14 December 2016

Social Security Advisory Committee

Minutes of the meeting held in room 5.21/5.22
Caxton House, Tothill Street, London, SW1H 9NA

Members:	Paul Gray (Chair) Carl Emmerson Colin Godbold Jim McCormick Gráinne McKeever Dominic Morris Seyi Obakin Judith Paterson Charlotte Pickles Liz Sayce Victoria Todd
Apologies:	Rachael Badger Bruce Calderwood Chris Goulden
Guests and Officials:	See Annex A

1 & 2. Private Sessions

[Reserved item]

3. The Universal Credit (Benefit Cap Earnings Exception) Amendment Regulations 2017 (Papers 37/16)

3.1 The Chair welcomed David Edson (G7) and Hana Chambers (HEO(D)), both from the Universal Credit Policy Division dealing with the benefit cap, and Katie Riley (G7 Analyst, Working Age) to the meeting.

3.2 Introducing the proposals Hana Chambers explained that the change related to the rule by which a claimant or a couple in work but in receipt of Universal Credit were exempt from the provision by which the overall amount of benefit received would be capped. That rule had been introduced along with the benefit cap in 2012. From inception, the threshold by which a claimant or a couple were held to be ‘in work' for those purposes was set at net earnings of £430 a month.[1] That figure had been determined on the basis that it equated to 16 hours a week at the gross national minimum wage (NMW) for someone aged 21 or above as it stood in 2012. It had remained at that level ever since, although the NMW had been increased annually.

3.3 The proposed change was in two parts. First, the regulations would fix the threshold to the national living wage (NLW) rather than specify a particular monetary figure. The NLW applied to workers aged 25 or more, whilst the NMW was for younger workers with different rates for apprentices, under 18s, 18-20 year olds and those aged 21-24 years. Hana advised that although a young person under 25 may be on a lower wage than the NLW they would only have to work one or two extra hours a week in order to meet the new threshold. Second, earnings would be assessed net of income tax and national insurance contributions rather than at the gross amount. This would be consistent with the way in which earnings were treated in Universal Credit.

3.4 The following main questions and comments were raised by Committee members in discussion:

(a) The policy reason for indexing the threshold to a figure based on a statutorily defined minimum wage level was understood. So why not index the benefit cap itself rather than set out specific amounts in legislation?

The Secretary of State wanted to retain the discretion to adjust the level of the benefit cap as he deemed appropriate. The Welfare Reform and Work Act 2016 provided that the Secretary of State had a duty to review the benefit cap level each Parliament and, in setting the level of the cap, was required to take into account the national economic situation and any other matters he considered relevant.

(b) It was stated in the explanatory memorandum that although the new earnings threshold was to be based on net earnings rather than gross earnings, in practice it was not 'expected to have an impact as the proposed earnings threshold is currently below Tax and National Insurance thresholds.' If the vast majority would not be affected by the change why it was it being introduced?

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[1] The Department subsequently advised that the £430 figure was based on the gross NMW for a person aged 21 or above but that, in considering the earnings to meet this threshold, the definition of "earned income" in regulation 54(1) of the Universal Credit Regulations was used. This was based on the actual amounts received in the assessment period. The Department therefore looked at the claimant's take-home pay (unlike in conditionality where "monthly earnings" as defined in regulation 90(6) of the Universal Credit Regulations was effectively defined in terms of gross earnings).

The decision was taken more out of principle than for any other reason. It would ensure that earnings would be treated consistently within Universal Credit (UC) and that in determining the appropriate threshold, the Department would be comparing like with like.

