Universal Credit Regulations 2012:
submission to the consultation of the Social Security Advisory Committee

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1. This response to the SSAC's consultation on the regulations has been prepared by Professor Paul Spicker, who holds the Grampian Chair of Public Policy in the Robert Gordon University, Aberdeen. Professor Spicker is the author of several books on social security, including *Poverty and social security* (Routledge, 1993), *Poverty and the welfare state* (Catalyst, 2002) and *How Social Security Works* (Policy Press, 2011). In 2007 he was a Special Adviser to the House of Commons Work and Pensions Committee for their report on *Benefit Simplification*.

These comments are made in a personal capacity, and do not represent the views of the Robert Gordon University.

Universal Credit

2. *Couples.* The intention is declared that all claims made that pertain to a couple should be made by both members of a couple, and that both will be asked for a "claimant commitment". "If one member of a couple ... fails to sign a Claimant Commitment then subject to a 'cooling off period' the couple will not be entitled." (Memorandum on UC Regs, para 8) Signing such an agreement constitutes a public acknowledgment of a relationship, which is itself one of the six tests of living together as man and wife. Some people will not sign, because they do not wish to make such an acknowledgement or deny that such a relationship exists. Others may wish to repudiate or terminate a relationship that has previously existed. This presents both personal dilemmas for claimants and administrative difficulties, and the problems are particularly important if the intention is to allow for real-time processing of claims. The regulations should seek to specify treatment in circumstances where

(a) either one of a presumed couple denies there is such a relationship
(b) a partner is absent through desertion
(c) a relationship should be considered to have terminated, and
(d) a relationship is considered to have formed.

If this cannot be done, then the rules requiring joint claims are unsustainable.

3. *Periodicity*. Universal Credit is going to be paid monthly in arrears. However,

- Qualifying conditions are generally expressed in days or weeks.
- The work capacity assessment and availability are subject to weekly earnings (UCR ss 37(2), 80(2), 86(1));
- Part time work is defined in hours per week (UCR ss 37(6), 80(3), 81);

- Sanctions are expressed in days.

Any of these can lead to inconsistent dispositions, especially where relevant weeks or periods in days straddle calendar months. All of these provisions should be re-expressed either in terms of months or as parts of a calendar month (e.g. work for 140 hours per month rather than 35 hours per week).

3a. Provision has been made for recalculation of rents to average the effect of rent-free periods; that implies that benefits will never be based on the actual rent paid in a calendar month. Social housing agencies should be advised to remove rent free weeks and to charge instead by the calendar month.

4. *Discretion*. There are several points where the legislation states there will be "no right of appeal". This does not mean literally what it says; in UK law it must mean that appeals will have to be considered in terms of judicial review of administrative action rather than through specified processes. Wherever the word "reasonable" is used, it imposes a condition that reasonable grounds must exist, and that condition is susceptible to judicial review (Nakkuda Ali v Jaratne, 1951 AC 66). The words "reasonable" or "unreasonable" occur 45 times in the UC draft regulations and 17 times more in the payment regulations. It is difficult to see how this level of administrative discretion can be sustained without an adequate system for redress and appeal. It follows that regulation DA10, which fails to specify procedures for revision, is not sufficient to support the weight that is being placed on it.

5. *Sickness.* The provisions for sickness while unemployed are restrictive. The regulations state that a person who is unemployed, and who becomes sick, should not have a work search requirement imposed if that person is unfit for work "for a maximum of 14 consecutive days from the date (of sickness) or "on no more than 2 such periods in any period of 12 months." (UC Regulations s.90 (5a)) This is not simply equivalent to saying that a person might be sick for 28 days in any one year - though that would still be much less responsive than the conditions applying to people in employment who claim Statutory Sick Pay. It states that a person will cease to be available for work, and so cease to be entitled to benefit if that person - or that person's partner, because these rules apply to both members of a couple - is sick for any period of more than 14 days or if that person has three periods of sickness in a year, regardless of their length. So, a person sick for three bouts of three days in a year - less than the national average for British workers - could be denied benefit. In these circumstances, there are strong incentives for a claimant to conceal a bout of influenza or winter vomiting, and to avoid contact with health professionals while in receipt of benefit. This is inconsistent with good practice in human resource management or in public health. A person who is unfortunate enough to contract a long-term illness which does not lead to long-term incapacity for work, such as diabetes or heart disease, could be subject to sanctions on that account.

The evidence on duration and frequency of sickness episodes while on benefit is limited, but any restrictions of this sort should be set with reference to such evidence, and sanctions should only be applied at the upper end. The duration in the first part of the regulation should probably not be less than six weeks, while the maximum number of permissible short periods in the second part should probably be four rather than two.

