



MINISTRY OF  
**JUSTICE**  
*Tāhū o te Ture*

# Tribunal Guidelines

Choosing the right decision-making body  
Equipping tribunals to operate effectively

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Ministry of Justice  
The Justice Centre, 19 Aitken Street  
DX SX10088, Wellington, New Zealand

**T** +64 4 918 8800  
**F** +64 4 918 8820  
**E** [info@justice.govt.nz](mailto:info@justice.govt.nz)

**W** [www.justice.govt.nz](http://www.justice.govt.nz)

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# Introduction and purpose

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**F**or many New Zealanders, tribunals provide their main experience and perception of justice in New Zealand. However, some tribunals are created without full consideration of other options, and some tribunals are created without the powers they need to be effective. These guidelines are designed to guide departments considering whether to establish a new tribunal. They also provide recommendations about what powers and processes are appropriate.

## **A definition of ‘tribunal’**

Tribunals are given many different names in New Zealand, such as an authority, tribunal or committee. This document refers to all these bodies using the term ‘tribunal’.

Tribunals generally find facts, apply the law and make reasoned, binding decisions. Tribunals usually focus on one subject area, unlike the courts. They are usually designed to be faster, more informal and cheaper. Tribunals in New Zealand resolve a range of matters, including private disputes, reviews of decisions of government agencies, and complaints about regulated professionals such as real estate agents.

Tribunals generally fall into one of the following categories:

### **ADMINISTRATIVE REVIEW TRIBUNALS**

These provide judicially-led, often merits-based review of government agency decisions. Examples include the Social Security Appeal Authority and the Taxation Review Authority.

### **CIVIL DISPUTE RESOLUTION TRIBUNALS**

These tribunals resolve civil disputes between citizens. The Disputes Tribunal and the Tenancy Tribunal are examples.

### **OCCUPATIONAL LICENSING AND PROFESSIONAL DISCIPLINARY TRIBUNALS**

These bodies deal with licences to practise specified occupations or professions. They usually also oversee professional conduct and discipline. Examples include the Real Estate Agents Disciplinary Tribunal and the Lawyers and Conveyancers Disciplinary Tribunal.

## **New Zealand’s tribunal system**

The Ministry of Justice is committed to making tribunals more modern, accessible and people-centred. Tribunals are an essential part of New Zealand’s justice system. For many New Zealanders, attending a tribunal may provide their main experience and perception of justice in New Zealand.

Over 100 tribunals and authorities exist in New Zealand. The Disputes Tribunal and the Tenancy Tribunal are New Zealand’s two largest tribunals. Between them, they resolve around 25,000 matters each year.

In 2007-08, the Law Commission (with support from the Ministry of Justice) [reviewed New Zealand's tribunal system and investigated the possibility of a unified tribunal framework](#). The Commission identified several deficiencies with the current system. Tribunals have been established on an *ad hoc* basis. There is little consistency in powers, processes and procedures across the system. The level of administrative support and resources available varies, as do terms and conditions for tribunal members. These issues impact the efficiency, quality and sustainability of the tribunal system.

### **Purpose of the guidelines**

These guidelines are intended to guide departments considering the establishment of a new tribunal. They are not intended to provide 'hard and fast' rules.

Part 1 guides departments considering whether to establish a tribunal. Part 2 discusses the powers and processes that may be appropriate for new and existing tribunals. This part is comprehensive, which means not all parts will apply in all situations.

The Ministry of Justice encourages consultation with its Policy Group on proposals to establish a new tribunal or change an existing tribunal. These guidelines provide a useful starting point to help departments focus on the key issues in their context.

# Part 1: Choosing the right decision-making body

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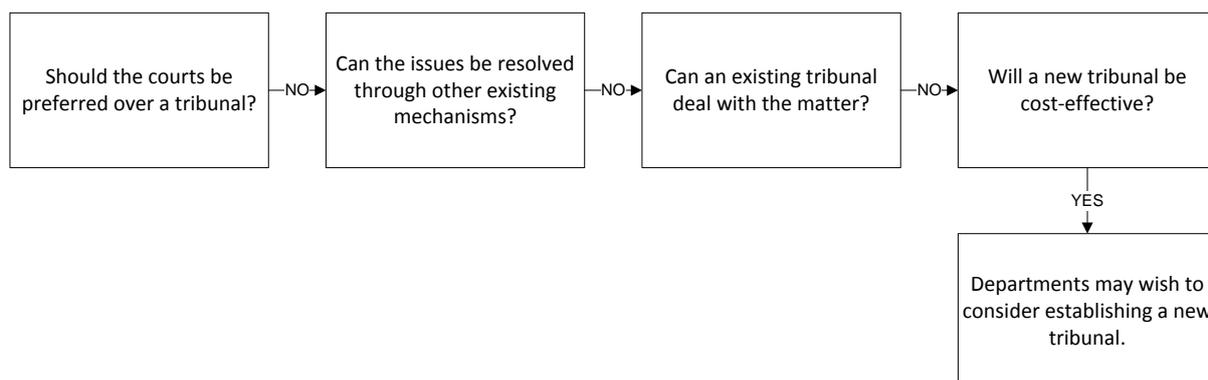
**T**his part sets out some questions to address in deciding whether to establish a new tribunal, or to use another decision-making body to resolve the issues in question. Although tribunals can provide an appropriate mechanism for resolving issues, it may be more efficient and cost-effective to use an existing mechanism.

Other available mechanisms for resolving matters may be more effective, cheaper and faster to establish. Creating a new tribunal may be expensive because operational costs will need to be met by the department – unlike the general courts. Establishing a new tribunal may also be time consuming. New legislation will usually be required, which will need to be factored into timeframes.

It is important to begin with a clear understanding of the purpose of the potential decision-making body. This may involve considering the following factors:

- What outcomes need to be achieved?
- Does the decision-maker need to be able to impose binding decisions?
- What kinds of issues need to be resolved? How complex will they be?
- How many matters may need to be resolved each year?
- What kind of parties will be involved?
- How accessible should the decision-maker be? Will the likely parties be able to afford a fee to use the service?

The following questions may help in deciding whether it is appropriate to establish a tribunal:



# Should the courts be preferred over a tribunal?

## What is the difference between a tribunal and a court?

Like courts, tribunals generally find facts, apply the law and make reasoned, binding decisions. Tribunals differ from courts in terms of:

- **Specialist expertise:** tribunals are established to deal with particular issues, whereas the courts have wider general jurisdiction.
- **Speed:** tribunal processes and decision-making are generally intended to take less time than court processes.
- **Informality:** many tribunals are less formal than courts. Some do not allow claimants to have formal legal representation and may accept evidence that would not be admissible in a court.
- **Investigative approach:** tribunals often aim to get to the right or preferable outcome through mediation or investigation and examination of the available information. This is different to the courts, which use an adversarial approach where the parties try to make the most compelling argument for their case.
- **Lower cost:** this tends to be a consequence of less formal and speedier proceedings.

## Is either a court or tribunal appropriate?

Either a tribunal or court is likely to be the most appropriate decision maker if the following circumstances apply:

- **Adjudication is required:** that is, a decision needs to be made on questions affecting people's rights. If the purpose of the proposed body is simply to provide a recommendation (and another party will be responsible for making a final decision), the function need not be undertaken by a tribunal or court.
- **Judgement needs to be exercised in reaching the decision:** the decision cannot be reached simply by applying a routine set of criteria or by 'ticking boxes'.
- **The function needs to be carried out independently:** whether from the executive government, a first instance decision-maker or an interest group. In comparison, an internal departmental review mechanism or an industry self-regulatory body is not fully independent.
- **Specific expertise is required to resolve the issues in question.**
  - Tribunals can provide a level of specific expertise that may not be available through the courts. Where the issues require a high degree of technical or professional knowledge, rather than a focus primarily on points of law, a tribunal may be preferred over the courts.
  - A tribunal may result in better quality decision-making than the courts because of a tribunal's focus on a defined set of issues and specific membership.
- **There is a high volume of matters that need to be resolved quickly, cheaply and informally.**
  - A tribunal may help improve public access to dispute settlement mechanisms. Once established, tribunals usually provide access to specialised adjudicators at relatively low cost to users of the tribunal.

