SUGGESTED AMENDMENTS TO THE WELFARE REFORM BILL 2012: A PAPER FOR THE SOCIAL DEVELOPMENT COMMITTEE

The Law Centre would recommend the following amendments to the Welfare Reform Bill.

Amendment 1: Clause 11 Housing Costs

Page 5, clause 11 line 31
5(b)(ii) add the words 'not exceeding 13 weeks'

rationale

From 5 January 2009 modified rules were introduced for income support, income related JSA and income related ESA to protect claimants from losing their homes by normally requiring only a 13 week waiting period before help with mortgage interest and other payments become available. Prior to this claimants had to serve either a 26 week or a 39 week period before receiving help with mortgage and other costs. The DWP has yet to announce what waiting period will apply under Universal Credit. The initial grounds for the modification in January 2009 have not significantly changed with repossessions currently on the rise. The amendment to clause (5)(b) will ensure the preservation of the current provision.

Amendment 2: Clause 11 housing costs
Page 5 clause 11 line 31

Add 5(c) 'provide for the calculation of an award under subsection (1) to be made according to different criteria for the first 13 weeks of a claim in such circumstances as may be prescribed'.

rationale: 13 – week rule amendment

Under current housing benefit rules, a claimant has a period of 13 weeks during which they may receive benefit equal to their full rental liability before broad rental market area restrictions apply from 14 weeks onwards. This is to allow a claimant time to find and move to a new address that is within the LHA and broad rental market area restrictions or a person who loses a job to find other work. It will confirm that the 13 week rule will continue under UC.

Amendment 3: Clause 14 claimant commitment

Page 7 line 3
At the end add

(b) regulations shall prescribe circumstances to allow payment of a modified amount of a standard allowance and amounts under section 10, section 11 and section 12 where only one member of a couple accepts a claimant commitment.

rationale

We understand that where only one member of a couple agrees a claimant commitment no Universal Credit will be paid. This in effect penalises the claimant willing to sign up to the claimant commitment and also any children who are part of the household. The regulations published in Britain do not provide an exemption to entitlement where the other partner refuses to make a claimant commitment for example, due to a family dispute or other dispute with the Department. The amended clause would allow for example, the Department to pay the partner an amount to cover a single person only plus an amount for children and housing costs. Without such an option a partner would be forced to leave the relationship to obtain any benefit. In some circumstances, this may not be appropriate or wise (for example, due to fear of domestic violence).

Amendment 4: Clause 26 higher level sanctions

Page 13 line 13
Replace the words 3 years with '26 weeks'

rationale

This would ensure that the maximum period of disallowance that currently applies to income support, income related JSA and income related ESA is maintained. Current sanctions apply from one to 26 weeks depending on circumstances. A sanction of loss of benefit for three years for a third failure to comply with a requirement within a year is disproportionate. Evidence suggests that people with mental health problems, learning disabilities and people with literacy problems are more prone to face sanctions. A three year loss of benefit combined with a backstop of a new hardship payment regime with tougher conditions and making payments through loans will particularly affect any household with children. The impact of a reduced income which is repayable for such a long period for households with children is counterproductive to the Northern Ireland Executive's aim of reducing severe child poverty.

Amendment 5: Clause 26 higher level sanctions

Page 13 line 24
Add
(9) 'a claimant shall be provided with at least fifteen days to provide a good reason for not complying with any requirement in this section.'

rationale

The Department has reduced the time to show good cause for failing to meet a requirement for income support JSA and ESA to five days in current regulations. Given the intention to significantly increase the period of sanctions there should be a more

reasonable period to allow a claimant to show good cause. The Department in Britain does not appear to be willing to extend the time to show good reason. Five days is insufficient in a variety of circumstances for example, the death of a close relative, family emergency, serious ill health. Fifteen working days is a more reasonable minimum.

Amendment 6: Clause 27 other sanctions

Page 14 line 20
Add
(10) 'a claimant shall be provided with at least fifteen days to provide a good reason for not complying with any requirement in this section.'

rationale

see amendment

Amendment 7: Clause 28 hardship payments

Line 35
Delete (2)(f) whether hardship payment are recoverable

rationale

The Department for Work and Pensions has confirmed that a hardship payment will be a fixed rate of 60 per cent of the daily amount by which the claimant's UC has been reduced by a sanction. This is a significant reduction in entitlement.

