



# Advice NI Policy & Information Briefing

## Restore Confidence in the Benefit Overpayment Recovery System

**July 2022**

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# Advice NI Policy & Information Briefing

## Restore confidence in the benefit overpayment recovery system

Advice NI has launched a campaign to lobby for action from the Secretary of State for Work and Pensions in respect of the overpayment recovery waiver system. Introducing a petition on the UK Parliament website, Advice NI Head of Policy, Kevin Higgins, emphasises the need ‘to restore confidence in the overpayment recovery waiver system by ensuring everyone affected by overpayments are made aware of the existence of waivers and how to seek one, and monitoring decision making to ensure that waivers are applied correctly.’<sup>1</sup>

According to the Department’s own guidance, the Secretary of State for Work and Pensions has the discretion to waive recovery of a benefit overpayment ‘where recovery is detrimental to the health or welfare of the debtor or a member of their family.’<sup>2</sup> It is Advice NI’s firm conviction that the Department has failed in its duty to claimants by severely limiting those discretionary powers.

The scale of the problem in the system was thrown into stark relief by the government’s response to a question tabled in the House of Commons by Alan Brown MP of the Scottish National Party on 22 November 2021. This revealed that the Department for Work and Pensions (DWP) had waived recovery of just 9 overpayments due to official error (caused by Departmental action) during the 2020-21 financial year, and only 5 from April to October 2021.<sup>3</sup> A Freedom of Information request made by the campaigner Frank Zola has subsequently established that this equates to a total value (rounded to the nearest £1,000) waived of £54,000 prior to 21 December 2021 in 2021-22, £22,000 in 2020-21 and £13,000 in 2019-20.<sup>4</sup>

Investigation of the Department’s own reports for the last two complete financial years show that £330m Universal Credit was overpaid due to official error in 2020-21 and £250m in 2019-20, equivalent to 0.9% and 1.3% of total Universal Credit expenditure in those years.<sup>5</sup> Therefore, the proportion of Universal Credit overpayments due to official error that were waived was 0.0066% in 2020-21 and 0.0052% in 2019-20. By any measure, an incredibly small proportion. It should also be noted that the figures for fraud and error provided by the Department are estimations based on the incidence of the relevant type of fraud or error in the

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<sup>1</sup> [Restore confidence in the benefit overpayment recovery waiver \(write-off\) system](#)

<sup>2</sup> [Benefit overpayment recovery guide, Chapter 5](#), para 5.73. Equivalent guidance relating to Northern Ireland remains unpublished.

<sup>3</sup> [UIN 75017](#)

<sup>4</sup> [Universal Credit official error overpayment waivers](#), DWP response dated 21 December 2021

<sup>5</sup> [Fraud and error in the benefit system for financial year ending 2021](#), 13 May 2021, [Appendix 1: Overpayment rates and monetary values by benefit; Fraud and Error in the Benefit System 2019 to 2020](#), 29 May 2020, [Appendix 1: Overpayment rates and monetary values by benefit](#)

sample taken, and not an actual figure drawn from the Department’s internal reporting mechanisms.<sup>6</sup>

In Northern Ireland, the Department for Communities estimated official error overpayments in Universal Credit at approximately £12.8m in 2020, which was 1.7% of total expenditure on Universal Credit in that calendar year, the most recent for which figures are currently available.<sup>7</sup> Meanwhile, a recent response to a written question in the Assembly from Matthew O’Toole MLA revealed that there had been just 8 Universal Credit official error overpayments waived in the previous 12 months.<sup>8</sup> Unfortunately, figures for the value of those waivers are not currently in the public domain, and the figures do not relate to the same time periods, so it is difficult to assess how Northern Ireland compares to Great Britain, but it is clear that this will represent an equivalently small proportion of official error overpayments being waived.

To understand the inequity this represents we need to consider the policy context relating to waivers and analyse the current rules that apply in relation to overpayments and the duties the Department has to protect the most vulnerable on its caseload. Aside from contextualising the problem, this will also provide both advisers and their clients with the best information to allow them to seek waivers where they are warranted.

