



## The Work Capability Assessment for Employment and Support Allowance

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The Work Capability Assessment (WCA) was introduced in October 2008 to assess entitlement to Employment and Support Allowance (ESA). The WCA determines whether a person has a “limited capability for work”, and also whether they are capable of engaging in “work-related activity”. This second part of the assessment determines whether an ESA claimant is placed in the “Support Group” or the “Work-Related Activity Group”.

The WCA is based on the principle that a health condition or disability should not automatically be regarded as a barrier to work, and that for such people work can itself have benefits. It has however been controversial from the outset. 59% of those who have undergone an initial assessment on making a claim for ESA so far have been declared “fit for work”, 40% of such decisions have been appealed against and 38% of appeals have been successful. Results so far from the reassessment of the remaining incapacity benefit claimants which started in October 2010 show 34% being found fit for work.

Welfare rights and disability organisations have voiced serious concerns about aspects of the test and about the way it has been applied. There is particular concern about how the test takes account of mental health problems and fluctuating conditions, and about the conduct of face-to-face assessments undertaken by Atos Healthcare staff on behalf of the DWP.

Changes have been made to the WCA following internal reviews, and the Government has also accepted recommendations made by Professor Malcolm Harrington’s independent reviews of the WCA. In his third and final report – published in November 2012 – Professor Harrington said that while real progress had been made in improving the WCA the “pace and scope” of improvements had been slower than hoped and it was “imperative that the momentum for change is maintained.” Recommendations from the latest review include improving communications with claimants and within DWP Operations, continuing improvements to face-to-face assessments including better monitoring of Atos performance, better dialogue between Atos staff and DWP “Decision Makers” and between DWP and First-Tier Tribunals, and continuing efforts to ensure Decision Maker’s are central to the WCA and have the information they need to get decisions “right first time.” In addition, work continues on new rules for people undergoing cancer treatment, on the WCA mental, intellectual and

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cognitive “descriptors”, and on the fluctuating condition descriptors.

Organisations working with claimants continue to highlight problems with the WCA. A report published by Citizens Advice in January 2012 found a “worryingly low” level of accuracy in WCA reports. On 2 April, Paul Farmer of the mental health charity Mind resigned from the Harrington review’s Scrutiny Panel, arguing that the WCA process “isn’t working” and that there was “insufficient recognition of the need to change the approach.” In a joint response to the Harrington review in September, leading mental health organisations said that they did not believe that reforms had gone far enough, that people with mental health problems continued to report “poor experiences” of the WCA, and that further substantial reforms were still needed.

On 26 July the High Court granted permission for a Judicial Review of the WCA. The Public Law Project, which is representing the two claimants in the case, argues that people with mental health conditions are placed at a substantial disadvantage in navigating the WCA system.

On 30 July both Channel 4’s *Dispatches* programme and the BBC’s *Panorama* carried reports on the Work Capability Assessment. Interviewed for *Panorama*, Professor Harrington said that while he believed his recommendations had improved the WCA, changes were not happening quickly enough and the experience was still “traumatic” for many people. While acknowledging ongoing problems, Professor Harrington challenged those who had called for the WCA to be scrapped to suggest what should be put in its place.

In a letter to the Labour MP Tom Greatrex dated 2 August, the head of the National Audit office said that while the DWP was addressing “weaknesses” in the contract with Atos Healthcare, the NAO had identified further outstanding issues regarding governance of the contract that needed to be addressed. The NAO had also concluded that the Department had “not sought adequate financial redress for contractor underperformance” and that current contractual targets for Atos were not “sufficiently challenging”. The NAO produced a report in June 2012 but it was not published until October, along with the Government’s response. While accepting the NAO’s recommendation that it needs to develop better systems to check Atos performance data, the Government disagrees with NAO’s conclusion that it failed to adequately enforce “financial levers” to manage performance.

In a Westminster Hall debate on 4 September 2012, the Chair of the Work and Pensions Committee, Dame Anne Begg, said that there was “something fundamentally wrong” with the ESA assessment system and the contract Atos was delivering. She believed the Government had failed to grasp how “disastrous” the system was, and that it was “not something that can be fixed by a few tweaks here and there.” In response, the then DWP Minister Chris Grayling defended the Government’s approach to reforming the WCA, pointing out that at no point in his dealings with him had Professor Harrington said that the process was not “fit for purpose.”

Mr Grayling’s successor at the DWP, Mark Hoban, has rejected calls for a fundamental review of the WCA, emphasising instead that the Government’s approach is to make “continuous improvements to the process to get the right outcomes for claimants.”

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## 1 Background

The Work Capability Assessment (WCA) determines eligibility for the Employment and Support Allowance (ESA), which replaced incapacity benefits for people making new claims from October 2008. The introduction of the new benefit did not initially affect people already getting incapacity benefits, but the remaining claimants (apart from those reaching retirement age or otherwise expected to leave incapacity benefits) are being reassessed under the WCA between now and 2014. Around 1.5 million people – nearly 11,000 a week – are being reassessed. The reassessment of incapacity benefits claimants started nationally from April 2011, following a small trial in the Aberdeen and Burnley areas involving around 1,600 claimants which started in October 2010.<sup>1</sup>

Those who satisfy the Work Capability Assessment, including the existing incapacity benefits claimants to be reassessed, will be entitled to ESA (provided they satisfy the other conditions for the benefit). Those who fail the WCA are deemed “fit for work” and will be required to claim Jobseeker’s Allowance instead (unless they can claim Income Support on other grounds, e.g. as carers).

ESA claimants are assessed during the first 13 weeks of their claim (or longer if necessary) to determine whether they have a “limited capability for work”, and also whether they are capable of engaging in “work-related activity”. This second part of the WCA determines whether the person is placed in the ESA “Support Group” or the “Work-Related Activity Group.” For those in the latter group, access to the full rate of benefit may be conditional on participation in Work-Focused Interviews (WFIs), and undertaking mandatory “work-related activity”. This could include things such as voluntary work, work trials or a training programme. Claimants are not however expected to apply for jobs or undergo medical treatment.

As a result of provisions in the *Welfare Reform Act 2012*, receipt of contributory ESA for claimants in the Work-Related Activity Group is now limited to 12 months. Those still on benefit at that point may then claim income-based (i.e. means-tested) ESA, but they may not be entitled to any benefit if they or their partner have other income, or capital above a certain level. The time limit will affect those “migrated” to ESA from Incapacity Benefit, in addition to those claiming ESA.

## 2 The assessment

### 2.1 Overview

The following extract from a DWP memorandum prepared for the Social Security Advisory Committee gives an overview of the Work Capability Assessment:

1.1 The Work Capability Assessment (WCA) was introduced in October 2008 to assess entitlement to Employment and Support Allowance (ESA). It replaced the Personal Capability Assessment (PCA) used to assess entitlement to incapacity benefits. The WCA was developed by departmental officials, working in close consultation with medical and other experts alongside specialist disability groups.

1.2 The WCA is based on the principle that a health condition or disability should not automatically be regarded as a barrier to work, and on the large body of evidence

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<sup>1</sup> See the DWP website, [Incapacity benefits – reassessing claims](#), updated August 2011

which shows that work is good for physical and mental well-being and can be beneficial for individuals with health conditions and disabilities and that being out of work can contribute to poorer health and other negative outcomes.

1.3 It is a functional assessment which focuses not on an individual's condition but on the functional effects on that particular individual. The assessment looks at a range of different activities related to physical, mental, cognitive and intellectual functions and certain additional criteria that do not directly measure function (such as terminal illness) to determine capability for work, taking into account developments in healthcare and the modern workplace.

1.4 Following an assessment, the healthcare professional provides advice to a DWP decision maker to inform the decision on benefit entitlement. The decision maker will use this advice alongside all other available evidence (including any medical evidence provided by the individual's GP or specialist) to determine an individual's capability for work and capability for work related activity. There are three possible outcomes:

- An individual is found fit for work and is therefore ineligible for ESA. They would be expected to return to work, claim Jobseekers Allowance even though they may still have a health condition or disability and require appropriate support, or claim another benefit such as Income Support.
- An individual is found to have limited capability for work at that time, but able to prepare for a return to work. They would be entitled to ESA and placed in the Work Related Activity Group.
- An individual is found to have limited capability for work-related activity and therefore entitled to ESA and placed in the Support Group. They are not required to undertake any work related activity.<sup>2</sup>

The WCA is, in general, much tighter than the Personal Capability Assessment (PCA) which determined whether a person could claim incapacity benefits. Like the PCA, the WCA is points-based, but some tests (e.g. walking difficulties) score fewer points than under the PCA, and many minor disabilities no longer count. This may cause difficulties for people who were previously able to claim incapacity benefits because they could add up lower scores across different "descriptors" to meet the threshold.

Some people can be *treated* as having a limited capability for work and so will not have to undergo the first part of the WCA. This includes, for example, those who are terminally ill whose death can reasonably be expected within six months. However, there are far fewer exemption categories than under the PCA. For example, there are no exemptions on the grounds of entitlement to Disability Living Allowance, or severe learning disability.<sup>3</sup>

Those who do not score sufficient points for "limited capability for work" can still pass the test in certain exceptional circumstances. This is where:

- there is medical evidence that they have a severe uncontrolled or uncontrollable life-threatening disease, and there is reasonable cause for the disease not to be controlled by a recognisable therapeutic procedure; or

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<sup>2</sup> DWP, *Explanatory Memorandum for the Social Security Advisory Committee: The Employment and Support Allowance (Limited Capability for Work and Limited Capability for Work-Related Activity) Amendment Regulations 2011*, August 2010

<sup>3</sup> The circumstances where a person may be treated as having a limited capability for work are listed in pp10-12 of the DWP publication *A guide to Employment and Support Allowance – The Work Capability Assessment*, ESA214, June 2011

- because of their condition, there would be a serious risk to the mental or physical health of any person were they found not to have limited capability for work

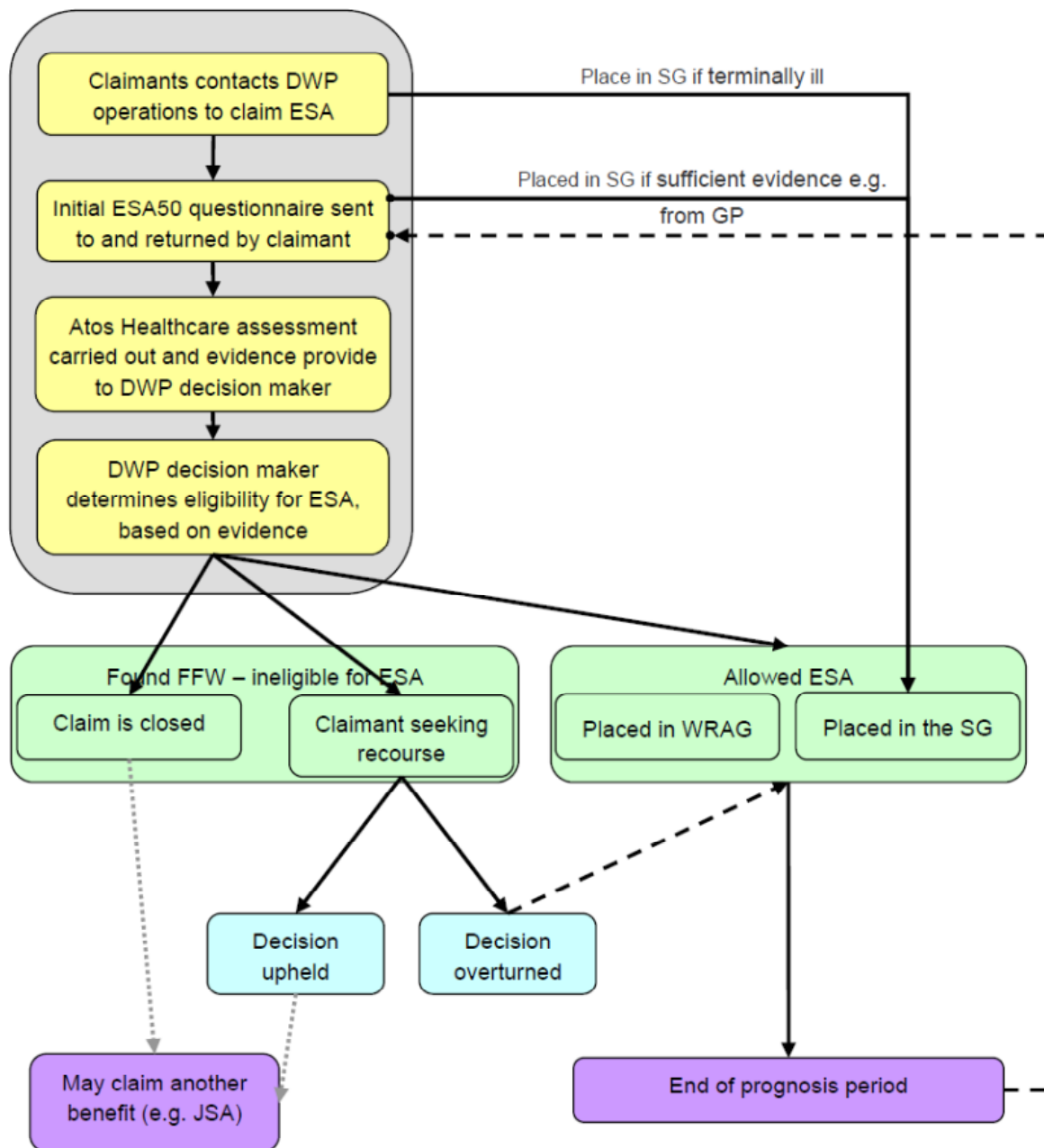
As with other benefits, decisions on limited capability for work, and limited capability for work-related activity, are made not by medical practitioners but by DWP “decision makers”, who should consider all the available evidence. If the decision maker decides there is insufficient evidence to make a decision from the information the person provided when they claimed ESA, the person is sent an [ESA50 questionnaire](#).

As well as considering the information from the questionnaire, the decision maker may request further information from the person’s GP and/or ask the person to attend an examination carried out by a “Healthcare Professional” working for the DWP (or, more precisely, working for Atos Healthcare, which is contracted to undertake examinations on behalf of the DWP).

The following figure – from a DWP statistical release on outcomes from the Work Capability Assessment – sets out the “customer journey” for someone making a claim for Employment and Support Allowance, starting with the original claim, taking in the functional assessment, and ending with an initial decision, a decision after reconsideration or appeal, or a repeat decision after a prognosis period.<sup>4</sup>

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<sup>4</sup> Source: DWP, *Employment and Support Allowance: Outcomes of Work Capability Assessments, Great Britain – new claims*, 24 April 2012, Figure A



FFW = “Fit For Work” decision

WRAG = Work Related Activity Group

SG = Support Group

## 2.2 Limited capability for work

To be eligible for Employment and Support Allowance, a claimant must, among other things, have a “limited capability for work”. This means that the person’s capability for work is limited by their physical or mental condition, and the limitation is such that it is not reasonable to require them to work.

The questionnaire asks a number of questions about physical activities, and about “mental, cognitive and intellectual” functions. The list of activities was revised substantially from 28



March 2011, as a result of *the Employment and Support Allowance (Limited Capability for Work and Limited Capability for Work-Related Activity) (Amendment) Regulations 2011*.<sup>5</sup> Further details are given later in this note.

The current activities for the physical assessment are:

- Mobilising unaided
- Standing and sitting
- Reaching
- Picking up and moving or transferring by the use of the upper body and arms
- Manual dexterity
- Making self understood
- Understanding communication
- Navigation and maintaining safety
- Continence
- Consciousness during waking moments

The activities for the mental, cognitive and intellectual function assessment are:

- Learning tasks
- Awareness of everyday hazards
- Initiating and completing personal action
- Coping with change
- Getting about
- Coping with social engagement
- Appropriateness of behaviour with other people

For each activity, there is a list of “descriptors” which describe the extent to which the person can undertake the activity. For example, under “Reaching” there are four descriptors:

<b>Descriptor</b>	<b>Points</b>
(a) Cannot raise either arm as if to put something in the top pocket of a coat or jacket.	15
(b) Cannot raise either arm to top of head as if to put on a hat.	9
(c) Cannot raise either arm above head height as if to reach for something.	6
(d) None of the above apply.	0

The descriptors have associated scores, ranging from 0 to 15. A person with a top score of 15 in any one activity automatically passes the test. People scoring less than 15 in any activity can add up the score they have for other activities (physical, or mental, cognitive and intellectual) to reach the threshold of 15 points needed to pass the test.

