

UKDPC

UK DRUG POLICY COMMISSION

Getting Problem Drug Users (Back) Into Employment

*Part One: Social Security and Problem
Drug Users: Law and Policy*

Evidence Review
December 2008

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Summary

AIMS OF THE RESEARCH

- To identify and explain the entitlement of problem drug users (PDUs – specifically, people who are regarded as dependent on opiates or crack cocaine) to current core social security benefits.
- To ascertain the numbers of PDUs in receipt of particular social security benefits and trends pertaining to them.
- To find and examine any evidence on how PDUs are dealt with under various welfare-to-work programmes and benefit regimes tied to the legislative requirements and under the Disability Discrimination Act 1995.
- To assess the potential impact on PDUs of government policy and prospective reforms governing, in particular, incapacity for work.
- To investigate the position of PDUs under benefits systems in other jurisdictions, particularly those where there is an 'activation' strategy comparable to that in the UK.

THE POLICY CONTEXT

Both the Home Office's drugs strategy and the Department for Work and Pensions (DWP) Green Paper on welfare reform (*No One Written Off: Reforming welfare to reward responsibility* (NOWO)), published in 2008, contain **proposals for reforms to the benefits system designed to reduce the numbers of PDUs who are principally supported by the benefits system**. The aim is to increase their responsibility to enter employment, reinforced by tighter conditions of entitlement and more strict administrative controls. There are also proposals to facilitate the identification of PDU claimants during the claim process and through information sharing between agencies, including the Prison Service and Jobcentre Plus.

The above policies are focused in particular on incapacity benefits (including the new benefit, Employment Support Allowance (ESA), which has replaced Incapacity Benefit (IB) for new claims from 27 October 2008), and Jobseeker's Allowance (JSA). These, along with Income Support (IS), are the **main benefits to which PDUs are likely to be eligible**.

Statistics on PDU numbers in receipt of benefit have been scant in the past. But in 2008, figures were published by the Government, and others figures became available as estimates in a working paper commissioned by the DWP. The figures reveal, for example, that nearly 50,000 people known to have a diagnosis of drug abuse received IB (or Severe Disablement Allowance) in 2007, but that an estimated 87,000 PDUs in 2006 were in receipt of this benefit. **Altogether, an estimated 240,000 PDUs received out-of-work benefits in 2006.**

An estimated 25,000 PDUs qualified for Disability Living Allowance in 2006. This is a benefit for which people in or out of work may be able to qualify. But the relationship between problem drug use and 'disability' is a problematic one under both social security law and disability discrimination law. So far as the latter is concerned, the Disability Discrimination Act 1995 and regulations made under it expressly exclude addiction to "alcohol, nicotine or other substance" from its definition of "impairment" and thus disability.

SOCIAL SECURITY LAW AND ADMINISTRATION IN THE UK

While problem drug use per se is not a *specific* basis for entitlement to any welfare benefit it is relevant to the strict procedural requirements surrounding claims and conditions of entitlement.

Procedural factors

Some PDUs are likely, because of their mental state and chaotic lifestyle, to experience difficulties in making claims, including meeting the strict time limits and providing the information required as part of the claims process. **They are also likely to find it more difficult to utilise the right of appeal when refused benefit.**

Although the time limit for making claims may be extended, the grounds have become less flexible over the years, and less favourable towards PDUs. In the one part of the benefits system where there is more flexibility, namely housing benefit/council tax benefit, a specific recommendation from the Social Security Advisory Committee to include drug addiction as a basis for "good cause" for a late claim was not acted upon.

Requirements concerning such matters as attendance at medical examinations and to avail oneself of a reasonable opportunity of employment or to take up a training place, which if not adhered to can lead **sanctions** such as loss of benefit, also have a "good cause" excuse which is not guaranteed to be satisfied in the case of someone whose cause relates to problem drug use.

Jobseeker's Allowance and Income Support

The general conditions of entitlement attached to receipt of JSA, including the need to be available for and "actively seeking" employment, reflect the purpose of the benefit as a means of support for those who are not in work but who nevertheless would be expected to have an attachment to the labour market by virtue of their age and physical and mental capacity for work. **The availability and jobsearch conditions are likely to make qualification particularly difficult for many PDUs.**

The condition of being willing and able to take up employment immediately may be difficult for a PDU to satisfy because he or she may need time to prepare mentally for work. However, the claimant may in some circumstances impose "reasonable" restrictions on the kind of work they are willing to accept; and **some PDUs may be able to restrict their employment (in terms of the nature of the work or the hours of work) on the basis that it is "reasonable in the light of his physical or mental condition".**

So far as being “**actively seeking employment**” is concerned, the prescribed factors that must be taken into account in determining what would be reasonable steps for the claimant to take in seeking work include the claimant’s “**physical or mental limitations**”, which would be particularly relevant to some PDUs. Although the steps taken by a claimant to find work are to be ignored if he or she acts violently or abusively while taking them or undermines his or her prospects of securing the work in question by reason of his or her behaviour or appearance, these factors are to be discounted if they were due to reasons beyond the claimant’s control, which could include cases where they were caused by the effects of a drug addiction.

The requirements to attend (for interview) and provide information and evidence to Jobcentre Plus are strictly applied and there are no exemptions or excuses that directly relate to health or disability.

A range of fixed-term sanctions (in the form of loss of a set number of weeks’ benefit) may be imposed on claimants who fail to participate in, or who lose, employment or training. In some cases the claimant can be exempted on the ground of “good cause”, including where they could not attend (or could not attend without risk to their health) a training scheme or employment programme because they suffered from a disease or mental or bodily impairment. **Claimants who lost their employment through misconduct or who left it without just cause, or who refused to apply for a notified vacancy without good cause, are among those who can have a variable length sanction of between 1 week and 26 weeks imposed. In fixing the length of the sanction, account must be taken of physical or mental stress on the claimant. These mitigating factors could well apply to some PDUs.**

The tightening up of the JSA regime, as outlined in a series of Green Papers, and especially in the recent NOWO paper, will result in more onerous conditions (including in some cases the undertaking of community work by long-term claimants) for all claimants. But in addition, **specific measures are being proposed with the aim of ensuring that more PDU claimants than at present move off benefits and into work, including referral to specialist services and a requirement to attend a discussion with a treatment provider.** NOWO contemplates that PDUs would in appropriate cases be **required to see a specialist employment adviser,** with whom a **rehabilitation plan** would be drawn up. **Those who fail to take up drug treatment or specialist employment support could be subjected to benefit sanctions.**

Incapacity for work

PDUs are most likely to be in receipt of Incapacity Benefit (IB) or Income Support (IS) with incapacity credits (ISIC). Entitlement is based on being classed as incapable of work. After 28 weeks on benefit the condition shifts from being incapable of undertaking one’s usual occupation to incapacity for *any* work, as assessed via the “personal capability assessment” (PCA). However, **some claimants with quite severe conditions may have to be treated as incapable of work, such as those with a severe mental illness** which severely affects their mood or

behaviour or severely restricts their social functioning – **a condition which could apply to some PDUs.**

From 27 October 2008 new claimants have to apply for Employment and Support Allowance (ESA) instead of IB. The Government's intention is that at some point those still receiving IB will be moved onto ESA. As the NOWO proposals indicated, out-of-work claimants would generally have to claim either JSA or, if incapacitated, ESA, not IS.

The IB legislation currently **permits claimants to undertake a limited amount of work without losing their "incapable for work" status**, including work attracting a wage up to a relatively small amount (currently £88.50 per week) which is part of a treatment programme under medical supervision at a hospital or similar institution (including treatment as an outpatient) and work as a volunteer. **PDUs undertaking therapeutic work or who work as a volunteer or part-time drug counsellor may thus be able to continue to receive IB.**

Claimants of IB have been governed by the Pathways to Work programme, which has now been rolled out nationally and provides for periodic work-focused interviews (WFIs) designed for discussion of employability and the planning of steps to facilitate entry to employment. Non-attendance at an interview can lead to the imposition of a benefit sanction. **Research has shown that PDUs are among the groups most likely to fail to attend a WFI. They are also, because of their chaotic lifestyle and instability, less likely to be able to undertake training or avail themselves of support.** The Government's **welfare reform plans include the possibility of requiring drug misusers on IB (or ESA) to attend a discussion with a treatment provider as part of the WFI requirements.**

Research has also shown that **concerns exist among PDUs about the lack of specialist help to which claimants can be referred.** However, a range of initiatives, especially progress2work (which involves specialist support for participation in work and training along with training and awareness provision for Jobcentre Plus staff, and which the Government plans to redevelop) and the new Condition Management Programme (which offers "therapeutic interventions", including one-to-one or group therapy sessions, to support those receiving IB or ISIC so that they can gain confidence and capacity to enter employment) have been developed to aid agency cooperation and provide practical support. **The Freud Report highlighted the need for coordinated support for drug users on benefit.**

ESA will assess a person's capacity for work differently from IB. In particular, **the descriptors on which the ESA "work capability assessment" (WCA) is based will be different from those under the IB PCA, particularly in the area of mental health (which is particularly relevant to PDUs).** Arguably, because of the way that the WCA mental health descriptors are drafted, **it may be easier for PDUs to satisfy this test than the PCA.** However, the WCA itself is designed to assess the extent of a person's "limited capacity for work" rather than mere "incapacity for work". The Government's argument is that the underlying assumption should be

that claimants may be capable of undertaking some work rather than that they are incapable of any.

The ESA regime itself will place greater expectations on claimants than the IB system. Actions plans, including work trials and voluntary work, are likely to set out what may be expected of claimants. Claimants who are assessed *not* to have a limited capacity for undertaking a work-related activity – in other words, those who are judged to be sufficiently capable of participating in such an activity – will receive a “work-related activity component” in their benefit. Those whose capacity *is* sufficiently limited (which would be assessed under different criteria to the WCA) will be entitled to a “support component”. **Although the Government’s intention is clearly that PDUs should receive ESA on only a short-term basis, while they are helped to become fit for work, some are likely to qualify for the support component on the basis of the criterion that refers to the claimant’s inability to “initiate or sustain any personal action”.** ESA has very similar rules to IB about work that is permitted while receiving the benefit.

Disability benefits

Some PDUs qualify for Disability Living Allowance (DLA), whether the mobility component or care component or both. One of the difficulties, however, arises from the pivotal requirement that the claimant suffers from a disability. **The relevant case law on DLA** (much of which is in fact concerned with alcohol addiction rather than problem drug use, although the jurisprudence is equally applicable) **indicates that substance addiction is a medical condition but not a disability per se.** The focus needs to be on the disabling effects of the condition. As drug abuse can engender mental and in some cases physical disablement it may give rise to entitlement to this benefit, as long as the disablement is sufficiently severe.

DLA is available to people regardless of whether or not they are in work, although clearly people who qualify for it (particularly for the care component) are less likely than others to be able to undertake regular employment, because of the severity of their condition. Although, therefore, it is not an ‘out-of-work’ benefit, its availability may help disabled people to manage their daily lives, thereby making work more feasible, and meet costs which might otherwise form a barrier to work: for example, the cost of transport.

There is a qualifying period for DLA: the claimant must normally have suffered from the disability for three months prior to the date of the award and it must be likely that he or she will continue to do so for the following six months. **If an available programme of rehabilitation could ameliorate a person’s dependence on drugs to such an extent as to remove or sufficiently reduce their disability within six months they could cease to meet this part of the qualifying period.**

So far as the individual components of DLA are concerned, it is unlikely that many PDUs would meet the test of being unable or virtually unable to walk so as to qualify for the higher rate of the *mobility component*; but **some may qualify for the lower rate, which is available where a person needs guidance or supervision**

(for example, due to a mental state such as paranoia or agoraphobia) in order to be able to get around in an unfamiliar place.

PDUs who qualify for the *care* component are likely to be eligible for the lowest or middle rate. The lowest rate is payable where they need attention from another person in connection with their bodily functions for a "significant portion of the day" or where they are unable to plan or prepare by traditional means a main meal for one person. The attention may, for example, take the form of prompting to clean or dress themselves or to eat, which could be needed where the claimant is in a depressed state. Prompting to cook, or assistance with organising the planning of a meal, may, for example, be needed where a claimant is in a disorientated or depressed state.

Qualification for the middle rate of the care component is based on the need for (i) "frequent attention throughout the day" or (ii) for "continual supervision" in order not to be in substantial danger or to place others in such danger. Some PDUs in, for example, a disturbed or suicidal state may need such supervision. It is also available to people who need sufficient assistance or watching over at night. People who need such assistance or supervision by day *and* night qualify for the highest rate care component.

INTERNATIONAL DEVELOPMENTS

Many other states have 'activation' provision within their welfare system that is broadly comparable with that in the UK, designed to ensure that those who are out of work are encouraged or pressured to enter employment. **Some, but not all, make special provision for PDUs under parts of their benefits system.**

Australia

In Australia the main out-of-work benefit, Newstart Allowance (Youth Allowance for the under-21s) has similar jobsearch and work availability requirements to their equivalents in the UK. There are also strict administrative requirements concerned with claiming benefit. These have been found to present real difficulties for people with a serious substance addiction, although in some (but not too many) areas, special arrangements are in place to facilitate satisfaction of these requirements (such as by agency staff visiting methadone clinics).

Although PDUs may qualify for incapacity benefits such as Sickness Allowance, they are most likely to be in receipt of Newstart Allowance.

Nevertheless, some may qualify for a **Disability Support Pension**. Qualification for this depends largely on having an impairment which generates sufficient points under the legislation. **The various impairments and the scores ascribed to them are set out in tables. There is a discrete table concerned with alcohol and drug dependence.** Not all of the impairments based on this dependence attract sufficient points in themselves to carry a claimant over the minimum threshold, but they can count towards the overall points score in conjunction with impairments in other impairment tables.

The 'quarantining' of benefits has been developed in Australia. The intention is for a form of 'income management' to operate so that benefits are paid in a way that curtails claimant control over expenditure, for example through the issuing of vouchers redeemable in particular shops or for specific goods only. The idea is to ensure that benefits are expended in accordance with a family's priority needs (as defined). In one scheme in Queensland, claimants who fail to meet a condition of refraining from activities that are regarded as threatening family welfare, namely the commission of offences relating to drugs, alcohol or family violence, may have their benefits quarantined. In this way, as has happened in the USA (see below), **benefit rules are seeking to modify behaviour relating to matters such as drug abuse.**

Germany

In Germany, **PDU's may qualify for unemployment benefits or assistance.** But as in the UK the jobcentre is assigned a role in supporting the unemployed into work, including drug addicts and others for whom there are entrenched barriers to employment.

Drug addicts who are medically unfit for work may qualify for sickness benefits under the sickness insurance scheme, provided they have an employment history. If they do not have such a history they would either qualify for the minimum benefit for jobseekers or, if only capable of working three days or less per week, for 'invalids' minimum benefit.

In some cases benefit claimants may be required to undergo **rehabilitation in order to improve their medical condition** (or to apply for such rehabilitation) as a condition of continued receipt of benefit.

New Zealand

The unemployment benefits framework in New Zealand is similar to that in the UK in terms of availability and worksearch requirements, entry into a jobseeking agreement and participation in welfare-to-work activities such as training. There are also sanctions for those whose claim for benefit is considered avoidable, such as where they lost their employment through misconduct. **There are no specific arrangements under the social security system designed for moving PDUs into employment.**

Normally, drug users who apply for benefit are considered not to be 'work ready' and are encouraged to obtain a medical certificate from their GP. Those classed as unable to work on health grounds (which may include drug addiction per se) will generally go onto Sickness Benefit. The Ministry of Social Development (MSD) will rely on the GP's assessment. **Over the past five years there has been a steady rise in the number of claimants qualifying for Sickness Benefit on the basis of drug abuse;** and the rate of increase has exceeded that for overall numbers of Sickness Benefit recipients. Those with the most serious and long term health problems are likely to be in receipt of **Invalids' Benefit: far fewer drug abusers receive this, but again the numbers have increased steadily in recent years.**

The MSD has launched a strategy designed to support recipients of these benefits to prepare for and enter work rather than be trapped on benefit. Under changes introduced through legislation in 2007, claimants of Sickness Benefit or Invalids' Benefit may be required to have personal development and employment plans. Although these claimants can be required to undergo rehabilitation, **drug treatment is classed as medical treatment, which is excluded**. However, drug addicts are encouraged to obtain medical help.

Norway

Norway has been developing **integrated welfare support** through a new Labour and Welfare Administration (NAV) established in June 2006. This is a cooperative endeavour between local authorities – which are still responsible for administering social welfare payments (but not insurance benefits such as sickness or unemployment benefit) and also for help with housing and other welfare needs – and central government. **These reforms should be of benefit to PDUs, who have a range of financial and other needs**. However, unemployment is very low in Norway (the rate as at June 2008 is less than 1.5% of the working-age population) and **PDU numbers are also low**. There are **no specific social security measures designed to get PDUs into employment**.

Sweden

Sweden still pays unemployment benefits at relatively generous rates, although the conditions are strict and mirror those elsewhere, such as requiring a willingness to accept work, to engage in the active pursuit of employment, to register with the relevant agency and to sign up to a **back-to-work plan**. Such a plan is **very unlikely to include a commitment that the claimant should undergo drug rehabilitation**. There are also similar sanctions to those attached to JSA in the UK.

The Swedish benefits system has a residual system of support for those who cannot qualify for unemployment benefit. As in Norway, this social assistance is locally administered, as are activation strategies attached to this benefit.

As in other Nordic countries there are no **specific schemes for getting unemployed PDUs into work or training**. Moreover, there has been an agency emphasis on getting people who are 'job ready' into work; most PDUs are not considered to fall into that category – although that is less true in Finland, where hard-to-place claimants with multiple life problems are being targeted for active help towards entry to employment, whereas in Sweden they would be assisted through the social assistance scheme. **PDUs may qualify for sickness or invalidity benefits, but probably only if they have a long history of drug addiction**.

The United States of America

The USA does not have an inherently generous social security system. But **PDUs are in any event likely to face particular barriers to support, at least where disability benefits are concerned**. Since 1996, federal legislation has been in place which effectively denies many of them the right to Social Security Disability Insurance and to Supplemental Security Income for the Aged, Blind and, Disabled, which is paid

on the basis of financial need, because they will only qualify as disabled if their disability is not primarily caused by drug dependence. Those convicted of a drug offence (including possession) may also be denied support (for themselves, although not for other family members) under the Temporary Assistance for Needy Families programme and the food stamps programme. **These restrictions have an underlying moral rationale**, based on behaviour disapproval. **There is also a concern**, which seems on the evidence to be misplaced, **that drug abuse is encouraged by the availability of social security to the individual.**

CONCLUSIONS

PDUs have generally had a low visibility within the UK benefits system and until relatively recently few measures or policies have been designed specifically for them. They are now being targeted under benefits reforms designed to reduce dependence on benefits and increase entry to employment. In general, PDUs are likely to face an increased difficulty in qualifying for all of the main out-of-work benefits with the possible exception of ESA (although they will be subjected to the stricter welfare-to-work regime applicable under ESA as compared with IB).

Under current legislation, **problem drug use will be a basis for entitlement to benefit only if it causes physical or mental problems which give rise to incapacity for employment or disabling conditions** affecting the capacity for self-care or mobility. However, there are a number of **grey areas within this area of the law** which make the ascertainment of actual or probable entitlement problematic.

