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**ADMINISTRATIVE JUSTICE AND THE CONTROL OF  
BUREAUCRATIC DECISION-MAKING**

*A study investigating how decision-makers in  
local authority education departments respond  
to the work of redress mechanisms*

**VOLUME I of II**

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Submitted in fulfillment of the requirements for the Degree of  
Doctor of Philosophy

School of Law  
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**For Maria and Jude**

## ABSTRACT

This socio-legal thesis has explored the factors responsible for explaining whether and how redress mechanisms control bureaucratic decision-making. The research considered the three principal institutions of administrative justice: courts, tribunals, and ombudsman schemes. The field setting was the local authority education area and the thesis examined bureaucratic decision-making about admissions to school, home-to-school transport, and Special Educational Needs (SEN). The thesis adopted a qualitative approach, using interviews and documentary research, within a multiple embedded case study design. The intellectual foundations of the research were interdisciplinary, cutting across law, socio-legal studies, public administration, organization studies, and social policy. The thesis drew on these scholarly fields to explore the nature of bureaucratic decision-making, the extent to which it can be controlled and the way that learning occurs in bureaucracies and, finally, the extent to which redress mechanisms might exercise control. The concept of control was studied across all its dimensions - in relation both to *ex post* control in specific cases and the more challenging notion of *ex ante* or structuring control. The aim of the thesis was not to measure the prevalence of bureaucratic control by redress mechanisms, but to understand the factors that might explain its presence or absence in a particular area. The findings of the research have allowed for a number of analytical refinements and extensions to be made to existing theoretical and empirical understandings. 14 factors, along with 87 supporting propositions, have been set out with the aim of making empirically derived suggestions which can be followed up in future research. In terms of the thesis' contribution to existing knowledge, its comparative focus and its emphasis on the broad notion of control offered the potential for new insights to be developed. Overall, the thesis claims to have made three contributions to the conceptual framework for understanding the exercise of control by redress mechanisms: it emphasizes the importance of 'feedback' in relation to the nature of the cases referred to redress mechanisms; it calls attention to the structure of bureaucratic decision-making as well as its normative character; and it discusses how the operational modes of redress mechanisms relate to their control functions.

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## ABBREVIATIONS

AJTC	Administrative Justice and Tribunals Council
Court	The Administrative Court
EFA	Education Funding Agency
HMCTS	Her Majesty's Courts and Tribunals Service
IAPs	Independent Appeal Panels
MoJ	Ministry of Justice
OSA	Office of the Schools Adjudicator
PHSO	Parliamentary and Health Services Ombudsman
SEN	Special Educational Needs
SENDIST	Special Educational Needs and Disability Tribunal
The 1944 Act	The Education Act 1944
The 1974 Act	The Local Government Act 1974
The 1988 Act	The Education Act 1988
The 1996 Act	The Education Act 1996
The 1998 Act	The Schools Standards and Framework Act 1998
The 2001 Act	The Special Educational Needs and Disability Act 2001
The 2010 Act	The Academies Act 2010
The Admissions Code	The School Admissions Code
The Appeals Code	The School Admissions Appeal Code
The DDA 1995	The Disability Discrimination Act 1995
The HRA 1998	The Human Rights Act 1998
The LGO	Local Government Ombudsman
The SEN Code	The Special Educational Needs Code of Practice
The Transport Guidance	The Home-to-School Travel and Transport Guidance
The tribunal	The First Tier Tribunal (Social Entitlement Chamber - Special Educational Needs and Disability)
The upper tribunal	The Upper Tribunal (Administrative Appeals Chamber)

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## **AUTHOR'S DECLARATION**

I declare that, except where explicit reference is made to the contribution of others, that this thesis is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature:

Printed name:       CHRIS GILL

## **1. INTRODUCTION**

### **1.1. Introduction**

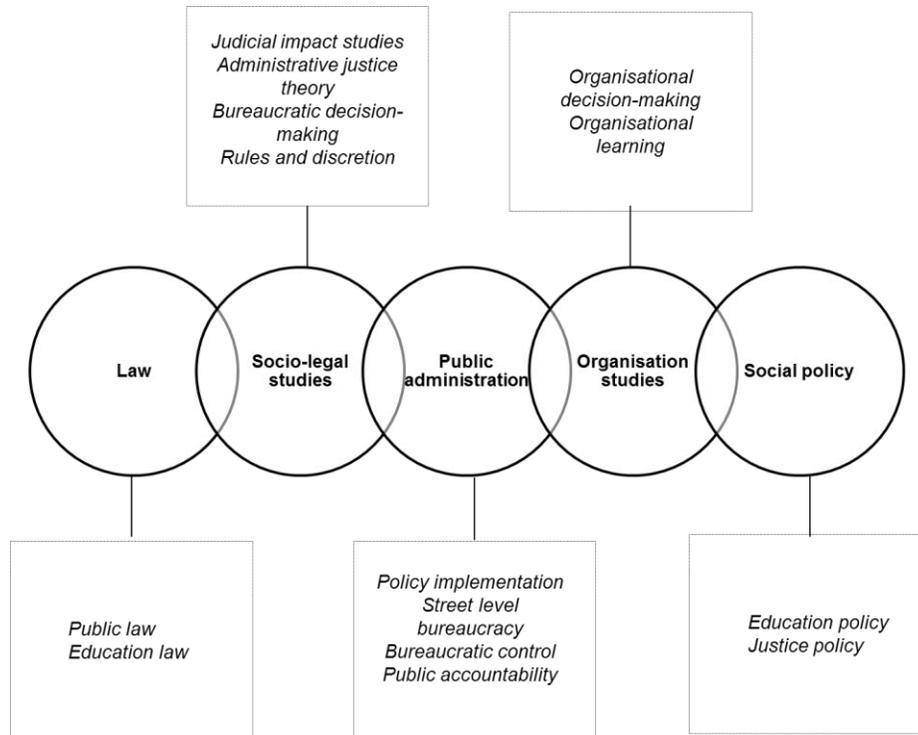
1.1.1. This chapter introduces the thesis. It begins by situating the thesis within scholarly traditions and disciplines, before providing an account of the particular focus of this research. The aims, objectives, and locus of the thesis are set out and a brief account is given of its methodology and field setting. An argument is made for the contribution of the thesis to existing knowledge, whilst also highlighting the limitations of the study. The chapter ends by explaining the structure of the thesis.

### **1.2. Situating the thesis**

1.2.1. This socio-legal thesis contributes to scholarship concerned with understanding the significance of law in society: does law matter in society and, if so, how? A particular strand within this literature has sought to understand the relationship between law and the behaviour of social actors. This has been investigated in relation to whether law structures the relationship of civil parties, whether it determines corporate behaviour, and whether it can control public bureaucracies. In each case, research has sought to address a fundamental paradox whereby law appears to be both central and peripheral to social life, at once knitted into the core of our social world and yet remote from it. The questions raised here are large ones that seek to understand the nature of social relationships, the determinants of social behaviour, and the structures that shape society. These underlying questions touch on the classic themes of social science and have been studied across disciplines, from law to psychology, from political science to philosophy, from public administration to sociology.

1.2.2. Within this broad canvas of scholarly interest, socio-legal researchers have sought to develop our understanding of a particularly important relationship: that between law and administration, and between courts and public bureaucracies. The idea that courts operate as a means of controlling bureaucracy and that legal principles arising from particular cases prospectively inform bureaucratic behaviour has often been assumed in traditional legal scholarship. However, widespread scepticism about this assumption has provided the prompt for empirical research which has sought to examine the extent to which received ideas about the role and significance of courts are reflected in real world settings. Judicial impact studies have aimed, therefore, to measure and explain the degree to which courts have an effect on public bureaucracies. The findings of this research have - with some notable exceptions - suggested that the impact of courts is limited and that their significance to routine processes of bureaucratic decision-making is likely to be peripheral.

1.2.3. This, therefore, is the principal context in which the present thesis situates itself and the specific field of enquiry in which it seeks to make a contribution. At the same time, as suggested above, the thesis has been strongly influenced by a number of complementary and intersecting scholarly traditions. These include research into the implementation of public policy, the organisation of bureaucracy, the nature of bureaucratic decision-making, the exercise of control and accountability, and learning within organisations. As such, the thesis draws on approaches from diverse academic fields in order to generate rounded and interdisciplinary insights. Figure 1.1 below provides a visual representation of the thesis' situation in relation to various disciplines, along with an indication of the particular fields of enquiry that are drawn on in each discipline.



*Figure 1.1: the interdisciplinary context for the thesis*

### 1.3. Focus and purpose of the research

1.3.1. Having provided an orientation to the intellectual foundations of the thesis, this section explains the particular focus of the research. The aim of the thesis is *to explore the factors that facilitate or obstruct the control of bureaucratic decision-making by redress mechanisms*. In setting out this aim, it is important immediately to define the terms used to describe the phenomenon under study, since these are both technical and used in a particular way in this thesis. This is done in box 1.1.

*Box 1.1: definitions of key terms used in the thesis*

*Control:* This refers to the notion that the behaviour of bureaucratic decision-makers can be limited, corrected, and structured by external forces (Dunsire 1979, 1984, Feldman 1998, 2003). In this thesis, the particular emphasis is on the extent to which redress mechanisms exercise such control. See chapter 3 for an in-depth discussion.

*Bureaucratic decision-making:* The thesis focuses on a particular type of organisational decision-making which involves the application of standards, with varying degrees of specificity and routinisation, to individual cases. This involves looking at what Galligan (1996) terms 'routine administration' and 'modified adjudication'. See chapter 2 for an in-depth discussion.

*Redress mechanisms:* In the UK, the principal means through which citizens can raise a grievance about bureaucratic decision-making are: the courts (via judicial review), tribunals, and ombudsman schemes (AJTC 2011). In this study, 'redress mechanisms' refer to these three mechanisms. See chapters 4 and 5 for an in-depth discussion.

1.3.2. In support of this overall aim, a number of more specific objectives have been developed:

- (i) To describe how redress mechanisms, individually and collectively, seek to achieve control over bureaucratic decision-making and how bureaucratic decision-makers respond to the decisions (and other actions) of redress mechanisms;

- (ii) To compare differences between individual redress mechanisms, between different areas of bureaucratic decision-making, and between the responses of bureaucratic decision-makers;
- (iii) To explain the circumstances in which redress mechanisms' attempts to exercise control are more or less likely to be successful by providing (a) analytical refinements to existing theoretical understandings and (b) extending these through the generation of novel hypotheses; *and*
- (iv) To evaluate current administrative justice policies in light of the research's findings.

1.3.3. Chapter 6 discusses these points in detail but, by way of introduction, it may be helpful to identify some of the distinguishing features of the study. One of these is the comparative approach which is adopted, whereby several redress mechanisms are studied across several decision-making areas. The literature features only one example of comparative work (Hertogh 2001) and none which involves all three redress mechanisms considered here. In addition to seeking to study these three mechanisms individually, the thesis enters new territory by adopting a holistic perspective which seeks to examine the extent to which administrative justice institutions - as a whole - control bureaucratic decision-making. Generally, therefore, the thesis departs from the purely legal focus of much existing research, and adopts a broader *administrative justice perspective*, where the concern is not only with legal institutions but with the wider suite of mechanisms and processes which allow citizens to pursue grievances against the state.

1.3.4. Another key feature is the thesis' objective to refine existing theoretical understandings and to develop new hypotheses. This aligns the thesis with Halliday's (2004) work and with research which has been more interested

in understanding the factors responsible for control, rather than in measuring the extent to which control is achieved in a particular area. While these questions are to some extent inter-linked, the focus of this research is on understanding the phenomenon of control by redress mechanisms rather than simply measuring it. Finally, the thesis seeks to consider how the question of control relates to administrative justice policy, an area which has tended to be ignored in previous studies. Here the thesis aims to make a connection with the literature on redress design (Bondy and Le Sueur 2012, Le Sueur 2012) and to reflect upon the way in which institutional design and the exercise of bureaucratic control may be connected.

1.3.5. While the thesis' main intellectual foundation can be found in the literature on the bureaucratic impact of courts (Hertogh and Halliday 2004), it should be noted that its approach departs from this literature in an important way. The key conceptual difference relates to this thesis' concern with the idea of *bureaucratic control*. This differs from the emphasis in existing literature which has tended to be on 'impact', 'influence', or 'compliance'. There are a number of reasons for adopting a *control perspective*. The first is that such a perspective gives a clearer sense of where the particular relationship under study (how redress mechanisms control administration) fits in with a broader phenomenon of legal and social scientific interest (how control over administration is achieved in general). The second is that, in the guise of Dunsire's (1979, 1984) cybernetic theory of control, it offers a helpful theoretical basis for understanding the idea of control and the means through which it may be achieved. The third is that it moves away from the legal emphasis of concepts such as compliance, which are less helpful when it comes to considering institutions such as ombudsman schemes which draw on extra-legal standards in addition to the law. The fourth is that it is a more precise concept than either 'influence' or 'impact', drawing attention to

the normative premise underlying the assumption that redress mechanisms should have an effect on bureaucratic behaviour *i.e.* that public bureaucracies require to be held in check in the public interest. And, finally, the fifth is that it allows for a clearer identification of the regulatory purpose of redress mechanisms (Halliday 2004), which seek not simply to effect behaviour change in public bureaucracies for its own sake, but with the fundamental purpose of aligning that behaviour with principles of good administration. For these reasons, the concept of control is preferred in this thesis as the means of articulating the particular phenomenon under study.

#### **1.4. Fieldwork setting and methodology**

1.4.1. The thesis has sought to achieve its aims and objectives by conducting empirical fieldwork in a particular area of public administration and with particular redress mechanisms. The area selected for study was local authority education departments in England responsible for taking decisions in three areas of statutory decision-making: admissions to school, home-to-school transport, and Special Educational Needs (SEN). The redress mechanisms operating in this area and subjected to study were the Local Government Ombudsman (from herein 'the LGO'), the First Tier Tribunal (Social Entitlement Chamber - Special Educational Needs and Disability) (from herein, 'the tribunal') and the Upper Tribunal (Administrative Appeals Chamber) (from herein 'the upper tribunal'), and the Administrative Court (from herein 'the court'). This fieldwork setting was chosen for a number of reasons: it featured relatively high levels of review by each of the three redress mechanisms; it was an important area of public administration, involving significant rights and entitlements; and, more pragmatically, it offered the best chance of getting access to conduct the research.

1.4.2. In terms of the methodology, the research adopted a multiple embedded case design (Yin 2009). This involved selecting six local authorities, which were chosen on the basis that: they were heavily reviewed by redress mechanisms; they were geographically diverse; they featured a good urban-rural mix. The methodology employed was qualitative, and the methods employed were semi-structured interviews and documentary research. Interviews were conducted with decision-makers in each local authority, with redress mechanism staff, with policymakers, and with parent support organisations. In total 61 interviews were conducted with 70 respondents. The documentary research considered the reported decisions of redress mechanisms and analyzed 66 decisions in total. The bulk of the research was conducted with decision-makers in local authorities, since it was considered that their perspectives were particularly vital in understanding whether and how redress mechanisms exercised bureaucratic control.

## **1.5. The thesis' contribution to existing knowledge**

1.5.1. The sections above will already have given some sense of the contribution that the thesis seeks to make to existing knowledge about the control of bureaucratic decision-making by redress mechanisms. However, it may be helpful to specify the particular gaps in the existing scholarly research base that the thesis seeks to address. The first of these has been touched on above and relates to the lack of comparative work on the bureaucratic control functions of redress mechanisms. This is an important area to address, not only because there are theoretical indications in the literature that there may be significant differences between redress mechanisms in terms of their control functions, but also because comparative approaches are particularly suited to theory development. Studying redress mechanisms in comparative perspective allows for insights to be obtained which may be hidden when they are studied in

isolation. The second gap relates to the lack of empirical knowledge about the control functions of ombudsman schemes and tribunals. There is currently a limited literature in both these areas, particularly in relation to tribunals. In relation to ombudsman schemes especially, there are also widespread suggestions that they are well suited to the task of bringing about administrative change and there is an increasing need to test whether these suggestions match up to empirical reality.

1.5.2. The third gap relates to the choice of fieldwork setting, which represents a novel area for the study of bureaucratic control by redress mechanisms. More importantly, the choice of this area - and its inclusion of several different 'types' of bureaucratic decision-making - allows for an exploration of the relationship between control by redress mechanisms and the fundamental structures of decision-making within a particular bureaucratic environment. The fourth gap relates to the relative lack of theoretical frameworks within the existing literature (Hertogh and Halliday 2004). While this thesis does not have the lofty aim of grand theory building, there is nonetheless scope for suggesting analytical refinements to existing conceptual understandings and generating novel hypotheses for testing in future research. As a result, a space exists for this thesis to continue to contribute to the incremental development of scholarly understandings in this area.

1.5.3. In terms of the knowledge contribution which the thesis has delivered, this is for the reader to judge, but the thesis makes three main claims in this regard. The first is that new empirical data is presented about the control of bureaucratic decision-making by redress mechanisms. This data provides novel insights into bureaucratic control in a context that has not previously been studied. The second is the development - in this thesis' discussion chapter - of 14 factors and 87 supporting propositions which seek to explain the presence or absence of control by redress mechanisms.

For each of the 14 factors, the thesis contributes to existing knowledge either by confirming, amending or developing understandings in the existing literature. At a granular level, the thesis also proposes a series of models which seek to explain some of the relationships which contribute to the overall achievement of control by redress mechanisms. The third and final area relates to the overall model and conceptual framework that is derived from the analysis. Here the claim is that the thesis has extended the scope of existing conceptual frameworks (particularly, Halliday's (2004) analytic framework) in three ways: firstly, by drawing attention to the importance of the inputs into control systems and the quality of the cases referred to redress mechanisms; secondly, by focusing on the processes and operational features of redress mechanisms and developing hypotheses about how these relate to the exercise of control; and thirdly, by highlighting the importance of variations in bureaucratic decision-making structures. Chapters 8 and 9 provide a full discussion of these points.

## **1.6. Limitations of the research**

1.6.1. A number of limitations affected the quality of the data collected in this thesis and should be considered when interpreting its findings and conclusions. One limitation related to the fieldwork setting which was selected. While, as noted above, there were good reasons for choosing the local authority education context, this setting was perhaps not optimal. Its major drawback was that it featured low numbers of judicial review cases and, although the authorities in the sample had been threatened with litigation, no cases had reached a hearing. Although respondents were still able to comment on judicial review in general and refer to reported cases, they had no direct experience of being subjected to judgments. This points to the difficulty of finding an area of public administration where

all three redress mechanisms operate to a significant extent and - importantly - where there is a reasonable chance of access being granted.

1.6.2. Another limitation related to the depth and saturation of data that was achieved. While sufficient interviews were conducted to obtain a rounded sense of the phenomenon under study, too few interviews were conducted with each individual local authority to develop a full contextual sense of how each local authority varied. It had initially been hoped that practices, processes, and attitudes could be compared across local authorities, however, since interviews were conducted across three decision-making areas in each authority, there was insufficient data to confidently talk about variations. As a result, data is presented in aggregate form (across all six local authorities) for each decision-making area: admissions, transport, and SEN. This lack of data saturation resulted from the difficulty experienced in gaining access to conduct the fieldwork and the need to present the research to potential participants as light touch and unobtrusive.

1.6.3. The final limitation referred to the methods employed as part of the research and the overreliance on interviews. There are strong indications in the literature that the use of direct observation is important when it comes to studying the bureaucratic control functions of redress mechanisms. This allows data to be triangulated and can highlight the gap between what respondents say they do and what they actually do in practice. Similarly, the use of primary documentary research, particularly case files, can provide more objective and comprehensive data than that which is available *via* interviews and published documents. While the strengths of observation and primary documentary research are acknowledged, a combination of ethical restrictions, difficulties in negotiating access, and a lack of time available to the researcher meant that these methods could not be included in the research design.

## **1.7. The structure of the thesis**

1.7.1. This thesis is in nine chapters, including this introduction. Chapter 2 describes the literature on bureaucratic decision-making, situates the particular type of decision-making with which this thesis is concerned, and considers a range of theories put forward to explain decision-making in organisations. Chapter 3 summarises the literature on the control of bureaucracies, with a particular emphasis on accountability mechanisms, before considering the organisational learning literature and making an argument for drawing on these insights in the present study. Chapter 4 gives an overview of the socio-legal literature on redress mechanisms' control functions and provides the principal foundation for the empirical part of the thesis. Chapter 5 provides an analysis of education law and policy, explaining the various areas that are considered in this thesis and mapping out the redress landscape in education. Chapter 6 describes the methodology used in the research. Chapter 7 outlines the findings, while chapter 8 discusses them with reference back to the earlier literature chapters. Finally, chapter 9 provides a conclusion which outlines an overall model for understanding the control functions of redress mechanisms, summarises the extent to which redress mechanisms exercise control in the local authority education area, and discusses the implications of the thesis for policy and future research.

## 2. BUREAUCRATIC DECISION-MAKING

### 2.1. Introduction

2.1.1. This chapter explores the nature of decision-making within bureaucracies. It begins with a discussion of the changing nature of public bureaucracy, before focusing on bureaucratic decision-making. This is a particular type of decision-making, involving the application of authoritative standards to individual cases, with varying amounts of discretion awarded, or defaulting, to the decision-maker. The chapter will also explore the characteristics of the decision-makers charged with making these kind of decisions, the so-called 'street level bureaucrats' (Lipsky 1980). The chapter then considers decision-making theory and the debate between those who argue that decision-making is a rational process of utility maximisation and those who suggest it is a normative process of identity realisation. Finally, the chapter considers the administrative justice literature, which highlights the particular importance of ideas about fairness in explaining the behaviour of bureaucratic decision-makers.

### 2.2. Developments in bureaucratic organisation

#### *Traditional conceptions of bureaucracy*

2.2.1. Max Weber's (1864 to 1920) rational-legal model of bureaucracy is central to modern understandings of bureaucracy (Scholy *et al* 1991, Schofield 2001). The characteristics of bureaucracies fitting the Weberian model include: independence from the political sphere; separation from other forms of social organisation; routinisation of decision-making; a high degree of internal specialisation; a hierarchical organisational structure; the development and use of technocratic expertise; a high level of

formality and rationality, with an emphasis on documented records; and impartiality and disinterest in the application of rules (Galligan 1986; Pollitt 2009). Bureaucracy is seen by Beck Jorgensen and Vrangbaek (2011, p.489) as fitting with the 'hierarchy' mode of governance, a top-down approach in which it is conceived as an externally controlled and neutral 'machine'. The aims of this particular form of administration are to minimise variation in the process and outcomes of administering policy programmes, to increase efficiency, and to centralise control over both officials and the targets of the policy intervention (Sandfort 2000). As Harlow and Rawlings (2009) point out, bureaucracy, as a form of organisation, has developed to meet the challenge of administering a large-scale modern welfare state.

2.2.2. Much of the commentary on bureaucracy has been negative (Farrell and Morris 2003). Kernaghan (2000), for instance, describes traditional bureaucracies as: concerned with the needs of the organisation rather than its clients; emphasising command and compliance rather than cooperation; focusing on the application of rules rather than the empowerment of individuals; failing to consult with those outside the bureaucracy; reluctant to change and favouring the *status quo*; and focused on process and losing sight of results. Beetham (1996) notes that a particular criticism of the traditional bureaucratic model is the naive assumption that bureaucracies are neutral, while Du Gay (2000, 2005) has pointed out that a key trend in the public imagination has been to see bureaucracy as a synonym for waste and inefficiency. Downs (1967), Tullock (1965), and Niskanen (1971) all argue that bureaucrats are motivated by self-interest and a desire to expand their bureaucratic empires. Dunleavy (1991) suggests an alternative to notions of bureau maximisation, with his concept of 'bureau-shaping' emphasising non-monetary and other motivators to explain the way in which bureaucrats seek to shape the administrative environment. Some authors, such as Du

Gay (2000, 2005) and Woodhouse (1997) have argued strongly for a more positive view of bureaucrats, taking a balanced perspective on the costs and benefits of bureaucracy as a form of social organisation. However, such accounts have tended to be drowned out by the view that bureaucracy is dysfunctional.

### *Administrative reform: the New Public Management*

2.2.3. The perception that bureaucracies suffer from bureau-pathologies has partly been responsible for the large-scale administrative reforms which have been implemented in most developed countries from the 1970s and 1980s onwards (Hood 1991; Hood and Dixon 2015). According to Hood and Dixon (*ibid.*) one of the three major changes in government in the last 30 years has been managerial makeovers, including the New Public Management (NPM) reforms. NPM is a tag that has been criticised for becoming something of a portmanteau for all changes that have occurred in government in the last 30 to 50 years (Pollitt 2009). Its exact meaning is fluid, but a key characteristic is its reliance on ideas from management in the private sector (Farrell and Morris 2003). Pollitt (2009) argues that there are two dimensions to this import of private sector notions. The first is doctrinal and involves an ideological argument for the perceived superiority of private sector practices. The second is more practical and involves a diffused cluster of practical tools and mechanisms (such as key performance indicators).

2.2.4. In terms of the core substance of NPM, Dunleavy (1991) has argued that this can be summarised as involving competition, disaggregation, and incentivisation. Competition involves the increasing use of quasi-market mechanisms to structure public services; disaggregation refers to the separation of policymaking and policy delivery functions; and incentivisation refers to the mechanisms used to manage performance

towards the delivery of desired outcomes. Du Gay (2000) prefers the term 'entrepreneurial governance' to NPM and includes a number of other features in his definition, including: the empowerment of citizens in relation to bureaucracy; the re-branding of citizens as customers with quasi-contractual rights; an emphasis on the fulfilment of broad missions rather than bureaucratic rules; and an emphasis on making money rather than only spending it.

2.2.5. One aspect which has increasingly come to dominate NPM approaches is the emphasis on customer rights and choice (Taylor and Kelly 2006). The notion that satisfying citizen-consumers should be part of the mission of government has been controversial, but also seen as necessary counterweight to the traditional dominance of producer interests (Needham 2006; Simmons *et al* 2007). Clarke *et al* (2010) argue that choice has provided the underlying logic for public services provision under the New Labour government. Harlow and Rawlings (2009) see this approach as an attempt to soften previous NPM reforms, by placing an enhanced emphasis on the responsiveness of services and their accessibility to consumers.

2.2.6. In the late 1990s and 2000s, there was a growth in focus on accountability, as recognition grew that quasi-markets could not take care of themselves (Dent *et al* 2004; Hood *et al* 2000; Taylor and Kelly 2006). According to Dent *et al* 2004, audit and accountability have now come to dominate NPM, while Taylor and Kelly (2006) talk about NPM having led to an increase in both top-down and bottom-up methods of accountability. Top-down methods include inspection, target-setting, and managerial oversight, while bottom-up approaches involve greater accountability to customers and stakeholders (accountability is discussed at length in chapter 3). Generally, the NPM approach continues to dominate government policy on public service delivery (Carolan 2013) and can

largely be summarised as an attempt to achieve improved policy outcomes *via* the creation of what are perceived to be more efficient bureaucratic structures and processes.

### *Assessing the reforms*

2.2.7. A major question has been over the net effect of NPM reforms and the degree to which bureaucracy has been transformed. Some have suggested that NPM has led to ‘post-bureaucratic’ organisations (Kernaghan 2000; Pollitt 2009). Pollitt (*ibid.*) defines post-bureaucracies as those which have consciously moved away from the principles of traditional bureaucracy with the aim of being quicker, more flexible, and more efficient. Post-bureaucracies can essentially be defined as the antitheses of the Weberian model surveyed above, in that they are: citizen centred; encourage public participation; supportive of employees; open to consultation and cooperation with stakeholders; oriented towards actions and outcomes; decentralised; and revenue-driven and competitive (Kernaghan 2000). Pollitt (2009) adds that they are characterised by flattened management structures, greater flexibility in employment patterns, and an emphasis on creativity and innovation instead of rule-following.

2.2.8. The existence of post-bureaucracies has, however, been challenged by a number of scholars. Bolton (2004, p. 321), discussing organisational change in the NHS, has questioned the extent to which changes have actually occurred on the ground, suggesting that they may be ‘just a façade’. Similarly, Hoggett (1996) has argued that rather than casting off traditional bureaucratic mechanisms, NPM reforms have in fact re-introduced or strengthened such approaches. The result has been a hybrid of old and new forms of management, rather than an entirely reformed system. Schofield (2001, p. 84) has also argued that bureaucracy as a mode of governance has in fact survived and proved very resilient. She

ascribes its longevity to the fact that elected members can rely on the obedience of bureaucrats, an obedience which is the result of a sense of bureaucratic vocation and professional reputation.

2.2.9. A feature of traditional bureaucracy which some have been seen as surviving reforms is the notion of the public service ethos. This is composed of values such as impartiality, integrity and objectivity, selection and promotion on merit, and accountability (Du Gay 2000, 2005). Although hard to define in exact terms, it has been seen as a central tenet of traditional public administration and as being ‘...passed from generation to generation in the form of a ‘genetic code’ (Woodhouse 1997, p. 33). The public service ethos can be seen to fit with Hood’s (1991, p. 11) description of ‘theta type’ values for public management, where the overall aim is to ‘keep it honest and fair’. Such values are distinct from ‘sigma type’ values associated with NPM, where the main aim is to ‘keep it lean and purposeful’. While theta and sigma values are in competition with each other, it appears that the public service ethos has retained a role in shaping the values and behaviour of public servants. The result is a plurality of new and old values co-existing in the moral universe of administrators (Beck Jorgensen and Vrangbaek 2011).

### **2.3. Bureaucratic decision-making and decision-makers**

2.3.1. Having discussed broad developments in bureaucratic organisation, this section now discusses: different types of bureaucratic decision-making; the particular type of decision-making which is of concern in this thesis; and the nature of the street level bureaucrats charged with this decision-making.

### *Types of bureaucratic decision-making*

2.3.2. Harrison and Pellettier (2001) argue that the following variables affect decision types: whether the decision is important or complex; whether the decision will recur frequently; and whether the likely outcome of a decision is relatively certain. Most accounts see these variables as producing two main types of decision-making, which have been variously described in the literature as programmed and non-programmed (Simon 1997), routine and factual (Gifford 1983), structured and unstructured (Cooke and Slack 1991), and generic and unique (Drucker 1967). The characteristics of programmed, routine, structured, and generic decisions are their high degree of recurrence, their relative simplicity, their suitability for routinisation, and their non-specific character. The characteristics of non-programmed, factual, unstructured, and unique decisions, on the other hand, include a high level of complexity, the need to consider individual circumstances in detail, the lack of clear pattern between decisions, and the need to adapt processes to each decision. This thesis follows Harrison and Pellettier (2001) in calling these two broad decision types category 1 and category 2 decisions, respectively. While this simple distinction between decision types helps to highlight key categories of decision, a number of authors make clear that decisions in the real world may involve elements of both approaches.

2.3.3. The idea of decision types existing on a continuum between routine and non-routine cases is helpful, and points to a middle ground of decision-making that has been neglected in the social-science literature, but has tended to be the central focus of socio-legal literature. Galligan (1996) has made a particularly helpful contribution to this latter literature, and he argues that three main types of decision can be identified: routine decisions, decisions requiring an element of enquiry and judgment, and policy-based decisions. He describes routine decisions as those involving the

straightforward application of criteria to a set of easily established facts, while policy decisions are those in which only loose standards are provided as the basis for decision-making and significant judgment is required. These decision-types can clearly be seen to mirror, respectively, the category 1 and category 2 decisions discussed above. Galligan (1996, p. 236), however, points out that a third category of decision exists:

‘Between routine administration and policy-based discretion lies the great mass of administrative processes... Here decisions are made by the application of standards which require a greater degree of enquiry and judgment, even discretion, than is provided by routine administration, but fall short of strong policy based discretion.’

Such decisions - involving elements of both structure and judgement, routinisation and sensitivity to individual facts - can be termed category 3 decisions.

2.3.4. In a previous work, Galligan (1986) provides a more detailed breakdown of the types of decisions arising within bureaucracies. He identifies four types: adjudication; modified adjudication; specific policy issue; and general policy issue. Adjudication is the process of determining the rights and duties of individuals through the application of reasonably settled standards. Modified adjudication is similarly based on an individual’s rights and duties, but also involves considering how he or she *should* be treated. Here, standards are less settled and there is more freedom for decision-makers to apply judgment. Specific and general policy decisions both involve the application of loose standards and significant elements of judgment, with a range of interests being affected. The key difference between the two is that specific policy decisions relate to a particular

individual, while general policy decisions refer to the formulation of general principles for future application in individual cases.

2.3.5. The central concern of this thesis can, therefore, be summarised as being about category 1 and category 3 decision-making; it is these decision types that are referred to when the thesis speaks of 'bureaucratic decision-making'. The emphasis is on the application of standards, with varying degrees of specificity and routinisation, to individual cases (a process referred to as individuation by Harlow and Rawlings 2009). While routine decision-making under rules (category 1) is relatively uncontroversial, category 3 decisions - consisting of modified adjudication and specific policy decisions - are perhaps the most controversial within the bureaucratic setting, for the very reason that the balance to be struck between pre-programming and deciding on the spot is unclear. They are also, as we shall argue throughout this thesis, a particularly complex category of case due to the need to reconcile individual interests with those of the broader community with each decision that is made.

#### *Key features of bureaucratic decision-making*

2.3.6. This section considers two central features of bureaucratic decision-making: the need to reconcile individual and collective interests; and the balancing of rules and discretion within decision-making processes.

2.3.7. *Individual and collective interests.* Galligan (1996) describes individualised decisions as those which only affect the interests of a single individual, while collective decisions are those where a wide range of interests are affected. As we saw above, however, the situation with regard to category 3 decisions is more complex, since here each decision on an individual case involves careful balancing between the individual's interest and the broader public interest. Tweedie (1989) refers to this as a

tension between an individual client orientation and a collective welfare orientation in bureaucracy. The former involves the careful tailoring of decisions to the individual circumstances of a case and the adoption of procedures that involve maximum participation for the individual. The latter is more concerned with ensuring that the goals of the policy programme are implemented in line with the interests of society at large and sees investment in practices to tailor services to individuals as detracting from resources available for others.

2.3.8. The tension between the rights of the individual and the interests of the collective in public administration has been a concern of legal theorists such as Dworkin (1978), who argues for a view of rights as ‘trumps’ whereby individual rights should take precedence over collective interests in those cases where they come into conflict. The reality of bureaucratic decision-making is, however, likely to be significantly different. Indeed, Tweedie (1989) argues that bureaucracies have a natural tendency to prioritise collective interests as a result of a lack of resources meaningfully to individuate decisions and a bureaucratic mind-set which favours a collectivist view. This collectivist approach mirrors the form of decision-making which is widely seen to dominate public bureaucracies and which Mashaw (1983) calls ‘bureaucratic rationality’, Galligan (1996) describes as ‘bureaucratic administration’, and Kagan (2010) terms ‘bureaucratic legalism’ (see section 2.5 below where these issues are discussed in detail). At the individual case level, the broader need to balance these interests is reflected in the need to appropriately balance the use of rules with the use of discretion. The latter is strongly associated with the ability of administrators to tailor decisions and adopt the individual client orientation discussed above (Ponce 2005), while the former are more clearly associated with collectivist approaches emphasising consistency and control (Jowell 2007).

2.3.9. *Rules and discretion.* The question of the proper apportionment of rules and discretion in bureaucratic decision-making has been a major concern of socio-legal and public administration scholarship. The latter has tended to frame the discussion in terms of the characteristics of street-level bureaucracy (Lipsky 1980), which will be considered in the following subsection. Here, our concern is with the long running debate about the extent to which discretionary decision-making can and should be constrained and rendered subservient to rule-based decision-making. This debate came to prominence with Davis' (1969) argument that discretion was the major source of injustice in public administration and as a result needed to be brought under strict control. Following his work, there have been two strands of scholarship on discretion, one of which has bemoaned its existence and the other which has celebrated its value (Keiser 1999). Before we examine these arguments in more detail, the chapter will first consider what is meant by rules and discretion.

2.3.10. There has been less controversy in relation to the definition of rules than discretion, and as a result this may be dealt with fairly briefly. Baldwin (1990, p. 321) provides the following definition: 'A rule may be defined as a general norm guiding conduct or action in a given type of situation.' It may be thought that discretion is the polar opposite of rules and the state that arises in the absence of rules. Indeed, some definitions seem to suggest this, and Dworkin's (1978, p. 31) famous description of discretion as the 'hole inside the donut' provides a very visual illustration of the perceived separation of rules and discretion. Others have provided somewhat more nuanced definitions, which see discretion less as an all-or-nothing matter arising from the absence of rules, and more as a matter of degree. Here, discretion is '...a series of gradations of freedom to make decisions' rather than a matter of unconstrained choice (Evans and Harris 2004, p. 871).

2.3.11. Different types of discretion may be identified as arising within the decision-making process. Dworkin (1978) distinguished between two types: weak discretion, which involves the discretion to interpret rules and to take decisions within the confine of rules; and strong discretion, which provides decision-makers with the freedom to devise their own decision-making rules. Galligan (1986) challenges Dworkin's approach by arguing that the latter's description of rule interpretation as 'weak' assumes that rules are clear and that a single correct answer is possible when applying rules. Galligan (*ibid.*) considers that rules are often complex and suggestive of multiple possible answers, so that an official may in fact have significant 'strong' discretion when applying rules. Galligan's (*ibid.*) alternative is to depict discretion as occurring in three aspects of the decision-making process: the finding, and interpretation, of facts; the search for, or creation of, relevant standards; and the application of standards.

2.3.12. Taylor and Kelly (2006) have suggested a three-fold classification of discretion involving rule discretion, value discretion, and task discretion. Rule discretion is similar to the weak form of discretion suggested by Dworkin (1978) in that it involves discretion in the context of rule-interpretation. Value discretion involves the discretion to draw on extra-legal notions of fairness, often provided by professional or organisational codes. Finally, task discretion refers to the wide range of discretionary action (and inaction) which decision-makers can take in the course of decision-making, such as whether to collect information or how much information to collect. Sainsbury (2008) argues that task discretion is particularly important but is often more hidden than other forms of discretion.

2.3.13. Much of the literature on discretion has been concerned with normative arguments about the role and value of discretion in public

administration. As noted above, Davis (1969) has been a central critic of discretion. His argument is that administrators are given far too much power to decide important issues affecting individuals without recourse to publicly determined standards. Davis (*ibid.*) accepts that discretion can play a part in a fair system of administration, but in order for this to be the case, discretion requires to be much more strictly controlled. His solution is to seek to confine, structure, and check the use of discretion through the greater use of rules. Confinement refers to an agency developing internal procedures to make sure that individuals are only allowed to exercise unfettered discretion in very limited circumstances. Structuring refers to using rules to limit the range of options that are open to a decision-maker: choices are structured through the provision of set options within the relevant rules. Finally, checking involves the use of external controls, such as courts, to ensure that decision-makers are acting properly and within the legitimate bounds of their discretion. Thus, Davis (*ibid.*) sees rules in a particularly positive light, as the means through which fairness, consistency, and equal treatment can be achieved.

2.3.14. While Davis' (*ibid.*) work has been very influential, the broad consensus in the literature has been that his thesis exaggerates the nature of the problem and is naïve in relation to the solution prescribed. Black (2001, p. 2), for example, states that Davis's (1969) suggestion that more rules might help resolve the problem of discretion is 'ambitious, if not misguided' and that rules cannot be considered a panacea. Wilson (1972) provided an early critique and suggests that Davis' (*ibid.*) assumption that discretion represents a distortion of the democratic will fails to recognise that discretion is often delegated as a result of failed processes of political compromise or as a result of attempts to shield elected members from taking responsibility for unpopular decisions. Baldwin (1990, p. 321), discussing the regulation of business by government, notes that rules are rarely determinative of behaviour. Indeed, a number of authors have

emphasised that compliance with rules, even assuming that individuals are willing to act in line with them, is mitigated by a range of political, social, and organisational factors (Harlow and Rawlings 2009; Hawkins 1992; Van Gunstensen 1976). Some authors have also suggested that the multiplication of rules in a bureaucratic environment can actually increase discretion, as bureaucratic systems become more complex, and provide more opportunities for decision-makers to shield their decision-making behind rules (Fletcher 2011; Hawkins 1992; Kagan 2010).

2.3.15. In addition to pointing out the shortcomings of rules as a solution to inappropriate discretionary behaviour, a positive case for the use of discretion has also been made. Discretion has been seen as a means of coping with unpredictability and uncertainty in policy implementation processes (Hawkins 1992), a means of ensuring that justice is achieved for individual citizens (Hetzler 2003), a vehicle for maintaining administrative flexibility and creativity (King 2012), and a way of providing citizens with self-respect by engaging with them on a human level (Tweedie 1989). Titmuss (1971) was an early proponent of the idea that discretion is beneficial within administrative systems and he argues that one of its key benefits is to allow administrators to respond to changing circumstances. Although he strongly supports the necessity of discretion in bureaucratic decision-making, he recognises that it requires to be exercised within certain limits. Unlike Davis' (1969) emphasis on rules, however, Titmuss (1971) argued for efforts to be made to shape bureaucratic cultures to encourage and reward the appropriate use of discretion. Some have argued that discretion is not only helpful in ensuring good administration, but is central to its very meaning. Jorna and Wagenar (2007), for example, state that the use of discretion is key to the core task of bureaucratic decision-making, which they see as 'individualising public law'.

2.3.16. As will have become clear, the debate over the place of rules and discretion in bureaucratic decision-making has moved away from a sense that they are binary opposites and that either approach is inherently superior. What we end up with is not the separateness suggested by the 'hole in the donut' metaphor, and instead something more akin to an occluded meteorological front, where rules and discretion coexist in a mixed form. In the same way that rules are seen to contain within them the potential for discretionary decision-making, so too grants of discretion (deliberate or otherwise) do not necessarily result in an absence of rules. Tweedie (1989), for example, in a study of admission to school decision-making, found that even where administrators were given discretion to consider the individual circumstances of applicants, they preferred to rely on the use of standardised bureaucratic rules.

*Street level bureaucracy*

2.3.17. A discussion of decision-making would be incomplete without examining the decision-makers engaged in this activity. Here, the literature has been concerned with the analysis of a particular type of decision-maker, operating at the front line of public policy implementation and responsible for making the day-to-day decisions on individual cases which bring policy to life. The term 'street level bureaucrat' (SLB) was coined by Lipsky (1980) to describe state officials who:

'... interact directly with citizens in the course of their jobs, and who have a substantial amount of discretion in the execution of their work. Typical street level bureaucrats... grant access to government programs and provide services within them' (Lipsky 1980, p. 3).

These officials include police officers, social workers, and officials in welfare bureaucracies. They are characterised by their low status within organisations and high levels of discretion (Scott 1997). Even where attempts are made to control the behaviour of SLBs, this has been seen as ineffective due to the nature of the street-level environment, which is characterised by insufficient resources, high numbers of cases, difficult clients, and a lack of clear goals in substantive policies.

2.3.18. As Maynard *et al* (1990) point out, Lipsky's description of SLBs was radical given existing assumptions at the time that frontline staff were machine-like implementers of policy. The SLB concept, therefore, sought to describe the space in which bureaucracies and citizens interact and to shed some light on the 'black box' of decision-making that occurred there (Sainsbury 2008, p. 328). SLBs in Lipsky's (1980) account are depicted as harassed individuals, doing their best in impossible circumstances, and attempting to see their way through the 'corrupted world of service' they inhabit. Although they are powerful actors in the sense of having significant discretion to shape outcomes, they are simultaneously depicted as victims of circumstances. Fletcher (2011, p. 446) describes SLBs as '...policymakers in an environment they do not control'. The effect of their use of discretion at the frontline is to produce practical versions of policies which look quite different from what policies look like on paper (Evans and Harris 2004).

2.3.19. The major contribution of the SLB concept has been to emphasise the importance of bureaucratic organisation and practice in the implementation of public policy, and to seriously question the extent to which traditional assumptions of central control exist in the real world (Evans 2011). It has also led to the adoption of increasingly 'bottom up' approaches to the study of policy implementation given the apparent importance of SLBs to policy outcomes. Central to these discussions are

questions about why SLBs behave in ways which appear to depart systematically from the expectations of their superiors. Lipsky's (1980) answer was largely situational and he described the use of discretion to adapt or distort mandated requirements as a coping mechanism to deal with the reality of the bureaucratic environment. Scott (1997) has suggested that the motivations of SLBs can arise from three sets of factors: the individual characteristics of decision-makers; the organisational environment; and the attributes of the clients whose cases are being decided.

2.3.20. Alden (2015) has argued that organisational factors have tended to dominate accounts of SLB motivation and that the effective scope of individuals' discretion is heavily constrained, such that individual factors have a limited importance in explaining variations in decision-making outcomes. Indeed, in his study of SLBs in the local authority housing context, Alden (*ibid.*) found that discretionary behaviour was largely shaped by top-down organisational pressures, and that dysfunctional SLB decision-making resulted from pressures within the organisation that required an adjustment away from mandated goals. Others concur and have argued that managers as well as SLBs have a significant role in the interpretation and potential distortion of policy (Evans 2011). While some have questioned the continued relevance of the SLB concept in the age of NPM (Taylor and Kelly 2006, Bovens and Zourdis 2002), the consensus in the literature remains that street-level staff continue to enjoy high levels of bureaucratic autonomy in the fulfilment of their tasks (e.g. Alden 2015, Evans 2011, Hoyle 2014, Rowe 2002).

2.3.21. The next section now turns to discussing some of the main theories that have been advanced to explain decision-making in organisations.

## 2.4. Theories of decision-making

2.4.1. The two key underlying debates in decision-making theory are: the relationship between structure and agency, and the differing ‘logics’ that have been ascribed to human behaviour in decision-making. The debate between structure and agency as the means of explaining human behaviour is at the core of many decision-making theories (Allen 2001). Put simply, the question here is whether action is the result of the agency of individuals, acting as autonomous agents, or whether it is produced by the range of structures - political, social, organisational - within which human action takes place (Sandfort 2000). While the relationship between individual decision-makers and their environments is seen as influential across the board, different theories take different views with regard to the extent to which such external influences are determinative of action, rather than simply providing a context for it. Perspectives emphasising agency are generally associated with rational choice theories, while perspectives which see individual autonomy as heavily constrained by structure are generally associated with theories such as rule-following (March 1994).

2.4.2. Etzioni (1988) argues that decision-making can be considered from three perspectives: utilitarian, social, and deontological. The utilitarian view sees decision-makers as individual persons trying to maximise their self-interest through a process of cost-benefit analysis. The social view sees decision-makers as desiring to conform to social norms to avoid punishment and to select courses of action that seem to them to be demanded by society. Finally, the moral or deontological view accepts that utilitarian and social perspectives bear upon decision-making, but see ethical and moral considerations as predominant and decision-making as a matter of ensuring that action is taken in line with moral codes. Each of these views fits with one of three broad categories of decision-making

theory: rational theory, bounded rationality theory, and rule-following theory. Each of these theories provide a different emphasis in their explanations of human behaviour, respectively: rationality and utility, rationality limited by human and organisational factors, and predominantly normative and value-based motivation.

### *Rational theories of decision-making*

2.4.3. Taylor (1911) argued that organisations could be managed by drawing on principles from the natural sciences and that management could become a science guided by immutable laws that applied across all organisations. Decision-making approaches based on the scientific management model tend to envisage a single decision-maker operating in a world of perfect information: assuming the decision-maker follows a rational and logical process, correct decisions will be arrived at. That process is usually defined as involving the following steps: the problem to be addressed is defined and objectives are set; a range of possible solutions are identified; an exhaustive search is made for information to help resolve the problem; the information is analysed and each possible solution is evaluated in terms of the likelihood that it will help the decision-maker meet the objectives; finally, the solution which seems most likely to address the set objectives is selected (Bazerman 1998; Weiss 1982).

2.4.4. The key feature of rational choice models that follow this basic pattern is the idea that ‘...human action is the result of human choice and that human choice is intendedly rational’ (March 1997, p.11). The decision-maker is seen as machine-like in his or her application of a scientific, universal decision process. An important element of choice in this model is the minimisation of risk and Beach and Connolly (2005) suggest that the image of decision-making presented in the classical model is akin to gambling, where the attractiveness of the pay-offs associated with one

particular option are weighed against the probability of those pay-offs actually being realised. As a result, decision-making is effectively a process by which information is collected in order to make two sequential guesses: what pay-offs are likely to be associated with particular courses of action; and what is the probability of those pay-offs materialising?

2.4.5. The rational model has been much criticised for its simplification of the messy reality of organisational decision-making and its somewhat naïve view of human rationality. March (1997) argues that the model has effectively been discredited, with those who still adopt broadly rational approaches drawing on Simon's (1997) 'bounded rationality' model (see paragraphs 2.4.7 and 2.4.8 below). At the same time, Harrison and Pellettier (2001) argue that rational models continue to dominate the academic literature and remain important in a number of disciplines. Hawkins (1992) sees the usefulness of rational choice theory as likely to vary depending on the particular type of decision-making being studied. He suggests, for example, that it may be useful when considering the decision of parties in a dispute to settle out-of-court, where rational calculation, weighing of alternatives, and probability assessments are all likely to be a factor. At the same time, however, Hawkins (*ibid.*) is critical of the individualistic approach of classical models and their association of rationality with utility theory and the pursuit of self-interest.

2.4.6. In relation to this thesis, and its concern with individuated bureaucratic decision-making, it is clear that the element of rational choice theory which stresses utility maximisation is of limited relevance. It is unlikely that bureaucratic decision-makers applying authoritative standards to individual cases have any significant self-interest to maximise. In relation to this type of decision-making, therefore, the relevance of rational choice theories will be restricted to an emphasis on the pursuit of rational processes and outcomes as providing the best explanation for decision-

making behaviour. Indeed, rationality remains a central expectation of bureaucratic decision-making, with procedural and substantive rationality required by administrative law and a much-valued principle of good administration. Where self-interest may have greater relevance is in relation to compliance decision-making and the assessments decision-makers make about whether or not to comply with decisions by redress mechanisms. Here consequentialist decision-making is likely to play a part in decision-makers' thinking, along with other factors, including their normative commitment to ideas such as the rule of law. As Hertogh (2001) has identified, decisions about compliance are likely to carefully weigh the costs and benefits of various courses of action with a view to finding outcomes that have the greatest individual and organisational utility.

#### *Bounded rationality*

2.4.7. Simon's (1997) influential theory of decision-making - bounded rationality - contains a number of key tenets. As noted above, he retains a fundamentally rational view of human action, believing decision-makers to be acting purposefully towards the achievement of desired outcomes. In this respect, he argues that:

'...people are generally quite rational; that is to say, they usually have reasons for what they do... almost all human behaviour consists of goal-oriented actions' (Simon 1985, p. 294).

The starting point for Simon's (*ibid.*) theory is, therefore, shared with classical theories. Where they diverge is with Simon's (*ibid.*) central insight that, although decision-makers aim to pursue rational courses of action, various factors interfere with their ability to do so in practice. Some of the limitations on decision-makers are cognitive and relate to the limited capacity of decision-makers to process information, as well as a

tendency to make mistakes in the course of decision-making. Inherent biases may also colour decision-makers' judgments when assessing problems, information, and possible solutions, meaning that purely rational outcomes are less likely (Khaneman and Tversky 1974; Khaneman 2011). Another set of limitations are those imposed by the organisation itself. Pressures such as limited time and resources curtail the extent to which exhaustive information searches may take place and suggest that many decisions will be rushed in order to meet the imperatives of the business (be they financial or political). Other organisational factors, such as the way decision-making processes are structured and the range of individuals involved in a process are also seen as likely to restrict attempts at rational behaviour. Simon (1997), therefore, describes this set of circumstances - where individual cognition and capability are limited and where the organisational setting places constraints on decision-makers - as bounded rationality.

2.4.8. As a result of the bounded nature of rationality in decision-making processes and their inherent lack of rational perfection, Simon (*ibid.*) argues that decision-makers are unlikely to pursue the optimisation strategies suggested in the rational decision-making model. Instead of being 'maximisers', he describes decision-makers as 'satisficers', content with achieving satisfactory results in recognition of the bounded sphere of rationality within which decision-making takes place. Satisficing refers to a curtailed decision-making process, where the search for possible solutions - rather than being exhaustive - ends as soon as an apparently workable option is found. As Beach and Connolly (2005) have commented, this approach to decision-making involves the considerable simplification of decision-making problems into 'small worlds' that are capable of being understood and processed by decision-makers. Simon's (1997) theory, therefore, adapts the rational model by pointing out that decision-makers require the use of heuristics - rules of thumb for decision-making - that

simplify problems and present bounded versions of the world that are capable of producing adequate, if not perfect, results.

### *Rule-following theory*

2.4.9. March's (1994) rule-following theory represents a significant departure from both the rational and bounded rationality theories of decision-making. March (*ibid.*) argues that, rather than seeing decision-making as following 'the logic of consequence', where alternatives are assessed on the basis of their likely consequences and ability to fulfil a desired objective, decision-making should be seen as following the 'logic of appropriateness'. This involves decision-makers making decisions based on their perceptions of their identities and roles within an organisation and, consequently, taking actions that they believe to be normatively appropriate. March (*ibid.*) argues that this approach remains logical and rational, albeit it employs a different type of logic. He notes that rational models tend to be 'choice-based' while the model he suggests is 'rule-based'. Zhou (1997, p.287), referring to March's work, offers the following, helpful definition of rule-following behaviour:

'...individual and organizational behaviour patterns that are either 'pre-programmed' by implicit rules, such as norms, conventions, and standards, or based on explicit rules such as formal procedures, policies and regulations.'

2.4.10. Decision-making according to the rule-following model, therefore, follows three steps. First, decision-makers must assess the decision-making situation they are confronted with. Second, decision-makers must assess what their role is in relation to the decision-making situation. Third, decision-makers must ask themselves what the appropriate course of action is for someone fulfilling their particular role when faced with the

particular situation. This last stage involves the decision-maker drawing on largely unwritten 'rules' about the type of behaviour expected of certain people in certain circumstances within an organisation. March (1994) argues that this model often operates implicitly and is not driven by personal preferences or the assessment of possible consequences - instead it is driven by a basic need to fulfil what decision-makers perceive to be their duties and obligations. Rule-following theory sees rational choice theory as derivative of rule-following, in that the rational search for and evaluation of alternatives may form a part of what decision-makers do when seeking to fulfil their roles and identities within the organisation. Indeed, March (*ibid.*) argues that rules that emphasise consequentiality are common and frequently seen in decision-making processes.

2.4.11. The rule-following model can be seen to make two important contributions to our understanding of decision-making. The first is that it provides a strong corrective to rational choice's limited understanding of human rationality. Instead of utilitarian calculation, human rationality is seen as the process by which decision-makers carry out what is expected of them within the social and organisational context in which they exist. The second, linked contribution, is that self-interest - while it may remain part of decision-making - is not a simple matter of cost-benefit analysis, but involves a fundamentally normative dimension. Decision-makers are driven not by assessing the consequences of particular courses of action, but by a normative desire to do the right thing, which is shaped by the rule environment (both formal and informal) of the organisational setting.

2.4.12. Beach and Connolly (2005) note that the social science literature on decision-making has tended to neglect values, norms, and the ethical basis of much human decision-making. They concur with March (1994) that a sense of obligation - an impulse to follow organisationally mandated 'rules' of behaviour - is fundamental to much human action. Beach and

Connolly (*ibid.*) suggest that there are two main forms of norms that provide such rules: social norms which shape behaviour through the threat of social sanctions if they are breached, and moral norms which operate internally and involve psychological penalties (such as guilt) when not followed. Norms, therefore, can be defined as follows:

‘... informal social regularities that individuals feel obligated to follow because of an internalised sense of duty, because of fear of external sanctions, or both’ (McAdams 1997, p. 341)

2.4.13. Social and moral norms have, therefore, been seen to play a significant role in shaping decision-making. As Sunstein (1996, p. 907) argues ‘...behaviour is pervasively a function of norms’. Together with the cognitive and organisational influences discussed above, they help to complete our understanding of the way that decision-making is likely to be shaped within organisations. Of particular importance is the idea suggested here and in rule-following theory that decision-makers fundamentally want to do the right thing. As Musheno (1986) and Bazerman (1998) have argued, despite this factor often being neglected in the decision-making literature, the motivation to act fairly is likely to be of significant importance. Musheno (*ibid.*) calls this the ‘justice motive’ and argues that it explains decision-making much better than economic decision-making models. However, as the next section explores, the idea of justice in bureaucracy is a fundamentally contested and pluralistic notion.

## **2.5. Administrative justice models and typologies**

2.5.1. A small but important socio-legal literature has endeavoured to theorise the nature of bureaucratic decision-making through the lens of administrative justice. Most of this work has its intellectual foundations in

Mashaw's (1981, 1983) empirical study of social security decision-making, from which he developed a model for understanding the fairness values that legitimate various approaches to decision-making. Subsequent writers have extended, reformulated, and occasionally departed from Mashaw's (*ibid.*) original insights, but all share the assumption that perceptions of what is fair lie at the heart of bureaucratic decision-making. They assume that it is important for actors to legitimise their actions, to themselves and others, and to have a reasoned basis for arguing that their decisions are fair. Administrative justice theories, therefore, portray decision-makers as rational actors concerned with the pursuit of fairness, with the explanatory power of these theories lying in their contention that different models of fairness compete with each other for dominance within administrative settings. This competition between different normative models of fairness explains variations in decision-making from one setting to another. The focus of these theories on fairness may be explained by their origin in socio-legal scholarship and the fact that they are part of a wider enterprise seeking to understand the significance of legal norms within public bureaucracies. The paragraphs that follow provide a summary of each of the key contributions to administrative justice theory to date.

#### *Mashaw's (1981, 1983) models*

2.5.2. Mashaw developed his models of administrative justice by drawing on three main criticisms of social security decision-making that were prevalent in the US at the time he was writing: it was inconsistent and unpredictable; it made insufficient use of professional expertise; and it ignored the law and individual rights. He hypothesises that each of these criticisms encompassed a different model of administrative justice, with justice in this context being carefully defined as '...the qualities of the system [of decision-making] that argue for the acceptability of its

decisions' (Mashaw 1981, p. 184). Justice in Mashaw's terms, therefore, is not seen as an absolute notion, but a relative one, which simply requires that an argument should be made for why a particular system of decision-making should be considered fair. He suggests that three distinct models of administrative justice - or justificatory arguments for the fairness of decisions - can be identified in the context of social welfare bureaucracies: bureaucratic rationality, professional treatment, and moral judgment. Importantly, Mashaw argues that these models have two particular features which help to explain how they operate in practice: each model is coherent and attractive, which means that in the right circumstances both decision-makers and neutral observers are likely to be persuaded by their respective fairness claims; and, although the models may co-exist within a bureaucratic setting, they are highly competitive and the internal logic of each model will seek to achieve dominance wherever possible.

2.5.3. The first model, bureaucratic rationality, has as its aim to devise a system of decision-making which, at the lowest possible cost, achieves the most amount of correct decisions. It therefore explicitly seeks to balance the cost of administering a decision-making system with the possible costs of errors that the system might produce. In doing so, it relies on the use of formal, impersonal processes to match individuals, relevant data, and rules in order to produce decisions. Its decision-making is hierarchical, tends to be operationalised through large-scale bureaucratic routines, and is strongly rule-based.

2.5.4. The second model, professional treatment, has as its main goal to provide a professional service to a client. Examples of areas which involve the professional treatment model include medicine, law, and social work. This model emphasises the client-centred nature of decision-making and the attempt to meet individual client needs through the application of

expert knowledge and judgment. Unlike the bureaucratic rationality model, which emphasises the replicable use of rules and similarity between cases, the professional treatment model sees each case as unique and values intuitive judgment based on knowledge and experience.

2.5.5. The final model, moral judgment, shares some similarity with bureaucratic rationality, in that it seeks to achieve fair outcomes partly through the application of rules to cases. It differs, however, in two respects. The first is the way in which it seeks to achieve fair outcomes, with the moral judgment model paying closer attention to the individual circumstances of claimants and the events and contexts which give rise to a claim. The second is that, in addition to applying rules, the moral judgment model is also 'value-defining' (Mashaw 1981, p. 188). This means that intense scrutiny is given to the individual facts and circumstances of a case in order to determine the deservedness of the individuals subject to the decision. Values are not entirely pre-prescribed within rules, but are created through the process of adjudication.

2.5.6. In setting out his models of administrative justice, Mashaw makes clear that the achievement of compromise between the models is unlikely. As noted above, the models are highly competitive and the different bases on which they justify the basis of bureaucratic decision-making are difficult to reconcile. Mashaw found that the bureaucratic rationality was dominant in the social security offices he studied and he suggests that this is likely to be the case for most large-scale welfare bureaucracies. In such settings, he argues that a central tension is likely to be between the bureaucratic rationality model's emphasis on accuracy and efficiency and the moral judgment's model on establishing the deservedness of the parties.

