The Employment and Support Allowance (Repeat Assessments and Pending Appeal Awards) (Amendment) Regulations 2015 (S.I. 2015 No. 437)

Report by the Social Security Advisory Committee under Section 174(1) of the Social Security Administration Act 1992 and statement by the Secretary of State for Work and Pensions in accordance with Section 174(2) of that Act

Presented to Parliament by the Secretary of State for Work and Pensions pursuant to Section 174(2) of the Social Security Administration Act 1992

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Statement by the Secretary of State in accordance with section 174(2) of the Social Security Administration Act 1992

The Employment and Support Allowance (Repeat Assessments and Pending Appeal Awards) (Amendment) Regulations 2015

INTRODUCTION

Employment and Support Allowance (ESA) was introduced in October 2008 to provide a measure of income replacement for people who are unable to work because of a health condition or disability. Once initial awards have been made, entitlement is based on a functional assessment of capability for work (Work Capability Assessment (WCA)).

WCAs are carried out by healthcare professionals who make recommendations to DWP decision makers who decide eligibility for ESA based on the evidence before them. To determine whether the claimant has limited capability for work (LCW), the assessment looks at the effects of any health condition or disability on a claimant's ability to carry out a range of everyday activities.

There are three possible outcomes of the assessment:

- Claimant has LCW and is placed in the work-related activity group
- Claimant has LCW and limited capability for work related activity and is placed in the support group
- Claimant does not have LCW, or claimant is found fit for work so no longer entitled to ESA and should claim Jobseeker's Allowance (JSA).

A claimant can also be found not to have LCW where they have failed to return the ESA50 questionnaire, or failed to attend a WCA without good cause.

The Department has become concerned that there is no barrier to a repeat award of ESA after six months, pending a fresh WCA, even where the claimant provides no evidence to suggest that their condition has substantially deteriorated, or that they have a new health condition.

This has prompted a change in policy which has resulted in the Employment and Support Allowance (Repeat Assessments and Pending Appeal Awards) (Amendment) Regulations 2015, which were referred to the Social Security Advisory Committee (SSAC) on 20 October 2014 to consider the proposals, in accordance with section 172 of the Social Security Administration Act 1992.

Under these changes the six month rule will be abolished and claimants will not be treated as having LCW if their most recent WCA outcome was that they were found fit for work, unless they can demonstrate that their condition has significantly worsened or a new health condition has developed.

Currently, after a WCA where a claimant is found not to have LCW, and the claimant decides to appeal that decision, ESA is unique in the social security system in continuing to be paid following mandatory reconsideration up to the point of the appeal outcome.

The Regulations also provide that where a claimant has previously been found not to have LCW, no payment pending appeal will be made.

This is intended to ensure that the majority of claimants claim JSA and receive the help and support they need to move closer to the labour market and return to work. It would also bring the conditionality arrangements for such claimants broadly into line with those for Universal Credit.

DWP officials discussed the Regulations with the Committee during the meeting of 5 November 2014. Following the meeting the Department provided additional information about the inclusion of proposals to restrict the payment of ESA pending appeal to those who are found not to have LCW following a repeat claim for benefit.

The Committee decided that the proposals should be formally referred to them under the statutory provisions and conducted a consultation from 8 to 19 December 2014. The Committee received 21 responses from a range of relevant stakeholders. The Committee also ran two workshops to seek views on the proposed changes: one in London on 17 December and the other in Glasgow on 18 December 2014. Input was received from 20 representatives of relevant stakeholder organisations. The Committee subsequently issued its report on 2 February 2015.

The Department notes the concerns raised by the Committee. I am grateful to the Committee and to the organisations that responded to the Committee's consultation and attended the workshops at short notice. I have given very careful consideration to the Committee's recommendations and the other points raised during the consultation.

This statement sets out, in accordance with section 174(2) of the Social Security Administration Act 1992, the reasons why I have decided on this occasion, not to give effect to the Committee's main recommendation that implementation of these Regulations should be delayed.

The Government is committed to supporting those who cannot work because of a health condition or disability. We are making this policy change because we believe that the existing rules encourage claimants to claim ESA, rather than claim JSA and get the help and support they need in order to return to work.

However, in response to concerns raised by the Committee and stakeholders who responded to the consultation, I have decided to retain the existing six month provision for those who failed to return the ESA50 questionnaire, or failed to attend a WCA.

I have also accepted a number of recommendations in principle including:

- Revising the Guidance for Jobcentre Plus (JCP) advisers, ESA decision makers and claimants;

- Examining the ESA and JSA claim process carefully to ensure it is robust enough to minimise the risk of a claim being incorrectly rejected, lost or delayed because of operational issues;

- The Department should be more proactive in accessing information and evidence that has previously been presented in support of a claim; and

- Improving training for JCP advisers to prevent claimants being discouraged from claiming JSA and better explain the flexibilities in the JSA scheme.

I believe it is important that claimants found not to have LCW and who have not developed a new condition, or whose existing condition has not significantly worsened, should receive the help and support afforded by JSA to return to work rather than making repeated claims to ESA where such support is not provided. I have therefore decided to proceed with these Regulations, having carefully considered the Committee's views.

The Employment and Support Allowance (Repeat Assessments and Pending Appeal Awards) (Amendment) Regulations 2015

The Committee's Report and Government's response

1. The proposed amendments will abolish the six months' rule. This means that, on any repeat claim for ESA in the circumstances described throughout this report, the claimant will not be treated as having limited capability for work pending the WCA. To receive benefit during this period JSA would need to be claimed, and any award would be dependent upon compliance with conditionality rules. As far as awards of ESA pending an appeal are concerned, the intention is that a claimant would be awarded ESA at the assessment rate if they appealed an initial fit for work decision terminating an award. Any similar and subsequent appeal, however, would not trigger such an award unless there had been an intervening determination (on a claim or appeal) that the claimant does have limited capability for work.

The Committee has some concerns about whether the draft regulations in their current precise formulation achieve the stated policy, and has instructed the Committee Secretary to write to DWP officials with our more detailed drafting comments. Should the Department decide to proceed with these proposals, we recommend that it review the wording of the draft regulations in light of our comments.

The Government accepts this recommendation.

The Department notes the observations made by the Committee as to the drafting of the "Application" provision (Regulation 2). The policy intent has always been that the Regulations apply solely to those making a repeat claim on or after the 30 March 2015, and we have now made amendments which we hope make it clear that this is the case.

Looping the System

2. Many of those who responded to the Committee's consultation acknowledged that some claimants make repeat claims to ESA and are awarded benefit at the assessment rate having had a previous award terminated because they had been found to be fit for work. Similarly it was widely accepted that people are able to gain access to ESA at the assessment rate through appealing against an unfavourable decision by the Secretary of State. Numbers involved however are not known. But the repeated and strongly held view of the respondents to the consultation is that, even if the numbers of repeat ESA claims were known, it would not necessarily mean that claimants were necessarily setting out to work the system in any kind of systematic or manipulative way. The reasons why repeat claims for ESA are made are, as yet, unexplored. The Committee therefore urges the Government to establish whether a problem on looping around does actually exist and, if so, to provide a robust evidential base which demonstrates the scale of it.

The Government is grateful to the Committee and respondents to the consultation for their comments. The Government is not suggesting deliberate manipulation. As has

been acknowledged, the proposed changes will end an unintended consequence of the existing arrangements where ESA claimants can reclaim ESA after six months despite no significant deterioration or change in a claimant's health condition or disability.

The Government acknowledges that there is not the available data to say precisely the number of people who would be affected by this measure other than the data already provided in the equality analysis that has been provided to the Committee.

However, some further analysis of repeat claimants and their WCA outcomes has been carried out since the equality analysis was provided to the Committee. This found that around 26,000 people in 2013 made a repeat claim with broadly the same health condition or disability after previously being found fit for work

Excluding those whose repeat assessments are still in progress, around 65% of those previously found fit for work and who re-claimed with broadly the same health condition were either found fit for work or had their claim closed before assessment.

Although we have not undertaken any specific research into why repeat claims are made, the Department has published "Routes onto Employment and Support Allowance". This can be accessed here:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/214556/rrep774.pdf

The Government's very firm view is that claimants, who have been found not to have LCW, should get the necessary help and support to enable them to move closer to the labour market through JSA.

Mandatory Reconsideration

3. The Committee further observes that if there is a case for paying ESA at the assessment rate during the mandatory reconsideration process where a decision to terminate an ESA award is being challenged, it follows that there is a similar case for not withdrawing payments pending an appeal.

Although mandatory reconsideration (MR) is out of the scope of these regulations, MR is a reform which we believe benefits claimants. It enables the Department to:

- provide a clear explanation of the decision;
- give the claimant the opportunity to further present his or her case, including providing new evidence; and
- crucially, change decisions at the earliest opportunity.

During the period while the MR is being considered other benefits may be payable, provided the claimant meets the conditions of entitlement. For the majority the benefit will be JSA. The conditions of entitlement and the Claimant Commitment can be tailored to reflect the claimant's health condition. JCP advisers, drawing on the expert help of disability employment advisers, can readily facilitate discussions in this area.

The Government believes that ending payment of ESA pending an appeal is appropriate for those previously found fit for work. To leave this provision in place would open up

further opportunity for claimants to receive ESA pending a further WCA, and subsequently not get the necessary support to return to work through JSA.

Administrative issues

4. The Committee raises the potential difficulty in submitting a repeat claim to ESA whilst in receipt of JSA and suggests that the Department examine this process carefully and ensures it is robust enough to minimise the risk of a claim being rejected, lost or delayed because of operational issues.

The Department recognises that there can be administrative difficulties making a claim for ESA, which can only be awarded if the person is found to have LCW, whereas JSA can only be awarded if the person does not. However, it is important to note that ESA law was amended in 2010 to remove any presumption that a JSA claimant could not be entitled to ESA. The guidance to decision makers will emphasise that it cannot be assumed that a person in receipt of JSA does not have LCW for the purposes of a repeat claim, which must be decided on the evidence about functional capability.

Barriers to claiming

5. The Committee asks the Department to consider the effect that more people might be found fit for work on providing written evidence alone. During its consultation, concerns were raised that vulnerable claimants had difficulty in completing the ESA50 unaided and in obtaining supporting evidence. Disallowing claims without the evidence available from a face-to-face discussion would therefore carry risks for ESA claimants in ways that would not apply for most other DWP benefits.

The Department acknowledges that a key part of the claiming process is the evidence that a claimant will need to provide to demonstrate that they have developed a new condition, or that their condition has deteriorated to such an extent that ESA would now be payable.

The guidance issued to DWP operational staff and decision makers will be expanded substantially, so that it is clear what evidence should be sought from claimants who make a repeat claim with the same condition as their previous ESA claim. We are also introducing a new form asking claimants for more detail on how their health condition affects them differently to when they were last assessed. This should help to ensure that decision makers will have the evidence they need to determine whether the claimant can be treated as having LCW (pending a new WCA).

Decision makers would consider each case on its merits and there would not be an automatic assumption that benefit should be refused without any investigation of the facts, which might also include a referral for further advice from a health care professional, or arranging for a further WCA.

The Department acknowledges the concerns of the Committee and stakeholders about the circumstances in which claimants are found fit for work without a face to face assessment.

6. **The Committee raises concern following its consultation that in some areas people are being discouraged, if not prevented, from claiming JSA by members of staff and if these proposals come into force they will need to be accompanied by a firmly directed training initiative and a thorough revision of guidance which would endeavour to close what appears to be a black hole in benefit provision.**

The Government takes very seriously the concerns raised during the Committee's consultation about JCP staff discouraging claims to JSA for claimants who are found fit for work. The Department has already provided extensive guidance to staff, but we recognise that in light of the anecdotal evidence provided as part of the Committee's report that this may not be being applied consistently as it should.

We will be ensuring relevant guidance is amended to reflect the new provision and will also be producing awareness packs for DWP Operations to ensure a standardised approach.

ESA or JSA?

7. **The Committee raises the position of claimants, often with mental health problems, who can neither mount a successful claim to ESA independently nor manage to negotiate safely the conditionality regime within JSA. Neither benefit can be said to work well for them. "Looping around the system" is a term which suggests a degree of control and determination which was not recognised by the majority of respondents to our consultation as being personal characteristics within the group with which we are concerned. It is probably more accurate to think in terms of people being passively moved around a system for which they are ill-suited.**

The Government provides extensive help and support to enable people to claim the appropriate benefit. It is recognised that some vulnerable claimants can find navigation of the benefit system difficult and the Department has reviewed its procedure and guidance to staff to help them understand the needs of more vulnerable claimants and try to ensure that they claim the benefit most appropriate to their needs.

The Department acknowledges that a key part of the claiming process is the evidence that a claimant will need to provide to demonstrate that they have developed a new condition, or that their condition has deteriorated to such an extent that ESA would now be payable. Following consultation, the Department is improving the way information is gathered for repeat claims and it is keen to get relevant evidence about claimants from the professionals best placed to provide it.

We are introducing changes to the contact centre script to ensure claimants are notified at the earliest opportunity that they will need to provide evidence to demonstrate how their health condition affects them differently to when they were last assessed rather than just stating that it has worsened. In addition, we are introducing a new form for claimants to explain how their condition has deteriorated and how it affects their day to day life differently to when they were last assessed.

The Committee's report raises concern about sanctions for claimants moving on to JSA from ESA. Sanctions are only applied when claimants have not met their obligations under their claimant commitment. Claimants with health conditions can tailor their commitment accordingly, and appropriate training is provided to staff to help inform these discussions. Therefore there should be no increased risk that these claimants will be subject to sanctions. In addition, claimants subject to sanctions have the right to request a mandatory reconsideration and if necessary make an appeal to the Tribunal Service if they remain dissatisfied with the decision on their claim.

The Committee report also raises concern that this guidance may not be being applied consistently and we will therefore ensure that through our awareness packs and through guidance changes, staff are reminded that JSA conditionality can be tailored for claimants with a health condition or a disability.

8. Given the risk of claimants falling between JSA and ESA, we would recommend that those who claim JSA pending an ESA appeal, or whilst their ESA claim awaits determination, should be offered back to work support on a voluntary basis but exempted from conditionality beyond attendance at a work-focused interview.

The Government does not accept the recommendation.

However, we are introducing changes to JSA regulations from 30th March 2015 which will introduce more flexibility for JSA claimants with medical evidence of a health condition or disability by enabling them to remain entitled to JSA with reduced conditionality for one period of up to 13 weeks in a year. During this time claimants will be treated as available for work and can be treated as actively seeking work. Work coaches can also ask claimants to take some steps to prepare to return to work but only where this would be reasonable for the claimant.

All claimants on JSA are required as a condition of entitlement to be available for, and to actively seek, employment. However, claimants with a health condition have considerable flexibility to restrict the work for which they have to be available. They may restrict their availability in any way provided the restrictions are reasonable in the light of their condition. So whilst the Government does not accept this recommendation, we believe that the further changes to the JSA regulations and guidance will provide further reassurance about the requirements that will be placed on people claiming JSA.

Evidence of a new or deteriorating condition

9. **The Committee's consultation feedback highlighted that information given by GPs is not always adequate in providing the information needed to secure an initial entitlement to ESA at the assessment rate pending a WCA. The issue of surgeries increasingly adopting a policy of charging for providing medical evidence was mentioned to the Committee several times.**

A clear problem with obtaining medical evidence in connection with a claim for ESA is that the claimant is, to a very large extent, in the hands of others. The individual can emphasise the urgency of their situation, but they are ultimately

dependent upon professional staff with their own time pressures and priorities. Even those who have a new or significantly worsened condition may face a potentially prolonged period without benefit if the evidence they are required to furnish is not provided promptly.

The Department continues to work with both the Royal College of General Practitioners and the British Medical Association on the issue of evidence provision. Updated fit note guidance has recently been produced and we are currently working with both organisations to update and digitise the ESA113 which is used to collect additional evidence.

While GPs will continue to issue fit notes where appropriate, it is ultimately the Department's decision makers that make the decision, based on the available evidence, whether an award of benefit can be made. This evidence does not necessarily have to be in the form of a fit note. For example, if a claimant's medication has altered significantly or it has increased this may be enough for a Decision Maker to find a significant deterioration. However each case must be determined on its own merits.

In addition, a new form will be introduced to encourage the claimant to explain how their condition has deteriorated and how it affects their day to day life.

Independent medical advice, such as on the possible progression of health conditions, is also available to decision makers where required through the Department's assessment provider.

10. The Committee was also concerned about the position of claimants who fail to return the ESA50 questionnaire, or fail to attend the WCA who under these Regulations will not be treated as having LCW unless they have a new condition, or their condition has worsened significantly.

Existing regulations provide that claimants who fail to attend a WCA or return their ESA50 are treated as not having LCW. Such decisions have validity for six months unless the claimant makes a repeat claim and can show that they have a new condition, or an existing condition has significantly worsened. The Department has listened carefully to the Committee and view of stakeholders and has decided to exclude this group from the scope of these Regulations. The six month policy will therefore remain intact for this group of claimants.

Decision-making

11. The Committee asked at what stage of the process a decision on a new or worsened condition would be made. Would it be on the initial information contained in the repeat claim itself, or after expert medical opinion had been obtained?

The decision would be made by a decision maker at the point they have sufficient information available, which may not require expert medical opinion. There are three possible options:

- evidence from the claimant's previous WCA is used alongside any new information received and the claimant is found not to have LCW;
- the claimant provides evidence of a new, or significant deterioration in their health condition and is treated as having LCW and paid ESA at the assessment rate; or
- the decision maker is unable to treat the claimant as having LCW and no ESA can be paid pending any new WCA.

12. **The Committee have also indicated that claimants should be given an appeal right. Claimants already have a right of appeal when they make a claim for benefit, once the mandatory reconsideration process has been completed. In the majority of cases where the Committee don't accept that anything has changed since the last WCA, the claim would be disallowed using that evidence, giving the normal right of appeal. Where the DM can't use the previous evidence - lost, no longer reliable etc. - but still considers that there is no new or worse condition, claimants would have to await the outcome of the WCA before being able to exercise the normal a right of appeal.**

Claimants already have a right of appeal when they make a claim for benefit, once the MR process has been completed. In the majority of cases where the Department does not accept that anything has changed since the last WCA, the claim would be disallowed using that evidence, giving the normal right of appeal. It is only where the decision maker cannot use the previous evidence, for example because it has been lost, is no longer reliable etc. but still considers that there is no new or worse condition, that claimants would have to await the outcome of the WCA before being able to exercise the normal right of appeal. The Department does not expect there to be many such cases and accordingly the Government does not accept this recommendation.

13. **The Committee also asked to see current statistics on the extent to which ESA fit-for-work decisions are overturned on appeal**

For ESA claims that began between the benefit introduction in October 2008 and March 2014, over 2.1 million claimants have had an initial WCA. Just over 1,000,000 were found to be fit for work.

421,700 appeals had been heard for claims that began by September 2013, with the following results for those for whom we have completed appeals information:

- 156,600 DWP decisions overturned (37%)
- 265,100 DWP decisions upheld (63%)

This means that the original DWP decision was confirmed in 63% of fit for work appeals heard. The Tribunal overturned only around 15% of the 1,000,000 'fit for work' decisions made.

Costs/Savings

14. **The Committee asked for further clarity about how the predicted administrative savings have been calculated.**

The administrative savings are based on the following assumptions which the Department regards as reasonably robust-

- Reduction in WCA referrals;

- Reduction in ESA administration costs - due to the Work Focused Interview for new ESA claims not being required for the ESA repeat claimants found not to have LCW, based on evidence from previous WCA;

- Increase in JSA processing costs due to ESA repeat customers who are found not to have LCW on a repeat claim moving to JSA. This comprises an inbound call, processing, new claim interview, two weekly review and weekly administration. The assumption is that 75% of ESA repeat claims found not to have LCW on a repeat claim will move to JSA.

15. **The policy costings state that the savings from this measure are estimated at £5m a year from 2015-16 onwards. The reason given is the anticipated reduced number of claims to ESA. While the Chancellor's statement does not explicitly say so, it follows that the expectation is a proportion of those denied ESA will not go on to claim JSA. Although some of those likely to be affected by the proposal would only be entitled to the contributory element within either ESA and JSA, and would therefore be expected to have other means of support, they would not account for all the projected savings. Others could be more vulnerable claimants.**

The Government acknowledges that not all claimants who are found fit for work will go on to claim JSA, as highlighted in the departmental research 'Routes onto Employment and Support Allowance'.

