

**EXPLANATORY MEMORANDUM TO
THE UNIVERSAL CREDIT REGULATIONS 2013**

2013 No. 376

**THE UNIVERSAL CREDIT (TRANSITIONAL PROVISIONS)
REGULATIONS 2013**

2013 No. 386

THE JOBSEEKER'S ALLOWANCE REGULATIONS 2013

2013 No. 378

THE EMPLOYMENT AND SUPPORT ALLOWANCE REGULATIONS 2013

2013 No. 379

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 instruments**
 - 2.1 These affirmative instruments support the introduction of Universal Credit.
 - 2.2 The Universal Credit Regulations 2013 make provision for determining entitlement to, and calculation of, an award of Universal Credit.
 - 2.3 The Jobseeker's Allowance Regulations and Employment and Support Allowance Regulations make provision for these benefits to be only payable based on a person's National Insurance contribution record and no longer through the alternative route of means testing. The rules for contributory entitlement are carried forward largely unchanged, but the regulations do make provision for new conditionality and sanctions regimes in these two benefits, so they are aligned with those for Universal Credit.
 - 2.4 The Universal Credit (Transitional Provisions) Regulations 2013 provide that the introduction of Universal Credit and the changes to Jobseeker's Allowance and Employment and Support Allowance from 29 April 2013 is limited to certain categories of claimant in "Pathfinder" areas.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 None.

4. Legislative Context

4.1 The Welfare Reform Act 2012 provides for the introduction in Great Britain of a new working age income-related social security benefit, Universal Credit, and the abolition of income-based Jobseeker's Allowance, income-related Employment and Support Allowance, Income Support, Housing Benefit, and Child and Working Tax Credits. These instruments implement a number of provisions of that Act for Universal Credit, Jobseeker's Allowance and Employment and Support Allowance.

4.2 Part 1 of the Act sets out the legislative framework for determining who is entitled to Universal Credit and how it is calculated. It also provides for the conditionality and sanctions regime under which claimants are to be subject to work-related requirements and may have their award reduced for failure to comply with those requirements.

4.3 The Universal Credit Regulations provide much of the detail in relation to the matters covered in Part 1 of the Act. Those Regulations also include provision for a Benefit Cap under Part 5 of the Act which reduces the amount of an award of Universal Credit in cases where it is applicable.

4.4 Part 1 of the Act also provides for the abolition of the income-related benefits that are to be replaced by Universal Credit.

4.5 Amendments to the Jobseeker Act 1995 and the Welfare Reform Act 2007 to enable the conversion of Jobseeker's Allowance and Employment and Support Allowance into contribution-based benefits only are found in Part 2 of the Act. Part 2 of the Act also provides the statutory framework for the conditionality and sanctions regime in relation to those benefits. The detailed provisions for entitlement to the benefits and the conditionality and sanctions regimes applicable to each benefit are set out in the Jobseekers Allowance Regulations 2013 and the Employment and Support Allowance Regulations 2013.

4.6 The provisions for the new conditionality regimes build on the changes to the existing Jobseeker's Allowance and Employment and Support Allowance sanctions and conditionality regimes. The Jobseeker's Allowance changes were introduced on 22 October and the Employment and Support Allowance changes on 3 December 2012 as a first step towards aligning with the Universal Credit sanctions model^(a).

4.7 The Committee's attention is drawn to the separate Explanatory Memorandum to the following instrument, which provides for decision making and appeals and related matters in relation to Universal Credit and the new contribution-based Jobseeker's Allowance and Employment and Support Allowance:

(a) The Jobseeker's Allowance changes are introduced through the Jobseeker's Allowance (Sanctions) (Amendment) Regulations 2012 (SI 2012/2568) and the Employment and Support Allowance changes are introduced through the Employment and Support Allowance (Sanctions) (Amendment) Regulations 2012 (SI 2012/2756).

- The Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013.

5. Territorial Extent and Application

5.1 These instruments apply to Great Britain. The Department for Social Development in Northern Ireland will be producing its own legislation for Northern Ireland.

6. European Convention on Human Rights

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

“In my view the provisions of the

- Universal Credit Regulations 2013;
- Universal Credit (Transitional Provisions) Regulations 2013;
- Jobseeker’s Allowance Regulations 2013; and
- Employment and Support Allowance Regulations 2013

are compatible with the Convention Rights. There is, however, an issue in relation to paragraphs 10, 25 and 36 of Schedule 4 to the Universal Credit Regulations 2013 as a result of the judgment of the Court of Appeal in the case of *Burnip and others* 2012 EWCA Civ 629. The Secretary of State for Work and Pensions is appealing to the Supreme Court against that judgment.”

6.2 This is explained in detail in the Annex below.

7. Policy background

The Universal Credit Regulations 2013

7.1 The current benefit system has become a significant barrier to work as a result of its inherent structural weaknesses. First, it can discourage individuals from work as a result of a swift withdrawal of benefits when taking a job, or working a few extra hours a week. Too many people have simply felt that work does not pay. Second, with the number of benefits available, the system has become incoherent and confusing. Stepping into the world of work appears too risky for the very people who have most to gain, because they may not know where they stand. Third, the complexity of the system has cost the taxpayer more than £5.5 billion every year in money wrongly paid out through fraud and error.

7.2 Universal Credit will help to remove the complexities of the current system. Instead of income-related Jobseeker’s Allowance, Housing Benefit, Child Tax Credit, Income Support, Working Tax Credit, and income-related Employment and Support Allowance as separate benefits, there will be a

single means-tested benefit for people both in and out of work. Claims to Universal Credit will be made by single claimants or jointly by couples.

7.3 Universal Credit aims to encourage and support people to move into and stay in work. It has a maximum award for the household calculated by reference to an age-related standard allowance to which additional elements, for example for dependent children, housing costs and other needs, are added as appropriate. Deductions from the maximum award will then be made in respect of any earnings or other relevant income. People with capital assets in excess of £16,000 will not be entitled to Universal Credit.

