

DEVELOPING THE TRIBUNALS SERVICE: RESEARCH ISSUES AND RESEARCH LESSONS

In developing the new Tribunals Service, I think it important that, as far as possible, those doing the hard and detailed work of translating the basic ideas for the service into operational reality should be informed by research.

I have therefore asked Professor Martin Partington CBE, Special Consultant to the Law Commission, to advise me on the issues on which new research might be appropriate and on the lessons which existing research can offer.

I am pleased that the first paper focuses on the question of 'feedback' which was identified as potentially one of the great prizes of the new Tribunals Service.

The views expressed are, of course, those of the authors only; they represent neither mine nor those of the Tribunals Service. However, I thought it right that they should be put in the public domain as a contribution to thinking about the issues that surround the question of feedback. The paper notes that comments on it will be welcome. Please send those comments to the address indicated in the paper.

Sir Robert Carnwath CVO

Senior President of Tribunals (designate)

RESEARCH ISSUES PAPER (1)

FEEDBACK

MARTIN PARTINGTON AND ED KIRTON-DARLING¹

INTRODUCTION

- 1.1 A key objective of the creation of the new Tribunals Service² is to emphasise the importance of getting decisions right first time. One way to improve initial decision-making is by helping decision-makers understand where things may be going astray. Information about this can come from a number of sources, including tribunals. Tribunals and other bodies which see a sufficient number of cases can enable general issues to be identified and fed back to front line decision takers. Simply publishing selected tribunal decisions in individual cases is unlikely to achieve this. There needs to be other means of communication between tribunals and other bodies and the decision-makers.
- 1.2 This paper presents a preliminary consideration of factors that may need to be in place for feedback to have the greatest effect. It is not a full research report. But it draws on a number of current examples of mechanisms for giving feedback and raises a number of questions that should be of interest to those currently establishing the new Tribunals Service. These also raise further research questions to be pursued when the work of the new service comes to be evaluated.³

THE ISSUE OF INDEPENDENCE

- 1.3 One preliminary issue needs addressing. Some fear that if bodies, such as tribunals, provide feedback to initial decision-takers, this will in some way compromise their ability to be independent of those decision-takers. Too close a relationship between the initial decision-maker and the tribunal will, it is argued, result in the tribunal becoming, or seeming to become, less independent.

¹ Martin Partington is Special Consultant to the Law Commission; Ed Kirton-Darling was Research Assistant to the Law Commission 2004-2006.

² See: Transforming Public Services: Complaints, Redress and Tribunals (2004) CM 6243 para 1.4

³ This paper is designed to provoke comment and discussion. We welcome contributions from those involved or interested in the issues discussed in this paper. Please e-mail them to frances.mcclenaghan@lawcommission.gsi.gov.uk.

- 1.4 This argument can be overstated. No one suggests that the provision of feedback should be about individual decisions in individual cases. The emphasis must always be on general problems, for example how evidence is collected in particular types of case, or general procedural questions. Indeed, the ability of tribunals to give feedback could be seen as an assertion of their independence. They are demonstrating that they are confident that they can continue to deal dispassionately and independently with individual cases, while at the same time giving advice on general issues.
- 1.5 Indeed, as will be argued later, critical feedback may have more impact and lead to greater change when it comes from agencies less formally independent than tribunals.⁴

REPORTING MECHANISMS

- 1.6 At present, there are three general mechanisms for communicating feedback:
- (1) Official reports, often annual reports;
 - (2) Direct communication to the initial decision-maker; and
 - (3) Informal feedback to the department/agency.

The paper examines each of these in turn, taking examples from current practice.

OFFICIAL REPORTS

- 1.7 There are a number of examples of official reports that may be relevant to the provision of feedback. These include: annual reports and other official reports into specific matters.

1. Annual Reports on Decision-making by the President of the Appeals Service

- 1.8 The most developed mechanism for feedback already existing within the tribunals system is that provided for in the Appeals Service. Under paragraph 10, Schedule 1 of the Social Security Act 1998, the President of the Appeals Service is required to make 'a written report, based on the cases coming before appeal tribunals, on the standards achieved by the Secretary of State in the making of decisions against which an appeal lies to an appeal tribunal'.⁵
- 1.9 The 5th report for 2004/5 states

⁴ See below the discussion of tribunals in Australia (paras 1.46 – 1.48); and the work of the Adjudicator's Office in the UK (para 1.59).

⁵ This is a statutory duty that was created to replace the work of the Chief Adjudication Officer, when that post was abolished by the 1998 Act.

The key themes from these reports have become established, they are remarkably similar to those produced by other agencies and coincide with what I and my colleagues learn from much wider consultation that goes on between ourselves and others inside and outside the tribunal. There is nothing new or startling in what we are saying but it is clear that more needs to be done to address the key issues highlighted [in the report].⁶

- 1.10 More specifically, the President highlighted two reports by the National Audit Office (NAO) and a report by the Parliamentary Committee of Public Accounts which echo many of the recommendations made in the President's Reports;

... improving the quality of pre-checks before claims are decided; improving the relevance and reliability of evidence gathered from appellants and medical reports amongst others; and making more use of the reconsideration process, all themes that have been present in [the President's] earlier reports.⁷

- 1.11 The President's Report also highlights what might be termed 'structural' problems. In particular, the President argues that the focus by Agencies on process (getting claims processed through the system) rather than on good practice in decision-making (quality of the process) means that the quality of initial decision-making is not as high as it should be. In addition, the report argues that the relatively small number of Presenting Officers attending hearings undermines the ability of tribunals to offer effective feedback at the local office level. Although the numbers of PO's attending hearings rose in 2004-2005, it was only by 4% to 27%.

- 1.12 The President's Report is published annually. It is based on quarterly reports which are not published but which are also provided to the Agencies. The data is compiled from a sample of adjourned, overturned and upheld decisions across the areas from which the Appeals Service hears appeals.⁸ Chairmen and medical members are then asked,

- (1) In relation to overturned decisions, why was the decision overturned?
- (2) In relation to upheld decisions, was there anything the Agency could have done to prevent the case from having to come to a Tribunal?

