

BRIEFING – IMPLICATIONS OF THE HARRINGTON REVIEW OF THE WORK CAPABILITY ASSESSMENT, NOVEMBER 2010

Steve Griffiths, 10 December 2010

HEADLINES

- **The first Review of the Work Capability Assessment by Professor Malcolm Harrington has concluded that ‘there is strong evidence that the system can be impersonal and mechanistic, that the process lacks transparency and that a lack of communication between the various parties involved contributes to poor decision making and a high rate of appeals’.**
- **It makes a package of recommendations that go some way towards a more humane and efficient approach, though there should be many caveats. Many of the proposals are ‘mood music’, designed to affect the culture of the WCA in a positive way. The history of the WCA’s development, with biased use of evidence and disregard both of concerns from the advice sector, and evidence of a large number of wrong and unjust disallowances since 1996, suggests the need for:**
 - **close scrutiny of the Government’s response; and**
 - **independent consideration of more substantial changes and safeguards.**
- **This Briefing identifies a number of areas where the Government response misinterprets the Review recommendation, disregards crucial details, or spins it to accord with its own priorities.**
- **The Disability Alliance ‘is disappointed that only a quarter of the recommendations seem to be planned to be implemented before people on Incapacity Benefit undergo a WCA from Spring 2011 at the rate of 10,000 per week. This will leave an ineffective test operational at substantial social and material cost through disabled people not receiving appropriate support, high rates of appeal and an increased role for Jobcentre Plus’.**
- **This has the potential to compound the existing injustices (see www.informedcompassion.com) on an industrial scale.**
- **The Review notes that up to February 2009, appeals against disallowance resulted in a decrease in the total number of people found fit for work of 15% - an extraordinary level of error; an increase of the numbers in the Work-Related Activity Group of well over a third; and an increase of more than 1 in 10 in the Support Group. Given the impact of this on the lives of thousands of vulnerable individuals, particularly those who should have been allocated to the Support Group, this is a description of a system that is comprehensively failing.**

- **The Review found that ‘many people who are found fit for work feel an injustice has been done and are more likely to appeal, rather than being receptive to other support available’. There is substantial evidence that an injustice has been done to hundreds of thousands of ill and disabled people. Jobcentre Plus are left to deal with the large number who are not fit for work, in consequence of the systemic malfunction of the WCA and its predecessors. In the past, 35% of the disallowed returned to incapacity benefit. That route is no longer open to them; and it was always unsatisfactory without proper co-ordination between employment and health services. What will be done about all the people on jobseeker’s allowance who are victims of ‘poor decision-making’? Will they be identified, their status revised, and indeed compensated?**

SOME OBSERVATIONS

Most of the sections below discuss one of the Review’s recommendations and the Government’s response to it, with reference to commentary by the Disability Alliance.

1. Recommendation: that Jobcentre Plus manages and supports the claimant during the course of their benefit claim and identifies their chosen healthcare adviser.

The Government response says (abbreviated):

Support for individuals going through IB Reassessment has commenced in the trial areas. Calls to ESA recipients to explain decisions and as part of enhanced reconsideration measures are being introduced. In terms of identifying an individual’s “chosen healthcare adviser”, this is about signposting people to areas for help and support, e.g., with completion of the ESA50 questionnaire and emphasising the need to supply additional evidence.

The Disability Alliance says:

Some disabled people will not have one healthcare advisor but many. Other disabled people may not even be registered with a GP (many people with learning disabilities and mental health problems are unregistered). DA is concerned that DWP appear to be acknowledging a problem of the WCA but not improving the WCA, instead requiring further Jobcentre Plus actions to address WCA failings. This new activity will use resources we believe should be focused on ensuring the test is effective and disabled people have the support they need to find and keep suitable work.

Steve Griffiths adds:

The Government misinterprets the recommendation. ~~M~~Managing and supporting is not about ~~s~~ignposting people to areas of help and support, for example ~~w~~ith completion of

the ESA50 questionnaire and emphasising the need to supply additional evidence
The Review states specifically:

The purpose of these telephone calls (when they first claim ESA, after they have had their Atos assessment and for those who wish to appeal their decision, on appeal) should be to:

.... explain the need for the claimant to gather corroborative evidence about their health from the healthcare professional (HCP) who best knows their condition; this person then becomes the claimant's chosen healthcare adviser.....

