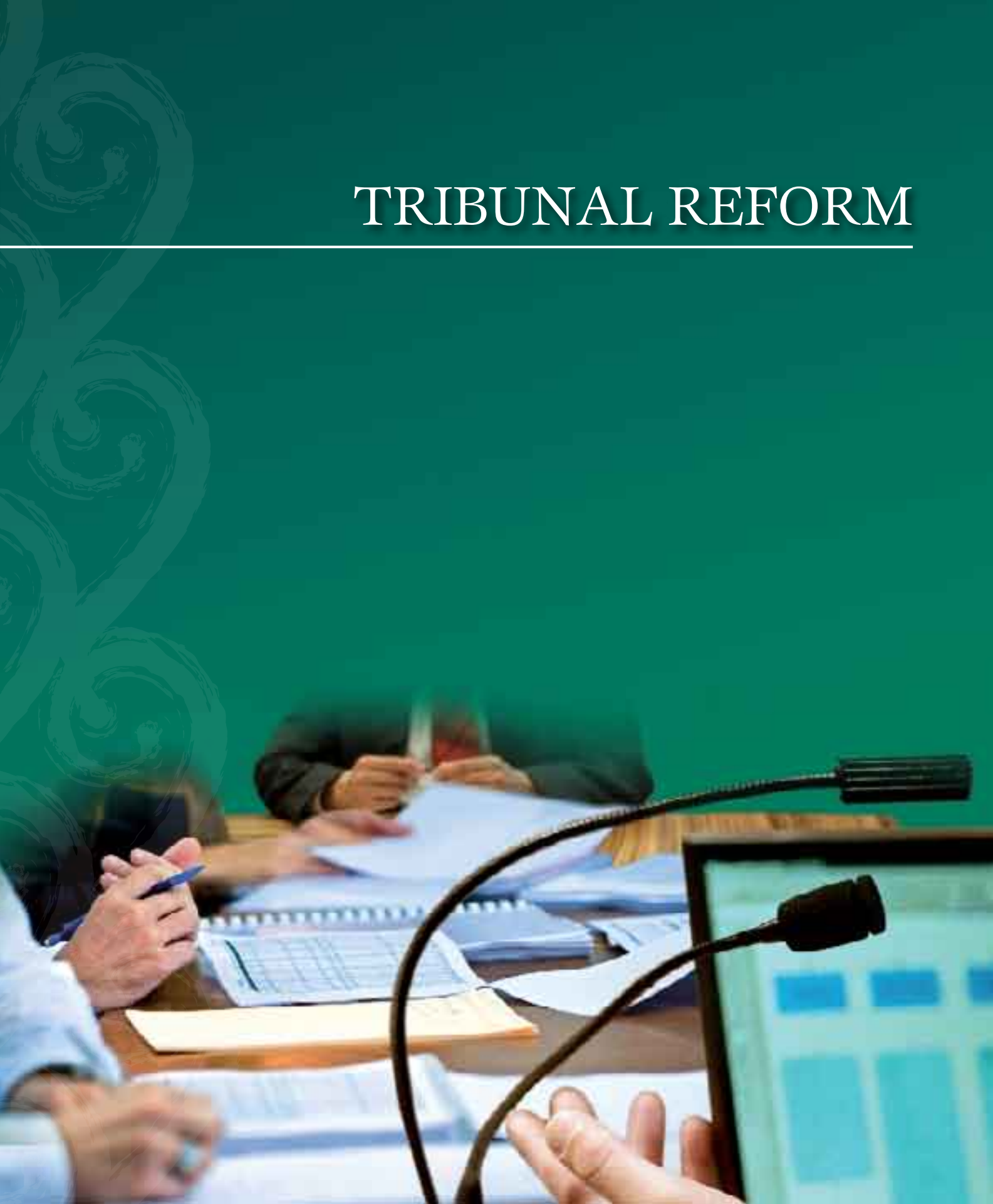




LAW COMMISSION
TE AKA MATUA O TE TURE

October 2008, Wellington, New Zealand | STUDY PAPER 20

TRIBUNAL REFORM





TRIBUNAL REFORM

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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FOREWORD

Tribunal reform is a law reform project whose time has come. Many ordinary New Zealanders receive fairness and justice from tribunals rather than courts. Tribunals are cheaper, quicker and more user friendly.

But the way tribunals have developed in New Zealand over the years is without system, without principle, and without consideration of the coherence of the field as a whole. That is unfortunate.

The Law Commission is deeply committed to the view that reform of the system of tribunals is not only inevitable but essential. It may not be popular in all circles. But the public interest demands a more systematic, more efficient and better structured system.

A handwritten signature in blue ink, reading "Geoffrey Palmer". The signature is written in a cursive style and is positioned above a short horizontal dashed line.

Sir Geoffrey Palmer

President

ACKNOWLEDGEMENTS This project on tribunals is being undertaken by the Law Commission in conjunction with the Ministry of Justice. While this paper is the responsibility of the Law Commission, it has been developed with input and assistance from the Ministry. Indeed much of the early part of the paper describes the reasoning leading to the formation of a proposal we arrived at, in conjunction with the Ministry. The Commission expresses its gratitude to the tribunal reform programme team at the Ministry, led by Elisabeth Numan-Parsons, for their assistance with this work.

We are grateful also to all those individuals and agencies who have written to us or met with us to discuss the issues in this reference. In particular, we acknowledge the valuable assistance of the Departmental Officials Reference Group and the Tribunal Members Reference Group.

The Commissioners responsible for this project were John Burrows and Geoffrey Palmer. The legal and policy advisers were Jo Dinsdale and Sara Jackson.



Comment invited

Comments on this study paper should be sent to the Law Commission by **9 January 2009**, to The General Manager.

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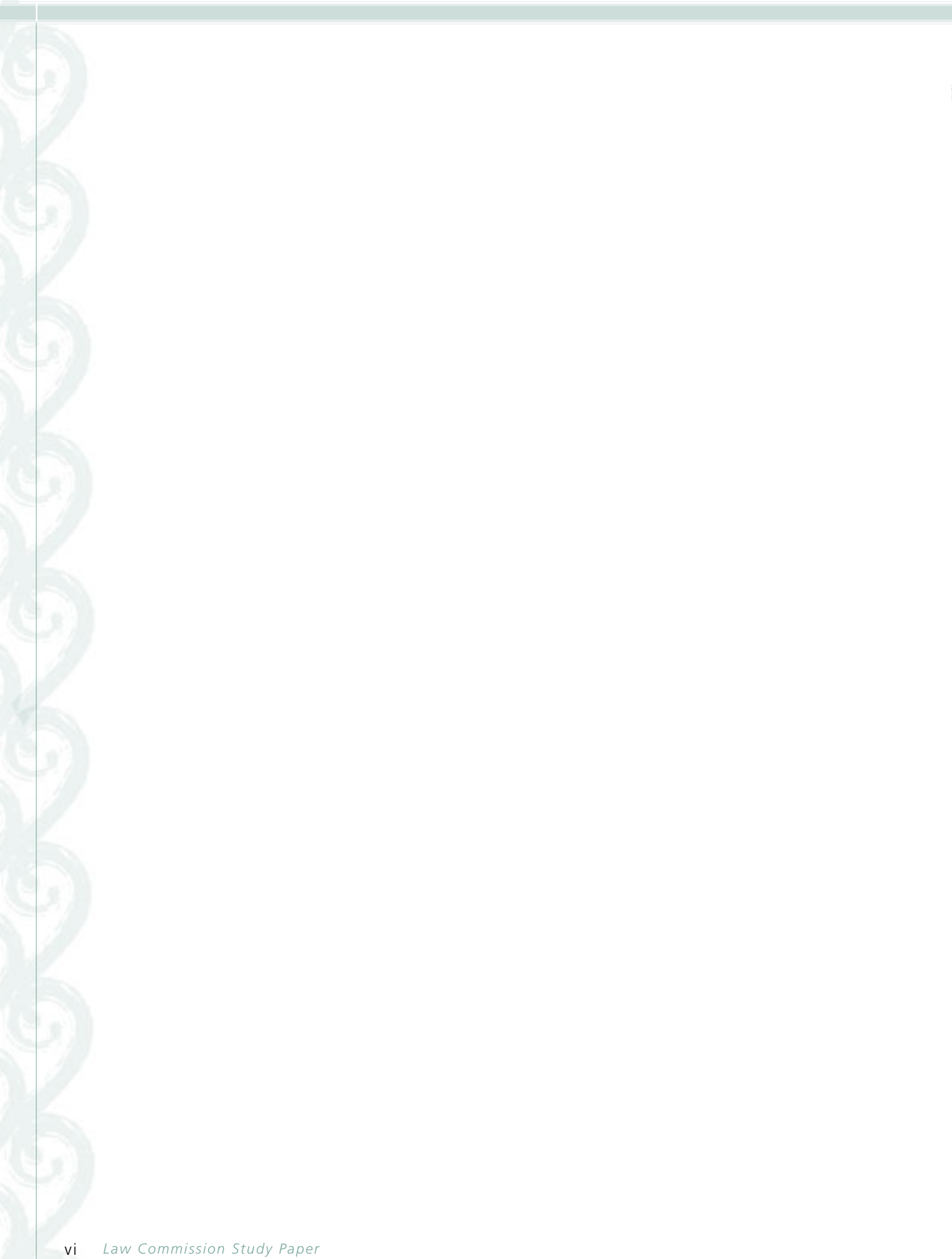
email – tribunalreform@lawcom.govt.nz

The Law Commission welcomes your comments on the proposals it has set out in Chapters 7, 8 and 9 of this study paper.

This Study Paper is available at the Commission's website: www.lawcom.govt.nz

Official Information Act 1982

The Law Commission's processes are essentially public, and it is subject to the Official Information Act 1982. Thus copies of comments made to the Commission will normally be made available on request and the Commission may mention comments in its reports. Any request for the withholding of information on the grounds of confidentiality or for any other reason will be determined in accordance with the Official Information Act.





Tribunal Reform

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Summary

TRIBUNAL REFORM PROJECT

- 1 In November 2006 the Law Commission and the Ministry of Justice commenced a project to advance a programme of tribunal reform. The aim of the project was to recommend a structure for existing tribunals as well as a framework for the establishment of tribunals in the future. During 2007 the Commission, working with the Ministry, undertook an extensive review of New Zealand's current tribunal arrangements. An issues paper, *Tribunals in New Zealand*¹ was published in January 2008 setting out the Commission's assessment of the current arrangements and the case for reform.
- 2 The Commission has continued to work closely with the Ministry of Justice developing proposals for reform over the last year. Together we analysed a number of options for reform and developed a preferred model for a new tribunal service. This study paper provides a record of that process and the reasons for proposing this particular model of reform. We emphasise that at this stage no final decisions have been taken. The paper also sets out some further proposals the Law Commission has developed on appeal rights from tribunals, principles for inclusion in a legislative framework and guidelines on the establishment of tribunals. We are seeking feedback and comment on these proposals.

DEFINING TRIBUNALS – ADJUDICATIVE BODIES

- 3 After examining the history and theory of tribunals we determined that for the purposes of this project tribunals are best defined as adjudicative bodies. The one essential characteristic which they have in common is that they decide questions or resolve disputes. Tribunals find facts based on the presentation of evidence, and decide cases by applying settled rules or principles to facts. We consider the primary characteristics of tribunals to be that:
 - they determine questions affecting people's rights;
 - they do this by considering facts and evidence and applying 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.
- 4 Tribunals have been deliberately created to remove certain decisions from the courts, so tribunals are not courts. Equally, they should be independent of the executive government, so they are not part of the executive. Tribunals stand somewhere between the two.

1 New Zealand Law Commission *Tribunals in New Zealand* (NZLC IP6, Wellington, 2008).



Desirable characteristics

- 5 We identified a small number of desirable characteristics or attributes that individual tribunals, and any system of tribunals, should normally exhibit. These are:
 - public accessibility, both in terms of costs and public awareness of opportunities to seek redress through tribunals;
 - membership and expertise appropriate to the subject matter;
 - actual and apparent independence;
 - procedural rules which secure the observance of natural justice, which are simple and less formal than those of the ordinary courts, and which 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.
 - 6 These characteristics or attributes formed for the project a standard against which our current tribunal arrangements were assessed. They also provided a set of objectives which should be promoted by tribunal reform.
-
- THE CASE FOR REFORM
- 7 The Commission, with assistance from the Ministry of Justice, surveyed the departments that administer tribunals and the chairs of the tribunals, following up in many cases with meetings. Their responses, together with our research, formed a basis for identifying the problems of New Zealand's tribunals. We set the results of that work out in the issues paper *Tribunals in New Zealand* and called for public submissions on whether we had accurately identified the problems with the current tribunal system. Submissions almost unanimously agreed we had.
 - 8 Briefly the results of that work are:
 - Tribunals are not always accessible to the public and there are problems of awareness and information about different tribunals. Legal aid is not consistently available for cases before tribunals and geography can also be a barrier to access.
 - The quality of training and development for tribunal members varies widely and more could be done to support tribunal members. Tribunal membership should be made more attractive as a career option.
 - There are a number of areas where guarantees of independence need to be strengthened to ensure the public see tribunals as independent.
 - There is wide variation in procedures, powers and appeal rights from tribunals. While we must be careful to avoid the trap of 'one size fits all', a more coordinated approach is needed.
 - There are not excessive delays, but delays do occur and timeliness might be improved.

- The level of administrative support for tribunals varies widely. A more streamlined, amalgamated system of tribunals would be able to take advantage of economies of scale and spread resources more fairly across tribunals.
- 9 Many of the problems described above are systemic in nature. There is a lack of overall coherence. Existing tribunals have developed on an ad hoc basis, which has led to a fragmented system. There is no single person or body able to coordinate tribunals or advocate for them, so there is a lack of overall oversight and coordination.
- 10 Reform is overdue.

OVERSEAS MODELS OF REFORM

- 11 In developing the options for reform we looked at recent reforms in Australia, the United Kingdom and Canada. While different jurisdictions have approached reform differently, some common threads are evident.
- 12 Most have amalgamated tribunals into larger structures to achieve greater coherence and efficiency. Examples of amalgamated structures we examined are the Victorian Civil and Administrative Tribunal in Victoria, the Administrative Decisions Tribunal and Consumer, Trader and Tenancy Tribunal in New South Wales, the State Administrative Tribunal in Western Australia, Tribunal Administratif du Québec or Administrative Tribunal of Québec, and the Tribunal Service in the United Kingdom. There are currently also proposals for consolidating tribunals being considered in Queensland and the Australian Capital Territory. Where amalgamated tribunals have been created, their structures are similar. There are generally sub-groupings within the overall tribunal structure, reflecting the wide variety of cases that an amalgamated tribunal must deal with.
- 13 Providing leadership for the tribunal system has been a key feature of most reforms as well. The amalgamated structures in Victoria, New South Wales, Western Australia, the United Kingdom and Québec are all headed by Presidents, most of whom are judges.
- 14 In all the overseas jurisdictions we examined, including British Columbia and South Australia which have not amalgamated tribunals, tribunal processes have been standardised to achieve greater consistency. However, a concern to maintain flexibility within a more standardised approach is also evident in these overseas reforms.

CONSIDERING OPTIONS FOR REFORM

- 15 A number of different options for reform were considered in the course of developing a preferred model for reform. We concluded that there are aspects of most options that address at least some of the problems inherent in our current tribunal arrangements. We developed an ideal solution by combining the best aspects of these reforms. In other words none of the “options” we have considered are suitable stand-alone solutions, but rather are components of an overall reform model.

Option 1: Standardised tribunal powers and procedures

- 16 Under this option tribunal procedure, powers, appeal rights and membership provisions would be standardised. The option aims to address the current level of disparity that exists between legislative provisions and administrative practices governing different tribunals. By tribunal procedure and powers we mean the rules that apply on matters such as whether unsworn evidence can be accepted,

whether hearings are oral or on the papers, whether hearings are in public or private and whether the tribunal can award costs. By aligning tribunal powers and procedures and appeal rights greater consistency would be introduced across the tribunal system. This would arguably improve perceptions of fairness and contribute to consistency in decision-making.

- 17 We are however concerned to maintain flexibility in order to reflect important differences that exist between tribunals. A cautious approach should be taken to standardising provisions recognising that a ‘one size fits all’ approach will not work. Standardisation should not be at the expense of retaining necessary differences or at the cost of the flexibility so necessary in many tribunals.
- 18 There are 47 tribunals that might be covered by this option. See Tables 1 and 3 in Appendix A for a list of these 47 tribunals.

Option 2: A single administration for tribunals

The second option is to rationalise the existing plethora of administrative arrangements for tribunals. Under this option tribunals would be administered together by one administering department or agency. This option focuses on improving the administrative support available to tribunals and the public that use them. A single administration for all state tribunals would provide a basis for a more effective and fairer application of the government’s administrative resources. It might address the problems caused by fragmentation and result in more efficient management of cases and resources.

The option also supports the independence of tribunals by ensuring that there is a clear separation between those providing administrative support for tribunals and those with an interest in the matters before tribunals. This is particularly important where tribunals perform the function of reviewing departmental or government decisions. Citizens’ perceptions of tribunals’ independence can be as important as actual independence. Administration by a neutral department or other neutral agency is the best way to guarantee that tribunals are, and are perceived to be, independent.

Administering agency – the Ministry of Justice

- 19 The administration of tribunals, which we consider to be part of the justice system, should sit with the Crown. The Ministry of Justice is the only existing department that could be the administering body for tribunals under this option. The administration of tribunals and courts is already part of the Ministry’s core business.

Scope of this option

Not all of the 47 tribunals identified in the previous option should be included in the type of shared administrative arrangements proposed here. We consider that occupational disciplinary tribunals that are not currently administered by the state, the Employment Relations Authority, and the Mental Health Review Tribunal should not be included.

Occupational disciplinary tribunals differ as a group from other tribunals. Many are effectively domestic/state hybrids, funded largely by the occupational group. Many are currently administered outside the state. A close relationship between the disciplinary body or tribunal and the occupational or professional group needs to be preserved, as does the occupational group's involvement in regulation and discipline of its members. At this stage we do not think it is necessary to include occupational disciplinary tribunals in the shared administrative arrangements proposed under this option. We note, though, that some occupational disciplinary tribunals are administered by the Ministry of Justice and see no difficulty in these tribunals being included in the shared administrative arrangements proposed under this option.

The Employment Relations Authority is excluded because it forms part of an integrated dispute resolution process. We think that it is desirable to retain the existing integration between the Employment Relation Authority and other employment relations institutions, particularly the early mediation service, which is administered by the Department of Labour.

The Mental Health Review Tribunal contains specialist psychiatric and mental health expertise. It has an inquisitorial process and also has the power to undertake inquiries into breaches of compulsory patients' statutory rights. Its current arrangements ensure it functions in a way that is accessible and efficient for its clientele and this might be jeopardised by merging its administrative arrangements with those of other tribunals with quite different requirements.

Option 3: Head of tribunals

- 20 This option focuses on leadership across the tribunal system by proposing that a new role of 'head of tribunals' be created. A lack of leadership and cohesion was identified by the Commission as one of the main systemic problems with our current tribunal arrangements. An overarching 'head of bench' for tribunals would provide professional leadership and have a similar role to that of a principal or chief judge within the court system.
- 21 The head of tribunals might also sit as a tribunal member on occasion, and perhaps chair cases of particular complexity or public profile. In most of the overseas models we examined the head of tribunals, or President as they are often called, sits as a tribunal member on occasion.

Option 4: Rationalisation of tribunals

- 22 Another option we considered was the disestablishment of any tribunals that are no longer required. Based on our research, it appeared to us that some tribunals may not need to exist as stand-alone tribunals. We used tribunal caseloads as a starting point. It seems inefficient to retain tribunals that hear very few cases. For tribunals with very low caseloads, we then considered whether their function required a separate tribunal: that is, whether the same function could be exercised by another body such as the District Court.
- 23 The four tribunals that we considered may be candidates for disestablishment are the Land Valuation Tribunals, Health Act Boards of Appeal, the Maritime Appeal Authority, and the Copyright Tribunal. However neither the District

Courts Act 1947 nor the District Courts Rules 1992 currently provide for the District Court to sit with assessors or other experts. Therefore, in order to enable the jurisdictions of the Land Valuation Tribunals, Health Act Boards of Appeal and Copyright Tribunal to be exercised by the District Court sitting with additional experts, there would need to be an amendment to the Act or the Rules to allow for this.

- 24 We note here that recent feedback in the course of the Government’s consultation on proposals for tribunal reform argues strongly for the retention of the Copyright Tribunal. Although the principle of disestablishing redundant tribunals should stand, further consideration is probably needed to determine which of the low volume tribunals identified should be abolished.

Option 5: Clusters of tribunals

- 25 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 broader tribunal structures. By the term ‘cluster’ we mean simply a close grouping of tribunals. The idea of a cluster does not compel any particular level of integration or sharing of services (although it does imply that there will be some sharing). Rather, the cluster model can be designed in a nuanced way, reflecting the level of connectedness that is desired for each different cluster.

Clustering by function

- 26 The most obvious approach is to cluster on the basis of the function performed by tribunals within a cluster. We identified three broad functions; administrative review; inter partes disputes; and occupational and industry regulation. Tribunals with the same function have similar needs. They will have similar requirements in terms of their powers and procedures, which in turn means they are likely to have similar administrative requirements. There is also potential for cross-membership. Where tribunals have common needs like this, it seems logical to group them together so that all tribunals within a cluster can take a common approach.

Proposed clusters

- 27 Reflecting the categories of function two clusters of tribunals emerged fairly clearly. These are an administrative review group, which deals mainly with appeals against decisions by government agencies affecting individual rights and entitlements;² and an inter partes disputes group, which deals with disputes between citizens.
- 28 Occupational disciplinary tribunals pose a challenge for the clustered approach. For the reasons noted under Option 2, disciplinary tribunals that are not administered by the state remain outside any new tribunal structures proposed under this option. While a third cluster may be possible under this option for the

2 It should be noted that the proposed Immigration and Protection Tribunal would be included in this category although not all of its proposed functions are in the nature of administrative review. It is included because all cases before it will involve an individual and the state.

occupational regulation tribunals currently administered by the Ministry of Justice these are a diverse group with differing needs and membership. We do not see sufficient commonality to form a cluster along similar lines to the other two. Any clustering of these remaining tribunals might seem relatively artificial.

Option 6: A single unified structure

- 29 Like clustering, unification involves grouping like tribunals and bringing them together into a structure. Unification does not differ significantly from the cluster model. The key difference is that in the unified option there is only one overarching structure, whereas in the cluster model there would be two or more different structures. The two clusters discussed in the previous option and the other tribunals administered by the Ministry of Justice would be grouped together under the unified model.

Establishing divisions and lists within the structure

- 30 In general the same criteria should apply to determining groupings within a unified structure as for the clustering option. Tribunals would be grouped within the single unified structure. This is a feature of all overseas models and allows for differences between tribunals. The groups are often called divisions. Each division might have a number of sub-groups which we have, following overseas practice, called 'lists.'
- 31 The occupational tribunals that are administered by the Ministry of Justice and the Liquor Licensing Authority can be more readily included under this option. It would be possible to group the six occupational regulation tribunals and the Liquor Licensing Authority into a looser group, rather than a division, within the model primarily for the administrative and organisational advantages this might produce.

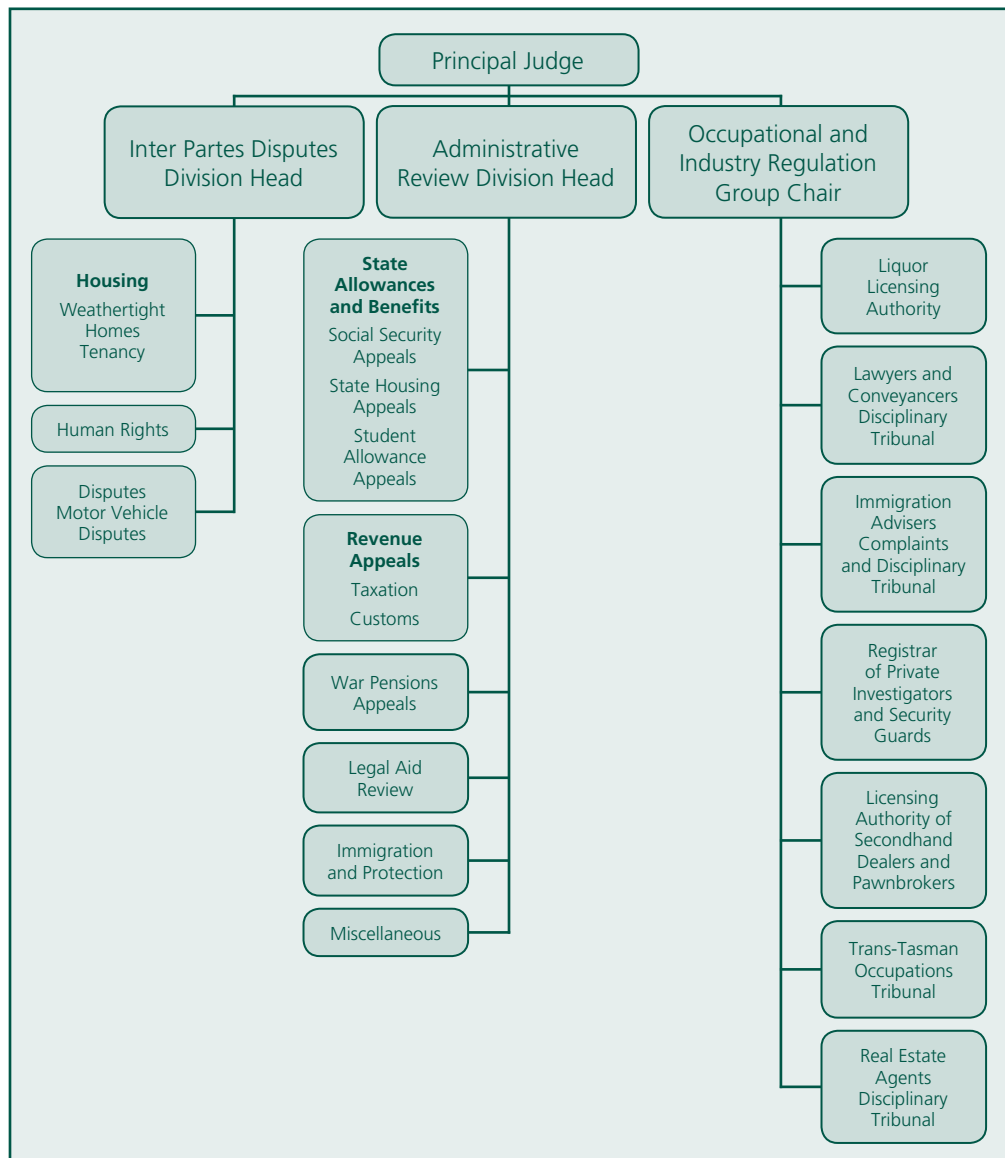
OUR PREFERRED MODEL – UNIFIED TRIBUNAL STRUCTURE

- 32 The model we arrived at, in conjunction with the Ministry of Justice, after considering all the options combines the unified tribunal structure outlined under Option 6 (arranged into divisions along the lines of the clusters outlined in Option 5), with the single administration in Option 2, together with the Head of Tribunals concept in Option 3. Redundant tribunals would be rationalised as set out in Option 4. The structure would be underpinned by a legislative framework that provides the necessary standardisation outlined in Option 1.
- 33 This model was presented in the consultation document *Tribunals in New Zealand: the Government's Preferred Approach to Reform* issued by the Ministry of Justice in July 2008.

Features of the structure

- 34 The unified tribunal structure brings 22 tribunals into one structure under the leadership of a single head, the Principal Tribunals Judge. We anticipate that the structure would form a new unit in the court system, similar to the Environment Court. As demonstrated in the diagram below we propose that the unified structure be grouped into two divisions, administrative review and inter partes disputes. The 'looser' occupational and industry regulatory grouping forms part of the structure but would be different from the two divisions.

- 35 We have proposed several further sub-groupings within the divisions, such as the merger of the social security related tribunals into the State Allowances and Benefits group. As tribunals align their procedures and more sharing of members is developed, it may be that it becomes apparent that other tribunals could be merged or integrated.
- 36 It will also be important to ensure that the structure is ‘future-proof’ and remains flexible. We envisage that, in the future, new divisions or lists within the structure may be created; that there may be mergers of similar tribunals; that some of the tribunals not currently proposed for inclusion in the structure may be brought into it; and that new tribunal jurisdictions will be created and should also be inserted into the structure unless there are good reasons not to.



Legislation

- 37 Although it would not only apply to tribunals within the unified structure the new legislative framework will play a crucial role in shaping the way in which the unified structure operates. It would provide a consistent approach to appointment processes, members' terms and conditions, the composition of tribunals, and tribunal processes including their powers and procedures. A set of common legislative provisions would aid the development of a common jurisprudence for the structure.

Leadership

- 38 Overall leadership of the tribunals system is an essential feature of the proposed reforms. We propose a number of new leadership positions, culminating in the Principal Judge of Tribunals role.

Judicial leadership: Principal Judge of Tribunals

- 39 We envisage the creation of a position of Principal Judge of Tribunals, as the overall leader of the tribunal structure. The Principal Judge would be responsible for the overall leadership, direction and quality of the tribunal system. We believe that having a judge in this position is necessary to ensure that the Principal Judge has sufficient standing and respect in the community to be able to effectively represent tribunals and advocate for their needs, especially to government.

Heads of division

- 40 Each division of the tribunal structure should also have a Head, to provide more targeted leadership for that division. Heads of division would be accountable to the Principal Judge for the performance of their division.

Occupational and Industry Regulation Group Chair

- 41 The Chair of this Group would be more like a coordinator, rather than a 'Head of Bench' type role. This is due to the different nature of the Group.

Chairs of individual tribunals

- 42 We anticipate that tribunals within the unified structure that have multiple members could continue to have their own Chair, as now. However some individual chair positions would no longer exist, because the relevant tribunal would be merged with others.

Abolition of redundant tribunals

43 As part of the reforms tribunals that are no longer needed should be abolished and their jurisdictions transferred to the District Court.³ An amendment to the District Courts Act 1947 would be needed to allow judges to sit with assessors.

A NEW LEGISLATIVE FRAMEWORK

44 An essential part of the proposed reform is a new legislative framework that will apply to all 47 tribunals that are within the scope of the project. The new legislative framework will play a crucial role in shaping the way tribunals within and outside the unified structure function. The proposed legislation would introduce consistent provisions to govern appointments of tribunal members and more consistent provisions in respect of tribunal powers and procedures. A coherent approach to appeal rights and provisions is also proposed. The Law Commission has developed some proposals for the legislative framework. These are proposals on which the government has not yet formed a view. Further work is needed to develop this framework and we are seeking comment on our proposals. We suggest that a working group be established to oversee the further detailed work that is needed for the legislative framework.

Appointments

- Appointments to all tribunals should be merit-based. Guidelines on appointments should be developed. They should include requirements of clear criteria, advertisement, and interview. These guidelines should apply to all state appointments to tribunals and should cover re-appointment processes also.
- To be perceived as truly independent all appointments need to be made by a disinterested party. The Minister of Justice, being the Minister responsible for the proposed Tribunal Service, should be the Minister responsible for tribunal appointments within the unified structure, although the Minister should consult with the Minister responsible for the relevant policy department. Most appointments should be made by the Governor-General.
- The Ministry of Justice should be responsible for running appointment processes for all tribunals included in the unified structure. Consultation with the relevant policy department might be necessary to ensure that factors relevant to the subject-matter are adequately considered.
- Appointments to other state-administered tribunals should normally be made by the Governor-General on the recommendation of the relevant portfolio Minister.
- Occupational disciplinary tribunals need to include professional members, but should also include an independent chairperson and lay members. The chairperson and lay members should generally be appointed by the Governor-General.

3 We have already noted that a number of submissions were received arguing strongly for the retention of a specialist Copyright Tribunal. As a result we think that further consideration should be given to whether that tribunal is retained and, if retained, how it is best accommodated within the unified tribunal structure.

- Some form of security of tenure is an essential guarantee of independence in adjudication. In the tribunal context it is normally acceptable for members to be appointed for a fixed term. We favour a minimum term of three years for ordinary members, but a minimum of five years for all tribunal Chairs and other leadership positions. These are minima and for some tribunals a longer term would be justified. Members should only be able to be removed from office for good cause by the Minister.
- Consideration should be given to the appointment of judges with full tenure to some key positions within the unified tribunal structure. The appointment of a District Court Judge as Chair of some tribunals provides a Chair with greater protections of independence where a tribunal makes decisions of substantial importance.
- An independent body such as the Remuneration Authority should set the remuneration for all tribunals and not just a few as at present.
- The current variation between provisions establishing panel size and composition should be reviewed as part of the work on the legislative framework.

Rules of Procedure

- There should be a requirement that all tribunals conduct hearings with as little formality as is consistent with a fair and efficient process and a just and quick determination of the matter before the tribunal
- Tribunals should 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. They should also be able to accept evidence that is not sworn.
- Tribunals included in the inter partes disputes division should have the power to depart from the letter of the law when strict observance of it will prevent them from determining the dispute before them according to the substantial justice of the case. The limits of this power should be clearly spelt out in legislation. Further consideration should be given to extending the power to relax the strict observance of the law in other tribunals also.
- All tribunals should have investigative powers that allow them to call and examine witnesses and have documents produced. Some should have stronger investigative powers than others.
- Individual tribunals should have the power to regulate their own procedure in order to effectively deal with any matter before them.
- To assist in ensuring a fair hearing the requirements of natural justice should be spelt out in legislation.

Powers

- All tribunals need powers to summons witnesses; administer an oath or affirmation and take sworn evidence; require parties and witnesses to produce information and documents; and require the disclosure of information between the parties to proceedings.
- Tribunals also need powers to close hearings and make orders to suppress the publication of material where the public interest requires a departure from the principle of openness; and exclude people when they are abusive or disruptive and generally maintain order during proceedings.

- Generally tribunals should operate under a presumption that their hearings are held in public and are able to be reported. However a few tribunals may need to operate under an assumption that hearings are to be in private.
- The power to state a case for the opinion of the High Court can probably be dispensed with.
- A consistent approach should be taken on the power to award costs so that tribunals exercising the same function are governed by the same principles.

Appeals

- There should be a right of appeal from all tribunals.
- Appeals from a tribunal which is itself an appellate tribunal should normally be confined to a matter of law, and should be to the High Court. (An exception would be when fuller rights of appeal are required, as they are in the case of tax appeals.)
- Appeals from first instance tribunals that are dealing with small claims and decide cases on their merits rather than the strict application of the law should be confined to procedural unfairness and substantive injustice.
- In all other cases appeals from first instance tribunals should be general appeals on fact and law.
- There should normally be a second appeal by leave on a point of law. In cases where the first appeal is confined to procedural unfairness and substantive injustice a second appeal is not required. In some exceptional cases a second appeal might also be a general appeal.
- Appeals from tribunals should normally be by way of rehearing, although in a few cases hearings de novo should be retained. Appeals by way of case stated should be abolished.
- The powers of a court on appeal and the procedure for filing and hearing an appeal should be governed by a standardised set of provisions.
- The time limits for lodging appeals should be standardised.