- 1.13 The results are presented in a collated form and also broken down into categories which are discussed further: (1) Non-medical decisions - Job Centre Plus and The Pensions Service and Debt Management, (2) Decisions involving medical evidence – disability and carers benefits, and (3) Child Support Agency decisions. The final chapter considers trends and draws together the key points.

⁶ Para 8.8, President's Report, 2004-2005, available at <http://www.appeals-service.gov.uk/publications/publications.htm>

⁷ Para 1.4, President's Report, 2004-2005

⁸ Child Support Assessments/Departures, Disability Living Allowance/Attendance Allowance, Incapacity Benefit, Income Support, Industrial Injuries Disablement Benefit/Industrial Injuries Benefit, Job Seekers Allowance and Others.

2. The Independent Review Service for the Social Fund (IRS)

- 1.14 A further set of annual reports is published by the Social Fund Commissioner (SFC), the head of the IRS. These draw together issues and recommendations for action addressed to the Department for Work and Pensions (DWP). Evidence of their impact is hard to assess. On the one hand Trevor Buck used recommendations taken from the 2001/2 Annual Report as evidence to support the statement that “[t]here are already indications that the lessons learned from the core review activity undertaken by IRS are being used to flag up general disorders in the administration of the fund and to make recommendations for their resolution.”⁹ On the other hand, as with the President’s Annual Reports, there are indications that issues are recurring, suggesting that lessons are not being drawn from the Annual reports as effectively as they might be. There is further comment on the role of the SFC in the section on informal mechanisms (below).

3. Reports from the National Audit Office (NAO) and Public Accounts Committee (PAC)

- 1.15 In addition to annual reporting mechanisms a number of bodies issue specific reports on particular issues. The most important of these is the NAO, operating under the National Audit Act 1983. The NAO provide two types of reports to Parliament: (a) financial audits of government departments, agencies and other public bodies, and (b) “Value for Money” reports on the economy, efficiency and effectiveness of public spending. The Parliamentary PAC receives and considers these reports. Approximately two thirds of NAO reports are used as the basis for a public hearing by the PAC. When this occurs, the Government is obliged to respond to the report produced.
- 1.16 Over the past few years, four NAO reports have touched on issues relating to the quality of decision-making. The first three of these resulted in a PAC hearing and a response from the Government. These are:
- (1) *Progress in improving the medical assessment of incapacity and disability benefits*¹⁰ (2003)
 - (2) *Getting it right, putting it right: Improving decision-making and appeals in social security benefits*¹¹ (2003)
 - (3) *Helping those in financial hardship: the running of the Social Fund*¹² (2005)
 - (4) *Citizen Redress: What citizens can do if things go wrong with public services*¹³ (2005)

⁹ p 146, in Chapter 8, *Undoing the Damage: Review Processes* in Buck T and Smith R *Poor Relief or Poor Deal? The social fund, safety nets and social security*, (2003) London: Ashgate.

¹⁰ HC 1141, Session 2002-2003, 17/10/2003

¹¹ HC 1142, Session 2002-2003, 07/11/2003

¹² HC 179, Session 2004-2005, 13/01/2005

¹³ HC 21, Session 2004-2005, 09/03/2005

Medical Assessment

- 1.17 The 2003 NAO report on medical assessment in incapacity and disability benefit claims followed an earlier report by the PAC on this issue.¹⁴ The PAC responded with a report in the 2003-04 Parliamentary Session.¹⁵ Their report also referred back to an earlier report published in 2001. The PAC noted that there had been a number of improvements in performance since 2001 and then made a number of further recommendations. These included the importance of feedback from the tribunal to the doctors and initial decision-makers, and the need to monitor the number of decisions overturned at appeal (with the aim being to improve training for tribunal doctors and enforce rigorous standards).
- 1.18 In relation to the feedback recommendation, the DWP responded, in June 2004,¹⁶ by making five points:
- (1) The Appeals Service and the DWP engage in a substantial amount of liaison.
 - (2) Where medical reports are substandard there are mechanisms for dealing with the doctors' failings.
 - (3) A pilot carried out as part of the *Pathways to work* project found little change where Presenting Officers attended 100% of hearings (see also the DWP Research Report discussed below).
 - (4) The President of the Appeals Service collects information and distributes it to first instance decision-makers as part of his annual report.
 - (5) There is an independent standards committee which advises the agency's chief executives on decision-making issues.¹⁷

Decision-making and appeals in social security benefit

- 1.19 The NAO report on this topic also resulted in a PAC inquiry¹⁸ and a response from Government.¹⁹ The key recommendations for improving decision-making were: to have greater transparency in the monitoring and reporting on performance in decision-making, to improve decisions at first instance – through ensuring better provision of evidence and better training for staff – and to make better use of the reconsideration stage in the process.

¹⁴ HC 682, PAC, Twenty Seventh Report of Session 2001-02

¹⁵ HC 120, PAC, Sixteenth Report of Session 2003-04

¹⁶ Cm 6191, Treasury Minutes on the Eleventh, Twelfth and Sixteenth Reports from the Committee on Public Accounts 2003-2004, June 2004

¹⁷ See the discussion below of the DWP Decision Making Standards Committee (paras 1.29 – 1.32).

¹⁸ HC 406, PAC, Twelfth Report of Session 2003-04

¹⁹ Cm 6191, Treasury Minutes on the Eleventh, Twelfth and Sixteenth Reports from the Committee on Public Accounts 2003-2004, June 2004

- 1.20 The Government accepted the need for greater transparency, and stated that improved claim forms and better customer communication would improve decisions at first instance. The DWP also stated their commitment to better use of the reconsideration process.

