

INEQUALITY IN THE WELFARE STATE?

Employment and Support Allowance and the Public Sector Equality Duty



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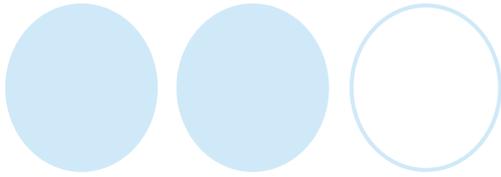
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Background

While the 1970's saw a general expansion in the provision of benefits for the sick and disabled, the 1980's marked the beginning of gradual erosion. The rates of long-term disability benefits were linked to prices instead of earnings in 1980 and by the late 1990's Invalidity Benefit and Severe Disablement Allowance had been replaced by Incapacity Benefit, which was taxable and imposed tougher 'eligibility' tests on applicants.

Where assessment for Invalidity Benefits had considered the age, qualifications and work history of the applicant, Incapacity Benefit (IB) applicants were assessed on their theoretical (in)ability to do any kind of work, regardless of the reality of them being able to gain or retain such employment. An emerging 'welfare to work' agenda had led to the introduction of a partial means-test, alongside continuous reassessment for many claimants.

The current economic recession has been used to bolster claims that the welfare state should be cut back further. The Labour Government introduced increasingly stringent eligibility assessments to IB during the late 2000's, which was finally wound-up and replaced by Employment and Support Allowance (ESA) in 2008. Further to this, the

Conservative-Liberal Coalition Government tightened the already stringent eligibility criteria for ESA in March 2011. It is on this most recent evolution in disability benefits, ESA, that this report will focus.

The Independent Resource Centre has been offering welfare rights advice in Clydebank, West Dunbartonshire for two decades. Our aim is to reduce poverty and address the issues that underpin financial exclusion. Our daily welfare rights work revolves around checking benefit entitlements, filling in benefit application forms and providing advice in cases of benefit denials, including representing claimants at appeals. This work gives us direct experience of the impact of ESA policies and procedures on our clients, as well as a comprehensive understanding of the problems inherent in the system. This is evidenced in the casework we undertake.

In recent years the demand for help with disability-related benefits has risen significantly, particularly with clients looking for support in appealing benefit denials. Lengthening application forms, increasing restrictions on eligibility and the proliferation of incorrect decisions on benefit assessments have all acted to increase the support required by our clients and, thus, increase our disability-benefit workload.

Between February 2008 and February 2010 the number of working-age people claiming out-of-work benefits rose sharply in Scotland, from 480,000 to 540,000, and more than half of those people were claiming benefits because they had an illness or disability. Moreover, the proportion of working-age people in receipt of out-of-work benefits is more than twice as high in West Dunbartonshire than in some other parts of Scotland, where over 15% of working-age people have a long-standing limiting illness¹.

The incidence of mental ill health and of physical disabilities are comparable, with just under half of those claiming subsistence disability benefits doing so because of a mental or behavioural disorder. Around 40% of those claiming are in the young working-age group, that is, under the age of 45.¹ The Independent Resource Centre's disability benefits caseload reflects these national and regional patterns, as do the case examples that appear later in this report.

It is against this background that the Equality Act came into force in October 2010. It realigned a number of older pieces of anti-discrimination legislation, so that anyone possessing any of the nine 'protected characteristics' became protected from discrimination, harassment

and victimisation in the same way. One of these protected characteristics is disability, which applies to anyone who has 'a physical or mental impairment' *and* 'the impairment has a substantial and long-term adverse effect on the person's ability to carry out normal day-to-day activities'.

The most pertinent aspect of the Equality Act (2010) for Welfare Reform is section 149, the Public Sector Equality Duty, which came into force on April 2011. The Duty requires all public bodies, while carrying out their day-to-day work, to have 'due regard' for the need to eliminate discrimination, advance equality of opportunity and foster good relations for protected groups. In this report, we will be focussing particularly on how the Duty applies to the Department for Work and Pensions (DWP) in its delivery of ESA. The DWP has until April 2012 to outline what action it intends to take to meet its responsibilities under the new Public Sector Equality Duty.

This report will examine how the eligibility criteria and assessment procedures for ESA may need to be revised to bring them in line with the Public Sector Equality Duty. To do this, we have analysed the casework undertaken by our welfare rights advisors over an eighteen-month period, from April 2010 to September 2011—a critical period in the evolution of ESA.



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During this time, our staff handled almost five hundred enquires relating to ESA, completed one-hundred and sixty ESA application forms on behalf of our clients and represented seventy-five clients at ESA appeal Tribunal hearings. It is from this body of work that we have drawn the information and case examples included in this study.

The first part of this report will begin with a review of the conclusions made in our 2009 report on IB, before moving on to a detailed outline of ESA policies and procedures. Following this, Part 2 will go on to consider the Equality Act (2010) and the Public Sector Equality Duty in detail.

In Part 3, these first two parts will be brought together, in the examination of a number of case studies of clients at the Independent Resource Centre who have applied for ESA. Specifically, we will consider how their experiences could be seen to constitute a breach of their rights under the Equality Act (2010). Finally, we will conclude by making a number of tentative policy recommendations for ESA, in light of the new Public Sector Equality Duty.

Notes:

1. The Poverty Alliance, online source: www.poverty.org.uk

Employment and Support Allowance

“We have changed the emphasis so that the Employment and Support Allowance is seen as a temporary benefit for the majority, with most claimants expected to move back into work within two years. We will take steps to reinforce this principle.”

Government White Paper: Raising Expectations and Increasing Support, Dec 2008, p.81

In early 2009 the Independent Resource Centre, in partnership with Dr. Chik Collins of the University of the West of Scotland, published a report on the experiences of Incapacity Benefit (IB) applicants¹. The report looked at the drivers of recent welfare reform, as well as the problems inherent in the process of application, assessment, refusal and appeal.

As IB began to be replaced by Employment and Support Allowance (ESA) in 2008, the conclusions of that report may appear, at first glance, to be out of date. However, many of the issues raised have continued to be problematic under the ESA system. It could even be argued that they have actually become more entrenched during this most recent round of welfare reforms. Therefore, it will be worth briefly recapping the findings of that 2009 report.

The initial plans for a ‘shake up’ of the welfare state were written up in a report entitled ‘Reducing dependency, increasing opportunity: options for the future of welfare to work’ by David Freud, an investment banking executive, in 2007.

