Neutral Citation Number: [2025] EWHC 58 (Admin)

Case No: AC-2023-LON-003619

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/01/2025

Before :

MR JUSTICE CALVER

- -

Between :

R (on the application of ELLEN CLIFFORD)	**Claimant**
- and -	
THE SECRETARY OF STATE FOR WORK AND PENSIONS	**Defendant**

- -
- -

Jenni Richards KC and Tom Royston (instructed by **Public Law Project**) for the **Claimant**
Sir James Eadie KC, Emily Wilsdon, George Molyneaux and Ella Grodzinski (instructed by **GLD**) for the **Defendant**

Hearing dates: 10-11 December 2024

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Thursday 16 January 2025.

Mr Justice Calver :

The Claim

1. Ellen Clifford ("**the Claimant**") has a disability; the Secretary of State for Work and Pensions ("**the Defendant**") has determined that it is not reasonable to require her to work, and not reasonable to require her to undertake work-related activity. The Claimant is also a disability rights campaigner with a particular interest in social security rights. She brings this challenge to the consultation on proposals to make legislative amendments to the Work Capability Assessment ("**WCA**"). The consultation was run by the Defendant from 5 September 2023 to 30 October 2023. The matters on which the Defendant consulted were set out in a consultation paper published on 5 September 2023 ("**the Consultation Paper**").

2. The Claimant alleges that the Defendant (i) failed adequately to explain what the proposals were (Ground 1A); (ii) failed adequately to explain the alleged true rationale for the proposals (Ground 1B); (iii) failed to provide adequate accompanying information about the impact of the proposals (Ground 1C); and (iv) failed to provide sufficient time for consultees to respond (Ground 2).

The Work Capability Assessment

3. The WCA is operated pursuant to the Welfare Reform Act 2007, ss.8 and 9; the Welfare Reform Act 2012 ("**WRA 2012**") s. 37; the Employment and Support Allowance Regulations 2008, Parts 5-6 and Schedules 2-3; the Employment and Support Allowance Regulations 2013, Parts 4-5 and Schedules 2-3; and the Universal Credit Regulations 2013 ("**UC Regulations**"), Part 5 and Schedules 6-9.

4. The WCA is used to assess the capability for working of (i) persons who claim Universal Credit ("**UC**") and report a health condition that affects their ability to work; and (ii) persons who claim Employment and Support Allowance ("**ESA**"). Assessments are carried out by healthcare professionals who are contracted on behalf of the Department for Work and Pensions ("**DWP**"). The healthcare professional makes a recommendation, and a DWP decision-maker then determines an individual's capability to work.

5. The WCA has three possible outcomes, namely:

    a. **"Fit For Work"** or **"FFW"**: this means that a person has no entitlement to ESA or the health-related amount of UC, and may have to look for work[1].

    b. **"Limited Capability for Work"** or **"LCW"**: Section 37 WRA 2012 defines LCW as follows: "*the claimant's capability for work is limited by their physical or mental condition, and the limitation is such that it is not reasonable to require the claimant to work*." This means that such a person is eligible for health-related benefits, and not required to look for work[2]. However, they may be

[1] The Defendant must, except in prescribed circumstances, impose on such a person a work search requirement as well as a work availability requirement: s. 22 WRA 2012. The requirements are set out at ss. 15-18 of the WRA 2012.

[2] WRA 2012, s 21(1)(a).

required to take part in '*work-related activity'*, i.e. activities intended to help prepare them for work in the future[3].

c. **"Limited Capability for Work and Work-Related Activity"** or **"LCWRA"**: Section 37 also defines LCWRA as follows: "*the claimant's capability for work-related activity is limited by their physical or mental condition, and the limitation is such that it is not reasonable to require the claimant to undertake work-related activity*". This means that such a person (i) cannot be required to look for work, or to take part in 'work-related activity'[4]; and, significantly, (ii) is entitled to benefits at a higher rate than a person assessed as having LCW[5].

6. Requirements to look for work and take up any available work (for people without LCW),[6] and requirements to engage in "work related" activities (for people without LCWRA),[7] are collectively termed "**conditionality**". "Work related" activities include attending employability skills workshops. A failure to comply with conditionality can lead to a reduction in the amount of benefit a claimant receives ("**sanctions**").[8]

7. The assessment by the healthcare professional looks at the effects of any health condition or disability on the individual's ability to carry out a range of everyday activities. These include 'mobilising' (i.e. moving from one place to another, assessing physical function), maintaining control of the bowel/bladder, 'getting about' (i.e. getting to places outside the individual's home, assessing cognitive/mental function), coping with social engagement and so forth.

8. For each activity, an individual is awarded points depending on the extent to which various 'descriptors' apply to them: see Schedule 6 to the UC Regulations.

9. For example, a person might be assessed as scoring 18pts if they satisfy the following descriptors:

> Cannot, for the majority of the time, remain at a work station: (i) standing unassisted by another person (even if free to move around); (ii) sitting (even in an adjustable chair); or (iii) a combination of paragraphs (i) and (ii), for more than an hour before needing to move away in order to avoid significant discomfort or exhaustion. [6pts]
>
> The majority of the time is at risk of loss of control leading to extensive evacuation of the bowel and/or voiding of the bladder, sufficient to require cleaning and a change in clothing, if not able to reach a toilet quickly. [6pts]
>
> Cannot learn anything beyond a moderately complex task, such as the steps involved in operating a washing machine to clean clothes. [6pts]

10. If a person scores a total of 15 points or more across the various activities, they are assessed as having LCW status. It follows that a person who met only two of those three descriptors (and did not have some other basis for qualifying) would not be given LCW

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[3] Ibid, s. 21(2).
[4] Ibid, s. 19(1). But they may access, *voluntarily*, work related activity.
[5] Ibid, s. 19(2)(a).
[6] Ibid, ss.17-18.
[7] Ibid, ss.15-16.
[8] Ibid, ss.26-27; UC Regulations 2013, Part 8 Chapter 2.

status, and would face full conditionality, including looking for work and taking up available work, with sanctions for failure to comply.

11. If certain prescribed descriptors apply to a person, reflecting particularly significant impairment, they are assessed as having LCWRA status (see Schedule 7 to the UC Regulations), such as:

> (i) Cannot move between one seated position and another seated position located next to one another without receiving physical assistance from another person [automatic LCWRA]
>
> (ii) At least once a week experiences: (a) loss of control leading to extensive evacuation of the bowel and/or voiding of the bladder; or (b) substantial leakage of the contents of a collecting device sufficient to require the individual to clean themselves and change clothing. [automatic LCWRA]
>
> (iii) Cannot learn how to complete a simple task, such as setting an alarm clock, due to cognitive impairment or mental disorder. [automatic LCWRA]
>
> (iv) Cannot mobilise more than 50 metres on level ground without stopping in order to avoid significant discomfort or exhaustion [automatic LCWRA].

12. Moreover, a person will also be 'treated as' having LCW or LCWRA in certain specific circumstances.[9] For example, a person who is terminally ill is treated as having LCWRA. Importantly, one of the circumstances in which a claimant is to be treated as having LCWRA is if they are:

> *"… suffering from a specific illness, disease or disablement by reason of which there would be a substantial risk to the physical or mental health of any person were the claimant found not to have limited capability for work and work-related activity.*"[10] ["**the Substantial Risk Criteria**"]

13. So far as the benefit amounts are concerned, by regulation 36 of the UC Regulations, the LCW additional element amounted to £156.11[11], whereas the LCWRA additional element amounts to £390.06 (at the time of the consultation – now £416.19). Moreover, the benefit cap does not apply to persons who have LCWRA[12]. It follows that if somebody is assessed as no longer having LCWRA status, and instead LCW status, they will lose £390.06 per month (now, £416.19), which is a very substantial sum indeed.

The consultation process

14. The consultation was announced, and consultation documents published, on 5 September 2023. The announcement was made in a Parliamentary statement by Mel Stride MP, the Secretary of State for Work and Pensions, on that date. The key

[9] UC Regulations 2013, Schs.8-9.
[10] UC Regulations 2013, Sch.9 §4.
[11] This is the 2024/25 rate for claimants whose LCW began before April 2017; for claims where LCW has begun since that time, a person with LCW receives the same sum as a person who is unemployed but FFW.
[12] UC Regulations, regulation 83.

consultation documents were (i) the Consultation Paper; (ii) the Easy Read Consultation Paper; and (iii) the announcement (on 8 September 2023) in DWP's 'Touchbase' newsletter.

15. In summary, the proposals which were the subject of the Consultation were:

    a. *Potential changes to the 'mobilising' activity and associated descriptors* (Consultation Paper, [32]). Three options for change were presented, the broad effect of which would be to reduce (to varying degrees) the extent to which difficulties with mobilising would lead to a person (i) scoring points for the purpose of assessing whether they had LCW; and/or (ii) being assessed as having LCWRA. The options were:

        (i) remove the 'mobilising' activity entirely, such that difficulties with mobilising would cease to be taken into account when determining whether a person should be assessed as having either LCW or LCWRA;

        (ii) amend the LCWRA Mobilising descriptor by replacing 50 metres with 20 metres for both descriptors within the LCWRA activity;

        (iii) reduce the points awarded for the LCW Mobilising descriptors.

    b. *Potential changes to the 'absence or loss of bowel/bladder control', 'coping with social engagement due to cognitive impairment or mental disorder' and 'getting about' activities and associated descriptors* (Consultation Paper, [33]-[35]). Again, various options were presented, the broad effect of which would be analogous to that of the proposals in respect of 'mobilising', namely (i) remove the activity entirely; (ii) amend the descriptor so that claimants are required to experience the adverse symptoms daily instead of weekly; and (iii) reduce the points awarded for the descriptors.

    c. *Potential changes to the Substantial Risk Criteria*. Two options were identified in this regard (Consultation Paper, [38]-[43]). The first option (at [39]) was to amend the Substantial Risk definition such that a person would not be assessed as having LCWRA if they *"could take part in tailored or a minimal level of work preparation activity and/or where reasonable adjustments could be put in place to enable that person to engage with work preparation"*. The second option (at [42]) was to remove altogether the possibility of a person being assessed as having LCWRA on the basis of the Substantial Risk definition. The Consultation stated at [40] that "*the intention of this change is not to bring people with risk into mandatory activity, nor to sanction them if they do not comply. Work coaches would offer appropriate and tailored support. They would support a claimant on work preparation activities. For example, activities to build confidence or wellbeing, learn skills, or gain a greater understanding of different sectors, local provision, or support*".

Grounds for judicial review

16. The Claimant's grounds for judicial review are as follows.

    Ground 1

17. The consultation was unlawful because the Defendant failed to provide sufficient information for consultees to give intelligent consideration to the proposals, in that:

    a. the Defendant ***failed to explain adequately the proposals themselves*** **(Ground 1A)**: bearing in mind the audience for the consultation, it was not made adequately clear that the legislative proposals for the affected groups were to replace voluntary work related activity with compulsory work related activity, and to reduce the income of a large number of claimants;

    b. the Defendant ***failed to explain adequately the rationale for making the proposals*** **(Ground 1B)**:

        i. the Defendant was not candid that fiscal impact, rather than labour market impact, was the central basis on which decisions would be taken;

        ii. if, alternatively, the central rationale for making the proposals was as the Defendant stated, then its link to the proposals was not adequately explained;

        iii. the Defendant misleadingly implied that the proposals on LCWRA risk were necessitated by increases in the proportion of LCWRA decisions accountable to risk, when in fact it had been steadily decreasing for years;

    c. the Defendant ***failed to provide adequate accompanying information about the impact of the proposals*** **(Ground 1C)**:

        i. the consultation documents did not explain that the number of people expected to find employment was vastly outweighed by the number of people who would lose money and face conditionality but would not as a result find employment;

        ii. no information was given about the likely disability impact.

