

Work and Pensions Committee: Cost of Living Inquiry

Public Law Project – Written Evidence

About PLP

1. Public Law Project (PLP) is an independent, national, legal charity which aims to improve access to public law remedies for those whose access is restricted by poverty, discrimination or similar barriers.
2. PLP has a strategic aim of achieving a just and non-discriminatory welfare system with a particular focus on benefit sanctions and deductions.
3. The focus of this evidence is on benefit deductions policy and practice.
4. PLP's experience in this area includes casework support in individual cases, strategic litigation to challenge systemic issues and providing training on benefit overpayment waiver requests.

What changes should DWP make to their deductions policies and practices to protect those on Universal Credit (UC) and legacy benefits from reduced incomes?

5. PLP recommends that DWP:
 - a. Suspends deductions for Government debt, similar to the approach taken in response to the Coronavirus pandemic. Unlike the pandemic suspension, this should include the suspension of recovery of Advance Payments.
 - b. Uses that suspension period to implement longer term changes to:
 - i. Convert Advance Payments and Hardship Payments into non-repayable grants.
 - ii. Write-off overpayments caused by DWP mistakes and those that relate to historic debt (including historic tax credit debt).
 - iii. Introduce proactive consideration of affordability and vulnerability prior to deciding a) whether to apply deductions; and b) the rate of recovery.

- iv. Improve the accessibility of the measures in place to safeguard against incorrect, unfair or harmful deductions (financial hardship decisions, suspensions and waivers).

Impact of deductions on Claimant incomes

- 6. The continued application of deductions risks undermining Government’s recent cost of living package¹. The £650 payment to those in receipt of low-income benefits is the equivalent of £54 a month² (£87.50 per month if you include the £400 energy grant and £100 if you include the £150 payment to those in receipt of qualifying disability benefits).
- 7. The current maximum rate of deductions for UC Claimants is 25% of the standard allowance each month:

Claimant circumstances	Monthly standard allowance	25% of monthly standard allowance
Single and under 25	£265.31	£66.33
Single and 25 or over	£334.91	£83.73
Couple both under 25	£416.45	£104.11
Couple either is 25 or over	£525.72	£131.43

- 8. While Government’s recent package is welcome, benefit levels continue to be set at low levels in historical terms³. The application of deductions takes individuals further below this already low level. The inevitability of hardship in these circumstances is acknowledged in DWP’s Benefit Overpayment Recovery Guide (BORG) which states at paragraph 5.72

¹ <https://www.gov.uk/government/news/millions-of-most-vulnerable-households-will-receive-1200-of-help-with-cost-of-living>

² Provided as a monthly amount for illustration only – payment itself will be in two lump sums: <https://www.gov.uk/guidance/cost-of-living-payment>

³ <https://www.jrf.org.uk/report/fifty-years-benefit-uprating>

that “*the recovery of an overpayment from any person in receipt of benefit is almost certain to cause some hardship and upset for them and their family*”⁴.

9. Evidence of the impact of benefit deductions can be found in the Trussell Trust’s recent report *Debt to Government, Deductions and Destitution*⁵ and Lloyds Bank Foundation’s report *Deductions as Drivers of Poverty*⁶.

Government policy as a driver of debt

10. Much of the debt recovered by way of deductions is not driven by Claimant behaviour or choice but as a result of system design, DWP mistakes and deliberate policy decisions. This includes Advance Payments, Hardship Payments, Official Error Overpayments and historic Tax Credit overpayments.

Official Error Overpayments

11. When introducing UC, Government expanded recoverable overpayments to include any type of UC overpayment, including those that result from DWP or system error.⁷ As a result, UC Claimants can find themselves in debt through no fault of their own, and entirely as a result of DWP’s mistakes.
12. Concerns were raised about this at the time of the introduction of the Welfare Reform Act 2012. In response, assurances were provided by the then Secretary of State for Work and Pensions (SSWP) that “*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 recover money where official error has been made.*”⁸
13. However in practice DWP’s default approach is to recover these overpayments. In 20/21 of 447,000 new UC overpayments recorded on DWP’s debt management system, 337,000 (75%) were classed as “official error”⁹.
14. DWP’s policy on overpayment recovery is set out in the BORG. This does provide for the possibility of waiver of overpayments “*in exceptional circumstances*”, reactively to a

⁴ <https://www.gov.uk/government/publications/benefit-overpayment-recovery-staff-guide/benefit-overpayment-recovery-guide>