There are interesting parallels with developments in other states, although none (with the exception of the 'quarantining' measures in parts of Australia) have as yet been uncovered which involve measures targeted specifically on problem drug use. **Australia seems to be the only state in the survey whose legislation specifically identifies drug addiction as a cause of impairment relevant to benefit entitlement.** The UK could, and arguably should, consider whether this might be feasible under its legislation on, for example, incapacity benefits. Another practice that seems worth emulating is the coordination of welfare and other support from local and central agencies that occurs in Norway. While PDUs qualify for a range of benefits across the various states surveyed, it cannot be ascertained whether qualification is in practice easier or more difficult than in the UK.

The UK's benefits system undoubtedly provides a lifeline for many PDUs who are unable to work or to find or retain employment. But it should not be assumed that because so many PDUs do gain access to the benefits system, qualification for support is guaranteed or maximised. The problem is that **we still do not really know enough about how PDUs are dealt with under the benefits system.** For this reason it is difficult to predict what the overall consequences will be of the tougher benefits regime for PDUs who are either capable or incapable of working, other than to observe that many will face increased difficulty in qualifying for support.

The **underlying policy assumption is that drug dependence is a 'lifestyle' and that the benefits system should make it a less 'comfortable' one in order to move PDUs off benefits and into work** – and government policy in the UK is going further than almost any other Western democratic state in this regard. While an emphasis on using the benefits system to pressurise PDUs into entering treatment programmes can arguably be justified by evidence that without tackling the claimant's drug dependency it will be impossible to increase their employability, **complementary cross-agency support and good treatment services are absolutely vital.**

Abbreviations

CMP	Condition Management Programme
CTB	council tax benefit
DLA	Disability Living Allowance
DWP	Department for Work and Pensions
ESA	Employment and Support Allowance
HB	Housing benefit
IB	Incapacity Benefit
IS	Income Support
ISIC	Income Support with incapacity credits
JSA	Jobseeker's Allowance
MSD	Ministry of Social Development (New Zealand)
NAV	Norwegian Labour and Welfare Administration
NOWO	<i>No One Written Off: Reforming welfare to reward responsibility</i> (DWP Green Paper 2008)
PCA	personal capability assessment
PDU	problem drug user
SDA	Severe Disability Allowance
SSAC	Social Security Advisory Committee
SSP	Statutory Sick Pay
WCA	work capability assessment
WFI	work-focused interview

1. Research aims and intended outcomes

1. This part of the research has four principal aims:

- To identify and explain the entitlement of problem drug users (PDUs – specifically, people who are regarded as dependent on opiates or crack cocaine) to current core benefits such as Incapacity Benefit and Disability Living Allowance, through examination of relevant legislation and the decisions of the courts and Social Security Commissioners.
- To attempt to find and examine statistics on the numbers of PDUs in receipt of particular social security benefits and trends pertaining to them, through exploration of a range of official data sources.
- To find and examine any evidence on how PDUs are dealt with under the Pathways to Work system and what impact that system has on their entry to employment, making particular use of the wide-ranging Department for Work and Pensions (DWP) research reports and independent publications on these matters.
- To assess how the Government's policy of moving people from long-term incapacity benefits into employment through the replacement of Incapacity Benefit from the end of October 2008 by a new Employment and Support Allowance (ESA) under the Welfare Reform Act 2007 and pursuant regulations might impact upon PDUs and to consider the effect of the Disability Discrimination Act 1995.
- To investigate how the position of PDUs in other jurisdictions, particularly those where there is a comparable 'activation' strategy to that in the UK (such as Australia, Germany and the Nordic countries), differs from that in the UK and whether there are any special arrangements for them.

2. A particularly significant development during the preparation of this report was the publication of the DWP Green Paper *No One Written Off: Reforming welfare to reward responsibility* (NOWO) (published 22 July 2008) (DWP, 2008c), which reiterates a number of policy changes (including some, such as the new ESA, for which the legislation is already in place), but also proposes a new regime for PDUs.

2. Background

THE DRUG STRATEGY AND NOWO

3. The proposals contained in NOWO (DWP, 2008c) to harness the benefits system with a view to “breaking the cycle of dependency” (Ibid: 46) followed on from references in the Home Office’s drug strategy 2008 to the use of “opportunities provided by the benefits system to provide support and create incentives to move towards treatment training and employment” (HM Government, 2008b: 27). The underlying rationale is that “we do not think it is right for the taxpayer to help sustain drug habits when individuals could be getting treatment to overcome barriers to employment”. The drug strategy advocates a new regime under which “[i]n return for benefit payments, claimants will have a responsibility to move successfully through treatment and into employment” (ibid., p.6). The detail of how this policy would be operationalised was not fleshed out, but the Government said that an announcement would follow. The recent NOWO proposals explain the possible reforms to bring it into effect.
4. NOWO builds on previous welfare-to-work initiatives but seeks to make an even greater shift in the balance between rights and responsibilities toward the latter, and in particular focuses on the individual’s “obligation to work”. The three guiding principles are “control”, “capability” and “contribution” (DWP, 2008c: paras 1.17–1.18). The first is based on the idea that “people should be in *control* of their own lives and take personal responsibility for making the most of the opportunities available”. The second involves support for people “by an active and enabling welfare state to build their *capability*”. People must, at the same time, “be aware of the *contribution* expected of them in return for help and support for the welfare system”. (The emphasis in each case is as per the original.)
5. As shall be shown, the application of these principles will mean that the regime facing people claiming Jobseeker’s Allowance (JSA) and Incapacity Benefit (IB) (or, for new claims from October, Employment and Support Allowance (ESA)) will become far tighter, with a much smaller proportion of people being accepted by the system to be merely waiting for work or incapable of undertaking it. In some cases this will mean people having to undertake work, or for PDUs, the prospect of having to undergo treatment or take certain other steps supporting a return to work, as a condition of receiving benefit. Indeed, one possible reform is the introduction of a new “Treatment Allowance” to replace normal benefit payments while a PDU is undergoing treatment (DWP, 2008c: para. 2.44). In addition, some PDUs would also be affected by the proposals concerned with disabled people and people with a mental health problem per se.
6. The NOWO Green Paper draws on the findings of a DWP-commissioned working paper estimating the prevalence of PDUs among the population in receipt of state

benefits (Hay and Bauld, 2008) (which is also covered below). Previous studies have also confirmed the extent of PDU-reliance on state benefits (see Kemp and Neale, 2005). It is estimated in NOWO that approximately 240,000 people in England who are receiving out-of-work benefits are PDUs (see also further discussion of the statistics at paras 12-14 below). NOWO explains how the Government is seeking to improve the way that agencies, including Jobcentre Plus, work together to support PDUs (lack of coordination and proper referral being a particular problem highlighted in the past). It also makes reference to funded initiatives such as progress2work (which involves specialist support for participation in work and training along with training and awareness provision for Jobcentre Plus staff: Kemp and Neale, 2005). Research commissioned by the DWP has found progress2work to have been quite successful in assisting into or towards employment over 10,000 people on benefit with drug problems (particularly those recovering from drug problems), mostly long-term unemployed (see Dorsett et al., 2007). Nevertheless, the Government believes that further progress is needed. It says that up to 100,000 PDUs on benefits are not in treatment and refers to proposals in the drug strategy to direct them towards a drug treatment provider and for possible benefit sanctions for non-compliance. The basic policy view is that “[t]axpayers cannot be expected to support a drug-dependent lifestyle, so where drug treatment is available and considered appropriate, then there should be an obligation that individuals will take it up” (DWP, 2008c: para. 2.33). The specific proposals, including sanctions for non-compliance, are discussed in the section on JSA (in particular, paras 44–45) below.

7. NOWO acknowledges that the feasibility of such a strategy is in part dependent on the capacity to *identify* PDUs in the benefits system. It regards the numbers of benefit claimants who are recorded as having a drug problem as under-representing the real total. (These figures are discussed at paras 12–14 below.) NOWO indicates that identification of PDUs in the benefits system will occur on a systematic basis in the future, for example through the claiming process for the new ESA and through the role of JSA personal advisers (DWP, 2008c: para. 2.37). Another measure will be to inform Jobcentre Plus whenever a person arrested and tested for certain drugs (e.g. heroin) is referred for a ‘required assessment’ by a drugs worker or when a person agrees to drug rehabilitation requirements as part of a community sentence. The DWP estimates that there would be around 11,900 cases of the former category and between 22,500 and 60,000 of the latter category per year in respect of whom notification would be needed (DWP, 2008b: paras 199–202). A further possibility being considered, given the high proportion of ex-offenders with a drug problem (some of whom, especially those with heroin addiction, may be unable to work: see Hartfree et al., 2008), is for the Prison Service and Jobcentre Plus to share information, ostensibly as a means to ensuring that there is “fast-track support for identified [PDUs]” (DWP, 2008c: para. 2.38). The DWP estimates that each year approximately 100,000 people leave prison and claim benefit (DWP, 2008b: para. 204). The idea that people claiming benefit should be required to declare whether they are a drug addict when making their claim is put forward, but relatively cautiously (DWP, 2008c: para. 2.39). It would be expensive in resource terms to police this requirement, but at the same time there is the counterbalancing argument that it would send out a useful message “that drug misuse is a serious cause of worklessness and that individuals have a responsibility to declare it and take steps to overcome it” (Ibid: para. 2.40).

DRUG USERS AND THE CURRENT BENEFITS SYSTEM

8. Many PDUs have health problems associated with their drug dependence (Kemp and Neale, 2005: 34) and consider themselves unable to work due to long-term sickness or disability.¹ At present, PDUs who are dependent on social security benefits are likely to be in receipt of IB (or Income Support with incapacity credits (ISIC)) on a long-term basis – or, if claiming after 27 October 2008, ESA. In particular, many PDUs will have mental disabilities, and in some cases physical disabilities, of sufficient severity to be classed as incapable of work under the prescribed statutory criteria for IB (or the equivalent under ESA), as discussed below. It is also possible that some drug misusers will have care needs that bring them within the statutory criteria for an award of Disability Living Allowance (DLA). However, unlike IB/ISIC, DLA entitlement is not dependent on incapacity for work and claimants can receive it even when in full-time employment.
9. The position of PDUs under these benefit regimes is not altogether straightforward, however. In part this is because of uncertainty as to whether or when substance addiction is a disability or a medical condition, and how far the consequences rather than the cause(s) of disability or incapacity are relevant, as opposed to the manifestations of the condition in question. (See, for example, the recent Commissioner's Decision *R(DLA)6/06*, discussed at para. 72 below.) These definitional issues are likely to continue under ESA (see paras 62 et seq. below), since if claimants are to be entitled to benefit, the problems that affect their capacity for work will need to arise from a "specific bodily disease or disablement", "a specific mental illness or disablement", or "as a direct result of treatment provided by a registered medical practitioner, for such a disease, illness or disablement".
10. Drug misusers who do not qualify for IB/ISIC (or ESA) but need benefits for basic income will generally have to apply for JSA. Entitlement to JSA is conditional on, among other things, the individual's availability for work and their active search for work, reinforced by jobsearch commitments set out in a Jobseeker's Agreement with the Department for Work and Pensions (DWP), or more particularly with Jobcentre Plus. The regime has been progressively tightened up over the years since its introduction in 1996. Since 1997 it has been central to the Labour Government's welfare-to-work strategy, which is tied in to various employment programmes, in particular those under the New Deal (Dorstal, 2008). Labour's current policy goal of raising the employment participation rate among the population of working age to 80% is being supported through tougher requirements on jobseekers: the DWP talks of "raising expectations of what a jobseeker should contribute" (DWP, 2007: 49).
11. While the number of claimants in receipt of JSA has fallen over the past ten years and currently stands at approximately 800,000 (although is starting to increase now due to the effects of the current economic downturn), the number of IB and ISIC recipients has risen overall (although has stabilised over the past few years) and

¹ For example, the Drug Treatment Outcomes Research Study (DTORS) found that 25% of drug treatment seekers class themselves thus; a further 24% were unemployed and not looking for work: Jones et al., 2007.

currently stands at 2.5 million. The Government’s aim is to reduce the latter number by at least 1 million and it became clear from the Home Office’s drug strategy that PDUs on benefit are among those claimants who would be targeted. As noted above, NOWO sets out specific proposals in this area. As discussed below (see paras 62–69), the ESA regime, which will come into force in October 2008, will be tougher than that previously faced by many IB claimants, particularly because many claimants will be required to undertake a “work-related activity” (DWP, 2006). The fact that the IB scheme was concerned, fundamentally, with the question of whether a person was “incapable of work”, whereas the ESA scheme aims to determine the extent of a “limited capacity for work”, shows a crucial difference of emphasis. The Government has made it clear throughout the various debates on the new scheme and in the preceding policy documents that it wants to avoid automatic assumptions that people with significant problems related to health or disability are not capable of undertaking work. The reforms include substantial changes to the assessment criteria, which will now form part of a “work capability assessment” in place of the PCA.

STATISTICS ON BENEFITS AND PDUs

12. There has until recently been very limited data on the numbers and proportion of benefit recipients who are PDUs. In October 2006, statistics were widely quoted in the press showing that around 48,000 of people receiving IB (or Severe Disablement Allowance (SDA)) – or just under 2% of all people receiving this benefit – qualified as incapable of work due to drug abuse (e.g. Wilson, 2006). In April 2008, figures for all years from 1997 to 2007 were published in response to a Parliamentary question. The figures, shown in Table 1, reveal that the proportion of IB/SDA claimants medically certified as drug abusers steadily increased over this period.

Table 1: Working age IB/SDA (successful) claims which include a recorded diagnosis of drug abuse from a claimant’s medical certificate

Number as of May	Drug abuse cases	Drug abuse as % of total caseload
1997	21,900	0.84
1998	25,300	0.96
1999	27,900	1.05
2000	30,950	1.15
2001	36,230	1.32
2002	40,690	1.47
2003	43,890	1.58
2004	46,120	1.66
2005	47,980	1.75
2006	48,550	1.81
2007	49,890	1.89

Source: House of Commons Written Answers, 2 April 2008.

A regional breakdown shows that in 2007 the highest rate of recorded drug abuse as a proportion of the caseload was in South-West England (3.7%), the second highest was in Scotland (2.7%) and the lowest (1.2%) was in North-East England.²

13. Recently, a working paper commissioned by the DWP (Hay and Bauld, 2008) has provided estimates of PDU benefit recipient numbers. The methodology employed by these researchers (who correlated from various data sources) and the validity of their estimates cannot be commented upon here. Assuming their estimates are broadly accurate, their findings point to a much higher number of IB recipients in England being PDUs than the above statistics would suggest: the figure is calculated at 86,869 (or 4.42% of IB recipients) in 2006 (Hay and Bauld, 2008: Table 4.1). Nevertheless, it is also noted that according to the National Benefits Database just 10,438 claimants of IB in 2006 cited drug use as the reason they are not able to work, representing only 12% of the estimated number of PDUs in receipt of IB (ibid., p.23). The researchers explain that the apparent under-representation reflected in this figure arises from the fact that it is based exclusively on the numbers who have drug abuse as their primary condition (although the total is also increased slightly by its inclusion of people whose drug problem is not from opiates or crack cocaine). The relationship between drug abuse and qualification for IB is discussed later in this report, but it is worth mentioning the part of the minister’s explanation linked to the data in Table 1: “Most people with drug or alcohol dependency also have other conditions, such as mental illness; and it is these other conditions which result in entitlement to benefits”.³ This gives further credence to the much higher estimate from Hay and Bauld above.

14. Hay and Bauld (2008) have also estimated the number of PDUs in receipt of other benefits. The full details are shown in Table 2.

Table 2: Estimated numbers of PDUs in receipt of various benefits; and PDUs as percentage of all benefit recipients in England, 2006

Benefit	PDUs in receipt of the benefit	Working-age people in receipt of the benefit	% of claimants who are PDUs
Jobseeker’s Allowance	65,668	798,520	8.22
Income Support	145,594	1,789,930	8.13
Incapacity Benefit	86,869	1,325,460	4.42
Disability Living Allowance	24,766	1,966,830	1.87
Any of above benefits	266,798	4,034,870	6.61

Source: adapted from Hay and Bauld (2008), Table 4.1.

² DWP Information Directorate, *Incapacity Benefit/Severe Disablement Allowance claimants with a Mental and Behavioural Disorder by government office region*, supplied to author (June 2008). Placed in the House of Commons Library in February 2008 in response to a Parliamentary Question: House of Commons, Written Answers, 5 February 2008, col. 970-971w.

³ House of Commons, Written Answers, 2 April 2008, col. 929w, per Mrs A. McGuire MP, Minister DWP.

The proportion of benefit recipients who, according to the estimate, are PDUs, 6.61%, contrasts with a prevalence of PDUs among the working-age population as a whole of just over 1% (Hay and Bauld, 2008: 26). Approximately one in four of the PDU benefit recipients is female (ibid., p.20). Unlike the IB figures shown in Table 1, the figures compiled by Hay and Bauld do not show year-on-year trends and are statistical estimates based on a number of suppositions.⁴

THE INTERNATIONAL PICTURE

15. The research has aimed to explore how far and in what ways PDUs have been included in social security and related welfare-to-work policies under comparable regimes in other states (see paras 86 et seq. below). But international comparisons are to some extent problematic because of the fundamental differences in national benefits systems and their underlying bases. However, it is clear that many other states have been increasing the pressure on unemployed recipients of benefit through so-called activation policies (e.g. Carney, 2008; Dorstal, 2008; Johansson and Hvinden, 2007; McGinnity, 2004; Ministry of Social Development, 2001). Moreover, it is also clear that the link between drug addiction and disability or incapacity for work can not only be problematic in definitional terms, as noted above, but also in policy terms. For example, in the USA, a federal law passed in 1996 (Public Law 104-121) provided for the termination of disability benefits where the cause of disability was primarily drug addiction (Watkins et al., 1999). This legislation reflects one approach to a prevalent policy goal, visible across various states, of striking an appropriate balance between supporting vulnerable people in need while discouraging particular forms of behaviour. In the case of the USA, the balance is tipped towards the latter objective, in part because of an assumption (seemingly disproved by empirical research: see Swartz et al., 2003) that the availability of federal cash benefits such as disability payments encourages drug use (see further paras 112–114 below).

THE DISABILITY DISCRIMINATION ACT 1995

16. While, as discussed in this report (especially at paras 48-53 and 70-85), a problem drug use can make a person incapable of work or give rise to disablement such as to trigger entitlement to incapacity or disability benefits, the social security case law effectively rejects the idea that problem drug use per se is a disability or automatically results in incapacity. It is also clear that while problem drug use is likely to make people less employable as well as less likely to be employed (e.g. due to a chaotic lifestyle) (South et al., 2001; Kemp and Neale, 2005), it will similarly not be regarded as a disability for the purposes of the Disability Discrimination Act 1995. This Act protects against discrimination on the basis of disability in relation to employment, including decisions on whether to employ the person, the terms on which a job is offered, and whether to dismiss a person from their employment. The definition of 'disability' under the 1995 Act refers to a "physical or mental impairment which has a substantial and long-term effect on [the person's] ability to carry out normal day-to-

⁴ There has also been a report in the *Daily Mail*, stated to be based on data obtained under the Freedom of Information Act, that the number of DLA claimants who are drug addicts or alcoholics "has risen five-fold, from 3,000 in 1997 to almost 17,000 last year": Harper, 2008.

day activities”.⁵ But the definition is to be read subject to Schedule 1 to the Act, which enables regulations to be made prescribing conditions as amounting to or not amounting to impairments.⁶ The regulations made under this provision state, among other things, that “addiction to alcohol, nicotine or other substance is to be treated as not amounting to an impairment for the purposes of the [1995] Act”.⁷ This would mean that a job applicant or employee who was discriminated against because he or she had a drug habit (past or present) may not have been treated unlawfully for the purposes of this Act. This contrasts with the position in Italy, where there is legislation that prohibits an employer from asking for information about a job applicant’s or existing employee’s use or dependence on drugs (Ministero del Lavoro etc., 2001: 39).