While the recommendation has a supportive tone (while emphasising the need to remind the claimant of responsibilities), interventions by phone from Jobcentre Plus may be viewed with some scepticism. There is clearly an aim to reduce the number of appeals. Will the telephone calls be essentially persuasive in nature? How will this be monitored? What part will referral to independent advice play?

Disability Alliance comment in a personal communication that the fact that the new phone calls are from Jobcentre Plus means that the Government is tacitly acknowledging that the test is failing, but requiring JCP to prop it up . despite the vast amount UK taxpayers provide for the WCA already

In managing and supporting the claimant during the course of their benefit claim . doing it properly - the Jobcentre Plus Adviser is likely to come across health needs that are not being met:

Despite considerable commitment to the aims of ESA, Benefit Delivery Centre staff and JobCentre Plus and Provider advisers expressed concerns at the perceived stringency of the Work Capability Assessment, and the unexpectedly severe health problems of many customers in the Work Related Activity Group. The scope for helping some of these customers back to work was felt to be limited, and advisers felt hindered by their lack of discretion¹

Support should include a skilled resource to ensure that the claimant has access to health support and advice: that should be a spinoff from contact with the claimant, and could have a beneficial effect. Putting the Work Focused Health Related Assessment on the back burner has narrowed the support dimension of the original concept:

better access to existing return-to work support and entirely new programmes, delivered in partnership with the NHS, to help individuals to manage their health conditions (A New Deal for Welfare, 2006)

Indeed, this wider approach appears to have been abandoned. The importance of health interventions which are not conditional on short- or medium-term access to

¹ Helen Barnes, Paul Sissons, Jane Aston, Sara Dewson, Helen Stevens, Ceri Williams and Ruth Francis, Institute for Employment Studies, Employment and Support Allowance: Early implementation experiences of customers and staff DWP Research Report No 631, 2010.

employment should be explicitly acknowledged. This is an aspect of conditionality which appears to claimants to be particularly lacking in empathy. It is about whole system working with the Department of Health, which invests vast resources in long term conditions . in the same people. This would be cost-effective for both departments.

2. Recommendation: that every Atos assessment contains a personalised summary of the assessment in plain English.

The Government response says:

We agree that it is crucial that all ESA reports clearly convey the basis of the healthcare professional's opinion on capability for work. All Atos healthcare professionals will receive updated training to provide a robust justification in ESA reports in the year 2010 - 2011. We will also explore the feasibility of providing a personalised summary as part of the ESA report before the end of 2011.

The Disability Alliance says:

DA believes all WCA assessors should be appropriately trained. This would help reduce avoidable appeals due to poor assessments. DA is disappointed that the Government is not committing to providing people a full copy of their WCA. A personalised summary will not contain the full information and the Government is only committing to exploring the feasibility. We await the final decision on feasibility.

Steve Griffiths adds:

A crucial issue here is timing, as well as completeness. Again, the Incapacity Benefit rollout is going to be affecting 10,000 claimants a week from Spring 2011 on this admitted unsatisfactory basis. Secondly, and also crucially, the term 'robust justification' is introduced by the Government: it is not part of the Review's recommendation. It is a telling response: the Review says 'Such a summary also requires that the HCP considers the individual more holistically, helping to reduce the number of reports that are driven by the LiMA system rather than the HCP's judgement'. The Government's gloss on this spins the recommendation in an entirely different direction.

3. Recommendation: that Atos provide mental, intellectual and cognitive champions in each medical assessment centre. These champions should spread best practice amongst healthcare practitioners in mental, intellectual and cognitive disabilities.

The Government response says:

We recognise that assessing individuals with mental, intellectual and cognitive impairment can be challenging. Therefore DWP and Atos will establish healthcare professionals with enhanced skills as champions who will serve as a resource for all

healthcare professionals. As part of its continuing professional development programme in the year 2010 . 2011, Atos Healthcare has produced an additional training module on mental health conditions.

The Disability Alliance says:

DA understands that each assessor will see 8 people a day and there are multiple assessors in each assessment centre. It is difficult to envisage how one champion of health conditions per assessment centre will answer the over-riding problem of inadequate training for assessors or poor assessments for people with fluctuating conditions in particular.

Steve Griffiths adds:

Again, this is about cultural change. One would have more confidence in it if the champions provided a systematic inspectoral intervention, in a transparent, independent role with public accountability (regular reports).

4. Recommendation: that Jobcentre Plus Decision Makers are put back at the heart of the system and empowered to make an independent and considered decision.