A tribunal may not necessarily be desirable even where the above factors are particularly important. The courts are well equipped to deal with technical and specific issues, and do so on a daily basis. Resolution of issues by the courts rather than a tribunal may be more appropriate when:

- decisions relate predominantly to matters of law rather than fact
- the potential sanctions are serious or significant
- legal expertise of decision-makers is more important than specific or technical focus

- claimants are more concerned with the legal robustness of the proceedings than other factors such as low cost and speed.

## Can the issues be resolved through other existing mechanisms?

If the courts are not an appropriate mechanism, consider other organisational forms, such as:

### Government inquiries

- These are time-limited bodies established to inquire into and report on any matter of major public importance or concern to the government of the day. An inquiry may [regulate its own procedure](#), which means it may decide the processes and procedures it uses. It may obtain information from any person, make findings of fault and award costs.
- There are three main types:
  - Royal Commissions of Inquiry, which are established by the Governor-General and tend to deal with matters of significant national importance.
  - Public inquiries, which are also established by the Governor-General and can deal with any matter of public importance.
  - Government inquiries, which are established by Ministers and tend to deal with more immediate matters of public importance.
- The [Department of Internal Affairs](#) provides administrative assistance to inquiries established under the Inquiries Act 2013 and the Commissions of Inquiry Act 1908.

### Independent Crown entities

- These are public bodies that operate independently from Ministerial influence. Examples include the Commerce Commission, Electoral Commission, Independent Police Conduct Authority and the Financial Markets Authority.
- They are appropriate where absolute public confidence in the decision-maker is paramount, and where the decision-maker needs to be protected against easy dismissal and not required to have regard to government policy.
- They are governed by the Crown Entities Act 2004 and their own enabling legislation, and have control of their own finances and processes.
- For guidance on the establishment of Crown entities, see the State Services Commission's publication [Reviewing the Machinery of Government](#).

### Internal review mechanisms established by departments

- These are quality assurance procedures that use a problem-solving approach to resolve matters. They are usually relatively informal and cheap.
- Departments may use them as an early step in a dispute resolution process to reduce the need for formal dispute resolution. For example, Work and Income appeal applications are first reviewed by the local office before being referred to the Ministry of Social Development's Benefits Review Committee if necessary. Appeals can then be made to the Social Security Appeal Authority.
- An internal review mechanism may not be enough on its own. A mechanism to appeal or review an internal review decision will usually be appropriate. See [Appeals](#) for more information.

## Self-regulatory bodies

- Self-regulatory bodies exercise some degree of regulation or control over an industry or profession. They are established by industry members, and membership is often voluntary.
- The [Advertising Standards Authority](#) is a useful example. It self-regulates advertising in New Zealand by setting out Codes of Conduct for its members to comply with. It adjudicates complaints about advertising in New Zealand, with a right of appeal to the independent Advertising Standards Complaints Appeal Board.

## Ombudsman

- The Ombudsman can investigate complaints about the administrative acts and decisions of central and local government agencies. In response, the Ombudsman can make non-binding recommendations to the agency. This may be a useful mechanism where members of the public are likely to complain about delays with a government service or the standard of service provided.
- The Ombudsman's authority is limited by statute, so it cannot investigate complaints about:
  - private individuals, lawyers, MPs or privately-owned companies
  - decisions made by courts or tribunals
  - decisions made by the Parole Board
  - decisions made by a full Council (however, the Ombudsman can investigate complaints about the advice provided to a full Council by Council employees)
  - Government Ministers (however, the Ombudsman can investigate complaints about advice provided to Ministers by government agencies, and decisions made by Ministers on requests for official information).
- The Ombudsman can investigate and review complaints about official information requests. The Ombudsman can make binding recommendations to the agency in question.

## Banking Ombudsman / Insurance and Financial Services Ombudsman

- The Banking Ombudsman Scheme investigates and resolves disputes between customers and their banks.
- The Insurance and Savings Ombudsman Scheme resolves complaints about insurance and financial services. These could relate to insurance, loans or credit, superannuation, a financial adviser, investments or other financial services.
- Both services are independent and free of charge. They can only investigate complaints about service providers which are members of the scheme.

## Alternative forms of dispute resolution ('ADR')

### WHAT IS ADR?

ADR includes processes such as mediation and arbitration:

- Mediation is where a neutral third party (the mediator) helps two parties reach a settlement.
- Arbitration is where a neutral third party (the arbitrator) makes a decision to settle a dispute after considering each party's case.

### KEY BENEFITS

ADR may be appropriate in a wide range of cases, including complex matters. It is flexible and informal. One of its key benefits is that it can facilitate early resolution of matters without formal adjudication. Compared to litigation, it is usually cheaper and less time consuming.

Another key benefit is that ADR is confidential and private. People may attend only if the mediator or arbitrator gives them permission. It would be very unusual for a member of the media to be given

permission to attend. This confidentiality can encourage parties to compromise and negotiate to achieve an outcome.

ADR can help foster enduring outcomes because it actively involves parties in decisions (as opposed to determinations made by a third party). ADR is particularly effective where the relationship between the parties might continue, or where parties' stances are flexible or more aligned.

Even where ADR does not lead to a settlement, it may help clarify the issues and possibly provide the participants with an indication of the likely success of the claim. It can help parties decide whether they should proceed with the claim, which may result in more efficient use of tribunal resources.

#### WHEN IS ADR APPROPRIATE?

ADR services can stand alone or complement the resolution of matters through adjudication (whether by a court or tribunal). ADR can be incorporated into a tribunal's process; for example, for an early refinement of the issues in dispute. Formalities and legal protections (such as appeal rights) should be incorporated into an ADR process via statute.

Issues to consider in deciding whether ADR is the appropriate way to resolve matters may include:

- **Degree of public interest**
  - Does the matter involve a predominantly private interest or is there a broader public interest involved? Cases with a high public interest may be more suited to an open hearing (that members of the public may attend) rather than a closed and confidential ADR process (that members of the public cannot attend).
  - Public interest in a case may arise where:
    - there are fundamental issues of liberty, health, safety, public protection or economic rights
    - a point of law needs to be established or a statute needs to be interpreted
    - one or more interests affect more than just the parties.
  - However, the public interest may sometimes be best served by using ADR to resolve complex, multi-party disputes. For instance, ADR is becoming more common as a mechanism to resolve complex international disputes relating to oil and gas contracts.
- **Ability to negotiate the outcome**
  - Does the nature of the dispute allow an outcome to be negotiated rather than determined? ADR is not a practical option where there is limited flexibility to negotiate or agree on an outcome. This could occur where the outcome is prescribed in legislation. For example, legislation may state whether a person is entitled to a benefit or not.
- **Ongoing relationship between the parties**
  - ADR can be particularly suitable where an ongoing relationship between the parties needs to be maintained. It can lessen stress on parties because the process actively involves the parties in the decisions that will affect them.