17. However, as for the purposes of social security legislation, problem drug use may be a cause of a disabling condition, whether physical or mental, which would be classed as a disability for the purposes of the Act. As the official guidance indicates,⁸ by way of example (referring to alcohol addiction, although the position of drug addiction is identical):

“A person with an excluded condition may nevertheless be protected as a disabled person if he or she has an accompanying impairment which meets the requirements of the definition. For example, a person who is addicted to a substance such as alcohol may also have depression, or a physical impairment such as liver damage, arising from the alcohol addiction. While this person would not meet the definition simply on the basis of having an addiction, he or she may still meet the definition as a result of the effects of the depression or the liver damage.” (DRC, 2006, para. A.14)

18. There is a problematic question, though, arising from the potential difficulty in determining whether the employer’s discrimination was due to the disability per se or the drug habit that has precipitated it. The question is, how far is it possible to separate the two for the purposes of determining whether unlawful discrimination has occurred? Say, for example, that as a consequence of their drug problem a person (X) has developed very slurred speech or experiences regular seizures. On the assumption that X’s condition amounts to a disability, one can say that if an employer treats him less favourably than a person who does not have that condition then that would

⁵ Disability Discrimination Act 1995, s. 1(1).

⁶ Schedule 1, para. 1.

⁷ The Disability Discrimination (Meaning of Disability) Regulations 1996 (SI 1996/1455), reg. 3(1). This exclusion does not, however, apply to “addiction which was originally the result of administration of medically prescribed drugs or other medical treatment”: reg. 3(2). Regardless of whether or not addiction to medically prescribed methadone (prescribed as a substitute for heroin) would fall within this definition, it could be argued that the original drug addiction continues and is within the exclusion. To be protected, it would seem to be necessary at the very least for the claimant to show that he or she is being discriminated against exclusively because of their methadone addiction rather than the underlying drug addiction. Note that the regulations define ‘addiction’ as including ‘dependency’.

⁸ The guidance must be taken into account by a court, tribunal or other adjudicating body deciding on a complaint under the Act: Disability Discrimination Act 1995, s. 3(3).

potentially amount to unlawful disability discrimination. On the other hand, if an employer treats X less favourably not because of his physical problem but because he is a drug abuser, then X would not be protected by the 1995 Act.⁹ However, if both factors (i.e. the drug problem and slurred speech) led to the less favourable treatment of X, then the Act might offer him protection.

⁹ *Lewisham London Borough Council v. Malcolm* [2008] UKHL 43, [2008] 3 WLR 194, per Lord Scott of Foscote at para. 29 and Lord Neuberger at para. 170.

3. Law and policy on social security in the UK

19. Social security legislation in the UK does not identify problem drug use as a specific basis for entitlement to any particular benefit. Problem drug use, through its effects on the individual, is nevertheless relevant to the strict procedural requirements surrounding claims and conditions of entitlement to a range of benefits.

PROCEDURAL FACTORS

20. Access to benefit entitlement is contingent on, among other things, meeting the **procedural requirements** within the social security system. One of the key areas is the **claims process**, which involves the provision by the claimant of detailed information (the claim forms for some benefits being notorious for their length) and in respect of which there are strict time limits. Those who wish to challenge a decision on a claim, via the **appeal process**, involving appeal to a tribunal, will also have to comply with procedural requirements. As Genn has explained, even though the tribunal process may be less formal than that involving a court, that does not “overcome or alter the need for applicants to bring their cases within the regulations or statute, and prove their factual situation with evidence” (Genn, 1993). Problems among vulnerable people, including those with various disabilities, in accessing the benefits system effectively and getting the most from it have been widely reported (e.g. Disability Agenda Scotland, 2005; Finn et al., 2008). This is part of a more general problem that has at its root the complexity of the system as a whole and of the individual benefit schemes and their legal frameworks, as highlighted by the Work and Pensions Select Committee (HCWPC, 2007a), which has prompted a government initiative to reduce complexity and monitor the progress of simplification (Harris, 2008). A general state of confusion experienced by appellants about the appeal process is also reported, across many different tribunal systems (Adler and Gulland, 2003), including Mental Health Review Tribunals (Dolan et al., 1999) and social security tribunals (in respect of IB and Disability Living Allowance (DLA)) (Berthoud and Bryson, 1997; Hawkins et al., 2007).

21. Thus it may be surmised that some PDUs could, because of their mental state, experience particular difficulties in coping with procedural aspects of the benefits system, including the appellate process. There does not appear to be any study of this in the UK in recent times (although the ability of PDUs to cope with welfare-to-work programmes themselves, such as the New Deal, has been questioned: Kemp and Neale, 2005), but there is a good illustration from research in Los Angeles. When, following the introduction of a new US federal law in 1996 terminating entitlement to disability benefits for people whose disability was derived primarily from alcoholism or drug abuse (see paras 112–114), many of these citizens who could have been eligible to stay on the benefit because of mental illness lost entitlement because they failed to

apply for re-certification or did not appeal (Watkins et al., 1999). The researchers in Los Angeles found that although people with high-severity psychiatric symptoms were more likely to appeal or be re-certified than others with lesser symptoms, 51% of them lost entitlement to the benefits (including those who failed to appeal).

22. There are **time limits for claims** in respect of almost all social security benefits in the UK. They are set out in regulations and they vary across the different benefits. Their effect is to limit the extent to which a person can have a claim for benefit backdated. For example, Income Support (IS) or Jobseeker's Allowance (JSA) entitlement cannot normally precede the date on which the claim was made, although in limited circumstances, where the claimant could not reasonably have been expected to make the claim earlier, it can be backdated by up to one month or in further limited circumstances up to three months; in the case of Child Benefit and Incapacity Benefit (IB) a claim can always be made at any time within three months of the date from which benefit is sought to be paid; in the case of State Pension Credit there is a time limit of 12 months.¹⁰ The rationale for these time limits is, in part, that decisions about entitlement to benefit should be based on facts, including medical evidence, that are capable of proper verification rather than on potentially unreliable past information; and on the basis that any period in which benefit is paid corresponds with the claimant's period of need. Yet there is also a case for flexibility and latitude, not merely because it may be regarded as unjust to deny a person in real need their due entitlement merely because of a procedural breach (Partington, 1994: 5), but also because it is fair for the system to acknowledge that it is not always possible for a person to make his or her claim promptly: for example, delay may be the result of difficult personal or family circumstances or health problems. Substance abusers, who often lead very disorganised lives, are particularly likely to fall foul of prescribed time limits for benefit claims.

23. For many years the legislation permitted an extension to the period for making a claim for any claimant who could show "good cause" for the delay. Between 1979 and 1987 it was necessary to show that this good cause prevailed continuously between the date from which the claimant had substantive entitlement to the benefit and the date on which the claim was made.¹¹ However, changes to the time limit regulations in 1987¹² meant that claims could be backdated only for up to 12 months, again on the basis of continuous good cause, or for up to one month at the discretion of the Secretary of State. It is unclear how many PDUs may have been permitted to submit late claims on the basis of good cause for delay. The accepted definition of good cause, derived from the case law, was:

"some fact which, having regard to all the circumstances (including the claimant's state of health and the information which he has received and that which he might reasonably have obtained) would probably

¹⁰ Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968), reg. 19 and Schedule 4, both as amended.

¹¹ Social Security (Claims and Payments) Regulations 1979 (SI 1979/628).

¹² Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968).

cause a reasonable person of his age or experience to act (or fail to act) as the claimant did".¹³

Those suffering from an illness, including a mental illness, which resulted in a late claim were regarded as having a good cause (Partington, 1994: 104–108). It is likely that some PDUs with a serious addiction could have been able to show "good cause", particularly if they were unable to look after their own affairs.

24. In 1997, proposals were published for reducing the possible backdating from 12 months to 13 weeks, but this was advised against by the Social Security Advisory Committee (SSAC), on the ground that the new time limit would be too short and would penalise the poorest claimants (those on IS) the most, while also diminishing the insurance basis of contributory benefits (SSAC, 1997a and 1997b). Nevertheless, amendments did take effect in 1997; instead of permitting "good cause" for late claims the rules prescribed the circumstances in which the period for claiming could be extended beyond the prescribed time limit. For example, an extension of the IS and JSA three-month time limit became possible (and this is still the case) only if the reasons for the claimant's delay fell within the circumstances prescribed by the regulations – such as if the delay was due to the claimant's communication difficulties consequent on a learning difficulty or blindness or because the claimant was advised by the Department for Work and Pensions (DWP) in a way that led him or her to believe that the claim would not succeed. The ground of particular relevance to PDUs relates to where the claimant is:

"ill or disabled, and it was not reasonably practical for the claimant to obtain assistance from another person to make his claim"

although this ground does not apply to JSA. In other circumstances the time limit may be extended by up to one month where, as a result of one or more prescribed circumstances (such as "adverse postal conditions" or the claimant ceasing to be a member of a couple within the month before the claim was made), the claimant "could not reasonably have been expected to make the claim earlier".

25. The SSAC reviewed the operation of these provisions seven years ago. Draft regulations were issued proposing broad alignment between the "good cause" rules in housing benefit (HB) and council tax benefit (CTB) with the IS and JSA time limits. But they drew strong criticism and were withdrawn, and the position today remains unchanged¹⁴ although some changes will be implemented later this year (see para. 26 below). At the same time, the SSAC also considered the impact of the changes to the "good cause" provisions that had taken place in 1997 and addressed specifically the position of people with problems related to alcohol and drug abuse. It is not necessary to consider all of the faults with the "good cause" rule, but an important conclusion of

¹³ Commissioners' Decisions *CS 371/49* and *R(S)2/63*, para. 11.

¹⁴ Housing Benefit Regulations 2006 (SI 2006/213), reg. 83(12); Council Tax Benefit Regulations 2006 (SI 2006/215), reg. 69(14); see also the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006 (SI 2006/214), reg. 64(13) and corresponding Council Tax Benefit Regulations (SI 2006/214), reg. 53(13).

the SSAC was that existing flexibility in determining good cause was important so that individual circumstances could be taken into account fairly. That overrode any concerns about inconsistency between different local authorities' interpretation of the provisions in question (HB and CTB being benefits administered by such authorities rather than the DWP). The Committee therefore recommended against the introduction of a prescribed list of permitted reasons for late claims to HB and CTB, but also suggested that if the Government was intent on making such a reform the ground concerning difficulty in communicating should specifically refer to mental health problems and drug and/or alcohol addiction problems (SSAC, 2001: para. 66). Although the reasoning behind this is not stated it seems highly likely that it reflected a concern that people with problems with drug and/or alcohol addiction do not easily fit within the "ill or disabled" category found in the mainstream regulations on claims and payments (cited in note 10 above)..

26. Although, in November 2000, the Government withdrew the proposed regulations altogether, in the light of the SSAC's views and those of local authorities and others,¹⁵ it has recently published similar proposals (DWP, 2008d). But this time the proposed changes will not alter the "good cause" rules, merely the maximum backdating period, which would fall from 12 to three months. This change would give rise to a saving of £100 million in 2009, according to DWP estimates included in the *Equality Impact Assessment* published in expanded form on the SSAC website.¹⁶ PDUs will have to rely on a generous interpretation of the "good cause" criterion by local authorities, as at present, whereas the SSAC's suggestion would have led to greater certainty. Unfortunately, there is nothing in the official guidance for decision makers on "good cause" and the relevant grounds for extending time for claiming, that considers how alcoholism or drug addiction or misuse might fit into these important provisions on claims.

27. "Good cause" is also linked to **the requirement to undergo a medical examination** to assess a person's capacity for work. Many PDUs will seek entitlement to IB or to Income Support with incapacity credits (ISIC) on the basis that as a result of their addiction they are unfit for work – that they meet the requirement of being "incapable of work" (see paras 48 et seq. below). But their entitlement may end or be refused where they fail to attend a medical examination to which they have been called by the DWP. This results from the fact that unless they can show good cause, they must be classed as capable of work.¹⁷ In deciding whether or not a person has good cause for this purpose, the matters to be taken into account must include the person's state of health and the nature of any disability from which they suffer. Thus a PDU's failure to attend because he or she is in such a mental state, such as suffering from chronic and acute anxiety, as to inhibit him or her from doing so may give rise to "good cause". On the other hand, some tribunals will take the view that a state of confusion or forgetfulness resulting from drug addiction may not suffice. In

¹⁵ Hansard, vol. 357, col. 490W, 28 November 2000, Angela Eagle MP.

¹⁶ www.ssac.org.uk (25 May 2008).

¹⁷ Social Security (Incapacity for Work) (General) Regulations 1995 (SI 1995/311), reg. 8.

CSIB/721/04, for example, the appellant relied on both non-receipt of the notice to attend the examination and a general argument that his medical condition due to drug addiction gave him good cause for not attending the examination. The tribunal commented in its decision, which went against him, that “[m]any addicts use devices such as diaries, written notes or reminders from friends to ensure that they remember to attend”. The case before the Commissioner turned on the issue of notice alone, but the case illustrates the potential difficulty for PDUs in seeking to show good cause in this context, where the symptoms of their condition on which they rely are confusion or forgetfulness.

28. It should be noted that, for the purposes of JSA, “good cause” also provides justification in law for a claimant’s **failure to apply for or to accept a job or to avail him or herself of a “reasonable opportunity of employment”** or for his or her **refusal to carry out a jobseeker’s direction or to take up a training place**.¹⁸ Such a failure would normally lead to a loss of benefit. The extent to which a person’s health or behavioural problems consequent on their drug habit may give rise to a good cause for this purpose is considered below (at paras 40–41).

ENTITLEMENT TO SPECIFIC BENEFITS

29. Table 3 summarises the features and implications for PDUs of the main social security benefits. The ensuing paragraphs of this section discuss the law and policy in detail.

¹⁸ Jobseekers Act 1995, s. 19(6)(c) and (d).

Table 3: Social security benefits and problem drug users: summary

NAME OF BENEFIT	Jobseeker's Allowance (JSA)	Income Support (IS)	Incapacity Benefit (IB)	Employment and Support Allowance (ESA)	Disability Living Allowance (DLA)
TYPE AND PURPOSE	Contributory (insurance) benefit (182 days maximum per unemployment period) or income-related benefit. For earnings replacement or (long-term) income maintenance.	Income-related, with incapacity credits available. For income maintenance for people not required to seek work.	Contributory (insurance) based but partially means tested. Support for people with short- or long-term incapacity for work.	Two forms: contributory (insurance) based and income-based (replacing incapacity IS). Purpose: like IB, but extra emphasis on support for entry or return to work.	Non-means tested, non-contributory. Help with the extra costs of disability. Mobility and/or care component. Rates tied to impact and extent of disablement.
PDUs RECEIVING IN 2006 (est.)	66,000	146,000	87,000	Started 27 Oct. 2008	25,000
MAIN CONDITIONS	Availability for and actively seeking work. Signed to jobseeker agreement. Meetings with personal adviser. New Deal or other work-related activity probably expected.	Not entitled to JSA. Carer, incapable of work or lone parent. Income or savings below limit. Not (nor partner) in FT (16+) work.	Incapacity for work; 'personal capability assessment' (PCA). Work-focused interviews (WFIs)	Work capability assessment (WCA). 'Support component' or 'work-related activity component' dependent capacity for 'work-related activity'. WFIs.	Mobility: unable/virtually unable to walk, or needing guidance or supervision. Care: attendance (re bodily functions) or supervision need
SANCTIONS	Fixed term (2 or 4 weeks loss of benefit) or discretionary length (up to 26 weeks), depending on condition or requirement broken.	None, but reduced rate of benefit if reliant on this benefit while disqualified from JSA.	Benefit loss or reduction, e.g. for non-attendance of medical examination or WFI or causing own incapacity.	Loss or reduction of benefit, e.g. for failure to attend medical examination or WFI or causing own incapacity or failing to undergo treatment.	None.
EMPLOYMENT	Voluntary work (unpaid) and work up to 16 hours a week (more, if disability reduces working or earnings by 25%+) will not affect entitlement, if willing to take up full-time work that becomes available. Earnings may reduce income-related JSA – see IS (opposite).	Permitted working is as per JSA (opposite), but no condition of being willing to take up full-time work. Earnings over £5 (£20 if lone parent or entitled to disability or carer premium) reduce benefit £ for £.	Work for weekly earnings up to £88.50, permitted for 52 weeks - or longer if work is part of treatment. Voluntary work and work of up to £20 per week permitted.	Permitted working is basically same as per IB (opposite), but if doing voluntary work Secretary of State must consider it reasonable that the work is done without payment.	No restrictions. Employment does not affect entitlement.
ISSUES RE: PDUs	May have limited 'good cause' or other justification for non-compliance with some labour market requirements. Stricter regime in prospect, with 'supported job search'. PDUs likely to be targeted; treatment advice linked to directions?	PDUs too incapacitated to work may receive this in place of IB or ESA if cannot meet IB/ESA insurance contribution conditions. Additional amount for incapacity.	Compliance by PDUs with WFI or examination conditions problematic. PCA not directly related to problem drug use. Possible exemption for some seriously ill PDUs.	Same as for IB. However, the WCA is more closely related to conditions likely to be experienced by PDUs, such as erratic behaviour. Possibility that PDUs will be required to meet with treatment adviser.	The <i>effects</i> of drug dependence (e.g. mental conditions) taken into account in assessing disability. Degree of dependence and feasibility of treatment to ameliorate it may be relevant.

Jobseeker's Allowance and Income Support

30. JSA provides contribution-based entitlement during the first six months of unemployment, and thereafter (or from the first day, if the claimant's insurance contributions record is inadequate) means-tested entitlement of unlimited duration. One of the principal conditions of entitlement is that of being "available for employment". Claimants also have to be "actively seeking employment". The requirements concerned with work search are linked to specific government schemes for arranged work and training (under various New Deal programmes). Sanctions, in the form of reduced or lost benefit, must or may be applied to those who do not take up employment or do not participate in activation measures, which are underscored by the terms of an express agreement between the jobseeker and Jobcentre Plus. Entry into an agreement (a jobseeker's agreement) is an express condition for entitlement to JSA. The "good cause" grounds noted above would, along with some others, provide exemption from such sanctions.

31. JSA combines two separate schemes: (1) Contribution-based JSA (CBJSA) and (2) Income-based JSA (IBJSA). Of those entitled to JSA, approximately 80% receive IBJSA. JSA, a complex benefit,¹⁹ has been linked post-1997 to the Labour Government's programme of activities designed to provide a welfare-to-work pathway, notably the various New Deal programmes offering work experience and/or a programme of training or education, such as the New Deal for Young People, New Deal 25 Plus and New Deal 50 Plus.

32. The kind of regime that faces jobseekers, discussed in more detail below, would present enormous challenges for some PDUs. People in receipt of IS (which, like IBJSA, is a means-tested benefit) are essentially outside this regime, as they are not expected to be available for work or to look for work, although they too may have to attend work-focused interviews (WFIs) at Jobcentre Plus. In the case of those whose claim to IS is based on their incapacity for work, they will face compulsory interviews under the Pathways to Work scheme that in fact applies to most people in receipt of IB. Under the Employment and Support Allowance (ESA) reforms being introduced from 27 October 2008 (see paras 62 et seq. below), people receiving IS on that basis will in future have to claim ESA. As noted earlier, most PDUs who claim IS at present will do so on the basis of their incapacity for work due to illness or disability.²⁰ However, if they are lone parents with a child aged under 16 (soon to be restricted to those with a child aged under 12) they may also be entitled to IS on that basis. Lone parents on IS (who form the largest group of claimants of this benefit) must also attend WFIs.