*Adler's (2003, 2006, 2008, 2010) models*

2.5.7. Adler has adapted and extended Mashaw's models of administrative justice.<sup>1</sup> He argues that changes in public administration (such as those covered in section 2.2 above) have meant that new and distinct models of administrative justice have emerged which he calls the managerialist, consumerist, and market models. Managerialism is characterised by managerial autonomy, a drive for efficiency, and the use of performance indicators to manage decision-making performance. Consumerism is characterised by decision-making processes that emphasise the participation of affected individuals, that seek to provide rights to consumers in terms of complaining, and ultimately aims at ensuring consumer satisfaction. Finally, the market model shares some of the characteristics of the managerialist and consumerist model, but here decision-making is characterised by the matching of supply and demand, while the goal of decision-making is ultimately to make a profit for the shareholders to whom they are accountable. Adler makes clear that his additional models of administrative justice operate in the same competitive way as Mashaw's and notes that this approach allows for the robust analysis of administrative decision-making through the identification of 'trade-offs' between the models.

2.5.8. Adler's additional models of administrative justice have been subjected to some criticism in the literature. Halliday (2004) has argued, for example, that the managerialist model is insufficiently distinct from the bureaucratic rationality model and that the mode of decision-making suggested in the managerialist and bureaucratic rationality models are substantially the same. He also suggests that the managerialist,

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<sup>1</sup> In terms of Adler's reformulation of Mashaw's models, he proposes certain terminological changes: preferring to refer to them as the bureaucratic model, the professional model, and the legal model. This thesis, however, focuses on Adler's extension of the model rather than his reformulation of it and, as a result, prefers to preserve Mashaw's original terminology.

consumerist, and market models are not distinct models of administrative justice and that they do not have the coherence and attractiveness which Mashaw stipulated as characteristics for his models. Instead, Halliday argues that Adler's models are better seen as part of a single model associated with NPM. Sainsbury (2008) also argues that Adler's models lack distinctiveness and states that they do not make clear what decision processes underlie them. He notes that Mashaw's models aimed to explain different approaches to bureaucratic decision-making and that they suggested three clear decision processes: rule-application (bureaucratic rationality), the application of professional judgement (professional treatment), and the adjudication of competing claims (moral judgment). Adler's (2003) models, on the other hand, do not clearly associate distinct decision processes with each conception of administrative justice.

2.5.9. Others have been more sympathetic to Adler's work and Halliday also appears to have revised his criticism somewhat. In Halliday and Scott (2010), for example, the argument is made that the consumerist and market models represent a novel and distinct contribution to Mashaw's original models. Benish (2014) considers the managerialist model to be distinct from bureaucratic rationality, arguing that managerialism places emphasis on wide managerial discretion to deliver suitable outcomes rather than consistency and as a result is different from the rule-application approach of bureaucratic rationality. He also argues that - especially when considering the increasing trend to outsource decision-making to the private sector - Adler's models are important for analysing all aspects of bureaucratic decision-making. Adler (2010) has himself responded to his critics. He notes that although his models can be put together to provide a description of NPM, this does not mean that they are not distinct and could not equally exist independently.

### *Galligan's models*

2.5.10. Galligan's (1996) approach stands somewhat to the side of other scholars, in that he does not draw substantially on Mashaw's work and because he provides a normative analysis of decision-making. Galligan suggests that two models struggle for dominance in shaping bureaucratic decision-making: the bureaucratic administration model and the fair treatment model. The bureaucratic administration model is similar to Mashaw's bureaucratic rationality model. It is concerned with maximising the common good and seeks to achieve the best overall outcomes and the most accurate decisions taking account of bureaucratic constraints. Its concern with justice in the individual case is limited, since it is firmly focused on achieving acceptable aggregate outcomes. The fair treatment model, on the other hand, not only seeks to ensure that rules are applied fairly, but also draws on wider notions of fairness in order to make sure individuals receive their due. The emphasis of the fair treatment model is on ensuring justice in every individual case, not only in terms of the overall outcomes of decision-making. As will be evident, the fair treatment model closely matches Mashaw's moral judgment model.

2.5.11. Galligan (1996, p. 238) argues that public administration is dominated by the bureaucratic administration model, which represents '...one of the major organising principles of modern government'. However, he argues that in the vast majority of cases that model is inappropriate since it privileges social and community goals over individual rights. Galligan (1996, p. 240) suggests that effort should be made to devise procedures that conform to the fair treatment model:

'The practical problem in devising procedures is that the bureaucratic administration model, because it better matches the internal dynamics of administrative bodies, will be the natural and

dominant model. The result is that special efforts will be needed to curb that natural hegemony in order to support the fair treatment model'.

Adler (2010) considers that Galligan's approach here is limiting, because it takes a normative stance in relation to the fairness claims of each model. Adler prefers the pluralist and relativist approach originally suggested by Mashaw and accepts that different types of decision-making processes are likely to be seen as fair in different settings.

#### *Kagan's (2010) models*

2.5.12. Like Galligan, Kagan does not rely on Mashaw's models as his starting point. He suggests the existence of four main approaches to bureaucratic decision-making: bureaucratic legalism, expert or political judgment, adversarial legalism, and negotiation. Kagan's first three models - although developed separately - can be seen to be direct matches of Mashaw's bureaucratic rationality, professional treatment, and moral judgment models. The additional contribution in Kagan's model, therefore, is the emphasis he places on negotiation as a distinctive decision-making process. The justificatory claim for the fairness of this type of decision-making is its emphasis on the participation of those subject to decision-making and the production of outcomes that are acceptable to affected parties.

#### *Halliday and Scott's (2010) cultural typology of administrative justice*

2.5.13. Halliday and Scott draw on cultural theory to propose what they consider to be a more comprehensive framework for explaining administrative justice, which integrates existing typologies and aims to be exhaustive in its approach. The foundation of cultural theory is that

culture mediates human perception and that behaviour can be understood to vary according to two factors: the degree to which individuals are part of a group or are detached from group structures ('group factor'); and the degree to which individuals are restricted by external prescriptions or have freedom of action ('grid factor'). Placed within a matrix, the group factor and the grid factor produce a four way typology of 'cultural biases': hierarchism, egalitarianism, individualism, and fatalism. These cultural biases are ideal types which represent extreme, rather than accurate visions, of reality. Nonetheless, Halliday and Scott argue that they provide a basis for systematically analysing different approaches to bureaucratic decision-making.

2.5.14. Each of the four cultural biases is seen to represent a model of administrative justice. Hierarchist administrative justice stresses authority and expertise and views citizens as the passive objects of official decision-making. Mashaw's bureaucratic rationality and professional treatment models, Galligan's bureaucratic administration model, and Kagan's bureaucratic legalism and expert judgment models all fit within the hierarchist bias. Egalitarian administrative justice is distrustful of government expertise and prefers to seek consensus between members of a group, with officials and citizens co-producing decisions. Mashaw's moral judgment model, Galligan's fair treatment model, and Kagan's adversarial legalism can be seen to fit with this model, in that they lay an emphasis on participation in decision-making.

2.5.15. Individualist administrative justice places a high degree of emphasis on individual choice and freedom of action, with bargaining seen as the main mode of decision-making. It emphasises a competitive setting in which individuals seek to pursue their self-interest and where officials seek to respond to the needs and desires of consumers. Adler's consumerist and market models are seen as fitting into this part of the

framework. Finally, Halliday and Scott note that fatalistic administrative justice is an underexplored area, but suggest lotteries may be the form of decision-making most appropriate in a context where individuals have low attachment to a group at the same time as being highly constrained by external prescription. Overall, having incorporated existing models into the grid-group framework, Halliday and Scott conclude that existing models of administrative justice have been ‘lop sided’, with a tendency to focus on hierarchist and egalitarian cultural biases. Their contribution, therefore, lies both in the integration of existing models into a coherent framework and in suggesting the areas that have yet to be fully explored.

*Buck et al's (2011) typology*

2.5.16. Buck *et al* provide the most recent contribution to this seam of administrative justice literature and set out a model which combines existing approaches, at the same time as adding additional dimensions. There are two key innovations in their approach: the first is to extend the functional sphere of administrative justice beyond first-instance decision-making and redress mechanisms to include the institutions by which redress mechanisms are themselves supervised and kept in check. They refer to these dimensions as ‘getting it right’, ‘putting it right’, and ‘setting it right’. The second innovation in their model is to suggest that Mashaw’s definition of administrative justice was limited in only explicitly applying to first-instance decision-making. Building on Adler’s insight that each model of administrative justice is accompanied by a characteristic mode of redress, Buck *et al* go further and suggest that existing models of administrative justice can equally be applied to explain decision-making practices within redress mechanisms. As a result, it is possible to identify redress mechanisms with particular models of administrative justice, in the same way that these can be identified in bureaucratic environments.

## 2.6. Chapter summary

2.6.1. This chapter initially sought to situate bureaucratic decision-making in the context of recent public administration reform. While NPM reforms undoubtedly changed the delivery of public services, bureaucratic structures have remained surprisingly resilient. The result is a hybrid system where old and new structures, mechanisms, and values co-exist and compete with each other. The chapter then identified the two types of decision-making of concern to this thesis: category 1 (routine decisions) and category 3 (modified adjudication and specific policy decisions). Here the chapter considered key debates around individual and collective interests, and rules and discretion, both of which reveal the inherently conflicted nature of bureaucratic decision-making. Such fundamental tensions were also reflected in analyses of street level bureaucrats, with an important concern of this literature being the extreme difficulty in achieving control in public bureaucracies.

2.6.2. The chapter then turned to consider decision-making theories and considered three theories which have sought to explain decision-making: rational choice; bounded rationality; and rule following theory. In considering these models, the chapter argued that each made a contribution to our understanding of bureaucratic decision-making and contained an element of truth with application to the decision-making of concern to this thesis. The chapter ended by focusing on the normative nature of bureaucratic decision-making, drawing on administrative justice theories which stress the importance of fairness perceptions in explaining decision-making. As we shall see, these were found to be particularly important in relation to this thesis' empirical findings.

### 3. CONTROL, ACCOUNTABILITY, AND LEARNING IN BUREAUCRACIES

#### 3.1. Introduction

3.1.1. This chapter explores the idea that bureaucratic decision-making may be controlled. It considers various theories of control in order to situate the control exercised by redress mechanisms within the broader panorama of bureaucratic control. The chapter moves on to discuss a particular sub-set of control mechanisms concerned with accountability, again seeking to situate more clearly the place of redress mechanisms within the overall landscape of mechanisms concerned with controlling bureaucratic decision-making. The chapter's final section argues for a connection to be made between the concepts of control, accountability, and organisational learning. Organisational learning, therefore, is framed as a significant process through which review activity carried out by accountability mechanisms subsequently leads (or does not lead) to changes in the bureaucratic *status quo*.

#### 3.2. The concept of control

*What is control?*

3.2.1. The issue of control is central to public administration. It arises because of the need for delegation of authority that arises in complex, democratic societies: since citizens cannot rule directly they delegate to elected representatives, and since elected representative cannot perform all the tasks of government themselves they, in turn, delegate to bureaucrats and others. Issues of control, therefore, arise wherever power is conferred on officials in order to carry out mandated tasks (Galligan 1986).<sup>2</sup> An important idea in relation to control is principal-agent theory, which

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<sup>2</sup> This thesis is interested in a particular type of control – that which seeks to ensure that public agencies act appropriately, rather than other types such as the control of elected representatives by citizens.

examines the implications of delegated authority (Gormley and Balla 2004). The principal is seen as entering into a contract with an agent, who is entrusted to carry out the specified wishes of the principal. Principal-agent theory identifies two problems wherever power is delegated: it is difficult, ahead of time, to know whether the agent entrusted with a task has the capacity to perform it (adverse selection); and it can be very difficult to monitor subsequently how the agent is performing in practice (moral hazard). Any delegation is seen to involve 'agency loss' (*ibid.*, p. 55) where the capacity of the principal to achieve their goals is limited by adverse selection and moral hazard.

3.2.2. Control can, therefore, be seen to be a purposive notion which relates to the ability of principals to ensure that the authority delegated to their agents is being, or has been used, appropriately. This is, however, only one dimension of control and Dunsire (1984, p. 83) points out that a distinction can be made between being 'in' control of a bureaucracy and a bureaucracy being 'under' control. Beck Jorgenson and Larsen (1987, p. 279) make a similar point when they distinguish between hierarchical modes of control and those that are 'inspector free'. The notion that bureaucracies may be 'under control' without the hierarchical oversight of 'inspectors' suggests that self-regulated and stable systems are possible without the command and control type of oversight with which the word 'control' is often associated. As Beck Jorgensen and Larsen (*ibid.*) argue, developing an understanding of how bureaucracies come to be under control, is a broader question than that which is concerned only with how principals seek to be in control of them. While this thesis is principally concerned with the ways in which actors external to bureaucracies (redress mechanisms) exercise control, it is nonetheless important to consider how self-regulatory controls operate. This is partly because hierarchical forms of control may harness 'inspector free' approaches (Hood 1995) and partly because understanding the operation of

control in its broad sense is essential to considering the narrower question asked in this thesis about the control function of redress mechanisms.

3.2.3. Dunsire (1984, p. 118) makes the argument for taking this broader view as follows:

‘Thinking of control as underlying and ubiquitous (rather than only exercised from central ‘control rooms’ and specific devices)... is a more amorphous and less graspable concept altogether. Yet it is the necessary underpinning of careful thought about control over government.’

Whether operated through conscious, centralised control mechanisms or through self-regulatory means, Dunsire (*ibid.* p. 82) offers the following definition of control:

‘...control means limitation of excess, or correction of deviation, or the capacity to change the world as-it-is, in some particular manner, into the world-as-you-would-have-it-be.’

3.2.4. Dunsire’s (1979, 1984) theory of control, which draws on cybernetic theory (Ashby 1956), provides the most detailed and complete description of the concept of control as it relates to bureaucracy. He argues that control mechanisms require three elements to be in place in order for control to be exercised. The first is referred to as a ‘director’ and involves a statement of the required actions to be performed or standards to be met. The second, the ‘detector’, refers to the means by which performance is measured in order to find out whether actions have been carried out as directed. The third, the ‘effector’, is the means by which any discrepancy can be corrected and the ‘directed’ state of affairs can be brought into being. Dunsire (*ibid.*) notes that a control system requires

three things: two types of information and power. The director requires normative information about what should be; the detector requires empirical information about what is; and the effector requires power to change behaviour from one state to another. A system of control is, therefore, made up of norms, facts, and leverage. An important insight from this tripartite view of control is that a system of control will only be as effective as its weakest element: unclear norms, a lack of factual information, or a lack of leverage can all significantly disrupt the control system's effectiveness.

3.2.5. There are two further, important features of Dunsire's (*ibid.*) control theory that help elucidate the notion of control. The first draws on the law of requisite variety as formulated in Ashby's (1957) cybernetic theory. This law posits that a system of control must be able to match the complexity and variety of the system to be controlled (here, bureaucratic decision-making). So, control devices must be as complex and varied as the decision-making behaviour that they seek to control. Dunsire (1992, p. 23) puts it as follows:

'...in order to govern a more dynamic, complex and diverse world, forms of control must become more dynamic, complex and diverse'.

The second notion is that complex systems are maintained in a stable and relatively steady state as a result of the balancing of various forces acting within and upon the system. This balancing of conflicting forces is known as isostasis and the process by which such a balance is reached is known as collibration. Isostasis explains why many social systems are able to exist in relatively stable states without the imposition of hierarchical control. Stability is the result of a number of forces pulling against each other, with each force checking the other, thus holding the whole system together. Control, therefore, becomes a matter of using collibration to

intervene in isostatic systems in order to produce change *via* a shift in the balance between opposing forces.

### *Forms of control over bureaucracy*

3.2.6. Having defined the idea of control and outlined its main theoretical elements, the following paragraphs set out some of the key forms that control mechanisms may take. While a number of different typologies have been suggested (Beck Jorgensen and Larsen 1987, Dunsire 1984), the focus here is on Hood's (1995) typology. He uses Mary Douglas' cultural theory<sup>3</sup> and associates the following forms of control which each of the four cultural biases: review (hierarchy), mutuality (egalitarianism), competition (individualism) and contrived randomness (fatalism).

3.2.7. Review is a form of control where one group of people is given the authority to decide on the correctness or otherwise of actions taken by another group of people. Review involves a hierarchical use of authority, where superiors in the hierarchy have the power '...to act as the referee who stops fouls in the game' (Hood 1995, p. 218). Mechanisms of control here include courts, inspectorates, and committees. Mutuality refers to using processes of social control within groups in order to ensure that desired behaviour is achieved. Control devices here include the use of peer review, mutual surveillance, and group veto. In terms of external controls, this type of control emphasises the importance of maximum interaction between citizens and officials, so that official action becomes co-produced (rather than imposed) and subject to the oversight of the community.

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<sup>3</sup> See Chapter 2 where the basis of cultural theory is explained in relation to Halliday and Scott's (2010) typology of administrative justice.

3.2.8. Competition is a frequently used form of control in public administration. Although it is often associated with market mechanisms, it has also been used in non-marketised bureaucracies (e.g. encouraging internal competition between departments, competition for promoted posts, etc.). Competition functions as a control mechanism because it is assumed that groups in competition will maximise efforts to please clients (be they governments or consumers themselves) and, as a result, optimal performance will be achieved. Finally, contrived randomness is a form of control that seeks to use unpredictability to keep officials on their toes. Random checks on officials are a way of controlling against deviant behaviour and the random nature of this method of control means that it is less easy to manipulate. Examples of the way this form of control operates include staff rotation and semi-random postings. Hood (*ibid.*) notes that it is also possible to observe hybrid forms of control. An example would be a combination of review and mutuality, involving elements of both hierarchical authority and peer review (a model that can be seen to operate in the assessment of university teaching and research).

3.2.9. The usefulness of Hood's (*ibid.*) typology lies in the fact that it allows us to identify the strengths and weaknesses of various control modes. Review's strength is seen as its ability to transfer best practice across organisations, while its weakness is that it is prone to juridification as rules are used to achieve control. Review also suffers from information asymmetry, with the controller finding it difficult to measure the performance of the controlled. Mutuality's strength is in providing redundancy, as peer group oversight ensures that many eyes are constantly watching for deviations. Its disadvantage is that it can break down depending on the culture within the group. Competition's strength lies in the strong incentives it provides to out-perform rivals. Its weakness is that it can lead to a 'race towards the bottom' rather than an enhancement of actual performance. Finally, contrived randomness is particularly effective

in protecting against corruption and conspiracy, but its weakness lies in the fact that it offers little in the way of incentives to improve. As Hood (*ibid.*) points out, therefore, none of the types of control are superior in every respect to the others.

3.2.10. Some observations may be made regarding the various control typologies and the place of redress mechanisms within them. As will be clear, most of the forms of control discussed above are ‘inspector free’ forms, where - although they might be initiated by, or sublimated to the needs of, a hierarchical controller - control is effectively exercised through self-regulatory or random processes (Hood *et al* 2000). As a result, it seems that since redress mechanisms clearly involve an inspector in the form of a judge or an ombudsman they fit most clearly into the review mode of control. While this is their dominant mode of control, it is worth noting that redress mechanisms can contain elements of each of the other modes. They share something with the mutuality mode of control in that redress mechanisms are initiated by citizens, and can be seen as a means through which the ‘voice’ of the citizen can be heard and amplified within public administration. Redress mechanisms also, arguably, draw on broader principles of fairness when reaching their decisions. In the courts, the common law has at times been represented as a repository of community values (Cotterell 1994), while ombudsman schemes appear to draw on a pragmatic, everyday sense of good administration in the course of their work. It is also possible to see ombudsman schemes, being in a horizontal (or possibly diagonal) rather than a vertical relationship with bureaucracies: they have authority in relation to their investigatory powers but may only recommend changes and as such could be seen as engaging in a dialogue with peers rather than as a coercive form of hierarchical authority.

3.2.11. While it may at first seem that redress mechanisms can have nothing in common with contrived randomness again, the method by which initiation of their control functions takes place (citizen complaint) is random. Bureaucrats cannot know which cases will be challenged, and recent research has confirmed that at least some of the power of judicial review comes from the fact that it has ‘shock’ value for administrators (Platt *et al* 2010). Finally, while there is no suggestion that redress mechanisms may operate according to the market mode of control, they may be able to harness market ideas in order to exert greater control. For example, ombudsman schemes, through their annual reports, effectively produce league tables showing which organisations are most complained about and found to be most often at fault. These could be used as the basis for encouraging competition and improving performance in line with the market control mode.

### **3.3. Accountability-based control mechanisms**

3.3.1. Although we have noted that redress mechanisms have some hybrid elements, they nonetheless fit most clearly with the ‘inspector’ or ‘review’ form of control. This mode of control has both an internal and an external element - senior bureaucrats within the bureaucratic hierarchy exercise ‘managerial control’, while external mechanisms of accountability exercise ‘accountability-based control’ (Scott 2000, p. 39). It is with accountability-based control that the chapter now concerns itself.

#### *What is accountability?*

3.3.2. Accountability is a concept that has recently been subject to significant academic interest and there has been concern that its meaning is becoming distorted (Lindberg 2013). The particular concern has been its

use in some literature to refer to a virtue held by administrators (that they are, in some way, responsive) rather than to refer to the operation of mechanisms which require administrators to give an account of their actions (Bovens 2007). Nonetheless, despite this concern, the literature provides a fairly uncontroversial sense of what accountability requires: accountability is the process of an individual or organisation being compelled to give an account of their actions to an authoritative person or organisation (Mulgan 2000, Scott 2000). While accountability is closely linked with the notion of control and, indeed, is a type of control mechanism, it has particular features which distinguish it from other mechanisms:

‘...it [accountability] refers only to one type of institutional mechanisms for controlling governments and government officials, where governments and government officials are actually called to account, made to answer for their actions and to accept sanctions’ (Mulgan 2000, p. 564).

Therefore, the central elements that must be in place in order for accountability mechanisms to be defined as such are: a person or institution who must give an account (the accountee); an area or subject for which the accountee is accountable (the domain); an institution to which the accountee must give account (the principal); and the right of the principal to impose a sanction (Lindberg 2013).

#### *Types of accountability mechanism*

3.3.3. In the same way that there are a number of different modes of control over bureaucracies, so there are also different forms of accountability mechanism. One way to describe the various forms is to describe their ‘spatial’ dimension, that is to say, to look at the direction of the

accountability relationship. Scott (2000), for example, refers to upwards, horizontal, and downwards accountability. Upwards accountability refers to giving account to a higher authority, horizontal accountability to giving account to an institution of equal status, and downwards accountability to giving account to stakeholders such as consumers. Bovens (2007) adds a further spatial dimension, which he calls diagonal accountability, to account for institutions such as ombudsman schemes, which he argues fit somewhere between vertical and horizontal control. Scott (2000) also suggests that accountability mechanisms can be grouped in terms of the basis on which the account is to be given. Some accountability mechanisms will be concerned with ensuring economic values (such as value for money), while others may focus on social values (such as fairness) or security values (such as health and safety).

3.3.4. Jos and Thompkins (2004) distinguish between performance-based accountability and compliance-based accountability: some mechanisms will be concerned with accounting for outcomes, while others will be predominantly concerned with whether processes have been followed. Jos and Thompkins (*ibid.*) argue that performance-based processes are generally ongoing processes of review that seek to shape future action, whereas compliance-based mechanisms tend to be episodic, case-based mechanisms that do not generally lead to broader change. Accountability mechanisms have also been categorised on the basis of the way in which they operate. Jos and Thompkins (*ibid.*) and Page (2010), for example, refer to ‘police patrol’ and ‘fire alarm’ oversight to distinguish between proactive, *ex ante* approaches by accountability mechanisms and more reactive *ex post* approaches. Generally, *ex ante* approaches have been seen as more powerful ways in which control can be exercised:

‘... *ex post* sanctioning is likely to be evidence of a poorly functioning accountability system, not an effective one... The

crucial purpose of accountability is really forward looking and prophylactic' (Mashaw 2006, p. 132).

3.3.5. A common way in which accountability mechanisms are described is by reference to the nature of the forum in which an account will be given. Romzek and Dubnick (1987) identify four types of accountability mechanism, which they refer to as bureaucratic, legal, professional, and political. Bovens (2007) adds a fifth category to this typology, which he calls administrative accountability. Taking each form in turn, *bureaucratic accountability* refers to internal processes of accountability, where subordinates give accounts for their actions to their superiors within the organisational hierarchy. As Bovens (2007) and Mulgan (2000) have pointed out, however, it is debateable whether this should be treated as accountability, since some authors consider that accountability mechanisms must function in an external and public fashion. Nonetheless, from the perspective of the decision-maker, it will be to internal, bureaucratic superiors that they most frequently are required to give account and it is helpful, therefore, to retain this form of mechanism within the typology. *Political accountability* refers to accountability to elected representatives, which could be through a minister in charge of a department or by appearance before parliamentary committees. *Legal accountability* refers to the work of administrative courts, which are able to impose sanctions for non-compliance. Bovens (*ibid.*) suggests that this mode of accountability is the least ambiguous, since it is based on detailed legal standards.<sup>4</sup> *Professional accountability* refers to accountability to the professional group which an individual may be part of, such as teachers' or medical associations. These may operate complaint or disciplinary systems as well as issue standards for members. Finally, *administrative accountability* refers to:

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<sup>4</sup> As we shall see in chapter 4, socio-legal scholars have taken a different view with regard to the clarity of the requirements imposed by courts.

‘... [a] whole series of quasi-legal forums that exercise independent and external administrative and financial oversight and control’ (Bovens 2007, p. 188).

Such mechanisms are seen, in the accountability literature, to include auditors and ombudsman schemes.

3.3.6. There are, therefore, numerous approaches, spatial directions, and types of forums, to which bureaucratic decision-makers are held accountable. In addition to traditional legal and political modes of accountability, what Scott (2000, p. 40) refers to as ‘extended accountability’ mechanisms have taken on an increasingly important role in recent times as a result of a growing recognition of the inadequacy of traditional mechanisms to control a complex and fragmented state. To borrow Dunsire’s (1979) terminology, the greater variety and complexity of arrangements for public administration have required greater ‘requisite variety’ in terms of accountability mechanisms. Power (1997) has referred to the growth in extended accountability mechanisms as an ‘audit explosion’ and as having created an ‘audit society’. Hood *et al* (2000) meanwhile have sought to chart the rise of regulatory mechanisms within government, arguing that they have become a major ‘industry’ (with direct costs of £1 billion a year). This has involved the creation of a host of bodies such as: auditors, inspectorates, ombudsman schemes, grievance handlers, central agency regulators, funding bodies with regulatory functions, departmental regulators, and central regulators of local government and the NHS. Overall, bureaucracies can be seen to be held to account from multiple, overlapping perspectives, in what has been termed a ‘regulatory jungle’ (*ibid.*) and a ‘minefield’ (Page 2010).

3.3.7. The literature is currently divided with regard to whether accountability is a positive phenomenon or one that leads to bureaucratic dysfunction, and whether there remains too much or too little of it (Aucoin and Heintzmann 2000, Bovens *et al* 2008, Carolan 2013, Schillemans 2010). Some, for example, have argued that the evidence is mixed with regard to whether accountability mechanisms actually lead to better bureaucratic performance (Lapsley and Lonsdale 2010). Jos and Thompkins (2004) have argued that accountability mechanisms can have perverse effects because they discourage bureaucrats from developing good judgment and do not encourage commitment to the values being safeguarded. Others have noted that the growth in the number of accountability mechanisms may lead bureaucrats to adopt shallow and superficial modes of compliance and ‘tick box’ approaches to deflect criticism and retain their autonomy (Power 1997). Bovens (2007) highlights three dysfunctions that may affect bureaucratic approaches - rule obsession, proceduralism, and rigidity. All of these imply that an effect of accountability mechanisms is to lead to a narrow focus on rules, at the expense of flexibility and creativity.

#### **3.4. Accountability mechanisms and learning in organisations**

3.4.1. This section begins by considering the purposes of accountability, focusing on its learning function, before making an argument for linking the concept of control with the concept of organisational learning. The chapter then discusses the processes by which organisations learn.

##### *The purposes of accountability*

3.4.2. Accountability can be seen to serve a number of purposes within the state. Aucoin and Heintzmann (2000) argue that three purposes can be identified: the control of abuse of authority; the provision of assurance regarding use of resources and compliance with law; and the promotion of

learning and improvement in government. The first two purposes have traditionally been seen as the heart of accountability, but this is increasingly shifting: 'It is now fashionable to depict this third purpose as the most important...' (Aucoin and Heintzmann 2000, p. 52). Bovens *et al* (2008) also highlight three core purposes of accountability, noting a democratic purpose (checking to ensure that the will of political principals is done), a constitutional purpose (uncovering and correcting abuses of power), and a learning purpose (helping the administration to deliver on promises in future). The concept of accountability as learning is considered to be particularly important in this thesis. This is because it is argued that it helps to explain the processes that intervene between the pronouncements of accountability mechanisms and the changes (or lack thereof) that occur within bureaucracies. Learning is, therefore, conceptualised as the internal organisational processes which mediate the extent to which control over bureaucratic decision-making - in the sense of amending prospective cognition and action - is achieved.

3.4.3. The literature on organisational learning provides a number of powerful insights into the way organisations respond to inputs from their environment and the way in which such inputs may lead to change: learning is a key concept because it provides a framework for understanding organisational responses to external *stimuli*. At a high level of abstraction, that is effectively the concern of this thesis: to understand the processes through which stimuli generated by redress mechanisms (a particular form of accountability process, fitting within particular modes of control) are perceived and responded to by decision-makers in bureaucratic organisations.

### *What is organisational learning?*

3.4.4. The organisational learning literature is now extensive, albeit Gilson *et al* (2009) have rightly pointed out that there is little in the way of strongly contrasting positions between scholars. One obvious trend has been a lack of attention given to the particular issues that may affect learning in public administration (Rashman *et al* 2009). Nonetheless, some work has been done in this area and, although learning in public bureaucracies presents additional challenges, many of the core concepts in the organisational learning literature are transferable. The only major area of disagreement in the literature has been around the definition of organisational learning, with debate about the extent to which organisational learning refers to the learning of individuals in an organisational context, or whether it implies that - to some extent at least - organisations actually learn themselves. Simon (1991), for example, is critical of literature that seems to anthropomorphise organisations by suggesting that they can somehow learn independently from individuals.

3.4.5. While it is clear that only individuals can learn, Simon's (*ibid.*) approach risks denying the social and group dynamics of learning processes and also seems to overlook the capacity of organisations - if not to learn themselves - to become repositories of the knowledge of their members through their policies, procedures, and storage capacity. Thus, this thesis prefers those accounts of organisational learning which provide a middle ground, accepting that organisations do not learn themselves, but conceiving of organisational learning as something more than just what happens when individuals learn in the workplace. Berends *et al* (2003, p. 1041), for example, consider organisational learning to refer to '... the increase or development of organisational knowledge'. This involves one or more individuals developing knowledge relevant and applicable to the organisation's particular mission, with the potential to change its

activities. Schilling and Kluge's (2009) definition emphasises the group nature of learning and the relationship between learning and the organisation's processes:

'We define organisational learning as an organisationally regulated collective learning process in which individual or group learning experiences concerning the improvement of organisational experience and/or goals are transferred into organisational routines' (Schilling and Kluge 2009, p. 338).

3.4.6. This definition, stressing the social element of learning and the fact that it is part of a collectively organised effort, is adopted here. Before discussing particular aspects of the organisational learning literature in more depth, it is worth pointing out that another notable feature of the literature - despite its many prescriptions for enhancing organisational learning - is its consensus that organisations are not very good at learning. Leeuw and Sonnichsen (1994) and Marshall *et al* (2009), for example, have argued that organisations are poor at finding the causes of their problems and that learning tends to be *ad hoc* and in response to particular problems, rather than being systematic.

#### *Types of learning*

3.4.7. Argyris and Schon (1978) have developed the concepts of single and double loop learning to describe the different types of learning that occur within organisations. Single loop learning occurs when an error is detected and corrected, but without raising any questions about the basic values of the system in question. Single loop learning, therefore, might involve amending a procedure for taking a decision, rather than amending the substantive policy which the procedure was intended to deliver. Double loop learning occurs when the underlying values of an organisation are re-

evaluated before action is taken to correct any errors. Double loop learning is, therefore, much more fundamental and seeks to look further into the root causes of problems. This is not to say that single loop learning cannot be useful and effective, since it can allow an organisation to operate its existing processes and practices more effectively (Leeuw and Sonnichsen 1994). However, it cannot lead to radical transformation of an organisation.

3.4.8. Double loop learning is significantly more disruptive and potentially powerful in terms of the change required of an organisation and it is probably not surprising that, as a result, single loop learning is considered to be the most frequent type of learning discernible in organisations (Argyris 1992). Some have noted that because of the political environment in which public bureaucracies work, they may find double loop learning extremely difficult, since actors outside the organisation will have a significant (if not the controlling say) on policy (Common 2004; Thomas 2015). A third, triple loop form of learning, has also been discussed in the literature and been taken to refer to learning which not only corrects the organisation's existing processes (single loop) or questions the organisation's values (double loop) but also reflects on why the need to learn something was not noticed sooner (Van Acker *et al* 2015). This type of learning is where the organisation self-reflexively considers its learning capacity and learning processes and seeks to improve this, as well as, its substantive areas of performance.

#### *The process of organisational learning*

3.4.9. Huber (1991) has produced one of the clearest and most comprehensive models to describe the processes of organisational learning. He argues that organisational learning takes place in four steps: knowledge acquisition, information distribution, information interpretation, and organisational

memory. Although models that suggest a series of distinct steps have been criticised for obscuring the fact that learning is often an iterative, continuous, and dynamic process, such models remain useful from the perspective of describing some of the fundamental elements of organisational learning processes (Rashman *et al* 2009). The following paragraphs will discuss each of the areas in Huber's (1991) model in turn.

3.4.10. *Knowledge acquisition.* Huber (*ibid.*) points out that learning can result from conscious, directed attempts at improvement and can also arise unconsciously. There are various sources from which these experiences might emanate and it is useful to enumerate these, partly in order to get a better sense of the concept of organisational learning and partly in order to begin to sketch out the range of influences (other than redress mechanisms) from which bureaucracies might learn. Gilson *et al* (2009) identify six sources of information: internal experiences (e.g. stored experiences, day to day reflections on work); citizens (e.g. customer research and feedback from redress mechanisms); other organisations (e.g. rivals, partners and similar organisations); top down direction (e.g. internal direction from senior sections of the bureaucracy); critiques and advice (e.g. media criticism, think tank reports, political and public opinion); crises and review (e.g. systematic learning from major mistakes, audit).

3.4.11. Knowing where information may come from is not sufficient, however, and a key concept in relation to organisational learning, particularly where the source of learning is external, is information seeking. Downs (1967) suggests that organisations are all, to some extent, involved in gathering information about themselves and their environments. Such scanning for information may be fairly minimal and only include information which organisations receive directly, without effort. For others, information seeking will be fairly regular and systematic

(Huber 1991). Two types of search have been described by Gilson *et al* (2009, p. 19): problematistic searching and 'slack search'. Problematistic searching is where the organisation is facing a particular problem and conducts a search in order to learn how it may deal with it. It is, therefore, reactive and *ad hoc*, arising only when it appears to be required. Slack search on the other hand occurs when staff have enough time to reflect on what they are doing, try new ideas, and search for new ways of doing things in the absence of having a present problem to deal with. Huber (1991) refers to three forms of search behaviour as scanning (routine monitoring or slack search), focused search (problematistic search) and performance monitoring (which involves continuous comparison of performance against expectations).

3.4.12. *Information distribution.* Once information has been acquired, it requires to be shared with others in the organisation in order to lead to broader based learning and the possibility that it will be institutionalised. In the same way that organisations must have processes to identify relevant information and bring it into the organisation, processes must then exist to spread the information internally.

3.4.13. *Information interpretation.* Crossan *et al* (1999) note that this stage involves the individual or group who have acquired the knowledge explaining the insight gained as a result of experience to themselves and to others in the organisation. The aim is to create a shared understanding amongst organisational members and to begin to understand the significance of the learning in terms of current and future practices. Huber (1991) argues that information interpretation is likely to be mediated by five factors: the extent to which there is existing uniformity of understanding across an organisation; whether the information is presented along with a clear interpretation; the richness of the medium in which the information is transmitted; the amount of information that

recipients are required to process; and the extent to which the new information requires a departure from previous practice.

3.4.14. *Organisational memory.* This stage is referred to by Crossan *et al* (1999) as institutionalisation, where new interpretations and responses to information are routinised into the standard practices of the organisation. Learning here can be both cognitive and behavioural - changes can be geared towards helping organisational members to think differently about their tasks, or to behave differently, or both (Dekker and Hansen 2004). Although organisations are able to 'store' newly acquired knowledge within routine procedures (hard information), much organisational knowledge is held tacitly within the minds of individuals (soft information) and as a result may be problematic in terms of employee attrition.

3.4.15. Other useful models have been suggested in the literature in relation to particular aspects of organisational learning. Barrados and Mayne (2003), adapting a concept drawn from the work of Lipshitz and Popper 2000) discuss organisational learning mechanisms (OLMs) in relation to learning in the public sector. OLMs are described as the:

'...institutionalised structural and procedural arrangements that allow organisations to systematically collect, analyse, store, disseminate, and use information relevant to the performance of the organisation' (Lipshitz and Popper 2000, p. 345).

The idea of OLMs provide a helpful elaboration to Huber's (1991) framework, by calling attention to the procedures and mechanisms that underlie each of the stages of learning he describes. Barrados and Mayne (2003) identify three elements to OLMs: measurement and analysis (a mechanism to monitor performance, seek solutions to problems, and provide an analysis of the options); information dissemination (includes

systems of knowledge storage and management, as well as other communication practices to provide information in a timely, useful, and relevant format); regular review (this involves a mechanism for the continuous review of performance rather than *ad hoc* learning).

3.4.16. Another model that is particularly relevant to this thesis is Rashman *et al*'s (2009) model of inter-organisational learning. Its emphasis on how one organisation can lead to learning in another is clearly important when considering the ability of redress mechanisms to control and bring about change in bureaucracies. This model stipulates three main factors to explain learning between organisations: the context of both organisations, the characteristics of the source and recipient organisation, and the characteristics of the relationship between these organisations. Contextual factors will be returned to in the next section of this chapter, and as a result, we focus here on the characteristics of, and relationships between, organisations.

3.4.17. In terms of relationships, Rashman *et al* (*ibid.*) and Knight (2002) highlight the importance of reciprocal and supportive networks for encouraging learning between organisations. They suggest that public sector organisations may be particularly able to learn in this way as a result of low levels of competition between agencies. Another key factor relates to the power balance in the relationship between the organisations. Some organisations may have coercive powers over others or have a formal hierarchical relationship with them that will influence potential outcomes. However, even where an organisation has formal, coercive power over another, Van Acker *et al* (2015) point out that learning is not a matter of 'dragging and dropping' knowledge from one place to another, but instead involves adaptation by the receiving organisation. Here the presence of 'communities of interaction' (Rashman *et al* 2009, p. 477) where the transmitting and receiving organisations are

able to develop shared understandings is thought to be particularly valuable.

*The factors facilitating and preventing learning*

3.4.18. The organisational learning literature has identified a significant number of factors, enablers, and prohibitors of learning in organisations. Shilling and Kluge (2009), reviewing the literature and collecting together perceived barriers to learning, identify 81 such barriers. Authors adopt various approaches to such lists of factors, with some like Schilling and Kluge (*ibid.*) focusing on barriers and others, such as Greiling and Halachmi (2013) focusing on enablers of learning. Since such lists of factors, while they have the advantage of being comprehensive, can be difficult to take-in meaningfully, the approach here has been to (a) select those factors that appear to be most relevant to learning in the context of public bureaucracies and (b) rationalise factors as far as possible into relevant groups and categories. In organising the factors, the thesis follows Shilling and Kluge's (2009) approach of dividing factors into individual, organisational, and environmental issues. It adds a fourth category, 'source of learning stimuli', to account for Rist's (1994) argument about the importance of the source of information, when that source is external to the organisation.

3.4.19. *Individual level factors.* Individual level factors cover the attitudes of employees and their cognitive ability and capacities. Schein (1995) argues that the concepts of learning anxiety and psychological safety are important in explaining how individuals respond to potential learning situations. Learning anxiety refers to a fear within individuals that admitting current approaches are wrong will lead to a loss of self-esteem and effectiveness. As a result, individuals will often resist admitting mistakes in order to preserve self-esteem. Psychological safety is

suggested as a possible answer to the problem of learning anxiety and involves providing an environment in which individuals feel safe from potential loss of self-esteem. Generally, commitment to learning is identified as a key issue at the individual level, with a number of factors potentially responsible for an individual's overall commitment level. These include individual biases, whether individuals associate change and learning with conflict, whether they have very fixed ideas, and so on. In terms of the capacity for learning, basic cognitive limitations, like the ability to take on new data are important, as are the skills of those who have a potential learning insight to advocate for change. A key capacity issue is whether staff have the ability to recognise the root causes of problems and generate double-loop learning. In a study looking at frontline workers' learning behaviours, Tucker *et al* (2002) found that they tended to focus on day-to-day problem solving, which reduced opportunities for deeper learning, thereby emphasising single-loop learning at the expense of double-loop learning.

3.4.20. *Organisational factors.* Most of the factors referred to in the literature fit within this category and relate to the nature, culture, structure, and processes of the organisation. A key issue at the organisational level is the attitude to learning that exists within the organisation's prevailing culture. Argyris (1992), for example, has referred to the common existence of defensive routines and anti-learning approaches within organisations, as they seek to protect themselves from potential embarrassment. In public bureaucracies in particular, an approach which does not like to admit that things have gone wrong can represent a significant barrier to learning (Barrados and Mayne 2003, Common 2004, Olsen and Peters 1996). Given the importance of trial and error to learning, an aversion to admitting error is likely to be problematic, as is the tendency in some organisations to focus on blaming rather than learning (Vince and Broussine 2000). This also ties in with the

organisation's general openness in dealing with problems. Marshall *et al* (2009), for example, note that free exchanges of information and dialogue are essential to learning and, therefore, require an open culture where discussion is encouraged. At a practical level, the nature of the organisation and the extent of staff turnover or resources at its disposal can seriously affect the presence or absence of learning (Pollitt 2009).

3.4.21. An organisation's structure is suggested to be important in facilitating or preventing learning. Here, the degree of fragmentation in an organisation, separation between sub-units, and the extent of role specialisation are all seen to influence the extent to which knowledge can be internally disseminated (Schilling and Kluge 2009). The presence of boundary spanning officials, communicating between units, is likely to be particularly important in facilitating such dissemination. As noted above, in discussing OLMs, the presence of specific processes to allow organisational learning to take place - rather than *ad hoc* arrangements - is likely to increase the chances of learning occurring (Barrados and Mayne 2003). In addition to ensuring that substantive learning mechanisms are in place, Van Acker *et al* (2015) suggest that follow-up arrangements are likely to be useful to monitor and assess changes.

3.4.22. *Environmental factors.* A range of factors in an organisation's environment are seen to condition the extent to which learning is likely. In some cases these factors will militate against change and in some cases they will be catalysts for change. Professional norms within an industry, for example, could lead to slower organisational change if that change goes against prevailing ideas, but professional groups may also be the instigators of fresh ideas. Political factors are particularly important in relation to public sector organisations, with a number of authors suggesting that they represent serious problems for organisational learning (Common 2004, Thomas 2015, Smith and Taylor 2000). These problems

include election cycles which can disrupt learning continuity, the poor quality of legislation which means that learning is restricted, and a blame environment which discourages risk taking. A further environmental factor is the influence of management fads which encourage quick fixes rather than long term thinking, reflection, and learning from experience. In the public sector context, Pollitt (2009) has noted that the NPM reforms have severely limited the capacity of organisations not only to learn in the first place, but to remember what they have learnt.

3.4.23. *Source of the learning stimuli.* As noted above when discussing learning between organisations, the source of the information that might lead to learning is particularly important when that source is external. Rist (1994) states that four factors matter in relation to the transmission of information from an external source into an organisation: the credibility of the source of the information, the credibility and authority of the person within the organisation receiving the information, the perceived legitimacy of the external organisation, and whether the relationship between the organisation transmitting information and that receiving it is close and trusting. In general, Rist (*ibid.*) notes that organisations are more likely to find internally produced information credible.

### **3.5. Chapter summary**

3.5.1. This chapter has considered three linked concepts which are central to the conceptual basis of the thesis: control, accountability, and learning. Following Dunsire (1979), control was described as the ability to limit excess, correct deviation, and change the world from one state to another. In Dunsire's (*ibid.*) theory of control, the principle mechanisms of control are directors, detectors, and effectors, and control is conceptualised as the ability to intervene in isostatic systems in order to disrupt power balances and effect change. The chapter proceeded to

outline Hood's (1995) typology of control and situated redress mechanisms primarily within the review mode of control, but also able to draw on mutuality, contrived randomness, and competitive control modes.

3.5.2. The chapter then turned its focus onto a category of control mechanism known as accountability mechanisms (of which redress mechanisms are a sub-category). While there is contention in the literature with regard to whether overlap and redundancy helps to ensure better accountability, it seems likely that multiple points of accountability increase the competition for bureaucrats' time and attention. Understanding that bureaucrats face a 'minefield' of accountability and need to respond to various organisations for various aspects of their performance, helps to contextualise the particular role of redress mechanisms and to highlight possible dysfunctions arising from the operation of accountability and control.

3.5.3. The chapter concluded by arguing that organisational learning was a key concept when considering questions of control and accountability, because it helped to provide the link between pronouncements by control mechanisms and potential changes in organisational cognition or behaviour. Organisational learning was, therefore, described as an important process through which control could be understood, since it sheds light on the way in which organisations receive new information and convert (or do not convert) it into concrete changes.

## 4. REDRESS MECHANISMS AND THE CONTROL OF BUREAUCRATIC DECISION-MAKING

### 4.1. Introduction

4.1.1. Having examined bureaucratic decision-making in chapter 2, and the various means by which attempts are made to control it in chapter 3, this chapter now turns to considering the control function of redress mechanisms. It begins by reviewing the theoretical, normative, and policy debates that surround this issue. The chapter then reviews the conceptual and empirical literature on the impact of redress mechanisms. The literature offers insights into the degree to which redress mechanisms have been found to control bureaucratic decision-making and suggests a range of factors that may facilitate or prevent the exercise of control.

### 4.2. Theoretical, normative, and policy debates

*Should redress mechanisms control bureaucratic decision-making?*

4.2.1. Redress mechanisms potentially fulfil a number of roles and their role in controlling bureaucratic action is neither uncontested nor does it necessarily predominate. The following paragraphs explore critical debates in the literature about the role of each redress mechanism.

4.2.2. *Judicial review.* In relation to judicial review, an important question is whether an instrumentalist focus on the effects of court decisions is appropriate. Cane (2004) has argued that this approach is reductive and neglects the expressive function of judicial review. He sees the value of judicial review lying in its ability to symbolically project a society's values, rather than necessarily in its ability to affect human action. King (2012) follows Cane (2004) and argues that there is a danger that scholars neglect other valuable roles which society expects courts to play. King (*ibid.*)

argues that judicial review remains a powerful tool for individuals seeking redress against the state and that aspects of judicial review (such as its emphasis on principled reasoning, its facilitation of public participation in government processes, and its expressiveness) retain a value that risks being lost in adopting too narrow a control perspective.

4.2.3. Others have considered what exactly the notion of control means in the context of judicial review. Harlow and Rawlings' (2009) famous characterisation of 'red light' and 'green light' theories of administrative law is instructive here. Red light theorists emphasise the need to control the power of an administrative state that is seen to be increasingly encroaching on the lives of individuals; green light theorists see state intervention as socially transformative and argue for a more limited and enabling role for courts. The idea of control also raises important constitutional questions. As Feldman (1988) has argued, judges must tread a careful line, maintaining their role as adjudicators and resisting the temptation to usurp the role of administrators. He notes that there is a danger that courts are perceived as attempting to take on legislative or executive functions if they take the notion of control too far.

4.2.4. One question is not only about whether control is an appropriate goal for judicial review but, if it is, what dimensions of control it should be expected to perform. Feldman (*ibid.*, 2003) has suggested that judicial control can be broken down into three techniques: *directing* refers to control where judges impose particular duties required by statute in a particular case; *limiting* refers to control where judges set out the lawful limits on administrative discretion; and *structuring* refers to control where judges impose principles which affect future decision-making. Feldman (*ibid.*) and Dunsire's (1979) notions of control (see chapter 3) can be categorised according to whether the control that is sought is *ex post* or *ex ante*: directing (correction of deviation) and limiting (limitation of excess)

are *ex post* forms of control, while structuring (the capacity to change the world) is an *ex ante* form of control. While the *ex post* function of judicial review is less controversial, the *ex ante* function begins to raise some of the constitutional dilemmas and fears of usurpation discussed by Feldman (1988).

4.2.5. A final question that is worth considering in exploring the normative aspects of judicial review's control function relates to understanding on whose behalf control is being exercised. This is likely to be particularly important from the perspective of legitimising the bureaucratic control function of courts. Cotterell (1994) explores this issue in his discussion of the constitutional position of judicial review. He argues that there are two influential images of judicial review in legal philosophy: the 'imperium' image suggests a hierarchical view in which courts are servants of a higher legislative power which controls all branches of the state; on the other hand, the 'community' image suggests that the common law principles of judicial review represent the cumulative wisdom of society at large and, therefore, act as an alternative source of legitimate power. Put another way, the issue here is whether the relationship between the court and the administration is one where the court acts as the principal of its administrative agent or whether the court, itself an agent of a superior legislative power, merely acts as a surrogate principal. Although both the imperium and community images offer arguments in favour of judicial review exercising a control on bureaucratic action, the point is that the basis on which control is exercised may lead to normative questions about the extent to which that control is appropriate.

4.2.6. *Ombudsman schemes*. The role of ombudsman schemes is similarly contested but, unlike judicial review, also varies significantly depending on the particular scheme being considered (Harlow 1978; Gill *et al* 2013). Traditionally, scholars have emphasised the parliamentary nature of UK

ombudsman schemes: they are an adjunct of Parliament designed to assist elected members in the resolution of constituents' grievances (Drewry and Harlow 1990; Morson 1993; Giddings 2008). As such, ombudsman schemes have been seen as form of political control over government and as a means of reinforcing the legislature's dwindling capacity to control the executive (Giddings *et al* 1993). Similarly to the 'imperium' image of the courts discussed above, ombudsman schemes have been cast '...as auxiliary mechanisms to aid political principals to oversee their administrative agents' (Van Acker *et al* 2015, p.40). On the other hand, however, ombudsman schemes have also been seen as a supplement to traditional administrative law remedies (Maggette 2003). Here, the adjudicative mode of ombudsman schemes is seen to distinguish them from political methods of control, which results in a hybrid perspective (Gill 2014).<sup>5</sup>

4.2.7. When it comes to considering the role of the Local Government Ombudsman (LGO), however, both the political and the hybrid conceptions seem inadequate. This is because, due to concerns about the propriety of parliamentary oversight of local democracy (Kirkham 2008), there has not been the same connection between the LGO and Parliament as exists for the Parliamentary and Health Services Ombudsman (PHSO). The lack of democratic connection to the LGO may place a question mark over its legitimacy and uncertainty about the basis on which it is seeking to exercise control over local administration. The suggestion we are making here, therefore, is that the type and extent of control that is to be exercised over public administration is intimately connected with the source of constitutional power which legitimates that control.

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<sup>5</sup> Other arguments have recently been put forward to explain the constitutional position and role of ombudsman scheme. Buck *et al* (2011) and Kirkham *et al* (2009), for example, have suggested that a fourth 'integrity branch' should be added to conventional understandings of the tripartite constitution. See Gill 2014 for further discussion of this point.

4.2.8. There has also been a significant development over time in relation to the control ombudsman schemes are expected to perform. This development is neatly captured by Harlow and Rawlings' (2009) 'fire-fighting' and 'fire-watching' metaphor. Traditionally, ombudsman schemes in the UK have been very much seen as 'fire-fighters', meaning that they are concerned predominantly with remedying individual injustices. This model sees ombudsman schemes as a small claims court, focussing on processing large volumes of low value disputes (De Leuw 2009). This conception of the ombudsman's role has been subject to criticism in the literature, with arguments being made that ombudsman schemes are better suited to the task of administrative audit (Harlow 1978; Lewis and Birkinshaw 1993). While it appears that ombudsman schemes are devoting ever greater attention to this fire-watching role in the UK (Buck *et al* 2011; Gill *et al* 2013; Gill 2014), the debate over whether this should be the case remains an important controversy within ombudsman studies (Stuhmcke 2010). There is, therefore, a similar malaise in relation to the control function of ombudsman schemes as there is in relation to that of courts.

4.2.9. *Tribunals*. Unlike in relation to courts and ombudsman schemes, the issue of control has not been subject to significant scholarly debate here. According to Thomas (2015, p.131), the idea that administrators might learn from the decisions of tribunals is 'rarely mentioned'. While, as we shall see below, recent policy developments have suggested an increased role for tribunals in providing feedback to first instance decision-makers, it seems that tribunals remain predominantly conceived as *fora* for the settlements of claims in high volume and highly specialised area of public administration. One interesting issue in this respect relates to the growing trend in the UK to see tribunals as judicial bodies, a trend confirmed with the creation of a unified court and tribunal service in 2008. While some have argued that the judicial character of tribunals has been entrenched

since the Franks Report (Richardson and Genn 2007), Thomas (2011) argues that too much emphasis has been placed on the idea that tribunals are judicial bodies separate from the administrative activities of government. He argues that tribunals have a direct role in the implementation of public policy, and that adjudication is better seen as existing on a spectrum, along with administration, as a tool for policy implementation.

4.2.10. UK tribunals, in this perspective, may be seen as something of a hybrid between judicial and executive-self-control, in the same way that ombudsman schemes exist in the zone between judicial and political control. At the same time, there is no doubt that the direction of travel in relation to UK tribunals is towards judicialisation. The operation of the doctrine of precedent in tribunals is particularly interesting when seen from a control perspective. Buck (2006), reviewing the limited literature on the operation of the *stare decisis* doctrine in tribunals, argues that differences between courts and tribunals in this respect have been over-emphasised and that *de facto* systems of precedent have developed in most tribunals. Hickingbottom (2009, p.5) has also commented on the upper tribunal's role in developing precedent, setting out his ambition to '... work towards a more coherent and distinctive system of tribunal justice...'. He argues that there are three ways in which the reformed tribunal service can deliver 'tribunal justice': by developing jurisprudence in the particular area of law covered by the tribunal; by developing overarching administrative law principles; and by providing practical guidance to users about decision-making. In emphasising the formal, judicial nature of the tribunal's role, these developments seem to suggest a move away from the policy implementation perspective suggested by Thomas (2011) and towards a more conventional, court-like approach. They also suggest a move towards tribunals seeking greater *ex ante* control of administration through the development of precedent and provision of feedback.

### *Can redress mechanisms control bureaucratic decision-making?*

4.2.11. Tied to the discussion of whether redress mechanisms should control bureaucratic decision-making has been analysis of the extent to which such control is possible. In relation to all three redress mechanisms, a significant impediment is the fact that they are reactive institutions, dependent on individual citizens bringing their concerns to them (Adler 2003, Pearson 2008, Rawlings 1986). The result of this is that complaints may be unrepresentative (Steyvers *et al* 2009) and the discovery of errors will be random (Harlow and Rawlings 2009). Some areas of administration do not involve a great deal of contact with citizens and, as a result, these areas in particular are likely to escape the form of control that redress mechanisms bring to bear. A great deal of scepticism has also been expressed about whether the external nature of redress mechanisms makes them ill-suited to exercise meaningful control (Adler 2003, Gregory and Hutchinson 1975). A somewhat different criticism has been that, to the extent that they have an effect, this will be negative, rather than improving practice (Compton 1970, Gregory and Hutchinson 1975, Harlow and Rawlings 2009, Morson 1993). In the paragraphs that follow, a theoretical discussion is provided of the ability of each redress mechanism to exercise bureaucratic control.

4.2.12. *Judicial review.* Assessments of the potential for judicial review to control bureaucratic action have generally been bleak. Feldman (1988, p.21) has stated that ‘judges do not control government’, while Rawlings (1986, p. 135) has argued ‘...judicial review fails in any sense to control central government’. Feldman (2003) puts forward a number of reasons in support of his conclusion and proposes that: bureaucracies are norm-based organisations; legal norms are only one set of competing norms; administrators are unlikely to give legal norms any privileged status over other norms; and, to be effective, legal norms must be seen by

administrators to be compatible with the realisation of the legitimate ends of public policy. Feldman (*ibid.*) goes on to argue that the ability of judicial review to control routine administration is heavily constrained by the presence of resource constraints and the strength of internal management control in bureaucracies. Harlow (1976) is similarly unconvinced and argues that a combination of judicial deference and bureaucratic disregard, means that judicial review can exercise only a very partial control.

4.2.13. Other authors have offered more positive accounts and King (2012), in particular, has sought to argue that courts have more value than is suggested in some of the more pessimistic assessments. One reason for this is the fact that an increase in judicial interventionism and the additional jurisdiction provided to judges following the introduction of the Human Rights Act 1998 mean that there has been a shift in the traditionally deferential approach of British judges. Other strands of thinking in legal scholarship also seem to be pointing in a somewhat different direction. Cooper (1995), for instance, has investigated the idea of juridification in local government and concluded that administrators see the law as a powerful colonising force, increasingly encroaching on administrative discretion. This more powerful view of law's influence is reflected in narratives developed in the US literature on courts. Galanter (1983), for example, famously suggested that courts had a radiating effect, with the principles developed in a small number of cases being hugely influential in shaping disputing behaviour and outcomes outwith the court.

4.2.14. Greer and Del Almagro Iniesta (2014) have argued in a similar vein that a narrow view of courts as institutions of hierarchical command has meant that the importance of courts as resources to be used by social actors has often been neglected. Rosenberg (2008) meanwhile has pointed

out that two common images are reflected in literature on courts. One sees courts as ‘constrained’ and limited by a lack of power and resources which render them weak and ineffective. The other sees courts as ‘dynamic’ and argues that courts are powerful and vigorous institutions able to induce substantial social change. While Rosenberg (*ibid.*) concluded that courts represent a ‘hollow hope’, his work is important in highlighting the paradoxical view that is present in much legal scholarship, where the courts are represented as at once powerful and powerless institutions.

4.2.15. *Ombudsman schemes.* Scholars have generally been more positive about the potential of ombudsman schemes to influence bureaucratic action. As noted earlier, some have seen ombudsman schemes as particularly suited to a fire-watching approach, and argued that this distinguishes them from other administrative justice institutions. Kirkham (2006), for example, highlights the inquisitorial approach of ombudsman schemes as facilitating the kind of intense scrutiny likely to lead to administrative improvement. The strong inquisitorial powers of ombudsman schemes and their ability to make recommendations in addition to findings of fact in relation to individual injustice, has often been seen as a strength of the institution (Gregory and Drewry 1991).

4.2.16. The ability to publish annual and other reports and issue guidance is also cited as an advantage in relation to shaping future bureaucratic action (Steyvers *et al* 2009). The LGO has been identified as particularly effective here and as more proactive than other ombudsman schemes in seeking to provide guidance (Kirkham 2005, Seneviratne 2002). Some ombudsman schemes have argued that their very existence exerts an influence on administrative practice which, although it cannot be measured, should be not ignored (Clothier 1986, Diamandorous 2008). One former ombudsman referred to this as a ‘tonic effect’ (Compton 1970,

p.6). Others have been more cagey in making their assessments of ombudsman schemes' influence on administrative practice, with Adler (2003, p. 328) providing an example of this more cautious approach:

‘...the opportunity of complaining to an ombudsman has contributed, if only to a small extent, to enhancing the justice inherent in administrative decision-making.’

4.2.17. The nature of ombudsman schemes' jurisdiction has also been perceived as a strength in relation to controlling administrative action. Indeed, it is clear that the concept of maladministration allows ombudsman schemes to go much further in probing bureaucratic action than does the legal conception of good administration (Steyvers *et al* 2009). As Kirkham (2006) has pointed out, the UK courts have recognised that ombudsman schemes are entitled to make findings of maladministration even where a court has found no breach of good administration in administrative law terms. That ombudsman schemes are able to consider a broader range of bureaucratic behaviour is, therefore, seen as potentially enhancing their ability to exert control.

