

Legal aid in welfare: the tool we can't afford to lose

Research conducted by Scope, as part
of the Justice for All campaign

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Foreword

With an overhaul of welfare and benefits on the horizon and millions of disabled people moving from older style to modern benefits, the need for information, advice and support has never been so important. Whilst policy makers iron out the inevitable difficulties that come from introducing ambitious reform, legal aid will be a crucial tool for creating the fairer, accurate and incentivising system the Government is aiming for.

Improvements in decision-making, strengthened by legal help to challenge inaccurate decisions, are vital to ensure disabled people access the support they need to move towards work or participate and contribute to their local communities. We know this, because many disabled people we have spoken to who have been placed on the wrong benefit have not received sufficient financial and practical support, have been subjected to inappropriate sanctions and so are less likely to find work.

Disabled people's appeals represent some of the most complicated cases that go through tribunals and this report shows the challenges they face in negotiating legal complexities unaided. For example, being able to understand, interpret and determine the case law around being 'virtually unable to walk' sounds simple on the surface, but can be extremely complex in practice, requiring the knowledge and expertise of legally-trained professionals.

Removing welfare from the scope of legal aid is likely to place immense strain on an already stretched tribunal service. Independent legal advice is crucial to making an accurate assessment of an individual's case and advising on whether to go to appeal. Its loss looks set to lead to a rise in appeals with little chance of success, and lengthen the duration of each case and ultimately undermine the ambitious agenda the Government is pursuing.

In this report, we demonstrate that the success of the Government's welfare reform is dependent on the use of legal aid for appeals to ensure that disabled people get the vital support they need.

Richard Hawkes, Chief Executive of Scope

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Executive summary and recommendations

This report has been commissioned by the Legal Action Group, and funded by the Baring Foundation, to investigate the impact of the proposed legal aid reforms on disabled people. Carried out as the Legal Aid and, Sentencing and Punishment of Offenders Bill 2011¹ is progressing through Parliament, the research reveals that the removal of legal aid for welfare benefits cases will have a detrimental impact on disabled people's lives, and could offset the measures being put in place by the Government to support disabled people to get into work and out of poverty. It is this important link between legal aid and the success of wider Government welfare reforms that this report seeks to address.

Legal aid constitutes an important tool for improving the accuracy of welfare benefits decisions and ensuring disabled people have the right financial and practical support to get back into work, thereby fully supporting the Government's ambitions. At the root of the problem with the proposed legal aid reforms is the failure to adequately assess the level impact on disabled people's finances and their ability to engage productively with the Government's programmes to promote work related activity and employment in the reform of welfare.

We recognise that the Government's welfare reform plans place great importance on improving the quality of decision-making within the system², which is welcome. However, this report makes clear that legal aid will remain an essential part of testing the effectiveness of the benefits system. Various reports in recent years have acknowledged that a quantum leap is needed in terms of improving the quality of decisions on welfare benefits³. The Government's justification for taking welfare benefits cases out of the scope of legal aid reflects an unfounded sense of optimism as to how rapidly the proposed welfare reforms will translate into improvements for disabled people. In contrast, the adverse effects of the removal of legal aid would be experienced by disabled people immediately.

Over the course of this and the next Parliament, there will inevitably be teething problems in the new welfare system that the Government is trying

¹ Legal Aid, Sentencing and Punishment of Offenders Bill 2010-2011, <http://services.parliament.uk/bills/2010-11/legalaidsentencingandpunishmentofoffenders.html>.

² Department for Work and Pensions (2011), Written Evidence to Work and Pensions Select Committee's inquiry into the role of incapacity benefit reassessment in helping claimants into employment, <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmworpen/1015/1015we02.htm>.

³ Malcolm Harrington (2010), An Independent Review of the Work Capability Assessment, <http://www.dwp.gov.uk/docs/wca-review-2010.pdf>

to bring in. This was reflected by the Minister for Employment, the Rt. Hon. Chris Grayling MP, in his own submission to the parliamentary committee overseeing the Welfare Reform Bill:

“There will always be decisions that we get wrong the first time round, however hard we try to perfect the system.”⁴

Without the safety net of legal aid as implementation issues arise, disabled people will be left to deal alone with any potential shortfalls thrown up by the new system.

Moreover, this report raises serious concerns that the Government has not attempted to explore the effects that the plans to radically reform the welfare system will have in terms of the need for advice. Increased demand for advice and guidance can be expected to arise from two migrations of benefit claimants, firstly from Incapacity Benefit (IB) to Employment and Support Allowance (ESA) in 2013, and then onto Universal Credit (UC) by 2017⁵.

The need for advice, both now and in the future, is further driven by the complex nature of the law in this area. Welfare benefits appeals have been portrayed in the Government’s consultation as being easy to navigate. This is a wholly inaccurate picture, as claimants have to take into account legislation, regulations, guidance and case law when pursuing an appeal. Legal help to take an unfavourable decision to a tribunal appeal is the only way to ensure that disabled people are equipped to navigate this process, and obtain a just outcome.

The potential adverse effects of removing legal aid for welfare benefit reforms are compounded by the knock-on impact on a tribunal system already stretched beyond breaking point. The tribunal system is simply unprepared to cope with the increase in the number of self-represented litigants who haven’t had access to advice before appearing in front of the tribunal. Lack of legal aid will result in cases taking longer to resolve, which will further add to the pressure from the unprecedented backlog of cases that the tribunal system is facing. In light of all the above, this report serves as a critical warning that removing legal aid will delay or even deny justice for many disabled people, and undermine the Government’s ambitions to have a fairer benefit system that incentivises work.

⁴ Welfare Reform Public Bill Committee Proceedings (17 May 2011), http://www.theyworkforyou.com/psc/2010-11/Welfare_Reform_Bill/22-0_2011-05-17a.6.0.

⁵ Welfare Reform Bill 2011, <http://www.dwp.gov.uk/policy/welfare-reform/legislation-and-key-documents/welfare-reform-bill-2011/>

Building upon this, the report draws on the experiences of disabled people who have recently been involved in the appeal process, and investigates their pathways and the role that legal aid plays. We have identified case studies that reflect typical circumstances in which disabled people use legal aid funding to help deal with issues around their benefits, and have mapped out the impact that removing legal aid would have, taking into account future reforms to the benefits system. Whilst the core of the report looks at welfare benefits issues, we have also explored in a case study the impact on Special Educational Needs (SEN) reforms, and looked at the implications of introducing mandatory mediation for disabled children and their families' pathways through the appeal system (despite SEN cases being brought back into scope of legal aid).

Finally, we make recommendations for the Government to bring forward amendments to the provisions in the Legal Aid, Sentencing and Punishment of Offenders Bill that would retain legal advice for welfare benefits advice and reconsiderations. The case for recognising legal aid as an essential element for the success of wider welfare reforms is a very strong one. As the evidence in the report makes clear, removing legal aid for welfare benefits cases will undermine the Government's own welfare ambitions to support more disabled people into work and deprive many of them of the very support that can make work viable. The lack of advice for mediation could, in much the same way, undermine the Government's core intentions of its SEN policy and agenda.

1. Introduction

The Government's legal aid reforms, and in particular the proposal to remove legal aid for welfare benefits cases, have provoked strong concern and criticism. Remarkably, more than 90 percent of those who responded to the Government's initial consultation (over 5,000 respondents in total) opposed the proposed changes to the scope of legal aid⁶. As discussed in the Government's response to the consultation, which was published in June 2011, there were five key aspects about which respondents expressed serious concerns in relation to withdrawing legal aid for welfare benefits advice:

“[Many respondents] argued that these cases were not simply financial claims, but claims for minimum subsistence benefits. They also argued that these cases were complex; that there were strict time limits for appeals against benefits decisions; and that forthcoming reforms to benefits would increase the need for advice. They also suggested that welfare problems, if not addressed at an early stage, could lead to more serious problems later, such as homelessness.”

Since initial publication, the Government's proposed reforms have been scrutinised closely in relation to their impact on disabled people. Concerns about the Government's plans have been echoed by the Justice Select Committee, which questioned the assumptions underpinning the reforms⁸, and drew attention to the Government's recognition that ‘the class of individuals bringing these cases [are] more likely to report being ill or disabled in comparison with the civil legal aid client base as a whole.’⁹

Much of the evidence on the ground makes it difficult to accept the legitimacy of some of the arguments being put forth by the Government for the reforms; including that the tribunals are ‘user-friendly’, that the issues involved are not of high enough importance and are mainly concerned with financial entitlement, and that alternatives to non-legally aided sources to provide advice would fill the gap from the removal of legal aid. The widespread view among respondents to the Government's consultation was that these assertions misunderstand deeply the reality in these cases. There is clear evidence that legal help is vital for these cases particularly

⁶ Ministry of Justice (2011), Reform of Legal Aid in England and Wales: the Government Response, <http://www.official-documents.gov.uk/document/cm80/8072/8072.pdf>

⁷ Ibid

⁸ Justice Committee (2011), Third Report on the Government's Proposed Reform of Legal Aid, <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmjust/681/68102.htm>

⁹ Ministry of Justice (2010), Proposals for the Reform of Legal Aid in England and Wales Consultation Paper CP 12/10, <http://www.justice.gov.uk/consultations/docs/legal-aid-reform-consultation.pdf>

because the law is complex and constantly changing. The appeal process remains difficult for disabled people to understand and navigate, notwithstanding the tribunal's inquisitorial nature.

Attempts have been made to bring welfare back into the scope of the Bill. For example, the Public Bill Committee which has been scrutinising the reforms considered an amendment which, if passed, would have put a duty on the Lord Chancellor to 'ensure that when an individual is in dispute with the state or with a body that is an emanation of the state, in relation to a matter of welfare benefits, employment, debt, housing, or immigration, education or asylum support, that the individual shall continue to be entitled to legal advice, assistance and representation against the state or emanation of the state'¹⁰. Disappointingly, this amendment was not voted through, leaving legal aid for welfare in a precarious situation. Further amendments were sought at the Report stage of the Bill, but these were not debated on.

If the Bill is implemented in the current form, it would have a significantly negative impact on disabled people who require advice for welfare benefit appeals. The premises behind the proposal to withdraw legal aid for welfare benefits advice have been further disputed by a judicial review challenge which has been recently initiated by the Disability Law Service. The judicial review argues that the legal aid reforms impact on the performance of the public sector equality duty by the Secretary of State, in particular that:

"The consultation carried out by the Secretary of State did not fully consider the effect the proposed cuts would have on disabled people; the Secretary of State irrationally asserts that the negative impact of a loss of benefits for the disabled will be only financial, with no other subsequent social or personal impact. This clearly calls into question the validity of the consultation's Equality Impact Assessments; to have due regard to the needs of those with disabilities as defined by Equality Act 2010."¹¹

This report provides yet further evidence that removing legal aid for welfare benefits cases is unjustified, and that the negative impact on disabled people has been greatly underplayed. Even where the impacts are recognised as likely to be significant, there is no attempt by the Government to quantify those impacts. This report demonstrates that this situation is untenable and that, at the very least, the scale of the likely impacts can be ascertained.

¹⁰ Legal Aid Public Bill Committee Proceedings (6 September 2011), <http://www.publications.parliament.uk/pa/bills/cbill/2010-2012/0205/pro205110906p.pdf>

¹¹ Disability Law Service Issues Legal Challenge Against the Government Over the Legal Aid Bill (6 October 2011), <http://www.dls.org.uk/Rights/News/2011/september/18.html>

2. Why is legal aid important for welfare benefits cases?

The impact assessment which was published alongside the consultation preceding the Bill¹² provides an indication of the comparative disadvantage that would be created by cutting legal aid for welfare benefits cases.

Disabled people make up a disproportionate proportion of 58 per cent of those who receive legal aid for welfare benefits cases¹³. This translates to over 78,000 disabled people who will be denied specialist legal help if these measures go through.

In the next section, we consider existing evidence around the value of legal aid in relation to welfare benefits cases. In particular, we look at the direct benefits that arise from the provision of legal aid for these cases focusing on three key areas:

- i. legal aid improves the prospects of an accurate outcome
- ii. legal aid helps overcome barriers from the complexity of social welfare law
- iii. legal aid expenditure on welfare benefits cases provides value for money

i. Legal aid improves the prospects of an accurate outcome.

Firstly, obtaining legal advice helps disabled people get a more accurate outcome in decisions about their benefits. This is best illustrated by how the initial decisions on welfare benefits are changed following an appeal. Department for Work and Pensions (DWP) statistics on the effect of ESA appeals has found that appeals ‘effectively increase the number of people in the Support Group and the Work Related Activity and reduces the number of people in the Fit for Work category’¹⁴. Consequently, more disabled people gain access, through appeals, to tailored support as a result of being put in the right benefit group. This tailored support is at the heart of the Government’s agenda of supporting more disabled people into work, yet without legal aid these programmes will not be adequately targeted, leading to less effective support.

