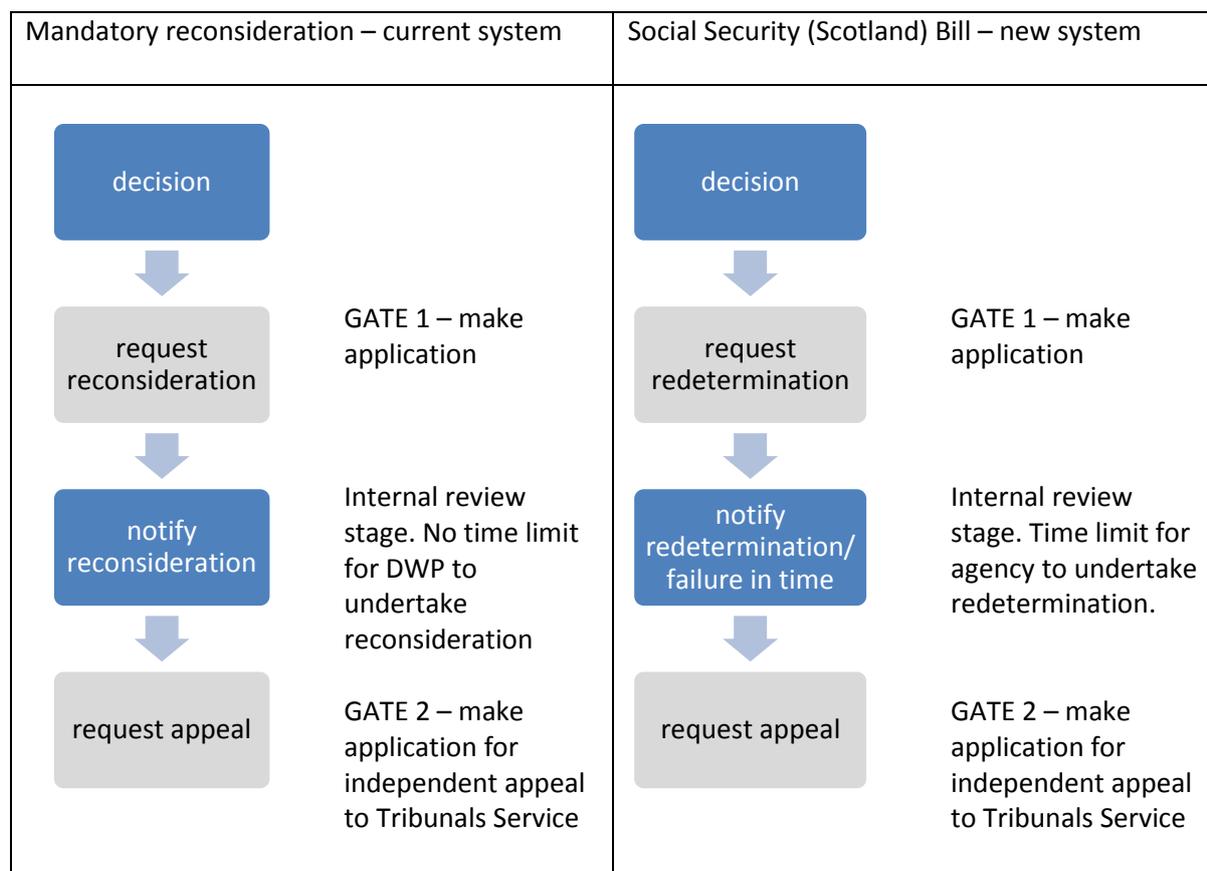


Social Security (Scotland) Bill briefing Redeterminations and appeals

The Scottish Government’s ambition is to establish a social security system that will operate on the basis that people have a right to administrative justice.¹ CPAG welcomes the Government’s recognition that there are ‘issues with the DWP’s current review process and there is a strong desire for Scotland to take a different approach’. This briefing looks at the new approach outlined in the Social Security (Scotland) Bill, asks how far it improves on the current system of mandatory reconsideration and whether it fully realises that right to justice. CPAG is concerned that the Bill as published retains key characteristics of the current process that act as a barrier to a fair hearing.

