

EXPLANATORY MEMORANDUM TO
THE SOCIAL SECURITY, CHILD SUPPORT, VACCINE DAMAGE AND
OTHER PAYMENTS (DECISIONS AND APPEALS) (AMENDMENT)
REGULATIONS 2013

2013 No. 2380

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. **Purpose of the instrument**

These Regulations concern decision making and appeals in relation to a number of benefits and payments administered by the Department for Work and Pensions (“the Department”). In particular, the Regulations enable the Secretary of State to require a person to apply for certain decisions relating to social security benefits and child support to be reconsidered by the decision-maker before they are permitted to appeal. They also revoke provisions in social security legislation which provide for appeals to be sent to the decision maker. Appeals will now be sent direct to Her Majesty’s Courts and Tribunals Service (see the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (S.I. 2008/2835).

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

None.

4. **Legislative context**

4.1. These Regulations use of powers, inserted by section 102 (power to require consideration of revision before appeal) of, and Schedule 11 to, the Welfare reform Act 2012 (c.5) which enable provision to be made in regulations requiring a person to apply to the Secretary of State for a decision to be reconsidered by the decision maker before they are permitted to appeal.

4.2. Section 12 (appeal to First-tier Tribunal) of the Social Security Act 1998 9c. 14) enables regulations to be made concerning the manner in which appeals are to be brought. Currently, regulations provide for appeals relating to benefits and payments administered by the Department to be sent (in the first instance) to the decision-maker. If the dispute cannot be resolved, the appeal notice and Department’s response is then passed to Her Majesty’s Court’s and Tribunals Service who arrange for the matter to be determined by the First-Tier Tribunal, which is independent of Department and established under the Tribunals, Courts and Enforcement Act 2007 c. 15).

4.3. The following Regulations are to be amended:

- i) The Vaccine Damage Payments Regulations 1979 (SI 1979/432)
<http://www.dwp.gov.uk/docs/a4-7801.pdf>

- ii) The Child Support (Maintenance Assessment Procedure) Regulations 1992 (SI 1992/1813)
<http://www.dwp.gov.uk/docs/a6-1861.pdf>
- iii) The Social Security and Child Support (Decisions and Appeals) Regulations 1999 (SI 1999/991)
<http://www.dwp.gov.uk/docs/a1-6011.pdf>
- iv) The Mesothelioma Lump Sum Payments (Claims and Reconsiderations) Regulations 2008 (SI 2008/1595)
<http://www.dwp.gov.uk/docs/a4-3607.pdf>
- v) The Child Support Maintenance Calculation Regulations 2012 (SI 2012/2677)
<http://www.dwp.gov.uk/docs/o-3121.pdf>

5. Territorial extent and application

This instrument applies to Great Britain.

6. European Convention on Human Rights

The Minister for Welfare reform has made the following statement regarding Human Rights:

“In my view, the provisions of the Social Security, Child Support, Vaccine Damage and Other Payments (Decisions and Appeals) (Amendment) Regulations 2013 are compatible with the Convention Rights”.

7. Policy background – What is being done and why

- 7.1. The Department is amending the regulations so that a person who wishes to dispute a decision can be required to ask the Secretary of State to consider revising the decision before they may appeal against it – known as “mandatory reconsideration”. The processes, namely mandatory reconsideration and the direct lodgement of appeals, have already been introduced in relation to Universal Credit and Personal Independence Payment (see The Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013, SI 2013/381).
- 7.2. Currently, people are notified of the options for disputing a decision when the decision is notified to them in writing. These options include asking for an explanation; requesting a written statement of reasons; asking for the decision to be looked at again with a view to revising or superseding; or appealing against the decision. In social security cases, the person has a time limit of one month to either request revision or appeal against the decision, although this can be extended if the claimant has requested a statement of reasons or if there are special circumstances that prevented the request being made in time.

- 7.3. Whilst these options currently exist, there is no requirement to have requested an explanation or revision before appealing against a decision. People can, and many do, simply appeal against a decision they wish to dispute.
- 7.4. In recent years, the volume of appeals has increased. Ministry of Justice¹ figures show that appeals received in the Social Security and Child Support jurisdiction have risen from 229,123 in 2007/2008 to 370,797 in 2011/2012. The increasing volume of appeals adversely affects the service delivered to people and puts pressure on both the Department and Her Majesty's Courts and Tribunals Service.
- 7.5. When a person appeals currently, the Department conducts a reconsideration of the disputed decision as part of the appeal handling process. If the decision is revised in the claimants favour then the appeal will lapse, otherwise the appeal proceeds to hearing unless the appellant chooses to withdraw it in light of the Department's written response.
- 7.6. Mandatory reconsideration will introduce a more independent reconsideration process, with, whenever possible, a different decision maker looking at the decision again. The Department will also ensure that a thorough explanation of the disputed decision is provided, and additional information or evidence is considered with a view to changing the decision where appropriate. The focus of the new process will be to try to resolve the dispute, rather than simply operate the process as now.
- 7.7. The Department believes that these Regulations will result in a clearer, escalating dispute process that will deliver a fair and efficient system for people who dispute a decision. The intention is that more disputes will be resolved first, at the mandatory reconsideration stage, before any appeal enters the tribunals system. The introduction of mandatory reconsideration will mean that people will need to make a positive choice to appeal, and that decision will be based on a clear justification and explanation of the original decision and a robust reconsideration, including the opportunity to provide additional information that may change the decision.
- 7.8. Mandatory reconsideration before appeal follows the Department's principle that issues should be resolved, and errors should be identified and corrected, at the earliest possible opportunity. The focus of the mandatory reconsideration process will be to ensure that persons disputing a decision receive an explanation and an opportunity to supply additional information or evidence. .
- 7.9. The Regulations will also allow for appeals to be lodged with the First-tier Tribunal, rather than the Department as they are now – known as “direct lodgement”. The procedure for appealing is set out in the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685) as amended by the Tribunal Procedure (Amendment) Rules 2013 (SI 2013/477).