4.2.18. Although, as we shall see, ombudsman schemes have been criticised for their lack of power and ability to compel public bodies to follow their recommendations, their ability to name and shame bodies and to use the media as a sanction (O'Reilly 2008) mean that there are generally few concerns in the literature about ombudsman schemes' ability to secure compliance with their rulings (Giddings 1998). Indeed, rather than emphasising the importance of sanctioning power, a suggestion in the literature is that their relative closeness to administrators and to public policy networks allows them to be more influential. The fact that ombudsman schemes are able to build a relationship, and enter into continuous dialogue with, the bodies they investigate is seen as providing

a strong basis for the receipt of guidance and advice by administrators (Farrand 1999). This is particularly the case for local ombudsman schemes, which are able to develop more direct and personal relationships with administrators (Van de Pol 2009).

4.2.19. A number of limitations have, however, been suggested in relation to the theoretical potential for ombudsman to exercise control. One issue is the increasing trend for ombudsman schemes to use informal resolution methods rather than the 'Rolls Royce' administrative audit style investigations that used to characterise the institution (Bondy *et al* 2014, Seneviratne 2002). The key idea behind 'modern complaints management' appears to be that quick resolutions to complaints are proposed without finding out what went wrong or why (Cabinet Office 2000). From a control perspective, the risk is clearly that a focus on individual satisfaction and a superficial treatment of cases militates against the intense scrutiny of processes provided by more formal investigations. Indeed, Kirkham (2005) has noted that some have criticised the 'local settlement' process used by the LGO because it can be used by local authorities to shield themselves from more probing investigation.

4.2.20. A major limitation highlighted by those who consider that ombudsman schemes should primarily be fire-watchers is the absence of own initiative powers of investigation in UK ombudsman schemes. As Steyvers *et al* (2009) have pointed out, ombudsman recommendations can often be dismissed by administrators on a 'damage score argument', where complaints are seen as representing a small sample of unrepresentative cases. More generally, while we noted above that compliance with ombudsman decisions and recommendations in the UK is generally good, it is not perfect. Kirkham (2006) and Kirkham *et al* (2008) have noted with concern a tendency by government departments to push back on a number of cases that have been upheld by the PHSO in recent

times. Although they are not in favour of ombudsman schemes having enforcement powers, others have suggested that ombudsman schemes' reliance on the goodwill of those investigated is problematic, especially in relation to the LGO where, as noted above, there is an absence of parliamentary support for the office (Lewis and Birkinshaw 1993). While the idea that ombudsman schemes' closeness to, and good relationships with, administrators suggests that they will be able to exert influence over them more effectively, there is also a danger that this closeness will be seen to impinge on the impartiality of the office (Gill 2014, King 2012, Kirkham 2005).

4.2.21. A final issue relates to ombudsman schemes' ability to develop coherent standards to guide the behaviour of public bodies. While the maladministration standard is broader than good administration in law, its exact meaning is 'notoriously uncertain' (Kirkham 2005, p. 386). While the development of 'principles' (PHSO 2009) and 'axioms' (LGO 1993) of good administration has undoubtedly been a step forward, there remains uncertainty about the extent to which pragmatism or principle predominate in the decision-making of ombudsman schemes (Gill *et al* 2013). In the Netherlands, there has been a recent surge of interest in the development of 'ombudsnorms' (De Leuw 2009; Langbroek and Rijkema 2006; Langbroek and Remac 2012; Remac 2013). This literature has sought to understand the extent to which a distinctive 'ombudsprudence' may develop. One criticism of current practice (which also applies to UK ombudsman schemes) is that published decisions rarely make reference to guidelines such as the Principles of Good Administration and do not, therefore, demonstrate the connections that may be made between the particular facts of the case and the general principle that may be drawn from it.

4.2.22. *Tribunals.* As noted above, there has been much less interest in the literature about the extent to which tribunals control bureaucratic action. The high volumes of cases dealt with by tribunals, and the expertise inherent in their specialist jurisdictions, certainly suggests some potential for exerting control over administrative decision-making. Wikeley (2006, 2008), however, has suggested that the extent to which tribunal decisions are used as a source of learning and possible improvement by decision-makers is very limited. He argues that lawyers have tended to view the administrative justice system as a pyramid, with decision-makers at the bottom and progressively more authoritative tribunals and courts at the top. In this view, principles of good decision-making flow downward through pyramid. However, the reality is that:

‘... administrative justice is... an arctic panorama in which there is only limited connection between individual ice floes, representing upper tier decisions, and the other frozen land masses of official decision-making’ (Wikeley 2008, p.176).

Wikeley’s (*ibid.*) conclusion is that while tribunals have a clear influence in individual cases, there is little evidence of their wider impact on bureaucratic decision-making. Factors that prevent this include: resource constraints on administrators; opposing values between administrators and tribunals; time pressures; and the volume and types of cases appealed. Another problem is the fact that because tribunals hear cases *de novo*, adverse decisions may simply reflect the fact that new information is presented at a hearing.<sup>6</sup>

4.2.23. The issue of feedback from tribunals to decision-makers has received some attention in the literature. Thomas (2015) and Richardson

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<sup>6</sup> Data from a pilot study looking at feedback from the Social Security and Child Support Tribunal indicates that only 15% of cases are overturned because the tribunal reached a different view to the initial decision-maker on the same facts (DWP 2012).

and Genn (2007) have argued that, although there is potential for tribunals to improve decision-making through feedback, this potential has yet to be realised. Partington and Kirton-Darling (2007) have surveyed existing approaches to feedback and possible ways that it might be provided in future. They discuss three ways in which tribunals might provide feedback to first instance decision-makers: official reports, direct communication, and informal feedback. In terms of the effectiveness of current feedback mechanisms, while making additional use of tribunal feedback is a common suggestion (McKeever 2014), there has been little in the way of exploration of current approaches.

*Does administrative justice policy expect redress mechanisms to control bureaucratic decision-making?*

4.2.24. Before we turn to the empirical literature, a final question concerns whether current administrative justice policy supports the notion that redress mechanisms should be exercising a control function in relation to bureaucratic decision-making. While it is evident that provision of state-sponsored mechanisms for resolving grievances against administrative bodies represents an acceptance of control in its corrective and limiting sense, the issue of an *ex ante* and structuring role may be more controversial. In this respect, a key turning point had been the former Department for Constitutional Affairs' White Paper *Transforming Public Services: Complaints, Redress, and Tribunals*. The White Paper introduced a holistic definition of administrative justice which encompassed both redress mechanisms and first instance decision-making. As a result, it created a new focus on the relationship between the decisions of redress mechanisms and the routine decision-making of public bodies, and an expectation that learning would occur following upheld cases. The White Paper led to the passing of the Tribunals, Courts, and Enforcement Act 2007 and the establishment of the Administrative Justice

and Tribunals Council (AJTC), which developed the vision of the White Paper by producing a number of publications which aimed at improving bureaucratic decision-making and enhancing the ability of redress mechanisms to do so (AJTC 2011, 2012). There have also been some attempts to make greater use of feedback by government departments and a recent initiative by the Ministry of Justice and the Department of Work and Pensions to analyse and make greater use of tribunal decisions appears to have produced positive results (Ministry of Justice 2014). The Ministry of Justice's Administrative Justice and Tribunals Strategic Work Programme 2013 - 2016 also has improving initial decision-making through better feedback as a key aim (albeit it focuses solely on tribunal feedback).

4.2.25. While these developments suggest support for the idea that the decisions of redress mechanisms should be used systematically by bureaucratic decision-makers as part of their routine work, other developments in administrative justice may militate against this. Adler (2012) considers that the eventual abolition of the AJTC demonstrated a lack of support for administrative justice from government and that the holistic vision of a distinct administrative justice system had effectively been abandoned. Recent changes in practice in some areas of primary decision-making have also had potentially important, although as yet unclear effects on the ability of redress mechanisms to exercise control. The introduction of a process of mandatory reconsideration by the Department of Work and Pensions in 2013, for example, may be a positive step forward in improving decision-making given the suggestions in the literature that internal processes may be effective in this respect (Adler 2003; Cowan and Halliday 2003). On the other hand, King (2012) has questioned whether internal processes are likely to improve decision-making given that administrators appear to be driven by different values to those that would be imposed externally.

4.2.26. Perhaps more importantly, one effect of mandatory reconsideration has been to reduce massively the number of appeals being heard by tribunals (Gill and Mullen 2015). Indeed, given that the receipt of cases is the lifeblood of redress mechanisms' control capacities, changes in the accessibility of the administrative justice system must be seen to threaten any policy commitment to enhance the influence of redress mechanisms over administrators. Mullen (2016, p.82) has identified six ways in which the Coalition government's administrative justice policies affect access to administrative justice:

'1) the broader vision of administrative justice has disappeared from government thinking, (2) there has been a serious attempt to undermine judicial review, (3) important rights of appeal have been removed, (4) there has been a failure to address those areas in which there were not adequate remedies and (5) in areas where there had been satisfactory remedies, new obstacles to their use have been created, and (6) there has been a decline in the availability of advice, assistance and representation to citizens in dispute with the state.'

4.2.27. The situation in relation to ombudsman schemes is a little more positive. In Scotland, the Scottish Public Services Ombudsman has been given a new 'design authority' role in relation to public service complaints procedures, which involves developing standardised complaints processes and then monitoring their effectiveness. While this quasi-regulatory role has been questioned in relation to its constitutional implications (Gill 2014), it is clear that - if successful - it represents an innovation with potential to improve complaint handling and may even have a knock-on effect on primary decision-making (Gill 2012, Mullen and Gill 2015). Wales has shown similar innovation through its creation of 'Complaints Wales', a one-stop-shop providing advice and signposting for citizens with a

complaint against government (Complaints Wales 2015). Both the Welsh and Scottish developments represent important steps forward in improving the accessibility of administrative justice and in rethinking the distinctive contribution that ombudsman schemes may make in this regard.

4.2.28. The situation in relation to the UK-wide and English ombudsman schemes is less clear. A recent review conducted by Robert Gordon, following an inquiry by the Public Administration Select Committee, recommended a range of changes that would significantly enhance the accessibility and fire-watching capacities of the PHSO (Gordon 2014). The government's response to the subsequent consultation on these proposals has ruled out the granting of own-initiative powers of investigation (the most radical part of the proposals) albeit some kind of 'design authority' based on the Scottish model may still be on the cards. While these developments are much more limited than they might have been, they nonetheless represent a small move towards seeking to enhance the ombudsman's influence over bureaucratic practice.

4.2.29. Overall, therefore, while policy in relation to ombudsman schemes seems to hold some potential for an increase in their fire-watching role, the same cannot be said for courts and tribunals. While the feedback agenda remains alive in the letter of government policy, and although the increasingly judicialised nature of tribunals perhaps offers enhanced standard setting potential, the reality of the marginalisation of the administrative justice system and the significant reductions in its accessibility are unlikely to make a positive contribution to redress mechanisms' ability to control bureaucratic action. Indeed, in relation to both tribunal and court reform, reducing legal control and oversight can be seen to be at the heart of the current government's policy agenda.

### 4.3. The empirical evidence: do redress mechanisms control bureaucratic decision-making?

4.3.1. The chapter now turns to the findings of empirical studies: what do we know about the extent to which redress mechanisms control bureaucratic decision-making?<sup>7</sup> This section provides a summary of the evidence in relation to each redress mechanism.

#### *Judicial review*

4.3.2. King (2012, p.79) has provided a pithy summary of the ‘mean point’ around which the findings of the judicial impact literature coalesce: ‘some impact, occasionally too much, more often too little’. Halliday (2004, p. 162) has commented in a similar vein that the research data suggests that judicial review’s influence is ‘patchy and varied’. While the general trend of the findings is downbeat, some studies have bucked this trend. Creyke and McMillan’s (2004) work on the influence of judicial review on administrators in Australia’s federal government, for example, reported that judicial review had a significant impact on administrative policy and practice. The work of Calvo *et al* (2007) and Platt *et al* (2010) also stands out for its upbeat findings. These scholars approach the question of impact with a different emphasis, seeking to establish an empirical connection between judicial review and the overall quality of service delivery in local government. They conclude that:

‘The findings provide a quantitative basis for arguing that judicial review challenges may contribute to improvements in local government services and therefore that the effect of judicial

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<sup>7</sup> The literature uses a number of different terms in investigating redress mechanisms’ control functions. Most have talked about their ‘impact’ or ‘influence’, while some have framed the enquiry in terms of ‘compliance’. A few have explicitly used the concept of ‘control’ (Gregory and Hutchinson 1975, Hertogh 2001). See chapter 1 for a justification of this thesis’ emphasis on control.

review is neither insignificant nor wholly negative' (Platt *et al* 2010, p.243).

Calvo *et al* (2007) and Platt *et al* (2010) also found a high level of commitment amongst bureaucrats to implementing judgments and positive attitudes in relation to the helpfulness of court judgments.

4.3.3. Buck (1998), whose findings are based on his personal experience of working with the organisation, considered the impact of judicial review on the Independent Review Service (IRS) of the Social Fund. He concluded that the level to which administrators had internalised the legal norms suggested that the court's influence had been 'comparatively high' (*ibid.* p. 129), even though this was constrained somewhat by the inconsistent application of administrative law principles by the courts. Similarly, Hammond's (1998) assessment of his own experiences working for the Treasury Solicitor's Department concluded that judicial review had a significant impact on government administration, with increased consideration being given to such issues as inviting representations, giving reasons, and granting hearings. James (1996), also writing from direct experience in administration, asserts that judicial review can have a powerful disruptive effect on administrators. Describing administrators as being 'irked' by judicial review, he considers that it has had an impact, albeit not always a positive one.

4.3.4. As suggested above, however, other assessments have been more negative. Kerry (1986), for example, considers that judicial review is generally peripheral to administration and that there has been no change in the general approach of administrators as a result of judicial review. Empirical studies conducted by academics have often shared this pessimistic view. Loveland (1995, p. 314), as part of a larger study looking

at homelessness decision-making in local government, reached damning conclusions about the impact of judicial review:

‘Legalism is an intruder... It does not prescribe administrative behaviour but challenges it. It does not facilitate the decision-making process, rather it gets in the way.’

4.3.5. Mullen *et al* 1996 found some evidence of judicial review’s impact in their study of homelessness decision-making in Scottish local government. They found evidence of changes in administration as a result of particular cases and attempts to pre-empt judicial reviews through such activities as training and manuals. Nonetheless, when placing such changes in context, Mullen *et al* (*ibid.*) concluded that although judicial review was not irrelevant, it had only a limited impact, and that internal methods of control might be more effective. Obadina (1998) in a study of gypsy site provision in local government, found that administrators did not consciously consider judicial determinations in devising their policies. Obadina (*ibid.*) considered the impact of a high profile and potentially far reaching judicial review case and found that it had limited impact beyond the authority subject to the challenge.

4.3.6. Richardson and Machin (1999, 2000) investigated the impact of judicial review on the Mental Health Review Tribunal, seeking to explore the hypothesis that judicial review may have a greater impact where the body acts in an adjudicatory rather than administrative manner. Overall, Richardson and Machin (*ibid.*) suggest that the court’s influence was ‘patchy at best’. Sunkin and Pick (2001) investigated the impact of judicial review on the Independent Review Service (IRS) of the Social Fund and sought to assess its impact over a ten year period rather than at a single point in time. They found that the influence of judicial norms was very strong when the organisation was first created, but waned over time as

the organisation's goals changed and as judicial norms came into competition with more managerial concerns.

4.3.7. Hertogh (2001), researching the extent to which the administrative court and the national ombudsman scheme in the Netherlands controlled the actions of government agencies, found that courts were more likely to lead to defensive reactions from administrators and less likely to engender a positive sense of mutual understanding. Halliday's (2000, 2004) study of compliance with administrative law in homelessness decision-making, meanwhile, found a significant degree of non-compliance in the authorities he studied. Where judicial review did have an effect, this was often negative, with administrators using legal knowledge to engage in defensive administrative practices.

4.3.8. Finally, it is worth noting that the literature on the impact of judicial review is not without its critics. In recent work examining compliance of local authorities with roads maintenance law in Scotland, Halliday (2013) has argued that the focus on the top-down impact of courts has excluded other perspectives that shine a light on the significance of law to the administrative process. He points out that other modes of governance exist apart from top down legal control, such as governance through markets and communities. In the context of road maintenance law, Halliday (*ibid.*) found that compliance had risen significantly, not only as a result of the hierarchical control of courts, but largely because of the commitment to change of professional networks and market pressures created through the insurance system operating there.

4.3.9. King (2012) has been critical of judicial impact studies and highlights a number of important limitations in the literature: the areas that have been investigated are not representative of general administration; the UK literature is out of step with the more mixed findings obtained in other

jurisdictions; and the literature generally adopts a qualitative approach and would benefit more from mixed method approaches. Some of these concerns are shared by Cane (2004, p.40) who argues that there are so many caveats around the findings of most judicial impact studies that the major contribution of the field to date has been to highlight our ‘ignorance and uncertainty’.

### *Ombudsman schemes*

4.3.10. In keeping with the theoretical arguments reviewed above, the empirical literature on the impact of ombudsman schemes has been more positive than the judicial review literature in its findings.<sup>8</sup> Beginning with research which has produced more pessimistic or at least ambivalent findings, Hill (1972, 1976) conducted the first empirical study seeking to evaluate the effect of ombudsman schemes on public administration. He investigated the reactions of senior civil servants in New Zealand to the New Zealand Ombudsman. His findings indicate that although administrators and the ombudsman shared a congruent and mutually reinforcing set of values, most considered that the ombudsman had little impact on their work.

4.3.11. Gregory and Hutchinson (1975) conducted a small scale empirical enquiry as part of a broader piece of research looking at the UK’s Parliamentary Commissioner for Administration (PCA).<sup>9</sup> They found that the creation of the commissioner in 1967 had not led to any changes in the attitudes of central government administrators and that, although changes to procedures and administrative systems had been brought about, these were peripheral. Gill (2012), meanwhile, conducted a small-sample study of the *ex ante* impact of the Scottish Public Services Ombudsman on the

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<sup>8</sup> Due to the limited number of studies conducted in the UK, the literature reviewed in this section is more international than that considered in relation to judicial review.

<sup>9</sup> The PCA is the formal name of the UK’s Parliamentary Ombudsman.

decision-making of local authority housing departments. He found that administrators showed little detailed awareness of the ombudsman's rulings and that commitment to learning from the work of the ombudsman was variable. Recognising the limited nature of the study and that its findings were less positive than a number of others, Gill (*ibid.*) nonetheless suggested a need for greater caution in assessing the claims made about the impact of ombudsman schemes, because many of the barriers that affect the ability of judicial review to control administrative action were also likely to affect ombudsman schemes.

4.3.12. Turning to the more upbeat literature, Friedmann (1976) researched the impact of the Alberta Ombudsman on public services and found that, while the ombudsman was rarely in the minds of administrators as they conducted their day-to-day work, attitudes to the ombudsman scheme were very positive. Overall, Friedmann (*ibid.*) concluded that given the positive attitudes of officials toward the ombudsman, it was likely to have a considerable ability to influence public administration. As noted above, Hertogh's (2001) research explored the impact of the administrative courts and the ombudsman in the Netherlands. His findings in relation to the ombudsman were very positive, suggesting its cooperative approach helped to reduce the barriers to administrators making changes to policies and procedures. Interestingly, Pajuoja (2009) - in a study looking at the impact of the Finish Ombudsman - also found a very high level of influence, but in that case it was ascribed to the ombudsman's strong powers of coercion, which included criminal prosecution.

4.3.13. In a sign that ombudsmen themselves are becoming more interested in their impact, two studies have now been commissioned by ombudsman schemes. The first, commissioned by the PHSO, examined the impact of 21 decisions which had led to adverse findings and

recommendations (IFF/PHSO 2010). This study concluded that individual recommendations did lead to change, although the study did note that the timeliness of investigations, some lack of clarity in recommendations, and the absence of a more cooperative approach, militated against impact in some cases. The second commissioned study, conducted on behalf of the Toronto Ombudsman, reported similarly positive findings (Siemiatycki *et al* 2015). This study found that the ombudsman had had an 'overwhelming positive impact' (*ibid.*, p.2) on municipal administration. A particular area where administrators reported that the ombudsman had led to improvements was in terms of the way administrators communicated with members of the public and in the treatment of vulnerable citizens.

4.3.14. Three further recent studies have been conducted in a European context. Kostadina (2012) researched the influence of the European Ombudsman on the European Commission. She found that in the majority of cases, the ombudsman's recommendations were accepted and that the Commission was willing to learn from the ombudsman. While Kostadina's findings are clearly positive, it is notable that the rate of compliance of the European Ombudsman's recommendations is poor compared with that achieved by UK public service ombudsman schemes. Hossu and Karp (2013) studied the administrative perceptions of the Romanian Ombudsman, finding generally positive views of the ombudsman and its influence. Administrators here reported that the ombudsman had 'very much' influenced their future activity even though they found it difficult to highlight specific changes arising from cases. Finally, Van Acker *et al* (2015) conducted a comparative study of the role of ombudsman schemes and audit bodies in generating and sustaining administrative innovation in a number of European countries, including the UK. This study's overall conclusion was that the recommendations of ombudsman schemes were effective in driving sustainable innovations in organisations.

## *Tribunals*

4.3.15. The very limited empirical interest in the impact of tribunals allows us to summarise the literature briefly. Young and Wikeley (1992) considered the influence of the Social Security Appeals Tribunal on the decision-making of bureaucrats working in the Benefits Agency. While noting that the quality of decision-making remained low and that bureaucrats faced significant pressures in dealing with their day-to-day work that might present a barrier to impact, Young and Wikeley (*ibid.*, p. 260) concluded that the tribunal did influence administrative action and ‘cast a long shadow’ over administrators.<sup>10</sup> Evans (1999) investigated the impact of the Special Educational Needs Tribunal on decision-making in local authorities in England. This study provided a mixed view of the tribunal’s impact, with 85% of respondents reporting that the tribunal had not led to any major changes in policy, although 41% said that they had amended their procedures as a result of the possibility of an appeal to the tribunal. Evans (*ibid.*, p. 32) found that local authorities generally adopted a reactive approach and tended to see tribunal decisions as ‘one-offs’ rather than as grounds for fundamental changes in policy and practice. The National Audit Office (2003) evaluated the way in which feedback from tribunals is used as part of a report looking into decision-making and medical assessments for incapacity and disability benefits. The report found that the feedback arrangements that were in place had been used very little and had not had a significant impact on decision-making.

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<sup>10</sup> It should be noted that in later work, Wikeley (2006, 2008) has concluded that changes in social security administration mean that the tribunal’s influence on routine decision-making is likely to now be reduced.

#### 4.4. What factors facilitate or impede the control of bureaucratic decision-making by redress mechanisms?

4.4.1. This section reviews the factors that have been suggested as important in explaining why redress mechanisms do or do not control bureaucratic decision-making. It begins by describing Halliday's (2004) 'analytic framework' and then uses an amended version of this framework in order to discuss the various factors in the literature.

##### *Halliday's (2004) framework*

4.4.2. Although impact studies have added to our empirical understanding in incremental ways, they have not necessarily greatly developed our ability to theorise the relationship between redress mechanisms and bureaucracy (Hertogh and Halliday 2004). And although individual studies have brought particular issues into sharper focus, the broad sweep of factors likely to influence the impact of redress mechanisms has been established some time ago. Indeed, reviewing literature on the impact of the Supreme Court in the United States, for example, Wasby (1970) listed 41 hypotheses which he grouped into the following six categories: characteristics of the cases and decisions; communication of decisions; the political environment; the extent of any follow up; characteristics of those responding; beliefs and values of those responding. While this list was produced in the context of US impact studies, and produced some 45 years ago, the broad categories of factors highlighted by Wasby (*ibid.*) closely match modern attempts at explaining the impact of redress mechanisms.

4.4.3. The most detailed recent attempt to understand the conditions under which judicial review will lead to compliance has been made by Halliday (2004). His 'analytic framework' sets out the conditions required in order for judicial decisions to influence bureaucratic behaviour. The conditions

relate to three areas: the law; the decision-makers; and the decision-making environment. In relation to the law, the conditions for impact are that the law, as expounded in judicial review decisions, must be clear and consistent. In relation to the decision-makers, the conditions are that decision-makers must: be aware of the judicial decisions, be committed to implementing them, and have the competence to understand and apply them. Finally, in relation to the decision-making environment, the model of administrative justice set out by judicial review must be dominant amongst other influences in the administrative environment.

4.4.4. Halliday's analytic framework provides a very helpful basis for categorising important explanatory factors and has been found to be a useful basis to guide empirical enquiry in different contexts (Cowan and Halliday 2003, Gill 2012, Hall 2011). It does, however, require some amendment to take account of this thesis' emphasis on multiple redress mechanisms and some suggestions in the literature that are not fully accounted for in the framework as it stands. The first amendment that is required is to broaden out the framework's first area to include not only the law but also non-legal principles of good administration such as those developed by ombudsman schemes. In addition, the comparative perspective adopted in this thesis requires not only that redress mechanisms should be investigated in terms of the clarity and consistency of the principles of good administration they propound, but a range of other variables in relation to how they operate. Hertogh (2001), for example, has suggested that a redress mechanism's 'style of control' is important in understanding its policy impact, while Hall (2011) has argued that the medium and approach to communicating decisions is as important as their substantive content. As a result, the first area of Halliday's (2004) framework is recast to consider the way in which redress mechanisms operate, including their roles, their decision-making, the nature of their proceedings, and so on.

4.4.5. The second area that requires some amendment is Halliday's (*ibid.*) focus on conditions relating to decision-makers, which currently does not have an explicit focus on the nature and structure of bureaucratic decision-making as possible factors influencing the likelihood of bureaucratic control by redress mechanisms being achieved. As chapters 5 and 6 will make clear, this is important to this thesis' field setting, where several decision-making areas are considered, with quite different types of decision-making operating in each. A clearer focus on decision-making itself in addition to the characteristics of decision-makers is, therefore, required. As a result, Halliday's (*ibid.*) framework is adapted as follows, to consider the following areas:

- The characteristics of redress mechanisms
- The characteristics of decision-making and decision-makers
- The characteristics of the decision-making environment

Within each area of the adapted framework, the thesis does not limit itself to the conditions proposed by Halliday (*ibid.*) but also draws on a range of other factors suggested in the literature. These are considered below, organised under the headings of the amended framework.

#### *The characteristics of redress mechanisms*

4.4.6. The obvious starting point when considering the ability of redress mechanisms to control bureaucratic action is whether the principles being expounded in rulings are clear and consistent. If administrators are unable to perceive a clear and consistent line of reasoning in decisions, they will not be able to deduce what is required of their decision-making. Clarity and consistency in the principles of good administration being expounded has been found to be a factor in relation to the control function of judicial review (e.g. Halliday 2004, Hertogh 2001, Calvo *et al* 2007), tribunals

(Evans 1999), and ombudsman schemes (Gill 2012, Hertogh 2001, IFF/PHSO 2010, Van Acker *et al* 2015).

4.4.7. There appears to be broad consensus in the academic literature that the principles of good administration developed within administrative law lack clarity and coherence, being described by Halliday (2004, p. 112) as ‘schizophrenic in character’. Daintith and Page (1999) have also pointed to the open textured nature of administrative law, which means that judgments are unlikely to be predicted by administrators. In relation to ombudsman schemes, Van Acker *et al* (2015) consider that a lack of clarity in the evaluation criteria used by ombudsman schemes is a major potential barrier to their influence. While some authors have found the principles advanced by ombudsman schemes to be clear and consistent (Gill 2012), others have emphasised their pragmatic approach and their lack of principle (e.g. Crawford and Thompson 1988).

4.4.8. Calvo *et al* (2007) discuss the importance of considering the type of decision being made by the redress mechanism, in addition to the clarity and consistency of the principles themselves. Different types of judicial decisions are likely to prompt different kinds of outcomes. Calvo *et al* (*ibid.*) note, for example, that decisions that require the extension of a service to a new category or group of citizens are likely to have significant consequences at all levels of an organisation; on the other hand decisions that are more operational in nature are likely to have a greater impact on middle managers and frontline staff.

4.4.9. One issue which has received only limited attention in the literature has been the way in which decisions are communicated, particularly in relation to the format and presentation of decisions. Langbroek *et al* (2015) in a study looking at judicial decisions in the Netherlands, found that judges wrote judgments primarily with a judicial and legal audience

in mind, and that the result was that they were unlikely to meet the needs of lay people. Meanwhile, one of Wasby's (1970, p. 246) 41 hypotheses concerning the impact of the Supreme Court in the US is that 'the greater the technicality of the language of a decision, the smaller the impact'. Gill (2012) also found that, in order to maximise their potential to be influential, ombudsman schemes needed to communicate their messages in ways that could be easily assimilated by administrators.

4.4.10. The need for channels of communication between redress mechanisms and administrators and for their overall relationship to emphasise mutual understanding and cooperation has been highlighted by some authors. Hertogh's (2001) insights here are particularly important, and he argues that cooperative relationships between redress mechanisms and administrators are likely to reduce the barriers that affect each of three stages of the implementation process. He suggests that cooperative approaches make it easier for administrators to understand judgments (the information stage), and are key to reducing both the degree of policy tension between a judgment and existing administrative policies (the transformation stage) and the possibility of defensive reactions during implementation (the processing stage).

4.4.11. Although he does not include it as a distinctive element in his framework, Halliday (2004) has discussed the importance of dialogue in assisting administrators to understand judicial norms and values. While he comments that judges simply issue decisions without further engagement with administrators, he points out that literature on regulation has suggested that intimate relationships between a regulator and regulatee, and the creation of interpretative communities, can be helpful in achieving a shared worldview. Given that control by redress mechanisms can only be achieved through achieving congruence between their values and those of administrators, this appears to be a particularly important

factor. Hertogh's (2001) conclusions also stress this relational dimension, while Hall (2011) emphasises the point with reference to communication theory, a key tenet of which is that for communication to be effective the sender of a message must have a good understanding of the persons for whom the message is intended. A close and cooperative relationship between redress mechanisms and administrators, therefore, is suggested not only to be important in terms of allowing them to disseminate messages, but also in terms of improving their understanding of administrative contexts and the future effectiveness of their messages.

4.4.12. Direct experience of, and repeated contact with, redress mechanisms has also been suggested as a potentially important factor (Gregory and Hutchinson 1975, Friedmann 1976, Young and Wikeley 1992). Young and Wikeley (*ibid.*) largely ascribe the influence of the Social Security Appeals Tribunal to the fact that decision-makers might be called up to defend their decisions and that hearings offer an opportunity to understand at first hand the tribunal's approach to administrative justice. Although Partington and Kirton-Darling (2007) suggest that widespread use of presenting officers is likely to be impractical, they also point to the value of feedback being provided to administrators as part of informal relationships. They suggest that feedback is more likely to be effective where the relationship between the tribunal and the administrator is one of trust and collaboration. The use of mechanisms for feedback such as face-to-face communication and training, in addition to written feedback, is also suggested as likely to improve the way feedback from tribunals is used. In the context of ombudsman schemes, Gill (2012) concluded that personal contact was likely to be the most effective way of ensuring that administrators found out about and used the messages being sent out by an ombudsman scheme.

### *The characteristics of decision-making and decision-makers*

4.4.13. Decision-makers' awareness of what redress mechanisms require of them is clearly important: they cannot be controlled and directed by principles of good administration of which they are not aware. While this may sound simple, the reality of administrators' routine work means that there are significant barriers to finding out about relevant cases (Wikeley 2006). Halliday (2004) identifies two main factors in relation to awareness: whether knowledge is contained within a small group of individuals (such as more senior staff); and whether administrators have close and frequent contact with their legal advisers. Gill (2012) suggests that, in the context of ombudsman schemes, variations in administrators' awareness are likely in terms of both seniority and the degree to which an official occupies a specialised dispute resolution role. Gregory and Hutchinson (1975) and Friedmann (1976) agree and also suggest that an administrator's level of experience may be significant. Important here is the degree to which organisational structures are created for the reception of knowledge from redress mechanisms; as Greer and Del Almagro Iniesta (2014) have pointed out, institutional structures can be a good indicator of the way in which public bodies approach compliance. Hall (2011), for example, found that none of the organisations she studied had a formal system for identifying and disseminating court judgments to administrators; instead, awareness of judgments was *ad hoc* and dependent on individuals making specific efforts to find out about them. Awareness, therefore, appears to be a matter of an individual's role within the organisation, their degree of personal commitment to becoming aware of cases, and the extent to which organisational structures exist for the dissemination of knowledge arising from the work of redress mechanisms. Here, the literature on organisational learning (see chapter 3) highlights some important factors, particularly in relation to the importance of organisational learning

mechanisms in explaining the process through which awareness of decisions is achieved.

4.4.14. The degree to which administrators are committed to acting in line with the requirements of redress mechanisms is widely seen as an important factor. Halliday (2004) argues that decision-makers' value systems must be congruent with those of redress mechanisms and that they must feel that compliance with the rulings of redress mechanisms is important. In his study, Halliday (*ibid.*) found that decision-makers were influenced by a different set of normative values to the courts, and that their administrative culture was resistant to legal norms. The idea of a 'clash of values' between legal and other normative frameworks acting as an impediment to the ability of courts to control administrative decision-making is frequently cited by scholars (e.g. Loveland 1995, Richardson and Machin 2000, Sunkin and Pick 2001). Richardson and Machin's (2000) study of the impact of judicial review on the Mental Health Review Tribunal presents perhaps the starkest example of such a clash, where the legal values of the court and the professional values of doctors were found to be in strong competition. Indeed, a number of impact studies have drawn on Mashaw's (1983) models of administrative justice (see chapter 2 where these are discussed) in explaining the way that competing value systems act as a barrier to the exercise of control by redress mechanisms. Sunkin (2004, p.47) refers to the range of factors competing within bureaucracies as an 'administrative soup' of influences.

4.4.15. King (2012) presents the clash of values between courts and administrators as absolute, while Woodhouse (1997) also perceives a strong and irreconcilable clash between public law values and those of modern managerial bureaucracy. As Mashaw (2010) and Thomas (2011) state, few systems of administrative justice can reconcile the inherent tensions between individual and collective interests, and between

administrative fairness and administrative efficiency. Overall, therefore, divergence between the value systems of redress mechanisms and administrators is likely to condition commitment to learning from their decisions. Similar value clashes have been suggested in relation to tribunals. Evans (1999), for example, found that the Special Educational Needs Tribunal's lack of concern for resources meant that its approach to decision-making was fundamentally different to that of local authority decision-makers. In relation to ombudsman schemes, studies to date have not considered the issue in depth, although there is a suggestion that ombudsman schemes and decision-makers have values that are reasonably congruent (Friedmann 1976, Hertogh 2001).

- 4.4.16. Halliday (2004) argues that even decision-makers who are aware of judgments and are committed to acting in line with them, may fail to comply if they lack the skills to identify, draw out, and apply the principles contained in judicial decisions. As noted above, court judgments are unlikely to be written primarily with the needs of administrators in mind, and a degree of legal training will be required to decipher the meaning and import of decisions. Decisions of tribunals and ombudsman schemes may be more accessible to administrators and, certainly, Gill (2012) found that decision-makers reported having no difficulty in understanding what ombudsman schemes required of them. Calvo *et al* (2007), differentiating between factors that particularly influence either the speed or comprehensiveness with which judgments are implemented, argue that legal consciousness and competence are factors that are likely to be particularly important in relation to comprehensiveness. Hertogh (2001), drawing on concepts from the literature on the implementation of public policy, breaks the question of competence down into three processes: information, transformation, and processing. Information involves the administrator asking themselves what the plain text of the ruling means; transformation involves the administrator asking themselves

what the consequences of the ruling are in terms of the goals of the organisation; and processing involves the administrator asking themselves what they should do about a ruling and whether or not to implement it.

#### *The decision-making environment*

4.4.17. The final cluster of factors relates to the decision-making environment and the idea that the principles being propounded by redress mechanisms must be dominant within the bureaucratic setting in order for control to be achieved. In his study of homelessness decision-making, Halliday (2004) found that a plurality of oversight regimes, an emphasis on financial management, and strong pressures from elected politicians all competed for influence with judicial norms. He suggested that the extent to which one set of norms is stronger than another in bureaucratic settings is governed by the degree of sanctioning power associated with those norms. In relation to judicial review, he argued that the extent to which it is perceived as a sanction is likely to vary and that it has significantly less sanctioning power than other regulatory mechanisms.

4.4.18. Other researchers have also pointed to the importance of the context in which decision-making takes place. Mullen *et al* (1996), for instance, found that even where a group of officials were legally conscientious, their attempts to implement changes could be thwarted by internal political pressures within the bureaucracy. Sunkin and Pick (2001) also demonstrate the strong influence of organisational values in their study, finding that the predominant concerns of an organisation could pull in different directions to the concerns expressed by the courts. In addition to specific pressures and influences (such as other accountability mechanisms), organisational culture appears to be a key factor in terms of the way in which judgments are responded to (Calvo *et al* 2007). Indeed, as Thomas (2015) has noted in his exploration of organisational learning in

the administrative justice system, culture can operate as a significant barrier to improved decision-making.

#### 4.5. Chapter summary

4.5.1. This chapter began by considering the extent to which redress mechanisms *should* control bureaucratic decision-making and acknowledged that this was a contested issue in relation to each mechanism. It then considered the linked issue of whether redress mechanisms *could* control bureaucratic decision-making to any significant degree, with reference to theoretical discussions in the literature. This is an issue which has been treated with a great deal of scepticism in relation to judicial review, which has received little attention in relation to tribunals, and which has generated a more optimistic outlook in relation to ombudsman schemes. This section of the chapter proceeded to conclude with a discussion of whether current administrative justice policy endorsed and supported the control functions of redress mechanisms. While rhetorical commitment to the idea that decisions by redress mechanisms should guide administrative behaviour still appears to be in place, the chapter noted that outwith the ombudsman area, there were few positive policy developments aimed at making this apparent commitment a reality.

4.5.2. The chapter then considered the empirical evidence about the effectiveness of redress mechanisms' control functions. Studies about judicial review are largely pessimistic in relation to the extent to which it achieves impact, although a small number of studies are more positive. The more optimistic outlook of the theoretical work on ombudsman schemes is also reflected in the empirical literature, while the very small number of studies regarding tribunals makes even tentative conclusions difficult. The chapter ended by considering the perhaps more important question of why control may be exercised in some cases and not others.

Here, Halliday's (2004) analytic framework was adapted to suit the broader focus of this thesis and then used as a basis for organising and discussing the various factors that have been found to be relevant in the empirical literature.

## 5. EDUCATION LAW, POLICY, AND REDRESS

### 5.1. Introduction

5.1.1. This chapter provides an outline of education law and policy in England. The chapter begins by providing an historical overview of the education system in England. It then concentrates on the areas of education law and policy that are of interest in this thesis: admission to schools, home-to-school transport, and special educational needs (SEN). For each area, an overview of the system for decision-making is provided, as well as a description of the statutory framework that governs that decision-making. A brief section also considers the role of cross-cutting legislation, such as the Human Rights Act 1998, in the education sector. The chapter ends by discussing the various redress mechanisms that are available for citizens to challenge decision-making in the education field.

### 5.2. The education system in England: an historical overview

5.2.1. While warning against over-simplification, Ball (2014, p.65) nonetheless suggests that it is helpful to divide modern education policy into three distinct periods: 1944 to 1976, 1976 to 1997, and 1997 to 2013. This division is followed in the discussion below although the period of the Coalition government (2010 - 2015) is discussed separately.

*1944 to 1976: the post-war consensus and beyond*

5.2.2. The Education Act 1944 ('the 1944 Act') was a key moment in the development of English education law and policy. The 1944 Act introduced free primary and secondary education for all children, with provision being made by local authorities and voluntary organisations (Noden *et al* 2014). It introduced a tripartite system of secondary schools, which included

technical schools, secondary modern schools, and grammar schools. There was, at this time, significant consensus amongst politicians, civil servants, and teachers, that state education was crucial to economic and social welfare (Chitty 2014). The system that emerged from the 1944 Act was one of partnership between central government, local government, and schools, in which a national framework of state education was administered on a local basis. While the 1944 Act was a landmark, it nonetheless fudged a number of issues. Feintuck and Stephens (2013, p.31) argue that unresolved issues included the debates between meritocracy and egalitarianism, secularism and faith, and parental choice and state planning. The other major development in this period was the development of comprehensive education, the schooling of all children within a single type of school and without selection (Chitty 2014). The implementation of comprehensive reorganisation has been described as ‘patchy and incomplete’ (Feintuck and Stephens *ibid.*, p. 32), albeit West *et al* (2011) note that by the early 1980s comprehensive education was almost universal in England.

#### *1976 to 1997: a quasi-market in education*

5.2.3. In the period 1976 to 1997, successive governments saw education as a means to enhance economic productivity rather than as a social good (Feintuck and Stephens 2013). This period saw a break from the comprehensive system of schooling that had partially emerged in the 1960s and increasing polarisation over education policy between the main political parties (Gorard *et al* 2013). The partnership between central government, local government, and teachers began to fray as central government’s approach became more directive (Chitty 2014). Initially, the most important piece of legislation was the Education Act 1980 which

introduced the concept of parental choice of schools (Noden *et al* 2014).<sup>11</sup> The next watershed was the Education Reform Act 1988 ('the 1988 Act'), which *inter alia* established a national curriculum, enhanced school autonomy, and entrenched the concept of parental choice. The 1988 Act effectively provided for a 'quasi market' in education, in which parental choice, league tables of examination results, and independent reports on the quality of schools were all designed to improve standards through competition (Rodda *et al* 2013). At the same time, however, there was a countervailing impulse towards centralising power and imposing uniformity (Glatter 2012).

*1997 to 2010: a neoliberal consensus*

5.2.4. The period 1997 to 2010 featured the end to the 'national system, locally administered', with a significant reduction in the role of local authorities, an increase in the role of central government, and a huge increase in the autonomy of the school system. Despite some departures from previous Conservative policy, the New Labour Government's approach was broadly congruent with the approaches of the 1980s and 1990s (Chitty 2014; Feintuck and Stephens 2013). The most significant legislation introduced at this time was the School Standards and Framework Act 1998 ('the 1998 Act'), which included, amongst other measures, provisions for increasing diversity by allowing more schools to specialise and changes to the structure of the school system. Chitty (2014) notes that the period between 1997 and 2010 resulted in an extremely complex and divided school system, with more than 20 types of secondary school in existence. An important development was the introduction of academies in 2000. Academies are publicly-funded independent schools, which operate as charities and have a funding agreement with the

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<sup>11</sup> Although the language of choice was used, in reality parents have only ever had the right to express a preference with regard to the school they wish their child to attend.

Secretary of State for Education rather than being part of the local authority framework (Glatter 2012).

*2010 to 2015: accelerated change*

5.2.5. Ideologically, the Coalition Government which assumed office in May 2010 shared many of the assumptions of the preceding administration (Feintuck and Stephens 2013). The main difference has been the speed with which the Coalition was prepared to push for a reformed schools system. One innovation was to repurpose the academies programme so that, rather than being schools sponsored in disadvantaged areas, academy status would be a reward for excellence (Chitty 2014). Indeed, the Academies Act 2010 ('the 2010 Act') allowed maintained schools to apply for academy status and gave all schools rated 'excellent' by Ofsted an automatic right to this status. Lupton and Thomson (2015, p.31) show the scale of the transformation in the schools system following the 2010 Act: while there were only 203 secondary academies when the Coalition took office in 2010, by 2014 there were 1,893. Another major and controversial innovation to the school system was free schools. These schools are a type of academy, which can be set up by parents, community groups, and faith groups in response to parental demand (Lupton and Thomson 2015; Green *et al* 2015). They have, however, been subject to debate in terms of the extent to which they will lead to further social segregation within the school system and the extent to which they can be held publically accountable (Harris 2012). Free schools have been described by Green *et al* (2015) as the final stage in the process of neoliberal, supply-side reform to the education system.

### *The current school system in England*

5.2.6. West and Bailey (2013, p.138) describe the current system of education in England as follows:

‘...the school-based education system in England is changing radically from a national system locally administered via democratically elected local education authorities to a centrally controlled system with the Secretary of State having legally binding contractual arrangements with an increasing number of private education providers.’

While the local authority’s role has been much reduced, it nonetheless retains significant powers and responsibilities in relation to those schools which remain under local authority control. As we shall see in the next sections of this chapter, local authorities also retain important functions regarding the coordination of admission arrangements, the provision of home-to-school report, and the identification, assessment and provision for children with SEN (the areas which are of main concern to this thesis).

### **5.3. The policy and statutory framework for admissions to school**

#### *Overview*

5.3.1. School admission is one of the most controversial areas of education policy, since the allocation of pupils to schools has powerful implications for equal opportunity (Tough and Brooks 2007, West *et al* 2011). The school admissions process strongly affects the interests of children and parents, and the latter often report feeling a high degree of anxiety about the process (Coldron *et al* 2008, Lamb 2009). One reason for the increasing importance of the admissions system is the market-based reforms referred

to earlier and the diversity in school provision which has resulted; the way in which school places are allocated in such a system is of central importance from the perspective of equity and social mobility (Feintuck and Stephens 2013). Much of the empirical literature on admissions has been concerned with assessing the extent to which local admission criteria and policies are lawful (Allen *et al* 2011; Morris 2014; West *et al* 2009; West *et al* 2011) and whether the system promotes social justice (Green *et al* 2015).

5.3.2. Not surprisingly, the school admissions area is one which generates large numbers of individual disputes (Feintuck and Stephens 2013). There were 50,550 appeals for primary and secondary school places in 2013/ 2014 (Department for Education 2014, p.1). Of those, 36,965 appeals proceeded to a hearing (*Ibid.*, p.1). The percentage of appeals decided in favour of the parents was 26.7% for secondary school places and 19.6% for primary school places (*Ibid.*, pp.2-3). Taylor *et al* (2002) argue that the high volume of appeals which are lodged by parents are a symptom of market frustration, caused by an inability to satisfy parental demands. Another concern has been that the admissions appeal system facilitates access to school choice for well-educated middle class parents at the expense of others (Coldron *et al* 2002). Meanwhile both the LGO and the AJTC have issued guidance on good practice in admission appeals in response to concerns about the fairness of the process (LGO 2011, AJTC 2012a).

#### *How the admissions system works*

5.3.3. The statutory framework for school admissions is provided by Part III of the 1998 Act, regulations made under the Act, and statutory codes of practice issued by the Secretary of State. The period in which the fieldwork was completed was one of transition and, therefore, bureaucratic decision-makers were still conducting part of their work

under regulations issued in 2008, in addition to using the new regulations issued in 2012 for their prospective work. In addition to the regulations, detailed guidance was provided to local authorities in the Schools Admission Code (the Admissions Code) and the School Admission Appeals Code (the Appeals Code).

5.3.4. The first step in the admissions process is the creation of admission policies (known as ‘admission arrangements’) by the admission authorities of individual schools. The body which carries out the role of admission authority varies depending on the type of school: for community and voluntary controlled schools it is the local authority, while for other types of schools it is the school’s governing body. The main purpose of school admission arrangements is to set out the criteria which will be applied to decide which children will receive a school place in cases where a school is oversubscribed. Each school is entitled to have its own admission arrangements and criteria (Office of the Children’s Commissioner 2014).

5.3.5. Once admission authorities have drawn up their admission arrangements, it is the local authority’s responsibility to coordinate the admissions process: they bring together the admission policies of individual schools and publish them within a single composite prospectus. Parents fill out a single application form, which asks them to list the schools they would like their child to attend in order of preference. The form is then submitted to the local authority. Where a parent has expressed a preference for a school and where the school is not oversubscribed, parental preferences must be met. However, where a school is oversubscribed, admission authorities must then apply the criteria in their admissions arrangements. Once the criteria have been applied, local authorities are responsible for making an offer of a school place to children.<sup>12</sup>

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<sup>12</sup> Parents may also apply for school places ‘in year’. Such applications might be due to children moving to a new locality or due to issues such as exclusion from school.

5.3.6. Admission authorities are required to set up Independent Appeal Panels (IAPs) to hear appeals. IAPs are set up by the admission authorities against whom cases have been appealed *i.e.* local authorities or governing bodies depending on the type of school. Panels are composed of three members, one of whom must have experience of working in education and one of whom must be a lay member. Admission authorities have a duty to recruit and train panel members and to provide a clerk to administer hearings. Once a parent lodges an appeal, they will be invited to attend an appeal hearing. In reaching a decision, IAPs must first consider whether the admission arrangements were lawful and properly applied and, assuming that is the case, must reach a decision on whether any prejudice to the school in admitting the child outweighs the prejudice that the child would suffer as a result of not being admitted. There is no right of appeal against the decisions of IAPs, although parents may make complaints to the LGO or apply for judicial review.

#### **5.4. The policy and statutory framework for provision of home-to-school transport**

5.4.1. The statutory framework for home-to-school transport is simpler than admissions, being neither subject to regulations nor binding guidance. The main statutory provisions for school transport are contained in the Education Act 1996 ('the 1996 Act') and, essentially, (a) require local authorities to assist certain children with home-to-school travel arrangements and (b) empower local authorities to assist other (non-eligible) children should they so wish. Children for whom transport must be provided include: those with SEN, disabilities or mobility problems; children who live on a walking route which is not suitable; and who live outside the statutory walking distance. Another factor that local authorities must consider as part of making decisions about the provision of school transport is the religious preferences of the parents. Most local

authorities also apply locally determined health and social criteria as part of discretionary arrangements.

5.4.2. The 1996 Act is supplemented by non-binding statutory guidance issued by the Secretary of State (The Guidance on Home to School Travel and Transport - 'The Transport Guidance'), to which local authorities must have regard in exercising their functions. Unlike school admissions and the SEN area, there is no statutory right of appeal against decisions of the local authority to refuse to provide home-to-school transport. The Transport Guidance in place during the fieldwork period recommended that a 'robust' appeals process should be set-up to review decisions challenged by parents, but did not specify the form that this should take. In the absence of a right of external appeal, parents' remedies in this area are restricted to making a complaint to the LGO or applying for judicial review.

## **5.5. The policy and statutory framework for special educational needs (SEN)**

### *Overview*

5.5.1. Children with SEN can be defined as '...children who face significant barriers in learning due to disability or other inherent cause of difficulty' (Harris and Smith 2011, p.54). In practice, the conditions that are considered to amount to SEN are subject to controversy between professionals, politicians, parents, and academics (Tomlinson 2012). In 2014, 17.1% of pupils in English schools were identified as having some form of SEN (Norwich 2014, p. 405). It is important to note that SEN can be associated with, but is different from, disability: children with SEN may or may not also be disabled (Harris and Smith 2011). Although the focus in this thesis is on decision-making conducted within the SEN framework, it is

important to note that children with SEN also have certain rights and entitlements arising from other cross cutting and overlapping statutory frameworks, including disability discrimination (the Equality Act 2010) and children's social care (e.g. the Children Act 2004). Booth *et al* (2011) argue that a distinguishing feature of the statutory SEN regime is that it is rights based and largely resource blind, unlike other areas of administration, which explicitly allow for a balancing of entitlements to services with the availability of resources.

#### *How the SEN system works*

5.5.2. The main provisions for SEN that applied at the time of the fieldwork were contained in Part IV of the 1996 Act and the Special Educational Needs and Disability Act 2001 ('the 2001 Act').<sup>13</sup> The regulations made under the 1996 Act were the Education (Special Educational Needs) (England) (Consolidation) Regulations 2001 and the statutory code issued by the Secretary of State is referred to as 'The Special Educational Needs Code of Practice' (the SEN Code). The latter was statutory guidance rather than a binding code. The main aims of the SEN system are to ensure that children with SEN are identified and assessed, and a determination made regarding what kind of provision was required (Harris and Smith 2011). Three levels of support existed: *School Action* (where needs can be met within a school), *School Action Plus* (where needs can be met within a school but with some external help), and *statements of SEN* (where following an assessment, the education of a child is legally prescribed in a statement). The responsibilities of local authorities within the SEN system relate largely to identifying, assessing and providing for children with the highest level of need, as well as ensuring suitable local educational provision exists to meet such needs (Tomlinson 2012).

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<sup>13</sup> The Children and Families Act 2014, subsequently brought in a new system for SEN in England.

5.5.3. Local authorities are only required to carry out assessments where they consider that a child probably has SEN. Where a decision to carry out an assessment is taken, a formal multi-disciplinary assessment is carried out of the child's needs. Once the assessment is completed, the local authority must decide whether to make and maintain a statement of the child's SEN. The local authority may decide, at this stage, that a child's needs can be adequately dealt with under School Action or School Action Plus. If a child's needs cannot be met adequately from within a school's own resources, local authorities produce a draft statement of SEN, which is shared with parents before being finalised. The final statement, which must be reviewed annually, is a legally enforceable document of entitlement and is seen by many parents as a guarantee that their child's needs will be consistently met (Booth *et al* 2011). Parents may appeal to a tribunal if they are unhappy with decisions taken by local authorities.

5.5.4. The system for the identification, assessment, and provision of SEN education described above has often been seen by those with experience of it as a field of 'unwarranted and unnecessary struggle' (Lamb 2009, p.6). Booth *et al* (2011) refer to the SEN area as the locus of a number of 'fights': parents fight for services, local authorities fight to safeguard public resources, and children fight to have a voice of their own. The widespread view that the SEN area represents a battleground for parents, schools, and local authorities, combined with parents' willingness to challenge decisions about their children's education, has made SEN 'one of the most dispute-laden areas of education' (Harris and Riddell 2011, p.xiv). The most recent figures for appeals to the tribunal show that in 2012/ 2013 3,602 appeals were registered by parents, with the most common decisions appealed against being a refusal to carry out an assessment (36%) and the content of a statement (46%) (Department for Education 2014a, p.23).

## 5.6. Human rights and equalities legislation

5.6.1. Several growing and cross-cutting areas of law have effect in the education area. In international law, there has been a consistent commitment to the right to education and the right to have individual preferences met with regard to its provision (Harris and Riddell 2011, p.1). A number of international law instruments contain provisions in relation to educational rights, although in practice they tend to operate as declarations of principles rather than enforceable rights (Harris 2007). In the UK, Protocol 1 Article 2 of the ECHR has been incorporated into domestic law by the Human Rights Act 1998 ('the HRA 1998'). This article requires that no one is denied the right to education and that respect must be given to parents' rights to ensure their child is taught in line with their moral and philosophical convictions. However, Harris and Smith (2011) have argued that the right to education in the ECHR and the HRA 1998 only provides guarantees in the most extreme cases. Feintuck and Stephens (2013) have similarly argued that the notion of individual rights in the context of education, an activity which is fundamentally collectivist in nature, must in practice be heavily curtailed. In the admissions context, for example, the Admissions Code states that although the HRA 1998 confers the right to education, it does not entitle parents to secure a place at a particular school of their choice (Department for Education 2014).

5.6.2. An important development in education law was the Special Education Needs and Disability 2001 Act, which made the Disability Discrimination Act 1995 ('the DDA 1995') applicable to schools and extended the tribunal's jurisdiction to consider disability discrimination claims. As a result, local authorities and schools came under a duty to make reasonable adjustments to education provision, prevent discrimination in admissions to school, and guarantee access to the curriculum for disabled children

(Booth *et al* 2011). The DDA 1995 was subsequently consolidated into the Equality Act 2010, which extended the duties of schools and local authorities by requiring that they provide disabled children auxiliary aids as a reasonable adjustment where required (Booth *et al* 2011). The Admissions Code outlines the key duties imposed by equalities legislation in relation to disability as avoiding discriminating against, harassing, or victimising disabled children with regard to arrangements for and decisions about admissions to school. The SEN Code makes clear that these duties also apply to schools with regards to arrangements made for SEN provision.

## **5.7. The redress landscape in the education sector**

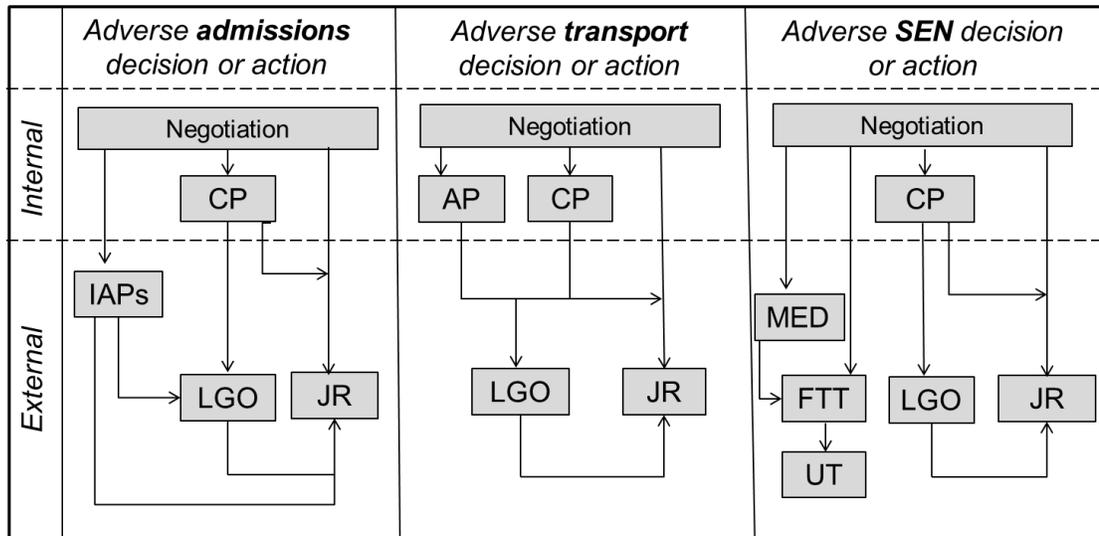
5.7.1. This section now provides an outline of the overall dispute resolution landscape in education. Figure 5.1 below provides a summary of the main formal mechanisms for challenging local authority decision making in each decision-making area.<sup>14</sup> As shown in figure 5.1, the major redress processes available in this area are: internal complaint and appeal processes; the IAPs; the LGO; the tribunal and upper tribunal; and the court (*via* judicial review). The following paragraphs discuss each of these processes.<sup>15</sup>

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<sup>14</sup> Figure 5.1 focuses on disputes with regard to actions and decisions affecting individual children and, as a result, excludes the Office of the Schools Adjudicator (OSA). The OSA is not a redress mechanism, in the sense that it does not provide remedies for individuals but is limited to considering the lawfulness of admission arrangements. Figure 5.1 also does not include the Education Funding Agency (EFA), which has a role in relation to admission complaints for own admission authorities.

<sup>15</sup> A description of the role of IAPs has already been provided above, as a result, IAPs are not discussed again here.

Figure 5.1: redress mechanisms for challenging local authority education decision-making



**Key:**

- CP = internal complaint process
- AP = internal appeal process
- LGO = Local Government Ombudsman
- JR = Judicial Review
- MED = Mediation
- FTT = First Tier Tribunal
- UT = Upper Tribunal
- IAPs = Independent Appeal Panels

*Internal appeal and complaints procedures*

5.7.2. For each area of decision-making, parents' first recourse is to raise the matter informally with the local authority. Attempts at resolution through negotiation are likely to be common, although there is no published information on the volume of cases challenged in this way. In the SEN area, Harris and Smith (2011) point out that a high volume of cases are likely to be solved through negotiation and with the help of the Parent Partnership Service.<sup>16</sup> If informal attempts at resolution fail to produce an acceptable outcome, one option will be to use an internal complaint or

<sup>16</sup> Local authorities are required to fund advice for parents in relation to SEN. Local Parent Partnership Services exist in all local authority areas.

appeal process operated by the local authority.<sup>17</sup> For all three decision-making areas, complaints about the service that has been provided can be made using the local authority's corporate complaints procedure. Referrals may then be made to the LGO. In the school transport area, as noted above, statutory guidance recommends that local authorities should set up robust internal appeal procedures for challenging decisions to refuse the provision of home-to-school transport. Such procedures are different from complaints processes in that they consider the merits of decisions. School transport is the only area considered in this thesis which features an internal appeal process and also the only area in which there is no external right of appeal.

### *LGO*

5.7.3. The LGO considers complaints about maladministration resulting in injustice. The LGO was established by the Local Government Act 1974 ('the 1974 Act'). The 1974 Act makes clear that the LGO's jurisdiction is restricted to considering the service provided to individuals: the LGO is not an appeal mechanism and cannot question the merits of decisions arrived at without maladministration. However, where maladministration is identified, the LGO can ask local authorities to review a decision. In education, the LGO's jurisdiction is restricted to considering the actions of local authorities and complaints about the internal management of schools are excluded from its jurisdiction. The LGO's decisions and recommendations are not binding and are subject to judicial review.

