sustain the claimant for a prolonged wait, and importantly, it is recoverable from future payments.<sup>79</sup> Continued evidence of claimant hardship during this waiting period eventually led to a political climb down and the abolition of the seven-day waiting period, but not until 2017.<sup>80</sup> At the time of its introduction the political calculation of what the public will tolerate as a minimum safety net appeared to be accurate, albeit that it may now need to be revised.

It is contended here that the problematic issues around governance stem directly from the Conservative's exploitation of the social security system as a tool to control claimant behaviour, as well as from its intensified rationalisation of social citizenship. As discussed at the beginning of Chapter 5, it is clear that the political approach to those of working age has narrowed to the point where it simply seeks to ensure that those who can carry out some sort of work do so, which fails to adequately recognise the diverse nature of the claimant's individual situations.<sup>81</sup> This fits with Bennet and Millar's contention that although UC promises much, it is at the same time too limited as the concept of a single benefit which focuses on the promotion of incentives is too narrow a principle for the whole of the social security system for working-age people and is too far removed from the realities of life on a low income.<sup>82</sup>

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(House of Lords) Select Committee on Financial Exclusion, *Tackling financial exclusion: A country that works for everyone?* HL Paper 132 (March 2017); and also HM Treasury, *Autumn Budget*, (HC 587, HMSO, November 2017)

<sup>77</sup> See Beth Foley, *Delivering on Universal Credit* (Citizens Advice Bureau, 2016) - 1 in 3 clients that it supported in full service areas were waiting over 6 weeks for their first payment, with 11 per cent waiting for more than 10 weeks.

<sup>78</sup> TH Marshall, 'The Right to Welfare', in Noel Timms and David Watson (eds), *Talking About Welfare* (Routledge, 1976), p 60

<sup>79</sup> See for example, Written evidence from the Welfare Conditionality: *Sanctions, Support and Behaviour Change Project to the Work and Pensions Select Committee inquiry on Universal Credit rollout* (October, 2017) < <http://www.welfareconditionality.ac.uk/wp-content/uploads/2017/10/WP-UCinq-WelCond-submn-Oct17.pdf> > (accessed 20 March 2018)

<sup>80</sup> HM Treasury, *autumn budget 2017* (HM Treasury, 2017); See also, Grainne McKeever, Mark Simpson and Ciara Fitzpatrick, *Destitution and Paths to Justice* (JRF/LEF, 2018) (Forthcoming), p 40

<sup>81</sup> See Chapter 5

<sup>82</sup> Bennett and Millar, n. 32 above, p 179

This view is countered slightly by Timmins' assertion that Iain Duncan-Smith was a 'structural reformer' who sought to produce a social security system that works better, not just one that costs less.<sup>83</sup> Certainly this aspiration is reflected in Duncan-Smith's letter of resignation, tendered in March 2016, less than a year after the election of a Majority Conservative government:

'I am unable to watch passively whilst certain policies are enacted in order to meet the fiscal self-imposed restraints that I believe are more and more perceived as distinctly political rather than in the national economic interest'.

'Too often my team and I have been pressured in the immediate run up to a budget or fiscal event to deliver yet more reductions to the working age benefit bill. There has been too much emphasis on money saving exercises and not enough awareness from the Treasury, in particular, that the government's vision of a new welfare-to-work system could not be repeatedly salami-sliced'.

This speaks directly to the consistent contention made within this thesis, that the purpose and operation of the social security system has been increasingly determined by political ideology. What Duncan-Smith's resignation most potently underscores is his fractious relationship with the Treasury, and more specifically with the Chancellor George Osborne. At the time of his resignation, Duncan-Smith said he felt 'semi-detached', 'isolated in a sense' and no longer able to 'make the case for his way of doing things' and that he 'was losing his influence', as the 'Treasury has too much influence over decisions'.<sup>84</sup> It is in this context that the influence of the Liberal Democrats becomes most discernible – as Timmins asserts, Duncan-Smith's UC mission would have died without the support of Clegg and Alexander in the face of Treasury officials' opposition and George Osborne's concerns.<sup>85</sup>

### ***An Austerity Agenda: Cuts and more cuts to social security***

The 2010 General Election was called in the midst of a growing opposition to Keynesian policies. Upon his election, George Osborne, frequently compared the UK's fiscal situation to Greece. The new Chancellor warned that 'you can see in Greece an example of a country that didn't face up to its problems, and that is the fate I want to

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<sup>83</sup> Timmins, n. 6 above, p 343

<sup>84</sup> Kate McCann, 'Iain Duncan Smith resignation: EU claims are a 'deliberate attempt to discredit me' IDS claims after emotional Andrew Marr interview' *The Telegraph* (London, 20 March 2016)

<sup>85</sup> Timmins, n. 6 above, p 343

avoid'.<sup>86</sup> Blythe contends that conflating the offensive against Keynesianism with the Greek debt amplified the UK impetus to implement fiscal austerity.<sup>87</sup> The ongoing crisis and the austerity narrative provided an ideal climate for Osborne to announce his emergency budget. Of the £99 billion of spending reductions by 2016/16, £11 billion cuts were to be applied to benefits and tax credits. Out of the fifty policy decisions listed in the budget, twenty-three were cuts to social security.<sup>88</sup>

The policy announcement that packed the biggest punch to benefit claimants was the switch from using the Retail Price Index to the Consumer Price Index as the basis for uprating benefits, tax credits and pensions (including public service pensions). The switch was projected to save the government in the region of £6 billion by 2014-15. A small reduction in benefit uprating for millions of claimants would reap rich dividends for the public purse.<sup>89</sup> Tax credits were reduced by £3 billion through measures such as removing them from the better off and withdrawing them more quickly.<sup>90</sup> Expenditure on housing benefits was reduced by £1.7 billion by 2015/15. The element of the emergency budget that drew the most attention was the decision to limit housing benefit for social housing tenants when they had more rooms than were deemed 'necessary'. Christened by the government as the spare room subsidy it soon became colloquially recognised as the 'Bedroom Tax'. It was projected to generate a £490 million saving by 2014/15. Carr and Cowan assert that of all the welfare cuts implemented in the name of austerity, the bedroom tax 'has the most

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<sup>86</sup> Osborne said this line during an interview with Andrew Marr on the BBC. See, Reuters Staff, 'UK to dodge Greek fate with tough budget - Osborne' *Reuters* (London, 21 June 2010) < <http://uk.reuters.com/article/uk-britain-osborne-budget/uk-to-dodge-greek-fate-with-tough-budget-osborne-idUKTRE65J0UX20100621> > (accessed 28 October 2017)

<sup>87</sup> Mark Blyth, *Austerity: The History of a Dangerous Idea* (Oxford University Press, 2013), p 73

<sup>88</sup> Timmins, n. 6 above, p 358; See, HM Treasury, *Budget 2010 Securing the Recovery*, HC 451 (HMSO, 2010)

<sup>89</sup> Timmins, n. 6 above p 328; See also, Stephen McKay and Karen Rowlingson, 'Social Security under the Coalition and Conservatives: Shredding the System for People of Working Age; Privileging Pensioners' in Bochel and Powell, n. 1 above, p 181; See also Table 8.1: Key Reforms to Social Security 2010-2014, p 183; See also, Robert Chote, *Post Budget Presentations: Opening Remarks* (IFS, 2010), p 1 < <https://www.ifs.org.uk/budgets/budgetjune2010/chote.pdf> > (accessed 16 October 2017)

<sup>90</sup> Emma Simon, 'Spending cuts: Child Trust Funds axed' *The Telegraph* (London, 24 May 2010) < <http://www.telegraph.co.uk/finance/personalfinance/savings/7759042/Spending-cuts-Child-Trust-Funds-axed.html> > (accessed 19 October 2017); See also, Timothy Edwards, *Child Trust Funds &*

*Junior Isa transferability*, Briefing Paper Number 06468, (House of Commons Library, 30 January 2014) < <file:///C:/Users/B00346831/Downloads/SN06468.pdf> > (accessed 20 October 2017), pp 13-14. Edwards writes that CPAG attitude towards the Child Trust Fund had been at best lukewarm and did not comment publicly on its demise. In submissions by the CPAG to the Chancellor before and after the spending review and emergency Budget, CPAG did not mention the Child Trust Fund



potential to disrupt the potency of contemporary common sense which reckons that no-one who is reliant on the state should receive a benefit that their equivalent operating within the market would not be able to afford'.<sup>91</sup> The coalition succeeded in further illuminating the visibility of the dividing lines between social tenants and private tenants/homeowners, which is consistent with the developing 'othering' of the unemployed. It was argued that social tenants have been 'discursively ghettoized', a notion which Carr and Cowan maintain encapsulates the ways in which social tenants are described and denounced as 'problematized separates' from the rest of the population. The management of social tenants, much like the unemployed has been underscored by the promotion of a culture of responsibility.<sup>92</sup> These tentacles of social responsibility have continued to strangle the vision of social rights as being an inherent aspect of citizenship, and of seeing the unemployed as 'lesser' citizens than those who do have to rely on the state for support or survival.

The Chancellor of the Exchequer was committed to finding further savings in the benefits system outside those identified in the emergency budget.<sup>93</sup> In this way he trapped Iain Duncan Smith in a catch-22 situation. In order for him to realise his vision he would have to cut resources from elsewhere, while at the same time successfully effecting reform (a challenge that Duncan-Smith ultimately failed to meet). Duncan-Smith's tenuous relationship with the Treasury did not deter him from marching on with his plans. It was his strong will, and the plausibility of UC as a long-term vision for social security that garnered support from David Cameron. Nick Clegg and Danny Alexander also supported the construction and introduction of UC. One Conservative Minister is noted as asserting that it would have been 'touch and go' whether UC would have got through a purely Conservative government – a statement which in itself underlines the significance of the Coalition partnership.<sup>94</sup>

The eventual deal between the Duncan Smith and Osborne resulted in the DWP receiving more than £2 billion to deliver UC over the coalition's mandate. In return Duncan Smith was directed to prepare for another £7 billion in benefit cuts so that the 'extra' benefit costs of UC were taken out of the system in advance of the implementation of the new measures. The £7 billion of targeted cuts was removed

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<sup>91</sup> Helen Carr and Dave Cowan, 'The Social Tenant, the Law and the UK's Politics of Austerity' (2015) *Oñati Socio-Legal Series* 5 (1), pp 73-89, pp 80-81

<sup>92</sup> *Ibid*

<sup>93</sup> Haroon Siddique, 'George Osborne denies Iain Duncan Smith dispute' *The Guardian* (London, 17 August 2010) < <https://www.theguardian.com/politics/2010/aug/17/george-osborne-ian-duncan-smith-dispute> > (accessed 4 October 2017)

<sup>94</sup> Timmins, n. 6 above, p 330

from the social security budget through the Comprehensive Spending Review in October 2010, which set out departmental spending in more detail.<sup>95</sup> The measures, included the introduction of a ‘benefit cap’ of £500 per week or £26,000 per year on the amount of out-of-work benefits families could receive to ensure that no family received more in welfare than the median income after tax earnings for working households.<sup>96</sup> Further cuts were also applied to housing benefit and a further net saving of £2.3 billion by 2015/2016 came from tax credits. As noted above, council tax benefit was cut by 10 per cent (although pensioners were protected), devolved to local authorities, and taken out of UC – essentially replacing one means test with hundreds of local ones and undermining the aim of a single, simple, taper ‘to ensure that work always pays’.<sup>97</sup> This move was considered ill-conceived by DWP Ministers but as Timmins indicates it was a move to accommodate ‘localism’, a buzzword concept promoted in the early days of the Coalition, and was commonly associated with the short-lived idea of the ‘Big Society’ which prioritised local authority and community decision making over that of central government.<sup>98</sup> However, as Meers argues, in the context of welfare reform, this can (and arguably has) proved problematic – particularly in a situation where new responsibilities are devolved alongside tightened budgets.<sup>99</sup> Indeed it has been asserted, that in a situation in which there are a multitude of local demands competing for limited resources, the possibility for transformational local decision making becomes ‘hollow’<sup>100</sup>

Child Benefit, one of the most fiercely guarded of the remaining universal benefits, was also cut. At the Conservative Party conference in October 2010, George Osborne (without reference to an apparently furious Iain Duncan-Smith) announced that it was to be withdrawn from higher-rate taxpayers. This reform was introduced with the aim of saving £2.5 billion. It meant that a family with only one working partner, who earned £51,000 would be required to pay back 10 per cent of their child benefit

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<sup>95</sup> HM Treasury, *Spending Review 2010* (HMSO, October 2010) < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/203826/Spending\\_review\\_2010.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/203826/Spending_review_2010.pdf) > (accessed 5 October 2017)

<sup>96</sup> HM Treasury, *Spending Review 2010 Cm 7942* (HMSO, October 2010), p. 8. See also, Steven Kennedy, Wendy Wilson, Vyara Apostola, Richard Keen, *The Benefit Cap, House of Commons Briefing Paper*, Number 06294 (House of Commons Library, 21 November 2016) < <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06294#fullreport> > (accessed 6 October 2017)

<sup>97</sup> Department for Work and Pensions, White Paper, para 21

<sup>98</sup> Meers, n. 28 above, p 126

<sup>99</sup> Ibid

<sup>100</sup> Erika Kispeter and Sue Yeandle, ‘Local Welfare Policy in a Centralised Governance System: Childcare and Eldercare Services in a Period of Rapid Change in Leeds’ in Dagmar Kutsar and Marjo Kuronen (eds), *Local Welfare Policy Making in European Cities* (Springer, 2015), p 104

through income tax, whereas a family where both partners earned £49,000, and thus had practically double the income, would be entitled to keep the child benefit.<sup>101</sup> As CPAG outlined, this would be the situation regardless of family size, disability and the income of the other parent in the family, leading to the conclusion that the UK's tax and benefits system would 'no longer recognise the extra costs of having children that are faced by all families across all incomes' for the first time in over a century.<sup>102</sup> McKee and Stuckler have argued that this reform represented the 'progressive exclusion of the middle classes from the welfare state through the incremental erosion of universal benefits', which has progressively cut off this section of the population from interaction with the welfare state.<sup>103</sup> As T.H. Marshall asserted, shared entitlements and duties granted through citizenship status must, as the very minimum, uphold equality of status, thus promoting a sense of collective belonging and identity.<sup>104</sup> However, as Edmiston affirms, 'the heterogeneous operation of citizenship is needed to accommodate a plurality of needs, capacities and applications', and 'the variegated nature of social citizenship is perhaps a necessary feature of its efficacy in this regard'.<sup>105</sup> The question that arises from this assertion is: at what point does citizenship become so variegated that it fails to uphold adequately the equality of status between its members?<sup>106</sup> The austerity programme brought about a regressive distributional impact with low-income households suffering the extensive cuts while, on the whole, wealthier households benefited.<sup>107</sup> This is not necessarily a surprising outcome – wealthier households are 'frequently able to make better use of the common services of the welfare system' and also of those forms of occupational and fiscal welfare systems that operate alongside social welfare.<sup>108</sup> Therefore, the further erosion of universal provision undermines the sense of mutual interest upon which the post-war welfare state was built. As Marshall emphasised the

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<sup>101</sup> HM Treasury, *Budget 2012*, HC 1853 (HMSO, March 2012), para 1.177, p 30; See also, Timmins, n. 6 above, p 331; See also, Steven Kennedy, 'Child Benefit for higher income families' (House of Commons Library Note, 2012)

<sup>102</sup> Rys Farthing, 'Save Child Benefit' (CPAG, Policy Briefing, 2012), pp 7-8

<sup>103</sup> Martin McKee and David Stuckler, 'The Assault on Universalism' (2011) *The British Medical Journal* (Online) 342, pp 1-6, p 1

<sup>104</sup> T.H. Marshall, *Citizenship and Social Class: and other essays* (Cambridge University Press, 1950)

<sup>105</sup> Daniel Edmiston, 'Welfare, Austerity and Social Citizenship in the UK' (2017) *Social Policy and Society* 16 (2), pp 261-270, p 264

<sup>106</sup> *Ibid*, p 265

<sup>107</sup> See Ruth Lupton, with Tania Burchardt, Amanda Fitzgerald, John Hills, Abigail McKnight, Polina Obolenskaya, Kitty Stewart, Stephanie Thomson, Rebecca Tunstall and Polly Vizard, 'The coalition's social policy record 2010–2015: policy, spending and outcomes', *Social Policy in a Cold Climate*, Summary Research Report 4 (CASE Research, LSE, 2015)

<sup>108</sup> David Vincent, *Poor Citizens: The State and the Poor in Twentieth Century Britain* (Longman, 1991), p 181; See also Richard M. Titmuss, *Essays on the Welfare State* (Allen & Unwin, 1958)

right to welfare is expected to operate with indifference to the personality and status of recipients.<sup>109</sup> It is in this context that ‘the increasingly variegated praxis of social citizenship propagates rather than moderates material and status inequalities and undermines the collectivisation of social risk and return’.<sup>110</sup> Therefore, social citizenship can be interpreted as being implicated in the growth of inequalities in the UK.<sup>111</sup>

By 2011 the biggest cuts to benefit had been announced. What followed in the 2013 budget was that a range of benefits were restricted to a one per cent rise over the next three years from 2013/14, the same applying to Child Benefit from 2014/15. This was justified in the context (notwithstanding cuts to entitlement) that most benefits had kept pace with inflation while real wages had been falling.<sup>112</sup> By 2014 it was too late to instigate any further radical measures, however it wasn’t too late for the ‘post-election battleground to be set’.<sup>113</sup> In early 2014 Osborne indicated that he would make further cuts to public spending totalling £25 billion, following the election. Half of the cuts would come from the social security budget, and the Treasury’s eyes were on those benefits for the young, rather than for pensioners.<sup>114</sup> Clegg asserted that further cuts to the benefits system of that magnitude could be a ‘monumental mistake’.<sup>115</sup> If the 2010 election focused on the future of the social security system, then the 2015 election determined that it would be one of the main bones of contention, and Labour would have to take a position on what they would retain and what they would change.<sup>116</sup>

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<sup>109</sup> Marshall, n 78 above, p 52; Hartley Dean, *Welfare Law and Citizenship* (Harvester Wheatsheaf, 1996), p 21

<sup>110</sup> Edmiston, 103 above, p 265

<sup>111</sup> *Ibid*

<sup>112</sup> HM Treasury, *Budget 2013*, HC 1033 (HMSO, March 2013) para 1.200, p 58 < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/221885/budget2013\\_complete.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/221885/budget2013_complete.pdf) > (accessed 9 October 2017)

<sup>113</sup> Timmins, n. 6 above, p 336

<sup>114</sup> Peter Dominiczak, ‘George Osborne pledges £12bn cuts in Government welfare spending after next general election’ *The Telegraph* (London, 6 January 2014) < <http://www.telegraph.co.uk/news/politics/georgeosborne/10553228/George-Osborne-warns-of-12bn-cuts-in-Government-welfare-spending-after-next-general-election.html> > (accessed 11 October 2017); Timmins, n. 6 above, p 336

<sup>115</sup> Nicholas Watt and Rowena Mason, ‘Tories making ‘monumental mistake’ with lopsided cuts, says Nick Clegg’ *The Guardian* (London, 6 January 2014) < <https://www.theguardian.com/politics/2014/jan/06/tories-monumental-mistake-lopsided-cuts-nick-clegg> > (accessed 11 October 2017)

<sup>116</sup> Timmins, n. 6 above, p 336

### ***The Meteoric Rise and Repercussions of Sanctions***

This thesis has pointed to the increasing propensity of the social security system to act as a disciplinary instrument which seeks to ensure that individuals are moulded to fit the altering ideal of social citizenship which, over everything else, prioritises participation in paid employment. New Labour had also sought to utilise the benefit system to encourage behaviour change and instil a stronger work ethic in benefit claimants, as described at length in Chapters 7 and 8. The main difference between New Labour and the Coalition's approach is that the latter sought to prioritise the coercive value of sticks (benefit sanctions in the case of non-compliance with work requirements) as opposed to carrots, both in rhetoric and in policy and legislation.<sup>117</sup> As discussed in detail in the next chapter, the extension of sanctions also speaks to the Coalition's rejection of the New Labour's more ostensible focus on the concept of reciprocity – that is providing meaningful employment support, further education and training in exchange for the claimant's fulfilment of conditions. Furthermore, the increasing rate at which sanctions were imposed during the Coalition's tenure suggests that the government failed to recognise its responsibility to provide work, particularly in the context of the harmful effects of the economic downturn.<sup>118</sup>

As the government struggled with the technicalities associated with the introduction of UC, it decided to push on with integrating a stricter benefits regime for those on JSA. This included the roll-out of a new 'claimant commitment', that from October 2012 included a new sanction which, in some circumstances would deprive JSA claimants from benefit for three years. It was hoped that this would powerfully convey the message to claimants that 'choosing a life on benefits when you're able to work is not an option'.<sup>119</sup> As Reeves and Loopstra explain, the sanctions regime attached to the Claimant Commitment conveys a state-dominated view of how the 'failed' citizen should be treated. An active citizen is prepared and able to demonstrate compliance with the claimant commitment and is available and willing to participate in activation programmes. A failed citizen is subject to a financial penalty, which symbolically and practically dictates that behaviour which is viewed

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<sup>117</sup> Anne Daguerre and David Etherington, 'Welfare and Active Labour Market Policies in the UK: The Coalition Government Approach' in Bochel and Powell, n. 1 above, p 210

<sup>118</sup> Aaron Reeves and Rachel Loopstra, 'Set up to Fail? How Welfare Conditionality Undermines Citizenship for Vulnerable Groups' (2017) *Social Policy and Society* 16 (2), pp 327–338, p 328

<sup>119</sup> Mark Hoban, Minister for Employment, quoted in DWP Press Release, October 22, 2012

as non-compliant dictates that the individual isn't worthy of entitlement. Thus this 'new norm' of social citizenship is effectively institutionalised.<sup>120</sup>

As a result of the intensified sanctions regime, the level of JSA sanctions increased from a low of 3.5 per cent in April 2012 to 5.8 per cent in December 2013, and have since slowly decreased.<sup>121</sup> A more stark analysis of the meteoric rise of sanctions is provided by Adler, who points out that there was a 350 per cent increase in sanctions over the longer period 2001 – 2013. He asserts that the figures provided 'seriously underestimate the significance of benefit sanctions'. A better measure, Adler maintains, would be the proportion of those who claim JSA who are sanctioned while on benefit, which is significantly higher.<sup>122</sup> According to data acquired from the DWP, 22 per cent of the 8.2 million individuals who claimed JSA over the five years 2009 – 2010 to 2013 – 2014 inclusive were sanctioned – receiving an average of 1.95 sanctions each. The number of ESA sanctions has been lower than the number of JSA sanctions, although the level increased over the period of the coalition from 19,000 in 2009 to just over 34,000 in 2013.<sup>123</sup> Sanctions are most frequently imposed for not 'actively seeking work' in line with the (now increased) expectations laid out by DWP, for failure or refusal to attend training and employment schemes and for missing interviews.<sup>124</sup> As discussed in previous chapters, they have been extended from unemployed claimants to those who were previously not expected to be available and seeking work, such as single parents and the long-term sick and disabled. For example, a sanctions regime for those claimants suffering or recovering from incapacity in the Work Related Activity Group of ESA, was introduced in November and amended in 2012, to introduce an open-ended sanction period (until the claimant meets a compliance condition defined by regulations) followed by a 'short fixed period'.<sup>125</sup> The fixed-period sanction is 1 week for a first failure, 2 weeks for a second

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<sup>120</sup> Reeves and Loopstra, n. 117 above, p 328

<sup>121</sup> Anne Daguerre, 'The Unemployed and the Moral Case for Benefit Sanctions' (2015) *Journal of Social Security Law* 22 (3), pp 130-153, p 139

<sup>122</sup> Michael Adler, 'A New Leviathan: Benefit Sanctions in the Twenty-first Century' (2017) *Journal of Law and Society* 43 (2), pp 195–227, p 208

<sup>123</sup> DWP Sanctions Statistics are available at < <https://www.gov.uk/government/collections/jobseekersallowance-sanctions> > and the full data set is in the Stat-Xplore database at < <https://stat-xplore.dwp.gov.uk/default.aspx> >. The statistics Great Britain, that is, to England, Wales, and Scotland, and no statistics are available for Northern Ireland. As cited in Table 5, 'JSA and ESA sanctions and disqualifications 2000-2013' in Adler, n 121 above, p 208

<sup>124</sup> David Webster, Briefing: The DWP's JSA/ESA Sanctions Statistics Release (2014) < <http://www.cpag.org.uk/david-webster-p.7> > (accessed 4 December 2017)

<sup>125</sup> Adler, n. 121 above, p 201-202; Daguerre, n. 120 above, p 139

failure, and 4 weeks for a third and subsequent failure in a 52 week period.<sup>126</sup> Adler argues that benefit sanctions are particularly problematic due to their severity, which causes disproportionate hardship, and because in addition to punishing offenders for not fulfilling administrative requirements, they also attempt to discipline claimants by pressurising them into taking low-paid insecure jobs.<sup>127</sup>

The Coalition introduced a discretionary 'hardship payment' for those subject to a sanction, which is paid at 60 per cent of normal entitlement to those considered destitute and who have no other means of support.<sup>128</sup> However, this provision is extremely residual and sanctioned claimants are often not informed of its availability. Furthermore, its provision is subject to the discretion of the decision maker, who must be satisfied that the sanction meant that the claimant could not meet his/her immediate individual needs or those of his/her household.<sup>129</sup> Furthermore, the amount awarded was recoverable from future payments of UC/JSA. Although 'vulnerable' claimants could apply immediately, most claimants are required to wait for the first two weeks after the sanction has been imposed. This two week period can further damage the claimant's health and wellbeing<sup>130</sup> Research has shown that sanctions are often suffered by those who are most vulnerable. The government-commissioned Oakley review found that those being sanctioned most often were those individuals who had the least capacity to understand what was happening and were often not clear what obligations they had to follow to receive entitlement.<sup>131</sup> As determined by Marshall, education (and information) is integral to the delivery of social citizenship rights which support citizens to recognise their obligations. Indeed, Beveridge recognised in his report that 'there should be in every local Security Office an Advice Bureau to which every person in doubt or difficulty can be referred which will tell him about the official provision for social security... (and) all other organisations – official, semi-official and voluntary, central or local – which may be able to help him in his difficulty'.<sup>132</sup>

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<sup>126</sup> Adler, n. 121 above, p 200

<sup>127</sup> *Ibid*

<sup>128</sup> *Ibid*, p 201

<sup>129</sup> See para. 35155 of ch. 35 of the DWP Decision Maker's Guide for JSA cases and para. 53096 of ch. 53 of the DWP Decision Maker's Guide for ESA cases; See also, DWP, 'Recoverable Hardship Payment Application Form' (DWP, UC, 10, 08/13) < <https://www.whatdotheyknow.com/request/223852/response/570455/attach/4/FM%20Hardship%20application%20form%201.pdf> > (accessed 5 December 2017)

<sup>130</sup> Adler, n. 121 above, p 201

<sup>131</sup> Matthew Oakley, *Independent review of the operation of Jobseeker's Allowance sanctions validated by the Jobseekers Act 2013* (HMSO, July 2014), p 40

<sup>132</sup> Sir William Beveridge, *Social Insurance and Allied Services* (Cm 6404, 1942), para 397

As the roll-out of UC has gathered pace, concern has grown about the continuing lack of direction and support offered to claimants who have been sanctioned, who are in need and potentially who do not understand why they have been punished.<sup>133</sup> Improved communications are particularly important in the context of the new review system. In October 2013, the government introduced a review process - Mandatory Reconsideration (MR), which comprises an internal procedure for reviewing sanctions and other administrative decisions. Prior to this, sanctioned claimants could ask for a review, whereby the circumstances would be examined by a different decision maker, or they could appeal directly to a first-tier tribunal. Now, they required to first make an informal request for reconsideration. The claimant will then receive a phone call from the original decision maker, who will provide a verbal explanation of the decision (or, upon request, a written statement of reasons) and may be given an opportunity to provide further information relevant to the decision. If the claimant accepts this explanation, the matter will conclude at that point. However, if the claimant disputes the explanation, the decision maker will consider their argument, including any new evidence they provide. The decision maker may change his or her position at that point, but if not, and the claimant continues to dispute their decision, the decision maker (not the claimant) will request a formal MR, which is carried out by a remote Dispute Resolution Team (DRT). Only if this is turned down, can the claimant appeal to the tribunal, within one month of the date which they were provided with the result of MR.<sup>134</sup> Throughout this period the claimant is without benefit entitlement.

Adler concludes that:

‘...the combination of review/reconsideration and appeal procedures does not provide an adequate amount of procedural protection for those who are sanctioned and, taking their severity, incidence, and impact into account, benefit sanctions are not only disproportionate but also inconsistent with justice’.<sup>135</sup>

Thus the Coalition’s approach to sanctions has had a profound two-pronged impact on the individual’s social citizenship rights. First, the removal of financial entitlement

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<sup>133</sup> See for example, written evidence to the Work and Pension Committee’s Inquiry into the roll out of UC from the Joseph Rowntree Foundation, (UCR01346) < <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/work-and-pensions-committee/universal-credit-rollout/written/71529.html> < (accessed 5 December 2017)

<sup>134</sup> Adler, n. 121 above, p 212

<sup>135</sup> Ibid, p 220



for a prolonged period of time severely impinges upon the individual's ability to achieve a guaranteed minimum standard of living and security.<sup>136</sup> Secondly, the protracted process of MR, which is heavily influenced by the discretion of the decision maker, not only further undermines the claimant's right to a minimum level of entitlement but also impinges upon his/her right to procedural justice, thus undermining the status of that individual in the eyes of the state.<sup>137</sup>

### **Conclusion**

The wide embrace of austerity across the Eurozone provided a strong impetus for the Coalition government to make deep cuts to the social security budget. In the UK, erosion of the right to entitlement for the unemployed, the sick and disabled was seen as the best way to provide fairness to the taxpayer while reducing the fiscal deficit. However, the chancellor's refusal to consider a compromise position between deficit reduction and maintaining the social security safety net led to Duncan-Smith's position becoming untenable as DWP struggled to introduce Universal Credit – a central aim of which was to ensure that work paid. The implication of the legislative measures will be discussed in detail in the next chapter.

