Talking with the Tribunal: A Study of the Complaints Review Tribunal

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I. INTRODUCTION

This article evolved from my interest in the powers and functions of administrative tribunals. In the course of my research, the Complaints Review Tribunal ("the Tribunal") stood out as being a significant body upon which very little had been written. Whilst the Tribunal acts as the final forum of dispute resolution within the human rights, privacy and health and disability jurisdictions, the only sources of written information on the subject were in the form of the empowering statutes, Parliamentary Debates, government information sheets and legislation reports. Consequently, there were still many aspects of the functioning of the Tribunal, such as its decision-making processes and the method by which its members are appointed, about which no information could be found.

To overcome this gap in the literature, I had to move beyond a methodology that utilised documented sources. Instead, my research was primarily facilitated by interviews with key members and end-users of the Tribunal, which took place in Auckland and Wellington with the approval of the Auckland University Human Subjects Ethics Committee.[1]

Part II of this investigation into the functioning of the Tribunal will describe the statutory setting. Part III discusses the role of the Proceedings Commissioner. The functions and powers of the Tribunal are addressed in Part IV, more specifically: representation; the process of appointment; membership of

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1 It should be noted that one condition under which these interviews were carried out was that the interviewees would remain anonymous. Also note that, due to space restrictions, the appendices to this paper in its unpublished form have been excised. These include a list of all interview questions asked and a discussion of the methodology employed. They will be available on request from the Auckland University Law Review, c/- Faculty of Law, The University of Auckland, Private Bag 92019, Auckland, New Zealand.

the Tribunal; the general profile of applicants; the subject matter of hearings; the procedure of Tribunal hearings; the procedure of High Court hearings and High Court Appeal decisions. Part V will canvas the successes and difficulties in the Tribunal's work within the privacy and health and disability jurisdictions. This article will conclude by considering the following questions that arose whilst researching this article. Why are there so few complaints coming before the Tribunal? Could the function of the Tribunal be transferred to the District Court? What is its likely future?

II. BACKDROP TO THE COMPLAINTS REVIEW TRIBUNAL

1. Parliament's Intention

When the Equal Opportunities Tribunal ("EOT"), under the auspices of the Human Rights Commission Bill 1977, was first subjected to parliamentary debate, it was proposed as a tribunal to "consider and adjudicate on matters referred to it by or from a human rights commission",[2] to be charged with the "very delicate but important job of always trying to reach conciliation between the aggrieved party and the other parties involved in their claims".[3] The Honourable Mr W R Austin emphasised that the paramount purpose of the Tribunal was to:[4]

> [C]onciliate between the parties – because the area involves very human issues which cannot always be properly measured scientifically .... This legislation deals with the emotions, thoughts, and aspirations of individuals, and surely conciliation should be not only the answer to many problems but also a guide for the future, giving the direction to be followed by those interested in the same area.

The Tribunal was set up to ensure that justice was being seen to be done – to allay fears of a "toothless" administrative body, and to deal with the difficult cases where agreement could not be reached through mediation.[5]

In a later reading of the same Bill, it was stated that, for the purpose of each case, two members would be selected for the Tribunal from a panel of suitable names kept by the Minister of Justice. This would enable cases to be heard before persons who had some expertise in the matters in dispute.[6] Even at this early stage of the Tribunal's development, an appeal to the Supreme Court was legislated for to ensure that there was comprehensive supervision of the Tribunal's rulings by a superior court.[7]

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2 (7 July 1977) 411 NZPD 1246.
3 Ibid 1253.
4 Ibid.
5 Ibid.
6 Ibid 1476.
7 Ibid.