The Government’s White Paper in December 2008 described plans to outsource more of the Department for Work and Pension’s (DWP) work to contractors paid on the basis of ‘results’, to introduce compulsory training and work experience schemes for those on Job Seekers Allowance (JSA) and ESA, and to introduce sanctions for those who fail to attend and participate in such schemes. All of these changes were based on the assumption that those who claim benefits largely do so because they are engaged in a ‘dependency culture’ that originated from the transfer of able but deskilled ex-industrial workers from JSA to IB in the 1980s.

However, the IB case studies from our 2009 report illustrate that this assumption was not justifiable. Claimants who were refused IB were rarely former industrial workers and they often had rather severe illnesses or disabilities. These cases also aptly illustrated the stress and disruption caused to claimants by the application, assessment,



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refusal and appeal procedures. Clients at the Centre have regularly commented that this process is of further detriment to their health. The analysis of case notes and medical records throughout the report showed that the decision to refuse a client IB payments seemed to be driven by a need to reduce the number of claimants 'passing' the medical assessment, so that the eligibility assessment report regularly bore little resemblance to the client's actual health or (in)ability to work.

Finally, the analysis showed that the evidence presented to the DWP by the medical examiner as 'proof' that a person was capable of work was often insufficient, but that that evidence was, in any case, regularly accepted by the DWP as the basis of declining a claim. Further criticisms included concerns that benefit levels meant that those unable to work due to an illness or disability lived in poverty and that any employment made available through government-subsidised schemes was low paid, unstable, short term and low skilled.

If we now return to consider the introduction of ESA, we are faced with an increasingly employment-orientated approach to disability benefits, complemented by enhanced levels of outsourcing. The 2008 Government White Paper 'Raising Expectations and Increasing Support'² stated:

"...we are confirming that we want to move to the 'Invest to Save' approach recommended by David Freud, also known as AME-DEL. This involves private and voluntary providers investing up front in getting more people back in to work, and being paid out of the resulting benefit savings."

The DWP first outsourced its disability benefits assessments to Atos Healthcare in 2005. The company is a subsidiary of Atos Origin, a technology company that employed almost 80,000 people with annual revenues of €8.7 billion in 2011. Atos operates in over forty countries, providing IT services, business consultations and medical services and has been contracted by the DWP to develop, maintain and use software in the eligibility assessments given to disability benefits claimants.

A freedom of information request in April 2008 led the DWP's Medical Services Contract Management Team to disclose that the total cost of the ten-year Atos contract, since it had begun in September 2005, was approximately £801 million. That contract was extended at the end of 2010 for a further five years, despite growing concerns over the quality of the medical reports produced by Atos assessors and the large numbers of successful appeals. These concerns culminated in a Parliamentary



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inquiry into ESA assessments and the wider migration of claimants from IB to ESA in the summer of 2011.

In February 2011, Chris Grayling, Minister of State for Employment, Work and Pensions, disclosed that the cost of the Atos Origin contract was actually 'in the region of £100 million per annum'³. Furthermore, this figure only covers the medical assessments, known as Work Capability Assessments, themselves. The DWP has additional direct costs associated with handling applications, making decisions and considering requests for reviews and appeals. It is this lengthy application and assessment process that we will now look at in outline.

An application for ESA is followed by a thirteen week assessment phase, during which the applicant receives £67.50 per week⁴. All claimants must complete a 21-page questionnaire regarding aspects of their physical and mental health. This is followed by a face-to-face Work Capability Assessment (WCA), which essentially determines the claimant's eligibility for ESA.

The WCA, conducted by Atos Healthcare, is structured around a points-based eligibility scheme. Points are allocated to claimants by the Atos examiner based on whether or not their (in)abilities are deemed to be accurately described by sets of highly specific

statements. These statements, or descriptors, are grouped into 'physical' abilities and 'mental' abilities, which are then further grouped into themes, such as 'walking with a walking stick or other such aid if normally used' and 'awareness of every day hazards'.

Under each theme, descriptors worth 6, 9 or 15 points are assessed against the claimant's capabilities and they are allocated points for any descriptors they cannot achieve. For example, if the Atos examiner felt that the statement 'cannot pick up and move a one litre carton full of liquid' applied to a claimant, they would be allocated 9 points. If the Atos examiner felt that a claimant 'had some difficulty conveying a simple message to strangers' they would allocate them 6 points. If the Atos examiner felt that a claimant could not 'learn how to complete a simple task, such as setting an alarm clock' they would allocate them 15 points, and so on.

A claimant must be allocated a total of at least 15 points to avoid being deemed 'fit for work' by Atos. At no stage does the Atos examiner have access to the claimant's medical records: points are allocated to claimants based solely on that single face-to-face WCA and the contents of their (self-completed) application form.



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Following the Atos WCA, an application for ESA will result in one of three outcomes⁵:

- One in ten claimants are put into the Support Group, where they receive £99.85 per week and are considered too ill or disabled to do any kind of work or to work towards returning to the labour market.
- Just over three in ten claimants are awarded ESA but are deemed able to return to the labour market in the near future. They are put into the Work Related Activity Group and receive £94.25 per week in exchange for taking part in Work Focused Interviews, where a series of 'work related activities' are drawn up for them by a Jobcentre advisor, aimed at improving their employability. Payment sanctions are imposed on claimants who do not attend these interviews or 'take part fully' in their employability training.
- The remaining six out of every ten applicants 'fail' their WCA, are deemed capable of work and are declined ESA. They then need to apply for Job Seekers Allowance (JSA), which requires them to be available for work at all times, attend fortnightly meetings with a Jobcentre advisor and evidence the fact that they are regularly applying for jobs. These claimants receive £67.50 per week. After six months JSA claimants lose the ability to decline jobs that they feel are unsuitable, too poorly paid, too difficult to reach, or of unsuitable hours. If they do decline such jobs they face sanctions, which start at withdrawal of benefit payments for two weeks for a 'first offence'.

In March 2011, the ESA descriptors were significantly streamlined. Descriptors relating to an ability to stand or sit for long periods of time, to bending and kneeling, to continence, to consciousness and to memory and concentration were removed. Descriptors relating to getting out and about, and to hearing, speech and vision were also amalgamated and reduced.