The diagram below outlines the legal steps required for a person to challenge a social security benefit decision through to an independent appeal at the First-tier Tribunal. On the left is the system as it is at present for disability and carers’ benefits and all other UK benefit and tax credits, with the exception of housing benefit. This is the ‘mandatory reconsideration’ system. On the right is the system set out in the Social Security (Scotland) Bill which uses the term ‘redetermination’.

‘Mandatory reconsideration’ is the process to get from internal review of a social security decision by DWP to independent appeal by the Tribunals Service, involving two gates for a person to get through: a first request for internal review (or ‘mandatory reconsideration’) and a second request to lodge an appeal.



¹ Social Security (Scotland) Bill Policy Memorandum, SP Bill 18-PM, para 179

There are some differences between the two processes, but in the most important respect – the requirement to make two separate applications to reach the appeal stage which is the key barrier to reaching an independent hearing – they are the same. Below we explore this in more detail and suggest an alternative.

Should there be a redetermination stage in the Scottish social security system?

Yes there should - as long as this does not mean having to make a second application to appeal if the award is unchanged, and as long as it is done without undue delay. This is the best way to resolve issues early, to avoid people having to go to the time and effort of an appeal, and to give the agency the best chance to continually improve the system.

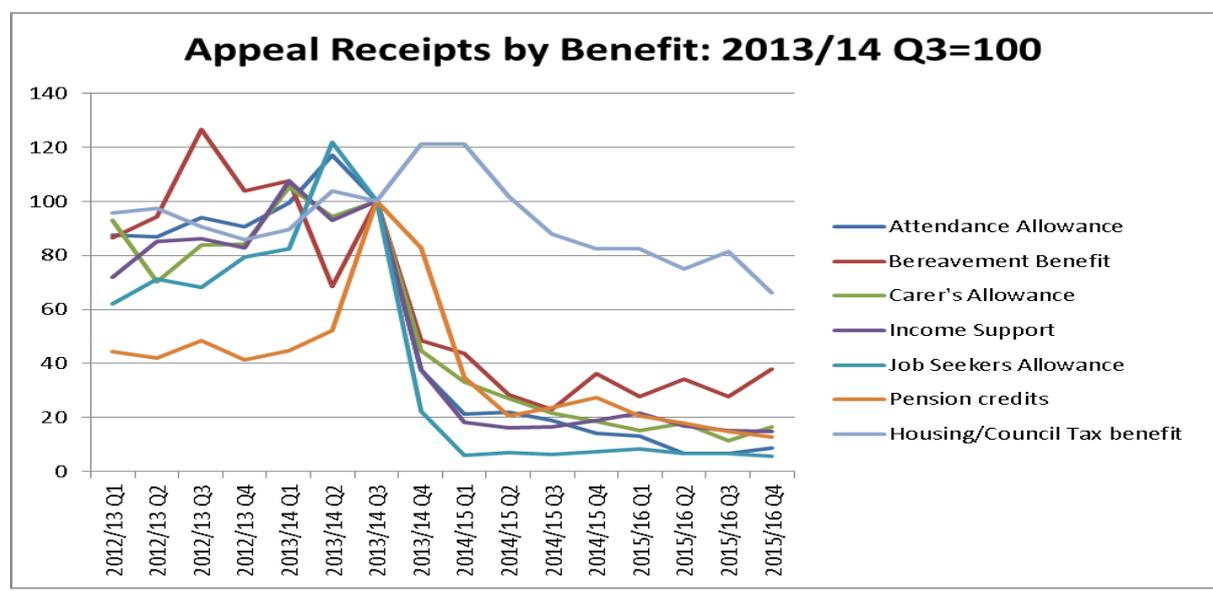
Why are so many people critical of the current system of mandatory reconsideration?