However, the Department is taking steps to ensure vulnerable claimants found fit for work are helped to claim JSA.

We have already put processes in place to aid the transition from ESA to JSA and to minimise any gap in payment. These include a decision assurance call by the ESA Decision Maker to see whether the claimant has any evidence which needs to be considered and during which a claim for JSA will be invited where appropriate. Claimants will also be routed to the contact centre to discuss the JSA claim with an agent rather than being signposted direct to the JSA online service. Where decision assurance calls are not successful claimants are provided with written information on how to call the JSA contact centre.

Guidance

16. **The Committee understands that the Department may be considering the need to introduce forms and leaflets for people making repeat claims for ESA. If that is the case, we welcome that initiative. A more bespoke approach designed to provide advice about the evidence claimants would need to provide in order to demonstrate the significant worsening of a condition known to the Department, or the onset of a new one, would be a positive step forward. We would go**

further and recommend that, in cases involving a repeat ESA claim, the Department should be more proactive in accessing information and evidence that has previously been presented in support of a claim.

The Department is planning to improve the way it collects information at the start of a repeat claim for ESA so that claimants are aware of the evidence that decision makers will need to determine whether a new condition or a significant deterioration has taken place. For example we plan to change the contact centre scripts so that claimants know what evidence they need to provide in order to demonstrate that their health condition has changed since the previous claim for ESA. In addition we are also introducing a new form at the start of the ESA claim process to improve the evidence we collect.

17. The Committee also requested that revised guidance provided to:

- **JCP advisers – in relation to claiming JSA with a fit note, and flexibilities within JSA;**
- **Decision Makers in relation to how to determine whether a condition has worsened; and**
- **Claimants – in relation to setting out the precise requirements of the worsening test – i.e. whether it relates to the significant worsening of the condition itself or of the impact of the condition, which is more in keeping with the general approach of ESA. It should also provide clarity about the specific types and sources of evidence that may be produced to support the claim, for example whether the claimant's own evidence will suffice.**

The Department plans to update the guidance for JCP advisers and decision makers not only for this measure but also for the JSA extended sickness provision which is coming into operation at the same time. We are planning to raise awareness of the change with relevant staff and plan to share the new decision maker guidance with the Committee before it is published. This guidance will include information about the evidence needed to demonstrate a change in a claimant's condition since the previous assessment and who can provide that evidence such as GPs and other professionals who know the claimant well. We are changing contact centre scripts so that claimants will know at the start of their claim what evidence the Department will need to support the claim. We have already started to work with organisations which provide advice to claimants, and plan to build on this awareness so they know what evidence will be needed to support repeat claims in the future.

Timing

18. The Committee believes that the proposals would largely dissipate once Universal Credit (UC) has been fully rolled out and would therefore argue that there is no great imperative for introducing these measures at such speed and urges the Government to pause and further explore the issues raised in this report.

The Government welcomes the Committees' acknowledgement that UC will benefit claimants, and make the welfare system simpler to navigate.

National expansion of UC started in February 2015 to all remaining Jobcentres and Local Authorities for new single claimants previously eligible for JSA, including those with existing Housing Benefit and Tax Credit claims.

The Department will personalise support to maximise flows into work as more households move onto UC as legacy benefits close.

The Government has carefully considered the issues raised by the Committee but does not believe that waiting for full UC roll out would provide these claimants with the right help and support they need now, to enable them to return to work.

The Committee's Recommendations

Unlike many draft regulations the Committee has recently considered, the need to reduce expenditure is not at the heart of these proposals, although some administrative and benefit savings are anticipated.

Instead, the proposals are designed to address the Government's concern that 'existing ESA rules encourage claimants to loop around the system'. The intention is that claimants that have been found fit for work should be prevented from returning to ESA - a benefit that, during the assessment phase, has no element of conditionality - unless an existing health condition has deteriorated significantly or a new condition has developed.

The Government notes the Committee's acknowledgement that this measure is motivated by the desire to help people to return to work. The Department's view is that claimants should claim JSA once they have been found fit for work so they can receive the personalised support they need to help them to return to work.

The Committee agrees that it is important that individuals who have been found fit for work should have access to the 'back to work' support that is available to JSA claimants. However, evidence presented to the Committee during our consultation suggests that some vulnerable claimants will be debarred from receiving ESA, but will either not claim JSA because they do not believe that they are fit for work or will fall foul of the associated conditionality regime.

The Government is doing all it can to ensure that claimants are directed to the correct benefit through its information providing services. These include doctors' surgeries, libraries, the internet, community groups, welfare rights groups, advice centres, and various voluntary organisations as well as Jobcentre Plus offices. It is recognised that some claimants have concerns about claiming JSA, but JSA does have in-built flexibility to take account of a claimant's health and the guidance to staff gives advice about how to help vulnerable people to claim the appropriate benefit. JSA is the appropriate benefit for most of those found fit for work, and ESA will remain available to those who develop a new condition or whose condition changes significantly.

The numbers of repeat ESA claims are not known, and there is only very limited anecdotal evidence to suggest that the reason for them is to manipulate the system.

As a consequence of the Committee's concerns, further analysis has been undertaken.

Around 240,000 of the 700,000 claims made in 2013 were repeat claims. Of these some 26,000 were claiming with broadly the same condition after previously being found fit for work.

The Government is not suggesting deliberate manipulation. As has been acknowledged, the proposed changes will end an unintended consequence of the existing arrangements where ESA claimants can reclaim ESA after six months despite no significant deterioration or change in a claimant's health condition or disability.

Neither are we persuaded by the evidence presented to us that the predicted administrative efficiencies will materialise, and are concerned that any benefit savings may be a direct consequence of a number of vulnerable claimants falling out of the benefit system.

The Government notes the Committee's concerns about the predicted efficiencies and vulnerable people falling out of the system.

Removing the six month provision will help claimants return to work, and stop the movement between benefits.

As stated earlier, the Department is also taking steps to ensure vulnerable claimants found fit for work are helped to claim JSA. This includes putting processes in place to improve the transition from ESA to JSA and minimise any gap in payment. Where appropriate, the decision maker during the decision assurance call will signpost the claimant to JSA to ensure they do not fall in between benefits.

Given that these changes have the potential to have serious consequences for people whose disability or ill-health is not in doubt, we do not think the case is yet sufficiently made for introducing the proposals. Our view is further strengthened by the fact that Universal Credit will largely diminish any need for these proposals, and that there is a persuasive case for holding off implementation whilst recent changes in the appeals process and improvements in the waiting time for a WCA take effect. It may be the case that sustained operational improvements will overtake the need for measures which are indirectly designed to tackle current flaws.

The Committee therefore recommends that these proposals should not proceed until such time that a clear supporting evidential base is in place – both in terms of the scale of the problem they are designed to resolve and an associated cost benefit analysis. If the Government decides to press ahead and bring these proposals into force on 30 March 2015, we strongly encourage the Department to address the concerns highlighted in this report.

The Government is unable to accept the recommendation.

Collecting any information about this group to build a wider evidence base would be a time consuming process, despite the relatively small size of the group, which would not be practical within the timeframes for this policy's implementation.

The Government has not suggested that people set out to intentionally manipulate the system, but the existing arrangements make it possible for claimants to move between benefits, despite no change to their health condition and each time they do, they move further from the labour market.

The Government has considered the Committee's view that Universal Credit would diminish the need for these proposals. However, as a Universal Credit service will not be established across Great Britain until 2017, not to implement the changes now would lead to even more claimants moving further away from the labour market.

The Government has carefully considered the Committee's concerns about the effect of the changes on those claimants with mental health conditions. The Department is committed to ensuring that the WCA accurately assesses the capability of people with conditions affecting mental function and the Department has made considerable efforts to ensure that the special needs of persons with mental health conditions are met as part of the assessment process, for example:

- All healthcare professionals carrying out WCAs receive specific and additional training in assessing mental health conditions;

- If someone with a mental health condition does not return their ESA50 within the four week period their case is still considered by the assessment provider, instead of being returned to DWP for a decision to refuse benefit;

- Where a claimant with a mental health condition fails to attend an assessment, they are considered "vulnerable" and attempts will be made to contact them by telephone and, if appropriate, to arrange a "safeguarding home visit" before a decision on entitlement is made.

If these claimants are found not to have LCW, there are statutory provisions for claimants with a physical or mental health condition claiming JSA which enable them to restrict their availability for work - provided the restrictions are reasonable in the light of their physical or mental health condition.

In these situations Jobcentre Plus staff will consider any restrictions which may be appropriate in light of the claimant's health condition and review and amend the claimant commitment as appropriate. Existing JCP systems should highlight where a claimant was previously claiming ESA with a mental health condition.

We will make substantial amendments to the guidance in line with the new processes and produce awareness packs for DWP operational staff.

This will make it clear what evidence should be sought from claimants who make a repeat claim with the same condition as their previous ESA claim. This will ensure that decision makers will have the evidence they need to determine whether the claimant meets the requirements to re-qualify for ESA.

The claimant will be given high level information at the first point of contact when making a repeat claim and then a new form will issued to the claimant requesting further information on how their health condition affects them differently.

We will consider each case on its merits and there would not be an automatic assumption that benefit should be refused without any investigation of the facts, which might also include a referral for further advice from a health care professional, or arranging for a further WCA.

The amended decision makers guidance will be shared with the Committee prior to publication.

Conclusion

The Government is grateful to the Committee, and to all those who took part in their consultation, for their views and constructive suggestions on the proposed changes. The Government has considered these carefully in coming to the decision to continue with these amendments to the Employment and Support Allowance Regulations.

The Employment and Support Allowance (Repeat Assessments and Pending Appeal Awards) (Amendment) Regulations 2015 are now laid before Parliament.

SOCIAL SECURITY
ADVISORY COMMITTEE

The Right Honourable Iain Duncan Smith MP
Secretary of State for Work and Pensions
Caxton House
London
SW1H 9NA

2 February 2015

Dear Secretary of State,

The Employment and Support Allowance (Repeat Assessments and Pending Appeal Awards) (Amendment) Regulations 2015

1 Introduction

1.1 The Committee[1] scrutinised the draft *Employment and Support Allowance (Repeat Assessments and Pending Appeal Awards) (Amendment) Regulations 2015* at its meeting on 5 November 2014.

1.2 The proposed legislation has two aspects to it. The first considers whether certain Employment and Support Allowance (ESA) claimants should be treated as having limited capability for work when they furnish a GP's 'fit' note and reclaim the benefit, thereby establishing entitlement to ESA at the assessment rate[2]. The second is whether ESA should be paid in all cases where an appeal has been made against a decision that the appellant is not entitled because they have been held not to have limited capability for work.

1.3 The Committee understands that the Government's intention is to prevent claimants who have been found fit for work from returning to ESA unless they are suffering from a new health condition or an existing condition had worsened significantly. If the outcome of the work capability assessment (WCA), or the final decision at the end of the appeal process, was that the individual did not have limited capability for work, then financial support would be available through Jobseeker's Allowance (JSA). An award of JSA would also ensure that the claimant stayed closer to the labour market and would have access to the support and advice of work coaches.

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1 The Social Security Advisory Committee. Its members are listed in Appendix 1.

2 The assessment rate (£57.35 a week for the under 25s and £72.40 for those aged 25 and above) is paid for what is normally the first 13 weeks of the award (the assessment phase). The benefit rates paid during the assessment phase are identical to the amounts paid to claimants on JSA, but there is no conditionality during this period.

1.4 Following careful consideration of the available evidence, the Committee decided to ask for the formal reference of the proposals in accordance with the statutory provisions.[3] The reasons for doing so were that the Committee:

- was not convinced that a sufficiently strong case had been made that the current system was being manipulated to the extent that warranted a legislative solution. The evidence that a problem exists at all is largely anecdotal; and

- wanted to gauge the impact of the proposals on the cohort of claimants making a repeat claim for ESA for what might be regarded as entirely genuine reasons. For example, those with mental health problems or fluctuating health conditions could be caught by these new provisions but without having an immediate or easy form of redress. We considered this to be especially important given that there had been no formal consultation on the changes[4] and yet their impact seemed far-reaching, both in terms of numbers and the extent to which lives could be affected.

1.5 The Government's intention is that these provisions should come into force on 30 March 2015.[5] This has meant that our own timetable for conducting a public consultation exercise was more constrained than we would have liked, running from 8 to 19 December. In an attempt to gather as much evidence as possible within this short period, we also brought together a range of relevant stakeholders to share their views and experience at two workshops: one held in London (17 December) and the other in Glasgow (18 December).

1.6 The Committee is grateful to those who submitted their views on the proposals.[6] Despite the challenging timetable, and close proximity to the peak Christmas and New Year holiday period, we received 21 well considered written responses. We also received strong and constructive input from the 20 representatives of the relevant organisations who attended our workshops.[7]

1.7 The Committee is also very grateful to DWP officials, led by Trevor Pendergast, who have provided valuable support and advice throughout this process.

2 The Perceived Problem

Looping around the System

2.1 The Committee understands that one of the reasons why these draft regulations are being proposed is the belief that people are taking advantage of rules which allow repeat awards of ESA, including awards made pending the outcome of an appeal. There is a longstanding rule that, after a period of six months has

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3 Sections 172(1) and 174(1) of the Social Security Administration Act 1992 [http://www.legislation.gov.uk/ukpga/1992/5/contents/enacted].

4 Paragraph 5.1 of the Explanatory Memorandum [https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384007/esa-repeat-awards-regulations-2015-ssac-memorandum.pdf].

5 Paragraph 2.1 of the Explanatory Memorandum.

6 A list of those who responded to the public consultation is at Appendix 2.

7 A list of the organisations that participated in the two workshops is at Appendix 3.

elapsed, another claim for ESA may be made despite a previous award of ESA having been terminated on the grounds that the claimant is fit for work, and despite no evidence of any deterioration in health. Similarly, an appeal against an unfavourable WCA-based decision on ESA entitlement, if supported by a GP's fit note, is normally sufficient to enable a decision-maker to make a new award of ESA at the assessment rate. The historical background to these rules is set out in Appendix 4. Whilst it would be inaccurate to caricature the legislation as containing loopholes, there is a view that people might be exploiting the rules inappropriately. Hence the intention to limit the number of situations in which repeat payments of ESA can be accessed.

2.2 In the explanatory material[8] presented to the Committee, the process of making repeat claims and receiving repeat awards of ESA has been termed "looping around the system":

> *"We are making this policy change because we believe that the existing ESA rules encourage claimants to loop around the system…"*

2.3 The two ways in which people may be held to loop around the system are as follows.

(i) A person whose entitlement to ESA is terminated on the ground that they are fit for work may, for example, claim JSA for six months but then make a repeat claim for ESA once again. At that point the six months' rule would not apply. Provided they had the requisite evidence and satisfied the conditions of entitlement, they would be treated as having limited capability for work and ESA would be awarded at the assessment rate. If the WCA resulted in a termination of the second award, there would be nothing to stop the person claiming JSA once again until six months had again elapsed. In that way a repeated pattern of shifting between benefits would emerge.

(ii) If the claimant sought to challenge the termination decision, they would first have to make an application for mandatory reconsideration. Throughout that process they could claim JSA and would be subject to conditionality rules. If, at the end of the mandatory reconsideration process, the claimant was still not satisfied with the outcome, the option of appealing would present itself, and with it, the commencement of a new award of ESA without conditionality. This would again be paid at the assessment rate and would again be dependent upon the production of a GP's fit note. By the time the appeal had been heard and dismissed, six months may well have elapsed. At that point there would be no barriers to reclaiming, and being awarded, ESA once again. By such means it would be possible to string out a long period of entitlement to ESA at the assessment rate, albeit interspersed with fairly short periods on JSA. And such a period of entitlement could be secured without the claimant ever having negotiated a WCA successfully as the following diagram illustrates:

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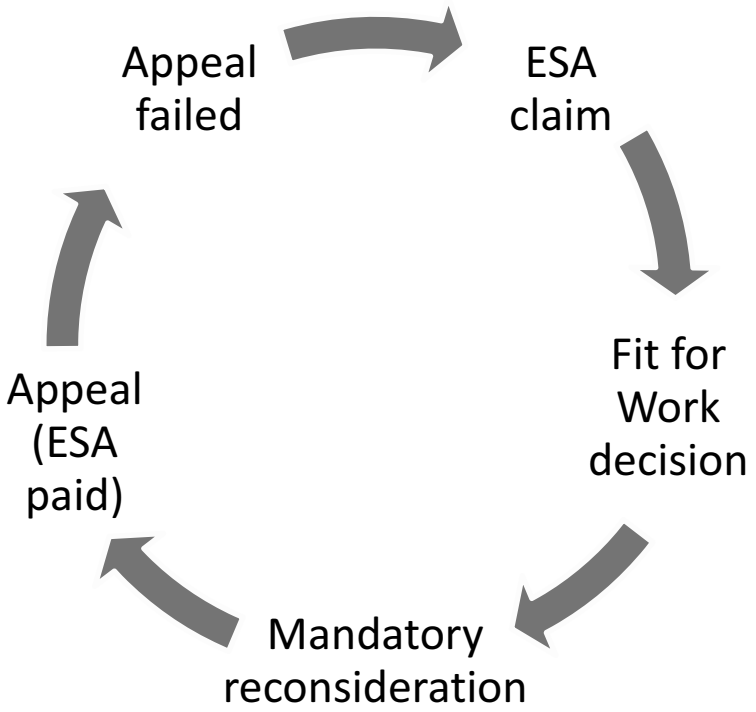
8 Paragraph 21 of the Equality Assessment [https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384009/esa-repeat-awards-regulations-2015-equality-assessment.pdf]



2.4 It is worth noting that, given the assumption that people are inappropriately taking advantage of long-standing rules, there are a number of other, secondary and consequential, problems which emerge.

Which benefit: ESA or JSA?

2.5 If it is correct that there is an element of "gaming" the system occurring, it must surely follow that there are a number of people on the wrong benefit. The argument would be that there is a cohort of claimants who may want to be on ESA, but are actually fit for work and who should be on JSA. By their actions which ensure repeated awards of ESA at the assessment rate, they put themselves out of reach of the support provided by Government to help them back into work.

2.6 The Government's goal is to get unemployed people into work, and those in work into better and more sustainable employment. The strong directive in the current climate is therefore that those who are found fit for work should claim JSA and stay on JSA whilst their health and general capability for work remains unchanged. They should not be able to mount a successful claim for ESA.

Administrative Costs

2.7 If, as is claimed, people are dipping in and out of JSA whilst seeking to lengthen their cumulative time on ESA, it follows that there is a lot of unnecessary movement between benefits. There is a cost in terms of administrative resources every time a new claim is made or an award is terminated. The Department's revised Explanatory Memorandum[9] is silent on costs and savings. However we

9 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384007/esa-repeat-awards-regulations-2015-ssac-memorandum.pdf

were advised at our SSAC meeting on 5 November[10] that, although there are start-up costs associated with these amendments, this would be offset and subsequently overtaken by administrative savings. The Committee was also told that there could be some further unspecified benefit savings through JSA claimants being in closer proximity to the labour market and the availability of employment advice and support that would help them to find work more quickly than they would have done had they been in receipt of ESA.

3 The Proposed Solution: Examining the Policy Rationale

3.1 The proposed amendments will abolish the six months' rule. This means that, on any repeat claim for ESA in the circumstances described throughout this report, the claimant will not be treated as having limited capability for work pending the WCA. To receive benefit during this period JSA would need to be claimed, and any award would be dependent upon compliance with conditionality rules. As far as awards of ESA pending an appeal are concerned, the intention is that a claimant would be awarded ESA at the assessment rate if they appealed an initial fit for work decision terminating an award. Any similar and subsequent appeal, however, would not trigger such an award unless there had been an intervening determination (on a claim or appeal) that the claimant does have limited capability for work.