¹ <https://www.gov.uk/government/publications/quarterly-statistics-for-the-tribunals--2>

- 7.10. Currently, when a person wishes to appeal a decision they must do so by sending a written request to the decision maker. The Department undertakes the initial administration of the appeal, referring any questions of validity to the Tribunal. Following consideration of revision of the disputed decision and the gathering of any additional evidence, the Department sends the appeal request to Her Majesty's Courts and Tribunals Service. It is only at this point, some considerable time after the appeal was made, that action is started to arrange a Tribunal hearing.
- 7.11. The Social Entitlement Chamber is the only major Tribunal jurisdiction that does not have appeals lodged direct with Her Majesty's Courts and Tribunals Service. This change will bring appeals made against decisions made by the Department's decision makers into line with other jurisdictions.
- 7.12. The introduction of direct lodgement of appeals will mean that, following completion of the mandatory consideration process, persons wishing to make a subsequent appeal will do so direct to the Tribunal.
- 7.13. The Department will no longer be responsible for the initial administration of the appeal, but will fulfil its proper role of respondent to the appeal. The Department will be required by the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685) to provide the response to the appeal within a 28-day time limit.
- 7.14. The new process will provide greater transparency for appellant, with clearly defined responsibilities in terms of who administers the appeal and who the respondent is.

8. Consultation outcome

- 8.1. A public consultation exercise on the proposed draft Regulations for mandatory consideration of revision before appeal ("mandatory reconsideration") has been carried out by the Department. The consultation exercise commenced on 9 February 2012 and closed on 4 May 2012 - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/176978/mandatory-consideration-consultation.pdf.pdf.

An interim response was published by the Department on 12 June 2012 - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/176977/mandatory-consideration-consultation-interim-response.pdf.pdf, and the full response on 26 September 2012 - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/176976/mandatory-consideration-consultation-response.pdf.pdf.

- 8.2. In summary, there were 154 responses received to the consultation from a wide range of organisations and individuals. Three common issues were raised by respondents:
- that the Department should have a time limit to complete the mandatory reconsideration process in each case.

The Department has not proposed that the new mandatory reconsideration process is subject to a time limit for its completion. It is important that decision makers focus on ensuring that the decision has been fully reviewed and that the claimant has been given the chance to provide any additional information or evidence. Applying a time limit to this process would not be right, however the Department does intend to monitor the process closely to ensure cases are not delayed unnecessarily.

- issues around the payment of Employment Support Allowance pending appeal. Currently, claimants appealing a decision that they do not have limited capability for work following a work capability assessment can receive Employment Support Allowance at the assessment phase rate pending the Tribunal hearing. Respondents to the consultation raised concerns about the impact the introduction of mandatory reconsideration would have on this arrangement, and many requested that payment of Employment Support Allowance at the assessment phase rate be made during the period while mandatory reconsideration was being completed. The Department does not intend to change the current policy following the introduction of mandatory reconsideration. Following a decision being made that a claimant does not have limited capability for work, no further payment of Employment Support Allowance can be made, including the period whilst mandatory reconsideration is carried out, until the Department is informed that an appeal has been lodged with Her Majesty's Courts and Tribunals Service. At that point, provided medical evidence is supplied payment of Employment Support Allowance can be made at the assessment phase rate, backdated to cover the period from when the claim was disallowed.
- the need for improvement to the standards of decision-making. Whilst this is an ongoing challenge for the Department, the Committee may wish to note the work it has done in response to Professor Harrington's reports on Employment and Support Allowance - Work Capability Assessment – Year 3². Also, the Department in conjunction with Her Majesty's Courts and Tribunal Service has developed a 'dropdown' menu which First-tier Tribunal judges are using to record why they made their decision. A pilot was run between July and October 2012 using cases where the Tribunal overturned the Department's decision. An analysis of the data gathered was published on 19 November 2012³, and the Department is continuing to work with the Ministry of Justice to build on the work further. Building on the 'dropdown' menu, the Judiciary have agreed to provide the Department with reasons for their decisions. This will begin in June 2013 in a number of tribunals to assess the impact.

