

**EXPLANATORY MEMORANDUM TO
THE EMPLOYMENT AND SUPPORT ALLOWANCE (CONSEQUENTIAL
PROVISIONS) (NO. 2) REGULATIONS 2008**

2008 No. 1554

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 As part of the Government's strategy for welfare reform, the Welfare Reform Act 2007 provides for the introduction of Employment and Support Allowance (ESA). It is planned that ESA will replace Incapacity Benefit (IB) and Income Support (IS) claimed on the grounds of incapacity for work from 27 October 2008.

2.2 The Government intends that the ESA regime will build on the successful 'Pathways to Work' initiative, which has demonstrated that, with the right help and support, many people on incapacity benefits can move back into work, reinforcing the view that labelling people on incapacity benefits as 'incapable of work' is wrong and damaging. ESA will not, therefore, assume that because a person has a significant health condition or disability they are incapable of work. Its focus, for those who are found to have 'limited capability for work' (LCW), will be on establishing what they can do and identifying the support required to help them towards taking up work.

2.3 The ESA regime will provide a financial and work-related support structure for those who are entitled to benefit on the grounds of having a health condition or disability. This will only be for new claimants and will not affect those claimants who are already in receipt of IB or IS on the grounds of incapacity for work.

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

3.1 None

4. Legislative Background

4.1 Part 1 of the Welfare Reform Act 2007 provides for a new benefit, ESA to replace IB and Income Support claimed on the grounds of incapacity for work from 27 October 2008. Section 28(2) of the Welfare Reform Act 2007 provides for consequential changes to be made to existing regulations.

4.2 The Regulations make the necessary changes to primary and secondary legislation relating to social security and these are listed in annex A. The more significant amendments are described below.

5. Territorial Extent and Application

5.1 This instrument applies to Great Britain.

6. **European Convention on Human Rights**

The Minister for Employment and Welfare Reform, Stephen Timms, has made the following statement regarding Human Rights:

In my view the provisions of the Employment and Support Allowance (Consequential Provisions) (No. 2) Regulations 2008 are compatible with the Convention rights.

7. **Policy background**

Policy

Amendments to the Income Support (General) Regulations 1987

7.1 These amendments ensure that the Income Support (IS) regulations make reference to ESA where appropriate and explain how they will interact as a consequence of ESA being introduced.

7.2 Where the IS claimant's partner is in receipt of ESA contributory (C) this will need to be treated as income for IS. The IS regulations contain provisions for calculating the amount of income to be taken into account and the period for which it is attributed.

7.3 There are exceptions to the definition of "persons of a prescribed category" as it applies to income support. The amendment to regulation 14(2) makes an exception for a young person who is entitled to ESA.

7.4 Although both ESA and IS are weekly benefits they may be paid for different pay-weeks. To cater for this, regulation 31(2) provides a method of attributing payments of certain benefits on a daily basis and is amended to include ESA.

7.5 There are occasions where, certain benefits are attributed to only part of the IS pay week. Regulation 32(4)(b) provides for the calculation of the amount to be taken into account in this situation and is amended to include ESA.

7.6 A person's weekly rate of ESA may be reduced if they do not comply with certain rules. This is known as a sanction. An amendment to regulation 40(3) ensures that the full amount of ESA (C) is taken into account and the claimant's IS is not increased if their partner's ESA (C) is reduced because of a sanction.

7.7 In urgent cases there are modifications to the ordinary rules on income and capital. As a general rule, all income and capital is taken fully into account but there are certain exceptions. One exception is made so that arrears of, or concessionary payments in respect of non-payment of, urgent cases payments of IS are not taken into account in the calculation of further urgent cases payments. A similar exception has been made to regulation 72(2) for the same types of ESA payments.

7.8 Part week payments of IS are needed in some cases, mainly at the start or end of claims. Where IS is payable for a part week, different rules apply to the attribution of

income. Amendments to regulations 73(3) and 75 ensure that payments of ESA are covered by these rules.

7.9 People who qualify for the disability premium (which includes people whose partner is receiving long-term incapacity benefit) also qualify for a £20 earnings disregard. The £20 disregard can continue after the claimant or partner reaches 60 and the disability premium is replaced by the higher pensioner premium provided it applied immediately before they reached 60 and the employment is continuous. Certain breaks in entitlement or part-time employment are ignored: for example, permitted periods during which the claimant is not entitled to JSA or IS because they are in remunerative work. The amendment to Schedule 8, para 4(7) ensures that when the claimant or partner has attained the age of 60 they may not be entitled to ESA(IR).

