

Disability and Carers Benefits Expert Advisory Group: Decision Making and Consultations

To: Shirley-Anne Somerville, Cabinet Secretary for Social Security and Older People
By e-mail

14 April 2020

Dear Ms Somerville,

Decision Making and Consultations

In your letter to the Advisory Group sent 12 Feb 2020, you asked for advice on entitlement decisions for disability assistance - the proposed framework for case managers making decisions.

We welcome the commitment by the Scottish Government to ensure safe and secure delivery of the newly-devolved benefits, and to improve the claiming process for all recipients. We understand that our advice may incur risks, implications and challenges for the Scottish Government. These will be made explicit in the current advice note and we aim, where possible, to signpost a proposed solution.

We have worked with officials to ensure that our advice is informed by information available at this time and relevant to the current policy landscape. In addition to officials attending our most recent quarterly meeting on 27 February 2020, a smaller contingent of DACBEAG met with officials on 14 February 2020 for a more in-depth review of the current policy and programme thinking. We would like to especially thank the officials who worked with us on this policy area. Their input was clear, concise, and greatly aided us in focusing this advice.

Clearly, information and the current policy landscape may change in ways that cannot be foreseen at this time, so the advice we give now is with the caveat that this too may change in light of developments. As always, but especially in light of the uncertain times we currently face, we would welcome returning to these issues in the future.

We set out below some issues arising from our discussions to which we wish to draw to your attention. Our recommendations are summarised at the end of this letter.

Consultations

We understand that the Scottish Government is considering removing physical examinations from the assessment process of disability assistance for working age people (DAWAP). Instead, a discussion focused “consultation” may be conducted if a claimant’s initial application and supporting information is deemed insufficient to make a positive determination.

We have heard time and again how upsetting people find PIP assessments. We have also heard that a one-off physical examination is often an ineffective and inefficient method of gathering the information needed to make a determination about someone’s

entitlement to disability assistance. Therefore, we welcome this decision which should make the application and information gathering process less stressful for claimants. We hope that claimants find the process of making an application for disability assistance in Scotland easier to navigate and less stressful than making a claim for PIP.

We see this new process as a significant step forward in terms of treating disabled people with dignity and respect, but there may be a risk that, without sufficient understanding, the public, including disabled people themselves, will think this new process is more susceptible to fraud.

We understand that in this new system, the burden of providing information is being shifted from disabled people themselves to their health and social care providers. The eligibility rules and the threshold at which disability assistance is awarded remains the same. The public must have a similar understanding. If they do not, this change has the potential to undermine public confidence in the Scottish Government's project to change the culture of social security administration.

To mitigate this risk, we recommend the Scottish Government implements a significant public engagement exercise on its social security objectives, well beyond the experience panels, to ensure this and other policy commitments are well understood ahead of implementation. This will also give the Government valuable insights into how to build public support for the changes it wants to achieve.

Recommendation 1: The Scottish Government should implement a significant public engagement exercise to improve insight around this and related social security objectives, to build public support for designing a more dignified approach to disability assessment and to ensure the proposed consultations are effective and sustainable.

Before the decision to remove physical examinations, the Scottish Government made several commitments regarding informal observations in face-to-face assessments.¹ These were largely in line with the recommendations we made on this issue.² With the move to consultations, we believe these commitments should remain.

We understand that there will still be some in-person face-to-face consultations if the claimant wishes: this is important, as some people are unable to communicate well over the telephone. Moreover, even if the consultation is conducted via telephone or video, it will still be possible for practitioners to pick up on how people sound, look, etc. Therefore, the issues these commitments were put in place to address will likely remain, at least in some form. We believe the Scottish Government should gather information and build on insights about diverse and inclusive communication. The surge in home working and electronic communication driven by recent events could provide a source for such information.

With regards to parity between claimants who receive telephone and face-to-face consultations regarding informal observations, we do not believe any measures can

¹ Part 4.4 of [Social Security. A Consultation on Disability Assistance in Scotland: Scottish Government response.](#)

² [Disability and Carers Benefits Expert Advisory Group - informal observations: advice](#)

be put in place to address this. Such parity is not achievable in our view. What is important is that claimants are able to choose if their consultation takes place via telephone, video, or in person; that they are aware informal observations may be taking place; and that such information will be used transparently and be open to challenge.

Recommendation 2: The Scottish Government should uphold its commitments regarding the use of informal observations despite the move to consultations.