Recommendation: that Decision Makers receive training so that they can give appropriate weight to additional evidence.

The Government response says:

The Department is committed to empowering and supporting Decision Makers to enable them to make the best possible considered decisions. Timing : A new communication forum "Every Decision Counts" is already in place providing Decision Makers with an opportunity to share issues and good practice. A Quality Assessment Framework will be developed to improve the consistency of decisions and Learning and Development will also be reviewed. These additional support tools will be introduced in 2011.

The Disability Alliance says:

DA is unclear what this means in practice but hopes tools are openly available and will be in place as early as possible in 2011. We suspect this partly links to the plan to use Jobcentre Plus staff to call claimants during the process. This duplicates the cost of running a WCA and will result in less DWP resources focused on ensuring disabled people get the support they need.

Steve Griffiths adds:

The recommendation refers to the Wrexham Benefit Delivery Centre scheme to telephone customers who had lodged an appeal against their WCA decision. The

original decision was explained to the individual, if they still had reasons to disagree additional information or evidence was obtained. Following this intervention, 15 per cent of claimants who had appealed either withdrew their appeal or had their initial decision revised by the Decision Maker. This pilot was also shown to have saved significantly more than the initial investmentq

Strangely, the Harrington Review does not find it necessary to enquire whether claimants were persuaded to withdraw their appeals, or whether decisions were revised in favour of the claimant, thus avoiding the need for an appeal. This is a lack of attention to fundamental outcomes.

In the Government response, there is a lack of specific attention to the Review's supporting point:

The Decision Maker is able to use additional medical evidence to help to assess a customer's eligibility for ESA, but in practice this doesn't appear to be taking place. Decision Makers should be better trained in interpreting medical evidence and in giving appropriate weight to the evidence provided.

From reading the evidence from advice and disability organisations, this is a point of considerable importance which should be specifically acknowledged by the Government.

5. Claimants as their own medical advocates

Relevant to this, a key concern from the advice and disability sectors is dismissed in the report with no discussion. The Review states (p51):

It is clear that some claimants expected DWP to be their advocate and to gather available medical information to assist them in their claim. One of the issues is the lack of clarity in communications with customers as to the role of medical evidence in the claim process. The ESA50 questionnaire asks for the contact details of treating HCPs and asks for permission to contact them, which some claimants, not unreasonably, then expect that DWP will follow up. No other communications with claimants tell them that medical evidence can be provided for use by Decision Makers.....

While the onus is and must be on the claimant to provide information to support their claim, this is not always clear to claimants. There is no doubt that collecting this information can place extra burdens on individuals. However, it is difficult to see any justification or method of operating such a system without requiring the majority of claimants to be their own advocates.

One does not have to go very far to find a method of operating such a system. It has just been abolished. The Disability Alliance submission to this very Inquiry stated:

Prior to the introduction of ESA, medical certificates could indicate people should be exempt from the Incapacity Benefit Personal Capability Assessment examination. Further information was then requested from their doctor (on a form IB 113). This has not been replicated within the ESA system which instead includes an ESA50 limited capability for work questionnaire form being sent to a claimant automatically (unless they are terminally ill). We believe the pre-October 2008 practice for information gathering had greater credibility and allowed more appropriate weight to be given to the evidence of people's own GP where necessary.

This is a point that is also dealt with in depth in the Citizens Advice report, *Not Working*. It is particularly important for claimants with mental health problems who may be unable to act as their own advocates. Failure to recognise this is an important shortcoming in the Review.

6. Recommendation: Decision Makers are able to seek appropriate chosen healthcare professional advice to provide a view on the accuracy of report if required.

The Government response says:

Decision Makers should seek appropriate advice and/or additional evidence in coming to their determination if they require. Different approaches, e.g., with Atos healthcare professionals providing advice and support in interpreting evidence on site through case consultations or "surgeries" and or workshops/training events, are currently being trialled. Agreed measures will be adopted nationally during 2011.

Steve Griffiths adds:

It does not appear that the Government is addressing, or indeed understanding, the thrust of the recommendation. A resource is needed which maintains the independence of the Decision Maker. That will hardly be Atos, which is to provide robust justifications of its decisions. It makes sense that the healthcare professional advice should be seen to be separate from Atos, and have a role of seeking evidence from healthcare professionals who know the claimant's case. This is known as medical evidence, and has a long established role in social security adjudication.

7. The appeals process

(15) Recommendation: that tribunal decisions are better monitored, including monitoring of the relative or comparative performance of tribunals.

