

“Legitimacy is
a balancing act,
but we can achieve
a much better balance
than the WCA”

A BETTER WCA IS POSSIBLE

Ben Baumberg Geiger

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A BETTER WCA IS POSSIBLE: DISABILITY ASSESSMENT, PUBLIC OPINION AND THE BENEFITS SYSTEM

Ben Baumberg Geiger

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Executive summary

This is *not* a report about the failings of the Work Capability Assessment (WCA) – not because the WCA can escape the accusation of failure, but because this is already widely known. Instead, the report aims to set out how a better WCA is possible. The over-riding aim is *legitimacy*: as the independent reviewer of the WCA has said, ‘to be a credible test, the WCA needs not only to be fair but to be perceived as such’. In this report, I therefore present extensive evidence on public attitudes. However, some caution is necessary: members of the public sometimes do not understand disability well, let alone the complexities of how the benefits system works. Nevertheless, alongside wider evidence, understanding the attitudes of the public and other key actors can help us develop a better, more legitimate WCA.

This report is based on evidence from a 4-year research project, partly carried out in collaboration with Demos and a team led by Professor Clare Bambra. It has four parts:

- a comparative study examining how other countries conduct social security disability assessment, based on 150 documents and 40 expert interviews across nine countries
- a new survey of the public, asking 2,000 people detailed questions about both disabled people in general and using vignettes of specific types of disabled people
- six focus groups with the public
- six focus groups with key actors: Maximus WCA assessors, welfare-to-work providers, disability charity workers and disability activists

The report focuses on three issues in turn:

- how the WCA decides if a claimant's impairments are 'genuine' in deciding if they should be eligible for incapacity benefits
- how the WCA decides if someone is capable of work
- the WCA's role in establishing if disabled claimants should be subject to conditionality and sanctions

Establishing 'genuineness'

Many members of the public are concerned about 'undeserving' people claiming incapacity benefits – but many are also concerned that 'genuinely' disabled people are being unfairly denied them (as we found in both the survey and the focus groups). If anything, the public are more concerned about the unfair treatment of genuine claimants than the unfair claims of undeserving ones. More people said they knew a deserving claimant who has struggled to get benefits than a claimant who is not genuinely disabled (28 per cent vs 19 per cent). And more people thought it was more important to support genuine claimants than to root out fraud (45 per cent vs 22 per cent). While the public do not necessarily want a more lenient assessment, they do want a better one: only 10 per cent of people thought that the WCA accurately assesses who should get benefits.

Public attitudes therefore tend to fall either side of a knife-edge: people are either generous towards 'genuine' claimants, or hostile towards fraudulent ones – so it is crucial to know how the public decide who is 'genuine'. The most common view was to rely on doctors. However, people also inferred 'genuineness' from clues such as a person's apparent work ethic and their own informal observations. Most were aware that these are problematic: doctors do not have perfect knowledge, and hidden impairments are not outwardly observable. Trust is therefore pivotal. If someone is trusted, then their description of their symptoms is likely to be believed, even without a doctor's diagnosis. Where people

were not trusted, weak evidence could be unfairly used as evidence that someone is not ‘genuine’.

WCA assessors themselves try to assess the ‘genuineness’ of claimants, but there are substantial concerns about each of the strategies they use to do this. Not only is medical evidence often unavailable, but claimants’ treatment history only provides indirect evidence about their impairments. Assessors therefore combine this evidence with their wider medical knowledge to decide if the reported impairments are ‘likely’, potentially leading them to make unfair decisions where people’s impairments are unusual, or where there are other reasons for a lack of treatment. Similarly, informal observations at the assessment (such as how people walked) provide highly unreliable clues on fluctuating conditions. Many key actors felt that appeal tribunal judges made better decisions about ‘genuineness’, not because they had more written medical evidence, but because they asked the claimant better questions and weighed the evidence they had more fairly.

Recommendations

- The government should ensure that assessors’ reports of what claimants said can unquestionably be trusted.* A number of claimants have reported that assessors of Personal Independence Payment (PIP) have fabricated some or all their reports, sometimes supported by strong evidence such as secret recordings. While these claims are anecdotal, and may or may not apply equally to the WCA, it is clearly very damaging to the legitimacy of Department of Work and Pensions (DWP) disability assessments in general. The government should therefore audio record all assessments, and annually review a sample of these recordings to ensure that they are accurate. Claimants should also be able to see – and comment on – the first part of their assessment report during the assessment.

- 2 *The government should improve the supply of useful medical evidence into the WCA.* Almost every report on the WCA since it was introduced has argued that the supply of medical evidence must be improved, but achieving this in practice has been slow and difficult. To address this, the government should reverse the current burden on assessors to justify only where they *do* request further medical evidence, instead requiring them to justify where they *do not*. These requests for information should be light-touch, using a secure electronic system.

- 3 *The government should improve the accuracy and transparency of any decisions that contradict claimants' descriptions of their lives.* A legitimate system cannot be based simply on whatever claimants claim, yet nor can a legitimate system use unreliable evidence to simply ignore claimants' own descriptions. The public are broadly sympathetic to claimants. Legitimacy is a balancing act, but we can get a much better balance than the current WCA provides. The government should *inter alia*:
 - require assessors to ask claimants if they have an explanation for any evidence that seemingly contradicts their description of their impairments, rather than jumping to a conclusion that the claimant is wrong
 - set a high evidence threshold for over-ruling claimants' descriptions of their lives, and ensure that assessors consistently apply it
 - allow claimants to go through a process of treatment to obtain medical evidence on their condition, and then go through another WCA without delay

Work capability

There is wide agreement that the WCA should not simply aim to establish if people's impairments are 'genuine'; it should assess whether people are capable of work. However, there is no coherent 'public opinion' about whether particular disabled people are capable of work: different people have wildly varying perceptions, and most people's views are not well informed. Rather than matching the WCA to public

perceptions, it therefore makes more sense to ground legitimacy in a trusted *process*, where there is transparent evidence underpinning the assessment.

Yet there is no evidence that the WCA captures the demands of work in Britain today accurately. There is some criticism from disability charity workers and disability activists that the individual functional descriptors are wrong, but we do not know if this criticism is fair because no transparent evidence on the descriptors has ever been published. The deeper problem is that the WCA is inaccurate if claimants have two or more types of impairment, which is probably the case for at least half of all disabled people. The WCA has always dealt poorly with multiple types of impairment, but since the changes in April 2017 to restrict extra payments to the Support Group only, it now does not deal with multiple impairments at all.

We can take inspiration for a better WCA from other countries, whose assessments take one of three forms:

- *Expert assessments* are common. They have some degree of legitimacy, but there are concerns about the validity and reliability of their judgements.
- *Demonstrated assessments* look at people's actual experiences in the labour market. However, these are only successful if there is substantial investment in rehabilitation to maximise people's work capability, and it is open to question whether the UK is presently in a position to do this.
- *Structured assessments* match people's capacities to the functional demands that have been found to be required in actually existing jobs. Despite some costs, they seem to produce decisions that are widely accepted as fair, and by providing a basis for 'objective', standardised assessments, they also seem to fit the requirements of the UK system best.

Recommendations

- 4 *The government should overhaul the WCA descriptors, so that they transparently reflect the British labour market.* It would be relatively straightforward to do this: the government could

collect data on the functional requirements of British jobs – the specific capabilities that people need to be able to do each job. There are various ways the government can implement a structured assessment – there are choices of who collects the data, how many jobs data should be collected for, and whether this should be a real-world test – any of which would be a major step forward on the WCA.

- 5 *The government should overhaul the structure of the WCA, so that it looks at the combined impact of multiple impairments on work capability.* Again, it is straightforward to do this, if we follow the previous recommendation and collect data on the functional requirements of work in Britain. Instead of just matching each type of impairment to British jobs in isolation, the government should measure the functional profiles required in different jobs – all the capacities in combination that someone needs to be able to do that job. That way, the functional profile of the claimant can be matched to the functional profile that jobs require.
- 6 *The government should make sure that the assumptions that the system makes about employers match the legal requirements placed on employers.* It would be possible for assessors to consider whether reasonable adjustments would make a particular type of job possible for a particular claimant, but there is a risk that the resulting decisions over-estimate what most employers will do, and are therefore unfair. I therefore recommend that the government links any considerations of workplace adjustments to what is currently legally required and enforced in practice. Indeed, as the government has been classifying more people as ‘fit for work’, they should also impose more significant burdens on employers to make the changes necessary for this group of people to have a real opportunity to work.

Conditionality

As well as deciding on the amount of money that people get, the WCA also decides the conditionality that people are subject to. While Employment and Support Allowance (ESA)

Support Group claimants cannot be sanctioned, ESA Work-Related Activity Group (WRAG) claimants can lose all their benefit for 1–4 weeks *after* they start complying, while those found fit for work who then claim Job Seeker's Allowance (JSA) have more demanding requirements and can lose all their benefit for between 4 weeks and 3 years. *In total, over a million benefit sanctions have been applied to disabled people since 2010*, mainly those claiming JSA. Now the government is considering increasing the conditionality for WRAG claimants, and adding some limited conditionality to Support Group claimants. There are two possible justifications for this: that it will have a positive impact on disabled people, and that it is fair.

While there were occasional key actors interviewed for this report who thought conditionality would be effective in getting disabled people into work (and focus group members of the public were split, where they gave this any thought), the overwhelming majority of key actors thought that conditionality would be counterproductive. The research evidence suggests that it is the latter who are right. Six studies look specifically at the impact of conditionality on disabled people, most of which have been ignored in UK debates. Taken together, the reports suggest that conditionality and sanctioning may have zero or even negative impacts on work-related outcomes. Less quantitative evidence is available about the wider impacts of conditionality on disabled people, but there is widespread anecdotal evidence that conditionality and sanctions can lead to anxiety and broader ill health.

The other major argument for conditionality centres on fairness, which was debated by the public. Some questioned the principle of conditionality for disabled people given the barriers they face, while others thought it was only fair that disabled people should be sanctioned if they did not take steps towards seeking work, just like other benefit claimants. Yet concerns about the *principle* of conditionality for disabled people quickly blurred into debates about the *practice* of conditionality – how do we know what people are capable of doing, in order to ensure that conditionality is fair? Many key actors in this study had concerns about how this was assessed,

echoing the views found in a government-commissioned review of sanctions, parliamentary select committees, a major qualitative academic study, and among staff of innumerable disability charities and campaigners. In new research, I show that disabled people on JSA were 26–53 per cent more likely to be sanctioned than non-disabled JSA claimants between 2010 and 2014, which provides some statistical support to the widespread view that this process was unfair.

From my international review of conditionality for disabled benefit claimants in other countries, I found two key lessons for the UK. First, it is very difficult to know what a disabled benefit claimant is capable of doing. The countries that seem to manage to implement conditionality are those that invest in providing claimants with expert assessment to direct them to rehabilitation that is tailored to their condition, which they are then expected to take up. Second, most countries that manage to implement conditionality use sanctioning as a last resort. This makes disability assessment much easier. The pressure on the assessment is greatest when sanctions are applied, and this is not only rare, but also only happens when the government has seen claimants multiple times.

Overall, the public often supported the imposition of sanctions for disabled people – but not in the form that the government applies them at present. A majority thought that disabled people's benefits should be cut if they do not take a job they can do, or if they refuse suitable training or rehabilitation. However, they were less supportive of sanctioning for minor non-compliance, such as sometimes turning up late for meetings. What is more, even those who do support sanctions prefer much weaker sanctions than those the government presently uses. Only 6–11 per cent of people thought that a disabled person should lose most or all of their benefits if they sometimes turned up late for meetings.

Recommendations

- 7 *The government should reduce the extent of benefit conditionality disabled people face.* It is not only expensive to make conditionality for disabled people fair, but the current system also goes beyond the public's conception of fairness, and is likely to actively *reduce* the chances of people moving into work. The government should therefore reduce the numbers of disabled people subject to conditionality (ensuring that there is no conditionality for the Support Group), the scope of the conditions imposed on claimants (instead encouraging people to make ambitious aspirations that do not attract a sanction), the likelihood that claimants will be sanctioned for minor non-compliance, and the value of sanctions.
- 8 *The government should continue to rely on the WCA and fit notes to set maximum conditionality groups for disabled people.* The green paper on work, health and disability stresses the advantages of setting conditionality completely separately from deciding the amount of benefits that people receive at the WCA, but in practice this is unlikely to be possible. Either conditionality for non-disabled people must be changed similarly, or there needs to be a gateway into the system of conditionality for disabled people – and there is no appetite to introduce an all-new assessment for this purpose. I therefore recommend that current practice is maintained: the disability-specific conditionality group should be set by both the WCA and by fit notes (medical statements from a doctor), albeit with some small changes to make the system fairer and less burdensome.
- 9 *The government should tailor any conditionality within these groups to claimants' own description of their capabilities; this should only be challenged in exceptional circumstances, and on the basis of expert assessment.* There are already major concerns about the fairness of conditionality for disabled people, and the proposals in the green paper seem likely to make this worse. If claimants' description of their own capacities is challenged, then relevant experts – particularly those with occupational health expertise – need to be involved.

However this is implemented, it will be both expensive, and will damage the relationship between the work coach and the claimant. It should therefore be a rare exception, rather than the rule.

- 10 *The government should strengthen safeguards to ensure disabled people are not unfairly sanctioned for failing to meet impossible conditions.* Thinking about claimants who might struggle with the system is not just inherently important, or a case of avoiding bad headlines, but is a legal requirement.

Three safeguards are particularly important:

- New claimants at crisis points cannot be expected to attend interviews or communicate by letter or phone with the DWP, and should be placed in the ‘no requirements’ group. The system must also cope with existing claimants who suffer a crisis mid-claim.
- Claimants who cannot be expected negotiate with a work coach should not be sanctioned until they have been assessed by a health professional.
- Where there is a risk to claimants’ health if they are sanctioned, additional safeguards need to be put in place.

General principles

Finally, there are several broader principles that are necessary to help ensure that these reforms are successful. The government should:

- co-produce the revised WCA with disabled people
- ensure the system as a whole makes sense for all claimants, whatever the result of their WCA
- ensure there is adequate time and enough resources to design and pilot the new assessments
- ensure that the transitions to new systems are implemented as fairly as possible

Introduction

This is not a report about the failings of the Work Capability Assessment (WCA), which decides if people receive incapacity benefits, though not because the WCA can escape the accusation of failure. It has been criticised by those on every side of the political spectrum and every group that knows about the issues, from parliamentary select committees to doctors, and from welfare-to-work providers to disabled people themselves. Rigorous academic research has found that the rollout of the WCA led to 400,000–1,000,000 antidepressant prescriptions and 200–1,000 suicides, backing up those coroners who have blamed the WCA for individual people's deaths.¹ In this report, I set out how the WCA fundamentally fails in its three key aims: to assess if claimants' impairments are genuine, to assess whether they are capable of work, and to assess what requirements can fairly be placed on them.

Although the assessment has fundamentally lost its legitimacy this report does not focus on this matter, because it is already widely known. Instead it aims to set out how a better, more legitimate WCA is possible. The failings of the WCA are so numerous – and contagious, having spread to the other social security disability assessment for Personal Independent Payment (PIP) – that policy makers no longer seem to have any faith that a successful assessment is possible. This is not helped by the absence of ideas about what an alternative social security disability assessment could realistically look like in practice, or even sets of principles by which a reform could be carried out. Even the recent government green paper *Improving Lives*,² which prompted news headlines that the WCA was to be 'overhauled',³ only suggests small steps towards a reformed system. It does indeed propose a new assessment for conditionality (as I explore in chapter 3), but it fails to address assessment for financial support.

This report tackles this challenge head on, by setting out what a new system could look like. The over-riding aim is *legitimacy*: as the independent reviewer of the WCA Paul Litchfield has said, ‘to be a credible test, the WCA needs not only to be fair but to be perceived as such’.⁴ This means both that claimants must trust in the WCA, and (again in Litchfield’s words) that ‘the general public must have the reassurance that the right people are receiving support and that the system is operating effectively’.⁵ In this report, I therefore present extensive evidence of public attitudes. However, some caution is necessary: we cannot just implement ‘what the public want’. As we shall see, the public – even including some disabled people – sometimes do not understand disability well, let alone the complexities of how the benefits system works. The public also do not speak with a single voice; there is some dissensus even on issues where an overwhelming majority agrees. Nevertheless, alongside wider evidence on how different types of assessment work, understanding the attitudes of the public and key actors can help us develop a better, more legitimate WCA.

The report focuses on three issues in turn, reflecting both the structure of the green paper and recent concerns about the conduct of disability assessments. It looks at:

- how the WCA decides if claimants’ impairments are ‘genuine’ when deciding if they should be eligible for incapacity benefits
- how the WCA decides if someone is capable of work
- the WCA’s third role in establishing if disabled claimants should be subject to conditionality and sanctions

Each section concludes by making practical recommendations through which the government could take steps to a better, more legitimate WCA.

The research underpinning the report

This report is based on evidence from a 4-year research project. We previously knew surprisingly little about public attitudes to incapacity benefits, and about how other

countries conduct incapacity assessments. I therefore set up the project Rethinking Incapacity, funded by the Economic and Social Research Council (ESRC) and in collaboration with Demos and a team at Newcastle University led by Professor Clare Bambra.⁶ Four parts of the project are used in this report: an international comparative study, a survey of the public, focus groups with the public, and focus groups with key actors.

The international comparative study examined how other countries conduct social security disability assessment for both conditionality and financial support, and whether these seem to be successful. I looked at nine countries: four Anglo-Saxon countries that are often the inspiration for policies in the UK (Australia, Canada, New Zealand and the USA) and five European countries that international experts identified as likely exemplars of best practice (Denmark, Germany, the Netherlands, Norway and Sweden). In total, I reviewed over 150 documents and conducted 40 expert interviews. The detailed methods and findings have been published in two open-access academic papers,⁷ and brief summaries of key findings are reported here.

Two parts of the project focused on public attitudes:

- To get a picture of the balance of attitudes among the British public, I commissioned a detailed YouGov survey of 1,973 members of the British public between 28 Feb and 6 March 2017. Rather than asking about ‘disabled people’, where it is hard to know exactly what is in the public’s mind, I used a variety of fictional pen-portraits – ‘vignettes’ – of different types of disabled people, including a wheelchair user, and people with back and leg pain, chronic widespread pain, depression and suicidal schizophrenia, as well as a variety of other characteristics (see online appendix). I also asked a number of general questions about incapacity benefits.
- To understand these attitudes in more detail, researchers from Demos and I conducted six focus groups with the general public between July and September 2016. The people taking

part fell into three overlapping groups (working people, unemployed people and disabled people), each of which was hosted once in London and once in the North of England. Each focus group included seven or eight people; 47 people took part in total. Again, much of the discussion focused on vignettes of different types of disabled people, some of which overlapped with the vignettes used in the survey.

Finally, researchers from Demos and I conducted six focus groups with key actors in disability policy between September 2016 and March 2017. The first five were conducted separately with Maximus WCA assessors, welfare-to-work providers (via the Employment Related Services Association), other organisations helping disabled people into work, disability charities (via the Disability Benefits Consortium), and disabled people's organisations and disability activists. The final group was a policy event with 21 people, including Conservative and Labour MPs, civil servants from the DWP, disability charity staff, welfare-to-work providers, academics and medical professionals.

A quick explanation of how the WCA works at present

It is sensible to start by explaining how the WCA currently works.⁸ The assessments are made by a company under contract from the DWP – previously Atos, now Maximus under the name ‘Centre for Health and Disability Assessments’ (CHDA) – although it is a DWP ‘decision maker’ who has the final say. The basic design is simple: people are assessed according to 17 sets of functional impairments, looking at practical abilities such as whether the claimant ‘cannot learn anything beyond a simple task’ or ‘cannot raise either arm to top of head as if to put on a hat’ (these are known as the ‘functional descriptors’). Following this assessment, people are currently assigned to one of three groups:

- Those scoring highest on the functional limitations are assigned to the ESA Support Group. They receive the highest benefits, and cannot be sanctioned under any circumstances.⁹

- Those scoring next-highest are put in the ESA Work-Related Activity Group (WRAG). They originally received higher benefits than unemployment benefit claimants (see below), and if they do not meet certain work-related requirements they can lose all their benefit for 1–4 weeks after they start complying.¹⁰
- The rest are found ‘fit for work’ and told to claim Jobseeker’s Allowance (JSA). They receive the lowest benefits, have much more demanding work requirements, and can lose all their benefit for between 4 weeks and 3 years.¹¹

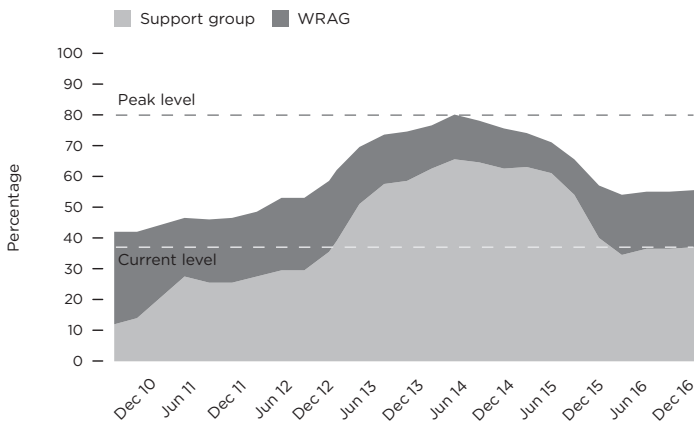
A few exceptional circumstances also influence which group people are put into, including terminal illnesses and any risk to health from working or conditionality.

