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RESPONSE TO THE CONSULTATION PAPER:

NO ONE WRITTEN OFF: REFORMING WELFARE TO REWARD RESPONSIBILITY

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INTRODUCTION

We have a number of concerns with the proposals in this consultation document. The goal, repeatedly stated throughout the document, is to end poverty (particularly child poverty) through work. However, far from removing the structural barriers that prevent or disincentivise work for many claimants, the proposals instead assume that claimants are not behaving in a responsible manner and seek to punish those who do not (or cannot) comply with work-search requirements. The proposals may reduce the numbers of those claiming benefits but will not necessarily reduce the level of poverty and use of the proposed sanctions will exacerbate poverty by temporarily removing a claimant's only source of income.

Evaluating similar programs in the United States, Joel Berg argues that: "judging the success of welfare reform solely by how many people leave welfare is a bit like judging the success of a hospital by how many people leave it, without differentiating between how many people leave it cured, ill or dead".² In our response we highlight some of the specific problems with these proposals, in particular their adverse and disproportionate impact on already disadvantaged sections of the community, primarily by drawing on research that has been conducted in relation to similar programs in North America. We argue that the government's anti-poverty strategy must pay attention not only to how many people are claiming welfare benefits and what they need to do to leave welfare, but also and more importantly to whether those who are leaving welfare are "cured, ill, or dead". In other words, forcing people to work may, in some circumstances, have a significant detrimental impact on them and their children/dependents. For example, the proposals completely overlook the existence of the working poor. We highlight examples of this in our responses to the specific questions.

Our concerns with the proposals fall under the following headings:

1. Stigmatisation of lone mothers
2. Poverty level benefits
3. Undervaluing and Privatising (Child-)Care Work
4. 'Family responsibility' enforces women's dependence on men

² Berg, J. (2007) 'Welfare Reform: The Promise Unfulfilled' **11** *The Journal of Gender, Race and Justice* 47 at p.47

5. Poverty level and precarious work is not ‘good for you’

1. Stigmatization of lone mothers

We are concerned with the ways in which these proposals contribute to the stigmatization of ‘lone parents’ (mothers) as lazy and unwilling to work, as well as the assumption that mothering is not a full-time job in itself. We are perplexed as to the different treatment of lone mothers compared to other carers, for whom work will not necessarily be required under these proposals. In order to force the sole caretaker of a seven-year-old child to work, the government would need to do much more in terms of childcare provision and mandatory employment protection for mothers. What happens, for example, during the school holidays or when the child is unable to attend school due to illness? Would a lone parent have access to an income when she is temporarily unable to work due to childcare responsibilities in the summer holidays? Would her job (and pay) be protected so that she may return, without detriment to her career, when the child is able to return to school? At the moment, UK law only grants parents the right to *request* flexible working, thereby burdening working mothers with the stress of resolving work/childcare tensions. In view of these and other concerns, our response also highlights the gendered impact of these proposals.

2. Poverty level benefits

We have serious concerns about the likelihood of exploitation under the ‘work for your benefit’ scheme. Who will benefit from the labour that is done, for much less than the minimum wage, by people compelled to work under this scheme? Will the savings made in wage costs be appropriated by private businesses who will then profit from the below minimum wage labour of welfare claimants?

The ‘something for something’ approach offers poverty-level benefits (under constant threat of withdrawal) and a massive increase in control of claimants by the government. There is a discrepancy, for example, between the commitments to listening to the voices of disabled people and respecting their autonomy, seeing them as experts in their own lives, and the level of control that these proposals impose on all claimants, who will be coerced, surveilled and forced to disclose information, such as whether they use certain drugs. We suggest that the latter has serious constitutional and administrative law implications, particularly with regard to the rights guaranteed under the European Convention on Human Rights (articles 8 and 14) and the Human Rights Act 1998 section 6. Article 8 protects private and family life, providing that the government may only interfere with these rights in certain circumstances. In relation to disclosure of medical information the European Court of Human Rights will “consider whether, in the light of the case as a whole, the reasons adduced to justify [the measures] were relevant and sufficient and whether the measures were proportionate to the legitimate aims pursued”.³ We suggest that the proposed requirement for benefit claimants to disclose drug use does not meet this test and may also engage Article 14 (discrimination).

³ *Z v. Finland*, 25 February 1997 (application number 22009/93), at para 94 (emphasis added).

3. Undervaluing and privatising (child-) care work

There is a considerable, and well-established, body of legal scholarship interrogating the gendered effects of recent ‘work/family’ policies at both a domestic and international level.⁴ This critique is based on an investigation of the unvalued nature of the care work that women undertake, and an analysis of how government policies in the field of work, family, and welfare benefits effectively privatise the care burden onto women.

The following two statements by prominent scholars working in this area highlight how punitive welfare regimes interact with insipid work/family policies to push poor women, including lone mothers, further into poverty:

“Recent ‘welfare reforms’ in the USA and the UK, which predominantly affect poor women and their children...are based on the assumptions that participation in formal-sector waged work is the path to individual independence, and that welfare receipt is the path to dependence. This... assumes clear distinctions between formal-sector waged work, informal-sector work, and family work. ***In this, it fails to recognize the complexity of women’s, particularly poor women’s, work***”.⁵

“...the assumption that unpaid workers are not economically related to processes of production and, therefore, at risk of, if not subject to, economic exploitation, is plainly unsustainable. If the current crisis of work and family tells us anything, it tells us that the dichotomy between ‘paid’ and ‘unpaid’ work is a product of legal and social forms which belie their interdependence in the context of productive activities.”⁶

Lone mothers who are not in paid employment, contrary to the rhetoric found in this consultation, *are* economically active. They are performing the economically valuable work of privatised care for children and, often, adults.⁷ The proposals in chapter 2,

⁴ See for example: Conaghan, J. (2004) ‘Women, Work and Family: A British Revolution?’ in Conaghan, Fischl, and Klare (eds) *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* pp. 53-74; Conaghan, J. (2005) ‘Work, Family, and the Discipline of Labour Law’ in Conaghan and Rittich (eds) *Labour Law, Work, and Family* Oxford University Press, pp. 19-42; McGlynn, C. (2005) ‘Work, Family, and Parenthood: The European Union Agenda’ in Conaghan and Rittich (eds) *Labour Law, Work, and Family* Oxford University Press pp. 217-236; Rittich, K. (2005) ‘Equity or Efficiency: International Institutions and the Work/Family Nexus’ in Conaghan and Rittich (eds) *Labour Law, Work, and Family* Oxford University Press pp. 43-78.

⁵ Williams, 2005:197; emphasis added

⁶ Conaghan, 2005, *supra* note 4 at p.42.

⁷ See: Conaghan, 2005, *supra* note 4; Waring, Marilyn (1988) *If Women Counted* (San Francisco: Harper & Row); Sophie Mullin, *Care in a new Welfare Society* (Institute of Public Policy Research, 2007) available at:

which are designed to reduce fiscal strain and promote individual choice, ignore the well-established and documented fact that childcare **is work**.⁸

The following extract illustrates a number of key points about how the proposals in chapter 2, combined with the gendered labour market and the gendered, undervalued and privatised care burden, would increase the financial burden that poor women face:

“...the issue of work/life balance becomes reformulated [in government policy] as a gender-neutral preoccupation with fulfilling individual desires or facilitating lifestyle choices. Women’s need for access to working arrangements which accommodated their family responsibilities becomes represented in terms of individual ‘choices’ by particular women to pursue family and career simultaneously, and the role of the state, in the form of family-friendly policies, becomes the facilitation of that choice (among others). *However, the structural context in which these choices are exercised – including a long-hours work culture, increasingly competitive labour markets, a new emphasis on performance-based pay, declining real wages, weakened bargaining power and greater overall economic insecurity for workers, and most importantly, labour markets that are still deeply stratified by gender and a gendered division of labour at home – remains relatively unprobed and hence undisturbed, despite the fact that it, too, is affected by the regulatory matrix governing work.*”⁹

These points, made by Joanne Conaghan and Kerry Rittich, apply directly to the proposed welfare reforms in chapter 2. First, a group of people who are mostly women are made out to be ‘lone parents’, thereby de-gendering the perceived impact of welfare policy. Second, the proposals are couched in terms of individual responsibility to work, as well as individualised support. This cuts out of the conceptual frame the gendered societal and familial dynamics that lead more women than men to assume caring responsibilities. Third, the proposals entirely ignore the entrenched structural factors that lead to women’s increased poverty and reliance on benefits in the first place, such as a gender segregated labour market that pushes women into the lowest paid jobs and keeps them out of the highest paid jobs, the overall gender pay gap, and employment law policies that still push the financial and personal burden for childcare onto women.

We are opposed to the proposals in chapter 2 because they:

- Ignore and de-value the caring work that low income lone mothers perform;
- Stereotype low income lone mothers as ‘welfare scroungers’ instead of acknowledging their contribution to the economy;

<http://www.ippr.org.uk/publicationsandreports/publication.asp?id=580> (last accessed 18 October 2008)

⁸ See also: Conaghan, J. and Rittich, K. (2005) ‘Interrogating the Work/Family Divide’ in Conaghan and Rittich *Labour Law, Work, and Family* (Oxford University Press) pp. 1-16 at p.10

⁹ *Ibid* (emphasis added).

