

Policy issues arising from the development and evaluation of Advicenow self-management guides

Introduction

1. These observations are based on inputs to the development of the Guides and to the evaluation itself, including the interviews conducted. Both the development phase of the Guides and the evaluation benefited from commentaries and views expressed by a wider group of advisers and fraud investigators.
2. This paper also draws on our own (limited) knowledge of social welfare issues, and of the benefits and justice systems.
3. The IUC Guide proved controversial for many of the commentators involved in its development, and as a result we have identified a greater number of issues arising around IUCs than around DLA/AA Appeals.

Issues from the DLA/AA Guide

First-level decision-making

4. Better first level decision-making for these claims would be far more cost-effective, and given the Tribunals Service commitment to early settlement, we are hopeful that steps can be taken to improve this.
5. Advisers commented that first-level decision making in the DWP was often poor, resulting in appeals that were almost always successful. Had decision-making been better, appeals would have been avoided. In the evaluation interviews we also found several cases where it was very difficult to understand first level refusals.

Adviser comments

'Although all blind people qualify for some DLA, it is common to have to appeal to get it.'

'The vast majority win (on appeal). This reflects their level of disability and the poor decision-making'.

Examples from interviews

6. A woman with quite severe Alzheimer's¹ was refused AA, even though during the interview with her husband it was clear that she was at a stage where she was more or

¹ The interviewer has worked in dementia day care, and is familiar with Alzheimer's

less lost in time and space, and so would require constant supervision and help with a range of essential tasks.

7. An MS sufferer was refused benefit until appeal even though she could no longer cope alone, and had only very limited abilities to manage daily life, needing a lot of help.

DWP appeal letters

8. An overhaul of appeal letters would help claimants to understand what had happened and what course of action might be best for them. We suggest using the approach illustrated by the public legal education project Preventing Possessions.

9. DWP letters which included information on appeals were described by advisers as confusing, resulting in a percentage of claimants who were entitled failing to make an appeal.

Representation at DLA/AA appeals

10. The promotion of more informed debate among advisers about representation at appeals would benefit good advice practice and promote better use of scarce resources. One useful step would be to make the best research evidence readily available to advisers. Advice networks and the LSC should work to encourage and facilitate further debate on this issue.

11. Among advisers there is both a debate about the value of representation at DLA/AA appeals, and variations in practice. Some advisers represent in all cases, some in cases of 'special needs' and some not at all. Despite of the growth in advice work over the last four decades, advisers tell us that most claimants attend tribunals without representation.

The range of adviser views

12. Advisers who do not represent point to evidence that advised appellants do just as well as represented appellants. In other words, preparation is the key aspect. However, advisers who do represent assert that the evidence is strong that appellants do better if a representative is present. They cannot both be right.

13. Advisers who argue for representation also comment that any further appeal - to the Commissioners - will be more difficult as they will not know exactly what was said at the first appeal. And among this group there are also different views on whether it is best to allow the user to speak for themselves, or whether it is better to speak 'for' them.

Issues from the IUCs Guide

Inadequate notifications from authorities

14. Advisers describe letters inviting claimants of IUCs as disguising the fact that an IUC is potentially a very serious part of a criminal prosecution. If this is the case, these letters should be changed to reflect the significance of the IUC and the legal rights of the interviewee. We suggest that the approach used in the Southwark Preventing Possession Project would be of value in making such changes.

15. Advisers highlighted claimant uncertainty about what an IUC was and what would happen at an IUC as a very common problem for their users.

16. Letters about IUCs are described by advisers as less than explicit in many cases, and as not giving a true indication of what is to take place at the interview. If such letters were common, it would seem that claimant uncertainty would be magnified and obstacles put in the way of claimants' preparing for and/or arranging representation for the IUC.

Justice and IUCs

17. We believe that there is a degree of doubt as to whether the criminal justice system is able to operate fairly in the case of allegations of benefit fraud.

18. There are two principal factors which we see as contributing to this situation.

Fraud investigator understandings of IUCs

19. The views of fraud investigators about the nature of IUCs and their role in IUCs may be at odds with the fair operation of the criminal justice system.

20. Investigators appear to consider the IUC a 'fact-finding' exercise. Investigators point to the fact that they do not make decisions, only recommendations, and so they are only 'establishing the facts'. In practice however, it is clear that the interview aims to gather evidence which may then be used in a prosecution.

21. Specialist benefits advisers believe that this 'fact-finding' view is mistaken in law, and Advicenow's key academic informant on this topic describes this attitude as a misunderstanding of the criminal justice system.

22. It also seems to be the case that fraud investigators tend to believe that claimants are only called to interview when there is already sufficient evidence to show that they are 'guilty'.

23. And so in practice investigators interview only when they have what they consider to be evidence. In this scenario, the IUC serves to confirm 'guilt', or possibly to show that they have misunderstood the situation. Finding 'new' facts does not seem to happen.

Representation at IUCs

24. Claimants are for the most part unable to confidently secure proper legal representation for IUCs. This lack of effective legal representation reveals a fault line in the criminal justice system.