Appeals to be heard by the courts

- 45 There is not a strong case for creating an appellate tribunal within the unified tribunal structure, at least at this time. Appeals from tribunals should continue to be heard by the courts. The following principles should apply to determining which court:
- Appeals from administrative review tribunals, tribunals headed by District Court Judges, and other tribunals that either resolve significant issues or determine disputes with a value beyond the jurisdictional limits of the District Court should be to the High Court.
 - All other appeals should normally be to the District Court.

GUIDELINES
FOR NEW
TRIBUNALS

- 46 There is a need to consider how tribunals and the unified tribunal structure will develop and change in the future. When should new tribunals be established? Should they all be included in the unified tribunal structure? Guidelines are needed to ensure that tribunals do not continue to develop in an ad hoc fashion in the future. These guidelines should require policy-makers to consider:
- Can the matter be dealt with through the ordinary courts? Are there compelling reasons relating to subject-matter or process which require a tribunal?
 - If a tribunal is required, can an existing tribunal deal with this matter, rather than creating a new one?
 - If a new tribunal is needed, it should be included within the unified tribunal structure, unless there are good reasons to exclude it and have it free standing.
 - Any free-standing tribunal would be included in the broader legislative framework that applies to all tribunals.
- 47 We think that these proposed guidelines should be binding on departments. The Ministry of Justice should be consulted, and provide advice, on all proposals to establish new tribunals.

A grayscale photograph of a courtroom scene. In the foreground, a black gooseneck microphone is positioned on a stand. In the background, several people are seated at a long table covered with papers. One person is holding a pen, and another is gesturing with their hand. The scene is dimly lit, with a focus on the microphone and the people at the table.

Part 1

TRIBUNALS IN NEW ZEALAND

Chapter 1

Tribunal reform project

DELIVERING JUSTICE FOR ALL

- 1.1 The Law Commission completed a wide-ranging review of the structure and operation of the courts and tribunals in New Zealand in 2004 and published the report *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*.⁴ The Commission concluded that tribunals had developed in piecemeal fashion resulting in a ‘jungle’ of different jurisdictions, often with no clear entry point for the ordinary citizen, and wide variations in process for no principled reason. The diversity and number of tribunals was much greater than was needed. 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.⁵

JOINT PROJECT ON TRIBUNAL REFORM ESTABLISHED

- 1.2 Responding to the Commission’s report, the Government agreed that a more coherent structure should apply to the administration and operation of tribunals. In November 2006 the Law Commission and the Ministry of Justice commenced a new project to determine and advance a programme of tribunal reform. The aim was to recommend a structure for existing tribunals, as well as a framework for the establishment of tribunals in the future.

ISSUES PAPER – TRIBUNALS IN NEW ZEALAND

- 1.3 During 2007 the Law Commission, working with the Ministry of Justice, engaged in research into the current state of our tribunal system. We consulted widely in the course of that research, sending questionnaires to and receiving written comment from a large number of departments and agencies and tribunal chairs. Personal interviews were conducted with representatives from departments and other administering agencies and some tribunal chairs also. The Commission met with representatives of the Law Society, and representatives of Community Law Centres and the Citizens’ Advice Bureau who advise tribunal applicants. We also reviewed and utilised the work that was done by the Commission during the preparation of *Delivering Justice for All* and examined the approach taken to tribunal reform in Australia, Canada and the United Kingdom.

⁴ New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004).

⁵ New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004) 284.



- 1.4 The results of that work were published in January 2008 in an issues paper entitled *Tribunals in New Zealand*.⁶ That issues paper traced the history of tribunals and showed how their development had proceeded on an ad hoc basis without any underpinning theoretical basis. It also examined the rationale for tribunals and the difficulties that arise in defining tribunals. Although the term ‘tribunal’ is broadly and loosely used, the Commission concentrated in the issues paper on bodies that primarily have an adjudicative function.
- 1.5 The Commission developed a set of desirable characteristics as objectives for tribunals and a system of tribunals. We subsequently analysed New Zealand’s existing arrangements against these. Our analysis revealed that there were many systemic problems in those arrangements and these were set out in some detail in the paper. Included also in the paper was a brief outline of the substantial reforms that have been adopted to introduce greater consistency and efficiency across tribunal systems overseas, together with a brief outline of a number of possible options for reform in New Zealand.⁷ Feedback was sought on whether the Commission had correctly identified the problems in the current system and what views submitters had on how the problems could be best addressed and the system improved.
- 1.6 In September 2007 the Minister for Courts announced the Government’s support for the programme of tribunal reform aimed at recommending a coherent structure for tribunals and authorities and ensuring consistency in the development of future tribunals.⁸ The Government agreed that reform was needed and that all decision-making bodies exhibiting the characteristics of tribunals should be considered further for inclusion within the programme of reform. Cabinet sanctioned further work on the development of options for reform.
- 1.7 The Commission has continued to work closely with the Ministry of Justice on proposals for tribunal reform over the last year. Together we developed and analysed a number of options and developed a proposed model for reform. A Tribunal Member’s Reference Group was established in October 2007 to contribute to this work. The members of the group were Tribunal chairs and members drawn from a range of tribunals. A second reference group, comprised of officials from the administering departments of many of the tribunals included in the programme, was also established. Both groups met regularly and assisted greatly through their feedback and comment on many of the reform options which were being considered and analysed by the Commission and the Ministry. The development of our proposed model for reform was greatly assisted by the valuable insight and expertise of these people.

THE
GOVERNMENT
ADOPTS A
TRIBUNAL
REFORM
PROGRAMME

6 New Zealand Law Commission *Tribunals in New Zealand* (NZLC IP6, Wellington, 2008).

7 These five options were the options presented to Cabinet in September 2007. See Hon Rick Barker, Minister for Courts “Tribunal Reform” (19 September 2007) Cabinet Paper.

8 Hon Rick Barker, Minister for Courts “Future Direction For Tribunal Reform Programme Announced” (12 October 2007) Media Statement.

- 1.8 On 30 June 2008 Cabinet authorised the release, by the Ministry of Justice, of a public consultation document, *Tribunals in New Zealand: the Government's Preferred Approach to Reform*.⁹ The paper set out, as the Government's preferred approach to reform, the model for a new tribunal service that had been developed jointly with the Commission. The consultation document was released on 14 July. Public submissions on the document closed on 29 August.
- 1.9 Representatives from the Commission attended public meetings in Auckland and Wellington and assisted the Ministry in presenting the preferred model for reform. The Commission has considered the submissions that were made on the Government's consultation document in the course of developing this study paper. Public feedback from the Ministry's consultation process and feedback from tribunal members and the judiciary has assisted in refining the proposed model. There may yet be further refinement before Cabinet makes a final decision. We have also developed a proposed approach to the question of appeals and some further detail around the content of the broader legislative framework and guidelines proposed in the Government's consultation document.

RECORD
OF THE
COMMISSION'S
VIEW

- 1.10 The Commission has prepared and issued this study paper to ensure that there is a transparent public record of the Commission's work and views on this reference. The proposals for a new tribunal service that were developed by the project are an important and significant piece of work designed to improve the administration of justice in New Zealand. The objective of this paper is to provide a record of all the options for reform that were considered and the comparative analysis that was undertaken by the Commission prior to supporting the proposed model for reform. The paper presents all the Commission's proposals for reform in this area. We would welcome feedback and comment on this paper.

STUDY PAPER:
TRIBUNAL
REFORM

- 1.11 This paper is structured in three parts. Part 1 provides a summary of the matters covered in the issues paper and reports back on the public submissions and feedback the Commission received during the course of its work. The contributions made by organisations and members with an interest in tribunals greatly assisted all work undertaken on this project. We appreciate and benefit from the time and consideration that other people give our work.
- 1.12 Part 2 examines the different options and models of reform that were considered by the Commission. During this exercise the Commission and the Ministry worked closely together. We examined a number of different options for reform. These were standardising tribunal powers and procedures; a single administering department; a head of tribunals; rationalisation of tribunals; clustering tribunals; and a single unified structure for tribunals. We also considered the reform models developed in similar reform exercises overseas. All of the options examined contributed to the reform proposals that form Part 3 of the paper.
- 1.13 In Part 3 of this paper the Commission sets out its proposals for reform. We present the proposed new unified tribunal service. This proposal was agreed upon by the Ministry of Justice and the Commission, and was contained in the consultation document referred to in paragraph 1.8 above. We also develop the Commission's proposals for the broader legislative framework that would apply

⁹ Ministry of Justice *Tribunals in New Zealand: The Government's Preferred Approach to Reform – Public Consultation Document* (Ministry of Justice, Wellington, 2008).

to all tribunals. In a separate chapter we consider appeal rights and put forward the Commission’s proposals for a more coherent approach on appeals. Part 3 concludes with a consideration of tribunals in the future. The new tribunal service will need to evolve and develop to meet the changing needs of the Justice sector. A coherent set of guiding principles covering the establishment of new tribunals in the future is needed to ensure that the proposed Tribunal Service continues to serve New Zealand well in the future.

Chapter 2

Development and role of tribunals

INTRODUCTION 2.1 In the issues paper *Tribunals in New Zealand*¹⁰ the Commission traced the history of tribunals and showed how their development had proceeded on an ad hoc basis without being underpinned by any theoretical basis. In that paper the Commission also considered the difficult question of “What is a tribunal?” and explored the various ways of categorising and defining those bodies which might be considered tribunals. For the purposes of the project we defined tribunals in terms of their adjudicative function and proposed a set of objectives or desirable characteristics which these tribunals should properly exhibit.

2.2 In this chapter we provide a brief summary of that earlier work. A full discussion of the history and theory of tribunals can be found in *Tribunals in New Zealand*.

WHAT IS A TRIBUNAL? – DEFINITIONAL CHALLENGES

2.3 The concept of a tribunal has historically not been clearly defined. The term ‘tribunal’ is used to identify a broad and diverse group of bodies that settle disputes. The term, which comes from the Latin *tribunus*, referred originally to the ‘raised platform that was provided for a magistrate’s seat’.¹¹ It is ‘an unusually fluid expression’¹² that is used, depending on context, to refer to ‘any place of judgement or decision’.¹³ In part, the problems with definition stem from the way in which tribunals evolved historically. Tribunals developed in an ad hoc fashion without being underpinned by any theoretical framework. They have been set up to meet specific needs, but not according to a rational pattern. The result is significant uncertainty over what features a tribunal should exhibit and how it should function.¹⁴

10 New Zealand Law Commission *Tribunals in New Zealand* (NZLC IP6, 2008) Chapters 1 and 2.

11 Leslie Brown (ed) *The New Shorter Oxford English Dictionary on Historical Principles* (Clarendon Press, Oxford, 1993) 3388.

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

13 Leslie Brown (ed) *The New Shorter Oxford English Dictionary on Historical Principles* (Clarendon Press, Oxford, 1993) 3388.

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



The development of the tribunal model

- 2.4 While there are many earlier examples,¹⁵ tribunals are essentially a 20th Century phenomenon.¹⁶ Commentators attribute the development and growth of tribunals in Britain, and later in British derived systems of law and government, to the increasing social and economic regulation associated with the development of the welfare state.¹⁷ Tribunals became a popular adjudicative mechanism for regulatory schemes in Britain in the first half of the 20th Century. They were seen as cost-effective where there was either a need for specialist technical expertise or where there were large numbers of similar cases that needed to be resolved quickly and consistently.¹⁸ Concern that the volume of claims arising out of social and economic regulation might overwhelm the courts contributed to the growth in the number of tribunals also.¹⁹
- 2.5 Tribunals began to proliferate in New Zealand during and after the Second World War.²⁰ There were no common principles underpinning the formation and composition of many of these tribunals.²¹ Each one that emerged was specifically designed for a particular situation.²² There was also a tendency in the years following the war to set up new tribunals to deal with matters rather than allocate new jurisdictions to the ordinary courts.²³ Tribunals were seen as more suited than the courts to regulatory tasks that could not be appropriately undertaken by government officials or Ministers.²⁴ The volume of cases and the relatively low level nature of many of them were also important considerations. It was argued that the courts would not be able to cope, unless transformed, with the multifarious disputes that went before tribunals.²⁵ Apart from the volume of work, other factors which played a part in the creation of tribunals

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- 15 See, eg, Chantal Stebbings *Legal Foundations of Tribunals in 19th Century England* (Cambridge University Press, Cambridge, 2006); R E Wraith and P G Hutchesson, *Administrative Tribunals* (Allen and Unwin, London, 1973).
- 16 William Wade and Christopher Forsyth *Administrative Law* (9th ed, Oxford University Press, Oxford, 2004) 906.
- 17 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, 1994) 59.
- 18 S A De Smith, J L Jowell and Andres Le Sueur *De Smith Woolf and Jowell’s Judicial Review of Administrative Action* (5th ed, Sweet & Maxwell, London, 1995) 35.
- 19 P P Craig *Administrative Law* (3rd ed, Sweet & Maxwell, 1994) 59.
- 20 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.
- 21 G S Orr *Report on Administrative Justice in New Zealand* (Government Printer, Wellington, 1964).
- 22 J L Robson “Administrative Tribunals: The War Period in Review” (1947) 10 *Journal of Public Administration* 4.
- 23 K J Keith “Administrative Law Reform 1953-1978” (1978) 9 *VUWLR* 427, 436.
- 24 J L Robson *New Zealand: The Development of its Laws and Constitution* (Stevens and Sons Ltd, London, 1954) 90.
- 25 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.

were the need for relative informality, the avoidance of unnecessary expense, and on occasions a desire for special qualifications and expertise in some members of tribunals.²⁶

Independent regulatory bodies and standing commissions

- 2.6 New Zealand's tribunal landscape was further complicated by the emergence, during the 1980s and 90s, of independent regulatory agencies, standing commissioners and commissions, and other crown entities. Independent regulatory bodies such as the Commerce Commission, the Securities Commission, the Takeover Panel and the Environmental Risk Management Authority have investigative and adjudicative powers and resemble tribunals. Similarly independent standing Commissioners, such as the Privacy Commissioner and the Health and Disability Commissioner, also have powers to investigate and report on breaches of codes or interferences with statutory rights. Independent regulators, Commissioners, and Commissions effectively operate as tribunals in some situations and therefore sometimes fall within a broad definition or conception of 'tribunal', although, as we shall shortly explain, we have excluded them from the scope of the project.

Tribunals in New Zealand today

- 2.7 Tribunals are an enduring feature of New Zealand's administrative law landscape, and, alongside the courts, play a vital role in delivering justice. Despite their importance there is still no rational pattern in our current tribunal arrangements. New Zealand has retained a relatively ad hoc and eclectic array of tribunals through the years, although the individual tribunals that make up the mix have changed. Many tribunals have been abolished but new ones have been created. A number of studies and reviews have been undertaken on tribunals during the last 40 years. Virtually all have recommended an overhaul and rationalisation of New Zealand's tribunals.²⁷ To date however, systemic reform has not been implemented in New Zealand,²⁸ although it has in other Commonwealth countries confronted with similar problems.²⁹

26 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.

27 Studies and reviews dating back 40 years include: Department of Justice *The Citizen and Power: Administrative Tribunals* (Government Printer, Wellington, 1965); Public and Administrative Law Reform Committee *First Report of the Public and Administrative Law Reform Committee of New Zealand* (Government Printer, Wellington, 1968) and the subsequent reviews in later reports; Legislation Advisory Committee *Report No 3: Administrative Tribunals* (Government Printer, Wellington, 1989); New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004).

28 There are however a few examples of increased rationalisation here in New Zealand. The best example of rationalisation was the creation by the Health Practitioners Competence Assurance Act 2003 of a single disciplinary tribunal for the many health professions covered by that Act.

29 In particular reform has occurred in a number of Australian states and also in the United Kingdom. Chapter 4 provides a short overview of tribunal reform in overseas jurisdictions.

Defining tribunals for inclusion in the scope of the project

- 2.8 The broad use of the term ‘tribunal’ made it difficult to settle on a precise definition of a tribunal for the project. Initially the Commission began the task of defining the scope of the project by identifying and examining the full array of bodies that might in the broadest sense be considered tribunals. There are over 100 bodies established by legislation that have functions and powers of a nature that could arguably bring them within the scope of a very broad definition of tribunal.³⁰ However such a broad approach brings together a very disparate group of bodies, including independent regulatory bodies, standing Commissioners and occupational regulatory bodies, as well as those bodies that are more traditionally recognised as tribunals. Logistical issues aside, there is likely to be little benefit in bringing together such a broad range of disparate bodies.
- 2.9 The focus of a project aimed at advancing systemic tribunal reform needed to be considerably narrower. To this end, the Commission considered the various ways of defining and categorising all those bodies that might be considered tribunals. In *Tribunals in New Zealand* we considered the functions undertaken by tribunals, the differences between tribunals and the ordinary courts and the executive, and the purposes for which tribunals are established, both historically and currently.

Tribunals are adjudicative bodies

- 2.10 The one essential characteristic we believe all tribunals have in common is that they decide or resolve some form of question or dispute. The Legislation Advisory Committee took a similar view in its 1989 review. It said that the basic function of a tribunal is to decide, reflecting the word’s meaning of a place of judgement or decision.³¹ An essential part of deciding a question or dispute is that some exercise of judgement is required. This distinguishes tribunals from purely administrative bodies, which are also required to decide claims, but do this through a mechanical application of set criteria to facts.³² The element of judgement in tribunal decision-making suggests to us that tribunals are, like courts, essentially adjudicative bodies.³³ Tribunals 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.³⁴

30 A table of over 100 bodies that formed this starting point was prepared. The table is available on the Law Commission website.

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

32 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. The mix of administrative and adjudicative functions in the licensing area caused some difficulty for the project. These are considered in Chapter 5.

33 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).

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

- 2.11 From this we were able to develop a suitable working definition of a tribunal for the purposes of narrowing and focusing the scope of our project. For the purposes of this project we consider the primary characteristics of tribunals to be that:
- they determine questions affecting people's rights;
 - they do this by considering facts and evidence and applying 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.

Tribunals are independent of the executive and are not courts

- 2.12 Having been deliberately created to remove certain decisions from the courts, tribunals are not courts. Equally, having been removed from executive government, they are not part of the executive either. Thus tribunals might best be described as “an institution which stands on the frontiers between law and administration.”³⁵ Wraith and Hutchesson suggest that:³⁶

[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.

The spectrum concept best captures the role played within our constitutional system by the wide range of bodies we call ‘tribunals’, with different ones differently placed on the administrative-judicial spectrum. However our adjudicative definition places the tribunals with which the project is concerned further towards the judicial than administrative end of this spectrum. A similar approach is taken in the United Kingdom, where commentators note that tribunals are seen as “firmly located within the judicial rather than the administrative branch of government.”³⁷

- 2.13 In reality, even the distinction between judicial and administrative is often blurred. Mechanical decisions not requiring judgement are theoretically located at the “administrative” end of the spectrum; but decisions made within the executive often also involve elements of judgement, and so shade into adjudication. In these situations there may be 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

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

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

37 Genevra Richardson and Hazel Genn “Tribunals in Transition: Resolution or Adjudication?” [2007] PL 116.

different to that of the courts. Rather, it is their procedures, and the absence of certain features of courts in those procedures, which distinguish such tribunals from the courts.³⁸

- 2.14 Rule of law arguments have been an important consideration in formulating our definition of a tribunal for the project. 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.³⁹ 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 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.⁴⁰

Regulatory bodies and standing commissions

- 2.15 We initially identified approximately 65 bodies as tribunals that satisfied our adjudicative definition.⁴¹ The Commission endeavoured to take a broad approach and included, rather than excluded, some tribunals even where we thought there was uncertainty about whether they fell squarely within the scope of the project. A list of these 65 tribunals was included in the issues paper *Tribunals in New Zealand*.
- 2.16 As already noted, regulatory bodies such as the Commerce and Securities Commissions, and standing Commissioners such as the Privacy and Health and Disability Commissioners have certain adjudicative functions that fit our definition. However these bodies were still excluded from the scope of our project, firstly because the issues which such bodies are required to address are highly ‘polycentric’ in nature and consequently their decision-making processes arguably fall outside the parameters of adjudication.⁴² But if they don’t, these bodies also typically have mixed functions. For many the adjudicative function is not even a primary one.

38 Hazel Genn “Tribunals and Informal Justice” (1993) 56 MLR 393, 395.

39 See generally Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) 163-4; Geoffrey de Q Walker *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne University Press, Melbourne, 1988) Chapter 1.

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

41 Later in the project we carefully reviewed the scope of the project and considered whether all 65 of these bodies should remain within the scope of the project. As a result of that review we ultimately identify 47 tribunals as being within the scope of the project. We discuss the final scope of the project in Chapter 5.

42 ‘Polycentric’ issues arise in situations with many interacting points of influence, where a change in any one point will have complex repercussions for all the others. For example it may not be possible to afford an opportunity to participate in the decision process to all parties who may be affected by the decision. If we define 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. See Lon L Fuller “The Forms and Limits of Adjudication” (1978) 92 Harv L Rev 353.

- 2.17 Moreover most of these bodies are already regulated under other statutory schemes, notably the Crown Entities Act 2004.⁴³ Functions now performed by Crown Entities were carved out of the functions of executive government,⁴⁴ 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.

Purposes of tribunals

- 2.18 Our review of the historical development of tribunals, the theory underpinning tribunals, and our examination of the 65 tribunals included within the scope of the project identified some common purposes for which tribunals are established. These 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 through review any errors in the original decisions made by administrators;
 - to promote executive accountability by providing oversight of administrative decision making; and
 - to deal with large volumes of low level cases.
- 2.19 Perhaps the most important rationale underlying the establishment and use of tribunals is the belief that tribunals improve public access to dispute settlement mechanisms. The original intent of the tribunal system was to provide easy access to specialised adjudicators at no cost to claimants.⁴⁵ According to Sir William Wade, “[t]ribunals exist in order to provide simpler, speedier, cheaper and more accessible justice than do the ordinary courts.”⁴⁶ The aim is to provide the greatest measure of justice possible within the constraints of efficient administration.
- 2.20 Specialisation is similarly another key purpose for which tribunals have often been established. Sometimes tribunals are 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.⁴⁷

43 For a list of bodies subject to the Crown Entities Act 2004, see Schedule 1 to that Act.

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

45 Hazel Genn “Tribunals and Informal Justice” (1993) 56 MLR 393, 395.

46 William Wade and Christopher Forsyth *Administrative Law* (9th ed, Oxford University Press, Oxford, 2004) Chapter 24.

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

2.21 Where individual rights are at stake, tribunals offer the protection of a formal process separate from the administration.⁴⁸ This is especially important in relation to disputes between citizens and the state. Tribunals that review decisions of officials have the important function of correcting any errors in the original decisions made by administrators and officials. It is thought that this can improve the quality of primary decision-making in general.⁴⁹ Tribunals that review administrative decisions by exercising an oversight or checking function help promote executive accountability. It is important to the rule of law that such disputes be determined by persons who are impartial and independent from the executive.

Desirable characteristics of tribunals

2.22 Given the adjudicative function tribunals exercise and the rationale for their establishment, we concluded that there are a small number of desirable characteristics or attributes that individual tribunals as well as our overall system of tribunals should normally exhibit. These are:

- public accessibility, both in terms of cost and public awareness of opportunities to seek redress through tribunals;
- membership and expertise appropriate to the subject matter;
- actual and apparent independence;
- procedural rules which secure the observance of natural justice, which are simple and less formal than those of the ordinary courts, and which 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.

2.23 Although these characteristics generally apply to tribunals and to our system of tribunals, it is important to acknowledge that some are more relevant in some types of tribunals than in others. In some cases there may also need to be trade-offs between these characteristics, depending on the functions and purposes of any particular tribunal. Proportionality is an important value in individual tribunals and across our system of tribunals. In some cases the nature and monetary value of a particular dispute, or type of dispute, will not warrant the full protection implicit in some characteristics.

Objectives for system of tribunals

2.24 The Commission has utilised these ‘desirable’ characteristics for two purposes during the project. Firstly, as will be summarised in the next chapter, we used them as a standard against which our current system of tribunals could be measured and assessed. Secondly, we used these characteristics as our objectives for tribunal reform. We consider that our system of tribunals should endeavour to embody these values and attributes.

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

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

Accessibility

- 2.25 Access to justice has been a key goal of the tribunal system since its inception. As Sir Andrew Leggatt so aptly stated in his review of the United Kingdom's tribunals:⁵⁰

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.

Public accessibility entails two main principles. First, cost should not be an unreasonable barrier. Second, it means ensuring that there is information and support so that people can effectively use and participate in tribunal hearings. People should have access to information on their avenues of redress, and know how to initiate and progress cases. "Tribunals should also do all they can to render themselves understandable, unthreatening, and useful to users."⁵¹

Membership and expertise

- 2.26 Tribunal members should have the skills and experience necessary to make high-quality decisions. The quality of a tribunal's members is perhaps the most important factor in ensuring good decision-making. Appropriate membership and expertise is largely determined by the subject matter, although there are core adjudication and communication skills that also play an essential role in high-quality decision-making. Training, together with experience, is key to building expertise. Although on appointment members should be appropriately qualified and possess a threshold of competence, members need to continue to develop their skills and be supported in this.

Independence

- 2.27 Tribunals must enjoy independence from the executive, and must also be perceived as independent.⁵² The perception is in many ways as important as the reality because it goes to the question of public confidence in tribunals and their decisions. In *Tribunals in New Zealand* the Commission adopted as a guiding principle the view that tribunals need to have a similar degree of independence and impartiality to that of the courts.⁵³ The factors that help to secure independence include a politically neutral appointment process, neutral administrative support,

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

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

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

53 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. The Commission also adopts this view. Sir Andrew Leggatt *Tribunals for Users – One System, One Service* (Report of the Review of Tribunals, London, 2001) para 2.18.

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.⁵⁴

Procedures, powers and appeals

- 2.28 The rules of natural justice apply to tribunals as to other decision-makers.⁵⁵ All tribunals should therefore have procedural rules which secure the observance of natural justice. While the underlying rules of natural justice remain the same, their application between tribunals and cases will vary. There is also an emphasis on informality in tribunal procedures because of the desire to make tribunals quicker, cheaper and more easily accessible. Generally tribunals do not have the same strict procedural rules as courts and their processes are simpler and less formal than those of the ordinary courts. They can also often be more inquisitorial than adversarial, depending on the nature of the case. Rules of procedure for all tribunals normally ought to be as simple and informal as the complexity of the subject matter and the requirements of natural justice will allow.⁵⁶
- 2.29 All tribunals need sufficient powers to carry out their functions. Their powers should be proportionate and appropriate to those functions. Public powers should not be created unless they are necessary, so like all bodies that exercise powers tribunals should only have the powers they need to perform their functions. Tribunal powers should be constrained by appropriate procedural and institutional safeguards so as to protect the rights and freedoms of those affected when they are exercised.⁵⁷
- 2.30 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.⁵⁸ There should be appropriate avenues for appeal or review of tribunal decisions. Appeals serve to correct error and to supervise and improve the decisions of tribunals and other decision-makers, so appeals from tribunal decisions will normally be appropriate. Appeals also help to maintain public confidence in the legal system by ensuring that outcomes in similar cases are consistent.⁵⁹
- 2.31 A coherent, consistent and principled approach to rules of procedure, constraints on powers and rights of appeals must be another objective of tribunal reform.

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

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

56 There is a challenge for those formulating rules of procedure for tribunals to balance the need for flexibility and informality with the requirements of natural justice. The balance between the two may need to be different for different categories of tribunals.

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

58 Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2001 Edition and amendments* (Wellington, 2007) 126.

59 New Zealand Law Commission *Seeking Solutions: Options for Change to the New Zealand Court System* (NZLC PP52, Wellington, 2002) 207.

Speed and efficiency

- 2.32 An important consideration behind the establishment of tribunals is that they ought to operate efficiently. 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.

Chapter 3

Reform is overdue

- INTRODUCTION 3.1 In *Tribunals in New Zealand*,⁶⁰ we analysed the problems of New Zealand’s tribunals which reform must address. This chapter briefly summarises this analysis. We developed this analysis through wide research and consultation. The Law Commission, with the assistance of the Ministry of Justice, surveyed the departments that administer tribunals and the chairs of the tribunals, following up in many cases with meetings. Their responses formed the basis of our identification of the problems. We also met representatives of other groups with an interest in this area, such as the New Zealand Law Society, Community Law Centres and Citizens Advice Bureaux.
- 3.2 We also called for public submissions on whether *Tribunals in New Zealand* correctly identified the problems with the current tribunal system. Submitters almost unanimously agreed that it did.
- 3.3 As described in Chapter 2 of *Tribunals in New Zealand*, there have been numerous reviews of tribunals, beginning in the 1960s, which have all identified similar problems and concluded that reform is necessary.⁶¹ Reform is overdue.
-
- ACCESSIBILITY 3.4 Tribunals must be accessible to the public. We found that this is not always the case. There are problems of awareness of and information about tribunals. Members of the public are not always aware of particular tribunals’ existence. In one case, we found that recipients of a decision by a government agency were not advised that they had a right to appeal to a tribunal.
- 3.5 We found that the process of starting a case before a tribunal could be simplified and streamlined. Users are not always given information about how to do this. A common ‘shop front’ would considerably improve the situation.
- 3.6 Furthermore, the quality of information and advice provided to tribunal users is variable, and in some cases needs considerable improvement. Wider publication of tribunal decisions would also assist.

60 New Zealand Law Commission *Tribunals in New Zealand* (NZLC IP6, Wellington, 2008).

61 New Zealand Law Commission *Tribunals in New Zealand* (NZLC IP6, Wellington, 2008) 24-29.

- 3.7 Legal aid is not consistently available for cases before tribunals, which can create cost barriers to using tribunals. Geography is also a barrier. A larger pool of available tribunal members, who are qualified to sit in the relevant jurisdiction, and better use of technology such as teleconferencing, and especially video conferencing, would assist in making tribunals available to users throughout the country.

MEMBERSHIP
AND
EXPERTISE

- 3.8 High quality members are vital to a well-functioning tribunal system. Appointments must be made based on merit. We found that more could be done to support members. The quality of training and development for members varies widely, with some tribunals having none. There is also unnecessary duplication of effort in devising training. In some small tribunals, members do not sit on enough cases to develop their skills.
- 3.9 A related issue is that tribunal membership could be made more attractive as a career option. Currently there are few opportunities for career progression, and salary levels can act as a barrier to recruiting good people.
- 3.10 We found significant inconsistencies in the way different tribunals are composed. Statutory requirements relating to the size of panels, the skills and experience required of members, and the balance between different skills on panels vary widely, often for no apparent rational reason. In a few tribunals, we suggested that there is a need for legal expertise or community representation. A more coherent approach is required.
- 3.11 We also noted that there is a lack of overall coordination and leadership. Members of small tribunals often have no support. Greater opportunities for collegiality and sharing of expertise would be beneficial. Tribunal members and chairs suggested to us that the tribunal system as a whole needs leadership and an effective ‘voice’.

INDEPENDENCE

- 3.12 Independence is vital to the credibility and effective functioning of tribunals. Perceptions of independence are as important as the reality. We identified a number of areas where guarantees of independence could be strengthened in order to ensure that the public sees tribunals as independent.
- 3.13 Appointments must be transparent and based on merit. We found that in some tribunals this is not obviously the case. Furthermore, in some tribunals a Minister or other appointing authority with an interest in the outcomes of cases appoints members of the tribunal.
- 3.14 Some security of tenure is also crucial in order for tribunal members to be able to make independent decisions. We found that in a few cases tribunal members did not have secure tenure within their term of appointment. However we suggested that a few tribunals deal with such important matters that it is worth considering giving their chairs lifetime tenure.
- 3.15 Where a tribunal is administered by the department whose decisions it reviews, we found some anecdotal evidence that members of the public perceive that the tribunal is not fully independent. While this perception may be mistaken, the appearance of independence would be enhanced by tribunals being administered by a neutral department or other entity.

- 3.16 The apparent independence of some occupational bodies could be enhanced by constituting the body as a separate entity from the relevant industry representative body, and by including lay members.

PROCESS

- 3.17 In general, we found wide variations in procedures, powers and appeal rights from tribunals. While we must be careful to avoid a ‘one size fits all’ approach, we do not believe that the existing level of inconsistency is justified. A more coordinated approach is required.

Powers and procedures

- 3.18 We found that procedural provisions applying to tribunals vary widely. The rules on matters such as whether hearings are in public or private, whether hearings are oral or on the papers, and whether tribunals have the power to award costs are inconsistent. Such inconsistencies potentially cause unfairness.
- 3.19 We also found that some tribunals do not have the powers they need and in some cases legislation does not adequately set out the procedures to be followed.

Appeals

- 3.20 We found wide variations in the current appeal arrangements. There are no rights of appeal or limited rights of appeal from the decisions of some tribunals. Although some of these restrictions may be justified, in some cases this means that tribunal users have inadequate appeal rights.
- 3.21 Appeal pathways and appellate procedures differ, often for no discernible reason. Similarly, time frames for filing appeals are inconsistent. This causes confusion for tribunal users and their representatives.

SPEED AND EFFICIENCY


- 3.22 Overall, we did not find that excessive delays are common in New Zealand’s tribunals. However some delays do occur and may be able to be reduced through more efficient use of resources and a better balance between full-time and part-time tribunal members.
- 3.23 The level of administrative support provided to tribunals varies widely. Each administering agency takes its own approach. There appears to be unnecessary duplication of resources and effort.
- 3.24 We found that some tribunals have very small caseloads. It seems inefficient to retain these. A more streamlined, amalgamated tribunal system would be able to take advantage of economies of scale and use the available resources more effectively.
- 3.25 We noted the trend to greater use of internal reviews in the case of administrative review tribunals, and also mediation. This has the potential to speed up the resolution of cases. While we support this development, care is needed to ensure that internal review or mediation does not create extra barriers for tribunal users, and that users do not perceive a lack of independence.

STRUCTURE
AND
COHERENCE

3.26 Many of the problems described above are systemic in nature. There is a lack of overall coherence. Existing tribunals have developed on an ad hoc basis, which has led to a fragmented system. As we have noted at various points in this chapter, there is duplication and waste in a number of areas. Furthermore, there is a lack of overall oversight and coordination. There is no single person or body able to coordinate procedures, develop coherent policy, monitor performance or act as an advocate for tribunals in relation to resources and other matters. We believe that leadership of this kind is needed in order to create a better performing and more efficient tribunal system.

