

AMENDMENTS TO DISCRETIONARY WAIVER GUIDANCE

Legal Information Briefing

February 2023

INTRODUCTION

A recent [judicial review](#) decision in Great Britain has emphasised the importance of adequate guidance and decision making on when to waive the recovery of overpaid benefits.

This legal action highlighted concerns relating to use of discretionary waivers and official error overpayments in GB. Many of these concerns had been raised by Law Centre NI in its April 2022 Policy Briefing Paper [Recovery of overpayments arising from ‘official error’: current problems and recommendations for change](#).

Following the publication of this briefing paper, Law Centre NI engaged with the Department for Communities (DfC) to outline our concerns that the guidance might limit access to discretionary waivers and our opinion that decision making flowing from this guidance would be vulnerable to legal challenge.

As a result of this engagement, the guidance was amended in Northern Ireland last year and communications informing claimants of the option to seek a discretionary waiver were greatly improved. This Information Briefing outlines these significant changes.

CONTEXT

A discretionary waiver is a mechanism, whereby in specific circumstances, DfC can exercise its discretion to ‘waive’ recovery of all or part of an overpaid benefit. The discretionary waiver mechanism became more important following a change in the law which, for the first time, allowed recovery of some overpaid benefits even in cases when the overpayment was caused by official error¹.

¹ Regulation 2 of The Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations (Northern Ireland) 2016:

“official error” means an error made by -

- a) an officer of the Department or HMRC acting as such which was not caused or materially contributed to by any person outside the Department or HMRC;
- b) a person employed by, and acting on behalf of, a designated authority which was not caused or materially contributed to by any person outside that authority,

but excludes any error of law which is shown to have been such by a subsequent decision of a Commissioner, or of the court (as defined in Article 27(7) of the 1998 Order(a))

The Welfare Reform (NI) Order 2015 allowed recovery of overpayments caused by official error for benefits such as Universal Credit, New Style Employment Support Allowance and New Style Jobseekers Allowance. This change was contrary to the ‘legacy’ benefit system, which previously ensured the department could not recover overpayments caused by official error.

Understandably, this change in the law had attracted criticism.

In response, when it had been debated in Parliament, Minister of State, Chris Grayling, had given assurances that although Department of Work and Pensions sought powers to recover monies, it had no intention to use these powers in ‘**many cases**’ where official error had been the cause.

However, statistics² obtained by Law Centre NI from DfC demonstrated that in the vast majority official error cases the overpayment was recovered and only a miniscule amount were in fact waived.

These same statistics also revealed that requests for waiver were rare but when they were sought there was actually an 86% success rate in NI. The number of official error overpayment waivers granted in Northern Ireland, although low, was actually much higher than in Great Britain³.

This provided an evidential basis for Law Centre NI to seek a change in Policy in NI.

LAW CENTRE INTERVENTION AND POSITIVE CHANGE

In the April 2022 briefing paper, Law Centre NI had outlined its concern that the existing guidance, which outlined waiver was *normally* only granted on grounds of health and welfare, could undermine the importance of other stated grounds for waiver such as the overpayment being caused by official error.

In addition, Law Centre NI had concern claimants were not sufficiently notified about the existence of Discretionary Waivers, demonstrated by the low number of requests.

Law Centre NI’s briefing made a number of recommendations to address unfairness and through positive engagement with the Department for Communities (DfC) a significant number of our recommendations were followed.

² 2 March 2022, FOI Response Ref: DFC2022-005. In 2020/21 - 8,447 Universal Credit overpayments were caused by official error and in the same year 29 Universal Credit overpayments were waived.

³ In 2020/21 – 29 Universal Credit waivers were granted in Northern Ireland and up to 10 were granted in GB

WHAT DOES THIS MEAN IN PRACTICE?

As a result of Law Centre NI's recommendations to address the unfairness, the DfC agreed to amend its guidance to outline that a waiver can be granted for several different reasons and should consider the debtors' entire circumstances including the following:

- 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 for example fraud, official error, DfC conduct
- the debtors conduct for example, whether the debtor took steps to mitigate any overpayment, notify DfC, 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

The DfC has also agreed to improve communication regarding the existence of the possibility to request a discretionary waiver of a debt. As a result:

- Each letter issued to a claimant notifying of a recoverable overpayment will now inform that in exceptional circumstances the Department for Communities has the discretion to waive recovery of all or part of an over-payment.
- Mandatory Reconsideration notices will also again inform the claimant of the possibility of having the recovery of the debt waived in exceptional circumstances.
- Information provided on the NI Direct website about Discretionary Waiver has now also been enhanced.

Law Centre NI is pleased that its evidence based briefing paper and positive engagement led to the change in policy in Northern Ireland which should improve access to Discretionary Waiver by those claimants that may be entitled. It is our view that the subsequently successful GB legal challenge against the DWP guidance demonstrates that DfC were correct to act and implement Law Centre NI's recommended changes in Northern Ireland last year.

WHERE CAN I FIND ADDITIONAL RESOURCES AND GUIDANCE?

Further information on waivers can be found on NI Direct website <https://www.nidirect.gov.uk/articles/overpayments-benefits-and-financial-support>

Guidance on Discretionary Waivers and templates which can be used to request a Discretionary waiver will be published on Law Centre NI's website in the coming days.

Additionally, Specialist social security legal advice can be obtained by calling Law Centre NI's telephone advice line: 028 90 244401

Disclaimer

Although every effort is made to ensure the information in Law Centre publications is accurate, we cannot be held liable for any inaccuracies and their consequences. The information should not be treated as a complete and authoritative statement of the law. Law Centre (NI) only operates within Northern Ireland and the information in this document is only relevant to Northern Ireland law. When reading Law Centre documents, please pay attention to their date of publication as legislation may have changed since they were published.

© Law Centre NI 2023