- Increase the financial and care burden on low-income lone mothers by forcing them into low paid, precarious work.

4. 'Family responsibility' enforces women's dependence on men

Though the government claims that these proposals are modeled on similar programmes in Denmark and the Netherlands (p.38), the punitive approach to lone parents on welfare, and the attempts to increase 'family responsibility' as an anti-poverty strategy bear a striking resemblance to the approach of the US government. This approach has been extensively criticised by US researchers and civil society organisations representing the poor for violating the rights of claimants.¹⁰ The current economic circumstances mean that an approach based on coercion, compulsory work programmes, threats of periods of indigence for non-compliance are not only out of step with rights-based approaches but also completely unworkable.

Though we welcome the proposal to 'write-off' maintenance payments, the proposals in relation to joint birth registration counteract some of the positive policy messages behind this. Introducing legislation that would require unmarried heterosexual parents to jointly register their child's birth¹¹ will not promote the government's stated aims of improving child welfare and promoting parental responsibility, while continuing to protect vulnerable women and children. This policy also effectively marks a reversal of the government's previous position on unmarried biological fathers and parental responsibility.¹² The logic behind the proposal seems to be that if unmarried biological fathers are given the legal rights that flow from birth registration (i.e. parental responsibility), they will become more responsible, and if they do not, they will be easier to trace for maintenance purposes. There is, however, very limited evidence to suggest that unmarried biological fathers will become more responsible simply by being given parental responsibility. Indeed, the government's proposal appears to be based on the results of one small US study.¹³

If the government wishes to promote child support through private responsibility it must not confuse issues of child support liability and the day-to-day realities of parental responsibility and child-care. Nor must it confuse child-care issues with broader issues of child welfare. This proposal also has the effect of shifting the onus from the man to have to show why he should be awarded a parental responsibility order (note that parental responsibility orders are rarely refused) to the woman having

¹⁰ See for example: Hardisty, J. (2008) 'Pushed to the Alter: The Right Wing Roots of Marriage Promotion', *Marriage Promotion Series, Pt 1*, Political Research Associates/Women of Color Resource Centre; Smith, A.M. (2007) *Welfare and Sexual Regulation* (Cambridge: Cambridge University Press); The Kensington Welfare Rights Union, at <http://www.kwru.org/> (last accessed October 10th 2008).

¹¹ Department for Work and Pensions (2007) *Joint Birth Registration: Promoting Parental Responsibility*, Cm. 7160.

¹² Sheldon, S. (2001) 'Unmarried Fathers and Parental Responsibility: A Case for Reform?' *9(2) Feminist Legal Studies* 93

¹³ Mincy, R. Garfinkel, I. and Nepomnyaschy, L. (2005) 'In-Hospital Paternity Establishment and Father Involvement in Fragile Families' *67 Journal of Marriage and the Family* 611

to establish her objection to joint birth registration and the man holding parental responsibility. We would suggest that the law as it currently stands in relation to birth registration better serves vulnerable women and children. Should the government insist on the value of joint birth registration in relation to child welfare and parental responsibility, we urge it to think of options that would promote joint birth registration other than a compulsory legal requirement.

5. Poverty level and precarious work is not 'good for you'

Finally, we question the assumption that “[paid] work is generally good for people’s well-being” in the context of both incapacity benefits and those who have caring responsibilities (including parents) that do not count as ‘work’.

The central failure of the proposals is that they do not challenge the full-time work model, which is critiqued by legal scholars for its ableist, sexist impacts and its inability to recognize and respect the needs of carers, and instead places the onus on the individual (lone mother, carer or disabled person) to overcome the structural inequalities that exist. The emphasis on full-time work neither necessarily ends poverty nor is it an effective equality strategy.¹⁴ It requires all claimants to be an “unencumbered individual”,¹⁵ who has no caring responsibilities, no disabilities and no educational or other barriers to lifting themselves out of poverty through (well-paid and full-time) work. Requiring all working-age adults to engage in paid work ignores the fact that someone has to provide dependents with care¹⁶. Such policies stigmatize unpaid care-giving which IPPR has estimated to have an economic value of £67 billion in substitute formal services in England alone.¹⁷

Our responses to the questions below should be read in the light of these concerns.

QUESTIONS AND PROPOSALS FOR CONSULTATION

Question 1: How long should ‘work for your benefit’ last at different stages in the claim?

We are opposed to the proposed ‘work-for-your-benefit’ scheme as it is neither an appropriate nor effective option and (with accompanying sanctions) would effectively

¹⁴ Dickens, L. (2007) ‘The Road is Long: Thirty Years of Equality Legislation in Britain’ **45**(3) *British Journal of Industrial Relations* 463; O’Connor, J. (2005)

‘Employment-Anchored Social Policy, Gender Equality and the Open Method of Policy Coordination in the European Union’ **7**(1) *European Societies* 27

¹⁵ Fineman, M.A. (2001) ‘Dependencies’ in Hirschmann, N.J. and Liebert, U. (eds.) *Women and Welfare: Theory and Practice in the United States and Europe* (London: Rutgers University Press) at p.36

¹⁶ Millar, J. and Rowlingson, K. “Comparing employment policies for lone parents cross-nationally: An Introduction” in Millar and Rowlingson eds., *Lone parents, employment and social policy: Cross national comparisons* (Policy Press, 2001) at 2.

¹⁷ Mullin, supra note 7.

constitute a form of compulsory labour. Encouraging and supporting people to find safe, viable and ongoing work is important, but requiring people to engage in compulsory labour is potentially abusive and exploitative. If people are forced to work full-time for their benefit (as stated in para 2.18) they will essentially work for a sub-standard wage. Even if paid at the higher benefit level (£102.10 per week), full time work hours would amount to payment of £2.72 per hour – less than half the current minimum wage.

While the *No One Written Off* report claims that the proposed changes are modeled after successful “work-for-benefit” schemes other countries, there is little consensus on the actual merits of these schemes. While some governments may claim success based on the number of people who have been removed from welfare rolls, such assertions must be carefully scrutinized.¹⁸ The Conservative Government (1995-2003) in Ontario, Canada, for example, routinely proclaimed the successes of its “workfare” program based on a net reduction in welfare recipients, but when the figures were examined more thoroughly, the program was deemed unsuccessful at best and disastrous in many regards. Although some people did find employment, most jobs were part-time and temporary, and on the whole, homelessness and poverty in the province increased significantly—factors that have led to a subsequent scaling back and reversal of several workfare related policies.¹⁹ Moreover, hardships of the Ontario “workfare” program have been disproportionately borne by women, single mothers, migrant communities and people with disabilities.²⁰

Reviews of workfare programs in the US also indicate mixed results. While workfare programs may reduce welfare spending in the short term, on the whole such schemes demonstrate little success in helping people find full-time jobs, rarely improve the quality of employment and often do not improve the long-term employability of participant:

¹⁸ See for example, our reference to Berg, above: it is necessary to look not only at how many people leave welfare, but also at how many leave it “cured, ill, or dead” (supra note 2).

¹⁹ Lightman, E., Mitchell, A. and Herd, D. (2005) 'Welfare to What? After Workfare in Toronto' **58**(4) *International Social Security Review* 95; Lightman, E., Mitchell, A. and Herd, D. (2005) 'One Year On: Tracking the Experiences of Current and Former Welfare Recipients in Toronto' **32**(4) *Journal of Poverty* 65; Matthews, D. (2004) 'Review of Employment Assistance Programs in Ontario Works & Ontario Disability Support Program' *Report to The Honourable Sandra Pupatello, Minister of Community and Social Services* (Ottawa, Canada); Drummond, D. and Manning, G. (2005) 'From Welfare to Work in Ontario: Still the Road Less Travelled' *TD Economics Special Report*, available online:

<http://www.td.com/economics/special/welfare05.pdf>

²⁰ Little, M. (1998) *'No Car, No Radio, No Liquor Permit.'* *The Moral Regulation of Single Mothers in Ontario, 1920-1997* (Toronto: Oxford University Press); Chouinard, V. and Crooks, V. (2005) 'Because they have all the power and I have none: state restructuring of income and employment supports and disabled women's lives in Ontario, Canada' **20**(1) *Disability & Society* 19; Bashevkin, S. (2002) *Welfare Hot Buttons: Women, Work and Social Policy Reform* (Toronto: University of Toronto Press).

“...supporters of welfare reform blithely ignore evidence that for every welfare recipient who moved into a long-term living wage job, many more were either moved into short-term jobs that paid too little to support their families, sanctioned off the rolls without having any employment, or continued to struggle on paltry welfare payments”²¹

Instead of creating viable, full-time employment, workfare programs tend to create a cheap pool of unregulated workers and subsidize labour costs for private and voluntary organizations.

