



The Bar Council

## Law Reform Essay Competition 2023: Highly Commended

### **'Barrier to Justice: Why the mandatory reconsideration stage of the Personal Independence Payment appeals process should be abolished' by Emma Townend**

The Welfare Reform Act 2012 introduced Personal Independence Payment (PIP) as the benefit to replace Disability Living Allowance (DLA) for those of working age<sup>1</sup> in the United Kingdom.<sup>2</sup> As part of the overall reform, The Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment Support Allowance (Decisions and Appeals) Regulations 2013 came into effect that prevented claimants from appealing directly to First-tier Tribunal (FTT) if dissatisfied with the DWP initial decision.<sup>3</sup> Claimants became required to first seek a 'revision of the decision'<sup>4</sup> – or 'Mandatory Reconsideration'<sup>5</sup> (MR) – by the Secretary of State before the right of appeal to FTT. Thus, the era of direct lodgement for most disability benefit appeals ended abruptly.

#### **Intention of the Mandatory Reconsideration (MR)**

The MR was thus a 'radical change'<sup>6</sup> designed to reduce the rising number of benefit decisions being appealed.<sup>7</sup> The DWP regards the MR as an effective 'filter', preventing the weakest cases from being heard by tribunal,<sup>8</sup> thereby reducing pressure on the service and savings for the public purse – PIP was initially forecast

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<sup>1</sup> Between 16 and State Pension age. See Social Security (Personal Independence Payment) Regulations 2013, Part 6

<sup>2</sup> Ibid, Part 7

<sup>3</sup> See Section 7 (1)(b)

<sup>4</sup> Ibid

<sup>5</sup> As it became informally known.

<sup>6</sup> Thomas and Tomlinson, 'A Different Tale of Judicial Power: Administrative Review as a Problematic Response to the Judicialisation of Tribunals' [2019] Public Law, 2

<sup>7</sup> <<https://commonslibrary.parliament.uk/challenging-benefits-decisions/>> Accessed 1 October 2023

<sup>8</sup> Michael Adler, 'Tribunal Reform: Proportionate Dispute Resolution And The Pursuit Of Administrative Justice' (2006) 69 Modern Law Review 958, 959

to save 20% in relation to its predecessor DLA by the time of full implementation.<sup>9</sup> Claimants refused PIP at initial decision are required by law to seek this internal administrative review before appealing to tribunal.<sup>10</sup> In theory, erroneous decisions are rectified by more experienced DWP caseworkers before the need for tribunal assistance arises. And at a cost of £80 per unit rather than £592<sup>11</sup>, the MR appears to provide a financially sustainable resolution. Indeed, from April 2018 to March 2023, just 8% of PIP decisions were appealed to tribunal.<sup>12</sup>

### **A perception of difficulty...**

Yet a central focus of the second Gray report was the 'inherent mistrust'<sup>13</sup> that permeates the PIP application process for claimants, with tribunal judges registering particular scepticism of the thoroughness of the MR process.<sup>14</sup> There is a perceived rubber stamping<sup>15</sup> of decisions in place of a full audit, which '[erodes] the trust of the claimants and stakeholders in the system'<sup>16</sup> and gives rise to overpowering feelings of anxiety and stress.<sup>17</sup> This in turn often leads to a worsening of the claimant's condition<sup>18</sup>. This perception is reinforced by the volume of unchanged awards. Indeed, from January to March 2023, MRs resulting in a change of award remained at 11%, as per the previous quarter.<sup>19</sup>

Few are persevering to tribunal beyond the MR stage, with just 35% of claimants lodging an appeal after MR.<sup>20</sup> The MR process leaves claimants despondent<sup>21</sup> and this experience is arguably transposed onto the tribunal appeal process. Indeed,

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<sup>9</sup> Alan Roulstone, 'Personal Independence Payments, Welfare Reform And The Shrinking Disability Category' (2015) 30 *Disability & Society* 673, 682. See also Department For Work and Pensions, 'Disability Living Allowance Reform' (2011);

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/20176/dla-reform-wr2011-ia.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/20176/dla-reform-wr2011-ia.pdf)> Accessed 1 October 2023.

