# Social Security Advisory Committee consultation on decision making and Mandatory Consideration: Response from Citizens Advice Scotland

## March 2016

*Citizens Advice Scotland (CAS), our 61 member Citizen Advice Bureaux (CAB), the Citizen Advice consumer helpline, and the Extra Help Unit, form Scotland’s largest independent advice network. Advice provided by our service is free, independent, confidential, impartial and available to everyone. Our self-help website Adviceguide provides information on rights and helps people solve their problems.*

*In 2014/15 the Citizens Advice Service network helped over 323,000 clients in Scotland alone and dealt with over one million advice issues. With support from the network clients had financial gains of over £124 million and the Scottish zone of our self-help website Adviceguide received approximately 5.4 million unique page views.*

*Issues relating to benefits and tax credits are the most common area of advice provided by citizens advice bureaux in Scotland, with 220,000 new issues in 2014/15, representing 37% of their work.*

**Summary**

* Citizens Advice Scotland strongly recommends that a statutory time limit should be introduced within which a Mandatory Reconsideration decision must be returned to the claimant.
* Prior to the introduction of Mandatory Reconsideration in April 2013, benefit claimants would be paid their benefit whilst awaiting their Tribunal hearing. This is not the case under Mandatory Reconsideration, and for some claimants this can mean waiting weeks with no benefit, or applying for a benefit for which they are unable to meet the conditionality requirements. CAS recommends that benefit payments continue at the assessment rate during the reconsideration period.
* CAS recommends that the DWP and HMRC provide clarity around whose responsibility it is to obtain and provide medical evidence during the Mandatory Reconsideration process as well as in other circumstances.
* CAS recommends that a review is undertaken of the process whereby health professionals provide evidence in support of benefit claims so that an integrated policy approach can be developed, addressing the existing limitations of both the social security system and the NHS in assessing how an individual’s condition affects their every-day lives.

This response focusses on the effect of Mandatory Reconsideration on Employment and Support Allowance (ESA), partly because the ESA Work Capability Assessment is the most common reason that claimants request a reconsideration, and partly due to the fact that Mandatory Reconsideration causes the most detriment to ESA claimants.

1. **How well does the appeals process currently function? Does mandatory reconsideration facilitate, encourage or discourage appropriate redress for claimants?**

Although Mandatory Reconsideration is achieving its purpose of reducing demand on the HM courts and Tribunals Service[[1]](#footnote-1), by reconsidering more decisions internally, CAS is concerned that the process could discourage people from appealing entirely, effectively preventing the right to an independent appeal and acting as a barrier to justice.

CAS’s primary concern is that no statutory time limit exists within which the DWP must provide a decision in response to a Mandatory Reconsideration request. The DWP have indicated that a mandatory reconsideration should be processed within 14 working days, although data on the time taken to reach a decision has been described by the Work and Pensions Committee as “sporadic and incomplete”[[2]](#footnote-2). The most recent official statistics, published in December 2014, show that 75% of ESA decisions are overturned within 30 days, and that the average timescale is 13 calendar days.[[3]](#footnote-3) However, Department ‘targets’ do not constitute a time limit, and in reality claimants can wait weeks to receive a decision. This presents a problem both for claimants and for advice agency staff, who do not know how long to wait before contacting the DWP regarding a reconsideration request.

* A South of Scotland CAB reports of a client who had had no communication from the DWP since requesting a mandatory reconsideration in September 2015, five months previously. The CAB made contact with DWP about the delay and was told that the client’s case had not been looked at by a Decision Maker. The Mandatory Reconsideration letter had been received but no further action had been taken. There was no explanation as to why it had taken five months for a reply. The adviser will resend MR to a decision maker and this could take another six weeks.

A related concern regarding the mandatory reconsideration process is that disputed benefit entitlement is not payable pending a mandatory reconsideration. This means that those in receipt of ESA who wish to challenge a decision regarding their entitlement to that benefit, or which group they should be in, are no longer entitled to receive benefit payments at the assessment rate during the reconsideration process, and must instead claim Jobseekers Allowance (JSA). However, many ESA claimants are reluctant to claim JSA, for reasons that will be discussed below, or experience a delay in making a claim, and therefore experience (sometimes severe) financial hardship as a result.

