

**EXPLANATORY MEMORANDUM TO**  
**THE HOUSING BENEFIT AND COUNCIL TAX BENEFIT (GENERAL)**  
**AMENDMENT REGULATIONS 2005**

**2005 No. 2904**

1. This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

**2. Description**

2.1 This package of regulations contains a number of amendments to the overpayments provisions of the Housing Benefit (General) Regulations 1987 (SI 1987/1971 (the HB regulations) and the Council Tax Benefit (General) Regulations 1992 (SI 1992/1814) (the CTB regulations). The main change is due to a decision made by a Tribunal of Social Security and Child Support Commissioners (Tribunal of Commissioners), which restricted the appeal rights of landlords and claimants against being the one chosen to repay a Housing Benefit (HB) overpayment. Another change is needed to remedy faults with the construction of the HB regulations for the calculation and recovery of overpayments, which have been highlighted by the abolition of benefit periods. The remainder of the changes are minor, merely standardising the terminology used to ensure consistency and some tidying up amendments.

**3. Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 None

**4. Legislative Background**

4.1 HB legislation provides that recoverable overpayments of benefit may be recovered, in all cases, from the claimant or from the person to whom the benefit was actually paid. Where HB is paid direct to a landlord rather than to the claimant, local authorities (LAs) have discretion whether to pursue recovery from the landlord or the claimant.

4.2 Following a campaign by landlords' associations, Ministers decided that landlords and claimants should have a right of appeal to a tribunal against a LA's decision to recover from them.

4.3 Social Security and Child Support Commissioner's Decision CH/4943/2001 (made on 15<sup>th</sup> July 2002) contradicted the policy intention, stating an appeal tribunal had no jurisdiction over the exercise of the LAs' discretion over whom to recover from. The Secretary of State took the case to the Court of Appeal. The Court decided that there was a right of appeal, but it's judgement was not specific as to what those rights actually were.

4.4 A Tribunal of Commissioners was convened to deal with the implications of the Court of Appeal's decision. It heard three joined cases and decided that the right of appeal was limited to Judicial Review grounds. This means that the landlord or claimant can only appeal if the LA has not applied the law correctly.

4.5 After seeking advice from Legal Counsel, Ministers agreed on 4<sup>th</sup> February 2004 that the Department for Work and Pensions (DWP) should not take the cases to the Court of Appeal, and instead should explore the possibility of amending legislation.

4.6 In April 2004, benefit periods were abolished for working age HB and Council Tax Benefit (CTB) claimants. Those changes were in The Housing Benefit and Council Tax Benefit (Abolition of Benefit Periods) Amendment Regulations 2004 (SI 2004/14). A benefit period was where HB and CTB claims could not run for more than 60 weeks, without a new claim being completed. The abolition has highlighted that the HB provisions for the calculation and recovery of HB overpayments require amendment and clarification.

4.7 An agreement was made between the European Community and its Member States and the Swiss Confederation on the free movement of persons, signed at Brussels on 21<sup>st</sup> June 1999. The HB/CTB regulations provide for overpaid HB/CTB to be recoverable from certain categories of benefit that are payable in other EU Member States. For the sake of uniformity the HB/CTB regulations should include recovery from those same categories of benefit paid in Switzerland.

## **5. Extent**

5.1 This instrument applies to Great Britain.

## **6. European Convention on Human Rights**

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## **7. Policy background**

### ***7.1 Amendments to the decision of who to recover an HB overpayment from***

A Tribunal of Commissioners' decision limited the right of appeal against the LAs' decision to recover from the claimant or landlord, to Judicial Review grounds. As the HB regulations are not prescriptive as to whom the LA should recover an overpayment from, the landlord and claimant cannot appeal on the grounds that they shouldn't be the person chosen to repay the overpayment.

