

Lord Trefgarne
Chair, Secondary Legislation Scrutiny Committee
House of Lords

16 March 2017

Dear Lord Trefgarne,

This letter raises points of concern in relation to SIs 2017/387 and 2017/376 which govern the introduction of a two-child limit for payments of Child Tax Credit and Universal Credit (and other benefits) respectively, for the attention of the Secondary Legislation Scrutiny Committee. Unless otherwise specified our comments relate to both instruments as they make many similar provisions.

First we draw the committee's attention to discrepancies between the two statutory instruments. Both SIs provide for exceptions to the two-child limit which we believe are intended to be identical, but there are various drafting inconsistencies which could result in significant differences in interpretation. We also note that in general SI 2017/387 is much less clearly worded and its explanatory memorandum is also extremely difficult to follow. Discrepancies with possible substantive effect include these:

- Under SI 2017/376 reg 4(1)(b) no reference is made to QYP, unlike in the equivalent reg 12(1)(b) of SI 2017/387.
- SI 2017/376 reg 4(2)(a) refers to the child arrangement order being 'in force'. There is no such reference in the equivalent reg 12(3)(a) of SI 2017/387.
- SI 2017/376 reg 4(2)(f) refers to the Children(Scotland) Act 1995 whereas the equivalent SI 2017/387 reg 12(3)(f) refers to the Children and Young People (Scotland) Act 2014.

Second we have serious concerns as to whether the two-child limit legislation overall, and these regulations specifically, are rational and likely to achieve their stated aims, and we wish to warn of a range of possible unintended consequences of this legislation. One of the central aims of the two-child limit, as stated in the government's October 2016 consultation document, is to ensure that families 'think carefully about whether they are financially prepared to support a new child without relying on the tax credits or means-tested benefit systems' (p.5). The purpose of the two statutory instruments discussed here is to 'ensur[e] that those parents or carers who are not in the same position to make choices about the number of children in their family as others will be exempted from new restrictions' (Explanatory memorandum to SI 2017/376, p.11). In our view there are serious gaps between both this overall stated objective, and the protections intended to flow from these regulations, and the likely consequences of the legislation as it stands.

Families who have already taken the decision to have a third or subsequent child, due to be born after 6th April 2016, were unlikely to have done so in full knowledge of this policy. This is partly because of the failure to finalise and communicate the policy in a timely manner. Final details of exceptions have only just been published, three weeks before the policy comes into effect; the only publically available document setting out detail of the policy and the exceptions are the statutory instruments and associated memoranda of understanding, which are not suitable for communicating the policy to the public; the two-child limit policy as a whole has not been widely communicated, for example as of 16th March 2017 it does not appear on the gov.uk Universal Credit pages; and to our knowledge Universal Credit claimants who already have two or more children have not received any notification of the policy coming into effect. Perhaps most significantly, under Universal Credit [see SI 2017/376] the limit will apply to children

who were born before the policy was ever announced, if their family makes a new claim from November 2018 onwards.

The legislation also fails to recognise that it is not only women who conceive through rape or coercion who can experience an unplanned birth. All contraception methods have a failure rate even when correctly used; parents may be ethically or religiously opposed to contraception or abortion; women with certain learning disabilities or mental health conditions may be less able to take control of family planning, use contraception reliably or resist pressure from a partner; and women in Northern Ireland may be unable to access abortions. Yet no exceptions are provided for these circumstances.

The legislation also fails to recognise that families cannot necessarily guarantee their financial circumstances eighteen years into the future when they decide to have a child. The exceptions offer no protection for families who experience an unexpected reduction in income due, for example, to the death or severe disability/ill-health of a parent, redundancy, separation, or unexpected caring responsibilities (e.g. for a severely disabled child). The following case, reported to CPAG by the family's welfare rights adviser, illustrates the sort of families who will be affected by the two-child limit in the future:

The client and his wife have three children, including two under five years old. Recently the client's wife suffered a serious brain injury. She is in hospital, with doctors unsure whether she will survive, and he has had to reduce his working hours in order to look after their children. This has left the family with a reduced income. If the children's mother survives she may be unable to work again and may require significant care. Their father hopes to increase his working hours in the future but in the meantime tax credits are proving vital for the family to manage.

We also have serious concerns about the design of some of the exceptions proposed in the two SIs. As noted in both explanatory memoranda, the exceptions for adopted children or those in kinship care are intended to keep vulnerable children in family units and out of the care system wherever possible. The exception has been designed to avoid a disincentive to adopt/take on children for families who already have two children or who do not plan to have biological children, but will not have this effect for those considering taking on children *before* having a first or second child of their own. Only third or subsequent children who are adopted or in kinship care count as exceptions under these regulations. We see no justification for this inconsistency and there is a risk that younger people will be disincentivised from adopting or becoming kinship carers, leading to more children entering or staying in the care system. Children in kinship care arrangements might even be sent into the care system if their carers subsequently have, or wish to have, biological children, further disrupting the lives of highly vulnerable children.

We also see no justification for a similar approach to the exception for rape and coercion, which would see this exception applied only for third or subsequent children. A young woman who is raped and has a child as a result will only be able to receive support for one further child if she later marries and has children with her husband, while a woman who already has two children and is later raped, resulting in a child, will receive support for all three.

Many organisations have also expressed grave concern that the exception model for rape and coercion is likely to lead to breaches of privacy, cause victims further trauma, and leave women at risk of financial loss if their reports are not believed. Some women may be deterred by these risks from claiming the exception. These concerns have not been adequately addressed in these regulations.