25. The representation gap for IUCs arises from a combination of circumstances:

- there is a lack of criminal legal representation for IUCs conducted away from police stations
- an IUC combines criminal law with benefits law, and it is likely that criminal lawyers will know little of benefits law and vice versa
- PACE allows for legal representatives and appropriate adults only at an IUC

26. Benefits advisers who do attend IUCs with their users are conscious of their lack of experience of criminal law, and would prefer a better solution. Most advisers saw the 'ideal' IUC representative as skilled in both criminal law and benefits law.

27. It would seem however that there are few if any such individuals, and adviser opinion seems to be that on balance suitable criminal legal representation is the better option. However, one adviser also gave us an example of a criminal lawyer defending a case which had no basis in benefit law, and which would never have been started had the benefits adviser known of the case sooner.

28. From the evaluation interviews we know of one local authority which has decided to exclude anyone other than a legal representative or an appropriate adult, so that for example a benefits adviser would be prevented from accompanying a claimant.

29. It seems that in practice most interviewees have no representative, and this causes advisers great concern. Indeed it does seem that legal representation when imprisonment is a possible outcome should be guaranteed, but for IUCs this is not the case.

Should claimants attend an IUC?

30. There are strongly differing views on the advisability of attending an IUC, and on the element of compulsion involved. This requires clarification for advisers, investigators and claimants alike.

31. Advisers hold a range of disparate views:

- Claimants should attend only with either a criminal lawyer or a specialist benefits adviser who has experience of IUCs – preferably the former
- It may be 'safe' for claimants to attend unaccompanied if they are well briefed by a specialist benefits adviser
- Claimants should never attend unrepresented
- If on refusal to attend the power of arrest is used, then claimants will get criminal legal representation at the police station, and this is preferable to attending without a representative

- If court action follows refusal to attend, the court will not penalise the claimant for refusing to attend an IUC for which no legal representation was available

32. These adviser views are influenced by three themes:

- The availability of suitable representation
- The extent to which the IUC is about the criminal law
- The consequences for the claimant of non-attendance

33. Broadly speaking, the more advisers held the view that IUC should be treated as being primarily about the criminal law, the more likely they were to urge non-attendance.

34. Investigators seem to agree on two points:

- It is in claimants' interest to attend what is in essence a 'fact-finding' exercise which can clear up misunderstandings
- Claimants must attend or there will be penalties – arrest by the police and/or prosecution

35. Investigator views on the IUC Guide

36. Some investigator views on the Guide suggest a degree of misunderstanding of how the criminal justice system works.

37. The provision of a Guide for interviewees was seen by some investigators as obstructive and as offering assistance to 'fraudsters'. Whilst some investigators welcomed the Guide – albeit suggesting amendments, others, who commented during the development of the Guide, were unhappy with it on the grounds that it would encourage fraud, or would make the process of investigation more difficult.

38. As already described, in this scenario, the investigation is in itself capable of uncovering 'the facts' and all the interviewee needs to do is answer questions truthfully. By advising interviewees to seek clarification, to ask for further information and copies of files, and to refuse to answer questions in some cases, the Guide is seen as making the investigation process unnecessarily difficult.

39. Investigators and benefit law

40. Investigators may be insufficiently knowledgeable about benefit law, leading to miscarriages of justice.

41. An adviser who commented on Guide drafts quoted a number of cases of findings of fraud without any basis in law. In these cases investigators, the relevant departments, and in one case a prosecution was underway which had no basis in benefits law when the benefits adviser intervened. The prosecution and the claimant's own solicitor had all accepted the charges as legitimate.

42. Of course, we would expect, but do not of course know, that such cases are not common. But from advisers comes the suggestion that acceptance of some sort of 'fraud' by 'innocent' claimants is widespread.

43. Advisers on the IUC Guide

44. A more forthright debate among advisers about the role and value of public legal education and problem-solving by their users would be of benefit to advisers and their service users alike

45. Most advisers saw the Guide as useful to their users - perhaps differently for different users- in dealing with an IUC. However, some were opposed to producing a Guide which might encourage claimants to attend an IUC unrepresented. The basis of this view is that IUCs are part of a criminal process and the claimant may be facing penalties and even imprisonment: without a knowledge of criminal law, it is always unsafe to attend an IUC unrepresented. And so these advisers also saw the only safe solution as to have everyone suitably legally represented at IUCs.

46. We believe however that most interviewees attend an IUC with no prior knowledge and no representation. If the above view is adhered to, this leaves most claimants at IUCs with no support at all.

47. These advisers had a parallel concern that funding Guidances would distract from efforts to get more legal representation. But we believe that it is very hard to show that funding a Guidance paper distracts from achieving access.

48. As a principle, we would also support the right of individuals to make their own decisions about how they deal with legal problems and to do this they need to be supported and informed. Whilst we agree that qualified representation is the best option for IUCs, we see the Guide as a potentially valuable support to a measure of 'self-management' of the problem.

John Seargeant
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