Adviser

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A guide to benefits, housing, employment, consumer and money advice

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The revolving doors of mandatory reconsideration

In this article, Eri Mountbatten looks at the new rules for mandatory reconsideration (MR) and whether they are achieving the aim of streamlining the dispute process.

In a recent press release dated January 2015, the Department of Work & Pensions (DWP) triumphantly claimed that mandatory reconsideration was working:

'New figures show the average waiting time for disputes against benefit decisions have dropped substantially, from over six months to under a fortnight on average, thanks to a new and quicker system introduced by the government.'[1]

Do the new rules streamline the disputes process, as promised by the Government, or do they are actually push claimants through an ever increasing number of revolving doors?

"These rules introduced a number of changes to the way benefit decisions were disputed so that claimants challenging a decision will have to follow an escalating process of MR prior to appeal."

SCOPE

For the purposes of this article, we will be focusing benefits administered by DWP and not looking at Her Majesty's Revenues & Customs decisions (HMRC). We will also be focusing on claimants who are, according to available evidence, the most affected by the changes; namely claimants of Employment & Support Allowance (ESA) and Jobseekers Allowance (JSA). Details are correct as of the time of writing.

Legal context

MR was introduced by section 102 of the Welfare Reform Act 2012; regulations followed shortly after in the form of the Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Decisions and Appeals) Regulations 2013 (D&A Regs). These rules introduced a number of changes to the way benefit decisions were disputed so that claimants challenging a decision will have to follow an escalating process of MR prior to appeal. These rules also altered the process by which appeals are lodged, called 'Direct Lodgement', whereby appeals were to be registered direct with Her Majesty's Courts & Tribunals Service (HMCTS) instead of DWP. Direct lodgement applied to appeals against HMRC decisions after 1st April 2014.

The Government introduced these changes for Personal Independence Payment and Universal Credit from April 2013 (when these benefits went live) and for all other DWP-administered benefits and child maintenance cases from 28th October 2013. DWP stated that the new rules aimed to:

- resolve disputes as early as possible;
- reduce unnecessary demand on Her Majesty's Courts & Tribunals Service (HMCTS) by resolving more disputes internally;
- consider revising a decision where appropriate;
- provide a full explanation of the decision; and
- encourage claimants to identify and provide any additional evidence that may affect the decision, so that they receive a correct decision at the earliest opportunity.[2]

Sector concerns

When announcements were made regarding MRs, it is fair to say that advisers were more than a little suspicious about the new rules, and welfare rights forums like

rightsnet were ablaze with issues predicted and commentary on the policy. Some of the most vocal concerns focused on Government proposals not to allow payment of the assessment phase rate during MR (for ESA claims)[3] – a move announced by Lord Freud (Minister for Welfare Reform) in February 2013.[4] Bearing in mind the historically poor level of quality work capability assessments, apprehensions like these were understandable.[5]

Other concerns from the advice sector focused on the potential length of time it might take to complete a dispute via MR with some research indicating it taking months before a MR is completed not weeks.[6] Critics were not, however, limited to the advice sector. Judge Martin, President of the Social Entitlement Chamber of the First-tier Tribunal, also argued that the introduction of MR was of 'dubious advantage', as claimant disputes were already automatically reviewed as a part of the appeals process.[7] This echoed sentiments also reflected by respondents to the Government consultation on MRs in 2012.[8]

Atos' early exit

Another important factor affecting dispute waiting times even prior to the introduction of MR is the collapse of the Atos contract in the context of significant backlogs in ESA reassessments. In any case, after years of ineffectual platitudes Ministers eventually began to admit what advisers (and campaigners) had known for many years. In July 2013 they promised to address the issues with Atos citing an 'unacceptable reduction in the quality of written reports produced following assessments'.[9] This culminated with DWP announcing in March 2014 that they were ending the WCA contract by February 2015, six months early.

In the context of all this upheaval, there were a number of questions remaining about how MR was working in practice, so when the DWP indicated that they intended to publish statistics on MRs by the end of 2014 [10] hopes were high.

