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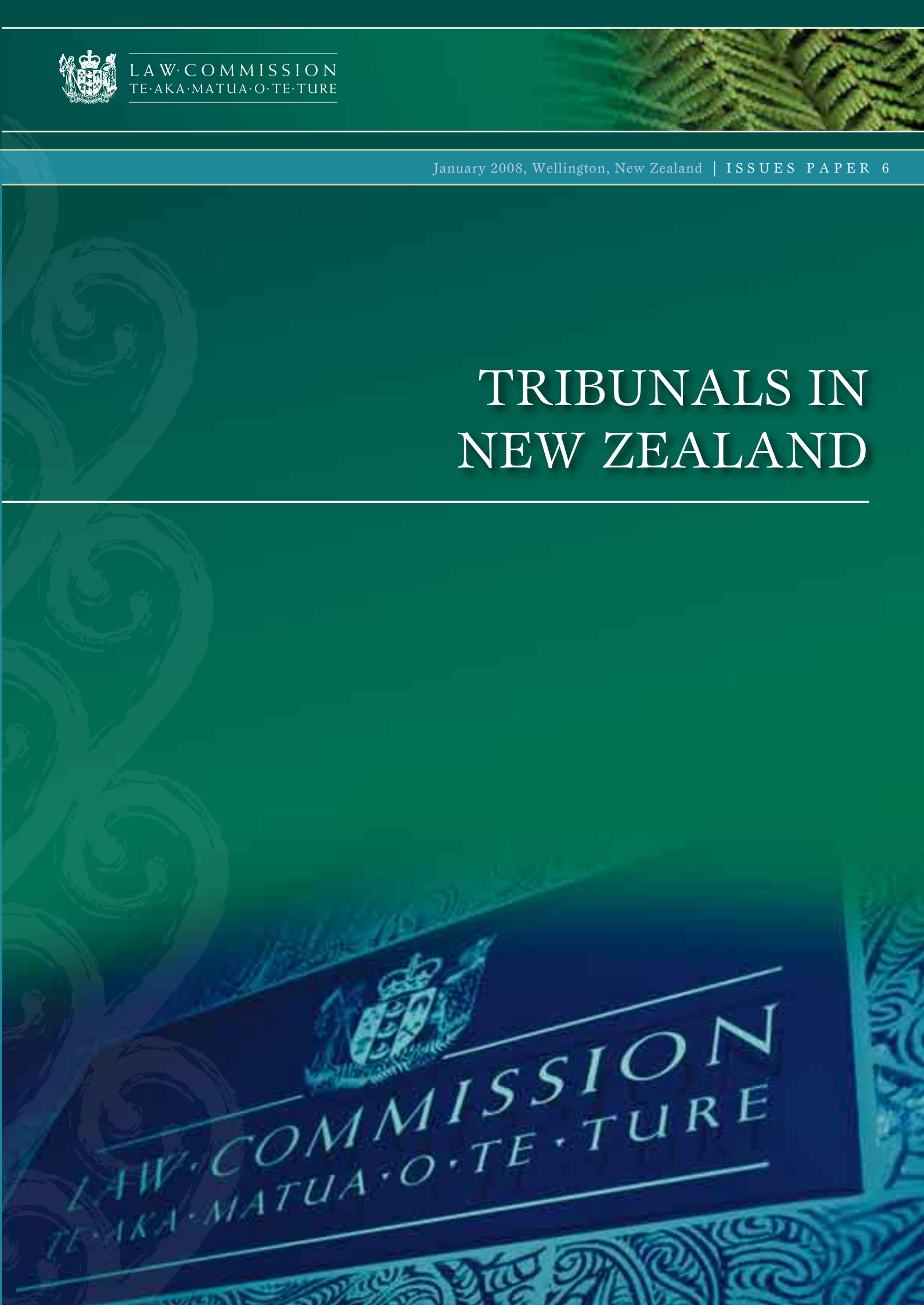
TRIBUNALS IN NEW ZEALAND



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Tribunals in New Zealand

Issues Paper

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FOREWORD

New Zealand's tribunals have grown in ad hoc and random fashion. They have been set up to meet specific needs, but not according to any rational pattern. We are not alone in this. Other jurisdictions have experienced just the same phenomenon.

The system needs overhaul and rationalisation. Studies dating back 40 years have reached this conclusion, but to date little has been done.

In 2004 the Law Commission produced its report "Delivering Justice for All" (NZLC R85) in which it recommended reforms to our whole court and tribunal system. It recommended the rationalisation of tribunals into a unified framework. In 2006 the Law Commission commenced a project with the Ministry of Justice to determine what the exact nature of the reform should be.

This issues paper is part of the Law Commission's contribution to this joint project. Its main purpose is to analyse in detail the problems of the current system of tribunals so that we can determine exactly what reforms are necessary to eliminate them. We have done much research into the history and rationale of tribunals, studied each of the many statutes which set them up, and carried out empirical research into how the system works in practice. We have interviewed and corresponded with many people and organisations.

This issues paper, having traced the history of tribunals, then formulates a working definition of what a tribunal is. The term is loosely used, but for the purpose of this paper we have concentrated on those tribunals which have an adjudicative function, and the decisions of which affect people's rights.

We then devote several chapters to analysing the problems of the system. In terms of the procedure and process of tribunals we have found unacceptable inconsistency. Certainly all tribunals are not the same, but the present diversity of procedure cannot be justified by the differences that exist. The same is true of the rights of appeal from decisions of tribunals: from some there is no appeal at all, from others there are two levels of appeal, and the nature of these appeals differs without reason from tribunal to tribunal.

Accessibility is another issue. People need to know that tribunals exist, how to access them, and what to expect when they do. Some of the information currently available to the public about some tribunals is inadequate. There are issues about independence too: some tribunals are administered by the very same department against whose decision they are hearing an appeal. There are issues about the appointment and tenure of tribunal members, and about the training available to them.

Perhaps more importantly, there is simply a lack of cohesion. Some tribunals have heavy workloads, some hardly ever sit. There is duplication of effort in the servicing and administration of them; some have much less support than they need. Many tribunals separately organise their own information programmes and their own training, such as it is. There is no oversight of the system as a whole, and no overall leadership. Tribunals lack the voice they should have in the justice sector.

The paper then sets out various solutions which have been adopted in other jurisdictions, in particular Australia, Canada and the United Kingdom. It also sets out the reform options which Cabinet has agreed should be investigated in this country. In the next stage of this project the Ministry of Justice and the Law Commission will be analysing these options, and deciding which of them, or which combination of elements of them, best suits this country's needs.

We call for comments from the public on the issues we have raised in this paper. These comments will help us in the next, crucial, stage of the project.

Geoffrey Palmer
President

CALL FOR SUBMISSIONS

The Law Commission welcomes your comments on this issues paper, which is also available on the Law Commission's website at www.lawcom.govt.nz. The closing date for submissions is 20 February 2008. Submissions should be sent to: Jo Dinsdale or Sara Jackson, Law Commission, PO Box 2590, Wellington 6140; or by email to tribunals@lawcom.govt.nz.

ACKNOWLEDGEMENT

This project on tribunal reform is being undertaken by the Law Commission in conjunction with the Ministry of Justice. While the views expressed in this issues paper are those of the Law Commission and this work is proffered as part of the Commission's contribution to an ongoing joint project, the paper has been developed with input and assistance from the Ministry. The Commission expresses its gratitude to the Ministry for their assistance with this work.

Introduction

BACKGROUND

1 In 2004 the Law Commission completed a wide-ranging review of the structure and operation of courts and tribunals in New Zealand and published the report Delivering Justice for All: A Vision for New Zealand Courts and Tribunals.[1] In the report the Commission concluded that the piecemeal way in which tribunals had developed had led to an unnecessary 'jungle' of different jurisdictions, often with no clear entry point for the ordinary citizen, and wide variations in process for no principled reason. A number of tribunals were serviced and resourced by the departments or agencies that were directly affected by their decisions. Some tribunals had few cases, met infrequently and had members who were not well trained or supported. The Commission found that the diversity of tribunals in New Zealand was much greater than was needed.

2 In Delivering Justice for All the Commission recommended that:

- most of New Zealand's tribunals should be integrated within a unified tribunal framework;
- this rationalisation of tribunals, their membership and processes should occur incrementally;
- certain bodies should be excluded from the structure;[2]
- future tribunals should be established only in accordance with principle and in conformity with fixed guidelines;
- unless exceptional circumstances exist, new tribunals should be integrated into the unified structure.

3 In response to the Commission's report the Government agreed that a more coherent structure should apply to the administration and operation of tribunals, although it considered that rationalisation of tribunals into a new structure should follow rather than precede the development of administrative and operational guidelines.

4 In 2006 the Law Commission and the Ministry of Justice commenced a new project to advance a programme of reform.

THIS ISSUES PAPER

5 As one step in this project the Commission has prepared this issues paper.

1 New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004).

2 The Waitangi Tribunal, the Securities Commission, the Commerce Commission, the Takeovers Panel, the Abortion Supervisory Committee, the Privacy Commissioner, the Employment Relations Authority, the Mental Health Review Tribunal, the New Zealand Parole Board, the Disputes Tribunal and the Tenancy Tribunal.

6 Firstly, the paper traces the history of tribunals in both England and New Zealand. It shows how their development has proceeded on an ad hoc basis over the 19th and 20th centuries without being underpinned by any theoretical basis. The reasons why decision-making has sometimes been allocated to tribunals as opposed to courts or other kinds of decision-makers have often not been clearly articulated, although certain patterns do emerge from the historical study. In the history chapter we also outline the various proposals for reform of the tribunal structure which have been put forward over the years.

7 Because of the ad hoc development of tribunals it is difficult to settle on a definition of tribunal which covers the whole range of bodies which sometimes go under that name. In chapter two we examine the theory of tribunals, and propose a definition which covers those many tribunals which perform an adjudication function. It is those tribunals which are the subject of this study.

8 Appended to this issues paper, as appendix 1, is a list of such tribunals, although we wish to make it clear that this list should not be regarded as final: there are some bodies in it which are unlikely to be included in any proposal of reform and others which may yet be added.[3] Chapter 2 also puts forward a set of characteristics which these adjudicative tribunals should properly exhibit. They form the basis of the subsequent analysis in this paper.

9 Part II contains the result of extensive empirical research. The Commission, with the Ministry's assistance, prepared and sent questionnaires to many departments and agencies which administer tribunals, the chairs of those tribunals, and some lawyers and consumer advocates. We also undertook analysis of all the Acts of Parliament establishing tribunals. We matched the results against our list of desirable characteristics. This work has revealed that there are many systemic problems in our tribunal set-up. It confirms many of the conclusions arrived at by earlier inquiries. We discuss our findings in chapters 3 to 9.

10 We are releasing this issues paper at this stage to stimulate debate about the role of tribunals in New Zealand, and to test our assumptions about the objectives, values and features that any effective system of tribunals should exhibit. We hope that comment on the paper will help us to develop a clearer picture of the issues and also build consensus over the role that tribunals should play in New Zealand.

11 Part III looks forward towards reform. It contains a summary of the main issues we think need to be addressed through reform, together with a brief outline of the substantial reforms that have been directed at introducing greater consistency and efficiency across tribunal systems overseas. Cabinet has agreed that five options be investigated. The final chapter of this paper sets those options out in summary form. Much work is yet to be done by the Ministry and the Commission in analysing and developing these options. Feedback on this present issues paper will help us in this next stage of the project.

3 A table of over 100 bodies that formed a starting point for the study is to be found on the Law Commission's website.

Part I
HISTORY AND THEORY

Chapter 1

Historical overview of tribunals

INTRODUCTION

1.1 In this part of the paper we provide an historical overview of the development of tribunals in order to place New Zealand's existing tribunal arrangements in their historical context, exploring how and why tribunals developed in New Zealand. From this historical perspective we identify the functions that tribunals have been established to fulfil and in particular the reasons why tribunals were established in preference to using the courts or entrusting certain functions to the executive. We also examine the issues which have been raised in earlier reviews of our system of tribunals.

THE ORIGINS OF THE TRIBUNAL MODEL

1.2 Tribunals are considered to be essentially a 20th Century phenomenon.[4] Commentators like Sir William Wade attribute the development and growth of tribunals in Britain, and later in British derived systems of law and government, to the increased social and economic regulation associated with the development of the welfare state.[5] Although the modern statutory tribunal of today developed as part of the machinery of the welfare state, other commentators such as Chantal Stebbings believe that the essential features of the tribunal model emerged earlier in the 19th Century during the industrial revolution.[6]

1.3 The first tribunal can be traced back to 1660, when Commissioners of Customs and Excise were given a judicial power by statute.[7] According to Wade, this development was strongly criticised at the time as a breach of the rule of law because it gave a power of adjudication to an executive official and not the courts.[8] It was long part of the conception of the rule of law that the determination

4 William Wade and Christopher Forsyth *Administrative Law* (9th ed, Oxford University Press, Oxford, 2004) 906.

5 See, eg, William Wade and Christopher Forsyth *Administrative Law* (9th ed, Oxford University Press, Oxford, 2004) Chapter 25; R E Wraith and P G Hutchesson, *Administrative Tribunals* (Allen and Unwin, London, 1973) 24; Rachel Bacon "Amalgamating Tribunals: A Recipe for Optimal Reform" (PhD Thesis, University of Sydney, 2004); P P Craig *Administrative Law* (3rd ed, Sweet & Maxwell, London, 1994) 59.

6 Chantal Stebbings *Legal Foundations of Tribunals in 19th Century England* (Cambridge University Press, Cambridge, 2006) 3.

7 William Wade and Christopher Forsyth *Administrative Law* (9th ed, Oxford University Press, Oxford, 2004) 906.

8 William Wade and Christopher Forsyth *Administrative Law* (9th ed, Oxford University Press, Oxford, 2004) 906.

of questions which required the finding of facts and the application of legal rules and principles belonged to the courts exclusively. Despite the criticism, this trend continued in the area of revenue collection, and many similar powers were conferred by statute on officials.[9] The first body which we would probably recognise as a tribunal was established in 1799 by the Income Tax Act.[10] Any taxpayer who objected to an assessment by a Tax Commissioner could have their objection determined by a tribunal-like board of three Commissioners of Appeal.

1.4 Boards of Railway Commissioners established during the industrial revolution are also early examples of the tribunal model.[11] Chantal Stebbings argues that these and other 19th Century bodies established the essential characteristics of the tribunal model and are the lineal ancestors of today's tribunals.[12] While the main purpose for establishing Boards of Railway Commissioners was to regulate railways and competition between railway companies, Boards were also given adjudicative powers. Boards determined disputes between competing interests in the process of implementing railway policy.[13] Such Boards were established because the issues that arose in disputes between traders and railway companies were considered to be too technical and too far removed from their usual function for the ordinary courts to resolve.[14]

1.5 In 1873 the Regulation of Railway Act established a new Railway and Canal Commission, comprised of a board of three Commissioners. The chairman of the Board was a lawyer, and at least one member of the Board was required to have a background in railway management. The legislation required the Board to adopt a process that was simple and inexpensive, and to investigate and determine complaints and disputes.[15] This 19th Century model is something of a prototype for tribunals. The membership pattern of three members, including a legally qualified chairperson and other members with expert experience and qualifications, is repeated in numerous later regulatory tribunals. The adoption of a procedure that is adversarial but less formal than a court has also endured.[16]

1.6 According to Stebbings, the term 'tribunal' was widely used in the 19th Century to refer to almost any body that had a dispute resolution function or process.[17]

9 William Wade and Christopher Forsyth *Administrative Law* (9th ed, Oxford University Press, Oxford, 2006) 906.

10 R E Wraith and P G Hutchesson *Administrative Tribunals* (Allen and Unwin, London, 1973) 24.

11 R E Wraith and P G Hutchesson *Administrative Tribunals* (Allen and Unwin, London, 1973) 24.

12 Chantal Stebbings *Legal Foundations of Tribunals in 19th Century England* (Cambridge University Press, Cambridge, 2006) 6.

13 R E Wraith and P G Hutchesson *Administrative Tribunals* (Allen and Unwin, London, 1973) 26.

14 R E Wraith and P G Hutchesson *Administrative Tribunals* (Allen and Unwin, London, 1973) 26.

15 R E Wraith and P G Hutchesson *Administrative Tribunals* (Allen and Unwin, London, 1973) 27.

16 R E Wraith and P G Hutchesson *Administrative Tribunals* (Allen and Unwin, London, 1973) 27.

17 Chantal Stebbings *Legal Foundations of Tribunals in 19th Century England* (Cambridge University Press, Cambridge, 2006) 3.

She argues that even during their inception there were no underlying principles or features other than those of the most general kind that were shared by all tribunals during the 19th Century.[18]

1.7 The development of these early tribunals in the 19th Century did not go unchallenged. The establishment of the Railways Commission was for example attacked on the grounds that its members were not judges and that there were no appeals from their decisions.[19] It was strongly argued that the ordinary law administered in the ordinary courts safeguarded the rights of the citizen against arbitrary official action. Objections to any attempt to give legal powers to those who were not magistrates or judges were based on the rule of law, although as Arthurs notes, opposition to the policies was often dressed as an objection to the institutions chosen to advance them.[20]

Tribunals – 20th Century phenomenon

1.8 The phenomenon of the 20th Century tribunal can be traced back to the reforms introduced by the Liberal government in the United Kingdom after the 1906 general election. The treatment by the courts of the Workmen's Compensation Act 1897 and earlier social legislation dealing with hours of work for child factory workers and railway charges led to a view among trade unions that the courts were unsympathetic to their position.[21] Dissatisfaction with the over-technical and allegedly unsympathetic approach of the courts towards the Workmen's Compensation Act led directly to the transfer of adjudicative functions to tribunals.[22] The Old Age Pensions Act 1908 began the shift away from the courts. The Act established local pension committees to decide disputes, and a Board to hear appeals.[23]

1.9 In 1911 the Liberal government, looking for a way to settle disputes over unemployment insurance without using the courts, adopted the approach taken in the social security system in Germany to settling disputes.[24] The National Insurance Act 1911 provided for appeals from departmental decisions on unemployment insurance to a specialist 'court of referees' with a further right of appeal to an 'umpire.'[25] The 'court of referees' was in effect a lay style of tribunal which employed specialist members, and which operated in a non-adversarial,

18 Chantal Stebbings *Legal Foundations of Tribunals in 19th Century England* (Cambridge University Press, Cambridge, 2006) 3.

19 H W Arthurs *"Without the Law": Administrative Justice and Legal Pluralism in Nineteenth Century England* (University of Toronto Press, Toronto, 1985) 134.

20 H W Arthurs *"Without the Law": Administrative Justice and Legal Pluralism in Nineteenth Century England* (University of Toronto Press, Toronto, 1985) 11.

21 P P Craig *Administrative Law* (3rd ed, Sweet & Maxwell, London, 1994) 59.

22 S A De Smith, J L Jowell and Andrew Le Sueur *De Smith Woolf and Jowell's Judicial Review of Administrative Action* (5thed, Sweet & Maxwell, London, 1995) 35.

23 William Wade and Christopher Forsyth *Administrative Law* (9th ed, Oxford University Press, Oxford, 2004) 907.

24 Rachel Bacon "Amalgamating Tribunals: A Recipe for Optimal Reform" (PhD Thesis, University of Sydney, 2004).

25 William Wade and Christopher Forsyth *Administrative Law* (9th ed, Oxford University Press, Oxford, 2004) 907.

informal manner.[26] Referees were drawn from a worker panel and an employer panel. The final right of appeal to an umpire was to a national appellate authority appointed by the Crown.[27] Disenchantment with the courts was however not the only reason for adopting this model. The attractions of the German approach to social security had a good deal of influence on key Liberal government Ministers of the time.[28] The National Insurance Act 1911 followed closely the German scheme in other details as well as adopting their method for settling disputes.[29]

1.10 The model used in the National Insurance Act 1911 effectively became a blueprint for tribunals in other fields.[30] In 1919 large numbers of claims for war pensions arising from the First World War resulted in the first pensions tribunal. It was designed to deal with claims as informally and inexpensively as possible, and consisted of a lawyer, who chaired the tribunal, a medical practitioner and a member from the armed services.[31] In 1921 the scheme under the 1911 Act was extended to claims from widows, orphans and old age contributory pensions.[32]

Early tribunals in New Zealand

1.11 From 1890 the Liberal government under the leadership of Ballance and then Seddon began to implement a programme of social reform in New Zealand.[33] Reform included social welfare legislation on old age pensions and workers compensation. However, unlike in Britain, old age pension legislation in New Zealand used the ordinary courts to determine entitlement and resolve disputes. The Act did not establish pension committees, and there is no evidence of a deliberate move away from the courts in early New Zealand social legislation. Under both the 1898 Act and the 1908 consolidation, pension claims were referred for determination to a local magistrate.[34] The magistrate was required to fully investigate and then determine a claimant's entitlement under the Act. This was done in open court using powers under the Magistrates' Court Act 1893.[35] The magistrate could compel witnesses to attend and could take evidence on oath.[36] The magistrate's decision was final and conclusive for all purposes. The Pensions Act 1926 continued to use magistrates to determine claims for old age pensions.[37]

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26 Rachel Bacon "Amalgamating Tribunals: A Recipe for Optimal Reform" (PhD Thesis, University of Sydney, 2004).

27 R E Wraith and P G Hutchesson *Administrative Tribunals* (Allen and Unwin, London, 1973) 34.

28 Lloyd George for example made a visit to Germany in 1908 with the express purpose of inspecting the German social insurance system at first hand. See R E Wraith and P G Hutchesson *Administrative Tribunals* (Allen and Unwin, London, 1973) 33.

29 R E Wraith and P G Hutchesson *Administrative Tribunals* (Allen and Unwin, London, 1973) 34.

30 William Wade and Christopher Forsyth *Administrative Law* (9th ed, Oxford University Press, Oxford, 2004) 907.

31 R E Wraith and P G Hutchesson *Administrative Tribunals* (Allen and Unwin, London, 1973) 33.

32 R E Wraith and P G Hutchesson *Administrative Tribunals* (Allen and Unwin, London, 1973) 34.

33 "Social Security in New Zealand: Report of the Royal Commission of Inquiry" [1972] AJHR H 53, 43.

34 Old Age Pensions Act 1898 and Old Age Pensions Act 1908.

35 Old Age Pensions Act 1898 s 15 and Old Age Pensions Act 1908 s 22.

36 Old Age Pensions Act 1898 ss 27-29.

37 Pensions Act 1926 s 29. Although the 1926 Act introduced a Commissioner of Pensions to determine eligibility for other pensions, such as a pension for the blind, military pensions, and a miners' pension. The Commissioner of Pensions was an official appointed under the Act, subject to the control of the Minister.

1.12 A board resembling a lay tribunal was however established to determine claims under the Military Pensions Act 1908. A Medical Board, consisting of three qualified medical practitioners, was appointed by the Governor to inquire into and determine claims for a pension, gratuity or allowance under the Act.[38] A similar early tribunal was established under the War Pensions Act 1915. A three member board, consisting of one member who was a registered medical practitioner and two others, was appointed by the Governor.[39] The Board was given all the powers of a commission of inquiry under the Commissions of Inquiry Act 1908.

1.13 A Social Security Commission was established in 1938 to determine eligibility to entitlements under the Social Security Act 1938. While this represented a shift away from the courts, the Commissioners were not independent of the executive. They were the senior officers of the Department of Social Security, which administered the Act. The Act did not provide a right of appeal to a separate board or tribunal for most claimants of benefits, although it did allow an appeal to a medical board comprising three medical practitioners where an application for an invalid's benefit had been refused on medical grounds.[40] A similar right of appeal to a Miners' Benefit Appeal Board was given where an application for a miners' pension was declined on medical grounds.[41]

1.14 It seems that New Zealand took quite a mixed approach in early income tax legislation. Boards of Review were established initially but later tax legislation replaced these with the Magistrate's Court. The Land and Income Assessment Act 1891 established Boards of Review of Assessment to determine disputed tax assessments. These were some of New Zealand's first recognisable tribunals. Boards were appointed by the Governor and had the power to make final and conclusive decisions relating to assessment of taxation.[42] The Land and Income Assessment Act 1908 disestablished these Boards. It provided that any objection to an assessment of income tax by the Commissioner of Taxes was to be heard and determined in the ordinary courts by a magistrate. For the purposes of determining such objections the magistrate had all the powers conferred by the Magistrates' Courts Act 1908, except that objections were not heard in open court. Each magistrate's decision was final except on points of law.[43] It appears that the lower judiciary was used quite extensively in administrative justice roles in New Zealand.

1.15 Licensing Committees, first established under the 1881 Licensing Act, were also among the earliest tribunals in New Zealand. Under the Act, the Licensing Committee for each district determined applications within the district for liquor licences. Following amendments made by the Licensing Act 1908, Committees were comprised of the local magistrate, who was the chair, and five other members elected by the ratepayers.[44] A Licensing Committee was required to

38 Military Pensions Act 1908 s 3.

39 War Pensions Act 1915 s 4.

40 The Board was called the Invalid's Benefit Appeal Board: see Social Security Appeal Act 1938.

41 Social Security Appeal Act 1938.

42 Luke Facer "The Introduction of Income Tax in New Zealand" (2006) 12 AULR 1, 65.

43 Land and Income Assessment Act 1908 s 22.

44 A H McLintock "An Encyclopedia of New Zealand 1966." Available at www.TeAra.govt.nz (last accessed 23 February 2007).

give public notice of any hearing and had the power to summons witnesses and hear evidence on oath.[45]

1.16 Early tribunals in the form of Boards of Appeal were a feature of public sector employment at the beginning of the 20th Century. The Government Railways Act 1894 for example established Boards of Appeal to hear appeals from employees who were aggrieved by grading, remuneration or discipline decisions.[46] These Boards consisted of a magistrate, who chaired the Board, and two employees elected by the members of the divisions within the department. Similar boards were established for other civil service departments.[47] Boards had the power to summons and examine witnesses and call for the production of documents. They had full powers to confirm, modify or disallow the decisions appealed. However their decisions were recommendations submitted to the Minister responsible, and did not take effect until approved by the Minister.[48]

1.17 The Civil Service Act 1908 took a similar approach. The Governor in Council could establish a Board of two or more people to assess any alleged breach of duty or inefficiency by a civil servant. After a full hearing of the case the Board would report to the Governor giving its recommendation.[49] The Public Service Act 1912 later established the Public Service Board of Appeal to hear appeals from work classification, grading and salary determination made by the Public Service Commissioner. The Board consisted of three people, two of whom were appointed by the Governor, and a third who was elected by members of the Public Service.[50] The Board made a final determination of the matter before it.[51]

1.18 Boards of Appeal were also used at an early stage for regulatory tasks. Regulations made under the Cinematograph-Film Censorship Act 1916 and later under the Cinematograph Censorship Act 1928, for example, established a Board of Appeal to consider appeals from decisions of the Censor under the Act. The Cinematograph Films Censorship Board of Appeal consisted of three people appointed by the Minister of Internal Affairs.[52]

The proliferation of tribunals

1.19 As economic and social regulation increased in the 20th Century, the tribunal model was adopted on what Rachel Bacon describes as a random basis by governments looking to relieve the pressures created by the unheralded

45 Licensing Act 1881 s 42.

46 Government Railways Act 1894 s 7(3).

47 A similar Board of Appeal was also established under the Post and Telegraph Department Act 1894 to hear employee appeals over classification, status and salary. See Post and Telegraph Department Act 1894 s 5(1).

48 Government Railways Department Classification Act 1896; Government Railways Department Classification Act 1901; Government Railways Act 1908.

49 Civil Service Act 1908 s 18.

50 Public Service Act 1912 s 32.

51 Public Service Act 1912 s 31.

52 The Board was established under regulation 6 of regulations made under the Cinematograph-Film Censorship Act 1916, Gazette 11 September 1916, 2987, continued by regulation 14 of the Regulations for the Censorship and Registration of Cinematograph Films made under the Cinematograph Act 1928.

encroachment of administrative decision-making on the rights of the individual.[53] Tribunals were seen as a cost-effective and efficient forum for resolving grievances. Tribunals became a common adjudicative and enforcement mechanism in regulatory schemes. Disputes needed to be settled quickly and cheaply, for the benefit of both the claimant and public administration. The tribunal provided a compromise between 'quality' and 'convenience'. The objective was to administer services with the greatest possible detachment from the ordinary courts, and to dispense with the refined techniques which the courts had developed.[54]

1.20 Tribunals could incorporate or rapidly develop technical expertise within their jurisdiction. Specialist tribunals were recognised as a mechanism for more expertly as well as more rapidly dealing with classes of cases.[55] The tribunal was seen as an effective mechanism for resolving large numbers of small claims. It gave faster, cheaper and more accessible justice than the slow and costly court processes.[56] The costs involved in taking a case through the ordinary courts would be disproportionate to the amount of money in dispute. There was also concern that the volumes of disputes involved in such regulatory schemes could overwhelm the courts.[57]

1.21 A number of commentators challenge the orthodox line, which argues that tribunals proliferated because they had the characteristics of speed, cost effectiveness and expertise, which gave them advantages over the courts.[58] Critics suggest that the establishment of tribunals represented a downgrading of the problems of the poor and the relegation of their disputes to a second class form of justice. They argue that decisions to establish rights of appeal to tribunals rather than the courts have primarily been based on political and cost considerations and not on the belief that tribunals will provide greater access to justice.[59]

1.22 By the 1920s there was growing criticism in Britain of the seemingly uncontrolled growth of tribunals.[60] The shift in the balance of power between courts and tribunals led to concerns about the constitutional implications of the growth of tribunals.[61] Tribunals were seen as sharing characteristics with the courts, but also with the executive and administrative decision-making. Like the executive, tribunals made a large number of decisions quickly, which leads to a higher risk of error. Tribunals often considered policy questions and exercised broad

53 Rachel Bacon "Amalgamating Tribunals: A Recipe for Optimal Reform" (PhD Thesis, University of Sydney, 2004).

54 William Wade and Christopher Forsyth *Administrative Law* (9th ed, Oxford University Press, Oxford, 2004) 907.

55 S A De Smith, J L Jowell and Andrew Le Sueur *De Smith Woolf and Jowell's Judicial Review of Administrative Action* (5thed, Sweet & Maxwell, London, 1995) 35.

56 William Wade and Christopher Forsyth *Administrative Law* (9th ed, Oxford University Press, Oxford, 2004) 907.

57 P P Craig *Administrative Law* (3rd ed, Sweet & Maxwell, London, 1994) 59.

58 See generally the discussion in Hazel Genn "Tribunals and Informal Justice" (1993) 56 MLR 393, 396.

59 For examples see Hazel Genn "Tribunals and Informal Justice" (1993) 56 MLR 393, 396.

60 Rachel Bacon "Amalgamating Tribunals: A Recipe for Optimal Reform" (PhD Thesis, University of Sydney, 2004).

61 Justice Bernard Teague "Tribunals and the Judicial Arm of Government" in Robin Creyke (ed) *Administrative Tribunals: Taking Stock* (Centre for International and Public Law, Canberra, 1992) 21, 24.

discretions.[62] Criticism was directed both at the practice of establishing special bodies in place of ordinary courts to hear disputes with the administration, and also at aspects of the way tribunals were constituted and functioned. For example the perceived lack of independence from the administration of some tribunals was criticised as well as the quality of some decisions.[63] A particular concern was that the executive could, for example, exert more power over tribunals, through the appointment process. Academic lawyers like Harold Laski, defending the development of tribunals, argued that critics in the judiciary were actually hostile to the substance of the social welfare programmes and policies themselves and were attempting to disguise this by dressing their opposition up as a commitment to lawyerly values.[64]

1.23 Largely it seems in response to the criticism of conservative academics and Judges over the 'ousting' of the courts and the growth of administrative powers in the hands of Ministers and the bureaucracy, and also over the growth of tribunals, the Donoughmore Committee was established in 1929.[65] The Committee was to report on what safeguards were desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of law.[66] The Donoughmore Committee concluded that there was nothing radically wrong with the existing practice of Parliament permitting the exercise of judicial powers by tribunals. The Committee recommended that judicial powers should normally be entrusted only to the ordinary courts, but that in exceptional cases where this was not possible the decision should be entrusted to a tribunal rather than a Minister personally.[67]

1.24 The Donoughmore report legitimised tribunals and their number increased, particularly during and after the Second World War. Activities associated with the war, such as compulsory national service, generated the type of cases and claims that were effectively resolved by tribunals. Also the tribunal model lent itself well to the implementation of post-war domestic policy. New tribunals established after the war fell into two groups: firstly those implementing the social securities programme of the post-war government, and secondly those associated with increased economic regulation.[68]

Growth in tribunals in New Zealand

1.25 During the Second World War tribunals really began to develop and expand in New Zealand. J L Robson writes that while the establishment of tribunals in New Zealand was no longer new, the frequency and extent to which the mechanism was used during and after the Second World War was a new

62 Hon Sir Gerard Brennan "Foreword" in Robin Creyke (ed) *Administrative Tribunals: Taking Stock* (Centre for International and Public Law, Canberra, 1992) 1.

63 B. L Jones *Garner's Administrative Law* (7th ed, Butterworths, London, 1989) 279.

64 Susan Sterett *Creating Constitutionalism? The Politics of Legal Expertise and Administrative Law in England and Wales* (University of Michigan Press, Ann Arbor, 1997) 38.

65 The Committee on Ministers' Powers, the Donoughmore Committee, reported on the use of administrative powers by Ministers, departments and tribunals.

66 Susan Sterett *Creating Constitutionalism? The Politics of Legal Expertise and Administrative Law in England and Wales* (University of Michigan Press, Ann Arbor, 1997) 33.

67 R E Wraith and P G Hutchesson *Administrative Tribunals* (Allen and Unwin, London, 1973) 38.

68 R E Wraith and P G Hutchesson *Administrative Tribunals* (Allen and Unwin, London, 1973) 39.

phenomenon.[69] Tribunals emerging during this period were each designed to meet a particular situation.[70] Activities associated with the war effort produced cases and disputes that could be effectively resolved by tribunals. Tribunals such as the Price Tribunal, the Land Sales Tribunal and the Goods Services Charges Tribunal were established in the economic field. Others, such as the Armed Forces Appeal Board, the Industrial Manpower Committee and the Aliens Tribunal, arose out of the restrictions placed on liberty associated with the war effort. Tribunals like the War Pensions Board and Appeal Board were also established to determine eligibility for benefits and provide a mechanism for appeal against adverse decisions.[71]

1.26 Tribunals continued to develop after the war. No common principles underpinned the formation and composition of many tribunals and the structure and powers of each tribunal largely depended on the particular inclinations of the Minister responsible for the policy at the time.[72] A number, such as the Copyright Tribunal and the Pharmacy Authority, exercised original jurisdiction, dealing with a particular subject-matter from the beginning, while others, like the Transport Licensing Appeal Authority, were appellate bodies.[73] A small number, such as the Cinematograph Films Censorship Board, heard appeals or complaints against ordinary administrative decisions,[74] although such appeals were more commonly still made to a magistrate during this period.[75]

1.27 An important group of tribunals to develop during this period were those concerned with the licensing and regulation of particular businesses and activities. Where the primary object was to exclude persons of bad character or prevent fraud, licensing was entrusted to Magistrates' Courts.[76] Where the predominant purpose in determining eligibility for a licence was social or economic, a special tribunal was usually established. For example, the licensing of liquor, transport, cinemas, milk, petrol retailing, pharmacy, and sea fishing was all undertaken by tribunals.[77]

1.28 For some time after the Second World War the tendency was to set up new tribunals to deal with matters rather than allocate new jurisdictions to the ordinary courts.[78] In many cases the tribunals were established to resolve issues newly the subject of regulation, such as the licensing of air services or pharmacies,

69 J L Robson *New Zealand: The Development of its Laws and Constitution* (Stevens and Sons Ltd, London, 1954) 103. He identifies 17 new tribunals which were created between 1939 and 1954.

70 J L Robson "Administrative Tribunals: The War Period in Review" (1947) 10 Journal of Public Administration 4.

71 For full details of all tribunals developed during this period see J L Robson *New Zealand: The Development of its Laws and Constitution* (Stevens and Sons Ltd, London, 1954) 90.

72 G S Orr *Report on Administrative Justice in New Zealand* (Government Printer, Wellington, 1964).

73 See Bruce James Cameron "Administrative Tribunals" in A H McLintock (ed) *Encyclopaedia of New Zealand* (1966) www.TeAra.govt.nz (last accessed 23 February 2007).

74 Bruce James Cameron "Administrative Tribunals" in A H McLintock (ed) *Encyclopaedia of New Zealand* (1966) www.TeAra.govt.nz (last accessed 23 February 2007).

75 Bruce James Cameron "Administrative Tribunals" in A H McLintock (ed) *Encyclopaedia of New Zealand* (1966) www.TeAra.govt.nz (last accessed 23 February 2007).

76 Department of Justice *The Citizen and Power: Administrative Tribunals* (Government Printer, Wellington, 1965) 16.

77 Department of Justice *The Citizen and Power: Administrative Tribunals* (Government Printer, Wellington, 1965) 16.

78 K J Keith "Administrative Law Reform 1953 – 1978" (1978) 9 VUWLR 427, 436.

but in other cases, areas of jurisdiction that had formerly been committed to the courts were removed from them and placed with new tribunals.[79] Each new tribunal was created for a situation where the courts were not seen as suited to the regulatory task, or it was not considered appropriate for the task to be undertaken by a government official or Minister.[80] Dissatisfaction with the courts' interpretation and application of indecent publications legislation was for example a factor in their displacement by the Indecent Publications Tribunal in 1963.[81] Similarly during the debate on the Trade Practices Bill in 1953 the Minister in charge of the Bill said "none of the regular courts of the country can have the special knowledge required and must always feel under some disability in determining questions in which policy and discretion are involved."[82] The prevailing view at this time was that a single tribunal could bring greater expertise and also develop and apply the policy of an Act with greater uniformity, especially if the legislation stated broad criteria.[83]

1.29 The volume of cases and the relative unimportance of many of them also made the use of the ordinary courts impractical for regulatory schemes. It was argued that the ordinary courts would not have been able to cope, unless transformed, with every land valuation, town and country planning or transport licensing dispute in New Zealand or with the multifarious other disputes that came for their first (and usually final) hearing before administrative tribunals at this time.[84] Apart from the volume of work, other factors which played a part in the creation of tribunals were the need for relative informality, the avoidance of unnecessary expense, and on occasions a desire for special qualifications in some members of the tribunal.[85]

1.30 In contrast to the ordinary courts, some tribunal members were recruited from specialists who were experts in their field and could maintain greater continuity of policy. Some legislation establishing tribunals expressly provided for representation of interests and the need for specialised knowledge. The War Pensions Appeal Board, for example, had two members who were medical practitioners. One of these was appointed as a representative of ex-servicemen, on nomination of the Returned Services Association. The chair was a lawyer with judicial experience.[86] The Price Tribunal consisted of a lawyer with judicial experience, a second member who was an economist, and two associated members representing the interests of consumers.[87]

79 K J Keith "Administrative Law Reform 1953 – 1978" (1978) 9 VUWLR 427, 436.

80 J L Robson *New Zealand: The Development of its Laws and Constitution* (Stevens and Sons Ltd, London, 1954) 90.

81 K J Keith "Administrative Law Reform 1953 – 1978" (1978) 9 VUWLR 427, 436.

82 Hon P N Holloway MP (1958) 318 NZPD 1168. The Minister was quoting from the judgment of Finlay J in *Central Taxi Depot (Rotorua) Ltd v NZ Retail Motor Trade Association* [1959] NZLR 1167, 1168.

83 K J Keith "Administrative Law Reform 1953 – 1978" (1978) 9 VUWLR 427, 437.

84 Public and Administrative Law Reform Committee *First Report of the Public and Administrative Law Reform Committee of New Zealand: Appeals from Administrative Tribunals* (Government Printer, Wellington, 1968) 3.

85 Public and Administrative Law Reform Committee *First Report of the Public and Administrative Law Reform Committee of New Zealand: Appeals from Administrative Tribunals* (Government Printer, Wellington, 1968) 3.

86 J L Robson *New Zealand: The Development of its Laws and Constitution* (Stevens and Sons Ltd, London, 1954) 109.

87 J L Robson *New Zealand: The Development of its Laws and Constitution* (Stevens and Sons Ltd, London, 1954, 109.

The Franks Committee report and the New Zealand response

1.31 As tribunals began to proliferate during the intense period of social legislation following the war, criticism intensified and lawyers and legal commentators began to raise questions over the haphazard manner in which new tribunals were developing. Little planning or thought was given to the way tribunals should be created or how they should operate. Bodies had simply been formed as needed to cope with specific legislative developments in a diverse range of areas.[88]

1.32 Concern about the ad hoc establishment and the operation of tribunals contributed at least indirectly[89] to the establishment in Britain of the Franks Committee on Administrative Tribunals and Enquiries.[90] The Report of the Franks Committee is considered a turning point in attitudes towards tribunals. The report identified clearly the new phenomenon of tribunals and gave them a higher status and a clearer identity.[91] The Committee's report allayed criticism directed at the very institution of tribunals, stressing the potential advantages, in terms of economy, informality, speed, and expert knowledge, of tribunal hearings over ordinary court procedures for certain classes of case.[92] The Committee considered that a decision-making power should still be entrusted to the courts rather than a tribunal in the absence of these special considerations that made a tribunal more suitable.[93]

1.33 The Franks Committee report has continued to influence thinking about tribunals, shaping later discussion about their characteristics and role, and marking them off from the executive and the courts as an alternative independent decision-making mechanism. The report was studied closely in New Zealand and a survey conducted by the Department of Justice was undertaken to provide a 'comparative' inquiry into New Zealand tribunals.[94] The objective was to review New Zealand administrative tribunals in light of the Franks Committee report and assemble facts on tribunal structure and procedure for the purpose of advancing discussion.[95] The Department considered the constitution of

88 Rachel Bacon "Amalgamating Tribunals: A Recipe for Optimal Reform" (PhD Thesis, University of Sydney, 2004).

89 M L Barker and R L Simmonds "Delivering Administrative Justice: The Role of Tribunals" Paper presented to Australasian Law Reform Agencies Conference, Wellington, New Zealand, 13 – 16 April 2004. Although the final trigger for the establishment of the Franks Committee was public concern over the *Crichel Downs* case of 1954, there was already significant concern about the ad hoc establishment of tribunals. The *Crichel Downs* case concerned the way in which a government department had handled a landowner's request to have land, which had been compulsorily acquired, returned after the war. See also William Wade and Christopher Forsyth *Administrative Law* (9th ed, Oxford University Press, Oxford, 2004) 920.

90 Report of the Committee on Administrative Tribunals and Enquiries (Her Majesty's Stationery Office, London, 1957) ["The Franks Committee Report"].

91 R E Wraith and P G Hutchesson *Administrative Tribunals* (Allen and Unwin, London, 1973) 41.

92 B. L Jones *Garner's Administrative Law* (7th ed, Butterworths, London, 1989) 279.

93 Department of Justice *The Citizen and Power: Administrative Tribunals* (Government Printer, Wellington, 1965) 9.

94 Department of Justice *The Citizen and Power: Administrative Tribunals* (Government Printer, Wellington, 1965). See M Taggart "The Rationalisation of Administrative Tribunal Procedure: The New Zealand Experiment" in Robin Creyke (ed) *Administrative Tribunals: Taking Stock* (Centre for International and Public Law, Canberra, 1992) 90.

95 M Taggart "The Rationalisation of Administrative Tribunal Procedure: The New Zealand Experiment" in Robin Creyke (ed) *Administrative Tribunals: Taking Stock* (Centre for International and Public Law, Canberra, 1992) 91.

tribunals, the appointment of members and their qualification and term of office. It also reviewed the administrative support provided to tribunals, and the procedure, rules and appeal rights which applied.

1.34 The Department of Justice concluded that tribunals had developed in an unsystematic way in New Zealand. What they described as "an empirical approach" had been taken under which the approach adopted was determined on a case by case basis.[96] By the 1960s the structure, composition and procedure of administrative tribunals in New Zealand was quite haphazard.[97] Their survey concluded that the importance of administrative tribunals in New Zealand's legal and governmental system was likely to increase in future. It identified 65 different tribunals already operating in New Zealand in 1965.[98]

1.35 The Department of Justice survey concluded that the choice between whether a tribunal was established to make decisions or whether decisions were left to the ordinary courts was largely pragmatic. Whether the most appropriate choice had always been made in each case could also be legitimately debated.[99] One important reason for establishing a tribunal rather than leaving a decision-making power with a department was that a tribunal guaranteed a person a fair and open procedure and a full opportunity to present their case.[100] The Department considered that a tribunal was appropriate in situations where an individual was entitled to have an impartial adjudication of his dispute with authority.[101]

1.36 Tribunals were now seen to play a vital part in what was described by one commentator as the task of 'judicialising' the process of administration without impairing its efficiency.[102] The value and necessity of tribunals within their proper sphere was no longer seriously questioned. J L Robson also considered that tribunals would be an enduring feature of New Zealand's administrative law landscape:[103]

> History gives many illustrations of new agencies which thrived for a time and were later absorbed into the orthodox judicial system, but there is nothing to suggest that a similar fate awaits New Zealand's administrative tribunals of today. On the other hand we do not see administrative tribunals merging into the administrative organisation of the ordinary government department.

96 Department of Justice *The Citizen and Power: Administrative Tribunals* (Government Printer, Wellington, 1965) 14.

97 M Taggart "The Rationalisation of Administrative Tribunal Procedure: The New Zealand Experiment" in Robin Creyke (ed) *Administrative Tribunals: Taking Stock* (Centre for International and Public Law, Canberra, 1992) 92.

98 Department of Justice *The Citizen and Power: Administrative Tribunals* (Government Printer, Wellington, 1965) 22.

99 Department of Justice *The Citizen and Power: Administrative Tribunals* (Government Printer, Wellington, 1965) 15.

100 Department of Justice *The Citizen and Power: Administrative Tribunals* (Government Printer, Wellington, 1965) 14.

101 Department of Justice *The Citizen and Power: Administrative Tribunals* (Government Printer, Wellington, 1965) 10.

102 Bruce James Cameron "Administrative Tribunals" in A H McLintock (ed) *Encyclopaedia of New Zealand* (1966) www.TeAra.govt.nz (last accessed 23 February 2007).

103 J L Robson *New Zealand: The Development of its Laws and Constitution* (Stevens and Sons Ltd, London, 1954) 126.

1.37 While there was wide variation in the composition, function, and jurisdiction of tribunals, the practice of incorporating by reference the Commissions of Inquiry Act 1908 meant that a number of tribunals had similar powers and protections. A number of tribunals were deemed to be commissions of inquiry for the purposes of that Act, which effectively provided a relatively standard set of powers which many tribunals had.[104] Such tribunals had court-like adjudicative powers, and could cite parties, summons witnesses, administer oaths, admit and hear evidence and conduct hearings. The Department of Justice survey found that it was standard practice for Parliament to provide any new tribunal with all the powers of a commission of inquiry under the Commissions of Inquiry Act 1908.[105]

Summary of tribunal development

1.38 Tribunals were established in preference to using the courts because:

- an assessment of social or economic policy was required;
- inclusion on some tribunals of representation of members of the groups affected by decisions would lead to greater public confidence and acceptance of decisions;
- there was a need for specialist expertise to deal with technical subject matter;
- tribunals could rapidly develop technical expertise by hearing large numbers of similar cases;
- a high level of consistency in the implementation of policy was required, which specialist members recruited from the field could provide; and
- tribunals could manage large volumes of low level cases and settle disputes cheaply, in a more informal, efficient and low cost manner.

1.39 Tribunals were established in preference to entrusting certain decisions to the executive because:

- there was a perception that tribunals were essentially independent of the executive, adding to public confidence and creating greater acceptance of the policy in new statutory regimes;
- tribunals working on judicial lines acted as a safeguard against state power, fostering public confidence in regulatory schemes; and
- tribunal procedures had the advantage of being court-like, providing claimants with, for example, an opportunity to be heard.

SURVEY OF PREVIOUS REVIEWS

Public and Administrative Law Reform Committee – reviews and proposals

1.40 Proposals for systemic tribunal reform began to emerge in New Zealand in the 1960s. The Department of Justice survey put forward a number of proposals for improving the system of tribunals. It suggested, for example, that all appointments should be for a uniform fixed term and that tribunal chairmen should be legally qualified. It also suggested that wherever practicable government departments

104 M Taggart "The Rationalisation of Administrative Tribunal Procedure: The New Zealand Experiment" in Robin Creyke (ed) *Administrative Tribunals: Taking Stock* (Centre for International and Public Law, Canberra, 1992) 94.

105 Department of Justice *The Citizen and Power: Administrative Tribunals* (Government Printer, Wellington, 1965) 36.

that appeared as parties before tribunals should not provide secretarial support to those tribunals.[106] The perception that the independence of a tribunal could be lessened if the tribunal was "housed" in and supported by a department affected by its decisions was identified at an early stage as a concern that should be addressed.

1.41 In 1968, the Public and Administrative Law Reform Committee began, in its first report Appeals from Administrative Tribunals, what became a sustained review of tribunals in New Zealand. The Committee estimated that, leaving aside licensing and private tribunals, there were 60 tribunals in New Zealand in 1968.[107] The Committee recognised how much the existing tribunals differed in form and process, often for no logical reason and without obvious principle.[108] The approach adopted in its first and later reports was to try and preserve the advantages of the existing tribunal system and eliminate the disadvantages. The Committee held back from recommending wholesale structural reform. It said:[109]

> [I]t would be wrong to approach our terms of reference by trying to devise some ideal pattern for an administrative tribunal system and then trying to fit or force various tribunals into that pattern.

Instead the Committee reviewed the arrangements for existing tribunals and recommended practical ways of improving tribunals.

1.42 The quality of adjudication and inconsistent and inadequate appeal rights were identified as significant concerns by the Committee. It found that tribunals were not always comprised of persons especially well equipped to adjudicate. As a consequence the Committee considered that some decisions may be incorrect, or the parties may not be satisfied with the quality of hearing they received.[110] This could erode confidence in tribunals. The Committee considered that the problem was compounded by a lack of adequate and consistent rights of appeal to the courts. A right of appeal lay in some cases to the ordinary courts, but in most cases it was to a further administrative body, the ordinary courts exercising control only on jurisdictional issues or where an error of law appeared on the face of the record.[111] Both the New Zealand Law Society and the then Solicitor-General also criticised the lack of appeal rights in the 1960s,

106 Department of Justice *The Citizen and Power: Administrative Tribunals* (Government Printer, Wellington, 1965) 29.

107 Public and Administrative Law Reform Committee *First Report of the Public and Administrative Law Reform Committee of New Zealand: Appeals from Administrative Tribunals* (Government Printer, Wellington, 1968) 6.

108 Public and Administrative Law Reform Committee *First Report of the Public and Administrative Law Reform Committee of New Zealand: Appeals from Administrative Tribunals* (Government Printer, Wellington, 1968) 12.