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<sup>5</sup> SI 2011/228

### **2.3 Limited capability for work-related activity**

The second part of the WCA determines whether the claimant can be placed in the ESA “Support Group” because the effect of their condition is so severe that it would be unreasonable to expect them to engage in work-related activity.

The circumstances where a person can be automatically treated as having “limited capability for work related activity” are again limited (eg the person suffers from a terminal illness and death can reasonably be expected within six months, or they suffer from a disablement and there would be a substantial risk to the mental or physical health of any person if they were found not to have a limited capability for work).

The “limited capability for work-related activity” test involves consideration of a wide range of physical and mental/cognitive functions. If a person satisfies at least one of the “descriptors”, they are placed in the ESA Support Group. The descriptors are grouped under 16 headings:

- Mobilising unaided
- Transferring from one seated position to another
- Reaching
- Picking up and moving things
- Manual dexterity
- Making yourself
- Understanding communication
- Contenance
- Learning tasks
- Awareness of hazard
- Initiating and completing personal action
- Coping with change
- Coping with social engagement
- Appropriateness of behaviour with other people
- Conveying food or drink to the mouth.
- Chewing or swallowing food or drink

The full list of activities and descriptors for both limited capability for work and limited capability for work-related activity are set out in DWP guide ESA 214, [A guide to Employment and Support Allowance – The Work Capability Assessment](#) (June 2011).

### **2.4 Work-Focused Health-Related Assessment**

When first introduced, the Work Capability Assessment also included a third component – the “Work-Focused Health-Related Assessment” (WFHRA). The WFHRA was mandatory for all ESA claimants judged to have a limited capability for work, other than those in the Support Group. The WFHRA – which, initially at least, took place on the same day as the medical assessment and usually involved the same Atos healthcare professional – focused on what the claimant was capable of doing and how their condition might be managed to help them obtain or stay in work. The purpose was to explore the claimant’s views about returning to work, what difficulties they faced in doing this, what they thought they could do to move back into work, and to identify health-related or workplace interventions which could support a move back to work. Following the assessment, the healthcare professional compiled a

report for the claimant's Jobcentre Plus Personal Adviser, to facilitate discussion of appropriate goals in subsequent Work-Focused Interviews (WFIs).<sup>6</sup>

The Work-Focused Health-Related Assessment was however suspended for a period of two years from 19 July 2010. A [DWP letter of 24 June 2010](#) announcing the decision to members of Jobcentre Plus Customer Representative Group Forum said that, in light of the new Government's planned "Work Programme", it was opportune to re-evaluate how best to support individuals to work, while targeting resources effectively. Suspending the WFHRA for two years would "provide an opportunity for DWP to reconsider the WFHRA's purpose and delivery" while also improving the "capacity to focus on and cope with the demands of the reassessment of existing incapacity benefit customers."<sup>7</sup>

## 2.5 The WCA process

On receipt of an ESA claim, DWP staff should look at the information provided by the claimant to see if benefit can be awarded without having to make further enquiries (eg because the claimant is terminally ill). Most claimants will however be sent an [ESA50 questionnaire](#) to complete and return to Atos Healthcare, the DWP Medical Services contractor. DWP guide ESA 214 states:

The questionnaire will seek the claimant's views on the effects of their disabling condition in each of the functional areas in the assessment. The claimant will be asked to identify (by a tick in a box) the descriptor in each affected area which best describes the effect of their disabling condition, and to give any further information that they think should be taken into account. It also gives the claimant the opportunity to provide information on any special needs they may have. For example, the claimant may require an interpreter at their assessment.

The claimant will then return the questionnaire to Medical Services. Given the wide variability of effects of disabling conditions between individuals, the majority of cases, except those with the most severe levels of disability, will be referred for a face to face medical assessment from an approved healthcare professional. Failure to return the questionnaire on time may result in loss of benefit.

In the case of people with the most severe levels of disability, the approved healthcare professional will consider all the available evidence on the claim and they may form a view that they can give advice to the decision maker on the basis of that evidence.

The approved healthcare professional may consider that further information from the claimant's doctor or other appropriate source is required and/or that the claimant should be medically assessed. **No claimant will be found not to have limited capability for work without either having a medical assessment or having been offered one.**<sup>8</sup>

The decision on whether a person is entitled to ESA is not however ultimately for the Atos healthcare professional – formally, it is for the DWP to decide. When deciding whether a person has a "limited capability for work" – and therefore eligible for ESA – a DWP "decision maker" **should** look at the **all** the available information – including the questionnaire the claimant completed and statements from their GP or consultant alongside the Atos

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<sup>6</sup> For further information see Helen Barnes, Jane Aston and Ceri Williams, *Employment and Support Allowance: Customer and staff experiences of the face-to-face Work Capability Assessment and Work-Focused Health-Related Assessment*, DWP Research Report 719, 2010

<sup>7</sup> See also HC Deb 16 Dec ember 2010 c872w

<sup>8</sup> *A guide to Employment and Support Allowance – The Work Capability Assessment*, June 2011, p12, original emphasis

healthcare professional's report following the claimant's face to face assessment (if such an assessment was deemed necessary).

## 2.6 Atos and medical assessments

Atos Healthcare is the private company which holds the DWP Medical Services contract. The contract was awarded in 2005 and was due to expire in 2012, but in November 2010 it was announced that the contract would be extended to 2015. The reason given by the Government was that it would not have been sensible to change supplier in the middle of the reassessment and "migration" of incapacity benefits claimants to Employment and Support Allowance.<sup>9</sup>

In the year from 1 April 2010 to 31 March 2011 payments to Atos under the Medical Services contract totalled £112.8 million. This figure covers **all** work undertaken by Atos however, not just in relation to the Work Capability Assessment. The Government has refused to disclose information on the cost of the Medical Services input to the WCA on the grounds that such information is "commercially sensitive."<sup>10</sup>

With regard to how Atos are paid, it is sometimes suggested that its "Healthcare Professionals" receive additional bonuses or incentive payments for recommending that claimants are declared "fit for work". The report by the Work and Pensions Committee on [The role of incapacity benefit reassessment in helping claimants into employment](#) published in July 2011 commented:

86. We were aware of considerable public suspicion that payments to Atos Healthcare are made on the basis of the outcomes of WCAs. Some claimants clearly believe that Atos healthcare professionals (HCPs) are encouraged through targets within the DWP contract to find people fit for work. DWP has made clear that this is not the case: "the result of the assessment has no bearing on Atos Healthcare targets or remuneration"; and that the Medical Services Agreement "does not include any provisions either from the Department or from Atos Healthcare to incentivise health care professionals to find claimants undergoing the WCA fit for work".<sup>[98]</sup> Lisa Coleman of Atos confirmed that, contractually, Atos is paid for the number of satisfactory assessments it completes, not on the basis of the results of those assessments.<sup>[99]</sup>

However, concerns about the accuracy of medical reports produced by Atos remain, in light of the high percentage of appeals against ESA decisions that are successful (38% to date). The Work and Pensions Committee expressed concern about whether the current contract with Atos contained sufficient incentives to ensure assessments are carried out to a high enough standard. In his latest review, Professor Harrington also recommended that the Government consider tightening the target for the number of unacceptable (Grade C) reports, and that data on Atos performance and quality should be regularly published, to improve transparency (see below).

For further information on the Atos contract and its performance see sections 7 and 12 below.

At the end of May 2011, Atos employed 665 "Healthcare Professionals" (HCPs), comprising:

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<sup>9</sup> See Part 3 of the Work and Pensions Committee report on [The role of incapacity benefit reassessment in helping claimants into employment](#), HC 1015 2010-12, 26 July 2011; and the [Government's response to the report](#) – HC 1642 2010-12, 9 November 2011

<sup>10</sup> See for example HC Deb 9 February 2011

- 231 doctors;
- 279 nurses; and
- 55 physiotherapists<sup>11</sup>

All HCPs are subject to an “approval process” which is intended to ensure consistent professional standards are upheld and that claimants get a thorough and objective assessment of their functional capabilities. The approval process comprises four stages:

- A prescribed training course;
- A written assessment of medical knowledge;
- Supervised practical training and appraisal; and
- Appraisal of casework

In addition, in order to maintain approved status the HCP must satisfy “quality standards”. Further information on the approval process for HCPs is given in pp6-7 of the DWP publication [A guide to Employment and Support Allowance – The Work Capability Assessment](#).

In relation to ESA, the role of the HCP falls into four main areas:

- Advice to the DWP “Decision Maker” in whether a claimant satisfies any one of the Support Group criteria or any of the criteria for treating the claimant as having “limited capability for work”;
- Further advice or clarification requested by the Decision Maker;
- Application of the WCA medical assessment, providing an assessment of the claimant's functional ability for the Decision Maker; and
- In cases where a person is already in receipt of ESA, scrutiny of the available medical evidence in order to advise whether a further medical assessment is required.<sup>12</sup>

[A guide to Employment and Support Allowance – The Work Capability Assessment](#) explains the purpose of the face to face medical assessment and the role of the Atos HCP as follows:

An assessment does not always mean that the approved healthcare professional will undertake a physical examination. They may just want to talk to the claimant about how their health condition or disability affects their everyday activities. The claimant will have an opportunity to give any other information relevant to their assessment.

The approved healthcare professional will consider all the information and exercise clinical judgement to reach an opinion on the nature and severity of the effects of the disabling condition. They will also take full account of factors such as pain, fatigue, stress and of the possible variability of the condition. For example, if the claimant can perform a particular activity only by incurring a considerable degree of pain, they will be classed as being incapable of performing that activity. The approved healthcare

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<sup>11</sup> [Independent Review of the Work Capability Assessment – year two](#), November 2011

<sup>12</sup> DWP Medical Services, [Training & Development Revised WCA Handbook ESA \(LCW/LCWRA\) Amendment Regulations 2011](#), MED-ESAAR2011HB-001, Version: 4 Final, 4 October 2011, para 1.7

professional will also consider the effects of the condition on the claimant for the majority of the time, so that the opinion will not be based on a snapshot of their condition on the day of the medical assessment.

The approved healthcare professional's task of considering the effects of a condition is different from that of a GP needing to make a diagnosis and plan treatment. The interview and assessment may therefore be different from that which the claimant might expect from their GP.

The approved healthcare professional provides advice to the benefit decision maker for each activity area. They will also provide a full explanation for their advice particularly where the opinion is different from the claimant's own perception of their functional limitations.

The approved healthcare professional will also provide advice to the decision maker on whether any of the Exceptional Circumstances (non-functional descriptors) apply.

Medical Services will try, where possible, to provide a same sex healthcare professional should the claimant request one. The claimant can make arrangements for a relative or friend to be present during the assessment.<sup>13</sup>

Atos HCPs use a computer system – Logic Integrated Medical Assessment (LiMA) – to help structure discussions at the face to face assessment, to build a picture of the claimant's functional capabilities, and to generate the final assessment report (the ESA85) containing the findings, advice and recommendations for the DWP Decision Maker.<sup>14</sup> Welfare rights and disability groups have voiced concern about the impact that the LiMA system can have on the way assessments are conducted and on the accuracy and quality of the reports produced by Atos HCPs. In year two of his Independent Review of the WCA, Professor Malcolm Harrington looked at how the LiMA system was being used and at whether it was “driving HCP behaviours” (see below).

### 3 WCA outcomes

Concerns have been voiced about the new Work Capability Assessment and the number of people being deemed “fit for work” under the new test. The WCA is, in general, much tighter than the Personal Capability Assessment (PCA) for incapacity benefits and it was expected that more claimants would fail the new test, but statistics so far suggest higher rates of “disallowance” than anticipated.

When considering outcomes from Work Capability Assessments conducted so far, it is important to distinguish between **outcomes from new claims** for ESA made since the benefit was introduced in October 2008, and **outcomes from reassessments of existing incapacity benefits claimants**. Reassessments only began in October 2010 (in two trial areas), and nationally from April 2011. The first figures on outcomes from the nationwide reassessment programme were released on 15 March 2012, with a further update on 6 November.

In either case, care needs to be taken when interpreting the figures, particularly when looking at changes over time. This is for two main reasons. First, figures on initial WCA outcomes

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<sup>13</sup> ESA 214 June 2011, pp12-13

<sup>14</sup> For further information on how assessments are conducted, see p8 of the Citizens Advice report, [Right first time? An indicative study of the accuracy of ESA work capability assessment reports](#), January 2012

will change over time following appeals, but because of the time it takes for appeals to be heard, this may be many months after the initial decision. Second, the WCA itself has changed since it was introduced – major changes were made to the assessment criteria in March following the internal DWP reviews, and further changes to procedures and practices have been made or are in the process of being implemented as a result of recommendations made by Professor Harrington in his first two reviews published in November 2010 and November 2011 respectively.

### 3.1 Outcomes on new claims for ESA

The latest figures on WCA outcomes on new claims for ESA were published by DWP on 23 October 2012 and cover claims made for the period October 2008 to February 2012.<sup>15</sup>

Looking at the 1,324,500 **completed assessments** on new claims (ie disregarding those where the claim ended before the WCA could take place, and those still in progress) carried out since ESA was introduced up to the end of February 2012, the outcome been as follows. The first figure is the percentage placed in each category following the initial decision by the DWP, and the second figure (in brackets) shows the percentage placed in each category taking into account subsequent appeals. The figures are for initial assessments only – they do not cover repeat assessments for existing ESA claimants.

- Entitled to ESA in the Support Group – 15% (16% following appeals)
- Entitled to ESA in the Work Related activity Group – 26% (33% following appeals)
- Fit for Work – 59% (51% following appeals)<sup>16</sup>

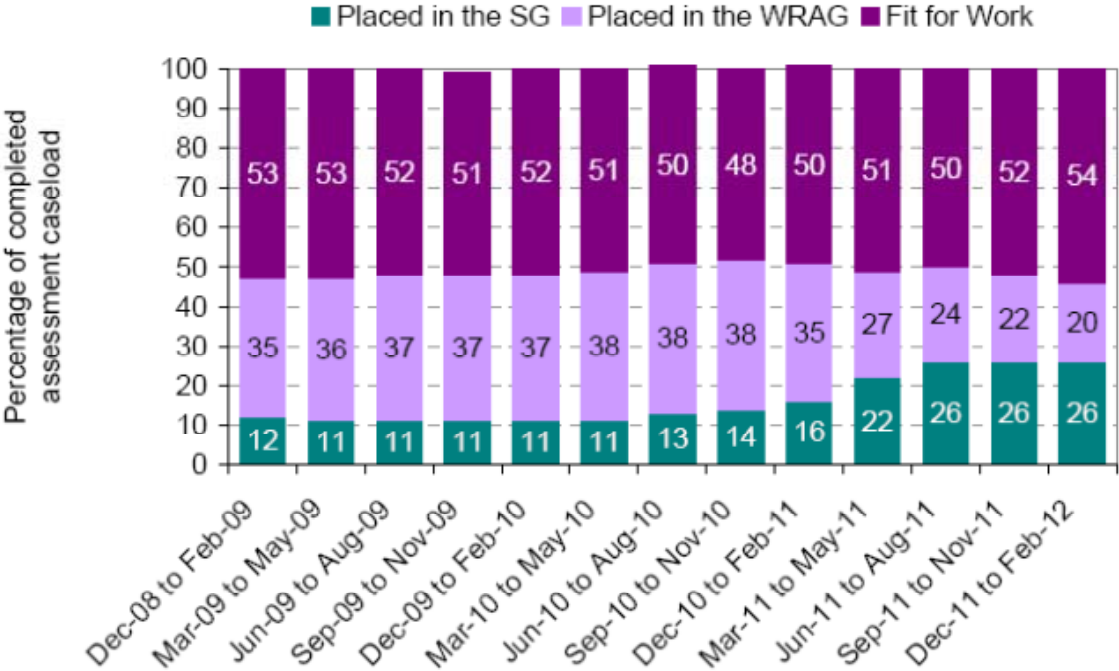
The following chart – from the latest DWP Statistical Bulletin – shows how outcomes from completed initial assessments on new claims (adjusted to account for the outcome of appeals) have changed since ESA was introduced:

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<sup>15</sup> DWP Statistical Bulletin, *Employment and Support Allowance: Outcomes of Work Capability Assessments, Great Britain – new claims*

<sup>16</sup> Ibid. Tables 1a and 4

**Outcome of initial functional assessment adjusted to account for the outcome of appeal by date of claim start, Great Britain<sup>17</sup>**



The DWP Statistical Bulletin comments, in relation to these figures (original emphasis):

...there are broadly flat trends in the fitness for work and eligibility for Employment and Support Allowance until November 2010, when the trends change. There is then a growth in the proportion of claimants assessed as Fit For Work, whilst the proportion assessed as eligible for Employment and Support Allowance has fallen. Within the latter group, there has been a fall in those being placed into the Work Related Activity Group and the proportion placed in the Support Group increased. It is impossible to say what is behind these changes with certainty, but it –

might be caused by the fact that many more claims starting in this period have assessments or appeals still in progress than in earlier periods; and/or

might be that this is at least partly due to a combination of changes to the Work Capability Assessment, including implementation of the Department-led review and others following implementation of the first Work Capability Assessment independent review’s recommendations.