DWP 'Experimental' statistical release

Finally, in response to recommendations from the Work & Pensions Select Committee (WPSC)[11], the curiously named 'Experimental Official Statistics' (EOS)[12] were released in December 2014. The statistics focus on ESA and JSA MRs and cover the period 28th Oct 2013 to 31st Oct 2014. Further, the release was based on data from the DWP's Decision Maker and Appeals Case Recorder (DMACR) system which only covers Job Centre Plus (JCP) decisions; therefore Personal Independence Payment (PIP) decisions were disappointingly out of scope.

What's missing from the EOS release?

The data from the EOS release does offer some insights, including overall request figures for MRs since the policy was introduced, timescales for completing MRs. Importantly however, and what is perhaps more telling, is what is not included. Despite the spin, we have no idea really (at least from these statistics) whether or not MR is really working, certainly in terms of resolving disputes early and improving the quality of decisions. The outcomes (successful or otherwise) for both the overall JCP benefits picture and specifically for ESA were omitted despite recommendations from WPSC to provide those details.

Other points of clarification that would have been of great value are the number of claimants who continue to appeal after having a negative MR outcome (decision quality indicators); and perhaps the number of cases where claimants have had a decision revised after having provided additional evidence (evidence gathering process indicators).

For now, we can obtain some inferences to the effects of MR on appeals from statistics provided by HMCTS, though it should be noted that this gives us just part of the picture.

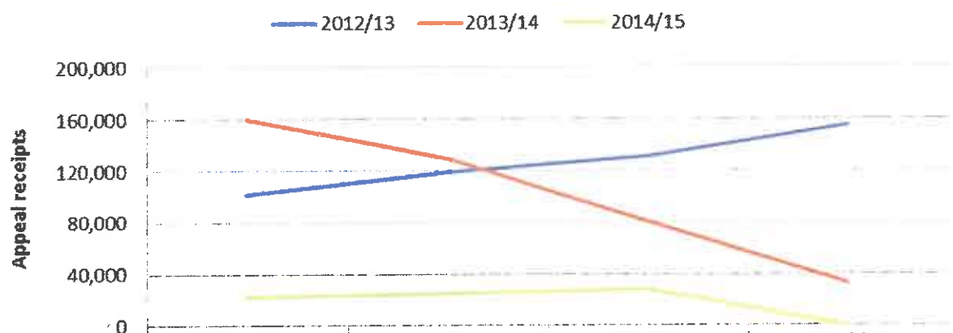
Appeal receipts hit the roof

In the year 2009-10[13], total Social Security & Child Support (SSCS) receipts were 339,213[14] and aside from a little dip in 2011-12, there was a steady increase in receipts year on year. This trend culminated with a staggering total of 507,131 appeals being registered by HMCTS in the year ending March 2013[15], equivalent to a rough increase in receipts of around 50% compared with 2009.

Receipts were continuing to rise (though at a slower rate) right up to the point prior to the introduction of MRs. In fact figures from HMCTS indicate rises of 36% (from 102,277 to 160,077) in the period April to June 2013 compared with 2012; and a rise of 8% (from 119.013 to 129,442) for the period July to September 2013 compared with 2012.[16]

"Despite the spin, we have no idea really (at least from these statistics) whether or not MR is really working, certainly in terms of resolving disputes early and improving the quality of decisions."

FIGURE 1: HTCTS APPEAL RECEIPTS 2012/13 VS 2013/14



	Apr-Jun	Jul-Sep	Oct-Dec	Jan-Mar
2012/13	102,277	119,013	130,606	155,235
2013/14	160,077	129,442	79,852	32,525
2014/15	22,699	24,969	28,142	0

Appeals drop almost completely off radar

In terms of comparing the results before and after the introduction of MRs, if we look at the latest statistics for the relevant comparable periods in 2012/13 and 2013/14 below,[17] it is like looking at a reverse mirror image. See Figure 1.

As soon as the new rules were introduced for all DWP benefits, we see an immediate drop of 64% in numbers (from 130,606 to 79,852) for the period October to December 2013 compared with the same period in 2012; a reversal of the trend to that point. We see another drop for the comparable period of 2014 (compared with 2013) with receipts dropping from 79,852 to just 28,142 (see Figure 2 below). Therefore, from a position of steady increase year on year, appeals receipts have now plummeted 78% overall in the two year gap between October 2012 and October 2014.

