

EXPLANATORY MEMORANDUM TO
THE HOUSING BENEFIT AND UNIVERSAL CREDIT (SIZE CRITERIA)
(MISCELLANEOUS AMENDMENTS) REGULATIONS 2017

2017 No. 213

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 The amount of Housing Benefit, and the amount of the housing costs element in Universal Credit, to which a person is entitled is, in part, dependant on the size and make-up of their household. This is known as the size criteria. The size criteria rules apply to claimants living in both the private and social rented sectors and prescribe the number of bedrooms a claimant would be entitled to.
- 2.2 The purpose of this instrument is to make amendments to the size criteria rules that determine Housing Benefit and Universal Credit entitlement.
- 2.3 The changes allow an extra bedroom where a couple are unable to share because of severe disability and a disabled child or non-dependant disabled adult requires overnight care from a non-resident carer subject to the qualifying conditions.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None

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 Removal of the Spare Room Subsidy was introduced in April 2013¹. It applied to all working age claimants living in, but considered to be under-occupying their social sector housing when assessed against a set of size criteria. Since then there has been a number of legal challenges to the policy, resulting in seven joined appeals being heard before the Supreme Court in February 2016.
- 4.2 The Court handed down its judgment on 9 November 2016. The Department was successful in five of these cases, but received an adverse decision in respect of two cases. These related to the overnight care of a disabled child (the Rutherford case) by a non-resident carer; and a couple who are unable to share a bedroom due to disabilities (the Carmichael case). The Court held that the legislation was unlawfully

¹ The Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations 2013

discriminatory in respect of these two cases. To comply with this decision, amendments are being made to the following instruments:

- The Housing Benefit Regulations 2006 (SI 2006/213) (www.legislation.gov.uk/uksi/2006/213);
- The Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006 (SI2006/214) (www.legislation.gov.uk/uksi/2006/214);
- The Universal Credit Regulations 2013 (SI2013/376) (http://www.legislation.gov.uk/uksi/2013/376/pdfs/uksi_20130376_311216_en.pdf);
- The Rent Officers (Housing Benefit Functions) Order 1997 (1997/1984) (www.legislation.gov.uk/uksi/1997/1984); and
- The Rent Officers (Housing Benefit Functions) (Scotland) Order 1997 (1997/1995) (www.legislation.gov.uk/uksi/1997/1995/pdfs/uksi_1997/1995_301115_en.pdf).

4.3 The amendments allow severely disabled couples who are unable to share a bedroom; and non-resident overnight carers required for severely disabled children and non-dependant adults to be taken account of by the relevant authority when assessing the size criteria across the social and private rented sectors. Rent Officers do likewise when making determinations for some cases within the private rented sector.

5. Extent and Territorial Application

5.1 The extent of this instrument is Great Britain (GB).

5.2 The territorial application of this instrument is GB.

5.3 Corresponding provisions will be made for Northern Ireland.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and do not amend primary legislation no statement is required.

7. Policy background

What is being done and why

7.1 The Removal of the Spare Room Subsidy was introduced in April 2013. If a claimant exceeds the number of bedrooms, as calculated by the size criteria, their Housing Benefit or Universal Credit award is “restricted”. In the case of private rented sector tenants, they only receive an amount with reference to the appropriate local housing allowance (LHA)² rate for their area (e.g. the shared accommodation rate, or one, two, three or four bed LHA rate). Social sector tenants’ eligible rent is subject to a 14% reduction if they exceed the size criteria by one bedroom, or a 25% reduction if they exceed the size criteria by two bedrooms or more. For social sector tenants this is called the Removal of the Spare Room Subsidy.

² Local housing allowance (LHA) is used to work out how much housing benefit a claimant may receive if they rent their home from a private landlord.

