Internal Review Systems and Administrative Justice

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Abstract and Keywords

Internal review is a process whereby an administrative organization reconsiders its own decisions. The rationales typically offered for internal review are that it provides a means of challenging administrative decisions which is more accessible, quicker, and more cost-effective than external remedies such as appeals to tribunal and judicial review, and encourages improvement in the quality of initial decision-making in public administration. This chapter reviews the use made of internal review and evaluates the performance of several existing systems of internal review, concluding that they have failed to deliver the benefits claimed for them. Possible reasons for this failure are discussed and suggestions made as to what is required for internal review systems to achieve the aims to providing effective remedies for bad decisions and to contributing to improving initial decision-making.

Keywords: administrative justice, administrative law, remedies, appeals, internal review

1. Definition

Internal review is a process whereby an administrative organization reconsiders its own decisions. Its distinguishing feature is precisely that it occurs within the organization responsible for making the initial decisions involved in performing an administrative function. It can be contrasted with all external means of challenging decisions including appeals to tribunals, judicial review in the courts and complaints to ombuds. It can also be contrasted with organizations' own complaints procedures. Whilst these procedures are internal to the organization, complaints are not necessarily about the correctness of decisions themselves (although they may be) and do not always lead to reconsideration of a decision (although they may do so). It is therefore better to restrict the definition to processes explicitly designed for review of decisions that affect individuals' rights and interests in order to test whether those decisions are correct or at least appropriate.

Sainsbury, writing about UK social security (Sainsbury, 1994), constructed an ideal type of review whereby it is (1) an internal mechanism carried out by officials of the organization, and (2) is carried out only on limited grounds set out in legislation. He contrasted this with an ideal type of appeal under which (1) the individual has a right to instigate appeal proceedings, (2) the grounds for appeal are unrestricted, and (3) the appeal is heard by a body independent of that which made the decision.

Cane suggests that—adopting a spatial metaphor—review is internal if it takes place within the institution in which the original decision-maker was located at the time the decision was made (Cane, 2009). Adopting a different metaphor, he suggests that the distinction between internal and external review concerns the 'distance' between the original decision-maker and the reviewer. Looked at in this way, the distinction between internal and external review may be seen as a matter of degree which depends on various aspects of the relationship between the original decision-maker and the reviewer. In certain contexts, this may be more useful for understanding what is going on than a stark contrast between internal and external. Cane also contrasts internal review to reconsideration, using the latter term to mean a process carried out by the original decision-maker as opposed to a different official.

For the purposes of this chapter, I will use a broader definition of internal review than either Sainsbury or Cane, one which covers all internal mechanisms carried out by officials of the relevant organization whereby the review decision-maker is entitled to substitute a different decision or require a fresh decision to be taken. It includes both the situation in which an official reconsiders his or her own decision and that in which review is carried out by a different official. It is not limited to processes in which review is permitted only on limited grounds, or to statutory processes. However, the distinctions made by Cane and Sainsbury are relevant to the analysis and evaluation of internal review processes. I exclude from the scope of this chapter institutions and processes which de facto or *de jure* have a high degree of independence from the original decision-maker such as the Independent Review Service for the discretionary part of the former UK Social Fund (1988–2013) (Dalley and Berthoud, 1992).

The terminology used varies both within and across different national legal systems. In the UK, the terms used are typically 'review', 'internal review', and 'administrative review.' In other countries similar processes may be described as 'internal review', 'internal reconsideration', or in other ways. What is important is to examine the function and nature of the process.

Whatever they are called, internal review processes may be conducted either at the request of a person aggrieved by a decision or on the initiative of the organization concerned. They may be conducted voluntarily as a matter of administrative practice or may be required by legislation. The scope of a review may vary from one administrative context to another. In many contexts, the person or persons conducting the review has authority to review the decision on its merits and not merely on grounds of legality or error in deciding the facts. Where the review is required or permitted by legislation, the legisla-

tion may prescribe the procedure to some extent or may leave it to the organization concerned to decide how reviews are to be conducted. Where review is non-statutory, the procedure is at the discretion of the organization. Two important procedural variables include the material on which the review is based and the manner in which the aggrieved individual participates in the review. As to the former, review may be restricted to the evidence on which the original decision was based or may include new information which has been acquired since the original decision. As to the latter, there may be no input from the individual beyond asking for a review or there may be communication between the individual and the reviewer by letter, email, telephone, or face to face.

Internal review processes should not be considered in isolation. There are two relationships that need to be considered. One is the relationship of the internal review process to the organization in which it is located; how is it affected by being so located? The other is the relationship of the internal review process and the organization to the overall system of administrative law and administrative justice within that jurisdiction; what other remedies might citizens use to challenge decisions and how does that affect the internal review process?

Asimow's comparative analysis of administrative adjudication (Asimow, 2015) is concerned with the second relationship. He suggests that most systems of individualized decision-making in public administration have three phases: initial decision, administrative reconsideration, and judicial review. He includes under the term 'judicial review' any type or remedy pursued before a judicial body (whether described as a court or a tribunal) and whether the remedy is an appeal or a more restricted form of review in which some form of illegality must be shown in order to revise the decision. He uses these three phases and four key variables to construct five models of administrative adjudication and suggests that most extant systems correspond to one of five models.