The additional condition of making the payment a recoverable loan is disproportionate. To qualify for a hardship payment a claimant has to demonstrate a need for a payment to meet the most basic and essential needs, in effect, accommodation, heating, food and hygiene needs. To make the payment a loan will only create longer term difficulties. A

household with children where a sanction is applied will face prolonged financial difficulties and hardship. The Northern Ireland Executive has set a target to reduce severe child poverty and sub paragraph (2)(f) runs counter to this aim.

Amendment 8: Clause 45 claimant commitment for jobseeker's allowance

Page 23 after line 37 add
(ii) regulations shall prescribe circumstances to allow payment of a modified amount of benefit where only one member of a couple accepts a claimant commitment.

rationale

This ensures where only one member of a couple agrees to enter a claimant commitment for jobseekers allowance then some benefit is payable. Regulations could provide for example, that a single person rate is payable.

Amendment 9: clause 47 sanctions

Page 25 line 4 to page 29 line 30 Delete clause 47

rationale

This clause is designed to introduce the increased sanctions powers and the new hardship payments including paying such payments by loans. The government in Westminster has argued that claimants will be helped back into work through improved earnings disregards and a comprehensive Work Programme tailored to claimants needs. In return, claimants are expected to take additional responsibilities and the failure to do so will lead to greater sanctions. The improved earnings disregards will not be in place within jobseeker's allowance and the programmes to support claimants back to work are not as comprehensive as those available in Britain. Moreover, the earliest any new programmes will commence is October 2013. This clause applies the stick part of the

new arrangements in advance of the introduction of Universal Credit without the carrot. It is therefore unfair and unreasonable.

Amendment 10: clause 50 claimant responsibilities for jobseeker's allowance

Page 35 line 14
In 5(b) replace 3 years with 26 weeks

rationale

This maintains the current maximum length of sanction of 26 weeks as a sanction covering three years is disproportionate (see amendment 4).

Amendment 11: clause 50 claimant responsibilities for jobseeker's allowance

Page 36 line 26 add

(10) A claimant shall for any purpose of this part be provided with at least fifteen days to provide a good reason for not complying with any requirement in this section.

rationale

As per amendment 5 this provides a claimant with more time to offer an explanation to the Department and to avoid a sanction being applied.

Amendment 12: clause 52 – period of entitlement to contributory allowance

Page 39 Line 7 delete sub paragraph (4)

rationale

This would allow claimants entitled to ESA in youth to continue to be entitled to benefit.

People who have become severely disabled in youth should be entitled to a sustainable income to support the transition from dependent young person to independent adult without being affected by decisions about work, education and relationships at a vulnerable age.

Currently, people who are disabled from birth or early in life may claim contributory ESA in youth from age 16. This kind of support has been a feature of the social security system in different guises since 1975.

The availability of contributory ESA is also of particular importance to:

- young disabled people who have been temporarily in and out of care as it provides a secure, independent income;
- young disabled people who have built up savings to be used for an adapted car, disability equipment, deposit on a property or future care needs. In the absence of non means-tested support, using savings for basic daily living costs, will have long-term implications for the future expenditure on care needs when their carers (usually elderly parents) are no longer able to provide care and accommodation;
- young disabled people who may be vulnerable to forming unsuitable relationships, and exploitation, due to fears about losing an independent income;

The retention of ESA in youth provisions has a modest additional cost of £390,000 a year which could be met for example, within the Social Protection Fund.

Amendment 13: **clause 52 – period of entitlement to contributory allowance**

Page 39 line 22
Amend subparagraph (b)

After allowance delete the rest of the sub paragraph and replace with the words 'only days occurring after the coming into operation of this section are to be counted'.

rationale

This amendment provides that the removal of entitlement to contributory ESA for people in the work activity related group will not be applied retrospectively. This provides time for claimants already on benefit to prepare for the loss of entitlement including adjusting financial commitments etc and recognises that when originally claiming contributory ESA there was no limited period of entitlement attached to the benefit.

