NEW ZEALAND LAW SOCIETY

NZLS EST 1869

# Tribunals Powers and Procedures Legislation Bill

*16/2/2018*

# Submission on the Tribunals Powers and Procedures Legislation Bill – tribunals amendments

## 1. INTRODUCTION

1.1 The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Tribunals Powers and Procedures Legislation Bill (Bill).[1]

1.2 The Law Society supports the efforts to increase the efficiency and accessibility of tribunals.

1.3 The relevant amendments broadly fall into two categories:

(a) The introduction of a standard set of powers and procedures to be followed by similar tribunals administered by the Ministry of Justice, aimed at improving productivity and administrative efficiency; and

(b) The introduction of specific, tailored amendments to the powers and procedures of specific tribunals.

1.4 The standardisation amendments introduce wide-ranging powers for tribunal decision-makers that are modelled on the powers of District and High Court Judges. If properly applied, the Law Society considers that these powers are an appropriate means of achieving the Bill's objectives, of ensuring consistency across the tribunals, improving the efficiency of tribunals, speeding up decisions on minor matters, and ensuring that sensitive information is suitably protected. However, there is a real risk of substantial injustice if these powers are not applied appropriately or consistently, and this is exacerbated in the tribunals where decision-makers are not familiar with or bound to follow the law. Accordingly, the Law Society recommends that the Bill be amended to impose some explicit limits on tribunals' discretion to exercise these powers. The Law Society also suggests that the Ministry of Justice release a Practice Direction in relation to the exercise of these powers.

1.5 The Law Society supports the specific, tailored amendments but considers that the decision to increase the monetary threshold of claims at the Disputes Tribunal to $30,000 creates risks, given that decisions made by the Disputes Tribunal are not strictly bound by the law. We suggest below ways in which the Bill might be amended to mitigate issues that could arise.

1.6 The Law Society does not wish to be heard, but is happy to discuss the contents of the submission with officials if that would be of assistance.

## 2. STANDARDISATION AMENDMENTS – STRIKE OUT

2.1 The Bill (at clauses 15, 32, 51, 77, 96, 117, 133, 138, 163, 226, 244, 292, 303 and 315) provides various tribunals with a standardised strike-out power in the following terms:

---

[1] The New Zealand Law Society in its regulatory role under the Lawyers and Conveyancers Act 2006 (the Act) has made a separate, stand-alone submission dated 16 February 2018 on the proposed amendments to the Act in subpart 10 of the Bill (in relation to the Legal Complaints Review Office (LCRO) and the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (NZLCDT)).

(1) The [Tribunal] may strike out, in whole or in part, a [proceeding] if satisfied that it—

a. discloses no reasonable cause of action; or

b. is likely to cause prejudice or delay; or

c. is frivolous or vexatious; or

d. is otherwise an abuse of process

(2) If a party is neither present nor represented at the hearing of a [proceeding], the [Tribunal] may—

a. Strike out the [proceeding]; or

b. Determine the [proceeding] in the absence of the party; or

c. Adjourn the hearing

2.2 The Regulatory Impact Statement records that the rationale for this provision is to resolve "*problems with parties who either wilfully fail to comply with tribunal process causing additional costs and delays or who are vexatious*".[2] It states "*Strike out provisions are always used sparingly and occur typically when matters are not being pursued*".[3] The Explanatory Note to the Bill states that the standard provisions enable "*the striking out of meritless applications*".

2.3 The Law Society supports a strike-out power for tribunals for appropriate cases. However, the Law Society considers that an aspect of the generic language used in the provision ("discloses no reasonable cause of action") is incongruous in the context of many of the tribunals in question. The Law Society also submits that the relevant legislation being amended should contain explicit safeguards so that only truly meritless or vexatious claims are disposed of without a full hearing.

***Subsection (1) of the proposed strike-out power***

*"No reasonable cause of action"*

2.4 The formulation "discloses no reasonable cause of action" is imported from the rules of civil procedure for the District Court and High Court in ordinary civil proceedings.

2.5 The terminology "discloses no reasonable cause of action" is not appropriate for those tribunals that hear complaints, reviews or appeals, or otherwise do not determine claims that require the establishment of a "cause of action" in the usual sense of the term (that is, a set of facts that give rise to a civil remedy from another person – such as breach of contract or the tort of negligence).

