Disability Rights UK (DR UK) is led by people with lived experience across the spectrum of disability and health conditions, including mental health conditions, learning disabilities, dementia and autism.

DR UK run a second-tier advice line where we assist their front-line advice workers with supportive information and advice.

We are a pan disability membership organisation led by disabled people seeking change. Our membership includes individual disabled people and organisations working on their behalf including disabled people led organisations. Among our membership are over three hundred organisations that give advice directly to disabled people, particularly in respect of benefit issues.

Introduction

In his report on the planned tribunals modernisation programme - Tribunals Judicial Ways of Working - the Senior President of Tribunals Sir Ernest Ryder says –

“There are two overarching principles which we all agree are fundamental; the first is that access to justice must be improved not reduced… The second, which came very clearly out of our discussions, is that ‘one size does not fit all’ - modernisation has to be and will be jurisdiction specific…”

While we would endorse both principles we here set out our concerns on the following aspects of tribunal reform especially as they relate to welfare benefit appeals –

- fully video tribunal hearings;
- composition of appeal tribunals; and
- continuous online resolution.

Disabled people and tribunals

Any reforms to social security tribunals will overwhelmingly impact on disabled people.

In total, 80% of welfare benefit appeals are made by disabled people. Employment Support Allowance (ESA) and Personal Independence Payment (PIP) appeals accounted for 24% and 56% of all SSCS receipts respectively in July to September 2018 (Tribunals and Gender Recognition Statistics Quarterly).

So around 4 in 5 appeals made to social security tribunals are made by disabled people.

With an overall appeal success rate for claimants of 68%, the figures showed that -
- 72% of PIP and ESA appeals found in favour of the claimant;
- 65% of disability living allowance appeals found in favour of the claimant.

These figures show that disabled people are not only the greatest users of HMCTS. They also significantly benefit from its justice in overturning poor PIP and ESA DWP decision making.
There are barriers to disabled people accessing HMCTS not least from the deterrent effect of the DWP’s Mandatory Reconsideration system. In contrast to successful tribunal appeals, DWP statistics show that in July 2018 only 22% decisions overturned at mandatory reconsideration stage.

Given all this, we would submit that HMCTS should undertake a full and thorough equality impact assessment of all its proposed tribunal reforms before any final implementation. And that the impact on disabled people is at the forefront of any piloting and reporting of such reforms.

But fundamentally, we submit that HMCTS must monitor and regularly publish the appeal success rates of any alternative form of appeal resolution to that of current appeal tribunal processes and make up.

We believe it may well be the case, as it is now, that disabled people will achieve significantly greater appeal success rate at face to face appeal hearings. And the HMCTS should make clear such success rates – including the level of ESA or PIP awarded - when asking appellants to indicate how they wish their appeal to be determined.

Oral hearings and video hearings

In Maty 2016, Minister for Disabled People Justin Tomlinson said in a parliamentary answer that -

“The Department gathers information on the reasons why PIP decisions have been overturned from its Presenting Officers and the summary reasons it gets back from the Tribunal hearing. Internal Management Information for 2015/16 indicates that either new oral or documentary evidence supplied at the hearing are the leading reasons for PIP decisions being overturned in 75% of overturns recorded.”

Significantly, the main source of additional evidence is oral evidence. In a further written response the next day, the Minister refined his answer as follows –

“The 75% can be broken down as follows:
Cogent oral evidence – 66%
Cogent documentary evidence supplied at the appeal – 9%.”

In its recent investigation, Decision Making and Mandatory Reconsideration (July 2016), the Social Security Advisory Committee considered evidence of the primary reasons for appeal tribunals overturning DWP decisions and concluded that –

“… the data suggest that cogent oral evidence provided is critical to decisions being changed at tribunal”

We are unsure if the Ministry of Justice collects data on the outcomes of different types of appeal hearings.

But advice sector representatives would universally agree that the success rate by disabled people at oral appeals is in stark contrast to that of paper appeals.

Research by the University College London Judicial Institute and the Nuffield Foundation in 2013 found that claimants were almost three times as likely to win an appeal for Disability Living Allowance after an oral hearing than paper alone (46%, compared to 17%).
There are likely to be several reasons for this. Primarily, without the disabled person sitting in front of them, a tribunal panel cannot judge for themselves how severe their condition is. Appeal panels, often faced with conflicting medical evidence, must make a decision about the credibility of an appellant. It is clearly far easier for them to make this judgment if a claimant is in front of them answering their questions.