Employment-training schemes, programmes that encourage genuine volunteerism, and community service options can be an important part of skill-building, experience generation and preparation for job-markets; however, such schemes should never require compulsory labour.

Moreover the role of schemes that compel work has to be rethought in times of recession and economic uncertainty. It seems unlikely that opportunities can be provided on any reasonable scale and the economic consequences may be detrimental:

“It is certainly true that when the economy was strong, many people on public assistance with the fewest problems, most skills, and greatest motivation, did indeed move from welfare to work. Some of these families did move out of poverty when they moved off welfare. Yet many others who moved from welfare to work in previous years still did not earn enough to feed their families and meet other basic expenses such as rent and child care.... Moreover, the true test of welfare reform is not whether it works when the economy is strong and when jobs are abundant, but whether it works when the economy is weak and living-wage jobs are scarce, as they are now.”²²

If the government does go ahead with this scheme, it would have to be very carefully drafted to ensure that those involved receive the same legal protections as waged workers. It would be all too easy for those working within a ‘work-for-your-benefit’ scheme to lose the employment rights guaranteed to all other workers. For example, the new federal welfare reform regulations in the United States allow those in the ‘welfare to work’ scheme only ten excused absences from work each year and only two per month at the most, compared to federal employees who get at least twenty-six sick and vacation days per year.²³ A ‘work for your benefit’ scheme must treat its workers in exactly the same way as waged employees and not impose sanctions due to excused absences, such as sick days. It must also ensure that compulsory work is quality work that is interesting, stimulating **and** safe, as well as incorporates employees’ entitlement to annual leave.

Moreover careful consideration would have to be given to the impact of the scheme on the availability of low paid casual employment. There seems little point making

²¹ Berg, supra note 2 at p.48

²² Berg, supra note 2 at p.56

²³ Berg, supra note 2 at p.55

people 'work for their benefit' if the end result is to reduce the availability of properly waged work.

Question 2: How could capacity and capability to provide full-time work experience in the community sector be provided and incentivised to produce the best employment outcomes for participants?

The assumption that full time work experience should be incentivised ignores the valuable social contributions that are already being made through unpaid care-giving and voluntary activities.

Question 3: Is full-time 'work for your benefit' as an alternative to a sanction of loss of benefit for repeated non-compliance with work search requirements an effective option for some jobseekers? How should it be targeted?

It is necessary to find an alternative to a loss of benefit sanction but see our answer to question 1 re: concerns relating to full-time 'work for your benefit'. Full-time 'work for your benefit' fails to recognize and take account of the structural reasons why some people might find it difficult to comply with work-search requirements, for example child-care, or medical conditions. This sanction is therefore unworkable and should not be introduced for these reasons and those outlined in response to question 1.

Sanctions of loss of benefits, even temporary, will prove catastrophic for poor people without any savings. The shortest benefit sanction of two weeks for failing to comply with activities such as seeking advice about debt or housing (p.40) are intrusive and violates the key principle enshrined in the government's approach to disability: that people should be in control of their own lives. These sanctions, which are not in keeping with an anti-poverty strategy that centres on (paid) work, massively expand surveillance of the poor, and threaten them with indignity for non-compliance with a range of measures that have tenuous and/or inadequately specified links to each other. Additionally, this might not satisfy a proportionality test under administrative law (see discussion below) and automatic benefit loss in the absence of a right to a fair hearing or to present a defence would clearly raise issues of natural justice and illegality under the Human Rights Act 1998. Furthermore, it is likely to lead people to desperate measures in order to survive.

Question 4: What penalties do you think would be most effective to deter more people from committing benefit fraud?

Current regulatory theory suggests that rewarding good behaviour is more effective than punishing bad behaviour. There are adequate criminal sanctions available for deliberate fraud so the government should focus on better publicizing the benefits to which people are entitled but that are massively under-claimed (such as free school

meals),²⁴ and simplifying the confusing rules that lead to claimants inadvertently falling foul of ‘fraud’ provisions.

The government should avoid using penalties and sanctions as a response to benefit fraud (see responses to question 5) and should seek less harmful and more effective alternatives. Some alternatives include:

i) Raise benefit levels to an adequate standard of living

There is ample evidence to indicate that actual benefit levels remain far below the poverty line and are insufficient to meet basic day-to-day needs of recipients.²⁵ Financial need is perhaps the single most important factor that contributes to welfare fraud, and should therefore be prioritized in fraud-reduction efforts. Raising benefits levels, rather than reducing or withdrawing entitlement, would be the most direct, immediate and preventive measure to combat welfare fraud.

ii) Provide additional income supports and financial incentives for those transitioning from benefits to employment

We welcome government initiatives that protect Housing Benefit levels for people starting work. However we consider that more could be done to support those who are making the transition into work. Government should recognize that entering paid employment is now a high risk for benefit claimants. It involves periods without wages, yet with the costs that working entails. Moreover because much available work is insecure, a person may forfeit benefits and then lose their job. This is a particular problem for women, especially mothers. For example on the basis of her research in Ontario and the UK, Evans finds that: “the jobs that [lone mothers] leave welfare for, or combine with income support, are usually low-paid and insecure, provide few if any benefits, and often involve unsocial and/or irregular hours”.²⁶ It is therefore necessary for consideration to be given to increasing security of employment and grants for those starting work.

In the Ontario system, the transition from welfare to work previously entailed an immediate loss of other benefits, such as extended medical care, drug cards, dental benefits and clothing allowances. This financially penalized people who sought employment because they would, for example lose their drug benefits card when they gained employment that exceeded the maximum income level, even if the job did not provide drug benefits. This posed a problem, especially for people with health issues not covered by state medical care. The government should ensure that those

²⁴ Storey, P. and Chamberlin, R. (2001) ‘Improving the Take Up of Free School Meals, *Department for Education and Employment* (Research Report Number 270)

²⁵ Predelli, L.N. France, A. and Dearden, C. (2008) ‘Introduction: The Poverty of Policy? Gaps in Anti-Poverty Policy for Children and Young People’ *Social Policy and Society* 7471-7477

²⁶ See for example Evans, P.M. (2007) ‘Not Taking Account of Precarious Employment: Workfare Policies and Lone Mothers in Ontario and the UK’ **41**(1) *Social Policy and Administration* 29

transitioning from welfare to work do not face comparable difficulties in the UK.

iii) Increase the level of allowable income/assets that benefit recipients may retain from other sources

Welfare fraud primarily occurs when people do not disclose income that they receive in addition to benefits. However, because benefit levels are so low, there incentives for non-disclosure are high. Increasing the levels of additional permitted income to a level that would meet the actual costs of living would further reduce incentives for benefit fraud. Such changes would enable people to transition into full-time employment with greater financial stability and would enable people to disclose their income without fear of penalty. We welcome the proposal that child-support and maintenance payments will not be considered for the purposes of calculating income but suggest that the government could go further.

iv) Change administrative rules which penalize individuals who pool resources with others but wish to remain financially independent

Current regulations penalize recipients who attempt to pool resources with others and force recipients into financially dependent relationships.²⁷ For example, failure to disclose living with another person is one of the most common types of fraud among lone parents.²⁸ Reductions in benefits levels for cohabitants not only creates an incentive to hide accommodation status, but also creates a disincentive to share resources with others so as to reduce costs. Such regulations are often highly gendered in their effects, not only because women earn less on average than men, but because such regulations replicate gendered patterns of dependency. For example, if a woman on benefits discloses that she is sharing accommodation with a man who earns a higher income, she may be forced into a financially dependent relationship with him – even if they only share partial living costs. These policies also have the effect of trapping women in abusive relationships and denying help to those most in need.²⁹ Such rules should be amended so as to reduce gender inequalities.

***Question 5:** Do you think it would be appropriate to reduce or withdraw entitlement to benefit after a first offence? How long should the sanction period be?*

Reducing or withdrawing entitlement should **never** be used as a sanction for benefit fraud or for failure to comply with program requirements, but particularly for a first

²⁷ JobCentre Plus are targeting those who fail to disclose that they are cohabiting: National Audit Office (2008) *Department for Work and Pensions: Progress in Tackling Benefit Fraud* (HC 102 Session 2007-2008). Available at: http://www.nao.org.uk/publications/nao_reports/07-08/0708102.pdf (last accessed 19th October 2008)

²⁸ McKeever, G. (2003) 'Tackling Benefit Fraud' **32**(4) *Industrial Law Journal* 326

²⁹ Kilty, K.M. and Segal, E.A. (eds.) (2006) *The Promise of Welfare Reform: Political Rhetoric and the Reality of Poverty in the 21st Century* (New York: Haworth Press) at 196

offence. If the government discovers that a person's financial circumstances have changed and they are genuinely not in need of benefit, then reduction or withdrawal of benefit should be made solely on the basis of financial status. Using benefit reduction or withdrawal as a punitive sanction is not only unjust, but will increase overall social and economic costs in the long term.

a) Reducing or withdrawing entitlement to benefits as a sanction for fraud or non-compliance, falsely assumes that such penalties are effective deterrents.