109 Public and Administrative Law Reform Committee *First Report of the Public and Administrative Law Reform Committee of New Zealand: Appeals from Administrative Tribunals* (Government Printer, Wellington, 1968) 10.

110 Public and Administrative Law Reform Committee *First Report of the Public and Administrative Law Reform Committee of New Zealand: Appeals from Administrative Tribunals* (Government Printer, Wellington, 1968) 6.

111 Public and Administrative Law Reform Committee *First Report of the Public and Administrative Law Reform Committee of New Zealand: Appeals from Administrative Tribunals* (Government Printer, Wellington, 1968) 7.

arguing that provisions should be amended to confer as a minimum a right of appeal to the Supreme Court (as it then was) on questions of law.[112]

1.43 The Committee proposed two means for improving the quality of adjudication by tribunals: a uniform right of appeal and improving the quality of tribunal membership.[113] The Committee argued that all decisions of administrative tribunals should generally be appealable to the ordinary courts.[114] The Committee proposed that a new administrative division be established in the Supreme Court to hear appeals. Changes to improve tribunal membership consisted of requiring legally qualified chairmen and disinterested, rather than representative, members, with the Minister of Justice being consulted on all appointments to tribunals.[115]

1.44 In response to the Committee's first report an Administrative Division was established in the Supreme Court to hear appeals from decisions of tribunals.[116] This was seen as a first attempt to bring some order into the system of appeals from tribunals.[117] The initial legislation established the new Division but left it to later legislation to confer jurisdiction designating those administrative tribunals from which appeals would lie to the new Division. Amendments were required to the individual statutes under which each tribunal operated to provide for appeals to the new division.[118] The jurisdiction of the Administrative Division grew steadily over the years as the list of statutes that authorised appeals grew. By 1989 a total of 57 statutes had conferred jurisdiction on the Administrative Division with the consequence that there was greater consistency in the appeals process, although a number of significant inconsistencies continued.[119]

1.45 The Administrative Division was abolished in 1991 on the recommendation of the Law Commission.[120] The Division had failed to develop as a specialist appellate and review body mainly because it did not have exclusive jurisdiction

112 Public and Administrative Law Reform Committee *First Report of the Public and Administrative Law Reform Committee of New Zealand: Appeals from Administrative Tribunals* (Government Printer, Wellington, 1968) 8. The Committee quotes from a New Zealand Law Society Committee report on the issue and a paper delivered by the then Solicitor-General, Mr Wild QC to the Commonwealth Law Conference in Sydney in 1965.

113 Jack Hodder "Tribunals in New Zealand: Role and Development" in Legal Research Foundation *Tribunals Law and Practice* (Proceedings of the Tribunals Law and Practice Conference, Auckland, 19 June 2003) 16.

114 Stephen Legomsky *Specialized Justice: Courts, Administrative Tribunals and a Cross National Theory of Specialization* (Clarendon Press, Oxford, 1990) 46.

115 Jack Hodder "Tribunals in New Zealand: Role and Development" in Legal Research Foundation *Tribunals Law and Practice* (Proceedings of the Tribunals Law and Practice Conference, Auckland, 19 June 2003) 17.

116 The Administrative Division was established by the Judicature Amendment Act 1968.

117 New Zealand Law Commission *The Structure of the Courts* (NZLC R7, Wellington, 1989) 155.

118 Jack Hodder "Tribunals in New Zealand: Role and Development" in Legal Research Foundation *Tribunals Law and Practice* (Proceedings of the Tribunals Law and Practice Conference, Auckland, 19 June 2003) 17.

119 For example while the registration and disciplinary appeals related to chiropractors, dieticians, doctors, electricians, surveyors and psychologists went to the Division, appeals relating to architects, dentists, lawyers, plumbers and vets went to the High Court. Also even where appeals where to the Administrative Division underlying legislation provided quite different appeal rights. Some gave a right of appeal on a question of law only while other legislation provided for a full rehearing. New Zealand Law Commission *The Structure of the Courts* (NZLC R7, Wellington, 1989) 158.

120 Abolition was one of the recommendations contained in the Report on the Structure of the Courts. New Zealand Law Commission *The Structure of the Courts* (NZLC R7, Wellington, 1989) 158.

over administrative law cases.[121] The anticipated volume of work and specialisation did not occur and there was consequently not the degree of specialisation anticipated for division members.[122] The conferral of jurisdiction in an incremental fashion had also meant that the Division never had the extensive jurisdiction that had been contemplated.[123]

Legislation Advisory Committee – guidance and proposals

1.46 In 1987 the Legislation Advisory Committee, which had replaced the Public and Administrative Law Reform Committee, published its report Legislative Change: Guidelines for Process and Content.[124] These guidelines identified a number of issues government should consider before proposing legislation to establish a new tribunal.[125] The objective of the guidance was to encourage a more systematic and coherent approach to the establishment of new tribunals and to ensure greater consistency of function, powers and processes between tribunals. The guidelines provided that before a new tribunal was established consideration should be given to whether the function should best sit with a tribunal rather than the courts or the executive.[126] Assuming a tribunal was the most appropriate option, the next step was to determine how the tribunal should be constituted and what powers and procedures were appropriate.[127]

1.47 The Committee advocated that members should be and should be seen to be separate from the parties. Independence was identified as essential and was enhanced by ensuring that appointments were made in an appropriate manner. The 1987 guidelines argued that independence was enhanced by making appointments on the recommendation of, or at least following consultation with, the Minister of Justice or the Attorney General.[128] A minimum term of three years terminable only for cause was also proposed as appropriate. The report contained quite detailed guidance to ensure that appropriate and consistent procedural provisions were included in legislation, so that tribunals undertaking the same or similar functions had the same or similar powers and processes.

1.48 In 1989 the Legislation Advisory Committee provided its most significant report on tribunals to the Minister of Justice.[129] The report concluded that tribunals

121 See the discussion in Stephen Legomsky *Specialized Justice Courts, Administrative Tribunals and a Cross National Theory of Specialization* (Clarendon Press, Oxford, 1990) Chapter 4.

122 New Zealand Law Commission *The Structure of the Courts* (NZLC R7, Wellington, 1989) 157.

123 New Zealand Law Commission *The Structure of the Courts* (NZLC R7, Wellington, 1989) 155.

124 Legislation Advisory Committee *Legislative Change: Guidelines on Process and Content* (Department of Justice, Wellington, 1987).

125 Later editions of the Legislation Advisory Committee Guidelines continued to include such guidance: see Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2001 edition and amendments* (Wellington, 2007) Chapter 13.

126 Legislation Advisory Committee *Legislative Change: Guidelines on Process and Content*, (Department of Justice, Wellington, 1987) 28. Note that these criteria were developed in more detail in the later report, Legislation Advisory Committee *Report No 3: Administrative Tribunals* (Government Printer, Wellington, 1989) 12.

127 Legislation Advisory Committee *Legislative Change: Guidelines on Process and Content* (Department of Justice, Wellington, 1987) 29.

128 Legislation Advisory Committee *Legislative Change: Guidelines on Process and Content* (Department of Justice, Wellington, 1987) 30.

129 Legislation Advisory Committee *Report No 3: Administrative Tribunals* (Government Printer, Wellington, 1989).

have an essential role and have important functions related to, but distinct from, those of the executive branch and the courts.[130] The Committee argued that public powers of decision should be allocated between the three in a way which recognises the responsibilities, qualifications and procedures of those who decide and the characteristics of the matters to be decided. Form should match function.[131] The report proposed a major rationalisation and reform of tribunals. The Committee identified 74 tribunals and approximately 40 occupational registration and disciplinary bodies that had a mix of tribunal and other functions. Of the 74 tribunals identified, the Committee considered that 24 of these, which were appeal bodies, could simply be abolished, and their jurisdiction transferred to the District Court.[132] Of the remaining 50 tribunals, the Committee found that there was a wide diversity of form and function and that an attempt should be made to rationalise the diversity of tribunals, and try to create some sort of coherence.[133]

1.49 The Committee recommended that New Zealand tribunals should be grouped into larger clusters, beginning with three major tribunals encompassing 20 distinct jurisdictions.[134] One would deal with welfare, another resources and a third revenue. The Committee also thought that licensing and indecent publications were two other areas worthy of major tribunals, but did not develop proposals for those areas.[135] The Committee, recognising the enormity of the reforms it proposed, advocated an incremental approach to amalgamation. The Committee considered that there would arguably be a growth in expertise, authority, confidence, independence, specialisation and administrative efficiency if the reforms were implemented. The Committee's recommendations were not acted on.

Law Commission – unified tribunal framework

1.50 In 2004 the Law Commission completed a wide ranging review of the structure and operation of courts and tribunals in New Zealand, publishing the report Delivering Justice for All: A Vision for New Zealand Courts and Tribunals.[136] In that most recent review of tribunals, the Commission essentially picked up and developed further the Legislation Advisory Committee proposals for tribunal reform. The Commission found that a number of tribunals were still serviced and resourced by the departments or agencies that were directly affected by their decisions. Some tribunals had few cases, met infrequently and had members who

130 Legislation Advisory Committee *Report No 3: Administrative Tribunals* (Government Printer, Wellington, 1989) 12.

131 Legislation Advisory Committee *Report No 3: Administrative Tribunals* (Government Printer, Wellington, 1989) 20.

132 Legislation Advisory Committee *Report No 3: Administrative Tribunals* (Government Printer, Wellington, 1989) 41. Appendix 1 contains a list of all appeal bodies.

133 Legislation Advisory Committee *Report No 3: Administrative Tribunals* (Government Printer, Wellington, 1989) 13.

134 Legislation Advisory Committee *Report No 3: Administrative Tribunals* (Government Printer, Wellington, 1989) 52.

135 Legislation Advisory Committee *Report No 3: Administrative Tribunals* (Government Printer, Wellington, 1989) 57.

136 New Zealand Law Commission *Delivering Justice for All: A Vision for New Zeland Courts and Tribunals* (NZLC R85, Wellington, 2004).

were not well trained or supported.[137] The Commission concluded that the diversity of tribunals was much greater than needed and that the piecemeal way in which they had developed had led to an unnecessary 'jungle' of different jurisdictions, often with no clear entry point for the ordinary citizen, and wide variations in process for no principled reason.[138]

1.51 The Commission recommended that most of New Zealand's tribunals should be integrated within a unified tribunal framework and that the rationalisation of tribunals, their membership and processes should occur incrementally with certain bodies being excluded from the structure.[139] Future tribunals should be established only in accordance with principle and in conformity with fixed guidelines and, unless exceptional circumstances exist, new tribunals should be integrated into the unified structure.

Future reform

1.52 Attempts at tribunal reform in New Zealand have been inhibited by both the reasons for diversity and the fact of it. Flexibility has historically been seen as a real virtue of tribunals. Different problems have required different solutions, and the lack of rigidity and formalism in the approach to tribunals has been seen as an advantage.[140] Tribunals, while they share some characteristics of a general kind, lack any unifying underlying principles. Most of the reports and proposals for reform demonstrate a real concern not to try and impose unified processes or structures that achieve coherence at the cost of effectively tailored mechanisms.[141]

1.53 While some situations did call for tailor-made solutions and responses, the complex and diverse tribunal arrangements that have developed in New Zealand during the second half of the 20th century cannot be justified on that basis.[142] Pragmatism has largely prevailed in tribunal development. New Zealand is now at the stage where we have so many tribunals, which vary so widely in form, function and process, that this complexity itself creates enormous challenges for any attempt to devise a simpler, more rational system of tribunals.

137 New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004) 284.

138 New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004) 284.

139 The bodies recommended for exclusion were the Waitangi Tribunal, the Securities Commission, the Commerce Commission, the Takeovers Panel, the Abortion Supervisory Committee, the Privacy Commissioner, the Employment Relations Authority, the Mental Health Review Tribunal, the New Zealand Parole Board, the Disputes Tribunal and the Tenancy Tribunal.

140 M Taggart "The Rationalisation of Administrative Tribunal Procedure: The New Zealand Experiment" in Robin Creyke (ed) *Administrative Tribunals: Taking Stock* (Centre for International and Public Law, Canberra, 1992) 94.

141 Judge Patrick Keane "Statutory Tribunals in New Zealand – A Jungle of Different Jurisdictions" in Legal Research Foundation *Tribunals Law and Practice* (Proceedings of the Tribunals Law and Practice Conference, Auckland, 19 June 2003) 2.

142 Judge Patrick Keane "Statutory Tribunals in New Zealand – A Jungle of Different Jurisdictions" in Legal Research Foundation *Tribunals Law and Practice* (Proceedings of the Tribunals Law and Practice Conference, Auckland, 19 June 2003) 3.

THE IMPACT OF THE CROWN ENTITIES REFORMS

1.54 Over the last 25 years the model of the independent regulatory agency has developed in New Zealand. Its development has been part of the deregulation and sweeping public sector reforms that were introduced by government during the 1980s and 1990s. New Zealand's public sector reforms were part of an international trend which included the devolution of decision-making away from central government and the creation of separate agencies for separate functions.[143] Service provision was separated out from funding and policy advice for example. In the United Kingdom similar developments occurred. The "Next Steps" reforms, which were launched in 1988, transferred many of the executive functions of central government departments to semi- independent agencies.[144]

1.55 In New Zealand the public sector reforms saw the establishment of a number of agencies which were incorporated separately from the Crown. These were later grouped as crown entities when the status of the crown entity was introduced in 1992 to bring such bodies within the ambit of the public sector financial management framework under the Public Finance Act.[145] Crown entities are organisations established and generally funded by the government to perform certain functions specified in statute. Most are governed by a board and are established to undertake advisory, regulatory, purchasing and service provision functions where a degree of independence from the government is appropriate.[146] Recently the Crown Entities Act 2004 reformed the law relating to existing crown entities and provided a consistent and comprehensive framework for the governance and operation of all existing entities. The Act also provided a framework for the establishment of new crown entities.[147]

1.56 Independent regulatory bodies such as the Commerce Commission, the Securities Commission, the Takeovers Panel and the Environmental Risk Management Authority are all crown entities. Having investigative and adjudicative powers, these agencies resemble tribunals; however, unlike tribunals, such agencies have other functions as well. The Takeovers Panel for example has the statutory function of reviewing the law relating to takeovers and recommending changes to the Minister.[148] The Commerce Commission, the Charities Commission, and the Environmental Risk Management Authority are other crown entities that have functions in common with tribunals, but have been established as regulators with a mix of functions.

1.57 Agencies that are established as crown entities, even though they have tribunal-like functions, cannot easily be accommodated within any system of tribunals. Similar problems arise in respect of other crown entities that have investigative and reporting functions. The Health and Disability Commissioner

143 Richard Mulgan *Politics in New Zealand* (3rd ed, Auckland University Press, Wellington, 2004) 140.

144 For a general discussion of the development of the Next Steps programme see Gavin Drewry "The New Public Management" in Jeffrey Jowell and Dawn Oliver *The Changing Constitution* (4th Ed, Oxford University Press, Oxford, 2000) 167.

145 McKinlay Douglas Limited "Crown Entities: Categories and Principles" (A Report for the State Services Commission, McKinlay Douglas Limited, 1995) 3.

146 Boston, Martin, Pallot and Walsh *Public Management: The New Zealand Model* (Oxford University Press, Auckland, 1996) 64.

147 Crown Entities Act 2004 s 3 sets out the purpose of the Act in these terms.

148 Takeovers Act 1993, s 8(1)(a). The Panel also has the function of promoting public understanding of the law and practice relating to takeovers (s8(1)(f).

and the Privacy Commissioner are crown entities that have powers to investigate and report on breaches of patient codes or interferences with statutory rights. Both also have a mix of other functions relating to public education and making recommendations and reports to Ministers.[149] It would not only be difficult, but it would probably also be undesirable, to try and separate out the tribunal-like functions exercised by these entities under these legislative schemes and include them within any tribunal reform.

149 The Health and Disability Commissioner prepares and reviews the Code of Health and Disability Services Consumers' Rights and promotes the Code by education and publicity. The Commissioner also advises the Minister of Health on a number of matters. See Health and Disability Commissioner Act 1994, s 14 for a full list of the Commissioner's functions. Similarly the Privacy Commissioner has a number of educative and reporting functions. See Privacy Act 1993 s13 for a full list.

Chapter 2

Tribunals: theory and definition

INTRODUCTION

2.1 In this chapter we explore the difficult question of "What is a tribunal?" We develop a working definition of a tribunal for the purposes of this paper by exploring the key functions of tribunals and the purposes for which tribunals are used. By analysing the functions and purposes of tribunals we build up a 'defining' set of key features, at least some of which all tribunals must possess. This chapter also explores the desirable characteristics that individual tribunals and a system of tribunals should exhibit.

DEFINITIONAL DIFFICULTIES – WHAT IS A TRIBUNAL?

2.2 The concept of a tribunal has historically not been clearly defined, and even the term 'tribunal' has been described as "an unusually fluid expression."[150] In part, these difficulties stem from the way in which tribunals have evolved. As discussed in our historical overview, the development of tribunals has occurred on an ad hoc basis over the course of the 19th and 20th centuries, without being underpinned by any theoretical framework. This has resulted in significant uncertainty over the features a tribunal should exhibit and how it should function.[151] Furthermore, the reasons why decision-making ought to be allocated to tribunals as opposed to courts or other kinds of decision-makers have often not been clearly articulated.[152]

2.3 As a result of their ad hoc development and the lack of conceptual basis, there is significant diversity in the forms taken by the bodies that we may call 'tribunals,' and in their characteristics. Recognition of the diversity of these bodies is important in formulating a definition, and it is likely that an assessment of whether any particular body is a 'tribunal' may not be a question which can be definitively answered. Much will depend on the context in which the question is asked.

2.4 Commentators have expressed concerns that to attempt to define precisely the concept of a tribunal may result in an overly simplified, inflexible definition which does not encompass all bodies which might be worthy of study.

150 R E Wraith and P G Hutchesson *Administrative Tribunals* (Allen and Unwin, London, 1973) 15.

151 Rachel Bacon "Amalgamating Tribunals: A Recipe for Optimal Reform" (PhD Thesis, University of Sydney, 2004).

152 P P Craig *Administrative Law* (3rd ed, Sweet & Maxwell, 1994) 61.

Conversely, the concept could be defined in an overly obscure and ambiguous way.[153] It may be that the best approach is to understand tribunals in terms of a cluster of properties which they generally exhibit, rather than to attempt to impose a single definition on the wide array of tribunals that currently exist.[154]

FUNCTIONS OF TRIBUNALS

2.5 The term 'tribunal' is loosely used to cover a wide range of entities, not all of which will ultimately form part of this study. We begin by examining all bodies to which the name 'tribunal' may be applied, and later in the paper we narrow the scope of the inquiry to focus only on those bodies which we will consider to be tribunals for the purposes of this project. Functions of bodies to which the term 'tribunal' is sometimes applied include:

(a) Deciding disputes between citizens

Here tribunals essentially act as alternatives to the courts. Examples of this type of tribunal in New Zealand include the Human Rights Review Tribunal, Copyright Tribunal, Employment Relations Authority, Tenancy Tribunal, Disputes Tribunal and Weathertight Homes Tribunal.

(b) First instance determination of disputes or questions between citizens and the state

A number of tribunals with original jurisdiction have been established to decide disputes or questions arising between citizens and the state. Examples include the Land Valuation Tribunals, which decide claims for compensation under the Public Works Act 1981, and District Claim Panels under the War Pensions Act 1954, which determine claims for war pensions.

(c) Reviewing and appealing administrative decisions

Tribunals of this type review or decide appeals from administrative decisions. The challenge to an administrative decision can be seen as constituting a 'dispute.' The majority of immigration and social welfare tribunals in New Zealand fall into this category. For example, the Refugee Status Appeals Authority hears appeals from decisions by refugee status officers as to whether to recognise a claimant as a refugee.

(d) Regulating and disciplining members of professions

Tribunals in this category regulate entry into the profession and professional standards, and take disciplinary action against members. Sometimes these functions are separated. For example, under the Health Practitioners Competence Assurance Act 2003, Registration Authorities deal with registration of practitioners, while the Health Practitioners Disciplinary Tribunal hears disciplinary charges against practitioners. Frequently, however, the two functions are combined within one body. This is the case, for example, in relation to the Building Practitioners Board, Registered Architects Board, Plumbers, Drainlayers and Gasfitters Board and Veterinary Council of New Zealand.

153 Rachel Bacon "Amalgamating Tribunals: A Recipe for Optimal Reform" (PhD Thesis, University of Sydney, 2004).

154 J A Farmer *Tribunals and Government* (Weidenfeld and Nicolson, London, 1974) 184.

(e) Deciding appeals from decisions of other tribunals

This is a common form of tribunal in the professional disciplinary area in particular. Examples include Appeals Tribunals established under the Racing Act 2003, which hear appeals from disciplinary decisions of Judicial Committees, and the Valuers Registration Board of Appeal, which determines appeals from decisions of the Valuers Registration Board in relation to complaints against valuers.

(f) Licensing particular activities

Independent bodies have been established to provide independence in licensing decisions, as decisions to grant or decline a licence can have a significant impact on individuals and their livelihoods. Licensing bodies currently operating in New Zealand include the Liquor Licensing Authority, Gambling Commission, Charities Commission, Abortion Supervisory Committee, Medicines Review Committee and Environmental Risk Management Authority. The degree of judgement which must be exercised varies between bodies, ranging from a fairly mechanical application of criteria to decisions which require a qualitative judgement. The Liquor Licensing Authority and District Licensing Authorities, for example, are only required to "have regard to" a list of matters such as the applicant's "suitability,"[155] giving them a measure of discretion in licensing decisions. Conversely, the Abortion Supervisory Committee must grant a licence where statutory criteria are satisfied.

(g) Investigating particular matters and making recommendations to Ministers/ Parliament[156]

Examples of tribunals in this category include the Police Complaints Authority and Health and Disability Commissioner, which investigate complaints and make recommendations based on their inquiries.

(h) Applying consistently, and developing, a broad policy set by Parliament to individual situations, where Parliament has considered that this would be most appropriately done by an independent body[157]

The Legislation Advisory Committee in their 1989 report identified this as a common form of tribunal, although there do not appear to be many examples in New Zealand. The former Overseas Investment Commission is one example. It does also occur to some extent in the case of consent authorities in resource management, which apply national policy to particular cases in deciding whether to grant resource consents. A more common situation now appears to be that the tribunal itself will be given power to issue guidelines and policies, and to oversee their application. This is the case, for example, in relation to the Health and Disability Commissioner and Charities Commission. Alternatively, tribunals will be created to oversee particular areas of policy or legislation,[158] and may also

155 Sale of Liquor Act 1989, ss 13, 35 and 59.

156 Legislation Advisory Committee *Administrative Tribunals: A Discussion Paper* (Report No 3, February 1989) 28.

157 Legislation Advisory Committee *Administrative Tribunals: A Discussion Paper* (Report No 3, February 1989) 28.

158 Judge Patrick Keane "Statutory Tribunals in New Zealand – A Jungle of Different Jurisdictions" in Legal Research Foundation *Tribunals Law and Practice* (Proceedings of Tribunals Law and Practice Conference, Auckland, 19 June 2003). See also New Zealand Law Commission *Delivering Justice for All* (NZLC R85, March 2004) 289-90.

make recommendations based on this. For example, the Securities Commission oversees securities law and practices,[159] the Takeovers Panel keeps under review the law relating to takeovers of specified companies, recommends changes to the law and oversees takeovers practices;[160] and the Abortion Supervisory Committee reviews the operation and effect of the law relating to abortion.[161]

2.6 Some tribunals will exercise more than one of these functions. The bodies in (g) and (h) are on the periphery of the group of bodies which have traditionally been thought of as tribunals, and there is considerable overlap here with other types of bodies such as standing commissions of inquiry. Beginning in the 1980s, the United States model of independent regulatory agencies has evolved in New Zealand. These types of bodies do not always sit well within the Westminster system.[162] These bodies generally exhibit a mixture of rule-making, adjudicative and sometimes executive powers, which can pose problems for administrative justice.[163] We have included them at this stage of the inquiry because some of their functions involve determination of questions with significant potential to impact upon individual rights and interests. Furthermore, we feel it is important that this study acknowledges recent shifts in the administrative law landscape towards an increased focus on economic and social regulation.

2.7 To summarise, the functions undertaken by bodies that we may describe as tribunals include:

- deciding disputes between citizens;
- first instance determination of disputes between citizens and the state;
- reviewing and appealing administrative decisions;
- deciding appeals from decisions of other tribunals;
- regulating and disciplining members of professions;
- licensing particular activities;
- investigating particular matters and making recommendations to Ministers/Parliament; and
- applying consistently, and developing, a broad policy set by Parliament to individual situations, where Parliament has considered that this would be most appropriately done by an independent body.

As part of this study, we compiled a table of all bodies in New Zealand which exercise any of the above functions, and analysed their constituting legislation. A copy of this table is available on the Law Commission's website.

CONSTITUTIONAL POSITION

2.8 What then is the position of the bodies we have just discussed within the framework of the three branches of government? As we have seen, these bodies perform a wide range of functions, ranging from court-like functions to those

159 Securities Act 1978 s 10.

160 Takeovers Act 1993 s 8.

161 Contraception, Sterilisation and Abortion Act 1977 s 14.

162 Michael Taggart "From 'Parliamentary Powers' to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century" (2005) 55 UTLJ 575.

163 William Wade and Christopher Forsyth *Administrative Law* (9th ed, Oxford University Press, Oxford, 2004) 176; Carol Harlow and Richard Rawlings *Law and Administration* (2nd ed, Butterworths, London, 1997) 83.

far more akin to executive functions. In fact, the different categories and roles they perform mean that different ones will be differently placed on the administrative-judicial spectrum. Wraith and Hutchesson write that:[164]

> [Tribunals] occupy a large part of a spectrum at one end of which is the everyday administrative decision…and at the other a judicial decision taken by a court. The metaphor of a spectrum is helpful to an understanding of the role played by tribunals in the making of decisions, for in the bands of colour which comprise a spectrum one can discern clearly enough a progression from one pole to another, but at the same time find it difficult to say at what point one colour passes over into another…The spectrum itself derives its colours from the interplay of law, policy and administration, rather than from any coherent set of principles.

2.9 The position is complicated further by the fact that the position of so-called tribunals within the structure of government varies according to the constitutional arrangements existing in different jurisdictions. In Australia, federal tribunals are generally considered closest to the executive. However, the Australian federal tribunal system is constrained by the constitutional separation of powers, which precludes bodies other than courts from exercising judicial power. Thus in Australia tribunals cannot exercise judicial power, and have tended to be viewed in terms of their lack of court-like features such as the absence of tenure, inability to exercise judicial power, and differences in procedure.[165]

2.10 Conversely, in many other common law legal systems there is no barrier to seeing tribunals as very closely aligned to the judiciary. In the United Kingdom, tribunals are seen as "firmly located within the judicial rather than the administrative branch of government."[166] This view stems from the 1957 Franks Committee report which took the view that tribunals should be seen as a part of the machinery of adjudication. The Committee wrote that:[167]

> Tribunals are not ordinary courts, but neither are they appendages of Government Departments. Much of the official evidence…appeared to reflect the view that tribunals should properly be regarded as part of the machinery of administration, for which the Government must retain a close and continuing responsibility…We do not accept this view. We consider that tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery for administration. The essential point is that in all these cases Parliament has deliberately provided for a decision outside and independent of the Department concerned.

2.11 The constitutional considerations which have led to Australian tribunals being viewed as part of the machinery of administration do not apply in New Zealand. Tribunals have often been set up as substitutes for adjudication by the courts in particular areas, and constitutionally there is no impediment to regarding them as part of the judicial machinery of the state.

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164 R E Wraith and P G Hutchesson *Administrative Tribunals* (Allen and Unwin, London, 1973) 222.

165 See generally Rachel Bacon "Amalgamating Tribunals: A Recipe for Optimal Reform" (PhD Thesis, University of Sydney, 2004).

166 Genevra Richardson and Hazel Genn "Tribunals in Transition: Resolution or Adjudication?" [2007] PL 116.

167 Cited in J A Farmer *Tribunals and Government* (Weidenfeld and Nicolson, London, 1974) 182.

2.12 A line of cases dealing with the application of the law of contempt of court to tribunals illustrates the wide variance in tribunals' position on the administrative-judicial spectrum. At one end of the spectrum, some tribunals exercise functions so similar to those of the ordinary courts as to be considered part of the judicial system for the purposes of contempt of court. The Employment Tribunal in New Zealand, for example, was considered to fall into this category. The court saw the Tribunal as essentially a replacement for determination of contractual disputes which would otherwise have been done by the ordinary courts.[168]

2.13 Other tribunals which have been treated as courts for the purposes of contempt include the United Kingdom Mental Health Review Tribunal[169] and Workers' Compensation Commissioners in Australia.[170] At the other end of the spectrum, the courts have viewed some tribunals as a form of administrative body, and so not eligible for protection under contempt law. For example, a Land Valuation Court in the United Kingdom was held not to be a court for the purposes of contempt, as it discharged administrative functions. The tribunal was defined instead as an administrative court "constituted to resolve problems which arise in the course of government administration."[171] Similarly, the Professional Conduct Committee of the United Kingdom Medical Council and the Investigating Committee set up under the Medical Practitioners Act in New South Wales were not seen as sufficiently court-like to qualify for the protection of contempt of court.[172]

2.14 Thus tribunals generally have been described as "an institution which stands on the frontiers between law and administration."[173] In our view, the spectrum concept best captures the role played within our constitutional system by the wide range of bodies we call 'tribunals.' Having been deliberately created to remove certain decisions from the courts, tribunals are not courts. Having been removed from government officials, they are not part of the executive either.

2.15 However, much tribunal decision-making has obvious similarities to the judicial process, in that tribunals find facts and reach a decision by applying the law to the facts. Commentators therefore frequently view many tribunals as being court-like.[174] Furthermore, many of them engage in adjudication, which is closely linked to the judicial function, as court procedures are designed to provide an institutional guarantee that disputants will have an opportunity to present proofs and reasoned arguments to an impartial judge.

2.16 Some tribunals, such as the Disputes Tribunal, exercise an almost entirely judicial function. Others may display more of a mixture of features. There may

168 *Attorney-General v Reid* [2000] 2 NZLR 377. See also *Peach Grey & Co (a firm) v Sommers* [1995] 2 All ER 513.

169 *Pickering v Liverpool Daily Post and Echo Newspapers Plc* [1991] 2 AC 370.

170 *New South Wales Bar Association v Muirhead* (1988) 14 NSWLR 173.

171 *Attorney-General v British Broadcasting Corporation* [1981] AC 303.

172 *General Medical Council v British Broadcasting Corporation* [1998] 3 All ER 426; *X v Amalgamated Television Services Pty Ltd* (1987) 9 NSWLR 575.

173 R E Wraith and P G Hutchesson *Administrative Tribunals* (Allen and Unwin, London, 1973) 13.

174 Judge Patrick Keane "Statutory Tribunals in New Zealand – A Jungle of Different Jurisdictions" in Legal Research Foundation *Tribunals Law and Practice* (Proceedings of Tribunals Law and Practice Conference, Auckland, 19 June 2003).

be administrative aspects to a particular tribunal's decision-making – tribunals are often given broad discretions in relation to policy matters, and may specifically be required to decide policy questions.

2.17 In reality, even the distinction between judicial and administrative is often blurred. Mechanical decisions not requiring judgement are presumably located at the "administrative" end of the spectrum; however decisions made within the executive can also involve elements of judgement, and so shade into adjudication. In these situations there may no significant difference between administrative and judicial decisions. What differentiates a tribunal from the executive in this class of cases is then its independence rather than a difference in the nature of its decision-making. At the other end of the spectrum, because tribunals adjudicate, their decision-making is generally not significantly different to that of the courts. Rather, it is their procedures, and the absence of certain features of courts in those procedures, which distinguish them from the courts.[175]

TRIBUNALS FOR THE PURPOSES OF THIS STUDY

2.18 We shall now attempt to isolate and define the types of tribunal with which this study is concerned. Cases before tribunals commonly involve some form of question or dispute to be decided by the tribunal. These are the 'classic' tribunals. The Legislation Advisory Committee in 1989 stated that the basic function of a tribunal is to decide, reflecting the word's meaning of a place of judgement or decision.[176] As one commentator says, "[t]here must be some question or dispute…as distinct from an application or claim for decision in the course of administration."[177] An essential part of deciding a question or dispute is that some exercise of judgement is required. This distinguishes tribunals in our sense from purely administrative bodies, which are required to decide claims, but do this through a mechanical application of set criteria to facts. For example, licensing bodies are often required to issue licences where the relevant criteria are satisfied. Some licensing decisions do require judgement however, as when relatively subjective standards such as "fitness" are introduced, thus some licensing decisions will fall within the type of decision-making with which we are concerned.

2.19 The element of judgement in tribunal decision-making suggests that tribunals in our sense are essentially adjudicative bodies.[178] In a broad sense, adjudication has been described as "all administrative decisions which require judgement in applying standards to facts."[179] More specifically, Lon Fuller defined adjudication as "a process of decision in which the affected party's participation consists in an opportunity to present proofs and reasoned arguments."[180] He noted that a number of other qualities flow from this definition. First, a decision based on

175 Hazel Genn "Tribunals and Informal Justice" (1993) 56 MLR 393, 395.

176 Legislation Advisory Committee *Administrative Tribunals: A Discussion Paper* (Report No 3, February 1989) 28.

177 Lindsay Curtis "Agenda for Reform: Lessons from the States and Territories" in Robin Creyke (ed) *Administrative Tribunals: Taking Stock* (Centre for International and Public Law, Canberra, 1992).

178 See, eg, Jack Hodder "Tribunals in New Zealand: Role and Development" in Legal Research Foundation *Tribunals Law and Practice* (Proceedings of Tribunals Law and Practice Conference, Auckland, 19 June 2003).

179 Genevra Richardson and Hazel Genn "Tribunals in Transition: Resolution or Adjudication?" [2007] PL 116, 119.

180 Lon L Fuller "The Forms and Limits of Adjudication" (1978) 92 Harv L Rev 353.

reasoned argument must be rational. Further, he suggested that the "natural" province of adjudication is in judging claims of right and accusations of fault, as the process of reasoned argument must be based on principles or rules in order to be meaningful and persuasive.[181]

2.20 The tribunals with which we are concerned generally find facts based on the presentation of evidence, and decide cases by applying settled rules or principles to facts. Their determinations affect the rights of parties, and they generally decide something in the nature of a legal dispute between parties.[182] Thus they seem to fit comfortably within the adjudicative paradigm.

2.21 A major constraint imposed by Fuller's definition of adjudication is that the process is not suited to determine what he termed "polycentric" questions. These are situations with many interacting points of influence, where a change in any one point will have complex repercussions for all the others. In this case it is not possible to afford to all parties who may be affected an opportunity to participate in the decision through the presentation of reasoned arguments. Thus if we view tribunals as primarily adjudicative bodies, this would tend to exclude bodies with functions such as overseeing the operation of legislation or developing policies, as these types of decision have wide-ranging effects and are not confined to deciding questions involving individual rights through the application of standards to facts. For example, bodies such as the Commerce Commission and Securities Commission are required to address questions with significant economic implications, which may be seen as highly polycentric. Some bodies may also have mixed adjudicative and non-adjudicative functions. Most New Zealand tribunals appear to fit most easily into the adjudicative model of decision-making.

2.22 Defining tribunals in terms of adjudication would have further implications for other aspects of the definition. For example, adjudication tends to imply an adversarial procedure. This will be considered later in this paper.

2.23 We are, therefore, primarily concerned in this paper with tribunals that are adjudicative, determining questions of individual rights and significant interests. In terms of the administrative-judicial spectrum referred to earlier in this paper, then, tribunals for the purposes of our study are generally situated close to the judicial end of the spectrum. Although regulatory bodies such as the Commerce and Securities Commissions, and standing commissions such as the Privacy and Health and Disability Commissioners have certain adjudicative functions, in our view they ought ultimately to be excluded from our study, for a number of reasons. First, as mentioned above, the issues which these bodies are required to address may be seen as highly 'polycentric' in nature and thus their decision-making processes fall outside the parameters of adjudication. Furthermore, these bodies typically have mixed functions, and it may be difficult to separate those functions which fit our definition of a tribunal from those that do not. Finally, most of these bodies are already regulated under other statutory schemes,

181 Lon L Fuller "The Forms and Limits of Adjudication" (1978) 92 Harv L Rev 353, 365-70.

182 John Burrows and Ursula Cheer *Media Law in New Zealand* (5th ed, Oxford University Press, Auckland, 2005) 430.

notably the Crown Entities Act 2004.[183] Functions now performed by Crown Entities were carved out of the functions of executive government,[184] and they were established, and operate, as instruments of the executive, subject to designated areas of independence. Thus they do not fit easily within the paradigm of tribunals as independent adjudicative bodies deciding questions affecting individual rights and interests.

2.24 We note at this point that while most of the tribunals with which we are concerned make decisions, we do not necessarily exclude those which make recommendations. There are some tribunals – the Police Disciplinary Tribunal is one – which hear evidence and exercise judgement in arriving at a recommendation rather than a decision. Their function is so close to an adjudicative function that they should remain within the ambit of this study.

2.25 Rule of law arguments are also relevant here. Central to the ideal of the rule of law is the principle that disputes involving individual rights, including review of the legality of government actions, are to be decided by judges independent of the executive. This helps secure two key tenets of the rule of law – the rule of law as opposed to arbitrary power, and the equal application of the law to government and its officials as well as citizens.[185] Because the tribunals with which we are concerned may be seen as part of the judicial system, they perform a role similar to that of the courts in upholding the rule of law. While tribunals are not courts, most contemporary commentators believe that giving certain types of disputes to tribunals rather than to the courts does not threaten the rule of law, because tribunals generally are, and should be, independent, and because they remain subject to the supervision of the ordinary courts.[186]

2.26 For the purposes of this study, then, we shall take the defining characteristics of tribunals to be that they exercise an adjudicative function and are independent. That is, their key features are that:

- they determine questions affecting people's rights;
- they consider facts and evidence and apply standards (generally rules or policies) to the facts;
- they exercise a defined specialist jurisdiction; and
- they are independent from the executive. That is, their members are not departmental officers.

We have adopted this method of analysis because we are primarily concerned with decisions which directly affect individual rights and interests. For the remainder of this paper we shall therefore concentrate only on those tribunals which exercise an adjudicative function. The first table in Appendix 1 lists the

183 For a list of bodies subject to the Crown Entities Act 2004, see Schedule 1 to that Act. It will be noted that many of the bodies listed in the table of bodies that may be tribunals under "Bodies that investigate particular matters and make recommendations" and "Independent bodies that apply and develop and consistent broad policy" are listed in this Schedule.

184 See generally P P Craig *Administrative Law* (3rd ed, Sweet & Maxwell, 1994) 81-85.

185 See generally Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) 148-50; Geoffrey de Q Walker *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne University Press, Melbourne, 1988) Chapter 1.

186 See, eg, William Wade and Christopher Forsyth *Administrative Law* (9th ed, Oxford University Press, Oxford, 2004) 21-22.

tribunals satisfying this definition that we have identified as being within the ambit of our study. This list has been approved by Cabinet for the purposes of this project, with the qualification that it is not "set in concrete:" as work proceeds tribunals may be added to, or deleted from, the list.

PURPOSES OF TRIBUNALS

2.27 Even tribunals which are within our study can serve different purposes in terms of the underlying goals of administrative justice. Perhaps the most important rationale underlying the use of tribunals is the belief that tribunals improve public access to dispute settlement mechanisms. The goal of public accessibility applies to most forms of tribunal, given that the original intent of the tribunal system was to provide easy access to specialised adjudicators at low cost to claimants.[187]

2.28 According to Sir William Wade, "[t]ribunals exist in order to provide simpler, speedier, cheaper and more accessible justice than do the ordinary courts."[188] This purpose was driven by the social welfare context of many of the early tribunals. The allocation of welfare benefits involved large numbers of small claims, creating a need for fast, cheap and accessible systems of review. The aim was to provide the greatest measure of justice possible within the constraints of efficient administration.

2.29 In addition to providing access to a form of review that was originally seen as being more efficient and cost-effective than the courts, tribunals were also sometimes established where it was thought that different values to those of the courts needed to be applied. In relation to the early social welfare legislation, it was thought that the courts would not be sympathetic to the goals and values underlying this legislation, therefore would not be the appropriate forum to resolve disputes.[189] Similarly, in some parts of the world trade union antagonism towards the courts drove the establishment of early industrial tribunals.[190]

2.30 Specialisation is another key purpose for which tribunals have often been established. Tribunals have often been established in narrow or technical fields where specialist expertise is desirable. Specialised tribunals are thought to be able to deal expertly and rapidly with special classes of cases. This is especially so where there is a significant volume of claims within a narrow and specialised area. Even without pre-existing technical skills, a specialised tribunal can quickly build up expertise in its field.[191]

2.31 Where individual rights are at stake, tribunals offer the protection of a formal process separate from the administration.[192] This is especially important in

187 Hazel Genn "Tribunals and Informal Justice" (1993) 56 MLR 393, 395.

188 William Wade and Christopher Forsyth *Administrative Law* (9th ed, Oxford University Press, Oxford, 2004) 906.

189 See, eg, P P Craig *Administrative Law* (3rd ed, Sweet & Maxwell, 1994); Lindsay Curtis "Agenda for Reform: Lessons from the States and Territories" in Robin Creyke (ed) *Administrative Tribunals: Taking Stock* (Centre for International and Public Law, Canberra, 1992).

190 Hazel Genn "Tribunal Review of Decision-Making" in Genevra Richardson and Hazel Genn *Administrative Law and Government Action* (Clarendon Press, Oxford, 1994) 252.

191 See, eg, William Wade and Christopher Forsyth *Administrative Law* (9th ed, Oxford University Press, Oxford, 2004) 908.

192 Legislation Advisory Committee *Administrative Tribunals: A Discussion Paper* (Report No 3, February 1989) 28.

relation to disputes between citizens and the state. As discussed above, it is seen as important to the rule of law that these disputes be determined by judges who are impartial and independent from the executive.

2.32 Administrative review tribunals serve important purposes in addition to the general purposes of tribunals noted above. Their purpose is to correct any errors in the original decisions made by administrators through review by tribunals. It is thought that this will thereby improve the quality of primary decision-making in general.[193] Appellate tribunals (those which review first instance administrative decisions or which deal with appeals from tribunal decisions), then, have an oversight or checking function in relation to administrative decision-makers, promoting executive accountability. This function is intended to provide a mechanism to identify and resolve systemic problems within public administration.[194] Again, the rule of law underlies these purposes, as provision of a mechanism to correct errors in administrative decisions is important in order to guard against abuse of powers, and to ensure consistency in the way that powers are exercised. Providing for appeals to tribunals from administrative decisions is one way of ensuring that government officials act in accordance with the law, along with other methods such as judicial review, ombudsmen and procedural protections.[195]

2.33 Tribunals can also have other, more pragmatic purposes, which are not underpinned by any theory of administrative justice. For example, many tribunals perform tasks very similar to the courts, and the matter has been given to a tribunal instead due to the inability of the courts to cope with the volume of cases.[196]

2.34 In sum, the main purposes for which tribunals are established are:

- to improve public access to dispute settlement mechanisms;
- to provide simple, speedy, cheap and accessible justice;
- to provide specialist expertise in a particular area;
- to give the protection of a formal process separate from the administration where individual rights are at stake;
- to correct any errors in the original decisions made by administrators through review by tribunals;
- to promote executive accountability by providing oversight of administrative decision-making; and
- to deal with large volumes of low level cases.[197]

193 Rachel Bacon "Amalgamating Tribunals: A Recipe for Optimal Reform" (PhD Thesis, University of Sydney, 2004).

194 Hon Justice Michael Barker "The Emergence of the Generalist Administrative Tribunal in Australia and New Zealand" Paper presented to the AIJA 8th Annual Tribunals Conference, Sydney, Australia, 9-10 June 2005.

195 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) 185.

196 Hazel Genn "Tribunal Review of Decision-Making" in Genevra Richardson and Hazel Genn *Administrative Law and Government Action* (Clarendon Press, Oxford, 1994) 256.

197 We note that in the past tribunals have often been established because it was thought that they would apply different values to those of the courts. This was discussed in Chapter 1. However, in our view it is no longer a significant driving force behind the establishment of new tribunals.

ARE THERE DISTINCT CATEGORIES WITHIN THE OVERALL CONCEPT OF A TRIBUNAL?

2.35 Even after isolating the tribunals with which this study is concerned, we find that they are not all of the same kind. Some tribunals may fit into more than one category, while others may not fit easily into any.[198]

2.36 The leading study, undertaken by Abel-Smith and Stevens, proposes a broad division of tribunals into court-substitute and policy-oriented tribunals.[199] Court-substitute tribunals are essentially used in place of the courts where the courts are seen as too expensive, formal or technical. Policy-oriented tribunals deal with matters of a more administrative nature, such as planning, where it is thought that courts do not have sufficient expertise, flexibility or policy consciousness.

2.37 Other commentators have broadly followed this approach. Rachel Bacon suggests that tribunals can be subdivided into administrative/merits review tribunals, court substitutes and professional disciplinary tribunals.[200] Another possibility may be a division between tribunals with original and appellate jurisdiction. This has some affinity with the suggested division between court-substitute and administrative/merits review tribunals, as merits review tribunals are all appellate bodies, while court-substitutes may often have original jurisdiction, although some will also have appellate jurisdiction.

2.38 In the table on our website of all bodies which could potentially be considered tribunals, we have grouped them according to our list of functions of tribunals in paragraph 2.5 above. As discussed, some of these categories will not fall within our definition of tribunals for the purposes of this study. Given that we have taken tribunals for our purposes to be primarily adjudicative bodies, the 'policy-oriented' category suggested by Abel-Smith and Stevens, corresponding to (g) and (h) on our list, may not ultimately be significant for our study. Therefore, the tribunals with which we will be concerned could be broadly grouped into three key categories:

- tribunals which review or hear appeals from administrative decisions;
- tribunals which make first instance decisions in relation to disputes between citizens or between citizens and the state; and
- licensing and disciplinary tribunals.

Inevitably there will be a few bodies which meet our definition of 'tribunal' which do not neatly fit into any of these categories, and can only be described as 'miscellaneous.'

DESIRABLE CHARACTERISTICS OF TRIBUNALS

2.39 Given their purposes and functions, tribunals as defined above should desirably be expected to display certain characteristics. Due to the wide divergence in tribunal forms and procedures, it is difficult to identify truly common characteristics across the system of tribunals. Similarly, the distinction between characteristics which tribunals desirably should exhibit and those which they in fact do exhibit can be difficult to draw, given that developments have often occurred in an ad hoc and unprincipled manner.

198 R E Wraith and P G Hutchesson *Administrative Tribunals* (Allen and Unwin, London, 1973) 43-4.

199 Brian Abel-Smith and Robert Stevens *In Search of Justice* (Allen Lane, London, 1968) 220-9.

200 Rachel Bacon "Amalgamating Tribunals: A Recipe for Optimal Reform" (PhD Thesis, University of Sydney, 2004) 42-48.

2.40 As we have noted, there are different types of tribunals, which may need to respond to differing priorities depending on the functions and purposes of the particular type of tribunal. Thus some characteristics may be more important in some types of tribunal than in others. Some may mean different things in the context of different types of tribunals. In some cases there may need to be trade-offs between characteristics. Proportionality is an important concept here – in some cases it may not be proportionate to the nature of the cases a tribunal deals with to give the full protection of some of the characteristics.

Public accessibility

2.41 As noted earlier, an important goal underlying the establishment of tribunals is that they should provide easier access to mechanisms for review or dispute settlement. Factors such as costs and formality are often seen as barriers to access, and tribunals have attempted to avoid some of these difficulties. The concept of accessibility entails two main principles. First, cost should not be an unreasonable barrier.

2.42 The second aspect of accessibility relates to ensuring that citizens are aware of the avenues of redress that exist, and know how to initiate and progress cases should they wish to. Members of the public should be aware that particular tribunals exist as a mechanism to resolve grievances, and in particular the subjects of administrative decisions should be made aware of any appeal rights to tribunals which may be exercised. Furthermore, the process of taking cases before a tribunal should be clear and made known to the public.

2.43 Other procedural features of tribunals are also sometimes associated with accessibility. For example, the formality associated with the courts is thought to be intimidating for some potential litigants, discouraging people who may have valid claims from initiating proceedings. Informality in tribunal proceedings is therefore seen as a way of ensuring that those who wish to access tribunals are not prevented from doing so. Provision of reasoned decisions could also be seen as an aspect of accessibility, ensuring claimants understand the outcome of their case and the reasoning upon which the decision was based.

Membership and expertise

2.44 There are certain generic skills that tribunal members should possess. In addition to this, a significant advantage of tribunal decision-making is the opportunity for decision-makers to build up specialist knowledge in the area dealt with by the particular tribunal. This can occur either because tribunal members are appointed for their expertise in the field, or, because, given that the area dealt with by a tribunal is generally limited, they can more quickly develop expertise in the field.

2.45 Many tribunals are multi-disciplinary, with a mixture of members of relevant professions and legally qualified members, as opposed to courts where judges are generalist and legally-skilled. This also contributes to specialisation, allowing members to bring their skills in the tribunal's field to bear on decisions.

2.46 Given that tribunals exercise an adjudicative role, ordinarily it will be appropriate to have at least one member with legal expertise. Often this will take the

form of a tribunal chaired by a judge or lawyer, with other members as desired. It will also often be desirable to have members with specialist expertise relevant to the subject matter dealt with by the tribunal, or representing the interests of groups likely to be affected by the tribunal's decisions.

Independence

2.47 A key rationale for the existence of tribunals is that they should be independent, and decide cases impartially, providing the citizen with a source of review or dispute resolution independent of government influence. Tribunals generally are not subject to administrative interference and are not composed of people allied with the administration.[201] This is important as the work of some tribunals involves reviewing administrative decisions, and they must be able to make such decisions without fear as to the possible executive response.

2.48 Appointment processes should reflect the goal of independence. There can also be issues of independence surrounding the administration of tribunals. Ideally tribunals should not be administered by departments that are involved in the cases which come before them.

Procedures

Informal and simplified procedures

2.49 The emphasis on informality in tribunal procedures is a result of the desire to make tribunals quicker, cheaper and more easily accessible which drove the establishment of the current tribunal system. Generally tribunals do not have the same strict procedural rules as courts. For example, the rules of evidence are usually relaxed somewhat and claimants often represent themselves rather than having legal representation. Many tribunals are deemed to be commissions of inquiry, and so have all the relevant powers of commissions. This may also allow tribunals to operate under different rules and procedures to those which would apply in court. Furthermore, a number of tribunals are explicitly required by statute to minimise formality in their procedures.

2.50 Similarly, tribunal procedures are usually designed to be simpler and more streamlined than formal court procedures. For example, generally all that is required in order to commence a case is to fill in an application form, rather than being required to file statements of claim and other documents of the type required to commence a case in court. Clear and uncomplicated procedures are considered important in encouraging citizens to use tribunals.[202] This promotes informality as well as accessibility and efficient decision-making.

