APPEAL AND REVIEW

Chapter 28 Creating a system of appeal, review, and complaint

Where a public body or agency makes a decision affecting a person's rights or interests, that person should generally be able to have the decision reviewed in some way. The ability to review or appeal a decision helps to ensure that those decisions are in accordance with the law. Also, the prospect of scrutiny encourages first-instance decision makers to produce decisions of the highest possible quality.

There are two general processes that allow for reconsideration of a decision. Judicial review (the inherent power of the High Court to review the lawfulness of decisions taken under statutory powers) will be available regardless of whether a statutory appeal or other complaint mechanism is provided for. However, judicial review is limited to examination of the lawfulness of decisions that are made. In contrast, and depending upon how the right is framed, an appeal may allow the appellate court or tribunal to stand in place of the original decision-maker and re-make findings of fact or law, or both. A right of judicial review exists unless excluded by legislation. A right of appeal however will only exist if legislation provides for it.

This chapter is primarily concerned with the second process, a statutory right of review or appeal. It discusses the following questions:

- Should there be a right of appeal?
- If so, who should hear the appeal?
- What should be the nature of the appeal?
- Should there be any limits on the appeal?
- What procedure should apply?

This chapter starts however by discussing legislation that seeks to limit the right to seek judicial review.

Guidelines

28.1 Does the legislation seek to exclude or limit the right to apply for judicial review?

Legislation should not restrict the right to apply for judicial review.

New Zealand courts do not have jurisdiction to invalidate legislation passed by Parliament, but do have the right to judicially review the legality of decisions made by Ministers, officials, or others under that legislation. This is a fundamental part of New Zealand's constitutional settings. The right to apply to the High Court for judicial review of a decision exists independently of any statutory appeal rights and is affirmed by s 27(2) NZBORA.

In judicial review proceedings, the court will determine whether the decision was made in accordance with the law and within the range of reasonable decisions that could have

been made. The court may set an unlawful or unreasonable decision aside, to be re-made by the decision maker. In rare circumstances, the court may substitute its own decision.

The requirement that decision-makers act within the law is fundamental to the rule of law. Ouster clauses (sometimes called privative clauses) remove or limit (either substantively or through procedural limits) the ability of the courts to judicially review the decision. As a result, they interfere with the courts' constitutional role as interpreters of the law and so undermine the rule of law. The inclusion of ouster clauses also needs to be very carefully considered as they raise issues as to whether legislation is consistent with s 27(2) NZBORA.

Because ouster clauses undermine fundamental principles of constitutional law, the courts give them a narrow interpretation to preserve their ability to review decisions in at least some circumstances. As a result, ouster clauses may not be fully effective even if included.

[Link to supplementary material: Excluding or limiting the right to judicial review]

28.2 Should the legislation provide a right to appeal a statutory decision affecting a person's rights or interests?

A person affected by a statutory decision should have an adequate pathway to challenge that decision.

Determining whether an adequate pathway to challenge a decision should involve an internal review or appeal (or both), or merely judicial review, turns on the nature of the decision and the decision-maker.[58]

In the case of criminal proceedings, the need to provide for a right of appeal is dealt with by the Criminal Procedure Act 2011. New legislation should rely on these existing appeal rights, and not create bespoke appeal rights.

For most other decisions, the starting point is that legislation should provide a right of appeal if the rights or interests of a particular person are affected by an administrative decision. An appeal enables the merits of a decision to be re-examined through an assessment of questions of fact and the application of judgement to those facts (rather than just an assessment of the process by which the decision was made, which is what is examined in a judicial review). Therefore, an appeal should be available unless there are factors that would make an appeal inappropriate.

The value of an appeal must be balanced in the particular circumstances against a consideration of the potential costs, implications of delay, significance of the subject matter, competence and expertise of the decision-maker in the first instance, and the need for finality. However, concerns about cost and delay should usually be dealt with by limiting the right of appeal, rather than denying it altogether.

28.3 Who should hear an appeal?

[58] See 28.8 for a discussion of internal review.

Legislation should identify which courts or specialist bodies will hear any appeal or complaint and new tribunals or appeal bodies should not be created if appeals or complaints could be heard by an existing entity.

Where a right of appeal from a decision (or from the internal review of that decision) is intended, the legislation should identify the body which will hear the appeal. The two general classes of appeal body are the courts of general jurisdiction (District Court, High Court, Court of Appeal, and Supreme Court) and specialist bodies and courts (such as the Social Security Appeal Authority, Environment Court, and Employment Court).

Courts of general jurisdiction are more appropriate for second appeals from specialist courts, or for first appeals where general matters of criminal or civil law are involved. A specialist body will generally be appropriate for first appeals from decision makers in narrow fields or in cases that require technical expertise on the part of the decision maker.

