nawra

national association of welfare rights advisers

Social Security Advisory Committee consultation review into

Decision making and mandatory reconsideration

NAWRA Response

March 2016

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The National Association of Welfare Rights Advisers – NAWRA

1. The National Association of Welfare Rights Advisers (NAWRA) was established in 1992 and represents advisers from local authorities, the voluntary sector, trade unions, solicitors, and other organisations who provide legal advice on social security and tax credits. NAWRA currently has 263 members.

2. We strive to challenge, influence and improve welfare rights policy and legislation, as well as identifying and sharing good practice amongst our members.

3. NAWRA holds a number of conferences throughout the year across the UK, attended by members from all sectors of the industry. An integral part of these events are workshops that help to share information, develop and lead good practice.

4. Our members have much experience in providing both front line legal advice on welfare benefits and in providing training and information as well as policy support and development. As such NAWRA is able to bring much knowledge and insight to this consultation exercise.

5. NAWRA is happy to be contacted to provide clarification on anything contained within this document. NAWRA is happy for details and contents of this response to be made public.

Purpose of this response

The Social Security Advisory Committee (SSAC) is reviewing decision-making and mandatory reconsideration in the Department for Work and Pensions (DWP) and HM Revenue & Customs (HMRC). The review is part of the committee's independent work programme and will focus on mandatory reconsideration before appeal. This is the response from NAWRA to that timely review.

Methodology

The NAWRA committee had numerous reports of concern with how mandatory reconsideration was operating in practice. As part of NAWRA's aims to challenge, influence and improve welfare rights policy and legislation, we therefore undertook some research during February 2015 in the form of a survey sent to NAWRA members, although we welcomed responses from non-members as well, in order to ascertain the level of issues faced by claimants and advisers. The questions also aimed to evaluate the success of the central aims of mandatory reconsideration. We received *94* responses, 97% from members and 3% from non-members.

Serious concerns were noted and we shared a summary of the results via a blog on the NAWRA website. We also explored the issues in more depth in an article in Adviser

magazine (edition 169, May/June 2015). You can read the blog and obtain a scanned copy of the article on our website[1]. In light of the substantial issues seen from last year's research into mandatory reconsideration, in order to have an updated picture of the operation of mandatory reconsideration (MR) in practice, NAWRA conducted some more recent research, one year on, in February 2016. This response aims to convey a comparative perspective using both *quantitative* data as well as summaries for the *qualitative* data taken from that research in 2015 and 2016.

Responses in the recent survey were accepted from NAWRA members as well as non-members (advisers and organisations associated with NAWRA members) with a ratio of 73% members to 27% non-members. This is an increase in responses from non-members as the survey was more widely distributed.

Comparatively, responses in the February 2016 survey demonstrate highly analogous results. We had *163* responses in all, which is the second highest number of respondents we have ever received on a NAWRA call for evidence.

Vulnerability

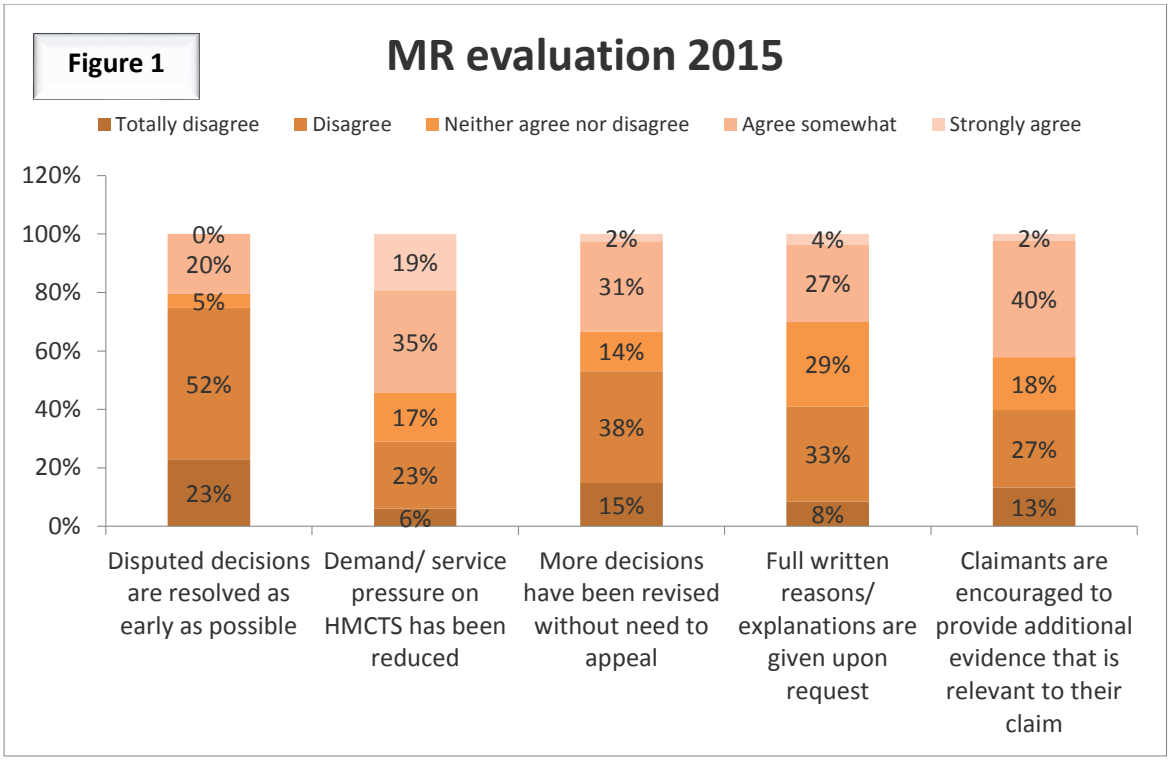
There are numerous definitions of 'vulnerability', depending on situation and context. However, for the purposes of this document, NAWRA adopts a broad definition of 'vulnerability'. In general, when we use this term we will mean claimants with hearing or cognitive impairments, those with substance or alcohol misuse, mental ill health, learning disabilities, language or literacy issues. NAWRA believes that these groups will have the conditions and symptoms which make them susceptible to having significant challenges with engaging (physically or mentally) with bureaucratic processes or public officials.