<sup>10</sup> Thomas and Tomlinson, 'A Different Tale of Judicial Power: Administrative Review as a Problematic Response to the Judicialisation of Tribunals' [2019] *Public Law*, 1

<sup>11</sup> *Ibid*, 10

<sup>12</sup>< <https://www.gov.uk/government/statistics/personal-independence-payment-statistics-to-july-2023/personal-independence-payment-official-statistics-to-july-2023>> Accessed 12 October 2023

<sup>13</sup> Paul Gray 'The Second Independent Review of Personal Independence Payment' (2017), 9

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/604097/pip-assessment-second-independent-review.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604097/pip-assessment-second-independent-review.pdf)> Accessed 1 October 2023

<sup>14</sup> *Ibid*

<sup>15</sup> *Ibid*, 45

<sup>16</sup> *Ibid*, 9

<sup>17</sup> *Ibid*, 39

<sup>18</sup> *Ibid*, 25

<sup>19</sup>< <https://www.gov.uk/government/statistics/personal-independence-payment-statistics-to-july-2023/personal-independence-payment-official-statistics-to-july-2023>> Accessed 1 October 2023

<sup>20</sup> *ibid*

<sup>21</sup> See Paul Gray 'The Second Independent Review of Personal Independence Payment' (2017), 9

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/604097/pip-assessment-second-independent-review.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604097/pip-assessment-second-independent-review.pdf)> accessed 1 October 2023

despite the fact the two appeals systems are uniquely different and proffer markedly different outcomes, by requiring claimants to first endure an unsuccessful and distressing internal administrative review, perception of the tribunal process is negatively influenced. This is further exacerbated by the association of attending a social security tribunal with 'going to court'.<sup>22</sup>

Thus, this perception that the MR is of 'dubious advantage'<sup>23</sup> and a widespread scepticism of its thoroughness<sup>24</sup> creates a significant problem. If the MR is effectively dissuading people from appealing a decision they believe to be incorrect, this represents a barrier to justice. Claimants have a right of appeal to FTT – but only after the DWP has made a 'revision' of the original decision.

Tribunal judges have also suggested that 'it is cogent oral evidence from the claimant at the hearing that is by far their most common reason for overturning decisions'<sup>25</sup>, supporting academic commentary that an inquisitorial approach is the most effective form of administrative review.<sup>26</sup> Furthermore, tribunals have: (1) more legal resources; (2) a legal background initial decision-makers do not; (3) less pressure to make decisions quickly and in accordance with Key Performance Indicators; (4) structurally mandated accountability to the Upper Tribunal and all courts above.<sup>27</sup>

### **... And the experience of difficulty**

The MR process is, from the very beginning, complicated and lacking in cohesion. Claimants ordinarily have one month from the date of initial decision to lodge an MR request.<sup>28</sup> This needs to be done by phone or by letter, with reasons for the

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<sup>22</sup> Machin, McCormack and Gidlow <<https://www.chadresearch.co.uk/wp-content/uploads/2019/04/DLA-to-PIP-CHAD-Project-Report-26-March-final-report.pdf>> accessed 3 October 2023

<sup>23</sup> Judge Robert Martin (Former President of First-tier Tribunal (Social Entitlement Chamber)), Quoted in Thomas and Tomlinson, 'A Different Tale of Judicial Power: Administrative Review as a Problematic Response to the Judicialisation of Tribunals' [2019] Public Law, 15

<sup>24</sup> Paul Gray 'The Second Independent Review of Personal Independence Payment' (2017), 9 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/604097/pip-assessment-second-independent-review.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604097/pip-assessment-second-independent-review.pdf)> accessed 1 October 2023

<sup>25</sup> Ibid, 46

<sup>26</sup> Thomas and Tomlinson, 'A Different Tale of Judicial Power: Administrative Review as a Problematic Response to the Judicialisation of Tribunals' [2019] Public Law, 1; Sophia Ridden, 'Hearing the Impact: The Experience of Social Security Tribunals in Relation to the Work of Citizens Advice' (2019) 5 The Open Review 42;