33. Although people working for more than 16 hours per week (the basic threshold for being in "remunerative work") would normally be ineligible for IS, a person who is mentally or physically disabled and because of that disability their earnings are reduced to 75% or less of the amount that a person without that disability would earn for

¹⁹ The broad framework is in the Jobseekers Act 1995 but the detail of the JSA scheme is set out in the Jobseeker's Allowance Regulations 1996 (SI 1996/207), as amended.

²⁰ Income Support (General) Regulations 1987 (SI 1987/1967), Schedule 1B para. 7.

working the same number of hours, may qualify for IS even if working more than 16 hours.²¹ This is a possible route to the benefit for PDUs disabled by their condition, but it seems likely that few if any would claim on that basis. If a PDU is ill and needs looking after temporarily, a family member engaged in that task may be entitled to IS. They could also qualify for IS if they provide regular and substantial care to a person on certain disability benefits such as DLA middle or highest rate care component or if in receipt of the Carer's Allowance, which is a separate benefit. As discussed later, some PDUs will qualify for disability benefits.

34. If a PDU's physical or mental health does not make them incapable of work and they are not in remunerative work they may be able to claim entitlement to JSA. The general conditions of entitlement reflect the purpose of this benefit as a means of support for those who are not in work but who nevertheless would be expected to have an attachment to the labour market by virtue of their age and physical or mental capacity for work, plus the fact that they are not engaged in full-time education.²² Leaving aside the contribution conditions for CBJSA and the means test for IBJSA, the basic conditions are that the claimant must be: in Great Britain; under pensionable age; "available for employment"; "actively seeking employment"; signed up to a jobseeker's agreement; capable of work; not engaged, nor having a partner who is engaged, in "remunerative work" (defined as 24 rather than 16 hours per week in the case of the claimant's partner); and not receiving "relevant education" (basically non-advanced full-time education). Full-time students in higher education are also excluded. The minimum age of entitlement is 18, but some 16- and 17-year-olds in exceptional categories are also eligible or may be eligible for a "severe hardship payment".²³

35. The **availability and job search conditions for JSA** make qualification for this benefit particularly difficult for many PDUs. First, there is the basic test of availability per se, which has remained the same for over 30 years: the claimant must be "willing and able to take up immediately any employed earner's employment".²⁴ The requirement of immediacy is strict. Some PDUs may be willing to take up employment but may need some time to prepare mentally for taking up work or, if their partner is a PDU, may need to make arrangements for the latter's care. Even a person who has caring responsibilities must be willing and able to take up employment within 48 hours. PDUs who, for example, work as volunteers helping other PDUs would have to be willing to take up work within one week, and be prepared to attend for interview for employment within 48 hours.²⁵

²¹ Ibid., regs 5(1) and 6(4)(a). There is also exemption under these provisions where the weekly time worked is 75% or less than a non-disabled person would be able to work.

²² Jobseekers Act 1995, s. 1(2)-(2D).

²³ Ibid., ss 16 and 17, and Jobseeker's Allowance Regulations 1996 (SI 1996/207).

²⁴ Jobseekers Act 1995, s. 6(1).

²⁵ Jobseeker's Allowance Regulations 1996 (SI 1996/207), reg. 5.

36. Second, to be available for work, the claimant must normally be willing and able to take up work of at least 40 hours per week.²⁶ However, he or she may set some restrictions on the kinds and place of work he or she is willing to accept, while remaining "available for work". This is generally known as the "reasonable restrictions test".²⁷ These restrictions could relate to the nature or terms of conditions of employment (including the rate of pay – but only for the first six months) or the locality of the work. But the claimant must still have "reasonable prospects of securing employment notwithstanding those restrictions". However, this "reasonable prospects" requirement is **not** attached to a further ground for restricting availability, which is of particular relevance to PDUs: that a particular restriction is "reasonable in the light of his physical or mental condition".²⁸ Furthermore, that particular ground enables the claimant to restrict their availability "in any way", which means that he or she could seek to impose restrictions on the nature of the work or the hours of work that they feel able to contemplate because of their condition (see generally Wood et al., 2007: 839). For a short period only (not more than 13 weeks), at the start of the claim, any claimant may in any event be permitted to restrict his or her availability to his or her usual employment, or work that pays no less than the amount he or she is accustomed to receive from work, or both.²⁹

37. The "actively seeking employment" condition is that, in the week in question, the claimant "takes ... such steps as he can reasonably be expected to have to take in order to have the best prospects of securing employment".³⁰ Factors that must be taken into account in determining what would be reasonable steps for a particular claimant to have to take in any week include some relating to the claimant him- or herself, including his or her skills, qualifications and abilities. Of particular relevance to PDUs, especially those who have been on IB and need to claim JSA because they have been assessed as capable of work following a medical examination, are the claimant's "physical or mental limitations".³¹ The steps expected to be taken towards securing employment might include: preparing a curriculum vitae; making oral or written job applications; searching for job opportunities in adverts and via employment agencies and employers; and obtaining specialist advice. However, steps taken must be ignored where the claimant, while taking them, "acted in a violent or abusive manner" or spoiled a job application, or where the claimant "by his behaviour or appearance ... otherwise undermined his prospects of securing the employment in question". The last part of this rule might well disqualify some PDUs. The claimant will, however, be excused this conduct if "the circumstances were due to reasons beyond [his or her]

²⁶ In some circumstances a claimant who is a carer is permitted to restrict his or her total hours of work availability to an amount below 40 hours in any week, subject to the above "reasonable prospects of employment" condition.

²⁷ Jobseekers Act 1995, s. 6(2) and (3), Jobseeker's Allowance Regulations 1996 (SI 1996/207), regs. 7, 8, 9 and 13.

²⁸ JSA Regulations 1996, reg. 13(3)

²⁹ Jobseekers Act 1995, s. 6(5) and JSA Regulations 1996, reg. 16.

³⁰ Jobseekers Act 1995, s. 7(1), JSA Regs, reg. 18.

³¹ JSA Regulations 1996, reg. 18(3)(b).

control”.³² This is consistent with the underlying aim of the rule, namely to “enable a person’s job-seeking activity to be disregarded if he or she behaves or presents himself in such a way as *deliberately* to reduce or extinguish his chance of receiving offers of employment”.³³

38. There are also administrative controls relating to *attendance, information and evidence*. A claimant may be required to attend at a stipulated place and time and to provide information and evidence “as to his circumstances, his availability for employment and the extent to which he is actively seeking employment”.³⁴ He or she may be instructed by a Jobcentre Plus personal adviser to provide a signed declaration as to his or her availability and active search for work.³⁵ The attendance requirement may be strictly enforced, as benefit entitlement will cease if the claimant defaults,³⁶ unless within five working days the claimant produces evidence of “good cause” for the failure.³⁷ There are no prescribed grounds of good cause that relate *specifically* to health or disability, but account must be taken of any misunderstanding by the claimant on account of his or her “learning, language or literacy difficulties” (although any PDU whose literacy has been affected by their addiction would probably be incapable of work anyway), while there could be good cause for failure to attend at the stipulated place if that was because of the need to attend a medical appointment which it would be unreasonable in the circumstances to expect to rearrange. In 2005–06, there were 154,800 referrals to a “Sanctions Decision Maker” in relation to failure to meet these attendance etc. conditions; in 74% of them (115,050 cases) a benefit sanction, in the form of a reduction of the personal allowance element of the benefit by 20%, was imposed (HCPAC, 2007). The sanction for refusal or failure to carry out a jobseeker’s direction has been prescribed as a fixed period of two weeks, or four weeks if a further breach occurs within 12 months of the first.

39. Within the JSA scheme there are prescribed **sanctions for non-participation in, or losing, employment or training**.³⁸ However, in some cases a sanction may not be imposed because the claimant had a “good cause” for acting as he or she did. It is a matter of judgment for the relevant official as to whether a person had good cause, but the JSA Regulations prescribe factors that should be taken into account. For example, it would be good cause for non-participation in a training programme if the claimant was suffering from a “disease or bodily or mental disablement” and consequently was not able to attend the training scheme or employment programme or his or her attendance would have put at risk his or her health or the health of other people. And there would be a good cause for giving up a place if the claimant’s

³² JSA Regulations 1996, reg. 18(4).

³³ DSS, *Notes on Clauses*, cited in Wood et al., 2007: 859, emphasis added.

³⁴ Jobseekers Act 1995, s. 8(1).

³⁵ JSA Regulations, regs 23, 23A and 24.

³⁶ *Ibid.*, see regs 25 and 26.

³⁷ *Ibid.*, regs 27–30.

³⁸ Jobseekers Act 1995, ss 19–20B.

continuing participation would have put his or her health or safety at risk.³⁹ Obviously, there may be circumstances in which a PDU's health could be put at risk or prevent him or her from participating. The sanction for failure to take up or apply for a training scheme or employment programme or for losing a place on such a scheme due to misconduct (see below) is a **fixed period** of two weeks. A sanction of four weeks may be imposed if there is a further breach within 12 months of the first.⁴⁰ However, in some cases it is 26 weeks if the failure or refusal etc. relates to an act or omission in respect of one of the specified New Deal options or in relation to the Intense Activity Period for 25 to 49-year-olds, where there have been previous sanctions.

40. The claimant's physical or mental condition may be taken into account in determining the **length of the sanction** to be applied, but **only** in the case of sanctions of **discretionary (or variable) length**. These sanctions apply where the claimant loses his or her employment due to misconduct; or has voluntarily left it "without just cause"; or where without "good cause" he or she failed to apply for or accept a vacancy notified by the jobcentre or in any event "neglected to avail himself of a reasonable opportunity of employment".⁴¹ The period of sanction must be set between one week and 26 weeks. The precise length of the period in an individual case is to be determined by the Secretary of State – in practice, by an official acting on his/her behalf. Account should be taken of "any mitigating circumstances of physical or mental stress" connected with the employment which the claimant has left or neglects to pursue.⁴² Otherwise there is a need to refer to the substantial body of case law that has developed over the years in connection with these sanction grounds, particularly those relating to misconduct and voluntarily leaving without just cause.

41. In some circumstances, a PDU who loses his or her job for a reason related to the drug habit, such as taking drugs and being intoxicated during working hours, may therefore be disqualified from receiving JSA for up to 26 weeks on the grounds that they lost their job through misconduct. Behaviour outside work that is taken into account by the employer in deciding to dismiss the person in question may also result in a person being classed as having lost their job for reasons of misconduct, if the conduct in question is connected with the employment in some way (the obvious example being a bus driver being convicted of an offence of being under the influence of drugs when driving his own car); or if, by virtue of the kind of employment in question, the employer may be said to have "a legitimate interest in the conduct of employees even outside the employment",⁴³ such as where a school teacher or cleric is found to have a drug problem.⁴⁴ Generally, research has shown that the sanctions cause hardship, but relatively few claimants exercise their right of appeal in respect of

³⁹ JSA Regulations 1996, reg.73.

⁴⁰ *Ibid.*, reg. 69.

⁴¹ Jobseekers Act 1995, s. 19(6).

⁴² JSA Regulations 1996, reg. 70.

⁴³ *R(U)1/71*.

⁴⁴ As noted above, drug addiction is not classed as an 'impairment' for the purposes of the Disability Discrimination Act 1995.

the imposition or severity of a sanction. The sanctions rules tend not to be well understood by claimants, leading to suggestions that fixed fines might have a more potent deterrent effect (Joyce and Whiting, 2006; Peters and Joyce, 2006; SSAC, 2006).

42. Despite the imposition of a sanction, a claimant may be entitled to some benefit on the grounds of hardship to him- or herself or family. The entitlement is to a reduced rate of benefit or payment for a prescribed period. The regulations prescribe when a person is in hardship: for example, when a woman is pregnant, or where person has a chronic medical condition which results in functional capacity being restricted by *physical* (not specifically mental) impairment.⁴⁵ The hardship payment is based on (means tested) IBJSA, but normally the standard rate benefit is reduced by 40% of the personal allowance for a single person or by 20% if the claimant or any member of his her family is either pregnant or seriously ill.⁴⁶

43. In terms of **planned reforms** to these benefits, jobseekers can expect to face a more intensive regime. The Government's 2008 drug strategy makes it clear that specific measures in this regard will also be taken with a view to moving PDUs towards and into employment, as noted above (and see para. 47 below). So far as the general position is concerned, the DWP talks of "raising expectations of what a jobseeker should contribute" (DWP, 2007a: 49). There are plans for more clearly defined stages, starting with greater jobsearch expectations after *three months* on benefit. The *No One Written Off* (NOWO) Green Paper refers to this post-three months phase as the "directed job search phase" (DWP, 2008c) – claimants would be required to widen the scope of the jobs they look for and to sign on every week for up to six weeks (DWP, 2008c: para. 2.6). After *six months* (by which stage, according to NOWO, 80% of JSA claimants have left the benefit) claimants would enter a "gateway" stage, referred to in the NOWO proposals as "supported job search". Under the NOWO proposals, claimants with a recent history of long-term unemployment will be fast-tracked onto this supported search phase. Drug abusers will be among the groups at a disadvantage in the labour market who will be able to "volunteer to be fast-tracked to this stage" (DWP, 2008c: para. 2.9).

44. On entering the "supported job search" phase a claimant's jobseeker's agreement would be formally reviewed and a back-to-work action plan would be drawn up, involving mandatory "agreed" activities (with sanctions for failure to comply). There would also be an occupational skills "health check" and a check of their progress in improving their basic skills. Any necessary training would be offered. They would be referred to suitable jobs on a regular basis and be liable to a 26 week benefit sanction if they do not take one up (DWP, 2008c: para. 2.7). They could in any event be subjected to a two-week sanction for failing to comply with an agreed activity in their action plan. After *12 months* (by which stage 90% of claimants will have left JSA), there would be referral to a specialist return-to-work provider, who could be from the voluntary or private sector (as recommended by Freud, 2007) (see also the DWP's

⁴⁵ JSA Regulations, regs 140–141.

⁴⁶ *Ibid.*, regs 145 and 146A–H.

"Commissioning Strategy": DWP, 2008a). The help would be provided via the flexible New Deal. Work experience or a work-related activity of a minimum of four weeks would be required. Those who still remained out of work after *two years* could be required to undertake community work, which initially will be piloted (DWP, 2008c: paras 2.18–2.21).

45. Further tightening up of sanctions is also proposed. For example, it is proposed that whenever a person fails without good reason (e.g. emergency) to attend for a meeting with their personal adviser they would automatically be denied the entire week's benefit, and possibly two weeks' benefit for a second failure. Threats of violence or actual violence towards staff in Jobcentre Plus is also being considered as grounds for a sanction (DWP, 2008c: para. 2.13).

46. Lone parents also face a tougher regime. The Government is implementing a recommendation of the independent review it commissioned on the welfare-to-work strategy, by Freud (2007), that lone parents of children younger than 16 should be expected to seek work if they are to continue to receive out-of-work benefits and should be expected to undergo regular WFIs. From October 2008, only parents with children aged under 12 will be exempt (as Freud recommended), but this will be progressively reduced to the age of 7 by 2010 (DWP, 2007a and 2007b). The aim is to get some 300,000 lone parents off IS (HCWPC, 2007b: para. 226). The NOWO proposals in fact contemplate a skills check and possible requirement to undergo skills training when the child is aged 5 or 6 (DWP, 2008c: paras 2.68 and 2.69). Indeed, it also talks of the possibility of moving all lone parents from IS to JSA, although they would not be subject to work availability and jobsearch requirements until their youngest or only child was aged at least 7. They would in effect move onto a "modified income-based JSA" (DWP, 2008c: para. 6.9). The Government considers that it might be feasible to abolish IS altogether; it regards IS as "a largely passive benefit" which "expects very little from its recipients and does nothing to prepare them for a life after benefits" (ibid.).

47. Obviously some of those affected by these changes will be PDUs, but additional measures are being targeted on them. The Government's 2008 drug strategy states that "in return for benefit payments, claimants will have a responsibility to move successfully through treatment and into employment" (HM Government, 2008b: 6 and 32). The strategy is concerned with IB (and thus implicitly ESA, its replacement) as well as JSA regimes. The aim will be to "use opportunities provided by the benefits system to provide incentives for treatment, training and employment" (ibid: 27). Persistent drug misusers in receipt of out-of-work benefits will be required to attend a discussion with a specialist treatment provider or partner organisation as part of a jobseeker direction or WFI requirements. They will in any event be referred to specialist services, under a "nationally agreed referral process" (HM Government, 2008a). The NOWO proposals in any event contemplate that PDUs will be required, in appropriate cases, to see a specialist employment adviser with whom a "rehabilitation plan" would be drawn up. This plan would set out the steps the claimant would take "to stabilise their drug dependency, move towards recovery, tackle the problems they face and get into work" (DWP, 2008c: para. 2.41). In relation to all these new procedures, there will be enforcement. Those who without good cause fail to take up

drug treatment or specialist employment support would be referred for a possible benefit sanction, although account would be taken of the chronic health problems and other difficulties PDUs may face.

Incapacity Benefit and Employment and Support Allowance

48. Significant numbers of PDUs are likely to qualify for IB, on the basis that they are **incapable of work due to sickness and/or disability**. The figures were discussed above (paras 12-14); as was noted, according to DWP statistics just under 50,000 claimants who receive IB are recorded as being drug abusers, but this represents around half of the number of PDUs who receive IB, based on estimated figures. Sainsbury et al. (2008: 2.1.1) highlight a case where an IB claimant was recorded as having an anxiety disorder but, when interviewed by the researcher, referred exclusively to drug use. This illustrates how the relationship between drug problems and mental health problems means that some PDUs will be hidden among the numbers recorded as being entitled to IB on the basis of mental health problems. In any event, when DWP statistics on drugs and IB were first released, in October 2006, a spokesperson for the DWP was reported as saying that these numbers were starting to fall as a result of WFIs for those on IB (Wilson, 2006). Research has indicated that PDUs are among the groups who are particularly difficult for the DWP to move off IB (Dickens et al., 2004). Nevertheless, drug users on IB will be affected by the tougher welfare-to-work regime announced as part of the UK drugs strategy, discussed above.

49. These changes cannot be viewed in isolation from the reorientation of incapacity benefits, in the form of the new benefit, ESA, as a benefit primarily aimed at supporting people while they prepare (or are prepared) for entry to employment. In view of this imminent reform, the IB scheme and how it affects PDUs are outlined and discussed only fairly briefly here. One area of the scheme that does warrant particular attention, however, is the system for assessing incapacity for work under the "personal capability assessment" (PCA), because of the changes to the physical and mental health descriptors under the replacement test under ESA, the "work capacity assessment" (WCA).

50. IB replaced Sickness Benefit and Invalidity Benefit in April 1995.⁴⁷ It introduced a new medical assessment of incapacity, related to functional capacity across a range of areas of activity.⁴⁸ The Welfare Reform and Pensions Act 1999 replaced the standard test of incapacity – the "all work test" – with the PCA; it tightened up the contribution conditions for this benefit; and introduced a small element of means testing to entitlement to this contributory benefit. At least one in ten people of working age in Glasgow, Liverpool, Manchester, Stoke and some other areas currently receive IB. Nationally, at present over 2.5 million people receive IB (or incapacity credits within their IS.) The DWP indicated in 2005 and 2006 that the benefit would be reformed, in order to increase the take-up of employment by persons on long-term sickness

⁴⁷ Under the Social Security (Incapacity for Work) Act 1994.

