

## Written evidence submitted by Public Law Project (BSW0047)

### About PLP

1. The Public Law Project ('PLP') is an independent, national legal charity which aims to improve access to public law remedies for those whose access is restricted by poverty, discrimination or similar barriers.
2. Building on our experience running public law conferences in Wales and working with the Welsh legal community for over a decade, PLP has recently appointed our first dedicated 'Wales lawyer' to provide public law advice and support to increase access to public law remedies in Wales. We have long taken an interest in the particular issues arising in the public law context in Wales and provided [evidence](#) to the Commission on Justice in Wales.
3. One of PLP's five current areas of focus is Benefit Sanctions. As part of this work, PLP is researching the barriers claimants may face when challenging unfair or incorrect decisions. This research is currently at a very early stage, however we have included detail on the background in case it is of use to the Committee in informing potential lines of inquiry.

### PLP's Research

4. PLP has previously identified four key stages of the conditionality regime<sup>1</sup> at which fairness of the system can have a significant impact on claimants:
  - a. The initial decision about benefit entitlement dictating the degree to which a claimant is subject to conditionality
  - b. The setting of mandatory requirements
  - c. The opportunity to provide an explanation for any alleged non-compliance
  - d. Access to remedies once a decision has been taken to impose a sanction.
5. PLP's current research focusses on the last of these strands.
6. The 2014 Oakley Review found that it was *"important that claimants who are sanctioned have easily accessible and understandable recourse to appeal, and potential redress, where they believe they have been unfairly treated and decisions are subsequently overturned in their favour."*<sup>2</sup>

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<sup>1</sup> Certain benefits are conditional on meeting "work-related requirements". A failure to meet these requirements can result in a sanction.

<sup>2</sup> Oakley (2014) [Independent review of the operation of Jobseeker's Allowance sanctions validated by](#)

7. PLP believes that access to effective and accessible appeal routes to challenge unfair or incorrect decisions is essential to:
  - a. safeguard against injustice for individual claimants
  - b. promote better-quality decision making by DWP in the round.

### **Challenging Sanction Decisions**

8. If a claimant has been sanctioned, they can ask DWP to review this internally (Mandatory Reconsideration (MR)).
9. If DWP does not change its decision at MR, the claimant can then appeal directly to the independent First-Tier Tribunal.
10. Since November 2013, a MR must have been undertaken before the claimant can appeal to Tribunal.
11. There is no deadline by which DWP is required to determine a MR. This differs from the equivalent procedure for certain devolved benefits in Scotland whereby re-determination decisions must be made within 16 working days of receipt of a request<sup>3</sup>.
12. The Work & Pensions Select Committee in its 2018 review of benefit sanctions recommended that DWP commit to a timeframe for MRs<sup>4</sup>. DWP did not accept this recommendation<sup>5</sup>.

### ***PLP recommends that a timeframe should be adopted.***

13. Following the introduction of the requirement that a MR must be undertaken before an appeal, the number of Tribunal appeals (across all decisions) reduced significantly<sup>6</sup>.
14. DWP's position appears to be that a low number of appeals is reflective of improvements in initial decision making and decision making at the MR stage. While PLP welcomes an approach that focusses on improving the quality of decision making

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#### [the Jobseekers Act 2013](#)

<sup>3</sup> <https://www.citizensadvice.org.uk/scotland/benefits/benefits-introduction/problems-with-benefits-and-tax-credits/challenging-a-benefit-decision/challenging-a-social-security-scotland-decision/challenging-a-social-security-scotland-decision/challenging-a-social-security-scotland-benefit-decision/>

<sup>4</sup> House of Commons Work and Pensions Committee (2018) [Nineteenth Report of Session 2017-19](#), HC 955, 6 November (para 113)

<sup>5</sup> House of Commons Work and Pensions Committee (2019) [Government Response to the Committee's Nineteenth Report of Session 2017-19](#) HC 1949, 11 February (para 73)

<sup>6</sup> Social Security Advisory Committee Study: [Decision Making and Mandatory Reconsideration](#) (July 2016) (p 22)

at the earliest possible stage, an assumption that a low rate of appeals is demonstrative of this fails to take into account:

- a. The high rate of success on appeal (based on the available data)
- b. The potential barriers to appeal.

### **Benefit Sanctions Appeals Data**

15. Data published by DWP in February 2018 (the latest published data), covering the period to October 2017, suggested that a relatively low number of UC Live Service (LS) sanction decisions (16%) were subject to challenge – but that when decisions were appealed to Tribunal, 81% were successful.<sup>7</sup>

16. This indicated that a large number of incorrect or unfair sanction decisions were potentially being allowed to stand.