Ground 2

18. The Defendant ***failed to provide sufficient time for consultees to respond*****:** the consultation ran for less than 8 weeks, which the Defendant knew or ought to have known in summer 2023 would be inadequate, but insisted upon that despite having no intention to put the measures into effect earlier than 2025-26, because of the unstated intention to be able to "score" fiscal savings on the back of the proposals in time for the 2023 Autumn Statement on 22 November 2023.

The law

19. Before turning to the contemporaneous documents and witness evidence concerning the purpose of the proposed changes, it is necessary to consider the content of the common law duty of procedural fairness in the context of a public consultation such as that which occurred in the present case.

20. When assessing the lawfulness or otherwise of a consultation, the fundamental question is whether the consultation was *"so unfair as to be unlawful"*: *R (Bloomsbury Institute*

Ltd) v Office for Students [2020] EWCA Civ 1074, [2020] ELR 653, [68]-[69]. Fairness in carrying out a consultation is part of procedural fairness in decision making more generally[13].

21. Whether the consultation process is fair is a fact-sensitive question that depends upon all the circumstances of the particular case looked at as a whole, and without drawing artificial distinctions between particular stages of the whole process[14]. It is for the court to decide whether a fair procedure was followed: its function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required[15].

22. If it is alleged that a consultation process is unfair, it is for the claimant to show that the unfairness was such as to render the consultation process unlawful. Especially with the benefit of hindsight, it may well be possible to identify how a consultation process might have been improved; but, even if it was less than ideal, it will become unlawful only if what has occurred makes it unfair as a matter of law. That is a substantial hurdle: in *R (J L and A T Baird) v Environment Agency* [2011] EWHC 939 (Admin), Sullivan LJ said that "in reality a conclusion that a consultation process has been so unfair as to be unlawful is likely to be based on a factual finding that something has gone clearly and radically wrong" at [51]; see also *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472 at [13] per Arden LJ[16].

23. In *R (Moseley) v Haringey London Borough Council* [2014] UKSC 56, [2014] 1 WLR 3947, Lord Wilson JSC identified the purposes and requirements of a fair consultation at [24]-[26]:

> "*24. Fairness is a protean concept, not susceptible of much generalised enlargement. But its requirements in this context must be linked to the purposes of consultation. In R (Osborn) v Parole Board [2014] 1 AC 1115, this court addressed the common law duty of procedural fairness in the determination of a person's legal rights. Nevertheless the first two of the purposes of procedural fairness in that somewhat different context, identified by Lord Reed JSC in paras 67 and 68 of his judgment, equally underlie the requirement that a consultation should be fair. First, the requirement "is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested": para 67. Second, it avoids "the sense of injustice which the person who is the subject of the decision will otherwise feel": para 68. Such are two valuable practical consequences of fair consultation. But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society.*
>
> *25.… [the following] basic requirements are essential if the consultation process is to have a sensible content. First, that*

[13] *R (Liberty) v Secretary of State for the Home Department* [2024] EWHC 1181 (Admin) at [160].
[14] See *R (Sumpter) v Secretary of State for Work and Pensions* [2014] EWHC 2434 (Admin) at [94(iii)].
[15] *Ibid*, citing *R (Osborn) v Parole Board* [2013] UKSC 61 at [65] per Lord Reed and see *Liberty* (supra) at [160].
[16] *Ibid* at 94(v).

> *consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third . . . that adequate time must be given for consideration and response*[17] *and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals*[18].
>
> *26. Two further general points emerge from the authorities. First, the degree of specificity with which, in fairness, the public authority should conduct its consultation exercise may be influenced by the identity of those whom it is consulting*[19]*. Thus, for example, local authorities who were consulted about the Government's proposed designation of Stevenage as a "new town" (Fletcher v Minister of Town and Country Planning [I947] 2 All ER 496, 50I) would be likely to be able to respond satisfactorily to a presentation of less specificity than would members of the public, particularly perhaps the economically disadvantaged*[20]*. Second, in the words of Simon Brown LJ in Ex p Baker [1995] 1 All ER 73, 91, "the demands of fairness are likely to be somewhat higher when an authority contemplates depriving someone of an existing benefit*[21] *or advantage than when the claimant is a bare applicant for a future benefit*."

24. It is *sufficient* to show that the unfairness affects only a group of the persons affected by the consultation: see *R (Medway Council) v Secretary of State for the Environment* [2002] EWCA 2516 (Admin). Unfairness to the general body of consultees is not required: *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472 at [14].

25. Although it is unhelpful to refer to a varying standard of procedural fairness, the content of the common law duty – and what the duty requires in any particular circumstances – is highly fact-specific and can vary greatly from one context to another. An important factor in that context is that the decisions in issue affect highly vulnerable persons[22]: see *R (Help Refugees Ltd) v Secretary of State for the Home Department* [2018] EWCA Civ 2098 at [87] per Hickinbottom LJ (in that case, highly vulnerable children).

26. As to the second *Gunning* requirement (which is relevant in the present case), namely the need for the proposer to give sufficient reasons for the proposal to permit of intelligent consideration and response:

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[17] Emphasis added, as the present case concerns only the second and third of these *Gunning* requirements.
[18] Thereby endorsing the requirements adopted by Hodgson J in *R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168 ("**the *Gunning* requirements**").
[19] Here, people with disabilities which include mental impairment.
[20] The consultation document must be clear to the general body of applicants: see *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472 at [9].
[21] Which was the case here, viz., the LCW and the LCWRA additional monetary elements of £156.11 and £390.06 respectively.
[22] As is the case here, viz., people with disabilities, as well as mental impairment and suicidal ideation.

a. In *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 (CA), the Court of Appeal said at [112]:

"It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this." (emphasis added)[23]

b. "*In order to enable effective representations to be made, it is necessary to publish not just "the proposal" in a narrow sense, that is what is proposed by way of structural change, but also a summary of the reasons why that change is proposed*": *R (Breckland DC) v Electoral Commission Boundary Committee* [2009] EWCA Civ 239 at [44] per Sir Anthony May P[24]. As Ouseley J stated in *R (Devon County Council) v Secretary of State for Communities and Local Government* [2010] EWHC 1456 (Admin) at [68]: "*sufficient information to enable an intelligible response requires the consultee to know not just what the proposal is in whatever detail is necessary, but also the factors likely to be of substantial importance to the decision, or the basis upon which the decision is likely to be taken*"[25].

c. Consultation axiomatically requires the candid disclosure of the reasons for what is proposed if the undertaking to consult is not to be rendered largely nugatory: *R v Barking and Dagenham LBC, ex parte Lloyd* [2001] EWCA Civ 533 per Schiemann LJ at [13]. The true reasons for the proposals should be revealed in the consultation process if that process is not to be legally defective: see Laws LJ in *R (Evans) v Lord Chancellor* [2011] EWHC 1146 (Admin) at [27], [30], [33].

d. But, as was stated in *R (United Co Rusal plc) v London Metal Exchange* [2014] EWCA Civ 1271, [2015] 1 WLR 1375 at [51] and [85] per Arden LJ:

"The adequacy of consultation must depend on the sufficiency of information in the context in which the consultation took place. Therefore the court cannot ignore information which was well known to the consultees even if it was not set out or referred to in the consultation document. Any other conclusion would

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[23] "*The Coughlan formula is a prescription for fairness. It is an aspect of fairness that a consultation document presents the issues in a way that facilitates an effective response*": *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472 at [9]; and at [10]: "*Another aspect of fairness is that it must present the available information fairly*".

[24] In that case, the Court found at [69] that the public consultation was inadequate because "*the need to explain the financial side of the draft proposals to the public in an understandable way was lost sight of or not understood*".

[25] In *Devon* at [68], Ouseley J also stated: "*What needs to be published about the proposal is very much a matter for the judgment of the person carrying out the consultation, to whose decision the courts will accord a very broad discretion.*" I agree with Sir James Eadie KC that this passage is not objectionable so long as it is understood to mean that subject always to the "outer perimeter" requirement of procedural fairness, which it is for the court to assess, there may be some *Tameside* judgment-call "inner areas" for the Defendant to make in respect of how the consultation is formulated.

lead to cumbrous and potentially self-defeating consultation exercises where the real issue is obscured by common knowledge."

"…the explanation provided by a consultant in its consultation document is not unfair unless something material has been omitted or something has been materially misstated[26]*."* (emphasis added)

e. In *R (Electronic Collar Manufacturers Association) v The Secretary of State for Environment, Food and Rural Affairs* [2019] EWHC 2813 (Admin), Morris J summarised the authorities as follows at [142]:

"…the presentation of the information must be fair. Thus it must be complete, not misleading and must not involve failure to disclose relevant information… Whether non-disclosure made the consultation so unfair as to be unlawful will depend upon the nature and potential impact of the proposal, the importance of the information to the justification of the proposal and for the decision ultimately taken, whether there was a good reason for not disclosing the information and whether the consultees were prejudiced by the non-disclosure, by depriving them of the opportunity of making representations which it would have been material for the decision-maker to take into account…"

27. The third *Gunning* requirement (which is also relevant in the present case), namely the need for adequate time to consider and respond to the consultation, is necessarily fact-sensitive. In *R v Social Services Association, ex parte Association of Metropolitan Authorities* [1986] 1 WLR 1 (QB), Webster J said that sufficient time *"does not mean ample, but at least enough to enable the relevant purpose to be fulfilled"* (4G-H).

The factual background leading up to the publication of the consultation paper

28. At the time when the consultation was announced, it is fair to say that potential consultees would not have been anticipating the proposed policy developments contained in the Consultation Paper, because (i) the Defendant had already announced a significant consultation on the Disability Action Plan, which was running from 16 July to 6 October 2023[27]; and (ii) the Defendant had very recently published *Transforming Support: The Health and Disability White Paper* (16 March 2023), which had set out detailed plans on the future of the WCA (relating to its abolition) and had made no suggestion of any plan for interim measures such as those proposed in the consultation.

29. Mr. William Thorpe, who is the Director of Disability and Health Support at the Department of Work and Pensions ("**DWP**") made reference to these plans for the WCA in his witness statement dated 19 June 2024, in which he described what he termed the "genesis of the proposals" which were put out to consultation as follows (at [7]-[9]):

"7. *…by May 2023 myself and my team were thinking about what further measures (beyond those announced at the March 2023*

[26] It must not be materially misleading. Consultation based upon a document which is materially misleading cannot be described as a full and fair consultation: *R v Secretary of State for Transport, ex parte LB Richmond upon Thames* [1995] Env LR 390 at 405 per Latham J.

[27] Clifford (2), at [13].

> *Budget) would be required to tackle the growth in economic inactivity due to ill-health. We were of the opinion that reform to the WCA, as an interim step before it was abolished, could be a good way to do so. This initial thinking was self-initiated by myself and my team as we thought that this area might be one in which Ministers would be interested.*
>
> *8. Therefore, in May and June 2023, in discussions with my team, we began planning to review the WCA to consider updating it to better reflect the modern world of work so that more people applying through the WCA were placed in the appropriate group for support.*
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> *9. The potential benefits of changes to the WCA activities and descriptors appeared significant. We believed greater labour market flexibilities and better employer understanding of the accessibility needs of disabled people and people with health conditions would have the most significant impact on supporting people to move closer towards or into work. We took into account that, notably, since 2011 more people have been able to benefit from the advantages and opportunities of flexible and home working. It was our view that working from home and hybrid working brings new opportunities for disabled people to manage their conditions in more familiar and accessible environments*".

30. I have no reason to doubt that the genesis of the proposals was as Mr. Thorpe states. However, it is also clear from the contemporaneous documents that reducing Annually Managed Expenditure ("**AME**") spending was or very shortly became at least an equally important driver in the formulation of the proposals.