These changes will be discussed in more detail later but, in summary, in comparison to the IB points system that preceded it, ESA descriptors generally award many fewer points for the same abilities and difficulties. For example, IB claimants were allocated up to 6 points for difficulties using one hand, whereas there are no points awarded at all under ESA for problems with manual dexterity unless it occurs in both hands.

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In addition, despite this complete overhaul, there is still no appreciation of the changeable nature of many health conditions. There has also been vociferous condemnation of the fact that descriptors relate to a claimant's absolute abilities, with little heed of the mental and physical strain or the discomfort, pain or impact on self esteem and on overall wellbeing that carrying out these activities may have. The descriptors speak only of activities causing 'significant discomfort or exhaustion' and there is no consideration given to the medium- to long-term effects of repeatedly carrying out such task as would be required in a working environment.

The result of the Atos WCA is a standardised report produced using drop down boxes on specialised computer software. It is sent from Atos to a DWP 'decision-maker', who considers the Atos report, alongside any submissions the claimant has been able to gather from their GP or consultant(s). If the Atos assessor has allocated the claimant less than 15 points at their WCA, they will recommend to the DWP that the claimant is 'fit for work'. The DWP use this information to decide whether or not the claimant is eligible to receive ESA.

Citizens Advice Scotland (CAS) released figures in the summer of 2011 that showed a 459% increase in the imposition of sanctions on JSA claimants from October 2008 to

October 2010, after some Job Centres set targets for advisors to impose penalties. One of the main reasons CAS cite for sanctions being imposed is refusal to attend an interview or take on a role that the claimant considers unsuitable because of their underlying medical condition. Although targets for sanctions have now been removed, this situation reflects an increasingly disciplinary and non-inclusive approach to benefits distribution, which leaves those with health problems particularly vulnerable.

An investigation conducted by the DWP on ESA claims from April to June 2009 found that over half of ESA claimants felt that the Atos examiner did not understand their condition well. Understandably, 71% of those who were found fit for work felt this way but, tellingly, 29% of those who were awarded ESA still felt that the Atos examiner had not understood their condition⁶.

The DWP report also outlines that almost three in five claimants found fit for work moved to appeal that decision⁶. Around 40% of appeals heard are upheld against the DWP⁵. This means that, of the six in every ten ESA applicants that are found fit for work, at least one is subsequently found to be eligible for ESA, against the evidence presented to the DWP by Atos Healthcare. This appeals process is estimated to be costing in excess of £30 million per annum,



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none of which is recouped from Atos Healthcare's fees⁷.

In Spring 2011 the House of Commons Work and Pensions Select Committee launched an inquiry into the migration from IB to ESA, with a focus on the WCA conducted by Atos Healthcare. The inquiry concluded that claimants needed to be treated with greater care and sensitivity during the assessments themselves, and that the DWP 'decision-making' process should be more significant and less of a 'rubber-stamping' exercise.

While these changes remain to be seen at the time of writing, the further streamlining of the ESA eligibility criteria in March 2011 has further restricted access to the benefit. This puts a significant proportion of those in our community, who are some of the least able to support themselves financially, in an extremely vulnerable position. With this in mind, the following section will now provide a detailed outline of the new protections afforded to disabled people under the Equality Act (2010).

Notes:

1. Dr. Chik Collins, 'To Banker, From Bankies. Incapacity Benefit: Myths and Realities', 2009
2. White Paper: Raising Expectations and Increasing Support, December 2008, p.12
3. <http://www.theyworkforyou.com/wrans/?id=2011-02-09a.37668.h>
4. For a single person over 25
5. DWP Official Statistics 'Employment and Support Allowance: Work Capability Assessment by Health Condition and Functional Impairment', October 2011
6. DWP Report no. 707 Nov 2010, "Employment and Support Allowance: findings from a face-to-face survey of customers", by Helen Barnes, Paul Sissons and Helen Stevens, Institute of Employment Studies, online source: <http://research.dwp.gov.uk/asd/asd5/rrs-index.asp>
7. Amelia Gentleman, "Benefits Assessment Firm causing 'fear and loathing' among claimants says MP", The Guardian, 24th July 2011

The Equality Act (2010) and the Public Sector Equality Duty

The Equality Act (2010) and the Public Sector Equality Duty

In respect of disabled people, the Equality Act (2010) consolidated and clarified existing protection under the Disability Discrimination Act (1995). Specifically, the Act recognises that equality for disabled people relies on service providers taking a more proactive approach in tackling deeply entrenched discrimination and inequality.

Therefore, the Act places a positive and proactive duty on both the public and private sector, through the Duty to make Reasonable Adjustments (s.20 Equality Act 2010) and the

Public Sector Equality Duty (s.149 Equality Act 2010). It is the latter that is most relevant to Employment and Support Allowance (ESA). The Public Sector Equality Duty (PSED) significantly extended the duties that already existed on the public sector to actively seek to eliminate discrimination in the course of their day-to-day work. In summary, it protects disabled people by insisting that public bodies must now have due regard for the need to do three key things, which are outlined in the box below. Aims 2 and 3 of the PSED, as shown here, only apply where a consideration for disabled

Public Sector Equality Duty Aims

1. Eliminate discrimination, harassment, victimisation and any other conduct prohibited under the Act.
2. Foster good relations between disabled and non-disabled people by:
 - Tackling prejudice.
 - Promoting understanding.
3. Advance equality of opportunity between disabled and non-disabled people by:
 - Removing or minimising the disadvantages suffered by disabled people, where those disadvantages are connected to their disability.
 - Taking steps to meet the needs of disabled people where they are different from non-disabled people.
 - Encouraging disabled people to participate in public life or any other activity in which the proportion of disabled people participating is particularly low.



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people is relevant to the work of the public body in question.

The PSED applies to all public bodies listed in Schedule 19 of the Equality Act 2010, including Ministers and government departments. Its broad purpose is to integrate a consideration of equality and good relations into the day-to-day business of public bodies. Thus, public bodies are required to consider how they can positively contribute to the advancement of equality and good relations through their policies and the delivery of their services.

While the PSED is not prescriptive about the approach a public body should take in having due regard, there are principles established in case law that will ensure their compliance with the duty. Compliance requires decision-makers in public bodies to have 'a conscious approach and state of mind' regarding the requirements of the PSED when taking decisions. Therefore, due regard to the need to advance equality must be exercised when any policy is implemented and reviewed. Furthermore, any third parties carrying out public functions on behalf of a public body are also required to comply with the duty.¹

With regards to ESA, the relevant public body covered by the PSED is the Department for Work and Pensions (DWP). Moreover, the duty also extends to Atos Healthcare as the organisation contracted to carry out the

Work Capability Assessment (WCA), on behalf of the DWP.

