

EXPLANATORY MEMORANDUM TO
THE SOCIAL SECURITY (MISCELLANEOUS AMENDMENTS No. 4)
REGULATIONS

2017 No. 1015

1. Introduction

1.1 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

2.1 This instrument makes amendments to several sets of Regulations to make minor corrections or clarify the existing regulations.

2.2 The instrument:

- makes an amendment to put beyond doubt the treatment of State Pension as income in State Pension Credit and Housing Benefit (for persons who have attained the qualifying age for State Pension credit);
- makes an amendment to avoid uncertainty about how notional income should be calculated following the introduction of pension flexibilities;
- makes amendments to reflect the increase in the age at which entitlement to Widow's Pension ends. This is currently 65 but will be State Pension age once that exceeds 65;
- makes amendments to reflect the Upper Tribunal decision¹ in the case of MM. This decision changed how the department applies the Past-Presence Test to child refugees;
- corrects a drafting error in The Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) regulations 2013/381². The amendment ensures that the legislation reflects the policy intent;
- makes amendments to reflect criticism by the [Joint Committee on Statutory Instruments \(JSCI\)](#) of the drafting of The Income Support (Work-Related Activity) and Miscellaneous Amendments Regulations (Northern Ireland) 2017 S.R.2017/18³;
- makes an amendment to ensure the law reflects the policy that only one individual is to be awarded a Child Benefit credit transferred from a Child Benefit recipient, in any one week. The current regulations do not sufficiently reflect that policy intention.

¹ https://assets.publishing.service.gov.uk/media/58a4218c40f0b6070b000052/2016_AACR_38ws.pdf

² <http://www.legislation.gov.uk/ukxi/2013/381/contents>

³ <http://www.legislation.gov.uk/nisr/2017/18/contents/made>

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 In the JCSI's 24th Report of Session 2016-17⁴ it drew special attention of both Houses to The Income Support (Work-Related Activity) and Miscellaneous Amendments Regulations (Northern Ireland) 2017 S.R.2017/18, on the grounds of defective drafting. In a letter to Damian Hinds, MP, on 13 March 2017, the Committee requested that the defects be rectified in the immediate future. This instrument corrects the defective drafting.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 The following regulations are being amended to avoid any uncertainty about how notional income should be calculated following the introduction of pension flexibilities:

- The Income Support (General) Regulations 1987/1967⁵
- The Social Security (Claims and Payments) Regulations 1987/1968⁶
- The Jobseeker's Allowance Regulations 1996/207⁷
- The State Pension Credit Regulations 2002/1792⁸
- The Housing Benefit Regulations 2006/213⁹
- The Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006/214¹⁰
- The Employment and Support Allowance Regulations 2008/794¹¹
- The Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013/380¹²

- 4.2 The following regulations are being amended to put beyond doubt the policy intent that when calculating entitlement to Pension Credit and Housing Benefit (for those who have reached pension age), the whole of the claimant's State Pension is taken into account even if the amount of the State Pension being paid has itself been reduced eg because an overpayment is being recovered:

- The State Pension Credit Regulations 2002/1792

⁴ <https://publications.parliament.uk/pa/jt201617/jtselect/jtstatin/128/12802.htm>