When ESA was originally launched, the crucial distinction for how much financial support people received was whether someone qualified for either the Support Group or the WRAG – in the simplest case they then received £109 or £102 per week respectively, compared with only £73 for those on JSA.¹² Over time, the difference between types of ESA claimants has become more and more important. This started in the 2012 Welfare Reform Bill, which time-limited the WRAG (but not the Support Group) so that people with savings or working partners lose their benefits after a year. The distinction became even sharper from April 2017, when the WRAG rate (but not the Support Group rate) for new claimants was cut to match JSA. This met with substantial opposition, including from some Conservative MPs, who were concerned that the change was made alongside a lack of investment in employment support for disabled people.¹³

Now only the Support Group receives greater levels of financial support than non-disabled unemployed people. The impact of this change is made even more severe by the government having recently raised the WCA threshold at which work or conditionality are thought to risk claimants’ mental health. The effect is clear: the proportion of new claimants being allocated to the Support Group was halved after the change in guidance was introduced (see figure 1).

As a result the proportion of new claimants who are given extra financial support by the WCA has dropped from 70–80 per cent to 30–40 per cent between 2014 and 2016.

Figure 1 **The proportion of new claimants given extra financial support by the WCA, December 2010 to December 2016¹⁴**



This framework sets the context for the rest of the report. I now turn to the first of the three key roles of the WCA: to establish the ‘genuineness’ of people’s impairments when deciding if they are eligible for incapacity benefits.

1 ‘Genuineness’ and trust

The public are deeply concerned about ‘genuine’ claimants

Given the barrage of negative coverage, we would expect the WCA to be a byword for failure among the general public, but this would be to over-estimate most people’s awareness of how the benefits system works. Instead, many people in the focus groups believed that the disability benefits system was not working well. Partly this was because some people – even some disabled people and carers – felt that many undeserving claimants were receiving the benefit:

I’m a full-time carer for my partner who suffers with PTSD [post-traumatic stress disorder], manic depression. She’s also a self-harmer and an alcoholic. The system now, as it stands, I think is exploited by many people that are saying that they’re ill but the harsh reality is they’re not.

Unemployed, North

The conventional wisdom is that the public want assessment for disability benefits to be stricter than it is currently (and that they over-estimate the extent of benefit fraud)¹⁵. However, I found that this was only part of the story. Many people in our focus groups also told us they believed genuinely disabled people were unfairly being denied benefits, or forced to struggle for them. Owen’s observation was not uncommon:

I know my neighbour, he suffers from blackouts. He put in a claim for the Incapacity Benefit and he's currently under [the local hospital]... But when he applied for the Incapacity Benefit, they basically said, 'No... he's not having sufficient blackouts.'... It's a farce.

Unemployed, North

Not everyone thought that benefit fraud was rife, and not everyone knew a deserving claimant denied benefits. But people commonly reported examples of both simultaneously, concluding that the system was completely broken: 'It goes both ways', as one said. Overall, while 19 per cent of respondents to the survey said they knew an incapacity benefits claimant who was 'not genuinely disabled', noticeably more people – 28 per cent – said they knew someone 'who is genuinely sick or disabled that has struggled to get the benefits they are entitled to'.

The public's attitudes towards disability benefits are therefore fundamentally ambivalent – concerned about fraud, but also about the treatment of 'genuinely' disabled people. And when asked explicitly which of these is more important, more of the public prioritise supporting genuine claimants (45 per cent) than rooting out fraud (22 per cent). This does not mean that people necessarily want a more lenient assessment overall,¹⁶ but that there is a widespread feeling that the WCA does not do a good job, with 56 per cent of people saying that it often makes wrong decisions, and only 10 per cent saying that it assesses who should get benefits accurately (the rest not being able to choose between the statements, or saying they don't know).

Doctors are seen to be best placed to decide who is 'genuine'

Public attitudes therefore tend to fall either side of a knife-edge: either generosity towards 'genuine' claimants, or hostility to fraudulent ones. The crucial question for understanding the public's views is therefore: how do they decide who is 'genuine'?

Survey respondents most commonly suggested that assessors of the WCA should trust in the opinions of doctors, stating that if claimants had a medical diagnosis or had had treatment this was evidence of their disability being genuine and that they deserved support: 'If the doctor's said you're ill, you're ill.' This view was held strongly when I presented people with the vignette of 'Fiona', a person with chronic, widespread pain but no diagnosis, which at times caused furious arguments between participants:

Rachel:

[With feeling] All that tax we pay goes into this big pot, and then you're paying out [to] these people who have not been diagnosed with nothing, and just saying they feel this way, money each week just because they're feeling unwell. 'Cause that's what you're doing. 'So by the way I'm suffering really bad from migraine. Can I have £100 a week please? I'm not willing to go to work.'

Chloe:

But she's in pain constantly, she wants to work. She can't sleep.

Rachel:

*[Shouting] Evidence, evidence comes from the doctors!
[Normal voice] And the doctors are saying there's no evidence...*

Disabled, North

Yet even though doctors were often seen as the key to identifying who was making a genuine claim, someone in every focus group pointed out doctors' fallibility. Occasionally people argued that minor ill health may nevertheless be signed-off by doctors, particularly if claimants exaggerated their symptoms, although it was very rare for someone to propose that a diagnosis would be based on a complete fabrication. More commonly, someone in a group suggested that doctors may fail to diagnose genuine conditions:

Olivia:

It's just difficult to believe that she is in constant pain because there's no reason, no apparent reason.

Jill:

No but they do this all the time, people are misdiagnosed for years then they find out they've got a tumour, and then it's like, 'Oh, that's what it was'.

Olivia:

Oh, ok.

Working, London

This view was expressed among both focus groups with disabled people, often based on participants' experiences of doctors initially failing to diagnose their own conditions. But similar views were also expressed by non-disabled people: 'Just because you can't see it doesn't mean that it's not true', as a participant in the unemployed, North group said.

There were two ways that participants reacted to this. Some focus group participants thought there still had to be a medical diagnosis for someone to receive disability benefits, to make sure that there was due process – even if the person's undiagnosed disability was genuine. As Melanie (unemployed, London) put it when discussing 'Fiona', 'I'm sorry, I think that she might be in pain but if there is no medical reason for it, she has to have JSA'. Rather than get ESA, the next step for 'Fiona' should be to get a second opinion, to try to get the diagnosis that had so far eluded her.

Others thought it was necessary to judge the claimants' genuineness in other ways, as explored in the next section.

'Genuineness' is also a wider issue of trust

Arguing against the need for incapacity benefit claimants to have a medical diagnosis, some participants said they thought that the symptoms claimants reported were more important. The disability of friends, family and respondents themselves was often established by describing the symptoms of their disability, rather than because they had been given any stamp of approval from the medical profession.

As Mila (working, London) put it:

If you had constant migraines, [for] example, three times a week, to the point where you need to be in a dark room and you cannot think, you're in constant pain, would you then say, 'Well, you know what, seeing as I don't have a diagnosis I understand why you guys aren't giving me the disability benefit?'

This again raises the question: apart from medical diagnosis, what sets apart the people and situations in which self-reported symptoms are accepted as genuine, from when they are doubted? Three further factors seemed to be critical among members of the public (although, as we shall see, these are not necessarily accurate): clues about 'work ethic', clues from informal observations, and wider issues of trust.

Clues about 'work ethic'

I deliberately varied each person's wider circumstances in the vignettes to see whether these affected the participants' views on whether the character in question was entitled to receive a disability benefit. And they did, particularly in the case of 'Bill', a vignette about an older man with back pain. The combination of his age (60), his long work history (25 years as a chef), the clear external cause of his injury (a car accident) and even the name 'Bill' seemed to conjure up in people's minds someone with a strong work ethic who had been unlucky, and therefore deserved benefits: 'You could tell he's a worker, can't you?... Maybe that's just me being naïve, to think he's a genuine case and some others aren't genuine' (working, North).

Many respondents similarly inferred that 'Fiona' genuinely had chronic widespread pain, despite her lack of diagnosis. I described 'Fiona' as being in a better-paying job than 'Bill' (a senior human resources manager), so people noted that there was little incentive for her to leave her well-paying job to claim benefits. I gave no external cause of her symptoms, but said she had worked for 25 years, as Bill had. Several respondents commented on her work history when concluding that she was probably genuine, with Kate (working, North) adding that 'it's not like this lady hasn't had a work ethic'. Susanne (disabled, London) was more explicit:

'I mean obviously if somebody's worked a long time you're more prone to believe that they are suffering from something.'

In contrast, some people in focus groups who considered 'David' – who had a patchy work history and a diagnosis of depression – thought this diagnosis was enough to convince them of his genuineness, but Melanie (unemployed, London) deduced from his work record that 'it's probably a bit of a smoke screen to not go to work'. Focus group participants' guesses about people's work ethic were not as important as medical diagnosis in influencing judgements of genuineness, but played a part, particularly for difficult-to-observe conditions.

Clues from informal observations

In the focus groups, I asked people if they knew any claimants who they believed were not genuine. Where they did I pressed them on how they could tell. One of the most common justifications was to say that they had seen the claimant carrying out activities that seemingly belied their claimed level of incapacity; for example, seeing Facebook photos of someone 'hanging upside down on these monkey things with his grandchildren' after a brain tumour (disabled, London). Several of these stories were about people with back problems that nevertheless were 'doing work on their house up on the roof' (disabled, North) or 'always repairing cars, up on the roof, fixing all his tiles' (working, North), whereas someone who appeared to have a limited life was seen as evidence of being genuine about a disability claim:

My friend's dad's got a terrible back, to the point where he never goes out of the house, can't drive, and he claims it. And I think well yeah, he deserves it, cause he doesn't then go to the pub on a Saturday and say, 'I can't walk to work but I can sit up in a pub for hours.'

Working, North

These judgements are potentially unfair where people's impairments are hidden or fluctuating. On one level, the existence of hidden impairments – 'invisible illnesses', as someone called it – was well known. Informal observations

were therefore unreliable, and people accepted that you 'shouldn't judge a book by its cover' (disabled, North). This was often brought up by disabled people when describing their own disabilities, or when describing a person who was known to be genuine. But despite knowing the difficulty of judging whether a disability claim was genuine, some people nevertheless continued to make judgements about others, almost in the same breath:

You could just see somebody like a student or somebody just out of school, they look perfectly fine but you cannot really judge them from the outside. But, for example, I've had colleagues [who] unfortunately I believe [are] fiddling the system.

Working, North

Both work ethic and informal observations were used, but also known to be potentially unreliable. One factor was more important than any other in governing whether these were used or not: trust.

Wider issues of trust

One of the most striking findings from our research was the importance of trust in determining whether someone was seen as deserving. Put simply: if you generally do trust a person, then you are more likely to believe that their ill health is genuine. If you generally do not trust them, you are more likely to think that they are exaggerating or even lying. Amelie provided a particularly striking example of this when describing two family members in turn, one she clearly likes, and one she clearly does not:

My brother-in-law, [sarcastically] he's got such a terrible back, that man cannot work. He's a very poor, sick man – but he's always repairing cars, up on the roof, fixing all his tiles. It's like it's his hobby and he's proud of the fact that he gets benefit. This is my new brother-in-law, don't know how my sister fell for this one... Yet my nephew from what I call her 'proper husband', he is a serious asthmatic and has been under medical treatment all his life, always worked, worked in the most terrible conditions that always

exacerbated his asthma. And he's coughed so much his intestines are now [gesturing] there, it looks like he's pregnant, and no one can operate on him. And he has just within the last six months been claiming benefits. [Before that] he was too proud to go and ask for benefit. And it's been a real struggle for him.

Working, North

This is not just an isolated example, but part of a strikingly consistent pattern. When describing close family and friends, people usually trusted their self-reported symptoms, and treated them as genuine. When describing other family and friends, people would sometimes treat these people as genuine and sometimes not, seemingly reflecting the sort of relationship they had with them, and wider clues (as with Amelie above). And when describing more distant acquaintances – including people in the street and neighbours – people would have few clues to go on, but were nevertheless often sceptical about the genuineness of their disability, sometimes in ways that seemed grossly unfair:

Sometimes you see people walking the streets and [they have] a cane, and they're just walking like everybody else, and you think, 'Well, you're not working... why?'

Working, North

The pattern can be seen more systematically in the results of the YouGov survey (table 1). I asked respondents if they knew any claimants who they thought 'are not genuinely sick or disabled', and any claimant who is 'genuinely sick or disabled' who 'has struggled to get the benefits they are entitled to'. When considering whether close family members were genuine claimants, respondents were six times more likely (13 per cent vs 2 per cent) to say that they knew a claimant who is genuine who has struggled, compared with a claimant who is not genuine. When considering neighbours and acquaintances, however, they were more likely to say that they knew someone who is not genuine (11 per cent vs 7 per cent).

Table 1 **The perception of knowing ‘genuine’ and ‘not genuine’ incapacity benefit claimants among the British public**

	Know a claimant who is not genuine	Know a genuine claimant who has struggled
Anybody	19%	28%
Within each group:		
Close family	2%	13%
Close friends	3%	10%
Distant family	3%	3%
Neighbours and acquaintances	11%	7%

Source: YouGov survey of 1,973 members of the British public between 28 Feb and 6 March 2017

It is not just people’s trust in particular people that determines whether someone is considered to be justified in making a claim for incapacity benefits, but the combination of this with trust more broadly. Those who thought that ‘most people can be trusted’ were about equally likely to say that they knew a non-genuine acquaintance as a genuine acquaintance who has struggled to claim. Those who disagreed that ‘most people can be trusted’, however, were more than twice as likely to say that they knew a non-genuine acquaintance than a genuine acquaintance who had struggled. Exactly the same processes can be seen when focus group participants were discussing fictional people in the vignettes: some people had greater trust in their fellow citizens than others:

The thing you haven’t discussed or mentioned in the entire group is the intrinsic value of people. Most people are honest and most people want to work and those that can will... I think the vast majority of people are genuine.

Norman, unemployed, North

To conclude (at least for the time being)¹⁷: the most common way that the British public judged ‘genuineness’ was based on the views of doctors. However, they also draw conclusions about ‘genuineness’ from clues such as people’s apparent

work ethic and their own informal observations. Most people are aware that these methods are potentially problematic: doctors do not have perfect knowledge, and hidden impairments are not easily outwardly observable. Trust is therefore pivotal. If someone is trusted, then their description of their symptoms is likely to be believed, even without a doctor's diagnosis. If someone is not trusted, informal observations may be used as evidence of their lack of 'genuineness'.

I should stress again that I am not endorsing the public's views, nor suggesting that policy should reflect the inclinations and prejudices of the public. There were times when focus group members made unfairly harsh judgements about other people's 'genuineness' based on a combination of flimsy evidence and a lack of trust. Rather than endorsing these views, in the rest of this chapter I consider how best to deal with this issue of 'genuineness' in creating a better and more legitimate incapacity benefits assessment to replace the WCA.

Judging 'genuineness' at the WCA is inherently difficult

The WCA itself also tries to assess the 'genuineness' of claimants – but there are substantial concerns about the way it does this. In this section, I first outline the strategies that WCA assessors use (in their own words as well as the DWP's guidance), before going on to consider the reasons why these strategies are often flawed (as raised by many other key actors and wider evidence).

The strategies of WCA assessors

I was fortunate to be able to speak to a group of frontline WCA assessors working for Maximus, and they talked at length about their role in establishing the genuineness of people's functional impairments. One said when talking about a clearly fraudulent claimant, 'If you take people at their word, they'd be getting this benefit left, right and centre.' Usually they were at pains to say that this was not because claimants were lying, but rather that claimants often wrongly came to believe that there were things that they could not do.

Assessor 1:

Some people think they can't do things because of the condition. Not that they can't. They almost think they cannot, or they're not allowed to even. Some people say, 'I'm not allowed to bend because I've got some back problems,' for example.

Assessor 2:

They almost disable themselves.

As we have seen, focus group members of the public thought that medical evidence was the best way of distinguishing genuineness in a claimant, and WCA assessors also thought it was necessary. It not only helped when deciding whether to call someone in for assessment at all, but also because, irrespective of their gut instincts, 'If you haven't got any medical evidence to suggest otherwise, then you have to take them at face value.' There were only two ways in which medical evidence could over-rule someone's self-reports: most straightforwardly, it could directly contradict what a claimant said about their treatment, but it could also allow assessors to use their 'medical knowledge of the likely effects of the condition' (as the DWP puts it), beyond what the medical evidence says directly.¹⁸ Several WCA assessors gave examples of this:

I mean if you ask them outright then they tend to say that they're bad most of the time or all of the time but... when you know... with the background knowledge that might not be a typical pattern for the condition that they've got or the disease.

If someone reported medication for seizures yet it wasn't then listed on their active problems with the doctor, they were reporting seizures three to four times a day, yet had no change in medication, there was no specialist input... I would then use my medical knowledge to say, 'Well it's probably not as frequently as they said, otherwise they would have had x, y and z as well.'

The DWP handbook tells assessors to consider a claimant's medical evidence and their description of a typical day, and

also to carry out formal and informal clinical observations at the assessment, listing a large number of observations that may be relevant (including how the claimant got to the assessment centre).¹⁹ Assessors spoke about noting the distance that claimants walked from the waiting room, a lack of visible muscle wasting, and claimants' skin complexion. Disabled people similarly said that assessors had based judgements on their ability to reach into their bag for tissues when they burst out crying. Even if claimants' self-reports are the basis of WCA judgements, there are many ways in which assessors over-rule them if they feel there is specific evidence that contradicts them.

But this is an inexact science

There are reasons to worry about how this process works. A number of claimants have reported that PIP assessors have fabricated some or all their reports, sometimes supported by strong evidence such as secret recordings.²⁰ These claims are anecdotal, and may or may not apply equally to the WCA.²¹ Nevertheless, all the evidence that can be used to over-rule or corroborate claimant self-reports – medical evidence, assessors' knowledge of the likely medical effects of their condition, clinical assessments and informal observation – are deeply problematic guides to assessing a particular individual's disability.

In an ideal world, medical evidence would provide a solid basis for deciding 'genuineness'. In practice, it has two problems, as widely recognised by WCA assessors (and indeed many other key actors I spoke to). First, getting medical evidence is surprisingly difficult. Claimants often do not supply medical evidence themselves, partly because most GPs charge for it.²² Assessors can also request evidence, but while they said they frequently requested it, some GPs refuse to reply without payment or even send back rude messages. Second, even where medical evidence is received, it usually does not help assessors decide on a claimant's ability to function 'because they [GPs] don't know that sort of thing', as one assessor put it. The focus of GPs and hospital doctors is to diagnose and treat patients while acting as their advocate,

rather than to catalogue how their conditions affect them in their everyday lives in order to restrict their access to benefits.

To translate medical evidence into WCA points, assessors had to use their wider medical knowledge, but this is usually uncertain. Some insight into this can be gained by looking at an internal resource that assessors are told to use, which describes likely functional effects of any given diagnosis.²³ Yet these are just *likely* impairments (assessors repeatedly talked about whether claimants' self-reported impairments were 'unlikely' – rather than impossible – given the medical evidence); there are inevitably exceptions, so this reasoning may be grossly unfair to individuals. Moreover, it is dangerous to see a lack of medical treatment as a sign of good functioning. A disability activist told us:

They [assessors] say, 'If this person were seriously depressed they would be on antidepressants.' Well the reasons why a person may not be on antidepressants are much broader than that. Or alternatively, 'If the person was that bad they would have been referred to a specialist.' Well maybe they should have been, you know. You need to know quite a lot about why people think the way they do, and what kind of treatment they've asked for.

This seems to be a widespread issue, and was raised by several charities as part of the Select Committee investigation into PIP earlier this year.²⁴

Perhaps the most controversial of all these pieces of evidence are assessors' observations. Many genuinely disabled people have fluctuating and hidden impairments: they may be able to perform a task for an assessment, but need several days to recover, or may not be able to perform it all tomorrow. This was noted by assessors, but it is unclear how they cross-referenced their informal observations against people's reported 'typical day'. At least some disabled people feel that this is done unfairly,²⁵ and one of the most common complaints is about assessors with little mental health training (eg physiotherapists) falsely judging claimants with mental health conditions to be exaggerating their impairments on the basis of observations at the assessment. Indeed, the Work and

Pensions Select Committee, the Scottish Expert Working Group on Welfare, and disability charities and activists have all echoed this call for assessments to be performed by professionals with expertise on the disabilities in question.²⁶

Aside from their validity, informal observations are also strongly disliked by disabled people. This has been noted by one of the Government-appointed independent WCA reviewers, who noted that these sort of inferences

*are interpreted by some as 'trying to catch people out'. Transparency and integrity are key components of interactional justice and techniques that undermine these (albeit unwittingly) should be reviewed and revised.*²⁷

Similar complaints were raised by key actors in our focus groups:

[Informal observation] introduces huge amounts of subjectivity. It gives the assessor and the decision maker huge scope for drawing conclusions that are counter to what they get from the descriptors. Nobody knows they're being assessed in these ways, so it's a complete lack of transparency.