CONCLUSION

3.27 Tribunals in New Zealand have developed haphazardly and without an overall coordinated approach. This chapter has outlined some of the problems that have developed as a result. We believe that the system of tribunals is now overdue for reform. As many of the problems are structural rather than simply procedural, so reform needs to address the structure of New Zealand's tribunals. This is increasingly happening in countries with similar tribunal arrangements to New Zealand, as will be detailed in the next chapter.



Part 2

REFORM OPTIONS

Chapter 4

Overseas models of reform

INTRODUCTION 4.1 In developing the options for reform we looked at recent reforms in Australia, the United Kingdom and Canada. This chapter briefly outlines these reforms.⁶² While different jurisdictions have approached reform differently, some common threads are evident. Reforms have been directed at achieving greater coherence and efficiency. Amalgamating tribunals, providing leadership and consistency of procedural provisions have been the primary methods used in order to achieve this.

VICTORIA

4.2 In Victoria a large number of tribunals have been amalgamated to create the Victorian Civil and Administrative Tribunal (“VCAT”), which deals with a wide variety of administrative review cases, including appeals from decisions of professional disciplinary bodies, as well as civil matters.

4.3 In order to cater for the diversity of cases that come before it, VCAT has adopted a structure of divisions and lists. There are three divisions, the Civil, Administrative and Human Rights Divisions. Each division is further divided into a number of lists dealing with particular types of cases within that division.

4.4 Leadership is an important aspect of VCAT’s structure. VCAT as a whole is headed by a President, who oversees the system and provides suggestions for improvement to the responsible Minister.⁶³ The President must be a Supreme Court judge.⁶⁴ Each Division is headed by a Vice-President, who must be a County Court judge. In turn, each List within a Division has a Deputy President as its leader.⁶⁵

62 See New Zealand Law Commission *Tribunals in New Zealand* (NZLC IP6, Wellington, 2008) Chapter 11 for a more detailed description.

63 Victorian Civil and Administrative Tribunal Act 1998 (Vic), ss 30 and 31.

64 Victorian Civil and Administrative Tribunal Act 1998 (Vic), s 10.

65 Victorian Civil and Administrative Tribunal Act 1998 (Vic), ss 11 and 12.



4.5 The legislation sets out a comprehensive set of powers and procedures for the Tribunal. This provides consistency, but the rules are drafted to give flexibility. The rules are varied for certain types of proceedings.⁶⁶ There is a Rules Committee whose purpose is to develop consistent rules of practice and procedure across the Tribunal and to provide training and education for members.⁶⁷

NEW SOUTH WALES

4.6 New South Wales has also amalgamated many of its tribunals. The Administrative Decisions Tribunal (“ADT”) operates along similar lines to VCAT, but is less comprehensive in the tribunal jurisdictions it incorporates. It reviews government decisions as well as some disputes between individuals, and has disciplinary and regulatory functions in relation to certain occupations. A separate specialised amalgamated tribunal, the Consumer, Trader and Tenancy Tribunal has more recently been created to deal with matters involving consumers, traders and tenancy.⁶⁸

4.7 The ADT is structured similarly to VCAT, with six divisions catering for different types of cases. However, unlike VCAT, it also has an Appeals Panel which hears appeals from any division on questions of law.⁶⁹

4.8 Like VCAT, the ADT has a President who is a District Court judge and is responsible for the overall operation of the Tribunal, with Deputy Presidents who may act as heads of Divisions.⁷⁰

4.9 Again similarly to VCAT, the legislation sets out a comprehensive framework of powers and procedures, broadly drafted to ensure flexibility.⁷¹ Further rules about the Tribunal’s practice and procedure may be made by the Rules Committee. Each division also has its own Rules Subcommittee.⁷²

WESTERN AUSTRALIA

4.10 Western Australia has also created a single amalgamated tribunal, the State Administrative Tribunal (“SAT”), which deals with a wide range of administrative review cases and civil matters, as well as with vocational regulation.

4.11 Again, a divisional structure has been adopted to reflect the diversity of cases, although there are no formal lists within divisions. The SAT has four streams: the Human Rights, Development and Resources, Vocational Regulation and Commercial and Civil Streams. Appeals from all streams are to the courts.⁷³

66 Victorian Civil and Administrative Tribunal Act 1998 (Vic), sch 1.

67 Victorian Civil and Administrative Tribunal Act 1998 (Vic), 150.

68 Consumer, Trader and Tenancy Tribunal Act 2001 (NSW).

69 Administrative Decisions Tribunal Act 1997 (NSW), s 24.

70 Administrative Decisions Tribunal Act 1997 (NSW), ss 16 and 17.

71 Administrative Decisions Tribunal Act 1997 (NSW), Chapter 6.

72 Administrative Decisions Tribunal Act 1997 (NSW), s 92.

73 State Administrative Tribunal Act 2004 (WA), s 105.

- 4.12 As in other reforms, leadership is a key feature of the SAT. A President, who must be a Supreme Court judge, heads the Tribunal.⁷⁴ There must be at least one Deputy President, who must be a District Court judge.⁷⁵
- 4.13 Again, consistent procedural rules are set out in legislation,⁷⁶ with a Rules Committee that may make further rules.⁷⁷

SOUTH AUSTRALIA

- 4.14 In contrast to other Australian states, South Australia has incorporated tribunals into the court system rather than creating an amalgamated tribunal. The Administrative and Disciplinary Division of the District Court now exercises many of the functions previously exercised by tribunals,⁷⁸ although quite a number of tribunals continue to exist separately from the District Court.

AUSTRALIAN CAPITAL TERRITORY

- 4.15 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.⁷⁹

QUEENSLAND

- 4.16 The Premier of Queensland announced the government's intention to establish a Queensland Civil and Administrative Tribunal on 12 March 2008. The new tribunal will amalgamate 26 existing bodies, and is expected to be established in the second half of 2009.⁸⁰

UNITED KINGDOM

- 4.17 The United Kingdom has taken an incremental approach, beginning with reform of the administration of tribunals and later introducing legislation to create a new structure for tribunals.
- 4.18 The first stage of reform was the creation of an independent Tribunals Service to provide common administration for the main central government tribunals. Individual tribunals retained their separate existence, but shared administrative support.
- 4.19 The next stage of reform, the Tribunals, Courts and Enforcement Act 2007, creates two new tribunals, the First Tier Tribunal and the Upper Tribunal,⁸¹ under the administration of the Tribunals Service. The First Tier Tribunal will eventually consolidate the majority of existing tribunals. The Upper Tribunal will deal with appeals from the First Tier, some first instance cases and some work currently undertaken by the courts. The tribunals are to be organised into chambers dealing with different types of cases.

74 State Administrative Tribunal Act 2004 (WA), s 108(3).

75 State Administrative Tribunal Act 2004 (WA), s 112(3).

76 State Administrative Tribunal Act 2004 (WA), Part 4.

77 State Administrative Tribunal Act 2004 (WA), ss 170 and 172.

78 District Court Act 1991 (SA).

79 Department of Justice and Community Safety *Options for Reform of the Structure of ACT Tribunals: Discussion Paper* (Canberra, 2007).

80 Tribunals Review Independent Panel of Experts *Queensland Civil and Administrative Tribunal: Stage 1 report on scope and initial implementation arrangements* www.tribunalsreview.qld.gov.au (accessed 8 September 2008).

81 Tribunals, Courts and Enforcement Act 2007 (UK), s 3.

4.20 Again, leadership is an important feature. The Senior President, who has the status of a Lord Justice of Appeal, presides over the First Tier and Upper Tribunals.⁸² There will also be Presidents of each Chamber.⁸³

4.21 Consistent processes are again also important. There are to be Tribunal Procedure Rules governing procedure in both tribunals. A Tribunal Procedure Committee will also be established to make these rules.⁸⁴ Furthermore, the Senior President and Chamber Presidents may also give practice directions.⁸⁵

QUÉBEC

4.22 Québec has established the Tribunal Administratif du Québec or Administrative Tribunal of Québec (“TAQ”), which consolidated five existing tribunals into one. Each former tribunal became a division of the TAQ.

4.23 As in other amalgamated tribunals, the TAQ is headed by a president and vice-presidents, who are responsible for the administration and management of the Tribunal.⁸⁶

4.24 Again, a standard set of procedures is laid down for cases in the TAQ, including a standard approach to appeals.⁸⁷

BRITISH COLUMBIA

4.25 Reform in British Columbia has been procedural rather than structural. The Administrative Tribunals Act 2004 establishes a set of common standards and procedures. Standard provisions now apply to matters involving membership, such as appointments; to procedures, such as the form of hearings, whether hearings are public or private, representation of parties and time limits for filing appeals; and to powers such as to compel witnesses, award costs and punish for contempt. However, subject to the general rules in the Act, an individual tribunal has the power to control its own processes, thereby maintaining flexibility.⁸⁸

CONCLUSION

4.26 It will be evident that overseas tribunal reforms have followed similar patterns, although there are differences in the approaches taken. Most have amalgamated tribunals into larger structures to achieve greater coherence and efficiency. Providing leadership for the tribunal system has also been a key feature of most reforms. In all cases, tribunal processes have been standardised to achieve greater consistency. However, a concern to maintain flexibility within a more standardised approach is also evident. Where amalgamated tribunals have been created, their structures are similar. There are generally sub-groupings within the overall tribunal structure, reflecting the wide variety of cases that an amalgamated tribunal must deal with.

82 Tribunals, Courts and Enforcement Act 2007 (UK), s 2.

83 Tribunals, Courts and Enforcement Act 2007 (UK), s 7.

84 Tribunals, Courts and Enforcement Act 2007 (UK), s 22.

85 Tribunals, Courts and Enforcement Act 2007 (UK), s 23.

86 Act respecting administrative justice RSQ 1996 c J-3, s 61.

87 Act respecting administrative justice RSQ 1996 c J-3, Chapter VI.

88 Administrative Tribunals Act SBC 2004 c 45, s 11.

Chapter 5

Options for reform

INTRODUCTION 5.1 In October 2007 the Minister for Courts announced the government’s support for a programme of tribunal reform, the aim of which is to propose a coherent structure for tribunals and ensure consistency in the development of future tribunals.⁸⁹ In *Tribunals in New Zealand* the Commission outlined very briefly five options which had been identified by the Cabinet as meriting further assessment.⁹⁰ The Commission, working closely with the Ministry of Justice, has examined these options together with various permutations of each that have since emerged.

5.2 This chapter outlines and critiques the different options for reform that were considered in the course of developing the project’s proposals for reform. As will become apparent through the following discussion, our task in analysing the options was essentially one of identifying and combining the best aspects of a number of options to produce a robust and effective model for reform. There are aspects of most of the options considered that address at least some of the problems inherent in our current tribunal arrangements. To develop an ideal solution we need to combine them. In other words none of the “options” we have considered are suitable stand-alone solutions. In this sense they are not true options at all, but rather components of an overall reform model.

**OPTION 1:
STANDARDISED
TRIBUNAL
POWERS AND
PROCEDURES** 5.3 Under this option tribunal procedures, powers, appeal rights and membership provisions would be standardised. The option aims to address the current level of disparity that exists between legislative provisions and administrative practices governing different tribunals. By tribunal procedures and powers we mean the rules that apply on matters such as whether unsworn evidence can be accepted, whether hearings are oral or on the papers, whether hearings are in public or private and whether the tribunal can award costs. We found in our early work that procedural provisions differ widely between tribunals.⁹¹ By aligning tribunal powers and procedures and appeal rights greater consistency would be introduced across the tribunal system. This would arguably improve perceptions of fairness and contribute to consistency in decision-making.

89 Hon Rick Barker, Minister for Courts “Future Direction For Tribunal Reform Programme Announced” (12 October 2007) Media Statement.

90 See Hon Rick Barker, Minister for Courts “Tribunal Reform” (19 September 2007) Cabinet Paper and Cabinet Policy Committee “Tribunal Reform” (19 September 2007) POL (07) M 22/18.

91 See New Zealand Law Commission *Tribunals in New Zealand* (NZLC IP6, Wellington, 2008) Chapter 6.



- 5.4 In addition provisions concerning the terms and process of appointment for tribunal members also could be standardised. Most of these things could only be aligned by a framework of legislation that applied to all tribunals, although it is important not to overlook other non-legislative ways in which consistency of process and practices can also be introduced across our system of tribunals. Codes of best practice and administrative guidance might also for example be developed to assist in standardising practices between tribunals.
- 5.5 Standardisation of processes aimed at introducing greater coherence has been a consistent feature in all the overseas jurisdictions that have embarked on tribunal reform. Virtually all feedback the Commission received throughout the course of this project has also expressed support for greater standardisation of provisions and practices between tribunals.⁹²

Degree and scope of standardisation

- 5.6 A more contentious issue arises, however, in respect of the extent to which variation and diversity, which can reflect important differences between tribunals, should be retained. A related issue, which is also contentious, is whether there are some tribunals included within the broad scope of the project that are actually so different from the majority of tribunals that they should be excluded from any legislative framework imposing standardising provisions. These two issues need to be resolved.

Retention of variation and flexibility

- 5.7 The Commission called for caution over uniformity in its issues paper.⁹³ We have never advocated imposing uniform provisions on all tribunals. Submissions on the issues paper were supportive of a cautious approach and recognised the importance of avoiding ‘one size fits all’ measures that prevent tribunals from appropriately resolving the matters before them. Standardisation should not be at the expense of retaining necessary differences or at the cost of the flexibility so necessary in many tribunals. If this option is adopted then new legislative provisions must recognise the variations that exist between different categories of tribunals. The aim should be to achieve the greatest possible standardisation between tribunals that is consistent with their differing functions. The flexibility for tribunals to determine their own procedure in appropriate cases should also be retained.

⁹² A number of submissions on the issues paper identified greater consistency between procedures, appeal rights and membership provisions as an important objective for reform.

⁹³ New Zealand Law Commission *Tribunals in New Zealand* (NZLC IP6, Wellington, 2008) para 6.45.

Coverage of the proposed legislative framework

- 5.8 As outlined in Chapter 2, we initially set a broad scope for the project and identified 65 bodies which arguably met our definition of tribunal. We had elected to include, at least initially, within the scope of this project bodies even when there was uncertainty about whether they really met our adjudicative definition of tribunal. However, when we began to focus in on the options for reform, it became apparent that we had caught within our broad scope a number of bodies that did not belong within a programme of tribunal reform aimed at increased coherence and consistency.
- 5.9 We identified ‘tribunals’ at the edges of the project that would either not fit or not benefit from inclusion within any legislative framework of standardised provisions, as proposed by this option. Consequently we reviewed our list of tribunals, applying our adjudicative criteria more rigorously, and excluded for other reasons a few quite unique bodies. As a result of that exercise we settled on a list of 47 tribunals that might sensibly be covered by the framework of standardised provisions proposed by this option. We excluded the Film and Literature Board of Review, War Pensions District Claim Panels and National Review Officers, Racing Judicial Committees and Appeal Tribunals, Police Disciplinary Tribunals, Judicial Conduct Panels, the Parole Board and all occupational bodies whose function is purely registration, on the basis that they either did not really meet our definition of a tribunal, despite having been included initially, or were tribunals with such unique roles that it would be unhelpful to include them. A list of the remaining 47 tribunals is included in Tables 1 and 3 of Appendix 1 to this paper.

Occupational registration bodies

- 5.10 The most difficult group of tribunal – like bodies to place throughout the project were licensing and registration bodies. We considered that a helpful distinction could be drawn between ‘licensing and registration’ bodies on the one hand and ‘occupational disciplinary’ bodies on the other. We acknowledge that this distinction is not always an easy one to maintain because some occupational licensing bodies exercise both of these functions. The granting of licences or registration of occupational groups is a fairly routine regulatory function with most licensing decisions being relatively mechanistic, whereas the exercise of disciplinary functions is adjudicative. Disciplinary matters normally involve hearings. Highly contested evidence often also needs to be assessed. It follows that the legislative provisions that will be appropriate for licensing and registration activity differ from those needed for disciplinary matters.
- 5.11 In some cases these distinctions are not so clear cut. Licensing activity can sometimes involve the exercise of discretion and judgement and on occasion licensing decisions require hearings and the assessment of conflicting evidence. Some licensing bodies as a result do need similar powers and procedures to tribunals to deal with these atypical situations. Although we recognise that there are these grey edges, we have excluded the few pure licensing and registration bodies that

were originally included from consideration of possible tribunal reforms.⁹⁴ We do not think it appropriate to try and standardise provisions between occupational bodies whose function is purely registration and the other tribunals included in the scope of the project. We are influenced also by the knowledge that pure licensing and registration activity has been left out of most of the overseas models we examined and only partially included in others.⁹⁵

- 5.12 Where occupational registration bodies also have disciplinary functions we have continued to include them, along with disciplinary tribunals, because they exercise disciplinary functions which are clearly adjudicative, so require similar provisions to other tribunals. We think that standardised legislative provisions are likely to be appropriate to all those bodies and tribunals that exercise disciplinary functions.

Our assessment of this option

- 5.13 As we have noted, standardisation of processes aimed at introducing greater coherence is a recurring feature of tribunal reform in all jurisdictions we studied. We think that it is beyond argument that any package of tribunal reform must include measures aimed at improving consistency between the processes, powers, appeal rights and membership provisions that apply across tribunals. It is a proposal that received almost universal support during the Law Commission’s consultation on the issues paper. Standardising tribunal provisions does not however address any of the more systemic problems such as the uneven distribution of resources across tribunals, the duplication of case management systems and the need for overall sector leadership and coherence.⁹⁶ So while this option is an essential part of the solution, it can not on its own be the entire solution. Other reforms of the kind proposed in some of the other options are also needed.

OPTION 2: A SINGLE ADMINISTRATION FOR TRIBUNALS

- 5.14 The second option that was considered was to rationalise the existing plethora of administrative arrangements for tribunals. Under this option tribunals would be administered together by one administering department or agency. This option focuses on improving the administrative support available to tribunals and the public that use them, and also on supporting the independence of tribunals by ensuring that there is a clear separation between those providing

94 Our review of occupational licensing and disciplinary bodies also resulted in the exclusion of the few complaints assessment committees and standards review committees that had originally been included for comparative purposes.

95 Registration bodies are not for example included in the Victorian Civil and Administrative Tribunal or the United Kingdom’s Tribunal Service. Although the State Administrative Tribunal in Western Australia does include a Vocational Regulation Stream it has a review jurisdiction so effectively hears appeals from the registration and licensing decisions of licensing bodies. See New Zealand Law Commission *Tribunals in New Zealand* (NZLC IP6, Wellington, 2008) para 11.17 for a short description of the Vocational Regulation Stream in the State Administrative Tribunal.

96 For further details of the problems identified see Chapter 3 above and also New Zealand Law Commission *Tribunals in New Zealand* (NZLC IP6, Wellington, 2008).

administrative support for tribunals and those with an interest in the matters before tribunals. This second objective is particularly important where tribunals perform the function of reviewing departmental or government decisions.

- 5.15 A single administrative department or agency might provide a common registry for all included tribunals as well as common facilities and administrative support. A tribunal service ‘shop-front’ could be established for all included tribunals under this option. Web-based services and ‘branded’ user information would support the concept of one tribunal service. A consistent level of assistance and advice could be provided to the public in respect of all tribunals. Public access might also improve, with one agency responsible for tribunals and all public information about them.
- 5.16 This option seeks to address many of the problems that arise currently because tribunal administration is fragmented and unevenly resourced. As we have previously documented in *Tribunals in New Zealand* and summarised above in Chapter 3, registry practices, and the type of information and support available to the public wishing to access tribunals, currently vary significantly between administering agencies. Similarly the amount and type of research and administrative support available to tribunal members is quite variable. By bringing all tribunals under the administration of one department or agency a more consistent application of resources is possible. A single administration for all state tribunals would provide a basis for a more effective and fairer application of the government’s administrative resources. It might address the problems caused by fragmentation and result in more efficient management of cases and resources.
- 5.17 The other important objective of this type of administrative reform is to achieve a clear separation between the department or agency that administers any tribunal and the departments and agencies whose decisions or interests are being assessed by the tribunal. Where tribunals review the decisions of officials we have argued strongly for tribunals to be supported by an administrative agency that is, and is seen to be, independent of those officials whose decisions are being considered. Citizens’ perceptions of tribunals’ independence can be as important as actual independence. In the few cases where government departments still administer tribunals that review their decisions, we found no evidence of any attempt to influence tribunal decisions. Despite this, citizens who use tribunals may still see them as a part of the relevant department and thus not independent. Administration by a neutral department or other neutral agency is the best way to guarantee that tribunals are, and are perceived to be, independent.⁹⁷

97 For example it appears that some members of the public did on occasion perceive that the immigration tribunals administered by the Department of Labour were not independent from the department. See Department of Labour *Immigration Act Review: Discussion Paper* (Wellington, April 2006) para 8.2. It seems that this occurred despite the rigorous steps that the department has taken to ensure that there is actual independence. For further discussion on this point see New Zealand Law Commission *Tribunals in New Zealand* (NZLC IP 6, Wellington, 2008) para 5.23 to 5.30.

Administering agency – the Ministry of Justice

5.18 There can be little disagreement about which department or agency should be the administering body under this option. Public service departments are part of the Crown, and, unlike crown entities, are not separate bodies corporate. The administration of tribunals, which we consider to be part of the justice system, sits constitutionally with the Crown. We think the Ministry of Justice is the only existing department that could have this role. The administration of tribunals and courts is already part of the Ministry's core business so a new department could not be justified solely to administer tribunals.⁹⁸ Over the years the administration of a number of existing tribunals has been transferred to the Ministry of Justice.⁹⁹ In addition most new tribunals that have been established in recent years are administered by the Ministry of Justice.¹⁰⁰ We think that the Ministry of Justice must therefore be the single administering department proposed under this option.

Which tribunals should be included?

5.19 The main issue that we needed to resolve when assessing this option was which of the 47 tribunals identified in the previous option should be included in the shared administrative arrangements being proposed. We considered firstly whether the many occupational disciplinary tribunals, which are currently administered by industry groups or agencies outside state tribunal structures, should be included in the shared administrative services the Ministry of Justice would provide under this option. We also considered whether there were any other tribunals, which are currently administered by another department or agency, that should not, for some specific reason, shift to the Ministry of Justice to share administrative arrangements with other tribunals.

Occupational disciplinary tribunals

5.20 Occupational disciplinary tribunals as a group differ in important respects from other tribunals:

- The relevant profession has an interest in any case even where it is not actually prosecuting the case itself. There is an interest in every profession being seen to be involved in the regulation and enforcement of its own standards.
- These tribunals often take the form of a panel and contain members of the occupation concerned, as well as lay members drawn from the public, and a legally qualified chairperson. They include members of the occupational group because they are experts in the standards expected.

98 The Review of the Centre of the New Zealand State Sector identified the structural fragmentation of the state sector and the leadership and coordination difficulties this can create as a significant concern. See Ministerial Advisory Group on the Review of the Centre *Report of the Advisory Group on the Review of the Centre* (State Services Commission, Wellington, 2002). A new department will only be established if it can be shown that a current department cannot perform the new function or that there will be significant added benefits in having a new department perform the function.

99 For example the Social Security Appeal Authority, the Student Allowance Appeal Authority, the Tenancy Tribunal and the Deportation Review Authority have been transferred to the Ministry.

100 For example the Ministry of Justice administers the new Immigration Advisors Complaints Tribunal and the Lawyers and Conveyancers Disciplinary Tribunal.

- These tribunals can, in addition to ordering reparation, impose penalties on errant members. They can normally also impose orders of costs as well.
 - The tribunal's decision can have a greater effect on a person than virtually any other: loss of a career.
 - Occupational tribunals are partly funded by the occupation concerned. They are domestic/state hybrids.
 - Many occupational tribunals have a combination of registration and disciplinary functions. Most of these combined occupational registration and disciplinary bodies are also incorporated entities and don't readily fit into state structures.
- 5.21 These differences mean that a close relationship between the disciplinary body or tribunal and the occupational or professional group must be preserved. We are hesitant to develop an approach that might cut across existing relationships. A balance needs to be maintained between allowing a profession to regulate itself and ensuring that the public can have confidence in the disciplinary decisions of such bodies. At this stage we do not think it is necessary to include the occupational disciplinary tribunals in the shared administrative arrangements proposed under this option in order to achieve this. We think that it would be better to see what impact the proposals for generic legislative provisions developed under the previous option will have first. Such provisions might include requirements for occupational disciplinary tribunals to all have some lay members and an independent tribunal chair, as well as provide for a right of appeal to the courts.
- 5.22 It should be noted that some occupational disciplinary tribunals are already administered by the Ministry of Justice.¹⁰¹ We would see no difficulty in these tribunals being included in the shared administrative arrangements proposed under this option. We anticipate that over time more occupational disciplinary tribunals will shift to the Ministry as regulatory models get reviewed.¹⁰²

Specific specialist tribunals

- 5.23 We also found two tribunals currently administered by other departments and agencies that we would be hesitant to see included in the shared administrative arrangements proposed under this option. These are the Employment Relations Authority and the Mental Health Review Tribunal. We think that in both cases there are currently sound reasons for retaining existing administrative arrangements rather than shifting these tribunals to the Ministry of Justice.
- 5.24 The Employment Relations Authority forms part of an integrated dispute resolution process and it would be difficult to separate the tribunal from the rest of the process without adversely affecting the overall process. Cases go to the Authority after mediation and before they go to the Employment Court. We understand that it is also common for cases to go back to mediation at any stage when they are before the Employment Relations Authority. In 2004 the Law Commission concluded that the role of the Employment Relations

101 The Licensing Authority of Second-hand Dealers and Pawnbrokers and the recently established Immigration Advisors Complaints and Disciplinary Tribunals are two examples.

102 A new Real Estate Agents Disciplinary Tribunal will be established under the Real Estate Agents Act 2008. This tribunal will be administered by the Ministry.

Authority might be impaired if it were assimilated into tribunal reforms.¹⁰³ We think there are still good reasons for retaining the existing integration between the Employment Relation Authority and other employment relations institutions, particularly the early mediation service, which is administered by the Department of Labour.

- 5.25 The Law Commission also proposed leaving the Mental Health Review Tribunal outside any structural changes in its 2004 report.¹⁰⁴ The Mental Health Review Tribunal is again quite a unique tribunal. Like the Parole Board, it decides matters of personal liberty and evaluates potential risks of harm. The Director of Mental Health made a submission to the Commission, which we accept, arguing that the tribunal should not be moved to the Ministry of Justice or incorporated into any new system of tribunals. The tribunal contains specialist psychiatric and mental health expertise. It has an inquisitorial process and also has the power to undertake inquiries into breaches of compulsory patients' statutory rights. Its current arrangements ensure it functions in a way that is accessible and efficient for its clientele, and this might be jeopardised by merging its administrative arrangements with those of other tribunals with quite different requirements.

Our assessment of this option

- 5.26 With the exclusion of the Employment Relations Authority, the Mental Health Review Tribunal and those occupational disciplinary bodies and tribunals that are not administered by the state there are 26 remaining tribunals that could be administered together under this option.¹⁰⁵ As with the previous option, we think that there is little to disagree with in principle in this option. Rationalising the state's administrative arrangements for tribunals is sensible. It is something that has been proposed many times by previous reviews both for the administrative efficiency reasons and for ensuring the neutral administration of tribunals.¹⁰⁶ To some degree this is already happening as tribunals are transferred to the Ministry of Justice and new ones established within the Ministry.
- 5.27 Submissions on our issues paper expressed significant support for all the options that proposed rationalising existing administrative arrangements for tribunals.¹⁰⁷ But many submissions expressed the concern that bringing administrative arrangements together does not go far enough to address the problem of a fragmented tribunal service. We agree. On its own, or combined with the previous option, shared administration does not bring tribunal jurisdictions

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

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

105 It should be noted that option 4 (which is discussed in para 5.36 to 5.43 below) proposes disestablishing four of these tribunals. See Appendix 1 for a list of the 22 remaining tribunals.

106 See for example Department of Justice *The Citizen and Power: Administrative Tribunals* (Government Printer, Wellington, 1965); Legislation Advisory Committee *Report No 3: Administrative Tribunals* (Government Printer, Wellington, 1989); Mel Smith *Review of the Tribunals Division – A Report for the Chief Executive, Department for Courts* (Wellington 1999); New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004).

107 The options that proposed rationalising tribunal administrative arrangements are option 2: A single administration for tribunals; option 5: Clusters of tribunals; and option 6: A single unified tribunal structure.

together or reduce the overall number of tribunals. The tribunals that might be administered by the Ministry under this option are retained as separate individual tribunals. So while shared administration, like the previous option, is a sensible and necessary part of any package of reform it does not address all the problems. It does not reduce the large number of tribunals, or facilitate the sharing of members across the different tribunals. Single member tribunals that sit infrequently and have few cases would be retained as separate tribunals under this option. Members are appointed to sit in specific tribunals, although the shared administrative arrangements might encourage more members to seek multiple warrants.

OPTION 3: HEAD OF TRIBUNALS

- 5.28 This option focuses on leadership across the tribunal system by proposing that a new role of ‘head of tribunals’ be created. Such a role would have an overarching coordination and leadership function in respect of tribunals. A lack of leadership and cohesion was identified by the Commission as one of the main systemic problems with our current tribunal arrangements. Within our tribunal arrangements there is currently no single person or body that exists to coordinate procedures, develop coherent practices and processes, monitor performance, or act as an advocate for tribunals in relation to resourcing and other matters. When considering and assessing this option we developed two different approaches to leadership.

Coordinating Council of tribunal leaders

- 5.29 The first approach considered was that outlined in the Minister’s Cabinet Paper.¹⁰⁸ Here it was suggested that a new overarching coordination role of ‘head of tribunals’ could be created. This role would work within existing tribunal structures, which could be retained. Two variations were suggested for this approach. The overarching coordination role envisaged could either be carried out by an individual person or it could be carried out by a Council of tribunal leaders. In either case the role would complement the existing professional leadership role of existing tribunal chairpersons. The Council of tribunal leaders approach is loosely modelled 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 practice and procedure in order to assist in the development of coherent principles and good practice for tribunals.
- 5.30 Under this approach tribunal chairs would continue to provide the professional leadership needed within their tribunal, but through the support of the Council or the person undertaking this coordinating role best practice would be developed and shared. Programmes of training and professional development could for example be developed and shared across all tribunals. Model rules of practice and procedure might also be developed, although their adoption would be a matter for each tribunal. So while a Council of tribunal leaders would provide a forum for tribunal leaders to work together and develop consistent approaches and best practices it is reliant on cooperation between all tribunal chairs. The approach therefore produces quite a weak leadership model.

¹⁰⁸ See Hon Rick Barker, Minister for Courts “Tribunal Reform” (19 September 2007) Cabinet Paper and Cabinet Policy Committee “Tribunal Reform” (19 September 2007) POL (07) M 22/18.

Head of Bench – a professional leadership model

5.31 The other approach that we considered under this option was to create an overarching ‘head of bench’ for tribunals. The role would provide professional leadership and have a similar overarching role to that of a principal or chief judge within the court system. The Chief District Court Judge as head of bench has for example a statutory responsible ‘for ensuring the orderly and expeditious discharge of the business of District Courts throughout New Zealand’. In consultation with the Principal Family Court Judge and the Principal Youth Court Judge the Chief District Court Judge may also assign and roster judges to the different jurisdictions of the District Court.¹⁰⁹ In a similar vein the Principal Family Court Judge is responsible ‘for ensuring the orderly and expeditious discharge of the business of the Family Court in consultation with the Chief District Court Judge’.¹¹⁰

5.32 We think that a similar ‘head of bench’ leadership role would be appropriate for tribunals, and that a person should be appointed to undertake this role. As head of bench, the head of tribunals under this approach would have responsibility for:

- Overall leadership of tribunals;
- Management of tribunal business and matters such as rostering and assigning tribunal members;
- Performance development, particularly in respect of training;
- Promoting consistency in procedure and practice, issuing practice guidance and advising government on possible tribunal rule changes;
- Advocacy and relationship management with the administering agency, the government and the judiciary.

The head of tribunals might also sit as a tribunal member on occasion, and perhaps chair cases of particular complexity or public profile. In most of the overseas models we examined the head of tribunals, or President as they are often called, sits as a tribunal member on occasion.

5.33 In contrast to the previous approach a head of tribunals appointed with this type of statutory mandate would provide a strong form of leadership and coordination. Significant structural change would however be necessary to implement this approach. We do not think that it would be feasible or desirable to mesh a head of bench role across a large array of relatively independent tribunals. Implicit in this approach is an assumption that there is a greater degree of administrative and structural cohesion between tribunals than presently exists. Appointing a head of bench for tribunals would therefore only be an option if it was accompanied by the type of structural change we consider in options five and six below.

Our assessment of this option

5.34 The option focuses solely on the issue of leadership so is proposed as one component of a package of reforms. The two approaches we have examined are each compatible with some of the other options considered in this section.

¹⁰⁹ District Courts Act 1947, s 9.

¹¹⁰ Family Courts Act 1980, s 6.

The first approach, which proposes a Council of tribunal leaders with administrative support, is a weak leadership model. It is ultimately reliant on cooperation between tribunal chairs and the promotion of mutual interest to improve leadership and coherence between tribunals. We are concerned that it may be too weak to provide strong leadership or effective advocacy for tribunals in relation to resourcing and other matters. It is also administratively cumbersome and could be expensive to maintain. Finally there is a risk that it might be dominated by the larger tribunals with full-time Chairs, as they are likely to have the resources to participate more fully.

- 5.35 The Tribunal Members Reference Group¹¹¹ expressed strong support for the establishment of an overall sector leader with a head of bench role similar to that of heads of bench in the court system. The reference group identified strong leadership as an essential feature of tribunal reform. The Commission agrees. This stronger form of leadership is more likely to bring the cohesion and effective advocacy that tribunals need.

OPTION 4: RATIONALISATION OF TRIBUNALS

- 5.36 Another option we considered was the disestablishment of any tribunals that are no longer required. In *Tribunals in New Zealand* the Commission identified a handful of tribunals that had had very few cases.¹¹² In the course of developing and assessing options for reform we considered whether all of these low volume tribunals should be retained. We concluded that some should because, although they have only a few cases, they have a unique function that requires a tribunal.
- 5.37 We initially concluded that four of these tribunals, which have appellate functions, could be disestablished and their respective jurisdiction transferred to the courts. Our reasons for suggesting these tribunals be disestablished and their jurisdictions shifted to the District Court are summarised below. However, as we note below, a number of subsequent submissions have argued that a specialist Copyright Tribunal is still needed despite the low number of cases. On that basis we are now persuaded that the future of that particular tribunal should receive further consideration.