⁵ <http://www.legislation.gov.uk/uksi/1987/1967>

⁶ <http://www.legislation.gov.uk/uksi/1987/1968>

⁷ <http://www.legislation.gov.uk/uksi/1996/207>

⁸ <http://www.legislation.gov.uk/uksi/2002/1792>

⁹ <http://www.legislation.gov.uk/uksi/2006/213>

¹⁰ <http://www.legislation.gov.uk/uksi/2006/214>

¹¹ <http://www.legislation.gov.uk/uksi/2008/794>

¹² <http://www.legislation.gov.uk/uksi/2013/380>

- The Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006/214
- 4.3 This instrument also amends provisions in the following regulations which refer to Widow's Pension ceasing at age 65:
- The Social Security (Widow's Benefit and Retirement Pensions) Regulations 1979/642;¹³
 - The Social Security (Claims and Payments) Regulations 1987/1968.
- 4.4 These amendments are required as a consequence of the change to the upper age limit for Widow's Pension which will be aligned to State Pension age with effect from 6 December 2018.
- 4.5 The following regulations are being amended to reflect the changes consequent to the Upper Tribunal decision in the case of MM:
- The Social Security (Invalid Care Allowance) Regulations 1976/409¹⁴
 - The Social Security (Attendance Allowance) Regulations 1991/2740¹⁵
 - The Social Security (Disability Living Allowance) Regulations 1991/2890¹⁶
 - The Social Security (Personal Independence Payment) Regulations 2013/377¹⁷
- 4.6 The following regulations are being amended to correct a drafting error in relation to the time for bringing a Mandatory Reconsideration:
- The Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) regulations 2013/381
- 4.7 The following regulations are being amended in consequence of a defective drafting report by the JCSI:
- The Social Security and Child Support (Decisions and Appeals) Regulations 1999/991
- 4.8 Finally, this instrument amends The State Pension Regulations 2015/173¹⁸ to put beyond doubt the policy intent that only one individual can receive a specified Adult Child Care Credit in any one week.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is Great Britain.
- 5.2 The territorial application of this instrument is Great Britain.
- 5.3 The Department for Communities in Northern Ireland will be making corresponding provisions for Northern Ireland.

¹³ <http://www.legislation.gov.uk/uksi/1979/642>

¹⁴ <http://www.legislation.gov.uk/uksi/1976/409>

¹⁵ <http://www.legislation.gov.uk/uksi/1991/2740/contents>

¹⁶ <http://www.legislation.gov.uk/uksi/1991/2890/contents>

¹⁷ <http://www.legislation.gov.uk/uksi/2013/377/contents>

¹⁸ <http://www.legislation.gov.uk/uksi/2015/173/contents>

6. European Convention on Human Rights

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

7. Policy Background

Amendment to put beyond doubt the treatment of State Pension as income in State Pension Credit and Housing Benefit (for persons who have attained the qualifying age for state pension credit).

- 7.1 In the income related benefits it is a general principle, prescribed in legislation, that apart from certain adjustments, it is the gross amount of any other social security benefit payment that is taken into account when assessing the correct amount of the income-related benefit. This ensures that the income related benefit is not increased, effectively compensating for the deduction. For example, if the other benefit is awarded at £50 per week but only £45 per week is paid because £5 is being recovered for an overpayment, then it is £50 that is taken into account when calculating the income-related benefit award and not £45.
- 7.2 However, in the State Pension Credit Regulations and the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations, State Pension is prescribed as retirement pension income and not as a social security benefit. It is arguable that where a deduction is being made from State Pension then regardless of the reason for that deduction, it would be the amount of State Pension after the deduction that would be taken into account when calculating the income-related benefit award. This amendment therefore makes it clear that it is the gross amount, apart from certain adjustments, that is to be taken into account, so putting the matter beyond doubt.

Amendment to avoid uncertainty about how notional income should be calculated following the introduction of pension flexibilities

- 7.3 Income related benefits legislation provides that, where a person who has reached the qualifying age for State Pension Credit has a pension pot they have not annuitized, then notional income is taken into account in the benefit calculation.
- 7.4 From April 2015 greater freedom was introduced into the private pension system enabling individuals to choose what to do with their defined contribution pension savings. Prior to April 15, in order to calculate the notional income from an untouched (or remaining) pension fund, a benefit claimant was treated as possessing “the maximum amount of income which may be withdrawn from the fund”.
- 7.5 This amount is worked out by the pension provider using the HMRC “capped drawdown” rules based on 150% of the maximum annual annuity which could be purchased, calculated by means of the Government Actuary Department (“GAD”) tables.
- 7.6 Post flexibilities, the “maximum amount” that may be withdrawn from the fund could, in theory, be the whole pension fund – which could result in a notional income assessment that was disadvantageous to the claimant.
- 7.7 These amendments mean that the amount of notional income will be the rate of the annuity that the pension pot would generate calculated in line with the GAD tables without the 150% uplift previously applied.

- 7.8 In order to ensure claimants were not disadvantaged the forms sent to pension providers and the guidance to operational staff were amended so that the notional income figure provided and applied would be based on 100% of the annuity the pension pot would generate. This amendment clarifies this in the legislation.