7.10 For the purposes of calculating income any concessionary payments made to compensate for the non-payment of IS sums is disregarded. An amendment to Schedule 9, para 7(b) ensures that any concessionary payment made to compensate for the non-payment of ESA is treated in the same way.

7.11 Similarly, training allowance is disregarded as income unless it is paid as a substitute for various benefits. An amendment to Schedule 9, para 13(1)(a) ensures that any payment made as a substitute of ESA is treated in the same way.

7.12 Arrears of certain benefits, including IS and JSA income-based (IB), and concessionary payments made to compensate for such arrears are treated as capital. That capital sum is disregarded for 52 weeks or, where it both exceeds £5,000 and rectified or compensated for an official error, until the end of the award during which the sum was received. These sums and equivalent payments relating to ESA(IR) are also disregarded in JSA(IB) and will be disregarded in ESA(IR). 'The award' for this purpose means the award either of IS or JSA(IB) during which the arrears or concessionary payment was received and includes subsequent awards (of either benefit) provided that they are continuous. An amendment to Schedule 10, para 7 treats payments which were received during awards of ESA(IR) in the same way.

Amendments to the Jobseeker's Allowance Regulations 1996

7.13 These amendments ensure that the JSA regulations make reference to ESA where appropriate and explain how they will interact as a consequence of ESA being introduced.

7.14 In determining whether a part-time student is available for employment the main condition is that for the whole three months immediately before the course commenced the claimant had been in receipt of JSA, IS on the grounds of incapacity or IB. Regulation 11(2) is amended to treat claimants who had been in receipt of ESA while having LCW in the same way.

7.15 Where the time for claiming JSA is extended and the claimant had been receiving IS on the grounds of incapacity or IB during that backdated period Regulation 14(1)(o)(ii) allows the claimant to be treated as available for work. An amendment to this enables a claimant in receipt of ESA to be treated in the same way.

7.16 There is normally no entitlement to JSA for the first three days of a claim. These are known as 'waiting days.' Waiting days do not need to be served again if an award of JSA commences within 12 weeks of a previous award of IS or IB ending. Regulation 46(1) is amended to include previous awards of ESA.

7.17 In JSA two or more jobseeking periods can be treated as one period in certain circumstances. These circumstances currently include the situation in which the two periods are separated by a period during which the person is incapable of work, or treated as incapable for work. An amendment to regulation 48(2) ensures that periods during which the person is, or treated as having, LCW will be treated in the same way.

7.18 Regulation 49 enables men between 60 and 65 to have days treated as part of a jobseeking period where, under normal rules, they would not. However, this does not include days of incapacity for work. The amendment to regulation 49(4) will ensure that days of LCW are treated in the same way.

7.19 A person who is entitled to JSA and who becomes incapable of work for no more than two weeks (short periods of sickness) may be treated as capable for work and continue to receive JSA provided that they do not make a claim for IB or IS and have not been in receipt of IB, Severe Disability Allowance (SDA), Statutory Sick Pay (SSP) or IS (including the disability premium) in the previous eight weeks. An amendment to regulation 55 adds a reference to ESA.

7.20 A person who is entitled to JSA and who goes abroad temporarily for the purpose of receiving treatment funded by the NHS may continue to receive JSA provided that they have not made a claim for Incapacity Benefit (IB) or IS before going abroad. They have to supply a written declaration stating that they are unfit for work and satisfy the conditions for an award of JSA. Thus a claimant may choose to remain on JSA or to claim IS or IB. An amendment to regulation 55A adds a reference to ESA.

7.21 Certain 16-17 year olds are exempt from the lower age limit imposed by the Jobseekers Act. An amendment to regulation 61(1)(c) makes similar exceptions for 16-17 year olds who have a LCW.

7.22 A young person who is entitled to JSA or IS in their own right is not treated as a member of a JSA claimant's family. The amendment to regulation 76(2) makes a similar exception for a young person who is entitled to ESA.

7.23 Regulations provide for circumstances in which, and the period for which, a young person is to be treated as being or not being a member of the household during a temporary absence abroad or in hospital and the way this period is to be calculated. Generally, where the temporary absence began before the JSA claim was made, the period starts from the date of that claim rather than the start of the temporary absence, but this does not apply if the JSA claimant had been entitled to IS immediately before he made that claim. The amendment to regulation 78(6) makes the same provision where the JSA claimant had been entitled to ESA immediately before making the JSA claim.

7.24 Although both ESA and JSA are weekly benefits they may be paid for different pay-weeks. To cater for this, regulation 96(2) provides a method of attributing payments of certain benefits on a daily basis and is amended to include ESA.