#### MORE INFORMATION

Organisations such as the [Arbitrators' and Mediators' Institute of New Zealand \(AMINZ\)](#), [LEADR Association of Dispute Resolvers](#) and the [New Zealand Law Society \(NZLS\)](#) have memberships of accredited ADR practitioners.

The [Government Centre for Dispute Resolution](#) can provide advice on ADR services. The Centre is located at the Ministry of Business, Innovation and Employment (MBIE). It has developed a suite of products related to the appropriateness of ADR, such as a guide on what to consider in the early policy design stage. It will be able to provide advice, tools and templates to agencies.

More information on ADR processes can be found in the [Legislation Guidelines \(2018 edition\)](#).

## Can an existing tribunal be modified or merged to deal with the issues?

Where a tribunal is considered the best option, it may not be desirable to establish a new tribunal. An existing tribunal may provide the appropriate forum, although it may be necessary to widen its jurisdiction or change its processes.

Alternatively, it may be appropriate to merge several tribunals into one. The Immigration and Protection Tribunal, for instance, replaced four previous immigration appeal authorities.

### What tribunals currently exist?

As part of their project on a [Unified Tribunal Framework](#), the Law Commission produced a table of bodies that exercise tribunal functions. This table provides a useful, if not fully up to date, list of tribunals that may provide an appropriate forum for resolution of the matter. A current list of tribunals administered by the Ministry of Justice can be found on the [Ministry's website](#).

### Will the existing tribunal's processes ensure procedural fairness?

The existing tribunal's processes will need to ensure procedural fairness for the types of cases and parties likely to come before it. Existing tribunals will have a particular balance between informality and speed on the one hand, and procedural fairness on the other hand. The balance may depend on factors such as the significance of the rights in issue and the nature of parties for which the tribunal was originally designed. Any increase in a tribunal's jurisdiction would have to fit appropriately within this balance.

Factors to consider in this context include:

#### MATTERS TO BE ADDRESSED BY THE PROPOSED NEW TRIBUNAL

- Are the matters to be addressed by the proposed new tribunal similar or related to issues that are dealt with by the existing tribunal? This should be analysed in terms of subject matter, industry, profession and type of dispute (eg complaints, disciplinary matters, disputes between two or more parties).

#### MEMBERS

- How similar are the skills and experience of the members?
- Could the members of an existing tribunal deal with additional matters, or would additional expertise be required?
- Is the pool from which members are to be drawn sufficiently wide? Or are there risks of significant conflicts of interest for the existing tribunal's members?

#### MAGNITUDE OF THE ISSUES

- Are the likely issues of such high public interest or significant impact that they could 'swamp' an existing tribunal?
- Would the public and/or stakeholders see a separate tribunal as more credible?

#### EXPECTED CASELOAD

- What are the resource requirements? Is the expected caseload sufficient to warrant a separate tribunal over time?

- A low caseload may undermine the effectiveness of a tribunal, even where the issues to be determined are significant. Low caseloads can make it difficult to retain and develop expert membership and sustain the quality of a tribunal's decision-making. It can also make it harder to maintain the necessary administrative functions required to operate the tribunal.
- What constitutes a low caseload will depend on the complexity of issues considered by a tribunal. Some tribunals administered by the Ministry of Justice have fewer than 40 new cases per year, but this is enough to justify these tribunals because of the complexity and seriousness of the issues under consideration.

#### LEGAL REPRESENTATION

- If there is a restriction on legal representation, could this exacerbate any existing inequalities between the parties that would come before the tribunal when the new jurisdiction is added?
- If legal representation is permitted in the existing tribunal, will this make the tribunal's processes too legalistic for the additional subject matter? Or will it help make the process run more smoothly? For instance, in the Weathertight Homes Tribunal, lawyers can make the process more efficient and effective because of the number of parties and potentially complex legal arguments involved.

#### DECISION-MAKING PROCESS

- Is the tribunal's decision-making process appropriate? Some tribunals decide matters according to strict application of the law while others make decisions according to the substantial merits and justice of the case.

#### FEES

- If there are user-fees, are these appropriate for the matters proposed to be added to the jurisdiction?

#### APPEAL RIGHTS

- Are the appeal rights proportionate to the magnitude of the issues?

## Will a new tribunal be cost-effective?

Tribunals often provide a low-cost service because their procedures are less formal than the general courts. However, the cost of administering a new tribunal will usually need to be met from the budget of the establishing department, whereas the general courts are administered and funded by the Ministry of Justice.

The cost of establishing and operating a new tribunal will vary depending on general factors, such as the:

- nature of the issues the tribunal will hear
- size and seniority of tribunal membership
- [procedural format chosen](#) (eg hearings in person, phone hearings or deciding matters 'on the papers')
- location of the tribunal, and whether travel will be necessary.

#### Operational costs

The extent of operational costs will depend on the general factors listed above. For instance, a tribunal that decides matters 'on the papers' (which is when parties provide written submissions and

the member makes a decision based only on those papers) will cost less to operate than a tribunal that requires hearings in person.

Operational costs may include:

- remuneration (chair, deputy chair, members, administrative staff etc.)
- costs of technical reports and investigations
- appointment, re-appointment and training processes
- research assistance for tribunal members
- rent, utilities and property maintenance
- travel
- cell phones and internet access
- library and database access
- publications and website maintenance
- stationery, photocopying and printing.

### **Set-up cost**

The one-off costs to set up a tribunal may include:

- recruitment and induction costs
- IT equipment
- a case management system
- office and tribunal furniture costs (soft fit-out)
- facilities (hard fit-out).

Some of these expenses may not be required. For instance, a tribunal that hears matters by teleconference or on the papers may not incur office and furniture costs. These new models of working can significantly reduce the overhead costs of setting up and operating a tribunal.

# Part 2: Equipping tribunals to operate effectively

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**T**his part sets out a range of procedural and operational matters affecting the operation of tribunals. This material will be useful when establishing a new tribunal or when evaluating the operation of an existing tribunal.

## Legislation or regulation

Legislation will usually be required to establish a new tribunal. It should provide the overarching mandate for tribunal powers and procedures and set out the tribunal's jurisdiction.

Chapter 14 of the [Legislation Guidelines \(2018 edition\)](#) provides a useful starting point to suggest what should be included in primary legislation and what may be addressed by rules or regulations (delegated legislation):

*Legislation should not authorise secondary legislation to be made in respect of matters that are appropriate for an Act.*

As a general rule, matters of significant policy and principle should be included in an Act. Secondary legislation should generally deal with minor or technical matters of implementation and the operation of the Act. However, there are difficult choices on the continuum between significant policy and technical detail.

Some matters, such as those that affect fundamental human rights in a significant way, are clearly appropriate only for an Act. However, the decision will not always be clear-cut, and some matters may be appropriate for both primary and secondary legislation. Secondary legislation often involves some policy, but this should be at a lower level than the policy in the Act.

Tribunal legislation may need to address the following matters:

- establishment of the tribunal
- the tribunal's jurisdiction, functions and orders
- important procedural matters, such as rules of evidence and enforcement of orders
- rehearing and appeal rights
- consequential amendments and transitional arrangements.

Operational detail associated with tribunal processes is more suitable for regulations, manuals, practice notes, rules and codes.

Legislation, such as the [Legal Services Act 2011](#), may provide a useful guide on what to include in legislation and regulation.

# Maintaining independence

## Judicial independence

Judicial independence is a fundamental principle of New Zealand's constitutional system, and this principle extends to tribunal members. As judicial officers, they must be free to make decisions without external interference, particularly from the executive branch of government.