(c) **But for UC purposes, earnings are defined as net of pension contributions[2] as well as of income tax and national insurance contributions. It would not therefore be comparing like with like because the proposals would not exclude pension contributions from the earnings.**

The Department would consider that point and come back to the Committee in writing.[3]

(d) **Although it might be possible for someone aged just below age 25 years and on the NMW to work one or two extra hours to meet the new threshold, the same could not be said of apprentices being paid at the apprentice rate of the NMW (£3.40 an hour). Even if they were working 30 hours a week which was the minimum number of hours that they must be offered in law, that would still not be enough to reach the threshold. Would that not leave the Department open to a legal challenge on the grounds of discrimination?**

Although 30 hours was the minimum number of hours that must be offered, most apprentices work 37 hours a week which would be enough to reach the earnings threshold. Working 36 hours a week at £3.40 per hour would bring an apprentice above the proposed threshold. The £3.40 rate only applied in the first year of an apprenticeship; after this the apprentice would be paid the relevant national minimum wage rate for their age. The Department anticipated that the number of first year apprentices in scope for the benefit

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[2] Regulation 55(5)(a) of the Universal Credit Regulations 2013 (SI 2013 No 376) provides that in calculating the amount of a person's employed earnings in respect of an assessment period, there are to be deducted "any relievable pension contributions made by the person in that period."

[3] The Department subsequently confirmed that the draft regulations provided for a threshold based on net earnings, minus any income tax and national insurance contributions paid, but that pension contributions are not deducted. They further advised that the net earnings exception threshold was intended to be an approximate, yet fair, amount against which to compare a person's earned income. Unlike income tax and national insurance contributions for which there are clear rules, the amount a person contributed to a pension would vary from scheme to scheme and would often be a matter of choice. It was therefore difficult to deduct a standard 'notional' amount for pension contributions which was fair to all when setting a threshold based on the NLW rate. This was the approach the Department had already taken in the Universal Credit Regulations 2013 when calculating the Minimum Income Floor threshold, for example. If, instead of determining a 'notional' pension contribution, the Department were to deduct an amount equal to actual pension contributions made in an assessment period, the policy would be extremely difficult to deliver as it would mean the threshold would vary from person to person.

cap and working less than 36 hours per week, meaning they would be affected by this change, would be very small.

(e) **The Department's rationale for having a single earnings threshold for all claimants was that 'a single threshold is easier to administer and is simpler for claimants to understand'. However in setting an earnings threshold for the purposes of determining whether a claimant should be subject to no work-related requirements, the UC system already recognised the position of apprentices and made provision for them.[4] If it was appropriate in those circumstances, why could it not be done for the purposes of the benefit cap as well?**

The Department would reflect upon that point and come back to the Committee.[5]

(f) **Did the Department have the numbers of apprentices who worked 30 hours a week compared to those who worked 37 hours?**

No, there was a general assumption that most worked 37 hours a week. Working 36 hours per week would take a first year apprentice above the proposed earnings threshold.[6]

(g) **The proposal raised an issue around averaging. A person paid weekly would have some assessment periods in which they received four weekly wage packets and others in which they received five. If their earnings were on the margins of the threshold, that could be crucial – some months where they were subject to the benefit cap and others when they were not. Given that the policy would seem to be to establish an equilibrium between a certain level of work and exemption from the benefit cap, it would seem to run counter to that policy if people swung in and out of meeting the required threshold despite being continually engaged in a consistent level of employment. Would that not make the**

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[4] Regulation 90(4) of the Universal Credit Regulations 2013.

[5] The Department subsequently advised that they would not include this provision in the benefit cap earnings exception, as the intention was to create a single threshold that was simple for claimants to understand. Linking the earnings exception threshold to conditionality earnings thresholds was considered and rejected because of the potential issues that could arise from the discretionary aspect of individualised earnings thresholds to exempt claimants from the cap. Additionally, conditionality earnings thresholds were set by work coaches; to ask a work coach to set a benefit cap earnings exception threshold risked it becoming an arbitrary threshold that could potentially create inconsistencies in how claimants were treated and detracted from work coaches' primary focus to support people into work.

