



# The Employment and Support Allowance (Transitional Provisions) (Existing Awards) Regulations (2010)

---

SSAC Consultation Response

8<sup>th</sup> February 2010

Child Poverty Action Group  
94 White Lion Street  
London N1 9PF  
[www.cpag.org.uk](http://www.cpag.org.uk)

1. CPAG welcomes the opportunity to respond to the Social Security Advisory Committee's consultation on the proposals by the Department for Work and Pensions' (DWP) for transferring existing claimant's of incapacity benefit, income support on grounds of disability and severe disablement allowance onto employment and support allowance (ESA).

### **CPAG's concerns**

2. We have a number of serious concerns about the effect these proposals would have. In particular we are of the view that:
  - The fact that transitional additions to the ESA of claimants following conversion are necessary simply highlights that the Government has reneged on its commitment to Parliament given during the passage of the Welfare Reform Act 2007 that the ESA regime would see more money for claimants. CPAG believes that a simpler solution which would be to increase the rates of the components for all ESA claimants to a level where (at least for those on income related ESA) no transitional additions would be necessary for claimants whose IS awards are converted as ESA would always be the same or higher. This could be funded from the expected financial savings the conversion is expected to provide.
  - Failing the above (our preferred option) then CPAG is of the view that the provisions which allow for the reduction of the transitional addition are too wide ranging and likely to cause considerable unfairness. CPAG is of the view that the transitional addition should only be reduced as a consequence of uprating.
  - CPAG welcome the fact that conversion decisions will not take effect immediately they are made. However, CPAG are of the view that where the conversion decision is not to convert an award to an ESA award then that decision (i.e. the decision which terminates entitlement to Income Support, Incapacity Benefit or Severe Disablement Allowance (IS, IB or SDA)) should not take effect until one month after the decision not to convert is made or, where the decision is appealed until that appeal is determined. We have additional proposals about how this aspect of the scheme could be made to work more smoothly for claimants.
  - The rules concerning those who appeal against a refusal to convert their award are unfair when compared with those which apply to those appealing against an ESA refusal on failure of the work capability assessment (WCA) more generally.
  - There is no protection for disabled students such that full time students who do qualify for income support and do not receive disability living allowance will not be entitled to conversion to ESA.
  - CPAG notes that the DWP state they will use, where possible, existing data held for IB/IS to determine entitlement to ESA. CPAG believe that the transitional provisions should provide that those currently exempt from the personal capability assessment (PCA): (ie people with severe

conditions) are to be treated as meeting the conditions for the support group.

### **Need for transitional additions: consequence of the inadequate rates of ESA**

3. During the passage of the Welfare Reform Act 2007, repeated assurances were given to Parliament by Ministers that the rates of ESA for new customers would be set above the rate of long term IB:
  - “In respect of the new ESA customers the commitment will be above the present long-term IB rate” (Jim Murphy, Hansard Committee debate, 17 October 2006, Column 58).
  - “In the main phase of the benefit, the rate will be higher than the current rate of long-term incapacity benefit and the most severely disabled people will receive a higher rate still.” (Jim Murphy, PQ106412, Hansard, 30 November 2006, column 863W)
  - “We have made it clear that, in the main phase, the basic allowance will be above the long-term IB rate” (Lord MacKenzie, Hansard Grand Committee debate, 20 February 2007, Column GC9).
  - “the basic allowance for someone on the contributory benefit or for a single person on the income-related benefit plus the work-related activity component will be higher than the current long-term rate of incapacity benefit, and those in the support group will receive a higher amount”.—[Official Report, 20/2/07; col. GC5.]
4. We believe that (as said in the House of Lords debate- 22 May 2008, Column 1639) the Government’s attempts at explaining that these statements were meant to indicate that the rates of ESA would be higher than the rate of long-term IB at the time they were made (i.e. that they were not to be relied upon in comparing current rates of IB with ESA rates) is “casuistry of the worst order”.
5. The fact that, on converting awards of IB or IS on grounds of disability to awards of ESA the Government is having to introduce “transitional additions” (the scheme for which the bulk of these regulations are devoted to providing for) demonstrates again that the promise made to Parliament about the rates of ESA has been broken.
6. It is CPAG’s view that this promise should be kept. Rates of ESA should be increased so that they are always at or above the maximum rate of IS which a person in similar circumstances, who is in receipt of that benefit on grounds of disability receives. Once this is done, then at least the poorest 50%<sup>1</sup> of those who are transferred to ESA would not require a transitional addition.
7. We note that the savings which the Government will make by cutting benefits through applying the much harsher test for the threshold of sickness required to remain on benefits (the limited capability assessment) could be used to enable the Government to keep its promise.