New specialist tribunals are rarely created. Officials should work closely with their legal advisers and the Ministry of Justice before deciding whether to create a new specialist tribunal or expand the jurisdiction of an existing tribunal. The creation of new tribunals and the granting of new powers to existing tribunals are discussed in Chapters 18 and 20. In 2015, the Ministry of Justice produced detailed guidance for departments considering whether to create a new tribunal or improve an existing tribunal. This guidance provides the starting point for any department that is considering creating a new tribunal.[59]

Similarly, a range of statutory office holders are also empowered to investigate complaints relating to specific fields. Examples include the Commerce Commission, the Privacy Commissioner, the Health and Disability Commissioner, the Human Rights Commissioner, and the Electricity Authority. Existing commissioners and statutory office holders with relevant jurisdiction should be relied on rather than creating new jurisdictions, unless there are good reasons not to do so. Good reasons for not relying on an existing body might include the fact that the body lacks the necessary powers, independence, or governance arrangements to properly address the issue. Also, the new powers or jurisdiction granted may conflict with the existing functions of the body. If consideration is being given to extending the jurisdiction of an existing body, that body should be consulted at an early stage.

28.4 What rules or procedures should apply to appeals?

Appeals to existing appeal bodies should be governed by the generic procedures that apply to appeals to those bodies.

The District Court Rules and High Court Rules establish the appeal procedures that apply to civil appeals to those courts. Those procedures provide default rules covering a range of

[59] Ministry of Justice *Tribunal Guidance - Choosing the right decision-making body Equipping tribunals to operate effectively* (2015) http://www.justice.govt.nz/assets/Documents/Publications/tribunal-guidelines-201511.pdf.

issues, including the time frame for commencing an appeal,[60] the nature of the appeal,[61] and requirements for leave to appeal.[62] Subsequent appeals (that is, those to the Court of Appeal and Supreme Court) should be governed by the respective rules of those courts.

The Criminal Procedure Act 2011, and the associated rules, provide a comprehensive appeal procedure in respect of criminal appeals.

Other bodies that hear appeals, such as Tribunals, will also have an established set of procedural rules.

New legislation should rely on existing procedures unless there are compelling reasons to create new procedures. The next four parts of this chapter concern the design of those special procedures, if they are required.

28.5 Should the right to bring an appeal be limited?

The rights to bring first and subsequent appeals should not be unreasonably limited.

Limiting the right to bring an appeal is a way of encouraging finality and avoids the prolonging of litigation. However, any limits must be reasonable and not so restrictive as to render the right to appeal worthless. Common limitations that promote finality are as follows:

- **Time limits** on when an appeal must be brought (on first and subsequent appeals). Exceptions to a time limit are appropriate as long as the criteria for granting an extension are expressly set out and it is clear that extensions should not be granted as a matter of course.
- **Limiting the subject matter of second and subsequent appeals to questions of law**. First appeals should generally include a right of appeal on the facts. In some cases, second and subsequent appeals are limited to questions of law. Limiting the scope of appeal to questions of law (that the decision-maker applied the law correctly) excludes examination of whether the decision erred in the conclusions as to the facts (to which they applied the law). This makes it similar to judicial review. However, the distinction between questions of fact and questions of law can be elusive, and any limitation should be based on the purpose of the appeal, the competence of the appellate body, and the appropriate balance between finality, accurate fact-finding and correct interpretation of the law.
- **Leave (permission) requirements** on subsequent appeals. A second right of appeal should generally be available only with the leave of the first or second appellate body. Typically, the criteria considered in granting leave will include either the interests of justice or the public interest in having an important question of law resolved.

[60] District Court Rules 2014, 18.4; High Court Rules, 20.18.
[61] District Court Rules 2014, 18.19; High Court Rules 2016, 20.4.
[62] High Court Rules 2016, 20.3.

28.6 What type of appeal should be granted?

Legislation should identify the type of appeal procedure to be adopted where existing appeal procedures cannot be relied on.

If new legislation does not rely on an existing appeal procedure, the appeal model that is most appropriate to the context of the legislation should be identified. The most commonly used models are "re- hearings" or "hearings *de novo*".

- **Re-hearing:** The appeal is heard on the record of evidence considered by the previous decision maker, but the appellate body has the discretion to re-hear some or all of the evidence and to admit new evidence. Re-hearings are generally appropriate where specific legal or factual errors are the focus.
- **Hearing de novo:** In a hearing *de novo* (from the beginning again), the appellate body may approach the case afresh and the appellant receives an entirely new hearing. Hearings *de novo* will generally only be appropriate when there is a reasonable possibility that the first instance decision maker may have incorrectly ascertained the facts.