¹² Ministry of Justice (2011), Reform of Legal Aid in England and Wales: Equality Impact Assessment, <http://www.justice.gov.uk/downloads/consultations/legal-aid-reform-eia.pdf>

¹³ Legal Services Commission (2011), Memorandum Submitted to the Public Bill Committee LA 46 – Social Welfare Law Client Demographics 2009 – 2010, <http://www.publications.parliament.uk/pa/cm201011/cmpublic/legalaid/memo/la46a.pdf>

¹⁴ Department for Work and Pensions (2011), Employment and Support Allowance: Work Capability Assessment by health condition and functional impairment: Official Statistics, http://research.dwp.gov.uk/asd/workingage/esa_wca/esa_wca_26072011.pdf

Legal aid is fundamental to ensure that disabled people are provided an accurate level of support to get back into work. Unfortunately, the statistics provided by the DWP do not give a breakdown of the number of disabled people who, following an appeal, move from the Fit for Work Group to the Support Group for ESA. However, based on tribunal data, it is clear that a huge discrepancy exists between the initial assessment and the result of appeals. This is demonstrated by the number of disabled people who have been found to qualify for ESA after being inaccurately allocated significantly fewer points when first assessed. Statistics indicate that between October 2008 and February 2010, there were 122,500 appeals heard, out of which 48,000 found in the favour of the claimant. In 60 per cent of appeals in which disabled people were eventually found to qualify for ESA, 0 points had been allocated to the claimants at the initial assessment. This suggests that on appeal, the points awarded by the tribunal leaped from 0 to 15 or over.

Table 1: Points scored at initial Work Capability Assessment (WCA) for claims found fit for work where an appeal has been heard by the Tribunals Service between October 2008 and February 2010.¹⁵

Points scored at initial WCA	Appeals finding in favour of claimant	Appeals upholding DWP decision	All appeals heard
0 points	29,000	56,100	85,000
Between 0 points and 6 points	11,100	12,500	23,600
Over 6 points	7,600	4,300	11,900
Unknown	400	1,600	2,000
Total	48,000	74,400	122,500

Disabled people who would become ineligible for legal aid under the proposal to remove welfare benefits cases from scope could miss out on crucial support. The failure to be placed in the correct benefit group could

¹⁵ Department for Work and Pensions (2011), Employment and Support Allowance: Work Capability Assessment By Health Condition and Functional Impairment, http://research.dwp.gov.uk/asd/workingage/esa_wca/index.php?page=esa_wca_arc

delay the provision of work-related support to people who have a limited capability for work and require additional help to get or keep a job. Another area to which the current government has shown particular commitment is reducing the poverty rates among disabled people. On the Government's own projection, approximately 250,000 households with a disabled person will be lifted out of poverty as a result of the introduction of the Universal Credit¹⁵. The level of poverty reduction, however, is going to be undermined in the absence of welfare benefits advice if disabled people will not be able to take up their entitlement, therefore defeating the Government's own purposes.

Another defining aim of the reforms is to make it easier for people to understand the benefits they are entitled to. There is evidence that disabled people miss out on much needed passported support due to lack of awareness of entitlement, which is precisely what the Universal Credit seeks to address. The Government has recently commissioned the Social Security Advisory Committee (SSAC) to undertake an independent review of possible approaches to the provision of passported benefits under the new Universal Credit¹⁶. Yet, in the absence of legal aid, disabled people could be denied access to the benefits to which they are entitled and which, in turn, 'passport' them to support from other benefits. Legal aid has therefore an important role to play in contributing to the success of wider government reforms by ensuring disabled people get the support they need.

These issues about accuracy and accessing the right support aside, there remain significant concerns that disabled people being put on the wrong benefit could further translate into greater knock-on costs through increased dependency on other support services such as the National Health Service (NHS) and housing, rather than delivering the savings the Government has stated.

Most of the Government's welfare reforms create a context where the need for disabled people to access legal help to test decisions about their benefits will become increasingly important. There are growing reservations about the accuracy of the assessment pilots for IB, particularly given the significant increase in the number of disabled people likely to be found Fit for Work compared to the 15 percent which had been estimated originally¹⁷. Interim data recently released by the DWP revealed that 32 percent of IB

¹⁵ Department for Work and Pensions (2011), Welfare Reform Bill Universal Credit Equality Impact Assessment <http://www.dwp.gov.uk/docs/eia-universal-credit-wr2011.pdf>

¹⁶ Social Security Advisory Committee (2011), Public Consultation: Passported Benefits under Universal Credit – Review and Advice, <http://ssac.independent.gov.uk/pdf/consultation-passported-benefits.pdf>

¹⁷ Work and Pensions Select Committee (2011), The Role of Incapacity Benefit Reassessment in Helping Claimants into Employment, <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmworpen/1015/101509.htm>

claimants who complete the re-assessment process were allocated to the Fit for Work group and found not to be entitled to ESA¹⁹.

The Government has begun implementing the recommendations by Professor Harrington, who looked at how to improve the effectiveness of the Work Capability Assessment (WCA) which is the main assessment for ESA. Notwithstanding this, there remain significant concerns that the WCA is still unfit for purpose. These have been further heightened by a recent research report by DWP which found that most disabled people who have been refused ESA identified the way the WCA had been conducted as the principal reason for being disallowed²¹. The advice that disabled people currently receive through the legal aid system will be absolutely crucial so as to not undermine confidence in the effectiveness of the assessment.

ii. Legal aid helps overcome barriers arising from the complexity of social welfare law.

Secondly, legal aid is crucial for helping to overcome the complexity of this area of law. The withdrawal of legal aid for welfare benefits advice has been driven by the very clear contention made by Government that these cases do not necessarily require legal expertise. This, however, underestimates entirely the complex bureaucracies that surround welfare benefits and the legal knowledge required to navigate these.

The argument that welfare benefits cases are not sufficiently complex to merit legally aided advice appears to be conflicting greatly with the rationale cited by the Rt. Hon Secretary of State for Work and Pensions, Iain Duncan Smith MP, for introducing the Welfare Reform Bill currently going through Parliament. The Bill, he argued, would 'cut a swath through the massive complexity of the existing benefit system'²². The consultation on the future of the welfare reform system mentioned that there were a total of 14 manuals or 8,690 pages of guidance, that the DWP issued to its decision makers to help them to apply benefit rules correctly²³.

¹⁹ Ibid

²⁰ Malcolm Harrington (2010), An Independent Review of the Work Capability Assessment, <http://www.dwp.gov.uk/docs/wca-review-2010.pdf>

²¹ Department for Work and Pensions (2011), Trial Incapacity benefits reassessment: customer and staff views and experiences Research Report No 741, <http://research.dwp.gov.uk/asd/asd5/rports2011-2012/rrep741.pdf>

²² Department for Work and Pensions (2010), Welfare Reform White Paper: Universal Credit to make work pay – Radical welfare reforms bring an end to complex system, <http://www.dwp.gov.uk/newsroom/press-releases/2010/nov-2010/dwp153-10-111110.shtml>

²³ Department for Work and Pensions, 21st Century Welfare Public Consultation Paper Cm 7913, <http://www.dwp.gov.uk/docs/21st-century-welfare.pdf>

Studies suggest a significant knowledge gap between disabled and non-disabled people in relation to being aware of one's rights. As revealed by the Civil and Social Justice Survey (CSJS), disabled people are more likely to report that they do not know their rights compared to other respondents (69.2 per cent versus 63 percent)²⁴. In light of such evidence and amid concerns that, in the context of welfare benefits cases, this lack of knowledge is exacerbated by the complexity of the legislation on which decisions about entitlement are made, the proposals bring with them serious implications for disabled people.

As is the case for other benefits, most of the cases in relation to entitlement to DLA have focused on the detailed interpretation of the descriptors set out in regulations on the basis of which eligibility is determined. In relation to just one of the descriptors that are applied for DLA which requires someone to prove that they are 'unable or virtually unable to walk', there have been a wealth of decisions which have attempted to suggest a distance as a rule of thumb to meet this test²⁵. Without advice, disabled people will lack the knowledge of case law around the descriptors which is constantly evolving, or know how to apply it to their circumstances.

It is also important to note that some aspects of the rules about entitlement to benefits are conceptually difficult, such as the difference between the concepts of 'being unable to walk' and 'being virtually unable to walk'. The latter is a much more complicated test and a number of factors have to be considered in assessing whether a person is virtually unable to walk, such as any rest periods during walking or speed at which a person can walk. Understanding these differences of interpretation is crucial for knowing whether the department has applied the test correctly, and, if not, on what grounds to appeal and using what evidence.

Most of the benefit rules are highly technical in nature and difficult to understand without specialist legal knowledge. There are important distinctions between conditions of entitlement that must be satisfied by day and those that must be met by night. For instance, for the DLA care component, the regulations refer to 'continual supervision' throughout the day, and 'prolonged or repeated attention' at night in order to avoid substantial danger. These descriptors have to be interpreted according to the meaning they have been given in regulations as well as in case law,

²⁴ Nigel Balmer, Alexy Buck, Ash Patel, Catrina Denvir, Pascoe Pleasence (2010), Knowledge, Capability and the Experience of Rights Problems Research Report, <http://www.plenet.org.uk/data/files/knowledge-capability-and-the-experience-of-rights-problems-lsrc-may-2010-255.pdf>

²⁵ Disability Alliance attendance allowance and disability living allowance case law, <http://www.disabilityalliance.org/dlalaw.htm#Virtually>

which is simply incomprehensible to many disabled people without legal help. Whilst a number of the reforms on entitlement to benefits may reduce the complexity of the existing system, decisions on entitlement for benefits will remain subject to complex regulations. The need for legal advice under the new system is all too evident as some of the new regulations emerge. By way of example, the draft Personal Independence Payment (PIP) assessment²⁶ proposes to take into account the successful use of aids and adaptations in determining eligibility. However, the way in which the regulations have been drafted ('such aid can be reasonably be used') will lead to appeals being taken to clarify the criteria for deciding what the term 'reasonably' means in this context. It will be crucial that legal aid is maintained to help iron out some of these complexities under the new system, which could affect entitlement to benefits for potentially a large number of disabled people.

iii. Legal aid expenditure on welfare benefits cases provides value for money.

Accuracy and complexity issues aside, there is a strong economic justification for continuing legal aid provision for welfare benefits cases. At a fixed fee of around £167 per case, advice on welfare benefits cases under the current system ensures value for money, by providing good quality early intervention and preventing costly appeals. A case that gets to an appeal carries with it a significant cost – the average cost of clearing a Social Security and Child Support appeal, on the basis of an average Tribunal Panel that would hear such cases and all associated administration costs of process the case is around £293²⁷.

The Government has argued that the rationale of the proposed changes to the legal aid system is to reduce expenditure. However, spending on legal aid for welfare benefits represents only a small proportion of the legal aid budget as a whole (£25 million out of the £2 billion overall)²⁸, and half of the total cost to the public purse arising from ESA appeals alone in 2009 – 2010²⁹.

²⁶ Department for Work and Pensions (2011), Personal Independence Payment: initial draft of assessment regulations, <http://www.dwp.gov.uk/docs/pip-draft-assessment-regulations.pdf>

²⁷ Parliamentary Written Answer to Tom Brake MP: "To ask the Secretary of State for Work and Pensions pursuant to the answer of 13 September 2010, Official Report, columns 821-22W, on social security benefits: appeals, what the cost to the public purse was of rejection of the 31,600 claims for employment support allowance made between October 2008 and June 2009 which were subsequently allowed on appeal.", <http://services.parliament.uk/hansard/Commons/ByDate/20101102/writtenanswers/part021.html>

²⁸ Ministry of Justice (2010), Legal aid reform: Scope Changes Impact Assessment, <http://www.justice.gov.uk/downloads/consultations/ia-scope-changes.pdf>.

²⁹ Work and Pensions Select Committee (2011), The role of incapacity benefit reassessment in helping claimants into employment - Work and Pensions Committee, <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmworpen/1015/101508.htm>

The effectiveness of legal aid advice is confirmed by Legal Services Commission (LSC) data. In 2010, 89% of welfare benefits cases funded through legal aid were considered to have produced a substantive outcome for the claimant³⁰. Legal advice for welfare benefits cases can save money across Government in the long term by ensuring disabled people get the right help at the right time – an analysis by Citizens Advice made an estimation of the costs from the withdrawal of legal help and showed that getting advice early on can save up to £8 for every £1 invested³¹.

The analysis by Citizens Advice draws on data from the Civil and Social Justice Survey (CSJS) to explore the financial and personal costs of this reform³². Using the same data but looking specifically at the adverse consequences that disabled people experience as a result of welfare benefits problems³³, we have found that stress-related ill-health (46 percent) and physical ill health (20.5 percent) were the most reported consequences of experiencing welfare benefits problems. The following table shows the adverse consequences experienced by disabled people in percentage terms. More importantly, the costs arising from these adverse consequences, whether in terms of health and social care costs or losses to the economy in terms of output, demonstrate why legal aid should continue to be a priority for these cases:

Illness / disability?		No		Yes	
		Number	Percent	Number	Percent
Physical ill health	no physical ill health	190	98.1%	86	79.5%
	physical ill health	4	1.9%	22	20.5%
Stress related illness	no stress related illness	151	78.3%	59	54.0%
	stress related illness	42	21.7%	50	46.0%
Relationship breakdown	no relationship breakdown	189	97.9%	107	98.2%
	relationship breakdown	4	2.1%	2	1.8%
Violence aimed at me	no violence aimed at me	193	100.0%	109	100.0%
	violence aimed at me	0	0%	0	0%
Damage to property	no damage to property	193	100.0%	109	100.0%
	damage to property	0	0%	0	0%

³⁰ Legal Services Commission (2010), Statistical information pack for financial year 2009-2010, http://www.legalservices.gov.uk/docs/archive/Statistical_information_pack_09-10.pdf.

³¹ Citizens Advice (2010), Towards a business case for legal aid, http://www.citizensadvice.org.uk/index/policy/towards_a_business_case_for_legal_aid.htm.