<sup>27</sup> Robert Thomas and Joe Tomlinson, 'Mapping Current Issues In Administrative Justice: Austerity And The 'More Bureaucratic Rationality' Approach' (2017) 39 Journal of Social Welfare and Family Law 380, 383

<sup>28</sup> Department for Work and Pensions, 'How to Ask for a Mandatory Reconsideration' <<https://www.gov.uk/mandatory-reconsideration/how-to-ask-for-mandatory-reconsideration>> accessed 30 August 2023

revision request outlined. Indeed, the fact that PIP remains ‘paper by default’<sup>29</sup> is noticeably out of step with the digitalisation of other benefit claim processes.<sup>30</sup> Despite ONS data showing that internet access for disabled adults is currently higher than it has ever been<sup>31</sup>, the DWP has not heeded the repeated calls to digitise and integrate its claims and appeals processes. The MR stands as a distinctly separate hurdle in the process of appeal.

This is not to say that the issues of complexity are not echoed at all stages of the claimant journey. It is proposed that the complete process from initial request of the PIP2 claim form to appeal can be broken down into at least eight distinct steps. At each stage, there is little room for error and disallowance occurs when deadlines are missed without good reason. A large-scale Disability Benefits Consortium survey revealed that 70% of respondents find completion of the PIP2 claim form ‘very hard’, and 11% find it ‘impossible’.<sup>32</sup> The implications of which are highly significant. Far from PIP forms being in the league of ‘banal paperwork’<sup>33</sup> that incite the kind of ‘routine responses’<sup>34</sup> of ‘sheer indifference’<sup>35</sup> that is ‘so often analysed in studies of forms and formfilling – these are high-stakes documents’<sup>36</sup> that carry very real consequences.

But these difficulties seem to multiply at the MR stage, the process seemingly compounding the frustration felt at the previous stages. DWP statistics indicate that 8% of claimants are withdrawing or cancelling their MR requests.<sup>37</sup>

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<sup>29</sup> Paul Gray ‘The Second Independent Review of Personal Independence Payment’ (2017), 70 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/604097/pip-assessment-second-independent-review.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604097/pip-assessment-second-independent-review.pdf)> accessed 2 December 2019

<sup>30</sup> Ibid. Most notably Universal Credit.

<sup>31</sup> ONS, ‘Internet Users, UK: 2019’ (2019)

<sup>32</sup> Disability Benefits Consortium, ‘Supporting Those Who Need it Most? Evaluating Personal Independence Payment’ (2017)

<<https://disabilitybenefitsconsortium.files.wordpress.com/2019/10/dbc-report-on-pip-supporting-those-who-need-it-most.pdf>> accessed 12 July 2023

<sup>33</sup> Jed Meers, ‘Forms of Fettering: Application Forms and the Exercise of Discretion in the Welfare State’ (2020) 42 *Journal of Social Welfare and Family Law* 221, 221

<sup>34</sup> Brenneis, ‘Reforming Promise’ in *Documents: Artefacts of Modern Knowledge* ed. A Riles (University of Michigan Press 2006) 41

<sup>35</sup> Marie-Andrée Jacob, ‘Form-Made Persons: Consent Forms As Consent’s Blind Spot’ (2007) 30 *PoLAR: Political and Legal Anthropology Review* 249, 258

<sup>36</sup> Jed Meers, ‘Forms of Fettering: Application Forms and the Exercise of Discretion in the Welfare State’ (2020) 42 *Journal of Social Welfare and Family Law* 221, 221

<sup>37</sup> DWP Statistics <<https://www.gov.uk/government/statistics/personal-independence-payment-statistics-to-july-2023/personal-independence-payment-official-statistics-to-july-2023>> Accessed 1 October 2023

### **A lack of support**

Further, there is a perception that the tribunal process is more complicated than the MR – and acknowledgement that the stakes are higher as the final possibility to have the initial decision completely reassessed – means support organisations are more likely to invest more heavily in assisting claimants *after* the MR. The Legal Aid reforms and an era of austerity also means that free channels of support are experiencing exceptionally high demand and thus need to ration support to the appeal stage only. Such perception effectively dissuades claimants from navigating the MR.