Re-hearings will generally be cheaper and faster than hearings *de novo*, but will still involve significant time and cost.

Two other appeal models are appeals by way of "case stated" and pure appeals (or "stricto sensu"). These two models can be restrictive in terms of the evidence that the court can consider and what outcomes can be achieved and it is now very rare to provide for them in statutes. Legal advisers and the Ministry of Justice should be consulted if an appeal model other than either a re-hearing or hearing *de novo* is being considered.

28.7 What other procedural safeguards should be built into the appeal or review process?

The appeal procedure adopted should contain adequate safeguards to protect an individual's rights and interests and be consistent with the right to natural justice affirmed by section 27(1) NZBORA.

Some common procedural protections for appeals, many of which are provided for in the Criminal Procedure Act, and the District Court Rules and High Court Rules include:

- independent and impartial decision makers;
- the opportunity to be heard (whether by oral hearing or in writing);
- ensuring parties are aware of things that affect their case (such as notice of hearings and impending decisions);
- disclosure of relevant material;
- the availability of legal representation;
- a right to call and cross examine witnesses;
- a requirement that the decision maker give reasons;
- the provision of interpreters;
- the provision of a further right of appeal.

Most of these protections are inherent in providing an appeal and, even if they are not expressly stated in the legislation, the court may "read them into" the legislation if doing so is necessary to give the legislation a meaning that is consistent with NZBORA.

Some of these protections are more dependent on the particular context (for example, legal representation or the right to call witnesses). In this case, what is appropriate and proportionate should be assessed in light of the character of the decision-maker and the context of the decision that is made. The risk of creating a longer process, increasing costs, or adding complexity needs to be balanced against the need to ensure that an appeal is conducted fairly and in accordance with the principles of natural justice.

28.8 Will the legislation provide for a process of internal review?

In some circumstances the legislation should also include a prior process of internal review of the merits of a decision. Internal reviews are an effective way of identifying and correcting mistakes without the cost and publicity that an appeal to an external body or judicial review may attract. However, they are not a substitute for considering whether or not a right of appeal is appropriate.

Internal reviews are particularly appropriate where there are lots of decisions being made that involve findings of fact and an internal review process will ensure quality and consistency of decision-making across multiple decision-makers (for example, decisions on benefits). Other circumstances that may make a process of internal review appropriate are when the decisions are likely to be delegated or where there are financial or other impediments to accessing review of the decisions through the courts.

Internal review involves empowering a person or body within the department to review a decision after receiving a complaint. The legislation can provide for and set out the procedure for the internal review, any criteria to be applied to the review, and any limits on the scope of the review.[63] Often, legislation will require a person to first apply for an internal review before appealing to an external body. This gives the opportunity to correct any mistakes without formal proceedings.

Providing internal review procedures in legislation has the advantage of providing certainty and transparency for those procedures, but many bodies operate internal review procedures without legislative provision and those advantages should be balanced against any risk that the procedures will become out-of-date.

28.9 Will decisions taken under the legislation be subject to a complaint to the Office of the Ombudsman?

All bodies that exercise public functions should be subject to the Ombudsmen Act 1975 unless compelling reasons exist for them not to be.

[63] Many of the issues described in this chapter that should be considered when designing rights of appeal will be equally relevant to the design of processes for internal review (for example, rules or procedures in 28.4; limits on the scope of the review in 28.5; and procedural safeguards in 28.7).

Ombudsmen have a general power to investigate the activities of a wide range of bodies (listed in the Ombudsmen Act 1975) and report on the lawfulness or reasonableness of those activities. These opinions are not binding (except in respect of opinions under the Official Information Act 1982). However, they may be forwarded to the House of Representatives if the Ombudsmen do not consider that adequate action has been taken by the public body. In many cases a public body will comply with the opinion of the Ombudsmen, leading to a satisfactory outcome for the complainant. The Ministry of Justice, the Department of Internal Affairs, and the Office of the Ombudsman must be consulted if it is proposed that the right to complain to the Ombudsmen be restricted by legislation.

Chapter 29 Including alternative dispute resolution clauses in legislation

Litigation can be expensive, time consuming, and damage relationships. In appropriate cases, the negative consequences of litigation can be reduced by providing for Alternative Dispute Resolution (ADR) processes in a statutory scheme.

ADR is a generic term for any form of dispute resolution other than proceedings in a court or a tribunal, and usually involves an independent third party. A range of procedures are available and are discussed in more detail on pages 400 to 410 of the 2001 edition of the LAC Guidelines on Process and Content of Legislation. The most common procedures are mediation, expert evaluation, arbitration, and adjudication. Each process has distinguishing characteristics that have to be considered before including them in a statutory ADR scheme.