Interestingly, internal review, as I have defined it, does not feature as a distinct element of Asimow's models. A review by the same administrative body which took the initial decision would actually be part of the first phase of Asimow's model: initial decision. However, Asimow's approach can be tweaked to treat internal review as a distinct phase so that, where the remedial structure includes both internal review and an independent tribunal, the sequence of phases would be: (1) initial decision, (2) internal administrative review, (3) appeal to/review by an independent tribunal, and (4) judicial review. Some examples of this structure are discussed in the following pages.

2. The Literature on Internal Review

Internal review processes have not been studied as intensively as the formal administrative law remedies both judicial and non-judicial. There is a voluminous literature on each of judicial review of administrative action, tribunals, and ombuds. By contrast, the literature on internal review is relatively sparse. This makes it difficult to provide a comprehensive analysis of internal review processes, to make generalizations about internal review processes or to engage in comparative legal analysis across different countries.

There is the additional difficulty with comparative analysis that the administrative law and broader governmental context in which internal review systems operate vary considerably, so that it can often be difficult to be sure when one is comparing like with like. This chapter does not, therefore, claim to be comprehensive or to provide a systematic comparative overview of internal review processes, and any generalizations I make should be viewed with caution. My analysis is limited to literature published in English and most of the specific examples of internal review examined are drawn from the UK, Australia, and Canada. What I have tried to do is to discuss the main issues raised in the literature and draw some provisional conclusions from it.

3. Rationales for Internal Review and its Advantages and Disadvantages

The two rationales typically offered for operating internal review processes in administrative organizations are (1) they can provide effective remedies for those aggrieved by administrative decisions which are more accessible, quicker, and more cost-effective than external remedies such as appeals to tribunals and judicial review, and (2) that they can encourage improvement in the quality of initial decision-making.

Harris, for example, thought it was rational to have formal review as the first stage of a structure for correcting decisions and to insist that a review be pursued before an appeal could be lodged (Harris, 1999). This was so particularly in areas with high volumes of decision-making. Prima facie internal review should be faster and cheaper than external appeals on the model of the courts. It had the additional advantage of not putting the individual through a potentially stressful tribunal hearing. He also argued that formal reviews might reinforce the idea of the administrative process itself forming part of a system of administrative justice and promote systemic reform from within. This echoed Mashaw's more general argument that achieving justice for citizens in their dealings with public administration was more likely to be achieved by developing 'internal administrative law' than by focusing on judicial review by the ordinary courts (Mashaw, 1983).

The Australian Administrative Review Council took a similar approach in two reports published in 1995 and 2000 (AARC, 1995; AARC, 2000). The latter report stated, first, that internal review might provide a quick and easily accessible form of review which could efficiently satisfy large numbers of clients who might otherwise not take up external review rights or unnecessarily pursue the more resource- and time-consuming external processes, and, second, that it might be a useful quality control mechanism, which because wholly 'owned' by an agency might have the best chance of feeding back and influencing primary decision-making.

Underlying the assumption that internal review will generally be quicker and cheaper than external reviews and appeals is a further assumption that the procedures involved will be simpler and more flexible when conducted within the administrative bodies that take decisions affecting individuals. External mechanisms, in addition to having their own

distinct procedures, will require their own personnel and premises and may require a full organizational infrastructure. The more cases that can be dealt with by internal review, the lower the costs of external review should be. The assumption that internal review procedures will be less complex and less formal than those of external reviews and appeals also grounds the assumption that it will generally be more accessible for citizens. There is also an explicit or implicit assumption that internal review will be tolerably accurate in identifying and correcting bad decisions.

There is widespread agreement that, in principle, the remedies available for bad administrative decisions should contribute to improving the quality of initial decision-making (AJTC, 2011). There are two possible reasons why this might happen. One is that awareness that decisions may be reconsidered may encourage decision-makers to take more care over decisions; another is that feedback can be provided to initial decision-makers to encourage improved decision-making. Such feedback might be general feedback (lessons drawn from a number of cases) or individualized feedback on specific decisions. Internal review mechanisms might have advantages over external judicial remedies for this purpose; being located within the organizations concerned, they might be better placed not only to identify bad decisions but also to identify the underlying reasons for bad decisions. Also, an internal review system can be deliberately designed to encourage improvement in the quality of initial decision-making whereas the external mechanisms tend to be focussed exclusively or mainly on redressing individual grievances.

A number of potential adverse consequences have also been identified (AARC, 2000; Ison, 1999; Sainsbury, 1994) including that internal review might:

- fail to provide effective remedies for citizens in the sense of failing to identify and correct a high proportion of bad decisions;
- delay access to external remedies such as tribunals where access to those remedies was postponed to review;
- discourage citizens from using the internal review process or external remedies;
- inflict on the individual the ‘therapeutic harm’ of receiving two negative decisions if the decision is not changed; and
- result in inconsistent treatment of citizens in different geographical areas.

Sainsbury (1994), when arguing against substituting internal review for independent appeals was also concerned that internal reviews did not give claimants one of the things they wanted from the process, that is to be able to participate and to be treated with dignity and respect. Ison (1999), although highly sceptical of the commonly stated rationale for internal review, did, however, support internal review provided it did not postpone access to appeals. It was acceptable in systems in which notice of appeal triggered an internal review and the internal reconsideration took place before the date of the appeal hearing so that the appeal would be heard on the normal timescale.