8.3. The proposals for regulations were presented to the Social Security Advisory Committee on 3 October 2012. The Committee decided that the proposals need not be referred to it. The Committee did however raise a number of points:

² <https://www.gov.uk/government/publications/government-response-to-the-work-capability-assessment-independent-review-year-3>

³ http://statistics.dwp.gov.uk/asd/asd1/adhoc_analysis/2012/sscs_appeals.pdf

“In the Committee’s response to the consultation exercise, the point was made that the Department should be subject to a time limit for making the reconsideration decision. That recommendation was not accepted by Ministers, but how would the Department ensure that such decisions were nonetheless taken promptly?”

The Department is committed to ensuring action is taken promptly by introducing a range of performance indicators. Work to develop these indicators are ongoing, and will be finalised prior to October 2013.

“Was there any scope for making the written reasons for the initial decision more understandable? Anecdotally many claimants did not understand the reason for the original decision until after they had been to appeal and it had been explained to them in plain English.”

Improved decision notices will be issued following completion of the mandatory reconsideration process. These will be fuller and more clearly written than the original decision, so that the person receiving it may make a more informed decision as to whether a subsequent appeal is necessary.

- 8.4. The Tribunal Procedure Committee also conducted a consultation exercise on the proposed rule amendments to make provision for the direct lodgement of appeals. This consultation commenced on 26 March 2012 and closed on 15 June 2012⁴.

The Committee received 24 responses to the consultation, the majority of which supported the introduction of direct lodgement. Those disagreeing did so on the grounds that direct lodgement of appeals would introduce delays, or that it was more efficient for the appeal to be lodged with the decision-maker. The Committee were not persuaded by these objections.

9. Guidance

- 9.1. The Decision Maker’s Guide will be updated to reflect the new Regulations. As now, we intend that it will be published on the main Department for Work and Pensions website. It will be in place before 28 October 2013 and prior to publication the guidance will be shared with key stakeholders and the Social Security Advisory Committee.

10. Impact

- 10.1. There is no impact on business or civil society organisations.
- 10.2. In relation to the impact on the public sector of these Regulations, we have considered the impact the changes will have on decision makers, claimants and stakeholders of operating the new appeal process. The Department will ensure that computer systems are updated so that decision

⁴ <http://www.justice.gov.uk/downloads/about/moj/advisory-groups/consultation-tribunal-procedure-committee.pdf>

notices issued to claimants will contain the correct information about the requirement to apply for reconsideration before appeal. Arrangements have been made to ensure that leaflets and guidance are updated to reflect the new processes.

10.3. Processes for the Department's operational staff to follow to deal with a disputed decision have been designed reflecting the requirements of mandatory reconsideration and operational impact have been identified and are being addressed by an Appeals Reform Project team.

10.4. The Department is also working with Her Majesty's Courts and Tribunals Service to ensure that a new appeal form, and revised guidance for people wishing to appeal, is available which reflects the move to direct lodgement of appeals.

10.5. The impact of the new mandatory reconsideration process on the DWP and Her Majesty's Courts and Tribunals Service is included in the published Impact Assessment which is on the DWP website at <http://www.dwp.gov.uk/docs/consideration-of-revision-wr2011-ia.pdf> Apart from the above, an Impact Assessment has not been prepared for this instrument.

11. Regulating small business

This instrument does not apply to small businesses.

12. Monitoring and review

As part of the Department's ongoing evaluation of the effectiveness of decision making and appeals, the effects of mandatory reconsideration will be monitored by examining:

- the number of requests received for decisions to be reconsidered – *this will be monitored by making use of the Department's existing databases, modified to collect the relevant data;*
- the length of time taken to process requests for mandatory reconsideration – *collected through modification of existing databases as above;*
- the outcome of requests for decisions to be reconsidered - *collected through modification of existing databases as above;*

The data collected using the databases above does not meet the standards required for publication. The Department does not, in general, publish data relating to process management and has no plans, therefore, to routinely publish information relating to the mandatory reconsideration process. The Department will use the data collected to monitor the operation of the mandatory reconsideration process and may, subject to Ministerial agreement, consider publishing an ad hoc analysis of data.

- the number and subject matter of appeals made by individuals to the First-tier and Upper Tribunals – *this information is published quarterly by Her Majesty's Courts and Tribunals Service, and is available on the GOV.UK website - <https://www.gov.uk/government/publications/quarterly-statistics-for-the-tribunals--2>;*
- the success rates of appeals made by individuals to the First-tier and Upper Tribunals – *this is current practice and is published as above;*

the number and success rates of appeals lodged by the Department against First-tier Tribunal decisions – *this information is already collected and published as above.*

13. Contact

Darrell Smith at the Department for Work and Pensions can answer any questions regarding the instrument. Telephone 020 7449 7345 or email darrell.smith@dwp.gsi.gov.uk.