The social fund

- 1.21 The third report by the NAO, on the Social Fund, devoted its third chapter to an assessment of whether the DWP could do more to improve the quality of decision-making. It makes many of the same points as in the other reports, concluding that the Department could improve training and guidance for initial decision-makers, as well as improving quality checking at national and district levels. It also recommends improvement in the standard of internal review and provides a series of good practice examples.
- 1.22 The PAC report made recommendations on the quality of decision-making focussing on the need for better collection of evidence, and for greater standardisation of decisions through improved training of staff and standardised procedures. The Government responded by pointing to a move into larger processing centres and improved procedures as a solution to the evidence collation problem. In relation to the variability of decisions (for Crisis Loans), the DWP pointed to two factors – the type and urgency of applications and different decision-making practices. It stated that to address the second of these they were piloting new operating models.

Citizens redress

- 1.23 The final report mentioned – the Citizen Redress report – was, regrettably, not the subject of a PAC hearing. Thus there was no Government response to its findings. This was a much more wide-ranging review of complaints handling within a number of government departments. The research was carried out by a research team at the London School of Economics for the NAO. It contains a review of methods by which citizens gain redress.
- 1.24 When organisations take complaints seriously, they can be a very rich source of information about things that may be going wrong with service delivery. Many companies in the private sector take complaints and the lessons to be drawn from them very seriously indeed.
- 1.25 By contrast, the NAO research suggested that complaints mechanisms were not as robust as they should be. Some departments and agencies were very unclear about what was a complaint and how it should be recorded. The key finding for the purposes of feedback was that learning from mistakes and complaints was not well developed by most Agencies/Departments. Rather it was seen as a difficult problem or challenge.²⁰

²⁰ See paras 3.22, 3.26 and 3.27, *Citizen Redress: What citizens can do if things go wrong with public services*, HC 21, Session 2004-2005, 09/03/2005

4. The Decision Making Standards Committee

1.26 The DWP's Decision Making Standards Committee was established in 2002.²¹ It is a non-executive body providing scrutiny of decision-making in benefits and employment matters across DWP and which reports to the Chief Executives of Jobcentre Plus, the Pension Service and the Disability and Carers Service.²² The Committee has three key objectives:

- (1) to provide independent advice to senior executives on whether reports on the standard of benefit decision-making are accurate;
- (2) to identify and make recommendations on the areas where standards can be improved; and
- (3) to conduct additional enquiries deemed to affect decision-making standards, at the discretion of the Chief Executives.²³

1.27 The Committee carries out its role by monitoring a sample of decisions. It also carried out a questionnaire for its second Annual Report in 2004-05. This report has a number of specific recommendations on the relationship with The Appeals Service (TAS) and feedback. Its recommendations include:

The businesses need to work with TAS to develop mechanisms for feeding back to decision-makers on the reasons for tribunal decisions. In view of the transfer of TAS to DCA in April 2006, agreement needs to be reached on this.

The businesses should follow their own guidance on attendance of Presenting Officers (POs) at appeal tribunals and report progress to the Standards Committee and systems should be in place for feedback to decision-makers.

The Department should consider asking TAS to provide written reasoned decisions of approximately half a page on every appeal. Although this would increase the time taken for tribunals it would produce better feedback to decision-makers.

The businesses should conduct an analysis to identify patterns of cases consistently overturned at tribunals and resources should be focused on improving decision-making in those areas.²⁴

1.28 In summary, it states that

²¹ Although there was a similar body responsible for oversight of decision-making in the Benefits Agency.

²² The members of the Committee are Sandra Walmsley (Chair), Penny Melville-Brown (Job Centre Plus), Margery Brown and Tom Hughes (Pension Service), Jenny Osbourne (Disability and Carer's Service).

²³ See http://www.dwp.gov.uk/resourcecentre/dmsc_report04_05.asp

²⁴ Department for Work and Pensions Decision Making Standards Committee, *Annual Report 2004-05*, pgs 8/9

The businesses are not following their own guidance on the attendance of Presenting Officers (POs) at appeal tribunals. The lack of feedback systems between tribunals and the businesses mean that learning opportunities are lost and confidence in the system is diminished.

The Parliamentary Ombudsman

- 1.29 The Parliamentary Ombudsman's jurisdiction covers both central government organisations and complaints against the National Health Service (NHS). The Ombudsman publishes annual reports, which are considered by the Public Administration Select Committee in the House of Commons.
- 1.30 Where there appears to be a widespread problem, the Parliamentary Ombudsman may write a special report addressing the issue. However even if a complaint is not widespread, the Ombudsman may decide that an individual case is of broader significance and so make it the subject of a special investigation. The Parliamentary Ombudsman also applies an array of informal feedback methods, which will be discussed in Part 4.

The Local Government Ombudsmen

- 1.31 The Local Government Ombudsman deals with complaints about maladministration, primarily against Local Authorities. As well as annual reports, each year the Ombudsman publishes a "Digest of cases". These outline lessons learnt from the previous year's complaints and provide advice on good practice.²⁵ Further discussion of the approach taken by the Local Government Ombudsman to feedback is contained in Part 4.

Conclusion on Official Reports

- 1.32 Official reports on the quality of decision-making have the advantage of potentially embarrassing the initial decision-maker into action. However, they can also be ignored and should not be seen to be a solution on their own. For example, the effectiveness of the Appeal Service President's Report on the quality of decision-making appears to be very limited. On the basis of comments in the Reports themselves, it seems that they are not given significant attention within the Agencies. (This is an empirical question on which further research could usefully be undertaken.) Statements by the President on this issue include the following from the 2003-2004 report: 'However, the fact that the figures in some areas seem to be deteriorating is perhaps an indication of the limitations of this type of report.'²⁶
- 1.33 Furthermore, the fact that the Reports have all made recommendations in the same areas with little noticeable effect seemingly prompted the following comment in 2004-2005

²⁵ Local Government Ombudsman, *Annual Report 2005/06: Delivering public value*, p 22

²⁶ Para 8.1, Appeal Service President's Report 2003-2004

The areas for improvement should form part of a strategic plan for improvement informed by the sources of feedback currently provided and implemented and monitored by the Agencies operationally with time limits on improvements. There seems little point in my colleagues and I providing more feedback or the Department commissioning further studies from the Appeals Service or their own Standards Committee when no discernible improvement in decision-making is the result.²⁷