By the time of writing, we do not yet have the full figures for the most recent quarter of 2014/15 (Jan-March 2015) but it is worth noting that since the seismic drop in the quarter ending March 2014, the overall figures for SSCS appeals have remained steadily low with receipts recorded at 22, 699 (Apr-Jun); 24,969 (Jul-Sep) and 28,142 (Oct-Dec).[18] Appeal receipts are a fraction of what they once were. The chart below, which looks at the specific quarters Oct-Dec for the three years 2012, 2013 and 2014, helps to illustrate the stepped descent more clearly. See Figure 2.

"If DWP were measuring success of the new rules in terms of preventing claimants from appealing, then these figures would suggest that they have done a great job."

ESA and JSA appeals

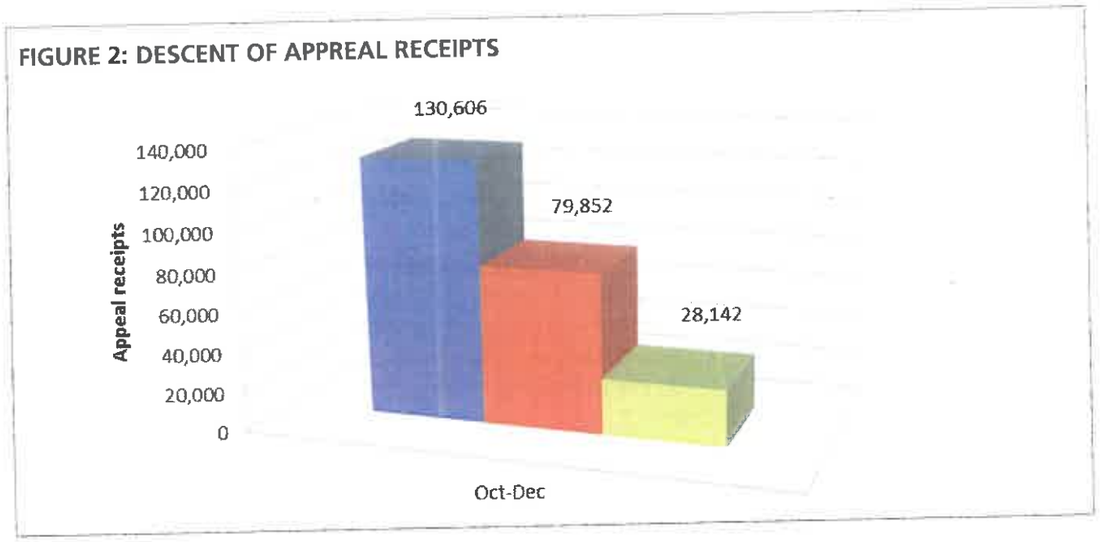
ESA and JSA are the largest benefit caseloads that DWP administer.[19] They were also the largest percentage of appeals registered prior to the introduction of the new rules.[20] Claimants of these benefits are therefore, demonstrably the most affected by the introduction of MR. For the same corresponding period since the introduction of the new rules, ESA appeals have dropped from 85,109 to 11,716 receipts (86%). JSA appeals have also dropped from 12,478 to 1,191 (90%).[21]

Further, the statistics for MR do not meet the breach. For example, using Tribunal statistics for ESA, average monthly appeal receipts for the year leading up to October 2013 were around 31,868; whereas, according to the EOS release by DWP, average monthly MR receipts for ESA were 14,758. We have to remain cautious at making too strong an inference from this, especially bearing in mind that less ESA decisions were being made in 2013; but it is interesting to note that on average, up to 17,110 ESA appeals per month may have dropped out the system. The numbers are simply staggering.

If DWP were measuring success of the new rules in terms of preventing claimants from appealing, then these figures would suggest that they have done a great job.

The NAWRA Mandatory Reconsiderations survey

According to recent data from the National Association of Welfare



Rights Advisers (NAWRA) indications are that MR is highly dysfunctional. NAWRA recently conducted some research by sending a survey to members across the UK. The survey asked a number of questions aimed at looking into how MR is working (or not working). There is not scope to report on the entire findings here but it is worth looking at some of the relevant sections from that data which is compelling.

