Dame Helen Winkelmann, Chief Justice of New Zealand

Address to Tribunals Aotearoa at the dinner held at Te Papa, Wellington

Thursday 30 March 2023

I want to begin by expressing my great pleasure at being invited here to speak this evening. It is wonderful to see this trans-Tasman gathering of tribunal members.

I was eager to accept the invitation because I see Tribunals as a key part of our justice system. Tribunals are of constitutional significance because, along with courts, they are charged with administering justice in the individual case. As tribunal members, you are an important group, and this is an important opportunity for me to speak to you.

The Chief Justice at present has no formal role in relation to the Tribunals. But when I was sworn in, I said I would speak out on issues that affect access to justice. Tribunals play a key role in providing access to justice. It is Tribunals, along with courts, that are responsible for delivering on the promise of the rule of law. That is, the promise that all are equal before, and can seek the shelter of the law.

To understand the position of Tribunals, and their relationship to courts, it is helpful to reflect, if only very briefly, on the history of Tribunals in New Zealand. Although bodies resembling Tribunals have operated in New Zealand since at least 1881, it was around the time of the Second World War that Tribunals, as we now think of them, began to be called into being by action of the both the Executive and of Parliament. They were developed to meet justice needs flowing out of a burgeoning administrative state. There was an understanding that the state's apparatus was now affecting fundamental rights and interests within society – the right to income support, to pensions, to health and to education, to name but a few. There was also an understanding that the volume of disputes generated by that administrative state might overwhelm the courts.[1]

Over time, Tribunals were created in many other areas. This development was ad hoc, with no common principles underpinning their formation, structures and powers. Those new Tribunals reached beyond regulating the rights of citizens versus the state, to regulating the rights of citizen versus citizen.

Even today, new Tribunals continue to be created. They are created to address contemporary issues facing New Zealand, such as the Weathertight Homes Tribunal, established in 2002, and the 2019 Canterbury Earthquakes Insurance Tribunal. As Brett highlighted it is even hard to settle on a count of Tribunals. I understand there are 45 Tribunals represented by Tribunals Aotearoa, but according to Ministry of Justice definitions there are over 100 tribunals and authorities.[2] These include civil dispute resolution, administrative review, professional disciplinary and licensing bodies. These Tribunals are administered by a number of different ministries and agencies, and cover a broad range of subject matters, from mental health to student allowances, to pawn-brokering. The 45 Tribunals represented here alone are made up of approximately 250 members and referees, who deliver justice to over 100,000 parties with claims valued at over 150 million dollars a year.[3]

[1] New Zealand Law Commission *Tribunals in New Zealand* (Issues Paper 6, January 2008) at 15-21.
[2] Ministry of Justice *Tribunal Guidelines* (2017) at 5.
[3] Tribunals Aotearoa *Key Facts about Tribunals Aotearoa* (Council of Australasian Tribunals New Zealand) [internal publication only].

Whatever their number, the important fact is that each year, far more people will access civil justice through the tribunals than through the courts.[4] The positive effect of this access on social cohesion, economic prosperity and on our very democracy, cannot be overstated. Given this central role Tribunals play in our system of justice, society has a keen interest in the quality of justice administered by them, their efficiency, and the accessibility of their processes.

At their best, Tribunals provide prompt and inexpensive resolutions of rights. They have flexible and informal procedures. They make use of specialised knowledge. Indeed, they build specialised knowledge in the Tribunal members.

The recent Rules Committee access to justice review was undertaken to identify, and if possible, address obstacles to access to the Courts, particularly to the District Court and High Court.[5] The Committee identified financial, psychological and cultural and informational barriers to access. After receiving many positive submissions about how effectively the Dispute Tribunal model provides justice in a flexible, efficient and proportionate manner, the Committee was convinced that greater use of the Disputes Tribunal model could assist in addressing these barriers.[6] It recommended extending the role of the Tribunal to handle higher value cases, by increasing the Tribunal's jurisdiction to $70,000 (and $100,000 with consent).[7] It remains to be seen whether this reform will be carried into effect, as it will require legislation. What I can say is that I would welcome such a change, as a first step in necessary reform.

The picture I have painted of Tribunals is very positive, but I am afraid, it is not the complete picture. The complete picture is one of rapid development of a tribunal sector without proper institutional protection of its independence, or proper organisational structure to ensure efficiency and effectiveness.[8] It is unacceptable that such a significant part of our justice system has developed in an ad hoc way, and that this sector continues to operate without this necessary support. Inconsistencies in procedure and lack of information about the existence, jurisdictions and procedures of different Tribunals detracts from the ideal of access to justice. Put simply, it creates complexity for users and, we can confidently speculate that it creates confusion for those who seek the protection of the law through Tribunals.[9]

I am not the first person to identify these issues. Proposals to reform the Tribunal system have been floated for nearly 60 years. To date, none of those proposals has been successfully carried into effect. As long ago as 1965, a review by the Department of Justice noted the unsystematic approach to Tribunal creation.[10] In 1968, a Public and Administrative Law Reform Committee review highlighted inconsistency and inadequacy of appeal rights and recommended a uniform approach.[11] In response, an Administrative Division of the then Supreme Court was established to hear appeals

[4] Ministry of Justice *Tribunal Guidelines* (2017).
[5] Rules Committee *Improving Access to Civil Justice* (23 November 2022).
[6] At [54].
[7] At 17.
[8] New Zealand Law Commission *Tribunals in New Zealand* (Issues Paper 6, January 2008) at 15-2 at 32.
[9] At [3.11].
[10] Department of Justice *The Citizen and Power: Administrative Tribunals* (Government Printer, Wellington, 1965) at 14.
[11] Public and Administrative Law Reform Committee *First Report of the Public and Administrative Law Reform Committee of New Zealand: Appeals from Administrative Tribunals* (Government Printer, Wellington, 1968) 6.

from Tribunal decisions, but was later abolished in 1991 because it did not achieve the anticipated level of workload and specialisation.[12]

In 1987, the Legislation Advisory Committee published guidelines to encourage a more systematic approach to the creation of new tribunals. It also suggested condensing the existing bodies into three major tribunals dealing with welfare, resources and revenue respectively.[13] These recommendations were not actioned.