Internal review processes may not in practice manifest either the advantages suggested by supporters of internal review or the disadvantages suggested by critics. Whether and to what extent the possible benefits of internal review are realized or the possible disadvantages occur is to a large extent an empirical question that must be answered by examining the evidence, and the answers may vary according to the administrative context or the country under consideration. The judgment as to whether it is appropriate to introduce a system of internal review, or to maintain an existing one should, therefore, vary according to context, and should be based at least in part, on the *likely or actual* performance of that system rather than hypothetical performance.

The next section looks at some examples of internal review systems in operation.

4. Examples of Internal Review

This section focuses on examples drawn from the UK, Australia, and Canada. In all three jurisdictions, internal review has been used in a number of contexts including decision-making in social security administration and immigration control.

4.1 Social Security

Internal review has been a feature of social security decision-making in the UK for decades. It has been used in a wide range of benefits including means-tested contributory and non-contributory benefits. Space does not permit telling the full story but, amongst other situations, it has been used (1) in the administration of Supplementary Benefit and some other benefits in the 1960s and 1970s, (2) in the means-tested part of the Social Fund from the 1980s until 2013, (3) for housing benefit and council tax benefit, (4) for certain disability-related benefits in the 1990s, and (5) for a wide range of other benefits since 2013.

Coleman (1971) described the internal review process used in relation to claims for Supplementary Benefit in the late 1960s. Legislation expressly authorized the substitution of a revised decision where there had been an error of law or fact or a change of circumstances. In practice, an appeal to a tribunal automatically triggered an internal review to check whether the decision had been and remained correct. If the original decision was confirmed on review and the claimant pursued an appeal, a fresh investigation was carried out, normally by an official from the regional office. Occasionally, a decision would be referred to the Supplementary Benefits Commission headquarters if it raised an important point of policy. In Coleman’s sample 23.2 per cent of the decisions were resolved by an administrative decision without a hearing. Note that this is essentially the model approved of by Ison, as the claimant could have the benefit of a review without specifically requesting one and had no obligation to seek a review before appealing to a tribunal.

Since the 1960s there have been many changes in the structure and nature of benefits, the use of internal review, the availability of appeals and the structure of tribunals. Following the Tribunals Courts and Enforcement Act 2007 (TCEA), the position was that

nearly all social security decisions were subject to appeal to an independent tribunal, the Social Entitlement Chamber of the First-tier Tribunal, with a further appeal on a point of law to the Upper Tribunal and onward appeals to the ordinary courts. Initial decisions were taken by officials of the Department of Work and Pensions (DWP) and in practice many decisions were in fact internally reviewed. However, the claimant was not obliged to seek internal review before lodging an appeal. That changed in 2013. Section 102 of the Welfare Reform Act 2012 introduced a requirement that a claimant aggrieved by a decision should as the initial remedy seek a review of the decision by the DWP, a process known as mandatory reconsideration. This change was phased in and from 28 October 2013 all benefit decisions had to be reviewed by the DWP before an appeal could be lodged; this remains the position at the time of writing.

Internal review has also been formalized in other social security systems. In the Australian social security system, a person affected by a decision of a Centrelink officer may apply for review of that decision which is conducted by a review officer also employed by Centrelink. This must be done before the next stage, which is an appeal on the merits to an independent body, the Administrative Appeals Tribunal (AAT), with the possibility of onward appeal on a question of law to the Federal Court, and ultimately to the High Court of Australia.

In Canada, a person who disagrees with a decision made by the Canada Employment Insurance Commission (CEIC) on an employment insurance benefit can request a ‘reconsideration’ of that decision. The request for reconsideration will be considered by a CEIC official different from that which made the original decision. From the reconsideration decision, there is an appeal to the General Division of the Social Security Tribunal of Canada. There is a possibility of a further appeal to the Appeal Division of the Tribunal but permission is required. The appeal is on restricted grounds corresponding to the grounds for judicial review in the common law courts. It is then possible to apply for judicial review of the Appeal Division’s decision before either the Federal Court of Appeal or the Federal Court, depending on the decision being judicially reviewed.

The standard model in all three countries is, therefore, that internal review of social security decisions is compulsory before an appeal to an independent tribunal is permitted.

4.2 Immigration Control

The range of decisions subject to appeal to an independent tribunal in the context of UK immigration control has varied considerably over the years. Immigration appeals were first introduced by the Immigration Appeals Act 1969. Appeals were made to a single adjudicator with a further right of appeal to the Immigration Appeal Tribunal. Latterly, immigration appeals were absorbed into the two-tier tribunal system created by TCEA. The range of decisions that were subject to appeal varied over the years but in the early years of this century there was a right of appeal against most of the important decisions that might be taken concerning a person’s immigration status. However, from 2008 onwards, successive restrictions of rights of appeal were imposed, culminating in the Immigration

Act 2014, which restricted appeals to the First-tier Tribunal to three situations, namely appeals against (1) refusal of an asylum or humanitarian protection claim, (2) refusal of a human rights claim, and (3) revocation of refugee or humanitarian protection status.

Decisions not subject to appeal were to be reviewed using an existing review process which had been developed for refusal of applications for employment visas under the points-based system. Such reviews are carried out by officials of the Home Office. In this case, therefore, administrative review has been substituted for the right of appeal to an independent tribunal rather than merely postponing access to it. It has been estimated that as a consequence of these changes only 12 per cent of the 3.5 million immigration decisions taken annually are subject to a right of appeal (Thomas and Tomlinson, 2019).