3.2 The Committee has some concerns about whether the draft regulations in their current precise formulation achieve the stated policy, and has instructed the Committee Secretary to write to DWP officials with our more detailed drafting comments. Should the Department decide to proceed with these proposals, **we recommend that it review the wording of the draft regulations in light of our comments.**

Looping around the System

3.3 Many of those who responded to our consultation acknowledged that some claimants make repeat claims to ESA and are awarded benefit at the assessment rate having had a previous award terminated because they had been found to be fit for work. Similarly it was widely accepted that people are able to gain access to ESA at the assessment rate through appealing against an unfavourable decision by the Secretary of State. Numbers involved however are not known. Paragraph 18 of the Equality Assessment states:

> *"Information is not currently available about the number of claimants who make a repeat claim for ESA and who choose to appeal a fit for work decision with broadly the same health condition."*

3.4 But the repeated and strongly held view of the respondents to our consultation is that, even if the numbers of repeat ESA claims were known, it would not mean that claimants were necessarily setting out to work the system in any kind of planned or manipulative way. The reasons why repeat claims for ESA are made are, as yet, unexplored.

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10 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/386480/ssac-minutes-nov-2014.pdf

3.5 The Government itself does not refer to people exploiting or manipulating the system in its explanatory material. As already noted, it speaks of looping around the system, but leaves it open whether claimants do this intentionally or not. The Government's clear position is that those claimants who have been found fit for work should claim JSA and access the support to help them secure employment. Such help is not provided to claimants getting ESA in the assessment phase. The respondents to our consultation were very consistent and robust in their assertion that the anecdotal evidence that people are deliberately using the rules to prolong or re-establish their ESA entitlement – necessitating these measures to close off the current avenue to benefit – are wide of the mark. They believe that the reality is very different and that, far from having a detailed knowledge of the benefit system and using it to maximise entitlement, most claimants do as they are instructed. If they are unfit for work they know they have to produce a note from their doctor and contact the local office. If they are told that they will have to claim ESA, that is what they do. If in the process they are awarded ESA at the assessment rate once again, then that may well be a consequence of their actions. It does not follow that it was necessarily the cause of their actions.

3.6 With the Department having introduced the concept of mandatory reconsideration in 2013, any incentive to appeal and secure a new award of ESA is reduced. During the phase of mandatory reconsideration the decision to terminate ESA stands so that the only route to benefit for the majority of claimants is through claiming JSA and complying with the associated conditionality requirements.

> *[The] ESA assessment rate is not available to people seeking mandatory reconsideration, which is a compulsory step before an appeal can be lodged. An opportunistic claimant who was merely trying to "loop around the system" would hardly go through the mandatory reconsideration process just for the chance of lodging an appeal – and claiming ESA assessment rate.*
>
> **National Aids Trust**

3.7 Some of our respondents have drawn a broad parallel between a claimant's current experience when they seek a mandatory reconsideration of an unfavourable ESA decision and what will happen should these proposals come into force as intended. In both cases the claimant may not have an immediate route back into ESA. The unfavourable ESA decision stands whilst the process of mandatory reconsideration is on-going, even though it may be revised at the conclusion of the process. At the same time, the proposed changes would effectively curtail the number of awards made at the assessment rate on repeat claims for ESA. A closer examination of what commonly happens in the mandatory reconsideration phase at the present time may therefore provide a useful insight into what may well happen should these proposals come into force.

> *In our experience, claimants who have been through the mandatory reconsideration process are relying on friends and family for*

financial support while they are awaiting a decision. Our staff have seen customers go into debt and rent arrears, and an increasing reliance on food banks. One customer told us he had lived on beans on toast for 3 weeks as he was without income during the reconsideration process.

Papworth Trust

3.8 The House of Commons Work and Pensions Select Committee investigated ESA and WCAs during the course of 2014. In their report they noted difficulties which stemmed from denying ESA at the assessment rate to those who had asked for a mandatory reconsideration of the decision to terminate the award. As a result they recommended that the Department should reconsider its policy. They said, at paragraph 109 of their report[11] –

> *"We believe that it is inappropriate that those who have been determined by DWP to be fit for work and who have asked the Department to reconsider the decision are ineligible for assessment rate ESA. Although these people may be eligible to claim JSA, many are reluctant to do so because of the accompanying conditionality requirements. There has also been a problem with some Jobcentre advisers not being aware of the flexibility to modify the attached conditionality appropriately for these claimants. Assessment rate ESA and JSA are the same amount of money, so there is no financial saving for the Department from the policy, and it may in fact cost the Department money due to the administrative burden of moving claimants from assessment rate ESA to JSA during reconsideration, and then back to assessment rate ESA if they decide to appeal. We therefore recommend that claimants deemed fit for work following the WCA process who have requested that the Department reconsider that decision be paid ESA at the assessment rate until they receive the reconsidered decision."*

3.9 Notwithstanding the Government's response to the Select Committee's recommendation on this point, we observe that if there is a case for paying ESA at the assessment rate during the mandatory reconsideration process where decisions to terminate an ESA award are being challenged, it follows that there is a similar case for not withdrawing payments pending an appeal.

Administrative issues

3.10 As we understand it from the Department's officials, there are likely to be operational difficulties if a person chooses to claim JSA after they have made a repeat claim for ESA which is awaiting a WCA before that claim can be determined. In law the two benefits are mutually exclusive and therefore entitlement to one means non-entitlement to the other. This appears to present a contradiction if someone has to claim one benefit whilst awaiting determination of the other.

11 http://www.publications.parliament.uk/pa/cm201415/cmselect/cmworpen/302/30209.htm

3.11 Both JSA and ESA are paid on the same Departmental computer system. We understand that system does not currently allow a claim for one of those two benefits to be made at the same time as there is a award of the other benefit currently in place. This creates a need for a manual adjustment every time mandatory reconsideration leads to an award of ESA being reinstated whilst there is an ongoing award of JSA.

3.12 All of this suggests that there are potentially difficult legal and operational issues yet to be resolved. The process for submitting a repeat ESA claim whilst in receipt of JSA is already an issue and although the solution adopted by the Department may be manageable under the current rules, this may raise a question mark if these amendments proceed. **We would therefore suggest that the Department examine this process carefully and ensures it is robust enough to minimise the risk of a claim being rejected, lost or delayed because of operational issues.**

Barriers to claiming

3.13 At present, whilst there may be enough information on the written evidence alone to enable the Secretary of State to award ESA, any decisions taken to disallow benefit are only generally taken following the face-to-face evidence considered at a WCA. The question of whether these proposals mean that, in future, more people might be found fit for work on the written evidence alone was raised with the Committee during its consultation. If this is the case then there are a number of issues which the Department might wish to consider further. For example, we were provided with many instances that demonstrate how some of the most vulnerable have great difficulty in properly completing the ESA50 unaided and in obtaining supporting evidence. Disallowing claims without the evidence available from a face-to-face discussion would therefore carry risks for ESA claimants in ways that would not apply for most other DWP benefits.

> *Worryingly, if paper assessments are extended, as the proposed ESA changes stand, someone would not be able to receive ESA following only a paper based assessment unless they can show an agreed significant deterioration of their condition or a new condition.*
>
> **Disability Rights**

3.14 A number of respondents deal with claimants who battle with mental health problems. In fact the inability of many people with these kinds of difficulties to manage the process of claiming ESA unaided is a recurring theme throughout the submissions we received. The suggestion that people are being encouraged to "loop around the system" requires an answer to the question: who is doing the encouraging? On the one hand it is partly those who seek to offer support to those who need help in claiming. By and large they know their claimants and they know the benefit system. In many cases they also believe that ESA is the appropriate benefit for the person in question.

> *On a regular basis we have clients turn up who have suddenly found*

themselves with no income. It is usually following being found not to have a limited capability for work (this can be for a number of reasons – the ATOS assessor has not carried out a full investigation into the claimants condition, the claimant has been unable to explain their condition and its effects, the claimant was unable to attend etc etc). Claimants do not normally turn up here until there are no funds available to them or their friends and family are no longer prepared to support them. We are often left with the only option of reapplying for ESA. We, as an organisation who support these vulnerable people, are not looking for a loophole but a way to ensure that the most vulnerable in the community are not left in destitution.

Luton Irish Forum

3.15 But it is not merely support workers or welfare rights officers who might encourage a claimant to make a repeat claim or to appeal an unfavourable decision. A number of those who attended our workshops spoke of the experience of some of their clients who had been advised by Jobcentre staff that, if they had a doctor's note, the benefit they needed to claim was ESA and not JSA.

An ever increasing number of claimants receiving Jobseekers Allowance (JSA) having been found 'fit for work' are being referred to us to challenge that decision by local Jobcentre or contracted provider staff. In some of those cases a challenge is not appropriate (or is outside the absolute time limit). Some claimants are being sent 'looping around the system' by Jobcentre and provider staff.

Oxfordshire Welfare Rights

[it is our experience] that, where such claimants do apply for JSA, they are told at interview that they are not fit to claim JSA and directed to claim ESA.

Rights Advice Scotland

3.16 The Committee understands that in some areas people are being discouraged, if not prevented, from claiming JSA. At one level it is understandable if a member of staff takes the view that a claimant is incapable of work through illness or disability and that they should claim ESA instead. However this is unhelpful if they are querying an adverse ESA decision through the mandatory reconsideration process. For them JSA is the only benefit open to them, and yet there may be barriers which prevent them from accessing it. The current guidance provides that:

> *"If the claimant questions whether they are fit enough to work, it should be pointed out to them that while claiming Jobseeker's Allowance, they have to be actively seeking and available for work. If they do not feel that they can meet either of these requirements, or cannot agree the types of jobs*

they will look for and the activities they will undertake to do so, the claim cannot be continued."[12]

3.14 On the face of things one would expect many claimants to raise questions precisely along the lines predicted by the guidance. Neither would it be surprising if a fairly high proportion of JSA claims failed at the first hurdle because of the claimant's reasonably-held doubts about their ability to meet the requirements. If these proposals come into force they will need to be accompanied by a firmly directed training initiative and a thorough revision of guidance which would endeavour to close what appears to be a black hole in benefit provision.

> *For mandatory reconsiderations, there appears to be a postcode lottery developing, with customers in some areas being told they cannot claim JSA by Jobcentre Plus as they are too sick to fulfil the conditions, whilst customers in other areas have been able to claim JSA as a temporary measure but without the conditions attached. We are concerned that there will be a similar situation during the appeal stage if ESA was to be withdrawn.*
>
> **Papworth Trust**

> *According to the equality assessment: 'Information is not currently available about the number of claimants who make a repeat claim for ESA and who choose to appeal a fit for work decision with broadly the same health condition'.*
>
> *This information is critical to understanding the number of people making and disputing repeat claims. Without it, there is no evidence for these reforms and no clear way to benchmark their success against the original policy intention. We strongly urge that reform of the regulations should not be allowed to progress further on this basis.*
>
> **Parkinson's UK**

3.15 **The Committee therefore urges the Government to establish whether a significant problem on looping around does actually exist, and, if so, to provide a robust evidential base which demonstrates the scale of it.**

Which Benefit: ESA vs JSA?

3.16 The Government's contention is that there is a cohort of claimants who are on ESA when they ought to be on JSA. There are others who may be currently on JSA but who cannot break away from the personal conviction that they really ought to be on ESA. Part of this is due to the fact that individuals believe themselves to be unfit for work and yet the test for the benefit is a point-scoring exercise, based on measuring functional capabilities. The tension between these

12 Paragraph 28 of ESA to JSA Transitions

two different approaches is best seen in cases where an individual gives up employment knowing that their declining health means they are no longer able to cope properly with the requirements of that particular job. We were given examples at our workshops where relatively young people had given up a demanding career in which they had excelled following the diagnosis of a life changing or threatening condition. Coming to terms with the condition itself proved to be a highly traumatic process – and this was worsened if, having taken a decision to abandon that career, their ESA (awarded at the assessment rate) was subsequently terminated following a WCA, on the grounds that they are fit for work. We highlight this, not to suggest that this is a problem which must be solved, but to illustrate our contention that the area of overlap between ESA and JSA can be very blurred. The proposed amendments advance on the basis of a proposition that there should be a sharp demarcation between the two benefits and that disallowance for one automatically means that the other benefit is the right one to claim. The reality is almost certainly less clear-cut.

3.17 Another factor in the reasons for the existence of a group of claimants who are perceived to be on the wrong benefit relates to the difficulty of managing a successful claim to ESA. Of JSA and ESA, JSA demands more of claimants once an award has been made, but ESA demands more of them in establishing entitlement in the first place. Repeatedly, both in discussion and in the responses we received, we were told of claimants, often with mental health problems, who can neither mount a successful claim to ESA independently nor manage to negotiate safely the conditionality regime within JSA. Neither benefit can be said to work well for them. "Looping around the system" suggests a degree of control and determination on the part of certain claimants. It is probably more accurate to think in terms of people being passively moved around a system for which they are ill-suited.

3.18 The key difference between JSA and ESA during the assessment phase is the issue of conditionality. During the ESA assessment phase there is no conditionality and claimants subsequently assigned to the support group are also exempt. In ESA therefore, sanctions become of relevance for those placed in the WRAG who fail, without good cause, to comply with requirements made of them in accordance with the legislation. We consider the particular impact on claimants with mental heath conditions later in the report, but note that 62 per cent of adverse ESA sanction decisions in the first three months of 2014 were made against people with mental or behavioural problems (9,851 out of 15,955).[13] That is a high proportion of cases and indicates that there would probably be an increased vulnerability to sanctions for those with mental health conditions under the stricter regime of JSA. Even allowing for discretion and flexibility within conditionality, there is uncertainty about how well and how consistently this operates across the UK.

13 Information released by DWP in response to a Freedom of Information request. [https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/383722/foi-2014-4860.pdf]

The proposals could leave an increased number of claimants at risk of sanctions because, in practice, Jobseekers Allowance is not the appropriate benefit for them.

Oxfordshire Welfare Rights

The government suggests that JSA conditionality could be relaxed for those who can show that they cannot meet the full requirements. However, we often hear that Job Centre Plus (JCP) advisers refuse to, or do not understand, that they can vary requirements in this way, thus exposing claimants to inappropriate levels of conditionality and the associated risk of sanction.

Child Poverty Action Group

3.19 Alongside the financial implications of having a benefit sanction imposed, there is the added stress of having to comply with a conditionality regime. It may seem that if the ESA and JSA benefit rates are identical or broadly comparable, it may not be overly important if people happen to be on the wrong benefit for a while. But if being on JSA brings added pressure, there is a danger that underlying health conditions, both physical and mental, may be put at risk.

3.20 **Given the risk of claimants falling between JSA and ESA, we would recommend that those who claim JSA pending an ESA appeal, or whilst their ESA claim awaits determination, should be offered back to work support on a voluntary basis but exempted from conditionality beyond attendance at a work-focused interview.**

Evidence of a new or deteriorating condition

3.21 A number of organisations responding to the consultation highlighted the difficulties encountered by some in obtaining the required medical evidence. We were advised that the information given by GPs can be cursory – often amounting to little more than recording what is on a screen – and not always adequate in providing the information needed to secure an initial entitlement to ESA at the assessment rate pending a WCA. The issue of surgeries increasingly adopting a policy of charging for providing medical evidence was mentioned to the Committee several times.

3.22 By the same token, some claimants themselves are not especially keen to visit their doctor and if they do, they may be reluctant to discuss their problems in depth. This may be through feelings of inadequacy, a reluctance to divulge sensitive and possibly embarrassing personal details to a stranger or even a lack of personal insight into the condition itself, particularly if it relates to mental well-being. If English is not the first language of the claimant, such difficulties multiply.

[Peabody cite cases where] claimants themselves underplay their conditions, or their conditions fluctuate to an extent where it is not possible for a healthcare professional to gain full insight from a

limited time assessment.

Peabody

3.23 Such examples illustrate the point that the fact that the individual may struggle to establish entitlement to ESA does not necessarily mean that it is the wrong benefit. Furthermore if the task of acquiring medical evidence to support an initial claim to ESA proves difficult, it is that much harder when it comes to demonstrating that an underlying condition has worsened significantly. This, of course, is often the predicament of those whose award of ESA is terminated following a fit for work decision. It will take on an added importance if these proposals come into force.

3.24 Claimants with a particular condition are typically referred by their GP to a medical specialist where outpatients' appointments may be arranged at regular but lengthy intervals. Obtaining medical evidence in these circumstances is unlikely to prove easy. Under the present rules, a repeat claim for ESA after six months (which does not require the production of proof of deterioration in health or the onset of a new condition) and which can trigger an award at the assessment rate, may work satisfactorily for claimants with a slowly deteriorating condition.

…… people with sensory impairments often do not see their GP on a regular basis and their doctor would not be the person who could verify if their condition has worsened. For some people it might be necessary to get evidence from a specialist. For people with mental health conditions, it may be that their psychiatrist is the person who has the best understanding of their condition but it is difficult to get a fit note from their psychiatrist.

Leonard Cheshire Disability

In particular a number of people including cancer patients do not routinely see a GP, however once out of treatment many patients are discharged from hospitals. This has particularly been the case since changes to health care patient tariffs and would make it difficult for cancer survivors to obtain evidence to show a change in the effects of their condition. This is a growing population number who survive cancer but are living with the long term effects of their treatment including pain and incontinence.

Macmillan

3.25 If the six months' rule is abolished, the onus will be on claimants to show, not only that there has been a worsening in their condition, but that it has been a significant one. There is precedence in case-law which holds that "significant" should be interpreted to mean that the deterioration is sufficient to raise the distinct possibility that a WCA would yield a different result from the previous one. This is a high burden of proof that is being asked of claimants.

3.26 Some claimants wait a long while before their condition is accurately diagnosed. Obtaining medical evidence in these circumstances may not be straightforward.

> *'I struggled to obtain a doctor's note. I was diagnosed with Asperger's by a specialist whilst at primary school aged 5 and I had no idea that this information had not been passed onto my doctors. I had to revisit high school and obtain SEN reports and diagnosis letters to prove to my own doctors that I have Asperger's. I therefore had no ESA at the assessment rate until very late in the process.'*
>
> **Leonard Cheshire Disability**
> [Testimony of a claimant]

3.27 It was also pointed out to us that the way large modern surgeries are organised is very different from the traditional patient and family doctor relationship, and that this can influence the degree to which any one doctor has an intimate and long-standing appreciation of a patient's condition. That in turn can make it difficult when it comes to assessing the progress of a condition over a longer period.

3.28 A clear problem with obtaining medical evidence in connection with a claim for ESA is that the claimant is, to a very large extent, in the hands of others. The individual can emphasise the urgency of their situation, but they are ultimately dependent upon professional staff with their own time pressures and priorities. Even those who have a new or significantly worsened condition, may face a potentially prolonged period without benefit if the evidence they are required to furnish is not provided promptly.

3.29 It should also be noted that the reason why a person's award of ESA at the assessment rate is terminated is not always because, following a WCA, they are found to be fit for work. Failing to return or complete the ESA 50 will also result in benefit being stopped. So too will failing to attend the WCA without good cause. In both these cases the current legislation provides that such failures mean that the claimant is treated as not having limited capability for work. In technical terms, failure to complete or return the questionnaire (regulation 22 of the Employment and Support Allowance Regulations 2008) or to attend, without good cause, a WCA (regulation 23), means that the person is treated as <u>not</u> having limited capability for work, thereby overturning the earlier decision that, because of the production of a doctor's fit note, they <u>are</u> to be treated as having limited capability for work.

3.30 Whilst it is not unreasonable that the Department should have mechanisms in place to enable ESA awards to be terminated if there is a failure without good cause to attend a WCA or to return an ESA 50, these rules may have an unwanted consequence in the light of these amendments. In some cases they will have the effect of imposing upon claimants an obligation to produce evidence of declining health – a task which may prove impossible, for the simple reason that their present condition is perfectly stable. A person with learning difficulties, for example, would not normally expect to see a deterioration in their condition unless another condition developed. That could mean that an initial failed attempt to claim ESA, perhaps because of the very condition itself, would mean that later

attempts to make a repeat claim would not succeed. The person concerned may have satisfied all the various medical and functional tests required to access ESA, had they managed to get that far. It is not so much that they failed the test for ESA but failed the test for claiming ESA.