Despite one of the government's key intentions for reform being the need to minimise complexity in the system in order to reduce the cost of governance and to emphasise the claimant's contractual obligations, it is clear that claiming UC has further complicated the process of seeking entitlement. Rather than removing barriers the government continued to erect them, by, for example, establishing a waiting period before a claimant could receive UC, determining that the default position is a monthly payment and the ability of RTI to only take into account wages rather than other forms of income such as tax credits. Finally, the Coalition government ushered in a further intensification of conditionality. Dwyer referred to 'creeping conditionality' in his depiction of New Labour's approach to activation.<sup>138</sup> By 2015, the principle of conditionality had knotted itself within the system. This chapter has pointed to two main developments. First, the introduction of 'in-work conditionality', which sought to activate the under-employed – those individuals who rely on working tax credits as state support to supplement low wages. This speaks to contemporary

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<sup>136</sup> Marshall, n. 78 above, p 60

<sup>137</sup> 'Equality of Status is more important than equality of income', TH Marshall, *Social Citizenship and Social Class* (Cambridge University Press, 1950), p 56

<sup>138</sup> Peter Dwyer, 'Creeping Conditionality in the UK: From Welfare Rights to Conditional Entitlements?' (2004) *The Canadian Journal of Sociology / Cahiers canadiens de sociologie* 29, pp 265-287

governments' increasing propensity to exploit the social security system's ability to implement tighter surveillance and control on the claimant, in order to restrain their financial reliance on the welfare state. It also serves to denigrate the part-time worker's status from an 'active citizen' who is fulfilling their social citizenship obligations by participating in paid employment to an inefficient citizen who is unable to achieve independence from the state. Second, the chapter pointed to the meteoric rise of sanctions during the Coalition's tenure. The sanction period has been considerably increased in tandem with the obligations that unemployed claimants are expected to fulfil. The extension of punitive armoury provided to frontline advisers and external providers, coupled with the additional barriers within appeal procedures seriously undermines the individual's access to mechanisms of social justice.



## Chapter 11: The Welfare Reform Act 2012: A 'New' Welfare State?

### *Introduction*

'I hope that (the Welfare Reform Bill) sets a new course for the welfare state...I believe it will enable us to reach out to some of the groups of people who have become detached from the rest of society – trapped, too often in a permanent state of worklessness and dependency'.

*Iain Duncan-Smith, Secretary of State for Work and Pensions*

In this introduction to the Welfare Reform Bill to the House of Commons, Iain Duncan Smith neatly sets the parameters for this, the final part of the thesis. The analysis of the parliamentary and legislative process of the Coalition's activation regime and the Welfare Reform Act 2012 (WRA, 2012), provides the final piece of evidence to underpin the central argument of this thesis, namely that the contemporary social security system has changed to such an extent that it no longer can be said to encompass Marshall's principle that social provision should provide a minimum level of economic wealth and security for all.<sup>1</sup> It will also continue to consider whether the definitive shift away from Marshall is linked to the clear influence of political ideology in the development of social security legislation, associated regulations and subsequent administrative processes. And furthermore, if the centrality of political thought is elevated above the importance of effecting an efficient service for the fair and equitable distribution of benefits and associated services to claimants. As outlined in Chapter 7 and 8, legislative reforms enacted during New Labour's final term in office, specifically the Welfare Reform Act 2007 (WRA 2007) and the Welfare Reform Act 2009 (WRA 2009) are rooted in what could be considered to be a 'fourth attempt' by government since the 1980s, to construct a politics of welfare obligation, which centres citizenship upon the principles of duty, obligation and personal responsibility. The fourth attempt overtly linked duty to equality through a contemporary version of the principle of reciprocity which integrates principles of traditional social democracy with the new politics of obligation.<sup>2</sup> Its working relies heavily upon 'real contractualism' or 'real communitarianism' which dictates that 'citizens who actually claim the share of the social produce necessary available to

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<sup>1</sup> TH Marshall, 'The Right to Welfare' in Noel Timms and David Watson (eds), *Talking About Welfare* (Routledge and Kegan Paul, 1979) p 60

<sup>2</sup> Tony Fitzpatrick, 'The Fourth Attempt to Construct a Politics of Welfare Obligations' (2005) *Policy and Politics* 33, p 15

them under these institutions have an obligation to make a decent productive contribution, proportional to ability, to the community in return'.<sup>3</sup>

This chapter will seek to consider whether the Coalition's reforms, enacted via the WRA 2012, establish what might be characterised as a fifth attempt to construct a politics of welfare obligation. This attempt represents the apex of consecutive governments' attempts to emphasise the value of individual responsibility and attachment to the labour market and essentially strips away New Labour's early emphasis on the principle of reciprocity, evoking instead a version of social citizenship which reinvigorates Thatcher's one dimensional anti-welfarist position - engendering a level of benefit stigma more akin to that consciously entwined in the Poor Law system.<sup>4</sup> This erosion of rights-based citizenship was supported by severe cuts to the social security budget, which arguably could not have been achieved during Thatcher's tenure. This retrograde approach is underpinned by assumptive political rhetoric (underpinned by the ideological ideas such as those promoted by the Centre for Social Justice and the wider Conservative party), in the absence of fact-based evidence, and a punitive austerity agenda which in turn presents serious implications for the administration of relief to benefit claimants. The WRA 2012, and associated regulations undoubtedly increase the onus on the unemployed claimant to prove that they are worthy citizens, deserving of benefit entitlement. An examination of the parliamentary process will show how the Coalition government, like previous governments, sought to further intensify the effects of welfare contractualism by increasing conditionality measures, including sanctions for non-compliance, alongside a tightened job-search regime, and notably, the extension of welfare conditionality to those who do not work full-time (40 hours per week), a move which both deepens and widens social control.<sup>5</sup>

The administration of the new system is in the main managed by DWP agents ('Work Coaches' and Decision-Makers) working at the front-line of the social security system, many of whom do not have adequate knowledge of the inherent complexities of the new system - thus arguably impairing their discretionary judgement, which has the

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<sup>3</sup> Stuart White, *The Civic Minimum* (Oxford University Press, 2003), p 18

<sup>4</sup> See Julian Fulbrook, *Administrative Justice and the Unemployed* (Mansell, 1978), p 69

<sup>5</sup> Peter Dywer, 'Citizenship, Conduct and Conditionality: sanction and support in the 21<sup>st</sup>-century UK welfare state' in Menno Fenger, John Hudson and Catherine Needham, *Social Policy Review 28: Analysis and debate in social policy, 2016* (Policy Press, 2016), p 42; Fran Bennett and Jane Millar, 'Universal Credit: Assumptions, Contradictions and Virtual Reality' (2017) *Social Policy and Society* 16 (2), p 176

propensity to lead to unfair and disparate treatment of claimants.<sup>6</sup> Connected to this is the increasing power of the state executive to determine the needs of claimants, and embed its position via the introduction of subordinate legislation, which escapes the benefit of parliamentary scrutiny despite often increasing the obligations required to access social citizenship rights.<sup>7</sup> The political preference for altering social security rules via subordinate legislation first drew attention from academic commentators during Thatcher's final term in office, with the trend cemented into place during the Blair and Brown premierships. The Coalition era Secretary of State for Work and Pensions, Iain Duncan Smith took advantage of this legislative trend both in relation to the introduction of activation measures and the WRA 2012 which was positively skeletal in its detail.<sup>8</sup>

### ***Legislative Trends***

The thesis has identified a number of legislative trends which reflect the now widely accepted political position that the unconditional provision of social security promotes passive dependency on the welfare state. Conservative and Labour governments have demonstrated increasing political and legislative consensus over

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<sup>6</sup> Del Roy Fletcher, 'Welfare Reform, Jobcentre Plus and the Street-Level Bureaucracy: Towards Inconsistent and Discriminatory Welfare for Severely Disadvantaged Groups?' (2011) *Social Policy and Society* 10 (4), pp 445–458, p 449; See also recent evidence from, Citizens Advice Bureau, *Written evidence to the to Work and Pensions Committee inquiry Universal credit* (October, 2017) < <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/work-and-pensions-committee/universal-credit-rollout/written/71554.html> > (accessed 10 January 2018); Child Poverty Action Group, *Written evidence to the to Work and Pensions Committee inquiry Universal credit* (15 October 2017) < <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/work-and-pensions-committee/universal-credit-rollout/written/71264.html> > (accessed 15 January 2018); Welfare Conditionality Project, *Written evidence to the to Work and Pensions Committee inquiry Universal credit* (October, 2017) < <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/work-and-pensions-committee/universal-credit-rollout/written/71286.html> > (accessed 16 January 2018); Joseph Rowntree Foundation, *Written evidence to the to Work and Pensions Committee inquiry Universal credit* (October, 2017) < <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/work-and-pensions-committee/universal-credit-rollout/written/71529.html> > (accessed 15 January 2018)

<sup>7</sup> See Chapter 5.

<sup>8</sup> John Mesher, 'The 1980 Social Security Legislation: The Great Welfare Chainsaw Massacre' (1981) *British Journal of Law & Society* 8 (1), pp 119–120; Tony Lynes and Richard Drabble, 'The Social Fund – discretion or control?' (1989) *Public Law*, pp 297–322; John Baldwin, Nicholas Wikeley and Richard Young, *Judging Social Security: The Adjudication of Claims for Benefit in Britain* (Clarendon Press, 1992), p 13; Julian Fullbrook, 'The Jobseekers Act 1995: Consolidation with a Sting of Contractual Compliance' (1995) *Industrial Law Journal* 24, pp 395–401; Michael Adler, 'Substantive Justice and Procedural Fairness in Social Security: The UK Experience' in Peter Robson and Asbjorn Kjonstad (eds), *Poverty and the Law* (Oñati International, 2001)

the last thirty years, which is arguably exemplified via their effective rejection of Marshall's post-war vision. Such consensus is further evidenced by the parliamentary assent of the WRA 2012 and the Labour Party's broad support for the principles underpinning Universal Credit, which established the introduction of a 'tougher' conditionality regime for working-age claimants, which Duncan-Smith described as both 'fair and reasonable'.<sup>9</sup> As well as political preference for subordinate legislation, there has been a move towards the bestowal, from Secretary of State level, of more administrative discretion to jobcentre agents. As detailed in Chapter 3, the introduction of the 'Discretionary Social Fund' demonstrated a significant sea change and delineated a re-introduction of increased administrative discretion in the contemporary social security system. The Social Fund (SF) established that 'first-tier' decisions should be made by SF Officers with the support of ministerial guidance, and precluded a right to appeal until the point that the Department of Social Security had reviewed the decision internally. Adler emphasised that the new process provided no appeal from an initial decision to the point of the independent appeal tribunal, thus 'the resulting balance between rules, discretion and rights is similar to that which applied in supplementary benefits before the 1980 reforms'.<sup>10</sup> The enactment of the WRA 2012, brought an abrupt end to the SF which had grown to become an integral part of the system.<sup>11</sup> This development did not deter administrative discretion in decision making, nor did it rectify the closely managed access to redress provided for individual claimants. The volume of discretionary power provided to work coaches and decision-makers has increased exponentially as claimants' procedural rights have simultaneously become weaker and less accessible, as was denoted in the last chapter in relation to the newest system of internal review – Mandatory Reconsideration (MR).<sup>12</sup>

Reforms have sought to reflect a growing consensus that it is fundamentally fair that individuals ought to earn their citizenship by taking more responsibility to live independently from the state.<sup>13</sup> Indeed, the political interpretation of unemployment has grown to encompass larger swathes of people – for example lone parents, the sick,

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<sup>9</sup> Iain Duncan Smith, HC Deb, Welfare Reform Bill, 9 March 2011, Vol. 524, col 925

<sup>10</sup> Adler, n. 8 above, p 210

<sup>11</sup> See for example, Labour's proposed amendment 53 during the parliamentary passing of the WRA 2012. It sought to ensure that 'the social fund should not be abolished without robust and effective alternatives put in its place'. See John McDonnell (Labour, Hayes and Harlington) HC Deb, 15 June 2011, Welfare Reform Bill, Vol. 529, col 798–800

<sup>12</sup> Michael Adler, 'A New Leviathan: Benefit Sanctions in the Twenty-first Century' (2017) *Journal of Law and Society* 43 (2), pp 195–227, p 208

<sup>13</sup> Bennett and Millar, n. 5 above, p 169

and the disabled, and indeed those who do not work full-time.<sup>14</sup> Those who wish to claim the rights attached to the contemporary interpretation of social citizenship are required to meet particular compulsory duties or patterns of behaviour.<sup>15</sup> This thesis has, in some detail, pointed to the role that individual personalities such as Keith Joseph, Margaret Thatcher and the Thatcherite Secretaries of State for Social Security, Norman Fowler and John Moore have played in planting the theoretical seeds which led to the legislative manifestation of increased conditionality into the fabric of the welfare state. Their position was informed by New Right thinkers, such as Charles Murray and Lawrence Mead.<sup>16</sup> While eligibility conditions have long formed a part of social security provision, 'conditions of conduct', which denote 'behavioural requirements and constraints imposed on different kinds of benefit recipients' have become more prominent in developed nations since the 1990's.<sup>17</sup> Therefore, it does not come as a surprise that New Labour sought to maintain the pace of the trajectory set by the Conservatives (1979 – 1997). Tony Blair and Gordon Brown drew inspiration from communitarians Anthony Giddens and Amitai Etzioni, in their determined effort to solidify the idea that no individual should be economically inactive.<sup>18</sup> New Labour promoted the idea that state support should only be provided if the claimant behaved in a pre-determined manner, in order to combat dependency on social provision. As discussed extensively in the previous chapters, Iain Duncan Smith and the Centre for Social Justice sought to reinvigorate the new right position by, for example, resurrecting Joseph's concept of the 'cycle of deprivation' which is particularly visible in the think-tank's view that 'worklessness

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<sup>14</sup> For example see, David Freud, *Reducing dependency, increasing opportunity: Options for the future of Welfare to Work and Pensions* (DWP, 2007), p 9

<sup>15</sup> Alan Deacon, 'Justifying Workfare: the historical context of the workfare debates' in Michael White (ed), *Unemployment in a changing Labour Market* (PSI, 1994)

<sup>16</sup> Charles Murray, *Losing Ground: American Social Policy 1950 – 1980* (Basic Books, 1984); Charles Murray, *Charles Murray and the Underclass* (IEA, 1996); Lawrence Mead, *Beyond Entitlement* (Free Press, 1986)

<sup>17</sup> Joel Handler, *Social Citizenship and Workfare in the United States and Western Europe: The paradox of inclusion* (Cambridge University Press, 2004); Jochen Clasen and Daniel Clegg 'Levels and levers of conditionality: measuring change within welfare states' in Jochen Clasen and Nico A. Siegel (eds), *Investigating Welfare State Change the 'dependent variable problem' in comparative analysis* (Edward Elgar, 2007), p 174; Commonwealth of Australia, *Changing behaviour: A public policy perspective* (Australian Public Services Commission, 2007); Geoff Mulgan, *Influencing behaviour to improve health and wellbeing, an independent report* (HMSO, 2010); Dale Southerton, Andrew McMeekin and David Evans, *International review of behaviour change initiatives* (Scottish Government, 2011); Sigrid Betzelt and Silke Bothfield (eds), *Activation and Labour Market Reforms in Europe: Challenges to Social Citizenship* (Palgrave, 2011)

<sup>18</sup> Anthony Giddens, *The Third Way* (Polity Press, 1998); Anthony Giddens, *The Third Way and its Critics* (Polity Press, 2000); Amitai Etzioni, *The New Golden Rule* (Profile Books, 1997); Amitai Etzioni, *The Essential Communitarian Reader* (Rowman and Littlefield, 1998); Amitai Etzioni, *The Third Way to a Good Society* (Demos, 2000)



has been passed from generation to generation like a family business'.<sup>19</sup> However, the implementation of austerity measures following the economic downturn in 2008, exposed a further gap between Duncan Smith's interpretation of social justice and George Osborne's marriage to fiscal responsibility. What the government claimed it could afford according to accepted economic tenets and what the population needed in order to maintain a minimum standard of living could not be reconciled in financial terms.<sup>20</sup> Pressure from the Treasury resulted in the crude assertion of parliamentary sovereignty via the unorthodox application of retrospective legislation – which was justified on the basis that it would save the taxpayer from paying for a group of sanctioned claimants, as will be discussed below in relation to the Reilly case.<sup>21</sup> Concepts of 'fairness' and concern for the hard earned money of the 'taxpayer' were key rationalisations for the reforms outlined by Iain Duncan Smith.<sup>22</sup>

### ***The Coalition's Conditional Activation Approach***

The Coalition government almost immediately sought to expand work-for-your-benefit schemes, and opted to do so via subordinate legislation, a 'quick-fix' legal solution which supports the swift introduction of regulations which escape parliamentary scrutiny. As noted above, by the end of New Labour's administration both public and political consensus on the value of activation policies facilitated the passage of secondary legislation, which sought to ensure claimant participation in welfare-to-work schemes was mandatory.<sup>23</sup> The Coalition amended existing regulations to introduce new provision to strengthen the 'work-first' logic, to ensure the focus was on implementing an intensive job search strategy and work-place discipline rather than effecting costly labour market policy interventions, such a training programmes.<sup>24</sup> The key statutory instrument, which provided the government with the scope to introduce new schemes was the Jobseeker's Allowance (Employment, Skills and Enterprise) Regulations 2011 (known as ESE), which replaced the Jobseeker's Allowance (Work for Your Benefit Pilot Scheme) Regulations 2010 (introduced as part of the WRA 2009). The 2011 regulations were established

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<sup>19</sup> Centre for Social Justice, *Worklessness - making work pay and the best route out of poverty* < <https://www.centreforsocialjustice.org.uk/policy/breakthrough-britain/economic-dependancy-worklessness> > (accessed 16 January 2018)

<sup>20</sup> See, Bentley B. Gilbert, *Britain Since 1918* (Harper Collins, 1967), p 168

<sup>21</sup> See below discussion on the Reilly and Wilson v Secretary of State for Work and Pensions

<sup>22</sup> DWP Press Release, *Welfare Reform Bill: restoring the welfare system to make work pay* (17 February 2011) < <https://www.gov.uk/government/news/welfare-reform-bill-restoring-the-welfare-system-to-make-work-pay> > (accessed 11 February 2018)

<sup>23</sup> See generally Chapter 7 and 8

<sup>24</sup> Anne Daguette, 'The unemployed and the moral case for benefit sanctions' (2015) *Journal of Social Security Law* 22 (3), pp 130-153, p 138

via section 17A of the Jobseekers Act 1995. As Larkin observed, what is not made explicit in the primary legislation is that the schemes created would not automatically lead to a participant gaining employment paid at market levels, but rather oblige participation in the programmes.<sup>25</sup> The ESE regulations first encompassed four activation initiatives – ‘Skills Conditionality’ was aimed at improving the take up of support for those claimants with an identified skills gap. Under this initiative Jobcentre Plus was responsible for referring claimants to a private skills providers. Another initiative saw the introduction of ‘Service Academies’ which were introduced to support jobseekers who were close to the labour market but who would benefit from participation in pre-employment training and work experience. This scheme provided a pathway to a guaranteed interview which was thought to support claimants sustain employment. An ‘Enterprise Allowance’ was established to promote self-employment whereby DWP provided access to a business mentor who managed access to a weekly financial allowance and business start-up loan finance. The fourth initiative is the Work Programme (WP) which is discussed below.

The regulatory details of those schemes can be interpreted as being the most punitive for the unemployed – the Mandatory Work Activity Scheme, which sought to oblige claimants to undertake unpaid work for up to 30 hours per week for four weeks (for receipt of benefits) and the WP the biggest scheme formed under the 2011 ESE regulations, which provided support for a diverse population, including those claiming JSA and ESA. The Coalition’s work-for-your-benefit regulations were subject to intense scrutiny in the courts, as indicated by the legal challenges that followed their implementation.

### ***The Mandatory Work Activity Scheme***

The government introduced the Jobseeker’s Allowance (Mandatory Work Activity Scheme) Regulations<sup>26</sup> under section 17A of the Jobseekers Act 1995 and they came into force in April 2011. DWP emphasised that the establishment of the scheme was ‘intended to help claimants move closer to the labour market, enabling them to establish the discipline and habits of working life, such as attending on time regularly, carrying out specific tasks and working under supervision while delivering a

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<sup>25</sup> Philip M Larkin, ‘A permanent blow to Workfare in the United Kingdom or a temporary obstacle? Reilly and Wilson V Secretary of State for Work and Pensions’ (2013) *Journal of Social Security Law* 20 (3), p 111

<sup>26</sup> SI 2011/688

contribution to the community'.<sup>27</sup> This could involve participating in work or work-related activity for up to 30 hours per week over a period of four consecutive weeks 'with a view to assisting jobseeker's allowance claimants to improve their prospects of obtaining employment'.<sup>28</sup> The Social Security Advisory Committee (SSAC) communicated a number of concerns to the government and in the course of doing so, it identified a number of the legislative trends which indicate the UK's transition to a 'new' disciplinary welfare state. For example, the significant intensification of activation measures, increased administrative discretion and a punitive conditionality regime with scant training and employment support available for unemployed claimants.<sup>29</sup>

In terms of the intensification of activation measures, SSAC pointed to DWP's own research which stated that 'there is little evidence that workfare increases the likelihood of finding work',<sup>30</sup> unless placement conditions closely reflect the realities of the workplace – indicating that mandatory work activity should be carefully tailored to an individual's specific needs. Contrary to developing a scheme which sought to focus on the individual needs of the claimant, the SSAC communicated that the proposed regulations established a crude 'precedent' which sought to punish claimants who were, at the time of being mandated to participate in work activity, adequately fulfilling the conditionality rules (otherwise they could be subject to a sanction), but who, in the view of their Personal Adviser appeared to be projecting what was deemed by the government as the 'wrong attitude'.<sup>31</sup> This activation approach, argued the SSAC, appeared to amend the body of case law which informs the definition of what 'actively seeking work' constitutes, as people would face sanction, despite fulfilling the obligations determined by law.<sup>32</sup> The SSAC also questioned the DWP's insistence that the scheme should be mandatory, which in their

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<sup>27</sup> Department of Work and Pensions, *Mandatory Work Activity provider guidance – incorporating Universal Credit (UC) guidance* (February, 2016), p 6 < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/635884/mandatory-work-activity-provider-guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/635884/mandatory-work-activity-provider-guidance.pdf) > (accessed 11 January 2018)

<sup>28</sup> Explanatory Notes, SI 2011/688

<sup>29</sup> SSAC, Report of Social Security Advisory Committee, made under section 174(2) of the Social Security Administration Act 1992 on the *Jobseekers Allowance (Mandatory Work Activity) Regulations* (2011) < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/229004/9780108510403.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229004/9780108510403.pdf) > pp 23-36, (accessed 12 January 2018)

<sup>30</sup> Richard Crisp and Del Roy Fletcher, Department for Work and Pensions Research Report No 533, *A comparative review of workfare programmes in the United States, Canada and Australia*, p 3 < <http://research.dwp.gov.uk/asd/asd5/rports2007-2008/rrep533.pdf> > (accessed 18 January 2018)

<sup>31</sup> Report of Social Security Advisory Committee, n. 29 above, para 4.4

<sup>32</sup> Ibid

view was another sign that the scheme was intended to be punitive in nature, rather than an opportunity for the claimant to learn new behaviours and skills.<sup>33</sup> The government rejected the notion that the new Scheme resembled a punishment, but rather argued that it was developed 'in recognition that some customers require additional support'.<sup>34</sup> However, the government failed to make clear the specific support mechanisms that would be in place, and indeed made an explicit reference to the 'limited resources for such support', which effectively undermines their own rejection of the SSAC's charge that the scheme is designed to be punitive.<sup>35</sup>

DWP's evaluation of the scheme found that some frontline advisers sought to use the threat of referral as a tool to encourage those with poor job seeking behaviour to sign off – which suggests that agents explicitly recognised and exploited the disciplinary nature of the scheme.<sup>36</sup> The Department's representation of the Mandatory Work Activity Scheme as supportive was further undermined by the sanction regime attached to the scheme, which the SSAC and other respondents deemed to be extremely 'disproportionate'.<sup>37</sup> A claimant was eligible for a 13 week sanction for a first offence, and a 26 week sanction for a second offence enacted within 12 months of the first sanction (from 22 October 2012, a third failure incurred the maximum penalty of 3 years).<sup>38</sup> A considerable punishment - bearing in mind that participation in the scheme lasts a maximum of four weeks and in the context that the three year sanction period is designated for the most important jobseeking requirements.<sup>39</sup> Furthermore, if a claimant was sanctioned for a failure to engage in the scheme, and thereafter decided to re-engage, they remained subject to enduring the entire sanction period, which effectively removed the incentive for the sanctioned claimant

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<sup>33</sup> Ibid, para 4.5

<sup>34</sup> The government response to the Social Security Advisory Committee, made under section 174 (2) of the Social Security Administration Act 1992 on the Jobseekers Allowance (Mandatory Work Activity) Regulations 2011, para 16 < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/229004/9780108510403.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229004/9780108510403.pdf) > (accessed 18 January 2018)

<sup>35</sup> Ibid, para 19

<sup>36</sup> Department for Work and Pensions, *Evaluation of Mandatory Work Activity* (Research Report No 823), (HMSO, 2012), p 3 < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/193330/rrep823.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/193330/rrep823.pdf) > (accessed 10 March 2018)

<sup>37</sup> Report of Social Security Advisory Committee, made under section 174(2) of the Social Security Administration Act 1992 on the Jobseekers Allowance (Mandatory Work Activity) Regulations 2011, para 4.16 < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/229004/9780108510403.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229004/9780108510403.pdf) > (accessed 18 January 2018)

<sup>38</sup> Department for Work and Pensions, n. 36 above

<sup>39</sup> Adler, n. 12 above, p 200

to return to the placement.<sup>40</sup> The threat of such punishment appeared to play a role in participation in the scheme – DWP’s evaluation of the scheme found that the risk of sanctions pushed many participants to agree attending mandatory work.<sup>41</sup>

Sanctions have been shown to impact excessively on those with multiple barriers to work, for example, those with caring responsibilities or a disability, find it most difficult to meet their obligations in taking part in unpaid work activity.<sup>42</sup> The SSAC emphasised that this group faced particular difficulties, in the context that ‘workfare’ programmes generally fail to address their individual needs. In regard to the Mandatory Work Activity Scheme, there was no additional provision outside the remit of the Jobseeker’s Agreement - signed off by the Personal Adviser.<sup>43</sup> Those participating the Scheme for up to 30 hours per week were also expected to continue attending fortnightly reviews at the Jobcentre and to provide evidence that they were still ‘actively seeking work’. The government asserted that the provision of 10 hours outside the scheme would allow for ‘significant’ job search activity.<sup>44</sup> The SSAC emphasised the ‘chilling’ effect that workfare activity can have on a claimant’s jobseeking activity. Indeed, the evaluation of the scheme showed that this was the case for some participants.<sup>45</sup> The Committee also outlined the barriers posed by

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<sup>40</sup> Report of Social Security Advisory Committee, made under section 174(2) of the Social Security Administration Act 1992 on the Jobseekers Allowance (Mandatory Work Activity) Regulations 2011, para 4.19 < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/229004/9780108510403.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229004/9780108510403.pdf) > (accessed 18 January 2018)

<sup>41</sup> DWP, n. 36 above, p 3

<sup>42</sup> Aaron Reeves and Rachel Loopstra, ‘Set up to Fail? How Welfare Conditionality Undermines Citizenship for Vulnerable Groups’ (2017) *Social Policy and Society* 16 (2), pp 327–338, p 328

<sup>43</sup> SSAC, n. 29 above, para 4.18; See also, Mark Peters and Lucy Joyce ‘A review of the JSA sanctions regime: Summary research findings’ (DWP, Research Report No 313) < <http://research.dwp.gov.uk/asd/asd5/rports2005-2006/rrep313.pdf> > (accessed 19 January 2018), p 17; Julia Griggs and Martin Evans, ‘Sanctions within conditional benefit systems: a review of evidence’ (Joseph Rowntree Foundation, 2010) < <http://www.jrf.org.uk/publications/review-of-benefit-sanctions> > (accessed 20 January 2018)

<sup>44</sup> The government response to the Social Security Advisory Committee, made under section 174 (2) of the Social Security Administration Act 1992 on the Jobseekers Allowance (Mandatory Work Activity) Regulations 2011, para 39 < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/229004/9780108510403.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229004/9780108510403.pdf) > (accessed 18 January 2018)

<sup>45</sup> Dr Eleanor Breen, Richard Lloyd and Daljeet Johal, *Evaluation of Mandatory Work Activity* (Research Report, No. 823) (DWP, 2012), p 9 < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/193330/rrep823.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/193330/rrep823.pdf) > (accessed 5 March 2018)

(unpaid) time spent travelling, child care issues, and those who lived in a rural location and how this may impede job search time.<sup>46</sup>