⁵ <https://www.trusselltrust.org/wp-content/uploads/sites/2/2022/02/Debt-to-government-deductions-and-destitution-qualitative-research-report.pdf>

⁶ <https://www.lloydsbankfoundation.org.uk/we-influence/welfare-deductions>

⁷ *LP v Secretary of State for Work and Pensions* [2018] UKUT 332 (AAC), at [10]

⁸ <https://publications.parliament.uk/pa/cm201011/cmpublic/welfare/110519/am/110519s01.htm>

⁹ https://www.whatdotheyknow.com/request/778106/response/1857789/attach/3/61616%20Response.pdf?cookie_passthrough=1

Claimant's request. However as set out below this policy is restrictively applied and difficult to access.

15. For the last three financial years the number of overpayment waivers granted has never exceeded 10 in each year¹⁰ – equivalent to 0.002% of new UC overpayment error debts added to DWP's debt management system in 20/21.
16. In the same parliamentary debate referred to above, the SSWP stated that there would be *“an absolutely clear code of practice that will govern the circumstances in which recovery action will or will not be taken”* allowing sufficient flexibility to take into account different circumstances including the *“degree of error”* and *“whether the Claimant received the money in good faith”*.
17. Until recently DWP's waiver policy made no reference to official error at all¹¹. Following a case brought by a PLP client, the BORG was updated to include reference to official error as a factor to take into account when determining waiver. However, we are concerned that in practice DWP will continue to apply an approach of only granting waivers where the (very high) threshold for hardship is met with official error taken into account only as an additional consideration, with no real weight being attached to it.
18. **PLP recommends that DWP clarify through both the BORG and staff training that official error a) may be a ground for waiver in its own right; and b) creates a presumption in favour of waiver.**

Insufficient safeguards against incorrect or unfair overpayment deductions

19. DWP's deductions policy applies where DWP has determined there has been a recoverable overpayment. The benefit system is complex, and just as official errors can lead to initial overpayments, it is possible for errors to be made in determining a) that an overpayment has occurred; and b) in the case of legacy benefits, that the overpayment is recoverable.
20. It is important that in these circumstances, Claimants are able to challenge potentially incorrect decisions where they have a right to mandatory reconsideration (MR) and appeal. For the reasons set out at paragraphs 23 – 32 we are concerned that current messaging in deductions correspondence may be misleading Claimants about this.

¹⁰ https://www.whatdotheyknow.com/request/universal_credit_deductions_data#incoming-2006402

¹¹ Chapter 8, BORG, version 2.60 May 2021

21. In response to concerns about the harmful impact of deductions, DWP has pointed to the option of Claimants contacting DWP Debt Management to request a reduction in the rate of repayment, suspension or, in exceptional circumstances, waiver.
22. We do not consider these to be adequate safeguards against harm for the following reasons:
- a. The combination of the very high threshold applied by DWP and the barriers Claimants face to making requests, means that very few Claimants are able to benefit from these measures in practice.
 - b. Even if someone does manage to successfully access relief, due to the reactive nature of the system, relief is only granted after an initial deduction has been made – potentially after harm has already resulted.

Incorrect overpayment recovery – MR and appeal

23. In relation to most benefits, DWP is only entitled to recover overpayments that are the result of Claimant misrepresentation or failure to disclose a material fact¹². Claimants have the right to appeal DWP's decision on recoverability¹³.
24. In relation to UC (and new style JSA and ESA), DWP is entitled to recover all overpayments however caused. Claimants cannot challenge on appeal the DWP's decision to recover a UC overpayment. However Claimants continue to have the right to appeal the amount of overpayment that is recoverable.
25. Claimants will sometimes have the right to challenge an underlying decision that they were not entitled to a particular payment, which in some instances is the reason that DWP has decided there has been an overpayment. This may occur, for example, where DWP decides to revise a decision on whether someone was eligible for a benefit at the time they claimed it. Such a decision is often subject to challenge in its own right.
26. We are concerned that the wording in overpayment recovery letters may incorrectly lead to Claimants thinking that they do not have these rights of appeal.
27. Following a decision to recover an overpayment, the relevant benefit office is required to send an ORG 7 notice to the Claimant. This Committee was recently provided with an

¹² Section 71 Social Security Administration Act 1992

¹³ Para 5 of Sch 3, Social Security Act 1998

example ORG 7 notice.¹⁴ This notice includes standard wording about the right to challenge by MR and appeal.