3.31 Under current rules claimants are given a second chance. They may have to wait a short while, but given proper support, they may complete the process at the next opportunity and subsequently be awarded ESA and placed in the support group or the WRAG. With these proposals in place that opportunity looks to be severely curtailed. Although DWP advises that they will be free to claim JSA whilst they await a WCA, we wonder whether this will be an easy process in practice, particularly where an individual believes that they are neither fit nor available for work.

> *[In December] client called into bureau with benefit enquiry. Client has recently applied for ESA and suffers from severe depression. Client advises that he has received absolutely no money for weeks, and is in a desperate situation and cannot afford food. Client advises he previously claimed ESA, but did not turn up for a work capability assessment in September after which his ESA was stopped. Client then claimed JSA, and last received a JSA payment on 17th September 2014. Client has received no money since then and would like to know why……*
>
> [Apparently ESA had not been awarded because of the 6 months rule. He was in a queue awaiting a WCA. The DWP had tried to contact him about this on several occasions but without success.]
>
> **Citizens Advice Scotland**

Decision-making

3.32 There appears to be a good deal of uncertainty among respondents to our consultation about the status of the decision that a repeat ESA claimant does not have a new condition or a significantly worsened condition and whether it will carry the right of appeal. It would also be helpful to know at what stage of the process a decision on a new or worsened condition would be made. Would it be on the initial information contained in the repeat claim itself, or after expert medical opinion had been obtained?

> *… the regulations are unclear as to how disputes about whether a claimant has a new medical condition or has experienced a significant deterioration in an existing condition will be adjudicated. There is no formal outcome decision in the event that a DWP decision maker indicates there is not sufficient evidence to prove either a worsening or a new health condition. As a result, there is no decision which can be appealed, leaving the claimant with no recourse except through judicial review. Given that a worsening or new condition are the only circumstances in which a new ESA claim can be lodged under the proposed regulations, clarifying how*

claimants could challenge such decisions is of critical importance.

Child Poverty Action Group

3.33 It is important therefore that the issue of handling disputes as to a new or significantly worsened condition is resolved quickly. If the proposals proceed, a determination that a repeat claim does not satisfy the criteria of a new or significantly worsened condition will become part of the eligibility criteria for a repeat ESA claim. That points to the need for decisions to be issued specifically in relation to the eligibility criteria. Bringing this area of decision-making within the standard appeal procedure so that decisions can be challenged at the First-tier Tribunal and beyond would provide a good fit.

3.34 In paragraph 4.3 of the Explanatory Memorandum,[14] the Department states that there are *"extensive safeguards in place to ensure that decisions on entitlement to ESA following a WCA are correctly made"*. It then goes on to outline how the re-designed questionnaire (form ESA 50) and the process for its completion now takes account of those with mental health conditions, how healthcare professionals have been trained in assessing those with disabilities as well as mental health conditions and how various recommendations made previously by Professor Harrington in relation to mental health in his review of the WCA have been adopted.

3.35 Many of the respondents to our consultation have asked why, if these safeguards are in place, the percentage of ESA decisions overturned on appeal remains so stubbornly high. Of claimants found fit for work and who appealed the decision disallowing ESA, the figures for July 2013 to September 2013 show that the initial decision was upheld in 53 per cent of cases and overturned in 47 per cent.[15] Since the introduction of mandatory reconsideration there has been a very substantial decline in the number of decisions being appealed. The figures of appeals against ESA fit for work decisions for the period July to September 2014 show a decrease of 86 per cent compared to the corresponding period in 2013.[16] Although up to date statistics on appeal rates are difficult to access we understand from evidence provided by stakeholders that the proportion of successful appeals has not declined to any great extent. In a submission from Oxfordshire Welfare Rights, they estimate that WCA decisions comprise approximately 80 per cent of all their tribunal representation work. They also comment that *"although the numbers of WCA appeals have dropped significantly, Oxford's success rate at WCA appeal hearings continues at around 90%."*

Prior to the introduction of Mandatory Reconsideration those ESA Claimants who were found fit for work incorrectly by ATOS medicals could appeal immediately (via GL24 form) and have ESA reinstated

14 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384007/esa-repeat-awards-regulations-2015-ssac-memorandum.pdf

15 https://www.gov.uk/government/statistics/esa-outcomes-of-work-capability-assessments-claims-made-to-mar-2014-and-appeals-to-sept-2014

16 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/385759/tribunal-grc-statistics-quarterly-jul-sep-2014.pdf

> *until a tribunal had reconsidered the decision. The statistics on successful ESA appeals clearly indicate that many DWP decisions on limited capability for work are incorrect.*
>
> **Gipsil Advice Service**

3.36 It would be helpful to see current statistics on the extent to which ESA fit-for-work decisions are overturned on appeal so that we are able to determine whether the experience in Oxfordshire of overturned ESA appeals is typical across the country. The evidence presented to the Committee suggests that, despite changes made to the WCA following acceptance by the Department of the successive recommendations of Professor Harrington and Dr Litchfield, the rate at which ESA fit-for-work decisions continue to be overturned at appeal remains high. It is also worth noting that not all such adverse ESA decisions are appealed, and there is no evidence to establish that those who do not appeal would not have been successful had they done so. The statistics therefore provide only a partial picture, although they are indicative of the difficulties of establishing entitlement to ESA. The evidence from research and stakeholders is that there are a number of barriers that prevent individuals from making a successful claim for ESA or in challenging an adverse decision. These barriers are separate from an inability to satisfy the entitlement criteria for ESA.

3.37 Although mandatory reconsideration has had a considerable effect in reducing the number of appeals, there is no evidence as to whether it has been successful in ensuring better decision-making.

Costs / Savings

3.38 The Government estimates that it will make administrative savings through this measure. We are not fully persuaded that will be the case.

3.39 Until Universal Credit is fully operational, people will still move between benefits. The issue of whether a person's condition has significantly worsened will be a factor in far more instances than has previously been the case and is likely to be more time consuming and complex for DWP staff as archived records will need to be retrieved and consulted. A trawl of material covering the period from the date of claim to the date of determination in order to establish entitlement may be required. This process may identify part-time earnings that need to be taken into account, or changes in the household composition that need to be factored in. We would welcome further clarity about how the predicted administrative savings have been calculated.

3.40 In terms of benefit costs, the documentation accompanying the Chancellor of the Exchequer's Autumn statement for 2014 provided further information in relation to benefit savings. The policy costings[17] state that the savings from this measure are estimated at £5m a year from 2015-16 onwards. The reason given is the anticipated number of reduced claims to ESA. While the Chancellor's statement

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17 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384071/AS2014_policy_costings_final.pdf (page 66)

does not explicitly say so, it follows that the expectation is a proportion of those denied ESA will not go on to claim JSA. Although some of those likely to be affected by the proposal would only be entitled to the contributory element within either ESA and JSA, and would therefore be expected to have other means of support, they would not account for all the projected savings. Others could be more vulnerable claimants. A number of organisations that work with people who have mental health conditions have, for example, advised us that this group are particularly at risk.

Guidance

3.41 The accompanying guidance in relation to reclaims for ESA will be important. Claimants will need to be clear about what they need to provide by way of evidence to demonstrate a worsened, or a new, condition. They must also have a clear understanding of the wider range of sources from which they may legitimately draw that evidence. The support provided to decision-makers will be equally important.

3.42 This guidance will need to provide clarity to help decision-makers assess whether there has been a significant worsening of a condition which may, by its very nature, fluctuate from day to day. Indeed we have been advised that the symptoms of some conditions (for example, the mobility and speech of stroke victims) may deteriorate as the day progresses. A number of conditions, for example dementia and multiple sclerosis, can be very debilitating, particularly during flare ups, and yet there is a fundamental difficulty in measuring and demonstrating a deteriorating condition. The guidance should also set out the precise requirements of the test – whether it relates to the significant worsening of the condition itself or of the impact of the condition, which is more in keeping with the general approach of ESA. It should also provide clarity about the specific types and sources of evidence that may be produced to support the claim, for example whether the claimant's own evidence will suffice.

3.43 The Committee understands that the Department may be considering the need to introduce forms and leaflets for people making repeat claims for ESA. If that is the case, we welcome that initiative. A more bespoke approach designed to provide advice about the evidence claimants would need to provide in order to demonstrate the significant worsening of a condition known to the Department, or the onset of a new one, would be a positive step forward. **We would go further and recommend that, in cases involving a repeat ESA claim, the Department should be more proactive in accessing information and evidence that has previously been presented in support of a claim.** This is a principle already upheld in case law, but we believe it has a heightened relevance in these cases.[18]

3.44 The Committee, as ever, would be happy to review the proposed guidance which would accompany the proposals if they proceed if that would be helpful.

Timing

3.45 The problems addressed by these proposals will largely dissipate once Universal Credit has been fully rolled out. Because it will be a single benefit whether the

18 Department for Social Development v Kerr [2004] UKHL 23.

claimant has limited capability for work or is unemployed, there will no longer be any issue of alternating between benefits in order to maximise entitlement, or avoid conditionality. The individual will stay on Universal Credit throughout the duration of need and, at any time there is medical evidence that they are not fit for work, a revised claimant commitment which takes account of the changed circumstances should be negotiated between the work coach and the claimant.

3.46 The Committee welcomes the Department's intention to emphasise tailored conditionality within Universal Credit. There will be many advantages to such an approach, not least here. It will also avoid the psychological difficulty that some claimants face when they are told that they are not entitled to ESA but should claim JSA instead. There may be some claimants who, in good conscience, cannot bring themselves to claim a benefit based on the premise of being fit and available for work when they do not believe that they are, especially if they feel unable to fulfil the requirements of a claimant commitment.

3.47 The Committee would therefore argue that there is no great imperative for introducing these measures at such speed and urges the Government to pause and further explore the issues raised in this report.

4 Recommendation

4.1 Unlike many draft regulations the Committee has recently considered, the need to reduce expenditure is not at the heart of these proposals, although some administrative and benefit savings are anticipated.

4.2 Instead, the proposals are designed to address the Government's concern that '*existing ESA rules encourage claimants to loop around the system*'. The intention is that claimants that have been found fit for work should be prevented from returning to ESA - a benefit that, during the assessment phase, has no element of conditionality - unless an existing health condition has deteriorated significantly or a new condition has developed.

4.3 The Committee agrees that it is important that individuals who have been found fit for work should have access to the 'back to work' support that is available to JSA claimants. However, evidence presented to the Committee during our consultation suggests that some vulnerable claimants will be debarred from receiving ESA, but will either not claim JSA because they do not believe that they are fit for work or will fall foul of the associated conditionality regime.

4.4 The numbers of repeat ESA claims, and the proportion of which that are unsuccessful, are not known. There is also only very limited anecdotal evidence to suggest that the reason for them is to manipulate the system.

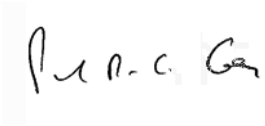
4.5 We are not persuaded by the evidence presented to us that the predicted administrative efficiencies will materialise, and we are concerned that any benefit savings may be a direct consequence of a number of vulnerable claimants falling out of the benefit system.

4.6 Given that these changes have the potential to have serious consequences for people whose disability or ill-health is not in doubt, we do not think the case is yet

sufficiently made for introducing the proposals. Our view is further strengthened by the fact that Universal Credit will largely diminish any need for these proposals, and that there is a persuasive case for holding off implementation whilst recent changes in the appeals process and improvements in the waiting time for a WCA take effect. It may be the case that sustained operational improvements will overtake the need for measures which are indirectly designed to tackle current flaws.

4.7 **The Committee therefore recommends that these proposals should not proceed until such time that a clear supporting evidential base is in place – both in terms of the scale of the problem they are designed to resolve and an associated cost benefit analysis.**

4.8 If the Government decides to press ahead and bring these proposals into force on 30 March 2015, we strongly encourage the Department to address the concerns highlighted in this report.



Paul Gray
Chair

APPENDIX 1

Members of the Social Security Advisory Committee

Paul Gray (Chair)
John Andrews
Adele Baumgardt
John Ditch
Keith Faulkner
Colin Godbold
Chris Goulden
Jim McCormick
Grainne McKeever
Matthew Oakley
Seyi Obakin
Judith Paterson
Nicola Smith
Diana Whitworth

APPENDIX 2

List of organisations and individuals who responded to the consultation exercise

Advice NI
Citizens Advice Scotland
Child Poverty Action Group
Disability Rights UK
Dundee North Law Centre
Gipsil Advice Service
Leonard Cheshire Disability
Luton Irish Forum
Macmillan
National Aids Trust
Norfolk Community Law Service
Oxfordshire Welfare Rights
Papworth Trust
Parkinson's UK
Peabody
Rethink Mental Illness
Right Advice Scotland
South Ayrshire Welfare Rights
Surrey Welfare Rights Unit
Welfare Rights Forum
Wolverhampton Welfare Rights

APPENDIX 3

Workshop Attendees

London – 17 December 2014

Benefits Consultant
Disability Rights UK
Department for Work and Pensions
Macmillan Cancer Support
MS Society
Peabody
Wolverhampton City Council, Welfare Rights
Wolverhampton City Council, Welfare Rights

Glasgow – 18 December 2014

Child Poverty Action Group Scotland
Citizens Advice (East Dumbartonshire)
Citizens Advice Scotland
Enable Scotland
Glasgow City Council (Welfare Rights) (x2 delegates)
Maggie's Centres
Money Advice Scotland
Parkhead Housing Association
Queen's Cross Housing Association
Scottish Government (Welfare Division)
Scottish Refugee Council
The Action Group

APPENDIX 4

Historical Background

Before 1995 there was a direct causal link between a sick note issued by a claimant's doctor and entitlement to benefit on the grounds of incapacity for work. This applied whether the benefit was sickness benefit or invalidity benefit. The same principle applied in income support cases where the contributory benefit was insufficient to meet a person's needs or where the contribution conditions were not satisfied. Regulation 2(1) of the Social Security (Medical Evidence) Regulations 1976 (SI 1976 No 615) provided that –

> *Where a person claims any benefit and his entitlement to that benefit depends on his being incapable of work in respect of the day or days to which his claim relates, he shall furnish evidence of such incapacity in respect of that day or those days either by means of a certificate in the form of a statement in writing given by a doctor in accordance with the rules set out in …… or by such other means as may be sufficient in the circumstances of any particular case.*

When sickness benefit and invalidity benefit were replaced by incapacity benefit in 1995 the emphasis shifted from the doctor's sick note as the (almost) sole arbiter of a person's capacity to work to that of the result of an "all work test", supplemented by medical evidence such as the doctor's note. The Department's decision-maker had always had the final word on benefit entitlement, but with the arrival of incapacity benefit, gathering and weighing up the evidence became less straightforward.

Because there would always be a time-lag between the date of claim and arranging an all work test, it was decided that the doctor's note should be deemed sufficient to enable the claimant to be *treated* as incapable of work as a temporary expedient until the all work test could be completed and a more substantive decision on entitlement made. In that way claimants would not be left without money whilst they awaited the test.

That left some difficult questions for the policy makers, such as 'what happens when the decision-maker decides that the person is not entitled to benefit on the basis of the all work test, but the person simply makes a repeat claim and provides a doctor's note in support?' Or, 'what happens if a person appeals against a decision disallowing them incapacity benefit because they are held to be fit for work, but there is a doctor's note which says that they are not fit for work?'

The Department's answers to those questions signalled an enduring trust in the judgments and views of GPs. Despite the partial devaluing of the medical certificate from its previous high position of authority, the Department sought to give it a continuing role when it came to resolving these difficult questions. Thus regulation 28 of the Social Security (Incapacity for Work) (General) Regulations 1995 (SI 1995 No 311) provided that –

> *(1) Where the all work test applies, the test shall, if the conditions set out in paragraph (2) are met, be treated as satisfied until a person has been assessed or until he falls to be treated as capable of work in accordance with regulation 7 or 8.*

(2) The conditions are –

(a) that the person provides evidence of his incapacity for work in accordance with the Social Security (Medical Evidence) Regulations 1976; and

(b) that it has not within the preceding 6 months been determined, in relation to his entitlement to any benefit, allowance or advantage, that the person is capable of work, or is to be treated as capable of work under regulation 7 or 8, unless –

(i) he is suffering from some specific disease or bodily or mental disablement which he was not suffering from at the time of that determination; or

(ii) a disease or bodily or mental disablement which he was suffering from at the time of that determination has significantly worsened; or

(iii) in the case of a person who was treated as capable of work under regulation 7 (failure to provide information), he has since satisfied any requirements of the Secretary of State under that regulation.

This regulation will be recognisable as the fore-runner of the present regulation 30 of the Employment and Support Allowance Regulations 2008 (SI 2008 No 794) and regulation 26 of the Employment and Support Allowance Regulations 2013 (SI 2013 No 379) which are the focus of these particular amending regulations.

The construction of this provision clearly shows that the policy makers of the day turned their minds to the issue of repeat claims. Understandably they wanted to prevent claimants from effectively undermining an unfavourable fit for work decision through making a repeat and immediate claim for incapacity benefit. And yet this needed to be balanced by respect for the doctor's opinion and the need to give claimants further opportunities to demonstrate that they were in fact incapable of work.

As a way forward, the time period of six months was written into the legislation. Assuming no deterioration in health, this meant that a decision disallowing incapacity benefit following the all work test had a prospective effect running forwards. The person could make a claim for benefit within six months, but unless there had been an onset of a new condition or a significant worsening of an existing condition, they could not be treated as incapable of work pending another all work test. Thus benefit could not be paid. This was not a period of disallowance in the classic sense in which it once applied to contributory benefits, but there were aspects to it which made it look like it.

As far as payments of benefit to appellants disallowed benefit on the grounds that they are held to be fit for work but whose appeal has yet to be determined are concerned, that too has a long pedigree. Its history is a further indication that the Department has sought to avoid undermining the place of the GP's note altogether. Thus a person appealing an Incapacity Benefit disallowance in these circumstances had the right to claim Income Support at a reduced rate, provided it was supported by a properly completed doctor's note.

We stress the historical background because we agree with the many respondents to our public consultation who have been anxious to point out that this is not a case of closing a loophole. Loopholes suggest that a particular policy, or the wording of a particular legislative provision, has an unintended flaw in it which allows claimants to exploit it to their own advantage. This, on the other hand, is a measure which seeks to change a policy which was deliberately formulated almost twenty years ago and then enshrined in legislation which has operated precisely as intended.

APPENDIX 5

ESA Directorate
3rd Floor
Caxton House,
6-12 Tothill Street
London
SW1H 9NA

Denise Whitehead
Secretary
Social Security Advisory Committee
5th Floor, Caxton House
6-12 Tothill Street
London
SW1H 9NA

14 November 2014

Dear Denise,

DRAFT REGULATIONS: THE EMPLOYMENT AND SUPPORT ALLOWANCE (REPEAT ASSESSMENTS AND PENDING APPEAL AWARDS) (AMENDMENT) REGULATIONS 2015

Further to my letter of 20 October, and my appearance before the Committee on 5 November concerning the draft Employment and Support Allowance (Repeat Assessments) (Amendment) Regulations.

At the meeting I explained that the original draft of the regulations which had been sent to the Committee for its consideration did not reflect the Ministerial decision that where -

- a claimant makes a repeat claim for Employment and Support Allowance (ESA) following a previous decision embodying a determination that they have been found not to have limited capability for work (LCW) (also known as being found fit for work)
- in respect of the later claim, it is again determined that the claimant does not have LCW, and
- (following mandatory reconsideration) the claimant appeals the decision,

no payment of ESA will be made pending the determination of the appeal by the First-tier Tribunal.

The Committee advised that it was not in a position to make a decision as to whether to refer the regulations, without seeing an updated version of the statutory instrument.

Consequently I now attach updated versions of the Explanatory Memorandum (**Annex 1**), Equality Assessment (**Annex 3**); and the draft statutory instrument (**Annex 2**). The draft regulations remain subject to legal checks and further drafting amendments may be required.

At the meeting the Committee asked whether the Department had additional data about the number of people likely to be affected by the measure. I explained that we only had broad data of the number of people who make a repeat claim (30,000-40,000 in 2013) with broadly the same condition, and that this was very likely to be an overestimate of the number of claimants affected by the policy. Analysts considered the number of cases who were making a repeat claim to ESA following a fit for work decision at their previous work capability assessment and who were reporting the same primary condition, to a fairly detailed degree. However, it is not possible to determine from this condition data whether a condition has demonstrably changed in the intervening period.