Disability activist

Overall, there seems to be some unhappiness among disability charities, disabled people's organisations and disabled people with the way that genuineness is established at DWP disability assessments. Even if PIP is currently the lightning rod for discontent, these issues are also raised about the WCA.

This seems to be a matter of delivery rather than design, because appeal tribunals are widely felt to give better decisions despite being bound to the same legal framework. As many as 1 in 7 WCA decisions were overturned by tribunals in 2012 (after this point, the figures are harder to interpret).²⁸ It seems that decisions are overturned not primarily because better medical documentation is available, but because of the information that the tribunal obtains from speaking to the claimant, and how tribunal judges weigh the oral and written evidence they already have.²⁹ Overturned decisions were

a source of frustration for the Maximus assessors I spoke to, as they felt they undermined their work. The assessors said that they got little feedback from the tribunals about why their decisions were over-ruled, as this exchange showed:

Assessor 1:

It would just be good to get that feedback as to are we applying [the descriptors] correctly, how many are overturned, what's the reason for overturning them, what extra information have they got that we haven't?

Assessor 2:

And I suppose the claimant's looking at the report that was five lines and saying, 'Well actually that was put down wrong, I can't do that,' and changing... just changing it a bit, I don't know? We honestly don't know.

Maximus assessors

This is not to advocate that the WCA should always endorse whatever claimants say. Disability activists suggested this – ‘who’s in a position to over-rule that feeling of hers?’ – but most focus group participants felt that there should be some way of establishing that people’s disability was ‘genuine’, and every system that I have looked at worldwide has some sort of a check on self-reports. Yet despite over-estimating benefit fraud, many people still think it is fair to trust claimants’ own reports of their lives unless there are strong reasons to doubt them, and the WCA does not currently reflect this. Legitimacy is a balancing act, but we can achieve a much better balance than the WCA.

Recommendations on establishing 'genuineness'

1 The government should ensure that assessors' reports of what claimants said can unquestionably be trusted.

A basic requirement for legitimacy is that we can trust assessors' reports of what happened in the assessment.

A number of claimants have reported that PIP assessors have fabricated some or all their reports, sometimes supported by strong evidence such as secret recordings. While these claims are anecdotal, and may or may not apply equally to the WCA, it is clearly very damaging to the legitimacy of DWP disability assessments in general. Two steps could ensure that this problem does not arise with the WCA:

- The government should audio record all assessments (and allow claimants to record the assessments in any way they choose), meeting a request that the independent WCA reviewer, disability charities, and disabled people have consistently made.³⁰ The government should then annually review a sample of recorded assessments to ensure that the reporting is accurate; as both the independent WCA reviewer and the independent PIP reviewer has also said, it is not sufficient for quality control to focus only on whether written reports follow the correct structure.³¹ Not only will this ensure that this part of the reports are fair, but it will demonstrate this fairness to claimants and the wider public.
- The claimant should be able to see – and comment on – the first part of the assessment report, as disability activists and the independent WCA reviewer have proposed.³² This could contain their description of their functioning in their own words, a list of any clinical assessments that were carried out, and potentially also any informal observations. Even if this first part of the report excludes the assessor's final conclusions, this would provide claimants – and the wider public – with further reassurances about the legitimacy of the assessment.

2 The government should improve the supply of useful medical evidence into the WCA

Medical evidence is crucial to the WCA; it is central to public legitimacy and to key actors' confidence that decisions are correct. It is also a legal obligation for the DWP, because failing to obtain medical (or other health and social care professional) evidence has been found to disadvantage people with mental health conditions at the WCA illegally.³³ Almost every report on the WCA since it was introduced has argued that the supply of medical evidence must be improved,³⁴ but achieving this in practice has been slow and difficult. The first WCA independent reviewer, Malcolm Harrington, argued that Maximus and the DWP should consider seeking further evidence in every case.³⁵ While no statistics are available, anecdotally it seems that medical evidence is being requested more often than in the past.

However, further progress is still needed: too often medical evidence is missing, and too many claimants are paying money for medical evidence that they can ill afford. To further improve the supply of medical evidence, the government should reverse the current burden on assessors to justify only where they *do* request further medical evidence,³⁶ instead requiring them to justify where they *do not*. These requests for information should be light-touch (requesting specific further information from GPs or named specialists, rather than asking them to go beyond their expertise and written records in describing functional impairments), and use a quick, secure electronic system, as the independent WCA reviewer has also suggested.³⁷ Additional work should also be undertaken to enable patients to share extracts from their medical records with Maximus and the DWP quickly and without charge, notwithstanding the broader challenges of delivering the NHS electronic health records programme.

3 The government should improve the accuracy and transparency of any decisions that contradict claimants' descriptions of their lives

A legitimate system cannot be based simply on whatever claimants claim; the public (and indeed, most other key actors) want safeguards against the possibility of someone lying or exaggerating. Yet nor can a legitimate system use unreliable evidence to simply ignore claimants' own description. Neither medical evidence nor one-off assessments provide perfect evidence about the real impairments that people face, and falsely assuming they do will lead to unfair decisions. On balance, the public are sympathetic: they are more likely to know a genuine claimant who has struggled to claim than a non-genuine one, and are more likely to be concerned about supporting genuine claimants than rooting out fraudulent ones.

Legitimacy here is a balancing act, but we can get a much better balance than the current WCA provides. The government should take the following concrete steps, which directly respond to the issues raised in this chapter:

- Require assessors to ask claimants if they have an explanation for any evidence that seemingly contradicts their description of their impairments, rather than jumping to a decision that the claimant is wrong. This mirrors existing recommendations from the independent WCA reviewer and the Work and Pensions Select Committee that have not been implemented.³⁸ We know that tribunal judges often reach different decisions from WCA assessors after having less-structured conversations with the claimant than WCA assessors had; it is plausible that this is simply because they are more likely to ask follow-up questions about areas that are unclear, rather than follow a structured interview approach.
- Set a clear and high threshold for over-ruling claimants' own description of their lives, and ensure that assessors consistently apply it. Assessors consulted in this study observed that in the absence of strong evidence to the

contrary, their decisions were shaped by what the claimant said in the assessment. However, there are many anecdotal reports that this is not consistently the case, and the guidance to WCA assessors suggests that assessors are expected often to over-rule claimants' self-descriptions.

- Allow claimants to go through a process of treatment to obtain medical evidence on their condition. We have seen that some claims may be rejected on the grounds that the reported impairments are not reflected in recent medical treatment or diagnosis, even if there is a possibility that these impairments are 'genuine' and there are other reasons for the lack of treatment. The government should therefore give claimants an opportunity to be medically treated to generate evidence of their impairments, and then reapply for a WCA without delay, as some members of the public suggested. While some countries have specific 'clarification benefits' for this purpose,³⁹ I recommend the simpler step of allowing medical clarification as a valid reason for being allowed to start a new ESA claim.⁴⁰
- Create and publish further evidence on the validity of decisions in which assessors over-rule claimants' self-reports. Several key actors have questioned the validity of inferring the 'genuineness' of impairments from assessor medical knowledge and informal observations, and there is little transparent evidence to demonstrate their legitimacy in this context. One way of creating a body of evidence about the validity of assessors' decisions would be for the DWP to investigate a sample of appeals regularly, to see if this provides evidence of occasions where these inferences are (in)accurate.
- Feed appeal decisions back to the original assessor. Assessors do not usually receive any feedback from tribunals about the claimants they have seen. This not only misses an opportunity to provide assessors with evidence on whether their judgements were accurate, but (as we have seen) is frustrating for assessors. While the DWP has implemented

some of the recommendations of the first Harrington review in this area, they should work with the Tribunal Service to provide further detail to assessors on individual cases.⁴¹

There are also several broader issues that are relevant to the WCA's legitimacy, even if these are not the main focus of the present report. In particular, disability charity staff, disability activists and doctors have raised concerns about the medical knowledge of assessors, and the limited time they have available in which to assess people.²⁶ Addressing this may prove to be crucial in restoring legitimacy to the WCA.

2 Work capability

Work capability should be central to the WCA

Having considered a claimant's level of functioning and 'genuineness', the second question that the WCA needs to decide is: should this person receive incapacity benefits? To answer this, we first need to decide on what these benefits are trying to achieve.

The most obvious answer is in the WCA's name: it should assess people's *capability for work*. The public seemed to agree: work capability was discussed at length in focus groups when considering whether people deserve incapacity benefits, and among survey respondents there is a strong relationship between seeing claimants as deserving of benefits and seeing them as capable of working.⁴² The role of an incapacity benefits assessment is not just to determine who is making a genuine claim, but more fundamentally to decide if people's worklessness is because of their disability or for some other reason (as the wider literature on public attitudes to benefits makes clear):⁴³

There's 'can't work' because of the problems, or 'don't want to work', isn't there?

Disabled, North

If she doesn't want to work or can't work, that's the difference in it.

Unemployed, North

Focus group members of the public also often debated whether someone with long-term limited work capability should deserve incapacity benefits more than others, particularly if they had a 'lifelong' condition. This is similar to the arguments of several key actors about why

incapacity benefits exist. Unemployment benefits are not designed to support people for long periods of time, but to tide people over until they find another job. Disabled benefit claimants tend to be out of work for much longer periods of time than those claiming unemployment benefit,⁴⁴ and instead need enough money to live on for several years or more. They therefore need higher benefits than non-disabled people.

Aside from work capability, focus group members of the public also took into account other factors in deciding who should receive incapacity benefits, including disability-related costs (carers and the costs of being 'out and about' were commonly mentioned, but a variety of other costs came up too). Such costs are nominally covered elsewhere in the system – including through Disability Living Allowance (DLA) and PIP – though these functions overlap in practice.⁴⁵ While some key actors suggested the whole system should be restructured to merge PIP and ESA, others strongly disagreed with this proposal, and it does not seem to be realistic in the short term given the practical and political challenges involved. I therefore do not discuss this here; nevertheless, if there is an attempt to create a grand plan for the future of the benefits system, the potential benefits and dangers of integrating PIP and ESA should be considered.

Perceptions of the work capability of disabled people vary enormously

While there was wide agreement among focus group participants that the WCA should assess work capability, views about the work capability of different disabled people varied enormously. We can see this most clearly when looking at how they responded to the vignettes of 'Sally', 'Bill' and 'Fiona'.

'Sally', a young woman with schizophrenia

- *Sally is 25*
- *Has been unemployed or doing temporary retail jobs since leaving school at 16*
- *Recently started hearing voices even though no one else was around, which told her what to do and think*

- *Lost her drive to do her usual work and activities, and retreated to her home*
- *Doctors diagnosed her with schizophrenia*
- *Sally doesn't want to work at the moment*

'Sally' was widely seen as having a severe mental health condition that prevented her from working. Some focus group participants thought this was because she was 'potentially dangerous':

If you force her back into work into a job that she doesn't want to do then she'll get increasingly agitated and then kill somebody.

Jill, working, London

In the London group of disabled people, one person tried to contest this, arguing that people with schizophrenia were no more dangerous than anyone else. Yet someone else in the group dismissed this by talking about their brother who 'was schizophrenic' and 'could be violent', which seemed to settle the argument for the wider group. Still, there was broad agreement that 'Sally' was not currently able to work while she was hearing voices and feeling unable to cope ('she's not well').

Yet differences emerged over her work capability in the longer term. Some people thought that 'Sally' would *never* be able to work, as schizophrenia is both serious and 'lifelong'. Others said that it might be possible for her to work in future if the conditions were right: if her symptoms were controlled by medication, if support was provided, if she was able to move away from retail jobs, and if the employer was understanding and made appropriate adjustments. Several participants' views seems to have been shaped by people with psychoses whom they knew and had found work:

I know somebody with schizophrenia and they didn't work for a long time but they do work now. They work in [a chain coffee store], and they've done manager roles and everything.

Disabled, North

Overall, there was more consensus within the focus groups around ‘Sally’ than any other vignette – notwithstanding the different views about how likely it was she would be able to work. For the remaining vignettes, differences were even more apparent.

‘Bill’, an older chef with back problems

- *Bill is 60*
- *Worked for 25 years as chef*
- *Was in car accident 6mths ago, now has severe and constant back pain*
- *Can’t walk 100m in one go, and can’t sit or stand for 1hr at a time*
- *But can still lift things and use a keyboard/mouse*
- *Doesn’t know how to use computers, doesn’t have any qualifications*
- *Bill can’t continue as chef, and doesn’t think there’s any jobs he can still do*

The starting point for most of the debates was that ‘Bill’ cannot continue working as a chef. Indeed, only one person in one of the focus groups – someone who helped disabled people into work professionally, and who also has a disability – took a different line:

I don’t know anything about cooking really, but if you’re preparing ingredients, you can do that sitting down with a lowered worktop, but then you’d be standing up to cook your sauces or whatever. So there would be I think quite easy ways to enable someone to be a chef that alternates between standing and sitting, because he can do both, he just can’t do either for a great length of time. I wouldn’t think that’s difficult at all. I think that would be quite easy to accommodate, just put lower worktops in and a seat.

Other frontline provider

This was a rare position – no one else in a frontline organisation felt this would be possible (‘whatever you say, a chef has to stand up for or most of the time; that is going

to ring a massive alarm bell'), and such views were not held by any members of the public in the focus groups either.

Instead, the public were split on whether 'Bill' was able to do a different, less physically demanding job. Some people thought that his impairments – particularly the inability to stand or sit for more than an hour at a time – made him 'virtually unemployable', even in an office job (disabled, North). Others, thought that 'most employers' would allow him to change posture regularly (unemployed, London), or even said that they already worked with people 'who literally [change posture] all day, up and down, up and down' (working, North). Group members often discussed the possibility of 'Bill' retraining to work in something completely new, while all those coming from organisations with experience of helping disabled people back to work said they would start by trying to use his existing skills within the catering trade (eg ordering food, training other chefs or designing menus).

For those who thought that 'Bill' could technically do other jobs, the final question was whether it was reasonable to expect this. Most focus group members were split on whether he should be expected to retrain at his age, but the key actors were more consistent in their pessimism about his chances of finding work, given his age and lack of skills. Even the person who was most optimistic about his capacity to stay as a chef (quoted at length just above) noted, 'I meant he's very employable, as opposed to easy to find a job.'

'Bill' would not be eligible for ESA as his impairments would not score enough points, something the Maximus assessors also pointed out. Nevertheless, many in the focus groups felt that he had low work capability (partly because of his age and skills, see below), and therefore deserved incapacity benefits.

'Fiona', a senior human resources manager with chronic widespread pain

- *Fiona is 50*
- *Worked 25 years as a [senior] HR manager*

- *12 months ago suddenly in constant pain all over her body*
- *She says it's difficult to sleep or think straight or do her job properly*
- *Doctors unable to find any medical cause [they just can't tell if this is caused by physical or psychological issues]*
- *Wants to work but now out of work and] feels unable to do anything at all at the moment*

[Text in brackets was not included for all groups.]

We have already discussed 'Fiona' in chapter 1. She was described as a person with chronic widespread pain but no diagnosis, which provoked fierce disagreement in the focus groups about her 'genuineness'. But beyond this, there were also disagreements about whether she is capable of work. Some thought that there is very little that someone in constant pain can do until they can 'manage the pain' (working, London). Focus group participants sometimes echoed the symptoms described in the vignette, thinking that 'if somebody wasn't concentrating, wasn't doing the job properly, it could cause all sorts of problems' (working, North).

Yet others thought that 'Fiona' was capable of work despite her symptoms, if that work is the right kind. The frontline professionals helping people back to work mentioned flexible hours and working from home, to deal with her poor sleep and intermittent concentration. But to our surprise, a number of members of the general public focus groups suggested that 'Fiona' was probably 'burnt out' and the stress of her job had been 'making her ill'. They therefore thought she might be capable of a different type of job 'in Tesco or something that's not as much responsibility' (unemployed, North). Some who doubted how genuine 'Fiona' was had a similar view:

We don't all like to get up in a morning, we all might be in pain in some way or another but we drag our backsides out of bed. There must be something she can do... She's obviously capable of work if they're putting reasonable adjustments in.

Unemployed, North

When asked about the chances of ‘Fiona’ actually finding work, her wider situation was brought into the discussion. There was general consensus that she should move into less stressful, lower-status work, but several people thought that she would struggle because she was over-qualified. Others thought that she would find it easy to get a job:

If she just said, ‘I want a job. I’ve been working 25 years in HR recently, I’ve had some health issues, but now I think I can work’, totally she would get a job, absolutely.

Disabled, London

Looking across ‘Sally’, ‘Bill’ and ‘Fiona’

There are two takeaway messages from these pen-portraits. First, we can see that there is an enormous variability in people’s perception of whether someone is capable of work (and their views can differ from those of more knowledgeable frontline professionals). This makes it difficult to suggest that the outcome of assessments should be determined by ‘what the public think’, so we must instead establish the legitimacy of the WCA in other ways. Second, work capability is linked to more than health. It is also linked to people’s understanding of how employers behave, and non-medical factors such as age and skills. I return to these real-world factors at the end of the chapter.

The WCA does not assess work capability

At the start of the chapter I set out what the WCA should aim to do: assess whether people are likely to be out of work for long periods of time because of their disability. The fundamental problem of the WCA is that it fails to do this. This stems from two different problems: the individual descriptors and the structure of the assessment itself.

Problems with the WCA’s individual descriptors

As I outlined at the start of the report, the heart of the WCA is a set of descriptors within 17 types of functional impairment. While some actors raised points of contention

about these, the key issue was that many disability charity staff and disability activists thought that the descriptors systematically failed to capture the requirements of the British workplace. As one said: ‘It doesn’t really assess your functionality in the workplace. It just basically assesses your ability to potter about at home.’

Another commented, ‘The kind of work that underpins the WCA is very... well, it doesn’t really exist.’ This echoes published concerns by the Work and Pensions Select Committee and disability charities.⁴⁶ Several examples were given in the focus groups; for example, the guidance to WCA assessors ‘doesn’t seem to bear any relationship’ to the level at which people with visual impairments struggle to work:

A blind person, for example, can be asked if they run a bath. A blind person could be observed for whether they can adjust a belt on a pair of trousers, or find a hat stand. So there is actually really very detailed guidance about these observations, and they don’t make sense. They don’t stand up. There’s almost no job in the world where a blind person’s working because they can run a bath.

Is this criticism fair? We do not know, because no transparent evidence on the descriptors has ever been published.⁴⁷ The descriptors were designed by an expert committee, who claimed that they reflect ‘activities and functional capability that a reasonable employer would expect of his workforce’;⁴⁸ the Maximus assessors also felt that they seemed reasonable. But as the independent WCA reviewer Paul Litchfield noted, the scoring of this expert consensus is inevitably ‘somewhat arbitrary’. A British Psychological Society report goes further, noting that there was no proper testing of the reliability or validity of the WCA criteria, and that it should therefore be replaced by a ‘reliable, valid and fully researched method of assessment’.⁴⁹

An underlying problem with the WCA is its lack of transparency, which undermines its legitimacy with key actors, and which may well contribute to the assessment not actually capturing people’s true capability to work. In the second half of this chapter, I therefore set out how the

WCA could be both a more valid and more transparent assessment of work capability.

Problems with the entire structure of the WCA

There is another and deeper problem within the WCA: it is inaccurate if claimants have two or more types of impairment, which is probably the case for at least half of all disabled people.⁵⁰ This is because the scores for each type of impairment are added together to determine if claimants should be put in the ESA WRAG. However, the combined score has no relationship to whether someone with this particular functional ‘profile’ – or combination of functional impairments – will have a chance of working. This is an inescapable problem in simple functioning-based assessments, and is sometimes called the ‘whole body problem’.

Each impairment needs to be quite severe before it receives *any* points under the WCA, so disabled people with many different types of lower-level impairments that in combination severely reduce their work capability – particularly because of pain and fatigue – may even score zero points at the WCA. Despite the difficulty of capturing fluctuating conditions, pain and fatigue being raised consistently since the WCA was introduced,⁵¹ and resulting changes to the WCA procedure itself, this issue is still being highlighted by disabled people’s organisations and charities.⁵² Strikingly, WCA assessors I spoke to raised this as their biggest issue, although they felt it was difficult to know how you could address it and still keep the assessment ‘objective’:

Assessor A:

I think you do get a lot of conditions where as a whole they present to you and using your medical knowledge in the background, you think ‘you probably couldn’t reasonably work for whatever reason’, yet they don’t score on any descriptors.

Assessor B:

There’s some that you see who’ve maybe got ten, fifteen things, and they all impact slightly. And therefore in one descriptor they don’t reach the points, so you think actually they could walk for

ten minutes but they really cannot do more than that. They might be going to the toilet ten times a day but not actually having incontinence. And all these things in one person, as well as lots of mental health issues. But they still go out themselves, they still can speak to people cause they're polite people, but they're not actually physically able to get out much, but the evidence is there that they probably could do 200 metres. So again it's the descriptors they don't match, but when you match all of them together, they couldn't go to work for, whatever, 16 hours a week.

