

**EXPLANATORY MEMORANDUM TO  
THE EMPLOYMENT AND SUPPORT ALLOWANCE (CONSEQUENTIAL  
PROVISIONS) (No. 3) REGULATIONS 2008**

**2008 No. 1879**

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 Employment and Support Allowance will be introduced on 27 October 2008 for claimants who will claim on the basis of having limited capability to work due to a health condition or disability. Employment and Support Allowance replaces Incapacity Benefit and Income Support paid on grounds of incapacity for new claimants only. As a result of Employment and Support Allowance's introduction, amendments to the legislation administered by government departments, (other than the Department for Work and Pensions (DWP)) and the devolved administrations in Scotland and Wales, are necessary to ensure that Employment and Support Allowance claimants are treated, in relation to those departments' schemes and benefits, in the same way as current incapacity benefits claimants. These Regulations propose to make the necessary changes.

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

3.1 None.

**4. Legislative Background**

4.1 The Welfare Reform Act 2007 provided for the introduction of Employment and Support Allowance. Underpinning the new benefit are the Employment and Support Allowance Regulations which were laid before Parliament on 27 March 2008 and define the conditions of entitlement for that benefit. The legislation administered by departments other than the DWP require consequential changes to ensure that claimants in receipt of the new benefit will be treated in a similar fashion to existing claimants of incapacity benefits currently. Section 28(2) of the Welfare Reform Act enables regulations making amendments consequential on Part 1 of the Act.

4.2 The necessary changes to primary and secondary legislation are described below.

**5. Territorial Extent and Application**

5.1 This Instrument extends to Great Britain. The regulations in Part 10 apply only in Wales and the regulations in Part 11 apply only in Scotland.

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

The Minister of State for Employment and Welfare Reform has made the following statement regarding Human Rights:

In my view the provisions of the Employment and Support Allowance (Consequential Provisions) (No.3) Regulations 2008 are compatible with the Convention rights.

## **7. Policy background**

### **7.1 Amounts to be taken into account in calculating sick pay payable by an employer**

Currently short term Incapacity Benefit or any payment representing it, may be taken into account when calculating the amounts of sick pay payable by an employer. An amendment is necessary to ensure that contributory Employment and Support Allowance is treated in the same way as Incapacity Benefit.

### **7.2 Workers who do not qualify for the national minimum wage**

Certain workers do not qualify for the National Minimum Wage. This includes workers who were in receipt of Income Support or income-based Jobseeker's allowance and previously homeless or residing in a hostel for the homeless and are now participating in a scheme whereby they are provided with shelter and other benefits in return for performing work. The proposed amendment would add people who were in receipt of or entitled to income-related Employment and Support Allowance immediately before entering a relevant scheme.

### **7.3 Remission of charges for school meals**

Currently children are entitled to free school meals if their parents claim "relevant benefits", including Income Support. This amendment proposes to add income-related Employment and Support Allowance to the list of relevant benefits.

### **7.4 Milk, meals and refreshment – non-maintained schools**

The governing body of special schools which are not maintained by a Local Education Authority (known as 'non-maintained special schools') has an obligation to provide free school lunches and to ensure that refreshments (including milk, if provided by the school) are provided for children whose parents are in receipt of certain income-related allowances, including Income Support. This amendment proposes to add income-related Employment and Support Allowance to this list of benefits.

### **7.5 Repayment of student loans**

When considering a person's income for the purposes of repaying a student loan certain social security benefits, including Incapacity Benefit, are disregarded. The

proposed amendment would ensure that Employment and Support Allowance is disregarded from a person's income as well.

#### **7.6 Cessation of financial support to a special guardian**

Currently, financial assistance to a special guardian ceases when the child qualifies for Income Support or Jobseeker's Allowance in his or her own right. The proposed amendment would ensure that this is also the case for Employment and Support Allowance.

#### **7.7 Water charges schemes**

Currently people receiving certain defined benefits, including Income Support, are regarded as vulnerable, and should receive assistance with any water charges scheme. The proposed amendment extends the definition to include those receiving income-related Employment and Support Allowance.