7.4 The following section describes key aspects of Universal Credit, highlighting significant differences from arrangements in the existing benefits and tax credits system.

Entitlement

7.5 The basic conditions of entitlement to Universal Credit require the claimant to:

- be between 18 and under Pension Credit age;
- be resident in Great Britain;
- not be in education; and
- have accepted a Claimant Commitment (see section 7.10 below).

7.6 The Regulations make provision for exceptions to these basic entitlement conditions, including circumstances in which young people aged 16-17 may claim Universal Credit, or a claimant be in full-time education or temporarily absent from Great Britain.

7.7 The Regulations also deal with the situation where one member of the couple meets the basic conditions of entitlement but the other does not.

7.8 Claims to Universal Credit will mainly be made on-line, though there will be telephone and face-to-face services for the minority of people who are unable to manage their claims on-line.

Monthly award

7.9 At present, existing income-related benefits are assessed weekly and paid weekly, fortnightly or four weekly. A key difference with Universal Credit is that it will be assessed and paid monthly. This approach is intended to reflect the world of work where around 75% of people receive their wages monthly. Paying in this manner will encourage and support claimants to budget on a monthly basis, which will help smooth the transition into monthly paid work. The monthly approach, together with the collection of earnings details via the new Real Time Information system being implemented by Her Majesty's Revenue and Customs, will help ensure that benefit assessments are accurate and reflect the current needs of the household.

The Claimant Commitment

7.10 In the current system, benefit claimants are often not clear about their responsibilities. To qualify for Universal Credit, all claimants will be required to agree to a Claimant Commitment, which will record all activities they are required to undertake, including, where appropriate, doing all that can reasonably be expected of them to find work or prepare for work. In exceptional circumstances, where a claimant is unable to accept a Claimant Commitment, for example where they lack capacity to do so, the requirement to accept the Commitment may be removed.

7.11 The Claimant Commitment will be personalised to the individual claimant. For example, for those who are expected to search for work, the Claimant Commitment will set out the work-related requirements a claimant must meet in order to receive their Universal Credit, and the consequences of failing to meet those requirements. The Claimant Commitment will be regularly revised to reflect a claimant's circumstances.

7.12 If a claimant disagrees with the work search or availability requirements imposed they can ask for these to be reconsidered. If a claimant refuses to accept their Claimant Commitment then they will not be entitled to Universal Credit. As Universal Credit is a household benefit, if either eligible adult in a couple refuses to accept their Claimant Commitment, the claim for the other eligible adult will also end. Where a claimant does refuse to accept their Claimant Commitment, a short 'cooling off' period will be allowed to give them the opportunity to reconsider their decision and the impact on the household claim.

7.13 The Claimant Commitment and associated sanctions will also apply to contributory Employment and Support Allowance and Jobseeker's Allowance.

Standard Allowance

7.14 The standard allowance for ordinary daily living expenses will be similar to existing income-related benefits. However, it will be a monthly, not weekly, amount. The structure of the allowances will be simpler with a single rate for people aged under 25.

Child Elements

7.15 The child element will be similar to existing Child Tax Credit provision. It will comprise of two rates: one rate for the first or only child or qualifying young person and then a lower rate for any further children or qualifying young persons.

7.16 A 'disabled child addition' will be payable for a dependent child who meets the definition of disability, with two rates payable depending upon the impact the disability has on their ability to lead active and independent lives.

Housing Costs

7.17 Support for housing costs for social sector tenants will be based upon their actual housing costs less any under-occupancy deduction. For private sector tenants, support will be the lower of actual costs or the Local Housing Allowance. For owner-occupiers, support will reflect a flat rate of interest applied to loans up to a set limit.

7.18 There are a number of changes aimed at simplifying some of the more complex elements of the current schemes and improving work incentives:

- the “shared accommodation rate” which restricts the amount of rent which can be allowed for certain tenants in the private rented sector will apply only to single childless tenants aged under 35. At the moment it can affect other people choosing to live in shared accommodation;
- in calculating support for rent, flat-rate deductions will be applied in respect of non-dependants living in the claimant’s household. This replaces the current system where different rates apply according to the non-dependant’s gross income. No such deductions will be made in owner-occupier cases;
- no rooms will be allocated for boarders or lodgers in calculating the appropriate size of accommodation for renters, but income from boarders and lodgers will be disregarded;
- the housing costs element can continue in payment for those expected to remain in prison for up to 6 months. This replaces the Housing Benefit rules which relate to 3 month absences for prisoners and 12 months for those on remand;
- owner-occupiers will continue to serve a waiting period before support for mortgage costs is provided, but, unlike the current arrangements, claimants will re-serve this waiting period where there is a break in their award. If the claimant or partner does any paid work, support for their owner-occupier costs will cease.

Childcare Costs Element

7.19 For many parents, childcare is essential to support their return to work and their progression in work. Within Universal Credit, support for childcare is provided in the form of an additional childcare element. The element is to be available to all lone parents and couples where both members are in work (with certain exceptions), and is not dependent on a claimant working a specific number of hours.

7.20 Where a child is in registered childcare, families will be able to recover 70% of actual childcare costs in Universal Credit up to a limit set in the Regulations.

Carer Element

7.21 Universal Credit will include a carer element where an eligible adult in the household provides regular and substantial care for a person with a long-term health condition or disability. The element is awarded where that person satisfies the conditions of entitlement of Carer's Allowance, or would do so but for their earnings exceeding the limit prescribed for receipt of an allowance. Only one person can be in receipt of the carer element as a result of caring for one severely disabled person.

Capability for Work

7.22 Universal Credit will simplify the existing disability-related premiums and additions into two elements: the limited capability for work element and the limited capability for work and work-related activity element. There will be a single assessment for these elements, called the Work Capability Assessment. This assessment already applies in Employment and Support Allowance. This applies to claimants who are either in or out of work.