17. This is consistent with conversations PLP has had with organisations supporting claimants to appeal which have indicated that these are very often successful. It is also consistent with written evidence submitted by the Welfare Conditionality project to the Work & Pensions Select Committee 2018 inquiry, which stated that of 34 sanctioned JSA recipients, most viewed their sanction as unjust or disproportionate, but did not request a MR or appeal “*because they thought it would be futile*”<sup>8</sup>.

18. Based on data available on Stat-Xplore<sup>9</sup>, the equivalent figure for Wales for 1 August 2015 to 31 July 2020 (the latest date for which UCLS data is available), suggested that:

- a. 15.6% of all adverse original sanction decisions were challenged by way of MR
- b. 2.6% of adverse MR decisions were appealed to Tribunal (0.27% of all original adverse decisions)
- c. Of those decisions challenged by MR, 31.6% were successfully challenged

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<sup>7</sup>DWP (February 2018) [Universal Credit Sanctions Experimental Official Statistics: Background information and methodology](#) (p. 4); D Webster [Briefing: Benefit Sanction Statistics February 2018](#)

<sup>8</sup> Welfare Conditionality: Sanctions, Support and Behaviour Change Project [written evidence](#) to the Social Security Advisory Committee consultation: Decision making and mandatory reconsideration (March 2016)

<sup>9</sup> <https://stat-xplore.dwp.gov.uk/webapi/jsf/login.xhtml>

d. Of those decisions appealed to Tribunal, 80.3% were successfully challenged.

19. As with the national statistics published in February 2018, this suggests that a low proportion of decisions are being challenged (15.6%) – but that when they are appealed to Tribunal, there is a high success rate (80.2%).

20. DWP has ceased to publish UCLS appeals data since February 2018 stating that this data should be treated with caution due to possible under-recording of adverse decisions. It continues to publish UCLS MR data while the underlying appeals data remains available for UCLS via Stat-Xplore.

21. UCLS has now been superseded by UC Full Service (FS). DWP does not currently publish data for UCFS MRs or Appeals. DWP's website states that they are "*continuing to investigate the available data and hope to be able to produce statistics on Mandatory Reconsiderations and Appeals in the near future*"<sup>10</sup>.

22. UC comprises the vast majority of sanctioned decisions (94.7% for October 2019<sup>11</sup>). It is therefore concerning that this data is not currently available - a regression from the position for JSA and ESA. It is particularly worrying given that the only available data (the UCLS data available via Stat-Xplore) suggests cause for concern.

***PLP recommends that UC MR and appeals data should be published.***

### **Barriers to Appeal**

23. While there is currently limited research into access to appeals in the context of benefit sanctions (a gap that PLP is seeking to fill with its current research), we draw the Committee's attention to:

- a. Written evidence of the Welfare Conditionality Project to the Social Security Advisory Committee's 2016 consultation.<sup>12</sup>
- b. Z2K's 2018 report on claimant experience of initial PIP and ESA assessments.<sup>13</sup>

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<sup>10</sup> DWP [Universal Credit sanctions statistics: background information and methodology](#) (updated 23 February 2021)

<sup>11</sup> D Webster, [Briefing: Benefit Sanctions Statistics February 2020](#)

<sup>12</sup> [Welfare Conditionality Project](#)

<sup>13</sup> Jen Durrant (2018) [Access Denied: Barriers to Justice in the Disability Benefits System](#) Z2K

c. Homeless Link's 2013 report on sanctions and homeless people.<sup>14</sup>

24. Consistent themes across these are the barriers created by complex and daunting processes (in particular for claimants dealing with multiple challenges and the consequences of a sudden loss of income), a lack of advisory support, "appeal fatigue" and a sense of futility.
25. Z2K's 2018 report identified MR as creating a barrier in itself due to the length of time it can take, claimants having the impression that it was the only appeal route and appeal fatigue.
26. The above findings are consistent with studies carried out in relation to internal reviews of housing allocation decisions in the UK<sup>15</sup> and New York<sup>16</sup>.
27. The purpose of PLP's current research is to look at the reasons why claimants do – and do not – appeal in the context of benefit sanctions specifically. This research is currently at a very early stage. In order to inform its design we recently carried out a small survey looking at the experiences of organisations supporting individuals at risk of benefit sanctions since the start of Covid-19. This was not intended to produce reliable data to form part of the research itself, and should therefore be treated with caution, but we have included some illustrative detail in the section below.