I was also asked whether the Department had conducted any research into the reasons why claimants made repeat claims for ESA, and although we have not undertaken any specific research, we have published “Routes onto Employment and Support Allowance” which may be of interest to the Committee. Please see link.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/214556/rrep774.pdf

I hope my answers and the updated documentation will aid the Committee in their consideration of these changes, and I will be happy to answer any further questions that members of the Committee may have.

Yours sincerely

By email

Trevor Pendergast
Employment and Support Allowance Directorate

Annex 1

ESA Directorate Strategy, Policy & Analysis Group	# Explanatory Memorandum for the Social Security Advisory Committee	
	# The Employment and Support Allowance (Repeat Assessments and Pending Appeal Awards) (Amendment) Regulations 2015	
For the Social Security Advisory Committee 14 November 2015	DWP Department for Work and Pensions	

Contents

1. Introduction

1.1 This Explanatory Memorandum covers amendments to:

- regulation 30 of the Employment and Support Allowance Regulations 2008 (SI 2008/794); and
- regulation 26 of the Employment and Support Allowance Regulations 2013 (SI 2013/379).

The amendments have the same effect for both sets of Regulations. [The differences between the Regulations are that the 2008 Regulations include both contributory and income-related Employment and Support Allowance (ESA) but the 2013 Regulations do not, reflecting the replacement of income-related ESA by Universal Credit.]

1.2 Further changes (to be confirmed) to both sets of ESA Regulations will be required, along with consequential amendments to other regulations including:

- the Claims and Payments Regulations 1987 (SI 1987/1968),
- the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (SI 2013/380), and
- the Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (No.2) Regulations 2010..

1.3 The original Equality Assessment considered the implications of the proposal to withdraw the 6 month time limit from claimants who, following a determination that they do not have limited capability for work (LCW), reapply for ESA but fail to produce any evidence that their condition has substantially worsened or that they nave developed a new condition.

1.4 This Equality Assessment is an updated version to consider the implications of the additional proposal to remove payments pending appeal from this same group of claimants. It is considered that the effects on claimants who will no longer receive ESA after they have appealed will be much the same as for claimants who, under the original proposal, will not be entitled to ESA following a reclaim until a fresh determination has been made as to whether or not they have LCW. Jobseeker's Allowance (JSA) will be available for some to provide financial support and claimants will particularly benefit from being closer to the labour market.

2. Commencement and application of the proposed changes

2.1 The proposed changes are intended to come into force on 30 March 2015. They will apply to all new claims for Employment and Support Allowance (ESA) made from the commencement date.

3. Explanation, purpose and effect of the proposed changes

3.1 Under the current system, a determination, made following the application of a Work Capability Assessment (WCA), that a claimant does not have limited capability for work (LCW) is valid for six months. Where a new claim is made within this period, supported by a fit note, claimants cannot be treated as having LCW until a fresh determination has been made as to whether or not they have LCW, unless their condition has substantially worsened or a new condition has developed. In the circumstances where the Department does not make an immediate decision on LCW because further evidence is needed, the claimant is referred for a new WCA, and they are not paid ESA in the interim.

3.2 However, where a new claim is made more than six months after the last fit for work decision then, subject to the other qualifying conditions, the claimant is treated as having LCW and ESA is awarded pending a fresh WCA, even where the claimant provides no evidence to suggest that their condition has substantially changed. One unwanted effect of this policy is that even where a First-tier Tribunal (FTT) has upheld a fit for work decision, if the appeal process has taken longer than six months, a claimant can immediately make a new (repeat) claim for ESA on the basis of exactly the same condition, and will be entitled to receive ESA at the assessment phase rate pending a new WCA. The whole process then begins again and if they are once more found fit for work they can, after mandatory reconsideration, lodge an appeal and become entitled to a further award of ESA pending the outcome of the appeal. This looping around the system is not only bad for the claimant who is likely to get little or no support to return to work but also imposes a costly administrative burden on DWP.

3.3 Under these proposals, it is intended that claimants will no longer be treated as having LCW if they were found 'fit for work' following their most recent WCA regardless of the period of time which has since elapsed unless they can demonstrate that there has been a significant worsening in their health condition or that a new health condition has developed. Since entitlement to ESA depends on the claimant having, or been treated as having, LCW, this change will mean that claimants in these circumstances will (unless they can demonstrate that there has been a significant worsening in their health condition or that a new health condition has developed) not be awarded ESA pending a fresh WCA. This change applies equally to those who are not treated as fit for work for other reasons such as failing to attend their medical assessment. This should stop people looping around the ESA system instead of claiming JSA and receiving the help and support they need to return to work. It would also bring the conditionality arrangements for such claimants broadly into line with those for Universal Credit.[19]

3.4 It is also intended that, where the repeat claim results in a fit for work finding and, after mandatory reconsideration, the claimant lodges an appeal, they should not become entitled to receive ESA pending the outcome of the appeal. For these claimants, this serves to align ESA with what happens for all other social security benefits where if a claimant is found not to be entitled, no benefit is paid whilst awaiting the outcome of the

19 In Universal Credit, both before and after the WCA determination, a claimant who does not have, or is not treated as having, LCW is subject to the full conditionality regime, although account is taken of the claimant's health in doing so.

appeal. We believe that is reasonable because the claimant in their previous claim will have had the opportunity to appeal to a tribunal if they disagreed with the decision. Claimants will instead be signposted to JSA as it is the appropriate benefit for someone who has been found fit for work. JSA provides claimants with personalised support to return to work taking into account their health condition or disability. It is acknowledged that not all ESA claimants will be eligible for JSA because they may not meet the conditions of entitlement.

3.5 We intend to amend the guidance issued to DWP operational staff and Decision Makers, so that it is clear what evidence should be sought from claimants who make a repeat claim with the same condition as their previous ESA claim. This should help to ensure that Decision Makers will have the evidence they need to determine whether the claimant meets the requirements to re-qualify for ESA. We would consider each case on its merits and there would not be an automatic assumption that benefit should be refused without any investigation of the facts, which might also include a referral for further advice from a health care professional, or arranging for a further WCA. In addition to that, claimants will have the normal right to a mandatory reconsideration of the decision and ultimately an appeal to a First-tier Tribunal if they continue to dispute the decision.

3.6 Analysis indicates that around 230,000 of the 700,000 new ESA claims made in 2013 were repeat claims, and of these 30-40,000 - around 15% - are estimated to make a repeat claim using the same broad health condition as at the previous WCA determination.

3.7 To summarise this change is expected to:

- discourage claimants looping around the system going from ESA to JSA and back to ESA with the same health condition;
- prevent payment of ESA for this *particular group of claimants* until a further WCA has been carried out and a fresh determination made as to whether they now have LCW
- prevent payment of ESA for this *particular group of claimants* in the period between the date of an appeal and the resolution of that appeal, if they are found fit for work and, after mandatory reconsideration, appeal;
- provide consistent support to help claimants (who are fit-for-work but may still have a health condition) return to work; and
- improve overall efficiency whilst not denying anyone the <u>appropriate</u> benefit, and broadly align conditionality arrangements with Universal Credit where the person claims JSA.

4. Impacts of the proposed changes

4.1 To meet the requirements of the Equality Act 2010, the Department for Work and Pensions has carried out an Equality Analysis on this measure and has updated it further to consider and include the implications of removing payments pending appeal from this group. Such an assessment considers the potential impact of the proposed policies in terms of the protected characteristics (disability, ethnicity and gender), and the additional protected characteristics (age, gender reassignment, sexual orientation, religion or belief, marriage and civil partnership, and pregnancy and maternity) and helps to ensure that the Department has due regard to the need to eliminate discrimination,

advance equality of opportunity and foster good relations when developing strategies policies and services.

4.2 In respect of the proposed change, the analysis (**Annex 3**) identified that there is an effect on disabled people who would otherwise have reclaimed after 6 months of an adverse decision, been treated as having LCW (upon production of medical evidence) and become entitled to ESA. However, in view of the extensive safeguards in place to ensure that decisions relating to LCW are correctly made, we believe that this change is a proportionate means of meeting the legitimate aim of ensuring that sick and disabled people found fit for work can get access to the support earlier than if they reclaimed ESA, to help them return to work thereby advancing equality of opportunity**.**

4.3 Mitigation for this adverse impact includes the extensive safeguards in place to ensure that decisions on entitlement to ESA following a WCA are correctly made, and support and alternative benefits are available for claimants as outlined below.

4.4 In recognition of the vulnerability of claimants with mental health conditions the WCA includes activities related to mental, cognitive and intellectual function. These include coping with social situations and dealing with other people. In addition special consideration is given to claimants with mental health conditions throughout the WCA process. For example, people who claim ESA are asked to complete a questionnaire (ESA50) as part of the claim process. The ESA50 was designed with input from technical working groups including Mencap and the National Autistic Society, to ensure a properly structured series of questions to guide a claimant to provide a full explanation of any mental health issues. However, if someone with a mental health condition does not return their ESA50 within the required 4 week period, their case is still considered by a health care professional, instead of being returned to DWP for a decision on whether benefit entitlement can continue.

4.5 The healthcare professionals carrying out the assessments are trained in disability assessment medicine in order to assess the capability of an individual to engage in work. They are given specific training in assessing individuals with mental health conditions and receive continuing professional education in order to remain up to speed with developments in the field of disability medicine.

4.6 DWP is committed to ensuring that the WCA accurately assesses the capability of people with conditions affecting mental function and the Department has made considerable efforts to ensure that the special needs of persons with mental health conditions are met as part of the assessment process. This is why following Professor Harrington's recommendation, a full complement of mental function champions have been in place since July 2011 as a resource to support the assessment of individuals with mental health conditions.

4.7 Prior to making a decision that someone is fit for work the DWP Decision Maker attempts to contact the claimant to explain that based on the evidence available they are likely to find them fit for work and ask if there is further evidence that they wish to be considered. If the claimant is still unhappy with the decision they can request a Mandatory Reconsideration which is undertaken by a different Decision Maker. Finally there is also the option to appeal the decision if it is not changed following mandatory reconsideration, and some claimants may claim JSA during the mandatory reconsideration and appeal period, on the basis that the ESA award has ended as a

result of the fit for work decision. It is intended that, in these circumstances, ESA will not be paid during the appeal period.

4.8 There are also statutory provisions for claimants with a physical or mental health condition claiming JSA which enable them to restrict their availability for work - provided the restrictions are reasonable in the light of their physical or mental health condition. For example, a person with emphysema could restrict the:

- type of work - to avoid working in smoke or fumes;
- number of hours worked in a week;
- number of hours in a shift.

4.9 Where the claimant imposes acceptable restrictions because of their physical or mental health condition they do not have to show they have reasonable prospects of getting a job. However, they must show all the restrictions are reasonable and are connected with their health condition. A claimant may also restrict their travel time if they have a physical or mental health condition, which affects their ability to travel.

4.10 In these situations jobcentre staff will consider the claimant's availability and any restrictions which may be appropriate in light of their health condition and review and amend the claimant's Jobseeker's Agreement as appropriate.

4.11 Minimal changes are expected to be required to Departmental IT systems.

4.12 Changes to guidance will be developed with input from Operational staff.

4.13 Input from the partial informal consultation with the Disability Charities Consortium will feed into the external communications plans.

4.14 The Department does not consider that this proposal would have any impact on business or charities.

4.15 The Department does not consider that the proposals would have any impact on the sustainability of rural communities.

5. Consultation on the proposed changes

5.1 Although there has been no formal consultation on the measure, Department officials discussed the changes – apart from the proposal to stop payments pending appeal for this group – with members of the Disability Charities Consortium on Tuesday 7 October 2014. They advised that many ESA claimants have difficulties in dealing with the claims system because of their health issues. They said that it is therefore essential that information is provided to advisers and claimants setting out what evidence is needed as part of the claim. This will enable Decision Makers to deal with each claim on its merits. The Department should also not assume that the GP is the most appropriate individual to provide the evidence needed, other health care workers may have a better knowledge of the effects of a claimant's condition. There was also concern in the past that new rules were interpreted in a "harsher blanket way" despite the policy intent. It was important that internal DWP guidance made it clear that this was not the policy intent. This input will be used to inform changes to operational guidance, learning and development for staff and new claimant communications.

5.2 DWP operational staff have also been consulted about the change. They identified the need for effective communications for claimants, advice agencies, GPs and staff to ensure that all were aware of the change, what it means, and what they need to do if affected. Their views will inform changes to operational guidance, staff learning and development requirements, operational process and performance management issues.

6. Information and communications strategy for the proposed changes

6.1 DWP has identified the importance of ensuring that claimants, advice agencies, GPs and DWP staff are aware of the proposed change and will feed the advice from the informal consultation session into the external communications developed.

6.2 The communications approach for DWP staff will include raising awareness through existing communications channels such as, Decision Maker's Guide Memoranda, Operational Senior Leaders Brief, Change and You, DWP Headline News, Advisory Bulletins, together with more targeted operational communications through implementation updates and operational guidance at the appropriate time.

6.3 For external advisers, stakeholders and intermediaries, we will provide information about the change in articles within the DWP Stakeholder Bulletin and Touchbase publication, and update Gov.uk.

6.4 Informal consultation on some of the proposed changes took place with the Disability Charities Consortium on 7 October.

6.5 MPs, Members of the Scottish Parliament and Welsh Assembly Members will also be made aware of the changes.

7. Monitoring and evaluation of the proposed changes

7.1 DWP is committed to monitoring the impact of all its policies. We will therefore be developing plans for monitoring the actual impact of this change on those groups who share protected characteristics under the Equality Act 2010.

Annex 2

The Employment and Support Allowance (Repeat Assessments and Pending Appeal Awards) (Amendment) Regulations 2015

STATUTORY INSTRUMENTS

2015 No. 000

SOCIAL SECURITY

The Employment and Support Allowance (Repeat Assessments and Pending Appeal Awards) (Amendment) Regulations 2015

Made - - - -	***
Laid before Parliament	***
Coming into force - -	***

The Secretary of State for Work and Pensions makes the following Regulations in exercise of the powers conferred by sections 1(1), 189(1) and 191 of the Social Security Administration Act 1992(1), and sections 8(5) and (6), 25(2), (3) and (5), and 29 of, and paragraph 1 of Schedule 2 and paragraphs 1, 7 and 8 of Schedule 4 to, the Welfare Reform Act 2007(2).

The Social Security Advisory Committee has agreed that the proposals in respect of these Regulations should not be referred to it (3). OR In accordance with section 172(1) of the Social Security Administration Act 1992, the Secretary of State referred these proposals to the Social Security Advisory Committee.

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Employment and Support Allowance (Repeat Assessments and Pending Appeal Awards) (Amendments) Regulations 2015 and come into force on ..... 2015.

(2) In these Regulations—

"the Act" means the Welfare Reform Act 2007;

"the Claims and Payments Regulations 1987" means the Social Security (Claims and Payments) Regulations 1987(4);

(1) 1992 c. 5. Section 189(1) was amended by schedule 7 of the Social Security Act 1998 (c. 14), schedule 3 of the Transfer of Functions Act 1999 (c. 2), and schedule 6 of the Tax Credits Act 2002 (c. 21). Section 191 is an interpretation provision and is cited for the definition of "prescribed" and was amended by paragraph 10 of Schedule 5 to the Welfare Reform Act 2007.
(2) 2007 c.5.
(3) see section 173(1)(b) of the Social Security Administration Act 1992 (c.5).
(4) S.I. 1987/1968 amended by S.I. 2010/840.

"the Claims and Payments Regulations 2013" means the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013(5);

"the ESA Regulations 2008" means the Employment and Support Allowance Regulations 2008(6);

"the ESA Regulations 2013" means the Employment and Support Allowance Regulations 2013(7); and

"the ESA Existing Awards Regulations 2010" means the Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (No.2) Regulations 2010(8).

Application

2.—(1) These Regulations apply to a person who does not, or ceases to, fall within paragraph (2).

(2) A person falls within this paragraph where they—

(a) have made a claim for an employment and support allowance before 30 March 2015; or

(b) have made and are pursuing an appeal against a decision of the Secretary of State that embodies a determination that the person does not have limited capability for work, and that decision was made before 30 March 2015.

(3) "Employment and support allowance" means an allowance under Part 1 of the Welfare Reform Act 2007.

Amendment of the ESA Regulations 2008

3.—(1) The ESA Regulations 2008 are amended as follows.

(2) In regulation 30 (conditions for treating a claimant as having limited capability for work) —

(a) for paragraph 30(2)(b)(9) substitute—

"(b) in relation to the claimant's entitlement to any benefit, allowance or advantage which is dependent on the claimant having limited capability for work, it has not been determined that the claimant—

(i) does not have limited capability for work; or

(ii) is to be treated as not having limited capability for work under regulation 22 or 23,

unless paragraph (4) applies.";

(b) for paragraph (3)(10) substitute—

"(3) Paragraph 2(b) does not apply where a claimant has made and is pursuing an appeal against a relevant decision of the Secretary of State, and that appeal has not yet been determined by the First-tier Tribunal."; and

(c) after paragraph (4) insert—

"(5) In this regulation a "relevant decision" means—

(a) a decision that embodies the first determination by the Secretary of State that the claimant does not have limited capability for work; or

(b) a decision that embodies the first determination by the Secretary of State that the claimant does not have limited capability for work since a previous determination by the Secretary of State or appellate authority that the claimant does have limited capability for work.

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(5) S.I. 2013/380.
(6) S.I. 2008/794 amended by S.I. 2013/2536; there is another amending instrument but it is not relevant.
(7) S.I. 2013/379.
(8) S.I. 2010/1907 amended by the Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (No. 2) (Amendment) Regulations 2010 (S.I. 2010/2430), regulation 15.
(9) Amended by the Social Security (Miscellaneous Amendments) Regulations 2013 (S.I. 2013/2536), regulation 13(14)(a).
(10) Amended by the Social Security (Miscellaneous Amendments) Regulations 2011 (S.I. 2011/674) regulation 16(3).

(6) In this regulation, "appellate authority" means the First-tier Tribunal, the Upper Tribunal, the Court of Appeal, the Court of Session, or the Supreme Court.".

(3) For regulation 147A(1)(11)(claimants appealing a decision) substitute—

"(1) This regulation applies where a claimant has made and is pursuing an appeal against a relevant decision of the Secretary of State as defined in regulation 30.".

Amendment of the ESA Regulations 2013

4.—(1) The ESA Regulations 2013 are amended as follows.

(2) In regulation 26 (conditions for treating a claimant as having limited capability for work)—

(a) for paragraph (2)(b) substitute—

"(b) in relation to the claimant's entitlement to any benefit, allowance or advantage which is dependent on the claimant having limited capability for work, it has not been determined that the claimant—

(i) does not have limited capability for work; or

(ii) is to be treated as not having limited capability for work under regulation 18 or 19,

unless paragraph (4) applies.";

(b) for paragraph (3) substitute—

"(3) Paragraph 2(b) does not apply where a claimant has made and is pursuing an appeal against a relevant decision of the Secretary of State, and that appeal has not yet been determined by the First-tier Tribunal."; and

(c) after paragraph (4) insert—

"(5) In this regulation a "relevant decision" means—

(a) a decision that embodies the first determination by the Secretary of State that the claimant does not have limited capability for work; or

(b) a decision that embodies the first determination by the Secretary of State that the claimant does not have limited capability for work since a previous determination by the Secretary of State or appellate authority that the claimant does have limited capability for work.

(6) In this regulation "appellate authority" means the First-tier Tribunal, the Upper Tribunal, the Court of Appeal, the Court of Session, or the Supreme Court.".

(3) For regulation 87(1)(claimants appealing a decision) substitute—

"(1) This regulation applies where a claimant has made and is pursuing an appeal against a relevant decision of the Secretary of State as defined in regulation 26.".

Amendment of the Claims and Payments Regulations 1987

5.—(1) The Claims and Payments Regulations 1987 are amended as follows.

(2) Regulation 3(12) (claims not required for entitlement to benefit in certain cases) becomes paragraph (1) of regulation 3.