Assessor C:

*Just because somebody might be able to walk 100 metres one day, they might not be able to manage it for 5 or 6 days a week because of their mental health. And I think there's an overlap [between mental and physical health] but I don't think that the WCA necessarily covers that, so you could say from a whole picture that they are probably too unwell to work. You know, some of the ones who have sort of a variety of moderate severity conditions but nothing that would put them into a support group or take them over the threshold, I think that there are some gaps. And I can think of a few assessments where after they'd left I've thought, 'It's such a shame because there wasn't quite a way for them to...'
Do you know what I mean?*

The changes to benefits that came into effect in April 2017 make matters even worse. Previously, people with multiple less severe impairments that scored 15 points at the WCA could receive £102 per week in the WRAG, noticeably more than the £73 for those on JSA, and almost as much as the £109 per week for those in the Support Group.¹² Now people in the WRAG receive the same benefit as those on JSA, so multiple less severe impairments do not 'add up' to a more severe one (even in an unsatisfactory way): the only thing that is considered is whether a claimant's most severe impairment reaches a certain threshold. There is no inherent reason why multiple impairments should be ignored; indeed, the PIP assessment adds up points from different types of impairment. In contrast, the WCA has always dealt poorly with multiple types of impairment, and now does not deal with them at all.

We can learn from how other countries assess work capability

While we have known for some time that the WCA fails to assess work capability, no one has been able to propose exactly how an assessment could do this (although there have been many practical suggestions for improving the assessment in general; see chapter 1). Many disability charities and disabled people's organisations have called for an assessment that looks more directly at what work people would be capable of⁵³ – often termed a 'real-world assessment' – and in 2010, the independent reviewer of the WCA, Malcolm Harrington, said this should be explored. Yet in 2011, Harrington rejected the idea because disability charities and disabled people's organisations had been 'unable to offer clear, evidence based advice on what a real-world test might look like'.⁵⁴ Similarly, a report for the World Bank has argued strongly in favour of directly assessing work capability (rather than using functioning as a proxy), but does not give concrete advice about how to implement this.⁵⁵

In the Rethinking Incapacity project, with the help of Clare Bamba, Kayleigh Garthwaite and Jon Warren,⁵⁶ I therefore looked at social security disability assessments in nine countries for practical ideas of alternatives to the WCA. I found that other countries *do* directly assess work capability, and some of them even have elements of real-world assessments (I return to the distinction between these below). I argue that there are three different types of direct work capability assessment:⁵⁷ expert assessments, demonstrated assessments and structured assessments.

Expert assessments

The first form of directly assessing work capability is the most common: to ask a professional to use their expertise to judge whether an individual is capable of work. However, there are longstanding concerns about the consistency and validity of such discretionary assessments.

One issue is around correctly understanding the demands of work. Commonly assessments are made by independent doctors (Germany) or allied health

professionals (Australia, Canada), but the training of these professionals is around diagnosing or treating ill health rather than occupational health. Nor do we have a clear idea of what assessors consider to be the general demands of the workplace – insurance physicians tend not to mention job requirements explicitly when making individual decisions about work capability.⁵⁸ One solution is to adopt a new professional category of specialists who have more relevant expertise and more explicit reporting requirements, such as the Dutch professional category of ‘labour market experts’. Some disability activists in the UK have proposed that this type of expert assessment should be introduced, in one of the few relatively detailed proposals for replacing the WCA.⁵³

A further key issue is to ensure there is consistency in this type of discretionary assessment. A recent systematic review found that expert assessments of work ability ‘show high variability and often low reliability’.⁵⁹ The authors suggest that this can be partly combated through standardisation, which can be seen in, for example, the standardised inputs that are prepared for rehabilitation assessment meetings in Denmark, via a standard rehabilitation plan completed by the claimant and their caseworker. The expert-based elements of assessment in the Netherlands are perhaps the most structured, in which insurance physicians follow interview protocols and disease-specific guidelines for assessing work-related functioning.⁶⁰ Yet even with such standardisation, getting consistent work capability judgements from expert assessment is difficult.⁶¹

For both of these reasons, there can be a considerable gap between the formal definition of work capability being assessed vs the actual criteria used by assessors. Even today, experts I spoke to in Australia described their benchmark hours criterion as ‘arbitrary’ and ‘almost a fictitious construct’.

Overall, experts can assess work capability with some degree of legitimacy, and are used in many systems around the world. Nevertheless, there are some concerns over the validity and reliability of their judgements. These may be partially mitigated through appropriating training and expertise, and standardisation of inputs, decision protocols and reporting requirements.

Demonstrated assessments

A fundamental challenge in the assessment of work capability is that many people's functional capacities and ability to cope in different workplaces are inherently uncertain. Leading models of supported employment such as individual placement and support therefore use an iterative learning process to assess an individual's work capability: they try the most suitable work environment first, and see how the person manages. A similar principle can be applied to incapacity benefits assessment: work capability can be based on the actual experiences of the individual in the labour market, hence this is a demonstrated assessment.

A clear statement occurs in an Australian high-level strategy document, where the assessment was tasked with assessing claimants' work capability over the next two years, but the author noted that for many claimants 'there is little or no practical evidence on which to base this judgment'.⁶² It therefore recommended that most claimants should only be eligible for the disability pension 'when their "Continuing Inability to Work" has been demonstrated'. Since the ensuing reforms, Australian claimants need to actively participate in a 'program of support' for 18 months before being eligible for the disability pension,⁶³ at which point they are referred to an expert assessment. There is a similar system in Denmark, where claimants are now only awarded a disability pension if an assessing multidisciplinary team is confident that they have no capacity for work.⁶⁴ In practice the majority of claimants are required to go through a scheme called Resource Activation for 1-5 years.

Again, there are several issues that need to be taken into account when considering this approach. First, because rehabilitation benefits are generally lower than disability pensions, critics have argued that this is a benefit cut for people who have no realistic chance of work. For example, in Denmark there has been considerable media and political attention on those placed in work trials or Resource Activation who have very low levels of assessed work capacity, including a widely reported case of someone who has 30 minutes of work capacity at low speed, twice per week.⁶⁵

Second, these assessments require investment in both assessment and rehabilitation. For assessment, there is still a need for considerable expertise in interpreting people's past experiences and in deciding what future rehabilitation steps are still feasible (if any). For rehabilitation, this model only provides an accurate picture of work capability if claimants go through rehabilitation that maximises work capability. In practice, however, there are examples from almost every country where this does not happen. For example, despite a series of reforms in Australia, a recent government consultation found that 'providers and people with disability expressed widespread, almost universal, concern about [the assessments], including consistent feedback that they often refer people with disability to inappropriate services'.⁶⁶

Finally, even though demonstrated assessments seem to overlap most strongly with assessments for employment support, this overlap is only partial. This is partly because the claimants' relationship with the assessor may be one of distrust when being evaluated for financial support, but more trusting when their rehabilitation needs are being evaluated. Yet even if these tensions can be overcome, modern ability-based rehabilitation needs to be based on a holistic assessment of an individual, including *inter alia* their motivation, but motivation is not usually considered a legitimate influence on benefit eligibility. Conversely, benefit eligibility assessments examine people's capacity to do jobs that they have no desire to do, which is unhelpful for the purposes of rehabilitation. It is therefore possible to combine these assessments in an inefficient way that *increases* the resources required for assessment, which was a key reason why Australian dual-purpose assessments were later abandoned.

Overall, there are challenges with demonstrated assessments, but countries like Denmark seem to have managed to implement them with sufficient investment in expertise and rehabilitation to be a success. In the UK, there have been many calls to improve the link of the WCA with getting people back to work, from all sides of the political spectrum.⁶⁷ The question is whether the UK is in a position to invest in a expert – and rehabilitation – focused overhaul

of the entire system at the present time, particularly given our historically weak systems of vocational rehabilitation.⁶⁸

Structured assessments

The final type of directly assessing work capability is the structured assessment, exemplified by the Dutch system. The full set of claimants' functional capacities are assessed, which are then compared to the required functional profiles – all the capacities in combination that someone needs to be able to do that job – in 7,000 actually existing jobs in the Netherlands in a database called CBBS (Claimbeoordelings – en Borgingssysteem).⁶⁹ It covers 28 different functional domains against which claimants are assessed, allowing variation between regular demands and peak demands, as well as covering the required work pattern, education, experience and skills of the job. This provides an empirically based assessment of jobs that the individual can perform.

There are several issues that need to be considered in structured assessments. First, like all good assessments, they work best if the assessor has considerable expertise in occupational health. The claimants' functional profile is fed into the CBBS database, but a labour expert provides the final definitive judgement to ensure that obvious errors or data limitations do not lead to unfair decisions.⁷⁰ The Netherlands has also been experimenting with personalised expert judgements about possible job *adjustments* that would enable the claimant to work. While the database is a valuable aid to decision-making, it does not fully substitute for expertise.

Second, while structured assessments can provide valid judgements of whether claimants should receive financial support, they are not necessarily helpful for helping people get back to work. They ignore psychosocial factors, do not start from the priorities of the individual in question, and do not consider what would help the individual to work. However, as the final WCA independent review pointed out, 'determining benefit eligibility and supporting employment outcomes may not be compatible objectives'.⁷¹

Finally, collecting data about the requirements of jobs within a country can be expensive. It would be a prohibitive

cost to cover all the jobs nationally, so CBBS covers only about 20 per cent of all the possible occupational codes in the Netherlands, weighted towards 'lower-level jobs' that are potentially available to all claimants. Nevertheless, it still requires a team of about 35 full-time specialists in the social insurance agency to make on-site observations of Dutch jobs. One alternative is to focus on the functional requirements of a much smaller number of jobs. The Dutch Sociaal-Medische Beoordeling van Arbeidsvermogen [Social Medical Assessment of Work Capacity] (SMBA) for youth disability benefit provides functional profiles for 15 relatively light minimum wage jobs (eg 'parking lot attendant', 'receptionist'), which are each supposed to represent the requirements of wider groups of jobs nationally.

Overall, the Dutch structured assessments seem to produce decisions that are widely accepted as fair, and are consistently cited by international experts as best practice,⁷² though they require some investment. In providing a basis for 'objective', standardised assessments, they also seem to best fit the requirements of the UK system.

Real-world assessment is contentious – but a slightly different issue

Many disability charities and disabled people's organisations have argued that the WCA should be replaced by a 'real-world' assessment, and indeed I myself argued for it in a 2015 Demos report. A real-world assessment is one that considers 'whether a person with impairments would realistically be able to find a job they can do, given who they are'.⁷³ This goes beyond their work capability: it takes into account whether they would *realistically* be able to get a job that they can do, given factors like their age, location or education. Survey respondents and focus group participants, including key actors, generally accept that these factors are crucial for people's chances of finding work. The question, however, is about whether real-world assessments are seen as a legitimate basis for deciding how much money people receive from the state.

This is a contested point: some people strongly believe that it is unfair to take account of non-medical factors,

while others equally strongly believe that is unfair to ignore them (mirroring debates in Parliament).⁷⁴ This can be seen in the focus group participants' reaction to the vignettes described above. For example, when talking about 'Bill', it was not uncommon to hear people in the focus groups citing his age as a reason why he should get incapacity benefits ('he's 60, he's going to probably struggle getting a job at that age anyway' (Claire, unemployed, North)) – sometimes overlapping with issues around the contribution that he had made: 'he's more or less done his work' (Alexa, unemployed, North). Maximus assessors similarly felt that the public sometimes expected them to give benefits to people like 'Bill'. And when questioned directly, some people defended using real-world factors in assessment: 'It would make it harder for them, that is a reality' (Mila, working, London).

Yet others argue that it would be 'unfair' or 'discriminatory' to younger disabled people if older, less skilled people could get benefits more easily (unemployed, London), and some thought that disability was all about health:

I thought disability benefit is based on the fact that you're disabled, and that doesn't change whether you're older or in the North.

Working, London

To see how many people have each view, in our survey I asked if two wheelchair users with identical impairments should receive ESA: one was low-educated and unlikely to work, the other was highly educated and could easily get a job. Survey respondents were split in their response, but more people opposed real-world factors than agreed with them: 30 per cent believe that only the low-educated claimant should receive benefits, while 58 per cent thought that both should receive benefits.

There is no need for a direct assessment of work capability to be a real-world assessment, however. Let us take the example of structured assessments. As we have just seen, these directly assess claimants' work capability by comparing a claimant's functional profile to the functioning that jobs actually require. This can be done in either a real-world way

(comparing people's functioning only to jobs that they could realistically get), or by ignoring real-world factors (comparing their functioning to all jobs that exist). I am still sympathetic to a real-world assessment, as it better captures people's true capacity for work. However, in the recommendations below, I no longer propose a real-world assessment: whatever its merits, at the present time it seems to be a distraction from other, more pressing issues.

Recommendations on work capability

The green paper provides little detail about the future of the disability assessment for financial support, other than saying it 'should still focus on the impact that an individual's health condition has on them'.⁷⁵ In this chapter I have argued that we need to look at claimants' actual capability of work, something the WCA currently fails to do. It is difficult for the public to judge the validity of the WCA from its outcomes, because the public's understanding of disability is so varied. Instead, it makes sense to ground legitimacy in a trusted process, where there is transparent evidence underpinning the assessment. Drawing on what other countries do, the following recommendations set out how we can directly look at work capability in practice.

- 4 The government should overhaul the WCA descriptors, so that they transparently reflect the British labour market**
Many disability charities and activists believe that the WCA descriptors do not capture the requirements of jobs in Britain. Yet the government has no evidence whatsoever with which to defend the WCA, which was originally based on expert judgement rather than transparent evidence, and has never been openly validated.

It would be relatively straightforward to deal with this: the government could collect data on the functional requirements of British jobs – the particular capabilities that people need to be able to do each job. I have called these structured assessments; they are already used in the Netherlands, and experts consider them to constitute

international best practice. There are various choices open to the government in implementing structured assessments, but any of these would be a major step forward on the WCA:

- *Who collects the data?* The government may wish to commission an independent body for this role,⁷⁶ but however the data collection is administered, the data should then be published, so that people can understand what the assessment is doing.
- *How many jobs should the government collect data on?* The Netherlands offers two models, a more intensive version (that collects thousands of observations of different jobs) and a less intensive version (which focuses on a small number of common jobs with low skills requirements). The government could decide which of these to pursue, trading off comprehensiveness against cost.
- *Is this a real-world test?* The government may wish to compare people's functioning with the functioning required in any job on the labour market. Alternatively, it may wish to compare functioning only with those jobs that people could actually get, given their age, skills or where they live, a version of what has been called a real-world assessment. Whether the revised WCA is a real-world assessment is a separate matter from making the descriptors transparently connected to the British labour market.

It has been forgotten that when the WCA's predecessor (the Personal Capability Assessment) was introduced in 1994, the government suggested that it would be based on the activities necessary to do the 100 most common jobs in the economy, covering three-quarters of the labour market.⁷⁷ Yet this research seems never to have been carried out. Two decades later, it is clear that it is still necessary to be able to defend the way disability assessments are carried out objectively.

5 The government should overhaul the structure of the WCA, so that it looks at the combined impact of multiple impairments on work capability

The WCA has always struggled to capture the work capability

of claimants with multiple impairments, because it focused on each type of impairment in isolation. Since April 2017, this has become even worse: the WCA no longer makes any attempt to look at multiple impairments when deciding how much money people should receive, instead only focusing on people's most severe impairment.

It is again straightforward to solve this problem, if we follow the previous recommendation and collect data on the functional requirements of work in Britain. Instead of just matching each type of impairment to British jobs in isolation, the government should measure the functional profiles required in different jobs – all the capacities in combination that someone needs to be able to do that job. Then the functional profile of the claimant can be matched to the functional profile that jobs require.

In practice, the professionals who complete the initial functional assessment could rely on an electronic tool that matches claimant functional profiles to the profiles required in various jobs. It would not be necessary to go through this stage of assessment in all cases. For some claimants, only a single type of impairment is relevant (either because they only have one type of impairment, or because they are eligible for the extra payment based on their most severe impairment). It is only where the assessment is inaccurate – as the current WCA is – that the second stage is necessary.

6 The government should make sure that the assumptions that the system makes about employers match the legal requirements placed on employers

I have proposed a system where assessors compare the capacities of the claimant to the demands of the workplace. In doing this, assessors could consider whether changes to a particular type of job ('reasonable adjustments') would make it possible for a particular claimant to perform that job, even if it would be impossible without them. The latest Dutch assessment for young people first compares people's functioning to a database of jobs, and then considers whether any adjustments could be made.

There is however a risk that the resulting decisions over-estimate what most employers will do, and are therefore unfair. While ‘reasonable’ adjustments are legally required of employers, the definition of ‘reasonable’ is often weak, and enforcement is erratic,⁷⁸ yet the WCA makes strong assumptions about the multiple adjustments that employers will provide.⁷⁹ Therefore I recommend that the government links any considerations of workplace adjustments to what is currently legally required and enforced in practice.

Indeed, a majority of the British public think that employers should be required to take a number of steps to help a disabled person return to work, such as changing their duties and allowing health-related time off that does not count towards ‘sickness absence’.⁸⁰ As the government has been classifying more people as ‘fit for work’, they should also impose more significant requirements of employers to make the changes necessary for this group of people to be able to work.

For similar reasons, the government should make sure that the equipment and support that claimants require is actually available to them. When the WCA was designed and tested, people were assessed as fit for work when they were only capable of working if they had a permanent support worker.⁸⁰ Clearly these assumptions are only fair if such support is actually available to the claimant.

3 Conditionality and sanctions

Over a million disabled benefit claimants have already been sanctioned

As well as deciding on the amount of money that people get, the WCA assessors also decide the conditionality that people are subject to – the requirement that claimants carry out work-related activities under the threat of sanctions. While there is no conditionality for ESA Support Group claimants, other disabled benefit claimants can be sanctioned in one of two settings:

- ESA WRAG claimants can be sanctioned if they do not meet certain work-related requirements, after which they can lose all their benefit for 1–4 weeks after they start complying. The overwhelming majority of WRAG claimants are not sanctioned,⁸¹ but given the large numbers of people who claim, over 110,000 ESA sanctions have been applied since May 2010, as well as a further 140,000 sanctions that were applied but later cancelled.
- Those found ‘fit for work’ who then claim JSA have much more demanding work requirements, and can lose all their benefit for between 4 weeks and 3 years. Sanctioning is much more common on JSA, where over 20 per cent of claimants are sanctioned over a 6-year period.⁸² Over 900,000 JSA claimants who report a disability have been sanctioned since May 2010, and a further 160,000 sanctions were later cancelled.⁸³

Over a million benefit sanctions have been applied to disabled people since 2010 (and 200,000 more during between 2008

and 2010). Now the government is considering extending this, by increasing the conditionality for WRAG claimants, and adding some limited conditionality to Support Group claimants (see recommendations below).

There are two main justifications for this: that conditionality is fair, and that conditionality will increase the numbers of disabled people moving into work. As a former special adviser to the then-Secretary of State Iain Duncan Smith MP has put it:

*In short, conditionality is necessary to ensure that claimants take the steps required to move back in to employment... Conditionality is also an important tool in managing benefit caseloads and ensuring that the system is perceived by the public as fair.*⁸⁴

In the remainder of this chapter, I explore both of these reasons, looking at both what the public think, and what the wider evidence says.

The impact of conditionality

One justification for conditionality for incapacity benefit claimants is that it is claimed to have a positive impact on their chance of employment (and thereby also their health). Focus group members rarely made this argument in these terms, but this may be partly because they mainly considered conditionality for individual people in vignettes, rather than its population-wide impacts. Still, at times the supporters of conditionality for vignette characters argued that ‘pressure’ and ‘incentives’ would improve the person’s ‘motivation’ or give them a ‘kick’ or ‘push’, particularly for the vignette of ‘David’ who had depression. This is consistent with what has more broadly been described as the paternalist justification for benefits conditionality.⁸⁵ One of the major advocates for conditionality at the policy event⁸⁶ justified it in this way:

When I wake up on a wet and cold morning going, ‘Oh my goodness, I don’t want to go to work but I really need to’, [then] I go to work. Similarly if they get up on a wet and cold morning and go,

‘Oh god, I don’t wanna go to the Jobcentre and do job search today’, they do, because they know that if they don’t do that, there’s a condition attached to it.

In contrast, most key actors were strongly sceptical about the potential of conditionality to improve employment for disabled people: ‘You can’t motivate people by sanctions.’ Frontline welfare-to-work providers repeatedly said that the relationship between their adviser and the claimant is crucial, particularly for disabled people who might be quite a long way from work, but this is undermined by the threat of sanctions. They also said that people’s motivation to find work was the bedrock of a successful journey towards work, but the threat of poverty (either through sanctioning or losing incapacity benefits entirely) in fact reduced claimants’ motivation to try things they were not sure they were capable of. As a result, to get disabled benefit claimants ‘you have to approach any contract as if it’s voluntary, even if it is mandatory’. One concluded:

If it’s there to catch those people who really want to play the system, well I guess it works. But is it actually a driver for people to get into meaningful, sustainable employment? The answer is no.