There will be a cost to such a provision but, this could be met through the Social Protection Fund and be part of any additional welfare protection fund which should be introduced to protect claimants from the impact of welfare reform. The extra costs will be for those claimants who cannot transfer to income related ESA due to having a partner working or savings over £16,000. This will be offset to an extent by savings made on tax credits for some claimants who would have lost ESA(C) earlier would also have seen an increase in WTC and/or CTC.

Amendment 14: clause 54 conditions relating to youth

Page 40 line 15 for clause 54 substitute the following:

> 54 In section 1 – 4 of Schedule 1 of the Welfare Reform Act (Northern Ireland) Act 2007 (employment and support allowance after subsection (3) insert

3A the third condition is that;

(a) the claimant has limited capability for work-related activity; and

(b) he was under 20 when the relevant period of limited capability for work began; and

(c) he has had limited capability for work for at least 28 weeks.

rationale

To make provision for young people to be eligible for contributory ESA where they have not had a chance to build up national insurance contributions and are in the support group.

This allows contributory ESA in youth to remain at least for those in the support group. Given that people in the support group are to be exempt from the one-year limit on contributory ESA entitlement, there is good reason to maintain eligibility to ESA in youth for those in the support group.

Amendment 15: clause 55 claimant commitment for employment and support allowance

Page 41 after line 14 add

(7) Regulations shall prescribe circumstances to allow payment of a modified amount of benefit where only one member of a couple accepts a claimant commitment.

rationale

This ensures that where only one member of a couple agrees to enter a claimant commitment that some benefit is payable, Regulations could provide for example, that a single person rate is payable.

Amendment 16: clause 58 claimant responsibilities for employment and support allowance

Page 50 after line 8 add

(d) after paragraph 102A there is inserted
102B 'Regulations shall for any purpose of this part provide for at least ten days to provide a good reason for not complying with any requirement in this section'.

rationale

As part amendment 5 this provides a claimant with more time to provide an explanation to the Department and will help avoid claimants with health problems facing sanctions.

Amendment 17: clause 60 claimant commitment for Income Support

Page 51 after line 15 add

(7) Regulations shall prescribe circumstances to allow payment of a modified amount of benefit where only one member accepts a claimant commitment.

rationale

This ensures where only one member of a couple agrees to enter a claimant commitment for income support then some benefit is payable. Regulations could provide, for example, that a single person rate if payable.

Amendment 18: clause 61 entitlement to work: jobseeker's allowance

Page 51 line 25 delete clause 61

rationale

This clause created new requirements for a claimant to have an 'entitlement to work' for contributory JSA, contributory ESA, maternity allowance, statutory maternity, paternity and adoption pay.

Current immigration rules provide that people 'subject to immigration control' are excluded from income based JSA and income related ESA. These provisions will be extended to Universal Credit. The exclusion does not currently extend to contributory benefits where a person has paid his or her tax and national insurance contributions.

We can see no basis for creating this new provision. As a result, a person whose legal status may have changed and who is legitimately challenging the situation will be denied a contributory benefit despite lawfully working during the period of building up contributions. Moreover, under the old A8 work registration scheme it was possible to lose the 'right to reside' status almost overnight in some circumstances.

This clause should not be passed. The Department should be asked to provide likely numbers affected and cost savings. The figures (if available) will be very small though the impact on individuals will be significant.

Amendments 19: clause 62 entitlement to work: employment and support allowance

Page 52 line 5 delete clause 62

rationale

See amendment 18

Amendment 20: clause 63 entitlement to maternity allowance and statutory payments

Page 52 line 27 delete clause 63

rationale

see amendment 18

Amendment 21: clause 69: determination of appropriate maximum

Line 15 delete clause 69

rationale

This is a significant clause which allows the Department to set the local housing allowance by reference to the lower of either the Consumer Price Index or bottom 30th percentile of private rented sector and to introduce the new public rented sector size related criteria into the calculation of HB for people of working age.

