

A report of investigations into complaints about *Access to Work*

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Introduction

This report highlights the key findings from a number of cases considered by the Parliamentary and Health Service Ombudsman (PHSO) in relation to the operation of the Access to Work scheme by the Department for Work and Pensions (DWP).

The problems highlighted by these cases, investigated by PHSO between 2014 and 2016, have since been rectified by DWP as outlined in this report. As a result, we have made no further recommendations for change. However, in the examination of what happened, there is useful learning for departments in relation to the execution of policies. Complainants that wish to understand more about what happened may also find it helpful to read the Work and Pensions Select Committee's December 2014 report, 'Improving Access to Work for Disabled People' and the DWP's response to that inquiry, published in September 2015.

Our Investigations

In 2014, following changes to the way the DWP operated the Access to Work scheme, we received 60 complaints from people who had experienced difficulties in accessing Access to Work support. These complaints covered a range of issues including how the DWP interpreted and applied its own guidance about the amount of funding people should receive; the use of criteria for company directors and self-employed people that did not reflect existing DWP approaches to their own guidance; poor communication; and poor complaint handling.

The people who complained to us said they feared losing their jobs and for the future of their businesses. They told us their work had suffered, their confidence was hit and they felt distressed, isolated, uncertain and humiliated. Some had to ask their employers for extra help to enable them to continue to work and many had spent long, fruitless hours trying to understand and change the DWP's decision about their Access to Work award.

Generally, before we begin to investigate a complaint about an organisation, we expect people to have completed that organisation's complaints process first. This is to give the organisation the opportunity to resolve and remedy any issues before we become involved. However, under our legislation we can exercise discretion where we believe this is appropriate and look at complaints before the local process has been exhausted.¹

A number of complainants approached us and asked that we use our discretion to investigate their complaint before the DWP had completed the local process, arguing that they had been attempting to complain for up to a year but had made little progress.² This

had led to relations between complainants and the DWP becoming increasingly difficult. In some cases complainants also said their mental health was suffering as a result of continued engagement with the DWP.

We were also concerned that the number of complaints we were receiving could indicate a more systemic problem with the way the Access to Work scheme was being administered, which could affect other people too. As a result, we decided to exercise our discretion and investigate these complaints before the DWP had completed their own complaints process. Although the DWP disagreed with our decision to use our discretion in this way, they co-operated with our investigations and we are grateful for the constructive assistance provided by DWP staff throughout this process.

The Access to Work scheme

The Access to Work scheme was created in 1994 as a specialist disability service, giving practical advice and support to disabled people who are working, self-employed or looking for work. It offers financial help via a discretionary grant towards the extra cost of employing a disabled person and practical help to overcome work-related barriers.

There is no statutory entitlement to funds and it does not replace, nor subsidise, the legal duty on employers to make reasonable adjustments³ but instead pays for support which a qualifying disabled person needs to do a job that a non-disabled person would not. The type of support Access to Work provides is tailored to individual needs and can include support with travel to work, support workers and specialist equipment. 36,470 people were helped by the scheme in 2015/16.

In December 2010 the Coalition Government

¹ Parliamentary Commissioner Act 1967, s5(5)

commissioned an independent review of the employment support given to disabled people. The review, by Liz Sayce, the then Chief Executive of the Royal Association for Disability Rights, was published in June 2011. The review highlighted the positive impacts of the Access to Work scheme and recommended it be *'transformed from being the best kept secret in Government to being a recognised passport to successful employment, doubling the number of people helped'*.

In March 2012 the Government agreed to accept all the recommendations in the Sayce review. Ministers announced an extra £15 million of funding for the Access to Work scheme, as well as protecting the total budget for disability employment. That summer the DWP set out plans to launch a targeted marketing campaign to increase awareness of, and demand for, the Access to Work scheme.

² This, in part, appeared to be due to the distinction the DWP make between their reconsideration process – which covers decisions – and their complaints process which looks solely at service.