#### **7.8 Home Energy Efficiency Scheme**

Certain benefit claimants, including those receiving Income Support, have access to a grant to improve the energy efficiency of their home. The proposed amendment extends that access to claimants on income-related Employment and Support Allowance.

#### **7.9 Healthy Start Scheme**

The proposed amendment would allow women who have been pregnant for ten or more weeks to have access to the Healthy Start Scheme, if they, or anyone in their family, are in receipt of income-related Employment and Support Allowance. This aligns the provisions for the new benefit with those which currently apply to Income Support.

#### **7.10 Asylum support**

Currently, Income Support claimants are prevented from claiming Asylum Support. This amendment extends this exclusion to those claiming an income-related Employment and Support Allowance.

#### **7.11 Bus service operators grant**

Bus Service Operators are eligible for a grant to cover their costs as long as the persons using their service are mainly drawn from specified groups including Income Support claimants. The proposed amendment seeks to extend this list of groups to include those in receipt of Employment and Support Allowance.

#### **7.12 Access to Community Legal Service**

If assessors are satisfied that claimants are in direct or indirect receipt of various benefits, including Income Support, the claimants may be able to access legal

services without making contributions to the cost of the service. The amendment proposes to extend this treatment to those in receipt of income-related Employment and Support Allowance.

#### **7.13 Legal advice and assistance**

In relation to specified circumstances (for example on being held in custody after arrest, or advocacy assistance before a magistrates' court or the Crown Court) recipients of certain benefits are eligible for free legal advice or assistance, including those directly or indirectly in receipt of Income Support. The proposed amendment would extend the list of qualifying benefits to include income-related Employment and Support Allowance.

#### **7.14 Applications to or hearings of Leasehold Valuation Tribunals**

Where a person or their partner is in receipt of various tax credits and benefits, including Income Support, they will not be liable for any fees in relation to applications to, or hearings of, leasehold valuation tribunals. The proposed amendment would extend this exemption to include income-related Employment and Support Allowance recipients.

#### **7.15 Applications to the Gender Recognition Panel**

Those in receipt of Income Support are exempt from fees in relation to an application to the Gender Recognition Panel. The proposed amendment would extend the list of qualifying benefits to include an income-related Employment and Support Allowance.

#### **7.16 Fees in relation to a residential property tribunal**

An appellant or applicant to a Residential Property Tribunal is not liable for fees related to a residential property tribunal, if they or their partner are in receipt of various benefits or tax credits, including Income Support. The proposed amendment would extend this exemption to those in receipt of income-related Employment and Support Allowance.

#### **7.17 Publicly funded representation in respect of criminal proceeding**

Certain benefit recipients are automatically eligible for publicly funded representation if they are involved in criminal proceeding in a magistrates' court. Currently the list of eligible benefits includes Income Support. The proposed amendment extends the list to include income-related Employment and Support Allowance.

#### **7.18 Fees in respect of Gambling Appeals Tribunals**

People in receipt of certain qualifying benefits, including Income Support, do not have to pay a fee when bringing a case to the Gambling Appeals Tribunal. The

proposed amendment would extend the list to include an income-related Employment and Support Allowance.

#### 7.19 **Working Tax Credit**

The proposed amendments would add “contributory employment and support allowance” and the “Welfare Reform Act” to the interpretation provisions of Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002. They would also ensure that claimants of Employment and Support Allowance are treated as being engaged in remunerative work for the first 28 weeks of their claim, as is currently the case for Income Support and Incapacity Benefit claimants. A further amendment would ensure that claimants of contributory Employment and Support Allowance and their partners receive the disability element of Working Tax Credits in the same circumstances as is currently the case for Incapacity Benefit and Severe Disablement Allowance. In addition, a couple can claim a child care element of Working Tax Credit where both partners are in qualifying remunerative work or where one partner is in qualifying remunerative work and the other partner is incapacitated.. The proposed amendment would ensure that contributory Employment and Support Allowance claimants are treated as incapacitated provided they have been entitled to the benefit for 28 weeks.