The calculation of the LHA by the lower rate of CPI or 30th percentile of private rented sector will have a considerable impact. The average increase in CPI since 1997 is around 2 per cent compared with a 4 per cent increase in 30th percentile rents in the private rented sector. At present, claimants on HB are expected to find accommodation in the cheapest 30 per cent of rents. Based on past evidence, the new arrangements will lead inexorably to HB claimants having to find accommodation in an even more restricted bottom end of the market or pay the difference in cost. This change needs to be considered as part of the wider cumulative impact of HB savings already implemented. This estimated savings for this £1.3 million in 2013/2014 rising to £7.92 million in 2014/2015.

In areas where demand for private rented sector accommodation is high, HB claimants will not be able to access accommodation.

This clause also introduces the new size related element of housing credit for people of working age living in public/rented sector housing. This regulation in Britain shows that this will lead to a reduction in maximum eligible housing benefits credit of 14 per cent where a claimant is deemed 'over-occupying' by one bedroom and a 25 per cent reduction where deemed 'over-occupying' by two bedrooms or more. Draft regulations in Britain suggest that there will be few exceptions to this rule. The provision is unlikely to apply to accommodation registered

As a result, the new proposed arrangements will affect significant numbers of households in Housing Executive and Housing Association accommodation. The Housing Executive stock includes 44.3 per cent of homes with three bedrooms or more which have three bedrooms or more. The Housing Executive and Housing Association movement has yet to come up with alternative proposals to manage the difficulties created by this provision.

Moreover, the significant proportion of 'single identity estates' contained within the Housing Executive stock will also make moving tenants to smaller accommodation even less straightforward. These proposals are likely to face legal challenges on a number of fronts. First, in Burnip v Secretary of State for Work and Pensions (SSWP) 2012 Trengrove v SSWP (2012) and Gorry v Secretary of State for Work and Pensions (2012) the Court of Appeal considered similar provisions which had been applied to HB in the private rented sector. The Court of Appeal held that the provision was indirectly discrimination which was covered by Article 14 of the ECHR and that HB was covered by Article 1 Protocol 1 of the Convention leave is being sought to appeal further to the Supreme Court.

In two of the cases, the applicants were severely disabled and required an extra bedroom for full time carers. This circumstance was resolved by an amendment to the HB

regulations introduced in April 2011. The exemption in the size related criteria in the public sector covering the need for an extra bedroom for a full time carer has been included in draft regulations. However, in the third successful appeal (Gorry) the issue concerned two daughters aged 10 and 8 who both had disabilities which meant it was impractical for the children to share a room. The Department has not added this to the exemptions in either the private sector HB regulations or the draft proposed public sector size-related regulations. This omission is unlikely to survive a further legal challenge bearing in mind that discretionary housing payments were also available in the cases before the Court of Appeal.

A further challenge may also arise under the right to a home, family and private life under Article 8 of the European Convention on Human Rights in cases where an extra room is provided for legitimate family reasons during temporary absences or in circumstances where a family is prepared to move to accommodation of a reduced size and no such transfer is forthcoming the private rented sector provides less secure tenure and a reduction in housing credit is applied.

As a result, the Law Centre would recommend that either a delay in implementing this clause is made until firm and clear proposals for dealing with the issue are in place or a phased approach is applied with a penalty only applying to households over occupying accommodation by two bedrooms. As an additional alternative, therefore exemptions from the provisions should be provided in the regulations including for families with children under 10 years of age with disabilities where sharing a room is not appropriate, foster carers who are between fostering placements and other circumstances where an additional bedroom is retained for legitimate family purposes. It is clear that discretionary housing payments will not fill this gap. Moreover, it is clear that discretionary housing payments are not intended as anything other than a temporary solution to individual cases.

The savings anticipated from this provision is £15.51 million a year from 2013/2014 onwards.