In the debate surrounding the second reading of the Human Rights Bill, it was stated that the EOT would continue under the new name of the Complaints Review Tribunal, maintaining essentially the same functions and powers.[8] However, there was added provision for a second Chairperson to be appointed, if the Minister of Justice so recommended, to assist with the expeditious handling of cases.[9]

When the Privacy Bill 1993 was first introduced to Parliament, it was stated that the Tribunal would be a resolution process of last resort within the privacy jurisdiction, coming into operation only after a complaint had been dealt with through full investigation with the availability of mediation, resulting in speedy and informal resolution whenever possible.[10]

The debate surrounding the Health and Disability Commissioner Bill 1994 also made mention of the Tribunal. First, it was listed as constituting the fifth level of resolution, together with disciplinary tribunals or other appropriate agents such as the Privacy Commissioner, the Human Rights Commission or the Police.[11] Secondly, it was mentioned that "under the Bill the Commissioner's office has the power not only to investigate fully, but also to prosecute ... complaints before any of the registered health professional disciplinary bodies or before the Tribunal set up under the Human Rights Act 1993". Furthermore, the Tribunal was seen as an instrument that would deal out "significant penalties and significant sanctions for those health professionals who abuse the trust that patients originally placed in them".[12]

In relation to each of the Bills that were passed containing a reference to the Tribunal, Parliament set out a statutory process of investigation and conciliation, such as is found in the Human Rights Act 1993 ("HRA"). In doing so, Parliament clearly intended that the preferred dispute resolution mechanism would be conciliation and not the Tribunal process. Only if the conciliation process broke down would enforcement through litigation become an option.[13]

From its earliest days as the EOT, the Tribunal has been charged with high expectations. It was always intended to be a forum of last resort in the resolution process, set up to deal with cases where agreement could not be reached through mediation. It was to handle cases in an expeditious manner and to utilise members who had some expertise in the matters in dispute. The Tribunal was also to be supervised by a superior court. The most important role of the Tribunal, in the eyes of some, was to give "teeth" to the dispute resolution processes that were in place and to ensure justice was seen to be done. In short, the Tribunal had two primary functions: to address the many problems that would

8 This was effected by the passing of the Human Rights Commission Amendment Act 1993, shortly before the passing of the Human Rights Act 1993.
9 (15 December 1992) 532 NZPD 13204.
10 (20 April 1993) 534 NZPD 14729.
11 (16 June 1994) 540 NZPD 1806.
12 Ibid 1814.
13 Interview with a member of the Human Rights Commission, Auckland, 6 July 1999.

arise in the emerging area of human rights law, and to guide future development by setting the direction that was to be followed in this area of the law.[14]

2. Legislation

The Human Rights Commission Act 1977, which established the EOT, contained 21 provisions setting out the Tribunal's functions, powers, membership and appeal process. The Human Rights Commission Amendment Act 1993 renamed the Tribunal, and introduced additional functions. It enabled the Tribunal to make interim orders, vested in the Governor-General the power to appoint a second Chairperson and significantly enlarged upon the sections dealing with membership.

The HRA, given assent on 10 August 1993, continued the existence of the Tribunal under section 93. In contrast to the 1977 Act, the HRA contains 45 sections dealing with the functions and powers of the Tribunal. Amongst other powers, the Tribunal is able to summon witnesses, commit for contempt and award damages on a par with the District Court; in addition, witnesses and counsel appearing before the Tribunal are subject to the same privileges and immunities as witnesses and counsel appearing before the District Court. The Complaints Review Tribunal Regulations 1996, passed under section 144 of the HRA, provide specific guidelines for the actual proceedings of the Tribunal, and deal with such matters as the commencement and notice of proceedings, the filing and service of statements of reply, the conduct of proceedings and the time and place of hearings and guidelines for the Tribunal's decisions.

In 1993 the Tribunal was incorporated as part of the dispute resolution process of the newly enacted Privacy Act. Sections 82 to 89 of that Act describe the role of the Tribunal within the privacy jurisdiction, and state who may bring proceedings before the Tribunal, what remedies are available, what the Tribunal's powers are, what right the Proceedings Commissioner has to appear in proceedings, and what categories of damages are available from the Tribunal. Section 89 of the Privacy Act stipulates that the provisions of the HRA that deal with the Tribunal – that is, sections 89 to 92 and Part IV – shall apply.