Evaluation of mandatory reconsiderations main aims - 2015 survey

The central purpose of MR is to facilitate early resolution. We asked members to evaluate the main aims and objectives of the policy since introduction in 2013. However, according to NAWRA members 75% disagreed that '*disputed decisions are resolved as early as possible'* [see Figure 1].

Members had an opportunity to comment on the process. Accordingly, members commented that confusion was prevalent and built into this new process, often leading to insurmountable challenges and additional barriers for vulnerable claimants. Challenges noted in the qualitative data were mostly linked to administrative issues and problems and with the written and verbal explanation process.

[1] *Revolving Doors* (blog post, dated 15.09.15); NAWRA; available @ www.nawra.org.uk/index.php/mandatory-reconsideration-revolving-door/



Qualitative data trends – 2015 survey

Administrative issues

There is evidence of widespread maladministration with DWP routinely either *losing or failing to record crucial evidence* sent by both claimants and advisers.

Members reported that claimants are often sent mandatory reconsideration notices (MRNs) before DWP have considered the written evidence sent in. DWP are noted as regularly failing to provide submission papers in time, in many cases taking many months. These delays can effect appeals from progressing or else (in cases where they arrive just prior to the Tribunal hearing) prevent effective submission support for claimants needed in order to prepare for appeals.

DWP are stated as routinely sending out explanation of reasons letters when claimants are asking for mandatory reconsideration notices (MRNs). This is then used as a reason to prevent appeal rights form progressing.

Many mandatory reconsideration requests by claimants (or advisers) are routinely either lost, not being processed and not being included within appeal bundles. Most members reported that claimants rarely received acknowledgment letters despite official guidance promising this[2]. However, there seems to be some disparity between differing benefits with

[2] *Appeals Reform* (August 2013); DWP; URL available @ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236733/appeals-reform-introduction.pdf

Employment & Support Allowance (ESA) and Personal Independence Payment (PIP) being the worst affected in this regard.

When a copy of the acknowledgement of the MR request is requested by claimants or advisers, members reported that DWP often tend not to send this on without multiple phone calls and weeks of chasing up by advisers. Requests for call-backs within 3 or 5 days are also routinely not being actioned, needlessly taking up advisers' time to chase these up (where claimant has one).

Late MRs

Most late MRs are noted as being accepted in the 2015 data, although some issues with increased strictness compared with pre-MR period for late appeals. Also, some issues noted with regards to getting papers late just before tribunal date.

Verbal explanations

During the verbal explanation process, DWP decision makers (DMs) are routinely calling at inconvenient or inappropriate times when claimants are unprepared and do not have an advocate or an adviser to support them. Further, DMs are routinely misleading claimants about their appeal rights and encouraging them to drop their appeals.

> *" I insist that a decision maker calls me as most of my clients have either confidence or perceptual issues over dealing with people over the phone."*

Attitudes of DWP Decision-makers are reported as being rude and intimidating, placing excessive emphasis and justification on poorly evidenced or biased DWP reasoning. Most respondents reported some form of high pressure tactics and misinformation employed by DMs, which seem to have the intention of deliberately deterring claimants from appealing.

> *" there is evidence that this call intimidates claimants not to appeal as DM justifies an expected negative outcome"*

Written explanations and 'mandatory reconsideration notices' (MRNs)

Members reported a perception that there was little or no difference between written explanations and MRNs. Many MRNs have differing titles and some did not have a title at all (PIP MRNs). This often led to a great deal of confusion for claimants.

Members noted that there is no prescribed form according to statute and many claimants believe that they had received an MRN and were ready to appeal but then have those requests refused on this basis. Accordingly many claimants simply do not challenge the decision after that stage and fall out of scope of support.

> *"Complex, bureaucratic, too hard for clients to understand"*

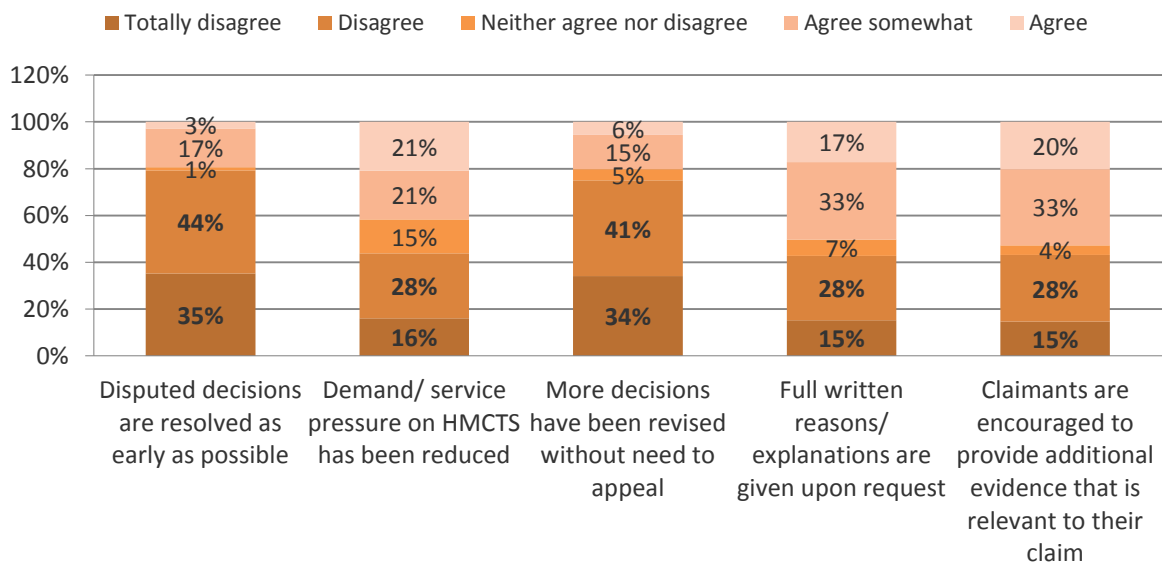
Language was another major factor of the evidence and claimants are reported as being highly confused by challenges such as information overload or overly complex or formalised language.