7.25 There are occasions where, certain benefits are attributed to only part of the IS pay week. Regulation 97(4)(b) provides for the calculation of the amount to be taken into account in this situation and is amended to include ESA.

7.26 A person's weekly rate of ESA may be reduced if they do not comply with certain rules. This is known as a sanction. An amendment to regulation 103(3) ensures that the full amount of ESA(C) is taken into account and the claimant's JSA is not increased if their partner's ESA(C) is reduced because of a sanction.

7.27 In certain circumstances where a sanction has been applied, hardship payments of JSA may be made if the person, or couple, is in hardship. A 'person in hardship' and 'couple in hardship' does not include people who, or whose partner, is entitled to IS. The amendments to regulations 140(3) and 146A(3) make a similar exception for people who are entitled to ESA.

7.28 In urgent cases there are modifications to the ordinary rules on income and capital. As a general rule, all income and capital is taken fully into account but there are certain exceptions. One exception is made so that arrears of, or concessionary payments in respect of non-payment of, urgent cases payments of IS are not taken into account in the calculation of further urgent cases payments. A similar exception has been made to regulation 149(1)(a)(ii) for the same types of ESA payments.

7.29 Part week payments of JSA are needed in some cases, mainly at the start or end of claims. Where JSA is payable for a part week, different rules apply to the attribution of income. Amendments to regulations 150(1)(b) and 153(b) ensure that payments of ESA are covered by these rules.

7.30 Where the partner of a JSA(IB) claimant is involved in a trade dispute the claimant's benefit is not affected if the partner is incapable of work or within the 'maternity period'. An amendment to regulation 171(b)(ii) allows periods during which the partner has a LCW to be treated in the same way.

7.31 There are certain categories of members of a joint-claim couple who are not required to satisfy the labour market conditions, those that are incapable of work in accordance with the provisions of Part XIA of the Benefits Act and those who are incapable of work by reason of pregnancy. An amendment to Schedule A1, para 6 and 12 enables periods of LCW to be treated in a similar manner.

7.32 Schedule 1, para 1(3) provides for the rate of Personal Allowance (used in the calculation of income-based JSA) for couples. Where both members of a couple are under 18 a higher rate applies if one member would satisfy the requirements for entitlement to IS. The amendment makes a similar provision where a member of a couple would satisfy the requirements for entitlement to ESA(IR).

7.33 Premiums are additional amounts that are paid with JSA in certain circumstances. These include the disability and higher pensioner premiums. One of the qualifying conditions for these is that the person has been, or has been treated as being, incapable of work for 364, or in some cases 196, days or more. The amendment to Schedule 1, para 20H(1)(e) adds a reference to people who have had, or have been treated as having had, LCW for the same periods.

7.34 People who qualify for the disability premium (which includes people whose partner is receiving long-term incapacity benefit) also qualify for a £20 earnings disregard. The £20 disregard can continue after the claimant or partner reaches 60 and the disability premium is replaced by the higher pensioner premium provided it applied immediately before they reached 60 and the employment is continuous. Certain breaks in entitlement or part-time employment are ignored: for example, permitted periods during which the claimant is not entitled to JSA or IS because they are in remunerative work. The amendment to Schedule 6, para 5(7) and Schedule 6A, para 1(5) makes similar provision for periods during which the claimant is not entitled to ESA.

7.35 For the purposes of calculating income any concessionary payments made to compensate for the non-payment of JSA sums is disregarded. An amendment to Schedule 7, para 8(b) allows any concessionary payment made to compensate for the non-payment of ESA to be treated in the same way.

7.36 Similarly, training allowance is disregarded as income unless it is paid as a substitute for various benefits. An amendment to Schedule 7, para 14(1)(a) ensures that any payment made as a substitute of ESA is treated in the same way.

7.37 Arrears of certain benefits, including IS and JSA(IB), and concessionary payments made to compensate for such arrears are treated as capital. That capital sum is disregarded for 52 weeks or, where it both exceeds £5,000 and rectified or compensated for an official error, until the end of the award during which the sum was received. These sums and equivalent payments relating to ESA(IR) are also disregarded in JSA(IB) and will be disregarded in ESA(IR). 'The award' for this purpose means the award either of IS or JSA(IB) during which the arrears or concessionary payment was received and includes subsequent awards (of either benefit) provided that they are continuous. An amendment to Schedule 8, para 12 treats payments which were received during awards of ESA(IR) in the same way.

Amendments to the State Pension Credit Regulations 2002

7.38 These amendments ensure that the State Pension Credit (SPC) regulations make reference to ESA where appropriate and explain how they will interact as a consequence of ESA being introduced.

