



Recovery of benefit overpayments due to official error

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People may receive benefits they are not entitled to, or payments in excess of their entitlement, because of fraud, or due to error. The Department for Work and Pensions estimates that in 2009/10, fraud resulted in overpayments totaling around £1.0 billion, or 0.7% of total benefit expenditure. This is however less than the amounts it estimates were overpaid because of mistakes or omissions by claimants or by the Department itself. Claimant or “customer” error is estimated to have resulted in overpayments totaling around £1.1 billion, and “official error” is thought to have caused a further £1.1 billion to be overpaid.

A recent report by the National Audit Office found that the DWP had insufficient data on the causes of official error overpayments, and that there was no clear evidence that the Department’s commitment to reducing administrative error had led to any significant improvement in performance. It recommended that the Department collect better information on the causes of administrative error and on the costs and benefits of different interventions, clarify responsibilities for tackling error, and improve quality control arrangements to prevent errors arising in the first place.

Social security legislation provides that, for most benefits, overpayments may usually only be recovered if they were caused by misrepresentation or non-disclosure of a material fact by the claimant. In a recent test case brought by the Child Poverty Action Group, the Supreme Court ruled that the DWP did not have the power to recover official error overpayments under common law and that recovery was only possible under the statutory provisions. The judgment does not affect overpayments of Housing Benefit of Council Tax Benefit, or tax credit overpayments.

The DWP has agreed to identify and reimburse claimants who repaid amounts overpaid to them because of official error, or who made arrangements to repay, in response to letters it sent out claiming that it had the right to seek recovery under common law. However, the Government has also said that it will seek to change to law to enable recovery of official error overpayments. Measures are expected in the forthcoming *Welfare Reform Bill*.

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1 Fraud and error

1.1 Definitions

People may receive benefits to which they are not entitled, or payments in excess of their entitlement, as a result of fraud, or because of mistakes, omissions or failures, either by the claimant, or by the Department for Work and Pensions itself.

DWP publications on fraud and error give separate estimates for fraud, “customer error” and “official error”:

Fraud: This includes all cases where the following three conditions apply:

- the basic conditions for receipt of benefit, or the rate of benefit in payment, are not being met;
- the customer can reasonably be expected to be aware of the effect on entitlement; and
- benefit stops or reduces as a result of the review.

Customer Error: The customer has provided inaccurate or incomplete information, or failed to report a change in their circumstances, but there is no fraudulent intent on the customer’s part.

Official Error: Benefit has been paid incorrectly due to inaction, delay or a mistaken assessment by the DWP, a Local Authority or Her Majesty’s Revenue and Customs.¹

Ministerial pronouncements have not always distinguished between the different causes of “incorrectness” in welfare payments. For example, in his statement on the Comprehensive Spending Review on 20 October, the Chancellor of the Exchequer said that fraud in the welfare system would no longer be tolerated, adding “We estimate that £5 billion a year is being lost in this way.”² In their foreword to the DWP’s October 2010 strategy document, *Tackling fraud and error in the benefit and tax credits systems*, the Minister for Welfare Reform, Lord Freud, and the Exchequer Secretary to the Treasury, David Gauke, also said:

This document sets out a radical new approach for addressing welfare fraud, which now costs the taxpayer £5.2 billion pounds every year, or £165 every second.³

However, a breakdown later in the paper indicates that of the £5.2 billion overpaid, only £1.6 billion was due to fraud (£1.0 billion for DWP benefits, and £0.6 billion for HMRC-administered benefits and tax credits).⁴

In response to the Chancellor’s statement and the Ministerial foreword in *Tackling fraud and error in the benefit and tax credits systems*, an alliance of church leaders wrote to the Prime Minister on 28 October expressing concern that “misrepresentation” of the level of fraud had had the effect of “stigmatising the poor”. The letter added:

We agree with the Government that benefit fraud is a serious offence, but implying that the poorest perpetrate this offence three times more than is the case is clearly unjust.

