Work and Pensions Select Committee Inquiry on PIP and ESA Assessments: Written Evidence Submission of Professor Robert Thomas and Dr Joe Tomlinson

1. We are academic lawyers based at the University of Manchester and the University of Sheffield, with an interest in the administrative justice system. We are both members of the Wider Core Team at the UK Administrative Justice Institute. We make these submissions in our personal capacity.

2. In recent years, we have been researching internal review procedures in government, including the mandatory reconsideration system ('MR'). Our submissions relate in particular to the Committee's questions on MR and appeals.

3. It is our view that the underlying idea of having a quick and informal check of decisions is unobjectionable. However, the practical implementation of MR has been problematic. As such, improvements need to be considered.

Background

4. The DWP introduced MR to resolve disputes as early as possible and to reduce unnecessary demand on tribunals, by resolving more disputes internally. Previously, claimants who wanted to contest a refusal decision could appeal to a tribunal. When an appeal was lodged, the DWP would routinely review the refusal.

5. The key difference with MR is that the internal review conducted by the DWP is now a separate and compulsory stage in the dispute process. Claimants can only access a tribunal once they have navigated the MR stage. Put simply: a one-stage process of challenging decisions became a two-stage process. There are concerns that MR is an additional barrier to accessing a tribunal.

6. Between 2013 and 2017, some 300 officials (mostly at Executive Officer grade) have undertaken some 1.5 million mandatory reconsiderations.

Does MR work?

7. In some respects, yes. The main advantage of MR is the speed of the process. Since 2014, the average monthly clearance time for mandatory reconsiderations has not exceeded 20 days. This compares with an average timeliness of appeals of 20 weeks. Generally speaking, claimants want disputes resolved quickly. This advantage of MR should not therefore be understand.

8. There are various concerns with multiple aspects of the MR process. One concern is that the two- process weakens access to justice by deterring claimants with strong cases from proceeding to tribunal appeals.

9. There has been a dramatic decline in the number of appeals lodged following the introduction of MR. In 2014/15, appeal receipts were 73 per lower compared with 2013/14.[1] There have been other contributory factors in play here, such as the early cancellation in 2014 of the contract with ATOS to undertake health assessments for Employment and Support Allowance and a consequent slowdown in initial decisions.

10. The government has viewed the continued reduction in the volume of appeals as evidence that mandatory reconsideration was successful in its aim of resolving more disputes without the need for appeal.

11. A reduction in appeals was to be expected if the new system was working well. MR was justified, at least in part, as a filtering mechanism. Such filtering, common in other redress mechanisms (*e.g.* at the permission stage in judicial review), is often a practical necessity to avoid overload.

12. A problem with the notion that MR is successfully filtering unnecessary appeals is that MRs are being undertaken by the same government department whose initial decisions are being challenged, prompting concerns there may be an operating self-interest in discouraging claimants from pursuing their cases further.

13. Evidence also suggests that claimant fatigue will often discourage people from challenging decisions and this is likely to be a major factor here. Vulnerable individuals with a long-term disability, or a physical or mental illness living in difficult circumstances often lack the ability and confidence to pursue a challenge against the DWP. This situation may be worse when an individual's claim has already been rejected twice.[2] The change with MR is that an individual must decide twice to challenge in order to reach a tribunal appeal.

14. There are also concerns with regard to the quality of MR decision-making. Shortcomings had been identified in the pre-2013 reconsideration system by the then President of Appeal Tribunals. There was little evidence that the DWP effectively reconsidered decisions before they came to the tribunal; 'often the appeal papers show an unwillingness on the part of the decision-maker to reconsider the decision in the absence of the appellant supplying fresh medical or other third party evidence'.[3]

15. With MR, the DWP stated that it would ensure its decisions would go through a 'robust reconsideration' by which decisions would be checked thoroughly and accompanied by detailed reasons.[4] However, the quality of reconsideration decisions has been criticised.[5] Tribunal Judges have expressed scepticism about the thoroughness of mandatory reconsideration and view the process as an additional administrative barrier for claimants who wish to challenge their decision rather than a substantive re-examination of the

evidence.[6] Advisers have stated that decision notices often repeat initial refusal reasons without further elaboration. From their perspective, MR is commonly seen as something of a rubber stamp.