The Health and Disability Commissioner Act 1994 ("HDCA") further extended the jurisdiction of the Tribunal. Sections 50 to 58 of the HDCA outline who may bring proceedings before the Tribunal, what remedies may be sought, what limitations there are on the right to bring proceedings, what powers the Tribunal has, what right the Director of Proceedings has to appear in proceedings and what damages are available. As with the Privacy Act, the HDCA, by section 58, stipulates that sections 89 to 92 and Part IV of the HRA will apply.

14 (7 July 1977) 411 NZPD 1253.

III. THE PROCEEDINGS COMMISSIONER

The Proceedings Commissioner of the Human Rights Commission has a central role in relation to the Tribunal. The four principal statutory roles that the Proceedings Commissioner fulfils are set out in sections 6, 75(g), 82, 84 and 97 of the HRA. The Commissioner's primary statutory responsibility is to decide which of the cases referred by the Human Rights Commission and the Privacy Commissioner will be taken before the Tribunal. Those that the Commissioner declines to pursue may be taken by the claimants themselves. However, if a case is taken by the Proceedings Commissioner, then all legal fees are paid by the Human Rights Commission.

The second statutory function of the Commissioner is that of a "filter" in regard to what cases go before the Tribunal. The decision whether to take proceedings before the Tribunal involves the exercise of a statutory power of decision in a manner consistent with public law principles. There is also a significant discretionary component to the decision. If the case satisfies three questions, proceedings will be brought before the Tribunal by the Proceedings Commissioner. The first two questions posed are analogous to the test for a prima facie case in criminal law. First, is there evidence which, if accepted, would make out an infringement of the Act? Secondly, is it reasonably likely that this evidence will in fact be accepted? The final question to be considered is whether there are discretionary factors which may properly be taken into account. Factors which may be considered include whether a significant legal question is involved, and whether the harm alleged is too minor to justify proceedings, this latter consideration being informed by relevant resource constraints.[15] In about 20 per cent of the cases referred to the Proceedings Commissioner, the Commissioner decides not to sue.[16]

The role of the Proceedings Commissioner is unique in that there is no conventional lawyer-client relationship with the complainant. Once the Commissioner decides to take a case before the Tribunal, he or she becomes the plaintiff.[17] In this way, the role of the Commissioner is similar to a statutory version of a litigant in person.[18] The only role that the complainant plays is that of "star" witness. The complainant receives any damages that are awarded. Any

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15 As with the Commissioners from each of the three jurisdictions that the Tribunal presides over, the Proceedings Commissioner does not have limitless resources to do the job, therefore some process of rationing is inevitable. The Commissioner is likely to use his or her discretion to channel resources into a case where he or she can get the full range of remedies, including damages. An exception may arise where an important question of law or an important strategic issue is raised.

16 Supra note 13.

17 The complainant and plaintiff can thus be two different people. However, this will only be the case when the Proceedings Commissioner or the Director of Proceedings takes the case before the Tribunal. Outside this context, complainant, applicant and plaintiff will be used interchangeably to describe the person or persons who bring proceedings before the Tribunal.

18 Supra note 13.

costs awarded against the Proceedings Commissioner are paid by the Human Rights Commission.[19]

Section 84 of the HRA gives the Proceedings Commissioner the right to appear in hearings before the Tribunal, the District Court, the High Court and the Court of Appeal, where he or she is not a party, or was not a party in the original proceedings. In addition, in non-appeal cases, the Commissioner has the right to adduce evidence and the right to cross-examine witnesses.[20] The Proceedings Commissioner will become a party to a case to represent the public interest if the public interest dimension of the case demands it. As the majority of cases containing such a dimension of public interest are taken by the Commissioner personally, this statutory power is not utilised very often.[21]

The role of the Proceedings Commissioner is strictly independent. It must be discharged independently of influences external to the Commission and independently of the other Commissioners. This functional independence is preserved by a clear understanding with the other Commissioners, including the Chief Commissioner, that they will not interfere with the performance of the Proceedings Commissioner's role. In the unlikely situation that someone does try to interfere, immediate difficulties would arise.[22]

