

# Recovery of overpayments arising from 'official error': current problems and recommendations for change

## At a glance

A change in policy brought about through the welfare reform process in Great Britain and Northern Ireland means that most benefit overpayments caused by 'official error' are recoverable.

A social security claimant who is subject to a benefit overpayment may, in exceptional circumstances, apply for a discretionary waiver. This is designed to ensure that claimants do not experience detriment to their health or severe financial hardship as a result of the recovery of the overpayment.

Law Centre NI is concerned that existing safeguards are insufficient to protect against unfairness in situations involving overpayments and official error. Law Centre NI notes that the Department for Communities (the Department) is due to update its guidance on benefit overpayments. This is an important opportunity to address the deficiencies of the current system and ensure that discretionary waivers can be obtained on grounds of health/financial hardship **or** unfairness. This briefing outlines a number of recommendations for reform to ensure the system works better for everyone.

This policy briefing:

- outlines key terminology and concepts relating to benefit overpayments in Great Britain and Northern Ireland;
- outlines data relating to benefit overpayments in Northern Ireland;
- **makes three recommendations to address unfairness:**
  1. **recommends** that the Department amends forthcoming guidance to encompass a test of 'unfairness arising from official error';
  2. **recommends** that the Department improves claimants' awareness of discretionary waivers;
  3. **recommends** that the Department improves data collection.

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## Benefit Overpayments: Background and context

A social security claimant may receive benefits to which s/he is not entitled or payments in excess of their entitlement because of mistakes, omissions or failures, either by the claimant or by the Department. This is called a benefit 'overpayment'.

The Department categorises overpayments as claimant error or official error or claimant fraud:

- **claimant error:** occurs where there has been a failure by the customer to notify a reportable change that affects the benefit in payment but there is no suspicion of fraud/fraudulent intent.
- **official error:**<sup>1</sup> occurs where a benefit award is miscalculated as a result of a decision-maker not applying the benefit specific rules correctly or not taking into account all the circumstances applicable to an individual.
- **claimant fraud:** occurs where the basic conditions of entitlement have not been met, where the claimant could reasonably be expected to be aware of the effect on entitlement to benefit and the claimant has deliberately not reported relevant information and/or provided false information.

Most benefit overpayments are 'recoverable'.<sup>2</sup> This means that excess payments must be repaid. Overpayments are either recovered by a reduction in social security benefit or through a repayment, for example, by instalment or lump sum.

Historically, social security benefit overpayments could only be recovered in situations involving claimant error and claimant fraud. An overpayment that was caused by official error could *not* be recovered from claimants as they had not caused the overpayment. The underlying principle was that claimants were entitled to assume that the Department would accurately calculate and pay the correct entitlement to benefit. For this reason, overpayments due to official error were not legally recoverable and in 2010, the Supreme Court ruled that the Department for Work and Pensions (DWP) did not have the power to recover benefit overpayments caused by official error under common law.<sup>3</sup>

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<sup>1</sup> DWP, Fraud and Error in the Benefit System: October 2008 to September 2009, 27 May 2010.

<sup>2</sup> Section 69 Social Security Administration (NI) Act 1992.

<sup>3</sup> [2010] UKSC 54, 8 December 2010.

## Recovering overpayments caused by official error

The Supreme Court's decision, however, coincided with a series of measures being progressed through welfare reform. The UK Government subsequently announced plans to expand the recovery of overpayments:

*"We will... seek powers to enable us to widen the range of debts we can recover from, to include those resulting from official error. While the Department must take responsibility for payments made mistakenly by our staff, that does not give claimants the right to keep hold of public money not intended for them".<sup>4</sup>*

This proposal attracted considerable opposition. For example, the Low Incomes Tax Reform Group voiced concerns that making official error payments recoverable would penalise vulnerable claimants who receive incorrect payments through no fault of their own.<sup>5</sup> In response to such criticism, the Minister of State at DWP, Chris Grayling, gave an assurance that although DWP sought powers to recover monies, it had no intention to use these powers 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**".<sup>6</sup>*

New powers were introduced in the Welfare Reform Act 2012 and subsequent legislation to provide for the recovery of overpayments arising from official error.<sup>7</sup> Consequently, *all* overpayments of Universal Credit and 'new style' benefits are now recoverable. In contrast, legacy benefit overpayments caused by official error are not recoverable.