³ By law, employers must make reasonable adjustments to make sure disabled workers have, as far as is reasonable, the same access to everything which is involved in getting and keeping a job as non-disabled workers. This may mean changing the way work is structured, removing physical barriers and providing extra support. The cost of any reasonable adjustments must be paid for by the employer.

Background to the complaints to the PHSO

The strategic approach

Following the Government's decision to accept the recommendations in the Sayce Review, DWP officials started to voice concerns internally about how they could meet an increase in demand for the Access to Work scheme within their allocated budget. From July 2013 DWP officials began briefing the Minister for Disabled People about how changes could be made to the scheme that would improve value for money so that they could help more people. They made a series of recommendations but were clear that these would need a more detailed assessment of their feasibility before they could be implemented.

The focus of these recommendations was on the more expensive, or 'high-cost' Access to Work awards. These were generally paid to people who required a full-time support worker, either to provide general day-to-day support, or communication support, such as acting as a British Sign Language interpreter for people who were Deaf or had hearing loss. Officials were concerned these high-cost awards did not represent value for money and meant that a large amount of the Access to Work budget was being spent on a relatively small number of people. Officials argued that this money could instead be used to support more disabled people into work.

Officials suggested imposing an annual cap on the amount they would pay for a support worker at £14,000 for a generalist support worker and £35,000 for communications support workers. According to officials, £35,000 would pay for a full-time, salaried British Sign Language Interpreter. They estimated that these caps on support worker costs would reduce the value of around 830

Access to Work awards and save the scheme approximately £6.2m over three years. Officials also argued that as well as being expensive, support workers could be inflexible. They recommended that the default position when considering an award for a support worker should be to first explore whether alternative, technological support solutions that supported greater independence might be available.

They also looked at the support being provided to self-employed people. DWP officials were concerned there were very few checks in place to determine if self-employed customers received an income from their business. They argued that there was a risk that Access to Work funding was being used to prop up non-viable businesses or fund hobbies. They proposed that, following a one year 'start up period', any self-employed customer should be required to demonstrate their business was making a net profit of at least National Minimum Wage for the hours for which they were receiving support. If a self-employed customer could not show this, then their Access to Work award would be terminated to make sure it was not being used as income for the business.

Officials told the Minister that there were some legal and delivery issues to rectify to make these proposals work, and that they might need to hold discussions with customers on some or all of the changes, '*because the impact on those affected could be quite significant*'. They said they would carry out detailed work to understand how they could mitigate any risks, deliver the proposals at an operational level and calculate the costs and savings they would generate and update the Minister again in October 2013.

At the same time, and in part to inform the DWP's briefings for the Minister, senior operational staff within Access to Work carried out a 'deep dive' review of high-cost awards. They looked at 279 cases where the support

people received either cost over £50,000 a year or totalled more than £50,000 over a three-year period. The majority of these awards (over 95 per cent) were for the provision of support workers. Of the total number of cases in the sample, 22 per cent of awards were paid to customers who were self-employed and 50 per cent of them were paid to people who were deaf or hard of hearing. The review concluded that these 50 per cent of cases were high-cost because of the commercial rate charged by British Sign Language interpreters.

In the deep-dive review, senior operational staff recommended the Access to Work guidance on support workers be looked at. The guidance, known as the '30 hour rule', said that if someone required a full-time support worker (full-time is considered to be for 30 hours or more a week), *'Access to Work will normally fund on the basis of an annual salary rather than an Agency worker employed on an hourly basis'*.

They also recommended the introduction of quality standards for support workers, more checks on decisions by operational staff, more consistent reviews of awards, and improved record keeping.