ADR has advantages over litigation, both in process and in outcome. It is more flexible and generally less confrontational than court proceedings, and it enables the parties to have a greater say in the process. It is usually faster and cheaper than court litigation, and has a greater scope for confidentiality. While court proceedings are generally limited to giving effect to legal rights, ADR processes may allow parties to reach settlements that meet other needs, for example by enabling the parties to receive an apology or explanation.

ADR processes should complement, but not exclude, the ability of the parties to bring court proceedings. ADR can take place before, and in some cases during, court proceedings. ADR already features in a number of New Zealand Acts. The Arbitration Act 1996 is one of the most prominent. It sets out a generic set of rules that apply to arbitrations in New Zealand. Many other Acts incorporate ADR procedures into their statutory scheme to varying degrees.

The Government Centre for Dispute Resolution at the Ministry of Business, Innovation & Employment has produced detailed guidance for departments considering whether to create new dispute resolution schemes.[64] This guidance should provide the starting point for any department that is considering creating a new scheme.

Guidelines

29.1 Should the legislation contain an ADR provision?

ADR provisions should be included in legislation where the potential nature of the dispute is suitable for determination by ADR.

Not all disputes can be appropriately addressed by ADR. The resolution of criminal charges, determination of points of law, or cases that require a determination of critical disputed facts are not generally suitable for ADR. ADR is not appropriate if important issues of public policy are at stake, the dispute relates to the content of legislation, a dispute over the meaning of legislation exists, fundamental rights or allegations of abuse of power are involved, or the outcome sought by one of the parties is outside the powers of the decision

[64] Ministry of Business, Innovation & Employment *Best practice dispute resolution guidance*.

maker concerned.

29.2 Which form of ADR should be used?

The form of ADR adopted should help to achieve the policy objective and be appropriate to the nature of the dispute and the issues in question.

A range of forms of ADR will be appropriate, depending on the different types of issues. The ADR processes most likely to be suitable for inclusion in legislation can be divided into three broad categories:

- **Facilitative processes (facilitation, negotiation, mediation)**—These involve an impartial third person with no advisory or determinative role who provides assistance in managing the process of dispute resolution.
- **Evaluative processes (conciliation, expert evaluation, case appraisal)**—These involve an impartial third person who investigates the dispute, advises on the facts and possible outcomes, and assists in its resolution.
- **Determinative processes (adjudication, arbitration, expert determination)**—These involve an impartial third person who investigates the dispute and makes a determination that is legally enforceable.

Some key issues to consider, when deciding which process is appropriate for a particular scheme, are noted below.

- **The role of the third party**—Will the third party predominantly help the parties to reach mutual agreement, will they investigate the dispute and advise on potential compromises and outcomes, or will they make a legally enforceable determination?
- **Control over participation and process**—How flexible or formal should the process be? How much of the process should the parties determine? What are the consequences (if any) of parties refusing to engage in, or withdrawing from, the process once commenced?
- **Nature of the outcome**—Will the outcome be confidential and binding on the parties? Will the outcome be appealable to a court under certain circumstances?
- **Administration**—Who will administer the service? Will the Government provide the ADR service? Will the service be free to all parties? How will the third person and location be determined?

Further detailed discussion on selecting the appropriate form of ADR can be found on pages 400 to 410 of the 2001 edition of the Guidelines.

29.3 Which elements of the ADR scheme should be included in the legislation?

Legislation should include those elements of the ADR scheme necessary to ensure that the

appropriate desired outcomes and procedures are adopted.

The flexibility of ADR is one of its great strengths. However, if not properly constrained by the legislation, the processes and outcomes adopted may not accord with the original policy objective and may, in some cases, undermine it. The Parliamentary Counsel Office has produced model ADR clauses that should be used when designing an ADR process.[65]

An Act that provides for an ADR process should:

- address the purpose and desired general outcome of the ADR process;
- describe the process clearly and consistently;
- set out sufficient safeguards to ensure that the principles of natural justice are adhered to, power imbalances are addressed, and the independence and impartiality of the third party is protected;
- identify the parties and any other bodies and people that might be consulted or involved;
- state whether the ADR process is subject to any legal privileges (such as self-incrimination), and whether the process and outcome are confidential;
- define when and in what manner the ADR process should commence, be suspended, and end;
- define the role, qualifications, powers, and protections of the third party (in particular, the third party should be prohibited from exercising more than one function—if a dispute is initially considered in a mediation, but later turns to formal arbitration, the mediator should not also act as an arbitrator);
- state clearly whether the ADR process is a pre-requisite to any other dispute mechanism (including court proceedings); and
- set out the status of the resolution (for example, whether it will be legally binding or enforceable in court).

[65] Parliamentary Counsel Office *Model clauses for alternative dispute resolution*.