**EXPLANATORY MEMORANDUM TO**

**THE EMPLOYMENT AND SUPPORT ALLOWANCE (TRANSITIONAL PROVISIONS, HOUSING BENEFIT AND COUNCIL TAX BENEFIT) (EXISTING AWARDS) (REVOCATION) REGULATIONS 2010**

**2010 No. 1906**

**THE EMPLOYMENT AND SUPPORT ALLOWANCE (TRANSITIONAL PROVISIONS, HOUSING BENEFIT AND COUNCIL TAX BENEFIT) (EXISTING AWARDS) (NO. 2) REGULATIONS 2010**

**2010 No. 1907**

**1** This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

## 2 Purpose of the instruments

2.1 These instruments address a problem with the commencement of powers[1] under which the Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) Regulations 2010 (S.I.2010/875) ("the original Migration Regulations") were made-

- the original Migration Regulations are revoked by the Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (Revocation) Regulations 2010; and

- the original Migration Regulations are replaced with the Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (No. 2) Regulations 2010 ("the remade Migration Regulations") with no substantive changes from the original Migration Regulations.

2.2 The purpose of the original Migration Regulations was explained in the explanatory memorandum laid with those Regulations. That explanatory memorandum (except for the impact assessment which had been attached to it[2]) is attached to this memorandum.

## 3 Matters of special interest to the Joint Committee on Statutory Instruments

The attention of the Joint Committee on Statutory Instruments is drawn to paragraphs 4.1 to 4.3, below. These instruments deal with a legal technical issue in the original Migration Regulations. The remade Migration Regulations do not differ in substance (and there is therefore no policy change) from the original Migration Regulations.

## 4 Legislative Context

4.1 The original Migration Regulations were made under a number of enabling powers contained in four different Acts of Parliament, including the Welfare Reform Act 2007 ("the 2007 Act").

4.2 It has come to the Department's attention that two of the cited provisions (paragraphs 7 and 8 in Schedule 4 to the 2007 Act) were not in force when the original Migration Regulations were made. In order to avoid any doubts as to the validity of the original Migration Regulations, the Department has decided to-

- commence paragraphs 7 and 8 of Schedule 4 (see S.I. 2010/1905 (C. 100)); and

[1] See paragraph 4.2 of this memorandum.
[2] See paragraph 10.3 of this memorandum.

- revoke and remake the original Migration Regulations, issuing the remade Migration Regulations free of charge to all known recipients of the original Statutory Instrument.

4.3 There is no change of substance between the original Migration Regulations and the remade Migration Regulations and the latter will come into force on the same day (1st October 2010 for most purposes).

## 5 Territorial Extent and Application

These instruments apply to Great Britain.

## 6 European Convention on Human Rights

As these instruments are subject to negative resolution procedure and do not amend primary legislation, no statement is required.

## 7 Policy Background

### What is being done and why

The policy background to the original Migration Regulations, which are revoked and remade with no change of substance by these Regulations, was set out in the Explanatory Memorandum to those Regulations, which is attached to this memorandum. These Regulations are being remade to correct the legal technical issue outlined above (as promised by the minister (Lord Freud) during a debate in the House of Lords on 20th July 2010 on a "take note of the Regulations" motion) and to ensure that the reassessment of incapacity benefit claims proceeds as planned, i.e. from 1st October 2010. The link to the Hansard report on the take note debate is at:
http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/100720-0001.htm

## 8 Consultation Outcome

8.1 For details of consultation relating to the original Migration Regulations, see the explanatory memorandum relating to those Regulations, attached to this memorandum.

8.2 The Department consulted extensively on the original Regulations and with the Social Security Advisory Committee[3]. The Department has not formally consulted the Social Security Advisory Committee about the remade Regulations. For public policy and operational reasons it is essential that the re-assessment process starts in October 2010. It therefore appeared to the Secretary of State, bearing in mind the technical legal nature of the reason for remaking the regulations, that by reason of the urgency of the matter it was inexpedient to again refer these Regulations to that Committee

8.3 The Department is aware that it is not obliged to refer these Regulations to that Committee if that Committee agrees that they shall not be referred.