In Australia, the internal review systems in immigration control were originally non-statutory, but the current system is statutory. Initial decisions on immigration matters and on refugee status may be subject to a merits review by a different official and may then be subject to a further merits review by an independent body, the AAT, with a further appeal on a point of law from the AAT to the Federal Court of Australia.

In Canada, a person who wishes to challenge an immigration decision may request a reconsideration by an immigration officer. Some categories of decision may be appealed to the Immigration Appeal Division (IAD) of the Immigration and Refugee Board of Canada (IRB). In the case of a decision which cannot be appealed, the individual may seek judicial review in the Federal Court of Canada.

4.3 Other Government Functions

All three countries also use internal review procedures in a number of other central government functions. In the UK, for example, internal review is also used in the context of taxation and criminal injuries compensation. The Criminal Injuries Compensation Scheme is a further example of the situation in which there is a right of appeal to an independent tribunal, but the individual must seek a review *before* lodging an appeal, thus postponing access to the First-tier tribunal.

Internal review is also used in the context of some local authority functions, the most notable in the UK perhaps being homeless persons legislation. Applicants for assistance under the homelessness legislation in England and Wales (Part IV of the Housing Act 1996 Act) have the right to request a review of a range of housing authority decisions in relation to homelessness under section 202 of the1996 Act. Applicants also have the right to appeal to the County Court on any point of law arising from a review decision or the original decision under section 204 but this right to appeal cannot be exercised until the original decision has been internally reviewed. There is a similar right of review in the corresponding Scottish legislation (sections 35A, 35B, Housing (Scotland) Act 1987) but no right of appeal to a court or tribunal leaving judicial review as the only remedy for an adverse decision.

Internal review, whether statutory as in the case of the review systems described in this section or non-statutory, has, therefore, been a prominent aspect of the administrative justice landscape in the UK and in a number of other countries in recent decades. I will now attempt an evaluation of the performance of two of these processes. These are chosen for illustrative purposes; space does not permit detailed analysis of more systems.

In the next section, I evaluate the actual performance of two internal review systems in the UK, social security and immigration control.

5. An Evaluation of Internal Review Systems in the UK

In order to evaluate the performance of internal review, we need normative criteria for judging whether it is operating appropriately. I suggest that these should be similar to those used for citizens' remedies generally:

- appropriate outcomes (i.e. detecting and correcting errors in initial decisions whilst not overruling sound initial decisions);
- impartiality and independence;
- procedural fairness;
- speed;
- cost;
- accessibility; and
- contribution to improving initial decision-making.

However, it is doubtful if the requirements of impartiality and independence and of procedural fairness can be the same or applied in the same way to internal review as they can to courts and tribunals. The Australian Administrative Review Council second report used a framework of principles broadly compatible with these to develop a best practice guide (AARC, 2000) for internal review. Apart from impartiality and independence, these follow directly from the benefits which have in fact been claimed either explicitly or implicitly for internal review. A few comments about some of the criteria are appropriate. A reasonable level of accuracy is the most important attribute of a remedial system just as it is the most important attribute of any initial decision-making system. A review system should identify a high proportion of actual errors and only rarely identify correct or defensible decisions as being errors.

Speed is desirable, in principle, because delay may add additional psychic injury to that caused to the individual by an incorrect adverse decision and may increase the cost of administration where delay results in inefficiency. The expectation of substantial delay in concluding a review may also discourage prospective applicants from applying for a review. However, there is likely to be a trade-off between speed and accuracy. Beyond a cer-

tain point, greater speed may lead to decreased accuracy because officials do not have time to consider decisions properly.

Cost may be viewed from the perspective of public administration or of the individual. As to the administrative perspective, in recent years, governments of the UK and of other countries have assumed that the use of administrative reviews would save significant costs to government departments in comparison to appeals to tribunals or courts. It is likely that costs would be saved in this way provided the use of internal reviews resulted in a smaller proportion of initial decisions being appealed. However, as with speed, there may be a trade-off between reducing costs and accuracy if reduced appeal numbers in fact lead to fewer bad decisions being corrected.

From the individual perspective, accessibility has several dimensions. One is economic cost. If any financial outlay is required to initiate a review, some prospective applicants are likely to be put off and as the outlay required increases the proportion who are put off is likely to increase. There may also be non-financial deterrents to using a review system such as procedures being difficult to understand or requiring substantial time and effort on the part of the individual.

I will now apply these criteria to social security and immigration control.

5.1 Reasons for Introducing Internal Review

The reasons given by the government for introducing mandatory reconsideration (MR) (DWP, 2013) were broadly consistent with the evaluative criteria suggested earlier and that process has now been operating for more than seven years—since October 2013. There has been no systematic and comprehensive research by independent researchers into the working and effects of MR but there a number of sources of evidence available on how it has worked in practice on which provisional conclusions can be based. Those sources include published government statistics, published research, and the evidence submitted to, and reports published by, Parliamentary committees.

The government’s case for substituting an internal review mechanism, administrative review (AR), for the right of appeal to an independent tribunal in immigration cases in 2014 was somewhat different. The main justification given was that appeal rights are routinely abused by those who have no good case yet seek to prevent or delay their removal from the UK (Travis, 2013). This claim has often been repeated by UK governments but has never been substantiated. Given that most classes of potential appellants lost their right of appeal rather than merely having access to it postponed, it is even more important than it is in the case of social security to achieve the potential benefits of internal review. However, there is rather less published data from which to draw conclusions.