28. However, in addition to the ORG 7 notice, Claimants are contacted separately by DWP Debt Management about recovery of the overpayment by deduction. PLP has seen correspondence from Debt Management that includes the following wording:

When we have looked at the decision again, we will send you a letter explaining what we have done. We call this a **Mandatory Reconsideration Notice**. This will include the information you need to be able to appeal.

You cannot appeal against a decision to take deductions to pay back:

- a loan from the Social Fund;
- a Short Term Benefit Advance;
- an overpayment;
- a payment from the Out of Hours Service;
- any penalty you agreed to pay back.

29. We are concerned that this:

- a. Is inaccurate in relation to legacy benefits; and
- b. Risks misleading Claimants that they don't have the right to challenge the underlying decision to entitlement that led to the overpayment.

30. This was described by one ESA Claimant PLP spoke to as follows:

"it was listed on every letter, but then on the second letter contradicted it and said that it wasn't allowable because of an issue with judgment. That is what I'm saying about them contradicting themselves in their letters. First one says yes you can, you can appeal this, you can, you could do this and do that. The second letter says no you can't. The only thing you can do there is also about the amount we take off of you. And so I gave up even trying to argue".

31. We are concerned that this may also be reflected in information provided by DWP staff.

The Claimant referred to above also described the following conversation:

"Interviewee: They also said we won't listen. You've already been, you've already been adjudged.

¹⁴ <https://committees.parliament.uk/publications/8565/documents/86502/default/>;
https://www.whatdotheyknow.com/request/benefit_overpayment_recovery_org

Interviewer: So how did that? How did that conversation go?

Interviewee: Uh, you could? Uh, you can't. You can't. You can go, do the mandatory reconstruction...whatever it's called, what's the word?

Interviewer: Reconsideration?

Interviewee: Yeah, uh, but that will not alter that will not alter it in any way, shape or form was literally one of the comments I had. You have been, this has been judged. That's it. No matter what you say, no matter what evidence you present, no, not good enough. We will not accept it. The only point you can argue on is how much money that we can take off of you. That's the only sort of thing that they would even listen to. And it was only as I said about, all I was saying about you can't take that amount, that's the only point they would even be willing to listen on."

- 32. PLP recommends that DWP urgently revise the wording in Debt Management letters and clarify via staff guidance that Claimants have the right to challenge a) relevant underlying decisions to entitlement leading to an overpayment; and b) recoverability of relevant overpayments.**

Overpayment recovery resulting in harm

33. Under the relevant statutory framework DWP continues to have discretion over:
- a. Whether or not to recover UC overpayments; and
 - b. The rate at which they can be recovered up to a maximum cap.
34. In practice however, DWP appears to apply an automatic approach to recovery (both in terms of the decision to recover and the rate at which it is recovered) with limited (or no) consideration of individual circumstances, including potential harm.
35. The initial decision as to whether there has been an overpayment (and whether that overpayment is recoverable) is made by a Decision Maker within the UC team.
36. Chapter D1 of the Advice for Decision Making: Staff Guide sets out the actions a Decision Maker is required to take when making an overpayment decision¹⁵. This does not include consideration of whether an overpayment should be recovered (for example, taking into

¹⁵ <https://www.gov.uk/government/publications/advice-for-decision-making-staff-guide>

account the Claimant's financial circumstances, vulnerabilities or the circumstances in which the overpayment arose).

37. Once an overpayment decision has been made, it is referred to Debt Management for recovery. Once the debt is recorded on Debt Manager, recovery appears to follow an automated process of recovery, including in relation to the determination of the applicable rate and the order of deduction.
38. Responses to a Freedom of Information Act request in early 2020 explain that Debt Management staff don't calculate the level of deduction or set the deductions up. Instead, when a UC payment is about to be made a "call out" is made to the Debt Management System asking if there are any debts that need to be recovered. If there is a debt on the system it will calculate and take the appropriate deduction¹⁶.
39. Regulations set a maximum rate of recovery for UC non-fraud overpayments of 15% if the Claimant doesn't have earned income and 25% if they do¹⁷. Multiple deductions (both overpayments and other types of deduction) can be applied up to a maximum cap of 40%. This was revised by Government as a matter of policy to 25% of the standard allowance. If there are multiple deductions that exceed this cap, a priority order is applied. We understand that deductions are "queued" so that once the prioritised debts have been recovered, deductions for the remaining debts will be deducted from the next UC payment.
40. We are not aware of any assessment having been carried out by DWP in determining the revised cap of 25%. It is also a blanket approach which does not take into account individual circumstances.
41. We know both from PLP's direct casework and from speaking to others in the advice sector that DWP doesn't routinely seek evidence or representations from Claimants about financial hardship or other considerations before recovering a debt or determining the rate.
42. Instead consideration of the impact on Claimants and the circumstances in which the debt arose is dependent on a Claimant contacting DWP to ask them to reduce the rate of recovery, suspend or waive recovery.