We also discussed the impact of the move to consultations on the requirement in the legislation for suitably qualified assessors. We note that an earlier policy statement from Scottish Government suggested that a proportion of the staff carrying out assessments would be specially trained in, for example, mental health issues and learning disabilities.³ We understand that, in line with this policy, some practitioners carrying out consultations will be specially trained and some will not. This means case managers and practitioners without specialist training will be expected to seek advice from practitioners that are.

We have raised in our previous advice that we consider the primary reason for a consultation to be filling a gap in the evidence available. Where that gap relates to the impact of a mental health condition or learning disability, for example, then a practitioner trained in that condition would be required when carrying out a consultation.⁴ In that same advice, we highlighted the need to avoid relying entirely on case managers and practitioners to recognise that they need additional advice. We have heard from others that the Mental Wellbeing Champions introduced by ATOS to carry out a similar role in PIP were under-used. There is a risk that case managers will be reluctant to ask for help, because they do not wish to appear unable to handle their own cases, or because they wish to close a case quickly for the benefit of the claimant. It will be important that case managers and practitioners are positively encouraged to make use of the specially trained practitioners, rather than feeling that they are a last resort. We would also suggest that specially trained practitioners should have a quality control role of being able to select appropriate cases at random to identify whether additional advice would be helpful.

Recommendation 3: Case managers and practitioners should be positively encouraged to make use of the specially trained practitioners. Specially trained practitioners should have a quality control role to identify areas where additional advice would be helpful.

Finally on this point, it is important to recognise that sometimes disabled people may underplay the effects of their disability. This can be especially prevalent for people with learning difficulties. Therefore, consultations must be designed in a way that ensures these issues are considered and addressed.

Recommendation 4: Consultations must consider and mitigate the fact that some disabled people, especially those with learning difficulties, may underplay the impact of their condition.

³ [Scottish Government Position Paper, Disability Assistance: Assessments, February 2019.](#)

⁴ [Disability and Carers Benefits Expert Advisory Group - suitably qualified assessors: advice](#)

Gathering information from external agencies

Reducing the number of consultations will hopefully lead to a better claimant experience. However, not having the information that is currently collected in PIP assessments may mean case managers will have to rely more heavily on the public and third sectors to provide information when additional information is required. In practical terms, this means there may be more pressure on, for example, GPs, councils and third sector services to collect, hold, and share this information. It also means that case managers may be receiving information in a different form than PIP decision makers.

This raises several points. First, external agencies that will be relied upon to provide Social Security Scotland (the Agency) with the information needed to make high quality decisions must be properly resourced to do so. Currently GP practices and the third sector are stretched doing their primary functions. The Scottish Government must recognise that it is adding an extra responsibility to these organisations and evaluate and address the resource implications of this policy.

Recommendation 5: The Scottish Government must recognise that where it is putting extra pressure on external organisations to provide information relevant to a claimant's application, it must evaluate and address the resource implications of this pressure.

Also, the information case managers will receive from these sources may be qualitatively different to what case managers would have received from assessments. Currently, when someone requests a letter from a GP it may only contain a diagnosis and a list of prescribed medications. Though we understand this may be sufficient to meet the requirement for one formal source of supporting information, it may not provide the information the case manager needs in order to make determination. Information provided by the third sector may be similarly unfocused on what is most relevant to DAWAP eligibility.

Additionally, relying on information from these sources may put these services in a difficult situation. Namely, they will be asked to provide information that may disadvantage their client in their benefit application. Doctors, welfare rights workers, and other support services are advocates for their clients: they may be unwilling to provide information that could have a detrimental impact on their client's health or wellbeing.

While recognising these tensions, these external agencies will need to prepare for these requests for information, including, for example, setting up policies and procedures for how to answer one. Therefore, they will need detailed information about the Government's plans as early as possible so they can make the proper preparations.

There may be information held by the DWP that has previously been used to determine entitlement to benefit. The agency may wish to consider if this is a useful source of evidence, and if so how and when it might be accessed, whilst always ensuring that the individual is aware of what information is being sought.

Recommendation 6: External organisations must be provided with substantial guidance to ensure the information they provide is as useful as possible to case managers. This should be provided as early as possible so organisations can prepare internal policies and procedures.

Recommendation 7: The relationship between external agencies and claimants must be considered. Where an external agency is unable to or does not wish to provide such information to the Agency, communications should be crafted in a way which mitigates risks to this relationship.

Gathering supporting information from clients

Where a case manager needs more supporting information from the claimant themselves, it will be important to ensure the process for doing so is transparent and allows for claimants to have the support (e.g. advisers or support workers) they require in place. Therefore any calls to claimants for this purpose should not be spontaneous, and should instead be pre-booked with the claimant. Claimants should be involved in choosing a time that suits them and those who support them.