### **Sanctions during Covid-19**

28. Government introduced several measures impacting on benefit sanctions in response to the pandemic. These included:
  - a. disapplying work-search and work availability requirements between 30 March and 30 June 2020 – in effect suspending almost all new sanction decisions
  - b. thereafter, only sanctioning in relation to claimant commitments imposed or updated since the start of the pandemic.
29. Unsurprisingly sanctions have fallen to an historic low (both nationally and in Wales) during this period.

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<sup>14</sup> Homeless Link (2013) [A High Cost to Pay: the impact of benefit sanctions on homeless people](#)

<sup>15</sup> Cowan, Halliday et al. (2003) *The Appeal of Internal Review: Law, Administrative Justice and the (non-) Emergence of Disputes*, (Hart Publishing)

<sup>16</sup> Vicki Lens (2007) *Administrative Justice in Public Welfare Bureaucracies: When Citizens (don't) complain*

30. This is reflected in the responses to PLP's survey. Responses to the question "*what has been your experience of the DWP's approach to sanctioning decisions*" since the end of the suspension included a softer approach to sanctions:

- a. *Publicly they have been at pains to say that they are being sympathetic to covid circumstances and taking extra care to check sanctionable breaches of conditionality are genuine before committing to a sanction. They were aware that the surge in UC claimants in April 2020 consisted of a high proportion of those not used to navigating a radically different benefits system (with the introduction of 'full service' UC only a few years old) and that if they weren't 'light touch' they could, potentially, be sanctioning thousands of new claimants who weren't knowledgeable about the UC process.*
- b. *DWP did show some tolerance to the claimant due to pandemic and restrictions.*
- c. *There seems to be a slightly softer line taken, with sanctions threatened rather than actually conducted which has turned things around quickly. It seems to be far more effective.*
- d. *Work Coaches appear more open to customers about sanctions but little change in application.*

31. However, while some respondents spoke favourably about their experience of their local Job Centre independently of the pandemic measures, there was also nervousness expressed by some respondents that this period of relative understanding was coming to an end:

- a. *My clients have kept work searches going and records of work related activity and I know this has spared them from sanctions. Anecdotally I hear from clients that many claimants haven't done this during covid and face sanctions because they haven't been meeting commitments. The work coaches my clients have seen have all expressed relief that claimant commitments have been followed up throughout the pandemic as they have been told to look at this*
- b. *...slightly more sympathy than pre-pandemic but that sympathy level is diminishing; partly due to 'back to normal' thinking, partly due to the number of new staff recruitment by the DWP (who have, by our experience, no in-built*

*sympathy towards sanctionable clients) and partly because of the potential for sanctions driven by the UC 'claim repair' exercise and how it is being delivered - ie in a way which makes it more likely that sanctionable breaches (for lack of evidence) will result.*

32. This included claimant anxiety about what will happen next:

- a. *Our service users are more anxious about benefits sanctions*
- b. *Suspension of sanctions was effective but little communication provided when sanction reimposes [sic.]*
- c. *The big change in approach, which has been much more noticeable this year (since roughly February 21, I'd say) is an increase in queries about conditionality. We are still not seeing sanction decisions, but we are seeing lots of claimants told they have to look for work, and asking questions about whether they will be sanctioned.*

33. This has also been reflected in some of the recent conversations PLP has had with organisations supporting claimants. There is a concern that as DWP returns to “business as usual”, with an increased focus on getting people back to work, there will be a return to high levels of sanctioning.

34. This is within the context of there being a greater number of people at risk of sanctioning than before Covid-19 – including a large number of individuals who may not have experienced the sanctioning regime previously. There has been a 100% increase in UC claimants since March 2020 (the last count before Covid-19) from 3 to 6 million<sup>17</sup>.

### **Hardship Payments (HPs)**

35. Sanctioned UC claimants can apply for HPs (a loan of 60% of the sanctioned amount), subject to certain conditions, including demonstrating that they:

- a. are struggling to meet their basic needs as a result of the sanction
- b. have done everything they can to get money from other sources.