- 7.2 The current size criteria rules provide one bedroom for each of the following:
- Every adult couple (married or unmarried);
 - Any other adult aged 16 and over;
 - Any two children of the same sex aged less than 16;
 - Any two children of opposite sex aged less than 10;
 - Any other child (other than a foster child or child whose main home is elsewhere);
 - A child who is unable to “share a bedroom” (the test for this is broadly that the child is in receipt of the middle/higher rate of Disability Living Allowance and because of the child’s disability or medical condition the child cannot reasonably share with another);
 - A non-resident carer (or team of carers) providing overnight care for the claimant or partner (the test for this is broadly that the claimant or partner is in receipt of middle/higher rate Disability Living Allowance or equivalent in the Personal Independence Payment or Attendance Allowance. For Housing Benefit claimants only, if a qualifying disability benefit is not in payment the local authority must be satisfied that such care is required. In the case of joint tenants, each will have an extra bedroom for overnight care from a non-resident carer if they both satisfy these conditions).
 - An extra bedroom is also allowed if the claimant or partner is a foster carer; and parents of armed forces personnel are allowed to retain their adult child’s bedroom if they are deployed on operations.
- 7.3 There have been a number of legal challenges since the introduction of the removal of the spare room subsidy in 2013. This culminated in seven cases being brought before the Supreme Court in February 2016. The judgment³ was handed down on 9 November 2016. Of the five cases that the Department won, four involved claimants with a disability and the other involved a claimant with a panic room. The two cases that were lost related to a claimant who requires an extra bedroom for a team of non-resident overnight carers who regularly look after his severely disabled grandson; and the second was in relation to a couple, one member of which was severely disabled and, as a consequence of those disabilities, they were unable to share a bedroom.
- 7.4 In both the Rutherford and Carmichael cases, the Supreme Court found that the legislation was unlawfully discriminatory. Their reasoning for the discrimination is linked to two previous Court of Appeal judgments (Burnip and Gorry)⁴ after which the Department took steps to allow an extra bedroom in the size criteria rules for children (but not adults) who cannot share a bedroom because of a disability and for an adult (but not a child) who requires an extra bedroom for their carer because of their disability.

³ *R (Carmichael and Rourke) v Secretary of State for Work and Pensions* [2016] UKSC 58
<https://www.supremecourt.uk/cases/uksc-2016-0029.html>

⁴ *Burnip v Birmingham City Council* [2012] EWCA Civ 629 and *Gorry v Wiltshire County Council*. These cases involved an appeal against the size criteria in the private rented sector and related to a non-resident carer for adults and a disabled child who was unable to share a bedroom.

Policy Change

- 7.5 To take account of the Supreme Court’s judgment in respect of Rutherford and Carmichael type cases, and to ensure disabled children and adults are treated in the same way, we propose to amend the size criteria rules from 1 April 2017 across both the private and social rented sectors, which will allow the relevant authority to provide funding for an extra bedroom (where one is available) when a:
- disabled child or non-dependant disabled adult requires, and has overnight care from, a non-resident carer. The qualifying test for both Housing Benefit and Universal Credit will be that the child/non-dependant adult is in receipt of middle or higher rate care component of Disability Living Allowance, Attendance Allowance or the daily living component of Personal Independence Payment. For Housing Benefit only, if the qualifying disability benefit criterion is not satisfied, the local authority can still allow an extra bedroom if it has been provided with sufficient evidence that it is satisfied overnight care is required. This effectively mirrors the current provision in the size criteria for adults who require a non-resident overnight carer.
 - couple cannot share a bedroom because of disability. The qualifying test for this will be that one member of the couple is in receipt of the middle or higher rate care component of Disability Living Allowance, higher rate Attendance Allowance, the daily living component of Personal Independence Payment or armed forces independence payment; and the individual cannot reasonably share a bedroom with the other member of the couple because of his/her disabilities. This will effectively mirror the current provision in the size criteria for children who cannot share a bedroom.

Consolidation

- 7.6 Informal consolidated text of instruments is available to the public free of charge via ‘The National Archive’ website www.legislation.gov.uk.