The original policy intention was that each overpayment should be looked at on its own merits, and the decision of whom to recover from should be based on who misrepresented or failed to disclose information, so as to actually cause the overpayment. The HB regulations however, were drafted in such a way that LAs make their discretionary decision based on whatever specifics they want to take into account. There are therefore some LAs who look at who and what has caused the overpayment, but there are others who only consider the quickest and easiest method of getting the money back. In the latter case, this will always be the landlord as the LA can recover in large lump sums from them, whereas they are restricted to a maximum of £8.55 per week from claimants.

**Regulation 6(3) to (5)** amend Regulation 101 of the HB regulations, so that the chief consideration when deciding “whom to recover from” should be who has misrepresented or failed to disclose information, and in a case of official error the person who could reasonably have been expected to realise that there had been an overpayment. This will mean that overpayments caused by a change to the claimant’s personal circumstances, which the landlord could not possibly know about, should be recovered from the claimant rather than from the landlord. If this legislative requirement to recover from the person who has misrepresented or failed to disclose information (or could reasonably have been expected to realise there was an overpayment) is not taken into account, the person from whom payment is wrongly sought will have a right of appeal to an appeal tribunal, on the basis that the LA has not applied the law correctly, in accordance with the Tribunal of Commissioners’ decision. The amendments also change the order of “whom to recover from”, so that recovering from the claimant should be considered before recovering from the claimant’s partner.

### ***7.2 Amendments to the criteria that, if satisfied, exclude the landlord from recovery of an HB overpayment***

The HB regulations contain a set of criteria that if satisfied exclude the landlord from recovery of an overpayment, namely:

- he must report a suspected overpayment in writing to the LA; and
- he must not have colluded or contributed to the overpayment in any way.

The policy intention is to encourage landlords to report suspected fraud, such as claimants cohabiting or working whilst claiming. Officials did not envisage that overpayments caused by a claimant moving address and the landlord continuing to receive the benefit, would fall within this exclusion from recovery. However, some landlords have found a loophole and are using this legislation to avoid paying back overpayments that they have received, due to claimants changing address.

**Regulation 6(2)** amends Regulation 101(1) of the HB regulations so that the criteria list for circumstances that must be satisfied for an HB overpayment not to be recovered from the landlord, excludes overpayments caused by a claimant changing address.

### **7.3 *Amendments to the method of recovery following the abolition of benefit periods***

A problem has arisen with the HB overpayment provisions following the abolition of benefit periods for HB and CTB. This is due to the fact that a claimant who changes address within the same LA's area is now dealt with as a change of circumstance rather than a new claim.

Currently if a claimant reports a change of address late and is paid his HB directly from the LA, rather than to his landlord, he could receive benefit twice for the same period, both for the previous property and the new tenancy. He would however only require HB to pay the rent at his new address. There would therefore be an overpayment for the period he was not residing in the first property, but this would only be recoverable from his ongoing benefit at £8.55 a week.

**Regulation 7(3) and (4)** amend Regulation 102 of the HB regulations, allowing LAs the discretion to recover an overpayment from a previous tenancy in one lump sum, from the HB due for the second property. They also prescribe how the LA should calculate the amount of the overpayment that can be recovered. This will reduce LA administration costs and stress for the claimant in having deductions made from their future entitlement.

### **7.4 *Amendments to the calculation of an overpayment following the abolition of benefit periods***

Another problem that has arisen with the HB regulations following the abolition of benefit periods for HB and CTB involves the calculation of an overpayment. This again is due to the fact that a claimant who changes address within the same LA's area is now dealt with as a change of circumstance rather than as a new claim.

If HB is being paid direct to the landlord, both at the previous property (Landlord A) and for the new tenancy (Landlord B), the current wording of the HB regulations states that underlying entitlement must be calculated. This means the HB due for the second property should be offset against the overpayment for the previous tenancy, which would allow Landlord A to keep the HB for the period the claimant was not living in their property, and leave the claimant in rent arrears to Landlord B.