Following the deep-dive review, further recommendations were made to the Minister for Disabled People in November 2013. DWP officials told the Minister that the average cost of a support worker was approximately £6,000 but Access to Work was making over 100 awards for support workers that cost more than £40,000 a year. Officials said the more expensive awards were overwhelmingly for hearing impaired customers using British Sign Language interpreters at freelance rates or for *'a potentially excessive number of hours'*. They proposed imposing a cap on support worker awards *'at a level within which a full-time salaried support worker can be provided'*. This would be approximately £15,000 for a general support worker and £35,000 for a British Sign

Language Interpreter. Officials recognised that in order to set such a cap, they would need to meet with disability organisations, particularly those representing hearing impaired people, to work out the detail and how it would operate within the support worker market.

The operational approach

At around the same time as the deep dive review and recommendations to the Minister, Access to Work staff began to apply the 30 hour rule more systematically than they had done in the past. The 30 hour rule meant that Access to Work support would 'normally' be provided on the basis of an annual salary which meant that, in some instances, staff could use their discretion to fund on a different basis; for example by making an award based on an hourly rate for a support worker. The more systemic application of the rule was, in effect, the removal of that discretion. Awards for people requiring full-time support were to be based on funding an annual salary, rather than paying for support at an hourly rate. For British Sign Language interpreter support this meant either employing a full-time interpreter on a fixed salary of £35,000 per annum, or using freelance interpreters at a rate of £18.19 per hour (equivalent to £35,000 per annum).

There is evidence that senior operational staff had concerns about whether the market in this area was operating in a way that provided value for money to the taxpayer and had conducted some research before making this change in approach.⁴ This included looking at a 2011 report by the Association of Sign Language Interpreters (ASLI). However, it appears that senior operational staff had failed to take account of variations in the salary an interpreter could expect to be paid to allow for location, specialism or level of experience, or the nature of the work being carried out. According to the same ASLI report, only 23 per cent of British Sign Language interpreters work

on a salaried basis, or that an annual salary of around £35,000 was around half the freelance rate a British Sign Language Interpreter would generally charge. It is not clear whether senior operational staff took account of this when deciding their change of approach.

The implication of the rule being applied more strictly was that people were given awards at levels well below the market rate charged by interpreters, meaning they were unable to get the support they needed. The people who complained to us said they were simply unable to get interpreters to work for the amounts being offered by Access to Work. This meant that long established relationships with interpreters broke down as they tried to negotiate down the rates and people suffered immense stress and worry. One man left his job in part because he decided he would be unable to carry it out properly any longer if the reduced support decision was implemented. Others had to rely on the good will of their employers to plug the gap in support in the short-term, but were incredibly worried about what the DWP's decisions might mean for them in the long-term.

As well as the rigid application of the 30 hour rule, senior operational staff also started using a more rigid approach to eligibility criteria for self-employed customers. Access to Work guidance had previously said there was no requirement for a self-employed person's business to be profitable within a specified timescale in order for them to receive support. Instead, businesses needed to have a history, or a reasonable prospect, of generating income and there was no lower limit on what that income should be. Access to Work advisers effectively had discretion to decide what information was needed to substantiate this.

Such evidence could include the voluntary payment of National Insurance contributions but this was not a mandatory requirement for eligibility.

The more rigid approach to the criteria required self-employed Access to Work customers to show they paid Class 2 or Class 4 National Insurance contributions as evidence of their businesses viability before they could receive support. This was despite HM Revenue and Customs only requiring these contributions to be paid if a person's profits exceed a certain level. In effect, the DWP were asking people who were self-employed to suddenly demonstrate their business generated a certain amount of profit before they could receive support. Although Access to Work is a discretionary DWP scheme and there is no requirement to align its guidance with HMRC's, the change here placed a sudden requirement on self-employed people that they could not reasonably be expected to have anticipated given HMRC rules.

In addition, the Department also began adhering more rigidly to the aspect of the guidance, which treated company directors as though they were employees. This required them to demonstrate that they could pay themselves the national minimum wage. In effect, this approach set a minimum income level for company directors to meet before they could receive support. Again, this was out of step with the approach taken elsewhere in Government by HM Revenue and Customs, which treats company directors as office-holders rather than employees.