5.7.4. The LGO received 3,051 complaints about education and children's services in 2013/ 2014 (figure derived from LGO 2014), which amounted to 17% of the total complaints received by the organisation. 38% of

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<sup>17</sup> Although figure 5.1 suggests a sequential process, the use of negotiation may continue throughout the life of the dispute.

complaints about education and children's services were upheld in 2013/2014. Unfortunately, the LGO no longer provides a detailed breakdown of the nature of the complaints received and detailed data is now only available for the year 2011/2012 (LGO 2012). Figures for this year show that 4,035 education and children's services complaints were received, of which 1,451 complaints related to children's services and 2,584 complaints related to education. Complaints about the operation of IAPs were the most significant area of education complaint (1,119 complaints). There were 349 complaints about SEN provision, 194 complaints about school transport, and 102 complaints about the general admissions process. The LGO does not produce formal investigation reports on all cases and resolves most of them informally. In 2011/2012, 77 investigation reports were published by the LGO, of which 19 related to education matters. 13 reports related to school admission and admission appeals, 5 related to special education needs, and 1 related to school transport. In the SEN area, common areas of complaint are delays in carrying out assessments or producing statements, and failures to implement the provision required in a statement (Harris and Smith 2011).

#### *The tribunal and upper tribunal*

5.7.5. A national tribunal for dealing with SEN appeals was first established following the Education Act 1993 as the Special Educational Needs Tribunal. Subsequently, as a result of the 2001 Act, the tribunal's jurisdiction was extended to cover disability discrimination claims and became known as the Special Educational Needs and Disability Tribunal (SENDIST). As a result of the reorganisation of the tribunal service provided for by the Tribunals, Courts and Enforcement Act 2007, SENDIST was incorporated into a new unified tribunal structure, consisting of a first tier tribunal, with various chambers, and an upper tribunal, also with

several chambers. Prior to the creation of the upper tribunal, appeals were heard by the Court of Appeal.

5.7.6. The tribunal has jurisdiction to consider appeals against a range of local authority decisions in the SEN area.<sup>18</sup> The most commonly appealed decisions are when a local authority has refused to carry out an assessment and when a parent disagrees with the contents of a statement. The tribunal considers the merits of the situation being appealed and its legality. It does not consider whether the original decision was sound, but only what the decision should be on the basis of what is known at the time of the hearing. The tribunal's decisions are binding (subject to an appeal to the upper tribunal on a point of law). In 2012/ 2013, 3,602 appeals were lodged with the tribunal in relation to SEN and disability. 76% of these appeals were withdrawn or resolved prior to a hearing. Of the 24% that reached a hearing, 85% were successful, at least to some extent, from the parent's perspective (Department for Education 2014). According to Her Majesty's Courts and Tribunals Service's tribunal decisions database, 64 education related decisions were published by the upper tribunal between 2009 and June 2015.<sup>19</sup>

#### *The court*

5.7.7. Parents may apply for judicial review if they consider that an action or a failure to act on the part of the local authority was illegal, either because to do so breached a particular statute or because the action breached administrative law. Applications for judicial review are usually heard by the Administrative Court, although they may also now be considered by

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<sup>18</sup> As noted in chapter 1, unless otherwise specified, references to 'the tribunal' in this thesis are to the first tier tribunal (special educational needs and disability).

<sup>19</sup> Not all UT decisions are published. Instead, HMCTS decides which cases to publish based on various criteria laid out in guidance (HMCTS 2013). Statistics are not provided for the number of education cases appealed to the upper tribunal.

the upper tribunal.<sup>20</sup> The main grounds for judicial review are that a decision, action or omission by a public body was: *ultra vires*; unreasonable; breached a citizen's legitimate expectations; or was procedurally unfair. If a court finds in favour of the applicant a range of remedies are available, including: quashing a decision, prohibiting a course of action, and requiring a course of action.

5.7.8. The Ministry of Justice's (MoJ's) summary statistics are only broken down on the basis of whether judicial review applications relate to criminal justice, immigration and asylum, or 'civil - other'. In 2014, there were 1,903 applications for permission to apply for judicial review falling in the 'civil - other' category (Ministry of Justice 2015). The MoJ now publishes data tables showing more detailed categories for the 'civil - other' category. In 2014, 79 cases were listed under the topic 'education'. Of the 79 education cases, 15 were granted permission to proceed to judicial review, 48 were refused, and 17 were classified as 'other' (derived from Ministry of Justice 2015). Of the 15 cases that were granted permission to proceed, 5 remained open at the time the statistics were published in March 2015. Of the 10 closed cases that had been granted permission to proceed, the court reached a substantive decision in seven cases (it is assumed that the three other cases were withdrawn). Four of these cases were allowed, while three were dismissed. Although these statistics give a sense of the volume of activity in relation to education judicial reviews, it should be noted that the statistics also cover further and higher education and the activities of bodies other than local authorities, which are not of concern to this thesis. As a result, the number of judicial reviews relating to the specific area under consideration here is likely to be very small.

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<sup>20</sup> As noted in chapter 1, unless otherwise specified references in this thesis to 'the court' refer to the Administrative Court.

## **5.8. Chapter summary**

5.8.1. This chapter has provided an overview of education law and policy in England. In relation to the decision-making areas of concern to this thesis, the chapter outlined how each of these operates in practice and described the statutory framework which governs them. The chapter then considered human rights and equalities legislation, before ending with an overview of the redress landscape in this area.

## 6. METHODOLOGY

### 6.1. Introduction

6.1.1. This chapter sets out the methodology used to investigate empirically the control of bureaucratic decision-making by redress mechanisms. The chapter aims to describe the methodology, to justify it, and to identify its limitations.

### 6.2. Research aim and objectives

6.2.1. The overall aim of the research was: to *explore* the factors that facilitate or obstruct the control of bureaucratic decision-making by redress mechanisms. This overall aim was supported by a series of more detailed objectives:

- (i) To *describe* how redress mechanisms, individually and collectively, seek to achieve control over bureaucratic decision-making and how bureaucratic decision-makers respond to the decisions (and other actions) of redress mechanisms;
- (ii) To *compare* differences between individual redress mechanisms, between different areas of bureaucratic decision-making, and between the responses of bureaucratic decision-makers;
- (iii) To *explain* the circumstances in which redress mechanisms' attempts to exercise control are more or less likely to be successful by providing (a) analytical refinements to existing theoretical understandings and (b) extending these through the generation of novel hypotheses; *and*

- (iv) To *evaluate* current administrative justice policies in light of the research's findings.

6.2.2. Walliman (2006) states that there are a number of potential objectives that a research project may have in relation to a phenomenon of interest: description, categorisation, explanation, evaluation, comparison, and action or change. As will be clear, this thesis seeks to *describe*, *compare*, *explain*, and *evaluate* aspects of redress mechanisms' bureaucratic control functions. With regard to the thesis' aim to provide 'explanation', some important caveats need to be discussed. The first is that objective (iii) should be read in the context of the overall aim to 'explore' the exercise of bureaucratic control by redress mechanisms. As a result, it is expected that the explanations produced will be exploratory and suggestive, rather than conclusive. The second is that caution is required with regard to generalisation in qualitative research:

'Simply put, small-N studies are not so much designed to offer analytical generalisation as analytical refinement... opportunities for refining our understanding of certain phenomena.' (Tsoukas 2009, p.295)

As Gray (2009) notes, the development of hypotheses for testing in future research is often a more realistic objective than grand theory-building. As a result, objective (iii) has been defined very carefully: the objective here is to produce *analytical refinements* in relation to existing theory and, where novel areas are identified, to *develop hypotheses* for testing in future research.

### 6.3. Choice of field setting

6.3.1. This section explains why the decision was taken to study the phenomenon of bureaucratic control by redress mechanisms in the local authority education area. In order to demonstrate the quality of research, it is important to be transparent about the reasons for selecting a particular field setting (Flick 2009, Gough 2003). The main criteria for selecting the field setting was to find an area which was subject to significant review by all three redress mechanisms. It was considered important that bureaucratic decision-makers should have significant exposure to redress mechanisms, so that they would be able to provide sufficient and meaningful data.

6.3.2. Statistical data produced by the Ministry of Justice (MoJ), Her Majesty's Courts and Tribunals Service (HMCTS), the Parliamentary and Health Services Ombudsman (PHSO), and the LGO were reviewed to identify areas subject to high levels of review. Statistics for 2010 - the latest available at the time the empirical fieldwork was being designed - showed that there were 10,548 judicial review applications in total, with 8,122 of these related to asylum and immigration cases, 335 to criminal cases and 2,091 were classified as 'other' (Ministry of Justice 2011). No breakdown was provided about which cases fell within the 'other' category.<sup>21</sup> As a result of this limited court data, the choice of fieldwork setting was determined with reference only to incidence of review by tribunals and ombudsman schemes.

6.3.3. In 2009/ 2010, there were 793,900 appeals made to tribunals (HMCTS 2011), 8,543 complaints received by the PHSO (excluding NHS complaints) (PHSO 2011), and 18,020 complaints received by the LGO (LGO 2011).

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<sup>21</sup> Data tables referred to in chapter 5, providing a more detailed breakdown of applications for judicial review, were published subsequent to the fieldwork being undertaken.

Table 6.1 below shows the top six areas in which complaints and appeals were received in 2009/ 2010, including the total number of complaints and appeals received in that year.

*Table 6.1: top six areas of complaint and appeal in 2009/ 2010 across central and local government*

<b>Tribunal</b>	<b>PHSO</b>	<b>LGO</b>
Social security and child benefit (339,200 appeals)	The Department of Work and Pensions (3,000 complaints)	Housing (3,694 complaints)
Immigration and asylum (159,800 appeals)	Her Majesty's Revenue and Customs (1,896 complaints)	Education and children's services (3,137 complaints, with 2,136 about education)
Mental health (25,200 appeals)	Home Office (952 complaints)	Planning and building control (3,007 complaints)
Tax (10,400)	Ministry of Justice (931 complaints)	Benefits and tax (2,106 complaints)
Criminal injuries (3,800 appeals)	Department for Transport (353 complaints)	Highways and transport (1,676 complaints)

Special education needs and disability (3,400 appeals)	Other (1,411 complaints)	Environmental services, public protection and regulation (1,851 complaints)
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6.3.4 The above data provided a guide to narrow down areas in which the research could be located. Social security was initially seen as the most suitable field, as it featured high levels of review and was a classic area of welfare administration. Unfortunately, however, the Department for Work and Pensions declined the researcher’s request for access. In choosing an alternative field work setting a key consideration was to minimise the risk of access being denied. For this reason, it was decided to select an area of local rather than central government decision-making for the research, the idea being that there were more local authorities and, therefore, more chance that some would agree to take part.

6.3.5 Having come to this view, the administrative area that seemed most suitable was the local authority education area. It had relatively high volumes of complaint and appeal (3,400 appeals and 2,136 complaints in 2009/ 2010). This represented the 6<sup>th</sup> highest volume of appeals to the Tribunal Service and the 3<sup>rd</sup> highest volume of complaint to the LGO. The local authority education area was also attractive in that it was important in terms of the rights and entitlements being decided and featured a variety of decision-making approaches across admissions, transport, and SEN.

## 6.4 Ontological and epistemological considerations

6.4.1 Even where a researcher takes a broadly a-theoretical stance, it is not possible to conduct research ‘...without some theory that guides the researcher in what is relevant to observe and what name to attach to what

is happening' (Anfara and Mertz 2006, p.195). Ontology has been described as the study of 'what kind of things really exist in the world' (Hughes and Sharrock 1997, p.5) or 'what there is to be investigated' (Walliman 2006, p.15). According to Gray (2009) there are two important ontological positions: the first is the idea that the world is continually changing around us and that reality is an emergent process; the second posits that the world is unchanging and that the reality we see around us is permanent and static. Gray (*Ibid.*) summarises the positions as being an ontology of 'becoming' and an ontology of 'being'.

6.4.2 Epistemology has been described as 'how we know things and what knowledge is acceptable within a discipline' (Walliman 2006, p.15). As opposed to ontology, therefore, which deals with the nature of social reality, epistemology refers to the status of our knowledge about social reality, how knowledge is generated and how knowledge relates to truth. Gray (2009) has suggested that there are three types of epistemology: objectivist epistemology assumes that reality is separate from the consciousness of the observer and that objective truth can be established; constructionist epistemology assumes that reality is constructed through interaction between the observer and external reality; and subjectivist epistemology assumes that meaning is entirely imposed on the outside world by the observer.

6.4.3 The position adopted in this thesis does not fit comfortably within these ontological or epistemological paradigms. The main assumptions underpinning the thesis are that: (i) social reality is created through interaction of the observer with an external, objectively existing social world and (ii) as a result of the interactive process through which social reality is constructed, it is often indeterminate and in flux, yet still based on objectively existing structures. The thesis, therefore, adopts a position between idealism (the idea that external reality exists purely in the mind) and materialism (the idea that reality exists materially) (Hughes and

Sharrock 1997). As a result, the thesis accepts that peoples' perceptions of the social world are important, but seeks to avoid the 'constructionist cul-de-sac' (Hammersley 2011), where it is only possible to generate knowledge about how knowledge is constructed rather than about social phenomena themselves (Seale 2004).

## 6.5 Research paradigms

6.5.1 Sarantakos' (2012) argues that there are three dominant paradigms within social research: positivism, interpretivism, and critical theory. These are briefly discussed, before the thesis situates itself within a fourth research paradigm: critical realism. Gray (2009) summarises positivism as the view that the social world has an objective existence outwith the researcher, which can be measured through empirical observation. According to Sarantakos (2012) positivist approaches involve: the use of strict, replicable procedures for generating data; the separation of facts from values and the pursuit of objectivity; and the use of research for the development of universal laws.

6.5.2 The key criticism of positivism relates to the way it seeks to transfer the assumptions of natural science to the study of the social world. The idea that human society can be understood in the same way as the inanimate world has been described as 'obnoxious' (Hughes and Sharrock 1997, p.21). At the same time, however, it remains an important paradigm and while it is frequently derided at a theoretical level, much social research seems to revert to positivist assumptions in practice. Indeed, it is difficult to conduct meaningful empirical research without reference to employing valid social scientific methods, and without assuming a link between observed behaviour and objective reality.

6.5.3 Interpretivism is the major anti-positivist stance, with many of its tenets adopted in opposition to positivist ideas (Gray 2009). The interpretative paradigm is generally concerned with the meaning that social actors ascribe

to their behaviours, attitudes and actions. Whereas the positivist tradition has sometimes been associated with quantitative approaches that aim to measure the prevalence of phenomena, interpretivism is more concerned with description and explanation of people's lived experiences (Fitzgerald and Dopson 2009). Interpretivism does not see a simple and uncomplicated relationship between ourselves and the social world. It argues that the world is mediated through individual, social and historical interpretations.

6.5.4 Although much qualitative social research now works within a broadly interpretive paradigm, the position is not without critics. One source of criticism comes from the third major paradigm in the social sciences: 'critical inquiry' (Gray 2009, p.25). This includes Marxist, feminist and critical sociological approaches, which are characterised by a desire to change the world rather than to understand or explain it (Sarantakos 2012). Critical perspectives are sceptical of 'facts', seeing it as part of the researcher's role to challenge the interests of powerful actors in society. The critical approach, therefore, represents a departure from both positivism and interpretivism.

6.5.5 This thesis recognises the limitations of each research paradigm in its pure form and as a result prefers a critical realist approach, which has sometimes been described as a middle way between positivist and interpretivist paradigms (Walliman 2006). According to Yeung (1997, p.53) critical realism:

'... celebrates the existence of reality independent of human consciousness..., ascribes causal powers to human reasons and social structures..., rejects relativism in social and scientific discourses ... and reorientates the social sciences towards its emancipatory goals...'

6.5.6 Like positivism, therefore, realism argues that certain objectively existing external structures underpin social reality. However, realism considers that these are not directly observable and cannot be understood by merely looking at surface phenomena (Walliman 2006). Instead, interpretation is required, allowing for fluidity and evolution in social scientific understanding as opposed to the generation of immutable laws. Realism also suggests that a single representation of reality is impossible and that multiple versions of the world will always be available, although this stops short of relativism (Porter and Shorthall 2009). The major difference between interpretivists and realists is that the former do not accept that there are any underlying structures shaping the social world (Walliman 2006). In this thesis' view, the distinct advantage of realism lies in its escape from the relativism that an interpretivist approach entails, and its concurrent escape from a superficial and naive positivistic view of social reality.

## 6.6 Methodology

6.6.1 Methodology '...translates the principles of a paradigm into research language and shows how the world can be explained and studied' (Sarantakos 2012, p.32). The two key methodologies in the social sciences are qualitative and quantitative methodologies (*ibid.*). Quantitative methodology is associated with positivist approaches, with social reality regarded as an objective fact and hypothesis testing being a prime method of enquiry. Qualitative methodology is associated with interpretivist approaches, stressing individual constructions of social reality and the importance of individual perceptions (Walliman 2006).

6.6.2 The selection of a qualitative methodology in the present research was driven by a search for the most appropriate means of fulfilling the research aim and objectives described above. In this respect, quantitative methodologies were rejected because a key objective of the research was

to gain an in-depth understanding of the way in which local authority decision-makers respond to review by redress mechanisms. The aim of the research was not so much to measure the extent to which redress mechanisms achieved bureaucratic control, but to understand that phenomenon in the first place. Gaining this understanding, it was thought, could predominantly be achieved by the collection of detailed, qualitative data obtained from close proximity to the study subjects.

## 6.7 Research design

6.7.1 Research design provides the link between research questions and the data collected within a piece of research (Yin 2009). Walliman (2006) has identified four main types of research design: experimental; cross sectional; longitudinal; and case study. Each type of design is capable of producing particular types of data that will allow researchers to answer particular types of question. With regard to the present research, a case study design was selected as being most appropriate on the basis that it was seen as the best design for achieving the kind of deep, holistic and context-dependent data necessary for the research to be successful.

6.7.2 Case studies have a number of advantages as a research design. One is that they are particularly suited to bridging the gap between the particular and the general, allowing for the generation of both context-dependent knowledge and theoretical generalisation (Flyvbjerg 2004). Flyvbjerg (*ibid.*) argues that the aim of social science should not be to prove things, but to learn things and that case studies are particularly useful when viewed from a heuristic perspective. Others have stressed that case studies seem to be particularly in tune with the way in which human beings explain the world: ‘this method has been tried and found to be a direct and satisfying way of adding to experience and improving understanding’ (Stake 2000, p.25).

6.7.3 In terms of what case study designs involve, the following definition is helpful:

‘...a case study in organisational research involves the collection of empirical data from multiple sources to explore an identified unit of analysis, such as an organisation, part of an organisation, or a division or group, and the characteristics of its context’ (Fitzgerald and Dopson 2009, p.465).

Core features of case study design include: a focus on a single or small number of cases; the collection of unstructured, qualitative data in naturalistic social settings; and the collection of multiple sources of evidence in order to obtain a holistic understanding of the cases subject to study (Gomm and Hammersley 2000; Yin 2009). There are, however, different types of case study design available (Yin *ibid.*) and this thesis adopted a multiple embedded case study design: several local authorities were selected and within each local authority three ‘embedded’ decision-making areas were considered: admissions, transport, and SEN. A multiple case study design was preferred over a single case study design, because of the desire to develop theoretical as well as contextual insight into the phenomenon under study.

6.7.4 It was decided to select six local authorities for inclusion in the multiple case study, in order to get the right balance between local contextualisation and comparison. The decision to recruit six case studies was also driven by pragmatic considerations: local authorities were considered more likely to agree to take part if fewer interviews were requested within each. The other important sampling decision related to the selection of decision-making areas for study. Admissions, transport, and SEN decision-making were chosen as these were the main areas in which local authorities make decisions affecting the individual rights and entitlements of children. There were also good theoretical reasons for focusing on these areas since each area is typical of particular approaches to bureaucratic decision-making.

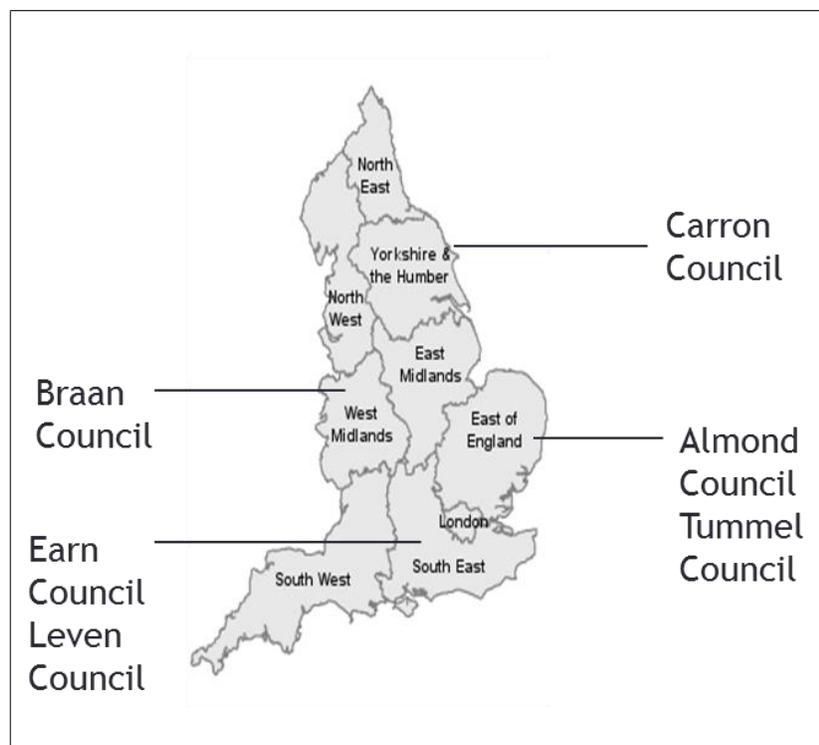
## 6.8 Case selection and sampling

- 6.8.1 Flyvbjerg (2004) notes that there are two broad approaches to sampling: random sampling and information-oriented case selection. Random sampling aims to allow for statistical generalisation and to avoid biases that may be present in data if not selected randomly. Information-oriented case selection aims to maximise the usefulness of information that can be obtained from a small number of cases. As may already be clear, the nature of the present research called for information-oriented case selection, in order to optimise the relevance and value of the data. A number of information-oriented case selection strategies are available: purposive, quota, emblematic, and snowball sampling (Gobo 2004).
- 6.8.2 Purposive sampling involves the researcher choosing cases based on whether they feature the phenomenon in which the research is interested (Silverman 2011). Quota sampling seeks to recruit a sample that has a proportional relationship with a wider population. Emblematic sampling involves selecting cases based on them being either typical or atypical and, finally, snowball sampling involves developing a sample as the research progresses. Patton (2002) has suggested further sampling approaches including: maximum variation sampling and intensity sampling. Maximum variation sampling seeks to include cases that are as different as possible. Intensity sampling involves selecting cases on the basis of the intensity with which they feature the particular issue being investigated.
- 6.8.3 Following the principles of purposive and intensity sampling, it was decided only to select cases that had significant experience of being reviewed by redress mechanisms. As Halliday (2004) has argued in relation to his study of compliance with judicial review in the local authority homelessness setting, studying heavily litigated authorities is the most appropriate sampling strategy when concerned with understanding the factors that facilitate or inhibit compliance. To select heavily reviewed local authorities, an

‘incidence of review factor’ was created, calculated by adding up the number of tribunal appeals and ombudsman complaints received by each English local authority over a two year period. Invitations to participate in the research were then sent to 30 local authorities with a high incidence of review. A maximum variation approach was followed in selecting authorities to participate in order to ensure that the sample contained a relevant range of authorities across three variables: nature of the local authority (county council/metropolitan borough council), geographical location, and rural/urban make up.

6.8.4 Six positive responses were received to the invitations to participate and all six were included in the study. Figure 6.1 below shows the approximate locations of the local authorities that were included in the study.<sup>22</sup>

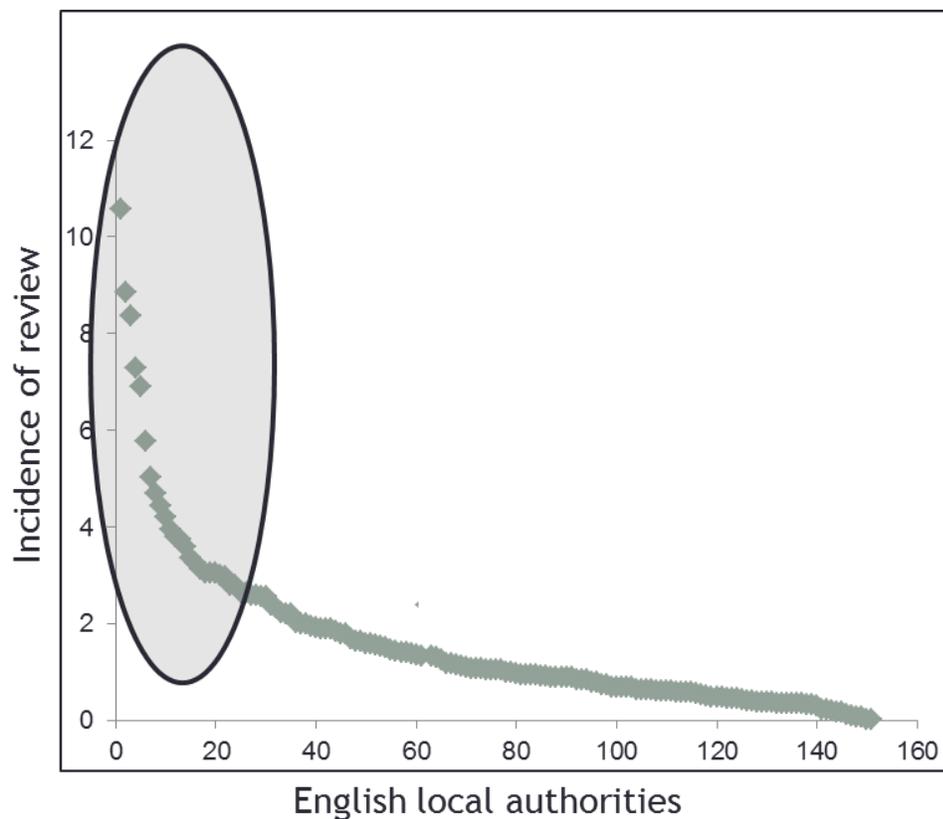
*Figure 6.1: map showing the approximate location of the case study authorities*



<sup>22</sup> To ensure the anonymity of participating authorities fictitious names were created.

6.8.5 Appendix 1 shows the characteristics of the final sample, which contained a good mix of local authority locations and urban-rural make up. Importantly, the final sample contained only authorities that fell within the top 25% of local authorities that were most heavily reviewed. Figure 6.2 plots local authorities against their incidence of review by redress mechanisms and highlights the approximate position of the case study authorities.

*Figure 6.2: scatter graph plotting local authorities against the incidence of review factor and highlighting, in the shaded circled area, the position of the case study authorities*



6.8.6 The main limitation of the sample was that no metropolitan borough councils were recruited and the sample was composed entirely of county councils.

## 6.9 Method selection

6.9.1 Having drawn up the multiple embedded case study design and selected the local authority case studies, the outstanding issue was to select the methods that would be used. The methods considered for use in the research included the three principal qualitative research methods, which Kritzer (2002) has referred to as watching (observation), talking (interviews), and reading (documentary research). In an ideal world, case study research would use all three methods (Yin 2009). While each method has weaknesses when used individually, when used together these weaknesses can be alleviated. Unfortunately, the research was not able to achieve this ideal and was limited to using only documentary research and interview research. The paragraphs that follow explain how and why these methods were selected.

### *Observation*

6.9.2 Observation has been seen to have a number of advantages for the kind of research this thesis wished to conduct (Cannon 2004). However, it was decided that it could not be used effectively in the context of this research. There were a number of reasons for this: the decision to select six local authorities spread across England limited the amount of time that could have been spent observing decision-makers; observation was likely to have been seen as more burdensome by potential participants, with a higher chance of access being denied; and there were ethical concerns around how consent could be obtained from individuals whose cases might be being discussed in the office environment being observed. As several authors have pointed out, it is more difficult to obtain access for observation than other methods (Kritzer 2002, Flood 2005) and observation often ends up being 'impossible or at least impractical' (Cannon 2004, p.99).

### *Documentary research*

6.9.3 Documentary research involves the collection and analysis of documents in order to answer the research questions and provide appropriate contextualisation (Prior 2004). The initial research design envisaged the analysis of individual case files in each local authority, in order to provide for triangulation between data sources and verification of data obtained in other contexts. However, the University of Glasgow Ethics Committee would only provide consent for the researcher to review case files if (a) explicit consent was obtained from each individual whose file would be considered or (b) an anonymised copy of the files was provided to the researcher. These requirements were considered to be overly burdensome for participating authorities and as a result the documentary research was limited to considering publicly available decisions and other documents produced by redress mechanisms.

### *Interview research*

6.9.4 For the reasons noted above, interview research was the principal method used in this study. The key advantages of interviews are that they provide insight into the experiences of research participants, they allow for those experiences to be appropriately contextualised, and they provide a reflective space in which participants can give meaning to their experiences (Fitzgerald and Dopson 2009). One of the ways in which interviews are particularly useful is in providing insight into the motivation of research participants (Kritzer 2002). Interviews have been seen as being particularly useful in organisational settings, when studying phenomenon such as decision-making that are not necessarily easy to isolate and observe (Hughes and Sharrock 1999).

## 6.10 Interview sampling and design

### *Interviewee sampling*

- 6.10.1 The approach to selecting interviewees for interview within each case study authority was information-oriented. A key priority in selecting interviewees was to ensure that a range of perspectives were obtained across the relevant decision-making areas and centralised or advisory services. A further priority was to ensure that the sample contained a mix of senior and less senior staff. Appendix 3 shows the anonymized identifiers used for research participants and gives a sense of their roles.
- 6.10.2 The final sample included 44 local authority interviewees, with an average of 7.3 interviews conducted *per* case study. 38 interviews were conducted in person, while 6 were conducted on the telephone. The average duration of interviews with local authority staff was 55 minutes. The research also recruited interviewees in each local authority area to provide a parental perspective. A total of 9 interviews were conducted with parent organisations; two of the interviews were conducted with several participants, so that there were a total of 15 participants in total. All interviews were conducted in person, with an average duration of 62 minutes.
- 6.10.3 Six interviews were conducted with redress mechanism staff: a court judge, an upper tribunal judge, two tribunal judges, an LGO manager, and three LGO investigators (who were interviewed as a group). One of these was over the telephone, while 5 were conducted in person. The average duration of interviews with redress mechanism staff was 62 minutes. Finally, two policymakers from the MoJ and the Department for Education were interviewed. Both interviews were conducted over the telephone and lasted an average of 56 minutes.

### *Interview design*

6.10.4 There are various types of interviews available to researchers, all of which vary in terms of the extent to which they are structured or unstructured (Cassell 2009). Structured interviews tend to be more suitable for the production of data which can be quantified. Unstructured interviews tend to produce qualitative data, with the research being guided by respondents. Between these two extremes is the semi-structured interview, which allows researchers to pursue pre-existing ideas while at the same time remaining open to new ideas (Silverman 2011). Given the aims of this research, semi-structured interviews were chosen as the most appropriate interviewing style. Appendix 2 shows the interview guide used with local authority respondents. To test the guide in practice before use, a pilot interview was conducted with an acquaintance working in a local authority.

## **6.11 Data analysis**

### *Interview data*

6.11.1 Interviews were digitally recorded and subsequently transcribed by a professional transcription company. The Nvivo computer software was used to assist the data analysis. The analysis employed the 'pragmatic realist' approach suggested by Miles *et al* (2014, p.7) which involves three elements: data condensation, data display, and drawing and verifying conclusions. The data condensation approaches used in this thesis included: writing summaries of the key points arising in each interview, conducting primary and secondary coding, and writing analytic memos to reflect on developing themes. The data display approaches used involved the development of matrices whereby summarised data could be displayed and compared across categories and the development of flowcharts and diagrams to explore important relationships between categories. The drawing and verifying conclusions phase involved, firstly, firming up the

tentative suggestions recorded in analytic memos and, secondly, a return to the various data displays and interview summaries in order to ensure that the conclusions were reflective of the data.

### *Decision analysis*

6.11.2 It was decided to select reported redress mechanisms decisions published within three years of the fieldwork period commencing (in July 2012). Because the first SEN case considered by the upper tribunal was published in September 2009, the 34 months period between then and July 2012 was used as the sampling period for all redress mechanisms.<sup>23</sup> 66 cases were identified in total, including 24 LGO cases, 29 upper tribunal cases, and 5 court cases (in addition 7 Court of Appeal cases and 1 Supreme Court case were included in the analysis). The analysis sought to identify possible learning points arising from cases, assess the extent to which the messages they contained were clear and consistent, and provide an assessment of the way in which decisions were written and presented.

## **6.12 Quality, reliability, and validity**

6.12.1 This section discusses the measures taken to ensure the quality, reliability and validity of the research process. Seale (2004, p.407) has stated that quality in qualitative research refers to ‘the transparency of the whole research process’. In the context of qualitative research, reliability refers predominantly to giving assurance to external audiences that an objective research process was conducted (Yin 2009). Validity refers to the truthfulness of the findings produced through the research (Silverman 2011) and, for qualitative research, this refers to maximising attempts to demonstrate the link between research findings and the phenomenon being studied.

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<sup>23</sup> The tribunal ceased publishing its decisions in 2006.

6.12.2 A number of concrete steps have been taken to ensure that the research produced good quality findings, including: the use of triangulation; adopting a reflective approach; being transparent; and using a systematic approach to data analysis. Triangulation involves the use of various data sources, investigators, theories, and methods to corroborate data (Patton 2002). This thesis uses both methodological triangulation and data triangulation (Gray 2009). Methodological triangulation involves the use of several methods within the same study, while data triangulation involves the gathering of data using multiple sampling strategies: this includes space triangulation (collecting data from different locations) and person triangulation (collecting data from a variety of individuals within the sample) (*ibid.*).

6.12.3 In the context of interview research in particular, the skill and craftsmanship of the researcher is essential to the production of good quality data (Kvale 2007). In this case, the researcher sought to ensure good research practice through training, reading in the methodological literature, and ongoing reflection. Another important step relates to the transparency with which the research process is described (Caelli *et al* 2003). This chapter has aimed to do this by spending time situating the author's theoretical stance, explaining the connections between each stage of the research process, and describing measures taken to help ensure the production of quality data. Key to both the transparent presentation of research methods and findings is the researcher's reflexivity (Gough 2003). In this case, an attempt was made before the research began to identify the possible ways in which the researcher's background and attitudes might influence the research.

6.12.4 The data analysis stage of the research is particularly crucial for ensuring the validity of findings. Qualitative research is often criticised for producing anecdotal accounts that reflect the existing prejudices of the researchers (Silverman 2011). The approach to data analysis described in section 6.11

incorporated important safeguards including: establishing the representativeness of data; scrutinising data for researcher effects; triangulating data sources and corroborating data; checking on the meaning of outliers and extreme cases; following up on surprises; looking for negative evidence once initial theories or ideas have been established; and brainstorming for rival explanations (Miles *et al* 2014). A further means through which the quality of the research was assured was by sharing the findings with research participants (Gray 2009).

### **6.13 Limitations of research**

6.13.1 There were a number of limitations in the final research design including: a choice of field setting that was not optimal; a sampling strategy that did not achieve ideal levels of depth and data saturation; and an overreliance on interview research.

6.13.2 With regard to the field setting selected for the research, the choice of the local authority education area had some limitations. One of these was that individual local authorities were subject to reasonably low relative volume of review. Low volumes of review have been seen as a general problem with research assessing the impact of redress mechanisms (Cannon 2004) and some of the case studies did not have as much experience of review as had been expected. In particular with regard to judicial review, the education area generally was not subject to very high levels of challenge.

6.13.3 A further limitation in the design of the research relates to the sampling strategy adopted. This attempted to get a good balance between breadth and depth but, perhaps, can be criticised with hindsight for not achieving sufficient depth. Indeed, given the number of 'embedded' decision-making areas considered in each local authority, the number of interviews conducted was too low to provide a fully bottomed out description of the

phenomenon in each case. Talking with more local authority staff within each authority would have allowed for a fuller picture to be presented. The lack of metropolitan borough councils in the final sample was also a limitation.

6.13.4 The thesis' reliance on interviews as the primary source of data was a final limitation of the research. Although the research includes a degree of triangulation, this is not as extensive as it could have been. The lack of access to case files was a limitation in terms of being able to verify information obtained in the course of interviews. It is also acknowledged that direct observation would have provided valuable data.

#### **6.14 Ethical considerations**

6.14.1 In addition to committing to an ethical approach (Murphy and Dingwall 2001) and consulting the guidance of the Social Research Association (2003), the following practical steps were taken to ensure the conduct of ethical research: seeking informed consent by providing potential research participants with information sheets prior to agreeing to take part; asking participants to sign consent forms; giving participants an opportunity to ask questions; anonymising data; and confidentially and securely storing primary data.

#### **6.15 Summary**

6.15.1 Table 6.2 below concludes the chapter by providing a summary of the methodological approach adopted in this thesis.

*Table 6.2: summary of the thesis' methodological approach*

<b>Research aim</b>	To explore the factors that facilitate or obstruct the control of bureaucratic decision-making by redress mechanisms.
<b>Research type</b>	Exploratory, but also descriptive, explanatory and comparative.
<b>Ontology/ epistemology</b>	Adopting a midpoint between idealist and materialist perspectives, and recognizing that social reality is made up of both objective and subjective elements.
<b>Research paradigm</b>	Critical realist.
<b>Methodology</b>	Qualitative.
<b>Research design</b>	Multiple embedded case study design.
<b>Sampling strategy</b>	Mix of purposive, intensity and maximum variation sampling.
<b>Methods</b>	Interviews (semi-structured) and documentary research.
<b>Quality measures</b>	Triangulation, researcher reflexivity, developing research craftsmanship, systemic data analysis and respondent verification.
<b>Limitations</b>	The choice of field setting, sub-optimal depth, and limited objective data verification.

**ADMINISTRATIVE JUSTICE AND THE CONTROL OF  
BUREAUCRATIC DECISION-MAKING**

*A study investigating how decision-makers in  
local authority education departments respond  
to the work of redress mechanisms*

**VOLUME II of II**

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Submitted in fulfillment of the requirements for the Degree of  
Doctor of Philosophy

School of Law  
College of Social Sciences  
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## **7. FINDINGS**

### **7.1. Introduction**

7.1.1. This chapter reports the findings from the empirical research. It presents the data in three parts, matching the framework set out in chapter 4, which was amended from Halliday's (2004) work. Part I reports data relating to the characteristics of redress mechanisms; part II describes data about the characteristics of decision-makers and their decision-making; and part III considers the characteristics of the decision-making environment. The data include the documentary analysis of redress mechanism decisions and four sets of interviews: with local authority decision-makers, with parent support organisations, with redress mechanism staff, and with policymakers.

#### **PART I: THE CHARACTERISTICS OF REDRESS MECHANISMS**

### **7.2. Introduction to part I**

7.2.1. This part of the chapter describes data that relate to: the nature of the cases referred to redress mechanisms; the nature of the principles of good administration being propounded by redress mechanisms; the quality of decisions issued by redress mechanisms; the status and legitimacy of redress mechanisms; the sanctioning power of redress mechanisms; the procedural approaches of redress mechanisms; and redress mechanisms' role perceptions and control styles.

### **7.3. The nature of the cases referred to redress mechanisms**

7.3.1. The nature of the cases referred to redress mechanisms was seen as important in determining the extent to which learning was likely to result

from cases. Low volumes, the individual and context-dependent nature of cases, and the ‘weakness’ of the types of cases referred to the LGO and the tribunal were seen as problematic. Respondents were more likely to consider that judicial review cases were ‘strong’ and had potential to generate significant change.

#### *Low volumes*

7.3.2. The low volume of cases referred to the LGO was seen by many respondents as limiting the extent to which learning from cases could routinely take place, particularly compared to the higher volume of cases considered by the tribunal. Respondent A4 was forthright in making the point: *‘I have just never really seen any professional value in getting to grips with it... [it’s] a bit out of proportion really’* (A4). Although respondents were much less likely to experience judicial review challenges, the low volume of the latter was not seen as a reason to ignore them. As respondent T8 commented *‘Though lowest in frequency [judicial review cases are] sometimes highest in influence’* (T8).

#### *Individual and context dependent*

7.3.3. Tribunal cases were seen as highly contingent on the unique needs of the child involved: *‘No two cases will ever be the same’* (C4); *‘There is always a way of saying, ‘This isn’t like that case’’* (B3). Respondent E6 felt the higher volumes of tribunal cases meant that patterns were more likely to emerge, whereas LGO cases *‘tend to be about how an individual case has been administered’*. LGO cases were generally seen to result most often from individual errors and localised problems, such as failures to follow established processes, rather than systemic problems. Respondents considered that judicial review cases had the most potential to challenge current administrative systems and to lead to widespread change.

### *Weak cases*

7.3.4. Some respondents considered that learning from LGO cases was limited by the fact that complaints were ‘*weak*’ (A4) and difficult to derive any principles from. Others commented that the cases were often ‘*total howlers*’, where the failures were too obvious to learn anything: ‘*It was very obvious that their processes were not clear... So there is no direct learning from that*’ (B2). A common point in relation to both LGO and tribunal cases was that there was little left to learn; respondent L1 felt LGO cases were more likely to involve ‘*re-emphasising points*’, while respondent E8 said ‘*you’re not going to get any surprises anymore*’ (E8). In relation to the tribunal, cases were considered to be weak because those that reached hearings most often involved disputes about whether expensive private provision was required:

*‘Tribunal is... not around... the process of decision-making. It’s around a view as to which school is appropriate... it’s irritating. Maybe I’d feel differently if we had different cases going’* (A1).

## **7.4. The nature of redress mechanisms’ decision-making**

7.4.1. This section draws on the decision analysis to describe the potential learning points contained in the reported cases of each redress mechanism (see chapter 6 for details with regard to the method adopted). It also reports how redress mechanism respondents described the issues arising from their work and how local authority respondents perceived the decision-making of redress mechanisms. Appendix 4 summarises the findings of the decision analysis.

## *LGO*

7.4.2. 24 decisions were analysed. 11 related to SEN, 10 to school admissions (including admission appeals), and 3 to school transport. In the SEN area, a common area of complaint considered by the LGO was failure by local authorities to make the provision listed in a statement. Decisions on this issue provided guidance in relation to the way in which local authorities should satisfy themselves that adequate provision was being made and the need to review needs and provision where this was felt to be appropriate. Delays were a common feature of the maladministration identified by the LGO, and guidance was provided about the need to meet statutory timescales even when attempts at negotiation with parents were ongoing. Several cases commented on the need for good decision-making practices, including the full consideration of evidence and the provision of clear reasons for decisions. Some cases involved situations where a child was being transferred between local authorities, and the LGO emphasised the importance of good collaborative working in such cases. A further linked theme was the importance of ensuring a holistic view was taken of children's needs.

7.4.3. The vast majority of LGO cases related to the operation of Independent Appeal Panels (IAPs). A clear theme in LGO decisions in this area related to basic issues of procedural fairness such as: recording the reasons for decisions, providing adequate reasons for decisions to the parties, and considering all parts of the appeal/ evidence. A difficulty highlighted in several cases related to the consideration of disability discrimination arguments, with guidance provided about the need to consider these in terms of equalities legislation (with appropriate legal advice if necessary). LGO decisions also contained specific guidance on decision-making, such as: the factors to be considered when determining whether there would be prejudice to oversubscribed schools in admitting a child; the need to

consider each child's individual circumstances when a number of appeals were being heard together; and the fact that decision-making must be based on established criteria rather than novel criteria invented by an IAP. The need for IAPs to be visibly impartial was stressed in several cases. Many cases emphasised the important role of the admission authority in providing adequate training for clerks and panels members. Other specific guidance for admissions authorities included the need to provide their case to the parent ahead of hearings and to respond appropriately to requests for information.

7.4.4. There were few transport cases. Two cases provided guidance that would be of particular relevance to officials in transport departments, in relation to the commissioning of contracted travel services and the content of travel policies. More broadly, the cases provided suggestions about good decision-making practice: ensuring there were good reasons for departing from previously agreed positions; convening new review panels when cases are re-heard; and the consideration of a child's individual circumstances in decision-making.

7.4.5. In addition to specific decisions, the LGO has issued more general guidance to administrators. Its *Axioms of Good Administration* (LGO 1993), provide generic guidance to administrators across all areas of administration. There are 42 axioms, covering: the law; policy; decisions; actions prior to decision-taking; administrative processes; customer relations; impartiality and fairness; and complaints. Specific guidance has also been produced for decision-makers in the education area. Two Focus Reports concentrating on education decision-making have been produced: *School Admissions - Are Parents Getting a Fair Hearing* (LGO 2011a) and *Out of School...Out of Mind? How Councils Can Do More to Give Children Out of School a Good Education* (LGO 2011b). The former report highlighted 6 priority areas for improvement: provision of clear

information to parents ahead of hearings; explaining the case for 'prejudice' to parents and panel members; ensuring parents and local authority representatives are treated equally by IAPs; evaluating each case on its individual merits; making good notes of hearings; and providing plain English decisions detailing clear reasons. The latter report highlighted 6 areas of good practice: considering individual circumstances; seeking professional advice when assessing needs; using evidence to decide to enforce attendance or make alternative arrangements; keeping part-time alternative provision under review; aiming to reintegrate children and have a plan for doing so; and avoiding delays. In addition to written guidance, the LGO provides training (at a fee) which disseminates good administrative practice in relation to the handling of complaints.

7.4.6. To supplement the decision analysis, LGO respondents were asked to describe the key issues picked up in their decisions in the education area. The key problem in the SEN area was perceived to be implementation of statements with one respondent noting that complaints about SEN had increased in the last two to three years (O4). In the admissions and general education area, a recurring issue had been alternative provision for children who were out of school and, as noted above, this had been the subject of a Focus Report. Across all areas, the key issue being picked up related to delays, failures to follow established policies and procedures, and poor complaint handling (O4). Respondent O3 described the issues as follows: *'Lack of transparency. Lack of consultation. The classic areas of good administrative practice'* (O3).

7.4.7. As will be made clear below, local authority respondents were generally fairly positive about the quality of the LGO's decision-making. However, they also perceived some important differences between their approach and that of the LGO. One of these was the LGO's concern with the individual case: *'What we have to consider is not just those complainants*

*who felt they were hard done by, but equally we had to consider all the other families' (T2). Several respondents noted that the LGO took decisions free from practical pressures: 'It is the same goals, but perhaps approached from slightly different directions with different pressures.'* (T8); *'The ombudsman isn't disabled by... the knowledge that, look, what these people want is huge, and what we're facing is I've had a pay cut...'* (T7). Respondents noted that the LGO tended to look at issues from the complainant's perspective and that a major difference between their approach and that of local authority decision-makers was they tended to give exceptional consideration to cases: *'They're looking at it from the complainant's perspective... [and] will be looking to see... if they've got a case there really for any exceptional consideration'* (L2). Linked to this perception that the LGO approached issues from a different perspective, was the notion commented on by one respondent that the LGO did not fully understand the local decision-making context: *'These people don't live and breathe it like we do... have they ever been operational?'* (T5).

#### *The tribunal and upper tribunal*

7.4.8. As noted in Chapter 6, only the decisions of the upper tribunal are reported. In addition to considering the upper tribunal's decisions, this section also considers court of appeal decisions published during the relevant period, where the court of appeal considered an appeal on a point of law from an upper tribunal decision. 29 upper tribunal cases were analysed. The vast majority of cases related to challenges about the school to be named in the SEN statement. A recurring issue in these cases involved decision-making around the comparative costs of parental preferences and the local authority's preferences. The upper tribunal's decisions provided significant guidance in this area, including: the circumstances in which comparative costs should be assessed; the need for admission of a child not only to effect the efficient use of resources for

other children, but to be ‘incompatible’ with such efficient use of resources; the factors that may be considered in assessing comparative costs, including social and health benefits to the child and the additional costs of transport to a parent’s preferred school; and the basis on which comparisons should be made, including the use of the Age Weighted Pupil Unit in calculations.

7.4.9. Other important decisions provided guidance, albeit these have not formed part of a string of cases. Guidance was, for example, provided on the circumstances in which an individual may still be considered a child, even when above compulsory school age and not registered at a school, and the approach that should be taken to giving weight to the views of children in decision-making. Individual decisions clarified specific points, such as the limited grounds on which a parent’s preference for mainstream education may be ignored and the need to abide by parental preference otherwise. One judgment provided helpful guidance in relation to decision-making on provision other than in a school and, where such provision is made, authorities must consider both whether the whole of the provision or ‘any part’ of it would be inappropriate to be made in a school. Another case made clear that when deciding whether or not to assess formally a child for a SEN statement, authorities must consider not only the adequacy of current provision for the child but its appropriateness. As might be expected, much of the upper tribunal’s work was concerned with the first instance tribunal’s decision-making practices. As a result, a number of cases highlight issues and provide guidance that would only be of relevance to first tier judges.

7.4.10. As noted above, court of appeal decisions published during the relevant period have also been analysed. There were 4 such decisions. Two of these confirmed some of the learning points highlighted above in the upper tribunal’s decisions (in relation to consideration of transport costs

and the Age Weighted Pupil Unit). As such, they provide guidance from the higher courts endorsing the upper tribunal's approach. The two other cases involved narrow issues, one relating to the tribunal's approach to costs awards and the other relating to cost comparison where an independent school has agreed a fee reduction.

7.4.11. In terms of the common issues the upper tribunal picked up on during casework, respondent TR3 noted that there were too few cases being appealed for trends to develop, although there had been a number of cases about comparative costs of private and local authority provision, cases about the duty to assess, and cases about the inclusion of children in mainstream education. In relation to tribunal cases, respondent TR2 commented as follows:

*'One very, very common theme is that local authorities make their decisions without applying the law. That they don't have an eye on the relevant legislation and the guidance in the Code of Practice... there is a genuine problem with people understanding the statutory framework and what they need to ask themselves' (TR2).*

The same respondent, while noting that some authorities prepared their cases very rigorously and also provided excellent reasons in support of decisions to parents, said:

*'I can't bring to mind an example of when we've had a [local authority] panel express reasons for their decisions, they simply reach a conclusion and there we are.'* (TR2)

7.4.12. Local authority respondents provided extensive comments on the tribunal's underlying perspective on dispute resolution, which was seen to diverge significantly from that of the local authority in three ways:

adopting a strict legalistic approach; being biased towards parent's needs; and failing to account for local context. Each of these areas of divergence is dealt with in turn in the paragraphs below.

7.4.13. Local authority and parent support organisation respondents widely noted that the tribunal had become more legalistic since its incorporation into the unified tribunal service. Many respondents noted that this had changed the decision-making style of the tribunal, from one which was consensual and inquisitorial to one which was formal and adversarial. Previously tribunals were seen as solution-focused '*business meetings*' (C4), whereas tribunal reforms had created hearings that were increasingly court like: '*It's more cross-questioning... It's more about the two sides having a pop at each other*' (A1). One respondent noted that there had been a '*whole culture shift*' within the tribunal and was told at one hearing: '*Why can't you get barristers like everybody else?*' (B4). Another respondent provided a more detailed description of this culture shift:

*'[Before] it was mediation. It was, 'We've got a little bit stuck now. It's time for somebody independent to help us with this.'... [Now it is] 'We're going to a court of law and I'm bringing a solicitor'' (C6).*

7.4.14. The result of these changes was seen by many respondents as creating an excessive focus on legalism on the part of the tribunal, whereas local authorities saw their decisions as based on sound professional advice and an in depth knowledge of local provision and needs:

*'It feels like case law snap at times... to win it you actually have... to bring in current case law ... They try to make it black*

*and white, but I think there's lots and lots of very subtle shades of grey' (C4).*

The tribunal's legalistic approach was seen as running counter to the needs of children and as offending the decision-making values of several respondents:

*'That's probably why we're so crap at tribunals, because we still believe in the rights of the child and everybody else has moved onto 'Let's just win it because it's a legal case'... regardless of whether it's morally right or wrong' (C4).*

Respondent A1 described the tribunal as a foreign environment, in which the needs of children are lost:

*'I have a strapline for our service which is 'children and young people at the heart of everything we do'... When you go out into a different environment and that's not the case, it's quite difficult to understand the decision-making... Where's the child in this?' (A1).*

7.4.15. The tribunal's approach was also perceived as being in conflict with the views of local authority's professionals:

*'I think professionals generally... don't agree with the law. So, they know better for their professional reasons... they don't really like what they hear sometimes' (E2).*

The same respondent noted that in her authority, a key reason for the high volumes of appeals conceded was the fact that professional views were privileged above the legal framework in decision-making:

*'It would be very easy to have a template setting that out so that when the experts are looking at all the evidence, they are not just randomly throwing in their professional view... it must be within the legal framework' (E2).*

Respondent C4 provided a very graphic description of the perceived difference between local authority and tribunal decision-making:

*'This is about... child development, special needs. This is about we should be more at Morrison's supermarket than the High Court... you do need to have a good eye on SEN legislation and the law. [But] it's about something that's delicate and precious, like a rosebud, and they [the tribunal] then take a shotgun to it' (C4).*

7.4.16. The second area where respondents felt, almost universally, that the tribunal's approach was different to theirs related to a perception that the tribunal was biased towards parents and placed too much emphasis on their anxieties: *'You need to detach what the parent has decided to do, with what we think is right for the child... I think some judges are pro parents' (T6)*. Some respondents felt that not only was the tribunal pro-parent, it could also tend to be anti-local authority: *'The only belief I think they [the tribunal] have is that authorities... are being very tight, and that this family is the underdog' (E8)*. Respondent L3 said that local authorities' motives were not viewed positively by the tribunal: *'[There isn't]... any assumption that... the local authority has actually tried to work to best practice' (L3)*. Many respondents felt that parents were successful in manipulating tribunals through the commissioning of independent reports, so that tribunal judgments based on these were seen as less legitimate. One respondent felt the tribunal was permissive of these parental strategies, referring to cases where independent reports

had been submitted late as being unfair *'because someone can go and buy' more information in cold terms'* (T6).

7.4.17. The final area where respondents felt that the tribunal's approach to decision-making diverged from theirs related to the extent to which tribunal decisions took proper account of the local educational context. The major issue raised by respondents here was that the tribunal did not take account of the local authorities' local policies and criteria in its decisions. Whereas local authorities tended to use these as their principal decision-making tools, they played no part in the tribunal's decisions. The latter's decisions were based only on the law and were seen to take place in an 'ideal world' rather than the real local context inhabited by local authorities:

*'Every local authority has its own criteria, but the tribunal is not bound by that criteria... The tribunal turns around and says, 'Well, it's all very well, but your criteria doesn't mean anything to us'' (L4).*

One respondent noted that local criteria devised by authorities did not necessarily match up with the requirements of the SEN Code of Practice and that this was one of the reasons for the conflict between the tribunal's decision-making and that of local authorities: *'I find that Local Authorities' own criteria, I'm not sure how much they match up with the code of practice' (B1)*. This view echoes comments made by respondent TR2, that authorities often failed to take account of the statutory framework in their decision-making (see paragraph 7.4.11).

7.4.18. Other respondents noted that the local authority's decision-making was very much influenced by local contexts and educational

expertise, neither of which were reflected in the tribunal's decision-making:

*'The tribunal system is a hard edged legal system. It's not always clear that... [it has] knowledge of child development, of education or even the subtleties of special educational needs at a practitioner level' (C4);*

*'They don't actually have a detailed knowledge of the provision that the parent is asking for... Sometimes, you want to say, 'For goodness sake, I wouldn't put my dog in that school' (C6).*

One respondent summarised the feelings of several respondents who commented on this area when she talked of there being *'a lack of shared purpose'* between the tribunal and the local authority:

*'They seem to operate in terms of different guidelines, and they have got a different remit. [The tribunal] has a different remit to my job... It is not interested in resources... it is not restrained by capacity or local area resources... So [the tribunal] is freed from those burdens of allocation.'* (E3)

7.4.19. An important point raised by some respondents was that the purpose of local policies and criteria being devised by authorities was to ensure parity across cases: *'You have to have some criteria because otherwise, how are you going to ensure that it's a fair and transparent process?'* (L4). The gap in concerns between individual and collective interests was referred to as *'a real mismatch'*: *'It's the mismatch between a class teacher with responsibility for 30 children, and a parent of one child in that class'* (E8). Some saw divergent views on fairness between the tribunal and administrators as a matter of morality: *'My feeling is that*

*the individual child will get a Rolls Royce service rather than the same as everyone else... It just feels morally wrong to me' (E3).*

#### *The court*

7.4.20. In addition to considering judicial review decisions of the court reported during the relevant period, the decision analysis also considered decisions of the court of appeal and the supreme court arising from judicial review applications. 5 decisions of the court were reported during the relevant period. 3 related to school admissions, 1 to SEN, and 1 to school transport. Given the small number of cases reported, there are no themes as such in decisions, although two of the admissions cases related to the adequacy of reasons provided by IAPs. These cases provided helpful guidance in relation to the approach to reason-giving that is likely to be found acceptable on judicial review, and the statutory grounds which must support certain types of decision-making by IAPs. The decision on the SEN case helpfully clarified that a pending appeal before a tribunal did not relieve a local authority of its responsibility to make provision for a child, where the provision named in the SEN statement subject to appeal cannot be made. Finally, in the decision on the transport case, the court suggested that transport review panels should consider the suitability of educational provision as part of their decision-making on transport entitlement.

7.4.21. Two decisions of the court of appeal were reported in relation to appeals from the court in the relevant period. One related to admissions and one to SEN. The latter case was very straightforward and should not have reached the court of appeal; the judgment confirmed simply that provision listed in a SEN statement was mandatory and that the court had clearly erred in deciding otherwise. The admissions case provided guidance on the approach of IAPs to the two stage decision-making process required

under the School Admissions Appeal Code. Whereas the court had held that the child's individual circumstances should be considered at the first stage of decision-making, the court of appeal disagreed. It ruled that the first stage of decision-making should simply consider whether the admission of any child would lead to prejudice to a school. Only at the second stage of decision-making does the particular child's individual circumstances become relevant in assessing whether prejudice to the school outweighs prejudice to the child. Finally, the supreme court considered a single admissions case in which it ruled that admissions criteria could prioritise children with a particular religious affiliation, as long as this was on religious rather than ethnic grounds.

7.4.22. Respondent AC1, when asked whether there were any areas of law that seemed particularly problematic in the education area, responded: *'I think they find the Equality Act difficult to handle, and not surprisingly. A lot of legislation is difficult to understand'* (AC1). When asked about any themes and trends in relation to local authority decision-making in the education, she noted that the court dealt with insufficient numbers and that the tribunal would be better placed to answer such questions: *'They know much more about it than I do'* (AC1). As a result of their much more limited experience of the court, local authority respondents were not able to comment on its decision-making in the same way as on the LGO's and the tribunal's.

## 7.5. The quality of redress mechanisms' decision-making

### *Clarity of decision-making*

7.5.1. Table 7.1 shows how local authority respondents perceived the clarity of LGO, tribunal and court decisions.<sup>24</sup>

*Table 7.1: local authority respondents' perceptions of the clarity of LGO, tribunal, and court decisions*

	<b>Mean perceived clarity*</b>
<b>LGO decisions</b>	1.98 (32)** (clear)
<b>Tribunal decisions</b>	2.87 (15)^ (fairly clear)
<b>Court decisions</b>	3.19 (13) (fairly clear)

\* Respondents were asked to rate their perception of the clarity of decisions on the following scale: 1 = very clear; 2 = clear; 3 = fairly clear; 4 = neither clear nor unclear; 5 = fairly unclear; 6 = unclear; 7 = very unclear.

\*\* The number in brackets represents the total number of responses to this question.

^ The low number of responses in relation to the tribunal (n = 15) compared with the LGO (n = 32) is explained by the fact that the LGO has jurisdiction over all the decision-making areas under study, whereas the tribunal only has jurisdiction over SEN decision-making.

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<sup>24</sup> The quantitative data presented here and in subsequent sections has limitations. The following points should be noted: respondents occasionally found it difficult to provide a response on the scales; due to time pressures when conducting the interviews, not all respondents were asked to provide a response to these questions; respondents had less experience of dealing with court decisions and fewer respondents commented about court decisions.

7.5.2. Table 7.1 shows that respondents perceived LGO decisions as being clearer than tribunal and court decisions. Tribunal decisions, in turn, were perceived as being clearer than court decisions. LGO decisions were, on average, perceived as being 'clear', while tribunal decisions were closer to being perceived as 'fairly clear'. Similarly, perceptions of court decisions were closer to being 'fairly clear'. Overall, respondents perceived the decisions of all redress mechanisms as being in the 'clear' to 'fairly clear' range.