Amendments consequential on the increase in the upper age limit for Widow's Pension

- 7.9 Widow's Pension ("WP") is a contributory benefit available to women without dependent children who were widowed before 9 April 2001 when over the age of 45 but under age 65. A widow who had one or more dependent children when her husband died before 9 April 2001 qualified for Widowed Mother's Allowance ("WMA") but if she is under 65 when her WMA ends, she can become entitled to WP. These "widow's benefits" were replaced for deaths on or after 9 April 2001 by Bereavement Allowance and Widowed Parent's Allowance, but continue to apply to widows who had qualified before that date. As at February 2017, the latest data available, there were around 20,000 widows still in receipt of WP (around half of whom were aged 60 to 64) and under 600 in receipt of WMA.¹⁹
- 7.10 The conditions of entitlement to WP are set out in section 38 of the Social Security Contributions and Benefits Act 1992 (the "CBA")²⁰. This currently provides that entitlement to WP may continue until age 65, but was amended by the Pensions Act 2007²¹ to provide for entitlement to continue until State Pension age. That amendment was due to take effect on 6 April 2024, when State Pension age was to have started increasing from 65 to 66. The Pensions Act 2011²², revised the timetable for increasing State Pension age, bringing forward the date at which State Pension age started to increase from 65 to 66 to 6 December 2018. Accordingly, provisions in regulations which refer to WP ceasing at age 65 need to be amended with effect from 6 December 2018 to reflect the revised State Pension age timetable.

Widows treated as entitled to Widow's Pension for State Pension purposes

- 7.11 Under the old state pension system, women widowed before 9 April 2001 who reached State Pension age before 6 April 2016 can qualify for a Category B pension (State Pension based on their late husband's National Insurance contributions) if they were entitled to WP, or are treated by regulations as entitled to WP. Men reaching State Pension age in the period 6 April 2010 to 5 April 2016 may also qualify for a Category B pension if they would have been entitled to WP had they been a woman.
- 7.12 People reaching State Pension age after the introduction of the new State Pension on 6 April 2016 may qualify for an "inherited amount" if they would have met the entitlement conditions for a Category B pension had they been in the old State Pension system. In such cases, the inherited amount is equivalent to the inherited additional state pension that would have been payable as part of the Category B pension.²³

¹⁹ Source: DWP Quarterly Benefits Summary August 2017 <https://www.gov.uk/government/statistics/dwp-statistical-summaries-2017>

²⁰ <http://www.legislation.gov.uk/ukpga/1992/4>

²¹ <http://www.legislation.gov.uk/ukpga/2007/22/contents> : see section 13(2) and (3)

²² <http://www.legislation.gov.uk/ukpga/2011/19/contents> : see paragraph 9 of Schedule 3

²³ The new state pension is generally based on a person's own National Insurance contributions only, but as part of the transition to the new system, an inherited amount may be payable subject to certain conditions. It is based on the old system inheritable additional state pension where the deceased reached state pension age or died before 6 April 2016.

- 7.13 Regulation 7(e) of the Social Security (Widow's Benefit and Retirement Pensions) Regulations 1979 provides that, for the purposes of establishing entitlement to Category B pension (and by extension, an inherited amount for those in the new State Pension) a widow can be treated as entitled to WP if she would be so entitled but for having "attained the age of 65". This enables a widow who was in receipt of WP which has ended only because she has reached the upper age limit to qualify. It also applies to a widow who was entitled to WMA which ended after she had reached 65 who therefore could not become entitled to WP.
- 7.14 As explained at paragraph 7.10 above, from 6 December 2018, it will be possible for entitlement to WP to continue beyond age 65, until State Pension age. The first widows who will be affected by this change are those born on 6 December 1953 who will reach State Pension age on 6 March 2019 aged 65 and 3 months. As reaching 65 will no longer be a reason why a widow is not entitled to WP, the amendment made by regulation 3 of this instrument replaces "the age of 65" with "pensionable age" from 6 December 2018.
- 7.15 Regulation 3 also inserts a new provision in regulation 7 to treat as entitled to WP widows whose WMA ends between age 65 and State Pension age. This is needed because section 38 of the CBA only enables widows whose WMA ends *before* they reach 65 to become entitled to WP. It is possible, albeit only in very limited circumstances, for WMA still to be in payment up to around January 2022. As a result, if WMA ends on or after 6 December 2018 for a widow who has reached 65 but has not yet reached State Pension age, she will not become entitled to WP.²⁴
- 7.16 The new provision inserted by regulation 3 will ensure that widows in this position will still be able to qualify for an inherited amount when they claim their new State Pension. We expect the number who could be affected to be minimal. As noted above, there were fewer than 600 widows still in receipt of WMA as at February 2017 and in the great majority of cases WMA will cease before age 65.²⁵
- 7.17 Regulation 3 also inserts a definition of WMA as it is referred to in the new provision in regulation 7, and for consistency with the existing definition of Widowed Parent's Allowance.