Adversarial or inquisitorial procedure?

2.51 Tribunals have variously been seen as adversarial or inquisitorial, or a mix

201 William Wade and Christopher Forsyth *Administrative Law* (9th ed, Oxford University Press, Oxford, 2004).

202 P P Craig *Administrative Law* (3rd ed, Sweet & Maxwell, 1994). See also William Wade and Christopher Forsyth *Administrative Law* (9th ed, Oxford University Press, Oxford, 2004).

of the two.[203] As noted above, if tribunals are seen as primarily adjudicative bodies, this tends to suggest that their procedures should be adversarial. However, the fact that a more inquisitorial procedure is adopted does not necessarily alter the essentially adjudicative nature of the decision-maker's task. Given the desired flexibility in tribunal procedures, tribunals would be expected to differ in the extent to which they follow an adversarial or inquisitorial model, and ought to be able to adapt their procedures according to the needs of a particular case.

2.52 In New Zealand, the Legislation Advisory Committee's 1989 Report seems to view tribunals as having a mixture of adversarial and inquisitorial features. The report argues that court processes are designed to resolve, through adversarial presentation and testing of evidence and argument, disputes about fact and law. Tribunal processes are less formal, with less strict rules of evidence. Tribunals are sometimes expected to take an active inquisitorial role, in contrast to the role of the ordinary courts.[204]

2.53 The overarching goals of the tribunal system, including public accessibility, informality and efficiency, suggest that it is often desirable for tribunals to incorporate inquisitorial elements into their procedures. There should be specific provision made to generate inquisitorial approaches if this is considered appropriate to the nature of the cases dealt with by individual tribunals. The extent to which an inquisitorial approach is desirable may vary quite considerably between tribunals. Flexibility is important here, and tribunals ought to be able to adopt the kind of procedure which best suits the nature of the case, within a framework that ensures a consistent approach between tribunals.

Natural justice

2.54 The rules of natural justice apply to tribunals as to other decision-makers.[205] These rules are commonly divided into two basic elements, known as the hearing rule and the rule against bias. The rule against bias is that the judge or decision-maker in a case must be impartial. The hearing rule signifies that a person has a right to know the case against them, and to have the opportunity to challenge it.

2.55 While the underlying rules of natural justice remain the same, their application to a particular case will vary according to the particular circumstances. Thus the exact requirements of natural justice in any case will depend on factors such as the surrounding circumstances, the nature of the inquiry, the rules governing the tribunal, and the subject-matter at issue.[206]

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203 By the term "adversarial," we mean a mode of dispute resolution in which the competing claims of the parties are presented, frequently by legal representatives, to an impartial and disinterested third party with the power to determine the dispute. By "inquisitorial," we refer to a proceeding where the adjudicator takes a more active role. The adjudicator's investigation is not limited to the evidence put before him or her, but (s)he proceeds with an inquiry on his or her own initiative, and may assume responsibility for determining how the competing claims of the parties are presented, determine what questions to ask, and define the scope and extent of the inquiry. See Peter Spiller *Butterworths New Zealand Law Dictionary* (6th ed, LexisNexis NZ Ltd, Wellington, 2005); Bryan A Garner (ed) *Black's Law Dictionary* (8th ed, Thomson West, St Paul (Minnesota), 2004); David M Walker *The Oxford Companion to Law* (Clarendon Press, Oxford, 1980).

204 Legislation Advisory Committee *Administrative Tribunals: A Discussion Paper* (Report No 3, February 1989) 28.

205 William Wade and Christopher Forsyth *Administrative Law* (9th ed, Oxford University Press, Oxford, 2004).

206 *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118, cited in P P Craig *Administrative Law* (3rd ed, Sweet & Maxwell, 1994) 292.

Powers

2.56 Just as tribunals must have procedures which ensure the fair and efficient disposal of the cases before them, they also require powers to enable them to operate those procedures and to properly perform their adjudicative function. There are certain core powers which almost all tribunals need, others which are required only by some. On the other hand it is important that tribunals not be accorded too much power. Their powers must be proportionate to the tasks they perform.

2.57 Most tribunals need powers to compel the attendance of witnesses, to require the production of documents and to make orders for disclosure. These powers are necessary to enable the tribunal to be fully apprised of the facts and to ensure that the parties are properly informed also. In addition, whether a tribunal's normal procedure is to sit in public or private, there should normally be a power to make exceptions where the nature of the case requires it, and to make orders for the suppression of publication of certain matters even where the matter is heard in public. There also needs to be power to maintain order at the hearings.

2.58 The substantive orders a tribunal can make should be such as to resolve in an effective way the kind of disputes which come before it. Disciplinary tribunals, for instance, need a range of powers to sanction breaches of differing degrees of seriousness. The power to award costs may be appropriate for some tribunals, but not for others.

2.59 A tribunal's powers should be such as to ensure it can effectively determine disputes, without sacrificing the informality, flexibility and efficiency which are so important in the majority of tribunals. It is important, too, that tribunals with similar functions and characteristics should have similar powers. Inconsistency between tribunals does not breed confidence.

Rights of appeal and review[207]

2.60 Where legislation authorises decisions that affect individual rights, interests or legitimate expectations, there generally ought to be an opportunity for challenge by way of appeal or review. There is a need to ensure oversight of tribunal decisions. Appropriate rights of appeal and review need to be available to ensure that errors are corrected and to maintain a high standard of first-instance decision-making. To this end, provision of a right of appeal from a tribunal to the courts will generally be desirable.

2.61 Rights of appeal do not exist unless created by statute. In the event that there is no appeal right, judicial review is available, although the High Court's inherent supervisory jurisdiction continues to exist alongside statutory appeal rights in any case. The distinction between the two forms of challenge is that appellate bodies generally sit in place of the original decision-maker, making their own findings of fact or law and re-evaluating the merits of the first decision. In contrast, the court's role on review is to supervise the process by which the original decision was made and to determine whether it was made according to law.

207 Unless otherwise noted, information in this section is taken from Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (Wellington, 2001).

2.62 Rights of appeal may come in different forms. The choice of a particular form of appeal requires a balancing of the desirability of appeals against their potential disadvantages. Appeals add further costs and delay, and may detract from the finality of a decision. However, it will usually be appropriate to limit rights of appeal rather than exclude them altogether.

Speed and efficiency

2.63 An important consideration behind the original establishment of tribunals was that they ought to operate efficiently. For our purposes here, efficiency essentially refers to the speed with which cases are heard and decisions made. Long delays are undesirable, and may also in some cases be thought to be disproportionate to the sums of money in dispute. A speedy determination of the case is often important where important individual interests are at stake, for example in professional disciplinary matters.

Challenges to characteristics

2.64 Many of the characteristics identified as defining features of tribunals are in reality ideals rather than entirely accurate descriptions of tribunals as they currently operate. The assumption that tribunals provide an accessible, cost-effective and efficient alternative to courts has been questioned, most notably by Hazel Genn. We note, however, that Genn's arguments are made in the context of the United Kingdom system, and research is necessary to determine how far they apply to the situation in New Zealand. Genn argues that, although the existence of tribunals is commonly justified on the basis of benefits such as speed, accessibility, lower costs and informality, these benefits are not always evident in practice. She argues that empirical studies of the operation of tribunals in the United Kingdom demonstrate that they frequently are not especially speedy or inexpensive, and the extent of informality varies significantly across tribunals.[208]

CONCLUSION

2.65 For the purposes of this study, we are taking the essential nature of a tribunal as being that it determines questions which affect rights by assessing facts and applying rules or standards to the facts. Usually tribunals make final, binding decisions, but in some cases may make recommendations. However, the process of reaching a conclusion is the same.

2.66 There are different types of tribunals, including first instance decision-makers in relation to disputes between citizens, and between citizens and the state, administrative review tribunals, and tribunals which hear appeals from other tribunals. These different functions, as well as the ad hoc development of the current system of tribunals, means that there is considerable diversity among tribunals. However, all make determinations by applying standards to facts in the manner described.

2.67 We have identified a number of characteristics which tribunals desirably ought to exhibit. These are:

- public accessibility, both in terms of costs and public awareness of opportunities to seek redress through tribunals;

208 Hazel Genn "Tribunal Review of Decision-Making" in Genevra Richardson and Hazel Genn *Administrative Law and Government Action* (Clarendon Press, Oxford, 1994) 257-285.

- membership and expertise appropriate to the subject matter;
- actual and apparent independence;
- procedural rules which secure the observance of natural justice, are simple and less formal than those of the ordinary courts, and will often be more inquisitorial than adversarial, depending on the nature of the case;
- sufficient powers to carry out their functions, which are proportionate to those functions;
- appropriate avenues for appeal or review of tribunal decisions, in order to ensure oversight and error correction; and
- speedy and efficient determination of cases.

Part II
ANALYSIS

Chapter 3
Accessibility

INTRODUCTION

3.1 Access to justice has been a key goal of the tribunal system since its inception. As we have noted in previous chapters of this paper, an original purpose of tribunals was to provide access to a cheaper, informal and efficient method of dispute settlement to deal with high volumes of low level cases. Given this objective, accessibility is crucial to an effective system of tribunals. Sir Andrew Leggatt, in his review of the United Kingdom's tribunals, stated:[209]

> It should never be forgotten that tribunals exist for users, and not the other way round. No matter how good tribunals may be, they do not fulfil their function unless they are accessible by the people who want to use them, and unless the users receive the help they need to prepare and present their cases…[T]ribunals should do all they can to render themselves understandable, unthreatening, and useful to users.

3.2 A number of issues can potentially act as practical barriers preventing potential users from accessing tribunals. These include costs, ignorance of rights and procedures, complexity of the appeal process and absence of appropriate help, and physical barriers, including geography and difficulties for people with disabilities in physically accessing tribunal premises.[210] In this chapter, we will primarily focus on the role of costs, physical barriers and users' knowledge of their rights and the process of applying to a tribunal. We consider methods of making tribunals as accessible as possible, given the potential barriers to access, and the extent to which barriers to access now exist.

COSTS

3.3 For many people, taking a case to a tribunal is their only option for redress, given the prohibitive costs often associated with other avenues such as the courts. It is vital, then, that costs do not prevent people who wish to do so from accessing tribunals. In the context of court fees, the Regulations Review Committee has argued that if fees are set at a level that may discourage potential litigants and mechanisms such as legal aid, concession rates and fee waivers are not available to a large section of court users to ensure access to the courts, there will be undue trespass on personal rights and liberties.[211] We suggest that the same principle applies to tribunals.

209 Sir Andrew Leggatt *Tribunals for Users – One System, One Service* (Report of the Review of Tribunals, London, 2001) para 6.

210 Michael Adler and Jackie Gulland *Literature Review of Users' Experiences, Perceptions and Expectations of Tribunals* (Council on Tribunals, London, 2003) 3-15.

211 Regulations Review Committee "Investigation and Complaint about Civil Court Fees Regulations 2004" [2005] I AJHR I.16H, 35.

3.4 Several kinds of costs can affect accessibility. These include tribunal fees, the cost of advice and representation, the cost of obtaining independent assessments, the cost of attending a hearing, and the risk of having costs awarded if unsuccessful.[212]

Tribunal fees

3.5 We suggest that the key principle underlying tribunal fees ought to be that they should never create an undue barrier to citizens' access to tribunals.[213] The cost of taking a case to a tribunal generally ought to be much lower than taking a case to court. In some cases it may even be appropriate that there be no cost associated with using a tribunal. The subject matter of cases and the intended users of the Tribunal will be relevant to an assessment of the appropriate costs. Tribunals which cater mainly for commercial users may be justified in imposing higher costs, whereas tribunals whose main users will be social welfare beneficiaries, for example, should aim to keep costs as low as possible.

3.6 It is difficult to determine the extent to which fees affect potential users' decisions on whether to seek redress in a tribunal. Fees in New Zealand's tribunals vary. A few, such as the Human Rights Review Tribunal, do not charge filing or hearing fees.[214] Application fees in other tribunals vary from $20 in the Tenancy Tribunal, to between $30 and $100 in the Disputes Tribunal, to $400 in the Weathertight Homes Tribunal. There do not appear to be many tribunals which have fees of more than $400. Tribunal fees, then, are considerably less than court fees. We have not encountered significant concerns about the level at which tribunal fees are set in our research. However, in some cases fees may still create barriers to access. For example, in a survey conducted for the Ministry of Consumer Affairs about the Disputes Tribunal, 45 per cent of respondents believed that the direct or indirect costs which may be involved created some barriers to accessing the Tribunal.[215]

Associated costs

3.7 Of course, tribunal fees are not the only costs which can create barriers to access. Filing and hearing fees are only a small part of the total costs that an applicant may incur. Costs associated with taking a case to a tribunal can include the cost of legal advice and/or representation, other advice, the cost of obtaining independent assessments and evidence, the costs of attending the hearing (for example travel costs or taking time off work) and the risk of having costs awarded if unsuccessful (where the tribunal in question has the power to award

212 Michael Adler and Jackie Gulland *Literature Review of Users' Experiences, Perceptions and Expectations of Tribunals* (Council on Tribunals, London, 2003) 4.

213 See, eg, Administrative Review Council *Better Decisions: Review of Commonwealth Merits Tribunals* (Report No 39, Australian Government Publishing Service, Canberra, 1995) 98 para 5.34.

214 Human Rights Review Tribunal Information Pamphlet www.justice.govt.nz/human-rights-review-tribunal (accessed 21 August 2007). Note, however, that the Human Rights Review Tribunal can award costs.

215 National Research Bureau Ltd *National Consumer Survey on Awareness and Experience of Consumer Legislation prepared for the Ministry of Consumer Affairs* (September 2005) 10.

costs). Costs associated with taking a case to a tribunal, and in particular the cost of obtaining legal advice and representation, do seem to act as a barrier to accessing legal services. In a recent survey of unmet legal needs, the perceived cost of lawyers' fees prevented a significant number of people from seeking legal help to resolve a legal problem they experienced.[216]

3.8 The extent to which these types of costs prevent potential users from accessing tribunals may be able to be reduced. Mechanisms such as legal aid, which is discussed separately below, and providing for tribunals to waive fees or set concession rates for those with financial difficulties can mitigate the financial burden imposed on potential users. We suggest that all these mechanisms should be available in appropriate cases to assist users. Community services will also have a vital role to play here. Citizens Advice Bureaux and especially Community Law Centres are among the only sources of free advice for those who cannot afford to pay for advice. However, awareness of Community Law Centres appears limited. Over half of respondents in a survey were not aware of the existence of Community Law Centres and of those who were aware, many did not know how to access their services.[217]

Availability of legal aid

3.9 At present, legal aid is available for disputes dealt with by some tribunals and specialist courts. These include the Employment Relations Authority, Human Rights Review Tribunal, Legal Aid Review Panel, Motor Vehicle Disputes Tribunal, Refugee Status Appeal Authority, Social Security Appeal Authority, Taxation Review Tribunal and Tenancy Tribunal. Legal aid is not available for cases before the Disputes Tribunal or tribunals which deal with immigration matters (other than the Refugee Status Appeals Authority).[218] Consideration ought to be given to whether legal aid should be available for all tribunals where legal representation might be desirable. We recognise that, for some tribunals, it may be inappropriate to the nature of the tribunal to provide for applicants to be legally aided. This is the case for the Disputes Tribunal, as legal representation is not permitted. Other tribunals may also be sufficiently informal and accessible for applicants not to require legal assistance. There may also be other policy reasons to exclude legal aid. At the very least, there needs to be a consistent and principled approach to the availability of legal aid for tribunal users.

The power to award costs

3.10 Not all tribunals have the power to award costs, and we discuss whether they should have the power to do so in Chapter 7.[219] Costs also have implications for accessibility, however, and the power to award costs potentially affects users' ability to access tribunals in a number of different ways. On the one hand, if people are aware that they may be able to recover money spent if they succeed, this may mitigate concerns about the expense of a tribunal case. Allowing tribunals to award costs could therefore encourage access. However, a power

216 Legal Services Agency *Report on the 2006 National Survey of Unmet Legal Needs and Access to Services* (Wellington, 2006) 5.

217 Legal Services Agency *Report on the 2006 National Survey of Unmet Legal Needs and Access to Services* (Wellington, 2006) 81.

218 Legal Services Agency *Legal Aid Guide* www.lsa.govt.nz/legalaid.php (accessed 11 September 2007).

219 See para 7.37.

to award costs may justify imposing higher costs on users at the outset, as there is the possibility to recover money spent at the end of the process. On the other hand, the power to award costs can also act as a disincentive as users may fear having costs awarded against them. We suggest that in some tribunals, such as occupational disciplinary tribunals and tribunals which deal with large commercial users, a power to award costs may not be a significant barrier to access. Where a tribunal deals with users with limited financial resources, however, care must be taken in granting the tribunal the power to award costs. This matter is further explored in Chapter 7.

EASE OF INITIATING CASES

Information about tribunals

3.11 Before they can initiate a case, users must first be aware that a tribunal exists to deal with their dispute, and that they have the right to apply. Research conducted in the United Kingdom suggests that taking the first step towards making a complaint or lodging an appeal is the most difficult for users. Especially difficult is finding out where to go to complain.[220] New Zealand research also suggests that not knowing where to go for help or being unaware of their rights can prevent people with legal problems from seeking help.[221] This highlights the importance of providing information and assistance to potential users of tribunals. The nature of the information, and the way in which it is provided, will vary for different types of tribunals. Where a tribunal deals with disputes between people, it draws its users from the public at large. Information about these tribunals and their processes should be available to the general public, so that if a dispute arises that would be within a particular tribunal's jurisdiction, the disputing parties may be aware that they can take their dispute to that tribunal.

3.12 Administrative review tribunals are in a different position because it is possible to identify their potential users. Everyone who receives a government decision where there is a tribunal which reviews those decisions is a potential user of that tribunal. Therefore potential users can be more specifically targeted. Recipients of a decision from which there is a right of appeal or review to a tribunal ought to be informed that they have the right to appeal the decision and given information on how to do this. Notification of the right should be clear and comprehensive, providing sufficient information on which to base a decision whether to proceed. Notification should include information such as explanation of what the tribunal is and what it does, how to contact the tribunal (location, opening hours, phone etc), whether there is a time limit for appealing to the tribunal and the effect of not meeting it, costs, whether there is any provision to refund fees if the case is successful, the availability of financial assistance and options for representation.[222] A related point is that recipients of administrative decisions also ought to be informed that they are entitled to request reasons for the decision from the original decision-maker.[223] This is important in order to facilitate an appeal to a tribunal.

220 Hazel Genn and others *Tribunals for Diverse Users* (Department for Constitutional Affairs Research Series 1/06, January 2006) 47.

221 Legal Services Agency *Report on the 2006 National Survey of Unmet Legal Needs and Access to Services* (Wellington, 2006) para 9.2.

222 Administrative Review Council *Better Decisions: Review of Commonwealth Merits Tribunals* (Report No 39, Australian Government Publishing Service, Canberra, 1995) 94 para 5.2.

223 Official Information Act 1982 s 23.

3.13 Our research shows that there is good information available about many tribunals in New Zealand. This is the case especially for administrative review tribunals. Most departments which make decisions now seem to inform recipients of any rights of appeal or review that they may have. In some cases there is a statutory requirement to do so.[224] However there are some exceptions. In one case, a department did not inform any recipients of decisions that they had a right to appeal the decision to a tribunal. Unsurprisingly, the tribunal in question receives very few appeals. Furthermore, where information about avenues of appeal is provided, its quality and depth is variable. Information ranges from a standard paragraph added to decisions informing recipients that they may appeal to a tribunal, to comprehensive systems including information packs, websites providing information on the tribunal process, application forms and so on. Again, there is a case for a standard approach to this issue, or at least setting minimum standards.

3.14 Ensuring access to information about tribunals which decide disputes between people seems to be more problematic, because they have a wider pool of potential users. For large tribunals in this category such as the Disputes and Tenancy Tribunals, public awareness is fairly high due to the volume of cases, so information may not pose such a problem here. Departments with responsibility for the overall policy area often provide information about a tribunal via their websites. Some of these websites are very useful. For example the Department of Building and Housing provides excellent information on tenancy disputes and the Tenancy Tribunal.[225] Other websites are more rudimentary. Some tribunals have developed innovative practices to ensure that they are accessible to members of the public who might wish to use them. For example, the Broadcasting Standards Authority advertises its existence through the media.

3.15 However, comments we have received suggest that potential users may not always be aware even of the existence of some tribunals in this category, particularly the smaller ones. Legal representatives are sometimes the source of information about such tribunals. Free services such as Community Law Centres and Citizens Advice Bureaux also have a vital role in informing those who use them of options available to resolve disputes. Internet-based advice services are also developing, and many of these point users to relevant tribunals. Some statutory schemes involve a first point of contact for complaints, who can direct people to the relevant tribunal if necessary. For example, the Privacy Commissioner and Health and Disability Commissioner handle complaints in these areas and direct people to the Human Rights Review Tribunal. However thought needs to be given to how information about tribunals in general can be most effectively promulgated.

Simple entry

3.16 Providing information about rights of appeal and review, and how to access them, should assist tribunal users to initiate cases. However, the process of starting a case (or the "entry point" into a particular tribunal's systems) is also important in helping people to access tribunals. This process should be as simple and understandable as possible. To do this, first, information about how

224 See, eg, Immigration Act 1987 s 129I(2) (Refugee Status Appeals Authority).

225 Department of Building and Housing www.dbh.govt.nz/tenancy-index (accessed 18 October 2007).

to initiate cases ought to be readily available through various media, for example websites and written publications such as information packs. Secondly, the application process needs to be readily understandable. Application forms should be simple, easily understandable and easy to fill in.[226] Forms should be readily available, including on the internet if possible. Electronic filing may also help accessibility.

3.17 In our view, entry into tribunals in some cases could be simplified and streamlined. Some tribunals or departments have excellent websites where potential users can download application forms and guides. Some examples include the Weathertight Homes Tribunal,[227] the Motor Vehicle Disputes Tribunal,[228] and the Student Allowance Appeal Authority (available through Studylink).[229] In other cases, however, there is little material available about how to initiate cases, and it would not necessarily be easy for users to understand how to do so. A further issue that arises here is that of 'multiple entry points,' in that some disputes can be handled by more than one tribunal. For example, cases in the Motor Vehicle Disputes Tribunal could equally be heard in the Disputes Tribunal and cases involving maritime safety can be decided in the Employment Relations Authority or Maritime Appeal Authority. Although some tribunal users do profit from this duplication, these multiple pathways can be confusing, and can lead to users "taking two bites of the cherry." We suggest that more could be done to provide easy access to application forms and the like, and that needless duplication of entry points should be reduced.

INFORMATION AND ASSISTANCE FOR USERS

Assisting applicants to understand the tribunal's process

3.18 We have already discussed information and assistance for users about the existence of particular tribunals and how to initiate cases. However, users are likely to need ongoing information throughout the process. Once they have begun their case, claimants should understand how it will progress through the tribunal and what steps they need to take. In the United Kingdom, the Council on Tribunals has recommended the following standards:[230]

- Users should be clearly informed about what is expected of them, what they have to provide, what will happen at a hearing, the circumstances in which travelling expenses are payable and how to make a claim.
- Users should be provided with clear and timely information about the date and venue of any hearing.
- Users should be clearly informed where a tribunal has the power to order one party to pay the costs or expenses of another. Wherever practical that information should include an indication of the scope and extent of a likely award.
- Users should be able to find out about the progress of their case and how long they are likely to have to wait for a hearing or decision.

226 Administrative Review Council *Better Decisions: Review of Commonwealth Merits Tribunals* (Report No 39, Australian Government Publishing Service, Canberra, 1995) 96, para 5.26.

227 Weathertight Homes Tribunal www.justice.govt.nz/wht/home.asp (accessed 18 October 2007).

228 Ministry of Consumer Affairs www.consumeraffairs.govt.nz/consumerinfo/motorvehicles/mv-problems/resolvingdisputes.html (accessed 18 October 2007).

229 Studylink www.studylink.govt.nz (accessed 18 October 2007).

230 Council on Tribunals *Framework of Standards for Tribunals* (November 2002) 6.

- Where it is possible to do so, users should be given a specific time for their hearing.
- Users should be informed whether they have to attend or not, and advised whether it will usually be in their interest to do so.
- The tribunal's decision should be accompanied by information about appeal rights and where independent advice may be obtained.

3.19 We were not able to obtain a clear picture of how far tribunal users' needs for information and assistance throughout the process are being met. Again, the information and assistance available seems to vary between different departments and other bodies which service tribunals. In some cases, users are provided with excellent information. Some tribunals have developed innovative ways of doing this. For example, the Disputes Tribunal sends out DVDs to users explaining what to expect at the hearing, along with written information packs, and also has videos available for viewing at District Court registries. Some departments responsible for tribunals, such as the Department of Labour for the Employment Relations Authority and the Department of Building and Housing for the Tenancy Tribunal, operate contact centres where users can seek advice on the law and procedure governing the tribunal. In other cases, however, there is no ongoing support or assistance for users. In these cases, users would probably need to rely on outside sources of information such as lawyers, other advisers such as beneficiary advocates, Community Law Centres and Citizens Advice Bureaux if they wished to understand the process. Often users seek advice from the department responsible for the relevant tribunal or policy area. We note that there are dangers where a department whose decision is under appeal gives advice to those appealing its decisions. It is not problematic for departments to give advice of a general nature, for example providing information about a tribunal and its processes, but they should not advise individuals on their particular cases. The problem of "shop-front," and how advice is to be supplied to persons filing claims, is one to which careful consideration needs to be given. Ultimately a pan-tribunal approach may be best.

Access to advice

3.20 While it is important to provide information to assist users to understand the process themselves, in many cases they will also need appropriate advice in order to fully put their case to the tribunal. Cases in tribunals such as the Taxation Review Authority, Customs Appeal Authority, Social Security and Human Rights Review Tribunal involve complex law and procedure. Given this complexity, users may not be able to entirely understand the proceedings without assistance. Therefore access to appropriate legal or other advice can be an important way to ensure that users understand the process and do what is required of them. We have already discussed the importance of legal aid, Community Law Centres and other sources of advice. If legal aid is available, people should be aware that they are eligible and assisted to access it.

3.21 We also note that tribunals and administering departments can take a role in assisting users to understand the process. The Ministry of Social Development has made funding available for beneficiary advocates. This operates outside the system of legal aid, but enables experienced assistance to be given to people who otherwise could not afford it. One innovative practice is that the Weathertight Homes

Tribunal has developed a series of seminars designed to assist self-represented claimants. One seminar gives a general introduction to the Tribunal, covering matters such as what happens at preliminary conferences, how to join or remove parties, what happens at the hearing, how the adjudicator reaches their decision, and the Tribunal's mediation service. Another seminar specifically covers remedies that claimants may seek. We suggest that more tribunals could develop practices such as this, although it will generally only be viable for larger tribunals.

EASE OF UNDERSTANDING

Helping users to understand tribunal proceedings

3.22 In addition to providing information and advice before the hearing, the tribunal has a role to play in ensuring that users understand the proceedings as they occur. The Chair should take an active role in explaining matters and ensuring the parties understand what happens during hearings. At the outset, they should explain the format of the hearing, the tribunal's procedures, and what will happen after the hearing. They should explain relevant legal and procedural issues that arise to the parties in language they can understand and give decisions in clear language so that the parties understand the result.[231] This has an obvious connection with the skills members and Chairs require, which is discussed further in the chapter on Membership and Expertise. For present purposes, we emphasise the importance of helping users to feel comfortable using tribunals, and to understand the process. In Chapter 6 we explore how the legislation constituting tribunals can facilitate this process.

Reasons for decisions

3.23 Giving reasoned decisions is important in order that claimants understand the outcome of their case and the reasoning upon which the decision was based. Reasons are also important in making rights of appeal effective, as they provide a basis upon which to appeal. Most tribunals do in fact give reasons, whether statutorily obliged to or not. We discuss this topic more fully in Chapter 6.

Publication of decisions

3.24 Making tribunal decisions publicly available has a number of advantages. The tribunal and its decision-making are made more visible and understandable to the public. Making decisions available also enables scrutiny of the Tribunal's decisions, which ought to promote better decision-making. Access to previous decisions of a tribunal will also assist potential applicants and their advisers in preparing cases.[232] However, these advantages must be balanced against competing interests such as privacy. Some tribunals, such as those dealing with professional disciplinary matters, may deal with cases which are sensitive and thus not appropriate to be publicised. However, many of these difficulties could be resolved by making decisions available without the names of the parties.

231 Judicial Studies Board *Competence Framework for Chairmen and Members of Tribunals* (2002). Available at www.jsboard.co.uk/publications.htm (accessed 24 July 2007) 5.

232 Administrative Review Council *Better Decisions: Review of Commonwealth Merits Tribunals* (Report No 39, Australian Government Publishing Service, Canberra, 1995) 106.

3.25 We have found that the extent to which tribunal decisions are publicized varies widely across tribunals. Some tribunals have excellent systems for publicizing their decisions. For example, some tribunals publish all decisions on their websites (frequently with names of parties removed). Others publish summaries. Others send their decisions for publication in law reports, where they are accessible to legal professionals, although such decisions may be published through other channels as well. Other tribunals publish their decisions, but they are difficult to find. Others do not publish their decisions at all. People we have spoken to commented that when tribunal decisions are not available, this creates difficulties for applicants and their lawyers. It can also create difficulties for tribunal members themselves: it makes it more difficult for the tribunal to establish a consistent body of jurisprudence. Several tribunal members commented that they would like to have a website where the public could access previous decisions. In one case, the tribunal in question could not obtain funds to do this. We suggest that tribunals should publish their decisions through widely accessible methods such as the internet. Privacy concerns should generally be dealt with by publishing decisions without identifying parties, rather than not publishing decisions at all.

GEOGRAPHIC BARRIERS TO ACCESS

3.26 It is important that distance does not create barriers to accessing tribunals. Distance poses a particular problem in New Zealand, given the small population that is widely dispersed over a large land area. Consequently, in some rural areas it may be difficult for people to access a tribunal when they need to. If users are required to spend their own money and time travelling to a tribunal hearing some distance from their home, this is likely to have a negative impact on accessibility, because users may decide not to pursue a legitimate case due to the cost and inconvenience of travelling. However, a number of steps can be taken to reduce the potential problems of access created by distance. An important one is for the tribunal in question to travel to hold hearings in a location convenient for the user, although this is currently usually not feasible in the case of smaller tribunals. Making good use of technology can also overcome geographic barriers. Hearings could be held via telephone conference or video link. Use of the internet also provides greater access at early stages. For example, making information packs and application forms available, and allowing the use of electronic filing would be of considerable assistance for users in remote locations. The form of the hearing can also have an impact. Provision to allow the Tribunal to hear cases on the papers could mitigate difficulties where claimants are unable to travel to attend an oral hearing.

3.27 We have found that currently many tribunals and departments are taking some steps to mitigate difficulties of access related to distance. Most tribunals can travel to locations close to users. Often they use local District Court registries, but many are also very flexible and can arrange hearings in venues such as community halls and motel conference facilities. However, in several cases there is room for improvement here. In one case, users are required to travel to attend hearings. The cost of travel for the user is paid for, but no funding is available to assist advocates or witnesses to attend. This is unsatisfactory, given that the tribunal in question deals with users with few financial resources. The extent to which tribunals use technology is variable. Many tribunals now use telephone conferencing, especially for preliminary matters. For example, the Disputes Tribunal allows users to apply to have their case heard by telephone

conference where they are located more than 100 km from the nearest registry. In contrast, there does not yet appear to be much use of video conferencing technology. We suggest that there could be more use of technology, and especially video conferencing. Furthermore, where face-to-face hearings are necessary tribunals should if possible travel to locations close to users rather than requiring users to travel. This is currently sometimes easier said than done. We suggest that any reform should take into account the desirability of having full-time tribunal members warranted to sit in a number of tribunals, so that visits to outlying centres to hear a variety of cases becomes more feasible.

CONCLUSION

3.28 The current situation regarding accessibility of tribunals is patchy and in some cases more could be done to ensure that tribunals are accessible to those who wish to use them. In this chapter, we have noted the following difficulties:

- There is inconsistency in availability of legal aid across tribunals.
- There are problems of awareness of and information about tribunals.
- Small tribunals often have little visibility due to their size. Potential users of these tribunals may not even be aware of their existence.
- In some cases, recipients of administrative decisions are not advised of their right to appeal to a tribunal.
- Entry points into tribunals could in some cases be simplified and streamlined.
- Assistance and advice provided to users about the progress of cases through tribunals is variable and in some cases inadequate.
- In some cases, tribunal decisions are not published and/or not widely available.
- More could be done in some areas to reduce geographic barriers to tribunals, particularly in the area of technology.

Chapter 4

Membership and expertise

INTRODUCTION

4.1 The quality of a tribunal's members is perhaps the most important factor in ensuring good decision-making. High-quality decisions will flow from skilled and talented tribunal members. Membership needs are also influenced by the purposes of tribunals such as specialisation within a narrow field of jurisdiction. In this chapter, we first discuss the skills and expertise requisite for tribunal members. This encompasses ensuring that appropriately skilled members are appointed, as well as ensuring that members have access to high-quality training and development. We then turn to consider the composition of tribunal panels, including issues such as the appropriate panel size and the desirable balance between different areas of specialisation.

EXPERTISE OF MEMBERS

Core skills of members

4.2 Regardless of their field of specialisation, certain key skills related to tribunal decision-making are essential for all tribunal members. Members may have these skills on appointment, or may develop them through appropriate training, or a combination of the two. We consider both in this chapter. In Australia, the Administrative Review Council has identified the following generic skills as being necessary or desirable for tribunal members:[233]

- understanding of merits review and its place in public administration;
- knowledge of administrative review principles, including understanding of administrative law, procedural fairness and the rules of evidence;
- analytical skills, including the ability to interpret legislation, apply relevant law and administrative law principles and evaluate evidence;
- personal skills and attributes such as empathy, sound judgement, gender and cultural awareness, interpersonal skills, ability to work as a member of a team and ability to be impartial; and
- communication skills, including listening skills, the ability to appropriately and effectively use interpreters, and the ability to write reasons clearly and concisely.

233 Administrative Review Council *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, Australian Government Publishing Service, Canberra, 1995) 71-73.

4.3 A similar approach has been taken in the United Kingdom, where the Judicial Studies Board has recently developed a framework of key competencies for tribunal members and chairs. Broadly speaking, the required competencies fall into the following categories:[234]

- law and procedure;
- equal treatment;
- communication;
- conduct of hearing;
- evidence; and
- decision-making.

4.4 While members should have basic competence in the above areas, they will develop many of the necessary skills through training and by gaining experience and confidence through practice.

What processes or standards are in place to ensure that suitable, well qualified and competent members are appointed?

4.5 The nature of the appointment process itself is critical in ensuring that the members appointed are of the highest quality. On appointment, members should be appropriately qualified and possess a threshold level of competence. Given that specialist knowledge is seen as a significant advantage of some tribunals, members will generally be expected to bring to those tribunals their pre-existing professional or technical skills. We shall discuss some aspects of the appointment process more fully in the chapter on independence. We simply emphasise here that the appointment process must be merit-based if members are to be of a high standard.

What ongoing professional development and training is provided?

4.6 As we have already noted, training, together with experience, is key to building up expertise. Members cannot always be expected to possess all the necessary skills on appointment, and should continue to develop their skills as they become more experienced. They must also be kept abreast of new developments in their field. The Australian Law Reform Commission has recommended that:[235]

> [e]very federal review tribunal should have an effective professional development program with stated goals and objectives. This should include access to induction and orientation programs, mentoring programs, and continuing education and training programs. In particular, training in administrative law principles relevant to decision making should be made available to members of tribunals who do not have legal qualifications.

234 Judicial Studies Board *Competence Framework for Chairmen and Members of Tribunals* (2002). Available at www.jsboard.co.uk/publications.htm (accessed 24 July 2007).

235 Australian Law Reform Commission *Managing Justice: A Review of the Federal Civil Justice System* (ALRC Report No 89, Canberra, 2000) R 9.

We would also support this recommendation. In our view, appropriate professional development and training must be provided for tribunal members in order to maintain and develop their expertise.

4.7 The Judicial Studies Board has identified the following as aspects of good training:[236]

- a clear training policy;
- an effective strategy for managing and monitoring training programmes;
- a systematic approach to training;
- providing an effective and well-targeted programme of induction for new chairmen and members; and
- providing an effective and well-targeted programme of continuing training and development opportunities for chairmen and members throughout their careers.

4.8 We suggest that training for tribunal members should include induction for new members, development of skills such as decision writing and conducting hearings and ensuring that members are kept informed of developments relevant to the tribunal, for example in case law and legislation. Tribunals should also be encouraged to co-operate and share information with other tribunals, and possibly with the judiciary, in order to learn from relevant experiences of others.[237] Chairs will require additional training involving detailed legal input, because they have responsibility for procedure and for guiding members.[238] We note that this may be problematic because in many tribunals in New Zealand the Chair organises and delivers training for members. In such cases there may be no one to provide training for the Chair. We discuss issues of this nature further in the section of this chapter entitled Leadership. The need for some overarching training programme is a key issue.

4.9 Our discussions with tribunal members and administering departments indicate that training for members of tribunals in New Zealand is haphazard. Some tribunals have excellent and comprehensive training. For example, some tribunals pair new members with existing members, who supervise and assist the new member, ensuring that the new member attains a required standard of competence. A number of larger tribunals conduct training sessions, sometimes over a day or a weekend, where members are given training by experts in the field and have the opportunity to meet fellow members and discuss issues. Some tribunals provide comprehensive induction courses, where members are trained in relevant legal principles and skills such as questioning and decision-writing. Despite these examples of good practice, however, some tribunals are not provided with any training whatsoever. In others, there is an initial induction but no ongoing professional development and training following this. Furthermore, the extent and quality of training seem to vary quite considerably. A recent report of the Council of Australasian

236 Judicial Studies Board *Framework of Standards for Training and Development in Tribunals* (2003). Available at www.jsboard.co.uk/publications.htm (accessed 24 July 2007).

237 Administrative Review Council *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, Australian Government Publishing Service, Canberra, 1995) 87-90.

238 Godfrey Cole "Creating and Maintaining an Effective Scheme of Training in the Independent Tribunal Service" (1996) 3 Jnl of Social Security Law 121, 127.

Tribunals found that tribunal members wanted professional development in skills such as questioning, writing, working with interpreters, giving reasons and delivery of oral reasons.[239] This seems to indicate a need for more professional development than members presently receive.

4.10 In some tribunals, members are appointed for their expertise, and are expected already to possess the necessary skills. Training is not provided for this reason. This is especially common where District Court judges or senior barristers are appointed. However, in other cases there is no discernible reason why training is not provided. Even where members already possess relevant skills and expertise, training and development is still valuable, especially ongoing professional development to build on their existing skills. We note that even the courts have extensive training provided by the Institute of Judicial Studies.

How many cases do members deal with?

4.11 The experience of handling cases is a significant way in which members develop expertise. Sitting more frequently increases members' confidence as well as their competence in handling cases.[240] Thus it is likely to be very difficult for members of tribunals which hear few or no cases to build up expertise. Similarly, part-time membership could pose a problem, because part-time members sometimes may not have the opportunity to handle a sufficient number of cases to develop and maintain their competence in decision-making. Part-time membership does have advantages in that it can enable a wider range of perspectives to influence a tribunal's decisions, provide flexibility to deal with fluctuations in workload and provide current experience in fields relevant to the tribunal's jurisdiction.[241] Furthermore, part-time members are often experienced barristers or similar, whose other work experience means that they are highly skilled and have much to contribute to tribunal decision-making. These advantages, then, need to be balanced against the potential disadvantages.

4.12 A number of tribunals in New Zealand sit infrequently, or have part-time members who do not sit on large numbers of cases. Some tribunals sit less often than once a year.[242] We discuss whether these tribunals are needed at all elsewhere in this paper. However, we suggest that it must be difficult for members of tribunals like this, who do not have other judicial experience, to develop and maintain an appropriate level of expertise when they have so little experience of sitting. For part-time members, too, it may be difficult to maintain expertise, given that these members may spend only a small amount of their time on tribunal work. However, feedback we have received suggests that this aspect of part-time membership is not seen as a significant problem in New Zealand. This is especially so where part-time members are highly skilled and expert in the tribunal's area of specialisation or where they have extensive legal or judicial expertise. Nevertheless, we suggest that part-time members need to

239 Cited in Mary Anne Noone "Improving Access to Justice: Communication Skills in the Tribunal Setting" (2006) 16 JJA 18, 22.

240 Godfrey Cole "Creating and Maintaining an Effective Scheme of Training in the Independent Tribunal Service" (1996) 3 Jnl of Social Security Law 121, 124.

241 Administrative Review Council *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, Australian Government Publishing Service, Canberra, 1995) 84.

242 See Table 5 in chapter 9: Speed and efficiency for information on tribunal caseloads.

be balanced with full-time members to counteract the potential difficulties of part-time membership.

COMPOSITION OF THE TRIBUNAL

Number of members

4.13 In this section, we are concerned with the appropriate size of panels, that is, the number of members that sit in a particular case, rather than the number of members the tribunal has in total. It is difficult to prescribe the optimal size of panels. Having multiple members on a panel has advantages in that it enables a range of perspectives and experiences to be brought to bear on decisions and increases the prospects of balanced and consistent decision-making.[243] Opportunities for dialogue between several members should improve the quality of deliberation.[244] Other practical advantages of multi-member panels are that they allow members to share responsibility for preparing written reasons and other work, provide an avenue for peer monitoring and supervision, and expose members to alternative approaches. More members provide greater safeguards against arbitrary or incompetent decision-making. However, multi-member panels are more expensive and can be slower due to the desirability of reaching an agreed position.[245] Finally, panels should not be too large, as this increases the cost, may be disproportionate to the matters being dealt with, and can be intimidating for people appearing.[246]

4.14 We suggest the following framework for determining the size of tribunal panels. Where significant rights and interests are involved, where a combination of different kinds of specialist expertise is required, or where the matters to be determined are complex, panels should generally have more than one member.[247] The optimal panel size is probably around three, allowing a mixture of expertise without being too large. A larger panel may also be justified where there is a need to include members representing the perspectives of different groups within society. Conversely, matters involving small amounts of money, or relatively uncomplicated matters of law or fact, or which involve only one specialisation, may be determined by a single member. Single-member panels may also be appropriate where the member in question is a judge, given that judges are skilled in making decisions across a wide range of fields.

4.15 Our analysis of the size of the panels in New Zealand tribunals, which is included at the end of this chapter, shows considerable variations. Administrative review tribunals tend to have either one or three members sitting in any particular case. Tribunals sitting in one-member panels include the Student Allowance Appeal Authority, Customs Appeal Authority, Taxation Review Authority, Removal Review Authority, Residence Review Board and Refugee Status Appeals Authority. Those with three-member panels include the Deportation Review

243 Nick Wikeley "Expertise and the Role of Members" in *The Leggatt Review of Tribunals: Academic Seminar Papers* (Bristol Centre for the Study of Administrative Justice, Bristol, 2001) 74, 78.

244 Michael Adler "Lay Tribunal Members and Administrative Justice" [1999] PL 616, 623.

245 Administrative Review Council *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, Australian Government Publishing Service, Canberra, 1995) 32.

246 Nick Wikeley "Expertise and the Role of Members" in *The Leggatt Review of Tribunals: Academic Seminar Papers* (Bristol Centre for the Study of Administrative Justice, Bristol, 2001) 74.

247 See, eg, Australian Capital Territory Department of Justice and Community Safety *Options for Reform of the Structure of ACT Tribunals: Discussion Paper* (Canberra, 2007) para 113.

Tribunal, Land Valuation Tribunals, State Housing Appeals Authority and Social Security Appeal Authority. Finally, the Medicines Review Committee has six members and the Film and Literature Board of Review has nine. In many of these cases, the size of panels appears appropriate. For example, determining eligibility for student allowances may not be seen as sufficiently complex to justify a panel of more than one. In the case of the Customs Appeal and Taxation Review Authorities, the Authority is a judge and the work of these tribunals is heavily legally-oriented, involving interpretation of complex statutes. However, the choice of panel size appears somewhat random and there are anomalies, particularly in the area of immigration. Although all three members of the Deportation Review Tribunal sit in any particular case, the Removal Review Authority, Residence Review Board and Refugee Status Appeals Authority all generally sit in panels of one. The Immigration Bill continues the preference for single-member panels.[248] The position may be contrasted with the situation in other administrative review tribunals, such as the State Housing Appeals Authority, which sit in panels of three.

4.16 The situation in tribunals which decide disputes between individuals is similarly variable. The Disputes Tribunal, Tenancy Tribunal, Employment Relations Authority and Weathertight Homes Tribunals all sit in panels of one, while the Motor Vehicle Disputes Tribunals have two members and the Human Rights Review and Copyright Tribunals sit in panels of three. There may be good reasons for such variation, but there needs to be serious consideration of whether that is so.

4.17 For tribunals that regulate and discipline occupational groups, somewhat different principles apply. It is important to draw a distinction here between different types of occupational bodies. Where professions have split disciplinary functions from functions such as registration, they will have a dedicated disciplinary tribunal, such as the Health Practitioners Disciplinary Tribunal, which can be seen as a 'pure' tribunal. Other bodies combine regulatory and disciplinary functions in one, and so often the 'tribunal' aspect of the body's function is only one part of its work. These bodies tend to be quite large. In such cases, we suggest that it will be appropriate to have quite a large panel. Conversely, bodies which conduct preliminary assessment of complaints, such as complaints assessment committees, tend to be fairly small. Where a profession has a disciplinary tribunal or body separate from the registration body, this should be smaller than the registration body as it only has the tribunal function. We suggest a maximum of five members for disciplinary tribunals.

4.18 The size of registration bodies, and those with mixed functions, varies from one, in the case of the Registrar of Private Investigators and Security Guards, to a maximum size of 14 for Registration Authorities under the Health Practitioners Competence Assurance Act 2003. The average size appears to be around seven. The variation in size here may not pose a problem, as different professions may have different needs, and allocate different roles and responsibilities to their registration bodies. Where professions have a dedicated disciplinary tribunal, again the size of panels varies. For example, the Immigration

248 Clause 197 of the Immigration Bill 2007 provides that the amalgamated Immigration and Protection Tribunal will sit as one member, subject to the Chair's discretion to direct that, where there are exceptional circumstances, more than one member hear a particular case.

Advisers Complaints and Disciplinary Tribunal sits in panels of one,[249] while most others, including the Health Practitioners Disciplinary Tribunal and the Disciplinary Tribunal for teachers, sit in panels of five.[250] In several cases, the legislation is unclear. For example, the minimum panel size for the New Zealand Lawyers and Conveyancers Disciplinary Tribunal is five, but the legislation does not appear to prescribe a maximum size.[251] In the case of the Licensing Authority of Secondhand Dealers and Pawnbrokers, the legislation does not prescribe any size whatsoever.[252]

4.19 Overall, then, there does not appear to be any consistent approach to the size of panels in New Zealand's tribunals, nor any attempt to articulate the circumstances in which a single- or multi-member panel will be appropriate. Several tribunals which make important decisions affecting individual rights and interests sit in panels of only one, where arguably more members would be appropriate. Conversely, a few tribunals are simply too large. This is an area which could benefit from rational criteria.

Should the tribunal be multi-disciplinary or should members all be drawn from the same field of expertise?

4.20 As we have noted in earlier parts of this paper, specialisation has been a key driver for the establishment of tribunals. Given this purpose, tribunal members are generally either appointed because they have particular specialist skills, or are expected to develop specialist expertise through deciding cases in a particular field. Tribunal decision-making will often require a range of different skills within one case. For example, many tribunals require legal skills, to interpret and apply the relevant law, together with technical skills in the tribunal's particular area of specialisation. In other cases, a tribunal will require concentrated expertise in a single specialist field.

4.21 Drawing members from across a range of disciplines is thought to have a number of benefits, promoting balanced decision-making, thoroughness and fairness, and enabling a broader range of skills and perspectives to influence the tribunal's decisions.[253] We suggest that there are several situations where it will generally be appropriate that a tribunal be multi-disciplinary. These are, first, where the nature of cases it deals with requires experience and knowledge across several fields.[254] Secondly, there may be a need to incorporate lay observers in the occupational context. Thirdly, it may be desirable to have members representing a variety of perspectives. For example, the Broadcasting Standards Authority must include members representing the broadcasting industry and the public interest.[255] Finally, where a tribunal makes decisions which are highly discretionary, rather than law-based, a range of perspectives may be helpful.

249 Immigration Advisers Licensing Act 2007 s 40(3).

250 Health Practitioners Competence Assurance Act 2003 s 88; New Zealand Teachers Council (Conduct) Rules 2004 r 24(1).

251 Lawyers and Conveyancers Act 2006 s 234.

252 Secondhand Dealers and Pawnbrokers Act 2004 s 70.

253 Jill Huck "Perceptions of Member Roles on an Inter-Disciplinary Tribunal: A Research Report" in Australian Institute of Administrative Law *'Non-Legal' Members on Review Bodies – Social Welfare Jurisdictions* (Victoria, 1992) 19, 26.

254 Legislation Advisory Committee *Administrative Tribunals* (Report No 3, February 1989).

255 Broadcasting Act 1989 s 26.

Conversely, some tribunals deal with matters which only involve one field of expertise. In such cases, there is no need for a multi-disciplinary panel.

4.22 The composition of panels in New Zealand tribunals can generally be grouped into three types. First, in some cases a tribunal's constituting legislation prescribes a multi-disciplinary panel and the types of expertise which the panel must include. For example, War Pensions Appeal Boards must consist of two doctors and one member nominated by the Returned Services' Association to represent the armed forces.[256] This type of tribunal is frequently chaired by a judge or lawyer. For example, the Human Rights Review Tribunal is chaired by a barrister and solicitor, who sits with two other members with expertise in human rights law, public administration, economics, social issues, employment, cultural issues or the needs of different population groups.[257] A second class of tribunal draws all its members from one field of expertise. These tribunals tend to be single-member tribunals. For example, the Taxation Review Authority, Customs Appeal Authority and Student Allowance Appeal Authority all consist of one member, who is a District Court judge or barrister and solicitor and is expected to have sufficient legal expertise to deal with the issues. Similarly, members of the Refugee Status Appeals Authority are all experienced lawyers or the equivalent, and generally sit in single-member panels, although in some cases two or three members sit.[258] This does not appear problematic given that the tribunal's work consists almost entirely of applying refugee law, so there is no real need for other expertise. Finally, in many cases, legislation does not prescribe any particular expertise that members must possess, but leaves it to Ministers to strike the appropriate balance when appointing members. For example, the State Housing Appeals Authority must have an experienced lawyer as its principal member. Other members must, in the opinion of the Minister, be capable by reason of knowledge, experience or training of performing the functions of a member, or must be tenancy mediators.[259] In such cases, we have found that the members selected generally have appropriate skills and experience. Ministers will generally look for relevant experience in appointing members. For example, in the Social Security Appeal Authority, Ministers seek members with an understanding of the relevant legislation and procedures, sound decision-making skills and some "community awareness." It is often also desirable to have a range of different ethnic groups represented.