8. Consultation outcome

- 8.1 As the policy is to comply with a Supreme Court judgment, the Department has not undertaken a separate consultation. However, in accordance with section 172(1) of the Social Security Administration Act 1992, the Department referred the regulations to the Social Security Advisory Committee (SSAC) and the Local Authority Associations.
- 8.2 No substantial concerns were raised at the SSAC meeting on 25 January 2017 and SSAC did not refer the regulations for consultation.
- 8.3 In accordance with section 176(1) of the Social Security Administration Act 1992, the Department has also consulted with the Local Authority Associations (LAAs) who have raised no concerns.

9. Guidance

- 9.1 The Department will publicise the changes through appropriate channels such as the Gov.uk website to make sure that people likely to be affected are aware of the changes.
- 9.2 Comprehensive guidance will be provided prior to the SI coming into force for both Universal Credit decision makers and local authorities to assist them with the effective

delivery and communication of these changes. This guidance will be made available through the standard web-based products with which the Department communicates with Housing Benefit managers.

10. Impact

- 10.1 This legislation has no direct impact on business, charities or voluntary bodies.
- 10.2 There will be some impact on public sector costs and will increase Departmental expenditure; with one-off costs for local authority housing benefit and housing departments to implement these changes.
- 10.3 We estimate that, in 2017/18, approximately 45 thousand households will benefit from the changes in the Housing Benefit and Universal Credit award calculation, with the average increase between £13 to 14 per week. This adds up to total additional Housing Benefit/Universal Credit spend of approximately £30m per annum. By 2020/21, the impacts are estimated to rise to approximately 55 thousand households at an average of £17 to 18 per week, totalling approximately £55m per annum. The increase in impact over time is due to a combination of reasons – principally, the introduction of Local Housing Allowance (LHA) rates into the social sector from 2019/20, the continuing restrictions on LHA rates compared with rents, and a small amount of additional cases brought into Universal Credit that were not already receiving Housing Benefit.
- 10.4 An impact assessment to cover the Removal of the Spare Room Subsidy was published on 28 June 2012 and is available on the DWP website: <http://www.dwp.gov.uk/docs/social-sector-housing-under-occupation-wr2011-ia.pdf> or the National Archive website www.legislation.gov.uk. This change will be beneficial to both disabled adult couples who are unable to share a bedroom due to a “transparent medical need” and to disabled children and disabled adult non-dependants who require an overnight carer. A further impact assessment has not been prepared for this instrument as it has no impact on the private sector or civil society organisations.
- 10.5 An equality impact assessment has been prepared and agreed by Minister for Welfare Delivery. In summary:
 - More working age families are likely to benefit from these measures as more working age families are responsible for children or an elderly relative, although numbers are small across both sectors (35,000) who are in receipt of a qualifying disability benefit.
 - The measures should help alleviate any issues about claimants being able to remain in their properties, unless they are significantly under-occupying.
 - The measure should help alleviate the uncertainty of not being awarded a Discretionary Housing Payment, as regulations will make provision for an extra bedroom in Rutherford and Carmichael type cases (12,000).
 - For those who do not currently have an extra bedroom, the measures will allow them to upsize to more appropriately sized accommodation.
- 10.6 An explanation as to which instruments are maintained on each site is available from <http://www.dwp.gov.uk/docs/lawvolnews.pdf>.

11. Regulating small business

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

12. Monitoring & review

- 12.1 A formal evaluation is not proposed for this change. DWP will monitor the impact through our regular liaison with the Local Authority Associations and use feedback from the FED Working Group and other stakeholder groups to assess whether there are unintended consequences for the protected groups and whether the policy itself results in adverse consequences for particular groups.
- 12.2 Administrative datasets, including the Single Housing Benefit Extract (SHBE) and Universal Credit administrative data will also be used to monitor trends in the benefit caseloads for some of the protected groups and in the level and distribution of benefit entitlements. The administrative data will provide robust material for age and gender although not, as a rule, for the other protected groups. DWP will also monitor changes in the distribution of caseload by area.

13. Contact

- 13.1 Beverley Walsh at the Department for Work and Pensions Tel: 0113 232 7601 or email: beverley.walsh@dp.gsi.gov.uk can answer any queries regarding the instrument.