³² Pascoe Pleasence, Nigel Balmer, Ash Patel, and Catrina Denvir (2010), Civil Justice in England and Wales 2009: Report of the 2006-09 English and Welsh Civil and Social Justice Survey, <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/2010CSJSAnnualReport.pdf>.

³³ Analysis carried out for Scope by Nigel Balmer, Principal Researcher at Legal Services Research Centre.

Had to move home	didn't have to move home	191	98.7%	109	100.0%
	had to move home	3	1.3%	0	0%
Loss of employment	no loss of employment	192	99.0%	107	98.2%
	loss of employment	2	1.0%	2	1.8%
Loss of income	no loss of income	129	66.5%	71	65.4%
	loss of income	65	33.5%	38	34.6%
Loss of confidence	no loss of confidence	182	94.1%	94	86.5%
	loss of confidence	11	5.9%	15	13.5%

A significant number of disabled people (34.6 percent) also reported a loss in their income. The consequences of this loss of income were shown by the Families Resource Survey in 2009 which showed that over half (53%) of disabled people not in receipt of disability benefits were in the bottom two quintiles of the income distribution compared with 36% percent of those living in families where no-one is disabled³⁴. This is a strong indicator of the role legal advice can play in reducing the likelihood of poverty by helping disabled people maximise their incomes through claiming the right benefits.

These findings are reinforced by a recent report which found that: 'welfare rights advice services continue to play a key role in improving take-up and delivering significant extra resources to low-income households. The findings of the numerous studies discussed in the report are clear that the extra resources raised, even when these are relatively small, can have a sustained positive impact on an individual's experience of hardship and social exclusion. The studies point to extra resources leading to increased spending on; fuel, educational and recreational goods and services and transport – all critical to reducing household likelihood of falling into poverty and social exclusion.'³⁵

Individual testimonies from a recent research study undertaken by Scope³⁶ illustrate the extent to which the failure to obtain the right level of benefits puts disabled people at a greater risk of poverty, as it means disabled people lose out on a large proportion of their income:

"I am now not receiving DLA and this has been under appeal since January 2010 – had received it for six years consecutively until then. I have been cutting back on food and lighting and gas and using the car. I tend not to go out unless it is very important."

³⁴ Department for Work and Pensions (2011), Families Resources Survey 2009 – 2010, http://research.dwp.gov.uk/asd/frs/2009_10/frs_2009_10_report.pdf.

³⁵ National Association of Welfare Rights Advisors (2006), The benefits of Welfare Rights Advice: A Review of the Literature, <http://www.nawra.org.uk/Documents/Benefitsofwelfarightsadviceelitreview.pdf>.

³⁶ Scope (2010), Counting the Cost, http://www.scope.org.uk/sites/default/files/Counting_the_Cost.pdf

“I am not eligible for any extra support and could not face the appeals process to get the middle rate care component of DLA which I should qualify for, therefore I am left with relying on family to provide free care and must fund disability related and ordinary expenses from my benefits and savings. It is awful to see my savings diminishing at such a rate through no fault of my own.”

The extent to which being assigned the wrong benefit significantly affects the incomes of those who cannot challenge those decisions is underpinned by HM Treasury data for 2009 – 2010 which shows that ‘cash benefits’³⁷ represent around 56 percent of gross income for the bottom quintile group and 39 percent for the second quintile group³⁸. Given that disabled people are currently over-represented in the two bottom quintile income groups³⁹, the lack of access to advice to get the support they currently rely on will push many further into poverty.

The Government has recently questioned the issue of whether to maintain payments during appeal arguing that this creates a tangible financial reason to appeal. The Rt. Hon Chris Grayling MP, the Minister for Employment, during parliamentary debates, has stated that ‘the question arises of whether the approach of someone being left to receive their full benefits while waiting for an appeal decision is right for appeals in general’⁴⁰. If disabled people were to be left with no support at all during the appeal process, this would no doubt push them further into poverty, as the above illustrates too well. Whilst there is no conclusive evidence to support the Government’s assumption of welfare benefits cases being taken before tribunals unnecessarily, this again emphasises the role that legal advice plays in terms of ensuring that only cases where there is a good reason to appeal go through.

On the issue of costs, it is extremely worrying that in making these reforms, the Government has acknowledged that costs will be transferred to other parts of national or local Government spending, but cannot calculate the value of the cost and therefore is hiding the true cost of the reforms. The savings in legal aid spending will result in a real terms increase in expense elsewhere in the system. Many of the costs identified in the Citizens Advice report and in our analysis are discussed as potential effects in the impact

³⁷ Cash benefits include Income Support, Pension Credit, Child Benefit, Incapacity Benefit, Tax Credits and Retirement Pension.

³⁸ HM Treasury (2011), Annex to the 2011 Budget, http://cdn.hm-treasury.gov.uk/2011budget_annexa.pdf

³⁹ Tania Burchardt, Inequalities and social security, in Jane Millar (2009), *Understanding Social Security: Issues for Policy and Practice*, <http://www.policypress.co.uk/display.asp?K=9781847421869>

⁴⁰ Welfare Reform Public Bill Committee Proceedings (17 May 2011), http://www.theyworkforyou.com/psc/2010-11/Welfare_Reform_Bill/22-0_2011-05-17a.6.0

assessment. This states, for example, that the reforms could see 'increased resource costs for other Departments. If civil and family issues are not resolved effectively people might continue to rely upon the state, because failure to resolve one issue may lead to another arising. This may include health, housing, education and other local authority services including services provided by the voluntary and community sector'⁴¹, however no attempt to quantify these is made. The revised assessment simply states that 'the lack of a robust evidence base means that we are unable to draw conclusions as to whether wider economic and social costs are likely to result from the programme of reform or to estimate their size'⁴² .

Seen in the round, the cost of not providing advice for welfare benefits cases is considerable. The additional knock-on costs to other parts of the justice system are equally important, as cases that come through without any advice will be more costly to process. While legal aid is not available for legal representation, the help provided at the early stages of a case enables a judge to dispose of a case within a sensible time frame. In the absence of legal aid, the cases that come through to the tribunal without any advice are likely to result in longer hearings and more adjournments as disabled people are not ready to proceed.⁴³

Tribunals have only a limited time to compensate for this lack of preparation. The likelihood of cases taking longer to resolve is important to consider against the high backlog of cases, as highlighted by Judge Martin:

"Even setting aside arguments about potential human suffering and long-term economic impact, it seems folly to risk overloading the tribunal system with self-represented claimants who have had no access to advice at a time when the pressure on tribunals is already increasing significantly due to benefit reform, difficult economic conditions and the social and economic impact of other government measures to address the deficit."⁴⁴

Legal help plays a key role as those appealing will have had the opportunity to prepare properly and send evidence that is of real assistance to the tribunal, enabling the tribunal to make its decision more quickly and accurately.

⁴¹ Ministry of Justice (2010), Legal aid reform: Scope Changes Impact Assessment, <http://www.justice.gov.uk/downloads/consultations/ia-scope-changes.pdf>.

⁴² Ministry of Justice (2010), Legal aid reform: Eligibility Impact Assessment, <http://www.justice.gov.uk/downloads/consultations/annex-b-eligibility.pdf>

⁴³ Administrative Justice and Tribunals Council (2010), Response to the Ministry of Justice consultation document Proposals for the Reform of Legal Aid in England and Wales, http://www.justice.gov.uk/ajtc/docs/Legal_Aid_Response.pdf.

⁴⁴ Ibid

3. What is the real impact on disabled people?

Despite acknowledging the adverse impact on disabled people⁴⁵, the Government's assessment of measures has been shown to be limited. The limitations with the Government's assessment are set out below⁴⁶.

Additional demand for advice on welfare benefits

Firstly, there is an anticipated increase in demand for advice on welfare benefits which needs to be accounted for. The Government is pursuing an ambitious programme of welfare reform⁴⁷, and inevitably this will lead to a greater need for advice, as people are moved onto new benefits with a stricter sanctions regime, which transfers more responsibility onto the individual to find and stay in work. Disabled people will need advice and support due to the uncertainties of how to navigate the new system, and this need will fall back on the legal aid system. However, this has not been reflected in Government assessments.

Increased demand will be driven by the sheer scale of welfare reform which the Government is pursuing. Some of these reforms have already begun, with the roll-out of the reassessment of 1.8 million IB claimants⁴⁸ who will be migrated either onto Employment Support Allowance (ESA) or Job Seekers Allowance (JSA). The proportion of decisions subject to appeal since the inception of the trial period or since the national roll-out of reassessment is not known at the time of writing, and given the significant backlogs facing the tribunals, very few appeals from these decisions will have been heard yet⁴⁹. However, findings from research carried out by the DWP from a survey of ESA claimants indicates that appealing is more common amongst people who had claimed Incapacity Benefit before (57 percent compared with 37 percent for those making a first claim)⁴⁹. If this pattern is sustained, this is

⁴⁵ Ministry of Justice (2010), Legal aid reform: Scope Changes Impact Assessment, <http://www.justice.gov.uk/consultations/docs/legalaidiascope.pdf>.

⁴⁶ Law Society (2011), Missing millions – Government plans for civil legal aid offer unproven savings and will incur unaccounted-for costs, <http://www.lawsociety.org.uk/new/documents/2011/legalaid-missing-millions.pdf>

⁴⁷ Welfare Reform Bill 2010-2011, <http://services.parliament.uk/bills/2010-11/welfarereform.html>

⁴⁸ Social Security Advisory Committee (2010), The Employment and Support Allowance (Transitional Provisions) (Existing Awards) Regulations 2010, http://ssac.independent.gov.uk/pdf/employment_and_support_allowance_regs.pdf

⁴⁹ Department for Work and Pensions (2011), Incapacity Benefits – reassessed claimants: IB reassessment cases undergoing an appeal will be shown in the published National Statistics as being on the Assessment phase of ESA, http://statistics.dwp.gov.uk/asd/asd1/stats_summary/ib_reassess_response.pdf

⁴⁹ Department for Work and Pensions (2010), Employment and Support Allowance: Findings from a face-to-face survey of customers Research Report 707, <http://research.dwp.gov.uk/asd/asd5/rports2009-2010/rrep707.pdf>

likely to result in much greater demand for legal advice on welfare benefits over this and the next parliament as the reforms become a reality.

Demand for legal aid will also grow as a result of other reforms which will be phased in over the coming years. Additional support and advice on welfare benefits issues will be needed to support the transition to Universal Credit by 2013 and the replacement of DLA with the new Personal Independence Payment by 2013 / 14, affecting 3.2 million disabled people currently in receipt of DLA who would be reassessed as part of that process⁵¹.

Taking into account the magnitude of the changes proposed to how the benefits system will be organised in the future, implementation issues will inevitably arise. As the new system will face all the initial teething problems, legal aid is crucial as a tool to increase accuracy of decisions for the state and stop costs being pushed or spiralling elsewhere, during the transition period (at least). The case studies presented later in this report illustrate the ways in which legal aid helps disabled people navigate their way around the system and to prepare appeals that work towards a more accurate outcome in decisions about their benefits.

The evidence from radical changes to welfare benefits shows that there will continue to be a strong demand for legal advice for the foreseeable future. Official statistics show that when the ESA was introduced in 2008, there was a four-fold increase in appeals in the first year. By the fourth quarter, there were already 46,500 ESA appeals⁵², which demonstrates a massive increase in the need for specialist advice from the creation of the new benefit:

Table 2: ESA appeals received by the Tribunal Service

	2009 – 2010				2010 – 2011			
	Q1	Q2	Q3	Q4	Q1	Q2	Q3	Q4
Number of ESA appeals received	10,100	29,000	41,100	46,500	46,000	55,700	44,800	50,800
Total	126,800				197,400			

This trend is highlighted by Citizens Advice Bureaux (CABx), which are reporting a substantial recent increase in demand for advice on welfare benefits. Local CABx have noted an increase of over 40 per cent in the

⁵¹ Department for Work and Pensions (2011), Disability Living Allowance Reform Impact Assessment, <http://www.dwp.gov.uk/docs/dla-reform-wr2011-ia.pdf>

⁵² Tribunals Service (2010), Quarterly Statistics for the Tribunals Service, 4th quarter 2009 – 10, <http://www.tribunals.gov.uk/Tribunals/Documents/Publications/QuarterlyBulletin0910.pdf>.

numbers wanting help with disability related benefits since the introduction of ESA⁵³.

In addition to the volume of reassessments on the horizon and speed of migration, there are important changes that will be introduced to the way in which decisions about entitlement are made. The Government has announced that unlike the current process for DLA, an important part of the new process for the PIP assessment is likely to be a face-to-face consultation with a healthcare professional⁵⁴. A precise estimate of the impact that this will have on demand for legal help is difficult to provide; however, an important factor to be taken into account is the higher appeal rates for benefits which involve carrying out a face-to-face assessment, as compared to those which do not⁵⁵. This implies that introducing a face-to-face assessment can be expected to have a significant impact on the need for advice, particularly if the PIP assessment were to create many of the same difficulties experienced with the Work Capability Assessment (WCA) for out-of-work benefits in adequately capturing disabled people's needs⁵⁶.

There are two further issues behind the increased demand for legal aid. Firstly, demand for advice is likely to increase as a result of the combined effect of the reforms being pursued by the Government. Claimants migrated from IB to contributory ESA who are not put in the Support Group would be subject to the proposed time limit for the payment of ESA to twelve months following reassessment. Given the important difference between those who will be put in the contributory ESA Work-Related Activity Group with time-limiting in force (40,000) compared to the number of those who would be put in if time-limiting were not in force (720,000)⁵⁷ by 2015 – 16, it becomes crucial for the Government to ensure that the right people are in the time-limited group. Legal aid constitutes an important tool to increase the accuracy of decisions and ensure people have the right financial and practical support to get back into work.