Widows claiming State Pension on cessation of Widow's Benefit

- 7.18 Regulation 3 of the Social Security (Claims and Payments) Regulations 1987 sets out the exceptions to the general rule that entitlement to benefit, including State Pension, depends on the person making a claim for it.
- 7.19 Regulation 3(1)(d) currently provides that a widow who was receiving widow's benefit is not required to claim State Pension when her widow's benefit ends, if at that point she is over the age of 65 (if she was in receipt of WMA or Widowed Parent's Allowance) or she has reached age 65 (if she was in receipt of WP or Bereavement Allowance).

²⁴ Primary legislation would be needed to amend the CBA to enable WP to be paid in any case where WMA ends between age 65 and State Pension age. As we do not expect there to be a suitable opportunity to make this amendment before December 2018, we are considering what alternatives are available to cover the gap in WP provision.

²⁵ Men widowed before 9 April 2001 are not affected, as those with a dependent child as at that date could qualify for Widowed Parent's Allowance which qualifies them for a Category B pension at state pension age.

- 7.20 It therefore currently applies only where the widow remains on widow's benefit past State Pension age. (The references to Widowed Parent's Allowance and Bereavement Allowance are redundant as they cannot be paid beyond state pension age.) She still needs to make a claim if she wishes to start receiving her State Pension from State Pension age, as is currently the case for any other customer. The Department sends a "claim invitation" letter to individuals four months before State Pension age. The accompanying booklet explains that widows in receipt of widow's benefit can choose either to claim their State Pension, remain on their widow's benefit until it ends or give up their widow's benefit in order to earn extra State Pension, and provides a telephone number for further information.
- 7.21 Regulation 5(2) replaces the reference to the age of 65 with "pensionable age" from 6 December 2018 in relation to widows in receipt of WMA, and deletes the provision relating to widows in receipt of WP (and Bereavement Allowance) to reflect the fact that WP will stop at State Pension age. The redundant reference to Widowed Parent's Allowance is also deleted.
- 7.22 This will maintain the existing position when the increases to State Pension age and the upper age limit for WP take effect. Widows in receipt of WMA will still be awarded State Pension without the need for a claim if their WMA award ends after they have reached the upper age limit for entitlement to WP. Widows in receipt of WP who wish to get their State Pension from State Pension age will be required to claim it, as now.

Upper Tribunal decision in MM – child refugees

- 7.23 The Past Presence Test ("PPT") has been a condition of entitlement to Disability Living Allowance ("DLA") since the inception of the benefit in 1992. The threshold for the PPT was increased in April 2013 from 26 out of the last 52 weeks to 2 years out of the last 3 years, in order to focus the Department's limited resources to those with the closest connection to the UK.
- 7.24 While we remain part of the EU, the only incomers who might be subject to the test are (i) EEA nationals who cannot aggregate periods of insured residence in another Member State and cannot demonstrate a genuine and sufficient link to the UK and (ii) people coming to the country from outside the EEA (including returning UK nationals). Therefore, in line with the PPT, refugees, their families and those of humanitarian protection status, who had not spent two out of the last three years in the UK, were not entitled to apply for DLA, Personal Independence Payment ("PIP"), Attendance Allowance ("AA") or Carer's Allowance ("CA").
- 7.25 The Upper Tribunal, in the case of MM, handed down a judgment on 17 March 2017 in respect of two children who wanted to claim DLA. One child was a refugee who entered the UK through the UN Gateway programme and the other was the child of a refugee who had entered the country to join his mother under family reunion rules.
- 7.26 The claimants argued that the application of the PPT discriminated unlawfully against refugees and their family members. The judge in the Upper Tribunal held that the PPT discriminated unlawfully against refugees under both EU law and the European Convention of Human Rights and should be disapplied. The department accepted the decision.
- 7.27 The amendments are being made to DLA, PIP, CA and AA Regulations to implement that decision. They will allow refugees, those of humanitarian protection status and

both groups' families to claim extra costs disability benefits once they have been granted asylum, rather than having to wait until they also satisfy the criteria as set out by the PPT. This will speed up the payment of benefit to these groups.