DWP laws of 'clause' and effect

NAWRA members were asked the degree to which they agreed with the statement 'disputed decisions are resolved as early as possible': 52% disagreed and 23% totally disagreed (75% combined). In fact, the data from NAWRA indicates that there is widespread confusion built into this process often leading to (in many cases) insurmountable challenges and additional barriers, particularly affecting vulnerable claimants.

For example, to summarise some of the core issues outlined in the data, there were numerous reports that claimants have no idea where they are in the MR process; verbal requests for MRs are not being recorded; written MRs are routinely being lost; evidence submitted is often lost; DWP also fail to follow up when they should in order to complete the MR process for claimants so they become out of time for appeal.

> '[It is] a barrier to many people with mental health. Under [the] old system when you appealed, another Decision Maker automatically reviewed the decision so [there was] no need to revise [the] system; other than to put off people from appealing. Having no ESA during MR stage is killing people!' [22]

If you believed DWP Decision Makers you would also be forgiven for thinking that the verbal explanation process is also mandatory; but it is not. It is supposed to be 'discretionary' and claimant-led (see Figure 3).[23] However, almost all respondents in the research reported that DWP had themselves instigated the verbal process in response to the claimant submitting either a verbal or written request for MR. Some even reported that the verbal explanation was triggered prior to the claimant even having received their benefit decision notice.

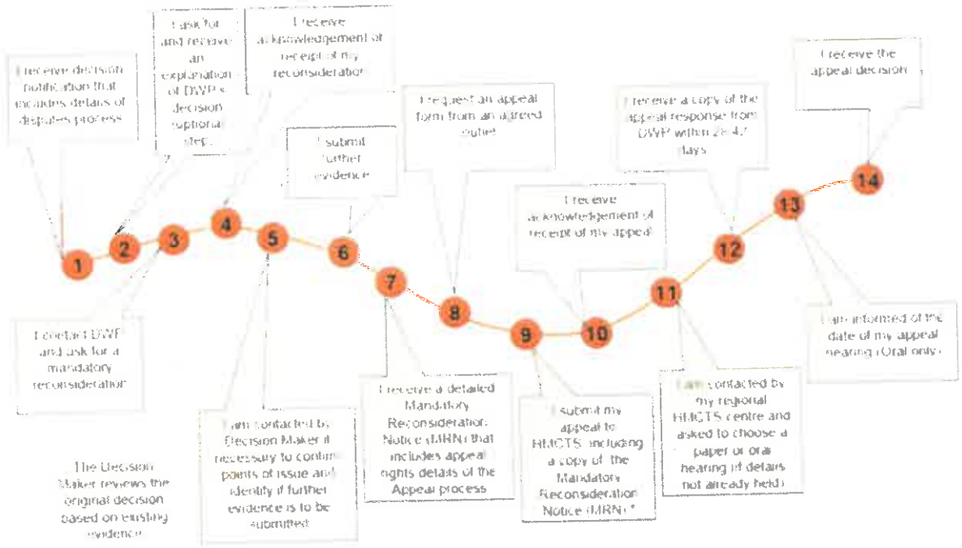
Further, according to the Appeals Reform Journey map, shown below in Figure 3,[24] acknowledgement letters should also be sent out to all claimants once a MR (verbal or written) has been received. Nevertheless, although there was evidence that at times these were being sent out, mainly for DLA and PIP MRs, there is no evidence that these being sent out to claimants as a matter of general process and the vast majority of respondents who commented had heard about these acknowledgement letters for the first time from the NAWRA survey itself. See Figure 3.

Smoke and mirrors

Trepidations about verbal explanation of reasons (i.e. step two above) were outlined by sector respondents to the

"If you believed DWP Decision Makers you would also be forgiven for thinking that the verbal explanation process is also mandatory; but it is not."

