



ENABLE Scotland

Leading the way in learning disability

Fifth independent review of the Work Capability Assessment – ENABLE Scotland response

About ENABLE:

ENABLE Scotland is the largest voluntary organisation in Scotland of and for children and adults who have learning disabilities and their families. We have a strong voluntary network with around 4000 members in 44 local branches and via individual membership.

Around a third of our members have a learning disability. ENABLE Scotland campaigns to improve the lives of people who have learning disabilities and their families and carers. ENABLE Scotland provides social care services to more than 2,000 people across Scotland who have learning disabilities or mental health problems.

ENABLE Scotland has provided advice and information on Employment and Support Allowance to people with a learning disability, their families and carers across Scotland since August 2013 when we recruited a Welfare Rights Adviser thanks to funds made available by the Scottish Government.

Advice and information provision was extended across the organisation in March 2014 by the recruitment of two Money Advice Workers covering the Glasgow and North Lanarkshire areas funded by the Scottish Legal Aid Board.

Already, Employment and Support Allowance is the number one issue that our clients are receiving advice and information on.

We feel therefore that our advice service and our network of members and branches places us in a strong position to comment on the impact of the WCA on people with a learning disability.

Although we have endeavoured to answer the questions posed by this review, we feel that it is important to note that an accurate picture of the operation of the WCA process may not currently be available.

DWP statistics have shown that only 22% of claims started between July and September 2013 had completed the Work Capability Assessment by March 2014ⁱ. These timescales are significantly outwith the 13 weeks that this process should take to complete.

Alongside delays in the decision making process, we are aware that there have been substantial drops in the number of appeals lodged. Tribunal Service statistics show that the period of January to March 2014 saw a 59% decrease in appeals lodged when compared to October to December 2013. This drop rises to 79% when compared to January to March 2013ⁱⁱ.

Although it could be argued that a drop in appeal receipts is a positive sign, we are concerned that this drop relates to the introduction of the mandatory reconsideration process in October 2013 rather than any positive change in the quality of decision making.

Our concern with the process of mandatory reconsideration is two fold. Firstly, we are concerned that a large number of future appellants may simply be waiting to have their decision reconsidered before proceeding to appeal (creating a bottle neck), and secondly that many people with a learning disability will simply not challenge decisions due to being overwhelmed or confused by the new process.

Tribunal statistics from 2013/2014 show that 65% of appeals disposed of were for ESA and it is likely that the majority of claimants going through the mandatory reconsideration process will also be for ESAⁱⁱⁱ.

Given that 44% of ESA decisions were overturned in favour of the appellant at tribunal in 2013/2014, it is likely that many of those refused at mandatory reconsideration would go on to win their appeal should they see the process through to conclusion^{iv}.

Our concern is that many people with a learning disability will drop out of the process and that an accurate picture of the success or failure of the WCA will not be available for this client group.

This fear is compounded by the fact that claimants will not receive any payments of ESA (often a claimants sole source of income) until the mandatory reconsideration process has been carried out, and the appeal lodged.

Consultation Questions

- 9. Over the course of the last four independent reviews, a number of recommendations have been made and implemented. How have these changes altered the experience of people going through the WCA? Please provide supporting evidence**

Employment and Support Allowance is the biggest single issue dealt with by ENABLE Scotland's Welfare Rights and Money Advice workers. This suggests that the WCA remains a significant source of stress for people with a learning disability, their families and carers.

People with a learning disability remain confused by the WCA process and communication from the Department for Work and Pensions.

Due to delays in carrying out WCA assessments and a temporary suspension of reassessments, the majority of clients do not currently require assistance to challenge decisions, but assistance to understand why they are in a particular group or with the claim process.

We are concerned that the accuracy of outcome decisions has not been improved and that delays in both WCA assessments and the introductions of the mandatory reconsideration process simply mean that a bottle neck of appeals is being created.

- 10. In the Fourth independent review Dr Litchfield recommended that the ESA50 and all letters and forms should be reviewed to improve how the DWP communicates with people undergoing a WCA. Are there any other specific areas for improvement in the way that the WCA communicates with people? Please give details of specific areas for improvement.**

Our members consistently tell us that the communication that they receive from the Department for Work and Pensions is difficult to understand and can be a source of stress.

Many of our members with a learning disability and their carers tell us that they simply do not understand the Work Capability Assessment process and find their letters and forms impossible to cope with without support.

There are two main areas where our members report confusion:

ESA50 questionnaires: Our members tell us that they still find the ESA50 extremely difficult to complete and will often have to seek advice for assistance. This can bring difficulties when advice agencies are unable to assist.

Whilst some of our members feel that they can cope after having spoken to an advice worker, a greater number require practical form filling assistance.

ESA award letters: Our members tell us that they find their ESA award letters extremely difficult to understand.

As well as being unable to understand how their payments are calculated (leading to potential issues with over or underpayments of benefit) our members also tell us that they do not understand the terms used such as “limited capability for work” and “limited capability for work related activity”.