And yet the statistics indicate that of the claimants that *do* appeal the Mandatory Reconsideration Notice (MRN), 71% will have a decision overturned in their favour.<sup>38</sup> This suggests that the MR as a supposed quick recourse to justice<sup>39</sup> is unsuccessful in righting incorrect decisions before tribunal. On the contrary, it is routinely failing to identify the very group of people it is designed to empower, protect and support.

### **Reliance upon an external mechanism of redress**

It therefore seems clear that the success of PIP delivery is dependant upon FTT. For if the PIP process under the control of the DWP is failing its policy aim, and tribunals are increasingly delivering it, the benefit's salvation rests upon an external mechanism of redress. At the least, tribunals are rectifying award decisions that are difficult to correctly award at initial decision. Assessing functional ability is 'not a precise science'<sup>40</sup> and assessing millions of claims in this way 'is a formidable undertaking'<sup>41</sup>. Complete consistency is 'an unattainable 'Holy Grail''<sup>42</sup> and any element of 'mechanical application of the rules to a wide variety of citizens can result in arbitrary, insensitive and incorrect decisions'.<sup>43</sup>

Additionally, some disabilities are inherently harder to assess. This is most noticeable with hidden disabilities or disabilities that have high functional

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<sup>38</sup> DWP Statistics <<https://www.gov.uk/government/statistics/personal-independence-payment-statistics-to-july-2023/personal-independence-payment-official-statistics-to-july-2023>> Accessed 1 October 2023

<sup>39</sup> Thomas and Tomlinson, 'A Different Tale of Judicial Power: Administrative Review as a Problematic Response to the Judicialisation of Tribunals' [2019] Public Law, 1

<sup>40</sup> Paul Gray, 'Personal Independence Payment (PIP) Assessment: First Independent Review' (2014), 2 <<https://www.gov.uk/government/publications/personal-independence-payment-pip-assessments-first-independent-review>> accessed 14 October 2023

<sup>41</sup> Ibid

<sup>42</sup> Ibid, 66

<sup>43</sup> Thomas and Tomlinson, 'A Different Tale of Judicial Power: Administrative Review as a Problematic Response to the Judicialisation of Tribunals' [2019] Public Law, 1

fluctuation. This is particularly well-documented with regards to mental health<sup>44</sup>, where claimants were 2.4 times more likely to have their disability benefit removed in the transition from DLA to PIP.<sup>45</sup>

But this all points to the fact that the MR is not fit for purpose, and that tribunal is able to achieve something that the MR is routinely failing to do.

### **PIP as a priority**

The MR was introduced for a significant number of benefits.<sup>46</sup> Yet it is proposed here that the MR presents the greatest barrier to justice for PIP claimants. The PIP process assesses functional capability, which marks a distinct shift away from the medical model of disability that DLA used to utilise. One of the primary objectives of PIP was to focus support on those with the greatest need,<sup>47</sup> and thus within the context of an assessment that moves away from strictly condition-based qualification, it is those with the least functional capacity that are most entitled to the benefit.

Ironically, this demographic is more likely to be unable to navigate such a complicated and disjointed series of hurdles without assistance to get to FTT. Critically – and in direct contradiction to its policy aim – it is precisely the most ‘vulnerable individuals – such as those with long-term disability or mental illness – [who] often lack the ability and confidence to challenge official decisions, especially when their claim has already been rejected twice.’<sup>48</sup>

It is for this reason that it is of paramount importance to remove the MR for disabled claimants. And whilst DLA and Attendance Allowance also require the claimant to first receive a MRN before appealing to FTT, PIP is the most significant of the disability benefits, with 2.8 million claims with entitlement to PIP as at 31 October 2022.<sup>49</sup> In contrast, 1.2 million claim DLA<sup>50</sup> and 1.5 million claim Attendance

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<sup>44</sup> See Katie Pybus and others, 'Discrediting Experiences: Outcomes Of Eligibility Assessments For Claimants With Psychiatric Compared With Non-Psychiatric Conditions Transferring To Personal Independence Payments In England ERRATUM' (2019) 5 BJPpsych 1