Recommendation 8: Requests for further supporting information from claimants should involve pre-booked interactions to allow claimants to secure the support they require.

We remain concerned about section 54(2) of The Social Security (Scotland) Act 2018 which gives Scottish Ministers the power to make a determination that an individual is not entitled to assistance if an individual fails to provide requested information (including the results of a consultation) in a timely manner. We are pleased to hear that information gathering will be led by claimants. Our understanding is that when the Agency requests further information from the claimant, the claimant can identify where that information might be held and, with the claimants consent, the Agency will collect the information on the claimant's behalf. We hope this means that even if the claimant does not respond to requests for further information, the Agency will take this to mean that the claimant does not wish to provide further information, and the Agency will make a determination based on the information they do have. Therefore, the powers set out in section 54(2) will rarely, if ever, be used.

Recommendation 9: We welcome the commitment for information gathering to be claimant led. Therefore, we recommend the Scottish Government commit to rarely, if ever, using the powers set out in section 54(2) of The Social Security (Scotland) Act 2018.

How claimants are asked to notify the Agency of changes of circumstances must be carefully thought through. Section 56 of The Social Security (Scotland) Act 2018 is worded broadly, so that any failure to notify the Agency of changes in circumstances of the type it requests, in the way they request for it to be notified, can constitute an offence of failing to notify under section 72 of the Act. Our understanding is that when an individual is informed of their award of disability assistance they will also be informed of the changes they need to report to the agency. There may be a danger

that the way the agency places a duty on an individual to report changes of circumstances could mean that claimants are unfairly subject to this offence.

Recommendation 10: The way the Agency requests information relating to changes of circumstances must be carefully considered to ensure claimants are not inadvertently or unfairly subject to an offence of failing to notify as described in section 72 of The Social Security (Scotland) Act 2018.

Gathering supporting information from third parties

We welcome the commitment that the Agency will collect supporting information from third parties on the claimant's behalf upon request. That said, when a claimant makes such a request, we believe the claimant should be able to see what information that third party provides. Ideally, the claimant should be able to see the information the third party intends to submit before it is actually sent to the Agency.

This, of course, must be balanced with ensuring clients receive quality decisions as quickly as possible.

Recommendation 11: Supporting information sent by third parties to the agency at a claimant's request should be immediately available for review by the claimant. This must be balanced with ensuring quality decisions are made quickly.

How long a case manager waits for third party information and how long they continue to search for supporting information should be led by the claimant. This will require consistent communication with the claimant to keep them informed regarding who the Agency has asked for further information and how long they have been waiting for that information. The claimant will have the best understanding of how useful information will be and where such information might be held.

Keeping claimants updated in this way will minimise uncertainty during the application process and let the claimant decide if they feel the information they are waiting for is worth further delaying their decision. It will also allow them to decide if further information could be obtained from another source. Each claimant's circumstances are different. As such, we do not believe there should be any strict time limits set for how long a case manager should wait for information or continue to look for it. However the agency should monitor, record and report on the time taken to undertake a determination of disability assistance.

Recommendation 12: There should not be a strict time limit put in place regarding how long a case manager should wait for information from third parties or how long they should continue searching for further information.

Decision making matrix

We were pleased to see an early draft of the tool case managers will use to make sure they have requested and considered all relevant information – the decision making matrix. We believe this will lead to more consistent, higher quality decision making.

One thing we noticed about the draft we saw is that included some information about the client, including e.g. name and gender. While we understand there must be some information available to case managers so they can make an accurate decision, we want to stress that unconscious bias should be considered and minimised wherever possible in the decision making process. However, more and better equalities data must be collected to enable robust analysis of its equalities impacts on take-up and outcomes.

Recommendation 13: Forms used by case managers, including the decision making matrix, should minimise possibilities for unconscious bias where possible. We stress that this data must be collected and analysed, but it must only be available to case managers where it is necessary to make a quality decision.

We also learned that when making a decision, case managers will cite the sections of the guidance they used when making their decision in the decision making matrix. We think this is an excellent policy that will make it easier for quality assurance and continuous improvement to be conducted at a high level.

We believe that this guidance, in addition to any internal operational guidance, should be publically available. We also believe this guidance must cite law, including both regulations and caselaw, where appropriate and be clear that where guidance is not backed up in law, it is not legally binding.

Recommendation 14: We welcome the policy to have case managers cite the guidance they referenced when making their decision. Case manager guidance, and operational guidance if different, must be published in full to allow claimants and their advisers to easily reference these citations. This guidance must cite the law where relevant, and be clear about what parts of guidance are not based in law and are therefore not legally binding.