⁵³ Citizens Advice (2010), Not Working, http://www.citizensadvice.org.uk/not_working.

⁵⁴ Department for Work and Pensions (2010), Disability Living Allowance Reform Public Consultation Cm 7984, <http://www.dwp.gov.uk/docs/dla-reform-consultation.pdf>

⁵⁵ There were 79,400 appeals for DLA compared to 197,400 appeals for ESA in 2010 – 2011. Tribunal Service (2010), Quarterly Tribunals Statistics 4th quarter 2010 – 2011, <http://www.justice.gov.uk/downloads/publications/statistics-and-data/tribs-stats/quarterly-tribs-stats-q4-2010-11.pdf>

⁵⁶ Citizens Advice (2011), Written evidence submitted to the Work and Pensions Select Committee's inquiry into the Proposal to replace Disability Living Allowance with Personal Independence Payment, <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmworpen/writtev/1493/pip10.htm>

⁵⁷ Parliamentary Written Answer to Stephen Timms MP by Chris Grayling MP (21 June 2011), "To ask the Secretary of State for Work and Pensions if he will estimate the number of recipients of employment and support allowance there would be in the (a) work related activity group and (b) assessment phase (i) with and (ii) without time-limiting in place for each financial year from 2011–12 to 2015 –16", <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110621/corrtext/110621c0001.htm>

Secondly, it is imperative to consider procedural reforms, particularly the proposals to increase the frequency of reassessments for benefits, as these are likely to generate a need for specialist advice on welfare benefits in the long-term. For instance, under proposed regulations, a claimant awarded PIP can be reassessed if ‘the Secretary of State wishes to determine whether there has been a relevant change of circumstances’⁵⁸. There is a lack of detail of how widely it is proposed that this power will be used other than it will be for the independent assessor to make a recommendation on how frequently a person should be reassessed; however, there appears to be a strong indication of the Government's intention to reassess claimants more frequently which is consistent with the wider efforts to target benefits. The increased need for advice as a result of having to go through more reassessments or reviews needs to be carefully taken into account. The protection that access to legal advice provides will remain essential in the longer term to ensure that disabled people who legitimately need help do not fall out of the system and miss out on support as a result of being reassessed more frequently.

Mitigating the impact

Welfare reforms have been driven, in particular, by a desire to address the current situation whereby the additional evidence provided at the tribunal hearing is the most common cause for why decisions on benefits are overturned⁵⁹. In light of this, the Government has committed to ensuring that such evidence is available to decision-makers earlier on and that greater weight is given to the professional opinion of GPs and other health professionals in contact with the individual making the claim⁶⁰.

This is welcome, as it addresses a key flaw in the current process whereby important sources of information are overlooked in the decision-making. Nevertheless, a more fundamental difficulty arises in relation to how such evidence is being considered in reaching the actual decision. Despite the Government's intention, it must be recognised that this will require a significant culture-shift in the decision-makers' approach to balancing different sources of information. This is evident from the small number of cases where the decision maker made a decision that differed from the original Atos advice for ESA decisions⁶¹. The independent Harrington review

⁵⁸ Department for Work and Pensions (2011), Personal Independence Payment: initial draft of assessment regulations, <http://www.dwp.gov.uk/docs/pip-draft-assessment-regulations-large-print.pdf>

⁵⁹ Department for Work and Pensions (2010), Government's response to Professor Malcolm Harrington's Independent Review of the Work Capability Assessment Cm 7977, <http://www.dwp.gov.uk/docs/wca-review-2010-response.pdf>.

⁶⁰ Ibid

⁶¹ Malcolm Harrington (2010), An Independent Review of the Work Capability Assessment, <http://www.dwp.gov.uk/docs/wca-review-2010.pdf>

of the WCA⁶² found that decision makers overturned less than 2% of the recommendations given by Atos Health Care Professional. The review concluded that ‘many decision makers lack the confidence to make a decision that deviates from the Atos advice’ and that ‘a culture has devolved amongst decision makers that sees the advice from Atos as forming the decision, and that they are there to simply ratify that decision’⁶³.

The pilot trials in Aberdeen and Burnley have shown signs of improvement on this, however concerns have been raised whether lessons learned could be implemented during the national roll-out, and whether the necessary resources that this would involve would be made available. Evidence suggests that Atos assessors and JobCentre Plus decision makers will not be able to proactively gather such evidence as much as they should. A DWP research report based on the pilot reassessments carried out in Aberdeen and Burnley found that:

“Staff felt the time spent chasing further evidence and clarifying the WCA report may have to be scaled back for national roll-out... acquiring further medical evidence could also be time-consuming, particularly if this involved chasing GPs. Some staff involved in decision-making and reviewing cases expressed doubt that the processes used in the trial were workable or sustainable on a national level without additional staff resources.”⁶⁴

A recent survey by the Disability Benefits Consortium (DBC) with over 300 welfare advisors adds weight to the argument that although the DWP is making clear efforts to improve the system, given the culture shift that is needed, these efforts will take time to translate into improvements for disabled people on the ground: “The whole situation is improving slowly – but the good work that Prof. Harrington is doing is not filtering down to the delivery staff and Decision Makers as quickly as it should be.”⁶⁵

A further reform which is projected to help drive down the need for appeals is making the reconsideration stage mandatory before an appeal. The data that currently exists on the operation of the reconsideration stage is very limited⁶⁶, so that an assessment of the effect on appeals rates is difficult.

⁶² Ibid

⁶³ Ibid

⁶⁴ Department for Work and Pensions (2011), Trial incapacity benefits reassessment: customer and staff views and experiences Research Report 741, <http://research.dwp.gov.uk/asd/asd5/rports2011-2012/rrep741.pdf>

⁶⁵ Disability Benefits Consortium (2011), A Call for Evidence: Year 2 Independent Review: A response from the Disability Benefits Consortium, <http://www.disabilityalliance.org/dbcharrington.pdf>

⁶⁶ Statistics are very limited, such as 9% of the decisions for someone to be put in the Work Related Activity Group (WRAG) are made after reconsideration. Department for Work and Pensions (2011), Employment and Support Allowance: Work Capability Assessment by health condition and functional impairment: Official statistics, http://research.dwp.gov.uk/asd/workingage/esa_wca/esa_wca_26072011.pdf

On the whole, the Government is not monitoring how many decisions are overturned at reconsideration stage, or in fact the success rate of onward appeals for cases that have gone through reconsideration. While there is generally a lack of statistics on the effectiveness of the reconsideration stage, it is clear that this will only be successful if further evidence is properly taken into account by the decision-maker.

These issues combined demonstrate that despite the potential of welfare reforms, the need for legal aid will continue through to the end of reforms in the next parliament. There is a danger that legal aid would otherwise be withdrawn before these problems are resolved. Linked to this, it is clear that, whatever the outcome of these reforms, the number of appeals will remain high. Indeed, the Secretary of State for Work and Pensions himself stated in his evidence to the inquiry carried out by the Work and Pensions Committee, that following the reforms, 'it is likely that an awful lot of people will appeal'⁶⁷. Legal aid will be crucial to ensure the confidence in the success of the reforms is not undermined, if disabled people do not have access to the advice and support they need to work towards a more accurate outcome in decisions on their benefits.

4. What are the barriers and pathways disabled people would go through in the absence of legal help?

The section above has reviewed the existing evidence about the impact of removing legal aid for welfare benefits cases, and the gaps in the Government's assessment of this impact. We now turn to explore typical welfare cases that disabled people use legal aid funding for advice and support. To identify and understand the typical pathways disabled people go through, we worked with local Disability Information Advice Line (DIAL) groups, who have direct experience of supporting disabled people challenging welfare benefits decisions, to identify disabled people who we could talk to. We conducted qualitative interviews with disabled people and

⁶⁷ Work and Pensions Select Committee (2011), The role of incapacity benefit reassessment in helping claimants into employment, <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmworpen/1015/101508.htm>

supplemented this with data from the tribunal service and information from legal professionals.

We used these data sources to explore the experiences of disabled people who have recently been through the appeal process and to identify the barriers they faced in challenging a decision relating to their benefits, and how receiving legal advice helped them improve the accuracy of the decision.

In this section of the report, we consider the pathways that disabled people take through their appeals and the role that legal aid plays. We then go on to describe the impact that removing legal aid would have on these pathways and the accuracy of benefit decisions being made. As there has been little assessment by the Government of the impact of the proposed reforms on disabled people's pathways through the system, either now or in the future, this analysis seeks to fill the gap by looking at the likely impact of removing legal aid funding in the context of future benefit reforms.

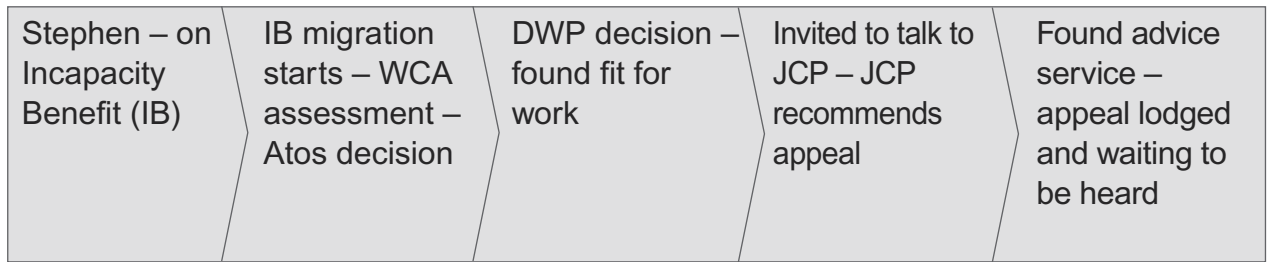
Introducing the typical case studies

The case studies reflect five changes that have been identified as driving the need for legal help over the course of this and the next Parliament. In particular, the case studies map out the ways in which getting legal advice makes a difference in disabled people's experiences at present, driving the accuracy of decision making. The cases also consider the impact of the withdrawal of legal aid in light of the following factors:

- the migration from Incapacity Benefit (IB) to Employment Support Allowance (ESA) and, in the transition to Universal Credit;
- the increased frequency with which benefits will be reassessed
- the broadening of the evidence base used in making welfare benefits decisions;
- the introduction of reconsideration as a mandatory stage before appeal;
- the introduction of a tougher conditionality system and a new regime for recovering overpayments of benefits.

1) Providing legal advice in the migration from IB to ESA and in the transition to Universal Credit

Pathway with support:



Legal advice is crucial to ensure disabled people get the appropriate support after being reassessed from IB to ESA, or in the transition to the new benefits system which will be dominated by the introduction of the Universal Credit.

Stephen was reassessed with a view to being migrated from IB onto ESA. He went through the process of completing the ESA questionnaire (ESA50) and attended a Work Capability Assessment (WCA) interview. Despite being due to go into hospital within weeks, he was found fit for work. After being informed of the outcome of his ESA application, he was offered the possibility to speak to a disability employment officer at his local Jobcentre Plus who advised him to appeal. He was told that he could not claim JSA because he was due for surgery. He sought specialist legal advice as he was uncertain how to take an appeal forward.

How many disabled people are likely to be in Stephen's situation?

Stephen's case is typical for the experiences of disabled people who are currently going through the migration process. The outcome of the migration will see disabled people being put into one of three groups: ESA Support Group for those who will not be required to undertake work-related activity, but who will be reassessed continuously; ESA Work-Related Activity Group for those deemed fit for work with the appropriate support which will be limited to just twelve months before ESA is stopped; or Fit for Work, for those who will not be entitled to ESA and transferred to a lower amount of Jobseeker's Allowance (JSA).

If the rate of disabled people being disallowed ESA (32 percent) is maintained, 576,000 disabled people who will be found fit for work during the migration⁶⁸ could be missing out on crucial support if legal help for these cases is removed.

⁶⁸ This figure has been calculated on the basis of an estimated of 1.8 million disabled people caseload for ESA. Social Security Advisory Committee (2010), The Employment and Support Allowance (Transitional Provisions) (Existing Awards) Regulations 2010, http://ssac.independent.gov.uk/pdf/employment_and_support_allowance_regs.pdf

How did getting legal advice help Stephen’s case?

Cases like Stephen’s highlight why specialist independent advice is required when a person disagrees with a decision made by the DWP because of their material circumstances, on their entitlement to a benefit. Jobcentre plus staff have valid roles to play in explaining how a decision has been reached; however, the experience that was echoed by benefits advisors most often was that it was usually the case that Jobcentre plus staff provided either incomplete or even incorrect advice, thereby increasing the likelihood of disabled people missing out on support to which they would be entitled.

The limits to the expertise of staff in agencies such as JobCentre Plus have to be recognised. Provision of advice, in any case, falls outside their respective statutory responsibilities. Staff are, however, much less well placed to offer ‘advice’ than an independent representative who would be able to explain the decision made, obtain the appropriate evidence to challenge it and prepare the written submission to the tribunal. The underlying objective for the Government’s reforms is to make the welfare system more efficient so that disabled people who need support will get it. Legal advice plays this role, contributing to the aim of ensuring that disabled people are put in the right benefit group.