5.1.1 Appropriate Outcomes

If the MR process were accurately identifying bad decisions then, all other things being equal (an important caveat), we would expect to see the overall number of appeals and success rates on appeal dropping over time. In fact, the reverse has happened: appeal

rates have risen after an initial drop and rates of success on appeal have also increased since the introduction of MR.

Thomas and Tomlinson's analysis of MR and appeals statistics covering the whole range of benefits (Thomas and Tomlinson, 2019) shows that from November 2013 the number of MRs decided rose substantially, peaking at well over 40,000 in November 2016 before dropping to a little below 30,000 in 2017. However, the numbers of MRs which were revised in claimants' favour changed little over that time. By contrast, the proportion of appeals which were successful rose from approximately 40 per cent to approximately 65 per cent.

More detailed information is available for two benefits, Personal Independence Payment (PIP) and Employment and Support Allowance (ESA), which together are a very large part of the DWP workload and are the benefits which give rise to the greatest numbers of MRs and appeals. A DWP statistical release (DWP, 2019a) included experimental statistics based on tracking of initial decisions following PIP assessment through to MRs or appeals for the period from April 2013 to March 2019. There were 3.3 million initial decisions and 750,000 MRs had been registered in relation to initial decisions. In 15 per cent of completed MRs (excluding those withdrawn), the award was changed. In 41 per cent of completed MRs, an appeal was lodged. In 8 per cent of cases, the DWP changed the decision before it was heard at a tribunal and in approximately two thirds (66%) of cases cleared at a tribunal hearing, the DWP decision was overturned and the decision was revised in favour of the claimant.

The key decision for most ESA claimants is the work capability assessment. The pattern of decisions, MRs, and appeals is broadly similar to that for PIP (DWP, 2019b) and recent tribunal statistics (see, e.g., Ministry of Justice, 2019) show that the rate of overturn of DWP decisions is not unique to PIP and ESA; it has also been high for a newer major benefit, Universal Credit.

It is not possible to derive definite conclusions on the appropriateness of MR decisions from statistics alone, but the other evidence available also suggests that MR has a significant accuracy problem. The sources include a survey of welfare rights advisers by the Low Commission in 2013 (Low Commission, 2014), a study conducted by the Social Security Advisory Committee (SSAC, 2016) in 2015–16 of social security decisions and mandatory reconsideration on ESA and Tax Credits and a number of inquiries by the National Audit Office (NAO) and committees of the UK Parliament over many years, all of which have highlighted concerns about initial decision-making by the DWP, (NAO, 2002/2003; HC Work and Pensions Committee, 2018). These reports are consistent in identifying apparent weaknesses in initial decision-making by the DWP and the more recent reports raise concerns specifically about MR. The Work and Pensions Committee inquiry into PIP and ESA assessments (HC Work and Pensions Committee, 2018) received much evidence commenting specifically and adversely on the quality of MR decision-making. Multiple organizations with experience of supporting claimants told the committee that, given their

experience of the MR process, they advised claimants that the chances of getting an award changed at the MR stage were minimal.

The DWP has not accepted that the high rate of appeals allowed indicates serious deficiencies in either initial decision-making or the MR process, arguing that the high rate of decisions overturned at appeal is largely driven by the emergence of new evidence that was not available at initial decision or MR stage. However, the DWP has not provided statistical information to substantiate its claim and the Work and Pensions Committee was not convinced by this explanation.

Therefore, although in the absence of systematic and comprehensive research we cannot draw any definitive conclusions about the accuracy of MR decision-making, the evidence from a variety of sources is consistent with the conclusions that there is a high error rate in initial decision-making, that the MR process is failing to correct a large proportion of defective decisions, and that the process has failed to achieve its stated aim of providing an effective remedy.

The statistical information available on ARs is not as detailed as that for appeals to tribunals and, as there is no right to appeal an adverse AR decision, it is not possible to make direct comparisons of internal review and appeal success rates; the two remedies are dealing with different categories of cases. However, we can say that success rates are much lower for ARs than for appeals. At the time AR was introduced, about 49 per cent of appeals were successful (Thomas and Tomlinson, 2019) and, over recent quarters, consistently half of appeals have been successful, for example, the First-tier Tribunal Immigration and Asylum Chamber disposed of 14,000 appeals in July to September 2019, 80 per cent (11,000) of these were determined by a judge at a hearing and 51 per cent were allowed/granted (MoJ, 2019).

Two recent reports by the Independent Chief Inspector of Borders and Immigration (ICIBI) based on an initial inspection of administrative reviews in 2015 (ICIBI, 2016) and a re-inspection based on ARs in 2016 (ICIBI, 2017) indicated that in 2015–16 (according to the Home Office management information) only 8 per cent of in-country ARs, 22 per cent of ‘at the border’ ARs and 21 per cent of overseas ARs were successful. In 2016–17, success rates had dropped further to 3.4 per cent for in-country cases and 6.8 per cent for ‘at the border’ cases.

The initial sampling of files by ICIBI indicated that valid applications were being incorrectly rejected and that the quality assurance process was not identifying and rectifying this. The inspections team’s analysis found that the AR process identified only ten out of twenty incorrect refusal decisions in the sample, a success rate of only 50 per cent. In the case of overseas applications, the AR process identified twenty out of twenty-six incorrect refusal decisions, a much higher success rate of 77 per cent. In the second inspection, the ICIBI found that whilst the handling of in-country reviews had improved considerably, progress with overseas and ‘at the border’ reviews had been slower.