The PSED came into force in April 2011. Further to this, in September 2011, the Westminster Government passed a number of specific duties designed to guide the public sector in implementing the general PSED. These specific duties stipulate that, by April 2012, all public bodies must publish information demonstrating their compliance with the PSED, that this information must be reviewed at least once per year, and that it must include information relating to those persons affected by their policies and practices. Furthermore, public bodies must also set and publish at least one objective towards achieving the PSED, which must be specific and measurable and reviewed at least every four years.

These specific duties are rather lean in comparison to those laid out by the Welsh Government, which has outlined some fourteen specific duties for devolved public bodies in Wales. In Scotland, the devolved government is expected to be in consultation on around eight specific duties until November 2011. Nevertheless, these UK-wide duties represent a significant obligation on the public sector to have due regard for the effects of their work on disabled people and to act on that duty. What's more, Government Ministers have the power to impose additional specific duties on individual public bodies where they deem

The Equality Act (2010) and the Public Sector Equality Duty

necessary, in order to assist them in meeting the PSED.

So how might this new legislation affect the DWP and its contractors? In developing ESA, the DWP published several Equality Impact Assessments (EIA), as a way of demonstrating their compliance with the old and new general equality duties. Initially, an EIA was published in January 2010 under the previous race, disability and gender equality duties. While it did consider all of the protected characteristics set out in the new Act, it did not explicitly set out the implications of the new ESA process on disability equality. Instead, the EIA only went as far as to state the potential, notional impacts of proposed changes on disabled people, with no reference to empirical evidence or the specific organisations consulted in making these assessments.

Subsequently, in response to mounting concerns about the new process, the Coalition Government appointed Professor Harrington, an occupational health specialist, to carry out an independent review of the WCA. The first independent review looked at ways to improve the effectiveness and fairness of the WCA and was published on 23 November 2010. The DWP accepted all of the recommendations of that independent review and announced how those changes

would be implemented. This in itself is an admission that their policy- and decision-making process had failed to produce a fair outcome.

As part of its response, the DWP carried out another EIA. While this Assessment did consider the protected characteristics set out in the new Act, there was little evidence of 'a conscious approach and state of mind' regarding how the ESA benefit system would meet the PSED. In part, this failure emanated from the structure of the EIA itself, which forced a consideration of specific protected characteristics but did not actually address the PSED directly. In short, it did not facilitate the setting out of exactly how ESA policies and processes will, in practice, eliminate discrimination, advance equality and foster good relations for disabled people.

It is against this background that this report will seek to outline the adverse impacts this failure is having on our disabled clients. In the context of this new equality legislation, the final part of this report will now describe the experiences of some of those attempting to claim ESA and consider how the evolving policies and processes attached to this disability benefit could be seen to be failing to meet the duties set out in the PSED.

Notes:

1. The essential guide to the PSED vol. 1 of 5, Equality and Human Rights Commission, 2011



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Employment and Support Allowance under the Equality Duty

The evidence presented in this section will revolve around three key issues with Employment and Support Allowance (ESA) that we, at the Independent Resource Centre, feel are most relevant to the Public Sector Equality Duty (PSED). These issues are:

- the underlying messages of disability-benefit reform
- the poor quality of the assessment process, in particular the Work Capability Assessments (WCAs) conducted by Atos Healthcare
- the contraction of entitlement to ESA under increasingly austere eligibility criteria

These issues will be illustrated using four typical case studies of people who have approached the Centre looking for help in claiming ESA, and will be further contextualised by statistics on the five-hundred or so enquiries about ESA we received in the eighteen months from April 2011 to September 2011. During that time, our staff completed 160 ESA application forms and represented clients at 75 ESA appeal tribunals. This has given us both a comprehensive understanding of the problems inherent in the system and a very rich and detailed paper trail to examine in drawing our conclusions.

Underlying messages of reform

The Welfare Reform White Paper of December 2008 lays out the UK Government's aims for a welfare state 'where nearly everyone is either looking for or preparing for (paid) work'¹. It boasts that the introduction of ESA has both 'deepened' and 'widened the obligation to work'² by increasing the conditionality of benefit payments.

The danger is that this emphasis on tackling 'benefit dependency' sends a message to the non-disabled community that disabled people who do rely financially on benefits do not necessarily need to do so. The increasing conditionality of benefit payments has further compounded this problem, with the majority of those who are eligible for ESA being placed in the 'Work Related Activity Group'. These claimants, along with those claiming Job Seekers Allowance, must now attend compulsory employability training or face benefit sanctions.

The implication here is that disabled people must, by and large, be compelled to improve their skills and qualifications in order to gain employment and that they are perfectly capable of doing so, but choose not to because they are happy to 'depend' on benefits instead of working.

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The result of this underlying message is that disabled people claiming much-needed state support are often labelled as ‘scroungers’, with ‘benefit fraud’ receiving widespread coverage in the media, regardless of the fact that it occurs rather infrequently in reality. In 2008 the British Social Attitudes Survey found that over four in every five people agreed that ‘large numbers’ of people falsely claim benefits. This ‘dependency’ message is a poor reflection of the reality of living with a long term illness or disability, and ultimately damages relations between the disabled community and non-disabled people.

The Department for Work and Pensions (DWP) now has an obligation under the PSED to foster good relations between disabled and non-disabled people, including promoting understanding and tackling prejudice. However, ESA is a system predicated on a message about the unacceptability of not being in paid employment, even for people who are recognised as having a health problem that affects their ability to work.

We argue that this works to *promote prejudice* against disabled people and does nothing to help non-disabled people understand the experiences of those who live (and often work) with a disability. In fact, it promotes *mis-understandings* about the reasons why around half of working-age disabled people are not engaged in paid

employment. These misunderstandings are embedded in the eligibility criteria for ESA, which we will consider in more detail later, but are also well expressed in the application process.

Initial applications for ESA follow a two stage process, the first requiring the claimant to provide a detailed breakdown of their household structure, income, savings and assets on a 52-page application form. The second stage is the completion of a 21-page medical questionnaire, requiring tick-box and short paragraph responses from the claimant about how capable they feel they are of carrying out activities under each of the ‘themes’ described in the previous section. At no point are claimants asked if they feel able to enter into paid employment or what kinds of employment they feel they might be able to do.