In October 2015, CAS received responses from 15 CAB welfare rights advisers to a survey which included two questions about Mandatory Reconsideration. When asked about the impacts of Mandatory Reconsideration, 13 respondents mentioned the fact that clients are not in receipt of the benefit during the reconsideration period, and ten mentioned the financial impact that this can cause and used words like “hardship”, “poverty” and “reliance on foodbanks”:

*“The main impact is loss of income. If a claim for ESA is subject to Mandatory Reconsideration then claimants lose out on potential components on an ongoing basis. It is alright to say that if the decision is overturned then the claimant receives a backdated payment of benefit, however the claimant has had to survive without it in the meantime.”* – Western Isles Citizens Advice Service

*“The person often has no money, this can mean they don’t have fuel or food or the money for their fare to hospital or money to top up the phone. It can result in malnourishment.”* – East Dunbartonshire CAB

*“Clients either are unable to afford essential living expenses or end up deeply in debt. As one claimant said - you can't walk out of the Co-Op telling them you'll backdate payment for your groceries.”* – Skye CAB

CAS evidence suggests that the lack of a clear timescale for the process, and the financial hardship experienced by claimants leads to stress and anxiety and can have a detrimental impact on mental health, especially for those who already have existing mental health conditions. CAS is concerned that these negative experiences reported by a significant number of CAB clients could deter them from appealing to a Tribunal if the reconsideration is unsuccessful.

In response to the survey, eight welfare rights advisers commented that Mandatory Reconsideration can have an impact on anxiety, stress and mental health, and a further three said that the time taken to challenge a decision through the Mandatory Reconsideration process can have a detrimental effect on physical health:

*“The stress that the delays in MR's should not be underestimated, I personally know of several clients who have broken down under the stress of waiting for a decision.”* - Skye CAB

*“Clients who have serious mental health problems find delays have a detrimental impact on their mental wellbeing and can set back any progress they may have made.”* – Glasgow Drumchapel CAB

*“The impacts of delays on Mandatory Reconsiderations on our clients are huge. The most vulnerable clients (those suffering from mental health illnesses) are the ones who are affected most.”* – East Renfrewshire CAB

There are also problems with the way in which the Mandatory Reconsideration process interacts with the tribunal process, for example where a client is unsuccessful at the mandatory reconsideration stage and then goes on to appeal. Once the appeal is lodged, a client should have their ESA payment reinstated at the assessment rate. However, there appears to be considerable confusion as to how that happens, including whether a client has to specifically request ESA to be reinstated or whether this should happen automatically when the DWP receives notification of an appeal. There are therefore often significant delays in clients receiving any payment of benefit.

If, at the Tribunal, the claimant's appeal is successful, and it is decided that they should be placed in the Work Related Activity Group or Support Group for Employment and Support Allowance, their benefit should be reinstated at the appropriate full rate. However, in many cases this does not happen, and the claimant is again left without benefit for what can be a number of weeks.

CAS has an overarching concern that due diligence is not being applied by decision makers to collect adequate evidence in relation to a reconsideration, and that because the reconsideration process is not independent, as is the case with an appeal to the HM Courts and Tribunals Service, this could introduce bias in the decision making process.

CAS strongly recommends that a statutory time limit should be introduced within which a Mandatory Reconsideration decision must be returned to the claimant.

1. **Is new evidence gathered in a way which is suitable for the claimant by DWP and HMRC? Could this be improved and, if so, how?**

There is sometimes confusion around who is responsible for gathering additional evidence, whether it is the responsibility of the DWP, the assessment provider or the claimant, although CAS believes that DWP should be ultimately responsible.

It is not always easy to obtain evidence from health professionals, and this is a problem which extends beyond Mandatory Reconsideration to affect many aspects of the benefits system. CAS ran a workshop with 120 advisers at a Citizens Advice and Rights Fife conference in February 2016, specifically exploring problems associated with obtaining medical evidence in support of benefit claims. Advisers cited a number of barriers to collecting evidence, including the fact that GP surgeries often charge fees to provide letters, but do not take a consistent approach, creating a ‘postcode lottery’ which depends on the practices of a claimant’s local surgery. Clients also experience difficulties in getting appointments with GPs or specialists in order to obtain medical evidence, particularly within the given time-frame to support a reconsideration or an appeal. Advisers mentioned that it was harder to obtain medical evidence in support of a mental health condition compared to a physical health condition.