The [International Framework for Tribunal Excellence](#) recommends the following criteria to ensure independence. These recommendations are reflected in the rest of this document:

- The tribunal is created by statute.
- The tribunal is an independent body.
- The tribunal chair has statutory powers to direct the tribunal's case management system (eg issue practice directions), assign cases, and administer the tribunal.
- Members are appointed on their merits, with the tribunal chair involved in any interview panel.
- The tribunal is free to apply or depart from government policy when reviewing a decision in accordance with common law.
- There is a statutory provision preventing a Minister or executive officer from overruling or altering a decision of the tribunal.

## Location of the tribunal

Sometimes it will be inappropriate for a tribunal to receive administrative support from a department or agency whose decisions may be subject to review by the tribunal. Locating the tribunal with a neutral host department may help avoid actual or perceived conflicts of interest, or other negative impacts on the tribunal's independence.

This is why the [Social Security Appeal Authority](#) is administered by the Ministry of Justice, rather than the Ministry of Social Development or Ministry of Defence. The Authority hears appeals by beneficiaries against decisions made by the Chief Executive of the Ministry of Social Development or the Secretary for War Pensions.

In other circumstances, it will be appropriate for a tribunal to receive administrative support from a department or agency whose decisions may be subject to review. For instance, the Legal Aid Tribunal is administered by the Ministry of Justice. It is possible to maintain tribunal independence because:

- the Legal Services Commissioner is independent of the Ministry
- the tribunal reviews decisions made by this independent statutory officer
- the Ministry of Justice has experience managing areas with independent functions, including employing Registrars in the courts who undertake a range of quasi-judicial functions under the supervision of judges rather than the Ministry.

# Members, chairs and panels

## Pool of members

The appropriate size of the pool of members will usually depend on the likely caseload and complexity of cases before the tribunal. A larger pool of members may be required for tribunals with a high caseload, where cases are heard by more than one panel member, or where cases are complex and may take a long time to resolve.

Legislation should not specify the number of tribunal members. Specifying the number of members does not provide the flexibility required to meet changes in workload.

### Panel size

Legislation usually states the appropriate size of the panel which will preside over tribunal hearings. A tribunal may have only one member per hearing, or several members plus a Chair may be required. It may be appropriate to allow flexibility over panel size, particularly where a tribunal deals with a range of matters.

A panel comprised of multiple members can bring a range of expertise and perspectives to bear on an issue. Most tribunals have between one and three members. Having more than one member allows a mixture of expertise.

A larger panel may be required if the tribunal is dealing with matters that require a range of specific and technical expertise. For example, an [occupational licensing and professional disciplinary tribunal](#) will require expertise concerning the occupation or profession but may also need legal expertise and representation from the public or stakeholder groups.

The type of tribunal and the nature of its decisions will usually also be relevant. [Occupational licensing and professional disciplinary tribunals](#) and some [administrative review tribunals](#) have multi member panels while [civil dispute resolution tribunals](#) generally only require a single member (who may be assisted by an expert).

Some useful questions to consider when deciding the size of the panel include:

- Are significant rights or interests involved?
- Is a combination of specific expertise required?
- Are the matters to be considered particularly complex?
- Is the cost of having a panel proportionate to the nature of the claim being determined?
- What [type](#) of tribunal is involved? What is the nature of its decisions?

### Minimum qualifications of members

The minimum qualifications required for members should be specified in legislation. When setting minimum qualification requirements, consider:

- the nature of the tribunal, including:
  - its purpose and role
  - the value of the issues it will hear
  - the formality of its processes
- the required amount of practice in or experience with the tribunal's subject matter
- whether, and how much, legal experience or qualification is necessary
- whether specific adjudication experience is necessary
- whether personal vetting checks are appropriate (ie to establish whether a potential member is a fit and proper person for the role).

Broad minimum qualification requirements may be appropriate where a tribunal will deal with complex matters requiring expertise in multiple areas.

Tribunal membership may need to provide for representation from particular groups. This is most likely to arise with [occupational licensing and professional disciplinary tribunals](#) where the relevant sector will have an interest in ensuring that [appropriately qualified persons](#) are appointed. If a tribunal has a disciplinary role, it should be made clear that members do not 'represent' the sector.

## Skills and qualifications of the Chair

It is useful to have a tribunal Chair to help oversee the operation of the tribunal and its members, to issue practice notes or directions, and to ensure consistency of processes and decision-making.

A Chair should have adjudicative experience and subject expertise above and beyond other tribunal members. This is particularly important during a tribunal's initial stages.

The key decision to make about the skills and qualifications of the Chair is whether it is more important they have predominantly technical or legal skills. Deciding which is more important involves consideration of the:

- nature of the issues addressed by the tribunal
- degree of formality and legal precision required to address the issues
- level and nature of appeal rights
- extent and mix of skills envisaged for other members
- degree of public, as against private, interest arising from the issues that are addressed by the tribunal
- profile of and public scrutiny of the tribunal's decisions.

It may be appropriate to consider appointing a judge as the Chair if the tribunal is deciding matters of considerable public interest or legal complexity. The Ministry of Justice and the judiciary will need to be consulted, as there will be implications for judicial rostering and scheduling.

## Temporary acting Chair

It can be useful to allow for a temporary acting Chair in legislation. This allows a tribunal to keep operating in the event of recusal (withdrawal due to conflict of interest) or long-term absence or illness of the Chair.

It will also often be desirable for legislation to give authority for the Chair to delegate all or most or their statutory duties to a member. This gives the Chair the ability to manage their workload. See [section 107 of the Weathertight Homes Resolution Services Act 2006](#) for an example provision.

A Deputy Chair may be more useful in a tribunal with a large workload. It will allow the Chair to permanently delegate tasks, which may improve the efficiency and effectiveness of the tribunal. This may not be necessary for one-member tribunals or tribunals with a small number of members where the Chair can already delegate responsibilities to any member.

## Temporary acting members

It can be useful to give tribunals the ability in legislation to appoint a temporary acting member when a member is incapacitated and cannot perform their duties for a long time. This is particularly relevant for tribunals with large volumes or a legislative cap on the number of members. Tribunals need to maintain access to a minimum level of judicial resource, so timeframes do not significantly increase when someone is on leave or sick. These appointments should still be subject to the normal Ministerial appointment process and be justified on a case-by-case basis.

## Length of appointments

Tribunal members need to have assurance regarding the length of their appointment. This helps to ensure their independence and provide certainty about their position.

A term of three to seven years is normal. The Ministry of Justice recommends that legislation should allow for a term of 'up to five years'. Short appointments can be time consuming and costly to administer. They are less attractive to judicial officers, especially in low-volume tribunals. Short terms can also affect tribunal timeliness because Chairs must spend time on appointment processes. Conversely, long appointments do not allow for refreshing of members and skills.

Some tribunals may consider matters so significant that a Chair should have full tenure (that is, their appointment is not for a fixed term). This need may be satisfied by appointing a District Court Judge as Chair. Only the Chief District Court Judge would be able to re-assign the Chair to other duties. Legislation will normally specify whether the Chair and members may be reappointed for another term. Providing for additional terms is useful because it allows for continuity in skills and experience.

It is good practice to include a provision in the tribunal legislation allowing for members to continue in office after the expiry of their term until another member is appointed or they are informed they will not be replaced, and to authorise them to complete any cases that were part-heard when they were advised that they would not be re-appointed or replaced.

### **Full-time or part-time appointments**

Members may be appointed on a full- or part-time basis. Whether a position is full-time or part-time will depend on the tribunal's anticipated caseload. This detail is unlikely to be specified in statute but needs to be communicated to potential appointees during the recruitment process. It should also be specified in subsequent letters of appointment.