The DWP’s own figures on the 1.3 million ESA claims made in the two years from October 2008 to November 2010 show that for every four applications received for ESA by the DWP, only one is successful. This might lead us to conclude that three in every four applicants for ESA are ineligible for the benefit. However, if we consider the success rate of ESA applications made with the assistance of a welfare rights advisor, we find that half of the applications we help our clients to make are successful. This is not because we carry out any pre-screening of



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clients or decline to fill forms in for clients who we suspect will not meet the criteria. This is because the application process itself is so complex, stressful and inaccessible that providing expert support to claimants actually doubles their chances of successfully completing the application process.

The DWP has a duty under the Equality Act (2010) to advance equality of opportunity between disabled and non-disabled people, one aspect of which is to meet the needs of disabled people where they are different from the needs of non-disabled people. All people need a basic level of financial stability. Many disabled people necessarily rely on the state for that support because they are not able to maintain paid employment. However, the ESA applications system is evidently not accessible enough for those who need it: many of those who are turned down do actually meet the stringent qualification criteria but are not able to successfully make their way through the application procedure.

Thus, many disabled people's particular need for a state-provided, basic level of financial security *is not being met* because of the unsuitability of the ESA application process. Significant numbers of disabled people are, therefore, being systematically consigned to abject poverty by a disability benefits system that is increasingly geared towards reducing the number of people claiming benefits. As a

result, we argue that disabled people's *equality of opportunity is being eroded*, not advanced.

This particular problem is augmented by the face-to-face Work Capability Assessments (WCAs) under the direction of Atos Healthcare. The majority of claimants who do successfully negotiate the application procedure are subsequently assessed as ineligible for ESA by Atos, in spite of the fact that many do actually meet the eligibility criteria. It is this issue we will now go on to consider.

Poor Quality Assessments

The penultimate part of a claimant's assessment for ESA, after the first two form-filling stages, is the face-to-face WCA by Atos Healthcare. It is during this meeting that an Atos employee uses drop down options to populate various pre-defined boxes relating to the 'themed' descriptors we considered earlier. It is worth reiterating that during this assessment the only documentation relating to the claimant that is accessible to the examiner is the claimant's own application form, and there is no access to medical records or the claimant's own doctor's letters (if supplied).

There have been numerous complaints about the way claimants are treated by Atos, many

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of which featured prominently in the 2011 Parliamentary inquiry into the migration of Incapacity Benefit to ESA. These include the fact that:

- claimants can be kept waiting long periods of time, well past their appointment, to see the assessor
- assessments are being conducted far too quickly, at only 10-20 minutes in some cases
- the facilities in the buildings in which the tests are held are not suitable for disabled people
- assessors are often unpleasant to deal with, with a lack of eye contact and listening skills featuring high on the list of complaints

In short, many claimants do not feel that they are being treated with dignity or respect and it is questionable whether the duty to make reasonable adjustments is actually being met. These issues were covered at length during the Parliamentary Inquiry and it will not be necessary to repeat them in detail here. Perhaps most relevant to the new Equality Act, however, is the fact that there seem to be a significant number of errors being made in the WCA reports that are sent on to the DWP 'decision-maker' by the Atos assessor.

If a claimant feels that they have been wrongly denied ESA they do have the right

of appeal. Recent DWP research shows that some two-fifths of claimants who have been turned down for ESA have an appeal heard, with 38% of all appeals being upheld in favour of the claimant³. This is a substantial margin of error but we believe that it does not actually reveal the full extent of the problem.

Clients who are assisted in their appeal by a welfare rights advisor at the Centre are much more likely to be successful, with two thirds of the cases we support at tribunal being ruled in the client's favour. This, in part, demonstrates the inaccessibility of the appeals procedure, the implications of which echo the problems already outlined in relation to ESA application procedures. However, it is the scale of the errors contained within these significant numbers of appeal cases that point towards the problems in the assessments themselves, as the following two case studies illustrate.

Case A

The first case is that of Ms C, a 44 year old single woman suffering from depression, epilepsy and a low blood count. She had left her last employer at the beginning of 2009 due to stress and was being re-assessed for ESA in late 2010. At the time she was attending regular out-patient appointments at hospital with a blood specialist and was



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experiencing epileptic seizures on a daily and nightly basis. These seizures regularly came on without warning and she had developed an acute fear of leaving the house.

This was compounded by her anxiety and depression, which left her unable to maintain a basic daily routine of housework and self care. The medications prescribed to deal with her epilepsy and depression were affecting her ability to concentrate on even short and simple tasks. On her application form for ESA she described feeling frightened, anxious and paranoid on a daily basis.

Following her application, Ms C underwent her Atos WCA with a registered nurse. In her report to the DWP, the nurse pointed out that Ms C's epileptic seizures occurred mostly at night, that she had never injured herself during a seizure and that she was usually conscious during them. She further noted that Ms C had come to the examination centre by bus and reported occasionally going to the supermarket, although she was always accompanied by a friend. Finally, she described Ms C's depression medication as 'average strength', and commented that she 'manages to wash and dress most days' and that she was 'focussed and pleasant throughout the interview'. Using this evidence, the nurse allocated Ms C no points under the themed descriptors and, as a result, the DWP

decision-maker declined Ms C's application for ESA.

At her appeal in mid 2011, Ms C was successful in challenging that decision and was allocated a total of 21 points by the appeal panel. She received 6 points because the panel felt that, due to her paranoia and anxiety, she was liable to misinterpret communications to the extent that it would cause her significant distress. She received a further 15 points because the panel appreciated that because of her mental health she would be unable to get to a specified and familiar place without being accompanied. Although this had been noted by the examining nurse, Ms C had been allocated no points for this problem at her WCA.

This was actually the second time Ms C had had to go appeal to be awarded her ESA. She had first applied in late 2009 and received no medical points at examination, but had subsequently won her appeal in early 2010 with 15 points (the minimum required). Her reassessment was necessary because the ESA system is designed so that those placed in the Work Related Activity Group are reassessed regularly, in some cases every 3-6 months.