High threshold applied

¹⁶ https://www.whatdotheyknow.com/request/debt_recovery_notification_and_t#incoming-1524429

¹⁷ Regulation 11, Social Security (Overpayments and Recovery) Regulations 2013

43. DWP's policy on renegotiation of rates of recovery is set out at paragraphs 5.71 to 5.78 of the BORG. As set out above, the policy tolerates a degree of hardship. DWP will only consider a reduction in rates if harm is "significant".
44. DWP's policy on waiver is set out at Chapter 8 of BORG. It states that waivers will only be granted in exceptional circumstances and where it can be clearly demonstrated that the Claimant's circumstances will only improve by waiver of the debt. If the Claimant has other debts, then the BORG suggests that this condition may not be met.
45. The Claimant is responsible for providing all necessary information and evidence to support their application. The evidential requirements are onerous – see paragraphs 8.11 and 8.12 of the BORG. This Committee recently heard evidence of some of the challenges of obtaining medical evidence in the context of the inquiry into Health Assessments¹⁸. Many of those considerations apply in this context too.
46. In our experience there are barriers to individuals obtaining evidence from a medical professional that 'in their opinion' the overpayment recovery of the debt is the main or only cause of the ill health (see paragraph 8.12), particularly in cases where a Claimant has a multitude of complex mental health problems, which may fluctuate, and life stresses that make it difficult for a GP to draw a simple causal link between the overpayment and ill-health. Claimants face difficulties gathering medical evidence where they do not have a trusted relationship with medical professionals and where they cannot afford the cost of paying for the GP's letter (as some surgeries will charge for this service).

Barriers to requesting

47. **Lack of awareness:** this is particularly acute in relation to waivers. The standard DWP overpayment letters don't advise Claimants of this right. A recent PLP poll of welfare benefits advisers attending a PLP training session, suggested that many respondents didn't know that DWP could waive debts or found the process unclear.

DWP's webpage *Who to Contact About Money Taken Off your Universal Credit Payment:* <https://secure.dwp.gov.uk/find-out-who-to-contact-about-money-taken-off-your-universal-credit-payment/> includes a step through process for identifying who to contact depending on the nature of the deduction and the issue you want to ask about. Of these, the step through for Hardship Payments is the only one to include an option for those concerned about their ability to repay.

¹⁸ <https://committees.parliament.uk/event/13485/formal-meeting-oral-evidence-session/>

48. **Difficult process:** this includes difficulty navigating between Debt Management (responsible for managing debt recovery) and UC (responsible for making a decision that there has been a recoverable overpayment). Conversations with Claimants and advisers have referred to:

- a. confusion resulting from different letters from each department using different wording and terminology;
- b. being passed back and forth between DWP Debt Management (who are unable to consider whether an overpayment is correct) and UC (who are unable to consider matters relating to the approach to debt recovery).

49. PLP are concerned about the accessibility of the waiver (and rate of reduction) process for all Claimants. However we are particularly concerned about potential discrimination on grounds of disability, for example, where individuals face additional barriers to self-reporting due to difficulties with social interaction or expression.

50. **PLP recommends that:**

- a. **DWP should actively consider whether to recover a debt before starting to make deductions and when determining the rate of recovery – taking into account the amount, cause, affordability, vulnerabilities and complex needs. This should include providing Claimants with the opportunity to make representations.**
- b. **Correspondence from DWP about overpayments and deductions should refer to the right to request a waiver.**
- c. **DWP should correct the above webpage to include clear options for who to contact if the Claimant a) thinks the overpayment is incorrect; or b) is concerned about their ability to repay.**

Advance Payments

51. 43% of UC claims with a payment due in February 2022 had a deduction for an Advance Payment¹⁹.