## Disputing overpayments

If an overpayment is identified, the claimant is notified that s/he is not entitled to the benefit received and has an opportunity to ask for a mandatory reconsideration of this decision. If the overpayment decision is upheld, recovery is effected. However,

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<sup>4</sup> DWP, 'Tackling fraud and error in the benefit and tax credits systems' (2010) at Para 14, p 35.

<sup>5</sup> Work and Pension Committee's inquiry into Universal Credit proposals 2010 UC38, Written Evidence Submitted by Low Incomes Tax Reform Group, para 3.13.1

<sup>6</sup> Public Bill Committee, 19 May 2011, Column number: 1019

<sup>7</sup> Explanatory Memorandum – Social Security (Overpayments and Recovery) Regs 2013 No. 384

if the claimant is able to argue that the debt will cause significant hardship, there is a process whereby the decision-maker may consider reducing or waiving recovery.

In exceptional circumstances, the decision-maker can use her/his discretion to waive all or some of an overpayment and any associated penalty and/or recoverable hardship payments. Waiver will result in abandonment of recovery of all or part of the overpayment and penalty.

### **Discretionary Waivers and DWP guidance: the GB position**

In February 2022, the Department for Work and Pensions updated its guidance to staff as to when it is appropriate to waive the recovery of an overpayment.<sup>8</sup> The guidance provides an expanded list of explicit factors to be considered when deciding if it is 'fair and reasonable' to grant a waiver.<sup>9</sup> The guidance explicitly states, however, that waiver is '*normally only considered where both current and future recovery action will result in severe issues for the welfare of the debtor or their family*'.<sup>10</sup> Law Centre NI is concerned that the GB guidance unnecessarily restricts the application of discretion available to the decision-maker. As outlined below, we recommend that the forthcoming Northern Ireland guidance does not similarly restrict discretion.

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<sup>8</sup> DWP, 'Benefit overpayment recovery guide' (February 2022)

<sup>9</sup> DWP, 'Benefit overpayment recovery guide' (February 2022) Factors to be considered are: the debtor's financial circumstances and those of their household; whether the recovery of the debt is impacting the debtor's health or that of their family; the circumstances surrounding how the overpayment arose e.g. fraud, official error, DWP conduct; the debtors conduct e.g. whether the debtor took steps to mitigate any overpayment, notify DWP, misrepresented or failed to disclose any matter, any fraudulent conduct etc; whether the debtor has relied on the overpayment to their detriment; whether the Department intended the claimant to have the money; where the debtor can demonstrate that they did not benefit from the money that was paid; any other factor which appears relevant to the decision maker or which indicates recovery would not be in the public interest. DWP, 'Benefit overpayment recovery guide' (February 2022), para 8.4

<sup>10</sup> DWP, 'Benefit overpayment recovery guide' (February 2022), para 5.85

## Overpayments in Northern Ireland

### Legislation

Corresponding powers were introduced in Northern Ireland in the Welfare Reform (NI) Order 2015. This means that official error overpayments of Universal Credit, new style Jobseekers Allowance, new style Employment and Support Allowance and Welfare Supplementary Payments are now recoverable.<sup>11</sup>

The Debt Management Team within the Department for Communities has responsibility for recovering overpayments from claimants.

### Discretionary Waivers

Similar to the process in Great Britain, the Department has powers to exercise discretion and waive overpayments. Overpayments can be waived in 'exceptional circumstances' where evidenced on health or financial hardship grounds.<sup>12</sup> The Department 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.