⁴⁸ The principal legislation at present, until the ESA scheme comes into operation under the Welfare Reform Act 2007, is the Social Security Contributions and Benefits Act (SSCBA) 1992, as amended, and the Social Security (Incapacity for Work) (General) Regulations 1995 (SI 1995/311).

benefits (DWP, 2005 and 2006). ESA comes into operation on 27 October 2008, but existing claimants of IB will continue to be entitled to it rather than ESA, at least for the time being (para. 62 below).

51. Most employees who are incapable of work due to sickness qualify for statutory sick pay (SSP) for up to 28 weeks (administered by employers). Those who do not – for example, because they are on low wages or employed on a short-term contract – may currently be able to claim short-term IB or (if they do not satisfy the contribution conditions for IB) IS. Someone seeking qualification for IB during the initial 28-week period must satisfy what is known as the “own occupation test” – that is, “whether he is capable by reason of some specific disease or bodily or mental disablement of doing work which he could reasonably be expected to do *in the course of the occupation in which he was engaged*’.⁴⁹

52. After 28 weeks, the claimant of SSP would need to claim IB. He or she would become entitled to the higher rate of short-term IB, as would someone who had already been on IB for the first 28 weeks of incapacity. In all cases, however, the claimant must at this stage be classed under the PCA (see below) as incapable of work (unless falling within one of the categories of exception in regulation 27 – see below).⁵⁰ The successful claimant would be entitled to the higher rate of the short-term IB for the next six months.⁵¹ Thereafter, they would receive the long-term rate of IB.⁵² (There is a separate route to IB for people incapacitated in youth.⁵³)

53. For the purposes of any claim to IB, however, some people with a severe condition must be **treated as incapable of work**.⁵⁴ They include: people receiving the highest rate care component of DLA;⁵⁵ people with a progressive disease who are expected to die within six months; people with tetraplegia, dementia, a severe and progressive neurological disease; and people suffering from “a severe mental illness, involving the presence of mental disease, which severely and adversely affects a person’s mood or behaviour, and which severely restricts his social functioning, or his awareness of his immediate environment”. Clearly, some PDUs will be in a sufficiently disturbed and perhaps intermittent psychotic state to fall within one of these categories

⁴⁹ SSCBA 1992: s. 171B(2). Emphasis added.

⁵⁰ Ibid., s. 171C and Social Security (Incapacity for Work) (General) Regulations 1995 (SI 1995/311), reg. 27.

⁵¹ SSCBA 1992, s. 30D. Someone getting SSP for 28 weeks would be treated as having received short-term IB during this period, provided he or she had met the contribution conditions for IB at the time.

⁵² SSCBA 1992, s. 30A(5).

⁵³ Ibid., s. 30A(2A). They must be aged at least 16 on the relevant day (effectively the date from which the claim would run), have been so incapable by then for at least 196 consecutive days (in most cases), and be under the age of 20, or in some cases 25, on a day which forms part of their period of incapacity for work.

⁵⁴ Social Security (Incapacity for Work) (General) Regulations 1995 (SI 1995/311), reg. 10.

⁵⁵ Namely people who are severely mentally or physically disabled and need frequent attention or continual supervision during the day and who need prolonged or repeated attention or watching over at night: SSCBA 1992, s. 72. See further para. 70 et seq below.

and thus be exempt from the PCA. The *Incapacity Benefit Handbook for Approved Doctors* (DWP, 2004), which has a discrete section of guidance on medical assessment of claimants who are abusing alcohol and/or other substances, identifies as features of a person's background that suggest that there should be exemption:

- chaotic and disorganised lifestyle;
- poly-substance abuse and dangerous injecting habits;
- compulsive drug seeking behaviour to the exclusion of all other activities;
- gross self-neglect;
- grossly impaired social interaction;
- currently undergoing detoxification or detoxification planned in the near future;
- overdoses or suicide attempts in the last six months;
- suicidal ideation and low self-esteem.

There will also be people who must be deemed to be incapable of work under regulation 27 ("exceptional circumstances"), namely people with a "severe life threatening disease" which, for example, is not controlled or controllable or for which they will have an operation within the next three months.

54. In some cases under the IB scheme claimants are entitled to **undertake a limited amount of work**, for example as a trial period of employment or because of the therapeutic benefits of working. Encouraging sick or disabled people to return to (or take up) work is part of the Government's welfare-to-work strategy (see below). Such arrangements are likely to be very important for PDUs who have undergone treatment but may not be fully recovered physically or mentally. The basic approach is to enable people to undertake some work while remaining on IB or for them to undertake work on a trial basis so that if they run into problems they can re-qualify for the previous rate of IB. Similar exemptions will apply under the ESA scheme. The basic rule in IB is that someone who works (whether or not for payment) on a day is to be classed as capable of work on that day.⁵⁶ However, some work is classed for this purpose as "exempt work",⁵⁷ including:

- work involving earnings of not more than £20 per week;
- work involving earnings of not more than £88.50 per week which is "part of a treatment programme and is done under medical supervision while the person doing it is an in-patient, or is regularly attending as an out-patient, of a hospital or similar institution";
- work for less than 16 hours per week for which earnings are no greater than £88.50 per week and which is done during a 52 week initial period (subject to various conditions);
- work as a volunteer (for expenses only); and
- work by someone who has a severe condition which falls within the class that the regulations deem makes them incapable of work without assessment.

⁵⁶ Social Security (Incapacity for Work) (General) Regulations 1995 (SI 1995/311), reg. 16.

⁵⁷ *Ibid.*, reg 17.

PDUs on IB who, for example, assist in a voluntary capacity helping others being treated for drug addiction are likely therefore to be classed as undertaking "exempt work", as would those who are undertaking low-paid work as part of their treatment for addiction.

55. People who become PDUs while in employment and then lose their job in consequence of their drug-taking may find that they are disqualified for up to six weeks under the **sanctions provisions**. The period of disqualification is discretionary and limited to six weeks, with a minimum period of one day.⁵⁸ The sanctions may be imposed where the claimant:

- (a) became incapable of work through his or her own misconduct;⁵⁹
- (b) failed without good cause to attend for or submit him/herself to such medical or other treatment as may be required under the regulations;⁶⁰ or
- (c) failed "without good cause to observe any prescribed rules of behaviour", namely to refrain from "behaviour calculated to retard his recovery" or "not to be absent from his place of residence without leaving word where he may be found".⁶¹

It is clear that PDUs may be liable to temporary disqualification from IB under one or more of these provisions.

56. For example, in *R(S)1/53* the claimant had been certified as incapable of work due to alcoholism and claimed Sickness Benefit (now IB). He was disqualified for six weeks on the ground that he had become incapable of work due to his own misconduct. The Social Security Commissioner (the second tier appellate body) referred to medical evidence that the claimant had been admitted to hospital some time prior to his claim as a voluntary patient and was suffering from "alcoholism due to anxiety psycho-neurosis". Basically, the claimant consumed excessive alcohol in the relief of stress. The Commissioner sought to distinguish between alcoholism "as a disease brought on by the claimant's lack of self-control attributable to a defect in character" and that brought on "by lack of self-control attributable to a disease of the mind or body". The Commissioner did not consider the evidence to show that the claimant's anxiety neurosis was sufficient to have impaired his will to moderate his drinking. He therefore upheld the decision that it was misconduct. Bonner et al. (2007: 707) argue, in the light of this ruling, that this ground "could have unfortunate implications for some AIDS victims such as intravenous drug users who become infected non-sexually". But more broadly speaking, incapacity for work brought on by addictive drug taking seems unlikely to be attributable merely to a "defect of character".

⁵⁸ SSCBA 1992, s. 171E(2).

⁵⁹ This does not apply where the incapacity was due to pregnancy or a sexually transmitted disease.

⁶⁰ I.e. where a person refuses without good cause to undergo treatment (excluding "vaccination, inoculation or major surgery") recommended by a doctor, or hospital, treating him, which would render him or her capable of work.

⁶¹ SSCBA 1992, s 171E(1); Social Security (Incapacity for Work) (General) Regulations 1995 (SI 1995/311), reg.18.

57. Ground (b) – failure to undergo treatment that would be likely to render someone capable of work – may also be relevant to PDUs. This ground could be used to encourage PDUs to enter or remain on a treatment programme, provided it is one that is likely to make them capable of work (even if only in the long term) and provided the claimant in question has no particular “good cause” for not receiving the treatment. Arguably, previous failures in such treatment may give rise to good cause in some cases. The first part of ground (c) – refraining from behaviour calculated to retard recovery – is designed to prevent claimants from deliberately prolonging their condition in order to remain incapable of work. It is not really applicable to people who have a substance addiction that makes them incapable of work.

58. The operation of the Government’s policy of reducing the number of people receiving benefits for incapacity by getting more of them into work is largely based on the **Pathways to Work** programme. Pathways was first introduced on a pilot basis in 2003, and by 2006 it had achieved both an 8% higher rate of off-flow from IB than among non-Pathways areas (Blyth, 2006) and an increased likelihood (+4–5%) of a claimant coming off benefit if they had a WFI within the first six months after the extension of Pathways to their area (Bewley et al., 2008). Under Pathways, new claimants have to undergo a WFI in the eighth week of a claim for IB, with additional monthly WFIs (all mandatory) – a total of five for new claimants. The premise is that by the eighth week the benefit claim will probably be settled and the claimant’s health will have stabilised. At the interview the claimant takes part in discussions relating to his or her employability or progress towards obtaining employment and any reasonable action that should be taken. The claimant must respond to questions and supply information on his or her opinion as to the extent to which his/her medical condition restricts the ability to obtain employment. Under the new Condition Management Programme (CMP), the IB personal adviser can refer the claimant to a CMP practitioner for an assessment. The CMP offers those who are assessed “therapeutic interventions” via the NHS, including one-to-one or group therapy sessions, to support them to gain confidence and capacity to enter employment. The claimant’s participation is voluntary. If the claimant participates, his or her GP and any other health worker involved in his or her care is informed. Between four and 16 sessions are offered and the claimant is supported throughout by the CMP practitioner. The CMP is aimed at those with mild to moderate mental health problems, cardio/respiratory problems or musculoskeletal problems. It might therefore be able to deal with some of the health problems experienced by PDUs but not the underlying drug problem, notwithstanding that one of its programme areas may be “healthy lifestyles”.

59. Those exempt from the PCA and those who fall within prescribed categories of persons considered likely to return to work within a short period are not required to participate in the WFIs. Those who are required to participate but who do not may face a sanction. A reduction in benefit by 20% of the IS personal allowance rate for a person aged 25 or over may be imposed on those who fail without “good cause” to take part in an interview. (There is sometimes a tension between the “enforcer” and “enabler” role of IB personal advisers: Knight et al., 2005.) The Government agreed to amend the non-exhaustive list of factors that must be taken into account in determining whether a person had good cause for failing to take part in an interview. It now includes the situation where a person’s failure is due to a relapse of a mental

health condition. The SSAC had expressed concern that the regulations should incorporate safeguards for people whose condition has a fluctuating effect on their capability to participate in a WFI.

60. Research has shown that PDUs are among the groups most likely to fail to attend WFIs (Dickens et al., 2004: para. 3.69). Those who were using drugs “chaotically” were said to be particularly difficult for personal advisers to assist – “it was felt that these customers’ lives were not sufficiently stable or predictable for them to be able to attend regular WFIs or access training or support” (Ibid.: para. 5.32). A further problem for personal advisers trying to assist PDUs in moving away from incapacity is a lack of local services. IB personal advisers act as “gatekeepers”, referring claimants to various services (Corden et al., 2005: 53). IB personal advisers in one survey indicated that “there was little they could do for these customers prior to their receiving specialist help” and that “the waiting lists for these types of services could be as long as eighteen months” (Knight et al., 2005: 5.3.4). As preparations were being made to roll out the Pathways programme nationally, among the unmet needs which were identified were drug and alcohol rehabilitation services (Corden and Nice, 2006: 65). The need to ensure coordinated support for drug and alcohol abusers and other disadvantaged groups such as homeless people and refugees was highlighted by the Freud Report on the future of welfare-to-work, commissioned by the Government (Freud, 2007: 41). It is possible that some such people would be helped by the new CMP (para. 58 above). There is also evidence from a study (Dixon and Warrener, 2008) that under the Pathways IWS (In Work Support) pilot for IB claimants who have *returned to work*, which is aimed at providing “‘light touch’ after-care support”, some account has been taken of the needs of drug misusers. Of the four areas in the study that operated the scheme, the subcontracted specialist support in one included the local Drug and Alcohol Action team, while in another people were informed about such provision. But it was found that such provision was “rarely used” by the people concerned, because they tended to have availed themselves of such support *prior* to returning to work.

61. One measure that the Freud report advocates is that individuals who are considered the “hardest to help” under the incapacity regime, including “homeless people and drug addicts”, should be given the kind of intensive support and direction into work by voluntary or private sector agencies, contracted to provide this, earlier than would normally be provided to claimants, who would receive it after 12 months (Freud, 2007: 94). Given the Government’s support for Freud’s recommendations and its programme of measures to support adults with chaotic lifestyles (including “recontracting a unified and very flexible progress2work and Linkup programme, offering extra help to recovering drug addicts”: DWP, 2007b: 81) this may occur, and it would constitute an important development. As noted above, the UK drugs strategy document also indicates that drug misusers on out-of-work benefits such as IB may be required to attend a discussion with a specialist treatment provider under WFI requirements (HM Government, 2008b: 32) and may be subject to a sanction for non-participation.

62. How will the change from IB to ESA in October 2008 affects PDUs? From 27 October 2008, no new claims for IB will normally be possible.⁶² A claimant becoming unable to work due to sickness/disability will need to claim ESA.⁶³ ESA, a fairly complex benefit, is in two forms: *contributory ESA*, which is based on National Insurance contributions or on illness or disability which began in youth;⁶⁴ and *income-related ESA*, which is means tested and replaces entitlement to IS plus incapacity credits. ESA is structurally very different to IB, with an emphasis on determining the extent of a person's "limited capability for work" rather than, as was the case with IB, with the question of whether a person was "incapable of work" (see generally Bonner, 2008).

63. "Limited capability for work" is the gateway provision so far as ESA is concerned. A person will have a limited capability for work where his or her capability for work is limited by a physical or mental condition and the limitation is such that it is "not reasonable to require him to work."⁶⁵ Some claimants must be treated as having a limited capability, such as those who are terminally ill or who are suffering from an uncontrollable disease, which mirrors the position under IB. Others will be assessed under a "limited capability for work assessment", shortened by the DWP to "work capability assessment" (WCA) (see below).⁶⁶ To check whether claimants, once on ESA, remain incapable work there will be a repeat WCA within not more than two years of the previous one (DWP, 2008c: para. 3.16). There will be equivalent disqualification rules in respect of misconduct etc. as under IB, and the same maximum disqualification period (six weeks).⁶⁷ However, unlike under IB, a person may be exempt from disqualification where they are classed as a person "in hardship".⁶⁸

64. The WCA is the equivalent form of assessment to the PCA under IB.⁶⁹ Both the WCA and the PCA involve a detailed medical assessment of the claimant's capacity in relation to a range of prescribed functional areas, such as walking, rising from sitting, bending and kneeling, lifting and carrying, and so on, and in respect of their mental capacity. Points are scored for incapacity in any of the functional areas, for which there are individual descriptors carrying diverse numbers of points. The points system is slightly simpler under the WCA compared with the PCA, but the main changes are in the descriptors on which they are based, and in particular those that relate to the

⁶² Those who continue on IB will, however, find that their capacity for work will be more routinely assessed and they will have to have an action plan and, of course, attend a WFI.

⁶³ The broad statutory framework for the scheme is contained in the Welfare Reform Act 2007, Part 1, which, for the most part, comes into force on 27 October 2008. The Employment and Support Allowance (ESA) Regulations 2008 (SI 2008/794) will bring the scheme into operation on that day. A separate set of regulations setting out transitional arrangements come into force on or from July 27, 2008: the Employment and Support Allowance (Transitional Provisions) Regulations 2008 (SI 2008/795).

⁶⁴ See note 53 above.

⁶⁵ Welfare Reform Act 2007, s. 1.

⁶⁶ ESA Regulations 2008, reg. 19.

⁶⁷ *Ibid.*, reg. 157.

⁶⁸ *Ibid.*, reg. 158.

⁶⁹ See the Social Security (Incapacity for Work) General Regulations 1995, reg. 24.

claimant's mental condition, which is likely to be particularly relevant to PDUs. Generally, many of the descriptors are significantly longer and more elaborate, which could make their application to individual cases a more complex task for decision makers and tribunals but may provide greater flexibility in their application to PDUs and others. The extra wordage tends to reflect an attempt to explain in the individual descriptors how the claimant's difficulty may manifest itself – as in this one:

“Has a completely disproportionate reaction to minor events or to criticism to the extent that the claimant has an extreme violent outburst leading to threatening behaviour or actual physical violence”.

65. On the whole, the new descriptors should make it easier for a PDU to satisfy the WCA than the PCA. Prescribed capacities such as awareness of hazards, memory and concentration, ability to complete everyday tasks at relatively normal speed, coping with social situations and interacting appropriately with other people are likely to be impaired in the case of PDUs. A claimant whose mental state due to drug abuse was poor would, for example, score 15 points if he or she was assessed as having:

“unpredictable outbursts of aggressive, disinhibited, or bizarre behaviour, being either:

- (i) sufficient to cause disruption to others on a daily basis; or
- (ii) of such severity that although occurring less frequently than on a daily basis, no reasonable person would be expected to tolerate them.”

For the complete set of descriptors relating to mental, cognitive and intellectual function assessment under the WCA, see **Appendix 1** to this report. Note that a person can only claim points for one descriptor per prescribed activity, but points for different activities are aggregated. A person who scores an overall total of 15 or more points would satisfy the WCA and thus be eligible for ESA, other conditions also being satisfied.

66. ESA claimants will enter an “assessment phase” which will normally run for 13 weeks from the first date of entitlement.⁷⁰ The assessment phase will include a WFI after eight weeks. An action plan will be determined, containing among other things a record of the interview and “a record of any activity that the claimant is willing to take which may make obtaining or remaining in work more likely or which may make it more likely that the claimant will be able to do so”.⁷¹ As with IB there will be sanctions for claimant non-attendance at interview or assessment where it is required under the regulations (there are exceptions to the requirements) and where there is no good cause for the failure to attend.⁷²

⁷⁰ ESA Regulations 2008, regs 4 and 6; Welfare Reform Act 2008, s. 24(2)(a).

⁷¹ ESA Regulations 2008, reg. 58(2)(b).

⁷² Ibid., regs 63 and 64.

67. Claimants who are able to do so (the DWP expects 90% of claimants to fall into this category: Bonner, 2008) will be expected to undertake a "work-related activity". This is defined as "activity which makes it more likely that the person will obtain or remain in work or be able to do so".⁷³ Those who are expected to be able to return to work in the short or medium term will be prepared for doing so by the inclusion in their action plan of activities such as a work trial or voluntary work as well as those related to jobsearch. Claimants who are found, as a result of a medical examination, to have a limited capacity for work-related activity due to their physical or mental condition and whose "limitation is such that it is not reasonable to require [them] to undertake such activity" may be entitled to a "*support component*". A different, and more restrictive, set of prescribed criteria will be applied under this assessment to those used in the WCA, and here the assessment is not points-score based (see Bonner, 2008). Instead, if the claimant meets any one of the descriptors he or she will reach the threshold and thus be entitled to support component.⁷⁴ One of the descriptors, for example, is that the claimant "Cannot initiate or sustain any personal action (which means planning, organisation, problem solving, prioritising or switching tasks)". This, along with some of the others, will be particularly apposite to some PDUs. Those whose capacity for a work-related activity is **not** limited may be entitled instead to a "*work-related activity component*".⁷⁵ These components in effect apply to both the contribution based (or "contributory") and income-related ESA.