These statements should not be interpreted to mean that the above are anything more than possible factors affecting the series, and there may also be other unknown causes at work.<sup>18</sup>

The high proportion of cases placed in the Support Group in the most recent quarters may also reflect the fact that Support Group cases tend to have shorter processing times than cases resulting in Fit for Work or WRAG determinations.<sup>19</sup>

<sup>17</sup> Ibid. Figure F, p11  
<sup>18</sup> Ibid. p10  
<sup>19</sup> Ibid. p8



### 3.2 Appeals against initial fit for work decisions

The volume of appeals against Work Capability Assessment decisions has put a considerable strain on the Tribunals system.

There were 126,800 appeals against ESA decisions in 2009-10, and 197,000 in 2010-11.<sup>20</sup> Of the 211,700 appeals received by Social Security and Child Support Tribunals between 1 April 2011 and 31 October 2011, just under half (101,600) concerned claims for ESA (However, the figures include **all** ESA appeals (other than IB reassessment cases), not just appeals against WCA decisions).

More recent figures suggest that the number of appeals on new ESA claims may be falling. Looking at the period June 2010 to August 2011, the number of ESA appeals received remained fairly constant at around 19,000 per month on average, but thereafter the number of appeals received fell sharply, averaging only around 13,000 per month between September and December 2011.<sup>21</sup> However, the figures include **all** ESA appeals (other than IB reassessment cases), not just appeals against WCA decisions.

Nevertheless, the volume of ESA appeals – and their cost – remains a concern. The Ministry for Justice estimates the total cost to Her Majesty's Courts and Tribunals Service of the 112,320 ESA appeals disposed of in the six months from April 2011 to October 2011 in which the Work Capability Assessment was a factor at £26.844 million.<sup>22</sup> Responding to suggestions that the cost of appeals against ESA decisions could reach £50 million a year, Professor Malcolm Harrington said in September 2011 "I am staggered and shocked, and I think it is a tremendous waste of public money when we could have fixed it earlier".<sup>23</sup> The Work and Pensions Committee also noted that the increased pressure on the Tribunals Service had resulted in significant delays for claimants waiting appeals to be heard, causing stress and anxiety for them and their families. It also noted that the volume of appeals was unlikely to decrease significantly over the next few years given IB reassessment, and called on the Government to ensure that the Tribunals system was adequately equipped to cope.<sup>24</sup>

Statistics on outcomes of appeals against WCA decision are included in the latest DWP Statistical Bulletin, *Employment and Support Allowance: Outcomes of Work Capability Assessments, Great Britain – new claims*, published on 23 October 2012.

To date, 40% of all “fit for work” decisions have been appealed against, and in 38% of cases the DWP’s initial decision was overturned.<sup>25</sup>

The DWP Bulletin gives statistics for appeal outcomes for claims starting in each quarter since ESA was introduced. These are shown in the figure below.<sup>26</sup>

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<sup>20</sup> HC Deb 27 June 2011 c517w

<sup>21</sup> HC Deb 26 January 2012 cc340-341w

<sup>22</sup> HC Deb 26 January 2012 c362w

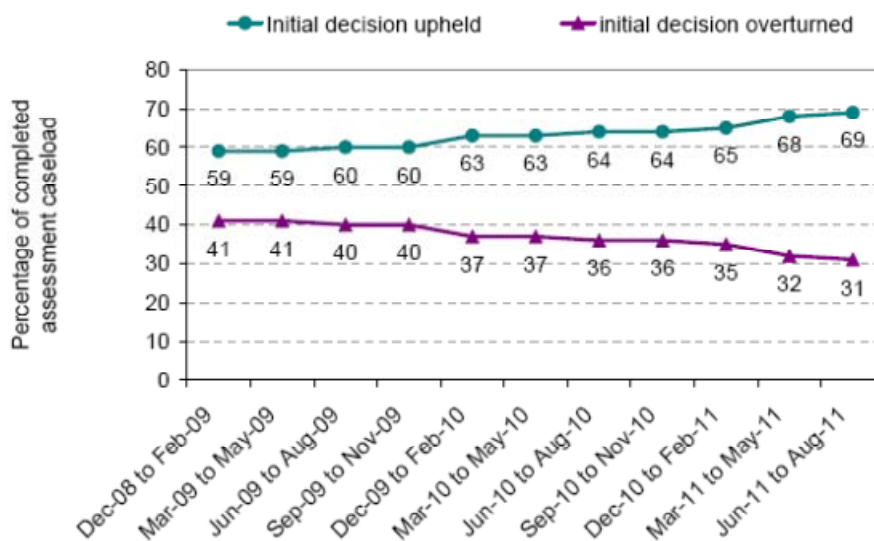
<sup>23</sup> 'No turning back on fit-to-work test', *The Guardian*, 6 September 2011

<sup>24</sup> Work and Pensions Committee, *The role of incapacity benefit reassessment in helping claimants into employment*, HC 1015 2010-12, 26 July 2011, paras 146-147

<sup>25</sup> DWP, *Employment and Support Allowance: Outcomes of Work Capability Assessments, Great Britain – new claims*, 23 October 2012,

<sup>26</sup> *Ibid.* p9

**Figure E: Outcome of appeals heard on Fit for Work decisions in initial functional assessment by date of claim start, Great Britain**



For the latest quarter for which figures are available – covering claims starting from June 2011 to August 2011 – the figure shows that:

- 69% of initial fit for work decisions appealed against were upheld after challenge; and
- 31% of initial fit for work decisions appealed against were overturned

The DWP Bulletin comments (original emphasis):

This represents a 1 percentage point increase in the proportion of appeals on Fit For Work decisions upheld and a corresponding 1 percentage point decrease in the proportion overturned compared to the previous quarter. However this comparison should be treated with caution as, although statistical outputs are presented to August 2011, figures for more recent dates are likely to change as more appeal cases are heard by the Tribunal Service. Note that the above statistics are for the 17 per cent of Fit For Work decisions with a completed appeal in this period.

**Figure E** [...] shows the time series of Table 3 where fewer of the initial Fit For Work decisions are being reversed in each successive period by HMCTS, this –

*might* reflect changes in initial decision-making since this new benefit was first rolled-out;

*might* be due to the fact that there are likely to be more appeals still to be heard for more recent months; and/or

*might* be due to the higher number of appeals still in progress in the latest period.

These statements should not be interpreted to mean that the above are more than possible influences on the series – there may also be others at work here.<sup>27</sup>

In addition, the more recent figures may reflect changes to the WCA from March 2011 and other changes resulting from Professor Harrington’s first review. However, given the time lag

<sup>27</sup> Ibid. p9

involved and the range of possible influences, it may be possible to gauge the true impact of these changes on the volume and outcomes of appeals for some time yet.

The Minister for Employment, Chris Grayling, was asked about appeals during the [Work and Pensions Committee's evidence session on 19 March 2012](#):

**Q6 Stephen Lloyd:** In that area, but slightly off piste, referring to the figures you announced on Friday, are you confident or not, as the case may be, that with the Harrington changes to the WCA, the level of appeals will be lower than they were, say, nine months ago when, depending on how you look at it, 40% of appeals overturned decisions of the WCA? How confident are you that the Harrington changes have made that difference?

**Chris Grayling:** It is too early to be certain because, with the timetabling, we started doing the assessments last June. We now do a reconsideration in virtually every case. People would have started to receive decisions in late June/early July. There is a period of nine weeks before the reconsideration deadline is reached, which is about September. Then you have a wait of about 24 weeks for an appeal to be heard. So, the appeals data have only just started to come through, and we do not have statistically accurate data yet. What I have done is ask Malcolm Harrington to watch over that early flow of appeal data.

We have looked at this quite carefully on the ground. You will remember that one of Malcolm Harrington's concerns was that very substantial amounts of new medical evidence were coming forward at the appeals stage. There is now virtually no new medical evidence coming forward at the appeals stage. We now have to watch carefully over the Tribunals Service. We have done everything we think we can. We have tried to improve the quality of decisions and the availability of evidence to the decision makers, but probably we will not be able to give you detailed figures until the next time we meet.

**Q7 Stephen Lloyd:** What is the ETA for when the Department thinks it will have more robust figures? Would it be one, two or three months?

**Chris Grayling:** Probably another three months...<sup>28</sup>

In oral evidence to the Work and Pensions Committee on 21 November 2012, the new Minister, Mark Hoban, was asked about the impact on appeals of changes to the WCA:

**Q73 Stephen Lloyd:** Do we have any details on the new figures, though, because that 40% was crucial? It was always one of the key points that we would see from the Harrington report, if they were beginning to improve the WCA, that the successful appeal rate—call it what you will—would begin to drop down from 40%. Have you seen any movement in that direction?

**Mr Hoban:** I do not think we have an updated figure. I would also be slightly wary of being caught by a benchmark. The easiest way to reduce the volume of appeals and overturn is to put everyone in the support group, and what we need to do is make sure we get the right decision being made.<sup>29</sup>

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<sup>28</sup> To be published as HC 1903. This is an uncorrected transcript of evidence taken in public and reported to the House. **Neither witnesses nor Members have had the opportunity to correct the record. The transcript is not yet an approved formal record of these proceedings.**

<sup>29</sup> To be published as HC 769. This is an uncorrected transcript of evidence taken in public and reported to the House. **Neither witnesses nor Members have had the opportunity to correct the record. The transcript is not yet an approved formal record of these proceedings.**

### 3.3 Outcomes from the reassessment of incapacity benefits claimants

The most recent results from the national reassessment of the remaining incapacity benefits claimants were published by DWP on 6 November 2012.<sup>30</sup> As with the statistics on WCA outcomes on new claims, care needs to be taken when interpreting the figures.

The following table compares the Labour Government's original estimate from December 2009 of the proportions likely to be found eligible for the ESA components and "fit for work" on reassessment, with actual outcomes from the Aberdeen and Burnley trials and outcomes from the national reassessment exercise so far. Of the 462,100 cases referred for reassessment by February 2012, outcomes were known for 431,100 individuals.

#### Expected and actual outcome of reassessment of existing IB/SDA/IS claims, for claims referred for reassessment up to February 2012, Great Britain

Outcome	Initial estimate, December 2009 [1]	Aberdeen and Burnley trials, Autumn 2010		National reassessment (including Autumn 2010 trials) – taking into account appeals [3] [4]
		Initial decision only [2]	Outcome taking into account appeals [3]	
ESA - SG	20%	30%	33%	26%
ESA - WRAG	65%	38%	45%	41%
Fit For Work	15%	32%	22%	34%
All completed assessments	100%	100%	100%	100%

#### Notes

1. DWP, *Impact Assessment of migration of incapacity benefits customers on to Employment and Support Allowance*, December 2009, para 19
2. Work and Pensions Committee, *The role of incapacity benefit reassessment in helping claimants into employment*, HC 1015 2010-12, para 153, p49
3. DWP Statistical Bulletin, *Employment and Support Allowance – Incapacity Benefits Reassessments: Outcomes of Work Capability Assessments, Great Britain*, November 2012, Table 1
4. 431,100 cases referred for reassessment up to February 2012, where the outcome was known

<sup>30</sup> DWP Statistical Bulletin, *Employment and Support Allowance – Incapacity Benefits Reassessments: Outcomes of Work Capability Assessments, Great Britain*, March 2012

There are some important caveats. In particular, not all appeals against decisions will have been heard. The DWP Statistical Bulletin notes (original emphasis):

**Figures in this issue cannot reflect the final outcomes, because they do not include:**

- effect of appeals still lodged in the legal system; and
- claims with no outcome yet recorded.

**For these reasons it is likely that the statistics underestimate the proportion of claimants who will ultimately be awarded ESA, by greater amounts for more recent periods.**

For the Aberdeen and Burnley trials, the figures both before and after appeals are given to provide an indication of the possible effect of appeals on the final figures for the national reassessment. Future statistical releases will include revised estimates, but in the meantime it is important to bear in mind the impact appeals are likely to have.

A further factor to note is the changes to the WCA from March 2011 and other changes resulting from the first Harrington review, which will have had an impact over the period covered by these statistics. However, again it may be some time before the true impact of these changes can be gauged.

On 16 November 2012 DWP also released statistics on outcomes from initial reassessments (adjusted to take account of appeals heard so far) by the duration of the existing incapacity benefit claim.<sup>31</sup> Overall, the statistics show that the likelihood of being placed in the Work Related activity Group following reassessment varies little by the duration of the existing claim – for those cases where reassessment had been completed, around 40 per cent were placed in the WRAG however long they had been in receipt of benefit. However, the longer the duration of the existing benefit claim, the greater the likelihood of being placed in the Support Group and the less likely the person was to be found Fit for Work. For example, for those who had been on incapacity benefit for less than five years, 21% were placed in the Support Group and 40% were found Fit For Work, but for those who had been on benefit for more than 15 years the corresponding figures were 34% and 23% respectively.

#### **4 Criticisms of the WCA**

From the outset, the Work Capability Assessment has been the subject of intense criticism from disability and welfare rights organisations.

In March 2010 Citizens Advice, in association with the mental health charity Mind, published a report based on feedback from its advice bureaux about the impact of the new benefit regime. The report, *Not working: CAB evidence on the ESA work capability assessment*, which was endorsed by a range of charities and pressure groups, presented evidence suggesting that people with serious illnesses and disabilities who could not reasonably be expected to work were being found “fit to work” under the new test, and argued that a more sophisticated approach to assessment was needed. The main findings were:

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<sup>31</sup> *Employment and Support Allowance – Incapacity Benefits Reassessments: Outcomes of Work Capability Assessments by duration of claim - update*, DWP ad hoc analysis, 16 November 2012

- Seriously ill people were being inappropriately subjected to the WCA, since there are fewer exemptions than under the previous Personal Capability Assessment.
- The assessment was not measuring fitness for work effectively. Among other things, it was not taking sufficient account of variable symptoms or the seriousness of underlying conditions, or the context of the work environment.
- Application of the assessment was producing inappropriate outcomes

With regard to the last finding, the report stated:

Citizens Advice and other organisations have been concerned for many years about the quality of medical assessments for benefits. We still hear repeated reports of rushed assessments, assumptions being made without exploration, inaccurate recording and poor recognition of mental health problems. Now the descriptors have become much tougher, this issue has been brought into sharper focus.

The quality of the tests could be assessed in line with standard good practice for assessing the validity and reliability of classification methods. As with any classification test, the WCA will have some false positives (scored more than 15 points, but should have scored 15 or fewer) and false negatives (scored 15 points or fewer, but should have scored more than 15). DWP does not appear to have done any evidence-based research to determine the proportion of false positives and false negatives arising in these tests. This could be measured by, for example, having a sample of mystery shopper' cases assessed and scored by a team of medical experts and then sent anonymously to be tested by HCPs [Health Care Professionals]. **We believe that the reliability of these tests should be independently measured as a matter of urgency.**

These problems create major difficulties for our clients and undermine the Government's aims for ESA. People with serious illnesses and disabilities who could not reasonably be expected to work are being found fit for work. Other people who might, with considerable support, be helped into work, are effectively being "written off" by being found fit for work and therefore ineligible for ESA.