7.20 Finally, it is proposed that the ‘50 plus’ element of Working Tax Credit is included in the calculation of the maximum amount if a claimant is over fifty and was in receipt of Employment and Support Allowance for a continuous or linked period of 6 months immediately prior to starting work. This mirrors the current position in Income Support and Incapacity Benefit.

#### 7.21 **Calculation of social security income for Tax Credits purposes**

The Tax Credits (Definition and Calculation of Income) Regulations 2002 provide for the calculation of social security income for the purposes of Tax Credits. As with Income Support currently, the proposed amendment would ensure that income-related Employment and Support Allowance is not taken into account as social security income.

#### 7.22 **Children or qualifying young people disqualified for the purposes of Child Tax Credit**

For the purposes of Child Tax Credit, a person is not responsible for a child or qualifying young person who is in receipt of Incapacity Benefit. The proposed amendment would extend that exclusion to those in receipt of a contributory Employment and Support Allowance. Also, a person who is not a child, but has not yet reached 20 years of age, is not defined as a “qualifying young person” during a period for which they receive Income Support. Under the proposed amendment the exemption from the definition is extended to include those in receipt of income-related Employment and Support Allowance.

**7.23 Income tests for Child Tax Credit and Working Tax Credit**

The income test for entitlement to a tax credit does not apply to recipients of certain benefits, including Income Support. The proposed amendment would include an income-related Employment and Support Allowance in the list of prescribed benefits.

**7.24 Child Benefit not payable in respect of qualifying young person**

Child Benefit is not payable in respect of a qualifying young person who receives certain benefits, including Income Support and Incapacity Benefit. The proposed amendment would include receipt of Employment and Support Allowance in the list of prescribed benefits.

**7.25 Bus service operators grant (Wales)**

Bus Service Operators are eligible for a grant to cover their costs as long as the persons using their service are mainly drawn from specified groups including Income Support claimants. The proposed amendment would extend this list of groups to include those in receipt of an Employment and Support Allowance.

**7.26 Learning accounts (Wales)**

This amendment to the Schedule adds income-related Employment and Support to a list of qualifying benefits which includes Income Support. Receipt of a qualifying benefit allows an applicant to access funding for further education.

**7.27 Fees in respect of Leasehold Valuation Tribunals (Wales)**

The proposed amendment extends the entitlement to a waiver of fees, if the claimant or their partner is in receipt of various benefits, currently including Income Support, to include income-related Employment and Support Allowance.

**7.28 Financial support for adoptive parents**

When a child becomes eligible for Income Support or Jobseeker's Allowance in his or her own right, financial support for adoptive parents ceases. The proposed amendments would ensure that such support would also cease if the child became eligible for Employment and Support Allowance.

**7.29 Cessation of financial support to a special guardian (Wales)**

Currently financial assistance to a special guardian ceases when the child qualifies for Income Support. The proposed amendment would ensure that this is also the case when the child qualifies for income-related Employment and Support Allowance.

**7.30 Fees in relation to a Residential Property Tribunal (Wales)**

An appellant or applicant to a Residential Property Tribunal is not liable for fees related to a residential property tribunal, if they or their partner are in receipt of various benefits or tax credits, including Income Support. The proposed amendment would extend this exemption to those in receipt of income-related Employment and Support Allowance.

**7.31 Housing assistance for people subject to immigration control (Wales)**

Certain benefit recipients, including people in receipt of Income Support, who are subject to immigration control are eligible for housing assistance. The proposed amendment would extend eligibility to those on income-related Employment and Support Allowance

**7.32 Home Energy Efficiency Schemes (Wales)**

Where a person or their partner is entitled to a prescribed benefit, including those receiving Income Support, they have access to a grant under the Home Energy Efficiency Schemes to improve the energy efficiency of their home. The proposed amendment extends that access to claimants on income-related Employment and Support Allowance.

**7.33 National Health Service travelling expenses and remission of charges (Wales)**

People in receipt of prescribed benefits, including Income Support, are entitled to the payment in full of NHS travelling expenses and the full remission of an NHS charge without having to make a claim. The proposed amendment would provide for eligibility to extend to those in receipt of income-related Employment and Support Allowance.