7.23 Before these elements are payable, there will normally be a three month period during which the claimant will provide medical evidence and will be required to participate in a Work Capability Assessment. This does not apply:

- where the claimant is terminally ill;
- where the claimant already has a determination of limited capability for work or work-related activity on the basis of the Work Capability Assessment in relation to an award of Employment and Support Allowance
- where a previous limited capability for work or limited capability for work and work-related activity determination applies and there has been a new award because the claimant ceases to be a member of a couple or becomes part of new couple;
- if a claimant's Universal Credit award ceases because their income is too high and within 6 months they are re-awarded Universal Credit.

Work-related Requirements

7.24 In Universal Credit, all claimants will be allocated to one of four work-related conditionality groups, according to their individual circumstances:

- No work-related requirements: where claimants already have or exceed a specified level of earnings or are unable to meet any work-related requirements because of particular circumstances or capability;
- Work-focused interviews only: for claimants who are expected to stay in touch with the labour market and begin thinking about a move into work, more work, or better paid work;
- Work preparation: some claimants who have limited capability for work (defined in Section 21 of the Act) will not be expected to look for or be available for work, but will be expected to prepare for a move into work,

more work, or better paid work by, for example, participating in the Work Programme, attending training courses or skills assessment; and

- All work-related requirements: for claimants expected to move into work, more work or better paid work.

7.25 A claimant's work-related requirements will be set according to the claimant's conditionality group. For example, work search and availability requirements can only be imposed on claimants in the all work-related requirements group. Any work-related requirements will be tailored according to the claimant's capability and circumstances, and recorded on the Claimant Commitment, which will clearly set out what is expected. In addition to supporting the personalisation of the requirements, the legislation is intended to provide for flexibility in how work requirements are applied. For example, the Regulations do not specify how frequently claimants should attend interviews.

7.26 Claimants in the all work-related requirements group may be temporarily exempt from work search and availability requirements in light of a temporary change of circumstances. For example, sickness, a bereavement, or temporary childcare responsibilities.

7.27 At the launch of Universal Credit, the intention is that the full conditionality regime will apply to groups roughly equivalent to those subject to the current Jobseeker's Allowance conditionality regime. Therefore, it is not intended that those with earnings above a certain administrative threshold will be subject to an intensive conditionality regime. This administrative threshold is flexible to allow the Department for Work and Pensions to explore and test various options for those with higher levels of earnings (up to the conditionality earnings threshold as described in Regulation 90 of the Universal Credit Regulations 2013).

Treatment of Earnings: The Work Allowance and Tapers

7.28 A key aim of Universal Credit is to make clear to people that they will be better off in work. A straightforward system of work allowances and a single taper rate will allow people in work to see clearly how much support they are able to receive and make sure that people considering a job can understand the financial advantages of work.

7.29 The Universal Credit work allowance is an earned income allowance, which works in a similar way to the personal tax allowance: people's earnings up to a certain level will be ignored when calculating how much Universal Credit a person should receive. There will be different work allowances for different types of household, to reflect their different needs and to support the aim that work pays. The work allowances for people with and without housing costs are set out in the Regulations for the following groups:

- single people and couples without children;
- lone parents with one or more children;
- couples with one or more children; and

- disabled single people or couples.

7.30 The single taper or benefit withdrawal rate is set at 65 per cent. The taper will be applied to earnings net of tax, National Insurance and pension contributions. In simple terms, the taper means that 35 pence in every pound earned will be kept by the claimant, meaning that claimants will be £35 better off for every extra £100 of net earnings.

Self-employment

7.31 Universal Credit will provide support for people who are self-employed only where self-employment is the best route for them to become financially self-sufficient. Claimants who declare that they are self-employed will attend a Gateway interview, so that an adviser can assess the plans and documentation they have in place to determine whether the activity they are undertaking is developed, organised and carried out in expectation of profit.

7.32 In most circumstances, where a claimant is treated as gainfully self-employed, they will be subject to the 'Minimum Income Floor', which sets a minimum level of assumed income from self-employment.

7.33 The Minimum Income Floor is designed to provide a fair incentive for the self-employed to increase their earnings and productivity and realise their financial potential. The earnings expectations of self-employed claimants under Universal Credit mirror those that would be expected of claimants, with similar circumstances, in employed work. For example, the level of the Minimum Income Floor for claimants expected to be able to work full-time will be equivalent to 35 hours per week at the National Minimum Wage.

7.34 If claimants are within one year of starting out in self-employed activity, they will be eligible for a 'Start-Up Period'. This is a one year period within which the Minimum Income Floor will not be applied. Following consultation with stakeholders and the Social Security Advisory Committee, eligibility for a 'Start-Up Period' has been extended to allow a further period every five years where the claimant has ceased the previous activity and started a new business.

Unearned Income

7.35 The Universal Credit Regulations prescribe types of income other than earnings that will be taken fully into account in calculating an award of Universal Credit. Income that is not listed in the Regulations is disregarded. This is different to existing income-related benefits legislation which prescribes the income to be disregarded.

The Benefit Cap

7.36 The Benefit Cap which is being implemented initially by Local Authorities through Housing Benefit from April 2013, as provided for in the

Benefit Cap (Housing Benefit) Regulations 2012(a), will be applied under these Regulations for households who claim Universal Credit or at the point their claim is transferred to Universal Credit.

7.37 The cap in Universal Credit will mirror that being introduced through Housing Benefit with the main differences being:

- The cap will be applied on a monthly basis and set at £2167 for lone parents and couples and £1517 for single people. These are the monthly equivalents of the £500 and £350 a week caps being established through Housing Benefit.
- The exemption for being in-work will be no longer based on entitlement to Working Tax Credit but be dependent instead on a household meeting an earnings threshold of, on introduction, £430 a month. This amount is based on 16 hours work at the National Minimum Wage.

Sanctions

7.38 Sanctions, which reduce the amount of the Universal Credit award for a fixed or variable period, play an important role in encouraging claimants to comply with requirements to move into or prepare for work. Research shows that compliance with requirements for, for example, active job search increases the chances that claimants find work quickly than they would otherwise(b).