Many of these people are too ill to sign on, or are not eligible for any other benefit, and so are left with no money and no help or support to find work. Furthermore, many of those found ineligible for ESA also lose access to an extremely helpful route into sustainable work through the disability element of tax credits.

**The Government's declared aim is to improve people's health and well-being but this report shows that ESA is not currently achieving this aim for some of the people who most need it. People moved off benefit but not into work are effectively moved further from the labour market, and risk poorer health outcomes.**<sup>32</sup>

The report made a number of specific recommendations, including:

There should be a full and independent review of the work capability assessment (WCA) which looks at not just the individual descriptors but at the underlying questions of who should be eligible for the benefit, the validity of the test at identifying those people and the accuracy of the medical assessments.<sup>33</sup>

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<sup>32</sup> p27, original emphasis  
<sup>33</sup> p4

## 5 Internal Government review of the WCA

The December 2008 White Paper, *Raising expectations and increasing support*, announced the Labour Government's intention to undertake an internal review of the Work Capability Assessment, to establish whether the WCA was achieving its aim of correctly identifying an individual's capability for work, and how it could be amended to better account for an individual's adaptation to their condition.<sup>34</sup> The review began the following March and reported to Ministers in October 2009.<sup>35</sup> The March 2010 Command Paper *Building bridges to work* announced changes to the WCA in the light of the review, and a subsequent technical review undertaken by the Chief Medical Adviser following representations from disability groups. These included greater recognition of fluctuating conditions in the assessment, expanding the support group to cover people with certain communication problems and severe disability due to mental health conditions, and making the language of the assessment clearer and the process simplified.<sup>36</sup> *Building bridges* also announced additional support for people judged fit for work but who are still managing a health condition or disability.<sup>37</sup>

The new Government subsequently announced that it would implement the recommendations of the DWP reviews<sup>38</sup>, and on 13 August 2010 it submitted draft regulations to implement the changes to the Social Security Advisory Committee (SSAC) for their consideration. The DWP's *Explanatory Memorandum for the SSAC* stated that the draft regulations included changes aimed at:

- Simplifying the descriptors by removing unnecessary complexities and overlaps to ensure ease of administration and transparency for the claimant.
- Expanding the support group (those found to have limited capability for work-related activity, who are paid the higher rate of ESA) in relation to certain mental function and communication problems.
- Ensuring that claimants who are awaiting or in between courses of chemotherapy are treated in the same way as those already receiving it.
- Taking greater account of the effects of adaptations and aids in improving an individual's function. An accurate assessment should identify those individuals who lack the capability to work, rather than assume that they do as the result of a particular functional impairment.
- Improving the assessment of fluctuating conditions by ensuring that the effects of exhaustion are recognised, as well as the effects of discomfort.<sup>39</sup>

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<sup>34</sup> Cm 5706 para 5.15

<sup>35</sup> [Work Capability Assessment Internal Review](#)

<sup>36</sup> Cm 7817 chapter 2; see also [Addendum: Work Capability Assessment Internal Review](#), March 2010

<sup>37</sup> Cm 7817 chapter 4

<sup>38</sup> HC Deb 29 June 2010 cc39-42WMS; HC Deb 1 July 2010 c598W

<sup>39</sup> Included in [The Employment and Support Allowance \(Limited Capability for Work and Limited Capability for Work-Related Activity\) Amendment Regulations 2011 \(S.I.2011 No.228\): report by the Social Security Advisory Committee under section 174\(1\) of the Social Security Administration Act 1992 and the statement by the Secretary of State for Work and Pensions in accordance with sections 174\(2\) of that Act](#), February 2011, p35

The Government expected the changes to increase very slightly (by about 0.5%) the proportion of claimants in the support group; however it also expected the changes to **increase** the number of people being found “fit for work” by 5%.<sup>40</sup>

The regulations implementing the WCA changes came into force on 28 March 2011.<sup>41</sup> Further information on the main changes made can be found in the [Explanatory Memorandum](#) accompanying the regulations.

While some of the changes were welcomed by interested organisations, serious misgivings were voiced by, among others, the Social Security Advisory Committee (SSAC), which had been asked to comment on the draft regulations. In a report published on 3 March 2011, the House of Lords Merits of Statutory Instruments Committee summarised the concerns voiced by various organisations and suggested that the House might wish to seek further information from the DWP on the rationale for making the changes at that particular point in time:

*Views from interested organisations*

19. The SSAC report welcomes some aspects, for example the new regulations which place those on chemotherapy in the Support Group. However it has serious concerns about other aspects, in particular:

- The streamlining of certain descriptor groups has lost necessary subtleties for example those dealing with memory and concentration, and those dealing with walking, standing and bending, which is likely to over-estimate an individual's capacity. (recommendations 13 & 14)
- The current descriptors are also inadequate in measuring the capacity of those with mental health conditions, sensory disabilities or fluctuating conditions. (recommendations 11& 20)
- There needs to be closer correlation between the tests and normal work situations - someone who needs to be accompanied to familiar places by a helper is not sufficiently adapted to their condition to be capable of work yet this only scores 9 points.(recommendation 15)
- As well as the evidence from the First Harrington review, there are clear indications that the WCA has not yet bedded in - for example 40% of appeals against a decision that an individual is capable of work are currently upheld, which suggests that the WCA guidance is not being applied correctly or consistently. (recommendation 15)

20. In consequence, the SSAC consider that it would be premature to make the majority of the changes to the descriptors. They believe they should be deferred and reviewed once the second stage of the independent review of the WCA has concluded and in the light of better evidence of the outcome of the trial of the migration of Invalidity Benefit claimants to ESA (which only commenced in October 2010).

21. The Disabilities Benefits Consortium, MIND, the Multiple Sclerosis Society and the Royal National Institute for the Blind have also sent in submissions that support this view [These are variously endorsed by Action for Blind People, ME Association, Parkinson's UK, National Aids Trust and Arthritis Care]. All of them make the point that

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<sup>40</sup> Para 4.9 of the DWP's Explanatory Memorandum

<sup>41</sup> [The Employment and Support Allowance \(Limited Capability for Work and Limited Capability for Work-Related Activity\) \(Amendment\) Regulations 2011, SI 2011/228](#)



although they were involved in one or more of the reviews they did not feel sufficient account was taken of their expert views and they did not subscribe to the recommendations made. The submissions are published at Appendix 1 and provide examples, based on case studies from their areas of expertise, that illustrate why a particular descriptor could over-estimate a person's capacity to operate in a normal work environment. For example:

- the perspective on work skills needs to be wider - someone might be able to pack boxes all day but not be able to competently find their way to the factory canteen
- people with a limited capability (e.g. blind) may be able to work but in a very circumscribed set of jobs and there is an insufficient supply of those jobs in a depressed job market
- pushing "borderline" people towards work may have negative consequences in many cases both on their finances and their self esteem if they are repeatedly rejected by employers
- the changes to the descriptors do not easily allow for multiple conditions - which may involve mental as well as physical conditions

22. Correspondents conclude that the changes are premature and should wait for the second phase of the Harrington review. Implementing these changes and the further set planned for later this year would mean the descriptors would be radically changed twice within the space of just one year. *"This would clearly be extremely unfair on those people being assessed in the interim, and risks a very high level of appeals, and potential judicial review cases, not to mention confusion, anxiety and frustration amongst claimants, professionals carrying out the WCA, and those supporting claimants through ESA applications."* (MS Society)

23. Some also question whether the latest proposals conform with the criteria set out in the Act:

*"These regulations set such a high threshold for eligibility for ESA that they effectively transform the 'Limited Capability for Work' test into a 'Limited Capability for Work Related Activity' test, losing distinction between the two tests. This undermines the intention within the 2007 Welfare Reform Act, that there should be two distinct groups of claimants; one moving towards work (Work Related Activity Group), the other with no conditionality (Support Group). Under the regulations, we believe that the numbers of disabled people able to qualify for the Work Related Activity Group would drop dramatically, as whole groups of people are largely excluded by the eligibility threshold."* (RNIB)

### Conclusion

24. It is clear that DWP see the implementation of the ESA and the Work Capability Assessment as an evolving programme. In line with best practice they have reviewed the initial performance of the WCA and, having found that it is not working as well as expected, are keen to revise it, which is laudable. However many of those involved in the consultation process, including those with considerable expertise, are expressing strong views that the current Regulations are premature and that piecemeal change will cause more harm than good. First, because there is insufficient data from the initial trial of the migration of Invalidity Benefit claimants to ESA to be clear whether the changes proposed will be an improvement. Second, there are concerns that the WCA system has not bedded in fully and the operation of the system needs to achieve greater consistency before further changes are added. Third, the current changes may

not maintain the distinctions set out in the Act between the two groups and may over-estimate many individuals' actual capability for work. And lastly, there are serious concerns about the effect on already vulnerable people from repeatedly changing the WCA eligibility descriptors. **The House may wish to seek further information from DWP on the rationale for putting forward these Regulations now.**

The regulations were subject to the negative procedure but were debated in both the Lords and the Commons.<sup>42</sup>

The Work and Pensions Committee's report in July 2011 also noted concerns about the WCA changes from March 2011, and about their timing, including those voiced by Professor Paul Gregg of the University of Bristol:

99. Professor Gregg felt very strongly that the changes should have been tested in the trials in Aberdeen and Burnley, before being implemented nationally. He believed that the trials had provided an "absolute gift opportunity" to test the changes and found it "baffling" that implementation was not delayed to allow this.[117] Professor Harrington would also have preferred the changes to the descriptors to have been delayed. He told us that he "had heard nothing but criticism of the changes" and had expressed his view to the Government that they should be delayed until after his independent review.[118]

100. The Minister [Chris Grayling] acknowledged that an argument could have been made for delaying the introduction of the changes, but said he was keen to implement the changes as soon as possible because he believed they would have three important effects: allowing people who were between courses of chemotherapy to remain in the ESA Support Group; ensuring that more people with mental health problems went into the ESA Support Group; and ensuring assessments took proper account of aids and adaptations.[119]

It is still too early to give a definitive assessment of the effect of changes to the WCA from March 2011. However, a survey of welfare advice workers carried out by Mind for the Disability Benefits Consortium (DBC) in August 2011 found that only half had noticed an impact of the changes on their clients' assessment outcomes, and of those who answered a question on whether the changes had led to a fairer and more accurate reflection of claimants' impairments, only just over 2% agreed; 92% disagreed.<sup>43</sup>

## 6 Independent review of the WCA

The *Welfare Reform Act 2007* places a statutory requirement on the Government to commission an annual independent review of the WCA for the first five years of its operation.

### 6.1 Independent review – year one report

On 29 June 2010 the new Government announced that Professor Malcolm Harrington had agreed to lead the independent review, which would report by the end of the year.<sup>44</sup> On 28 July 2010 DWP published *The Work Capability Assessment A Call for Evidence*, and Professor Harrington's first report was published on 23 November 2010.<sup>45</sup>

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<sup>42</sup> HL Deb 16 March 2011 cc304-327; HC DLC (1<sup>st</sup>) Deb 14 June 2011 cc1-16

<sup>43</sup> [DBC Harrington Survey results](#), September 2011

<sup>44</sup> HC Deb 29 June 2010 cc39-42WMS

<sup>45</sup> Professor Malcolm Harrington, [An Independent Review of the Work Capability Assessment](#)

While supporting the rationale underpinning ESA and the Work Capability Assessment – that “as a civilised society, we need to enable as many people as possible to take advantage of the positive aspects of work while at the same time providing support for people who cannot work” – Professor Harrington found that the WCA was “not working as well as it should”:

There are clear and consistent criticisms of the whole system and much negativity surrounding the process. There is strong evidence that the system can be impersonal and mechanistic, that the process lacks transparency and that a lack of communication between the various parties involved contributes to poor decision making and a high rate of appeals.

I do not believe that the system is broken or beyond repair. I am proposing a substantial series of recommendations to improve the fairness and effectiveness of the WCA. If adopted, I believe these recommendations can have a positive impact on the process – making it fairer and more effective, changing perceptions so the WCA is seen as a positive first step towards work, and reducing the rate of appeals. I also set out a future programme of work indicating areas that subsequent reviews should examine.<sup>46</sup>

The evidence examined by the review “consistently and regularly highlighted problems with each stage of the WCA process, which limit both the assessment’s fairness and effectiveness”. The key findings were:

- Claimants’ **interactions with both Jobcentre Plus and Atos are often impersonal, mechanistic and lack clarity**. As a consequence, many people who are found fit for work feel an injustice has been done and are more likely to appeal, rather than being receptive to other support available;
- The Jobcentre Plus **Decision Makers do not in practice make decisions**, but instead they typically ‘rubber stamp’ the advice provided through the Atos assessment. They often do not have or do not appropriately consider additional evidence submitted to support a claim for Employment and Support Allowance (ESA). This results in the Atos assessment driving the whole process, rather than being seen in its proper context as part of the process;
- **Some conditions are more difficult to assess than others**. This appears to be the case with more subjective conditions such as mental health or other fluctuating conditions. As a result, some of the descriptors used in the assessment may not adequately measure or reflect the full impact of such conditions on the individual’s capability for work; and
- **Communication and feedback between the different agencies and organisations involved is often fragmented** and in some cases non-existent. For example, if a claim goes to appeal, Jobcentre Plus and Atos are not provided with the reasons for the subsequent decision.<sup>47</sup>

Professor Harrington’s report made a number of recommendations, including:

- **Building more empathy into the process** with Jobcentre Plus managing and supporting the claimant. This includes speaking to them to explain the process, to explain their result and to explain the support that is available after the WCA;

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<sup>46</sup> *Ibid.*, Executive Summary

<sup>47</sup> *Ibid.*

- **Improving transparency of the Atos assessment** by ensuring each report contains a personalised summary of the Atos healthcare professional's recommendations; sending this summary to all claimants; and piloting the audio recording of Atos assessments;
- **Accounting for the particular difficulties in assessing mental, intellectual and cognitive impairments** by ensuring Atos employ "mental, intellectual and cognitive champions" in each Medical Examination Centre to spread best practice and build understanding of these disabilities;
- **Empowering and investing in Decision Makers** so that they are able to take the right decision, can gather and use additional information appropriately and speak to claimants to explain their decision; and
- **Better communication and feedback** between Jobcentre Plus, Atos and the First-tier Tribunal to improve the quality of decision making on all sides.<sup>48</sup>

Professor Harrington said that the recommendations, if adopted, would "enable the WCA to become a positive first step on the way back towards work for most people and ensure that state support is truly focused on those who cannot work."

The independent review also identified a number of issues for future consideration:

This review is the first of five annual Independent Reviews into the WCA. It has examined the whole WCA process from end-to-end in a short timescale. As a result, some questions have remained unanswered and some pieces of work have remained uncompleted. The review has set out a proposed programme of work to look in more detail at these issues during the second review.

This programme focuses on: the descriptors, particularly in assessing fluctuating conditions; what happens to people who go through the WCA; and assessing whether the WCA could also provide a more rounded picture of a person's readiness to work.

The review has already set up a task group to look at the mental, intellectual and cognitive descriptors and they will report back in late-November. The Independent Reviewer will assess this report and after consulting with a wide range of experts will make recommendations to Ministers.

In year two the review should also monitor the implementation of those recommendations in the year one report which have been adopted by the Government.<sup>49</sup>

### ***Government response to the year one report***

In the Government's response – published on the same day as the independent review – the Minister for Employment, Chris Grayling, said that it fully endorsed the recommendations in Professor Harrington's report, which it would take forward at the earliest opportunity.<sup>50</sup> The following extract gives details of how it was taking forward certain key recommendations:

#### **Capable and confident Decision Makers**

2. Good progress has been made in improving the decision making process and increasing the confidence of Decision Makers. But we recognise that more must be

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<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> [Government's response to Professor Malcolm Harrington's Independent Review of the Work Capability Assessment](#), Cm 7977, November 2010

done if we are to put the Decision Maker back at the heart of the system, to take on the central role advocated by the Harrington Review.