**7.34 Unpaid Community Charges (Scotland)**

Where a person is in debt to a local authority in Scotland for unpaid Community Charges and that person receives certain benefits, the authority may apply to the Secretary of State for deductions to be taken from that person's benefit and paid to the authority to repay the debt. The proposed amendments would allow such deductions to be made from Employment and Support Allowance.

**7.35 Legal advice and assistance (Scotland)**

If an applicant for legal advice and assistance is in receipt of a prescribed benefit, which includes Income Support and Incapacity Benefit, fees or outlays cannot be recovered from the benefit. The proposed amendments add income-related and contributory Employment and Support Allowance to the list of prescribed benefits. Further, the amendment ensures that contributory Employment and Support Allowance is not taken into account when computing an applicant's income and capital.

**7.36 Repayment of student loans (Scotland)**

Where a person is in receipt of a ‘disability-related benefit’ and because of their disability they are permanently unfit for work, repayment of their student loan is cancelled. The proposed amendment extends the definition of “disability-related benefits” to include Employment and Support Allowance.

**7.37 Bus Service Operators Grant (Scotland)**

Bus Service Operators are eligible for a grant to cover their costs as long as the persons using their service are mainly drawn from specified groups including Income Support claimants. The proposed amendment seeks to extend this list of groups to include those in receipt of Employment and Support Allowance.

**7.38 Civil Legal Aid (Scotland)**

A person’s liability to the Scottish Legal Aid Fund cannot be recovered from certain benefits, including Income Support. The proposed amendment extends the list of prescribed benefits to include an income-related Employment and Support Allowance.

7.39 When calculating disposable income certain benefits, including Income Support, are disregarded. The proposed amendments would ensure that income-related Employment and Support Allowance is also not taken into account in the computation of income, and that any amount of income-related Employment and Support Allowance that exceeds the disposable capital limit is disregarded.

**7.40 Persons disregarded for the purposes of establishing a Council Tax discount (Scotland)**

Certain prescribed persons are disregarded when calculating the amount of council tax payable by a household in Scotland. For a severely mentally ill person to be disregarded for the purposes of such a calculation they must be in receipt of a qualifying benefit. The qualifying benefits include entitlement to short-term Incapacity Benefit and Severe Disablement Allowance. The proposed amendment would extend the list of qualifying benefits to include Employment and Support Allowance.

**7.41 Education Maintenance Allowances (Scotland)**

Scottish Ministers can, in prescribed circumstances, pay an educational maintenance grant to a person undertaking a course of education in Scotland who attained age 16 years on or after 1 March 2004, and who is under 20 years of age. The grant may be payable if the person or, in certain cases, one or both of their parents, has been ordinarily resident in a relevant area (e.g the United Kingdom or the European Economic Area), and has been so for a prescribed period. However, the grant is not payable if the person falls within prescribed categories of people who are regarded as ‘independent persons’. A person in receipt of certain benefits, including Income Support, is regarded as an



independent person. The proposed amendment would mean that a person in receipt of income-related Employment and Support Allowance would be regarded as an independent person.

### *Consultation*

7.42 The Department for Work and Pensions has consulted with all the relevant other government departments and the devolved administrations who are all content for the amendments to be made.

### *Consolidation*

7.43 There are no plans to consolidate the legislation. We are not intending to consolidate the existing regulations once this statutory instrument has been laid; our reasons being that the Blue Volumes provide this function and will eventually incorporate this statutory instrument into the existing regulations. They are held online and are available to the public free of charge.

### *Guidance*

7.44 Guidance will be available to Jobcentre Plus concerning the amendments made by this instrument.

## **8. Impact**

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

8.2 The impact on the public sector is nil.

## **9. Contact**

Mark Rogers at the Department for Work and Pensions Tel: 020 796 28195 or e-mail: mark.rogers2@dwp.gsi.gov.uk can answer any queries regarding the instrument.