7.39 For the purpose of calculating the savings credit, an amendment to regulation 9 of the SPC regs inserts ESA in the list of income types which do not count as qualifying income for the savings credit.

7.40 The regulation for part-weeks provides for a simple means of ensuring continuity of entitlement for claimants transferring from IS or JSA(IB) to SPC. Claimants in such

circumstances are entitled to a part-week payment of the guarantee credit to take them up to the start of their first week on SPC. This part-week payment is paid irrespective of the claimant's income (or their partner's if applicable). The amendment to regulation 13A(1)(a) includes a reference to ESA(IR) to ensure these arrangements also apply to claimants transferring from ESA(IR) to SPC.

7.41 Although both ESA and SPC are weekly benefits, they may be paid for different pay-weeks. To cater for this, regulation 13B(1)(b) provides a method of taking account of certain benefits on a daily basis and is amended to include ESA.

7.42 As a general rule, where a deduction is being made from a benefit, the gross amount of that benefit is taken into account in the SPC calculation. This ensures that SPC is not increased where, for example, a sanction applies to, or an overpayment is being recovered from, that other benefit. An exception is made to this rule where a deduction is made from IB because of pension payments or councillors' allowances. In those cases the net amount of IB is taken into account. This avoids double counting as the pension or allowance will itself be income and taken into account. The amendment to regulation 15(4)(c) makes a similar exception where deductions are made from ESA for pension payments and councillor's allowances under section 2(1)(c) of the Welfare Reform Act.

7.43 Schedule 1, para 6 provides for a transitional additional amount where that is needed to ensure that someone transferring from IS or JSA(IB) to SPC does not suffer a decrease in income at that point. The amendment allows for a similar provision to be available for someone who transfers from ESA(IR) to SPC.

7.44 Arrears of benefit and concessionary payments are treated as capital and disregarded in certain circumstances until the end of the award during which the sum was received. These sums and equivalent payments relating to ESA(IR) will be disregarded. 'Benefit for this purpose means the award of SPC during which the arrears or concessionary payment was received and includes subsequent awards provided that they are continuous. The amendment to Schedule 5, para 20(2) and 20A(2) treats payments which were received during awards of ESA(IR) in the same way.

7.45 People who, or whose partner, receive certain benefits, including long-term incapacity benefit, qualify for a £20 earnings disregard. This can continue to apply, in certain circumstances, after the person has reached State Pension age and no longer receives IB. A similar disregard applies in IS and JSA(IB) and people who have benefited from this can, in certain circumstances, continue to do so if they transfer to SPC. The amendment to Schedule 6, para 4(1) and 4(2) makes the same provision for people who are, or were, receiving ESA.

The Social Fund (Recovery by Deductions from Benefits) Regulations 1988

7.46 An award from the Social Fund may be recovered by deduction from an award of ESA(IR).

Social Fund Cold Weather Payments (General) Regulations 1988

7.47 Under prescribed circumstances, a claimant may be entitled to a Cold Weather Payment. These circumstances are where there has been a recorded period of cold weather or a forecasted period of cold weather at a weather station identified within these regulations. A claimant may qualify for a Cold Weather Payment where they have an award of ESA(IR) which includes either a Pensioner Premium or a Severe Disability Premium and they live within a designated post code area.

The Social Fund Winter Fuel Payment Regulations 2000

7.48 A definition of ESA(IR) has been included within these regulations. A person will qualify for £100 Winter Fuel Payment where, during the qualifying week, he satisfies the qualifying criteria. The qualifying week is the week starting on the third Monday in September in any particular year. The claimant may, before the 31st March of the year following the year in which the qualifying week falls, be awarded a Winter Fuel Payment in respect of the previous winter where it is clear they will qualify for such a payment. Where a claimant becomes entitled to ESA(IR) due to no longer being excluded under Section 115 of the Immigration and Asylum Act 1999 they may also become entitled to a Winter Fuel Payment in respect of the winter following the qualifying week without having to make a claim.

The Social Fund Maternity and Funeral Expenses (General) Regulations 2005

7.49 We have included a definition of ESA and ESA Regulations. The claimant will be paid an amount to meet maternity expenses where the claimant or their partner has an award of ESA(IR). Similarly, the claimant will satisfy the first condition for a funeral payment where, in respect of the date of claim, they or their partner have an award of ESA(IR).