Often, medical evidence attests to the medical *condition* rather than how it affects the client in day-to-day life, and therefore is of limited use in support of a reconsideration or appeal. This is partially due to the fact that GPs and other NHS consultants do not know the individual’s limitations in daily life, and also because health professionals are not trained in the benefits system and do not always know what is required of them when asked to provide evidence in support of a benefit claim.

Many clients disagree with the evidence of the Health Care Professional (HCP) report that is the outcome of their Disability Living Allowance (DLA), Personal Independence Payment (PIP) or ESA medical assessment (by Atos, Maximus or Salus). However, CAS evidence suggests that decision makers and tribunals are unduly deferential to this evidence unless there is overwhelming independent medical evidence to the contrary. And, in some cases, it seems that not all evidence is being properly considered.

* A West of Scotland CAB reports of a case in which the decision maker made a decision without having seen the GP letter that the CAB sent in support of the Mandatory Reconsideration request, resulting in the client being refused placement in the Support Group. CAB adviser’s comments: “I want to emphasise the point that even though the DWP state they didn't receive the GP letter that we sent with the Mandatory Reconsideration request they went ahead and made a decision, and chose to prefer the HCP’s findings. Please note that our contact details, including phone number are on the Mandatory Reconsideration request form and yet the DM didn't think it prudent to phone us to ask us to forward the evidence.”

One adviser who responded to the survey last year said:

*“We feel that often a decision is made before new evidence is submitted and received by the Decision Maker and also before the requested Health Care Profession report is received by the claimant’s representative. It feels like they are just going through the motions.” –* Nairn CAB

CAS recommends that the DWP and HMRC provide clarity around whose responsibility it is to obtain and provide medical evidence during the Mandatory Reconsideration process as well as in other circumstances.

CAS also recommends that a review is undertaken of the process whereby health professionals provide evidence in support of benefit claims so that an integrated policy approach can be developed, addressing the existing limitations of both the social security system and the NHS in assessing how an individual’s condition affects their every-day lives.

1. **What are claimants’ experiences of claiming Jobseeker’s Allowance (JSA) while waiting for their mandatory reconsideration notice when appealing an ESA fit for work decision?**

* A South of Scotland CAB reports of a client who came to desk asking for a food parcel for himself. He stated that his ESA has been stopped and he is waiting to hear about his mandatory reconsideration, so has no money at the moment. The client stated that he knows he could apply for JSA, but he is not fit to work, so doesn't want to do this.

The DWP encourages ESA claimants to apply for JSA while awaiting the outcome of a Mandatory Reconsideration. However, many individuals are not well enough to actively seek work or to meet the strict conditionality for JSA. This can result in a revolving-door scenario of claimants being told to claim JSA because they are fit for work, and then being told by the jobcentre to claim ESA because they are too sick to work. In addition, many ESA claimants are reluctant to claim JSA as they worry that the claim will be seen as conceding they are fit for work and this will count against them in the future.

When responding to the survey, eight welfare rights advisers commented on the fact that those awaiting a decision on their ESA are expected to claim JSA, and the difficulties they experience in trying to meet the conditionality requirements:

*“ESA appellants have to satisfy the JSA conditionality which is extremely difficult for them because they are ill.  They fear getting sanctioned adding to the daily pressure they are under.”* – Coatbridge CAB

*“No clear guidelines on time limits means clients are often in financial hardship where they are too unwell to claim JSA. Clients also can be sanctioned due to claiming JSA and not being able to fulfil the requirements.”* – Renfrewshire CAB

*“Certain conditionality requirements have always been attached to JSA. As part of the introduction of Universal Credit, all JSA claimants are now required to sign the Claimant Commitment, which requires them to undertake extensive job-search activities, which may be up to 35 hours a week, in return for receiving the benefit. If claimants do claim JSA, they may be sanctioned if they do not fulfil the conditionality requirements.”* – Nairn CAB

In some cases people claim ESA due to physical health conditions, in some cases mental health conditions, and in some cases drug and alcohol dependency. This policy raises questions not only about whether it is reasonable to expect these claimants to keep up with the conditionality of Jobseekers Allowance, but also about whether such expectations might exacerbate existing conditions.