7.5.3. Where respondents were critical of the clarity of the LGO's decisions, this tended to be around the rationale provided for recommending financial redress: *'It's a bit opaque... 'We believe the local authority should pay x pounds', and you say, 'Well, how do they work that figure out?'*' (L1). Several respondents pointed out that LGO decisions could be variable in quality: *'Some are very clear and I think others are less clear'* (C7). Some respondents noted that it could be difficult to understand the LGO, noting that they *'lack understanding'* (T5) and that the reasoning around decisions could be *'a bit shady'* (E8). Others considered that reasoning could be incorrect: *'The ombudsman makes mistakes, as we perceive it'* (E2); *'The LGO got it so wrong it was unbelievable'* (T6).

7.5.4. Where respondents perceived LGO decisions to be clear, one of the reasons cited for this was that the kind of issues dealt with by the LGO tended to be related to process issues: *'Because that's the type of thing [process] that the LGO deals with and because we're reasonably hot on processes'* (B3). Several respondents commented favourably on LGO decisions, especially in comparison to other redress mechanisms: *'The ombudsman ones are normally bullet-pointed and nailed down'* (C4); *'The ombudsman cases are... designed to be read by a parent... Whereas some of the judicial reviews... you can't see the wood for the trees'* (C3).

7.5.5. Respondents' qualitative comments regarding the tribunal were less positive. Nonetheless, several respondents did perceive tribunal decisions as very clear: *'I might not agree with them, but I think they're very clear'* (L3). Respondent L4 said that the clarity of the tribunal's reasoning had increased as a result of the presence of the upper tribunal. Other respondents noted that, as with LGO decisions, clarity could be variable and that it depended to some extent on the particular case. Some of those respondents who were critical of the clarity of the tribunal's decisions, noted that the rationale for decisions was not always clearly laid out: *'They [the tribunal] have got simpler language [than the court] It's the actual decision-making which is unclear in that case. It's 'On what basis have you made that decision?'* (C4); *'Sometimes... I'm looking at the evidence and I'm looking at the conclusions and I don't understand that at all'* (B3). One respondent compared the tribunal's decisions and the LGO's decisions as follows: *'You've got reasons for the judgment in the ombudsman... 'We've reached this decision because of x, y, z.' The tribunal decision will say 'After considering all of the above, we have reached this decision'* (C4).

7.5.6. The court's decisions received the most negative comment from respondents in terms of their clarity. The main issue that was raised was the length of the judgments and the language they used:

*'[Cases are] not particularly written in a lay person's terms. I think they go round and round the houses sometimes...'* (C3).

*'Their wording is nowhere near as direct as... the LGO in explaining what they expect or think should happen'* (A6).

*'I find the odd court ruling that I read wordy ... they're not easy to get to the decision bit of'* (B7).

Several respondents pointed out that the real difficulty lay in working out what the consequences of the judgment might be for the future: *‘The implications may be less clear than the decision itself’* (B4). Respondent E8 referred to the need for expert assistance to decipher court cases, which was not required with the LGO or the tribunal: *‘I need a bit of help to think, ‘Okay, what does that mean for me’* (E8).

*Consistency of decision-making*

7.5.7. Table 7.2 shows how local authority respondents perceived the consistency of LGO, tribunal and court decisions.

*Table 7.2: Local authority respondents’ perceptions of the consistency of LGO, tribunal and court decisions*

	<b>Mean perceived consistency*</b>
<b>LGO decisions</b>	2.26 (27) (consistent)**
<b>Tribunal decisions</b>	3.2 (15) (fairly consistent)
<b>Court decisions</b>	3.33 (6) (fairly consistent)^ ^

\* Respondents were asked to rate their perception of the consistency of decisions on the following scale: 1 = very consistent; 2 = consistent; 3 = fairly consistent; 4 = neither consistent nor inconsistent; 5 = fairly inconsistent; 6 = inconsistent; 7 = very inconsistent.

\*\* The number in brackets represents the total number of responses to this question.

^ The low number of responses in relation to the tribunal (n = 15) compared with the LGO (n = 27) is explained by the fact that the LGO has jurisdiction over all the decision-

making areas under study, whereas the tribunal only has jurisdiction over SEN decision-making.

^^ The low number of responses in relation to court decisions was due to respondents not having seen sufficient cases to comment on consistency.

7.5.8. Comparing tables 7.1 and 7.2, we can see that respondents tended to perceive the clarity of decisions taken by the LGO, the tribunal and the court more positively than they perceived their consistency. Looking at table 7.2, we can see that respondents perceived LGO decisions as being more consistent than court and tribunal decisions, and tribunal decisions as more consistent than court decisions. Looking at the overall picture painted by table 7.2, we can see that the perceived consistency of LGO, tribunal and court decisions was in the 'consistent' to 'fairly consistent' range.

7.5.9. Qualitative comments on the LGO's consistency were broadly positive, with most respondents saying they could not think of any examples of inconsistency: *'I cannot recall something that flew in the face of a previous decision'* (B2). Others pointed out that although they did not agree with decisions, they did not have any issues in relation to their consistency *'They're not necessarily consistent in a good way, but they are consistent'* (L1). Respondent T8 pointed out that the issue of consistency depended to some extent on the time period over which cases were being considered, as positions could vary over time.

7.5.10. Some considered that the issue of inconsistency was more widespread and noted: *'There are... many cases where different ombudsman investigators... have come up with significantly different views'* (T7); *'The previous manager would... say to you that it depends which ombudsman, which officer, investigates'* (E9). Another respondent noted that in her view inconsistency occurred around the LGO

investigation process: *'That particular year, they weren't consistent... as to how they were looking at things. You did feel that you were being interrogated'* (C2). Others pointed out that there could be contradictions in LGO decisions: *'One minute they say they can't reverse an independent appeals panel's decision, but then they're actually telling us to put the child in'* (E5).

7.5.11. Respondents were more likely to report negative perceptions with regard to the consistency of the tribunal's decisions, although some commented positively. One respondent noted that consistency was *'not a pressing concern'* (L6), while another commented: *'I think we go into tribunals with a strong sense of what is likely to be the outcome'* (L3). Other respondents were less positive and even those who noted that the tribunal was fairly consistent, did not feel that it was entirely so: *'You do get ones where you go, 'Really?'* (E8). Another respondent noted that the tribunal was *'not consistent enough'* (B3) to be treated as precedent.

7.5.12. Some respondents expressed stronger feelings about the consistency of the tribunal's decisions and noted that they were unpredictable and could vary *'enormously'*:

*'I've always had a view of tribunals that you could take a particular set of facts to one tribunal... and get one decision. And ... on another day, with exactly the same facts, get a different concrete decision'* (B4).

Respondent L1 noted:

*'You get completely rogue decisions and sometimes you have to look at that and say, 'Well, I don't believe on another day they would have made that decision'* (L1).

7.5.13. Very limited data was provided by respondents in relation to the consistency of court decisions, since most respondents had not seen enough of them to comment. Of those that did comment, a mix of opinion was presented. At one extreme, a respondent noted that: *'It doesn't jump out at me that... a judge has said that and that one's said that'* (A6). While another respondent noted that: *'The High Court swings left and right, doesn't it?... So it's not consistent'* (E8). The two other respondents that provided qualitative data on this subject noted that the court's decisions were *'generally consistent'* (T8 and B3).

7.5.14. Having described how local authority respondents perceived the clarity and consistency of redress mechanisms' decisions, the following paragraphs return to the decision analysis to provide the researcher's assessment with regard to the presentation, clarity and consistency of reported cases.

7.5.15. LGO decisions were generally clear and it was easy to understand the nature of the complaint, the legal and policy context of decision-making, the facts of the case, and the reasons for the LGO's decisions. Decisions were prefaced with a one page summary setting out the basis of the decision. While decisions contained a technical approach that might be unclear to a lay person, an experienced public servant is unlikely to have major difficulties in comprehending them. While decisions were clear on the facts, it was rare for the LGO to comment on the wider applicability of decisions or to seek to explicitly distil any learning points that arose from the case at issue. The decisions did not cross-reference with the *Axioms of Good Administration* and, as a result, did not make clear what the broader points of good administration at issue were. While it was possible to extract learning points (a process referred to as 'reconstructing norms' by Langbroek and Ripkema 2006, p. 87), this would involve additional interpretative effort for administrators. While rarely providing guidance in

the broader application of cases in individual decisions, the LGO's *Focus Reports* did provide such broader guidance in a clear and accessible format - tying together learning across cases to distil short lists of good practice. In terms of consistency, there was no obvious inconsistency of principle or approach identifiable in the sample of cases analysed here.

7.5.16. In terms of the upper tribunal decisions, the format and presentation of decisions was less accessible, with only some of them containing a summary of the case upfront. The style of decisions was more idiosyncratic, with variations in approach between judges, and less of a consistent house style than the LGO reports. As might be expected given the legal status of the upper tribunal's decisions, they involved sophisticated technical and legal argument, which required close reading and significant legal capacity in order to understand. It is likely that administrators would require assistance in interpreting the legal significance of these decisions and the way in which principles might be applied elsewhere. Given that the cases have, as their primary focus, the decisions of the tribunal, there was an additional layer through which administrators would need to delve in order to identify matters that related to their own decision-making. As with the LGO's decisions, the upper tribunal's decisions generally made little effort to comment on the wider significance of judgments. As can be seen from appendix 4, there were a number of cases where no particular learning points could be distinguished. In relation to consistency, there were no clear examples of inconsistency between cases in the sample analysed here, although it is arguable that in case [2011] UKUT 468 (AAC), the upper tribunal's decision was not consistent with a previous court of appeal judgment on the specificity of statements (Stout 2012).

7.5.17. Court decisions were clearly aimed at a judicial and legal audience, rather than administrators. Judgments tended to be lengthy and

densely reasoned, with the significance of various legal arguments unlikely to be instantly obvious to a lay person. An administrator looking for lessons in relation to his or her decision-making practice was likely to find this a difficult task. The question of clarity here must be distinguished depending on the audience which the judgments were meant for: they might be clear to a suitably trained legal audience. But if their aim was to be clear to bureaucratic decision-makers, then the analysis of these cases suggested that such an aim would be far from being met. There are too few cases to comment on the question of consistency, although as with the other redress mechanisms, there was no obvious inconsistency in the sample analysed here.

## **7.6. The status, legitimacy and sanctioning power of redress mechanisms**

### *LGO*

7.6.1. Several respondents referred to the fact that the LGO was a respected organisation, whose investigations were taken seriously. One respondent (B5) said that ombudsman investigations were a *'high priority'* for her local authority, while several other respondents commented that they took the ombudsman very seriously: *'We try everything we can to avoid complaints'* (B4). A number of respondents pointed to the fact that the LGO was at the back of their mind in the course of decision-making: *'So any decision-making we would think, 'Is that maladministration? Are we open to challenge?'* (T5). The LGO was also seen as a significant sanction, particularly where findings were made public: *'Members are very concerned, rightly, about reputational issues'* (T7). Several respondents noted that the publicity attached to LGO reports was a particular reason why decisions were treated with respect: *'Ombudsman is a very painful process, it's a very public process... So that has to make sure that you change everything'* (E8). A local authority lawyer commented:

*'My clients are very, very scared, and very, very wary of the ombudsman. Because they are aware of the power of that, and the consequences... of a public announcement' (T4).*

Not all perceptions were positive, however, with a number of respondents suggesting that the LGO's decisions would not always lead to changes if there was disagreement about their merits. One respondent noted that the LGO's legitimacy could be particularly questionable in the controversial area of compensation: *'I don't see what right they have telling us that we should compensate the parent' (E5).*

#### *The tribunal*

7.6.2. Most respondents considered that the tribunal was a necessary institution: *'You need an ultimate place to go, don't you?' (A1).* Respondents tended to highlight particularly the upper tribunal as authoritative: *'I would treat the upper tribunal like I treat the court; it's basically at that level' (B3).* The status of the tribunal was, however, generally acknowledged grudgingly, with a widespread view that its judgments were not particularly authoritative: *'I think there's a little pinch of salt with the first [tier tribunal]' (E8); 'It's not the same as the supreme court' (B3).* Commenting on a specific case in which, despite an upper tribunal and court of appeal decision having been issued, the local authority had decided not to change its general policy on SEN transport respondent B5 commented:

*'I think the way we viewed it altogether, it was sort of a joint view, that it wasn't a legal determination... We weren't going to change our policy because of one decision based on an individual tribunal decision' (B5).*

## Court

7.6.3. Those respondents who felt able to express an opinion generally perceived the court to be authoritative and its judgments to have a straightforward legitimacy: *'It produces case law doesn't it?... Case law helps you to clarify and inform your practice'* (L5); *'I think, when there's a new relevant piece of case law, it's about disseminating that, and people understanding it, and absorbing it into their practice'* (E8). Several respondents, comparing the LGO and the court, noted that the latter would be taken much more seriously by staff and that its decisions were less subject to debate around implementation:

*'Well for me personally there is no comparison. A court case is an entirely more serious matter... [The LGO] are making different decisions, they are not making quite as high-level decisions as a court would make'* (L5).

7.6.4. Several respondents commented on the fact that judicial reviews tended to be significant events for local authorities, with judgments carrying a lot of weight and authority:

*'It does not reflect well on the organisation's reputation, which matters. It also can end up with findings which... carry absolute legal weight, and it means that our policy and practice is determined by a body well outside our control'* (L3).

The public nature of the process was again seen as the principal sanction being applied, in addition to a sense that judicial review cases would lead to a loss of local control over policy and practice.

## 7.7. The procedural approach of redress mechanisms

### LGO

7.7.1. The LGO's inquisitorial approach was seen by respondents as making their decisions more persuasive: *'I would love to be able to argue with this, but... they have come in afresh, they have looked at the evidence, and you have got to go with it'* (T6). One respondent, comparing her perceptions of the LGO with the tribunal, said the fact that the LGO was concerned with maladministration rather than attacking the merits of decisions, meant that its decisions were more likely to lead to learning:

*'I think an LGO case is much rarer and I think they are genuinely about, in a sense, somebody receiving a bad service... Whereas tribunals are just about somebody not getting the gold standard that they wanted'* (L1).

*'The root and branch way that they [LGO] approach stuff... In their questioning they will say, 'Okay, how was this decision taken, and by whom, and what are the terms of reference?'... Whereas the tribunal does not do any of that'* (E8)

7.7.2. While LGO decisions were seen as clear, they were not seen as generally requiring major changes. A focus on maladministration was widely perceived as being about bringing authorities into line with existing practices and policies, rather than being about changing those practices and policies in the first place: *'Any major changes now are going to come about because of case law really, ombudsman should really be about bringing everyone in line'* (L5). Respondent B5 made the point more explicitly when commenting on the different ways in which ombudsman decisions were perceived compared to case law: *'An ombudsman*

*decision... might lead to a tweak in our process... Whereas case law may well change our policies' (B5).*

### *Tribunal*

7.7.3. The increasingly adversarial nature of the tribunal process was seen by some respondents as creating negative feeling towards its decisions. Respondents perceived the experience of the tribunal as traumatic, unfair, and disruptive to ongoing relationships with parents. Several respondents commented on the fact that the tribunal could lead to local authority staff being unfairly criticised: *'I mean, sometimes it's just downright rude'* (L1). Several respondents reported staff feeling alienated by the process of going to tribunal: *'I've heard the special school heads here say they are sick to death of their professional integrity being challenged'* (E8). One respondent noted that a colleague had had an experience which was so bad that it had seriously affected how she approached the rest of her job: *'She felt she'd been cheated in... a court of law, basically... [Since then] she's been very guarded'* (C4).

7.7.4. Respondent TR1, a tribunal judge, commented on the importance of the tribunal's *de novo* approach to appeals. Appeals were described as an appeal of the child's situation rather than the decision taken by the local authority. This meant that new evidence produced by parents could often lead to a different decision: *'They are not fighting the same case which they started with in many, many cases'* (TR1). Respondent TR1 expressed her hope that in future, the tribunal could move to considering whether the original decision was correct as that would be fairer and provide clearer feedback to local authorities.

## *Court*

7.7.5. Respondents noted that the precedential effect of court decisions made a difference to how they would see court decisions as opposed to those of the LGO:

*'With the high court there should be a stream of case law that is consistent and follows on... The ombudsmen have always been clear that it is a standalone decision' (T8).*

Comparing the court with the tribunal, one respondent noted that the public nature of the judicial review process and the greater scope of issues considered meant that reactions to the court and tribunal would be different:

*'I think we would be much more worried... to be facing a judicial review process... because it's a much wider, more public, and potentially powerfully directed force, around wider issues than just this child, we would have a different emotional response I think' (L3).*

## **7.8. Redress mechanisms' role perception**

7.8.1. This section presents data from interviews with redress mechanism respondents discussing the extent to which they considered that influencing bureaucratic decision-making was part of their roles.

### *LGO respondents' role perception*

7.8.2. Respondents described the LGO as having three roles: providing individual redress, generating administrative improvements through

casework, and helping authorities improve administrative practices through the provision of training and advice. LGO respondents were in agreement that the redress of individual grievances was the LGO's most important function. Other functions were described as *'residual'*: *'The key area is to address an individual grievance'* (O3). Several respondents were keen to distinguish the LGO's investigation process from *'systemic investigations'* and *'audits'*: *'We don't do systemic investigations'* (O2); *'What we tend not to do is then say, 'I'm now going to carry out a council-wide investigation about how they handle all of those types of issues... That's not really our role'* (O1). Indeed, respondents were clear that while administrative improvements could be recommended, they had to remain closely justified in terms of the individual complaint or a series of individual complaints.

7.8.3. Complaint investigation was seen as an essentially reactive activity, which was limited in the extent to which it could lend itself to administrative improvements: *'It's always going to be reactive, isn't it? Investigations always are'* (O1). The same respondent also noted that there were limits to the extent to which the LGO could follow up individual recommendations: *'It's difficult because once we complete our work... we wouldn't necessarily chase up unless we had it referred back to us'* (O1). Respondents explained that some recommendations were difficult to follow up since they might require the involvement of local authority committees and take significant time to implement. The status of recommendations was noted as being somewhat ambiguous with one respondent noting that *'we recommend changes... Well a lot of the time... we would phrase it in way that the council should consider doing X, Y or Z'* (O2). Where recommendations were made as part of local settlements *'we don't generally as a matter of course follow up. We rely on the local authority to act in good faith'* (O4). Respondents, therefore, saw the LGO's improvement role as requiring to be delineated with great care.

### *Tribunal respondents' role perception*

7.8.4. Similarly to the LGO, tribunal respondents saw themselves as fulfilling several functions, but with a prime focus on the provision of individual redress. One respondent summarised the tribunal's distinct roles as follows:

*'The essential function of the tribunal is to make a decision in accordance with the law... we also need to ensure that a parent puts forward the best case they can. So that is our, if you like, our interrogatory function... Our function on the local authority... is to ensure that they get it right first time... But they are the secondary functions; the primary function is to make the correct decisions so that people have a rock, if you like, to anchor these things'* (TR1).

Another respondent commented in similar terms, but went on to discuss the role that tribunals sometimes had in picking up on bad practice in their decisions: *'I don't think that there is any fear among the panels in this tribunal about criticising or indeed congratulating good practice when they see it'* (TR2). Respondent TR2 noted that - in another jurisdiction - the upper tribunal had recently criticised the practice of flagging up issues as part of decisions. When asked whether she thought the current balance between providing individual redress and contributing to administrative improvement was right, she responded: *'I'm quite happy with things as they are... I think that putting it into the decision is an effective means of getting that authority to address the problem which has arisen in this particular appeal'* (TR2).

7.8.5. Respondent TR3, an upper tribunal judge, said that generating administrative improvement was part of the tribunal's general function

but considered that this role was limited: *'We would take some steps to publicise what we regarded as the more important of our decisions in the area. So, to that extent anyway... there is a wider role, potentially, contributing to administrative decision-making'* (TR3). Beyond publishing important decisions, however, respondent TR3 considered that there was little the tribunal could do in relation to local authority decision-making: *'I think it's up to people, really, what they make of it... We don't exist to train one or the other party really'* (TR3). Respondent TR3 considered that, despite the fact that the upper tribunal was able to publish important cases, the tribunal was more likely to be influential in terms of the routine decision-making of local authorities. She noted:

*'They have a much greater caseload. There will be the interaction between the panel members and the local authority's witnesses... that sort of question and answer has got a much greater capacity for influencing the authority than someone could find in the recherche things that we get up to'* (TR3).

One of the policy officials who took part in the research considered that the provision of feedback was currently more likely in low volume tribunals, where more detailed judgments could be handed down (PO1).

#### *Court respondent's role perception*

7.8.6. The court judge who participated in the research (AC1) made it clear that, beyond taking a decision on the facts of a case and applying what she considered to be the correct interpretation of the law, little conscious effort was spent in trying to influence future practice in local authorities. She commented that cases that were brought would often have wider ramifications as they tended to have significant costs involved and be used as test cases. However, what happened after cases was not something that

she would concern herself with and she would only find out what happened after decisions if they were appealed or there were reports in the press.

## **7.9. Redress mechanisms' style of control**

7.9.1. This section reports data describing the extent to which redress mechanism and local authority respondents considered that redress mechanisms adopted facilitative and cooperative approaches.

### *LGO*

7.9.2. Several LGO respondents commented on the informal, cooperative, and advisory role that they had in relation to local authorities. They noted that local authorities would look to the LGO for advice and that this was given in the course of informal interaction. One respondent provided an example of being asked for advice on remedies and providing *'back of a fag packet'* advice: *'They would ring up and say, 'Look, we've done the stage two investigation. We recognise we haven't done well here... What would you suggest?''* (O2). Respondents emphasised that contact for advice tended to be around the complaint process rather than requests for advice on substantive issues.

7.9.3. Respondents noted that they generally had good relationships with local authorities. One respondent noted that the LGO's intervention was at times welcomed as a prompt for change: *'Councils ring up and say, 'Can you be highly critical because this department needs to get its act in order''* (O2). Respondents noted other ways in which the LGO sought to develop its advisory function and cooperative relationships with local authority staff. One respondent pointed to an annual seminar being held for officers where recurrent themes could be discussed. Respondent O2

noted that there were opportunities for informal contact between the LGO and local authority: *'Council officers find it very helpful just to meet informally... they recognise we are professionals trying to be professional with them'* (O2).

7.9.4. While stressing an overarching approach to their role which was cooperative and which sought to help local authorities, one respondent noted that more coercive approaches were sometime required to ensure that the LGO could fulfil its core function around individual redress. One respondent cited an example of the kind of coercive approaches that the LGO could employ: *'It was decided to subpoena them. The Chief Exec and three senior managers had to come with all the files and sit there... that's our final [sanction]'* (O2).

7.9.5. Some local authority respondents described their relationship with the LGO in similar terms, referring to a relationship between professionals with shared goals. One respondent, for example, referred to the LGO as a *'critical friend'* and characterised her relationship with the LGO as one of *'cooperation'*: *'I find it constructive... I find the dialogue helpful... The culture is one of cooperation'* (B7). Another respondent commented in similar terms, describing the relationship as less adversarial or even inquisitorial and more as a kind of partnership: *'We have all got the same objective in mind ... It is more about working together'* (L5). Another respondent commented on the personal nature of the interaction between herself and the LGO, noting that: *'They have always been approachable... They have never shied away from actually talking things through'* (A6). One result of this cooperative approach was that respondents found LGO decision to be generally clear as there were opportunities to ask questions, seek clarification, and lobby for changes: *'I find them clear, because they normally put a provisional view out, so I think if there was any uncertainty...'* (B7).

7.9.6. While there was a significant strand of opinion referring to good, cooperative relationships with the LGO, the data presented above in relation to different approaches between the LGO and administrators should be born in mind. Not all administrators agreed that the LGO and decision-makers had a shared purpose, nor did all respondents view the LGO's recommendations positively. One respondent also noted that, as the LGO had grown and as they made more use of paper investigations, it was harder to build relationships with LGO staff than in the past: *'There is more investigators [now, so] you don't have that ability to build that relationship'* (T4).

#### *Tribunal*

7.9.7. Tribunal judges described having some interaction with local authority decision-makers outwith hearings. The tribunal ran a number of user groups where local authorities and parent support organisations could discuss issues in relation to appeals with tribunal staff. Respondent TR2 noted that these user groups - while they would not discuss individual cases - could be used to provide general feedback to decision-makers: *'We will chair discussions... I've given a talk to local authorities about the best way to proceed, what a tribunal expects and how they should approach matters'* (TR2). When asked whether there was scope to provide oral feedback to decision-makers at hearings, respondent TR3 felt this would be inappropriate and work against the tribunal's impartiality. She considered that there were strict limits on the extent to which feedback could be given to one of the parties in dispute and to the kinds of relationships that could be engaged in outwith particular cases.

7.9.8. Respondent TR1 mentioned an important example of the kind of work that the tribunal undertook to contribute to the 'right first time' agenda. This was a pilot project they had been working on with some local

authorities to improve the administrative process around appeals. This involved using LEAN methodology, in partnership with two local authorities, to review processes around refusal to assess appeals. This was seen to have led to improvements in the system for parents: *'It's about actively engaging the parents and getting them to participate, giving them a voice I suppose'* (TR2). Respondent TR1 commented that the pilot sought to work collaboratively with local authorities in order to determine: *'How they should approach an appeal and making sure that everything was right before they came to us'* (TR1). Respondent TR1 described the processes used prior to the pilot as *'deeply daft'*.

7.9.9. Very few local authority respondents mentioned their interactions with tribunal judges outside of cases and, as noted above, the tendency was for these encounters to be viewed as stressful and negative by administrative staff. Tribunal user groups were mentioned, but generally they were viewed as forums in which technical matters of tribunal process were discussed rather than substantive issues. One respondent did comment very positively about her relation with the tribunal; she noted: *'We've got a good reputation at tribunal... I was with the president yesterday. We have respect'* (E2).

#### *Court*

7.9.10. Local authority respondents did not report having had any interaction with the court, since no cases went to a hearing. They also reported having no other interaction with the court. AC1 made clear that she did not engage in any conversations with local authorities about their practices outside of cases in order to steer clear of arguments. One of the policy officials who took part in the research said that the 'right first time' strand of the Ministry of Justice's administrative justice strategic work programme had not engaged much with courts: *'It's certainly a less*

*developed area. It can be quite difficult to work with'* (PO1). Commenting on this area of policy in relation to all redress mechanisms, PO1 noted: *'There has certainly been a lot of work going on, but just not as an agenda in itself. It hasn't been pushed on as it could have been, I think'*.

## **PART II: CHARACTERISTICS OF THE DECISION-MAKERS AND THEIR DECISION-MAKING**

### **7.10. Introduction to part II**

7.10.1. This section reports data about: the nature of decision-making; decision-makers' commitment to learning from the work of redress mechanisms; and the processes of organisational learning they undertake in order to acquire, interpret, disseminate, and store information arising from the work of redress mechanisms.

### **7.11. Characteristics of the decision-making areas**

#### *School admissions*

7.11.1. There was a great deal of consistency amongst respondents in terms of how they described school admissions decision-making. A key feature was the high volume of applications dealt with; Carron Council, for example, reported approximately 6,000 applications a year, Tummel Council approximately 40,000, and Almond Council approximately 15,000. Admissions decision-making was described as being driven by the consistent application of policy to cases: *'All aspects of our job are policy driven... we haven't got a lot of leeway'* (E5). Decision-making was described as governed by clear criteria and routinised. In Almond Council, respondent A2 referred to a computer system which matched cases to criteria, so that aspects of the process did not even require a human decision-maker.

7.11.2. Interestingly, one respondent challenged the idea that school admissions could be described as ‘*decision-making*’: ‘*There is no discretion, there is no decision-making, it is government policy*’ (E7). Applying discretionary judgment was perceived as subjective and unfair, leaving the system open to abuse: ‘*We apply no discretionary judgment to that, because if we do, then it becomes an unfair process*’ (A6). Indeed, in describing their decision-making and the values that underpinned it, respondents noted that consistency, transparency and equity between cases were essential:

*‘You are either an impartial service that does everything strictly according to a criteria, or you are not... we have to be impartial and treat children as a number, as a number of parents say, rather than treat them as human beings.’* (A2)

Respondents noted some circumstances in which limited discretion could be exercised, such as on social or medical grounds. However, even where discretion was exercised, it was referred to as being in ‘*pre-prescribed ways*’ (A7).

7.11.3. As noted in chapter 5, local authorities are also responsible for setting up and administering Independent Appeals Panels (IAPs) for schools where they are the admission authority. Respondent C7 noted that the key decision-making task of IAPs was deciding whether admitting a child would result in greater prejudice to the child or the admitting school. Rather than reviewing the original decision based on the same criteria applied by the local authority, IAPs were described as having discretion to take into account a host of personal circumstances which had previously not been considered by the local authority. Respondents suggested that IAPs were perhaps best seen as part of the continuation of the general decision-making process of admissions: ‘*We tend not to normally get involved in*

*the individual case of the family...We probably use the Panel to look at an individual case like that' (A3).*

#### *Home-to-school transport*

7.11.4. Transport decision-making was often conducted by integrated admission and transport teams and there were strong parallels between the way respondents described their admissions and transport decision-making. Respondents generally noted that although local transport policy often involved discretionary elements that were not required by statute, this did not mean that they had any more discretion in deciding individual cases: *'the policy is discretionary, we don't necessarily have discretion ourselves'* (E7). As with admissions decision-making, local transport policies generally provided for the consideration of some individual circumstances, such as medical conditions: *'We do have a slight discretion'* (E5).

7.11.5. Some respondents described a situation whereby discretion was exercised in relation to transport decision-making, but only once those cases were escalated to the transport review panel: *'Normally where it's discretionary it has to have an authorisation'* (C3). The process of cases being escalated from initial decision, to review by a manager, and then to review by an appeal panel was described as allowing the circumstances of a case to be fully considered: *'It's been looked at from every possible angle'* (A6). As in admissions decision-making, review panels were seen as being allowed a much greater degree of discretion and this was seen as helpful in delineating the role of administrators: *'It's far better to leave it to the panel, because it then doesn't set a precedent, in that sense of the word'* (A6). Overall, decision-making around transport was described by respondents as *'policy led'* (L2) and designed to ensure the consistent

application of pre-determined rules to individual cases: *'This is the criteria. If you don't meet it, you don't get it'* (E5).

### *Special Educational Needs*

7.11.6. SEN decision-making was described in very different terms. An important feature of the approach of local authorities in the sample was the ubiquitous use of multi-disciplinary panels to advise SEN officers on cases. Panels were advisory rather than decision-making bodies: *'the panel cannot reach a decision, the local authority has to do it through a named officer'* (E8). While panels received a range of professional inputs, the role of SEN officers and managers was generally to chair the panels and provide input on issues around the law: *'As a SEN Manager, we have to keep abreast of developments in the law because the others on the Panel have expertise in other areas really'* (E6). Administrators also had to consider the likely stance of a tribunal in case of dispute: *'Particularly me, rather than maybe the psychologist... is thinking... given past decisions, is it defensible?'* (B1).

7.11.7. Respondents described the assessment of a child's needs as the core of their decision-making: *'We're looking at the needs of the young person. The advice that we've been given is: it's needs-driven'* (C6). The SEN Code of Practice and its definition of needs were seen as important here, as was the balancing of a wide range of evidence and professional views:

*'It's really about looking directly at the needs and all the information that we're presented with and applying the Code of Practice to that. It is a very multidisciplinary view on what we have in front of us'* (C6).

7.11.8. Respondents were generally clear that, although resources were a significant factor in decision-making, they were secondary. One respondent noted that unlike in other areas of public service, SEN legislation did not allow services to be rationed: *'There's a notion in SEN legislation, if it's necessary it's necessary, and finance is not allowed to fetter our judgments'* (B4). Another respondent noted that need was always the driving factor rather than resources: *'Whilst I have to have an eye to the budget, I'm aware that we have to make appropriate allocations to meet needs'* (A1). While no respondents in the sample said that this general need to have *'an eye to budget'* had any direct effect on the way in which individual cases were dealt with, the need to conserve finite resources was clearly a strong driver: *'You can't spend all the money in the first six months, and then in month seven say... 'Sorry, we've spent all the money'* (E8). Resource issues were widely perceived as being a factor that made SEN decision-making complex: *'You are going to immediately get a confrontation between a parental viewpoint and our own viewpoint in that use of resources'* (C4).

7.11.9. Respondents noted that there remained a perception that SEN decision-making was a *'battleground'* (B4) and that parents had to *'fight'* in order to get the provision they felt was required for their children. Indeed, when describing decision-making in other local authorities, a number of respondents stated that SEN decision-making was often confrontational and driven by resources or other considerations: *'I do have to say that in my experience there are authorities who fight for the sake of fighting'* (E8). Another respondent said: *'I've been in other authorities where accountants rule'* (C4). Many respondents felt that their decision-making compared favourably with other local authorities and, indeed, a tendency to see their decision-making positively was a feature of all respondents.

7.11.10. Several respondents pointed out that SEN decision-making was an area which was devoid of hard and fast rules. Respondent B4 illustrated this point clearly when commenting that he was often ‘*on his own*’ in making important decisions: ‘*On the key issues, to some degree, you’re on your own*’ (B4). Another respondent noted that SEN decision-making often involved a more negotiated approach to decision-making:

*‘You’ve got your Education Act, you’ve got your code of practice. But having pooled all that in together you still then have to sit down with the parent... what are their areas of mediation that they may take?’ (C4)*

Indeed, most respondents perceived their decision-making as involving significant negotiation with parents to find mutually acceptable compromises: ‘*We will agree whatever we can agree*’ (E2).

7.11.11. Data provided by parent support organisations provided a more critical view of local authority decision-making.<sup>25</sup> One area that was subject to significant criticism across the sample related to the degree to which parents were involved in decision-making: ‘*I think there is still a bit of the ‘us and them’’*’ (P6). Respondent P14 commented in similar terms that the extent to which officers welcomed parental involvement was a ‘*postcode lottery*’. Respondent P15 saw a lack of responsiveness in her local authority’s approach: ‘*I don’t think they think that the Local Authority really listens to their issues, then realigns what they’re doing... in the light of parents’ complaints*’ (P15).

7.11.12. Respondents across the sample echoed local authority respondents’ concerns that more effort could be made to resolve cases

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<sup>25</sup> The parent support organisations who took part in the research were mostly focused on helping parents whose children had SEN. They were generally not able to comment on other areas of decision-making.

early: *'We're very much about trying to promote early meetings, face to face meetings right from the very beginning'* (P6). One of the policy officials who took part in the research also considered that there was scope for more early resolution of cases: *'Decisions could be considered earlier and, perhaps, better judgements come to'* (PO2). Respondents P9 - P13<sup>26</sup> commented that parents would like to be more involved in decision-making particularly at the *'elusive panel'*: *'You get decisions being made on evidence that parents don't always agree is the most accurate, up-to-date reflective evidence on their child'* (P9 - P13). Parent support organisations considered that local authority cultures remained defensive: *'They [decision-makers] feel... very threatened by parents who have more knowledge than them on many occasions'* (P1-P3).

7.11.13. Several respondents said that local policy priorities tended to predominate in terms of determining local authority decision-making:

*'The whole drive... is to improve provision everywhere. So that actually children can go to their local school and get good quality provision. So in effect what would be happening, if the authority is paying for a child to go to school B, and they are paying say £100 a month to transport them to school B, that is letting school A off the hook'* (P8).

Respondents P9 - P13 referred to parents with disabled children receiving almost identical letters with regards to request for school transport, without their specific needs having been assessed at any point: *'Which sort of supports the, I suppose, the cynical kind of approach to the fact that this is not led by individual; this is led by saving money'* (P9 - P13). Respondent P7 spoke about the policy drive to reduce the number of statements being issued as shaping the local authority's decision-making:

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<sup>26</sup> This was a group interview and data is reported together rather than individually.

*'The local authority don't make it easy for parents... It's all about reducing the number of statements, I think' (P7). This gatekeeping approach was widely seen as prevalent in local authorities' approaches: 'It is now the Local Authority's policy to turn that down at least twice before they'll go ahead and give you one.'* (P15); *'They try and wear you down' (P9 - P13).*

## **7.12. The commitment of decision-makers to learning from the LGO**

7.12.1. This section presents data, drawn from interviews with local authority respondents and LGO respondents, about decision-makers' levels of commitment to learning from the LGO.

### *Local authority respondents' perceptions*

7.12.2. Expressed commitment to learning from the LGO was generally high. The need to simply comply with its decisions was perceived as self-evident: *'We would automatically look at that. I think we would want to keep a good rapport with the ombudsman' (C3).* Other respondents referred in similar terms to how they approached learning from LGO decisions: *'So we do say, 'Look, we can't do this again.... We need to change our practice'' (L3).* Respondents generally saw implementing LGO decisions as part of a broader commitment to legality and to doing the right thing: *'We are not a maverick authority' (C7); 'We're very law abiding really here' (T5).* Some respondents were more ambiguous and felt that, although they would not disregard the LGO's findings, it was not a particularly significant influence on decision-making:

*'What I consider, and I guess it's eventually what the Ombudsman considers but that's not why we consider it... I consider our agreed procedures' (C5).*

Respondent E1 also commented that the LGO was not a strong motivating factor in her work: *'My work is influenced by trying to do the best for children in school and not particularly influenced by whom somebody might go to complain to'* (E1).

#### *LGO respondent's perceptions*

7.12.3. LGO respondents commented that it was difficult to know how far LGO decisions were used as a source of learning, although they provided some evidence that the LGO had been influential in a number of cases. Respondent O4 noted that around 95% of recommendations were accepted, although she accepted that few checks were conducted. Respondent O3 noted that, although the LGO was reliant on receiving new complaints to find out if recommendations had been carried out, this happened very infrequently, which suggested that they were generally being implemented. The high rate of compliance was seen as due in part to the fear and respect with which the LGO was held by local authorities: *'If I ring up... You can almost hear them tugging the forelocks'* (O1). Respondents O1 and O2 also noted that sanctions such as publicity and the political scrutiny that surrounded published reports meant that compliance was generally not an issue: *'Most councils will fall over backwards to avoid reports'* (O1).

7.12.4. LGO respondents noted changes in the quality of information provided to the LGO and in complaint handling: *'I think councils have taken [things] on board'* (O1). Attempts to improve complaint handling had not only occurred through individual recommendations, but also through the delivery of training to local authorities. A particular area where respondents felt the LGO had been influential was in the production of the 'Focus Reports' referred to in part I of this chapter above.

Respondent O4 noted that some positive feedback had been received from local authorities about these reports.

7.12.5. Other specific examples where the LGO had been influential included a case on prejudice in school admissions as a result of which an amendment was made to the Admissions Code (O4). Another instance where respondent O4 felt the LGO had been influential was in terms of the administrative process for setting up admission appeals, where she described a *'huge influence'*: *'We issued a special report... which basically became a model of good practice'* (O4). Respondent O2 cited an example where, after a series of complaints, a particular local authority had changed its approach in order to avoid the possibility of a public report: *'We had a whole spate of SEN complaints... As a result of that they reviewed how they were delivering the SEN function'* (O2). Another respondent also noted that authorities would seek to learn from each other's cases: *'They will read other councils' reports'* (O1).

#### *Specific instances of learning from the LGO*

7.12.6. Respondents reported more changes having occurred as a result of LGO decisions than as a result of tribunal and court cases. This finding may in part be explained by the fact that respondents had significantly more experience of LGO cases than court cases and that only respondents in the SEN area were under the tribunal's jurisdiction. In general, respondents tended to minimise the importance of adverse LGO decisions, often suggesting that the issues criticised had been peripheral and not core to the complaint. It was also clear that the vast majority of instances of learning cited by respondents related to their own cases; cases published against other local authorities did not seem to have led to changes in practice. Table 7.3 below presents a summary of changes made as a result of LGO cases. As the table indicates, there were a range of different

responses following LGO cases, although by far the most common changes were individual feedback, the circulation of information about a case, and minor procedural and practice changes. There were no examples provided where LGO decisions had not been complied with. In addition to these specific examples of changes, several respondents mentioned a more difficult to identify influence of the LGO, whereby its presence - *'the ombudsman in the background'* (A4) - had a cumulative effect over time:

*'I do think we have had incremental change over time, as a sort of incremental response to a single case, and then further incremental response to a similar further case, which over time does result in quite significant changes.'* (L3)

Table 7.3: adverse LGO findings and types of response reported by respondents

<b>Adverse LGO findings</b>		
<i>Admission appeals</i>	<i>Admission and transport</i>	<i>SEN</i>
Procedural unfairness in conduct of IAP	Unclear guidance	Delay in reaching a decision
Unclear information provided to IAP	Misapplied policy	Specificity of statements
Inappropriate decision to quash IAP decision	Poor wording in letters	Poor communication between departments
Inadequate advice provided to IAP	Failure to consider Equality Act	Poor communication between authorities
Poor administrative system for issuing IAP decisions	Poor information/ communication	Arrangements for out-of-school children
Fairness of the block IAP appeal process	Communication and notice periods for policy changes	Failure to evidence decision-making
Failure to avoid perception of bias in conduct of IAP	Fettering discretion	
	Unclear process for measuring distances	
<b>Types of response</b>		
Individual remedies for the complainant		
Feedback provided to individual decision-makers		
Information about decisions circulated to staff		
Practices changed		
Guidance/ procedures amended		
Training conducted		
Reviewing similar cases		

## 7.13. The commitment of decision-makers to learning from the tribunal

### *Local authority respondents' perceptions*

7.13.1. Most local authority respondents expressed a commitment to using tribunal decisions to improve their decision-making and few rejected this out of hand: *'They're [SEN officers] very aware of those cases... and that feeds into their provision decisions'* (C6). Many respondents, however, were not wholeheartedly committed, seeing the tribunal as more of a necessary evil than an unmitigated good: *'If there is something that they can improve on they do take that up... I don't think anybody particularly likes the tribunals'* (T1). As we will see further below, some respondents' commitment to learning took on a very limited form, relating to improving their arguments in order to 'win' cases rather than learning in relation to the authority's broader decision-making: *'All we can do is to make it more difficult for even the most cantankerous panel to decide against us.'* (B4). Even where commitment to learning was expressed, as with the LGO, respondents were clear that the tribunal's work was not a great influence when it came to their decision-making: *'I don't think that decision-makers are thinking of tribunal... They have the evidence at hand and they have the experts at Panel that they can consult'* (L4).

### *Tribunal respondents' perceptions*

7.13.2. One respondent noted that the scope for learning from upper tribunal decisions was *'real but limited'*: *'But I think it's a relatively small part, in reality, of what a local authority... will be engaged in doing'* (TR3). Respondent TR3 went on to comment that the SEN area presented limitations in terms of whether learning was likely, both because the law was relatively simple and because there were so many different

organisations implementing it. TR3 felt there was greater scope for tribunals to influence social security decision-making:

*‘The SEN framework is far less detailed, in terms of actual legal provisions. I think a lot of the questions that arise are heavily influenced by the particular factual context... [also] where you’ve got all the local authorities with education functions appearing... one doesn’t have the same awareness of there being information sharing mechanisms among themselves’ (TR3).*

In relation to the tribunal, respondent TR2 commented on her experience of how local authorities had responded over time, particularly in relation to deciding what cases to defend: *‘They’re using their knowledge and experience of the tribunal to decide what they’re defending’ (TR2).* Respondent TR1 noted, however, that it was frustrating that local authorities seemed to take decisions late in the day on whether to defend cases or not: *‘They do look at the case, even if it is quite late. That is obviously extraordinarily frustrating for us’ (TR1).*

#### *Parent support organisations’ perceptions*

7.13.3. Although parent support organisation respondents were able to provide some limited examples of situations where local authorities had learnt from tribunal decisions, they expressed some scepticism about the extent to which they were generally committed to learning. Respondents P9 - P13 for example said: *‘I don’t think they learn. Because it seems that they are really so willing to pile money into, ‘Let’s go to tribunal’’ (P9 - P13).* Respondent P7 noted that she had experience of a case being upheld at tribunal one week, and an almost identical case being refused by the local authority a few weeks later. Respondent P15 felt that her local authority should be learning from the tribunal and that there was much

scope to do so, but that this was currently unrealised: *'I am not aware that [the local authority] actually analyse things like that'* (P15). P9 - P13 noted that even where learning from cases was disseminated, the information was not necessarily clear enough to influence practice: *'I don't know that necessarily the reasoning behind it, necessarily cascades to the bottom'* (P9 - P13).

7.13.4. In explaining why decision-makers might not always be committed to learning from the tribunal, respondents suggested that a tension between the statutory framework and what local authorities were resourced to deliver was important: *'They're not the same thing'* (P15). Another reason was organisational culture, with many respondents criticising local authorities for assuming that parents were making unreasonable demands in relation to their children: *'In an organisation you get convinced of the rightness of your own position... You start to decide that parents are pushy parents'* (P7). Respondent P7 went on to elaborate that the tribunal's basic stance, in line with the SEN legislation, was that need rather than resources should be the primary consideration, but that this was a message that had trouble getting through. Indeed, several respondents noted that decision-makers did not place sufficient emphasis on legal considerations in their decision-making: *'I think it's making sure that the local authority is working in terms of the law and not their interpretation of the law which suits them'* (P6). Respondents P1 - P3 saw a divergence in approach between local authorities' main decision-making tool (panels) and that of the tribunal:

*'The panels as I understand it are basically resourcing, aren't they? Whereas the tribunal is more of a legal thing in the sense of, 'What's our entitlements and what counts as legal evidence?''*  
(P1 - P3).

### *Specific instances of learning from the tribunal*

7.13.5. Respondents reported a number of changes that had occurred in light of tribunal cases. As with the LGO, changes reported related to respondents' own cases rather than those against other local authorities. The most commonly reported changes related to changes in practice defending and presenting cases at tribunal. There were very few examples given of where the tribunal had led to a change in practice, process or policy in terms of SEN decision-making. Respondents did report that the tribunal could lead to fairly major changes in provision over time. This tended to be largely a reflection of changing parental demands and developments in SEN education, with the tribunal potentially affecting local provision where it consistently agreed that certain types of provision ought to be made available to meet a child's needs. Interestingly, the only example of non-compliance cited in the course of the fieldwork occurred in relation to the tribunal, and this is discussed in more detail below. Table 7.4 highlights adverse tribunal findings which respondents reported had been made and shows that types of changes that were made as a result.

*Table 7.4: adverse tribunal findings and types of response reported by respondents*

<b>Adverse tribunal findings</b>
Refusal to over-admit child to a school that is full but is the parent's preferred choice
Inadequate joint working between departments and partner organisations
Over complexity of some educational and care packages
Calculation of comparative costs of provision between the authority's choice and the parent's choice
Weak evidence, poorly presented and defended cases
Inadequate professional reports
Inadequate provision
<b>Types of responses</b>
Changes in practice
Changes in approach to defending tribunal cases
Changes in approach to conceding tribunal cases
Changes in educational provision
Ambivalent response to cases involving comparative costs

*Example of limited compliance*

7.13.6. Many of the respondents who commented on the tribunal's decisions referred to those cases that involved comparisons of costs (see also the decision analysis). A particular case that was discussed in interviews was heard in the upper tribunal, [2011] UKUT 67 (AAC), and subsequently in the court of appeal, [2012] EWCA Civ 346, [2012] ELR 206. In brief, the case involved the question of what was a reasonable additional transport cost that local authorities should have to pay in order to meet parental preferences. While it was clear that its implications were

given serious consideration by local authorities, it appeared that they were generally unwilling to amend their transport policies as a result. This was because they felt the cost was prohibitive. Instead, it seemed that respondents had decided to maintain their current policies and deal with any cases that arose on a case-by-case basis.

7.13.7. Respondent C3 described the case and her authority's response in the following terms:

*'If it was a decision where we didn't think there was going to be that much cost implication, then we may accept that ruling and go with it. But I think in this case one of the things we will be doing is to look at what that cost implication might be' (C3).*

Respondent E3 noted that the tribunal's decision had led to a change in practice but the overall policy had not been changed:

*'Now when a case comes to panel and the parent doesn't want their nearest school, I have to have the costings before I can decide... I don't think we've changed policy though' (E3).*

The same case was commented on in some detail by respondents in Braan Council, where respondent B3 (a legal adviser) noted that the tribunal's approach was in conflict with the authority's policy and he advised that the safest course would be to amend the policy accordingly. Respondent B4 noted that, although the policy had been reviewed, a decision was taken not to amend it and to see how the issue played out in future appeals and challenges:

*'We decided to retain our present policy in relation to the nearest appropriate school. We may, and the premise of your*

*discussion today is about learning from experience, then if I go to tribunal and have my ears boxed presenting that kind of argument on more than one occasion, then I, battered and bruised, may have to come back and say 'Look, it's not working' (B4).*

#### **7.14. Decision-makers' commitment to learning from court decisions**

##### *Local authority respondents' perceptions*

7.14.1. Despite having the least direct experience of court decisions, respondents' comments often indicated that courts were potentially the most significant redress mechanism in terms of their decision-making: *'Courts are the most influential of the three... Though lowest in frequency [they are] sometimes highest in influence'* (T8). Indeed, respondents were generally positive about their commitment to learning from the courts, noting that important cases tended to be written into codes and become part of their practice: *'Any court decision could have an impact on not only the Code, but it could impact on what we would determine as an authority as a fair process'* (A3). Respondents were enthusiastic about the ability of judicial review to clarify the law and provide guidance: *'[Case law] will set the precedent and say, 'You must do this.' Then you can change your practice in accordance'* (L5). One respondent noted the influence of classic administrative law cases as well as cases that occurred specifically in the education area: *'We do have backgrounds of the Wednesbury rules...and various cases. We do have at the back of our heads easily-accessible case law'* (C2). In addition to actual judgments, respondent E6 noted that threats of judicial review had a significant influence on his local authority and provided great impetus to resolve cases: *'[Pre-action protocol letters] have quite an effect because, obviously, we want to avoid getting embroiled in that'* (E6).

### *Court respondent's perceptions*

7.14.2. Respondent AC1 said she had no knowledge of what happened following her decisions and how they were used by local authorities: *'Well, I think they would just have to go off and think about it... The only thing we know is if it's appealed or not appealed and we see some stuff in the newspapers that we look at very quickly'* (AC1). Asked whether she had any sense of what happened after cases left the courtroom, respondent AC1 responded: *'No, none at all, and we distance ourselves from people like that because we don't want to get into arguments'* (AC1).

### *Specific instances of learning*

7.14.3. Respondents provided limited data in relation to court decisions that had proved influential in terms of their decision-making and information that was provided was often vague. Nonetheless, some respondents did highlight changes that had been made following specific court judgments against other authorities, while others commented on responses to threatened litigation against their own. In terms of responses to specific judgments, one respondent commented on a case that had led to a change in wording used in standard letters in the transport area: *'We've taken the recommended wording from that particular case'* (C5). In the admissions area, many respondents referred to the importance of historic cases, which had now been written into the School Admissions Code and the School Admissions Appeal Code. These were widely seen as influential and introduction into the Code meant that there was clarity about the application of particular judgments. One respondent referred to a case that had had broad influence on the admissions area at the time, which involved the way in which local authorities should approach the issue of parental preferences: *'The Rotherham Judgment, which is going back quite a long time ago... That had quite an impact'* (T2). A local

authority lawyer (respondent B3) commented on an influential case which referred to the required specificity of learning difficulty assessments; this case had led to changes in the advice he provided to colleagues.

7.14.4. Respondents who commented about threatened litigation tended to be lawyers and emphasised that threats of judicial review and the receipt of pre-action protocol letters were influential in terms of achieving a resolution to the particular case being challenged. The cost of fighting cases, along with the fact that there was often at least some merit to the challenge, meant that threatened litigation was described as an effective way of changing a local authority's approach on particular cases: *'Usually what it does is it provokes dialogue between the two parties... [and] we will inch our way towards a solution that's somewhere in the middle'* (B3). The few respondents who commented on responses to threatened litigation tended to emphasise that these were pragmatic and involved a strong element of bargaining, along with consequential assessments of the costs involved in pursuing various courses of action. It appeared that decisions on how to respond to cases were often driven by costs or the potential for negative publicity, rather than an acceptance that the authority's original course of action had been wrong. One respondent implied that achieving resolutions in individual cases was a way of avoiding more widespread compliance with judgments; she referred to the approach in her local authority as *'damage limitation'*: *'The last thing we want is hundreds of people coming forward and challenging... that would cost us an arm and a leg'* (T4). A respondent (L6) in another authority, however, suggested that negotiated settlements could achieve broader changes in a local authority's policies. In one case, a possible breach of human rights law was identified which led to a re-appraisal of the policy in question in addition to a remedy for the individual.

## 7.15. Processes of organisational learning

7.15.1. Data presented in this section describe the processes of organisational learning used by local authority respondents. The data are shown using Huber's (1991) framework: knowledge acquisition, information interpretation, information dissemination, and organisational memory. Respondents tended not to distinguish between learning processes used for different redress mechanisms and, as a result, the data presented below relates to all redress mechanisms.

### *Knowledge acquisition*

7.15.2. Respondents were asked how they became aware of decisions taken by redress mechanisms against other authorities. Systematic, *ad hoc* and unsystematic approaches were reported.

7.15.3. *Systematic approaches.* Respondent B5 reported the most systematic approach to finding out about redress mechanisms' decisions. She brought a file of LGO decisions about other authorities to the interview and commented: '*We are aware of them.... We have got a file*' (B5). Another respondent noted that the manager in her team had specific responsibility for monitoring for decisions of redress mechanisms: '*She does a lot of work on looking at information that's come off the internet, news bulletins, making sure that anything [is picked up]*' (C3). Similarly, respondent E8 noted that she had responsibility for ensuring cases were identified and, in relation to the LGO, this tended to be done once a year when they published their annual reports.

7.15.4. Respondent C1 noted that the legal team had a responsibility for becoming aware of cases in her authority: '*The Legal Officer has a regular responsibility to do a monthly update*' (C1). Respondent L5 saw routine

monitoring for decisions by redress mechanisms as a part of her wider responsibility to keep aware of developments outwith the local authority. One respondent (T2) noted that there was a formal monitoring process for decisions at a corporate level in her authority. Another respondent noted that in addition to routine monitoring of cases, sometimes searching occurred as a result of having encountered a particular problem on which guidance was required: *'It also works the other way... you backtrack to something that's come from some guidance'* (C5).

7.15.5. *Ad hoc approaches.* A greater number of respondents reported that they had ways of finding out about decisions, but that these did not necessarily take the form of proactive monitoring and scanning for cases. Instead, information would arrive to them through a variety of sources and, while they felt that they did get to find out about cases, it was often acknowledged that this was *ad hoc*: *'To some extent we pick these things up. Heaven knows it isn't watertight'* (T7). Respondent L2 reported that she did occasionally look out for cases, but did not have time to monitor for cases regularly. When she did proactively look for cases, it would be in response to a particular problem she was trying to address: *'I don't have time to [monitor regularly] Well, I mean, if there's something with a specific issue, I may'* (L2).

7.15.6. Most respondents who reported a more *ad hoc* approach, noted that they tended to pick up information through colleagues and networking groups and, therefore, in a more reactive fashion. Respondent L1 referred to finding out about cases *'anecdotally'*. Respondents L3 and E2 noted that although various bits of information would reach them, there was not a formal process for monitoring: *'I wouldn't say it's systematic'* (L3); *'There's no formal way'* (E2). Respondents E5 and E6 also mentioned the importance of continuous routine dialogue between officers as an important process of acquiring knowledge about cases.

7.15.7. *Unsystematic.* Several respondents noted that there was either no system in place to monitor decisions about other authorities, or that they were unaware of any. Respondents L4, A6, C7 and T3, for example, made this point with the latter commenting that some form of monitoring would be a *'good idea'*. Another respondent noted that she did not have the time to look for cases: *'People have got so much to do that there is probably less time now for reading'* (C7). Respondent L1 commented that there were perhaps issues with the way in which information about tribunal cases was shared nationally: *'I certainly couldn't think of one where we sat up and we took notice. Maybe that's an issue about information-sharing'* (L1). Respondent L4 also made the point that more could be done to find out proactively about cases: *'Whatever is happening in other local authorities should be shared with us and vice versa'* (L4).

7.15.8. Table 7.5 below shows the top five sources of information through which respondents found out about redress mechanisms' decisions against other authorities.

*Table 7.5: top 5 sources of information about redress mechanisms' decisions cited by respondents*

Source of information about redress mechanisms' decisions	Number of times cited by respondents
Professional networking groups	27
Training	15
Email updates/ newsletters	9
Internet/ websites	8
LGO Annual Report	4

7.15.9. Table 7.5 shows clearly that the major source of information about decisions against other local authorities was professional networking groups. Training and various forms of email updates also rated highly in terms of sources of information. Email updates referred to included news bulletins from the LGO and legal or professional updates to which the local authority was signed up.

*Information interpretation*

7.15.10. There were two broad ways in which respondents described the process of interpreting information acquired from redress mechanisms. The first involved a process where the relevance, value, and practicality of judgments were unquestioned. Here, a single manager or member of staff in a specialist role, was responsible for establishing what needed to be

learned from decisions and then passing those messages on to others for implementation. The second approach saw compliance as more problematic, and involved widespread discussion of cases in order to determine their relevance and implications for the local authority. Here decision-making was not restricted to how to learn from decisions, but included whether and to what extent to do so.

7.15.11. *Single interpreter.* Respondent T8 noted that part of her role involved assessing cases and then making sure that any changes required were implemented by her team. This process involved changes being decided and then communicated to relevant staff. Respondent L2 noted that the process of deciding what should happen as a result of decisions by redress mechanisms was fairly uncomplicated: '*we just take it on board*' (L2). Respondent E8, referring to LGO and court cases, said that learning involved an immediate process of implementation: '*You just have to incorporate that straight away*' (E8). Respondent E1 noted that changes were made quickly following decisions: '*I think it's something that is dealt with immediately, the people involved are told about it and the processes are reviewed*'. Respondent L4, meanwhile, said that she was responsible for producing a summary of cases after every appeal, listing what went well and what went less well. She outlined what learning was required and then passed it on to others in the team: '*now, what they do with that, it's up to them*' (L4).

7.15.12. *Group interpretation.* A number of respondents reported that adverse findings against their authority, or significant cases against other authorities, would initiate a process of reflection and discussion amongst decision-makers and that this was the primary means by which the meaning and significance of cases would be interpreted. Some respondents noted that the first step would be in deciding whether they thought the redress mechanism's decision had been valid. Respondents T5 and E5,

referring to the LGO, noted that if they received an adverse ruling but felt that they had been correct in their actions and were not persuaded by the LGO's judgment, they would not consider making any changes. As noted above, Respondent B2 made a similar comment in relation to the tribunal's decisions, where a single decision in a single case would not necessarily be seen as persuasive.

7.15.13. Respondent C3 noted that an individual would be given responsibility for what should happen as a result of decisions, but that this would involve a wide process of consultation with a number of parties:

*'We make sure that one person co-ordinates it, but we go back round to all the people... "Can we incorporate that?" ... "Is this a possible change?'" (C3).*

A number of other respondents made the point that, in determining what should be done as a result of a particular case, questions were asked about how important it was, what its consequences were, and how feasibly any changes could be incorporated into the local authority's current practice. Respondent C5/ C6, for example, commented: *'What we do at the moment, rather than comply with it, is take notice of information that comes through and consider it really in our situation.'* (C5/ C6). Respondent B2 similarly commented that the process of deciding what to do with cases was one of careful reflection rather than simple compliance: *'We continue to be aware of such decisions, and reflect on them accordingly'* (B2). Respondents' comments in relation to assessing the validity of judgments were generally restricted to the LGO and the tribunal; the court's decisions were seen to require compliance regardless of their perceived merits.

7.15.14. Rather than decisions about what needed to happen being imposed on decision-makers, respondents C5/ C6 noted that frontline staff were involved in considering what should happen: *'Then we will discuss as a team. It's not from on high'* (C5/ C6). Respondent T8 similarly commented that decision-makers would be directly involved in discussing what should happen as a result of adverse findings: *'Frontline staff would be involved in the review'* (T8). This discursive element and the idea that group processes of discussion and sense-making were required to understand the potential impact of redress mechanism decisions, was reflected by a number of respondents who referred to holding a *'debrief'* or an *'autopsy'* following upheld cases. The approach to identifying areas for improvement and understanding their significance varied in relation to its formality. Respondent T6 described a very thorough process through which potential learning might be identified:

*'If we lose at a tribunal, or more to the point, if the LGO takes a dim view of what we are doing... What I do is I take the LGO report to my board... and we pull it apart... I tend to ask an officer to go away and say, 'Right, read the case, bring back lessons learnt.' If it is a really tricky case... I normally bring an outside person in to look at it for me'* (T6).

Others described the process through which discussions happened as much less formal, often because teams were small and discussions could happen over people's desks: *'it's funny how much information you gain by talking to each other'* (E5); *'There are a number of fora where we can have conversations... But I'm not sure I would be confident... [that] an agreed dataset is shared, and a strategic response is decided upon, in truth'* (L3).