For completeness, we should mention that, although there is no right of appeal from an AR, a person aggrieved by an AR decision may seek judicial review and there is a large (although declining) judicial review (JR) caseload. However, the scope for changing decisions is much narrower on judicial review (legality) than on appeal (merits) and it is also more difficult to determine whether a particular disposal represents success or failure for the applicant. So, a comparison of 'success rates' of AR and judicial review would be of limited value.

The information available provides cogent evidence that the quality of AR decision-making is not as good as it should be. When one considers also the large discrepancy in success rates between appeal and AR, the claim that AR can identify and correct most defective decisions has not been proved. It is also relevant to consider the recent history of the Home Office. It has been subject to much criticism over a number of years of its decision-making standards (Thomas and Tomlinson, 2019). Indeed, the Home Office had admitted in the MR impact assessment that the high appeal success rate was largely attributable to its own errors: approximately 60 per cent of appeals were allowed because of case-working mistakes.

5.1.2 Speed

The PIP statistics released in September 2019 show clearance times for MRs fluctuating over the period during which MR has operated, with the median MR clearance time reaching an all-time high of 69 calendar days in July 2019. By contrast, clearance times for ESA work capability assessment have been much less. After an early spike followed by a steep drop the range of variation has been relatively narrow and between August and October 2019 the median clearance time was six days. Therefore, while MR has in fact been a relatively speedy remedy in relation to one major benefit—ESA—the DWP has failed to achieve consistency in the time taken to process MRs for another major benefit—PIP—and processing has been particularly slow recently. While we cannot tell from this data alone whether disputes are being finally resolved more swiftly than under the previous system, we can say that the claim that *in general* MR would be a relatively speedy remedy has not been proved.

As regards immigration control, the first ICIBI report noted that the Home Office had created a 'separate dedicated' AR Team in Manchester to handle in-country reviews. The report noted that this team was comfortably meeting the twenty-eight days' service standard for responding to reviews and that at the border ARs were also being processed well within twenty-eight days, as were over 80 per cent of overseas ARs. However, inspectors also identified inconsistencies in how applications delays were causing difficulties for some applicants. Stakeholders had told inspectors that Tier 4 applicants were regularly deterred from applying for an AR because of the length of time it took for a decision and the fact that a fresh study visa application could not be made while an AR was pending. The time taken to process internal reviews in the Home Office does seem to have been less than in the DWP and to have corresponded much more closely to existing service

standards, but it would be unwise to reach definite conclusions about the speed of AR in practice on the basis of such limited data.

5.1.3 Cost

From the claimant's perspective, there has been a clear contrast between social security and immigration control. Both MR and appeal are free to claimants so in theory there is no cost barrier. In immigration control, in-country applicants have been charged a fee of £80 for online (both in-country and at the border) AR applications, while overseas applications have been free. In the absence of data, we cannot know whether and to what extent the fee required may be acting as a deterrent to seeking an AR. The rationale for charging a fee for access to justice in the one context but not the other is unclear.

We do not have data on the cost to government covering all social security benefits, but data on the costs of MR and appeals was provided to the Work and Pensions Committee for its PIP/ESA inquiry. The DWP estimated a unit cost of £55 per MR for new PIP applicants and £38 per MR for PIP applicants who were undergoing reassessments. The estimated unit cost of ESA MRs was £54. The DWP also estimated the unit costs of appeals as £211 per PIP appeal for new applicants, £93 per PIP Appeal for applicants who were undergoing reassessment and, on average, £83 for each ESA appeal. To this we should add the costs incurred by the HM Courts and Tribunal Service in cases which are appealed. The Ministry of Justice estimated that for 2015/16, the average unit cost of a PIP or ESA appeal was £543.

The costs of MRs are clearly lower than those for appeals but there are reasons to doubt whether MR has reduced the overall cost to the government of providing remedies. First, MR will save money only in cases which would have gone to appeal under the former system but have not done so because of the introduction of MR. Secondly, in cases in which MR fails to correct errors in decisions which are then overturned on appeal it is likely to have actually increased the cost of providing remedies. There is nothing in the available costs data to support the inference that the introduction of MR has saved money.

In immigration control, the Home Office's Impact Assessment estimated savings of £261m over ten years from the introduction of ARs, but at the time of the inspection, no analysis of actual cost savings had been done, and the Home Office did not have any reliable data on costs associated with judicial review claims, even though the impact assessment had acknowledged that these were likely to increase as a result of the removal of appeal rights. ICIBI concluded that the Home Office "was not yet able to demonstrate that it had delivered an efficient, effective and cost-saving replacement for the previous appeals mechanisms."

5.1.4 Accessibility

There is evidence both that claimants find the MR process off-putting and that MR may have discouraged claimants from exercising their right of appeal. The sources include a small-scale study of twenty Citizens Advice Bureaux clients carried out in 2014 (Citizens Advice, 2014), the SSAC Report on ESA and Tax Credits (SSAC, 2016), and the DWP's

own research, the *Claimant Experience Survey 2014/15* (DWP, 2016). In the latter, as the SSAC noted, researchers stated that MR was 'perceived to be a lengthy, complex, and error-prone process, involving staff who were not always equipped with the knowledge required'. In its PIP and ESA Assessments inquiry, the House of Commons Work and Pensions Committee (2018) noted that organizations with experience of supporting claimants:

> frequently view MR as simply a 'hurdle', 'barrier' or hoop that claimants must jump through before going to appeal, rather than a thorough review. Worryingly, organisations reported that having failed to get a new decision at MR, some claimants give up rather than going to appeal, despite not necessarily agreeing with the decision.