Health Act Boards of Appeal

- 5.38 Health Act Boards of Appeal should be abolished and their jurisdiction transferred to the District Court. Boards of Appeal are very rare, and when established are chaired by a District Court judge. The Ministry of Health has advised the Commission that there have not been any Boards of Appeal established under the Health Act for many years. The Legislation Advisory Committee recommended in 1989 that Boards of Appeal be abolished in favour of the District Court.¹¹³ In any event the Public Health Bill that is currently before Parliament will, if enacted, abolish Boards of Appeal when it repeals most of the Health Act 1956.

111 A Tribunal Member's Reference Group was established in October 2007 to contribute to the development of options for reform.

112 See New Zealand Law Commission *Tribunals in New Zealand* (NZLC IP 6, Wellington, 2008) para 9.24-9.28 and Tables 5 to 7 inclusive.

113 Legislation Advisory Committee *Report No 3: Administrative Tribunals* (Wellington, 1989) 62.

Maritime Appeal Authority

- 5.39 The Maritime Appeal Authority hears appeals from determinations of the Director of Maritime Safety. Again we think consideration should be given to abolishing it as a separate tribunal and shifting this appellate jurisdiction to the District Court. The single member Authority is required to be a lawyer with over seven years experience. As a matter of practice it seems the Authority has always been an existing judicial officer.¹¹⁴ The tribunal has heard very few cases over recent years and is largely redundant.

Copyright Tribunal

- 5.40 We initially formed the view that it was not necessary to retain the Copyright Tribunal as a separate tribunal. Our reasons were that the Copyright Tribunal deals only with disputes over copyright licensing schemes. Other copyright and intellectual property matters are dealt with in the courts. The chairperson of the tribunal has normally been a District Court Judge. Proceedings are conducted quite formally before the tribunal by way of oral hearing utilising rules of civil procedure from the courts. Parties are normally represented and the area of law in dispute tends to be complex. Costs are also awarded on the same basis as in civil proceedings and appeals are to the High Court. Our research indicates that the tribunal has very little work. During the last five years an average of less than one case has been lodged each year. Since 1977 the tribunal seems to have heard only 13 cases. We initially suggested that the jurisdiction of the Copyright Tribunal might be shifted to the District Court. This was recommended by the Legislation Advisory Committee in 1989.¹¹⁵
- 5.41 However we recognise that the Copyright Tribunal does deal with quite specialised subject matter. If the tribunal is abolished, as we initially proposed, then we think that it would be desirable for the District Court to sit with an expert assessor. This would help ensure that specialist expertise continues to be available when the court hears a matter previously within the jurisdiction of the tribunal. Currently the District Courts Act 1947 and the District Courts Rules 1992 do not cater for the possibility of District Court judges sitting with assessors. An amendment to the District Courts Act would be necessary to allow the court to sit with an assessor.
- 5.42 We should note here that a number of submissions on the Government's consultation document *Tribunals in New Zealand: The Government's Preferred Approach to Reform* issued by the Ministry of Justice in July 2008¹¹⁶ have argued strongly in favour of retaining the Copyright Tribunal. These have suggested that past case numbers do not accurately reflect the likely level of future activity and that a specialist tribunal with a specialist Chair, rather than a District Court Judge, is needed to deal with complex specialist cases in a timely fashion. In light of these concerns, we think further consideration should now be given to the question of whether the Copyright Tribunal is retained.

114 We understand that the warrant has been held either by a District Court Judge or by a Coroner in the past.

115 Legislation Advisory Committee *Report No 3: Administrative Tribunals* (Wellington, 1989) para 92.

116 Ministry of Justice *Tribunals in New Zealand: The Government's Preferred Approach to Reform – Public Consultation Document* (Ministry of Justice, Wellington, 2008).

Land Valuation Tribunals

5.43 Land Valuation Tribunals might also be abolished and their function transferred to the District Court. Each tribunal currently consists of a District Court Judge sitting with a panel of two expert valuers. We understand that across the country there are about 20 District Court Judges that hold Land Valuation Tribunal warrants and that there are less than 20 cases a year. If Land Valuation Tribunals are abolished and their role shifted to the District Court then it would be desirable for the District Court to sit with expert valuers. As already noted a change would be needed to the District Courts Act 1947 to allow for this.¹¹⁷

Our assessment of the option

5.44 Irrespective of whatever other changes are made we think that any tribunal that is no longer required should be disestablished. We see little value in retaining tribunals when they have few cases and their jurisdiction can readily be accommodated within the ordinary courts. We believe this is a sound principle. Careful consideration needs to be given to whether all four of the tribunals we have listed meet these criteria.

OPTION 5: CLUSTERS OF TRIBUNALS

5.45 This is one of the two structural reform options we examined. It 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 broader tribunal structures. The Legislation Advisory Committee in its 1989 report on tribunal reform proposed ‘clustering’ tribunals primarily along the lines of compatible subject matter and expertise.¹¹⁸ By the term ‘cluster’ we mean simply a close grouping of tribunals. Some key aspects of the groupings envisaged in this option include:

- Sharing of administrative support and services, so that the tribunals are administered as a whole rather than as separate, stand-alone bodies.
- Some sharing of members between tribunals, or some tribunals, within the grouping.
- A common approach to powers, procedures and appeal rights for the cluster.
- A single point of entry into the cluster for users.
- An overall leader of the grouping to oversee, promote consistency and coherence across the grouping.
- Some degree of integration or merging of the jurisdictions of the grouped tribunals.

5.46 We should also emphasise that there is no abstract definition of the concept of a cluster. The idea of a cluster does not compel any particular level of integration or sharing of services (although it does imply that there will be some sharing). Rather, the cluster model can be designed in a nuanced way, reflecting the level of connectedness that is desired for each different cluster. We stress too that the extent of connection need not be the same for each cluster within the reform. There may, for example, be one cluster where the tribunals are closely connected in terms of

¹¹⁷ Retaining the input of valuers will be important so the court can critically consider the expert valuation evidence which parties present in most cases before the Land Valuation Tribunal.

¹¹⁸ Legislation Advisory Committee *Report No 3: Administrative Tribunals* (Government Printer, Wellington, 1989).

common membership and procedures. This cluster may even merge some of the individual tribunals' jurisdictions. On the other hand, another cluster could be a far looser grouping, with individual tribunals maintaining their own identities, sharing fewer members and having greater procedural variance among themselves.

Identifying 'like' tribunals

- 5.47 The key issue to be resolved in developing this option is determining appropriate groupings of 'like' tribunals. The most obvious approach is to cluster on the basis of the function performed by tribunals within a cluster. Another approach is to consider the subject matter with which tribunals in a cluster are concerned.

Clustering by function

- 5.48 In *Tribunals in New Zealand* we identified three distinct categories of functions that tribunals within the scope of our study exercise. These are reviewing or hearing appeals from administrative decisions; making first instance decisions in relation to disputes between citizens or between citizens and the state; occupational licensing and discipline. A further group, comprising tribunals that do not fit easily into any of these categories, can only be described as miscellaneous. With the exception of the miscellaneous category, each category has some distinctive features shared by tribunals within the category.

- 5.49 Administrative review tribunals have the following features:

- One party will always be an arm of the state. This has a number of flow-on effects. Independence is particularly important. This has implications for tenure and appointments for members of these tribunals.
- Given that these tribunals involve a citizen contesting a decision of the state, there is a risk of inequality of arms and legal representation. This places a more inquisitorial burden on the tribunal, and is likely to generate more inquisitorial processes and procedures.
- Parties without legal representation may require more initial help, for example registry advice and information to assist in preparing their case. Ease of initiating a claim is also important.
- Some of these tribunals, but not all, require considerable legal skill in interpreting complex statutes. Consequently these tribunals are likely to be chaired by Judges or experienced lawyers.
- Mediation-type forms of alternative dispute resolution (ADR) may be inappropriate, as this would involve mediating entitlements to state benefits. However there is scope for ADR in the form of "neutral reappraisal" (often referred to as internal review) to occur before cases go to the tribunal.
- Limited powers only to award costs seem appropriate for these tribunals because of the impact on access and the fact that the state is always a party.

- 5.50 Tribunals that deal with disputes between citizens (or inter partes tribunals) have other characteristics in common:

- They generally involve two citizens in adversarial mode.
- Of all the types of tribunals, their function is closest to that of the ordinary courts.

- In differing degrees, they allow for the exercise of a discretion which can moderate the strict application of the law.
 - Given that cases before these tribunals involve disputes between individuals, with mainly private interests at stake, they are particularly suitable for a mediated result.
- 5.51 Finally, as noted earlier, occupational disciplinary tribunals differ from other tribunals in some important ways. Disciplinary tribunals have the following characteristics in common:
- The relevant profession has an interest in all cases before the tribunal. There is an interest in every profession being seen to be involved in the enforcement of its own professional code and standards.
 - These tribunals often take the form of a panel and contain members of the occupational group concerned, as well as lay members drawn from the public, and a legally qualified chairperson.
 - In addition to ordering reparation these tribunals can impose penalties on errant members and also make punitive costs awards.
 - Disciplinary tribunals, including some housed within the Ministry of Justice,¹¹⁹ are at least partly funded by the profession concerned.
- 5.52 There are a number of advantages in an approach based upon clustering tribunals that exercise similar functions. The distinguishing characteristics of each category mean that the tribunals within it have particular needs. For example, we have listed the risk of inequality of arms as a distinguishing feature of administrative review tribunals. Characteristics such as this generate a need for different approaches, such as a more inquisitorial style of decision-making. Similarly, these distinguishing features will generally mean that tribunals in each category have similar requirements in terms of their powers and procedures. These in turn are likely to mean that administrative requirements for each category of tribunals are similar. Where tribunals have common needs like this, it seems logical to group them together so that all tribunals within a cluster can take a common approach.
- 5.53 This approach allows the most potential for cross-membership between tribunals. Because members are carrying out the same function (albeit in relation to different regulatory schemes), there is a high degree of commonality in the decision-making process. The skill sets required are therefore likely to be similar. Members should be able to develop the ability to hear cases across multiple jurisdictions within the cluster. Similar decision-making processes may also mean it is easier to achieve integrated case management for each cluster. Where tribunals have common needs like this, it seems logical to group them together so that all tribunals within a cluster can take a common approach.

119 The New Zealand Lawyers and Conveyancers Disciplinary Tribunal is an example.

Subject-matter as basis for clustering

- 5.54 Grouping tribunals according to similarities in the subject-matter they deal with is another possible approach. ‘Subject-matter’ in this context refers to the sector in which tribunals are involved, such as the health, education or welfare sectors. For example, one obvious subject-matter grouping would be tribunals that deal with welfare and benefits.
- 5.55 The disadvantage of clustering on the basis of similar subject-matter seems to be that tribunals within a sector may only appear similar when in fact they require quite different decision-making processes and approaches.¹²⁰ For example, grouping all tribunals dealing with health-related matters, such as the Medicines Review Committee, Boards of Appeal under the Health Act 1956, the Mental Health Review Tribunal, and the Health Practitioners Disciplinary Tribunal, might appear attractive because they are all in the health sector.¹²¹ But this is actually a disparate group of tribunals exercising different functions that do not sit easily together. In particular, sector wide groupings create difficulties around membership because the different types of decision-making processes involved require different skills and expertise from members. Tribunals with different functions also require different processes and administrative support.

Criteria selected for clustering tribunals

- 5.56 Both of the above approaches have benefits and disadvantages, suggesting that an optimal result would combine tribunal function and subject-matter. We think the most sensible approach would be a composite model with clusters formed primarily based on function but with tribunals organised within the cluster according to similar subject-matter and administrative needs. Overseas reforms appear to have also prioritised subject matter and function in determining tribunal groupings. For example, in the United Kingdom, the government has determined:¹²²

that the right approach is to group similar subject-matter together, which to some extent means that similar skills will be needed. Each Chamber should be broad enough to bring together Tribunals which deal with similar or related subject matter, but not too wide as to prevent any meaningful form of judicial leadership and jurisdictional guidance being provided by the Chamber President.

It should be noted that references to subject-matter here, seem to include what we have termed tribunal function. For example, a General Regulatory Chamber is proposed in the United Kingdom model because while that Chamber would cover a wide range of regulatory subject-matter, the fundamental legal skills required for dealing with regulatory matters are the same.

120 See also Michael Adler and Anthony Bradley “The Organisation of the Proposed Tribunal Service” in Martin Partington (ed) *The Leggatt Review of Tribunals: Academic Seminar Papers* (Working Paper Series No 3, Bristol Centre for the Study of Administrative Justice, Bristol, 2001) 172.

121 The Human Rights Review Tribunal might also be included because of its jurisdiction under health and disability legislation.

122 Ministry of Justice *Transforming Tribunals: Implementing Part 1 of the Tribunals, Courts and Enforcement Act 2007: Consultation Paper* (London, 2007) 33.

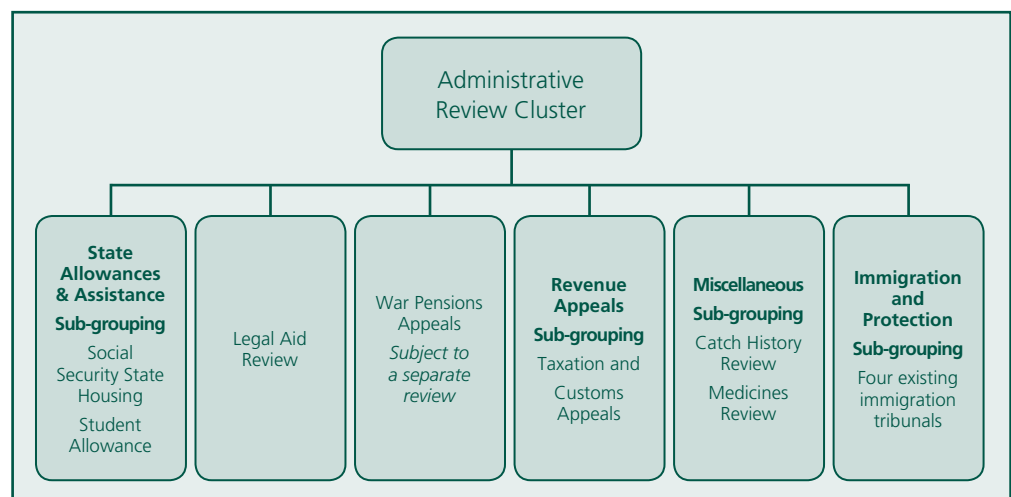
Proposed clusters or groupings

5.57 Reflecting the categories of function two clusters of tribunals emerge fairly clearly under this option. These are an administrative review group, which deals mainly with appeals against decisions by government agencies affecting individual rights and entitlements; and an inter partes disputes group, which deals with disputes between citizens. A third cluster may also arguably be possible under this option for the occupational regulation tribunals currently administered by the Ministry of Justice. However these are a much more diverse group with differing needs and membership, so any clustering of these tribunals might seem relatively artificial.

Administrative review cluster

5.58 These tribunals all deal with cases between a citizen and the state. Most perform a very similar function: reviewing government decisions taken under particular statutes. For example, a number review original decisions on entitlements to a benefit or payment of some sort. Others review the decisions and assessments of officials that impose obligations on citizens. For example, the Taxation Review Authority hears and determines objections and challenges to assessments of tax and other decisions of the commissioner. Other administrative review tribunals such as the Medicines Review Committee hear appeals from decisions to engage in activities that are licensed through a government department. While some tribunals in this group, such as the proposed Immigration and Protection Tribunal, do have some original jurisdiction, they still involve a citizen challenging the state. There are therefore some obvious synergies and a high degree of commonality between these tribunals. As such, they seem to form a natural grouping. The cluster is illustrated in the following diagram.

5.59 Given the similarities between the tribunals in this grouping, we envisage that some merging of them would be possible. In particular, we suggest that there could be a State Allowances and Benefits sub-grouping, bringing together the Social Security Appeal Authority, State Housing Appeal Authority and Student Allowance Appeal Authority. These tribunals deal with very similar matters, hearing appeals on entitlements to state assistance. In fact, the legislation under which the State Housing Appeal Authority is constituted provides that the Social Security Appeal Authority could have been used as the appeal body. We think that these tribunals could easily share common members and procedures.



- 5.60 We also think that the Taxation Review Authority and the Customs Appeal Authority could form a Revenue Appeals sub-grouping. Most, although not all, of the Customs Appeal Authority's work involves revenue matters. There is a high degree of synergy between these tribunals. Similar powers and procedures are appropriate to both. Proceedings in these tribunals are likely to be more formal than in other tribunals in the administrative review division, as corporate bodies are more likely to be parties and legal representation is more common. Membership requirements for both are the same, and there is already common membership.
- 5.61 The Immigration and Protection Tribunal, which is proposed by the Immigration Bill 2007, will merge the four existing immigration tribunals into a single tribunal. As a new tribunal, the Immigration and Protection Tribunal will need time to settle down and develop its profile under the new legislation. The reform process leading to its creation has carefully considered the specialist skills needed by its members. It will be chaired by a District Court Judge. As already noted, not all of its functions are in the nature of administrative review, although all involve an individual and the state. For the purposes of developing this option we have included it within this cluster. There are no special synergies with other tribunals in the cluster and indeed the proposed tribunal is itself a sub-grouping of the four existing tribunals.
- 5.62 We have also not proposed any sub-grouping of the War Pensions Appeal Board with other tribunals. The Law Commission is currently undertaking a review of the War Pensions Act 1954. The Commission has completed the first stage of that review and has recently published an issues paper setting out options for reform and inviting submissions.¹²³ We do not wish to pre-empt the outcome of that separate review, so Appeal Boards have been included relatively unchanged within the cluster. The War Pensions Act review does not envisage that the composition of boards, with members with a military background as well as a mix of medical and legal expertise, should change significantly as a result of the review.¹²⁴ Whether the legal membership of these boards could be shared with other tribunals in the cluster remains to be seen.
- 5.63 The Legal Aid Review Panel also retains its distinct identity within the proposed cluster because it differs in some important respects from the other tribunals in the cluster. In particular it has a large panel of approximately 25 part-time members. Legal aid is also available for proceedings before other administrative review tribunals, so we think it may be helpful to retain some separation between those other tribunals and the assessment of applications for legal aid. We would therefore see it as another distinct tribunal within the cluster.
- 5.64 Finally, the cluster includes a miscellaneous sub-group, which could provide a home for those tribunals that only occasionally hear cases. As in the UK model, we think that a miscellaneous regulatory sub-group would allow the small remaining jurisdictions to be located together and share a common legal membership. Other members of each tribunal included in the sub-group might need to be appointed to a specific tribunal in the sub-group. The Medicines

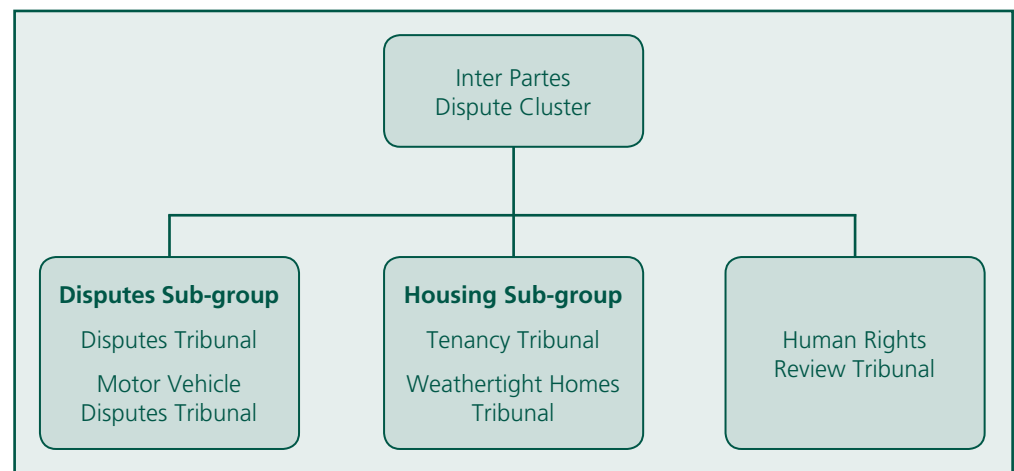
¹²³ New Zealand Law Commission *Towards a New Veterans' Entitlements Scheme: A Discussion paper on a Review of the War Pensions Act 1954* (NZLC IP7, Wellington, 2008).

¹²⁴ New Zealand Law Commission *Towards a New Veterans' Entitlements Scheme: A Discussion paper on a Review of the War Pensions Act 1954* (NZLC IP7, Wellington, 2008) para 20.44.

Review Committee has for example membership with specialist knowledge in medicine, pharmacy, natural therapy, pharmaceutical manufacturing industry, and chemistry. At this stage only two tribunals, the Medicines Review Committee and the Catch History Review Committee, have been included in the miscellaneous sub-group.¹²⁵ Both have few cases.

Inter partes disputes cluster

This cluster is smaller, containing only five tribunals and, it might be thought, is more diverse than the administrative review group. Nevertheless, the functions of each member tribunal in this cluster are similar: to adjudicate upon disputes between citizens in an efficient, speedy manner with flexible procedures.



- 5.65 Although it is a small cluster in the sense that it has few tribunals, it includes the Disputes and Tenancy Tribunals, which both have far larger caseloads than any other tribunal.¹²⁶ In our view the Disputes and Tenancy Tribunals ought to form part of this division. Between them, they hear around 90 per cent of all tribunal cases, so it is important that they be included. Otherwise, the majority of tribunal users would not benefit from the reform. We also do not see the volume of cases as a barrier to their inclusion. However care needs to be exercised when grouping these large tribunals with other tribunals with far smaller caseloads. It is important that the high volumes of Disputes and Tenancy cases do not overwhelm the cluster. It is perhaps inevitable that the larger tribunals in the cluster will have a higher profile, however good information and publicity can ensure that the smaller tribunals also maintain their profile. Good management and administrative systems will be needed to ensure that the large volume of cases is managed well.
- 5.66 One particular issue arising in relation to the Disputes Tribunal is that it is currently constituted as a Division of the District Court, and as such has a close relationship to the court system, and the District Court in particular. The Principal Disputes Referee reports to the Chief District Court Judge. Rostering and training of Disputes Referees is formally the responsibility of the

¹²⁵ It should be noted that the Medicines Review Committee might also be classified as an occupational and industrial regulation tribunal because of its role in industrial and professional regulation.

¹²⁶ According to figures provided by the Ministry of Justice approximately 22,000 and 23,000 cases are filed in these tribunals per year respectively.

Chief District Court Judge,¹²⁷ although in practice the Principal Disputes Referee does most of this work. The Disputes Tribunal currently shares administrative staff and premises with the District Courts. Despite these links, the Disputes Tribunal, like the Tenancy Tribunal, which is also serviced through the District Court, is a classic tribunal. Both are informal tribunals, dealing with low-level claims with a strong accessibility focus. It would be confusing to the public if they were not part of a unified tribunal service. It would also result in fragmentation of exactly the kind we are trying to avoid. The experience of these tribunals would benefit other smaller tribunals. We think both should be included in the inter partes disputes cluster under this option. As a result the Disputes Tribunal would cease to be a division of the court under this option, although administrative arrangements could continue if support from the courts administration was desirable.

- 5.67 There is also scope for sub-groupings within this cluster. In particular, the Disputes Tribunal and Motor Vehicle Disputes Tribunal share a number of similar features, and may be able to be more closely integrated. For example hearings in both are conducted with as little formality as proper consideration of the case allows.¹²⁸ Both Tribunals act inquisitorially and parties are not entitled to be represented.¹²⁹ There is already an overlap in the jurisdiction of both tribunals. Because of the overlap between the work of the Motor Vehicle Disputes Tribunal and that of the Disputes Tribunal and the courts, in 1989 the Legislation Advisory Committee recommended that the jurisdiction of the Motor Vehicle Disputes Tribunal be given either to the Disputes Tribunal or to the District Court.¹³⁰ We have therefore formed the Disputes and Motor Vehicle Disputes Tribunals into a sub-group within the cluster under this option, although in some cases involving engineering expertise specialist assessors may need to sit with the member in the latter.
- 5.68 The Tenancy Tribunal and Weathertight Homes Tribunal might also possibly form a housing sub-grouping within the cluster. However while these tribunals have some similarities there are also have important differences between them. The Weathertight Homes Tribunal deals with high-value, often complex cases, while the Tenancy Tribunal deals with large numbers of low-value claims. The Weathertight Homes Tribunal is consequently somewhat more formal than the Tenancy Tribunal, although it may take an inquisitorial role and has a statutory obligation to manage proceedings in such a way as to best ensure that they are speedy, cost-effective and flexible, to encourage parties to work together, and to avoid unnecessary or irrelevant evidence and cross-examination.¹³¹ There are also differences in the skills members of each tribunal need to possess. In the end we have grouped these two tribunals in a housing sub-group in the illustrative diagram, but we accept that a closer examination is needed before confirming that grouping.

127 Disputes Tribunals Act 1988, s 6.

128 Motor Vehicle Sales Act 2003, sch 1, cl 8.

129 Although an adjudicator in the Motor Vehicle Disputes Tribunal has some discretion to allow legal or other representation: Motor Vehicle Sales Act 2003, sch 1, cl 9.

130 Legislation Advisory Committee *Report No 3: Administrative Tribunals* (Wellington, 1989) para 86.

131 Weathertight Homes Resolution Services Act 2006, s 57.

- 5.69 The Human Rights Review Tribunal is perhaps the most individual of the tribunals in the inter partes cluster. It can award damages to the level of the District Court¹³² and even has statutory authority to declare legislation inconsistent with the New Zealand Bill of Rights Act 1990. It deals with matters of considerable public sensitivity, such as, for example, the human rights of prisoners. In some ways it is more like a court than a tribunal, and there is an argument for saying that its Chair should have more secure tenure than is currently the case. We think that in principle the Human Rights Review Tribunal ought to be included in the inter partes cluster. It deals with many relatively low level disputes between citizens, and it has many features which align it with tribunals, so we have included it in the cluster. In overseas reforms, human rights and anti-discrimination claims have similarly been included in tribunal structures.
- 5.70 A broader issue that might be considered is whether the Human Rights Review Tribunal's jurisdiction might more appropriately be exercised by the courts, or whether it ought to become a specialist Human Rights Court, given the nature of the issues before it and particularly the power to declare legislation inconsistent with s 19 of the New Zealand Bill of Rights Act 1990.¹³³ We do not propose to consider this broader issue as part of this project.

Occupational tribunals not included

- 5.71 Occupational disciplinary tribunals pose a challenge for the clustered approach proposed by this option. For the reasons already outlined in the discussion under option two, disciplinary tribunals that are not administered by the state remain outside any new tribunal structures proposed under this option. These tribunals would still be covered by generic provisions as envisaged in option one. This leaves the six occupational regulation and disciplinary tribunals administered by the Ministry of Justice to consider as well as the Liquor Licensing Authority.
- 5.72 In theory it might be possible to group the occupational bodies and the Liquor Licensing Authority into a third cluster. It has been argued that even reasonably disparate tribunals might be administered as a group for administrative support. The type of administrative support contemplated could include the sharing of facilities, common training and professional development, integrated accounting and management reporting, common information technology, registration and record keeping, and sharing of library and other corporate support services.¹³⁴ Such groupings are possible because there is a degree of synergy in the administrative and resourcing requirements of all tribunals. The Ministry of Justice would administer all clusters under this option, so it would seem appropriate to try and expand the cluster arrangements to cover all the tribunals the Ministry administers if this is possible.
- 5.73 However the seven tribunals in question are more diverse than the tribunals in the two clusters discussed above. The occupational group represents a rather ad hoc collection including lawyers, pawnbrokers, private investigators and real

¹³² The limit set by s 29 of the District Courts Act 1947 is currently \$200,000.

¹³³ Note that the Law Commission is currently conducting a review of the Privacy Act 1993. Part of this review will examine the functions of the Human Rights Review Tribunal in its privacy jurisdiction.

¹³⁴ Martin Jenkins *Decision-making criteria and other considerations for tribunal reform* (December 2007).

estate agents. While there are administrative reasons for grouping these remaining tribunals administered by the Ministry of Justice, there is unlikely to be much scope for common membership given the occupational differences.¹³⁵ We also think it might be difficult for any one person to head and provide leadership for such a group of distinct tribunals. We do not see sufficient commonality to form a cluster along similar lines to the other two.¹³⁶ We think however that a looser grouping of these tribunals might be possible and we have developed that approach as part of the unified tribunal structure considered under the next option.

Leadership and membership

- 5.74 Both of the clusters would have an overall head of bench or principal tribunal member. The role, which is essentially the stronger leadership model examined under Option 3, would provide overarching leadership and cohesion for the cluster. Each sub-group within a cluster would also have a member responsible for that sub-group. It may be that one member might be responsible for more than one sub-group. This role would largely equate to the role currently performed by the chairperson or principal member of a tribunal except that overall responsibility for the cluster would be separated out. It is important to ensure that there is an appropriate distinction between the role of Head of the cluster and that of the sub-group chairs. Tribunals that do not form part of a sub-group would also have a Chair with the same role as the sub-group Chairs.
- 5.75 Members could be appointed to a cluster rather than an individual tribunal or a sub-grouping within a cluster if their expertise made that more appropriate. If a particular jurisdiction within the group required specific specialist expertise members could continue to be appointed to that jurisdiction alone. The balance between full-time and part-time members might shift, with more persons seeing tribunal membership as a career option. Members appointed to sit in a number of jurisdictions would be able to travel and hear a variety of cases in outlying areas, thus creating greater access to the tribunal. There would be a greater likelihood of consistency of approach and greater opportunities for collegial sharing of best practice. The public should benefit through greater consistency and quality of performance, the government from the efficiency of not having to deal with multiple heads of a variety of tribunals.

Our assessment of the option

- 5.76 The tribunals in the administrative review and inter partes disputes clusters would number 15. The Liquor Licensing Authority and six occupational regulation and disciplinary bodies administered by the Ministry of Justice would not be clustered under this option, although they could share administrative support in the manner proposed under Option 2. Despite the exclusion of these tribunals, grouping the other tribunals in clusters has a lot of advantages.

¹³⁵ However a common pool of lay members for occupational disciplinary cases might be considered.

¹³⁶ The possibility should be left open of other occupational tribunals coming under state administration in the future. It may well be that at some future time a separate occupational discipline cluster would also be viable under this option.

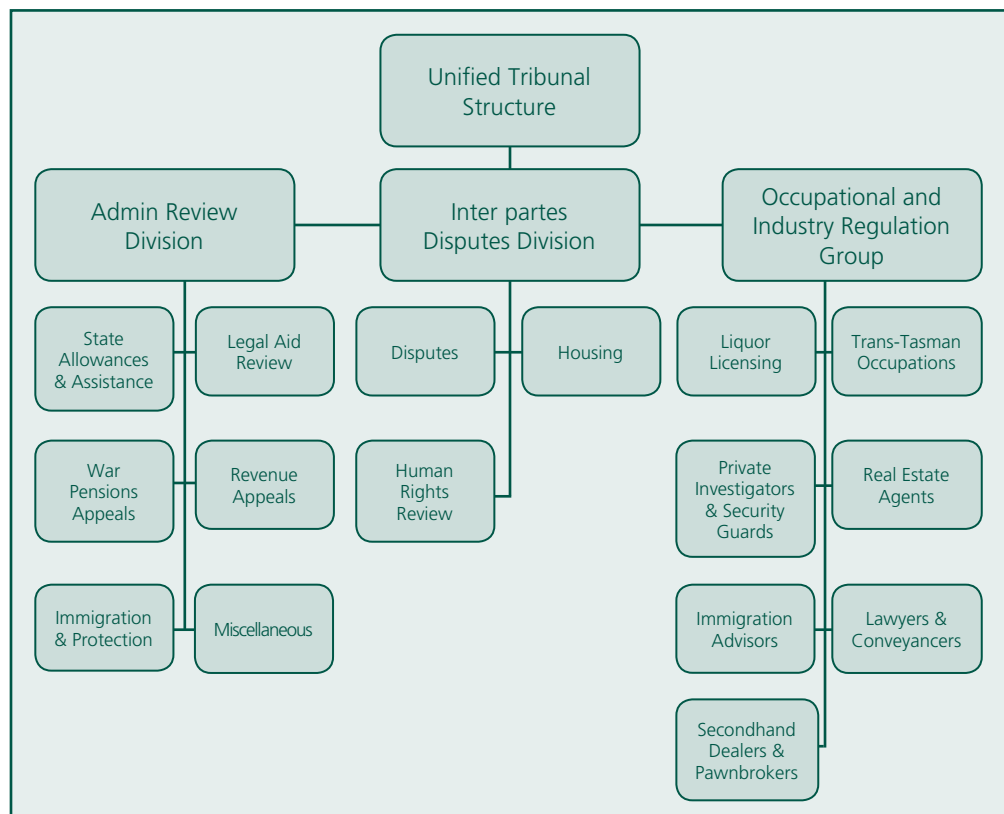
- 5.77 The option provides a higher degree of administrative control and unified management of resources, at least within each cluster, than Option 2. A cluster-wide case management system could be developed and ensure best use of staff and members. With only two structures instead of many separate tribunals economies of scale in resourcing might also be expected. However two structures still means some duplication of resource as well as the duplication associated with retaining the separate occupational tribunals within the Ministry of Justice. There is also the difficulty that both clusters would be administered by the Ministry of Justice. Why duplicate administrative systems within one department in this way?
- 5.78 While this option includes a strong model of professional leadership for each cluster it does not provide tribunal sector wide leadership. The model produces two heads and not one. This is a weakness, and the model might not produce effective advocacy for tribunals in relation to resourcing and other matters. The model allows for an appropriate mix of full-time and part-time members to be appointed within a cluster so that workloads can be balanced and members well utilised. A versatile approach to membership is possible under this option. Training and skill development for members as well as research support can be organised across each cluster. A degree of cooperation and coordination would however be needed to reduce the duplication of training and development between the clusters and to cater for the needs of the occupational tribunals that have not been clustered. There are clear career path options for tribunal members under the model also. While the option has these advantages in terms of leadership and membership, there is still a degree of duplication here that would be avoided if the clusters were combined as they are in the next option.
- 5.79 A number of submissions expressed support for this option because it brought similar jurisdictions together and significantly reduced the number of tribunal structures. Some considered this the best structural option. They thought it achieved most of the goals of structural reform without the risk of creating a rigid structure that failed to maintain needed diversity. The main attraction of this option for many of those consulted is the nuanced way in which groupings and sub-groupings can be designed so as to reflect the extent of connectedness between individual tribunals. We agree that this flexibility is essential, but believe it can also be achieved, maintained and indeed enhanced within the unified model considered next.

OPTION 6:
A SINGLE
UNIFIED
STRUCTURE

- 5.80 Like clustering, unification involves grouping like tribunals and bringing them together into a structure. In fact, the boundary between clustering and unifying tribunals is not a very clear one. Unification does not differ significantly from the cluster model. The key difference is that in the unified option there is only one overarching structure, whereas in the cluster model there would be two or more different structures. The two clusters discussed in the previous option and the other tribunals administered by the Ministry of Justice would be grouped together under the unified model. Another difference is that the unified structure presents itself to the public as one integrated body. The single unified structure would also have only one overall head of tribunals with oversight and leadership of the entire tribunal structure.