¹⁹ <https://questions-statements.parliament.uk/written-questions/detail/2022-06-13/17006>

52. Advance Payments have the effect of building in debt from the outset. As one UC Claimant that PLP spoke to described it:

“It’s all just about getting you into debt. Same with these Advance Payments. You’re always paying back a loan. I’ve struggled every time I’ve gone into work and then come back on to Universal Credit. You’re always then one month behind on your rent – somehow with all your finances, UC leaves you short. I’ve gone back into work I think two times, and when I’ve come back I’ve ended up behind on my rent – its all about keeping you in debt.”

53. The impact of the 5-week wait and Advance Payments was considered in detail by this Committee in its 2020 inquiry Universal Credit: the wait for a first payment. Since then, DWP has extended the repayment period for Advances from 12 months to 24 months. While this “smooths out” the period over which Claimants are required to repay it does not address the fundamental issue which is that Claimants are required to enter into debt from the outset of their claim.

54. **PLP recommends that:**

- a. Recovery of Advance Payments should be suspended for the period of the current cost of living crisis**
- b. In the longer term, Advance Payments should be converted to grants**

Hardship Payments

55. Sanctioned UC Claimants can apply for Hardship Payments (a loan of 60% of the sanctioned amount), subject to certain conditions, including demonstrating that they:

- a. are struggling to meet their basic needs as a result of the sanction
- b. have done everything they can to get money from other sources.

56. Hardship Payments are recoverable by way of deductions from UC payments. The normal maximum recovery rate is 25% of the standard allowance. Given that, by definition, a Claimant must have been struggling to meet their basic needs and have no other options in order to access a payment, this creates a real risk of an extended period of financial hardship. UC Claimants PLP spoke to expressed anxiety about the fact that hardship payments are a debt, for example:

- *“...and if I don't get any money, I don't know what to do after that? Apply for another hardship payment? I feel I'm being pushed to apply for hardship payments and get myself into more debt.”*
- *“...to apply for hardship payment and get into more debt, it's just a way, I feel, of forcing you off the dole, making you take more hardship payments, and get into more debt.”*

Historic Tax Credit Debt

57. Overpayments and underpayments are an inherent feature of the tax credit system. This is largely due to the nature of the tax credit system which means awards are calculated based on an estimate of earnings for the year ahead. Reconciliation is then at the end of the year when a calculation can be based on real earnings.

58. In 2014 DWP and HMRC entered into a Memorandum of Understanding that tax credit debts would be transferred to DWP and collected through deductions from UC²⁰.

59. A letter from the Permanent Secretary to the Chair of this Committee in January 2022 set out that of Tax Credit debt transferred to DWP on UC claims, 27% were over 5 years old. PLP has seen DWP attempt to recover an alleged Tax Credit overpayment debt that is 18 years old. In that instance, the individual had no recollection of incurring an overpayment, which was unsurprising, given the passage of time. While HMRC only sought to recover the alleged debt in 2021 when the individual migrated to UC, they maintained that she was out of time to challenge recovery, as that ought to have been done within 3 months of the debt being incurred. When HMRC were asked by PLP to provide the individual with further information about how the debt had actually arisen, HMRC admitted that they were unable to ascertain the precise circumstances from their internal records, and on this basis agreed to remit the alleged overpayments and repay the amounts that had been deducted.

60. The barriers to challenging or seeking relief in relation to overpayment deductions are exacerbated with Tax Credit overpayments due to the additional complexity of navigating between DWP and HMRC. In PLP's experience it is often unclear to Claimants (or even experienced benefit advisers) whether DWP or HMRC should be approached when challenging recovery.

²⁰ <https://www.rightsnet.org.uk/forums/viewthread/17450/>

61. For example, when someone makes a UC claim and they have a Tax Credit overpayment debt, DWP can only see the amount owed, tax credit award end date and basic identification details. Without more details about the specific errors in the claim, DWP is unable to provide the information which would help individuals better understand why they find themselves owing money.²¹

62. PLP is aware of one example where an individual sought to challenge HMRC's recovery of historic tax credit overpayments by making a complaint to HMRC, as she was advised to do by senior officials at HMRC. In responding to the complaint, HMRC informed her that her complaint had also been referred back to DWP because "*part of [her] complaint is in relation to recovery by DWP*". This demonstrates the difficulties that individuals face in holding decision-makers to account.

63. **PLP Recommends that:**

- a) DWP and HMRC urgently review their processes for coordinating challenges to Tax Credit overpayments**
- b) DWP / HMRC should write off historic Tax Credit Overpayments**

²¹https://www.stepchange.org/Portals/0/assets/pdf/True_cost_tax_credit_overpayments_StepChange.pdf