68. Both forms of the ESA (contributory and income-related) will be paid at the same rate. People on contributory ESA will, however, be disadvantaged by the way that it does not provide a passport to other benefits unlike income-related ESA. The rates of benefit are prescribed by the new regulations.⁷⁶ A single claimant in receipt of the contributory ESA would receive £60.50 per week, but, in the case of someone aged under 25, only if he or she also meets the conditions for one of the above two components, otherwise the prescribed rate is £47.95 (which will be the rate during the 13-week assessment phase). The work-related activity component is set at £24.00 and the support component is set at £29.00. 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% of the excess above that amount is to be deducted from a contributory ESA allowance.⁷⁷

69. A vitally important factor in the success of ESA in providing support combined with pressure to ease PDUs into employment will lie in the improvements to the coordination of services for these individuals. Given that drug addicts are among the groups most difficult for the DWP to move off IB and into employment or training at present, as noted above, significant improvements will be needed. At the same time, the new WCA could result in more PDUs than at present becoming eligible for the

⁷³ Welfare Reform Act 2007, s. 13.

⁷⁴ ESA Regulations 2008, reg. 34(1) and Schedule 3.

⁷⁵ Welfare Reform Act 2007, s. 2.

⁷⁶ ESA Regulations 2008, Schedule 4.

⁷⁷ Ibid. reg. 74.

benefit for a long term, on the basis of being people with a limited capability for work. One of the issues that is as yet unclear is whether meeting with drug counsellors or treatment providers will be classed as a "work-related activity" which if not undertaken could lead to reduced benefit. It seems to be the Government's intention that it should be so classed, given the mandatory tone adopted (see HM Government, 2008a).⁷⁸ However, the regulations made to date do not make provision for this, so implementation seems to be contingent on further legislation. Finally, the opportunities for working while receiving ESA are basically the same as under IB, save that in the case of unpaid work for a voluntary organisation or as a volunteer the Secretary of State must consider it reasonable that the work is done without payment.⁷⁹

Disability Living Allowance

70. Claimants with care needs, including a need for continual supervision during the day, and those who have mobility problems due to physical difficulties with walking or mental or physical problems going to unfamiliar places without guidance and supervision, may qualify for Disability Living Allowance (DLA).⁸⁰ It is not known how many PDUs currently qualify for DLA, but the estimate cited earlier (para. 14 above) suggests that the proportion of DLA recipients who are PDUs is significantly lower than in the case of the other major benefits. DLA is potentially available both to people in work and to those out of work and it is not means tested nor taken into account in assessing someone's income for the purposes of entitlement to income-related benefit such as housing benefit or IS. However, entitlement to the DLA care component at above the lowest rate may increase the amount of a person's entitlement to IS, through the award of a disability premium or in some cases a severe disability premium.

71. In essence, DLA will have a neutral impact on someone's entry to employment, save that by assisting in meeting the extra costs of being disabled, which is its underlying purpose, it will assist a person to manage their daily life. In that sense, it could be very important in enabling a disabled person to cope with the extra strains of holding down a job. Nevertheless, for most people whose entitlement to DLA is based on mental disablement the severity of the condition that is needed in order to trigger entitlement makes it unlikely that they could work full-time, if at all.

72. The question of disability or disablement will be pivotal to entitlement to DLA, as shown below. This issue has proved to be problematic one in relation to be people with dependence on alcohol or a drug addiction. The issue was authoritatively resolved a couple of years ago by a Tribunal of Commissioners in *R(DLA)6/06*. It had already been confirmed that disability is distinct from a medical condition but is concerned with

⁷⁸ See, for example, a recent report in *The Guardian* indicating that "Drug users who claim incapacity benefit because of their habit – nearly 50,000 of the total – will lose their IB for 26 weeks if they fail to turn up to rehabilitation programmes three times running" (Taylor, 2008).

⁷⁹ ESA Regulations 2008, reg. 45.

⁸⁰ SSCBA 1992, ss 71–76 and Social Security (Disability Living Allowance) Regulations 1991 (SI 1991/2890).

a deficiency in a functional ability.⁸¹ In *R(DLA)6/06* the Commissioners noted that alcohol dependence falls within the category of Substance Dependence (which, incidentally, also includes drug dependence) in the *Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association* (DSM IV). The Commissioners held that any disability that arises from alcohol abuse, whether the result of voluntary consumption or driven by dependence, could count for DLA purposes, although merely transient effects of voluntary consumption would hardly ever entitle a person to DLA. The Commissioners also confirmed that:

“[a] person who cannot realistically stop drinking to excess because of a medical condition and cannot function properly as a result can reasonably be said ... to be suffering from disablement”

as well as having care needs that are a consequence of his or her drinking.⁸² The Commissioners also confirmed that alcohol dependence was a medical condition, not a disability per se. It may have disabling effects, including the effects of withdrawal symptoms and cravings, but whether there is a disability will depend on their severity.

73. Indeed, in another case, it was accepted that drug or alcohol abusers frequently develop clinical depression over a period of time and that withdrawal from various drugs can lead the problem user to develop anxiety. Thus in determining whether the claimant needed supervision, a possible ground for an award of DLA (see para. 80 below), it was “clearly not possible to unravel the complex interaction between the various conditions giving rise to a claimant’s possible supervision needs”.⁸³ In a case where a claimant’s doctor described the claimant’s epilepsy as including “alcohol/cannabis related seizure” and the appeal tribunal did not assess the epilepsy because of its origin in substance abuse, the Commissioner said that the epilepsy should have been assessed whatever its cause; even though being a drug or alcohol abuser did not in itself mean the claimant had a mental or physical disability, nevertheless if they suffered from mental or physical disability – in this case epilepsy – as a result of their substance abuse it fell to be assessed.⁸⁴

74. In *R(DLA)6/06* the Commissioners also confirmed that where substance dependence is concerned the test is not simply whether a person had no choice but was rather based on “the degree of self-control that is reasonably attainable in all the circumstances, including the claimant’s history and steps that are available to him to address his dependence”.⁸⁵ This approach therefore means that consideration would be given to whether a person may realistically be able to reduce their consumption of alcohol so as to reduce or obviate the necessity for care from another (but see

⁸¹ *R(DLA)3/06*.

⁸² *Ibid*.

⁸³ *CDLA/396/2004*, paras 11 and 12.

⁸⁴ *CSDLA/171/98*, paras 4, 10 and 11.

⁸⁵ *R(DLA)6/06*, para 33.

below).⁸⁶ In another case the Commissioners accepted that for a claimant whose care needs flowed from habitual consumption of “inordinate quantities” of laxatives “the psychiatric position may be such that the claimant no longer has any control over that aspect of her life”.⁸⁷ Of course, if an available programme of rehabilitation could ameliorate a person’s dependence sufficiently within six months they may cease to meet the qualifying period for benefit (see below). Although mostly concerned with alcohol dependence, much of the above reasoning is equally applicable to drug dependency.

75. The care component of DLA is paid at three rates, related to the level of disability: lower rate, middle rate and highest rate. The mobility component is paid at two rates: lower rate and higher rate. Someone may be entitled to either component or to both of them. As regards the *length of an award*, DLA may be awarded for a fixed period or for an indefinite period (but if both components are awarded they may not be awarded for different periods). The possibility of future treatment can be taken into account in determining the length of an award. This may be apposite to the case of a person whose disability is derived from substance addiction/dependence. In one case, involving an alcoholic who claimed DLA, where the claimant had managed to avoid alcohol at the time of her daughter’s wedding (so she could avoid embarrassment and enjoy the wedding), the Commissioner commented:

“Alcohol dependency is not a hopeless condition, and the benefits system should not contribute to a belief that it is. Awards should normally be made for a limited period, so as to allow an automatic review”.⁸⁸

On the other hand, it has been recognised that people who are physically and psychologically dependent on a drug or alcohol have very limited control over their intake over any period of time.⁸⁹ Time-limiting the award means the claimant would have to make a renewal claim. At that point any change in his or her condition could mean that a different rate of benefit, or none, may be appropriate.

76. There is a *qualifying period* for DLA: the claimant must satisfy the test of disability for three months prior to the date of the award and must be likely to continue to do so for the succeeding six months.⁹⁰ This does not apply to a person who is terminally ill such that his or her death might reasonably be expected within six months.

77. The different rates of *care component* reflect gradations of disability, or rather the needs that arise from it. The issue in relation to each concerns the nature and amount

⁸⁶ See *ibid.*, para 35 and 36.

⁸⁷ *R(A)4/90*, para. 38.

⁸⁸ *CDLA/778/00*, para. 21 (Commissioner Fellner).

⁸⁹ See *CDLA/396/2004*, paras 8 and 9.

⁹⁰ SSCBA 1992, ss 72(2) and 73(3).

of the care the claimant “requires”. This means that care must reasonably be required; it is immaterial to entitlement that the claimant actually lives without it.

78. A person is entitled to the *lowest rate* throughout a period that he or she is

“so severely disabled physically or mentally that – (i) he requires in connection with his bodily functions attention from another person for a significant portion of the day (whether during a single period or a number of periods); or (ii) he cannot cook a main meal for himself if he has the ingredients.”⁹¹

“Significant portion of the day” has been held to be a minimum of one hour.⁹² But this view was doubted in another case,⁹³ where Commissioner Walker held that “attention for a lesser period may be ‘significant’ depending upon the circumstances. Thus if it consists of many short periods of attention the total significance in time terms may be greater”. Attention in connection with bodily functions will not normally include housework or the washing of clothes, and in any event attention must be rendered in the presence of the individual,⁹⁴ but it could include helping someone participate in everyday social life.⁹⁵ Thinking can be a bodily function for the purposes of this condition.⁹⁶

79. A need for support in the form of encouragement given to a person with a phobia, depression or paranoia, to enable them to perform everyday tasks such as get up from bed, cook, eat properly, and so on, could amount to attention in connection with bodily functions.⁹⁷ In one case where the claimant suffered from depression but had also become addicted to prescribed sleeping tablets and painkillers and had “started to take them to excess”, the Commissioner confirmed that there had to be a

⁹¹ SSCBA 1992, s. 72(1)(a). In *CDLA/085/1994* it was held that this cooking test is to be determined objectively, disregarding such factors as the type of facilities available and the claimant’s cooking skills. A “cooked main meal” was defined by Commissioner Hegggs as “a labour intensive reasonable main daily meal freshly cooked on a traditional cooker”. The test was whether the claimant could cook a meal for himself/herself rather than for the whole family. The cooking test also involves all auxiliary activities, such as reaching for a saucepan, filling it with water and lifting it on or off a cooker. “Prepare” includes peeling and chopping vegetables.

⁹² *CDLA/058/1993*

⁹³ *CSDLA/29/94*

⁹⁴ E.g. *R v. National Insurance Commissioner ex parte Secretary of State for Social Services* [1981] 1 WLR 1017; Social Security (Disability Living Allowance) Regulations 1991 (SI 1991/2890), reg.10C See further Bonner et al. (2007: 136-137),

⁹⁵ “The test, in my view, is whether the attention is reasonably required to enable the severely disabled person as far as reasonably possible to lead a normal life ... Social life, in the sense of mixing with others, taking part in activities with others, undertaking recreation and cultural activities can be part of normal life. It is not in any way unreasonable that the severely disabled person should wish to be involved in them despite his disability”: *Cockburn v. Chief Adjudication Officer, Secretary of State for Social Security v. Fairey* [1997] 3 All ER 844, HL, per Lord Slynn at 859-860.

⁹⁶ *CDLA/2974/2004*.

⁹⁷ *CDLA/148/97*.

causal link between the encouragement and the performance of the bodily function: "it must be demonstrated that the claimant would probably not perform the bodily function unless he was so encouraged, or at least not perform it within an acceptable and useful time".⁹⁸ In any event, the cooking test (head (ii) above) to determine an inability to cook a main meal can be satisfied by a lack of motivation to cook due to severe depression⁹⁹ as well as by physical problems such as neuropathy or tremor affecting the hands. There will be PDUs who have such problems (see further below).

80. There are two routes to the *middle rate* of care. One involves satisfaction of a "day" condition, which refers to care needs during the day; the other is the "night" condition, for care needed at night. The day condition is that the claimant must be:

"so severely disabled physically or mentally that, by day, he requires from another person – (i) frequent attention throughout the day in connection with his bodily functions; or (ii) continual supervision throughout the day in order to avoid substantial danger to himself or others."¹⁰⁰

It is not necessary here to discuss the case law concerning the frequency of attention that is required and the meaning of "throughout the day". Head (ii) (supervision needs) is generally awarded to people who have problems such as relatively frequent blackouts or epileptic seizures or who have serious mental health problems, including where there is a risk of suicidal or self-harming behaviour.¹⁰¹ It may also be satisfied if the claimant requires supervision in order not to be a danger to another person – such as his or her very young child. In one case the Commissioners suggested that a person who vomits or is incontinent when in an intoxicated state due to alcohol dependence could have supervision needs (or attention needs) for DLA purposes;¹⁰² and, by analogy, this may be applicable to some drug addicts. In any event, quite a number of PDUs may also be likely to have various of the needs that are covered by the middle rate care component under head (ii); but possibly also under head (i) if, for example, they need encouragement to look after themselves.¹⁰³ A person who qualifies for middle rate care on the basis of the day condition is unlikely to be capable of most kinds of work.

⁹⁸ *CSDLA/554/2005*, para. 9.

⁹⁹ *Ibid.*, para. 13.

¹⁰⁰ SSCBA 1992, s.72(1)(b).

¹⁰¹ E.g. *R(A)2/91*, *R(A)1/83*; *R(DLA)10/2002*.

¹⁰² *R(DLA)6/06*, para. 39.

¹⁰³ Attention claims based on encouragement needs are more likely to succeed than those based on supervision, since for the latter there is a condition that the supervision must be needed to prevent substantial danger. In *R(DLA)10/2002* the Commissioner stated that such danger "is unlikely to arise with respect to self neglect because it is probable that encouragement to wash, dress and eat would be enough if provided for part of the day only. It may however be different with a claimant who makes suicide attempts or where there is evidence that without the support, mental health may deteriorate to that state" (para 13). See also *CSDLA/554/2005*.

81. The night condition for middle rate care is satisfied where a person is:

“so severely disabled physically or mentally that, at night – (i) he requires from another person prolonged or repeated attention in connection with his bodily functions; or (ii) in order to avoid substantial danger to himself or others he requires another person to be awake for a prolonged period or at frequent intervals for the purpose of watching over him.”

It will be seen that the kinds of care and supervision required under the night condition are different to those under the day condition – for example, the latter refers to “prolonged or repeated attention”, which is a less onerous condition than the day condition’s “frequent attention”.

82. Entitlement to the *highest rate* of the care component arises where a person meets *both* the day and the night condition above.¹⁰⁴

83. The *mobility component* has two rates. There is entitlement to the *higher* rate if a person is over the age of three and is “suffering from physical disablement such that he is either unable to walk or virtually unable to do so”.¹⁰⁵ Most DLA recipients of the higher rate will receive it under this head. The other heads of entitlement to this rate are that the claimant has both blindness and deafness (although not necessarily total) or he or she is severely mentally impaired, displays severe behavioural problems and meets the conditions for the highest rate of the care component.¹⁰⁶

84. Entitlement to the *lower* rate of the mobility component is restricted to a person who:

“is able to walk but is so severely disabled physically or mentally that, disregarding any ability he may have to use routes which are familiar to him on his own, he cannot take advantage of the faculty out of doors without guidance or supervision from another person most of the time”.¹⁰⁷

Many people are entitled to the lowest rate on the basis of a severe mental condition such as acute agoraphobia, anxiety (but only where it is a symptom of a mental disability and is sufficiently severe), paranoia or a behavioural disorder which means

¹⁰⁴ SSCBA 1992, s. 72(4).

¹⁰⁵ SSCBA 1992, s. 73(1)(a); Social Security (Disability Living Allowance) Regulations 1991 (SI 1991/2890), reg. 12.

¹⁰⁶ SSCBA 1992, s. 73(1)(b) and (c), (2) and (3) and 1991 Regs above. Reg. 12(6) defines severe behavioural problems as being disruptive behaviour which is extreme, regularly requires another person to intervene physically restrain the person to avert danger, etc., *and* is so unpredictable that another person needs to be present and watching over him whenever he or she is awake.

¹⁰⁷ SSCBA 1992, s. 73(1)(d).

that they are a risk to themselves or others if unaccompanied outdoors.¹⁰⁸ Thus some PDUs who have developed a mental disorder may qualify. People who qualify for the middle rate of the care component on the basis of needing supervision will often also qualify for the lowest rate care component. If the claimant is under 16, this condition for the lowest rate of the mobility component will not be satisfied unless he or she requires “substantially more” guidance or supervision than a person of his age in standard physical or mental health would require or persons of his age in such condition would not require.¹⁰⁹ This requirement aims to take account of the fact that younger people in general, especially children under 10, will often need a degree of supervision and guidance when going to unfamiliar places, merely by virtue of their young age.

85. People who, despite their disability, may be able to work could benefit from the Government’s planned expansion of disability employment programmes and the Access to Work scheme which funds work-related costs of dealing with barriers to employment such as the cost of specialist aids and equipment. The Government says in the NOWO Green Paper that it is particularly keen to find ways of making Access to Work more responsive to the needs of claimants with “fluctuating conditions – including mental health conditions” (DWP, 2008c: para. 3.42). Clearly, some PDUs will fall into this category. The need to engage employers is also recognised (Ibid., paras 3.49–3.51) and this is important given the unwillingness on the part of some employers to employ people with mental health conditions such as schizophrenia or bipolar disorder and people with a drug problem and the fact that most employers (according to a survey commissioned by the DWP) regard drug or alcohol abuse as a mental health condition (Sainsbury et al., 2008).

¹⁰⁸ SSCBA 1992, s. 73(1)(d) and 1991 Regs above, reg. 12(7) and (8).

¹⁰⁹ SSCBA 1992, s. 73(4).

4. International developments

86. The research on arrangements in other states has concentrated on those in which a comparable policy emphasis to that in the UK is placed on the 'activation' of the non-employed. The research has been as extensive as permitted by the short time span over which it had to be conducted.

AUSTRALIA

87. The main out-of-work benefits within Australia's social security system are similar to those in the UK.¹¹⁰ In particular, the Newstart Allowance mirrors Jobseeker's Allowance (JSA) in the UK and has similar job search, or 'activity', tests. For example, it includes a condition of being actively seeking and willing to undertake paid employment and a requirement to enter into an agreement (a Newstart Activity Agreement) with the agency (Centrelink) and take reasonable steps to comply with it. The terms of the agreement may stipulate some form of training or work/rehabilitation programme as the activity to be undertaken. There is a separate Youth Allowance for people under 21; for this group the activity test can be satisfied through work or study. As in the UK, it has been noted that people with a substance addiction may face particular difficulties in meeting the requirements attached to this activity regime: "Remembering appointments, turning up on time, providing prompt advice of causal earnings, changes of address ... may all prove beyond a person with a severe addiction" (Carney, 2004: 5). In some Centrelink regions particular account is taken of these difficulties, with mobile teams being sent to places such as methadone clinics to speak to claimants, but this is "all too rare" (Ibid.).