31. A note from the private office of the Defendant to the Chancellor dated 19 June 2023 states: *"As you know, the Secretary of State is determined to do everything possible to reduce economic inactivity, while managing our AME spending and addressing drivers for inflation"*. Under the heading "Health and Disability Benefits", it is stated:

> "*Officials have been identifying options to advance components of our structural reform to tackle the issue of rising caseloads*[28]*. Secretary of State proposes we review and update the activities and descriptors in the Work Capability Assessment (WCA) to reflect improvements in the modern workplace such as flexible/home working. Alongside this, Secretary of State is reviewing the existing application of the 'substantial risk criteria (non-functional)' to identify how we make better use of reasonable adjustments and specific work-related activity to support moving some people closer to the labour market.*"

[28] i.e. rising caseloads of people with LCWRA.

32. In the summary at the end of the note, the author makes express reference to AME savings options and the OBR scoring of the proposals, which need to be considered as the Autumn 2023 budget approaches:

> "*Secretary of State looks forward to discussing his proposed package in more detail with the Chancellor on the 22nd. It will be important to assess the likelihood of the OBR scoring*[29] *these proposals against their four tests, and all measures that officials are working up will require further detailed delivery impacting. As you know, Secretary of State is also meeting the Chief Secretary in July to discuss the Welfare Cap and AME savings options, where he has noted the additional comments which you may wish to briefly cover. Officials are further developing the list of savings options, and Secretary of State also continues to consider the areas where the poorest families remain under the greatest financial pressure – for instance those living in private rented accommodation. It will clearly be critical for us to think about the positioning of DWP policies in the round as we head towards Autumn Budget*".

33. The note included a table setting out various potential measures (many of which are irrelevant for present purposes) intended to advance this objective, together with a high-level assessment of the cost implications of each measure. The potential measures, which appeared under the heading *"Helping the long-term sick into work or remain in work"*, and the sub-heading "*Health and Disability Benefits*", included:

> "*7. Review the Work Capability Assessment (WCA) descriptors, with the intention of updating them to better reflect improvements in the modern workplace, flexible working and progress in occupational health"*; and
>
> *"8. Review the existing application of the substantial risk criteria (non-functional) in the WCA to identify how we make better use of reasonable adjustments and specific work-related activity*".

The Departmental Expenditure Limit/AME cost implications of each of these potential measures was assessed as 'low'. That is because it was anticipated that the measures would lead to reductions in expenditure on benefits (although the Defendant fairly points out that the *objective* of the note was not to identify measures to achieve costs savings as some potential options in the list would have involved spending money).

34. In June 2023, DWP officials discussed potential options to tackle economic inactivity with the Defendant, and there were also discussions between the Defendant, the Prime Minister and the Chancellor (see Mr. Thorpe's first witness statement at [10]).

35. In particular, on 22 June 2023, the Defendant and the Chancellor had a bilateral discussion on *"labour supply"*. Proposals to *"modernise the WCA descriptors"* and

[29] Office for Budget Responsibility. "Scoring" is a method of estimating the total fiscal impact of a policy change.

review the Substantial Risk Criteria were discussed in that context. The Defendant expressed the view that there was a *"strong case"* for reform, *"given the world of work has changed since WCA was introduced."* The Chancellor was "*keen to present this as a work from home revolution*."

36. Also on 22 June 2023, the Prime Minister wrote a personal minute to the Defendant, referring to the steps he was taking *"to continue to increase participation in the labour market"* and also referred to his work to find *"AME savings options"*. The Prime Minister stated that "*these strands of work are of fundamental importance to our economic and fiscal outlook*." He expressed interest in reviewing the WCA descriptors *"to better reflect improvements in the modern workplace, with the aim of supporting more LCW/fit for work outcomes"* and stated that "*it cannot be right that so many (and increasing numbers of) people are written off and left without access to support from a work coach*". These comments appeared within the part of the minute headed *"Principled reforms to welfare".* In the part of the minute headed *"Welfare AME spending"*, the Prime Minister stated "*Thank you for your work with the Chief Secretary to explore options to ensure welfare spending is placed on a sustainable footing. Like you, I am very concerned by the forecast levels of spend and am keen that you continue to prioritise this work to identify significant, scorable savings. We need to demonstrate that we have a credible plan to bring welfare spending down*".

37. It can be seen that the Prime Minister's concerns related to both getting people back into work and reducing spending.

38. On 30 June 2023, a submission to the Defendant from his officials at the DWP set out *"initial proposals for reviewing the WCA descriptors with the aim of reducing economic inactivity and AME spend"* (emphasis added), again referring to the two strands of work which the Prime Minister had identified.

39. This is an important document. Because the Government was keen to score these proposals in the Autumn Statement, it is stated that there was a "*need to work at pace*" with a "*compressed timetable*", despite the fact that essential evidential data concerning the pros and cons of the proposals had not yet been acquired:

> "*You should note the compressed timetable we have to score any announcement ahead of the Autumn Statement and the risks associated with that. An alternative timeline would be to announce any change at the first fiscal event next year.*"

Under the heading "**Options to reduce WCA spend**", it is stated that:

> "*We do not currently have the data which disaggregates LCWRA outcomes by which descriptors have been met. This data is essential to understanding volumes and potential AME savings. Given that constraint, and prioritising changes with the biggest impact, we are undertaking a quick audit to quantify the cost benefits of proceeding with specific descriptor changes. This data will be important for OBR to consider scoring any change.*"

40. A table is then included, in which broad brush estimates of the likely AME savings in respect of proposed changes to different descriptors is set out. Under the heading

"*assumptions to test*", it is stated that "*The volumes for WCA outcomes by these descriptors*[30] *(AME savings) justifies the change – critical given the high probability of negative reaction from stakeholders*". In other words, the anticipated negative reaction to changes in these key descriptors from the organisations representing those affected (disabled rights groups) will be tolerated by the government because of the likely significant AME savings.

41. Under the heading "Risks" at [10]-[12] of the submission, it is stated:

> "*10. Potential changes to reduce the number of people who are entitled to ESA or UC health, or the amount that they are entitled to, are likely to be very contentious. The White Paper is also very clear that structural reform (including phasing out the WCA and move to single PIP gateway) of the benefit system is not about fiscal savings, but rather improving the system and engendering trust, so perceived cost saving measures risks undermining the core message of the White Paper. We would need to develop a strong evidence base for making any changes in order to establish a rationale beyond cost-savings*[31]*.*
>
> *11. The Bill to abolish the WCA is also going to be introduced after the next election, in 2024. Simultaneously abolishing the WCA whilst also making regulation changes to tighten the gateway would be very challenging to explain to Parliament, stakeholders and individuals at a time when their support will be vital to successful passage of the Bill.*
>
> *12. [There is a] reputational risk from any accelerated consultation timetable for changes to WCA.*"

42. This document strongly suggests, therefore, that costs savings was not merely a secondary benefit resulting from the proposals but rather at least an equal driver for the formulation of the proposals.

43. Moreover, it was estimated that "*it would take 9 months to introduce secondary legislation for each option, starting with the further work to develop and impact the proposed change*" and "*the earliest we could introduce legislation for each option is Spring 2024*". The Consultation Paper itself at [23] states that any changes would not be implemented "*until 2025 at the earliest*." This also strongly suggests, as Ms Richards KC (counsel for the Claimant, together with Mr. Tom Royston) submitted, that the (or at least a) rationale for rushing the proposals through in time for the Autumn 2023 budget was the anticipated costs savings which could be announced.

44. That is also supported by the fact that under "next steps" at the end of the submission it is stated:

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[30] The descriptors in paragraphs 15a and 15b above.
[31] Emphasis added.

> "*Subject to your agreement, we will undertake the following activities to help inform and support your decisions on the merits of the WCA options:*
>
> *• Undertake a rapid audit to understand and disaggregate WCA outcomes by descriptor to identify scale of AME opportunity.*
>
> *• Refine AME savings analysis based on the outcomes from the audit and develop a prioritised list of descriptors for change.*"

45. In other words, the formulation of the proposals (i.e., which descriptors to change) was dependent upon the extent of the AME savings. Those changes to descriptors which a rapid audit showed resulted in the greatest AME savings would be prioritised.

46. Annex B to the same submission itself warned "*Compressed AB23*[32] *timetable leaves extremely limited time to develop options and source evidence*[33]*. Also means analysis of caseload and impacts would be done during consultation.*" Indeed, as Ms Richards KC pointed out and as Mr. Peri[34] admits[35], no evidence base was ever established by the Defendant for making the changes to the scheme (relating to the numbers of people brought back into work) beyond the costs savings rationale.

47. The submission further noted that, unlike the compressed timetable in this case, "*[t]he end-to-end consultation period for the last full review of descriptors in ran from March 2009 – October 2010, including expert case analysis and group descriptor analysis, technical review by the CMA and a separate consultation by SSAC*".

48. Mr. Peri states in his second witness statement at [19] that there was then a meeting on 5 July 2023 between the Defendant, the Minister for Disabled People and key officials. Both PIP and WCA reform options were discussed. "*No decisions were made or recorded in the readout in relation to WCA, but officials were directed to undertake more work on the options ('SoS asked the team to look into what it would look like if we made changes to the WCA gateway, and wanted to see the potential fiscal impact of these changes' and there was also an action recorded which said 'Continue to feed into the work on AME savings and autumn statement options').*"

49. On 6 and 7 July 2023 there was an exchange of emails between civil servants in the Disability and Health Support Directorate, being the policy group conducting the WCA review. This exchange included Mr. Thorpe. These emails noted that there were two options on the table:

> "*a review of functional descriptors and activities to tighten the gateway and reduce LCWRA outcomes (for new claims and reassessments); and*

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[32] Autumn Budget 2023.
[33] To establish the rationale beyond costs savings, of moving people back into work.
[34] Deputy Director in the Employment-related Health Benefits Division, Disability and Health Support Directorate at the DWP.
[35] See his first w/s, [12]: "*No departmental evaluation of the disability impact of the proposals had been done to assist the Defendant in complying with the PSED prior to 5 September 2023*".

> *a review of the application of the 'substantial risk'(non-functional) provision to reduce LCWRA eligibility where risk can be mitigated by tailored work-related activity or more effective use of reasonable adjustments, including availability of home working*".

Importantly, it was stated in particular as follows:

> "*The SoS is tentatively supportive of the potential for WCA review ahead of structural reform. Narrowing the gateway would move fewer people into long-term inactivity, and have long-run AME benefits, particularly when considering numbers eligible for transitional protection. The SoS is keen that we develop an evidence base to understand which changes deliver the greatest impact and quantify this. Work to audit assessments and develop this evidence base is underway to deliver indicative costs that would need to be refined through testing. The SoS considers that SB24 is a more feasible timetable, to take account of the need to undertake detailed impacting and the rationale for the changes, and to allow sufficient time for an adequate consultation that permits proper consideration of the responses.*"

50. This shows that changes to the WCA descriptors were being assessed from a costs savings point of view, as well as moving people out of long-term inactivity, and that an evidence base was required to establish which changes delivered the greatest AME costs savings. However, in order to complete this evidence base, the 2024 Spring Budget was a more feasible deadline than Autumn 2023.