Pathway without support:

Stephen – on Incapacity Benefit (IB)	IB migration starts – WCA assessment – Atos decision	DWP decision – found fit for work	Persuaded not to appeal	Falls out of the benefit system. Subject to conditions and penalties	Does not have finances to meet everyday basic living costs	Increased reliance on debt – becomes reliant on other state services
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The withdrawal of legal help for welfare benefits will mean that disabled people who face being migrated or reassessed will not be able to turn to independent advice services for help and support, and may be unduly influenced not to appeal.



Photos have been changed to protect the identity of the people involved in the case studies.

The advice Stephen received from Jobcentre Plus to appeal the WCA outcome meant that he understood that he had a case for doing so. However, he was still unsure what he should be doing to pursue an appeal and felt he required more support to go down that route. Whilst the Government has claimed that agencies such as Jobcentre Plus could fill the gap left by the removal of legal advice from independent benefits advice providers, this fails to acknowledge the limitations of Jobcentre Plus staff to provide necessary depth and scope of advice.

Our research shows that there are two further outcomes that need to be considered if legal aid were to be removed. One is that the lack of independent advice could result in disabled people not pursuing an appeal and missing out on the support they need if they are being told that they have no grounds on which to appeal. Having access to independent legal advice provides an important safeguard to ensure that there is no attempt to persuade disabled people that there is no merit in appealing, if the latter would be in their best interests to ensure that they receive the adequate level of support.

It is important to weigh some of the recent initiatives being trialled by the Government against the effects of removing legal aid for welfare benefits cases. The aim of some of these initiatives has been to ensure 'greater engagement with claimants to improve their understanding of the reasons for the decision with the aim of reducing appeals', including through more direct telephone contact⁷⁰. It was reported in one case that 15 per cent of claimants who had appealed either withdrew their appeal or had their initial decision revised by the decision maker⁶⁹. However, these findings need to be viewed with extreme caution, as they may potentially be putting at risk disabled people's ability to make a choice of whether to pursue an appeal with no undue influence, if the provision of legal aid is withdrawn for welfare benefits cases.

The other outcome from the withdrawal of legal aid could, of course, be that more disabled people take the route of appealing. Evidence from the pilot trials showed that JobCentre Plus staff were inclined to advise disabled people that they could appeal 'as a means of deflecting negative attitudes towards reassessment'. A recent DWP report found that 'customers

⁶⁹ Work and Pensions Select Committee (2011), The role of incapacity benefit reassessment in helping claimants into employment, <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmworpen/1015/1015.pdf>.

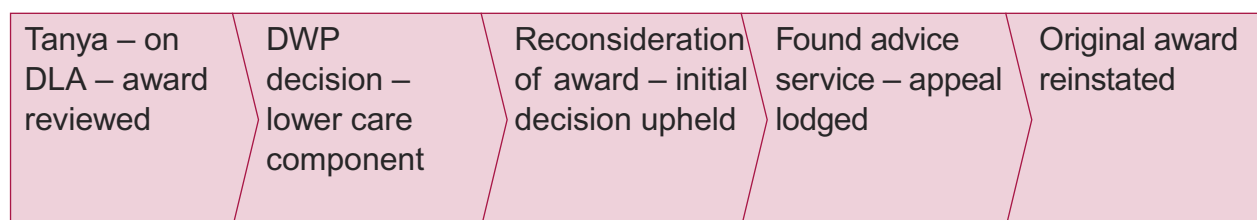
⁷⁰ Malcolm Harrington (2010), An Independent Review of the Work Capability Assessment, <http://www.dwp.gov.uk/docs/wca-review-2010.pdf>

reported that Job Centre Plus had advised them to appeal because their outcome did not look ‘right’, and this was corroborated by staff feedback⁷¹. Such a situation is hardly satisfactory, as it may result in raising the hopes of disabled people who may already be receiving the support that they should be getting. It also imposes greater costs burdens on the DWP and the Tribunals Service in responding to, or adjudicating, appeals which would not have been brought had the appellant been given robust legal advice. This, again, raises the issue about the quality of advice that statutory agencies like JobCentre Plus would be able to provide, and the adverse consequences of removing independent legal advice that is provided through the legal aid system which currently acts as a filter for cases that are taken through to appeal.

Ultimately, in the absence of legal aid, the Government's reforms could be undermined, as many disabled people going through the migration from IB to ESA or in the transition to the Universal Credit will end up on the wrong benefit without the adequate level of support they need. The lack of advice and, by extension, the lack of accuracy of outcome would lead to an increase in personal and state costs, due to increased dependency on other parts of spending. Ultimately, this could see disabled people drop out of the system – research into the overall destinations for those not in the Work Related-Activity Group or Support Group, shows that 42 percent were reported to be neither working nor claiming an out-of-work benefit⁷².

2) Providing legal advice in the context of more frequent reassessments of welfare benefits

Pathway with legal advice



In the current pathways, legal aid is important for a renewal claim as it is for the initial claim, to ensure disabled people get the level of support they need.

⁷¹ Department for Work and Pensions (2011), Trial Incapacity benefits reassessment: customer and staff views and experiences Research Report 741, <http://research.dwp.gov.uk/asd/asd5/rports2011-2012/rrep741.pdf>.

⁷² Department for Work and Pensions (2011), Employment and Support Allowance: Findings from a follow-up survey with customers Research Report 745, <http://research.dwp.gov.uk/asd/asd5/rports2011-2012/rrep745.pdf>.

Tanya was in receipt of high rate mobility and high rate care components of DLA, until her award was reduced to low rate mobility after submitting a renewal application. The reason for lowering her DLA mobility award was that her school claimed in a letter that she ‘had been observed running out between parked vehicles into the road’. After receiving the decision, her mother asked for the decision to be looked at again, but failed to get it changed on reconsideration. She then sought specialist legal help to decide whether to carry on and appeal. On appeal, the high rate care component for DLA was reinstated.

How many people are likely to be in Tanya’s situation?

This had been Tanya’s fourth renewal claim of DLA. The Pensions, Disability and Carers Service (PDCCS), which is responsible for the administration of DLA, handles 250,000 renewal claims every year⁷³, that is disabled people initially awarded DLA for a fixed period who applied for an extension of their award. Legal aid will be crucial to ensure disabled people get the correct level of award and do not find the support they receive reduced on renewal, especially if the reviews for the Personal Independence Payment will occur more often than as currently is the case with DLA.

How did getting legal advice help Tanya’s case?

Getting legal advice can prevent disabled people from simply falling out of the system if they, for instance, still do not manage to get the support they need at reconsideration. Reconsideration could be very beneficial in having another decision maker looking at the decision afresh, which could potentially avoid the stress and costs of an appeal; however, its effectiveness depends on there being a fixed time limit for the department to reach their decision, and ensuring that decisions are genuinely looked at again and not just rubber stamped. In this case, legal advice was essential in helping the mother understand how to proceed following the reconsideration decision which upheld the initial decision to lower Tanya’s mobility award:

“The help was important to know that you have got a case. I didn’t know whether I should carry on at that point. [The whole process] is like dissecting your child; it’s very emotional and upsetting. I didn’t want to go any further if I didn’t think that I had a chance of changing the decision”.

⁷³ Department for Work and Pensions (2011), Written evidence submitted to the Work and Pensions Select Committee’s inquiry into the Proposal to replace Disability Living Allowance with Personal Independence Payment, <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmworpen/writev/1493/m53.htm>

The provision of legal advice is important to ensure disabled people get their correct benefit entitlement on renewal, and do not miss out on vital support. In cases like these, legal advice is important in helping the parent(s) sustain the appeal and in particular, it is crucial for giving the parent(s) and claimant the support they need to present the right evidence at the appeal, and put forward the most accurate case possible.

Getting supporting evidence is very important for a renewal claim, as the appeal will be decided solely on the up-to-date evidence the tribunal has in front of it. The additional evidence that Tanya's mother obtained, with the help she received, clarified that what the school had put in the original letter gave the wrong impression and that her daughter could not in fact run:

“They advised me what information to get to support the case, I had to get a letter from the school to explain what they had originally said, I had to get a doctor's report. They worded the submission for me taking all the evidence and putting the things together, and thinking from the original form pointing out why she should receive that support.”

Tanya's case points to the important role that legal advice plays in the renewal process. The above is not, in any way, arguing that legal advice is needed to ensure that disabled people get the same award on renewal. It may be that disabled people find their claim being reduced on renewal if the law has changed since their last claim was decided. For instance, the law relating to entitlement to lower rate mobility component has recently been amended so that disabled people who are too anxious to go outdoors alone in strange places because of a fear of an episode of incontinence will no longer qualify for support⁷⁴. Rather, as illustrated by Tanya's case, legal advice is fundamental for ensuring disabled people get the level of support that accurately reflects their needs.

Ensuring that disabled people have access to legal advice is as important for a renewal claim as it is for the initial claim. Legal advice is a crucial element of those efforts to better target support, by ensuring that those who need support are not excluded from receiving it. With the proposed shift towards more frequent reviews and reassessments for welfare benefits, this has never been more significant.

⁷⁴ Secretary of State for Work and Pensions v. DC [2011] UKUT (AAC) 17 June 2011, <http://www.britishcaselaw.co.uk/secretary-of-state-for-work-and-pensions-v-dc-dla-2011-ukut-235-aac-17-june-2011>.

Pathway without legal advice:

Tanya – on DLA – award reviewed	DWP decision – lower care component	Reconsideration of award – initial decision upheld	Giving up after reconsideration	Extra disability absorbed by family finances	Family struggle to maintain continuity of support	Greater dependency on other state services
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Removing legal advice would create a much less efficient system that fails to reflect actual need, as disabled people who will no longer qualify for legal help may potentially miss out on vital support.

Cases like Tanya’s illustrate unequivocally how the withdrawal of legal help may mean that where decisions remain unchanged after reconsideration, disabled people may be deterred from taking the case further to appeal. As Tanya’s mother told us:

“I think I would have given up on the first hurdle, when they asked for it to be looked at it again and it came back and the decision stood, and that we would still got the lower rate, I think I would have given up there if I hadn’t had the support to go through with it.”

The likelihood of giving up in absence of advice is exacerbated by the nature of the appeal process, which implied a change in the mother’s attitude towards her child’s impairment:

“The process was so stressful and emotionally charged, because you’re looking at the negatives of your child. Because you have a disabled child you know that it’s that way, but because you live with it day to day it becomes part of your normal life. You feel a lot like dissecting your child, and being critical of your child all the time”.



Photos have been changed to protect the identity of the people involved in the case studies.

If the parent had not had access to advice, her emotional involvement would have been likely to lead to her withdrawing the appeal at a later stage.

The importance of legal advice needs to be seen against the implications of not providing it. Losing the higher rate mobility would have, in practice, resulted in a much less efficient system in terms of how support is targeted. Given the imminent replacement of the DLA with the new PIP, how this will be targeted is all the more vital. DLA provides a contribution towards the extra cost of disability and if these extra costs are not covered accurately, the Government risks targeting the PIP incorrectly – leaving the family to pick up the bill and potentially costs the state more in the long run.

Furthermore, this would have, on the whole, undermined the Government's wider reforms seeking to ensure every disabled child has access to the support they need to fulfil their potential. As pointed out by Tanya's mother, this would have significantly reduced the extent to which Tanya could participate in her community:

"We now have a Motability car, if her high rate mobility component would have been reduced, we wouldn't have been able to have the car which means we would have been virtual prisoners in the house. Because of her needs, it's difficult for us to go out anyway, so to get her out of the house without the car is virtually impossible."

The findings from other interviews we conducted with disabled people and legal advisors reinforce the fact that that the pathway in the absence of legal aid would likely to be more disabled people potentially dropping out of the system and missing out on vital support. Overwhelmingly, the interviews revealed that disabled people's ability to navigate the whole process of making and taking a claim would be undermined in the absence of legal advice and support. Other disabled people who participated in the research frequently reported that they would have given up their appeal without access to advice:

"I don't think I would have gone as far as I did [without advice]. I would have given up, it's so much stress, it is a real negative experience to go through."

Furthermore, the general picture emerging from the interviews is reinforced in a research report by the DWP which looked into the experiences of

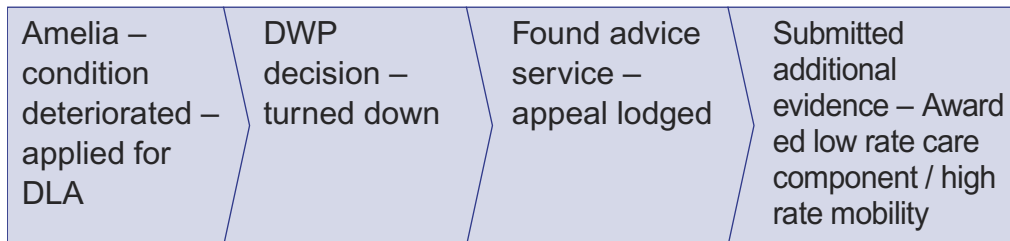
disabled people who have recently applied for ESA but had been unsuccessful⁷⁵. The DWP report also underlined the likelihood of disabled people to report having withdrawn their appeal because it became more than they could cope with⁷⁶. In addition to the issues raised by our interviewees, a worrying view expressed by disabled people as part of the DWP research was that they found the whole process intimidating and reported feeling ‘powerless in the face of officialdom’, which influenced their decision not to appeal. One comment from a disabled individual who had been found fit for work illustrates this sense of powerlessness:

“I could understand from the letter I could appeal but I just thought “What’s the use? I’m appealing against the Government.”⁷⁷

These findings are extremely worrying, as they provide a real insight into how failing to consider the role that legal aid can play in strengthening the Government’s reform agenda, risks undermining its aims.

