

# Implicit/explicit consent in Universal Credit: role for third sector



## At a glance

Universal Credit commences in Northern Ireland from September 2017. This is a new benefit and will be administered differently to current social security benefits.

One of the changes is a shift in the requirements for obtaining client consent for the sharing information between the department and third parties. This will change from a policy of *implicit consent* to a requirement for *explicit consent*. This is a significant change and is likely to impact upon the ability of third parties – including advice sector organisations and constituency offices – to assist benefit claimants. According to the Chair of the Work & Pensions Committee this risks presenting a ‘major barrier to justice’.

This paper:

- explains the change in approach to consent;
- recommends that the Department for Communities consults with the Department for Work and Pensions to agree a mechanism whereby third parties can continue to assist and support benefit claimants;
- concludes by suggesting potential models for consideration.

## Law Centre (NI)

- Promotes social justice and provides specialist legal services to advice organisations and disadvantaged individuals in social security, community care and mental health and employment law
- Provides advice, casework, training, information and policy services
- Member of the Department for Communities Operational Forum and Disability Consultative Forum.
- Works in partnership with Advice NI and CAB to deliver the Welfare Reform Support Project
- Convenes regular Social Security Practitioner Forums and a NI Welfare Reform Group

## Our advice line

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**Independent Welfare Changes Helpline: 0808 802 0020**

## Benefit claimants and third party assistance

Benefit claimants may need to seek assistance from third parties in relation to their claim. Such third parties include advice centres and elected representatives' constituency offices. The type of assistance required varies considerably. Some people need information on a particular benefit, timescale or process or help with form filling. Others require more extensive support including expert legal advice and representation before a Social Security Tribunal or appeal hearing before the Social Security Commissioners.

Depending on the assistance sought, the third party might need to contact the benefit provider to discuss the case, liaise with other statutory bodies, request information in relation to the client's case, etc. The third party requires the claimant's *consent* to do this.

### Providing consent

There are different ways in which consent can be provided.

#### a) Explicit consent

Where the claimant is physically present and the issue can be resolved with a particular government agency by telephone, the claimant typically speaks briefly to the benefit provider to confirm their identity before the third party completes the conversation. This is an example of *explicit consent* in that the claimant has specifically authorised the third party to take action on their behalf.

If a claimant becomes a client of the particular third party organisation, then s/he is likely to sign a form of consent, typically referred to as a "client consent form" (perhaps also known as a "client authority" form or "authority to disclose" form). This form authorises, in writing, the third party to act on the claimant's behalf and permits exchange of relevant information with the benefit provider and other agencies within the parameters of that written consent. Again, this is an example of explicit consent.

Generally, government departments are unable to disclose information to third parties. The Data Protection Act requires departments to protect personal information. It is for this reason that departments either asks the person to verify their identity or requests a written authority before proceeding.

#### a) Implicit consent

It is recognised that claimants have the right to ask a representative to help them conduct their business with government departments. This is particularly important for claimants who may find it difficult to communicate with government departments – perhaps due to a disability, health condition or language barriers. It is also recognised that advice agencies and representatives can play an important and helpful role within the welfare benefit process.

*Customers have the right to enlist the help of a representative. The Department must respect that right and co-operate with representatives where possible.*

(NI departmental guidance)<sup>1</sup>

Situations arise where a person is not physically present with the third party and is not a client (so no written authority) but nevertheless requires assistance in respect of a benefit claim. For example, a person might ask an advice agency to check on the status of their application. A straightforward query like this can potentially be resolved quickly with a telephone conversation between the advice agency and the government department. Thus, in situations like this, Department for Work and Pensions guidance permits its staff to accept *implicit consent* from the third party. In this way, a balance is struck between protecting the claimant's personal data and facilitating their request to use the services of and assistance of a third party. The Department describes implicit consent as where 'staff use their experience and judgement to satisfy themselves that the caller has consent to act on behalf of the customer.'<sup>2</sup>

### Example

Person "A" submitted her Personal Independence Payment ("PIP") claim five weeks ago and has not heard anything since. She starts to worry that her application got lost in the post. She rings the Law Centre NI's advice line.

The Law Centre NI's adviser contacts the PIP Centre. As there is no written authority, the PIP telephone operator must use her judgement and decide whether the adviser has implicit consent to act on behalf of the claimant. In making this decision, the operator considers a number of factors: the Law Centre NI service is familiar to the PIP Centre and the operator can check the incoming call telephone's number; the Law Centre NI's adviser is able to provide Person A's date of birth, national insurance number of date and address; the type / amount of information requested by the Law Centre NI's adviser does not include sensitive information or extend beyond what is necessary. The PIP operator decides that *implicit consent* applies; she confirms therefore that the claim has been registered and that person A is likely to receive a letter about a medical assessment in the next 4 weeks.