¹ DWP, *Fraud and Error in the Benefit System: October 2008 to September 2009*, 27 May 2010

² HC Deb 20 October 2010 c956. For reactions to this see ‘Churches call Osborne to account for welfare fraud exaggeration’, *The Guardian*, 29 October 2010

³ DWP and HMRC, *Tackling fraud and error in the benefit and tax credits systems*, 18 October 2010, p3

⁴ *Ibid.* Figure 1, p12

We also agree with you that the CSR will dramatically affect the lives of a generation, but the fact that issues around welfare reform are vital to the social and economic future of this country means it is imperative that the debate is informed by accurate information.⁵

The letter called on the Prime Minister to instruct the Chancellor to correct his statement of 20 October, and for the Ministerial foreword to be similarly corrected.

On 12 December Lord Freud wrote to the signatories of the letter, saying that as Minister for Welfare Reform he had been asked to reply. Lord Freud said that “the Government recognises that the vast majority of benefit recipients are genuinely entitled to the financial support they receive and there is certainly no desire to stigmatise people who rely on benefits”. He thanked the group for drawing attention to incidences, including the statement in the foreword to the strategy document, where the figure of £5.2 billion had been attributed to fraud alone, rather than fraud and error, adding:

I am satisfied, however, that this was entirely inadvertent and not in any way intended to mislead. I apologise for the concern this has caused, and I have asked officials to take corrective action.⁶

The Ministerial foreword to the version of *Tackling fraud and error in the benefit and tax credits systems* at the [DWP website](#) has now been amended to refer to a “radical new approach for addressing welfare fraud and error”.

1.2 Estimates

The following table gives the Department’s latest estimate of total fraud and error across all DWP benefits in Great Britain in 2009/10.⁷ Because of uncertainties surrounding the estimates, the Department publishes estimates as ranges, although for each it also gives a “central estimate”. Figures are also given as a percentage of total benefit expenditure (£148.0 billion in 2009/10).

	Central estimate		Range ⁸	
	Amount	Percentage of expenditure	Amount	Percentage of expenditure
Fraud	£1.0 billion	0.7%	£0.8-£1.4 billion	0.6-1.0%
Customer error	£1.1 billion	0.7%	£0.8-£1.4 billion	0.6-0.9%
Official error	£1.1 billion	0.7%	£0.9-£1.5 billion	0.6-1.0%
Total	£3.1 billion	2.1%	£2.7-£3.8 billion	1.8-2.5%

⁵ Methodist Church, [Churches write to Cameron asking him to set the record straight](#), 28 October 2010. See also ‘Churches call Osborne to account for welfare fraud exaggeration’, *The Guardian*, 29 October 2010; Peter Osborne, ‘George Osborne must correct his claims about benefit fraud. And his portrayal of the poor as mean-minded and cheating’, *Daily Telegraph*, 1 November 2010

⁶ [Letter from Lord Freud to the Reverend Martyn Atkins, General Secretary of the Methodist Church](#), 12 December 2010

⁷ Source: DWP, [Fraud and Error in the Benefit System: October 2008 to September 2009](#), 27 May 2010

⁸ Approximate 95% confidence intervals are given. These indicate the range within which one can be 95% sure that the true value lies for each of the estimates.

The central estimate of the amount overpaid due to official error in 2009/10 is £1.1 billion, although the range is from £0.9 billion to £1.5 billion.

Around 70% of the total amount overpaid due to official error concerned claims for means-tested benefits, Incapacity Benefit or Jobseeker's Allowance. Housing Benefit overpayments resulting from official error were estimated at £200 million, with Pension Credit accounting for a further £150 million, Incapacity Benefit £130 million, Income Support £120 million and JSA £110 million (all central estimates). As a percentage of benefit expenditure, the incidence of official error overpayments was greatest for JSA (2.3%), followed by Incapacity Benefit (2.1%) and Pension Credit (1.8%).⁹

The DWP report also gives estimates for fraud and error in previous years, although it says that comparisons with the earlier period in particular (2000/01 to 2004/05) should be treated with caution, because of changes in the way fraud and error has been estimated. However, the Department's "best available estimates" do not suggest any diminution of the amount overpaid due to official error over time.