Is there a need for legal expertise?

4.23 We suggest that many tribunals will require at least one member who has legal expertise. Tribunals need this expertise in two situations in particular. First, many tribunals must interpret and apply highly complex laws and thus require expert legal knowledge.[260] For example, the Taxation Review Authority

256 War Pensions Act 1954 s 8.

257 Human Rights Act 1993 ss 98, 99A and 101. Further examples of multi-disciplinary tribunals with legal chairs include Land Valuation Tribunals, which has a District Court judge as Chair and two members who are valuers, and the Mental Health Review Tribunal, which comprises one lawyer, a psychiatrist and one other member, usually a community representative. Land Valuation Proceedings Act 1948 s 19; Mental Health (Compulsory Assessment and Treatment) Act 1992 s 101.

258 The Removal Review Authority is also composed of experienced lawyers who sit in panels of one: Immigration Act 1987 s 49.

259 Housing Restructuring (Appeals) Regulations 2000 regs 17 and 19.

260 William Wade and Christopher Forsyth *Administrative Law* (9th ed, Oxford University Press, Oxford, 2004) 913.

and Social Security Appeal Authority must construe very complex statutes: the Income Tax Act 2004 and Social Security Act 1964 respectively. It would be difficult, if not impossible, for the tribunal to do this effectively without legal skills. Secondly, administrative review tribunals will almost always require legal expertise because they review or decide appeals on the interpretation of a particular statute and its application to the facts of an individual case. A primary purpose in providing for appeal or review must be to correct legal and factual errors in the original decisions. It could be argued that most types of tribunals would probably benefit from legal expertise, as they are all involved to some extent in applying standards to facts and all need to apply the principles of natural justice.

4.24 There seemed to be a consensus among people we spoke to that tribunals should generally include some legal expertise, as tribunals decide questions affecting individual rights and interests. The majority of tribunals do. In many cases, a tribunal's constituting legislation requires that it be chaired by a lawyer, or at least that a legal member be included. Examples of this type include the Deportation Review Tribunal, Land Valuation Tribunals, Film and Literature Board of Review, Copyright Tribunal, Broadcasting Standards Authority and most of the occupational disciplinary tribunals. We have also found that, where there is no statutory requirement for legal expertise, the appointment process often takes into account the need for legal skills in any case. For example, members of the Weathertight Homes Tribunal are often legally-qualified, although the legislation does not require this.[261] In a number of cases legally-qualified Chairs are appointed by convention, as it is generally recognised that lawyers can make a valuable contribution as Chair, due to their knowledge of procedures and natural justice requirements.[262]

4.25 However, there are a few tribunals that do not include legal expertise, which arguably should do so. For example, War Pensions Appeal Boards comprise two doctors and one nominee of the Returned Services Association.[263] Given that the Boards hear appeals on the application of rules to particular cases, and those cases can involve questions of interpretation of complex legislation, we wonder whether it may be preferable to require a member with legal expertise. Similarly, the Medicines Review Committee determines appeals from decisions of licensing authorities and the Director-General of Health, involving making findings of fact after hearing evidence, and applying rules to those facts. However, there is no requirement of legal expertise.[264] The Employment Relations Authority is a special case. It performs a function similar to that of the courts. It has exclusive jurisdiction over matters such as interpretation and application of employment agreements, determining breach of an employment agreement and determining whether a person is an employee. It may also impose penalties and make a range of orders including orders that an employee be reinstated.[265] These questions involve important individual interests – their livelihood. The Authority's members do not

261 Weathertight Homes Resolution Services Act 2006 s 103.

262 However some of the overseas literature suggests that lawyer chairs can sometimes dominate tribunals in an undesirable way. See, eg, Nick Wikeley and Richard Young "The Marginalisation of Lay Members in Social Security Appeal Tribunals" (1992) 2 JSWFL 127. We do not suggest that a lawyer must always be the chair, rather that there should be some legal expertise on tribunal panels.

263 War Pensions Act 1954 s 8.

264 Medicines Act 1981 s 10.

265 Employment Relations Act 2001 s 161.

need to be legally qualified,[266] but the requisite expertise is ensured in another way: members must have significant knowledge of employment law and practice in New Zealand. In fact the non-lawyer members invariably have strong backgrounds as employment advocates.

4.26 There may be some tribunals where legal expertise is not required. These are tribunals which involve skills other than just applying law to the facts: when, in other words, an element of 'justice on the merits' is important. The Disputes Tribunal is in this category. Legal qualifications are not required, and some members do not possess them. However, such members are in fact given basic legal training on appointment.

Is there a need for representation of groups affected by the decision, or of particular interests?

4.27 In some cases it will be appropriate that a tribunal include representatives of particular interests or groups. This might be necessary or desirable in several types of situation. First, in some cases, a community representative may be included to reflect the community's views or add an element of public interest into the tribunal's decision-making. Second, there may be a need to reflect a range of different perspectives, requiring members from different backgrounds, industries or interest groups. Finally, for occupational bodies in particular it will generally be important to include members who represent the profession being regulated or disciplined. These members understand the context in which members of the profession operate and can better assess whether professional standards have been met. They also lend the body credibility with the profession. In these cases, though, it may be necessary to ensure that one group does not have too much influence over the outcome by incorporating lay members, for example.

4.28 Legislation constituting a particular tribunal often provides for the inclusion of lay members, or representatives of consumers, the community or the public interest. Similarly, the majority of the bodies which regulate and discipline occupational groups now include lay representatives alongside professional peers. For example, the Health Practitioners Disciplinary Tribunal must include one lay member along with three health practitioners and a Chair who is a barrister and solicitor.[267] This is a common model for occupational groups with dedicated disciplinary tribunals. However, the position is somewhat inconsistent. For example, the Valuers Registration Board consists only of valuers.[268] The Building Practitioners Board has a lawyer as Chair but does not include lay representatives.[269] We suggest that including a lay member on occupational bodies, and especially those which also have disciplinary functions, will enhance public confidence in these bodies. This is an area where perceptions are important.

THE ROLE OF THE CHAIR

4.29 The role of the Chair currently often has an important leadership aspect above what is required of members. Chairs require additional skills such as managing hearings, which includes ensuring that parties understand the tribunal's processes and procedures, ensuring that each party receives a full and fair

266 Employment Relations Act 2001 ss 166 and 167.

267 Health Practitioners Competence Assurance Act 2003 s 88.

268 Valuers Act 1948 s 3.

269 Building Act 2004 ss 344 and 345.

hearing, dealing with conflicts of interest, maintaining a proper balance between formality and informality, and ensuring that reasoned decisions are delivered in a timely manner. Chairs ought to be able to establish a structured decision-making process, ensuring that the tribunal identifies the issues, makes findings of fact and applies the law, with proper consideration being given to the views of all members.[270]

4.30 The Chair's role varies with the nature and size of the tribunal. In some large tribunals it is largely a management role, whereas in smaller tribunals it will mostly involve providing leadership during tribunal hearings. In some cases, the Chair's role is quite extensive and involves functions such as managing members, managing the operation of the tribunal, organising training and professional development for members and communications with the public. In other cases the Chair's role is limited to chairing actual hearings of the tribunal. We see key aspects of the Chair's role as being providing leadership for the tribunal, managing members and encouraging good performance, running hearings, ensuring procedures are fair and efficient, and overseeing the tribunal's jurisprudence for quality and consistency.

4.31 Feedback we have received shows that the Chair of a tribunal has an essential role. A good Chair can have an immense positive impact on a tribunal's work. A number of tribunals have very innovative Chairs who have developed new initiatives that have significantly improved performance. In the case of several tribunals that we are aware of, a good Chair was able to transform the tribunal through introducing initiatives such as case management systems, information systems and decision-writing structures. This has led to increases in efficiency and quality of decisions for the tribunals in question. Similarly, good management skills and an ability to guide members have played a key role in achieving high standards for these tribunals. The role of the Chair, then, has an important extra dimension in that the Chair provides leadership. The appointment process for Chairs must reflect this, ensuring that Chairs have the necessary management and leadership skills as well as the other skills necessary to deal with the cases before the tribunal. One of our concerns, though, is whether too much is expected of tribunal chairs, and whether some of their onerous responsibilities should be borne centrally. There is currently a good deal of duplication and "reinvention of the wheel" in matters such as training, as each Chair devises programmes for his or her own tribunal. A question for any reform initiative will be how far Chairs can be relieved of some of their administrative burdens.

LEADERSHIP AND COHESION

4.32 We have noted a number of issues involving tribunal membership which are systemic in nature. First, members of small tribunals often experience difficulties in that they have no effective support. This is particularly acute in the case of single-member tribunals. Members of these tribunals have commented that the lack of collegiality and support creates difficulties. Similarly, we have already noted the lack of training in many tribunals. This is partly due to issues such as the size, together with the lack of a cohesive tribunal system.

4.33 Feedback we have received suggests that many tribunal chairs and members perceive that the tribunal system as a whole lacks leadership, cohesion and an

270 Judicial Studies Board *Competence Framework for Chairmen and Members of Tribunals* (2002). Available at www.jsboard.co.uk/publications.htm (accessed 24 July 2007) 6-8.

effective 'voice.' For example, tribunals that are under-resourced sometimes find that they need to argue the case for more resources from the relevant administering department. However, an individual tribunal member or chair generally does not have sufficient influence to advocate effectively for the tribunal at the ministerial level. This applies to issues such as appointments as well as to funding. These are not only issues of leadership. There are a range of other issues related to this, such as the low profile of tribunals in the legal system and a lack of consultation with tribunal members on issues affecting tribunals. We return to this important issue in Chapter 10.

RECRUITMENT AND RETENTION OF MEMBERS

4.34 We have identified two particular issues in New Zealand. These are salary levels and career paths for tribunal work.

Salary

4.35 It is axiomatic that tribunal members ought to be paid a salary which reflects their skill and expertise. Furthermore, salaries ought to be set at a level that is sufficient to attract highly skilled people. In assessing the remuneration of tribunal members, two key issues arise. These are how much tribunal members should be paid, and who should set their remuneration.[271] Considering the question of how remuneration is to be set, in Australia the Administrative Review Council has recommended that the independent Remuneration Tribunal, similar to New Zealand's Remuneration Authority, should set members' salaries. The Council saw it as important that salaries be determined by an independent body.[272] This links to the importance of independence for tribunals. We also see it as preferable that an independent body determine salaries for tribunal members.

4.36 Salary levels can pose a problem in recruiting and retaining good members, although we were not able to obtain definitive information about the extent of the problem. At present, only a handful of tribunal members have their remuneration determined by the Remuneration Authority. These are the Principal Disputes Referee, the Chief and certain members of the Employment Relations Authority, the Principal and Deputy Principal Tenancy Adjudicators, the Chair of the Weathertight Homes Tribunal, and adjudicators of the Motor Vehicle Disputes Tribunal.[273] Remuneration for other tribunals is set under the Cabinet Fees Framework. It is important that remuneration be set at a level which does not act as a barrier to recruitment of high quality members.

Career path

4.37 A further issue affecting recruitment is the career opportunities which tribunal membership is perceived to offer. Some people we spoke to suggested that aspects of the job of a tribunal member create difficulties in recruiting the best people. One aspect of the job that was suggested as a disincentive is a lack of variety, in that most tribunals, by their very nature, deal with a narrowly defined specialist field. Another difficulty is that tribunals are sometimes perceived not

271 Administrative Review Council *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, Australian Government Publishing Service, Canberra, 1995) 85.

272 Administrative Review Council *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, Australian Government Publishing Service, Canberra, 1995) 85.

273 Remuneration Authority Act 1977 sch 4.

to offer a clearly defined career path, with opportunities for future advancement. Members are frequently experienced lawyers or similar, and for them taking a tribunal position can be a significant "opportunity cost" in terms of their career advancement. It is important, then, to guarantee future career opportunities. To this end, there should be a performance review by a neutral body, with the chance of renewal if the job is done well.[274]

4.38 Some ways in which tribunal careers could be made more attractive include greater opportunities for 'cross-membership,' which allows one person to sit on several tribunals at once, increasing the variety of work that the person will be exposed to. This happens a little at the moment, although members with multiple warrants can find themselves operating under different systems, due to the current fragmentation of tribunals. Developing tribunal leadership positions, as we have referred to above, would also create further opportunities for advancement within the tribunal system. This assumes that members will want to work full-time in tribunals. For some this may not be the case and members ought to be able to continue to balance part-time membership with other work. Furthermore, members who are generalists or are legally-qualified would be likely to benefit more from these opportunities than those who are skilled in particular specialist areas.

CONSISTENCY

4.39 As a general point, we note that there is no coherent, coordinated approach to tribunal membership. Provisions relating to the size and composition of tribunals, and the skills and expertise required of members, vary widely across tribunals, often with no discernible principled basis. For example, in the social welfare area there exist a number of tribunals which review first instance decisions on eligibility for various benefits. The State Housing Appeals Authority decides appeals on eligibility for state housing and the calculation of income-related rents. The Principal member of the Authority must be an experienced lawyer, and other members must, in the opinion of the Minister, be capable by reason of knowledge, experience or training of performing the functions of a member, or be tenancy mediators.[275] The Social Security Appeal Authority decides appeals on determinations of eligibility for welfare benefits and related matters. In contrast to the State Housing Appeals Authority, the legislation constituting the Social Security Appeal Authority does not state any requirements as to the required skills and expertise of members, although there is probably a need for at least a legally-qualified member, given the nature of the Authority's work.[276] Similarly, the Student Allowance Appeal Authority, which decides appeals on student allowance decisions, consists of a single member, and there are no stated requirements of knowledge or expertise.[277] These three tribunals perform very similar tasks, reviewing decisions on eligibility for social welfare benefits, yet are subject to widely varying requirements regarding both the number of members and the skills and experience required of members. The current situation of the various tribunals dealing with immigration matters is equally

274 We note that performance reviews need to be carefully managed to ensure that they do not impinge upon members' independence. For a discussion of these issues see Administrative Review Council *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, Australian Government Publishing Service, Canberra, 1995) 85-7.

275 Housing Restructuring (Appeals) Regulations 2000 regs 17-19.

276 Social Security Act 1964 s 12A.

277 Education Act 1989 s 304.

inconsistent, although the proposed consolidation of these tribunals into one Immigration Tribunal will resolve these difficulties.

CONCLUSION

4.40 In this chapter we have identified inconsistencies in the overall approach to tribunal membership and suggested areas which could be improved. Dealing first with issues relating to members' expertise, the key problems we see are insufficient training and development, recruitment and retention issues around salary and career paths, and, in the case of some tribunals which sit infrequently, insufficient opportunities to develop skills through hearing cases. In terms of the composition of tribunal panels, we have found inconsistencies in statutory provisions relating to the size of panels, the skills and experience required of members, and the balance between different skills on panels. In some cases, we have suggested that there is a need for legal expertise or for better lay or community representation. We note a lack of overall coordination and leadership.

TABLE 1: MEMBERSHIP

Tribunal	Size of panel
Administrative Review Tribunals	
Student Allowance Appeal Authority	1
Customs Appeal Authority	1
Taxation Review Authority	1
Maritime Appeal Authority	1
Catch History Review Committee	1
Removal Review Authority	1
Residence Review Board	1
Refugee Status Appeals Authority	Usually 1, sometimes 2 or 3
Legal Aid Review Panel	1 – 3
Deportation Review Tribunal	3
Land Valuation Tribunals	3
State Housing Appeals Authority	3
Social Security Appeal Authority	3
[Health Act] Boards of Appeal	3
War Pensions Appeal Boards	3 – 4
Medicines Review Committee	6
Film and Literature Board of Review	9
Tribunals that decide disputes between individuals	
Disputes Tribunal	1
Tenancy Tribunal	1
Employment Relations Authority	1
Weathertight Homes Tribunals	Usually 1 (statute does not specify panel size)
Retirement Villages Disputes Panels	1 or 3

TABLE 1: MEMBERSHIP continued...	
Tribunal	**Size of panel**
Tribunals that decide disputes between individuals continued...	
Motor Vehicle Disputes Tribunals	2
Human Rights Review Tribunal	3
Copyright Tribunal	3
Occupational licensing, registration and discipline	
Registrar of Private Investigators & Security Guards	1
Registrar of Motor Vehicle Traders	1
Legal Complaints Review Officer	1
Police Disciplinary Tribunal[278]	1
Immigration Advisers Complaints and Disciplinary Tribunal	1
Licensing Authority of Secondhand Dealers and Pawnbrokers	Legislation silent
Valuers Registration Board of Appeal	3
[Veterinarians] Complaints Assessment Committees	3
Trans-Tasman Occupations Tribunal	3
Engineering Associates Appeal Tribunal[279]	3
Lawyers & Conveyancing Practitioners Standards Committees	3 or more
[Teachers] Complaints Assessment Committees	Minimum of 3
[Veterinarians] Judicial Committees	3 – 5
Health Practitioners Disciplinary Tribunal	5
Real Estate Agents Licensing Board	5
[Real Estate Agents] Regional Disciplinary Committees	5
Social Workers Complaints and Disciplinary Tribunal	5
[Teachers] Complaints Disciplinary Tribunal	5
Valuers Registration Board	5
New Zealand Lawyers and Conveyancers Disciplinary Tribunal[280]	Not specified – no less than 5
Cadastral Surveyors Licensing Board	6
Music Teachers Registration Board	6
Building Practitioners Board	6 – 8
Registered Architects Board	6 – 8
Chartered Professional Engineers Council	6 – 9
Electrical Workers Registration Board	7
Veterinary Council of New Zealand	7
Plumbers, Gasfitters and Drainlayers Board	10
Social Workers Registration Board	10

TABLE 1: MEMBERSHIP continued...	
Tribunal	**Size of panel**
Occupational licensing, registration and discipline continued...	
Teachers Council	11
Engineering Associates Registration Board[281]	14
[Health Practitioner] Registration Authorities	Up to 14
Miscellaneous	
Mental Health Review Tribunal	3
Parole Board	3[282]
Judicial Conduct Panel	3
Liquor Licensing Authority	3 – 4

Note: The busier tribunals have many members appointed to sit on panels. For example the Disputes Tribunal has 60 members, the Legal Aid Review Panel 25, and the Human Rights Review Tribunal 15. But some tribunals have only one member, for example the Student Allowance Appeal Authority and the Maritime Appeal Authority.

278 Note that this tribunal is to be abolished following the recommendations of the Commission of Inquiry into Police Conduct.

279 Note that the Engineering Associates Act 1961 is currently under review.

280 Note that the Lawyers and Conveyancers Act 2006 is not yet in force.

281 Note that the Engineering Associates Act 1961 is currently under review.

282 But note that certain cases are heard by an Extended Board of 7 members.

Chapter 5
Independence

INTRODUCTION

5.1 Tribunals are established to deliver justice, frequently in disputes between the citizen and the State. This adjudicative function means that tribunals must enjoy independence from the executive, and must also be perceived as independent.[283] The perception is in many ways as important as the reality. It goes to the question of public confidence in tribunals and their decisions. This need for independence is especially compelling in tribunals where a government department is a party to the disputes decided by the tribunal. However guarantees of independence are still important where the government does not appear as a party before the tribunal, because the legislature and the executive establish the mandates of tribunals through legislation, and exercise some indirect control over the operation of tribunals through appointments and budgets.[284] Tribunals must, therefore, be able to reach decisions according to law without pressure from the parties to the dispute, or from external considerations such as resource constraints.[285]

5.2 The Leggatt Report in the United Kingdom took as its guiding principle that tribunals need to have a similar degree of independence and impartiality to that of the courts.[286] We would also adopt this view. Factors commonly thought to secure independence include a politically neutral appointment process, neutral administrative support, security of tenure and financial security. The overriding concern is to ensure that tribunal members have the freedom to take judicial decisions uninfluenced by resource or other external considerations.[287] We note too that many of the issues that are considered in other chapters of this paper, including procedures and membership, have a flow-on effect on independence, in that independence and credibility are enhanced where the tribunal runs in an effective and fair way.[288]

283 Council on Tribunals *Tribunals: their organisation and independence* (The Stationery Office, London, 1997) 3.

284 Katrina Miriam Wyman "The Independence of Administrative Tribunals in an Era of Ever Expansive Judicial Independence" (2001) 14 Can J Admin L & Prac 61, 121.

285 Council on Tribunals *Tribunals: their organisation and independence* (The Stationery Office, London, 1997) 3.

286 Sir Andrew Leggatt *Tribunals for Users – One System, One Service* (Report of the Review of Tribunals, London, 2001) para 2.18.

287 Council on Tribunals *Tribunals: their organisation and independence* (The Stationery Office, London, 1997) 3.

288 Council on Tribunals *Tribunals: their organisation and independence* (The Stationery Office, London, 1997) 3.

5.3 It has frequently been suggested that independence comprises two distinct yet interrelated components: impartiality and institutional independence.[289] Impartiality refers to a tribunal's approach to deciding cases without any personal interest or bias. This is seen as essential to good decision-making, as an impartial decision-maker will be better able to determine facts and to apply standards accurately.[290] Institutional independence refers to the structural or institutional framework which secures the appearance of, and actual, impartiality. Some distance ought to be maintained between the decision-maker and disputing parties. In this sense institutional independence encourages impartial decision-making, and is also valuable in engendering public confidence that tribunals will decide disputes in an impartial manner.[291] This approach has informed our analysis. However in this paper we have not considered the issues specifically under these two headings. In this chapter, we identify some key issues around independence in New Zealand tribunals as being impartiality, appointments, tenure and administration.

IMPARTIALITY Do the tribunal or any of its members appear to have a personal interest in the case or bias?

5.4 Natural justice requires that decision-makers not be biased, and the New Zealand Bill of Rights Act affirms this principle.[292] Bias may be apparent as well as actual. The test is "whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."[293]

5.5 While we have found no evidence of any actual bias in tribunals in New Zealand, there needs to be appropriate provision for dealing with conflicts of interest which may arise, so that the tribunal also does not appear to be biased. In at least one case the statute setting up a tribunal makes express provision for it.[294] We suggest that in the absence of a statutory requirement, internal guidelines or procedures would be sufficient.

5.6 Members representing particular groups contribute specialist expertise, which must be balanced against the potential damage to the tribunal's appearance of impartiality. Conflict of interest rules could probably deal with most difficulties here.

289 See, eg, *Valenté v The Queen* [1985] 2 SCR 673 (SCC); *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2 (HL); Genevra Richardson and Hazel Genn "Tribunals in Transition: Resolution or Adjudication?" [2007] PL 116, 120.

290 Genevra Richardson and Hazel Genn "Tribunals in Transition: Resolution or Adjudication?" [2007] PL 116, 120.

291 Genevra Richardson and Hazel Genn "Tribunals in Transition: Resolution or Adjudication?" [2007] PL 116, 121.

292 New Zealand Bill of Rights Act 1990 s 27(1).

293 *Porter v Magill* [2002] 2 AC 357, 494 Lord Hope. This has been followed by the New Zealand Court of Appeal in *Muir v Commissioner of Inland Revenue* [2007] NZCA 334, Hammond J for the Court.

294 Parole Act 2002 s 118.

APPOINTMENTS

5.7 The method of appointing members to tribunals can have a significant impact on public perceptions of the tribunal's independence. We have identified two main aspects of appointments which may provide guarantees of tribunal independence. First, politically neutral appointments are vital to ensure that tribunals are, and are seen to be, independent. Second, from an institutional perspective it is important that the person who makes the appointments is seen as neutral.

Politically neutral appointments

5.8 A strong theme to emerge from our discussions with tribunal members and departments that administer tribunals was that the appointment process must be merit-based if members are to be of a high standard. Merit-based appointments have significant implications for independence, as they help dispel any suggestion that members have been appointed based on political patronage or favouritism. While government departments will necessarily be involved in the appointment process, appointments should not be "political" in the sense that the government deliberately selects members who might be seen as favouring its own interests.[295] Having appointment processes which appear to be based on merit, and are politically neutral, is therefore important for two reasons. First, it encourages public confidence that tribunal members are of a high standard of competence and integrity, and, second, it ensures that they perform their duties free from undue influence by government or others.[296] We reiterate that there is no evidence of members being biased in favour of particular political views; however it is important that there is no perception of lack of independence.

5.9 We therefore suggest that the perceived independence of tribunals will be enhanced where members are appointed on the basis of merit, following a fair and neutral appointment process. Factors which have been suggested as contributing to an open and merit-based process include public advertising of tribunal positions, qualifications standards that reflect the adjudicative tasks they will undertake, and the existence and publication of clear criteria upon which members are selected.[297] In our view, tribunal vacancies should be advertised, and following this there should be an open merit-based selection process before suggested appointments are put forward to the responsible Minister. It is important that this process is robust to ensure quality.

5.10 Many departments that administer tribunals do now run merit-based appointment processes. Departments commonly follow the State Services Commission guidelines in appointing tribunal members.[298] These guidelines encourage appointing departments to follow good practices such as shortlisting and interviewing candidates, although they do not require that they do so. One example of good practice that we encountered involved an open advertisement process. A panel is formed to consider candidates, which will include a Chair, senior

295 See, eg, Robin Creyke and John McMillan (eds) *Control of Government Action* (LexisNexis Butterworths, Chatswood (NSW), 2005) 129.

296 Administrative Review Council *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, Australian Government Publishing Service, Canberra, 1995) 70.

297 See, eg, Lorne Sossin "The Uneasy Relationship between Independence and Appointments in Canadian Administrative Law" in Grant Huscroft and Michael Taggart (eds) *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (University of Toronto Press, Toronto, 2006) 69.

298 State Services Commission *Board Appointment and Induction Guidelines* (Wellington, May 2007).

member of the tribunal in question, a lay member and senior officials in the Department. From this, a shortlist is developed and put forward to the Minister.

5.11 However, in several cases we found that appointments are still sometimes made on the basis of nominations by political parties. Ministers also often nominate candidates. We suggest that it may be acceptable for Ministers and other Members of Parliament to nominate potential appointees to tribunals, provided that these candidates are subjected to the same merit-based assessment as any other candidates, and are not automatically appointed based on the nomination. The State Services Commission guidelines also seem to support this view, suggesting that potential appointees may be identified through a number of channels, including nominations by interest groups or MPs.[299]

Does the appointing Minister or other appointing authority have an interest in the outcomes of tribunal decisions?

5.12 Where a government department appears before a tribunal, or is otherwise interested in the outcomes of a tribunal's decisions, the tribunal may not be perceived as independent if the department is able to appoint members to the tribunal. To this end, the United Kingdom Council on Tribunals argues that procedures for the selection and appointment of tribunal members should be independent of related departments of government or other interested parties.[300] This is not to say there should be no involvement by the department at all. Our consultations suggested that the department's in depth knowledge of the surrounding policy and the context in which the tribunal operates can be very helpful in assessing who is likely to be an effective tribunal member. The department has an interest in the policy issues and in the system, so has a strong incentive to ensure quality.

5.13 Overall, however, we suggest that the appearance of independence will generally be enhanced where appointments are made by a 'neutral' department. As a minimum, the Minister of Justice or Attorney-General should usually be involved in the appointment process by way of consultation. It is not then problematic for the relevant departmental Minister to also have a role in appointing members.[301] In the case of administrative review tribunals, it will be more important that the appointments process is seen to be distanced from the department, as the decisions of the department are being reviewed in the tribunal and thus the department should not be perceived as having any influence on the decisions. In this situation appointments by the Attorney-General or Minister of Justice will strengthen the appearance of neutrality.[302]

5.14 Considering first the tribunals which engage in administrative review, the majority appear to have appointments processes which are clearly independent of the department whose decisions will be reviewed by a particular tribunal. In many cases the Governor-General or Attorney-General makes the

299 State Services Commission *Board Appointment and Induction Guidelines* (Wellington, May 2007).

300 Council on Tribunals *Framework of Standards for Tribunals* (November 2002) 1.

301 Legislation Advisory Committee *Report No 3: Administrative Tribunals* (Government Printer, Wellington, 1989) para 48.

302 We note that there may be other potential solutions to this issue. For example, tribunal members in the new United Kingdom system are appointed by the Judicial Appointments Commission.

final appointment. For example, members of the Social Security Appeal Authority are appointed by the Governor-General on the recommendation of the Minister for Social Development and Employment, after consultation with the Minister of Justice, while members of the Legal Aid Review Panel are appointed by the Attorney-General.[303] However, in the case of a number of administrative review tribunals, the appointments process does not appear to provide a sufficient appearance of independence. For example, the Catch History Review Committee under the Fisheries Act 1996 decides appeals on the allocation of provisional catch history by the Chief Executive of the Ministry of Fisheries. Appointments to this Committee are made by the Minister of Fisheries. Similarly, members of the Medicines Review Committee are appointed by the Minister of Health, and some of the Committee's work involves determining appeals against the decisions of the Director-General for Health in relation to exemptions for clinical trials or determinations that particular medical devices are unsafe. War Pensions Appeal Boards are also appointed by the Minister of Veterans' Affairs. There is no suggestion that in any of the above cases any improper advantage is in fact taken. It is the perception that is all-important.

5.15 Appointment processes may adversely impact upon actual or perceived independence even in the case of tribunals which decide disputes between citizens. While it will generally not be problematic that the Minister responsible for the particular policy area makes appointments to these tribunals, it could be where one party appears to be able to influence the composition of the tribunal. For example, Retirement Villages Disputes Panels are appointed by the operator of a retirement village, from a list maintained by the Retirement Commissioner, and hear complaints against the operator. The operator also pays the costs of the Panel member. This arrangement does not seem to sufficiently guarantee the necessary perception of independence.

Qualifications of appointees

5.16 Selecting particular types of people to fill tribunal positions can also influence perceptions of the tribunal's impartiality. It is often suggested that selecting a judge as Chair (or as President of a larger tribunal structure) enhances the appearance of impartiality. A judge's position as a judge imports all the protections of judicial independence from government, and as such judges are more likely to be viewed as neutral.[304] While lawyers do not have the same in-built independent status, it is sometimes suggested that legal qualifications and experience also suggest impartiality, as legal work involves making a detached and impartial assessment of facts and law.

TENURE

Do members have freedom to make decisions according to law, without influence from government?

5.17 Some form of security of tenure is an essential guarantee of independence in adjudication, as it is part of ensuring that members decide cases solely on their

303 Members of the various immigration tribunals are also appointed by the Governor-General on the advice of either the Minister of Immigration or the Minister of Justice. Immigration Act 1987 ss 18B, 49, 103 and 129N.

304 See, eg, New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004) 295.

merits, and are not swayed by external pressures. Without security of tenure, the Executive could in theory attempt to influence decisions through the threat of dismissing members whose decisions do not favour the government's interests. Again, perception is as important as reality. There need not be any actual threat to dismiss members, as even a risk that this could occur would be enough to skew a tribunal's decision-making process. For this reason, appointments "at pleasure" are undesirable, as they do not provide the degree of independence necessary to perform adjudicative functions impartially and at arm's length from the executive.[305]

5.18 Therefore, to ensure that government does not attempt to exert influence over decisions, or appear to do so, members ought to have security of tenure and appointments should only be terminable for good reason such as disability. However, in the tribunal context it has often been suggested that members need not have lifetime tenure, as judges do, but rather that fixed term appointments with security within the fixed term will provide a sufficient guarantee of independence. It has been held in Canada that tribunal members appointed for a fixed term will be considered to have sufficient security of tenure so long as they may not be removed without cause.[306] New Zealand has tended to take a similar approach, and it has not generally been thought necessary for tribunal members to have lifetime tenure in order to secure their independence.[307] Rather, appointments should be for a fixed term,[308] which must be sufficiently long so that members have a sense of security. The Legislation Advisory Committee recommends a minimum term of three years.[309] Similarly, in Australia the Administrative Review Council recommends a term of three to five years.[310]

5.19 This approach to tenure is not universally supported, however. Some commentators note that tribunals determine far more questions affecting rights than the courts do, and question why people coming before tribunals should enjoy fewer protections of impartiality and independence than a person coming before a court, especially given that many tribunals have jurisdiction that once belonged to the courts.[311] Where members have tenure for a fixed term, and may be reappointed at the end of that term, there is potential for the government to use decisions about reappointment to express pleasure or displeasure at the decisions members have made while in office. However, there seems to be a consensus that lifetime tenure is inappropriate for tribunal members in New Zealand, except perhaps in exceptional circumstances.

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305 Administrative Justice Project "Appointments: A Policy Framework for Administrative Tribunals" (Victoria (BC), 2002) 35.

306 *Québec Inc v Québec (Régie des permis d'alcool)* [1996] 3 SCR 919 (SCC) para 67-68. See also *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)* [2001] 2 SCR 781 (SCC).

307 See, eg, *Claydon v Attorney-General* [2004] NZAR 15, para 115 (CA), Glazebrook J.

308 Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (Wellington, 2001) 162.

309 Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (Wellington, 2001) 162.

310 Administrative Review Council *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, Australian Government Publishing Service, Canberra, 1995) 82.

311 Lorne Sossin "The Uneasy Relationship between Independence and Appointments in Canadian Administrative Law" in Grant Huscroft and Michael Taggart (eds) *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (University of Toronto Press, Toronto, 2006) 52. See also David J Mullan "Ocean Port Hotel and Statutory Compromises of Tribunal Independence" (2002) 9 CLELJ 193.

5.20 Whether tenure is for a fixed term or for the duration of working life, the key is that a tribunal member's position be secure against interference by the executive or the appointing authority.[312] The majority of tribunals in New Zealand satisfy these standards, providing fixed terms of appointment, generally of three years or more, and legislation generally states a number of limited grounds for termination of appointment. For example, members of the Residence Review Board are appointed for four-year terms, and may be removed from office by the Minister for inability to perform the functions of the office, bankruptcy, neglect of duty, or misconduct, proved to the satisfaction of the Minister.[313] However, this is not the case for a small number of tribunals. Some statutes establishing tribunals provide for a term not exceeding a certain number of years, suggesting that there could in theory be much shorter terms under these provisions.[314] The Chairs of Land Valuation Tribunals hold office at the pleasure of the Governor-General.[315] Similarly, Chairs and members of War Pensions Appeal Boards hold office during the pleasure of the Minister who appointed them.[316] Several statutes are silent regarding tenure, suggesting that there is no security of tenure.[317] These types of provisions tend only to be found in older legislation, so there is a case for reviewing older provisions to bring them into line with current standards.

5.21 While in general fixed terms of appointment will be appropriate provided that they are secure, we suggest that in limited circumstances there may be an argument for giving full lifetime tenure to heads of tribunals that make particularly significant decisions. For example, the Human Rights Review Tribunal makes important decisions about the application of key human rights laws, and has the very significant power to declare legislation inconsistent with section 19 of the New Zealand Bill of Rights Act 1990.[318] Arguably, a tribunal with such important powers ought to be headed by a Chair who has full tenure. The consolidated Immigration and Protection Tribunal, if established, will be headed by a District Court judge,[319] suggesting a move to have Chairs with greater protections of independence where the tribunal has power to make decisions of substantial importance, or with substantial societal or political implications.

5.22 As a final point, we note that tribunals constituted on an ad hoc basis present a problem in terms of the traditional arguments for giving tribunal members secure tenure. Members of these tribunals are only appointed when a case arises, and only hold office to decide that particular case. Examples of this type of tribunal include the Boards of Appeal under the Health Act 1956, Engineering Associates Appeal Tribunal and Valuers Registration Board of Appeal. Even in relation to ad hoc tribunals of this kind it should be possible to devise protections against any perceived potential for influence, by government or otherwise, during the tribunal's engagement.

312 *Valenté v The Queen* [1985] 2 SCR 673 (SCC).

313 Immigration Act 1987 sch 3A cl 1.

314 See, eg, Human Rights Act 1993 s 100; Residential Tenancies Act 1996 s 68.

315 Land Valuation Proceedings Act 1948 s 19(3)(a).

316 War Pensions Act 1954 ss 8(2) and 9.

317 See, eg, Health Act 1956 ss 55 and 124.

318 Human Rights Act 1993 s 92J.

319 Immigration Bill 2007 cl 195.

5.23 We are concerned here with a department that appears as a party in cases before the tribunal, or advises on the law that governs the tribunal. If the same department also administers the tribunal the tribunal may appear less than independent. It may seem that the department has the opportunity to influence the tribunal's decisions in its favour. In the United Kingdom, the Leggatt Report suggested that:[320]

> The very fact that a Department is responsible for the policy and legislation, under which cases are brought in the tribunal it sponsors, leads users to suppose that the tribunal is part of the same enterprise as its sponsoring Department.

Therefore, if a department may be required to appear as a party before a tribunal, or where a tribunal hears appeals from the department's decisions, the Legislation Advisory Committee Guidelines recommend that where practicable the same department should not provide administrative services to the tribunal.[321] In these situations, tribunals should ideally be administered by another department or host agency which can be seen as unambiguously neutral.[322]

5.24 We have heard some argument that there can be some benefits in tribunals being administered by interested departments. Departments and tribunal members to whom we spoke argued that in some cases departments with an interest in the policy context in which a tribunal operates have incentives to provide a higher level of service to the tribunal, thereby improving the quality of its decision-making. Furthermore, sharing relevant information between department and tribunal is easier, and the connection means that the tribunal is kept informed by developments in policy-making, and the tribunal's decisions can in turn inform departmental policy.[323]

5.25 Whatever merit there may be in this argument, we think it should not prevail in the case of administrative review tribunals. The most stringent standards of institutional independence ought to apply in the case of these tribunals, as disputes brought before them will always, by their very nature, involve a government department as a party. However, a number of administrative review tribunals are presently administered by the department whose decisions they review. In *Delivering Justice for All* the Law Commission gave the example of the Removal Review Authority, Residence Review Board and Refugee Status Appeals Authority, which are administered by the Department of Labour and hear appeals against that department's decisions. The Commission suggested that these tribunals in all probability function independently, but may not enjoy the full confidence of those bringing appeals due to the "potentially tainting link" with the Department.[324] From time to time it appears that members of the public do perceive

320 Sir Andrew Leggatt *Tribunals for Users – One System, One Service* (Report of the Review of Tribunals, London, 2001) para 11.

321 Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (Wellington, 2001) 164.

322 New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004) 296.

323 See, eg, Department of Labour *Immigration Act Review: Discussion Paper* (Wellington, April 2006) para 8.2.

324 New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004) 296.

that these tribunals are not independent.[325] Further examples of tribunals whose administrative arrangements might be perceived as compromising their independence include the Legal Aid Review Panel, which determines appeals from decisions of the Legal Services Agency on legal aid eligibility but is itself administered by the Legal Services Agency. The Medicines Review Committee is administered by the Ministry of Health and part of its function involves determining appeals from decisions of both the Minister and the Director-General of Health. Finally, War Pensions Appeal Boards are administered by Veterans' Affairs New Zealand. We reiterate that there is no evidence whatever of the actual exercise of improper influence. In this area perceptions are all-important.

5.26 In *Refugee Appeal 75692*,[326] the Refugee Status Appeals Authority considered the argument that there was a potential conflict of interest in their being administered and funded by the Department of Labour, which had made the decision under appeal in the case. The Authority rejected this argument, pointing to various features of its constituting legislation and administrative arrangements in support. These included provision of administrative support by a separate secretariat within the Department whose staff members may not concurrently make immigration or refugee status decisions, and membership comprised of experienced barristers and solicitors, who may only be removed by the Minister of Immigration on limited grounds. The Authority went on to argue that tribunals are not required to have equivalent protection for their independence to the courts, as there is a legitimate distinction between courts and tribunals in the way in which independence is secured. Nevertheless, as we have said, community perception is the key, and it is safer for there to be complete separation.

5.27 We found many situations to be unproblematic. For example, the State Housing Appeal Authority determines appeals from decisions of Housing New Zealand on eligibility for state housing and calculation of income related rents, and is administered by the Department of Building and Housing.[327] Housing New Zealand is a crown agency under the Crown Entities Act 2004, and is therefore independent from the Department. Any perception of connection between Housing New Zealand and the Department can be dismissed as mistaken. Similarly, the Department of Internal Affairs provides administrative support to the Film and Literature Board of Review, but does not appear as a party before the Board. It is simply a neutral administering agency.

5.28 In the case of tribunals which decide disputes between individuals, or which carry out occupational registration, licensing and discipline, the government will not generally be involved. Thus government departments which administer these tribunals may be seen as unrelated to the disputes in question, and there is not the same need for administration by a neutral department. An example is the Employment Relations Authority, which the Department of Labour administers.

5.29 Citizens' perceptions of tribunals' independence are the key in all this. In the cases referred to above, there is no evidence that government departments administering tribunals do attempt to influence their decisions. To the contrary, they often take steps such as creating separate secretariats within the Department

325 Department of Labour *Immigration Act Review: Discussion Paper* (Wellington, April 2006) para 8.2.

326 [2007] NZAR 307, [42]-[57].

327 Housing Restructuring (Appeals) Regulations 2000 reg 21.

to administer tribunals (as in the case of the Department of Labour). However, despite this citizens who use tribunals may still see them as a part of the relevant department and thus not independent. In some cases where a tribunal is administered by the Department which sets its policy and legislation, we have found some anecdotal evidence that users do perceive that the tribunal in question is part of the Department's decision-making process.[328] While it is difficult to determine how widespread this perception is, we suggest that, for administrative review tribunals at least, administration by a neutral department or other entity is the best way to guarantee that tribunals are, and are perceived to be, independent.

What type of administrative support does the administering department provide?

5.30 The level of administrative support provided to tribunals varies widely. Many departments provide only case management and secretarial services. Others provide more comprehensive services such as legal research support. The type of support the department provides might be thought to influence the perception of the tribunal's independence. In some cases departments provide the information on which the tribunal bases its decision. We suggest that, in these types of cases, tribunal members need to be able to make their own enquiries, rather than being forced to rely solely on the information provided by the department. Provision of secretarial services only may be less problematic, as it is not directly connected to the outcomes of cases. There can also be an issue of the extent to which the administering department provides advice to applicants who wish to appear before the tribunal. This whole issue of "shop-front" – i.e. who applicants approach initially, and from whom they obtain assistance in filing their application – is a serious one which we discussed in Chapter 3.

INDEPENDENCE OF OCCUPATIONAL TRIBUNALS

5.31 Slightly different principles are likely to apply in assessing the independence of occupational tribunals, given that these bodies operate within the policy context of occupational regulation. This context means that there will be additional values and interests that need to be recognized, in addition to the values underlying the general system of tribunals.[329] There is some tension between allowing the profession to regulate itself and ensuring that the public can have confidence in disciplinary decisions.

What is the impact on independence of occupational tribunals when they are composed of members of the profession? Is there a need for lay members or representatives of consumers or other groups affected by the conduct of professionals?

5.32 Including professional members on occupational tribunals is both necessary and

328 We heard from some departments and community representatives that this perception exists. Another example is that 80% of submitters on the recent review of the Immigration Act 1987 were in favour of the proposed immigration tribunal(s) being administered by the Ministry of Justice, to provide a clearer separation from the initial decision-maker and improve perceptions of independence. Department of Labour *Immigration Act Review: Summary of Submissions* (Wellington, 2006) para 8.2. At the time of writing the Immigration Bill 2007, proposing a new consolidated tribunal, is before Parliament. There is discussion as to where it should be administered.

329 For an explanation of the policy goals surrounding occupational regulation, see Ministry of Economic Development *Policy Framework for Occupational Regulation: A Guide for Government Agencies Involved in Regulating Occupations* (Wellington, 1999).

desirable. Members of the profession whose members the tribunal disciplines have a vital insight into the subject matter being dealt with and the relevant professional standards. Their involvement also contributes to a sense of responsible self-regulation. However, there is some potential that professional members may be perceived as being biased in favour of their peers, or even against them.[330] This can lead to allegations that a profession is "looking after its own." In order to deal with this difficulty, the Public and Administrative Law Reform Committee suggested in 1976 that a representative of the public or lay observer should participate in disciplinary proceedings to ensure that proceedings are conducted fairly and impartially.[331] We would also adopt this view. We note that this refers specifically to occupational disciplinary matters, rather than registration, although there is an argument for lay representation on bodies of the latter kind too.

5.33 The majority of occupational bodies of all types in New Zealand do include lay members or representatives of the interests of the community and/or consumers. For example, the Plumbers, Gasfitters and Drainlayers Board, which has registration and disciplinary functions, is composed of a mixture of members of the relevant professions and lay persons, including two members appointed to represent consumer interests.[332] In virtually all cases where a profession has a dedicated disciplinary tribunal, that tribunal includes lay representatives. For example, the Social Workers Complaints and Disciplinary Tribunal and Health Practitioners Disciplinary Tribunal must both include at least one lay member.[333] In the cases of bodies which deal solely with registration, again most include lay representation. However, there are several bodies which do not have lay members, which may pose a problem in terms of perceptions of their independence from the profession. These bodies tend to be constituted under older legislation. For example, the Valuers Registration Board is chaired by the Valuer-General and the members are all registered valuers, two of whom are appointed by the Minister for Land Information, and two of whom are recommended by the New Zealand Institute of Valuers.[334] The board does have some disciplinary functions.

Separation of functions

5.34 The Public and Administrative Law Reform Committee also suggested that independence would be enhanced by separating investigative and adjudicative functions, so that the tribunal does not act as both prosecutor and judge.[335] It is less common to have adjudicative functions separated out from the other functions such as registration, although this is generally acknowledged to be desirable. The Health Practitioners Competence Assurance Act 2003 provides a good model. Under the Act, a number of different bodies are created to deal with the different facets of occupational regulation. Registration Authorities for each profession deal with registration, professional conduct committees

330 In *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2, the Court suggested that members of occupational disciplinary tribunals adjudicating on their professional peers were not institutionally biased in favour of their peers.

331 Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (Wellington, 2001) 164-5.

332 Plumbers, Gasfitters and Drainlayers Act 2006 s 134.

333 Social Workers Registration Act 2003 s 116; Health Practitioners Competence Assurance Act 2003 s 88.

334 Valuers Act 1948 s 3.

335 Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (Wellington, 2001) 164-5.

undertake preliminary investigations in respect of complaints against practitioners, and the Health Practitioners Disciplinary Tribunal adjudicates on complaints. We suggest that separating adjudicative or disciplinary functions from other functions is generally desirable; however it may not always be feasible for smaller occupations.

Should occupational tribunals be institutionally separate from the profession?

5.35 Current thinking on the design of occupation regulatory systems is that the credibility of disciplinary decisions requires that disciplinary bodies have some kind of institutional independence or separation from the industry.[336] This need may be less acute in bodies which make only registration decisions, but even then there is an argument for it.

5.36 A difficulty arises here in that occupational regulatory and disciplinary bodies are often funded by the relevant industry, which may adversely affect perceptions of their independence. However, this funding is necessary. We suggest that it may be acceptable for these bodies to be funded through mechanisms such as licensing fees and industry levies provided that they are independent from industry associations and other purely industry groups, and that other mechanisms are in place to safeguard their independence. For example, in its recent review of the Real Estate Agents Act 1976, the Ministry of Justice suggested that the body responsible for licensing and disciplinary matters ought to be "independent from the industry," meaning that the Real Estate Institute of New Zealand should not be able to exercise control over it. This body would be constituted as a separate body that would be required to report annually to Parliament. Finally, it was seen as important for public perceptions of independence that the Minister of Justice should appoint members, rather than the industry appointing the members.[337] We note that these recommendations arose in a context of public concern about the real estate industry. However, we suggest that the underlying principles reflect a wider trend towards greater independence for occupational bodies, and that the recommendations can be considered as an example of best practice in any event.

5.37 The majority of bodies within our study which regulate and discipline occupational groups do enjoy a degree of independence from the occupation itself. Although many are funded by industry levies and the like, they are frequently established as Crown entities or bodies corporate, so are independent from their industry representative body. For example, the New Zealand Teachers Council is an autonomous Crown entity, and is funded through a government grant and registration fees. Similarly, the registration and disciplinary system for social workers is run through the Social Workers Registration Board, which may impose a levy on members for the purposes of discipline under the Act.[338] The Chartered Professional Engineers Council is a body corporate under the oversight of the Department of Building and Housing, and is funded

336 See, eg, Ministry of Justice *The Government's Preferred Options for Reform of the Real Estate Agents Act 1976: Public Consultation Document* (Wellington, 2007). A new Real Estate Agents Bill was introduced on 3 December 2007.

337 Ministry of Justice *The Government's Preferred Options for Reform of the Real Estate Agents Act 1976: Public Consultation Document* (Wellington, 2007). A new Real Estate Agents Bill was introduced on 3 December 2007.

338 Social Workers Registration Act 2003 s 109.

through levies.[339] However, there are some exceptions. The Real Estate Agents Licensing Board is currently administered by the Real Estate Institute of New Zealand, and the Music Teachers Registration Board is administered by the Institute of Registered Music Teachers. There should be consistency here.

CONCLUSION

5.38 Independence is vital to ensure a credible and effective system of tribunals. Independence must be real, but it is equally important that the public perceives tribunals to be independent. Tribunals must decide cases impartially, and have sufficient guarantees of independence to ensure that they are able to do this, and are seen to do it. In this chapter, we have identified a number of areas where guarantees of institutional independence could be strengthened in order to enhance the perception of independence. These are:

- In some tribunals appointment of members is not transparently based on merit.
- In some tribunals, a Minister or other appointing authority with an interest in the outcomes of cases appoints members of the tribunal.
- Some tribunal members do not have adequate guarantees of secure tenure within their term of appointment.
- Some tribunals are administered by departments whose decisions are reviewed in the tribunal, or who appear as a party in cases before the tribunal.
- Some occupational bodies do not appear to be sufficiently independent from the relevant industry representative body.
- Some occupational bodies do not include lay members.

339 Chartered Professional Engineers of New Zealand Act 2002 sch 1 cl 40.

Chapter 6
Procedure

INTRODUCTION

6.1 There is great variability in the procedures statutorily prescribed for tribunals. All tribunals are not the same. Professional disciplinary bodies carry out very different functions from the Disputes Tribunal, which in turn is different from a tribunal which reviews the decision of a government agency. The procedures for tribunals are bound to vary according to the subject-matter with which they deal, the complexity of the issues, and the consequences of their decisions for the parties. That said, however, we believe that there is currently much more diversity than is necessary or desirable.

6.2 A number of tribunals with similar functions have different procedures prescribed for dealing with similar types of matters. Thus, even though the State Housing Appeals Authority and the Social Security Appeal Authority are both tribunals that hear appeals on eligibility for state assistance they have quite different procedural rules.[340] While different provisions can achieve a similar outcome for tribunal users that is not always the case. Existing differences create the perception of inequality and unfairness.

PROCEDURAL REQUIREMENTS

6.3 Tribunals are not courts. They have often been specifically set up to keep matters away from the courts. Many tribunal users who appear before tribunals have little or no experience in setting out and arguing legal disputes, so most tribunals should promote informality in their hearings. Tribunal procedures consequently normally need to be flexible and informal. They should only be as formal and complex as is necessary to ensure that rights, interests, or legitimate expectations are fairly determined.