Establishing divisions and lists within the structure

- 5.81 We consider that, in general, the same principles and criteria should apply to determining groupings within a unified structure as we have set out under the clustering option above. For the reasons we have set out in our discussion of clustering, we believe that function should be a primary consideration in determining groupings or divisions within the unified structure, with subject-matter as an important secondary consideration, and other considerations such as administrative requirements of tribunals in the grouping also being taken into account.
- 5.82 Tribunals within the single unified structure would be grouped into sub-groups within the structure. This is a feature of all overseas models and allows for differences between tribunals. The sub-groups are often called divisions. Tribunals within the structure would be allocated to a division. Each division might have a number of sub-groups which we have, following overseas practice, called ‘lists’. The divisions and lists of the unified structure are similar to the sub-groups within clusters except they now form part of one overall structure. We think that the two divisions, and also the looser occupational group, can each be designed so as best to reflect the appropriate level of connectedness between the tribunals included in each. We have set out under the last option the nuanced way in which the administrative review and inter partes tribunals might be arranged. We think that same approach can apply in this model. In both divisions some existing tribunals might therefore be closely integrated in the unified model while others are not. Flexibility can be built into the model, in the same way as it can in the clusters model, to retain important differences between jurisdictions in each of these two divisions.



- 5.83 This type of single structure with divisions and lists could be expected to generate a broad range of options for the deployment of members across the structure. Members would have the greatest opportunities to work in different tribunals across the system. Members could be appointed with warrants that would allow them to hear cases either at the list or division level, depending on their skills and experience. Some members might even be appointed to work across the entire structure.

Occupational regulation tribunals

- 5.84 The majority of occupational and industry regulatory bodies will not form part of the new structure, given that they are currently administered by industry and have close links with the occupations they regulate. However, the six existing or proposed occupational tribunals that are already administered by the Ministry of Justice and the Liquor Licensing Authority can be included in the structure. It makes sense to include them rather than have them sitting outside the structure but still within the ambit of the Ministry of Justice.
- 5.85 We think it would be possible to group the six occupational regulation tribunals and the Liquor Licensing Authority into a looser group, rather than a division, within the model primarily for the administrative and organisational advantages this might produce. If each tribunal retained its separate identity and formed a separate 'list' within that group then the differences between them could be accommodated. We envisage that this grouping will be a fairly 'loose' one, designed differently from the rest of the structure. For this reason it is named a group rather than a division in the illustrative diagram. We think it would be headed by a chair rather than a divisional head. Given that the seven bodies within the group regulate disparate occupations and are quite different from one another, there will probably be less scope for sharing of members between lists in this group.¹³⁷ However there is room to develop shared administration.
- 5.86 Greater opportunities for collegiality for members can be provided by including these tribunals in the unified structure. There would be scope for the grouped tribunals to discuss common concerns and share best practice. Having an overall Chair will also provide leadership and greater cohesion for the group. The Chair could for example represent the views of the tribunals in the group where this is required. They could work to develop and support collegiality and the sharing of information on good practice. A common approach to training could also be taken across the group. There may also be scope for the Chair to develop relationships with occupational bodies not included in the unified structure.

Leadership

- 5.87 The unified structure would have a clear and strong leadership structure. There would be one head of tribunals responsible for the overall leadership, direction and quality of the tribunal structure as a whole. The head of the unified tribunal structure would be a head of bench type role. This is the strong leadership model outlined under Option 3. Each division and the looser group of tribunals could also have a head. These positions would work closely with the

¹³⁷ However as noted earlier there may be scope for having a shared panel of lay members for occupational disciplinary cases.

head of the tribunal structure. They would work together to ensure good process and procedure across all tribunals. In consultation with the heads of the divisions the head of the tribunal structure could recommend changes to rules and other enhancements to the system.

- 5.88 The head would be the public face of the tribunal structure, and would be its representative in dealing with the government and the judiciary. He or she would be responsible for high level performance development and management. The head would work closely with the Chief Executive of the administering department. In 2004 the Commission recommended that the single unified tribunal framework it proposed be headed by a President who is a judge. The Commission proposed this because it considered that judicial leadership was indispensable to ensuring the proposed tribunal framework is independent and neutral and that its processes are fair, and that its members exercise their powers of decision-making competently and confidently.¹³⁸
- 5.89 We still consider judicial leadership to be essential for the single unified tribunal structure proposed under this option. In our view the head of the tribunal structure under this option should be appointed as a judge at District Court level. We think this is essential partly to ensure that the head of tribunals is qualified to hear any case that might come before any tribunal within the structure and partly to ensure that they enjoy the standing and public confidence that is necessary for the role. While we acknowledge that in many overseas jurisdictions unified tribunal structures are headed by Presidents who are judges from the superior courts in those countries, we don't think this is necessary or appropriate for New Zealand. We think the Environment Court model, which is headed by a Principal Judge appointed at District Court level, is an appropriate model for the New Zealand context.

Our assessment of the option

- 5.90 The single unified structure brings all of the 22 state-administered tribunals identified under option two together in one structure. It provides a higher degree of administrative control and unified management of resources than Option 5 (clusters). It is most likely to provide a basis for the best use of staff, tribunal members and other resources. With only one structure maximum economies of scale might be achieved.
- 5.91 This option includes a strong judicial model of leadership. A versatile approach to membership is also possible under this option. Like the clusters option, the model allows for a mix of full-time and part-time members so that workloads can be balanced and members well utilised. Training and skill development for members as well as research support can be organised across the single structure and there are clear career path options for tribunal members and for tribunal staff. We think that this unified option will provide a better structural reform than the clusters option, although the principles which were developed under the clusters option for grouping tribunals need to be retained.

¹³⁸ New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004) 295.

5.92 The majority of submissions we received on the options expressed support for this option.¹³⁹ There was also stronger support for this option from the Tribunal Member's Reference Group than for any other, many seeing it as the option that was most likely to provide solutions to the current problems caused by fragmentation. However concern was expressed by some tribunal members and by others who were consulted that the unified model might result in a rigid 'super-tribunal' that was not responsive to users or allowed for sufficient diversity between tribunals. We agree that there are these potential risks with a single unified model, but believe that by designing the divisions and looser occupational group in the way developed under the clusters option necessary differences between tribunals can be retained.

CONCLUSION 5.93 In this chapter we have examined and critiqued the different options for reforming New Zealand's tribunals. All of the options examined have contributed to the reform proposals that are outlined in Part 3 of this paper.

139 As the options were only set out in broad terms, some responses to the issues paper did not expressly comment on the options.



Part 3
PROPOSALS
FOR REFORM

Chapter 6

Unified tribunal service

- INTRODUCTION 6.1 This chapter describes the model we arrived at, in conjunction with the Ministry of Justice, after considering all the ‘options’ explained in Chapter 5. It is the model presented in the consultation document *Tribunals in New Zealand: The Government’s Preferred Approach to Reform* issued by the Ministry of Justice in July 2008.¹⁴⁰ Here we explain what it will look like, how it will work and what we expect it to achieve. As noted in Chapter 5, the proposed reform includes elements of each of the options considered. The model we propose combines the unified tribunal structure outlined under Option 6 (arranged into divisions along the lines of the clusters outlined in Option 5) with the single administration in Option 2, together with the Head of Tribunals concept in Option 3. The structure will be underpinned by a legislative framework that provides the necessary standardisation outlined in Option 1. The legislative framework is also a separate element of the reform, which is outlined in more detail in Chapter 7. Finally, four tribunals are proposed for rationalisation as set out in Option 4.
- 6.2 We emphasise that decisions have not yet been taken. The model may yet be refined further in light of the consultation process before it is finally proposed for adoption by Cabinet.

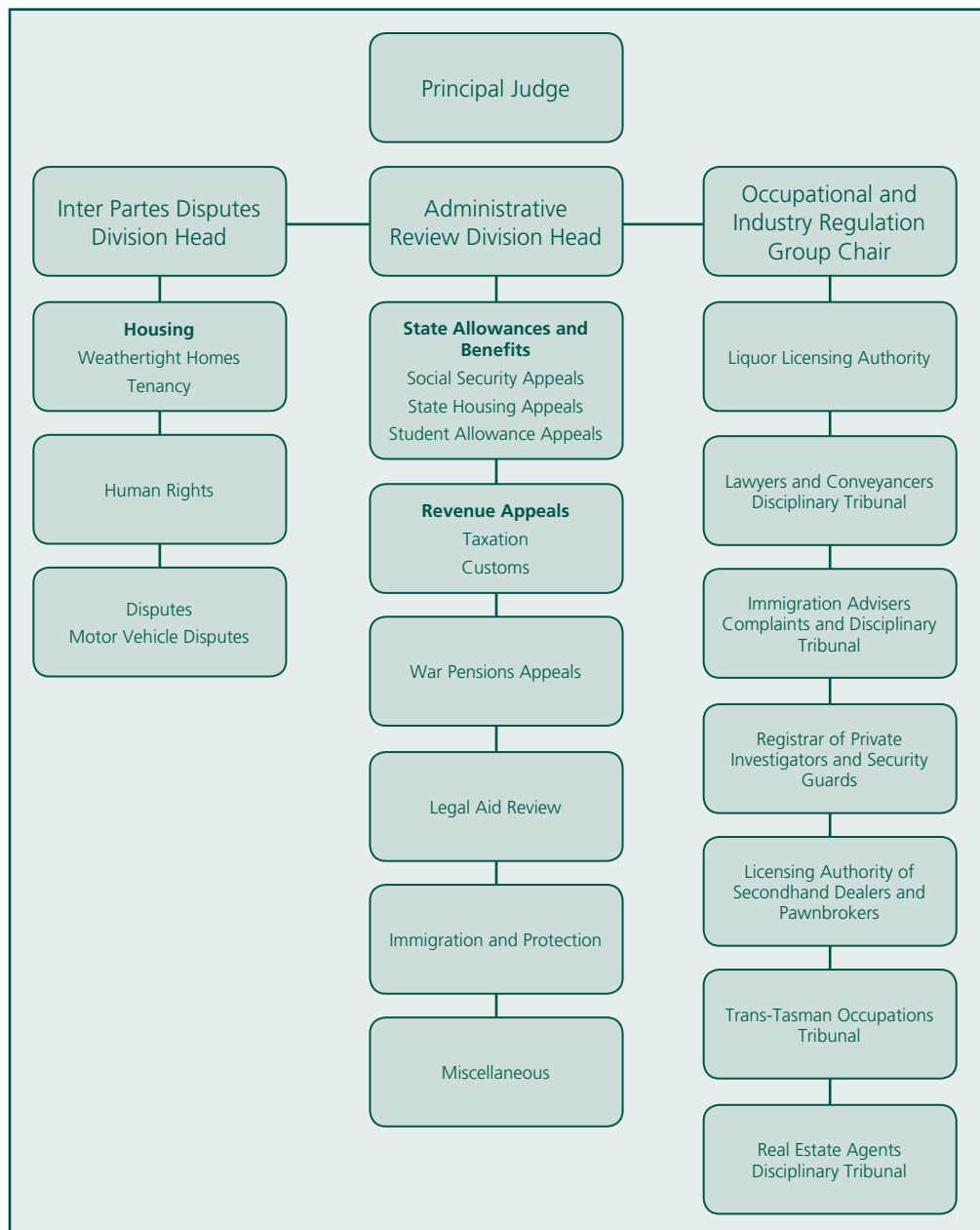
- FEATURES OF THE STRUCTURE 6.3 As outlined in the last chapter, the unified tribunal structure brings the 22 included tribunals into one structure under the leadership of a single head, the Principal Tribunals Judge. We anticipate that the structure would form a new unit in the court system, similar to the Environment Court. As demonstrated in the diagram below, and as discussed in the last chapter, we propose that the unified structure be grouped into two divisions, administrative review and inter partes disputes. The ‘looser’ occupational and industry regulatory grouping forms part of the structure but would be different from the two divisions. We have proposed several further sub-groupings within the divisions, such as the merger of the social security related tribunals into the State Allowances and Benefits group. We also note here that there is also scope for further mergers

¹⁴⁰ Ministry of Justice *Tribunals in New Zealand: The Government’s Preferred Approach to Reform – Public Consultation Document* (Ministry of Justice, Wellington, 2008).



within these divisions in the future. As tribunals align their procedures and more sharing of members is developed, it may be that it becomes apparent that two or more tribunals could be merged or integrated.

- 6.4 The diagram below shows how the tribunals would be structured to form the unified tribunal structure. The following discussion outlines the features that determine how tribunals would operate within the new structure.



Legislative framework

- 6.5 Chapter 7 outlines the proposed legislative framework that would apply to all tribunals within the scope of the reform programme. While it would not only apply to tribunals within the unified structure, the new legislative framework will play a crucial role in shaping the way in which the unified structure operates. It provides a consistent approach to appointment processes, members' terms and conditions, the composition of tribunals, and tribunal processes including their powers and procedures. While the legislative framework is a distinct element of the reform, it is an important feature of the structure because it will provide the necessary standardisation discussed in Chapter 5.

Common administration

- 6.6 There would be a common administration for the tribunals in the unified structure along the lines discussed in Chapter 5 under Option 2: A single administration for tribunals. We envisage a unit within the Ministry of Justice, which would provide administrative support for the tribunal structure. This unit would also be responsible for operational policy concerning the tribunals in the structure. All tribunals included in the tribunal structure would be supported by this unit. This would mean that five tribunals not currently administered by the Ministry of Justice transfer to the Ministry of Justice. These are the Legal Aid Review Panel, State Housing Appeal Authority, War Pensions Appeal Boards, Medicines Review Committee and Catch History Review Committee.
- 6.7 We anticipate that this unit would provide the following types of support for the tribunal structure:
- There would be dedicated administrative support staff to assist members. They would administer information and research resources, recording facilities, accommodation and hearing facilities, and information technology. There could be online access to decisions;
 - Staff would develop training and induction programmes and manage appointment processes in a consistent and timely manner;
 - There would be a common 'shop front': a website and 0800 number which would enable the general public to contact the tribunal service. Enquirers could be directed to the correct tribunals;
 - Ideally there would be a common information technology system, including a common case management system;
 - Tools and resources could be developed to aid community and advisory groups.
- 6.8 The unit would also need to manage the interface between the included tribunals and other state agencies with an interest in the matters that come before the tribunals. For example tenancy cases go through a mediation process, which is administered by the Department of Building and Housing, before reaching the Tenancy Tribunal.

Leadership

6.9 Overall leadership of the tribunals system is an essential feature of the proposed reforms. As we have previously noted, the current system is seen as lacking leadership and support for tribunal members, which in turn contributes to the lack of overall coherence. In order to address this, we propose a number of new leadership positions, culminating in the Principal Judge of Tribunals role.

Judicial leadership: Principal Judge of Tribunals

6.10 We envisage the creation of a position of Principal Judge of Tribunals, as the overall leader of the tribunal structure. The Principal Judge would be responsible for the overall leadership, direction and quality of the tribunal system. He or she would provide a public ‘face’ for the tribunal structure, and would liaise with government and the judiciary.

6.11 The Principal Judge would be responsible for:

- Leadership of the tribunals within the Tribunal Service (similar to the Heads of Bench roles in the judiciary);
- Ensuring that the tribunals within the Service perform effectively;
- Training of tribunal members;
- Rostering;
- Recommending any necessary changes to the legislative framework;
- Recommending any necessary changes in the tribunal structure and system;
- Liaising with the tribunals that are not within the Tribunal Service, but do fall within the scope of the Tribunal Reform Programme;
- From time to time sitting on cases, especially controversial or significant cases; and
- Overseeing an accessible and effective user complaints system.

6.12 The Principal Judge would be at the level of a District Court Judge. We believe that having a judge in this position is necessary to ensure that the Principal Judge has sufficient standing and respect in the community to be able to effectively represent tribunals and advocate for their needs, especially to government. Having a leader with the status of a judge ought also to enhance public confidence in the independence of the tribunal structure.

6.13 The Principal Judge’s status would be similar to that of the Principal Environment Court Judge; that is, on the same hierarchical level as the District Court and subject to the oversight of the Chief Justice as head of the judiciary. Like the Principal Environment Court Judge, the Principal Judge of Tribunals would have permanent tenure as a District Court Judge, but would be appointed to the position of Principal Judge of Tribunals for a fixed term. We suggest that a term of around five years would be appropriate.

6.14 We envisage that the Principal Judge would report to the relevant Minister, raising issues they wish to be considered, or reporting on matters about which the Minister has requested information.

Heads of division

- 6.15 Each division of the tribunal structure should also have a Head, to provide more targeted leadership for that division. Heads of division would be accountable to the Principal Judge for the performance of their division. Their role would include:
- Training specific to the work of the division;
 - Rostering;
 - Overseeing the processes and practice of tribunals within the division, with a view to achieving consistency where appropriate; and
 - Contributing to the development of procedural rules.

Occupational and Industry Regulation Group Chair

- 6.16 The Chair of this Group would be more like a coordinator, rather than a 'Head of Bench' type role. This is due to the different nature of the Group. The precise nature of the Chair's role requires further consideration, but we anticipate that it could involve:
- Representing the views of the Group where required;
 - Building collegiality among the tribunals within the Group;
 - Facilitating information sharing between tribunals within the Group, and also with the rest of the tribunal structure where appropriate;
 - Identifying and promoting good practice and opportunities for innovation; and
 - Identifying training needs common to the Group, and where appropriate developing training programmes to meet these needs.

There may be scope for the Chair to develop some common performance standards for the Group particularly around the generic adjudicative skills that these tribunal members share with all others.

Chairs of individual tribunals

- 6.17 We anticipate that tribunals within the unified structure that have multiple members could continue to have their own Chair, as now. However some individual chair positions would no longer exist, because the relevant tribunal would be merged with others. For example, if the Social Security Appeal Authority, State Housing Appeal Authority and Student Allowance Appeal Authority were merged as we envisage, there would only be one Chair. One person might be appointed as Chair of more than one tribunal. A Head of Division or the Chair of the Occupational and Industry Regulation Group might also be the Chair of one or more individual tribunals.
- 6.18 The Chairs' role may be more limited than currently, however, because the Principal Judge and Divisional Heads would take over some of the functions now performed by Chairs. In particular, responsibilities such as liaising with government would be given to the Principal Judge. Responsibility for training, currently a key function of many Chairs, would be spread between the Principal Judge, Divisional Heads and Chairs, with Chairs only developing training specific to the needs of their particular tribunal.

Leadership of tribunals outside the tribunal structure

6.19 Leadership arrangements for tribunals that do not form part of the tribunal structure would not change. However, the Principal Judge would develop relationships with the Chairs of these tribunals. Therefore, the Chairs may benefit from increased opportunities for collegial association with Chairs of other tribunals. They may also be able to share in training programmes developed by the Principal Judge for tribunals in the tribunal structure. These advantages would in turn benefit the members of these tribunals. Leadership of tribunals outside the structure may thus be enhanced.

ABOLITION OF SOME TRIBUNALS

6.20 As part of the reforms, some tribunals as discussed in Option 4: Rationalisation of tribunals should be abolished and their jurisdictions transferred to the District Court. As noted in Chapter 5, this requires an amendment to the District Courts Act 1947, allowing judges to sit with assessors. For the reasons outlined in paragraph 5.42 above some questions still remain as to which of the tribunals we have identified should be disestablished.

WHAT THE REFORM WOULD ACHIEVE

Advantages of the unified structure

6.21 In our view, the proposed unified structure would have significant benefits. We have already alluded to many of these in describing its features. The key benefits are as follows.

- Having only one overarching structure would create a coherent and unified tribunal system.
- Common administration ought to be able to use the resources available to tribunals more efficiently and effectively, ensuring a better and more consistent overall standard of service.
- Common administration also means that administrative and operational policy staff could look across all tribunals in the structure when delivering administrative services and developing operational policy. This will help to ensure that the system remains coherent. It should also assist in implementing other aspects of the reforms. For example, having staff overseeing appointments for all tribunals in the structure may increase opportunities for tribunal members to be appointed to sit on a number of tribunals within the structure, because staff would be aware of members' skills and of opportunities for them to sit on other tribunals, and could inform the Principal Judge of this.
- The unified structure would have strong judicial governance, providing leadership and contributing to increased coherence.
- The structure would have a number of benefits in terms of membership. The approach to membership is versatile, creating a pool of full – and part-time members who may sit across several tribunals or even an entire division. This in turn would make tribunal membership more attractive as a career option. Together with opportunities to take up the new leadership positions, the opportunity to sit on a number of tribunals creates more career paths for members.
- Training and development for members can also be expected to improve, with the oversight of judicial leaders and a single operational policy department developing training programmes.

- A single unified structure would provide a visible “face” to present to the public. This ought to increase the profile of tribunals, enhancing their accessibility.
 - The legislative framework would provide a consistent approach to procedures, powers and rights of appeal across the tribunals in the structure.
- 6.22 While the unified structure would have all these anticipated benefits, realising the full potential of the reforms will require greater investment in tribunals, in addition to structural reform. We expect that tribunals will receive additional funds as part of the reforms. We believe that these additional resources are necessary to allow tribunals to deliver a consistently high level of service. Underinvestment in the past has meant that, for example, many tribunals’ information technology systems are outdated. It has also affected the quality of information and training that tribunals have been able to provide. The combination of better resources and a more efficient structure within which to allocate those resources ought to ensure that the quality of service improves.

How the reforms solve the problems

- 6.23 It will be evident that these expected benefits to a large extent address the problems outlined in *Tribunals in New Zealand*. More specifically, we believe that the problems will be addressed in the following ways:

Accessibility

- 6.24 Problems of awareness of, and information about, tribunals that we identified are likely to be substantially improved. A single structure could be expected to have a greater public profile than any single tribunal. Thus, the public are more likely to be aware of the existence of the structure. The common ‘shopfront’, with website and 0800 number, would provide a clearly accessible entry point, and would provide a consistent level of information and advice for tribunal users. A larger pool of facilities and technological resources, together with more members able to sit in different jurisdictions, should enable tribunals to travel more to outlying areas, addressing geographical barriers to access.

Membership and expertise

- 6.25 Lack of leadership, collegiality and support for members would be addressed through the new leadership structure. There would be a more consistent approach to membership overall, including to issues such as the composition of panels and appointment processes. There would be an integrated approach to training and development, addressing the problems of a lack of training for some tribunals, variable quality and duplication of training programmes. Problems of members of small tribunals having insufficient opportunities to sit on cases would be addressed through the new versatile approach to membership, with potential to be appointed to several tribunals, an entire division or list. Scope for multiple appointments, together with leadership positions, would provide more attractive career opportunities for members.

Independence

- 6.26 Having a neutral department responsible for administration of the tribunal structure, including appointments, would remove the potential perception that, where a department whose decisions are challenged in a tribunal administers the same tribunal and/or appoints its members, the tribunal's decisions may not be independent. Having a District Court judge at the head of the structure would also contribute to the impression of an independent tribunal structure.

Process

- 6.27 The legislative framework applying to the structure would address the problems of inconsistent powers, procedures and appeal rights for tribunals.

Speed and efficiency

- 6.28 The unified structure ought to be far more efficient than the current fragmented system. Common administration would address the problems of administrative 'silos,' uneven resourcing, duplication and variable quality of service provided to tribunals. The rationalisation of the four tribunals we have identified would help to address the problem of very low volume tribunals whose separate existence is difficult to justify.

Systemic problems

- 6.29 The unified tribunal structure would be an integrated and cohesive system. Current problems of fragmentation, duplication of effort, inefficiencies and a lack of oversight would be substantially addressed. Having an overall head of the structure would provide necessary oversight and coordination, as well as a stronger 'voice' for tribunals within the justice system.

Potential disadvantages

- 6.30 While it has many benefits, the unified structure does present some risks, although we believe that many of these can be avoided by careful design. One risk is that the unified structure may be overly rigid and may impose uniformity at the expense of the necessary flexibility and differences between tribunals. A related concern is that its procedures may become too formal and court-like. However, flexibility and room for difference would be built into the legislative framework as we envisage it. Similarly, the legislative framework would be designed to preserve the advantages of tribunals such as their informal approach and ability to determine cases quickly. Another potential risk is that there may be insufficient appropriately qualified members to develop the desired cross-membership. However, we expect that members could develop these skills through experience and training. Another possible risk is that, with the improvements in service and public accessibility, caseload would increase and the tribunal structure may struggle to cope with the increased volume of cases. However, while some increase in caseload is possible, it is unlikely that this would overwhelm the structure.

- 6.31 Creating the unified structure would involve significant structural change, and therefore disruption for many tribunals and administrators. Furthermore, the upfront cost of the change is not insignificant. However, we believe that the benefits of the reforms justify this, and that in the long term there will be efficiency gains from the new structure.

What the public should expect

- 6.32 As we have noted, there is considerable room to improve the standard of service provided to tribunals and the public. We think that the public should be able to expect:
- A consistent level of service, regardless of the nature of the dispute;
 - A clear and easily accessible entry point;
 - High quality information about tribunals and their processes (including before, during and after a case is heard);
 - Independence; and
 - Timely resolution of their dispute.

POINTS FOR FURTHER CONSIDERATION

- 6.33 A number of aspects of the reform still require further consideration and development. These are:
- The position of the Occupational and Industry Regulatory Group within the structure. Particular issues requiring further thought are how closely the Group will be linked to the rest of the structure and what the relationship will be between the Chair and the Principal Judge of Tribunals, as well as between the Chair and the existing chairs of each individual tribunal within the Group. What role, if any, the Chair might be expected to play in relation to the occupational tribunals not included in the Group is also not yet settled.
 - The position of the 21 tribunals that are included in the legislative framework but not in the unified structure. It still remains to consider how these 21 tribunals should relate to the unified structure, if at all. Currently we envisage that the 21 tribunals not in the structure will still be able to benefit in some ways from the establishment of the structure, and in particular from the establishment of the Principal Judge position. The Principal Judge position is intended to provide oversight and leadership for tribunals, and it would be unfortunate if this oversight and leadership did not extend in any way to the tribunals outside the structure. Some of the potential benefits to these tribunals could include opportunities to discuss issues of common concern with tribunal members within the structure and to share in training programmes developed for members of tribunals in the structure (presumably at a cost). The Principal Judge might be able to advocate for the needs of these tribunals as well as those in the tribunal structure. Some aspects of the administrative support provided by the Ministry of Justice might also be able to be extended to these tribunals providing capacity allows. For example the Ministry could provide lists of available lay members (especially for occupational tribunals) that they could use. Finally, we anticipate that some or all of these tribunals could eventually become part of the unified structure if desired.

6.34 It will also be important to ensure that the structure is ‘future-proof’ and remains flexible. We envisage that, in the future, new divisions or lists within the structure may be created; that there may be mergers of similar tribunals; that some of the tribunals not currently proposed for inclusion in the structure may be brought into it; and that new tribunal jurisdictions will be created and should also be inserted into the structure unless there are good reasons not to. We discuss this further in Chapter 9.

CONCLUSION

6.35 In this chapter we have outlined what we see as the key features of the proposed Tribunal Service. In sum, these are:

- A unified tribunal structure including 22 tribunals;
- An Administrative Review and Inter Partes Disputes Division;
- An Occupational and Industry Regulation Group of tribunals more loosely affiliated with the unified structure;
- A Principal Judge of Tribunals to provide overall leadership, together with Divisional Heads, a Chair of the Occupational and Industry Regulatory Group and Chairs of individual tribunals to provide leadership at lower levels;
- A dedicated unit within the Ministry of Justice to provide administrative support; and
- Abolition of some tribunals.

Chapter 7

A new legislative framework

INTRODUCTION 7.1 In this chapter the Commission outlines its proposals for the development of a new legislative framework for tribunals. The proposed legislation would introduce consistent provisions to govern appointments of tribunal members and more consistent provisions in respect of tribunal powers and procedures. A coherent approach to appeal rights and provisions is also proposed, but this is dealt with in the next chapter on appeals. The proposals set out in this chapter, and also in Chapters 8 and 9, are those of the Law Commission. The Government has as yet not formed a view on them.

A FRAMEWORK APPROACH 7.2 We envisage that the proposed framework would contain a core of legislative provisions that would apply to all of the 47 tribunals included in the reforms. These core provisions might for example apply in a similar way to the core provisions in the Crown Entities Act 2004 that govern appointments to the boards of Crown entities and their powers and procedures. In addition, the legislative framework should also probably contain further supplementary menus of provisions that apply to proceedings before only some of the tribunals included in the unified tribunal service. We imagine that these supplementary menus of provisions might govern similar tribunals in a division or list. The individual needs of each tribunal will need to be carefully assessed before the content of legislation can be determined.

7.3 We suggest that a tiered approach might be an effective way of introducing consistent provisions based on principles, while catering for the specific needs of different types of tribunals. New legislation must be sufficiently flexible to cater adequately for the different needs of different tribunals.

7.4 Tribunals outside the unified structure may also need to access menus of additional provisions to effectively undertake their function. Further consideration needs to be given to this question.

7.5 In the remaining sections of this chapter and in Chapter 8: Appeals we put forward our preliminary views on the types of provisions that might be included in a core set of provisions that could apply to all tribunals.



- 7.6 We think that a working group should be established to undertake and oversee the further more detailed work on the legislative framework. This group could also oversee the development of additional menus of provisions for particular divisions or lists within the unified structure. Input from tribunal members, practitioners and also the operational staff responsible for tribunals within the Ministry of Justice will be essential for this more detailed work. The Law Commission may also be able to play a useful role on the proposed Working Group.

APPOINTMENTS

- 7.7 Tribunal members have an adjudicative function. They perform a similar role to judges, and require similar attributes. The manner of their appointment is of critical importance. Appointment processes have two related objectives. The first is to ensure that people appointed as tribunal members are of a high standard and have the skills needed to do the job effectively, or the capability to develop those skills. High quality decisions will flow from skilled and talented tribunal members. The second objective is to ensure that tribunals are independent and perceived as such. Both objectives are advanced by merit-based appointment processes. In this section we consider the essential elements for appointment processes and provisions. Although appointment processes have a basis in legislation, much is a matter of administrative practice. We therefore consider administrative aspects of appointment processes as well as the legislative provisions that might govern appointments.

Merit-based appointments

- 7.8 Appointments are independent and merit-based when tribunal members are appointed for their skills and ability, following a fair and neutral appointment process. Their appointment must be free from any suggestion of political influence. Factors which contribute to an open and merit-based process include public advertising of tribunal positions, qualifications standards that reflect the adjudicative tasks tribunal members will undertake, and the existence and publication of clear criteria upon which members are selected.¹⁴¹ In our view, tribunal vacancies should be advertised, and following this there should be an open, merit-based selection process, including an interview, before suggested appointments are put forward to the relevant appointing authority.
- 7.9 We think this is primarily a matter for guidelines rather than legislative provision as it is largely a matter of process. At present most departments responsible for tribunal appointments follow the State Services Commission guidelines on appointing board members.¹⁴² These guidelines encourage appointing departments to follow good practices such as shortlisting and interviewing candidates, although they do not require that departments do so. While the State Services Commission guidelines are helpful, they are designed primarily with appointments

¹⁴¹ 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.

¹⁴² State Services Commission *Board Appointment and Induction Guidelines* (Wellington, May 2007).

to statutory boards in mind, and are not tailored towards the appointment of adjudicators. We think that a separate set of guidelines for tribunal appointments should be developed.¹⁴³ Such guidelines would provide guidance on best practice for all departments and other bodies responsible for tribunal appointments.

- 7.10 A further issue that will need to be addressed in these guidelines is the process for re-appointment of members. Again this should be merit-based. It should follow an appropriate and thorough performance appraisal.

Appointing authority

- 7.11 To be perceived as truly independent and merit-based appointments need to be made by a disinterested party. This is particularly important for administrative review tribunals. 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 runs the appointment process and the department's responsible Minister is able to appoint the members of the tribunal. We think that both the selection process and appointment of members to these tribunals needs be undertaken with some independence from the department and their responsible Minister. This is not to say there should be no involvement by the department at all. Our consultation 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.
- 7.12 The Minister of Justice, being the Minister responsible for the proposed Tribunal Service, should be the Minister responsible for recommending appointments to all tribunals in the unified structure. In the case of administrative review tribunals, it is essential that the appointments process is distanced from the department being reviewed in this way. There should be no perception that the department being reviewed might have any influence over the tribunal by selecting its membership.¹⁴⁴ In the case of the other tribunals included in the unified structure, it will still be appropriate for the Ministry of Justice to run these appointment processes, although this is largely because of their responsibility for providing operational support for those tribunals, and not because it is necessary for perceptions of independence. Where another Minister has responsibility for the legislation reviewed or applied by the tribunal then that Minister should be consulted over appointments.
- 7.13 For the majority of tribunals in the unified structure appointments should be made by the Governor-General on the recommendation of the Minister of Justice. The Minister of Justice might consult with other relevant Ministers before appointments are proposed.
- 7.14 All tribunals that review departmental or ministerial decisions have been included in the unified tribunal structure, but issues of actual or perceived independence do arise in relation to appointments to other tribunals also. While it will generally not be problematic that the Minister responsible for the

143 Guidelines might be developed by the Ministry of Justice and the State Services Commission.

144 We should 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.

particular policy area makes appointments to other tribunals,¹⁴⁵ problems may arise where one party appears to be able influence the composition of the tribunal, and therefore, potentially, the outcome in a case. For example, Retirement Villages Disputes Panels are appointed by the operator of a retirement village, and hear complaints against the operator. The operator also pays the costs of the Panel. This arrangement does not seem to sufficiently guarantee the necessary perception of independence. We think that the legislation underpinning this tribunal needs to be reviewed and the issue of independence addressed.¹⁴⁶

Independence of occupational tribunals

- 7.15 Slightly different principles apply to ensuring actual and perceived independence in occupational disciplinary tribunals because each occupational group needs to be involved in its own regulation. The inclusion of professional members on occupational tribunals is both necessary and desirable. Members of the profession have a vital insight into the subject matter being dealt with and the relevant professional standard. Their involvement also contributes to a sense of responsible self-regulation. However, if they dominate a tribunal there is some potential that professional members may be perceived as being biased in favour of their peers, or even against them.¹⁴⁷ This can lead to allegations that a profession is “looking after its own.”

Lay members and independent chair

- 7.16 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.¹⁴⁸ We also adopt this view. The legislative framework should require occupational disciplinary bodies whether inside or outside the unified structure to include lay membership. Our review of existing legislative provisions found that the majority of existing occupational disciplinary bodies in New Zealand do already include lay members or representatives of the interests of the community and/or consumers. Our proposal here will therefore involve little change for most of these tribunals. Lay members should in our view be appointed by the Governor-General on the recommendation of the relevant policy Minister, or by that Minister. The Minister of Justice should also be consulted over these appointments. To ensure consistency departments running these appointment processes should follow the guidelines proposed earlier in this section.
- 7.17 It is also essential to ensure that the Chair of an occupational disciplinary tribunal is independently appointed. The Chair should be appointed by the Governor-General on the recommendation of the relevant policy Minister.