Time limits for applying for Mandatory Reconsideration

- 7.28 Prior to the introduction of Mandatory Reconsideration (“MR”) in child support in 2013, the time limit for applying for revision was one month, extendable by 12 months, i.e. a total of 13 months. The start date is the date of the notification of the original decision.
- 7.29 This has been the policy and legal position since the current decision making system was introduced by the Social Security Act 1998 and the accompanying regulations – The Social Security and Child Support (Decisions and Appeals) Regulations 1999, see regulation 3(1) & 4(3)²⁶. When MR was introduced in April 2013 the policy was to continue unchanged. Unfortunately the drafting of the equivalent provision for the new benefits - Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance - in The Universal Credit, Personal Independence Payment, Jobseeker’s Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 was flawed. Regulation 6, which provides for late applications of MR, was drafted (see reg 6(3)(c)) such that the extension period commenced from the end of the one month period allowed for an in-time application of MR and not from the date of the original decision itself. This gives a total period of 14 months.
- 7.30 As this was not noticed at the time, the guidance in the Advice for Decision Making guide was drafted on the basis that nothing had changed. Accordingly Decision Makers have been working to the 13 month limit – as per the policy. The amendment restores the policy intention in law.

Defective drafting reported by the JCSI

- 7.31 The Income Support (Work-Related Activity) and Miscellaneous Amendments Regulations 2014/1097²⁷, amended The Social Security and Child Support (Decisions and Appeals) Regulations 1999/991, to enable a decision made in relation to the requirement for a claimant to undertake work-related activity to be revised and superseded. A later amendment replicated the same for Northern Ireland (“NI”).
- 7.32 The department was reported by the Joint Committee for Statutory Instruments for defective drafting of the NI amendment. This related to the failure to reflect on the face of the Regulations that claimants could show good cause for their failure to undertake the necessary activity.
- 7.33 The JCSI had not previously commented on the GB drafting of the same amendment but because the NI amendment mirrored that for GB then the comment applies equally.
- 7.34 Both Statutory Instruments are being amended to reflect the criticism of “partial and defective drafting.”

²⁶ <http://www.legislation.gov.uk/ukxi/1999/991/contents>

²⁷ <http://www.legislation.gov.uk/ukxi/2014/1097/contents/made>

Amendment in relation to Specified Adult Child Care Credits

- 7.35 Specified Adult Childcare credits are available to adults over 16 and below State Pension age who provide childcare for family members under 12. The credits recognise the important contribution that certain family members (for example, grandparents) make by providing this childcare and enabling the primary carer to work. Specified Adult Childcare credits help to ensure that a person's National Insurance contributions record is maintained for state pension purposes.
- 7.36 People in receipt of Child Benefit for a child under 12 automatically receive credits. In some cases they do not need the credits because they have qualifying years by other means, for example through paid National Insurance contributions. The policy intention was to allow the Child Benefit recipient to be able to transfer their credits to the specified adult in these circumstances.
- 7.37 A child benefit recipient only has one Child Benefit credit available to transfer in each week, even if there is more than one child under 12 being cared for. However the current wording of regulation 35 (3) could be construed to support multiple applications when there is more than one child cared for in a single week, for example, by separate grandparents, because the legislation does not explicitly cover a situation where there are multiple children with different carers in a single week.
- 7.38 The regulation does not refer to an award of child benefit in respect of more than one child. It assumes that there is an award of child benefit in respect of the child who is cared for. It is therefore possible to argue that a credit can be awarded where a person cares for a child where the child benefit is awarded in respect of more than one child, and that the carer of that other child is also entitled to be awarded a credit.
- 7.39 This interpretation of the regulation would allow for double provision in that, for any relevant week, one credit could give entitlement to benefit (in the case of a Class 3 credit, to a new state pension) to more than one person. Avoiding double provision is a principle which runs through social security policy and legislation.
- 7.40 The amendment to Regulation 35 (3) of the State Pension Regulations 2015 involves a small technical change to ensure the regulation makes clear that only one individual can benefit from a transferred Child Benefit Credit from a Child Benefit recipient in any one week. This was the original policy intention but the current wording of the regulation does not sufficiently reflect this.

Consolidation

- 7.41 Informal consolidated text of instruments is available to the public free of charge via the National Archives website legislation.gov.uk.

8. Consultation outcome

- 8.1 The instrument was considered by the Social Security Advisory Committee who agreed formal consultation was not required. No other consultation was considered necessary because these are minor and technical changes.

9. Guidance

- 9.1 Guidance for staff and information for customers will be updated to reflect the changes implemented by this instrument. This will be available by the end of October.

10. Impact

- 10.1 There is no impact on business, charities or voluntary bodies.
- 10.2 There is no impact on the public sector.
- 10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

- 11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

- 12.1 None is planned as the changes made by this instrument are minor and technical.

13. Contact

- 13.1 Lyndon Walters at DWP. Telephone: 02074497347 or email:
Lyndon.walters@dwp.gsi.gov.uk can answer any queries regarding the instrument.