(3) In paragraph (1) for subparagraph (j) substitute—

"(j) in the case of an employment and support allowance where the beneficiary has made and is pursuing an appeal against a relevant decision of the Secretary of State.".

(4) After paragraph (1) insert—

"(2) In this regulation—

"appellate authority" means the First-tier Tribunal, the Upper Tribunal, the Court of Appeal, the Court of Session, or the Supreme Court; and

"relevant decision" means—

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(11) Inserted by the Social Security (Miscellaneous Amendments) (No. 3) Regulations 2010 (S.I. 2010/840), regulation 9(15).
(12) Amended by the Social Security (Miscellaneous Amendments) (No. 3) Regulations 2010 (S.I. 2010/840), regulation 2.

(a) a decision that embodies the first determination by the Secretary of State that the claimant does not have limited capability for work; or

(b) a decision that embodies the first determination by the Secretary of State that the claimant does not have limited capability for work since a previous determination by the Secretary of State or appellate authority that the claimant does have limited capability for work.".

Amendment of the Claims and Payments Regulations 2013

6.—(1) The Claims and Payments Regulations 2013 are amended as follows.

(2) For regulation 7 (claims not required for entitlement to an employment and support allowance in certain cases) substitute—

"7.—(1) It is not to be a condition of entitlement to an employment and support allowance that a claim be made for it where the claimant has made, and is pursuing an appeal against a relevant decision of the Secretary of State.

(2) In this regulation—

"appellate authority" means the First-tier Tribunal, the Upper Tribunal, the Court of Appeal, the Court of Session, or the Supreme Court; and

"relevant decision" means—

(a) a decision that embodies the first determination by the Secretary of State that the claimant does not have limited capability for work; or

(b) a decision that embodies the first determination by the Secretary of State that the claimant does not have limited capability for work since a previous determination by the Secretary of State or appellate authority that the claimant does have limited capability for work.".

Amendment of the ESA Existing Awards Regulations 2010

7. For paragraph 10 of Schedule 2 (modifications of the 2008 Regulations) to the ESA Existing Awards Regulations 2010 substitute—

"(10) Regulation 30 (Conditions for treating a claimant as having limited capability for work until a determination about limited capability for work has been made) is to be read as if, for paragraph (3), there was substituted—

"(3) Paragraph (2)(b) does not apply where a claimant has made and is pursuing an appeal against a conversion decision that embodies a determination that the claimant does not have limited capability for work and that appeal has not yet been determined by the First-tier Tribunal.".".

Signed by authority of the Secretary of State for Work and Pensions

Name
Parliamentary Under Secretary of State
Department for Work and Pensions

Date

EXPLANATORY NOTE

(This note is not part of the Regulation)

These Regulations make amendments to the provisions within the Employment and Support Allowance Regulations 2008 ("ESA Regulations 2008") and the Employment and Support Allowance Regulations 2013 ("ESA Regulations 2013") which deal with the treatment of repeat claims and pending appeal awards. Consequential amendments are also made to related provisions within the Social Security (Claims and Payments) Regulations 1987 ("Claims and Payments Regulations 1987") and the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 ("Claims and Payments Regulations 2013") and the Employment and

Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (No.2) Regulations 2010 ("Existing Awards Regulations 2010").

Regulation 1 covers general provisions including commencement and interpretation.

Regulation 2 sets out to whom these Regulations apply. The amendments apply to a person who does not fall within paragraph (2) of that regulation. Paragraph 2 provides that a person falls within that paragraph where they have made a claim before these Regulations come into force, or have made and are pursuing an appeal in respect of a decision which was made by the Secretary of State before these Regulations come into force.

Regulation 3 amends the ESA Regulations 2008. It removes the specific six month time limit which prevents a claimant who is making a new claim for ESA from being treated as having limited capability for work while going through the work capability assessment where there is a previous determination that the claimant does not have limited capability for work, or cannot be treated as having limited capability for work due to failure to comply with requirements. This applies where there is no evidence of significant worsening of the claimant's existing condition or a new condition. Regulation 3 also removes the possibility of a claimant receiving a pending appeal award where they appeal against a second or further consecutive decision which embodies a determination that they do not have limited capability for work. This prevents a claimant who has been found not to have limited capability for work on consecutive occasions from receiving a second or further pending appeal award on making an appeal.

Regulation 4 amends the ESA Regulations 2013 in similar fashion.

Regulation 5 makes consequential amendments to the Claims and Payments Regulations 1987 in order to align it with the amendments made in Regulation 2. It amends the circumstances in which claims are not required for an employment and support allowance and limits that to circumstances where a claimant is pursuing an appeal against the first decision that embodies a determination that they do not have limited capability for work, or the first such decision following a period of limited capability for work. This will prevent claimants who have been found not to have limited capability for work on consecutive occasions from receiving a second or further pending appeal award on making an appeal.

Regulation 6 makes consequential amendments to the Claims and Payments Regulations 2013 in similar fashion.

Regulation 7 amends the Existing Awards Regulations 2010 in so far as those Regulations make modifications to the ESA Regulations 2008. These amendments are necessary to ensure that the modifications set out in the Existing Awards Regulations continue to work effectively in light of the amendments which are made to the ESA Regulations by regulation 3.

Annex 3– Equality Assessment

Introduction & Policy background

Introduction

1. This document records the analysis undertaken by the Department to enable Ministers to fulfil the requirements placed on them by the Public Sector Equality Duty (PSED) as set out in section 149 of the Equality Act 2010. The PSED requires the Minister to pay due regard to the need to:

    - eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act;
    - advance equality of opportunity between people who share a protected characteristic and those who do not; and
    - foster good relations between people who share a protected characteristic and those who do not.

2. In undertaking the analysis that underpins this document, where applicable, the Department has also taken into account the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), and in particular the three parts of Article 19 which recognise the equal right of all disabled people to live in the community, with choices equal to others, and that the Department should take effective and appropriate measures to facilitate full enjoyment by disabled people of this right and their full inclusion and participation in the community.

3. We have also taken into account the purposes of Article 27 of the UNCRPD which requires the Department to take appropriate steps to:

    - promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;
    - promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include incentives and other measures;
    - promote the acquisition of work experience in the open labour market; and,
    - promote vocational and professional rehabilitation, job retention and return-to-work programmes.

Current policy

4. There is a large body of evidence showing that work is good for physical and mental wellbeing and that being out of work can lead to poor health and other negative outcomes. So, whilst the Government is committed to supporting those who cannot work because of a health condition or disability, it wants to help as many people as possible to find suitable work. To do this the Department needs a fair and accurate assessment of the extent to which a person's health condition or disability limits their capability for work.

5. Entitlement to Employment and Support Allowance (ESA) is based on an individual's functional ability rather than the condition itself. Anyone claiming ESA will undergo the Work Capability Assessment (WCA). The WCA is based on the premise that eligibility should not be based on a person's condition, but rather on the way that condition limits their functional capability.

6. The WCA was developed in consultation with medical and other experts alongside representative groups to ensure that it deals more effectively with the types of conditions that are prevalent today. It focuses on the functional effects of an individual's condition rather than the condition itself.

7. There are currently around 60-70,000 WCAs a month and they are undertaken by health care professionals employed by the Department's health and disability assessments provider, presently Atos Healthcare. Health care professionals make recommendations about a claimant's functional capability, but DWP Decision Makers determine eligibility for benefit having considered all available evidence, including that provided by the claimant.

8. When someone claims ESA, they enter an "assessment phase" during which they undergo a Work Capability Assessment (WCA) to determine whether they have limited capability for work (LCW) and, if so, whether they also have limited capability for work-related activity (LCWRA). During this period, provided they supply medical evidence, the claimant may be treated as having LCW and, if so, is paid ESA at the basic rate. Claimants are not required to engage in steps to return to work whilst they are in the assessment phase.

9. If, following the application of the WCA, it is determined that the claimant:

   - does not have LCW, their award of ESA is terminated;
   - has LCW but is nevertheless capable of undertaking some work related activity, their award of ESA continues and they are allocated to the work-related activity group;
   - has both LCW and LCWRA, their award of ESA continues and they become a member of the support group.

10. Under the current system, a WCA-based determination that a claimant does not have LCW (and is thus not entitled to ESA) normally has validity for six months. Claimants have the right of appeal against this decision after completing the Mandatory Reconsideration (MR) process. If the claimant appeals, ESA uniquely can continue to be paid at the assessment phase, until the appeal is heard.

11. Where a new claim based on the same health condition is made within this six month period there would be no entitlement to ESA from the date of claim, if the evidence from the previous WCA is used to assess the claimant as not having LCW. In circumstances where the Decision Maker cannot decide on LCW immediately, they may refer the claimant for a new WCA but in such cases the claimant will not be treated as having LCW and will therefore not receive payment of ESA pending the outcome of that WCA.

12. This six month barrier on repeat awards does not apply where the claimant's health condition has, in the interim, significantly worsened or a new condition has developed. Nor does it apply if the claimant appeals against the decision which embodies the determination that they do not have LCW. However, once the six months has passed, there is no barrier to a repeat award of ESA, pending a fresh WCA, even where the claimant provides no evidence to suggest that their condition has substantially changed etc.

13. ESA is re-awarded at the assessment phase rate (the same rate as Jobseeker's Allowance (JSA)) and the cycle between ESA claim, WCA and disallowance starts all over again.

Policy changes and who will be affected

14. Under the proposed change it is intended that claimants will not be treated as having LCW if their most recent WCA outcome was that they were found fit for work unless they can demonstrate that there has been a significant deterioration in their health condition or a new health condition has developed. Furthermore ESA payments pending appeal will not be made for people affected by this measure who are found fit for work again. This should stop people looping around the ESA system instead of claiming JSA and receiving the help and support they need to return to work. It would also bring the ESA arrangements broadly into line with those for Universal Credit. Universal Credit is planned to replace income–related ESA.

15. It is estimated that around 230,000 of the 700,000 new ESA claims started in 2013 are repeat claims, but only around 30-40,000 are estimated to make a repeat claim using the same broad health condition as at the previous WCA determination.

16. There have been 2.05 million decisions on new ESA claims started between October 2008 and June 2013, following an initial WCA.

- 1,032,000 were found Fit for Work.
- 418,600 appeals heard on these decisions.
- 155,000 (37%) DWP decision overturned.
- 263,500 (63%) DWP decision upheld.

17. The 418,600 represents around 41% of the 1,032,000 fit for work decisions. The Tribunal overturned the DWP decision in around 155,000 (37%) of the 418,600 appeals heard. The original DWP decision was therefore confirmed in 63% of fit for work appeals heard. Overall Tribunals overturned only around 15% of the 1,032,000 'Fit for Work' decisions made.

18. Information is not currently available about the number of claimants who make a repeat claim for ESA and who choose to appeal a fit for work decision with broadly the same health condition.

19. Note: DWP figures do not relate to the Ministry of Justice data releases which covers all ESA appeals heard (including appeals on IB Reassessment cases), and not just fit for work decisions on initial claims, and all appeals heard in 2012/13 regardless of when the original decision was made.

20. This change applies to both ESA under the Employment and Support Allowance Regulations 2008 (contributory and income-related) and the Employment and Support Allowance Regulations 2013 (contributory only). There are also changes needed to the Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968), the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (SI 2013/380) and the Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (No.2) Regulations 2010 (SI 2010/1907).

Why we are making these changes?

21. We are making this policy change because we believe that the existing ESA rules encourage claimants to loop around the system, rather than reflecting the outcome of the WCA which is designed to make sure that people with health conditions get the help and support they need in order to return to work. The changes we make here will also reduce the administrative burden on the Department and mean that those new claimants waiting for an assessment should have reduced waiting times in the longer-term.

What the changes mean for claimants

22. The Secretary of State will be able to refuse to treat ESA claimants as having LCW if they make a new ESA claim more than six months after they are found fit for work, where their condition has not altered and they have not developed a new condition, pending a fresh WCA. This means these claimants will not be entitled to ESA while awaiting the new determination on whether they have LCW. , Additionally, these claimants will not be treated as having LCW if they appeal a decision that they do not have LCW, so they will cease to become entitled to ESA whilst they are awaiting the outcome of the appeal.. Where a claim is determined and refused, or the claimant is not treated as having LCW, these claimants may be able to claim JSA instead. JSA is the appropriate benefit for someone who has been found fit for work. JSA provides claimants with personalised support to return to work taking into account their health condition or disability.

Mitigation

23. There are extensive safeguards in place to ensure that decisions on entitlement to ESA following a WCA are correctly made, and support and alternative benefits are available for claimants.

24. In recognition of the vulnerability of claimants with mental health conditions the WCA includes activities related to mental, cognitive and intellectual function. These include coping with social situations and dealing with other people. In addition special consideration is given to claimants with mental health conditions throughout the WCA process. For example, people who claim ESA are asked to complete a questionnaire (ESA50) as part of the claim process. The ESA50 was designed with input from technical working groups including Mencap and the

National Autistic Society, to ensure a properly structured series of questions to guide a claimant to provide a full explanation of any mental health issues. However, if someone with a mental health condition does not return their ESA50 within the required 4 week period, payment of ESA continues and their case is still considered by a health care professional, instead of being returned to DWP for a decision on whether benefit entitlement can continue.

25. The healthcare professionals carrying out the assessments are trained in disability assessment medicine in order to assess the capability of an individual to engage in work. They are given specific training in assessing individuals with mental health conditions and receive continuing professional education in order to remain up to speed with developments in the field of disability medicine.

26. DWP is committed to ensuring that the WCA accurately assesses the capability of people with conditions affecting mental function and the Department has made considerable efforts to ensure that the special needs of persons with mental health conditions are met as part of the assessment process. This is why following Professor Harrington's recommendation, a full complement of mental function champions have been in place since July 2011 as a resource to support the assessment of individuals with mental health conditions.

27. Prior to making a decision that someone is fit for work the DWP Decision Maker attempts to contact the claimant to explain that based on the evidence available they are likely to find them fit for work and ask if there is further evidence that they wish to be considered. If the claimant is still unhappy with the decision they can request a Mandatory Reconsideration which is undertaken by a separate Decision Maker. Data is not currently available about the effects of Mandatory Reconsideration, which was introduced for ESA claimants in October 2013. The Department is aiming to provide data by the end of this year. Finally there is also the option to appeal the decision, and some claimants may claim JSA during the mandatory reconsideration and appeal period. In addition if a claimant is successful in their appeal, ESA is re-awarded and any arrears that may be due are paid, after offsetting any JSA paid during the appeal period where relevant.

28. There are also statutory provisions for claimants with a physical or mental health condition claiming JSA which enable them to restrict their availability in any way - provided the restrictions are reasonable in the light of their physical or mental health condition. For example, a person with emphysema could restrict the:

    - type of work - to avoid working in smoke or fumes;
    - number of hours worked in a week;
    - number of hours in a shift.

29. Where the claimant imposes acceptable restrictions because of their physical or mental health condition they do not have to show they have reasonable prospects of getting a job. However, they must show all the restrictions are reasonable and are connected with their health condition. A claimant may also restrict their travel time if they have a physical or mental health condition, which affects their ability to travel.

30. In these situations jobcentre staff will consider the claimant's availability and any restrictions which may be appropriate in light of their health condition and review and amend the claimant's Jobseeker's Agreement as appropriate.

Consultation and involvement

31. This policy proposal will require a change to Regulations. As part of the legislative process DWP has decided not to undertake a formal consultation exercise. However DWP has had informal discussions with both external stakeholder organisations and DWP staff in relation to the removal of the six month period, but not the proposals to end payments pending second or subsequent appeal. They have both stressed the importance of ensuring that advisers, GPs, claimants and others receive clear information about what evidence will be required in circumstances where a repeat claim has been made. DWP guidance will be amended to reflect the legislative change and also the input from stakeholders, which was limited to how to communicate the change.

Evidence and analysis

32. The following sections look specifically at the possible impact of the policy changes in terms of the protected groups (gender, disability, age, race, sexual orientation, gender re-assignment, pregnancy and maternity, marriage and civil partnership and religion and belief).

33. We have used internal administrative data to identify ESA claimants who have made a repeat claim for ESA with the same broad condition (and are thus more likely to be affected by the policy). This is likely to be an overestimate of the actual population affected by the policy as it is not possible to identify cases where the broad condition has deteriorated. We have compared the characteristics of the "potentially affected population" to the overall ESA caseload using the latest results from DWP Administrative Data and Atos Assessment Information for November 2013. We have also used data from the latest Family Resources Survey to consider the characteristics of ESA claimants in relation to the overall working age population.

Gender

34. The changes will apply to all claimants on ESA who make a repeat claim after the six month period and whose condition has not changed, both male and female. We estimate that around 57% of the claimants who could potentially be affected by the policy are male and 43% are female. Overall, 54% of ESA claimants are male and 46% are female and so men are slightly more likely to be in the potentially affected group. The data is shown in Table 1 below.

Table 1: Gender

	All ESA	**Potentially affected subgroup**
Female	46%	43%

Male	54%	57%

Source: DWP Administrative Data and Atos Assessment Information
All figures rounded to the nearest percentage point

Disability

35. By definition everybody potentially affected by our policy proposal has an illness or disability of some sort and according to the latest Family Resources Survey (FRS), over 90% of ESA claimants report that they are disabled according to the DDA definition[20]. This compares with 25% of the overall working age population, according to the survey.

36. We have considered the primary condition reported by the potentially affected subgroup and the overall ESA caseload. The subgroup has a higher proportion of claimants reporting a mental health condition as compared to the total ESA caseload. 53% of those who make a repeat claim with the same broad condition fall into the category of mental and behavioural disorders compared with 46% of the total ESA caseload. Correspondingly they appear less likely than the overall ESA caseload to report a disease of the nervous system or to be in the category 'injury, poisoning and certain other consequences of external causes'. The data on conditions is set out in Table 2 below:-

Table 2: Health Conditions

	All ESA	**Potentially affected subgroup**
Diseases of Musco-skeletal system and Connective Tissues	15%	18%
Diseases of the Nervous System	6%	3%
Diseases of Respiratory and Circulatory System	6%	5%
Injury, Poisoning and certain other consequences of external causes	5%	2%
Mental and Behavioural Disorders	46%	53%
Other	21%	18%

Source: DWP Administrative Data and Atos Assessment Information
All figures rounded to the nearest percentage point

20 93%, Family Resources Survey, 2011/12

Age

37. Analysis suggests that the policy will impact claimants across the age range. Overall it appears that those under 45 are more likely to be in the potentially affected caseload (those making a repeat claim based on the same condition) than the ESA caseload overall. Those under 45 constitute 59% of those who made a repeat Claim and report the same broad condition whilst those under 45 constitute only 43% of the total ESA caseload. The data is shown in Table 3 below.

Table 3: Age

	All ESA	**Potentially affected subgroup**
Under 18	*	1%
18-24	8%	12%
25-34	15%	19%
35-44	20%	27%
45-49	15%	15%
50-54	16%	13%
55+	26%	13%

Source: DWP WCA Cohort Data Set and Work and Pensions Longitudinal Study
All figures rounded to the nearest percentage point

38. The latest FRS data indicates that ESA claimants also tend to be older than the overall working age population - 48% of the ESA caseload is over 45 in the latest survey compared to 39% of the working age population as a whole.

Race

39. A significant number of respondents chose not to identify their ethnicity on the DWP administrative data. The proportion whose ethnicity is unknown is larger for the total ESA caseload (21%) than it is for those in the potentially affected caseload. The data is shown in Table 4 below.

40. Once we account for the discrepancy in the 'unknown' cases there does not appear to be a significant difference between the ethnic makeup of the overall ESA caseload and those potentially affected by the policy proposal.

Table 4: Ethnic group

	All ESA	**Potentially affected subgroup**
White	66%	78%
Mixed	1%	1%
Asian or Asian British	3%	6%
Black or Black British	2%	4%
Chinese or other Ethnic Group	1%	2%
Prefer not to Say	6%	4%
Unknown	21%	5%

* Less than 1 per cent

Source: DWP Administrative Data and Atos Assessment Information
All figures rounded to the nearest percentage point

41. According to the latest FRS estimates, 89% of the ESA caseload report a white ethnic background compared to 82% of the working age population as a whole. Sample size restrictions preclude any further breakdown of the ethnicity of the ESA caseload reported on the FRS.