145 We don't think this problem arises in the case of other state administered tribunals not included in the structure. Appointments to the Employment Relations Authority are made by the Governor-General on the advice of the Minister of Labour. Appointments to the Mental Health Review Tribunal are made by the Minister of Health.

146 We have made some further comments on the future of this tribunal in paragraph 9.20.

147 In *Gillies v Secretary of State for Work and Pensions* [2006] 1 All ER 731 (HL), the Court suggested that members of occupational disciplinary tribunals adjudicating on their professional peers were not institutionally biased in favour of their peers.

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

Occupational disciplinary tribunals will normally require legal expertise. We suggest that it might be appropriate for the Chairs of such tribunals to be experienced lawyers. The need for legal expertise on tribunal panels is discussed below.

- 7.18 As has already been noted, occupational representation should also be included on disciplinary tribunals, though it should not be able to dominate. Again the perception of independence is enhanced where these appointments are made by a Minister. Members who are representative of the occupational groups can be nominated by the relevant occupational group but they should normally be appointed by the Minister.

Term of appointment

- 7.19 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 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 might be enough to skew a tribunal's decision-making process. Appointments "at pleasure" do not provide the degree of independence necessary to perform adjudicative functions impartially and at arm's length from the executive.¹⁴⁹
- 7.20 To ensure that the Executive 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. However, in the tribunal context it is normally accepted 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.¹⁵⁰ The fixed term must be sufficiently long so that members have a sense of security. The Legislation Advisory Committee recommends a minimum term of three years.¹⁵¹ In Australia the Administrative Review Council recommends a term of three to five years.¹⁵² We also think that a period of three years is an appropriate minimum, but favour a minimum period of five years for all tribunal chairs and other leadership positions within the unified structure. These are minima and for some tribunals a longer term would be justified.
- 7.21 It must be noted that this approach to fixed term tenure is not universally supported. Some commentators question why people coming before tribunals should enjoy fewer protections of impartiality and independence than a person

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

150 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. See *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).

151 Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2001 edition and amendments* (Legislation Advisory Committee, 2007) 162.

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

coming before a court, especially given that many tribunals have jurisdiction that once belonged to the courts.¹⁵³ 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.

- 7.22 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.¹⁵⁴ The legislative framework should provide for a term of appointment of at least three years for all tribunal members and a minimum for tribunal chairs of five years. The legislation should also state, as it normally does, a number of limited grounds for termination of appointment. Members should only be removed from office by the Governor-General for good cause.
- 7.23 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 1990.¹⁵⁵
- 7.24 Arguably, a tribunal with such important powers ought to be headed by a Chair who has full tenure. This need may be satisfied by appointing District Court judges to chair the tribunal, as already occurs in a number of tribunals. The consolidated Immigration and Protection Tribunal will be headed by a District Court judge,¹⁵⁶ suggesting a move to have Chairs with greater protections of independence where a tribunal has power to make decisions of substantial importance, or with substantial societal or political implications.

Setting remuneration

- 7.25 Tribunal members should be paid a salary which reflects their skill and expertise. Salaries ought also to be set at a level that is sufficient to attract highly skilled people. Currently a few tribunal members have their remuneration set by the Remuneration Authority, while most tribunals are governed by the Cabinet Fees Framework which applies to appointments to regulatory authorities and other boards. The current position is particularly unsatisfactory because only some Chairs have their remuneration determined by the Authority. Some Chairs are paid at an annualised daily rate. This discrepancy needs to be addressed as a priority. The Commission favours the Remuneration Authority, because it is

153 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 CLEJ 193.

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

155 Human Rights Act 1993, s 92J.

156 Immigration Bill 2007, cl 195.

independent, setting remuneration for all tribunals. We think that it is important that salaries be determined by an independent body because of the links this issue has to independence for tribunals.

Panel size

- 7.26 The legislative framework will need to determine 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 an optimal size of panels for tribunals.
- 7.27 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.¹⁵⁷ Opportunities for dialogue between several members should improve the quality of deliberation.¹⁵⁸ 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 need to reach an agreed position.¹⁵⁹ Panel size should not increase the cost of resolving a dispute in a way that is disproportionate to the value or significance of the matters being dealt with.
- 7.28 We suggest that the following principles might be appropriate 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.¹⁶⁰ Conversely, the principle of proportionality suggests that matters which are of lower monetary value, 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.
- 7.29 The optimal panel size is probably between one and three members for most tribunals. This allows a mixture of expertise where that is needed, without being too large. However larger panels may be required in the occupational disciplinary area because of the need to include members of the profession, an independent chairperson, and lay members. We still caution against larger panels here and suggest that three members will still normally be adequate. Rarely larger panels may be justified where there is a need to include members representing the perspectives of a range of different groups.

157 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.

158 Michael Adler “Lay Tribunal Members and Administrative Justice” [1999] PL 616, 623.

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

160 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.

Panel composition

- 7.30 A closely related issue is the composition of tribunal panels. Since specialisation has been a key driver for the establishment of tribunals, tribunal members in some tribunals are appointed because they have particular specialist skills, or are expected to develop specialist expertise. 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.¹⁶¹ 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. Finally, where a tribunal makes decisions which are highly discretionary, rather than law-based, a range of perspectives may be helpful. 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. Where specialist expertise is required the legislation governing appointments should specify this.
- 7.31 Most tribunals 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 complex laws and thus require expert legal knowledge.¹⁶² It would be difficult, if not impossible, for some tribunals to do this effectively without legal skills.¹⁶³ Secondly, administrative review tribunals will almost always require legal expertise because they hear appeals involving, or review 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.
- 7.32 The majority of tribunals do currently include legal experience. 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. We have also found that, even where there is no statutory requirement for legal expertise, the appointment process often takes into account the need for legal skills in any case. 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. However, there are a few tribunals that do not include legal expertise, and arguably should do so.
- 7.33 This is not to say that all tribunals need legal experience. There may be a few 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.

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

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

163 For example, the Taxation Review Authority and Social Security Appeal Authority construe complex statutes: the Income Tax Act 2007 and Social Security Act 1964 respectively.

7.34 Currently we think there is more variation than is necessary between provisions governing the size and composition of tribunals. We suggest that the legislative framework should introduce a more consistent, principle-based approach on both of these issues. We favour the existing provisions being reviewed against the principles we have suggested here. The specific needs and requirements of each tribunal need to be considered carefully.

Appointments – summary of proposals

7.35 Our proposals for developing provisions on appointments are that:

- Appointments to all tribunals should be merit-based. Guidelines on appointments should be developed. They should include requirements of clear criteria, advertisement, and interview. These guidelines should apply to all state appointments to tribunals and should cover re-appointment processes also.
- To be perceived as truly independent all appointments need to be made by a disinterested party. The Minister of Justice, being the Minister responsible for the proposed Tribunal Service, should be the Minister responsible for tribunal appointments within the unified structure, although the Minister should consult with the Minister responsible for the relevant policy department. Most appointments should be made by the Governor-General.
- The Ministry of Justice should be responsible for running appointment processes for all tribunals included in the unified structure. Consultation with the relevant policy department might be necessary to ensure that factors relevant to the subject-matter are adequately considered.
- Appointments to other state-administered tribunals should normally be made by the Governor-General on the advice of the relevant portfolio Minister.
- Occupational disciplinary tribunals need to include professional members, but should also include an independent chairperson and lay members. The chairperson and lay members should generally be appointed by the Governor-General.
- Some form of security of tenure is an essential guarantee of independence in adjudication. In the tribunal context it is normally acceptable for members to be appointed for a fixed term. We favour a minimum term of three years for ordinary members, but a minimum of five years for all tribunal Chairs and other leadership positions. These are minima and for some tribunals a longer term would be justified. Members should only be able to be removed from office for good cause by the Minister.
- Consideration should be given to the appointment of judges with full tenure to some key positions within the unified tribunal structure. The appointment of a District Court Judge as Chair of some tribunals provides a Chair with greater protections of independence where a tribunal makes decisions of substantial importance.
- An independent body such as the Remuneration Authority should set the remuneration for all tribunals and not just a few as at present.
- The current variation between provisions establishing panel size and composition should be reviewed as part of the work on the legislative framework.

- 7.36 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 decisions of a government agency. The procedures for tribunals must vary according to the subject-matter with which they deal, the complexity of the issues, and the consequences of their decision for the parties. That said, however, we believe that there is currently much more diversity than is necessary or desirable.
- 7.37 But in all tribunals the procedures must comply with the principles of natural justice. The New Zealand Bill of Rights Act requires it. It provides that 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.¹⁶⁴ The challenge for those formulating rules of procedure for tribunals therefore is to balance the needs of flexibility and informality with the requirements of natural justice.
- 7.38 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.¹⁶⁵ In this section of the chapter we put forward proposals for core procedural requirements that should apply in all tribunals. We think the new legislative framework should include provisions that emphasise flexibility and informality, minimise technicalities, relax rules of evidence and introduce a more investigative approach in tribunals. It must also include some essential procedural safeguards to facilitate natural justice.

Informal and flexible procedures

- 7.39 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. Tribunals are designed to be quick and efficient, and more readily accessible than the ordinary courts. Tribunal procedures consequently normally need to be more flexible and informal than those of the courts. Of course some tribunals will require greater formality than others. It would be a mistake to regard all tribunals as the same.

¹⁶⁴ New Zealand Bill of Rights Act 1990, s 27 (1).

¹⁶⁵ Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2001 edition and amendments* (Legislation Advisory Committee, 2007) 292.

Culture of informality

7.40 The statutes of some tribunals currently impose an obligation to conduct proceedings informally.¹⁶⁶ Such provisions legitimise practical steps that can support and assist a tribunal to develop a “culture” of informality. Things such as the layout of the hearing room and the active participation of the chair can assist unrepresented participants to tell their story. But informality can go too far: if practices become too flexible consistency and fairness may be compromised. In some tribunals with a more adversarial flavour, a more formal approach is needed to ensure fairness. We think that it would be appropriate to include in the legislative framework a provision requiring tribunals to conduct hearings with as little formality as is consistent with a fair and efficient process. This type of provision might aid the development of an appropriate tribunal culture across the tribunal service and would be flexible enough to allow for different levels of informality.

Rules of evidence

- 7.41 It is common for tribunals to be given a power to accept evidence that would not be admissible in a Court. Many tribunals 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.¹⁶⁷ Every tribunal that is deemed to be a commission of inquiry under the Commissions of Inquiry Act 1908 has a similar power.¹⁶⁸ It has been suggested that 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.¹⁶⁹
- 7.42 Tribunals can also, if they think it is prudent or convenient, accept evidence that is not sworn. Some have expressly been given the power to accept evidence that is not given on oath¹⁷⁰ although for most it is implicit in a provision that permits, but does not require, evidence to be taken on oath. The objective of such provisions is to focus on whether the evidence or information is relevant rather than any technical question of admissibility.¹⁷¹ Again we think that this approach to evidence is appropriate for tribunals. Tribunals should be able to receive any material as evidence that they consider to be relevant and a provision to that

166 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. 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. See Housing Restructuring (Appeal) Regulations 2000, rr 10 and 13 and Motor Vehicles Sales Act 2003, s 8.

167 The Tenancy Tribunal, the Health Practitioners Disciplinary Tribunal and the Social Security Appeal Authority, to name just a few, have this power. See Residential Tenancies Act 1986, s 97(4); Health Practitioners Competence Assurance Act 2003, Schedule 1, c 6(1); Social Security Act 1964, s 12M(5).

168 Commissions of Inquiry Act 1908, s 4B(1). Note that a Public Inquiries Bill has recently been introduced to replace the Commissions of Inquiries Act 1908. See Public Inquiries Bill 2008.

169 D L Mathieson (ed) *Cross on Evidence* (loose leaf, Lexis Nexis, Wellington) para 1.78 Administrative Tribunals, (updated 19 July 2007).

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

171 Peter Spiller *The Disputes Tribunals of New Zealand* (2nd ed, Brookers, Wellington, 2003) 72.

effect could be included in the legislative framework. It is preferable to include an express provision, rather than rely on any cross-referencing to the Commissions of Inquiry Act.

Minimise legal technicalities

- 7.43 The legislation setting up some of the tribunals included in the inter partes disputes division of the unified structure expressly provides that these tribunals can reach their decisions without regard to technicalities. The Human Rights Review Tribunal is required, for example, to decide a case on its substantial merits, without regard to technicalities.¹⁷² There is however some uncertainty as to what this and other similar provisions allow tribunals to do. 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.¹⁷³ Similarly in *O'Neill v 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”.¹⁷⁴
- 7.44 The Acts establishing the Disputes Tribunal and the Tenancy Tribunal make similar provision.¹⁷⁵ The courts have determined that a tribunal referee must consider any legal principle of which he or she may be made aware in a fair and unbiased manner and apply the law as he or she understands it in an impartial manner to the facts as found. However, he or she may depart from the law when strict observance of it would prevent the determination of the dispute according to the substantial merits and justice of the case.¹⁷⁶ This differs slightly from the situation in the Tenancy Tribunal. The Tenancy Tribunal is required to “determine each dispute according to the general principles of the law relating to the matter and the substantial merits and justice of the case, but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities.”¹⁷⁷ The High Court has said this means that the tribunal must consider strict legal principles, and only if the application of those strict principles points to a clear injustice should the strict principles be departed from.¹⁷⁸
- 7.45 While such judicial authority is of course helpful, there is still some uncertainty as to what these types of provisions really mean and the extent and circumstances in which tribunals may depart from the application of strict legal principle. In our view it would be helpful if the meaning of such provisions was clearer. We favour one clearly formulated provision for all the tribunals in the inter partes disputes division. We suggest that one form of words should be used for all these tribunals so that a common test is applied across these tribunals rather than the current variations. This would also allow a helpful body of jurisprudence to develop. We think that careful consideration needs to be given to achieving greater

172 Human Rights Act 1993, s 105.

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

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

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

176 See *NZI Insurance v Auckland District Court* [1993] 3 NZLR 453 (HC) Thorp J.

177 Residential Tenancies Act 1986, s 85(2).

178 See *Welsh v Housing NZ Limited* (9 March 2001) HC, Doogue and Goddard JJ, WN AP 35/2000.

clarity of meaning also. The extent and circumstances in which a tribunal can legitimately depart from the strict letter of the law should be clear. Currently the wording and meaning of some of these provisions is not clear. We are uncertain whether it would also be appropriate to consider relaxing the application of strict legal principle in other types of tribunals. This is a matter that needs further consideration in the course of developing the legislative framework.

Investigative powers

- 7.46 While there is debate as to whether tribunals, which in the end have to decide between two disputing parties, should adopt inquisitorial or adversarial procedures,¹⁷⁹ there is much support for a more active investigative approach.¹⁸⁰ The lack of legal representation before many tribunals 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.¹⁸¹ 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.
- 7.47 Some tribunals have powers to seek and receive at their own initiative such evidence, and undertake such investigations, as they think necessary.¹⁸² Some are instructed to act inquisitorially, although there is little guidance given as to what this might mean.¹⁸³ Currently 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.¹⁸⁴ The legislation establishing the Employment Relations Authority goes much further, establishing the Authority with strong investigative powers. As well as having the sorts of investigative powers that other tribunals have, the Authority also has powers to independently define the issues in any case before it and then call for evidence beyond the scope of that the parties put before it.¹⁸⁵

179 See William Wade and Christopher Forsyth *Administrative Law* (9th ed Oxford University Press, Oxford, 2004) 176.

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

181 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.

182 An example is the Mental Health Review Tribunal which takes an active role in collecting evidence and calling witnesses, and may even initiate reviews of patients: Mental Health (Compulsory Assessment and Treatment) Act 1992, Schedule 1.

183 The Legal Aid Review Panel and War Pensions Appeal Boards for example. See Legal Services Act 2000, s 56 and War Pensions Act 1954, s 13.

184 Commissions of Inquiry Act 1908, ss 4B-4D. Note that a Public Inquiries Bill has recently been introduced to replace the Commissions of Inquiries Act 1908. See Public Inquiries Bill 2008.

185 In *Claydon v Attorney-General* McGrath J observed that: "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": *Claydon v Attorney-General* [2004] NZAR 16, 35 (CA) McGrath J.

- 7.48 We are generally supportive of a more active investigative approach being taken in tribunals and think that all tribunals need powers to facilitate this. All tribunals should have the power to call and examine witnesses. All tribunals should also be able to require the production of papers, documents, records or things for inspection by the tribunal.¹⁸⁶ Many, including some of the professional disciplinary tribunals which are considered to be adversarial tribunals,¹⁸⁷ already have such powers.¹⁸⁸
- 7.49 However we recall our earlier express caution that tribunals are not all the same. Some tribunals, like the Employment Relations Authority, do need the stronger powers of inquiry that they currently have, but others, such as the professional disciplinary tribunals, are less likely to need these because they follow a more adversarial process. We think that whether specific tribunals should have stronger powers of inquiry needs to be considered on a case by case basis. In any event such powers as are decided to be appropriate should be clearly spelt out, rather than couched in vague and indeterminate language.

A power to regulate procedure

- 7.50 It is common for the constituting legislation to confer on a tribunal the power to determine or regulate its own procedure. This is the case, for example, in the Health Practitioners Disciplinary Tribunal.¹⁸⁹ Within the confines of legislative provisions governing procedure, and any rules of procedure that might be set to apply across the unified tribunal structure, or within a division of it, individual tribunals should have the power to regulate their own procedure in order to effectively deal with any matter before them. Although the courts have not substantially considered the extent of a tribunal's statutory ability to control its own processes, such a power clearly allows tribunal members the flexibility to adjust the procedure to the requirements of the case before it.

Natural justice – a fair hearing

- 7.51 The requirements of natural justice prescribe what is necessary for issues to be fairly determined after an adequate hearing. They apply to all tribunals. 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,¹⁹⁰ 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. 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,

186 These are essentially the powers many tribunals currently have through the application of the Commissions of Inquiry Act 1908, ss 4B-4D.

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

188 The Health Practitioners Disciplinary Tribunal for example has this power. See Health Practitioners Competence Assurance Act 2003, sch 1 cl 7.

189 Health Practitioners Competence Assurance Act 2003, sch 1cl 5.

190 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.

and, potentially, the application of more or fewer protections than desirable.¹⁹¹ We agree and think that the core elements that provide a basis for a fair hearing should be specified in the legislative framework for tribunals.

Adequate notice

7.52 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.¹⁹² Most tribunals have prescribed notice periods and requirements for serving notice of claims on parties. Currently notice provisions appear to vary quite randomly between tribunals. We think that the period of notice should be standardised as far as possible. The complexity of cases before some tribunals may require some exceptions.

Disclosure

7.53 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.¹⁹³

7.54 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.¹⁹⁴ 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.¹⁹⁵

7.55 Again, it would be helpful if the legislative framework 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

7.56 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

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

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

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

194 Student Allowances Regulations 1998, r 37.

195 Housing Restructuring (Appeals) Regulations 2000, r 8(2).

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.¹⁹⁶ There must be a fair opportunity to comment on any adverse material.¹⁹⁷

- 7.57 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 papers only: the Legal Aid Review Panel¹⁹⁸ and two of the current immigration tribunals are in that category.¹⁹⁹ Some, although not required to, do invariably deal with matters on the papers.²⁰⁰ 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 tribunals prefer to hold oral hearings.
- 7.58 Factors of efficiency, cost, location and proportionality all enter into the decision of whether or not to hold hearings in person. The need may differ in different kinds of case. But our 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.²⁰¹ We take the view that tribunals should all have power to hear cases orally when they think this is desirable, even tribunals where the normal practice is to decide on the papers. Again this could be included in the legislative framework.

Examining and cross-examining witnesses

- 7.59 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, however require a right of cross-examination.²⁰² In some – the disciplinary tribunals being a good example – cross-examination is more important than in others. We do not think that a right to examine and cross-examine witnesses should apply in all tribunals, although it will need to be included for some tribunals. In some tribunals where cross-examination is appropriate it may be appropriate for the tribunal to have powers to limit cross-examination.

Legal representation

- 7.60 Does natural justice entitle parties to be legally represented? There is no absolute right, but often it will be entirely appropriate before a tribunal. Parties commonly represent themselves before some tribunals but only rarely before others. Proceedings before some tribunals involve highly complex legal and factual issues

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

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

198 Legal Services Act 2000, s 56(5).

199 The Removal Review Authority and Residential Review Board review cases on the papers: Immigration Act 1987, ss 18F(1) and 50(1).

200 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.

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

202 For example there is no right to cross-examine in the case of any tribunal that is deemed to be a commission of inquiry because the Commissions of Inquiry Act 1908 does not provide such a right.

which render legal representation highly desirable. Legislation currently restricts lawyers from appearing for parties before a handful of tribunals.²⁰³ The norm however is not to prohibit or even discourage people from being represented by counsel. It should be noted that in some tribunals representation by representatives who are not lawyers may also be appropriate.

- 7.61 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. This inequality of arms can impose burdens on the tribunal to assist the unrepresented party.
- 7.62 In deciding whether legislation should permit or disallow legal representation, all these matters need to be taken into account. Again, we take the view that a right to representation probably should not apply in all tribunals. We think that restrictions on lawyers or other representatives appearing before some tribunals are appropriate given the functions of these tribunals, although we favour these tribunals having the discretion to allow representation when fairness requires that. We think that the Disputes Tribunal should have the discretion to allow representation (legal or otherwise) when fairness requires it.

Reasons for decision required

- 7.63 While there may not yet be a legal principle that all decision-makers must give reasons,²⁰⁴ most tribunals are either required to give reasons or do so as a matter of practice. Legislation establishing some tribunals is however silent as to whether these tribunals are required to give reasons.²⁰⁵
- 7.64 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.²⁰⁶ 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.

203 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 ban 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; and Housing Restructuring (Appeals) Regulations 2000, r 13.

204 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.

205 For example the War Pensions Appeal Board and the Medicines Review Committee are not under a statutory requirement to give reasons.

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

Rules of procedure – summary of proposals

7.65 Our proposals for developing provisions on tribunal rules of procedure are that:

- There should be a requirement that all tribunals conduct hearings with as little formality as is consistent with a fair and efficient process and a just and quick determination of the matter before the tribunal.
- Tribunals should 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. They should also be able to accept evidence that is not sworn.
- Tribunals included in the inter partes disputes division should have the power to depart from the letter of the law when strict observance of it will prevent them from determining the dispute before them in according to the substantial justice of the case. The limits of this power should be clearly spelt out in legislation. Further consideration should be given to extending the power to relax technicalities to other tribunals also.
- All tribunals should have investigative powers that allow them to call and examine witnesses and have documents produced. Some should have stronger investigative powers than others. Such powers should be clearly defined.
- Individual tribunals should have the power to regulate their own procedure in order to effectively deal with any matter before them.
- To assist in ensuring a fair hearing the requirements of natural justice should be spelt out in legislation. In particular:
 - There should be a standard period of notice for most tribunals, although some exceptions will be necessary.
 - Parties should be fully informed of the evidence against them and given sufficient opportunity to respond.
 - All tribunals should have the power to hear cases orally when they think this is desirable.
 - A right to examine and cross-examine witnesses might be appropriate in some tribunals, but not in all. In some tribunals rights of cross-examination may need to be restricted.
 - Legal representation should normally be permitted before tribunals. In some tribunals representatives other than lawyers may also be appropriate. Where representation is not usually permitted the tribunal chair should have the discretion to allow legal or other representation in cases where fairness requires this.
 - All tribunals should be required to give their decisions in writing with reasons.

POWERS

- 7.66 Tribunals consider an enormous variety of matters but 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. While there are core powers which all tribunals are likely to require, there will also be others that are only required by some tribunals.
- 7.67 In this section of the chapter we identify the core powers that tribunals need to perform their functions effectively. Provisions governing these matters will need to be included in the framework. There is obviously some overlap with the rules of procedure which we discussed in the previous section of this chapter.

Witnesses summonses and sworn evidence

- 7.68 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 to either of their own motion or on application summons people to give evidence, and to produce any papers, documents, records or things in that person's possession or under that person's control that are relevant to the scope of the inquiry.²⁰⁷ 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.²⁰⁸
- 7.69 Some tribunals do not currently have powers to summons witnesses. The few tribunals that are currently required to determine matters on the papers without a hearing do not have powers to summons witnesses.²⁰⁹ A number of others that normally hold oral hearings also do not have a power to summons witnesses.²¹⁰ It is not clear why. A few occupational regulation and disciplinary tribunals constituted under older statutes also do not have powers to summons witnesses.²¹¹
- 7.70 We think this is an important power for all tribunals to have to enable them properly to undertake their decision-making function. It is a power that will probably be needed on occasion by almost all tribunals, although many tribunals will use it only rarely. Witnesses are more likely to attend if they are aware that if they refuse to attend, they can be summoned.

207 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 similar powers under their establishing legislation. See Human Rights Act 1993, s 109; Disputes Tribunals Rules 1989, r 14; and Residential Tenancies Act 1986, s 98.

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

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

210 The Medicines Review Committee, the Motor Vehicle Disputes Tribunal and the State Housing Appeal Authority are examples.

211 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 examples of disciplinary tribunals that do have powers to summons witnesses.

- 7.71 Some tribunals can administer an oath or affirmation and so can require sworn evidence but others don't have an express power to require evidence to be given under a promise, oath or affirmation.²¹² Some of these may be able to rely on the power in section 14 of the Oaths and Declarations Act 1957.²¹³ In the tribunals which do have the power, some virtually always take evidence under oath or affirmation,²¹⁴ whereas in others, such as the Disputes Tribunal, it is generally seen to be an unnecessary and intrusive formality and avoided when possible.²¹⁵
- 7.72 Again we think it is necessary for all tribunals to have this power. Even if, as is suggested,²¹⁶ the administration of an oath makes little difference to whether people actually tell the truth, it does serve to remind people of the seriousness of the situation and imposes an obligation to be truthful. It is an offence for a witness to deliberately give false evidence under oath. There is a link with the power to summons a witness, which would ultimately be less effective without a power to examine the witness under oath.

Production of documents and disclosure orders

- 7.73 All tribunals with the power to summons witnesses have the power to require any witness summoned to produce any books, papers, documents or records.²¹⁷ Again we understand that it is relatively rare for orders requiring the production of documents to be made. In some tribunals these sorts of powers are rarely used because documents are produced and also exchanged by agreement.²¹⁸ Being able to require the production of a document is regarded by many as an essential power for tribunals. The threat of an order that a document be produced may ensure a higher degree of cooperation. This is a power that is needed by all tribunals.
- 7.74 However tribunals also need powers to order the disclosure of documents to other parties and not just to the tribunal for the purposes of preparing for proceedings. A number of tribunals have these sorts of powers or are able to make orders for discovery in the same terms as the District Court.²¹⁹

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

213 The Oaths and Declarations Act 1957, s 14 applies 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).

214 For example sworn evidence is normally 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.

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

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

217 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." Some tribunals, such as the Employment Relations Authority, have a stand-alone power to require people to produce documents; Employment Relations Act 2000, s 160.

218 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.

219 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.

Other tribunals don't have such powers and there is some uncertainty whether they can require disclosure. We think a consistent approach needs to be taken on this issue. We favour a simple provision that would allow all tribunals to require disclosure of information between the parties.²²⁰

Privileges and immunities of witnesses

- 7.75 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 same privileges and immunities as witnesses and counsel have in proceedings before a court.²²¹ That is so of tribunals which take their powers under the Commissions of Inquiry Act.²²² 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.²²³
- 7.76 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.²²⁴ Two examples of privileges that apply before the courts are the privilege against self-incrimination and legal professional privilege.²²⁵ It would seem appropriate for these same protections to apply before tribunals as apply before the courts. Again a standard provision should apply to give witnesses and counsel appearing before tribunals the same privileges and immunities as witnesses and counsel have in proceedings before a court.

Closed hearings and name suppression orders

- 7.77 Tribunals take various approaches to the issue of openness, and a lack of consistency is again evident. While we accept that there are some exceptions, we think most tribunals should, as they currently do, function under a presumption of openness.

220 One example is the provision that applies in the Health Practitioners Disciplinary Tribunal. The 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: Health Practitioners Competence Assurance Act 2003, sch 1 cl 7.

221 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).

222 Commissions of Inquiry Act 1908, s 6.

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

224 Witnesses have this civil immunity irrespective of whether the evidence they gave was true or false, or was given in bad faith. However immunity applies only to civil actions and does not extend to criminal or disciplinary proceedings. See *Dentice v Valuers Registration Board* [1992] 1NZLR 720, 724 (HC) Eichelbaum CJ.

225 Both of these have been codified in the Evidence Act 2006: see ss 60 and 63 in respect of the privilege against self incrimination and ss 54 and 56 in respect of legal professional privilege as it relates to court proceedings.

Presumption of openness

- 7.78 Most tribunals are required to 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.²²⁶ Some occupational tribunals are also required to consider the privacy interests of the complainant when deciding whether to hear disciplinary matters in public.²²⁷ The presumption of openness means that as a matter of practice most tribunals hold most of their hearings in public. It is relatively rare for hearings before tribunals operating under this presumption to be held in private. Such tribunals will sometimes hear evidence of a personal nature, such as an individual's medical history or evidence that could damage commercial or security interests, in private.
- 7.79 Many tribunals also have the power to make orders prohibiting publication of material such as evidence of the identities of parties or witnesses.²²⁸ 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 tribunals. It is normally an offence for a person to contravene a suppression order.²²⁹
- 7.80 These 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

- 7.81 In contrast a few tribunals are currently required by law to hear all cases in private.²³⁰ In a similar vein some other tribunals are required to hear cases in private, but may open a hearing to the public in some instances.²³¹

226 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: see Customs and Excise Act 1996, s 257(6).

227 See for example Health Practitioners Competence Assurance Act 2003, s 95(2); Veterinarians Act 2005, s 49(2).

228 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.

229 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.

230 Examples are the Disputes Tribunal, the Motor Vehicle Disputes Tribunal, the Mental Health Review Tribunal and the Taxation Review Authority.

231 Examples are the Social Security Appeal Authority, the Teachers Disciplinary Tribunal and the Cadastral Surveyors Licensing Board.

Conclusion

- 7.82 We question whether so many tribunals really need to be closed. In the course of developing legislative provisions for tribunals we think that the issue of openness needs careful examination. We found examples across the spectrum. The most appropriate starting point in reviewing such provisions should be a presumption that public access to tribunals and to reporting of proceedings should be permitted, unless an overriding interest requires otherwise. We have no doubt that in some tribunals there will be such an interest but think that it will justify a presumption of a closed hearing in very few tribunals.²³² 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.
- 7.83 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.²³³ The Commission continues to think that hearings before that tribunal and all others in the inter partes disputes division should be open, although it acknowledges that there are differences of view about this.

Maintaining order during hearings

- 7.84 Legislation establishing many tribunals makes it an offence of contempt for a person to threaten, obstruct or hinder the tribunal.²³⁴ Regardless of whether the person is actually charged with contempt, a number of tribunals are given an express power to exclude from the tribunal any person whose behaviour may constitute contempt of the tribunal.²³⁵ The power is designed to assist the tribunal in dealing with abusive or disruptive behaviour during a hearing. Where necessary the tribunal is entitled to call on the assistance of the police to remove any person from the tribunal.
- 7.85 Tribunals need powers to exclude people where they are abusive or so disruptive that the tribunal is unable to maintain order and proceed with the hearing. We think that almost all tribunals need such powers, and that powers for controlling proceedings should be included in the core powers that apply to all tribunals. Legislation or rules of procedure should so provide.

232 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.

233 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.

234 Fines range from \$500 to \$10,000.

235 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.

Stating a case for the opinion of the High Court

7.86 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. 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 as a rule to tackle any difficult legal issues which arise in cases within their jurisdiction. Tribunals should apply the law as they understand it and determine the questions before them. We think that tribunal rulings that are incorrect on legal questions are better remedied on appeal. Given the rarity with which it is used anyway, we think the power is probably unnecessary and can be dispensed with.

Awarding costs

7.87 Some tribunals can award costs and others can not. Many tribunals are in a halfway house, having some restricted powers to award costs. There is currently a range of approaches taken in legislation, and principles need to be developed and applied.

7.88 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.²³⁶ Such an approach would not be appropriate in all tribunals. Tribunals are primarily about accessibility. There is concern that the risk of costs may deter people from accessing tribunals. We suggest that it would not be appropriate to apply the approach that costs will follow the event to tribunals in the administrative review division or to tribunals in the inter partes division.²³⁷ We think that tribunals in these divisions should probably have limited powers to award costs. For example where a party has caused unnecessary expense by bad faith or by taking a claim without substantial merit the tribunal should have the power to award costs.²³⁸ We suggest that a provision to this effect could be included in the legislative framework. There may be exceptions for some tribunals.

7.89 In contrast we think a cost recovery approach should operate across occupational disciplinary tribunals. For most this is the status quo. 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. Most disciplinary tribunals currently have powers to award costs to allow the tribunal to recover some of the costs associated with such proceedings. Costs that are not recovered by an award are borne by other members of the occupational group via disciplinary levies. A provision could also be included to cover these tribunals.

²³⁶ *Commerce Commission v Southern Cross Medical Care Society* [2004] 1 NZLR 491, 494.

²³⁷ However the Human Rights Review Tribunal currently has full powers to award costs. See Human Rights Act 1993, s 92L. Further consideration might be needed as to whether restrictions on costs of the type we suggest are appropriate in this tribunal.

²³⁸ The second leg of this test is intended to include claims that are frivolous and vexatious.

Powers – summary of proposals

7.90 Our proposals for developing provisions on powers are that:

- All tribunals need the following core powers:
 - powers to summons witnesses, administer an oath or affirmation and take sworn evidence;
 - powers to require parties and witnesses to produce information and documents;
 - powers to require the disclosure of information between the parties to proceedings;
 - powers to close hearings and make orders to suppress 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 maintain order during proceedings.
- Generally tribunals should operate under a presumption that their hearings are held in public and are able to be reported. However a few tribunals may need to operate under an assumption that hearings are to be in private.
- The power to state a case for the opinion of the High Court can probably be dispensed with.
- A consistent approach should be taken on the power to award costs so that tribunals exercising the same function are governed by the same principles.

CONCLUSION

7.91 In this chapter we have outlined our suggestions on the development of a new legislative framework for tribunals. The proposed framework would introduce more consistent provisions on appointments, procedure and powers. In order to cater adequately for the different needs of different tribunals the legislation will need to be designed in a flexible way.

7.92 We have put forward our preliminary views on the range of provisions that could be included within the core set of provisions that apply to all tribunals. However we think that a working group should now be established to undertake and oversee the further more detailed work that is needed on these core provisions, and on any additional provisions for particular divisions or lists within the unified structure that should also be included in the legislative framework.