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<sup>6</sup> [Background information: Fraud and error in the benefit system statistics](#), 13 May 2021, see especially [4. Sampling and Data Collection](#): Official Error Checking

<sup>7</sup> [Annual Report and Accounts for the year ended 31 March 2021](#), 9 August 2021, p. 205

<sup>8</sup> [AQW 29446/17-22](#)

## Welfare Reform and Overpayment Recovery

The programme of welfare reform introduced by the Conservative and Liberal Democrat coalition government between 2010 and 2015, and in the main duplicated by the Northern Ireland Executive, included a wide range of changes to the administration of the benefit system.<sup>9</sup> One aspect that was little remarked upon at the time was a change in the approach to recovery of certain benefit overpayments.

Under the legacy regime, the recoverability of an overpayment depends on an assessment by a decision maker. In general, only the amount of a benefit under the legacy regime that has been overpaid as a result of a failure to disclose or misrepresentation of information relevant to a claim can be recovered.<sup>10</sup> However, the legislation relating to the administration of Universal Credit, new-style Jobseeker's Allowance and new-style Employment and Support Allowance removed this principle, meaning that *any* overpayment of these three benefits, including those caused by the Department (due to 'official error'), can be recovered from the claimant.<sup>11</sup> In addition, it is important to note that recovery of an overpayment under the Universal Credit regime will not be suspended pending the outcome of an application for revision of or an appeal against the recoverability decision.<sup>12</sup>

This was a substantial shift in policy, which provides another example of how the Universal Credit system is more punitive to claimants (it is notable that the principle was not extended to overpayments of Personal Independence Payment, despite that benefit being part of the same programme of reform). Yet by comparison to other reforms – such as the bedroom tax, the two-child limit and the introduction of claimant commitments – the decision to hold claimants liable for overpayment of benefit caused through no fault of their own did not hit the headlines. Perhaps one reason for this was the way in which the change was contextualised by those in government at the time.

On 19 May 2011 the matter was raised at the Public Bill Committee in relation to 'probing' amendments to the Welfare Reform Bill put forward by the Opposition. In response, Chris Grayling, then Secretary of State for Work and Pensions, sought to reassure Members of Parliament that the Bill did not intend to make every overpayment recoverable, but to allow scope for 'common sense' to be applied by decision makers:

The practical reality is that we do not have to recover money from people where official error has been made, and we do not intend, in many cases, to

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<sup>9</sup> [2010 to 2015 government policy: welfare reform](#); [Welfare changes in Northern Ireland](#)

<sup>10</sup> See DMG Chapter 09: Overpayments, Recoverability, Adjustments, Civil Penalties and Recoupments ([GB version](#); [NI version](#)), especially 9163; Social Security Administration Act 1992, [§71\(1\)](#); Social Security Administration (Northern Ireland) Act 1992, [§69\(1\)](#)

<sup>11</sup> ADM Chapter D1: Overpayments, Recoverability, Adjustments, Civil Penalties and Recoupment – UC, JSA and ESA ([GB](#); [NI](#)), specifically D1103; Social Security (Overpayments and Recovery) Regulations 2013, [reg 4\(1\)](#); Social Security (Overpayments and Recovery) Regulations (Northern Ireland) 2016, [reg 4](#)

<sup>12</sup> [Benefit overpayment recovery guide, Chapter 8](#), paras 4.6, 4.13, 4.15 and 4.24-28

recover money where official error has been made. There will be an absolutely clear code of practice that will govern the circumstances in which recovery action will or will not be taken, to ensure consistent, considered decision making.

Nonetheless, the Secretary of State resisted the call from the opposition to return to the principle of legacy benefits, under which overpayments not caused by the claimant could not be recovered from them:

What I do not want to do, however, is apply the one-size-fits-all approach suggested by the amendments. If we prescribe circumstances for a discretionary write-off or non-recovery of an overpayment, we will miss the fact that every case is different and every circumstance is different. The degree of error is also different in every case. We must have sufficient flexibility in the system to apply discretion and common sense to individual cases.<sup>13</sup>

The consequence of this change in policy is the greater emphasis it places on the pre-existing discretion available to the Secretary of State, through the decision maker, not to recover an overpayment. According to the Department's overpayment recovery guidance, this discretion can be exercised in three ways:

1. writing off debts that are not cost-effective to recover (in the main this applies to small overpayments, SMOPs, which is currently any overpayment below £65);
2. writing off debts that have become 'unrecoverable', that is, 'where all options for recovery have been exhausted';
3. waiving debts 'in exceptional circumstances' where there are 'very specific and compelling grounds to do so.'<sup>14</sup>

Of these, it is only the discretion to waive debts that can be interpreted widely enough to offer claimants the prospect of avoiding recovery action by the Department, and waivers 'are only granted in exceptional circumstances where it can be clearly demonstrated that the debtor's circumstances will only improve by waiver of the debt.'<sup>15</sup>

Given that waivers are discretionary, advisers and clients need to be clear about the interpretation of 'exceptional circumstances' in these cases. In response to a case brought by the [Public Law Project](#), the overpayment recovery guidance now lists a number of 'factors' relevant to the decision maker's consideration of a waiver that do offer some hope if applied by the Department. These include:

- the debtor's financial circumstances and those of their household

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<sup>13</sup> [Welfare Reform Bill](#), Public Bill Committee, Thursday 19 May 2011, column 1019

<sup>14</sup> [Benefit overpayment recovery guide, Chapter 8](#), para 8.2

<sup>15</sup> Para 8.3

- whether the recovery of the debt is impacting the debtor’s health or that of their family
- the circumstances surrounding how the overpayment arose for example fraud, official error, DWP conduct
- the debtors conduct for example, whether the debtor took steps to mitigate any overpayment, notify DWP, misrepresented or failed to disclose any matter, any fraudulent conduct etc
- whether the debtor has relied on the overpayment to their detriment
- whether the Department intended the claimant to have the money
- where the debtor can demonstrate that they did not benefit from the money that was paid
- any other factor which appears relevant to the decision maker or which indicates recovery would not be in the public interest.<sup>16</sup>

Whilst the guidance does go on to state that ‘it would normally be expected that the recovery of the debt is causing either financial hardship or welfare issues for the debtor or their family’, the terminology leaves some room for interpretation in that regard.<sup>17</sup> As such, it seems claimants would generally be advised to submit a request for a waiver, and figures obtained by the Law Centre Northern Ireland suggest that, in Northern Ireland at least, there is evidence that those that make waiver requests are successful, ‘where there is evidence of detriment to health’.<sup>18</sup> However, it is unclear at present how Debt Management intend to interpret the change in the guidance, and therefore whether it will result in waivers being considered more broadly than at present.

Of course, as waiver decisions are discretionary they do not carry appeal rights, and the claimant would have little immediate recourse if the request were to be rejected. However, there may be grounds for a judicial review in respect of the Department failing to lawfully apply the discretion available to the Secretary of State, and the Child Poverty Action Group have produced a pre-action template letter laying out the basis on which this could be argued.<sup>19</sup> In addition, the Public Law Society are also concerned about the impact of current policy in this area and believe there may be grounds to bring cases on discrimination grounds if the policies can be shown to have a disproportionate impact on special interest or minority groups.<sup>20</sup>

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<sup>16</sup> Para 8.4

<sup>17</sup> Para 8.5

<sup>18</sup> Law Centre NI, [Recovery of overpayments arising from ‘official error’: current problems and recommendations for change](#) (April 2022). Information obtained by the Law Centre via a Freedom of Information request revealed that in 2020-21 86% of waiver requests were granted. No further contextual information is provided in the briefing.

<sup>19</sup> [JR61: Failure to exercise discretion not to recover an overpayment of UC \(generic - where overpayment is a result of official error and claimant is experiencing financial hardship\)](#)

<sup>20</sup> As discussed during a Benefit Deductions Round Table hosted by the Public Law Project on 3 May 2022 with representatives from across the advice sector.

## Managing Public Money and Discretionary Waivers

In an effort to understand why so few waivers are granted, it is worth engaging with the context within which decisions about them are made. In effect, there are two priorities: on the one hand, concern for the welfare and wellbeing of claimants, and on the other, protecting the public purse. Returning to the Department's recovery guidance, we can see this laid out in stark terms:

The Secretary of State has a duty to protect public funds and will therefore seek to recover debt in all circumstances where it is reasonable to do so. Waivers are only granted in exceptional circumstances where it can be clearly demonstrated that the debtor's circumstances will only improve by waiver of the debt.<sup>21</sup>

Greater weight appears to be placed on the Department's duty to the public purse than on any duty to claimants, and both statistics and the experience of those seeking waivers support this interpretation. Moreover, the simple fact that waivers are considered by Debt Management, the branch of the Department responsible for recovery action, is also indicative of where the priority lies.