### *Knowledge dissemination*

7.15.15. Various approaches were taken to the dissemination of knowledge. As noted in the preceding section, in many cases interpretation and dissemination of knowledge were connected - interpretation was a group exercise and shared meanings were developed through conversation. However, respondents also referred to a range of other means through which information was disseminated. In some cases, rather than group processes of reflection, information appeared to be passed on to decision-makers in order for them to reach their own conclusions. In other cases, more directive methods of dissemination, such as the use of training or specific process changes were used.

7.15.16. Often respondents referred to the circulation of written information to colleagues as a means of dissemination. In some authorities, these messages were the 'raw' information from redress mechanisms, while in others the information was the result of previous interpretation processes. One respondent, for example, said that all information would be passed on to colleagues as it was received: '*All cases go through. I don't filter anything*' (C6). Others, however, would provide more selective information: '*[An officer] reviews them on a weekly basis and prepares the update*' (C1). Respondent B2 referred to drawing out '*learning points*' from cases and disseminating these, while respondent C3 referred to changes required from cases being put in a '*procedural note*' that would be circulated. One respondent referred to dissemination as a process of leading through example: '*You disseminate it by demonstrating it*' (E8). Generally, it is unclear that processes of dissemination were particularly effective. Indeed, the data above on knowledge acquisition shows respondents in the same authority reporting different approaches to knowledge acquisition, which indicates that information may not be widely and clearly shared in all cases.

### *Organisational memory*

7.15.17. Few respondents referred to specific systems for storing knowledge that arose out of cases. Some kept paper or electronic files (C4 and B5). Most seemed to assume that tacit knowledge gained through discussions would be maintained within the collective consciousness of staff, or that changes embedded through process changes would be a sufficient record of learning that had been achieved. One respondent noted that discussions arising from important redress mechanism cases would ‘*permeate practice*’ and become embedded in the organisation’s routine approaches (E8).

## **7.16. Levels and variations in awareness**

### *Levels of awareness*

7.16.1. Table 7.6 below presents an overall summary of local authority respondents’ awareness levels of decisions taken by redress mechanisms against their own local authority.<sup>27</sup>

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<sup>27</sup> The same caveats apply to the data presented here as were noted for tables 7.1 and 7.2.

*Table 7.6: respondents' awareness levels of decisions taken by redress mechanisms against their own authority\**

	<b>Mean awareness of decisions*</b>
<b>LGO</b>	2.12 (33)** (high awareness)
<b>Tribunal</b>	1.96 (12) (high awareness)
<b>Court</b>	2.11 (9) (high awareness)

\* Respondents were asked to rate their awareness levels on the following scale: 1 = very high awareness; 2 = high awareness; 3 = fairly high awareness; 4 = neither high nor low awareness; 5 = fairly low awareness; 6 = low awareness; 7 = very low awareness.

\*\* The number in brackets represents the total number of responses to this question.

7.16.2. Table 7.6 provides a clear picture of respondents' awareness levels of decisions taken by redress mechanisms against their own authority: these were all in the 'high' range. Next, respondents were asked how aware they were of decisions taken by each redress mechanism against other local authorities around the country; this data is shown in Table 7.7 below.

*Table 7.7: respondents' awareness levels of decisions taken by redress mechanisms against other local authorities*

	<b>Mean awareness of decisions*</b>
<b>LGO</b>	4 (34) (neither high nor low)
<b>Tribunal</b>	4 (12) (neither high nor low)
<b>Court</b>	4.45 (29) (neither high nor low)

\* See table 7.6 above for information on how to interpret this table.

7.16.3. Table 7.7 above shows that respondents' average awareness of decisions taken by each redress mechanism against other local authorities was 'neither high nor low'. Comparing table 7.6 with table 7.7 above, a clear finding, as might be expected, is that respondents reported being more aware of decisions taken by redress mechanisms against their own authorities compared to decisions against other local authorities. This suggests, generally, a low level of confidence amongst respondents in the effectiveness of their organisational learning mechanisms and a limited commitment, in practice, to learning from cases against other authorities.

*Variations in awareness*

7.16.4. Qualitative data indicated that there were significant individual variations in awareness, related to the individual's level of seniority and the nature of the individual's role.

7.16.5. Indeed, several respondents reported that an individual's level of seniority within the organisation was likely to affect the degree to which they became aware of redress mechanisms' decisions. The more junior the staff, the less likely they would be to be aware. Awareness of the actual details and significance of decisions was more likely to reside with more senior staff. Respondent E1 noted that she would get informed of the outcomes of cases but not the reasoning for the decision: *'we wouldn't get any specifics about it'* (E1). Particularly in relation to awareness of cases that occurred in other local authorities, respondents noted that more senior officers were likely to be more aware: *'Obviously other officers higher up [would know more]'* (A5).

7.16.6. The degree to which an individual's role was operational rather than strategic, or specialised rather than generic, was commented on by some respondents to explain variations in levels of awareness. One respondent, with a specialist role dealing with complaints, commented: *'They [transport and admission officers] wouldn't obviously know it in the same way that I do... their role is so operational'* (L2). Another officer with a specialist complaints role commented in similar terms: *'When I was an operational manager... I'd never heard of the local government ombudsman'* (T7). Several respondents commented that officers were likely to be aware on a need-to-know basis: *'In terms of the wider office, if you like, that's a bit of information overload'* (B7).

7.16.7. Several respondents pointed out that, in relation to the LGO, staff who were 'link officers' (responsible for providing a central point of communication with the LGO) had higher levels of awareness. A similar point was made in relation to the tribunal, where legal advisers and officers who had a specialist role in relation to tribunal cases had higher levels of awareness: *'There was a key officer, who held all this information... at the point that they walked through the doors of the*

*tribunal. But other members of staff, in a wider staff group, who were interacting with parents on a day to day basis, did not necessarily know that'* (E8). Also in the SEN area, where administrators worked in collaboration with other professionals, several respondents commented that awareness was likely to vary: *'Other people on the panel, I think they are aware, but I don't think that's at the forefront of their minds'* (B1).

### **PART III: CHARACTERISTICS OF THE DECISION-MAKING ENVIRONMENT**

#### **7.17. Introduction to part III**

7.17.1. This part of the chapter describes the challenges, pressures, and influences that local authority respondents reported within their decision-making environment.

#### **7.18. Challenges and pressures affecting decision-making**

7.18.1. Respondents were asked whether there were particular challenges and pressures that affected the work of decision-makers; these fell broadly into the areas shown in table 7.8.

Table 7.8: challenges and pressures mentioned by respondents

All areas	SEN
<ul style="list-style-type: none"> <li>• Changes in demand for services</li> <li>• Volume of work</li> <li>• Resource pressures</li> <li>• Parents becoming more demanding and difficult to deal with</li> <li>• Use of legal representation by parents</li> <li>• The impact of central government policy changes</li> </ul>	<ul style="list-style-type: none"> <li>• The commissioning of independent reports by parents</li> <li>• Working with health professionals</li> </ul>

*Changes in demand for services*

7.18.2. Some respondents reported pressure on their admissions teams from growing numbers of children. Respondent T6, for example, reported that Tummel Council had one of the country’s fastest growing pupil populations. Respondent C7 reported a similar issue and stated that: ‘*The thing calling for attention at the moment is the growing number of children*’ (C7). In the SEN area, a number of respondents referred to changing local needs amongst children providing a challenge for the local authority: ‘*We’re seeing a big growth in a requirement for specialist provision... the authority is playing catch-up*’ (E6).

*Volume of work*

7.18.3. Linked to the issue of changing demand for services, many respondents referred to the volume of work they had to deal with as constituting a significant pressure. Respondent E7, who worked in the

admissions and transport area, said: *'We have lots and lots of appeal dates set up... So therefore letters aren't being answered, and we have more and more angry parents.'* (E7). High volumes of work were influential in determining the kind of service that the local authority was able to provide to parents: *'When you've got 17,000 applications coming through... it's very hard to keep that level of 'We're doing well'* (E5). This theme was picked up by respondents in other authorities, who pointed out the seasonal spikes in work in the admissions area in particular which could lead to very pressured periods of decision-making. Similar comments were made in relation to the SEN area: *'Volume does make a difference'* (E6).

#### *Resource pressures*

7.18.4. It was noted above that resourcing played an important part in local authority decision-making, however, many respondents said this had become acute as a result of cuts in public spending. Lack of resources meant that it had become difficult to implement policy in line with central government rhetoric: *'I think the rhetoric from the government implies that local authorities should have all these things available, but we don't'* (A1). Respondent A6 noted that it had become difficult to fulfil basic tasks: *'Would you like my desk? My computer? I will just do it by telepathy'* (A6). The recession also meant that parents were asking for more resources than they otherwise might have done: *'There has been a definite correlation between the recession and the number of people appealing'* (C3).

#### *Parents becoming more demanding and difficult to deal with*

7.18.5. Many respondents mentioned that difficult behaviour on the part of some parents was a challenge. There was a widespread view that

decision-making around educational entitlements was highly emotive: *'People are very passionate... they want the best school for their child'* (E7). Respondent C2 said admission to a particular school could become a matter of *'life and death'* for parents. Parents were described by respondents as being vigorous in the pursuit of what they wanted and increasingly knowledgeable about how to obtain this: *'The majority of them know their rights, they are very articulate'* (T5). Knowledgeable consumers presented a challenge for administrators: *'I welcome it as a problem, but it is hugely time consuming'* (T6). Respondent L1 commented about parents in her area that: *'They've basically got their appeal papers ready from the minute they haven't got the decision they want'* (L1). As well as a greater propensity to appeal or complain, respondents noted that parents were more knowledgeable about their children's entitlements: *'Parents have been reading this, 'How to win your admission appeal' book'* (C7).

7.18.6. A number of respondents mentioned the challenges caused by a small number of parents who were - rather than just demanding - unreasonable. Respondent T6, for instance noted that: *'We have some parents who are very, very unreasonable, and aggressive, and unpleasant, and difficult'* (T6). A respondent from Earn Council noted that *'people's mentality in this day and age is still a case of he who shouts the loudest gets what they want'* (E5), while a colleague reported that *'we have a lot of angry parents... which can cause quite a lot of pressure'* (E7). Although respondents were often clear that parents had the right to pursue their child's interests, it appeared that distinctions were sometimes made between individuals with 'genuine' grievances and others. There was a widespread view that genuine grievances were few and far between, compared to those who were pursuing issues unreasonably, which made deserving cases harder to identify: *'There are inevitably some where you have quite a genuine parent who actually has very genuine reasons, but*

*they tend to end up getting treated a bit like everybody else'* (L1). Respondent T6 said that it could be hard to tell the difference between cases once *'the heat of battle takes over'*.

#### *Use of legal representation by parents*

7.18.7. A number of respondents noted the greater propensity of parents to use legal representation to challenge decisions: *'There are companies that are coming out of the woodwork for profit to give advice on admissions'* (T5). Respondent C7 noted that: *'We get parents now who will bring in consultants, barristers, solicitors'* (C7). In the SEN area, there was a widespread view that the use of legal representation by parents had increased: *'With SEN we have three or four firms that we constantly interact with, who market themselves as SEN specialists'* (T4). One respondent noted that the use of legal representation by parents could make it more difficult to resolve cases: *'It's not in their interests to reach an easy resolution'* (L1).

7.18.8. A respondent from Braan Council noted that there had been a *'culture shift'* in the use of representation at tribunals: *'When I first started, the involvement of solicitors was very much a minority activity'* (B4). Local authorities were seen as having become more legalistic to keep up with parents: *'Officers are struggling against... parents with legal representation'* (C2). Most of the respondents who mentioned the issue of increased representation portrayed this phenomenon in a negative light, with particular concerns that parents were being exploited by unscrupulous legal firms: *'Some solicitors perhaps don't do parents justice on some of the cases'* (T1).

### *The impact of central government policy changes*

7.18.9. A number of respondents referred to the impact of changes in central government policy as creating challenges for their work. The academy and free schools programmes were seen as making lines of responsibility and decision-making more complex. Respondents also cited other examples, such as the remit given to the Education Funding Agency (EFA) to deal with complaints about academies: *'The problem now is we're getting into this very confused state of 'Does it go to the Ombudsman or does it go to the EFA?'* (A3). Several respondents referred to challenges that arose from amendments to the Admissions and Admission Appeal Codes: *'That tends to be where the most guidance gets issued and reissued'* (T4). Respondent A6 noted that guidance *'chops and changes every five minutes'*.

7.18.10. Respondents also felt that changes to the rules governing admissions could bring about increased workload and lead to unpredictable long term results: *'There was no idea of the bombardment of the number of applications that we would receive'* (E5). Another respondent noted that while the changes to the Admissions Code would give schools more flexibility to over-admit, it would also store up future problems as she predicted that parents would eventually start complaining if classrooms were too full: *'...schools are going to find it difficult, and eventually parents will find it difficult'* (C7). Finally, lack of clarity in the guidance available from central government was cited by some respondents: *'The codes of practice are clearly written by somebody in Whitehall who doesn't do the actual job'* (A4).

### *The commissioning of independent reports by parents*

7.18.11. A major challenge reported by respondents in the SEN area related to countering professional expert reports commissioned by parents. These were one of the tools parents were increasingly using to ensure that they achieved their desired outcomes: *'If they [parents]... are able to pay for independent professional reports to say what they want, then they are more likely to get the decision they want'* (L1). This was referred to as a consumerist process where parents could buy reports *'off the shelf'*, that all said more or less the same thing: *'You could probably... put together two or three reports and there would only be slight differences'* (T3). Respondent E8 said that private professionals were *'being commissioned to recommend over-provision'*, and this made it harder to counter the view that the local authority would only provide the minimum. One respondent also noted that some private practitioners brought questionable ideological preferences into the equation: *'There are some professionals out there that are either unethical or completely removed from reality'* (L4).

### *Working with health professionals*

7.18.12. Working with professionals in the health and social care area who were not directly employed by the local authority was seen as a challenge by a number of respondents: *'They're a bit less keen to get involved in a tribunal situation'* (B1). Respondent T3 noted that the quality of reports being provided by health professionals was often inadequate, with a *'lack of detail in the professional reports, [and] sweeping statements from medics'* (T3). Respondent L4 noted that NHS professionals were often not as prepared for the tribunal process as private practitioners: *'We have very, very good professionals but they're not professional witnesses,*

*whereas... what I call 'A Teams' on the other side... They practically live at the tribunal' (L4).*

## 7.19. Internal and external influences on decision-making

7.19.1. Respondents were asked to describe any internal and external influences on their decision-making. Some of the pressures and challenges described above could also have been categorised as influences and it is recognised that there is some fluidity between these categories. The key difference is that influences could affect decision-making without necessarily being seen as challenging: the influence of colleagues, for example. Table 7.9 outlines the main influences referred to by respondents.

*Table 7.9: main influences on decision-making cited by respondents*

All areas	SEN
<ul style="list-style-type: none"> <li>• Legislation</li> <li>• Codes</li> <li>• Internal and external colleagues</li> <li>• Elected members</li> </ul>	<ul style="list-style-type: none"> <li>• Legal advice</li> <li>• Local charities</li> </ul>

### *Government legislation and codes*

7.19.2. By far the most frequently cited external influence by respondents was the legislation which governed their decision-making and, particularly, the codes that accompanied the legislation in the admissions and SEN areas and the guidance issued for transport. In the admissions area, the Admissions Code was a strong influence: *'That would be our first point of reference in any decisions that are made'* (A6). Despite the broader scope for discretionary decision-making in relation to SEN,

respondents also described the centrality of legislation and the SEN Code of Practice as an influence on their decision-making: *'The Education Act and the Code of Practice... Of course, I'm guided by those two main pieces of regulation'* (L4).

#### *Colleagues inside and outside the local authority*

7.19.3. Officers in all decision-making areas referred to the existence of various regional officer groups which met to discuss professional issues in relation to their decision-making areas and which exerted a *'professional influence'*: *'Whether that is just email contact, or else formal contact through things like the Transport Officers Group, or else attendance at an annual admissions get together'* (B2). Within their local authorities, respondents frequently cited other teams and departments as influences on their decision-making and this seemed to reflect the interdisciplinary nature of decision-making, which required input from various sources: *'They're all impacting on and giving us information to go towards making a decision'* (A3). In the SEN area, the importance of the broader multi-disciplinary team was emphasised by several respondents: *'I need to work in a collaborative way with... the Health Service and also Social Care or Social Services'* (L4). One respondent noted that colleagues in other areas were not only important but, in relation to the provision of professional advice, were crucial to the decision-making of SEN panels: *'It's still very much on the position or the evidence and views of the professionals. Not anything far broader than that'* (L1).

#### *Elected members*

7.19.4. Elected members were seen by a number of respondents as influential, with one respondent describing the influence of elected members as twofold: *'One is... fighting for their constituents, then the*

*second obviously is in terms of... the policies that the councillors or executive members want to set'* (T8). Respondents referred to receiving significant correspondence from elected members: *'The councillor and MP involvement is far greater now'* (B5). Respondent E8 noted that the pressure from elected members in her local authority came more from their desire to ensure budgets were under control and that spending was kept down: *'When you're the decision maker.. you are the profligate or the parsimonious. As far as the elected members are concerned you are the profligate'* (E8).

#### *Legal advice*

7.19.5. Respondents described legal advice as an influence on their work: *'The law is always subject to interpretation as well. So it is a case of just seeking advice'* (E3). Several respondents noted that they would only seek legal advice in relation to the most complex and potential high cost cases. They pointed out that their authorities experienced high levels of appeals and, therefore, that SEN officers tended to be well informed in relation to any legal issues. One respondent (a solicitor) noted that: *'I am there when they hit a bit of an obstacle I suppose'* (B3). Another respondent said that interaction between the legal department and the SEN team tended to be around judicial review applications. Generally, however, advice was only sought on cases that had been challenged and it was rarely sought in relation to routine decision-making.

#### *Local charities*

7.19.6. Several respondents noted that local charities and parent organisations could have a significant influence on their decision-making: *'The local ASD support group... is very influential* (E3); *'I think that*

*organisations like... the local branch of the National Autistic Society, they will influence every resource in your policy' (E8).*

## **7.20. Chapter summary**

7.20.1. This chapter has reported the empirical findings of the research and presented data relating to the operation of redress mechanisms, bureaucratic decision-makers and their decision-making, and the decision-making environment. The following chapter will discuss the significance and value of these findings in understanding the factors responsible for the exercise of bureaucratic control by redress mechanisms.

## 8. DISCUSSION

### 8.1. Introduction

8.1.1. This chapter seeks to identify the principal contribution that the thesis has made to existing empirical and theoretical understandings of whether, to what extent, and how, redress mechanisms control bureaucratic decision-making. Based on the empirical data, it will identify 14 factors, each with a set of supporting propositions, for explaining the presence or absence of bureaucratic control by redress mechanisms.

8.1.2. In reading this chapter, a few points should be noted. In keeping with the aims of the thesis (see chapter 6), the data's main contribution has been to provide the empirical prompt for the refinement of existing frameworks and the development of further hypotheses. The 'propositions' set out in this chapter should, therefore, be seen as hypotheses in the common sense of the word - suppositions to explain known facts based on limited evidence (Walliman 2010) - which aim to provide a basis for future research. It should also be noted that in reducing a mass of data for reporting purposes, and then seeking to articulate overall trends, an element of simplification is unavoidable. The chapter, therefore, seeks to simplify reality sufficiently to allow for meaningful analysis, at the same time as seeking to avoid losing sight of the inherent complexity of the social phenomena being examined.

8.1.3. The chapter is in three parts, following the same structure as chapter 7.

## **PART I: THE CHARACTERISTICS OF REDRESS MECHANISMS**

### **8.2. Introduction to Part I**

8.2.1. This part of the chapter discusses the characteristics of redress mechanisms and identifies two clusters of factors: the first relates to the nature and quality of redress mechanisms' decisions, and the second to redress mechanisms' approach and mode of operation.

### **8.3. The nature and quality of redress mechanisms' decisions**

*Factor A: the nature of cases being reviewed by a redress mechanism*

8.3.1. The question here relates to whether there is intrinsic scope, in the cases referred to them, for guidance on good administration to be provided by redress mechanisms. Using Dunsire's (1979) terminology, the ability of a redress mechanism to act as a 'director' is reliant on the existence of cases which allow for direction to be provided in the first place. Since redress mechanisms rely, for their 'detector' (*ibid.*), on citizens referring cases for review, it is important to be clear about the types of cases that are subject to control oversight. The data collected in this thesis suggests that, in the local authority education context, the cases referred to redress mechanisms present some limitations on their ability to provide meaningful guidance to decision-makers.

8.3.2. In relation to the LGO, local authority respondents often referred to cases as being weak, focused on peripheral issues, and not applicable to their own local context. Echoing Van de Pol's (2009) experience, cases were frequently seen as limited to individual circumstances, requiring only procedural tweaks, and providing little opportunity for the identification of broader principles. In relation to the tribunal, a strong finding was that

local authority respondents felt the cases that were appealed were most often about resource allocation rather than the quality of decision-making. As a result, learning from the tribunal was generally limited to improving how cases were conceded and defended. The data on judicial review suggested that decision-makers considered cases referred to the court to have more scope for generating substantive learning: court cases were perceived to have the potential to lead to large scale changes in policy and practice.

8.3.3. The volume of cases being reviewed by redress mechanisms was also seen as important. Some local authority respondents suggested that the low volume of LGO cases meant that there were limits to its influence. Interestingly, however, matching Platt *et al's* (2010) finding, the low volume of court cases was cited as a reason for their increased potential to have a major influence. At the same time, some of the local authority respondents were blasé about the significance of the tribunal, which was seen as a routine process to which they had become habituated. One suggestion, therefore, might be that familiarity breeds contempt when it comes to decision-makers' interactions with redress mechanisms. This may explain Loveland's (1995) and Halliday's (2004) findings in relation to non-compliance with judicial review, where high volumes of cases were reviewed by the courts. It may also explain why in some of the most important areas of bureaucratic decision-making consistently high levels of upheld tribunal cases have not improved decision-making (Thomas 2015). In this view, the shock value of redress mechanisms may, therefore, depend on cases being isolated enough to take decision-makers by surprise and to disrupt routines. This argues against the assumption that the isolated nature of redress mechanism cases represents a limit on their bureaucratic control functions (Rawlings 1986).

8.3.4. On the other hand, while the isolated intrusion of redress mechanisms may heighten their impact in individual cases, it seems clear that - in order to exercise routine control over administration - a reasonable volume of cases must be subject to review. In relation to Feldman's (2003) and Dunsire's (1979) identification of three elements of control - the correction of error (directing), the limitation of excess (limitation), and the capacity to change the world (structuring) - error correction and the limitation of excess is only possible where cases are challenged in the first place and in sufficient numbers. The structuring dimension of control is less reliant on a high volume of cases, however, the issue here also relates to the quality of the cases being challenged. As Mulcahy (2013) has argued in relation to the civil courts, in the context of the increasing use of Alternative Dispute Resolution, there is a need to ensure that significant cases are allowed to reach formal adjudication.

8.3.5. So the question of volume is a complex one. For control to be exercised across all its dimensions, a reasonably high volumes of cases will be necessary. At the same time, high volumes may lead to bureaucratic inertia, whereas lower volumes of cases may present shocks to the administrative system that can catalyse change. Hood's (1995) 'contrived randomness' model of control is relevant here: control is predicated on the fact that administrators never know which cases are likely to be challenged. Looked at in this way, the random and occasional nature of cases may be part of what allows redress mechanisms to exercise effective control, rather than a limitation on their effectiveness. Nonetheless, even if this point is accepted, it remains necessary for decision-makers to be at sufficient risk of random control and, as a result, it is likely that receipt of a certain volume of cases will remain important.

8.3.6. The question of case volumes is also important to the overall design of the administrative justice system (Bondy and Le Sueur 2012, Le Sueur 2012). The data in this thesis indicate that redress mechanisms are in

competition with each other for grievances and that the presence of one redress mechanism (particularly a tribunal) may limit the extent to which other redress mechanisms are able to perform a control function. The opportunity to have a decision reconsidered on its merits by a tribunal is likely to be the most attractive option for most citizens with a grievance. As a result, the courts and the ombudsman may be left to deal with only a small selection of issues, often at the periphery of administration. This division of labor between redress mechanisms is significant, because each mechanism is controlling a different aspect of bureaucratic decision-making (maladministration, legality, and merits). This represents a failure to take a ‘horses for courses’ approach to administrative justice, where cases are matched with the most appropriate means of dealing with them (AJTC 2012).

8.3.7. Box 8.1 below summarises the propositions advanced in this section.

*Box 8.1: propositions relating to the nature of the cases being reviewed by a redress mechanism*

- i. Cases received by redress mechanisms must contain the potential for principles of good administration to be developed.
- ii. A reasonably high volume of cases is required for redress mechanisms to perform effectively the ‘directing’ and ‘limiting’ aspects of their control functions.
- iii. A low volume of cases allows for the exercise of ‘structuring’ control, but where volumes are low, the intrinsic potential of cases for the development of principles of good administration becomes more important.

- iv. For redress mechanisms to harness the potential of ‘contrived randomness’, there must be a realistic chance of routine decision-making being challenged.
- v. The presence of a tribunal in an administrative setting is likely to restrict the flow of cases to other redress mechanisms, leading to some aspects of decision-making being more subject to control than others.

*Factor B: the nature of the principles of good administration put forward by redress mechanisms*

8.3.8. The key questions here are (a) whether redress mechanisms’ decisions provide guidance about good administration and (b) if they do, which model of administrative justice decisions conform to.

8.3.9. Even where cases are amenable to the development of principles of good administration, their potential may not be realized. Halliday’s (2004) analytic framework suggests that the clarity, consistency, and coherence of the principles of good administration being propounded by redress mechanisms are conditions for the achievement of compliance; however, a pre-condition must be that redress mechanisms issue such principles in the first place. While there may be an assumption that principles are developed by courts through the operation of precedent in common law, there has been little discussion of the extent to which tribunals (Buck 2006) and ombudsman schemes (Gill 2012, Langbroek and Rijpkema 2006, Langbroek and Remac 2012, Remac 2013) are involved in this activity. This thesis’ decision analysis found that the published cases of redress mechanisms provided useful, if not transformational, guidance on

principles of good administration. With regard to LGO decisions, the issues raised across all the cases in the sample amount to a reasonably comprehensive set of directions on the requirements of good administration. In terms of the upper tribunal's decisions, the decision analysis showed a narrower emphasis on clarifying the specific SEN statutory framework, with less emphasis on matters of routine administration and a greater difficulty in identifying clear directing principles in a number of cases. In relation to the courts, the data suggest that, although very few in number, decisions have clarified the interpretation of legislation and provided guidance on good administrative practice.

8.3.10. The results of the decision analysis are somewhat at odds with the views of administrators themselves who, as noted above, tended to see the cases being considered by redress mechanisms as inherently limited. This may be explained by the fact that the decision analysis considered only published cases, which were more likely to raise significant issues, whereas respondents' views were based on their experiences of dealing with routine cases. This is important, because the research found that administrators were much less likely to know about cases against other authorities than they were to know about their own cases (see factor K below). While upheld cases against respondents' own authorities were likely to have involved redress mechanisms performing a 'directing' and 'limiting' control function, it seems probable that the most important 'structuring' decisions will have been those that are reported. And these cases were those that were least likely to be taken note of by decision-makers.

8.3.11. This section now discusses the data in relation to the models of administrative justice described in chapter 2. Sainsbury (2008) and Buck *et al* (2011) have argued that Mashaw (1983) and Adler's (2003) models can

also be applied to redress mechanisms, as well as primary decision-making in bureaucracies. This approach is followed here in order to analyze which models of administrative justice were seen to feature in redress mechanisms' decision-making and to get a clearer sense of the particular type of 'direction' which redress mechanisms were involved in issuing. In relation to the tribunal and the LGO's decisions, a clear finding was that local authority respondents saw them as focused on the individual needs of complainants and as taking a 'pro-parent' stance. Generally, redress mechanisms were seen to prioritize and favor individual interests and notions of individual justice over those of the broader community (*c.f.* Tweedie 1989). Their focus on individual injustices meant that their decision-making was perceived to conform to a quite different logic to that which guided bureaucratic decision-making.

8.3.12. While some respondents considered that this individual focus provided a helpful and acceptable corrective to the collective focus of day-to-day administration, some respondents (especially commenting on the tribunal) reacted strongly against it, finding it to be 'immoral'. As will be discussed further below, there was a very strong 'clash of values' (Richardson and Machin 1999, 2000) between the dominant models of justice endorsed by redress mechanisms and decision-makers. The latter saw the citizens who 'shouted loudest' getting provision which could not be made routinely available to others, with redress mechanisms facilitating this. In relation to both the court and the tribunal - in addition to perceiving a highly individually focused approach - respondents perceived a strong and foreign concern with legality.

8.3.13. As may be evident from the discussion so far, the focus on the individual case and the application of rules with a view to securing the fair treatment of the individual, fits strongly with Mashaw's (1983) 'moral judgment' model of administrative justice. It also fits with other models

which can be seen to have equivalence to Mashaw's model, such as Adler's (2003) 'legal judgment' model, Kagan's (2010) 'adversarial legalism' and Galligan's (1996) 'administrative justice' model. It may have been expected that the tribunal's model of justice - since it includes professional membership - will have included strong aspects of the 'professional treatment' model. However, there was little suggestion that the tribunal was significantly influenced by the professional judgment of the education member.

8.3.14. In relation to the LGO, a strong finding was that, in addition to operating to a primarily 'moral judgment' model of administrative justice, it also shared an outlook which was closer to that of administrators. Indeed, the LGO was described by some respondents as having shared values and a common purpose. Perhaps as a result of the LGO's inquisitorial approach or the fact that it is staffed by bureaucrats and operates as a traditional bureaucracy, the LGO appeared to be more sensitive to bureaucratic concerns and to arguments about the collective interests of public administration. The association of the LGO with bureaucratic perspectives meant that its primarily 'moral judgment' model was often tempered by the existence of the 'bureaucratic rationality' (Mashaw 1983), 'bureaucratic legalism' (Kagan 2010) and 'bureaucratic administration' (Galligan 1996) models of administrative justice.

8.3.15. Perhaps as a result of this ability to work across these competing perspectives, the LGO was also described as being able to reach negotiated settlements with authorities. Such outcomes could be seen as the reaching of an accommodation between individual and collective interests, and between the requirements of good administration and those of efficient administration. This also suggests that the LGO's approach contains elements of Kagan's (2010) negotiation model of decision-making, involving a quite different approach to the solely adjudicative approach of

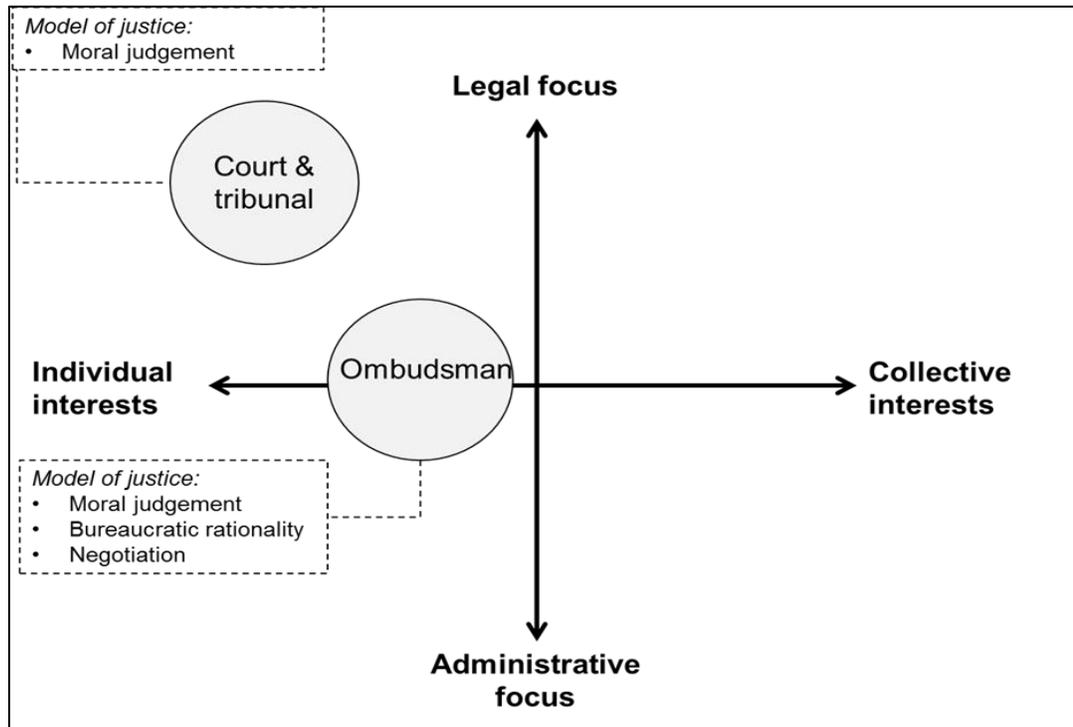
courts and tribunals. The possible effects of adopting a negotiated approach in some cases are considered further below.

8.3.16. The importance of establishing the dominant model of administrative justice to which redress mechanisms conform is that previous work (Halliday 2004, Richardson and Machin 2000) provides a strong suggestion that rival normative frameworks are a significant impediment to the achievement of administrative change. Therefore, the first step in assessing the potential for normative conflict between redress mechanisms and administrators is to be clear about the nature of the normative principles propounded in the decisions of redress mechanisms. This point is also emphasized in Hertogh's (2001) work, which suggests that the degree of 'policy tension' between redress mechanisms and administrators is a key factor in determining whether or not changes in administrative practice occur.

8.3.17. This suggests that, at least at a theoretical level, the fact that the LGO was perceived to incorporate a greater variety of models of administrative justice and to have a willingness to understand and to compromise with bureaucratic perspectives, may reduce the amount of policy tension between it and decision-makers. If this is the case, and if it is correct that such normative conflict is a major barrier to the exercise of bureaucratic control by redress mechanisms, then it is likely that the LGO will be in a better position to exercise such control than the court and the tribunal.

8.3.18. Figure 8.1 below summarises the models of administrative justice adopted by redress mechanisms.

Figure 8.1: matrix showing the position of redress mechanisms' between contending forces (individual-collective and law-administration) and identifying their models of administrative justice



8.3.19. Figure 8.1 not only shows the models of justice with which each redress mechanism is associated, but also places these in the context of what this thesis sees as the main contending forces which shape the bureaucratic environment: the struggle between individual and collective interests and between law and administration. Situating each redress mechanism within the resulting matrix created by these contending forces allows for a more precise sense of their normative positioning. This will also allow for greater clarity when the thesis turns to the models of justice operating in relation to bureaucratic decision-making (see factor H below).

*Box 8.2: propositions relating to the nature of the principles of good administration put forward by redress mechanisms*

- i. The decisions of redress mechanisms must provide guidance to decision-makers in relation to good administration.
- ii. To reach decision-makers (given their relative lack of awareness - see factor K below), the provision of guidance must take place in the course of decisions on unreported cases, as well as in those which are selected for reporting.
- iii. The decisions of tribunals are more likely to be restricted to the clarification of legal positions within sector specific statutory frameworks, whereas the decisions of courts and ombudsmen are more likely to provide general guidance on good administration.
- iv. Redress mechanisms are likely to conform primarily to the moral judgment model of administrative justice, although ombudsman schemes have the potential to draw on a wider range of models, including bureaucratic rationality and negotiation.
- v. The bureaucratic environment is principally shaped by the struggle between two principal sets of rival forces - individual and collective interests, and law and administration - and differences between redress mechanisms and between redress mechanisms and bureaucracies can be most clearly defined in these terms.
- vi. The closer redress mechanisms and decision-makers are to each in terms of their models of justice and their location on the individual-collective and law-administration matrix, the less

resistance there is likely to be to the exercise of control by redress mechanisms.

*Factor C: the quality of the decisions taken by redress mechanisms.*

8.3.20. Three main aspects arose from the data in relation to the quality of the decisions taken by redress mechanisms. Two of these already feature in Halliday's (2004) analytic framework and relate to the clarity and consistency of decisions. The third relates to how administrators perceived the merits of redress mechanisms' decisions.

8.3.21. In terms of clarity, a strong trend is evident from the decision analysis and the responses of local authority respondents: LGO decisions were seen as clearest, followed by the tribunal's, followed by the court's. Overall, respondents perceived the decisions of all redress mechanisms as 'clear' or 'fairly clear'. This is perhaps surprising given previous assessments of the clarity and consistency of administrative law (Halliday 2004) and this thesis' own decision analysis, which suggested that administrators would be likely to struggle with the legal language of court and tribunal decisions. Indeed, some respondents did comment on the difficulty of legal terminology and there was some support for Wasby's (1970) suggestion that the technicality of language in decisions constitutes a barrier to impact and Hume's (2009) finding that the language of judgments is an important factor in the degree to which they are adopted by other decision-makers.

8.3.22. There is, of course, a difference between understanding the plain text of a judgment and understanding its underlying principles (Sunkin 2004). There was some evidence that respondents struggled with this and that drawing lessons from one context to another could be challenging. There was also evidence that decision-makers tended to see some of the

stances set out by redress mechanisms in reductive ways. For example, the criticism put forward by some respondents that redress mechanisms were ‘pro-parent’ could be seen as a rather dismissive means of understanding the way in which redress mechanisms emphasised the consideration of fairness in the individual case. Some decision-makers interpreted this stance as one of inherent bias, rather than seeming to get to grips with what redress mechanisms were signaling about the need for fair individual treatment.

8.3.23. Generally, the decision analysis found considerable variations in the way decisions were presented. LGO decisions were written in the most accessible way for a lay audience, while tribunal and court decisions were written with a legal audience in mind (*c.f.* Langbroek *et al* 2015). A point that applied across the board was that decisions did not seem to be written with the purpose of influencing decision-makers, reflecting the ambivalence expressed by redress mechanism respondents about fulfilling such a role (see factor G below). There is of course a question about whether court decisions need to be presented in a way that can be understood by lay people; as Harlow and Rawlings (2009) have pointed out, there is a community of legal commentators and advisors who can help extract principles from cases and provide the interpretative community in which judgments are understood. While this is the case, the findings of this thesis suggest that administrators do not have particularly close relationships with their legal advisors (see factor K below).

8.3.24. It seems unlikely, therefore, that reliance on lawyers to interpret and disseminate principles from legal judgments will be sufficient if the aim of courts is to achieve proactive, structuring control over administration. The focus in the literature on the impact of courts, especially where scholars have been working in a legal tradition, has tended to be on whether administrators have the legal skills to understand judgments rather than on whether judges have the communication skills to

clearly explain decisions to the various audiences that might require to know about them. This point is important and the way in which decisions are written, the audiences they are imagined to be written for, and the means with which they are communicated have tended to be neglected areas in existing literature (Hall 2011).

8.3.25. The LGO stands out in relation to other redress mechanisms in that it is able to supplement its reported decisions with a range of approaches to disseminating principles of good administration. Its ability to produce thematic reports and to reflect annually on trends, allows greater scope for the explicit development of principles and guidance. The LGO's *Axioms of Good Administrative Practice* and its *Focus Reports* spell out points of good practice in ways which are likely to be clear to bureaucratic audiences. Some of the work of the LGO can therefore be seen to have addressed criticisms about the readability and usefulness of ombudsman reports (Drewry and Harlow 1990). In addition to written communication, the LGO offers training to local authorities in complaint handling and its officers occasionally engage with local authority networks.

8.3.26. Partington and Kirton-Darling (2007), referring to tribunals, suggested that there are three ways beyond the publication of individual decisions in which redress mechanisms could provide feedback to decision-makers: official reports; direct communication; and informal contact. As will be clear from the above discussion, only the LGO's activities operate across this spectrum of feedback, with the tribunal's feedback capacity having actually decreased over time. Indeed, the latter went from publishing all tribunal decisions in an online database to publishing none and from having a stand-alone annual report to having only a section in a wider annual report prepared by HMCTS.

8.3.27. While the range of approaches to dissemination open to the LGO is a clear advantage, the LGO can be criticized for failing to make explicit

use of its own *Axioms of Good Administrative Practice*. LGO respondents reported never having used them as part of their investigations, and the decision analysis also found no reference to them. This finding is similar to that of Langbroek and Rijkema (2006) who found that the Dutch National Ombudsman failed to explicitly draw out and use principles of good administration in its decisions. Nonetheless, the LGO can be seen to have a wider range of tools at its disposal with which to seek to influence administrators.

8.3.28. In terms of consistency, local authority respondents reported a similar pattern to that examined above in relation to clarity - LGO decisions were seen as the most consistent, followed by the tribunal, followed by the court. Overall, decisions were considered to be in the consistent to fairly consistent range for all redress mechanisms. Where administrators seemed to have more trouble with redress mechanisms' decisions was in terms of their merits. Here, a number of local authority respondents expressed the view that, while they found decisions clear and consistent, the problem was that they did not agree with them.

8.3.29. In relation to the LGO, some respondents considered that investigators could make mistakes and that they were not always sufficiently expert in the areas being reviewed. In the case of the tribunal, the fact that it was reviewing the merits of decisions meant that there was scope for divergent views on the same set of facts. Where this was the case, respondents found it difficult to accept a tribunal's decision as superior, instead considering that the tribunal had allowed itself to be misled by parental anxieties and the use of 'off the shelf' independent reports. This points to the fact that - while clarity and consistency are important pre-requisites to decisions being accepted by decision-makers - the extent to which they are persuaded to agree with decisions is likely to be significant in terms of their subsequent decision-making around the implementation of a judgment. Decisions must not only clearly set out the

principle, but also make an argument for why that principle should be preferred over others. Where administrators disagree with redress mechanisms' decisions, minimal forms of compliance become more likely (see factors J and L below).

8.3.30. In relation to both the LGO and the tribunal, some administrators said that they were likely to find decisions persuasive. There was, however, a range of factors cited by respondents which suggested that disagreement on the merits of cases could often occur. In relation to the LGO, this included a perception that it operated in an ideal world, used hindsight when making judgments, and did not always understand decision-making contexts. In relation to the tribunal, this included a view that the tribunal privileged parents over children, took an anti-local authority line, ignored locally determined criteria, and took decisions based on new information. In relation to both the LGO and the tribunal, some respondents considered that there was bias in favor of appellants and complainants. Understanding these factors, and the fundamental perceptions which some decision-makers have of a redress mechanisms' decisions may, therefore, be important if redress mechanisms wish to improve the persuasiveness of their judgments and overcome potential barriers to their implementation.

*Box 8.3: propositions relating to the quality of decisions taken by redress mechanisms*

- i. A lack of clarity in decisions is likely to represent a barrier to redress mechanisms achieving control.
- ii. The decisions of ombudsman schemes are likely to be perceived by decision-makers as being clearer and more consistent than those of courts and tribunals, as a result of their ability to communicate with administrators in a broader range of ways and in lay terminology.
- iii. The more redress mechanisms explain their decisions in terms of their potential consequences for future decision-making and the more clearly decisions are written with the learning needs of decision-makers in mind, the more likely they will be to influence administrative practice.
- iv. Clarity and consistency are crucial to the achievement of control, but, administrators' subjective assessment of the merits of redress mechanisms' decisions are likely to be as important.
- v. Where administrators disagree with the merits of a decision, they are more likely to adopt a 'minimal' approach to compliance (see factor J below), so that redress mechanisms need to focus not only on the clarity and consistency of decisions, but also on their persuasiveness.

#### **8.4. The status, powers, processes, and approach of redress mechanisms**

*Factor D: the perceived status and legitimacy of redress mechanisms.*

8.4.1. The status of redress mechanisms and the degree to which they are considered to be legitimate is an important factor in explaining whether their authority will be recognized and their guidance complied with. Rist (1994) argues that the characteristics of the source of a 'learning stimuli' is crucial when it comes to inter-organisational learning. The court was the mechanism whose legitimacy and status were seen by local authority respondents as highest. The court's authority, its ability to make binding decisions, and its accepted precedent setting role meant that respondents saw it as an institution to be respected. Many respondents also considered the LGO to be a highly respected institution. For many, the authority of the LGO was unquestioned, although some respondents were less sure, particularly where it appeared to be challenging settled local authority practices. There was also a tendency, as noted above, to minimize the importance of LGO cases and to see them as driven by undeserving individuals.

8.4.2. Local authority respondents were much more ambivalent about the legitimacy of the tribunal and it tended to be seen as a necessary evil, rather than in any more positive terms. The tribunal's decisions were treated with a 'pinch of salt' by some administrators. The tribunal's failure to take account of local contexts in its decision-making, and its narrow emphasis on legality, meant that administrators considered its decisions to be lacking in legitimacy in the educational context. In relation to both the tribunal and the LGO, some local authority respondents questioned their expertise and knowledge base in relation to the matters being reviewed. The upper tribunal was viewed as having more authority, with local authority respondents noting that they would treat it as they would a court.

8.4.3. Theories regarding the psychology of procedural justice (Lind and Tyler 1988) suggest that the legitimacy of decisions, and the degree to which they will be accepted, depends in part on the way in which those who are subject to the decisions perceive the fairness of the decision-making process. In addition, therefore, to considering local authority respondents' explicit statements in relation to how they perceived the status of redress mechanisms, it is possible to assess the degree to which they are seen as legitimate by reference to data about how local authority respondents perceived the process of being reviewed by redress mechanisms. Here, as noted above, local authority respondents often perceived both the LGO and the tribunal to be biased towards parents. In relation to the tribunal, local authority respondents were also critical of the confrontational style of hearings and what was perceived as a negative attitude towards local authorities by some tribunal panels. These views were, therefore, likely to affect the extent to which the LGO and tribunal were seen as legitimate institutions.

8.4.4. Although not explicitly raised by local authority respondents, it is also likely that local authority decision-makers viewed the court as the most legitimate source of formal authority amongst redress mechanisms, due to its history and its clear constitutional role in relation to public administration. The lack of clarity over the source and nature of the powers exercised by the LGO and the tribunal (i.e. whether their powers spring from legislative, executive, or judicial sources) may help to explain why respondents had - at the outset - a more ambivalent view with regard to the status of these redress mechanisms. The arguments about the proper constitutional positioning of ombudsman schemes (Buck *et al* 2011, Gill 2014) and tribunals (Thomas 2011) show that this positioning is contestable, with the source of the ombudsman's authority (particularly in relation to local government) remaining unclear and the status of the tribunal continuing to sit uncomfortably between executive and judicial

functions. It is unclear whether ombudsman schemes and tribunals fit within vertical, diagonal, or horizontal modes of accountability (Bovens 2007) and this ambivalence may have an effect on decision-makers' propensity to accept redress mechanisms' decisions.

*Box 8.4: propositions relating to the perceived status and legitimacy of redress mechanisms*

- i. The extent to which the authority of a redress mechanism is perceived as legitimate provides the context in which subsequent responses to specific decisions take place.
- ii. The more decision-makers perceive a redress mechanism to exercise legitimate authority, the more they will be disposed to accept and act upon their decisions.
- iii. Generally, courts are likely to be perceived as having higher status, formal authority, and legitimacy than ombudsman schemes and tribunals.
- iv. Where the constitutional source of redress mechanisms' authority is ambiguous, it is more likely that their legitimacy will be questioned by decision-makers.
- v. Whether redress mechanisms' processes are perceived to be fair is likely to have an effect on whether redress mechanism's decisions are seen as legitimate.

*Factor E: the sanctioning power of redress mechanisms*

8.4.5. The literature suggests that sanctioning power is likely to be an important factor in relation to the ability of redress mechanisms to exercise control. Adler (2003) has argued that the greater the formal authority of a redress mechanism, the more likely it is to exert an influence over the administrative process. Similarly, Halliday (2004) has suggested that the ability to act as a sanction is crucial when it comes to redress mechanisms competing for attention with other normative influences in the bureaucratic environment. Although some (Hertogh 2001, Hall 2011) have suggested that cooperative relationships may be more effective than coercive power in explaining compliance with decisions (a point returned to below), what appears to be clear is that redress mechanisms must exercise power in some form. As Dunsire (1979, 1984) suggests in his theory of control, control mechanisms must be able to act as 'effectors'.

8.4.6. Interestingly, in the case of both the LGO and the court, local authority respondents perceived their power less in terms of formal sanctions and more in terms of the attendant negative publicity and reputational damage that would arise from cases being 'lost'. The LGO's ability to choose which cases resulted in formal reports and which would be dealt with less formally, provided strong incentives for local authorities to settle cases and to agree 'local settlements'. Where a local authority refused to accept its recommendations, the LGO could also use a procedure whereby the local authority would be compelled to make an announcement in the local press that a complaint had been upheld and that it had refused to comply with the ombudsman. Publicity was, therefore, the main sanction available to the LGO and it was the threat of negative publicity which was seen as allowing for the more informal settlement of disputes in the LGO's 'shadow' (Gallanter 1983).

8.4.7. While this approach was helpful from the perspective of resolving individual cases - the classic fire-fighting (Harlow and Rawlings 2009) mode of ombudsman operation - there was some evidence that this could reduce the LGO's ability to pursue the aim of generating administrative improvement. Indeed, LGO respondents noted that administrative changes that were agreed as part of local settlements were not followed up as they would have been following the publication of an official report. There was also a sense, from the data provided by local authority respondents, that local settlements would be agreed as a face-saving mechanism and to avoid having to make substantive changes to their decision-making. For example, some respondents referred to not having had any cases upheld but then went on to describe local settlements where the LGO's view had clearly been that the administrative action had been inappropriate.

8.4.8. The local settlement process, therefore, seemed to allow local authorities to conclude cases without having officially been found to have acted maladministratively. Given that very few cases reach a formal report stage, the question then is whether - for the bulk of the LGO's work - local authorities are able to find an easy way out of cases which militates against administrative change. Indeed, the lack of clarity around blame allocation and the failure to clearly report action as being maladministrative, may well result in administrators' existing practices, processes, and outlooks remaining unchanged. Such use of 'informal resolution' by ombudsman schemes has been seen by Bondy *et al* (2014) to be both confusing from the perspective of citizens and as acting against the development of clear principles and the pursuit of administrative change.

8.4.9. In relation to the court, local authority respondents were not only concerned about its formal powers to quash decisions and prevent or compel action, but also by the fact that decisions resulted in negative publicity and a loss of control by local authorities. This loss of control

related to the fact that the processes of local authorities - generally kept hidden from public view and determined by the authorities themselves - could suddenly become the subject of debate and decision in a public forum. Unlike the LGO, however, the court's ability to compel action and its formal authority to set precedent were also seen as important in addition to the publicity that attended court cases. Here, perhaps even more so than in relation to LGO settlements, there was a sense that local authority respondents wished to avoid formal decisions by courts in order to preserve control and maintain their freedom of action in relation to their administrative practices.

8.4.10. This may help to explain the high level of responsiveness to judicial review threats reported by a number of local authority respondents - settlements were often negotiated with individuals in order to prevent possible influxes of cases or widespread changes in practice. The desire to avoid the formal decisions of the court and to a lesser extent the LGO, could therefore be seen as attempts to evade more directive forms of control. In other words, losing individual battles to win the larger administrative war. Some local authority respondents noted that cases that were settled could lead to lessons being learned and practices being changed. As we shall see below, the thesis found mixed data with regard to whether cynicism and calculation or ideology and normative alignments were most responsible for explaining decision-making around both settlement and the implementation of judgments (see factor J).

8.4.11. In relation to the tribunal, the fact that its decisions were not published and that upper tribunal decisions did not seem to attract significant negative publicity for local authorities, meant that the extent to which it was perceived as a sanction was less clear. The tribunal's power to substitute its decisions for those of administrators, was seen as a considerable sanction, but one that would only affect the case in question rather than one that could affect whole classes of cases. The upper

tribunal's decisions were more likely to be seen as having the potential to set directions for future behaviour, although as noted below (see factor K), there seemed to be little awareness of its decisions and, the only direct example of ambiguous compliance in the empirical data occurred following an upper tribunal decision. Generally, the tribunal process was one that local authorities were able to manage in the dark and outwith the glare of publicity.

8.4.12. Generally, therefore, the relationship between the existence of a power to sanction and the ability to exercise control of administrative decision-making is a complex one, mediated to a significant degree by its effect on settlement rates. Indeed, the existence of such power - along with the more general encouragement of settlement within the justice system (Genn 2008; Genn 2012; Mulcahy 2013) - encourages the concession of individual cases, often at the expense of the development of principles of good administration. Figure 8.2 below provides a visual representation of the relationship which is suggested to exist between sanctioning power and settlement rates, and the consequent effect of sanctioning and settlement on the potential for learning from redress mechanisms. Of course, it is possible to argue that settlement activities are likely to show an element of learning, as guesses are made about the likely positions of a redress mechanism as part of negotiations. However, there is significant uncertainty about the justice value of settlements and the extent to which they reflect the principled positions of redress mechanisms (Genn 2012). And, as we shall argue below (see factor M), compliance which occurs solely in the shadow of redress mechanisms is indicative of a very limited and narrow form of control affecting only the tip of the iceberg of the bureaucratic process.

Figure 8.2: the relationship between sanctioning, settlement, and learning



*Box 8.5: propositions relating to the sanctioning power of redress mechanisms*

- i. Coercive sanctioning power, including negative publicity, reputational damage, and substituting decisions, is likely to be effective in prompting changes in individual cases subject to challenge.
- ii. The existence of sanctions may, however, also increase the use of settlements as a means of evading more directive forms of control by redress mechanisms.
- iii. While the shadow of redress mechanism can provide a very effective force for individuals to obtain redress, settlements may result in a failure to establish clear points of principle and to provide the impetus for administrative change.
- iv. Where settlements are heavily used this may exacerbate the fact that there may be limited intrinsic potential for learning in the cases referred to redress mechanisms (see factor A).
- v. There is not a straightforward relationship between the existence of sanctioning power and redress mechanisms' ability to control bureaucratic decision-making.

*Factor F: the procedural approach of redress mechanisms.*

8.4.13. There are a number of variations in procedural approach adopted by redress mechanisms. Table 8.1 provides a summary of the variations that will be discussed in subsequent paragraphs.

*Table 8.1: variations in the procedural approaches adopted by redress mechanisms*

	<i>Court</i>	<i>Tribunal</i>	<i>LGO</i>
<i>Review process</i>	Adversarial	Adversarial	Inquisitorial
<i>Basis of review</i>	Retrospective	<i>De novo</i>	Retrospective
<i>Decision standard</i>	Legality	Legality Merits	Maladministration
<i>Decision mode</i>	Adjudication	Adjudication	Adjudication Resolution
<i>Decision status</i>	Binding Precedent	Binding No precedent	Not binding No precedent
<i>Follow up</i>	None	None	Some

8.4.14. *Review process.* The data show that whether the process adopted by a redress mechanisms is adversarial or inquisitorial is potentially important in determining attitudes to a particular redress mechanism, as well as in determining what can be learned from it. The tribunal process was seen by respondents as a highly adversarial one. Tribunal hearings were seen by many respondents as confrontational and leading to resentment. The confrontational nature of adversarial hearings, which

were noted to be making increasing use of barristers, seemed to exacerbate the strongly divergent normative stances adopted by the tribunal and decision-makers (see factor B above and factor H below). The adversarial process was also seen as giving parents an unfair advantage in that they could ‘buy’ expert help that could not be afforded by the local authority. This led some respondents to consider that the tribunal assisted the most able parents to receive public funding, while the potentially more deserving children of less well-resourced parents missed out (this point will be returned to below in discussing factor H and factor N). Adversarialism in the tribunal context was, therefore, seen as an approach which was more likely to generate resentment amongst decision-makers and to reduce goodwill towards the tribunal and its decisions. Respondents’ lack of direct experience of court hearings meant that they did not provide data in relation to the effect of adversarialism in the court process.

- 8.4.15. In relation to the LGO, some local authority respondents referred to its inquisitorial approach as an advantage. This was because the LGO took a ‘root and branch’ approach where the basis of the authority’s decision-making required to be explained end-to-end. The inquisitorial mode was also seen by respondents as providing opportunities to clarify understandings on both sides. Local authority respondents commented that by the time an investigation concluded, it was usually clear what the outcome would be. The LGO’s practice of sharing findings in draft with local authorities was also seen to be beneficial: it allowed local authority respondents the opportunity to ensure that the decision took full account of their position. This data echoed Van Acker *et al’s* (2015) finding that ensuring a mutual understanding may increase the degree to which decisions are accepted. Generally, the LGO’s procedural approach stood in stark contrast to that of the tribunal on two counts: firstly, in being a

better means of identifying areas for improvement in decision-making; and secondly, in being less alienating for decision-makers.

8.4.16. *Basis of review.* The court and the LGO both establish whether decision-making is reasonable retrospectively based on the situation as it existed at the time of the original decision. The tribunal's approach is different in that it takes *de novo* decisions on the merits of disputes as those merits appear at the time of the hearing. While this benefits appellants, from the perspective of providing feedback to decision-makers, this approach is unlikely to be helpful. This was pointed out by one of the tribunal respondents, who suggested that in future the tribunal process might be changed to become retrospective in order to provide better feedback. Local authority respondents often believed that the tribunal's decisions seemed to be swayed by additional evidence commissioned by parents, which were widely seen as biased and bordering on unethical. It is perhaps not surprising that learning not to lose tribunals and about how to counter such parental evidence was cited as a major aspect of what they had learned from the tribunal, rather than improvements in substantive decision-making.

8.4.17. *Decision standards.* The data suggest that the decision standards adopted by a redress mechanism - legality, merits review, or maladministration - are likely to be important in terms of its ability to exercise a control function. The first point here is that each redress mechanism, by having different decision standards, is effectively controlling for a different aspect of bureaucratic decision-making. The court's primary concern is with substantive legality and common law principles of good administration; the tribunal's primary concern is with substantive legality and the merits of cases; and the ombudsman's primary concern is with extra-legal principles of good administration. As has already been pointed out above, the fact that each mechanism controls a

different aspect of decision-making, and that each mechanism is likely to be in competition with the others for the receipt of disputes, suggests that the overall system of control provided by redress mechanisms is likely to be inefficient. The dominance of one redress mechanism, often likely to be a tribunal, will squeeze out the presence of the other mechanisms, rendering them somewhat marginal, and effectively resulting in certain aspects of decision-making being less controlled for than others.

8.4.18. The standard adopted by a redress mechanism is also likely to be important in shaping bureaucratic responses. We have already noted above, for example, that the court's and the tribunal's concern with legality was likely to be seen by administrators as more foreign than the ombudsman's concern with the concept of maladministration. While there has been criticism regarding the opacity of the concept of maladministration, it seems that respondents did not find it a particularly obscure notion. This may be because they tended to see maladministration as accepting administrators' own definitions of fair procedures in most cases, rather than necessarily challenging the fairness of the procedures themselves. This view of maladministration is a rather limited one and suggests a timid approach on the LGO's part. Indeed, local authority respondents were clear that the role of the ombudsman was not to create new standards of fairness, but to bring local authorities up to accepted minimum standards. One of the reasons, therefore, why local authorities might tend to see ombudsman decisions as according with their own perspectives, is that they are rather tame. While an inquisitorial and retrospective approach offers potential to highlight deficiencies in decision-making, the congruence of perspectives between the ombudsman and administrators may reduce the extent to which the ombudsman presents a challenge to administration. In Galligan's (1996) terms, the model of justice suggested by the LGO's interpretation of the maladministration standard is unlikely to break the hegemony of the

‘bureaucratic administration’ mode of decision-making. It may even be that the LGO’s focus on process and its general acceptance of bureaucratic norms legitimizes this hegemony.

8.4.19. One of the historic criticisms of maladministration is that it fails to consider the merits of decisions. This was seen by some early critics (Marshall 1973) as a means of ensuring that the administrative process would be protected from any serious degree of challenge. The question of whether the ability to review the merits of a case is also a way of enhancing the degree to which administration may be controlled is, however, an ambiguous one. In relation to the tribunal, there was evidence that its focus on merits review undermined its legitimacy in the eyes of administrators. Indeed, while merits review provides a powerful tool from the perspective of the individual wishing to challenge an administrative decision, it was seen to draw the tribunal into an inherently more subjective and controversial aspect of decision-making. While the emphasis on good process, a feature of both ombudsmen and courts’ approaches to good administration, may sometime seem peripheral to the heart of a decision (its merits), it is likely to be seen as a more legitimate and more objective concern.

8.4.20. In this study, decision-makers rarely seemed to be moved by the tribunal’s decisions on the merits of cases and to amend their routine decision-making in line with the tribunal’s approach. Instead, it seemed that local authorities went away from tribunal hearings agreeing to disagree. That the tribunal had come to a particular decision was not seen as the achievement of an authoritatively fair outcome; it was often simply seen as an opinion from a tribunal perceived to be misguided in its approach and priorities. As may already be clear, the ability of administrators to dismiss merits-based decision-making by the tribunal was reinforced by the fact that decisions were taken *de novo*, so that not only

might the merits be a matter for disagreement, but also the basis of the decision might be quite different from the authority's initial decision.