Unsurprisingly, therefore, claimants with cognitive impairments, such as those with mental ill health, learning disabilities, substance or alcohol misuse, literacy challenges, or those with low self-esteem, were reported as having suffered the most. These groups typically found it hardest to understand processes, manage intimidating conversations with DMs, understand complex terms (written or verbal) or engage effectively without extensive support and advocacy.

Evaluation of mandatory reconsiderations main aims – 2016 survey

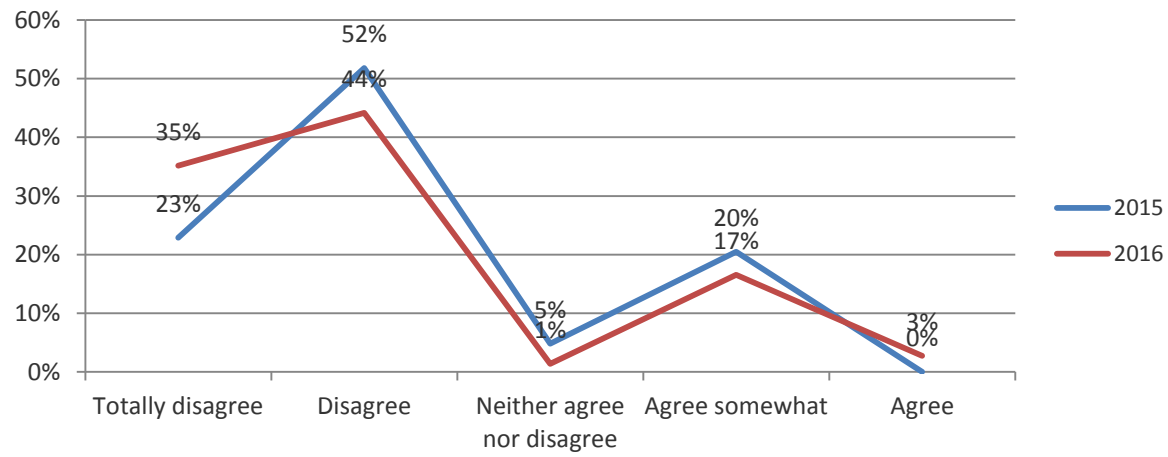
We asked the same set of questions in February 2016. The *quantitative data* in [see Figure 2] below conveys how members rated the core aims of mandatory reconsideration.

Figure 2 Success for main aims of MR - 2016 survey



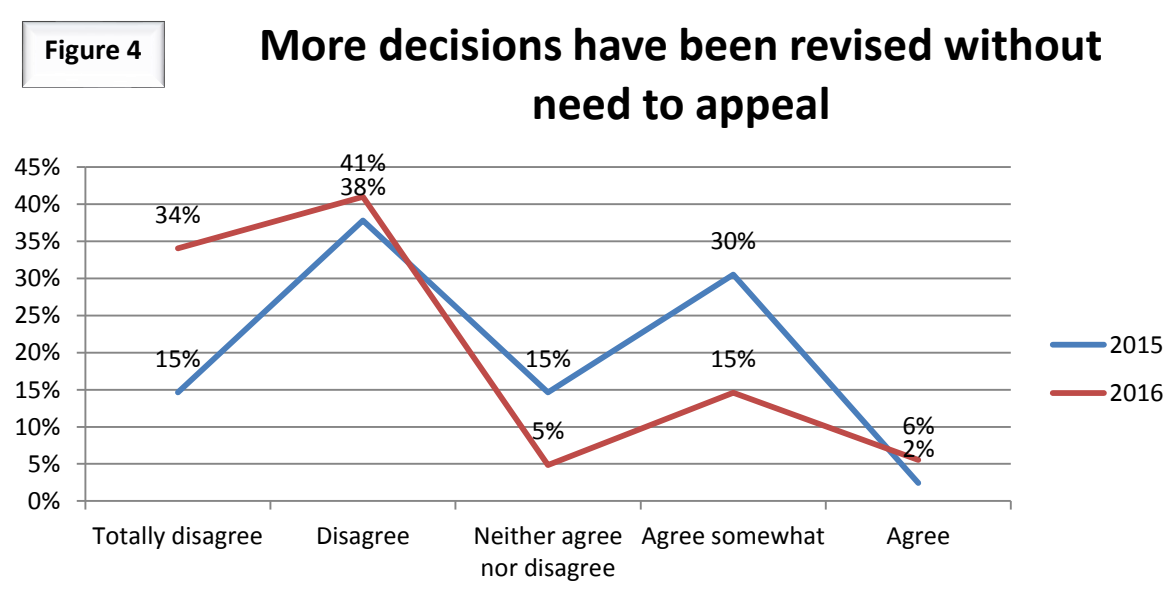
Broadly, the data from 2016 virtually parallels the 2015 data in most categories with marginal differences. However, respondents were more concerned in general. Specifically respondents expressed more serious concerns over early resolution in the 2016 survey with an increase of 12% in the 'Totally disagree' category. However, this was balanced by a slight drop in the 'Disagree' category [see Figure 3].

Figure 3



There were also significant increases in concerns for how MR is operating in some other key areas. For example, when questioned over whether more decisions had been *revised without needing to appeal* there was a 22% increase in the 'Disagree' and 'Totally disagree' categories combined, alongside a 15% decrease within the 'Agree somewhat' category [see Figure 4]. These figures worryingly outline *significant losses of confidence* since 2015 in the ability of this policy to meet its core aims and revise decisions early, fairly and effectively.

Figure 4



The reasons for these concerns will be explored in more depth in the subsequent qualitative data section which addresses the specific questions raised as part of this review. However, suffice to comment that respondents noted considerable and widespread concerns that MR is an additional process which adds confusion, obstruction and complexity to the appeals processes with *little or no added value* compared with the older automatic revision process.

Qualitative data trends -2016 survey

Does the mandatory reconsideration process facilitate appropriate redress for claimants?