51. The emails reveal the serious concerns of the civil servants as to the consequences of rushing through these changes:

> "*Announcing the changes in the Autumn <u>would not be compliant</u> with the Gunning principle (sic) as there is insufficient time to properly undertake all the necessary steps (it would require shortened consultation, risk not providing accessible formats, and leave inadequate time should be given for consideration) … The SoS considers that SB24 is a more feasible timetable, to take account of the need to undertake detailed impacting and the rationale for the changes, and to allow sufficient time for an adequate consultation that permits proper consideration of the responses… We also consider that it would be better to decouple any announcement of changes from a fiscal event because the measures are expected to be controversial and risk being perceived as purely cost-saving measures by influential disability rights groups, individual stakeholders and by SSAC. We would want to develop a wider narrative based on modern and home working, which would also mitigate these risks. Distinguishing this from a fiscal event would support that aim.*"

And:

> "*SB 24 timeline looks essential to ensure we've properly consulted.*"

52. The fact that the civil servants who were concerned with working on the policy changes – including Mr. Thorpe – themselves considered that rushing to a consultation in September 2023 in time for the 2023 Autumn Budget would not amount to an adequate consultation is, I consider, highly significant. Mr. Thorpe makes no mention of this fact in his witness statements, save that in [44] of his first witness statement he states that "*my advice [to Ministers] was that a 12-week consultation would be preferable... We thought that a 8-week consultation would be reasonable given the precedents of similar consultations on changes to the PIP assessment, which had run to a similar window.*" He further stated at [46]:

> "*An 8-week consultation period would balance the need to give disabled people and people with health conditions time to digest the proposals and meaningfully respond, the ability of my team to run meaningful engagement including face to face events around the country, and the Government wanting to make progress on a burning issue.*"

53. However, the documentary evidence shows that at the time, he was part of a group of civil servants who appear to have been concerned that announcing the changes in the Autumn would actually be unlawful, being contrary to the *Gunning* principles. He must also have been aware that the reason for the undesirable rush to publish the consultation paper was to announce the AME savings in the 2023 Autumn Budget; but he does not say this in [31]-[32] of his first witness statement, in which he states:

> "*31… The WCA proposals were part of the commission to come up with proposals for reducing economic inactivity, for which there were also other options available. Simultaneously, we had been commissioned to develop AME savings for which, again, there were multiple available options.*
>
> *32. This is reflected in the 30 June 2023 submission, which also shows that thought was being given to whether the WCA proposals could be developed in time to be included as part of the Autumn Statement.*"

54. A further, more detailed, submission was made on 18 July 2023 to the Defendant from his officials at the DWP. The focus was upon changes to descriptors and substantial risk in order to make AME savings. There was little or nothing about the benefits to individuals of getting back into work or the beneficial impacts on the labour market resulting from the proposals. By this stage, high level savings estimates suggested the potential for savings of £500m and, despite their stated concerns concerning the rushed consultation, the civil servants were nonetheless working at pace in order to meet the Autumn Budget deadline:

> "*1. We wrote to you on 30th June 2023 with initial proposals for reviewing the WCA descriptors to reduce economic inactivity and AME spend. Following your bilateral with the Chancellor, this advice outlines the areas of most significant impact for WCA*

> *reform to recognise opportunities from home working, address the growth in inactivity, and make AME savings. We have undertaken audits at pace to give us indications of likely impacts of WCA review options, though testing will be needed to refine these and for OBR to score savings. High level estimates based on the audit findings suggest changing descriptors and substantial risk for the flow of initial assessments could lead to an upper estimate of £500m savings by the end of the scorecard. Further savings could be made through reassessments and work is underway to develop this estimate.*
>
> *2. Work is underway at pace to put plans in place for a consultation in time for Autumn Budget and we will provide more on this timeline at the start of next week. To help further develop the options and mitigate some of the risk, we are seeking permission for informal engagement with specialists and external clinicians through recess, in particular with musculoskeletal and mental health experts.*" (emphasis added)

55. The submission referred to the fact that "*we undertook two audits, each of circa 300 cases awarded LCWRA to understand the functional descriptors that most commonly lead to LCWRA outcomes and have the most opportunity from review. The most significant change would be delivered from removing or amending the Mobilising descriptor in line with the increased ability to work remotely or from home. Alternatively, the threshold could be increased by changing the distance that an individual cannot mobilise unaided from 50m to 20m…*"

56. These audits were not shared with the consultees as part of the consultation.

57. The central importance of making AME savings through the proposals, and the rushed nature of the exercise, are again demonstrated by the fact that:

> "*High level estimates from the audit findings indicate that changing mobilising for the flow of initial assessments could lead to an upper estimate of £300-350m saving, once adjusted for co-morbidities and behavioural impact. There is a high degree of uncertainty in these estimates and further work is needed to refine them.*"

58. It was also identified that tightening the Substantial Risk Criteria definition could lead to further savings of £150m:

> "*For claimants that meet 'Substantial Risk', the small-scale case audit has illustrated that tightening its use has the potential to reduce LCWRA outcomes. While the guidance is already tightly defined, its interpretation and use has gone beyond the policy intent for exceptional circumstances. From the audit indications, we have modelled halving the 15.5% of LCWRA risk outcomes at initial assessment from tightening use of Substantial Risk. If we assume, in the absence of evidence, that around half of these cases will behave differently and meet functional criteria, then*

> *we expect savings could be up to £150m. This would need to be refined and tested*".

59. The focus here is, once again, upon costs savings rather than on the likelihood of increasing the numbers of those people back into work who previously met the Substantial Risk Criteria definition.

60. In the light of this submission, two days later on 20 July 2023, the Defendant sent the Prime Minister a letter headed *"Welfare Reform and Savings"*. He discussed the possibility of changes to the WCA descriptors within a section of the letter headed *"Principled reforms to welfare"*. There was a separate section of the letter headed *"Wider AME savings"*, which did not concern the matters which would be the subject of the Consultation. However, under the heading "PIP descriptors"[36], the Defendant referred to the fact that "*as with the WCA gateway*", he was "*moving forward at significant pace towards a possible consultation so that savings might be scored at the Autumn Budget*."

61. It is clear that the Defendant still had significant reservations about the pace of the proposed consultation:

> "*We need to be fully aware that no options are straightforward or without risk. We need to develop an evidence base for making any changes to establish the rationale upon which we would be seeking to make changes to the policy*[37]*. We need to agree the timetable for both WCA and PIP gateway changes. Going too fast could put at risk longer-term reform ambitions for PIP and for WCA reform and it will be politically challenging to make changes given the nature of the benefit and the people it aims to support. With this in mind, I would be keen to use our meeting to discuss your appetite for bold reform, the potential risks and practical implications of potential reforms in this space*". (emphasis added)

62. It is significant that the Defendant was pushing ahead with the consultation in time for the 2023 Autumn Budget despite not having any evidence base to support the proposed changes, but in the anticipation that the changes would lead to significant AME savings. Indeed, Ms Richards KC pointed out that that evidence base was not developed in time for the launch of the consultation.

63. On 21 July 2023, Mr Thorpe sent the Defendant a submission which recommended that he consult on potential changes to the WCA descriptors. Mr Thorpe stated that "*we recognise and agree that there are too many people being written off through the WCA and being declared as LCWRA and receiving no employment support to help them reintegrate into the labour market"*. That was a somewhat curious statement as a person declared as LCWRA is not "written off" with "no employment support": they are able voluntarily to access such support. It will be seen that this became a false rationale for the proposals in the consultation paper.

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[36] Personal Independence Payments.

[37] i.e. moving people back into work.

64. So far as reform to WCA is concerned, Mr. Thorpe again repeated that whilst "*we recognise that you have been asked to deliver significant savings to an Autumn Budget*":

> "*Our recommendation remains that to deliver this safely, and have time to work through difficult changes for a complex and sensitive group we should work to a Spring timeline. The presentational risk of a rushed reform is significant and could be detrimental to our ability to deliver our structural reforms*."

65. The reference to delivering this WCA project "*safely*" is presumably a reference to delivering it without it being susceptible to challenge under the *Gunning* principles and without it undermining the structural reforms to the WCA described in paragraph 28(ii) above. It is clear that Mr. Thorpe remained very concerned about the constricted timetable which was being proposed in order to deliver AME savings by the time of the Autumn Budget.

66. On 1 August 2023, there was a trilateral meeting between the Prime Minister, the Chancellor and the Defendant, which concerned both (i) the proposed reforms to the WCA, and (ii) separate potential reforms to the PIP. They discussed what the Government's "strategic pitch" should be as the consultation is launched. It was agreed that "*On WCA, rationale will major heavily on changing world of work and wanting to modernise the WCA to reflect this and prepare for structural reform. We do not want people languishing on LCWRA when we know with the right support they could move into work in the near future*." There is no mention of the presented rationale also being the making of AME savings.

67. They agreed that timing was "*tight for an eight-week consultation*" and that a "*six-week rather than eight-week timetable would provide an additional 10 days before consultation (aiming to launch on 14 September) which could be used for further policy refinement and engagement."*

68. On 7 August 2023, the Defendant was sent a submission with a draft of the Consultation Paper for review. Because of the rushed process, the Defendant was asked to review it urgently and give it clearance as soon as 11 August. The submission referred to it having been agreed at the trilateral meeting that the Consultation should be conducted prior to the Chancellor's Autumn Statement (i.e. 22 November 2023) for a dual purpose: "*to help deliver fiscal savings and improve labour market outcomes*". Sir James Eadie KC (who appeared together with Emily Wilsdon, George Molyneaux and Ella Grodzinski for the Defendant) submitted that this reflects that, while the proposals were not driven by a desire to achieve costs savings, it was anticipated that they would do so; and that unsurprisingly, the Government wished to be able to take any such anticipated savings into account for the purposes of the Autumn Statement.

69. I do not accept that submission. I consider that the contemporaneous documents show that the proposals were indeed driven <u>both</u> by a desire to improve economic activity <u>and</u> also by the desire to make AME costs savings, and that the latter desire accounted for the great urgency to publish the Consultation Paper before the 2023 Autumn Budget, regardless of the lack of research to provide the requisite evidence base (moving inactive people back into work) for the proposals. Indeed, this is apparent from paragraph 9 of the same submission of 7 August, in which it is stated that:

> "*There are likely to be people with severe physical and mental health conditions who would be impacted by the proposed changes, and we can expect a very strong reaction from disability rights groups and stakeholders, even with the additional rationale beyond cost-saving. The handling and engagement strategy development to mitigate the impact of this potential fallout will be critical.*" (emphasis added)

70. This makes clear that the rationale of the changing world of work and the desire to change the WCA to reflect this, which was to be the Government's "strategic pitch" in presenting the reforms, was by no means the primary rationale/driver for the decision to make changes to the WCA despite its impending abolition. It was "a" driver, but at least an equally important rationale/driver (and possibly even the greater driver) was the desire to make AME costs savings. The Government would put forward the additional rationale of changes to the WCA being necessary because of the changing world of work.

71. This conclusion is further reinforced by Annex C of the same submission which contains the consultation timeline. That provides a three-week period between 31 July – 18 August to "*Develop options*" and "*Source evidence to justify consultation*". As Ms Richards KC succinctly put it, this is "back to front policy making". The Defendant had decided to go ahead with the rushed consultation in order that the Prime Minister would be in a position to announce AME savings in the 2023 Autumn Budget which meant that the civil servants now had to hurriedly source evidence in an 18-day window to justify the consultation (despite the publication of the White Paper referred to in paragraph 28(ii) above), on the basis of the "additional rationale" – i.e., the changing world of work rationale.

72. The same submission also rightly recognised that the "*long timetable for enacting changes*" to the WCA which were to be proposed, being Summer 2025, "*makes it harder to justify short consultation.*"

73. This conclusion also derives strong support from an email dated 11 August 2023[38] containing the comments of the Defendant on the terms of the proposed consultation, which was sent to Mr. Thorpe and the other civil servants in the Disability and Health Support Directorate. The Defendant states:

> - "My view is that, as recommended, we should not consult on raising the points threshold. Simply raising the threshold would look quite arbitrary, and since it sounds like there is clear evidence of clustering at the 15 points mark, I would expect that outcomes would simply start to cluster around the new threshold instead if you raised it.
>
> - I agree that including removal of the LCW risk criteria in the consultation would be highly inadvisable – part of our case for reviewing LCWRA risk is that we will have a

[38] This email was only disclosed as a result of the Claimant bringing an application for disclosure against the Defendant.