A major concern outlined by the SSAC and respondents to its call for submissions on the proposals was the significant levels of discretion<sup>47</sup>. The SSAC understood that a referral to the Mandatory Work Activity Scheme would be based purely on the views and opinions of the Personal Adviser. However, the evaluation report detailed a slightly different picture, revealing that there was an element of ‘gentle’ pressure on advisers to refer those claimants who had incurred two sanctions.<sup>48</sup> Furthermore, respondents shared concerns that claimants could be referred at any point during the lifetime of their award – with no apparent trigger points communicated to the claimant.<sup>49</sup> There was no point in the referral process where a person could object to a direction to participate in mandatory work activity and indeed the only point where an individual could appeal the decision is if they were subsequently sanctioned. The Committee outlined particular concerns about the way in which the ‘good cause’ provisions were designed to work. They pointed to the conventional arrangement whereby if a claimant satisfied one of a prescribed number of circumstances detailed in JSA legislation, they would satisfy ‘good cause’ for failing to carry out a specified obligation and gained immunity to receiving a sanction. In other social security legislation, matters which should be taken into account when reaching a decision are outlined.<sup>50</sup> In relation to the Mandatory Work Activity Scheme, the Department proposed that ‘good cause’ should be left open, apart from the regulations stating that the Secretary of State must take account of the person’s circumstances including, in particular, their mental health. DWP argued that prescribing a list of circumstances that should be considered ‘good cause’ actually limited the circumstances where an exemption can be applied.<sup>51</sup> However, as highlighted earlier in the thesis, increased

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<sup>46</sup> Report of Social Security Advisory Committee, made under section 174 (2) of the Social Security Administration Act 1992 on the Jobseekers Allowance (Mandatory Work Activity) Regulations 2011, para. 4.11 < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/229004/9780108510403.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229004/9780108510403.pdf) > (accessed 18 January 2018)

<sup>47</sup> Ibid, para 5.3

<sup>48</sup> Ibid, B1, p 101. The evaluation report inadvertently included what appears to be a comment from a DWP reviewer, which suggests that there are unwritten parameters for adviser discretion

<sup>49</sup> Ibid, para 5.4

<sup>50</sup> Ibid, para 4.20

<sup>51</sup> The government response to the Social Security Advisory Committee, made under section 174 (2) of the Social Security Administration Act 1992 on the Jobseekers Allowance (Mandatory Work Activity) Regulations 2011, para 71 < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/229004/9780108510403.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229004/9780108510403.pdf) > (accessed 18 January 2018)

administrative discretion can lead to variation and unfair outcomes which will ultimately impact negatively on the claimant.<sup>52</sup> The government's approach to discretion has been considerably liberalised since the introduction of the SF, when decision-makers were bound by a specific set of statutory criteria within which discretion was exercised when determining an application.<sup>53</sup>

As Lipsky demonstrated in his study of the 'street-level bureaucrat', front-line officials have to make choices in their decisions.<sup>54</sup> For example, when the application of rules, both substantive and procedural, fail to provide an unambiguous decision, they will consider criteria that lie outside the rules. In this context, decision making effectively enters a 'black-box' that is difficult for outside parties, including the claimant affected by the decision, to penetrate.<sup>55</sup> The inability to penetrate administrative decisions is of particular concern in the context of the Coalition's intense sanctioning regime. As outlined by Adler, there is a growing body of evidence showing sanctions are often applied for unreasonable and trivial misdemeanours.<sup>56</sup> Fletcher's research suggests that inappropriate sanctioning may be attributed to some Advisers seeking to follow procedures 'to the letter' and issuing sanctions even if this caused great personal distress to the claimant.<sup>57</sup> Although, Soss et al found that street-level staff did not recognise sanctioning as a desirable response, they often resorted to applying them due to the lack of alternative tools at their disposal and their limited capacity to address the real life and often complex problems of claimants. The lack of alternative options provided to Advisers points to the increased propensity of governments who operate residual welfare regimes to place the responsibilities squarely on the claimant to fulfil their responsibility. Indeed, the Coalition's positive valorisation of the sanction arguably warranted its discharge as a 'default response' in the effort to motivate claimant compliance.<sup>58</sup> Sainsbury pointed to the presence of constraints on the Personal Adviser, which are often concealed from the claimant who is subject to their advice and discretion. For example, evidence

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<sup>52</sup> See Chapter 3; Chapter 7; Chapter 8; and also John Baldwin, Nicholas Wikeley and Richard Young, *Judging Social Security: Adjudication of Claims for Benefit in Britain* (Clarendon, 1992), p 8

<sup>53</sup> See Chapter 3

<sup>54</sup> Michael Lipsky, *Street-level Bureaucracy* (Russell Sage Foundation, 1980)

<sup>55</sup> Roy Sainsbury, 'Administrative justice, discretion and the 'welfare to work' project' (2008) *Journal of Social Welfare & Family Law* 30 (4), pp 323-338, p 238

<sup>56</sup> Michael Adler, n. 12 above, p 226

<sup>57</sup> Fletcher, n. 6 above, p 450

<sup>58</sup> Joe Soss, Richard Fording and Sanford F. Schram, 'The Organization of Discipline: From Performance Management to Perversity and Punishment' (2011) *Journal of Public Administration* 21, pp 203-232, p 205

has shown that the target driven nature instituted in DWP leads to Personal Advisers seeking ‘quick wins’, by concentrating on getting claimants closest to the labour market into employment.<sup>59</sup> There is also evidence that an adviser can subvert a claimant’s own employment aspiration by edging him or her away from ‘unrealistic’ goals towards ‘achievable’ goals – i.e. a Personal Adviser may not engage in discussions around an employment aspiration that requires re-training or further education in favour of pushing a claimant towards a low-entry job.<sup>60</sup> This latter approach became more routine during the Coalition administration, due to significant pressure from DWP to get claimants into work.<sup>61</sup> The consequence of this, explains Sainsbury, is that the exercise of discretion, which might be legitimated by the provision of professional treatment is undermined due to the government’s insistence that decision making habitually privileges organisational policy goals over the needs of the claimant.<sup>62</sup>

The government informed the SSAC that the provision of increased discretion was related to the ‘introduction of more flexibility to Jobcentre Plus managers and advisers from April 2011, allowing staff to judge which interventions will best help individual customers’. The government vowed to provide Personal Advisers ‘with the support and tools they need’ in order to provide a more individualised service, and referenced ‘new training material, supporting tools and products’.<sup>63</sup> However, the ‘vision’ set out for Personal Advisers administering the Mandatory Work Activity Scheme is extremely vague. Indeed, the Countess of Mar pointed to the 27<sup>th</sup> Report from the House of Lords Merits Committee which noted; ‘although there is a considerable amount of paper attached to this instrument the information it contains

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<sup>59</sup> Sharon Wright, ‘The administration of transformation: a case study of implementing welfare reform in the UK’ in Paul Henman and Menno Fenger (eds), *Administering Welfare Reform* (Policy Press, 2006), p 167; Wright outlines the impact of new forms of governance at street-level in her doctoral thesis, see Sharon Wright, *Confronting Unemployment in a Street-level Bureaucracy: Jobcentre Staff and Client Perspectives* (University of Stirling, 2003)

<sup>60</sup> Sainsbury, n. 55 above, p 335

<sup>61</sup> See for example, Abigail McKnight, *The Coalition’s Record on Employment: Policy, Spending and Outcomes 2010-2015* (LSE, CASE/187, 2015) < <http://sticerd.lse.ac.uk/dps/case/cp/casepaper187.pdf>> (accessed 25 January 2018)

<sup>62</sup> Sainsbury, n. 55 above, p 335

<sup>63</sup> HM Government, *The government response to the Social Security Advisory Committee, made under section 174 (2) of the Social Security Administration Act 1992 on the Jobseekers Allowance (Mandatory Work Activity) Regulations 2011*, para 27, < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/229004/9780108510403.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229004/9780108510403.pdf)> (accessed 18 January 2018)



is ... vague'.<sup>64</sup> This is despite the Merits Committee's attempts to seek clarification on the government's intentions.<sup>65</sup>

The structural priorities outlined in the DWP 2011 – 2015 business plan fail to reveal much more about the support for Advisers to enable a responsible level of flexibility. Rather the plan emphasises the government's priority to create a system which can 'get Britain working', including 'jobseekers who have been out of work for some time, to those who may have been receiving incapacity benefits for many years'.<sup>66</sup> Sainsbury argues that the large degree of discretion allocated to advisers is consistent with Mashaw's 'professional treatment model of decision-making' which dictates that decisions are made by the application of a body of knowledge to an individual's personal circumstances. Decisions made in line with this model are not predetermined by a set of rules, but rather culminate from a range of possible options based on what is best for the claimant.<sup>67</sup> However, the role of the Personal Adviser becomes complicated by the necessity to make decisions that are more clearly tied to Mashaw's 'bureaucratic rationality model', whereby decisions are made by the application of rules decided directly by, or on behalf of, the legislature.<sup>68</sup> As determined above, the Personal Adviser's interpretation of the Mandatory Work Activity Scheme allows ample flexibility – for example, they can determine, without much guidance in the way of regulations, if a claimant has satisfied the 'good cause' threshold. This points to the presence of inherent tension in the role of the adviser:

'At the same time as they are expected to perform a 'professional' role, acting as the claimant's advocate and collaboratively working towards mutually agreed aims, they are also required to be rule-bound bureaucrats, applying the rules of conditionality and possibly invoking sanctions'.<sup>69</sup>

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<sup>64</sup> Merits of Statutory Instruments Committee, *Twenty-Seventh Report: Jobseekers Allowance (Mandatory Work Activity Scheme) Regulations 2011 and Statement of Changes in Immigration Rules* (March, 2011) < <https://publications.parliament.uk/pa/ld201011/ldselect/ldmerit/126/12602.htm> > (accessed 20 January 2018); The Merits Committee formerly examined the policy merits of any statutory instruments or regulations laid before the House of Lords that were subject to parliamentary procedure. The Committee is now called the 'Secondary Legislation Scrutiny Committee'

<sup>65</sup> HL Deb, 10 May 2011, Jobseeker's Allowance (Mandatory Work Activity Scheme) Regulations 2011, Vol. 727, col 848

<sup>66</sup> Department for Work and Pensions, *Business Plan 2010 – 2015* (November, 2010) < <http://webarchive.nationalarchives.gov.uk/20110601194729/http://www.dwp.gov.uk/docs/dwp-business-plan-2011-2015.pdf> > (accessed 25 January 2018)

<sup>67</sup> Sainsbury, n. 55 above, p 325

<sup>68</sup> Ibid, p 333

<sup>69</sup> Ibid

Thus personal advisors are required to manage the tension between playing ‘good cop’ and ‘bad cop’ in real-life situations.<sup>70</sup> This exemplifies the manifestation of ‘competition’ between models of administrative justice that form part of Mashaw’s approach.<sup>71</sup> Professional treatment and bureaucratic rationality can co-exist, but the challenge of enforcing conditionality on claimants (i.e. acting as a state ‘bureaucrat’) devalues the adviser’s expanding professional role.

Sainsbury’s application of Mashaw’s model to New Labour’s welfare to work approach provides a useful interpretation of the challenges that Personal Advisers face, and the subsequent effect this can have on the claimant. The Mandatory Work Activity Scheme does not quite so neatly demonstrate the two-way split between professional treatment and bureaucratic rationality that Sainsbury identified in New Labour’s Pathways to Work scheme.<sup>72</sup> Based on the SSAC’s assessment of the Scheme, alongside the Department of Work and Pensions emphasis on the behavioural value of participation in compulsory work activity, and the role of longer and tougher sanctions as a deterrent<sup>73</sup> - there is a stronger focus on the adviser’s role as a rational bureaucrat with minimal value placed on the adviser’s capacity for developing effective professional treatment skills. As Baroness Ruth Lister asserted, ‘flexibility sounds very positive, but its flip side is a lack of clear rights and the danger of arbitrary and inconsistent decision-making and lack of transparency’.<sup>74</sup>

This style of activation approach, whereby a considerable extension of conditionality is achieved via the introduction of ‘vague’ delegated legislation marks a concerning development for the contemporary social security system. The response of Chris Grayling, the then Minister of State for the Department of Work and Pensions, to the Merits Committee (who sought more detail about the scheme), provides an interesting glimpse into the government’s view on the sanctity of the Executive’s power in the secondary legislation making process. He wrote:

‘I do not believe that the Department should be criticised for not providing information on all these issues in the explanatory memorandum that

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<sup>70</sup> Ibid

<sup>71</sup> Ibid

<sup>72</sup> Pathways to Work was the ‘principal policy mechanism aimed at getting recipients of Incapacity Benefit back into work and will continue to operate after Incapacity Benefit was replaced Employment and Support Allowance. Sainsbury, n. 55 above

<sup>73</sup> HM government, The government response to the Social Security Advisory Committee , n 63 above

<sup>74</sup> Baroness Lister of Burtsett (Labour) HL Deb, 10 May 2011, Jobseeker’s Allowance (Mandatory Work Activity Scheme) Regulations 2011, Vol. 727, col 858–860

accompanied the Regulations...the function of the (Merits) Committee is to examine whether a statutory instrument will effectively achieve the stated policy objectives, not to examine whether those policy objectives are themselves desirable. In my view some of your detailed questions, including that regarding Jobcentre Plus resources, suggest that the Committee is straying further into questioning the policy itself than it should do'.<sup>75</sup>

The Committee responded that they 'felt strongly' that the letter represented an inappropriate response to legitimate concerns. Responding to concerns, Lord Freud confirmed that the Scheme represented a 'new approach' and encompassed a 'new philosophy' which dictates that initiatives should have the freedom to flourish into success – providing staff with room to innovate. Freud also emphasised that rather than providing Advisers with specific guidance, the Department were instead choosing to trust those who have day-to-day experiences with claimants.<sup>76</sup> This approach overlooks the value of legal protection for both the decision maker and the claimant which undermines the most basic requirements of justice.<sup>77</sup> The same discretionary approach was further extended to the WP, which provided considerable decision making power to both front line advisers employed by DWP and private providers.

### ***The Governance of the Work Programme***

The Work Programme (WP) was the Government's flagship welfare-to-work scheme and was primarily directed at people claiming Jobseekers Allowance (JSA) or Employment and Support Allowance (ESA) who were referred to the programme from their local Jobcentre Plus and could remain on the programme for up to two years. It was established under powers that the Secretary of State has in section 2 of the Employment and Training Act 1973 and sections 17A and 17B of the Jobseekers Act 1995. Section 2 of the Employment and Training Act provided the Secretary of State with power to make such arrangements as he considered appropriate to assist persons to obtain and retain employment, or assist persons to obtain suitable employees – this legislation allowed the Secretary of State to set up the Work

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<sup>75</sup> Chris Grayling, Minister of State for the Department of Work and Pensions, HL Deb, 10 May 2011, Jobseeker's Allowance (Mandatory Work Activity Scheme) Regulations 2011, Vol. 727, col 855–856

<sup>76</sup> The Parliamentary Under-Secretary of State, Department of Work and Pensions (Lord Freud) HL Deb, 10 May 2011, Jobseeker's Allowance (Mandatory Work Activity Scheme) Regulations 2011, Vol. 727, col 864

<sup>77</sup> Michael Alder and Stuart Asquith (eds), *Discretion and Power in Discretion, Justice and Poverty* (Heinemann Educational, 1981), p 10

Programme for claimants who were not receiving JSA. Section 17A of the Jobseekers Act 1995 provided the Secretary of State with the power to make secondary legislation to impose an obligation to attend the WP, and impose sanctions if claimants failed to participate in the scheme and 17B provided the power to run the scheme. The government introduced the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011<sup>78</sup>, which mandated participation and introduced sanctions for claimants who failed to participate without 'good cause'. This is a further example of the Coalition government's use of secondary legislation to extend activation requirements. Referrals to the WP ceased in April 2017, with the introduction of a new Work and Health Programme.

The scheme, normally led by private contracted providers, who were designated with power to introduce and implement their own schemes to support unemployed claimants to find and sustain employment. Daguerre and Etherington noted that this structure was 'emblematic of the governmental strategy of opening up the public sector to the market', as the WP further extended the contracting model and the role of providers in the delivery of previous welfare-to-work schemes.<sup>79</sup> As discussed in previous chapters, the modernisation of welfare-to-work programmes is closely tied to the shift towards new managerialism and contractualism, as well as advanced economies' assertion of 'new' forms of governance which alter the relationship between the state, citizens and disadvantaged groups.<sup>80</sup> There has also been a more recent move towards shifting risk away from central government.<sup>81</sup> Providers were paid on the basis of the results achieved – they were liable to receive a *job outcome payment* after a participant had spent a minimum time period in employment (either 13 or 26 weeks), and *sustainment payments* for every four weeks the participant remained in employment thereafter. Those perceived to be the most difficult to support into employment had the highest incentive attached. The WP was, in most cases, a mandatory programme – claimants between 18-24 were referred to the scheme at the 9 month point of the JSA claim, while those over 25 were placed at the

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<sup>78</sup> SI 2011/917

<sup>79</sup> Anne Daguerre and Daniel Etherington, 'Welfare and Active Labour Market Policies in the UK: The Coalition Government Approach' in Hugh Bochel and Martin Powell (eds), *The Coalition and Government Policy: Restructuring the Welfare State* (Policy Press, 2016), p 208

<sup>80</sup> James Rees, Adam Whitworth and Elle Carter, 'Support for All in the UK Work Programme? Differential

Payments, Same Old Problem' (2014) *Social Policy and Administration* 48 (2), pp 221–239, p 222; See also, Mark Considine, *Enterprising States: The Public Management of Welfare-to-Work* (Cambridge University Press, 2001)

<sup>81</sup> Rees, Whitworth and Carter, n. 80 above, p 222

12 month point of the JSA claim.<sup>82</sup> The government's development of quasi-markets in employment services have increasingly adopted the conditionality model for the public financing of welfare-to-work-schemes. This form of contractualism involves the privately contracted providers achieving specified employment outcomes as a condition of funding. Developing a market of employment services, in which provision is contracted to competing providers, the government is effectively commodifying the unemployed by attaching a financial value on placing them into work. Shutes and Taylor assert that this process may 'limit the development of support which adequately addresses the needs of different social groups'.<sup>83</sup> The development of extended conditionality in the workfare market speaks to Dean's assertion on the dominant role played by administrative re-commodification which is characterised by widespread welfare pluralism and the growth of New Public Management (NPM).<sup>84</sup>

The WP replaced 20 welfare-to-work schemes established by New Labour. In its design the Coalition government sought to realise the key tenets of international activation programme reforms over the previous twenty years – freedom and flexibility for programme providers, personalised support, localisation, incentive driven outcomes and providing value for money by getting more people into work and spending less on benefits.<sup>85</sup> However, as emphasised by Rees *et al*, programme design which seeks to incorporate such a diversity of aims has the propensity to 'create multiple tensions and vulnerabilities' around achieving these objections and the provision of an effective service for claimants.<sup>86</sup> However, DWP expressed confidence that the implementation of a differential pricing structure within the programme would encourage providers to work with claimants who face

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<sup>82</sup> Aliyah Dar, *Work Programme: background and statistics*, Briefing Paper Number 6430 (House of Commons Library, March 2016)

<sup>83</sup> Isabel Shutes and Rebecca Taylor, 'Conditionality and the Financing of Employment Services – Implications for the Social Divisions of Work and Welfare' (2014) *Social Policy and Administration* 48 (2), pp 204–220, p 205-206

<sup>84</sup> Hartley Dean, *Social Rights and Human Welfare* (Routledge, 2015), p 13

<sup>85</sup> DWP, *The Work Programme* (DWP, 2012) < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/49884/the-work-programme.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/49884/the-work-programme.pdf) > (accessed 18 January 2018); See also, Oral Evidence to the Public Accounts Committee: Managing Delivery of the Work Programme, HC 457-I, Robert Devereux (Permanent Secretary, Department for Work and Pensions); Matt Thurstan, (Senior Responsible Officer for the Work Programme, DWP); and Mike Driver, (Finance Director General) < <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/public-accounts-committee/managing-delivery-of-the-work-programme/oral/11369.html> > (accessed 28 January 2018)

<sup>86</sup> Rees, Whitworth and Carter, n. 80 above, p 222

disadvantages in the labour market, compensating providers for the additional costs of support.

Although this seemed like a reasonable design rationale, there is scant evidence that providers were using the pricing structure to target different types of support to different client groups, with some providers suggesting that the payment differences were not significant enough to influence their behaviour.<sup>87</sup> This is reinforced by the Third Sector Research Centre, and later the Public Accounts Committee (PAC) who found that the ‘creaming’ of easier to place claimants whilst the ‘parking’ of harder to place clients was embedded in the WP and could be seen as a reasonable response to payment-by-results in the context that a proportion of clients would always be unlikely to secure a job.<sup>88</sup> Performance statistics published by the National Audit Office in 2014 revealed that 32 per cent of claimants on WP achieved positive job outcomes (which is below the minimum performance level of 33 per cent) while only 11 per cent of more complex resulted in a positive job outcome (which represents just half of the minimum performance level for this group of 22 per cent).<sup>89</sup> Some providers also pointed to the fact that differential pricing was categorised by benefit type, which was seen as problematic, as these categories did not accurately reflect the type of assistance required. For example, providers identified that some JSA claimants required more intensive support than ESA claimants. The Work and Pensions Committee confirmed these issues with the WP, asserting that the differential pricing structure was ineffective in ensuring that the most disadvantaged jobseekers were getting sufficient support, and that the type of benefit claimed did not provide an effective indicator of the level of support that was required by individual claimants.<sup>90</sup> The Committee recommended that the DWP develop a needs-based assessment of jobseekers’ needs to determine the type of support required by each jobseeker; that

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<sup>87</sup> Grainne McKeever, ‘Work Programme’ (2013) *Journal of Social Security Law* 20 (3), pp 103-104

<sup>88</sup> James Rees, Rebecca Taylor and Chris Damm, *Does sector matter? Understanding the experiences of providers in the Work Programme* (Third Sector Research Centre, February 2013) < <https://www.birmingham.ac.uk/generic/tsrc/documents/tsrc/working-papers/working-paper-92.pdf> > (accessed 26 January 2018); House of Commons Committee of Public Accounts, *The Work Programme*, HC 457 (HSMO, 2014) < <https://publications.parliament.uk/pa/cm201415/cmselect/cmpublicacc/457/457.pdf> > (accessed January 24 2018)

<sup>89</sup> See, Department for Work and Pensions, *The Work Programme* (HC 266, Session 2014-15) < <https://www.nao.org.uk/wp-content/uploads/2014/07/The-work-programme.pdf> > (accessed 5 February 2018), p 7-8

<sup>90</sup> Work and Pensions Select Committee, *Can the Work Programme Work for All User Groups?*, HC No. 162, Session 2013-14, p 6 < <https://publications.parliament.uk/pa/cm201314/cmselect/cmworkpen/162/162.pdf> > (accessed 25 January 2018)

the prime providers should be required to survey participants' satisfaction with the programme and the results should be used as part of DWP's assessment of providers' effectiveness; and that the caseloads per advisor in the Work Programme to ensure jobseekers get one-to-one time with qualified advisors.<sup>91</sup>

DWP's trade-off for the substantial increase in the conditional requirements that providers were required to fulfil, was the increased autonomy they were provided in delivering the WP.<sup>92</sup> Under previous governments, central government (DWP) prescribed the terms and conditions of services that contracted providers might deliver (e.g. number of weeks of job training). By contrast, the WP required only minimum service requirements and allowed the provider complete discretion in relation to how to work with a participant.<sup>93</sup> Research has shown that the implications of such an approach included a limited use of specialist support within the supply chain of providers and sub-contractors to address particular support needs, such as for claimants who had a mental health issue.<sup>94</sup> In cases where special providers were used, the support was in many cases unpaid and provided by organisations outside the programme (funded by other sources) or secured at a low cost, rather than from the specialist tier two providers listed by prime providers. This was partly down to providers under-resourcing their offering in order to successfully compete for funding at the commissioning stage of the programme. The rising unemployment in the first years of the WP also played a part in the difficulties providers faced in securing job outcomes – increased success in this regard may have in turn paid for specialist support.<sup>95</sup> The PAC also highlighted that, on average, prime contractors spent less than half on what they had intended to spend on those groups perceived as harder-to-help.<sup>96</sup>

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<sup>91</sup> Ibid

<sup>92</sup> Rees, Taylor and Damm, n. 88 above, p 6 < <https://www.birmingham.ac.uk/generic/tsrc/documents/tsrc/working-papers/working-paper-92.pdf> > (accessed 26 January 2018); Isabel Shutes and Rebecca Taylor, Conditionality and the Financing of Employment Services – Implications for the Social Divisions of Work and Welfare (2014) Social Policy and Administration, 48 (2), pp. 204 – 220, p. 212.

<sup>93</sup> Shutes and Taylor, n. 83 above, p 212; See also, Becci Newton, Nigel Meager, Christine Bertram, Anne Corden, Anitha George, Mumtaz Lalani, Hilary Metcalf, Heather Rolfe, Roy Sainsbury and Katharine Weston, *Work Programme Evaluation: Findings from the First Phase of Qualitative Research on Programme Delivery* (DWP, 2012)

<sup>94</sup> Newton, Meager, Bertram, Corden, George, Lalani, Metcalf, Rolfe, Sainsbury and Weston, n. 93 above, p 56

<sup>95</sup> Rees, Taylor and Damm, n. 88 above

<sup>96</sup> House of Commons Committee of Public Accounts, *The Work Programme*, HC 457 (HSMO, 2014) < <https://publications.parliament.uk/pa/cm201415/cmselect/cmpubacc/457/457.pdf> > (accessed 18 January 2018)

A 2014 evaluation of the participants' experience of the WP found that conditionality and sanctions attached to the mandatory nature of the scheme were not considered by participants as having any significant bearing on their behaviour or attitudes towards compliance:

'The most common view among participants interviewed shortly after joining the programme was that the conditionality and sanctions regime was largely unnecessary or irrelevant to them. This was because they saw themselves as naturally compliant because of their overwhelming desire to find work'.<sup>97</sup>

The evaluation also found that claimants who were sanctioned felt they lost their benefits unjustly because of isolated lapses in participation or missed appointments.<sup>98</sup> Indeed, the Joseph Rowntree Foundation's 2014 report on Monitoring Poverty and Social Exclusion found that the number of JSA claimants sanctioned for non-attendance on the WP had been higher than the number of claimants finding work as a result of the process.<sup>99</sup> The PAC determined that it was unclear whether the sanctions regime attached to the WP was appropriate in encouraging claimants to engage in support offered by prime providers. The Committee were particularly concerned that sanctions referrals were rising – and it was unable to understand if providers were making appropriate sanction referrals – and that some prime providers, such as 'Seetec', made more sanction referrals than other prime providers.<sup>100</sup>

This highlights one of the main perils of wide-ranging powers of discretionary decision making – it is impossible to ensure consistent and fair treatment across a

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<sup>97</sup> Nigel Meager, Becci Newton, Roy Sainsbury, Anne Corden, Annie Irvine, *Work Programme Evaluation: the participant experience report* (DWP, 2014), p 8 < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/425081/rr892.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/425081/rr892.pdf) > (accessed 19 January 2018); see also Ruth Patrick, *For Whose benefit? The Everyday Realities of Welfare reform* (Policy Press, 2017); Welfare Conditionality Project, *Written evidence to the to Work and Pensions Committee inquiry Universal credit* (October, 2017) < <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/work-and-pensions-committee/universal-credit-rollout/written/71286.html> > (accessed 21 January 2018)

<sup>98</sup> Meager, Newton, Sainsbury, Corden and Irvine, n. 97 above, p 8

<sup>99</sup> Tom MacInnes, Hannah Aldridge, Sabrina Bushe, Adam Tinson and Theo Barry Born, *Monitoring Poverty and Social Exclusion 2014* (JRF, 2014), p 94 < <https://www.jrf.org.uk/sites/default/files/jrf/migrated/files/MPSE-2014-FULL.pdf> > (accessed 19 January 2018)

<sup>100</sup> House of Commons Committee of Public Accounts, *The Work Programme*, HC 457 (HSMO, 2014) < <https://publications.parliament.uk/pa/cm201415/cmselect/cmpublic/457/457.pdf> > p 8 (accessed 18 January 2018)



large population of claimants, particularly in the context of the WPs requirement that contractors fulfil only minimum standards which vary from contractor to contractor. DWP's own evaluation included evidence from DWP Performance Managers who regarded minimum service delivery standards as insufficiently well-defined to be monitored effectively.<sup>101</sup> By July 2014, four years on from the Coalition's decision to condemn all New Labour's welfare-to-work schemes in favour of its modified approach, the NAO ultimately concluded that the WP was performing 'at similar levels to previous programmes' for those on JSA, but that the scheme's performance was failing those hardest to help, including those claiming ESA. It was found that providers were spending half the originally projected amount on getting them back to work.<sup>102</sup>

Increasing work-related conditionality in the financing of employment services and entitlements to welfare indicates a 'dual process of conditionality in the governance of employment services'.<sup>103</sup> How these processes are experienced by providers and claimants points to the need for a new theoretical interpretation of the social divisions in which contemporary reforms to the provision of employment support is embedded. The development of extended conditionality in the workfare market is underscored by Dean's assertion that the concept of administrative re-commodification is a dominant force in the social security market which is characterised by widespread welfare pluralism and New Public Management (NPM).<sup>104</sup> As Shutes and Taylor assert the practical manifestation of increased administrative re-commodification can be identified in the WP. The government's allocation of public resources to employment services on the basis of market principles, which position unemployed claimants as individual units of (paid) labour which need to be financially incentivised, or indeed threatened with financial penalties to sell their labour while service providers are market agents who have been financially incentivised to place people in paid work, and who have been given the power by the state to discipline those who do not comply.<sup>105</sup> As denoted throughout the thesis, the reframing of social provisions which 'reconstitute the state'

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<sup>101</sup> Pippa Lane, Rowan Foster, Laura Gardiner, Lorraine Lanceley and Ann Purvis *Work Programme Evaluation: Procurement, Supply Chains and Implementation of the Commissioning Report* (DWP Research Report 832, 2013) p 50 < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/197710/rrep832.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/197710/rrep832.pdf)> (accessed 22 January 2018)

<sup>102</sup> National Audit Office, *The Work Programme* (HC 266, Session 2014-15) < <https://www.nao.org.uk/wp-content/uploads/2014/07/The-work-programme.pdf> > (accessed 2 February 2018)

<sup>103</sup> Shutes and Taylor, n. 83 above, p 215

<sup>104</sup> Dean, n. 84 above, p 13

<sup>105</sup> Shutes and Taylor, n. 83 above, p 215

whereby the provision of welfare is decided in terms of 'modes of contractual governance' inevitably ties citizenship to market participation.<sup>106</sup> Although Marshall emphasised that social citizenship should be dependent on the 'fruits of (individuals') collective labour', he unequivocally asserted that universal access to citizenship rights provided a worthy means through which the inequality of the operation of capitalist markets assert.<sup>107</sup> In relation to the operation of the WP, divisions of class, gender, race and disability which shape individuals experiences and needs in relation to paid and unpaid work, and which form the basis of their entitlement to welfare, are obscured by the Coalition's model of market-led contractualism in the delivery of their welfare-to-work schemes.<sup>108</sup> The divisions are recognised to an extent in terms of the additional value attached to those claimants who are identified as being 'harder to help' such as people claiming ESA. However, as discussed above, there are serious limitations ascribed to the government's practice which seeks to finance employment services on the condition of placing and keeping claimants in a job – such as the lack of support available to those with particular employment needs.<sup>109</sup>

The rapidly developing legislative trend which provides increasing discretionary powers to those at the front line of the social security system can be identified in the WP, for example the decision-making freedom provided to private providers in relation to claimants' (conditional) work activity. Adler's development of Mashaw's approach to administrative justice provides a good lens through which to interpret this administrative shift. His socio-legal interpretation of administrative justice incorporates three additional models to Mashaw's model of administrative justice<sup>110</sup>, including managerialist, consumerist and market models which Adler asserts can be combined to provide a 'good account' of the cumulative implication of NPM. The characteristics Adler conflates with the market model (aspects of which can be identified in the managerial and consumer models) can be identified in the WP. For

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<sup>106</sup> Kanishka Jayasuriya, *Statecraft, Welfare and the Politics of Inclusion* (2006, Palgrave Macmillan); Also, Shutes and Taylor, n. 83 above, p 215; Carole Pateman, *The disorder of women: democracy, feminism and political theory* (Stanford: Stanford University Press, 1989) 186; Ruth Lister, *Citizenship: feminist perspectives* (Basingstoke: Palgrave Macmillan, 2003) 138

<sup>107</sup> Marshall, n. 1 above, p 63

<sup>108</sup> See, Nancy Fraser, *Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition* (Routledge, 1997)

<sup>109</sup> Shutes and Taylor, n. 83 above, p 216-216

<sup>110</sup> Mashaw's model of administrative justice includes the bureaucratic rationality model, the professional treatment model and the moral judgement model. See Jerry L. Mashaw, 'Conflict and Compromise among Models of Administrative Justice' (1981) *Duke Law Journal* 2, pp 181-212

instance, and as identified above, the administration of the WP relies on market led decision making which involves 'the matching of demand and supply is made with reference to the price mechanism'.<sup>111</sup> The central goal of the contract provider is profit-making, while the main mode of accountability is to the owner - in the case of the WP this is the government. However, Adler's conception of the market model individual as 'rational economic actors who choose the producer who best satisfies their wants or preferences' does not quite fit with the governance of the WP.<sup>112</sup> The claimant participant is unable to choose the provider, and their participation in the scheme is mandatory as they are ultimately bound to comply with the discretionary directions laid down by a WP contractor or a jobcentre plus Adviser. This speaks more directly to Mashaw's bureaucratic rationality model, or what Adler reinterprets as simply 'bureaucratic' which more decisively encompasses external procedures for achieving administrative justice.<sup>113</sup> It may be possible to argue that the claimant is encumbered by an approach more akin to Adler's managerial model, which 'challenged the powers and prerogatives of bureaucrats and professional in the name of managers who demanded the "freedom to manage" the prescribed standards of service'.<sup>114</sup> Equally, it might be argued that the administration of the WP and indeed the Mandatory Work Activity Programme cannot be fitted into a specified administrative justice model as the design of welfare-to-work schemes fail to place the complex and individual needs of the service user at the centre. Rather the development of employment schemes is based on the need to connect as many people to the labour market as possible, on the basis that paid work has been identified by the political elite as the only way to escape poverty. The impetus to increase employment levels is coupled with growing and competing pressures of administrative convenience, the need to minimise cost, and the desire to protect ministers from responsibility for decision making.<sup>115</sup> However, the ironic fact is, the government's pursuit of administrative convenience effectively sacrifices the facilitation of a sufficient redress process for claimants who have suffered injustice, and thus creates increased scope for legal challenge.

