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## Knowledge Exchange Seminar Series (KESS)

**ACCESS TO JUSTICE THROUGH BETTER DECISION MAKING**

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### **Introduction**

The process of welfare reform highlights the pressures on government agencies to deal with an increased number of claims, which has inevitably led to an increased number of individuals disputing the decisions made on their claims. While welfare reform is an obvious trigger for increased pressure on decision making, pressures are also evident for other government agencies where regulatory frameworks have remained constant. The challenge for government departments is to make good decisions, and to protect the rights of individuals to challenge those decisions, but there is substantial empirical evidence which demonstrates that individual citizens face barriers in disputing administrative decisions, not least because of difficulties in navigating claims through internal departmental review processes and bringing cases to tribunal.<sup>1</sup> This briefing will outline the nature of the barriers faced by individuals disputing administrative decisions, and the access to justice issues that arise. It will examine the steps that initial decision makers and government departments can take, individually and systematically, to improve access to justice, from the focus on improving the quality of initial decisions, to developing mechanisms to support individuals throughout the dispute resolution process.

### **Increased disputes**

In 2012-13 there was an increase of 43% in the number of tribunal cases received for those tribunals supported by the Department of Justice, compared with the previous year.<sup>2</sup> The largest percentage increase was for appeals received by the Northern Ireland Valuation Tribunal, which experienced a 127% increase in appeals in 2012-13, representing an additional 51 cases

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<sup>1</sup> See G McKeever and B Thompson, *Redressing Users' Disadvantage* (Law Centre: 2010) and G McKeever, *Supporting Tribunal Users* (Law Centre: 2011) and the research cited therein.

<sup>2</sup> This includes the majority of tribunals in Northern Ireland with the notable exception of Industrial and Fair Employment Tribunals which carry the second largest case load of all Northern Ireland tribunals.

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compared to 2011-12, an increase attributable to new 'empty homes' legislation.<sup>3</sup> The largest increase in case numbers was experienced by the Appeals Tribunal, with an additional 7,719 social security and child support cases received in 2012-13, constituting an increase of 51% of appeals compared with 2011-12. This increase is attributed to the increasing number of appeals relating to employment and support allowance (ESA).<sup>4</sup>

While challenges tend to reduce as new legislation beds down, external pressures beyond the control of administrative decision makers can also lead to increased numbers of decisions being challenged. The Special Educational Needs and Disability Tribunal (SENDIST) has seen a 26% increase in the number of appeals received during 2012-13, compared with 2011-12, with no obvious reason for this increase.<sup>5</sup> The Office of Industrial and Fair Employment Tribunals has recorded an overall decrease of 3% in the number of tribunal claims registered in 2012-13 compared to the previous year,<sup>6</sup> but the numbers of unfair dismissal and redundancy related complaints continue to be high – a fact attributed to the “challenges still facing the Northern Ireland labour market”<sup>7</sup> – and a reduction in registered claims before the Fair Employment Tribunal has been offset by an increase in claims before the Industrial Tribunal.<sup>8</sup>

## **Barriers to resolving disputes**

It is important to realise that tribunal statistics represent only a portion of disputes raised, since the appeal is only one part of the dispute resolution process and may not be accessed by all those who dispute decisions. Research on the experiences of individuals disputing administrative (and employment) decisions has established that difficulties can arise at each stage of the dispute resolution process, from the initial decision through to the final appeal. These difficulties can be categorised as intellectual, practical and emotional barriers.<sup>9</sup>

**Intellectual barriers** exist where individuals have difficulty in understanding how dispute resolution processes work. These individuals struggle with understanding what is required of them and how they can progress their case within an unfamiliar system. The intellectual barriers can begin with the initial process used by decision makers to gather information, particularly in relation to social security claim forms, and social security appellants attribute the complexity of claim forms to their reasons for ending up at an appeal tribunal. Navigating through the internal departmental dispute process can also present intellectual barriers, particularly where individuals do not understand the reason/s for the initial decision. The research indicates that those who dispute administrative decisions are often unaware that the dispute raises legal as well as factual issues and where this is the case individuals tend not to seek assistance with the legal issues, which can reduce their ability to participate in the legal arguments that are under dispute. The intellectual barriers at tribunal hearing can mimic those of the decision making process: the language used, the formality of proceedings, the need to address certain issues and disregard others. Different

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<sup>3</sup> NICTS Annual Report and Accounts 2012-13, p 16.