In which case, we need to consider whether the Department's approach is in line with wider public policy. HM Treasury published updated guidance on the management of resources across the public sector in May 2021.<sup>22</sup> Annex 4.11 of that document outlines the approach to be taken to overpayments, and provides further grounds for interpreting the list of factors included by the Department in the overpayment recovery guide quoted in the previous section. Therefore, it is a useful document for informing a waiver request, in two respects.

In the first case, the claimant may be able to argue that they acted 'in good faith' – that is to say, that they believed the payment to have been made correctly and did not mislead the Department about their entitlement. Factors which might inform an argument on these grounds include the 'complexity' of certain benefit entitlements, the claimant's understanding of and the Department's explanation of those entitlements, and the role played by changes in the claimant's circumstances. In short, exactly the kind of decision-making criteria familiar from legacy benefits and enshrined in legislation and case law, but for claims to Universal Credit, new-style Jobseeker's Allowance and new-style Employment and Support Allowance, subject solely to the Department's discretion. Whilst 'good faith alone is not a sufficient defence', it is important to be aware that it can still form part of the claimant's case for a waiver.<sup>23</sup>

In addition to emphasising the 'good faith' argument, the Managing Public Money guidance also provides the background for the long-standing defence against recovery of hardship, which is that generally emphasised by the Department in its

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<sup>21</sup> [Benefit overpayment recovery guide, Chapter 8](#), para 8.3

<sup>22</sup> HM Treasury, [Managing Public Money](#) (May 2021)

<sup>23</sup> A4.11.6-8

communication around waivers. The definition of hardship given in the document is that recovery 'would be detrimental to the welfare of the debtor or the debtor's family' and is interpreted as encompassing both 'financial' concerns and the 'mental welfare' of those affected. In any claim of hardship, 'reasonable evidence' will be required to support the assertion.<sup>24</sup>

Detail about what constitutes reasonable evidence is provided in the overpayment recovery guidance, which also narrows the interpretation of hardship. Those claiming financial hardship need to show that their problems are 'long standing' and likely to continue 'in the foreseeable future'. In other words, 'it is not reasonable to expect the debtor to make even reduced payments.' To prove this, they must provide income and expenditure information for themselves and any family members, including at least 6 months' bank statements, and evidence of other debts being pursued.<sup>25</sup>

In order to argue for a waiver on welfare grounds, the debtor will need to show 'how recovery of the debt is the main or only cause of the ill health, or the reason for the escalation of the ill health.' The evidence required must come from a health professional, although supporting evidence from other professionals, such as advice workers, can also be included, and it 'should demonstrate exactly how recovery of the debt would have an excessive negative impact on the welfare of the debtor and their family'. In short, a brief confirmation of the claimant's medical condition will not be sufficient.<sup>26</sup>

These criteria are narrow and place substantial demands on claimants who, by the very definition of hardship, are already highly vulnerable. The process of obtaining and collating the required evidence will be stressful, time-consuming and potentially costly. It is perhaps not surprising that so few seek waivers when the barrier to obtaining one is set so high.

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<sup>24</sup> A4.11.20. Additional defences relating to the length of time since the overpayment was made, change of position, estoppel and good consideration are also outlined, but are more technical and will therefore be relevant in far fewer cases.

<sup>25</sup> [Benefit overpayment recovery guide, Chapter 8](#), paras 8.10-11

<sup>26</sup> Paras 8.12-13



## Recovery by deduction and instalments

Another significant barrier to waiver applications lies in the Department's emphasis on reducing the rate of recovery in its communication with clients. This reflects the policy to pursue recovery of overpayments in almost all cases under the Universal Credit regime, and that waivers are considered a recourse of absolute last resort, with numerous administrative barriers being placed in the way of those who might be eligible for them. As such, it is important to consider the Department's approach to repayment as integral to the discussion around waivers.