[6] The Department subsequently expanded their answer, advising that while the Department for Education did not collect any data on the number of hours worked as part of apprenticeships, the annual Apprenticeship Learner Survey provided evidence on this. The 2015 survey indicated that 75% of apprentices surveyed worked more than 30 hours a week. Younger apprentices tended to work longer hours, with an average of 37 hours per week for those under 19; 36 hours per week for those aged 19-24; and 34 hours per week for those aged 25 and over.

operation of the policy both unfair and overly complicated? Would the Department not consider introducing the principle of averaging in order to avoid such an effect? To do so would be consistent with the approach taken in relation to the rules on conditionality.[7]

The Department accepted that the result could be as described. It would reflect further on the issue of averaging and respond to the Committee.[8]

(h) **For a woman who was expecting, or who had recently had, a baby, the prospect of working extra hours to meet the new threshold might not be realistic. Rather than look for a mitigating solution in discretionary housing payments (DHPs), had the Department considered the rule which HMRC applied in relation to working tax credits whereby a woman within the maternity period was treated as in work?**

The option of aligning the rules with those which applied in working tax credits had been rejected.[9]

(i) **It would be helpful to know more about the apprentices working and being paid at the NMW level for apprentices. There might be some disabled young people, for example, who could not do more hours because of their disability. There was arguably a risk that having an earnings rule which might be beyond the reach of some disabled apprentices would disincentivise them from working.**

The way in which the earnings rule applied to disabled people for the purposes of the benefit cap was consistent with the way that disabled people were treated in other parts of UC. Individuals entitled to Disability Living Allowance, Personal Independence Payment, Attendance Allowance, Industrial Injuries Benefit, the Limited Capability for Work Related Activity

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[7] Regulation 90(6) of the Universal Credit Regulations 2013

[8] The Department subsequently advised that the Surplus Earnings and Self-Employed Losses Regulations 2015, when brought into force, would resolve this issue.

[9] The Department subsequently expanded its response to this question by advising that if the individual decided to quit work to take maternity or paternity leave, they might qualify for the benefit cap grace period if they had a consistent work history. This would prevent their benefits from being capped for a period of nine months. If they continued to work when over the age of 25 or when under 25 but paid at least the NLW, they would continue to be exempt from the benefit cap. In such cases the earnings exception threshold would be in line with the NLW and the design of labour market contracts meant that individuals were likely to work 16 hours or more rather than less. If the claimant was under the age of 25, then it was not disproportionate to expect them to work an additional 1-2 hours per week. The Annual Survey of Hours and Earnings also indicated that a higher proportion of 16-24 year olds are paid around the NLW than were paid around the NMW for 21-24 year olds (roughly 10% of 16-24 year olds in full time work were paid around the NLW, and roughly 15% of 16-24 year olds in part-time work were paid around the NLW). Finally, the option of aligning the rules with those which applied in working tax credits had been rejected because the intention was to provide a simplified benefit system with Universal Credit.

element of UC or the Support component of an Employment and Support Allowance were exempt from the benefit cap as work was not a current viable option for them. Those not in receipt of these benefits were considered able to work and have access to a range of support to do 16-18 hours per week of work – the approximate level of work required to exempt themselves from the cap.

(j) Limitations on a person's mental or physical health or abilities were taken into account for the purposes of determining conditionality in JSA and ESA. There was therefore a precedent for allowing greater flexibility which could perhaps be applied to the earnings exception rule for benefit cap purposes.

The Department noted that point, but commented that the earnings exception was intended to be simple for claimants to understand, consistent with the original policy and the broader aim of UC in providing a simplified benefit system.[10]

(k) Since it would be easier for self-employed workers to dip below the earnings threshold for some months, the proposals would seem to affect the self-employed disproportionately more than other groups. Not only would some claimants become subject to the cap for the months their earnings had failed to meet the threshold, but it could also be harder for them to qualify for the grace period. Given that many within this category would be subject to the minimum income floor (MIF) rule, was there a case for including earnings which were treated as received for the purposes of the MIF for the additional purposes of the earnings exception from the benefit cap? As currently drafted the definition of earnings only extended to actual earnings.

The Department was aware of the issue. The Surplus Earnings and Self-Employed Losses Regulations 2015 may support the approach outlined by the Committee. The Department would continue to discuss this issue with the UC policy earnings team and with lawyers.

(l) How many people in receipt of UC were self-employed? The Committee had come across quite widely differing figures and wondered whether the Department could clarify the figure.