The DWP publication also gives estimates for the amounts *underpaid*, i.e. where claimants receive less than they are entitled to. In 2009/10, it estimates that around £1.3 billion was underpaid to claimants, of which £0.8 was due to "customer error" and £0.5 billion official error. It is important to note however that this only includes claimants who were already in receipt of benefits, but getting less than they were entitled to. It does *not* include people who were eligible for benefits but who did not apply for them. The Government does not produce a global estimate of the total amount unclaimed due to incomplete take-up of benefits, but in 2008/09 around £10 billion of means-tested benefits alone went unclaimed, and around £6 billion of tax credits went unclaimed in 2007/08. However, both figures are again "central estimates" and should be treated with caution.¹⁰

1.3 National Audit Office report

On 25 November 2010 the National Audit Office published a report, *Minimising the cost of administrative errors in the benefit system*.¹¹ The report concluded that was "no clear evidence that the Department's commitment to reducing administrative error has led to a significant improvement in performance".¹² It noted that the previous Government's 2007 strategy for tackling error in the benefits system had led to a range of initiatives, but observed:

Despite these efforts, the Department's commitment has served only to hold the 11 level of error steady, not to reduce it. Between 2006-07 and 2009-10 there has been no discernible decrease in the estimated cost of overpayments or underpayments due to administrative error as a percentage of benefits expenditure. The cost of overpayments as a percentage of expenditure has remained at 0.7 of a per cent. Underpayments as a percentage of expenditure have changed from 0.4 of a per cent in 2006-07 to 0.3 of a per cent in 2009-10, but this difference may simply be due to the sampling process used – it is not sufficient to show any trend.¹³

⁹ DWP, *Fraud and Error in the Benefit System: October 2008 to September 2009*, 27 May 2010, Table 2.1

¹⁰ DWP, *Income-related benefits: estimates of take-ups*; HMRC, *Child and Working Tax Credit take-up rates*.

¹¹ [HC 569 2010-11](#)

¹² *Ibid.* p6

¹³ *Ibid.* p7

The NAO noted that the rate of administrative error for both overpayments and underpayments varied markedly from benefit to benefit, with means-tested and disability benefits having the highest incidence. It also noted:

There are also noticeable variations in the accumulated overpayments that customers can receive. In 2009-10, for example, 19 per cent of the £53 million new debt registered for Income Support that year was for accumulated overpayments of more than £10,000 per claim. The Department recorded 268,876 overpayments resulting from administrative error in 2009-10, and in that year wrote off administrative error debts to the value of £143 million.¹⁴

Despite the sums involved the NAO found that the Department did not have sufficient data on why errors had occurred. During focus groups conducted by the NAO DWP staff suggested various reasons for administrative error, including:

- Incompatible computer systems;
- Inadequate training;
- Poor guidance and inadequate support for staff encountering problems;
- Concern about targets affecting the accuracy of processing; and
- Human error, e.g. mistakes in transcription or during data entry.

However, the NAO emphasises the need to treat these explanations with caution, in the absence of “robust evidence”.

The NAO concluded that “In the absence of data we could not establish that the Department had consistently targeted its resources and initiatives to the best effect”.¹⁵ It went on:

The Department and its senior officials are clearly committed to reducing the cost of administrative error, and it is frustrating that there has been no discernible reduction since 2007. Their existing approach, however, lacks the information needed to target initiatives effectively and thus the sophistication needed to achieve a significant reduction. The Department has yet to develop a consistent method of assessing the cost effectiveness of its interventions and lacks costing data on the consequences of error such as re-works. Accordingly, the Department does not have sufficient evidence to demonstrate that existing activities to reduce administrative error have been value for money.¹⁶

The publication by the Government of a revised fraud and error strategy in October 2010 was, the NAO said, “an opportunity to re-assess existing priorities, to assign clear responsibilities at operational level, and to put in place a more systematic approach to minimising administrative error and monitoring progress”. The NAO accordingly made a number of recommendations:

- a) **Collect data to improve understanding of costs and benefits of different interventions.** This should involve:

¹⁴ *Ibid.* p7

¹⁵ *Ibid.* p9

¹⁶ *Ibid.* p9

- developing a systematic costing model that would include the indirect as well as the direct costs of each intervention. Such a model would be helpful at the business case stage and for subsequent monitoring of progress; and
- developing an approach to estimate the full costs of re-working administrative errors so as to provide a better understanding of the costs and consequences of such errors.

b) **Collate better information on why administrative errors arise.** The Department has already confirmed that it is undertaking a more detailed examination of errors to determine their underlying cause. This should not be the only source of information, however, and this information should be supplemented by:

- instigating more systematic feedback from quality assurance teams on where errors have arisen and why the mistakes occurred. This should include regular reports on the nature of staff enquiries to internal helplines; and
- drawing on the results of our workshops to capture staff perceptions by encouraging staff feedback or suggestions on how quality can be improved.

c) **Assigning clear responsibilities at operational level so that the Department and its agencies understand their role in minimising administrative error.** This should involve:

- developing a methodology to hold managers to account by monitoring the progress made by each operational manager in improving levels of accuracy;
- specifying processing accuracy targets at operational level so that each centre can fully understand its own contribution to error reduction; and
- regular monitoring so that any decline in performance automatically triggers remedial action.

24 Improving quality control arrangements to prevent errors arising in the first place is likely to be a more effective approach. Instigating such a strategy should involve:

- introducing an accreditation system for staff in Jobcentre Plus responsible for quality checking in order to determine common standards of approach;
- reviewing training provision and staff feedback mechanisms to inform the development of guidance, interventions and procedures; and
- timely interventions to limit the extent of any underpayments or overpayments arising from an error.¹⁷

The Public Accounts Committee held an oral [evidence session](#) on “Minimising the cost of administrative errors in the Benefit System” on 8 December 2010.

2 Recovery of overpayments due to official error

Overpayments of most benefits administered by the Department for Work and Pensions¹⁸, and of Child Benefit, may be recoverable under social security law in two main sets of circumstances.

¹⁷ *Ibid.* pp10-11

The conditions that must usually be satisfied for an overpayment to be recoverable are that:¹⁹

- There was a misrepresentation, or failure to disclose, a material fact; and
- The overpayment occurred as a result of that misrepresentation or failure to disclose; and
- The original decision awarding benefit has been changed.

The misrepresentation or failure to disclose does not need to have been purposeful. For example, if someone did not report a source of income simply because they did not think it mattered, any resulting overpayment would still be recoverable. However, if the overpayment was the result of official error, where all relevant information was disclosed to the DWP in the appropriate manner and at the appropriate time, it would not be recoverable under these provisions.

If a decision to recover an overpayment is made, an individual has the right to ask for the written reasons, and the decision can be appealed in the usual way.

Section 71(4) of the *Social Security Administration Act 1992* also allows the Secretary of State to recover overpayments which are “materially due” to the way in which the direct payment system for benefits operates.²⁰ This might include, for example, where a claimant informs the DWP of a change in their circumstances reducing their award but the Department cannot adjust the payment in time because it is after the cut-off date for altering a payment via credit transfer, or because the system is not functioning properly. Another example would be where the system itself causes duplicate payments to be made.

If neither of the above sets of circumstances applies, then the overpayment cannot usually be recovered under social security law.

The rules governing recovery of **tax credit overpayments** are different from those for social security benefits. HMRC may decide not to recover an overpayment of tax credits if it would cause hardship, or if the overpayment was caused by official error, but only in certain circumstances.

The situation is complicated by the fact that the rules changed at the end of January 2008. Prior to then, HMRC applied the so-called “**reasonable belief**” test, under which claimants were expected to show that:

- the overpayment resulted from an error on the part of HMRC, and
- it was reasonable for the claimant to have thought that their payments were right.

If the claimant could satisfy both parts of the test, then the overpayment could be written off. The “reasonable belief” test was the source of much controversy, and criticisms of the test, and the way it was applied, were voiced by many organisations and individuals, including the Parliamentary Ombudsman.

¹⁸ The rules on recoverability of Housing Benefit and Council Tax Benefit – which are administered by local authorities – are however quite different. For further details see Chapter 39 of the Child Poverty Action Group *Welfare benefits and tax credits handbook 2010-2011*. See also the DWP [HB/CTB Overpayments Guide](#)

¹⁹ Section 71(1) *Social Security Administration Act 1992*

²⁰ Regulation 11 *Social Security (Payments on Account, Overpayments and Recovery) Regulations 1988*, SI 1988/664