> *"MRN are very poor, often make unusual arguments, fail to provide supporting evidence for their decision, includes poorly manipulated information taking claimants comments and manipulating them to mean something different, instances such as this should be clarified by the Decision Maker and the claimant made aware of Decision Makers interpretation giving the claimant an opportunity to put this right."*

Administrative issues - lost MR requests & late MRs

Similarly to the data from 2015, respondents reported widely that *verbal* requests for MR were routinely not being recorded. This meant that claimants would often be lulled into a false sense of security by believing that they had disputed a decision when in fact no dispute is recorded. This inevitably leads these claimants making late MR requests. Consequently many MRs are dropping off the system unless a claimant (or adviser) is very persistent and able to engage with the process fully. Vulnerable claimants are worst affected because they need support to engage throughout.

> *Biggest issue for my clients is missing out on right to appeal. Whenever we try to submit late MR these requests get ignored and clients cannot take this further. There needs to be some proper procedure for dealing with later MRs.*

Written MR requests were also reported as being either lost or not recorded. Again, this often results in what 'appears' to be late requests for MR but what actually is maladministration. Many respondents mentioned that this was for example evidenced by omissions of evidence submitted in the DWP or HMRC submission bundles.

To compound the problem, both DWP and HMRC seem to be applying the rules for late MR requests much stricter than previously as a trend compared with early 2015, thereby leaving more claimants totally outside of appropriate redress.

Verbal explanations

> *"There needs to be clearer communication regarding the entitlement to challenge the decision. DWP telephoning the claimant could be so useful but tends to be just a phone conversation to shut the door on the process"*

Verbal explanations, in principle, should be an opportunity for the DWP to assist claimants to provide additional evidence and information relevant to their claim prior to a decision being made. However, most respondents reported that verbal explanations were in fact used as a way to justify the decision against the claimant and deter them from proceeding with an appeal.

> *"When clients ring, disagreeing with a decision they are frequently given an explanation, rather than their request for a mandatory reconsideration being logged. This leaves many clients believing that their mandatory reconsideration request has been considered and refused, when in fact no such request has actually been accepted."*

Even though this should be a voluntary process, as with the 2015 data, most respondents reported that when claimants phone in to request an MR verbally, DWP often insist on phoning the claimant back to explain the reasoning of their decision and why they would not have a chance of success at appeal. Further, decision-makers are reported as using "*bully tactics*" and are not informing claimants that they can dispute an ESA decision and get ESA reinstated once an appeal is accepted post MR. These factors clearly work to deter many claimants from taking it further even where advisers reported claimants having strong claims. This was widely reported in the 2015 data as well.

Other issues reported include claimants believing that the verbal explanation is the appeal and once told they do not have a chance they do not realise and are not advised that there is further redress.

> *"Many claimants are told during the verbal explanation that they have 'no chance' of winning an appeal so should not proceed to that stage. They then tend to drop their challenge."*

Issues with verbal explanations are probably the most shocking issue raised in the evidence. This is because of the abhorrent level of unfairness, lack of accountability and gateway-keeping, deterrent effect preventing access to justice for vulnerable people.

HMRC are reported by many as refusing to accept verbal MRs at all. Respondents reported that DWP decision-makers tended to work from scripts, giving no weight at all to claimant verbal evidence. Where verbal requests are lodged, this was not easy to secure as respondents reported that DWP often insist on claimants specifically using the word '*reconsideration'*; if they do not then the matter is not taken further. It was also widely reported that decision-makers are telling claimants that they can only dispute a decision if they provide new evidence.

> *"Often when they receive the explanation the customer then says that they want to request the MR, they are sometimes told that unless there is new evidence that the decision won't be changed."*

Cognitive challenges

> *"Many people that we work with have poor telephone communication skills in this formal setting - either because of language problems, cognitive or behavioural problems, mental health or substance abuse issues*."

Clearly one of the most significant reports was the almost insurmountable issues faced by vulnerable claimants. Reports outlined that such claimants will often not understand what

is being said to them or the implications of what they are saying (which is later used against them). A number of respondents reported that their customers suffered from phobias dealing with people in authority or with public officials or from "*brain-freeze*" with dealing with people on the phone; some also noted fears from claimants about receiving calls from withheld numbers, for example, because they are in debt and afraid of speaking with creditors.

> *"It is dangerous because the client may well be on his/her own and may have suicidal thoughts without anyone to assist. .. There are in any case the same problems of clients with mental health issues finding any phone conversation difficult and especially those from official bodies. The phone call serves no purpose because there is not sufficient information to question the decision."*

Written explanations and MRNs

> *"There seems to be a lot of confusion regarding the MR with customers and they don't always know they've even had a reconsideration and miss the appeal process"*

A further layer of challenge is with the process of issuing written explanations. Again, whilst this could service a reasonable and supportive function to clarify gaps in evidence to support effective revisions and decision-making, it has the effect of further obscuring the dispute process by adding a further layer of jargon and bureaucracy. This is mainly because MRNs are very unclear and claimants do not realise what is an MRN and what it is not.

There is no actual statutory requirement for an MRN and there is no prescribed format for what it should contain, yet if a claimant has not received one this can be used as a barrier to appealing as a matter of DWP policy. PIP MRNs being most notably unclear and being mentioned in both sets of data as a particular cause for concern by respondents.

It is arguably obstructive to natural justice to have a policy or practice which expects claimants to respond to a letter that has no statutory basis, no clear format, title or structure and only mentions appeal rights after multiple pages of generalised text and complex jargon.

> *"Letters related to the process are equally concerning and the idea of consistently getting 2 copies of each MR or being able to send them to reps also seems to have gone out of the window. The decisions themselves are often rambling; happily and obviously inconsistent and often incomprehensible."*

Use of evidence & quality of decision-making

> *"They could be more objective in viewing the Maximus/ATOS medical reports. It is often the case that a challenge to a benefit decision is based around pointing out the obvious flaws in these reports."*

In both sets of data decision-makers are reported as "*rubber-stamping*" widely discredited private contractor medical reports whilst ignoring other evidence from credible sources close to the claimant (i.e. GPs, support workers, specialist workers, social workers, carers etc.). Indeed, the use of private contractors at all was criticised and argued as a significant cause for the poor quality of decision-making.

> *"DWP could take account of the number of successful appeals and complaints regarding HCP reports and place more weight on evidence provided by professionals who know the claimant where that is available "*

DWP decision-makers routinely fail to reconsider a decision where health care professional (HCP) input is considered important, so this impacts on all disability-related claims for ESA and PIP.