- 1.34 The Council on Tribunals has also commented on the limitations of the Presidential Report. For example, in their 2004/5 Annual Report, they noted that, although the downward trend in attendance of Presenting Officers had been reversed (possibly through the intervention of the Council and the Secretary of State), the increase was small and the President had had cause to note the problem again.²⁸
- 1.35 It is also hard to assess the effectiveness of the NAO in ensuring its published recommendations are translated into action. Unlike the President's Annual Reports or the reports of the Social Fund Commissioner, which are not debated in Parliament, most reports by the NAO result in a follow-up inquiry by the PAC. This ensures that there is at least a formal response from government. This close working has resulted in a number of recommendations which have been subject to some ongoing scrutiny within the Government department concerned. There appears to have been some success in improving initial medical assessments in particular. Again, however, it is very hard to assess how these recommendations translate into changes in practice at the local office level.
- 1.36 On this analysis it would appear that such official reports can support other forms of feedback, and should not be discounted, but their value as a 'stand alone' mechanism is limited.

²⁷ Para 1.12, Appeal Service President's Report 2005-2005

²⁸ Council on Tribunals, 2004/5 Annual Report, pg 22/3, para 17/18, which states "The President of Appeal Tribunals, His Honour Judge Harris, had cause to mention again the continuing decline in the attendance of Presenting Officers at appeal tribunal hearings in his Report for 2003-04 on standards of decision-making by the Secretary of State. In our last Report we mentioned the encouraging response we had received from the then Secretary of State, the Rt. Hon. Andrew Smith MP, to a letter from our Chairman raising our considerable concern about this matter. In his letter the Secretary of State acknowledged the seriousness of our (and Judge Harris's) concerns and undertook to remedy the situation by asking his Department's agencies to take steps to reverse the decline in attendance. We have been pleased to learn that the President's Report for 2004-2005 shows that the downward trend in attendance has been reversed. However, the rate of increase is small (24% to 27% of hearings) and we hope this can be improved further."

DIRECT COMMUNICATION

- 1.37 Direct communication – the initial decision-maker receiving oral or written information directly from the tribunal (or other body) – is the most obvious method of ensuring that the front line decision-makers receive feedback. There are two ways in which front-line decision takers may interact with a tribunal or other body. Either they may come to the tribunal, for example as a presenting officer; or a representative of the tribunal or other body can hold follow-up meetings with initial decision-makers at their offices.
- 1.38 The former method is the one advocated strongly by the President of the Appeals Service, who has stated in each of his Annual Reports that the most effective method of improving initial decision-making would be for the decision-maker to attend the hearing. He also stresses the importance of their attendance so they can explain the original decision. The problem is to know how this can be achieved in a cost-effective fashion.

DWP Research Report

- 1.39 In this context the following research report should be noted. As part of the Pathways to Work Incapacity Benefit Reform Pilot, the DWP carried out a trial of the impact of 100% attendance by Presenting Officers at appeal hearings. Following an internal report the pilot was discontinued and this report was never published.²⁹ The main findings, however, were:
- (1) Levels of attendance rose to 68%. The Report stated that it would be highly unlikely that 100% attendance could be achieved, as it was not possible for the tribunal service to schedule appeals together, especially in remote locations.
 - (2) The main benefit of having the Presenting Officer is from a customer service perspective for the tribunal service. The process ensures the customer will have had a detailed explanation of the decision and had the chance to provide additional evidence to enable a reconsideration to take place. All decisions will have been reconsidered before having the appeal prepared and submitted as a matter of course. The Presenting Officer can clarify any points of law with the case but this has little affect on the outcome.
 - (3) There was no significant change in the outcome of appeals by having a presenting officer at the hearing, the customer still tends to present additional evidence at the tribunal, mainly oral, which is the main reason for the tribunal finding in favour of the customer.

²⁹ Edward Kirton-Darling (Research Assistant at the Law Commission) obtained the report from DWP following references to it in Cm 6191, Treasury Minutes on the Eleventh, Twelfth and Sixteenth Reports from the Committee on Public Accounts 2003-2004, June 2004.

- (4) Decision-makers are less likely to change a decision at the reconsideration stage, which the Report states reflects the fact that significant further evidence is not made available prior to the hearing. It finds that it is still hard to tell from these results even where a decision is revised as to whether this will lead to the customer reaching the threshold for benefit to be reinstated.
 - (5) The researchers felt that adjournments would decrease by having a presenting officer. However there was a net increase of 2%, which again was attributed to the late production of evidence on occasions.
- 1.40 The results of this admittedly limited study have, it is understood, been taken to support the DWP's line that increased investment in the provision of more presenting officers at hearings will not be cost effective. There is, however, the possibility that a rather more important finding emerges from this study. If it is the case that many people who appeal to tribunals do not present essential evidence until they get to the tribunal, does this not suggest that if there were more efficient ways of gathering that information earlier, better outcomes could be arrived at earlier?
- 1.41 The second approach, going to talk to front-line decision-takers, is the one adopted by the Social Fund Commissioner. He and his staff currently visit each Social Fund region to discuss their annual findings on the quality of local decision-taking. As the procedures of the Social Fund Inspectorate are entirely paper-based, it would by definition not be possible for front-line staff to appear before the reviewers. But annual meetings may be a more cost-effective way of trying to get messages across to front-line staff than appearing in each case. Again, though the continuing appearance of similar issues in annual reports suggests that any improvement is patchy.

Australian Administrative Appeals Tribunal

- 1.42 In this context, one innovation in Australia may be noted. In its *Managing Justice* Report,³⁰ the Australian Law Reform Commission considered whether there should be a statutory duty on agencies to assist tribunals to reach the correct or preferable decision. The Commission preferred the option of the Attorney-General specifying these duties in a statement of model litigant obligations. However, the Administrative Appeals Tribunal Amendment Act 2005 introduced an amendment to the Administrative Appeals Tribunal Act 1975. Section 33(1AA) now states

In a proceeding before the Tribunal for a review of a decision, the person who made the decision must use his or her best endeavours to assist the Tribunal to make its decision in relation to the proceeding.