> bespoke WRA requirement for that group instead (i.e. much reduced conditionality but removing the benefit premium). Having checked with officials, I also don't think we should include potential amendments to the LCW risk criteria either. I'm satisfied that we can address this through the operational review, looking at how the rules are being applied. Including options to amend the rules themselves in the consultation would be very difficult and rushed now given the timings involved.
>
> - I also think that there's not much gain from potential measures in this space given, as the sub says, it doesn't increase scoreable AME impacts. I would note, however, that in (political) discussions with the PM he expressed the view that something on LCW would be useful *because* it doesn't save any AME – as a way to try to show we aren't just doing this to save money, it's a principled package about the importance of work etc. But we will move some people from LCW into FFW via removal of descriptors anyway, so we can achieve that without needing to raise the points thresholds.
>
> - On removing substantial risk – James agrees that we should include option to remove. We can lean on the fact that this would be coherent with the direction of the structural reforms. Handling could potentially be challenging if we did go ahead, but I think if we have the option in there, we can always opt for amending rather than removing in the end. May be useful to have that option so we can say we have listened to views in the consultation and appear to be taking the middle way if the consultation lands particularly badly and we need to appear conciliatory. We would need to make clear, though, that there would be a very carefully and sensitively crafted form of conditionality for those moving into LCW risk – to combat suggestions that we will be forcing suicidal people to come to the JCP and sanctioning them if they don't etc."
>
> (emphasis added)

74. This email strongly supports the finding that the primary rationale of the proposed reforms, at least in equal measure with a desire to address work inactivity, was the desire to make AME costs savings. The Defendant is recorded as saying that there was little point in proposing the changes in the first two bullet points because they would not increase scorable AME impacts, but despite that, it would be "useful" if the proposals nonetheless contained something on LCW purely for presentational reasons – to support the appearance that the primary purpose of the proposals concerned the importance of work, rather than costs savings. As Ms Richards KC pointed out, this email does not even address the extent to which it was considered that the proposed

threshold changes to LCWRA/LCW would have a positive effect on economic activity, presumably because the Defendant had still not sourced any evidence on the topic.

75. Consistently with this analysis, in a document disclosed by the Defendant headed "*PIP & WCA options, "RAG rating summary to deliver to an Autumn Budget timeline"*", against the "*claimant impact*" of the proposal to delete the descriptor concerning incontinence the following is stated: "*the radical option is to remove the descriptor altogether and make the case that home working means the risks associated with incontinence are reduced to an acceptable level by the fact they are in the familiar setting of their own home with accessibility to their own toilet facilities*." Against the heading "Advantages" it is then stated "*The volumes scoring LCWRA based on incontinence are low (c.1%) so the impact on AME would be negligible. However, for consistency of argument with the WFH [working from home] narrative we should make the changes to support what we are doing, for example on mobilising*." The focus is again on AME savings; although the AME savings of this option are negligible, the option is to be included in the proposals so as to present a consistent narrative that the proposals are intended to address the new world of working from home.

76. Finally, in the DWP Autumn Statement 2023 update, dated 30 August 2023, there is reference to a number of studies carried out on AME savings which were not referred to in the Consultation Paper as follows:

1) Potential AME savings identified of up to £5bn pa by 2028/29[39];

2) Review of LCWRA activities and descriptors to reflect home working will move c. 145k people out of LCWRA by 27/28, with an average loss of £85 per week;

3) WCA review of the application of "substantial risk" provision will move c. 70k people out of LCWRA by 2027/28, with an average loss of £85 per week;

4) Poverty impact: 100k into absolute poverty AHC in 26-27 based on illustrative 10% reduction in on-flows.

Mr. Thorpe's witness statements

77. This brings me to a consideration of the evidence of Mr. Thorpe and how the court should assess his evidence in light of what the contemporaneous documents show. Sir James Eadie KC pointed out that he is the senior civil servant responsible for this area, and the official who led all discussions with the Defendant. Mr Thorpe's unequivocal evidence, submits Sir James, is that (i) in all discussions that he had with ministers the *"primary motivation"* for considering changes to the WCA was not a fiscal/welfare savings one but rather to reduce economic inactivity levels; (ii) *"there was no hidden 'real' motive to the reforms"*; (iii) the fact that the proposed reforms would deliver savings while unsurprisingly welcome, was no more than a *"secondary benefit"*; and (iv) if AME savings had been the primary driver for selecting this reform, then other

[39] The OBR Report of November 2023 states in paragraph [3.21] that *"The fiscal savings arising from this policy, which amount to an average of £1.0 billion a year between 2026-2027 and 2028-2029, come from lower spending on the health element of UC and its equivalent in ESA. Individuals in the LCRWA group currently receive an additional £390 a month in benefits."*

options on other benefit lines would have been prioritised ahead of changes to WCA: see Thorpe (1) at [24]-[35], especially [24]-[25] and [28].

78. Sir James argues that the Claimant did not apply to cross-examine Mr Thorpe, and does not appear to question that he genuinely believed (and believes) that the rationale for the proposals was as stated. Instead, the Claimant relies upon the fact that the Defendant has not taken "the extraordinary step" of adducing a witness statement from The Rt Hon Mel Stride MP, explaining his own state of mind. However, there is no need for a witness statement from him, maintains Sir James, since there is ample documentary evidence which supports the proposition that the rationale for the proposals was as stated. Those documents indicate that the Defendant saw proposals to change the WCA as a facet of the *"principled reforms to welfare"* that he wished to make in order to tackle economic inactivity, and not simply as a cost-cutting measure. Moreover, the reasons which the Consultation Response gave as to why the Government had decided to pursue certain of the proposals, but not others, had nothing to do with potential costs savings: see especially [43]-[80].

79. Ms Richards KC submitted that it was unnecessary to apply to cross-examine Mr. Thorpe. He was not the decision-maker and his motivation or his view of what the Defendant's motivation might have been is not relevant. She maintained that the Claimant's case rests upon an objective analysis of what the contemporaneous documentation reveals about the decision-making in this case, and it is that which the court should rely upon, not the *ex post facto* stated motivation of those involved in the decision-making over a year later.

80. I agree with Ms Richards. This is a case where the court has the benefit of the contemporaneous documents which demonstrate clearly that (i) the reason for the compressed, rushed timetable for the proposed changes to the WCA was the desire to make AME costs savings ahead of the 2023 Autumn Budget; (ii) at least equal drivers of the proposed changes to the WCA were a desire to make AME costs savings and a desire to improve the situation of economic inactivity in the LCW and LCWRA groups. AME costs savings were not merely a secondary benefit resulting from the changes. They were central to the Defendant's decision to consult on changes to the particular descriptors which were selected, and then in a very compressed timespan.

81. In *F v Surrey County Council* [2023] EWHC 980 (Admin) there was a factual dispute in a judicial review claim about what the claimant's mother was told by the Defendant at the relevant time. There was no application to cross-examine the Defendant's witnesses and the Defendant submitted that in the absence of cross-examination, the Defendant's evidence must be presumed to be correct unless documents or other objective evidence shows it to be incorrect.

82. At [46]-[50] Chamberlain J summarised the law as follows:

> *46. In general, a court hearing a judicial review claim does not resolve disputes about primary fact. This is because, in general, the issues for the court to determine do not turn on the resolution of such disputes. Typically, the court focuses on the procedure adopted before the decision was made; whether the decision-maker was entitled to conclude the information before him was sufficient; and whether the decision-maker identified and answered what in law were the right questions, approached and structured his task in a logically acceptable way, gave adequate*

and intelligible reasons and reached a decision that was open to him on the evidence. In most cases, a claim alleging a flaw of this kind will not depend on the resolution of any dispute about primary fact. When a decision is challenged on the basis of material error of fact, the claimant is required to show that the fact is "uncontentious and objectively verifiable" rather than one that the court has to determine for itself: see e.g. R (Law Society) v Lord Chancellor [2018] EWHC 2094 (Admin), [2019] 1 WLR 1649, [98].

47. When a claimant invites the court to resolve a dispute of fact, the invitation is sometimes an indicator of his inability to identify a proper public law ground on which the challenged decision can be impugned. There are, however, situations in which a genuine public law ground of challenge requires resolution of a dispute about a primary fact. In that situation, it is often claimed that there is a general principle that the defendant's written evidence is to be preferred, unless exceptionally the court permits cross-examination or the evidence "cannot be correct": see e.g. R (Safeer) v Secretary of State for the Home Department [2018] EWCA Civ 2518, [16]-[19] (Nicola Davies LJ); R (Singh) v Secretary of State for the Home Department [2018] EWCA Civ 2861, [16] (Underhill LJ). The scope of the "cannot be correct" exception was explained by Stanley Burnton J in S v Airedale NHS Trust [2002] EWHC 1780 (Admin), at [18]: "There may be an exception where there is undisputed objective evidence inconsistent with that of the witness that cannot sensibly be explained away (in other words, the witness's testimony is manifestly wrong)…"

48. There are, however, other equally authoritative statements which put the principle more neutrally and do not refer to any presumption in favour of the defendant. In R (Talpada) v Secretary of State for the Home Department [2018] EWCA Civ 841, Hallett LJ said this at [2]:

"If there is a dispute of fact, and it is relevant to the legal issues which arise in a claim for judicial review, the court usually proceeds on written evidence. Since the burden of proof is usually on the person who asserts a fact to be true, if that burden is not discharged, the court will proceed on the basis that the fact has not been proved. It would be an exceptional case in which oral evidence was needed by the Administrative Court – or the Upper Tribunal when exercising its judicial review jurisdiction."

49. There are many instances in which the courts have resolved questions of fact on the basis of written evidence without cross-examination, sometimes against defendants: see, for example, the cases referred to by Sir Michael Fordham in his Judicial Review Handbook (7th ed., 2020), at para. 17.3.12.

50. In my judgment, the correct approach is as follows:

(a) If invited to resolve a dispute of primary fact, the court should consider carefully whether any pleaded ground of challenge really requires resolution of the dispute. In most cases, the answer will be that the resolution of the dispute was for the decision-maker, not the court: the court's supervisory function does not require it to step into the shoes of the decision-maker and therefore does not require it to resolve the issue for itself.

> *(b) Where the resolution of a dispute of primary fact is necessary, the court usually proceeds on written evidence: see e.g. Talpada, [2]. The court will generally do so if – as here – no application to cross-examine has been made before the start of the substantive hearing.*
>
> *(c) There is no absolute rule that the court must accept in full every part of the statement of a witness who has not been cross-examined, whether the statement is adduced for the claimant or the defendant. The court can reject evidence in a witness statement if it "cannot be correct" (Safeer, [16]-[19] and Singh, [16]). That might be so if it is contradicted by "undisputed objective evidence… that cannot sensibly be explained away": S v Airedale, [18]. But there are also examples of courts rejecting evidence given in witness statements as, on balance, inconsistent with other written evidence: see e.g. Talpada, [48].*
>
> *(d) In some cases, the court may be unable to resolve a conflict of written evidence on a question of primary fact. In that situation, "the court will proceed on the basis that the fact has not been proved": Talpada, [2]. This will be to the disadvantage of whichever party asserts the fact. That will generally be the claimant, because in judicial review the claimant generally bears the burden of proving all facts necessary to show that the decision challenged is unlawful. Thus, the principle that the defendant's evidence is to be preferred, save where it "cannot be correct", arises because of the difficulty of satisfying the burden of proof where there is a conflict in written evidence, not because evidence adduced on behalf of a defendant is inherently more likely to be true than that adduced on behalf of a claimant.*

83. In [28] of his first witness statement, Mr. Thorpe gives evidence that the AME savings "*were considered to be a secondary benefit resulting from the change*"; and in [24] he states that the Government's "*primary motivation for changes to the WCA was to reduce economic inactivity levels*".

84. Applying the approach of Chamberlain J in *Surrey* at [50(c)] above with which I agree, in so far as Mr. Thorpe is saying that he considered the savings to be merely a secondary benefit of the WCA changes, then (whether he did or not) I do not consider that *the Defendant* also held that view. In so far as he is suggesting that the *Defendant* held that view, the contemporaneous documents (described above) show him to be mistaken in that regard (or at least that his use of language – "*secondary benefit*" – is imprecise), and I do not accept that part of his statement. Likewise, the contemporaneous documents (described above) show him to be mistaken in his suggestion that fiscal/welfare savings were not the Government's *primary motivation* for the WCA changes to this extent at least: whilst they were not the *only* motivation, fiscal/welfare savings were, at the very least, an equal part of the motivation for the proposed changes to the WCA, together with the motivation to reduce economic inactivity levels.