16. Of all the transactions claimants have with DWP, MR has the lowest satisfaction rating.[7] Claimants have felt that any new evidence submitted for MR is ignored and that the process is not a thorough audit of the original decision.[8] This in turn prompts claimants to lodge appeals that could have been properly resolved earlier. For instance, it is common for claimants to be awarded no entitlement points initially, to submit additional information at the reconsideration, which then confirms the initial decision, for the tribunal to then award maximum points.[9]

17. The above concerns are reflected in the noticeably lower success rates for claimants at MR compared with appeals. Of the nearly one million reconsiderations decided between 2013-16, 17 per cent were allowed. By contrast, appeal success rates have been substantially higher: 40per cent of appeals were allowed before MR and this has increased to 65 per cent.

18. While MR was introduced to reduce unnecessary appeals, the proportion of initial decisions overturned by tribunals has increased. Comparing review and tribunal outcomes is not necessarily comparing like with like because of the different cohorts of claimants. Furthermore, there is not much of a clear picture as to why tribunals allows appeals. The DWPs has argued that appeals are often allowed because claimants submit new evidence not previously considered. Accordingly, the rate of allowed appeals does not imply that initial decisions were inadequate. By contrast, the tribunal's perspective is that decisions are most commonly overturned because the tribunal hearing generates additional evidence, usually in the form of oral evidence provided by the appellant.[10] What is apparent though is that the rate by which appeals are allowed – 65 per cent – strongly suggests that MR is not performing its aim of reducing unnecessary appeals that would succeed at the appeal stage. On the contrary, the success rate indicates that significant improvements are required to the MR process so that it can capture similar information as tribunals.

19. Appeals are frequently allowed because the tribunal is able to investigate the details of an individual's circumstances more effectively in a hearing than through the paper-based processes used by the Department for Work and Pensions. There are also concerns that the reviewers conducting MRs frequently uncritically accept health care reports from the DWP's contracted supplier (the quality of which has been criticised),[11] and disregard other evidence such as a medical report by a General Practitioner. Tribunal judges regularly see decision letters and health assessment reports at appeal hearings that have used standard or repetitive language for different functions, which in turn undermines confidence in the rigour of the original assessment.[12]

20. At present, it is likely that the MR process results in a significant number of claimants not receiving benefits to which they are entitled if they do not pursue their cases to the tribunal.

Further, such a high proportion of allowed appeals erodes the trust of claimants and stakeholders in the system.

21. A further area of concern relates to the opportunity to learn from tribunals in order to make better primary decisions. A redress system should have feedback-loops built in throughout to improve front-line decisions. The DWP aspires to a 'right first time', but it has struggled to raise the quality of decision-making. Staff undertaking MRs are not routinely notified if their decisions are overturned by tribunals.[13] Previous research has found that the most effective influence of tribunals was through direct practical experience by individual officials in seeing how tribunals adjudicated upon cases.[14] The DWP is increasing the previously low attendance by presenting officers, but the role of tribunals has overall been diminished. The DWP has also been unable to use the reconsideration process in order to capture information from claimants in the same manner as tribunals.

22. Overall, there are concerns that mandatory reconsideration has reduced access to justice. The underlying idea of having a quick and informal check of decisions is unobjectionable, but its practical implementation has been problematic. It is doubtful whether the process as currently designed is adequate.

What changes are needed?

23. The basic challenge with MR is to design an innovative dispute resolution processes that go beyond the traditional administration-appeal divide.

24. There is a successful precedent in this respect. The former Independent Review Service (abolished in 2013) was a unique dispute resolution system for social fund decisions.[15] The Independent Review Service operated an efficient, cost-effective administrative law dispute resolution model, which involves the customer meaningfully in the process and is accessible, timely, proportionate, and fair.[16] In 2012/13, the Independent Review Service completed 99 per cent of some 48,000 cases within 21 working days of receipt at a unit cost of £73.

25. Many current models of administrative review—such as MR—demonstrate a lack of innovation akin to social fund adjudication.

26. We suggest the following four points are important considerations in any discussion of improving the present MR system:

    i. To ensure their independence and to insulate them from political and administrative pressures, reviewers need to be separate and autonomous from initial decision-making institutions.

    ii. Review procedures need to be operated by specialist and expert reviewers with experience of initial decision-making. Such reviewers need specialist training in the

essential aspects of decision-making: fact-gathering and assessment; using inquisitorial procedures effectively; impartiality; and reason-giving.

iii. To ensure oversight and transparency, the DWP should allow independent and external oversight.[17] The DWP must be willing to cede some control of MR to promote public confidence.

iv. MR should be overseen by a separate statutory officer responsible to Parliament. The formal responsibilities of this officer would be to monitor quality, to promote feedback and organisational learning, and to report publicly. The position could also have a leadership role to improve the quality of primary and review decision-making, and to serve a liaison role between government and the judiciary.