88. As in the UK there are various benefit sanctions, whether in respect of an administrative breach (such as a failure to attend an interview with the agency) or a breach of an activity requirement (such as meeting the terms of an Activity Agreement) (Carney, 2004). Carney identifies the claims process as a particular hurdle for drug addicts (Ibid.). Late claims may be permitted if the delay was caused by illness.

89. As in the UK, sickness or incapacity can relieve a claimant from the availability and activity requirements. However, he or she would remain entitled to Newstart Allowance or Youth Allowance. As with Incapacity Benefit (IB) in the UK, a person's benefit can be stopped if they fail to attend for a medical examination, including a psychiatric assessment. If someone becomes incapacitated for work while in employment, or in some cases if they are in full-time education, he or she would instead be eligible for Sickness Allowance. Drug addicts seeking benefit on the basis of incapacity in Australia are, however, most likely to be seeking Newstart Allowance

¹¹⁰ The relevant legislation is the Social Security Act 1991.

(Carney, 2004). Generally, the incapacity claim can subsist for a maximum of 13 weeks, but could be less if the medical certification so states.

90. If incapacity for work or study is of a longer duration and the requisite conditions are met, a person aged 16 or over can qualify for Disability Support Pension. According to Carney, "a person with a severe addiction will achieve greater certainty of income, and will minimise their administrative difficulties" if they qualify for this benefit (Carney, 2004: 12). The basic conditions for the Disability Support Pension include having a "physical, intellectual or psychiatric impairment" which scores 20 points or more under the prescribed Impairment Tables and having a "continuing inability to work".¹¹¹ The Impairment Tables are somewhat like the tables of descriptors used for the personal capability assessment (PCA) in relation to IB (and the forthcoming work capability assessment (WCA) for Employment and Support Allowance (ESA)) in the UK; but obtaining the requisite points score is a separate issue to the determination of a continuing inability to work. What is also different from IB in the UK is that there is a discrete table, Table 7, concerned with alcohol and drug dependence. This is set out in **Appendix 2** to this report. It will be seen that a person could score 20 points if the following description applies:

"Dependence on alcohol or other drugs, well established over time, which is sufficient to cause prolonged absences from work. Reversible end organ damage may be present."

A lesser problem, that of having "A pattern of alcohol or drug use sufficient to cause intermittent or temporary absence from work", although carrying only 5 points, could contribute to a total score of 20 or higher when added to points arising from another form of recognised impairment set out in other of the Impairment Tables, such as communication difficulties or memory. For conditions to count, however, they must be permanent (that is, likely to persist for the foreseeable future, which is defined for this purpose as a prospective period of at least two years) (Carney, 2004).

91. One measure employed in some parts of Australia, the 'quarantining' of benefit, is targeted on those whose lifestyle or pattern of behaviour is considered to threaten the welfare of their child, although this measure may also be regarded as being aimed more generally at behaviour modification. The objectives of the legislative provisions include: "to promote socially responsible behaviour, particularly in relation to the care and education of children".¹¹² Quarantining – officially termed "income management" – in effect involves paying benefits via third parties or in a way that curtails the claimant's control over expenditure. For example, it can involve the issuing of vouchers redeemable in particular shops or for specific goods only. All or part of a person's welfare entitlement can be directed by the administrative authority into an income management account for this purpose.¹¹³ The idea is to ensure that welfare benefits

¹¹¹ Social Security Act 1991, s. 94.

¹¹² Social Security (Administration) Act 1999 (Australia), s. 123TB. See generally Part 3B of the 1999 Act, which was inserted by the Welfare Payment Reform Act 2007.

¹¹³ Social Security (Administration) Act 1999 (Australia), ss.123TA, 123TB.

are expended on the family's "priority needs".¹¹⁴ Two such schemes have been proposed for parts of the Northern Territories and Cape York in Queensland. They are controversial because they appear to be directed at indigenous populations (Sutton, 2008). Drug abuse is one of the forms of behaviour that quarantining of benefits is designed to deter. The Cape York scheme, for example, would place the recipient of welfare under an obligation to, among other things, abstain from committing offences relating to drugs, alcohol, gambling or family violence. If a breach occurs, the Queensland Commission would be able to recommend the sanction of income management. Thus, it is through the conditions attached to welfare payments that the claimant "earns" the 'right' to spend payments without state supervision" (Sutton, 2008: 29).

GERMANY

92. The German social security system has traditionally focused on social insurance, with provision for earnings-related unemployment benefit for a period related to the length of the previous employment but paid for not more than 32 months (McGinnity, 2004). After that period a claimant previously used to qualify for unemployment assistance, paid indefinitely but at a lower rate. Other claimants, who for example, had never worked and were in need, could qualify for social assistance (*Sozialhilfe*). Across these benefits there was an 'activation' regime with elements common to that concerning JSA in the UK, including requirements concerning active search for employment and sanctions for loss of employment through misconduct, or voluntarily, or for non-compliance with an action plan etc. The German social security system has also provided sickness benefit on the grounds of physical or mental ill health.

93. Changes were made to the German social security system following the recommendations of the Hartz Commission set up in 2002. The system has now been rationalised and the notion of an activating welfare state has been made even more central to the arrangements. One of the changes has involved giving the local employment centres – renamed 'JobCenter' – a more active, discretionary role in supporting the unemployed into work. The idea has been not only the integration into the labour market of those immediately able to work but also support for those with entrenched barriers to employment, including those with health problems and/or a drug addiction (Eichenhofer, 2006). However, this 'pedagogic form of welfare intervention' for addicts and other problem groups such as the homeless and people with mental illness is seen as facing practical problems because it would need to be lengthy and can be expensive in terms of manpower; and in any event it is 'not guaranteed to succeed' (Opielka 2008: 81). As regards benefit itself, the two separate assistance schemes – unemployment assistance and social assistance – were merged (under the 'Hartz IV' regulations). The long-term unemployed will be dependent on this benefit; unemployment benefit paid at a higher rate is now only available for the first

¹¹⁴ Social Security (Administration) Act 1999 (Australia), s. 123TB. Priority needs are defined in s. 123TH and include all the obvious items such as food, clothing and fuel plus education/training costs and work-related expenses. Excluded items (s. 123TI) include alcohol beverages and other items to be specified by statutory instrument.

12 months out of work. A new distinction is also now evident, between the 'able-bodied' and those classed as incapable of work.

94. It has been difficult to obtain further detailed information on the position of PDUs within the German social security system due to the lack of publications in English. However, it has been possible to ascertain a number of key points via a German social security law expert, Dr Felix Welti.¹¹⁵ Dr Welti explains that drug addicts who are medically unfit for work (*arbeitsunfähig krank*) are entitled to sickness benefits (*Krankengeld*) under the sickness insurance scheme, provided they were employed previously.¹¹⁶ The amount paid will be related to what they earned in their employment. Payment would be for a maximum of 78 weeks. If they had not previously been employed they would receive only the minimum benefit for jobseekers (*Grundsicherung für Arbeitsuchende*), provided they are able to work more than three hours a day.¹¹⁷ Those who are unable to work for three hours per day would be entitled to the minimum benefit for 'invalids'¹¹⁸ or in some cases they may qualify for an invalids' pension (*Erwerbsminderungsrente*) from the pension insurance scheme.¹¹⁹

95. Claimants may be required to undergo rehabilitation to improve their medical condition.¹²⁰ This seems to reflect a principle under the German Social Law that rehabilitation of a drug addict is not complete until he or she is in long-term employment (Verster and Soberg, 2003: 16). The authorities can require insured people to apply for medical or vocational rehabilitation as a condition of continued entitlement to benefit. Although rehabilitation cannot be imposed on anyone without their consent,¹²¹ there is pressure arising from the fact that those who do not make such application would lose their entitlement to sickness benefit.¹²²

96. Dr Welti explains that rehabilitation of drug addicts is typically split into detoxification, financed by sickness insurance; medical and vocation rehabilitation, financed by pension insurance; and social adaptation, financed by social welfare administration. In some Bundesländer (69, according to Eichenhofer, 2006) the mutual cooperation of these bodies has been institutionalised.¹²³

¹¹⁵ Prof. Dr. jur. habil. Felix Welti, Sozialrecht und Verwaltungsrecht, Hochschule Neubrandenburg Fachbereich Gesundheit – whose assistance I acknowledge with thanks.

¹¹⁶ Social Security Code Book 5, § 44 SGB V, para. 44.

¹¹⁷ Erwerbsfähigkeit, § 8 SGB II.

¹¹⁸ Grundsicherung für dauerhaft Erwerbsgeminderte § 41 SGB XII

¹¹⁹ § 43 SGB VI.

¹²⁰ § 63 SGB I.

¹²¹ § 9 IV SGB IX.

¹²² § 51 SGB V.

¹²³ § 94 II SGB X.

NEW ZEALAND

97. New Zealand has a similar framework to its unemployment benefits to that in Australia and the UK.¹²⁴ There are the same basic conditions of entitlement of being not in full-time employment but available for it, seeking and taking "reasonable steps to find it" and willing and able to undertake it. There are the same kind of administrative requirements related to attending interviews and signing up to a jobseeker agreement setting out, among other things, plans for job search and participation in "jobseeker development activities" (such as training). There is a similar range of sanctions in respect of these conditions and circumstances related to losing employment through misconduct etc. In some ways the activation measures are more strict than seen elsewhere, or least more explicit. There are no special arrangements for moving unemployed PDUs into employment, only the standard activation provision applicable to all.

98. In any event, the Ministry of Social Development (MSD) reports that only occasionally will a person with substance addiction apply for Unemployment Benefit on the basis that they are fit for work (and in any event that is more likely in the case of alcohol addiction than drug addiction). According to the MSD, in such a case the case manager might suggest that the claimant has a medical check up, or, if in their assessment the person is not "work ready", they might inform the claimant that he or she does not qualify for Unemployment Benefit due to being unable to work and advises them to go to their GP for a medical certificate.¹²⁵ Drug addicts (and alcoholics) who are unable to work will normally be on Sickness Benefit rather than Unemployment Benefit. The MSD will rely on a medical certificate from the claimant's doctor indicating that they are unable to work due to the state of their health – with drug addiction regarded as a health issue for this purpose. Normally, single 16- and 17-year-olds will not be eligible for Sickness Benefit, but if they are suffering hardship and are in a recognised rehabilitation programme (or pregnant) they may qualify for it.

99. According to MSD statistics, as at the end of March 2008, 1,913 people were in receipt of Sickness Benefit primarily on the basis of their drug addiction and 1,930 for alcohol addiction.¹²⁶ The figures in Table 4 show that this total has increased annually for all but one of the past four years and appear to indicate that the rise in substance cases exceeds the overall rise in claimants, most markedly in the case of drug abuse cases.

¹²⁴ Social Security Act 1964, as amended, s. 89ff.

¹²⁵ Communication with Ministry of Social Development, New Zealand June 2008.

¹²⁶ Statistics supplied to the author by MSD and included here with MSD's permission.

Table 4: Numbers of working-age recipients of Sickness Benefit in New Zealand with a primary incapacity of substance abuse

	2004	2005	2006	2007	2008
Drugs	919	912	1,337	1,454	1,913
Alcohol	1,260	1,159	1,603	1,830	1,930
Other substance	154	154	133	185	0 [category abolished]
Total substance abuse	2,333	2,225	3,073	3,469	3,843
Total benefit recipients	43,698	45,176	47,072	48,063	46,271

Source: MSD statistics supplied to author, MSD 2006 and MSD National Benefit Factsheet June 2007. Overall total recipient numbers for 2004 to 2008 are for the year ending in June whereas the substance cases are for year ending in March.

Note that although in Table 4 the 'total benefit recipients' shown necessarily spans a slightly different 12-month period to the substance abuse cases (year ending March as opposed to June), the respective figures are available across the same time period for the years to March 2007 and March 2008. The total number of benefit recipients was 47,862 in the year to March 2007, with drug problem cases therefore representing 3% of all successful claims that year; and it was 45,676 in the year to March 2008, with drug users representing 4.2% of successful claims.

100. Claimants whose addiction is sufficiently serious or protracted and is giving rise to serious health problems which would mean they would not be capable of working in the foreseeable future might go straight on to Invalids Benefit. At the end of March 2008 there were 627 people in receipt of this benefit primarily for drug problems, 809 for alcohol addiction and 61 for other substance abuse.¹²⁷ There has been an annual increase in drug abuse cases for each of the past four years: see Table 5. Eligibility to Invalids Benefit arises where a person is blind or "permanently and severely restricted in his or her capacity for work because of sickness, or because of injury or disability from accident or congenital defect". The legislation states that a person "is severely restricted in his or her capacity for work" if the agency is satisfied that they are "incapable of regularly working 15 or more hours a week in open employment". So a person could be able to undertake a limited amount of work and still be eligible for this benefit, as in the case of a person claiming IB in the UK.

¹²⁷ Ibid.

Table 5: Numbers of working-age recipients of Invalids Benefit in New Zealand with a primary incapacity of substance abuse

	2004	2005	2006	2007	2008
Drugs	378	419	432	503	627
Alcohol	570	606	617	665	809
Other substance	62	62	61	73	61
Total substance abuse	1,010	1,087	1,110	1,241	1,497
Total benefit recipients	70,807	73,186	75,349	77,301	82,879

Source: MSD statistics supplied to author (substance abuse cases), MSD 2006 and MSD National Benefit Factsheets June 2007 and June 2008. Note the overall total recipient numbers for 2004 to 2008 are for the year ending in June whereas the substance cases are for year ending in March.

A much smaller proportion of the awards of this benefit (less than 1%) as compared with Sickness Benefit (para. 99 above), are made primarily on the basis of drug abuse.

101. The MSD has launched a Sickness and Invalids Benefit Strategy designed to support recipients of these benefits to prepare for and enter work. In part this is a response to the increases in recent years in the numbers of people receiving these benefits. In explaining the reason for the strategy the MSD says it does not want people to be “trapped on benefit when work is available”.¹²⁸ Changes introduced under the Social Security Amendment Act 2007 mean that people claiming either Sickness or Invalids Benefit may be required to have personal development and employment plans if requested to do so. They can also be required to:

“undertake any activity or any rehabilitation (other than an activity or rehabilitation involving participation in work, or medical treatment) the [MSD] considers suitable for the beneficiary to improve the beneficiary’s work-readiness or prospects for employment”.¹²⁹

The MSD has explained to the author that whilst this might sound as though it could give it the mandate to require a drug addict to attend a rehabilitation programme, in practice the Ministry’s interpretation of the term “rehabilitation”, in relation to treatment for drug addiction, is that it could be construed as medical treatment for this purpose (and therefore is excluded). The MSD says that it nevertheless encourages claimants with known addiction problems to seek help through their GP and will “support people who acknowledge that they have a problem and wish to try and overcome it.”¹³⁰

¹²⁸ www.msd.govt.nz/work-areas/people-with-disabilities/sbib-strategy/index.html (accessed 24 July 2008).

¹²⁹ Social Security Act 1964, s. 60Q(1)(cb).

¹³⁰ Note 128 above.

102. Sickness benefits can continue to be paid to claimants who enter a residential rehabilitation programme, for the first 13 weeks of the programme. Thereafter (if the programme is longer running) they can be paid benefit at a reduced rate. Although they would cease to be eligible for certain benefits such as accommodation supplement, they could be eligible for the Community Cost Payment amounting to up to \$300 per week, aimed at assisting them to meet the costs of maintaining a home during their period in rehabilitation. They may also be eligible for a residential support subsidy to help them financially. The Ministry says that it is at present considering offering referrals to rehabilitation services through an "Innovation Fund" set up by the Government. Participation would be purely voluntary; there is no intention to make attendance in rehabilitation a prerequisite for benefit assistance.

NORWAY

103. The Norwegian Labour and Welfare Service administers the main social security benefits as well as providing assistance and advice for jobseekers. While social welfare payments, as opposed to insurance-based benefits such as Sickness Benefit or Unemployment Benefit, are still administered by local authorities alongside other social welfare services, the local authority services and the Norwegian Labour and Welfare Service have been combined into the Norwegian Labour and Welfare Administration (NAV) since July 2006. The NAV, whose offices have been progressively introduced around Norway (121 were opened in 2007), is therefore a cooperative endeavour between central government and local authorities. There is a local cooperative agreement between each local authority and the central agency, which means that the nature of provision made by the NAV can vary from one area to the next. According to the NAV's webpages,¹³¹ the aim of the NAV reform has been to:

"Get more people into work and useful activity, and fewer on benefit. Make things easier for users, and adjust administration to the needs of the consumer. Attain a uniform and efficient labour and welfare administration."

The idea is to provide an integrated service combining elements of social security, employment and social welfare services (including housing, social assistance payments and help for the disabled).

104. The above reforms should result in better assistance for PDUs, who may have a range of support and intervention needs. Many PDUs who are not in employment will be dependent on social welfare assistance. Although this is meant to be a short-term form of help, many people with serious drug problems can remain on these benefits for five or even 10 years, according to the Health and Welfare Agency in Oslo.¹³² The Agency reports that attempts to get PDU clients into rehabilitation programmes are common, but that even where they succeed the treatment itself does not prevent

¹³¹ <http://www.nav.no/page?id=805312738> (accessed 23 July 2008)

¹³² Correspondence with the author.

many continuing as before, living a life on basic welfare, which cannot be denied to citizens who need help. Housing assistance is also provided.

105. Although the form of social security benefits of which PDUs are most likely to in receipt in Norway will be means-tested social assistance, some will be able to qualify for Sickness Benefit, but only on the basis of a health problem and only on condition that they undergo treatment. However, there is a condition of having been gainfully employed (or in receipt of Unemployment Benefit or a Care Allowance or an Adoption, or Maternity Benefit) for at least four weeks prior to the claim.¹³³ NAV will monitor the treatment arrangements. Sickness Benefit entitlement runs for a maximum period of one year. Those whose entitlement to Sickness Benefit has expired and who remain unable to work may, if they are continuing to receive treatment which aims to make them capable of work (this could include treatment for the addiction and for the illness that has resulted from it), be entitled to Rehabilitation Benefit for up to 12 months. Those who are disabled may, under the supervision of NAV, receive a benefit entitled Temporary Benefit for up to four years while they take steps to improve their capacity for work. But they would have to have prospects for improved work capacity: if that was not the case then they could be eligible for a Disability Pension. If they refused to undertake relevant training or to receive treatment their benefit would be stopped.

106. There does not appear to be any specific initiative to assist PDUs into employment. This may be because the numbers of PDUs are relatively small (although have been rising among the 21-plus age group in recent years: SIRUS, 2007) and unemployment itself is at a very low level in Norway (only 1.5% of the population are fully non-employed jobseekers, according to NAV statistics for June 2008). Some Norwegian PDUs may in theory qualify for various disability benefits but in practice it is difficult for them to qualify. One general problem concerning payment of benefits to PDUs in Norway is that payment is via a bank account but some PDUs are unable to obtain one.

SWEDEN

107. Sweden still has a relatively generous system of unemployment benefits, but conditions have been tightened up in recent years. To be eligible for Unemployment Benefit¹³⁴ a person must be: unemployed; fit for work; available for work for at least three hours per day and at least 17 hours per week; willing to accept an offer of suitable work; actively seeking work; registered as a job seeker with the relevant agency (*Arbetsförmedlingen* – Public Employment Service); and cooperate with the drawing up of a back-to-work action plan. Doubts have been expressed as to whether this action plan actually succeeds in providing tailored arrangements and enables claimants to exercise choice (Johansson and Hvinden, 2007).

