

HOUSING BENEFIT OVERPAYMENT AND DEBT RECOVERY POLICY

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Version	Changes	Date	Owner
1.5	Additional changes made by Jenni Craig	03/03/17	Clare Easson
2.1	Review of Policy	15/01/19	Clare Easson
2.2	Draft	31/01/19	Clare Easson
2.3	Final	13/02/19	Clare Easson

1. INTRODUCTION

- 1.1 In administering Housing Benefit on behalf of the Department for Work and Pensions (DWP), the Council has a responsibility to recover any Housing Benefit which has been overpaid.
- 1.2 This policy document sets out Scottish Borders Council's commitment to the recovery of Housing Benefit overpayments as laid down by The Housing Benefit Regulations 2006 and The Housing Benefit (Person who have attained the qualifying age for state pension credit) Regulations 2006.
- 1.3 The Council aims to comply wherever possible with guidance issued by the DWP such as the Benefit overpayment guide and as such undertakes to review this policy in order to incorporate and update for best practice as and when necessary.
- 1.4 In all cases, staff will act in accordance with relevant legislation, treat all citizens fairly and encourage people to pay promptly and regularly.

2 WHY WE NEED A POLICY

- 2.1 It is essential for the Council to demonstrate that it carries out administration and recovery of Housing Benefit overpayments efficiently, effectively and fairly. By doing so the Council:
 - (i) provides Revenue for the Council;
 - (ii) helps reduce the cost caused by lower Housing Benefit subsidy receipts from DWP on overpayments;
 - (iii) deters fraud and error;
 - (iv) demonstrates commitment to accuracy;
 - (v) demonstrates a provision of a quality service to customers.

3. AIMS OF THE POLICY

- 3.1 The main aim of this policy is to set out how Scottish Borders Council, Customer Advice and Support Services, interact with claimants and their agents in the administration of Housing Benefit overpayments and the subsequent recovery and to set out a clear debt recovery strategy.
 - 3.1.1 Ensure that all staff involved in the recovery of overpayments operate a fair and consistent process;
 - 3.1.2 Set out a clear debt recovery strategy;
 - 3.1.3 Demonstrate the Council's commitment to the delivery of quality services to our customers;
 - 3.1.4 Minimise losses to the Council from overpayments.

4. CUSTOMER CHARTER

- 4.1 The Council's Customer Charter in respect of recovery of overpayments of Housing Benefit is as follows:
 - 4.1.1 Good work practices will help avoid or minimise overpayments;
 - 4.1.2 Debtors will be given clear and prompt information about Housing Benefit overpayments;
 - 4.1.3 Debtors will be treated courteously, efficiently and with empathy;
 - 4.1.4 Information will be treated as confidential within Customer Advice and Support Services unless regulations, and/or Data Protection allows the sharing of information with other Council services and/or external organisations;

- 4.1.5 Debtors will be offered, when required, a private interview with Customer Advice and Support Services staff;
- 4.1.6 Customer Advice and Support Services staff will follow guidance on debt collection;
- 4.1.7 An income & expenditure assessment may be carried out to establish any excess income the customer has each week;
- 4.1.7 Any payment arrangement made will be realistic and reflect the ability to pay as well as the level of debt owed;
- 4.1.8 Staff will be sensitive to debtor's individual circumstances, for example, if money is owed to other creditors the debtor is likely to be under stress, this will be taken into account;
- 4.1.9 Flexible and convenient methods of payment will be provided;
- 4.1.10 No debtor will be subject to discrimination;
- 4.1.11 When appropriate, debtors will be directed to a relevant advice agency (such as Financial Inclusion Team, Citizen's Advice Bureau);
- 4.1.12 Debtors who are unhappy with the service or treatment they have received will be advised on the Council's Complaints procedure;
- 4.1.13 Generally, the minimum amount of an instalment following a payment arrangement would be equal to the amount which could be obtained by deductions from the customer DWP state benefit.

5. HOUSING BENEFIT AND OVERPAYMENT ADMINISTRATION

- 5.1 Housing Benefit applications and change of circumstance notifications are assessed by Customer Advice and Support Services staff; as a result, overpayments can be calculated by any member of staff within the service. Customer Advice and Support Services are responsible for actioning all change of circumstances on claimants accounts, electronic changes reported via the DWP, changes resulting from Verify Earnings and Pension Information provided by HMRC, and changes notified through the DWP Fraud and Error Service
- 5.2 The recovery of Housing Benefit overpayments is undertaken from within various sections of Customer Advice and Support Services. This includes sending invoices and reminders, discussing payment options, making payment arrangements, monitoring debt recovery while ensuring staff follow the customer charter.

6. IDENTIFICATION OF OVERPAYMENTS

6.1 What is a Housing Benefit overpayment?

- 6.1.1 An overpayment of Housing Benefit is any amount which has been paid out, but to which there was no entitlement. This includes any amount of rent rebate or rent allowance paid in excess of entitlement.
- 6.1.2 DWP guidance indicates that an assessor must identify each decision made during the overpayment period and revise or supersede those decisions in order to create an overpayment decision.

Example

A claimant received maximum Housing Benefit from 4 January 2016.

On 7 May 2016 his adult daughter, who is in full time employment, comes to live with him.

The claimant fails to inform the Council of this change until 4 July 2016.

The Council decide a non-dependant deduction should have been made for the daughter from benefit week starting 9 May 2016, the date the change of circumstances should have taken effect.

The claimant received maximum benefit entitlement up to and including week ending 3 July 2016.

An overpayment occurred for 8 weeks reducing his entitlement from £65.00 to £50.00 from 9 May 2016 to 3 July 2016 resulting in an overpayment of £120.00.

6.2 What causes a Housing Benefit Overpayment?

6.2.1 Overpayments can occur as a result of :

- (i) **Claimant error** - the claimant or their representative complete their claim form incorrectly or fail to report a change in circumstances which they have a duty to report, such as the end of entitlement to Jobseekers Allowance (Income Based);
- (ii) **Local Authority error** - for example, the Council fails to act on a notice of change of circumstances provided by the claimant;
- (iii) **DWP official error** - this is usually an overpayment caused by an error or omission by an officer of the DWP;
- (iv) **Third party error** this is an overpayment caused by an error or omission by a third party acting on behalf of the claimant, e.g. employer, landlord;
- (v) **Fraud** - the claimant deliberately misrepresents their circumstances or fails to disclose material facts in order to obtain benefit to which they are not entitled, for example, the claimant fails to declare a person in the household, capital, income, etc;
- (vi) **An administrative delay** - for example, a delay by the LA in processing a change of circumstances.

This is not a comprehensive list.

6.2.2 It is important that the cause of an overpayment is established as soon as possible as this information must be taken in to account:

- (i) when classifying overpayments;
- (ii) when deciding if the overpayment is recoverable;
- (iii) when deciding who to recover from.