The Consultation Proposals as published

85. The WCA Consultation was announced by the Defendant in Parliament on 5 September 2023. He stated in particular:

> "*These proposals will help people to move into, or closer to, the labour market and fulfil their potential. We are consulting over the next eight weeks to seek the views of disabled people,*

> *employers, charities and others on our proposed changes. If the proposals were taken forward following consultation, the earliest we could implement any change would be from 2025, given the need to make changes to regulations and to ensure appropriate training for health assessors.*
>
> *These plans are part of our wider approach to ensuring that we have a welfare system that encourages and supports people into work, while providing a vital safety net for those who need it most. A welfare system that focuses on what people can do, not on what they cannot do, and that reflects the modern changes to the world of work. It is time to share the opportunities of work far more fairly. It is time for work to be truly available to all those who can benefit from it. It is time to get Britain working*."

86. The Defendant made no mention at all of the fiscal/welfare savings aspect of the proposed changes to the WCA, in particular of the fact that the proposals would result in people with LCWRA status losing their current benefit payment of £390.06 (now £416.19) per month; nor of the fact that for people with LCWRA status, the proposals would replace voluntary work related activity with compulsory work related activity.

87. The Consultation Paper was published on the same day. The proposals which were the subject of the Consultation were those set out in paragraph 15 above. In the Executive Summary at [2], the proposals are presented in the following manner: "*we need to go further to facilitate work opportunities for those who are able, and not exclude people from the support they are entitled to*". Further, in [6] it is stated that "*People assessed as LCWRA do not have any requirements to engage with this tailored work coach support. It is not right that so many people are left without support, and we must not hold people back from opportunity*."

88. I agree with Ms Richards KC that this presentation, which had earlier been trailed in the submission from Mr. Thorpe referred to in paragraph [63] above, was misleading. It fails to state that people assessed as LCWRA could (currently) have any amount of support offered to them by the Defendant without any legislative change at all; rather, these proposals would *compel* additional people to look for work and take up available work, and *compel* additional people to participate in work related activity.

89. Furthermore, the Consultation Paper fails to make clear that the proposals will reduce very significantly the amount of benefits paid to some or all affected claimants. The fact that people who lose LCWRA status will lose their benefit payment of £390.06 (now £416.19) is not expressly mentioned anywhere in the main body of the text.

90. Sir James Eadie KC submits the fact that a person transitioning from LCWRA to LCW under the proposals would lose their monthly benefit payment can be inferred from (i) paragraph 5 of the Executive Summary which states "*Where people are assessed as LCWRA they are not expected to undertake any work preparation activity and receive an additional amount of benefit*" and (ii) scrutinising the Benefit Rate figures in Annex D at paragraph 7 which states "*A UC claimant who has LCWRA receives a monthly rate of £390.06"*. But the Consultation Paper nowhere specifically states that fact, and whilst an expert stakeholder in this field might understand that that would be the consequence, I consider that many people, and particularly vulnerable disabled people (including

those suffering from cognitive impairments), might very well not have realised this. Since this (financial savings) was one of the two key drivers behind the proposed changes, it should plainly have been expressly spelled out.

91. Ms Richards KC points out that (and I did not understand the Defendant to take issue with this) if the finalised proposals become law:

a. 424,000 disabled people a year will receive lower rates of benefits than they otherwise would (most commonly by the current figure of £416.19 per month), reducing disability benefits expenditure by £1,425,000,000 per year by 2028-29;[40]

b. Instead of having a choice over what employment support they receive from the Defendant (as they do under the present rules), those 424,000 claimants will, by virtue of being in the LCW group instead of the LWCRA group,[41] have to comply with "work-focused interview requirements" or "work preparation requirements" imposed on them by the Defendant, and may be "sanctioned" (lose benefits) if they do not;

c. An additional 33,000 claimants will be moved from the LCW group to the "intensive work search" ("IWS") group, where they will have to comply with all work-related requirements imposed by the Defendant, and may be sanctioned if they do not; and

d. Of the 457,000 people identified above, only 15,000 extra are expected by the Defendant (through a combination of reduced income and increased conditionality) to enter employment.[42] Put differently, for every hundred people who face reduced income and sanctions, only three, approximately, are expected to find work as a result.

92. The Consultation Paper fails to set any of these points out, presumably because the evidence base for the proposals had not yet been established at the time of the hurried consultation.

93. An "Easy Read" consultation document was published on the same day. In particular:

i. It gives the misleading impression at p. 9 that the object of the proposals is to "*give [LCWRA claimants] support, to help them get ready to work*", whereas in fact they already benefit from such support which they can choose to take up on a voluntary basis or not as they wish, without being subject to conditionality. But the document does not inform the reader of this critical fact. It is not made clear that the proposals are to *compel* additional people to participate in "work related activity" (and to a more limited extent, to *compel* additional people to look for work).

ii. Under the heading "*Changing substantial risk*" it states of the proposals: "*We are not going to force people to work or get ready for work, or take*

[40] DWP, *Work Capability Assessment Reform: update to estimated number of claimants affected* (18 April 2024); Thorpe WS §39(f).
[41] These terms are explained further below.
[42] Thorpe WS, WT8 table 1.2.

away money if they do not". This also gave a misleading impression. As set out in paragraphs 39 and 42 of the Consultation Paper, the proposal was to amend the LCWRA Substantial Risk Criteria definition, or to remove the LCWRA risk criteria entirely. That could indeed lead to an affected person being forced to undertake "tailored" work related activity on pain of being sanctioned if they did not, and it would indeed take away money (the LCWRA benefit sum) from them.

Sir James suggested that this was merely an expression of intention (i.e. "we do not intend to take away your money") but I consider a reasonable person reading this document would understand this to be a description of the *effect or consequence* of the proposals[43]. Sir James also suggested that those people designated as LCWRA could be taken to understand they will lose their LCWRA financial benefit if they move into the LCW category. I do not accept that: they are being told the opposite in this document. Nor do I consider that the misleading impression given by this statement was dispelled by the wording at the top of the next page of the Easy Read document as suggested by Sir James: "*But we want to get people to take part in activities that help them learn and feel better about working*."

iii. There is no mention anywhere in the Easy Read document that the proposals are to reduce very significantly the amount of money paid to most affected claimants, even if they comply fully with all conditionality. Nothing is said at all (whether expressly or inferentially) to the effect that should a person transition from LCWRA to LCW under the proposals, then they will lose their monthly benefit payment of £390.06. There is, in particular, no equivalent of Annex D to the Consultation Paper[44]. I accordingly reject the Defendant's submission that this would have been "*obvious to any potential respondent to the Consultation and therefore did not need to be expressly stated*"[45]. It was not so obvious, and it did need to be so stated[46].

94. There would have been no difficulty in the Defendant spelling out the adverse[47] financial effects of the proposals. Indeed, these effects were well known to the Defendant and his department, as is evidenced by a document dated 21 August 2023[48] exhibited to Mr. Thorpe's witness statement of 19 June 2024 – i.e., exhibit WT22, headed "*WCA – options to ease transition on reassessment*" , in which it is clearly stated that:

[43] As Ms Richards KC pointed out, there is no discretion in the statute allowing for the waiving of sanctions.
[44] And accordingly, Sir James does not have available to him the argument which he advanced as recorded in paragraph [90] of this judgment.
[45] Skeleton argument at [32.4].
[46] In any event, as Ms Richards KC rightly pointed out, it would not necessarily have been obvious to a person with LCWRA how much financial benefit a person with LCW was receiving; or that they were subject to conditionality and sanctions.
[47] Adverse, that is, to LCWRA and LCW categories of claimants.
[48] Note, pre-consultation.

"*For the proportion of UC and ESA claimants that move from LCWRA to LCW/FFW due to the WCA changes we are planning to consult on, reductions in income for individuals will be significant. The LCWRA element is £390 per month.*

LCWRA also removes people from the household benefit cap so overall reductions in income could be greater (see Annex A).

Volumes of people affected if WCA changes to Mobilising and Substantial Risk activities and descriptors were applied to initial claims or reassessments respectively.

Claimants affected by reforms (000s)

	25/26	***26/27***	***27/28***
Initial claims	*45*	*80*	*120*
Reassessment	*30*	*60*	*95*

• Options could be considered to ease this transition, particularly given the substantial risk claimants, whom we know have preexisting significant mental health conditions and suicidal ideation. The reduction in income alone might be a bigger contributory factor to a deterioration in mental health than undertaking work preparatory activity."

95. On 8 September 2023 a *Touchbase* summary of the proposals was produced, which was sent by the DWP to subscribers to its mailing list. It stated that:

> "*Under plans included in the consultation, those identified as capable of work preparation activity under the new criteria*[49] *would receive tailored support, preventing automatic exclusion from available support.*" (emphasis added)

96. This again was misleading. There is no legislative basis for "automatic exclusion" from support in the present system. Sir James realistically accepted that this "could have been better phrased". The same misleading impression – that the proposals were ensuring that those persons with LCWRA who are currently automatically excluded from available support would, under these proposals, now be able to access support – was given in the Government's Press Announcement on 5 September of the launching of the consultation[50]:

> "*Those who were found capable of work preparation activity in light of the proposed changes would receive tailored support, safely helping them to move closer to work and ensuring a significant proportion of people are not automatically excluded from the support available.*"

[49] Namely those with LCWRA status.

[50] It was also given in the email communications from DWP to stakeholders on 5 September 2023.

97. In short, none of the consultation documents contain any reference to (i) the fiscal savings by reason of the proposals; or (ii) the loss of the substantial monthly benefit payments for those who are moved out of LCWRA status. Furthermore, the documents give the impression that those with LCWRA status presently cannot access support to move towards work and are automatically excluded from it, which will not be the case should the proposals become law. That was also a misleading impression.

Complaints about the rushed nature of the consultation process and lack of analysis

98. Significantly, before the consultation concluded, the Chairman of the Work and Pensions Committee wrote to the Defendant and stated as follows:

> "***Work Capability Assessment: activities and descriptors consultation***
>
> *The Committee has received representations from key stakeholders expressing concern about the timetable for the Work Capability Assessment: activities and descriptors consultation. There is a view that previous changes of this scale have been made after an extensive period of evidence gathering and consultation, including involving experts and representative groups in stages of development and testing. Eight weeks for this consultation may not enable all affected people to engage and contribute.*
>
> *I would therefore be grateful if you could give consideration to extending the consultation deadline and if you do, if you could determine an adequate length of extension after discussion with key stakeholders. Should you not agree to extend the current consultation, will you give an undertaking now to conduct a further consultation on the detail of the changes to the WCA following the initial announcement at the Autumn Statement.*
>
> *I would also be grateful if you could confirm that the Department will conduct a full impact assessment of its proposals. If it does conduct such an assessment, can you please also confirm that this will be published.*"

99. Various non-governmental organisations also wrote to the Defendant to complain about the rushed nature of the consultation exercise and the lack of any analysis of the impact upon disabled people:

    (1) On 26 October 2023 the Equality and Human Rights Commission wrote to the Defendant stating: "*Our concerns about this consultation exercise relate to the duration of the consultation and the absence of any analysis in published documents of the potential impact of the proposals on disabled people and other protected characteristic groups… the impact of the proposals on disabled people, including people with different types of impairment, warrants careful and detailed consideration.*"

(2) In October 2023, the Child Poverty Action Group explained in their response that "*we are concerned about the proposals contained in this consultation, and we strongly recommend that they should not go ahead. We believe that a brief public consultation on measures that could result in significant changes affecting large number of claimants with disabilities and long-term health conditions, including those claimants losing access to higher rates of benefits associated with universal credit (UC) limited capability for work-related activity (LCWRA) status and membership of the employment and support allowance (ESA) support group and/or being put at risk of sanctions is inadequate. We recommend that the DWP conducts further consultations with claimants, advisers and other stakeholders before any of the proposed changes are implemented*".