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<sup>111</sup> Michael Adler, 'A Socio-Legal Approach to Administrative Justice' (2003) *Law and Policy* 25 (4), pp 323-351, p 334

<sup>112</sup> *Ibid*

<sup>113</sup> *Ibid*, p 329

<sup>114</sup> *Ibid*, p 333

<sup>115</sup> Roy Sainsbury, 'A critique of the case for change' in Michael Adler and Roy Sainsbury, *Adjudication Matters: Reforming Decision Making and Appeals in Social Security* (CPAG, 1998), p 29

***Reilly and Wilson v Secretary of State for Work and Pensions***

A detailed account of the legal challenges to the Coalition's activation approach is beyond the scope of this chapter, which seeks to concentrate on the political intentions underpinning the extension of conditionality and social control in the WRA 2012. Nonetheless, in the context of analysing the outcome of the Coalition's welfare-to-work regulations, it is valuable to refer to one of the key legal challenges which includes inferences to many of the issues detailed above; *Reilly v Secretary of State for Work and Pensions*.<sup>116</sup> The case concerned two jobseekers, Caitlin Reilly and Jamieson Wilson.<sup>117</sup> Reilly, a university graduate, signed on for JSA in August 2010 and subsequently secured a paid placement through the government's 'Future Jobs Funds' scheme, at the Birmingham Pen Museum, which was in line with her future career aspirations (November 2010 – May 2011). Reilly continued working voluntarily for the museum, and made a second claim for JSA in July 2011 – complying with the conditions set out in the Jobseekers Agreement.<sup>118</sup> In October 2011, Reilly's jobcentre adviser informed her of an 'opportunity' to attend an open day where retail posts would be available, and that if she accepted a position advertised at the open day she would be guaranteed a job interview with, for example, the discount retailer 'Poundland'. The adviser did not inform Reilly that she would be obliged to undertake work activity, or that what she was being offered involved unpaid work. It followed, that Reilly was then informed that her participation on a six week training scheme was mandatory, and if she did not comply she would lose her entitlement to JSA.<sup>119</sup> Reilly felt compelled to attend the training, as she could not afford to lose her only source of income, despite her preference to continue working at the museum which she had duly communicated to her Adviser. After one week of training, Reilly was placed at a Poundland store for two weeks, required to work for five hours a day, five days a week, but did not receive a market wage. By the end of December 2011, Reilly's experience and her assertion that she had not been given proper notice that she would have to take unpaid work under reg. 4. of the 2011 Regulations had become exposed to the national media.<sup>120</sup> The facts in Jamieson Wilson's appeal, which was

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<sup>116</sup> *R. (on the application of Reilly) v Secretary of State for Work and Pensions* [2013] EWCA Civ 66; [2013] 1 W.L.R. 2239 (CA (Civ Div))

<sup>117</sup> See a fulsome description of the facts in Larkin, n. 25 above, pp 110-118

<sup>118</sup> See s.9 of the Jobseekers' Act 1995

<sup>119</sup> Reilly was not informed for how long she would lose entitlement for

<sup>120</sup> Caitlin Reilly contributed an article to the Guardian setting out her opposition to the nature of the "training" schemes offered under the Regulations, and the lack of information provided to her and attempted to defend herself against some commentators who suggested that she felt the role in Poundland was "beneath her". See 'Why the Government was wrong to make me work in Poundland for free' *The Guardian* (London, 15 January 2012)

conjoined to Caitlin Reilly's, vary from those detailed above. Wilson held a heavy goods vehicle licence, and had worked as a lorry driver and a landscape gardener. On 24 August, 2011, Wilson was informed that, in order for him to continue receiving JSA he would be obliged to participate in a new programme, the Community Action Programme (CAP).). In November 2016, Wilson's Adviser informed him that refusal to take part in the scheme would result in a loss of JSA for 26 weeks, with a potential loss of National Insurance credits.<sup>121</sup> The unpaid work would involve collecting and renovating disused furniture for people in need in the local community and Wilson would be required to work for 30 hours per week for 26 weeks. The requirements were not communicated in writing. Wilson was not prepared to work for free for such an extended period of time.

It followed that both claimants sought to challenge the validity of the Jobseeker's Allowance (Employment and Enterprise) Regulations 2011, and the two schemes created by the Secretary of State under these regulations (Community Activity Programme and the Sector-Based Work Academy schemes). There were four main grounds of challenge. First, they claimed that the regulations were ultra vires the governing statutory provision (s. 17A of the Jobseekers Act 1995), since they failed to provide a description of each scheme or underline the circumstances in which an individual could be obliged to participate in the scheme. Secondly, the Secretary of State should have published appropriate details of each scheme, including information on the type of work a claimant could be expected to undertake, the circumstances in which claimant may be compelled to undertake such work and the period for which they were bound to do so, alongside a specification of the consequences of non-compliance. Third, that reg. 4 of the regulations required provision of specific notice in relation to various aspects of the scheme including details about the requirement of their participation in the selected scheme and notice of the sanctions for non-participation. Fourth, that the regulations were not compliant with art. 4(2) of the European Convention on Human Rights, which provides (subject to some exceptions) that: 'No one shall be required to perform forced or compulsory labour'.<sup>122</sup>

Foskett J. found merit in ground 3 for the challenge, and accordingly ruled that the requirements of reg. 4 were not met for either Reilly or Wilson. In Wilson's case, this

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<sup>121</sup> Under reg.8 Wilson's JSA could only be stopped for two weeks if he failed to participate in the scheme

<sup>122</sup> Larkin, n. 25 above, p 115

was due to insufficient detail about sanctions in the letters from the Secretary of State. It was also determined that there was potential for the nature of the scheme to deter citizens who wished to communicate their unwillingness to participate in a particular scheme, but who were worried about facing a prolonged sanction (up to 26 weeks). Foskett J. also pointed to Wilson's objection to participation in an unpaid scheme that was not tailored to his own employment needs. The judge outlined that Reilly had a valid complaint in regard to misinformation given to her about the fact that the scheme was compulsory, which impeded her efforts to build a career in the museum, and indeed the work experience offered at Poundland did not seem to offer worthwhile experience to embark on an alternative career path. Although the 2011 regulations were held to be in accordance with s. 17A of the Jobseekers Act 1995, leave was granted for an appeal.<sup>123</sup>

In February 2013 the Court of Appeal ruled that the 2011 Regulations were ultra vires the Jobseekers Act 1995 on the basis that the Regulations did not provide a 'prescribed description' of the schemes as required by the Act (ground 1 above). This resulted in the powers within the regulations, which allowed for the enforcement of sanctions on claimants who failed to comply with the conditions of the work schemes to be deemed unlawful. The Court of Appeal's judgement had the potential to incur a liability of up to £130 million in repaying those claimants who had been sanctioned under the regulations.<sup>124</sup> The government subsequently changed the law to reverse the decision of the Court of Appeal to ensure that the sanctions imposed would stand.

The Constitutional Select Committee voiced concern about the retrospective nature of the amending legislation, which impinged the rule of law principle that individuals may be punished or penalised only for contravening what was at the time a valid legal requirement.<sup>125</sup> Although the Committee conceded that the doctrine of parliamentary sovereignty provides for the passing of retrospective legislation, they also asserted that 'from a constitutional point of view it should wherever possible be avoided, since the law should so far as possible be clear, accessible and predictable'.<sup>126</sup> The Committee also questioned the government's decision to fast-track the legislation, noting particularly its failure to explain why the Bill should be fast-tracked, and

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<sup>123</sup> Ibid, p 117

<sup>124</sup> Explanatory notes on the Bill, para 3

<sup>125</sup> Select Committee on the Constitution, *12th Report of Session 2012-13 Jobseekers (Back to Work Schemes) Bill* (HL Paper 155, HMSO, 2013), para 14

<sup>126</sup> Ibid

concluding that it was not a necessary measure.<sup>127</sup> The new Jobseekers (Back to Work Schemes) Act was passed on March 20, 2013, and included an amendment to require the Secretary of State to appoint an independent person to carry out a review of the operation of the sanctions under the legislation during the first 12 months after Royal Assent.

Following an appeal by the Government, the case continued to the Supreme Court.<sup>128</sup> The Judges upheld the Court of Appeal's determination that the 2011 regulations under which most of the government's back-to-work schemes were conceived were unlawful and should be quashed. Crucially, the Supreme Court was moved to comment on the government's 'rather unattractive' position of 'taking up court time and money to establish that a regulation is valid, when it has already taken up parliamentary time to enact legislation which retrospectively validates the regulations'.<sup>129</sup> The 2013 Act was targeted at resolving the Reilly litigation, thus the passing of the retrospective legislation amounted to an interference in ongoing legal proceedings.<sup>130</sup>

It followed that in 2014 Reilly and jobseeker Daniel Hewstone<sup>131</sup> sought to challenge the validity of the retrospective legislation on the basis that it was a ploy by a 'cynical' government to make lawful what senior judges had declared unlawful and to avoid the consequences of its flawed activation approach.<sup>132</sup> The High Court ruled that the retrospective legislation breached the right to a fair trial protected under article 6(1) of the ECHR, a possible consequence of which was repayment of up to £130m to claimants who had been penalised.<sup>133</sup> DWP subsequently sought to appeal the decision and took the opportunity to emphasise that the High Court decision was

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<sup>127</sup> Ibid, para 11

<sup>128</sup> R (Reilly & Anor) v Secretary of State for Work and Pensions [2013] UKSC 68

<sup>129</sup> Ibid, [40]

<sup>130</sup> Rosalind English, *Retrospective legislation that interfered with judicial ruling violated the Convention and the rule of law*, UK Human Rights Blog (8 July 2014) < <https://ukhumanrightsblog.com/2014/07/08/retrospective-legislation-that-interfered-with-judicial-ruling-violated-the-convention-and-the-rule-of-law/> > (accessed 14 February 2018); See also, *Zielinski v France* (2001) 31 EHRR 19

<sup>131</sup> Hewstone was sanctioned for six months following a complaint that he was required to pay for his travel costs to clean graffiti. He won his case at social security tribunal which reimbursed his benefits however the introduction of retroactive legislation overturned that compensation award

<sup>132</sup> Rajeev Syal (and agencies), 'Court rules back-to-work legislation incompatible with European law' *The Guardian* (London, 4 July 2014) < <https://www.theguardian.com/society/2014/jul/04/high-court-back-to-work-legislation> > (accessed 20 February 2018)

<sup>133</sup> R (Reilly (No. 2) and Hewstone) v The Secretary of State for Work and Pensions [2014] EWHC 2182

‘wrong in law’ and that Lang J. had ‘failed to afford the necessary constitutional respect to parliament and the parliamentary process’. But Lord Justice Underhill, announcing the ruling of the Court of Appeal, said: ‘We have also held - upholding the decision of the High Court - that in the cases of those claimants who had already appealed against their sanctions, the Act was incompatible with their rights under the European Convention on Human Rights’.<sup>134</sup>

### ***A Valuable Intersection between Politics and the Law?***

What has been dubbed the ‘Poundland’ case provides a number of important observations in relation to this chapter’s endeavour to assess the extent to which the centrality of political impetus trumps the priority of ensuring benefit claimants can access their social right to social security. Throughout the ‘Poundland’ case’s journey through the UK court system, the government sought to communicate its steadfast view that the unemployed claimant ought to demonstrate value for the taxpayer by working for their benefits and furthermore that the introduction of retrospective legislation was justified on the basis that it was in the ‘public interest’ not to award circa £130m to the ‘undeserving’ claimants.

‘...it is entirely proper to enact such (retrospective) legislation if there is a compelling reason to do so. There is a compelling reason here on three grounds: first, the cost involved; secondly, the claimants affected do not deserve a windfall payment; and, thirdly, this is an unusual case in social security legislation where a court or tribunal has a retrospective effect’.<sup>135</sup>

Larkin has described the nexus between the protection of socio-economic rights under the ECHR and the position of the judiciary as ‘lukewarm’. This seems like a fair representation in relation to the Court’s decision to determine that the unpaid work of Cait Reilly in Poundland, which was found not to be incompatible with Art. 4 of the

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<sup>134</sup> R (Reilly (no.2) and Hewstone) v Secretary of State for the Home Department and Bevan, Jeffrey and Green v Secretary of State for the Home Department [2016] EWCA Civ 413 [180]. A group of claimants were simultaneously challenging their sanctions as unlawful in the social security tribunal route, asserting that the 2013 Act could be read so as to have no effect in their cases. The Upper Tribunal agreed, effectively allowing the appeal against the sanctions. The two routes thus produced incompatible findings—if it were possible to read the 2013 Act to not apply in the claimants’ cases there would be no declaration of incompatibility, while if there were incompatibility with the Human Rights Act 1998, there would be no appeal against (and so no repayment of) the sanctions. See Tom Royston and Charlotte O’Brien, ‘Workfare and retrospective legislation’ (2016) *Journal of Social Security Law* 23 (2), pp 57-58

<sup>135</sup> Lord Freud, Parliamentary Under Secretary of State (Minister for Welfare Reform), (2013 Act) Second Reading in the House of Lords, 21 March 2013 Vol. 730



ECHR.<sup>136</sup> This initial ruling speaks to the wide margin of appreciation provided to contracting states under the ECHR when it comes to policy development, which subsequently reinforces the argument that the Convention is not adequately concerned with the fundamental resources necessary to sustain life.<sup>137</sup> However, following the government's move of enacting retrospective legislation which interfered with legal proceedings, the judiciary exhibited a pro-active approach in voicing the constitutional importance of protecting the rule of law, specifically on the basis that the enactment of retrospective provision was seen to 'offend a citizen's sense of fair play'.<sup>138</sup> Moreover, *Reilly (No.2)* demonstrated that the judiciary is prepared in certain circumstances to impose limits to the power of Parliament in relation to what it conceives is in the public interest. As Lang J. asserted 'I do not agree that repayment would be 'an undeserved windfall', as Lord Freud described it. They are merely receiving their legal entitlement'.<sup>139</sup> The Court of Appeal's decision to uphold the High Court's ruling in *Reilly (no. 2)* solidifies the judiciary's fortitude in seeking to limit the government's imposition of a measure which favours the interests of some citizens over others, specifically those who are seeking to claim their social citizenship rights.

The passage of the 2013 Act was aided by Labour's decision to abstain from a vote in the Commons. The media reported that the Labour leader Ed Miliband<sup>140</sup> threatened that senior members of the party would be sacked if they stepped out of line.<sup>141</sup> Again this speaks to the measure of consensus between both sides of the house in relation to dealing with the unemployed and the need to limit public spending on those determined to be undeserving. The Shadow Work and Pension Secretary asserted in the Commons that Labour were abstaining because 'this Bill restores the general legal power of the DWP to issue sanctions'. He continued to articulate the need to protect

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<sup>136</sup> Philip M Larkin, 'Delineating the gulf between human rights jurisprudence and legislative austerity: the judicial entrenchment of "less-eligibility"' (2016) *Journal of Social Security Law* 23 (1), pp 42-63, p 44

<sup>137</sup> *Ibid*, p 48

<sup>138</sup> *R (Reilly (no.2) and Hewstone) v Secretary of State for the Home Department and Bevan, Jeffrey and Green v Secretary of State for the Home Department* [2016] EWCA Civ 413 [82]

<sup>139</sup> *Ibid*, Lang J also remarked on the absence of any consultation with representative organisations or by the Joint Committee for Human Rights or the Social Security Advisory Committee, which may have contributed to the government's misconceptions about the legal justification for the retrospective legislation [para 96]

<sup>140</sup> Elected leader of the Labour party on 25 September 2010

<sup>141</sup> Hugh Muir and Shiv Malik, 'Labour abstention on workfare bill prompts party infighting' *The Guardian* (London, 21 March 2013) < <https://www.theguardian.com/politics/2013/mar/21/labour-abstention-workfare-bill-byrne> > (accessed 21 February 2018)

the 'sui generis power that has been in place since 1911'.<sup>142</sup> However, Byrne failed to mention that the vastly increased scale of sanctions, which 'cover more people, apply to more situations and are greater than severity than was formerly the case'.<sup>143</sup> It is important to note that 44 members of Labour rebelled and voted against the 2013 Act, which reflected a not-insignificant level of disapproval at the government's actions. A particularly powerful statement came from Labour MP John McDonnell who, in line with the legal-political trajectory interpreted in the thesis, described the altering view of the unemployed claimant:

'...There have always been sanctions within the system to prevent people from abusing it, but they were about ensuring that people were sanctioned if they refused to go for paid work, never unpaid work. Now...the attitude is that unemployment is not the fault of the system or a failure of Government or of society, but a failure of the individual...Therefore, the logic follows that the individual must be penalised, so what the Government have successfully done in the media and elsewhere by ministerial statements is demonise the unemployed—the unemployed themselves have caused their own poverty, rather than the system that has created the unemployment. The result of that logic is what we see today: the poor and unemployed have to be harassed, pilloried, sanctioned, blamed and made to feel guilty for being unemployed.'<sup>144</sup>

This statement appropriately underscores the political turn from the Beveridgean/Marshallian vision of citizenship. As Beveridge outlined in his 1909 analysis, the problem of mass unemployment is primarily a problem of the system, rather than a result of the deficiencies of the unemployed – it was this fixed idea which created the basis for the reciprocal provision of entitlement to social protection whereby the state assumed its duty to create full employment.<sup>145</sup>

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<sup>142</sup> Shadow Secretary of State for Work and Pensions, Liam Byrne (Labour, Birmingham Hodge Hill), HC Deb, 19 March 2013, Jobseekers (Back to Work Schemes) Bill, Vol. 560, col 834; See also, Liam Byrne, 'A William Beveridge for this century's welfare state' *The Guardian* (London, 2 January 2012) < <https://www.theguardian.com/commentisfree/2012/jan/02/beveridge-welfare-state-labour-revolution> > (accessed 21 February 2018)

<sup>143</sup> Adler, n. 12 above, p 202

<sup>144</sup> John McDonnell (Lab, Hayes and Harlington) HC Deb, 19 March 2013, Jobseekers (Back to Work Schemes) Bill, Vol. 560, col 855-866

<sup>145</sup> See William Beveridge, *Unemployment: A Problem of Industry* (Longmans Green and Co, 1930)

### **Conclusion**

As Paz-Fuchs underlines, welfare reform in contemporary social security system no longer adheres to fixed, rights based principles. The approach which underpinned the Beveridgean system of welfare has been surpassed by a politically discursive approach whereby the primacy of rights no longer feature as 'an independent consideration that should have an effect on policy decisions'.<sup>146</sup> Rather than constituting a lynchpin, the concept of welfare rights is based on a spectrum of political interest that, to a great extent, hinges on whether the citizen has made a good enough contribution to be deserving of entitlement. Until the point where the Coalition government came to power the test of deservedness could largely be satisfied if the claimant could establish a measure of reciprocity for which they could claim compensation from society. The approach taken by the government, outlined above, adds credence to this chapter's assertion that the Coalition administration sought to establish a fifth attempt to construct a politics of welfare obligation, which rather than focusing on the centrality of the concept of reciprocity, emphasises the virtues associated with individual responsibility and the financial privilege of parliament to assert measures that it deems appropriate, even if such measures impinge upon a claimants right to social security.

The final chapter of this thesis illustrates how this shifting view of social citizenship, and the attendant rights of social security claimants, final solidified in the shape of the Welfare Reform Act 2012.

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<sup>146</sup>Amir Paz-Fuchs, *Welfare to Work: Conditional Rights in Social Policy* (Oxford University Press, 2008), p 62

## Chapter 12: The Welfare Reform Act 2012

### *Introduction*

At the centre of the Welfare Reform Bill stood the new 'Universal Credit' (UC) which sought to address a number of well-worn problems inherent in the social security system. UC sought to ameliorate the 'poverty-trap' which creates a perverse incentive for claimants to remain on benefit rather than seek employment. While intense conditionality measures sought to activate 'workless' claimants into paid work.<sup>1</sup> In doing this, it sought to simplify a hugely complex system of over-lapping provision, which – it was argued – had the added advantage of being able to reduce opportunities for benefit fraud.

This chapter will examine the Welfare Reform Bill as it moved through the parliament, gaining royal assent on 8 March 2012. The commentary will focus on the prevalence of those legislative trends outlined throughout the thesis. It will also focus on the ubiquity of those ideologies embraced by the new right which are averse to the 'scourge' of 'worklessness' and 'welfare dependency' – terms which were rejuvenated by the CSJ and the wider Conservative Party in the run up to the 2010 election.<sup>2</sup> The chapter considers the impact of such ideological influences on the resulting legislation and comments on the potential implications of the measures for those who are unemployed. Finally, it assesses the role of Labour in Opposition, and more specifically the extent of not only consensus on the proposed measures and the areas of reform in which the Labour Party sought to 'push back' on the Coalition's agenda for the social security – and indeed, what insight this provides to the continuously shifting political approach to social citizenship.

### *Political Rhetoric and Reasoning: The emergence of Legislative Trends at Debate Stage*

Iain Duncan-Smith's introduction of the Welfare Reform Bill made a promise to the taxpayer that their 'hard earned money must be spent responsibly'.<sup>3</sup> This theme was repeated by much of the Conservative MPs.<sup>4</sup> The idea of ensuring 'fairness' was a

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<sup>1</sup> See Philip Larkin, 'Universal Credit, 'Positive Citizenship', and the Working Poor: Squaring the Eternal Circle?' (2018) *Modern Law Review* 81 (1), pp 114–131

<sup>2</sup> See Chapter 6

<sup>3</sup> Secretary of State for Work and Pensions, Iain Duncan Smith, HC Deb, 9 March 2011, Welfare Reform Bill, Vol. 524, col 921

<sup>4</sup> Secretary of State for Work and Pensions, Iain Duncan-Smith, HC Deb, 9 March 2011, Welfare Reform Bill, Vol. 524, col 922-925; Minister of State, Department for Work and Pensions, Chris Grayling, HC Deb, 9 March 2011, Welfare Reform Bill, Vol. 524, col 1021

significant theme, although as Hills established, it was quite a different approach to fairness than that adopted by the previous New Labour government, which had set about ‘creating a fairer society’ which was congruent with their efforts in reducing inequality through greater redistribution.<sup>5</sup> There were some occasions when the Coalition’s use of the term echoed Labour’s: for example, George Osborne’s statement in relation to the 2010 Spending Review that ‘fairness also means that...those with the broadest shoulders should bear the greatest burden’<sup>6</sup> or indeed when Deputy Prime Minister Nick Clegg claimed that the concept of fairness was violated when children’s social circumstances meant a ‘life sentence of disadvantage’.<sup>7</sup> However, in relation to welfare reform, the term has assumed rather different connotations. David Cameron set a precedent at the 2010 Conservative Party conference when he asserted that ‘Fairness means giving people what they deserve – and what they deserve depends on how they behave’.<sup>8</sup> Thus those who are fulfilling their citizenship obligations by obtaining full-time employment and contributing income-tax to HMRC should be treated more favourably than those who are unemployed. For example, the Coalition determined that those who are unemployed are seen as undeserving of to live in places that would be too expensive for ‘hard-working’ citizens. This view was communicated clearly by Iain Duncan Smith during the second reading of the bill when he said:

‘The [benefit cap] principle is that people who are unemployed and on benefits should not be receiving more than average earnings. It is a matter of fairness, so that those who are working hard and paying their taxes do not feel that someone else will benefit more by not playing a full part in society’.<sup>9</sup>

The concept of conflating the term ‘fairness’ with the ‘taxpayer’ provided a convincing soundbite for many contributions, including one from Conservative backbencher

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<sup>5</sup> John Hills, ‘The Coalition’s Record on Cash Transfers, Poverty and Inequality 2010-2015’, CASE Working Paper 11 (LSE, 2015), p 11 < <http://sticerd.lse.ac.uk/dps/case/spcc/WP11.pdf> > (accessed 19 February 2018); See also, Tania Burchardt, ‘Fairness’ in Nicola Yeates, Tina Haux, Rana Jawad and Majella Kilkey, *In Defence of Welfare: The Impacts of the Spending Review* (Social Policy Association, February 2011) < <http://www.social-policy.org.uk/downloads/idow.pdf> > (accessed 19 February 2018)

<sup>6</sup> George Osborne, Spending Round 2013, Speech, 26 June 2013 (HM Treasury) < <https://www.gov.uk/government/speeches/spending-round-2013-speech> > (accessed 26 February 2018)

<sup>7</sup> Liberal Democrats, ‘Nick Clegg Announces a £7bn Fairness Premium’ (15 October 2010) < [https://www.libdems.org.uk/nick\\_clegg\\_announces\\_7bn\\_fairness\\_premium](https://www.libdems.org.uk/nick_clegg_announces_7bn_fairness_premium) > (accessed 15 February 2018)

<sup>8</sup> David Cameron, Speech to the Conservative Party Conference, 2010

<sup>9</sup> See, Secretary of State for Work and Pensions, Iain Duncan Smith, HC Deb, 9 March 2011, Welfare Reform Bill, Vol. 524, col 922

David Evenett who said: 'It is a matter of fairness, so that those who are working hard and paying their taxes do not feel that someone else will benefit more by not playing a full part in society'.<sup>10</sup> Similarly, Conservative MP, Tracy Couch asserted, in a defiantly Thatcherite tone, that 'The Government simply must urgently address that appalling legacy [of benefit expenditure] by establishing fairness and an ethos of individual responsibility as cornerstones of our welfare system'.<sup>11</sup> Opening the Third Reading of the Bill, Iain Duncan Smith again emphasised the 'fairness' of the implementation of the benefit cap on the basis that 'Our reforms are fundamentally about fairness: fairness to recipients, but also—and too often forgotten—fairness to the hard-pressed taxpayers who have to pay for those on benefits'.<sup>12</sup>