Sexual orientation

42. The policy proposals will apply to all ESA claimants regardless of their sexual orientation. The Department does not hold information on its administrative systems on the sexual orientation of claimants. We do not envisage an adverse impact on these grounds.

Gender re-assignment

43. The Department does not hold information on its administrative systems on transgender persons. We have no specific evidence on how the policy may impact on ESA claimants who have undergone gender re-assignment, but do not consider that there will be an adverse impact on these grounds. The Department has endeavoured to ensure that customers will be treated in the same way, regardless of whether they have undergone gender re-assignment.

Pregnancy and maternity

44. Claimants who are pregnant are automatically treated as having LCW for ESA purposes if they are within the Maternity Allowance period and do not have to go through the WCA process. Similarly if there is a serious risk to the claimant or her unborn child she would be treated as having LCW. Accordingly, therefore, we do not believe there will be an adverse impact on the basis of pregnancy or maternal status because of this proposed policy change.

Marriage and civil partnership

Table 5: Marriage and Civil Partnership **-** ESA caseload (August 2013) by the partner status of claimants and ESA phase:

Status	**Claims (no partner recorded)**	**Claims (partner recorded)**	**Total**
Unknown	50,000 (79%)	13,000 (21%)	63,000
Assessment Phase	439,000 (86%)	69,000 (14%)	508,000
Work Related Activity Group	467,000 (84%)	93,000 (17%)	559,000
Support Group	748,000 (87%)	109,000 (13%)	856,000
Total	1,704,000 (86%)	283,000 (14%)	1,987,000

Source: DWP Administrative Data. *Data is based on cases with adult dependency allowances - so it significantly under represents contributions based claimant partners, who are not included in contribution based ESA claims. Figures may not sum due to rounding*

45. We do not envisage that this policy will have an adverse impact on the basis of marriage or civil partnership status.

Religion or belief

46. We do not have a breakdown on religion or belief for ESA claimants. We do not envisage an adverse impact on these grounds. The Department wants to provide a service appropriate to the needs of claimants with different religions/beliefs, to enable them to access the Department's services. Jobcentre Plus already has in place within their working practices, various general measures which are sensitive to the needs of people from different religions.

Decision making

47. Having had due regard to the PSED and the UNCRPD, the evidence and the analysis detailed in this document, including ending payments pending appeal for this group, the Department acknowledges that this policy may have an adverse impact on some claimants with a protected characteristic. However, this is mitigated in part by the availability of JSA for some ESA claimants. The JSA regime can also be modified to take account of a claimant's health and JSA also provides personalised support to help claimants to return to work. There is also no indication that the proposed change would have an adverse impact under the UNCRPD as the change is intended to encourage disabled people to return to work.

48. The effect of the policy change is to restore the original policy intention that the functional assessment determination should stand unless there has been a change in the claimant's condition, or a new condition has developed; in which case ESA may be re-awarded.

49. In particular there is no evidence that the proposed policy would have an adverse impact on the duty to eliminate discrimination. We believe that the policy change will advance equality of opportunity of disabled people by providing claimants who claim JSA as a result of this measure with personalised support to return to work in future. We recognise that not all those who qualify for ESA would also qualify for JSA (primarily self-employed people). We do not have evidence to indicate that the change will lead to adverse impact on the duty to foster good relations between disabled people and those who do not have protected characteristics.

50. The change to ESA eligibility should not have an impact on disabled people's ability to choose where they live in the community. Housing Benefit will remain available regardless of the availability of ESA to those on low incomes. Disabled people will still have access to community services and help and support will be provided to those who claim JSA to return to work, in common with other members of the general population.

51. This assessment will be attached to a submission that is being sent to Ministers to consider whether this change of policy should be made and in doing so personally consider equality duties under the PSED and UNCRPD.

Monitoring and evaluation

52. DWP is committed to monitoring the impacts of its policies and we will use evidence from a number of sources on the experiences and outcomes of the protected groups.
    a) We will use administrative datasets, including the Department for Work and Pension's Work and Pensions Longitudinal Study (WPLS), to monitor trends in the benefit caseloads for the protected groups and in the level and distribution of benefit entitlements. The administrative data will provide robust material for age and gender although not, as a rule, for the other protected groups. Where it is practical we will endeavour to incorporate information for the other protected groups.

    b) We will use survey data, such as the Family Resources Survey (FRS) and Labour Force Survey (LFS), to assess trends in the employment outcomes of the protected groups. Both the FRS and LFS will collect information on age, disability, gender, ethnicity, sexual orientation, religion and civil partnerships.

53. DWP is looking across its activities to identify and address further gaps in data provision, for protected groups, wherever reasonable.

When will the potential impacts be reviewed?

54. Once the policy is introduced we will monitor on a regular basis the effects of the change.

55. We will use qualitative research and feedback from stakeholder groups to assess whether there are unintended consequences for the protected groups, and whether the policy has resulted in adverse consequences for particular groups.

56. We will utilise feedback from Departmental employee networks and internal management information. For example we will monitor the level of complaints in order to assess the broader impact of the policy.

Sign off

Iain Walsh

Department for Work & Pensions

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20 October 2014

Denise Whitehead
Secretary
Social Security Advisory Committee
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6-12 Tothill Street
London
SW1H 9NA

Dear Denise,

DRAFT REGULATIONS: THE EMPLOYMENT AND SUPPORT ALLOWANCE (REPEAT ASSESSMENTS) (AMENDMENT) REGULATIONS 2015

The purpose of this letter is a formal request, in accordance with section 172 of the Social Security Administration Act 1992, for the Committee to consider proposals to amend the Employment and Support Allowance Regulations.

The amendments proposed reflect a change of policy intended to end an unintended consequence of existing arrangements where ESA claims can loop around the system despite no significant deterioration or change in a claimant's health condition or disability. This may include ending payments pending appeal in such cases, if the claimant chooses to appeal.

The policy intention is to bring the conditionality arrangements for people affected by this measure more closely in line with the arrangements in Universal Credit where claimants who do not have Limited Capability for Work are subject to the normal all-work requirements, but can make modifications in respect of their health.

For the benefit of the Committee, I am attaching:

- a full explanation of the purpose and effect of the proposals, at section 3 of the accompanying **Explanatory Memorandum** at **Annex 1;** and
- an assessment of the impacts of these proposals, at section 4 of the Memorandum, with the **Equality Assessment** at **Annex 3**.

I also attach a copy of the **draft Statutory Instrument** for the **Employment and Support Allowance (Repeat Assessment) (Amendment) Regulations 2015** at **Annex 2** (which remain subject to legal checks, and in respect of which further drafting amendments may therefore be required). Note this does not include provisions to end payments pending appeal, which are still being considered by lawyers, and upon which the Department is yet to make a final decision. If the decision is made to end payments pending appeal for this group, we will send an updated Equality Assessment to the Committee.

I hope these documents fully explain the proposals, and that they will aid the Committee members in their consideration of these changes. However, if you or any member of the Committee has any queries or requires further information, please do not hesitate to contact me.

Informal consultation took place with members of the Disability Charities Consortium on 7 October 2014 and they raised a number of concerns which the Department will be addressing in guidance to ensure that claimants provide the evidence needed to support their claims. This informal consultation did not include the possibility of withdrawing pending appeal payments for this group.

The Committee is invited to consider whether these Regulations may be made without further formal references.

Yours sincerely

Trevor Pendergast
Employment and Support Allowance Directorate

Annex 1

ESA Directorate Strategy, Policy & Analysis Group	**Explanatory Memorandum for the Social Security Advisory Committee**	
	The Employment and Support Allowance (Repeat Assessments) (Amendment) Regulations 2015	
For the meeting of the Social Security Advisory Committee on 5 November 2014	DWP Department for Work and Pensions	

Contents

1. Introduction

1.1 This Explanatory Memorandum covers amendments to the Employment and Support Allowance Regulations 2008 and 2013:

- Regulation 30 of the Employment and Support Allowance Regulations 2008 (SI 2008/794); and
- Regulation 26 of the Employment and Support Allowance Regulations 2013 (SI 2013/379);

1.2 The amendments have the same effect for both sets of regulations. The differences between the regulations are that the 2008 regulations include both contributory and income-related Employment and Support Allowance (ESA) but the 2013 do not, reflecting the replacement of income-related ESA by Universal Credit.

1.3 Once lawyers and Ministers have considered the proposal to remove payments pending appeal from this group of claimants, amendments are likely to be necessary to the ESA Regulations and other secondary legislation.

2. Commencement and application of the proposed changes

2.1 The proposed changes are intended to come into force on 30 March 2015. They will apply to all new claims for Employment and Support Allowance (ESA) made from the commencement date.

3. Explanation, purpose and effect of the proposed changes

3.1 Under the current system, a Work Capability Assessment (WCA) based determination that a claimant does not have Limited Capability for Work can be relied on for six months. Where a new claim is made within this period claimants cannot be treated as having Limited Capability for Work on production of a fit note during the assessment phase, unless their condition has substantially worsened or a new condition has developed. This means that, in circumstances where the Department does not make an immediate decision on limited capability for work because further evidence is needed to determine the claim, the claimant is referred for a new WCA, and they will not be paid ESA during the assessment phase.

3.2 However, where a new claim is made after the six months has passed, there is presently no barrier to a repeat award, pending a fresh WCA, even where the claimant provides no evidence to suggest that their condition has substantially changed. One unwanted effect of this policy is that even where a First-tier Tribunal (FTT) has upheld a fit for work decision, a claimant can make a new (repeat) claim for ESA immediately, on the basis of the same condition, and will be entitled to receive the assessment phase rate pending a new WCA, as long as the appeal process has taken longer than six months. The whole process then begins again and if they are once more found fit for work they

can, after mandatory reconsideration, lodge an appeal and receive ESA pending the outcome of the appeal. This looping around the system is bad for the claimant who is likely to get little or no support to return to work and imposes a costly adminstrative burden on DWP.

3.4 Under these proposals, it is intended that claimants will no longer be treated as having Limited Capability for Work during the assessment phase if they were found 'fit for work' following their most recent WCA unless they can demonstrate that there has been a significant worsening in their health condition or that a new health condition has developed. This should stop people looping around the ESA system instead of claiming JSA and receiving the help and support they need to return to work. It would also bring the conditionality arrangements for such claimants broadly into line with those for Universal Credit.[1] In Universal Credit, both before and after the WCA determination a claimant who is not treated as having Limited Capability for Work is subject to the full conditionality regime, although account is taken of the claimant's health in doing so. It is also intended that, where the repeat claim results in a fit for work finding, such claimants should not be entitled to receive ESA payments pending appeal.

3.5 We intend to amend the guidance issued to DWP operational staff and Decision Makers, so that it is clear what evidence should be sought from claimants who make a repeat claim with the same condition as their previous ESA claim. This should help to ensure that Decision Makers will have the evidence they need to determine whether the claimant meets the requirements to re-qualify for ESA. We would consider each case on its merits and there would not be an automatic assumption that benefit should be refused without any investigation of the facts, which might also include a referral for further advice from a health care professional, or arranging for a further WCA. In addition to that, claimants will have the normal right to a mandatory reconsideration of the decision and ultimately an appeal to a First-tier Tribunal if they continue to dispute the decision.

3.6 Analysis indicates that around 230,000 of the 700,000 new ESA claims each year are repeat claims, and of these 30-40,000 - around 15% - are estimated to make a repeat claim using the same broad health condition as at the previous WCA determination.

3.7 The Secretary of State will be able to refuse to treat ESA claimants as having limited capability for work if they make a new ESA claim at any time (and not only within the six months following the original decision) after they have been found fit for work, where their condition has not altered and they have not developed a new condition, in circumstances where he is unable to make a determination of limited capability without referring the claimant for a fresh WCA. This means that these ESA claimants will not be paid the assessment rate while waiting for the new determination on whether they have limited capability for work. Where a claim for ESA is determined and refused, or a claimant is not treated as having limited capacity for work during the assessment phase, these claimants may be able to claim Jobseeker's Allowance (JSA) instead. JSA is the appropriate benefit for someone who has been found fit for work. JSA provides claimants with personalised support to return to work taking into account their health condition or disability.

3.8 To summarise this change is expected to:

1 Universal Credit is planned to replace income–related ESA.

- prevent claimants looping around the system going from ESA to JSA and back to ESA with the same health condition;
- provide consistent support to help claimants (who are fit-for-work but may still have a health condition) return to work; and
- improve overall efficiency whilst not denying anyone the appropriate benefit and broadly align conditionality arrangements with Universal Credit.

4. Impacts of the proposed changes

4.1 To meet the requirements of the Equality Act 2010, the Department for Work and Pensions has carried out an Equality Analysis on this measure but intends to update it further to consider and include the implications of removing payments pending appeal from this group. Such an assessment considers the potential impact of the proposed policies in terms of the protected characteristics (disability, ethnicity and gender), and the additional protected characteristics (age, gender reassignment, sexual orientation, religion or belief, marriage and civil partnership, and pregnancy and maternity) and helps to ensure that the Department has due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations when developing strategies policies and services.

4.2 In respect of the proposed change, the analysis (**Annex 3**) identified that there is an effect on disabled people who would otherwise have reclaimed after 6 months and been awarded ESA. However, in view of the extensive safeguards in place to ensure that decisions relating to limited capability for work are correctly made, we believe that this change is a proportionate means of meeting the legitimate aim of ensuring that sick and disabled people found fit for work can get access to the support earlier than if they reclaimed ESA, to help them return to work thereby advancing equality of opportunity**.**

4.3 Mitigation for this adverse impact includes the extensive safeguards in place to ensure that decisions on entitlement to ESA following a WCA are correctly made, and support and alternative benefits are available for claimants as outlined below.

4.4 In recognition of the vulnerability of claimants with mental health conditions the WCA includes activities related to mental, cognitive and intellectual function. These include coping with social situations and dealing with other people. In addition special consideration is given to claimants with mental health conditions throughout the WCA process. For example, people who claim ESA are asked to complete a questionnaire (ESA50) as part of the claim process. The ESA50 was designed with input from technical working groups including Mencap and the National Autistic Society, to ensure a properly structured series of questions to guide a claimant to provide a full explanation of any mental health issues. However, if someone with a mental health condition does not return their ESA50 within the required 4 week period their case is still considered by a health care professional, instead of being returned to DWP for a decision on whether benefit entitlement can continue.

4.5 The healthcare professionals carrying out the assessments are trained in disability assessment medicine in order to assess the capability of an individual to engage in work. They are given specific training in assessing individuals with mental health conditions and receive continuing professional education in order to remain up to speed with developments in the field of disability medicine.

4.6 DWP is committed to ensuring that the WCA accurately assesses the capability of people with conditions affecting mental function and the Department has made considerable efforts to ensure that the special needs of persons with mental health conditions are met as part of the assessment process. This is why following Professor Harrington's recommendation, a full complement of mental function champions have been in place since July 2011 as a resource to support the assessment of individuals with mental health conditions.

4.7 Prior to making a decision that someone is fit for work the DWP Decision Maker attempts to contact the claimant to explain that based on the evidence available they are likely to find them fit for work and ask if there is further evidence that they wish to be considered. If the claimant is still unhappy with the decision they can request a Mandatory Reconsideration which is undertaken by a different Decision Maker. Finally there is also the option to appeal the decision if it is not changed following mandatory reconsideration, and claimants may claim JSA during the mandatory reconsideration and appeal period. It is intended that, in these circumstances, ESA will not be paid during the appeal period.

4.8 There are also statutory provisions for claimants with a physical or mental health condition claiming JSA which enable them to restrict their availability for work - provided the restrictions are reasonable in the light of their physical or mental health condition. For example, a person with emphysema could restrict the:

- type of work - to avoid working in smoke or fumes;
- number of hours worked in a week;
- number of hours in a shift.

4.9 Where the claimant imposes acceptable restrictions because of their physical or mental health condition they do not have to show they have reasonable prospects of getting a job. However, they must show all the restrictions are reasonable and are connected with their health condition. A claimant may also restrict their travel time if they have a physical or mental health condition, which affects their ability to travel.

4.10 In these situations jobcentre staff will consider the claimant's availability and any restrictions which may be appropriate in light of their health condition and review and amend the claimant's Jobseeker's Agreement as appropriate.

4.11 Minimal changes are required to Departmental IT systems.

4.12 Changes to guidance will be developed with input from Operational staff.

4.13 Input from the informal consultation with the Disability Charities Consortium will feed into the external communications plans.

4.14 The Department does not consider that this proposal would have any impact on business or charities.

4.15 The Department does not consider that the proposals would have any impact on the sustainability of rural communities.

5. Consultation on the proposed changes

5.1 Although there has been no formal consultation on the measure, Department officials discussed the changes – apart from the proposal to stop payments pending appeal for this group – with members of the Disability Charities Consortium on Tuesday 7 October 2014. They advised that many ESA claimants have difficulties in dealing with the claims system because of their health issues. They said that it is therefore essential that information is provided to advisers and claimants setting out what evidence is needed as part of the claim. This will enable Decision Makers to deal with each claim on its merits. The Department should also not assume that the GP is the most appropriate individual to provide the evidence needed, other health care workers may have a better knowledge of the effects of a claimant's condition. There was also concern in the past that new rules were interpreted in a "harsher blanket way" despite the policy intent. It was important that internal DWP guidance made it clear that this was not the policy intent. This input will be used to inform changes to operational guidance, learning and development for staff and new claimant communications.

5.2 DWP operational staff have also been consulted about the change. They identified the need for effective communications for claimants, advice agencies, GPs and staff to ensure that all were aware of the change, what it means, and what they need to do if affected. Their views will inform changes to operational guidance, staff learning and development requirements, operational process and performance management issues.

6. Information and communications strategy for the proposed changes

6.1 DWP has identified the importance of ensuring that claimants, advice agencies, GPs and DWP staff are aware of the proposed change and will feed the advice from the informal consultation session into the external communications developed.

6.2 The communications approach for DWP staff will include raising awareness through existing communications channels such as, Decision Maker's Guide Memoranda, Operational Senior Leaders Brief, Change and You, DWP Headline News, Advisory Bulletins, together with more targeted operational communications through implementation updates and operational guidance at the appropriate time.

6.3 For external advisers, stakeholders and intermediaries, we will provide information about the change in articles within the DWP Stakeholder Bulletin and Touchbase publication, and update Gov.uk.

6.4 Informal consultation on some of the proposed changes took place with the Disability Charities Consortium on 7 October.

6.5 MPs, Members of the Scottish Parliament and Welsh Assembly Members will also be made aware of the changes.

7. Monitoring and evaluation of the proposed changes

7.1 DWP is committed to monitoring the impact of all its policies. We will therefore be developing plans for monitoring the actual impact of this change on those groups who share protected characteristics under the Equality Act 2010.

Annex 2

THE EMPLOYMENT AND SUPPORT ALLOWANCE (REPEAT ASSSESMENTS) (AMENDMENT) REGULATIONS

STATUTORY INSTRUMENTS

2015 No. 000

SOCIAL SECURITY

The Employment and Support Allowance (Repeat Assessments) (Amendment) Regulations 2015

(a)	*Made* - -	- -
	***	
	Laid before Parliament	***
	Coming into force - -	***

The Secretary of State for Work and Pensions makes the following Regulations in exercise of the powers conferred by section 22 of, and paragraph 1 of Schedule 2 to, the Welfare Reform Act 2007(**1**)

The Social Security Advisory Committee has agreed that the proposals in respect of these Regulations should not be referred to it (**2**). OR In accordance with section 172(1) of the Social Security Administration Act 1992, the Secretary of State referred these proposals to the Social Security Advisory Committee.

Citation, commencement and extent

2.—a) These Regulations may be cited as the Employment and Support Allowance (Repeat Assessments) (Amendment) Regulations 2015 and come into force on ..... 2015.

(1) In these Regulations—

"the Act" means the Welfare Reform Act 2007;

"the 2008 Regulations" means the Employment and Support Allowance Regulations 2008(**3**);

"the 2013 Regulations" means the Employment and Support Allowance Regulations 2013 (**4**).

Amendment of Regulation 30 of the 2008 Regulations

3.—b) The 2008 Regulations(**5**) are amended as follows.