3) In the context of seeking wider evidence in making welfare benefits decisions

Pathway with support:



In the current pathway, legal help is crucial to ensure disabled people can obtain and present the best possible evidence for their case.

On advice from her GP, Amelia submitted a new application for DLA as she was struggling to cope due to the pain in her back. After receiving the decision that her application had been turned down, she sought specialist legal help to pursue an appeal. She was awarded the low rate for the care component and the high rate for the mobility component.

⁷⁵ Department for Work and Pensions (2011), Unsuccessful Employment and Support Allowance claims – qualitative research Research Report 762, <http://research.dwp.gov.uk/asd/asd5/rreports2011-2012/rrep762.pdf>.

⁷⁶ Ibid

⁷⁷ Ibid

How many disabled people are likely to be in Amelia's situation?

There were 267,000 disabled people who were disallowed after making a new claim for DLA in 2009 – 2010⁷⁸. The evidence shows that disabled people face a great likelihood of missing out on the support they need when a new claim for DLA is made and turned down, given the high proportion of appeals arising from new claims which are then overturned in favour of the claimant (38 percent)⁷⁹. In light of this, the provision of legal advice for these cases will be imperative when all disabled people currently in receipt of DLA will be assessed against the new criteria for the Personal Independence Payment starting from 2013 / 14, and when new claims for Universal Credit begin in October 2013.

How did getting legal advice help Amelia's case?

The strength of an appeal depends heavily on the supporting evidence that is provided. Amelia's case highlights the role that legal help plays in enabling disabled people to understand what further evidence would be needed to support their case, or who the most suitable source to seek the evidence from would be:

"I didn't know whom to contact when the decision was turned down, or how to go about getting the information that I needed to support my case, and the advice that I got helped with all of that."

Disabled people often reported finding the appeal process extremely daunting, but the need to obtain additional supporting evidence for their case exacerbated this further. It is clear from Amelia's case that the knock-on effects of having to adjust to the change in their circumstances can be significant:

"Not having access to the things that we now have access to [after decision was overturned on appeal] affected our family in every way. We were struggling on a daily basis. Financially, I couldn't afford to pay for someone to come and help me with things such as picking the children up from school. I had to keep calling my partner at work because I got stuck and couldn't move. You also lose access to certain services if your benefit is removed".

This translated into a feeling of not being in a position where she could cope with the need to find additional evidence by herself:

⁷⁸ Department for Work and Pensions (2011), Analysis of Disability Living Allowance: DLA Awards, http://research.dwp.gov.uk/asd/asd1/adhoc_analysis/2011/analysis_of_disability_living_allowance_DLA_awards.pdf.

⁷⁹ Tribunal Service (2010), Quarterly Tribunals Statistics 4th quarter 2010-2011, <http://www.justice.gov.uk/downloads/publications/statistics-and-data/tribs-stats/quarterly-tribs-stats-q4-2010-11.pdf>

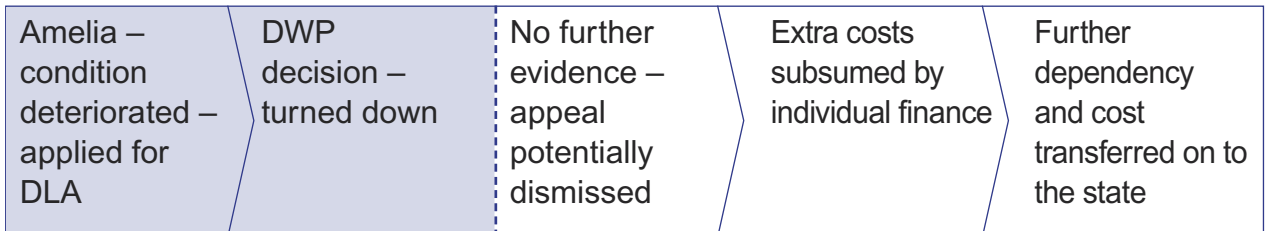
“[They] supported me throughout the whole of the appeal, writing letters to whoever it needed to be written, making calls on my behalf, and just generally acting on my behalf. When somebody is offering to take that load off you, you take it!”

Legal aid ensures that people can find and then use relevant evidence effectively and clearly in the tribunal, to help decision makers to come to a more informed and accurate decision about the case. In her interview, Amelia reported feeling out of her depth if she were to have had to make those arguments herself. As a consequence, she relied on the advice she received to draw out in the written submission to the tribunal the key arguments which supported her case and back those up with the relevant points of law:

“It’s difficult to know how to word things [in appealing]. It helps when you have got someone who knows what to expect or how to put things, that makes a lot of difference.”

The evidence from Amelia’s case shows the key role that legal aid plays in enabling disabled people to obtain the best possible evidence to support their case. The benefit of advice was also that it helped set out the facts clearly and concisely in the submission to the tribunal, enabling it to make its decision more quickly and more efficiently.

Pathway without advice:



The absence of legal help for welfare benefits cases in the future will undermine disabled people’s ability to obtain the evidence they need to mount an effective challenge. By extension, this would translate into missing out on vital support.



Photos have been changed to protect the identity of the people involved in the case studies.

The likelihood of giving up was all too apparent in Amelia's case. The lack of advice may translate into deciding not to pursue an appeal even where there is a strong sense that the decision made did not reflect a person's actual needs:

"If it hadn't been for the help I received, I would have given up at first hurdle. You start thinking 'perhaps I'm not entitled'. The whole experience was a negative one as far as the actual process involved. I can see how people very easily give up on things to which, if they were pushing harder, they would be entitled to."

This was exacerbated by the stream of negative rhetoric from the Government about claiming benefits⁸⁰, which was seen as potentially feeding into this and deterring disabled people from appealing. In Amelia's case, she described how these attitudes would influence her decision to appeal, if necessary, in the future. "The prospect of having to sit there and be scrutinised, you just sit there and think that you are treated by the whole system all the way through like you are a fraud, and then you have to prove that you're not rather than the other way around. You have to justify every little thing. I have to say, if it came to that situation I wouldn't have gone through it again." This prior experience with the benefits and appeals systems, combined with the negative attitudes towards those claiming benefits, may deter disabled people from pursuing an appeal in the future.

Compounding this, the need to get the right evidence was cited as presenting a further barrier:

"If I had persevered, and I had been quite stubborn about it, which I sometimes can be I suppose, I don't think I would have managed to achieve the same outcome by myself."

Difficulties in getting the appropriate evidence were recounted, particularly as some GPs may be reluctant to agree to this unless the request for further evidence came from an advisor, or in some cases they charged for it. Also, it is clear that supporting evidence can sometimes even prove counter-productive if it does not relate to the legal test for the benefit. The complex legal rules based on which decisions about entitlement to benefits are made were an area about which the interviewees appeared to have very limited knowledge. Inevitably,

⁸⁰ Benefits claimants aren't all waiting for handouts, Guardian 4 October 2011, <http://www.guardian.co.uk/society/joepublic/2011/oct/04/government-rhetoric-benefits-lifestyle-choice>

this made it unlikely that they would be able to get the information that is most helpful to the appeal without having access to legal advice.

Access to a specialist adviser who could draw out the relevant issues for an expert to give an opinion on was also highlighted as crucial to ensure that evidence provided is of real assistance to the tribunal. This was linked to the importance of advice in ensuring that disabled people had a clearer idea of what the relevant issues are and are less likely to bring up irrelevant issues. Interviewees emphasised that the appeal process had caused a further deterioration of their condition, however this would have been irrelevant as the tribunal would only look at the circumstances when the claim was made.

Furthermore, this needs to be seen against the limits to the tribunals' ability to compensate for appellants' difficulties in presenting their case. There are limits which prevent judges from out-stepping their impartial role, as aptly highlighted by the Judge Robert Martin, President of the Social Entitlement Chamber. He also emphasised the detrimental effect on the quality of justice⁸¹.

The Government's argument that legal help for welfare benefits may not be necessary due to the tribunal system being user-friendly⁸² does not take into account these limits. In great contrast to the case studies illustrated above, Judge Martin described the circumstances which the judges can expect to come across more often, should legal aid funding for welfare benefits cases be withdrawn:

"In many cases where a social security appeal turns on a person's state of health, we see an appeal letter or correspondence from the appellant which says, "My GP knows all about my health problems. You are quite free to ring him up and he will help you." But the tribunal really isn't in a position to pick up the phone, interrupt a GP's surgery and say, "We have an appeal on at the moment." Legal help comes in where the advice worker can say, "The tribunal won't be doing that, but I can do that for you," and possibly even pay for a short medical report. The person then arrives at the tribunal equipped with that evidence."⁸³

He further illustrated the costs associated with the greater pressure on judicial resources and time, and the value for money that legal aid provides

⁸¹ Judge Robert Martin (2011), President of the Social Entitlement Chamber, Response to Proposals for the Reform of Legal Aid in England and Wales, <http://www.judiciary.gov.uk/NR/rdonlyres/543C1139-3343-42A9-8AA0-C0A948BD9B36/0/legalaidresponsefromsectrib.pdf>

⁸² Ministry of Justice (2010), Proposals for the Reform of Legal Aid in England and Wales Consultation Paper 12/10, <http://www.justice.gov.uk/downloads/consultations/legal-aid-reform-consultation.pdf>.

⁸³ Judge Robert Martin (2011), President of the Social Entitlement Chamber, Response to Proposals for the Reform of Legal Aid in England and Wales, <http://www.judiciary.gov.uk/NR/rdonlyres/543C1139-3343-42A9-8AA0-C0A948BD9B36/0/legalaidresponsefromsectrib.pdf>

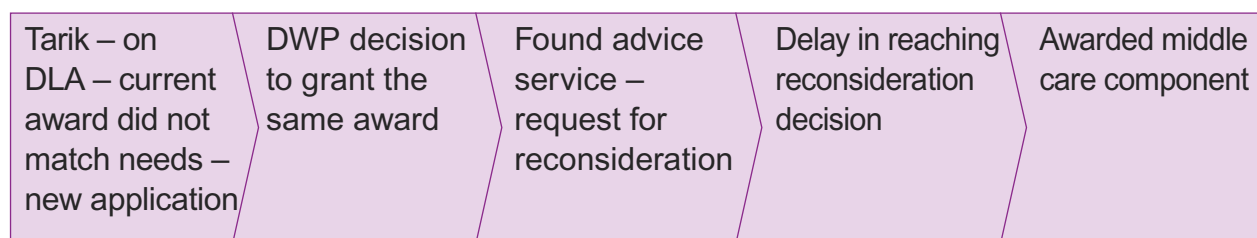
in ensuring that advice is provided at an early stage, enabling hearings to proceed more efficiently:

“A considerable amount of judicial time is expended at the hearing in explaining to a party who has not had the benefit of Legal Help, what the relevant issues are, what evidence is relevant, how the proceedings are conducted, what the tribunal can and cannot do to reach a solution. In welfare benefit cases, about 10% of the hearing time is consumed in explaining these basics. Compared to Legal Help, this is an expensive way of providing information, and rather late in the day.”⁸⁴

Whilst it is the Government’s intention to expand the sources of evidence that are used in making a decision at the initial claim, it also needs to be recognised that legal advice provides a key role in making sure that additional evidence is available at reconsideration stage or when taking an appeal.

4) Providing legal advice when introducing reconsideration as a mandatory stage before appeal

Pathway with support:



In the current pathway, legal help is getting decisions put right at reconsideration stage, so that disabled people would get the right support earlier on.

Tarik was in receipt of DLA low rate mobility and low rate care. However, following discussions with his support professionals, it was felt that he would qualify for the middle rate care due to his needs. Following an initial application at which Tarik was awarded the same level of support as before, his parents sought specialist legal advice to submit a request for the

⁸⁴ Ibid

Photos have been changed to protect the identity of the people involved in the case studies.



decision to be reconsidered. The delays for the department to reach its decision on reconsideration nearly exceeded a year.

How many disabled people are likely to be in Tarik's situation?

In the absence of official published statistics on applications for reconsiderations and their outcome, one can reasonably expect that most appeals on welfare benefits would be affected by the measure to require people to seek reconsideration before appealing. To give an indication of the scale of the proposed change, based on last year's number of appeals, this would have resulted in a total of 373,200 appeals cases which were disposed by the tribunal in 2010 – 2011 and involved DLA, ESA, JSA, IB and Income Support (IS) claims⁸⁵ having to go through the reconsideration stage.

How did getting legal advice help Tarik's case?

The significant delays experienced in Tarik's case add weight to the calls for a time limit for the department when processing revisions as well as appeals⁸⁶. With the increase in the number of cases going through reconsideration, such delays are likely to become much more common unless a time limit is imposed.

Within a system where reconsideration will become compulsory, the implications for those involved would be far-reaching if it were to result in long delays, as in Tarik's case:

"I don't know what the reason for the delay was. I don't know if they've got a lot of requests for it, or if they've got a backlog, but we had no explanation and weren't kept up to date. We had a letter saying they had received our forms, it was months and months after that when we got another letter to say that according to them, my son's needs were as before and didn't warrant any higher rate, and it was months and months after that, and then we got the ok in the end."