Such rhetoric speaks to the previous chapter's assertion that the Coalition's social policy agenda signified a 'new dawn for the new right'. As Grimshaw and Rubery, concluded 'whatever the failure of the New Labour agenda, there is nevertheless evidence of consistent and repeated attempts to square the circle of neo-liberalism with a human face'.<sup>13</sup> In contrast, the Coalition in the context of austerity sought to implement wide-reaching cutbacks in public services and to social security benefits which the authors regarded as characteristic of a withdrawal of the state that fits the 'textbook model of a liberal market economy with a residual welfare state, something that has been resisted even in the heyday of Thatcherism where the poll tax represented a step too far towards that model'.<sup>14</sup>

The neoliberal tone underscoring Conservative remarks of the nature outlined above were felt by some Labour members but some in Labour felt the moves towards distinguishing between the hardworking 'us' and the feckless 'them' were misleading. Edinburgh MP, Sheila Gilmore said:

'I see a substantial difference in attitude between the two sides of the House. We have heard the Secretary of State and many speakers talk about the distinction between taxpayers, on the one hand, and claimants, on the other, as though they

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<sup>10</sup> David Evenett (Conservative, Bexleyheath and Crayford) HC Deb, 9 March 2011, Welfare Reform Bill, Vol. 524, col 957

<sup>11</sup> Tracey Crouch (Conservative, Chatham and Aylesford) HC Deb, 9 March 2011, Welfare Reform Bill, Vol. 524, col 961

<sup>12</sup> Secretary of State for Work and Pensions, Iain Duncan Smith, HC Deb, 15 June 2011, Welfare Reform Bill, Vol. 529, col 880

<sup>13</sup> Damian Grimshaw and Jill Rubery, 'The End of the UK's Liberal Collectivist Social Model? The Implications of the Coalition Government's Policy During the Austerity Crisis' (2012) *Cambridge Journal of Economics* 36, pp 105–12, p 107

<sup>14</sup> *Ibid*

were two completely different groups of people. They are not. At various times in our lives we may be either or both. It is unproductive to pit these people against each other'.<sup>15</sup>

Also reflecting on the expanding dividing lines, Labour MP Anne McGuire sought to draw a distinction between the intent behind UC and Beveridge's conception of the welfare state, which was to be based on collectivist principles, inherent in the structure of the social insurance system whereby citizens had an equal stake in a system which they could draw on during periods of need. UC on the other hand was built upon a new foundation – one which prioritises means-tested non-contributory rules which seek to distinguish between the 'deserving' and 'undeserving' thus deconstructing any notions of social cohesion.<sup>16</sup>

This dividing line arguably contributed to the Conservatives' broadening definition of 'social justice' as a concept which places an emphasis on changing individual behaviour in order to conform with an acceptable form of citizenship, rather than on the broader notions of addressing inequality.<sup>17</sup> The fulfilment of the Conservative's version of 'social justice' thus depends on individuals taking responsibility for their own socio-economic prosperity to ensure that they are providing good value to the taxpayer. This can be contrasted significantly with the practices that came to define social justice and indeed the parameters of citizenship in the post-war era. For instance, Whiteside describes how the Atlee government constructed the rationing of essentials as less of an imposition on the consumer, and more as a means of securing 'fair shares for all'. In this way the extension of state control became recognised as a viable method of achieving social justice. In the contemporary welfare state, state control has incrementally manifested itself to create a form of behavioural social control which seeks not to ensure 'fair shares for all' but to ensure that everyone is doing their fair share and is subsequently entitled *only* to the dividends of their own labour and upon compliance with the government's citizenship expectations. This is particularly evident in the government's controversial move of laying retrospective legislation to repeal the 2011 Jobseeker's Allowance (Employment and Enterprise) Regulations in order to 'avoid a potential liability of up to £130 million' and 'to ensure

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<sup>15</sup> Sheila Gilmore (Labour, Edinburgh East) HC Deb, 9 March 2011, Welfare Reform Bill, Vol. 524, col 1016

<sup>16</sup> Anne McGuire (Labour, Stirling) HC Deb, 9 March 2011, Welfare Reform Bill, Vol. 524, col 981. See also Larkin, n. 1 above, p 123

<sup>17</sup> Hills, n. 5 above, p 11

that those sanctioned (under the 2011 regulations) do not receive an unfair advantage over 'compliant' claimants.<sup>18</sup>

An element of the Welfare Reform legislation which caused much consternation on both the opposition benches and for many other stakeholders was the decision to time-limit contributory Employment and Support Allowance (ESA) to twelve months; a further exacting blow for the insurance principle. As Jane Millar asserted 'means-tested benefits are now the mainstream for people of working age while insurance benefits are the residual...Universal Credit is one huge means-tested monster'.<sup>19</sup> The government's decision was motivated by the opportunity to make savings to the social security budget and by the ideological drive to get more claimants back to work – particularly those limited in their capability to work. DWP detailed that they sought to make the conditions for claiming contributory ESA (for those in the assessment and Work-Related Activity groups) closer to the process for claiming contributory JSA in order to send a strong message that 'people on benefit' are expected to take up the support available through Jobcentre Plus or the WP to 'move off benefit into work'.<sup>20</sup> This indicated a further renouncement of the right of those with incapacities to claim entitlement to unconditional state support. Labour's Frank Field (a prominent advocate for the contributory principle) went to the heart of the matter when he pointedly asked the Minister of State for Social Security, Chris Grayling:

'Are the national insurance measures designed to shape and change behaviour, and in what way will they do so, or are they merely just to save money? In other words, is the Minister doing what the Treasury has required him to do on national insurance?'<sup>21</sup>

Field sought to highlight the arbitrary nature of the government's justification that further eroding the insurance principle would have the propensity to influence

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<sup>18</sup> Department for Work and Pensions, Jobseekers (Back to Work Schemes) Bill, Explanatory Notes 9-10, See also, Steven Kennedy, Roderick McInnes and Feargal McGuinness, 'Jobseekers (Back to Work Schemes) Bill 2012-13' (House of Commons Library, 2013) < <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06587#fullreport> > (accessed 11 February 2018)

<sup>19</sup> Jane Millar, 'No 15: Universal Credit, Means-Testing and Social Security' (Social Policy Association, 29 January 2018) < <http://www.social-policy.org.uk/50-for-50/universal-credit-means-testing/> > (accessed 1 March 2018)

<sup>20</sup> Department for Work and Pensions, 'Changes to Contribution-Based Employment and Support Allowance: Welfare Reform Act 2012' (21 May 2012), p 2 < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/181603/esa-changes-q-and-a.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181603/esa-changes-q-and-a.pdf) > (accessed 1 March 2018)

<sup>21</sup> Frank Field (Labour, Birkenhead) HC Deb, 1 Feb 2012, Welfare Reform Bill (consideration of Lords amendments), Vol. 524, col 832



behaviour. Indeed, he followed up by asserting that there was no reason why ‘seeking work’ conditions could not be attached to a benefit, while retaining the contributory principle.<sup>22</sup> Ultimately, like so many other political decisions in relation to the social security system, the key overriding motivation is the rationalisation of public expenditure. As well as time-limiting provision of ESA (for those in the Work Related Activity Group or assessment phase), the government also removed the special contribution conditions that allowed some young people to qualify for contribution-based ESA without paying National Insurance contributions on the basis that it was ‘unfair’ to other groups.<sup>23</sup> Parallels can be drawn between this political move and the decision in 1988 to remove Income Support for 16 and 17 year olds. As asserted in Chapter 3, the Conservatives identified young people as ‘an easy target’, less likely to mobilise and challenge the implications of such a decision.<sup>24</sup>

The alleged propensity of the legislation to combat fraud was closely tied to providing a greater sense of fairness to the ‘hard working taxpayer’ and thus it was also a strong thread running through the parliamentary proceedings. And it was a point where Iain Duncan-Smith sought to reach consensus with members of the opposition,<sup>25</sup> which was rather straight forward considering New Labour’s relatively recent social security legislation, in order to ensure more severe penalties and increased surveillance in relation to fraud.<sup>26</sup> Indeed, Liam Byrne explicitly remarked that ‘we certainly welcome tougher and tougher measures on fraud’.<sup>27</sup> The instruments to deal with fraud were contained in Part 5 of the WRA 2012 and included provision for the introduction of a Single Fraud Investigation Unit<sup>28</sup>, the introduction of a minimum financial penalty in all cases of false claims for benefit (including situations where incidents were detected before payment was made and an overpayment did not occur)<sup>29</sup> and to implement longer benefit disqualification periods following the discovery of an act of fraud.<sup>30</sup> During the debate stages, there were numerous

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<sup>22</sup> Ibid

<sup>23</sup> Department for Work and Pensions, n. 20 above, p 3

<sup>24</sup> See Chapter 3

<sup>25</sup> Secretary of State for Work and Pensions, Iain Duncan Smith, HC Deb, 9 March 2011, Welfare Reform Bill, Vol. 524, col 933

<sup>26</sup> Changes were made under the WRA 2009, See Ch 5, p 53

<sup>27</sup> Liam Byrne (Labour, Birmingham Hodge Hill) HC Deb, 9 March 2011, Welfare Reform Bill, Vol. 524, col 938

<sup>28</sup> Section 112 inserts s.116ZA into the SSAA 1992

<sup>29</sup> Section 113 amends s.115A of the SSAA 1992

<sup>30</sup> Section 117 amends s.6A of the Social Security Fraud Act 2001 (SSFA) for the purposes of ss.6B and 7. Section 118 amends the SSFA 2001 to change the benefit payment disqualification period for the purposes of s.6B. Section 119 amends s.7 of the SSFA 2001 to increase the periods of benefit payment disqualification following repeated benefit fraud. Section 120

references to the pervasive nature of, and damage inflicted by fraud with specific reference to its cost.<sup>31</sup> Notably during an early Public Bill Committee meeting (before the scrutiny phase) , Conservative MP Priti Patel sought to explicitly link administrative error (on the part of DWP) with fraud perpetrated by the claimant – arguably providing an important insight into the Conservative’s developing ‘philosophical approach’ of who ought to be responsible for the cost of fraud.<sup>32</sup> It follows that section 105 of the WRA 2012 provides that ‘The Secretary of State may recover any amount of the following (Universal Credit, Employment and Support Allowance and Jobseekers Allowance) paid in excess of entitlement’. This is a move that Labour may not have anticipated. Labour MP Karen Buck identified that ‘the clause will allow recovery in all cases, regardless of culpability, which will unfairly alter the balance of responsibility in favour of the Department.’<sup>33</sup> The decision provided the Secretary of State with power to recover *any* overpayment, even in cases where the error was made by a DWP agent.

In response, Chris Grayling asserted that the government did not want to create ‘a legal strait jacket’ by prescribing circumstances whereby there should be a non-recovery of an overpayment. He further asserted that there must be ‘sufficient flexibility in the system to apply discretion and common sense to individual cases’.<sup>34</sup> This reasoning points to the presence of two legislative trends – the increasing reliance on discretionary decision making and the provision of more administrative power in the form of regulatory power for the Secretary of State. In relation to the former trend, Buck asserted that while discretion was important ‘guidance should be

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inserts provisions relating to the loss of tax credit into the Tax Credits Act 2002 (TCA), to allow a more uniform imposition of penalties following convictions for benefits and tax credits fraud. Section 121 amends the SSFA 2001 and the TCA 2002 to remove all references in these Acts to the consequences of accepting a caution, as the DWP will no longer offer cautions to perpetrators of benefit fraud

<sup>31</sup> See, Tracey Crouch (Conservative, Chatham and Aylesford) HC Deb, 9 March 2011, Welfare Reform Bill, Vol. 524, col 961; David Evennett (Conservative, Bexleyheath and Crayford) HC Deb, 9 March 2011, Welfare Reform Bill, Vol. 524 Col. 957; Chris Skidmore (Conservative, Kingswood) HC Deb, 9 March 2011, Welfare Reform Bill, Vol. 524, col 963 – all of these members cited that £1.5 billion was lost annually to fraud

<sup>32</sup> Priti Patel (Conservative, Witham) 22 March 2011, Public Bills Committee (Bill 154), col 65. Chris Grayling also explained that the government sought to reduce all overpayments. See, Minister of State for Work and Pensions, Chris Grayling, 19 May 2011, Public Bills Committee (Bill 154), col 1019–1031; See also Karen Buck (Labour, Westminster North) 19 May 2011, Public Bills Committee (Bill 154), col 1011. Labour sought to table a number of ‘scoping amendments’ in relation to the government’s approach to fraud to understand it’s ‘philosophical approach’

<sup>33</sup> Karen Buck (Labour, Westminster North) 19 May 2011, Public Bills Committee (Bill 154), col 1016

<sup>34</sup> See, Minister of State for Work and Pensions, Chris Grayling, 19 May 2011, Public Bills Committee (Bill 154), col 1019-1020

sufficiently robust to err in favour of the vulnerable and, by definition, very low-income claimants, if they are not at fault and if there is official error'.<sup>35</sup> Discretion was also a central principle in the application of the new £50 civil penalty for those claimants found to be negligent in informing the government of a change in circumstance and those who knowingly commit fraudulent behaviour. The decision to apply the penalty lay with the frontline adviser.<sup>36</sup> The new system effectively heightened the onus on the claimant to identify the occurrence of an overpayment on occasions where it was not picked up by DWP agents. Moreover, it provided that a claimant who was privy to an administrative error was responsible for identifying a system failure and asserting their reasoning for a 'write-off' to an adviser. Additional onus was also passed onto individuals who did not inform DWP about a change of circumstance, perhaps due to a mental or physical vulnerability, or due to a genuine oversight. In both circumstances, the claimant was now required to make representation to a DWP decision maker who, in law, had complete discretion to decide whether recovery should continue, or indeed whether a penalty should be applied. The new fraud measures point to the extended role of conditionality in controlling not just fraud but error over which the claimant may have little control.

The absence of detail was a further significant theme throughout the early Bill proceedings. At the second reading, Iain Duncan Smith assured MPs that more detail would be provided for the Committee, which reflected a trend of publishing a 'skeleton' legislative framework which was subsequently padded with regulations.<sup>37</sup> Liam Byrne remarked that this process suggested that the 'government's mind has been set in stone' due to the limited scope for parliament to digest and scrutinise the detail.<sup>38</sup> Labour's Dame Anne Begg commented that in almost all the briefing papers she had received, the idea of a universal credit has been accepted in principle. However, she stated 'that the devil is in the detail'. That is where the problem lies for Labour Members, who are well aware that we do not yet have much of the detail'.<sup>39</sup> Anne McGuire asserted that 'the Bill is skeletal in the extreme'. She further

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<sup>35</sup> Karen Buck (Labour, Westminster North) 19 May 2011, Public Bills Committee (Bill 154), col 1017

<sup>36</sup> Minister of State for Work and Pensions, Chris Grayling, 19 May 2011, Public Bills Committee (Bill 154), col 1031

<sup>37</sup> Secretary of State for Work and Pensions, Iain Duncan Smith, HC Deb, 9 March 2011, Welfare Reform Bill, Vol. 524, col 934.

<sup>38</sup> Liam Byrne (Labour, Birmingham Hodge Hill) HC Deb, 9 March 2011, Welfare Reform Bill, Vol. 524, col 934

<sup>39</sup> Dame Anne Begg (Labour, Aberdeen South) HC Deb, 9 March 2011, Welfare Reform Bill, Vol. 524, col 951

commented that the clauses were drafted with a 'broad brush' providing an account of 'intent' rather than detailing what would happen, and pointed to the significant use of the phrase the 'regulations *may* provide'.<sup>40</sup>

While supporting the central 'principle of simplifying the benefits system and good work incentives' Labour tabled an (unsuccessful) amendment which outlined their initial concerns on the parameters of the Bill - the absence of detail was a recurring theme. More specifically they referred to the lack of information on the level of childcare support to be provided for parents following abolition of the tax credit system; the lack of detail on the incorporation of Council Tax in the UC system; the lack of clarity on the future of free school meals and security for the beneficiaries of the social fund. The amendment also included concerns in relation to the limits on contributory Employment and Support Allowance; the preclusion of those with savings from accessing UC; the power provided to Secretary of State in relation to levels of housing benefit and the potential disincentives for the self-employed.<sup>41</sup> There was also a reference to the absence of an extended consultation period and pre-legislative scrutiny of the Bill.<sup>42</sup> Reference to the skeletal nature of the Bill continued into the Public Bill Committee stages of the process. At the fourth sitting of the Committee, which saw both Iain Duncan Smith and Chris Grayling appear as witnesses, Labour members pushed hard for guarantees that more information would be forthcoming. Chris Grayling (Minister of State for Work and Pensions) very clearly articulated the government's position on such:

'We will set out intentions right the way through, but this is still fundamentally an enabling Bill and we are discussing measures that create the framework and not the detail itself'.<sup>43</sup>

Grayling was effectively pointing to the scope for broad government powers in relation to the creation of secondary legislation to enact the legal parameters of the

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<sup>40</sup> Anne McGuire (Labour, Stirling) HC Deb, 9 March 2011, Welfare Reform Bill, Vol. 524, col 980

<sup>41</sup> See, Liam Byrne (Labour, Birmingham Hodge Hill) HC Deb, 9 March 2011, Welfare Reform Bill, Vol. 524, col 935

<sup>42</sup> Liam Byrne (Labour, Birmingham Hodge Hill) HC Deb, 9 March 2011, Welfare Reform Bill, Vol. 524, col 935

<sup>43</sup> The Minister of State for Work and Pensions, Chris Grayling, 24 March 2011, Public Bills Committee (Bill 154), col 161-162

new system. Labour's Stephen Timms objected to Grayling's explanation on the basis that insufficient information undermines the scrutiny role of the Committee.<sup>44</sup>

At the beginning of the fifth sitting which marked the beginning of the Committee's Clause by Clause scrutiny of the Bill, Timms again sought to emphasise the ubiquity of the 'regulations that the Bill gives the power to make', drawing the Chair's attention to the fact that, for instance, the regulations on Section 12 would only be available at the end of the deliberations, meaning that the Committee would have to proceed with their debate on child care without the benefit of the detail. He also drew the Chair's attention to the fact that the sections 1 and 2 regulations relevant to the fifth sitting agenda were incomplete.<sup>45</sup> In response, the Chair outlined that he was not able to compel the government to provide information. This was followed by the Minister of State for Work and Pensions, Chris Grayling explicitly pointing to the precedent set by New Labour in relation to 'skeleton' Bills, as detailed in Part 3 of this thesis. He went on to defend the lack of detail on the same basis as his parliamentary colleagues, now in opposition, had previously done – explaining that the 'tradition' for a large amount of detail in primary legislation created circumstances where changes could not be made except through primary legislation 'which was unnecessarily unhelpful and inflexible'.<sup>46</sup> Thus he continued, sections 1 and 2 of the legislation 'will create a bookcase on which we can lodge the books of the detail of the future benefit system' emphasising that 'the debate is not about the detailed content of every single book' – rather, the Bill intended to set out the key features of the UC and how it fits with the rest of the system. The details would be 'left for social security regulation on a year-by-year basis'.<sup>47</sup> The lack of draft regulations was also a matter of concern for the Human Rights Joint Committee, which asserted that the decision made by government not to publish the draft regulations alongside the Bill may result in the implementation of the proposals in such away as the process would not be compatible with convention rights.<sup>48</sup> In relation to the WRA 2012, the details which dictate the rules for UC can be found in the Universal Credit, Personal Independence Payment,

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<sup>44</sup> Stephen Timms (Labour, East Ham) 24 March 2011, Public Bills Committee (Bill 154), col 162

<sup>45</sup> Stephen Timms (Labour, East Ham) 29 March 2011, Public Bills Committee (Bill 154), col 169

<sup>46</sup> The Minister of State for Work and Pensions, Chris Grayling, 29 March 2011, Public Bills Committee (Bill 154), col 170

<sup>47</sup> The Minister of State for Work and Pensions, Chris Grayling, 29 March 2011, Public Bills Committee (Bill 154), col 171

<sup>48</sup> Human Rights Joint Committee, *Twenty-First Report, Legislative Scrutiny: Welfare Reform Bill* (HMSO, 2011), para 1.16

Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013.<sup>49</sup>

***Consensus and Discord: The Opposition's Position on the Bill***

'Frankly, we are being asked to buy a pig in a poke. We are told, "If you don't accept it, don't vote for it or don't agree with it, you are throwing over the whole issue of welfare reform." I do not accept that. Nor do I accept the Minister's view that he was given that sort of response by the previous Government and that there should be simply a framework—an empty bookcase, as he was wont to say in Committee—as there was before. It seems to me that if he thought it was wrong then—and it sounds as if he did—it may still be wrong now. As I said in Committee, people should not be asked to buy that empty bookcase without knowing whether it contains classics or cheap comics'.<sup>50</sup>

*Sheila Gilmore (Labour), Report Stage, 1<sup>st</sup> Sitting, 13 June 2011*

Upon the first reading of the Welfare Reform Bill, there was a palpable sense of unanimity in the Commons. Despite the omission of important details, Labour were prepared to give the Coalition government the benefit of the doubt that they would deliver a well-defined system that would serve all citizens effectively. There was consensus on the principle of UC, on the minimisation of complexity, on the promise of greater work incentives and on tougher conditionality for those who did not adequately respect the obligations attached to the right to claim social security.<sup>51</sup> As discussed throughout the latter half of the thesis, this measure of agreement on the aims of social security increased to the point that it was relatively difficult to decipher the ideological nuances between both sides. This was particularly evident during the parliamentary debates on the Welfare Reform Act 2009.<sup>52</sup> For both Parties, the primacy of achieving high levels of labour market attachment was deemed to be a crucial watermark in the success of the contemporary social security system.

However, by the end of the 2011 Public Bill Committee Stages, there was a slight change of mood. As detailed to some extent above, Labour was unable to extract the crucial legislative details that they sought. The government officials - in the main the

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<sup>49</sup> SI 2013/380. See also WRA 2012, ss. 3 and 4

<sup>50</sup> Sheila Gilmore (Labour, Edinburgh East) HC Deb, 13 June 2011, Welfare Reform Bill, Vol. 529, col 546

<sup>51</sup> Liam Byrne (Labour, Birmingham, Hodge Hill) HC Deb, 13 June 2011, Welfare Reform Bill, Vol. 529, col 885

<sup>52</sup> See Chapter 8

Minister of State for Work and Pensions, Chris Grayling and the Parliamentary Under Secretary for Work and Pensions, Maria Miller - provided an outline of 'broad intent' thus refusing to furnish Grayling's metaphorical bookcase. There was frequent reference by Grayling, Miller and Conservative members to New Labour's comparable approach during the previous administration, which sought to provide 'flexibility' to the Secretary of State and increased discretion to front-line advisers in pursuit of promoting activation in the Labour market. Accordingly, Labour found itself in a weak negotiating position, due to its own entrenchment of the trend of consigning detail to secondary legislation in the form of regulations during its time in government. Labour's bind in this regard was not helped by the Liberal Democrats' seemingly abiding loyalty to their Conservative partners which resulted in Labour's failure to get the support required to make any proposed amendments to the Bill at final stage.<sup>53</sup> This arguably motivated Labour's last ditch appeal to their opponent's liberal roots during the third reading:

'The Liberal Democrats...should not betray the principles of Lloyd George, Beveridge and Keynes for the political convenience of the hour. They should show us, show people and show their grass roots that like us they have heard the voices of the vulnerable, who are calling on them to act—and to act tonight'.<sup>54</sup>

Due the inability of the opposition to gain any concessions there was a detectable difference in Labour's tone by the time the Bill had reached third reading stage, whereby rather than an overt emphasis on obligations there was a reversion to underlining the importance of providing 'statutory rights', particularly in relation to vulnerable populations.<sup>55</sup> Liam Byrne commented that the bill was 'so cold and so hard that it ends a tradition of compassion in the welfare state that we should conserve and not consign to history';<sup>56</sup> Labour's Tom Clarke asserted that 'these welfare reforms are not meant to take us forward, they are not part of a progressive society...They are taking us back to the '20s and the '30s. The expression 'Out of sight,

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<sup>53</sup> Liam Byrne (Labour, Birmingham, Hodge Hill) HC Deb, 13 June 2011, Welfare Reform Bill, Vol. 529, col 885

<sup>54</sup> Liam Byrne (Labour, Birmingham, Hodge Hill) HC Deb, 13 June 2011, Welfare Reform Bill, Vol. 529, col 886

<sup>55</sup> See John McDonnell (Labour, Hayes and Harlington) HC Deb, 15 June 2011, Welfare Reform Bill, Vol. 529, col 800; Karen Buck (Westminster North) HC Deb, 15 June 2011, Welfare Reform Bill, Vol. 529, col 802

<sup>56</sup> Liam Byrne (Labour, Birmingham, Hodge Hill) HC Deb, 13 June 2011, Welfare Reform Bill, Vol. 529, col 885

out of mind' came into my head again and again during today's debate'.<sup>57</sup> In response to the opposition's perhaps unexpected belligerency, Iain Duncan Smith hardened his rhetoric, highlighting his Thatcherite roots – he underlined the deficit reduction plan and Labour's alleged 'economic mismanagement'; it was in this, a context of austerity that he asserted that the reforms are based on fairness to the taxpayer. 'Across a range of areas, we have made changes designed to ensure that people on benefits cannot live a lifestyle that is unattainable to those who are in work'.<sup>58</sup> Similarly, when the Bill made its way to the Lords, The Parliamentary Under-Secretary of State, Department for Work and Pensions, Lord Freud, focused on the Bill's propensity to 'end benefit dependency and redress the balance by restoring fairness and affordability'.<sup>59</sup>

In the Lords, there was a recognition of the conscious presence of Treasury influence in the shaping of the legislation. Lord Kirkwood said, 'The Treasury's influence is malign, and while I myself am in favour of supporting the architecture I will do everything I can within the Committee structure to mitigate some of these cuts'<sup>60</sup>, and Lord Whitty asserted that 'simplification costs money, at least in the short term. Yet the Ministry is attempting to do this at the same time as delivering to the Treasury significant savings in order to offset the deficit'.<sup>61</sup> The Lords subsequently sought to bring forward a number of amendments to allay the impact of the Treasury cuts, including challenging the government's proposals to limit contributory ESA to 12 months, and the benefit cap – which were both defeated when they came back to the Commons on the basis that they 'impinge on the financial privilege of the House'.<sup>62</sup> The Labour opposition's failure to achieve any amendments points to the implications its own welfare reform strategy while in government. It also speaks to the impetus granted to the Coalition's austerity agenda and the power of its rhetorical concern for the taxpayer.

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<sup>57</sup> Tom Clarke (Labour, Coatbridge, Chryston and Bellshill) HC Deb, 13 June 2011, Welfare Reform Bill, Vol. 529, col 862

<sup>58</sup> Secretary of State for Work and Pensions, Iain Duncan Smith, HC Deb, 13 June 2011, Welfare Reform Bill, Vol. 529, col 862

<sup>59</sup> Parliamentary Under-Secretary of State, Department for Work and Pensions, Lord Freud, HL Deb, 13 September 2011, Vol. 730, col 628

<sup>60</sup> Lord Kirkwood of Kirkhope (Liberal Democrat), HL Deb, 13 September 2011, Welfare Reform Bill, Vol. 730, col 628

<sup>61</sup> Lord Whitty (Labour), HL Deb, 13 September 2011, Welfare Reform Bill, Vol. 730, col 688

<sup>62</sup> The Minister of State for Work and Pensions, Chris Grayling, HC Deb, 1 Feb 2012, Welfare Reform Bill, Vol. 539, col 826



That is not to say that Labour's moments of opposition during the parliamentary process pointed to a change of heart on its position on the unemployed – to do so would risk losing potential voters whose attitude to the unemployed had hardened. As Timmins pointed out, Liam Byrne, the Shadow Secretary for Work and Pensions delivered a speech at the 2011 Labour Party Conference (which took place after the parliamentary scrutiny of the WRB) which was 'intended to shock the faithful' in which he asserted that 'many people on the doorstep at the last election felt that too often we were for shirkers not workers' and called for a re-introduction of the 'something for something bargain'.<sup>63</sup> In the same speech, Byrne briefly criticised Universal Credit, focusing on its impact for working families rather than on its increased conditionality.<sup>64</sup> Byrne's channelling of the rhetorical power of neo-Conservative language that worked so well for Prime Minister David Cameron in the run up to the Election, reflects the perceived political need to hit the right notes for the public to hear. The reality is, of course, that the intricacies of parliamentary debates, including the emergent legislative trends detailed in this thesis, and the consequential negative outcome of such trends, are not widely accessible or understood by the wider British public. The drivers of social security reform that the WRA 2012 symbolises are not the inherent concepts of citizens' rights, but the desire by political elites to generate media friendly soundbites outside the confines of Westminster's chambers and committee rooms.