2.6 Moreover, strike-out applications in ordinary civil proceedings sometimes involve lengthy and complex legal arguments to resolve questions of legal principle on the basis of pleaded facts that are assumed to be true — in order to avoid determining facts that do not give rise to a legal remedy when forensic tools such as discovery, oral evidence and cross-examination will involve significant time and cost. The Law Society submits that strike-out arguments of this sort should not be a feature of the practice of tribunals, which typically

[2] Ministry of Justice *Regulatory Impact Statement: Tribunal Enhancements* (26 March 2014) at 7.

[3] At 7.

have more informal and circumscribed hearings. In the case of tribunals, the Law Society considers that genuine legal controversies should be resolved in the context of a normal hearing. The strike-out power should be reserved for obviously hopeless cases.

2.7 For these reasons, the Law Society recommends that the words "discloses no reasonable cause of action" be replaced with "is clearly meritless and has no prospect of success".

*Express opportunity for amendment*

2.8 Many litigants in the tribunals will be self-represented, and accordingly circumstances may arise where, despite having a legitimate case, they fail to adequately articulate their complaint in the first instance. In ordinary civil proceedings, litigants are typically given an opportunity to amend their pleadings if their case is able to be salvaged through amendment.

2.9 The Law Society suggests that express provision be made in the generic formulation so that the tribunal must communicate its intention to strike out the proceeding with a statement of reasons, and provide the claimant with an opportunity to amend the claim so as to meet the tribunal's concern, if it is possible to do so.

***Subsection (2) of the proposed strike-out power***

2.10 The Law Society has not been able to find a provision in New Zealand equivalent to subsection (2) of the strike-out clause.[4] A similar provision is contained in the English & Welsh Civil Procedure Rule (CPR) 27.9, which is the rule applicable for court claims allocated to the small claims track.

2.11 In many instances, strike-out or determination of a claim or defence may be a disproportionate and draconian response to a party's failure to attend a hearing. However, as drafted, the discretion to make such an order in the Bill is currently unfettered.

2.12 CPR 27.9 includes specific provision for parties to be able to notify the court in advance of a hearing that they will not attend, and for the court to decide the claim in their absence. In this situation, the court must not strike out the claim for non-attendance and must determine it on the available material. The Law Society recommends that a similar provision be included in the Bill.

*Recommendations*

2.12 The Law Society recommends that, in each of clauses 15, 32, 51, 77, 96, 117, 133, 138, 163, 226, 244, 292, 303 and 315:

- The words "discloses no reasonable cause of action" be replaced with "is clearly meritless and has no prospect of success".
- A requirement be introduced requiring the relevant tribunal to notify the parties of its intention to strike out the proceeding and providing the claimant with the opportunity to amend its case.

[4] There are provisions which address aspects of this rule. For example, clause 19(3) of the Human Rights Review Tribunal Regulations allows the Tribunal to determine a proceeding in the absence of one or both parties.

- A requirement be introduced that strike-out on the grounds of non-appearance be a reasonable and proportionate response to the non-attendance.
- Provisions along the lines of CPR 27.9 be introduced enabling a party to notify the Tribunal of the party's intention not to appear and request determination of the case on the basis of submitted written material.

## 3. STANDARDISATION AMENDMENTS – HEARINGS ON THE PAPERS

3.1 The Bill provides (at clauses 13, 94, 118, 124, 163, 192, 223, 275, 291 and 302) for hearings on the papers in the following (or substantially similar) terms:

> (1) Despite anything in this Act to the contrary, the Tribunal may determine a proceeding on the papers if the Tribunal considers it appropriate.
>
> (2) Before doing so, the Tribunal must give the parties a reasonable opportunity to comment on whether the proceeding should be dealt with in that manner.
>
> (3) The hearing of a matter or any part of it may be conducted by telephone, audio-visual link, or other remote access facility if the Tribunal or Chairperson considers it appropriate and the necessary facilities are available.

3.2 The Regulatory Impact Statement records that this is desirable at "*times when no party or witness wants or needs to be present because of the nature of the matter and it could be dealt with by a member based on written evidence*".[5] However, it notes "*[w]here significant rights are at stake there should in general be the opportunity for an oral hearing. Oral hearings are likely to be required where a person's credibility is at issue or where the nature of the fact-finding task requires it. "In person" hearings may also provide a sense of increased fairness and openness, as parties are able to present their case and response to the other party*".[6]

3.3 Although the Regulatory Impact Statement identifies the limited situations where it may be appropriate for matters to be considered on the papers, the provision in the Bill simply enables the relevant tribunal to hear matters on the papers "*if the Tribunal considers it appropriate*". The Law Society recommends that the factors which the tribunal should take into account in deciding whether to make a decision without a hearing be explicitly prescribed.