However, timescales have also been identified as a problem to obtaining extra evidence. The concern around this was particularly where the reconsideration was done so quickly that a disabled person had no time to send in additional information, making this an additional process that is

⁸⁵ Tribunal Service (2010), Quarterly Tribunals Statistics 4th quarter 2010-2011, <http://www.justice.gov.uk/downloads/publications/statistics-and-data/tribs-stats/quarterly-tribs-stats-q4-2010-11.pdf>

⁸⁶ Administrative Justice and Tribunals Council (2011), Time for Action A Report on the absence of a time limit for decision makers to respond to Social Security appeals, http://www.justice.gov.uk/ajtc/docs/Time_Limits_final.pdf

unlikely to add extra value. This meant that by the time the evidence was sent in, the decision had been reconsidered and unchanged, and therefore they had no choice but to appeal.

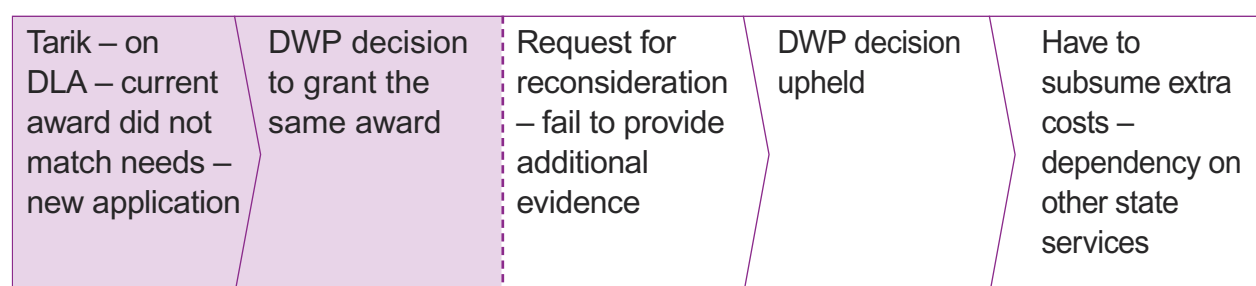
Rt. Hon Chris Grayling MP, the Minister for Employment, has highlighted the benefits of making greater use of the reconsideration process. He emphasised that the Government's 'focus on strengthening the reconsideration process is all about making sure that we try to maximise the evidence available to us. We give people the opportunity to return with further evidence, so that we can look again at that evidence and reconsider decisions before they go to appeal. The focus on reconsideration aims to ensure that decisions are changed quickly if we get them wrong the first time'⁸⁷.

The Minister's arguments that if further evidence is provided during the reconsideration process it can work very successfully are certainly true. However, what appears to be missing is an understanding of the importance of advice to get the adequate evidence, as highlighted in Tarik's case:

"[the advisor] had a lot of experience with this, so her experience and help in getting all the evidence needed helped us get the decision eventually changed on reconsideration".

While there may be practical constraints around time for obtaining further evidence from GPs and other professionals, legal help is crucial for ensuring that the right evidence is submitted in time, enabling the department to make its decision more quickly, and thus ensuring the efficiency of the reconsideration stage in getting disabled people the right support without the need to go through a lengthy appeal.

Pathway without support:



If legal aid were to be removed, disabled people would not have sufficient time to prepare their case for reconsideration or gather appropriate evidence.

⁸⁷ Welfare Reform Public Bill Committee Proceedings (17 May 2011), http://www.theyworkforyou.com/psc/2010-11/Welfare_Reform_Bill/22-0_2011-05-17a.6.0

Removing legal aid for welfare benefits means that opportunities would be lost, and that confidence in the reconsideration stage as an effective stage in the process would be undermined – some of the comments related to the need to get advice to gather the appropriate evidence. Without this evidence, the decision maker’s ability to conduct a thorough reconsideration would clearly be hindered.

These findings are supported by recent DWP research into the experiences of disabled people in the trials in Aberdeen and Burnley⁸⁸ which found that hardly any disabled people who had been disallowed ESA opted to submit further evidence after being told of the possibility to do so. The experience from the trials reinforces the need for advice for disabled people to get the necessary evidence at the reconsideration stage. The report suggested that it would be helpful to give people an indication of the type of evidence that they could provide. This is precisely the role that legal aid currently provides.

5) Providing legal advice when introducing a tougher conditionality system and a new regime for recovering overpayments of benefits

Pathway with support:



In the current pathway, legal help is crucial for ensuring disabled people do not miss out on vital support due to sanctions being wrongly applied or to challenge liability for overpayments.

Aaqib has lived in supported housing for many years. When his partner moved in, Aaqib notified the Department and a representative visited them both to take down the details of the change in circumstances. It was later

⁸⁸ Department for Work and Pensions (2011), Trial Incapacity benefits reassessment: customer and staff views and experiences Research Report 741, <http://research.dwp.gov.uk/asd/asd5/rports2011-2012/rrep741.pdf>

discovered that his partner was in receipt of Severe Disablement Allowance (SDA). As a result of the SDA not being taken into account, an overpayment of Income Support had been made. Aaqib's sister sought specialist legal help to challenge the decision to make the overpayment recoverable. With legal help, she managed to get his overpayment written off.

How many disabled people are likely to be in Aaqib's situation?

The cost of overpayments as a percent of benefit expenditure is around 0.7 percent⁸⁹. In addition to the concerns about the ability of HMRC to deliver a fully working real time data system within the timeframe set out for Universal Credit, the use of real time earnings creates another possible area of error for overpayments which result from official error.

Disabled people potentially face a loss of their benefits not only from overpayments, but also from being imposed sanctions. Disabled people currently represent 21 percent of the total JSA population sanctioned, and 15 percent of those who received a higher level sanction⁹⁰. The number of disabled people relying on legal aid to avoid a sanction being imposed in their case may increase given the more stringent levels of conditionality with claimants being expected to meet more requirements in order to receive benefit payments.

How did getting legal advice help Aaqib's case?

Legal advice was needed to ensure Aaqib was not held responsible for an overpayment that had arisen through no fault of his own:

“They said there was an overpayment, and they hadn't been told. But they had been told, when they moved in together. It was nerve-wracking, nobody had done anything wrong, it was very upsetting really... I then had to go to the Job Centre and they made me his appointee, so that I could deal with his money.”

Government departments often contribute to overpayments through official error and disabled people need legal advice to dispute overpayments they are left with as a result of official error.

Without advice, Aaqib's sister struggled to reverse the decision which was affecting his entitlement to income support and the overpayment:

⁸⁹ Committee of Public Accounts (2011), Reducing errors in the benefits system, <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmpubacc/668/668.pdf>

⁹⁰ Department for Work and Pensions (2011), Conditionality, sanctions and hardship Equality Impact Assessment, <http://www.dwp.gov.uk/docs/eia-conditionality-wr2011.pdf>

“Suddenly they stopped his Income Support and said that he was claiming too much, and that he shouldn’t be claiming it. Nothing I did or said could get the benefit reinstated. Whatever I did, it didn’t make any difference and it was only when I sought legal help, we got something moving.”

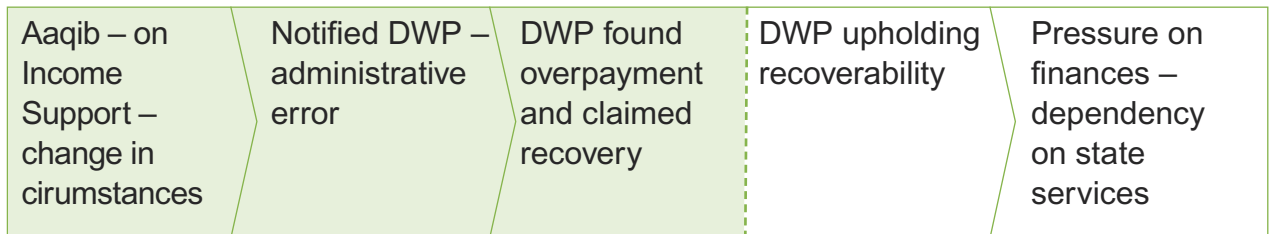
Many disabled people will be unable to identify what the cause for the overpayment due to the sheer complexity of the system. In Aaqib’s case, this involved the rules around paying the couple’s rate for Income Support and the interaction with the receipt of SDA.

The importance of legal advice in relation to overpayments needs to be viewed against the significant financial hardship that is caused if these are made recoverable:

“He was running out of money, I was lending him money and paying him, and the money was just winding away. It had a massive impact, he had hardly any money coming in. I had to really cut it down for him, or even pay for things myself.”

This is further exacerbated if processes are not in place to identify vulnerable people. In Aaqib’s case, it was subsequently recognised that he should have an appointee, which was arranged and his sister was made his appointee.

Pathway without support:



The absence of legal advice would leave disabled people facing a greater risk of having their support due to harsher sanctions or recoverability of overpayments.



Photos have been changed to protect the identity of the people involved in the case studies.

Without advice, Aaqib would have struggled to identify and challenge the precise error in the administration of the benefits system on which to base his appeal. The impact of removing legal aid for welfare cases will be worsened by the Government's plans to increase its powers in respect of the recovery of official error overpayments⁹¹. The use of real time earnings data for the Universal Credit increases the risk of official error, which makes access to legal advice all the more important. Linked to this, escalating conditionality will introduce more punitive changes which will include an increase in the length of sanctions and no option to re-engage following a sanction⁹². The issue of whether or not someone has failed to engage without 'good cause' which could then result in a benefit sanction is complex.

By increasing conditionality, sanctions and making changes to the existing overpayment rules, the Government is transferring the risks to disabled people, whilst at the same time removing the protection that legal aid provides to ensure that disabled people are not unfairly penalised or do not suffer hardship from not being able to challenge a recovery of overpayment. Within a context of greater conditionality, harsher sanctions and stricter rules for how recovery of overpayments will operate, it becomes crucial that the safety net that legal aid provides is retained.

What are the main findings from these pathways?

The case studies demonstrate that not receiving legal aid around benefit entitlements would have resulted in significant and long-term implications for disabled people and their families. The positive impacts of getting the support they needed from their benefits were seen in terms of offsetting additional costs associated with living with an impairment; increased ability to afford essential items, and greater capacity to engage in work and other social activities. Legal help impacted positively on their and their family's well-being, reducing anxiety due to financial worries.

This puts into perspective the impact that the withdrawal of legal aid will have in terms of disabled people's pathways through the system. In the absence of advice, disabled people may fall out of the benefits system or be subject to conditions and penalties, with the costs transferred onto the state and also undermining wider Government reforms. In addition, disabled people will struggle to maintain continuity of support if legal advice is removed, further increasing dependency on other state services.

⁹¹ Steven Kennedy (2011), Recovery of benefit overpayments due to official error Commons Library Standard Note, <http://www.parliament.uk/briefing-papers/SN05856>.

⁹² Department for Work and Pensions (2011), Conditionality Measures in the 2011 Welfare Reform Bill Impact Assessment, <http://www.dwp.gov.uk/docs/lone-parent-conditionality-wr2011-ia.pdf>

5. Where else can disabled people get legal help for welfare benefits cases?

The vast majority of social security cases are solved through legally aided work, rather than through non-legal aid channels. The Justice Select Committee highlighted the consequences if legal aid was stopped and raised the improbability of organisations already providing legal assistance to individuals to be able to fill the huge gaps created by the withdrawal of Government funding:

“Representatives of organisations in this field have made it clear they do not believe it will be possible for their organisations to meet all the unmet demand which will be created by the proposed changes to legal aid. That assertion casts doubt on a key condition for the Government’s proposed reforms – that clients will be able to access non-legal aid-funded sources of advice.”⁹³

Evidence points to the extent to which the reforms will undermine the viability and sustainability of many organisations currently providing advice:

“Social welfare law advice, (67% of which is provided by charities) is facing dramatic cuts. Out of its total (08/09) budget of £69m, £49m will be cut (equivalent to a 71% reduction).”⁹⁴

If legal aid is to be withdrawn so extensively, this will undermine the ability of such organisations to sustain themselves in the long term. It was apparent from DIAL advisers that they are already fully stretched providing the level of advice that they currently do, so groups have nowhere near the infrastructure that would be required to replace services currently funded by legal aid. Local DIAL groups do not have a direct contract with the Legal Services Commission to provide legal aid but changes of the level expected if legal aid is removed would therefore be very destabilising, as DIAL local groups rely on referring or ‘signposting’ disabled people to other sources of advice such as Citizen Advice Bureaux, Law Centres and other independent community advice agencies. As such, they cannot be the fall back option for future delivery of advice on social welfare law.

⁹³ Justice Committee (2011), Government’s Proposed Reform of Legal Aid, <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmjust/681/68110.htm>.

⁹⁴ Community Links (2011), The impact of proposed legal aid changes on the charity sector, <http://www.community-links.org/uploads/editor/charities%20and%20legal%20aid.doc>

6. SEN appeals

The case studies and analysis above have considered the pathways disabled people go through in relation to welfare benefits cases. For disabled children, the most important public service in their lives is likely to be education, and getting the right education will be critical to their future life chances. Despite this, the consultation on legal aid reform proposed to remove education appeals to the First Tier Tribunal from scope for Legal Help. After a significant public outcry, this decision was reversed. However, families still cannot access public funding to secure representation at Tribunal, even though those who are financially eligible will continue to be able to access help with preparing their cases. The problems from the lack of representation were highlighted in the Lamb report in 2009:

‘It is better for everyone if provision is made for children without recourse to the Tribunal. However, the cases going to the hearing are becoming more complex and issues under contention are more likely to be matters of law to be decided, rather than matters of fact to be established. Despite changes in the Tribunal system, many parents are finding appeals too difficult or complex and feel unable to pursue their claim without legal support.’⁹⁴

Furthermore, the Government’s wider Special Educational Needs (SEN) reforms will impact on how disabled children and their families navigate the system to get the support they need, particularly the proposal to introduce compulsory mediation⁹⁶. In the current system, the Statement of SEN is a legally enforceable document of entitlement which must identify the child’s needs and the educational provision which is considered necessary to meet those needs. Once the provision is agreed, or the Tribunal orders provision to be recorded, then there is an absolute duty on the local authority to ‘arrange’ it – in other words to make sure the child gets the help required and if necessary to fund it.