### ***The Welfare Reform Act 2012: Universal Credit and the Unemployed***

Section 1 and Section 2 of the legislation identify those claimants who qualify for UC – either an individual person, or to a couple jointly.<sup>65</sup> Section 1 also sets out the method of calculation for UC, with reference to the provision of a standard allowance, and supplementary allowances recognising responsibility for children and young persons, for housing and for particular needs or circumstances, including child care. As denoted by Professor Sainsbury at Committee stage, the new system would not be without its complexities and this is certainly evident in the calculation process contained in Section 8 (1) of the legislation which determines that the amount of an

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<sup>63</sup> Nicholas Timmins, *The Five Giants: A Biography of the Welfare State* (William Collins, 2017), p 696; Liam Byrne (Shadow Secretary of State for Work and Pensions) Speech to the Labour Party Conference, (The Telegraph, London, 26 February 2011) < <https://www.telegraph.co.uk/news/politics/labour/8790389/Labour-Party-Conference-Liam-Byrnes-speech-in-full.html> > (accessed 24 March 2018)

<sup>64</sup> Ibid

<sup>65</sup> WRA 2012, ss 1(2)(a) and (b). See also s 2

award of UC consists of the ‘maximum amount’ minus ‘the amounts to be deducted’.<sup>66</sup> This sum will consist of all the claimant’s or the joint claimants’ earned and unearned income, and 65 per cent of the amount by which the claimant’s or the joint claimant’s income exceeds the ‘work allowance’, which is equivalent to the ‘earnings disregard’ set out in previous income-based benefits.<sup>67</sup>

***The ‘Work Allowance’: An Incentive for the Unemployed to Work?***

The establishment of a ‘work allowance’ was seen by some as the most innovative aspect of the calculation. It sets out deductions to be made from the award of UC as the earnings of the individual or couple increase and was conceived to provide greater incentives for individuals and families to find and sustain paid employment. The ‘work allowance’ provides for higher disregards than other income-based benefits such as JSA and Income Support and allows claimants to retain more of their earned income before their UC award is reduced. If the claimant’s earned income during the assessment period does not exceed the work allowance level, then no reduction is made from the maximum amount, and a higher work allowance is applicable if the final award does not include the housing element.<sup>68</sup> When the claimant’s earnings exceed the maximum, the reductions will be at 65 per cent of the increase of their income rather than 100 per cent as is the case for working claimants on JSA. Larkin argues that this reform contributes to ‘removing the longstanding seemingly intractable financial disincentives for citizens from various types of family background to engage with the labour market’.<sup>69</sup> Grayling asserted that the 65 per cent taper would ‘make work pay and be seen to pay’ and maintains the principle that it is advantageous to take on a few extra hours of work, as it will always be financially better than not working.<sup>70</sup> This incentive to work was bolstered further by the design of UC, which integrated in and out-of-work support, smoothing the transition from benefits to work for claimants. This is in contrast to the current system whereby claimants are required to sign off one benefit and claim another depending on their employment status. The creation of a more adaptable system reduced the impediments to taking up any type of job as the risk of claimants signing off benefit, and then finding themselves without an income should their job end, or should the

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<sup>66</sup> See Professor Roy Sainsbury, 24 March 2011, Public Bills Committee (Bill 154), col 7–8

<sup>67</sup> See WRA 2012, s 8(3) and UC regs, reg 22

<sup>68</sup> See John Mesher, Richard Poynter, Nick Wikeley and Penny Wood, *Universal Credit: Volume V Social Security Legislation 2013/14* (Sweet and Maxwell, 2014), p 10

<sup>69</sup> See Larkin, n. 1 above, p 125

<sup>70</sup> The Minister of State for Work and Pensions, Chris Grayling, 29 March 2011, Public Bills Committee (Bill 154), col 249–251

opportunity fall through, is abated.<sup>71</sup> The IFS established that the reforms strengthened average incentives for individuals to be in work – with particular benefits bestowed upon single-earner couples with children.<sup>72</sup> However, certain developments have undermined the introduction of the taper rate for other groups – particularly second earners and lone parents – which in turn damaged UC’s aim of providing an incentive for joining the labour market.

Importantly, the government opted for a higher taper rate than proposed by the CSJ’s Economic Dependency Working Group, who suggested a standard withdrawal rate of 55 per cent, arguing that it ‘represents the best compromise between improving incentives and containing costs’.<sup>73</sup> Mike Brewer of the Institute of Fiscal Studies and Professor Paul Gregg, who provided evidence to the Public Bills Committee, concluded that a 60 per cent taper would represent a ‘neutral’ rate,<sup>74</sup> and Labour representatives on the Committee subsequently sought to amend the legislation on that basis. Members including Stephen Timms and Sheila Gilmore challenged the Minister of State, Chris Grayling on the limited advantages of the 65 per cent rate, particularly for second earners and for the self-employed.<sup>75</sup> In response, Grayling resorted to the government’s stock position which related to Britain’s ‘very precarious financial position’. He said that; such in such circumstances ‘real choices have to be made about the level of support that the taxpayer can be asked to fund’.<sup>76</sup> This exchange presents a clear cut example of how wider political aims, in this case the imperative to reduce the fiscal deficit, can influence the development of social security legislation and result in less favourable outcomes for citizens – in this case an effective taper rate.

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<sup>71</sup> Lindsay Judge, *Will Universal Credit Work?* (Written for the TUC by the Child Poverty Action Group) (TUC, April 2013), p 2

<sup>72</sup> Stuart Adam and James Browne, *Do the UK Government’s Welfare Reforms Make Work Pay?* IFS Working Paper W13/26 (Institute for Fiscal Studies, 2013), p 17 < <https://www.ifs.org.uk/wps/wp1326.pdf> > (accessed 16 March 2018)

<sup>73</sup> The Centre for Social Justice, *Dynamic Benefits: Towards Welfare that Works* (September, 2009), p 26 < <http://www.centreforsocialjustice.org.uk/core/wp-content/uploads/2016/08/CSJ-dynamic-benefits.pdf> > (accessed 25 February 2018)

<sup>74</sup> Mike Brewer, 22 March 2010, Public Bills Committee (Bill 154), col 13. See also, Professor Paul Gregg, 24 March 2010, Public Bills Committee (Bill 154), col 93

<sup>75</sup> Stephen Timms (Labour, East Ham), 29 March 2011, Public Bills Committee (Bill 154), col 240–246; Sheila Gilmore (Labour, Edinburgh East), 29 March 2011, Public Bills Committee (Bill 154), col 248

<sup>76</sup> Minister of State for Work and Pensions, Chris Grayling, 29 March 2011, Public Bills Committee (Bill 154), col 250–251

The Resolution Foundation's analysis underlines a number of factors that diminish the incentive value of the taper rate.<sup>77</sup> Firstly, despite Labour pressure to incorporate Council Tax Support under the UC umbrella, it was precluded in the legislation and instead devolved to local authority level, creating complexity and impinging on incentives, as each Council has the power to run its own scheme. The additional council tax support taper can result in households keeping just 28 pence in the pound rather than the 35 pence set out under UC. Second, UC was applied to net rather than gross earnings as in tax credits, which was relatively less favourable to those who payed less tax, for example second earners in the household. Households were allocated a single work allowance. If this was exceeded by the first earner, then the second earner would be subject to the 65 per cent taper rate from her (most second earners were female) first hour of work. This contrasts with the operation of the system of Working Tax Credits (WTC), where second earners who did not earn enough to make National Insurance payments only faced a 41 per cent taper rate. Keeping only around half of earnings when claiming UC weakens the incentive to work for second earners.<sup>78</sup> Indeed, the Joseph Rowntree Foundation found that in many cases, UC provided little or no incentive for additional work, particularly for second earners and lone parents on minimum wage. For this group, working 30 hours or more per week reduces disposable income compared to working fewer hours, due to the consequential increase in childcare bills, reduced UC income and surpassing the income tax threshold.<sup>79</sup> Similarly, the IFS determined the existence of weakened incentives for potential dual-earner couples.<sup>80</sup>

The decision not to introduce a work allowance for a second earner (due to budget constraints) was a deliberate attempt to prioritise reducing household worklessness, by ensuring at least one person was in work, rather than boosting overall employment.<sup>81</sup> However, this approach failed to acknowledge the potential gender implications, such as recognising the potential long term impact on the income profile

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<sup>77</sup> David Finch, Adam Corlett and Vidhya Alakeson, *Universal Credit: A Policy Under Review* (Resolution Foundation, 2014), p 12 <  
<http://www.resolutionfoundation.org/app/uploads/2014/09/Universal-Credit-A-policy-under-review1.pdf>> (accessed 10 February 2018)

<sup>78</sup> Ibid

<sup>79</sup> Donald Hirsch and Yvette Hartfree, *Does Universal Credit enable Households to Reach a Minimum Income Standard?* (JRF, 2013), p 21-22 <  
<https://www.jrf.org.uk/sites/default/files/jrf/migrated/files/universal-credit-income-standards-full.pdf>> (accessed 26 March 2018)

<sup>80</sup> Adam and Browne, n. 72 above, p 2 and p 17

<sup>81</sup> Finch, Corlett and Alakeson n. 77 above, p 18

and gender roles of those dissuaded from entering into the Labour market.<sup>82</sup> Furthermore, as argued by Bennett, ‘choices exercised by couples *together* are not the same as individual choices, and may not have an equal impact on these individuals’ opportunities and outcomes’.<sup>83</sup> Indeed, Lister has described this move as shifting the ‘architecture of choice’ against dual earner families.<sup>84</sup> It is also notable that the new arrangements applied to couples with and without caring responsibilities. Although New Labour’s various tax credit schemes faced similar criticisms, the changes established by UC will be more intense due to the steeper withdrawal rate which will also be more immediate in its impact. Furthermore, stricter conditionality measures will be applied to both claimants in the couple, including potential ‘second earners’, which may also affect the incentive to seek work.<sup>85</sup>

The net taper also meant that any tax cuts introduced were not fully passed onto UC as they would be under the tax credit system. Furthermore, the tax credit system established ‘hours rules’ based on the household type which sets out how many hours have to be worked to qualify for support. UC has abolished these rules and has replaced them with a system of in-work conditionality, which, as detailed in the previous chapter, entails earner claimants facing government intervention, including the possibility of sanctions, if they are unable to earn less than the equivalent of the full-time minimum wage. The introduction of the latter aspect of the new system will be discussed in more detail below.<sup>86</sup>

The Resolution Foundation’s most recent analysis concludes that the ‘laudable’ aims of simplifying working age benefits and strengthening incentives to work have been significantly eroded since the introduction of the WRA 2012. This chapter does not allow for an extended analysis of the impact of the cuts, the majority made following the election of a majority Conservative government in 2015. In brief, the steady accumulation of cuts has meant that the system now ‘does little to improve financial incentives’.<sup>87</sup> The end result is a system that was £3bn a year less generous than the

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<sup>82</sup> Fran Bennett, ‘Universal Credit: Overview and Gender Implications’ in Majella Kilkey, Gaby Ramia and Kevin Farnsworth, *Social Policy in Review 24: Analysis and Debate in Social Policy, 2012* (Policy Press, 2012), p 23

<sup>83</sup> Finch, Corlett and Alakeson n. 77 above, p 22

<sup>84</sup> Ruth Lister, Oral evidence to the House of Commons Work and Pensions Select Committee Inquiry into Universal Credit (2011)

<sup>85</sup> Bennett, n. 82 above, p 22

<sup>86</sup> Finch, Corlett and Alakeson n. 77 above, p 12

<sup>87</sup> Mike Brewer, David Finch & Daniel Tomlinson, *Universal Remedy: Ensuring Universal Credit is Fit for Purpose* (Resolution Foundation, October 2017), p 9 <  
<http://www.resolutionfoundation.org/app/uploads/2017/10/Universal-Credit.pdf> >  
 (accessed 23 March 2018)

system it replaced. This constitutes a ‘major drag’ on the living standards of low and middle income earning families over the next few years. Despite the government recently announcing a nominal reduction to the taper (63 per cent) it is estimated that 3.2 million working families are expected to be worse off, with an average loss of £48 per week – while 600,000 most by couple-parent families will lose entitlement altogether. 2.2 million working families are expected to gain by an average of £41 per week, while lone parent households are estimated to lose £26 per week on average.<sup>88</sup>

***In-Work Conditionality: The Government’s Call for Full-time Employment***

The new and untested concept of ‘in-work conditionality’ is enshrined in section 18 (2) of the WRA 2012, and determines that the ‘work availability requirement’ encompasses being ‘able and willing immediately to take up paid work (or more paid work or better-paid work)’.<sup>89</sup> As asserted in the previous chapters, this move serves to expand contemporary social citizenship obligations to the ‘undeserving’ under-employed, as well as the unemployed.<sup>90</sup> Minister of State, Chris Grayling told the Public Bills Committee that the kind of situation by which the government envisaged the effectiveness of in-work conditionality was in the case of some someone with a disability (e.g. an individual who has been in an accident or who suffers from a chronic condition) making a ‘first return to the workplace’. A ‘step-by-step process’, whereby when the claimant first gets back into the workplace, understands what he or she can do, and comes to the realisation that they can do more. Grayling argued that ‘the Bill is about nudging them along to do more’.<sup>91</sup> Although, Labour’s Stephen Timms expressed ‘alarm’ at the government’s in-work conditionality proposals – he did not press his amendment to leave out the phrase ‘or more paid work or better paid work’ to a vote, and subsequent debate on the measure was short-lived.<sup>92</sup> Indeed, scrutiny of this measure throughout the Bill’s passage in the Commons was noticeably absent. This is surprising considering the scope of the in-work intervention to insert new disciplinary measures (including sanctions) which seek to more quickly ‘nudge’ the claimant towards complete financial independence from the state – incorporating punishment (in the form of a sanctions) for those under-employed individuals who do not satisfy the government’s subjective in-work progression expectations.

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<sup>88</sup> Ibid, pp 8–10

<sup>89</sup> S 18 (2) WRA 2012

<sup>90</sup> See chapter 6

<sup>91</sup> The Minister of State for Work and Pensions, Chris Grayling, 5 April 2011, Public Bills Committee (Bill 154), col 421

<sup>92</sup> See, Stephen Timms, (Labour, East Ham), 5 April 2011, Public Bills Committee (Bill 154), col 420–423

In the Upper House, Lord Luton sought to introduce the same amendment as his Labour colleague, Stephen Timms. He framed it as a ‘probing amendment’ which sought to extract more information on in-work conditionality.<sup>93</sup> In the process of expanding his explanation, Lord Luton, in one sentence encapsulated the legislative trends which increasingly seemed to be on the way to becoming legislative norms in the development of the WRA 2012:

‘The vagueness around the provisions, the extent to which providers or Jobcentre Plus staff will be making the determination, and the sources of capacity and training is a real worry. Affirmative regulations are all very well, but we know they provide limited parliamentary oversight of what is a significant change’.<sup>94</sup>

Baroness Drake sought to emphasise the ‘significant discretion’ to be ushered in by the WRA as particularly ‘novel’ for three main reasons – the fact that it has the propensity to ‘impact on a much greater volume of people’; due to its perceived ability to bear an influence on ‘existing in-work relationships’; and the requirement that Jobcentre Plus agents and any contracted providers ‘engage with large numbers of companies with whom they’ve had no previous engagement’.<sup>95</sup> Underlining the risks associated with the exercise of discretion in this context, Baroness Drake asserted that the members of Parliament required confidence from the government that discretion can be applied ‘consistently, fairly and proportionately’.<sup>96</sup> Focusing on Baroness Drake’s latter point, Baroness Lister pointed to a government commissioned research report which claimed that part-time workers were ‘surprised that the UC proposition addresses them as they tended to perceive that they were already doing their bit and felt a strong sense of entitlement to tax credits’.<sup>97</sup> She

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<sup>93</sup> Lord McKenzie of Luton, 26 October 2011, Grand Committee, Welfare Reform Bill (Bill 154), Amendment 51CDZA, col GC285

<sup>94</sup> Lord McKenzie of Luton, 26 October 2011, Grand Committee, Welfare Reform Bill (Bill 154), col GC286

<sup>95</sup> Baroness Drake (Labour), 26 October 2011, Grand Committee, Welfare Reform Bill (Bill 154), col GC290

<sup>96</sup> Baroness Drake (Labour), 26 October 2011, Grand Committee, Welfare Reform Bill (Bill 154), col GC291

<sup>97</sup> Baroness Lister of Burtsett (Labour), 26 October 2011, Grand Committee, Welfare Reform Bill (Bill 154), col GC291. The government report is Monique Rotik and Luke Perry, *Perceptions of Welfare Reform and Universal Credit* (Research Report No 778, DWP, 2011), p 19

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/214563/rrep778.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/214563/rrep778.pdf)> (accessed 11 March 2018)

argued that this indicated a level of disturbance at the new level of social control likely to felt by workers.<sup>98</sup>

Commenting on the flip-side of this relationship, Baroness Donaghy alluded to the new level of co-operation required from employers. She pointed to the legal complexity of the employer-employee relationship whereby 'any external factor can easily upset the applecart'.<sup>99</sup> At surface level the concept of in-work conditionality seems to go against the grain of the neoliberal emphasis on minimal state intervention in economic matters, in terms of the potential implications of in-work interventions for employers. However, it is clear that the balance of responsibility lies more firmly with the claimant rather than their employer, as it is the employee who is entering into the contractual agreement with the state. Creating a new layer of conditionality aligns with the retreat of social citizenships which seeks to protect individuals from the harmful social and economic forces of capitalism to the contemporary version which is driven primarily by economic policy and the needs of capitalism.<sup>100</sup> The under-employed are being trained to maximise their labour, learn that they are individually responsible for their circumstances, both positive and negative and they must 'conceive of themselves as competitors and life as a competition'.<sup>101</sup> In this way, the concept of in-work conditionality can be characterised as a derivative feature of the neoliberal state.<sup>102</sup>

In response to the members' concerns, Lord Freud explained that the proposed legislative removal of 'arbitrary hours rules' precipitates a risk that claimants may claim benefits even if they have the ability to work or earn more.<sup>103</sup> In view of this risk, the government argued that conditionality could play an important role in encouraging such claimants to work more or attain more earnings. Furthermore, it was believed that it would halt employees consigning themselves to working the set 16 hours per week required for eligibility to Working Tax Credits, at which point the individual is not required to engage with HMRC or take any action to increase their

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<sup>98</sup> Baroness Lister of Burtsett (Labour), 26 October 2011, Grand Committee, Welfare Reform Bill (Bill 154), col GC291

<sup>99</sup> Baroness Donaghy (Labour), 26 October 2011, Grand Committee, Welfare Reform Bill (Bill 154), col GC293

<sup>100</sup> Kenneth Veitch, 'Law, Social Policy and the Neoliberal State' in Honor Brabazon, *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge, 2017), p 81; See also, Bob Jessop, *The Future of the Capitalist State* (Polity Press, 2002)

<sup>101</sup> Veitch, n. 100 above, p 81

<sup>102</sup> Ibid

<sup>103</sup> The Parliamentary Under-Secretary of State, Department for Work and Pensions, Lord Freud, 26 October 2011, Grand Committee, Welfare Reform Bill (Bill 154), col GC293



earnings.<sup>104</sup> The Parliamentary Under Secretary for Work and Pensions was unable to offer much in the way of assurance in relation to potential issues presented by a further introduction of discretion into the system.<sup>105</sup> He did however offer a public commitment that advisers would assess the benefits of the claimant's current working situation before insisting that they consider another better paid position. This commitment was centred on the ability of the work coach to recognise circumstances where a claimant has negotiated a position with flexible working conditions and where someone has, for example, accrued a significant pension contribution.<sup>106</sup> Freud concluded with the nuance that the government was still developing its proposals – with a promise of providing more evidence in due course. Despite the obvious absence of any substance, Freud in a somewhat audacious manner, insisted that the power to apply conditionality to in-work claimants must be incorporated into the Bill. He reassured members that the proposal which stated that claimants would be required to secure 35 hours of full-time work was not intended to be a 'default setting' and that DWP would consider the circumstances of each individual claimant.<sup>107</sup>

In its written response to the Universal Credit Regulations 2013, the SSAC recommended that in-work conditionality be regulated separately from out-of-work conditionality in acknowledgement of the differences in approach between the two. It also recommended a staged and evidence-based approach to the regime's introduction, in order to minimise the impact of negative risk.<sup>108</sup> In relation to the former recommendation the government determined that the in-work regime would be set out in adviser guidelines and would thus not require separate regulations from those that would determine who would be subject to, and excluded from

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<sup>104</sup> SSAC, 'In-work Progression and Universal Credit, Occasional Paper No. 19' (HMSO, November 2017), p 6 < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/657842/ssac-occasional-paper-19-in-work-progression-and-universal-credit.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/657842/ssac-occasional-paper-19-in-work-progression-and-universal-credit.pdf) > (accessed 26 March 2018)

<sup>105</sup> The Parliamentary Under-Secretary of State, Department for Work and Pensions, Lord Freud, 26 October 2011, Grand Committee, Welfare Reform Bill (Bill 154), col GC295

<sup>106</sup> The Parliamentary Under-Secretary of State, Department for Work and Pensions, Lord Freud, 26 October 2011, Grand Committee, Welfare Reform Bill (Bill 154), col GC296

<sup>107</sup> The Parliamentary Under-Secretary of State, Department for Work and Pensions, Lord Freud, 26 October 2011, Grand Committee, Welfare Reform Bill (Bill 154), col GC298

<sup>108</sup> Report by the SSAC under Sections 174(1) of the Social Security Administration Act 1992 and statement by the Secretary of State for Work and Pensions in accordance with Section 174(2) of that Act (HMSO, 2012), p 98 < [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/243550/9780108509674.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/243550/9780108509674.pdf) > (accessed 26 March 2018)

conditionality requirements.<sup>109</sup> The implication of this response points to the absence of any statutory instrument which determines the operation of in-work conditionality and any consequent redress mechanisms. The government did accept the SSAC's latter recommendation – dictating that the introduction of the in-work regime would assume a staged approach based on the piloting of a number of interventions, which would build evidence and a better understanding of the in-work claimant group.<sup>110</sup>

The SSAC's more recent assessment reflects upon the lack of UK or international evidence in regard to the route to advance earnings progression. Therefore they assert that the DWP 'will need to test a broad range of approaches'<sup>111</sup> This process should be double-edged, which will require centrally directed randomised control trials, as well as recording learnings from the experiences of individual jobcentres which can be integrated into a structured evaluation framework.<sup>112</sup> The SSAC support the government's position that work coaches are well placed to identify potential interventions that could support a claimant to progress.<sup>113</sup> However, this is dependent on the jobcentre's ability to test and define their own initiatives which take into consideration local knowledge and geographical factors such as labour market conditions.<sup>114</sup> The SSAC also stressed the need for 'greater policy clarification' to enable work coaches to effectively and consistently exercise discretion.<sup>115</sup> For example, claimants may have a variety of reasons for choosing to work part time, such as re-training or engaging in education which may preclude their availability for work for a prolonged period, or as denoted by Baroness Hollis a parent to teenage children who in some circumstances will not be able to commit to full-time work.<sup>116</sup> It is still to be determined how work coaches will respond to such scenarios with a measure of consistency.

With regard to applying sanctions and conditionality measures pressed upon claimants who are already in work, the SSAC asserted that it 'requires sensitive handling'.<sup>117</sup> Those who are in employment are likely to be more restricted in their ability to attend work focused interviews with a work coach or to even engage in a

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<sup>109</sup> Ibid, p 22

<sup>110</sup> Ibid

<sup>111</sup> SSAC, n. 104 above, p 9

<sup>112</sup> Ibid

<sup>113</sup> Ibid, p 37

<sup>114</sup> Ibid, p 9

<sup>115</sup> Ibid, p 9 and p 42

<sup>116</sup> Baroness Hollis of Heigham, 26 October 2011, Grand Committee, Welfare Reform Bill (Bill 154), col GC298

<sup>117</sup> SSAC, n. 104 above, p 30

telephone conversation.<sup>118</sup> Notably, the SSAC found that work coaches believe that sanctions could be justified. While there may be circumstances where such action is justified, any decision must be balanced with the fact that in-work claimants are already meeting many of the contemporary social citizenship obligations and are more likely to expect different treatment from jobcentre agents. Crucially, the SSAC emphasised that DWP be mindful that many individuals who have previously only claimed tax credits will have no previous contact with jobcentres, and how important was that these claimants understood the obligations attached to their claim for UC and that work coaches were considerate of their circumstances.<sup>119</sup>

This stretching of conditionality to apply to low income workers further distorts the value of citizenship in protecting the citizen from the risks of financial insecurity. Such workers are already labour market commodities, exchanging valuable labour that may not have its value recognised in financial terms, but that complies with the responsibilities of citizenship that contract or communitarian-based approaches demand. These responsibilities are already recognised by those discharging them as part of the citizenship contract, and to add to those responsibilities under threat of removing existing security speaks to the last remnants of Marshall's vision being replaced.

***'Undeniably tough' for the Unemployed: The Claimant Commitment***<sup>120</sup>

Section 14 of the legislation introduces the 'claimant commitment' which requires the claimant to take specified steps to engage with the labour market. It is described in the legislation as a record of the claimant's responsibilities in relation to an award of UC, which includes requirements that the claimant must comply with any prescribed information and any other information which the Secretary of State considers necessary to include. As Larkin contends, 'there is nothing entirely original in this idea', and indeed the path to the enactment of contractual agreements for the unemployed has been well detailed in the thesis. However, what sets the WRA 2012 apart is the extension of DWP powers in relation to work-related activity and

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<sup>118</sup> Ibid

<sup>119</sup> Ibid, p 35

<sup>120</sup> David Cameron, Speech on the Welfare Reform Bill 2011 (17 February 2011). Commenting on the 'end product' the PM said the Bill is 'undeniably tough...certainly radical...and really fair'. Full text available here < <https://www.gov.uk/government/speeches/pms-speech-on-welfare-reform-bill> > (accessed 6 March 2018)

preparation for labour market participation. This was clearly outlined during Committee stage by Chris Grayling who asserted:

‘Our intention is that the claimant commitment is effectively a binding agreement to take part in job search activities...That is the contractual basis between the state and the claimant that says that the claimant will actually do such things to try and get into work.’<sup>121</sup>

In response, Labour’s Sheila Gilmore pressed that a contract is traditionally a ‘two-way’ process and thus pressed for information on the steps that the government would take in providing training and other activities.<sup>122</sup> However, as outlined above, the Coalition government showed a reticence to prescribe a statutory schedule of support for individual claimants and instead introduced ‘greater flexibilities into Jobcentre Plus, so that advisers have more discretion about the nature of the support, guidance and advice that they provide for individuals’.<sup>123</sup>

This new discretionary approach to the provision of social rights represents a vastly compromised approach to Marshall’s emphasis on the value of social integration provided by a defined right to entitlement.<sup>124</sup> Kate Green MP emphasised the importance of creating ‘a spirit of association’ and not resorting to treating those who come to rely on safety-net benefits as the ‘undeserving other’. Akin to scholarship previously cited, Green asserted that the government must achieve ‘a fair balance between the might of the state and the much weaker bargaining position of the individual’. Labour consequently saw its ‘philosophy’ on the ‘welfare bargain’ to be ‘unbridgeable’ with the government. From Labour’s point of view, the government sought to dictate the terms of the contract on the basis of the financial nature of the transaction.<sup>125</sup>

Labour subsequently sought to press for some technical amendments to shape the administration of the Claimant Commitment which sought to put the claimant’s input into the contractual arrangement on a statutory footing in order to realign the balance

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<sup>121</sup> Minister of State for Work and Pensions, Chris Grayling, 29 March 2011, Public Bills Committee (Bill 154), col 196

<sup>122</sup> Sheila Gilmore (Labour, Edinburgh East) 29 March 2011, Public Bills Committee (Bill 154), col 196

<sup>123</sup> Minister of State for Work and Pensions, Chris Grayling, 29 March 2011, Public Bills Committee (Bill 154), col 196

<sup>124</sup> TH Marshall, ‘The Right to Welfare’, in Noel Timms and David Watson (eds), *Talking About Welfare* (Routledge, 1976), p 60

<sup>125</sup> Kate Green (Labour, Stretford and Urmston), 5 April 2011, Public Bills Committee (Bill 154), col 399-400

between the state and the individual: for example, by inserting into the regulations a right for the claimant to initiate a request for the Claimant Commitment to be varied (to accommodate a change in circumstances)<sup>126</sup>, by inserting a requirement that the adviser and the claimant co-design the commitments<sup>127</sup>, and by inserting a right to appeal the contents of the commitment in situations where for example, it is unreasonable that the claimant should be expected to comply with the conditions<sup>128</sup>. Responding, Grayling again underlined the government position that the Secretary of State ought to be provided with the ‘freedom to choose the form in which the Claimant Commitment will be made’, and that ‘in reality, it will be for the delivery agency Jobcentre Plus – predominantly – to decide the best way to set out the commitment’. However, he did commit to ensuring that DWP would sustain the established relationship between the claimant and the adviser.<sup>129</sup> Crucially, Grayling offered only verbal reassurance that the process would be fair.

Rather than using the opportunity to introduce statutory protection for claimants, the Minister of State again indicated a greater role for frontline discretion in the administration of the system.

#### ***A Double Commitment: Claiming UC as a Couple***

As noted above, section 2 of WRA 2012 determined that unemployed couples were required to make a single application for UC and it was subsequently paid to a single bank account, or a joint bank account as determined by the couple. Regulations allow for this default position to be bypassed in certain exceptional circumstances.<sup>130</sup> The principle of providing a single joint payment to couples reflects the precedent first set by New Labour when it passed the Welfare and Pensions Act 1999. Indeed, during the Public Bill Committee stage, Chris Grayling remarked that ‘it is *standard practice* within the benefits system for individuals to make joint claims, and a household claim for universal credit from two people will need to be a joint one’. However, what this statement failed to recognise was the essential fact that UC replaces six different payments which encompassed three forms of assistance including out-of-work

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<sup>126</sup> Kate Green (Labour, Stretford and Urmston), 5 April 2011, Public Bills Committee (Bill 154), col 401

<sup>127</sup> Kate Green (Labour, Stretford and Urmston), 5 April 2011, Public Bills Committee (Bill 154), col 406

<sup>128</sup> Kate Green (Labour, Stretford and Urmston), 5 April 2011, Public Bills Committee (Bill 154), col 405

<sup>129</sup> Minister of State for Work and Pensions, Chris Grayling, 5 April 2011, Public Bills Committee (Bill 154), col 407

<sup>130</sup> Reg. 3, The Universal Credit Regulations 2013

income replacement benefits for different groups; in work tax credits and support for additional costs. The default position assumed on making joint payments overlooked the implication of each amalgamation.<sup>131</sup> As Lister asserted in her written evidence to the Work and Pensions Committee, it was a ‘widely accepted principle that benefits for children should be paid to the ‘main carer’, usually still the mother’.<sup>132</sup> She added that the individual in the household most likely to make the application is the father rather than the mother, therefore if the total UC allowance is paid to one partner ‘there would be a gendered redistribution from ‘purse’ to ‘wallet’ with a potentially adverse impact on intra-household poverty’.