Sanctions which fail to address the underlying causes of benefit fraud are ineffective. While there may be a small number of people who commit malicious benefit fraud (i.e. organized crime schemes or fraud involving large sums of money), most fraud cases involve small amounts of money and are committed by people for reasons of financial need, rather than greed.³⁰ Indeed, where fraud is driven by financial necessity, the "choice" to commit fraud remains the same, regardless of increased risk of detection or additional penalties.³¹ Using loss of benefits as a sanction is therefore unlikely to work as a deterrent in cases motivated by financial need and will instead push people into deeper poverty. Sanctions essentially punish people whose financial needs exceed current benefits levels as well as those who face desperate situations.

The *No One Written Off* report acknowledges that only half of job seekers say they are more likely to look for work if faced with the threat of sanctions (para 2.12). This finding should be highlighted for two reasons. First, if the threat of sanctions—including loss of benefit—only impacts 50% of job-seekers, then logic of "choice" may not be the key motivating factor in persistent unemployment or non-compliance. Other contributing factors—such as child care demands, structural barriers to employment, addictions, disability, discrimination, physical and mental health—may be more relevant than "motivation" or "willingness" to seek work. Second, even if sanctions are 50% effective in forcing people to seek work, such measures do not necessarily translate into *finding* and *securing* viable employment. In other words, benefit sanctions not only fail to address both the underlying causes of fraud and non-compliance, but do nothing to address structural barriers to employment.

b) Reducing or withdrawing entitlement to benefit may have the effect of pushing people into the underground economy and other illegal activities, which will exacerbate broader social problems and further escalate the criminalization of poverty.

Imposing benefit sanctions is presumably designed to both punish people for fraud/non-compliance and force them to find employment. Yet the inability to find sufficient employment (whether because of lack of job opportunities or because of

³⁰ Mckeever, G. (1999) 'Fighting fraud: An evaluation of the government's social security fraud strategy' *21*(4) *Journal of Social Welfare and Family Law* 357; Mckeever (2003) *supra* note 28.

³¹ Mckeever (2003) *supra* note 28.

barriers to work) is often a reason why individuals commit fraud or remain on benefits in the first place. Denying people access to benefits when they are already unable to find paid employment will simply lead them deeper into poverty, and may force people to engage in other survival tactics, such as illegal drug trade, sex work, theft, credit card fraud, or substance abuse.

Rather than alleviating the financial needs that motivate benefit fraud, sanctions exacerbate that impetus and increase financial vulnerability. Reducing or withdrawing benefits is therefore counter-productive, particularly if one of the government's goals is to reduce overall costs. What the government saves in welfare costs, it will pay three times over in other social and financial costs, particularly through the already over-burdened criminal justice system. Indeed, several studies have shown a strong correlation between social welfare levels and prison population: countries with better welfare systems and more equal distribution of wealth tend to have lower incarceration rates.³² As the prison population in the UK continues to expand rapidly and incarceration costs spiral out of control, the government should consider the impacts of its welfare and penal policies in tandem, and should develop welfare policies that simultaneously address income inequalities and reduce incarceration rates.

The criminalization impact of denying people benefits is highly racialized and gendered. As the Ministry of Justice acknowledged in its 2008 Service Framework for Women Offenders, "women's offending is most often associated with poverty and financial difficulties."³³ In 2006, for example, more women were sentenced to prison for theft or handling of stolen goods than for any other crime.³⁴ The Corston Report affirmed those findings, stressing that for many imprisoned women "poverty had forced them into crime"³⁵ As such, reducing homelessness, preventing accommodation loss, and addressing unemployment for women are among the key strategy recommendations made by the National Offender Management Service.³⁶ Denying benefits would work against these recommendations.

c). Using reductions or withdrawal of benefits as a sanction will harm the most vulnerable by pushing people deeper into poverty and by putting their basic health

³² Cavadino, M. and Dignan, J. (2006) 'Penal policy and political economy' 6(4) *JCriminology and Criminal Justice* 435-456; Downes, D. and Hansen, K. (2006) 'Welfare and Punishment: The Relationship Between Spending and Imprisonment', *Crime and Society Foundation Briefing 2* Available online: http://www.crimeandjustice.org.uk/opus303/Welfare_and_Punishment_webversion.pdf

³³ Ministry of Justice - National Offender Management Service (2008) "National Service Framework: Improving Services to Women Offenders" Available online: <http://noms.justice.gov.uk/news-publications-events/publications/strategy/NSF-Women-08>

³⁴ Prison Reform Trust (2008) "Bromley Briefings - Prison Fact File June 2008" Available online: <http://www.prisonreformtrust.org.uk/subsection.asp?id=1378>

³⁵ Home Office (2007) "The Corston Report: A Review of Women with Particular Vulnerabilities in the Criminal Justice System" Available online: <http://www.homeoffice.gov.uk/documents/corston-report/>

³⁶ Ministry of Justice - National Offender Management Service (2008) *supra* note 33.

and well-being at risk.

Reducing or withdrawing benefits for fraud, particularly for a first offence, unjustly targets individuals who are already struggling with financial need. Given the complexities of current welfare regulations and general lack of knowledge about benefit entitlement among recipients, many cases of fraud may be committed unknowingly. For those who commit fraud intentionally, many are simply acting out of desperation due to dire circumstances.

Similarly, those who have difficulty complying with job-seeker requirements are often individuals who face other challenges—such as child care demands, housing insecurity, disability, physical and mental health issues, drug and alcohol addictions. Sanctions do nothing to address the reasons why people are unable to comply with programme requirements and will simply increase the risks of criminalization of vulnerable people. For example, people with substance abuse problems face a range of complex and chronic problems, which not only make programme compliance and employment extremely difficult but also in many cases unviable.³⁷ If addictions and other mental health issues factors remain unaddressed (or coercively treated), sanctions are likely to exacerbate the existing over- criminalization of people mental health issues end up in conflict with the law. Indeed, up to 80% of women in prison have diagnosable mental health problems, compared to 20% of women in the community.³⁸

Withdrawing benefits as a punishment only further exacerbates poverty levels and increases risks of losing accommodation, going without food, increasing stress and anxiety, declining health and even death. The 2001 death of Kimberly Rogers in Ontario, Canada, serves as a stark warning against penal and welfare sanctions as punishment for fraud.

Kimberly Rogers was convicted of welfare fraud for receiving a student loan while on welfare benefits (a practice which was previously permitted and then subsequently forbidden under welfare reforms). Rogers was sentenced to six-months under house arrest and declared permanently ineligible for social benefits under the government's "zero tolerance" policy for welfare fraud. While a court order subsequently reinstated her benefits on an interim basis, pending a constitutional challenge, she was still left with grossly inadequate resources: once her rent was paid she was left with \$18 per month to cover all other expenses. During a heat wave in mid-August 2001, Rogers, who was eight-months pregnant at the time, was found dead in her apartment, following a prescription drug overdose.³⁹ The jury at the coroner's inquest made fourteen recommendations, including the removal of the "lifetime ban" on welfare eligibility in cases of fraud, an increase in social benefits rates based on actual needs, and the use of discretion in the suspension for benefits, particularly in

³⁷ Kemp, P.A. and Neale, J. (2005) 'Employability and problem drug users' **25**(1) *Critical Social Policy* 28

³⁸ Ministry of Justice - National Offender Management Service (2008) supra note 33.

³⁹ Chunn, D. E. and Gavigan, S.A. M. (2004) 'Welfare Law, Welfare Fraud, and the Moral Regulation of the 'Never Deserving' Poor' **13**(2) *Social Legal Studies* 219-243

cases where withdrawal may have life-threatening consequences for the recipient or their dependents.⁴⁰ While several factors contributed to Roger's death, the desperation of her situation, which arose directly from the government's punitive response to her attempt to better her life through education, was a leading cause.

Sanctions will also have a detrimental impact on other family members who are financially dependant on the claimant's welfare payments, such as children and partners. A study in the United States, where sanctions are common, has found that infants and toddlers in families that had been sanctioned by reduction of welfare payments had a 30% greater risk of hospitalization and a 50% greater risk of 'food insecurity',⁴¹ leading to malnutrition and other health problems.⁴² After controlling for other possible contributory factors, the study found that the welfare sanctions were "implicated in the causal chain of exacerbation of chronic health conditions or onset of acute and serious health problems in young children."⁴³ In particular, they concluded that: "unintended consequences of welfare reform may jeopardize the health of an increasing number of America's children as the current economic downturn, welfare sanctions, and welfare time limits simultaneously decrease families' resources".⁴⁴ It is vital that the UK government avoid these unintended consequences by not imposing sanctions, particularly on those with dependents.