- 1.43 In 2005, the President of the AAT stated that this recommendation was made to avoid an overly adversarial approach by Departments and Agencies. It envisages that this statutory obligation will remind them that they have an obligation to assist the tribunal to get the right answer, by:

- (1) reconsidering their initial decision to ensure it is still their position,
- (2) providing evidence and submissions, particularly where the claimant is unrepresented, and
- (3) responding to requests for assistance on particular issues from the Tribunal.

1.44 These actually correspond very closely with the ‘vital dual role’ the President of the Appeals Service has identified, that decision-takers should both represent the agency in explaining the decision made and act as *amicus curiae* in assisting the tribunal to come to the correct legal decision.³¹

Conclusions on direct communication

1.45 Two particular conclusions derive from these examples. First, whatever aspirations those working within the Tribunals Service may have, the attempt to secure 100% attendance by Presenting Officers at hearings is probably unrealistic. Future research could usefully focus on identifying the classes of case where the presence of a Presenting Officer is most valuable. This might be linked to the development of guidance (or even a legislative provision) that initial decision-takers should not simply seek to defend their original decision but, of appeal, should help the appeal/review body to come to the legally correct decision.

1.46 Second, there should be further investigation of more efficient ways of capturing additional evidence earlier. As this appears to be the key factor leading to a changed decision, if taken serious this might go some way to reducing the need for tribunal hearings.

1.47 In this context, lessons could be learnt from the Australian tribunal system where the decision-maker has a statutory obligation to assist the tribunal to make its decision.

INFORMAL MECHANISMS

1.48 In addition to direct contacts between decision-takers and appeal/review bodies, there are a number of methods of informal feedback from reviewing bodies to first instance decision-makers. These can include:

- (1) written recommendations, which are filtered through senior management or a liaison officer;
- (2) bulletins sent direct to initial decision-makers;³²
- (3) regular high level meetings between officials and review/appeal bodies; or

³⁰ Australian Law Reform Commission, *Managing Justice: a Review of the Federal Civil Justice System* (2000) ALRC 89

³¹ para 1.10, Appeal Service President's Report 2005-2005

³² See Creyke research and Adjudicator's Office approach discussed below.

- (4) through regular training provided by the appeal/review body to initial decision takers.

The following paragraphs give examples of these mechanisms in practice.

Decision making Standards Committee

1.49 As mentioned above, the DWP Decision-making Standards Committee is a non-executive body providing scrutiny of decision-making in benefits and employment matters across DWP. Its key objectives are:

- (1) to provide independent advice to senior executives on whether reports on the standard of benefit decision-making are accurate;
- (2) to identify and make recommendations on the areas where standards can be improved; and
- (3) to conduct additional enquiries deemed to affect decision-making standards, at the discretion of the Chief Executives.³³

It is not known how regularly the meetings referred to in (1) above occur or what the outcomes of those meetings are. But presumably they take place on a regular basis. Thus the effectiveness of their detailed recommendations is hard to assess. However, the 2004-05 Annual Report stated that '[i]n general the Committee has been pleased with the responses of the businesses to their recommendations.'³⁴

The Statutory Adjudicator

1.50 The Adjudicator's Office deals with maladministration type complaints (delay etc) relating to Her Majesty's Revenue and Customs and a number of other agencies. Her organisation tests complaints against the Codes of Practice issued by the initial decision-maker and performs a judicial review-type exercise, considering the reasonableness of the Department's action. One of the chief functions of the Office is to feed back their decisions to ensure improvements in initial decision-making in future. Where the Department/Agency refuses to comply with an individual decision, the Adjudicator can, as a last resort, highlight the issue in an annual report.

1.51 From discussion with various members of her office, a number of points emerge:

- (1) To get the feedback to the initial decision-maker, there needs to be a clear tree of decision-making within the Department. Recommendations by the Adjudicator are disseminated by a liaison officer or by senior management.

³³ See http://www.dwp.gov.uk/resourcecentre/dmsc_report04_05.asp

³⁴ Annual Report Department for Work and Pensions Decision Making Standards Committee, *Annual Report 2004-05*, pg 3

- (2) The Office places emphasis on a collaborative approach, and whilst it maintains its independence in making individual decisions, it will work closely with the initial decision-maker to assist them to improve their policies and procedures. Those working in the Adjudicator's Office felt that the Department valued their input and that they were considered to do a valuable job in providing a review which was objective and independent but which did not antagonise initial decision-makers.
- (3) It was agreed that the direct funding of the Office by the initial decision-makers improved their ability to ensure their feedback was listened to, but that this was less important than the approach they adopted.
- 1.52 Where an agreement is mediated the Adjudicator's Office will still send a letter setting out recommendations for improvements in the decision-making process.
- 1.53 The Office is currently establishing an Issues Log, which will be a joint database with HMRC. Where the Adjudicator's Office makes recommendations for changes, they will follow up issues without any further intervention from the original complainant. The Issues Log is designed to allow more efficient organisation of this follow up function.
- 1.54 Although the relationship between Adjudicator and department is closer than that between Tribunal and Department, the Adjudicator argues that, in practice, she is independent from first instance decision-makers. But her relationship to her departments, and the trust generated between them, enhances rather than compromises their authority when it comes to giving general feedback advice to decision-takers.