The DWP has stated that documentation sent to claimants will not include the reason for the additional payment of the child element. But it has offered no response to the warning, made in response to its recent consultation, that there are commonplace situations in which either the victim's family members or various authorities could easily identify that the rape exception has been applied. Many women will have a joint tax credit/Universal Credit claim with

a partner, who will be able to see that more than two child elements are being paid and will typically know that none of the other exceptions apply to the children (they were not part of a multiple birth, adopted or in kinship care). The same problem could arise in any situation where women have to provide evidence of tax credit/universal credit awards alongside children's birth certificates, for example to claim housing benefit or student childcare support.

Other evidence submitted to the recent consultation shows that forced disclosure of a rape can be extremely (re-)traumatising, yet for a woman in financial difficulty struggling to support her children, the requirement to disclose to a third party in order to receive financial support would effectively amount to forced disclosure. The government has recognised that some women may take a long time to disclose their rape because of how difficult disclosure can be. This is tantamount to admitting that the policy will leave some vulnerable women and young children with no choice but to either undergo the trauma of disclosure or face extended financial difficulty. The risk of trauma is further increased by the possibility that third parties might subject women to intrusive and humiliating questioning, or disbelieve women's claims. There is already evidence that police officers - one of the professionals expected to appear on the list of approved third parties –under-report reports of rape as crimes, indicating that they do not believe those reporting them.¹

Given all these risks we find it alarming that the list of approved third parties has not even been finalised yet and guidance is not yet available (to our knowledge) on how this exception will operate, just three weeks before the policy is due to come into force. There is not enough time for comprehensive training of either the approved third parties or staff of the various benefit teams who will have to discuss this exception with claimants, before the policy is due to be implemented on April 6th. Nor will there be sufficient opportunity to publicise the availability of the exception and the list of approved third parties to families claiming tax credits or universal credit, so that women who may currently be pregnant as a result of non-consensual conception will be in a position to claim the exception if they give birth shortly after April 6th. We believe that until concerns regarding privacy, trauma and the assessment of claims are robustly addressed, it is not safe to implement this policy.

Thirdly we believe that there is a risk of other unintended consequences flowing from the two-child limit, with potential negative effects on children, which are not addressed in these regulations (but which could, at least in some cases, be addressed through further exceptions). First, decisions about which parent a child lives with might be driven by the desire to maximise child elements rather than by the child's best interests. Second, larger families might be incentivised to separate or to send children to live with other relatives. Third, women may have abortions under economic duress.

As a result of the problems outlined above we believe that a range of other exceptions are necessary to recognise people for whom conception is not completely voluntary or for whom unforeseeable changes in family income or costs have occurred, and to ensure that the policy does not create perverse incentives as outlined above. For brevity we simply list these here, but further details are available in CPAG's published response to the recent consultation:²

- All children born less than 10 months after the family could reasonably have been expected to be aware of the policy and available exceptions, regardless of the date of claim
- Births resulting from the failure of contraception
- Families in unforeseeable hardship due to the death, ill-health, new caring responsibilities, involuntary reduction in earnings, redundancy or separation of parents or carers
- Children born to women with certain learning disabilities or mental health conditions
- Families with a conscientious or religious objection to contraception or abortion
- Persons who have been victims of, or at risk of, domestic abuse, within a recent grace period
- Children who move from the household of one parent to another
- Children whose parents make a new claim as a result of separation

¹ HM Inspectorate of Constabulary (2014) Crime-recording: making the victim count. <http://www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/crime-recording-making-the-victim-count.pdf>

² <http://www.cpag.org.uk/content/consultation-exceptions-two-child-limit-cpags-response>

- Children who move into a new household after the death of the parent they were living with
- Children who join a household as part of a blended family
- Families with a disabled family member
- Third children whose older sibling is not expected to survive childhood
- Saviour siblings

Finally we suggest that the two-child limit in its current form is very likely to contravene human rights treaties to which the UK is a signatory. It seeks to restrict women's basic reproductive rights, contrary to Article 16 of the Convention on the Elimination of all Forms of Discrimination Against Women, and would discriminate against groups with a conscientious objection to contraception and abortion or for whom large families are a tenet of faith, in breach of Article 14 of the European Convention of Human Rights. It also fails to give primary consideration to the best interest of the child in contravention of Article 3(1) of the UN Convention on the Rights of the Child. This policy will introduce, for the first time in our social security system, the idea that two children with identical assessed needs can be treated differently.

The UN Committee on Economic, Social and Cultural Rights raised a specific concern about the effect of cuts to social security on the standard of living enjoyed by families with two or more children in the Concluding Observations of its recent review of the UK's compliance with the International Covenant on Economic, Social and Cultural Rights.³ Projections by the Institute for Fiscal Studies estimate that this policy alone will put 200,000 children in poverty by 2020/21.⁴

We thank the committee for considering our submission.

Yours sincerely,

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Child Poverty Action Group (CPAG) works to prevent and relieve poverty among children in the UK. We have particular expertise in the functioning of the social security system through our welfare rights, training and policy work. We author and publish The Welfare Rights Handbook (the annual authoritative guide to social security in the UK), provide specialist advice to first tier advisors through a telephone and email service, and are currently providing frontline welfare rights advice to food bank users in Tower Hamlets.

³ UN Committee on Economic, Social, and Cultural Rights (2016) Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGBR%2fCO%2f6&Lang=en

⁴ Institute for Fiscal Studies (2016) Living standards, poverty and inequality in the UK: 2015-16 to 2020-21

<https://www.ifs.org.uk/publications/8171>