6.4 But in all tribunals the procedures must comply with the principles of natural justice. The generally applicable principles of administrative law and the New Zealand Bill of Rights Act require it. Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests, protected or recognised by law.[341] The challenge for those formulating rules of procedure for tribunals therefore is to balance the need for flexibility and informality with the requirements of natural justice.

340 The notice periods for filing an appeal differ, the provisions relating to how a hearing is conducted differ, and the rules around legal representation also differ; see Housing Restructuring and Tenancy Matters Act 1992, Housing Restructuring (Appeals) Regulations 2000 and Social Security Act 1964.

341 New Zealand Bill of Rights Act 1990 s 27 (1).

6.5 The balance between informality and flexibility on the one hand and natural justice on the other may need to be different for different categories of tribunals. In general, the more significant the right or interest at stake, the more protection will be necessary.[342]

INFORMAL AND FLEXIBLE PROCEDURES

6.6 This section outlines the ways in which statutory provisions currently encourage flexible and informal process, and how tribunals currently give effect to such requirements. The rules are set in a number of different ways: entirely by statute, or by a combination of statute and delegated legislation. There is a need to consider what statutory formulation, of the several currently in use, best facilitates what is required.

Statutory discretion to minimise formality

6.7 The statutes of some tribunals impose an obligation to conduct proceedings informally. The State Housing Appeal Authority for example must conduct hearings with as little formality as is consistent with a fair and efficient process and a just and quick determination of the appeal.[343] Another example is the Motor Vehicle Disputes Tribunal, which is required to conduct proceedings with as little formality as the requirements of the Act and the proper consideration of the matters before the tribunal allow.[344]

6.8 Some tribunals do manage to develop a "culture" of informality to a greater extent than others. Such things as the layout of the hearing room can matter. Active participation by the chair can assist by practices such as inviting the participants to ask questions about things they are not sure of, and helping unrepresented participants to tell their story.[345] But informality can go too far: if practices become too flexible consistency and fairness may be compromised.[346]

Modified rules of evidence

6.9 It is very common for tribunals to be given a power to accept evidence that would not be admissible in a Court. The Tenancy Tribunal, the Health Practitioners Disciplinary Tribunal and the Social Security Appeal Authority for example all have the power to receive as evidence any statement, document, information, or matter which may assist the tribunal to deal effectively with the matter before it, whether or not the same would be admissible in a court of law.[347]

6.10 A number of other tribunals have similarly worded provisions, and every tribunal that is deemed to be a commission of inquiry under the Commissions of Inquiry Act 1908 has the power to "receive as evidence any statement, document, information, or matter that in its opinion may assist it to deal effectively" with the matter before it, "whether

342 Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2001 edition and amendments* (Legislation Advisory Committee, 2007) 292.

343 Housing Restructuring (Appeals) Regulations 2000 r 10 and 13.

344 Motor Vehicles Sales Act 2003 s 8.

345 Taken from the responses tribunal chairs and members provided to the Law Commission's questionnaire on tribunals, July 2007. See also Hazel Genn "Tribunals and Informal Justice" (1993) 56 MLR 393, 395.

346 In some tribunals with a more adversarial flavour, evidence is normally taken on oath and there is cross-examination. Taken from responses to the Law Commission's questionnaire, July 2007.

347 Residential Tenancies Act 1986 s 97(4); Health Practitioners Competence Assurance Act 2003 sch 1 cl 6(1); Social Security Act 1964 s 12M(5).

or not it would be admissible in a court of law."[348] Even where the statute does no more than give a tribunal the power to determine its own procedure, a Court will probably infer that the ordinary rules of evidence are inapplicable to that tribunal.[349]

6.11 Tribunals can, if they think it is prudent or convenient, accept evidence that is not sworn. Some tribunals, such as the Disputes Tribunal, are given the express power to accept evidence that is not given on oath.[350]

6.12 But all of this does not mean that decisions can be made without a basis in evidence that has logical probative value. In an often quoted passage Diplock LJ summed the position up as follows:[351]

> The requirement that a person…must base his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined…It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason has some probative value…

Legislation establishing a number of tribunals provides that the tribunal is subject to the Evidence Act 2006 as if the tribunal were a court within the meaning of that Act.[352]

Measures that minimise legal technicalities

6.13 The legislation setting up some tribunals expressly provides that they can reach their decisions without regard to technicalities.

6.14 The Human Rights Review Tribunal is required for example to decide a case on its substantial merits, without regard to technicalities.[353] In *Carlyon Holdings Ltd v Proceedings Commissioner* Potter J said this required the Human Rights Review Tribunal to act according to equity and good conscience.[354] Similarly in *O'Neill v The Proceedings Commissioner* Goddard J held that the Human Rights Review Tribunal is not bound to follow legal niceties, but must regulate its own procedure within the confines of the requirement to be "speedy, fair and just."[355]

6.15 The Acts establishing the Disputes Tribunal and the Tenancy Tribunal make similar provision.[356] It is worth considering whether these types of provisions, which free tribunals from legal niceties, should be applied more widely to tribunals.

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348 Commissions of Inquiry Act 1908 s 4B(1). A list of tribunals that are subject to that Act are included in Table 3 in Chapter 7: Powers.

349 D L Mathieson (ed) *Cross on Evidence* (loose leaf, Lexis Nexis, Wellington) para 1.78 Administrative Tribunals (updated 20 May 2007).

350 Disputes Tribunals Act 1988 s 40(1); see also Peter Spiller *The Disputes Tribunals of New Zealand* (2nd ed, Brookers, Wellington, 2003) 72.

351 *R v Deputy Industrial Injuries Commissioner; ex parte Moore* [1965] 1 QB 456, 488.

352 For example the Health Practitioners Disciplinary Tribunal and the Human Rights Review Tribunal are subject to the Evidence Act 2006: Health Practitioners Competence Assurance Act 2003 sch 1 cl 6(5) and Human Rights Act 1993 s 106(4).

353 Human Rights Act 1993 s 105.

354 *Carlyon Holdings Ltd v Proceedings Commissioner* (2000) 5 HRNZ 527, 535 (HC) Potter J.

355 *O'Neill v The Proceedings Commissioner* [1996] NZAR 508, 515-516 (HC) Goddard J.

356 Disputes Tribunals Act 1988 s 18(6) and Residential Tenancies Act 1986 s 85(2).

Inquisitorial character: investigative powers

6.16 While there can be debate as to whether tribunals, which in the end have to decide between two disputing parties, should adopt inquisitorial or adversarial procedures,[357] there is much support for a more inquisitorial approach.[358] The lack of legal representation before many of them can generate this, as tribunal members need to take a more active role to compensate. Moreover some of the assumptions underlying the adversarial court system do not apply to tribunals.[359] That system assumes the two opposing sides will be in an equal position, whereas where an applicant is contesting a decision of the state this is often not so. Furthermore, tribunals must often consider public interest factors. As we have noted above[360] in New Zealand the 1989 Report of the Legislation Advisory Committee seems to view most tribunals as having a mixture of adversarial and inquisitorial features.

6.17 Some tribunals are expressly required to take an inquisitorial approach and have powers to seek and receive at their own initiative such evidence, and undertake such investigations, as they think necessary.[361] For example, the Mental Health Review Tribunal takes an active role in collecting evidence and calling witnesses, and may even initiate reviews of patients.[362] The Legal Aid Review Panel and War Pensions Appeal Boards similarly are both instructed to act inquisitorially.[363] Every tribunal that is deemed to be a commission of inquiry under the Commissions of Inquiry Act 1908 will normally have a commission's powers of investigation such as the power to require production of papers, documents, records or things for inspection, and the power to call and examine witnesses.[364]

6.18 The Employment Relations Authority may, in investigating any matter before it, call for evidence and information from the parties or from any other person and require the parties or any other person to attend an investigation meeting to give evidence. The Authority may for example interview any of the parties or any person at any time before, during, or after an investigation meeting and fully examine any witness.[365] The Authority has developed especially flexible and informal procedures of its own.

6.19 In *Claydon v Attorney-General* the Court of Appeal held that the provisions of the Employment Relations Act 2000 "fundamentally changed the jurisprudential basis of the body."[366] McGrath J observed that:

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357 See William Wade and Christopher Forsyth *Administrative Law* (9th ed, Oxford University Press, Oxford, 2004) 928.

358 See Rachel Bacon, "Amalgamating Tribunals: A Recipe for Optimal Reform" (PhD Thesis, University of Sydney, 2004); P P Craig. *Administrative Law* (3rd ed, Sweet & Maxwell, 1994).

359 See Narelle Bedford and Robin Creyke *Inquisitorial Processes in Australian Tribunals* (Australian Institute of Judicial Administration, Melbourne, 2006) 15, which lists the features and powers indicating that a tribunal has an inquisitorial character.

360 See para 2.52.

361 For example the Human Rights Review Tribunal has these powers: Human Rights Act 1993 s 106(1).

362 Mental Health (Compulsory Assessment and Treatment) Act 1992, Schedule 1.

363 Legal Services Act 2000 s 56; War Pensions Act 1954 s 13.

364 Commissions of Inquiry Act 1908 ss 4B-4D.

365 Employment Relations Act 2000 s 160(1)

366 *Claydon v Attorney-General* [2004] NZAR 16 para 66 (CA) McGrath J.

> As an investigative body the Authority need not operate in a formal passive manner, receiving material put before it by parties to the dispute at sittings. The Authority does not have "sittings" as such at which it "receives evidence", but rather "investigation meetings"…Consistent with its power independently to define the issues it may call for evidence beyond the scope of that the parties put before it.

6.20 It may well be that more tribunals should have this express power to inquire into and investigate issues. However we recall our earlier express caution that tribunals are not all the same. Some should retain a more adversarial process: the professional disciplinary tribunals are probably the best example.[367]

Power to determine its own procedure

6.21 It is common for the constituting legislation to confer on a tribunal the power to determine its own procedure. This is the case, for example, in the Deportation Review Tribunal, Residence Review Board, Removal Review Authority and the Refugee Status Appeals Authority.[368] Although the courts have not substantially considered the extent of a tribunal's statutory ability to control its own processes, the power clearly allows tribunal members the flexibility to adjust the procedure to the requirements of the case. However it has been suggested that such an authorisation may not in fact lead to a more inquisitorial process in the absence of more specific authorisation and other factors such as training.[369]

Legal representation

6.22 The fact that one or both parties are legally represented can alter the culture of the hearing, and the way it is conducted. This is an important matter to which we shall return in our discussion of natural justice below.

NATURAL JUSTICE – A FAIR HEARING

6.23 The requirements of natural justice apply to all tribunals. They prescribe what is necessary for issues to be fairly determined after an adequate hearing. There is some debate as to whether it is enough for the legislation regulating a tribunal simply to provide that "the principles of natural justice" are to be observed,[370] or whether it is better to set out the requirements in more detail. The Legislation Advisory Committee Guidelines prefer the latter, acknowledging that tribunals (and other decision-making bodies) differ, and that the requirements of natural justice can be subtly different in different contexts. But leaving it to tribunals to infer what, if any, natural justice protections are applicable under the general law can lead to uncertainty, legal risk and associated litigation, and, potentially, the application of more or fewer protections than desirable.[371]

367 P D G Skegg and Ron Paterson (eds) *Medical Law in New Zealand* (Brookers, Wellington, 2006) 667, referring to the Health Practitioners Disciplinary Tribunal.

368 Immigration Act 1987 ss 18F, 50, 129P.

369 See generally Narelle Bedford and Robin Creyke *Inquisitorial Processes in Australian Tribunals* (Australian Institute of Judicial Administration, Melbourne, 2006).

370 See, eg, Medicines Act 1981 ss 10-14 (Medicines Review Committee). In the absence of an express requirement to observe natural justice, the Courts will imply it anyway: *Lloyd v McMahon* [1987] AC 625; New Zealand Bill of Rights Act 1990 s 27(1) applies also.

371 Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2001 Edition and amendments* (Wellington, 2007).

Adequate notice

6.24 People whose rights and interests will be affected should generally be given adequate notice of an impending decision or hearing and adequate time to prepare and present their case.[372] Most tribunals have prescribed notice periods and requirements for serving notice of claims on parties.

6.25 We think that legislation governing all tribunals should specify the period of notice. Currently notice provisions vary quite randomly between tribunals.[373] A more consistent approach should be taken.

Disclosure

6.26 People must be informed of the evidence against them and given sufficient opportunity to deal with it. In general a tribunal should be required to disclose all material upon which it may base its decision so as to enable those affected to comment on that material and respond to and address any issues.[374]

6.27 Many tribunals have express procedural provisions which require disclosure of relevant material. Regulations governing appeals to the Student Allowance Appeal Authority for example require the Authority to provide copies of any evidence, statements or submissions to the other party to the proceedings.[375] Legislation establishing the State Housing Appeal Authority expressly requires the Registrar of the Authority to provide copies of any evidence produced by the appellant to the other party.[376]

6.28 It would be helpful if legislation governing all tribunals contained consistent provisions to ensure that parties are fully informed of the evidence against them and given sufficient opportunity to respond.

Opportunity to make representations

6.29 Is an oral hearing required, or will a hearing on the papers suffice in the circumstances? In some situations the opportunity to make written submissions will be sufficient to meet the requirements of natural justice. Where a hearing on the papers is appropriate, there must be an opportunity to make submissions, to be informed of any prejudicial information and be able to challenge it.[377] There must be a fair opportunity to comment on any adverse material.[378]

6.30 There is currently some variation among tribunals as to whether cases are heard in person or on the papers. Some are statutorily required to hear cases on the

372 Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2001 Edition and amendments* (Wellington, 2007).

373 Compare the Land Valuation Proceedings Act 1948 s 23(1) and the Social Security Act 1964 s 12K(7).

374 Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2001 Edition and amendments* (Wellington, 2007).

375 Student Allowances Regulations 1998 r 37.

376 Housing Restructuring (Appeals) Regulations 2000 r 8(2).

377 William Wade and Christopher Forsyth *Administrative Law* (9th ed, Oxford University Press, Oxford, 2004) 517.

378 William Wade and Christopher Forsyth *Administrative Law* (9th ed, Oxford University Press, Oxford, 2004) 518.

papers only: the Legal Aid Review Panel[379] and two of the immigration tribunals are in that category.[380] Some, although not required to, do invariably deal with matters on the papers.[381]

6.31 Most tribunals have an express power to direct an oral hearing or to deal with the matter on the papers. Many give the applicant the choice. Many prefer to hold oral hearings.[382]

6.32 No doubt considerations of efficiency, cost and proportionality enter into the decision of whether or not to hold hearings in person. The need may differ in different kinds of case. But our current view is that there should be an opportunity for an oral hearing where significant rights are at stake; an oral hearing is especially desirable where credibility is in issue.[383] We tend to the view that tribunals should normally have power to hear cases orally when they think this is desirable. No doubt this can pose problems of availability of accommodation, and of geographical location. Some tribunals are already making good use of tele-conferencing and other forms of remote communication.

Examining and cross-examining witnesses

6.33 Natural justice will normally require that a party have the right to call witnesses or present any evidence they wish in support of their case. It does not always require a right of cross-examination. In some – the disciplinary tribunals being a good example – cross-examination is more important than in others.

Legal representation

6.34 Does natural justice entitle parties to be legally represented? There is no absolute right, but often it will be entirely appropriate. A range of matters need to be taken into account. The points that need to be considered include the seriousness of the issues and the possible consequences of the decision, whether points of law are likely to arise, the ability of the parties to present the case, and the need for fairness between participants.[384]

6.35 Currently there is much variation on this issue between tribunals. Parties commonly represent themselves before some tribunals but only rarely before others. In some tribunals representation is encouraged or expected. Legislation currently restricts

379 Legal Services Act 2000 s 56(5)

380 The Removal Review Authority and Residence Review Board review cases on the papers: Immigration Act ss 18F(1) and 50(1).

381 For example the Student Allowance Appeal Authority: the regulations governing the operation of the Authority, while not precluding oral hearings, make no provision for them and appear to assume that matters will be dealt with on the papers. See Student Allowances Regulations 1998. Likewise, the Broadcasting Standards Authority does not hear the parties in person.

382 We understand that the Social Security Appeal Authority, the Land Valuation Tribunal, the Judicial Committee of the Veterinary Council and the Refugees Status Appeal Authority to name just a few normally hold oral hearings. Taken from responses to the Law Commission's questionnaire, July 2007.

383 Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2001 Edition and amendments* (Legislation Advisory Committee, 2007) 294.

384 *Drew v Attorney-General* [2002] 1 NZLR 58, 73 (CA) Blanchard J.

lawyers from appearing for parties before a handful of tribunals.[385] The norm however is not to prohibit or even discourage people from being represented by counsel.

6.36 Proceedings before some tribunals involve highly complex legal and factual issues which render legal representation highly desirable. Parties are normally represented before the Taxation Review Authority for example, and may be at a disadvantage if they are not.[386]

6.37 Equality of arms can be an issue when some parties are represented but others are not. Government departments and agencies are always represented before administrative review tribunals by either an administrative officer or a department lawyer, yet citizens are often not represented when they appear before some of these tribunals.[387] In hearings before the Taxation Review Authority the Commissioner is normally represented by experienced crown counsel or by department lawyers specialising in taxation litigation. Although most citizens are represented by counsel, we understand that on occasion taxpayers do represent themselves before the Authority. This inequality of arms can impose burdens on the tribunal to assist the unrepresented party.

6.38 There are significant advantages for parties who are represented. Lawyers are trained to research the issues and present cases so as to assist the tribunal by identifying the issues in dispute. This can save time and lead to a smoother process. The main disadvantages of legal representation are the cost to parties,[388] and the increased formality of the hearing. Cases with lawyers involved tend to also take longer to complete than others, which can increase the administrative costs as well as those of the parties. Lawyers can also take a more adversarial approach and take procedural points as part of their litigation strategy.

6.39 In deciding whether legislation should permit or disallow legal representation, all these matters need to be taken into account. We think the principle should be that statutory provisions prohibiting legal representation should be included only where there is very good reason. Important issues arise as to which tribunals should attract legal aid, and what advisory services are available to enable unrepresented applicants to prepare their case. The Ministry of Social Development has a limited amount of funding for beneficiary advocates.

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385 Lawyers are not permitted to appear except in a personal capacity in the Disputes Tribunal and tribunal referees do not have the discretion to allow lawyers even in exceptional situations. See Disputes Tribunals Act 1988 s 38(7). Legal representation is not permitted as of right in the Tenancy Tribunal, the Motor Vehicle Disputes Tribunal, and the State Housing Appeal Authority but these tribunals have the discretion to allow a party to be represented by a lawyer in certain circumstances so the restriction on legal representation is not an absolute one. See Residential Tenancies Act 1986 s 93(3); Motor Vehicle Sales Act 2003 sch 1 cl 9; Housing Restructuring (Appeals) Regulations 2000 r 13.

386 Taxation is probably the most complex and demanding jurisdiction dealt with by a tribunal. Taken from responses to the Law Commission's questionnaire, July 2007.

387 The Social Security Appeal Authority estimates that about 25 % of appellants before it are represented by an advocate or lawyer. In contrast the Refugee Status Appeal Authority estimates that 95 % of appellants before it are represented. From responses to the Law Commission's questionnaire, July 2007.

388 The availability of legal aid for tribunal cases is discussed in Chapter 3: Accessibility, para 3.9.

Reasons for decision required

6.40 While there may not yet be a legal principle that all decision-makers must give reasons,[389] most tribunals are either required to give reasons or do so as a matter of practice. The Student Allowance Appeal Authority and the Refugee Status Appeal Authority are expressly required to give written reasons for their decisions. Legislation establishing the War Pensions Appeal Board and the Medicines Review Committee is silent as to whether these tribunals are required to give reasons.[390]

6.41 It is desirable for reasons of transparency, openness, and as a basis for considering the appropriateness of exercising rights of appeal or review that all tribunals provide reasons for their determinations. The rules of fairness and good practice will in most cases require written decisions with reasons. The giving of reasons is required for the ordinary person's sense of justice and also imposes a healthy discipline on bodies making decisions that affect other people's rights and interests.[391] It also assists the parties in assessing the appropriateness of appealing the decision. Reasons should be given in writing and we think there is a strong case for making it a mandatory requirement for all tribunals to do this.

6.42 Section 23 of the Official Information Act 1982 requires organisations covered by the Act to provide a full statement of reasons for a decision, when requested to do so. Although tribunals are excluded from the application of the Act in respect of their judicial functions,[392] the standard imposed on statements of written reasons provided under that section might be an appropriate one to apply to tribunals.[393]

CONCLUSION

6.43 We have found that the procedural provisions that apply to tribunals differ, and believe that there is more diversity than is needed. The Leggatt Report in the United Kingdom argued for the greatest possible coherence across the system for rules of procedure and recommended that tribunals should be regulated by the same rules of procedure.[394] Having reviewed the range of procedures that apply to different tribunals, we think that greater coherence and standardisation of rules of procedure is needed in New Zealand also. That will result in increased public accessibility and improve public perceptions of fairness and equity between tribunals. Some tribunals have provisions that provide better protections and greater clarity than others, and it makes sense to adopt the best provisions across all tribunals.

6.44 Consistency will assist tribunal members who may sit across different tribunals and lawyers representing clients before different tribunals.

389 The common law does not yet impose a general duty to give reasons for a decision; see William Wade and Christopher Forsyth *Administrative Law* (9th ed, Oxford University Press, Oxford, 2004) 522.

390 See Student Allowance Regulations 1998 r 39; Immigration Act 1987 s 129Q(3); War Pensions Act 1954; Medicines Act 1981.

391 William Wade and Christopher Forsyth *Administrative Law* (9th ed. Oxford University Press, Oxford, 2004) 522.

392 Official Information Act 1982 s 2(6).

393 Written statements must contain the findings on material issues; the information on which the findings were based and the reasons for the decision: Official Information Act 1982 s 23(1).

394 Sir Andrew Leggatt *Report of the Review of Tribunals: Tribunals for Users – One System, One Service* (London, 2001) Chapter 8.

6.45 Nevertheless, we repeat that such standardisation should not be at the expense of necessary differences, nor of the flexibility so necessary in many tribunals. One way of achieving this might be to have a number of templates for different categories of tribunal. Another would be to have a core set of procedural rules that are common to all tribunals and provide appropriate procedural safeguards for tribunal users. Within the confines of those basic core rules, each tribunal could have the flexibility to determine its own procedures and process. Yet another would be to have a core set of common rules with exceptions or additions for certain types of tribunal. In some overseas jurisdictions core rules are set by Rules Committees.

Chapter 7
Powers

INTRODUCTION

7.1 Although tribunals consider an enormous variety of matters they exercise a similar function. Subject to rights of appeal and review, the function of all tribunals is to make a final determination of a question affecting the rights, interests or legitimate expectations of those that come before them. In doing this tribunals consider evidence and determine facts. All tribunals consequently need certain core powers so they can perform this adjudicative function effectively and independently. They also need other powers to assist them to effectively run their own proceedings.

7.2 While there are core powers which all tribunals are likely to require, there will also be others that are only required by some tribunals. The specific matters dealt with by some tribunals may in some cases require additional or different powers. Occupational disciplinary tribunals for example require the power to suspend and de-register members and to impose other penalties.

7.3 Tribunals should only have the powers that they need to perform their functions. The Legislation Advisory Committee says that public powers should not be created unless they are necessary. Where they are created, appropriate procedural and institutional safeguards should be put in place to protect the inherent rights and freedoms of individuals when the power is exercised.[395] The nature of these safeguards will depend on the purpose and characteristics of the power in question and also on the interests and rights that may be affected by an exercise of the power. Safeguards need to be proportionate to the interests affected.[396]

WHAT POWERS SHOULD TRIBUNALS HAVE?

7.4 In this section we examine the core general powers that many tribunals currently have. We consider whether these powers are necessary powers for tribunals, and whether all tribunals should have them to ensure they can perform their functions effectively.

7.5 We identify a set of core powers that many tribunals need. These are powers to summons witnesses, take evidence, inspect documents, require witnesses and parties to produce documents for examination, sometimes conduct proceedings in private or suppress publication of information. Many tribunals also have, and probably most need, powers to ensure they can maintain order during hearings.

395 Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2001 Edition and amendments* (Wellington, 2007).

396 Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2001 Edition and amendments* (Wellington, 2007).

Some tribunals have and some require the power to order the disclosure of documents. Quite a few tribunals, including almost all disciplinary tribunals, currently also have the power to award costs and almost all disciplinary tribunals have and require powers of sanction. These issues are all examined below. Once again, we conclude that there is unjustifiable inconsistency between tribunals.

Witness summonses and taking evidence

7.6 Many tribunals currently have the power to issue a witness summons requiring any person to attend before the tribunal to give evidence. All tribunals that are deemed to be commissions of inquiry for example have the power, either on their own motion or on application, to summons people to give evidence, and to produce any papers, documents, records or thing in that person's possession or under that person's control that are relevant to the scope of the inquiry.[397] If a witness fails to answer a summons without good cause then the witness normally commits an offence and is liable on summary conviction to a fine.[398]

7.7 Some tribunals do not however currently have powers to summons witnesses. For obvious reasons, tribunals that determine matters on the papers and without a hearing are not given express powers to summons witnesses.[399] The Medicines Review Committee, the Motor Vehicle Disputes Tribunal and the State Housing Appeal Authority are however examples of tribunals that normally hold oral hearings but do not have a power to summons witnesses. It is not clear why. A few occupational regulation and disciplinary tribunals constituted under older statutes also do not have powers to summons witnesses.[400]

7.8 Although many tribunals have this power it is not used often in some tribunals, but it is used regularly in others.[401] The power can have an effect even when it isn't exercised. One tribunal chair said that there are many occasions when witnesses attend because they are aware that if they refuse to attend, they can be summoned.

7.9 A number of tribunal chairs consider that this is an important power for tribunals to retain to enable them properly to undertake their decision-making function. It is probably a power that is needed on occasion by almost all tribunals, other than those that are required to determine all matters on the papers.

7.10 Some tribunals can administer an oath or affirmation and so can require sworn evidence. In the Tenancy Tribunal evidence is not given under oath or affirmation but the tribunal may require a witness to make a statement promising to tell the

397 Commissions of Inquiry Act 1908 s 4D(1). Other tribunals such as the Human Rights Review Tribunal, the Disputes Tribunal and the Tenancy Tribunal also have this power: Human Rights Act 1993 s 109; Disputes Tribunals Rules 1989 r 14; Residential Tenancies Act 1986 s 98.

398 For example r 18 of the Disputes Tribunal Rules 1989 provides for a fine of up to $500.

399 The Legal Aid Review Panel and the Student Allowance Appeal Authority are examples.

400 The Valuers Registration Board, which was established under s 3 of the Valuers Act 1948, is a good example of a Board which does not have this power. The Building Practitioners Board and the Cadastral Surveyors Licensing Board are both examples of disciplinary tribunals that do have powers to summons witnesses.

401 We understand that a few tribunals, such as the Copyright Tribunal and the Customs Appeal Authority never use the power, while a few others, such as the Disputes Tribunal and the Refugee Status Appeals Authority regularly use this power. From responses to the Law Commission's questionnaire on tribunals, July 2007.

truth.[402] All tribunals that are commissions of inquiry have the power to take evidence on oath.[403] It is an offence for a witness to deliberately give false evidence on oath. Some tribunals virtually always take evidence under oath or affirmation,[404] whereas in others, such as the Disputes Tribunal, it is generally seen to be an unnecessary and intrusive formality and avoided when possible.[405]

7.11 A number of tribunals that hear evidence don't have an express power to require evidence to be given under a promise, oath or affirmation.[406] Some of these may be able to rely on the power in section 14 of the Oaths and Declarations Act 1957.[407] Tribunals that don't have the power to administer an oath or affirmation or otherwise require a witness to make a statement that they will tell the truth may be at a disadvantage, particularly when trying to determine issues of credibility or where the evidence of witnesses conflicts.

7.12 It is important for most tribunals to have the power to impose an obligation to be truthful when evidence is given and information provided. Even if, as is suggested, such an obligation makes little difference to whether people actually tell the truth, it does serve to remind people of the seriousness of the situation. An obligation to be truthful is imposed where it is an offence for a witness or party to give false evidence or information to a tribunal. An offence provision of this sort could be considered as an alternative to giving tribunals the power to require evidence to be given on oath or by affirmation.

Production of documents and disclosure orders

7.13 All tribunals with the power to summons witnesses have the power to require any witness summoned to produce any books, papers, documents or records.[408] In addition some tribunals, including many that take powers from the Commission of Inquiry Act 1908, have the power to require any person to produce documents for examination as well as the power to inspect and examine any documents.[409] Again we understand that it is relatively rare for orders requiring the production of documents to be made by tribunals.[410] In some tribunals these sorts of powers are rarely used because documents are produced

402 The Residential Tenancies Act 1986 s 97(1) provides that where the witness promises to tell the truth and fails to do so they are liable to prosecution for giving false evidence.

403 Commissions of Inquiry Act 1908 s 4B.

404 Sworn evidence is normally for example taken in the Human Rights Review Tribunal and in disciplinary tribunals such as the Health Practitioners Disciplinary Tribunal and the Judicial Committee of the Veterinary Council. From responses to the Law Commission's questionnaire on tribunals, July 2007.

405 Peter Spiller *The Disputes Tribunals of New Zealand* (2nd ed, Brookers, Wellington, 2003) 74.

406 Two examples are the Medicines Review Committee and the Valuers Registration Board.

407 The Oaths and Declarations Act 1957 s 14 will apply to some tribunals and gives a power to all persons acting judicially to administer an oath to all witnesses that are lawfully called or voluntarily come before them. Whether this power is available will turn on whether the tribunal is acting judicially. For a discussion on what constitutes judicial proceedings see Hon Bruce Robertson (ed) *Adams on Criminal Law* (Brookers online, Wellington, 1992) para CA 108.01 (last accessed 28 September 2007)

408 For example Human Rights Act 1993 s 109(2)(c) provides that a witness summons must state "the papers, documents, records, or things which that person is required to bring and produce to the Tribunal."

409 Commissions of Inquiry Act 1908 s 4C(1).

410 For example the power is sometimes exercised in the Disputes Tribunal, the Social Security Appeal Authority and the Health Practitioners Disciplinary Tribunal. From responses to the Law Commission's questionnaire on tribunals, July 2007.

and also exchanged by agreement.[411]

7.14 Powers to inspect documents or require them to be produced for examination are regarded by many as essential powers for tribunals. The threat that an order may be made requiring that a document be produced may ensure a higher degree of cooperation also. This is a power that is probably needed by all tribunals, including those that determine cases on the papers.

7.15 Some tribunals have the power to require the disclosure of documents to other parties,[412] including a number that may make orders for discovery in the same terms as the District Court.[413] However other tribunals do not have express powers to order discovery. Some manage discovery using their general power to regulate their own procedure.[414] Tribunals that have the powers of a commission of inquiry under section 4C of that Act can, either of their own motion or on application, order that any information produced to the tribunal be supplied to any person appearing before the tribunal.[415]

7.16 It would be helpful if a more consistent approach was taken on the issue of production, inspection and disclosure of documents. We favour stand alone provisions, rather than importing the procedure and powers of the District Court. While we are not sure that all tribunals will need these powers, many do need them and it would be better to give tribunals express powers rather than leave uncertainty. In *Public Inquiries – Draft Report*[416] the Commission suggests that rather than a power to order general discovery, inquiries should have powers to order that any information produced for examination be disclosed to other participants, subject to any relevant privileges or confidentiality and natural justice. It may be that a similar approach is appropriate for some tribunals also.

Privileges and immunities

7.17 Where tribunals have the powers we have just discussed they are normally subject to a provision that gives witnesses and counsel appearing before the tribunal the

411 For example parties in both the Employment Relations Authority and the Weathertight Homes Tribunal generally agree to produce books, papers, documents and records when the exchange of documents is facilitated by the tribunal; from responses to the Law Commission's questionnaire on tribunals, July 2007.

412 For example the Health Practitioners Disciplinary Tribunal may require, for its inspection and examination, the production of any relevant documents or items in any person's possession. It can require any person, including persons not involved in the matter before the tribunal, to provide information or documents. After it has inspected and assessed such documents it has the power to order that they be supplied to the parties for the purposes of the proceedings; see Health Practitioners Competence Assurance Act 2003 sch 1 cl 7.

413 An example of a tribunal that can make orders for discovery on the same terms as the District Court is the Weathertight Homes Tribunal: Weathertight Homes Resolution Services Act 2006 sch 3 part 2 cl 15.

414 We understand that the Human Rights Review Tribunal for example assumes a power to order discovery in reliance on its general power to regulate its procedure. From responses to the Law Commission's questionnaire on tribunals, July 2007.

415 There is some uncertainty as to whether this power allows a tribunal to require documents to be produced directly to another party. See *Comalco New Zealand Ltd v Broadcasting Standards Authority* (4 March 1996) CA 148/95 and 159/95 and *Waitakere Licensing Trust v 3mi Choices Ltd* (10 July 2002) HC AK AP109-PL01, para 36 Fisher J. A 1995 substituted decision of the Court of Appeal seemed to conclude that the provision did not allow for a requirement that documents be produced directly to another party, while in a later case in 2002 Fisher J held that s 4C(3) directly contemplates "the equivalent of an order for discovery."

416 New Zealand Law Commission *Public Inquiries – Draft Report* (NZLC IP 5, Wellington 2007). This draft report on Public Inquiries has been put up on the Law Commission website www.lawcom.govt.nz for submissions by 31 January 2008.

same privileges and immunities as witnesses and counsel have in proceedings before a court.[417] That is so of tribunals which take their powers under the Commissions of Inquiry Act.[418] Many provisions also preserve privilege in relation to the giving of information to tribunals, the answering of questions during investigations, and the production of papers and documents.[419] Again that is so of all tribunals which take their powers through the Commissions of Inquiry Act.[420]

7.18 The immunities and privileges that apply in the courts include for example immunity against liability for defamation and other civil actions in respect of anything that is said, written or done by a witness during proceedings.[421] Two important examples of privileges that apply before the courts are the privilege against self-incrimination and legal professional privilege. The Evidence Act 2006 introduced significant changes to how matters of privilege are protected during court proceedings. The Act codified legal professional privilege as it relates to court proceedings.[422] It also removed the protection of the privilege against self-incrimination with respect to disclosure requirements in civil proceedings and replaced that privilege with an immunity which applies to the use in criminal proceedings of information directly or indirectly obtained as a consequence of the incriminating evidence.[423] It is not clear that these changes extend to proceedings before tribunals.[424] In its recent report, *Search and Surveillance Powers*, the Law Commission notes that it is desirable to maintain consistency in relation to privilege rules across different contexts unless there is a clear justification for departure.[425] It would probably be appropriate to have the same privileges apply before tribunals as apply in the courts in civil cases. However now that the Evidence Act treats criminal and civil proceedings differently for the purposes of the privilege against self-incrimination further consideration may need to be given as to whether the privilege against self-incrimination should apply before disciplinary tribunals.[426]

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417 For example legislation establishing the Trans-Tasman Occupations Tribunal, the Copyright Tribunal, the Customs Appeal Authority, and the Health Practitioners Disciplinary Tribunal include a standardised provision giving witnesses and counsel the same privileges and immunities as witnesses and counsel have in the courts. See Trans-Tasman Mutual Recognition Act 1997 s 67; Copyright Act 1994 s 219; Customs and Excise Act 1996 s 264; and Health Practitioners Competence Assurance Act 2003 sch 1 cl 11(2).

418 Commissions of Inquiry Act 1908 s 6.

419 For examples see Customs and Excise Act 1996 s 261(4); Health Practitioners Competence Assurance Act 2003 sch 1 cl 11(1).

420 Commissions of Inquiry Act 1908 s 4C(4).

421 Witnesses have this civil immunity irrespective of whether the evidence they gave was true or false, or was given in bad faith. See *Dentice v Valuers Registration Board* [1992] 1 NZLR 720, 724 (HC) Eichelbaum CJ.

422 Section 54 codifies legal advice privilege and applies to communications between a person and their legal adviser if the communication was (a) intended to be confidential; and (b) made in the course of and for the purpose of (i) the person obtaining professional legal services from the legal adviser; or (ii) the legal adviser giving such services to the person. Section 56 codifies litigation privilege and applies to protect communications or information made, received, complied, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding.

423 Section 60 sets out when the privilege against self-incrimination now applies and section 63 removes the privilege for disclosure requirements in civil proceedings and sets out the immunity that will apply.

424 It is unclear because, although a broad definition of "Judge" includes "any tribunal," "proceeding" is defined as limited to "proceedings conducted by a court" and the definition of a court does not expressly include a tribunal. See Evidence Act 2006 s 4 for definitions.

425 New Zealand Law Commission *Search and Surveillance Powers* (NZLC R97, Wellington, 2007) 354.

426 For a fuller discussion on these issues see New Zealand Law Commission *Public Inquiries – Draft Report* (NZLC IP 5, Wellington 2007) Chapter 9 (available at www.lawcom.govt.nz). In that draft report the Commission proposes applying s 61 of the Evidence Act 2006 to inquiries.

7.19 Another area where a consistent approach is needed is the issue of tribunal immunity.[427] In *Crown Liability and Judicial Immunity*, the Law Commission concludes that the immunities of public bodies should be subject to a necessity test and should only extend beyond those of the ordinary citizen to the extent necessary to allow them to perform their public function. Consideration should be given to applying this principle to tribunals to develop a consistent approach across the system of tribunals.[428]

Closed hearings and name suppression orders

7.20 Tribunals take various approaches to the issue of openness. Lack of consistency is again evident.

Open tribunals

7.21 Most tribunals function under a legislative presumption that they hear cases in public unless, having regard to the interests of the parties and the public interest, it is appropriate to hold a hearing or part of a hearing in private.[429] Some occupational tribunals are also required to consider the privacy interests of the complainant when deciding whether to hear disciplinary matters in public.[430] The presumption of openness means that as a matter of practice most tribunals hold most of their hearings in public.[431]

7.22 It is relatively rare for hearings before tribunals in this category to be held in private. For example it would only be in a situation where the safety of an applicant or another party was at risk that the Tenancy Tribunal would exclude the public or the press. Other tribunals will sometimes hear evidence of a personal nature, such as an individual's medical history, in private. Similarly evidence that could damage commercial or security interests may also sometimes be heard in private.

7.23 Many tribunals also have the power to make orders prohibiting publication of material such as evidence of the identities of parties or witnesses.[432] Tribunals with this power normally have a wide, but fettered discretion, with relevant considerations being specified in legislation. Applications for name suppression for witnesses and parties are reasonably common before some occupational tribunals. The frequency of suppression orders varies significantly between

427 Some tribunals for example have the same immunities and privileges as a District Court judge has in the exercise of his or her civil jurisdiction: see, eg, Cadastral Survey Act 2002 s 40(4).

428 New Zealand Law Commission *Crown Liability and Judicial Immunity* (NZLC R37, Wellington, 1997) 7.

429 The Customs Appeal Authority for example is required to hear cases in public unless it is of the opinion that it is proper to hold a hearing or any part of a hearing in private, having regard to the interests of any party and to the public interest: Customs and Excise Act 1996 s 257(6).

430 See, eg, Health Practitioners Competence Assurance Act 2003 s 95(2); Veterinarians Act 2005 s 49(2).

431 For example almost all hearings before the Customs Appeal Authority, the Land Valuation Tribunal, the Maritime Appeal Authority, the Medicines Review Committee, the Film and Literature Board of Review, the Tenancy Tribunal, the Human Rights Review Tribunal, the Judicial Committee of the Veterinary Council, and the Health Practitioners Disciplinary Tribunal are held in public. From responses to the Law Commission's questionnaire on tribunals, July 2007.

432 For example Customs and Excise Act 1996 s 257(7); Veterinarians Act 2005 s 49(2); Health Practitioners Competence Assurance Act 2003 s 95; Plumbers Gasfitters and Drainlayers Act 2006 s 113.

tribunals.[433] It is an offence for a person to contravene a suppression order.[434]

7.24 Rights of appeal against a suppression order are usually to the High Court.[435] When considering appeals, the Courts have emphasised that the starting point must always be the importance in a democracy of open judicial proceedings and open media. These public interests must be balanced against the private interests of those seeking prohibition orders. The courts have said there needs to be consideration of whether there are "compelling reasons" or "very special circumstances" that justify departing from the open justice principle.[436]

7.25 Tribunals that have the power to make prohibition orders or to hear some or all evidence in private have in reality a very broad range of options between the extremes of a fully public hearing and total secrecy. Such tribunals can use their powers to strike an appropriate balance between public and private interest in any particular case. There should consequently be very few cases where total secrecy is ever justified.

Closed tribunals

7.26 In contrast a few tribunals are required by law to hear all cases in private. The Disputes Tribunal and the Motor Vehicle Disputes Tribunal are both required to hear cases in private and neither tribunal has the power to open a hearing to the public.[437] Proceedings before the Mental Health Review Tribunal and the Taxation Review Authority are also required to be held in private and cannot be opened to the public.[438] Legislation requires the Social Security Appeal Authority to hold hearings in private as well, although the Authority may order that a particular hearing be held in public.[439] In a similar vein some occupational disciplinary tribunals, for example the Teachers Complaints Disciplinary Tribunal and the Cadastral Surveyors Licensing Board, are required to hear cases

433 For example applications are made to the Health Practitioners Disciplinary Tribunal for either an interim or permanent suppression order in about 60% of cases. Orders prohibiting the publication of the names and identifying details of a witness or a party are not uncommon in the Human Rights Review Tribunal. The Customs Appeal Authority prohibits the publication of parts of its decisions in some cases.

434 For example Veterinarians Act 2005 s 49(5) provides that every person commits an offence and is liable on summary conviction to a fine not exceeding $10,000 who, without lawful excuse, breaches any suppression order made by the Council.

435 For example Health Practitioners Competence Assurance Act 2003 s 99 gives a right of appeal against a prohibition order.

436 *Victim X v TVNZ Ltd* [2003] 3 NZLR 220. See also *Director of Proceedings v Nursing Council of New Zealand* [1999] 3 NZLR 360.

437 The Disputes Tribunal may permit a person who has a genuine and proper interest in proceedings to be present but the Motor Vehicle Disputes Tribunal has no powers of this kind: Disputes Tribunal Act 1988 s 39; Motor Vehicle Sales Act 2003 sch 1 cl 8(1).

438 Mental Health (Compulsory Assessment and Treatment) Act 1992 sch 1 cl 7 lists the people that may attend a review hearing; Taxation Review Authorities Act 1994 s 16 provides that hearings shall not be open to the public.

439 The Social Security Act 1964 provides that every sitting of the Authority is to be held in private although the Authority may, in any case if it considers that the interests of the parties to the appeal and of all other persons concerned will not be adversely affected, order that the sitting or any part of it shall be held in public. The Act also prohibits the publication of any part of any proceedings before the Authority unless the Authority has ordered otherwise; see Social Security Act 1964 s 12N.

in private, but may open a hearing to the public in some instances.[440]

Conclusion

7.27 A consistent approach has not been taken across tribunals on the issue of openness and we have found examples across the spectrum. We believe that a more consistent principle-driven approach on the question of openness of tribunal proceedings is needed. As a starting point we think that generally public access to tribunals and to reporting of proceedings should be permitted, unless an overriding public interest requires otherwise. We have no doubt that sometimes there will be such a public interest. The public interest is likely to justify private hearings for example in the following types of situations:

- holding the hearing in private will better serve the interests of a disadvantaged or vulnerable person, including assisting their participation in the hearing;
- the matter under determination is primarily of a personal nature and predominately involves detailed personal (including medical) information;
- a predominance of personal financial information or commercially sensitive information will be disclosed during the hearings.

Other considerations such as those relating to security or the need to protect the identity of participants may also justify a departure from a presumption of openness before tribunals.

7.28 When a principled approach is taken we think that the public interest will only justify a presumption of a closed hearing in very few tribunals.[441] When hearings are held in public justice is seen to be done. We think that perceptions are important, and this is particularly the case in the occupational disciplinary area where private hearings can engender a public suspicion of a lack of impartiality resulting from members of a profession judging their own. Transparent and open disciplinary processes counter this. We question whether it is appropriate for occupational disciplinary tribunals to operate under an assumption of a closed hearing. In its 2004 report on the Courts and Tribunals, *Delivering Justice for All*, the Commission concluded that there were no compelling reasons for the Disputes Tribunal to continue to hold hearings in private. The Commission continues to think that hearings before that tribunal should be open.[442]

Maintaining order during hearings

7.29 Legislation establishing many tribunals creates an offence of 'contempt of tribunal.' The offence, which is similar to contempt of court, can be committed by wilfully assaulting, insulting, or obstructing a member, witness or officer of

440 The Teachers Complaints Disciplinary Tribunal operates under the New Zealand Teachers Council (Conduct) Rules 2004 made by the Teachers Council. These require hearings to be held in private, although applications can be made on certain grounds to have hearings held in public. Section 38(3) of the Cadastral Survey Act 2002 provides that the hearing of a complaint "is not open to the public unless the Board directs otherwise."

441 A public interest exception is likely to be justified for the Mental Health Review Tribunal for example. All proceedings before the tribunal are currently required to be held in private due to the very personal nature of the determinations of the tribunal and the vulnerable situation of applicants. Likewise, the policy of our taxation legislation in general is that confidentiality is important in relation to taxation matters.

442 The Disputes Tribunal should have the power to close a hearing in those rare cases where either the subject matter or the circumstances of a party warrant it. See New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004) 322.

the tribunal, or by intentionally interrupting proceedings or intentionally disobeying an order or direction of a member of a tribunal in the course of any proceedings.[443] Most tribunals do not have powers to punish for the offence of contempt, and prosecutions need to be commenced by the police laying a charge either on their own instigation or in response to a complaint.[444] Irrespective of whether a person is actually charged with contempt, such provisions also give tribunal members an express power to make an order excluding any person whose behaviour may constitute contempt from a sitting of the tribunal. Where necessary the tribunal is entitled to call on the assistance of the police to remove any person from the tribunal.

7.30 Although the approach described above seems to be the norm for legislation establishing tribunals, a few tribunals have powers to commit for contempt. The Human Rights Review Tribunal and the Employment Relations Authority for example both have a power to order that a person be taken into custody and detained until after the tribunal rises where they are in contempt of the tribunal.[445] Tribunals that take powers under section 4(1) of the Commissions of Inquiry Act 1908 have the powers of a District Court exercising its civil jurisdiction to punish for contempt.[446] The District Court may commit an offender to prison for any period not exceeding three months or impose a fine not exceeding $1,000.[447]

7.31 While it is important that tribunals have powers to exclude people from hearings where they are in contempt of the tribunal it is not clear that tribunals need to have powers to actually punish for contempt. In *Public Inquiries – Draft Report*[448] the Commission considers this issue in relation to public inquiries and proposes a framework for inquiries which replaces the inquirer's contempt powers with offences, punishable by a fine of up to $10,000, directed at contemptuous behaviour. In that report the Law Commission suggests that the Solicitor-General be given to an express power to commence contempt proceedings in the High Court in instances of ongoing non-compliance with an inquiry's orders or in situations where there is very serious contempt of an inquiry.[449] We would be interested in any feedback on whether a similar type of framework might be appropriate for most tribunals.

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443 A reasonably standard provision is included in the enabling provisions for many tribunals including the Disputes Tribunal, the Tenancy Tribunal and the Health Practitioners Disciplinary Tribunal to name a few. See Disputes Tribunal Act 1988 s 56(2); Residential Tenancies Act 1986 s 112(2); Health Practitioners Competence Assurance Act 2003 sch 1 cl 13.

444 A person is liable on summary conviction to a fine. Examples of fines current range from $500 to $10,000. We think that the level of fines for such offences could sensibly be standardised.

445 The Employment Relations Authority may order that an offender be taken into custody until the rising of the Tribunal and the Human Rights Review Tribunal may order that a person be detained for a period expiring not later than one hour following the rising of the Tribunal. The Chairperson of the Human Rights Review Tribunal may also commit the offender to prison for up to 10 days or impose a fine not exceeding $1,500. See Employment Relations Act 2000 s 196 and Human Rights Act 1993 s 114.

446 Section 4(1) of the 1908 Act provides that "for the purposes of the inquiry, every such Commission shall have the powers of a District Court, in the exercise of its civil jurisdiction, in respect of … conducting and maintaining order at the inquiry."

447 District Courts Act 1947 s 112.

448 New Zealand Law Commission *Public Inquiries – Draft Report* (NZLC IP 5, Wellington 2007). This draft report on Public Inquiries has been put up on the Law Commission website www.lawcom.govt.nz for submissions by 31 January 2008.

449 See Chapter 8 of *Public Inquiries – Draft Report* pages 120 – 127 for a detailed discussion of the proposal for inquiries.

Stating a case for the opinion of the High Court

7.32 Many tribunals have the power, either by express enactment or by way of the application of the Commissions of Inquiry Act 1908, to state a case for the opinion of the High Court. This power is not widely used. The Employment Relations Authority does occasionally refer a question of law to the Employment Court for its opinion. Other tribunals use the power even less frequently.[450]

7.33 In Chapter 8: Appeals we discuss the case stated process in more detail and identify some significant problems that arise with it as a form of appeal.[451] We think that ensuring that parties have adequate rights of appeal is a more effective mechanism for addressing conflicting decisions at a lower level. In general appellate courts expect tribunals to tackle any difficult legal issues which arise in cases within their jurisdiction. Tribunals apply the law as they understand it and determine the questions before them. Although the power is rarely used, there may still be some occasions where it will be appropriate for a case to be stated for the opinion of the High Court.

Sanctions in disciplinary tribunals

7.34 Tribunals in the occupational regulation and disciplinary category have powers that allow them to impose disciplinary sanctions on their occupational groups. Disciplinary charges are laid against a member of an occupational group who is then prosecuted in the tribunal.[452] Although they are civil proceedings, the courts have observed that hearings before disciplinary tribunals have aspects that are akin to criminal proceedings.[453] This is partly because where a charge is proved sanctions can be imposed by the tribunal.

7.35 Occupational tribunals have powers which allow them to impose sanctions in the form of professional censure and financial penalties. Professional censure usually involves the suspension or de-regulation of the person or the imposition of conditions on their continued practice of their occupation.[454] Financial penalties can take the form of fines or awards of costs. Occupational tribunals normally have the power to impose fines up to a statutory maximum.[455]

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450 The Taxation Review Authority, the Human Rights Review Tribunal and the Legal Aid Review Panel use the power rarely. From the responses tribunal chairs and members provided to the Law Commission's questionnaire on tribunals, July 2007.