As detailed in Chapter 3, the Conservative government had earlier proposed paying Family Credit via the wage packet as part of an effort to maintain an incentive to work and to bring together the tax and benefit systems.<sup>133</sup> The government was forced to renege due to significant opposition. New Labour also toyed with the idea of paying Working Family Tax Credit through the pay-packet. Again it faced widespread opposition and it was conceded that it should be paid to the caring parent.<sup>134</sup> Interestingly, Lister pointed to the fact that this was a decision taken by ministers; rather than being framed as an operational issue it was framed as ‘political’ decision.<sup>135</sup> This goes to the heart of the argument in the thesis that the ideological development of social security is increasingly affecting the administration of benefits, and furthermore, the increasing power given to the Secretary of State meant that opposition was less effective. Lister and Bennett also pointed to the failure of the joint payment arrangement in recognising the importance of receiving an independent income. The view of couples constituting one unit, with the sharing of resources is inherently problematic. An individual’s income is affected by his/her partner’s presence, actions, inaction and resources; and if one partner’s income and/or assets exceed the eligibility threshold, the other partner will be deemed ineligible.<sup>136</sup> The

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<sup>131</sup> Fran Bennett, Written Evidence to the Work and Pensions Committee on the White Paper for Universal Credit (December 2010) <  
<https://publications.parliament.uk/pa/cm201011/cmselect/cmworpen/743/743we14.htm>  
 > (accessed 22 March 2018)

<sup>132</sup> Ruth Lister, Written Evidence to the Work and Pensions Committee on the White Paper for Universal Credit (7 March 2011) <  
<https://publications.parliament.uk/pa/cm201011/cmselect/cmworpen/743/743we13.htm>  
 > (accessed 22 March 2018)

<sup>133</sup> House of Commons Social Services Committee Report, *First Report from the Social Service Committee, Session 1985-86: Reform of Social Security* (No. 180, HMSO, 1986), para 53

<sup>134</sup> Lister, n. 132 above; See also Jackie Goode, Claire Callender and Ruth Lister, *Purse or Wallet?* (Policy Studies Institute, 1998)

<sup>135</sup> Lister, n. 132 above

<sup>136</sup> Bennett, n. 2 above, p 22; Bennett, n. 131 above; Lister, n. 132 above

government's political decision to treat individuals as a partnership extends to the conditionality requirements for UC. Both members of a couple are required to sign a personalised Claimant Commitment in order to satisfy the eligibility conditions. Therefore, if one member of a couple refuses to sign the Claimant Commitment, neither partner will be entitled to UC. The guidance provided that the government would provide a short 'cooling off' period to give the claimant the opportunity to consider the impact of their decision on the couple.<sup>137</sup> If, following this period, the couple still refused to make the Claimant Commitment, the claim would be terminated for both individuals in the partnership. The cooling off period was limited to the 5 days following the establishment of the 'original' Claimant Commitment – for example if the individual requested a second opinion on the mandatory requirements set out in the claimant commitment during their 'work search interview' and it was not within the 5 day cooling off period, the entire claim would be terminated and the couple would be required to make a new application.<sup>138</sup> The SSAC recommended that the government consider (in limited circumstances), that the claim be processed for one member of the couple as a single person to avoid hardship.<sup>139</sup> In response, the government asserted that this 'would undermine the principle that the working age members of households claiming UC should agree, and be held to, reasonable commitments to engage in looking for work and taking up work'. In short, the government asserted its power to insist on claimant compliance even in circumstances where the social rights of another individual were at stake.

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<sup>137</sup> The cooling off period is a period of 5 working days from the date the individual does not accept the Claimant Commitment. See Reg. 15, The Universal Credit Regulations 2013 and also Explanatory Memorandum to The Universal Credit Regulations 2013, para 7.12 < [https://www.legislation.gov.uk/ukdsi/2013/9780111531938/pdfs/ukdsiem\\_9780111531938\\_en.pdf](https://www.legislation.gov.uk/ukdsi/2013/9780111531938/pdfs/ukdsiem_9780111531938_en.pdf) > (accessed 21 March 2018)

<sup>138</sup> The claimant can request a second opinion during the cooling off period. It is the claimant's responsibility to initiate contact with the Work Coach within the 5 day timeframe. If the second opinion does not change the terms of the original Claimant Commitment the UC claim will be terminated and the couple must make a new online claim the next working day. If the second opinion does change the terms in the Claimant Commitment the UC will continue. The claimant will not be provided with a subsequent cooling off period to consider the second Claimant Commitment. The claimant has no right of appeal if the work related requirements in their second Claimant Commitment is not accepted. See Department for Work and Pensions, *Claimant Commitment Guidance* (made public via a Freedom of Information request (685)): < <https://www.whatdotheyknow.com/request/317750/response/781571/attach/3/685%20CLAIMANT%20COMMITMENT%20GUIDANCE.pdf> > (accessed 19 March 2018)

<sup>139</sup> SSAC, *Report by the Social Security Advisory Committee under Section 174(1) of the Social Security Administration Act 1992 and statement by the Secretary of State for Work and Pensions in accordance with Section 174(2) of that Act* (HMSO, December 2012), para 7.8

### **Conclusion**

This chapter demonstrates that the legislative developments implemented by the Coalition government were very much a product of the political, economic, theoretical and social context of the period. The examination of the government's activation approach and its forthright implementation of the WRA 2012 reveals the problematic extent of the legislative trends that embedded themselves within the system since 2010, which were themselves set in motion following the changing approach to social citizenship applied by previous Conservative and Labour governments.

Unfortunately, it is not possible to provide an account of the most current extent of the changes, such is the complexity of the constantly changing web of regulatory provision – much of which escapes the attention and more fundamentally the scrutiny of politicians, scholars and commentators. However, it is hoped that by shining a light on the intricacies of the provisions detailed above, the reader garners a good understanding of the scale of reforms and the potential difficulties that they present for the sustainability of the safety net envisaged by Beveridge.

A significant feature of the WRA 2010 was the unprecedented level of discretion enveloping every aspect of reform. As Baroness Ruth Lister asserted, 'flexibility sounds very positive, but its flip side is a lack of clear rights and the danger of arbitrary and inconsistent decision-making and lack of transparency'.<sup>140</sup> Extensive decision-making powers have been granted to frontline advisers, decision-makers and external providers. As detailed throughout this chapter, increased discretion has been provided in relation to activation measures and conditionality including; enforcing mandatory (unpaid) work, the ability to issue sanctions, to establish the recoupment of administrative overpayments, and to 'write-off' administrative debt, to interpret 'good reason' for non-attendance or non-participation, to issue hardship payments and to outline the personalised contractual conditions in the claimant commitment. This level of discretion is particularly concerning in the context of the government's localisation agenda, which has increasingly sought to devolve central responsibility for decision making.<sup>141</sup> There is currently no mechanism in place to

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<sup>140</sup> Baroness Ruth Lister of Burtersett (Labour), HL Deb, 10 May 2011, Jobseeker's Allowance (Mandatory Work Activity Scheme) Regulations 2011, Vol. 727, col 858–860

<sup>141</sup> James Rees, Adam Whitworth and Elle Carter, 'Support for All in the UK Work Programme? Differential Payments, Same Old Problem' (2014) *Social Policy and Administration* 48 (2), pp 221–239, p 222



ensure that discretionary decision making maintains an acceptable level of consistency and fairness. It is also concerning in the context of the erosion of expedient and rights-based appeal mechanisms. As Adler has argued, the sense of injustice is further compounded for claimants who are subjected to unfair outcomes as there is no legal mechanism which provides that individual members of staff who have acted unfairly can be held to account for their decisions – even where decisions are overturned as a result of review or appeal.<sup>142</sup> The implications of a distinct lack of knowledge of frontline advisers in relation to the complexities of provision and of the administrative processes of UC has begun to be felt on the ground as the system continues its roll-out.<sup>143</sup>

This impact that such confusion has had on discretionary decision making remains to be fully seen – however, past studies have shown that variation is a serious threat to the integrity of the system. For example, an adviser involved in the operation of New Labour’s mandatory work scheme explained that ‘I have no confidence in decision making and appeals,’ as the investigator claimed that in some areas with several decision-makers, each had different ideas about how the process should be conducted.<sup>144</sup> It is certainly a worrying development that the claimant’s entitlement to social citizenship rights are increasingly being devolved to individual decision makers, particularly in light of the increasing conditionality that is being applied to social security claimants.

Perhaps the most ubiquitous trend exemplified by the WRA 2012, which has been the main subject of the thesis, is that of conditionality. Conditionality seeps into every pore of those governance processes attached to the new system – including for those market providers.<sup>145</sup> The Coalition’s interpretation of the disciplinary aspect of enforcing contractual obligations has been particularly severe and has exceeded

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<sup>142</sup> Michael Adler, *Austerity and Public Law: Benefit Sanctions and the Rule of Law* (UK Constitutional Law Association, 23 October 2015) < <https://ukconstitutionallaw.org/2015/10/23/austerity-and-public-law-michael-adler-benefit-sanctions-and-the-rule-of-law/> > (accessed 18 January 2018)

<sup>143</sup> See for example, Child Poverty Action Group, Written evidence to the to Work and Pensions Committee inquiry Universal credit, (October, 2017) < <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/work-and-pensions-committee/universal-credit-rollout/written/71264.html> > (accessed January, 2018)

<sup>144</sup> Del Roy Fletcher, ‘Welfare Reform, Jobcentre Plus and the Street-Level Bureaucracy: Towards Inconsistent and Discriminatory Welfare for Severely Disadvantaged Groups?’ (2011) *Social Policy and Society* 10 (4), pp 445–458, p 451

<sup>145</sup> Isabel Shutes and Rebecca Taylor, ‘Conditionality and the Financing of Employment Services – Implications for the Social Divisions of Work and Welfare’ (2014) *Social Policy and Administration* 48 (2), pp 204–220, p 205-206

considerably the scope of New Labour's efforts to shape a conditional system which sought to ingrain the philosophy of 'reciprocity'. At its most simple, reciprocity is characterised by the idea that claimants should not receive 'something for something' – including training and skills development. The Coalition government has more intensely sought to discipline and punish claimants who do not fulfil their contractual obligations. To that end the Claimant Commitment has been aptly named – for it is not about identifying gaps in a claimant's employability skills so that the state can commit to offer conditional support in return for participation from the claimant. Rather it is designed to legally enshrine the claimant's commitment to the state that they will do everything in their power and ability to seek paid employment and become fully independent from the state. High levels of conditionality have now been extended to the entire unemployed population, including those who have considerable incapacities and those whose underemployment has been equated with unemployment. It is now only the individuals with the most debilitating conditions who can claim unconditional entitlement.

The extent to which this punitive conditionality has reached has not been readily apparent, kept hidden by the legislative 'norm' of passing skeletal primary legislation that offers no detail on the extent or nature of the conditionality to be applied. The arguments articulated above will not be repeated here – save to say that such is the scale of regulatory amendment that the process of identifying the implications of change for the unemployed claimant was extremely arduous and at times frustrating. The scale and scope of this conditionality affirms that there has been what might be understood as fifth attempt to interpret the welfare settlement – one which imbues levels of oppressiveness found in the pre-Beveridge system.

The reforms are a product of political rhetoric, of poorly evidenced assumptions and the need to cut public expenditure. There can be no doubt that measures which have been built upon such politicised foundations will have severe implications upon the administration of a system which is so integral to the lives of those who rely on it for access to social entitlement and protection from destitution. There has already been extensive evidence that claimants are suffering severe hardship due to the design of UC<sup>146</sup> – the original principle of which has been consistently eroded due to further

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<sup>146</sup> See generally the many responses to the Work and Pensions Committee's Inquiry into the roll out of UC < <https://www.parliament.uk/business/committees/committees-a-z/commons-select/work-and-pensions-committee/inquiries/parliament-2017/inquiry/> > (accessed 28 March 2018)

fiscal cuts and the disastrous ICT failures which have led to extensive roll-out delays.<sup>147</sup>

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<sup>147</sup> See for example, Patrick Butler, 'Digital Universal Credit System is Plagued by Errors, says MP (The Guardian, London, 6 September 2016) < <https://www.theguardian.com/society/2016/sep/06/digital-universal-credit-system-plagued-by-errors-says-mp> > (accessed 28 March 2018)

## **PART 5: Conclusion**



### ***Conclusion***

The main aim of the thesis was to investigate how the political developments since 1979 have impacted on the social security of UK citizens. The thesis has demonstrated how a dominant political paradigm of ‘responsibilising’ the individual citizen for his or her own welfare has ultimately resulted in an initially diverse range of political ideologies coalescing to create a social security system which seeks to recondition the out-of-work to be economically self-sufficient and to live independently from the state. The author has used T.H. Marshall’s post-war interpretation of social citizenship as a baseline from which to trace the contemporary and politically charged interpretation of social citizenship which provides that rights are predicated on the fulfilment of increasing obligations. Through a detailed analysis of the socio-political and legal context of the period 1979 - 2012, the author has demonstrated that the move away from Marshall’s rights-based mode of social citizenship has been on a relatively steady upward trajectory.

### ***Answering the Research Questions***

The author set out to evaluate whether the political drive since 1979 has been to create a social security system which seeks to recondition the out of work to be economically self-sufficient. In order to meet this aim, and the objectives which follow (as laid out in the introduction)<sup>1</sup>, the author has addressed four research questions:

1. To what extent have contemporary interpretations of social citizenship moved away from T.H. Marshall’s post-war rights-based model of social citizenship?

Through a detailed analysis of the socio-political and legal context of the period 1979 - 2012, the author has demonstrated that the move away from Marshall’s rights-based model of social citizenship has been on a steady upward trajectory over the last forty years. The current social security system fails to provide a ‘modicum of economic welfare and security’. The contemporary interpretation of social citizenship very clearly prioritises responsibilities over the guarantee of rights.

2. To what extent has political ideology, as espoused by the three main government administrations from 1979-2012, influenced contemporary interpretations of social citizenship?

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<sup>1</sup> See p5 – 6 of this thesis.

The thesis has shown, through an in depth analysis of primary and secondary sources, how political ideology and hollow rhetoric has influenced the development of social security law from 1979 – 2012. In doing so, the author has shone a light on the key intersections between politics and the law. The research demonstrates how political interpretations of social citizenship have shifted from a post-war advocacy of collectivist principles that sought to prioritise social rights to a clear preference for the primacy of individual responsibility and obligation underpinned by the notion of reciprocity – that is, that social security entitlement should only be provided on the condition that claimants evidence that they have sufficiently endeavoured to meet contractual terms largely determined by the Secretary of State for Work and Pensions. Analysis of political debate has shown that such increasingly conditional terms are predominantly informed by ideological assumptions which seek to demonise and stigmatise those who do not engage in the formal, paid employment market.

The author has pinpointed moments of resistance to the erosion of rights-based entitlement to social security - such as the left's attempted reclamation of the term 'citizenship' in the late 1980's and early 1990's; Frank Field's push for a modernised Beveridgean social insurance model; Labour backbench revolts against welfare reform during the Blair and Brown eras; and widespread civic, political and academic critique of the implementation of austerity and arguably the protest resignation of Conservative Secretary of State for Work and Pensions, Iain Duncan Smith - but has concluded that the judiciary, opposition politicians, civil-society organisations or arms-length bodies like the SSAC are no match for the legislation making powers attributed to the government – or more specifically to the Secretary of State for Work and Pensions who has increasingly used secondary legislation as an implementation mechanism for a contemporary interpretation of social citizenship based on ideological notions of the 'deserving' and 'undeserving' claimant. A major casualty in this process has been the unemployed, who are widely considered as being undeserving of state support and rather are at increasing risk of being punished for their perceived inability to adhere to the mould of the active citizen worker.

3. How has the intersection of politics and the law impacted on the development of social security legislation?

The thesis provides an analysis of the parliamentary path to each piece of major social security law since 1979 and evidences the effect that political rhetoric has had on the resultant legislation. This process is often bolstered by the work of external influences, such as think tanks. The author focused particularly on the role that the Centre for Policy Studies (CPS) played in the ascension of neoliberal Conservatism in from 1974 and the comparable role that the Centre for Social Justice (CSJ) played in the manipulation of Conservative policy on social security in the run up to, and following the 2010 election. Both contributed to the contemporary depiction of the unemployed as 'scroungers' who threatened a sense of "fairness" and morality for the working taxpayer.<sup>2</sup> It is clear that the increased political scepticism of allocating increased fiscal resource to the social security system and the rhetoric used as rationale to reduce the budget has contributed greatly to the move away from collectivist principles and ultimately has erosion of social citizenship.

The crystallisation of a political ideology in legislation limits the opportunity for public challenge. Those affected by a breach of their social citizenship rights must rely on the readiness of welfare rights organisations to launch a suitable challenge in the courts. The struggle to assert individual social rights are transferred into an arena where the government has a distinct advantage owing to its effective control of the parliamentary legislative process. This advantage is buttressed by the long-standing reticence of the judiciary to intervene in constitutional matters of public policy and spending.<sup>3</sup> Although the passing of the Human Rights Act 1998 provided temporary cause for optimism in relation to the enforcement of socio-economic rights - since its assent it has become increasingly clear that states have an almost insurmountable margin of appreciation when it comes to social policy development.<sup>4</sup> This already

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<sup>2</sup> See Chapter 12 for a discussion of Iain Duncan Smith and Conservative colleagues use of the term of 'fairness' as rational for removing entitlement from the 'undeserving' unemployed.

<sup>3</sup> See generally Chapter 4 and 11. See also, Emma Laurie, 'Judicial Responses to Bright Line Rules in Social Security: In Search of Principle' (2009) *Modern Law Review* (72, 3) pp. 384-411; House of Lords, Select Committee on the Constitution, 6th Report of the Session 2006-07: *Relations between the Executive, the Judiciary and Parliament*, HL 151 (HMSO, 2007)

<sup>4</sup> See, Aileen Kavanagh, 'The Elusive Divide between Interpretation and Legislation under the Human



complicated relationship is further fraught with difficulty, due to the sheer complexity of social security law and the consequent challenges in navigating the labyrinth of provision.

4. What legislative trends have emerged in the development of social security law and what are the possible implications for unemployed claimants?

As discussed frequently throughout the thesis, the Secretary of State responsible for the benefit system has throughout the last 20 years consistently used the power to lay supplementary regulations in a manner which reflects the overriding weight provided to the principle of welfare contractualism and the conditional mechanisms through which it is exercised. The pre-eminence accorded to 'skeleton' primary legislation leaving room for detailed secondary legislation in social security law effectively erodes the individual's right to participate as a full democratic citizen in the (legislative) consultation process, since such secondary legislation is not accompanied by consultation. It also prevents the discharge of the function of the full complement of the Houses of Commons and Lords to influence the formation of law and its ability to scrutinise its implications as secondary legislation is not laid before parliament in the same way that primary legislation is.<sup>5</sup> It is the legislative provision discharged by social security regulations which is largely responsible for the steady tightening of eligibility conditions and tougher conditional arrangements for jobseekers.<sup>6</sup> Analysis of the swathe of secondary legislation introduced by the three government administrations since 1979, demonstrates the primacy of conditionality and more specifically the breadth of welfare contractualism in the operation of the contemporary social security system.

### ***The Socio-Economic and Political Catalysts Driving Welfare Reform 1979 – 2012***

Part two of the thesis (1974 – 1997) depicts a socio-economic context characterised by flux. The Keynesian consensus which had established a social revolution in post-war Britain was under significant stress. The climate created an environment befitting the advancement of an alternative doctrine, which duly arrived in the shape

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Rights Act 1998' (2004) 24 OJLS; Philip Larkin, Delineating the gulf between human rights jurisprudence and legislative austerity: the judicial entrenchment of "less-eligibility" (2016) *Journal of Social Security Law* 23(1), pp. 42-63

<sup>5</sup> Gráinne McKeever, 'Legislative scrutiny, co-ordination and the Social Security Advisory Committee: from system coherence to Scottish devolution (2016) *Journal of Social Security Law* 23(3), pp. 126-149

<sup>6</sup> *Ibid*

of a neo-liberal ideology that was to go on to foment a kind of counter-revolution.<sup>7</sup> The two key characters responsible for convincing the Conservative party and subsequent to that, the British electorate that it was time for the 'right approach' were Keith Joseph and Margaret Thatcher. The founders of the Centre for Policy Studies provided an insight into the future of social security in the 1979 Tory manifesto, which depicted an ambition to 'simplify the system, restore the incentive to work and bring more effective help to those in need'.<sup>8</sup> The 'great welfare state chainsaw massacre' associated with the Social Security Act 1980 was a sign of things to come.<sup>9</sup>

As the unemployment rate soared in the early part of the 1980s (reaching over 3 million people in 1983) the government sought to convince the electorate that being out of work was due to the failure of the individual, not the failure of the government in adapting the structural conditions to a rapidly changing economy.<sup>10</sup> It followed that the Fowler reforms to social security were firmly informed by the neo-liberal approach, with the objective of limiting public expenditure in the belief that this would encourage economic growth. Thatcher's government sought to target entitlement to the most vulnerable and simplify the system.<sup>11</sup> Reminiscent of more recent concerns in regard to the welfare reform process, the SSAC and others were perplexed at the government's intention to effect substantial change within the same level of expenditure (a commitment that would be repeated in 1997 when New Labour assumed power). The SSAC asserted that 'there is no cheap route to simplification', an insight that maintains a strong resonance.<sup>12</sup> Targeting need was a by-line for expanding the practice of means-testing benefits. The introduction of Income Support (IS) supported the categorisation of claimants according to a broad assessment of their needs rather than identifying individual circumstances, and particularly vulnerable to this shift were the young, whom the Conservatives

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<sup>7</sup> See chapter 3; See also, Eric Hobsbawm, *Age of Extremes: The Short Twentieth Century 1914 – 1991* (Abacus, 1994) p 409

<sup>8</sup> See chapter 3 and also, The Conservative Party, *The Right Approach*, (Conservative Central Office, 1976)

<sup>9</sup> John Mesher, The 1980 Social Security Legislation: The Great Welfare Chainsaw Massacre, *British Journal of Law and Society* Vol. 8, No 1, 1981, pp. 119 – 120

<sup>10</sup> For detailed discussion on unemployment in the 1980's see Noel Whiteside, *Bad Times: Unemployment in British Social and Political History* (Faber and Faber, 1991) p 1 – 20; See also, Richard Clegg, 'Comparisons between Unemployment and the Claimant Count: 1971 to 2007' (ONS, 2008) [file:///C:/Users/B00346831/Downloads/ELMR\\_May08\\_Clegg\\_tcm77-101671.pdf](file:///C:/Users/B00346831/Downloads/ELMR_May08_Clegg_tcm77-101671.pdf) (accessed September, 2018).

<sup>11</sup> Department of Social Security, 'Reform of Social Security' (Green Paper) (1985), Vol. 1, para 1.1

<sup>12</sup> See Chapter 3 also SSAC, *Third Report of the Social Security Advisory Committee 1984* (HMSO, 1985), p. 4 and also Sue Ward (Ed.) '*DHSS in Crisis*' (CPAG, 1985) p 145 (Appendix)

regarded as being politically expendable.<sup>13</sup> The Social Fund which was introduced to provide help for temporary, one-off expenses, morphed from a discretionary grant to a loan, with a capped budget administered under local discretion and under the inspection of the Social Fund Commissioner. When the annual discretionary provision was gone, it was gone until the next financial year, indicating the strong influence of a political perception of need as a temporary, transient issue, and progressively ignoring the necessity of establishing an evidence-based approach for determining financial allocation.<sup>14</sup>

The political environment of the 1980s led to strongly opposed responses. On the left, welfare rights advocates sought to protect the rights-based foundation upon which the welfare state was built and attempted to rejuvenate the Marshallian brand of social citizenship.<sup>15</sup> Welfare rights organisations sought to provide a counter-balance to Thatcherite policies and practices by representing those who had been most negatively affected by social security reform. Ultimately, however, the action at a local level was no match for the legislative power asserted from Westminster. Influenced by American new-right thinkers such as Charles Murray and Lawrence Mead, the Thatcher government sought to put in place legislative measures that would seek to move the unemployed claimant from 'dependence to independence'.<sup>16</sup> Fitzpatrick argued that this was the 'first attempt' to reconfigure citizenship on the principles of duty, obligation and responsibility – which has culminated in an overwhelming challenge to a 'preference for solidarity grounded on universal and egalitarian social rights' transforming the vocabularies and objectives of social security policy and legislation.<sup>17</sup>

Minister for Social Security John Moore, enshrined the concept of conditionality into the British social security system via the Social Security Act 1989, reflecting the

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<sup>13</sup> See Chapter 3 and House of Commons Seventh Report, Session 1984/85, *The Government's Green Paper 'Reform of Social Security'* (HMSO, 1985), para. 35; Janet Allbeson, 'Seen but not heard: Young People' in Sue Ward (ed.) *DHSS in Crisis* (CPAG, 1985), p 88

<sup>14</sup> See Chapter 3 and John Mesher, 'The Legal Structure of the Social Fund', in Michael Freeman (ed.) *Critical Issues in Welfare Law* (Special Issue of Current Legal Problems (1990), pp. 35-37; SSAC, 'Report on the Draft Social Fund Manual' (HMSO, 1987); Trevor Buck, *The Social Fund: Law and Practice* (2000, Sweet and Maxwell)

<sup>15</sup> See Chapter 2; Chapter 4 and more generally See, Ruth Lister, *The Exclusive Society: Citizenship and the Poor* (CPAG, 1990)

<sup>16</sup> John Moore in a speech cited by Nicholas Timmins, *The Five Giants: A Biography of the Welfare State* (William Collins, 2017), p 446

Tony Fitzpatrick, *The Fourth Attempt to Construct a Politics of Welfare Obligations* (2005) *Policy and Politics* 33 (1) p 16

Conservative view that what one receives ought to be proportionate to what one contributes. Even after Margaret Thatcher's resignation, her spirit lived on through successive Conservative leaders. Despite his efforts to portray the Conservatives in a more compassionate light, when it came to the unemployed Thatcher's immediate successor John Major was committed to expanding the new 'active' base for social citizenship in what Fitzpatrick termed as the 'second attempt' to redefine the individual's role in society. The introduction of the Citizen's Charter revealed the influence of communitarianism, which provides that citizenship should be drawn around communal perceptions of what is 'right, just and moral'. Thus social policies must create a greater role for obligation and conditionality, which surpasses what was contemplated by most post-war welfare states.<sup>18</sup>

The political reality of Fitzpatrick's analysis was borne out by Major's appointment of Peter Lilley, to the position of Secretary of State for Social Security, a Thatcherite disciple who firmly embedded conditionality into watershed legislation namely the Jobseekers Allowance Act 1995. The 1995 Act was widely perceived as successfully achieving its aims, particularly in relation to reducing benefit expenditure. This was mainly due to the reduction in contributory based entitlement from 12 months to 6 months which had a further corrosive effect on the Beveridge vision of a system based on national insurance contributions.<sup>19</sup> The provisions built upon Moore's measures by tightening the labour market conditions for entitlement via the introduction of the jobseeker's agreement. The contractual nature of the agreement remains the mainstay of determining eligibility for the benefit entitlement for the unemployed in the current system. Of note was the addition of a 'jobseekers direction' which provided new impetus for entitlement to out of work benefits to be determined not by income or circumstances but by attitude and actions. Jobcentre Advisers were given the (discretionary) power to direct the claimant to take a specific course of action with a view to improving his/her chances of finding employment, along with the extension of benefit sanctions for those failing to comply. When the legislation was introduced, Wikeley drew attention to a particularly 'peculiar' provision of the Jobseekers Act (section 7 (3)) which vested power in the Secretary of State (via a frontline Adviser) to make a jobseekers direction based upon the claimant's

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<sup>18</sup> Ibid, p.20

<sup>19</sup> See Chapter 4; Trevor Buck, 'Jobseekers Allowance: Policy Perspectives' (1996) *Journal of Social Security Law*, 3(4), pp. 149-164; David Piachaud 'The Growth of Means-Testing' in Alan Walker and Carol Walker, *Britain Divided: The growth of social exclusion in the 1980's and 1990's* (CPAG, 1997), p. 80

appearance or behaviour.<sup>20</sup> Again, this provision, coupled with the tightening of the work tests (the requirement to be 'available for work' and to be 'actively seeking work') provides a vital insight into the systems trajectory.<sup>21</sup> No longer was social security simply tasked with the equitable distribution of social entitlement; it was now responsible for conditioning the claimant to meet politically valorized patterns of behaviour. The communitarian basis for social citizenship is not dissimilar to the Conservative one in that both are suspicious of universalist frames of reference. Rather they view social justice as being founded on duties, where social rights are either undermined or dismissed.<sup>22</sup>

The legislative process attached to the passing of the Jobseekers Act 1995 also bore witness to the beginning of the trend of laying skeleton primary legislation, which provided the Secretary of State with even more power in determining the terms of the welfare contract through secondary legislation. In just under two decades, the Conservatives had effectively changed the face of the welfare state. The social right to welfare was no longer based on the post-war vision of the provision of unconditional rights to welfare – rather the burden of proof was placed on the citizen to demonstrate that they were deserving of entitlement.