v. Quality assurance panels incorporating external members could also promote independent oversight.

vi. Summaries of MR decisions should be published.

vii. The DWP needs to take responsibility for promoting the quality of both procedures and decision outcomes. At present, some claimants experience unnecessary difficulty in attaining their entitlements. This is self-defeating as it undermines the legitimacy of MR and the DWP more generally. Government must ensure that the quality of procedures and decisions has equal priority as speed and cost. To this end, government needs to invest in developing a culture of adjudication within the MR process.

viii. Administrative review needs to be seen within the context of the digitisation transformation programme being pursued by the Ministry of Justice and HM Courts and Tribunal Service. The intention is to transform the justice process (including tribunals) by making it digital by default. This will be achieved by largely replacing physical hearings with continuous online hearings.[18] Online dispute resolution will soon be piloted in social security tribunals. It is expected that such online appeals could be resolved in a couple of weeks or so – significantly quicker than the current average of 20 weeks. With the advent of online tribunal procedures, the distinction between administrative review and tribunal procedures may again be reshaped. If tribunals are effectively digitised, then there could be an argument for reverting back to the previous position in which tribunals were the principal means of redress and for discarding the current MR scheme. There is, of course, significant scope for departmental disagreement over this within government. Nonetheless, it makes little sense to operate paper-based administrative review procedures—such as MR—when simultaneously introducing online tribunal hearings.

Professor Robert Thomas, University of Manchester

[1] The subsequent increase is largely accounted for by appeals lodged by claimants being transferred from Disability Living Allowance to Personal Independence Payments.

[2] S. Halliday and D. Cowan, *The Appeal of Internal Review: Law, administrative justice, and the (non-) emergence of disputes* (Oxford: Hart, 2003) pp.138-40.

[3] President of the Social Entitlement Chamber of the First-tier Tribunal, *Report on the standards of decision-making by the Secretary of State and Child Maintenance and Enforcement Commissioner 2007-08* (2008), para 1.7.

[4] Department for Work and Pensions, *Mandatory Consideration of Revision Before Appeal* (2012), p.11.

[5] In *MD v HMRC* (TC) [2017] UKUT 0106 (AAC), [11] the Upper Tribunal noted that as the reconsideration was 'woefully inadequate … [without] any meaningful reasoning'.

[6] P. Gray, *The Second Independent Review of the Personal Independence Payment Assessment* (DWP, 2017), p.45.

[7] Department for Work and Pensions, *DWP Claimant Service and Experience Survey 2014/15* (2016), p. 85.

[8][8] P. Gray, *The Second Independent Review of the Personal Independence Payment Assessment* (DWP, 2017), p.45.

[9] P. Gray, *The Second Independent Review of the Personal Independence Payment Assessment* (DWP, 2017), p.29. Tribunal judges have noted that they often see appellants awarded no entitlement points initially, who are then given the maximum award possible: 'Why I went to court for my disability payments' BBC News 2 May 2017. Claims for both Employment and Support Allowance and Personal Independence Payments are decided on the basis of a graded scale of points scored against health conditions and living abilities.

[10] President of Tribunals Report 2008-09, [1.7].

[11] House of Commons Public Accounts Committee, *Department for Work and Pensions: Contract Management of Medical Services* (HC 744 2012-13); House of Commons Public Accounts Committee, *Contracted Out Health and Disability Assessments* (HC 727 2015-16).

[12] P. Gray, *The Second Independent Review of the Personal Independence Payment Assessment* (DWP, 2017), p.45.

[13] Social Security Advisory Committee, *Decision Making and Mandatory Reconsideration* (2016), p 50.

[14] N. Wikeley and R. Young, 'The Administration of Benefits in Britain: Adjudication Officers and the Influence of Social Security Appeal Tribunals' [1992] P.L. 238, 250-259.

[15] See T. Buck, *The Social Fund: Law and Practice* (London: Sweet & Maxwell, 2000); T. Buck, 'A Model of Independent Review?' in M. Partington (ed.), *The Leggatt Review of Tribunals: Academic Seminar Papers* (Bristol Centre for the Study of Administrative Justice, Working Paper Series No 3, 2000).

[16] Social Fund Commissioner, *Annual Report 2012/13* (2013), p.i.

[17] Social Security Advisory Committee, *Decision Making and Mandatory Reconsideration* (2016), p.50.

[18] Sir Ernest Ryder, Senior President of Tribunals, 'The Modernisation of Access to Justice in Times of Austerity' (5th Annual Ryder Lecture, the University of Bolton, 3 March 2016).