8.4.21. *Decision mode.* In relation to redress mechanisms' mode of decision-making, only the LGO took a proactive approach to brokering resolutions, in addition to fulfilling its core role of adjudication, which is shared by the court and the tribunal. Although settlements are a considerable feature of the work and influence of courts and tribunals, the difference with the ombudsman is that it has a proactive resolution role - directly suggesting settlements. The key criticism here is that this approach leads to a failure to develop principles of good administration and to a pragmatic approach that lets authorities 'off the hook'. On the other hand, the use of resolution approaches requires the LGO to enter into closer relationships with public bodies, with a certain amount of good will developed as a result. This may be seen, as pointed out above, as a failure on the part of the ombudsman - with the suggestion that it is too ready to accept administrative realities and too reticent to develop more stretching principles of good administration - but it could also be seen as a reasonable accommodation with administrative reality which allows the LGO to extend its influence. Reaching workable accommodations with administrators may, therefore, be an effective means of securing administrative change. However, as noted above in relation to factor E, it may actually allow administrators to evade more powerful and widespread control and only really be effective in relation to the presenting case.

8.4.22. *Decision status.* In terms of the status of decisions, the fact that the decisions of the courts and the tribunals were formally binding on the parties, while the decisions of the ombudsman were not, did not seem to be particularly significant. As a result of the sanctions in place for non-compliance with the LGO, administrators were unlikely not to make the amendments required in the individual case. Of more relevance here, is

the status of ombudsman and tribunal cases in terms of their precedential effect. While the court and upper tribunal were understood in an uncomplicated fashion as precedent-setting bodies, the status of the LGO and the tribunal were less clear. Both bodies emphasised - at a rhetorical level - that they did not set precedents and that they considered individual cases on their merits. At the same time, however, there was some expectation on the part of redress mechanism respondents that local authorities would amend their practices as a result of redress mechanisms' conclusions.

8.4.23. Even where technically the rule of precedent does not operate, dispute resolution systems are likely to build their own submerged systems of precedent (Buck 2006). This point is also made by Morris (2008), discussing the Financial Ombudsman Service, who argues that it is misleading for dispute resolution schemes to suggest that they do not have a precedential effect since such an effect is inevitable in practice for adjudicatory bodies. As argued above, it seems clear that the tribunal and the ombudsman do seek to develop coherent principles through their case work. However, the suggestion here is that the ambiguity around the formal status of decisions allows decision-makers to more easily escape from the implications of unpopular decisions, compared to the decisions of those redress mechanisms that unambiguously have a precedent-setting role. Some respondents in this study, for example, commented on the fact that decisions did not carry the force of precedent to explain why they might not always make wider changes in their practice following a decision of the LGO or the tribunal.

8.4.24. Finally, the ability to follow up on decided cases to check compliance has been identified as potentially significant (Cannon 2004, Mullen 2008, Van Acker *et al* 2015). Only the LGO conducted any kind of follow up on cases, however, LGO respondents acknowledged that this

practice was very limited. Even where follow up occurred, this was a paper exercise and LGO respondents emphasised that they would not get involved in audits of processes following on from cases. As a result, the current approach of the LGO does not make the most of the ability to follow up on cases and this feature of its process could be deployed more effectively. Having said this, the argument may again be made that the LGO's reliance on trusting authorities to comply with decisions is part of what makes the ombudsman effective, in that it builds positive and trusting relationships with administrators. If processes of follow-up are too intrusive, it could potentially destabilize a relationship which, at least potentially, allows the ombudsman to achieve a number of its goals.

*Box 8.6: propositions relating to the procedural approach of redress mechanisms*

*Review process*

- i. Adversarial processes are more likely to lead to confrontation, resentment, and a loss of good will, exacerbating the distance between normative stances that is already likely to exist between administrators and redress mechanisms (see factor B and factor H).
- ii. Inquisitorial processes are more likely to root out areas for improvement, to result in clearer decisions, and to be seen as persuasive, as well as more likely to avoid confrontation with administrators.

*Basis of review*

- iii. Redress mechanisms which take *de novo* decisions, rather than a retrospective approach, have inherently less scope to provide guidance to administrators.
- iv. Where a redress mechanism adopts a *de novo* approach, it is likely that learning will be limited to changing the ways in which cases are conceded, defended, and presented, rather than leading to changes in routine decision-making.

*Decision standard*

- v. Where redress mechanisms are in competition within an administrative environment, the likely dominance of one mechanism (see proposition A (v.)) reduces the comprehensiveness of the overall control of decision-making by administrative justice institutions: legality, merits, and maladministration are likely to be controlled for in an uneven and inefficient manner within a particular administrative setting.
- vi. Maladministration is likely to be well understood and accepted by administrators, since it accepts their own understandings of good administrative practice and is not seen to create new standards of fairness.
- vii. The closer the maladministration standard is to the dominant paradigm of administration, the more readily it may be accepted by administrators (see factor B and H), but at the same time, the closer these perspectives are, the less potential there will be for

significant enhancements of bureaucratic approaches to fairness.

- viii. The ability to review the merits of decisions is likely to draw redress mechanisms into controversy and to result in their decisions being seen as more subjective and less legitimate; while merits review may be a powerful tool for the individual appellant, it is less likely to result in significant shifts in administrative practice, compared with approaches which stress legality or maladministration.

*Decision mode*

- ix. Redress mechanisms that take a proactive role in brokering settlements, may increase their ability to influence administrators through their development of good relationships, but at the same time risk compromising the development of clear principles of good administration.
- x. Where redress mechanisms broker settlements, it is important that they ensure that principles are formally developed in a proportion of their casework, although in order to be effective this requires administrators to have good levels of awareness of the formal decisions that are issued against other local authorities and this may happen infrequently in practice (see factor K below).

*Decision status*

- xi. The greater the degree of ambiguity in the precedential status of a redress mechanism's decisions, the more likely it is that the implications of a judgment for wider administrative practice can

be ignored by administrators.

*Follow up*

- xii. The ability to follow up proactively on concluded cases is a potentially powerful design feature for a redress mechanism, since it allows the deployment of a more proactive ‘detector’ than merely relying on the submission of further challenges by citizens.
- xiii. If follow up processes are too intrusive, however, there is a risk that relationships between a redress mechanism and administrators based on cooperation and trust are destabilized.

*Factor G: redress mechanisms’ role perception and style of control*

8.4.25. A key issue in relation to a redress mechanism’s ability to perform a control function is the degree to which it considers such a function to be part of its role. LGO respondents were clear that they aimed to improve administrative decision-making through making recommendations on specific cases as well as through more general advice and guidance, but that this was a ‘residual’ role. As noted above in relation to factor F, a result of this stance was that the LGO performed only a very limited form of follow up on cases and LGO respondents described the fundamental approach of the ombudsman as ‘reactive’. Generally, LGO respondents saw the organisation as conforming to the fire-fighting (Harlow and Rawlings 2009) and reactive (Stuhmcke 2012) models of ombudsmanry. The achievement of a proactive and *ex ante* control over administrative decision-making was, perhaps surprisingly, not a particularly strong motivation for the LGO.

8.4.26. Similarly, tribunal respondents saw their prime role as the provision of individual redress, with a secondary function to assist decision-makers to get decisions 'right first time'. In relation to the latter, one respondent commented that judges frequently highlighted good and bad practice in their decisions. Another respondent considered that beyond publishing decisions that were particularly important, there was little that the tribunal could or should be doing in relation to influencing administrative practice: there were strict limits to the improvement function of tribunals and it was not the tribunal's responsibility to train one of the parties. Overall, therefore, the tribunal's perception of its own role was further towards the 'fire-fighting' model than the LGO's. While it also considered that part of its role should be to help administrators to improve, this appeared to be a much more *ad hoc* activity.

8.4.27. This court respondent said that the court would not be concerned with what happens following its decisions and that it would not be appropriate for judges to have any proactive role in generating administrative improvements beyond issuing decisions. At the same time, however, she did expect that judgments of the higher courts would be complied with and operated on the assumption that decisions would be used as a source of guidance on the meaning of law. As a result, there was an implicit acknowledgment that the court performed an important declaratory function even if no proactive measures were taken in terms of ensuring that decisions would be influential. Generally, the greater the degree to which a redress mechanism consciously saw its role as involving an element of *ex ante* control, the more proactive measures it took to try to achieve this. This can be seen in the more proactive approach of the LGO, compared with the tribunal and the court.

8.4.28. In terms of the nature of the relationship between redress mechanisms and decision-makers, Hertogh (2001) has suggested that redress mechanisms using a more cooperative style of control, are more

likely to generate 'policy impact'. A similar suggestion has been made by Hall (2011), who draws on communication theory to suggest that effective communication must involve two way dialogue and the existence of interpretive communities, which allow for shared understandings to be developed. Other research has similarly suggested that cooperative approaches are particularly likely to be effective in an ombudsman context (IFF/PHSO 2010, Gill 2011) and, in the context of learning between organisations, Rist (1994) has highlighted the importance of close relationships to the effective transmission of knowledge. Bondy and Le Sueur (2012), in their examples of redress mechanisms that are effective in feeding back to decision-makers, cite close and trusting relationships as an important factor.

8.4.29. The question here, therefore, is what kind of relationships the redress mechanisms considered in the thesis had with administrators. LGO respondents, and a majority of local authority respondents, considered that the LGO developed good, cooperative working relationships with administrators, where advice would be provided and matters arising from casework could be discussed. The LGO was seen as an approachable organisation and some even described the relationship as a partnership in pursuit of shared goals. The fact that administrators could challenge aspects of the LGO's approach and findings and engage in discussion where they did not agree was seen positively by local authority respondents. Such approaches heightened the legitimacy of ultimate outcomes, as a result of being more cooperatively produced. While not all administrators saw their relationships as cooperative, there was nonetheless good evidence in the data to support Hertogh's (2001) suggestion that (a) ombudsmen tend to operate a cooperative mode of control and (b) this kind of cooperation can be useful in bringing about changes in administration.

8.4.30. While there was some support for Hertogh's (*ibid.*) hypothesis, as noted above, the more cooperative approaches of the LGO take place in the context of it also being able to deploy significant sanctions. These were generally used sparingly and operated as a coercive back stop which supported routine cooperative relationships being developed. As Halliday (2004) has suggested, therefore, drawing on the regulation literature, the question may not so much be about whether cooperation or coercion are best placed to bring about behaviour change and more about the ability to use both modes effectively. The point is that there is a danger in too readily identifying the LGO's style as cooperative, whereas in fact, it operates a mixed mode of control, drawing on both approaches depending on circumstances. The suggestion, therefore, is that the ability to function in a mixed mode of control (rather than only one or the other) is likely to represent an advantage for redress mechanisms, since both approaches appear to have a role in the achievement of control.

8.4.31. Tribunal respondents referred to several instances where they interacted with local authority staff outside of hearings and, perhaps surprisingly, there was also evidence of cooperative approaches here. The existence of tribunal user forums, for example, provided a space in which communication could take place, while the tribunal had closely cooperated with several local authorities in the course of a pilot project to streamline how appealed cases were dealt with. While these examples show the tribunal operating in a more cooperative way, discussion and cooperation appear to be restricted to matters of tribunal process rather than substantive decision-making. Indeed, tribunal respondents and local authority respondents made clear that tribunal user forums were about discussing procedural aspects of appeals. Similarly, the tribunal's pilot project did not seek to improve substantive decision-making, but merely to ensure that the administrative process around appeals was as efficient as it could be. Nonetheless, such approaches stand out when compared to

the much more distant, non-existent relationship, which the court had with decision-makers. It may also be that, although focused on matters of procedure, interaction and cooperation with the tribunal may lead to enhanced mutual understanding in the longer term.

8.4.32. As we have already noted briefly above, more cooperative approaches are not without their problems. King (2012), in discussing Hertogh's (2001) work, for example, notes there is a danger that cooperative relationships may result in redress mechanisms becoming overly influenced by administrators (rather than *vice versa*). Indeed, the risk of 'capture' by administrators, the potentially murky constitutional space created by such relationships, and the appearance of bias, are all significant drawbacks. There is also a question about whether the development of cooperative relationships and the idea - theoretically sound - that true mutual understanding requires bi-directional interaction, can be meaningfully applied beyond ombudsman schemes and the lower tier of the tribunal. As the legal weight of cases increases in those cases dealt with by the upper tribunal and the court, the need for clearer separation of powers and visibly detached adjudication, must become greater. In the higher courts and tribunals, the benefits of mixed modes of control become outweighed by their disadvantages.

*Box 8.7: propositions relating to the redress mechanisms' role perception and style of control*

- i. The more redress mechanisms see the *ex ante* control of bureaucratic decision-making as part of their role, the more likely they are to take proactive measures to influence administrators.

- ii. Redress mechanisms are unlikely to consider the *ex ante* control of administrative decision-making to be their primary function, remaining predominantly focused on the resolution of individual disputes.
- iii. The ability to use mixed modes of control, both cooperative and coercive, is likely to represent an advantage for redress mechanisms seeking to achieve bureaucratic control.
- iv. While there are likely to be benefits derived from the development of cooperative relationships, there are also likely to be associated risks, including the appearance of bias, constitutional impropriety, and becoming ‘captured’ by bureaucratic interests.
- v. The development of cooperative approaches is only likely to be appropriate for ombudsman schemes and lower tier tribunals, and unlikely to be appropriate in relation to the higher tribunals and courts.

## **PART II: BUREAUCRATIC DECISION-MAKING AND DECISION-MAKERS**

### **8.5. Introduction to part II**

8.5.1. This part of the chapter first considers factors relating to bureaucratic decision-making itself, including the model of administrative justice which dominates a particular setting and the degree of structure which characterises decision-making. The chapter then considers factors relating to the decision-makers, including their commitment to learning from

redress mechanisms and the organisational learning mechanisms they put in place for doing so.

## **8.6. The nature of bureaucratic decision-making**

*Factor H: the model of justice dominating administrative decision-making.*

8.6.1. In terms of exploring the normative foundations of the decision-making areas subject to study in this thesis, admissions and home-to-school transport are discussed together due to the congruence of approaches in these areas. Here, local authority respondents described an approach to decision-making which very strongly favored consistent rule application and a view of fairness which prioritised the efficient application of criteria across cases. Individuals were treated ‘like a number’ and decision-making was strongly routinised, to the extent that much of it was automated. Some respondents did not even consider their work to be decision-making, but saw it instead as a simple matter of neutral policy implementation. Respondents considered that their decision-making was devoid of discretion and that, where it did exist, discretion was entirely ‘pre-prescribed’. Generally, decision-making was seen as involving the application of clear criteria to unambiguous facts, which suggests that this decision-making conformed to ‘type 1 decision-making’ (Harrison and Pelletier 2001) which has been described as ‘programmed’, ‘routine’, ‘structured’, and ‘generic’ (Simon 1997, Gifford 1983, Cooke and Slack 1991, Drucker 1967).

8.6.2. Local authority respondents justified this approach by suggesting that it was more objective and that to depart from it would involve decision-makers making inherently unfair individual assessments. Fairness was seen to reside in treating citizens alike and in the preservation of the common good through the consistent allocation of scarce resources. This approach,

therefore, strongly emphasised collectivist interests (Tweedie 1989). Local authority respondents did recognise that greater levels of individuation (Harlow and Rawlings 2009) were required to ensure that legitimate individual interests were safeguarded; however, this was seen as being impossible to realize in the course of routine administration without descending into subjectivity. These respondents, therefore, had a strong Davisonian view of administrative discretion as a source of arbitrariness and as an aspect of decision-making which required to be limited and confined (Davis 1969). This was achieved by the discretionary aspects of decision-making being almost wholly delegated to the appeal stage of decision-making and removed from routine administration (*via* the IAPs in admissions and the internal review arrangements in transport).

8.6.3. In terms of the model of justice operating in this area, the model variously described as bureaucratic rationality (Mashaw 1983), bureaucratic administration (Galligan 1996) and bureaucratic legalism (Kagan 2010) was clearly dominant. This model emphasises efficiency, formality, impersonality, bureaucratic routine, and its claim to fairness lies in its supposed objectivity, its treatment of like cases alike, and its pursuit of correct aggregate decision-making in a context of limited resources. One of the notable features here is the uniformity and strength of this model of justice in terms of local authority respondents' perceptions. There was little room for alternative approaches and no competition from other ways of justifying the administrative justice of decision-making. Instead, administrators saw fairness in strongly binary terms, as one respondent put it: 'You are either an impartial service that does everything strictly according to criteria, or you are not'. Such views provide strong support for Mashaw's (1983) and Hood's (1991) important insight that administrative values are strongly competitive and that their underlying logics have a tendency to exclude alternative perspectives. In part, the existence of this approach to decision-making results from the

statutory framework, but it also seems very much to reflect the core preferences of bureaucrats. This echoes Tweedie's (1989) findings that bureaucracies tend towards the prioritization of collective interests (most strongly associated with the bureaucratic rationality model) and Galligan's (1996) view that such approaches have a hegemonic hold over administration.

8.6.4. In terms of SEN, this decision-making area shared a strong orientation towards the maintenance of collective interests and a normative stance that considered an element of standardization to be essential to the provision of fair treatment across all cases. While SEN decision-makers considered individual cases in more detail, that individual consideration occurred in the context of a collectivist approach: decisions on provision were heavily influenced by the availability of resources, the need to ensure fair allocation across cases, and local criteria which were meant to ensure a degree of standardization. As a result, although SEN decision-making involved a larger degree of individuation than the admissions and transport area, collectivist and bureaucratic imperatives still provided the dominant impetus. Departures from this approach were seen as normative violations by administrators, who spoke of the immorality that resulted from some individuals being able to secure better educational provision as a result of intervention by redress mechanisms. A strongly collectivist approach, therefore, conforming to the bureaucratic rationality (Mashaw 1983), bureaucratic administration (Galligan 1996) and bureaucratic legalism (Kagan 2010) models could also be seen to operate in SEN.

8.6.5. However, unlike in the admissions and transport area, the SEN area featured a plurality of models of justice. Here, a strong emphasis on individual interests and individuation (although always subsidiary to collectivist approaches) resulted from the influence of education, health and social care professionals. Professional input into decision-making

encouraged a perception of children as clients and a strong emphasis on understanding and meeting their particular needs. Unlike admissions and transport, where respondents treated the individual 'like a number', a respondent in the SEN area referred to treating children 'like a flower'. This application of professional judgment can be seen to fit clearly within the professional treatment model (Mashaw 1983). While the greater focus on individuation may suggest an approach more in keeping with that of redress mechanisms, it is important to note that the approach was less guided by notions of individual rights and fair treatment, and much more guided by the idea that professional and administrative expertise was required to ensure that children's needs were met. The achievement of the latter was strongly seen by local authority respondents to reside in the administrative and professional, rather than the legal, sphere.

8.6.6. Another mode of decision-making in the SEN area was negotiation (Kagan 2010). Although this mode of decision-making is ignored in much administrative justice theory and does not have a particular model of justice associated with it, it is possible to identify the particular fairness claim which might underlie it as follows: the balancing of interests, the reaching of compromises that will satisfy both parties in a dispute, the facilitation of good ongoing relationships, and the preservation of resources through consensual resolution of disputes. Negotiation is, therefore, less a matter of the application of values to cases, and more that of a pragmatic response which recognizes that workable outcomes are predicated on the degree to which they are acceptable to parents. As such the negotiation mode of decision-making can be associated in part with Adler's (2003, 2010) consumerist model, where consumer satisfaction is a key goal of administrative decision-making and the standard by which its fairness is measured.

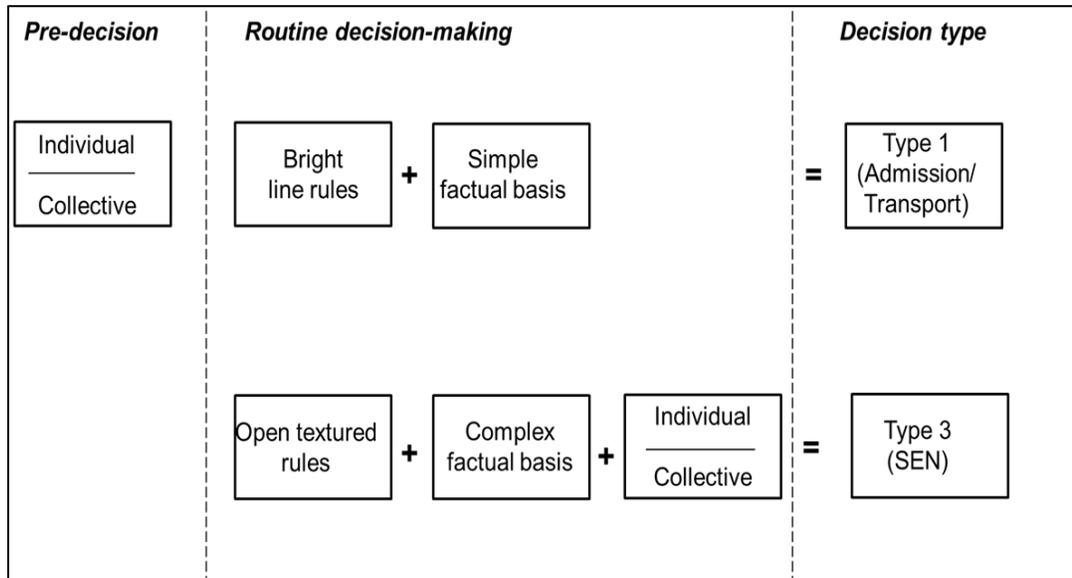
8.6.7. Negotiation as a mode of decision-making was most likely to come into play once cases had been appealed and local authorities were brought to the negotiating table in the shadow of the tribunal. This is the circumstance when the tribunal appeared most influential on decision-makers and when its decisions in previous cases were most likely to be taken account of. Decision-making here was shaped by attempts to satisfy individuals within the overall context of the likely decision of the tribunal, all the while seeking to preserve the collective interest as far as possible and not giving in to those who administrators saw as 'shouting the loudest'. Overall, therefore, routine decision-making in SEN could be seen to be dominated by the bureaucratic rationality model, with a strong secondary influence being the professional treatment model, while in appealed cases the negotiation mode of decision-making was prevalent (emphasising aspects of the consumerist model of administrative justice).

8.6.8. In terms of the structure of SEN decision-making and the degree to which it conformed to either rule-based or discretionary approaches, a rule-based approach was in evidence as a result of the statutory framework and the strict use of local criteria. However, these rules were more open-textured and allowed for the greater exercise of judgment in decision-making. Indeed, discretion - rather than being effectively excised from decision-making - was prevalent in all aspects of SEN decision-making and seen as key in ensuring good results for children. While such discretion was ubiquitous, it should not be confused with personal whim: generally, discretionary decision-making was guided by widely shared common values amongst administrators and a strong local sense of how things should be done. In this sense, the SEN area was much more reflective of arguments in the literature on discretion (see chapter 2) which questions whether any truly non-discretionary decision-making can exist and, at the same time, challenges the idea that discretion is equivalent to decision-makers being given entirely free reign. As a result, decision-making here was finely

balanced between rule-based and discretionary elements, with decision-making being a complicated interaction between open-textured rules, administrative and professional discretion, and complex individual circumstances.

8.6.9. Overall, SEN decision-making can be seen to fit within the ‘type 3 decision-making’ category outlined in chapter 2 of this thesis. This is the kind of decision-making described as ‘modified adjudication’ by Galligan (1996), which sits between the two poles of administrative decision-making: routine bureaucratic decision-making (type 1 decision-making) and unique policy decision-making (type 2 decision-making). Here, decision-making is only semi-programmed by rules and there is considerable discretion in terms of deciding individual cases. A particular feature of such decision-making is that it constitutes a middle ground between the achievement of the common good and the fair treatment of the individual (Galligan 1996). Whereas in type 1 decision-making, a ‘pre-programmed’ decision is taken about the appropriate balance between individual and collective interests ahead of any actual decisions in cases, in type 3 decision-making the balancing of individual and collective interests occurs in each and every decision taken by decision-makers. Each decision is, therefore, a contestable and potentially controversial balancing act and this defining characteristic of bureaucratic decision-making helps to explain the real challenge faced by decision-makers. A summary of the key differences between admission and transport and SEN decision-making is presented figure 8.3 and the significance of these differences is returned to in relation to factor I below.

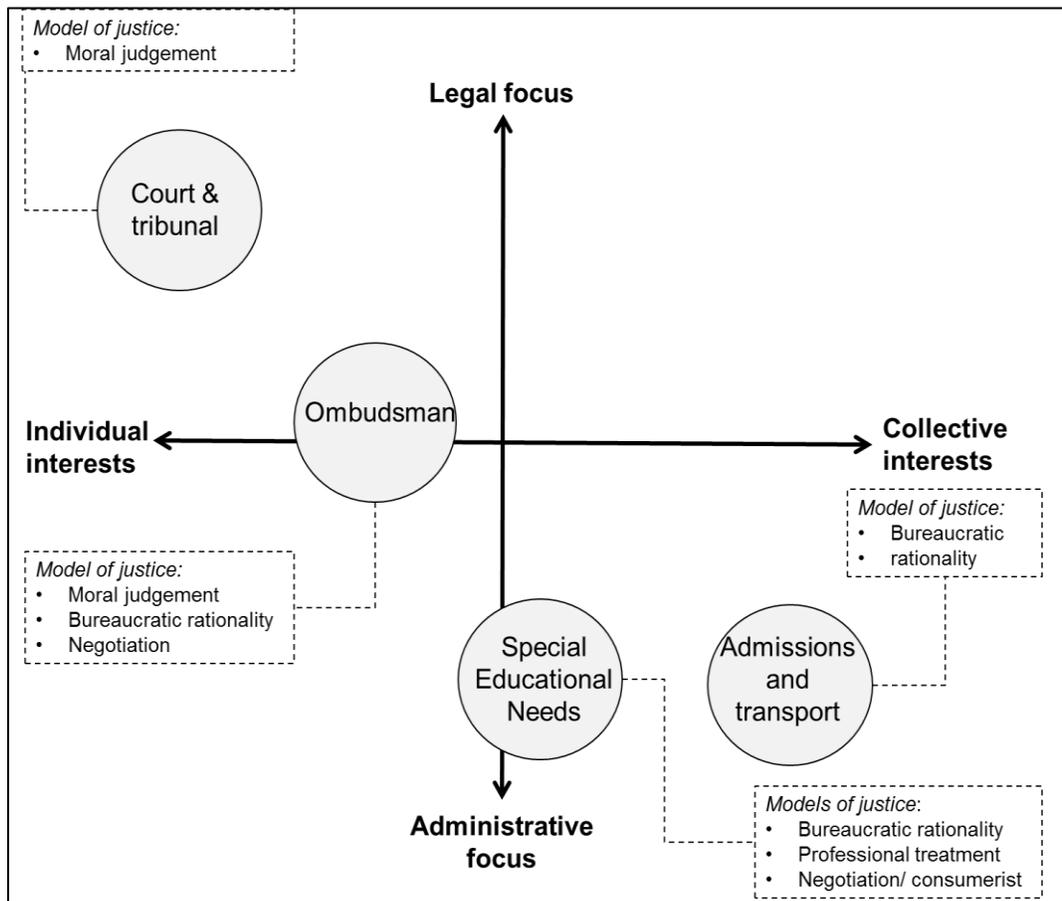
Figure 8.3: the structure of type 1 (admissions and transport) and type 3 (SEN) decision-making



8.6.10. Having described these areas of decision-making, the chapter now seeks to explain the significance of the different justice models operating in each area for the exercise of control by redress mechanisms. A key conclusion here is that the models of administrative justice endorsed by redress mechanisms (see factor B above) are significantly different to the models of administrative justice that characterise bureaucratic decision-making. What we observe is a ‘clash of values’ similar to that which has been described in previous empirical research (Richardson and Machin 2000). While some have argued that the existence of a public service ethos means that there is not such a gulf between administrative and legal values (Platt *et al* 2010), this thesis has found significant gaps between the normative stances of redress mechanisms and administrators. The operation of different models of justice in each area represents a substantial barrier to the exercise of control. Halliday (2004) has previously referred to this when arguing that the greater the degree of congruence between the models of justice propounded by courts and those

characterizing administrative decision-making, the more likely compliance will be. Hertogh (2001) also makes reference to this point in his concept of ‘policy tension’. The clash of values between redress mechanisms and administrators can be seen to exist across three main dimensions: the models of justice they adopt, their different orientations to collective and individual interests, and their different prioritization of legal and administrative values. Figure 8.4 summarises the argument and provides a visual representation of the normative distance between redress mechanisms and decision-makers.

*Figure 8.4: the clash of values between redress mechanisms and decision-makers*



8.6.11. A clash of values was highlighted most strongly in the data provided by local authority respondents working in the SEN area when discussing the tribunal. The tribunal's emphasis on legal values and its perceived disregard for professional and administrative expertise were seen very negatively by local authority respondents. Its prioritisation of individual interests over collective ones was seen to result in inconsistent, unfair, and immoral outcomes between individuals. Values also clashed in relation to whose interests the tribunal served: decision-makers saw themselves as defenders of the interests of the child, while they saw the tribunal as being driven by the needs of parents. Respondents saw the tribunal as being swayed by parents who, acting as knowledgeable consumers, were able to secure their desired educational provision through effective use of the appeal system. This may explain why the consumerist model of justice operated in the tribunal's shadow: administrators considered that satisfying parental preferences would be important, because they saw this as a feature of the tribunal's decision-making.

8.6.12. This clash of values was least significant in relation to the LGO. The LGO's straddling of legal and administrative values and its greater propensity to accept arguments about the need to protect collective interests, meant that its normative position was closer to that of administrators. While this does not suggest total synergy, the LGO's greater closeness suggests that it may be easier for it to bridge the gap between world views. The reduced 'policy tension' (Hertogh 2001) that appears to exist naturally between the ombudsman and administrators may facilitate its attempts at control, even before other aspects of the LGO's mode of operation (such as communicative capacity and cooperative style of control) come into play. Of course, as noted earlier in this discussion, normative closeness may also risk the ombudsman being subject to administrative 'capture' and to the outcomes of control being

inherently weaker, in the sense that the normative adjustment required of decision-makers is minimal and unlikely to threaten the *status quo*.

*Box 8.8: propositions relating to the model of justice dominating administrative decision-making*

- i. Bureaucratic rationality is likely to be the dominant model of administrative justice across bureaucratic decision-making, reflecting a strong inherent preference amongst bureaucrats for a model of fairness that privileges collective and administrative interests.
- ii. The existence of a gap between the normative stances of redress mechanisms and decision-makers, defined across three dimensions - their models of justice, their preference for collective or individual interests, and their prioritisation of administrative or legal values - represents a significant challenge to the achievement of control by redress mechanisms.
- iii. The greater the gap between the normative stances referred to in proposition H (ii) above, the less likely redress mechanisms are to exercise effective control over administrative decision-making and *vice versa*.
- iv. This clash of values does not mean that redress mechanisms are unable to affect any changes in administration, but it does suggest that changes will be limited if they require an amendment to fundamental views about the requirements of fairness.

*Factor I: the structure of bureaucratic decision-making.*

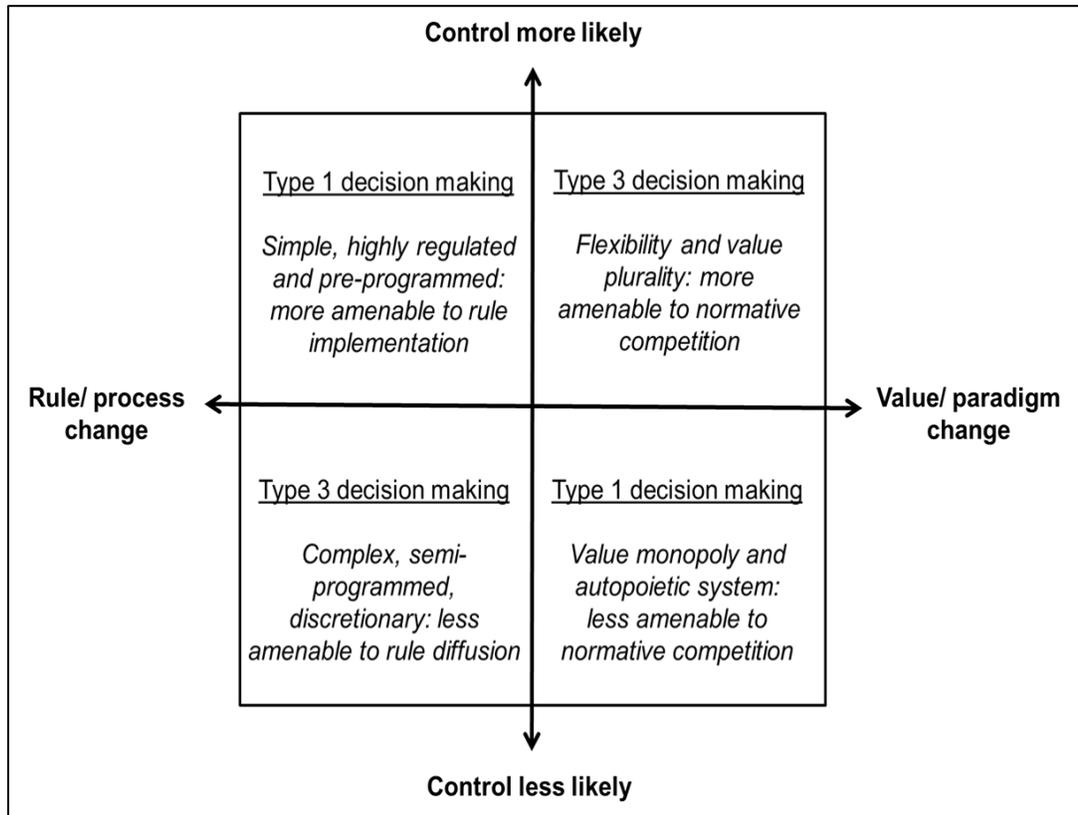
8.6.13. As part of the discussion of factor H above, the chapter has already provided an analysis of the structure of bureaucratic decision-making operating in the areas considered in this thesis. It remains, therefore, to comment on the potential significance of these structural differences in relation to the exercise of control by redress mechanisms, and some suggestions are made here about the possible impact that decision-making structure and decision-making type will have.

8.6.14. The key question which may be speculated on is whether type 1 decision-making, with its high degree of structure and confined discretion, is more or less amenable to control, than type 3 decision-making, with its more open structure and more routine use of discretion. In answering this question it is worth remembering that the nature and scale of the 'directions' provided by redress mechanisms can vary considerably and be seen as existing on a continuum: at one end, the changes that are required are easily reducible to simple rules and process changes; at the other end, the changes required are more fundamental and akin to changes in decision-making values and paradigms. Drawing on the organisational learning literature, these extremes can be referred to respectively as changes requiring 'single loop learning' and changes requiring 'double loop learning' (Argyris and Schon 1978).

8.6.15. Figure 8.5 below sets out this thesis' suggestion with regard to how the ability of redress mechanisms to exercise control over type 1 decision-making and type 3 decision-making might vary depending on the extent to which the directions of redress mechanisms require either single loop or double loop learning. In brief, the figure suggests that type 1 decision-making is more likely to be subject to control where the directions of redress mechanisms require process or rule change (single loop learning) and less likely to be subject to control where redress

mechanisms require paradigm or value change (double loop learning). The situation is exactly reversed in relation to type 3 decision-making. The reason why type 1 decision-making is more amenable to rule change than type 3 decision-making is related to the structure of the decision-making environment - the highly rule-bound nature of type 1 decision-making and its tightly controlled hierarchic structure mean that, assuming administrators wish to implement the changes suggested by redress mechanisms, rule changes should be easier to implement and diffuse throughout the organisation. This contrasts with type 3 decision-making, whose open textured, discretionary and more complex environment mean that the transmission, diffusion and correct interpretation of rule changes is likely to be more difficult.

Figure 8.5: variations in the likelihood of control being exercised, depending on the types of changes required and the types of decision-making



8.6.16. In relation to directions which require value changes, the hypothesis is that type 3 decision-making will be more amenable to control, although for reasons which will be discussed, still highly resistant to these kind of changes. The reason why type 3 decision-making may be more amenable is that this decision-making environment is inherently more pluralistic in normative terms than type 1 decision-making. In the latter, there is a monopolistic and hegemonistic value system in operation, with the imperatives of the bureaucratic rationality model dominating entirely the normative space in which decision-making takes place. This environment is driven strongly by intra-bureaucratic preferences for collectivist approaches. As shown in figure 8.3 above, choices about the

balancing of individual and collective interests are taken in a pre-decision phase, so that decision-making is strongly and centrally steered towards a particular normative position. Type 3 decision-making, on the other hand, is less autopoietic and much more pluralistic in its range of normative influences. Its greater discretionary aspects also leave more space for decision-makers to make choices between alternatives and to select between different models of fairness. As shown in figure 8.3 above, decisions about balancing interests are not pre-prescribed but occur in each and every decision that is taken. So although type 3 decision-making environments are likely to be highly competitive, their pluralistic nature at least allows redress mechanisms to compete.

8.6.17. While it may be the case that double loop learning is more possible in type 3 environments, it is nonetheless worth stressing the fact that such learning remains highly unlikely in the context of public bureaucracies (Common 2004; Thomas 2015). Partly as a result of the statutory frameworks in which they exist, and partly as a result of the inherent complexity of public bureaucracies, the likelihood of ever achieving radical value change is slight. As a result, a further conclusion is that although type 3 decision-making is theoretically more amenable to value change, because such value change is inherently difficult in public bureaucracies, the likelihood of achieving any form of learning (*i.e.* single or double loop) in type 3 decision-making is likely to be less than that of achieving any form of learning in type 1 decision-making.

*Box 8.9: propositions relating to the structure of bureaucratic decision-making*

- i. Type 1 decision-making is more likely to be effectively controlled by redress mechanisms where the latter's directions constitute attempts at rule change (single loop learning) and less likely to be effectively controlled where the directions constitute attempts at value change (double loop learning).
- ii. Type 3 decision-making is more likely to be effectively controlled by redress mechanisms, where the latter's directions constitute attempts at value change (double loop learning) and less likely to be effectively controlled where the directions constitute attempts at rule change (single loop learning).
- iii. Because of the inherent difficulty of achieving double loop learning and value change in public bureaucracies, type 3 decision-making is less likely to be the site of any form of learning, while type 1 decision-making is more likely to be subject to at least some form of (single loop) learning.

**8.7. The characteristics of decision-makers**

*Factor J: the commitment of decision-makers to be controlled by, and to learn from, redress mechanisms.*

8.7.1. The data on decision-makers' commitment show higher levels of commitment to learning from the LGO and the court, and more limited commitment to the tribunal. In relation to the LGO, local authority respondents generally expressed a very strong commitment to learning,

suggesting that they would automatically seek to implement decisions, and not citing any examples of non-compliance. Local authority respondents also reported having made a significant number of changes as a result of the LGO's decisions. In relation to the court, respondents expressed a similarly high level of commitment to learning, although fewer examples of this happening in practice were provided. When discussing the tribunal, respondents expressed commitment, but this was with some caveats and limitations. A number of respondents suggested that, although there may have been some substantive learning when the tribunal was first set up (echoing Sunkin and Pick's (2001) finding that impact may change over time), learning was now largely confined to finding better ways to win tribunal cases. Commitment was, therefore, to a narrow form of learning and this was reflected in the examples provided by respondents, where changes were more likely to be about the way cases were conceded and defended, than about substantive process and practice changes.

8.7.2. The overall picture, in summary, is one where high commitment was expressed in relation to the LGO and the court and lower commitment was expressed in relation to the tribunal. However, this picture needs to be considered in light of other data, for example, relating to decision-makers' perceptions of the potential for learning from redress mechanisms' decisions. Indeed, it is worth remembering that LGO cases were often perceived as 'weak' and peripheral to administration. The point is that, even where commitment appears to be higher, the context is important in being clear about exactly what administrators were committed to. In the LGO's case, commitment was perhaps limited to making small changes that did not risk upsetting the *status quo*. So what exactly were decision-makers committed to?

8.7.3. The first issue relates to whether there was significant commitment to learning from cases against other local authorities. Almost all the

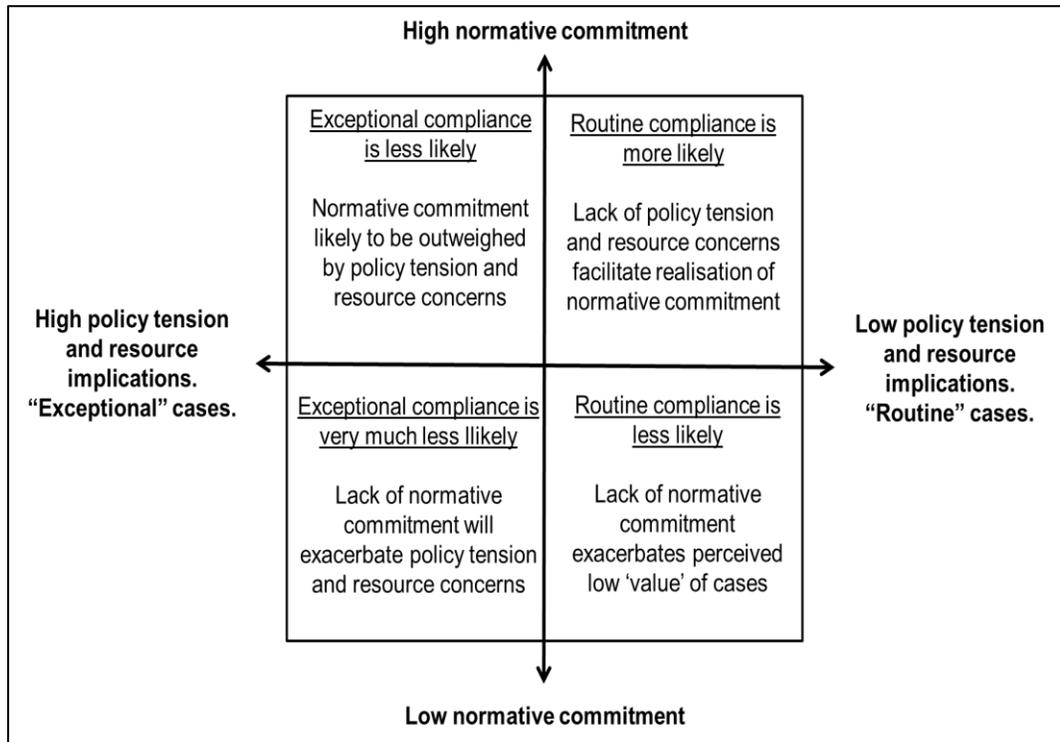
examples of actual learning cited by respondents referred to changes made following direct experiences of review. It is, of course, likely that such cases will be those most vividly remembered by administrators, but the data nonetheless suggest that limited learning occurred as a result of decisions that were external to the authorities in question. This finding is echoed by the data on processes of knowledge acquisition (see factor K below) which suggest that there is only middling awareness of cases against other local authorities and that authorities were unlikely to have set up particularly effective Organisational Learning Mechanisms (OLMs - Lipshitz and Popper 2000). What this indicates, therefore, is a stronger commitment amongst decision-makers to learn from their own direct experiences, and a much weaker commitment to the value of learning from redress mechanism decisions that arise elsewhere. This shows a reactive approach to learning from redress mechanisms, where authorities will often prefer to wait until they are challenged by a citizen before considering what a redress mechanism's position might be, rather than taking a more proactive stance to establishing and implementing such positions.

8.7.4. The second issue relates to how far decision-makers' commitment is determinative of actual behaviour in submitting to control by redress mechanisms. Here it is instructive to examine the only significant example of non-compliance discussed by administrators. This involved a case that had been upheld by the upper tribunal and the court of appeal. Administrators who discussed the case showed a clear commitment to learning, in the sense that they took the case seriously and spent considerable amounts of time to try to understand the judgments and to consider their implications. However, while they appeared minded to comply if they could, they ultimately decided to adopt a 'wait and see' approach, where they would only make changes if they were to be directly challenged themselves and unable to convince a future tribunal of the

reasonableness of their position. In explaining their reasoning, respondents made clear that the scale of the change and the resource implications associated with it were so significant as to make their current SEN transport policy untenable. Ultimately, they did not feel that this could be justified nor that the tribunal and the court's decisions were reasonable in seeming to require such a change in established policy.

8.7.5. This example of non-compliance strongly supports Hertogh's (2001) suggestion that the degree of 'policy tension' in a judgment - the distance between the directions in a judgment and current administrative practices - is an important factor in determining the likelihood of judgments being taken on board. It also recalls Halliday's (2004) discussion of the fact that commitment, while important, will not necessarily lead to compliance where other factors are in play. Indeed, the analysis here suggests that the importance of commitment as a factor facilitating the exercise of control by redress mechanisms will vary depending on the type of cases involved. Where cases are 'routine', in the sense that there is low policy tension and low resource implications involved (as with the bulk of LGO cases, for example), a normative commitment to learning from redress mechanisms is likely to be important. Where cases are 'exceptional', in the sense that there is high policy tension and high resource implications involved (as with the case of non-compliance discussed above), normative commitment is not irrelevant but is likely to be trumped by the existence of other powerful factors. This suggestion is described in visual form in figure 8.6 below.

Figure 8.6: differential effect of normative commitment depending on the degree of policy tension and the resource implications of decisions



8.7.6. Effectively, the argument set out in figure 8.6 is this: commitment to learning is likely to be most determinative of compliant behaviour where cases are the least important (in change and resource terms). Here, an absence of commitment is likely to lead to non-compliance, while the presence of commitment makes compliance much more likely. However, where cases are most important, commitment to learning is likely to be least determinative of compliant behaviour. Here, normative commitment, even where it exists, is likely to struggle for dominance against other factors.

8.7.7. That normative commitment may have such a differential effect is important, because some have suggested that the existence of commitment is key to explaining what they see as a general propensity for

administrators to comply with decisions by redress mechanisms (Calvo *et al* 2007, Platt *et al* 2010). In particular, the concept of the public service ethos has been suggested as important in explaining why, generally, administrators are likely to be predisposed to implement the decisions of redress mechanisms. This ethos strongly supports notions of the rule of law (Woodhouse 1997), an important aspect of which should be to act in line with the decisions made by redress mechanisms. Although this thesis found strong support for the suggestion that a public service ethos exists amongst administrators, with a strong desire amongst respondents to ‘do it right’, the argument here is that there is a complicated relationship between such commitments and actual behaviour.

8.7.8. This is for two reasons. The first is set out in figure 8.6 above - normative commitment will only go so far where other countervailing factors are present. The second is that, within the ‘public service ethos’, the normative stances of administrators are both capacious and multi-dimensional. Indeed, the ‘public service ethos’ contains within it many of the fundamental tensions that populate public administration, in particular, multiple competing conceptions of fair administration (Mashaw 1983). As a result, the battle between efficiency and fairness, between the collective and the individual, between law and administration, is not resolved by the adoption of a public service ethos. The public service ethos, far from resolving such conflicts, merely reflects the normative complexity of the task. At the same time as the ethos compels decision-makers to act lawfully, it compels them to have a mind to resource implications and to other sources of legitimate guidance which influence the administrative setting (see factor N below). Given the gap identified above between redress mechanisms and administrators in terms of their fundamental stances on the fairness of decision-making, it should not be surprising that a commitment to learning might not only be trumped by resource issues, but also by the fact that administrators are influenced by

justifiable, rival normative commitments that may suggest non-compliant courses of action.

8.7.9. More generally, a question is raised here about whether compliance decision-making is best explained by stressing the rational assessment of costs and benefits (e.g. Simon 1997) or theories stressing the realization of normative ideals (e.g. March 1994). Rather than being in conflict here, however, rational and normative factors appear to play equally important roles. This is because, in assessing practical costs and benefits (such as the effort required to make changes or the financial costs associated with them), administrators are also likely to be making calculations about the normative costs and benefits of certain actions. Here, the psychological and social costs of not complying with decisions which are considered to be authoritative by society, will be one of the factors that will form part of administrators' consequential calculations. In assessing these normative costs and benefits, administrators will, as suggested above, be seeking to balance the contradictory requirements of good administration and decide, in each case, which model of justice they should adopt and which they should depart from. Rarely, therefore, will the normative positions of administrators be unequivocal, since decisions will infrequently be able to satisfy more than one model of fairness.

*Box 8.10: propositions relating to the commitment of decision-makers to be controlled by, and to learn from, redress mechanisms*

- i. Decision-makers' commitment to learning from the tribunal is more limited than their commitment to learning from the LGO and the court.
- ii. In examining decision-makers' commitment, it is important be clear about what they are committed to; in relation to the

LGO, the perception that cases were weak and peripheral, meant that commitment was to the implementation of small changes that would not affect the *status quo*.

- iii. Decision-makers are more likely to be committed to making changes as a result of redress mechanisms' decisions on their own cases, and less committed to making changes where decisions are about other authorities.
- iv. The extent to which normative commitment to learning from redress mechanisms may be a determinative factor in whether redress mechanisms achieve control, depends on the nature of the particular directions by redress mechanisms.
- v. In routine cases, where policy tension and the resource implications are low, normative commitment to learning is likely to be a significant factor: variations in commitment levels may help explain compliance levels here.
- vi. In exceptional cases, where policy tension and the resource implications are significant, normative commitment is less likely to be an important factor: even where commitment is high, such commitment is unlikely to outweigh other factors.
- vii. The existence of a public service ethos and a desire to act lawfully and in line with the directions of redress mechanisms, generally, run up against competition from other factors: (a) policy tension and resource implications and (b) contrary but simultaneously held normative commitments which also feature as part of the public service ethos.

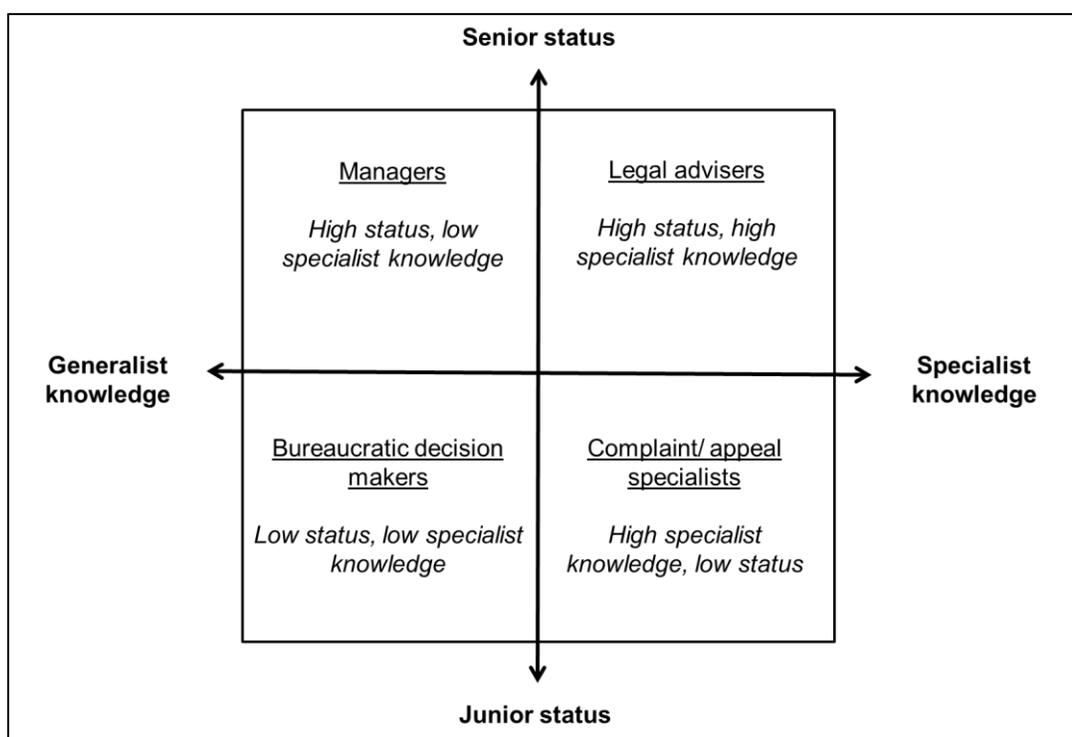
*Factor K: decision-makers' processes of knowledge acquisition*

8.7.10. Before considering the processes by which administrators became aware of redress mechanisms' decisions, it is important to contextualize those processes in relation to decision-makers' overall levels of awareness. Here the findings were clear: administrators generally reported high awareness of decisions against their own authorities, but when it came to decisions about other local authorities, they reported middling awareness. These results seem to indicate that administrators were not confident about the comprehensiveness of their processes for finding out about the decisions of redress mechanisms. The data on levels of awareness also suggest strongly that decision-makers are likely to make judgments on the overall value of feedback from redress mechanisms on the basis of a small and local sample of decisions, rather than on the basis of wider knowledge. As noted above, this is potentially problematic since those cases that are publicly reported are likely to be those that contain the most standard-setting potential and the most relevant guidance for future action.

8.7.11. Although the average levels of awareness were consistent across the sample, there was a significant amount of variation between individuals and, particularly, significant variation depending on the seniority and degree of specialization of the officer involved. Those with a specialized dispute resolution role were more likely to have higher awareness with regard to the decisions of redress mechanisms than those whose role was either managerial or involved primary decision-making. In relation to the latter, the qualitative data suggested that managers would know more than primary decision-makers, but this knowledge was likely to be higher level and more generic than specialist staff. The other main variation here related to the status of various decision-makers within the organisation, and whether or not they had high or low status. This variable

is potentially important in explaining not just who has knowledge about the decisions of redress mechanisms within an organisation, but also who has the status and ability to use that knowledge effectively. Figure 8.7 below, shows four key categories of staff displayed in a matrix whose axes plot level of seniority against job specialization.

*Figure 8.7: staff categories on a matrix plotting level of seniority against job specialization*



8.7.12. Figure 8.7 is offered as a means of displaying not only the likely variations in awareness within organisational settings, but also how knowledge about redress mechanisms is contained within certain job roles and how that containment may limit the extent to which knowledge is put into practice. The suggestion is that those with the most specialist knowledge - the complaint and appeal specialists and the legal advisers - are unlikely to have a major influence on routine administration. This is because complaints and appeal specialists do not have a high status within

the organisation and, therefore, struggle to get routine decision-makers and managers interested in feedback from redress mechanisms. This supports the suggestion that the status of those receiving knowledge into the organisation is important in terms of the extent to which it is subsequently transmitted (Rist 1994). In relation to legal advisers, they often do have a high status within organisations, however, the issue here is that legal advisers tend to be removed from the routine bureaucratic process. They are called upon infrequently to troubleshoot particular problems that arise when a local authority is challenged. As a result, their knowledge and potential influence tends to have a limited effect in practice outwith challenged cases.

8.7.13. On the other side of the matrix, managers have some knowledge, and more than junior decision-making officers, but the breadth of matters they deal with means that they are likely to have only a partial grasp of redress mechanisms' requirements. So although they have the authority to effect change, they will not necessarily either have the knowledge or the time to be able to do so. Finally, figure 8.7 suggests that routine decision-makers are those who are least likely to have either in-depth knowledge of casework or to be able to effect significant change as a result. Figure 8.7, therefore, suggests a picture where awareness and knowledge are distributed differentially within organisations and factors of organisational structure and hierarchy are likely to interfere with the extent to which knowledge is converted into concrete changes.

8.7.14. This differential awareness may also be explained in terms of the different ways in which administrators went about finding out about cases. Here local authority respondents described three approaches - systematic, *ad hoc*, and unsystematic - which are summarised in table 8.2 below.

Table 8.2: different approaches to finding out about redress mechanisms' decisions

Systematic	Ad Hoc	Unsystematic
Routine monitoring Central information storage Part of individual roles Proactive scanning	Occasional problem solving No clear storage system Not part of individual roles Reactive approach	Neither reactive nor proactive systems Information acquisition left to chance

8.7.15. Interestingly, respondents within the same authority reported different approaches to finding out about cases, which suggests that even where more systematic approaches were reported these may not function effectively. Respondents generally reported that time and resources were the most significant barrier to adopting systematic and proactive approaches to finding out about cases and this resulted in most respondents referring to the existence of a more *ad hoc* system within their local authority. As may be evident, therefore, there appears to be a substantial gap between local authority respondents' commitment to learning from redress mechanisms and the measures they actually take to implement this commitment. The existence of Organisational Learning Mechanisms (OLMs) - the structures and processes for collecting, analyzing and using data (Lipshitz and Popper 2000, Barrados and Mayne 2003) - can probably be taken as a more accurate measure of decision-makers' commitment to learning from redress mechanisms. And, in this respect, the findings suggest that systematic approaches are likely to be unusual.

8.7.16. In terms of the sources of information used by local authority respondents, the data showed that networking with colleagues was by far

the most common way that administrators found out about decisions. This was followed by training, newsletters/ email summaries, and websites. Interestingly, very few respondents referred to receiving information from their legal teams, which supports the suggestion made in the discussion of figure 8.7, that the knowledge of legal advisers is likely to be ‘siloed’ and have a limited effect on wider bureaucratic processes. This data is potentially important in suggesting the most effective channels through which redress mechanisms’ decisions reach decision-makers. The data suggest, for example, that being able to participate in or influence professional networks is likely to be particularly effective as a means of disseminating information.

8.7.17. Halliday (2013), in a study looking into legal compliance in the context of local authority roads maintenance, has recently suggested that public sector networks may be able to play a significant role in enhancing legal compliance. Hall (2011) has also suggested that the ability of redress mechanisms to form ‘interpretive communities’ with administrators can significantly enhance their ability to be influential. Existing professional public sector networks may provide a locus for such communities and a tool to be leveraged in encouraging learning from redress mechanisms. The data also suggest that the channel and presentation of information is likely to be important. This might include, for example, preparing information about cases in a format that could easily be used in a training context and providing summary information of the sort that is most likely to capture the attention of time pressured administrators (Gill 2012).

Box 8.11: *propositions relating to decision-makers' processes of knowledge acquisition*

- i. Decision-makers are likely to be more aware of their own cases than they are of cases against other authorities, and this may limit the extent to which they are exposed to important, standard-setting directions of redress mechanisms.
- ii. There are likely to be significant variations in awareness between individuals, with these variations resulting from their degree of seniority and specialization.
- iii. Those with the greatest specialist knowledge are least likely to be able to effect change in the administrative process, because they have low organisational status or because they are isolated from routine administration.
- iv. Those with the greatest ability to affect change - managers and senior managers - may have difficulty in doing so as a result of their more generalist roles and lower levels of knowledge.
- v. Routine decision-makers are those who are least likely to have significant knowledge about the requirements of redress mechanisms.
- vi. Decision-makers' commitment to learning from redress mechanisms is best measured in relation to the extent to which that commitment is reflected in practice through the creation of Organisational Learning Mechanisms.

- vii. Processes of organisational learning are likely to vary in the degree to which they are systematic, *ad hoc*, or unsystematic.
- viii. Networking groups represent a key site of knowledge acquisition and transmission for decision-makers and are likely to be an important channel through which to enhance awareness and adoption of redress mechanisms' decisions.
- ix. Other common sources of information suggest that the way in which redress mechanisms communicate and package their decisions for consumption by decision-makers is likely to make a difference.

*Factor L: decision-makers' processes of knowledge interpretation, dissemination, and storage*

8.7.18. The data indicate three broad approaches that decision-makers might take to the interpretation, dissemination, and storage of redress mechanisms' decisions. These approaches represent a spectrum of practice from proactive to more reactive learning processes, as illustrated in figure 8.8 below.



8.7.20. The median learning model represents a different approach, where compliance decision-making is decentralized. Here decisions are passed through the organisation in their 'raw' form with the expectation that decision-makers will read them, assess them, and make any changes that may be required as a result. In this more 'laissez faire' approach, compliance decision-making becomes diffused throughout the organisational setting, leading to more uneven results. Even where appropriate decisions are taken by administrators, the visibility and sustainability of any changes (Van Acker *et al* 2015) is likely to be reduced, since change involves local adaptations in practice rather than more formal implementation processes. The means by which any learning is recorded is also likely to be much more transitory, particularly as modern bureaucracies have been thought to have lost much of their ability to store knowledge (Pollitt 2009). In this model, information is circulated within the organisation, but without any strong central direction. The individual is left to decide, so that the importance of individual decision-makers' conscientiousness and capacity become much more important.

8.7.21. The minimal learning model goes beyond a 'laissez faire' approach to one which effectively involves an organisational culture of default non-compliance. Here, compliance decisions are neither made centrally nor passed down the bureaucratic chain. Instead, the basic organisational stance is that changes will not be made unless they are forced as a result of the organisation being challenged in an individual case. The approach is entirely reactive, with no attempt to use the decisions of redress mechanisms as opportunities to amend routine decision-making. Instead, the decisions of redress mechanisms only become relevant retrospectively when a case has been challenged and administrators require to know the likely position of a redress mechanism to assist in the process of negotiating in the mechanism's shadow. Here, compliance decision-making is restricted to the individual case.