451 See para 8.24 page 168.

452 For example charges against a health practitioner are prosecuted before the Health Practitioners Disciplinary Tribunal by either the Director of Proceedings or by a Professional Conduct Committee: Health Practitioners Competence Assurance Act 2003 s 91(1). Charges before the Valuers Registration Board are prosecuted by a person appointed by either the Valuer-General or the Institute of Registered Valuers; see Valuers Act 1948 s 32(5). Disciplinary charges against a plumber are laid before the Plumbers Gasfitters and Drainlayers Board and prosecuted by an investigator appointed by the Board to undertake an investigation into any allegation of misconduct: Plumbers Gasfitters and Drainlayers Act 2006 s 114.

453 See, eg, *Gurusinghe v Medical Council of New Zealand* [1989] 1 NZLR 139, 155 (HC).

454 For example the Valuers Registration Board has the power to strike the name of a registered valuer from the register, suspend him or her, cancel registration, or impose conditions on registration. The Board may also impose a fine of up to $10,000. See Valuers Act 1948 ss 33 and s33A. The Judicial Committee of the Veterinary Council has similar powers. It can cancel or suspend registration, impose conditions on practice and impose a fine of up to $30,000. See Veterinarians Act 2005 s 51.

455 For example the Immigration Advisers Complaints and Disciplinary Tribunal is able to impose a penalty not exceeding $10,000. See Immigration Advisers Licensing Act 2007 s 51. The Health Practitioners Disciplinary Tribunal has the power to impose a fine of up to $30,000. See Health Practitioners Competence Assurance Act 2003 s 101(1).

7.36 Cancellation or suspension of registration is the most serious penalty such a tribunal can impose because it precludes a person from lawfully practising their occupation for a period of time. To help ensure consistency we think it is important that the imposition of penalties by disciplinary tribunals is subject to appropriate appellate supervision.

Awarding costs

7.37 A number of tribunals have the power to award costs. In the absence of express statutory authority a tribunal has no powers to award costs. Table 2, which is included at the end of this chapter, shows which tribunals do and don't have the power to award costs. There is little consistency of approach as to which tribunals have the power to award costs. A number of tribunals are in a halfway house and have some restricted powers to award costs. However these restrictions vary considerably between tribunals.

- The Disputes Tribunal, the Motor Vehicle Disputes Tribunal and the Tenancy Tribunal may only award costs where a claim is frivolous or vexatious.
- The Weathertight Homes Tribunal may only award costs where a party has caused unnecessary expense by bad faith or by taking a claim without substantial merit.
- The Social Security Appeal Authority has full power to award costs to an appellant if they are successful, but may only award costs in favour of the department if the claim was frivolous or vexatious. The Authority may also order the department to pay the Authority's costs.
- The Student Allowance Appeal Authority has no powers to award costs but may order the department to pay the Authority's costs in hearing the appeal.
- The Deportation Review Tribunal may only award costs if there are special reasons to do so.
- The Taxation Review Authority has no power to award costs between parties, but can order a party to pay the costs of hearing if it considers the party has incurred the Authority unnecessary expense.

Should tribunals be able to order costs on the same basis as the courts?

7.38 The award of costs by the courts in civil cases is discretionary, although there is a presumption that in the absence of particular reasons to the contrary, costs will follow the event and a successful party will be entitled to costs against the unsuccessful parties.[456] Where tribunals have full powers to award costs a similar approach applies.

7.39 It is argued that the potential of recovering costs may encourage people to pursue valid claims. The ability to recover costs from the other party partially indemnifies a successful party. The threat of a punitive order for costs may also deter litigants from unnecessary procedural steps which unduly lengthen, obstruct or add cost to other parties. A desire to avoid an award of costs may also encourage the parties to settle a claim. However a presumption that costs follow the event may have a chilling effect on access. Some people may be discouraged from seeking redress because of the risk that, if unsuccessful, they will be required to pay the costs of the other party.

456 *Commerce Commission v Southern Cross Medical Care Society* [2004] 1 NZLR 491, 494.

7.40 The balance between factors that favour a full discretion to award costs and concerns over access vary across tribunals. Concerns that the risk of costs may restrict access are particularly important for example for administrative review tribunals such as the Social Security Appeal Authority and State Housing Appeals Authority.

7.41 There currently seems to be a real mix of approaches taken on the power to award costs. We haven't found any consistency of approach across the tribunals in each of the first three categories of tribunal in Table 2. Differing restrictions apply even where different tribunals are exercising similar functions. A more consistent and principled approach needs to be taken across these categories. In formulating such an approach there will need to be a careful analysis of the arguments for and against in respect of the different categories of tribunal.

7.42 A consistent pattern does however emerge between occupational disciplinary tribunals. A cost recovery policy operates across most tribunals in this category. These tribunals are not fully funded by the state. The costs and expenses incurred in conducting disciplinary proceedings are normally funded by a disciplinary levy imposed on members by the occupational regulation body. Disciplinary tribunals therefore normally have full powers to award costs to allow the tribunal to recover some of the costs associated with such proceedings.

7.43 As a matter of practice some tribunals in this category do normally impose costs where a disciplinary charge has been upheld. They often fix costs as a percentage of the total cost of the hearing, reflecting the seriousness of the matter as well as other relevant factors.[457] Costs that are not recovered by an award are borne by other members of the occupational group via disciplinary levies.

THE COMMISSIONS OF INQUIRY ACT 1908

7.44 The legislation establishing a number of tribunals deems them to be commissions of inquiry under the Commissions of Inquiry Act 1908 and provides that some of that Act's provisions apply to them. This legislative practice developed early in the history of New Zealand tribunals as a convenient way of applying a menu of powers to tribunals. A list of existing tribunals that are subject to the Commissions of Inquiry Act is included as Table 3 at the end of this Chapter.

7.45 Although historically it seems that many tribunals were deemed to be commissions of inquiry, more recent practice is much less consistent. We have been unable to determine why this practice has continued in a relatively haphazard way over more recent years with a few tribunals still being established with the same powers as are conferred on a commission of inquiry when most recent tribunals are established with stand alone powers.[458]

7.46 We question the value of continuing this practice because of the divergence between the powers that Act provides and those a tribunal actually requires to undertake its function. As is evident from Table 3, the practice has been to

457 For example the Health Practitioners Disciplinary Tribunal would set costs at approximately 50% of the total reasonable costs in a case of serious misconduct. P D G Skegg and Ron Paterson (eds) *Medical Law in New Zealand* (Brookers, Wellington, 2006) 673. Awards by the Plumbers Gasfitters and Drainlayers Board are usually around 35% of actual costs. From responses to the Law Commission's questionnaire on tribunals, July 2007.

458 The Veterinary Council and the Plumbers Gasfitters and Drainlayers Board are two tribunals that were recently established with the same powers as are conferred on a commission of inquiry: Veterinarians Act 2005; Plumbers Gasfitters and Drainlayers Act 2006.

pick and choose from the menu of provisions in that Act. Sections 11 and 12 of the Act are for example often excluded. It is also common for legislation establishing a tribunal to supplement or modify the powers taken from that Act as well. This results in something of a hybrid, so we can see no advantage in selecting some powers from the Commissions of Inquiry Act.

7.47 The Law Commission is currently undertaking a review of the law as it relates to public inquiries, including inquiries established under the Commissions of Inquiry Act 1908. The Commission has just released *Public Inquiries – Draft Report*.[459] This draft report puts forward proposals for a new Public Inquiries Act. It is therefore quite timely to consider severing the link between tribunals and the Commissions of Inquiry 1908 Act. We think that such incorporation of powers by reference is undesirable in any event. It renders the law less accessible to the public, and can cause difficulty where the analogy between a tribunal and a commission of inquiry is not exact.

CONCLUSION

7.48 We have identified the core powers that various tribunals currently have. Many tribunals currently have, and most tribunals probably need, the following core powers:

- powers to summons witnesses and take evidence;
- powers to inspect documents and require parties and witnesses to produce information and documents;
- powers to close hearings and make orders suppressing the publication of material where the public interest requires a departure from the principle of openness; and
- powers to exclude people when they are abusive or disruptive and generally to maintain order during proceedings.

Some tribunals that need the powers outlined above and in the next paragraph, do not currently have them. We think a more consistent approach needs be taken on the issue of powers across all tribunals.

7.49 Some tribunals currently have, and some need, certain additional powers:

- more extensive powers around the disclosure of information (for example the power to make orders requiring that information produced be disclosed to participants subject to any relevant privileges or confidentiality and natural justice requirements);
- in the case of occupational disciplinary tribunals which require powers that other tribunals generally don't, the power to impose sanctions (for example the power to impose awards of costs and fines and to impose registration sanctions); and
- some powers to award costs.

7.50 There are currently a range of responses to the question of whether tribunals, other than those in the occupational disciplinary category, should have powers to award costs. A mix of approaches has been taken across different tribunals. Also where tribunals have the power to award costs differing criteria and restrictions apply. This seems to be the case even where tribunals are exercising

459 New Zealand Law Commission *Public Inquiries – Draft Report* (NZLC IP 5, Wellington 2007). This draft report on Public Inquiries has been put up on the Law Commission website www.lawcom.govt.nz for submissions by 31 January 2008.

very similar functions. Again we think a more consistent and principled approach needs to be taken on this issue. What types of tribunals should be able to award costs?

7.51 The power to state a case for the opinion of the High Court is rarely used by those tribunals that have it. We think that the power is probably unnecessary, and given the difficulties identified with its use, we are inclined to think it can be dispensed with.

7.52 The practice of providing tribunals with a menu of powers by reference to the Commissions of Inquiry Act 1908 is another practice that should be dispensed with. This would also seem an appropriate time to consider severing the links existing tribunals have with that Act, and providing a statutory framework specifically for tribunals.

TABLE 2: POWERS TO AWARD COSTS

Administrative review tribunals		
No power to award costs	**Some limited powers to award**	**Fuller powers to make awards**
Legal Aid Review Panel	Deportation Review Tribunal	Customs Appeal Authorities
Medicines Review Committee	Social Sec Appeal Authority	Health Act Boards of Appeal*
[Fisheries] Catch History Review Committee	Student Allowance Appeal Authority	Land Valuation Tribunals*
[War Pensions] District Claim Panels	Taxation Review Authority	Maritime Appeal Authority*
[War Pensions] National Review Officers		War Pensions Appeal Boards*
Film and Literature Board of Review		
Residence Review Board		
Removal Review Authority		
Refugee Status Appeals Authority		* These tribunals have the power to award costs by virtue of application of section 11 of the Commissions of Inquiry Act 1908.
State Housing Appeals Authority		
Disputes between people		
No power to award costs	**Some limited powers to award**	**Fuller powers to make awards**
Racing Judicial Committees	Motor Vehicle Disputes Tribunals	Human Rights Review Tribunal
	Weathertight Homes Tribunals	Retirement Villages Disputes Panels
	Tenancy Tribunal	Copyright Tribunal
	Disputes Tribunal	Employment Relations Authority
		Racing Appeals Tribunals
Miscellaneous tribunals		
No power to award costs	**Some limited powers to award**	**Fuller powers to make awards**
Mental Health Review Tribunal		Patents, TradeMarks and Design Commissioner
		Liquor Licensing Authority – has the power to award costs by virtue of application of section 11 of the Commissions of Inquiry Act 1908.

TABLE 2: POWERS TO AWARD COSTS continued...

Occupational licensing, registration and discipline

No power to award costs	Some limited powers to award	Fuller powers to make awards
Engineering Associates Registration Board		Building Practitioners Board
Electrical Workers Registration Board		Cadastral Surveyors Licensing Board
Registrar of Motor Vehicle Traders		Chartered Professional Engineers Council
Music Teachers Registration Board		Engineering Associates Appeal Tribunal*
Police Disciplinary Tribunal		Health Practitioners Disciplinary Tribunal
		District Law Practitioners Disciplinary Tribunal
		New Zealand Law Practitioners Disciplinary Tribunal
		New Zealand Lawyers and Conveyancers Disciplinary Tribunal
		The Licensing Authority of Secondhand Dealers and Pawnbrokers*
		Plumbers, Gasfitters and Drainlayers Board
		Registrar of Private Investigators & Security Guards*
		Real Estate Agents Licensing Board
		[Real Estate Agents] Regional Disciplinary Committees
		Registered Architects Board
		Social Workers Complaints and Disciplinary Tribunal
		Trans-Tasman Occupations Tribunal
		[Teachers] Complaints Disciplinary Tribunals
		Valuers Registration Board
		Valuers Registration Board of Appeal
		Veterinary Council of New Zealand including Judicial Committees

* These tribunals have the power to award costs by virtue of application of section 11 of the Commissions of Inquiry Act 1908.

TABLE 3: TRIBUNALS SUBJECT TO THE COMMISSIONS OF INQUIRY ACT
Cadastral Surveyors Licensing Board *(ss 4, 4B, 4D, 5, 6, 7, 8)*
Deportation Review Tribunal *(all provisions except ss 11 & 12)*
Electrical Workers Registration Board *(ss 4, 4B to 9)*
Engineering Associates Appeal Tribunal *(all provisions)*
Health Act Boards of Appeal *(all powers)*
Land Valuation Tribunals *(all powers)*
Licensing Authority of Secondhand Dealers and Pawnbrokers *(ss 4 – 12)*
Liquor Licensing Authority *(all provisions)*
Maritime Appeal Authority *(all provisions except 2 & 4A)*
Mental Health Review Tribunal *(all provisions except ss 11 & 12)*
Plumbers, Gasfitters and Drainlayers Board *(ss 4,4B – 9)*
Police Disciplinary Tribunal *(all provisions except ss 11 & 12)*
Registrar of Private Investigators and Security Guards *(ss 4, 5, 6, 7, 9, 10, 11, 12, 14)*
Refugee Status Appeals Authority *(all provisions except ss 11 & 12)*
Social Security Appeal Authority *(all provisions except ss 2, 10, 11, 12)*
Taxation Review Authority *(all provisions except ss 11 & 12)*
Veterinary Council of New Zealand *(all provisions except ss 11 & 12)*
War Pensions Appeal Boards *(all provisions)*

Chapter 8
Appeals

INTRODUCTION

8.1 Where legislation authorises decisions that affect rights, interests or legitimate expectations, there generally ought to be an opportunity for challenge by way of appeal or review.[460] Appropriate avenues of challenge from decisions of tribunals therefore need to be considered. Rights of appeal from tribunals do not exist unless they are created by statute. Their scope and nature is also similarly determined by statute.[461] Where there is no appeal right, judicial review is available by way of the High Court's inherent supervisory jurisdiction. Judicial review continues to exist alongside any appeal right in any case, unless expressly excluded by statute.

8.2 Appeals serve to correct error and to supervise and improve the decisions of tribunals and other decision-makers. Appeals therefore serve both a private and public purpose. The private purpose is to scrutinise and correct specific decisions of first instance decision-makers.[462] Correcting specific decisions ensures that justice is done between the parties. Scrutiny by an appellate body also imposes a discipline on tribunals to produce high quality well-reasoned evidence-based decisions. The public purpose of appeals is to maintain a high standard of public administration and public confidence in the legal system.[463] The reconsideration of previous decisions clarifies and develops the law and establishes precedents that others can use in future cases.[464] The supervision of the higher appellate body improves the decisions of tribunals and increases public confidence in the decision-making process. It also ensures consistency in the administration of justice by making sure outcomes in similar cases are consistent.[465]

8.3 While judicial review will also usually be available, it is not generally considered as effective or desirable as a right of appeal because of its restricted nature. Appellate bodies generally sit in the place of the original decision-maker, make

460 Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2003 Supplement to the 2001 Edition* (Wellington, 2003) 126.

461 *Shotover Gorge Jet Boats v Jamieson* [1987] 1 NZLR 437, 441 (CA) Cooke P.

462 Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2003 Supplement to the 2001 Edition* (Wellington, 2003) 127.

463 Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2003 Supplement to the 2001 Edition* (Wellington, 2003) 127.

464 New Zealand Law Commission *Seeking Solutions: Options for Change to the New Zealand Court System* (NZLC PP52, Wellington, 2002) 207.

465 New Zealand Law Commission *Seeking Solutions: Options for Change to the New Zealand Court System* (NZLC PP52, Wellington, 2002) 207.

their own findings of fact and law and re-evaluate the merits of the first decision. In judicial review proceedings the court's role is to supervise the process by which the original decision was made and determine whether it was made in accordance with the law.[466] Rights of appeal are also likely to be cheaper and speedier to exercise.

8.4 Although it is generally desirable to provide a right of appeal, rights of appeal are at odds with the principle of finality. A sequence of appeals can cause objectionable delay and frustration to the parties and may ultimately be counterproductive.[467] The decision to include a right of appeal and the scope and nature of such a right needs to therefore be balanced against the cost, delay and significance of the matter at issue. [468] Adding cost and delay to the process of obtaining a final authoritative decision will be justified where the importance of the matters under decision warrants this. Where there is a need for an immediate final decision and the matters in issue are relatively less important, full rights of appeal may not be justified. For example appeal rights from the Disputes Tribunal are circumscribed for these reasons. The rationale is that speed and certainty are especially important in this tribunal and a broader set of appeal rights would be likely to introduce further cost, delays and legal technicalities.[469] Restrictions are similarly imposed on appeal rights from the Taxation Review Authority where a case involves a lower value claim, so is arguably less important.[470]

8.5 The fact that an original decision-making body has specialist expertise or a role in making decisions consistently throughout New Zealand might also be a reason for either not providing a right of appeal or restricting a right of appeal to a question of law. Rights of appeal from some tribunals, such as the Copyright Tribunal and the Legal Aid Review Panel, appear to be limited to appeals on questions of law for this reason.

8.6 The Legislation Advisory Committee says that it is normally appropriate to respond to concerns over cost, delay and finality by limiting rights of appeal rather than excluding them altogether.[471] Rights of appeal can be limited by imposing restrictions on the scope of appeals, imposing time limits for bringing appeals and by restricting the powers of the appellate body. A common restriction is to limit rights of appeal to substantive decisions and final orders. Appeals from the Disputes Tribunal are for example not permitted on interlocutory matters on the basis that broader appeal rights would increase delay, the likelihood of legal argument, and overall costs to the parties and the system.[472]

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466 Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2003 Supplement to the 2001 Edition* (Wellington, 2003) 125.

467 Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2003 Supplement to the 2001 Edition* (Wellington, 2003) 128.

468 Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2003 Supplement to the 2001 Edition* (Wellington, 2003) 128.

469 Peter Spiller *The Disputes Tribunals of New Zealand* (2nd ed, Brookers, Wellington, 2003) 121.

470 Appeals to the High Court are restricted to questions of law where the case involves tax of less than $2,000 or a loss of less than $4,000, whereas a general right of appeal is provided for claims over this value: Taxation Review Authorities Act 1994 s 26(1).

471 Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2003 Supplement to the 2001 Edition* (Wellington, 2003) 127.

472 Peter Spiller *The Disputes Tribunals of New Zealand* (2nd ed, Brookers, Wellington, 2003) 121.

WHAT RIGHTS OF APPEAL ARE AVAILABLE?

8.7 We reviewed the existing appeal rights for 62 tribunals. Appendix 1 categorises and describes existing appeal rights from all of these tribunals. While, for the reasons we have just outlined, it would be wrong to assume that appeal rights should be the same for all classes of tribunal, we believe that the inconsistencies apparent in this table are greater than can be justified.

No rights of appeal or limited rights of appeal

8.8 In 22 tribunals there are either no rights of appeal or limited rights of appeal. Table 4 at the end of this chapter contains a list of these tribunals. There are no rights of appeal at all from the decisions of 10 of the tribunals we reviewed. Appeals are limited to appeals on a question of law only for nine tribunals, and appeals are limited in other ways, as noted in Table 4, from three tribunals. A general or unrestricted right of appeal is currently available from the other 40 tribunals we examined.[473]

No rights of appeal

8.9 The absence of a right of appeal might be justified for some of the tribunals in Table 4 because a number of these tribunals are appellate tribunals. There may still however be grounds for providing a second or subsequent right of appeal on a question of law from the decisions of appellate bodies that hear first appeals. The issue of subsequent appeals is discussed later in this chapter. Racing Appeals Tribunals, the Engineering Associates Appeal Tribunal, and the Valuers Registration Board of Appeal for example all appear to be appellate tribunals because they all hear appeals from other tribunals.[474] It needs to be noted at this point that not all tribunals that are called appeal tribunals are actually appellate tribunals. A number of other tribunals, for example the Student Allowance Appeal Authority and the Refugee Status Appeals Authority, are called appeal tribunals although they are in reality the first tribunal to consider a matter. Such bodies have the word appeal in their names only because they hear appeals from the decisions of government agencies and other first instance decision-makers. It is important not to confuse tribunals that are called appeal tribunals with tribunals that are actually appellate tribunals.

8.10 A special case may also justify providing no right of appeal from a tribunal like the Police Disciplinary Tribunal because it makes recommendations rather than decisions. It would be unusual to provide a right of appeal from a recommendation.

8.11 It is less obvious why there are currently no rights of appeal from the decisions of six administrative review tribunals. Despite many being called appeal tribunals,

473 Where legislation does not expressly limit the appeal to one on a question of law the Courts have taken the view that the appeal is a general appeal by way of rehearing. *Ratima v Parole Board* (5 February 2004) HC CHCH CRI-2003-409-111, paras 14-15, Panckhurst J.

474 The Racing Appeals Tribunal hears appeals from Racing Judicial Committees, the Engineering Associates Appeal Tribunal hears appeals from the Engineering Associates Registration Board, and the Valuers Registration Board of Appeal hears appeals from the Valuers Registration Board.

all of them, except possibly the War Pensions Appeal Board,[475] hear appeals from determinations by officials. These administrative review tribunals provide the first truly independent review of the matters they consider. We think there should normally therefore be an opportunity for appeal from their decisions. We note that rights of appeal are currently available from the other 14 administrative review tribunals in our study.[476]

Limited rights of appeal: general

8.12 There is not currently a consistent approach on appeal rights between administrative review tribunals. Appeals from many administrative review tribunals, for example the Social Security Appeal Authority and the Removal Review Authority, are currently restricted to appeals on questions of law only, although appeals from a few, such as the Customs Appeal Authority, the Land Valuation Tribunal and the State Housing Appeals Authority, are not restricted and are a general appeal on both law and fact. We favour a consistent approach being taken to appeal rights across all administrative review tribunals.

Questions of law

8.13 Considerations such as costs, delays, and the principle of finality may, as already noted, justify imposing limits on the scope of appeals from tribunal decisions. Table 4 lists the tribunals from which a right of appeal is limited to an appeal on a question of law only.[477] Most of these are the administrative review tribunals which have been discussed above. The other two are the Liquor Licensing Authority,[478] which is in the miscellaneous category, and the Copyright Tribunal, which is in the disputes between people category. All appeals that are restricted to questions of law are appeals to the High Court. We are not aware of any appellate panels or tribunals that are constituted to hear appeals on questions of law only.

8.14 A cautious approach should be taken when considering limiting appeals to questions of law. It is sometimes very difficult to distinguish between questions

475 However because District Claim Panels and National Review Officers are not independent from the executive, the determination of an appeal by the War Pensions Appeal Board is the first fully independent review of the decision. National Review Officers are employed by the Defence Forces and District Claim Panels have two members who are employees of the Defence Forces. Both exercise the delegated powers of the Secretary for War Pensions when making a determination. The War Pensions Appeal Board may itself be an appellate tribunal because it hears appeals from the District Claim Panels and National Review Officers.

476 The number here would be reduced to 11 if the District Benefit Review Committees, War Pensions National Officers and War Pensions District Claims Panels were not included.

477 The Taxation Review Authority has been included in the list because appeals on claims under a set monetary limit are restricted to questions of law. Similarly the Liquor Licensing Authority has been included because appeals, other than those on the ground of the suitability of an applicant to hold a managers licence, are restricted to questions of law. The Trans-Tasman Occupations Tribunal has not been included because there is a general right of appeal on unsuccessful applications, although some other appeals are restricted to questions of law. The Motor Vehicle Disputes Tribunal is also included although it does allow a general appeal for disputes over the value of $12,500.

478 The Liquor Licensing Authority has what can be described as a dual jurisdiction. Appeals are confined to questions of law when the Authority sits as an appeal tribunal, hearing appeals from the decisions of District Licensing Agencies. The Authority also has a first instance jurisdiction and determines applications for licences and manager certificates. There is a general right of appeal to the High Court from some of the Authority's first instance determinations.

of law and fact.[479] Nevertheless, the courts have tried to draw a distinction between the two. In *CIR v Frethey* McCarthy J, whilst noting that "the distinction between questions of fact and questions of law is often difficult to perceive," observed that whether any inference in support of a particular conclusion can be drawn, in other words whether there is any evidence at all to support it, is a question of law.[480] Similarly, in *Commissioner of Taxes v McFarlane*, F B Adams J added that a question of law is simply a question with regard to which a general rule can be enunciated, and which the Court is prepared so to treat. F B Adams J described this as "the truth of the matter," rather than as a strict definition.[481]

8.15 Alongside the difficulty in defining the concepts, concerns have also arisen about the effect of limiting an appeal to a question of law, because the appellate body cannot overturn the decision at first instance in the event of factual error. Yet often what an appellant desires is to correct factual errors that may have been made by first instance decision-makers.[482] Limiting the scope of appeal may consequently leave an individual with no right of redress where factual errors have been made. It can also lead to appellants struggling to "dress up" what is essentially a factual issue as one of law. The Legislation Advisory Committee suggests that in such cases rights of appeal should not be limited to questions of law.[483] In its earlier report *Delivering Justice for All* the Law Commission also expressed strong reservations about the view that appeal rights should be limited to matters of law.[484] The Commission maintains those reservations. We think that the adoption of a standard rule that appeals should be on matters of law only would be problematic for the reasons outlined. It would also mean a dramatic change in the case of many tribunals.

General appeal on fact and law

8.16 A general right of appeal on both law and fact is currently the norm for most tribunals. A general or unrestricted right of appeal is available from two-thirds of the tribunals we reviewed. Where legislation does not expressly limit the appeal to one on a question of law the courts have taken the view that the appeal is a general appeal by way of rehearing.[485] The decisions of almost all occupational registration and disciplinary tribunals are currently subject to a general right of appeal.[486] Disciplinary tribunals such as the Health Practitioners Disciplinary Tribunal hear highly contested evidence, and make decisions that can have a profound impact on a practitioner's career and reputation. We think that a general right of appeal on both law and fact, as currently exists, is appropriate for such matters and reflects the importance of the rights at stake.

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479 *CIR v Walker* [1963] NZLR 339, 353 (CA) Gresson P.

480 *CIR v Frethey* [1961] NZLR 245, 249 – 250 McCarthy J.

481 *Commissioner of Taxes v McFarlane* [1952] NZLR 349, 380 F B Adams J.

482 Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2003 Supplement to the 2001 Edition* (Wellington, 2003) 133.

483 Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2003 Supplement to the 2001 Edition* (Wellington, 2003) 134.

484 New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004) 297.

485 *Ratima v Parole Board* (5 February 2004) HC CHCH CRI-2003-409-111, paras 14-15, Panckhurst J.

486 As noted no right of appeal exists from the Engineering Associates Appeal Tribunal, Valuers Registration Board of Appeal or the Police Disciplinary Tribunal.

8.17 The same is true for many other tribunals. It is probably therefore appropriate to start from an assumption that a first right of appeal should be a general appeal, on both fact and law, and should be available as of right. Each situation which departs from this position should then be justified on the basis of the specific circumstances surrounding the tribunal in question.

Appellate procedures

8.18 This section considers the procedures used by appellate bodies when hearing appeals from tribunals. By far the most common procedure for an appeal is by way of re-hearing. Appeals from a few tribunals are by way of the case-stated procedure and appeals from a few others are by way of a hearing *de novo*.

Appeal by way of rehearing

8.19 On a re-hearing the appeal is heard on the record of evidence given in the tribunal below, subject to discretionary power to rehear the whole or any part of the evidence or even to receive further evidence.[487] The appellate body is not limited by any findings which the tribunal made and may draw different inferences from the evidence where these are warranted;[488] however the appellate body must acknowledge the advantage which the tribunal had in seeing and hearing witnesses.[489] It is customary for the courts to exercise restraint in interfering with discretionary decisions of a tribunal that has seen and heard witnesses.[490] There is a presumption that the decision of the tribunal is correct and ordinarily the appellate body will only differ from factual findings if the conclusion reached was not open to the tribunal on the evidence (i.e. there was no evidence to support it) or the tribunal is plainly wrong.[491]

8.20 The Legislation Advisory Committee says that an appeal should usually be by way of re-hearing because in most situations this procedure strikes the appropriate balance between the flexibility to correct apparent and glaring factual errors and the need for appeals to be expeditiously resolved. An appeal should focus on specific alleged errors and there is generally no need to provide an opportunity to re-litigate the whole matter.[492] We found that this is by far the most common form of appeal from tribunal decision.

8.21 An appeal by way of re-hearing brings into focus the importance of having an accurate record of the evidence given in the tribunal available. In 2004 the Commission recommended that all proceedings in the Disputes Tribunal should be recorded so that a transcript is available if an appeal is sought.[493] We think that the same considerations apply to other tribunals and believe that consideration must be given to accurately recording proceedings before all

487 *Shotover Gorge Jet Boats v Jamieson* [1987] 1 NZLR 437, 440 (CA) Cooke P.

488 *Billy Higgs & Sons v Baddeley* [1950] NZLR 605.

489 *Shotover Gorge Jet Boats v Jamieson* [1987] 1 NZLR 437, 441 (CA) Cooke P.

490 *Shotover Gorge Jet Boats v Jamieson* [1987] 1 NZLR 437, 441 (CA) Cooke P.

491 *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190, 197.

492 Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2003 Supplement to the 2001 Edition* (Wellington, 2003) 135.

493 New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004) 160.

tribunals. As was noted in 2004, the recording of informal proceedings can also have the added benefit of having a salutary effect on behaviour in tribunals.[494]

Hearing de novo

8.22 When an appeal is heard *de novo* the appellate body approaches the case afresh. There is effectively an entirely new hearing and no presumption that the decision appealed from is correct.[495] In the Guidelines the Legislation Advisory Committee say that a *de novo* hearing will only be appropriate where there is reason not to presume the tribunal can ascertain the facts.[496] Unsurprisingly, given the specialist expertise of tribunals, we found that *de novo* appeals are very uncommon in respect of tribunal decisions.[497] The added costs and delays count against a *de novo* hearing also.

8.23 Whether an appeal is *de novo* or by way of a rehearing may depend on the appropriate interpretation of the provisions in the legislation. An appeal may be by way of a *de novo* hearing even where this is not expressly stated. This is the case where the right of appeal is expressed in terms that indicate that it is unrestricted.[498] We had difficulty in some cases assessing whether the legislation provided for an appeal by way of rehearing or a hearing *de novo*. This difficulty highlights the importance of having clear appeal provisions for each tribunal. Legislation should clearly and expressly state the applicable scope and nature of rights of appeal.

Appeal by way of case stated

8.24 Appeals from the decisions of a very few tribunals are by way of case stated to the High Court.[499] The classic definition of an appeal by way of case stated was set out by Lord Widgery CJ in *Harris, Simon & Co Ltd v Manchester City Council,* who explained that it is:[500]

> not a right of appeal by way of rehearing…It is a form of consultation with [a] court to obtain an answer on a point of law, and there is clearly no jurisdiction for [the appellate court] to concern [itself] with the merits…unless it can be said that the decision of the court below is wrong in law or in excess of jurisdiction.

8.25 The case stated procedure has been subject to criticism on the grounds that it wastes time and weakens the value of the appellant's right of appeal, because the

494 New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004) 160.

495 *Shotover Gorge Jet Boats v Jamieson* [1987] 1 NZLR 437, 437 (CA) Cooke P.

496 Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2003 Supplement to the 2001 Edition (*Wellington, 2003) 137.

497 Two examples are decisions of the Mental Health Review Tribunals and the Employment Relations Authority.

498 *Shotover Gorge Jet Boats v Jamieson* [1987] 1 NZLR 437, 440 (CA) Cooke P.

499 The case stated procedure is used for appeals to the High Court from the Social Security Appeal Authority, the Taxation Review Authority and the Customs Appeal Authority.

500 *Harris, Simon & Co Ltd v Manchester City Council* [1975] 1 All ER 412, 417 Lord Widgery CJ.

tribunal controls the formulation of the question.[501] The Legislation Advisory Committee describes the case stated procedure as "cumbersome."[502] The *Sixteenth Report of the Public and Administrative Law Reform Committee*, presented to the Minister of Justice in March 1982, made substantial criticisms of the procedure.[503] The latter Committee proposed that the procedure be replaced with a simple formula providing a right of appeal to the High Court on questions of law, which is what the Legislation Advisory Committee favours as well. We think the criticisms above are still valid. We agree with the Legislation Advisory Committee that it would be preferable to abolish appeals by way of case stated.

Appeal structure – are appeals to an appellate tribunal or to the courts?

8.26 Appeals from tribunals can either be to a specialist appellate tribunal or to the ordinary courts. Currently appeals from only nine of the 62 tribunals examined are to a specialist appellate tribunal.[504] In addition appeals from the Employment Relations Authority are heard by the specialist Employment Court. The vast majority of appeals are currently to the ordinary courts. Appeals from 42 tribunals are to the ordinary courts. The split between appeals to the High Court or the District Court is even, with appeals from 20 tribunals being heard exclusively by each court. Appeals from two tribunals, the Weathertight Homes Tribunal and the Retirement Villages Disputes Panels, are heard by either the High Court or the District Court depending on the value of the claim. When hearing appeals from Land Valuation Tribunals and the Human Rights Review Tribunal the High Court sits with two additional specialist members.

8.27 A specialist appellate tribunal may be best placed to determine appeals in a narrow focused field where there is a need for technical expertise. Where functions have been conferred on specialist first instance tribunals because of the need for expertise, experience or consistency of application of policy, the same argument applies to appeals from that tribunal. Specialist appellate tribunals are also more likely to deal with matters with less delay than the courts because of the workloads of the general courts. In its 2004 report *Delivering Justice for All* the Commission recommended that the first appeal for tribunals within a unified framework be to an appellate panel established as part of that framework, but that the second discretionary appeal on a matter of law should be to the general courts.[505] This option would only be viable, however, if there was sufficient work to warrant a purpose-built tribunal, or if tribunals were clustered or unified into a framework that incorporated an appellate panel that had access to relevant specialists.

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501 See New Zealand Public and Administrative Law Reform Committee *Sixteenth Report of the Public and Administrative Law Reform Committee: Appeals on Question of Law from Administrative Tribunals* (PALRC R16, Wellington, 1982).

502 Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2003 Supplement to the 2001 Edition* (Wellington, 2003) 137.

503 New Zealand Public and Administrative Law Reform Committee *Sixteenth Report of the Public and Administrative Law Reform Committee: Appeals on Question of Law from Administrative Tribunals* (PALRC R16, Wellington, 1982) 10.

504 The specialist appellate tribunals are the Social Security Appeal Authority, War Pensions Appeal Board, Racing Appeals Tribunal, Chartered Professional Engineering Council, Engineering Associates Appeal Tribunal, NZ Law Practitioners Disciplinary Tribunal, Real Estate Agents Licensing Board, Valuers Registration Board of Appeal and War Pensions National Review Officers. Even in this list it may be debated whether some of these bodies truly hear appeals from tribunals: some of them hear appeals from decision-makers which are more in the nature of an internal review.

505 New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004) 298.

8.28 Where appeals are confined to questions of law or to matters of procedural fairness they are readily determined by the general courts which have expertise in the law and follow rigorous procedures. They are in most cases also well able to deal with appeals involving mixed questions of law and fact. Other issues that may be the subject of an appeal from a tribunal will also come within the ambit of the general work of courts.

8.29 An appellate court which has not seen and heard the witnesses is slower to overturn a discretionary decision of a court that has had that advantage; stress is laid on the need to show that the decision under appeal was wrong.[506] Appeal courts show due deference to the experience and expertise of specialist courts and tribunals on questions of fact and policy.[507] The inclusion of additional specialist panel members when sitting on appeals from tribunals is another way of ensuring the general courts can appropriately address appeals from specialist tribunals.

Appeal pathway – allowing for subsequent appeals

8.30 A second and sometimes a subsequent right of appeal, either as of right in a few cases,[508] or more normally with the leave of the court,[509] is currently permitted under most statutes establishing tribunals. However in the case of a few tribunals in the occupational regulation and discipline category legislation provides that the District Court's decision on appeal is final and further appeals are excluded.[510] A consistent approach has again not been taken because legislation establishing other similar occupational regulation and disciplinary tribunals allows for second and subsequent rights of appeal.[511] It is not clear why the decisions of some of these occupational tribunals cannot be appealed beyond the District Court, when the decisions of other very similar ones can be. We think a more consistent approach should be taken.

8.31 In *Delivering Justice for All* the Commission recommended a two tier appeal structure from tribunals. It proposed that there should be a first appeal as of right, either on matters of fact and/or law, according to the particular tribunal, and a further appeal, with leave, on a matter of law only.[512]

8.32 While we acknowledge that the matter is not uncontroversial, and are conscious

506 New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004) 112.

507 New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004) 112.

508 Leave does not seem to be required for subsequent appeals to the Court of Appeal from decisions of the High Court on appeals from the Film and Literature Board of Review. Films, Videos and Publications Classifications Act 1993 s 70.

509 For example a party may appeal with leave to the Court of Appeal against a decision of the High Court on an appeal from the Social Security Appeal Authority or the Residence Review Board, or the Removal Review Authority.

510 There is one right of appeal to the District Court, which makes a final decision, on appeals from the Cadastral Surveyors Licensing Board, the Licensing Authority of Secondhand Dealers and Pawnbrokers, the Registrar of Motor Vehicle Traders, the Music Teachers Registration Board and the Registrar of Private Investigators & Security Guards.

511 Decisions of the Electrical Workers Registration Board, the Building Practitioners Board, the Chartered Professional Engineers Council and the Registered Architects Board can for example be appealed to the District Court as of right and then there is a second appeal with leave to the High Court.

512 New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004) 298.

of the workload of our courts, and issues of proportionality, we still think that the principle of allowing two opportunities of appeal is appropriate for most tribunals. While different types of tribunal decisions and processes may require different appeal rights, we believe that two appeals should be the guiding principle, and appeal rights should be rationalised to remove the ad hoc anomalies that currently exist between similar tribunals. We think that there should be a first appeal as of right, normally by way of a general appeal on matters of fact and law, and a further appeal, with leave, on a matter of law only. However as we have noted one should not too readily assume that 'one size fits all,' and there may be instances when it may be more appropriate to restrict the first tier of appeal to a question of law only.

Time limits on exercising rights of appeal

8.33 Statutes conferring rights of appeal set different time frames for filing an appeal. The time frames that are currently imposed for filing an appeal against a tribunal decision vary from ten working days to six months.[513] Appendix 1 shows the full range of time limits that are currently imposed for filing appeals. The most common time periods allowed are "28 days,"[514] "20 working days,"[515] and "one month."[516] As well as differences in the period of time for filing appeals, differences exist as to how the period is expressed and calculated. For example some time limits are expressed in days and others in working days.

8.34 We see no rational reason for retaining the current degree of variation, which has occurred because of the piecemeal way tribunals are established. Needless variation in the time limits for lodging appeals causes confusion for tribunal users and lawyers. It can result in deadlines being missed. Lawyers or users filing appeals must carefully check the specific provisions for each tribunal and then calculate the time period to ensure an appeal is filed within the timeframe. We favour standardising time frames for filing appeals. The most appropriate time period might be 20 working days, which is consistent with the current timeframes for over 30 existing tribunals.[517]

8.35 Statutes normally, but not always, confer a discretion on appellate bodies to extend the time limit for filing an appeal. An extension of time is an indulgence within the discretion of the Court.[518] An appellate body may however only

513 Appellants are given 10 working days from the date of notice of the decision of the Motor Vehicle Disputes Tribunal to lodge an appeal with the District Court. Appellants are given 6 months from the date of notification of a decision of the War Pensions National Review Officer to lodge an appeal with the War Pensions Appeal Board.

514 Appeals from the Employment Relations Authority must be filed within 28 days of the date of determination.

515 Appeals from the Retirement Villages Disputes Panels must be filed within 20 working days of a Panel's decision.

516 Appeals from decisions of the Mental Health Review Tribunal must be filed within one month of the Tribunal's decision.

517 Our review found that 33 existing tribunals have a time period of either 28 days or 20 working days for filing an appeal. There may be some exceptional circumstances that call for a longer time frame, although we think that these are probably best addressed by conferring a discretion on the appellate body as suggested in the next paragraph.

518 RA McGechan (ed) McGechan on Procedure (Looseleaf, Brookers, Wellington, 1988) HR 704.02 (last updated 10 October 2007).

extend the time for appeal where the statute permits an extension to be granted.[519] A number of statutes do not give an appellate court the discretion to allow further time for an appeal. The time limits for filing an appeal from a decision of the Human Rights Review Tribunal, the Motor Vehicle Disputes Tribunal, the Tenancy Tribunal and the Retirement Villages Disputes Panel are absolute for example, and the courts have no discretion to extend them. This can lead to disastrous consequences if, due to confusion over time limits, an appellant misses the deadline.

8.36 At present it seems to be something of a lottery as to what time limits apply and whether they are absolute or whether the appellate body has the discretion to extend them. We think that a consistent approach should be taken across tribunals and appellate bodies should always have the discretion to extend the time for filing an appeal.

Powers of appellate bodies

8.37 A consistent approach has not been taken to the granting of powers to appellate bodies. The legislation establishing different tribunals gives appellate bodies different powers when hearing and determining appeals. Different provisions are included in different Acts, and the powers of appellate bodies are expressed in different terms in different Acts. When hearing an appeal from the Tenancy Tribunal the District Court has the power, for example, to quash any order of the tribunal and substitute for it any other order that the tribunal could have made.[520] When hearing an appeal from the Weathertight Homes Tribunal the District Court or the High Court can, for example, confirm, modify or reverse the determination of the tribunal and exercise any of the powers that could have been exercised by the tribunal.[521] The High Court also has the same power when hearing an appeal from the Human Rights Review Tribunal.[522]

8.38 However other legislation uses different formulations of powers. These may in some cases appear to confer a more limited power on the body hearing an appeal. In particular some formulations of powers on appeal do not expressly give the appellate body the power to direct a rehearing by the tribunal, or remit a matter back to the tribunal with directions.[523] Where appeals are to the courts, the rules of court as set out in the District Court Rules and the High Court Rules supplement the express provisions in the Act.[524] The District Court has for example referred a matter back for rehearing by the Motor Vehicle Disputes

519 *Ta'ase v Victoria University of Wellington* (1999) 14 PRNZ 406, 407 (HC) Goddard J.

520 Residential Tenancies Act 1986 s 117.

521 Weathertight Homes Resolution Services Act 2006 s 95.

522 Human Rights Act 1993 s 123.

523 For example the Motor Vehicle Sales Act 2003 does not give the District Court an express power to remit a case to the Motor Vehicle Disputes Tribunal for reconsideration or rehearing. The Secondhand Dealers and Pawnbrokers Act 2004 also does not give the District Court an express power to remit a matter back to the Authority for reconsideration. However the District Court has held that it can refer a matter back for rehearing or reconsideration under R 561 of the District Court Rules. R 561 applies to all appeals to the District Court under any enactment. It applies subject to any specific provisions contained in the Act conferring the right of appeal. See *Harris v Phillips Mills Ltd* [2000] DCR 778, 785 Judge P J Keane.

524 Under Rule 718A the High Court has extensive powers on appeal and the District Court also has the power to remit a matter back to the tribunal under Rule 561 of the District Court Rules 1992.

Tribunal under the District Court Rules where there was no express provision allowing for that.[525]

8.39 Although the rules of court supplement provisions, we still favour a more consistent approach being taken to the express powers conferred by legislation. If rights of appeal are to an appellate tribunal rather than to the courts, then the rules of court do not apply. An appellate tribunal has only the powers conferred on it by statute. We therefore think the better approach is to expressly give appellate bodies a full set of powers to deal with the matter on appeal.

Rights of appeal and judicial review

8.40 Judicial review is a more expensive and technical process than an appeal, and usually more limited in its remedies. The courts therefore expect rights of appeal to be exercised by parties before judicial review is considered, although that is not an absolute rule. Several reasons are given for why the courts are unwilling to allow judicial review if a statutory right of appeal has not been exercised.

8.41 An appeal might be more appropriate than review and Parliament's intention in conferring a right of appeal should be given effect to. Appeal will be more appropriate where there is "an opportunity to re-ventilate the whole matter with all one's original rights preserved."[526] In *Wislang v Medical Council of New Zealand*, Blanchard J stated that a provision which provided for an appeal from the Medical Practitioners Disciplinary Tribunal to the District Court demonstrated that the legislature had seen the need for speedy disposition of any challenge to the Tribunal's exercise of its penalty powers. The more leisurely process of judicial review would not be consistent with this direction in the general run of cases.[527] The Privy Council agreed with this point.[528] Similarly, in *Rajan v Minister of Immigration*,[529] Glazebrook J for the Court of Appeal emphasised that if statute provided for a right of appeal, the court must take care not to render it nugatory.

8.42 The plaintiff should not be able to re-litigate a matter taken on appeal. In *Butler v Removal Review Authority*, Wild J stated that the plaintiff could not attempt to take two identical bites at the same cherry.[530] Similarly, the Privy Council in *Wislang* found the appellant was dressing up points of fact which had already been canvassed by the Tribunal as points of law. Their Lordships called the application for judicial review "misconceived" and "regrettable."[531]

Should there be statutory restrictions on rights of judicial review?

8.43 In a few instances the statutes establishing tribunals impose statutory limits on judicial review to ensure that rights of appeal are exhausted before judicial review action can be taken. For example any person who has a right of appeal

525 See *Harris v Phillips Mills Ltd* [2000] DCR 778, 785 Judge P J Keane.

526 *Wislang v Medical Practitioners Disciplinary Committee* [1973] 1 NZLR 29, 44 (HC) Speight J.

527 *Wislang v Medical Council of New Zealand* [2002] NZAR 573, 583 (CA) Blanchard J.

528 *Wislang v Medical Practitioners Disciplinary Committee* [2005] NZAR 670 (PC).

529 *Rajan v Minister of Immigration* [2004] NZAR 615 (CA) Glazebrook J.

530 *Butler v Removal Review Authority* [1999] NZAR 68, 77 (HC) Wild J.

531 *Wislang v Medical Practitioners Disciplinary Committee* [2005] NZAR 670 (PC).

in respect of any decision of the Liquor Licensing Authority is not entitled to make an application for judicial review of that decision or to institute proceedings seeking review until that party has exercised their right of appeal in respect of that decision and the appeal has been finally determined.[532]

8.44 Currently such provisions appear to be rare. In view of the way the courts approach applications for review when appeal rights have not been exercised, they are probably not necessary. We are also not convinced that such statutory restrictions are desirable because they impose a rigid rule which precludes an application for judicial review until all appeal rights are exhausted. We can see advantages in retaining a more flexible approach.

CONCLUSION

8.45 It is generally desirable to provide a right of appeal against decisions of tribunals although rights of appeals are at odds with the principle of finality. Concerns over cost, delay and finality may justify limiting rights of appeal from some tribunals. We have identified a number of issues with rights of appeal within our tribunal arrangements:

- While a general right of appeal is currently available from most tribunals, there are no rights of appeal, or limited rights of appeal, from the decisions of some tribunals.
- Although some of the existing restrictions will be justified, tribunal users may have inadequate rights of redress from the decisions of some tribunals.
- Appellate procedures currently differ between tribunals, although the most common procedure is an appeal by way of rehearing.
- Most rights of appeal are to the ordinary courts, although there are a few specialist appellate tribunals that hear appeals from tribunals.
- There is no consistency of approach as to when a second appeal is available and whether it is as of right or by leave.
- Different time frames for filing appeals apply to different tribunals and appellate bodies do not always have the discretion to extend time for an appeal.
- A consistent approach has not been taken to the granting of powers to appellate bodies.

532 Sale of Liquor Act 1989 s 148.

TABLE 4: TRIBUNALS FROM WHICH RIGHTS OF APPEAL ARE LIMITED

Category of tribunal	No appeal	Appeal on question of law only	Appeal otherwise limited
Administrative review	Refugee Status Appeals Authority Student Allowance Appeal Authority Health Act Boards of Appeal War Pensions Appeal Boards Maritime Appeal Authority Fisheries Catch History Review Committee	Social Security Appeal Authority Residence Review Board Deportation Review Tribunal Removal Review Authority Film and Literature Board of Review Legal Aid Review Panel Taxation Review Authority	Medicines Review Committee (limited to the ground that relevant requirement of the Act or regulations have not been complied with or the decision is unreasonable.)
Disputes between individuals	Racing Appeals Tribunals	Copyright Tribunal	Disputes Tribunal Motor Vehicle Disputes Tribunals (appeals from both limited to situations where proceedings or an investigation was conducted in a manner unfair to the appellant and prejudicially affected the result.)
Occupational licensing and discipline tribunals	Engineering Associates Appeal Tribunal Valuers Registration Board of Appeal Police Disciplinary Tribunal		
Miscellaneous		Liquor Licensing Authority	

Chapter 9

Speed and efficiency

INTRODUCTION

9.1 Tribunals exist to provide simple, speedy, cheap and accessible justice.[533] The speed with which cases are heard and decisions given is an important measure of success for tribunals. Disputes and claims need to be settled quickly, cheaply and justly for the benefit of the parties and the state. In order to achieve this objective, our system of tribunals must be efficient and produce satisfactory results with an economy of effort and a minimum of waste. Efficiency encompasses the notion of dealing with matters quickly and at a low cost to the parties and to the state, but not at the expense of quality decision-making.

9.2 Long delays are particularly undesirable in tribunals where they are disproportionate to the monetary value of the matter in dispute. A speedy determination of a case is also crucial where important individual interests are at stake, for example in professional disciplinary matters or in determining eligibility for a state benefit. Research undertaken in the United Kingdom on the experiences of tribunal users confirmed what is probably obvious; delay causes hardship where people are seeking access to a state benefit of some description. Interestingly though, the study found that even where the delay worked to the advantage of tribunal users, it caused stress, and was still considered a problem.[534]

9.3 The tribunal system should avoid unnecessary delay where possible. Tribunals need to be institutions that can dispatch matters with speed and efficiency.

SPEEDY DETERMINATIONS

9.4 Some tribunals have an express statutory duty to resolve matters in a speedy and efficient manner. The Employment Relations Authority for example is directed to provide "speedy, informal and practical justice" and the Tenancy Tribunal is instructed to "exercise its jurisdiction in a manner that is most likely to ensure the fair and expeditious resolution of disputes".[535] Provisions of this sort emphasise the importance of speed and efficiency as well as fairness in resolving cases.[536]

533 William Wade and Christopher Forsyth *Administrative Law* (9th ed, Oxford University Press, Oxford, 2004) 906.

534 Michael Adler and Jackie Gullard "What Users Want" Tribunals Volume 10 Issue 2, 2003, Judicial Studies Board, 19.

535 Employment Relations Act 2000 s 174; Residential Tenancies Act 1988 s 85(1).

536 It should be noted that the ordinary courts are also charged with a similar duty. Rule 4 of the High Court Rules requires court rules to be interpreted to secure the just, speedy and inexpensive determination of disputes. See Judicature Act 1908 sch 2 r 4. A similar provision is contained in the District Court Rules 1992 r 4.