*Recommendation*

3.4 The Law Society recommends the following amendments (**marked in bold**) be made to the power proposed in clauses 13, 94, 118, 124, 163, 192, 223, 275, 291 and 302 of the Bill to determine a proceeding on the papers:

> (1) Despite anything in this Act to the contrary, the Tribunal may determine a proceeding on the papers if the Tribunal considers it appropriate.
>
> (2) Before doing so, the Tribunal must give the parties a reasonable opportunity to comment on whether the proceeding should be dealt with in that manner.

---

5 At 8.

6 At 8-9.

**(3) In deciding whether to determine a proceeding on the papers, the Tribunal must take into account whether:**

**a. the proceeding concerns a determination of rights or obligations that would be significant to the parties; and**

**b. the Tribunal will be required to determine a disputed question of fact that is significant to the proceeding and where a person's credibility is in issue or determination of the factual question would otherwise benefit from an oral hearing.**

## 4. THE DISPUTES TRIBUNAL

4.1 In addition to the standard terms above, the Bill makes various amendments to the powers and procedures of the Disputes Tribunal.

### *Increase in monetary threshold to hear cases up to $30,000 (no consent required)*

4.2 The monetary threshold is proposed to be increased from $15,000 (or $20,000 if the parties agree) to $30,000 (irrespective of whether the parties agree).

4.3 The Regulatory Impact Statement estimates that this will result in 500-800 more Disputes Tribunal cases (3% - 5% more) and up to 200 fewer District Court cases yearly.[7] It notes that the consent provision currently in force is used in less than 1% of cases, as respondents do not consent or applicants do not try to get their consent.[8] The change in the Bill is intended to provide more access to the Disputes Tribunal, which is simple, fast and low-cost.

4.4 The Law Society supports this proposal, subject to addressing the subject of the extent to which decisions made by the Disputes Tribunal are based on law. This issue is considered below.

### *Decisions based on the law*

4.5 The Bill preserves the status quo by providing that Disputes Tribunal referees make decisions based on the substantial merits and justice of the case having regard to the law (but not to strict legal rights or obligations, or legal forms or technicalities).

4.6 The Regulatory Impact Statement records that this approach was considered together with an option that "*Dispute Tribunal referees make decisions based on the law, with regard to the substantial merits and justice of the case*".[9] The RIS concluded that the status quo was a preferable option and necessary to avoid "*power imbalances between parties who have more in-house legal expertise*", "*increased disposal times as parties take longer to make legal arguments and referees take longer to decide*", "*more legal advice before hearing*", and also noted that "*more referee training would be required*".[10]

---

7 Ministry of Justice *Regulatory Impact Statement: Increasing the maximum claim level in the Disputes Tribunal* (27 November 2013) at 7.

8 At 7-8.

9 At 10.

10 At 10.

4.7 The Law Society submits that if the status quo is retained in circumstances where the monetary threshold of the Disputes Tribunal has increased, this increases the risk that decisions made other than in accordance with the law will result in real injustices.

4.8 A similar scenario has been the subject of judicial consideration the United Kingdom. The UK Financial Ombudsman Services (FOS) considers banking and finance disputes by reference to what is "*fair and reasonable in all the circumstances of the case*" but is required to have regard to legal principles. The extent to which the FOS is required to engage those legal principles has been considered at length by the Courts. In *R (Heather Moor & Edgecomb) v FOS* [2008] EWCA Civ 642, the English Court of Appeal confirmed that the FOS was free to depart from the relevant law but, if the FOS does so, then it should say so in its decision and explain the reasons for the departure. In *R (Aviva Life and Pensions) v Financial Ombudsman Service [*2017] EWHC 352 (Admin), Justice Jay quashed a FOS decision on the basis that, although the FOS had been free to depart from the relevant law, it had not provided proper reasons for doing so. His Honour made the following comments:

> *By way of postscript, I do have personal concerns about a jurisdiction such as this which occupies an uncertain space outside the common law and statute. The relationship between what is fair and reasonable, and what the law lays down, is not altogether clear. The approach of the Court of Appeal has been to say that a sufficient nexus exists between these two normative categories because (i) the corpus of legal principles and rules is clear, and (ii) the Ombudsman must give clear reasons when she departs from the law. Speaking entirely personally, I am not wholly satisfied that this adequately bridges the gap, or gives sufficient definition to the norms under scrutiny. Who, or what, defines the contours and content of fairness and reasonableness? If the law takes one policy direction, what can rationally survive of a policy which has been eschewed? During the course of oral argument, I suggested that fairness and reasonableness may occupy some sort of penumbral space, by implication contiguous with the much larger body of principles and rules which are visible to all, but I have begun to wonder where this metaphor leads. It might be said that this jurisdiction is penumbral because its shadows cannot be illuminated.*