11. At certain points in the WCA process, either a person must take action to progress their claim or the expectations placed on them change. For example:

- **action is needed if the person wants a mandatory reconsideration; and**
- **expectations change when a person is placed in the Work Related Activity Group (WRAG) and is expected to undertake work- related activity.**

Is the information currently provided to explain the process or the expectations of the person undergoing the WCA adequate? If not, please consider what further information would be useful and why, and who would benefit from it, and provide supporting evidence.

People with a learning disability, their families and carers consistently report that the WCA is a stressful and confusing process.

ENABLE Scotland accepts that claimants will be asked to undertake certain actions in order to receive benefits, but we are clear that the demands made of claimants with a learning disability must be proportionate and clearly explained.

We are concerned that some of the burdens currently placed on claimants with a learning disability are not proportionate and that adequate support is often not available for people who require it.

ENABLE Scotland feel that the process of mandatory reconsideration has placed additional pressure on those challenging decisions and that this system leaves people with a learning disability particularly vulnerable to financial destitution whilst they await their reconsideration to be completed.

We would point out that under the previous system, decisions were already reviewed prior to proceeding to appeal and we can see no substantial positives from legislating for this process to be mandatory thus denying appellant’s entitlement to benefit.

We note that the Work and Pensions Select Committee share our concerns and stated in their first report of the 2014 – 2015 session that “*We are however concerned that its introduction may deter claimants who are likely to have been successful in their challenge from appealing, because the new dual process is more onerous*”^v.

12. In October 2013, ‘mandatory reconsiderations’ was introduced for a number of welfare benefits. Concentrating on the mandatory reconsideration process for WCA decisions, how do you feel this process is working? Please detail areas that do or don’t work well, and provide supporting evidence.

As noted in our introduction, ENABLE Scotland is extremely concerned about the introduction of the mandatory reconsideration process.

We are concerned that this process is another barrier for people with a learning disability to overcome when challenging a negative decision and fear that many potential appellants will become lost in the process through a combination of confusion and frustration.

Perhaps our main point of concern, however, is that potential appellants will not be paid benefit when challenging a negative decision until their appeal has been lodged with the Tribunal service. This is a significant departure from the previous system where an appellant could appeal as soon as a negative decision was received and be paid assessment phase rate ESA.

The Work and Pensions Select Committee again share our concerns in this area and have questioned the reasoning behind it stating that: *“there is no financial saving for the Department from the policy, and it may in fact cost the Department money due to the administrative burden”^{vi}*.

13. Thinking about the overall WCA process from when someone makes a claim to when they receive the final decision notification from the DWP, are there areas where the WCA doesn’t work well and/or could be improved? If so, please give details of improvements you would make, and provide supporting evidence.

We would suggest that claimants are provided with clear information about the WCA process as early into the claim as possible.

This information should explain the theory underpinning the benefit, what the WCA will involve, how they can submit any evidence they have they feel might be useful and a basic explanation of the two groups that they can be placed into.

We would also suggest that the differences between contribution based and income based ESA be explained to claimants and that contribution based recipients be made aware that their payments will end after 365 days if they are placed in the work related activity group.

Employment and Support Allowance and the Work Capability Assessment are complicated processes and we recognise that there may well be practical difficulties in explaining these to clients (particularly those with a learning disability) but at the moment, clients of our advice service are reporting that most aspects of the benefit have not been adequately explained.

14. Are there areas where the WCA process works well? How could these be built on to improve the experience of people going through the process? Please explain the impact that you would anticipate this having, and provide supporting evidence.

ENABLE Scotland we have seen examples where claimants have been placed into the support group without the need for a medical/functional assessment.

In these cases we have assumed that this has been on the basis of completion of an ESA113 form by the claimants GP or other medical professional. We would suggest that the process of additional evidence gathering becomes an automatic part of the WCA for all claims.

For people with a learning disability, we would recommend that evidence is gathered from a range of professionals and family members supporting the claimant. This will help to properly identify support needs as learning disability does not fall easily into a medical model of assessment.

ENABLE Scotland has assisted many clients who do not see their GP as there are no clinical treatments available for their disability but have found that family, friends and support workers have been key in providing valuable evidence as to the capabilities of the client.

15. In Employment and Support Allowance there are two groups that people can be placed in following the WCA process; the WRAG or the Support Group. Do you feel that the WCA is generally effective in correctly placing people in either the WRAG or the Support Group? If not, please detail areas of difficulty and provide supporting evidence.

ENABLE Scotland believes that the main problem with group designation is not only with the process of identifying the appropriate group for a claimant but with the design of the test which decides which group is appropriate.

We feel that the WCA descriptors have been designed in such a way that many people who could benefit from being placed in the support group will not meet the criteria. Similarly, we feel that many people with a learning disability will be found fit for work and be forced to claim Job Seekers Allowance when the reality of their circumstances is that they require additional support that they are unlikely to receive under the Job Seekers Allowance regime.