Chapter 8

Appeals

INTRODUCTION 8.1 In this chapter we consider what rights of appeal there should be from the tribunals covered by the legislative framework. We also consider who should hear appeals from these tribunals. In particular we look at whether a new appellate tribunal should be established within the unified tribunal structure to hear appeals. The alternative, which we favour, is for appeals to continue to be heard by the ordinary courts. The consultation so far undertaken reveals some differences of view on this point. While we don't think an appellate tribunal is warranted at this stage, one could, at a later stage, be incorporated into the unified structure if the situation changed.

8.2 Other issues that are also examined in this chapter are appellate powers and procedures. We propose that appeals should normally be by way of rehearing and that the courts should have broad powers when hearing appeals. To avoid having to remit cases back to a tribunal a court should have the power, when hearing an appeal, to make any decision it thinks should have been made. A consistent approach is also needed on time limits for appeals and other rules of procedure for appeals. Provisions governing appeals will form part of the legislative framework.

RIGHTS OF APPEAL 8.3 A general right of appeal on both law and fact is currently the norm for most tribunals. When reviewing existing appeal rights in the course of producing the issues paper *Tribunals in New Zealand*, we found that a general or unrestricted right of appeal was available from two-thirds of the tribunals we reviewed.²³⁹ In that paper we suggested that this norm should be our starting principle. We argued that there should normally be two appeals from any tribunal decision. First, there should be a general appeal, on fact and law, as of right. There should then be a second appeal, with leave, and on a question of law only.²⁴⁰

8.4 We think that this as an appropriate general principle from which departures and restrictions must be justified. The two exceptions from this general principle that we think can be justified are:

²³⁹ See New Zealand Law Commission *Tribunals in New Zealand* (NZLC IP6, Wellington, 2008) Chapter 8 and Appendix 2.

²⁴⁰ This was also the position taken by the Law Commission in *Delivering Justice for All* in respect of appeals from first instance decisions in the courts: New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004) 112.

- appeals from tribunals that are themselves appellate or review tribunals may be confined to matters of law; and
- where tribunals deal with claims of low monetary value rights of appeal may also be restricted.

In this section we examine the principle that there should be a general right of appeal and consider these two exceptions.

There should normally be a right of appeal from a tribunal

- 8.5 We think there should normally be rights of appeal to the courts from all tribunals. Tribunals should not normally be final decision-makers, particularly on matters of law. Appeals serve to correct error and to supervise tribunals. Supervision by the courts arguably increases public confidence in the tribunal system and also ensures consistency between tribunals and the courts in the administration of justice. There should normally therefore be rights of appeal from all tribunals.
- 8.6 There are currently three tribunals in the administrative review division from which there are no rights of appeal. We think that a right of appeal, which can be restricted to matters of law for the reasons we discuss later in this section, should be available from the Student Allowance Appeal Authority, the War Pensions Appeal Board and the Catch History Review Committee.
- 8.7 There are also three appeal tribunals included in the broader group of tribunals that will be covered by the legislative framework. These are the Engineering Associates Appeal Tribunal, the Institute of Chartered Accountants Appeal Council and the Valuers Registration Board of Appeal. These tribunals are all specially constituted to hear appeals from other disciplinary tribunals and registration bodies.²⁴¹ Currently there are no rights of appeal to the courts from these tribunals. Applying the principle that there should be rights of appeal from all tribunals, we think that there should be a further right of appeal from these tribunals to the court. Such rights of appeal could also be restricted to matters of law for the reasons we discuss later in this section.

A general appeal on fact and law for most tribunals

- 8.8 In the case of most tribunals a general right of appeal on the facts and law should be available. Where a tribunal is the first-instance decision-maker, as it normally is, a general appeal on fact and law ensures that there is an opportunity to correct both factual and legal errors. In the table below we have identified our proposals for rights of appeal from all tribunals. A general right of appeal is proposed for most tribunals. The two exceptions to this general principle are discussed below.

²⁴¹ The question of whether these tribunals should be retained may also need to be addressed at some point.

General appeal on fact and law	Appeal on matters of law only	Appeal restricted to grounds decision is substantially unjust
<p>Administrative Review Division</p> <p>Revenue appeals –Taxation</p> <p>Inter Partes Division</p> <p>Tenancy claims over small claim threshold</p> <p>Motor Vehicle claims over small claim threshold</p> <p>Human Rights</p> <p>Weathertight Homes</p> <p>Occupational and Industry Regulation Group</p> <p>Liquor Licensing Authority originating jurisdiction</p> <p>Registrar of Private Investigators and Security Guards</p> <p>Immigration Advisers Complaints and Disciplinary Tribunal</p> <p>Lawyers and Conveyancers Disciplinary Tribunal</p> <p>Real Estate Agents Disciplinary Tribunal (proposed)</p> <p>Licensing Authority of Second hand Dealers and Pawnbrokers</p> <p>Other tribunals covered by the legislative framework</p> <p>All tribunals included in the framework except the Engineering Associates Appeal Tribunal, Institute of Chartered Accountants Appeal Council and the Valuers Registration Board of Appeal</p>	<p>Administrative Review Division</p> <p>Immigration and Protection Tribunal (proposed)</p> <p>Legal Aid Review Panel</p> <p>War Pensions Appeals</p> <p>All State Allowances & Benefits Tribunals</p> <p>All Miscellaneous</p> <p>Revenue appeals –Customs</p> <p>Occupational and Industry Regulation Group</p> <p>Liquor Licensing Authority – Appeals from DLAs only</p> <p>Trans-Tasman Occupations Tribunal</p> <p>Other tribunals covered by the legislative framework</p> <p>Engineering Associates Appeal Tribunal</p> <p>Institute of Chartered Accountants Appeal Council</p> <p>Valuers Registration Board of Appeal</p>	<p>Inter Partes Division</p> <p>Disputes Tribunal</p> <p>Tenancy Tribunal claims under ‘small claims’ limit</p> <p>Motor Vehicle Disputes under ‘small claims’ limit</p>

Limiting first appeals to questions of law

8.9 The need for certainty means it is important to avoid the endless re-litigation of factual matters. Second appeals are therefore normally restricted to appeals on questions of law only.²⁴² In some cases however, it is appropriate for the first appeal from a tribunal to also be restricted to issues of law. Where the tribunal itself is effectively a review or appeal body rather than a first instance

²⁴² There are currently some exceptions. For example taxation legislation provides for a general right of appeal to the High Court on questions of both fact and law and also a general right of appeal from there to the Court of Appeal and the Supreme Court.

decision-maker we think it will normally be appropriate to limit the rights of appeal from that tribunal to matters of law. Considerations such as cost, delays and the monetary value of cases can also be relevant when deciding whether a right of appeal should be restricted to issues of law.

- 8.10 We have suggested that a cautious approach should generally be taken before limiting first appeals to questions of law only.²⁴³ There can be difficulties in distinguishing between questions of law and fact.²⁴⁴ This leads to attempts to “dress up” factual issues as legal ones. In some cases the effect of limiting an appeal to a question of law means that the appellate court cannot overturn an earlier decision in the event of factual error. This may leave an individual with no right of redress where factual errors have been made.²⁴⁵ While these are real concerns, we think they are less of an issue where the tribunal itself is an appeal tribunal reviewing an earlier decision.

Administrative review division

- 8.11 Many of the tribunals included in the administrative review division hear appeals from the first-instance decisions of officials or government agencies. The case before such tribunals is effectively a first general appeal on fact and law. We do acknowledge though that the hearing before the tribunal is the first opportunity for a hearing before a body that is independent from the administering official or agency. But we think that the interests of finality mean that some limits must be placed on the number of times the facts of each case are reviewed. We think that appeals from most of the tribunals in the administrative review division should be restricted to matters of law, as they currently are. This still allows for a second opportunity to correct or address matters of legal principle that may be of broader application.
- 8.12 One exception though should probably be made for the Taxation Review Authority. Currently taxation legislation provides for a general right of appeal to the High Court on questions of both fact and law and a general right of appeal to the Court of Appeal.²⁴⁶ Currently a taxpayer can also choose whether to commence tax proceedings before the Taxation Review Authority or in the High Court. It is essential to retain consistent rights of appeal across taxation proceedings regardless of forum so we suggest that there should continue to be a general right of appeal against decisions of Taxation Review Authority. Litigants who elected to commence proceedings in the tribunal rather than the High Court should not be disadvantaged.

Other appeal tribunals

- 8.13 The Liquor Licensing Authority also has an appellate jurisdiction. When it is sitting as an appeal authority, rather than exercising its first instance jurisdiction, appeals should also be restricted to matters of law. However where the Authority exercises its first instance jurisdiction, a general right of appeal on fact and law

²⁴³ See New Zealand Law Commission *Tribunals in New Zealand* (NZLC IP6, Wellington, 2008) para 8.13 – 8.15.

²⁴⁴ *CIR v Walker* [1963] NZLR 339, 353 (CA) Gresson P.

²⁴⁵ Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2003 Supplement to the 2001 Edition* (Wellington, 2003) 133.

²⁴⁶ See Taxation Review Authorities Act 1994, ss 26, 26A and 28.

would seem to be appropriate, as it is from other first instance tribunals. The Trans-Tasman Occupations Tribunal hears appeals from registration authority decisions. Appeals from this tribunal can also be restricted to matters of law for the same reasons.

Limiting appeal rights for low value civil claims

- 8.14 As already noted, rights of appeal are at odds with the principle of finality. Sequences of appeals cause delay and add to the costs the parties incur in resolving a dispute. The additional cost and delay associated with appeals might not be justified where the matter in dispute is of relatively low value. Some tribunals, like the Disputes Tribunal, have been designed primarily to resolve large numbers of ‘small claim’ disputes quickly and cheaply. In such tribunals there is something of a trade-off between speed and finality and the benefits of scrutiny and error correction in individual cases that an appeal might offer. Questions of volume and proportionality are most relevant in the inter partes division tribunals that are designed to resolve large numbers of low value disputes quickly and efficiently.
- 8.15 We think that restricted rights of appeal are appropriate in the Disputes Tribunal. A full general right of appeal on fact and law seems to us to be disproportionate to the nature and value of the matters in dispute in such cases before this tribunal. There is often a need for an immediate final decision also from this tribunal. Restricted rights of appeal are, for similar reasons, also appropriate in the Motor Vehicle Disputes Tribunal and Tenancy Tribunal when these tribunals are resolving ‘small claims’.
- 8.16 Currently the grounds of appeal from the Disputes Tribunal are limited to procedural fairness. Appeals on ‘small claims’ before the Motor Vehicle Disputes Tribunal are similarly limited. An appeal is available where the manner in which the tribunal conducted the hearing was unfair to the appellant and in addition, prejudicially affected the result of the proceedings.²⁴⁷ There is no appeal on the merits of the case. Nor is there an appeal on a matter of law. The courts have determined that a Disputes Tribunal referee must consider any legal principle of which he or she may be made aware in a fair and unbiased manner and apply the law as he or she understands it in an impartial manner to the facts as found. However, the referee may depart from the law when strict observance of it would prevent the referee determining the dispute according to the substantial merits and justice of the case. Where the referee does this, his or her assessment of relevant legal principles is not open to challenge on appeal.²⁴⁸
- 8.17 Restricting the grounds of appeal for cases that are of low monetary value seems appropriate and in keeping with the scheme of the Act. However restricting appeals to procedural fairness may be more restrictive than the situation requires. The Principal Disputes Tribunal Referee has proposed a slight broadening of

247 See Disputes Tribunals Act 1988, s 50.

248 See *NZI Insurance v Auckland District Court* [1993] 3 NZLR 453 (HC) Thorp J There may be grounds for review by the High Court where the tribunal makes an error of law that is so material to its decision that it leads to a result which is plainly unjust in terms of the substantial merits of the case. See *Director-General of Social Welfare v Disputes Tribunal* (1999) 12 PRNZ 642; *Evans v Disputes Tribunal at New Plymouth* (2000) 14 PRNZ 183; and *Bellis v Disputes Tribunal* (HC Christchurch 5 September 2007), John Hansen J CIV – 2007-409-000731.

appeal rights to the grounds that a substantial wrong or miscarriage of justice has or may occur. This would make it clear that there is a right of appeal in those cases where a decision is substantially wrong or unjust regardless of whether the process was fair.²⁴⁹ We are supportive of this type of approach being taken. We think that a test that allowed an appeal where the dispute had not been determined on its substantial merits would be more in keeping with the scheme of the Act also.²⁵⁰

- 8.18 We suggest that the same test could apply to appeals from decisions of the Motor Vehicle Disputes Tribunal that fall below that tribunals 'small claim' threshold. In the interests of consistency we also suggest that consideration should be given to allowing appeals on similar restricted grounds from lower value cases before the Tenancy Tribunal.²⁵¹
- 8.19 It should be noted here that there have been calls for the jurisdictional limit of the Disputes Tribunal to be increased beyond the current limit of \$7,500.²⁵² We found, during our consultation on the project, that there was significant support for increasing the current limits,²⁵³ which have not been increased since 1998.²⁵⁴ If the jurisdictional limit was increased significantly then a two-tiered approach to appeal rights might need to be considered. A two-tiered approach currently applies in the Motor Vehicle Dealers Tribunal. Appeal rights are of a more restricted nature for claims of \$12,500 or less, but there is a general right of appeal for claims over this amount.²⁵⁵ We think a similar split approach would be appropriate if the Disputes Tribunal jurisdiction was extended to a similar level.
- 8.20 In some situations parties before the Disputes or Tenancy tribunals may be able to seek a rehearing. Rights of rehearing are additional to appeal rights. We note that there is currently no right to seek a rehearing before the Motor Vehicle Disputes Tribunal and that the rehearing provisions differ between the Tenancy and Disputes Tribunals. In the interests of consistency attention may need to be given to these provisions. It would seem sensible to have one consistent set of provisions for these tribunals.

249 Judges when faced with decisions that are clearly and fundamentally wrong currently have to either let them stand or try and bring them within the grounds of procedural fairness. This has led to something of a gloss being placed on the wording of s 50 of the Act. In one case Goddard J suggested that an appeal was available where a dispute had not been determined in accordance with the substantial merits and justice of the case when the result of the proceedings was materially and prejudicially affected. See *New Zealand Insurance Ltd v Blenheim District Court* (2001) 16 PRNZ 493 (HC) (Goddard J) 499.

250 Further consideration will need to be given to the wording of the provision.

251 There is currently no right of appeal from a decision where the amount in dispute is less than \$1,000 but a general right of appeal on all higher value claims. We are therefore suggesting a change here also. We think there should be a limited right of appeal restricted to substantive unfairness for low value claims. The general right of appeal that currently exists should be retained for higher value claims.

252 Disputes Tribunals Act 1988, s 10. Section 13 of the Act provides that the tribunal's jurisdiction may be extended by agreement between the parties to \$12,000.

253 These submissions were made even though this was not an issue we were examining as part of the project. We received a number of submissions on this issue and it was raised in consultation meetings with community law centres also.

254 These jurisdictional limits were set by the Disputes Tribunals Amendment Act 1998 (1998 No 84).

255 See Motor Vehicle Sales Act 2003, sch 1, cl 16.

8.21 As already discussed, we think there should generally be two appeals from a tribunal decision. The second appeal should be confined to matters of law only and leave should be required for a second or subsequent appeal. We acknowledge that the matter is not uncontroversial, and has implications for the workload of the courts. We consider though that a principle of normally allowing two opportunities of appeal in respect of substantive decisions is appropriate for most tribunals.²⁵⁶ However issues of proportionality are relevant also. In some cases one appeal is sufficient. In other cases the issues in dispute are of a nature that may require a right of appeal all the way through to the Supreme Court.

Small claims – only one appeal

8.22 Under the proposals already outlined appeals from the Disputes Tribunal and ‘small claims’ from the Motor Vehicle Disputes Tribunal and Tenancy Tribunal would be confined to the grounds that the decision is substantially wrong. A second appeal on a question of law would not therefore be appropriate because of the restricted nature of the first appeal. We think there should only be one appeal from these decisions.²⁵⁷

Second appeals normally confined to matters of law only

8.23 In all other cases we think a second right of appeal should be available. With the exception of taxation, which has already been discussed, we favour second appeals being confined to matters of law. A leave requirement will in our view help guard against frivolous or unmeritorious appeals taking up court time.²⁵⁸

Further appeals rarely needed

8.24 Currently appeal pathways from some tribunals go all the way to the Supreme Court, while others stop at the District or High Court. We question whether it is necessary to have more than two appeals, but accept that legal issues of significance may, at least in theory, arise before almost any tribunal. We are therefore hesitant to exclude the possibility that a tribunal case might be appealed all the way to the Supreme Court. We note that on occasion cases have actually gone from tribunals to the Supreme Court.²⁵⁹ We think it will be very rare for tribunal cases to be appealed that far, but don’t think the possibility should be precluded. In any event, if leave is required for second and subsequent appeals, only those rare cases that have salient legal issues can proceed.

256 In *Delivering Justice for All* the Law Commission expressed the view that there should generally be at least two opportunities to appeal most substantive matters in the courts; one as of right, and a further opportunity if leave is granted by the court to which the appeal is proposed. New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004) para 80.

257 There would be a second right of appeal however from Tenancy Tribunal and Motor Vehicle Disputes Tribunal decisions in cases that were over the ‘small claims’ threshold.

258 However we acknowledge that some argue that imposing a leave requirement can be costly and time-consuming for litigants and does use up court time hearing applications for leave. If leave has to be sought from the High Court then an interlocutory fixture is required to determine whether leave will be granted. Some argue that this step is unnecessary and causes delay in the resolution of the appeal if leave is granted. See Andrew Beck “Litigation with Andrew Beck” [2008] NZLJ 133, 134.

259 For example the case *Arbuthnot v Chief Executive of the Department of Work and Income* [2008] 1 NZLR 13 (SC).

APPELLATE
PROCEDURES
AND POWERS

- 8.25 In this section we consider the procedures and powers that should apply to appeals from tribunals. We suggest that appeals from tribunals should normally be by way of rehearing, although in a few cases hearings *de novo* might be appropriate. Where appeals are currently heard by way of the case-stated procedure we think a change is needed. We also propose that a consistent set of broad powers be available to the courts when determining appeals.

Appeal by way of rehearing

- 8.26 By far the most common procedure for an appeal is by way of rehearing. The expression “appeal by way of rehearing” has a technical meaning. It does not mean that the court starts with a clean slate. Rather, the court has to come to its own conclusion, based on the material presented before the tribunal, and any further evidence which has been admitted.²⁶⁰ Appeals, including those limited to matters of law,²⁶¹ will be by way of rehearing unless the statute conferring the right of appeal specifies another approach.²⁶²
- 8.27 On a re-hearing the appeal is heard on the record of evidence given in the tribunal below, subject to a discretionary power to rehear the whole or any part of the evidence or even to receive further evidence.²⁶³ Where there is a general appeal on fact and law the appellate body is not limited by findings which the tribunal made and may draw different inferences from the evidence where these are warranted.²⁶⁴ However where the tribunal had some particular advantage, such as technical expertise or the opportunity to access the credibility of witnesses, an appellate body may hesitate to conclude that the tribunal’s findings of fact and degree are wrong.²⁶⁵ But the extent of the consideration an appeal court exercising a general power of appeal gives to the decision appealed from is a matter for its judgment. On a general appeal, the appeal court has the responsibility of arriving at its own assessment of the merits of the case.²⁶⁶
- 8.28 An appeal by way of re-hearing strikes an appropriate balance between the flexibility to correct errors and the need for appeals to be expeditiously resolved.²⁶⁷ This is by far the most common form of appeal from tribunal decisions currently.²⁶⁸ We think that it should continue to be the procedure used for most rights of appeal.

260 RA McGechan (ed) *McGechan on Procedure* (Looseleaf, Brookers, Wellington) HR 718.01 (last updated 16 May 2008).

261 Rule 718 of the High Court Rules, which provided that appeals are by way of rehearing, applied to an appeal to the High Court on a question of law because s 59 of the Legal Services Act 2000 was ‘uninformative’ as to the nature of the appeal. The appeal was therefore by way of rehearing: *Kelly v Legal Services Agency* (2004) 17 PRNZ 449, 451 (HC) Williams J. Note that this rule is now Rule 20.18 of the new High Court Rules: *Judicature (High Court Rules) Amendment Act 2008*.

262 The other approaches which could be specified for an appeal are by way of case stated or hearing *de novo*, or words that make it clear one of these is intended.

263 *Shotover Gorge Jet Boats v Jamieson* [1987] 1 NZLR 437, 440 (CA) Cooke P.

264 *Billy Higgs & Sons v Baddeley* [1950] NZLR 605.

265 *Shotover Gorge Jet Boats v Jamieson* [1987] 1 NZLR 437, 441 (CA) Cooke P.

266 *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141, 147 (SC).

267 *Legislation Advisory Committee Guidelines on Process and Content of Legislation: 2003 Supplement to the 2001 Edition* (Wellington, 2003) 135.

268 See New Zealand Law Commission *Tribunals in New Zealand* (NZLC IP6, Wellington, 2008) Chapter 8 and appendix 2.

- 8.29 An appeal by way of re-hearing also brings into focus the importance of having an accurate record of the evidence given in the tribunal available. We think that consideration will need to be given to accurately recording proceedings before all tribunals.

Hearing *de novo*

- 8.30 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.²⁶⁹ Unsurprisingly, given the specialist expertise of tribunals, *de novo* appeals from tribunal decisions are very uncommon.²⁷⁰ We think that it may be appropriate to provide for *de novo* hearings before one or two tribunals, but we would not expect to see provision for a fresh hearing rather than a rehearing very often.²⁷¹ The added costs and delays count against a *de novo* hearing also.

Appeal by way of case stated

- 8.31 Appeals from the decisions of a few tribunals are by way of case stated to the High Court.²⁷² 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:²⁷³

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.

- 8.32 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 tribunal controls the formulation of the question.²⁷⁴ The Legislation Advisory Committee describes the case stated procedure as "cumbersome."²⁷⁵ 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.²⁷⁶ We think the criticisms above are still valid and suggest

269 *Shotover Gorge Jet Boats v Jamieson* [1987] 1 NZLR 437, 437 (CA) Cooke P.

270 Two examples are decisions of the Mental Health Review Tribunal and the Employment Relations Authority.

271 They may remain appropriate for the Mental Health Review Tribunal and the Employment Relations Authority. We note also that not all appeals from the Employment Relations Authority are *de novo*. See Employment Relations Act 2000, s 179.

272 For example the case stated procedure is used for all appeals to the High Court on questions of law from the Social Security Appeal Authority. It is only used for appeals from some decisions of the Taxation Review Authority.

273 *Harris, Simon & Co Ltd v Manchester City Council* [1975] 1 All ER 412 Lord Widgery CJ.

274 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).

275 Legislation Advisory Committee *Guidelines on Process and Content of Legislation: 2003 Supplement to the 2001 Edition* (Wellington, 2003) 137.

276 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.

that it would be preferable to simply abolish appeals by way of case stated in those few tribunals where they are used and replace them with an appeal by way of rehearing.

Powers of appellate courts and time frames

- 8.33 A consistent approach has not been taken to the granting of powers to appellate courts. The legislation establishing some tribunals sometimes specifies the powers the court has when determining appeals. In such cases these specific provisions displace all rules of court that are inconsistent with them. In other tribunals the District Court or High Court Rules govern appeals without supplementary legislative provisions. In some cases the provisions included in an Act establishing a right of appeal limit the powers the courts would otherwise have under court rules when hearing an appeal.²⁷⁷ In others they expand the options to include specific remedies.
- 8.34 We favour a consistent approach being taken, and think a standard broad set of powers should be available to the courts when determining appeals from tribunals. If most appeals are by way of rehearing, as proposed, then the powers of the court on appeal that are currently available under the District Court and the High Court Rules would seem to contain all the powers the courts require to resolve appeals.²⁷⁸ If appeals were eventually to be to an appellate tribunal rather than the courts, then these rules of court might still provide a useful model. In either case it is important that the appellate body not only has the power to reverse, confirm or amend the decision or remit the matter back to the tribunal for reconsideration, but also has the power to make any decision it thinks should have been made. This broad set of powers would then allow the appellate body to deal with all matters that arise as a result of their determination without needing to send matters back for further decision from the tribunal. Where appropriate the appellate body could still refer matters back.
- 8.35 Finally, there are currently unhelpful and unnecessary differences between the time limits that apply in different tribunals for filing an appeal. We favour a standard time period for filing all appeals. The appellate court should also have the discretion to extend time for an appeal where this is appropriate. It would be easier for the parties, those hearing appeals, and those administering tribunals, if there were standard time provisions governing all tribunal appeals.

SHOULD AN APPELLATE TRIBUNAL BE ESTABLISHED?

- 8.36 The question of whether the unified tribunal structure should include a new appellate tribunal is an important one. There are broadly two options:
- establish a new appellate tribunal as part of the proposed unified structure to hear appeals from all or some tribunals; or
 - have the courts resolve all appeals from tribunals.

²⁷⁷ R 561 of the District Court Rules applies to all appeals to the District Court under any enactment, but 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.

²⁷⁸ Under Rule 20.19 (previously 718A) of the High Court Rules 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.

8.37 Both options have merit. In this section we examine the arguments for and against establishing an appellate tribunal. Although we acknowledge that some hold a different view, we conclude that an appellate tribunal is not needed at this stage. We think the courts should continue to hear appeals from tribunals, and suggest some principles for determining whether first appeals should be to the District or High Court. While we do not think an appellate tribunal should be established within the unified tribunal structure at this stage, we do not wish to close off the option of one being included in the structure at some later date.

Arguments for and against an appellate tribunal

Issues of specialism and membership

8.38 An appellate tribunal could import many of the advantages of tribunals: specialisation, flexibility and accessibility. It could also operate more speedily than the courts. Where functions have been conferred on tribunals for these reasons it might seem to be appropriate that appeals from tribunals be dealt with by another higher tribunal expert in the particular operation of tribunals. This argument will be more compelling where appeals are general appeals on both fact and law and not restricted to matters of law.

8.39 However, there are equally advantages in having appeals heard by the courts. Judges are trained and expert in dealing with appeals and matters of law and procedural fairness. Why establish an alternative appeal body within the tribunal structure when it will duplicate the work the courts already do? Some appeals are confined to matters of law. These are readily determined by the general courts which are experts in the law. The courts are also well able to deal with appeals involving mixed questions of law and fact. In addition courts (in particular District Courts) sit in a large number of locations throughout New Zealand: an appellate tribunal would for the most part be confined to one location.

8.40 It can also be argued that when an appeal is being considered, wider issues of principle are more important and specialist knowledge and expertise less so. The responding argument is that specialist knowledge can still be important at the appellate stage to avoid fundamental misunderstandings of technical factual issues. Even if this counter argument is accepted, the inclusion of specialist knowledge can be difficult to achieve in an appellate tribunal which deals with appeals from a range of tribunals. An appellate tribunal could only incorporate subject specific expertise if it drew members from a broad pool that covered the areas of expertise of the included tribunals.

8.41 If an appellate tribunal was established as part of the unified structure it would be presided over by the Principal Judge of Tribunals. We think this would be essential because the Principal Judge has responsibility for the overall leadership of the tribunal structure. The Heads of Divisions or the Occupational and Industry Regulation Group Chair might also be expected to be members of the appellate tribunal. They might sit instead of, or with, the Principal Judge in cases from their division or group. To provide subject specific expertise the appeal tribunal would need to draw on a panel of other members. These are likely to be the more experienced members of the included tribunals.

- 8.42 An overlap in panel membership between the appellate tribunal and other tribunals is therefore inevitable. Based on current figures,²⁷⁹ there are unlikely to be enough appeals from most tribunals to justify having a separate panel of members who only hear appeals. Overlapping membership raises a number of issues. Some may view an appeal tribunal comprised of members at the same level as those that made the original decision as not a true appeal. Having members at the same level determine appeals against the decisions of their peers may also affect the development of collegial relationships across the structure. Equally, if appeals were all heard by the Principal Judge and Heads of Division, this would alter the nature of the relationships between these leaders and tribunal members. Public perceptions of fairness may also be different if appeals were all heard by those responsible for the leadership of the tribunal service.
- 8.43 There are also limits on the range of appeals such an appellate tribunal could hear. The appellate tribunal would be presided over by the Principal Judge of Tribunals,²⁸⁰ a judge appointed at a level equivalent to the District Court.²⁸¹ An appellate tribunal chaired by the Principal Judge would therefore sit at about District Court level. This places some limitation on the matters which this tribunal could determine. For reasons we discuss in the next section of this chapter, we think appeals from the tribunals included in the administrative review division, and certain other tribunals, must be to the High Court.²⁸²
- 8.44 An appellate tribunal, if established, would not therefore hear all appeals, but it would hear all appeals that would otherwise be heard in the District Court. This could include appeals from tribunals that are outside the unified tribunal structure that are currently heard by the District Court.
- 8.45 Specialist appeal tribunals or panels have been included in only two of the overseas models we have examined: the UK Tribunal Service and the Administrative Decisions Tribunal in New South Wales.²⁸³ In both cases the appellate tribunal does not hear all appeals from the tribunals included in the structure. Some appeals are heard by the ordinary courts. The Upper Tribunal in the UK Tribunal Service is, like the New Zealand High Court, a superior court of record presided over by the Senior President of Tribunals.²⁸⁴ The Appeal Panel in the Administrative Decisions Tribunal hears appeals from a few tribunals and

279 See the table showing current numbers of appeals in para 8.46.

280 We also considered the option of the appeals panel being headed by a High Court Judge, but ruled this out as incompatible with the proposal that the unified tribunal structure should be under the overall leadership of the Principal Judge of Tribunals.

281 In contrast the two overseas models that include appeal bodies are presided over by Judges of the superior courts. The UK Tribunal Service is headed by a Lord Chief Justice (NZ Court of Appeal equivalent) and the Administrative Decisions Tribunal in New South Wales is headed by a Supreme Court Judge (NZ High Court equivalent).

282 See paragraphs 8.49 – 8.64 below.

283 See Chapter 4 above and New Zealand Law Commission *Tribunals in New Zealand* (NZLC IP6, Wellington, 2008) Chapter 11 for a discussion on the overseas models we examined. An appellate tribunal has now also been proposed for Queensland. See Tribunals Review Independent Panel of Experts *Queensland Civil and Administrative Tribunal: Stage 1 report on scope and initial implementation arrangements* www.tribunalsreview.qld.gov.au (accessed 8 September 2008).

284 Tribunals, Courts and Enforcement Act 2007 (UK), s 5.

courts that are not part of the tribunal structure.²⁸⁵ The membership of the Appeal Panel is not separate, but is drawn from the membership of the different divisions included in the Tribunal.²⁸⁶

Practical considerations

8.46 As well as the matters of principle discussed above there are also other more practical considerations that persuade us that an appellate tribunal, and the additional cost associated with its establishment, is not justified at this stage. Firstly, the number and nature of appeals is an important practical consideration. The table below shows that a total of 416 appeals were heard by the District Court in the 2005/06 year. Of these 345 or a little over 80 % were appeals from the Disputes Tribunal.²⁸⁷ For comparative purposes a table showing similar figures for appeals to the High Court in 2005/06 year is also included.²⁸⁸

Table 1: Appeals heard by District Court in 2005/06

Tribunal	Appeals heard in 05/06
Disputes Tribunal	345
Tenancy Tribunal	56
Motor Vehicle Disputes Tribunal	15
Registrar of Private Investigators and Security Guards	No figures
Licensing Authority of Secondhand Dealers and Pawnbrokers	0
Weathertight Homes Tribunal	New tribunal
Total	416

285 The Appeal Panel of the ADT hears appeals from the Guardianship Tribunal and, in respect of protective estate orders, the Mental Health Review Tribunal.

286 The Appeal Panel comprises a presidential member, a judicial member and a non-judicial member. The usual practice is for the President or the Divisional Head of the relevant Division to preside at appeals.

287 The figures used to compile these tables were supplied by the Ministry of Justice.

288 These figures do not include second or subsequent appeals.

Table 2: Appeals heard by High Court 2005/06

Tribunal	Appeals heard in 05/06
Legal Aid Review Panel	6
War Pensions Appeal Board	No appeal rights
Taxation Review Authority	5
Customs Appeal Authority	0
Immigration Tribunals	28 (Deportation Review Tribunal 10, Removal Review Authority 6, Residence Review Board 3; Refugee Status Appeal Board 9)
Social Security Appeal Authority	10
Student Allowance Appeal Authority	No appeal rights
State Housing Appeal Authority	0
Medicines Review Committee	0
Catch History Review Committee	No appeal rights
Human Rights Review Tribunal	2
Trans-Tasman Occupations Tribunal	0
Liquor Licensing Authority	2
Weathertight Homes Tribunal	New tribunal
NZ Lawyers and Conveyancers Disciplinary Tribunal	New tribunal
Real Estate Agents Disciplinary Tribunal	Proposed tribunal
Total	53

- 8.47 Most appeals that an appellate tribunal would deal with are therefore currently from the Disputes Tribunal. This tribunal has a broad general jurisdiction rather than a specialist jurisdiction. Appeals from the Disputes Tribunal are also, for the reasons discussed earlier in the chapter, currently confined to matters of procedure.²⁸⁹ It follows then that the advantages of specialisation and expertise, which is the strongest principle-based argument for an appellate tribunal, is not actually relevant for most appeals. Judges are trained and expert in dealing with appeals and in matters of law and procedural fairness. The District Court also has a similar broad civil jurisdiction and deals with the same type of cases when the value of claims is higher. The bulk of current appeals therefore fall squarely within the expertise and ordinary work of this court.
- 8.48 The second practical consideration is whether the establishment of an appellate tribunal will have any impact on the workload of the District Court. If an appellate tribunal was established appeals work, which is currently spread across the District Courts, would be taken over by the appellate tribunal. Such a redistribution of work could, in theory, free the court up for other work. However, information from the Ministry of Justice indicates that appeals to the District Court from tribunals currently makes up only a small proportion of

²⁸⁹ Earlier in this chapter we proposed changing the grounds of appeal to include the grounds that the decision is substantively wrong and unjust. See paras 8.14 – 8.19.

the District Court's civil case work load.²⁹⁰ It is not clear that there would be any noticeable benefit in terms of a reduction in the work of the District Court if an appellate tribunal was established. Without a commensurate benefit it would be hard to justify the added costs associated with a new appellate tribunal.

- 8.49 After weighing all the different considerations and factors canvassed above, we are not persuaded that an appellate tribunal is presently necessary to deal with appeals. The Law Commission therefore does not favour the inclusion of an appellate tribunal in the unified structure at this time.