*Recommendation*

6.9 In order to avoid similar cases being advanced in New Zealand, and in an attempt to mitigate the risk associated with decisions being made only with "regard to the law", the Law Society recommends that an amendment be introduced to the Bill that requires referees to specifically address any legal rights or obligations raised in their decisions, and make clear if they are not following the law (on the basis that the substantial merits and justice of the case requires it), with an explanation as to the reason for the departure.

***New referees to be qualified***

4.10 By virtue of clause 44, section 7(2) of the Disputes Tribunal Act 1988 is proposed to be replaced with the following:

> (2) A person is qualified to be appointed as a Referee only if that person-
>
> a. holds a relevant qualification (for example, a qualification in law, mediation, or arbitration) or has had relevant training; and

b. has the personal attributes, knowledge, and experience so as to be capable of performing the functions of a Referee; and

c. has been recommended for appointment under section 8.

4.11 The Regulatory Impact Statement records that this approach was considered together with the status quo, the status quo plus improved referee training, and an option requiring all referees (not simply newly appointed referees) to hold appropriate qualifications.[11]

4.12 Given the increased monetary threshold, and the Law Society's proposal that referees should engage with legal principles when providing reasons, the Law Society submits that the Bill should be amended so that all referees are required to hold appropriate qualifications. We note that the Regulatory Impact Statement records this option as having most of the advantages of the proposed option, save for "*Increased referee recruitment costs*", and "*Risk that some highly capable referees would be lost*".[12] The Law Society considers that the advantages of all referees being appropriately qualified outweighs these costs.

***Appealing Disputes Tribunal decisions***

4.13 There is a further matter not included in the Bill which the Law Society recommends be given consideration, namely, whether there should be a broader ability to appeal Disputes Tribunal decisions.

5.14 At present, appeals from Dispute Tribunal decisions to the District Court are restricted to a ground of procedural unfairness. By way of contrast, under the Residential Tenancies Act, a dissatisfied party has a general right of appeal to the District Court, and a further right of appeal on a question of law to the High Court. The Law Society considers that an extension of the appeal right for the Disputes Tribunal be included in the Bill to cover cases of manifest injustice.

5.15 This issue has received attention from the courts in the last decade. The courts have called into question the scope of the appeal right, interpreting it in a wider way than a natural reading would suggest, in order to correct demonstrable injustices. By way of example in *NZ Insurance Ltd v District Court at Blenheim* (2001) 16 PRNZ 493 (HC), Goddard J found the substantial merits and justice of the case as referred to in section 18(6) of the Disputes Tribunals Act had not been properly considered. At paragraph 20, her Honour said:

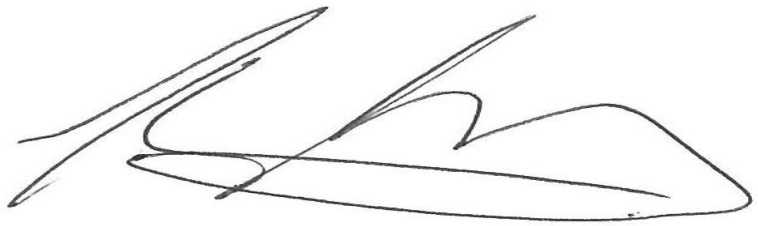
> *I do not find it necessary to characterise the situation as one of either procedural unfairness or error of law. The important point is that the dispute was not determined in accordance with the substantial merits and justice of the case and the result of the proceedings have been materially and prejudicially affected.*

11 At 10-12.

12 At 10-12.

5.16 This reasoning has been adopted subsequently, most recently in *Aero New Zealand Ltd v Duncan* [2011] DCR 711 (DC) and *Cressida Eltham Ltd v ASB Contracting Ltd* CIV 2012-004-572 DC Auckland, 14 June 2012.

5.17 The Law Society recommends that the Disputes Tribunal Act be amended so as to incorporate an appeal right explicitly for extraordinary cases where a referee's decision is obviously wrong and an injustice has occurred.



Kathryn Beck
**President**
16 February 2018