Re: Financial sanctions for violent behaviour (para 2.13)

Violence is not acceptable and should not be condoned. However, it is inappropriate and may be a breach of the Human Rights Act to withdraw benefits as a punishment for violence. Withdrawing benefits in such cases is equivalent to denying people food and shelter for violent behaviour. Even when people are imprisoned by the state, they cannot be deprived of basic food and shelter as punishment. Not only are such sanctions inappropriate and unjust, they are ineffective. To put people in a more financially precarious situation may provoke further violence. A more effective response would be to address the reasons for the violent behaviour. Mental health issues, feelings of desperation and frustration, anger management issues, addictions and social exclusion may all be contributing factors to violent behaviour. Steps should be taken to proactively prevent, intervene in, and respond appropriately to violence. For example, violence-prevention workers can train staff to be aware of warning signs of violence, provide supports to those at risk of violence, and respond to violence in ways that will promote changes in both the behaviour itself and the circumstances that lead to violence. Such steps are likely to be more effective than financial sanctions, particularly in the long term.

⁴⁰ Ontario, Office of the Chief Coroner (2002) 'Verdict of the Coroner's Jury into the Death of Kimberly Ann Rogers, Held at Sudbury, Ontario'

⁴¹ 'Food insecurity' refers to a situation where "families do not have a consistent supply of all the food they need for a healthy diet": Berg, supra note 2 at p.48.

⁴² Children's Sentinel Nutritional Assessment Program Report, *The Impact of Welfare Sanctions on the Health of Infants and Toddlers* (July 2002). Report available at: http://www.c-snap.org/upload/resource/welfare_7_02.pdf (last accessed 26 Sept 2008).

⁴³ Ibid. at p.11

⁴⁴ Supra note 42 at p.13

Re: Financial sanctions for missed appointments or failure to comply with work preparation obligations (para 2.13)

The government should not impose financial sanctions on those who fail to meet appointments or fail to comply with program requirements. Such sanctions falsely presume that people do not want to work and need to face penalties to be persuaded to find employment. The *No One Written Off* report acknowledges that the vast majority of benefit recipients want to work. This suggests that for the majority of people, the problem is not one of motivation, but rather there are other barriers to finding work. Moreover, such sanctions fail to recognize the variety of reasons why people may be unable to complete the tasks that are required. If there are other challenges – such as child care demands, physical and mental health issues, ability level, addictions, or social skill issues – then financial penalties will be ineffective as they fail to address the underlying issues. Such policies also adopt a narrow definition of work, which fails to count the value of unpaid work in looking after the basic needs of dependents.⁴⁵

Question 6: Do you agree with the proposed approach for identifying problem drug use? How should it be implemented? Do you think that everyone claiming a working-age benefit should be required to make a declaration of whether or not they use certain specified drugs?

Forcing people to disclose drug use is a privacy issue, falling within the remit of Article 8 of the European Convention on Human Rights. Therefore, under section 6 of the Human Rights Act 1998, public authorities requiring disclosure of this information (which is arguably a health issue and should be subject to the same data protection measures as other health information) must have a legitimate aim and be proportionate. In the absence of these, the forced disclosure will be illegal. Requiring claimants to make such a declaration also contravenes the presumption of innocence by requiring a statement that claimants are not ‘guilty’ of a criminal offence, despite the absence of reason to suspect that they are. Failing to ‘prove’ ones innocence in the form of a (truthful) declaration to that effect would attract sanctions in breach of the basic principles of natural justice relating to procedural fairness.

Proportionality, as Lord Steyn outlined, requires that the courts assess the balance struck between the rights of the individual and the legitimate aim being pursued.⁴⁶ Though encouraging and supporting people to seek treatment for drug addiction *may* be argued to be a legitimate aim, the coercive element of these proposals means that it goes beyond encouragement and support and into the realm of punitive sanctions. In light of the absence of evidence that coercive treatment is effective (please see our response to question 7, below), this proposal arguably would not meet the suitability

⁴⁵ Jane Lewis, “Orientations to work and the issue of care”, in Jane Millar and Karen Rowlingson (eds.) *Lone parents, employment and social policy: Cross national comparisons* Policy Press, 2001

⁴⁶ *R (Daly) v. Secretary of State for the Home Department* [2001] 2 AC 532 at p.547

test as required under the well-established ‘proportionality’ judicial review criteria and would be counter-productive in discouraging drug users from voluntarily seeking help for fear of sanctions if they are unsuccessful in their treatment and their drug use is revealed. As the European Court of Human Rights has noted, in determining whether a justification for infringing a person’s privacy is proportionate:

“... the Court will take into account that the protection of personal data, not least medical data, is of fundamental importance to a person’s enjoyment of his or her right to respect for private and family life.... Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general. Without such protection, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health”.⁴⁷

Proportionality requires the courts to consider whether the action is “really proportionate” to the aim being pursued⁴⁸ and to “evaluate whether on the facts the decision maker adopted the approach which least undermined the rights in question.”⁴⁹ This test would cause serious problems for the proposed approach to drug use, which is therefore unlikely to be compatible with the Human Rights Act 1998. For example, the European Court of Human Rights considers the issue of disclosure of health data in the context of HIV infection:

“The disclosure of such data may dramatically affect [a person’s] private and family life, as well as social and employment situation, by exposing him or her to opprobrium and the risk of ostracism. For this reason it may also discourage persons from seeking diagnosis or treatment and thus undermine any preventative efforts by the community to contain the pandemic.... The interests in protecting the confidentiality of such information will therefore weigh heavily in the balance in determining whether the interference was proportionate to the legitimate aim pursued....”⁵⁰

The plan to share information between JobCentre Plus, the police, the probation service and prisons (p.48) raises additional privacy and natural justice issues in that the information shared may be inaccurate or, again in the absence of a conviction, contravene the presumption of innocence by requiring a claimant to disprove a (potentially false) allegation. This provides an example of a key problem with the

⁴⁷ *Z v. Finland* supra note 2, at para 95 (emphasis added).

⁴⁸ (per Lord Steyn, *idem*)

⁴⁹ Cane, P. (2004) *Administrative Law* (4th edition) (Oxford: Clarendon Press) at p.756

⁵⁰ *Z v. Finland* supra note 2 at para 96 (emphasis added).

welfare system: it massively over-reaches in certain areas and takes over roles already being dealt with by qualified agencies (such as the probation service in relation to those leaving prison). JobCentre Plus and private agencies dealing with skills training should not have access to this information.

Further, to the extent that there are racial/ethnic or gender differences between groups who use the drugs that have been singled-out in the proposals (crack cocaine and opiates) as against those who use other drugs, this provision would engage Article 14 as well as Article 8 ECHR. For example, in the US context, while African-Americans constitute only 13% of drug users, 81% of those convicted for crack cocaine offences in 2004 were African-Americans.⁵¹ There is also evidence that, in the UK, black drug users are more likely to be imprisoned than white drug users: a higher proportion of black inmates were imprisoned on drug offence charges (28%) compared to white (13%), even though blacks have an equal or lower per-capita level of drug use than whites.⁵²

The government is mistaken to frame this an issue of ensuring that taxpayers do not support a drug-dependent lifestyle (p.47). Taxpayers already pay to criminally sanction and incarcerate drug users who violate the law, and this is a completely separate issue to welfare benefits. These proposals would massively extend the state's surveillance of poor people's lives, violate their privacy and fair hearing rights, raise data security concerns, and put the health of drug users at increased risk by providing a *disincentive* to seek treatment or admit the problem.

***Question 7:** What elements should an integrated system of drug treatment and employment support include? Do you agree that a rehabilitation plan would help recovering drug users to manage their condition and move towards employment?*

Like several other proposals in this consultation paper, this approach is similar to (though does not go as far as) part of the US welfare regime. In that context, a legal scholar has observed that: "... increasingly punitive measures levied against welfare recipients in the war on drugs is neither legally sound, nor wise or just public policy".⁵³ This statement also provides an appropriate response to this question in the UK context because coercive drug treatment has not been proven effective and benefit sanctions will merely punish people for their addictions and will act as a disincentive for people to seek help elsewhere for fear for disclosure.

⁵¹ Families Against Mandatory Minimums (2006) 'Race and Mandatory Sentences' <http://www.famm.org/PressRoom/PressKit/FactSheets/Raceandmandatorysentences.aspx> (last accessed 12 October 2008)

⁵² Home Office RDS (2003) - The prison population in 2001: a statistical review, cited in Transform Drug Policy Foundation, "Fact Research Guide: Prisons" Available at: http://www.tdpf.org.uk/MediaNews_FactResearchGuide_prisons.htm

⁵³ Carey, C.A. (1998) 'Crafting a Challenge to the Practice of Drug Testing Welfare Recipients: Federal Welfare Reform and State Response as the Most Recent Chapter in the War on Drugs' **46** *Buffalo Law Review* 281 at p.283.