Welfare-to-work provider

The only form of conditionality that any frontline welfare-to-work providers thought might be effective was to mandate an initial meeting (also suggested in wider debates)⁸⁷. Their reasoning was that ‘it’s useful to get people through the door to see what’s on offer’, because otherwise people will rely on hearsay that little support is available and anything that exists is poor quality. Any conditionality beyond that was consistently felt to be counterproductive.

Beyond employment, some general public focus group participants talked about the potential for conditionality and ‘pressure’ to make people’s mental health worse, which was ‘counterproductive’. These health risks of conditionality were echoed more forcibly by several of the key actors I spoke to. They included Maximus assessors when discussing ‘Sally’,

the vignette character with schizophrenia who would be likely to meet the current WCA criteria of exceptional circumstances because of the risk to health. One said that conditionality is ‘an absolute no. There would be risks.’

Evidence on the effect of benefits conditionality for disabled people

While there were occasional key actors who thought conditionality would be effective in getting disabled people into work (and focus group members were split, where they gave this any thought), the overwhelming majority of key actors consulted in this research thought that conditionality would be counterproductive. The research evidence suggests that the latter are right.

It is true that programmes that combine sanctioning and support – such as the Support for the Very Long-Term Unemployed (SVLTU) Trailblazer in the UK⁸⁸ and Personal Roads to Individual Development and Employment (PRIDE) in the USA⁸⁹ – can sometimes increase employment outcomes for disabled people, though not, as has been claimed, Pathways in the UK.⁹⁰ However, the employment outcomes were relatively small, and the programmes were only aimed at those with less severe disabilities who are not claiming disability benefits. More importantly, even the OECD (which is pro-conditionality) accepts that it is impossible to tease apart the role of conditionality in these studies, as the extra support alone could cause these positive impacts.⁹¹

In an academic paper I reviewed the only six studies I found that allow us to focus on the impacts of conditionality itself on disabled people:⁹²

- Four studies have looked at the impact of mandatory rehabilitation-focused meetings on those on sick leave and disability benefits (in Australia, Denmark, Norway and Sweden).⁹³ One found positive impacts on return to work from sickness absence in Norway, but this is methodologically the weakest of the studies. The three stronger studies found either no effect (in Australia), or for two randomised controlled trials (in Denmark and Sweden), negative effects of conditionality.

- Two studies from the UK have looked more directly at the impact of sanctioning.⁹⁴ The methodologically weaker of these finds suggestive evidence that sanctions may be partly driving people from unemployment into inactivity, and possibly also into employment. Much stronger evidence comes from a recent study by the National Audit Office, which found that Work Programme providers that relied more heavily on sanctioning had noticeably worse employment outcomes for identical (randomly assigned) people.

My conclusion in the paper is therefore ‘the limited but robust existing evidence focusing on disabled people suggests that sanctioning may have zero or even negative impacts on work-related outcomes’.⁹⁵

Less evidence is available about the wider impacts of conditionality on disabled people. Nevertheless, as sanctioning involves withdrawing money from people who lack jobs (even if mitigated by hardship payments), it is unsurprising that research has linked sanctioning in general with destitution and food bank use.⁹⁶ For disabled people the issues may be even more acute, given the greater costs of disability, the greater challenges that many disabled people have in the labour market, and the added challenges of responding to sanctions by those with learning disabilities and mental ill health.⁹⁷ Alongside these financial impacts, the stress of conditionality itself may also negatively affect disabled people’s health. We have already seen that the rollout of the WCA led to increases in suicides and mental ill health,¹ and there is widespread anecdotal evidence that this is partly attributable to anxiety about the conditionality regime.⁹⁸

The fairness of conditionality

The other major argument for conditionality centres on fairness, but this was debated by focus group participants in terms of both principles and practice. Some questioned conditionality *per se*, including for non-disabled people, as it was ‘cruel’ and based on ‘punishing people’. More commonly – perhaps because of the questions I was

asking – focus group participants questioned the principle of applying conditionality specifically to disabled benefit claimants, because it seemed harsh for those who deserved compassion (particularly those with progressive or terminal illnesses) and faced discrimination by employers. It was seen as particularly unfair for people with low work capability:

Just in a moral sense having sanctions in place, particularly for vulnerable individuals, I think is something that shouldn't be happening... What we're effectively doing then is setting people up for jobs that aren't available for them, and then taking money that they need to live on away.

Labour MP at policy event

This view was contested by others, who thought it was only fair that disabled people should be sanctioned if they did not take steps towards finding work, just like other benefit claimants. The most unambiguous support for conditionality was where claimants were blamed for their lack of work and not seen to be 'genuinely' disabled:

[On 'Fiona']: 'She's obviously capable of work if they're putting reasonable adjustments in, she just doesn't want to... Therefore, she shouldn't be given any money because she's choosing not to work. Why pay somebody to sit at home doing nothing?'

Unemployed, North

Where people accepted the genuineness of symptoms, in contrast, even those who were instinctively pro-conditionality became more uncertain. Rather than making a sweeping judgement, it was common to say that people should be sanctioned only if they had chosen not to do a particular task, rather than because they were unable to do it. This can be seen in reverse among some of those who opposed conditionality: they did not necessarily disagree with the principle of conditionality, but suspected that there was a genuine reason for a person failing to do the task. As Melanie (unemployed, London) said when questioning other people's support for sanctions in the focus group,

‘The reasoning behind it is perfect, but I don’t know how realistic that [activity] would be.’

Concerns about the principle of conditionality for disabled people therefore quickly blur into debates about the practice of conditionality – how do we know what people are capable of doing, in order to ensure that conditionality is fair? Most focus group members thought the decision should be delegated to doctors (as found in chapter 1), sometimes making clear their unhappiness about leaving this to a ‘jobsworth’ in a Jobcentre. They were rarely prepared to go into detail and did not talk about whether conditionality had been fair in practice to date. In contrast, key actors often raised practical concerns:

I guess my scepticism is making sure that people that are mandated aren’t people that, at this time, can’t participate in the process because of their health condition... I’m maybe just sceptical about the ability of DWP at the moment to do that.

Welfare-to-work provider

These concerns were shared by many frontline welfare-to-work agencies, disability charity staff and disability activists alike. Unfair conditionality was felt to stem from a combination of a lack of expertise by Jobcentre advisers (who were regularly referred to as ‘generalists’ without detailed knowledge of disability), combined with the lack of time available for these advisers to really understand a person’s health and wider situation (an average of 88 minutes per claimant per year, according to some welfare-to-work agencies). They argued that this was worst for people with learning difficulties or mental health issues, who either lacked insight into their condition or would only talk about their situation once they trusted their adviser.

Wider evidence on the fairness of UK conditionality

There is wider evidence that bears out concerns about the practice of conditionality. In new research, I show that disabled people on JSA were 26–53 per cent *more* likely to be sanctioned than non-disabled claimants between 2010

and 2014.⁹⁹ This finding provides statistical support to the concerns raised by the government-commissioned review of sanctions by Matthew Oakley, parliamentary select committees, a major qualitative academic study and innumerable disability and social welfare charities and campaigners¹⁰⁰ – including in this report – that sanctions were being wrongfully applied to vulnerable claimants, particularly JSA claimants with mental health problems and learning disabilities. While the conditionality regime in ESA is more health-sensitive, a convenience survey of WRAG claimants still found that only about 20 per cent thought their adviser recognises all the barriers they face, and over half thought their action plan was inappropriate for them.¹⁰¹

The WCA is partly responsible for this. Because the WCA has governed conditionality, the system has assumed that people found ‘fit for work’ have no health-related barriers to work or work-related activity.¹⁰² Yet this is not what the WCA assesses – there are plenty of sick and disabled people who do not meet the criteria set out by the WCA, who are nevertheless temporarily or permanently incapable of doing certain tasks. Even when deciding whether someone should be placed in the WRAG or the conditionality-free Support Group, the WCA functional descriptors bear almost no relation to people’s capacity to undertake ‘work-related activity’, and the Work Programme that WRAG claimants were often referred to has been particularly criticised for not being tailored to disabled people.¹⁰³ Despite these failures, there have been pressures on Jobcentre staff to sanction claimants,¹⁰⁴ and Work Programme providers have been told to refer non-attending claimants for sanctions irrespective of whether they think there is a good reason for non-attendance.¹⁰⁵

It is unclear how the situation has changed in the last few years to 2017. The use of sanctioning in general has declined, sickness provisions in JSA have improved, and more scope has been given to Jobcentre staff to personalise conditionality. A further flexibility that may have helped is the exceptional circumstances safeguard in the WCA (regulations 29 and 35), where people can be allocated to the WRAG or Support

Group if any other decision would substantially adversely affect their health, which in many ways was a direct assessment of whether people could cope with conditionality. However, this avenue was closed with revised guidance in late 2015 that reduced the proportion allocated to the Support Group (as shown in the Introduction), which placed the onus for conditionality assessment back onto frontline staff.¹⁰⁶ And as we saw at the start of this chapter, the green paper has proposed to extend considerably the role of frontline staff in implementing conditionality for disabled people.¹⁰⁷

International evidence on implementing conditionality

In an academic paper as part of the Rethinking Incapacity project, I reviewed the implementation of disability conditionality in several high-income countries.¹⁰⁸ This shows that countries implement conditionality for disabled people very differently, which is likely to influence both the fairness of the system and the impacts it has; the differences are summarised in Table 2.

Table 2 **How countries implement conditionality for disabled people**

	Low conditionality	High conditionality
Conditionality weakly linked to rehabilitation	<i>Passive systems:</i> on-paper requirements, but weak assessment and little that claimants can be required to do (eg Norway)	<i>Compliance-based systems:</i> weak assessment and few rehabilitation options, but relatively high levels of sanctioning nevertheless (eg UK)
Conditionality strongly linked to rehabilitation	<i>Supportive systems:</i> substantial assessment and rehabilitation, and on-paper conditionality, but low conditionality applied (eg Sweden)	<i>Demanding systems:</i> intensive assessment and rehabilitation, which claimants are obliged to take up, though they do not usually result in sanctioning (eg Denmark)

There are two key lessons for the UK that help explain why conditionality for disabled people has not been consistently fair. First, we have seen that it is very difficult to know what

a disabled benefit claimant is capable of doing. Some countries have strict on-paper conditionality that is not applied in practice, because frontline staff do not have the skills to assess people's capabilities, nor suitable work-related activities that they could require them to do (eg the 'passive system' of Norway). In contrast, the countries that seem to manage to implement conditionality are those that invest in expert assessment and suitable rehabilitation activities for people to undertake. For example, in Denmark:

- Claimants are assessed via a multidisciplinary rehabilitation team meeting of four to six people representing different areas of expertise.
- When the multidisciplinary team cannot think of any steps that would help someone move towards work, they are found eligible for the disability pension.
- There are many options for claimants who are not fully fit for work yet have some potential work capability: they can be sent on a 1–5-year rehabilitation programme (Resource Activation), or referred to a 'flex-job' scheme that provides substantial employer subsidies to almost 2 per cent of the whole Danish working-age population.¹⁰⁹
- Where claimants' work capability is unclear, they can also be sent on work trials or work tests to safely experiment with work tasks, before coming back to a further multidisciplinary team meeting.

In other words, unlike in the UK, conditionality in Denmark is closely linked to rehabilitation: people are provided with expert assessment to direct them to rehabilitation that is tailored to their condition, which they are then expected to take up.

Second, in most countries that manage to implement conditionality sanctioning is used as a last resort. In Denmark, even municipalities that use the threat of sanctions rarely actually apply them.¹¹⁰ In the Netherlands, caseworkers must go through four steps before deciding that someone's 'participation behaviour' is inadequate and that a sanction should be applied, and at each step the main aim is to

encourage the claimant to start participating fully in the process.¹¹¹ This makes disability assessment much easier. The pressure on the assessment is greatest when sanctions are applied, and this is not only rare, but only happens when the government has seen claimants multiple times.

I am not arguing that demanding systems are *effective* (indeed, there is evidence of their ineffectiveness below). Instead, my argument is about implementation: only demanding systems manage to require disabled people to carry out tasks that they can be reasonably confident they can perform. In the recommendations at the end of this chapter I therefore suggest ways that the government could improve the implementation of conditionality for disabled people, if they are committed to conditionality *per se*.

The public's overall support for sanctions

We have seen that some – but not all – focus group members supported conditionality for disabled people, generally on the grounds of fairness. To see how common these views are among the British population, I asked questions about conditionality in our YouGov survey, making them as tangible as possible by asking about the situations of vignette characters who had specific characteristics. Table 3 shows the results of questions asked about wheelchair users (the type of disabled person the focus group members of the public were least likely to want to sanction) and people with depression (who they were most likely to want to sanction); the full description of each vignette is given in the appendix.

The results demonstrate that the public often support sanctions for disabled people, but not in the form that the government issues them at present. A majority of respondents thought that disabled people's benefits should be cut if they do not take a job they can do, or if they refuse suitable training or rehabilitation. (Note that the question assumes that the government knows exactly what people are capable of, so these answers related to an idealised image of conditionality, which ignores the practical challenges I explored above.) However, the public are much less

supportive of sanctioning for minor non-compliance, such as sometimes turning up late for meetings – indeed, a majority thought that there should be no sanctions whatsoever for wheelchair users in this situation.

Even those who do support sanctions prefer much weaker sanctions than those the government presently imposes, as Table 3 shows.¹¹² When considering the situation for which the public were most likely to support a sanction – refusing to take part in suitable training or rehabilitation – only 28–39 per cent thought that the claimant should lose most or all their benefits. They were overwhelmingly opposed to imposing major sanctions on people who sometimes turned up late for meetings at the Jobcentre – only 6–11 per cent thought that people should lose most or all of their benefits for this. These results are very similar to responses to a more general question asked in the British Social Attitudes Survey in 2011, when many people supported conditionality, though believed sanctions should be less severe than currently exist.¹¹³

Table 3 **Public views of sanctioning out-of-work disabled benefit claimants who have a medical diagnosis and sick note**

	Do not cut benefit at all	Lose less than half of benefit	Lose half of benefit	Lose most or all of benefit
Sometimes turns up late for meetings at the Jobcentre				
Wheelchair user	53%	37%	3%	6%
Has depression	35%	46%	8%	11%
Does not apply for a job as disagrees with the Jobcentre that they are capable of doing it				
Wheelchair user	32%	33%	12%	23%
Has depression	19%	29%	16%	35%
Refuses to do suitable training or rehabilitation				
Wheelchair user	9%	43%	20%	28%
Has depression	7%	37%	18%	39%

Source: YouGov survey for Rethinking Incapacity, 2017; see web appendix for further details. Sample size varies from 3,959 to 4,195 vignettes for 1,765–1,855 people, excluding don't knows (8.9 per cent of responses for situations 1 and 2; 14.1 per cent for situation 3).

Focus group members came to exactly the same conclusions. There was a debate about whether a disabled claimant should receive a small sanction for not turning up to a meeting – ‘a tenner’, ‘20 pounds’, ‘a day’s wage’, ‘10 per cent’ or just ‘a small sanction’ – or not be sanctioned at all. No focus group participant proposed there should be a larger sanction than this where a ‘genuinely disabled person’ did not do what was asked of them (though there were debates about whether non-genuine claimants should be entitled to benefits in the first place).

Overall, there is some truth in the argument that the public opinion backs conditionality for disabled people,¹¹⁴ but this is not the whole story. The British public are not always aware of how difficult it is to implement conditionality for disabled people fairly, nor that when implemented it is more likely to push people away from work than move them towards it. Nonetheless, a majority do not support the severity of the conditionality that has been implemented to date.

Recommendations on conditionality and sanctions

The green paper made three sets of recommendations about conditionality:

- For those currently in the WRAG, it proposed to give work coaches ‘discretion to make case-by-case decisions about the type of employment support a person is able to engage with’ (para 132).
- It considered extending more limited conditionality to nearly all disabled benefit claimants, by requiring those in the ESA Support Group to take part in a ‘keep-in-touch’ discussion with work coaches (para 114).
- It hints at a long-term desire to completely split the assessment for financial support (the WCA) from the assessment of conditionality (para 131), which is likely to lead to work coach discretion being extended to the Support Group.¹¹⁵

However, the evidence presented here suggests there could be several dangers if conditionality is extended: it may harm

claimants' employment outcomes; it may contradict the public's idea of fairness; and there may be such severe implementation challenges that unfair decisions are commonplace.

In this section, I make a series of recommendations designed to combat these issues, while being mindful of the government's aims. The evidence suggests that conditionality for disabled people may be neither effective nor fair. Nevertheless, if the government is committed to maintaining and extending conditionality for disabled people, the proposed system would at least enable them to do so while minimising costs, satisfying the public's conception of fairness, and maximising the chances that claimants will move into employment.

7 The government should reduce the extent of benefit conditionality disabled people face

The evidence in this chapter has consistently pointed to the need to reduce the extent of conditionality faced by disabled people. Making conditionality for disabled claimants fair is essential, but expensive. Conditionality is not just ineffective in getting disabled people back to work, but it may even be counterproductive. And while the evidence suggests that the public want *some* conditionality for disabled benefit claimants, the level of conditionality in the benefits system goes far beyond most members of the public's sense of fairness.

One possibility would be to reduce the level of sanctioning in the benefits system *per se*. Assuming that the government is committed to continuing with the current form of conditionality in general, though, I recommend that the government should:

- *Reduce the numbers of disabled people subject to conditionality.* The green paper proposes to extend conditionality to claimants in the ESA Support Group. However, while offering employment support to claimants in the Support Group is sensible, extending conditionality to them is not, as others have argued.¹¹⁶ If assessed correctly, these claimants will have severe disabilities, be claiming for long periods of time, and

are very unlikely to get into work. Sanctions are particularly unlikely to have a positive impact on employment for these claimants, and are unlikely to be seen as fair by key actors or the general public, particularly in the current climate.

- *Reduce the scope of the conditions imposed on claimants.* For those disabled people who are subject to conditionality, their work coach should only ask them to make two commitments: to come to meetings, and to try to take steps towards finding work. (The experience of Pathways to Work is that this type of low-level conditionality does not damage the relationship with the claimant,¹¹⁷ and this fits the suggestion made earlier in this chapter that the only requirement should be to attend an initial meeting at a Jobcentre.) Beyond that, work coaches should get disabled claimants to consider having ambitious aspirations, rather than making commitments that they are sanctioned for failing. (There are various ways this could be done within the Universal Credit infrastructure.)¹¹⁸ This will create a space for ‘safe experimentation’ where people take risks in getting back to work, rather than hunkering down on benefits. The green paper hinted that for legal reasons only an initial meeting would be mandatory before the WCA;¹¹⁹ this should be continued for the WRAG after the WCA as a deliberate policy decision.
- *Reduce the likelihood that claimants will be sanctioned for minor non-compliance.* Sanctioning should only be considered when the work coach believes that claimants’ non-attendance or non-engagement is major, repeated and deliberate. If claimants are trying to experiment with their capacity to work, they should be encouraged to try and fail, rather than penalised for it. This chimes with what the public thought was fair: a sustained refusal to engage is seen to be much worse than occasional lateness.
- *Reduce the amount that people can be sanctioned.* The value of sanctions is far above what the public think is fair (even in an idealised situation where people’s capability is correctly assessed). A revised system should begin with a warning,

before moving on to ‘lowest-level’ sanctions¹²⁰ of withholding less than half the benefit. At each stage the aim should be to get the claimant to re-engage.

I have justified each recommendation on either the grounds of fairness or because if implemented they are likely to improve employment outcomes, but crucially they will help contain the costs of implementing conditionality for disabled people fairly, by minimising the need for expert assessment and other safeguards. All of these aims are best served by a simple principle: the overwhelming majority of disabled claimants should never be threatened with sanctions, let alone actually sanctioned in practice.

8 The government should continue to rely on the WCA and fit notes to set maximum conditionality groups for disabled people

The green paper stresses the advantages of setting conditionality completely separately from deciding the amount of benefits that people receive at the WCA, but in practice this is unlikely to be possible. The previous recommendation has explained why: those in the Support Group should not be subject to any conditionality, and the focus for other disabled people should be on non-binding aspirations, not sanctionable commitments. If this involves treating disabled people differently from non-disabled people, there needs to be a gateway into this separate system of conditionality, but there is currently no appetite to introduce an all-new assessment for this purpose.

I therefore recommend that current practice is maintained: the conditionality group should be set by both the WCA (there is a different conditionality regime for those in the WRAG from those on JSA, although they receive the same level of benefits) and fit notes.¹²¹ Some tweaks to this system are sensible. The government should accept fit notes written by social care professionals¹²² and that it is unreasonable to require claimants to get fit notes every 2 weeks for sustained periods. Indeed, most survey respondents said that they would not require people to have a fit note each time their recognised

health condition affected them.¹²³ Fit notes should therefore be presumed to continue for a set period unless there is good reason to think that someone's health has improved.

9 The government should tailor any conditionality within these groups to claimants' own description of their capabilities; this should only be challenged in exceptional circumstances, and on the basis of expert assessment

Over a million sanctions have been applied to disabled benefit claimants since 2010. Disabled people and frontline welfare-to-work providers alike are already worried that disabled people are being sanctioned unfairly, and this chapter has presented further evidence that they are right: disabled JSA claimants are *more* rather than less likely to be sanctioned than non-disabled JSA claimants. The current conditionality assessment, carried out by a mix of WCA and Jobcentre advisers, is not accurately assessing what people are capable of doing, and this contributes to the poor legitimacy of the WCA. In contrast, countries that implement conditionality successfully do so by providing claimants with expert assessment to direct them to rehabilitation that is tailored to their situation, which they are then expected to take up.