The Work and Pensions Select Committee have agreed with our concerns stating that: *“many find themselves in an outcome group which does not reflect their health barriers to employment, because the current system is not sufficiently sophisticated to cope with the wide variety in prognosis and impact which arises from the huge range of conditions which claimants present with^{vii}*

Although it could be argued that regulations 29(2)(b) and 35(2)(b) provide for claimants who should be in either group but do not meet the ordinary criteria, we would contend that as these regulations can only be used in exceptional circumstances, they are not sufficient to meet the needs of the people that we support^{viii}.

ENABLE Scotland also agree with the Work and Pensions Select Committee when they argue that claimants find terms such as limited capability for work and work related activity confusing and support their recommendation that more meaningful terminology be used^{ix}

- 16. The WCA aims to differentiate between moderate or severe impairment of a person's capability for work, resulting from a health condition or disability. For those with severe and enduring mental health conditions or severe learning difficulties:**
- a. What examples can you provide of this differentiation not working well? Please detail the parts of the WCA that contribute and provide supporting evidence.**
 - b. What examples can you provide of this differentiation working well? Please detail the parts of the WCA that contribute to this and provide supporting evidence.**

ENABLE Scotland feel that it is not simply a question of differentiating between the extent of an individual's learning disability when assessing either ability to work or benefit entitlement.

Whilst the nature of a claimant's learning disability will be an important factor in designing a strategy to both obtain and sustain employment, there are other factors which are also crucial. Availability of suitable employment, support to find employment, in work support, social care assistance and support from family and friends are all also key factors which affect capability for work.

Given the right combination of support and employment, it is perfectly possible that a claimant with a severe learning disability will be able to obtain and sustain employment, whereas a claimant with a mild to moderate learning disability with less of a support network may not be able to ready or able to do this.

Whilst the Work Capability medical assessment is intended to be a functional assessment rather than one of diagnosis, ENABLE Scotland are often told by carers and support workers that not only is the tick box nature of the assessment inappropriate but that people with a learning disability are liable to under report their support needs to medical assessors and that more background information should be sought prior to assessment to guard against this.

The Mental Welfare Commission for Scotland have also recommended that further evidence be sought to support claims in its report *who benefits? the benefits assessment and death of Ms DE^x*.

On a positive note, we have seen examples where ESA115's or other evidence has been requested prior to assessment allowing appropriate decisions to be made at as earlier a stage as possible but these cases do not seem to occur as often as they should.

- 17. For those people with more severe and enduring mental health conditions or severe learning difficulties:**
- a. Are there parts of the WCA process that you feel are particularly difficult to navigate? Please provide details of how this could be improved, and any supporting evidence that this would be effective**
 - b. Are there parts of the WCA process that you do feel support people well? Please provide supporting evidence.**

It is our experience that claimants, their carers, families and support workers are confused by the Employment and Support Allowance process.

We often hear that it is not until they speak to an independent advice agency that someone takes

the time to go through the specifics of the assessment process. This situation is not helped by the written information received by claimants that is also difficult to follow.

A specific example of this is that claimants often misunderstand the nature of the Work Capability Assessment points system and when completing the ESA50 questionnaire are prone to complete this under the assumption that their answers must be black and white and that fluctuating care needs cannot be counted.

We would like to see more support for claimants to ensure that all the factors contributing to their day to day life are noted at assessment as well as better recognition by medical assessors and decision makers of the importance of gaining a true picture of the claimant's life.

We do have examples of the process working well where claimants have been placed into the support group as the direct result of an ESA115 being requested but we would suggest that this does not happen nearly as often as it should.

For more details on any element of this response, please contact:

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ⁱ *Employment and Support Allowance: outcomes of Work Capability Assessments, Great Britain, Quarterly official statistics bulletin*, June 2014

ⁱⁱ Ministry of Justice, *Tribunal statistics quarterly January to March 2014*, June 2014

ⁱⁱⁱ Ministry of Justice, *Tribunal statistics quarterly January to March 2014*, June 2014

^{iv} Ministry of Justice, *Tribunal statistics quarterly January to March 2014*, June 2014

^v House of Commons Work and Pensions Select Committee, *Employment and Support Allowance and Work Capability Assessments*, Paragraph 19 of conclusions and recommendations section

^{vi} House of Commons Work and Pensions Select Committee, *Employment and Support Allowance and Work Capability Assessments*, Paragraph 22 of conclusions and recommendations section

^{vii} House of Commons Work and Pensions Select Committee *Employment and Support Allowance and Work Capability Assessments* Committee, Paragraph 1 of conclusions and recommendations section

^{viii} The Employment and Support Allowance regulations 2008

^{ix} House of Commons Work and Pensions Select Committee, *Employment and Support Allowance and Work Capability Assessments*

^x *Who benefits? The benefits assessment and death of Ms DE*, Mental Welfare Commission for Scotland,