<sup>4</sup> NICTS, *Annual Report and Accounts 2012-13*, p 17.

<sup>5</sup> NICTS, *Annual Report and Accounts 2012-13*, p 17. During 2012-13 102 appeals were received, compared to 81 appeals received in 2011-12.

<sup>6</sup> During 2012-13 there were 2,722 claims registered, compared with 2,810 claims registered in 2011-12, a decrease of 88 claims: OITFET Annual Report 2012-13, p 2.

<sup>7</sup> OITFET Annual Report 2012-13, p 2.

<sup>8</sup> OITFET Annual Report 2012-13, p 12.

<sup>9</sup> G McKeever, “A ladder of legal participation for tribunal users” [2013] *Public Law* 575.

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forms of assistance have been developed to help users overcome these intellectual barriers, of which the most successful tend to be individualised support. Written information is not universally useful, and (in general) the more dense, technical and voluminous the information, the less likely it is to be able to break down intellectual barriers. Overall, however, where intellectual barriers are reduced, the more participative the dispute resolution process is for the user.

**Practical barriers** are those faced by individuals in accessing practical help in resolving their disputes. Where practical support is available, the effect is often to reduce or overcome intellectual and emotional barriers. This practical support is required at each of the different stages of the dispute resolution process, beginning with the initial information required by decision makers and continuing through to the tribunal hearing. Practical barriers can take the form of financial barriers: in securing independent evidence to corroborate claims, and accessing specialist advice and assistance. The success or failure of an appeal can turn on the evidence used to substantiate a claim, but the costs of obtaining this may be prohibitive. Specialist advice and assistance can also be inaccessible, creating an inequality of arms between legally unassisted individuals and legally assisted decision makers. Dispute resolution, including the tribunal experience, is intended to be informal and to avoid the need to rely on legal advice, but the reality for individuals is often that the process is not informal, and that they are disadvantaged by the lack of legal or specialist assistance. The absence of assistance can deter individuals from progressing their disputes but may also assist users to resolve disputes informally rather than at tribunal. Perversely, practical barriers may also arise where legal assistance becomes the problem: where the user is unable to participate in the tribunal hearing because the lawyers have taken over. Overall, however, the research suggests that practical barriers can be overcome with specialist (but not necessarily legal) advice and assistance, where the user remains central to the process.

**Emotional barriers** are connected to the basic fact that, for most individuals, the issue under dispute is likely to be one of fundamental importance in their lives, but the barriers go beyond this and become an aspect of the dispute resolution process itself. Individuals have described their experiences of different stages of dispute resolution as inducing fear, helplessness, nausea, anger and stress leading to an absence of trust in decision makers, and reducing the likelihood that individuals will be able to participate effectively in the resolution of their dispute. Levels of need vary but a common theme in the research is a desire by individuals for some support: someone to guide them through the process. Where support is available individuals describe feelings of relief as anxieties are dissipated, and a consequent increase in confidence that enables them to engage fully with decision makers.

The challenge is not to rid the system of disputes but to ensure better decision making at each stage of the dispute resolution process so that fewer disputes arise. Part of this involves facilitating the participation of those seeking a decision, and enabling them to overcome the barriers they face. This, in turn, will generate better information for the decision maker, enabling a better decision to be made, ensuring that access to justice is improved. Given that the largest tribunal caseload is for social security appeals, and in the face of substantial changes to social security entitlements under the Welfare Reform Bill, it is likely that the greatest challenges in ensuring better decision making over the next few years will be faced by DSD decision makers and social security appeal tribunals. The analysis of decision-making will therefore identify specific issues for this area of administrative justice, but the recommendations which flow from the analysis will be applicable to other areas of decision making as well.