(16) Recommendation: that training offered by the Chamber President to Tribunal Judges and medical Members should include modules on the evidence of the beneficial effects of work to an individual's well-being.

(17) Recommendation: that feedback from the First-tier Tribunal should be routinely shared with Jobcentre Plus staff and Atos healthcare professionals. As part of their professional development, Jobcentre Plus Decision Makers should be encouraged to attend tribunals.

The Government response says:

We will consider these recommendations, which are the remit of the First-tier Tribunal.

The Disability Alliance says:

DA is very concerned that these three recommendations appear to undermine the independence and authority of the Tribunals and await final consideration. It may mean that the Govt will make adjustments to the appeals process, perhaps in the Welfare Reform Bill due in January.

Steve Griffiths adds:

This does appear to be beyond the remit of the Review, and reflects a defensive approach perhaps occasioned by resentment in the DWP at the proportion of revisions of determinations by the Decision Maker: the number of allowed appeals reduced the number of claimants found fit for work in the ESA process by 1 in 7 up to February 2009 . an extraordinary figure (Table 6, p57 of the Review). There is no evidence of complaints about the appeals process . rather, in the published evidence (not only in the Review, but in reports such as Citizens Advice *Not Working* . the reverse. The President of the First-Tier Tribunal has been a consistent critic of poor decision-making by DWP for a period of years, and this continued in submissions to the Review:

“Many claimants give careful and detailed descriptions [in the ESA50] but this evidence is never referred to in the Atos HCP report. Nor is it drawn upon by the decision-maker. It seems to be air-brushed out of the information-gathering process.” President, First-tier Tribunal.

“The law refers to a “medical examination”. The invitation to the claimant refers to a “medical assessment” at a “medical examination centre”. Criticism by the claimant of the thoroughness of the examination usually meets the official response that it is not a medical examination but a “functional assessment”.” President, First-tier Tribunal

This points to a confusion at the heart of the design of ESA.

The House of Commons Work and Pensions Committee report, *Decision making and appeals in the benefits system* Second Report of Session 2009. 10, records a submission that has direct relevance to Recommendation 17 (that feedback from the First-tier Tribunal should be routinely shared with Jobcentre Plus staff and Atos

healthcare professionals). It is not a concept that will be new to the President of the First-Tier Tribunal:

In 2008, the final President of Appeal Tribunals annual report was published.Thereport summarised the key themes that have emerged since publication began in 2001, as follows:

- a) DWP should engage in more face-to-face contact with claimants;
- b) There was no consistent evidence of the effectiveness of reconsiderations;
- c) Some medical reports have underestimated the severity of disability; and
- d) Benefit claims and the appeals process could be particularly difficult for people with specific disabilities such as mental health issues or sensory impairments.

The former President of Appeal Tribunals (now the President of the Social Entitlement Chamber of the First-tier Tribunal), Judge Robert Martin, told us that, despite raising similar concerns each year, he believed no one within DWP had listened to the conclusions and recommendations detailed in the President's annual report. He explained that he had, in the past, asked for examples from the Department, which could demonstrate how the President's report had influenced or changed DWP decision making. He told us that, despite his request, he had received no examples from DWP to illustrate the report's value.

It will be good to see implementation of a dialogue the President has been calling for since 2001. The themes raised since 2001 have become very familiar.

It is interesting to note that the Review notes that there is a lack of robust data and management information on Tribunals which has made it difficult to understand fully the reasons behind the appeal overturn rate. Being able to differentiate between results of appeals by Judge and across regions, and cross-referencing them against the decisions, outcomes and regional variation available from Tribunals Service and DWP data would be invaluable in allowing a greater degree of understanding and transparency about this section of the process.

This is a rather different emphasis from the unmentioned Disability Alliance submission that:

DA members have also suggested regional variations in WCA outcomes which should not be the case. Scottish members have suggested a particularly stringent approach to the WCA in Scotland. Although there may be areas with particularly high incidences of some impairment groups, this should result in greater, not less, use of ESA. DA recommends regional breakdowns of outcome by impairment groups (and by overturned initial DWP decisions in appeals) should be used to identify areas where better training is required for WCA assessors.

8. The Review's Evidence for a Work Capability Assessment (Chapter Two)

The Review's overview of evidence for a Work Capability Assessment (Chapter Two) is narrow in its scope and gathers evidence off the shelf without looking at it thoroughly.