During our investigation we found no evidence that senior operational officials carried out any research before implementing this more rigid

⁴ This included talking to organisations such as the Scottish Association for Sign Language Interpreters; evidence gathered from an interpreting agency; and the Association for Sign Language Interpreters (ASLI) *Fees and Salaries Report of 2011*.

application of the guidance. We have not seen any evidence that the stricter approach to the guidance was discussed with those likely to be affected by it, or that the new approach was publicised. The impact of this approach was that company directors and self-employed people had their Access to Work support withdrawn, even though they were running viable businesses in accordance with HMRC rules.

Our conclusions and wider system learning

It was clear when the Government accepted the findings of the Sayce Review in 2012 that there would be an increased demand for the Access to Work scheme; part of the Review highlighted the need for the *'best kept secret in Government'* to become better known so that more people could benefit from the scheme. Despite a modest increase in funding, there were understandable concerns expressed by officials about how the scheme could continue to provide support to existing users whilst also managing an increase in demand.

When Government departments make decisions – even where these are in relation to discretionary schemes where a balance must be struck to ensure efficiency and value for money as was the case with Access to Work - we expect them to do so having taken account of all relevant considerations, ignoring any irrelevant ones and balancing the evidence appropriately. In circumstances such as the ones DWP found themselves in in 2012, those relevant considerations included not only the prospect of an increase in demand and the need to identify savings, but also the impact that those savings might have on particular groups of people. Relevant considerations would also include whether other savings were possible, including amongst lower cost awards or across the scheme more generally.

The evidence we received during our investigations showed that the DWP officials responsible for briefing the Minister for Disabled People began in 2012 and 2013 to identify ways that savings might be made. The officials recognised that a significant amount of work would be required before these changes could be made, which would require Ministerial agreement. Part of this was ensuring that changes had been publicised where

appropriate and any legal issues dealt with. Whilst not explicitly stated in their briefings to the Minister, it was clear from the evidence we saw that these officials recognised the need to properly test and understand the impact of their recommendations before they could progress them.

At the same time, decisions were taken by senior operational staff to make changes that would reduce costs and save money. These changes were broadly in line with what was being proposed to the Minister, namely that high-cost awards needed to be reduced in order to generate savings that could be used to support more people. However, whilst they clearly took account of the financial impact of their decisions, senior operational staff failed to give due consideration to the impact of the changes on particular groups of disabled people. There was also no consideration of whether other savings might have been possible, and if any were identified, a balancing of the costs and benefits of all of them before reaching a decision about which to make. These were the relevant considerations we would have expected DWP to take into account.

The effect was a series of flawed decisions that underpinned a change in operational approach which had a particularly detrimental impact on some members of two specific groups of people: deaf and self-employed customers.

In the context of increasing demand and limited resources, it can be tempting for Departments to look to make immediate savings by focusing on the most expensive cases and making cuts to these. However, to avoid making the same mistakes as the ones the DWP made, any decisions about changes or cuts to funding must take account of all relevant considerations, including the impact on those most likely to be affected by them, and whether any alternatives are possible. In the absence of this good decision making, it

becomes difficult for departments to justify the fairness of their approach, not only to those affected, but to themselves and others who might seek to question it.

We recognise and welcome the steps DWP has since taken to put things right, including suspending the new operational guidance so that the necessary considerations could be taken account of first. This includes holding discussions with those most affected by the changes and considering a longer-term strategy to changing the interpreter market. The DWP has also remedied the injustice suffered by people in the individual complaints we investigated and upheld. There are no new recommendations that we need to make to address the issues that were raised by these complaints.

We do note, however, that the DWP's Equality Analysis shows that the new, higher cap may still have an impact on Deaf People. The DWP says it cannot quantify these risks and will take steps to monitor the impact. We hope that this means any negative effects of the new cap will be identified and acted upon quickly to avoid a repeat of the complaints we investigated in 2013 and 2014.