The Social Security (Claims & Payments) Regulations 1987

7.50 The Social Security (Claims and Payments) Regulations 1987 (“the Claims and Payments Regulations”) set out common rules connected with the administration of social security benefits, in relation to the making of claims by claimants and the making of payments by the Secretary of State. The introduction of ESA has necessitated substantial amendments to the Claims and Payments Regulations: sometimes including ESA within the existing structure of a common rule applying to all benefits, sometimes opting for one set of rules to be applied to ESA as opposed to another where existing rules differ (for example where the rules relating to Incapacity Benefit differ from those relating to Income Support), and sometimes adopting an entirely new rule altogether.

7.51 A claim to ESA will normally be made by telephone using a telephone number stipulated by the Secretary of State. Telephone calls will be recorded and no signed claim form will usually be required. The Secretary of State does have the discretion to require a claim to be made in writing and the customer themselves may, for various reasons prefer to make their claim in writing.

7.52 The claimant must provide all information and supporting evidence before their claim can be accepted as a valid claim. Where the initial date of contact is to be treated as the date of claim and the claim is made over the telephone or in writing, the claimant has

one calendar month from the Initial Date Of Contact to provide the necessary information and supporting evidence. The Secretary of State does have the discretion to allow an extension to the one month, during which the claim must be made if the initial date of contact is to be treated as the date of claim. This will ensure evidence is gathered within a reasonable timescale.

7.53 Where the claimant informs the appropriate DWP office of their intention to claim ESA and then makes the claim within one calendar month, and provided all information and supporting evidence is received, the claim will be treated as being made on the date the claimant originally notified the appropriate office of their intention to claim.

7.54 The members of a couple may choose between themselves whom should claim ESA(IR). However, where they cannot decide between themselves the Secretary of State will decide on their behalf. In addition, where one member of a couple is in receipt of ESA(IR) and the other member makes a claim, where they both agree that member should be the claimant, the first award should cease. Both members of a couple may claim ESA(C) where they both satisfy the conditions of entitlement.

7.55 Where a claimant is expected to be confined or has been confined a claim to Maternity Allowance will be treated as a claim to ESA provided the claim is made within the prescribed time limits. In these circumstances the claimant will be paid 6 weeks prior to and up to the 14th day after confinement where there is no entitlement to Maternity Allowance. Where there is entitlement to Maternity Allowance and the rate payable is less than the ESA(C), payment of MA maybe 'topped-up' by ESA(C) up to the maximum rate of ESA(C) payable. This 'top-up' payment is paid throughout the Maternity Allowance Period.

7.56 Claimants are able to make an advance claim to ESA where the conditions of entitlement are not satisfied on the date the claim is made but will be satisfied at a future date. For example, where the claimant has excess income but knows that this will either reduce or end at some point in the future and their income will no longer exceed their ESA. However, these provisions do not apply to persons from abroad as these claimants have to show habitual residency before entitlement to ESA can be established.

7.57 ESA will be paid from the first day of the award regardless of whether this is the first payday or not. We have therefore amended existing regulations to ensure part week payments of ESA can be made where necessary.

7.58 ESA will be paid fortnightly in arrears, unless otherwise specified by the Secretary of State, and on the day of the week determined by the last two numbers of the claimants National Insurance Number. The Secretary of State may, however, decide in any particular case that ESA should be paid on any day of the week where he decides this is necessary.

7.59 In cases where there are pension payments and the weekly amount of ESA is less than £5.00 after deductions for pension payments this will be paid at intervals not exceeding 12 months. Where the weekly rate of ESA amounts to less than £1.00 this will be paid in arrears at intervals of not more than 13 weeks. The justification for the

difference in time span is that the pension payments will also be available to the individual concerned. Where the weekly amount of ESA is less than 10 pence per week this will not be paid. Finally, claims for ESA(C) can be made on behalf of someone who has died.

7.60 Claimants who are entitled to a personal pension must provide enough information to allow the Secretary of State to verify any amounts received. This information is needed in order to calculate notional income where the pension has not been claimed. Also, a partner of an ESA claimant will be able to act as an alternative payee for Winter Fuel Payments where the partner is in receipt of ESA(IR).

7.61 There are time limits for claiming ESA which the claimant must adhere to. The claimant has three months in which to make a claim, beginning with the first day for which the claim is made.

7.62 Third Party Deductions e.g. Housing Costs and Water Charges will be available to claimants who are on ESA. We have included ESA within the Claims and Payments Regulations as a specified benefit. This means deductions can be taken from the payment due to the claimant and paid to a third party. Similarly, deductions can be taken from the payment due to the claimant in respect of Child Support maintenance payable to a person with care of a qualifying child and ESA has been included as a specified benefit to allow for this.