There are a number of options open to the Department for recovering overpayments, including deduction from benefits, lump sum recovery and recovery by instalment. Recovery by means of direct payments, whether in lump sum or instalments, is not administered according to specific legislation, and the Department states that this will be agreed 'in consultation with the debtor ... based on their individual circumstances.'<sup>27</sup> In practice, this will undoubtedly require the debtor to present a degree of evidence regarding their ability or otherwise to make repayments.

Recovery from benefits is more complex, as procedures are governed by regulations. However, recovery can be made by deduction from the majority of social security benefits.<sup>28</sup> The basic principle is that deductions should be taken from income related benefits in the first instance, although there are a number of non-income related benefits from which deductions can be made. In cases where both types of benefit are in payment, deductions from the non-income related benefit should be in line with those that would be prescribed for the income related benefit, and if necessary a 'better off calculation' should be performed by Debt Management 'where there would be entitlement to an income related benefit if there were no contributory benefit in payment'.<sup>29</sup>

In the case of deductions from income-related benefits under the legacy regime – Income Support, State Pension Credit, Jobseeker's Allowance and Employment Support Allowance – a maximum rate of recovery is set by legislation. In standard cases this figure is 3 times 5% of the personal allowance for a person aged 25 or over (£11.55 per week as of April 2022), whilst in fraud cases the maximum rate of deduction increases to 8 times 5% of the personal allowance (£30.80).<sup>30</sup> Regulations governing deductions from Universal Credit are roughly similar, with a standard rate of 15% and a higher rate of 25% in cases where the claimant has earnings taken into account on their claim or the overpayment is due to fraud:<sup>31</sup>

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<sup>27</sup> [Benefit overpayment recovery guide, Chapter 5](#), paras 5.61-65

<sup>28</sup> See [Appendix 1](#) of the [Benefit overpayment recovery guide](#) for a complete list.

<sup>29</sup> [Benefit overpayment recovery guide, Chapter 5](#), paras 5.22-28

<sup>30</sup> The Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, reg 16(4) & (5) ([GB](#); [NI](#))

<sup>31</sup> [Social Security \(Overpayments and Recovery\) Regulations \(Northern Ireland\) 2016](#), reg 11(2); [Benefit overpayment recovery guide, Chapter 5](#), paras 5.19-21 and [Appendix 2](#); CPAG, *Welfare Benefits and Tax Credits Handbook 2022/23* (2022) [4. Recovery of overpaid benefit](#). A higher fraud rate of 40% is in the legislation, but this is not currently applied by the Department.

<b>Monthly deductions</b>	Standard rate (15%)	Higher rate (25%)
Single under 25	£39.80	£66.33
Single over 25	£50.24	£83.73
Couple both under 25	£62.47	£104.11
Couple one or both over 25	£78.86	£131.43

NB: Rates of deduction for the recovery of overpayments will be affected by other deductions which are being taken from the claimant. See [Chapter 5](#) (sub-section, 'Impact of other deductions'), [Appendix 3](#) (legacy benefits) and [Appendix 4](#) (Universal Credit) of the Benefit overpayment recovery guide for more detail.

In general, the Department's practice is to apply these rates automatically, unless they receive specific representation from the claimant about their ability to repay. When the Department is contacted by the claimant or their representative staff apply a Repayment Negotiation Framework, which considers the degree of 'hardship and upset' recovery may be likely to cause. The assessment will consider hardship on both welfare and financial grounds, and in both cases suitable evidence will need to be provided (no specific information is given in the guidance about the type of evidence required). When hardship is claimed on financial grounds, Debt Management should perform an 'affordability assessment', which uses a format of the Department's own design rather than the [Standard Financial Statement](#) approved by the Money & Pensions Service and used by the vast majority of debt advisers.<sup>32</sup>

The option of negotiating a reduction or temporary suspension of debt repayments involves debtors overcoming many of the same barriers as they would in seeking access to a discretionary waiver. In the first instance, they must be aware of this option – although communications from Debt Management do advise debtors to contact the Department in the event that they feel unable to meet repayment, there is little detail provided about what this conversation will entail. Secondly, they must meet the Department's definition of hardship in order to avail of a reduction, and this definition is not clearly established in the guidance. Finally, they must gather appropriate evidence and submit to the Department's affordability assessment – for many claimants, but especially those who are most vulnerable, they may simply not have the capacity to do so.