---

<sup>1</sup> i.e. those who are receiving IS

### Inadequate transitional additions

8. The proposed rules provide that where a claimant would receive less ESA than they had previously received by way of IS, IB etc then they will also receive a “transitional addition” of the amount by which they would otherwise be worse off.
9. Regulation 19 provides for the amount of the “transitional addition” to be reduced whenever the maximum amount of ESA to which a person could be entitled changes (unless it is a change to the housing costs allowable under Regulation 67(1)(c) and Schedule 6 to the Employment and Support Allowance Regulations 2008 (SI 2008/794)) (the 2008 Regulations).
10. It is our view that this is unfair and only provides the most basic protection to claimants. We illustrate this with an example:

#### **EXAMPLE 1**

Mary has long term depression for which she receives NI Credits. She gets Disability Living Allowance at the lower rate for care component only.

Mary's IS is £91.80 (i.e. £64.30 (personal allowance) plus £27.50 disability premium).

On conversion Mary is placed in the work related activity group and she starts to receive income related ESA of £89.80 (i.e. £64.30 plus £25.95 component).

Thus, because under ESA she is £2 worse off, she is also given a “transitional addition” of that amount.

Mary moves in with John who is not working either. At this time her transitional addition ends as she gets an increase in her applicable amount under Regulation 67(1)(a) of the 2008 Regulations (i.e. increase from the single person rate to the couple rate).

John and Mary's relationship ends three weeks later because John is violent to Mary. Mary's income is now £2 less than previously- she has lost her transitional addition and it can never be regained.

11. It is CPAG's view that Regulation 19 of the proposed Regulations should be altered so that it provides that a “relevant increase” as defined in paragraph 2 is only an increase consequent on annual benefit uprating. This would effectively eliminate the sort of unfairness described above.

### Effective date of conversion decision

12. Regulation 14 provides that the conversion decision takes effect from a fortnight after the decision is made.
13. In our view this has two undesirable effects:
  - In the few cases where a person would be entitled to **more** ESA than the IS or IB which they were previously receiving (which will in practice only be for single claimants who are placed in the support group) then

they must lose out on 14 days worth of increased income. It seems to us that if it has been determined that a person would be entitled to increased amounts of ESA then the decision should have immediate effect. Indeed there is no reason why the effective date in such circumstances could be the commencement of the conversion phase.

- In the cases where a person is determined not to be entitled to ESA on conversion then the 14 day grace period is inadequate (we discuss this in more detail below).
14. A person who is determined not to be entitled to conversion of their award to ESA will have their existing award of benefit terminated 14 days after the decision (Regulation 16). The DWP refer (at para 19 of the Impact Assessment, Annex A) to an estimated 15% of conversion decisions having the effect that the claimant is found fit for work (hence not entitled to conversion to ESA). That is based “on evidence from those assessed using the PCA and applying WCA descriptors to PCA data to determine the likely numbers in each group”. Even if this figure is correct (and we are of the view that the actual experience is likely to be that far more people fail to have their awards converted) then this is some 210,000 claimants and their families who will be forced off sickness benefits (taking the 1.5 million claimants likely to be affected in total- see para 13).
15. We do not feel that 14 days is sufficient time to enable people, most of whom will have significant disability, having been able to pass the PCA albeit not the WCA to approach the Jobcentre and arrange for JSA to be claimed. Even in cases where the claimant does this promptly on receiving their decision, we do not believe that the Jobcentre Plus will be capable of determining the resultant claims to JSA within a fortnight. Therefore, such claimants are likely to experience a gap where they have no income. Because of this, we suggest that one of the following possibilities be considered (we list them in our order of preference):
- In cases where the claimant sought to claim JSA (should that be required – see below) the effective date was simply extended until the determination of that claim for JSA.
  - Failing that, the gap between notice of the failure decision and its effective date could at least be set to be as long as the average time it takes the DWP to process a JSA claim.
  - In any event, the effective date of a disallowance decision should be at least 1 month after the decision is notified (rather than after the decision is made- it would not be fair to allow a DWP failure to notify a decision on the date it is made to reduce the period a claimant has to rearrange their affairs).
16. In addition it is our view that the regulations should provide for a claimant who fails to have their award converted and is in receipt of Income Support to be treated as having claimed JSA if they simply indicate to the JCP that they are going to make themselves available for and actively seek work. The DWP already has such a claimant’s income and capital details. In such circumstances a complete claim for JSA should not be required.

17. CPAG would expect a large number of these claimants to appeal the decision. We would further expect a large number of those people to be successful at appeal. We believe that a fairer system would allow claimants who wish to appeal to keep their existing award of benefit until their appeal is determined.
18. As often claimants will not take action until their benefit level changes (i.e. it is the loss of income when actually experienced that prompts the appeal) then we believe that time for appealing in such cases should be changed so that the time limit expires one month after the effective date of the decision rather than the date of notification of the decision itself.

