

# Reforming laws on free movement will be a headache for any future government

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By Democratic Audit UK

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*Immigration will be one of the defining issues of the General Election, with Labour and the Conservatives responding to UKIP's hardline, anti-EU stance with tough and supposedly crowd-pleasing measures of their own. Here, **Marley Morris** argues that freedom of movement rules are something that any party is going to struggle to reform after the general election.*



The new British Social Attitudes Survey out last week [revealed](#) a divided public on EU migration. While the benefits of free movement remain popular – more than two thirds of the public think it is important that Brits have the right to work in other European countries – a significant minority (29 per cent) want to stop EU jobseekers from accessing the same welfare benefits as British citizens, and a further 30 per cent want jobseekers' access to these benefits to be restricted for six months or less.

The government has already put in place a number of restrictions on access to benefits, including a limit on income-based Jobseeker's Allowance (JSA) for three months unless migrants can show they have a "genuine prospect for work". But it is clear that the three main parties feel they have more to do if they are to assuage public opinion on this issue.

Indeed, as the election campaign kicks off, each of the main parties are in an odd position on free movement: they have set out firm policies on benefits for EU migrants, but appear reluctant to actually talk about them. Cameron outlined a number of proposed reforms in his big immigration speech in November, where he exhorted that "freedom of movement is not an absolute". On Labour's five-point pledge card, launched by Miliband in Birmingham two weeks ago, controls on immigration and tightening rules on benefits for EU migrants take fourth place. And Nick

Clegg outlined his own curbs on EU migrants' benefits in an article in the Financial Times late last year. Yet in the main the three major parties want to focus their campaigns on other areas – whether they be economic competence, living standards, or the NHS.

There is a good reason for this. At the core of the parties' agendas are proposals that involve serious political or legal challenges.

Let's take the Conservatives first. In his [November speech](#), Cameron set out a number of major reforms to free movement. His central announcement was a ban on EU migrants' access to social housing, child benefit or tax credits in their first four years of living in Britain. This policy was meant as a response to public concern about newly arrived migrants having unfair access to the welfare system without having contributed first. But it is also being touted by the Conservatives as a way of driving down the net migration figures.

Despite these claims, there is little reason to think that clamping down on benefits will have much effect on net migration. [More than half](#) of EU migrants coming for work-related reasons already have a job to go to and NINo registration figures indicate that the number of EU nationals claiming working age benefits is only 2.5% of the total number of claimants. So limiting benefits further is unlikely to put many migrants off from coming and will probably do little to help the government reach its net migration target.

But there is a further problem with the proposal: its feasibility. According to [Steve Peers](#), a Professor in EU Law at Essex University, nothing other than an EU treaty change will secure this reform. This is because the proposal applies to EU workers as well as jobseekers, and, according to the EU Treaties, all EU workers have a right to equal treatment – by law they should have the same access to benefits and tax advantages as UK citizens. So if Cameron wants to implement this reform, he will need a change to these treaties.

To be fair, Cameron fully recognised the need for treaty change in his speech. But it is still worth spelling out what a treaty change, as opposed to an amendment to EU legislation, would require. At the very least, it would need agreement from every single one of the EU's 27 other member states. Support from sympathetic countries in Northern Europe like Germany and the Netherlands will not be enough if another member state decides to torpedo the reforms. There are already signs that [Poland](#) would do just that. Moreover, a treaty change could trigger referendums in some European countries, opening a so-called "Pandora's Box" at just the moment when a number of Eurosceptic parties are riding high after success in the European Parliament elections. Like with the government's sinking net migration target, this is a policy destined to cause trouble down the line.

Cameron also [proposed](#) that, when the children of EU migrants are not living in the UK, families should not receive any child benefits and child tax credits for those children. This policy – also supported by Labour and the Liberal Democrats – has its legal issues too, but there are [signals](#) that German Chancellor Angela Merkel and Commission President Jean-Claude Juncker are more inclined to support such a reform.

How about Labour's proposals? The [party's pledge card](#) states that "people who come here won't be allowed to claim benefits for at least two years". On the face of it, this sounds remarkably similar to the Conservative's proposals, excepting the obvious difference in time period. But in fact Labour are not referring here to child benefit or tax credits; instead, they [specify](#) that they want to extend the period that "EU jobseekers" have to wait to claim out of work benefits for at least two years.

This is no surprise. Miliband is far more reluctant than Cameron to try to change the EU treaties, not least because a treaty change may precipitate an EU referendum under a Labour government. Miliband, after all, has [promised](#) a referendum on any treaty change proposing a transfer of powers from the UK to the EU.

But, even so, it is still not clear whether Labour's version of reform will be possible without a change to the treaties. Steve Peers' [analysis](#) indicates that, while the EU treaties allow for a ban on "social assistance" for EU jobseekers for longer than three months, the Court of Justice of the European Union has said that EU jobseekers cannot be

denied benefits that facilitate access to employment. So if the Court sticks to its guns, Labour might not be able to implement its policy without either breaking EU law or securing treaty change.

Supposing Labour is able to implement its proposal while avoiding treaty change, it still faces a political headache. Its proposal will only affect first-time EU jobseekers who have remained unemployed in the UK for more than three months. Data on this is limited, but, given that the [impact assessment](#) of the government's three month policy suggested that not many migrants would be affected, it's likely that Labour's two year policy would apply to very few people. Labour then may face the charge that the party's policy here is effectively a symbolic one – and in the long term risks provoking further public ire.

Finally, Clegg [proposed](#) in his *Financial Times* piece that EU jobseekers would not get access to Universal Credit for at least six months once it is fully rolled out. This could face a similar challenge in the Court to Labour's proposal because it may count as denying EU jobseekers benefits that facilitate access to employment. Clegg has also outlined proposals for EU migrants to be barred from tax credits unless they work the equivalent of a 35 hour week on the minimum wage. Because these are in-work benefits, it is quite possible that, without a treaty change, this policy is also subject to legal challenge.

On top of all this, even if the parties water down their proposals enough to avoid treaty change, they may still need to amend EU legislation. In order to do that, the UK needs a qualified majority in the Council and a majority in the European Parliament. Given Britain's failure to win enough support to block Jean-Claude Juncker's bid to become Commission President, this in itself will be a diplomatic challenge.

The point here is that there is a troubling mismatch between any future government's desired aims to address public concerns about EU migration and free movement, the policy levers it has available, and the niceties of negotiations with the other 27 EU member states. There is no easy solution to this – even if Britain left the EU, no-one has come up with a [clear explanation](#) for how it could negotiate a free trade agreement with the EU while opting out of free movement rules.

As IPPR argued in our report '[A Fair Deal on Migration for the UK](#)', a promising approach is to change Britain's welfare system to make it more contributory: this avoids the charge of being discriminatory to EU migrants and fits with the public's sense of fairness. In [The Condition of Britain](#), IPPR outlined a strategy for building a more contributory welfare system. This included plans to increase the rate of contribution-based JSA – and then paying for this through measures such as scaling back marginal benefits like the Christmas Bonus and extending the period people need to work in order to access contribution-based JSA from two years to three.

The release of the party manifestos will reveal whether any of the main parties have been able to come up with a satisfactory answer to public concerns over free movement. The danger is that any future government pursues a short-termist strategy that ends in failure – and that this further undermines [public confidence](#). Honesty about the government's options is vital for beginning a constructive debate.

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Note: *this post represents the views of the author, and not those of Democratic Audit or the LSE. Please read our [comments policy](#) before posting.*

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