7.39 The sanctions regime will incorporate a range of safeguards for claimants, including:

- Reasonable requirements: the requirements placed on claimants will be reasonable, taking into account their capability and circumstances, such as health conditions, disability and caring responsibilities. Ensuring that the requirements placed on claimants are reasonable will help to prevent sanctions being applied inappropriately.
- Good reason: sanctions will not be applied if a claimant can show good reason for non-compliance.
- Sanction cap: the total sanction period that can be applied to a claimant at any one time is to be capped at three years.
- Appeal rights.

7.40 The Universal Credit sanctions regime will feature four levels of sanction according to the claimant's conditionality group and type of compliance failure.

(a) SI 2012/2994

(b) DWP Research Report 2008, 'More support, higher expectations; the role of conditionality in improving employment outcomes'

7.41 Higher-level sanctions may be imposed on claimants subject to all work-related requirements for failure to meet the most important requirements for that conditionality group. This is where a claimant, for no good reason, fails to undertake Mandatory Work Activity; apply for a particular vacancy; take up an offer of paid work; or, by reason of misconduct, or voluntarily loses paid work or pay.

7.42 Higher-level sanctions will be for a fixed period:

- 91 days for a first failure (14 days for 16/17 year olds);
- 182 days for a second failure committed within 365 days of the previous failure (28 days for 16/17 year olds); and
- 1095 days (3 years) for a third or subsequent failure committed within 365 days of a previous failure that resulted in a 182 or 1095 day sanction.

7.43 Where a failure relates to cessation or non-take-up of work or losing pay or paid work and occurred before the claim for Universal Credit, the fixed period will be reduced by the period between the failure and the date of claim and, if appropriate, the duration of the employment that has been foregone.

7.44 Medium-level sanctions may be imposed on claimants subject to all work-related requirements who for no good reason fail to meet other important labour market requirements for that conditionality group: to take all reasonable work search action; and to be able and willing to take up work immediately (or more paid work or better paid work). These sanctions will be for a fixed period of 28 days (7 days for 16/17 year olds) for a first failure or 91 days (14 days for 16/17 year olds) for a second and subsequent failure within 365 days of the previous failure.

7.45 Low-level sanctions may be imposed on claimants in the work preparation conditionality group, as well as those subject to all work-related requirements. Failures at this sanction level include not complying with a work-focused interview requirement and failures to comply with a work search requirement to take a particular action or to comply with a requirement to, for example, come for an interview or provide information.

7.46 Low-level sanctions are open-ended and continue until a compliance condition is met. The compliance condition is either meeting the original requirement or an alternative agreed with an adviser. Once the compliance condition is met, for claimants over 18 there will be an additional fixed period of 7 days for a first failure, 14 days for a second failure at the same level within 365 days of a first and 28 days for a third or subsequent failure within 365 days of a previous failure which resulted in a 14 or 28 day sanction. The reduction period for 16/17 year olds will be the open-ended component for first failures and the open ended component plus a fixed 7 day period for second and subsequent failures within 365 days of the previous failure.

7.47 Lowest-level sanctions will apply to claimants subject to work-focused interview requirements only. They will be open-ended until the claimant meets the compliance condition.

7.48 Claimants subject to higher, medium and low-level sanctions will be sanctioned an amount equivalent to 100% (or 50% if a joint claimant) of their standard allowance amount for Universal Credit. Claimants subject to lowest level sanctions and 16/17 year olds will be sanctioned an amount equivalent to 40% (or 20% if a joint claimant) of their standard allowance. A sanction may be reduced from 100% if a claimant's circumstances change such that they move to the no work-related requirements conditionality group: to 40% if they now have responsibility for children or nil, if they have limited capability for work and work-related activity.

Hardship Payments

7.49 Claimants subject to a sanction can apply for hardship payments. To receive these, they must meet a number of conditions, including that they have complied with their labour market conditions (if applicable) and can show their household is unable to meet their immediate basic and essential accommodation, food, heating or hygiene needs. The claimant (or both joint claimants) must also accept that payments will be recoverable from future non-sanctioned benefit payments. Recovery of payments will cease where the claimant has been in paid work with an income at or above the level reasonably expected of them for a period of (or periods that add up to) 26 weeks.

7.50 A hardship payment is paid at a daily rate of 60% of the sanction reduction. It is paid for the number of days from the date the claimant meets the conditions to be in hardship to the day before their next Universal Credit payment is due. A claimant must re-apply for a hardship payment each assessment period to demonstrate their continuing need for support, that they are making reasonable efforts to reduce non-essential costs and seeking any alternative sources of support.

The Jobseeker's Allowance Regulations 2013

7.51 Jobseeker's Allowance is payable to people who are out of work and seeking employment. Under the current Jobseeker's Allowance Regulations 1996(a), there are two elements of Jobseeker's Allowance: a contribution-based element and an income-based element. The first of those elements is for claimants who have paid sufficient National Insurance contributions. The second is for those who have not paid enough National Insurance contributions and/ or have low or no other income.

7.52 The 2013 Regulations will work alongside Universal Credit and make provision for an award of Jobseeker's Allowance based only on National Insurance contributions. The Regulations do not include references to the

(a) SI 1996/207

income-based element of Jobseeker's Allowance. This is because claimants who are out of work, seeking employment and who want an income-based benefit will claim Universal Credit rather than income-based Jobseeker's Allowance. As a result, Jobseeker's Allowance will only be payable to claimants with sufficient National Insurance contributions.

7.53 With the exception of the conditionality and sanctions regime, the rules for the new Jobseeker's Allowance will be very similar to the existing rules for contribution-based Jobseeker's Allowance, made under the 1996 Regulations.

7.54 Jobseeker's Allowance for claimants under these Regulations will be paid either alone or along with Universal Credit. As Universal Credit is rolled out from April 2013, the income-related element of Jobseeker's Allowance will be phased out.

7.55 The work-related requirements set out in the Universal Credit Regulations will apply to awards of Jobseeker's Allowance where both benefits are in payment; the work-related requirements in this instrument only apply where there is no Universal Credit award. The work-related requirements and sanctions in this instrument are similar to those in Universal Credit with differences reflecting the different circumstances of people who claim Jobseeker's Allowance, for example, there are no "lowest level" sanctions.