7. REPORTING CHANGE OF CIRCUMSTANCES

7.1 Claimants, their appointees/agents, or landlords to whom a direct payment is being made, must report to the Council all change of circumstances they could reasonably be expected to know, which may affect entitlement to HB.¹

7.2 A person who has a duty to notify the Council about a change of circumstances, must be informed by the Council about:

- (i) the kind of changes likely to affect HB entitlement, and
- (ii) the need to report the changes when they occur.²

¹ HB Reg 88 & (SPC) 69, Reg 3 (D&A Regs)

² HB sch 9, part 2, 3 & 4 and (PC) Sch 8

- 7.3 Claimants, or those acting on their behalf, are usually notified about these obligations in the declaration part of the HB application form. However we have a duty to include such information in benefit decision notices, ensuring landlords are informed of their responsibilities before setting up direct payments.
- 7.4 Claimants **do not have to** report changes in:
- (i) the age of the claimant;
 - (ii) the age of any member of the claimants family;
 - (iii) the age of any non-dependants;
 - (iv) the HB regulations;
 - (v) circumstances which affect the amount of Employment and Support Allowance (Income Related), Jobseekers Allowance (Income Based), Income Support or Pension Credit payable.
- 7.5 A claimant, in deciding whether they should report a change, including, but not exclusively, the list below: - when
- (i) their entitlement to ESA(IR), IS, JSA(IB) ends;
 - (ii) a member of their family ceases to be a child or young person;
 - (iii) a young person leaves full time education;
 - (iv) child Tax Credit (CTC) or Child Benefit (CB) ceases;
 - (v) if the CL/PT stops being entitled to Carers Allowance or Underlying Entitlement to Carers Allowance;
 - (vi) if they stop paying for Child Care;
 - (vii) they move home;
 - (viii) someone moves in to or out of the household;
 - (ix) the circumstances of a member of your household change;
 - (x) their or their partners income changes;
 - (xi) any income of a member of their household changes;
 - (xii) someone starts to get Carers Allowance for looking after them;
 - (xiii) they stop getting Child benefit for any children in their household;
 - (xiv) the amount of childcare costs they pay changes;
 - (xv) their rent changes.
- 7.6 The DWP will pass to each Council, details of any change of circumstances for claimants in receipt of a DWP benefit or Tax Credits that have been reported to them, and should have been reported to the Council.
- 7.7 The legal responsibility for reporting change of circumstances remains with claimants. Overpayments may occur when the Council are not notified about a change of circumstances.
- 7.8 It is important to stress the importance of reporting change of circumstances to all claimants and people who are required to notify a change of circumstances, and advise them how, when and whom they should report the change to and what may/will happen if they fail to do this. Customer Advice and Support Services will include advice on application forms, benefit decision notices, Council Tax bills, SBC website and regular media campaigns to publicise their duty.
- 7.9 Benefit decision notices and the Housing Benefit application form details the claimant's responsibility to notify the Council of any change of circumstances.
- 7.10 The Council will also send any details it becomes aware of that may affect the claimants entitlement to ESA(IR), IS, JSA(IB) or PC to the DWP.

8. WHERE TO REPORT A CHANGE OF CIRCUMSTANCES

- 8.1 The regulations provide that if the Council does not give details of where a claimant must report changes of circumstances to (a designated office), and just uses terms such as 'us', 'council', or 'local authority' in its communications, a claimant may report a change of circumstances to any department in the Council.
- 8.2 By doing so, they will have satisfied their duty to report change of circumstances as prescribed by regulations.
- 8.3 If there is no designated office, any overpayment from when the claimant reports the change of circumstances to the Council up to when the change of circumstances is processed, would be classified as LA official error or Admin delay (depending on whether the overpayment was caused by a delay and whether that delay was caused by a mistake).
- 8.4 If, however the Council makes it clear in its communication that a specific department/address is the 'designated office' to which a claimant must report a change of circumstances, then the claimant must report changes to that designated office in order to satisfy the regulations.
- 8.5 If the claimant reports a change of circumstances to a different department/address, any overpayment would be classified as claimant error up until:
- (i) the claimant notifies the designated office of the change; or
 - (ii) the Council stops the overpayment from continuing (suspends the claim or processes the change)³
- 8.6 The Councils designated offices can be found at www.scotborders.gov.uk/contactcentres

9. CLASSIFICATION OF OVERPAYMENTS

- 9.1 When an overpayment is identified, the Council will :
- (i) establish the cause of the overpayment;
 - (ii) identify the period and calculate the amount of the overpayment;
 - (iii) classify and record overpayments so the correct rate of recovery can be made;
 - (iv) decide whether or not the overpayment is recoverable;
 - (v) decide from whom the overpayment should be recovered;
 - (vi) notify any 'person affected'.
- 9.2 Classifying an overpayment
- 9.2.1 Overpayments can be costly to recover. Money lost through reduced subsidy and the costs of recovering overpayments comes from the Council's overall budget, therefore not limiting costs here means there are fewer funds available for other services.
- 9.2.2 It is important to ensure that in addition to preventing overpayments occurring, every effort is made to recover them.
- 9.3 Explanation of the classifications

³ HB Reg 88, & (PC) 6

9.3.1 Overpayments will be classified as Fraudulent, Claimant error, Local Authority Official error, Admin Delay, DWP error or Other error.

9.3.2 Classifying an overpayment is an essential but basic step in the overpayment process, and should be carried out at the outset when an overpayment is identified.

9.4 Fraudulent overpayments

9.4.1 Fraudulent overpayment means an overpayment in respect of a period falling wholly or partly after 31 March 1993, when the claimant has, in respect of the overpayment:

- 9.4.1.1 been found guilty of an offence whether under statute or otherwise;
- 9.4.1.2 made an admission after caution of deception or fraud for the purpose of obtaining relevant benefit; or
- 9.4.1.3 agreed to pay a penalty under section 115A of the Social Security Administration Act and the agreement has not been withdrawn.

9.4.2 Admission after caution in Scotland means an admission after caution has been administered, such admission being duly witnessed by two persons.

9.4.3 LA's receive 40% subsidy from DWP for this overpayment classification.⁴

9.4.4 Any HB overpayment classified as fraud can be recovered at a higher recovery rate. Also, overpayments classified as fraud can be treated differently, for recovery purposes, when the claimant is involved in insolvency procedures.

Example

The Council receive anonymous information suggesting that a claimant is receiving benefit as a single person however they have someone living with them. After investigating, it is identified that the claimant has had a partner living with him for the last 2 years who is in full time employment.

Calculate the changes in the normal way. The overpayment should be classified as fraud.

9.5 Claimant error overpayments

9.5.1 Claimant error overpayment means an overpayment which is caused by:

- (i) the claimant;
- (ii) a person acting on the claimants behalf;
- (iii) any other person to whom the payment was made including landlords/agents; and
- (iv) the person fails to provide information in accordance with HB Reg 83(1) or 86, PC 64(1) or 67; or
- (v) fails to report a change of circumstances in accordance with HB Reg 88, PC 69; and
- (vi) it is not a fraudulent overpayment.

9.5.2 The Council receives 40% subsidy from DWP for this classification

Example

⁴ HB Reg 102 & (PC) 83

A change occurs in the claimant's earnings on 14 January 2016. The claimant fails to report the change until 29 January 2016. The Council actions the change on 29 January 2016. The overpayment is classified as follows.

18 January 2016 – 31 January 2016: claimant error

9.6 LA official error and admin delay overpayments

9.6.1 LA official error overpayments means an overpayment caused by a mistake, whether in the form of an act or omission, made by the Council or someone acting on their behalf. The claimant, a person acting on the claimant's behalf, or the person to whom the benefit was paid, did not cause or materially contribute to that mistake, act or omission.⁵

9.6.2 Admin delay overpayment means an overpayment arising when the Council is notified of a change of circumstances and has sufficient information and evidence to make a revision or supersession decision, and the :

- (i) Council does not make the decision before the claimants next pay day; and
- (ii) delay was not caused by a mistake, whether in the form of an act or omission made by the Council; and
- (iii) the delay was not caused or materially contributed to by the claimant, a person acting on the claimant's behalf, or any other person to whom the benefit was paid.

9.6.3 Council's receive subsidy from DWP of :

- (i) 100% subsidy (less than or equal to the lower threshold);
- (ii) 40% subsidy (more than the lower, up to and including the upper threshold);
- (iii) nil subsidy is received on any overpayment above the upper threshold.

9.7 LA Official error or admin delay – which classification is appropriate?

9.7.1 When all the information to process a change in circumstance is provided to the Council, and the change would result in a reduction to the claimants HB entitlement, the Council must action it before the claimants next pay day. If it is not actioned before the next pay day, any overpayment from the first day of the benefit week following receipt of all the information should be classified as admin delay.