Independent Complaints Reviewer

- 1.55 The Independent Complaints Reviewer (ICR) investigates complaints about the Land Registry, the National Archives, the Charity Commission and the Housing Corporation. The ICR notes that the organisations it reviews rarely, if ever refuse to implement a recommendation³⁵. However if an organisation were to refuse then the issue could be included in an official report. An explicit aspect of her role is the development of 'systematic' recommendations designed to improve procedures in the future.
- 1.56 For each of the organisations reviewed, the ICR submits systematic recommendations to a liaison body charged with considering the recommendations. For example, recommendations to the Land Registry are referred to the Independent Complaints Reviewer Evaluation and Study Team (ICREST) for consideration. ICREST includes members drawn from a number of offices and jobs within the Registry and is chaired by the Corporate Legal Services Lawyer. ICREST meets regularly to discuss ICR reports and recommendations, and its deliberations and the actions taken following decisions are accessible to Registry staff on the internal intranet.³⁶

³⁵ Independent Complaints Reviewer to the Charity Commissioner, *Annual Report 2004-2005: Seeking a Fair Resolution*, pg 9

³⁶ Independent Complaints Reviewer to Land Registry, *Annual Report 2004-2005: Seeking a fair resolution*, pg 6

- 1.57 The ICR notes that the Land Registry has never refused to implement an ICR recommendation. Examples of systemic recommendations to the Land Registry include the need to provide customers with a clear understanding of the potential time scales involved in responding to complaints when cases are referred to its Agency Case Review Team and that the Registry should take steps to ensure a consistent and fair approach when disclosing evidence in a dispute case.
- 1.58 Similarly the Charity Commission ‘has responded positively to all of the systematic recommendations that the ICR made.’³⁷ Examples include the recommendation that the Charity Commission ought not act outside its complaints policy and procedure, and that it ought to ensure it records reasons for its decisions which are capable of explanation to interested parties.

The Independent Review Service

- 1.59 The Social Fund Commissioner provides two groups with feedback on the quality of decision-making: the Department for Work and Pensions/Jobcentre Plus, and the Social Fund Inspectors, the initial decision-makers within the Social Fund.

Feedback to Jobcentre Plus

- 1.60 In his annual report for 2004/5, the Social Fund Commissioner states that his organisation has a “long-standing agreement ... to feed back its findings and observations ... to improve the standard of first line decision-making and reviews and administration of the fund.” The feedback occurs in the form of reports including regionally comparative information about errors, processing times and common issues which arise. These are supported by annual meetings with Social Fund Managers.
- 1.61 Professor Buck refers to this and the recommendations in the SFC’s Annual Report as “systemic justice.” Buck highlights the development of a maladministration jurisdiction by the IRS and states that the IRS “organises its liaison activity with [the DWP] and welfare advice groups with the deliberate intention to better inform policy makers and other stakeholders in the social fund system.”³⁸ According to the 2004/5 Annual Report, Department staff attended 118 workshops held by the IRS on the Social Fund.

³⁷ Independent Complaints Reviewer to the Charity Commissioner, *Annual Report 2004-2005: Seeking a Fair Resolution*, pg 9

³⁸ T. Buck, *Undoing the Damage: Review Processes* in Buck T and Smith R *Poor Relief or Poor Deal? The social fund, safety nets and social security*, (2003) London: Ashgate, pg 148

Feedback to the Social Fund Inspectors

- 1.62 The Commissioner has statutory duties in relation to the decisions of the Social Fund Inspectors, set out in section 37(5) and (6) of the Social Security Act 1998. These are (a) to monitor the quality of decisions of social fund inspectors and give them such advice and assistance as he thinks fit to improve the standard of their decisions; (b) to arrange such training of social fund inspectors as he considers appropriate; and (c) to carry out such other functions in connection with the work of social fund inspectors as the Secretary of State may direct. Also the social fund Commissioner shall report annually in writing to the Secretary of State on the standards of reviews by social fund inspectors, and the Secretary of State shall publish his report.
- 1.63 The Commissioner fulfils his duty through “reading cases, examining complaints and other correspondence about decisions, giving formal written advice and ensuring on-going support, training and development for inspectors.”³⁹ His oversight is exercised through two steering groups: the Standards Conference and the Quality Forum. The Standards Conference identifies areas for improvement by considering a range of sources of information on the quality of decisions made, and the Quality Forum takes action on the basis of this work and agrees the subject matter and content of Commissioner’s advice to Inspectors.
- 1.64 The case reading exercise is “the primary means”⁴⁰ used by the Commissioner to assess the quality of first instance decisions. More than 5% of cases are reviewed, and the duty under section 37(6) is fulfilled through publication of the case reading results in the annual report.⁴¹ Otherwise, assessment of the quality of decision-making is considered by an independent Customer Service Team if there is a complaint.
- 1.65 Feedback to the Inspectors occurs chiefly through two methods: training on issues identified through case reading and advice notes.

The Parliamentary Ombudsman

- 1.66 As mentioned in Part 2, the Parliamentary Ombudsman’s handles complaints against central government organisations and against the National Health Service (NHS). The Parliamentary Ombudsman has developed a good working relationship with a number of government departments to improve their complaint-handling procedures. This year the Ombudsman worked with the Department of Health to develop a NHS Complaints Standard⁴² and advised the Healthcare Commission on ways of reducing their backlog of complaints at the independent review stage.⁴³

³⁹ Social Fund Commissioner, *Annual Report 2004-2005*, pg 21

⁴⁰ pg 21, *Annual Report 2004/5*

⁴¹ Results appear to have dropped overall in the last four years, with 6% having a wrong outcome in 2002/3 and 10.2% being wrong in 2003/4. In 2004/5, 13.4% did not meet the quality standards required (different wording but apparently the same test), and 12.6% failed in 2005/6.

⁴² Parliamentary and Health Service Ombudsman, *Annual Report 2005-06: Making a difference*, pg 3

⁴³ Above, pg 3

1.67 However other departments have been less receptive to the Ombudsman's recommendations. In the past year, on two occasions, the Ombudsman has had to report to Parliament on injustices caused by maladministration that the Government did not intend to remedy.⁴⁴ Only four such reports have ever been made.⁴⁵ In the 2005-2006 Annual Report, the Ombudsman lamented the defensive approach adopted by certain departments. In these cases the departments not only contested the Ombudsman's recommendation, but the finding of maladministration itself. In evidence to the Public Administration Select Committee (PASC), the Parliamentary Ombudsman warned,

If this becomes a general pattern, or a culture, ...this can only undermine the confidence and credibility that is necessary to ensure that the Ombudsman's office can fulfil its role and purpose.⁴⁶

The Local Government Ombudsmen

- 1.68 As previously mentioned in Part 2, the Local Government Ombudsman deals with complaints against Local Authorities. In addition to giving advice to local authorities on an ad hoc basis when requested, the Ombudsman also provides advice in the form of guidance notes, special reports and letters.⁴⁷
- 1.69 Letters are sent to councils annually informing them of trends in complaints and possible lessons they could learn from them. From this year onwards the letters will be published on the organisation's website and passed on to the National Audit Office.⁴⁸
- 1.70 A final method of feedback is through the effective complaint handling training the Ombudsman provides for local authority staff.