(**1**) 2007 c.5.
(**2**) see section 173(1)(b) of the Social Security Administration Act 1992 (c.5)
(**3**) S.I. 2008/794.
(**4**) S.I. 2013/379

(1) For regulation 30(2)(b)(6) (conditions for treating a claimant as having limited capability for work) substitute —

"(b) in relation to the claimant's entitlement to any benefit, allowance or advantage which is dependent on the claimant having limited capability for work, it has not been determined that the claimant:

(i) does not have limited capability for work; or

(ii) is to be treated as not having limited capability for work under regulation 22 or 23,

unless paragraph (4) applies."

Amendment of Regulation 26 of the 2013 Regulations

4.—c) The 2013 Regulations are amended as follows.

(1) For regulation 26(2)(b) (conditions for treating a claimant as having limited capability for work) substitute—

"(b) in relation to the claimant's entitlement to any benefit, allowance or advantage which is dependent on the claimant having limited capability for work, it has not been determined that the claimant:

(i) does not have limited capability for work; or

(ii) is to be treated as not having limited capability for work under regulation 18 or 19,

unless paragraph (4) applies."

Signed by authority of the Secretary of State for Work and Pensions

Name
Parliamentary Under Secretary of State
Department for Work and Pensions

Date

EXPLANATORY NOTE

(This note is not part of the Order)

These Regulations amend two provisions having identical effect in different regulations relating to employment and support allowance.

Regulation 2 amends the Employment and Support Allowance Regulations 2008. It removes the specific six month time limit which prevents a claimant making a new claim for ESA from being treated as having limited capability for work while going though the work capability assessment where there is a previous determination that the claimant does not have limited capability for work, or cannot be treated as having limited capability for work due to failure to comply with requirements. This applies where there is no evidence of significant worsening of the claimant's existing condition or a new condition.

Regulation 3 amends the Employment and Support Allowance Regulations 2013. It removes the specific six month time limit which prevents a claimant making a new claim for ESA from being treated as having limited capability for work while going though the work capability assessment where there is a previous determination that the claimant does not have limited capability for work, or cannot be treated a having limited capability for work due to failure to comply with requirements. This applies where there is no evidence of significant worsening of the claimant's existing condition or a new condition.

(5) S.I. 2008/794, amended by S.I. 2013/2536; there is another amending instrument but it is not relevant.
(6) Regulation 30(2)(b) was amended by regulation 13(14)(a) of S.I. 2013/2536

Annex 3– Equality Assessment

Introduction & Policy background

Introduction

1. This document records the analysis undertaken by the Department to enable Ministers to fulfil the requirements placed on them by the Public Sector Equality Duty (PSED) as set out in section 149 of the Equality Act 2010. The PSED requires the Minister to pay due regard to the need to:

- eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act;
- advance equality of opportunity between people who share a protected characteristic and those who do not; and
- foster good relations between people who share a protected characteristic and those who do not.

2. In undertaking the analysis that underpins this document, where applicable, the Department has also taken into account the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), and in particular the three parts of Article 19 which recognise the equal right of all disabled people to live in the community, with choices equal to others, and that the Department should take effective and appropriate measures to facilitate full enjoyment by disabled people of this right and their full inclusion and participation in the community.

3. We have also taken into account the purposes of Article 27 of the UNCRPD which requires the Department to take appropriate steps to:

- promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;
- promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include incentives and other measures;
- promote the acquisition of work experience in the open labour market; and,
- promote vocational and professional rehabilitation, job retention and return-to-work programmes.

Current policy

4. There is a large body of evidence showing that work is good for physical and mental wellbeing and that being out of work can lead to poor health and other negative outcomes. So, whilst the Government is committed to supporting those who cannot work because of a health condition or disability, it wants to help as many people as possible to find suitable work. To do this the Department needs a fair and accurate assessment of the extent to which a person's health condition or disability limits their capability for work.

5. Entitlement to Employment and Support Allowance (ESA) is based on an individual's functional ability rather than the condition itself. Anyone claiming ESA will undergo the Work Capability Assessment (WCA). The WCA is based on the premise that eligibility should not be based on a person's condition, but rather on the way that condition limits their

functional capability.

6. The WCA was developed in consultation with medical and other experts alongside representative groups to ensure that it deals more effectively with the types of conditions that are prevalent today. It focuses on the functional effects of an individual's condition rather than the condition itself.

7. There are currently around 60-70,000 WCAs a month and they are undertaken by health care professionals employed by the Department's health and disability assessments provider, presently Atos Healthcare. Health care professionals make recommendations about a claimant's functional capability, but DWP Decision Makers determine eligibility for benefit having considered all available evidence, including that provided by the claimant.

8. When someone claims ESA, they enter an "assessment phase" during which they undergo a Work Capability Assessment (WCA) to determine whether they have limited capability for work (LCW) and, if so, whether they also have limited capability for work-related activity (LCWRA). During this period, provided they supply medical evidence, the claimant may be treated as having LCW and, if so, is paid ESA at the basic rate.

9. If, following the application of the WCA, it is determined that the claimant:

- does not have LCW, their award of ESA is terminated;
- has LCW but is nevertheless capable of undertaking some work related activity, their award of ESA continues and they are allocated to the work-related activity group;
- has both LCW and LCWRA, their award of ESA continues and they become a member of the support group.

10. Under the current system, a WCA-based determination that a claimant does not have limited capability for work (and is thus not entitled to ESA) normally has validity for six months. This means that where a new claim is made within this period there would be no entitlement to ESA from the date of claim, if the evidence from the previous WCA is used to assess the claimant as not having limited capability for work. In circumstances where the Decision Maker cannot decide on limited capability for work immediately, they may refer the claimant for a WCA but in such cases the claimant will not be treated as having LCW and will therefore not receive payment of ESA during the assessment phase.

11. This six month barrier on repeat awards does not apply where the claimant's health condition has, in the interim, significantly worsened or a new condition has developed. Nor does it apply if the claimant appeals against the decision which embodies the determination that they do not have limited capability for work. However, once the six months has passed, there is no barrier to a repeat award and payment of assessment phase ESA, pending a fresh WCA, even where the claimant provides no evidence to suggest that their condition has substantially changed etc.

12. ESA is re-awarded at the assessment phase rate (the same rate as Jobseeker's Allowance (JSA)) and the cycle between ESA claim, WCA and disallowance starts all over again.

Policy changes and who will be affected

13. Under the proposed change it is intended that claimants will not be treated as having limited capability for work if their most recent WCA outcome was that they were found fit for work unless they can demonstrate that there has been a change in their health condition or a new health condition has developed. This should stop people looping around the ESA system instead of claiming JSA and receiving the help and support they need to return to

work. It would also bring the ESA arrangements broadly into line with those for Universal Credit. Universal Credit is planned to replace income–related ESA.

14. It is estimated that around 230,000 of the 700,000 new ESA claims each year are repeat claims, but only around 30-40,000 are estimated to make a repeat claim using the same broad health condition as at the previous WCA determination.

15. This change applies to both ESA under the Employment and Support Allowance Regulations 2008 (contributory and income-related) and the Employment and Support Allowance Regulations 2013 (contributory only).

Why we are making these changes?

16. We are making this policy change because we believe that the existing ESA rules encourage claimants to loop around the system, rather than reflecting the outcome of the WCA which is designed to make sure that people with health conditions get the help and support they need in order to return to work. The changes we make here will also reduce the administrative burden on the Department and mean that those new claimants waiting for an assessment should have reduced waiting times in the longer-term.

What the changes mean for claimants

17. The Secretary of State will be able to refuse to treat ESA claimants as having limited capability for work if they make a new ESA claim more than six months after they are found fit for work, where their condition has not altered and they have not developed a new condition, pending a fresh WCA. This means these ESA claimants will not be paid the assessment rate while waiting the new determination on whether they have limited capability for work. Where a claim is determined and refused, or the claimant is not treated as having limited capability for work during the assessment phase, these claimants may be able to claim JSA instead. JSA is the appropriate benefit for someone who has been found fit for work. JSA provides claimants with personalised support to return to work taking into account their health condition or disability.

Mitigation

18. There are extensive safeguards in place to ensure that decisions on entitlement to ESA following a WCA are correctly made, and support and alternative benefits are available for claimants.

19. In recognition of the vulnerability of claimants with mental health conditions the WCA includes activities related to mental, cognitive and intellectual function. These include coping with social situations and dealing with other people. In addition special consideration is given to claimants with mental health conditions throughout the WCA process. For example, people who claim ESA are asked to complete a questionnaire (ESA50) as part of the claim process. The ESA50 was designed with input from technical working groups including Mencap and the National Autistic Society, to ensure a properly structured series of questions to guide a claimant to provide a full explanation of any mental health issues. However, if someone with a mental health condition does not return their ESA50 within the required 4 week period, payment of ESA continues and their case is still considered by a health care professional, instead of being returned to DWP for a decision on whether benefit entitlement can continue.

20. The healthcare professionals carrying out the assessments are trained in disability assessment medicine in order to assess the capability of an individual to engage in work. They are given specific training in assessing individuals with mental health conditions and receive continuing professional education in order to remain up to speed with developments in the field of disability medicine.

21. DWP is committed to ensuring that the WCA accurately assesses the capability of people with conditions affecting mental function and the Department has made considerable efforts to ensure that the special needs of persons with mental health conditions are met as part of the assessment process. This is why following Professor Harrington's recommendation, a full complement of mental function champions have been in place since July 2011 as a resource to support the assessment of individuals with mental health conditions.

22. Prior to making a decision that someone is fit for work the DWP Decision Maker attempts to contact the claimant to explain that based on the evidence available they are likely to find them fit for work and ask if there is further evidence that they wish to be considered. If the claimant is still unhappy with the decision they can request a Mandatory Reconsideration which is undertaken by a separate Decision Maker. Finally there is also the option to appeal the decision, and claimants may claim JSA during the mandatory reconsideration and appeal period.

23. There are also statutory provisions for claimants with a physical or mental health condition claiming JSA which enable them to restrict their availability in any way - provided the restrictions are reasonable in the light of their physical or mental health condition. For example, a person with emphysema could restrict the:

- type of work - to avoid working in smoke or fumes;
- number of hours worked in a week;
- number of hours in a shift.

24. Where the claimant imposes acceptable restrictions because of their physical or mental health condition they do not have to show they have reasonable prospects of getting a job. However, they must show all the restrictions are reasonable and are connected with their health condition. A claimant may also restrict their travel time if they have a physical or mental health condition, which affects their ability to travel.

25. In these situations jobcentre staff will consider the claimant's availability and any restrictions which may be appropriate in light of their health condition and review and amend the claimant's Jobseeker's Agreement as appropriate.

Consultation and involvement

26. This policy proposal will require a change to Regulations. As part of the legislative process DWP has decided not to undertake a formal consultation exercise. However DWP has had discussions with both external stakeholder organisations and DWP staff in relation to the removal of the six month period. They have both stressed the importance of ensuring that advisers, GPs, claimants and others receive clear information about what evidence will be required in circumstances where a repeat claim has been made. DWP guidance will be amended to reflect the legislative change and also the input from stakeholders.

Evidence and analysis

27. The following sections look specifically at the possible impact of the policy changes in terms of the protected groups (gender, disability, age, race, sexual orientation, gender re-assignment, pregnancy and maternity, marriage and civil partnership and religion and belief).

28. We have used internal administrative data to identify ESA claimants who have made a repeat claim for ESA with the same broad condition (and are thus more likely to be affected by the policy). This is likely to be an overestimate of the actual population affected by the policy as it is not possible to identify cases where the broad condition has deteriorated. We have compared the characteristics of the "potentially affected population" to the overall ESA caseload using the latest results from DWP Administrative Data and Atos Assessment Information for November 2013. We have also used data from the latest Family Resources Survey to consider the characteristics of ESA claimants in relation to the overall working age population.

Gender

29. The changes will apply to all claimants on ESA who make a repeat claim after the six month period and whose condition has not changed, both male and female. We estimate that around 57% of the claimants who could potentially be affected by the policy are male and 43% are female. Overall, 54% of ESA claimants are male and 46% are female and so men are slightly more likely to be in the potentially affected group. The data is shown in Table 1 below.

Table 1: Gender

	All ESA	**Potentially affected subgroup**
Female	46%	43%
Male	54%	57%

Source: DWP Administrative Data and Atos Assessment Information
All figures rounded to the nearest percentage point

Disability

30. By definition everybody potentially affected by our policy proposal has an illness or disability of some sort and according to the latest Family Resources Survey (FRS), over 90% of ESA claimants report that they are disabled according to the DDA definition[1]. This compares with 25% of the overall working age population, according to the survey.

31. We have considered the primary condition reported by the potentially affected subgroup and the overall ESA caseload. The subgroup has a higher proportion of claimants reporting a mental health condition as compared to the total ESA caseload. 53% of those who make a repeat claim with the same broad condition fall into the category of mental and behavioural disorders compared with 46% of the total ESA caseload. Correspondingly they appear less likely than the overall ESA caseload to report a disease of the nervous system or to be in the category 'injury, poisoning and certain other consequences of external causes'. The data on conditions is set out in Table 2 below:-

1 93%, Family Resources Survey, 2011/12

Table 2: Health Conditions

	All ESA	Potentially affected subgroup
Diseases of Musco-skeletal system and Connective Tissues	15%	18%
Diseases of the Nervous System	6%	3%
Diseases of Respiratory and Circulatory System	6%	5%
Injury, Poisoning and certain other consequences of external causes	5%	2%
Mental and Behavioural Disorders	46%	53%
Other	21%	18%

Source: DWP Administrative Data and Atos Assessment Information
All figures rounded to the nearest percentage point

Age

32. Analysis suggests that the policy will impact claimants across the age range. Overall it appears that those under 45 are more likely to be in the potentially affected caseload (those making a repeat claim based on the same condition) than the ESA caseload overall. Those under 45 constitute 59% of those who made a repeat Claim and report the same broad condition whilst those under 45 constitute only 43% of the total ESA caseload. The data is shown in Table 3 below.

Table 3: Age

	All ESA	Potentially affected subgroup
Under 18	*	1%
18-24	8%	12%
25-34	5%	19%
35-44	20%	27%
45-49	15%	15%
50-54	16%	13%
55+	26%	13%

Source: DWP WCA Cohort Data Set and Work and Pensions Longitudinal Study
All figures rounded to the nearest percentage point

33. The latest FRS data indicates that ESA claimants also tend to be older than the overall working age population - 48% of the ESA caseload is over 45 in the latest survey compared to 39% of the working age population as a whole.

* Less than 1 per cent

Race

34. A significant number of respondents chose not to identify their ethnicity on the DWP administrative data. The proportion whose ethnicity is unknown is larger for the total ESA caseload (21%) than it is for those in the potentially affected caseload. The data is shown in Table 4 below.

35. Once we account for the discrepancy in the 'unknown' cases there does not appear to be a significant difference between the ethnic makeup of the overall ESA caseload and those potentially affected by the policy proposal.

Table 4: Ethnic group

	All ESA	Potentially affected subgroup
White	66%	78%
Mixed	1%	1%
Asian or Asian British	3%	6%
Black or Black British	2%	4%
Chinese or other Ethnic Group	1%	2%
Prefer not to Say	6%	4%
Unknown	21%	5%

Source: DWP Administrative Data and Atos Assessment Information
All figures rounded to the nearest percentage point

36. According to the latest FRS estimates, 89% of the ESA caseload report a white ethnic background compared to 82% of the working age population as a whole. Sample size restrictions preclude any further breakdown of the ethnicity of the ESA caseload reported on the FRS.

Sexual orientation

37. The policy proposals will apply to all ESA claimants regardless of their sexual orientation. The Department does not hold information on its administrative systems on the sexual orientation of claimants. We do not envisage an adverse impact on these grounds.

Gender re-assignment

38. The Department does not hold information on its administrative systems on transgender persons. We have no specific evidence on how the policy may impact on ESA claimants who have undergone gender re-assignment, but do not consider that there will be an adverse impact on these grounds. The Department has endeavoured to ensure that customers will be treated in the same way, regardless of whether they have undergone gender re-assignment.

Pregnancy and maternity

39. Claimants who are pregnant are automatically treated as having LCW for ESA purposes if they are within the Maternity Allowance period and do not have to go through the WCA process. Similarly if there is a serious risk to the claimant or her unborn child she would be treated as having LCW. Accordingly, therefore, we do not believe there will be an adverse

impact on the basis of pregnancy or maternal status because of this proposed policy change.

Marriage and civil partnership

Table 5: Marriage and Civil Partnership **-** ESA caseload (August 2013) by the partner status of claimants and ESA phase:

Status	Claims (no partner recorded)	Claims (partner recorded)	Total
Unknown	50,000 (79%)	13,000 (21%)	63,000
Assessment Phase	439,000 (86%)	69,000 (14%)	508,000
Work Related Activity Group	467,000 (84%)	93,000 (17%)	559,000
Support Group	748,000 (87%)	109,000 (13%)	856,000
Total	1,704,000 (86%)	283,000 (14%)	1,987,000

Source: DWP Administrative Data. *Data is based on cases with adult dependency allowances - so it significantly under represents contributions based claimant partners, who are not included in contribution based ESA claims. Figures may not sum due to rounding*

40. We do not envisage that this policy will have an adverse impact on the basis of marriage or civil partnership status.

Religion or belief

41. We do not have a breakdown on religion or belief for ESA claimants. We do not envisage an adverse impact on these grounds. The Department wants to provide a service appropriate to the needs of claimants with different religions/beliefs, to enable them to access the Department's services. Jobcentre Plus already has in place within their working practices, various general measures which are sensitive to the needs of people from different religions.

Decision making

42. Having had due regard to the PSED and the UNCRPD, the evidence and the analysis detailed in this document the Department does not believe that this policy will have an adverse impact on claimants with a protected characteristic. Nor is there any indication that the proposed change would have an adverse impact under the UNCHR.

43. The effect of the policy change is to restore the original policy intention that the functional assessment determination should stand unless there has been a change in the claimant's condition, or a new condition has developed; in which case ESA may be re-awarded.

44. In particular there is no evidence that the proposed policy would have an adverse impact on the duty to eliminate discrimination. We believe that the policy change will advance equality of opportunity of disabled people by providing claimants who claim JSA as a result of this measure with personalised support to return to work in future. We recognise that not all those who qualify for ESA would also qualify for JSA (primarily self-employed people). We do not have evidence to indicate that the change will lead to adverse impact on the duty to

foster good relations between disabled people and those who do not have protected characteristics.

45. The change to ESA eligibility should not have an impact on disabled people's ability to choose where they live in the community. Housing Benefit will remain available regardless of the availability of ESA to those on low incomes. Disabled people will still have access to community services and help and support will be provided to those who claim JSA to return to work, in common with other members of the general population.

46. This assessment will be attached to a submission that is being sent to Ministers to consider whether this change of policy should be made and in doing so personally consider equality duties under the PSED and UNCRPD.

Monitoring and evaluation

47. DWP is committed to monitoring the impacts of its policies and we will use evidence from a number of sources on the experiences and outcomes of the protected groups.
    a) We will use administrative datasets, including the Department for Work and Pension's Work and Pensions Longitudinal Study (WPLS), to monitor trends in the benefit caseloads for the protected groups and in the level and distribution of benefit entitlements. The administrative data will provide robust material for age and gender although not, as a rule, for the other protected groups. Where it is practical we will endeavour to incorporate information for the other protected groups.

    b) We will use survey data, such as the Family Resources Survey (FRS) and Labour Force Survey (LFS), to assess trends in the employment outcomes of the protected groups. Both the FRS and LFS will collect information on age, disability, gender, ethnicity, sexual orientation, religion and civil partnerships.

48. DWP is looking across its activities to identify and address further gaps in data provision, for protected groups, wherever reasonable.

When will the potential impacts be reviewed?

49. Once the policy is introduced we will monitor on a regular basis the effects of the change.

50. We will use qualitative research and feedback from stakeholder groups to assess whether there are unintended consequences for the protected groups, and whether the policy has resulted in adverse consequences for particular groups.

51. We will utilise feedback from Departmental employee networks and internal management information. For example we will monitor the level of complaints in order to assess the broader impact of the policy.

Sign off

Iain Walsh

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