### **Appeals against conversion decisions**

19. Para 10 of Schedule 1 to the Regulations disapplies Regulation 30 of the 2008 Regulations which ordinarily provide for a claimant appealing a decision that they do not have limited capability of work and who is providing medical evidence to be treated as having such limited capability pending the appeal (and thereby to receive the basic rate of ESA).
20. Instead, paragraph 11 of Schedule 2 has the effect of inserting a new Regulation 18A to the 2008 Regulations. This regulation provides that a person appealing against a refusal to convert their existing award, who is providing medical evidence, should be treated as having a limited capability (and hence will receive the basic rate ESA) only until the first of the events listed in Regulation 18A(3). These events include another decision on limited capability for work having been made.
21. Regulation 30 would not have this effect: i.e. a claimant appealing a decision they did not have LCW otherwise than one made on conversion would continue to be treated as having LCW whilst their appeal was pending even if the Secretary of State had made a further decision that they did not have LCW.
22. As stated above, it is our view that those appealing such refusals to convert would be better served by a provision extending the effective date of the conversion decision pending the appeal.
23. However, in the absence of such a provision then we believe that the proposed Regulation 18A should be amended so that it confers precisely the same entitlement to claimants appealing against conversion decisions as Regulation 30 does to those appealing against ordinary LCW decisions. In fact, we see no need to disapply Regulation 30 for those appealing conversion decisions.

### **Disabled students**

24. At present a "disabled student" is entitled to claim Income Support. By para 10(b) of Schedule 1B to the Income Support (General) Regulations 1987 (SI 1987/1967) a person who has been incapable of work for 196 days counts as a disabled student and will thus (other conditions being satisfied) be able to get Income Support.
25. However, for income related ESA, then it is a condition of entitlement that a person is not receiving education (paragraph 6(1)(g) of Schedule 1 to the

Welfare Reform Act 2007). Regulation 18 of the 2008 Regulations disapplies this rule where the claimant is entitled to a disability living allowance.

26. There is nothing in the proposed regulations which enables a person who is in receipt of income support and is receiving education (see the definition in Reg 14 of the 2008 Regulations) and who does not receive DLA to be entitled to ESA on conversion.
27. It is CPAG's view that it is unfair to impose this additional condition on disabled students following conversion. CPAG is of the view that the regulations should provide that Regulation 18 of the 2008 Regulations is modified such that paragraph 6(1)(g) of Schedule 1 of the 2007 Act is also disapplied where the claimant whose award is converted and has had an incapacity for work and/or a limited capacity for work for a continuous period of 196 days.

### **Claimants with severe conditions**

28. Regulation 10 of the Social Security (Incapacity for Work) (General) Regulations 1995 (SI 1995/311) provides that people with severe conditions should be treated as incapable of work. These include those who are in receipt of the highest rate of the care component of DLA, those with severe mental health illnesses, dementia etc.
29. It is CPAG's view that anyone who is covered by Regulation 10 would almost certainly, correctly assessed under the work capability assessment, be placed in the support group for ESA on conversion.
30. However Regulation 20 of the 2008 Regulations contains a much briefer list.
31. CPAG is of the view that there is therefore little point in formally applying the new test to such persons- by virtue of their conditions such people will in general find it difficult to deal with the necessary paper work and will be unduly worried by the prospect of being subject to a new test.
32. In these circumstances, CPAG are of the view that these regulations should provide that anyone who falls within Regulation 10 should be placed within the support group.
33. CPAG is of the view that in general the Regulation 10 exemptions should have been carried over into the ESA scheme as a package. It is simply not acceptable that (for example) someone in a persistent vegetative state (Regulation 10(2)(d)) should not be treated as having a limited capability for work and indeed a limited capability for work related activity without the need for further enquiry (or indeed the possibility that if they fail to return a complex form about their health they could be treated as not having a limited capability for work). This is similarly the case for the other categories in Regulation 10.

### **About CPAG**

CPAG promotes action for the prevention and relief of poverty among children and families with children. To achieve this, CPAG aims to raise awareness of the causes, extent, nature and impact of poverty, and strategies for its eradication and prevention; bring about positive policy changes for families with children in poverty;

and enable those eligible for income maintenance to have access to their full entitlement.

**Martin Williams**  
**Welfare Rights Advisor**  
**Child Poverty Action Group**  
94 White Lion Street  
London N1 9PF  
tel: 020 7812 5215  
fax: 020 7837 6414  
email: [mwilliams@cpag.org.uk](mailto:mwilliams@cpag.org.uk)

Child Poverty Action Group is a charity registered in England and Wales (registration number 294841) and in Scotland (registration number SC039339), and is a company limited by guarantee, registered in England (registration number 1993854). VAT number: 690 808117