8.4 Broadly similar provisions apply in relation to consultation with local authority associations when making regulations relating to Housing Benefit or Council Tax Benefit.

## 9 Guidance

Readers of this memorandum are directed to the equivalent section in the Explanatory Memorandum prepared for the original Migration Regulations. Guidance on these Regulations is not proposed.

## 10 Impact

[3] The Act Paper was published on 29 March 2009 which contained the Report by the Social Security Advisory Committee and the Statement by the Secretary of State in accordance with section 173 and 174 of the Social Security Administration Act 1992 about the Migration Regulations.

10.1 The legislation does not impact on business, charities or voluntary bodies.

10.2 The impact on the public sector of the remade Migration Regulations is as described in the explanatory memorandum for the original Migration Regulations.

10.3 A full impact assessment was attached to the explanatory memorandum prepared for the original regulations (but is not attached to this memorandum). No material changes have occurred since the date of that impact assessment. That memorandum and impact assessment are already published on the OPSI website.

## 11 Regulating Small Business

The legislation does not apply to small business.

## 12 Monitoring and Review

Details as to monitoring and review of the migration process were set out in the explanatory memorandum relating to the Migration Regulations.

## 13 Contact

Trevor Pendergast at the Department for Work and Pensions (Tel: 020 7449 5639 email: trevor.pendergast@dwp.gsi.gov.uk) can answer any queries regarding this instrument.

**Attachment**

**EXPLANATORY MEMORANDUM TO**

**THE EMPLOYMENT AND SUPPORT ALLOWANCE (TRANSITIONAL PROVISIONS, HOUSING BENEFIT AND COUNCIL TAX BENEFIT) (EXISTING AWARDS) REGULATIONS 2010**

**2010 No. 875**

**1** This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

## 2 Purpose of the instrument

2.1 These Regulations provide for the migration to Employment and Support Allowance, of the majority of people with current awards of benefit on incapacity grounds (Incapacity Benefit, Severe Disablement Allowance and Income Support on the grounds of incapacity referred to as an "existing award").

2.2 These Regulations essentially make transitional provision, where appropriate, for those customers whose awards qualify for conversion.

## 3 Matters of special interest to the Joint Committee on Statutory Instruments

None.

## 4 Legislative Context

4.1 Schedule 4 to the Welfare Reform Act 2007 provides the main legislative authority for the transition to the new arrangements. The Employment and Support Allowance Regulations 2008 (SI 794/2008) and the Employment and Support Allowance (Transitional Provisions) Regulations 2008 (SI 795/2008) already provide that, from 27 October 2008, new customers unable to work because of illness or disability (other than customers whose claims for an incapacity benefit link to past awards of such a benefit[4]) must claim Employment and Support Allowance.

4.2 These Regulations now provide for the migration of people on existing incapacity benefits and related changes to their Housing Benefit and Council Tax Benefit. This is part of a broader set of reforms introduced to move to a more active welfare system.

## 5 Territorial Extent and Application

This instrument applies to Great Britain.

## 6 European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## 7 Policy Background

### What is being done and why

7.1 These Regulations provide for the migration of existing benefit recipients who qualify for conversion to Employment and Support Allowance which is a more pro-active, work-focused benefit that looks at what a customer is capable of doing. It is designed to ensure that people receive the support they need to take up or prepare for work, where appropriate.

[4] These Regulations provide that, from 31 January 2011, all claims for an incapacity benefit will be treated as a claim to Employment and Support Allowance, irrespective of whether they may otherwise have linked to a previous award of an incapacity benefit.

7.2 The policy intent is, with few exceptions[5], for existing incapacity benefits customers to go through the migration process between October 2010 and the end of March 2014. This will determine if they qualify for Employment and Support Allowance and will eventually enable the other incapacity benefit schemes to be wholly wound down.

7.3 Migration to the Employment and Support Allowance regime, (to which the Government committed in the December 2008 White Paper[6]), will align and simplify the benefit system, by ensuring that, over time, all customers with a health condition or disability in similar circumstances will be treated equally, receiving support to get into to work and the same level of financial help.

7.4 Some current incapacity benefits customers will be found fit for work and disallowed benefit on grounds of incapacity. They may claim Jobseeker's Allowance or remain on Income Support if they qualify on grounds other than incapacity.