The Social Security and Child Support (Decision and Appeals) Regulations 1999

7.63 These Regulations are amended so that the general provisions relating to decision-making are applied to ESA. These include revisions under regulation 3, supersessions under regulation 6 and the effective date for supersessions under regulation 7.

7.64 Further amendments have been made to regulation 3 so that decisions relating particularly to ESA may be revised including where the claimant is terminally ill and where a decision has been made to reduce the claimant's benefit.

7.65 The amendments to regulations 6 and 7 also include changes specific to ESA. These include where new medical evidence has been received and where the claimant has failed to attend certain interviews.

7.66 These regulations have been amended to include ESA where determinations have to be made with incomplete evidence. In these instances the Secretary of State will make the decision based on the evidence available on the assumption that missing evidence will be adverse to the claimant.

7.67 The Secretary of State may require further information or evidence before they can determine whether a decision is to be revised or superseded. The persons listed within these regulations must supply the information or evidence within certain time limits. We have included a person whose award of ESA is based on them having or being treated as having LCW within this rule.

7.68 A person claiming ESA would normally have to submit themselves for a medical examination, except where a question had arisen as to whether they had LCW. We have included reference to the relevant ESA regulation which outlines this.

7.69 There are certain decisions against which no appeal can be made and we have included ESA within the relevant parts of these regulations. The relevant decisions are:

- a decision around which partner should make a claim for ESA (IR),
- the decision to treat a claim to Maternity Allowance as a claim to ESA
- the manner and time of payment of ESA.

7.70 Except in certain circumstances, where an award of ESA is superseded on the grounds of a change of circumstances, the new award will take effect from the first day of the benefit week in which the change occurs. However, certain changes will take effect from the day on which the change occurs. These include where:

- an award of ESA comes to an end
- a child/young person lives with or is expected to live with the claimant for part of a week
- the claimant or a family member ceases to be or is expected to cease to be a patient
- a claimant becomes or ceases to be a prisoner
- during a current claim to ESA the claimant makes a claim to a relevant social security benefit and this has resulted in a change to his benefit week.

These regulations have been amended accordingly.

7.71 Where a change is as a result of income being treated as paid on a particular date the superseding decision will take effect from the date on which the payment is treated as paid. Also where a change has resulted in a reduction of ESA and the Secretary of State decides that it is not practicable to apply the change when it would have been applied, the superseded decision will take effect from the first day of the benefit week following the week in which the superseded decision is made or change is expected to occur. The regulations have been amended accordingly.

7.72 Where a superseding decision has been made on a change and that decision is superseded by a further decision due to circumstances having changed, the subsequent decision will take effect from the second date of change. This has also been included within Schedule 3C.

The Social Security Contributions and Benefits Act 1992

7.73 These amendments bring ESA (C) recipients within the additional State Pension provisions on similar terms to long term incapacity benefit recipients.

7.74 Section 44A(2)(d) is amended to provide for a person in receipt of ESA (C) for a complete tax year to build up rights to the additional State Pension by being treated as having earned at the annual lower earnings limit for National Insurance purposes. The

rules then provide for those notional earnings to be further enhanced to the statutory low earnings threshold (£13,500 in 2008/09).

7.75 The insertion of new subsection 7 will allow a person to build up additional State Pension entitlement after a certain period depending on the ESA (C) component in payment. A person in receipt of the work related activity component of ESA (C) will start to build up additional State Pension entitlement after 52 weeks. Others will start to build up additional State Pension entitlement upon receipt of the support component.

7.76 In determining their entitlement to long term IB people who were in receipt of Statutory Sick Pay (SSP) immediately before receiving contributory IB could have this prior period of incapacity taken into account. As this link to prior SSP entitlement will not feature in ESA there is potential for a small number of people who are due to reach State Pension age before 6 April 2012 to be disadvantaged in terms of additional State Pension entitlement. To cater for this transitional provisions at subsection 44A(7)(c) will allow people in this group who were in receipt of SSP immediately before receiving ESA (C) to be treated as receiving the Support Component for additional State Pension purposes.

The Social Security (Credits) Regulations 1975

7.77 A claimant will be entitled to a National Insurance credit for each week where there is entitlement to ESA(C) or LCW. These credits will help the claimant qualify for benefit/pension in the future. Certain other credits will help the claimant satisfy the contribution conditions for ESA(C). These include:

- credits for each week they undertake approved training
- credits awarded as a result of finishing full time education, training or apprenticeship
- credits awarded for every year up to and including the year in which Bereavement Benefit ceased can also be used to satisfy the second contribution condition in respect of ESA(C).