The Law Centre NI's adviser relays this information to Person A who is reassured.

The policy of *implied consent* is set out in the guidance, 'Working with representatives'.<sup>3</sup> It permits third parties to exchange a degree of information with the department in an efficient manner, which is of benefit to all parties. Whether *implicit consent* applies in each scenario is fact specific and depends on the type of information being requested.

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<sup>1</sup> DSD Personal Information Policy issued by Security & Emergency Planning Unit (October 2006)

<sup>2</sup> DSD Personal Information Policy

<sup>3</sup> DWP, 'Working with representatives: guidance for staff' (published 2009, updated 2015) accessible here:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/461988/working-with-representatives-sept-2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/461988/working-with-representatives-sept-2015.pdf)

## Example

Person B's ESA application is rejected. He contacts the Law Centre NI wishing to know the reasons for the refusal.

The Law Centre NI's adviser contacts the Department. Given the nature of the information requested (i.e. the amount of personal data involved), the Department can share detailed reasons only in circumstances where Law Centre NI has provided a written signed consent form. Implicit consent does not apply in this case.

## Universal Credit: shift from implicit consent to explicit consent

*Implicit consent* does not apply under the Universal Credit full service.<sup>4</sup> Third parties will have to demonstrate *explicit consent* prior to any information being transferred. The rationale is the need to protect personal information:

*The online digital account, which is fundamental to the design of the full service, allows claimants access to all their personal, medical, financial and other data. As a result, the claimant 'holds the key' to that account at all times. So I hope you can see that running a system of implied consent means that the risks of the disclosure of this material to third parties is heightened beyond an acceptable level under data protection rules and might also undermine some of the other security features we have built into the system through personal accreditation.*

(UC Programme Director General Neil Couling)

Department for Work and Pensions has explained that a claimant can give *explicit consent* in respect to a Universal Credit application in one of three ways: either via their online account 'journal', through a three-way telephone conversation, or in person, with the third party, in a local jobs and benefits office. The claimant will have to be clear about what information is being disclosed and to whom. For example, "I give consent for the DWP to discuss my childcare costs with Jane Brown of xx organisation".

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<sup>4</sup> Letter from DWP UC Programme Director General Neil Couling to the welfare advice sector, dated 20 January 2017 accessible here: [https://www.rightsnet.org.uk/pdfs/UCFS\\_Welfare\\_Advisers\\_20\\_Jan\\_2017\\_rightsnet\\_upload.pdf](https://www.rightsnet.org.uk/pdfs/UCFS_Welfare_Advisers_20_Jan_2017_rightsnet_upload.pdf)

## MPs and explicit consent

Universal Credit is already being rolled out in Great Britain and the shift in consent policy impacted on the advice sector. The following remarks were made by an adviser on an online advice forum:<sup>5</sup>

*I got through this morning after 25 minutes. Not allowed to use implicit consent. This is really not acceptable for my clients. They are very sick and I am mostly seeing them in a hospital bed or at home in their own beds. Waiting half an hour plus for a phone to be answered (maybe) is a big deal either way.*

(GB adviser on online forum discussion)

MPs also have found themselves unable to assist their constituents. Some MPs objected and argued that the explicit consent rule was creating a fresh layer of bureaucracy and placed extra pressure on vulnerable people who had approached their MP as a last resort. Frank Field MP, Chairman of the Work and Pensions Select Committee, highlighted his concerns to Ministers:

*It [the restriction] makes the job more tiresome, slows it down and creates more work for constituents. It's barmy and unnecessary, and it is a major barrier to justice.<sup>6</sup>*

The government quickly responded to the criticisms and agreed that the Department for Work and Pensions would revert to its policy of implicit consent - but only for MPs:

*[...] it is clear MPs engaging on their constituents' behalf need constant access to such a system through which they can help their constituents. Today, I have agreed that the implicit consent approach which operates well for all other DWP benefits can be extended to MPs representing the interests of their constituents who are engaging with or directly claiming Universal Credit. We can offer this because of our pre-existing relationships between MPs offices, District Managers and their teams. This is something which cannot pertain for enquiries from other sources.*

*This means any correspondence – letter, email, or telephone enquiries – from MPs on behalf of a constituent relating to Universal Credit will be answered directly, without a requirement to seek explicit consent from their constituent. This will ensure consistency and clarity for MP offices, no matter what benefit the enquiry is about.*

*Extending this support for MPs and their constituents will continue to help enable the successful delivery of this key welfare reform programme.<sup>7</sup>*

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<sup>5</sup> See CPAG, 'Universal Credit: problems and solutions' Issue 256 (Feb 2017) accessible here: <http://cpag.org.uk/content/universal-credit-problems-and-solutions>. There has been significant discussion on advice forums.