FIGURE 3: HIGH LEVEL APPEALS JOURNEY (MANDATORY RECONSIDERATION AND DIRECT LODGEMENT)



*If appeal includes further evidence it will be referred back to DWP Decision Maker for further reconsideration

Government MR Consultation exercise in 2012. Specifically, there were fears that 'the proposal to deliver the result of the reconsideration by telephone would put vulnerable claimants under pressure'.[25] Nevertheless, the Government pressed on with these proposals citing the policy, ironically in a move to create a more 'compassionate process' for WCA claimants in particular.[26]

One of the largest areas of concern within NAWRA data was about the attitudes of DWP Decision-makers (DMs) who were contacting claimants during verbal explanations. DMs were reported as being rude, 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, some might say, deliberately intended to deter claimants from appealing.

There were ubiquitous comments that DMs were making statements to claimants and representatives (though far less towards the latter) like, 'there is no point trying to dispute the decision'.. or there is 'nothing wrong with the decision and any appeal would be unsuccessful'.. or 'the decision is final'.

Noting the inherent unfairness in the process some claimants and representatives have been asking for the explanation to be put in writing, only to be told by some DMs that the verbal process must follow its course in situ first and that no written explanation or MR can be issued until they deal with it at the time, clearly meaning that claimants cannot adequately prepare.

Respondents also noted that DWP records of the conversation (where recorded at all) were later used against the claimant in the MRN and that reasoning was almost always generalised, biased and partial with selective interpretations of any evidence. There were also reports that MRs can only be issued where there is new evidence. We have seen similar reports on rightsnet where one member outlined that a DWP staff member stated that 'A mandatory reconsideration will not

"DMs were reported as being rude, placing excessive emphasis and justification on poorly evidenced or biased DWP reasoning."

'The calls are cold and claimants are dealing with legislation without advice and are being advised and convinced to withdraw their appeal without being told they can provide other medical evidence - which is not encouraged at form completion - which is leading to withdrawal of claims and appeals'.[27]

"In the face of extensive reforms and pressures on the advice sector (financial or otherwise), advisers are somehow required to do more for less."

be carried out if there is any gap in the customer's medical evidence.'.[28]

Unsurprisingly, claimants with cognitive impairments, such as those with mental ill health or learning disabilities, were reported as having suffered the most as they 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.

'....the time it takes to do a MR ....10-12 weeks and a high proportion of client have no income in this time, this in turn adds to the [work of] peripheral organisations GP's A&E food banks , hardship teams, churches and voluntary organisations . Frequently health issues that have been dormant flare up, [and there is a] risk of losing accommodation, but DWP don't count this impact'.[29]

When is an MR not an MR

As if the verbal process was not enough of a challenge, there is also strong evidence that the DWP are routinely issuing a written explanation of reasons prior to issuing the MRN – without this being requested. For all intents and purposes, other than a heading saying MRN (aside from PIP MRNs which do not have this label at all but rather are headed 'Your Personal Independence Payment Decision') there is little difference between the original decision notice, the written explanation or an MRN. All of these notices outline a general reasoning for their decision and it is understandable that advisers, let alone claimants, routinely get confused with what stage a claimant is at.

It is arguably unfair to require a claimant to produce a document that does not have a consistent template and is not defined in law to be used as a preventative measure to appeal rights.

A perfect storm

MR was intended to streamline disputes processes and reduce the burden and cost of seemingly unnecessary appeals. Intended or not, the consequences of the additional explanatory processes introduced outside of statute or regulatory guidance has meant that, particularly vulnerable, claimants have suffered the most.

In some ways what we have seen is a perfect storm. There was a sizeable backlog in ESA decision-making, particularly for the most disputed benefits ESA; fewer decisions naturally results in fewer appeals. Further, the introduction of MR added additional process designed to prevent disputes from progressing to HMCTS. Further, in terms of the effect on benefit disputes, it is fair to say that the ESA backlog discussed earlier, also contributed to some practical limitations; fewer decisions mean fewer decisions to dispute. As the Low Commission report had recently observed, there was a 'knock on effect' as 'fewer cases are reaching the tribunal stage over the claims cycle'.[30]

The system has demonstrably become more complex and alongside a number of other factors, such as less representation and advice services available, these have contributed to massive reductions in the numbers of appeals going ahead resulting in substantial limiting effects on claimants' human rights of access to a fair trial.[31]

In the face of extensive reforms and pressures on the advice sector (financial or otherwise), advisers are somehow required to do more for less. Nevertheless, if vulnerable claimants are to navigate the maze more effectively they will require more intensive and ongoing support from representatives, even in the current political and economic climate.