9.7.2 If the delay in processing the change of circumstances was due to something out of the Council's control, for example staff shortage due to sickness, or if they had prioritised their workload, but were unable to process it because of a backlog, the overpayment will be classified as admin delay.

9.7.3 If the overpayment is classified as an admin delay, the overpayment is recoverable.

9.7.4 If the delay in processing the change of circumstances was caused by a mistake, for example the Council put the change of circumstances information to one side and forgot to process it, the overpayment should be classified as LA official error.

9.7.5 If the overpayment is classified as LA official error, the Council must then make a decision on whether it is recoverable.

⁵ HB Reg 100 (PC) 81

- 9.7.6 In order to determine if an overpayment is recoverable, the Council must ask itself if the claimant, person acting on their behalf or any other person to whom the payment is made could not, at the time of receipt of the payment or any notice relating to that payment, reasonably have been expected to realise that it was an overpayment.
- 9.7.7 If the answer is no, the overpayment is not recoverable. If the answer is yes, the overpayment is recoverable.
- 9.7.8 All overpayments of HB are recoverable except certain official errors. As the Council has made a decision that the overpayment was not caused by a mistake and is therefore not LA official error, the overpayment is recoverable.
- 9.7.9 The decision as to whether the overpayment is LA official error or admin delay must be made by the Council based on the individual circumstances of each case. If the claimant appeals against the overpayment decision, for example the Council has classified the overpayment as an admin delay and the claimant thinks that it was caused by official error, the Council must be able to justify their decision.
- 9.7.10 It should also be noted that if the LA's decision is that the overpayment is recoverable because it is not an official error, a tribunal or a court might take a different view. There should therefore be a record of the decision, outlining why the delay in processing the change of circumstances was not caused by a mistake by the Council.

9.8 DWP Official Error

- 9.8.1 This is an overpayment which arises from a mistake, whether in the form of an act or omission, made by an officer of :
- (i) the DWP;
 - (ii) the commissioners of Her Majesty's Revenue and Customer; or
 - (iii) a person acting on behalf of any of the above.⁶
- 9.8.2 This classification is not relevant when the person affected caused or contributed to the mistake, act or omission.
- 9.8.3 A DWP official error is only recoverable when the person affected, at the time of receipt of the payment or any notice relating to that payment, could have reasonably been expected to realise that it was an overpayment.
- 9.8.4 Recovered DWP official error overpayments, or any part of Departmental official error overpayments which are recovered, are not eligible for subsidy.

9.9 Other error overpayments

- 9.9.1 'Other' overpayment means any overpayment which does not fit in any of the other classifications. Examples could be when:
- (i) A Council makes a payment in good faith, but a change, such as an adverse decision in judicial review results in an overpayment; or
 - (ii) An award of benefit does not take in to account any income subsequently paid as arrears, for instance when a claimants earnings increase retrospectively and they

⁶ HB Reg 100 & (PC) 81

receive a lump sum payment of arrears, or as a result of entitlement to another benefit commencing or increasing.

9.9.2 However, if there has been a delay in processing a benefit and it is due to a mistake made by the DWP, the overpayment can be classified as DWP official error.

9.9.3 Council's receive 40% subsidy from DWP for this classification.

Example

An employed earner who is paid monthly is entitled to a pay increase from April, but the arrears are not paid until November.

As there was entitlement to the pay increase from April, the arrears of pay would be taken in to account for the period over which they should have been paid if the increase in pay had been processed on time.

Calculate the overpayment in the normal way. This should be classified as other.

10. EXPECTED ACTION TO MINIMISE OVERPAYMENTS

10.1 Regulation 11 of the Housing Benefit (Decision and Appeals) Regulations 2001 states that a Council may suspend HB, in whole or part, if there is an issue regarding the conditions of entitlement on a claim or if the Council suspects an overpayment is occurring. The decision to suspend is discretionary.

10.2 In a case where the claimant reports a change of circumstances, but does not provide sufficient information and the Council has not suspended benefit, a decision will have to be made on whether the Council were justified in not suspending the HB and whether the claimant has contributed to the overpayment.

10.3 The classification of the overpayment will also depend on how long HB is paid when the Council is aware there are issues around conditions of entitlement or a suspected overpayment. The Council should not pay HB indefinitely whilst awaiting further information from the claimant.

10.4 Sufficient information provided by a third party

10.4.1 If the Council has sufficient information to be able to process a change of circumstances irrespective of where that information has come from, any overpayment from the Monday following the date that information is received would be classified as LA official error or admin delay, depending on whether the delay in processing was caused by a mistake.

10.4.2 From the point that the Council has sufficient information, the claimant is no longer contributing to the mistake. This is because nothing further is needed from the claimant.

10.4.3 If a third party does not provide sufficient information for example when the Council receives an Automated Transfer to Local Authority Systems (ATLAS) notification from the DWP stating the claimant has started work, further information would be needed from the claimant and therefore the overpayment would continue to be classified as claimant error until the claim is suspended or the information is received.

10.5 This is because the claimant has not :

- (i) Satisfied their legal duty to notify a change of circumstances that they might reasonably be expected to know might affect their entitlement to benefit.⁷
- (ii) Provided the evidence and information needed to process any questions arising out of the claim⁸

10.6 The claimant is therefore contributing towards the overpayment.

11. CLAIMANTS IN RECEIPT OF PENSION CREDIT

11.1 There are certain change of circumstances that claimants who are also in receipt of Pension Credit (PC) can report to The Pension Service (TPS) and by doing so, have satisfied their duty of reporting the change to the Council. In these cases, the Council is reliant on receiving the information from TPS.

12. WHICH OVERPAYMENTS ARE RECOVERABLE

12.1 An overpayment is recoverable if :

- (i) it arose because of an 'official error' by the claimant, or someone acting on his or her behalf;
- (ii) the payee could reasonably have been expected to know it was an overpayment;
- (iii) it is due to an error (or fraud) of the claimant or a third party; or
- (iv) it is no one's fault.

12.2 An overpayment is not recoverable if :

- (i) it arose because of 'official error' by a relevant authority; and
- (ii) the claimant, someone acting on their behalf, or the payee could not reasonably have been expected to know it was an overpayment.

12.3 An official error is a mistake whether in the form of an act or omission, made by the authority, the DWP or HMRC – or someone on their behalf. It does not include cases when a claimant, someone acting on their behalf, or payee, caused or materially contributed to that error.

12.4 The question of whether an overpayment is recoverable is separate from the question of whether to recover it. However, it can be a difficult decision to make. There are a number of further issues that must be considered, such as, did the people affected:

- (i) receive the decision notices?
- (ii) read and understand the decision notices?
- (iii) know which change of circumstances must be reported to the Council?

12.5 Also, could the people affected 'reasonably' have:

- (i) known an overpayment occurred, from the information the Council provided?
- (ii) expected a change in the amount of HB they receive, having notified the Council of a change of circumstances?
- (iii) expected an overpayment to occur if they has previously has a similar change, which caused a change in the amount of HB they receive?

12.6 'Reasonably have been expected to know' can be interpreted in the person affected's favour, if :

⁷ HB Reg 88 & (PC) 69

⁸ HB Reg 86 & (PC) 67

- (i) you consider, because of their age, intelligence or mental condition, that they were genuinely unaware of the official error overpayment; or
- (ii) they state they were wrongly advised by an official source, however the onus of the proof will be on the person affected. In such cases a statement should be taken from all parties concerned and a decision made on the balance of probabilities.

12.8 Any recoverable overpayment may be recovered at the Council discretion. If it is established an overpayment is recoverable, it does not mean it must be recovered. The decision that an overpayment is recoverable must be separate to recovering it. Due regard should be given to the circumstances relating to individuals cases, when deciding whether or not recovery is appropriate.