The third statutory function of the Proceedings Commissioner, in addition to deciding whether or not to take a case to the Tribunal, is demonstrated by the Commissioner's ability to bring declaratory judgment proceedings under section 6 of the HRA. Section 6 provides that the Human Rights Commission can refer any issue to the Proceedings Commissioner, who will then have standing to go to the High Court and seek a declaratory judgment. It is a useful power for the Commissioner to have because it enables some significant strategic issues, including issues of construction, to be addressed. However, there are currently a number of section 6 cases that the Proceedings Commissioner is unable to address due to inadequate resourcing.[23]

Section 97 of the HRA provides the fourth statutory function of the Proceedings Commissioner. On the application of the Commissioner – or one of several other parties – the Tribunal has the power to declare lawful any act, omission, practice, requirement or condition that would otherwise be unlawful under Part II of the Act, if it constitutes a genuine occupational qualification, or there is a genuine justification.[24]

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19 Ibid.

20 See, for example, *O'Dea v B H P New Zealand Steel Ltd* (1997) 3 HRNZ 683, in which the plaintiff claimed that he had been discriminated against on the grounds of political opinion. He took his case before the Tribunal. The Proceedings Commissioner intervened and played an amicus-type role, as this was the first time that the question of political opinion had come before the Tribunal.

21 Supra note 13.

22 Ibid.

23 Ibid.

24 HRA, s 97.

IV. THE TRIBUNAL IN ACTION

1. A Brief Overview

The statutory functions of the Tribunal are outlined in Part III and Part IV of the HRA. A complaint must come within one of the areas of adjudication outlined in sections 21 and 62 of the HRA for the Tribunal to have jurisdiction. The first important issue covered in Part III of the Act is who may have access to the Tribunal. The Proceedings Commissioner of the Human Rights Commission is referred complaints by the Complaints Division of the Human Rights Commission or by the Privacy Commissioner. If the Proceedings Commissioner decides to take the complaint to the Tribunal then the complainant pays no legal fees. If the Proceedings Commissioner declines to take the case then the complainant is free to take his or her own case before the Tribunal. The same situation arises in the health and disability jurisdiction with regard to the Director of Proceedings. An aggrieved person can also directly access the Tribunal when one of the Commissioners or the Complaints Division of the Human Rights Commission decides that the complaint has no substance.[25]

The Tribunal's main function is to consider and adjudicate upon proceedings brought before it in regard to full hearings and interim orders. It is also charged with exercising and performing any other functions, powers or duties that are conferred on it by the HRA, the Privacy Act, the HDCA or any other Act.[26] In addition, the Tribunal may declare any act, omission, practice, requirement or condition that would otherwise be unlawful under the HRA to be lawful in certain circumstances.[27]

If it is unsure on a point of law, the Tribunal may state a case for the opinion of the High Court on any question of law arising in its proceedings. The High Court then will determine the question, and remit the case back to the Tribunal with its opinion.[28]

Applicants may appeal to the High Court if they are unhappy with a decision of the Tribunal, in the case of either an interim order or a decision of the Tribunal.[29] In such a hearing, two Tribunal members sit on the High Court appeal with the Judge, and the decision of the majority is the decision of the Court.[30] Applicants who are still dissatisfied may appeal to the Court of Appeal on a point of law.[31]

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25 HRA, s 83.
26 HRA, ss 94 and 97.
27 HRA, s 97. These circumstances are that the act or omission constitutes a genuine occupational qualification in respect of ss 22-41 of the HRA, or that the act or omission is a genuine justification in respect of ss 42-60 of the HRA.
28 HRA, s 122.
29 HRA, s 123.
30 HRA, s 126.
31 HRA, s 124.