Glimmers of hope

The good news is that things are moving swiftly in the right direction. Thanks to the efforts of some noisy campaigners there have been some concessions. For example, in Touchbase Jan 2015 – it was announced that the verbal phone call routinely made to PIP claimants whose claims have been disallowed or reduced will no longer take place. The March 2015 version of the PIP handbook has already been updated.[32]

In the Government response to Dr Litchfield's fifth review – dated Feb 27th 2015 – Recommendation 3 was accepted. This means that the Verbal explanation call will begin to be generally removed from the MR process 'within a year' and information on the points of contention will be collated and included in the referral to the dispute resolution teams where possible.[33]

Using evidence from NAWRA members (and elsewhere), Neil Bateman badgered the DWP Head of Labour Market Decisions, Graham Dumbrell, who has since issued Gatekeeper Memo 03.15.38.[34] Dumbrell has since

promised that he will be collating information from across all of DWP Operations and has made assurances that DWP will be issuing new guidance to all departments; by the time of publishing this should be available.

There were 'no plans to introduce a timescale for completion of the mandatory reconsideration process'.[35] However, in response to a written question about the average clearance time for PIP in the House of Lords, Lord Freud has now confirmed that the DWP '...plans to introduce a clearance time target for all benefits, starting with ESA from April 2016.'.[36] This is a certainly a breakthrough as long as the timescale begins at the appropriate stage of the MR process and not deceptively midway through.

"There are some common sense measures that many agencies are already doing, such as producing your own easy-read self-help guides for claimants with simple charts for easy of navigation."

Mandatory manoeuvres

There are some common sense measures that many agencies are already doing, such as producing your own easy-read self-help guides for claimants with simple charts for easy of navigation. Further, although services vary considerably across the nations of the UK, advice agencies can (and many already are) also try to tier advice or set up service agreements by making more effective use of local statutory social support or tenancy support services too.

There are some other practical steps that claimants and representatives can make. For example, they can ensure that they are keeping well documented records of any communications with DWP and try their best to use written communications wherever possible.

Tactically speaking, for ESA claimants, because evidence submitted during MR stages will often delay the process substantially, claimants might find it more useful to supply the evidence at the appeal stage (prior to hearing) where it can still be used by DWP to revise a decision, thereby securing the assessment phase rate considerably earlier.

Despite the challenges, some advisers, myself included, are also successfully using Tribunal rules to effectively side-step the chaos in cases where a written explanation has been issued. The rules for dealing with MR are specifically set out under rule 22. In short, these require that along with the SSC1, the appellant must provide a copy of 'the notice of MR', a statement of reasons and relevant documents (rule 22). However, many readers may also be aware that Tribunals are bound by their 'overriding objective' to treat cases fairly and to avoid unnecessary formality and delay etc. (rule 2). HMCTS also have wide discretion to permit a breach of the rules where it is in the interests of justice to do so. This is dealt with under rule 7 which states:

'7.—(1) An irregularity resulting from a failure to comply with any requirement in these Rules, practice direction or a direction, does not of itself render void the proceedings or any step taken in the proceedings'.[37]

Therefore, claimants or representatives can ask HMCTS to use their discretion and accept a written explanation where it seems fair to do so and in my experience this is in many cases. Judges appear to be sensitive to the issues with MR and are applying the rules flexibly.

That does not mean, however, that the DWP will let it go that easily. DWP may (and often will) try to challenge HMCTS and argue that they are 'out of jurisdiction' using the D&A Regs (reg 26) and rule 22 of the Tribunal Rules; but the Judge will consider the matter on its own merits.

In the meantime, campaigners and advisers alike will be hoping for the current trend of good news to continue; and who knows, with the prospect of a new Government in May we may well get what we all want. If not, equality or human rights challenges in the High Courts, as we have seen with the WCA, are more than likely.

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