12.9 The Council is not obliged to recover overpayments. Each individual case should now be decided on its own merits, i.e. a blanket policy for recovery must not be applied. If the Council is unreasonable or irrational, it could be subject to judicial review. The Council must satisfy itself that it is reasonable to recover in each individual case.

13. WHO DO WE SEEK RECOVERY FROM?

13.1 An overpayment is recoverable from the claimant, the payee, or someone on their behalf, however, there are some exceptions :

13.1.1 an overpayment caused by the claimant, payee or someone on their behalf is recoverable only from that person

13.1.2 an overpayment caused by official error, and the claimant, payee or someone on their behalf, could reasonably have been expected to realise they were being overpaid, is recoverable from that person

13.1.3 an overpayment that is no-ones fault can be recovered from the claimant or the payee

13.1.4 where an overpayment can be recovered from the claimant, it can also be recovered from their partner, if they were a couple at the time the overpayment was created and at the time of recovery.

14. DECISION MAKING ON RECOVERABILITY

14.1 Correct decision making regarding whether or not there is an overpayment and whether or not it is recoverable is essential because there are consequences concerning the rights of claimants and other affected persons. If the overpayment is recoverable, then the claimant or the other affected person can be pursued for the debt. If it is unrecoverable, then the Council will have to consider writing the debt off and bearing the cost of this.

14.2 The claimant has the right of appeal against the amount of overpayment and its recoverability. Section 23 gives more information on appeals.

14.3 Overpayment classification and recoverability decisions can provide an indication of the levels of fraud and error compared with efficiency in the Council's benefit administration. For example if a large amount of the Council's total overpayment error is classed as LA error as described in Section 9 then it may bring into question the quality of the Benefit Assessment decisions being undertaken by staff. If LA error levels exceed predefined thresholds then the Council may also be hit with a significant financial penalty.

14.3 Whether a recoverable overpayment is recovered or not, is at the discretion of the Council. Regard will be given to individual circumstances when deciding whether recovery is appropriate. Care will be

taken where the debtor is deemed to be 'vulnerable' and staff should ensure that they are fully aware of all options open to them.

14.5 The term 'vulnerable' person would apply to one of the following :

- (i) a customer with learning difficulties;
- (ii) a disabled customer;
- (iii) a customer suffering mental health problems;
- (iv) a pregnant customer;
- (v) a person under 21 years old;
- (vi) a customer perceived as being vulnerable for any other reason, i.e. race, sexual orientation, etc.

14.5 This is not an exhaustive list and it is a matter for officers to decide based on the circumstances of each case

15. NOTIFICATION OF AN OVERPAYMENT

5.1 When the Council decides that a recoverable HB overpayment has occurred, a decision notice will be issued to any person the overpayment is legally recoverable from, even if the Council has decided to recover from someone else. For example, if the debt is to be recovered from the landlord, the decision notice must be issued to both the claimant and the landlord. When the decision has been made that an overpayment is recoverable, a decision notice will be sent within 14 days of the decision being made, or as soon as is reasonably practical thereafter.

15.2 The decision notice will provide information as to how payment should be made and who to contact regarding any enquiries. An overpayment decision will include the following information :

- (i) whether there has been an overpayment
- (ii) what caused it
- (iii) the period of the overpayment
- (iv) the amount of the overpayment
- (v) how the overpayment has been calculated
- (vi) whether some or all of the overpayment can be offset and if so, how offsets have been applied
- (vii) whether the overpayment is recoverable and
- (viii) if so, who the overpayment is recoverable from.

16. METHOD OF RECOVERY OF HOUSING BENEFIT OVERPAYMENTS

16.1 Once an overpayment has been correctly classified and the correct person identified for recovery, the overpayment will either be recovered by:

- (i) deductions from ongoing HB;
- (ii) offsetting any underpayment against the overpayment;
- (iii) by raising a debtor invoice;
- (iv) by applying for deductions from certain DWP benefits;
- (v) by recovery from HB paid to a landlord/agent for another tenant if the overpayment is recoverable from the landlord, i.e. where the landlord has been classed as responsible for a debt (known as 'blameless tenant' recovery);
- (vi) Direct Earnings Attachment (DEA);
- (vii) diligence by debt collection agents
- (viii) transferring credit balances from any Scottish Borders Council accounts to the overpayment.

16.2 Recovery from ongoing benefit

16.2.1 Where the claimant is still entitled to HB, the overpayment can be recovered from their ongoing HB entitlement. The Government sets the weekly rate each year that Councils can recover. There is a standard overpayment recovery rate and a fraudulent overpayment recovery rate. It should be noted that recovery from on-going benefit is recovery from the claimant, not the landlord. Consequently the landlord is not a person affected and cannot apply for a revision of the decision or appeal against it. The claimant must make up the shortfall in their rent in order to avoid any arrears. If a rent arrears situation does develop, then this is not an issue for the Council, it is up to the landlord to deal with this.

16.2.2 An additional 50% of any earned income disregards, disregarded regular charitable or voluntary payments, the £10 disregard of war pensions for bereavement or disablement can also be recovered from either classification.

16.2.3 The fraudulent deduction amount can be levied where the debtor :

- (i) has been found guilty of an offence whether under statute or otherwise;
- (ii) made an admission after caution of deception or fraud for the purpose of obtaining relevant benefit; or
- (iii) agreed to pay a penalty under section 115A of the Social Security Administration Act and the agreement had not been withdrawn.

16.2.4 Where the overpayment is to be recovered from on-going HB, details of this are shown on the decision notice. If the debtor is still in receipt of HB but the amount in payment is not enough to allow the normal recovery rate to be taken, the Council will recover all but £0.50 per week. Alternatively, it may be decided to invoice the claimant in circumstances where there is evidence to suggest that the claimant is vulnerable and deductions from on-going benefit would not be in their best interests.

16.2.5 In cases where a debtor or a person acting on the debtor's behalf, indicates that they are unable to pay the standard deduction amount, an income and expenditure form will be issued in order to consider reducing the weekly deduction amount. Completion of an income and expenditure form allows maximum recovery whilst taking essential expenditure into account. Debtors are expected to review their outgoings to make additional income available and to reduce non priority expenses.

16.2.6 All reduced deduction cases are periodically reviewed on a case by case basis which includes consideration of claimants income and expenditure.

16.3 Offsetting

16.3.1 This is considered whenever an award is revised or superseded on reconsideration or appeal for a period for which benefit has already been paid. The regulations allow Housing Benefit for the period covered by the original determination to be offset against the entitlement under the subsequent award.

Example

If someone is now entitled to £50 a week for a particular period but has already been paid £40 per week for that period, then the £40 should be offset against the overpayment and only £10 is payable for that period under the new award.

16.4 Recovery by debtor invoice

16.4.1 If there is no on-going benefit entitlement, the debt will be recovered by raising an invoice.

16.342 If payment is not received, recovery action against the customer in line with recovery procedures will commence. Customer Advice and Support Services are responsible for ensuring that final notices are issued in accordance with the recovery timetable. Customer Advice and Support Services staff will also oversee the process dealing with telephone and written correspondence regarding any recovery action, and make payment arrangements with customers, where possible.