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[10] The Department subsequently expanded their answer, advising that introducing a personalised earnings exception threshold by mirroring conditionality rules could also potentially pose problems because of the work coach discretion involved. Using work coaches to set the benefit cap earnings exception threshold would also detract from their primary focus of supporting people into work. It was also important to note that a claimant who received the Limited Capability for Work Related Activity element of UC, the UC equivalent of ESA, was exempt from the cap.

It was extremely difficult to estimate the number of self-employed households in UC due to the fact that a number of them also have PAYE earnings. The Department would check the estimated number of self-employed claimants and get back to the Committee.[11]

(m) Had the Department considered whether the 12 months qualifying period for the grace period should be reconsidered? There were parts of the country for example where a six months qualifying period would be more consistent with work patterns and perhaps more appropriate in determining whether or not a person was in employment.

The qualifying period of one year had deliberately been set at quite a high level. Nonetheless the Department were looking at whether it remained appropriate.

(n) The explanatory memorandum advised that 'the Minister has considered the impact of the benefit cap on families, including the Family Test, as these policy amendments were developed.' Could the Department say what conclusions were reached? Could the Department say something about the application of the Family Test and the level of detail in which the implications were considered?

The Family Test was considered by the Minister along with the draft regulations and supporting documents. Most of the policy's impact on families, particularly lone parents, was contained in detail in the sections on Age and Gender in the draft Equality Analysis and draft Impact Assessment documents. An additional point made in the Family Test that does not appear in the documents considered by the Committee was that the earnings exception threshold in UC may encourage couple formation. As the threshold was the same for both single claimants and couples, there were potential incentives for two capped single people, who were in a relationship but living separately, to form a couple household so that they can more readily qualify for the benefit cap exception.

(o) The explanatory memorandum advised that there were additional sums being made available to local authorities through DHPs. What were the additional sums?

The Government had committed £870 million in funding for the Discretionary Housing Payments (DHP) scheme over the next 5 years to help ensure Local Authorities were able to protect the most vulnerable claimants and to support households adjusting to reforms. DHP funding for the benefit cap increased by £15 million for 2016/17 (from £25 million in 2015/16 to £40 million in

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[11] The Department subsequently expanded their answer, advising that forecasting based on the revised transition plan for scaling up the digital service suggested that the number of self-employed claimants in UC would have grown to around 30,000 in the year 2017/2018.

2016/17). For 2017/18, overall DHP funding was increasing further by £35 million from £150m in 2016/17 to £185m in 2017/18 to reflect the introduction of the lower benefit cap levels.

(p) The Committee understood anecdotally that some local authorities had applied a blanket ban on DHPs for people affected by the benefit cap.

The Department was not aware of that. An updated DHP guidance manual for Local Authorities was due to be published and the Department had been working closely with Local Authorities on the lower benefit cap. The Department did collect information from Local Authorities to understand how they are spending DHP funds and how much was spent in relation to households affected by the benefit cap. However, the latest information available was for 2015/16 and was therefore based on the existing benefit cap. The analysis showed that Local Authorities were using their DHP funds for the benefit cap.

(q) Would the Department be sharing the details of this proposal with the Department for Communities in Northern Ireland?

Yes. The Department had already been discussing the proposal with colleagues from the Department for Communities.

(r) The only solution for a number of young people potentially affected by an increase in the earnings threshold was to work more hours. They may not constitute a large group but the impact upon those unable to work additional hours could be severe.

Ministers were unwilling to countenance five different earnings thresholds. It would be difficult to deliver and would contradict the principle of simplicity underpinning UC.

(s) In some cases employers were unable to accommodate employees who wanted to work additional hours.

That was acknowledged, but it was a problem faced by all workers to some extent. There was evidence that some younger workers were paid the NLW or more, even though their employers were not legally obliged to do so.[12]

[12] The Department subsequently expanded their answer, advising that the Annual Survey of Hours and Earnings indicated that a higher proportion of 16-24 year olds were paid around the NLW than were paid around the NMW for 21-24 year olds (roughly 10% of 16-24 year olds in full time work were paid around the NLW, and roughly 15% of 16-24 year olds in part-time work were paid around the NLW).

(t) Even though not many were likely to be affected by the change, it would still be helpful to know who they were and precisely how they would be affected.