There is little conclusive data on the effectiveness of compulsory drug treatment, but an evaluation of preliminary data from 318 offenders in a Drug Treatment Court (DTC)⁵⁴ in Toronto, Canada found that 65% of the group had been expelled or withdrawn from the programme; only 11% had graduated and 18% were continuing treatment.⁵⁵ Fischer *et al* therefore conclude that compulsory drug treatment has been “adopted enthusiastically” in the absence of any evidence that it is effective or cost-effective:

“With on-going programme participation as an indicator, the above data seem to suggest that the [coercive drug treatment programme] appears to ‘work’ for a minority of subjects at best, even though subjects in current DTC pilot projects tend to be carefully selected and less problematic offenders”.⁵⁶

Therefore, benefit sanctions are not an effective means to promote treatment for drug addictions. Such measures will not facilitate support but will simply punish people for their addictions. Such measures also fail to recognize that drug use may be a key factor in the reasons for people with addictions missing appointments or failing to meet other obligations. For example, even under threat of imprisonment, people with drug addictions often fail to attend probation meetings, treatment sessions and court dates.⁵⁷

Using benefits sanctions for drug users will also act as a disincentive for people to disclose, and seek help for, drug addictions. If the government is serious about assisting people who use drugs, they must provide support that is voluntary, client-centred, and based in a harm-reduction rather than punitive approach.

Though drug treatment and support for addressing addictions should be available to all welfare recipients who seek it, attaching sanctions to failing to complete treatment is likely to act as a disincentive to seeking help at all. As with other sanctions, removing people’s only source of income leaves little option but for them to turn to crime or the underground economy. This simply transfers the cost from the benefits system to the criminal justice system. Use of drugs should have no bearing on benefit eligibility.

Question 8: *When is the right time to require ESA claimants to take a skills health check?*

⁵⁴ Drug Treatment Courts were created as a ‘compulsory treatment tool’ (Fischer *et al*, below), which provides an alternative to imprisonment for drug users who complete the treatment programme.

⁵⁵ Fischer, B. Roberts, J. and Kirst, M. (2002) ‘Compulsory Drug Treatment in Canada: Historical Origins and Recent Developments’ **8** *European Addiction Research* 61 at p.66.

⁵⁶ *Idem*.

⁵⁷ Department of Constitutional Affairs (2005) “Review of the effectiveness of specialist courts in other jurisdictions” Available online: www.dca.gov.uk/research/2005/3_2005.pdf

We have no response to this question.

Question 9: *Should ESA customers be required to attend training in order to gain the identified skills they need to enter work?*

We have no response to this question.

Question 10: *In view of the need to help lone parents develop the skills they need to find work, are we right to require lone parents to have a skills health check and training as a condition of receiving benefit?*

No. To compel lone parents to undertake skills health checks and training two years before their eligibility for income support ends (or risk losing benefits) is counterproductive to encouraging engagement with skills development, whilst sanctioning goes against the best interests of the children involved (see above, response to question 5). Skills health checks and training should remain voluntary rather than compulsory, as a lone parent's ability to return to work rests on a number of complex factors, rather than just "skills health" - such as the expense and inflexibility of childcare; the inadequate availability of flexible employment; family support; confidence-levels; and the very real fear of in-work poverty. As 57% of British children who fall below the poverty line live in households where at least one adult is in work,⁵⁸ the low pay culture of Britain should be addressed through an increased minimum wage and enforcement of employment protections.

Lone parents are not a gender-neutral category. As most lone parents are women,⁵⁹ these proposals will disproportionately affect poor women, whose needs, voices and expertise on their own lives is entirely absent from this report. On the face of it, the proposals appear to facilitate the aim of assisting women into work and helping their children out of poverty. However, the overall result of the proposals will be to subject lone mothers to greater degrees of government surveillance and rolling-back of benefits while at the same time pushing them into gendered, low paid jobs in an uncertain labour market. The proposals give inadequate attention to child-care needs (a key concern for low-income parents) and flexible working arrangements.

Increasing the skills of the female workforce will only address a small part of the reason why the large gender gap persists in the UK. It is the lack of quality family-friendly employment and affordable quality child care⁶⁰ rather than the *lack of skills*, which most disadvantages mothers. The Women and Work Commissioners confirm that women returning to work after time spent looking after children find it difficult to find a job that matches their skills and are crowded into a narrow range of lower-

⁵⁸ See Fair Pay Network website at <http://www.fairpaynetwork.org/>

⁵⁹ According to the Economic and Social Research Council, about nine out of ten lone parents are women. See 'Welfare and Single Parenthood in the UK', 30 June 2007.

Available at: <http://www.esrcsocietytoday.ac.uk/ESRCInfoCentre/facts/index40.aspx>

⁶⁰ Jonathan Bradshaw et al., *The Employment of Lone Parents* (Family Policy Studies Centre, 1996)

paying, mainly part-time, occupations.⁶¹ Thus, requiring lone parents to develop their skills as a condition of receiving benefit is a punitive measure that would not address the real reasons why lone parents struggle to find quality employment.

While we support the government's aim to support lone parents develop skills, in the absence of a government commitment to address the quality of employment available to lone mothers, this is likely to have little impact. For example, Patricia Evans argues that, "a failure to address the marginal nature of employment will also fail to address the cycling on and off income support that is characteristic of the experience of lone mothers in Ontario and the United Kingdom".⁶² Evans, therefore, suggests that more attention should be paid to "the characteristics of the available jobs and how these may operate as barriers to improving and sustaining employment among lone mothers", rather than exclusively focusing on claimants and their perceived inadequacies.⁶³ Precarious employment,⁶⁴ in particular, creates additional challenges for lone mothers that are unlikely to be met by current child-care and employment support mechanisms: "Arranging drop-offs and pick-ups from child care and holding jobs that require irregular/weekend/evening hours is more difficult for mothers without a partner to share in child care responsibilities".⁶⁵

Specifically, we are very concerned with the way in which the proposals in chapter 2 intersect with two aspects of work/life policy in the employment sphere: maternity pay and flexible working.

i) Lone mothers and maternity pay

Following the Work and Families Act 2006, women in employment are entitled to more maternity leave than they are entitled to pay. That is to say, they are entitled to 52 weeks maternity leave, with the possibility of statutory maternity pay (SMP) for only 39 weeks. The financial burden of having children is therefore privatised and, in the case of lone mothers, is passed entirely onto women. This development is a safe way for the government to appear to be family-friendly whilst in fact failing to address the difficult financial circumstances that many women, and particularly lone

⁶¹ Women and Work Commissioners (February 2006) *Shaping a Fairer Future* (Department of Trade and Industry) p. 2, available at http://www.womenandequalityunit.gov.uk/publications/wwc_shapingfairerfut_execsum06.pdf

⁶² Evans, P. (2007) '(Not) Taking Account of Precarious Employment: Workfare Policies and Lone Mothers in Ontario and the UK' *41(1) Social Policy and Administration* 29-49 at p.43

⁶³ Evans (2007), *ibid*, at p.30

⁶⁴ "Precarious employment is a phrase that captures the shift from full-time and more or less permanent jobs to those that are increasingly characterized by some or all of the following dimensions: temporary, part-time, providing irregular hours, low wages and few, if any, benefits" (Evans, 2007, *supra* note 62 at p.31).

⁶⁵ Evans, *supra* note 62 at p.33

mothers, face on having children.⁶⁶ As Grace James points out, many women return to work following leave due to financial necessity.⁶⁷

By requiring women to re-enter the labour market, the proposals in chapter 2 effectively put the financial burden for any subsequent children overwhelmingly onto lone mothers. The rate of SMP (and maternity allowance, if applicable) is currently set at 90% of a woman's weekly earnings for the first six weeks and up to £117.18 per week after that. It is extremely difficult to live on this amount of money per week, especially with one or more children. Even in employment, therefore, lone mothers will still be hit by the financial burden of child-rearing.

ii) Lone mothers and flexible working

Current legislation (The Employment Act 2002 in particular) allows parents with children under 6 years of age to request flexible working arrangements to facilitate childcare. The proposals in chapter 2 would require parents of children who are seven or over to start looking for work. We do not agree with this requirement, however if the government is going to implement it, then the right to request flexible working should be extended until children are ten years of age, or older, to ease lone mothers' entry back into the labour market. The government should look at closing that gap for low income women by extending the period in which parents can claim flexible working, and by making flexible working a right, instead of merely a 'right to request'.

Question 11: *Should we pilot extra benefit payments for lone parents in return for training, and if so, when the youngest child is what age?*

This very much depends on the package offered. Even with the "extra benefit payments", will this be sufficient to cover childcare and after-school care? Also, how long would the training last? As with other parts of the Green Paper, will this only be full-time training programmes of up to 8 weeks? Such short spells of training may make little difference to a lone parent's employability. Putting a young child in childcare for eight weeks disrupts the family routine, so the social and economic costs of child-care arrangements may outweigh both the benefits of training and of having extra benefit payments.

The types of training opportunities available are very important. If this "employment focused training" is highly gendered, it will only serve to channel women into low paid, insecure employment when they are ready to take up work. One recent study found that lone mothers in receipt of welfare benefits were being encouraged to train as childcare workers and the women felt that they were being forced to give up caring for their own children in order to care for someone else's.⁶⁸ The authors of this

⁶⁶ James, Grace (2006) 'The Work and Families Act 2006: Legislation to Improve Choice and Flexibility?' *35 Industrial Law Journal* 272.