The Social Security (Crediting & Treatment of Contributions and National Insurance Numbers) Regulations 2001

7.78 The Social Security (Crediting & Treatment of Contributions and National Insurance Numbers) Regulations 2001 outline the treatment of National Insurance Contributions in relation to contributory benefits. Certain late paid contributions can be used to satisfy the second contribution condition in order to qualify for ESA(C) and the Social Security (Crediting & Treatment of Contributions and National Insurance Numbers) Regulations 2001 have been amended to include ESA(C). Similarly, certain late paid class 1 contributions can count towards ESA(C) provided it can be shown that the claimant was in no way responsible for the contributions having been paid late.

The Social Security (Overlapping Benefits) 1979

7.79 ESA(C) will be a contributory benefit for the purposes of the Overlapping Benefits Regulations. This means that ESA(C) cannot be paid at the same time as certain

other personal benefits as outlined within Schedule 1 of the Overlapping Benefits Regulations. Instead an adjustment will need to be made where two or more personal benefits become payable in order to avoid an overpayment. Similarly, where a dependency increase is payable for another benefit and that dependant becomes entitled to ESA(C), the dependency increase must be adjusted accordingly. Finally, we have amended these regulations in order to avoid an adjustment for an overlapping benefit being made on more than one benefit.

The Social Security (Loss of Benefit) Regulations 2001

7.80 Where a claimant has been convicted of at least two separate benefit offences and one of those offences has been committed within three years of the other, certain restrictions will be applied to their ESA. A disqualification period will be imposed starting on the 28th day from the date of the determination. Any ESA to which the offender may be entitled within the disqualification period will then be reduced by either 20% or 40% depending on family circumstances. However, HB/CTB cannot be reduced where the offender or a member of the offender's family is entitled to IS or JSA(IB). An amendment will add entitlement to ESA(IR) to that provision so that ESA(IR) customers will not have their HB/CTB reduced.

The Social Security (Benefit) (Married Women and Widows Special Provisions) Regulations 1974

7.81 When looking at the contribution conditions for ESA(C) any periods of Widows Benefit/Bereavement Benefit or Widowed Mothers Allowance/Bereaved Parents Allowance need to be considered. Where these benefits ceased for reasons other than remarriage, cohabitation or the forming of a civil partnership, the first and second contribution condition can be deemed as satisfied for the purposes of ESA(C). This will align the provisions for satisfying the contribution conditions for ESA(C) with those of other contributory benefits.

Consultation

7.82 The Government set out its strategy for helping those with a health condition or disability in its Green Paper '*A new deal for welfare: Empowering people to work*' (Cm 6730) published in January 2006. The measures proposed were intended to tackle three key areas: increasing the number of people who remain in work when they fall sick or become disabled; increasing the numbers leaving benefits and finding employment; and better addressing the needs of all those who need extra help and support.

7.83 The Green Paper asked for comments on the Government's proposals. The formal consultation period lasted 12 weeks, up to 21 April 2006. However, comments were accepted up to the following June. The results of over 600 responses were published in '*A new deal for welfare: Empowering people to work. Consultation report*' (Cm 6859) published in June 2006. However, not all responses would have dealt exclusively with ESA. During the consultation period Ministers and officials attended or hosted almost a hundred events with a total estimated audience of over 5,000 people. The Department also initiated a prototype discussion forum devised with, and moderated by, the Hansard Society on which over 80 people registered.

7.84 The consultation showed there was strong support for reforming the current incapacity benefits regime and extending the Pathways to Work initiative and that, amongst other things:

- there was also strong support for making the capability assessments more effective and for reviewing the arrangements for people trying work
- there were concerns about the levels of benefit (which will be the same as the basic levels of Jobseeker's Allowance during 'the assessment phase' – which will normally be the first 13 weeks of benefit) and whether the Pathways to Work support package would respond sufficiently to the needs of people with mental health conditions and those with learning disabilities.

7.84 In devising the new capability assessments which will be integral to the ESA regime, two technical working groups, consisting of medical and other relevant experts, were set up to consider how the current Incapacity Benefit 'Personal Capability Assessment' could be improved and updated. One of these groups focused specifically on mental health and learning disabilities and the other on physical functions. As well as the technical working groups, consultation groups, consisting of organisations representing the main user groups were set up. The Department continues to involve these organisations in other aspects of the work related to the capability assessments.

7.85 Since the Green Paper consultation exercise ended, officials have continued to meet voluntary organisations on request to listen to their concerns in relation to the detailed policy and to consider if, and how, those concerns can be overcome. As ESA moves from detailed policy into implementation Jobcentre Plus is sharing the development of operational plans with representative organisations through a series of events, including workshops and presentations at existing forums and local meetings. In September, Jobcentre Plus hosted a large seminar for representative organisations to explain the 'customer journey' - how people will be able to claim ESA and how their claims will be dealt with during the assessment phase. Jobcentre Plus will continue to keep representative organisations informed as operational plans develop.