3. To improve the capability and confidence of Decision Makers, we are reviewing their training to ensure it is appropriate. We have also launched a forum to spread best practice and empower Decision Makers called "Every decision counts".

4. To improve the reconsideration process, we have rolled out and will continue to monitor the effectiveness of the Wrexham and Preston pilots.

5. We are testing ways of improving communication between Decision Makers and Atos, and Judges. Through surgeries and ad hoc events, we will spread best practice, a better understanding of the decision making role and ensure more decisions are right first time.

### **A more compassionate process**

6. Claiming a benefit as a result of a health condition or disability is a difficult time for many people, so we will ensure the administration of that process is compassionate in its treatment of individuals. We will take forward the recommendations outlined by the Harrington Review to increase the empathy in the system.

7. To do this we will ensure there is greater communication with individuals undergoing reassessment from incapacity benefits so they understand the process and their responsibilities. Every individual going through reassessment will get a call at the beginning of the process, at the end of the process and a further call if they appeal. The purpose of these calls will be to explain: the WCA; an individual's responsibilities; the support that is available after the WCA; and to allay fears about the process.

8. For those claiming ESA, we have already rolled out calls at the end of the process and for individuals who appeal. We will also use the experience of the incapacity benefits reassessment trial to look at enhancing information at the beginning of the process for this group.

### **Improving the Atos assessment**

9. Professor Harrington also makes a series of recommendations to improve the Atos assessment. We support these recommendations and we will ensure that Atos implement them.

10. We will ensure Atos has in place "champions" with additional expertise in mental, cognitive and intellectual conditions to improve the service to individuals and to provide opportunities for staff to further develop their skills. This will be in place by Spring 2011.

11. We will ensure that Atos pilot the audio recording of assessments to understand the benefits and practical challenges this could bring.

12. We will also ensure that Atos create and publicise a Customer Charter, so that people are clear what can be expected from their Atos assessment and what their responsibilities are.

### **Examining the descriptors**

13. Professor Harrington has already launched a group to look in detail at the mental, intellectual and cognitive descriptors. This group, comprised of Mind, Mencap and the National Autistic Society will make recommendations to Professor Harrington about

any refinements to the descriptors. He will then assess these and make recommendations to Ministers.<sup>51</sup>

The Government's detailed response to each of the recommendations in Professor Harrington's report is given in Annex A of the Command Paper.<sup>52</sup>

### ***Other responses to the year one report***

Disability and welfare rights organisations welcomed Professor Harrington's report. In press release issued by the **Disability Benefits Consortium** its Co-Chair, Dr Mark Baker, said that the DBC was glad that the review has undertaken such a comprehensive investigation of the WCA, and was pleased that the report reflected the concerns its members had raised. He hoped the Government would fully implement its recommendations. He added:

The extent of the Review's recommendations clearly indicate that the current WCA process is deeply flawed and the Government needs to make sure that, once they have implemented the recommendations, these issues are fully resolved. They should not proceed with moving claimants of older incapacity benefits onto ESA, via the WCA, until it is clear that the assessment is working fairly and effectively.<sup>53</sup>

**In a press release issued by Citizens Advice**, its Head of Welfare Policy, Lizzie Iron, welcomed many of the constructive changes outlined in the review and the Government's commitment to putting these changes in place:

"In particular we are very pleased that our recommendations for a more central role for DWP decision makers will be implemented. Rather than just rubber stamping the decisions made by ATOS, DWP decision makers will now also be expected to consider evidence from all sources when making final decisions on whether people are fit for work.

"ATOS will also now be required to provide every client with a summary of the decision on their ability to work. We were also very vocal in our wish for this and it means that every client will have the chance to challenge the report if they believe that there are mistakes or discrepancies.

"Time and again people tell us that during their assessment, medical evidence and supporting statements from their own practitioners have been disregarded. The commitment to collect more evidence from a health care professional or support worker nominated by the client is also very positive.

"There are still significant problems with the system and a lot more work needs to be done to make it fair, but we are particularly pleased that Professor Harrington has recommended further research in 2 key areas; what happens to those people found fit for work and whether the assessment could consider the real life chances of the person in finding suitable employment."<sup>54</sup>

**Disability Alliance** produced a briefing which lists the individual recommendations in the first Harrington report, along with the Government's response to each and its own observations. This briefing also stated (original emphasis):

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<sup>51</sup> *Ibid.* pp10-11

<sup>52</sup> [Government's response to Professor Malcolm Harrington's Independent Review of the Work Capability Assessment](#), Cm 7977, November 2010

<sup>53</sup> [DBC response to the WCA review](#), 23 November 2010

<sup>54</sup> [Citizens Advice response to Professor Malcolm Harrington's Independent Review of the Work Capability Assessment](#), 23 November 2010

The Government accepts 21 of the recommendations (at least in part). *But DA is disappointed that only a quarter of the recommendations seem to be planned to be implemented before people on Incapacity Benefits undergo a WCA from Spring 2011 at the rate of 10,000 per week.*

*This will leave an ineffective test operational at substantial social and material cost through disabled people not receiving appropriate support, high rates of appeal and an increased role for Jobcentre Plus.<sup>55</sup>*

A January 2011 report from the think tank the **Centre for Economic and Social Inclusion (CESI)** on the proposed “Work Programme” also argued that the Government should either implement the recommendations in Professor Harrington’s report immediately, or if this could not be done, postpone the reassessment of incapacity benefits claimants:

We welcome all the recommendations made by Professor Harrington in his review of the WCA and are pleased that the government intends to implement them in full. However, in light of the government’s acknowledgement that the existing system should be revised to improve its fairness and effectiveness, we are concerned that those who are undergoing reassessment in the pilot areas of Aberdeen and Burnley are being assessed using the current WCA. It will be neither fair nor effective if claimants end up transferring to the wrong benefit because of systemic problems with the WCA. We urge the government to implement the recommendations of the Harrington review with immediate effect; if this is not possible, we believe the reassessment process should be postponed until the revised WCA is rolled out.

The migration of large numbers of benefit claimants from inactive to unemployment benefits marks one of the most radical welfare reforms in decades. It is crucial that the effectiveness of this policy implementation is monitored to ensure that it is successful, and leads to more people entering the workforce and being better off as a result. It will therefore be important that the trajectories of different groups are tracked. We recommend that both DWP and future independent reviews of the WCA follow cohorts of claimants in the ESA work-related activity group, the ESA support group and those who are found fit for work, and tracks their destinations over specified time periods (for example six months, 12 months, 24 months).<sup>56</sup>

The report also argued however that the Work Capability Assessment, with its “crude appraisal of functionality”, was too narrow in scope:

We maintain that a comprehensive assessment of a person’s capability to work requires more than the crude appraisal of functionality, which is the scope of the current WCA. We believe that an employability assessment, which considers a broader range of employability factors in the context of an individual’s health condition or disability, would improve the overall assessment process. This should be undertaken by a professional, possibly an occupational health specialist, and should be made available to employment advisers on the Work Programme as soon as the claimant is referred to them. To ensure objectivity and consistency, we would argue that this assessment should be undertaken at the point of transfer, whilst the claimant is still in receipt of support from Jobcentre Plus.<sup>57</sup>

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<sup>55</sup> Disability Alliance, *Independent review of the work capability assessment: The Harrington review*, updated 28 November 2011

<sup>56</sup> Amy Tarr, *Making the Work Programme work for people with health conditions*, CESI, January 2011, p10

<sup>57</sup> *Ibid.*

### **Views on the impact of the year one recommendations**

In its response to the Call for Evidence for year two of Professor Harrington's review, the **Disability Benefits Consortium** presented results from a survey of around 300 welfare advice workers carried out in August 2011 which sought to gauge whether the measures recommended by the year one report were having an impact. The main conclusion was however that little change had been experienced over the previous year.<sup>58</sup>

Key results from the survey included:

- Three quarters of respondents said that support offered to claimants by Jobcentre Plus had not improved since the beginning of 2011.
- More than eight out of ten (81%) of respondents said that claimants were not more aware of the need to collect evidence from their favoured healthcare professional, just 7% felt that DWP Decision Makers were more likely to seek evidence from the customer's chosen healthcare professional, and only 16% felt that Decision Makers were giving greater weighting to this evidence.
- Less than 5% felt that more weight was being given to the ESA50 "free text" box by Atos assessors or DWP Decision Makers.
- 73% felt that the Atos Customer Charter had not made any difference to the behaviour of Atos assessors, and only 4% believed it would in the future.
- The large majority of respondents did not feel that written communications to claimants had improved.
- Six out of ten were not aware of the introduction of mental, cognitive and intellectual champions.
- Over a third (35%) had noticed an increased use of the reconsideration process, but less than a third of these (32%) felt that this had had a positive impact on claimants receiving a fair outcome.

Similar concerns were voiced by the homeless charity **Crisis** which was, overall, "very disappointed that Professor Harrington's initial changes to the WCA have either not been implemented effectively or have simply failed to make the desired impact." In its response to the year two Call for Evidence, it concluded:

Whilst some progress has been made over the last year, the changes made to the WCA since the last review have not been as impactful as might have been hoped. The WCA itself is still not working adequately and in particular is failing to effectively pick up underlying or fluctuating conditions, particularly related to mental health issues. Face-to-face assessments are relied upon too heavily and there is not enough scope for introducing additional evidence. There are still problems with the way in which Atos HCPs are carrying out assessments where they are far too often concentrating on the LiMA computer system and not the customer. 'Rubber stamping' of Atos HCP

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<sup>58</sup> [A Call for Evidence: Year 2 Independent Review: A response from the Disability Benefits Consortium](#), September 2011



recommendations by JCP decision makers appears to be continuing and more attention needs to be paid to the appeals process.<sup>59</sup>

## 6.2 Independent review – year two report

On 14 July 2011 Professor Harrington issued a “Call for Evidence” as part of the second year of his Independent Review of the Work Capability Assessment.<sup>60</sup>

In his foreword, Professor Harrington stated:

My first review of the WCA found that it is the right process for assessing eligibility for Employment and Support Allowance, but that it is not working as well as it should. The review, therefore, made a number of recommendations to improve the fairness and effectiveness of the system as well as setting out a programme of work for the second review this year.

The call for evidence this year is deliberately more focussed than last year, asking questions about more specific issues. This will help me gather further evidence about the key issues on which I believe this and future reviews need to focus on.

The specific questions Professor Harrington sought views on were:

- Have you noticed changes to the WCA process as a result of the Year 1 recommendations? If so, what are these changes?
- Are there further areas of work that you think should be added to the programme of work for Year 3? If so, what should these consider?
- At what stage should we stop making changes to the system and let the changes already being made bed in to ensure they are having the desired impact?
- Does the Year 1 recommendation go far enough in placing the right emphasis on the face-to-face assessment?
- Do you have any robust evidence about the face-to-face assessment processes and outcomes which will help us make recommendations for future improvements?
- Are you aware of any concerns about the face-to-face assessment, and if so where have these been focused?
- If you have heard specific concerns about the IT supporting the assessment (i.e the Logic Integrated Medical Assessment or LiMA system), do you have any robust evidence about how this adversely affects the assessment or its outcome?
- Is there a need to present and explain the face-to-face assessment in a different way, making it very clear to claimants what it will involve and how a functional assessment relates to work capability?
- What one thing would you change about the WCA to make it operate more fairly and effectively?

The deadline for responses was 16 September 2011.

Professor Harrington’s second report, *An Independent Review of the Work Capability Assessment – year two*, was published on 24 November 2011. Professor Harrington was pleased that all of his year one recommendations had been, or were in the process of being, implemented by DWP and Atos. He added:

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<sup>59</sup> *Crisis’ response to Professor Harrington’s independent review of the Work Capability Assessment, Year 2*, September 2011

<sup>60</sup> *The Work Capability Assessment: A Call for Evidence: Year 2 Independent Review*, July 2011

5. **The WCA has, in my view, noticeably changed for the better.** However there is still further to go. Some of the improvements from my first Review have not reached all parts of DWP Operations.

6. To those who feel nothing has happened, I say: be patient. It is happening. The process is not yet perfect, but **it is improving and will continue to do so over the course of the five Independent Reviews.**<sup>61</sup>

His foreword to the report commented:

Even without Incapacity Benefit reassessment, the changes I proposed to the WCA system would have presented a big challenge for two large and complex organisations, namely DWP Operations and Atos. DWP rapidly adopted my proposals as policy and DWP Operations set about the necessary changes with energy and commitment. Atos, who are contracted to DWP for their part of the WCA, fulfilled their contractual requirements.

I have seen these improvements in the day-to-day running of both DWP Operations and Atos. This has taken time and some observers have told me that they have seen no change. I advise patience. The process of improvement is happening, but is not yet in evidence everywhere. It will take time to have the desired impact and the year three Review will closely monitor the impact of the changes and ensure there is continuing progress in improving the assessment.

Whilst real progress has been made this year, I would not for one minute claim that things are perfect. Much criticism about the assessment – particularly from individuals – remains. This criticism should certainly not be ignored and the Call for Evidence this year was particularly helpful in getting views about the assessment and how it could be improved.

In some areas however there had been less progress than hoped:

No real progress has been made with recommendations relating to the appeals process, particularly around feedback from Tribunals to Decision Makers about reasons for overturn of appeals. This is very disappointing. I have had a lot of positive feedback from a lot of people about this idea, and I am certain that it would improve the WCA process – and performance within it – if implemented. However, the First-tier Tribunal President has informed me that judicial matters are outside my remit.

Communications before, during and after the WCA also remains problematic. Messages about the WCA and what a ‘fit for work’ decision means need to improve within DWP Operations. There is a need to move away from the view of the assessment as something that people either ‘pass’ or ‘fail’. And finally there appears to be a need to improve communications between DWP Operations and the Work Programme providers to ensure that people who can work are given the opportunity to do so at the earliest opportunity.<sup>62</sup>

The following extract from the Executive summary gives the “key findings and themes” from the year two report:

8. In this Review I propose **a number of more detailed recommendations to improve further the process of the WCA and the criteria used to determine eligibility for ESA.**

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<sup>61</sup> Executive Summary, p7, original emphasis

<sup>62</sup> Foreword, pp5-6

9. This Review sets out a series of recommendations which complement – and build on – the recommendations from the year one Review. They aim to improve the fairness and effectiveness of the assessment by:

- **Better communications and sharing of information between all parts of the system**

This will mean that everyone involved knows their roles and responsibilities and that the purpose of the WCA and the reasons for decisions are better understood. This is particularly the case between Decision Makers and Personal Advisers within DWP Operations so that reasons for reaching a decision and what that decision actually means are clear. Although there is no clear evidence that ‘employability’ should feature in the WCA, Decision Makers and the Work Programme providers should liaise more closely so that the latter are better able to help people back into work.

Whilst the First-tier Tribunal President considers it to be outside the remit of the Review, better communication between the First-tier Tribunal and Decision Makers so that reasons for upheld appeals are clear would also considerably add to the fairness and effectiveness of WCA process.

- **Increasing and improving the transparency of the assessment**

DWP and Atos need to engage with representative groups and their clinical advisers to ensure that Decision Maker and healthcare professional guidance used during the WCA process is up-to-date and clinically sound; and the regular publication of Atos data will ensure consistency and that standards are not allowed to slip.

- **Ensuring quality decisions are made**

Regular audit of Decision Maker’s performance is needed to ensure they are making consistent, robust and evidence-based decisions and that – as newly empowered Decision Makers – they are accountable for their decisions.

- **Monitoring the impact of recommendations from the Independent Reviews**

This will help ensure, and provide evidence, that the changes are having the desired impact. This could be achieved by collecting indices for change on the rate and amount of progress made; and carrying out research into what happens to people who are placed in each group over time.

