

## **‘Decision Making and Mandatory Reconsideration’, Social Security Advisory Committee (2016)**

The SSAC’s report, ‘Decision Making and Mandatory Reconsideration’, examines the impact of Mandatory Reconsideration (MR), the 2013 reform introducing a compulsory internal review stage of the process of challenging benefits decisions. The intention of the reform is to resolve disputes earlier and reduce appeals to tribunal, but the SSAC notes the controversy around the change and the questions raised about how successful it is in meeting those policy objectives.

The report reflects a consultation conducted by the SSAC earlier this year to seek evidence about the working of the decision-making process in more detail. It received 80 submissions, in addition to carrying out desk research, statistical analysis, discussion groups and site visits. The SSAC concludes that ‘evidence from our consultation indicates the process is not always working as intended. It is of concern to the Committee if the new process fails to provide proper access to redress for claimants.’

### **Concerns**

Problems highlighted in submissions to the SSAC consultation include:

- complexity of the process and confused wording of decision letters – for example, HMRC decision letters telling people to ‘get in touch’ rather than advising them of internal review and their appeal rights
- time limits that are often insufficient to gather evidence – and late requests being disallowed even when good reasons put forward
- the need to make multiple MR requests for review of multiple aspects of decisions
- problems with telephone requests for MR – requests not being treated as ones for MR if ‘mandatory reconsideration’ not used; people being advised there’s no point in requesting an MR
- erroneously suggesting to claimants that additional evidence is required in order to progress an MR
- lack of guidance for claimants on making a written request for MR
- format of MR notices – such as failure to refer to evidence or confirm it was considered; no mention of appeal rights; unclear explanations

A claimant challenging an adverse decision through MR now receives no interim benefit (formerly assessment rate benefit was paid while appealing). Claimants advised to make a claim for Jobseekers’ Allowance (JSA) face a Kafkaesque situation where they are meant to demonstrate they are fit and ready for work and thus eligible for JSA while arguing they are not fit for work and eligible for ESA. As the SSAC notes, they are ‘too well for ESA, too sick for JSA’. With no funds, it can be difficult to gather evidence to challenge a decision (CAB research found that 50% of GPs charge for providing medical evidence), travel to appointments, make calls and copies. Claimants may also lose other benefits such as Housing Benefit and find they face arrears, and evidence from food banks suggests a large proportion of users are those suffering delays in returning to ESA following an MR notice.

These and other problems and barriers were also identified in research carried out by the National Association of Welfare Rights Advisers (NAWRA) in 2015 and 2016. The findings, as NAWRA's Eri Mountbatten has written in a piece for UKAJI's blog, 'should shock us all into making sure that something changes and justice is restored'.

### **Decision-making by DWP and HMRC**

Social security is the largest administrative decision-making system in the UK. Understandably, therefore, decisions by the DWP are the primary focus of this report, given the Department's role in delivering social security benefits, although decisions by Her Majesty's Revenue and Customs (HMRC), related to Tax Credits, are also explored. Welfare reforms have had a smaller impact in Scotland and Northern Ireland, and thus the report addresses decision-making in England and Wales only.

The delivery of social security benefits (the report looks specifically at Employment and Support Allowance (ESA) and Tax Credits) is a lengthy process, starting with policy development, legislation, and then implementation by individual decision-makers. Technically, decisions by the DWP are made by the Secretary of State, but this power is devolved to individual decision-makers (DMs).

The SSAC notes that in HMRC, decision-making on Tax Credits is made by a commercial organisation on a 'pay by results' basis, leading to specific concerns about transparency, fairness, and access to data. One recommendation is for the National Audit Office to examine the HMRC's provider contract to ensure it is not only value for money but also ensures 'safeguards to preserve justice for the claimant'.

A section of the SSAC report covers the role of evidence and how it features in decision-making. Concerns were raised in consultation submissions about the quality of eligibility assessments carried out by private contractors (originally ATOS, now Maximus) and decision-makers' failures to spot contradictions in the assessments. SSAC highlights the need for DWP decision-makers to 'be vigilant around their interpretation of reports' by these providers. Respondents to the consultation also cited problems in gathering evidence, including access to medical reports.

### **Costs of not getting it right first time**

The SSAC report notes that processing Mandatory Reconsideration (MR) requests and preparing for tribunals in ESA cases costs the Department more than £300 million per year, and estimated costs to the tribunal are more than £240 million (arrived at by dividing the cost of the Social Security and Child Support Tribunal by the number of cases, 2013/14). Add to this the costs of complaints to the Parliamentary and Health Service Ombudsman and the Independent Case Examiner (both of which can consider aspects of service provided by the DWP), and the costs to other government departments, local authorities, and devolved administrations through, for example, discretionary payments.

The costs go wider, however – loss of trust in public bodies and their ability to be fair can lead to more, and more complex and time-consuming, challenges to decisions, putting

additional burdens on initial decision-makers. More worrying, the costs to claimants can mean increased personal debt while awaiting decisions, build-up of arrears, ill health and stress.

The number of appeals has decreased dramatically since the introduction of MR, and the SSAC notes that from the perspective of reducing costs, the policy has been a success. But that is only one angle, and as the evidence submitted suggests, it is a false measure of success.