It should be borne in mind that very few people under the age of 25 years would have a benefit entitlement which would put them at risk of being subject to the benefit cap. The draft Impact Assessment showed the numbers affected and considered the impact by protected characteristic as well as the impact on the number of additional hours younger claimants not paid the NLW would need to work to remain exempt from the cap, compared to those paid the NLW.

3.5 After a period of private discussion, the Chair advised officials that the Committee had decided to ask for the draft proposals to be submitted on formal reference. The Committee was mindful of the Department's timetable for introducing the change in line with the uprated amount for the NLW which was due to take effect from the beginning of April 2017 and proposed, exceptionally, to draft its report without having undertaken a public consultation exercise. The intention was to produce a short report which would focus on a couple of points which the Committee felt worthy of particular note. Other points would be captured in a separate letter from the Secretariat. The Chair thanked the officials for attending and responding to the Committee's questions.

4. Private Session

[RESERVED ITEM]

5. The Universal Credit (Surpluses and Self-employed Losses) (Change of coming into force) Regulations 2017 (Paper 35/16)

5.1 The Chair welcomed James Wolfe (Deputy Director, Universal Credit Policy), Liz Roebuck (HEO, Working Age), Danielle Bates (HEO(D), Working Age) and Cath Hamp (SCS, External Relations and Orientation) to the meeting.

5.2 The Universal Credit (Surpluses and Self-employed Losses) (Digital Service) Amendment Regulations 2015 (SI 2015 No 345), on which the Committee had reported to the Secretary of State,[13] had been laid with a coming into force date of 6 April 2016. However that date had then been put back for a further 12 months by the Universal Credit (Surpluses and Self-employed Losses) (Change of coming into force) Amendment Regulations 2016 (SI 2016 No 215). James Wolfe reminded the Committee that the reason for initiating that delay had been twofold: first, the need to ensure that the legislation landed safely and would operate effectively and as intended; and second, because the slower pace of the roll-out of Universal Credit (UC) meant that the numbers of claimants or their partners who were in self-

[13] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/407122/universal-credit-surpluses-and-self-employed-losses-ssac-report.pdf

employment would not be sufficiently significant to apply the regulations and then adopt a ‘test and learn’ approach in order to make any necessary adjustments.

5.3 James Wolfe noted that the draft legislation being presented to the Committee proposed a further delay of 12 months. The new coming into force date would be 2 April 2018. Explaining the need for a further delay, he advised the Committee that the two reasons given in connection with the original delay applied equally to the current proposals. The Secretary of State had announced a revised roll-out plan for UC on 20 July 2016 and was consistent with the Department’s amended timetable. He emphasised that the further delay did not signal a change in policy – rather a change in the plan for UC roll-out.

5.4 The following main questions and comments were raised by Committee members in discussion:

(a) One of the main drivers for the original policy was around the potential for a claimant to manipulate their remuneration arrangements with their employer in order to maximise UC entitlement. With Real Time Information now being available, did the Department have any data on whether this was happening in practice?

There was nothing as yet. Since only around six per cent of people’s earnings fluctuated the potential numbers were already low at the outset. It then would take time for people to become aware of benefit rules and, for some, what might be possible by way of working the system. Delaying the coming into force date until 2 April 2018 would enable more time to collect data on this. If the Department then became aware that UC claimants in work were arranging with their employers that they should be paid quarterly there would be a need to look again at the timetable. As yet however, there was no indication that this was happening.

(b) Any self-employed person on UC could be adversely affected by the delay in implementing the substantive regulations. Would it be possible to keep them in tax credits until the main regulations came into force?

That would be difficult to operate, not least because the Department would be managing some claimants on UC with a partner in self-employment. It would also be an odd experience for individual claimants who might move in and out of self-employment or supplement their self-employment with earnings from employment. The Department did not want to see people lose out, but in this instance it was not so much about losses as about equity. Despite not having their losses from a previous assessment period carried forward, a self-employed person with a low level of earnings in a particular month would still have their needs met through a maximum UC award in that month.