Guidance

7.86 ESA will transfer many of the benefit rules that currently apply in Incapacity Benefit and Income Support. So, much of the detailed information, for example treatment of income in ESA income-related allowance, is already in the public domain. However, it was recognised that significant changes would be made in relation to the capability assessments that will be a fundamental part of ESA. Therefore, sets of key regulations in draft and other explanatory material were made available to the House by the Government during the passage of the Welfare Reform Bill (*Welfare Reform Bill: Draft Regulations and supporting material*, October 2006, revised January 2007). This document was also made publicly available on the Department's website.

7.87 The Department has been in close contact with other Government departments and devolved administrations to ensure that there is clear understanding of the introduction of ESA and that they identify the effects the new benefit will have on their areas of responsibility. The departments have also had an opportunity to comment upon

the draft regulations. The regulations have also been sent to the Social Security Advisory Committee for information.

7.88 Jobcentre Plus recognises that a broad range of audiences need to have information about the new allowance, for example, that customers know how to make a claim, and that GPs understand how to provide their evidence. In developing the ESA communication strategy Jobcentre Plus has put a great deal of effort into compiling desk research and insights from across government in order to identify all of the audiences who need to be aware of the introduction of ESA and its implications for them. The strategy is already being put into effect as communications have already started with staff, representative organisations and other stakeholders to raise awareness about the ESA regime and create an understanding about what it will achieve and how it will work. The strategy will employ a wide variety of methods to suit the particular audience including changes to the Department's range of benefit leaflets, articles in magazines and on websites aimed at welfare advisers, healthcare practitioners, representative organisations, employers and others.

8. Impact

8.1 An Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary sectors.

8.2 The impact on the public sector is nil.

9. Contact

Any queries regarding this instrument should be directed to the following;

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Annex A

The primary legislation amended by these Regulations are:

1. The Social Security Contributions and Benefits Act 1992
2. The Social Security (Recovery of Benefits) Act 1997

The subordinate legislation amended by these Regulations are:

1. The Age-Related Payments Regulations 2005
2. The Children (Leaving Care) Social Security Benefits Regulations 2001
3. The Child Support Departure Direction and Consequential Amendments Regulations 1996
4. The Child Support (Maintenance Assessments and Special Cases) Regulations 1992
5. The Child Support (Maintenance Assessment Procedure) Regulations 1992
6. The Child Support (Maintenance Calculation Procedure) Regulations 2000
7. The Child Support (Maintenance Calculations & Special Cases) Regulations 2000
8. The Child Support (Variations) Regulations 2000
9. The Community Charge (Deductions from Income Support) (No. 2) Regulations 1990
10. The Council Tax (Deductions from Income Support) Regulations 1993
11. The Fines (Deductions from Income Support) Regulations 1992
12. The Income Support (General) Regulations 1987
13. The Jobseeker's Allowance Regulations 1996
14. The Social Fund Cold Weather Payments (General) Regulations 1988
15. The Social Fund Maternity and Funeral Expenses (General) Regulations 2005
16. The Social Fund (Recovery by Deductions from Benefits) Regulations 1988
17. The Social Fund Winter Fuel Payment Regulations 2000
18. The Social Security and Child Support (Decisions and Appeals) Regulations 1999
19. The Social Security (Airmen's Benefits) Regulations 1975
20. The Social Security (Benefit) (Married Women and Widows Special Provisions) Regulations 1974
21. The Social Security (Benefit) (Members of the Forces) Regulations 1975
22. The Social Security Claims and Information Regulations 1999
23. The Social Security (Claims and Payments) Regulations 1987
24. The Social Security (Crediting and Treatment of Contributions and National Insurance Numbers) Regulations 2001
25. The Social Security (Credits) Regulations 1975
26. The Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000
27. The Social Security (Jobcentre Plus Interviews for Partners) Regulations 2003
28. The Social Security (Loss of Benefit) Regulations 2001
29. The Social Security (Maintenance Payments & Consequential Amendments) Regulations 1996
30. The Social Security (Mariners' Benefits) Regulations 1975
31. The Social Security (Medical Evidence) Regulations 1976
32. The Social Security (Overlapping Benefits) Regulations 1979
33. The Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988

34. The State Pension Credit Regulations 2002
35. The Statutory Maternity Pay (General) Regulations 1986
36. The Statutory Sick Pay (General) Regulations 1982