16.5 Methods of payment of debtor invoice

16.5.1 It is essential to provide flexible and convenient methods of payment. At present the Council can accept payment by the following means:

- (i) Online (payments can be made online at www.scotborders.gov.uk/pay The invoice number will need to be provided.)
- (ii) By telephone using debit or credit card (a payment line is available by dialling 08450 758517 and select option 3 or by calling Customer Advice and Support Services on 0300 100 1800. The claimant will need their invoice number to pay in this way.)
- (iii) By standing order (a standing order mandate can be sent to the customer by calling 0300 100 1800 or by visiting their local Contact Centre/Library Contact Centre. This allows the customer to present it to their bank. The mandate must detail the invoice number.)
- (iv) At a Paypoint outlet or Post Office (a barcoded invoice can be issued for payment to be made at a Paypoint Outlet or Post Office. This can be obtained by calling Customer Advice and Support Services on 0300 100 1800 or by visiting their local Contact Centre/Library Contact Centre.)
- (v) In person (Cheque, Credit or Debit Card can be used to pay face to face at any Council Contact Centre/Library Contact Centre. The customer will need to provide their invoice number.)
- (vi) By post (Cheque or Postal Order with the invoice number, name and address written on the reverse of the cheque or postal order and sent to Scottish Borders Council, Council Headquarters, Newtown St Boswells, TD6 0SA.)
- (vii) Contact Centre/Library Contact Centre locations and opening hours can be found at www.scotborders.gov.uk/contactcentres

16.6 Instances of non-payment

16.6.1 If payment or an arrangement for payment is not made, a reminder will follow the invoice requesting payment be made within 14 days. If payment or an arrangement for payment is still not made, a final demand will follow the reminder. This requests payment within 7 days.

16.6.2 If no reconsideration or appeal is received 4 weeks after the customer is notified of the overpayment, we will check if DWP payments are in place and request recovery via DWP if appropriate. If deductions via DWP are not an option we will check existing data to identify employer information in order to consider a Direct Earning Attachment (DEA), see section 15.8 monitoring arrangements and 16.12 recovery using a direct earnings attachment.

16.6.3 If we are unable to carry out a DEA, we will check for recovery methods through the Department for Work and Pensions Housing Benefit Data Matching Service.

16.7 Recovery from DWP benefits

16.7.1 If no appeal is received, the debt is not paid or no reasonable payment arrangement is made, deductions from certain prescribed DWP benefits can be made. For a complete list, see Appendix 1

16.7.2 In these instances, the Council will request that the DWP implement deductions. The regulations state that the DWP will recover overpayments from social security benefits where :

- (i) It is requested by the Council to do so;
- (ii) They are satisfied that the overpayment arose as a result of a misrepresentation or failure to disclose a material fact by, or on behalf of, the claimant, or by some other person to whom payment has been made; and
- (iii) That person is receiving sufficient amounts of one or more benefit to enable deductions to be made.

16.8 Payment arrangement

16.8.1 If the debtor cannot pay the overpayment invoice in full then the Council will encourage them to make contact immediately, as it may be possible to make a payment arrangement.

16.8.2 Each case will be considered on its own merits, taking the amount due and personal and financial circumstances into account. There are no rules limiting the maximum amount that can be asked for. The aim is to agree a realistic arrangement to collect unpaid debts within a reasonable time, without the need for more serious recovery action.

16.8.3 It may be necessary to issue an Income and Expenditure form in order to obtain a clear picture of the person's financial circumstances and thereby act as a basis for reaching a mutually acceptable instalment plan. Completion of an Income and Expenditure form allows maximum recovery whilst taking essential expenditure into account. Debtors are expected to review their outgoings to make additional income available and to reduce non priority expenses.

16.8.4 Once the arrangement is agreed, a letter confirming the details is issued. A payment arrangement may be reviewed at a future date.

16.9 Monitoring arrangements

16.9.1 If the claimant defaults on their arrangement a reminder or final notice, whichever is appropriate, will automatically be issued. When a final notice is issued, the instalment plan/arrangement is cancelled and the debtor is asked to make payment in full.

16.10 Further recovery action

16.10.1 Where payment has not been made in accordance with an arrangement or no payment has been made at all a decision on further action will be made based on the circumstances of each case. See sections 15.10, 15.11 and 15.12 below for further information on the type of action that may be taken.

16.11 Recovery from landlord payment

16.11.1 When an overpayment is recoverable from the landlord and payment is not made by the invoice due date, the debt can be deducted from the landlord's next HB payment.

16.11.2 The landlord cannot seek to recoup these monies from any tenant other than the one whose tenancy the overpayment arose under. The rent liability in respect of all other tenants covered by the HB payment is discharged to the full amount of their HB.

16.12 Recovery using a direct earnings attachment (DEA)

16.12.1 The Welfare Reform Act 2012 supported by the Social Security (Overpayments and Recovery) Regulations 2013 introduced Direct Earnings Attachments (DEAs) from April 2013. A DEA allows for recovery of overpaid benefit directly from a debtor's earnings without having to apply via the court system. The Regulations also allow Councils to recover overpayments of Housing Benefit using a DEA.⁹

16.13 Recovery by Diligence

16.13.1 Where Customer Advice and Support Services have been unable to recover the overpayment, the debt may be referred to debt collection agents for further action.

16.13.2 Before pursuing recovery via the courts, the Council should:

- (i) allow the appeal rights' period to expire (at least one month), and
- (ii) allow any outstanding appeal to be fully determined

16.13.3 Good practice would be to issue at least two letters requesting repayment. The Council should consider an interview and the cost effectiveness of a home visit.

16.13.4 Further good practice is to ensure that procedures are in place to check that the claimant is receiving all the HB and any other benefits that they may be entitled to (with the aim of reducing the overpayment or recovering the overpayment from their benefit entitlement).

16.13.5 Legal proceedings should only be considered after attempts to achieve recovery by other means have failed and there is good reason to believe the debtor can afford to make repayments.

17 DIMINUTION OF CAPITAL

17.1 Diminution of capital applies to overpayments in excess of 13 weeks that arise due to the claimant's failure to disclose or misrepresent their capital assets.

17.2 Where a claimant receiving Housing Benefit has capital of £1 or more over the prescribed limit, their entitlement ceases from the day that the capital goes over the limit. If the claimant has been receiving benefit for a length of time and the limit has been exceeded by a small amount near the start of the claim, it would be unfair to expect the claimant to repay the whole amount of benefit paid. If the capital had been properly taken in to account from the day it exceeded the limit, it would, over time, potentially have reduced to below the limit in order to provide for living expenses.

17.3 The regulations provide for the reduction of the figure of capital resources at quarterly intervals from the beginning of the period of the overpayment by the amount overpaid in the previous quarter.

⁹ *Social Security (Overpayments & Recovery) Regulations 2013 Part 6*
SSAA 71ZD
HB Regs 2016 Para 106A, HB (SPC) Regs Para 87