9.5 The courts have considered such provisions to be significant in determining the approach that the tribunal in question should take when determining any matter before it. In the case of the Tenancy Tribunal the District Court has said that "[i]t must be remembered that expedition – promptness, speed and efficiency – is the very cornerstone of the legislation; the preamble to the Act makes that very clear."[537] In a similar vein Baragwanath J observed in *Cruickshank v Disputes Tribunal* that it is a plain purpose of the Disputes Tribunals Act to provide a simple, rapid and economical means of determining minor disputes, and that the Court should give effect to that aim.[538]

9.6 Statutory provisions, which stress values like speed, informality and practical justice, can assist in ensuring that an appropriate culture develops within the tribunal system. There are tribunals that are exceptions, but for many tribunals, speed, informality and practical justice are among the core values. There is a trade-off between values like "speed" and "informality" against the types of procedural protections that militate against the quick processing of cases. If tribunals hold oral hearings for example, or parties are legally represented, that may slow the processing of cases down. The speedy resolution of cases cannot therefore be the only consideration for tribunals. Tribunals should deal with matters quickly and at a low cost to the parties and to the state, but not at the expense of quality decision-making or just outcomes. Tribunals must still do justice to the issues before them.

WHAT CAUSES DELAY?[539]

9.7 We have had difficulty obtaining accurate information on the average length of time it takes for cases to be routinely resolved and decisions issued in many tribunals. Some administering departments and agencies collect little information on this and other aspects of tribunal performance. Where information is collected it tends to be quite rudimentary, identifying for example the average number of days it takes from filing a claim to the issuing of a decision. Where case numbers are low, these figures are distorted by atypical cases so are not particularly helpful in assessing whether delay is commonplace. We think that it is important to ensure that good quality accurate information is systematically collected so the performance of tribunals can be assessed and efficiency continually improved.

9.8 Despite these difficulties, the information we have obtained suggests that long delays are not typical across tribunals. The information that is available on performance indicated that many tribunals currently deal with most claims within a reasonable time of filing.[540] There are some exceptions, but it does seem that generally most tribunals resolve most claims within a few months of them being started.[541] For example it seems that it is relatively rare for cases to routinely take over a year to resolve.[542]

537 *Nixon v Brown and Anor* [1989] DCR 404, 406, Judge J R Callander.

538 *Cruickshank v Disputes Tribunal* [2007] NZAR 602 (HC) para 23, Baragwanath J.

539 Unless otherwise noted, information in this section is taken from the responses administering departments and agencies and tribunal chairs and members provided to the Law Commission's questionnaire on tribunals, July 2007.

540 This assessment is based on the responses administering departments and agencies and tribunal chairs and members provided to the Law Commission's questionnaire on tribunals, July 2007.

541 For example cases before the Refugee Status Appeals Authority generally take 5 to 6 months to complete; cases before the Student Allowance Appeal Authority take about 3 months to complete; cases before the Removal Review Authority take an average of about 7 1/2 months to complete; cases before the Residence Review Board take an average of about 8 months to complete; and cases before the Film and Literature Board of Review take about 4 months to complete.

542 Cases take 9 – 12 months before the Copyright Tribunal.

9.9 Although long delays are not typical, there is room for improvement because there are avoidable delays before some tribunals that can be addressed. For some issues a wait of even a couple of months for an outcome can be too long. From the information that was provided by administering departments and tribunal members we have been able to identify a few common causes of delay for most tribunals. We think that many of these causes would be partially addressed by tribunal reform. The most common causes of delay are as follows.

Availability of tribunal members

9.10 Where a tribunal consists predominantly of part-time members, who have other competing calls on their time, the availability of members and the scheduling of hearings can cause delay.[543] Ensuring that there is an appropriate balance between full and part-time tribunal members will in our view go some way to addressing the issue of availability.

Insufficient members for volume of cases

9.11 Delays can also occur when there are insufficient tribunal members to deal with the volume of cases. This is more likely before tribunals where the volume of cases can vary significantly over time.[544] Also where legislation is prescriptive as to the numbers of tribunal members that can be appointed, spikes in demand can be more difficult to deal with.[545] Tribunals need to have sufficient members to ensure that there is adequate time for preparation, hearing and decision writing and to deal with variations in volume. The appointment of additional part-time members, or members who can sit across several tribunal jurisdictions, helps address fluctuations in case volumes.

Availability of counsel

9.12 Delays are caused at times by the availability of the parties but particularly by the availability of their legal representatives.[546] The availability of counsel can be a significant issue particularly where there is a small specialist bar working in an area.[547] While this is not easily solved, careful case management and scheduling goes some way towards minimising the numbers of hearings that fail to proceed for this reason.

Conduct of parties

9.13 Delay can be used as a litigation tactic by parties. The absence of parties and witnesses, which results in multiple adjournments, is also a cause of delay.[548] Tribunal determinations can also be delayed by parties providing incomplete

543 The more members on a panel the greater the difficulty.

544 For example it was reported that delay before the Removal Review Authority and the Residence Review Board was partly caused by the volumes of cases per member at times.

545 Identified as a general cause of delay for Justice-administered tribunals.

546 For example hearings before the Commissioner of Patents Trade Marks and Design are sometimes abandoned at the last minute due to unavailability of counsel.

547 A small specialist bar tends to appear before a number of disciplinary tribunals for example.

548 For example Disputes Tribunal and Tenancy Tribunal cases can encounter this problem.

information.[549] We are particularly concerned to learn that the main cause of delay before some administrative review tribunals can be government departments not providing information or filing submissions within a reasonable time frame.[550] Departments need to give the tribunal cases in which they are involved a high priority and must ensure that the tribunal is not prevented from progressing a case simply by avoidable delay on their part. Good case management techniques and the systematic use of preliminary case conferences help to ensure that hearings are not scheduled until all necessary information is available and the parties are able to attend.

Awaiting outcome of appeal to higher courts

9.14 On occasion a number of similar cases before a tribunal will be adjourned or stayed while the tribunal awaits a decision from a higher court on a salient legal issue.[551] While this has an unfortunate impact on the parties, it is probably unavoidable on occasion.

Complex legal issues raised in case

9.15 There may be delay in issuing decisions in a number of tribunals where the law needs to be researched more fully before a decision is given. This is particularly relevant where complex legal issues are raised before tribunals.[552] The administrative support provided for some tribunal members does not currently include access to research assistance or even in some cases legal information services. It can be time-consuming for tribunal members to undertake all research on each case for themselves. Single member tribunals are also in the difficult position of not having other tribunal members to discuss and debate any complex or difficult cases with. We think this is unsatisfactory, and suggest that to perform their role well, tribunal members, like Judges, need access to research assistance as well as the support at times of a collegial approach.

Resourcing issues

9.16 There are a number of other reasons for delay that relate to the nature and levels of resourcing available to tribunals. Delays in some tribunals can be caused by the availability of sufficient interpreters and investigators for example.[553] Also access to limited numbers of suitable hearing rooms and facilities can cause scheduling delays. This seems to be a particular problem for tribunals that meet infrequently and for tribunals that are required to compete for the use of District

549 For example the time parties take to file evidence in support of their claims significantly affects time frames within the Copyright Tribunal.

550 In one of these citizens have 21 days to file their appeal in the tribunal, but time limits are not imposed on the department responding to the appeal and the department is not timely in its response. In another the department regularly exceeds the statutory time frames imposed.

551 This occurs for example in the Tenancy Tribunal, the Customs Appeal Authority and the Taxation Review Authority.

552 It is common for example for the Refugee Status Appeals Authority to find that the inquiry has highlighted the need for further research into information about the country or the law to be completed before the case can be determined.

553 Delays in the Disputes Tribunal, the Tenancy Tribunal and some of the immigration tribunals are occasioned by the need for assistance from interpreters, investigators and other third party experts.

Court facilities.[554] Resourcing problems of these kinds are much more difficult to resolve because they go to the level and nature of administrative support and resourcing that is currently available to tribunals.

ADMINISTRATIVE SUPPORT FOR TRIBUNALS[555]

9.17 The nature and level of administrative support that is provided clearly has a significant impact on the speed and efficiency with which tribunals can function. To be efficient our system of tribunals needs to make the best possible use of the available resources. The information obtained from our discussions with administering departments and agencies and with tribunal members gave a strong impression of both staff and members working hard and making their best efforts to effectively use the resources available to them. However a broad view across existing tribunal arrangements, with silos of administration providing support of different kinds and at differing levels, provides a picture of a fragmented system of tribunals. This section focuses on the disparity in existing administrative arrangements.

9.18 The level of administrative support currently varies between tribunals. There are also differing case management approaches within tribunals. Larger tribunals with multiple numbers of members are normally serviced by case managers and support staff specifically dedicated to that tribunal.[556] Smaller tribunals don't have dedicated support and many, particularly those with few cases, have quite rudimentary case management systems.[557]

9.19 To function most effectively tribunals appear to need more than just a few members and support staff. Larger structures take advantage of economies of scale on training and IT systems. They can also more readily develop effective case tracking and management systems. One large tribunal that has the advantages of a critical mass of members and support staff is the Employment Relations Authority. The Authority has 16 members, many of whom are full-time, directly supported by a staff of 14 located across three offices. Support staff roles are all dedicated, which means they are only responsible for supporting the Authority and its processes. The support team is big enough to include dedicated senior officers responsible for staff training and management. As a larger tribunal, with a dedicated staff, the Authority can utilise economies of scale. Training and staff development for example are undertaken on a nationwide basis.

9.20 In contrast many smaller tribunals are provided with much more limited administrative support. Many do not for example, because of their size, have dedicated support roles. For many tribunals there is simply insufficient work to justify dedicated support. That is so of both tribunals administered by the Ministry of Justice and others.[558]

554 This is cited as a reason for delay in the Tenancy Tribunal for example.

555 Unless otherwise noted, information in this section is taken from the responses administering departments and agencies and tribunal chairs and members provided to the Law Commission's questionnaire on tribunals, July 2007.

556 The Refugee Status Appeals Authority is provided with a dedicated secretariat for example.

557 It should be noted however that different tribunals, because of the nature of their work, may require different types of support also.

558 For example the Land Valuation Tribunal, the Customs Appeal Authority, the Copyright Tribunal, the Student Allowance Appeal Authority and the Taxation Review Authority do not have full time dedicated support roles. One staff member in the Department of Internal Affairs provides administration and secretariat support for the Film and Literature Board of Review on a part-time basis.

9.21 The absence of dedicated support staff can be an issue. Staff training and skill development is more pragmatic where servicing a tribunal is only part of an employee's role. Work demands may spike at times and an uneven demand is harder to manage within a small support team. Tribunals that have few cases also don't always have case management systems in place.[559] We think there is also a significant duplication of effort across government, as government departments and other administering agencies develop their own staff training, case management systems, IT systems and facilities for the tribunals they support. To some extent the clustering of support staff in a dedicated Tribunals Unit within the Ministry of Justice addresses such issues. Staff in the Tribunals Unit can for example provide support to more than one tribunal, utilising similar skills. However supporting a number of separate small tribunals can still be problematic. We understand that there are still problems around uneven supply and demand for support across tribunals, and that staff induction and training requirements differ between tribunals. Variable practices also apply in each tribunal jurisdiction so the administrative needs remain relatively distinct. For example different time limits and rules apply to filing applications in each tribunal so induction, training and case management systems must cater for this.

9.22 As noted earlier, little is currently provided to most tribunals in the way of legal research support. There are few dedicated legal officer or researcher positions across the tribunal system. We understand that there is for example one legal researcher, with another being recruited, to provide support for most of the tribunals administered within the Ministry of Justice. A few tribunals only, such as the Weathertight Homes Tribunal and the Liquor Licensing Authority, have their own dedicated legal research support positions.

9.23 Tribunals also have different levels of physical resources provided. Smaller tribunals don't have dedicated facilities. Many tribunals have difficulties obtaining access to adequate hearing rooms for example. Tribunals administered by the Ministry of Justice share court facilities, but these are not always suitable or available. Provision of access to library services and online access to legal information services also varies between tribunals with some having no access at all.[560]

9.24 Current administrative arrangements for tribunals can best be described as ad hoc and variable, with each different administering agency taking its own approach on the nature and level of support provided. Each determines and develops its own staffing ratios, training arrangements, case management systems and IT systems. There is currently an absence of central support or guidance on the administration of tribunals. The result is a high level of variation in practice. We do not consider that the limited resources that are currently available to tribunals are utilised as efficiently as they could be.

THE WORKLOAD OF TRIBUNALS

9.25 A significant justification for establishing tribunals has been that a single tribunal can efficiently apply regulatory policy across all cases and develop and bring greater expertise than the general courts.[561] Technical expertise is built up through

559 The Medicines Review Committee for example, which infrequently receives applications, has no formal system for allocating or managing cases. A process is developed each time an application is received.

560 This can be problematic for tribunal members who live in smaller centres.

561 K J Keith *A Code of Procedure for Administrative Tribunals* (Legal Research Foundation, Auckland, 1974) 6.

resolving large numbers of similar claims and can contribute to efficiency. Arguments for economies of scale, which can be put forward in support of amalgamating tribunals, suggest that a critical mass of cases is needed for an efficient tribunal and case management system. As discussed in Chapter 4, a critical mass of cases is also helpful for tribunal members to build up and retain their expertise.[562]

9.26 Currently it seems that a number of existing tribunals do not have many cases. Case numbers suggest that some tribunals currently have very little work. The tables included at the end of this chapter illustrate this. Tables 5 to 7 show the volumes of applications that were filed in each listed tribunal during the 2005/06 financial year. Included also, where available, is the average number of cases filed during the last five years.[563] Due to the difficulties in obtaining information, we have only been able to present figures for a small sample of occupational licensing and disciplinary tribunals in Table 7.[564]

9.27 Although numbers of applications filed is a crude measure, it does give an indication of the volume of cases that each tribunal could potentially deal with in a year. In reality significant numbers of applications that are filed are not pursued to determination.[565] The figures also don't give any indication of the complexity of any case or the time that each case might take to determine. A complex case before the Taxation Review Authority or the Human Rights Review Tribunal will take longer and involve significantly more work than a straightforward routine dispute before the Tenancy Tribunal for example.

9.28 Even with the caveats noted above in mind, it is still useful to consider the numbers of applications filed with tribunals as an indication of potential work. The numbers of cases filed with different tribunals vary significantly. The tables show that very few applications are filed in a number of tribunals.[566] Questions should be asked as to whether it is sensible to retain so many tribunals. Is it efficient for New Zealand to retain all of these tribunals when some only deal with a few cases each year? Where there are very few cases in any jurisdiction, should consideration be given to alternatives to the tribunal model? For example, should some jurisdictions simply be collapsed back into the courts?

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562 See para 4.11 – 4.12.

563 Figures of applications filed have been taken from material provided by the Ministry of Justice and other departments and bodies that administer tribunals. Where figures were not available from departments we have sourced our figures from the annual reports on tribunals. We were unable to obtain sufficient data to find averages for some tribunals.

564 The data in this table has been extracted mainly from annual reports.

565 For example only 800 of approximately 1,700 claims filed with the Employment Relations Authority each year actually result in a determination by the Authority; from responses to Commission's questionnaire July 2007. Another example is that of the 154 applications made to the Mental Health Review Tribunal in 2005/06 about 90 cases resulted in determinations. On average about 40 % of cases are withdrawn each year; these figures are taken from the annual report of the Mental Health Review Tribunal for the 2005/06.

566 One example is the Film and Literature Board of Review which since its establishment has heard approximately 66 reviews, averaging out to about 6 cases a year. Another example is the Trans-Tasman Occupations Tribunal: only three cases have ever been filed with the Trans-Tasman Occupations Tribunal, two in 2002 and one in 2003 and all three cases were later withdrawn, so this tribunal has not yet heard a case. Similarly only three cases have been filed with the Copyright Tribunal during the last 5 years. We understand that only one of these is a live case and there have only been 16 cases filed since the tribunal was established in 1977.

ALTERNATIVE DISPUTE RESOLUTION

9.29 The term alternative dispute resolution or ADR is used to refer to a number of dispute resolution mechanisms that form alternatives to litigation before courts and tribunals. A number of ADR mechanisms are currently built into many of the statutory schemes that establish tribunals. The objective of such ADR mechanisms is to resolve disputes at the earliest opportunity and in the most efficient manner. Where possible this is done before a dispute reaches the tribunal. ADR, by resolving cases without adjudication, deals with them more quickly and ensures that the more resource-intensive tribunal stage is reserved for those cases which cannot be resolved in these other ways. ADR mechanisms therefore filter out cases at a lower level and have the potential to reduce delay before tribunals. For this reason we have included our examination of ADR as a section in this chapter, although in many ways it can be viewed as a separate topic.

9.30 The inclusion and use of ADR has been an important innovation and is now an established feature of the tribunal system. Provided appropriate safeguards are built in, we encourage this development.[567]

Administrative review tribunals – neutral internal review

9.31 Some statutory schemes provide for some form of neutral internal review of an administrative decision as a prerequisite to an appeal to the courts or to a tribunal.[568] In addition government departments and other administrative decision-makers have also put in place non-statutory internal review mechanisms, which people are expected to utilise before proceeding with an application to the relevant administrative review tribunal.[569]

9.32 To be an effective form of ADR an internal review needs to be a 'neutral appraisal or re-appraisal' of an applicant's case. It must therefore be undertaken with a high degree of detachment from the original decision-making process. However it is important to note that internal reviews by their nature are not, and cannot be, truly independent.[570] Citizens are effectively given a second opportunity to have their application assessed when their case is reviewed by other officials in this way. There is evidence that decisions change on review and that the number of cases that consequently go to a tribunal is reduced.[571]

9.33 While internal review processes do normally assist the citizen, because they

567 For a discussion on ADR see Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2001 Edition and amendments* (Wellington, 2007) Chapter 18.

568 For example District Benefit Review Committees are established under the Social Security Act 1964 to review decisions of the Chief Executive and District Claim Panels are established under the War Pensions Act 1954. In *Arbuthot v Chief Executive of the Department of Work and Income* [2007] SC 55 the nature of the Benefit Review Committee was discussed. It was held not be a judicial body: [2007] SC 55 para 28.

569 The Department of Inland Revenue for example has such a review process. The Ministry of Social Development has also developed an informal internal review that sits below the statutory review by District Benefit Review Committees.

570 Internal reviews within IRD are conducted for example by the Adjudication Unit, which consists of IRD employees, although they come from a separate unit within the department and are required to reach their own decision. National Review Officers who conduct reviews under the War Pensions Act for example are subject to legislative restrictions but are still employed by the Defence Forces and exercise the delegated powers of the Secretary for War Pensions.

571 Figures provided by the Ministry of Social Development show that in 2006/07 23% of decisions were overturned through internal review. In addition the Benefit Review Committee overturned 9% of decisions.

rectify errors at an early opportunity, there is a risk that people can become despondent and deterred by each step in an application process. It is important that review mechanisms do not become too drawn out. The risk of this is greatest where there are layers of increasingly formal review for people to work through before reaching an external tribunal. We think that generally one internal review, before a matter goes on to the tribunal, is sufficient.

9.34 It is also important that internal reviews not be perceived as favourable towards the department or government agency. The degree of independence and formality differs between reviews, and some agencies may not routinely offer them. It would be helpful if there was more consistency, perhaps in the form of minimum standards that applied across government. The line between an internal review and consideration of a matter by a tribunal is not always clear.[572] We think that attention needs to be given to this issue to ensure a fair and consistent approach is taken.

Mediation – disputes between individuals

9.35 Mediation has been built into the statutory frameworks for almost all tribunals that resolve disputes between individuals.[573] Mediation is the term used for a process in which participants, with the assistance of a mediator, systematically isolate disputed issues in order to develop options and consider alternatives that will serve their needs.[574] Mediation is normally provided, sometimes as a compulsory stage, prior to a claim going to a tribunal for determination. The objective is to assist parties in resolving their own disputes rather than having the disputes adjudicated.[575] The format for mediation and the way it is used differs a little between tribunals but has these consistent features.[576]

9.36 An important feature of mediation processes is the ability to achieve a binding enforceable and confidential decision through mediation. If the parties reach agreement during mediation before their claim reaches the Employment Relations Authority for example that agreement can be recorded and will be enforceable in the same way as an order of that Authority.[577] Similarly, tenancy disputes can be resolved by tenancy mediators who provide a mediation service organised through

572 An interesting illustration is the position of the independent reviewer under the Injury Prevention, Rehabilitation and Compensation Act 2001. The Corporation is required by the Act to appoint a person to independently review any Corporation decision on a claim for compensation. The reviewer cannot be an employee of the Corporation and is required by the Act to make an independent determination. Decisions of the reviewer are not taken to a tribunal, but are appealed to the District Court. This independent reviewer has similar powers and fulfills the function of a tribunal. We understand that most reviews are currently undertaken under a contractual arrangement by the company Dispute Resolution Services Ltd. See Injury Prevention, Rehabilitation and Compensation Act 2001, ss 133 – 148.

573 There are for example statutory requirements for mediation prior to disputes going for adjudication in the Tenancy Tribunal, the Employment Relations Authority and the Human Rights Review Tribunal.

574 This definition is adapted from Department of Labour "Going to Mediation" Factsheet (Department of Labour, Wellington).

575 Under the Human Rights Act 1993 complainants have access to a mediation service provided by the Human Rights Commission as part of the statutory complaints process. The objective of the complaint process run by the Commission is to resolve complaints in the most efficient, informal and cost-effective way; see Human Rights Act 1993 s 76(1)(a).

576 For example mediation under the Human Rights Act can take a range of forms, from a duty mediator making some initial informal attempts, possibly via correspondence and phone calls, to a more structured face to face mediation meeting; see generally Human Rights Commission "What is the Process for Dealing with Disputes?" Fact sheet 2 (Human Rights Commission, Auckland, 2005).

577 Employment Relations Act 2000 s 149.

the Department of Building and Housing. Tenancy mediators can also make orders giving effect to a settlement and these have similar effect to tribunal orders enforceable as orders under the Residential Tenancies Act.[578]

9.37 A key feature of most mediation processes is that it is undertaken as a separate stage to adjudication and not normally by tribunal members.[579] Trained specialist mediators are a feature of many schemes. Under the Employment Relations Act 2000 mediation has been separated out from adjudication by the Employment Relations Authority and occurs as an almost compulsory first step before a case can proceed to investigation by the Authority. Mediation services provided through the Department of Labour deal with between 8,000 and 9,000 applications for mediation a year acting as an effective filter for claims to the Authority.[580] The feedback we received from practitioners in this field suggests that this is seen as a very successful model with mediation settling a very significant portion of claims.[581]

9.38 There are considerable advantages in building such mediation processes into the tribunal system. Mediation allows parties to resolve their own disputes where this is possible and often provides savings in cost and time also.[582] Questions remain as to whether mediation should be a compulsory step and as to how closely it should be linked with adjudication by the tribunal.

Professional conduct committees – occupational tribunals

9.39 Legislation establishing many occupational regulation schemes includes, normally as an early step in the complaints and disciplinary process, a low-level dispute resolution stage.[583] A professional conduct committee can be established, for example when a serious complaint is made about a health practitioner. The Committee investigates the complaint and can refer the complaint for resolution by conciliation.[584] In a similar way, complaints assessment committees established under the Education Act provide an initial screening process where there is a complaint against a teacher.[585]

9.40 These types of complaint processes, which allow for resolution and settlement without the involvement of the tribunal, again play the role of ensuring that complaints are resolved at the earliest opportunity and the lowest level.[586] Only the

578 Residential Tenancies Act 1986 s 88.

579 The significant exception here is the Disputes Tribunal where mediation is undertaken by a referee as part of the adjudication process; Disputes Tribunals Act 1988 s 18.

580 Applications for mediation can be made without filing a claim with the Employment Relations Authority.

581 The Authority for example only determines approximately 800 of the 1,700 applications filed in a year, with the others (900) being resolved mainly by mediation.

582 Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2001 Edition and amendments* (Wellington, 2007) 388-389.

583 For example see Health Practitioners Competence Assurance Act 2003 and Veterinarians Act 2005.

584 Health Practitioners Competence Assurance Act 2003 ss 71-83.

585 A complaints assessment committee decides, after an investigation, whether to refer the complaint to the Teachers Disciplinary Tribunal or to settle it with the consent of the teacher and complainant: Education Act 1989 ss 139AE and 139AJ.

586 Most schemes also include other low level options like mediation: see, eg, Veterinarians Act 2005 s 46.

most serious complaints consequently go before disciplinary tribunals.[587]

9.41 Safeguards over the use of mediation and conciliation can be built into occupational disciplinary schemes to ensure an appropriate level of transparency and public involvement in such arrangements. Complaints assessment committees for example normally include lay representatives and peers from within the occupational group as well as representatives of the occupational registration body. Not only is this necessary for reasons of accountability and scrutiny, but it can also ensure that such occupational groups are not seen to be just looking after their own members. Where these mechanisms operate cases do still reach disciplinary tribunals, suggesting that the approach is working and serious cases are not screened out, but go before disciplinary tribunals.[588]

CONCLUSION

9.42 In this chapter we have identified the factors that can cause unacceptable or long delays in having cases resolved by tribunals. Although we are concerned that good quality accurate information on current timeframes is not readily available, the information we have suggests that excessive delay is not a routine feature of our tribunal system. Having said this, delay does occur, and we think some of it could be avoided by a more efficient use of resources.

9.43 A problem we have identified is the spread of resources across a large number of tribunals resulting in a degree of duplication of effort and many administering departments and agencies providing varying degrees of support to scattered tribunals.

9.44 We have also identified a number of tribunals that have very little work. It is probably not efficient for New Zealand to retain such a large number of small low volume tribunals. Some tribunal jurisdictions which have very few cases could for example be collapsed back into the general courts. There is also scope for amalgamating similar tribunals and moving towards a system with a small number of larger tribunals. To be efficient tribunals need to be of a reasonable size, having a sufficient volume of cases to ensure that tribunal members and staff are effectively utilised. We think that arguments for utilising greater economies of scale are quite persuasive. It does seem that administrative support (including case management systems, IT and facilities) can be provided more efficiently across larger tribunals and better use can generally be made of resources. To some degree this is already acknowledged in the clustering of tribunal administration within the Ministry of Justice.

9.45 We note the increasing incidence of internal review mechanisms and of mediation and other forms of alternative dispute resolution before matters proceed to a tribunal. We support these initiatives, but believe that there need to be safeguards to ensure (i) that they do not place undue additional hurdles in the way of applicants; (ii) that they do not result in undue delay; and (iii) that there is no perception of undue influence or lack of independence.

587 For example according to their annual report 37 complaints about veterinarians were resolved by the Veterinary Council during 2006; 19 resulted in a finding of no professional misconduct and no action; 8 resulted in a similar finding but advice was given; 4 failed to reach the threshold to trigger an investigation; 3 were withdrawn by the complainants; 2 were resolved by mediation; and only 1 resulted in a charge of professional misconduct being laid before the Judicial Committee. See Veterinary Council of New Zealand, *Annual Report for the Year Ending 31st December 2006* (Veterinary Council, Wellington, 2006).

588 In 2006 for example 22 charges were received by the Health Practitioners Disciplinary Tribunal; 13 resulted in the practitioner being found guilty of professional misconduct; 5 resulted in conviction; 1 charge was dismissed; 1 was withdrawn; and 2 were not completed during the year. See Health Practitioners Disciplinary Tribunal www.hpdt.org.nz (accessed 31 October 2007).

TABLE 5: VOLUMES OF APPLICATIONS FILED IN ADMINISTRATIVE REVIEW AND MISCELLANEOUS TRIBUNALS		
Tribunal	**Number of applications filed in 2005/06**	**Average number of applications filed over last 5 years**
Liquor Licensing Authority	978	
Commissioner of Patents Trade Marks and Design	353 (oppositions filed resulted in 74 decisions issued)	399 (oppositions filed resulted in 70 decisions issued)
Residence Review Board	372	390 (over last 2 years)
Removal Review Authority	329	388
Refugee Status Appeals Authority	317	475 (over last 3 years)
Legal Aid Review Panel	331	406
Taxation Review Authority	205	123
Social Security Appeal Authority	154	241
Mental Health Review Tribunal	154	155
Student Allowance Appeal Authority	74	65
Land Valuation Tribunal	< 20	< 20
Customs Appeal Authority	13	19
Film and Literature Board of Review	8	6
Medicines Review Committee	O (but 1 application in 2007)	0 (between 1995 and 2006)
Maritime Appeal Authority	0	0 (over last 3 years)
State Housing Appeal Authority	0 (cases heard in 2005/06 year)	
[Health Act] Boards of Appeal	0	0 (no cases for several years)

TABLE 6: VOLUMES OF APPLICATIONS FILED IN TRIBUNALS THAT RESOLVE DISPUTES BETWEEN INDIVIDUALS		
Tribunal	**Number of applications filed in 2005/06**	**Average number of applications filed over last 5 years**
Tenancy Tribunal	21,663	20,378
Disputes Tribunal	20,066	20,592
Employment Relations Authority	1,700	2,000
Motor Vehicle Disputes Tribunal	282	360
Human Rights Review Tribunal	49	49
Retirement Villages Disputes Panel	This is a new tribunal and has not yet been operating for a full year.	
Weathertight Homes Tribunal	A new tribunal established on 2 April 2007 after the 2002 Act was repealed.	
Copyright Tribunal	0	< 1

TABLE 7: VOLUMES OF APPLICATIONS FILED IN OCCUPATIONAL TRIBUNALS		
Tribunal	**Number of applications or cases**	**Average number of applications over number of years**
Health Practitioners Disciplinary Tribunal	22 (calendar year to December 2006)	23 (over 3 years)
Teachers Council Disciplinary Tribunal	16 (decisions issued in 2006 calendar year)	8 (cases heard on average a year)
Chartered Professional Engineers Registration Authority	12 (complaints received by Registration Authority in 2005/06 year)	
Building Practitioners Board	The tribunal is a new one and administers a voluntary scheme at this stage.	
Plumbers Gasfitters and Drainlayers Board	3 (disciplinary inquires in 2004/05 year)	
Veterinary Council Judicial Committee	1 (year ending 31st December 2006)	
Chartered Professional Engineers Council	1 (appeal filed in 2006 calendar year)	
Trans-Tasman Occupations Tribunal	0 (2005/06 year)	< 1

Part III
REFORM

Chapter 10
Summary of issues

INTRODUCTION

10.1 Tribunals, as we have defined them, exist to resolve citizens' problems. Tribunals are the only experience some people have of our system of justice. It is important that the system be effective, efficient and fair. However the citizens who use tribunals are not the only persons with an interest in them. Tribunal members and chairs, the departments and agencies that administer them, the organisations whose determinations are reviewed by the tribunals, and the government itself also have an interest in tribunals.

10.2 The Law Commission, working with the assistance of the Ministry of Justice, has engaged in research to inform itself of the current state of our tribunal system. It has consulted widely in the course of this research. It has received written comment from a large number of departments and agencies and tribunal chairs, and conducted personal interviews with some of these. It has also met with representatives of the Law Society, and representatives of Community Law Centres and the Citizens Advice Bureau who advise possible applicants. It has also used the work done by the Law Commission during the preparation of its report *Delivering Justice for All,* published in 2004, and the previous reports on the subject referred to in Part I.

ISSUES FOR REFORM

10.3 In Part II of this paper we have set out the results of this research. Overall, we are left with the impression of a large group of tribunal members who are dedicated to their task, and determined to do the best they can. Many of them are part-time, and give their time, sometimes for low remuneration, on top of their otherwise onerous professional responsibilities. Support staff likewise generally give of their best. However our research demonstrates that the system of tribunals in this country is beset by problems and that overall the service provided by tribunals could be greatly improved. Reform is required. The problems have become clear in the preceding chapters; we summarise them here, and draw some conclusions.

Process

10.4 Tribunals have been created ad hoc with no overall pattern. There is unsatisfactory inconsistency in their procedures and powers.

Appeals

10.5 This inconsistency is clearly apparent in the system of appeals from the decisions of tribunals. From some tribunals there is no right of appeal at all. In those

tribunals where there is a right of appeal, there is great variety. In some cases there is an appeal on the law only, in others a full appeal on the merits. Sometimes the appeal is by way of case stated – now generally regarded as unsatisfactory – sometimes by way of rehearing, sometimes de novo. There is variation also as to the appellate body: sometimes it is a special appeal tribunal, sometimes the District Court, sometimes the High Court. Likewise there are differences as to the levels of appeal, in other words whether there is one appeal or two. The time limits for appeal differ markedly, and in some cases there is no discretion to extend the time. The orders which the appellate bodies can make differ also.

10.6 Sometimes no doubt the differences can be justified. We must be wary of assuming that one size fits all. But the variation is currently altogether too great. Many of the differences cannot be justified in any rational way and can create a perception of unfairness. There is need for rationalisation.

Powers and procedures

10.7 The statutes setting up the various tribunals govern their powers and procedures. There is inconsistency here too, often between very similar tribunals. Some normally sit in public, others in private; some hold oral hearings, others proceed solely "on the papers;" some can award costs, others cannot. Some of the statutory provisions are rudimentary, and leave tribunal members in doubt as to whether they possess certain powers at all: the power to order inspection of documents, for instance. In a number of cases, the tribunal is given all or some of the powers of a commission of inquiry; in others it has certain powers of a District Court. Incorporation by reference in this context has all the unsatisfactory features of this form of legislation in general: the analogies are often inexact, leading to further doubt. Mediation and other forms of alternative dispute resolution have promise, but there is no uniformity about their use.

10.8 We repeat that we must be careful not to take a "one-size-fits-all" approach, but the need for some standardisation is undoubted.

Speed and efficiency

10.9 Tribunals exist to provide simple, speedy, cheap and accessible justice. While we did not find, overall, that delay is a regular problem in the New Zealand tribunal system, we did find that certain factors can on occasion cause undesirable delay. They include the unavailability of tribunal members, in particular part-timers; insufficient members for the volume of cases; the availability of counsel; the conduct of parties including, sometimes, government departments; resource issues; and unavailability of resource assistance for tribunal members. Some of these factors are not easily avoidable, but better resourcing and a more satisfactory balance between part-time and full-time members would go some distance towards correcting some of them.

10.10 The level of administrative support between tribunals also varies greatly. For some tribunals the lack of dedicated support, or a critical mass of staff, is a real

issue. Each administering agency takes its own approach. There is unnecessary duplication in some areas. A coordinated approach could result in economies of scale and improved efficiency.

10.11 We also note the greatly variable caseload of tribunals. Some deal with great numbers of cases, others have very few, indeed some hardly any. There is a real question whether it is sensible to retain them all. Amalgamation seems a sensible solution.

Accessibility

10.12 An efficient tribunal system is one which is readily available to users. They must be aware of its existence, and know how to commence proceedings and how to put their case. They should be able to understand the proceedings, and know how and why the eventual decision is reached.

10.13 We found some variability in accessibility. The information on websites is of variable quality. We found that recipients of a decision by one government agency were not even advised that they had a right to have it reviewed by a tribunal. There were instances of people commencing a claim in the wrong tribunal, and in some cases approaching several tribunals. Unless they are able to obtain legal advice, or know of the existence of bodies such as the Community Law Centres, they often do not know how to access their rights. There is what may be described as a "shopfront" problem.

10.14 We did not, overall, find that the monetary cost of filing was a deterrent, but the cost of effective legal representation can be. In some tribunals, particularly ones where a government department is the other party, there can be a significant power imbalance if the applicant is not represented. There are discrepancies in the availability of legal aid which need addressing.

10.15 New Zealand's geography is a barrier to physical access to tribunals. Some tribunals are sufficiently well-resourced to allow their members to travel to outlying centres. In the case of others, matters are dealt with "on the papers." There is a need for careful exploration of the new technologies: e-filing, video- and telephone-conferences, and other remote means of bringing parties together.

10.16 Reasons should be given for decisions. In most tribunals they are, but there is great variability in access to those written reasons. Some tribunals place summaries on their website; some publish all their decisions in full; some publish nothing. Access to precedents gives guidance not only to future parties and their advisers, but also to tribunal members. It enables consistency of decision.

Independence

10.17 We have noted earlier that, whatever label may be used to describe tribunals' functions, they decide disputes about people's rights. They have functions which are court-like. It is thus important that they be perceived as independent. This requires two things. First, appointment to tribunals must be transparent and merit-based. It must not be influenced by political considerations. More could be done in New Zealand to ensure that this happens across the board. Secondly, tribunals must not appear to be connected with, or subject to influence by, government departments. That is particularly the case when it is

the department's own decision that is subject to review. We found no evidence that tribunals are in fact subject to improper influence in New Zealand, but in some cases the connection with the relevant department or agency is close enough to create a perception of lack of independence.In this fragile field perceptions can be as important as actuality.

10.18 In the case of some tribunals "internal reviews" of applications take place before the matter proceeds formally to the tribunal. Much good can be achieved by such reviews, but care must be taken to ensure that the process is not perceived as a way of discouraging an applicant from proceeding further. We heard from a number of tribunal chairs that this possible perception is a matter of concern to them.

10.19 The various occupational discipline and registration tribunals raise different issues. It is necessary that members of the relevant profession or occupation be members of the board. They are the experts, and their input is important. But again perceptions are important, and there is a need to ensure that there is "lay" membership, and if possible a degree of distance from the relevant professional body to engender the necessary public confidence. Those requirements are satisfied in the case of some tribunals, but not all.

Membership

10.20 The surest guarantee of quality decision-making is the ability of the tribunal members. We have already referred in this summary to the necessity for merit-based appointment. It must be clear that members have the generic abilities required, and any necessary specialisation. It would be helpful if there were an established set of criteria against which applicants were measured. There is currently variability as to when legal expertise is required.

10.21 There is also inconsistency as to how many members should constitute a panel: currently the numbers range from one to nine, and often there is no clear answer to why there are such differences.

10.22 Some members of some tribunals are full-time, but there is a very long list of part-time members. Any tribunal system will need to rely on part-timers. But the balance needs to be right: sometimes part-timers have difficulty with their time schedules, and in some cases they do not sit frequently enough to build up the requisite expertise.

10.23 Training is an issue too. The chairs of some of the larger tribunals organise excellent training for their members. In the case of other tribunals there is no training at all. Even the most practised tribunal members need to be kept up with recent developments. The problem is exacerbated in the case of small tribunals whose members do not sit often enough to build up much experience.

Structure and coherence

10.24 It will be clear from the above summary, and from the earlier chapters of this paper, that the problems of the New Zealand tribunal system extend beyond the procedural, although the deficiencies in that regard are serious enough. There is what may best be described as a structural deficiency: a lack of overall coherence. At the risk of some repetition we can illustrate the point as follows.

10.25 First, as we have just noted, there are some tribunals which seldom, indeed hardly ever, meet. This is inefficient. Consideration needs to be given to whether some of these tribunals are needed at all; and whether, if their function needs to be retained, it could be exercised by a court, or absorbed into a larger tribunal.

10.26 Secondly, the proliferation of tribunals means that some members have multiple warrants and sit on a number of tribunals. That can lead to unnecessary complexity if those tribunals are administered by different departments or agencies, and have different requirements.

10.27 Thirdly, the present fragmented system of individual tribunals which are part of no overall structure leads to duplication and waste. The provision of training is a good example. Tribunal chairs each devise training for their own tribunals. There is re-invention of the wheel. The same is true of the supply of information to prospective applicants. A coherent, simple structure could lead to such matters being organised once for the benefit of all.

10.28 Fourthly, and this is related to the last point, there is a lack of oversight of tribunals as a whole. No single body or person exists to co-ordinate procedure, to develop coherent policy, to monitor performance, to have dialogue with ministers and officials, and to act as an advocate for tribunals in relation to resources and other matters. The many individual tribunals have a weaker voice in the justice system than they should. Resourcing is always an issue: it is an issue in the court system as well as the tribunal system. But the lack of coherence and unity among the tribunals means they are not competing as well as they might.

10.29 Fifthly, and this is again a related point, members of the smaller tribunals are very much left to their own devices. They lack support and the ability to engage in discussion with colleagues. COAT (Council of Australasian Tribunals) is a voluntary organisation set up by tribunal members themselves. While it serves a useful function, its voluntary and "unofficial" nature counts against it. Not all tribunal members even know of its existence. As we have said, many people willingly give their time as tribunal members on a part-time basis. The system does not serve them well. Tribunal membership is not as attractive a career option as we believe it should be.

CONCLUSION

10.30 We believe the system of tribunals is long overdue for reform. That is increasingly happening in overseas jurisdictions. In the next two chapters of this issues paper we outline some of these overseas reforms, and set out the options for reform currently under investigation in this country.

Chapter 11

Tribunal reform in other jurisdictions

INTRODUCTION

11.1 In recent years most Australian states, the United Kingdom and several provinces of Canada have undertaken substantial tribunal reforms. These reforms have invariably been directed at introducing greater consistency and efficiency across the tribunal system. In this chapter we briefly outline these overseas reforms.

VICTORIA

11.2 In Victoria a large number of tribunals have been amalgamated into a single entity, the Victorian Civil and Administrative Tribunal ("VCAT"). VCAT deals with a wide variety of administrative review cases as well as civil matters, describing itself as a "one-stop shop" for resolving disputes. This model has been emulated by a number of other states of Australia.

11.3 While VCAT is a single integrated tribunal, it divides cases between three divisions, the Civil, Administrative and Human Rights Divisions. Within each division are a number of lists to deal with different types of cases arising in that division. For example, the Civil Division is organised into the following lists:

- Civil Claims List;
- Credit List;
- Domestic Building List;
- Legal Practice List;
- Real Property List;
- Residential Tenancies List; and
- Retail Tenancies List.

Unlike some similar integrated tribunals, there is no appeal division. Appeals from VCAT are to the courts.[589]

11.4 A number of tribunals and tribunal-like bodies have been excluded from VCAT. These are the Mental Health Review Board, Victims of Crime Assistance Tribunal, Racing Appeals Tribunal, Health Services Commissioner, Abortion Committee, Parole Board and Privacy Commissioner. The Administrative Division hears appeals from the decisions of professional disciplinary bodies, but the bodies themselves are not part of VCAT, with the exception of the legal profession.

589 Victorian Civil and Administrative Tribunal Act 1998 (Vic), s 148.

The former Legal Profession Tribunal has been abolished and its jurisdiction given to the new Legal Practice List within VCAT's Civil Division.[590]

11.5 VCAT is headed by a President, who must be a Supreme Court judge.[591] The President oversees the system and provides suggestions for improvement to the responsible Minister.[592] Each Division is headed by a Vice-President, who is a County Court judge. In turn, each List within a Division is headed by a Deputy President. The remaining members are classed as either senior or ordinary members and are appointed on a full-time, part-time or sessional basis.[593]

11.6 The Act establishes a set of powers and procedures for the Tribunal, covering all aspects of a case. The Tribunal may require parties to attend a compulsory conference to clarify the issues and promote settlement.[594] It may also refer a matter to mediation with or without consent of the parties.[595] The Act also sets out rules relating to matters such as representation of parties, the composition of panels, rules of evidence and natural justice and reasons for decisions.[596] This provides a consistent and standard approach, but the rules are drafted to give flexibility. The Act also sets out variations for certain types of proceedings.[597] A Rules Committee is also established to develop consistent rules of practice and procedure for all Divisions, as well as to provide education and training for members.[598]

11.7 VCAT's premises are situated in Melbourne. Applicants must file their claim at the registry in Melbourne, but hearings are held as near to the applicant as possible, at Magistrates' Courts throughout the state.

NEW SOUTH WALES — Administrative Decisions Tribunal

11.8 Similarly, in New South Wales an amalgamated tribunal has been created. The Administrative Decisions Tribunal ("ADT") was established in 1997, and reviews government decisions as well as resolving disputes between individuals in discrimination and retail leases, and exercising disciplinary and regulatory functions in relation to certain occupations.

11.9 The ADT is organised into six divisions.[599] These are:

- General;
- Community Services;
- Equal Opportunity;
- Legal Services;
- Retail Leases; and
- Revenue.

590 Legal Profession Act 2004 (Vic). For further information about the Legal Practice List see Victorian Civil and Administrative Tribunal *2006-07 Annual Report* (Melbourne, 2007) 30-31.

591 Victorian Civil and Administrative Tribunal Act 1998 (Vic), s 10.

592 Victorian Civil and Administrative Tribunal Act 1998 (Vic), ss 30 and 31.

593 Victorian Civil and Administrative Tribunal Act 1998 (Vic), ss 13 and 14.

594 Victorian Civil and Administrative Tribunal Act 1998 (Vic), s 83.

595 Victorian Civil and Administrative Tribunal Act 1998 (Vic), s 88.

596 Victorian Civil and Administrative Tribunal Act 1998 (Vic), Part 4.

597 Victorian Civil and Administrative Tribunal Act 1998 (Vic), sch 1.

598 Victorian Civil and Administrative Tribunal Act 1998 (Vic), s 150.

599 Administrative Decisions Tribunal Act 1997 (NSW), s 19.

The ADT may also constitute an Appeals Panel to hear appeals from any Division on a question of law. The appeal may also be extended to a review of the merits of the decision by leave of the Panel. The Appeals Panel also has jurisdiction to review the decisions of certain bodies which are not part of the ADT. There is a final right of appeal from the Panel's decision to the Supreme Court on a question of law.

11.10 The Land and Environment Court and the Consumer, Trader and Tenancy Tribunal are key tribunals excluded from the ADT. Professional disciplinary bodies are also excluded, with the exception of the legal profession. This means that quite a significant amount of tribunal work does not fall within the ADT's jurisdiction.

11.11 A President, who is a District Court judge,[600] is responsible for the overall running of the ADT, while Deputy Presidents and Divisional Heads head each of the six divisions. Only the President and Deputy Presidents are full-time. All other members are part-time.

11.12 Subject to the Act and Tribunal rules, the ADT has the power to determine its own procedure.[601] The Act sets out a comprehensive framework of powers and procedures.[602] Further rules about the Tribunal's practice and procedure may be made by the Rules Committee established under the Act. Each division also has its own Rules Subcommittee.[603] The Act also provides for alternative dispute resolution, which can occur on a voluntary basis. The ADT may refer matters for mediation or neutral evaluation if the parties agree.[604]

11.13 The ADT is situated in central Sydney. There is also provision for remote access, including video links and telephone conferencing, and hearings can also be held outside Sydney.

Consumer, Trader and Tenancy Tribunal

11.14 New South Wales has created a further tribunal, the Consumer, Trader and Tenancy Tribunal ("CTTT").[605] This is a specialised tribunal, amalgamating a number of different jurisdictions relating to matters involving consumers, traders and tenancy.

11.15 The CTTT is organised into eight divisions, according to the subject matter dealt with. These are:

- Home Building;
- Residential Parks (such as caravan parks);
- Motor Vehicles;
- Retirement Villages;
- Tenancy Disputes;
- Strata and Community Schemes;
- General; and
- Commercial.

600 Administrative Decisions Tribunal Act 1997 (NSW), s 17.

601 Administrative Decisions Tribunal Act 1997 (NSW), s 37(1).

602 Administrative Decisions Tribunal Act 1997 (NSW), Chapter 6.

603 Administrative Decisions Tribunal Act 1997 (NSW), s 92.

604 Administrative Decisions Tribunal Act 1997 (NSW), Part IV.

605 Consumer, Trader and Tenancy Tribunal Act 2001 (NSW).

Western Australia

11.16 Western Australia has also created a single amalgamated tribunal, the State Administrative Tribunal ("SAT"). This was established in 2005, and deals with a wide range of administrative review cases and civil matters.

11.17 The work of the SAT is divided into four streams. These are:

- Human Rights Stream, which makes original and review decisions on guardianship, discrimination and adoptions, and reviews the decisions of the Mental Health Review Board.
- Development and Resources Stream, which reviews government decisions about planning, development and resources, land valuation and compensation and rating.
- Vocational Regulation Stream, which deals with complaints about professional conduct. This stream encompasses most professions. It also reviews licensing decisions and makes decisions regarding fidelity and compensation funds.
- Commercial and Civil Stream, which hears disputes about commercial tenancies, credit and state revenue decisions and reviews local government decisions.
- There is no Appeal division within the SAT. Rather, decisions of the SAT can be appealed to the Supreme Court or Court of Appeal on questions of law.[606]

11.18 Tribunals and tribunal-like bodies excluded from the SAT are the Equal Opportunity Commission, Assessor of Criminal Injuries Compensation, Information Commissioner, Small Claims Tribunal and Small Debts Division of the Local Court. The Mental Health Review Board is not part of the SAT but is co-located within it.

11.19 The SAT is headed by a President, who must be a Supreme Court judge.[607] There must be at least one Deputy President, who must be a District Court judge.[608] Other members, who must have legal qualifications or knowledge of matters within the SAT's jurisdiction, are classed as senior or ordinary members,[609] and are appointed on a full-time, part-time or sessional basis.[610]

11.20 Again, the Act sets out consistent procedural rules for the Tribunal.[611] Except as prescribed in legislation, the SAT may determine its own procedure.[612] There is also a Rules Committee established under the Act, which may make rules relating to the Tribunal.[613] The Act also provides for alternative dispute resolution mechanisms. At any time before the hearing, the SAT may require the parties to attend a compulsory conference to clarify the issues and promote settlement.[614] It may also refer a matter to mediation at any stage in the proceedings, with or without the consent of the parties.[615]

606 State Administrative Tribunal Act 2004 (WA), s 105.
607 State Administrative Tribunal Act 2004 (WA), s 108(3).
608 State Administrative Tribunal Act 2004 (WA), s 112(3).
609 State Administrative Tribunal Act 2004 (WA), s 117.
610 State Administrative Tribunal Act 2004 (WA), s 118.
611 State Administrative Tribunal Act 2004 (WA), Part 4.
612 State Administrative Tribunal Act 2004 (WA), s 32.
613 State Administrative Tribunal Act 2004 (WA), ss 170 and 172.
614 State Administrative Tribunal Act 2004 (WA), s 52.
615 State Administrative Tribunal Act 2004 (WA), s 54.

11.21 The SAT is situated in Perth, but operates throughout the state in court houses, local government chambers, private conference facilities and by video and teleconferencing.[616]

SOUTH AUSTRALIA

11.22 South Australia has taken a different approach to that taken in other Australian states. Rather than amalgamating tribunals within a stand-alone tribunal structure, tribunals have been incorporated into the court system. The Administrative and Disciplinary Division ("ADD") of the District Court of South Australia conducts merits review of administrative decisions and is not separate from the courts.