### **Sourcing members from existing tribunals**

It may be possible to source members from an existing tribunal on a semi-permanent or permanent basis. This may be appropriate where a proposed tribunal will hear matters requiring similar expertise from members to an already existing tribunal.

Using members from existing tribunals may make for better use of adjudicative resources. Shared membership can add an element of direct experience to otherwise untested tribunal processes and membership.

### **Appointment process**

The appointment process should be fair, transparent, independent and merit-based. It should assess whether members have a demonstrated ability to act neutrally and without bias of any kind.

The detail of an appointments process is unlikely to be included in statute. Such details are, however, essential in ensuring best practice in selecting and appointing tribunal members.

The relevant Minister should have discretion to appoint (or recommend appointment) and to agree to a process to identify candidates for appointment. The Minister's discretion to appoint must be unfettered. The Ministry of Justice considers that as wide a range of options as possible should be provided to Ministers regarding the processes for recruitment and appointment.

The following process should be considered:

- Provide a clear job description that outlines the functions of the tribunal, the role the appointee is expected to play, whether the position is full-time or part-time, terms and conditions, and accountability arrangements.
- Advertise vacancies, calling for expressions of interest and seeking nominations from stakeholders. There may be exceptions to this, for example, where the position requires the appointment of a judge.
- Establish an independent panel to assess candidates and conduct interviews. Where a tribunal has the function of reviewing a department's decisions, it is important that the selection process be seen as independent of that department.
- Interview short-listed candidates and check for conflicts of interest. For instance, membership of a particular profession may lead to an actual or perceived conflict of interest.
- Before a person is appointed, they should sign a statutory declaration:
  - consenting in writing to being a member
  - certifying that they are not disqualified from being a member

- disclosing any conflicts of interest
  - disclosing any other information that would put into question their independence or ability to undertake the role.
- Appointments are normally made by the Governor-General on the recommendation of the responsible Minister or Ministers.

The relevant sector should not appoint or be seen to appoint members of [occupational licensing and professional disciplinary tribunals](#). In the past, statutes have provided for professionally qualified members to be chosen by the relevant sector. Sector input is a necessary part of the process, but members should be appointed by the Governor-General on the recommendation of the Minister.

The ‘Appointments’ section of the [CabGuide](#) and the State Services Commission’s [Board Appointments and Induction Guidelines](#) provide further guidance on appointments.

## Remuneration

The basis for setting remuneration should be specified in the establishing legislation. In some instances, the [Cabinet Fees Framework](#) (‘the Framework’) may apply. In other instances, remuneration may need to be set through the Remuneration Authority.

### CABINET FEES FRAMEWORK

The Framework will generally apply to statutory tribunals. It imposes different fee ranges depending on a tribunal’s classification (also determined under the Framework). This improves transparency and avoids unnecessary variation between members of different tribunals. The Framework is reviewed periodically, and updated versions are published in [Cabinet Office Circulars](#).

Fees which constitute exceptions to the Framework are permissible in certain circumstances. However, detailed justification is generally required before any exception is agreed (usually involving Cabinet, the Minister of State Services, and Cabinet’s Appointments and Honours Committee).

### REMUNERATION AUTHORITY

The Remuneration Authority only determines positions that are specified in its legislation. In general, they are full-time, high profile positions. The Remuneration Authority will require a copy of the position profile, and the appointee’s details and curriculum vitae.

### RELEVANT FACTORS WHEN SETTING REMUNERATION

Consider the following factors when setting remuneration:

- the complexity of the functions and the expertise required
- recruitment and retention issues
- the extent to which an individual member needs to insure against personal liability (other than for actions undertaken in good faith)
- the potential risk to reputation
- the degree to which the role is in the public eye
- affordability
- whether the member should be paid per day or at an annualised rate.

## Induction and training for members

Departments should consider the costs inducting and training members as part of the tribunal’s budget.

The chair of a tribunal is usually responsible for organising training for members. Some larger tribunals have an education committee that helps with this. Generally, either the chair or the education committee decides what training should be provided each year, in consultation with the members.

Larger tribunals generally have an annual training conference lasting two or three days each year and some regional training days. Smaller tribunals run training days throughout the year. Members can also attend training events run by the New Zealand Law Society on areas relevant to their jurisdiction. Regular meetings between members provide a forum for discussing difficult issues.

Most tribunals have a formal induction for new members. This is often accompanied by a mentoring programme.

Tribunal chairs may wish to consider attending the annual tribunal conference run by the Council of Australasian Tribunals.

### **Members' conduct**

The conditions of appointment and induction procedures for tribunal members should set out clear expectations about the role and conduct of tribunal members.

Tribunal Chairs usually oversee the performance and conduct of tribunal members. This helps to ensure tribunal members make effective decisions and provide professional services to users.

Legislation should set out matters of serious misconduct that may lead to [removal from office](#). Legislation should also set out immunities so that members are not personally liable for any act done or omitted in good faith as a member.

Tribunal legislation should provide civil and criminal immunity for tribunal members for actions associated with their work undertaken in good faith. This will prevent unnecessary litigation arising from the performance of their duties.

A code of conduct and performance frameworks for the Chair and members may help to set out service and conduct expectations. These can also help set the basis for tailored training, performance and remuneration reviews, and assessing grounds for [removal from office](#).

It may be desirable for legislation to require the Chair to issue the code of conduct. Examples of this are in the enabling legislation for both the Immigration Protection Tribunal and the Legal Aid Tribunal.

### **Complaints process**

It is good practice for legislation to specify that the Chair will establish, maintain and publicise a complaints process for tribunal users. Generally, the Chair will determine the detail of the process. The following features are usual:

- Information for users should be readily accessible – for example, on a tribunal website.
- Complaints about a member's decision should not be permitted. This is a common ground of complaint but can only be the subject of whatever [appeal or review rights](#) are available.
- The process should be clearly defined. For instance, it should state to whom the complaint should be sent, any applicable timeframes, and which matters are subject to complaint.
- Complaints should be swiftly acknowledged, and complainants informed of the progress and/or outcome of their complaint.
- Members should be informed of the nature of the complaint and given a right of reply.
- Appropriate action should be taken to address the complaint.

Sometimes a tribunal may have only one member or a Chair with no reporting line. In these tribunals, it would be inappropriate for the member or Chair to be responsible for the complaints process. Instead complaints should be made to the Minister responsible for these appointments.

## Removal from office

Legislation should specify clearly the grounds on which a Chair or member may be removed from office. To ensure the independent of members, these grounds should be relatively limited and address issues that would significantly impair the member's ability to carry out their role.

Grounds for removal may include:

- ill health
- serious misconduct
- being convicted of an offence punishable by imprisonment
- neglect of duty
- inability to perform the functions of the office
- bankruptcy.

These broad statutory provisions should be supported by some form of guidance (a code of conduct, rules, procedures, etc). This will provide additional clarity and certainty for members, Ministers, administering departments and the public around the expectations of tribunal members.

Legislation should also specify who may decide on the removal of a member from office. Generally, this would be the Governor-General on the recommendation of the responsible Minister.

## Powers and procedures

The following section contains guidance on a range of procedural matters and powers that a tribunal may need to be effective and efficient in the delivery of its services. No single approach will fit all tribunals because tribunal roles, issues and scale vary. As a general rule, the more significant the issues at stake, the more procedural protections will be required.

### Natural justice

The New Zealand Bill of Rights Act 1990 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.

The rules of natural justice prescribe what is necessary for issues to be fairly heard and determined. The concept usually includes the following minimum standards of procedural fairness:

- providing adequate communication and notice of proceedings and hearings to all parties
- providing all parties with a reasonable opportunity to present their cases
- treating all parties equally
- making decisions impartially and independently.