⁶⁷ *Ibid.*

⁶⁸ F. Smith, J. Barker, E. Wainwright, El. Marandet and S Buckingham (2008) 'A new deal for lone parents? Training lone parents for work in West London' *Area*, 40(2), June 2008, pp. 237-244(8)

research suggest that ‘such regulatory training programmes are (re)producing and reinforcing gendered inequalities in the labour market by encouraging women to undertake training in feminised occupational areas such as childcare’ and furthermore ‘supporting the “new-class dualism” where professional couples are enabled to work in highly paid jobs by paying low-paid childcare workers to look after their children.’⁶⁹ Thus extra benefit payments in return for training will only make a real difference if training for lone parents (90% of which are of course women – see above response to question 10) does not reproduce existing employment inequalities.

Question 12: *Are there any other circumstances where customers cannot get the skills they need to enter employment under present and planned arrangements?*

The government should make further changes to the 16-hour study rule in JSA to broaden the definition of ‘employment focused training’. The report recognizes that poor people should and do aspire to more than low-skilled, low-paid jobs (p.118) but offers inadequate provisions for them to acquire those skills. Those who have suffered disrupted schooling should be able to study full-time for A-Levels or equivalent but the government should also go further and remove the age limit. This support should also be extended to include higher education.

Question 13: *How might we build on the foundations of the current rules so that they do not discourage unemployed people from volunteering as a deliberate back-to-work strategy, while retaining a clear focus on moving off welfare into paid employment?*

We have no response to this question.

Question 14: *Do you agree that the WCA and WFHRA should be re-focused to increase work-related support?*

We do not agree with transferring people from incapacity benefit to work-related benefits. As Mind pointed out in its comments on the Welfare Reform Bill,⁷⁰ employer discrimination is a severe barrier to people with disabilities entering or re-entering the workplace. Furthermore, in relation to the proposals in chapter 3, we would add that UK discrimination law is not sufficiently clear or cohesive to be able to do justice to the disabled people who would be directed into paid work (see further below).

While we agree that no-one should be ‘written off’ in terms of access to employment, the report displays an individualistic approach to disability and long term illness, implicitly situating responsibility for exclusion from work on welfare benefit

⁶⁹ Ibid, p. 243

⁷⁰ Available at <http://www.mind.org.uk/NR/rdonlyres/11D7C4BC-7E8D-438E-A950-96ED5D4469C5/0/WelfareReformBill2006Mind2Rshortbriefing.pdf>.

claimants themselves. This belies the apparently disability-aware rhetoric of parts of this policy.

The proposals in relation to disability outlined in chapter 3 rest on a number of explicit flawed assumptions and beliefs:

- People use incapacity benefit as ‘an early retirement pension’ (p65);
- There is a compelling body of evidence that work generally helps recovery: the ‘work is good for you’ argument (p65);
- The government has been contributing to disabled people’s employment rights, which has been one of the factors that has ‘helped reverse the long-term increase in people claiming incapacity benefits’.

These assumptions draw on the following stereotypes about welfare benefits claimants:

- People who claim welfare benefits are dishonest about their medical condition or about the extent to which living with a disability in an abilist society affects their ability to work;
- Claimants persist in living on benefits despite the economic and ‘therapeutic’ value of work;
- Claimants prefer benefit to work, or do not try ‘hard enough’ to get back to work; and
- Claimants do not, and have not, paid national insurance or tax: that is, they have not been economically active in the past and their activities have no economic value in the present.

None of these stereotypical assumptions are true.

With these points in mind, we have the following specific criticisms and policy suggestions:

Decentring the ‘Paid Work’ Paradigm

All of these proposals are based on a model that uses paid work as the central indicator of being economically active. This model, as we have already shown, has been subject to intense criticism by a range of economists and feminist theorists over the last 20 years and is unsustainable as the basis for government policy in 2008. No evidence has been advanced in the consultation document about the economic value of other forms of work that welfare claimants do: for example caring responsibilities or voluntary work. We are sceptical of the ‘paid work’ paradigm because it has been shown consistently to undervalue or entirely devalue the work of anyone who does not form part of the recognised economy: women, disabled people, post retirement age people. In this sense, using paid work as an indicator of productivity within the economy not only assumes that disabled people and people with long term illnesses are entirely economically inactive, but it also has a gendered effect.

Is work ‘good for you’?

Over 40% of the people claiming incapacity benefit have a mental health diagnosis as their primary specified health problem.⁷¹ Many of these claimants have severe mental health diagnoses, and good mental health is also clearly important to anyone with a disability or a long term illness. With this in mind, it is not straightforward to claim that ‘work is good for you’. Whilst apparently advancing a holistic view of ‘wellbeing’, this argument is influenced by a narrow liberal ethic of work and productiveness, which holds that work is the path to virtue and those who do not work hard enough are lazy and unvirtuous. It ignores the heavily ingrained structural barriers to, and inequalities within, work, that have been the basis for much work in socio-legal scholarship, including: discrimination; dismissal; harassment; glass ceilings; bullying; failure to accommodate difference; and unequal pay.⁷² There is a line of scholarship that focuses specifically on the rise of more flexible forms of work – contracting, zero hours contracts, temporary workers – and the damaging effects these have on workers despite legislation at domestic and European levels that purports to give individuals better rights in the workplace.⁷³ Furthermore, legal scholars have traced the many, and interlinked, ways in which employers and government place extra burdens on women for caring responsibilities, despite statements to the contrary.⁷⁴

⁷¹ Source: Mind’s Briefing on the Second Reading of the Welfare Reform Bill 2006, available at http://www.mind.org.uk/NR/rdonlyres/11D7C4BC-7E8D-438E-A950-96ED5D4469C5/0/WelfareReformBill2006Mind2R_shortbriefing.pdf.

⁷² This is a very large field, but a very short sample of the scholarship includes: Lawson, A. and Gooding, C. (2005) *Disability Rights in Europe: From Theory to Practice* (Hart); Fredman, S. (2002) *Discrimination Law* (Oxford University Press); Fredman, S. (2001) ‘Equality: A New Generation?’ **30** *Industrial Law Journal* 23; McColgan, A. (1999) *Women under the Law: The False Promise of Human Rights* (Essex: Longman).

⁷³ See for example: Fredman, S. (2006) ‘Precarious Norms for Precarious Workers’ in Fudge and Owens (eds.) *Precarious Work, Women, and the New Economy* (Hart); Wynn, M. and Leighton, P. (2006) ‘Will the Real Employer Please Stand Up? Agencies, Client Companies, and the Employment Status of the Temporary Agency Worker’ **35** *Industrial Law Journal* 301; Leighton, P. (2002) ‘Problems continue for Zero Hours Workers’ **32** *Industrial Law Journal* 71; Quinlan, M., Mayhew, C. and Bohle, P. (2001) ‘The Global Expansion of Precarious Employment, Work Disorganisation and Occupational Health: A Review of Recent Research’ **31**(2) *International Journal of Health Services* 335; Bohle, P., Mayhew, C. and Quinlan, M. (2001) ‘The Health and Safety Effects of Job Insecurity: An Evaluation of the Evidence’ **12**(1) *Economic and Labour Relations Review* 32

⁷⁴ See, for example: James, G. (2006) ‘The Work and Families Act 2006: Legislation to Improve Choice and Flexibility?’ **35** *Industrial Law Journal* 272; Fredman, S. (2004) ‘Women at Work: The Broken Promise of Flexicurity’ **33** *Industrial Law Journal* 299; Conaghan, J. (2004) ‘Women, Work and Family: A British Revolution?’ in Conaghan, J., Fischl, M. and Klare, K. (eds) *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* pp. 53-74; Conaghan, J. (2005) ‘Work, Family, and the Discipline of Labour Law’ in Conaghan, J. and Rittich, K. (eds) *Labour Law, Work, and Family* Oxford University Press, pp. 19-42; McGlynn, C. (2005) ‘Work, Family, and Parenthood: The European Union Agenda’ in Conaghan and Rittich (eds) *Labour Law, Work, and Family* Oxford University

From these well-established perspectives, work is often neither ‘good for’ mental health and general wellbeing nor is it (often) economically rewarding. Work is increasingly lower-paid (see, for example, the freeze in public sector pay) and more precarious. Advancing such an argument ignores the reality of working life in contemporary Britain for those who are most impacted by structural inequalities and changes in working patterns: people with disabilities and long term illnesses.

Stronger legal rights make it easier for disabled people to access the labour market

The argument on page 67 of the consultation report is that partly as a result of stronger discrimination law, disabled people are more able to come off incapacity benefit and enter the workplace. We would contest this. Disability discrimination law in the UK was initially brought in under the Conservative government, and despite recent reforms it remains prohibitively complex for potential claimants. It is based on the assumption that anyone experiencing discrimination at work is able or willing to address this through litigation. Furthermore, the definition of ‘disability’ under the legislation is based on an unwieldy combination of medical and functional tests, not the social model of disability, leaving a great many people unprotected. Due to these major problems with the legislation employers are still able to discriminate against people with disabilities by failing to consider them for jobs, by failing to promote them, and by failing to adapt the workplace to different abilities.