(3) The National Association of Welfare Rights Advisers also stated in their response that: "*No impact assessment appears to have been carried out for these proposals … The government has already set out plans to abolish the work capability assessment in its White Paper and has provided no justification for rushing through these proposals, the full impact of which has not been considered, in advance of that*."

(4) The response of a number of different disabled people's organisations (including Inclusion London, Disability Rights UK and Disability North) was to similar effect:

> "*This consultation lasted only 8 weeks. It proposed a huge change which will have a serious impact on thousands of people. We did not have enough time to properly engage with our members in accessible ways. Many of our organisations do not have the capacity to respond in such a short time. We find it totally unacceptable that such a short period of time is given when the key audience are disabled people with a range of access needs who will find it harder to respond and need more time not less…*
>
> *As a result of proposed changes people will lose £390.00 a month. It is shocking that the consultation proposal does not mention this at all. It is also disappointing there is no clear indication of how many people will be affected. This is crucial information and we seriously doubt the public can make informed contributions to this consultation without fully understanding the negative financial impact for future claimants.*"

(5) In their response, Equity pointed out that:

> "*It is our view that to understand this consultation requires substantial knowledge of the law in this area. This will undoubtedly hinder many people's understandings of the proposals, including those who are directly affected by the proposals if implemented.*

> *The issues are complex and a brief public consultation on measures that could see people lose vital income and/or be put at risk of serious harm is entirely inadequate and dangerous ... The consultation states that the descriptors are no longer relevant but does not provide a robust analysis as to why.*
>
> *We are also concerned that the timeline for this consultation is seemingly designed to enable an announcement at the Autumn Statement rather than allow for careful consideration of responses as is vital in the current context of DWP investigations on safeguarding and DWP related deaths for vulnerable claimants.*
>
> *The consultation is not clear that in fact in work support is available to those in the support group/LCWRA, but on a voluntary basis.*"

(6) Z2K, an anti-poverty organisation, put these points very well in its letter to the Defendant dated 25 October 2023:

> "*Neither the main consultation document, nor the accessible formats, are clear about the implications of losing LCWRA status – particularly the impact it would have on an affected claimant's Universal Credit award.*
>
> *In the main consultation document, it is left to the reader to infer this from the material in an annex and a single mention of an unspecified 'additional amount of benefit' in paragraph five. This is not repeated in the sections discussing the specific sets of proposals.*
>
> *In the Easy Read consultation document, there is no mention at all of any income loss which would result from the proposals. There is certainly no reference to the additional £390 a month payment that LCWRA status entitles someone to. This is a deeply concerning oversight. Someone relying on the Easy Read format to respond to the consultation would have no way of knowing that LCWRA status provides an additional Universal Credit payment, nor that this would be lost if they no longer qualified for LCWRA status. We also believe this document gives a misleading impression that support cannot be accessed by someone who currently has LCWRA status.*
>
> *<u>Duration of consultation period</u>*
>
> *Z2K does not consider eight weeks a sufficient period to consult on changes that could have a substantial impact on disabled people and people with long-term health conditions. It has not been feasible to meaningfully engage our networks with lived experience on such a complex area in this timeframe. This challenge has been made greater by the lack of clarity in the*

> *consultation documents, in particular the accessible versions. We are aware that we are not the only organisation to have faced this challenge.*"

(7) Finally, Disability Wales made the same complaints:

> "*We are disappointed to see that this consultation did not give a full 12 weeks for a response, this has made it difficult to engage with disabled people in the depth that we believe is required for these proposals.*
>
> *We share the England DPO Forum's concern that there is no mention of the financial difference in receiving LCW and LCWRA. This is essential information for this consultation, we do not believe that you can fully answer some of the questions posed by this consultation without awareness of this. These proposed changes would leave disabled people £390 worse off a month.*"

100. The Claimant relies upon a number of witness statements in support of her claim. In particular, Ellen Clifford has given two witness statements. She states that she was confused about some of the content in the Consultation Paper and there was missing information which she required in order properly to assess the proposals, including what the impact would be on groups of disabled people and how many disabled people were likely to be impacted by the proposals. This significantly hampered her ability to obtain the views of members on the consultation and to respond effectively. Her mental health condition and impairment-related physical injuries meant that she did not have sufficient time to respond to the consultation in the way in which she would have liked to do.

101. William Scott, the Senior Policy Advisor at Inclusion Scotland states:

> "*Eight weeks was wholly insufficient to give an organisation like Inclusion Scotland time to ensure that its members had the opportunity to engage with the Consultation. While we did attempt to arrange an engagement event at short notice and in the limited time available, for unavoidable but foreseeable reasons, it could not take place*".

102. He further states:

> "*I do not think it was clear that individuals could lose up to £390 as a result of the policy proposal, or that they could become subject to the sanctions regime if they could not comply with new conditions which could be imposed on them if they no longer were accessed as having limited capability for work-related activity ('LCWRA'). Indeed one part of the Consultation stated that it was not the intention of the change (in the context of the Substantial Risk rule) to bring people into mandatory activity or sanctions territory, when it seems to me that that is the necessary result of the changes being called for. I also think that people*

> *may have formed the view that the LCWRA group were currently not able to avail of any support, when in reality they can if they would like, but on a voluntary basis.*"

103. Svetlana Kotova, Director of Campaigns and Justice at Inclusion London also states:

> "*8…We were under the impression that DWP's focus was on the Transforming Future Support: The Health and Disability White Paper (which had been published earlier in the year) and the Disability Action Plan, which the government was consulting on at that time. I was really worried that they were also launching the Consultation, and giving people less than two months to respond, as I had real concerns about whether an adequate response was possible in that time for Inclusion London and for other DDPOs and Disabled people who may have wanted to have their say.*"

104. Importantly, she explains that:

> "*16. I was able to understand that the policy proposals would ultimately lead to loss of benefits and an imposition of conditions for some, and that changes were not required to the law to offer support on a voluntary basis. However, I know this because I have worked in various welfare policy roles for the last 10 years and so know how the systems work. I do not think any of these points were obvious from the consultation paper. There were also aspects of the consultation paper that I found difficult to grapple with, because I felt like I needed more information, including how many people would be impacted by the policy change.*
>
> *17. I also felt that the overall impression of the Consultation was misleading, if you did not have prior knowledge of the direct impact it would have on the financial and general well-being of those affected by changes. I think most people would support an aim to help more Disabled people into work. However, people may be less likely to agree with such a proposal if the help is in the form of compulsory activity that work coaches without appropriate training in dealing with Disabled people think are acceptable. They may also be less likely to support changes where not availing of this help could lead to benefit sanctions, in circumstances where these people may have already lost £390 a month due to no longer being assessed as having LCWRA. Given the lack of clarity, I think it is quite possible that some smaller organisations without welfare policy experience may not have understood the implications of the Consultation, and that non-disability sector organisations and members of the general public (including some Disabled people) would also not have appreciated the effects of the proposal. For this reason, these organisations and people may not have responded or, if they did respond, may have not dealt with the issues raised comprehensively.*"

105. Emma Cotton of Equity stated in [18] of her witness statement that:

> "*I have two degrees, including Law, and nearly 20 years of social security advice in practice: advising individuals, groups,*

> *and policy makers. As a result I understood the main legal implications of the policy proposals. I knew that many people would lose up to £390 a month in benefits and some would become subject to conditions, and that changes were not required to the law to offer support on a voluntary basis. But I only knew this because I am a specialist who knows a lot about the law in this area. I think it would have been difficult for a lay person to understand the legal implications of the proposed cuts.*"

Results of the consultation process

106. The consultation ended on 30 October 2023. Despite these many letters of protest, the Defendant neither extended the consultation period nor did he clarify the effect of the proposals upon claimants. On 22 November 2023, the Defendant published a response to the consultation exercise: *Government response to the Work Capability Assessment Activities and Descriptors Consultation* ("**the Response**"). In its response the Government stated that it would amend the LCWRA Substantial Risk Criteria; remove the LCRWA Mobilising activity; and reduce the points awarded for the LCW Getting About descriptors. It stated that it would not make changes to LCWRA or LCW Continence, nor to LCWRA or LCW Social Engagement. It received 1,348 responses.

107. At [44] of the Response, the Government set out the main themes of the responses to the consultation, which included that the proposed changes would increase the number of people under conditionality and at risk of sanctions; that good quality, tailored voluntary employment support would be the most effective way to support disabled people and people with health conditions in improving their employment prospects; and making changes to the WCA would reduce financial support for disabled people, which risks bringing people into poverty.

Merits of challenge

108. In the light of the foregoing, I find as follows in respect of the Claimant's grounds of challenge.

Ground 1A

109. By Ground 1A, the Claimant contends that the Defendant failed to explain adequately the proposals themselves. The Claimant contends that bearing in mind the audience for the consultation, it was not made adequately clear that the legislative proposals for the affected groups were to replace voluntary work related activity with compulsory work related activity, and to reduce the income of a large number of claimants.

110. I consider that this ground is made out. Sir James submitted that the Claimant does not say that she misunderstood what was proposed and does not identify anyone in that position. Moreover, he submits, none of the responses to the consultation suggested a misunderstanding of what was proposed.

111. But first, that is factually incorrect. The evidence of a number of key NGOs (as set out in paragraph 99 above) and of the witnesses (in particular as set out in paragraph 102, 104 and 105 above) was that, in light of the way the proposals were presented, a proper

understanding of those proposals by vulnerable people would likely have been seriously hindered[51]. I accept that evidence. It is well summarised by Inclusion London, Disability Rights UK and Disability North which stated in its consultation response:

> "*As a result of proposed changes people will lose £390.00 a month. It is shocking that the consultation proposal does not mention this at all. It is also disappointing there is no clear indication of how many people will be affected. This is crucial information and we seriously doubt the public can make informed contributions to this consultation without fully understanding the negative financial impact for future claimants.*"

112. Second, Sir James' submission assumes that those who wished to respond to the consultation understood what was being proposed. If they did not, they may not have considered it necessary to respond. Thus, if you are mistakenly led to believe that the proposals are beneficial to you (as they were portrayed), you may very well not see the need to respond. More particularly, if you do not understand that your existing financial benefit is likely to be removed, or that you may now be *required* to undertake work related activity against pain of sanction (when that is currently not the case), again you may very well not consider it necessary to respond. But it will never be known that you were misled, because you did not see the need to respond.

113. I do not consider that the fact that the overwhelming majority of responses received in the first week (154 responses) and by week four (435 responses) were from individuals leads to a conclusion that people with cognitive impairment, for example, had no difficulty in understanding what was proposed. I consider it very likely that there would have been vulnerable people who were misled in the ways suggested by the Claimant, being people who had limited access to education, with learning disabilities and cognitive impairments, as well as substantial risk claimants with mental health conditions and suicide ideation, many of whom are likely to be without access to sophisticated professional people and organisations.

114. These would be the very people who could be expected to rely upon the Easy Read document. This is a case in which fairness dictated that the Defendant ought to have spelled out clearly to these consultees the effect upon them of what was being proposed. Indeed, that is why the Defendant produced the Easy Read document (in addition to the Consultation Paper): specifically to assist this vulnerable category of people. As explained in paragraph 94 of this judgment above, there would have been no difficulty in the Defendant spelling out these fundamental matters. And yet, the Easy Read document was unfairly misleading in the fundamental ways set out in paragraph 93 above, and the misleading nature of this document was reinforced in one respect in the *Touchbase* communication and the Government's Press Announcement of 5 September, namely that the proposals would benefit those persons with LCWRA who are currently "*automatically excluded*" from available support, when there was no automatic exclusion. Indeed, the Consultation Paper itself was similarly misleading in these respects: see paragraphs [87]-[89] above. These documents did not say, as Sir

[51] Indeed, the Claimant herself found statements in the Consultation Paper to be "confusing", with the absence of key information: see paragraph [20] of her first witness statement.