More guidance on natural justice requirements can be found in the [Legislation Guidelines \(2018 edition\)](#).

### Power to regulate own procedure

It is common for tribunal legislation to contain a power for the tribunal to 'regulate its own procedure'. The Law Commission notes in its report on [Tribunal Reform](#) that:

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.

Giving a tribunal the power to regulate its own procedure provides flexibility to effectively deal with any matter before it.

### **Formal or informal proceedings**

Tribunal proceedings will usually be less formal than those of a court. This helps to ensure fast and affordable access to justice. Some tribunals will, however, be more court-like than others. The degree of formality will be governed by such factors as:

- the nature of the issues concerned
- appeal rights
- public against private interest
- the value of claims to be heard
- tribunal membership (eg whether the tribunal is headed by a judge or lay person).

### **Legal representation**

Legal representation is a feature of many, but not all, tribunals. Tribunals dealing with complex matters, or matters with significant financial or other impacts, are more likely to allow legal representation. The following considerations are relevant to whether legal representation is a desirable procedural protection:

- the seriousness of the issues to be heard and the possible consequences
- whether points of law are likely to arise
- the ability of the parties to represent themselves
- the possibility of procedural difficulties
- the need for a prompt decision
- whether government departments are likely to be represented, and by whom
- the need for fairness between parties.

It may be appropriate to allow a legal representative in limited circumstances. For example, representation is permitted in the Disputes Tribunal in certain limited circumstances where a party is unable to present their case.

It may also be appropriate to allow a support person (such as a friend, colleague or relative) to attend the hearing. A support person can usually participate in the hearing only with the judicial officer's permission.

### **User fees**

User fees should be set at a level that is consistent with:

- the monetary jurisdiction of the tribunal
- the aim of providing efficient, low cost and specialist access to justice.

Application fees should not create an undue barrier to accessing a tribunal, but are useful to reduce the likelihood of vexatious applications and to recover costs for using the service. However, such concerns should primarily be managed through the tribunal's powers to strike out or dismiss vexatious applications.

The fee to access a tribunal will usually be lower than the fee to access the courts. In some cases, however, application fees may be set at a high level to offset the high cost of processing and determining the matter.

Further guidance on setting fees can be obtained from guides published by the [Office of the Controller and Auditor-General](#) and [Treasury](#), and in the framework produced by the Ministry of Justice for the 2012 civil fees review. The civil fees for accessing the courts and tribunals administered by the Ministry of Justice may provide useful guidance, see Appendix 1.

## Type of hearings: in-person, virtually or 'on the papers'

Tribunals may hear cases in the following ways:

- in person
- virtually (either by audio visual link or telephone)
- 'on the papers' (which is when parties provide written submissions and the member makes a decision based only on those papers).

It is best practice for tribunal legislation to allow virtual hearings where appropriate. It is important for tribunal legislation to be technology neutral, as this will 'future proof' the legislation against technology changes.

It is best practice for the tribunal, not the parties, to have the right to determine the appropriate type of hearing in each case. This prevents arguments about the type of the hearing that is appropriate.

To decide which option is appropriate, consider the following:

- **Ability to investigate:** One of the most important considerations is whether the tribunal will be able to investigate cases appropriately through an on the papers hearing or whether an in-person hearing is required.
- **Potential consequences:** Where significant rights or a person's credibility are at stake, there should be an opportunity for an oral hearing: either in-person or virtually.
- **Relationship between parties:** Where relationships between parties are ongoing, the ability to negotiate and tailor solutions in person may outweigh the savings made conducting hearings on the papers.
- **Efficiency:** Hearings on the papers are usually quicker than in-person or virtual hearings.
- **Cost for the department:** Hearings on the papers will be cheaper than virtual hearings, which will be cheaper than in-person hearings.
- **Cost for the parties:** Providing the option for virtual hearings may be helpful in managing parties' time and costs, particularly where parties are likely to be in remote or different locations.
- **Location:** Hearings on the papers and virtual hearings will usually not require parties' attendance at a particular location.

On the papers hearings may be appropriate when no party or witness wants or needs to be present because of the nature of the matter. This is particularly relevant in occupational and industry regulation tribunals when issuing licences and certificates, and administrative review tribunals when reviewing another body's decision.

Where a hearing is to be conducted on the papers, both claimants and defendants must have the opportunity to make submissions. Parties must also be able to comment on any adverse material or prejudicial information, either presented by the opposing party or resulting from the tribunal's own inquiries. These safeguards protect the right to [natural justice](#).

Some tribunals, including the Immigration and Protection Tribunal, vary or combine hearing formats for certain classes of hearing. It is recommended that the tribunal should determine whether a hearing is held in-person or on the papers if there is jurisdiction for both.

## Open or closed hearings

Public access to hearings aids transparency and enhances confidence in the tribunal system. Tribunal hearings are usually held in public and are able to be reported.

The Ministry considers that closed tribunal hearings should be the exception, rather than the norm. However, closed hearings may be appropriate for matters that have a primarily private, rather than public, interest. Also, closed hearings will usually be appropriate where mediation is part of the hearing process (as with the Disputes Tribunal).

A tribunal will usually need the power to close a hearing where evidence poses a risk to security, may prejudice a commercial interest or is of a sensitive personal nature. In addition, a tribunal may need the power to make orders prohibiting publication of certain evidence or identities.

### **Adversarial, inquisitorial or investigative approach**

Decision-making bodies can use different approaches to come to a conclusion.

- The **investigative** approach is used in most New Zealand tribunals. The aim is to get to the right or preferable outcome through investigation and examination of the available information. This approach can help mitigate an imbalance between the parties.
- The **adversarial** approach is the approach used in New Zealand's general courts. The parties must gather and present their own evidence to an impartial adjudicator. They compete against each other to make the most compelling argument for their case.
- The **inquisitorial** approach is used in some countries with civil legal systems. The adjudicator takes an active role in determining the conduct of the hearing. They can call and question witnesses and evidence.

Tribunals need to have appropriate powers to be able to take an active investigative approach. Legislation should explicitly state the nature of a tribunal's investigative powers rather than referencing the Inquiries Act 2013 or Commissions of Inquiry Act 1908.

The Disputes Tribunal is an example of an investigative tribunal. Referees may appoint a person to inquire into and report upon any matter of fact having a bearing on any proceedings and may give such directions as to the nature, scope, and conduct of the inquiry as the appointee thinks fit.

Tribunals need to be adequately resourced to be investigative. The budget needs to allow for sufficient tribunal member and staff time to carry out the appropriate investigative work. For more information, see [operational costs](#).

## **Evidence**

### **ADMISSIBILITY OF EVIDENCE**

Many tribunals will have the power to receive as evidence any statement, document, information or matter that may assist the tribunal to deal with the case at hand, whether or not such material would be admissible in a court of law.

Tribunals should also be able to accept evidence that is not sworn. The flexibility to accept information on the basis of relevance, rather than technical admissibility, is consistent with the broad objectives for tribunals.

### **DISCLOSURE OF EVIDENCE**

Consider including a provision requiring disclosure to concerned parties of all material on which the tribunal may base its decision. This will allow parties to respond to the issues raised.

### **INSPECTION OF EVIDENCE**

Some tribunals may benefit from a power to inspect evidence or require the production of information relevant to cases before it.

Administrative review tribunals will usually have either a legislative entitlement to or a power to require the initial administrative decision-maker to provide information relating to the original decision and any reconsideration.

If a power to inspect or require the production of information is being considered, we suggest discussing the options with the Ministry of Justice to ensure consistency with principles relating to searches.