36. DWP does not publish data on the number of HPs applied for or granted.

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<sup>17</sup> DWP [Universal Credit statistics, 29 April 2013 to 8 April 2021](#) (May 2021)

37. HPs are recoverable by way of deductions from UC payments. The normal maximum recovery rate is 25% of the standard allowance. This in effect extends the period of potential financial hardship<sup>18</sup>. Given that, by definition, the claimant has been struggling to meet their basic needs and has no other options, this creates a real risk of an extended period of financial hardship.
38. This applies even when a sanction has been overturned at MR or appeal i.e. a claimant may find themselves in debt as a result of an incorrectly applied sanction.
39. Until recently, recovery occurred automatically<sup>19</sup>. Following a recent case brought by PLP's client "B", DWP has now agreed that it has a discretion over whether to recover HPs and has changed its guidance accordingly (summarised [here](#)).
40. It remains to be seen how this will apply in practice, however in PLP's view the following areas require monitoring:
- a. Ensuring DWP decision makers know this discretion exists
  - b. Ensuring claimants know they can ask DWP to exercise this discretion
  - c. The threshold DWP applies to waive repayment (the current standard appears to be the same as that applied in overpayment cases, despite these circumstances being qualitatively different).

### **Discrimination in Benefit Sanctioning**

41. An Equality Impact Assessment (EIA) published prior to the Welfare Reform Act 2012 showed that Black and Asian claimants in 2010/11 received disproportionately more medium level JSA sanctions than their white counterparts<sup>20</sup>.
42. JSA statistics published in 2017 confirmed a similar trend<sup>21</sup>.

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<sup>18</sup> D Webster [Briefing Benefit Sanctions Statistics, February 2018](#); illustrated at para 129 of the Work & Pensions Committee 2018 [report](#)

<sup>19</sup> Except for where certain earnings thresholds are met (Reg. 119(2) of the Universal Credit Regulations 2013/376).

<sup>20</sup> DWP (2011) [Conditionality, sanctions and hardship: Equality Impact Assessment](#) (p.12)

<sup>21</sup> DWP (2017) [JSA Sanctions: Ethnicity Facts & Figures](#)

43. A 2017 working paper published by the LSE International Inequalities Institute also found that ethnic minorities faced a substantially higher risk of receiving a JSA sanction.<sup>22</sup>
44. DWP does not publish equivalent data for UC.
45. In response to a PLP Freedom of Information Act request, DWP confirmed it has been collecting the requested statistics, but has declined to disclose this on the ground that it is “*intended for publication at a future date*”. The explanation provided on DWP’s [website](#) is that the proportion of UC claimants voluntarily declaring their ethnicity falls below the threshold rate for publication.
46. This is particularly concerning as research by the Welfare at a Social Distance project has identified an increase in the proportion of people from BAME backgrounds claiming benefits since the start of the pandemic<sup>23</sup>.

## **Recommendations**

47. We recommend that DWP be required to publish:
- a. UC MR and appeals data
  - b. UC ethnicity data
  - c. Data on the number of HPs applied for and granted.
48. PLP’s benefit sanction research is currently at a very early stage and we are therefore not yet at a stage to make formal recommendations. However potential recommendations, based on PLP’s existing expertise in this area, are:
- a. **Yellow carding**: introducing a system of warnings for all “sanctionable offences”.
  - b. **Suspension pending challenge**: pausing sanctions whilst the matter is challenged (similar to the approach to Housing Benefit overpayments).
  - c. **MR deadline**: introducing a time-limit for determining MRs, similar to the approach to devolved benefits in Scotland.

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<sup>22</sup> De Vries, Reeves and Geiger (2017) [Inequalities in the application of welfare sanctions in Britain](#) (p. 11)

<sup>23</sup> Edmiston et al. (2020) [Who are the new Covid-19 cohort of benefit claimants?](#)

- d. **Automatic appeal:** while recent changes made to DWP's sanction procedure (including the introduction of more robust internal checks before a sanction is imposed) are potentially positive, greater procedural fairness would be achieved by a right to challenge sanctions before an independent decision-maker before they are imposed
- e. **Hardship Payments:** UC HPs should not be recoverable, as is the case with JSA and ESA HPs. In the alternative:
  - i. The repayment rate should be set at a more affordable rate.<sup>24</sup>
  - ii. There should be an automatic waiver of HP debt where a sanction has been overturned by MR or appeal.<sup>25</sup>
  - iii. There should be a dedicated policy governing the waiver of HP debt reflecting a more generous approach than the overpayment recovery guide.

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<sup>24</sup> E.g. the 2018 recommendation of the Work & Pensions Select Committee for recovery of HPs to only ever be set at a rate that is affordable for the claimant with the default being 5% of the standard allowance

<sup>25</sup> Consistent with assurances provided by Chris Grayling MP (then minister of state at the DWP) during the passage of the Welfare Reform Bill that "*if [claimants] are successful at appeal, their previous financial position will be reinstated, and there will certainly be no question of recovering any hardship payment that had been made*" (Hansard [HC Debates, Welfare Reform Bill, Public Bill Committee, 26 April 2011](#), col 511).