James submitted, that the "practical reality" was that persons with LCWRA did not access that support.

115. This unfairness to the very people who were likely to rely upon the Easy Read document was further compounded by the fact that this vulnerable group of people were given very limited time in which to respond to these unexpected proposals, or in which to take advice as to what the proposals in fact meant for them, and how they should respond to best protect their interests.

116. Ground 1A is accordingly established by the Claimant.

Ground 1B

117. By Ground 1B, the Claimant maintains that the Defendant failed to explain adequately his rationale for making the proposals as follows:

i. the Defendant was not candid that fiscal impact, rather than labour market impact, was the central basis on which decisions would be taken;

ii. if, alternatively, the central rationale for making the proposals was as the Defendant stated, then its link to the proposals was not adequately explained;

iii. the Defendant misleadingly implied that the proposals on LCWRA risk were necessitated by increases in the proportion of LCWRA decisions accountable to risk, when in fact it had been steadily decreasing for years.

118. As explained above[52], the contemporaneous documents show that AME costs savings were not merely a secondary benefit resulting from the proposals, but rather at least an equal driver (with the desire to move people out of long term inactivity) for the formulation of the proposals. The compressed timetable for consultation resulted from the need to identify costs savings by the time of the Autumn budget in 2023.

119. It is notable that the OBR stated in paragraph [3.25] of its Report of November 2023, post-consultation, that "*We expect the WCA reform to raise employment by around 10,000 by 2028-29, as the loss of income from the health element (£390 a month) and higher conditionality requirements in LCW and intensive work search (IWS) incentivises these individuals to seek employment.*" As against this raising of employment by around 10,000, the OBR states in paragraph [3.21] that *"The fiscal savings arising from this policy, which amount to an average of £1.0 billion a year between 2026-2027 and 2028-2029, come from lower spending on the health element of UC and its equivalent in ESA. Individuals in the LCRWA group currently receive an additional £390 a month in benefits."* If correct, it can be seen that the real monetary gains from the proposals come from the reduction in benefit payments to this highly vulnerable group of people.

120. I consider that the Defendant ought in fairness to have made clear that AME costs savings were, together with work inactivity, the rationale for the proposals (and accordingly likely to be a factor of substantial importance to the decisions taken). Yet,

[52] In particular at [69]-[75] and [80].

the section of the Easy Read Document headed "Why we are making changes" makes no reference whatsoever to the desired AME savings, including in particular the savings from moving people in the LCWRA category into the LCW category. I consider that the candid disclosure of this highly relevant fact, well known to the Defendant, was required. But that did not occur. As Ms Richards KC said, moving people from category LCWRA into category LCW would result in significant costs savings but would not necessarily move those people into work. The fact that there is little or no analysis (in terms of an evidence base which it was recognised by the Defendant was required[53]) of the extent to which people would thereby be moved back into work strongly supports the conclusion that costs savings was at least one of the two bases, if not *the* central basis, on which decisions would be taken, and that should have been clearly explained in the consultation documents, but it was not. I consider that to this extent Ground 1B succeeds – there was a failure to explain adequately the rationale for making the proposals.

121. I should add that Mr. Tom Royston also developed in very short order an attractive submission, on behalf of the Claimant, that the Defendant misleadingly implied that the proposals on LCWRA risk were necessitated by increases in the proportion of LCWRA decisions accountable to risk (see paragraphs [36]-[37] of the Consultation Paper), when in fact (he maintained) they had been steadily decreasing for years. He relied for that purpose upon a line graph contained in a DWP costings note dated 7 November 2023, at paragraph 7. He argued that it had not been possible for consultees to make this point because this information was known only to the Defendant.

122. However, in her brief response to this, Ms Emily Wilsdon developed a cogent submission on behalf of the Defendant, by reference to statistics/data presented in the Consultation Paper, to the effect that the Claimant was drawing erroneous conclusions from isolated DWP statistics. Moreover, she relied upon the fact that, as Mr. Thorpe states in his first witness statement at [5], the proportion of assessments that result in a person being assessed to have LCWRA had increased from 21% in 2011 to 65% in 2022. Both she and Mr. Royston also put in short but detailed notes on the conclusions which they maintained the court should or should not draw from the DWP statistics which are before the court.

123. However, on a judicial review application I do not consider that the court is in any position to draw reliable conclusions as to where the truth lies in respect of the rival submissions as to what can be gleaned from these statistics/data, which only present a partial picture of a particular period in time in any event. I certainly do not consider that the court can, based upon the statistics relied upon, conclude that the consultation was so unfair as to be unlawful and I do not base my decision upon them.

Ground 1C

124. By Ground 1C, the Claimant also argues that the Defendant failed to provide adequate accompanying information about the impact of the proposals. At the hearing it took this point more shortly than Grounds 1A and 1B. The Claimant argued that:

i. the consultation documents did not explain that the number of people expected to find employment was vastly outweighed by the number of

[53] See for example, paragraphs [41], [49]-[50], [61] and [69] above.

people who would lose money and face conditionality but would not as a result find employment;

ii. no information was given about the likely disability impact.

125. In particular, the Claimant submits that the Defendant did not at any stage in the consultation provide information about:

a. what evidence he considered supported his implicit view that increased compulsion and reduced benefit levels would achieve his stated objectives; and what that evidence showed about the scale of the likely positive and negative impacts of his proposals;

b. the likely fiscal and labour market impact of the proposals; or

c. the likely equality impact of the proposals.

126. As explained above, consultation must be at a time when the proposals are still at a formative stage, and the proposer must give sufficient reasons for any proposal to permit of intelligent response: *R (Moseley) v Haringey London Borough Council* [2014] UKSC 56 (*supra*) at [25]. The proposer's "*obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this*": *R v North and East Devon Health Authority, ex parte Coughlan* (*supra*) at [112].

127. In the present case, the Defendant was accordingly obliged to inform the consultees of the nature of the proposals (these were proposals to *compel* additional people to look for work and take up available work, and *compel* additional people to participate in work related activity, thereby reducing the benefit expenditure upon persons in those categories) and why they were under positive consideration (for financial savings and to reduce inactivity). This it failed to do, as I have found. But I do not consider its duty to consult, at the formative stage, goes further than that.

128. As the Defendant pointed out (and the Claimant implicitly accepted[54]), the consultation included (i) 3 potential changes in respect of 'mobilising', plus the implicit option of maintaining the status quo, i.e. 4 options in total; (ii) 3 potential changes (so 4 options) in respect of 'continence'; (iii) 2 potential changes (so 3 options) in respect of 'social engagement'; (iv) 2 potential changes (so 3 options) in respect of 'getting about'; and (v) 2 potential changes (so 3 options) in respect of the Substantial Risk Criteria (Consultation Paper, [30]-[43]). There were therefore a large number of potential permutations. Modelling all of these permutations would have been a very substantial exercise, and at the time that the Consultation was launched the DWP only had rough estimates of the potential financial impact of one particular combination of measures.

129. Of course, the fact that the Defendant had not yet had time to gather any of this information was a consequence of the unreasonably compressed consultation timetable. That is why the civil servants were arguing for a deadline of Spring 2024. Had more

[54] See paragraph 49 of her skeleton argument.

time been allowed for the consultation process, that could have allowed for "*a strong evidence base for making any changes in order to establish a rationale beyond cost-savings*" as well as providing an evidence base of indicative costs for the proposals. The Defendant recognised this to be the desirable course to adopt, as the documents above show and it would have allowed for a more informed consultation process. But I do not consider that the Defendant had a duty to take these steps before going out to consultation. This does, however, lead on to a consideration of Ground 2.

Ground 2

130. Finally, the Claimant contends that the Defendant *failed to provide sufficient time for consultees to respond*: the consultation ran for less than 8 weeks, which the Defendant knew or ought to have known in summer 2023 would be inadequate, but insisted upon that despite having no intention to put the measures into effect earlier than 2025-26, because of the unstated intention to be able to "score" fiscal savings on the back of the proposals in time for the 2023 Autumn Statement on 22 November 2023.

131. I accept this submission. There is a strong evidential basis for finding that less than 8 weeks for a consultation concerning such significant proposals was insufficient and so unfair as to be unlawful: see paragraphs 98-105 above. Accordingly I do not accept the suggestion of Sir James that the consultation period was adequate because only a "tiny minority" expressed concern about the shortness of the consultation period. Many of the NGOs expressed serious concern about it, as did the Work and Pensions Select Committee. In any event, whether the shortness of the consultation period was unfair is not to be judged by reference solely to the percentage of people who complained about it.

132. The significance of the compressed consultation timetable is that it contributed to (a) the hurried publication of misleading and unfair consultation documents and (b) a failure adequately to explain the proposals themselves or the rationale for making the proposals. As a result, consultees required more time, not less, to understand and take advice on the effect of the proposals upon them.

133. Moreover, as explained above, the consultation was launched at a time when potential consultees (which included vulnerable categories of people) would not have been anticipating the proposed policy developments contained in the Consultation Paper because (i) the Defendant had already announced a significant consultation on the Disability Action Plan, which was already running, and which therefore ran across the same period, from 16 July to 6 October 2023; and (ii) the Defendant had very recently published *Transforming Support: The Health and Disability White Paper* (16 March 2023), which had set out detailed plans on the future of the WCA (relating to its abolition) and had made no suggestion of any plan for interim measures such as those proposed in the consultation until they were unexpectedly announced on 5 September 2023. The unfair burden upon vulnerable people of having to deal with a yet further consultation process at this time at such short notice cannot be overstated.

134. In setting the consultation period, the Defendant ought to have had more regard to the attributes of those people who would be affected by these proposals. These were proposals which, in particular, could potentially drive vulnerable people into poverty as well as adversely affecting disabled people and substantial risk claimants who have mental health conditions and suicide ideation. The Defendant knew that these changes

would likely impact these vulnerable people: see paragraph [12] of the DWP "WCA Consultation Handling and Stakeholder Engagement Plan" document dated 24 August 2023 from the Disability Benefits/DHSD to the Defendant in which it was stated "*Some of the changes we intend to consult on are controversial and would likely impact vulnerable claimants, including those at risk of self-harm and suicidal ideation*." Affording them adequate time to consider, take advice upon and respond to the proposals was essential. That did not happen. Indeed, as described above, Mr. Thorpe himself was fully aware at the time of the unfairness of a rushed Autumn consultation bearing in mind the characteristics of the people who would be affected by the proposals: "*Our recommendation remains that to deliver this safely, and have time to work through difficult changes for a complex and sensitive group we should work to a Spring timeline. The presentational risk of a rushed reform is significant and could be detrimental to our ability to deliver our structural reforms*."

135. It is significant that the very civil servants who were concerned with working on the policy changes – including Mr. Thorpe – themselves considered that rushing to a consultation in September 2023 in time for the 2023 Autumn Budget would not amount to an adequate consultation and indeed was likely to be unlawful, being non-compliant with the *Gunning* requirements. As they stated at the time, "*SB 24 timeline looks essential to ensure we've properly consulted"*, but despite that the Defendant forged ahead with a consultation prior to the 2023 Autumn Budget. Whilst this is not decisive, it is not irrelevant as Sir James suggested: these civil servants were very well placed to assess how long was needed fairly to conduct this particular consultation process.

136. In all the circumstances I consider that Ground 2 is established.

Conclusion

137. I find that each of Grounds 1A, 1B (to the extent described above) and 2 are established by the Claimant. Taking them together, I consider that the Claimant has surmounted the substantial hurdle of establishing that the consultation was so unfair as to be unlawful. Indeed, had the Claimant only established Grounds 1A and 1B (together); or had she only separately established Ground 1A; or Ground 1B; or Ground 2, then I would in this case still have found that the Consultation was so unfair as to be unlawful.

138. Accordingly, I grant the declaration that the Consultation was unlawful. I leave the parties to agree the wording of a draft order to reflect my findings in this judgment.