11.23 The ADD sits as a division of the District Court,[617] meaning that its members are all District Court judges. Consequently, a judge sitting alone will generally decide cases, rather than a larger panel of several members as in many tribunals. However judges may seek expert reports and, depending on the legislation under which an appeal is brought, may sit with assessors.[618]

11.24 The ADD has jurisdiction under a number of acts that confer an appellate jurisdiction on the District Court. These include the Mental Health, Guardianship and Administration, Freedom of Information and Passenger Transport Acts. The ADD also presides over a number of statutory tribunals. These are the Medical Practitioners Professional Conduct Tribunal, the Dental Professional Conduct Tribunal, the Equal Opportunity Tribunal, Pastoral Land Appeal Tribunal, Police Disciplinary Tribunal, the Wardens Court, Soil Conservation Appeal Tribunal and Fire Service Appeals. However, many existing tribunals continue to sit separately from the ADD. These include the Environment Resources and Development Court, the Residential Tenancies Tribunal and the Workers Compensation and Appeal Tribunal.

AUSTRALIAN CAPITAL TERRITORY

11.25 The Australian Capital Territory is currently considering options for tribunal reform. The preferred option at this stage is to consolidate tribunals into one body, similar to VCAT or the SAT.[619]

UNITED KINGDOM

11.26 The United Kingdom has taken an incremental approach to reforming tribunals and has chosen to begin with reform of the administration of tribunals, with legislative changes to the structure of the tribunal system coming later. The various phases of reform are outlined below. Initially individual tribunals were retained but brought under a common administration. However, the enactment of the Tribunals, Courts and Enforcement Act 2007 signalled a move to a much greater degree of integration of tribunals.

Leggatt Report

11.27 In May 2000 Sir Andrew Leggatt was asked to carry out a review of tribunals. The resulting Leggatt Report proposed unification of tribunals under a common administrative service independent of the bodies whose decisions tribunals

616 State Administrative Tribunal *Annual Report 2005-2006* (Perth, 2006) 1.

617 District Court Act 1991 (SA), s 7(d).

618 District Court Act 1991 (SA), ss 20(4) and 34.

619 Australian Capital Territory Department of Justice and Community Safety *Options for Reform of the Structure of ACT Tribunals: Discussion Paper* (Canberra, 2007).

reviewed. The Report proposed a two-tier structure, with each tier grouped into divisions according to subject matter. There would be nine divisions within the first tier, with an overarching appellate tier.[620]

11.28 The Government accepted the Leggatt Report's recommendations in relation to creating a more unified structure and a Tribunals Service to provide common administrative support. However it took the view that formal divisions were not necessary.[621]

Tribunals Service

11.29 The first stage of reform dealt with arrangements for administrative support to tribunals. In May 2003 the Government announced that it would create an independent Tribunals Service. This drew together the administration of tribunals within a single agency under the Department for Constitutional Affairs (now part of the Ministry of Justice). In April 2006 the Tribunals Service took over responsibility for administration of the main central government tribunals. The individual tribunals retain their separate existence, with the Tribunals Service providing common administrative support.[622]

Tribunals, Courts and Enforcement Act 2007

11.30 This Act provides the legislative mandate for structural change, creating a unified system of tribunals. The policy behind the Act is "to create a new, simplified statutory framework for tribunals, bringing existing tribunal jurisdictions together and providing a structure for new jurisdictions and new appeal rights."[623]

11.31 The Act creates two new tribunals, the First Tier Tribunal and Upper Tribunal,[624] which will be administered by the Tribunals Service. The First Tier Tribunal will eventually consolidate the majority of existing tribunals and will hear the majority of first instance cases. The Upper Tribunal will deal with appeals from the First Tier, some first instance cases, some work currently performed by the High Court and judicial reviews. While the Government has rejected a formal divisional structure, the Lord Chancellor may, with the concurrence of the Senior President of Tribunals, organise both the First Tier and Upper Tribunals into chambers.[625] The Lord Chancellor is given power to transfer the jurisdiction of existing tribunals into the new tribunal structure.[626] This process is expected to begin in October 2008,[627] and tribunals will be transferred into the new structure incrementally. Furthermore, new jurisdictions created in the future will be placed within the new tribunal structure.

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620 Sir Andrew Leggatt *Tribunals for Users – One System, One Service* (Report of the Review of Tribunals, London, 2001) para 6.3, 6.5 and 6.10.

621 Department for Constitutional Affairs *Transforming Public Services: Complaints, Redress and Tribunals* (London, 2004) para 6.38.

622 In the UK system, machinery of government transfers of this nature can be achieved without primary legislation.

623 Tribunals, Courts and Enforcement Bill 2006 (Explanatory Notes) para 6.

624 Tribunals, Courts and Enforcement Act 2007 (UK), s 3.

625 Tribunals, Courts and Enforcement Act 2007 (UK), s 7.

626 Tribunals, Courts and Enforcement Act 2007 (UK), s 30.

627 Lord Justice Carnwath "Comment: The Tribunals Revolution" (July 2007) Adjust – Newsletter of the Council on Tribunals London. Available at www.council-on-tribunals.gov.uk/adjust/item/comment_tribrev.htm (accessed 14 November 2007).

11.32 Key tribunals excluded from the new structure are the Asylum and Immigration Tribunal, Employment Appeal Tribunal and employment tribunals. However these tribunals, while remaining separate from the new structure, will be administered by the Tribunals Service and will be under the leadership of the Senior President of Tribunals. Most professional disciplinary bodies will also be excluded. Furthermore, all local government tribunals will be excluded due to their funding and sponsorship arrangements.

11.33 The Act creates the office of Senior President of Tribunals to preside over both the First Tier Tribunal and the Upper Tribunal.[628] It is envisaged that the Senior President will have knowledge, experience and standing equivalent to a Lord Justice of Appeal.[629] Where chambers within the Tribunals are established, there will also be Chamber Presidents to preside over each chamber.[630] Other members, who are called tribunal judges, may be appointed on a full-time, part-time or sessional basis.

11.34 There are to be Tribunal Procedure Rules governing the practice and procedure in the First Tier and Upper Tribunals. These Rules may also include provisions about mediation, but mediation is only to take place by agreement of the parties.[631] A Tribunal Procedure Committee will be established to make these rules.[632] The Senior President may also give practice directions relating to practice and procedure of the Tribunals and Chamber Presidents may give practice directions relating to practice and procedure in their chambers.[633]

11.35 From the Upper Tribunal, there is provision for a further appeal to the Court of Appeal, with leave, on questions of law.[634]

11.36 The Tribunals Service is based in London. However, it is proposed to create core hearing centres to be located in the most densely populated areas, permanent hearing centres and casual hearing centres to supplement the other centres as needed. Administrative Support Centres will provide case administration for the hearing centres.[635]

11.37 The Administrative Justice and Tribunals Council, which replaces the previous Council on Tribunals, is to oversee the new system.[636] The Act gives the Council a wide mandate, entrusting it with keeping the administrative justice system under review with a view to making it more accessible, fair and efficient; advising the Lord Chancellor, Scottish and Welsh Ministers and Senior President of Tribunals on the development of the system; keeping under review the workings of the two new tribunals; scrutinising legislation relating to tribunals and advising on tribunal rules.[637]

628 Tribunals, Courts and Enforcement Act 2007 (UK), s 2.

629 Department for Constitutional Affairs *Transforming Public Services: Complaints, Redress and Tribunals* (London, 2004) para 6.61.

630 Tribunals, Courts and Enforcement Act 2007 (UK), s 7.

631 Tribunals, Courts and Enforcement Act 2007 (UK), s 24.

632 Tribunals, Courts and Enforcement Act 2007 (UK), s 22.

633 Tribunals, Courts and Enforcement Act 2007 (UK), s 23.

634 Tribunals, Courts and Enforcement Act 2007 (UK), s 13.

635 Administrative Justice Office *Update on 2007 Reforms in Other Jurisdictions* (Victoria (BC), 2007) 5.

636 Tribunals, Courts and Enforcement Act 2007 (UK), s 44.

637 Tribunals, Courts and Enforcement Act 2007 (UK), sch 7, cl 13 and 14.

QUÉBEC

11.38 Tribunal reform in Québec took place as a part of wider reform of the entire system of administrative justice. The Act respecting Administrative Justice establishes rules governing various decision-making institutions. As a part of this reform, the Tribunal Administratif du Québec or Administrative Tribunal of Quebec ("TAQ") was established and consolidated five existing tribunals into one.

11.39 The five pre-existing tribunals became divisions of the TAQ. These are:

- Social Affairs Division, dealing with income security or support, social allowances, mental health orders, health and social services, education and road safety, pensions, compensation and immigration;
- Immovable Property Division, which determines the indemnities awarded in matters of expropriation, and deals with municipal taxation and property or rent rolls;
- Economic Affairs Division, dealing with the protection of agricultural land and farming activities; and
- Territory and Environment Division, concerned with permits or authorisation under various economic, industrial, professional and commercial laws.

11.40 The TAQ is headed by a president and vice-presidents, who are charged with the administration and general management of TAQ.[638] There are then around one hundred members, called administrative judges. Members are assigned primarily to one division, but may be required to sit in other divisions according to their qualifications. The Act prescribes the composition of panels, which differs according to the type of case.

11.41 A standard set of procedures is laid down for cases in the TAQ. The Act institutes a set of quite specific procedures governing all aspects of tribunal processes, including establishing rules around the conduct of case management conferences, conciliation, pre-hearing conferences and hearings. Rules about evidence and decisions are also enacted, as is a standard approach to appeals.[639]

11.42 The Act also establishes the Conseil de la Justice Administrative, or Administrative Justice Council, to oversee the administrative justice system. Key functions of the Council relating to the TAQ are to establish a code of ethics for members, receive and examine complaints against members and inquire into removal of members. It also may report and make recommendations to the Minister on matters concerning the administration of administrative justice by bodies including the TAQ.[640]

BRITISH COLUMBIA

11.43 British Columbia has taken a different approach, focussing on standardising the legislation governing tribunals rather than creating any new tribunal structure. This has been done by way of a general statute, the Administrative Tribunals Act 2004, which establishes a set of common standards and procedures directed at making tribunals in British Columbia more open and accessible.[641]

638 Act respecting Administrative Justice RSQ 1996 c J-3, s 61.

639 Act respecting Administrative Justice RSQ 1996 c J-3, Chapter VI.

640 Act respecting Administrative Justice RSQ 1996 c J-3, s 177.

641 Ministry of Attorney General "New Act creates consistent procedures for tribunals" (13 May 2004) Media Release 2004AG0022-000353.

11.44 The Act sets out a comprehensive range of provisions relating to all aspects of tribunal work. The key areas that have been standardised are:

Membership

- The Act standardises provisions relating to the term of appointment of Chairs and members, reappointment, grounds on which members' appointments may be terminated, the role of the Chair, remuneration and members' duties.[642] The Chairs of individual tribunals are also given the power to organise the tribunal into panels.[643]

Procedures

- The Act standardises all key areas of procedure including:
  - the form of hearings;
  - whether hearings are public or private;
  - representation of parties;
  - examination and cross-examination of witnesses;
  - the form of applications;
  - requirements for notice and service;
  - time limits for filing appeals; and
  - immunities for tribunal members.

Powers

Tribunals are given powers including to the power to compel witnesses and order disclosure, to award costs, to punish for contempt and to make orders including interim orders, consent orders, and orders to maintain decorum at hearings.

11.45 However, standardisation does not come at the expense of flexibility. Subject to the Administrative Tribunals Act and individual tribunals' enabling acts, a tribunal has the power to control its own processes and may make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it.[644] Many provisions of the Act do not lay down fixed rules but rather clarify what tribunals may do if they choose, and in some cases set criteria for the exercise of discretion.

11.46 The Act covers all of British Columbia's administrative tribunals, of which there are around 30. Certain provisions of the Act are also applied to bodies which are not considered tribunals, including many occupational regulatory and disciplinary bodies.[645]

11.47 There is no overarching body with oversight of the tribunal system. However, there are two voluntary organisations which perform some of this role. The Administrative Justice Organisation monitors consistency of decisions and procedures across different tribunals and proposes reforms. The British Columbian Council of Administrative Tribunals focuses on training and education for tribunal members and standardising procedures across tribunals.

642 Administrative Tribunals Act SBC 2004 c 45, ss 2-10 and 30.

643 Administrative Tribunals Act SBC 2004 c 45, s 26.

644 Administrative Tribunals Act SBC 2004 c 45, s 11.

645 Administrative Justice Office *Application of the Administrative Tribunals Act (ATA) to "Other" Entities* (Victoria (BC), 2007).

CONCLUSION

11.48 In recent years almost all Commonwealth jurisdictions have reformed tribunals to a greater or lesser extent. While there are some important differences between jurisdictions, some distinct trends emerge. Overall, there has been a movement towards a more a consistent and coherent approach to tribunals. Most of the jurisdictions reviewed have amalgamated, grouped or integrated tribunals, although the extent and pace of unification have varied. Within a more integrated system, however, there has still been a need to provide for different types of cases, so the structure of divisions within a larger structure has generally been favoured. Finally, providing some form of leadership and oversight of the tribunal system has been an important aspect of most reforms.

Chapter 12
Options for reform

INTRODUCTION

12.1 On 12 October 2007 the Minister for Courts, Hon Rick Barker, announced Cabinet agreement to begin a programme of tribunal reform aimed at recommending a coherent structure for tribunals and authorities and ensuring consistency in the development of future tribunals.[646] As part of that programme, Cabinet has agreed to work being undertaken to develop a number of options for reform.[647]

12.2 The Law Commission is working with the Ministry of Justice on examining and developing options for reform. The options that are currently on the table for further assessment are those set out in the Cabinet Paper.[648] In this chapter we briefly outline those options, noting that some options may be combined to form broader models for reform. They are not necessarily stand-alone options.

CURRENT OPTIONS

12.3 The options currently under discussion follow.

Option 1: Standardised processes and procedures

12.4 This option focuses on eliminating disparities in tribunal process and procedures. Consistency could be introduced across tribunals through the application of generic legislative provisions, common codes of practice, administrative guidance and cooperative practices. Tribunal powers and procedures and appellant rights could also be aligned to ensure consistency and fairness. The terms of appointment for members, appointment processes and training practices could also be standardised. There could also be scope within this option for more harmonisation in the administrative arrangements used for different tribunals. For example common application forms and processes could be adopted across tribunals. Information and advisory services provided by agencies administering tribunals could also have a common look and feel.

12.5 The option addresses problems of inconsistency and disparity within tribunal processes but does not address other types of issues, particularly those resulting from current administrative arrangements and structures. The current structure,

646 Hon Rick Barker, Minister for Courts "Future Direction For Tribunal Reform Programme Announced" (12 October 2007) Media Statement.

647 Cabinet Policy Committee "Tribunal Reform" (19 September 2007) POL (07) M 22/18.

648 Hon Rick Barber, Minister for Courts "Tribunal Reform" (19 September 2007) Cabinet Paper, Ministry of Justice www.justice.govt.nz (accessed 7 December 2007).

characterised by multiple administrative agencies and large numbers of relatively small tribunals with separate membership, is not really addressed by this option. This option could therefore be considered, in conjunction with other options, as part of a package of reform.

Option 2: Head of tribunals

12.6 The focus of this option is on leadership across the existing system of tribunals. The Cabinet Paper suggests that a new role, 'head of tribunals', could be created with an overarching co-ordination and leadership role across all tribunals. In the preceding chapters we identified a lack of oversight of tribunals as a whole as a serious deficiency of our current arrangements. There is currently no single body or person that exists to co-ordinate procedure, develop coherent practices and processes, monitor performance, or act as an advocate for tribunals in relation to resourcing and other matters. A 'head of tribunals' would give tribunals a stronger voice in the justice system and this may help address such concerns.

12.7 Examples given in the Cabinet Paper illustrate that this option can be developed in a range of ways. It could for example be approached as an 'office' that might be held by an individual person, who would complement and provide support to the judicial or professional leadership of tribunals. Alternatively it might be an agency modelled loosely on the newly reformed United Kingdom Administrative Justice and Tribunals Council. The United Kingdom Council is essentially an advisory body with the statutory function of advising on changes to legislation, practice and procedure in order to assist in the development of coherent principles and good practice for tribunals.

12.8 Although not put forward as part of this option in the Cabinet paper another approach that merits consideration is the creation of an overarching 'head of bench' role. An overarching 'head of bench' or President providing leadership and cohesion is for example an important feature of many of the overseas models discussed in the previous chapter.

12.9 This option, like the previous one, still essentially retains the status quo in terms of tribunal structure. It does not, for example, impact on the overall number of tribunals or address the issues raised in Chapter 5 over the need to separate the administration of tribunals from the agencies whose decisions are being reviewed. This option can therefore also best be considered as part of a package of reform.

Option 3: Clusters of tribunals

12.10 This option proposes grouping or clustering tribunals together with common administrative services. This would reduce the overall number of tribunals by joining or amalgamating groups of 'like' tribunals into new larger tribunals. Administrative arrangements are also consequently rationalised through this process as well. The extent to which the jurisdictions of existing tribunals should be melded or retained is a critical issue for the development of this option and needs careful consideration. As the overseas examples show, there is scope for retaining a greater or lesser degree of separation by having 'divisions' or jurisdictional 'lists' within clustered tribunals.

12.11 A key issue to resolve in developing this option is determining an appropriate approach for grouping 'like' tribunals. The Legislation Advisory Committee in its 1989 report on tribunal reform proposed 'clustering' primarily along the lines of compatible subject matter and expertise for example.[649] A similar approach has been taken in some overseas jurisdictions because it allows scope for members to sit across a number of 'lists' or 'divisions' within a tribunal structure. What constitutes compatible expertise or subject matter is also a matter for careful consideration. There may be other approaches to determining clusters which can be examined as part of the development of this option also.

12.12 The focus of this option is on amalgamating and grouping jurisdictions and administrative arrangements to produce a more coherent well-structured system of tribunals. Better utilisation, training and development of tribunal members, standardising best practices across tribunals and more coherence in appeal arrangements for example are likely to be easier to achieve within clustered tribunals.

Option 4: A single administration for all tribunals

12.13 The option focuses on rationalising the existing plethora of administrative arrangements and on improving perceptions of independence. It proposes that all tribunals would be administered and supported by a single government department or agency which would provide a common registry for tribunals as well as the administrative support and facilities they require. A key objective of this option is to achieve greater separation between the administration of tribunals and the departments or individuals whose decisions or interests are being adjudicated within the tribunal. Another key objective is to facilitate more efficient administration, management of resources and case management.

12.14 This option can also be considered as part of a package of reform measures. It could, for example, be combined with the standardisation of procedures option and a formation of the 'head of tribunals' option to form a more comprehensive proposal for reform.

Option 5: Single unified structure

12.15 This option involves bringing all tribunals together under a single administering body into a single entity or 'super tribunal' which would combine the jurisdictions of existing tribunals into a number of divisions. In many of the unified models that have been established overseas jurisdictional lists are also retained within each division. When developing this option consideration will need to be given to how existing tribunals are grouped and amalgamated and fitted into 'divisions' or 'lists' within the structure. Again in overseas models, the single unified tribunal structure is normally overseen by a 'head of tribunals' in the form of a head of bench who provided leadership across the entire structure.

12.16 In its report *Delivering Justice for All*, published in 2004, the Law Commission recommended a single unified structure, although it did not develop that proposal in detail.

649 Legislation Advisory Committee *Report No 3: Administrative Tribunals* (Government Printer, Wellington, 1989).

CONCLUSION

12.17 The Law Commission and Ministry of Justice are examining and developing options for tribunal reform in New Zealand. They are currently considering the five options outlined above, and also the ways in which those options can sensibly be combined into broader reforms to better address the issues we identified in Part II and Chapter 10. Much definition and analysis will need to take place before we will be in a position to make any recommendations. It may be that as work progresses other options for reform will emerge. We remain open to that possibility.

12.18 This issues paper has sought to define the problems in the current system. We welcome comment. We would be interested to know whether we have identified the problems correctly; and any suggestions readers may have as to how the system could be improved.

Discussion questions

Q1.	Have we correctly identified the problems in the current tribunal system?
Q2.	Are there any other problems you can think of?
Q3.	Which do you think are the most significant problems?
Q4.	Have you any views on how the problems of the current structure might best be addressed?
Q5.	Have you any other comments?

APPENDICES

Appendix 1

List of tribunals – inclusions and exclusions

Decision-making bodies proposed for inclusion in the scope of the tribunal reform programme[650]

Administrative review tribunals (Provision of judicially-led review of government agency decisions [often merits-based])	• Land Valuation Tribunals • Residence Review Board* • Deportation Review Tribunal* • Removal Review Authority* • Refugee Status Appeals Authority* • Legal Aid Review Panel • State Housing Appeal Authority • Social Security Appeal Authority • Student Allowance Appeal Authority • [War Pensions] District Claim Panels • [War Pensions] National Review Officers • War Pensions Appeal Boards • [Health Act] Boards of Appeal • Medicines Review Committee • Customs Appeal Authorities • Taxation Review Authority • Maritime Appeal Authority • [Fisheries] Catch History Review Committee • Film and Literature Board of Review

* These tribunals are in the process of being amalgamated into the Immigration and Protection Tribunal

650 Cabinet agreed that the decision-making bodies set out in this table be included in the scope of the tribunal reform programme as work progresses, but noted that ongoing work is to be done to decide finally which decision-making bodies should be included. The list is therefore only indicative at this stage. See Cabinet Policy Committee "Tribunal Reform" (19 September 2007) POL (07) M 22/18.

Occupational licensing, registration and discipline (Provision of occupational licensing, registration and disciplinary functions to statutorily established bodies)	• Building Practitioners Board • Cadastral Surveyors Licensing Board • [Chartered Professional Engineers] Registration Authority • Chartered Professional Engineers Council • Electrical Workers Registration Board • Engineering Associates Registration Board • Engineering Associates Appeal Tribunal • [Health Practitioner] Registration Authorities • Health Practitioners Disciplinary Tribunal • District Law Practitioners Disciplinary Tribunal • New Zealand Law Practitioners Disciplinary Tribunal • Lawyers & Conveyancing Practitioners Standards Committees • Immigration Advisers Complaints and Disciplinary Tribunal • Legal Complaints Review Officer • New Zealand Lawyers and Conveyancers Disciplinary Tribunal • The Licensing Authority of Secondhand Dealers and Pawnbrokers • Racing Appeals Tribunals • Racing Judicial Committees • Registrar of Motor Vehicle Traders • Music Teachers Registration Board • Plumbers, Gasfitters and Drainlayers Board • Police Disciplinary Tribunal • Registrar of Private Investigators & Security Guards • Real Estate Agents Licensing Board • [Real Estate Agents] Regional Disciplinary Committees • New Zealand Registered Architects Board • Social Workers Complaints and Disciplinary Tribunal • Trans-Tasman Occupations Tribunal (might not fit in this category) • [Teachers] Complaints Assessment Committee • [Teachers] Complaints Disciplinary Tribunals • Valuers Registration Board • Valuers Registration Board of Appeal • Veterinary Council of New Zealand • [Veterinarians] Complaints Assessment Committees • [Veterinarians] Judicial Committees

Tribunals that decide disputes between people (Specialised dispute resolution services)	• Copyright Tribunal • Disputes Tribunal • Employment Relations Authority • Motor Vehicle Disputes Tribunals • Human Rights Review Tribunal • Retirement Villages Disputes Panels • Weathertight Homes Tribunals • Tenancy Tribunal
Miscellaneous (Agencies with the characteristics of tribunals that do not fit well within any other category)	• Liquor Licensing Authority • Judicial Conduct Panel • Mental Health Review Tribunal • Parole Board

Decision-making bodies proposed for exclusion from the tribunal reform programme[651]

Reason for exclusion	Tribunal-like body
Parliamentary bodies and independent Commissions and Commissioners, and Crown Entities (and similar bodies that have been established to run as completely independent organisations without external direction)	• Banking Ombudsman • Insurance and Savings Ombudsman (ISO) • Office of Electricity & Gas Complaints Commissioner • Transport Accident Investigation Commission • Environmental Risk Management Authority • Civil Aviation Authority • Ombudsmen • Parliamentary Commissioner for the Environment • Health and Disability Commissioner • Privacy Commissioner • Judicial Conduct Commissioner • Charities Commission • Commerce Commission • Telecommunications Commissioner • Securities Commission • Takeovers Panel • Electricity Commission • Police Complaints Authority • Gambling Commission • Social Workers Registration Board • Teachers Council • Office of Film and Literature Classification • Broadcasting Standards Authority • Commissioner of Patents • Commissioner of Trade Marks • Commissioner of Designs. • Commissioner of Plant Variety Rights
Bodies that are recommendatory only, or primarily recommendatory	• [Fisheries] s 181 Public Inquiry Tribunals • Waitangi Tribunal • Coroners
Bodies that have some tribunal-like functions and characteristics, but these are only a small part of their role	• Soil Conservation and Rivers Control Tribunals • Birdlings Flat Land Titles Commissioner • (NZ) Horticulture Export Authority • Abortion Supervisory Committee • Central Committee of the Hawke's Bay Earthquake Relief Funds

651 Cabinet agreed that the decision-making bodies set out in this table be excluded from the scope of the tribunal reform programme at this stage, but noted that ongoing work is to be done to decide finally which decision-making bodies should not be included.

Appendix 2

Table of appeal rights

Administrative review tribunals							
The tribunal	Nature of 1st appeal	1st appeal body	Time limits	Appellate procedures	Powers on appeal	Nature of 2nd appeal	2nd appeal body
Refugee Status Appeals Authority	Decisions are final and there are no rights of appeal.						
Student Allowance Appeal Authority	Decisions are final and there are no rights of appeal.						
[Health Act] Boards of Appeal	Decisions are final and there are no rights of appeal.						
War Pensions Appeal Boards	Decisions are final and no further right of appeal except that a claimant may seek to satisfy the Chief Executive of the administering department that additional evidence has become available or it is otherwise in the interests of justice for the claim to be reconsidered. If accepted it is dealt with as a fresh claim for a pension.						
Maritime Appeal Authority	Decisions of Authority are final.						

Abbreviations

DC – District Court
HC – High Court
CA – Court of Appeal

Administrative review tribunals continued...

The tribunal	Nature of 1st appeal	1st appeal body	Time limits	Appellate procedures	Powers on appeal	Nature of 2nd appeal	2nd appeal body
[Fisheries] Catch History Review Committee	No rights of appeal.						
Social Security Appeal Authority & Special Appeal Authorities	Appeal on a question of law only.	HC	Within 14 days of the determination appellant must lodge notice of appeal. Judge may extend time limit. Appellant's case must be lodged within a further 14 days or such further time as Chairperson of Authority allows.	Appeal by way of a case stated.	Not specified in Act	With leave may appeal against determination of HC on case stated.	CA
Residence Review Board	Appeal on a question of law.	HC	Within 28 days after the date on which the decision was notified, or such further time as the Court may allow.	Rehearing	Determine question(s) of law and do 1 or more of: (a) confirm the decision of the Board; (b) remit the matter to the Board with its opinion and any directions; (c) make any other order in relation to the matter as it thinks fit.	With leave a final appeal on question of law.	CA
Deportation Review Tribunal	Appeal on a question of law.	HC	Within 28 days after the date of determination the appellant must lodge notice of appeal. HC may extend time.	Rehearing	Determine question(s) of law and do 1 or more of: (a) reverse, confirm or amend the decision of the Tribunal; (b) remit the matter to the Tribunal with its opinion; and (c) make any other order in relation to the matter as it thinks fit.	Excluded – HC decision stated as final.	
Removal Review Authority	Appeal on a question of law.	HC	Within 28 days after the date on which the decision was notified, or such further time as the Court may allow.	Rehearing	Determine question(s) of law and do 1 or more of: (a) confirm the decision of the Authority; (b) remit the matter to the Authority with its opinion and any directions; (c) make any other order in relation to the matter as it thinks fit.	With leave a final appeal on a question of law.	CA

Administrative review tribunals continued...

The tribunal	Nature of 1st appeal	1st appeal body	Time limits	Appellate procedures	Powers on appeal	Nature of 2nd appeal	2nd appeal body
Film and Literature Board of Review	Appeal on a question of law.	HC	Within 20 working days after the date of determination appellant must lodge a notice of appeal. Court may extend time for lodging appeal.	Rehearing	Under the HC Rules the court may make any decision or decisions it thinks should have been made or may direct the tribunal (a) to rehear the roceedings concerned; or (b) to consider or determine (whether for the first time or again) any matters the Court directs; or (c) to enter judgment for any party to the proceedings the Court directs; or (d) make any further or other order the Court thinks fit (including any order as to costs).	Appeal for opinion on a question of law.	CA
Legal Aid Review Panel	Appeal on a question of law.	HC	HC Rule 704 - Within 20 working days after the decision appealed against is given. HC may extend the time limit.	Rehearing	Under the HC Rules (see entry under Film and Literature Board of Review above.)	With leave appeal on question of law.	CA
Taxation Review Authority	Appeal on question of law or where monetary criteria are met there is a general right of appeal.	HC – but may remove to CA	Within 30 days after the date of determination appellant must lodge a notice of appeal. Must submit the case stated within 9 months of the determination. If appellant is an objector must provide security for costs. No discretion to extend time limit given.	Appeal by way of case stated.	Under the HC Rules (see entry under Film and Literature Board of Review above.)	Question of law.	CA
Medicines Review Committee	Right of appeal limited to ground that a relevant requirement of the Act or regulations has not been complied with or the decision is unreasonable.	HC	Within 28 days after the notice of decision that is the subject of the appeal, or within such extended time as the Court allows.	Rehearing	Court has all powers of the Committee for purposes of modifying any decision or substituting a new decision.	With leave may appeal. For purposes of determining appeal the Court shall have all the powers conferred on HC by the Act.	CA
District Benefit Review Committees	General right of appeal.	Social Services Appeal Authority	Appeal must be lodged within 3 months after the applicant receives the decision or any additional time allowed by the Authority.	By way of rehearing.	May confirm, modify, or reverse the decision or determination appealed against.	Appeal by way of case stated on a question of law only.	HC
[War Pensions] District Claim Panels	General right of appeal.	National Review Officers	Seek review within 6 months of notification of decision. No discretion to extend time limit given.		National Review Officer has power to (a) confirm the decision; or (b) amend or reverse the decision; or (c) make such other decision as is appropriate to the circumstances of the case.	General right of appeal.	War Pensions Appeal Boards

Administrative review tribunals continued...

The tribunal	Nature of 1st appeal	1st appeal body	Time limits	Appellate procedures	Powers on appeal	Nature of 2nd appeal	2nd appeal body
[War Pensions] National Review Officers	General right of appeal.	War Pensions Appeal Boards	Seek review within 6 months of notification of decision. No discretion to extend time limit given.		May confirm the decision or in accordance with the provisions of the Act, grant or refuse to grant a pension, or increase or reduce the rate of any pension, or terminate any pension.	Excluded – No further rights of appeal except that a claimant may seek to satisfy the Chief Executive of the administering department that additional evidence has become available or it is otherwise in the interests of justice for the claim to be reconsidered. If accepted it is dealt with as a fresh claim for a pension.	
State Housing Appeals Authority	General right of appeal.	DC	Appeal must be lodged within 14 days or within such additional time as Court allows.	DC Rules specify appeal by way of rehearing.	The Court may set aside or quash a decision, substitute its own decision, make consequential orders, or remit the whole or any part of the matter for further reconsideration and determination. If the matter is remitted, the Court shall give the tribunal reasons and directions.	General right of appeal to HC. Further right of appeal to the CA lies only with leave of the HC or CA. See Judicature Act 1908 s 67.	HC
Customs Appeal Authorities	Where decision erroneous in point of law or fact may appeal to Court.	HC	Within 20 working days after the date of the decision or within such extended time as Court allows. Except where appellant is the Chief Executive of the Customs Service must give security for costs. Must submit case setting out facts and questions of law within 2 months after date of decision.	Appeal by way of case stated.	Under the HC Rules (see entry under Film and Literature Board of Review above.)	Question of law only.	CA
Land Valuation Tribunals	General right of appeal.	HC sitting with 2 additional non-judicial members.	Time limits vary for different decisions. 21 days in case of an order on a claim under Public Works Act 1981; 7 days in case of an order under Part II Land Settlement promotion and Land Acquisition Act 1952; 14 days in all other cases. Court may allow further time.	By way of rehearing	Court may confirm, discharge, or vary any order of the Tribunal, or direct that the matter be referred to the Tribunal for further consideration, and may make any such order as it considers just and equitable.	With leave – s 66 of Judicature Act 1908 applies to any appeal.	CA

Tribunals that resolve disputes between people

The tribunal	Nature of 1st appeal	1St appeal body	Time limits	Appellate procedures	Powers on appeal	Nature of 2nd appeal	2Nd appeal body
[Racing] Appeals Tribunals	No rights of appeal.						
Copyright Tribunal	Appeal on question of law.	HC	HC Rule 704 – Within 20 working days after the decision appealed against is given. HC may extend the time limit.	Rehearing	Under the HC Rules (see entry under Film and Literature Board of Review above.)	Further right of appeal to the CA lies only with leave of the HC or CA. See Judicature Act 1908 s 67.	CA
Disputes Tribunal	May appeal to the District Court against a tribunal order if the proceedings or investigation was conducted in a manner unfair to the appellant and prejudicially affected the result.	DC	Within 28 days of the making of the order appealed against, or such further time as the Court allows.	Restricted to procedural unfairness.	The court may quash the order and order a rehearing of the claim in the Tribunal or quash the order and transfer the proceedings to a District Court for hearing; or dismiss the appeal.		
Motor Vehicle Disputes Tribunals	General right of appeal if amount claimed exceeds $12,500 otherwise appeal on grounds that the proceedings were conducted by the Tribunal in a manner that was unfair to the appellant and prejudicially affected the result of the proceeding.	DC	Within 10 working days of notice of decision. No discretion to extend time limit given.	By way of rehearing.	District Court Rules apply - The Court may set aside or quash a decision, substitute its own decision, make consequential orders, or remit the whole or any part of the matter for further reconsideration and determination. If the matter is remitted, the Court shall give the tribunal reasons and directions.	No further right of appeal – DC decision final.	
[Racing] Judicial Committees	General right of appeal.	[Racing] Appeals tribunal	Not specified in Act but Racing Rules which are made under s 29 of the Act cover such matters.		Not specified in Act but Racing rules which are made under s 29 of the Act cover such matters.	No further rights of appeal.	
Tenancy Tribunal	General right of appeal against all decisions of tribunal except interim orders and disputes with a value of <$1,000.	DC	Within 10 working days after the date of the decision. No discretion to extend time limit given.	By way of rehearing.	The court has power to quash the order of the Tribunal and order a rehearing of the claim by the Tribunal on such terms as the court thinks fit; or quash the order, and substitute for it any other order or orders that the Tribunal could have made in respect of the original proceedings.	Appeal on question of law to HC, then with leave of the HC further appeal to CA.	HC
Retirement Villages Disputes Panels	General right of appeal.	DC if had jurisdiction to hear the dispute as a court of first instance, or HC in all other cases.	Within 20 working days of the Panels decision. No discretion to extend time limit given.	By way of rehearing.	Under the HC Rules (see entry under Film and Literature Board of Review above.)	Excluded – Decision on appeal is final.	

Tribunals that resolve disputes between people continued...

The tribunal	Nature of 1st appeal	1St appeal body	Time limits	Appellate procedures	Powers on appeal	Nature of 2nd appeal	2Nd appeal body
Weathertight Homes Tribunals	Appeal on question of law or fact.	DC or HC depending on amount at issue. DC has jurisdiction for claims not exceeding $200,000.	Within 20 days of the date of the determination or within any additional time the Court allows.	Rehearing	When determining the appeal, the court may: (a) confirm, modify, or reverse the determination or any part of it; (b) exercise any of the powers that could have been exercised by the tribunal in relation to the claim to which the appeal relates.	Excluded – HC determination on appeal is final.	
Human Rights Review Tribunal	General right of appeal.	HC sitting with 2 additional members appointed by a Judge from a panel maintained by the Minister under the Act.	Within 30 days after the written decision of the Tribunal. No discretion to extend time limit given.	High Court Rules - By way of a rehearing under R718.	The court may confirm, modify, or reverse the decision or any part of it and exercise any of the powers that could have been exercised by the tribunal. The court may refer the matter back to the tribunal for further consideration.	Appeals with leave on questions of law.	CA
Employment Relations Authority	General appeal either de novo or on specified error(s) of law or fact.	EC	Within 28 days of the date of the determination. Must specify errors of fact and law or elect a de novo hearing in the notice of appeal.	De novo or by way of rehearing.	No limits on the power of the EC to make any order.	May appeal on questions of law. Section 66 of the Judicature Act 1908 applies.	CA

Occupational regulation and disciplinary tribunals

The tribunal	Nature of 1st appeal	1St appeal body	Time limits	Appellate procedures	Powers on appeal	Nature of 2nd appeal	2Nd appeal body
Engineering Associates Appeal Tribunal	No right of appeal.						
Valuers Registration Board of Appeal	No right of appeal.						
Police Disciplinary Tribunal	Tribunal makes recommendations to Commissioner. Commissioner may approve rehearing of the charge. No other rights of appeal are provided.						
Trans-Tasman Occupations Tribunal	General right of appeal from unsuccessful applications Appeal on question of law from any other decision.	HC	High Court R 704 - Within 20 working days after the decision appealed against is given. HC may extend the time limit.	Rehearing	Under the HC Rules (see entry under Film and Literature Board of Review above.)	Silent - Further right of appeal to the CA lies only with leave of the HC or CA. Judicature Act 1908, s67.	CA

Occupational regulation and disciplinary tribunals continued...

The tribunal	Nature of 1st appeal	1St appeal body	Time limits	Appellate procedures	Powers on appeal	Nature of 2nd appeal	2Nd appeal body
[Chartered Professional Engineers] Registration Authority[652]	General right of appeal.	Chartered Professional Engineers Council	Within 28 days after the person receives notice of the decision from the Authority; or any further time that the Council allows on application.	By way of rehearing.	The Council may confirm, vary, or reverse the decision, to which the appeal relates. It may refer the matter back to the Authority for it to reconsider together with any directions that the Council thinks fit. It may make any decision that could have been made by the Authority.	Appeal by way of rehearing.	DC
Engineering Associates Registration Board	General right of appeal.	Engineering Associates Appeal Tribunal	Within 3 months after notice of the decision has been given. No discretion to extend time limit given.	Rehearing	The tribunal may confirm or vary or cancel the decision of the Board, or may order the registration of the appellant or the restoration of their name to the register, or make any other order as the case may require.	Excluded – Tribunal decision final.	
District Law Practitioners Disciplinary Tribunal	General right of appeal.	NZ Law Practitioners Disciplinary Tribunal.	Time limit for appeal to be prescribed in rules.	By way of rehearing.	The Tribunal may confirm, reverse, or modify the order or decision appealed against.	Right of appeal by way of rehearing.	HC
[Real Estate Agents] Regional Disciplinary Committees	General right of appeal.	Real Estate Agents Licensing Board	Within 28 days after the date on which the appellant was notified in writing of the Committee's decision. No discretion to extend time limit given.	Rehearing	The Board may confirm or reverse the decision appealed against or make such other order as the case requires, or may refer the matter back, together with its reasons for doing so, to the Committee for reconsideration.	Board's decision on matters appealed from Disciplinary Committees is final.	
Valuers Registration Board	General right of appeal.	Valuers Registration Board of Appeal	Within 3 months after notice of the decision has been given to the appellant. No discretion to extend time limit given.	Rehearing	The Appeal Board may confirm the decision of the Board, or may order the registration of the appellant or the restoration of the appellant's name to the register or the determination of the order of suspension, or the remission of the whole or any part of any monetary penalty imposed, or may make such other order as the case may require.	Excluded – decision of Board is final.	

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Occupational regulation and disciplinary tribunals continued...

The tribunal	Nature of 1st appeal	1St appeal body	Time limits	Appellate procedures	Powers on appeal	Nature of 2nd appeal	2Nd appeal body
Cadastral Surveyors Licensing Board	General right of appeal.	DC	Within 28 days of after notice of the decision has been communicated by the Board or within any further time that the District Court may allow.	Rehearing	The Court may confirm, reverse, or modify the decision of the Board, or may refer the matter back to the Board in accordance with rules of Court, and may give any decision that the Board could have given in respect of the matter.	Excluded – DC decision final.	
Electrical Workers Registration Board	General right of appeal.	DC	Within 20 working days after notice of the decision has been communicated or within such further time as a District Court may allow.	Rehearing	The Court may confirm, reverse, or modify the decision of the Board or may give any decision, or make any direction or order, that the Board may make. The Court may direct the Board to reconsider the whole or any part of the matter to which the appeal relates.	Appeal by way of case stated on question of law.	HC
Building Practitioners Board	General right of appeal.	DC	Within 20 working days after notice of the decision is communicated to the appellant or such further time as the DC allows.	By way of rehearing.	The DC may confirm, reverse, or modify the decision or action appealed against; and may make any other decision or take any other action that the Board could have made. The Court may direct the Board to reconsider the whole or any part of the matter to which the appeal relates.	Appeal on question of law. Part 4 of the Summary Proceedings Act 1957 (together with the other provisions of that Act that are applied in that Part) applies to the appeal.	HC
Chartered Professional Engineers Council	General right of appeal.	DC	Within 28 days after the person receives notice of the decision from the Council; or any further time that the Court allows on application.	By way of rehearing.	The Court may confirm, vary, or reverse the decision, to which the appeal relates. It may refer the matter back to the Council for it to reconsider together with any directions that the Court thinks fit. It may make any decision that could have been made by the Council.	Appeal by way of case stated.	HC

Occupational regulation and disciplinary tribunals continued...

The tribunal	Nature of 1st appeal	1St appeal body	Time limits	Appellate procedures	Powers on appeal	Nature of 2nd appeal	2Nd appeal body
[Health Practitioner] Registration Authorities[653]	General appeal against decisions in relation to registration.	DC	Within 20 working days after notice of the decision or order is communicated to the appellant, or within any further time the Court allows.	By way of rehearing.	The Court may confirm, reverse, or modify the decision or order appealed against; and make any other decision or order that the authority could have made. The court may direct the Authority to reconsider the decision or order.	Further appeal on question of law. Part 4 of the Summary Proceedings Act 1957 (together with the other provisions of that Act that are applied in that Part) applies to the appeal.	HC
Registered Architects Board	General appeal on registration and disciplinary matters.	DC	Within 20 working days from when decision is communicated to appellant or within such further time as the court allows.	Rehearing	The Court may confirm, reverse, or modify the decision or action appealed against; andmay make any other decision or take any other action that the person or body that made the decision or took the action appealed against could have made or taken. The Court must not review any decision or action or any part of a decision or action not appealed against. The Court may also refer the matter back to the Board with directions for rehearing.	Further appeal on question of law. Part 4 of the Summary Proceedings Act 1957 (together with the other provisions of that Act that are applied in that Part) applies to the appeal.	HC
The Licensing Authority of Secondhand Dealers and Pawnbrokers	General right of appeal, except in the case of a decision relating to waiver of disqualification, where there is no appeal.	DC	Within 20 days of the date of the decision appealed against, or within any longer period that the Court allows.	Rehearing	The Court may confirm or reverse the decision of the Authority.	Excluded – DC decision on appeal is final.	
Registrar of Motor Vehicle Traders	General right of appeal against Registrar's decision to refuse or to cancel registration.	DC	Within 20 working days after the date on which notice of the decision was communicated to the appellant or any further time that the Court may allow.	Rehearing	The Court may confirm or reverse the decision of the Registrar. The Court may make an interim order allowing the appellant to carry on the business of motor vehicle trading while appeal is being determined.	Excluded – DC decision on appeal is final.	

653 The Registration Authorities are Dental Council, Midwifery Council, Pharmacy Council, Osteopathic Council, Chiropractic Board, Dietitians Board, Medical Radiation Technologists Board, Medical Council of New Zealand, Medical Laboratory Science Board, Nursing Council of New Zealand, Occupational Therapy Board, Optometrists and Dispensing Opticians Board, Podiatrists Board, Psychologists Board.

Occupational regulation and disciplinary tribunals continued...

The tribunal	Nature of 1st appeal	1St appeal body	Time limits	Appellate procedures	Powers on appeal	Nature of 2nd appeal	2Nd appeal body
Music Teachers Registration Board	General right of appeal against decision to register, not register or cancel registration.	DC	Within 1 month after notice of the decision has been given to the appellant by the Registrar.No discretion to extend time limit given.	By way of rehearing.	District Court R561 applies – The Court may set aside or quash a decision, substitute its own decision, make consequential orders, or remit the whole or any part of the matter for further reconsideration and determination. If the matter is remitted, the Court shall give the tribunal reasons and directions.	Excluded – DC decision on appeal is final.	
Plumbers, Gasfitters and Drainlayers Board	General right of appeal to against decisions of the Board.	DC	Within 20 working days after notice of the decision was given to the appellant or any further time that the Court allows.	Rehearing	The Court may confirm, reverse, or modify the decision of the Board or make any decision that the Board could have made in respect of the matter. The Court may also refer the matter back to the Board with directions for rehearing.	Further appeal on question of law.	HC
Registrar of Private Investigators & Security Guards	General right of appeal.	DC	Within 28 days after the date on which the appellant was given written notice of the decision appealed against, or within such further time as the Court allows.	Rehearing	The Court may confirm, vary, or reverse the decision appealed against; orrefer the matter back to the Registrar with directions to reconsider the whole or any specified part of the matter.	Excluded – DC decision on appeal is final.	
Social Workers Complaints and Disciplinary Tribunal	General right of appeal.	DC	Within 20 working days after notice of the decision is communicated to the appellant, or within any further time the Court allows.	Rehearing	The Court may confirm, reverse, or modify the decision or order appealed against; and make any other decision that the Tribunal could have made. The Court may refer the matter back to the Tribunal with directions for reconsideration.	Further appeal on question of law.	HC
Teachers Council	General right of appeal by way of rehearing (excluding complaints about competency).	DC	Within 28 days of receiving notice of the decision from the Council or any longer period the Court allows.	Rehearing	Court may confirm, reverse or modify decision, or make any decision Council could have made. Court may refer the matter back to the Council with directions for reconsideration.	On question of law with leave of HC or CA.	CA

Occupational regulation and disciplinary tribunals continued...

The tribunal	Nature of 1st appeal	1St appeal body	Time limits	Appellate procedures	Powers on appeal	Nature of 2nd appeal	2Nd appeal body
[Teachers] Complaints Disciplinary Tribunals	General right of appeal.	DC	Within 28 days of receiving notice of the decision, or any longer period that the Court allows.	Rehearing	Court may confirm, reverse or modify decision, or make any decision Council could have made. Court may refer the matter with directions for reconsideration.	On question of law with leave of HC or CA.	CA
Veterinary Council of New Zealand	General right of appeal by way of rehearing against decision to decline application, suspend or cancel registration.	DC	Within 20 working days after notice of the decision or action is communicated to the appellant, or within any further time the Court allows.	Rehearing	The Court may confirm, reverse, or modify the decision appealed against or make any other decision or take any other action that the Council could have made or taken. The Court may refer the matter back to the Council for reconsideration.	Further appeal on question of law. Part 4 of the Summary Proceedings Act 1957 (together with the other provisions of that Act that are applied in that Part) applies to the appeal.	HC
Real Estate Agents Licensing Board	General right of appeal against refusal to issue licence, cancellation or suspension. No right of appeal from Board's decision on matters appealed from Disciplinary Committees.	HC	Within 28 days after the date on which the appellant was notified of the decision appealed against, or within such further period as the Court may allow.	Rehearing	The Court may confirm, modify, or reverse the decision appealed against. The Court may also refer the matter back to the Board with directions for reconsideration.	Further appeal by way of case stated on question of law only.	CA
Health Practitioners Disciplinary Tribunal	General right of appeal.	HC	Within 20 working days after notice of the decision or order is communicated to the appellant, or within any further time the Court allows.	By way of rehearing.	The Court may confirm, reverse, or modify the decision or order appealed against; and make any other decision or order that the Tribunal could have made. The court may direct the Tribunal to reconsider the decision or order.	Further appeal on question of law. Part 4 of the Summary Proceedings Act 1957 (together with the other provisions of that Act that are applied in that Part) applies to the appeal.	CA
New Zealand Lawyers and Conveyancers Disciplinary Tribunal	General right of appeal.	HC	High Court R 704 applies – Within 20 working days after the decision appealed against is given. HC may extend the time limit.	By way of rehearing.	The Court may confirm, reverse, or modify the order or decision appealed against.	Further appeal, with leave, on question of law.	CA
New Zealand Law Practitioners Disciplinary Tribunal	General right of appeal.	HC comprising at least 3 judges.	High Court R 704 applies – Within 20 working days after the decision appealed against is given. HC may extend the time limit.	By way of rehearing.	The Court may confirm, reverse, or modify the order or decision appealed against.	Silent - Further right of appeal to the CA lies only with leave of the HC or CA. See Judicature Act 1908, s 67.	CA

Miscellaneous tribunals

The tribunal	Nature of 1st appeal	1St appeal body	Time limits	Appellate procedures	Powers on appeal	Nature of 2nd appeal	2Nd appeal body
Liquor Licensing Authority	Appeals on refusals to grant or renew any licence or any manager's certificate or decisions to cancel or suspend any licence or manager's certificate on the ground of the suitability of the applicant (suitability cases) by way of rehearing. All other cases appeal on a question of law.	HC	Suitability cases – Within 10 working days after the date on which notice of the decision is given. Appeals on question of law – A notice of appeal must be lodged within 20 working days after the determination. Court may extend time for lodging appeal.	By way of rehearing.	Under the HC Rules (see entry under Film and Literature Board of Review above.)	With leave on question of law.	CA
Patents, Trade Marks & Design Commissioner	General right of appeal.	HC	Under Design Act and Patents Act – Within 28 days after date on which decision is given.Under Trade Marks Act – Within 20 working days after date on which decision is given.No discretion to extend time limit given.	Rehearing	Court has the same powers as are conferred upon the Commissioner under Design Act and Patent Act. Under Trade Mark Act court may confirm, modify, or reverse the Commissioner's decision and exercise any powers that could have been exercised by the Commissioner.	Under Patents Act – Decision of HC final on most matters except certain specified sections of that Act. Under those sections right of appeal to CA as of right. Under other Acts right of appeal to CA with leave.	CA
Mental Health Review Tribunal	A general right of appeal from tribunal's decisions under s 79 of Act. Under that section the tribunal reviews a patient's condition to determine whether or not the patient is fit to be released from compulsory status under the Act. It has been observed that the right of appeal under this section is not an appeal in the usual legal sense, but is in fact a review under s 16 of the Act.	DC (except where it is not practical appeal should be heard by a Family Court Judge.	Within 1 month after the date of the Review Tribunal's decision. No discretion to extend time limit given.	De novo rehearing.	The Court reviews the patient's condition and determines whether or not the patient is fit to be released from compulsory status. The provisions of section 16 of the Act apply, with any necessary modifications, to every appeal. Section 16 sets out the approach that a Judge is to take when reviewing a patient's status.	Silent – s 72 of the District Court Act 1947 appears to apply to give a general right of appeal by way of rehearing.	HC