7.5 The structure of Employment and Support Allowance and its rate of allowances vary significantly from the incapacity benefits it is replacing. The Government has committed on several occasions that no incapacity benefits customer who qualifies for Employment and Support Allowance will see a cash reduction in their benefit at the point of migration[7]. So, in moving to protect the amount of benefit paid to existing customers, these Regulations provide for three situations -

- Where someone receives more from their existing benefit than the amount they would otherwise receive by way of Employment and Support Allowance, this level will be frozen on a mark-time basis; and they will receive a 'transitional addition' that will make their Employment and Support Allowance up to the level of their old benefit entitlement until either the Employment and Support Allowance rate catches up or 5th April 2020, whichever comes first.
- Where someone's existing award is the same amount as the amount they would receive by way of Employment and Support Allowance, the customer will get Employment and Support Allowance at the same rate from the effective date of migration.
- Where someone receives less on their existing benefit than the amount they would receive by way of Employment and Support Allowance, they will receive the appropriate Employment and Support Allowance rate as soon as they are migrated.

7.6 These Regulations will make equivalent provisions for customers who are also receiving Housing Benefit and/or Council Tax Benefit.

7.7 Informal consolidation will be included in the Department's "the Law Relating to Social Security" (the Blue Volumes)[8].

## 8 Consultation Outcome

8.1 Initial consultation on the plans to migrate existing customers of incapacity benefits to Employment and Support Allowance took place in the formal twelve-week consultation on welfare reform from July 2008, and was contained in the July 2008 consultation Green Paper[9].

8.2 In the Government's response to the consultation[10], published in December 2008, it was noted that most people welcomed welfare reform and recognised that changes needed to be made. The responses to the specific proposal to convert current incapacity benefits customers to

[5] Exceptions will include people who reach state pension age during the migration period, the Government's view being that it would not be sensible for customers to switch benefit only to transfer to pension benefits shortly thereafter. Customers over State Pension age in receipt of Severe Disablement Allowance will also be excepted since Employment and Support Allowance is solely for working age customers. The migration of customers who are being awarded National Insurance credits-only as a result of being incapable of work will take place after the main migration exercise has ended.

[6] 'Raising expectations and increasing support: reforming welfare for the future' - http://www.dwp.gov.uk/docs/fullversion.pdf

[7] Hansard: 20 Feb 2007 Column GC8/GC9

[8] Available on the internet at: http://www.dwp.gov.uk/advisers/docs/lawvols/bluevol/pdf/c_0031.pdf at no cost to the public.

[9] 'No one written off: reforming welfare to reward responsibility'(Cm 7363) - http://www.official-documents.gov.uk/document/cm73/7363/7363.pdf

[10] 'The Green Paper Consultation: No one written off – reforming welfare to reward responsibility' - http://www.dwp.gov.uk/docs/consultationreport.pdf

Employment and Support Allowance centred largely on the proposal that, as part of plans to smooth the transition to Employment and Support Allowance, Incapacity Benefit customers with an age addition would have their benefit frozen until they were migrated to Employment and Support Allowance. Following consultation, the Government published its response in the December 2008 White Paper[11]. As a result of the consultation the Government decided to align the rates more slowly by continuing to increase Incapacity Benefit by half of the normal uprating from April 2009. The additions will therefore be phased out more gradually than previously planned. The Department wrote to the Social Security Advisory Committee on 16 January 2009 explaining how it intended to do this as part of the Social Security Benefits Uprating Order 2009.

8.3 The Government has been proactively engaging with key stakeholder groups on the detail of these Regulations, including meeting with the Disability Benefits Consortium in January 2010, and engaging with stakeholders through regular events such as:

- the DWP Scottish Annual Stakeholder Forum held on 25th November 2009
- the JCP Customer Representative Group Forum held on 9th December 2009
- the DWP Policy Strategy Forum held on 17th December 2009
- the Welsh Annual Forum held on 25th January 2010

8.4 Follow-up meetings have been arranged with some of these forums; there will be a meeting with stakeholders in Scotland and the Jobcentre Plus Customer Representative Forum. Stakeholders will continue to be engaged with on a one-to-one basis.