If DWP and HMRC applied a similar approach that Tribunals adhere to, giving due regard to *all* evidence submitted, and making decisions ,using a balance of probability test, the quality of decisions would arguably be vastly improved saving the claimant the stress, support services the drain on resources and the tax payer the expense of funding and administering appeal hearings.

> *"We have experienced a number of occasions where the MR is done verbally and they are invited to send further evidence but decisions are made before they are able to send such evidence in support of the MR"*

It has also been widely reported that the chances of a claimant actually having their decision revised at MR stage are almost negligible to the point where most advisers and claimants view MR as a formality and expect a negative decision.

One respondent noted that in order to achieve success outside of Tribunal they were using either the complaints process under Equality law or else pre-action protocol for Judicial Review. This includes examples of considerable jumps from low points and no award to higher or standard rate PIP in both components.

> *"Examples of changes of PIP points allocations include a profoundly deaf young person going from 2 points to 26 points after judicial review pre-action, another profoundly deaf young person going from 2 points to 22 points at tribunal and a further profoundly deaf young claimant going from 2 points to 18 points following a complaint. "*

Numerous respondents reported issues with meeting deadlines for supplying evidence.

> *"With failed WCAs, you are supposed to submit supporting evidence, but you generally don't get to see the full ESA85 report in time, so cannot submit any meaningful evidence that can directly challenge the assessor's opinion"*

Respondents outlined that the cost of obtaining evidence was a considerable barrier with many GPs charging up to £125 per letter; when these were affordable they were often not

taken into account by decision-makers. Frustratingly, at times the evidence from GPs is of little or no value in terms of detail and relevance to the benefit but costs the same anyway.

> *"I am aware of very few cases in which the DWP has actively attempted any sort of evidence gathering. If such processes exist, I don't think they are being used. Evidence gathering is left to the claimant with all the costs and problems which attach."*

Numerous respondents expressed deep concern that the responsibility for gathering evidence is placed on the claimant who is often vulnerable and who in most cases cannot afford to provide the evidence that they need. The DWP are also not very forthcoming with the evidence that they use to inform their decision and their written explanations confuse claimants. This leaves the claimant unable to focus clearly on relevant points that are in disagreement and for representatives, increases the administrative burden related to delays in the appeal process.

An easy win solution for all would be for DWP to more regularly use the powers they currently have to request evidence form HCPs direct. HMRC were cited as using these powers more often which was a positive.

Could more effective communication with claimants and their support workers or advisers improve the quality of decision making?

DWP need to acknowledge advocates or advisers better and ensure that they engage effectively with them in order to support claimants to better engage with the process.

Respondents noted that it was good practice to develop local links with services as the conduct of decision-makers tends to be less intimidating towards advisers or advocates. Working with advisers and advocates also improves the efficiency of decision-making because claimants are able to provide what is needed at the right time, thereby preventing needless escalation.

> *"..previously we were able to speak to the decision makers in our local office who, after we had explained the facts of the case, would direct us as to what evidence was required to alter the decision. This gave us an opportunity to try and obtain evidence that was appropriate to the question at issue form the decision makers view point. Obviously, if we were unable to do this then the case would proceed as normal; however, it did mean that cases were not ending up at Tribunal unnecessarily."*

Finally, some respondents reported that when they phoned in as advisers, for example to clarify where the client was in the process, there was mixed use of 'implicit consent' by DWP call handlers. Some also noted that even where written authority was sent in, at times this was not registered on the claimants' file and at other times DWP failed to engage with them unless they had enduring power of attorney. There were also numerous issues with DWP failing to call back the adviser/ advocates even after multiple chasing calls.

What types of communications should the government prioritise?

Use of email & apps

> *"The DWP should as a matter or priority make it possible to deal with the appropriate DWP office by email. Local authorities can manage this with highly confidential information."*

A number of respondents suggested improving communications by making effective use of secure email to supplement postal communications. The benefits vastly outweigh any perceived risks. This is a free communication tool used by the Tribunal service and local authorities very effectively. It generates evidence of sending, whilst also proving receipts. It also helps ensure that at least outward communication (such as evidence sent by claimants) is kept and not lost.

Over time perhaps DWP and HMRC could explore use of secure apps so claimants can take a photo scan of a document and instantly send it to the relevant department.

Written communications

Respondents noted a number of improvements that could be made to written communications from DWP and HMRC. For example, as noted earlier, PIP decision notices and MRNs are generally very lengthy and full of jargon, overly generalised and lacking in any useful insights into the reasoning or evidence used to make the decision. Letters should always be provided in jargon free plain English which means that the phrase 'mandatory reconsideration' itself should be re-phrased.

Verbal / Telephone communications

> *"Telephone communications with DWP should be with local BDC offices. Calls must be free and Vivaldi must go".*

The evidence from both sets of data in 2015 and 2016 indicates that there are substantial issues with the telephone communication skills of DWP call handlers and decision-makers. Respondents noted that phone contacts often involved attempts to process and communicate complex data.

> *"To be successful at reconsideration requires an understanding of activities/descriptors being assessed. Without tailoring evidence towards this criteria - it is not going to be successful. Particularly harsh when there are barriers to communication e.g. learning disability, mental health condition etc."*

Therefore, respondents suggested that training staff with equality awareness and communication skills for vulnerable claimants would be a good improvement. Discussions with claimants on the phone should always be conducted in a respectful manner, 'listening' to claimants and appropriate to their specific communication needs.

Many of the skills or solutions suggested by respondents here reflect good practice already applied in the advice sector on a daily basis when communicating with clients (empathy, respect, good use of open, closed and probing questions, active listening, reflection, clarification etc.); these skills are particularly useful when talking with the vulnerable. These skills are also employed daily by Tribunal judges and Panel members when making adequate findings of fact.

> *"Pre decision communication and fact finding could create very significant cost savings."*

Some form of 'assessment' or 'screening' of communication needs, like that which is used to support students in further and higher education sectors (special educational needs assessment), would arguably support an improvement and more effective engagement with these groups.