- Further decisions need to be made on the proposals for new mental, intellectual and cognitive descriptors once further research has compared the proposed descriptors with the current ones. I hope that it will be possible to consider similar research for the recently submitted proposals for refining the fluctuating conditions descriptors, or for them to join this process.<sup>63</sup>

The year two report also looked at a number of areas flagged up as causing concern, including the use of the LiMA computer system by Atos Healthcare Professionals, the constituency of HCPs’ performance, and the adequacy of training.

In relation to LiMA, Professor Harrington sought to determine whether its use was “driving” HCP behaviours and leading to a “tick-box” approach to assessments. He concluded:

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<sup>63</sup> Executive Summary, pp8-9, original emphasis

34. The Review welcomes the positive changes made to LiMA as part of the continual process of improving it. Although some minor changes might further improve LiMA there does not appear to be any fundamental problems with the way in which the software operates.

35. Any issues or concerns expressed by stakeholders and Call for Evidence respondents about LiMA appear to relate more to the way in which HCPs carry out assessments or use the software, rather than the software itself.

36. Many of the comments received about LiMA and what it does/does not do appear not to be robust or evidence based. The Review has seen no evidence that LiMA:

- drives HCP behaviours by forcing the face-to-face assessment down a certain path;
- drives HCP decisions about what appears in the final report; and
- leads to an impersonal and mechanistic assessment where the HCP has to focus on the computer screen rather than the claimant.

37. The important caveat to all of this is that LiMA relies on the quality of information which is put into it, and so the quality of assessment carried out by the HCP. Failure to put adequate information into LiMA is likely to lead to a final report which does not adequately reflect the individual claimant, and vice-versa.

38. Atos are rightly encouraging HCPs to use more free text in their assessments, and this (along with the personalised summary statement) will help better reflect individual claimants. But there is no evidence that LiMA in itself drives either positive or negative behaviours as the face-to-face assessment is being carried out.

Professor Harrington recommended some changes to the language used in LiMA, further monitoring of the use of “free text” within the system, and additional training (if needed) for Atos HCPs to enable them to use the system “intelligently.” However, his main conclusion was that the system “seems to work reasonably well if the HCPs are able to use it properly.”<sup>64</sup>

As regards the performance of Atos HCPs and whether this varied according to the type of healthcare professional (doctor, nurse or physiotherapist), Professor Harrington concluded:

62. The data provided by Atos suggests that there is not a significant consistency issue between the three types of HCPs who carry out face-to-face assessments either in terms of recommendations for claimants scoring 15 or more points or recommendations for where points are scored.

63. Taking this, the training provided to new recruits to Atos (see Chapter 6) and the audit procedures in place into account it would appear that continuing negative responses to the face-to-face assessment – particularly about the way in which the assessment was conducted – are related to isolated individuals rather than there being an endemic issue within Atos. This, of course, does not mean that these negative experiences should be ignored.<sup>65</sup>

Professor Harrington recommended that the Government should consider tightening up the target for unacceptable (Grade C) reports by Atos HCPs, and that data on Atos performance should be regularly published “to improve the transparency of the face-to-face-assessment”.

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<sup>64</sup> Chapter 6, para 32

<sup>65</sup> p60

While Professor Harrington's conclusions as regards Atos HCPs' performance, training programmes and LiMA were largely positive, he noted the continuing reports of negative experiences from face-to-face assessments from welfare rights organisations and pressure groups, which he described as "worrying".

### ***Government response to the year two report***

The Government's response to Professor Harrington's recommendations was published alongside the year two report.<sup>66</sup> In his foreword, the Minister for Employment, Chris Grayling, said:

We endorse Professor Harrington's second independent review and we will make further improvements to the Work Capability Assessment to ensure it continues to be fit for purpose. This includes working with a number of disability groups to ensure the guidance for Atos healthcare professionals and Decision Makers is fully up to date.

We also want to ensure that individuals being treated for cancer are supported in a sensitive way. So this can happen, we intend to consult on our proposals for changing the current provision for people being treated for cancer. These proposals are based on evidence provided by Macmillan Cancer Support, but we want now to seek wider views, including those of individuals affected by cancer, their families and experienced healthcare practitioners, as well as other disability groups.

Annex A gives the Government's response to each of the 23 recommendations in Professor Harrington's second report. All were either accepted or "accepted in principle".

The Government also announced that it would reappoint Professor Harrington as independent reviewer of the WCA "for a further and final year", with the existing terms of reference.<sup>67</sup>

A consultation paper, [Work Capability Assessment: accounting for the effects of cancer treatment – informal consultation](#), was published by DWP on 16 December 2011 and the consultation ran until 9 March 2012. The DWP also issued a press release summarising its proposals:

#### **16 December 2011 – Making the WCA work better for cancer patients**

Today the Government launched a consultation on reforming the Work Capability Assessment with a view to ensuring a substantial increase in the number of cancer patients who receive unconditional support while they are receiving treatment.

Ministers have accepted the principle that patients receiving oral chemotherapy should receive the same kind of protection as those receiving more traditional intravenous treatment.

The move is the latest in a series of measures to improve the support those with chronic conditions receive from the welfare state.

Government, stakeholders and experts have agreed that under the present rules, which determine someone's eligibility for help due to the sort of treatment they are receiving, some cancer patients are unfairly missing out on support.

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<sup>66</sup> [Government's Response to Professor Malcolm Harrington's Second Independent Review of the Work Capability Assessment](#), Cm 8229 November 2011

<sup>67</sup> paras 52-53

This consultation follows a series of recommendations from Professor Malcolm Harrington on how changes to the WCA could result in more people who need help and support from the Employment and Support Allowance, accessing it more quickly and easily.

Following work with Macmillan Cancer Support, Professor Harrington accepted the existing rules which assumed eligibility for the Support Group based on the sort of treatment someone was receiving were unfair.

This has resulted in some people who could not work because of their cancer treatment not being able to access extra support because the system has decided that their treatment means they should be capable of doing some sort of work.

Professor Harrington agreed with Macmillan that most patients should be considered eligible for the Support Group regardless of the type of treatment being undertaken.

The Government proposals would see more people automatically go into the ESA Support Group based on information, such as a letter from the claimant's GP or cancer specialist confirming their condition and the treatment being provided. Speeding up the process and reducing the need for face-to-face meetings. It would also take into account that for many people, being able to do some work during treatment or recovery was important.

The consultation will be seeking views from all interested stakeholders, including individuals who have been or are being affected by cancer, their families and carers, healthcare practitioners and cancer specialists as well as representative organisations and employers.

Based on evidence, we will be looking to see how we can build on the consensus that the WCA must be more reflective of the reality of today's cancer treatments as well as keeping the option of work open to those who want to.

The consultation is seeking views on proposals to change and expand the current provisions to include individuals:

- Awaiting, receiving or recovering from treatment by way of oral chemotherapy, except when the therapy is continuous for a period of more than six months;
- Awaiting, receiving or recovering from combined chemo-irradiation;
- Awaiting, receiving or recovering from radiotherapy in the treatment of cancer in the following areas: Head and neck; Brain; Lung; Gastro-intestinal; Pelvic

To ensure that everyone has the opportunity to comment on the evidence available, the Department is publishing the advice which Professor Harrington received from Macmillan Cancer Support and on which its proposals are based.

### **6.3 Independent review – year three report**

Professor Harrington's third and final Independent Review was published on 20 November 2012.<sup>68</sup> In his foreword, Professor Harrington notes that his reviews have concentrated on two main strands: improving the "claimant journey" right through initial contact with DWP through t appeal; and reviewing whether the descriptors "accurately capture the true nature of the claimant's case." As regards the claimant journey, while acknowledging the

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<sup>68</sup> [An Independent Review of the Work Capability Assessment – year three](#)

“strenuous efforts” made by staff in DWP Operations Professor Harrington said the work was “not yet complete”:

The improvements that have been started must be carried through to the end. It is important that the momentum is not lost and, indeed, that the changes are reviewed periodically to ensure that the alterations are working. It is vital for there to be continual review, modification and monitoring of the WCA.

A number of the major charities in this year’s call for evidence say that although they have seen some change for the better, it is disappointingly incomplete in coverage and depth. I agree with them. Changing such a large and complex process and such a controversial assessment takes time – it is happening.

With regard to the descriptors, Professor Harrington said that progress has been “positive but slow”:

We are close to a new and much improved set of provisions for cancer treatment. For the mental, intellectual and cognitive conditions descriptors and for the fluctuating condition descriptors, work is underway for a formal review of new proposals from a number of charities to compare them with the existing descriptors. This work will continue into 2013 and I have been asked to chair the expert independent steering group overseeing the quality and validity of the evidence-based review. It is important to wait for the results of this before rushing to conclusions about how to change the descriptors.

In his final report, Professor Harrington says that it is “regrettable” that the First-Tier Tribunal had “effectively distanced itself from the rest of the WCA”:

Feedback from the Judges to the Decision Makers has, at last, started in a rudimentary way. However, much, much more is needed if we are to see a real dialogue between the Judges and the Decision Makers. This must happen on cases where there is a difference of opinion on what category is appropriate for that case *based on the same set of evidence*. For the First-tier Tribunal to suggest that the WCA Independent Review has no remit to consider the appeal stage of the process is illogical and untenable in my view.

Looking at implementation of his year one and year two recommendations, Professor Harrington notes:

Real progress has been made but the pace and scope of the improvements has been slower than the Review would have hoped. The direction is the right one although the goals have not yet been reached. 7.

It is imperative that the momentum for change is maintained. The Department for Work and Pensions (DWP) has worked hard to effect change and continual improvement must become the watchword for the future.<sup>69</sup>

Looking forward, the “key findings and themes” from the year three report are:

- Continuing to **improve communications with claimants**: changes so far are having a positive impact on the claimant experience, although increased contact with claimants can prove difficult for both individuals and Decision Makers.

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<sup>69</sup> Executive Summary, p8

- Continuing to **improve communications within DWP Operations**: DWP is a large Department but effective communications between Decision Makers and Personal Advisers are vital if the whole organisation is to understand both the overarching purpose of the WCA and why decisions have been reached at an individual level. The extension of a pilot aimed at smoothing the transition between the WCA and work is welcomed. Rapid implementation is needed if this proves successful.
- Continuing to **improve the face-to-face assessment**: DWP should monitor Atos performance more closely. Indeed the quality and depth of the relationship between DWP and Atos remains variable at a local level. The opportunity for Decision Makers and Atos healthcare professionals to discuss individual cases will help ensure quality decisions, but these relationships take time to build.
- Establishing **quality dialogue between DWP and First-tier Tribunals**: while progress has, finally, been made here there remains much more to do if the whole assessment process is to become transparent and accountable.
- Keeping the **Decision Maker central to the assessment process and providing them with all the further documentary evidence they need to get the decision ‘right first time’**: shifting the emphasis from the independent face-to-face assessment to a more holistic approach will help improve both the accuracy and the integrity of the whole process. Decision Makers are being empowered, but they need to have access to as much information as possible on which to make their decisions and to be given latitude to make these decisions ‘right first time’.
- Continually **monitoring changes to the WCA**: the Review has seen, first hand, the changes that are beginning to take root. Considerable disquiet remains, and this cannot be ignored. Continuing to monitor the implementation of the Review’s recommendations, and their impact, is key to communicating improvements as they happen.
- **Completing work underway on the descriptors**: momentum must be maintained to make changes to the cancer treatment provisions and to complete, evaluate and act on the findings of the evidence-based review. This is a far from straightforward process – the work to date is encouraging and must be followed through.<sup>70</sup>

Professor Harrington concludes:

I believe that my recommendations are effecting change for the better in the WCA. There is some way to go but I am confident that significant and lasting improvements are coming and that DWP and my successor will see the job completed.<sup>71</sup>

The *Government’s Response to Professor Malcolm Harrington’s Third Independent Review of the Work Capability Assessment* was also published on 20 November.<sup>72</sup> The DWP Minister Mark Hoban also issued a Written Ministerial Statement:

I am pleased to announce that today Professor Malcolm Harrington’s third independent review of the work capability assessment (WCA) will be published. This is the third of five independent reviews as required by the Welfare Reform Act 2007.

As part of the Government’s ambitious welfare reform programme, we are keen to ensure the WCA is as fair and accurate as possible. Those who are assessed by the

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<sup>70</sup> Ibid. pp9-10

<sup>71</sup> Ibid. p6

<sup>72</sup> Cm 8474



WCA and found fit for work or with the potential to return to work will be given support to help them do so; those who are unable to work will continue to receive full support.

With this in mind, Professor Harrington has made a further set of recommendations to enhance the experience of those that undertake the WCA.

Professor Harrington made 48 recommendations across his first and second independent reviews and the Government have accepted all of them. In his third year review, Professor Harrington has made a further six recommendations. The Government's response to Professor Harrington's review will also be published later today, and we have accepted or accepted in principle all of his recommendations this year.

We welcome Professor Harrington's assessment that the WCA has improved further over the last year. However, we also recognise that there is more to do and we are committed to improving the system.

This is Professor Harrington's third and final independent review of the WCA. I would like to thank him for all the work he has done to improve the assessment. Professor Harrington's successor will be appointed shortly.<sup>73</sup>

#### **6.4 Successor to Professor Harrington**

Professor Harrington's third report was his last as Independent Reviewer. The *Welfare Reform Act 2007* provides however for a further two annual independent reviews. In a written answer on 9 July 2012, the Minister for Employment, Chris Grayling, said:

The Secretary of State for Work and Pensions is aiming to appoint a successor to Professor Malcolm Harrington to undertake the fourth independent review of the Work Capability Assessment before the fourth review commences in 2013.

The Department is currently considering its options for the recruitment of Professor Harrington's successor and their terms of reference.<sup>74</sup>

### **7 Work and Pensions Committee report, July 2011**

On 26 July 2011 the Work and Pensions Committee published a report on [The role of incapacity benefit reassessment in helping claimants into employment](#).<sup>75</sup>

The Committee concluded:

It is widely accepted that the Work Capability Assessment (WCA) as introduced in 2008 was flawed. This has been borne out by the high number of appeals and the high success rate of appellants. It was also reflected in the amount of evidence from individuals which expressed grievances with the way they were treated during the process and the accuracy of the outcome.

The service provided by Atos Healthcare, which carries out the WCA, has often fallen below the standard claimants rightly expect. This has contributed significantly to the widely felt mistrust of the whole process. Welcome changes to the WCA have been made, mainly in response to the recommendations in Professor Malcolm Harrington's independent review, which we fully endorse. Further welcome changes to the process

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<sup>73</sup> HC Deb 20 November 2012 c30WMS

<sup>74</sup> HC Deb 9 July 2012 c61w

<sup>75</sup> HC 1015 2010-12

were made as a result of the reassessment trials in Aberdeen and Burnley. These changes have already improved communication between Jobcentre Plus and claimants and the service provided by Atos Healthcare.

The decision-making process is also showing signs of improvement, with more decisions on work capability being "got right the first time". The new measures introduced are likely to be resource-intensive, but it is important that the necessary funding is made available for their implementation nationwide, despite the pressures on DWP budgets, because accurate decisions will save the Government money through fewer appeals and greater efficiency in the process.

The Government has acknowledged that the WCA requires further refinements. We look forward to the outcome of Professor Harrington's second review which will focus on mental, intellectual and cognitive conditions and fluctuating conditions; improving the IT system; tracking outcomes of different claimant groups; and assessing whether the WCA could contribute more to establishing an individual's employment capability.<sup>76</sup>

The Committee noted a number of concerns about assessment experiences, including problems with Atos call centres, overbooking of appointments, sanctions for non-attendance at assessments, and the facilities at assessment centres. However, it observed:

**76. Most of the submissions we received from individuals were from claimants who were dissatisfied with the WCA process and who did not believe that they had been accurately assessed. The Minister asked us to bear in mind that much of the evidence submitted to us related to assessments carried out prior to implementation of the two sets of review recommendations and experience from the Aberdeen and Burnley trials. We fully acknowledge this fact. However, we believe that there is no room for complacency and we have identified a number of areas where further improvement is required.**

While noting concerns voiced about the Work Capability Assessment, about decision making and appeals, and about the link to back to work support, the Committee's report stopped short of concluding that the WCA itself was irredeemably flawed. In relation to Atos however, it concluded:

**92. We recognise that Atos Healthcare, as the sole provider of the Work Capability Assessment, takes the brunt of public criticism about the WCA. Some of this arises from the understandable anxiety which claimants feel about the process. We accept that considerable efforts have been made on the part of both Atos Healthcare and DWP to improve the quality of assessments. However, it is also clear that many claimants have not received the level of service from Atos which they can reasonably expect.**

**93. We remain concerned about whether there are sufficient levers within the DWP contract with Atos to ensure that Atos consistently gets the assessment right first time. We therefore recommend that, when the contract is re-let in 2015 and in future contracts for other medical assessments, DWP reviews the performance indicators, with significant financial penalties built in if standards are not met.**

In its [response published on 11 November](#) the Government stated, in relation to the above recommendation,-

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<sup>76</sup> Ibid, summary, p3

The Department closely monitors Atos quality through a number of different channels, including audit, customer satisfaction surveys, complaints and reworks. This gives a picture of the overall quality and performance of Atos Healthcare. Following Professor Harrington's first review and the reassessment pilots, Atos have made several improvements, including:

- publishing a customer charter setting out what the claimant can expect;
- rolling out new soft skills training; and
- implementing the Personalised Summary Statement—a clear plain English justification of their advice to decision makers at the end of each report.