<sup>45</sup> *ibid*

<sup>46</sup> <<https://www.gov.uk/mandatory-reconsideration>> Accessed 14 October 2023

<sup>47</sup> Paul Gray, 'An Independent Review of the Personal Independence Payment Assessment' (2014), 16 <<https://www.gov.uk/government/publications/personal-independence-payment-pip-assessments-first-independent-review>> accessed 18 November 2019

<sup>48</sup> Thomas and Tomlinson, 'A Different Tale of Judicial Power: Administrative Review as a Problematic Response to the Judicialisation of Tribunals' [2019] Public Law, 15

<sup>49</sup> DWP statistics <<https://www.gov.uk/government/statistics/personal-independence-payment-statistics-to-october-2022/personal-independence-payment-official-statistics-to-october-2022>> Accessed 12 October 2023

<sup>50</sup> DWP Statistics <<https://www.gov.uk/government/statistics/dwp-benefits-statistics-august-2022/dwp-benefits-statistics-august-2022>> Accessed 1 October 2023



Allowance<sup>51</sup> as of February 2022. And whilst these are not insignificant numbers, the priority has to be reform of PIP first and foremost.

Furthermore, a key difference between PIP and its predecessor, DLA, is that PIP awards are usually for a fixed period only. In 2011, 70% of all claimants of DLA received an award for an indefinite period of time.<sup>52</sup> In contrast, in the quarter ending July 2022, 78% of claims awarded were short term (between 0-2 years) and 11% were longer term (over 2 years), with just 10% of all PIP claims being on-going (requiring a 'light touch' review after 10 years).<sup>53</sup> Thus, the majority of claimants are undergoing a complete review of their award every 2 years, increasing the chance of claimant fatigue – a very real and well-documented phenomenon.<sup>54</sup> This makes it even more critical to reform PIP as a priority among other disability benefits.

### **Possible implications**

By removing the MR, it is likely that the number of appeals to tribunal will increase as claimant fatigue becomes less of a phenomenon. But this in turn raises the question of what role tribunals *should* play and whether it is appropriate for a judicial body to become a primary implementor of 'democratically mandated policy'<sup>55</sup>. And with the increasing judicialisation of tribunals<sup>56</sup> in the wake of the Tribunals, Courts and Enforcement Act 2007, there are far-reaching consequences on public law and the UK constitution.<sup>57</sup> Whereas prior to reform FTTs functioned as another limb of government, in the PIP era they are pitted as a separate entity acting as a check on the executive.

It is in this sense that tribunals provide a recourse to claimants against the government<sup>58</sup> and invests tribunals with a more traditional judicial role. It is precisely this right to an independent appeal that establishes the benefit more securely as a 'right'<sup>59</sup> and not just an act akin to 'charitable giving'<sup>60</sup> of the state.

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<sup>51</sup> *ibid*

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<[https://assets.publishing.service.gov.uk/media/5a7ce094e5274a2ae6eeb513/analysis\\_of\\_disability\\_living\\_allowance\\_DLA\\_awards.pdf](https://assets.publishing.service.gov.uk/media/5a7ce094e5274a2ae6eeb513/analysis_of_disability_living_allowance_DLA_awards.pdf)> P6, Accessed 1 October 2023

<sup>53</sup> <<https://www.gov.uk/government/statistics/personal-independence-payment-statistics-april-2013-to-july-2022/personal-independence-payment-official-statistics-to-july-2022>> Accessed 1 October 2023

<sup>54</sup> Thomas and Tomlinson, 'A Different Tale of Judicial Power: Administrative Review as a Problematic Response to the Judicialisation of Tribunals' [2019] Public Law, 15

<sup>55</sup> *Ibid*, 4

<sup>56</sup> *Ibid*

<sup>57</sup> *Ibid*, 30

<sup>58</sup> Paul R Verkuil and Jeffrey S Lubbers, 'Alternative Approaches to Judicial Review of Social Security Disability Cases' (2003) 55 Admin L Rev 731, 739

<sup>59</sup> Ciara Fitzpatrick, Gráinne McKeever and Mark Simpson, 'Conditionality, Discretion and TH Marshall's 'Right to Welfare'' (2019) 41 Journal of Social Welfare and Family Law 445, 457