It repeats the fault of much of the thinking that has gone into the development of the Work Capability Assessment: it airbrushes out any serious consideration of the possibility that a substantial proportion of claimants might be currently, or in the long term, incapable of undertaking any work. It does not acknowledge that in cases of severe ill health, continual offers of inappropriate work-related support - rather than more broadly based support and rehabilitation on a basis of informed compassion as envisaged in the 2006 Green Paper - might be distressing and counter-productive, especially where financial security has been reduced. This disregards the weight of accumulating evidence from organisations such as Citizens Advice. The DWP's own findings of the high levels of health needs encountered in Pathways to Work (see Section 1 above) are relevant here.

Although the Review acknowledges that there has been some injustice, it gives almost no attention to the widely reported problems of inadequate assessment for the Support Group. It does find space for criticism of the independent Tribunal Service, giving a platform to those who wish to argue with the referee rather than addressing the failures that have occurred.

It may also be considered beyond his brief that Harrington should frequently repeat the assertion that work is good for all Incapacity Benefit claimants without provisos regarding their state of health. It continues the failure in the duty of care to those who cannot work, a failure which is the subject of overwhelming evidence, and a duty of care which receives almost no attention in this report.

In CPAG's Poverty magazine (Autumn 2010), their Projects and Outreach Worker Nick Jones questions the simplistic 'Work is good for you' message of successive Government publications, which refer constantly to Waddell and Burton's 'Is Work Good for your Health and Wellbeing'? Jones finds a far more nuanced and questioning account in Waddell and Burton's report than the conclusion repeated in the Harrington Review - indeed, he identifies a battery of unanswered questions. He says 'to recap: there is a lack of direct evidence on the subject, but the indirect evidence suggests that work is generally good for your health and wellbeing, provided you can get a job. Not just any job, but a good job'. According to Waddell and Burton:

'in terms of promoting health and wellbeing, the characteristics that distinguish 'good' jobs and 'good' workplaces might include: safety; fair pay; social gradients in health; job security; personal fulfilment and development; investing in human capital; accommodating, supportive and non-discriminatory; control / autonomy; job satisfaction; good communications'.

The Harrington Review compounds the fault by recommending that Tribunal medical members and judges should be trained in the Government interpretation of the importance of work without this important and little-known caveat. It is time the misuse of research in this field was acknowledged. When it is, the nature of the challenge will change.

9. A more compassionate process

There is striking acknowledgement that mistakes have been made, that the system is not compassionate, and that there have been victims. The Review concludes that ~~there~~ there is strong evidence that the system can be impersonal and mechanistic, that the process lacks transparency and that a lack of communication between the various parties involved contributes to poor decision making and a high rate of appeals. The Government attempts to respond positively to this:

6. Claiming a benefit as a result of a health condition or disability is a difficult time for many people, so we will ensure the administration of that process is compassionate in its treatment of individuals. We will take forward the recommendations outlined by the Harrington Review to increase the empathy in the system.

7. To do this we will ensure there is greater communication with individuals undergoing reassessment from incapacity benefits so they understand the process and their responsibilities. Every individual going through reassessment will get a call at the beginning of the process, at the end of the process and a further call if they appeal. The purpose of these calls will be to explain: the WCA; an individual's responsibilities; the support that is available after the WCA; and to allay fears about the process.

8. For those claiming ESA, we have already rolled out calls at the end of the process and for individuals who appeal. We will also use the experience of the incapacity benefits reassessment trial to look at enhancing information at the beginning of the process for this group.

Paragraph 7 shows that lessons have not yet been learned: the subject of the greater communication with individuals is that 'they understand the process and their responsibilities' – and not that claimants are listened to and sufficient and correct evidence obtained to reach a correct decision. Claimants have heard enough about their responsibilities. What about Government responsibility for all the injustices for which there is such substantial evidence? There are two points here: reassurance means that the claimant is invited to talk about the evidence, particularly medical evidence, that should be available in order to reach a correct decision.

But then, what about all the people on jobseeker's allowance who should not be? Will they be identified, their status revised, and indeed compensated? This is not a trivial proposal, but it follows from the evidence and the Government's claim that it is adopting a more compassionate stance. A major injustice has been perpetrated by Labour and Coalition administrations, with Lord Freud's design and continuing involvement a connecting link. The admission has repercussions: identification and compensation are the least that should be offered to the many whose health and wellbeing have suffered at the hands of this gigantic failure of policy and compassion.