18. SEQUESTRATION

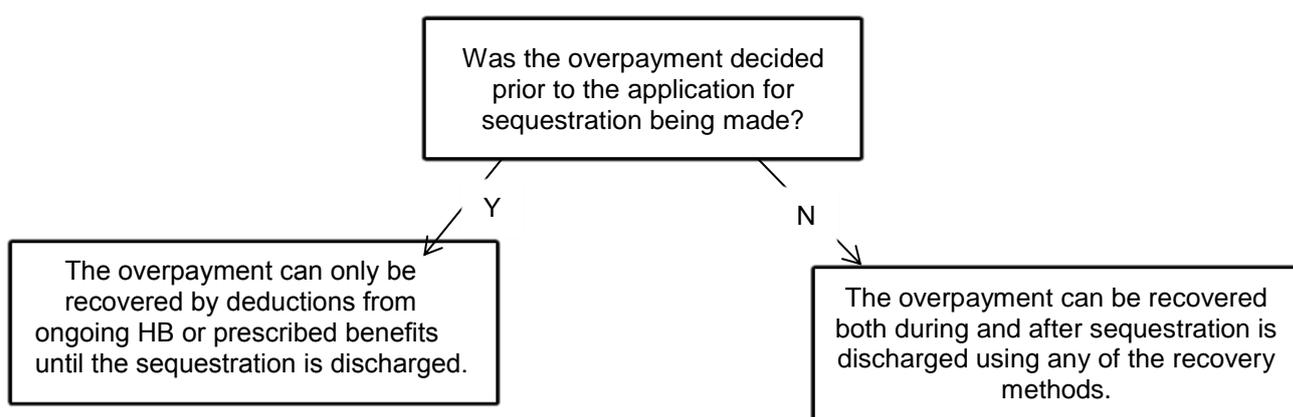
- 18.1 There are two methods of sequestering a debtor; by debtor application to the Accountant in Bankruptcy or by petition to the Sheriff Court.
- 18.2 A petition for the sequestration of a debtor may be brought (amongst others) by one or more qualified creditors. The sequestration is administered by a trustee, who could be the Accountant in Bankruptcy or an insolvency practitioner.
- 18.3 In cases where the amount owed to the Council is £3000 or greater, the Council can apply by petition to the Sheriff Court to have the debtor sequestered. Sequestration involves the transfer of the debtor's assets and property to the trustee for the benefit of the creditors. The trustee has a duty to sell the assets/property. The trustee may also seek a voluntary contribution from the debtor's income, if in regular employment.
- 18.4 If a debtor applies for their own sequestration, they will normally be discharged one year after the date the order was awarded. If a creditor petitioned for the sequestration, discharge will be one year after the date that the court issued the warrant citing the debtor to appear at a hearing. If a debtor does not co-operate with the trustee, the trustee can ask the sheriff to delay the discharge by up to two years at a time.
- 18.5 Like bankruptcy, discharge from sequestration will release the debtor from all debts that pre-dated the date of sequestration. However there are exceptions, such as debts arising from fraud (Fraudulent overpayments), certain crimes and fines, and debts incurred after the date of sequestration (overpayment decisions that were made after the date of sequestration). These exceptions can continue to be recovered after discharge and any recovery methods can be utilised.
- 18.6 Overpayments that were decided prior to sequestration can only be recovered during the period of insolvency, by making deductions from ongoing HB or prescribed benefits and only up to the date of discharge. Any amounts outstanding must be written off on discharge (excluding Fraudulent overpayments)
- 18.7 Recovery when a debtor has been sequestered

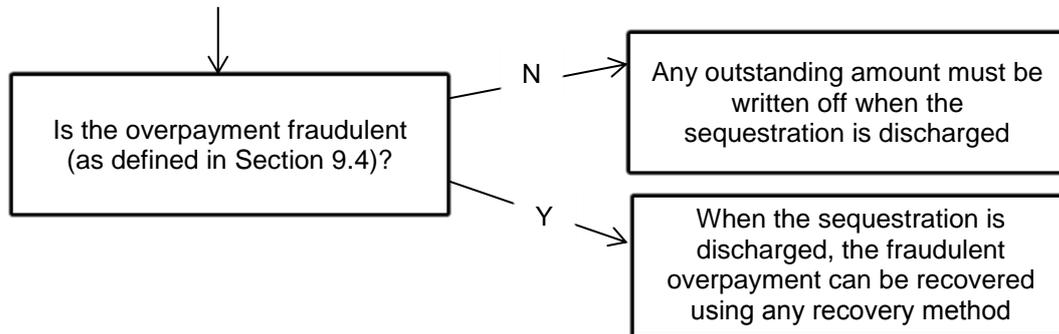
18.7.1 It should be noted (per Section 75 of the Social Security Administration Act 1992):

“As Housing Benefit is always recoverable from prescribed benefits, and benefits cannot be transferred to new ownership, the power to recover from such benefits is outside the laws of insolvency. As a result of this, a Local Authority may recover the overpayment by making deductions from any ongoing Housing Benefit entitlement or certain prescribed DWP benefits”.

18.7.2 This is due to the fact a claimant is entitled to benefit net of deductions.

18.7.3 The flow chart below shows the sequestration overpayment recovery process.





18.7.4 For sequestration purposes, a fraudulent overpayment which fits into one of the categories listed below falls out-with the laws of sequestration and can continue to be collected after the date of discharge. The claimant must have:

- (i) been found guilty of an offence whether under statute or otherwise;
- (ii) made an admission after caution of deception or fraud for the purpose of obtaining relevant benefit; or
- (iii) agreed to pay a penalty under Section 115A of the Social Security Administration Act 1992 and the agreement has not been withdrawn. Administrative Penalties do not fall within the judgement, as discharge does not release the bankrupt from any liability in respect of a fine imposed for an offence.

19. CHANGE OF ADDRESS AND “GONE AWAYS”

- 19.1 If correspondence is returned undelivered and marked “Gone Away”, or similar, and a forwarding address is not already known, every effort is made to find a new address for the debtor.
- 19.2 The Council will make all legally allowable checks on different records, systems and tracing agents where appropriate, to trace the individual and continue to recover the debt.
- 19.3 Cases where an individual has not been traced will be prepared to consider for write off.

20. DEBTS NOT RECOVERED

- 20.1 In certain circumstances, the Council can decide to write-off an overpayment and this will be done in line with the Scheme of Delegation. Examples include:
- (i) any instance where the Council cannot prove the debt for legal challenge purposes;
 - (ii) circumstances where an official error has resulted in an overpayment being classed as unrecoverable;
 - (iii) the customer is deceased and has left no estate with which to clear the debt;
 - (iv) the customer has gone away and the Council has been unable to trace them;
 - (v) the customer has been sequestrated; (exception to this is fraud op)
 - (vi) in certain circumstances where a de minimis level is set;
 - (vii) where it is uneconomical to pursue the debt any further;
 - (viii) other exceptional circumstances.

21 AUTHORISATION FOR WRITE-OFF

21.1 Write offs generally fall in to three categories:

- (i) non-recoverable write offs
- (ii) discretionary write-offs
- (iii) standard write offs

21.2 Non recoverable write-offs

21.2.1 These overpayments are caused by an official error, LA or DWP, when the claimant could not reasonably have been expected to know that they were being overpaid. They are therefore deemed to be non recoverable by the Council.

21.2.2 In this circumstance, the Council would notify the claimant of the overpayment and the fact that they are not going to pursue its recovery.¹⁰

21.2.3 Once these overpayments are written off, they would not normally be resurrected and pursued.

21.3 Discretionary write-offs

21.3.1 A recoverable overpayment can be considered for write off if the Council uses its discretion and decides not to recover it. These types of write offs are called discretionary write offs.

21.3.2 Fraudulent overpayments will not be considered for a discretionary write off.

21.3.3 Scenarios for considering an overpayment for a discretionary write off will be on financial or hardship grounds. However the medical condition of the claimant or family may be relevant and should always be recorded to assist such a decision being made.

21.3.4 Recovery of an overpayment below specified amounts deemed not to be cost effective to recover will therefore be written off. This level will be agreed with the Service Director - Neighbourhood Services annually.

21.3.5 Discretion cannot be prescriptive and there are no rules or examples that can be given. Each case must be decided on its own merits. However the following situations may be relevant when considering discretionary write offs:

- (i) financial hardship;
- (ii) terminal illness;
- (iii) senility or learning disability;
- (iv) severe medical conditions;
- (v) health and welfare; or
- (vi) all other relevant factors.

21.3.5 In order to establish if a claimant is suffering financial hardship, an Income and Expenditure form must be completed and where necessary, an interview should take place between a representative from Customer Advice and Support Services and the claimant. Hardship is proven when the income, minus the debts, gives a figure of more than £10.95 below the

¹⁰ HB Sch 9 & (SPC) Sch 8

applicable amount. This figure is annually updated and is based on the maximum that the DWP recovers from IS/JSA(IB) in non-fraud cases.