This disadvantage is exacerbated by the fact that many claimants appealing a decision are not actually aware of the complicated legal criteria for being eligible for benefits. When the appeal is only by paper, a tribunal has no way of filling in the gaps in the evidence so may not make an award.

Tribunal hearings held by video conferencing will not have similar disadvantages to that of paper hearings. But many disabled people will not be able to access such video conferencing from their own homes.

Using a computer is still something many disabled people struggle with. The latest statistics (2016) from the Office of National Statistics show that 25% of disabled adults had never used the internet which translates to over three million people. This contrasts with just 11% of non-disabled adults who had never used the internet. In 2013, Ofcom said that factors beyond age and income, possibly related to the individual’s disability, contribute to limited internet access.

The Extra Costs Commission, launched by the disability charity Scope, did a year-long enquiry exploring the extra costs faced by disabled people, estimated to be on average £550 more a month. In its report released in June 2015 they cite that disabled people could save money by learning how to use the internet, for example by using cost comparison websites, yet disabled people were not online because of a lack of training, cost of equipment and the accessibility of web content.

In terms of disabled people accessing our www.disabilityrightsuk.org website, around half do so not from a PC or laptop but via a smartphone. The latter clearly would be inadequate in terms of participating in a video hearing.

Some disabled claimants may feel uncomfortable with teleconferencing, as they are not actually able to speak to a judge face-to-face. The experience of watching the tribunal panel on a computer screen or television monitor may make some individuals feel like the hearing is too impersonal.

The credibility of the disabled person can be a major part of a tribunal’s reasoning as to the correct disposal of their welfare benefit appeal. This can be especially so if they have mental impairments or physical issues that do not appear on x-rays or MRIs, such as fibromyalgia or chronic fatigue syndrome.

In addition, we strongly oppose any proposal for video conferencing hearings not to be held in “continuous real time” as are oral hearings. This presumes that disabled people will have ready access to online facilities to participate from home. Those with cognitive difficulties will for example find it difficult to follow a process subject to unexpected interruption and restarting.
Oral hearings are both performed in a real-time environment that always allows representation by welfare rights advocates during the hearing, including cross-examination of DWP presenting officers and questioning their disabled clients to enable them to elaborate on their evidence.

Social security legislation is often complex and disabled claimants will not always know the technical rules at dispute in their case. It is therefore important that any representative can attend the full hearing of their appeal.

At present, all claimants have an absolute right to choose either a paper hearing of their appeal or an oral hearing. In future, it is essential that they have a right to choose a paper hearing, video conferencing or an in person oral hearing of their appeal.

In addition, we would stress that any move to digitisation must enable disabled people to retain the right to an oral hearing as an effectively resourced choice. They must not feel pressurised to opt for a video hearing as there may be a substantially longer wait for a face to face oral hearing.

**Panel composition of tribunals**

In May 2018, new regulations removed the requirement on the Senior President of Tribunals (SPT) to have regard to how tribunal panels were formerly composed replacing it with a requirement that the SPT can specify whether a tribunal panel is to consist of one, two, or three members.

DR UK strongly disagrees with any change to the panel composition of tribunals hearing appeals that relate to a claimant’s eligibility for benefit under disability qualification regulations.

Panel members with close or direct experience of disability provide a perspective that is unavailable to judicial or medical members.

Panel members with experience of disability may also be seen by appellants as providing a neutral presence in a process which many find stressful or distressing or both.

In a October 2106 Guardian article, a disability-qualified tribunal panel member gave this summary of their role -

“It’s part of my job to look at a claim from a disabled person’s perspective. I can ask questions about how someone has filled in the form and get an understanding of the implications of what they have (or haven’t) said.

My personal experience of disability gives me some insight into the kinds of questions to ask to get relevant information about people’s conditions that make their day-to-day life difficult.

Most appellants who come to the tribunal are nervous. Tears and distress are common, even though tribunals are pretty informal.

Having someone on the panel who isn’t a doctor, or a lawyer does make things easier for many claimants and they are more likely to open up.
I help increase the general knowledge base of a tribunal. It’s not a “jury of their peers”, because there are not 12 of us, but it does at least nod to that principle by having a disability expert on the panel.