However, the Department recognises that there is more to be done to learn lessons from the management of this contract and improve quality monitoring of future contracts. There must be robust indicators and levers to monitor performance and quality and prompt action should be taken where either fall below acceptable standards. The Department is actively reviewing this area ahead of re-letting the contract in 2015.

Further information on penalty clauses in the Medical Services contract was given in a written answer in February 2012:

**Dr Huppert:** To ask the Secretary of State for Work and Pensions whether the Atos contract for work capability assessments includes penalty clauses; whether those clauses have come into effect; and whether he has any plans to implement any such penalty clauses. [95410]

**Chris Grayling:** The Department of Work and Pensions (DWP) contractual agreement with Atos Healthcare contains performance service levels. The contract also contains financial remedies where there is service level failure based on a pre-estimate of loss to the Department which are described as service credits.

Service credits are considered on a month by month basis taking into consideration any mitigation presented to the Department by the contractor. The Contracts Service Credits regime allows the contractor, in certain circumstances, to recover some or all of the service credit accrued. This mechanism incentivises the service provider, following failure, to re-achieve and maintain the service level position within a reasonable time period.

The actual application of service credits is commercial in confidence as, if disclosed; the information may prejudice the commercial interests of the Atos Healthcare and the Department's future dealings with the Atos Healthcare or other service providers.

The contractual performance and service credits are monitored and decided by the Medical Services Contract Management Team in accordance with the contractual arrangement.<sup>77</sup>

For further information on the Atos contract and on criticisms of the performance of Atos see section 12 below.

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<sup>77</sup> HC Deb 21 February 2012 c646w

## 8 Citizens Advice 'Right first time' report, January 2012

On 11 January 2012 Citizens Advice published a report, *Right first time? An indicative study of the accuracy of ESA work capability assessment reports*. The report gives the findings from an in-depth analysis of 37 WCA reports produced by Atos Healthcare Professionals between summer 2010 and June 2011. The report found:

Our analysis indicates that the level of accuracy in reports is worryingly low. This is true even where ESA has been awarded. Sixteen of the 37 in-depth reports reveal a serious level of inaccuracy, 10 a medium level of inaccuracy - enough to have a detrimental effect on an award of DLA, and 11 had a low (or no) level of inaccuracy.

This report calls on the DWP to undertake, with some urgency, regular, independent monitoring of the accuracy of WCA reports, to ensure that people who are too ill or disabled to work, either in the short- or long-term, are properly supported by the benefit system.

The study found five types of reported error or omission which appeared to have a significant impact on the accuracy of the report and the level of points awarded:

- Obvious impairments not being recorded, or records incorrectly stating that the claimant could perform a particular activity;
- Incorrect factual recording of the history given by the claimant;
- Medical evidence being incorrectly determined, including instances where Atos Healthcare Professionals reported information on a claimant's condition which they were not in a position to decide, or made unjustified assumptions about the claimant's condition;
- Closed questions, lack of empathy to encourage the person to talk and incorrect assumptions made when the information was not gathered; and
- Inconsistencies within reports

The report comments:

The most common reported problem overall was general inaccuracy in the recording of what the client had said. The next most common problem – reported by just over half the participants – was lack of exploration of the effect, or variability, of the condition. Problems with inconsistency within the reports are particularly worrying, because decision makers did not pick up these inconsistencies until pointed out by welfare rights workers when the appeals were submitted. We are also concerned about these types of inaccuracies, as they have significant implications for DLA awards.<sup>78</sup>

The report's conclusions and recommendations are below:

This study confirms existing concerns about the accuracy of ESA WCAs. While the clients accepted a number of the reports as giving an accurate picture of the impact of their condition or impairment on their life, this was not the case for the majority. Of particular concern is the level of error in cases where ESA is awarded but the report is subsequently used to decide entitlement to DLA. A claimant in this situation would have no reason to request a copy of their WCA report from DWP and would be unaware of the potential impact on a claim for DLA.

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<sup>78</sup> p12

These findings clearly support a recommendation that the DWP should introduce a routine method of monitoring for accuracy, before increasing the use of this type of assessment.

In his *Independent Review of the Work Capability Assessment – year two*, Professor Harrington expresses concern about continued negative experiences of the face-to-face assessment and the WCA process as a whole, including inaccurate WCA reports. Citizens Advice submitted an early version of the findings of this study to his call for evidence and the report recognises the value of our indicative study in highlighting concerns about the accuracy of reports. Indeed, Harrington suggests that the study be repeated, in 2012, “so that trends in accuracy of reports can be monitored and further recommendations, if appropriate, can be made”.

The Government, in its response to the Work and Pensions Select Committee report on the reassessment of incapacity benefit claimants, recognises that “there is more to be done to learn lessons from the management of this [the Atos] contract and improve quality monitoring of future contracts. There must be robust indicators and levers to monitor performance and quality and prompt action should be taken where either fall below acceptable standards”.

Citizens Advice believes that independent monitoring of the accuracy of WCA reports would be a very good place to start.

#### **Quality assurance**

- Citizens Advice recommends that the DWP conducts regular, independent, assessments of the accuracy of the reports prepared by health care professionals employed by contractors on behalf of the DWP, which make recommendations to decision makers about entitlement to ESA.

#### **Improving accuracy**

- Health care professionals conducting WCAs must be reminded that, even if someone would score enough points to receive ESA on the basis of one or a few descriptors, all of the descriptors must be fully considered in order to give a full assessment of the client’s situation.
- DWP decision makers must be trained to examine the internal consistency of WCA reports from Atos, and more readily reject reports that do not justify the recommendations made.
- As part of Atos’ customer service surveys, we recommend that they regularly send a copy of the WCA report to claimants and ask them to verify the accuracy of the record of what they said and did during the assessment.
- The Atos personalised summary – or the report itself – must be sent to all claimants, not just those found fit for work. It must also be made clear to claimants that whether or not they receive ESA, it is important that they challenge any inaccuracies, and why.
- The DWP should consider imposing financial penalties on Atos for every inaccurate report that they produce.

#### **Collecting other evidence**

- Medical evidence must be requested in all cases from the professional nominated by the claimant as knowing them best. We welcome the fact that

the value of medical evidence is now recognised. However, it should not be the responsibility of the claimant to provide the medical evidence as this will lead to a two-tier system whereby the poorest and most vulnerable claimants, who cannot afford to pay for the evidence, could receive a less reliable decision.

- This medical evidence must also state if there are serious investigations underway, or if the claimant is likely to have a serious operation in the near future. In cases where there is likely to be fuller information available shortly, the assessment should be delayed for a short time until the investigations are complete. Power should be given to the decision maker to assign the client temporarily to an appropriate group.
- Medical tests – such as a vision test – must not be carried out at assessments if a more accurate record is available from the claimant’s medical records.

#### **Use of face-to-face assessments for other purposes**

- WCAs must not be used for other purposes – such as deciding a DLA award – until the accuracy of the reports has been independently verified, or – at the very least – the claimant has had an opportunity to correct errors.
- Face-to-face assessments must not be used as the primary method of assessment for the personal independence payment (PIP) without further research into the accuracy of this method of assessment.
- Research must also be commissioned into the most effective method of assessment, by comparing, testing and piloting different methods.

## **9 Resignation of Paul Farmer from the WCA review Scrutiny Panel**

As part of the Independent Review of the Work Capability Assessment, the Government also appointed an Independent Scrutiny Group to oversee Professor Harrington’s work, to monitor progress of the review, and to provide advice and support to the Reviewer. The group comprised experts from the medical profession, disability groups, occupation health and employers.<sup>79</sup>

On 2 April, Paul Farmer of the mental health charity Mind, resigned from the Scrutiny Panel, arguing that the WCA process “isn’t working” and that there was “insufficient recognition of the need to change the approach.” He explained his decision further in his [blog](#):

#### **Why the WCA isn’t working**

Posted: Monday 2 April 2012

*Following his resignation from the Government’s review panel for the Work Capability Assessment, our Chief Executive Paul Farmer blogs about the damage the process is doing to the lives of people with mental health problems.*

At Mind, we follow a simple model of how we work - we listen to what people with mental health problems are telling us, and then we seek to influence change so that people’s lives can be improved.

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<sup>79</sup> For further details including the terms of reference for the Scrutiny Group see pp11-13 of [An Independent Review of the Work Capability Assessment – year two](#), November 2011

For the last couple of years, the issue of welfare reform has consistently been an important issue for people with mental health problems. And one aspect in particular has dominated: the Work Capability Assessment (WCA).

It's worth remembering that the WCA was initially conceived before the recession, when this country was estimated to be within a year of achieving full employment. Even in those early days, we urged caution as we had real concerns about how a new system would apply.

It's in everybody's interests to get this right. When around 40 per cent of people on Incapacity Benefit have a mental health problem, it makes sense to design the new system so it can properly assess the needs of people with mental health problems.

In July 2010, I joined the Harrington Scrutiny Panel, which was set up to oversee the work of the WCA Independent Review team. My role was to give advice and criticism regarding the areas the reviewer was looking at and the changes they are recommending.

The DWP has committed to making some changes arising from the Independent Review, but these will take time, and some fundamental changes required haven't even started to be addressed.

Meanwhile, tens of thousands of people are being reassessed using a test which is still not fit for purpose. Around 50 per cent of people are appealing against the decision, and a remarkable half of those appeals are being upheld, meaning that as many as one in four tests are wrong. The cost to the taxpayer of the tribunal system alone is £50m, around a half of the £100m a year being spent on reassessment.

I spent some time last week at Mind's Infoline. Call after call was coming in from individuals with a mental health problem, or a member of their family, anxious about the reassessment letter, concerned about having to appeal and the potential impact on their lives. We've heard about Job Centres who are shocked when someone who is clearly unwell turns up having been told that they are fit for work.

The callers to our line were not benefit scroungers – they were ordinary people whose health had put them in a very vulnerable state. Ordinary people desperate to recover and be able to work, but who just weren't yet well enough. And instead of offering support and help to recover and then find and stay in work, the WCA process is making their health worse and so, ironically, the prospect of a job even less likely.

The time has come to call a halt in the reassessment process until real changes are made. It's damaging people's lives. It's costing the taxpayer a fortune. And it certainly isn't fulfilling its purpose of supporting people with mental health problems on their journey back to work.

This Government has some good aspirations on mental health set out in an excellent Mental Health Strategy - it's seen the importance of good mental health to the country and it's acknowledged the high cost of poor mental health. But when it comes to benefits and supporting people out of work to get back into work, the DWP is letting people down.

I have taken the decision to leave the Harrington Scrutiny Group. Our concerns about the reality of the WCA have grown, but we see insufficient recognition of the need to change the approach, and the need to do so quickly, before more and more people are subjected to a process which isn't working.

Mind will continue to campaign on improving the WCA until people with mental health problems get the support and respect they deserve. I hope the Department will hear these concerns and act upon them.

Subsequent media reports quoted the Minister for Employment, Chris Grayling, as saying that, before the announcement, he had in fact already asked officials to ask Mr Farmer to stand down from the group, on the grounds that Mind had become involved in “legal action against the department.”<sup>80</sup> The Judicial Review in question is being brought on behalf of two claimants by the Public Law Project, not Mind, and at the time of writing there has been no announcement on whether permission has been granted for the case to proceed. At the time of Mr Farmer’s resignation Mind was not taking legal action, but had written to the court to express an interest in intervening in the case, were the Judicial Review to be given permission to proceed.<sup>81</sup>

A note dated 4 April on Mr Farmer’s [blog](#) states:

Some reports have suggested that Paul was asked to stand down. It is true that DWP officials had asked him to re-consider his position, but there was no reason he could not have continued to sit on the panel.

Paul came to his own conclusion that he no longer wanted to be part of the review. He resigned via a letter to Chris Grayling which clearly set out his reasons for doing so.

## 9.1 Judicial Review of the WCA

On 26 July 2012, the High Court granted permission for a Judicial Review of the WCA. The Public Law Project (PLP), which is representing the two claimants in the case, argues that people with mental health conditions are placed at a substantial disadvantage in navigating the WCA system and that the *Equality Act 2010* requires the DWP to make reasonable adjustments to avoid such disadvantage. PLP argues:

The reasonable adjustment to the process that the claimants seek is for medical evidence to be sought by the Atos Health Care Professional and the DWP at the very outset of the claim. This would ensure that very sick people for whom having to go through a WCA would be extremely distressing are exempted from the process, and for those that do attend a WCA, the assessment of fitness to work takes place in the correct medical context, so that dangers associated with forcing people back to work are correctly identified.<sup>82</sup>

In granting permission for the Judicial Review to proceed, the Judge stated:

I consider that it is reasonably arguable that the reasonable adjustments required by the [Equality Act 2010] include the early obtaining of independent medical evidence where the documents submitted with the claim show that the claimant suffers from mental health problems and that this has not been done, or at least not done on a sufficiently widespread basis.<sup>83</sup>

Further information can be found in a PLP press release of 26 July, [High Court rules Work Capability Assessment arguably unlawful](#).

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<sup>80</sup> See ‘[Charity chief quits government welfare panel over incapacity tests](#)’, BBC News online, 2 April 2012; ‘[Mind rebuts DWP version of resignation row](#)’, *Third Sector Online*, 4 April 2012; ‘[Charity chief quits over fit-for-work test](#)’, *The Guardian*, 10 April 2012;

<sup>81</sup> Information provided by Mind

<sup>82</sup> PLP press release, [High Court rules Work Capability Assessment arguably unlawful](#), 26 July 2012

<sup>83</sup> *Ibid.*



## **10 Mental health organisations' joint submission to the Harrington review**

In September 2012 the from Centre for Mental Health, Hafal, the Mental Health Foundation, Mind, Rethink Mental Illness, the Royal College of Psychiatrists and the Scottish Association for Mental Health published a [joint submission](#) to Professor Harrington's year three call for evidence, saying that they did not believe that reforms had gone far enough, that people with mental health problems continued to report "poor experiences" of the WCA, and that further substantial reforms were still needed. The front page summary is below:

Although we recognise that there have been improvements in the WCA process, we do not believe that reforms have gone far enough. People with mental health problems continue to report poor experiences of the WCA process and outcomes that they do not believe are fair. Huge numbers of people continue to successfully overturn Fit for Work decisions at tribunals, and welfare rights advisers tell us that the system is still not making sufficient use of additional evidence about claimants, which could help avoid poor decisions.

We also believe that there have not been sufficient efforts made by the DWP to monitor the impact of both the Independent Review recommendations and other changes made to the system during this period. Without this detailed analysis, it is difficult to understand exactly how the system has been changing over the last two years.