6. *Work search*. The regulations propose (UCR 86(1), JSA regs 12(1)) that "A claimant is to be treated as not having complied with a work search requirement to take all reasonable action for the purpose of obtaining paid work in any week unless ... the claimant takes action for the purpose of obtaining paid work for the claimant's expected hours of work per week minus any relevant deductions". The explanatory memorandum clarifies that "we propose that claimants are expected to have spent up to 35 hours a week (or their agreed number of hours, if less) looking or preparing for work" (para 238). The current practice is to require claimants to show evidence of steps taken to find work, which is effective and enforceable. This condition, by contrast, bears no relationship to the process of looking for or preparing for work. A person might send a hundred letters of enquiry in a week and still not meet the test; and a person who has learned how to use internet sources and where to look may be able to complete in an hour what at first took fifteen. It might be reasonable to say that claimants cannot refuse to spend less than 35 hours in a week when opportunities present themselves, for example by spending a day travelling to an employment agency; but this is not what the regulation actually says. It is different to say that 35 hours is the expectation, when very few claimants will be able to find sufficient opportunities or avenues for exploration to fill that time. It is a recipe for inconsistent administration. It also invites claimants to lie.

Contributory Benefits

7. *The relationship of National Insurance benefits to Universal Credit.* The documentation includes a restatement of rules for Jobseekers Allowance and Employment and Support Allowance, which will continue to exist as contribution-based benefits. While Universal Credit is in payment, it will still be possible for one or both of a couple to claim these benefits. The explanatory notes on Claims and Payments state that "whilst there are no policy changes the opportunity is being taken to simplify and tidy up the existing provisions" (CPR para 1). As these benefits have different eligibility criteria, rules for application and different time-periods for payment, the combined effects are unpredictable, and the result adds greatly to the complexity of the system. The inconsistencies cannot be eliminated, but their effects could be mitigated by bringing the point at which benefits are payable into line with the Universal Credit regulations (using the calendar month, in place of waiting days and benefit weeks), and wherever possible reviewing the period of qualification and entitlement in terms of parts of a calendar month.

8. *Employment and Support Allowance*. The call for views states that "The Committee is not formally consulting on the remainder of the regulations it considered at its June meeting, but ...{it} would also welcome representations on any parts of these regulations insofar as they impact on the coherence of the overall legislative programme."

8a. The first problem relates to an oversight in the ESA Regulations. Entitlement to ESA is in general based on a decision that

> (a) claimants have limited capacity for work, and
> (b) it is not reasonable to require the claimant to work
> (Welfare Reform Act 2007, 1(4); ESA draft regs. 15(1).)

Part 5 of the draft ESA regulations, "Limited capability for work-related activity", defines

circumstances in which some people might be considered to have limited capacity for work related activity. It does not define cases where they have the capacity for work related activity. Given that it must have been previously decided that the person has limited capacity for work and that it is not reasonable to make work requirements, the scope for capacity for work-related activity must itself be limited, and there can be no presumption that persons not defined as having that capacity do indeed have it.

The Welfare Reform Act 2007 specifies that the tests for limited capacity for work related activity should be specified in regulations:

> "Regulations under subsection (1) shall—
> (a) provide for determination on the basis of an assessment of the person concerned;
> (b) define the assessment by reference to such matters as the regulations may provide;
> (c) make provision as to the manner of carrying out the assessment." (s. 9(2))

This has not yet been done.

8b. A second inconsistency relates to periodicity. Section 1(5) of the Welfare Reform Act 2007 states that "An employment and support allowance is payable in respect of a week", and distinct provision is made for the special case of part of a week. Nevertheless, the regulations refer repeatedly to days of entitlement - for example, capacity for work is based on daily circumstances. This is a survival from the time when National Insurance was based on the days of the week, and daily appraisal of capacity for work is no longer appropriate as a test of entitlement.

8c. It should also be noted that the Welfare Reform Act 2012 makes provision for the exemption from the LCW test for people of a "prescribed description" (s.11D). The descriptions have been limited in regulation 46 to a very small group of persons, principally carers and new and expectant mothers. We know from the figures for the reassessment of ESA claims (http://research.dwp.gov.uk/asd/workingage/esa_ibr/esa_ibr_mar12.pdf) that two-thirds of claimants in two particular categories are assessed directly as belonging to the support group: they are people with neoplasms (67.7% of assessed claims) and "congenital" or "chromosomal" conditions (66.7%) Exempting these categories from further assessment would be fair and proportionate, and it would facilitate effective administration.

9. *Jobseeker's Allowance.* There are further problems in new rules relating to sickness and work search; as these also apply to Universal Credit they have been discussed in paras 5 and 6 of this submission.

In relation to sickness, the explanatory notes also state that "there may be a deduction applied if the claimant falls ill and cannot reasonably be expected to meet the standard 35 hour requirement" (para 19). This condition is unreasonable and should be reconsidered.

Summary

10. The central points raised in this submission are as follows:

- *Couples.* There are gaps in the definitions which require filling, including specification of relationships and identification of transitions.

- *Periodicity.* The frequent references to days and weeks, e.g. in qualifying conditions, work requirements and sanctions, need to be reviewed to be consistent with monthly operation.
- *Discretion.* Wherever discretion is to be exercised, there need to be appropriate mechanisms for review and redress.
- *Sickness while unemployed.* The allowance made for everyday sickness - that is, periods of sickness that do not amount to "limited capacity for work" - is too low.
- *Limited capacity for work related activity.* We are still waiting for regulations that might clarify how this is defined.
- *Work search.* The proposed requirement to engage in work search for 35 hours each week is not meaningfully related to the process of job-seeking and inconsistent with effective administration.
- *Contributory benefits.* Regulations governing contributory entitlements need to be reviewed for consistency with the new mode of operation.

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