21.3.6 Priority debts include :

- (i) rent, Council Tax, utilities (e.g. gas, electric, water), any arranged weekly payment of arrears
- (ii) fines – any weekly amounts
- (iv) medical expenses

21.3.7 Other factors to be considered in such a scenario are :

- (i) the health of the claimant and members of the household;
- (ii) any savings the claimant has;
- (iii) the level of disposed income in comparison to people receiving IS;
- (iv) whether they have tried to make an arrangement for minimum repayment;
- (v) whether they have any debt priorities;
- (vi) whether a non-dependant can contribute to other household expenses;
- (vii) whether it would be feasible to postpone repayment of the debt rather than write is off or writing off part of the overpayment rather than all of it;
- (viii) whether the claimant has contacted their other creditors to reduce repayments in order to repay this debt.

Note : This list of not prescriptive or exhaustive.

21.3.8 If hardship is proven, the Council will consider the overpayment for a discretionary write off in extreme circumstances and the claimant will be notified in writing.

21.3.9 Once these types of overpayments are written off, and claimants notified of the decision, they would not normally be resurrected and pursued.

21.4 Standard write offs

21.4.1 The Council within its Bad Debts Provision, hold some money back for writing off debts, where all recovery methods have been exhausted. This is because the claimant cannot be traced or all methods of recovery have been tried and have been unsuccessful. These overpayments will only be considered for write of if there are no further methods that can be pursued.

21.4.2 Examples of such overpayments are:

- (i) a debtor who cannot be traced;
- (ii) debts which could become non-recoverable through the courts due to the Limitations Act 1980 (Scotland)¹¹;
- (iv) debts when all action has been considered/taken and it is decided not to pursue any further;
- (v) the debt cannot be substantiated.

21.4.3 Even though an overpayment has been written off, if the claimant has not been notified of the write-off, it can be resurrected and recovered at a later date. For example if a claimant cannot be traced, the overpayment can be written off. The claimant will not be notified of the write-off as their whereabouts are not known. If they apply for HB/CTR at a later date, the overpayment can be resurrected and recovered.

¹¹ Must notify the claimant within 6 years of the overpayment being created

- 21.5 Prior to any debt being recorded for write-off, the appropriate process, documentation and authorisation will be followed and recorded.

22. APPEALS

- 22.1 The claimant can ask for a reconsideration or appeal against a decision. Should an appeal be received from the customer in respect of an overpayment calculation it will be handled firstly as a request for reconsideration.
- 22.2 Reconsideration is carried out by a member of Customer Advice and Support Services and this must be someone other than the person that calculated the original overpayment. A check will be carried out to ensure that Underlying Entitlement was offered to the claimant and that all information has been applied to the claim. If the reconsideration does not result in any change of decision the reconsideration will be passed to a higher graded officer.
- 22.3 Appeals must be made according to the review procedures and not to the courts. The courts will not accept a dispute regarding the fact that there is a recoverable overpayment or from whom it should be recovered. This is a matter that can only be taken up by applying for a revision or by appealing to the Council. The Council should have allowed one month for appeal rights and so disputes should have been raised before pursuing the debt in court.
- 22.4 If an overpayment decision notice is defective or the appeal rights have been ignored by the Council, then an application can be made to the court for them to set aside the order.

23. HOUSING BENEFIT OVERPAYMENT DECISION NOTICES

23.1 Matters to be included in overpayment decision notices

- 23.1.1 When a decision is made that the overpayment is recoverable, a decision notice must be issued to any person the overpayment is legally recoverable from, even if we decide to recover the overpayment from someone else.

Example

If the Council decides to recover from the landlord, but both the landlord and the claimant have misrepresented or failed to disclose information, an identical decision notice must be issued to both the claimant and the landlord.¹²

- 23.1.2 The Council must send the decision notices :

- (i) within 14 days of the decision being made; or
- (ii) as soon as reasonably practical thereafter.¹³

- 23.1.3 A decision notice should provide the person it is issued to with enough :

- (i) detail to check the factual basis of the Council's decision; and
- (ii) information to decide if they want to request a reconsideration/appeal of the overpayment decision, for example, it is not sufficient to just say there has been an overpayment because of a change in the claimant's circumstances.

¹² HB Sch 9 & (SPC) Sch 8

¹³ HB Reg 90 & (SPC) 71

23.1.4 The decision notice(s) should be issued to all affected parties who the Council could legally recover the HB overpayment from. This could be:

- (i) the claimant;
- (ii) a person acting on behalf of the claimant, e.g. an appointee; or
- (iii) any person to whom the overpayment was paid, e.g. the landlord/agent who received direct payment of HB.

23.1.5 HB Reg 101(2)/(SPC) 82 (2) was amended in April 2006 to state that an overpayment caused by a misrepresentation or failure to provide information is recoverable from the person or persons who actually misrepresented or failed to disclose that information. In cases where the HB is paid direct to the landlord, the Council would only need to issue a decision notice to the landlord if they had misrepresented or failed to disclose information.

23.1.6 If the overpayment was caused by an official error, the overpayment is recoverable from the person/persons who could reasonably have been expected to realise they were being overpaid. In cases when the HB is paid direct to the landlord, this could be the claimant, landlord or both.

23.1.7 A decision notice should only be issued to the person/persons who could reasonably have been expected to realise they were being overpaid, for example, a landlord

23.1.8 If the overpayment was not caused by a misrepresentation, failure to disclose information or an official error, and the HB is paid direct to the landlord, the overpayment is recoverable from the claimant and the landlord. A decision notice should be issued to both the claimant and the landlord.¹⁴

23.2 Information that must be on the overpayment decision notice

23.2.1 The following information is the minimum that should be included in a decision notice¹⁵ :

- (i) that there is a recoverable overpayment;
- (ii) the reason there is a recoverable overpayment. (It is not sufficient to just say there has been a change of circumstances);
- (iii) the period of the overpayment;
- (iv) the amount of the recoverable overpayment and how the amount was calculated;
- (v) who the overpayment is legally recoverable from and why;
- (vi) who the Council has decided to recover the overpayment from and why;
- (vii) the method of recovery, for example, ongoing HB payments, and the amount of the deduction;
- (viii) the person's right to request written statement setting out the Council's reasons for its decision on any matter stated in the decision notice and the manner and timescale in which to do so;
- (ix) the person's right to apply for a reconsideration of the decision or appeal against it and the manner and time in which to do so; and
- (x) anything else that the Council thinks is appropriate, for example, matters relating to the person's health and financial circumstances.

23.2.2 The Council is also expected to include an invitation to make either a full repayment of the debt or negotiate some other arrangement within one month from when the decision notice was issued. This actually equates to one month and a day, for example if it is issued on the 28 March, they have until 28 April to respond.

¹⁴ HB Reg 101(2) & (SPC) Sch 8

¹⁵ HB Reg Sch 9 & (SPC) Sch 8

24. HOUSING BENEFIT (DECISION AND APPEALS) REGULATIONS 2001

- 24.1 A person from whom the overpayment is recoverable has a right of appeal against the HB overpayment decision.
- 24.2 Overpayment decision notices must be issued to all parties the overpayment is legally recoverable from (even if you have decided to recover from someone else). This could be:
- (i) the claimant;
 - (ii) in the case of a person who is unable, for the time being, to act :
 - a Court Appointed Deputy, these are appointed by the Court of Protection with power to claim, or as the case may be, receive benefit on their behalf;
 - in Scotland, a tutor, curator or other guardian acting or appointed in terms of law administering that persons estate;
 - an attorney with general power, or power to receive benefit appointed by the person liable to make those payments under the Power of Attorney Act 1971 or Enduring Power of Attorney Act 1985 or Mental Capacity Act 2005;
 - (iii) a person appointed by the Council to act for the claimant; or
 - (iv) a person from whom the Council determines that an overpayment is recoverable from the landlord or agent, when a decision has been made by the Council under regulation 95 or 96 or [(SPC) 76 or 77] of the Housing Benefit Regulations.