(c) If the data was saying that no significant problem existed, could the proposals to amend the surplus earnings rules for those with high levels of fluctuations in their monthly earnings be left altogether?

The implementation of the regulations was not being delayed because the policy was no longer wanted. The regulations would be needed when more people with fluctuating earnings were in receipt of UC, but the Department needed significant numbers in the system before it could be said that the regulations had landed safely.

(d) Was it time to look again at the policy and see whether it was fit for purpose? By the time the proposals had come into effect there would be other significant factors at play – for example the impact of the two-child policy. Was there a need for a revised impact analysis?

That was a good point. There were aspects of the policy which the Department would be looking at again. The de minimis level was one such example.

(e) How would the Department communicate the messages around new legislation affecting UC claimants and their partners with fluctuating earnings but being delayed before it took effect? Would the Department be contacting its stakeholders on these issues?

The self-employed were a group that the Department had not previously interacted with and one of the difficulties the Department faced in reaching out to self-employed workers who were, or would be, in receipt of UC was that there was no representative body at a national level. For that reason communications needed to be very clear and effective. The Department was working on a strategy which did not rely on a single information leaflet being read, but had the back-up of successive levels of additional advice and which came in different forms. It was intended that these various means of communication should be put into operation ahead of the system being perfected. A recent communications initiative informing work coaches about payment cycles had gone down very well, and the Department would want to employ a similar approach with those with fluctuating earnings.

(f) It was well-known that the number of self-employed workers was growing. It was also the case that those with health conditions and disabilities were more likely to be self-employed – a focus of the recently published Work, Health and Disability Green Paper. For them, fluctuations in earnings may be a simple reflection of their fluctuating health condition. They could therefore be adversely impacted by a delay in the coming into force of the legislation.

Many with disabilities would be entitled to a higher level of UC. That in turn would mean that the need for regulations smoothing out fluctuations in earnings would be less. Although some people on UC were moving into self-employment and numbers were beginning to increase, most UC claimants were still single, childless and on low earnings. The Department therefore needed a higher level of numbers in self-employment and a wider range of differing individual and family circumstances before the regulations could be introduced.

(g) **The additional year before the legislation took effect would give the Department an opportunity to gather and consider further evidence. For example, in some cases the structure of UC with its policy on waiting days, payment in arrears and payment at monthly intervals meant that people were beginning a period of entitlement with debts. The assumption with the legislation on surplus earnings was that people would be returning to UC with savings from their earnings, but relevant information on debt might throw light on the appropriateness of that policy.**

The Department wanted to know the profile of the six per cent with fluctuating earnings. The extra year would give the Department an opportunity to update its information base and consider what adjustments might be needed.

5.5 After a private discussion of the Committee, the Chair advised DWP officials that, it was content that the draft regulations could proceed without the need to be submitted on formal reference. The Committee had accepted that the coming into force of the substantive regulations could be delayed although there were concerns about those who would, in the meantime, fail to derive any mitigating help from the adverse working of the tight rules around monthly assessment periods for the self-employed. The Committee would therefore be sending an informal letter expressing those concerns. In the meanwhile the Chair encouraged officials to ensure that the further fact-finding mentioned during the course of the discussion was pursued with some rigour. In closing, he thanked the officials for attending the meeting and addressing the Committee's questions.

6. AOB

Date of next meeting

6.1 The following meeting was scheduled to take place on Wednesday 25 January 2017 in Caxton House.

Annex A

Attendees

Guests and Officials

Item 3:	David Edson (G7 Working Age, Strategy, Policy and Analysis Group – Benefit cap) Hana Chambers (HEO(D) Working Age, Strategy, Policy and Analysis Group – Benefit cap) Katie Riley (G7 Analyst Housing and Migrants Access to Benefits)
Item 5:	James Wolfe (Deputy Director, Universal Credit Policy) Liz Roebuck (HEO, Working Age) Danielle Bates (HEO(D), Working Age) Cath Hamp (SCS, External Relations and Orientation)

Observer:	Izzie Pragnall (G7, Private Pensions and Stewardship)	
Secretariat:	Denise Whitehead	(Committee Secretary)
	Paul Mackrell	(Assistant Secretary)