* A West of Scotland CAB reports of a client who failed to attend a Work Capability Assessment and his reconsideration request was refused. He is an ex-drug addict and is on a methadone programme and states his life is chaotic and he can't sleep at night. Adviser’s comments: “Because of client's alcohol dependency he should have been treated as a vulnerable person by the DWP. The DWP appears to have ignored its own duty of care to client and not followed the 'safeguarding' guidance prior to stopping his benefit.”
* A West of Scotland CAB reports of a client who had been found fit for work approximately two weeks ago and currently did not have any funds for gas/electricity or food. The client struggles with reading and writing and did not understand the reasons why this had happened. During the process of claiming JSA over the phone the Rotherham centre began by taking the client through security questions, however proceeded to speak with the client regarding the application. Despite the client advising of his mental health conditions and that he was finding this difficult to understand, and requesting that the CAB adviser speak on his behalf, the DWP telephone adviser stated that this needed to be completed by the client themselves. This meant that the client became increasingly agitated as he felt they were not listening to his request to have someone speak on his behalf.

A related issue is the impact this has on entitlement to passported benefits such as Housing Benefit and Council Tax Reduction. If claimants choose not claim JSA, a claimant's Housing Benefit can be stopped because the local authority has been informed by DWP that the claimant is no longer in receipt of a relevant out-of-work benefit.

* A West of Scotland CAB reports of a client who was in receipt of ESA but after submitting his ESA50 form and attending a Work Capability Assessment his ESA was stopped as he attained only nine points on the assessment. He advised that he applied for JSA but had heard nothing since. He stated he also received a letter advising that his Housing Benefit has ceased when his ESA ceased. He is concerned that his JSA has not started yet and he will have a problem keeping his home.

CAS recommends that benefit payments continue at the assessment rate during the reconsideration period, as was the case prior to introduction of Mandatory Reconsideration, and that ESA claimants are not expected to claim JSA while they are challenging a decision.

1. **Are there ways in which DWP and HMRC could make better use of evidence in making decisions on entitlement for benefits and tax credits? If so, how?**

DWP could be clearer about the kinds of evidence that can be considered, and who is responsible for providing it.

As has been previously mentioned, it is important that decision makers treat all evidence equally, and ensure that evidence of the existence of mental health conditions is not treated differently to evidence of physical health conditions. The symptoms of mental health conditions are not always as visible, easily identified or correctly diagnosed. It is important that DWP decision makers bear this in mind and ensure that adequate evidence is gathered.

There are also some situations in which the DWP hold evidence that could be in support of a client’s claim. If this is the case, it would benefit claimants and advice agencies if this evidence was made available to them:

* An East of Scotland CAB reports of a case in which the DWP were asked for a copy of the renewal claim pack for DLA which had been completed by the client's mother. This would assist in the request for a Mandatory Reconsideration. DWP stated that they no longer supply copies of claim forms due to the workload of the section involved. CAB adviser’s comments: “This seems to be a change of policy as I have not encountered problems with this in the past. If this is a new policy it is one which disadvantages the claimant.”

1. **Could more effective communication with claimants and their advisers improve the quality of decision making? What aspects of claimant communications should the government prioritise?**

A claimant can ask for a decision to be revised either orally or in writing and there is no application form that must be used. This is intended to allow flexibility, but it can mean that claimants are confused about the process and whether they have requested a decision to be reconsidered or not.

* An East of Scotland CAB reports of a client who returned to the bureau because he had not heard back from DWP regarding the verbal Mandatory Reconsideration. The client’s last ESA payment was earlier that month and he had no money or electricity in his prepayment meter. The client’s girlfriend had been helping him.