7.56 Jobseeker's Allowance claimants are expected to be available for full time work immediately (depending upon their commitments and capabilities) and to demonstrate that they are normally spending 35 hours per week to find work. These requirements can be adjusted in a wide range of circumstances, for example, if the claimant is a carer or disabled or has recently been a victim of domestic violence. The requirements are intended to be flexible in recognition of the difficulties some claimants may face.

7.57 The Regulations provide new claimant responsibilities, sanctions for failure to comply with the conditionality regime and disapplication of sanctions in Jobseeker's Allowance where sanctions are applied to a claimant who is also awarded Universal Credit. The Jobseeker's Allowance sanctions regime features three levels of sanctions (high, medium and low level) which broadly work in the same way as the equivalent sanctions for the Universal Credit all work-related requirements group. The requirements placed on Jobseeker's Allowance claimants are broadly equivalent to those placed on claimants in the Universal Credit all work-related requirements group. In cases of dual entitlement to Jobseeker's Allowance and Universal Credit the sanction will be applied to Universal Credit.

The Employment and Support Allowance Regulations 2013

7.58 Employment and Support Allowance is payable to those who claim benefit on the basis that they have, or are treated as having, a health condition or disability which affects their ability to work.

7.59 Under the Employment and Support Allowance Regulations 2008 Employment and Support Allowance has, like Jobseeker's Allowance, two elements: a contributory element and an income-related element. The first of those elements is for claimants who have paid sufficient National Insurance contributions; the second is for those who have low or no other income. Universal Credit replaces the income-related element of Employment and Support Allowance, and this element will be phased out as Universal Credit is rolled out, leaving Employment and Support Allowance payable only to claimants who have paid sufficient National Insurance contributions.

7.60 The Employment and Support Allowance Regulations 2013 will work alongside those for Universal Credit. The Regulations omit any reference to income-related provisions, as claimants who want an income-based benefit will claim Universal Credit. Awards made under the Regulations will be paid either alone or together with Universal Credit.

7.61 With the exception of the conditionality and sanctions regime, the rules for the new Employment and Support Allowance will be very similar to the existing rules for the contributory element of Employment and Support Allowance under the 2008 Regulations.

7.62 The Regulations provide new claimant responsibilities, sanctions for failure to comply with the conditionality regime and disapplication of sanctions in Employment and Support Allowance where sanctions are applied to a claimant who is also claiming Universal Credit. The Employment and Support Allowance sanctions regime is based on the Universal Credit sanctions model, though there are some significant differences that reflect the circumstances of people who claim Employment and Support Allowance. For example, it features only two levels of sanctions, *low* and *lowest*, so does not include medium or higher level sanctions. The two levels of sanctions broadly work in the same way as the equivalent sanctions for Universal Credit claimants in the work preparation and work-focused interview requirement groups. The names 'low' and 'lowest' given to sanction levels in Employment and Support Allowance reflect their fit within the wider sanction regime that has been aligned across Universal Credit, Employment and Support Allowance and Jobseeker's Allowance. This will allow claimants to move more easily between the different benefits and to understand the conditionality and sanctions provisions that apply to them across the aligned regimes. .

7.63 The requirements placed on Employment and Support Allowance claimants are also based on the Universal Credit model, though there are again some significant differences. For example, claimants can be required to prepare for work and attend work-focused interviews, but are not required to look for work or be available for work where as in Universal Credit, within limits, claimants may be required to look for or be available for work that they are capable of. The requirements to prepare for work and attend interviews are broadly equivalent to those requirements placed on claimants in the Universal Credit work preparation and work-focused interview only groups.

The Universal Credit (Transitional Provisions) Regulations 2013

7.64 These Regulations make provision for the introduction of Universal Credit on a 'Pathfinder' basis from 29 April 2013. The intention is that Universal Credit will be introduced in a limited geographical area and to a limited range of claimants. This will facilitate an evaluation of the Universal Credit business processes and information technology functionality in a live environment before it is rolled out nationally from October 2013. The specific postcodes in which the Pathfinder will operate will be set out in an Order commencing the relevant provisions of the Welfare Reform Act.

7.65 The changes to Jobseeker's Allowance and Employment and Support Allowance will be introduced in parallel to the roll-out of Universal Credit. Claimants who meet the Pathfinder criteria will be excluded from claiming income-based Jobseeker's Allowance or income-related Employment and Support Allowance, but may make a claim for the new, contributory, versions of these benefits. This provision will be made in an Order commencing the relevant provisions of the Welfare Reform Act.

7.66 These Regulations provide that a claimant who is entitled to Universal Credit will not be able to claim income support, housing benefit or tax credits.

7.67 The Regulations set out detailed criteria which must be met in order for a person to be entitled to claim Universal Credit during the Pathfinder. In summary, claimants must be:

- British Citizens who are habitually resident in the United Kingdom;
- aged between 18 years and 60 years and 6 months;
- resident in the Pathfinder locations (but not owner-occupiers or in temporary accommodation);
- single; and
- available for work or in work with low earnings (but not have earnings from self-employment).

Claimants must not:

- be receiving existing benefits;
- have capital above £6,000; or
- have children.

7.68 Where incorrect personal information is supplied by a claimant when making their claim, the Regulations provide that, unless payments of Universal Credit have already begun, the claimant will be informed that they are not entitled to claim Universal Credit. If the claimant then claims an existing benefit, their claim will be treated as made on the date of the erroneous Universal Credit claim.

7.69 Where a Universal Credit claimant subsequently forms a couple with another person, an award of Universal Credit may be made to the couple jointly. If the new partner was previously claiming existing benefits, those awards will come to an end. However, the Regulations make provision to

ensure that the claimant is not penalised when they move to Universal Credit. These include:

- time spent on existing benefits can be carried over so that it can count towards the qualification period for receiving support for mortgage interest payments within Universal Credit. If a claimant is already receiving such support, the Regulations provide for it to continue;
- time spent in the assessment phase for an award of Employment and Support Allowance will be taken into account to adjust the length of the Universal Credit assessment phase; and
- decisions resulting from a Work Capability Assessment relating to Employment and Support Allowance will be taken into account in determining whether the claimant is eligible for the Limited Capability for Work, or Limited Capability for Work-Related Activity element within a Universal Credit award.