The reassessment process mirrors the application process, so that a claimant is sent

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the same questionnaire they filled in to apply initially and then must attend another WCA. Ms C is expected to revisit the Centre in the coming months for her third appeal. In the mean time, as she has been placed in the Work Related Activity Group, she must attend regular meetings with an employability advisor at the Jobcentre and take part in any 'work related activities' (such as training or placements) that are deemed necessary by the DWP. If she does not fully take part in every step of this process, her ESA payments will be stopped immediately.

Case B

Our second case is that of Mr K, a 59 year old retired taxi driver with heart and back problems, who applied for ESA at the start of 2011. Mr K was also coping with bereavement after losing his wife to cancer in the summer of 2010, having given up work to care for her at home a year earlier. He had epidural lipomatosis, a problem with his spinal cord, which had led to him having substantial mobility problems, requiring a walking stick and leaving him unable to bend over at all without severe pain. His heart problems further restricted his mobility, so that he experienced breathlessness and fatigue after walking around 50m.

He was attending an out-patient pain clinic for his spinal problems and taking prescription medication after having had two heart attacks and a coronary bypass, as well as awaiting therapy for his bereavement. He was suffering from insomnia, depression and anxiety, which were affecting his ability to cope with basic daily housework, to leave the house and to meet new people. The examining Atos nurse noted on the WCA report that Mr K was 'very distressed at the outset' of the interview, that 'after 15 minutes he was able to gather his emotions', but that he 'appeared to be trembling', 'tense' and 'withdrawn' throughout the examination.

In the body of the WCA report, the nurse noted that Mr K was able to wash and dress and cook for himself, despite experiencing pain and breathlessness throughout, but that he needed help to complete household cleaning and shopping. She noticed that he had difficulty sitting for over 10 minutes at a time, and with standing for more than 4 minutes, as well as problems with getting onto and off of a couch. She commented that his pain medication was of 'potent strength'.

She further noted that he had no history of disruptive behaviour and talked to his son on the phone every day, as well as occasionally visiting the local shop alone. As a result, she recommended that 'a return to



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work could be considered within 3 months' and allocated Mr K 6 points, under the theme 'standing and sitting', indicating that, in her opinion, he would be unable to sit in a chair for more than 30 minutes without needing to move. A claimant requires a minimum 15 points to be deemed 'unfit for work' by Atos, so Mr K's application for ESA was declined by the DWP decision-maker.

In the additional evidence submitted by Mr K at his ESA appeal, his consultant biochemist commented:

"There is no question that this gentleman presents with severe co-morbidity and that the coexistence of his back problems and advanced coronary disease severely impairs his mobility and ability to physically cope with everyday life. He remains severely restricted not only in terms of capability for work but also with regard to simply dealing with day to day demands. He is not a man who would apply for benefits without a truly genuine need."

At his appeal our welfare rights officer sought points for problems with walking and with bending under the physical descriptors, which would have provided Mr K with 15 points on top of the 6 he was allocated at his medical. We sought an additional 15 points under the mental health descriptors, including 6 points for an inability to cope

with changes in routine and 9 points for the fact that his anxiety prevented him from meeting new people or visiting new places alone.

The appeal panel saw fit to award ESA and to place Mr K in the Support Group, indicating that they felt he had such a limited capability to work that he should not be obliged to engage in any work-related activity (such as employability training) in order to receive his ESA payments.

It is necessary to reiterate that these cases are representative of the cases we deal with on a daily basis. We do deal with cases of a more extreme nature, such as that of Mr S, who's appeal panel were so appalled by the fact that he had been declined ESA when he was so clearly in need of support and unable to work, that they made comments to that effect on his appeal decision notice. We have also handled two cases where clients have passed away whilst awaiting their appeal hearing, having been declared 'fit for work' at their Atos WCA.

The cases presented here are much more typical of those who must regularly appeal their ESA decision. Of our clients who were awarded 15 points or more at their appeal (and, thus, were awarded ESA), 80% were awarded no points at all at their Atos WCA. Therefore, the vast majority of cases are not

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cases in which marginal errors are being made, but cases in which claimants are being wholly and completely let down by the assessment process.

The reasons for this can be broken down into three key failures of the current assessment process:

- a lack of adequate knowledge among Atos assessors about the diverse medical conditions they are presented with
- insufficient time for a proper medical assessment of work capability to be made
- a lack of access to claimant's medical history when making recommendations

Claimants are not allocated an examiner who specialises in their illness or disability. This means that a physiotherapist, a mental health nurse or a GP could equally assess a person with heart problems or a person with a learning disability. Moreover, we do not believe that it is possible, even with specialist expertise, for a person's condition to be accurately assessed in under an hour. Many claimants' conditions present with symptoms that vary enormously from day to day and, in some cases, from hour to hour.

Furthermore, it is frequently the case that a person will inadvertently seek to mask their disability, in the process of adapting to and coming to terms with their condition. This,

it should be noted, is not the same as saying that their ill health does not affect their daily life, but that it is often made to appear unproblematic, as part of their own coping mechanism. It is also important to recognise the social stigma attached to 'disability' and the impact this has on the way people cope with their impairment or health conditions.

These kinds of adaptations cannot be 'switched off' for the Atos examiner, and to encourage a claimant to do so puts them under significant and unnecessary stress. It is therefore open to question whether an Atos examiner can form a reasonable understanding of how someone's medical condition or impairment actually impacts on their ability to cope with day-to-day activities in the workplace, within the short time-span they spend with a disabled claimant during a WCA.

The result of the incredibly high error rate in medical examinations, as evidenced by the proportion of successful appeals, is that many people with a long-term illness or disability are incorrectly deemed ineligible for ESA by the DWP. The appeals process is notoriously complex, drawn out and stressful⁴, often leading to feelings of powerlessness, which results in many who are eligible simply giving up their rights to ESA.



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For those who do successfully appeal, the wait is often around nine months from the initial decision, during which time appellants are paid a significantly reduced rate of ESA, if anything at all. Although full ESA payments are eventually backdated following successful appeals, examination errors are pushing eligible but mis-examined applicants into poverty, either permanently in the case of those who do not feel able to appeal, or in the short- to mid-term in the cases of those who do appeal.

Under the Public Sector Equality Duty, the DWP has a responsibility to advance equality of opportunity for disabled people, one aspect of which is to minimise the disadvantages caused by their illness or disability. Poverty is a disadvantage that has long been associated with poor health. Unfortunately, the current assessment process for ESA is now systematically denying essential financial support to many disabled people, resulting in an increased likelihood of abject poverty. This constitutes a *significant and growing disadvantage* for disabled people that the DWP has a duty to minimise, not exacerbate.