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<sup>32</sup> [Benefit overpayment recovery guide, Chapter 5](#), paras 5.71-6

## Pathways to Destitution

Many claimants now find themselves subject to a social security system that runs the genuine risk of making them destitute. Changes to the recoverability of overpayments are forcing more people into debt and contributing to a mental health crisis amongst benefit claimants. Recent research from the Trussell Trust has shown how ‘benefit overpayments themselves were a common trigger event leading directly to a debt spiral, often caused by a change in circumstances.’<sup>33</sup> Owing to the changes to the recoverability of overpayments outlined above, even something so simple as a miscommunication could force claimants into serious financial difficulty.

These issues are often even worse for those claimants dealing with mental health problems. Only a quarter of respondents to a Money and Mental Health survey of Universal Credit claimants were clear about which changes in circumstance they needed to report, whilst two-thirds had trouble understanding how the Department calculated their payments. Challenging sanctions and deductions was identified as the most difficult aspect of maintaining a Universal Credit claim.<sup>34</sup> Money and Mental Health’s report identifies five common symptoms of mental health problems that impact on claimants’ ability to manage their claim:

**Table 1: Common symptoms of mental health problems and their impact on maintaining a UC claim**

What is the problem?	What is the impact?	In the words of experts by experience
<b>Depleted energy levels and motivation</b>	Can make logging into your UC account and completing tasks tricky	“Sometimes, I end up missing messages completely as a result of my mental health.”
<b>Short-term memory problems</b>	Can make remembering to check your UC account for messages or tasks difficult	“I sometimes forget to check my account and almost had my payment suspended once.”
<b>Reduced concentration</b>	Can make completing tasks within tight timescales impossible	“I knew that I had a deadline but I couldn’t focus or concentrate... I was struggling to think properly.”
<b>Difficulty understanding and processing information</b>	Can mean interpreting correspondence and understanding tasks and calculations is challenging	“I panic that I am not doing things in time and that I am doing the wrong thing.”
<b>Social anxieties and communication difficulties</b>	Can make resolving problems or seeking clarity an impossibility	“I find it difficult to... figure out how to talk to somebody through the site. It raises my anxiety to the point where I need to take meds.”

<sup>33</sup> Trussell Trust, [Debt to Government, Deductions and Destitution: Qualitative Research Report](#) (Feb 2022), p. 16.

<sup>34</sup> Money and Mental Health, [Set Up to Fail: Making it easier to get help with Universal Credit](#) (May 2021), pp. 13-14

It ought to be clear how these symptoms would make it extremely difficult to engage with the complex and at times opaque overpayment recovery system. Moreover, given the now well-established link between debt and mental health problems there is a strong argument for building recognition of these challenges into debt management processes, and for debt recovery agencies providing appropriate support.

Politicians and civil servants will no doubt point to the welfare and hardship grounds for waiver and reduction in rate of repayment as evidence that those practices already exist within the current system. Likewise, we recognise that, here in Northern Ireland at least, our engagement with Debt Management has been positive and there appears to be a culture of managing debt in a way that recognises the difficulties that claimants are facing. Nevertheless, the statistical reality is stark and the lived experience of claimants demonstrates that there is still much more to be done. As a consequence, Advice NI makes the following recommendations:

- The Secretary of State needs to restore confidence in the overpayment recovery waiver system by ensuring everyone affected by overpayments are made aware of the existence of waivers and how to seek one.
- The Secretary of State should also monitor decision making to ensure that waivers are applied correctly.
- Engagement activity should be conducted by the Department with stakeholders in relation to the recent changes to the Benefit overpayment recovery guide.
- Clearer guidance needs to be provided to claimants both at the outset of their claim for Universal Credit and when reporting changes in circumstance about the potential for overpayments to arise and their available recourse in the event that an overpayment does occur.
- The Department should adopt the Standard Financial Statement as the basis for any discussions with claimants in relation to financial hardship.
- The Department should improve the training of all benefit staff in the principles of safeguarding to ensure that appropriate support is offered to claimants, particularly those reporting or presenting mental distress.
- The Department should bring an end to the blanket policy of requiring formal medical evidence of claimants' mental distress as the basis for consideration of hardship, and instead apply a genuinely discretionary approach that the legislation requires, including treating claimants' own accounts of their mental state as of equal value to other forms of evidence.



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