7.70 The Regulations allow Universal Credit claimants who were previously receiving existing benefits to request a recoverable advance payment of Universal Credit during their first assessment period. A request for an advance payment may also be made when a person who is entitled to Universal Credit forms a couple with a person who was previously entitled to an existing benefit. The intention is to ease the transition from existing benefits that are paid weekly, fortnightly or four weekly, to monthly payments of Universal Credit.

7.71 Where an award of Universal Credit is made to a claimant who was previously entitled to an existing benefit, any current sanctions and fraud penalties that have been applied to existing benefit awards will be transferred to the award of Universal Credit. Previous sanctions will also be taken into account when determining the appropriate sanction for any subsequent sanctionable failure by the claimant. This is to ensure that where claimants (or in the case of fraud penalties their partners as well) have not complied with the conditions of an existing benefit and had a sanction or penalty applied, then that sanction or penalty is not diminished by a move to Universal Credit.

7.72 The Benefit Cap will not apply to awards of Universal Credit during the Pathfinder.

7.73 Where a claimant was previously entitled to tax credits in the same tax year as they are awarded Universal Credit, the Regulations modify the tax credits legislation which will apply to them. Provisions of the Tax Credits Act 2002 are modified to ensure that an overpayment of tax credits can be treated as an overpayment of Universal Credit, enabling recovery of the overpayment from the Universal Credit award. In addition, the provisions that specify the time limits for the imposition of tax credits penalties made under Sections 31 or 32 of the Tax Credits Act are amended to take account of the fact that, as a result of other changes to tax credits legislation made by these Regulations, a tax credits award may be made for a part tax year, rather than the whole tax year.

7.74 Other modifications to the Tax Credits Act, and to regulations made under that Act, allow for tax credits awards to be finalised before the end of the tax year. Finalising tax credits awards in-year will ensure that Universal Credit claimants do not have to wait until the end of the tax year for any earlier entitlement to tax credits to be calculated. This means that any over- or underpayments are identified and dealt with much sooner in these cases than by continuing to finalise awards after the end of the tax year.

7.75 The intention is that in-year finalisation of tax credits awards will be the default approach in every case. However, the Regulations allow the Commissioners of Her Majesty's Revenue and Customs to continue to finalise tax credits awards after the end of the tax year, if they are of the opinion that it is not reasonably practicable to apply the modified legislation to any particular case or category of case. This flexibility has been built in as a sensible contingency to guard against unforeseen operational difficulties with the in-year finalisation process.

7.76 Whilst it is inevitably difficult to predict the types of problem that might arise, it is envisaged that the Commissioners' discretion might, for example, be exercised where there is an unforeseen system or process failure. Similarly, it could be exercised in the event that it proved difficult to verify income in a case or class of case where income is particularly complex, such as, for example, those including particular combinations of self-employed and other income.

Consolidation

7.77 These instruments are the product of an exercise to rewrite around 1,000 pages of existing regulations. In relation to the Universal Credit Regulations, the approach has been, wherever possible, to replace detailed provisions with general principles supported by guidance. This should reduce the need for frequent amendment of the regulations.

7.78 The Employment and Support Allowance Regulations and the Jobseeker's Allowance Regulations are themselves both a consolidation and rewrite of the existing regulations. Opportunities have been taken wherever appropriate to make simplifications and improvements.

8. Consultation outcome

8.1 The draft Universal Credit Regulations were not subject to statutory referral to the Social Security Advisory Committee, as it was planned that they be made within six months of the commencement of the relevant enabling power. However, in recognition of the importance of the changes encompassed by these measures, the Secretary of State for Work and Pensions invited the Committee to consider them in a similar way to regulations that are subject to formal scrutiny under the Social Security Administration Act 1992.

8.2 The Employment and Support Allowance Regulations 2013 and the Jobseeker's Allowance Regulations 2013 were both subject to statutory formal

consideration by the Social Security Advisory Committee^(a). The Committee raised a number of points during their consideration. All these points were considered and changes were made where appropriate. For example, the Committee questioned regulation 46 of the Employment and Support Allowance Regulations, which said that the purposes of a work-focused interview “include” the five things in the list. The Committee questioned whether this meant there were other purposes of such an interview which were not included in the list. The intention is that the list includes all the purposes of an interview. Regulation 46 was therefore amended to remove the word “include”.

8.3 Both the Employment and Support Allowance Regulations and the Jobseeker’s Allowance Regulations were included as part of the Committee’s wider Universal Credit consultation exercise, as the sanctions and conditionality rules for both benefits were being brought broadly into line with Universal Credit. Therefore, the views expressed during the consultation period, regarding the proposals for the Universal Credit conditionality and sanctions regime, also applied to the reform of Employment and Support Allowance and Jobseeker’s Allowance. Those views were considered for both those benefits. For example, removing reference to “long term” to take into account a range of physical and mental impairments that a claimant may have when considering any limitations that may be placed on a Jobseeker’s Allowance claimant’s work-related requirements

8.4 The Committee consulted with a broad range of organisations and individuals, between 15 June 2012 and 27 July 2012. In particular, the Committee examined the coherence of the package of regulations in terms of implementation, and whether there were gaps or unintended consequences that need to be addressed.

8.5 On 23 August 2012 the Committee delivered its report on the Universal Credit and related Regulations to the Secretary of State for Work and Pensions. The report and the Secretary of State’s response was published on 10 December 2012.

8.6 In August 2012, the Work and Pensions Select Committee launched an inquiry into the implementation of Universal Credit. The Secretary of State for Work and Pensions and the Minister for Welfare Reform attended a hearing on 17 September 2012. The Government published its response to the Committee’s findings on 5 February 2013.