⁴⁴ Parliamentary and Health Service Ombudsman, *Annual Report 2005-06: Making a difference*, pg 3

⁴⁵ Above, pg 3

⁴⁶ Public Administration Select Committee, *The Ombudsman in Question: the Ombudsman's report on pensions and its constitutional implications*, Ev 54

⁴⁷ Local Government Ombudsman, *Annual Report 2005/06: Delivering public value*, pg 22

⁴⁸ Above, pg 22

Australian Migration Review Tribunal

- 1.71 Another example can be found in the Australian Migration Review Tribunal. In November 2005, a Memorandum of Understanding between the MRT, Refugee Review Tribunal and the Department of Immigration and Multicultural and Indigenous Affairs was published. Paragraph 3.1 provides for national liaison meetings between “senior representatives of the Agencies, including Output/Program Managers, to exchange information on any issues, activities or developments in the Agencies’ caseloads or areas of portfolio responsibility that are relevant to each others’ operations.” A standing item on the agendas in these meetings will be the commitment to continuous improvement of decision-making set out in paragraph 7. Furthermore, paragraph 7.2 states “The Agencies will regularly review their processes to ensure decisions continue to be made effectively, efficiently and lawfully, and to agree to further develop advisory arrangements for issues or concerns relating to the quality of decision-making.”

Conclusions

- 1.72 Three themes seem to emerge from this brief review of informal feedback mechanisms.
- 1.73 First, there may be more likelihood of feedback being taken seriously and acted upon if there is trust between the decision takers and those who are commenting on their decisions.
- 1.74 Second there seem to be distinct advantages in building a collaborative approach between those offering feedback and those receiving it. (Indeed in all the models considered there is an assumption that feedback is only one way; should this always be the case?)
- 1.75 Third is the importance of effective communication. This may not always be achieved in written reports, but through face to face meetings, training and other initiatives.
- 1.76 This issue of effective communication comes across in research carried out in Australia by Creyke and McMillan. In assessing the perception of tribunals amongst initial decision-makers they were able to identify 3 broad suggestions made by officers to improve feedback.⁴⁹ These are
- (1) Improving communication within agencies and bringing policy areas into closer contact with operational areas,
 - (2) Improving the method of disseminating the information, so that it is more formal, timely, regular and systematic,
 - (3) Improving the way that agencies identify and analyse relevant decisions: the dissemination of general principles rather than summarising principles in specific cases.

⁴⁹ See R. Creyke and J. McMillan, *Executive Perceptions of Administrative Law – An Empirical Study* (2002) 9 AJ Admin L 163

CONCLUSION

- 1.77 The purpose of this paper is to explore the issue of feedback. The analysis has centred on three mechanisms for communicating feedback: formally through annual or other official reporting mechanisms, direct communication to the initial decision-maker, and informal feedback to the department or agency. The main conclusions resulting from an analysis of these areas are as follows.

Formal Reporting Mechanisms

- 1.78 At present, the principal formal report on the quality of feedback is the annual report by the President of the Appeals Service. This report seems to lack impact with initial decision-makers, particularly when compared with the ad hoc reports made by the National Audit Office which lead to Committee on Public Accounts investigations.
- 1.79 This may suggest that when the Tribunals Service is fully functional, the Senior President's Report on decision-making would be more influential if it resulted in Select Committee scrutiny. It might attract more attention than the Appeal Service report because of the wider breadth of the subject matter. However it would also need to be followed up with presentation and seminars in the individual departments and agencies concerned.

Direct Feedback to the Initial Decision-maker

- 1.80 Intuitively, involving the initial decision-maker in the tribunal hearing should enhance their knowledge and create improvements in both the substance and form of later decisions. The President of the Appeals Service argues for this approach, stating that the most effective way for the initial decision-maker to gain more knowledge of the tribunal decision-making process is for them to attend the tribunal hearing. Furthermore, he argues that this also has benefits for the tribunal hearing overall.
- 1.81 However, research conducted for the DWP suggests, to the contrary, that the attendance of the initial decision-maker has little impact on the outcome of the hearing. The research did not consider the question of whether the fact of appearing at the hearing improves the ability of the Presenting Officer to make initial decisions within the office.
- 1.82 Clearly, requiring 100% attendance would be extremely expensive and would be difficult to achieve.⁵⁰ However, it might be possible to establish some clear guidelines as to when the initial decision-maker ought to be obliged to attend and when it is less important that they do so. Therefore, further research which considered how cases might be categorised in relation to their importance to feedback, and which could then lead to guidelines, might be of assistance.

⁵⁰ This was acknowledged in the DWP Research where they attempted to increase attendance to 100% but achieved only 68% attendance at best.

Informal Feedback to the Department/Agency

- 1.83 The structure and effectiveness of this type of feedback depends on the organisation and commitment of the Department or agency to a far greater degree than the other two general categories. While it lacks the directness of the direct feedback mechanism and does not have the public nature of the formal reporting mechanisms, it does have advantages. Although formal reporting does not have to be antagonistic, informal feedback carries a far greater potential for effective collaborative working.