Since 31 January 2008 HMRC has operated a new test which looks at whether both the claimant and HMRC have met various respective **responsibilities**. The rules are set out in revised Code of Practice COP26, *What happens if we have paid you too much tax credit?*²¹ It sets out claimants' responsibilities for claiming correctly, checking awards, notifying changes, checking payments and reporting errors within one month (unless there are exceptional circumstances for not reporting within this time). HMRC is expected to give correct advice, accurately record information, pay the right amount and send out new award notices within 30 days of the claimant reporting a change of circumstances. If the claimant meets their responsibilities but HMRC fails to meet its responsibilities, the overpayment can be written off. Similarly, if HMRC meets its responsibilities but the claimant fails to meet theirs, HMRC will seek to recover the overpayment. If both parties fail to meet some of their responsibilities, the overpayment may be written off in part.

Although it is not possible to appeal to an independent tribunal against a decision to *recover* an overpayment of tax credits, it is possible to challenge such a decision. This is an extremely complicated area. The Low Incomes Tax Reform Group (LITRG) has produced a factsheet on [Overpayments & underpayments](#) which explains the circumstances where the revenue may decide not to recover an overpayment of tax credits. The Child Poverty Action Group also has a factsheet on [Tax Credits Overpayments](#).

3 The CPAG test case

In 2006 and 2007 the DWP wrote to over 65,000 claimants who had been overpaid due to official error informing them that, while their overpayment was not recoverable under social security law, the Department could take them to court under common law if they did not pay back the amount overpaid. This was challenged by the Child Poverty Action Group (CPAG), which argued that the DWP had no powers to recover overpayments other than those set out in the legislation. The test case ultimately went to the Supreme Court, and on 8 December 2010 it ruled that the DWP did not have the power to recover official error overpayments under common law. The judgment does not affect overpayments of Housing Benefit of Council Tax Benefit, or tax credit overpayments.

The CPAG website has a briefing note for advisers²² which summarises the background to the test case, and its outcome.²³ The following is an extract:

Between March 2006 and February 2007 the Department for Work and Pensions (DWP) wrote to over 65,000 claimants telling them it could take them to court under common law if they did not pay back overpayments of benefit. The letters say the money was paid due to DWP error and/or is not recoverable under social security law.

In social security law, the test for when the DWP can recover overpayments of relevant benefits is set out in section 71 Social Security Administration Act. The test in s71 broadly allows for recovery where the claimant has misrepresented or failed to disclose a material fact. The claimant has a right to appeal to a tribunal against a decision that an overpayment is recoverable under this test. If the overpayment is found to be recoverable under this test there are a number of ways the DWP can recover it including through deductions from current or future benefit payments.

The DWP accepted in the letters it wrote that the overpayments fell outside the test in s 71. The DWP accepted that the overpayments were caused by mistakes made by the

²¹ [COP26, July 2010 revision](#)

²² CPAG, [Overpayment Recovery Test Case](#), updated January 2011

²³ [\[2010\] UKSC 54](#), 8 December 2010; see also the [press summary of the judgment](#)

DWP and were not caused by anything the claimants had done or failed to do. The DWP was arguing that even though these cases did not meet the test set out in s 71 they could still recover the overpayments through the county court at common law, ie outside the scheme set out in the social security legislation.

The evidence we had, showed that on receipt of these letters many claimants were very worried and frightened by the threat of legal action. Social security law is extremely complicated. Claimants often do not realise that they are being overpaid. They spend the money received in good faith and have no means to repay. Claimants in receipt of these benefits are likely to be on extremely low incomes, and may be vulnerable, elderly or in poor health.

CPAG made an application for judicial review challenging the writing and sending of these letters. CPAG argued that the DWP had no legal right to recover overpayments at common law where the s71 test was not satisfied. We argued that the practice of writing these letters was unlawful. We asked the court to make a declaration that overpayments made in these circumstances were not recoverable at common law. At first instance we were not successful. By a judgment made in February 2009, the High Court decided that the Secretary of State could recover overpayments at common law. CPAG successfully appealed this judgement to the Court of Appeal.

The DWP appealed against the Court of Appeal's decision to the Supreme Court. The Supreme Court has now given its judgment, and CPAG has been successful again. The Supreme Court has accepted CPAG's argument that s 71 was part of a complete statutory scheme and that the DWP had no power to recover outside the scheme. Put simply, the DWP can only recover under s 71. This means that if overpayments are caused by the DWP's own error the Department cannot recover them by suing at common law in the county courts. Claimants who have been overpaid as a result of the DWP's own errors can choose to repay voluntarily if they wish to.