Although the vast majority of panel members I’ve sat with over the years are good people, everyone can have bad days, doctors and lawyers included. Three-person tribunals add checks and balances to the benefit appeal process, with room to challenge and probe decision-making and reasoning.

... It’s part of my job to look at a claim from a disabled person’s perspective. I can ask questions about how someone has filled in the form and get an understanding of the implications of what they have (or haven’t) said. My personal experience of disability gives me some insight into the kinds of questions to ask to get relevant information about people’s conditions that make their day-to-day life difficult.”

We acknowledge there are circumstances where a judge and not a medical member or a disability member may not be needed on a panel considering a ESA or PIP appeal. For example, in cases where the issue under appeal only relates to whether an appellant has a right to reside in the UK or how long they have resided here.

However, this must only be where the issue under appeal does not relate to the nature and severity of someone’s disability or ill health condition and how it effects their daily life.

We believe that disabled people should be given the choice as to whether to have their appeal heard by a single judge.

We believe that few may do so and any imposition of a judge only hearing can only damage the perception of HMCTS as an independent adjudicator.

HMCTS should also monitor an publish appeal success rates in cases heard by a single judge including the level of ESA or PIP awarded.

**Continuous online resolution**

HMCTS is developing systems to allow appellants in Social Security and Child Support appeals to make and track their appeal and submit evidence online and receive text and email alerts letting them know the progress of their appeal.

None of this is inherently wrong. There will clearly be some disabled people who have the ability and technology to make use of these online processes. However, we would draw attention to the points we have earlier made as to the difficulties many disabled people have in using and accessing the internet.

However, such greater use of digital processes also carries advantages for HMCTS itself, in terms of cost and perhaps staffing, over a paper-based system.

It is essential that ‘digital by default’ does not predominate so that it effectively excludes those who because of the nature of their disability, skills or finance cannot make use of IT or the internet.
Full access to HMCTS must remain readily available by means other than the internet and highlighted to users accordingly (even though this may be considered inefficient or not cost effective by HMCTS itself).

We are also concerned about the following additional piloting of ‘continuous online resolution’ in PIP appeals (set out in pages 8 to 35 of slides used in February 2019 HMCTS event).

Very briefly, a tribunal panel will review information from both parties and consider if that appeal is appropriate for the pilot and that the panel needs more information. Following this –

- the panel will form questions for the appellant and invite responses through an online account that will include a facility to upload evidence;
- responses will be reviewed within a week and further questions may be posed; all responses will then be reviewed and shared with the DWP;
- if the panel decides it has enough information to make a decision decide it provides a preliminary view which is shared with the appellant and the DWP; the view includes detailed reasons for the proposed decision;
- the appellant has the option of accepting the view - and if the DWP raises no objections this will become the decision - or choosing a hearing to provide oral evidence.

This in practice is a ‘paper hearing plus’. And we would highlight that for HMCTS as a public body - perhaps in workload and cost - its use would be advantageous if it were to replace the current level of oral hearings.

We acknowledge that some disabled people will see this as a way of avoiding an oral hearing that they are too anxious and fearful of attending.

We submit that disabled appellants should be given a choice whether to participate in the pilot and so are able to choose instead to proceed immediately to a face to face oral hearing. This should be the case if this paper hearing plus is eventually adopted.

We are also concerned as to possible implications for the just adjudication of disabled people’s appeals.

While having an appeal upheld, a disabled claimant may be deterred from seeking to further pursue a benefit decision challenge due to concern that they may jeopardise the level of award offered.

Claimant uncertainty as to ‘what to do’ will inevitably place further demands on the ever-reducing advice sector. Which in turn may not eb able to respond with advice within the specified HMCTS timescale.

In addition, this form of paper adjudication cannot provide the same level of evidence and the weighing of it as an oral hearing. We believe that it would be better used only by a tribunal who after considering the evidence from both parties are ‘minded’ to uphold an appeal but after some further limited information confirmed by the appellant.
Again, we submit HMCTS should make clear paper hearing plus success rates – including the level of ESA or PIP awarded - when asking appellants to indicate how they wish their appeal to be determined.

Thank you for your consideration of these points,

March 2019