Another thing we noticed in the draft of the decision making matrix is that there seemed to be a continuous process of seeking further information if there was not enough information to make a positive determination to award benefit. There must be a way for a case manager to decide that they do not need further information and make a negative determination not to award benefit. We understand this was only an early draft, and we believe it highlights the positive philosophy the Government has nurtured – that everything must be done to ensure those that are eligible receive their awards. However, it does raise the point that it will be necessary to say “no” to some claimants.

Communications

How the Agency says “no” to clients will be incredibly important. This will be a difficult time for claimants and it is important they understand what their next steps are and what support is available to them.

Recommendation 15: How negative determinations are communicated to claimants must be carefully considered. These communications should leave claimants feeling informed about why the decision was reached, what further

options are available to them and where they can receive support to access those options.

Communications will also be especially important when interacting with people who are terminally ill. There will be instances where the terminally ill person is unaware of their prognosis. How the Agency identifies and communicates with these claimants must be carefully considered and any risks must be mitigated.

Recommendation 16: Communications from the Agency to terminally ill claimants must be carefully considered. It is especially important that risks regarding communicating with claimants that are unaware of their terminal prognosis are mitigated.

We understand that “information” is currently being used to describe both information describing a claimant’s condition and functional abilities and evidence that supports the claimant’s description of their condition and abilities. We agree with the thinking behind this decision - that we don’t want claimants to feel they are part of an adversarial system where they must prove their entitlement. However, there is a difference between descriptive information and evidence used to prove that information is true in this context. For example, descriptive information may be that the claimant has trouble walking while evidence would be the claimant’s statement that they have trouble walking. Using the same phrase to describe both will be confusing for both claimants and case managers. We therefore recommend that more thinking is done to devise wording that acknowledges the difference between evidence and information, but still does not make claimants feel they are presumed untrustworthy until they prove otherwise. We suggest the experience panels and other stakeholder engagement should inform this language. In general, we believe the Scottish Government should be clear that the decision-making process is there to determine eligibility - there has to be a threshold at which point disability assistance is secured. Claims should be seen as genuine whether they succeed or not – the latter telling us only that the threshold hasn’t been met.

Recommendation 17: “Information” should not be used to describe both descriptive facts and evidence used to prove those facts. Communications should make it clear that what is being determined is eligibility, not whether or not the information in the claimant’s application is being taken as genuine.

Looking outwith social security

When designing the decision making process, it is important to remember that important decisions are made in a variety of contexts and robust decision making policies and procedures have been developed as a result. We believe these other contexts - including for example: the legal system, social care, the Scottish Public Services Ombudsman – should be looked at and used to develop the social security system decision making process. So far it appears mostly Department for Work and Pension (DWP) processes are being looked at and used as a basis for the Scottish system. While this makes sense to a degree, this is an opportunity to make Scottish social security decision making the best it can be, so other contexts should also be explored.

Recommendation 18: The Scottish Government should look outwith DWP decision making to other decision making contexts including the legal system, social care and Ombudsman for insights into good decision making policy and practice.

Conclusion

Getting the information collection and decision making process right is arguably the most important task in devising a new social security system. It is where the claimant, Social Security Scotland and government policy interact most closely. We are encouraged by the progress that has been made in this regard to date and hope this advice aids in improving it further.

Recommendations

Please see below our key recommendations.

Recommendation 1: The Scottish Government should implement a significant public engagement exercise to improve insight around this and related social security objectives, to build public support for designing a more dignified approach to disability assessment and to ensure the proposed consultations are effective and sustainable.

Recommendation 2: The Scottish Government should uphold its commitments regarding the use of informal observations despite the move to consultations.

Recommendation 3: Case managers and practitioners should be positively encouraged to make use of the specially trained practitioners. Specially trained practitioners should have a quality control role to identify areas where additional advice would be helpful.

Recommendation 4: Consultations must consider and mitigate the fact that some disabled people, especially those with learning difficulties, may underplay the impact of their condition.

Recommendation 5: The Scottish Government must recognise that where it is putting extra pressure on external organisations to provide information relevant to a claimant's application, it must evaluate and address the resource implications of this pressure.

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should make it clear that what is being determined is eligibility, not whether or not the information in the claimant's application is being taken as genuine.

Recommendation 18: The Scottish Government should look outwith DWP decision making to other decision making contexts including the legal system, social care and Ombudsman for insights into good decision making policy and practice.

I hope this is helpful. I look forward to your response and we would be pleased to discuss this further with officials.

With best wishes,

Dr. Jim McCormick
Chair