Importantly, where claimants either have disclosed a need or it becomes apparent that there may be a need of support to engage effectively, claimants should be supported to make relevant links with local advice or advocacy agencies. There are a number of local and national databases which could help. An example is the *Social Care* widget (run by LASA) which helps claimants and/or advisers to source local advice & support[3].

DWP Alternative communications Task group

It may be worth noting that NAWRA has been engaging with the DWP Alternative Communications Task Group and recommendations are due imminently. Initial recommendations released to members on 15th March 2016 indicate acceptance that a "*one-size fits all*" approach is not appropriate to meet the needs of claimants with cognitive, literacy or linguistic challenges. Rather, there is cross-group support for more individually tailored communications with vulnerable claimants across all DWP departments; this would arguably help Government meet Equality legislation more adequately in this vital area.

Claimants' experiences of claiming JSA pending ESA dispute

> *"Poor decision-making has led to disabled people being forced to sign on to continue receiving benefit income."*

The problems with this part of the process are significant in terms of impact on claimants' health. Respondents noted that lengthy delays in processing MRs often meant that claimants appealing a Work Capability Assessment (WCA) decision remained on JSA (and thereby under conditionality and threat of sanctions) for far too long.

[3] Social care info (database); URL available @ http://socialcareinfo.net/

Poor advice at Job Centre Plus (JCP) offices

> *"Some claimants are being told that they cannot claim JSA as they are unfit for work therefore unable to fulfil claimant commitment. They don't challenge this and are then left with no income, having to rely on foodbanks, crisis loans etc. Others cannot face claiming JSA and just don't bother."*

Where claimants challenge a WCA decision they can obviously claim JSA pending their MR; however, the basic rules of JSA dictate that they must also sign-on to declare that they are available and actively seeking work. This creates an ethical issue for many claimants who do not wish to lie on the forms every two weeks.

> *"ESA claimants left without an income until their appeal is registered find it extremely difficult to get redress as they often cannot make or receive phone calls as they have no electricity to charge their mobile and no money to put credit on their phones or pay for food"*

Respondents also noted that many of their clients were also worried about signing a form that could be later used against them. Indeed this fear is not without grounds as there were a few of examples where respondents noted that DWP made that precise argument in the submission, citing that the appellant was able to engage with interviews and undertake job search etc.

A further issue is with JCP work coaches and staff who were often cited as needing further training to help them to understand the restrictions that claimants may negotiate on their claim. Although they still have to agree that they are capable of work, under regulation 13 (3) of the JSA regulations 1996, claimants can place "*reasonable restrictions*" on what is expected of them due to their physical or mental health condition[4].

There are also other rules under regulation 55 (ibid) regarding extended sickness which allows claimants to take between 2 and 13 weeks off sick on account of some form of "*specific disease or disablement*". This could help claimants during the MR stage and many advisers are supporting claimants to apply for this exemption where applicable.

However, rather than discussing the full range of options open to claimants, or signposting them to independent advice and support, JCP staff are routinely advising claimants to sign off JSA and re-claim ESA. This is evidence of maladministration which creates inevitable administrative barriers, delays in payment and of course poverty.

Sanctions

> *"People with serious mental health problems often cannot deal with the extra bureaucratic obstacle that this process involves. They get further into debt, burden friends and relatives, get utility cut-offs and go without food etc. Their health suffers further deterioration.*

[4] Jobseekers' Allowance regulations 1996; URL available @ http://www.legislation.gov.uk/uksi/1996/207/contents

Otherwise there is the problem that everyone involved is taking part in a pretence: that the person is fit to work."

The numbers announced recently by Dr David Webster of University of Glasgow indicate staggering numbers of individuals subjected to repeated sanctions during 2014/15. For example, out of the 284,436 claimants sanctioned under JSA, 24% were sanctioned more than once; 9% were sanctioned three times or more; and 1,042 were sanctioned ten or more times (0.05%). ESA claimants are also more not less likely to get sanctioned repeatedly. Further, safeguarding guidance[5] does not seem to be widely known or applied.

"It might be thought that because ESA WRAG claimants are agreed to be too ill to work, DWP might be more reluctant to subject them to repeated sanctions. Figure 6 shows that this is not the case. ESA claimants are in fact more likely than JSA claimants to be sanctioned repeatedly." [6]

Indeed, respondents in the NAWRA data widely reported that claimants misunderstand escalating sanctions rules so become subjected to them all too easily. Naturally, claimants who are busy trying to secure basic survival needs are not very well able to engage with job search or other mandated activities so were often caught in a cycle of sanction, poverty and destitution.

Further, respondents reported that such claimants rarely dispute these sanction decisions, again, because they were not advised or supported effectively about their options and rights. Again, this is supported by Dr Webster's research which indicates that around 80% of JSA sanctions decisions remain *unchallenged* even though success rates are as high as 70%. The figures for ESA challenges are 50% with a 50% success rate. Four fifths of ESA sanctions are now imposed for failing to participate in '*work related activity*'[7].

Summary

"The process is utterly flawed and simply not fit for purpose."

Claimants face a considerable and often insurmountable tide of barriers which they need to overcome in order to secure dispute resolution. The quantitative data from 2015 for evaluating the main aims of MR were highly critical in most areas, and NAWRA members overwhelmingly disagreed (75%) that MR met its main aims to resolve disputes as early as possible.

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[5] *Safeguarding and Vulnerability* ; Work Programme Provider Guidance; URL available @ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/476639/wp-pg-chap-4b.pdf ; also see *Safeguarding guidance, a tool for practitioner* – CPAG's Welfare Rights Bulletin 248 – Oct 2015; URL available @ http://www.nawra.org.uk/wordpress/wordpress/wp-content/uploads/2015/12/Safeguarding-guidance-a-tool-for-practitioner-CPAGs-Welfare-Rights-Bulletin-248-Oct-2015.pdf

[6] *David Webster (Glasgow University) briefings on benefit sanctions*; CPAG; URL available @ http://www.cpag.org.uk/david-webster

[7] ibid

The qualitative NAWRA data from 2015 clearly highlighted a barrage of administrative challenges that only the most persistent claimant (or adviser/ advocate) can overcome. These included: almost no acknowledgement letters being sent out; lost requests for MR and evidence provided in support of MR; written explanations being sent out without request and being formed using vague language and without clear signposts to appeal rights; late DWP submissions and other related problems in many cases causing late requests for MR (which are most often refused).