In the cases we have covered in this section we have considered how those who are eligible for ESA, but not properly examined, are being affected. However, there are a rapidly growing number of disabled people who are now not eligible for ESA at all due to recent contractions in entitlement, and it is

these cases we will go on to consider in the next and final section.

Contraction of Entitlement

When ESA was first introduced in 2008, the eligibility criteria were somewhat narrower than its predecessor, Incapacity Benefit (IB), so that many claimants who had been eligible for IB suddenly found themselves 'fit for work' under ESA.

IB was assessed in a similar way to ESA, with physical and mental health descriptors grouped into 'themes'. In the case of physical health, the replacement of IB with ESA resulted in around a 10% reduction in the overall number of physical descriptors, with a further 30% or so having their wording and points amended. Significantly, a further quarter of the physical descriptors remained unchanged apart from the amount of points they represented, which were reduced.

Much broader changes were made to the mental health descriptors. The old IB points system required claimants to achieve a 10 point threshold from twenty-five descriptors distributed between four themes, each of which provided either 1 or 2 points. This system was completely replaced with the introduction of ESA to match the physical descriptor system, so that a 15 point

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threshold was now required from descriptors worth 6, 9 or 15 points distributed over ten different themes. In the process, descriptors that related mainly to depression and emotional health, which constituted around half of the old IB mental health descriptors, were removed. The result has been a significant reduction in the ability of those with mental health problems to meet the ESA eligibility criteria.

Case C

Two case studies will suffice in illustrating these issues. The first is the case of Ms B, a 47 year old mother with long-term depression and anxiety, paranoia and panic attacks, who had not been able to work since her child was born. She had been receiving long-term IB at the time of her ESA re-assessment in late 2010, as she was receiving prescription medication and therapy for her mental health problems. She was effectively housebound by her paranoia and anxiety, and struggled with day-to-day housework because of her depression. Her medication made her drowsy and panic attacks inhibited her ability to cope with almost any social situation.

At her Atos WCA, a registered nurse noted that Ms B regularly missed her therapy appointments due to her agoraphobia, was

suffering from suicidal thoughts and had attempted suicide in the past. She further noted that Ms B relied on family to do the housework and bring shopping and regularly suffered sustained and occasionally aggressive panic attacks. However, she ended the report by concluding that Ms B was 'well kempt' and 'was able to sit still during the interview', that she 'has good insight into her illness' but that she was 'tearful during the assessment'.

The Atos nurse allocated Ms B only 6 points for just one descriptor, under the theme 'coping with social situations', because she felt that Ms B had notable problems engaging in social contact due to her anxiety. As a result of her not reaching the 15 point threshold, Ms B was denied ESA by the DWP decision-maker.

At her appeal, Ms B was allocated one further descriptor worth 6 points under the theme 'getting about', as the appeal panel felt that she would also be frequently unable to get to a familiar place unaccompanied. At a total of 12 points, Ms B still did not meet the ESA eligibility criteria and was again declined ESA. The only remaining source of basic financial support for Ms B is Job Seekers Allowance (JSA).



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Case D

Our second case is that of Ms H, a 48 year old single woman with musculoskeletal problems and arthritis in both hands and arms. She stopped working around a year before her application for ESA in late 2010, as she was finding it difficult to walk and had suffered a fall at work – her doctor diagnosed possible sciatica and arthritis in her hands.

She was unable to use a pen to fill in the ESA application form herself and was taking a total of five different prescription painkillers every day, including Tramadol, as well as attending a physiotherapist weekly. Her musculoskeletal problems made walking, sitting, bending and getting up painful and difficult. Housework, cooking and shopping were time consuming, exhausting and painful.

The Atos examiner's WCA report described Ms H as coping well with her illness, by adapting to doing tasks more slowly or in different ways due to her disability, but that pain was a now a major feature of her life. He noted that 'sitting too long can be uncomfortable but she should be able to sit over 30 minutes or so', that her grip was reduced in both hands and her ability to reach was reduced and caused her pain. She had had to stand up during the interview

because of pain in her back caused by sitting for too long. Since the examiner's observations did not fit any of the ESA descriptors, Ms H was allocated no points.

This decision was upheld six months later at her appeal, in spite of the fact that Ms H had been awarded the low mobility component of Disability Living Allowance in the meantime. Ms H was in the somewhat fortunate position of having her job held for her while she was being diagnosed and receiving treatment for her condition. However, if she is not able to return to work in the coming months, she will lose that position. At this point, she will also have to claim JSA.

JSA requires claimants to attend fortnightly meetings with a Jobcentre advisor and to physically evidence the jobs they have applied for. After six months, JSA claimants lose the right to exercise their discretion in applying for jobs: they must apply for every job they are qualified for, even if they feel that their health would prevent them from being a successful employee.

Furthermore, claimants may be recommended by their Jobcentre advisor to attend basic skills training courses or engage in voluntary work to improve or maintain their chances of gaining employment. If claimants do not follow these

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recommendations they face immediate sanctions of their JSA payments, including withdrawal of Housing Benefit and Council Tax Benefit. These sanctions seem to be imposed with scant regard for the fluctuating nature of a disabled person's health condition, fluctuations that can seriously impede their ability to comply with such stringent requirements.

The fact that the disability benefits system now places a significant proportion of disabled people in the labour market, instead of protecting their financial stability while they recover from or deal with their illness, presents a two-pronged problem. The first is that people in poor health are simply less able to cope with the requirements of their Jobseekers Agreement. For some, the variability of their condition makes meeting an inflexible Jobseekers appointment set some two weeks in advance problematic - the same applies to job interviews. If appointments or interviews are missed, benefit payments are forfeited immediately.

Furthermore, people with disabilities have additional needs with regards to job-seeking, such as the costs of taxi travel (which are significant on a budget of £67.50 per week), or the effects this process has on their levels of stress or pain. A claimant such as Ms B, with agoraphobia and panic attacks, is very unlikely to be able to cope

with an interview or a meeting with a Jobcentre advisor.

Similarly, Ms H's pain and mobility problems will act as a significant extra strain on her search for employment, yet she will not receive any additional help as a JSA claimant. Thus, the DWP is *not meeting her additional needs* as a disabled person and a JSA claimant, and this is contrary to their duty to advance equality of opportunity under the Public Sector Equality Duty.