Then, in 2004 and 2008 the Law Commission published a series of reports which recommended the creation of a new legislative framework and unified tribunal structure.[14] This was expected to improve accessibility and awareness of tribunals. It aimed at creating a greater public profile, consistency of information, and a larger pool of resources to address technical and geographical barriers. As Geoffrey Palmer noted on the release of the Law Commission report back in 2008, to achieve a more efficient Tribunals system, structural reform was essential — and he said, inevitable.[15] Unfortunately, to date, Sir Geoffrey's predicted reform has not come to pass.

Meanwhile, reform has taken place or is underway in a number of countries. Examples include the New South Wales Civil and Administrative Tribunal which consolidated 22 tribunals into a single point of access. This is overseen by a single President who is a Supreme Court judge, thereby strengthening the independence of Tribunals.[16] In 2011, the United Kingdom created a unified body — Her Majesty's Courts and Tribunal Service. The Tribunal division is overseen by a Court of Appeal judge appointed as Senior President, who is independent of both the Executive and Chief Justice.[17] Just this last week, the Welsh Counsel General announced a White Paper to create a modernised, unified tribunal system with judicial independence as a guiding principle.[18]

New Zealand, then, is lagging behind. I believe the case for reform is overwhelming. While I have no control over whether, and what shape, any such reform will take, I can use my voice as Chief Justice to identify the case for it. In the meantime, and in the absence of reform, there are steps we can all take.

First, as Chief Justice it is my intention to do what I can to support the Tribunals — to ensure their independence and support their proper functioning. As I said at the outset, I have no formal role in respect of Tribunals and therefore what I can do is limited. But I do have a role in speaking out on matters affecting access to justice.

An example of this approach came during the Covid-19 lockdowns. Sarah mentioned the experience of Tribunals during that time. Though some Tribunals, such as the Tenancy Tribunal, were able to

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[12] New Zealand Law Commission *The Structure of the Courts* (NZLC R7, Wellington, 1989) at 158.
[13] Legislation Advisory Committee *Legislative Change: Guidelines on Process and Content* (Department of Justice, Wellington, 1987); Jack Hodder "Tribunals in New Zealand: Role and Development" *in Legal Research Foundation Tribunals Law and Practice* (Proceedings of the Tribunals Law and Practice Conference, Auckland, 19 June 2003) at 16-17.
[14] New Zealand Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004); New Zealand Law Commission *Tribunals in New Zealand* (Issues Paper 6, January 2008); New Zealand Law Commission *Tribunal Reform* (Study Paper 20, October 2008).
[15] Geoffrey Palmer "Tribunal Reform" (media release, 22 December 2008).
[16] Civil and Administrative Tribunal Act 2013 No 2 (NSW).
[17] Her Majesty's Courts and Tribunals Service *Framework Document* (Her Majesty's Stationery Office, Cm 8043, July 2011).
[18] Mick Antoniw "A "simple, modern and fair" tribunal system will be significant step towards a Welsh justice system" (press release, 21 March 2023).

switch to online adjudication, some tribunals did not operate at all during the initial lockdown.[19] I asked the Ministry of Justice to engage with key Tribunals to ensure that they were able to operate, and I was assured that occurred.

Secondly, I am encouraging an approach where Tribunals are recognised as a part of the formal justice system. An example of this is the inclusion of Tribunals in the Digital Strategy, which was launched yesterday, on the 29th of March.[20] The review undertaken in preparation for the Strategy found that none of the Tribunals administered by the Ministry of Justice currently have a case management system that is fit for purpose.[21] I pause to acknowledge however, that the same conclusion would be reached in respect of almost all courts. The Digital Strategy identifies that essential digital infrastructure such as video technology for remote hearings is not available in all Tribunals.[22] This poses challenges to overcoming geographical barriers for claimants. We therefore will also include Tribunals in our review of remote hearing technology, which will begin midway through this year.

Finally, we can take steps by organising ourselves better. The reinvigoration of the New Zealand branch of COATs is an important move in this direction. I also commend the steps that Tribunals have taken to organise, and in particular, to begin regular meetings of Chairs so that issues of common concern and opportunity can be identified. This creates the opportunity to drive the administrative and operational reform Brett referred to, even if organisational and institutional reform remains out of reach for now. I have met, and will continue to meet regularly, with Tribunal Chairs so that I can better understand how you see these issues. Because different parts of the justice system need to speak to each other. Discussion enables us to learn from each other. The Rules Committee access to justice report makes the case for this. And when we talk to each other we identify areas we can work together to improve access to justice, and to better serve our society.

Thank you for listening to me.

Nō reira, tēnā koutou, tēnā koutou, tēnā tātou katoa.

[19] Memorandum from Helen Winkelmann (Chief Justice) to Heads of Bench regarding the Teleconference with Tribunal Chairs (10 September 2020); Notes of meeting between Tribunal Chairs (10 December 2020).
[20] Chief Justice of New Zealand *Digital Strategy for Courts and Tribunals* (Te Tari Toko i te Tumu Whakawā | The Office of the Chief Justice, March 2023).
[21] At 36.
[22] At 15.