<sup>6</sup> As reported in the Guardian, 'Curbs on MPs helping benefit claimants are a 'barrier to justice'' (4 March 2017)

<sup>7</sup> Damian Green, Secretary of State for Work and Pensions, written statement on Universal Credit HCWS528 13 March 2017

## What is the position with MLAs?

The ministerial statement makes no reference to the elected representatives of the devolved regions. We have asked for clarification as to whether MLAs are exempt; we are worried that they are not. If this is the case, it would constitute a significant departure from the current policy.

*It is a long-standing practice within the Department that it can be assumed that the constituent's consent has been given when an MP/MLA makes an approach to the Department on their behalf. The Department fully accepts that effective communication with MPs/MLAs, amongst others, is necessary and in our customer's interests, subject to checks or knowledge of the bona fides of the representative. There has never been any policy intention to prevent efficient and effective working relationships between MPS/MLAs, their constituents and the Department .<sup>8</sup>*

(NI departmental guidance)<sup>9</sup>

## Universal Credit in Northern Ireland

Universal Credit will commence in September 2017, first in the Limavady district and then rolled out across Northern Ireland. Universal Credit 'Full Service' will apply from the outset in Northern Ireland, bringing with it the policy of *explicit consent*. We anticipate that there will be similar issues as experienced in Great Britain, i.e. that the capacity of advice sector organisations and MLAs to assist vulnerable claimants will be significantly limited unless action is taken.

There is a system of appointeeship, which permits a named individual to manage the affairs of a person who is unable due to incapacity or severe disablement. However, this will only apply in a very limited number of cases.

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<sup>8</sup> As reported in the Guardian, 'Curbs on MPs helping benefit claimants are a 'barrier to justice'' (4 March 2017)

<sup>9</sup> DSD Personal Information Policy issued by Security & Emergency Planning Unit (October 2006)

## Discussion and recommendations

Universal Credit is intended to be a new benefit that will be administered almost entirely online – a significant change to the current social security benefit system. In face of the distinctions in welfare benefit administration arising as a result, the Law Centre acknowledges that this will necessitate a change in working practices within the voluntary and community sector. Law Centre recommends:

1. The policy of *implicit consent* should likewise extend to MLAs (and to other devolved elected representatives). As do MPs, MLAs represent the interests of their constituents applying for or in receipt of Universal Credit and accordingly the same principles of access should apply.
2. Implicit consent should also apply to established advice centres. Some possible ideas and potential models that could be explored are as follows:
  - Law Centre understands that there are plans to introduce a landlord portal whereby landlords can communicate with the Department for Work and Pensions in respect to tenants receiving Universal Credit.<sup>10</sup> Consideration could be given to the introduction of a similar portal for advice sector organisations, to permit a two way exchange of information.
  - Northern Ireland is introducing a new telephone service that is designed to be a ‘supporting contact channel’ for those who cannot access, or need assistance to access the online system. Consideration could be given to allow advice centres to register with this service so they can phone in on behalf of clients. This would be quite similar to the current HMRC Office Identification Number (“OIN”) scheme. This scheme permits voluntary and community sector organisations to register on a HMRC database so that they can act as intermediaries in relation to tax credits or Child Benefit.<sup>11</sup> This could form a helpful template.
  - Consideration could be given to permit advice centres partial shadow access to a claimant’s online account. For example, advice centres could register with their own login details and could then post a request for information on a claimant’s online account. The DWP staff member would then use their judgement (as they do now) to determine whether the information can be provided or whether explicit consent is necessary.

Northern Ireland has a unique opportunity to learn from the roll-out of Universal Credit in Great Britain. We hope that plans can be made now to ensure that MLAs and advice agencies in Northern Ireland are able to provide efficient and effective service to claimants.

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<sup>10</sup> This portal will be introduced and trialled from Summer 2017. See <http://www.housing.org.uk/latest-updates/universal-credit-landlord-portal/>. A portal was recommended by the Work & Pensions Committee in its ‘Benefit Delivery’ report (2015)

<https://www.publications.parliament.uk/pa/cm201516/cmselect/cmworpen/372/37202.htm>

<sup>11</sup> HMRC form TC1136, accessible here: <http://revenuebenefits.org.uk/pdf/TC1136.pdf>

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