CAS is also concerned that advice and support agencies are being excluded from the process when a claimant is informed of an initial decision concerning their benefit claim over the phone, and the claimant expresses that they disagree with this decision, this is understood by the DWP to be a request for a reconsideration. However, the problem is that the claimant does not always realise that this has been understood as a Mandatory Reconsideration request, and the claimant has not had the opportunity to receive advice and support as they would if they had submitted a written request.

* A North of Scotland CAB reports of an occasion when an adviser phoned the DWP with the client present to request a copy of the PIP medical assessment report. The call handler asked if this was in connection with a Mandatory Reconsideration, and if so which parts of the decision did the client disagree with. It became clear that call handler was preparing to carry out the MR there and then on the phone. The CAB adviser told call handler that the client did not want this, and that the CAB would be submitting a written MR. He made a note on client's file to this effect. CAB adviser’s comments: “I am concerned that if clients phone DWP to request a document in connection with a MR - perhaps at the request of a CAB adviser - they may unwittingly have their MR carried out on the phone, and thereby be denied the right to be given advice on this and to submit a considered response in writing.”

*“There is a general lack of understanding regarding the MR process in its entirety. It is often explained on the phone when claimants have been told that their benefits are being stopped – they do not take it in. By the time they engage with CAB, the deadlines have expired or are near expiry.”* – Nairn CAB

CAS recommends that the script used by DWP telephony advisers when calling a claimant to inform them of a decision is a) clear that they can challenge the decision by requesting a Mandatory Reconsideration; b) that this can be done over the phone or in writing and c) that they may wish to consider seeking help from a third party such as an independent advice agency.

1. **Do you have any other general views about the quality of decision making and the role of mandatory reconsideration?**

CAS has concerns about the ability of claimants to undergo the Mandatory Reconsideration process by themselves without support from a third party, as they may not know what language to use (for example, what a ‘descriptor’ is, and which descriptors they wish to focus their reconsideration on).

*“I see how it affects clients on a daily basis and without our support, most of the clients would find themselves without any money at all.”* – East Renfrewshire CAB

The case below is an example of not only how important it is that claimants have access to advice and support agencies, but also an example of good practice on the part of both the Jobcentre Plus and the DWP decision maker.

* An East of Scotland CAB reports of a client who has lived all his life with his mother and was in receipt of Income Support and Carers Allowance until sadly, very recently, his mother passed away. The client’s Carers Allowance stopped after this and he had to apply for ESA. His sister completed the form on his behalf but unfortunately he received a letter advising that he gained 0 points at his Work Capability Assessment. The client had been advised to make a claim for JSA whilst he asked for a Mandatory Reconsideration of his ESA decision but was struggling to do this by himself. The client had struggled that morning at the Jobcentre and had become quite distressed about the whole situation.

The CAB Adviser had offered to do mandatory reconsideration for the client, but after speaking to the Disability Officer at the local JCP in advance of client's appointment with her, the Disability Officer had contacted the Decision Maker at DWP and they had a detailed discussion regarding the client’s health issues. The decision was reversed without a Mandatory Reconsideration being necessary and the Client was placed in the Support Group of ESA for three years. The Decision Maker also immediately notified the Local Authority regarding the current suspension of Housing Benefit.

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1. Statistics published by the Ministry of Justice show that the number of appeals to the First-tier Tribunal (Social Security and Child Support) had fallen by 86 per cent in the first quarter of 2014, compared with the previous year. While there are likely to be a number of factors responsible for this fall, including the backlog of cases being assessed for ESA and PIP, the introduction of mandatory reconsideration has had a significant impact. [↑](#footnote-ref-1)
2. [www.publications.parliament.uk/pa/cm201516/cmselect/cmworpen/372/372.pdf](http://www.publications.parliament.uk/pa/cm201516/cmselect/cmworpen/372/372.pdf) [↑](#footnote-ref-2)
3. [www.gov.uk/government/uploads/system/uploads/attachment\_data/file/387871/MR\_adhoc\_final.pdf](file:///E:\SSAC%20consultation%20response\SSAC_consultation_response\www.gov.uk\government\uploads\system\uploads\attachment_data\file\387871\MR_adhoc_final.pdf) [↑](#footnote-ref-3)