The second problem is that people with long term health issues are at significant risk of discrimination in the labour market. Although the Equality Act (2010) extended and consolidated the rights of disabled people, including increasing their protection from (potential) employers, those with disabilities still find themselves at a disadvantage in the labour market. This occurs, variously, because: employers are not flexible enough with their absence policies and working hours; buildings are not adequately equipped; transport to work is time consuming, complicated or expensive; pay rates are too low; and recruitment is prejudiced against those with anomalous absence records, periods of unemployment or a disability.

The DWP, as a public sector body, must have due regard for the need to eliminate



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discrimination against disabled people. By forcing disabled people into the labour market, instead of providing them with basic financial support, it is inevitable that *they will be discriminated against* by employers.

The claimants we have considered as case studies in this report were assessed under the original ESA regulations from 2008 but, as we have already seen, ESA regulations were significantly streamlined in March 2011. In the original ESA descriptors there were over one hundred statements (under twenty-one separate themes) that claimants could be allocated 6, 9 or 15 points for. After the revision, half of those statements were removed and around a fifth were simplified or amended, with the effect of reducing the number of themes to only seventeen. There is now a much greater emphasis on the use of physical aids, such as walking sticks, wheelchairs, guide dogs, hearing aids and sign language, so that a claimant can no longer receive points for a difficulty they have if they can use an aid to reduce that difficulty.

Mental health descriptors have, again, been cut back the most, with points invariably being awarded only if the claimant is a threat to public safety or is mentally incapable, so that emotional distress and depression are even harder to 'quantify' under the new system. Furthermore, due to the cyclical nature of the assessment process, those who have recently been awarded ESA under the old regulations are now having their applications reviewed under the new rules, alongside those being migrated from IB to ESA. Therefore, an increasing number of disabled people are being found 'fit for work' and forced into the labour market by ESA eligibility criteria.

Notes:

1. White Paper: Raising Expectations and Increasing Support, December 2008, p.8
2. White Paper: Raising Expectations and Increasing Support, December 2008, p.7
3. DWP Official Statistics 'Employment and Support Allowance: Work Capability Assessment by Health Condition and Functional Impairment', October 2011
4. DWP Report no. 762 July 2011, "Unsuccessful Employment and Support Allowance Claims", by Helen Barnes, Joy Oakley, Helen Stevens, Paul Sissions, Institute of Employment Studies
- 5 (over) Adults = those aged 25-retirement . Poverty = less than 60% of the UK median income. The Poverty Site, online source: www.poverty.org

Findings and Conclusions

In summary then, the Department for Work and Pensions (DWP) and its contractor, Atos Healthcare, appear to be failing to have due regard to the Public Sector Equality Duty (PSED) in relation to Employment and Support Allowance (ESA) in a number of ways. The boxes on the following pages briefly recap on these issues. By way of conclusion, we argue that ESA runs counter to all three elements of the PSED.

We will finish by considering how ESA policies and procedures might be improved, to ensure they better comply with the Equality Act (2010). In the first instance, the emphasis on paid work and the move towards a 'workfare' system needs to be rebalanced to produce a system of stable financial support at a decent standard of living for all those who are unable to engage in paid employment. Secondly, a fair and accessible application and appeals system is vital and this would require substantial simplification of the current arrangements.

Finally, an assessment system reliant on claimants' medical records and their GPs' and consultants' expertise would ensure that all those who are eligible for ESA have equal access. These measures together would ensure that people with long term health issues are well supported enough to

decide for themselves if and when they are able to enter paid employment.

It is hoped that the requirement, as of April 2012, for the DWP to set specific, measurable objectives in meeting the PSED will encourage a fuller engagement with disability-based discrimination and disadvantage. More importantly, however, the setting of this fresh legislation could be an opportunity to scrutinise and challenge the rapid erosion of disability benefits on legal grounds, to ensure better outcomes for disabled people.

Unfortunately, our breadth and depth of experience at the Independent Resource Centre leads us to believe that the changes currently being enacted in disability benefits will be of significant and disproportionate disadvantage to disabled people. Furthermore, although the DWP and, by extension, Atos Healthcare come under the jurisdiction of the Westminster Government, we still feel that the Scottish Government has a fundamental duty to disabled people in Scotland.

We therefore urge the Scottish Government to consider carefully how it might improve equality for disabled people in Scotland, in light of these UK-wide issues.



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Key Findings

- ◆ ESA eligibility criteria do not sit well with the public sector's duty to have due regard for the need to eliminate discrimination. As it currently operates, ESA policies and procedures are effectively denying benefits to many people with a health condition that adversely affects their ability to work. As a result, they must seek employment that they are often not well enough to engage in. There is a real danger that this will result in discrimination against them by potential employers. The evidence indicates that this process, rather than advancing equality for disabled people is, in reality, stimulating an *increase* in disabled people's experiences of discrimination.
- ◆ Policy statements on welfare reforms over the last five years or so have put significant emphasis on disabled people entering paid employment and benefit 'dependency' cultures. We argue that this runs counter to the duty the DWP has under the PSED to foster good relations between disabled and non-disabled people by promoting understanding and tackling prejudice. Indeed, in our view, these reforms have *promoted misunderstandings of and fuelled prejudice* against health-related benefit claimants and, thus, against disabled people who are not able to work.

- ◆ It is questionable whether the DWP and Atos Healthcare can evidence how they have had due regard for the need to advance equality of opportunity for disabled people when designing and implementing ESA because:
 - ◇ Disabled people have additional needs, which are not being met by the DWP as administrator of ESA. Many disabled people who require state financial support because they cannot work, cannot access ESA because of the inaccessible application process, the poor quality of the medical examinations and tightening eligibility criteria. Furthermore, many disabled people who are no longer eligible for ESA are pushed onto JSA, where they receive no supplementary support while seeking work.
 - ◇ Disabled adults are twice as likely to live in poverty than non-disabled adults⁵, a disadvantage that is being augmented by ESA because the application process is proving inaccessible and the assessments are not sufficient. The result is that many eligible disabled people are denied ESA and must claim JSA, the payments for which are only two thirds of the value of those under ESA. Furthermore, people with long-term health problems claiming JSA are less likely to be able to meet the conditions of the Jobseekers Agreement and are thus at greater risk of being sanctioned, systematically resulting in more disabled people experiencing abject poverty.