The green paper proposals are likely to make this worse. Work coaches are not sufficiently well trained to make consistently fair decisions about what people are capable of, nor do they have sufficient time to make use of any expertise they have, as has been widely noted.¹²⁴ The reduction in spending on specialist employment support for disabled people removes the easy option of referring people to schemes that are known to take account of their health. And there is an emphasis in Universal Credit on all advisers being able to work with all claimants, which will reduce specialist adviser knowledge (although there are signs that this may be relaxed slightly in practice). Yet while it would be an improvement if specialist Jobcentre staff such as disability employment advisers were widely available and widely used, they would still struggle to set appropriate conditionality for all disabled claimants.

If claimants' description of their own capacities is challenged, then relevant experts – particularly those with occupational health expertise – need to be involved. The green paper talks about trialling three-way conversations between the claimant, work coach and a healthcare professional (albeit in a different context, separate from conditionality), which may prove to be a sensible model for obtaining expert help.¹²⁵ However this is implemented, it will be both expensive and damaging to the relationship between the work coach and the claimant, as we have explored in chapter 1. Invoking expert assessors to challenge claimants should therefore be an exceptional response to what work coaches feel to be a major, repeated and deliberate decision not to engage; it should be a rare exception, rather than the rule.

10 The government should strengthen safeguards to ensure disabled people are not unfairly sanctioned for failing to meet impossible conditions

Thinking about claimants who might struggle with the system is not just inherently important, or a case of avoiding bad headlines, although both of these are true. More than this, it is a legal requirement: the courts have already ruled that the government must not discriminate against those with mental health conditions in its disability assessment.¹²⁶ There has been some discussion over safeguards¹²⁷ and it is worth stressing that four are particularly important:

- *New claimants at crisis points cannot be expected to attend interviews or communicate by letter or phone with the DWP, and should be placed in the No Requirements Group.* When applying for Universal Credit, claimants should be asked questions which flag that they are at a crisis point. The DWP should then confirm this via the claimants' doctors and medical records, with expert assessment available by telephone or home visits if sufficient medical information is not given.
- *The system must also cope with existing claimants who suffer a crisis mid-claim.* When a claimant does not turn up to a meeting or respond to contacts, this should be a flag to the DWP to contact the claimant's doctor, other health

or social care professional or named contact person to see if they are at a crisis point.

- *Claimants who cannot be expected to negotiate with a work coach should not be sanctioned until they have been assessed by a health professional.* Work coaches are particularly likely to make mistakes for claimants who cannot clearly communicate what they can do (because of communication barriers or a lack of insight into their condition). Health professionals are therefore required to understand the often hidden impact of their conditions.
- *Where there is a risk to claimants' health if they are sanctioned, additional safeguards need to be put in place.* The criteria and assessment for this are slightly different from criteria for assessing work capability, but adequate safeguards are clearly essential – given the large number of claimants, there are substantial numbers of very vulnerable claimants within the system.

To maximise transparency and legitimacy, these safeguards should be monitored by a new reference group for protecting vulnerable claimants.

4 Final words: principles of reform

This report has not just argued that the WCA is broken; it has set out straightforward steps to overhaul the WCA to improve the assessment of ‘genuineness’, work capability and conditionality for disabled benefit claimants. In this final section, I want to make several further, broader recommendations to help ensure that these reforms are successful.

Recommendations on principles of reform

11 The government should co-produce the revised WCA with disabled people

Legitimacy relates not just to decisions made, but to all the processes that lead to that decision – including how the system is designed in the first place. Given the lack of trust between those working in the DWP and many disability activists and disability charity staff, the government should overhaul the WCA in collaboration with representatives of disabled people. The proposals in this report are therefore intended to be a starting point for this discussion, rather than the final word on how a revised system should operate.

12 The government should ensure the system as a whole makes sense for all claimants, whatever the result of their WCA

It is difficult to consider an assessment in isolation from what people are being assessed *for*. Indeed, some of the apparent problems of the WCA are in fact problems of the wider system, in which assessors told a group of disabled people that they are fully ‘fit for work’, and should claim a benefit (JSA) on the assumption that they have no health problems.

The government should therefore:

- *Ensure that benefits are adequate for claimants to live on, for the duration that they are likely to need them.* We know that people in the WRAG are overwhelmingly likely to claim benefits for more than two years, something that is true for only a small minority of JSA claimants. If disabled people receive insufficient benefits to live on, then they and the wider public are likely to feel that a wrong decision has been made, even if the WCA has correctly identified those who have lowest work capability and should therefore be in the Support Group.
- *Change the language of the WCA, so that the DWP no longer tells people that they are fully 'fit for work' if they have a genuine disability.* The label 'fit for work' is not helpful: it suggests that claimants have been lying about their impairments, or that their impairments do not affect their work capability at all. Instead, the system needs to recognise that many of the people failing the WCA have real barriers to work, and make reasonable adjustments accordingly. To communicate this clearly to claimants, the public and DWP staff alike, it would be sensible to avoid the term 'fit for work' for anyone with a health condition, and instead talk about 'slightly reduced chances of finding work'.

13 The government should ensure there is adequate time and enough resources to design and pilot the new assessments

Redesigning the WCA is urgent, but cannot be rushed, because to do so would risk repeating the mistakes that were made in the design of the existing assessments. The government has put considerable effort into developing its in-house capacity around the WCA, and this should be used to help pilot and refine the revised WCA.

14 The government should ensure that the transitions to new systems are implemented as fairly as possible

The new assessment will inevitably lead to some (notional) winners and (notional) losers. The government should learn the lesson of past reforms, and give careful thought to how claimants transition between assessments in the fairest way,

avoiding the traumas of introducing sudden, life-changing differences to people's financial situation. There is no silver bullet – every country finds this process difficult. Nevertheless, there are ways of making the change go more smoothly.

One way of doing this would be to have transitional payments for those whose payments are reduced, where a claimant's benefit level gradually moves to the lower level over a period of time, thereby allowing them to adjust their expenditure. Another would be to allocate additional work coach time to helping claimants deal with the reassessment, and additional employment support to help them move towards work during the transition period. In one sense, being found to have greater work capability should be good news for a claimant – but this is only the case if the assessment is fair, and if the support that the claimant needs to move towards work is actually provided.

Notes

- 1 See F Ryan, ‘How many benefits claimants have to kill themselves before something is done?’, *Guardian*, 10 Feb 2015, www.theguardian.com/commentisfree/2015/feb/10/benefits-sanctions-malcolm-burge-suicides (accessed 11 Nov 2017) and B Barr et al. “First, do no harm”: are disability assessments associated with adverse trends in mental health? A longitudinal ecological study’, *Journal of Epidemiology and Community Health* 70, no 4, 2016, pp 339–45.
- 2 DWP and DoH, *Improving Lives*.
- 3 For example, see ‘Green paper “start of action to confront prejudice” over disabled people in work’, *Daily Mail*, 31 Oct 2016, www.dailymail.co.uk/wires/pa/article-3886196/Overhaul-planned-work-capability-assessments-disabled-people.html (accessed 11 Nov 2017); A Cowburn, ‘DWP set to overhaul Work Capability Assessments for people with disabilities’, *Independent*, 29 Oct 2016, www.independent.co.uk/news/uk/politics/dwp-set-to-overhaul-work-capability-assessments-for-people-with-disabilities-damian-green-a7386481.html (accessed 11 Nov 2017); and BBC News, ‘Work capability assessment overhaul for disabled’, BBC News, 31 Oct 2016, www.bbc.co.uk/news/uk-politics-37810701 (accessed 11 Nov 2017).
- 4 P Litchfield, *An Independent Review of the Work Capability Assessment – Year five*, presented to Parliament pursuant to Section 10 of the Welfare Reform Act 2007, 2014, p 42.
- 5 P Litchfield, *An Independent Review of the Work Capability Assessment – Year four*, presented to Parliament pursuant to Section 10 of the Welfare Reform Act 2007, 2013, p 38.

- 6 For more information, see the website Rethinking Incapacity at www.rethinkingincapacity.org/. The Rethinking Incapacity project was funded by a 3-year grant from the ESRC (ES/K009583/1).
- 7 See Geiger, 'Benefits conditionality for disabled people', and BB Geiger et al. 'Assessing work disability for social security: international models for the direct assessment of work capacity', *Disability and Rehabilitation*, 2017, in press.
- 8 For further details of the assessment, see the explanation in my previous report, B Baumberg et al. *Rethinking the Work Capability Assessment*, London: Demos, 2015.
- 9 More precisely, to be assigned to the Support Group people need to meet one of a specified list of descriptors, which are generally equivalent to the most severe of the WRAG descriptors for each type of functional impairment (those scoring 15 points; see following note). However, nine of the most severe descriptors are not included on the Support Group list, and therefore do not qualify someone for the Support Group. Indeed, it is impossible be put in the Support Group on the basis of the functional descriptors caused by epileptic fits ('consciousness during waking moments'), whatever their frequency.
- 10 People are put in the WRAG if their impairments are scored at 15 or more points in total, but they do not satisfy the requirements for the Support Group (see note above). People can score between 6 and 15 points under each of the different types of functional impairments – so they can either qualify for WRAG if they have two or three less severe impairments each scoring 6–9 points, or through a single more severe impairment scoring 15 points. The strengths and weaknesses of this method of taking into account multiple impairments are discussed in chapter 2.

WRAG claimants cannot be required to take a job, but they can be required to come to work-related interviews or take

part in an employment support programme. The amount they can be sanctioned has changed over time. From December 2012, ESA WRAG claimants who are sanctioned lose everything except the work-related activity component of their benefit. Originally they lost £73 of the £102 weekly total (in 2016/17 for a single person), but new claimants from April 2017 lose the entire benefit (because the work-related activity component has been abolished; see later in the present section). The sanction lasts for 1 week if it is the first failure, 2 weeks for the second failure, and 4 weeks after this, and about 10–20 per cent of WRAG sanctionees receive hardship payments. See D Webster, *The DWP's JSA/ESA Sanctions Statistics Release, 11 Nov 2015 and Hardship Payments Ad Hoc Statistical Release, 18 Nov 2015*, briefing, London: Child Poverty Action Group, 2015.

- 11 JSA claimants have much more demanding requirements than ESA claimants (they have to search for work for 35 hours a week and take any job available). If they fail to do this without good reason they face longer sanctions, the length of which depends on the nature of the failure. If failures are ‘lower-level’ or ‘intermediate-level’ then people are sanctioned for 4 or 13 weeks (first or second time), if they are ‘higher-level’ then people are sanctioned for 13, 26 or 156 weeks (first, second or third time). Around 40 per cent of JSA sanctionees receive hardship payments. See also previous note.
- 12 These are March 2017 weekly benefit rates for a single childless adult aged over 25, who is not eligible for an extra cost benefit, whether Disability Living Allowance (DLA) or PIP. Until the WCA has been carried out, claimants are paid assessment-rate ESA, which is the same level as JSA.

It is worth briefly explaining why these rates only apply to those not eligible for DLA or PIP, as this is often missed. Under ESA and JSA, disability premiums are payable for claimants receiving PIP or DLA (or other similar benefits). Detailed eligibility is complex and the amounts variable,

but for a single person they are an extra £6–78/wk (ESA) or £3–111/wk (JSA). Comparisons with Universal Credit are complicated by the fact that these premia are removed under Universal Credit, to be replaced by a payment of £147 per wk for those in the equivalent of the Support Group – higher than those in the Support Group who are not eligible for these premia, but lower than those who are eligible for them.

- 13 The leading Conservative critic of the WRAG cut, Heidi Allen MP, a member of the Work and Pensions Select Committee, said on the day that the cut was implemented, ‘Both in evidence to the Committee and in the Commons, repeated assurances were given that claimants would not be financially disadvantaged. I cannot say, hand on heart that this will be the case and worry about the hardship new claimants may face.’ See Commons Select Committee, ‘Employment Support Allowance changes’ impact questioned’, 3 Apr 2017, www.parliament.uk/business/committees/committees-a-z/commons-select/work-and-pensions-committee/news-parliament-2015/employment-support-allowance-questioned-16-17/ (accessed 11 Nov 2017). Disability activists’ criticisms can be seen at J Pring, ‘Exposed: Mordaunt’s “false promises” on WRAG cut mitigation’, Disability News Service, 6 Apr 2017, www.disabilitynewsservice.com/exposed-mordaunts-false-promises-on-wrag-cut-mitigation/ (accessed 11 Nov 2017).
- 14 Trends in WCA outcomes will be partly affected by the backlog that built up before Atos were replaced with Maximus (particularly as Atos anecdotally were focusing on easier-to-decide, more severe, paper-based claims). To separate out this effect, I here only show the results of WCAs of people claiming in the past three months (thereby excluding the backlog). Further discussion of this is available at B Baumberg, ‘The return of the stricter WCA?’, Rethinking Incapacity, 21 Sep 2016, www.rethinkingincapacity.org/return-strictier-wca/ (accessed 11 Nov 2017), which also describes the policy

change in more detail. The figures themselves are from the latest official WCA statistical release.

- 15 BB Geiger, 'Benefit 'myths'? The accuracy and inaccuracy of public beliefs about the benefits system', *Social Policy and Administration*, 2017, in press.
- 16 When survey respondents were asked before the April 2017 cut in generosity (see chapter 2) if they thought the system should be stricter or easier in general, the most common response was that it should be stricter, but only just over one-third (37 per cent) of people said this (28 per cent thought no change, 19 per cent thought it should be easier, and 15 per cent didn't know). Interpreting these views is hard, however, as the public don't seem to have a clear idea of how strict the WCA actually is. I gave people vignettes describing particular types of claimants and asked them if they would currently be eligible for ESA. Large numbers of people (36–43 per cent) said they simply didn't know if this person was eligible for ESA, and those who answered were often wrong. This was most striking for a vignette of a wheelchair user, where 52 per cent wrongly thought the applicant would be eligible for ESA (only 9 per cent correctly thought they would not). In contrast, 20–29 per cent of people thought that someone with severe back or leg pain would not be eligible for ESA, only slightly below the number who correctly thought they would (30–36 per cent). (They were described in a way that would place them in the WRAG.)
- 17 I will return to these issues of trust in academic papers in 2018; please get in touch at b.b.geiger@kent.ac.uk if you would like to be informed of further work in the project (or to engage critically with the ideas here!).
- 18 The DWP instructions are contained in the WCA handbook for healthcare professionals, the most recent published in July 2017. See Centre for Health and Disability Assessments, *Revised WCA Handbook*, 31 July 2017,

www.gov.uk/government/publications/work-capability-assessment-handbook-for-healthcare-professionals (accessed 11 Nov 2017).

- 19 Centre for Health and Disability Assessments, *Revised WCA Handbook*.
- 20 These concerns have prompted a current Work and Pensions Select Committee inquiry, see Work and Pensions Committee, 'PIP and ESA assessments inquiry', 2017, www.parliament.uk/business/committees/committees-a-z/commons-select/work-and-pensions-committee/inquiries/parliament-2017/pip-esa-assessments-17-19/ (accessed 11 Nov 2017) (and also the evidence of the earlier inquiry on PIP assessments in March 2017, which was aborted because of the election). These anecdotal reports can be seen in posts made on the Disability News Service at www.disabilitynewsservice.com/tag/pip/ and the Inclusion London submission to the March 2017 Select Committee Inquiry, Inclusion London, 'Written evidence from Inclusion London (PIP0013)', Apr 2017, <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/work-and-pensions-committee/personal-independence-payment/written/69130.pdf> (accessed 11 Nov 2017).
- 21 Anecdotal reports currently seem to be most common for PIP assessments. Nevertheless, incorrect observations and incorrect factual recording of claimants' history are each reported for half of the 37 WCA cases investigated in Citizens Advice, *Right First Time?*. More recently, Labour MP Louise Haigh in early 2016 reported anecdotal evidence of 'factual errors' and 'falsification' in WCA reports on her constituents; see J Pring, 'Maximus "has falsified results of fitness for work tests"', says MP, Disability News Service, 11 Feb 2016, www.disabilitynewsservice.com/maximus-has-falsified-results-of-fitness-for-work-tests-says-mp/ (accessed 11 Nov 2017).

- 22 A Citizen's Advice survey of 111 GPs found that 15 per cent turn down all patient requests for evidence, while three-quarters of those who do provide evidence sometimes charge. The majority charge £10–50, but some said their fees are £100 or above. See Citizens Advice, 'Half of GP surgeries providing patients with medical evidence for ESA appeals charge a fee', 14 May 2014, www.citizensadvice.org.uk/about-us/how-citizens-advice-works/media/press-releases/half-of-gp-surgeries-providing-patients-with-medical-evidence-for-esa-appeals-charge-a-fee/ (accessed 11 Nov 2017). The DWP argues that medical professionals should provide evidence requested by the DWP or Maximus (the ESA 113 form) without charge, although the BMA claims that this depends on whether there is any mention of this in the professional's contract. See BMA, 'Benefits certification and work for Atos', 22 Jul 2013, www.bma.org.uk/advice/employment/fees/benefits-and-work-for-atos (accessed 11 Nov 2017).
- 23 The resource is called the EBM LiMA Repository, part of the computer system through which the assessments are conducted. While this has not been made public, extracts on 'complex regional pain syndrome' and 'cluster headaches' have been made available via FOI requests; see What Do They Know, letter responding to a freedom of information request by DWP Business Management Team, 15 Feb 2013, www.whatdotheyknow.com/request/146840/response/360584/attach/html/2/FOI339%20Response%20Mr%20Collins.pdf.html (accessed 11 Nov 2017), and What Do They Know 'Training and development cluster headaches', response to a freedom of information request by the DWP, 20 Jun 2014, www.whatdotheyknow.com/request/268326/response/662651/attach/html/4/RED%20498i%20MED%20CMEP%20143%20of%20Cluster%20Headaches%20v1%20Final.pdf.html (accessed 11 Nov 2017).

- 24 The problem is that many people with chronic disabilities do not see medical specialists regularly, sometimes because there is little that the specialist can do once someone has been examined and medication has been prescribed, sometimes because they do not want to see specialists, and sometimes because specialist support (particularly mental health support) is not available. This was raised by several oral witnesses and in written evidence provided by the MS Society and Rethink Mental Illness; see Work and Pensions Committee, 'Personal Independence Payment inquiry – publications', 6 Mar 2017, www.parliament.uk/business/committees/committees-a-z/commons-select/work-and-pensions-committee/inquiries/parliament-2015/inquiry4/publications/ (accessed 11 Nov 2017).
- 25 We heard examples of this in our focus groups, and these cases have been reported more widely. For example, the disability charity Mind and the disabled people's organisation Inclusion London argue strongly in their written evidence to the Select Committee inquiry on PIP assessments that assessors use observations unfairly for claimants with fluctuating and hidden impairments (see previous footnote).
- 26 See Work and Pensions Committee, *Employment and Support Allowance and Work Capability Assessments*, HC302, First Report of Session 2014–15, London: House of Commons Work and Pensions Committee, 2014; Expert Working Group on Welfare, *Re-thinking Welfare: Fair, personal and simple*, Edinburgh: Scottish Government, 2014; R Trotter, *A Million Futures: Halving the disability employment gap*, London: Scope, 2014; and S Benstead and E Nock, *Replacing Employment and Support Allowance Part Two: Consultation on a new system*, London: Ekklesia, 2016.
- 27 Litchfield, *An Independent Review of the Work Capability Assessment – Year four*, p 41.

- 28 In 2012, 39 per cent of cases were being appealed, and 34 per cent of these were successful, hence 14 per cent overall were overturned. From claims made from Jan 2013, figures are increasingly affected by the introduction of ‘mandatory reconsideration’ in October 2013, which had the effect of making it harder for claimants to appeal. While in the 2015 calendar year only 9 per cent of cases were appealed, a majority of these (57 per cent) were successful, so 6 per cent of all WCA decisions were overturned. Data taken from the latest (March 2017) WCA statistical release; given the recent drop in the proportion of new claimants being awarded higher payments (see Introduction), the rate of appeals is likely to have risen since 2015.
- 29 A 2012 pilot study of the reasons why WCA decisions were overturned at appeal found that only a tiny proportion (12 per cent) were overturned because of new written evidence. (I exclude the 36 per cent of successful appeals where the judges provided no reason for overturning the original WCA assessment.) The rest were overturned because of ‘cogent oral evidence’ (64 per cent) and ‘different conclusion reached on substantively the same facts’ (24 per cent). See DWP, *Social Security and Child Support Tribunal Hearings: Early analysis of appeals allowed from pilot data*, London: Department for Work and Pensions, 2012.

Similarly, the government has said that the reason for 75 per cent of successful PIP appeals is that new evidence is submitted – but they have since clarified that this is primarily new *oral* evidence (things that the claimant said to the tribunal), and only rarely new medical evidence. See S Ashton, ‘Personal Independence Payments and “additional” evidence’, *Zacchaeus* 2000, 3 Jun 2016, <https://z2k.org/2016/06/personal-independence-payments-and-additional-evidence/> (accessed 11 Nov 2017).