The ruling does not affect overpayments of Housing Benefit or Council Tax Benefit, or tax credit overpayments.

In a [letter to CPAG dated 26 January 2011](#), the DWP said that it will identify claimants who repaid overpayments, or who made arrangements to repay, in response to its letters referring to common law powers, and refund them where appropriate.

4 Announcement in the new DWP fraud and error strategy

On 18 October the Government published a new strategy paper on [Tackling fraud and error in the benefit and tax credits systems](#). This announced that, as part of the new strategy, DWP would "look to widen the range of debts" it could recover from claimants:

We will... seek powers to enable us to **widen the range of debts we can recover from**, to include those resulting from official error. While the Department must take responsibility for payments made mistakenly by our staff, that does not give claimants the right to keep hold of public money not intended for them.²⁴

A written answer on 10 January 2011 it confirmed that measures would be included in the forthcoming *Welfare Reform Bill* to widen the range of working age benefit overpayments the DWP could recover, and that this would include those resulting from official error.

²⁴ Para 14, p35, original emphasis

Stephen Timms: To ask the Secretary of State for Work and Pensions whether any Universal Credit payments attributable to official error will be recoverable from recipients as debts. [29619]

Chris Grayling: As announced in the joint DWP/HMRC strategy paper, 'Tackling fraud and error in the benefit and tax credits systems', we will be bringing forward proposals in the Welfare Reform Bill to widen the range of working age benefit overpayments we can recover and this will include those resulting from official error. While the Department must take responsibility for its mistakes, that does not give people the right to keep taxpayers' money that they are not entitled to.

However, we recognise that recovery will not be appropriate in all cases, and the legislation will be supported by a code of practice which will set out the type of case where recovery action will not be taken. This will include overpayments arising from official error where the customer accepted the payment in good faith and where, given the customer's circumstances, it would be unreasonable for the money to be repaid.²⁵

4.1 Responses

Some of the organisations which submitted responses in December 2010 to the Work and Pensions Committee inquiry into the Government's Universal Credit proposals argued that making official error payments recoverable would penalise vulnerable claimants who receive incorrect payments through no fault of their own. **The Low Incomes Tax Reform Group** commented:

We are worried about the Government's plans to increase their powers in respect of official error overpayments. Whilst we understand that they have a duty to protect public money, Government departments often contribute to overpayments through official error and claimants are left with overpayments through no fault of their own. It would be wrong to penalise people for errors over which they have no control and which often they are unable to identify due to the sheer complexity of the system.²⁶

There is also concern that, in the context of the Universal Credit plans, the change effectively transfers to claimants the risks associated with new IT systems. **Advice Northern Ireland** commented:

Advice NI is concerned about the proposal to 'seek powers to enable us to widen the range of debts we can recover, to include those resulting from official error.' Advice NI believes that the introduction of such radical reform may be susceptible to inherent error (for example due to inadequate IT systems) and as such this approach is effectively passing the risk of error within the new system on to shoulders of claimants. We believe this is unfair and claimants should not be held liable for the failure of others.²⁷

The **Northern Ireland Welfare Reform Group** also noted the proposal in *Tackling fraud and error in the benefit and tax credits systems* to increase the rate at which the Department could recover fraud-related debts from ongoing means-tested benefit awards, and sought clarification on whether this would also apply to debts caused by official error:

We also have reservations about the proposal to increase the maximum rate at which fraud debts can be recovered through deduction from benefits by almost 25%. We would welcome clarification as to whether this will apply to the recovery of Official Error

²⁵ HC Deb 10 January 2011 cc137-138w

²⁶ UC38, *Written Evidence Submitted by Low Incomes Tax Reform Group*, para 3.13.1

²⁷ UC18, *Written Evidence Submitted by Advice NI*, para 17

overpayments. There is a high risk of passing administrative errors of the new system onto the claimants. We recommend that there needs to be protection from debt recovery due to official error for the most vulnerable claimants.²⁸

²⁸ UC48, *Written Evidence Submitted by Northern Ireland Welfare Reform Group*, para 8.2