Law Centre NI is concerned that awareness of discretionary waivers remains low and that claimants are experiencing significant financial hardship as a result of overpayments. Law Centre NI has addressed these concerns in a number of ways. A briefing paper for advisers in 2019 outlined the process of requesting a discretionary waiver;<sup>13</sup> information was circulated through our Adviser Network and public awareness of the issue as raised via the media.<sup>14</sup>

Where claimants do request a discretionary waiver, our experience is that they are likely to succeed where there is evidence of detriment to health: in 2020/21, 95 applications for waivers were made and 86% were granted.<sup>15</sup>

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<sup>11</sup> Art. 109 The Welfare Reform (Northern Ireland) Order 2015

<sup>12</sup> Overpayments of benefits and financial support | nidirect Further information is available: Annual Report and Accounts - for the year ended 31 March 2021 (communities-ni.gov.uk)

<sup>13</sup> Law Centre NI, 'Overpayments in social security and the discretionary waiver' (October 2019)

<sup>14</sup> Irish Legal News, 'People with welfare debt 'should be told' about discretionary waiver', 9 December 2019; BBC On your Behalf <https://www.bbc.co.uk/sounds/play/p07x6qqz>

<sup>15</sup> Law Centre NI Freedom of Information Request: DFC2022-005

## Evidence of unfairness in cases involving official error

Whilst Law Centre NI acknowledges the Department's obligation to protect public monies, concern remains that current policy, which makes claimants responsible for repaying the cost of official error overpayments, is not appropriate without updating waiver guidance. We have consistently highlighted these concerns to both the Department for Work and Pensions<sup>16</sup> and the Department for Communities.<sup>17</sup>

Law Centre NI has received many queries from claimants about overpayments caused by official error. Some examples:

- in Case A, our client received an assurance from the Department that she could spend arrears received following an appeal, only to later be advised that the Department had been mistaken and that an overpayment had occurred;
- in Case B, our client had declared all their circumstances and provided all requested paperwork before the benefit was paid. The Department later determined, however, that it had been mistaken; that the basic eligibility criteria was not met and an overpayment had occurred;
- in Case C, our client's employment had ended and he continued to receive payment without being invited to a genuine prospects of work interview. The Department later retrospectively applied the test and required the claimant to repay the benefit for the entire period of the Departmental error.

In a number of our cases, the Department has issued an apology and acknowledged the poor service that resulted in the overpayment before seeking recovery.

Dissatisfaction about the Department seeking recovery of an overpayment due to official error was recently expressed by the Tribunal, which remarked:

*"[...] it should be noted that the appellant is a genuine and honest person. The great majority of the fault in this case lay with the Department. I would be astonished if the Department sought to recoup this amount given the (in)actions of the Department. It was Department officials who filled in the*

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<sup>16</sup> The Law Centre convened the NI Welfare Reform Group which provided written evidence to the Work and Pension Committee's 2010 inquiry into Universal Credit proposals. See UC48, Written Evidence Submitted by Northern Ireland Welfare Reform Group, para 8.2

<sup>17</sup> Meeting of the Northern Ireland Standards Committee and Voluntary Sector, 2 December 2019

*forms incorrectly. They did not listen to the appellant and did not record his answers properly. They did not reply to the query sent by the appellant. I can understand that there was an ongoing pandemic but this offers no comfort to the appellant wherein he faces the prospect of owing this money...”<sup>18</sup>*

In the above example, the claimant successfully applied for a discretionary waiver with Law Centre NI’s assistance.

### Prevalence of benefit overpayments in Northern Ireland

Law Centre NI’s concern is that the post-welfare reform change to overpayments policy could have an impact on the quality of decision-making. Previously, the Department carried the costs of official error as these were not recoverable from the claimant. Now, the claimant carries the costs of official error. Given the impact on claimants, Law Centre NI recommends that the Department regularly reports on the statistical occurrence of Universal Credit official error overpayments as a means to monitor any change to the quality of decision-making. Currently, the Department does not routinely publish data on official error overpayments as these are not quality assured to the standard of official statistics.