We are particularly concerned that many people who are currently eligible for incapacity benefit would not fit the onerous and complex test for disability under the Disability Discrimination Act and could therefore be subject to discrimination without being able to bring a case under the Act. The recently decided case of *McDougall v Richmond Adult Community College* provides an example.⁷⁵

Elizabeth McDougall had a mental health diagnosis. After recovering from a long period of mental illness, she was offered a job by Richmond Adult Community College subject to health clearance. When there was a delay in getting a report from Ms McDougall’s psychiatrist, the College withdrew the job offer on the ground that medical clearance had not been obtained. Ms McDougall subsequently became ill again and was detained for some months in a psychiatric facility under section 3 of the Mental Health Act 1983. She later made a claim for disability discrimination under the Disability Discrimination Act. There was an argument about whether her diagnosis – ‘persistent delusional disorder’ – constituted a disability under the Act because of the requirement for the claimant to show that the disability will recur, or is likely to last for more than twelve months.

The Court of Appeal found that in deciding whether a claimant’s condition was ‘likely to recur’ for the purposes of establishing disability under the Act,

Press pp. 217-236; Rittich, K. (2005) ‘Equity or Efficiency: International Institutions and the Work/Family Nexus’ in Conaghan and Rittich (eds) *Labour Law, Work, and Family* Oxford University Press pp. 43-78.

⁷⁵ (2008) EWCA Civ 4.

tribunals should not take notice of subsequent events to the alleged act of discrimination (for example, subsequent period of mental illness, as in this case).

The McDougall case shows how hard it is for people with disabilities that do not clearly fit the narrow medical model originally envisioned under the Act to make a successful claim for discrimination. Fluctuating medical conditions, like Ms McDougall's condition, in particular, pose considerable problems to the Employment Tribunals under the Disability Discrimination Act, and many mental health diagnoses are fluctuating. If you bear in mind that, as previously stated, 40% of current incapacity benefit claimants have mental health conditions, then there is a clear challenge to make sure that people currently on incapacity benefit are not left without the protection of the Disability Discrimination Act if and when they are required to go back into the workplace. The government cannot progress with the proposals in chapter 3 without resolving these problems, otherwise it risks pushing disabled people into extremely harmful (due to harassment), impossible (due to failure to accommodate) or non-existent (due to discrimination) employment and thereby leaving them without a source of income.

***Question 15:** What expectations should there be of people undertaking the personalised support we will now be offering in the Work Related Activity Group? Could this include specific job search?*

We have no response to this question.

***Question 16:** How can we make Access to Work more responsive to the needs of claimants with fluctuating conditions – including mental health conditions?*

Please refer to our answer to question 14. We are opposed to requiring anyone who is currently, or would be on the current rules, on incapacity benefit to take up employment in lieu of benefits. Requiring disabled people and people with long-term illnesses to come off incapacity benefit and take paid employment means putting the risk of discrimination, low pay, and precarious working hours on them individually because discrimination law does not adequately address the ingrained structural discrimination they face.

We do not have specific suggestions in relation to Access to Work. However, if the government wants to reduce the number of people on incapacity benefit by requiring claimants to go into employment, then the challenge of responding to fluctuating medical conditions should also be taken up in reforming the Disability Discrimination Act to make it easier to prove that one can be disabled even if one's condition changes over time. It is important that people who are eligible for incapacity benefit, and who might under the new regime be required to work, are not penalised once reaching the workplace by not being covered by the Disability Discrimination Act on the ground that their condition does not constitute a 'disability'.

Question 17: *What additional flexibilities in the system or forms of support would claimants with multiple and complex problems need to enable them to meet the new work-focused requirements proposed in this Green Paper?*

We have no response to this question.

Question 18: *What are the key features of an action planning approach that would best support employees and employers to take the steps for the employee to make a swifter return to work?*

We have no response to this question.

Question 19: *There is no Question 19.*

Question 20: *What approach might be suitable to assist partners of benefit claimants who can work into employment?*

We have no response to this question.

Question 21: *What are the next steps in enabling disabled people, reliably and easily, to access an individual budget if they want one? Should they include legislation to give people a right to ask for a budget or will the other levers the Government has got prove sufficient? What are the safeguards that should be built in? How can this be done?*

We have no response to this question.

Question 22: *Is a system based on a single overarching benefit the right long-term aspiration? How could a simpler system be structured so as to meet varying needs and responsibilities?*

We have no response to this question.

Question 23: *Would moving carers currently on IS onto JSA be a suitable way of helping them to access the support available to help combine caring with paid work or preparing for paid work?*

The best way to serve the interests of carers within the benefit system is to decentre full-time paid work as currently constituted as the condition for receiving respect and subsistence; to reflect fully on the importance of unpaid caring work to society and to reward it financially.

Question 24: *How might we reform Bereavement Benefit and IIDB to provide*

better support to help people adjust to their new circumstances while maintaining the work focus of the modern welfare state?

We have no response to this question.

Question 25: *Are lump sum payments a good way of meeting people's needs? Do they give people more choice and control? Could we make more use of them?*

Lump sum payments are a crucial way of enabling people to manage the normal expenses of day to day living when benefit levels are so low. The Social Fund in general works well; however rules that were designed to provide grants to those being resettled from institutions into the community are now outdated and need to be rethought. Grants should be available to anyone seeking to set up home on their own, whether leaving the parental home for the first time, supported housing, refuge provision etc. The loan system should be extended and claimants should be able to use the loans for their own, rather than state defined priorities. Many people do not recognize the financial skills of those who manage to effectively budget whilst on benefit. The government should work with the financial sector to get them to accept that people who handle money effectively whilst on benefit, and have a good record of managing their social fund loan repayments, have the financial literacy and credibility to utilize private sector credit once they return to the workforce.

Question 27: *What would the processes around contributing to commissioning and performance management look like in a range of different partnership areas? How might they best be managed to achieve the desired outcomes?*

We have no response to this question.

Question 28: *How could a link be made to the radical proposals for the pilots set out in Chapter 3, which seek to reward providers for outcomes out of the benefit savings they achieve?*

Rewarding private agencies for localized job placements is not a national employment strategy. It is also peculiar in the context of the government's assertions that JobCentre Plus is "recognized as one of the best back-to-work agencies in the world" (p.17).

There are perverse incentives in the proposal to contract out to private and voluntary sector organisations that may harm good service provision. For example providing good services may require greater outlays, yet rewards are given for reducing benefit costs. It also creates a control and accountability problem since there will be multiple stakeholders with different interests and needs, for example: the state looking to reduce benefit levels, benefit recipients looking for sustainable and fairly paid work, private companies seeking to make a profit, and employers looking for workers. The needs of the benefit recipient, which should be central to this process, are in danger of

being overtaken by the drive for profit. There are several examples of this in the US context.

For example, the Applied Research Centre in the United States has published a report detailing the ways in which private companies are benefitting at the expense of claimants and the federal/state governments:

- Inadequate and poor provision of service
- Misappropriation of funds, cronyism and other financial irregularities
- Discriminatory practices at company offices, with allegations that staff are: “funneling women to low-paying jobs in order to quickly receive the bonus staff gets for placements”⁷⁶

Some providers in the US not only receive government funds for finding people work, but also keeps some of the wages that the client earns during their first few months in the job: one company gets approximately \$5000 per client from the government when it places someone in work *and* takes a proportion of the claimant’s salary for their first four months on the job, “During this time, while monitoring performance, [the private company] reaps \$6-9 an hour from the employer, which pays the trainee minimum wage”.⁷⁷ The report also details complaints about another firm, which asks clients themselves to fill in difficult 16-18 page assessment forms, designed to be filled in by a professional case-worker. “Since the forms are complicated and require some lengthy explanations, they are often incomplete, providing [the private company] with an excuse to deny support”.⁷⁸

The report also notes that problems are not confined to profit-making companies. Nonprofit organisations are “tempted to save money on wages, for example by replacing reasonably compensated janitorial help with welfare-to-work employees”.⁷⁹

These examples highlight and exemplify the likelihood of exploitation in a compulsory labour program and illustrate that control and accountability of private and voluntary sector organisations running these programs will be difficult to achieve.

To maximize the government’s agenda of expanding choice for the poor, the claimants’ needs must be central; JobCentre Plus has, according to the government, a proven track record in providing the type of support that jobseekers require in a non-coercive and supportive manner. The proposals in this report would merely replicate existing efforts, incentivise cost-cutting and profit-seeking rather than client-controlled service provision, and render claimants under the control of largely unaccountable agencies and private companies.

⁷⁶ These allegations are all detailed in the report: Berkowitz, B. (2001) *Prospecting Among the Poor: Welfare Privatization*, A publication of the Applied Research Centre, California.

⁷⁷ Berkowitz, 2001 (Ibid. at p.13).

⁷⁸ Berkowitz, 2001 (Supra note 76 at p.14)

⁷⁹ Berkowitz, 2001 (Supra note 76 at p.15)

Question 29: How effective are current monitoring and evaluation arrangements for City Strategies?

We have no response to this question.