108. Unemployment Benefit takes two forms – *basic insurance*, for those who are not a member of an unemployment fund or who are a member but do not satisfy the

¹³³ National Insurance Act 1997 ('Folketrygdlöven'), s. 8-2.

¹³⁴ Unemployment Insurance Act (SFS 1997: 238).

conditions of entitlement for an income-related benefit; and *income-loss insurance* (set at 80% of the claimant's previous income, for the first 200 days, and thereafter 70%) for those who are a member of this fund for at least a year and satisfy a work condition (requiring the undertaking of at least the prescribed minimum amount of work in the 12 months preceding unemployment, or a prescribed amount of study). Unemployment Benefit entitlement only runs for 300 days but may be extended for a further period of up to 300 days. Similar to the UK, the legislation provides for sanctions for claimants who have lost their job due to misconduct or who have left their employment without "valid cause". In these cases, payment of benefit is "suspended" for up to 168 days, in the case of misconduct, or 112 days, in the case of leaving without valid cause. Benefit can be reduced by 25%, rather than suspended, if a person rejects a suitable job offer without "acceptable reasons" or, by reason of his or her conduct, is not offered employment. Reduction by 50% for a further 40 days would be imposed if either happened a second time within the benefit period.

109. In Sweden, the activation regime found in Unemployment Benefit is also a feature of the social assistance scheme, which provides "residual income support", for example for those who have ceased to be entitled to Unemployment Benefit. In all Nordic countries, social assistance schemes are locally administered, with considerable scope for local/professional discretion (Johansson and Hvinden, 2007). (But see further the section on Norway above.) Activation regimes are also operated for social assistance, but at a local municipal level (under the Social Services Act). However, it is not compulsory for municipalities to provide activation arrangements. Nevertheless, municipalities can impose work search conditions for payment of social assistance¹³⁵ and sanctions for non-compliance with administrative or work-search conditions can also be applied. But generally activation is seen as a responsibility for the (national) Public Employment Service, and municipalities' involvement in it is being discouraged.

110. There do not appear to be any special schemes for getting unemployed PDUs in Sweden or other Nordic countries into work or training;¹³⁶ their social reintegration is regarded as an aim of drug abuse treatment per se (Verster and Solberg 2003: 72). Moreover, in recent years the Public Employment Service has focused increasingly on those who are 'job ready': and drug abusers would not be considered to be in that category. This contrasts with the position in Finland, where Labour Force Services Centres are being established to complement existing state employment services by assisting 'hard to place' claimants to enter employment, such as persons with "multiple life problems" (Johansson and Hvinden, 2007: 145). In general, in Sweden, this is a group mainly provided for by the local municipalities via social assistance, and there is otherwise no evidence of any systematic provision for them. There is, however, some voluntary sector activity supporting people with drug problems, involving training and other schemes to try to get them into or closer to the labour market.

¹³⁵ Social Services Act 1998.

¹³⁶ Dr Håkan Johansson, Växjö University, private communication to the author. I gratefully acknowledge Dr Johansson's assistance.

111. As regards the question whether individual action plans for Unemployment Benefit might include commitments to seek treatment for drug addiction, that is possible but there have been no studies of these plans in Sweden. Individual action plans administered via the Public Employment Service are considered most unlikely to contain such a condition, but it is possible that plans administered by the local social service could include such a requirement as a condition attached to payment of social assistance.¹³⁷ Drug abusers may be able to qualify for sickness or invalidity benefits, but after a long history of drug addiction (when they would have been on social assistance).

UNITED STATES OF AMERICA

112. Federal legislation in the USA in 1996, the Personal Responsibility and Work Opportunity Reconciliation Act 1996 (PRWORA) (Public Law 104-121), provides (in section 115(a)) that:

“An individual convicted (under Federal or State law) of any offense which is classified as a felony by the law of the jurisdiction involved and which has as an element the possession, use, or distribution of a controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))) shall not be eligible for—

1. assistance under any State program funded under part A of title IV of the Social Security Act, or
2. benefits under the food stamp program ... or any State program carried out under the Food Stamp Act of 1977.”

In such a case, where financial assistance is paid to a family under the “Program of Temporary Assistance for Needy Families” entitlement is reduced by the amount that would otherwise have been paid in respect of that convicted individual. Individual State legislatures nevertheless are granted the power to opt out of the provision for disenfranchising those convicted of drug offences or are permitted to make their exclusion from entitlement limited to a specific period of time (section 115(d)(1)).

113. In the case of Social Security Disability Insurance, no such conviction is needed to bar a drug user from entitlement. Section 223(d)(2)(C) of the federal Social Security Act removes many drug addicts or alcoholics from the category of ‘disabled’:

“An individual shall not be considered to be disabled for purposes of this title if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the ... determination that the individual is disabled”.

An identical exclusion applies also to Supplemental Security Income for the Aged, Blind and Disabled, which is paid on the basis of financial need (section 1614 (a)(3)(J)). This

¹³⁷ Ibid.

means, as Watkins et al. (1999) explain, there would be no entitlement, or there would be termination of entitlement, of disability benefit where the cause of disability was primarily drug addiction. Even if drug addiction is not the primary cause of disability, payment may be made to a representative rather than the claimant if it is considered by the authorities that it would “serve the interest of the individual because the individual also has an alcoholism or drug addiction condition ... and the individual is incapable of managing such benefit”.¹³⁸

114. The exclusion from disability benefits reflects a policy goal of striking a balance between supporting vulnerable people in need while discouraging behaviour considered unacceptable. There is clearly an underlying moral rationale (Paz-Fuchs, 2008: 117), which in part rests on the assumption (which empirical research does not in fact support: see Swartz et al., 2003) that the availability of federal cash benefits such as these disability benefits encourages the use of illicit drugs.

¹³⁸ Social Security Act, s. 1631 (2)(A)(ii)(II)

5. Conclusions

115. The evidence from the research to date shows that despite the fact that they “tend more often to be unemployed, and unemployed people tend more often to be [PDUs]” (South et al., 2001: 24), **on the whole PDUs have tended to have very low visibility within the UK welfare benefits system**, a problem compounded by the absence of systematic research into their position in this specific context. A further factor is that **while drug abuse is often the cause of other problems, related to mental and/or physical health, it is the case that those health problems rather than the addiction problems per se trigger entitlement to benefit** (or in some cases exemption from or automatic satisfaction of particular conditions of entitlement).¹³⁹ The underlying cause of the health problems may not be of concern to the benefit authorities (nor the social security legislation itself), so the drug problem may remain hidden and in consequence will not be reflected in the official social security statistics. Moreover, much of the case law on the position of substance abusers for the purposes of various benefits – especially Disability Living Allowance and Incapacity Benefit (IB) – concerns alcoholism rather than drug abuse, even though there are almost as many people receiving IB on the basis of drug abuse as there are those categorised as entitled on the basis of alcohol problems¹⁴⁰ and the definitional issues concerning disablement, etc., are equally problematic.

116. To date, **the international evidence has uncovered few models of better practice or provision with regard to PDUs dependent on welfare benefits**, including the parts of states’ welfare systems geared up to activate the unemployed. Many states’ laws and policies either ignore PDUs as a specific group or else, as in the case of the USA, treat them quite harshly. Few states seem to monitor PDUs within their benefits system: New Zealand is an exception. However, there are a few examples of practice that may warrant emulation in the UK. An example is the way that **the Australian system addresses specifically the position of PDUs in its social security legislation**. Another is the **legislation in Italy requiring a person to be given the option of returning to their employment where they have been confirmed as drug dependent**.¹⁴¹ This option must be kept open for three years running from the ceasing of work until the completion of treatment; and the treatment can take place in separate blocks. However, this would only help a small

¹³⁹ In a recent survey of IB recipients for the DWP, drug addiction was placed in the category “mental health conditions” and only 2% of the sample categorised their addiction as their main health problem. The researchers acknowledged that the experiences and outcomes for those with a substance abuse problem are likely to be “quite different” from those with depression, but regarded the sample of substance abusers as “too small for analysis”: Hales et al. (2008), p. 100.

¹⁴⁰ Per the DWP figures cited at note 2 above, showing that in May 2007 there were 49,890 in the former category and 51,430 in the latter category.

¹⁴¹ Law 309/90.

proportion of PDUs, as most are already unemployed. **In general, there is evidence of increasing pressure on PDUs internationally via the activation regimes to increase their employability or in some cases a utilisation of use the benefits system as a mechanism for behaviour modification.** What we do not know from elsewhere or from the UK is how many PDUs are being *refused* various social security benefits and on what grounds.

117. The UK's benefits system undoubtedly provides a lifeline for many PDUs who are unfit for work or who cannot secure employment. Although social security law makes scant or no direct reference to drug problems per se, PDUs are accommodated within the benefits system because they satisfy the relevant prescribed conditions of entitlement, even though it may be difficult in some cases for them to qualify on medical grounds for some kinds of help that their needs may justify. Moreover, **while they may qualify for benefit support on the basis of the physical or mental effects of their addiction, those very effects may prejudice their capacity to navigate the system's onerous claims process or to meet its other administrative conditions,** such as those relating to attendance or the provision of information, or (in the case of Jobseeker's Allowance) the jobsearch conditions.

118. It should not be assumed that because so many PDUs do gain access to the benefits system – and we are getting a clearer picture of the scale of PDUs' reliance on benefits – qualification for support is guaranteed or maximised. The problem is that **we still do not really know enough about how in practice PDUs are dealt with under the benefits system,** even though a little more evidence has emerged recently. For this reason it is difficult to predict what the overall consequences will be of the tougher benefit regime for PDUs who are either capable or incapable of working, other than to observe that many will face increased difficulty in qualifying for support. Indeed, this consequence is intended, as the underlying assumption is that drug dependence is a 'lifestyle' and that the benefits system should make it a less 'comfortable' one in order to move PDUs off benefit and into work – and government policy in the UK is going further than almost any other Western democratic state in this regard (the USA having the most strict benefit regime). In one sense this approach, or at least the **government emphasis on using the benefits system to pressurise PDUs into entering treatment programmes,** can be justified by evidence that without tackling the claimant's drug dependency it will be impossible to increase their employability (Kemp and Neale, 2005). But **it remains to be seen whether vital, complementary cross-agency support is rendered, and good treatment services made universally available, to put sufficient balance into this policy.**

Appendix 1

EMPLOYMENT AND SUPPORT ALLOWANCE: WORK CAPABILITY ASSESSMENT¹⁴²

Mental, cognitive and intellectual function assessment

(1) Activity		(2) Descriptors	(3) Points	
12. Learning or comprehension in the completion of tasks.	12	(a)	Cannot learn or understand how to successfully complete a simple task, such as setting an alarm clock, at all.	15
		(b)	Needs to witness a demonstration, given more than once on the same occasion, of how to carry out a simple task before the claimant is able to learn or understand how to complete the task successfully, but would be unable to successfully complete the task the following day without receiving a further demonstration of how to complete it.	15
		(c)	Needs to witness a demonstration of how to carry out a simple task, before the claimant is able to learn or understand how to complete the task successfully, but would be unable to successfully complete the task the following day without receiving a verbal prompt from another person.	9
		(d)	Needs to witness a demonstration of how to carry out a moderately complex task, such as the steps involved in operating a washing machine to correctly clean clothes, before the claimant is able to learn or understand how to complete the task successfully, but would be unable to successfully complete the task the following day without receiving a verbal prompt from another person.	9
		(e)	Needs verbal instructions as to how to carry out a simple task before the claimant is able to learn or understand how to complete the task successfully, but would be unable, within a period of less than one week, to successfully complete the task the following day without receiving a verbal prompt from another person.	6
		(f)	None of the above apply.	0
13. Awareness of	13	(a)	Reduced awareness of the risks of everyday hazards	15

¹⁴² ESA Regulations 2008, Schedule 2, Part 2.

hazard.			(such as boiling water or sharp objects) would lead to daily instances of or to near-avoidance of:	
			(i) injury to self or others; or	
			(ii) significant damage to property or possessions,	
			to such an extent that overall day to day life cannot successfully be managed.	
		(b)	Reduced awareness of the risks of everyday hazards would lead for the majority of the time to instances of or to near-avoidance of	9
			(i) injury to self or others; or	
			(ii) significant damage to property or possessions,	
			to such an extent that overall day to day life cannot successfully be managed without supervision from another person.	
		(c)	Reduced awareness of the risks of everyday hazards has led or would lead to frequent instances of or to near-avoidance of:	6
			(i) injury to self or others; or	
			(ii) significant damage to property or possessions,	
			but not to such an extent that overall day to day life cannot be managed when such incidents occur.	
		(d)	None of the above apply.	0
14. Memory and concentration.	14	(a)	On a daily basis, forgets or loses concentration to such an extent that overall day to day life cannot be successfully managed without receiving verbal prompting, given by someone else in the claimant's presence.	15
		(b)	For the majority of the time, forgets or loses concentration to such an extent that overall day to day life cannot be successfully managed without receiving verbal prompting, given by someone else in the claimant's presence.	9
		(c)	Frequently forgets or loses concentration to such an extent that overall day to day life can only be successfully managed with pre-planning, such as making a daily written list of all tasks forming part of daily life that are to be completed.	6
		(d)	None of the above apply.	0
15. Execution of tasks.	15	(a)	Is unable to successfully complete any everyday task.	15
		(b)	Takes more than twice the length of time it would take a person without any form of mental disablement, to successfully complete an everyday task with which the claimant is familiar.	15
		(c)	Takes more than one and a half times but no more than twice the length of time it would take a person without any form of mental disablement to	9

			successfully complete an everyday task with which the claimant is familiar.	
		(d)	Takes one and a half times the length of time it would take a person without any form of mental disablement to successfully complete an everyday task with which the claimant is familiar.	6
		(e)	None of the above apply.	0
16. Initiating and sustaining personal action.	16	(a)	Cannot, due to cognitive impairment or a severe disorder of mood or behaviour, initiate or sustain any personal action (which means planning, organisation, problem solving, prioritising or switching tasks).	15
		(b)	Cannot, due to cognitive impairment or a severe disorder of mood or behaviour, initiate or sustain personal action without requiring verbal prompting given by another person in the claimant's presence for the majority of the time.	15
		(c)	Cannot, due to cognitive impairment or a severe disorder of mood or behaviour, initiate or sustain personal action without requiring verbal prompting given by another person in the claimant's presence for the majority of the time.	9
		(d)	Cannot, due to cognitive impairment or a severe disorder of mood or behaviour, initiate or sustain personal action without requiring frequent verbal prompting given by another person in the claimant's presence.	6
		(e)	None of the above apply.	0
17. Coping with change.	17	(a)	Cannot cope with very minor, expected changes in routine, to the extent that overall day to day life cannot be managed.	15
		(b)	Cannot cope with expected changes in routine (such as a pre-arranged permanent change to the routine time scheduled for a lunch break), to the extent that overall day to day life is made significantly more difficult.	9
		(c)	Cannot cope with minor, unforeseen changes in routine (such as an unexpected change of the timing of an appointment on the day it is due to occur), to the extent that overall, day to day life is made significantly more difficult.	6
		(d)	None of the above apply.	0
18. Getting about.	18	(a)	Cannot get to any specified place with which the claimant is, or would be, familiar.	15
		(b)	Is unable to get to a specified place with which the claimant is familiar, without being accompanied by another person on each occasion.	15
		(c)	For the majority of the time is unable to get to a specified place with which the claimant is familiar without being accompanied by another person.	9

		(d)	Is frequently unable to get to a specified place with which the claimant is familiar without being accompanied by another person.	6
		(e)	None of the above apply.	0
19. Coping with social situations.	19	(a)	Normal activities, for example, visiting new places or engaging in social contact, are precluded because of overwhelming fear or anxiety.	15
		(b)	Normal activities, for example, visiting new places or engaging in social contact, are precluded for the majority of the time due to overwhelming fear or anxiety.	
		(c)	Normal activities, for example, visiting new places or engaging in social contact, are frequently precluded, due to overwhelming fear or anxiety.	6
		(d)	None of the above apply.	0
20. Propriety of behaviour with other people.	20	(a)	Has unpredictable outbursts of aggressive, disinhibited, or bizarre behaviour, being either:	15
		(i)	sufficient to cause disruption to others on a daily basis; or	
		(ii)	of such severity that although occurring less frequently than on a daily basis, no reasonable person would be expected to tolerate them.	
		(b)	Has a completely disproportionate reaction to minor events or to criticism to the extent that the claimant has an extreme violent outburst leading to threatening behaviour or actual physical violence.	15
		(c)	Has unpredictable outbursts of aggressive, disinhibited or bizarre behaviour, sufficient in severity and frequency to cause disruption for the majority of the time.	9
		(d)	Has a strongly disproportionate reaction to minor events or to criticism, to the extent that the claimant cannot manage overall day to day life when such events or criticism occur.	9
		(e)	Has unpredictable outbursts of aggressive, disinhibited or bizarre behaviour, sufficient to cause frequent disruption.	6
		(f)	Frequently demonstrates a moderately disproportionate reaction to minor events or to criticism but not to such an extent that the claimant cannot manage overall day to day life when such events or criticism occur.	6
		(g)	None of the above apply.	0
21. Dealing with other people.	21	(a)	Is unaware of impact of own behaviour to the extent that:	15
		(i)	has difficulty relating to others even for brief periods, such as a few hours; or	

		(ii)	causes distress to others on a daily basis.	
		(b)	The claimant misinterprets verbal or non-verbal communication to the extent of causing himself or herself significant distress on a daily basis.	15
		(c)	Is unaware of impact of own behaviour to the extent that:	9
		(i)	has difficulty relating to others for longer periods, such as a day or two; or	
		(ii)	causes distress to others for the majority of the time.	
		(d)	The claimant misinterprets verbal or non-verbal communication to the extent of causing himself or herself significant distress to himself for the majority of the time.	9
		(e)	Is unaware of impact of own behaviour to the extent that:	6
		(i)	has difficulty relating to others for prolonged periods, such as a week; or	
		(ii)	frequently causes distress to others.	
		(f)	The claimant misinterprets verbal or non-verbal communication to the extent of causing himself or herself significant distress on a frequent basis.	6
		(g)	None of the above apply	

Appendix 2

AUSTRALIAN DISABILITY SUPPORT PENSION: IMPAIRMENT TABLE 7¹⁴³

TABLE 7 ALCOHOL AND DRUG DEPENDENCE

Alcohol and drug dependence is assessed using Table 7. A rating other than **NIL** on this Table should only be assigned where the person's medical and other reports, history and presentation consistently indicate chronic entrenched drug and alcohol dependence. It should also be causing a functional impairment; the use of drugs or alcohol does not in itself constitute or necessarily indicate permanent impairment. Any associated neurological functions or end organ damage should also be assessed on the appropriate tables in addition to Table 7. The ratings are then added together to obtain a total work-related impairment rating.

When applying this Table, consideration should be given to the known biological and behavioural effects of particular substances.

Rating	Criteria
NIL	A pattern of alcohol or drug use with no or only minor effects on daily functioning or work capacity.
FIVE	A pattern of alcohol or drug use sufficient to cause intermittent or temporary absence from work.
TWENTY	Dependence on alcohol or other drugs, well established over time, which is sufficient to cause prolonged absences from work. Reversible end organ damage may be present.
THIRTY	Dependence on alcohol or other drugs, well entrenched over many years, with minimal residual work capacity. Irreversible end organ damage may be present.
FORTY	Pattern of heavy alcohol or other drug use with severe functional disability and irreversible end organ damage.

¹⁴³ Social Security Act 1991, Schedule 1B.

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