After eighteen years at the helm, the Conservatives set the stage for a New Labour party, one that wanted to ensure citizens earned their rights by assuming their responsibilities to find work – in many ways the transition between the two parties was seamless.<sup>23</sup> The New Labour narrative, set out in part three of the thesis, provides an overview of the ideological and theoretical underpinning of its style of welfare governance and the development of three main pieces of social security legislation. The New Labour play was in two Acts. Dominant in the first act was the elected Prime Minister, Tony Blair, who was influenced by a number of political and philosophical gurus. The main guru was social theorist Anthony Giddens who argued

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<sup>20</sup> Nick Wikeley, 'The Jobseekers Act 1995: What the unemployed need is a good haircut...' (1996) *Industrial Law Journal*, 23 (1)

<sup>21</sup> See Chapter 4 and also Laura Lundy, 'From Welfare to Work? Social Security and Unemployment' in Neville Harris, *Social Security Law in Context* (Oxford University Press, 2000) p 304

<sup>22</sup> Fitzpatrick above, n.11, p. 20

<sup>23</sup>McKeever illustrates how The Social Security Administration (Fraud) Act 1997 was developed under the Conservatives and implemented under New Labour. See, Gráinne McKeever, *Detecting, Prosecuting and Punishing Benefit Fraud: The Social Security Administration (Fraud) Act 1997* (1999) *Modern Law Review*, 62 (2) pp 261 – 270; Gráinne McKeever, *Fighting fraud: An evaluation of the government's social security fraud strategy* (1999) *Journal of Social and Family Welfare Law* 4, pp 357 – 371

that there ought to be 'no rights without responsibilities'.<sup>24</sup> As the thesis has illustrated, Fitzpatrick was accurate in defining the 'third way' as representing the 'third attempt' to redefine social citizenship. The 'third way' draws from communitarianism in that it strongly emphasises the reciprocity between rights and responsibilities, reflecting the interdependencies of social communities. Also evident are the social influences that prioritise obligations over rights. Fitzpatrick argued that 'third way' citizenship frames inclusion as more important than equality per se, as where the latter demands nothing of the unemployed, social inclusion demands that everyone who is able to work make a contribution through paid employment.<sup>25</sup>

The Prime Minister's understudy, Chancellor Gordon Brown, assumed responsibility for the practical outworkings of Giddens' 'third way' agenda, playing a key role in dictating the implementation strategy for what became the 'New Social Contract'.<sup>26</sup> The high political status of the two main characters drove a top-down emphasis on the importance of individual responsibility, with some balancing between the carrot of incentives with the stick of sanctions. The complex legislative tapestry that resulted, much of which lay in statutory instruments, reached from the top down to the frontline agents who were required to ensure that jobseekers were compliant with the tightening conditions of entitlement. The Welfare Reform and Pensions Act 1999 provided a statement of intent for the shape of things to come. The key message was that those who could work, should work, even if it was for entitlement to social security benefit. In order to separate its approach from that of the Conservatives, New Labour posited its social contract as reciprocal. In this way, the 'third way' arguably amplified the top down approach adopted by New Labour political elites as the duties owed routinely translated into duties owed by the disadvantaged to the taxpayers who fund the welfare services on which they depend. In exchange for compliance with fulfilment of specified obligations, claimants would be rewarded with access to training and education, designed to facilitate their transition to citizen-producers.<sup>27</sup> Parallel to the labour-focused activation of a broader swathe of claimants, Brown also sought to align the tax and benefit systems by providing incentives for employers and employees via means-tested benefits, perhaps the starkest move yet in shifting the

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<sup>24</sup> See Chapter 5 and also Anthony Giddens, *The Third Way: The Renewal of Social Democracy* (Polity Press, 1998); Anthony Giddens and Patrick Diamond, *The New Egalitarianism* (Polity, 2005)

<sup>25</sup> Fitzpatrick above, n.11, p. 21

<sup>26</sup> Ibid, Giddens and Diamond

<sup>27</sup> See Chapter 6 for a full analysis of the Welfare Reform and Pensions Act 1999

operation of the market and the distribution of public entitlement into the same stream. New Labour's new direction was a catalyst for an initial level of discord amongst its own party's backbenches – particularly for the party faithful who vividly recalled the consequences of the Conservatives interpretation of social citizenship.<sup>28</sup> However, the British economy was in relatively good health, the ruling party's political optimism was high and the party had faith that New Labour leadership understood the needs of a nation heading towards a new millennium, a situation which drowned out the voices of those who foresaw the dangers on the path ahead. As a result, the most significant element of change – the introduction of Employment Support Allowance – under the Welfare Reform Act 2007, was implemented with relative ease, despite the consternation among disability campaigners and claimants.<sup>29</sup> ESA firmly established the principle that work was the best route out of poverty, even for those who were previously protected by the state by virtue of their incapacity to work. The use of the word 'empowerment' was used to shroud the move further away from a rights-based interpretation of social citizenship.<sup>30</sup> It was in this context that parliamentarians on both sides of the house appeared to arrive at a point of broad consensus. Both of the main parties were reverting to the well-worn view that the individual should assume responsibility for their own economic prosperity which in the contemporary world depended upon participation in the labour market. Fitzpatrick identified the opportunity for a 'fourth attempt' to redefine the characteristics of social citizenship which would tie the duty of equality to the principle of reciprocity. However, he conceded that if social participation is to rely on a contractual model then it becomes inevitable that there is the possibility of using force and coercion in order that social membership imbues the required measure of fairness. He argued that the counterbalance to this process was that social product should not be claimed on the basis of social responsibility per se, but that there should be a mechanism through which contemporary democracies could provide unobstructed access to 'full voice' in the democratic distribution process. This, alongside the establishment of a Basic Income model, Fitzpatrick argued provided a diffusion to the UK's evident commitment to the use of force and coercion.<sup>31</sup>

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<sup>28</sup> See Chapter 5 and Chapter 6

<sup>29</sup> See Chapter 7 for a full analysis of the Welfare Reform Act 2007

<sup>30</sup> DWP, *A new deal for welfare: Empowering people to work* (DWP, 2006); DWP, *A new deal for welfare: Empowering people to work: Consultation report* Cm 6859 (HSMO, 2007)

<sup>31</sup> Fitzpatrick above, n.11, p. 23-24

The socio-political context that produced the 2009 Welfare Reform Act was not conducive to a Fitzpatrick's alternative approach to a 'fourth attempt' at social citizenship. The legislation came before parliament in the midst of a difficult period for New Labour and for the whole of the United Kingdom. New Prime Minister – Chancellor Gordon Brown had stepped into Blair's shoes. He no longer had the will, nor the time to supervise the balancing act of rounding the sharp edge of the obligation to work with the provision of an incentive to work. He had bigger fish to fry – Europe had descended into an economic recession of catastrophic proportions which required all of the ex-Chancellor's attention.<sup>32</sup> The intellectual gap left by Brown in the Treasury led the party to seek out an alternative visionary. It came in the unlikely form of ex-banker and journalist David Freud, who had carried out a review of New Labour's welfare to work strategy in the midst of the Welfare Reform Act 2007.<sup>33</sup> He had concluded that intensifying the level of conditionality in tandem with decreasing barriers to work (for those with caring commitments) would theoretically and practically ensure that no individual had reason not to enter the formal labour market. This basic premise formed the starting point for the development of the 2009 legislation. Of course this position failed to recognise the structural difficulties that accompany an economic crisis. Reminiscent of the early-1980s, unemployment levels exploded, but rather than seek a collective state response, the government elected to push further responsibility for surviving the perils of the fiscal storm onto the individual citizen. Those who could not find paid employment would be compelled to participate in mandatory work activity in order to earn a right to claim out-of-work entitlement. Those who were considered to be non-compliant would be subject to tougher sanctions.<sup>34</sup> Conditionality had suddenly become the strong-hold in the social security system, and provided the politically acceptable face of stigmatising the poor. Thus, in reality the 'fourth attempt' followed the clear trajectory identified by Fitzpatrick his analysis of the 'first', 'second' and 'third' attempts. Rather than being a conduit for 'fair reciprocity' Labour's latter period in government saw a clear embedding (particularly in the design of the 2007 and 2009 Acts) of increased coercion via the vehicle of welfare conditionality – the

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<sup>32</sup> Mark Blyth, *Austerity: The History of a Dangerous Idea* (Oxford University Press, 2013); See also, Aditya Chakraborty, 'Gordon Brown did not save the world but he saved the UK' The Guardian (London, 6 February 2012) <<https://www.theguardian.com/commentisfree/2012/feb/06/gordon-brown-save-world-uk>> accessed April 2018

<sup>33</sup> David Freud, *Reducing dependency, increasing opportunity: options for the future of welfare to work* (DWP, 2007)

<sup>34</sup> See Chapter 8 for a full analysis of the Welfare Reform Act 2009



implication of which was a further diminution of social citizenship rights in the distribution of social security. There was also a clear break away from Labour's earlier and more obviously communitarian commitment to provide training and education in return for social participation.<sup>35</sup>

The proposals under the 2009 Act roused the traditional-left faction of the Labour Party, who were at this stage situated on the back-benches. A key leader in the Labour rebellion was John McDonnell (the current Shadow-Chancellor) who sought to reignite a sense of compassion among his party colleagues, but too few followed his lead and the WRA 2009 gained royal assent, with little public awareness of the disputed perspectives on social security rights.<sup>36</sup> Despite making a commitment to simplify the system, by the end of its tenure, New Labour had left a web of provision which was arguably more complex than it had ever been, through its resolute layering of secondary legislation. The passage of three major pieces of social security legislation had resulted in only nominal structural reform, and instead Labour's 'social contract' firmly embedded the pre-existing framework.<sup>37</sup> In doing so, it provided a running-start for the Conservative-Liberal Democrat Coalition to reconfigure the welfare state from its relatively humble neo-liberal shape under Thatcher to the point where it is being pushed beyond recognition.

Long-serving Conservative Iain Duncan-Smith took the lead at the Department of Work and Pensions and was supported in his endeavour by the new Prime Minister, David Cameron. Cameron had based much of his pre-election rhetoric on social issues on the material promoted by Duncan-Smith's Centre for Social Justice and was impressed by the level of favour that it found with the public. An inspection of the research promoted by the CSJ shows that much of the content has been regurgitated from new-right sources – suitably amended for the ears of the modern electorate who were exasperated by the unrelenting economic recession.<sup>38</sup> The appointment of the Coalition government saw the commencement of a fifth attempt at a construction of a politics of welfare obligations. It was characterised by an intolerance of those unable

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<sup>35</sup> See chapter 7

<sup>36</sup> See for example, John McDonnell (Labour, Hayes and Harlington) HC Deb, 17 March 2009, Vol. 489, col 795 – 796

<sup>37</sup> Neville Harris, 'New Labour and social security - the long and the short of it' (2010) *Journal of Social Security Law* 17 (3), pp 135-136

<sup>38</sup> See Chapter 9 for discussion on the influence that Iain Duncan-Smith's Centre for Social Justice had upon David Cameron's rhetoric in the run up to the 2010 elections

to engage in full time employment, thus discharging their full duties as active citizen workers.

When the Coalition cabinet was formed, Duncan-Smith was appointed as Secretary of State for Work and Pensions and immediately set about trying to realise his ambition of creating a streamlined benefit system – the crown jewel of which was Universal Credit. His efforts were beset with significant difficulties from the very start – as the economic doctrine of austerity, which was adopted in earnest by the new Conservative chancellor George Osborne, swept the Eurozone. The answer the Chancellor offered to Britain’s economic woes involved cutting the public budget in an unprecedented fashion.<sup>39</sup> This economic context could never be conducive to a wide-scale reform of the social security system. It is unclear whether Duncan-Smith exercised blissful ignorance or stubborn belligerence in pushing ahead with establishing a new system. What is clear, however, is that UC has been recognised by many as one of the biggest policy disasters of recent years. Most members on both sides of the House, as well as many spectators outside it, saw Duncan-Smith’s aims as commendable: simplifying a hugely complex system of over-lapping provision by streamlining provision; incentivising any level of labour market participation; and to ‘activating’ ‘workless’ claimants into paid work via increased levels of conditionality.<sup>40</sup> However, the original policy aims were quickly eroded by the overwhelming mandate of the Chancellor.

In order to feign some measure of credibility Duncan-Smith was forced to demonstrate his acquiescence in regard to the austerity measures insisted upon by his senior colleague. He justified the implementation of deeper and deeper cuts, alongside the application of more expansive and tougher conditionality measure as being the vehicles through which to achieve fairness for hardworking taxpayers.<sup>41</sup> In

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<sup>39</sup> See Chapter 9 and Chapter 10; See also, Nicholas Timmins, *The coalition and society (IV): Welfare* in Anthony Seldon and Mike Finn (Eds.) *The Coalition Effect: 2010-2015* (Cambridge University Press, 2015), p. 318 - 344

<sup>40</sup> DWP, *Universal Credit: Welfare that Works* (White Paper, Cm, 7957, November 2010)

<sup>41</sup> See Chapter 12 for a full analysis of the Welfare Reform Act 2012. As outlined in Chapter 12, the concept of fairness was a significant theme in the debates leading to the assent of the Welfare Reform Act 2012. See for example, Secretary of State for Work and Pensions, Iain Duncan Smith, HC Deb, 9 March 2011, Welfare Reform Bill, Vol 524 Col 921; David Evennett (Conservative, Bexleyheath and Crayford) HC Deb, 9 March 2011, Welfare Reform Bill, Vol 524 Col 957; Tracey Crouch (Conservative, Chatham and Aylesford) HC Deb, 9 March 2011, Welfare Reform Bill, Vol 524 Col 961; Iain Duncan Smith, HC Deb, 15 June 2011, Welfare Reform Bill, Vol. 529 Col 880

adopting such a perilous position, Iain Duncan-Smith stood over measures that have imposed unspeakable levels of cruelty upon the poor.

The outcome of the Coalition years is a social security system akin to the much reviled poor law system of entitlement. Social security never stepped very far away from the Poor Law's foundational principle of 'less eligibility'. The moral hazard of welfare remains a conundrum for political parties of all shades – but what was developed under the Coalition was a blatant scapegoating of the poor for the economic problems of society, and a moralistic undertone that required them to atone for their fecklessness. The fifth attempt characterises the social security claimant as a shirker, a scrounger in need of discipline and control rather than an individual with the rights of social citizenship. The moral status of the claimant was stripped away, and in its place was a parsimonious support system that demanded more and offered less. Duncan-Smith opted to step away from the unfolding disaster at the point where he was no longer able to tolerate being undermined by the Chancellor, leaving behind a system which has undermined the social citizenship rights of all those who seek recourse to public funds to meet their most basic needs. Further research is required to draw out the theoretical underpinnings of the fifth attempt to construct a politics of welfare obligation which this thesis has laid the groundwork for.

***The Main Consequences for Access to Social Citizenship Rights for the Out-of-Work Claimant***

The collective consciousness of post-war Britain that paved the way for the development of Beveridge's social security system has been replaced. The current system of benefit entitlement is based on an individualist philosophy which determines that each person is responsible for establishing their own livelihood through paid participation in the labour market. Almost every citizen is subject to this blanket approach. The only individuals afforded protection are those who are deemed 'most vulnerable' due to a profound disability. Where the sick, disabled, the lone parent, the carer and the young once had protection from exposure to the harshest elements of the socio-economic climate – they are now viewed as part of a general population that must be compelled to contribute to the sustenance of nation's fiscal health – contemporary governments have assiduously rejected the notion that the welfare state should take long-term responsibility for ensuring financial stability of those who aren't able to work. The significant focus in this thesis has been the political approach of the last forty years. Political policy-making based on rhetoric and popular assumption rather than scientific research has been translated into

legislation which seeks to condition the behaviour of the out-of-work claimant to secure their expedient return to work.

The political influence on the trajectory of welfare reform is reflected in the changing nature of the administrative governance of the contemporary welfare state. The relationship has been examined on two main levels in the thesis: at a theoretical level, which seeks to build an understanding of the conceptual drivers that establish the relationship between the government and the individual claimant; and at frontline level where the conceptual relationship is given practicability via the management and consequent actions and decisions of jobcentre agents.

As established in Chapter 2, Marshall envisaged that the concept of the 'hyphenated society' ('democratic-welfare-capitalism') could adequately manage the relationship between the increasing ubiquity of the market (or the mixed-economy) and the social needs of the individual. Marshall asserted that 'social insurance is...a hybrid of welfare and capitalism and a bridge between them' – a metaphor which separates the operation of both yet at the same time emphasises the connection between them.<sup>42</sup> He maintained that if too much emphasis was placed on citizens' capacity as producers and consumers and not enough on citizens' right to social entitlement, that there was an increased likelihood for social instability.<sup>43</sup>

Rather than focusing on decreasing the scope for social instability via the provision of greater social rights and collective social provision, contemporary governments have sought other means by which to quell the scope for social disorder, in line with the growing influence of philosophies associated with neo-liberalism and the implications of globalisation which have brought the operation of the contributory basis of the welfare state and operation of the capitalist market within a hair's breadth of each other. A discernible measure was, for example, the Thatcher government's significant weakening of the democratic power of the union movement. In his later writings (1981), Marshall looked upon the union movement with a measure of scepticism - asserting that freedom must not be built on anarchy but on the foundation of law.<sup>44</sup> However, what Marshall may not have anticipated was that the government would seek to use the use the social security law as an instrument to

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<sup>42</sup> T H Marshall, Value Problems of Welfare Capitalism (1972) *Journal of Social Policy* 1 (1), pp. 15 – 32

<sup>43</sup> See Chapter 2. See also, TH Marshall, *The Right to Welfare and Other Essays* (Heinemann, 1981) p 128

<sup>44</sup> *Ibid*, Marshall, p. 172

limit social entitlement and to increase the level of obligation imposed on citizens. The legal tightening of eligibility criteria for out-of-work brings to the fore Piven and Cloward's classic thesis that systems of welfare do not reflect a historical perspective of liberalisation or increasing compassion; instead they have been created to ensure political control and to compel the poor to participate in the labour market.<sup>45</sup>

As noted previously, Marshall's social citizenship thesis was a product of post-war Britain. This point is critical in an assessment of its continued relevance in the development of contemporary social security policy and legislation. Marshall assumed the government's maintenance of full employment of a male labour market. This remains one of the main weaknesses of Marshall's interpretation of citizenship. He did not anticipate the changing family pattern nor the presence of women in the paid labour market. The modern labour market that men and women participate in is very different.<sup>46</sup> It is characterised by increasing part-time work and zero-hour contract employment. Women are more likely to be working in such flexible and often insecure environments.<sup>47</sup>

Furthermore, as Lister points out, technological change has infiltrated every aspect of our lives, accelerating the pace of economic and social globalisation in a way that could not be imagined in the early 1950's.<sup>48</sup> Giddens defined globalisation as the 'transformation of space and time in our lives' which he linked to the 'the new individualism' which implied a retreat from tradition and custom in our lives. This, he claimed, give rise to 'pressure towards greater democratisation' in the private as well as the public sphere.<sup>49</sup> This necessitated a new 'welfare contract' between the government and the individual. What Giddens may not have anticipated when he pushed this theory was the implication for individuals who were unable or unwilling to meet their obligations. In the private sphere the relationship between women and men, and between parents and children has been transformed. Britain is more multi-cultural, diverse and has welcomed workers from the European Economic Area and

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<sup>45</sup> Frances Piven and Richard Cloward, *Regulating the Poor: The Functions of Public Welfare* (Tavistock Publications, 1972)

<sup>46</sup> Ruth Lister, Citizenship, Exclusion and "the Third Way" in Social Security Reform: reflections on T.H. Marshall. (2000) *Journal of Social Security Law* 7 (2), pp. 70-87, p. 71

<sup>47</sup> ONS, 'People in Employment on a zero-hours contract: March 2017'

<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/contractsthatdonotguaranteeaminimumnumberofhours/mar2017>

(accessed, October 2018); ONS, 'UK Labour Market: 2018'

<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/uklabourmarket/september2018> (accessed October 2018)

<sup>48</sup> Lister, n. 43 above, p. 71

<sup>49</sup> Anthony Giddens, *The Third Way* (Polity Press, 1998) pp. 31, 37-38

beyond it; disabled people have been much more active in demanding civil, social and political rights; and the Lesbian, Gay and Transgender community have secured rights which have added a further dimension to the citizenship debate, usurping Marshall's dominant focus on social class.<sup>50</sup> While the existence of diversity in the public and private sphere is welcome, the value of cultivating a 'politics of redistribution' of material resources has been undermined – the implication of such is a manifestation of class inequalities which have been exasperated by political interpretations of the poor as undeserving.<sup>51</sup>

In short, it is clear that Marshall's theory of social citizenship is outdated. The social and political context is far-removed from life in Great Britain in the 1950's. However, what Marshall's theory does offer is a strong principle - the 'right to welfare', whereby an individual has at least a right to a 'modicum of economic welfare and security'. This thesis focuses on that core value that upholds the dignity of the individual citizen and their need for security and therefore maintains Marshall's position as a leading authority on the theorisation of social citizenship. It is a yardstick which offers academics, activists and others against which to measure the current rights of the social security claimant and a framework for modelling reform. In terms of the governance of social security provision, Offe's theory of 'administrative-commodification' provides a useful lens through which to interpret the more subtle, yet no less powerful, bureaucratic measures through which policy makers have sought to reconfigure Marshall's post-war interpretation of social citizenship.<sup>52</sup> It is not that social rights are being extinguished; rather they are being undermined, made less democratic, and more akin to the property rights of classical jurisprudence. Social rights have become less interested in facilitating individuals to live independently of the market, and instead forces them to participate in markets, including 'quasi-markets' for welfare schemes/services. Overall, the management of social security (and other welfare state services) has been transformed to prioritise spending constraint, simplification, operational efficiency and support strategies that engage claimants.<sup>53</sup> The government's emphasis on targets and levels of service

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<sup>50</sup> Lister, n. 44 above, pp. 71-72

<sup>51</sup> Ibid, see also Abigail McKnight, Magali Duque and Mark Rucci, 'Double Trouble: A review of the Relationship between UK Poverty and Economic Inequality' (Oxfam/LSE CASE, 2017) <https://oxfamlibrary.openrepository.com/bitstream/handle/10546/620373/rr-double-trouble-inequality-poverty-uk-091117-en.pdf;jsessionid=AA55E2C6D7478D631F13029D9A8C46B0?sequence=1> (accessed October 2018)

<sup>52</sup> Claus Offe, *Contradictions of the Welfare State* (Hutchinson, 1984)

<sup>53</sup> Peter Taylor-Gooby, *Reframing Social Citizenship* (Oxford University Press, 2009) p 34

contributes to the principle of upholding an individualized contractarian basis for citizenship, which results in an expectation for managers and professionals to strive harder to ensure that both targets are met and that the institution remains attractive to users, thus protecting its budget.<sup>54</sup>

Administrative-commodification is closely related to the rise of New Public Management (NPM) which has influenced the approach to the management and conditioning of the frontline agents responsible for processing entitlement for out-of-work claimants, who are often portrayed by the political elite as being undeserving of state support. In this way, the claimant is dehumanised and commodified as a drain on the tax-payer that must be activated into employment in order to deliver an economic benefit to the wider community. The adviser has progressively been persuaded to look upon the claimant with an element of 'moral indifference' as they are urged to make difficult moral decisions within a narrow framework of compliance which is anchored on the disciplinary value of the benefit sanction.<sup>55</sup> Adler has conceptualised the implications that NPM has had upon administrative processes via his development of Mashaw's model of administrative justice, which the author has used to interpret the Coalition's activation approach.<sup>56</sup> The culmination of the managerial culture, established during Major's premiership, which continued in earnest through the New Labour years and was strongly enforced by the Coalition, imposes significant ramifications for out-of-work citizens seeking to claim their social citizenship rights. The central thread of discussion which has run the length of the thesis has been the rise of conditionality. Frontline advisers are responsible for ensuring that the claimant fulfils those obligations which form the basis of the contractual arrangement between the individual and the state. Fulfilment of the (persistently increasing) responsibilities outlined by the Adviser guarantee access to entitlement. Failure to participate in those measures outlined in the contract, and any supplementary activation measures which the Adviser determines appropriate to support the claimant into work, results in a sanction which directly contravenes Marshall's assertion that the primary function of the social security system is to protect the poor from the effects of poverty.<sup>57</sup> Those who face a sanction often have no other choice but to seek help from charitable organisations. Thus rather than

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<sup>54</sup> Ibid, p 121

<sup>55</sup> See, Zygmunt Bauman, *Modernity and the Holocaust* (Polity Press, 1989), p. 20; Mark Smith, *Reading Bauman for Social Work*, (2011) *Ethics and Social Welfare*, (5)1, pp. 2-17, p. 10

<sup>56</sup> See especially Chapter 5 and Chapter 12

<sup>57</sup> T H Marshall and T Bottomore, *Citizenship and Social Class* (Pluto, 1992), p 33

ameliorate the structural inequalities created by the capitalist system, the 'new' social security system perpetuates barriers for citizens who are seeking to realise their ability to exercise social, political and economic participation in society.<sup>58</sup> The safety-net has definitively given way to the stick.

Hand in hand with the increasing conditionality within welfare has been the quiet embedding more and more discretionary powers in legislation. The government has emphasised the value of handing more decision making power to both frontline Advisers and to Decision-Makers as providing 'greater flexibility' in determining what course of action is most appropriate to connect the claimant with the labour market. A consequence of higher levels of discretion include the disparate allocation of social citizenship rights, with minimum levels of transparency in regard to the process of reasoning which dictates a particular course of action for a claimant. Furthermore, access to a legal remedy and subsequent redress is much more difficult, as the individual has no choice but to challenge a discretionary decision rather than a statutory right. As indicated by Adler, the framework of redress has become much less accessible. Since October 2013, the claimant is precluded from being able to appeal directly at tribunal level; rather they must wait for the process of Mandatory Reconsideration (MR) to take place. MR is not subject to any time limits and during the time that it is being carried out the claimant will receive no entitlement (JSA) or greatly reduced entitlement (depending on the elements of UC they are entitled to). The new arrangement has beyond doubt to added 'appeal fatigue' felt by claimants.<sup>59</sup> Thus rather than operating in a rights-based framework, decision-making operates in a 'variable, particularistic manner' which risks the concept of social citizenship and the prioritisation of rights becoming both conceptually and operationally redundant.<sup>60</sup>

The intensification of the bureaucratic process outlined above is steeped in irony, as respective governments have cited the need to simplify the social security system as a key motivation for undertaking welfare reform. The thesis' examination of social

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<sup>58</sup> Ibid. See also Neville Harris, *Social Security Law in Context* (Oxford University Press, 2000), p 20; Ruth Lister, 'Social Security', in Michael McCarthy (ed.), *The New Politics of Welfare* (Macmillan, 1989), pp 104 – 131, p 128; David Harris, *Justifying State Welfare* (Basil Blackwell, 1987) p 147

<sup>59</sup> Michael Adler, A New Leviathan: Benefit Sanctions in the Twenty-first Century (2016) *Journal of Law and Society* 43 (2) pp 195 – 227, p 212

<sup>60</sup> Alon Harel, 'What Demands are Rights?' (1997) *Oxford Journal Legal Studies* (17) pp 101 – 136, p 111; Kirsten Campbell, *The Concept of Rights* (DPhil Thesis, Oxford) 1979, p 74; Amir Paz-Fuchs, *Welfare to Work: Conditional Rights in Social Policy* (Oxford University Press, 2008) p 63



security policy and law throughout the last 40 years exposes that, in reality, the exercise of simplification is often a cover term for 'selective rationalisation', which seeks to ensure that the social security system complies with economic mores. As Harris and Wikeley outlined, if meaningful modernisation of the social security system is to occur, it requires a broad, principle-centred approach.<sup>61</sup> There is much to be said for looking to Marshall for a theoretical basis in rebuilding an unconditional rights-based system of entitlement. Crucial is the re-establishment of a bridge between the construct of social citizenship and the market. The reinstatement of an unconditional element into the social security system would represent a significant step towards precluding 'the invisible hand of the market' in the governance of welfare and in the process would ameliorate the consequence of political force in the lives of those not in paid work.<sup>62</sup> If the concept of a welfare contract is to prevail it must be built on the concept of the citizen's status as a member of a community with collective interests, not linked to an interpretation of the out-of-work as internalising behaviour that is undeserving of support.<sup>63</sup>

The current government under the premiership of Theresa May has largely upheld the Coalition's position on social security, accommodating the roll-out of further punitive measures which are based on a vision of the out-of-work as undeserving, in need of discipline and punishment. Unlike under the previous administration, however, there has little political focus on social security, with a rapid turn-over of Secretaries of State for Social Security indicating that the pre-eminence of the role has disappeared. Understandably, perhaps, there has been no political drive to reform the social security system one way or another, and such reforms that have happened have come about through the active interventions of welfare rights organisations, challenging the lawfulness of policies like the bedroom tax and 'two child limit', as well as the public disquiet (though not yet anger) over the perilous position of UC claimants who must serve waiting time for their benefits and phone premium numbers for state support. It may be that the tide is changing. The Labour party is now led by Jeremy Corbyn, with John McDonnell as Shadow Chancellor – a consistently vocal opponent of the market-based conceptualisation of social security entitlement and whose social security thinking is closer to a Marshallian rights-based

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<sup>61</sup> See Chapter 5, p. 5; See also, Neville Harris and Nick Wikeley, 'Modernisation of Social Security' (1997) 4(3) *Journal of Social Security Law* pp. 93 – 94.

<sup>62</sup> Ralf Dahrendorf, 'The Changing Quality of Citizenship' in Bart van Steenberg (ed), *The Condition of Citizenship* (Sage, 1994), p 10 - 13

<sup>63</sup> Paz-Fuchs, above n 16, p 63 - 64

approach than the UK has seen for some time. It may also be that the public are growing weary of the hardship associated with a social security system governed on a contractual basis which prioritises social obligation over social rights. And the great unknown in all of this is the effect of Brexit which has sucked the political life-blood of parliament, squeezing all other domestic issues into the crevices of political thinking, only to emerge as undiscovered crises that can no longer be contained. Whether this fluid combination of political and public thinking proves positive or toxic for social security claimants is worthy of further study, though sadly beyond the scope of this thesis. Instead, what the thesis offers is the point at which further examination can be conducted, to understand the ideology, the pathology and the potential for future welfare reform.



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s. 9

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Reg 9

Reg 12 (3)

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Reg 18



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Reg 19 (1)

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Reg 25

Reg 26

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s. 16

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