**Regulation 8** amends Regulation 104(1)(c) of the HB regulations so that underlying entitlement will not be calculated on these cases. This will allow the overpayment at the property the claimant was not residing in to be recoverable, and alleviate the problem of rent arrears at the new tenancy.

### **7.5 *EU-Switzerland Agreement***

**Regulation 9** amends Regulation 105 of the HB regulations and **Regulation 10** amends Regulation 91 of the CTB regulations. For the sake of uniformity, HB and CTB regulations will include recovery in Switzerland, from those

same categories of benefit from which recovery can be made in other EU Member States.

#### **7.6**     *Correction of a drafting error and the inclusion of “supersession”*

A drafting error was made when the regulations were amended in July 2001 by SI 2001/1605. The word “or” was inadvertently deleted by the amendment. The effect of this was to substantially narrow the scope of the definition of the “meaning of overpayment” by excluding payments made in error. Also the regulations do not include “supersession”, which does not reflect the policy intention.

**Regulation 2** amends Regulation 98 of the HB regulations. **Regulation 3** amends Regulation 83 and **Regulation 5** amends Regulation 84(5) of the CTB regulations. This will mean that the original wording of the “meaning of overpayment” is restored and “supersession” in addition to “revision” is included for both HB and CTB.

#### **7.7**     *Minor “tidying up” amendments, standardising the terminology*

Currently various phrases are used throughout the HB regulations with regards to “official error”. Some of these differ from those used in the CTB regulations. This can be confusing. Also the regulations include the wording “an authority”, which is not the usual terminology used when referring to an LA administering HB.

**Regulation 4(2) to (4)** amend Regulation 99 and **Regulation 7(2)** amends Regulation 102 of the HB regulations, so that the terminology used in respect of “official error” is standardised. Also the reference to “an authority” will be replaced with “a relevant authority”, which is the usual phrase, and is defined in regulations.

#### **7.8**     *Consultation*

Local Authority Associations have been consulted and expressed their general support of the package. The regulations were considered by the Social Security Advisory Committee at its meeting on 3<sup>rd</sup> August 2005. They suggested a couple of minor amendments, which we have incorporated into the package. The Committee agreed that proposals in respect of these regulations did not need to be formally referred.

### **8.     Impact**

8.1     A Regulatory Impact Assessment (RIA) has not been prepared for this instrument, as no impact on the private or voluntary sector is foreseen. An Initial Public Sector RIA was completed, which determined that a full RIA was not needed.

8.2     Impact on the public sector: There may be a reduction in recovery due to some LAs having to realign their practices with Departmental policy and

recover some rent allowance overpayments from claimants rather than from landlords. This is due to the retrieval being spread over a longer period of time, as LAs can only recover a maximum of £8.55 a week from claimants compared to large lump sums from landlords.

8.3 Analysts have estimated that the reduction in overpayment recovery might, at the very most, be in the region of £5m. However, they have also pointed out that the total amount of recovery from rent rebate cases (which LAs can only recover from the claimant, at £8.55 a week) is currently only slightly lower than that from rent allowance cases. That indicates that the amendments we are proposing, which align the rent allowance recovery procedures more closely to the ones for rent rebates, might in fact have a relatively small impact on the total amount recovered.

8.4 Another balancing factor is that there might be an increase in recoveries in those cases where the landlord was using the regulations to avoid repaying overpayments when the claimant had moved out of their property and the landlord continued to receive the HB. The proposed amendments will allow these overpayments to be recoverable from the landlord, rather than only recovering them weekly from the claimant.

8.5 It is likely therefore that the estimated reduction and increases in recovery due to the proposed amendments, plus the savings in not continuing to take the cases to court, should balance out.

## **9. Contact**

Jane Autherson at the Department for Work and Pensions, Tel: 0113 232 7755 or e-mail: [Jane.Autherson@dwp.gsi.gov.uk](mailto:Jane.Autherson@dwp.gsi.gov.uk) , can answer any queries regarding this instrument.