2. Representation

Tribunal members acknowledge that representation can be an advantage for those bringing disputes before them. This is in part due to the nature of the hearing, which involves much cross-examination.[32] A layperson often has no idea how to martial the material, cross-examine witnesses or sum up a case. The Tribunal can partly assist the complainant but cannot put the words in the complainant's mouth, even when it is obvious what the complainant ought to be saying, or what the complainant should be seeking in the way of remedies.[33]

On the other hand, there have been cases before the Tribunal where parties have not been assisted by their counsel. Generally, lawyers who are familiar with the relevant Acts and who are competent all-round practitioners can assist their client's case most effectively.[34] However, there are also practitioners who tend to hold up the process by focusing unhelpfully on technicalities.[35]

If the Proceedings Commissioner takes the action then it is likely that the defendant will be represented by a lawyer. However, persons initiating their own proceedings tend to represent themselves. Professional people are more likely to have representation than non-professionals, as are institutions that have been accused of breaches of the Privacy Act.[36] Consequently, not only can legal representation affect the outcome of a Tribunal hearing, but it may well determine whether a case is brought in the first place.[37]

3. Process of Appointment

The process of appointing a member to the Tribunal is set out in statute.[38] The HRA directs that a panel of 20 members shall be maintained.[39] In practice the panel has, in the past few years, been maintained at around 12 persons. The Act requires that, in considering the suitability of any person for inclusion on the panel, the Minister shall have regard not only to his or her personal attributes, but also to his or her knowledge of and experience in the different aspects of matters likely to come before the Tribunal. The general practice has been for the Minister of Justice to invite nominations from Caucus, although targeted organisations may also be invited to submit nominations. Self-nomination also occurs from time to time.

The initial selection process can be quite informal. The Ministry provides the Minister with a summary of the nominations or applications and incorporates any relevant advice as to any existing need to appoint people from a particular geographic location, or of a particular gender or ethnicity, or with a particular

32 The briefs of evidence are taken to have been read by the Tribunal.
33 Interview with member of the Tribunal, Wellington, 13 July 1999.
34 Ibid.
35 Ibid; see also HRA, s 105.
36 Interview with member of the Tribunal, Wellington, 12 July 1999.
37 Ibid.
38 HRA, ss 98-103.
39 HRA, s 101.

technical or professional skill. Once the Minister has selected the candidates to be appointed or reappointed, the nominees and applicants are referred first to the Cabinet Committee on Appointments and Honours, and then to Cabinet as part of the process of collective responsibility. For those who are accepted, the process is completed by the signing of the appointment warrant by the Minister.[40]

4. Membership of the Tribunal

The membership of a particular Tribunal reflects both the availability of members at the time of the hearing, and the type of case that the Tribunal is considering. The interests and experience of members is also a deciding factor. The Tribunal is comprised of laypersons and specialist practitioners drawn from different geographical areas and from different social and racial groups. Laypersons on the Tribunal, in contrast to specialist practitioners, bring a unique perspective to hearings due to their varied backgrounds.[41] However, demographic and geographic representation is not easily achieved, and in recent times there have been very few representatives appointed from the South Island.[42]

The legislation does not provide for the automatic replacement of members upon expiration of tenure. Whilst there is a statutory requirement of twenty members on the Tribunal, there are currently only nine – including the Chairperson – several of whom were set to relinquish their tenure at the end of 1999.[43] Such a shortage of members undermines the representative nature of the Tribunal.

The Executive Officer is another key person in the complaints process. The Executive Officer registers a complaint with the Tribunal on behalf of a plaintiff, undertakes the administrative work of the Tribunal, and acts in a day-to-day capacity as Registrar of the Tribunal.[44]

5. General Profile of Applicants

As Associate Professor Paul Roth identifies,[45] many issues brought before the Tribunal have their origin in relationships – often medical, financial, employment, family or education – that have broken down. In this way, the Tribunal can be likened to the Family Court, only the conflict in question is more likely to be with an employer, next-door-neighbour or club that the complainant used to belong to.[46] In many cases a grievance can be carried into the privacy

40 Email to the author from Mr Philip Gini, Senior Executive Officer for Appointments, Department of Justice, 24 August 1999.
41 Supra note 33.
42 For example, only one member of the Tribunal as at July 2000 was a South Island resident.
43 Ibid.
44 Ibid.
45 Roth, "Right and Process in the Privacy Act" (1999) 5 HRLP 17.
46 Supra note 36.