Data received through a Freedom of Information request to the Department shows that in 2020/21, more than 8,000 people in Northern Ireland had an overpayment in Universal Credit as a result of official error. The data also shows a 66% increase in such overpayments on 2019/20 - 2020/21.<sup>19</sup>

Benefit type	19/20		20/21	
	Volume	Value £	Volume	Value £
Universal Credit official error overpayment	5,078	3,245,485	8,447	5,387,794
<b>Totals:</b>	<b>5,078</b>	<b>3,245,485</b>	<b>8,447</b>	<b>5,387,794</b>

Other data for this same period shows that the Department waived eight Universal Credit overpayments caused by official error.<sup>20</sup> In other words, **less than 0.1% of UC payments caused by official error are waived in Northern Ireland.** Law Centre NI is concerned that this approach is seemingly at odds with the initial reassurance by DWP that ‘many cases’ involving official error would not lead to benefit recovery.

<sup>18</sup> Decision dated 28 October 2021.

<sup>19</sup> Department response to Law Centre NI FOI 16/11/21 (not quality assured to the standard of official statistics)

<sup>20</sup> [AQW 29446/17-22](#)

## Recommendations to address unfairness

As a means to address these concerns, Law Centre NI recommends that the Department for Communities adopts the following measures:

### **Recommendation 1: amend forthcoming guidance to encompass a test of 'unfairness arising from official error'.**

Law Centre NI understands that the Department intends to update its own guidance on overpayment recovery. This presents an opportunity for the Department to review its communications and its guidance on when it would be appropriate to waive recovery of all or some of an overpayment as well as any associated penalty and recoverable hardship payments.

We recommend that the guidance continues to make provision for waivers in circumstances involving financial hardship and welfare.

In addition, we recommend that the guidance explicitly states that decision-makers should grant waivers in circumstances where unfairness has arisen from the way in which the official error has occurred. The factors that decision-makers should take into account when considering such unfairness could include:<sup>21</sup>

- the type of official error (maladministration/system errors);
- the period of time between the payment of the benefit and the identification of the official error overpayment;
- the claimant's conduct e.g. whether s/he sought to query or notify the Department of the overpayment;
- the Department's response to the claimant's query or notification, for example, whether the Department acknowledged the issue; whether the Department provided further assurance that the claimant could spend the benefit received; whether the Department offered an apology to the claimant;
- whether the claimant relied on the overpayment to his/her detriment;
- whether the overpayment was made to a third party, for example, a landlord;
- any other factor which appears relevant to the decision-maker or which indicates recovery would not be in the public interest.

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<sup>21</sup> The DWP 2022 guidance referred to above contains a list of factors which could potentially be incorporated into the Northern Ireland guidance.

## **Recommendation 2: improve claimants' awareness of discretionary waiver**

The overpayment notification decision currently issued to claimants does not inform claimants of the option to seek a discretionary waiver nor where they might obtain information relating to this. Law Centre NI acknowledges that information about discretionary waiver is contained on the NI Direct website, however, the overpayment notification letter does not currently signpost to this information.

Law Centre NI's experience is that a significant number of claimants are unaware of the option of seeking a discretionary waiver. For this reason, we recommend that the notification letter is amended to explicitly inform claimants of the availability of a discretionary waiver in exceptional circumstances including in situations involving 'official error'.

Further, we recommend that NI Direct information is amended to specify that a discretionary waiver may be available where damaging to health/welfare or where there is unfairness.

## **Recommendation 3: improve data collection**

As outlined above, the Department does not currently publish statistics on a routine basis on the level of official error overpayments.

As a means to improve transparency and to promote improved decision-making, Law Centre NI renews its recommendation that the Department records and publishes official error statistics.

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