8.5 Jobcentre Plus has ongoing consultation with representative organisations through a series of events, including workshops and presentations at existing forums and local meetings. Jobcentre Plus will continue to keep representative organisations informed as operational plans develop.

8.6 The overall response to the proposals has welcomed the Department's plans to protect customers' incomes on migration to Employment and Support Allowance but expressed concern about a number of other areas: the ability of Jobcentre Plus and the Tribunals Service to deal with the increased volumes of appeals; support available to customers going through the migration process; the performance of the Work Capability Assessment and the ability of the Pathways programme to deliver job outcomes. In response to these concerns: joint work is underway across DWP and the Tribunals Service to mitigate any increased volumes of appeals; the Pathways programme is under review and feedback from current Employment and Support Allowance customers and stakeholders is helping to inform development of the migration customer journey. The Government was already committed to both a departmental review of the Work Capability Assessment, which is underway, and an independent review of the Work Capability Assessment which is currently being commissioned, and will report its first findings later in 2010.

8.7 The Local Authority Associations were consulted on the proposals to amend the Housing Benefit and Council Tax Benefit regulations. They made no comments.

8.8 The Department has formally consulted the Social Security Advisory Committee about these Regulations. The Committee raised similar concerns in their report on these regulations and the report and Government's formal response were published at the same time these Regulations were laid.

## 9 Guidance

9.1 The Government's objectives for communications include:

- For customers – to ensure that they understand the Employment and Support Allowance ethos, what it means for them, what is going to change for them and when and how they will be affected;

[11] 'Raising expectations and increasing support' (Cm 7506), - http://www.officialdocuments.gov.uk/document/cm75/7506/7506.pdf

- For staff – to ensure that DWP and provider staff understand the policy and processes in relation to migration and are able to effectively communicate to customers and support them through the migration process;
- For stakeholders – to provide assurance that Employment and Support Allowance provides a safety net for people who cannot work and is focused on helping those who can prepare for a return to work, as well as supporting stakeholders and sustaining support for Employment and Support Allowance policy. To ensure that local authority staff understand the changes made to the Housing Benefit and Council Tax Benefit policy and the wider policy objectives in relation to migration.

9.2 Work to develop and test this strategy both for Employment and Support Allowance and migration is ongoing. A comprehensive round of stakeholder engagement has been undertaken in recent months where one of the issues discussed has been communications. This, together with Departmental analysis following the introduction of Employment and Support Allowance, means we now have a much clearer view of the way forward.

9.3 A Departmental communications assurance group has been established which will provide strategic oversight as this work develops - ensuring that the strategy:

- supports the culture and associated behavioural change required for the effective delivery of Employment and Support Allowance and migration; and that it
- is developed, deployed and delivered effectively.

9.4 There is also an ongoing commitment to actively involve external stakeholders and intermediaries as this work progresses.

## 10 Impact

10.1 The legislation does not impact on business, charities or voluntary bodies

10.2 In order to achieve the migration of customers on incapacity benefits to Employment and Support Allowance within the planned timescales, around 10,000 cases per week will need to be processed. This is a considerable undertaking for Jobcentre Plus and its contractors. In order to lessen the impact, as much of the work as possible will be automated, particularly around the assessment and payment of benefit awards. Steps are also being taken to increase the medical capacity that is available to undertake the necessary medical assessments.

10.3 A full impact assessment is attached to this memorandum at **Annex A**.

## 11 Regulating Small Business

The legislation does not apply to small business.

## 12 Monitoring and Review

12.1 This policy will be subject to ongoing review. The introduction of Employment and Support Allowance will be fully evaluated by 2014. These Regulations will be monitored and reviewed as part of that evaluation.

12.2 The evaluation spans a number of quantitative and qualitative research projects. Quantitative research will provide evidence which is representative of the experiences of the entire Employment and Support Allowance population, while the qualitative elements will provide in-depth information which can probe more complex issues.

## 13 Contact

13.1 Trevor Pendergast at the Department for Work and Pensions (Tel: 020 7449 5639 email: trevor.pendergast@dwp.gsi.gov.uk) can answer any queries regarding this instrument.