What DWP did to put things right

During the course of our investigations the DWP gave us information about the improvements that they have made to enhance the customer journey. We recognise that prior to our involvement, the DWP was already taking steps to make improvements to the way they managed the discretionary scheme. We have detailed some of these changes below. However, in response to our investigations, the DWP identified that further improvements needed to be made, and made these changes too.

In May 2014 the DWP announced that they were suspending the '30 hour rule' pending

a review. They committed to providing a full reconsideration to all customers who asked for one. New guidance was drafted and an Equality Analysis was carried out. A new cap was introduced in October 2015, set at 1.5 x national average earnings and the 30 hour guidance is no longer in place. The DWP has demonstrated that they have learnt from previous mistakes, and handled the introduction of the cap for new and existing customers very differently. For self-employed customers they have acted on the recommendations of the Work and Pensions Select Committee to clarify the guidance and evidence required. The guidance now uses the Universal Credit criteria and company directors no longer need to pay themselves the national minimum wage to be eligible.

Alongside guidance changes, the DWP made the following improvements to their communication and decision making:

- They streamlined the reconsideration and complaints process. In 2014, the DWP put in place a complaint resolution team to deal with complaints about Access to Work, and improved the reconsideration process by introducing a Reconsiderations Team to review decisions about support. Further improvements have been made, following our investigations, to provide a clearer escalation route for customers in the reconsideration process. Complaints and reconsideration data is being captured and analysed on a monthly basis, which enables trends or concerns to be identified at an earlier point.
- They streamlined the number of teams dealing with Access to Work and set up centralised teams to ensure a more consistent approach to decision making. They implemented specialist teams to manage applications from self-

employed customers, deaf customers and customers with hidden impairments to ensure consistency in the decision making. The quality aspect was further enhanced with the introduction of the quality assurance team, which checks new decisions and provides constructive feedback to staff.

- They improved the training given to staff with the introduction of a standard training package and provided opportunities for staff to gain externally recognised qualifications. Staff understanding of customer needs has been enhanced following awareness sessions delivered by external stakeholders. In addition, workshops are being provided on complex areas of the scheme (for example, reasonable adjustments) to improve staff knowledge. These sessions are prompted by feedback on casework from the quality assurance team.
- They introduced a payments team to deal with more complex cases, allowing expertise to build, and improve the payment processing time.

The DWP is also working towards making the scheme more accessible to customers by improving communication channels. Access to Work has gone 'digital' allowing the customer to make an online application for support. Customers can use email as their preferred method of communication and Access to Work are using the SMS messaging system to inform customers that invoices have been paid. Deaf customers can also now opt to use the Video Relay Service when communicating with the DWP.

Lessons for PHSO

It is not only the DWP who can learn lessons from how the Access to Work complaints were handled. We, too, must reflect on our approach

to these complaints and whether we could have done things differently.

We began receiving complaints from Access to Work customers in 2014 and it took us over two years to complete the investigations on which this report is based. We know that we took too long to investigate these cases and we are reshaping how we manage and progress cases to create a more efficient service for complainants and the organisations we investigate.

During this time, our engagement with the DWP could have been better. We did not provide a clear enough explanation to them about why we had decided to accept these cases before their own complaints process had been exhausted. The DWP had by this time recognised that errors had been made in their approach and were taking steps to remedy this. They felt that, had we given them the opportunity to put things right first, it would not have been necessary for us to become involved. We have since explained why we took the decision to investigate these complaints early but we should have been more transparent about our decision in the first place. This would have saved the DWP a lot of frustration.

We could also have been clearer with DWP about our approach to systemic investigations, where a number of people have complained about the same issue and we consider this indicates a wider system problem that requires addressing. We made the DWP aware we intended to publish a systemic investigation into the Access to Work cases but then did not provide them with the information they needed to understand what this would entail and what the outcome might be. We have learnt from these lessons whilst developing our new approach to developing systemic investigations, which will help prevent them being repeated in our future handling of such matters.

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