8.7 More generally, extensive stakeholder engagement has taken place throughout the development of the Universal Credit Regulations. The Department for Work and Pensions has held workshops with customer representative organisations and Devolved Administrations to outline detail within the draft Regulations and provide the opportunity for them to seek clarification. Individual policy areas have worked closely with the Third

(a) <http://ssac.independent.gov.uk/pdf/minutes/minutes-13-14-06-12.pdf>

Sector and other Government departments to learn from their experiences of working with our claimants groups and to ensure alignment of policy.

9. Guidance

9.1 Work is underway to draft guidance to provide effective support for advisers and decision makers in administering Universal Credit, including for claimants on new Jobseeker's Allowance or Employment and Support Allowance.

9.2 In October 2012, a series of workshops were held with stakeholders to provide the opportunity for them to inform the development of this guidance. The Department for Work and Pensions will continue with this engagement throughout the development of guidance and will be sharing drafts of key parts of guidance with them and the Social Security Advisory Committee for their consideration. Comments will be invited to ensure that guidance is clear and easy for advisers to understand and delivers the policy intent for Universal Credit.

9.3 In line with standard practice, the Decision Makers Guide will be published on the Department for Work and Pensions website.

10. Impact

10.1 There is no impact on business or civil society organisations.

10.2 There are no significant costs to the public sector.

10.3 Impact Assessments have not been separately prepared for these Regulations. However, an assessment has been made of the impact of the introduction of Universal Credit and has been published on 10 December 2012 on the Department for Work and Pensions website^(a). This also covers information concerning the Department's obligations regarding its Equality Duty.

11. Regulating small business

11.1 These Regulations do not apply to small business regulation.

12. Monitoring & review

12.1 The Department is firmly committed to evaluating and monitoring the impact and effects of Universal Credit and the new Jobseeker's Allowance and Employment and Support Allowance.

^(a) <http://www.dwp.gov.uk/policy/welfare-reform/legislation-and-key-documents/welfare-reform-act-2012/impact-assessments-and-equality/>

12.2 Universal Credit marks a fundamental change to the way in which people engage with the benefit system and access in-work financial support. Universal Credit design, implementation and delivery will span a number of years. Evaluation plans will therefore reflect both the long timescale and complexity of the reform. This has involved developing a wide-ranging evaluation strategy which will employ a number of different approaches over the lifetime of the policy, including ongoing monitoring, ‘live running reviews’ of implementation and delivery, and longer term analysis of the outcomes and impacts for different groups of claimants, from implementation through to 2017 and beyond. A high level evaluation strategy is being published by the Department for Work and Pensions on 10 December 2012.

12.3 Central to the effective transition to Universal Credit is the Pathfinder activity. The prime focus of the Pathfinder evaluation is to examine implementation and operational delivery issues from the perspectives of staff, claimants and delivery partners. It will specifically examine:

- service delivery;
- operational processes;
- partnership arrangements; and
- customer experience.

12.4 This evidence will ensure the operational delivery of Universal Credit in Pathfinder is secure and, if required, improvements put in place before Universal Credit is rolled out on a national basis.

12.5 An external expert advisory group has been convened to offer advice and technical expertise on aspects of the evaluation strategy. It includes leading international experts in the fields of evaluation, financial capability, economics, experimentation and trialling, amongst other areas.

13. Contact

13.1 David Tottey at the Department for Work and Pensions can answer any queries regarding the instrument. Tel: 020 7449 7150 or email: david.tottey@dwp.gsi.gov.uk

Appeal to Supreme Court against the Court of Appeal judgment in *Burnip and others*

1. This Annex explains in more detail the issue about human rights compatibility referred to in Section 6 of the Explanatory Memorandum.

Summary of the Court of Appeal judgment

2. The judgment of the Court of Appeal in the cases of Burnip, Trengove and Gorry [2012] EWCA Civ 629 was given on 15 May 2012. It concerned the "size criteria" used in working out Housing Benefit through the Local Housing Allowance for those in the private rented sector. The judgment can be found at <http://www.bailii.org/ew/cases/EWCA/Civ/2012/629.rtf>.
3. The size criteria are the rules which determine the number of bedrooms allowed for when determining the size of dwelling for which Housing Benefit may be paid. The size criteria make no allowance for situations where, as a result of serious disabilities, two children cannot be expected to share. Paragraphs 10, 25 and 36 of Schedule 4 to the draft Universal Credit Regulations contains provision which have the same effect – in that they make no allowance for situations where, as a result of serious disabilities, two children cannot be expected to share. Until April 2011, the rules also made no allowance for situations where an additional bedroom is required for a carer who, although not resident at the property, provides overnight care to a disabled person. (From April 2011 the Housing Benefit Regulations were amended to allow an additional room in this second category of case (and the Universal Credit Regulations also provide for an additional room in such cases), but the case continued to the Court of Appeal on the question of whether the rules before that date had been lawful.)
4. The Court of Appeal found that, by not allowing for an additional bedroom in such cases, the size criteria especially affected disabled people. This amounted to "indirect discrimination" - in other words, although the rules on their face treated people the same regardless of disability, in practice they had a particular effect on disabled people. The Court of Appeal found that this effect was not justified, and was therefore in breach of Article 14 of the European Convention on Human Rights (non-discrimination). In reaching this decision the Court of Appeal overruled earlier decisions of the Upper Tribunal in these cases.

Secretary of State's grounds for appealing to the Supreme Court

5. The view is taken that it is nonetheless compatible with the Convention rights to proceed to make the Universal Credit Regulations as set out above. This is because the Secretary of State considers that the Court of Appeal judgment is wrong, and is appealing to the Supreme Court. The appeal is being brought on three grounds.
6. First, the Secretary of State believes that, when considering whether the rules had a particular effect on disabled people, the Court of Appeal made the wrong

comparisons and wrongly chose comparators against whom it was inevitable that less favourable treatment would be shown. The Secretary of State argues that the correct comparison should be with the position of a person who has no disability but who is otherwise in an identical position to that which existed in these cases.