Appeals heard by the courts

- 8.50 If appeals are to be heard by the courts we need to also consider which court should hear which appeals. Should some appeals be directly to the High Court, while others are heard in the District Court? Or should all be to the same court, and if so, which court?
- 8.51 Consistency must be a guiding principle, but the nature and importance of the issues under appeal differ considerably. The tribunals included in the reform have different functions, so uniformity is simply not appropriate. The function and membership of each tribunal is also relevant when deciding which court should hear appeals. The experience and standing of the membership of different tribunals is closely linked to the significance of the rights and interests in disputes resolved by each tribunal.
- 8.52 Whether appeals from tribunals are heard by the District or High Court will depend therefore, at least in part, on these factors. The unified tribunal structure is to be headed by a Principal Judge, appointed at District Court level. Some of the tribunals included in the structure are also chaired by District Court Judges, while other tribunals, although not chaired by judges, clearly also sit at a similar level as the District Court. Appeals from some tribunals therefore need to be to the High Court.
- 8.53 The courts themselves form a hierarchy and have different functions in our legal system. This is also relevant in deciding which court should hear appeals from the different tribunals within the reform. Both the District and High Courts have a broad jurisdiction, although there are important differences. The District Court is an inferior court because its limited statutory jurisdiction is inferior to that of the High Court, which is a superior court.²⁹¹ The High Court has an unlimited jurisdiction of “all judicial jurisdiction which may be necessary to administer the laws of New Zealand”.²⁹² The High Court has a general supervisory jurisdiction over the proceedings of inferior courts and tribunals and over the exercise of statutory power generally. The High Court may also intervene to

290 Although the number of appeals from tribunals represents approximately 19% of the total number of civil cases, the time spent on these appeals forms only a small portion of the courts' work when measured in court hours.

291 Judicature Act 1908, s 2 defines 'inferior court' in this way.

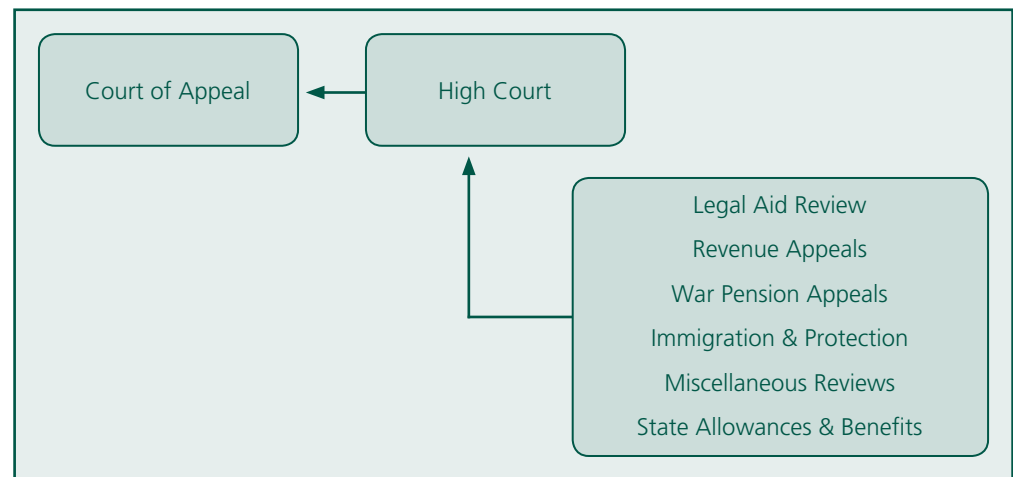
292 Judicature Act 1908, s 16.

protect an inferior court or tribunal from abuse of process.²⁹³ The High Court therefore has responsibility within our system of courts for the supervision and the maintenance of legality and standards of public administration.

- 8.54 The District Courts have a broad jurisdiction, although it is derived solely from statute. They have jurisdiction to hear and determine civil claims founded upon statute, contract, tort or equity up to a monetary limit of \$200,000.²⁹⁴ They also exercise an extensive criminal jurisdiction.²⁹⁵ In addition to their current appellate jurisdiction in respect of tribunals, they exercise an appellate function in respect of many licensing and occupational registration matters.²⁹⁶ District Courts have been aptly described as ‘the workhorses of the New Zealand judicial system’.²⁹⁷ In addition the District Court is more readily accessible, with a much broader geographical spread, and a lower costs structure, than the High Court.

Administrative Review Division

- 8.55 A number of tribunals in this division are chaired by, or have members who are, District Court Judges. All appeals from tribunals chaired by District Court Judges are currently heard in the High Court. This is appropriate given the standing and membership of the tribunals and that court’s status as a superior court. Appeals from administrative review tribunals are also, in many cases, appropriately restricted to matters of law. Again, given the High Court’s general supervisory jurisdiction over the proceedings of inferior courts and tribunals, it would seem appropriate for appeals on law and rights of review to converge in the one court. Appeals from the tribunals in the administrative review division should continue to be heard in the High Court.
- 8.56 The appeal pathways are illustrated in the following diagram:



293 *The Laws of New Zealand* (LexisNexis, Wellington, 2008) Courts para 136 (last updated 31 March 2008) www.lexisnexis.co.nz.

294 District Courts Act 1947, ss 29-30 and 34.

295 District Courts Act 1947, s 28A.

296 For example District Court Judges determine appeals against licensing decisions under the Arms Act 1983, and the Hazardous Substances and New Organisms Act 1996. Appeals from registration decisions under the Health Practitioners Competence Assurance Act 2003 are also heard by the District Court as are appeals under the Injury Prevention, Rehabilitation, and Compensation Act 2001.

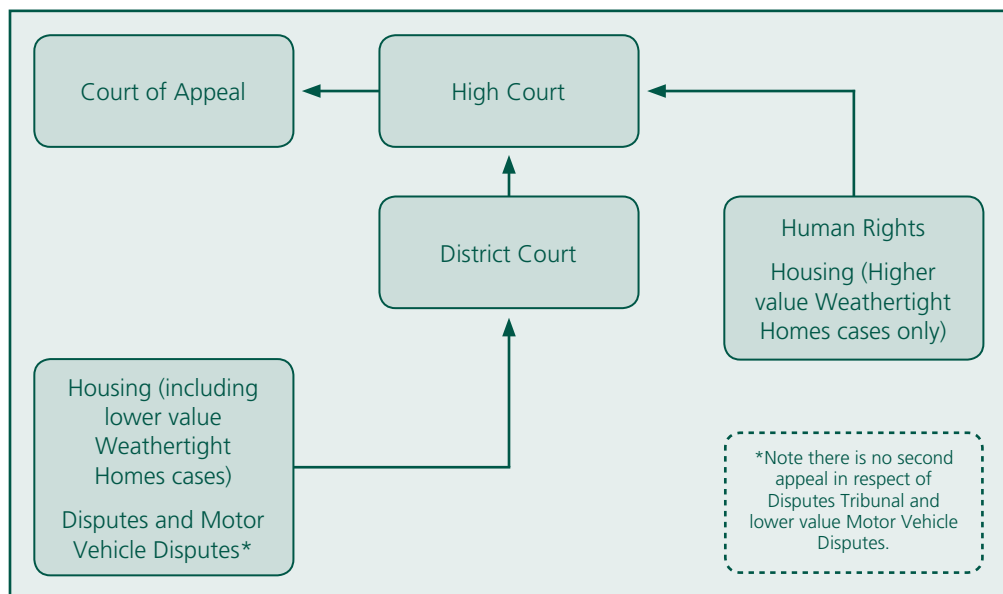
297 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) 796.

Inter Partes Division

8.57 In contrast, the District Court can be considered more appropriate for appeals from most of the tribunals in this division. The District Court currently has jurisdiction to hear appeals from the Disputes Tribunal, the Motor Vehicle Disputes Tribunal, the Tenancy Tribunal, and the Weathertight Homes Tribunal in cases where the amount of the original claim does not exceed \$200,000. As already noted, appeals from the Disputes Tribunal and Motor Vehicle Disputes Tribunal are limited to procedural fairness. Appeals from the other tribunals are general appeals on fact and law. All are civil claims and fall within the broad range of work that is currently undertaken by the District Court. The District Court is also more readily accessible, which is another important consideration.

8.58 We think however, that appeals from the Human Rights Review Tribunal should continue to be heard in the High Court. We identified this tribunal as being of particular significance in *Tribunals in New Zealand*. There we suggested that there is an argument for giving full lifetime tenure to the head of this tribunal because it makes particularly significant decisions. 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 1990.²⁹⁸ Its decisions can have substantial societal or political implications. A right of appeal directly to the High Court appropriately reflects this tribunal's important role and function.²⁹⁹ Some appeals from the Weathertight Homes Tribunal will also need to be heard in the High Court because they exceed the jurisdictional limits of the District Court.

8.59 The suggested appeal pathways are illustrated in the following diagram:

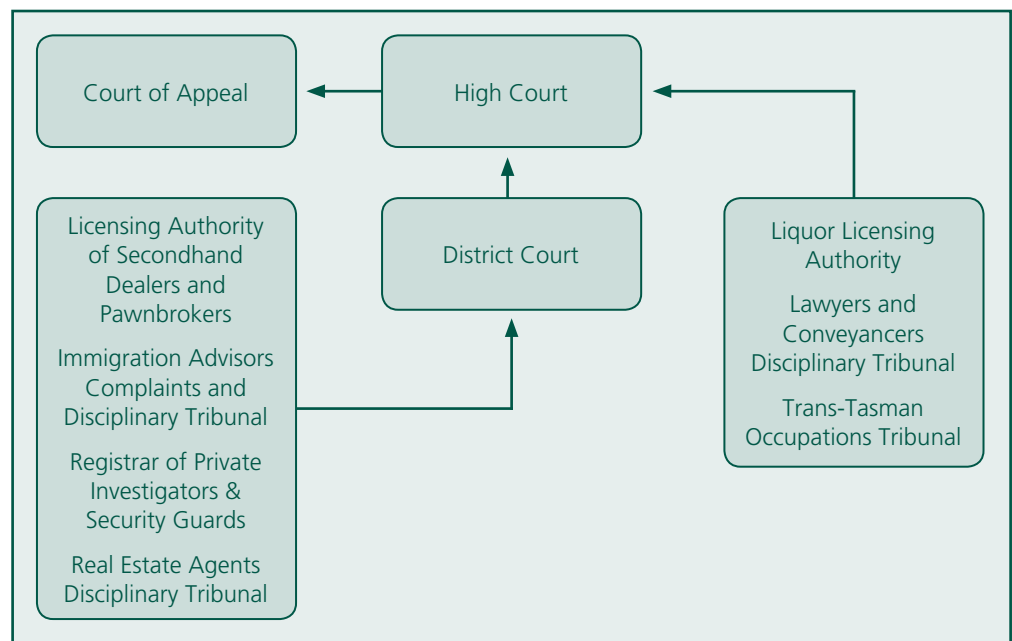


298 Human Rights Act 1993, s 92J.

299 The tribunal does also hear a number of cases that do not raise any significant issues. While appeals from less significant cases are perhaps not of a nature that merit the High Court's oversight, we did not consider it possible or appropriate to split the appeal jurisdiction between the District and High Courts. The monetary value of claims before the tribunal does not provide an appropriate basis for splitting jurisdiction in the way it does in other tribunals, such as the Weathertight Homes Tribunal.

Occupational and Industry Regulation Group

- 8.60 As noted, the District Court currently has an appellate jurisdiction in respect of many licensing and occupational registration matters from licensing bodies other than tribunals. It seems appropriate for it to therefore retain its appellate jurisdiction in respect of the occupational and industry regulation tribunals in this group.
- 8.61 In three cases however appeals should continue to be to the High Court. Firstly, appeals from the Liquor Licensing Appeal Authority will need to be to the High Court because the Authority is chaired by a District Court Judge. Second are appeals from the Trans-Tasman Occupations Tribunal. This body is reviewing the decisions of registration bodies. Appeals are restricted to matters of law so it would seem appropriate for them to continue to be heard by the High Court. Finally, under its inherent jurisdiction, the High Court can punish and discipline officers of the court. The High Court is responsible for the admission of barristers and solicitors and has a supervisory jurisdiction over this occupational group. Appeals from the Lawyers and Conveyancers Disciplinary Tribunal should also consequently continue to be heard by the High Court.
- 8.62 The suggested appeal pathways are illustrated in the following diagram:

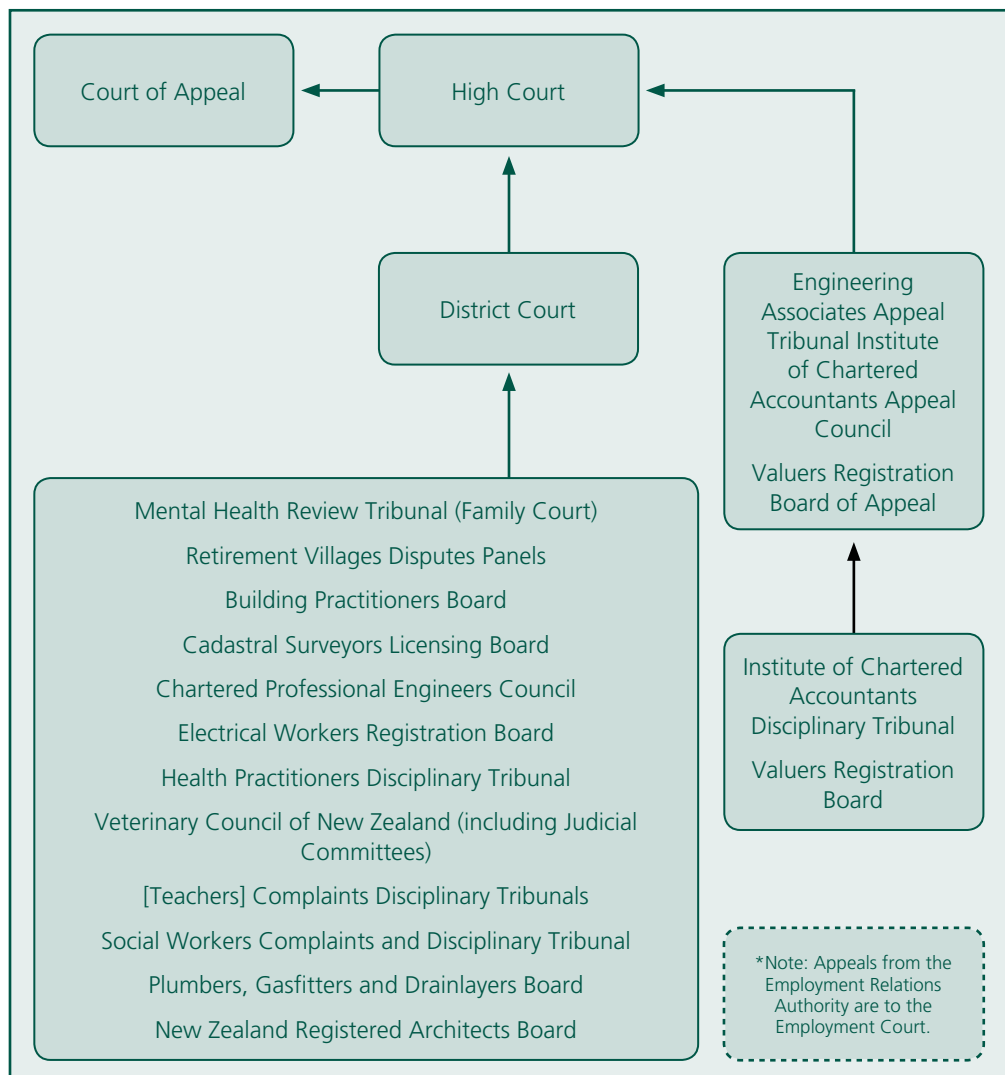


Tribunals in the broader legislative framework

8.63 We deal now with the tribunals outside the proposed tribunal structure, but within the broader legislative framework. We do not propose any changes to the specialist appeal arrangements from the Employment Relations Authority and the Mental Health Review Tribunal. Appeals would continue to be heard in the Employment Court and Family Court respectively. As already discussed, there should be a right of appeal on the law from the three specifically constituted occupational appeal tribunals.³⁰⁰ Given that these bodies are hearing appeals from the decisions of registration bodies it would seem appropriate for appeals from them to be heard by the High Court rather than the District Court. Some appeals from the Retirement Villages Disputes Panels will also need to be heard in the High Court because they exceed the jurisdictional limits of the District Court.

8.64 Appeals from all occupational tribunals included in the legislative framework should be to the District Court, which already has an appellate jurisdiction in respect of other licensing and occupational registration matters.

8.65 The suggested appeal pathways are illustrated in the following diagram:



300 The Engineering Associates Appeal Tribunal, the Institute of Chartered Accountants Appeal Council, the Valuers Registration Board of Appeal.

Summary

8.66 In summary, the following principles should apply to appeals:

- There should be a right of appeal from all tribunals.
- Appeals from a tribunal which is itself an appellate tribunal should normally be confined to a matter of law, and should be to the High Court. (An exception would be when fuller rights of appeal are required, as they are in the case of tax appeals.)
- Appeals from first instance tribunals that are dealing with small claims and decide cases on their merits rather than the strict application of the law should be confined to procedural unfairness and substantive injustice.
- In all other cases appeals from first instance tribunals should be general appeals on fact and law.
- There should normally be a second appeal by leave on a point of law. In cases where the first appeal is confined to procedural unfairness and substantive injustice a second appeal is not required. In some exceptional cases a second appeal might also be a general appeal.
- Appeals from tribunals should normally be by way of rehearing, although in a few cases hearings *de novo* should be retained. Appeals by way of case stated should be abolished.
- The powers of a court on appeal and the procedure for filing and hearing an appeal should be governed by a standardised set of provisions.
- The time limits for appeals should be standardised.

8.67 There is not a strong case for creating an appellate tribunal within the unified tribunal structure, at least at this time. Appeals from tribunals should continue to be heard by the courts. The following principles should apply to determining which court:

- Appeals from administrative review tribunals, tribunals headed by District Court Judges, and other tribunals that either resolve significant issues or determine disputes with a value beyond the jurisdictional limits of the District Court should be to the High Court.
- All other appeals should normally be to the District Court.

Chapter 9

Guidelines for new tribunals

- INTRODUCTION 9.1 There is a need to consider how tribunals and the unified tribunal structure will develop and change in the future. When should new tribunals be established? What features should they have? Should they all be included in the unified tribunal structure? This chapter sets out some broad principles that should be considered before new tribunals are established. We think that these principles might form a basis for developing guidelines to manage the future development of tribunals. The chapter also considers the related issue of how the unified tribunal service could expand in the future to incorporate other tribunals.
- 9.2 We think it is important to consider these two issues at this stage to ensure that the new tribunal service is designed to accommodate future changes.
- GUIDELINES FOR NEW TRIBUNALS 9.3 The history of tribunal development, which we examined in *Tribunals in New Zealand*,³⁰¹ illustrates that tribunals have been established on an ad hoc basis in response to changing social and commercial needs. New tribunals have been established and others disestablished reflecting the changing requirements of different social and commercial regulatory schemes. It is inevitable that regulatory schemes and the forms of dispute resolution used within them will change.
- 9.4 But there does seem to be a tendency for groups or sectors of the community to agitate for a new tribunal to be created whenever a new problem emerges, often because it is perceived that the existing court system does not respond in a suitable, proportionate or cost-effective way to the demands which need to be addressed. One of the main reasons for the current diversity of tribunals is that they have generally been established indiscriminately, sometimes in response to a particular issue or pressure point, without an eye to coherence or a principled structure. As our history demonstrates, there is a risk of fragmentation and inconsistency in this approach.
- 9.5 To avoid the ad hoc development of tribunals continuing into the future and undermining the rationalisation that can be achieved by the proposed unified tribunal service and legislative framework, new tribunals should only be established in future in accordance with clear and agreed principles.

301 See New Zealand Law Commission *Tribunals in New Zealand* (NZLC IP6, Wellington, 2008) Chapter 1.

We think that guidelines are needed to ensure that agreed principles govern the establishment and design of future tribunals. These guidelines should be considered by departments and Ministers when considering proposals for new tribunals.³⁰² The Commission envisages that the Ministry of Justice would lead the development of these guidelines, but there would need to be input from other agencies. Once guidance has been developed and adopted by the Government, departments could be required to report their compliance with the guidelines when proposing a new tribunal. The guidelines could also apply where significant changes are proposed to an existing tribunal. The Ministry of Justice should be consulted on proposals that affect tribunals and could advise departments and agencies on the guidelines and issues relating to tribunals.

Principles for establishing new tribunals

- 9.6 Whenever there is a call for a new tribunal we think a principle-based analysis must be undertaken. The following questions can usefully be considered by policy makers at the outset:³⁰³
- Can this matter be dealt with through the ordinary mechanisms of the general courts? Are there compelling reasons relating to subject-matter or process which require a tribunal?
 - If it is thought that a tribunal is required, can an existing tribunal deal with this matter, rather than creating a new one?
 - If a new tribunal is found to be needed, it should be included within the unified tribunal structure, unless there are good reasons to exclude it and have it free-standing.
 - Any free-standing tribunal would be included in the broader legislative framework that applies to all tribunals.

Is a new tribunal needed?

- 9.7 The first question really anticipates policy makers identifying clearly the reasons why a tribunal rather than the courts or some other type of decision-maker is needed. The Legislation Advisory Committee in its 1989 report³⁰⁴ on tribunals identified three criteria for assessing whether the decision-maker under any new statutory scheme should be a court, a tribunal or an arm of the government. The three criteria developed by the Committee were:³⁰⁵
- identify the characteristics of the function, together with the issues to be resolved and the interests affected;
 - identify the qualities and responsibilities of the decision-maker; and
 - identify the procedure to be followed.

These criteria still provide useful guidance today. In all cases where the choice is between the courts or a tribunal the function can be characterised as adjudicative. If the function is not adjudicative then policy makers will be

302 This is not a new idea; the Law Commission recommended it in 2004. See New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004) 293 – 4.

303 The first 3 were identified by the Commission in 2004. See New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004) 293 – 4.

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

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

considering some form of government decision-maker rather than a tribunal or the courts.³⁰⁶ The choice between adjudication before the courts or before a tribunal will therefore be more dependent on the more subtle aspects of the function as well as the issues to be resolved and the interests affected. The qualities and responsibilities of the decision-maker and requirements of procedure are also important. The Legislation Advisory Committee suggested that the criteria be considered from the point of view of those affected by the decisions (the users) as well as from the point of view of the state.³⁰⁷

9.8 We think that if these criteria are applied then new tribunals may be required on occasion. A further question that might also sensibly be considered is the period of time for which the tribunal is needed. Consideration should also be given to undertaking periodic reviews of the continued need for any tribunal. In *Tribunals in New Zealand* we examined the purposes for which tribunals have been established.³⁰⁸ We would expect that these would continue to be the main purposes for which tribunals would continue to be established. In summary the main purposes for which we consider that 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.

Design issues for new tribunals

9.9 The guidelines should also address issues relating to the design of tribunals. For example there should be guidance to help policy makers determine the appropriate panel size and composition for any new tribunal. When is a single member tribunal most appropriate? When is a panel needed? How should the panel be composed and who should be involved in the selection and appointment? Guidelines might also provide direction on identifying the relevant membership expertise for new tribunals. When should legal expertise be a requirement for members? When is legal qualification unnecessary? The guidelines could also identify the types of situations in which it is appropriate to appoint a judge to head a tribunal.³⁰⁹ These are the same matters that we discussed in chapter 7 on the new legislative framework.

306 Within the broad category of executive government there are of course further choices to be made, between central and local government, between Ministers (and officials), crown entities or independent regulatory bodies.

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

308 New Zealand Law Commission *Tribunals in New Zealand* (NZLC IP6, Wellington, 2008) Chapter 2.

309 The principles that might be included in guidelines are set out in New Zealand Law Commission *Tribunals in New Zealand* (NZLC IP6, Wellington, 2008) Chapters 4 and 5.

- 9.10 The guidelines might also address the question of administrative support for any new tribunal. We would expect that the key principle here would be ensuring institutional independence between those administering the tribunal and those appearing before it or with an interest in the matters it resolves. As we have already stressed perceptions of independence can sometimes be as important as actual independence.³¹⁰ For these reasons we would expect new tribunals to be placed in the unified structure, and there to be supported by the Ministry of Justice.
- 9.11 We have already discussed in chapter seven the need for open merit-based selection processes being followed when appointing members to tribunals. In that chapter we have suggested that guidelines are needed to govern all appointments to tribunals. The guidelines for tribunal appointments that we have suggested in chapter seven would also apply to appointments to new tribunals.³¹¹

Can an existing tribunal be utilised?

- 9.12 Can an existing tribunal be adapted to deal with the new subject matter? This can be a complex question since it involves policy considerations relating to the consequences of expanding the jurisdiction of the existing tribunal as well as those relating to the reasons for establishing a new tribunal. Considerations such as similarity in function and subject-matter will be most relevant. Could the same membership, with the same skills, preside over both jurisdictions? Is there a high degree of commonality in the decision-making process in both cases? Could the same management systems and processes apply to both? In fact all the same considerations that arise when considering how to merge and cluster existing jurisdictions apply equally here.³¹²
- 9.13 We suggest that in the future the Principal Judge of Tribunals should also play an important advisory role on questions such as this.

Unified structure

- 9.14 The assumption must be that all new state tribunals will be included in the unified tribunal structure. We would anticipate that exceptions to this would be rare. Given the advantages we outlined in the earlier chapters, we think it unlikely that policy makers would not wish to include new tribunals in the structure. We would only see tribunals being established as stand-alone bodies where there were quite compelling policy reasons for keeping a tribunal separate. One example might be where the tribunal forms one part of an integrated dispute resolution process and it would adversely affect the overall process to separate out the tribunal.³¹³ Another reason might be that the new body is not a classic tribunal but is an occupational regulatory body which has a mix of functions including some that are not adjudicative.³¹⁴

310 The principles that govern institutional independence are set out in New Zealand Law Commission *Tribunals in New Zealand* (NZLC IP6, Wellington, 2008) Chapter 5.

311 This guidance might be developed by the Ministry of Justice and the State Services Commission.

312 For a discussion on these issues see Chapter 5, para 5.45 – 5.56.

313 It was for this reason for example that the Employment Relations Authority was excluded from the unified structure.

314 A number of the occupational bodies covered by the legislative framework are in this category. Any new bodies of this sort might be difficult to include in the unified structure.

- 9.15 Where new tribunals are to be included in the unified structure, the guidelines should contain some principles to assist in incorporating the tribunal into the structure. Again we would expect the Principal Judge to have some role in determining whether the proposed tribunal can be accommodated in an existing division or whether a new division is needed. The principles developed in chapter five for clustering tribunals on the basis of their function and subject-matter might provide the basis for this part of the guidelines.

Legislative framework

- 9.16 Even if a tribunal is to be free-standing, it would still be included in the broader legislative framework that is proposed for all tribunals. We think this is essential to ensure that there continues to be as much consistency as possible between the processes, powers, appeal rights and membership provisions that apply in tribunals. Although we would expect the framework to apply, all tribunals are different and the specific needs of any new tribunal would need to be considered. The core provisions in the legislative framework might need to be supplemented by further tailor-made provisions.

EXPANSION OF THE TRIBUNAL SERVICE

- 9.17 A separate but related issue is the question of expansion and evolution of the proposed unified tribunal structure. While this is really a matter for future consideration we have during the course of the project identified a number of tribunals or tribunal-like bodies that we think might also be considered, at some future stage, for inclusion in the tribunal structure. For the sake of completeness we identify these bodies and some of the issues surrounding their potential inclusion here. While we have not expressed any definitive views on the future inclusion of any of these bodies, we think it is important to ensure that the new tribunal service is designed in a flexible way so that it might accommodate additional tribunals at some later stage.

Occupational disciplinary tribunals

- 9.18 The majority of occupational disciplinary bodies will not form part of the unified structure initially. We concluded that it would be premature to bring occupational regulation and disciplinary bodies, which are administered by occupational groups, into the new structure at the set-up stage. There are many of them, and all have close links with the occupation involved.
- 9.19 However we also believe that this occupational area would benefit from a separate reform process, outside the current tribunal reform programme, to address current inconsistencies, issues of independence and the separation of registration and disciplinary functions. If these issues were addressed over time, it may be appropriate to reconsider in the future whether some or all of the remaining occupational discipline tribunals should be moved into the new structure. If this is thought to be desirable, it could happen incrementally over a number of years. This type of incremental approach has been taken in Victoria for example.³¹⁵

³¹⁵ This is the approach that was taken in Victoria with the Legal Practice List in VCAT replacing the old Legal Profession Tribunal in 2005 and new jurisdictions (such as the Health Professions) being added to the Occupational and Business Regulation List within VCAT. Under the Health Professions Registration Act 2007 VCAT can hold hearings into the professional conduct of health practitioners.

Retirement Villages Disputes Panels

- 9.20 One body that is currently outside the structure, but should be considered further, is the Retirement Villages Disputes Panel. These panels are in our view tribunals. They are constituted to hear disputes between operators and residents of retirement villages. Retirement Villages Disputes Panels are currently appointed by the operator of a retirement village, 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, particularly since these tribunals deal with the interests of vulnerable people. As we have already noted, we think that the legislation underpinning this tribunal needs to be reviewed and the issue of independence addressed. Once these issues are resolved we anticipate that this tribunal could more readily be incorporated into the unified structure.

Independent ACC Reviewers and District Benefit Review Committees

- 9.21 In the issues paper *Tribunals in New Zealand* the Commission identified two forms of neutral review that are utilised under two different statutory schemes.³¹⁶ One of these is the independent reviewer under the Injury Prevention, Rehabilitation and Compensation Act 2001 and the other is the District Benefit Review Committees established under the Social Security Act 1964. The line between these quite formal review mechanisms and tribunals is not always a clear one. We had some difficulty in determining which side of that line the independent reviewers under the Accident Compensation scheme fell, although ultimately we excluded them from the scope of the project.³¹⁷ It was clearer to us that the District Benefit Review Committees were neutral internal review mechanisms rather than tribunals.³¹⁸ Although the Commission did in the end exclude both of these review arrangements we received some submissions suggesting that these review arrangements should be considered further. A strong theme of those submissions was that both District Benefit Review Committees and independent Accident Compensation Scheme reviewers really should be established with a greater degree of independence so that they are independent tribunals. These proposals fall outside the scope of our project so we have not commented on them. However we believe further consideration needs to be given to both arrangements.

316 See New Zealand Law Commission *Tribunals in New Zealand* (NZLC IP6, Wellington, 2008) para 9.31 – 9.34.

317 The Corporation is required by the Injury Prevention, Rehabilitation and Compensation Act 2001 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 fulfils 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.

318 In *Arbuthnot v Chief Executive of the Department of Work and Income* [2008] 1 NZLR 13 (SC) the nature of the Benefit Review Committee was discussed. It was held not to be a judicial body.

Flexible design proposed

9.22 Given the potential for expansion, the unified tribunal structure should therefore be designed with some longer term expansion in mind. As discussed above there are also likely to be a few new tribunals established within the structure and others disestablished over time also. The building blocks of ‘divisions’ and ‘lists’ used in the proposed model should ensure that it, like its overseas counterparts, can be readily modified to adapt to New Zealand’s changing needs over time. New divisions and lists can be added if required, while the existing ones can also be modified without changing the fundamental structure. An important issue, which will therefore need to be resolved in the course of developing the implementing legislation, is the extent to which the structure is set by legislation. Care is needed to ensure that the structure is not too rigid and that there is sufficient discretion to shift and modify the arrangements of divisions and lists as this is required.

CONCLUSION

9.23 Guidelines are needed to ensure that tribunals do not continue to develop in an ad hoc fashion in the future. These guidelines, which should be considered before a new tribunal is established, should require departments to consider the following:

- Can the matter be dealt with through the ordinary courts? Are there compelling reasons relating to subject-matter or process which require a tribunal?
- If a tribunal is required, can an existing tribunal deal with this matter, rather than creating a new one?
- If a new tribunal is needed, it should be included within the unified tribunal structure, unless there are good reasons to exclude it and have it free-standing.
- Any free-standing tribunal would be included in the broader legislative framework that applies to all tribunals.

9.24 Guidelines should also contain the principles around clustering tribunals on the basis of function and subject-matter to assist in determining how any new or existing tribunals can be incorporated into the unified structure. Principles for determining optimum panel size and composition for tribunals should also be included.

9.25 Guidelines should be binding on departments and the Ministry of Justice should be consulted on and provide advice on all proposals to establish new tribunals.

9.26 It is anticipated that the unified tribunal structure will expand as required to include a number of existing tribunals as well as any new ones that are created under the proposed guidelines. The building block approach of ‘divisions’ and ‘lists’ can accommodate this type of change. In the course of developing legislation to establish the unified structure care will be needed to allow for such change.



Appendix



Appendix

List of tribunals within the scope of the tribunal reform programme

TABLE 1: TRIBUNALS WITHIN THE PROPOSED UNIFIED STRUCTURE

Administrative Review Division

Immigration and Protection Tribunal (proposed)

Legal Aid Review Panel

State Housing Appeal Authority

Social Security Appeal Authority

Student Allowance Appeal Authority

War Pensions Appeal Boards

Customs Appeal Authority

Taxation Review Authority

Catch History Review Committee

Medicines Review Committee

Inter Partes Disputes Division

Disputes Tribunal

Motor Vehicle Disputes Tribunals

Human Rights Review Tribunal

Weathertight Homes Tribunal

Tenancy Tribunal

Occupational and Industry Regulation Group

Real Estate Agents Disciplinary Tribunal

New Zealand Lawyers and Conveyancers Disciplinary Tribunal

Licensing Authority of Second-hand Dealers and Pawnbrokers

Registrar of Private Investigators and Security Guards

Immigration Advisers Complaints and Disciplinary Tribunal

Trans-Tasman Occupations Tribunal

Liquor Licensing Authority



TABLE 2: TRIBUNALS TO BE CONSIDERED FOR DISESTABLISHMENT

Health Act Boards of Appeal
Copyright Tribunal
Maritime Appeal Authority
Land Valuation Tribunals

TABLE 3: TRIBUNALS WITHIN THE WIDER LEGISLATIVE FRAMEWORK

Occupational and Industry Regulation

Building Practitioners Board
Cadastral Surveyors Licensing Board
Chartered Professional Engineers Council
Electrical Workers Registration Board
Engineering Associates Appeal Tribunal
Lawyers and Conveyancing Practitioners Standards Committees
Legal Complaints Review Officer
Plumbers, Gasfitters and Drainlayers Board
New Zealand Registered Architects Board
Social Workers Complaints and Disciplinary Tribunal
Teachers Complaints Disciplinary Tribunals
Valuers Registration Board
Valuers Registration Board of Appeal
Veterinary Council of New Zealand
Veterinarians Judicial Committees
Institute of Chartered Accountants Disciplinary Tribunal
Institute of Chartered Accountants Appeals Council
Health Practitioners Disciplinary Tribunal

Other Tribunals

Employment Relations Authority
Retirement Villages Disputes Panels
Mental Health Review Tribunal



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