8.7.22. As noted above, the maximal learning model is most likely to result in redress mechanisms achieving a measure of control, even although centralized decision-making may result in non-compliance decisions. Generally, this seemed to be the model adopted by administrators when deciding how to respond to redress mechanisms' decisions about their own cases. When directly under the spotlight, clear, central decisions about compliance were more likely to be taken. The median and the minimal compliance model are generally less likely to result in the significant exercise of control by redress mechanisms. In the case of the median model, this is because the adoption of a decentralized approach puts the emphasis onto decision-makers throughout the organisation who are less likely to have the awareness, time, expertise, and commitment to take appropriate action. In the case of the minimal model, this is because compliance is dependent on cases being challenged by citizens in the first place and because any learning is confined to challenged cases rather than the broader administrative process. As will be clear, the minimal approach was the one which was perhaps most associated with attitudes towards the tribunal, where there was little in the way of proactive learning and a high propensity to settle cases in the shadow of the tribunal. Generally, the median and the minimal approaches were more likely to be those adopted towards decisions made by redress mechanisms against other local authorities.

*Box 8.12: Propositions relating to decision-makers' processes of knowledge interpretation, dissemination, and storage*

- i. The learning processes adopted by administrators are likely to vary in relation to how proactive or reactive they are and three learning models can be identified: the maximal, median, and minimal learning models.
- ii. The maximal learning model involves centralized processes of knowledge interpretation, dissemination, and storage and is most likely to involve formal processes of implementation.
- iii. The median learning model involves decentralized processes of knowledge interpretation, dissemination, and storage and is most likely to involve informal processes of implementation.
- iv. The minimal learning model effectively involves an organisational stance of non-compliance, except where there is a realistic chance of adjudication by a redress mechanism and, here, learning is restricted to individual cases.
- v. The maximal learning model is most likely to be adopted when administrators are considering the implications of redress mechanisms' decisions against their own authorities; the median and minimal learning models are most likely to be adopted where administrators are considering decisions against other authorities.
- vi. Overall, the maximal learning model is most likely to facilitate the exercise of control by redress mechanisms, as a result of its formal

and structured processes of decision-making and implementation.

- vii. The median learning model is less likely to facilitate the exercise of control by redress mechanisms, and is much more reliant on individual variations which will result in patchy control where it is achieved at all.
- viii. The minimal model's relationship to the extent of control exercised by a redress mechanism depends on the volume and proportion of cases which are challenged; if this is high and many cases enter the redress mechanisms' shadow, control will be significant, but if volumes are low and few cases enter its shadow, then control will be peripheral.

### **PART III: CHARACTERISTICS OF THE DECISION-MAKING ENVIRONMENT**

#### **8.8. Pressures, challenges, and influences in the decision-making environment**

8.8.1. This part of the chapter considers two factors relating to the decision-making environment: the pressures and challenges facing decision-makers and external influences on decision-making.

*Factor M: pressures and challenges facing decision-makers.*

8.8.2. The perceived pressures and challenges affecting decision-making provide the context in which decision-makers respond to redress mechanisms' decisions. Understanding the 'administrative soup' (Sunkin 2004) of matters which call for administrators' attention is important, even though these are often very mundane; the so-called 'practical influences' referred to by Galligan (1996). An example of this is the strong

trend in the data around pressures on resources - a constant feature of public administration, although perhaps particularly acute in light of current austerity policies. Similarly, the continual tinkering with administrative systems by politicians was cited as a bugbear which made the administrative task more complex. Such factors are so common across administrative settings that their importance may be neglected when it comes to considering the core concern of this thesis. However, they are likely to be important in shaping the everyday realities of decision-makers. Respondents often suggested that the tasks and pressures at hand were more likely to call for their attention than redress mechanisms. In the context of services that were struggling to carry out their basic decision-making tasks and being affected by continual, radical changes in education policy (see chapter 5), the capacity of administrators to learn from redress appears to be restricted.

8.8.3. In addition to these well-known pressures on public administration, one strong trend in the data related to an increase in consumerist behaviour on the part of parents. Respondents commented that the policy rhetoric in education was all about 'choice' and that this language permeated policy documents, but that the reality was that real choice was rarely available to parents and, where preferences were a consideration in decision-making, these could often not be met as a result of the need to ration public resources. Respondents found themselves between a rock and hard place: central government policy encouraged parents to act as consumers, but left local authorities with the job of managing limited resources fairly. As we saw above, decision-making in this area was strongly dominated by bureaucratic rationality as a model of justice, and this perhaps explains administrators' strong reactions against consumerist approaches in public services.

8.8.4. Generally, increasingly vocal, knowledgeable, and well represented parents were seen as increasing workloads and distorting local authorities' attempts to ensure that all children got their share of a limited public purse. The encouragement given to parents to act as consumers in an education marketplace clashed with the collectivist approaches which dominated these administrative settings. Attempts to use consumer power - such as referrals to redress mechanisms - were seen by many respondents as attempts by a privileged minority to distort the provision of education services in their favor and at the expense of less resourceful parents. This echoes the findings of Hastings and Matthews (2011) in relation to potential distortions of public service delivery in favor of the middle classes. That redress mechanisms were seen as facilitators of such distortions and that complainants were viewed in this way, emphasizes again the gap that exists between decision-makers and redress mechanisms and illustrates why administrators often felt that the cases considered by redress mechanisms were unrepresentative and, even, underserving.

*Box 8.13: propositions relating to the pressures and challenges facing administrators*

- i. Mundane features of public administration - such as lack of resources and policy change - are likely to shape the daily concerns of decision-makers.
- ii. Such pressures are likely to limit the amount of time and resources that administrators will have to organize themselves to learn from redress mechanisms' decisions, even where they are committed to doing so.
- iii. A strong pressure in the education area is the encouragement of

consumerist approaches by central government, which was seen to have created increasingly pushy, knowledgeable and well represented parents.

- iv. Although parental consumerism was seen as a challenge, it was strongly resisted by decision-makers, who saw it as a distorting force, privileging the interests of the middle class.
- v. Redress mechanisms are likely to be seen - at least by some administrators - as facilitating undeserving individual consumer interests, which impedes administrators from achieving equity for parents.
- vi. Resistance to consumerist logics in public service, and a fear of increasing individual challenges to the collectivist outlook of bureaucracy, may in part help to explain some of the normative distance between redress mechanisms and decision-makers.

*Factor N: external influences on decision-makers.*

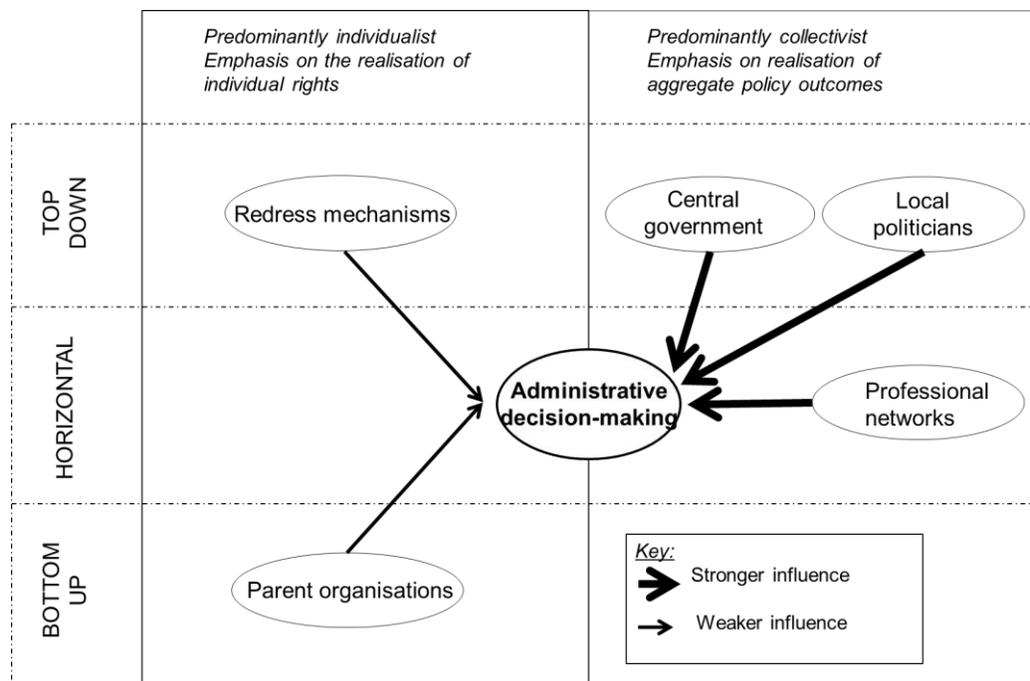
8.8.5. A surprising finding, given the suggestions in the literature of an 'audit explosion' (Power 1997) and a surfeit of accountability (see Bovens 2007), was that bureaucratic decision-making in the local authority education area was not subject to a multiplicity of control mechanisms. For example, local authority respondents reported that their decision-making was not subject to performance audits nor to inspection regimes. The only other specific 'review' type control mechanism (Hood 1995) in operation was the Office of the Schools Adjudicator, a tribunal operating in a largely regulatory capacity (see chapter 5). That there was limited direct competition from other specifically instituted control mechanisms, and

little evidence of the plethora of bodies for regulation inside government highlighted by Hood *et al* (2000) does not mean that there were no external influences over administrative decision-making. For example, central government was cited as a strong influence in the sense that it was responsible for producing the legislation, codes and guidance for decision-making, even though its role was very limited in relation to the monitoring and the implementation of these frameworks. This role was, however, fulfilled by local authority elected members, who were identified as being involved in reviewing aggregate outcomes and the financial efficiency of decision-making. Although this did not come out very strongly in the data, it is likely that the need for administrators to report these outcomes and keep spending under control, with the knowledge that this would be subject to local political scrutiny, was influential. Indeed, the collectivist orientation of administrators and their concern with the delivery of fairness across cases, may have been significantly influenced by the perspectives and priorities of elected members.

8.8.6. Overall, therefore, what we can see is a strong norm-setting influence from central government (as the key source of law and guidance in this area) and a significant influence from local politicians and their concern with the overall effectiveness of decision-making. In addition to these 'top down' influences, respondents identified 'horizontal' influences in the form of professional colleagues inside and outside their authorities, and 'bottom-up' influences in the form of pressure from parent organisations and local charities. While these influences, unlike hierarchical control forms, had no formal authority in relation to administrative decision-making, they also had an important norm setting function, providing the context for behaviour which administrators would deem to be appropriate. Indeed, as Dunsire (1979, 1984) notes in his theory of control, administrative systems often operate 'under control' as a result of a web of carefully balanced influences acting on them. This is what allows

administrative systems to be kept in check, even though perfect control of administration is likely to be impossible. The main features of this ‘web’ in relation to the local authority education area are shown in figure 8.9 below. This figure describes the main influences described by local authority respondents, and classifies them according to whether they are top-down, horizontal, or bottom up, and whether they have a principally individualist or collectivist orientation. Figure 8.9 also makes a suggestion about the likely relative strength of these influences on administrative decision-making, and helps support the suggestions outlined below about the particular isostatic balance that exists in this area of administration.

*Figure 8.9: influences on administrative decision-making*



8.8.7. Our discussion of the normative outlooks of administrators and the way in which they perceived the fairness of their decision-making (see factor H above) can lead us to draw some tentative conclusions about the relative strength of these various influences on administrators *i.e.* what the current isostatic balance (Dunsire 1984) of local authority education

decision-making involves. In this regard, it is likely that the stress on collectivist interests, aggregate outcomes and financial efficiency of central and local government represent a powerful force, either helping to create the conditions for - or reinforcing the general predispositions of administrators towards - the strongly collectivist 'bureaucratic rationality' approach described above.<sup>28</sup> The more individualist interest and concern with specific case outcomes adopted by redress mechanisms, on the other hand, did not seem to be strongly reflected in the way administrators perceived and described their decision-making. The horizontal influence of professional networks is likely to be influential, emphasizing and providing the context in which distinct professional and administrative norms can operate. The influence of these groups was also seen in the data above in relation to where administrators were likely to acquire knowledge. Finally, the bottom up influence of parents and parent organisations, most strongly associated with consumerist perspectives, were influential in the sense that they required to be dealt with, but also seemed to be largely resisted by local authority decision-makers. Their perspective and their emphasis on the full vindication of individual rights, provided only a limited influence on the normative outlooks of administrators. The suggestions made here about the relative strength of the various influences in the web of control are shown in the arrows in figure 8.9.

8.8.8. While there is debate about the degree to which bureaucracies are autopoietic or highly porous to their external environments (see chapter 2), figure 8.9 suggests that the web of external influences which hold administrative decision-making 'under control' push it strongly towards an isostatic balance which emphasizes the importance of collectivist and

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<sup>28</sup> There is clearly a danger of over-simplification in equating central and local government concerns only with aggregate outcomes, particularly since the policy framework explicitly calls for some degree of individuation. At the same time, however, the data presented here suggest that commitments to individuation are largely rhetorical and unfunded, leaving it to the local tier of government to deal with the consequences of what could be seen as cynical game-playing on the part of central government.

administrative perspectives. It seems likely, given the discussion above, that administrators' strong preferences for modes of administration stressing the achievement of collectively good outcomes and the importance of efficiency in resource allocation are strongly supported by central government, local political control, and professional networks. Whether these influences are determinative of the dominant modes of decision-making or simply reinforce existing predispositions is unclear. However, it seems likely that a combination of innate preference for collectivist approaches, combined with support from other norm-setting influences in the broader environment, provide an explanation for Galligan's (1996) widely supported view that the 'bureaucratic administration' model exercises a hegemonic hold on public administration. Here, what we can see is that the strong internal logics of bureaucracy find normative succor in the external environment and a strong basis for resisting the potentially disruptive normative alternatives suggested by redress mechanisms or others, such as parents and service users.

*Box 8.14: propositions relating to the internal influences on bureaucratic decision-making*

- i. The existence of an 'audit society' and multiple overlapping accountability mechanisms, is likely to be less true of some areas of public administration than others.
- ii. In the local authority education context, redress mechanisms do not face strong competition from other specific accountability mechanisms, with only local politicians providing this function.
- iii. Even where there is not a plethora of accountability mechanisms, bureaucratic decision-making is likely to be strongly influenced by

the norm-setting potential of central government and professional groupings, and by the direct review capacity of their political principals.

- iv. It is likely that a combination of bureaucratic predisposition and supporting external influences, help to explain the strong hold of the 'bureaucratic administration' model of decision-making on public administration.
- v. The existence of reinforcing external norms is likely to strengthen and legitimize the internal logics administrators adopt in their decision-making and to help them to resist alternative, more individualist, normative ideals such as those put forward by redress mechanisms.
- vi. The existence of redress mechanisms may help to ensure that the isostatic balance of an administrative system is not too heavily weighted against the fulfilment of individual rights; however, in the system under study in this thesis, it is likely that this balance is only very slightly redressed.

## **8.9. Chapter summary**

8.9.1. This chapter has provided a discussion of the thesis' empirical findings. It has identified 14 factors which are likely to help explain the extent to which redress mechanisms exercise control over bureaucratic decision-making. For each of these factors, the chapter has provided a set of propositions, which provide a summary of the key conclusions of the thesis, combining empirical insights with further analysis of the literature, in order to explain the phenomenon of control by redress mechanisms. The

detail of these propositions offers new empirical and conceptual insights, which support, extend, and develop the findings of previous research. Many of these hypotheses have the potential to be operationalized in future research and to be tested in different contexts. By way of conclusion, the next and final chapter of the thesis will now set out an overall model for explaining the exercise of control by redress mechanisms.

## **9. CONCLUSION**

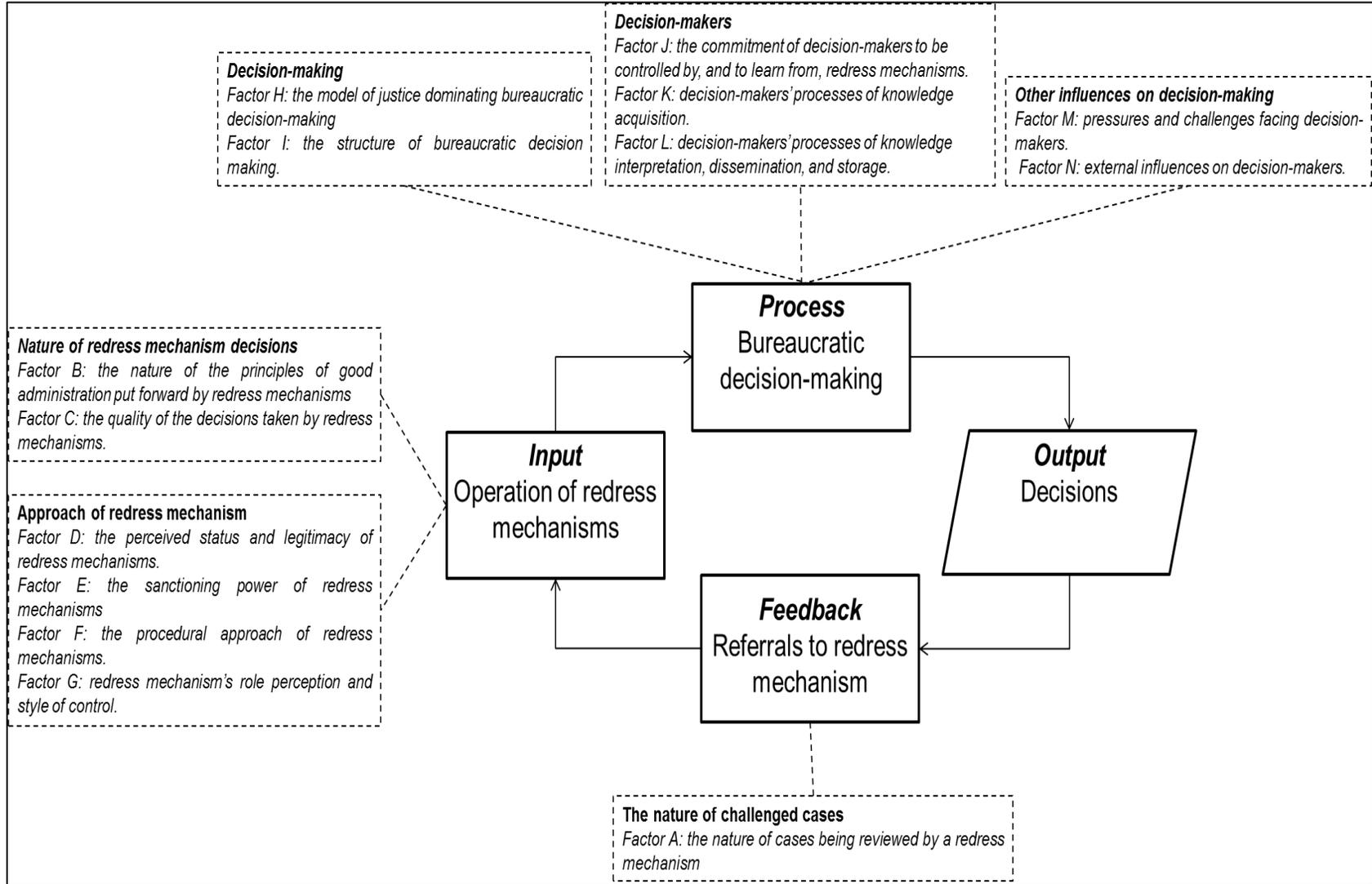
### **9.1. Introduction**

9.1.1. This chapter presents an overall model summarising the factors that have been found to facilitate or impede the control of bureaucratic decision-making by redress mechanisms. In presenting this model, the chapter will set out an argument for the thesis' contribution to the existing literature. It will then apply the model back to the data in order to draw conclusions about the extent to which bureaucratic control is achieved in the local authority education area. The chapter then considers the implications of the thesis' findings for administrative justice policy, before closing with some suggestions for future research.

### **9.2. A model for understanding bureaucratic control by redress mechanisms**

9.2.1. In this section, a summary model is presented which brings together the factors and propositions discussed in chapter 8. Figure 9.1 presents the factors around a simplified systems diagram, which illustrates the key elements involved in the control of bureaucratic decision-making by redress mechanisms. In brief, this involves examining the effect of an input (the decisions and actions of redress mechanisms) on a process (bureaucratic decision-making) which results in an output (bureaucratic decisions) which are then subject to feedback (referrals to redress mechanisms). For each area of the system, particular sets of factors are in operation. Setting out the factors in this way and presenting them in the context of a systems model is considered helpful in providing a snapshot of the key relationships considered in the study of bureaucratic control.

Figure 9.1: model summarising the factors responsible for the exercise of control by redress mechanisms



9.2.2. In setting out this thesis' contribution, it should be noted that its focus, scope, and conceptual outlook vary in important ways from much of the existing socio-legal literature on the impact of judicial review. The thesis' comparative approach, in particular, and the consideration of how three mechanisms - the key institutions of administrative justice - individually and collectively control bureaucratic decision-making have allowed for new perspectives to be developed. Here, Hertogh's (2001) comparative work has been built on to generate new insights into variations in control between redress mechanisms and, just as importantly, to give a better sense than has been given so far about how the administrative justice system - *as a whole* - functions as a control on bureaucratic decision-making.

9.2.3. The nature of this comparison, bringing together three diverse mechanisms, has also provided the impetus for a broader approach to be taken to defining the particular phenomenon under study. In his study, Halliday (2004) found the concept of compliance more helpful than the concept of impact, partly because the former gives a clearer sense of the regulatory purpose of that relationship (i.e. not impact for its own sake, but to ensure compliance with administrative law). While this thesis supports Halliday's (2004) approach, the idea of 'compliance' is not easily transferred across to the study of ombudsman schemes: while we could talk of compliance with an ombudsman's principles of good administration, the absence of legal weight to these principles, means that the concept of compliance is somewhat limiting.

9.2.4. The adoption of a control perspective is, therefore, argued to have been helpful, allowing for the breadth of approaches between redress mechanisms, as well as giving a clearer sense of where the particular relationship under study (how redress mechanisms control administration)

fits in with a broader phenomenon of legal and social scientific interest (how control over administration is achieved in all its guises). The specifically legal emphasis of compliance as a concept was seen as limiting and obscuring this connection to a broader world of action aimed at keeping public bureaucracies 'under control' (Dunsire 1979, Hood 1995, Beck Jorgensen and Larsen 1987). The thesis' subsequent emphasis on organisational learning, as the internal organisational processes through which control is emphasized, has also helped to contribute to existing perspectives in the socio-legal literature. In particular, the thesis has sought to demonstrate the value of drawing on organisational learning to elucidate the processes by which knowledge is received, transmitted, interpreted and stored within organisations. Conceptually, organisational learning has provided a framework for understanding the internal dynamics of organisations in relation to various types of knowledge and is the other side of the coin of control, which provides a framework for analyzing the relationship between organisations and institutions.

9.2.5. The preliminary argument here, therefore, is that the framing of this study has allowed for a fresh perspective to be added to the literature. In moving on to outline the substantive contribution of the thesis to the literature, it should be noted that this conclusion will not rehearse every analytical refinement suggested in chapter 8; the summary boxes through that chapter may be referred to for a summary snapshot of these detailed contributions. In this conclusion, the aim is instead to identify the overall contribution which the model in figure 9.1 has made to the fundamental conceptual basis for understanding the exercise of control by redress mechanisms. This contribution can most clearly be seen by comparing the model to Halliday's (2004) analytic framework, which - as argued in chapter 4 - constitutes one of the most comprehensive attempts in the

literature to explain the relationships between a redress mechanism and the decision-makers subject to it. Three main contributions are identified.

9.2.6. The first contribution relates to the novel emphasis this thesis' model places on the nature of the cases that are received by redress mechanisms - the 'feedback' element of the system shown in figure 9.1.<sup>29</sup> The importance of the type of issues being challenged, the volume of cases that are received, and the potential for competition between redress mechanisms for disputes, are all brought into focus by a specific emphasis in the model on the 'feedback' area. At its broadest level, this focus helps to make a connection between scholarly interest in the control exercised by redress mechanisms and another major theme of socio-legal interest: the accessibility of the justice system. If the basis of the exercise of control is the nature of the feedback received from the bureaucratic decision-making system, then accessibility becomes a foundational issue for those interested in control. This echoes Dunsire's (1984) emphasis on the importance of 'detection' to a system of control - control cannot be exercised unless there are effective means of detecting the presence of errors within the system. The addition of this explicit focus within the model and the theoretical propositions derived from this, therefore, represent the thesis' first contribution to the conceptual framework.

9.2.7. The second contribution is to place a novel emphasis - not only on the nature of the principles being propounded by redress mechanisms - but on a range of other factors to do with the way in which they operate (factors D to G in the model, summarized as 'approach of redress mechanisms' in figure 9.1). It is here that the thesis' comparative approach has been most helpful for the generation of new insights. Whereas the literature on

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<sup>29</sup> Up until this point factor A was discussed in relation to the characteristics of redress mechanisms, however, its position is now more clearly reflected as relating to 'feedback' in the systems model.

judicial review considered a single mechanism in isolation, and therefore perhaps took for granted various ways in which it operated, the introduction of a comparative element has allowed for an emphasis on matters that did not feature significantly in previous research. This is particularly the case in relation to factor E, where issues around differential responses to processes involving adversarialism and inquisitorialism, *de novo* and retrospective decision making, and the importance of rules of precedent have been explored. While this set of factors builds on existing insights, it develops and extends these sufficiently to allow the thesis to claim that a distinct contribution is made to the overall framework within which control by redress mechanisms should be studied. In particular, the model calls for factors around the ‘approach of redress mechanisms’ to form an explicit focus in future research and outlines a number of new propositions about the aspects of these approaches that should be explored.

9.2.8. The third and final contribution to the existing conceptual framework relates to the model’s emphasis on the nature of decision-making in a particular administrative area, in addition to the emphasis on the characteristics of decision-makers which is the mainstay of existing approaches (this is summarized as ‘decision-making’ in figure 9.1). While existing literature has discussed the rival tensions between various models of justice (factor H), it has not paid significant attention to the differential effect created by the structure of bureaucratic decision-making (factor I). Again, this is where this thesis’ comparative approach has proved to be particularly helpful in generating insight: most existing studies have considered the interaction of redress mechanisms and bureaucratic decision-makers in the context of a single type of decision-making. In this thesis, although the overall focus was on educational decision-making, this involved looking at quite different decision-making

areas conforming to different decision types. The importance of this contribution, in addition to simply adding an area suggested for exploration in future work, is that it has allowed for novel theorizing in relation to the way in which decision type affects the propensity for redress mechanisms to achieve control. The recognition that there are different types and gradations of bureaucratic decision-making undertaken in different parts of public administration and that these have qualities which may have an intrinsic impact on the ability of redress mechanisms to exercise control is, therefore, argued to be a helpful development of existing ideas which have centered largely on the normative character of decision-making rather than its fundamental structure.

### **9.3. Bureaucratic control by redress mechanisms in the local authority education area**

9.3.1. Having described the overall model, it is now possible to provide a brief account of the extent to which redress mechanisms exercised control in the particular area of public administration investigated in this thesis. While measuring the degree of control being exercised was explicitly not an objective of the research (see chapters 1 and 6), a summary is provided here on the assumption that readers are likely to be interested in this, in addition to the thesis' principal focus on understanding factors of control.

9.3.2. One clear conclusion arising from the data was that the redress mechanisms studied here were not well designed to perform a control function. They were too reactive, dealt with too few cases, and did not function effectively as a whole system of redress. In terms of the latter, the presence of tribunals tended to edge out other redress mechanisms, leading to inefficiency, and a system whereby the full range of administrative justice principles were unlikely to be controlled for. Even

where redress mechanisms operated processes and approaches that might be beneficial to the achievement of control (such as in the case of the LGO with its inquisitorial process and its ability to follow up on cases), they were not used to their full potential. Particular issues such as the tribunal's *de novo* approach to cases and the lack of published decisions were also significant impediments to decision-makers learning.

9.3.3. While decision-makers generally perceived decisions of redress mechanisms to be clear, redress mechanisms paid insufficient attention to the persuasive effect of decisions. These were not written with the needs of decision-makers in mind nor with the intention of overcoming likely bureaucratic resistance. Generally, redress mechanisms perceived their roles in very conservative and cautious ways and it is perhaps not surprising, therefore, that their approaches were mostly reactive and that, consequently, decision-makers took only limited steps to take account of their decisions.

9.3.4. Nonetheless, a clear finding was that authorities were generally compliant in individual cases and when directly under review: redress mechanisms appeared to be able to secure individual redress. For LGO cases, direct experiences of review led to limited but nonetheless useful changes in routine bureaucratic decision-making, while in tribunal cases changes were narrowly confined to decision-making around conceding and defending cases. While the suggestion was that courts could have the most transformational effect, there was little evidence of such transformations having occurred in the accounts of respondents. Overall, therefore, redress mechanisms appeared to operate most effectively in terms in the correcting and limiting control modes, and least effectively in terms of the structuring mode. In other words, direct review was likely to lead to errors being corrected and unreasonable discretion being limited, but the extent

to which redress mechanisms resulted in *ex ante* control was much less clear.

9.3.5. The data revealed that redress mechanisms faced a significant challenge in penetrating the bureaucratic environment of local authority decision-making and of establishing a more powerful form of prospective control. Strong alternative logics shaped the work of redress mechanisms and decision-makers with little sense of 'shared purpose' between them. Where greater congruence was achieved, in the case of the LGO, this seemed a matter of the ombudsman moving towards bureaucratic perspectives, rather than *vice versa*. While there was evidence that decision-makers were often willing to learn in a 'single loop' fashion from their direct experiences of review, there was little evidence of more profound 'double loop' learning or of learning from published external cases. In the tribunal's case, learning was entirely reactive and only occurred on a case-by-case basis in response to particular challenges. In some cases it appeared acceding to single-loop changes, as with agreeing to settlements, was a means of ensuring that fundamental control of bureaucratic decision-making remained with the local authority.

9.3.6. Indeed, decision-makers' commitment to learning was ambiguous, showing a mixture of genuine commitment and cynicism, as well as being limited in the extent to which it was translated into practice. This may in part have been due to the fact that the external environment strongly reinforced the internal logics of bureaucratic decision-making, rendering them much less open to challenge by redress mechanisms. In most cases, the local authorities in this study did not organize themselves to learn from redress mechanisms, and while there were mixed practices, the general sense was that authorities committed little effort to the creation of robust organizational learning mechanisms. In the words of one

respondent, the 'professional value' in doing so was not always clear to decision-makers.

9.3.7. Drawing on Galligan's (1996) terminology, we can conclude that the decision-making areas considered in this thesis were indeed under the hegemonic hold of the 'bureaucratic administration' model, with the idea of 'fair treatment' being a largely peripheral concern. The isostatic balance (Dunsire 1984) in these areas of public administration was therefore heavily weighted against the dominant approaches endorsed by redress mechanisms. And, while redress mechanisms performed a small role in ensuring that the isostatic balance did not wholly neglect the fair treatment of the individual, they do not do so in ways powerful enough to disrupt the fundamental outlook of decision-makers. In other words, and in final conclusion, the data suggest that control of local authority education decision-making by redress mechanisms was likely to have been limited.

#### **9.4. Policy implications of the thesis**

9.4.1. Current administrative justice policy retains a commitment to improving bureaucratic decision-making by government agencies and using feedback from redress mechanisms as one way to achieve this. As we saw in chapter 4, however, the current Government's commitment to administrative justice in general and the 'right first time' agenda in particular is extremely weak. Current policy largely involves restrictions in access to administrative justice and attempts to shield decision-making from robust oversight. So in setting out the policy implications of the thesis, and what might be done to realize the rhetorical commitment of policymakers, there should be recognition that the current policy environment is likely to be highly resistant to any real change. It should also be remembered, as discussed in chapter 4, that the idea that redress mechanisms should

perform any kind of prospective control on decision-making, and that feedback should be widely used to shape administrative practice, is contested. Nonetheless, it is considered useful to explore some areas where changes could be made if policymakers were serious about enhancing redress mechanisms' control functions.

9.4.2. The focus of the policy recommendations below is on the design of the redress system. Other approaches to encouraging organisations to learn from redress mechanisms, such as 'polluter pays' systems, have been helpfully discussed elsewhere (Thomas 2015). As a result, the recommendations below focus on improvements that might be made to the system of redress. This directly addresses one of Bondy and Le Sueur's (2012) nine principles for redress design, which is that:

'As well as dealing with individual grievances, redress mechanisms should contribute to improvements in public services.'

The five recommendations below, therefore, aim to contribute towards this principle of redress design and flesh out some ways in which it might be achieved in practice. For each recommendation a brief explanation is provided with regard to how it would address issues identified in the thesis.

*Recommendation 1: enhance the accessibility of the administrative justice system*

9.4.3. While the volume of cases considered by redress mechanisms may not be a significant impediment to them generating occasional far reaching change, the exercise of control requires that a significant number of cases are subject to review. Complaints, appeals and requests for review are the

‘detectors’ which allow redress mechanisms to exercise their control functions: as such the quality and volume of these control inputs is essential to the level of control that redress mechanisms can exercise. As Dunsire (1979) suggests, a system of control is only as good as its weakest element. Here, redress mechanisms are at a serious disadvantage as a result of relying on the random referral of cases in the context of a justice system which is increasingly concerned with diverting cases away from redress mechanisms and towards various forms of internal resolution or Alternative Dispute Resolution. An administrative justice system interested in maximizing the learning potential to be derived from the work of redress mechanisms, therefore, would seek to ensure that sufficient cases reach adjudication and that a system of triage exists to ensure that the right kinds of cases are formally adjudicated (*c.f.* Mulcahy 2013).

*Recommendation 2: enhance co-ordination and cooperation between redress mechanisms*

9.4.4. The learning potential to be derived from cases referred to redress mechanisms is likely to be significantly reduced as a result of the narrow remits and approaches of each redress mechanism. The AJTC (2012) refer to a ‘horses for courses’ approach whereby disputes and processes should be matched in ways that meet the needs of the citizen. The suggestion here is that this approach should also be adopted in ensuring that the learning potential of cases is fully exploited. One approach might be to facilitate the transfer of cases between redress mechanisms where there are indications, for example, that extra-legal administrative problems are at play. Such case transfers were previously proposed by Lord Woolf (1995) in relation to the courts and the ombudsman. Similarly, a tribunal might, for example, refer a case to an ombudsman where maladministration is suspected. Or an ombudsman might refer a case to the court where a

point of law requires to be clarified. This would provide both a more holistic remedy from the perspective of the aggrieved citizen and allow the relatively few cases that are challenged to be considered across all the dimensions of administrative fairness which the administrative justice system seeks to safeguard (maladministration, merits, legality).

9.4.5. More radically, redress mechanisms might be given extended remits, so that ombudsman schemes might be able to consider the merits of decisions, while tribunals might be able to criticize maladministration. While this suggestion may be anathema to both legal scholars and administrators for whom this distinction is important, Dunleavy *et al* (2010) have rightly pointed out that the distinction between complaints and appeals is one of the great sources of dissatisfaction with the redress system for citizens. There is also now an example within the UK of an ombudsman scheme incorporating an appeal jurisdiction (Mullen and Gill 2015). Generally, particularly in areas where a tribunal is in operation and there is a risk that the majority of disputes will be diverted there, thought is required about how to ensure that the administrative justice system promotes the control of all aspects of bureaucratic decision-making.

*Recommendation 3: improve redress mechanisms' communication*

9.4.6. The LGO's (and ombudsman schemes in general) approach to communicating its findings and issuing guidance should be seen as a model for other redress mechanisms. While far from perfect, their use of plainer language, their openness to explaining their decisions informally, and the variety of means at their disposal to communicate with decision-makers are distinct advantages. The court and the tribunal's more technical and idiosyncratic approaches - while they may be necessary in order to define legal positions with the requisite precision - are unlikely to be as

accessible for decision-makers. For all redress mechanisms, there is a need to focus more on the needs of decision-makers as an audience and on facilitating the transmission of guidance into practice. There is a need not only to simplify language and presentation, but to make communication more persuasive and compelling.

9.4.7. The ombudsman's cooperative approach is likely to be an advantage and could be developed further to make full use of its ability to engage and participate in policy networks, a key site of potential influence (Halliday 2013). This approach - while it would not be suitable for the upper tribunal or the court - could also be extended to the lower tribunals. More cooperative relationships and the creation of interpretive spaces and communities in which principles of good administration can be discussed and disseminated are likely to be effective in promoting good administrative practice.

*Recommendation 4: improve the tribunal's current approach*

9.4.8. There are specific issues in relation to the tribunal's current approach that may helpfully be addressed. The first would be to place a duty on the tribunal, not only to determine a case based on current evidence, but also to provide an opinion with regard to the quality of the authority's original decision. This would not be a formal determination but would be designed to provide decision-making feedback to authorities. It is noteworthy that the tribunal has recently been given pilot powers to make recommendations regarding the health and social care aspects of cases they review.<sup>30</sup> This may be a useful precedent for the approach suggested here and a power could also be provided for recommending administrative

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<sup>30</sup> See the Special Educational Needs and Disability (First-tier Tribunal Recommendation Power) (Pilot) Regulations 2015

improvements where these are considered necessary by the tribunal. The tribunal should also begin to publish its decisions, to provide a wider potential source of learning for decision-makers and make greater use of publicity as a tool for securing improvements. It seems unlikely that the move towards adversarialism and the increasingly court-like nature of tribunals can be reversed. However, efforts to ensure that hearings are non-confrontational and attempts to return the tribunal to its more inquisitorial roots are likely to reduce some of the antagonism currently perceived by decision-makers.

*Recommendation 5: make the ombudsman a learning champion*

9.4.9. One of the clear conclusions of this thesis is that the ombudsman institution has a number of potential advantages when it comes to helping decision-makers to learn, albeit these are currently imperfectly realized. In addition to borrowing some of these approaches in other parts of the administrative justice system, the existing potential of the ombudsman could be harnessed and developed so that it takes on a broader role in relation to disseminating and overseeing principles of good administration. This role would be that of a learning agent within the administrative justice system, a role which would have three facets:

- *Spokesperson*: working collaboratively with courts and tribunals, the ombudsman could distil and disseminate important decisions taken by other redress mechanisms. This would draw on the institution's skill in packaging messages in ways that are accessible to administrators. Rather than only drawing on its own casework, it could bring together and disseminate important, cross-cutting administrative justice principles. Drawing on its closer understanding of bureaucratic decision-makers, the

ombudsman could be charged with the coherent presentation of administrative justice principles to bureaucratic audiences.

- *Relationship manager*: here the ombudsman would function as a conduit for interchange between decision-makers and redress mechanisms. The ombudsman could either create professional networks or develop existing ones, which would function as spaces in which administrative justice principles could be disseminated and as *fora* in which shared understandings of good practice could be jointly developed. This would capitalise on the ombudsman's ability to enter into professional networks and would allow it to extend its scope as a policy actor. This would also allow the ombudsman to identify more clearly areas where the decision-makers require training or guidance.
- *System fixer*: The third dimension of the ombudsman as learning agent would require new powers of own-initiative investigation, which could be harnessed to trouble-shoot problem areas within the administrative justice system. For example, the ombudsman might launch an investigation in areas where there are high levels of successful appeals, or in response to concerns raised in the annual reports of the Senior President of Tribunals. The ombudsman might also investigate where new initiatives have a significant knock on effect on the administrative justice system, such as currently in relation to mandatory reconsideration. There is also potential for the ombudsman to follow up individual cases. Particularly where important legal precedents are set, the ombudsman could have a role akin to Special Masters in the US court system (Cannon 2004). Here, judges might refer cases to the ombudsman for follow up where public interest issues appear to be at stake. Such a proactive role is quite different from the fire-fighting approach currently adopted by the LGO; however,

this thesis' findings suggest that the potential benefits of the ombudsman within the administrative justice system are currently underdeveloped.

9.4.10. The developments suggested in the ombudsman's role within the administrative justice system would build on recent innovations, such as the quasi-regulatory role performed by the Scottish Public Services Ombudsman in relation to public services complaint handling (Gill 2014). Here, the ombudsman has taken on a broader role in relation to the complaints system, involving a much more proactive interest in helping administrators to deliver fair outcomes for citizens. This involves a standard setting and monitoring function, the provision of training, and the coordination of professional networks aimed at developing good complaint handling practice. While this new role has yet to be evaluated and, although there are some potential issues in relation to its constitutional implications (*ibid.*), it perhaps points the way towards the expanded role suggested in recommendation 5.

9.4.11. As noted above, it is recognized that the focus on the design of redress mechanisms is only one side of the coin and some authors have suggested that it is only decision-makers themselves who can affect bureaucratic change and that, consequently, the focus should be on them (Adler 2003). While this is true, the argument here is that the current design of redress mechanisms does not facilitate learning and control and that this acts as a signal to decision-makers that this agenda is not particularly valued. While the attitudes and approaches of decision-makers are indeed important, the first step in enhancing the learning and control capacity of the administrative justice system would be to ensure that its institutions are designed in such a way as to maximize their control potential.

9.4.12. Finally, as noted above, existing studies have tended to shy away from discussing the policy and practice dimensions of their findings. There are three reasons for this: (a) the contested nature of redress mechanisms' control functions (see chapter 4) has made authors reluctant to discuss practical measures for change when there is little agreement over the extent, even in an ideal world, that redress mechanisms should exercise 'more' control (b) studies have tended to have limitations, considered small and unrepresentative areas of public administration, and resulted in data that do not provide a sufficient evidence base for policy change and (c) it seems likely that the scale of changes in policy, which empirical data might have suggested to be required, has led to some reticence in exploring them. While these issues are significant, this thesis considers that it is important to explore the real world significance of findings even where doing so might be contestable and difficult. While the recommendations should, therefore, be read alongside caveats about the contested nature of the enterprise and the limitations of the data on which they are based, they are nonetheless considered to be a useful essay in connecting empirical and theoretical knowledge back to the real world.

## **9.5. Future research**

9.5.1. The model developed as part of this research, which refines and extends existing models in the literature, provides a basis for the conduct of further comparative research on the control functions of redress mechanisms. The model sets out hypotheses which could be operationalized and tested in a range of contexts. Although the purpose of this thesis meant that a qualitative approach was most appropriate, future research should take note of King's (2012) criticism of the qualitative focus of existing studies and consider quantitative approaches. It would

also be worth following up on the intriguing fact that the few quantitative studies that have been conducted to date have produced much more positive outcomes than their qualitative counterparts (Creyke and Macmillan 2004, Platt *et al* 2010). The model set out in this thesis could be used as the basis for designing such a quantitative research project.

9.5.2. Future research may also wish to examine other redress mechanisms and investigate, for example, departmental complaint handling agencies, which have often been suggested as being particularly effective in terms of helping decision-makers to learn from casework. Studies may also wish to consider international perspectives, and perhaps compare how different legal and bureaucratic systems and cultures mediate the extent to which redress mechanisms are able to exercise control. There would also be merit - since the fundamental question in such research relates to behaviour change - in comparing the control functions of redress mechanisms with those of other bodies which seek to exercise a controlling influence on bureaucrats. Van Acker *et al* (2015) for example have considered ombudsman schemes in comparative perspective with audit agencies, and it would be possible for future research to make similar comparisons with inspectorates or regulators. Other fertile areas of comparison might be between responses to redress mechanisms in the public and private sector.

9.5.3. Generally, although Cane (2004) has expressed scepticism about the value of empirical studies that consider the bureaucratic impact of redress mechanisms, many gaps remain in our empirical knowledge and this area remains a fertile one for further study.

**APPENDIX 1 - CHARACTERISTICS OF THE LOCAL AUTHORITY SAMPLE**

<b>Case study</b>	<b>Location</b>	<b>Council type</b>	<b>Council size (1000s of pupils)*</b>	<b>Number of complaints to LGO **</b>	<b>Number of appeals to tribunal ^</b>	<b>Incidence of review factor^^</b>
Earn Council	South East of England	County council	> 150	>50	> 100	>5
Leven Council	South East of England	County council	> 150	35 - 40	> 100	>5
Tummel Council	East of England	County council	> 150	35 - 40	75 - 80	>5
Carron Council	Yorkshire and the Humber	County council	50 - 100	40 - 45	15 - 20	3 - 4
Almond Council	East of England	County council	50 - 100	10 - 15	45 - 50	3 - 4
Braan Council	West Midlands	County council	100- 150	15 - 20	30 - 35	2 - 3

◇ To protect the anonymity of the case study authorities only approximate figures are provided; these are shown either as figures greater than (>) or as figures in a range (-).

\* Figures taken from the Department for Education, 'Schools, Pupils and their Characteristics: January 2011'.

See: <https://www.gov.uk/government/organisations/department-for-education/series/statistics-school-and-pupil-numbers>.

\*\* Average number of complaints received by the Local Government Ombudsman and passed to an investigation team per year, for the years 2009-2011. These were the latest figures available at the time of conducting the research. The figures were obtained by searching through the Annual Reviews for 2009-2010 and 2010-2011 published for each local authority.

See: <http://www.lgo.org.uk/CouncilsPerformance/>.

^ Average number of appeals registered by the First Tier Tribunal per year, for the years 2008-2010. These were the latest figures available at the time of conducting the research and were obtained in the Special Education Needs Tribunal Annual Reports for 2008-2009 and 2009-2010.

See: <http://www.justice.gov.uk/publications/corporate-reports/tribunals/send>.

^^ The incidence of review factor was calculated by adding together the total average number of complaints to the Local Government Ombudsman (2009-2011) and the total average number of appeals to the First Tier Tribunal (2008-2010). The resulting figure was divided by two to give the total average number of complaints and appeals. To make the figures more manageable for comparison purposes the total average number of complaints and appeals was then divided by 10 to produce the factor shown in this column.

## APPENDIX 2 - EXAMPLE INTERVIEW GUIDE

### **A. Your role and decision-making**

1. Your role
2. The types of decision you take
3. Influences on your decision-making
4. Main pressures and challenges regarding decision-making

### **B. Your experiences of being reviewed by redress mechanisms**

1. Frequency of review
2. Outcomes of review
3. Examples
4. What happened after redress mechanism decisions
5. Interaction with redress mechanisms outside of cases

### **C. Your awareness of redress mechanism decisions**

1. Awareness of cases about your authority
2. Awareness of cases in other authorities
3. Mechanisms for finding out about decisions

4. Differences in awareness between staff

5. Barriers to awareness

**D. Your response to redress mechanism decisions**

1. Importance attached to implementing decisions

2. Importance attached to learning from cases in other authorities

3. Process for implementing redress mechanism decisions

4. Examples of change to practice/ policy following decisions

5. Examples of non-implementation and disagreement with decisions

6. Barriers to implementing and learning from decision

**E. The nature of decisions taken by redress mechanisms**

1. Recurrent themes/principles in redress mechanism decisions

2. Consistency between redress mechanism decisions

3. Comprehensibility/clarity of redress mechanisms decisions

4. Barriers to understanding redress mechanism decisions

5. Quality of redress mechanism decisions (and other information produced by these bodies)

6. Significance of decisions beyond individual circumstances of the case  
(frequency, examples)

7. Predictability of redress mechanism decisions

**F. Other influences on your day-to-day work**

1. Influential organisations/stakeholders/pressures in relation to decision-making

2. Overall influence of redress mechanisms on decision-making

3. Anything the interview has not covered

## APPENDIX 3 - INTERVIEWEE IDENTIFIERS

*Note:* wherever possible positions are generic job titles to protect the anonymity of respondents.

### Almond Council

Identifier	Position
A1	Senior SEN Manager
A2	Admissions Officer
A3	Admissions Officer
A4	Admissions Appeal Officer
A5	Admissions and Transport Officer
A6	Admissions and Transport Manager

### Braan Council

Identifier	Position
B1	SEN officer
B2	Senior Admissions and Transport Manager
B3	Legal adviser
B4	Senior SEN Manager
B5	Transport Officer
B6	Admissions Officer
B7	Admissions Appeals Manager

## Carron Council

Identifier	Position
C1	Legal Adviser
C2	Admissions Appeals Officer
C3	Transport Officer
C4	SEN Manager
C5	SEN Officer
C6	SEN Senior Manager
C7	Admissions Manager
C8	Admissions Officer

## Earn Council

Identifier	Position
E1	Admissions Manager
E2	SEN Tribunal Manager
E3	SEN Manager
E4	Admissions Appeals Officer
E5	Admissions and Transport Manager
E6	SEN Manager
E7	Transport and Admissions Manager
E8	Senior SEN Manager
E9	Admissions Appeal Officer

## Leven Council

Identifier	Position
L1	SEN Manager
L2	Admissions/ Transport Customer Manager
L3	Senior SEN Manager
L4	SEN Tribunal Officer
L5	Admission Appeals Manager
L6	Legal adviser

## Tummel Council

Identifier	Position
T1	Tribunal officer
T2	Transport Manager
T3	Senior SEN Manager
T4	Legal adviser
T5	Senior Admissions and Transport Manager
T6	Senior Manager
T7	Complaint Manager
T8	Admissions and Transport Manager

## Parent support organisations

Identifier	Organisation
P1	Other Parent Support Organisation Worker
P2	Other Parent Support Organisation Worker
P3	Other Parent Support Organisation Worker
P4	Parent Partnership Service Worker

P5	School Choice Adviser
P6	Parent Partnership Service Worker
P7	Parent
P8	Parent Partnership Service Worker
P9	Parent Partnership Service Worker
P10	Parent Partnership Service Worker
P11	Parent Partnership Service Worker
P12	Parent Partnership Service Worker
P13	Parent Partnership Service Worker
P14	Parent Partnership Service Worker
P15	Parent Partnership Service Worker

### Local Government Ombudsman

Identifier	Position
O1	Investigator
O2	Investigator
O3	Investigator
O4	Manager

### First Tier and Upper Tribunal

Identifier	Position
TR1	Senior Tribunal Judge
TR2	Senior Tribunal Judge
TR3	Senior Upper Tribunal Judge

## Administrative Court

Identifier	Position
AC1	Senior Judge

## Policy officials

Identifier	Position
P01	Policy Manager, Ministry of Justice
P02	Policy Manager, Department for Education

## APPENDIX 4 - DECISION ANALYSIS

### 1. LGO Decisions

Reference	Learning Points
08 014 474	Independent Appeal Panel (IAP) clerks and members should be properly trained. Reasons should be given for decisions. Notes should be taken of hearings. IAP members have a responsibility to challenge, not just accept, a school's case.
08 011 742	IAPs should consider the requirements of the Disability Discrimination Act 1995 when a parent's grounds include a claim of disability discrimination.
09 005 338	IAPs should consider all the factors listed in the Code when considering whether an oversubscribed school will be prejudiced by admission of a child. Reasons should be recorded.
10 011 837 10 011 846	IAPs should not invent new criteria when making decisions. IAP clerks should be properly trained. Reasons should be recorded. IAP clerks should give appropriate legal advice to IAP members and advice should also be related to parents.
09 007 281	The Department for Education should provide guidance with regard to what should happen if an IAP decides that some, but not all, children who appeal for a particular school may be admitted without prejudice to the efficient education of children at that school.
10 006 162	IAPs should fully consider the arguments raised in an appeal, including claims of disability discrimination. Admission authorities should provide parents with reasons for decisions and appeal information. IAP hearings should be held in line with statutory timescales. IAPs must be visibly independent.

09 010 311 (+ 7 others)	IAP clerks and members should be properly trained. Notes of hearings should be made. Admission authorities should not send letters to parents on the IAP's behalf. Chairs should refrain from asking irrelevant questions. Where a test is applied as part of admission arrangements, alternative tests should be provided where a test is initially disrupted.
10 004 884	IAPs should be visibly impartial. Admission authorities should provide requested information to IAPs. Decision letters should give reasons and be signed by the IAP Chair or Clerk. IAP clerks and members should be properly trained. IAP clerks should give accurate guidance at hearings.
11 003 563	Admission authorities must provide their case to parents ahead of a hearing. IAPs must consider the question of prejudice to the school as part of their decision-making.
10 012 911 10 013 069	Where several appeals are heard together, each child's case should be given individual consideration. All grounds of appeal must be considered in deliberations.
07B04696 07B10996	Education and social care needs should be considered holistically by local authorities in decision-making about a child with SEN. The whole family's needs should be considered.
08 014 997	Local authorities should not unreasonably delay in making SEN provision.
07A14912	Local authorities should make arrangements for provision of education to excluded children. Attempts to agree placement with parents should not prevent the meeting of statutory timescales.
09 001 513	Local authorities should make the provision required by a SEN statement.
08 005 914	Where a child is out of school because the school named in the statement is unable to make adequate provision, alternative full time provision should be made. Local authorities should communicate decisions clearly.

08 014 844	Local authorities must regularly review SEN provision and ensure statements of SEN are updated accordingly. Local authorities should consider professional evidence when deciding whether provision meets a child's needs.
09 004 278 09 011 462	Local authorities should proactively check whether provision is in line with a statement where there are suggestions to the contrary.
09 018 565 09 018 567	SEN decision-making panels must consider all relevant evidence. Local authorities must clearly communicate decisions so that they may be challenged by parents. Local authorities must regularly review SEN provision for a child. Local authorities must cooperate where a case is being transferred.
10 002 102 10 005 663	Provision should be provided as required in a SEN statement or, if provision is no longer suitable, the SEN statement should be amended.
11 007 324	Local authorities should provide alternative arrangements for children unable to attend school for a reason other than sickness or exclusion. Local authorities should challenge schools that unreasonably refuse to admit a child under a fair access protocol.
10 005 330 10 015 240	Once a tribunal has determined that provision must be made, the appropriateness of that provision should not be questioned by the local authority.
09 010 645	Local authorities should: properly consider and keep a record of evidence; set out the grounds for decisions; consider a child's individual circumstances; make provision for children with SEN or a disability living beneath the minimum distance from school in their transport policies; convene a fresh panel, if a case is re-heard by a transport appeal panel.
09 008 248	Local authorities should make sure, when contracting transport services, that appropriate criminal

	record checks are made for transport staff.
09R012 826	If a parent's argument has previously been accepted as valid, a local authority should have good reasons for departing from its position. Local authority transport policies should clearly communicate the extent to which parental preferences for single/ mixed schooling will be a factor in awarding transport.

## 2. Upper Tribunal Decisions (and Court of Appeal Decisions from Upper Tribunal Decisions)

Reference	Possible Learning Points
[2009] UKUT 178 (AAC)	Comparative costs, including transport costs, between the local authority's choice of provision and the parent's, should only be considered where the local authority does not agree to the parent's choice.
[2009] UKUT 239 (AAC)	The tribunal should give adequate reasons. Careful distinctions should be made between educational and social need when determining the suitability of residential provision. Expert opinion should not go unchallenged; where there is a conflict of opinion, reasons should be given for preferring one account over another.
[2009] UKUT 295 (AAC)	The tribunal should not admit late evidence unless there are exceptional circumstances or serious risk that the child's interests will be prejudiced.
[2010] UKUT 34 (AAC)	The tribunal should provide reasons with regard to its treatment of important evidence and sufficiently explain the basis of decisions.
2010] UKUT 96 (AAC)	An individual may be considered a child in terms of the Education Act 1996 even where he/ she is above compulsory school age.

[2010] UKUT 180 (AAC)	When deciding whether admission of a child with a SEN statement would be incompatible with the efficiency of education for other children, incompatibility must be demonstrated (rather than simply having some adverse effect).
[2010] UKUT 205 (AAC)	No obvious learning points.
[2010] UKUT 249 (AAC)	No obvious learning points.
[2010] UKUT 242 (AAC)	No obvious learning points.
[2010] UKUT 292 (AAC)	Disproportionate precision is not required when assessing the comparative costs of provision. What is required is sufficient accurate information that is material to the balancing exercise.
[2010] UKUT 349 (AAC)	The views of a child must be given weight according to the context of the case. Unquestioningly letting the views of a child be determinative is likely to be unlawful, as is ignoring them. The more mature the child, the more weight should be given to his/ her views.
[2010] UKUT 368 (AAC)	No obvious learning points.
[2010] UKUT 8 (AAC)	The tribunal must explore evidential conflicts and avoid taking account of irrelevant considerations.
[2010] UKUT 376 (AAC)	When assessing comparative costs, it is reasonable to use the Age Weighted Pupil Unit (AWPU) as the basis for the calculation.

[2010] UKUT 395 (AAC)	The tribunal's reasons must cover the key issues involved in an appeal.
[2010] UKUT 406 (AAC)	Professional views about whether a child's needs may be met in mainstream education are not relevant where a parent has expressed a preference for such provision.
[2010] UKUT 15 (AAC)	The tribunal must provide reasons for decisions to exclude evidence from a hearing.
[2011] UKUT 50 (AAC)	Decisions on whether SEN provision should be made other than in a school, should consider both whether the provision as a whole and 'any part' of the provision would be inappropriate to be made in a school.
[2011] UKUT 51 (AAC)	When assessing the comparative costs of provision, the potential wider benefits of the parent's preferences, including those relating to health and social reasons, should be considered.
[2011] UKUT 191 (AAC)	No obvious learning point.
[2011] UKUT 215 (AAC)	The statutory tests around 'unreasonable public expenditure' and incompatibility with 'effective use of resources' are distinct and may both apply in determining whether a local authority should meet parental preferences.
[2011] UKUT 292 (AAC)	No obvious learning points.
[2011] UKUT 393 (AAC)	Where a parent's choice of school is not named in the SEN statement, and the parent has expressed a general preference for mainstream education, the school or type of provision named in the statement

	must consist of mainstream provision (unless this would interfere with the efficient education of other pupils).
[2011] UKUT 468 (AAC)	While SEN statements must be specific, specificity is variable dependent on the facts of the case.
[2011] UKUT 499 (AAC)	When determining whether the needs of a child should be formally assessed, the current provision for a child must be examined rather than simply assuming its adequacy in meeting a child's needs.
[2012] UKUT 85 (AAC)	No obvious learning points.
[2011] UKUT 67 (AAC)	In deciding whether to meet parental preferences, the additional cost of transporting a child to the parent's preferred school should be considered. Where those costs do not constitute an inefficient use of resources, local authorities should comply with parental preference.
[2012] UKUT 211 (AAC)	Where a child is approaching a transition in his/ her schooling, the tribunal should consider the full range of matters subject to an appeal, including the longer term provision for a child.
[2012] UKUT 214 (AAC)	Where not already explicitly provided for in a funding agreement, academies have a duty to admit a child if directed to do so by the tribunal.

Reference	Learning Points
[2012] EWCA Civ 346	Transport costs should be considered when assessing the comparative costs of provision and assessing whether expenditure would be unreasonable or inefficient.

[2011] EWCA Civ 709	When assessing comparative costs, it is reasonable to use the Age Weighted Pupil Unit (AWPU) as the basis for the calculation.
[2010] EWCA Civ 668	It is reasonable to name an independent school in a statement of SEN where it has agreed a fee reduction to allow a particular child to attend.
[2011] EWCA Civ 870	Local authorities may be liable for costs where they knew, or should have known, before a hearing that they were in breach of a statutory duty.

### 3. Administrative Court Decisions (Including Court of Appeal and Supreme Court Appeals from Administrative Court Decisions)

Reference	Learning Points
[2010] EWHC 3785 (Admin)	Independent Appeal Panels (IAPs) should give reasons. Reasons must be explicit enough to ensure that the parties understand the basis on which the decision was reached.
[2009] EWHC 3060 (Admin)	Review panels considering appeals against transport entitlement decisions have jurisdiction to consider the suitability of educational provision when deciding whether transport should be awarded.
[2010] EWHC 731 (Admin)	An appeal pending before the tribunal does not relieve a local authority of its responsibility to provide education for a child. However, if it has good reason to believe it is practicable for the pupil to attend the named school, it is not required to make alternative provision pending the outcome of a tribunal.
[2011] EWHC 3350 (Admin)	A local authority is likely to face costs if it fails to engage in the judicial process before the last minute.

[2012] EWHC 943 (Admin)	IAPs should ensure that the grounds for decisions in infant class size appeals are tenable. They should not quash an admission authority's decision on grounds other than those allowed in regulations. Moreover they should ensure that adequate reasons are provided and that the reasons provided in letters match those recorded during the hearing.
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Reference	Learning Points
[2009] UKSC 15	Admissions criteria may distinguish between pupils based on their religious affiliation as long as the distinction is drawn on religious grounds and not on racial grounds.
[2010] EWCA Civ 135	The provision listed in a statement of SEN is mandatory and must be provided.
[2010] EWCA Civ 1103	IAP decisions follow a two stage decision-making process. Considering whether there is prejudice to a school at the first stage is an objective test, where the particular situation of the child is not relevant. The question to be considered at this stage is whether the admission of any child would prejudice efficient provision of education within the school. At the second stage, decision-making becomes concerned with whether prejudice to the particular child outweighs that to school.

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