<sup>60</sup> *Ibid*

Arguably, this has been one of the successes of the legal evolution of tribunals<sup>61</sup> and helps better regulate citizen disputes with the government.<sup>62</sup>

But the recourse to FTT is a worrying development. It indicates that the DWP, whether or not is their intention, is manoeuvring FTT into a role it was never intended to play with such routine and regularity. As already indicated, the fact that nearly three quarters of PIP appeals to FTT result in a change of award in favour of the claimant points to a failure of the MR. The statistics indicate that it is simply *not* weeding out the weakest cases from reaching tribunal. The question thus becomes, does abolishing the MR actually do more harm than good by simply increasing pressure on an already over-burdened Social Entitlement Chamber? Indeed, whilst pressure on the FTT is likely to increase, this points to a wider problem within the PIP system.

### **The Unparalleled Independence of FTT**

The independence of FTTs is critical in understanding the role they now play. There was significant concern prior to reform of the 'close prescription'<sup>63</sup> under DLA of officials' exercise of discretion by departmental authority of 'how decisions should be made to ensure that entitlement is targeted'.<sup>64</sup> This effectively allows FTTs to pave the way for the implementation of the descriptors as they stand bound in law, freed from the governmental constraint of needing to balance resources against justice and fairness.<sup>65</sup>

The MR is ineffective, and its removal is the first stage of PIP reform. For the MR as an internal administrative review cannot 'in any sense be regarded as a proper substitute for a right of appeal'.<sup>66</sup> It is not just that the MR is particularly onerous and poorly placed within the PIP appeals process, but also that it lacks the objectivity of the independent tribunal service. The bottom line is that administrative review lacks 'institutional independence'<sup>67</sup> and thus serves as an impediment to true and

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<sup>61</sup> See Gavin Drewry, 'The Judicialisation of 'Administrative' Tribunals in the UK: From Hewart Michael Adler, 'Tribunal Reform: Proportionate Dispute Resolution And The Pursuit Of Administrative Justice' (2006) 69 *Modern Law Review* 958

<sup>62</sup> See Robert Carnwath, 'Tribunal Justice – A New Start' (2009) 69 *Public Law* 48, 49

<sup>63</sup> Neville Harris, 'Complexity In The Law And Administration Of Social Security: Is It Really A Problem?' (2015) 37 *Journal of Social Welfare and Family Law*, 220, 211

<sup>64</sup> *Ibid.*

<sup>65</sup> Robert Thomas and Joe Tomlinson, 'Mapping Current Issues In Administrative Justice: Austerity And The 'More Bureaucratic Rationality' Approach' (2017) 39 *Journal of Social Welfare and Family Law* 380, 381

<sup>66</sup> Thomas and Tomlinson, 'A Different Tale of Judicial Power: Administrative Review as a Problematic Response to the Judicialisation of Tribunals' [2019] *Public Law*, 12.

<sup>67</sup> *ibid*



objective justice in the form of FTT. Indeed, academic opinion on administrative review ranges from 'traditional scepticism'<sup>68</sup> to unbridled optimism.<sup>69</sup> At the most cynical end of the PIP debate, the MR is merely a crude device to retain control, and a blunt and discriminatory tool to filter out the most vulnerable claimants in a bid to force through policy priorities and reducing spending. As Thomas and Tomlinson write:

'This is a radical change to how people access and experience justice in the public law context. For the last fifty years and more, individuals in receipt of a negative administrative decision could appeal directly to independent and judicial tribunals to determine their legal rights and entitlements. The rationale for this fundamental shift is clear: the increase in tribunal caseloads and the success rates for appellants, austerity, and political objectives (the desire to reduce social security spending and immigration rates) have prompted the Government to reduce the number of tribunal appeals by requiring individuals to use administrative review.'<sup>70</sup>

This therefore all points to the fact that the MR is failing. Indeed, it represents a significant barrier to justice in a modern age of disability benefits. And if PIP is to truly succeed as a benefit, the MR must be abolished.

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<sup>68</sup> Ibid, 2

<sup>69</sup> ibid

<sup>70</sup> ibid