### **Decrease in legal aid and loss of external oversight**

The report notes the stark impact of the removal of legal aid (in England and Wales) from social security cases as part of the LASPO reforms and the resulting diminution of advice agencies' support for claimants. Since 2009 there has been a loss of 100 Citizen Advice Bureau (CAB) branches, and the CAB estimates it has seen 120,000 fewer people. 'Legal aid for the purposes of social security has all but disappeared in England and Wales': there were only 458 legal aid cases in 2014/15, down from 110,475 three years earlier. Research and consultation submissions point to the evidence that appellants are severely disadvantaged if not represented at tribunal, and there is increasing evidence of the cost to tribunals dealing with unrepresented appellants.

The SSAC also notes that the abolition of the oversight bodies, including the Administrative Justice and Tribunals Council (AJTC) and, more recently, the Administrative Justice Forum (in April 2017), 'will leave no oversight of decision-making quality in GB'. This combination of loss of legal aid and loss of independent oversight is what NAWRA's Eri Mountbatten has labeled 'a perfect storm'. In their response to the consultation, UKAJI members Tom Mullen (Glasgow University) and Robert Thomas (Manchester University) highlighted the loss of judicial oversight as well: the role of tribunals in supervising this system is being diminished in favour of internal review undertaken within government departments themselves. Aside from giving feedback to the DWP, tribunals have no jurisdiction over how the MR process operates. The SSAC recommends that the Government 'consider aspects of the decision making process that could benefit from external oversight and how best this can be carried out'.

Research on users' experiences of tribunals carried out by Brian Thompson (Liverpool University) and UKAJI's Grainne McKeever (Ulster University) reveals the obstacles (intellectual, practical and emotional) faced by those who challenge administrative decisions:

*'There are many reasons why individuals choose not to challenge decisions, including where they feel disempowered and ill-equipped to bring those challenges. The problems in decision making therefore affect significantly more individuals than is apparent from tribunal statistics. The need for improved decision making is an issue of access to justice, since for many individuals the initial claim is the only bite at the cherry that they will take; while, for those bringing challenges, the problems of poor decision making often necessitate the dispute while simultaneously constituting barriers in progressing those disputes.'*

## **Data deficit**

A key theme of the report – and a significant area of interest to UKAJI – is the lack of data on MR. Despite the Coalition Government’s promise, in March 2015, that data on MRs would be published, the DWP released its first statistics on the process in June 2016, covering only ESA fitness-to-work decisions. At UKAJI’s workshop in May 2015 on initial decision-making, a DWP representative explained the difficulties the Department faces with publishing stats on MR, noting that ‘turning management information into Official Statistics at the level of accuracy and quality demanded by the UK Statistics Authority has proved more challenging than anticipated’. No data on MR outcomes on other benefit decisions, and none on HMRC decisions on Tax Credits, have been published. One of the SSAC’s several valuable recommendations is that the Government should prioritise this and set a clear timetable for publishing data on outcomes across the benefits system.

On timeliness of decision-making, limited statistics are published by the DWP, for the period Nov 2013 to Oct 2014; none are published in HMRC decisions. The DWP stats (again on ESA fitness-to-work decisions) show improvements in waiting times – but as the SSAC emphasises, this appears to reflect a change in practice in which decision-makers no longer seek additional evidence. ‘It seems the emphasis had shifted to “quantity” of decisions at the expense of quality’ – something that the SSAC notes is at odds with the policy intent of thorough reconsideration.

Tribunal overturn rates can be helpful (in 2015/16, 58% of ESA decisions are overturned on appeal). But they have limited ability to give us the full picture. Appeals are a very small proportion of decisions made, and furthermore tribunals may be better placed to make better quality decisions because of members’ expertise, the inquisitorial process and the availability of oral evidence.

In 2012, a pilot launched by DWP and HMCTS collected primary reasons for tribunals overturning DWP decisions – a far better indicator of problems with initial decision-making. This is now ‘business as usual’ for PIP, ESA and UC benefits. The SSAC recommends that further publication of the findings from the ongoing feedback exercise would be useful, as would launching a similar exercise for HMRC appeals on Tax Credits.

Research on claimant experiences ‘indicates considerable room for improvement in the appeals journey and decision-making more generally’, according to the SSAC. The report cites the DWP’s Claimant Service Experience Survey, most recently carried out in February 2016, which shows high rates of dissatisfaction and confusion. Audit statistics of DWP decisions do not include claimants found not to be entitled to benefit – a key group of potential appellants.

## **Going forward**

The conclusions aren’t all negative, and the SSAC is clear that there is potential for MR. The report includes a number of valuable recommendations for changes in decision-making, consideration of evidence, communication with claimants, data collection and publication,

and training for decision-makers. Learning lessons from appeals and feeding this back into initial decision-making is key, but the mechanisms for doing so are limited or absent.

In order to act on many of these recommendations and improve the system, more detail is needed of what is happening now. In their submission to the SSAC's consultation, UKAJI's Tom Mullen and Robert Thomas argued that empirical research should be undertaken into the operation of MR in practice; what is needed is a large-scale research project to build on those already undertaken (such as those by Citizens Advice and NAWRA). Without such research, there is a risk that much of the evidence is anecdotal – as indeed is the case with much of the evidence submitted to the SSAC in its consultation. As vital as it is, such anecdotal evidence nevertheless is more readily dismissed because of the impossibility of identifying the actual scale or frequency of problems that need to be addressed.