- 30 Among others, this was recommended by Citizens’ Advice, the grassroots disability organisation Spartacus, and in the first independent review of the WCA. See Citizens

Advice, *Right First Time?*; Spartacus Network, *Beyond the Barriers: A Spartacus Network report into Employment Support Allowance, the Work Programme and recommendations for a new system of support*, 2014; and recommendation 8 in M Harrington, *An Independent Review of the Work Capability Assessment*, London: The Stationery Office for the Department of Work and Pensions, 2010.

Since 2013 the DWP has publicised the availability of audio recording, but there is no legal right to do this; instead claimants must request an audio recording in advance, and then either rely on DWP or Maximus equipment or go to great lengths to prove that their recording is tamper-proof. Only a small number of requests to record WCAs are received, of which most – but not all – are agreed. See Disability Rights UK, ‘Audio recording of WCA assessments’, 6 Jun 2013, www.disabilityrightsuk.org/news/2013/june/audio-recording-wca-assessments (accessed 11 Nov 2017), and DWP, ‘Statistics for audio recorded face-to-face WCAs: December 2012 to February 2014’, Dept for Work and Pensions, Jan 2015, www.gov.uk/government/uploads/system/uploads/attachment_data/file/390698/audio-recorded-wca.pdf (accessed 11 Nov 2017).

- 31 The independent WCA reviewer Malcolm Harrington said in the Year Four review said that the quality assurance framework for DWP decision-makers ‘requires that decision makers make justifiable decisions, but there are limited incentives to make “accurate” decisions... The [framework] focuses principally on whether processes have been followed correctly. There is less emphasis on outcomes than on the manner in which decisions have been reached’. See Litchfield, *An Independent Review of the Work Capability Assessment – Year four*, p 54.

The independent PIP reviewer Paul Gray said that he was concerned that the PIP audit ‘focuses too narrowly on the report produced. This is problematic as the relationship between the quality of the assessment report and the

quality of the actual assessment is not well established'. See P Gray, *The Second Independent Review of the Personal Independence Payment Assessment*, presented to Parliament pursuant to section 89 of the Welfare Reform Act 2012, London: Her Majesty's Stationery Office, 2017, p 50.

While most existing WCA quality control mechanisms seem to focus on independent scrutiny of the written report, it seems that sometimes the relationship of the report to the actual claimant is considered.

- 32 The fourth independent review of the WCA recommended that on the grounds of perceived fairness, 'the person being assessed should be able to see what is being written during the assessment'. The update on progress in the following year's review notes that the DWP accepted this in principle, but have not taken this forward primarily because of 'concerns that it might increase the time it takes to complete assessments'. See Litchfield, *An Independent Review of the Work Capability Assessment – Year four*, recommendation 11; and Litchfield, *An Independent Review of the Work Capability Assessment – year five*, p 96.

A similar proposal has been made by two knowledgeable disability activists, to send claimants a draft report before any final decision is made. They found this was supported by an overwhelming majority of disabled people themselves in a recent convenience sample. See S Benstead and E Nock, *Replacing Employment and Support Allowance: Dignity and support, a new sickness benefit*, Ekklesia, unpublished, nd, and Benstead and Nock, *Replacing Employment and Support Allowance Part Two*. A similar proposal has been made for PIP by Rethink Mental Illness in their response to the Select Committee's March 2017 PIP review.

- 33 Because medical evidence was not being used sufficiently, the Court of Appeal in 2013 (largely) ruled that the DWP was failing to make the necessary reasonable adjustments in the WCA application process for people with mental health conditions. While the DWP has issued revised guidance

in April 2017, it makes relatively minor changes. On the Court of Appeal case (widely known as ‘the MM case’) and the latest revision by the Government, see Disability Rights UK, ‘Govt no action on WCA mental health case’, 20 Jan 2014, www.disabilityrightsuk.org/news/2013/december/govt-no-action-wca-mental-health-case (accessed 11 Nov 2017). For a critical response by a disability activist see J Pring, ‘DWP pilot failure on WCA “calls into question willingness to learn from suicides”’, Disability News Service, 18 May 2017, www.disabilitynewsservice.com/dwp-pilot-failure-on-wca-calls-into-question-willingness-to-learn-from-suicides/ (accessed 11 Nov 2017).

- 34 For example, see the five independent reviews of the WCA; Work and Pensions Committee, *Employment and Support Allowance and Work Capability Assessments*; and Citizens Advice, *Not Working: CAB evidence on the ESA work capability assessment*, London: Citizens Advice, 2010.
- 35 Harrington said, ‘A consensus has clearly emerged. There should be a requirement in *every* claim to consider seeking further documentary evidence and, if that evidence is not sought, then the decision not to should be justified’ (M Harrington, *An Independent Review of the Work Capability Assessment – Year three*, London: The Stationery Office for the Department of Work and Pensions, 2012, p 22).
- 36 This is contained in *Decision Makers’ Guide*, update 28 Apr 2017, in response to the legal obligations (and independent review recommendations) to collect further medical evidence; see DWP, ‘ESA: further evidence of LCW’ in DWP, *Decision Makers’ Guide*, Dept for Work and Pensions, memo DMG 13/17, 28 Apr 2017, www.gov.uk/government/uploads/system/uploads/attachment_data/file/613996/m-13-17.pdf (accessed 11 Nov 2017).

- 37 The Year Four Litchfield review said that the DWP should ‘work with BMA to develop and co-design a revised electronic ESA113 with the aim of simplifying the process for GPs and improving the quality of evidence available’. However, the Year Five review notes there has been ‘limited progress. DWP has met with BMA... with plans to explore an electronic version in 2015. But this is not co-design.’ See Litchfield, *An Independent Review of the Work Capability Assessment – year four*, recommendation 25, and Litchfield, *An Independent Review of the Work Capability Assessment – year five*. See also Work and Pensions Committee, *Employment and Support Allowance and Work Capability Assessments*, no 26.
- 38 The Year Four Litchfield Review recommended that ‘the assessor should avoid reporting inferences from indirect questioning as factual statements of capability’. The Work and Pensions Select Committee echoed this recommendation, and assessors ‘instead... use follow-up questions to ensure that they fully understand the impact of a health condition or disability on a claimant’s functionality’. See Litchfield, *An Independent Review of the Work Capability Assessment – Year four*, and Work and Pensions Committee, *Employment and Support Allowance and Work Capability Assessments*. For earlier examples see Citizens Advice, *Not Working*.
- 39 The job clarification process (Jobafklaringsforløbet) was introduced in Denmark in 2013. It is for people who have exhausted their sickness benefit and are not entitled to an extension because their work ability is not clear, and involves a multidisciplinary rehabilitation programme, similar to those who are applying for the disability pension. Summary information in Danish is available from A Larsen, Jobafklaringsforløb, sundhed.dk, 17 Jan 2017, www.sundhed.dk/borger/patienthaandbogen/sociale-ydelser/sociale-ydelser/ydelser/jobafklaringsforloeb/ (accessed 11 Nov 2017).

- 40 Following a change in 2015, claimants are no longer allowed to reapply for ESA six months after their previous WCA. The only grounds for reapplying for ESA following a failed WCA are a significant worsening of the health condition such that it is 'fair to assume' that they would now be granted ESA, or that the claimant now has a completely new health condition; see CPAG, 'ESA and significant worsening', Child Poverty Action Group, Jun 2015, www.cpag.org.uk/content/esa-and-significant-worsening (accessed 11 Nov 2017) and the report by the Social Security Advisory Committee, *The Employment and Support Allowance (Repeat Assessments and Pending Appeal Awards) (Amendment) Regulations 2015 (S.I. 2015 No. 437)*, 2015, www.gov.uk/government/uploads/system/uploads/attachment_data/file/409456/esa-repeat-assessment-regs-sac-report-web.pdf (accessed 11 Nov 2017).
- 41 The recommendation stated in more general terms, 'feedback from the First-Tier Tribunal should be routinely shared with Jobcentre Plus staff and Atos healthcare professionals'. The third review noted that some very limited one-line reasoning was being made available, but that providing further detail was primarily a decision for the Tribunal Service rather than DWP. See Harrington, *An Independent Review of the Work Capability Assessment*. The National Audit Office has similarly recommended that DWP needs to better understand the reasons for successful appeals; see National Audit Office, *Contract Management of Medical Services*, report by the Comptroller and Auditor General, HC 627, Session 2012–13, 18 Oct 2012.
- 42 For each vignette, respondents were asked, 'Does [name] deserve to receive support from the government while [he/she] is out of work?' and 'How easy or difficult would it be for [name] to get a job if they wanted one?' These were moderately strongly correlated ($r=0.48$), and many of the characteristics of the vignettes had a similar impact on both (eg the symptoms that people reported, their age, gender, and how long their symptoms have lasted).

However, whether people were to blame for their condition (through obesity or addiction) had a much stronger influence on perceptions of deservingness than work capability, as did whether they had been diagnosed by a doctor, and their recent work history (see also below). Conversely, having a degree was more likely to raise a person's perceived chance of working than reduce their deservingness of receiving benefits.

- 43 See W Van Oorschot and F Roosma, 'The social legitimacy of targeted welfare and welfare deservingness' in W Van Oorschot et al. (eds), *The Social Legitimacy of Targeted Welfare: Attitudes to welfare deservingness*, Cheltenham: Edward Elgar, 2017, also available online at <https://econpapers.repec.org/paper/hdlimprov/1511.htm> (accessed 11 Nov 2017).
- 44 78 per cent of WRAG claimants and 74 per cent of the Support Group have claimed for 2 or more years, compared with only 17 per cent of JSA claimants who have claimed for that long. Great Britain official data for August 2016 (the latest available for ESA claimants) taken from Stat-Xplore (ESA) and nomis (JSA), 5 May 2017.
- 45 PIP was formerly DLA. DLA and PIP do not cover all the costs for everyone, so ESA ends up partly covering them in practice, for two reasons. First, not all ESA claimants receive PIP – either because they fail to claim, or they would not be eligible (because there is quite a high threshold before people qualify). The technical annex to the green paper (DWP and DoH, *Improving Lives*) shows that just under half of ESA (or similar) claimants receive PIP or DLA (48 per cent of all claimants, and 47 per cent of WRAG claimants; see Tables 4c and 4d). Second, even for people who get PIP/DLA, this is a contribution towards their extra costs, rather than fully covering them. Scope research suggests disabled people's extra costs are £550 per month on average, whereas the average PIP or DLA award is £360 per month. See E Brawn, *Priced Out: Ending the financial penalty of disability by 2020*, London: Scope, 2014.

- 46 See Citizens Advice, *Not Working*; Work and Pensions Committee, *Employment and Support Allowance and Work Capability Assessments*; and Litchfield, *An Independent Review of the Work Capability Assessment – year five*.
- 47 The DWP cites something called the evidence-based review as evidence that the descriptors cannot be improved. This compared the performance of the WCA against alternative descriptors created by a group of disability charities (see www.gov.uk/government/publications/work-capability-assessment-evidence-based-review (accessed 11 Nov 2017)). However, the ‘correct’ decisions in the evidence-based review were made by an expert group, and it is unclear on what basis they made them; this simply provides further evidence that the WCA reflects expert opinion, without providing a more transparent justification. One of the few things that we know about the expert decisions for the evidence-based review is that it made seemingly unreasonable assumptions about employer behaviour; see note 74. The Work and Pensions Select Committee is similarly sceptical about the value of the evidence-based review; see Work and Pensions Committee, *Employment and Support Allowance and Work Capability Assessments*, point 58.
- 48 A hat-tip to Elina Rigler for noting this; the original source is Technical Working Group, *Transformation of the Personal Capability Assessment: Technical Working Group’s phase 2 evaluation report*, Department for Work and Pensions, 2007, p 4. Elina Rigler points out that a similar claim was made for the WCA’s predecessor, the All-Work Test (later renamed the Personal Capability Assessment). It was claimed in the House of Lords debates – before the test was finalised – that the activities will be ‘those necessary to perform the 100 most common jobs in the economy. These jobs are drawn from the Labour Force Survey, classified according to standard occupational classification, and between them cover nearly three-quarters of all the jobs in the UK economy. It can therefore hardly be said that the test is unreasonable.’ See *Hansard*, HL Deb, 21 April 1994,

vol 554, cols 287–346, http://Hansard.millbanksystems.com/lords/1994/apr/21/social-security-incapacity-for-work-bill#column_325 (accessed 11 Nov 2017).

- 49 British Psychological Society, *Call to Action on Work Capability Assessment Reform*, Leicester: British Psychological Society, 2016.
- 50 The claim that around half of disabled people have two or more impairments comes from a new analysis of the Health Survey for England in 2014, a nationally representative survey of the household population in England; further details are available at <https://digital.nhs.uk/catalogue/PUB19295> (accessed 11 Nov 2017). People were asked if their longstanding health condition affected them in any of nine domains (vision, hearing, mobility, dexterity, learning or understanding or concentrating, memory, mental health, stamina or breathing or fatigue, and socially or behaviourally). Of those aged 18–64 reporting limitations in at least one domain, 53 per cent reported limitations in multiple domains. These domains are not exactly the same as the WCA categories, but if anything it seems likely that the greater number of categories in the WCA would lead to even higher figures there. While being slightly further away from the WCA descriptors, a DWP study has similarly shown that two-thirds of claimants have multiple health conditions, rather than just a single condition; see P Sissons, H Barnes and H Stevens, *Routes onto Employment and Support Allowance*, research report 774, London: Department for Work and Pensions, 2011.
- 51 See eg Citizens Advice, *Not Working*.
- 52 See eg C Hale, *Fulfilling Potential? ESA and the fate of the Work-Related Activity Group*, London: Mind and the Centre for Welfare Reform, 2014, pp 14–16, and p 25 of the MS Society’s response to DWP and DoH, *Improving Lives*, available at www.msociety.org.uk/ms-resources/our-response-improving-lives-work-health-and-disability-green-paper (accessed 11 Nov 2017).

- 53 The grassroots disabled people's organisation Spartacus has gone further than any other in drawing on international evidence to show that assessing work capability directly (and even undertaking real-world assessments) are possible: see Spartacus Network, *Beyond the Barriers*, as well as the pending report, Benstead and Nock, *Replacing Employment and Support Allowance*. While *Beyond the Barriers* provides more detail than most on how a new assessment could look, it does not say exactly how work capability could be assessed, other than by getting an expert to try to think of three jobs that the claimant could do, similar to the expert assessment model that I review in this section. While this is a crucial contribution to the debate, the problem remains that, as Harrington put it, the proposal 'for a more realistic assessment of ability for work lacked any information on what objective, measurable and fair criteria could be used to assess "employability"'. See M Harrington, *An Independent Review of the Work Capability Assessment – Year two*, London: The Stationery Office for the Department of Work and Pensions, 2011.

Other organisations have provided even less evidence on how an assessment of work capability could be implemented. For relatively recent examples see Lord Low of Dalston, Baroness Meacher and Baroness Grey-Thompson, *Halving The Gap? A review into the government's proposed reduction to Employment and Support Allowance and its impact on halving the disability employment gap*, London: Disability Benefits Consortium, 2015, and Trotter, *A Million Futures*. Calls to rethink the WCA pre-2014 are listed in Baumberg et al. *Rethinking the Work Capability Assessment*.

- 54 The two reviews are: Harrington, *An Independent Review of the Work Capability Assessment*, and Harrington, *An Independent Review of the Work Capability Assessment – Year two*.
- 55 J Bickenbach J et al. *Assessing Disability in Working Age Population: A paradigm shift, from impairment and functional limitation to the disability approach*, Washington DC: World Bank, 2015.

- 56 Clare Bambra is Professor of Public Health (see @ProfBambra and www.ncl.ac.uk/ihs/staff/profile/clarebambra.html#background) and Jon Warren is a senior research associate, both at Newcastle University. Kayleigh Garthwaite is now a Birmingham Fellow in the Department of Social Policy, Sociology and Criminology at the University of Birmingham (see @KA_Garthwaite and www.birmingham.ac.uk/staff/profiles/social-policy/garthwaite-kayleigh.aspx).
- 57 Building on the findings of Baumberg et al. *Rethinking the Work Capability Assessment*, the full analysis is contained in Geiger et al. 'Assessing work disability for social security'.
- 58 See S Brage, D Konráðsdóttir and G Lindenger, 'Work disability evaluation' in R Escorpizo et al.(eds), *Handbook of Vocational Rehabilitation and Disability Evaluation: Application and implementation of the ICF*, New York: Springer, 2015; and FG Slebus et al. 'Work-ability evaluation: a piece of cake or a hard nut to crack?', *Disability and Rehabilitation* 29, no 16, 2007, pp 1295–3000.
- 59 J Barth et al. 'Inter-rater agreement in evaluation of disability: systematic review of reproducibility studies', *British Medical Journal*, Jan 2017, p 356.
- 60 WE de Boer et al. 'Interviews for the assessment of long-term incapacity for work: a study on adherence to protocols and principles', *BMC Public Health* 9, no 1, 2009, p 169, and WE de Boer et al. 'Evidence-based guidelines in the evaluation of work disability: an international survey and a comparison of quality of development', *BMC Public Health* 9, no 1, 2009, p 349.
- 61 The evidence on standardisation in Barth et al.s review is not compelling. See the discussion in Geiger et al. 'Assessing work disability for social security', pp 5–6.

- 62 W Jackson, *Strategic Review of Job Capacity Assessments Program: Report to the Australian Government*, cabinet paper released under freedom of information, 2009.
- 63 DSS, *Guide to Social Security Law*, version 1.227, Canberra: Australia Government Department of Social Services, 7 Nov 2016, <http://guides.dss.gov.au/guide-social-security-law> (accessed 12 Jun 2016).
- 64 From expert interviews and D Caswell and HB Kleif, 'Disability pensions and active labor market policy', *Journal of Social Service Research* 39, no 4, 2013, pp 572–84.
- 65 M Lauth, 'Kommune om praktik med seng: man skal finde sin spidskompetence' ['Municipality's internship with a bed: you need to find your core competence'], *Avisen*, 25 Jul 2015, www.avisen.dk/kommune-om-praktik-med-seng-man-skal-finde-sin-spids_335972.aspx (accessed 6 Dec 2016).
- 66 DSS, *National Disability Employment Framework: Consultation report*, Canberra: Australia Government Department of Social Services, 2015.
- 67 Almost every proposal around the WCA has argued that there should be a greater link with employment support, even if they do not agree on what form this should take. For example, compare the Labour disability manifesto's commitment to 'a personalised, holistic process which provides each individual with a tailored plan, building on their strengths and addressing barriers', from Labour, *Nothing About You Without You: A manifesto with and about disabled people*, 2017, <https://labour.org.uk/wp-content/uploads/2017/10/manifesto-for-disabled-people-1.pdf> (accessed 11 Nov 2017), with the scheme outlined by one of Iain Duncan Smith MP's former special advisers in C Pickles et al. *Working Welfare: A radically new approach to sickness and disability benefits*, London: Reform, 2016.

- 68 A fierce critique of the history of vocational rehabilitation in Britain can be found in R Grahame, 'The decline of rehabilitation services and its impact on disability benefits', *Journal of the Royal Society of Medicine* 95, no 3, 2002, pp 114–17. There have been nevertheless some improvement since; A Frank, 'Vocational rehabilitation: supporting ill or disabled individuals in (to) work: a UK perspective', *Healthcare* 4, no 3, 2016, p 46.
- 69 A full list of sources is provided in my full paper, but key introductory sources on CBBS include JPJ Broersen et al. 'The identification of job opportunities for severely disabled sick-listed employees', *BMC Public Health* 12, 2012, p 156; F Pennings, 'The new Dutch disability benefits act: the link between income provision and participation in work' in S Devetzi and S Stendahl (eds), *Too Sick to Work? Social security reforms in Europe for persons with reduced earnings capacity*, Alphen aan den Rijn: Kluwer Law International, 2011; AJ Schellart et al. 'Inter-doctor variations in the assessment of functional incapacities by insurance physicians', *BMC Public Health* 11, no 1, 864, 2011.
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- 71 Litchfield, *An Independent Review of the Work Capability Assessment – Year five*, pp 82–3.
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- 73 Baumberg et al. *Rethinking the Work Capability Assessment*, p 25.

- 74 In Baumberg et al. *Rethinking the Work Capability Assessment*, we quote recent debates, but the issues can be seen even more clearly in the debates about the 1994 Act that led to the replacement of Invalidity Benefit with Incapacity Benefit. For example, the Labour MP Keith Bradley argued that ‘it is nothing short of cruel that people found to be capable of work on functional grounds should be expected to find employment when there is no work for them to do’. The Conservative Minister William Hague countered that taking account of real-world factors ‘would mean that incapacity benefit would be paid to people because they are unemployed rather than incapable of work’. These quotations are taken from Elina Rigler’s post at E Rigler, ‘How can we assess work capability in the “real world”?’ blog, *Rethinking Incapacity*, 31 Aug 2016, www.rethinkingincapacity.org/mean-assess-work-capability-real-world/ (accessed 11 Nov 2017). The original quotes are available at *Hansard*, HC Deb, 2 Feb 1995, vol 253, cols 1233–74, http://Hansard.millbanksystems.com/commons/1995/feb/02/social-security#S6CV0253Po_19950202_HOC_284 (accessed 11 Nov 2017) and http://Hansard.millbanksystems.com/commons/1995/feb/02/social-security#S6CV0253Po_19950202_HOC_242 (accessed 11 Nov 2017).
- 75 DWP and DoH, *Improving Lives* (para 135).
- 76 The UK Commission for Employment and Skills would have been the logical body to lead this data collection, but it was closed in March 2017, with responsibility for the Employer Skills Survey passing to the Department for Education. See R Halfon, ‘Update on the UK Commission for Employment and Skills: written statement – HCWS121’, Dept for Education, 21 Jul 2017, www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2016-07-21/HCWS121/ (accessed 11 Nov 2017).