Amendment 22: clause 95 – benefit cap

Page 66 after line 30 after subsection (4) insert new subsection

(4)(a) 'The regulations under this section must not impose a benefit cap to the welfare benefits of claimants with entitlement to carer's allowance or additional amounts within universal credit for claimants with regular and substantial caring responsibilities'.

rationale

This amendment would ensure that where a claimant or partner is providing full time care of at least 35 hours a week to a disabled person then the benefit cap would not apply. In practice, such carers save the state a considerable cost in not having to provide alternative care to that provided in the home. Applying the benefit cap which is designed to move people into work is likely to push a carer into giving up this role and the savings from the benefit cap may well be displaced by additional expenditure elsewhere.

Amendment 23 – clause 95 – benefit cap

Page 67 after line 4 inserts (c) and (d)

(c) child benefit under the Social Security Contributions and Benefits (Northern Ireland) Act 1992.
(d) employment and support allowance under the Welfare Reform (NI) Act 2007 or an additional amount in universal credit based on having limited capacity for work or limited capability for work related activity because of their physical or mental condition.

rationale

These amendments ensure that the payments of child benefit to meet a child's needs and ESA and the additional sum paid in universal credit to people with significant health problems can be used to meet their purpose. The needs of children and additional costs of having serious health problems should not be eroded through the benefit cap. In addition, those people recognised as having limited capability for work or limited capability for work related activity are unlikely to be able to enter employment in order to avoid the impact of a benefit cap.

Amendment 24. Clause 101: powers to require consideration of revision before appeal

P70 after line 8 insert

101A payments pending appeal

In Section 5(1) of the Social Security Administration Act (NI) 1992 (regulations about claims and payments) after paragraph (r) insert (s) for the making of a payment pending appeal.

Rationale

This amendment provides for payment pending appeal. This is necessary to enable claimants to financially survive while waiting for social security appeals, which are currently taking months to be heard. The motivation for this amendment is natural justice. A high number of appeals are decided in favour of appellants, and it is unjust and unfair for appellants and their families to be left without benefit while they are waiting for their appeals to be heard. In the case of appeals relating to housing costs, this could result in, at best, rent or mortgage arrears, and at worst, possession proceedings and homelessness. In the case of appeals relating to personal allowances for claimants or their children, this could result in severe hardship, and in the worst case scenarios, destitution, or children being taken into care. Under the current system, there

is provision for payment of the basic level of employment and support allowance pending an appeal about work capability assessment. We believe this provision should be carried forward into universal credit and extended to appeals relating to other elements of universal credit.

Amendment 25: Clause 103 recovery of benefit payments.

P71 after line 30 insert

(8) For the purposes of this section, "entitlement" means the amount that would have been awarded to the claimant had the claim been correctly represented and all relevant material facts disclosed for the period to which the overpayment applies.

Rationale.

To apply to Universal Credit the rules on the recovery of overpayments that reflect those currently applying to most benefits namely that official errors by the Department that a claimant could not have known about are not recoverable and to provide for the offset of 'underlying entitlement' from overpayments.

The current rules on recoverability of overpayments that apply to income support, JSA, ESA, DLA, pension credit and other benefits is that overpayments are recovered where there has been a misrepresentation, or failure to disclose a material fact, by a claimant or any other person.

This is a fair and just test, which has been in place for many years. Its purpose is to allow recovery of an overpayment which arose as a result of a claimant's actions or failures (whether innocent or fraudulent) but protects the claimant in cases where the overpayment arose because of official error by the Department. This balances the

responsibilities of claimants to correctly notify their circumstances when claiming benefit, and the Department to correctly calculate and pay awards based on the information available to them.

Clause 103 of the Bill proposes to allow recovery in all cases, regardless of culpability. This alters the balance of responsibilities and justice unfairly in favour of the Department. It would mean, for example, that a claimant could be presented with a large bill for repayment amounting to many thousands of pounds, many years after an overpayment occurred, even though the overpayment was entirely due to the errors of the Department. This is unfair and unreasonable. The Department of Work and Pensions has recognised the justice of such a contract by indicating that it would provide for non recovery in cases of official error in a code of practice on recovery. We believe that it is essential that this provision is statutory, so that a wronged claimant has a right of appeal against recoverability to an independent tribunal. It should be noted that the Government has expressed its confidence that the introduction of universal credit will significantly reduce the scope for official error (see chapter 5 of the White Paper, Universal Credit: welfare that works Cm7957 November 2010). If this is the case, the administrative burden of retaining protection for the claimants unjustly prejudiced by official error overpayments should be greatly reduced.