## **Witnesses**

### **POWER TO SUMMONS WITNESSES AND EXAMINE UNDER OATH**

Many tribunals will need the power to summons witnesses to ensure efficient and evidence-based decision-making. Where witness summons are permitted, a tribunal should usually also be given the power to examine witnesses under oath. This reminds witnesses of the significance of the process and the obligation to be truthful.

### **EXAMINING WITNESSES**

A party should normally have the right to call witnesses and present evidence in support of their case.

A right of cross-examination may be appropriate for tribunals, particularly where credibility is an issue. If a right to cross-examination is provided, limits on that right should be approached with care.

### **PRIVILEGES AND IMMUNITIES OF WITNESSES**

It may be appropriate to give witnesses appearing before a tribunal the same privileges and immunities as if they were appearing in the courts. Examples of immunities and privileges that may be appropriate include immunity from defamation and privilege against self-incrimination.

## **Maintaining order through contempt powers**

Tribunals need to have powers to maintain order and to enable the efficient conduct of proceedings. Where hearings are held in person, tribunals generally will need the power to exclude people who are disruptive or abusive. To this end, legislation might define the offence of contempt to include threatening, disrupting or hindering the tribunal, and specify the tribunal's powers to respond.

Contempt powers should be available throughout the proceedings and not just during the hearing. Proceedings may be more quickly resolved if contempt powers are clearly available and/or used to enforce the tribunal's pre-hearing orders.

## **Strike out powers**

Tribunals should have the power to strike out proceedings that:

- disclose no reasonable cause of action
- are likely to cause undue prejudice or delay
- are frivolous, vexatious or made in bad faith
- are otherwise an abuse of tribunal process
- are not within the tribunal's jurisdiction.

It may be appropriate to provide strike out powers where a party is neither present nor represented at the hearing. This power should only be exercised where other alternatives (eg adjournment) are not appropriate.

### Power to act without the parties

Some tribunals will need the power to determine a claim even where the parties have failed to act as required. This prevents parties from deliberately delaying or frustrating proceedings. See, for instance, sections 74 and 75 of the Weathertight Homes Resolution Services Act 2006.

### Remedies

Tribunals should be empowered to award a range of remedies. Specific remedies might include the power to:

- order payment of a fine (to the state). This may be appropriate for occupational licensing and professional disciplinary tribunals, for instance in cases between a regulator and an industry member who is legally represented.
- award damages and compensation in circumstances where the tribunal is satisfied that harm has been caused
- make a declaration
- order a party to undertake specified training or some other programme
- confirm, modify or quash the decision or aspect of decision appealed against. This is common for administrative review tribunals.
- make a work order (for instance, to fix a defect in property)
- send matters back to lower decision-makers for reconsideration, with directions (for [administrative review tribunals](#))
- order an apology (for [occupational licensing and professional disciplinary tribunals](#)).

Tribunals should not have a power to award exemplary damages (an order that one party pay a sum to another, in order to punish). They are reserved for court proceedings involving exceptional and serious cases of conscious wrongdoing, where other remedies do not provide adequate punishment. A tribunal's other powers and remedies should be adequate to deal with the cases before it.

### Awarding costs

The ability for a decision-maker to make a cost award is discretionary in civil courts and tribunals. Generally there is a presumption that cost awards will be permitted, although this may depend on the nature of the matters the tribunal will consider and the likelihood of vexatious and frivolous claims.

### Reasons for a decision should always be provided, preferably in writing

Accessible reasoning is desirable as it provides transparency and allows parties to decide whether to appeal a decision.

The form, extent and detail of written decisions may vary depending on the nature of the proceedings and significance of the matters to be resolved. Decisions relating to less serious or significant issues may require only a brief write-up of the decision and its reasons, primarily for the information of the parties. A brief write-up may be appropriate if:

- a tribunal deals with lower value or less serious issues where the outcome is of interest to the parties rather than the broader public
- appeal rights are very limited
- the objective of a tribunal is to resolve matters very quickly with a minimum of formality
- there is not a strong reliance on precedent.

More detailed and formal recording of decisions and their underlying rationale will be appropriate where:

- a tribunal's proceedings are more formal (possibly but not necessarily including legal representation, formal evidence, witnesses)

- appeal rights are provided
- there is public interest in the outcome of the proceedings.

## Publication of decisions

### PUBLICATION IMPROVES TRANSPARENCY

Publishing decisions may be a time-consuming process but it makes a tribunal more transparent. Public scrutiny may ensure better quality decision-making.

Previous decisions may help potential participants decide whether to lodge their claim in a tribunal or a court. Parties can better evaluate the potential outcome in their case, and assess the costs and benefits of lodging the application with the tribunal.

### LEVEL OF PUBLICATION WILL DEPEND ON THE PARTICULAR TRIBUNAL

Publishing decisions need not require an 'all or nothing' approach. It may be appropriate to publish only a selection of significant decisions, particularly if the tribunal deals with a large number of cases. The Disputes Tribunal, for instance, publishes a selection of [decisions of interest](#) on its website.

Parts of decisions may need to be withheld before publication. For example, the decisions of interest published on the Disputes Tribunal's website do not contain the names of parties. This ensures their privacy in what is usually a purely private dispute. It may also be appropriate to withhold other material to prevent unfair prejudice to a party's business interests or an individual's privacy rights. Where parts of decisions need to be withheld, this task should be included in the job description of case managers as it can be time consuming.

Published decisions should ideally be made available on a searchable website. There is little point publishing a large number of decisions without enabling people to be able to search for relevant cases.

## Access to records

A tribunal's enabling legislation or rules should set out how its records must be kept and who may access them.

It is standard practice to give parties a right to access the records of their case.

Third parties should generally have the ability to obtain access with the consent of the member who made the decision or the tribunal chair. Legislation may specify the considerations a decision-maker should take into account when deciding whether to grant consent. This could include the effect of release on the privacy or safety of individuals concerned.

The Public Records Act 2005 applies to tribunals. The Act requires public offices and local authorities to create full and accurate records of their business activity and to organise and maintain them so they can be accessed for as long as they are needed.

## Suppression orders

Tribunals generally operate under the presumption of openness but, like courts, need the power to protect sensitive information when it is shared in a hearing. It will usually be appropriate to provide a tribunal with the power to make suppression orders for all or part of proceedings.

Legislation should provide guidance on when suppression is appropriate, having regard to the presumption that publication is in the public interest and the need to balance this against protecting private interests. Legislation should also define breaching a suppression order as an offence, and specify a proportionate maximum penalty. While it would be rare for this power to be used, it is important that such orders are enforceable.

## Alternative dispute resolution ('ADR') as part of a tribunal's process

### WHEN IS ADR APPROPRIATE AS PART OF A TRIBUNAL'S PROCESS?

ADR services might be appropriate as a pre-cursor to more formal adjudication in a court or tribunal.

ADR is unlikely to be a part of the process for most [administrative review tribunals](#). Generally the applicants either meet or do not meet the statutory requirements and this is not generally an issue that can be resolved through ADR. Any role for ADR with these issues is usually at a much earlier stage – eg as part of the departmental internal complaints and review procedures prior to any application being filed with the tribunal.

ADR is an appropriate part of the process for [civil dispute resolution tribunals](#); however, the legislation should not prescribe how ADR fits within a tribunal's process. Tribunals with the [power to regulate own procedure](#) can build in mediation or settlement conferences as required. Flexibility around the process and timing allows tribunals to build ADR into the process in a natural way as appropriate. Where necessary these matters can also be dealt with by practice directions.