General remarks

- 1.84 Providing feedback, though desirable, is a real challenge for the new tribunals service. But it is a goal worth striving for. It should improve efficiency, improve service delivery to the public, and reduce demands on the tribunal service.
- 1.85 Two general themes arise from this survey. First, feedback must be coherently presented and organised so that it draws out principles rather than explaining individual decisions. Whatever the method of delivery of the information, the tribunal or other review body should ensure that any general feedback fulfils this criterion.
- 1.86 Secondly is the importance of the perception of the tribunals service by the initial decision-maker. In Australia, when appeals go to the Administrative Appeals Tribunal the initial decision-maker has a statutory obligation to assist the tribunal, which the President of the Tribunal states is designed to avoid an adversarial approach by the department or agency. Further consideration of how, in the UK, we might improve the initial decision-maker's perception of the tribunal service would be valuable.
- 1.87 It will be important for the tribunal service to experiment. A one-size-fits-all approach to the provision of feedback is probably not appropriate or desirable because of the essential requirement that the initial decision-making body has a degree of 'ownership' over, and commitment to, the process.
- 1.88 Whichever method is adopted, it is also important to remember the human factors that need to be taken into account. No one likes to be criticised. Feedback provided in an atmosphere that does not encourage better performance may always be ineffective.
- 1.89 Of course, the key question is: what is meant by better performance? If the emphasis is on *output*, then a bit of rough justice at the edges may be the price to be paid for maintaining the turnover of cases. If the emphasis is on *outcome*, the quality of initial decision taking then assumes greater importance. Achieving an appropriate balance between these two will not be easy as front line agencies decide how they are going to deliver services in a cost-effective way. But in determining what is cost-effective, the costs of not getting the decision right first time must be carefully assessed.

OFFICIAL SOURCES (UK)

National Audit Office Reports:

- *Progress in improving the medical assessment of incapacity and disability benefits*⁵¹ (2003)
- *Getting it right, putting it right: Improving decision-making and appeals in social security benefits*⁵² (2003)
- *Helping those in financial hardship: the running of the Social Fund*⁵³ (2005)
- *Citizen Redress: What citizens can do if things go wrong with public services*⁵⁴ (2005)

Committee of Public Accounts Reports:

- HC 682, PAC, Twenty Seventh Report of Session 2001-02
- HC 120, PAC, Sixteenth Report of Session 2003-04
- HC 406, PAC, Twelfth Report of Session 2003-04

Department for Work and Pensions, Treasury Minutes on the Eleventh, Twelfth and Sixteenth Reports from the Committee of Public Accounts 2003-2004, June 2004, Cm 6191.

Department for Work and Pensions, Treasury Minute on the Twenty seventh Report from the Committee of Public Accounts 2001-2002, June 2002, Cm 5524.

Department for Work and Pensions Research Report: 4th Interim Evaluation Report – Attendance of Presenting Officers at the Incapacity Benefit Personal Capability Assessment Tribunal (2005, unpublished).

President's Report (Appeal Service) on decision-making by the Secretary of State, 2004-2005 and 2003-2004.

The Adjudicator's Office, Annual Report 2005, draft Business Plan 2006-2007 and Service Level Agreement for the provision of complaints adjudication services for HM Revenue and Customs by the Adjudicator's Office.

Decision-making Standards Committee, Department for Work and Pensions, Annual Report 2004-2005.

The Social Fund Commissioner's Annual Report 2004-5, 2003/4 and 2002/3

⁵¹ HC 1141, Session 2002-2003, 17/10/2003

⁵² HC 1142, Session 2002-2003, 07/11/2003

⁵³ HC 179, Session 2004-2005, 13/01/2005

⁵⁴ HC 21, Session 2004-2005, 09/03/2005

OFFICIAL SOURCES (NON-UK)

State Administrative Tribunal (Western Australia), Annual Report 2005.

Memorandum of Understanding between the Department of Immigration and Multicultural and Indigenous Affairs, and the Migration Review Tribunal, and the Refugee Review Tribunal, 25 November 2005.

Administrative Appeals Tribunal (Australian Commonwealth), Annual Report 2004-2005.

Australian Law Reform Commission, *Managing Justice: a Review of the Federal Civil Justice System* (2000), ALRC 89.

New Zealand Law Reform Commission, *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals*, NZLC R85.

ACADEMIC WORK

R. Thomas R, *Evaluating tribunal adjudication: administrative justice and asylum appeals*, (2005) *Legal Studies*, Vol 25, No. 3.

N. Wikeley, *Decision Making and the New Tribunals* (2006) 13 *Journal of Social Security Law* 86.

Papers from the ESRC Seminar Series on Administrative Justice (2006); Robin Creyke *Administrative Justice: Towards Integrity in Government: the first to the third way* and Marc Hertogh *Through the Eyes of Bureaucrats: an alternative perspective on administrative justice in the Netherlands*.

T. Buck, *Undoing the Damage: Review Processes in Buck T and Smith R Poor Relief or Poor Deal? The social fund, safety nets and social security*, (2003) London: Ashgate, pp 131-149.

T. Buck, *A Model of Independent Review?* in Partington M., (ed) *The Leggatt Review of Tribunals: Academic Seminar Papers*, (2001) Bristol Centre for the Study of Administrative Justice, Working Paper Series No 3, pp 127-140.

T. Buck, *The social fund: law and practice* Imprint London: Sweet & Maxwell, 2000.

T. Buck, *Judicial Review and the discretionary Social Fund: The Impact on a Respondent Organization* in Buck T. G. (ed) *Judicial Review and Social Welfare* (1998) London and Washington: Pinter, pp 115-142.

R. Creyke and J. McMillan, *Judicial review outcomes – An empirical study* (2004) 11 *AJ Admin L* 82.

R. Creyke and J. McMillan, *Executive Perceptions of Administrative Law – An Empirical Study* (2002) 9 *AJ Admin L* 163.

M. Hertogh, Coercion, Cooperation, and Control: Understanding the Policy Impact of Administrative Courts and the Ombudsman in the Netherlands (2001) 23(1) Law and Policy 47.

R. Creyke and J. McMillan, The operation of Judicial Review in Australia in Hertogh and Halliday Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives (2004) Cambridge: Cambridge University Press.

G. Richardson, Impact Studies in the United Kingdom, in Hertogh and Halliday Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives (2004) Cambridge: Cambridge University Press.

G. Downes AM, President of the Administrative Appeals Tribunal, *Government Agencies as respondents in the Administrative Appeals Tribunal*, 16 June 2005.

G. Downes AM, President of the Administrative Appeals Tribunal, *Why Does Australia Have a General Review Tribunal?* 7 October 2005.