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## Improving decision making

- Initial claim forms

The starting point for improving decision making has to be the process by which information on the claim is gathered. While administrative efficiency is a necessary goal, it is also the case that the probative value of evidence used to make administrative decisions will, by and large, determine the quality of those decisions, since good decisions rely on good evidence. The goal is to get enough information to make a reasonable decision: too much and the efficiency costs are lost; too little and the quality of the decision is compromised. Research by Genn and Thomas examined the effect of the form of the tribunal hearing (paper or oral) on case outcomes, and revealed that the same DLA case considered at an oral hearing was 2.5 times more likely to succeed than on a paper hearing. What was perhaps more interesting is that the added value of the oral hearing could be almost replicated where the evidence obtained through an oral hearing was added as a written supplement to the paper hearing, in which case the appeal outcome for the oral and the supplemented paper hearings were very similar: 60 per cent success rate at oral hearing and 50 per cent success rate at the supplemented paper hearing. The researchers' conclusion was that the DLA claim form – on which the paper hearing was largely based – was an inadequate means of providing the necessary information to determine the claim, effectively preventing “fair and sound decision-making at the first tier decision-making level at DWP”, with consequently similar limitations applying to tribunal decisions on paper hearings.<sup>10</sup> In *AR v SSWP (ESA)* the Upper Tribunal in Britain commented specifically on the paucity of evidence available to decision makers to determine if a claimant was able to mobilise with the use of a wheelchair, noting that the question in the ESA claim form did not reflect the descriptor it was designed to assess.<sup>11</sup>

*Recommendation 1: identify the gaps in initial information gathering by mapping the new information that is received through the dispute resolution processes against the reasons for overturning initial decisions.*

- Focused evidence gathering

Departmental decision makers, whether on an initial decision or on reconsideration of that decision, may be able to seek specific evidence from claimants. This creates the opportunity to focus on gathering evidence to meet the evidential gaps that exist. Where claim forms do not elicit the necessary information, decision makers will need to be trained to compensate for these inadequacies. Focused evidence gathering may also need to take account of difficulties individuals may have in participating in the decision making process. The Upper Tribunal has found that the difficulties experienced by claimants with mental health problems mean that they (as a class) are put at a substantial disadvantage by the present practice of the Department for Work and Pensions towards obtaining further medical evidence in the assessment of their entitlement to ESA, putting the Secretary of State in breach of his equality duty to make reasonable adjustments.<sup>12</sup>

*Recommendation 2: train decision makers to identify the evidence gaps and to seek specific evidence from claimants to fill this gap.*

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<sup>10</sup> H Genn & C Thomas, *Tribunal Decision-making: An Empirical Study* (UCL Judicial Institute Discussion Paper, 2013) p 13.

<sup>11</sup> [2013] UKUT 0417 (AAC), para. 12.

<sup>12</sup> *MM & DM v Secretary of State for Work & Pensions* [2013] UKUT 0259 (AAC), para.s 131-132.

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- Quality of evidence

The probative value of evidence will depend on its quality, but where there is (in effect) a monopoly on the provision of evidence, decision makers will still have to rely on this evidence even where it is of poor quality. In Britain, the high volume of complaints – including by parliamentary committees and watchdogs – about external medical assessments for ESA has not reduced their evidential importance to decision makers. In Northern Ireland, social security decision making has been found to be of a higher standard than the equivalent decision making processes in Britain, but this finding was partly based on DSD using in-house medical assessors; medical assessment has been outsourced since June 2011.<sup>13</sup> The onus is on claimants to counter the credibility of a departmental assessment by providing an assessment by their own medical practitioner but claimants may face difficulties in securing this evidence, partly through cost but also where medical practitioners object to acting as gate-keepers to the system.