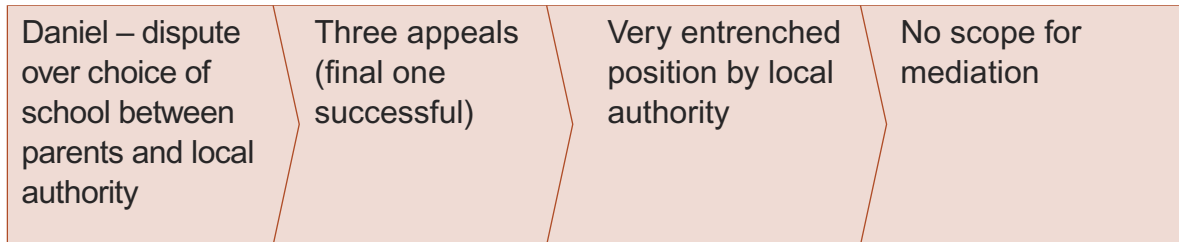
For many parents, the Statement is the route to obtain the support that meets their child’s educational needs. Currently, legal aid is available to support parents for preparing a case, but not for representation at a hearing. This unequal access to legal advice would be further compounded if

⁹⁵ Brian Lamb (2009), Special educational needs and parental confidence, <https://www.education.gov.uk/publications/eOrderingDownload/01143-2009DOM-EN.pdf>

⁹⁶ Department of Education (2011), Support and aspiration: A new approach to special educational needs and disability – a consultation, <http://www.education.gov.uk/childrenandyoungpeople/sen/a0075339/sengreenpaper>

mandatory mediation is introduced. For the mediation process to be effective, it is crucial that parents have access to advice to understand what is likely to happen during the mediation process or how mediation fits into the larger appeal context. The case study below illustrates some of the barriers to mediation and highlights the importance of making advice available for mediation to develop to its full potential.

Pathway with mediation under the current statementing system:



Under the current system of Statementing, some cases, such as those when the choice of school is disputed, are unsuitable for mediation because there is usually little room for negotiation. Most parents are unprepared to engage in mediation without support, feel intimidated by the process, and consequently may end up giving up provision of support to which their child would be entitled.

The cases for which legal aid is available in relation to SEN involve disputes about naming a school or including adequate provision on a statement. Daniel’s case involved a disagreement between the parents and the local authority over the school where he should be educated, and is illustrative of the experience of many families with disabled children who struggle to obtain the support to meet their child’s needs.

Parents views’ suggested that having to put their case across is challenging, and that they would lack the skills and knowledge to argue their case effectively in a mediation situation, as in Daniel’s case:

“I think you need help, you need someone on your side; you may be sure of the facts but you may not be able to argue it; you need someone to help you prove it.”



Photos have been changed to protect the identity of the people involved in the case studies.

As local authorities will have legal advice to call upon, parents would also need access to independent legal advice in a mediation context. Mediation may otherwise place parents at a disadvantage, as emphasised by IPSEA:

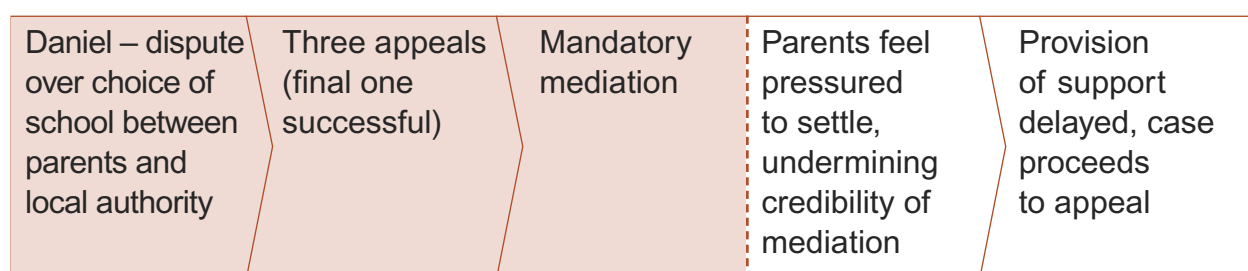
“Effective mediation occurs when both parties have equal knowledge of their rights and what they might, in effect, be giving up as part of any negotiated settlement. There is a clear risk that unsupported and / or less able parents will be pressured to give up on provision when it is in fact their children’s legal entitlement to receive it.”⁹⁷

Parents argued that mediation may be a difficult route when the position of the local authority is entrenched:

“We appealed, went to the tribunal and we actually lost it, I didn’t feel that at any stage mediation would do any good. We were pushing all the points forward but we were still ending with a blank; the local authority were saying that he couldn’t go to the school that I wanted. It took three tribunals and a very good advocate that I was put in contact with that won the day third time round.”

The argument that mediation should always be attempted before appeal fails to recognise that most cases, particularly those involving the choice of school, reach tribunal because there is no scope at all for mediation. This is particularly true when, as in the vast majority of cases, the local authority’s opposition to the provision or school sought by the parents is driven by cost considerations.

Pathway with mandatory mediation under the new system of a single health, social care and education plan:



Parents will need advice to engage in mediation effectively, to explore alternative solutions as well as to counteract pressures to accept a settlement that may not be in their child’s best interest.

⁹⁷ <http://www.ipsea.org.uk/AssetLibrary/News/SEN%20Green%20paper%20-%20full%20response%20-%20IPSEA%20-%20final.pdf>

The existing problems parents face in getting the right level of support would be merely replicated or potentially put parents in a more difficult position than now, if they do not have advice to effectively engage in the mediation process. Advice can improve the effectiveness of mediation by ensuring parents have preparation for mediation, as indicated by Daniel's mother:

"The help I got from the advocate could put down just hard facts; there was no point in saying "I think it is the right school for my child", you need to be able to say why another school won't meet his needs."

Without this preparation, parents are likely to be less able to articulate or express their views or concerns during mediation, or explore solutions other than those already proposed, and become reliant on the local authority or school gaining a better understanding of their child during mediation.

In cases like Daniel's, a further concern with the proposal to introduce compulsory mediation will be that the whole process is likely to lengthen not shorten where there is a dispute. Given that at the centre of every Tribunal appeal is a child who may be without suitable education, or indeed any education at all, this is unacceptable. The importance of speedy resolution, and the adverse consequences for the child in cases of delays, were highlighted by Daniel's mother:

"I think when it's your son's schooling you want things to move forward fast, and I don't think anything does move forward fast, my son didn't start school full time until he was nearly seven."

It was emphasised that mediation should not become another hurdle or blocking mechanism for families to access the support they need for their child's education (or in relation to health or social care provision).

Issues specific to the mediation process aside, the concerns about unrepresented parents in mediation include many of the same concerns that have been raised about unrepresented parents taking an appeal case to the tribunal. It is unlikely that mediators will be in a position to address the power imbalances between the parties and remain impartial to fulfil their duties. Ensuring parents have access to advice would be key to increase their confidence in mediation, and improve their sense of control over the process and outcome.

7. Conclusions and recommendations

The case studies and analysis presented in the report illustrate an amalgam of factors that would act as barriers for disabled people if they were to navigate the appeal process on their own in relation to their welfare benefits. Lack of knowledge about whether they have grounds to pursue an appeal and the need to obtain supporting evidence were the greatest barriers, but this was compounded by the complexity of the system itself and the effects of having to cope with the wider consequences of support that disabled people previously relied on being taken away. Concerns about the negative rhetoric around scrounging and falsely claiming benefits were also important factors that, in the absence of legal aid, would deter disabled people from pursuing an appeal case.

The analysis of disabled people's pathways through the system without legal aid illustrates the important role of legal aid in terms of contributing to the broader goals of the Government reform agenda. One of the ways in which legal aid plays a key role is by ensuring disabled people get a more accurate outcome in decisions about their benefits, and by extension the support they need to engage productively with the Government's initiatives to promote work related activity and employment in the reform of the welfare system.

The case studies show the extent to which the proposals contradict wider Government policy concerned with supporting disabled people into work and to live independent lives. For disabled people who will no longer be able to access advice, this will significantly affect their ability to maintain their independence, reduce their capacity to cope with the additional costs associated with living with an impairment, and undermine their ability to stay in employment or maintain contact with the labour market. The removal of legal aid will, in these ways, undermine the very objectives that the Government has set out for its welfare reforms, making accessing the support disabled people need more difficult.

Successfully obtaining legal advice in relation to welfare benefits saves costs that would follow if problems were left unresolved. Investing in legal aid for welfare benefits makes economic sense. As shown in this report, there are

very real economic costs that are likely to arise from the lack of advice. This would result in knock-on costs that will fall both on disabled people, such as reduced employment prospects and poor mental and physical health, and on the Government including increased health and social care costs.

Below, we have set out recommendations that the Government should commit to and implement as a matter of priority during the passing of the Bill, as well as once the Bill is passed to ensure disabled people can access the support to which they are entitled and ensure the success of wider Government reforms:

During the passing of the Legal Aid, Sentencing and Punishment of Offenders Bill, the Government should:

- retain legal aid for benefits appeals and reconsiderations, and seek to introduce amendments to the Bill that would keep these types of cases within scope
- ensure that provision of legal aid for welfare benefits cases is maintained until the proposed welfare reforms are fully bedded-in, to help disabled people adjust to the proposed welfare reforms.

Once the Bill has been passed, we call on the Government to:

- improve the infrastructure of advice to ensure a sustainable provision of legal advice on welfare benefits in the long-term, with quality of advice and specialist expertise as key principles
- consider steps to address current challenges in the landscape of provision and develop proper incentives for this work to be undertaken by advice providers and solicitors firms
- undertake a comprehensive review of the impact of the proposed welfare reforms to ensure the provision of advice is based on an understanding of real demand for advice, and re-examine the case for expanding funding to cover legal representation in relation to welfare benefits cases.

Furthermore, this report also highlights through case studies the challenges to ensuring mediation within the SEN context will work effectively, particularly in the absence of advice to support parents of disabled children during mediation. The recommendations for the ways to overcome some of the barriers under the current context are set out below:

During the passing of the Legal Aid, Sentencing and Punishment of Offenders Bill, the Government should:

- provide families and children with the advice necessary to engage effectively in mediation, to address the power imbalance which affects parents' abilities in this process
- consider the impact of these proposals within the wider context of the Government's SEN agenda, and in particular review the case for extending legal aid to cover representation in SEN cases

Once the Bill has been passed, we call on the Government to:

- ensure mediation is properly resourced and that mediators have expert knowledge of issues involved in SEN cases which is critical for mediation to succeed

Glossary of terms

The following are the definitions of terms used most frequently in the report:

Appeal	Challenging a decision about benefits and entitlements
Atos Healthcare	Providing independent medical advice to the Department for Work and Pensions
Department for Work and Pensions (DWP)	Department responsible for administering social security benefits
Descriptors	Range of actions, set out secondary regulations, on which entitlement to benefits is decided
Disability Living Allowance (DLA)	Non-means tested benefit paid as a contribution to extra costs of disability

Employment and Support Allowance (ESA)	A benefit which can be claimed if ability to work is limited by ill health or disability. There are two elements: contributory which is linked to national insurance contributions and income related which is means tested.
Fit-for-Work	Claimants found fit for work are found not to be entitled for ESA and transferred to a lower amount of Jobseeker's Allowance
Health Care Professional (HCP)	Employed by Atos Healthcare to provide medical services to the Department for Work and Pensions.
Incapacity Benefit (IB)	Benefit paid to people who cannot work because of illness or disability.
Job Seekers Allowance (JSA)	Out-of-work benefit that requires claimants to prove they are actively seeking work.
Job Centre Plus (JCP)	Government agency, which is part of the Department for Work and Pensions, supporting people of working age from welfare into work
Legal Services Commission (LSC)	Agency running the legal aid scheme in England and Wales
Personal Independence Payment (PIP)	Benefit to replace the current Disability Living Allowance, all existing claimants of DLA will be reassessed for eligibility and all DLA claimants will be subjected to a new medical test

Special Educational Needs (SEN) Mediation	Process in which disputes between parents and schools or local authorities with regard to a child's special educational needs are discussed with the help of an impartial professional
Reconsideration	A stage performed by the Department for Work and Pensions which involves looking at a decision about welfare benefits again
Social Security Advisory Committee (SSAC)	Independent advisory committee providing detailed scrutiny of proposals on social security matters
Support Group	Claimants placed in the Support Group are judged to be unable to work or undertake work-related activity
Universal Credit (UC)	Single benefit that will replace a range of benefits, including: child tax credit, housing benefit, income related employment and support allowance, income based jobseekers allowance, income support, social fund budgeting loans and working tax credit
Work Capability Assessment (WCA)	Main assessment test for Employment and Support Allowance claims
Work Related Activity Group (WRAG)	An individual is placed in the Work Related Activity Group if found to have limited capability for work at the time, but able to prepare for a return to work.

Scope

We believe disabled people should have the same opportunities as everyone else. We run services and campaigns with disabled people to make this happen. As a charity with expertise in complex support needs and cerebral palsy we never set limits on potential.

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