This echoed evidence given by Judge Robert Martin (the senior social security judge), when giving evidence to the Committee in 2014 (House of Commons Work and Pensions Committee, 2014). It is not possible to reach a definitive conclusion but there is substantial evidence suggesting that remedies for defective social security decision-making have become less accessible as a result of the 2013 changes both because of difficulties claimants experience in operating the MR process itself and because these difficulties may discourage appeals.

In immigration control, the issue of fees has already been discussed. It is conceivable that there are other factors which are having an adverse impact on the accessibility of AR, but we do not have the data that would enable us to evaluate this.

5.1.5 Improving Initial Decision-Making

There is little evidence to suggest that initial decision-making by either the DWP or the Home Office has improved as a result of the introduction of MR and AR. The statistical data on the outcomes of MRs and appeals we have reviewed makes such a claim implausible and there is also more direct evidence on the question. The SSAC report raised concerns about the adequacy of feedback loops within DWP and HMRC (those making decisions were getting little useful feedback from colleagues conducting MR) and the extent to which the DWP was learning from previous mistakes via feedback from, or observation, of appeals. It also raised the question of whether the Quality Assurance Framework used by DWP and HMRC was fit for the purpose of evaluating the quality of decisions. It made recommendations to address this (SSAC, 2016). Similarly, the Work and Pensions Committee recommended that the Department must learn from overturned decisions at appeal in a much more systematic and consistent fashion and made a number of recommendations (House of Commons Work and Pensions Committee, 2018). The Committee also expressed concerns about the involvement of independent contractors in PIP and ESA and considered both the performance of the contractors and supervision of that performance by the DWP to be inadequate.

In immigration control, the first ICIBI report had found that there was no systematic feedback to original decision-makers from ARs of overseas and at the border reviewers. The

outcomes of in-country AR outcomes were fed back regularly to original decision-makers (via their managers). Managers claimed this had resulted in improvements in the processing of grant decisions, but the available data did not demonstrate whether errors in original refusal decisions had decreased as a result of the AR process. Generally, it was unclear whether the AR Team was learning from its own mistakes, since the inspection found that the locally held data on conceded PAPs and lost JRs was full of omissions (ICIBI, 2016).

The re-inspection report (ICIBI, 2017) concluded that the Manchester AR 'hub' had worked hard to ensure that the results from AR outcomes, quality assurance, and litigation were used to further continuous improvement of in-country AR decisions and of initial decision-making. By contrast, there were significant gaps in how learning from overseas and 'at the border' ARs was being captured and shared. In all three areas there was a need to do more to capture data that demonstrated how the AR system was working for each category of AR, and the Home Office needed to do more analysis.

5.1.6 Conclusions

Drawing this analysis together, we can say that the relevant UK government departments have simply failed to prove the main claims made for MR and AR before their introduction. There is no convincing evidence in either context that in practice internal review decision-making has been reasonably accurate, that it has reduced the cost to the government of providing remedies, or that that initial decision-making has improved as a result of its introduction. In fact, there is substantial evidence suggesting that internal review decision-making is not accurate enough and that initial decision-making has not improved greatly. In social security, there is substantial evidence suggesting that internal review is not speedy enough, that claimants find the MR process difficult to operate and that it may even be discouraging some claimants from pursuing appeals, although none of these effects can be conclusively demonstrated. There is less reason for concern about speed in immigration control or accessibility although in the case of the latter, the position is unclear.

6. Why Does Internal Review Sometimes Fail to Achieve its Aims?

In neither of the systems we have discussed has internal review been shown to achieve the benefits routinely claimed for it by governments. It is therefore worth inquiring why internal review might fail to achieve its aims. The precise combination of reasons will vary from context to context, but based on recent UK experience, we can consider a number of possibilities. Using a framework adapted from Halliday's research into the effect of judicial review on homelessness decision-making (Halliday, 2003), I suggest that the relevant factors might be categorized as relating to:

- the decision criteria, i.e. law and other standards that govern decision-making;

- the processes followed in making decisions; and
- the decision-making environment.

6.1 UK Social Security Decision-Making

Halliday suggested that the likelihood of officials following the law correctly might vary according to the complexity and difficulty of the law governing decisions. That is certainly a possible reason for the apparently high level or error in social security and immigration decision-making both at initial decision stage and at the MR stage. Both areas of law are notoriously complex and change very frequently, but we do not have the right sort of evidence to conclude that this complexity is a substantial cause of error.

The processes of internal review may well have contributed, particularly in social security. New evidence that turns out to be decisive for the decision frequently emerges for the first time at tribunal hearings, suggesting that MR processes are not the most appropriate for turning up relevant evidence and the fact that new evidence is not normally admitted in immigration ARs does not seem conducive to accuracy. Specific procedures also appear to encourage delay. There is no time limit for concluding an MR, which removes one incentive for speedy decision-making and the fact that MR postpones access to the tribunal builds in delay to all cases in which an appeal is made. The multi-stage structure of MR decision-making also seems inherently likely to reduce the number of claimants appealing by causing applicant fatigue. Lack of independence may also be an issue. MR reviewers generally work with front-line decision-makers and the closeness of reviewing and reviewed officials might work against objectivity in reviewing decisions. There is more obvious de facto independence in the AR system given the creation of the separate AR Hub. However, this may have been undermined by the fact that administrative reviews were undertaken by low-level, untrained, and temporary staff with limited or no experience of immigration law, that the AR Hub had been staffed with junior and inexperienced officials, and arrangements for quality assurance were poor (ICIBI, 2016, 2017; Thomas and Tomlinson, 2019). Whilst the AR hub seemed to have had some effect in improving immigration decision-making, in social security it appears that there are not effective processes for organizational learning through feedback mechanisms from both tribunals and MR reviewers to initial decision-makers. The involvement of external contractors in some benefits inevitably complicated both the processes of decision-making and of organizational learning.