There are a number of concerns with the process, but the main criticism is that people need to make not one but two separate applications before getting to an independent appeal. People give up before making an appeal when under the previous system their appeal would have continued and in most cases been successful. The number of appeals went down dramatically when mandatory reconsiderations were introduced in 2013. The exception was housing benefit where mandatory reconsideration has never been introduced. It might seem surprising that there has been such a dramatic effect from simply introducing a requirement for a second application. But poor health, fatigue and lack of confidence can mean people find it difficult to ‘take on the state’ and navigate the system.²

Mandatory reconsideration ‘acts as a deterrent to appellants who may have legitimate grievances’

Tribunal judge

From *Decision Making and Mandatory Reconsideration*, SSAC July 2016



Reproduced from Decision Making and Mandatory Reconsideration, Social Security Advisory Committee July 2016, Data from Tribunal and gender recognition statistics quarterly: January to March 2016 (2016)

While the number of appeals went down, the number of decisions changed at an earlier stage remained low – 15% of personal independence payment (PIP) decisions on new claims

² [Decision Making and Mandatory Reconsideration, Social Security Advisory Committee July 2016](#); D. Cowan and S. Halliday, *The Appeal of Internal Review* (2003); R Thomas, 'Immigration Appeals for Family Visitors Refused Entry Clearance' [2004] P.L. 612, 625-631

are changed at mandatory reconsideration stage.³ Yet, for the minority who do manage to pursue their appeal, 64% of PIP decisions are overturned at the First-tier Tribunal.⁴

Does the new system improve on this?

Not in this critical respect. The new system is also a two-application process, just like the current system. In this respect, the new system will be as much of a barrier to a fair hearing for people as before.

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There are features of the new system that do advance the right to a fair hearing. It introduces a time limit for the agency to undertake the redetermination. There are no time limits in the current system for the mandatory reconsideration to take place so there can be lengthy delays. The Bill also introduces a new **'short-term assistance'** to be paid while people are challenging a decision on entitlement.

The Scottish Government has also said the system will be better because the agency will 'put aside the original determination and go through the entire process of making a new determination rather than just examining whether the original decision was right or not'.⁵ CPAG would question whether that is significantly different from the current system. In reconsidering a decision, UK social security law is framed in such a way that DWP should also consider the whole case. In so far as this is not required, it is because there is flexibility in law to leave alone part of an award that the person says they are happy with. This flexibility is lost in the new system with no obvious gain in the legal framework.

Example 'whole case' review

Jo has severe anxiety and depression. She gets DLA care component and the lower rate of the mobility component. She thinks she should get the higher rate of the mobility component and asks the Scottish social security agency to look at her case again. She tells them she's happy with the care component. There isn't anything that puts her entitlement to the care component in doubt, however, the agency tells Jo they are obliged to look at the whole case and ask for information about both the care and mobility components. Jo is very stressed by this and doesn't think she can cope. She withdraws her application.

There is certainly scope for improvement in the process operationally, beyond what is set out in legal provisions. For example, under the current system, far fewer decisions are overturned at the internal review stage than would be expected given the high overturn rate at independent appeal. However, even with much better early decision making and a more accessible process, when things go wrong, people must be able to access a fair hearing at an independent tribunal without unnecessary barriers.

What other options are there for a better system?

A better alternative has the following characteristics:

- people only need to make one application to appeal to an independent tribunal

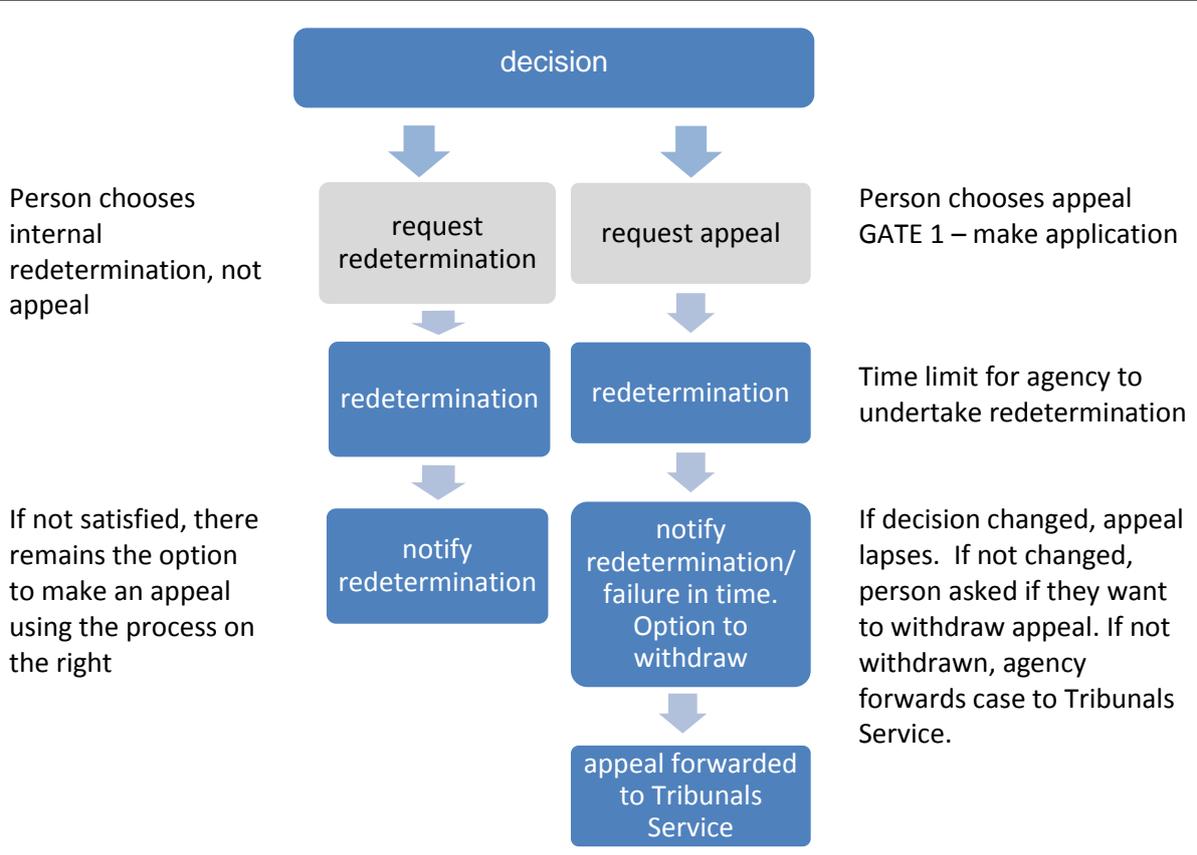
³ <https://www.gov.uk/government/statistics/personal-independence-payment-april-2013-to-october-2016>

⁴ [Tribunal and gender recognition statistics quarterly: January to March 2017](#)

⁵ Social Security (Scotland) Bill Policy Memorandum, SP Bill 18-PM, para 206

- people have a choice to have a decision looked at again without having to appeal
- the agency can always redetermine a case before any appeal
- the process promotes better decision making at the earliest stage e.g., better support for people to give an account of their situation when they make an application, better, more inquisitorial evidence gathering by the agency
- the process provides feedback loops for the agency to improve performance

An alternative– based on system currently operating for housing benefit



An alternative is outlined in the diagram above. This is based on the system currently used for housing benefit appeals.⁶ It involves a redetermination in every case, but just one application needed to get to an independent appeal. With this system, at the start of the process, people have a choice whether they just want an internal review (with an option to progress to appeal later) or whether they want an independent appeal. Those who opt for an appeal at the start will not have to make another application if the internal redetermination does not find in their favour. They will be given an option to withdraw the appeal, but if they do not exercise that option, the agency will forward the appeal to the Tribunals Service.

If you make it easy to appeal, won't there be too many appeals for the system to handle?

The aim is not to increase the number of appeals but rather to remove barriers to a fair hearing. The Scottish Government has not yet developed operational systems but its overarching policy aim is that the right payments are made to the right people at the right

⁶ Schedule 7 to the Child Support, Pensions and Social Security Act 2000 and rule 23 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008

time. Most decisions are overturned at appeal because the tribunal hears at first hand from the person about their situation, applying an inquisitorial approach to get the fullest account of the case.⁷ There is an opportunity to build processes that support people to complete their applications fully from the start, and to gather the most relevant evidence. Better decision making at the start should mean fewer appeals. That way, ‘an allowed appeal would be seen not as a defeat, but as a learning opportunity’.⁸

August 2017

⁷ [Social Security and Child Support Tribunal Hearings: Early Analysis of Appeals Allowed from Pilot Data, DWP \(November 2012\)](#)

⁸ [Administrative Justice, Better Decisions, and Organisational Learning, Robert Thomas, Public Law \(2015\)](#)