We believe that substantial further reforms are still needed and hope that the Independent Review will endorse the following recommendations:

- More detailed monitoring of a number of aspects of the WCA as it changes over time
- Additional evidence from applicant's medical and support staff routinely collected in cases involving mental health
- Assessors with specific expertise in mental health assigned to applicants with mental health problems, or, at the very least, testing of the impact of such an approach
- A more considered approach to the frequency of reassessment, taking into account the impact of the WCA process on claimants
- A detailed examination of the role of welfare advisers and the impact they have on claimants receiving a fair assessment
- A fundamental review of what is meant by 'work' and how the assessment gauges applicant's ability to work

## **11 British Medical Association vote**

At the annual conference of the British Medical Association's Local Medical Committee in Liverpool on 23 May 2012, GPs voted unanimously in favour of a motion put forward by doctors in Hampshire and the Isle of Wight and in Scotland calling for an end to the Work Capability Assessment, with immediate effect. The full motion was:

That conference, in respect of work capability assessments (WCA) as performed by ATOS Healthcare, believes that the:

(i) inadequate computer based assessments that are used have little regard to the nature or complexity of the needs of long term sick and disabled persons

(ii) WCA should end with immediate effect and be replaced with a rigorous and safe system that does not cause avoidable harm to some of the weakest and most vulnerable in society.

Following the decision, BMA Scotland issued a press release:

GPs at their annual conference in Liverpool, have today [Wednesday 23 May 2012] voted in favour of a motion calling for the end of the work capability assessment. The doctors, who represent GPs from across the UK, agreed that the system should be replaced with a more rigorous and safe process which takes into account the needs of long term sick and disabled patients.

Dr Dean Marshall, Chairman of the BMA's Scottish General Practitioners Committee, said:

"These assessments can have a devastating effect on our patients' mental and physical health. There has been a dramatic increase in the numbers being assessed as fit to work and a massive number of appeals have been made against these decisions. The frequency of successful appeals seems to us to demonstrate the mechanism's shortcomings."

"Our patients are very concerned and confused about these assessments. Many are in fear of how they will cope with the removal of, or cuts to, their benefits. Evidence appears to suggest that people with serious health conditions are sometimes being declared fit for work."

With reference to the Stage 1 debate on the Welfare Reform (Further Provision) (Scotland) Bill that will take place in the Scottish Parliament today, Dr Marshall added:

"The BMA is concerned about the impact that UK welfare reform legislation will have on the people of Scotland. It is highly likely that there will be a significant impact on general practices, especially those who have a high population of patients in receipt of incapacity benefits. But, more importantly, we must keep an eye on the wider implications of these reforms. A reduction in income may lead to poorer quality of health for individuals and increased health inequalities for our nation as a whole.<sup>84</sup>

This followed a vote in favour of the same motion by GPs in Scotland at their annual conference on 22 March 2012.<sup>85</sup>

## 12 "Dispatches" and "Panorama" programmes

On 30 July 2012 both Channel 4's *Dispatches* programme and the BBC's *Panorama* carried reports on the Work Capability Assessment.

*Dispatches* followed a GP – Dr Steve Bick – who went "undercover" as a trainee Atos Healthcare Professional. An article at the Channel 4 website, "Britain on the Sick", states-

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<sup>84</sup> BMA Scotland press release, [GPs call for work capability assessments to be scrapped](#)

<sup>85</sup> See BMA Scotland press release, [Scrap Work Capability Assessments, say GPs](#), 22 March 2012

GP Dr Steve Bick agreed to go undercover and become an assessor at the company. While training he's told more than once to understand the new Employment Support Allowance process is 'meant to take people off benefit'.

Despite repeated claims by the government and Atos that there are no targets for taking claimants off benefit, it's made clear to Dr Bick that if he finds too many people unfit for work, his own assessments will be monitored.

The trainer explains: 'You are being watched carefully for the rate of support group (people found unfit for work and therefore eligible for the highest level of ESA). If it's more than, I think, 12 or 13 percent you will be fed back 'your rate is too high'.'

It's a view repeated later in the footage by another doctor who says the targets come from the Department for Work and Pensions - a claim once again denied by the government and by Atos.

The footage also suggests just how tough it is to be found 'unfit for work'. The trainer talks through how people with a disability affecting their arms must be assessed: 'If they have one problem, one frozen shoulder, one impeachment syndrome, one broken elbow, one hand problem, no limb, amputation, they may score a little but the problem has to be bilateral'. She goes on to concede that it's a 'very, very tough benefit'.

How tough is made clear when Dr Bick asks what sort of job someone with only one hand might be able to do. The trainer elaborates: 'As long as you've got one finger and you can press a button you don't score anything for manual dexterity'.

The Department for Work and Pensions refused to give an interview to Dispatches. They take issue with Dr Bick's role in the film. He stood as parliamentary candidate for the Labour party in 2010.

But what about what Dr Bick found in a system which, after all, was first introduced by Labour. In a statement the DWP said when the system was assessed two years ago it was not 'entirely fit for purpose but has since been significantly improved'.

Atos said that independent reviews confirm they are providing a high standard of work, but that it is their duty to look for ways to improve. They also said, 'We invest time and resource in training and reviewing the work of our medical professionals to ensure that those assessed are treated professionally and sympathetically'.<sup>86</sup>

The BBC's *Panorama* programme – “[Disabled or Faking It?](#)” – includes an interview with Professor Malcolm Harrington and can be viewed in full at the BBC website. Further information is also given in a report at the BBC News website, “[Reviewer of fitness-to-work benefit tests to stand down](#)” (30 July). An extract is given below:

Brought in to review the system in 2010, Prof Harrington has recommended major changes - such as putting a single health professional in overall charge of each case rather than relying on responses to questionnaires and computer assessments handled by staff from contractor Atos.

Prof Harrington - an occupational health specialist - told the *Panorama* programme he would stand down after he produced his third review later this year and someone else would take over.

He made it clear it was the government's decision, but rejected suggestions that he had effectively been sacked.

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<sup>86</sup> Jackie Long, *Britain on the Sick: Reporter Feature*, Channel 4 website, 30 July 2012

## **'Traumatic'**

"They said to me 'you have been doing this for three years and you have come up with a number of recommendations which we are going to implement... we think it would be a good idea if a fresh set of eyes looked at it for the final two years'."

Prof Harrington said there was no political pressure for him to go and since he had not "come up with any bright ideas" in the last few months the time may be right for a change.

### **Quote:**

**"I think people are being treated more like human beings now but it is still difficult to go through it"**

### ***Professor Malcolm Harrington***

"At no stage has anybody... ever said to me we are not going to do that because we cannot be bothered or it is too much trouble. No recommendation has been turned down."

Under the system, claimants are placed in three categories: those deemed able to work straight away, those considered able to do so at some point in the future with the right help - the so-called work-related activity group - and those judged unable to work and needing unconditional support.

Prof Harrington said his recommendations had resulted in a fall in the number of those in the fit-to-work category and a rise in those in the work-related group - the most "difficult" group to assess.

Although he believes his recommendations have improved the system, Prof Harrington said changes were not happening quickly enough and the experience was still "traumatic" for many people.

"I think people are being treated more like human beings now but it is still difficult to go through it."

## **'Human beings'**

Those challenging decisions often found themselves in "a state of limbo and increased anxiety" for months, he added, while it was "illogical" that some people were being asked to go for further tests just weeks after they had been found unable to work.

"I would like to think it was dramatically better and my recommendations have done a fantastic job. I am not sure that is true. I think it is better, it is improving but it is still patchy."

### **Quote:**

**"It was made clear at the start that Prof Harrington would undertake three reviews"**

### ***Department for Work and Pensions***

While people had been let down by the system, he challenged campaigners who had called for it to be scrapped entirely to come up with an alternative.

"What are you going to put in its place? Tell me why, how you are going to make it better."

Ministers have said the welfare state will continue to support those in "genuine need" but "tough decisions" have to be taken to tackle the deficit.

The Department for Work and Pensions said it had made clear in November that this would be Prof Harrington's final year in the role and his successor should be named before the end of the year.

"It was made clear at the start that Prof Harrington would undertake three reviews," a spokeswoman said. "The department is currently considering its options for the recruitment of Professor Harrington's successor and their terms of reference."

### **13 NAO comments regarding the Atos contract**

On 2 August 2012 the Comptroller and Auditor General, Amyas Morse, wrote to Tom Greatrex MP giving details of a National Audit Office investigation into DWP's contractual relationship with Atos Healthcare and at the Department's management of the contractor's performance against selected service level measures. Mr Greatrex had written to the NAO in February 2012 raising concerns about whether the DWP was receiving value from its contract with Atos.

With regard to governance of the contract, the NAO noted that the Department had itself acknowledged that, prior to summer 2011, its management of the Medical Services contract had "lacked sufficient vigour", and that officials had been working to address some of the concerns it had highlighted. The NAO's review had however identified further outstanding issues requiring attention, including uncertainty about how medical quality issues fit into the new governance arrangements, the need to enhance and develop risk management arrangements, limited routine validation of information provided by Atos (although DWP had recently introduced a new system of checking payment requests submitted by Atos), and the need to strengthen documentation on contract changes.

On the performance of Atos, the NAO noted that while it had not looked at the wider decision-making process, it was not clear how far contractor performance had contributed to the high percentage of successful ESA appeals. The letter continues:

The result of each appeal is likely to be due to wider issues than just the quality of the medical assessment, but this is difficult to assess as the Department does not routinely request feedback on the rationale for Tribunal decisions. Without such data it is not clear whether any changes in the medical assessment process are needed.

Consequently, we have recommended that the Department put in place arrangements to better understand why decisions are overturned at appeal. Without adequate information on successful appeals the Department cannot target remedial action cost-effectively. The Department advises that it now receives feedback on tribunal outcomes where its decision has been overturned (an arrangement that has been in place since 9 July 2012).

Further details of the arrangements for Tribunals to give feedback were given in a written answer on 12 July.<sup>87</sup>

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<sup>87</sup> [HC Deb 12 July 2012 cc344-345w](#)

The NAO letter states that it does not “consider that the current contractual targets are sufficiently challenging” and recommends that DWP consider “tightening the performance requirements on the contractor in relation to the quality of medical assessments.” The NAO’s review had also concluded that “the Department has not sought adequate financial redress for contractor underperformance”, noting that just 10% of “service credits” had resulted in a penalty being imposed:

Where service credits have been incurred, the Department and the contractor review any mitigating evidence and the Department then takes decisions on whether to apply, allow 'earn back' of, or extinguish credits. Just 10 per cent of service credits triggered have been applied. When service credits are incurred, the contractor has presented a number of mitigating factors, including variances in the Department's forecast of benefit claimant referral volumes and Department-sponsored changes to the medical assessment. We concluded that the Department needs to give greater consideration to how changes in operational delivery are likely to impact on referral volumes, as it is clear that inaccurate forecasting has undermined the Department's negotiating position in discussions around performance and service credit application, investigation by the National Audit Office.

For further comment on the NAO letter see ‘[NAO finds faults in disability assessments contract](#)’, *Public Finance*, 16 July; ‘[NAO criticises Atos benefits contract](#)’, *The Guardian*, 17 July; ‘[Atos contract does not offer value money](#)’, *The Independent*, 17 July; and ‘[Watchdog finds ‘weaknesses’ in sickness benefit system](#)’, *BBC News*, 17 July.

The NAO’s report was prepared in June 2012 but was not published until 18 October 2012. The report, *Contract management of medical services*<sup>88</sup>, is available at the NAO website, along with the Government’s response. In its [response](#) – dated 3 October – the Department for Work and Pensions says:

The Department generally accepts these NAO views although given the progress on all but one of the areas outlined in the recommendations feels that more credit could be given for the progress made.

However, DWP does not agree with the NAO’s finding that it failed to adequately administer financial penalties:

The Department does not agree with the NAO view of how financial levers were applied. In periods where service credits were applied due to failure to meet non-quality related targets because of volumes and turnaround of cases DWP and Atos followed the agreed contractual process of discussing the impact of changed requirements and then taking a reasonable approach to application. In addition the contract incentivises the provider to ‘earn back’ financial remedies over the following three months rather than encouraging them to ‘write off’ poor performance. However, prior to the NAO report we had already planned to significantly amend the process of how service credits are considered. A monthly Board chaired by DWP with senior attendees considers performance, mitigation and the application of service credits. This has brought additional visibility and senior attention to the process. Service Credit activity from December 2012 to date illustrates that where no acceptable mitigation exists, DWP apply appropriate financial remedies.

The report specifically mentions the two periods of service credit suspension. These relate to a time when the impact of new policy was unknown – at the time we were introducing of ESA, a revised Work Capability Assessment, and implementing the

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<sup>88</sup> [HC 627 2012-13](#)

findings from the Harrington review. As a result the mitigations agreed were subjective. We believe that the suspension of service credits was a reasonable decision and an option available to us through the terms of the contract.<sup>89</sup>

### **13.1 Citizens Advice response**

On 17 August, Citizens Advice issued a press release in response to the NAO's letter, calling on the DWP to impose financial penalties on Atos for inaccurate WCA reports (NB this was before the full report and the Government's response was published):

#### **Citizens Advice calls for financial penalties on Atos**

"We wouldn't allow a private contractor to let us down on the Olympics, we can't allow one to let down disabled people." – Gillian Guy, Citizens Advice CEO

Citizens Advice today renewed its call for the government to impose financial penalties on Atos for every inaccurate work capability assessment report that they produce.

The call follows National Audit Office criticism of the Department for Work and Pensions' failure to penalise Atos – the private company with whom it has a contract to carry out 'fitness for work' medical assessments – for under-performance.

Citizens Advice Chief Executive Gillian Guy said:

"We wouldn't allow a private contractor to let us down on the Olympics, we can't allow one to let down disabled people. Mistakes by Atos have a human cost and a cost to the tax payer. Getting medical assessments right first time is absolutely essential to ensuring that seriously ill and disabled people get the support they are entitled to, and cutting the number of unnecessary appeals.

"Private companies on government contracts must be accountable to the public. Government should act now to put in place regular, independent monitoring of the accuracy of work capability assessment (WCA) reports and look at imposing financial penalties on Atos for every inaccurate report that they produce."

CAB advisers helped with more than 97,000 ESA problems in the three months January to March 2012 - up 71 per cent compared with the same quarter last year, making ESA the fastest growing advice issue seen in bureaux.

In the same three month period, bureaux recorded an 82 per cent increase in advice about appeals against ESA decisions. Over a quarter of all advice given by bureaux about ESA concerns appeals. Latest official DWP figures say 32 per cent of appeals against an ESA decision are successful and CAB advisers estimate the success rate at appeal where someone receives specialist CAB advice and is represented is around 80 per cent.

## **14 Looking ahead**

To date, controversy about the Work Capability Assessment has tended to focus on the numbers being found "fit for work", rather than on decisions about whether claimants should be placed in the Support Group or the Work Related Activity Group. This may however change as the 365 day time limit on receipt of contributory ESA for claimants in the Work Related Activity Group begins to have effect. Further information can be found in Library

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<sup>89</sup> Ibid. pp3-4

standard note, [Time limiting of contributory Employment and Support Allowance from 30 April 2012](#).<sup>90</sup>

Looking further ahead, it seems likely that the Work Capability Assessment will have an additional role when the Universal Credit is introduced. Universal Credit is to replace a range of means-tested benefits and tax credits for people of working age, starting from October 2013. As part of the changes, the Government intends to replace the current system of multiple, overlapping “disability premiums” for benefit and tax credit claimants with a simpler system, where means-tested additions for disabled people are payable at two rates only: £77 a week for those with more severe disabilities; and £26.75 a week for others (both 2011-12 equivalent rates). The Government also wants to align rates for adults and children.

The Government proposes that the Work Capability Assessment – or a version of it – will be used to determine the level of support a disabled person receives under Universal Credit. Those eligible for the ESA Support Group would receive the higher disability addition.

Further information is given in a DWP briefing prepared for the *Welfare Reform Bill*, [Universal Credit Policy Briefing Note 1: Additions for longer durations on Universal Credit](#) (September 2011). This states:

The Department will undertake further work as part of the Universal Credit implementation to develop a supplement to the Work Capability Assessment to ensure it can accurately identify individuals with enduring health conditions that limit their long term ability to fully provide for themselves through work. Once developed, the Department will ensure this supplement can be reviewed as part of the ongoing annual independent reviews of the WCA, currently being undertaken by Professor Harrington.<sup>91</sup>

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<sup>90</sup> SN06305

<sup>91</sup> Para 6.3