The decision-making environment (Halliday, 2003) is a compendious category which includes the resources available to make decisions, internal organizational culture and external pressures from politicians and the media. Limited resources may be an issue in these contexts. In common with other UK departments, the DWP has been subject to substantial cuts in staffing levels since 2010 without a corresponding reduction in workload. External pressures may also be having an impact on decision-making. Recent years have seen negative government rhetoric from politicians, including government ministers, on claiming benefits (Jowit, 2013). This rhetoric, combined with the patently inadequate

arrangements for learning from mistakes and, more generally, the conspicuous lack of evidence to support the government's case for introducing MR might lead us to infer a lack of genuine enthusiasm in government for improving the quality of decision-making. Indeed, the known facts about MR are consistent with the inference that the primary purpose of introducing MR was to reduce the numbers of appeals to tribunals in order to save the government money rather than to improve remedies for the citizen.

In considering why internal review has not achieved its goals in any context, it is necessary to look closely at original decision-making in that context. There is ample evidence to suggest that there has been a significant problem of defective initial decision-making in UK social security administration over many years with causes including deficiencies in training, lack of resources, inadequate procedures for monitoring the correctness of decisions, and a background of negative political rhetoric and media coverage. If nothing is done to address these issues that affect initial decision-making, it seems unlikely that the introduction of a new internal review system would result in any substantial improvement.

Similarly, in immigration control, the quality of Home Office decision-making has been subject to severe criticism over many years. Cuts in staffing levels may again be an issue. There is some evidence from other investigations of issues around training and workload. There is even more reason to suppose that government rhetoric and media coverage have had an impact on decision-makers than in the case of social security. Over recent decades, successive governments have been highly reactive to perceived public concern over the level of immigration and its economic and cultural consequences so that the main driver of policy has been the desire to reduce the numbers coming to the UK, culminating in the declaration by the Home Secretary of an intention to create a 'hostile environment' for illegal immigrants in 2013 (Travis, 2013). Remedies themselves have been under attack. The government and other politicians have claimed that rights of appeal and judicial review were routinely abused and manipulated by those who were rightly barred from entry to, or faced with removal from, the UK. Against this background, it would not be surprising if political rhetoric and media coverage influenced decision-making by public officials and the recent Windrush scandal is persuasive evidence that they do (HC Public Accounts Committee, 2019).

Given this background, the conspicuous failure to create effective feedback systems, the failure even to gather the type of information necessary to show that AR has improved decision-making, and the relatively high success rate at tribunals, the most plausible inference to draw is that the government's claim that AR would provide an adequate remedy was not sincere. Rather, it was merely rhetorical cover for the aim of reducing the number of decisions being successfully challenged by the wholesale removal of rights of appeal.

However, although the reasons suggested for the failure of internal review to deliver the claimed benefits either in social security or in immigration administration are plausible, we do need more comprehensive empirical research to determine how internal review

has been working in practice and what the causes of success and failure have been in these and in other areas.

7. Conclusions

Governments have been attracted to internal review systems in a variety of national and policy contexts. However, several actual internal review systems have failed to deliver the benefits that are routinely claimed by governments. Possible reasons why these aims have not been achieved have been discussed in this chapter, but it is unlikely that internal review systems will disappear from the grievance redress landscape soon either in the UK or elsewhere. Nor should they, for internal review has the potential both to provide effective remedies for bad decisions and to contribute to improving initial decision-making in public administration. However, for internal review systems to achieve these aims, I suggest that the following are requirements.

The first requirement is political will. Policy-makers (both elected and appointed) and public sector managers must be genuinely committed to providing effective remedies and to improving the quality of initial decision-making. Second, internal review systems should be appropriately designed to achieve the aims set out here. Third, arrangements for feedback to initial decision-makers ought to be consciously designed into MR systems. There ought also to be specific processes designed to identify systemic weaknesses via internal review and report that information up the management chain. Fourth, internal review decision-makers ought to have an objective and impartial attitude to their task and it may be beneficial to have significant de facto separation between initial decision-makers and reviewers. Fifth, public authorities should systematically collect and publish the data necessary to determine whether internal review systems are achieving those aims. Sixth, there should be an independent element in quality assurance processes. Seventh, internal review processes must be adequately resourced. Eighth, governments must ensure that initial decision-making is adequately resourced and that generally the decision-making environment is conducive to good decision-making. Otherwise, systemic weaknesses revealed by the internal review system will merely continue.

Finally, it is important to create the right relationship between internal review and independent external remedies such as appeals to tribunals. Both principle and the experience of internal review in UK practice suggest that internal review should not be substituted for appeal, nor should appeal be postponed to review. Rather, internal review should take place automatically when an appeal is lodged and should not delay the hearing of the appeal.

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