7. So, for example, a disabled person who requires an extra bedroom for an overnight non-resident carer to look after them as a result of their disability should be compared with a person with no disability who requires an extra bedroom for such a carer while they are recovering from an accident. And a family with children who cannot be expected to share because they have severe disabilities should be compared with a family with children who have no disability but cannot be expected to share for some other reason, for example behavioural problems.
8. Applying these comparisons it can be seen that, even in the situations where there is no disability, Housing Benefit for an additional bedroom would still not be permitted. Therefore, the Secretary of State argues that the size criteria rules do not have any prejudicial effect on people with disabilities. The Secretary of State argues that the case law of the European Court of Human Rights in Strasbourg requires the court to identify a true comparator even in cases like this which involve indirect discrimination.
9. Second, the Secretary of State argues that the Court of Appeal was wrong to apply the principle in a Strasbourg case called *Thlimmenos* (34369/97 [2000] ECHR 162, <http://www.bailii.org/eu/cases/ECHR/2000/162.html>) to cases like these where a person is seeking an extra amount of assistance from the state. The case of *Thlimmenos* decided that discrimination can also happen when a state without reasonable justification fails to treat differently people whose situations are significantly different. However there is no other case where this principle has been applied in such a way as to require a state to take positive steps to award more in benefits to a particular person, which may have an effect on other recipients of benefits. The Secretary of State argues that the principle in *Thlimmenos* should be confined to cases where a person is arguing that a rule which excludes them, for example from a certain profession, should be disappplied.
10. Third, the Secretary of State argues that the Court of Appeal was wrong to reject his reasoning as to why, even if the size criteria were said to have a particular impact on disabled people, those rules were justified and therefore lawful. The case of *Humphreys v HMRC* (a decision of the UK Supreme Court decided after the decision of the Court of Appeal in the present cases- [2012] UKSC 18, <http://www.bailii.org/uk/cases/UKSC/2012/18.html>) confirmed the principle that the courts will generally respect a state's policy in relation to awarding social security benefits unless it is clearly irrational (in the legal sense of being outside the range of options reasonably open to the government).
11. The Secretary of State argues that, when considering whether the rules were justified, the Court of Appeal should have looked at the system of support as a whole, including not only Housing Benefit but also the full range of other benefits available to disabled people *and* the possibility of their obtaining extra help for their rent through discretionary housing payments made by their local authority. The Secretary of State argues that, taking all these avenues together, the size

criteria rules are well within the range of options reasonably open to him when setting the rules for Housing Benefit and therefore for the housing costs element of Universal Credit..

12. Also decisions such as the decision to amend the size criteria rules from April 2011 to allow an extra room for a non-resident overnight carer involved a consideration of ways in which the extra cost of this measure could be offset by other reforms to Housing Benefit and other benefits. The Secretary of State argues that difficult decisions of this kind about the best way to allocate scarce public funds are best left to the elected government and should not be decided by the courts.

The position pending the outcome of the appeal

13. Until such time as the appeal is determined, the rights of disabled people are being properly protected, as explained below.
14. Shortly after the Court of Appeal's judgment the Secretary of State gave guidance to local authorities on how they should apply the Housing Benefit rules following the judgment. This guidance indicated that local authorities are legally bound to apply the Court of Appeal judgment when determining applications for Housing Benefit under the the private rented sector size criteria. Those who needed an extra room for a non-resident overnight carer were already able to get Housing Benefit for that due to the amendments made in April 2011. The judgment did not change that. Those whose children are said to be unable to share a bedroom because of severe disabilities would be able to claim Housing Benefit for an extra room from the date of the judgment.
15. The guidance indicated that it remained for local authorities to assess the individual circumstances of the claimant and their family and decide whether their disabilities were genuinely such that it was inappropriate for the children to be expected to share a room. This would involve considering not only the nature and severity of the disability but also the nature and frequency of care required during the night, and the extent and regularity of the disturbance to the sleep of the child who would normally be required to share the bedroom. This would come down to a matter of judgment on the facts. Local authorities should expect to be provided with sufficient medical evidence to satisfy themselves that these factors were sufficiently weighty in the individual case to make it inappropriate for the children to share a bedroom on a continual basis. Only in such circumstances would they be justified in making an exception to the normal application of the size criteria and granting Housing Benefit on the basis of an additional bedroom. The guidance also pointed out that, given the intention to appeal the judgment they may wish to consider suspending the part of the Housing Benefit award that relates to the additional room allowed as a result of that judgment pending any appeal by the Department. There are powers to suspend part of housing benefit under regulation 11(2)(b)(ii) of SI 2001/1002 (the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001) when an appeal is pending. Regulations 2001).
16. The Secretary of State is proposing to update this guidance shortly to confirm to local authorities that permission to appeal to the Supreme Court has been granted,

and that we do not expect the case to be decided for some time. The updated guidance also indicates that local authorities should allow an extra room for disabled children only where, as in the case that was considered by the Court of Appeal, the family is in fact living in a property that has the extra room to enable the children to sleep separately.

17. These Universal Credit Regulations do not include provision for an extra bedroom in cases where children sleep in separate bedrooms due to their serious disabilities. Guidance will confirm that relevant cases will need to be considered in line with the overriding legal precedence of the judgment. The Secretary of State is considering whether a suspension of the increased benefit is appropriate in these cases. Section 21 of the Social Security Act 1998, read together with regulation 44 of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 allows for suspension when an appeal is pending
18. For these reasons the department is confident that Universal Credit claimants will be treated in a way that is compliant with the Court of Appeal judgment, and therefore compatible with section 6 of the Human Rights Act 1998 regardless of the outcome of the Secretary of State's appeal to the Supreme Court.

Future steps

19. In the event that the Secretary of State's appeal to the Supreme Court is unsuccessful and the Supreme Court upholds the judgment of the Court of Appeal, then of course that judgment will continue to be applied. The Universal Credit Regulations and Housing Benefit Regulations would be amended as soon as possible to ensure that they reflect the judgment.