- 77 This was stated by Baroness Cumberledge in the House of Lords (seemingly in her role as Parliamentary Under-Secretary of State in the Department of Health). See *Hansard*, HL Deb, 21 Apr 1994, vol 554, cols 287–346, http://Hansard.millbanksystems.com/lords/1994/apr/21/social-security-incapacity-for-work-bill#column_325.
- 78 See Select Committee on the Equality Act 2010 and Disability, *The Equality Act 2010: The impact on disabled people*, report of Session 2015–16, London: House of Lords Select Committee on the Equality Act 2010 and Disability, 2016.
- 79 It seems that the experts who designed the WCA assumed that everyone’s employer would make multiple adjustments *and* provide a support worker (this was implied by the report of the evidence-based review of changes to the WCA; see Baumberg et al. *Rethinking the Work Capability Assessment*, pp 31–2). Several disability charities have argued this is unfair. As Lord Swinfen put it in the Incapacity for Work Act 1994 debate, ‘It should be the requirements of an average employer which is the yardstick... People who could only work for an ideal, altruistic employer, who is willing for staff to work when they feel up to it, should not be regarded as capable of work’, cited in Rigler, ‘How can we assess work capability in the “real world”?’ The original text is available from *Hansard*, HL Deb, 21 April 1994, vol 554, cols 287–346, http://Hansard.millbanksystems.com/lords/1994/apr/21/social-security-incapacity-for-work-bill#column_294 (accessed 11 Nov 2017).
- 80 In the *Rethinking Incapacity* survey, majorities supported making employers ‘move the employee to a more suitable job in the same organisation’ (67 per cent), ‘allow regular working from home (if possible in the job)’ (65 per cent), ‘allow reduced and/or flexible hours’ (64 per cent), ‘change duties to only include tasks they can still do’ (61 per cent), and ‘allow health-related time off that doesn’t count towards ‘sickness absence’ (54 per cent). There was even widespread (if not quite majority) support for making

employers ‘reduce workload to allow more time to perform certain tasks’ (43 per cent). Further results will be available later in 2017 from the 2016 British Social Attitudes survey, which asked a similar question.

- 81 3 per cent of WRAG claimants were sanctioned in 2014/15; D Webster, *The DWP’s JSA/ESA Sanctions Statistics Release*, briefing, 17 Feb 2016, London: Child Poverty Action Group, 2016.
- 82 D Webster, *Benefit Sanctions Statistics: JSA, ESA and Universal Credit February 2017*, briefing, London: Child Poverty Action Group, 2017.
- 83 UK disability sanctioning data was obtained from the Department of Work and Pensions (DWP)’s Stat-Xplore tool (<https://sw.stat-xplore.dwp.gov.uk/webapi/jsf/login.xhtml>), with ESA sanctioning data being downloaded on 11 Sep 2016, and JSA sanctioning data on 29 Mar 2017. According to Freedom of Information request 2013–2901, the disability measure in JSA reflects that a person can self-declare in the Jobcentre whether or not they consider themselves to ‘have a physical or mental impairment which has a substantial and long-term effect on their ability to carry out normal day to day activities’; see ‘Freedom of information request 2013–2901’, gov.uk, 12 Jul 2013, www.gov.uk/government/uploads/system/uploads/attachment_data/file/212228/foi-2901-2013.pdf (accessed 11 Nov 2017).
- 84 The adviser in questions is Charlotte Pickles, who was an advisor to Iain Duncan Smith MP as Secretary of State in DWP 2010–15. The quote is from Pickles et al. *Working Welfare*, p 41. The green paper does not explicitly make this case, but notes that introducing conditionality would ‘avoid the current situation where someone’s entitlement to additional financial support can also result in them being given no employment support’. See DWP and DoH, *Improving Lives*.

- 85 A good overview of arguments for and against conditionality is given in B Watts et al. *Welfare Sanctions and Conditionality in the UK*, York: Joseph Rowntree Foundation, 2014.
- 86 This was the final focus group with 21 people, including Conservative and Labour MPs, civil servants from the DWP, disability charity staff, welfare-to-work providers, academics and medical professionals.
- 87 The most notable contribution has been by Matt Oakley, who previously conducted a review of sanctions for the Government. Oakley did recommend that sanctions should only be applied for non-attendance at an initial meeting – but he went on to suggest that there should also be a positive incentive (the ‘step to work wage’), which would be conditional on meeting commitments set by a work coach. See M Oakley, *Closing the Gap: Creating a framework for tackling the disability employment gap in the UK*, London: Social Market Foundation, 2016.
- 88 The Support for the Very Long-Term Unemployed (SVLTU) Trailblazer was a randomised trial of a combination of support (either a work placement or intensive case management) and conditionality (compliance interview and frequent signing-on), among long-term JSA claimants. The number of days in work of JSA claimants who self-reported as disabled increased in the following 2 years, but there was no impact on employment at the end of the follow-up period. See DWP, *Support for the Very Long Term Unemployed Trailblazer: Longer term analysis of benefit impacts*, ad-hoc statistical analysis 2013, quarter 4, London: Department for Work and Pensions, 2013.
- 89 A randomised trial of the Personal Roads to Individual Development and Employment (PRIDE) program in New York – a combined support and conditionality intervention for disabled recipients of Temporary Assistance for Needy Families (TANF), excluding the most disabled claimants – resulted in a noticeable increase in employment. However,

most people still never had a job across 4 years (the increase in being employed *at all* over 4 years was from 40 per cent to 45 per cent, and the number employed for four successive quarters from 20 per cent to 25 per cent), and total income barely changed (increases in earnings were outweighed by losses in cash assistance). Sanctioning was also much more common than employment outcomes (the number sanctioned at least once over 2 years rose from 8 per cent to 32 per cent). See D Butler et al. *What Strategies Work for the Hard-to-Employ? Final results of the Hard-to-Employ Demonstration and Evaluation Project and selected sites from the Employment Retention and Advancement Project*, OPRE report 2012–08, Washington DC: Office of Planning, Research and Evaluation, Administration for Children and Families, US Department of Health and Human Services, 2012.

- 90 A report by the think-tank Reform called for greater conditionality for disabled benefit claimants, arguing that ‘there is some evidence of effectiveness for claimants with health conditions where conditionality has been applied’ (Pickles et al. *Working Welfare*). Their main evidence for this is the Pathways to Work initiative, the Labour government’s 2003 trial requiring incapacity benefit claimants to attend a work-focused interview (supplemented by considerable investment in a wider package of support), where sanctioning was very rare and relatively minor. While earlier evaluations were primarily positive, later evaluations were not, and the National Audit Office ultimately branded the initiative a failure. See National Audit Office, *Support to Incapacity Benefits Claimants through Pathways to Work*, Comptroller and Auditor General, HC 21, Session 2010–11, London: The Stationery Office, 2010.
- 91 OECD, *Sickness, Disability and Work: Breaking the barriers, a synthesis of findings across OECD countries*, Paris: Organisation for Economic Co-operation and Development, 2010.

- 92 Geiger, 'Benefits conditionality for disabled people'.
- 93 These are: in Sweden, P Engström, P Hägglund and P Johansson, 'Early interventions and disability insurance: experience from a field experiment', *Economic Journal*, 2017, in press; (in Denmark, K Rehwald, M Rosholm and B Rouland, *Does Activating Sick-Listed Workers Work? Evidence from a randomized experiment*, Bonn: Institute for the Study of Labor (IZA), 2015; in Norway, Markussen S, Roed K and Schreiner RC, *Can Compulsory Dialogues Nudge Sick-Listed Workers Back to Work?*, IZA discussion paper 9090, Bonn: Institute for the Study of Labor (IZA), 2015), and in Australia, B Broadway, A Chigavazira and S Kassenboehmer, *Labour Force Potential of Disability Support Pension Recipients*, Melbourne: Melbourne Institute of Applied Economic and Social Research, 2014.
- 94 The methodologically weaker study is A Reeves, 'Does sanctioning disabled claimants of unemployment insurance increase labour market inactivity? An analysis of 346 British local authorities between 2009 and 2014', *Journal of Poverty and Social Justice* 25, no 2, 2017. The methodologically stronger study is National Audit Office, *Benefit sanctions: Report by the Comptroller and Auditor General*, HC 628, London: National Audit Office, 2016.
- 95 Geiger, 'Benefits conditionality for disabled people'.
- 96 Almost one-third of destitute people in the UK said they had been sanctioned in S Fitzpatrick et al. *Destitution in the UK*, York: Joseph Rowntree Foundation, 2016. A UK area-based study found that increased sanctioning of unemployment benefit claimants led to greater food bank use; R Loopstra et al. 'The impact of benefit sanctioning on food insecurity: a dynamic cross-area study of food bank usage in the UK', *Sociology working paper 2016-03*, Oxford: Department of Sociology, University of Oxford, 2016.

- 97 P Dwyer et al. *First Wave Findings: Disability and conditionality*, York: University of York, ESRC Welfare Conditionality Project, 2016, and Inclusion London, Written evidence to House of Commons Committee of Public Accounts, for their report into ‘benefit sanctions’, 2016, <http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Public%20Accounts/Benefit%20sanctions/written/44101.html> (accessed 29 Mar 2017).
- 98 Disabled unemployment and disability benefit claimants in a large-scale piece of qualitative research regularly referred to the anxiety-inducing effects of conditionality; see Dwyer et al. *First Wave Findings*, and J McNeill et al. ‘Welfare conditionality and disabled people: claimants’ perspectives’, *Journal of Poverty and Social Justice* 25, no 2, 2017. Similarly, 85 per cent of WRAG claimants in one non-representative survey reported feeling anxious about sanctions; see Hale, *Fulfilling Potential?* There are even several anecdotal reports in the UK of claimants dying from suicide or heart attacks while being subject to conditionality, although the extent to which conditionality can be blamed for these individual cases is contested; see P Butler and J Pring, ‘Suicides of benefit claimants reveal DWP flaws, says inquiry’, *Guardian*, 13 May 2016, www.theguardian.com/society/2016/may/13/suicides-of-benefit-claimants-reveal-dwp-flaws-says-inquiry (accessed 11 Nov 2017).
- 99 Data are taken from a DWP FOI release; the full calculation and sources are given in web appendix 1 of Geiger, ‘Benefits conditionality for disabled people’. Equivalent figures for 2015–17 are not currently available.
- 100 The official government review of sanctions is M Oakley, *Independent Review of the Operation of Jobseeker’s Allowance Sanctions Validated by the Jobseekers Act 2013*, London: HMSO, 2014. There is greatest attention to sanctioning in Work and Pensions Committee, *Benefit Sanctions Policy Beyond the Oakley Review*, House of Commons Work and

Pensions Select Committee, Fifth Report, London: TSO, 2015. It is also covered in several other reports such as Public Accounts Committee, *Benefit Sanctions*, London: House of Commons Committee of Public Accounts, 2016. The major qualitative academic study is the ESRC-funded welfare conditionality project, Dwyer et al. *First Wave Findings*, which interviewed 56 disabled unemployment and disability benefit claimants, of which 21 reported being sanctioned. The evidence from disability and social welfare charities and campaigners can best be seen in the submissions to the aforementioned Oakley review and parliamentary select committees, as well as the submissions to DWP and DoH, *Improving Lives*.

- 101 This is the convenience sample of 500 WRAG claimants by Catherine Hale. See Hale, *Fulfilling Potential?*
- 102 Astonishingly, until 2015 JSA claimants were only allowed to be sick for two weeks at a time, and the benefits director of DWP admitted that advisers were often not aware that they could change the standard JSA conditionality requirements to better reflect people's health. See Work and Pensions Committee, *Employment and Support Allowance and Work Capability Assessments*. In March 2015 this was changed, but sickness on JSA is still capped at 13 weeks. See DWP, *Touchbase*, Dept for Work and Pensions, Mar 2015, www.gov.uk/government/uploads/system/uploads/attachment_data/file/417850/touchbase-mar-15.pdf (accessed 11 Nov 2017).
- 103 Anecdotal complaints about the quality and appropriateness of support can be seen in the case studies by McNeill et al. 'Welfare conditionality and disabled people', in a special issue that I edited. More systematically, employment outcomes for disabled people have been found to be poor. See Public Accounts Committee, *The Work Programme*, London: House of Commons Public Accounts Select Committee, 2014.

- 104 Jobcentre staff have sometimes been monitored against performance standards that included sanctioning rates. See PCS, *Supplementary Written Evidence Submitted by Public and Commercial Services Union (PCS) to inquiry 'Benefit sanctions policy beyond the Oakley review'*, SAN0161, London: House of Commons Work and Pensions Select Committee, 2014. While not formally a 'target', this nevertheless seems to have strongly influenced the behaviour of frontline staff to sanction claimants even if they did not judge this would help move them towards work.
- 105 National Audit Office, *Benefit sanctions*.
- 106 As concerns about the sanctioning of disabled people on JSA and ESA rose in 2012, doctors became ever-more likely to tell the DWP that their patient's mental health would be at risk, and the proportion of WCAs where people were placed in the Support Group because of this risk rose from 5 per cent at the start of 2011 to 30 per cent in early 2015. However, from a DWP perspective the exceptional circumstances safeguard was not intended to be used in this way, and there were concerns at the increasing numbers of claimants being placed in the Support Group. In late 2015, the DWP therefore circulated new guidance that not only raised the bar for 'substantial risk', but also emphasised that 'claimants must not be asked by DWP to do anything that is unrealistic or could put their health at risk'. Since then, the share of WCAs that go to the Support Group because of the substantial risk regulations has gone down to 9 per cent of completed claims, and greater numbers of disabled people are having to deal with conditionality requirements on both ESA and JSA. Figures are an updated analysis (to June 2016, from the March 2017 statistical release) of results presented in more detail at Baumberg, 'The return of the stricter WCA?', figure 3. The blog post also presents details of the changes in the DWP substantial risk guidance.
- 107 DWP and DoH, *Improving Lives*.

- 108 Geiger (2017), 'Benefits conditionality for disabled people'.
- 109 Data from 2010 taken from Eurostat Labour Market Policy database (<http://ec.europa.eu/eurostat/web/labour-market/labour-market-policy/database>), downloaded 13 Aug 2017.
- 110 Sanctioning practices seem to vary by municipality; some municipalities do not even threaten sanctions as they feel this is counterproductive, others use threats for those who are not motivated to participate in the rehabilitation process. Even in the latter case, municipalities rarely impose sanctions. See L Mehlsen et al. *Ressourceforløb: Koordinatorende sagsbehandlere og borgeres erfaringer* [*Resource Activation: Coordinating caseworkers' and citizens' experiences*], SFI report 15:39, Copenhagen: SFI, 2015.
- 111 NVVG, *Verzekeringsgeneeskundige Protocolen: Participatiegedrag* [*Medical Insurance Protocols: Participation behaviour*], Utrecht: NVVG [Dutch Association of Insurance Medicine], 2010.
- 112 We did not specify the timescale to avoid making the question too complex to answer, but it seems likely from the focus groups wanted these sanctions to last until the claimant started complying again; we assume that people would have been even further away from Government policy if we said that any sanctions would last for weeks or months.
- 113 In 2011, the BSA survey asked, 'Which of the statements on this card comes closest to what you think should happen to disabled people's benefits if they do not take active measures to find appropriate work?'. The responses were that their benefits 'not be affected' (24 per cent), 'should be reduced a little' (39 per cent), 'should be reduced a lot' (14 per cent), 'should be stopped' (12 per cent) or some other answer (11 per cent, 'it depends' or 'don't know').
- 114 As suggested by Pickles et al. *Working Welfare*.

- 115 DWP and DoH, *Improving Lives*.
- 116 ‘A ‘keep in touch’ discussion could help claimants who would like to take steps towards work to access support. We are concerned, however, about the green paper’s suggestion of applying conditionality to people in the ESA Support Group. We recommend that any steps to engage the Support Group are introduced on a voluntary basis, and are led by the needs of individual claimants’; see Work and Pensions Committee, *Disability Employment Gap*, Seventh Report of Session 2016–17, London: House of Commons Work and Pensions Committee, 2017, point 27.
- 117 Dorsett R, *Pathways to Work for New and Repeat Incapacity Benefits Claimants: Evaluation synthesis report*, research report 525, London: Department for Work and Pensions, 2008.
- 118 One option would be to put claimants into the Work-Focused Interview Only Group (which currently is not available on the grounds of disability, instead being used for those with substantial caring responsibilities). An alternative would be to put claimants into the Work Preparation Group, but to change work coach guidance so that only a standard commitment to move towards work is made, and the discussion instead focuses on non-binding, voluntary aspirations within the claimant commitment.
- 119 The government is bringing in a new ‘health and work conversation’ for ESA claimants before the WCA, intended to help people ‘to identify their health and work goals, draw out their strengths, make realistic plans, and build resilience and motivation’ (paragraph 92 of DWP and DoH, *Improving Lives*). The green paper says that the actions they subsequently agree to within the conversation ‘will be entirely voluntary in the period *before the Work Capability Assessment*’ (italics added) – which suggests that the claimant commitment (containing the agreed actions) will not result in sanctions at first. However, it implies that the conversation will force people to take these steps after

the WCA, and (when the WCA is fully separated from conditionality) that this will become mandatory for most claimants in the longer term, which is not the approach recommended here.

- 120 The lowest-level sanctions for Universal Credit are 40 per cent of the normal benefit rate, but these are currently only used for people in the Work-focused Interview Requirement Only Group (currently reserved for carers), and everyone else can be sanctioned for their full benefit for up to 3 years. It is recommended that their use is extended here, as they are much closer to the public's view of the appropriate level of sanctioning for disabled benefit claimants than the other levels of Universal Credit sanctions.
- 121 Within Universal Credit, while requirements are personalised by the work coach, the scope is determined by the conditionality group that claimants are assigned to: people who would be in the ESA WRAG into the Work Preparation Requirement and Work-focused Interview Group, and people who would be in the ESA Support Group into the No Requirements Group. Before undergoing the WCA, claimants are in the All Requirements Group. However, anyone with a fit note from their GP or doctor is effectively in the Work Preparation Requirements Group (formally they are in the All Work-Related Requirements Group but the Universal Credit Regulations stipulate that no work search or work availability requirements can be imposed. See The Universal Credit Regulations 2013, para 99 (1) and (5)(c), www.legislation.gov.uk/uksi/2013/376/regulation/99/made (accessed 11 Nov 2017).
- 122 GPs are often not the best person for sickness authentication for those with learning disabilities, who are likely to find other healthcare professionals or social workers more knowledgeable and able to write fit notes or equivalent certificates. This follows similar

recommendations by others: see Pickles et al. *Working Welfare*, p 38, and British Psychological Society, *Call to Action on Work Capability Assessment Reform*.

- 123 Respondents were asked, ‘Imagine a benefit claimant that the Jobcentre knows has a diagnosed health condition. They have not turned up to a meeting at the Jobcentre, and don’t have a doctor’s note for that day because they say they weren’t feeling well enough to go to the doctor. Should they have their benefits cut or stopped because they don’t have a doctor’s note?’ Only 22 per cent said their benefit should be cut in this situation, whereas 56 per cent said they should not be.
- 124 See Work and Pensions Committee, *Disability Employment Gap*, chapter 3, and the references and evidence therein.
- 125 DWP and DoH, *Improving Lives*, para 91.
- 126 This is the ‘MM case’: MM and DM v Secretary of State for Work and Pensions, [2013] EWCA Civ 1565, www.bailii.org/ew/cases/EWCA/Civ/2013/1565.html (accessed 11 Nov 2017).
- 127 See Work and Pensions Committee, *Disability Employment Gap*, paras 30–31.

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This report aims to set out how a better WCA is possible. The over-riding aim is legitimacy: that the WCA is not only fair, but is perceived to be fair.

It is based on four pieces of research consisting of a comparative study examining how other countries conduct social security disability assessment, based on 150 documents and 40 expert interviews across nine countries; a new survey of the public, asking 2,000 people detailed questions about both disabled people in general and using vignettes of specific types of disabled people; six focus groups with the public and six focus groups with key actors including Maximus WCA assessors, welfare-to-work providers, disability charity workers and disability activists.

It sets out three sets of recommendations. Firstly, it sets out how the WCA should assess if claimants are 'genuine'. Secondly, it sets out how the WCA should assess if claimants are capable of work. Finally, it sets out how the WCA should assess the conditionality that claimants are subject to – that is, the things they are expected to do under the threat of sanctions. It concludes by arguing that the public often support the imposition of sanctions for disabled people – but not in the form that the government applies them at present.

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