However, of particular concern was the devastating 'gateway-keeping' effect that verbal explanations were having on the processing welfare disputes and judicial redress. This was seen to be caused by officious and intimidating verbal justifications for DWP decisions, very often providing erroneous advice, withholding the full range of options open to often vulnerable claimants and deterring them from taking further action. These procedural barriers are totally unacceptable and are arguably a breach of natural justice and human rights law.

Similarly, the 2016 data is more or less congruent with the 2015 data and respondents remained highly critical that the policy was delivering on its main aims, despite having almost doubled the response rate.

> "*(By design) it creates confusion and delay and therefore achieves the aim of reducing appeals"*

The qualitative data also demonstrated virtually identical trends with issues repeated across all of the major areas already identified in 2015 but with more detail. This helps demonstrate the veracity and consistency of the data and the compelling issues noted for vulnerable claimants by NAWRA members and associated individuals and organisations across the UK.

Issues noted by respondents in the latest set of data centred on the immense challenges that claimants with cognitive impairments face when dealing with the complex welfare system.

> *"It puts multiple barriers to access to justice for appellants. it has been designed to reduce the number of appeals not by giving an earlier fairer outcome but by putting off people appealing in the first place"*

This includes numerous examples about the devastating impact that being on JSA has for claimants disputing WCA decisions with related issues being noted about poor levels of advice and maladministration often leading to sanctions and destitution for the vulnerable.

Social Security & Child Support (SSCS) Appeal receipts - post MR

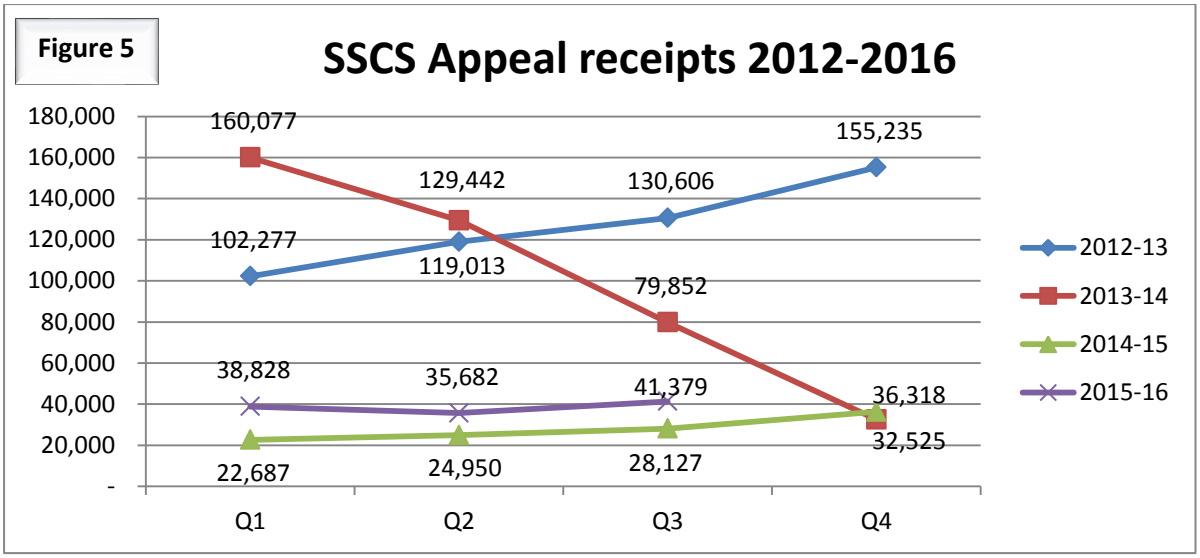
> *"The independent element in the system offered by Tribunals has been effectively destroyed"*[8]

It is widely reported and is a matter of public record that the quality of WCA decisions has been consistently poor[9]. It is also recorded in the Tribunal statistics leading up to the introduction of MR that that most of the social security appeals over this period consisted of challenges against WCA decisions, averaging 66% of all social security appeals over the year prior[10].

There were decreases in WCA appeals anyway before MR was extended to cover all major DWP and HMRC benefits, likely due to the assessment back log noted in the Low Commission report from March 2015[11]. However, as soon as the new rules were introduced for all DWP benefits, and led by dramatic drops in WCA appeals in particular, there was an immediate drop of 64% in overall numbers (from 130,606 to 79,852) for the period October to December 2013 compared with the same period in 2012. There was another drop for the comparable period of 2014 (compared with 2013) with receipts dropping from 79,852 to just 28,142.

In short, from a position of consistent and incremental increases year on year, appeals receipts plunged 78% overall in the two year gap between October 2012 and October 2014.

Figure 5



[8] ibid

[9] *Employment and Support Allowance and Work Capability Assessments, First Report of Session 2014–15*; (Works & Pensions committee); URL available @ http://www.publications.parliament.uk/pa/cm201415/cmselect/cmworpen/302/302.pdf

[10] Tribunals statistics (HMCTS); URL available @ https://www.gov.uk/government/collections/tribunals-statistics

[11] *Getting it right in social welfare law* (Low Commission, March 2015); URL available @ http://www.lowcommission.org.uk/dyn/1435772523695/Getting_it_Right_Report_web.pdf

Though imminently due, the figures for the most recent quarter of 2015/16 (Jan-March) are not yet available. However, it is worth noting that appeal receipts are now a fraction of what they once were. We can see this graphically if we compare the blue (2012-13) and red (2013-14) lines in *Figure 5* above. Since the drop in appeals in the quarter ending March 2014 after MR was introduced across all benefits, the overall figures for SSCS appeals have remained steadily low (green and purple lines above).

Administrative Justice Concerns

As Judge Martin, former President of the Social Entitlement Chamber of the First-tier Tribunal has argued that the introduction of MR was of "*dubious advantage"* and he expressed concerns that the process may deter perfectly valid claims from proceeding. The only advantage he saw to its introduction would be if it led to "*a much more rigorous reappraisal by the Department of its decisions*" [12]. The broad evidence, including the evidence from NAWRA members and associates, clearly indicates that this has not been the case.