25. THE DISPUTE PROCESS¹⁶

- 25.1 If a 'person affected' disagrees with a decision they may query it or ask for a written statement of reasons. Before offering an explanation or issuing a written statement of reasons, it is good practice for the Council to check that the decision is correct. If the 'person affected' still does not accept the decision, they have one calendar month in which to dispute it. The dispute period starts on the day following the date of the decision notice. This period can be extended in specified circumstances, including when a written statement of reasons has been requested. During this time the 'person affected' may ask for the decision to be reconsidered or appeal against it immediately.
- 25.2 The process of looking again at a decision is known as 'reconsideration'. To make sure that the decision is correct the original decision maker will look again at the evidence, including any evidence that may be offered by the 'person affected' at the explanation stage, and also the facts and law. A different officer to the person who made the original decision will carry out the reconsideration.
- 25.3 If, following reconsideration, the original decision is not revised, and the 'person affected' does not appeal the original decision, the Council should notify them of the decision not to revise. They then have a further month (from the date the decision not to revise is issued) in which to appeal. If they have already appealed, the Council should tell them that the decision has been reconsidered, but not revised and that the appeal will proceed.
- 25.4 If the decision is revised to the claimant's advantage or disadvantage, the Council will notify the 'person affected' of the revised decision. Everyone who the overpayment is legally recoverable from should also receive a revised decision. The new decision carries fresh appeal rights and the 'person affected' has a further month to appeal.
- 25.5 If a 'person affected' appeals on receipt of a decision it is good practice to carry out a reconsideration. However, some decisions, mainly administrative ones, do not carry a right of appeal, such as the ones listed earlier in this section (section 23.3). The legal right of the 'person affected' to appeal to an independent and impartial tribunal is one of the fundamental elements of the Decision Making and

¹⁶ For the remainder of this section, 'person affected' refers to anyone who could appeal the overpayment decision.

Appeals process. It is for this reason that if the 'person affected' appeals immediately on receipt of a decision, and the Council is unable to revise the decision to their advantage, the appeal together with a submission from the Council setting out the facts of the case and the reasons for their decision, should be sent to the Tribunal Service Scotland (TSS).

- 25.6 A copy must also be sent to the "person affected" and their representative.
- 25.7 The TSS must hold an oral hearing, before making a decision on the appeal unless each party to the appeal has consented to or not objected to the matter being decided without a hearing and the TSS considers it can decide the appeal without a hearing.
- 25.8 If there is an oral hearing, then the Council may decide to send a Presenting Officer to represent them. Following the hearing, the tribunal's decision is notified to the 'person affected' and the Council. If the Council or the 'person affected' feels that the decision of the TSS is erroneous in law, then there is the option to seek leave to appeal to the Upper Tribunal. It is important to note that TSS/ Upper Tribunal rules are statutory and have the same statutory regulations. They are not guidance.
- 25.9 The dispute process cannot exceed 13 months.

26. WHAT OVERPAYMENT DECISIONS CAN BE APPEALED AGAINST

- 26.1 A person who has received an overpayment decision notice has a right of appeal to a First Tier Tribunal against some relevant decisions (whether as originally made or as revised or superseded) that the Council makes on a claim, or on an award of HB.
- 26.2 Examples of overpayment decisions that have a right of appeal are:
- (i) whether the overpayment is in fact a recoverable overpayment, for example, if the Council has decided that an official error overpayment is recoverable because the claimant, a person acting on their behalf or any other person to whom the payment is made, contributed to the mistake, act or omission;
 - (ii) the decision to recover an overpayment caused by a misrepresentation or failure to disclose information, if the person chosen to repay the overpayment does not feel they have misrepresented or failed to disclose information;
 - (iii) the decision to recover an official error overpayment, if the person chosen to repay the overpayment, does not feel they could reasonably have been expected to realise they were being overpaid;
 - (v) the calculation of the overpayment;
 - (vi) the period of the overpayment;
 - (vii) the calculation of diminution of capital; or
 - (viii) the calculation of underlying entitlement.
- 26.3 Examples of overpayment decisions that do not have a right of appeal are:
- (i) who the Council has decided to recover the overpayment from, if it is legally recoverable from more than one person;
 - (ii) whether the overpayment should be recovered;
 - (iii) the recovery rate (although a 'person affected' may ask you to look at this due to hardship); or
 - (vi) the method of recovery.

27. APPEALS AND RECOVERY

- 27.1 There is no legislative requirement to halt overpayment recovery if an appeal is lodged but it is considered good practice to do so. Recovery action will be suppressed in respect of any overpayment that is appealed until a decision is made, as soon as it is practicable after receipt.

28. TIME LIMITS FOR RECOVERING OVERPAYMENTS

- 28.1 Any obligation to repay overpaid HB is extinguished (and therefore must be written off) 20 years after the date the overpayment decision was made by the Council, as per The Prescription and Limitation (Scotland) Act 1973 (s7), if:

28.1.1 there has been no 'relevant claim' made against the debt (for example, the Council has not brought any action in the courts to recover the overpaid benefit, such as pursuing a method of diligence or initiating/claiming in sequestration proceedings),

28.1.2 there has been no acknowledgment of the debt (for example, the Council has not received part payment of the debt or a written admission of the debt from the debtor. Part payment of the debt could include a deduction taken from benefits payable to the debtor)

- 28.2 If a decision is made to pursue through the Court, this must be brought within five years, although if there is a later acknowledgement by the debtor of that debt, in whatever form, the time limit starts again,

- 28.3 The 20 year time limit starts again, as per The Prescription and Limitation (Scotland) Act 1973 (s7), when :

28.3.1 the Council brings action in the courts to recover the overpaid benefit (e.g. pursuing any method of diligence or initiating/claiming in sequestration proceedings), or

28.3.2 the debtor acknowledges the debt (e.g. makes a part payment of the debt, such as a deduction from benefits, or a written admission of the debt).

- 28.4 The Prescription and Limitation (Scotland) Act 1973 is different to The Limitation Act 1980 (which applies in England and Wales), as The Limitation Act just limits the period within which court action can be taken. Section 7 of The Prescription and Limitation (Scotland) Act 1973 (extinction of obligations by prescriptive periods of twenty years) applies the 20 year period to obligations to repay debts, including repaying overpaid benefits under sections 75 and 76 of the Social Security Administration Act 1992.

APPENDIX 1 – Prescribed Social Security Benefits/Payments

DWP benefits that we can recover overpayments under social security legislation (S71 of the Social Security Administration Act) and that we can take compulsory deductions from.

- Attendance Allowance
- Bereavement Allowance
- Carer's Allowance
- Disability Living Allowance
- Employment and Support Allowance (ESA)
- Incapacity Benefit
- Income Support
- Industrial Death Benefit
- Industrial Injuries Disablement Benefit
- Jobseekers Allowance
- Maternity Allowance
- *New style Jobseekers Allowance
- *New style ESA
- Pension Credit
- Personal Independence Payment
- Pneumoconiosis, Byssinosis & Miscellaneous Disease Benefit
- Reduced Earnings Allowance
- Retirement Pension
- Severe Disablement Allowance
- State Pension
- Universal Credit
- Widows Benefit
- Widowed Mothers Allowance
- Workers Compensation (Supplementation) Benefit

We cannot take deductions from any of the following payments

Training Allowance
Widow's lump sum Payment
Disablement Gratuity
Christmas bonus
Tax Credits
New Deal
Bereavement Benefit lump sum payment
Universal Credit Recoverable Hardship Payments
Council Tax Reduction

* - for claims made on or after 29/04/2013 in a relevant district and by a pathfinder group.