

Overpayments in social security and the discretionary waiver



At a glance

Under the legacy benefit system the recovery of overpaid benefits largely depended on the Department for Communities (DfC) being able to show that the claimant caused the overpayment through the failure to disclose or the misrepresentation of a material fact. As a result, if the department caused the overpayment then it was non-recoverable.

The law relating to the recovery of overpayments has been changed with particular repercussions for new benefits such as universal credit and welfare supplementary benefits. For these benefits, the department just needs to demonstrate that the claimant has been overpaid. The overpaid amount is then recoverable even if DfC caused the overpayment.

Advisers should note, however, the claimant still has the option to ask DfC to exercise its discretion and decide to waive recovery due to the claimant's circumstances.

The department has not been advising claimants of this option when notifying them of an overpayment or communicating regarding its recovery. In addition there is no advice regarding discretionary waivers on the *nidirect* website. This may have contributed to very few people seeking a discretionary waiver relating to these new benefits.

This briefing is aimed at:

- Advisers
- Members of the public

It outlines the background to the law and policy on the issue, and highlights how to seek a discretionary waiver, including an example letter.

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1. Overpayments in social security: law and policy background

Since the introduction of welfare supplementary payments and universal credit to June 2019 there were 2,938 identified overpayments of welfare supplementary payment totalling £1,814,890.76 and 3,546 identified overpayments of universal credit totalling £1,699,778.22. The department will seek to recover these overpayments regardless of fault.

In a response to a freedom of information request from Law Centre NI, the department has indicated that it cannot identify the proportion of overpayments that occur as a result of official error for welfare supplementary payments and universal credit. This means the occurrence of official error overpayments is not being statistically noted. There is a concern that this could impact on the standards of decision making as there appears to be diminished repercussions from overpayments arising out of official error.

Previously an overpayment was non-recoverable unless it could be shown that it was caused by a failure to disclose; or misrepresentation on behalf of the claimant. These legislative tools to challenge an overpayment recovery have been removed for universal credit. When concerns were raised in a parliamentary debate on the Welfare Reform Bill, during the Public Bill Committee on 19th May 2011, the then Minister of State for the Department of Work and Pensions, provided assurances. It does not appear to have been the government's stated intention to recover overpayments caused by official error in many cases.

“The practical reality is that we do not have to recover money from people where official error has been made, and we do not intend, in many cases, to recover money where official error has been made. There will be an absolutely clear code of practice that will govern the circumstances in which recovery action will or will not be taken, to ensure consistent, considered decision making.”

The current implementation seems, however, to be contrary to this intention as many vulnerable adults are not being advised of the option to seek a waiver of recovery. The legislative tools to challenge an overpayment have been removed for Universal Credit. Welfare advisers therefore need to actively advise overpaid claimants and assist them to seek the department's discretion to waive recovery of these overpayments, where appropriate.

2. What is a discretionary waiver & when can it be sought?

The Department for Communities has authority to apply its discretion on whether or not to recover an overpaid amount of benefit. This discretion must be applied consistently.

The Department also has a responsibility to protect public funds and will seek recovery of the overpayment unless:

- It is not cost effective to do so;
- It would cause undue detriment to the health and/or welfare of the claimant or their family; or
- Recovery would not be in the public interest.

Departmental guidance outlines that it may apply this discretion at any time during the overpayment process.

3. How to seek a discretionary waiver?

In most circumstances a claimant or their authorised representative must request a discretionary waiver for the department to consider if it is appropriate. However, guidance confirms they can act without a request.

Waiver requests should normally be made in writing and should outline the reasons why the department should waive recovery of the overpayment.

Recovery will not normally be suspended on the basis of a waiver request and any monies already recovered will not be refunded. It is therefore important that the applicant outlines that they do not agree to recovery and that they would like the department to use its discretion not to recover.

Waiver requests should be sent to:

Department for Communities
PO Box 2136
Belfast
BT1 9RW

It will normally be necessary to provide supportive evidence along with the discretionary waiver request.

4. What evidence is required to seek a waiver?

- **Evidence of detriment to health or welfare:**

It will not normally be sufficient to provide evidence of diagnoses or the medical condition.

Evidence should specifically outline how the recovery of the overpaid amount would be detrimental to the health of the claimant or their family. This might include a letter from a

medical practitioner explaining how the overpayment and its recovery has already caused or would lead to a significant deterioration in health.

If no evidence is supplied the department may ask for this before rejecting a request.

Additional evidence is not necessary where there is an award of benefit under the 'special rules' for terminal illness. However, guidance indicates that waivers will not be granted automatically and that each case must be considered individually. It is recommended that requests in these circumstances explain how the recovery will impact on health and would not be in the public interest to recover in these circumstances.

- **Evidence of financial hardship:**

Where financial hardship is claimed it will be necessary to provide a full breakdown of the family income and expenditure.

The department will assume that overpayment recovery will cause some level of hardship and therefore when preparing the income / expenditure information advisers must outline the significant impact any recovery will have on the client and their family.

5. What if the discretionary waiver request is refused?

There is no limit on how many times a person can seek a discretionary waiver and it is possible to reapply if new evidence is available.

There is no right of appeal against a decision not to grant a discretionary waiver but any decision which is unreasonable, unfair or inconsistent with guidance and practice may be subject to judicial review. Law Centre NI advisers can help.

Please contact the Law Centre NI's social security team should you require further advice and assistance.

Tel: (028) 9024 4401

Appendix 1: Example discretionary waiver request letter

1 September 2019

Department for Communities
PO Box 2136
Belfast
BT1 9RW

DISCRETIONARY WAIVER REQUEST

To whom it may concern,

Re: Mrs Joan Bloggs. 1 Spring Rise, Townsville. BT99 3LJ
NINO: AB123456C

I write on behalf of the above named client and attach a signed form of authority. My client has received notification on 1 August 2019 seeking a recovery of an overpayment of Universal Credit totalling £3,195.30.

My client is not able to repay this overpayment due to the impact on her and therefore does not agree to any recovery.

We request that the Department use its discretion to waive recovery of this overpaid amount because of the significant detrimental impact it will have on our client's health and financial circumstances.

As outlined in the attached letter from the GP, our client has a history of anxiety and depression which has, on previous occasions, required specialist intervention. The GP has recorded deterioration in Mrs Bloggs condition associated with the ongoing concerns about the recovery of the overpayment. It is the GP's opinion that the recovery of the overpayment could cause a further deterioration in the condition and has recently referred the patient back for specialist support.

We have also provided an income and expenditure which outlines that, in addition to Mrs Bloggs' health issues; she also has significant financial pressures. This demonstrates that, even with the minimal deductions, Mrs Bloggs does not have sufficient income to repay the overpaid amount without incurring further debt and reducing her living standards below a reasonable level.

In addition, the overpayment in this case occurred in good faith because our client did not cause it to occur. The overpayment occurred due to official error and our client had spent the money believing she was entitled to receive this as indicated in previous award notifications.

For the reasons outlined above, we do not consider it to be in the public interest to recover this overpayment and therefore request you apply discretion and waive recovery of the overpaid amount.

We look forward to receiving your response.

Yours faithfully,

- Enc. -Form of Authority
-GP Letter dated 23 August 2019
-Income/Expenditure August 2019

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