Simultaneously, the Administrative Justice and Tribunals Council (AJTC), a body which helped to keep account of Government decisions, was sadly formally abolished on 19th August 2013 just prior to the introduction of MR across most DWP and HMRC welfare benefits. This was executed in a climate of legal aid reform scrapping most opportunities of access to welfare benefit advice under legal aid.

Nevertheless, after it was announced that AJTC would be disbanded, and citing concerns about the risk for lack of independent judicial oversight over Government decisions during a period of unprecedented reforms to welfare policy, AJTC stated:

> *"It would in our view be unsurprising if claimants conflated these concepts [appeal and MR], or failed to appreciate how an appeal was an independent judicial process entirely distinct from the reconsideration concept"*[13]

It is the view of NAWRA that the swathe of welfare reforms introduced by recent Governments has had a cumulative and devastating effect on some of the weakest and most vulnerable in our society. Whilst the appeals system was functioning, although decision-making at DWP and HMRC did not improve significantly, there was redress via the Tribunal system. However, the appeals system has effectively been decimated with the introduction of MR. Due to the obstructive nature of MR in practice this is arguably the single most significant blow to the administrative justice system of recent times.

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[12] *Mandatory reconsiderations* (Employment and Support Allowance and Work Capability Assessments - Work and Pensions Committee); URL available @ http://www.publications.parliament.uk/pa/cm201415/cmselect/cmworpen/302/30209.htm

[13] *Future Oversight of Administrative Justice* (Administrative & Justice Tribunals Council, July 2013); URL available @ http://ajtc.justice.gov.uk/docs/AJTC_Response_to_JCR_(07.13)_web.pdf

" 'Administrative justice' has at its core the administrative decisions by public authorities that affect individual citizens and the mechanisms available for the provision of redress"[14]

Key recommendations

Before being disbanded AJTC provided some excellent frameworks which are still very useful for benchmarking administrative justice standards today. These are known as the *principles of administrative justice*.

Recommendation 1: NAWRA recommends that DWP and HMRC commit to a clear strategy which aims to ensure that every level of social welfare decision-making follows the principles of administrative justice as laid out by the former AJTC; namely to:

1. make users and their needs central, treating them with fairness and respect at all times;
2. enable people to challenge decisions and seek redress using procedures that are independent, open and appropriate for the matter involved;
3. keep people fully informed and empower them to resolve their problems as quickly and comprehensively as possible;
4. lead to well-reasoned, lawful and timely outcomes;
5. be coherent and consistent;
6. work proportionately and efficiently;
7. adopt the highest standards of behaviour, seek to learn from experience and continuously improve. [15]

Recommendation 2: Given the weight of evidence against MR in practice, and the amount of work, time and money it will take to make MR "*fit for purpose*", Government should consider whether the process of MR is worth retaining at all. In order to save time, money and meet the central aims of MR as a policy, NAWRA recommends that MR be scrapped entirely.

However, if the policy must be kept, to help ensure that the mandatory reconsideration process is achieving its main aims to resolve disputes as early as possible and in line with equality and human rights legislation, NAWRA recommends that DWP and HMRC undertake a wide reaching Equality Impact review of the mandatory reconsiderations process *end-to-end*.

Recommendation 3: NAWRA also recommends that DWP and HMRC make the following specific changes aimed at increasing accessibility for vulnerable claimants as soon as possible.

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[14] *What is Administrative Justice*? (UK Administrative Justice Institute (UKAJI); URL available @ https://ukaji.org/what-is-administrative-justice/

[15] *Principles for Administrative Justice,* (AJTC); URL available @ http://ajtc.justice.gov.uk/docs/principles_web.pdf

i. Verbal explanations

a. Take a proactive approach to assessing vulnerability early on. Checking details of vulnerability disclosed on an application form is a good starting point; however, if claimants are not engaging or are difficult to communicate with this could be a sign of underlying vulnerability.
b. Improve equality training for call-handlers and decision-makers. Aim for best practice in communication as routine for all claimant contacts, including use of empathy, respect, congruence and active listening skills. Vulnerable claimants require the additional support to engage and it is in everyone's interests that they do engage effectively.
c. Always offer the full range of options when speaking to claimants over the phone. As there is a clear conflict of interest, decision-makers should never advise on particular routes of action. It is up to the claimant to decide on next steps once informed by independent advice.
d. Always signpost for further advice and support allowing reasonable and proportionate time extensions for providing supporting evidence. This might include linking with local specialist agencies in the Third sector that might have specialist skills and experience for certain disabilities or conditions.

ii. Written explanations

e. Remove jargon wherever possible and commit to use plain English. As above, have a strategy for assessing needs and offer specialist support for additional needs where needed (i.e. literacy, language, mental health or cognitive impairments etc.).
f. As used in HMCTS as well as local authorities, accept use of secure email communications and explore use of other technologies in order to bring DWP and HMRC up to speed with 21st century working practices. This will have the effect of reducing barriers and helping to limit maladministration and lost evidence.

iii. Evidence gathering & decision-making.

a. Use *inquisitive* not adversarial methodology when gathering and interpreting evidence. Aim for objectivity and apply the balance of probabilities test. Tribunal decisions are widely accepted as being of a high standard because principles of administrative justice are generally adhered to. DWP and HMRC should therefore aim for the same standards of fairness and objectivity and should not be influenced by political or other drivers.
b. Be proactive about obtaining evidence. There is no reason why DWP cannot contact HCPs direct with specific queries. This will save claimants and assessors time and will improve quality of decision-making.
c. Allow plenty of time for claimants to provide evidence in a way that is suitable for them.
d. The current system is detached from accountability and is therefore very inefficient. Therefore, DWP should return to using decision-makers who can

develop local partnerships, relationships and knowledge useful to facilitate quality decisions.

e. Improve communication with advisers and other advocates in order to improve quality of decisions and support vulnerable to engage effectively

NAWRA hopes that SSAC will consider seriously the proposals laid forward in this response in order to support *radical* and meaningful reform of the Government's mandatory reconsiderations policy and practices.

NAWRA committee

March 2016

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