Sometimes ADR may be the most appropriate mechanism to resolve disputes separate from a tribunal: see [Can the issues be resolved through other existing mechanisms?](#)

### CONSULTATION WITH THE GOVERNMENT CENTRE FOR DISPUTE RESOLUTION

The [Government Centre for Dispute Resolution](#) should be consulted on any proposal to include ADR services as part of a tribunal's procedure. The Centre is located at the Ministry of Business, Innovation and Employment (MBIE). The Centre has developed a suite of products related to the appropriateness of ADR and may be able to provide advice, tools and templates to agencies.

### Power to issue practice notes and make rules

It is standard practice for legislation to include a power for the Governor-General, by Order in Council, to make rules relating to tribunal procedures. This provides a mechanism for making binding procedural requirements (such as service requirements, forms, office hours, fees etc).

It is useful for legislation to include the power for the Chair to issue practice notes. These are designed to provide procedural guidance to parties and individuals appearing before a court or tribunal. They may indicate best practice or explain how the rules should work in practice. They are not binding.

### Enforceability of judgments

Tribunal judgments can become enforceable by declaring in the act establishing the tribunal that the tribunal's orders 'are deemed to be orders of the District Court and can be enforced in the District Court'. Under the District Court Act 2016:

- if an order relates to the payment of money, section 133 provides a range of proceedings that can be used to enforce payment
- if an order is not for the payment of money, but instead requires a person to do or refrain from doing something, and a person does not comply with that order, enforcement is available under section 134. This section provides for imprisonment for up to 3 months; while this power would be used very infrequently, it would have a strong deterrent effect.

Depending on the remedies available, it may be appropriate to provide a power to issue fines for non-compliance with certain orders, as well as the powers contained in the District Court Act 2016.

# Appeals, rehearings and reviews

This section outlines the general principles to take into account when considering how to allow parties to challenge tribunal decisions.

There are three general mechanisms to allow a person to challenge a decision:

- **appeals** allow reconsideration of the merits of a decision
- **rehearings** are about reconsidering whether there was a substantial miscarriage of justice
- **reviews** (often called judicial review) are about correcting procedural irregularities.

## Appeals

There should normally be a right of appeal to the courts from a tribunal. Tribunals should not be the final decision-makers, particularly on matters of law.

### FIRST APPEALS

Where a tribunal is a first-instance decision-maker, the first right of appeal should usually be a general one on matters of fact and law. This allows both factual and legal errors to be corrected. [Civil dispute resolution tribunals](#) and [occupational regulation tribunals](#) would generally come into this category.

Where a tribunal is a review or appeal body, rather than a first instance decision-maker, the first right of appeal should be limited to matters of law. This is because the tribunal has already provided the opportunity to address issues of fact. [Administrative review tribunals](#) would generally fall into this category.

Limited rights of appeal are likely to be appropriate where a tribunal is designed to resolve large numbers of low value claims quickly and cheaply, such as the Disputes Tribunal. There is a trade-off between speed and finality, and the benefits of error correction and scrutiny that an appeal might offer.

### SECOND AND SUBSEQUENT RIGHTS OF APPEAL

As a general principle, provision should be made for two appeals from a tribunal decision. The second appeal should usually be by leave only and limited to matters of law.

It may be appropriate to depart from this general principle where the possible consequences of a decision are very serious or very minor, or where the questions to be decided by the tribunal are very complex or very simple. The need for a prompt decision may make it appropriate to provide for only one appeal from a tribunal decision.

### APPEAL PROCEDURES

#### Appeals 'by way of rehearing'

An appeal by way of rehearing is not the same as a [rehearing](#). It is where the appellate body comes to its own conclusion based on the material presented before the tribunal and any further evidence that has been admitted. The appellate body has a discretionary power to rehear all or any part of the evidence and receive further evidence.

This appeal process will usually be the most appropriate for appeals from tribunal decisions. It strikes a balance between the flexibility to correct errors and the need for appeals to be expeditiously resolved.

### ***De novo* appeals are rare**

In *de novo* hearings, the appellate body approaches the case afresh: this is effectively a new hearing and there is no presumption that the decision appealed is correct. *De novo* appeals from tribunals are rare because of the specialist expertise generally held by tribunals.

### **Appeals ‘by way of case stated’ are usually inappropriate**

Appeals from tribunals should not be by way of case stated. The case stated procedure involves tribunal consultation with a court to obtain clarification on a point of law. The procedure weakens the value of the appellant’s right of appeal because the tribunal formulates the questions for the court to answer.

### **APPEAL PATHWAYS – APPEAL TO WHICH COURT**

The importance of the matter will largely determine which court should hear the appeal. Other factors to consider include:

- **the monetary value of the matter** – the District Courts’ civil jurisdiction is up to \$350,000. If the Tribunal can make orders for greater amounts, appeals should be able to be made to either the District Court or the High Court depending on the amount involved.
- **the function and membership of the tribunal** – for example, if the tribunal deals with particularly significant matters, appeals to the High Court may be appropriate. If the tribunal is required to be chaired by a District Court Judge, appeals are usually to the High Court.

### **Rehearings**

Some legislation provides the ability for people to apply for a rehearing, as well as an appeal. A rehearing allows a person to challenge a decision where they think the decision was substantially wrong or a miscarriage of justice may have occurred. There need to be clear statutory criteria set for granting a rehearing.

### **Judicial review**

Statutory decision-makers are subject to judicial review under the Judicial Review Procedure Act 2016. As a general rule, judicial review is automatically available and does not need to be specified in the tribunal’s enabling legislation. This existence of an appeal right does not bar a person from applying for judicial review. Further information is available from sources such as McGechan on Procedure.

# Further resources

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The Treasury. (2017) Guidelines for setting charges in the public sector. <http://www.treasury.govt.nz/publications/guidance/planning/charges>.

# Appendix 1

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## CIVIL FEES REVIEW: POLICY FRAMEWORK

### **Is it appropriate to charge fees?**

Courts and tribunals generate public and private benefits in the civil jurisdiction. The total cost of these bodies is therefore most appropriately shared by taxpayers and users. There may, however, be times when fees will not be appropriate; for example, where there is a human rights issue or social policy that would not be achieved if fees were imposed. Any fee that is imposed on users must have legal authority.

### **What is the cost to government of delivering the service?**

All departmental and Crown costs associated with the relevant proceedings or services of a court or tribunal should be included when calculating the base cost of the service or jurisdiction. For courts and tribunals, this includes non-departmental costs, such as judicial costs. Non-relevant costs should be excluded.

### **How should fees be set?**

Fees should be set at levels which are reasonable and do not act as a barrier to access. The proportion of costs recovered through fees in a jurisdiction, or service within a jurisdiction, should broadly reflect the balance of private and public benefits generated by the jurisdiction or service.

### **Will access to justice be preserved?**

Fees should not bar or introduce significant impediments to people's ability to access a court or tribunal. Where safeguards to protect access to justice are required, these can be provided by waivers, concession rate fees or exemptions. A judicial officer should have a power to review a registrar's decision not to waive a fee.

### **Who should pay fees? Should costs be able to be reallocated?**

The user of a service should pay any fee. Judicial officers should generally have discretion to reallocate costs between parties.

### **How should fees be structured to ensure simplicity, fairness and efficiency?**

A fee system should be simple, fair and efficient. A single fee is more likely to achieve these objectives for proceedings that do not involve many different steps and choices. A multiple fee system is more likely to be appropriate for cases that follow different paths through a process. Fees should be payable in advance, where possible. Specific fees should be based on average cost pricing.

### **Implement and monitor fees transparently**

Fee setting requires transparent processes for identifying costs and revenue. It also requires regular reviews.





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