The system of automatic recoverability (supplemented by a non statutory code of practice) being proposed by Clause 103 mirrors the system which applies to tax credits. This system has injustice and hardship, and has been condemned in reports by the Parliamentary Ombudsman and Select Committees of the House of Commons. It has also resulted in thousands of complaints to MPs, the Revenue Adjudicator and the Ombudsman.

The proposed amendment provides for the offset of underlying entitlement when calculating overpayments. Underlying entitlement means the entitlement that would

have been paid to the claimant had a claim been correctly made at the time. For example, an overpayment may arise if a claimant had separated from their partner and the claim continued to be paid as a couple claim for several weeks after the date of separation. The claimant had not declared the change of circumstances immediately and had told their personal adviser that they were not aware that they needed to because they had hoped the separation was temporary. The claim is cancelled form the date of separation and the claimant must make a new claim. However, had he or she immediately declared the change, then the claim would have been reassessed as a single claim, so it would have given rise to the entitlement as a single claimant which could be offset against the overpayment as 'underlying entitlement'.

This mirrors the approach taken in the housing benefit regulations which ensures that only the true amount of excess entitlement is recovered.

This provision is particularly needed in relation to universal credit because there is a requirement for the benefit to be claimed by with either a single claimant or by both members of a couple, which, as the case with tax credits, results in many notional overpayments when there is a change of status from single to joint claims, and vice versa. HMRC belatedly recognised the needs for the offset of underlying entitlement in such cases and has introduced non statutory provision for this from January 2010-. This Bill gives the opportunity of providing for offsetting on a statutory basis, ensuring that if applied fairly, openly and consistently.

Amendment 26: Schedule 1 Universal Credit: Supplementary regulation – making powers

P99 line 5

Delete subparagraph 7 work related requirements.

Schedule 1 subparagraph 7 allows for regulations to provide that claimants from the EU with a right to reside who fall into the no work related requirements, work focused interview requirement only and work preparation requirement only can instead by made subject to the all work related requirements. We would recommend that this clause be deleted from the Bill. The provision is likely to prove unlawful. Article 14 of the European Convention of Human Rights provides for freedom from discrimination. The right is not free standing and must be invoked alongside another substantive right in the convention. Article 1 of the Convention provides for a right to property. In Stec v UK (2005) the Grand Chamber of European Court of Human Rights held that social security benefits whether funded on a contributory or non contributory basis were covered by Article 1 of Protocol 1. The UK government has accepted this ruling in a number of cases concerning the status of social security benefits under Article 1 or Protocol 1. This leaves the Department having to provide an objective justification for treating EU national adversely. We can see no objective basis for such discrimination. It is also arguably contrary to age discrimination legislation as it will require EU claimants of pensionable age to meet work conditions requirements while making no such provision for British and Irish nationals. The Department for Work and Pensions has stated that "claimants from the European Union who are workers or jobseekers and are entitled to Universal Credit will always fall into the all work related requirements group (see paragraph 233 Explanatory Memorandum for the Social Security Advisory Committee Universal Credit Regulations 2012). In effect, this provision enables the Department to treat an EU national who has a right to reside to meet all work requirements which will entail normally looking for work 35 hours a week. The right to reside test will already exclude work seekers or new arrivals from other EU member states. Instead it will impact on people from the European Union who have worked from Northern Ireland for example, where the claimant:

- has earnings above the individual conditionality threshold
- has caring responsibilities for a severely disabled person
- is a lone parent with a child under 12 months old
- is a nominated foster parent or adopter of a child under 12 months old

- is pregnant and within 11 weeks of the baby being due or for the first 15 weeks after birth
- above state pension age

This provision proposes to do something contrary to European Law and the Human Rights Act 2000 and is therefore unlawful. As the Welfare Reform Bill is secondary legislation under the Human Rights Act the courts have powers to strike down the clause. As a matter of law and principle the clause should be deleted.