*Recommendation 3: ensure that decision makers have access to high quality subject-specific evidence, and support claimant access to additional corroborative evidence where this is required.*

- Explaining the reasons for the decision

At the outset, claimants should be aware of the assessment criteria for the entitlement they are claiming. For ESA, for example, claimants are assessed against a list of functional indicators which have different scores for different functions, but claimants are not provided with this list and so a decision telling them that they have scored less than the required 15 points is often meaningless. There is evidence that social security claimants dispute the decision on their claim because, *inter alia*, they disagree with it, without understanding why the decision has been made, and that it is not until the decision is explained to them by a tribunal panel that they can understand it. There are, inevitably, challenges in personalising huge numbers of decisions in such a way that claimants understand them but, equally, using tribunals as a means of communicating the explanation to claimants is an even less efficient measure.

*Recommendation 4: develop improved models of communication to help claimants understand departmental decisions, including providing claimants with the full criteria to be used to assess their claims as part of the explanation of the decision.*

- Tribunal feedback

Where tribunals overturn the original decision, decision makers need to understand why, particularly where there are large volumes of decisions being overturned. There are different means of achieving this including, on an individual level, where the department's representative attends the tribunal hearing and receives an explanation of the tribunal's decision, and, on a systematic level, the department conducts an analysis of the different reasons for decisions being overturned to identify any learning for initial decision makers.

*Recommendation 5: identify the best means for decision makers to understand the reasons for tribunal decisions and ensure these reasons are fed back into the initial decision making process.*

- Oversight of the system

Improvements in decision making are made within a system of administrative justice, and the value of establishing an overview of how well that system is functioning has been demonstrated by

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<sup>13</sup> M Harrington, *An Independent Review of the Work Capability Assessment for Northern Ireland* (2011).

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the work of the (now defunct) Administrative Justice and Tribunals Council. Other oversight bodies exist to review the work of individual departments, such as the Social Security Advisory Committee which was recently noted as holding a critical role because “political impartiality and independence from Ministers is crucial and will be particularly important at a time of major reform to the welfare system.”<sup>14</sup> Where departmental decision makers and individuals face significant challenges in decision making then an oversight body which reviews the entirety of the system to identify systemic problems and appropriate solutions will add value.

*Recommendation 6: establish an independent oversight mechanism for administrative justice in Northern Ireland.*

## **Conclusions**

The available research demonstrates that individuals face significant intellectual, practical and emotional barriers in disputing administrative decisions, but it is also important to recognise that those who bring challenges represent only a portion of those who might wish to challenge administrative decisions. There are many reasons why individuals choose not to challenge decisions, including where they feel disempowered and ill-equipped to bring those challenges. The problems in decision making therefore affect significantly more individuals than is apparent from tribunal statistics. The need for improved decision making is an issue of access to justice, since for many individuals the initial claim is the only bite at the cherry that they will take; while, for those bringing challenges, the problems of poor decision making often necessitate the dispute while simultaneously constituting barriers in progressing those disputes.

The purpose of this briefing paper is to identify discrete areas of decision making that may be problematic and develop recommendations that flow from this analysis. Government departments dealing with the implementation of new decision making processes arising from new legal entitlements are most susceptible to increased challenges, but problems in decision making exist across the administrative justice spectrum, and the recommendations put forward in this paper are intended to be generic. Improvements can be made across the whole process of a department’s dispute resolution procedures, from the initial decision to the final appeal, and the recommendations here focus on improving the evidence needed to make decisions, communicating the reasons for the decision, understanding why the decision is successfully challenged, and developing holistic oversight of administrative justice to monitor problems and identify further solutions.

Not all of the barriers faced by individuals can be removed by the recommendations listed. Some barriers will only be overcome with the assistance of specialist advice and representation, but improvements in decision making can help to reduce reliance on this support. Such improvements also have the potential to reduce the number of challenges being brought, where disputes are based on a lack of understanding of the initial decision, and to promote the integrity of the decisions that are made. Consequently, better decision making can improve access to justice.

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<sup>14</sup> DWP, *A Review by the Department for Work and Pensions of the Social Security Advisory Committee* (2012), p 5.