jurisdiction by "framing it as an 'interference with the privacy of an individual'".[47]

6. Subject Matter of Hearings

Since its establishment the Tribunal has dealt with a number of significant issues, including the first cases of discrimination on the grounds of age and political opinion in New Zealand.[48] In clarifying ambiguous provisions in both the HRA and the Privacy Act,[49] the Tribunal has also taken on a vital "law-making" role.[50]

To ensure consistency in Tribunal decisions, all members receive copies of all decisions and are expected to read them. Consistency is also derived from the chairing of all hearings by a common Chairperson, and from the use of training workshops for new Tribunal members.[51]

Although most of the cases that come before the Tribunal are of a high calibre, many coming from the privacy jurisdiction are not. Roth has observed that this is primarily because, as of June 1999, only one privacy case was brought by the Proceedings Commissioner. The balance of cases are being brought by the complainants themselves, as either the Privacy Commissioner or the Proceedings Commissioner has decided that the complaints did not have substance, or should not be proceeded with before the Tribunal.[52] Although vexatious claims may come before the Tribunal, many are struck out by the Chairperson in a qualifying process.

7. Procedure of the Complaints Review Tribunal Hearing

The total length of time from the lodging of a complaint to the release of a decision is about four months.[53]

Once a proceeding is filed with the Executive Officer it is served on the other party, who then has 30 days from the receipt of that complaint to respond. The next step is a directions conference between the parties and the Chairperson,[54] in which a date is set for the hearing within six to eight weeks.

47 Roth, supra note 45, 26.
48 Supra note 33.
49 For example, in the cases on sexual harassment the Tribunal had to decide what "behaviour of a sexual nature" meant.
50 Supra note 36.
51 Ibid. Detailed information on the specific issues that arise in cases before the Tribunal will not be covered in this paper.
52 Roth, supra note 45, 29.
53 Supra note 36.
54 This is not something that the Chairperson is statutorily required to do, but it is of great assistance, particularly to parties who are not represented and to parties who are represented by lawyers unfamiliar with the jurisdiction. The Chairperson informs the parties, amongst other things, that the primary purpose of the hearing is for cross-examination, that the evidence in chief will have been read and digested, and that the Tribunal will not be asking for it to be read back to them. As a result, the hearing time for cases is significantly reduced. Ms Bathgate instituted this conference upon being appointed Chairperson.

The focus of the hearing is cross-examination, thus it is largely on questions of evidence and of witness credibility that the case turns.[55] Decisions are written immediately after the hearing. It takes about a week for the decision to be written and another week or two for the members to read it. In coming to a decision, individual members are guided both by precedents in cases that have previously come before the Tribunal, and by principles that have been developed in the courts.[56]

8. Procedure of High Court Appeal Hearings

The procedure followed in High Court appeals differs from that followed by the Tribunal. The role of the layperson in the High Court hearing is to sit with the judge and contribute to and deal with questions of fact or questions of mixed fact and law. The judge decides the legal issues and gives the lay-members a summary of the law. Mixed fact and law questions are discussed by all three members of the Court, ideally leading to a consensus agreement.[57]

The High Court cases maintain the credibility of the Tribunal. Aggrieved defendants may see the appeal process as another opportunity to have their case heard. However, the appeal is not a re-hearing of evidence: the High Court does not overturn the findings of credibility made by the Tribunal, whose members had the benefit of seeing and hearing the witnesses.[58]

9. High Court Appeal Decisions

The decisions of the Tribunal are often appealed. Many of these appeals are driven by "litigious" complainants who are unwilling to accept its judgment. The appeal decisions do not often lead to a change in the Tribunal's approach to issues, because its decisions are usually upheld.[59] The High Court has not overturned any questions of fact or credibility that have been dealt with by the Tribunal, primarily because the Tribunal has had the advantage of having the parties before them.[60]

In fulfilling its role as a supervisory Court to the Tribunal, the High Court has provided much constructive guidance and has influenced the Tribunal in different areas of its practice. In *D v S*,[61] McGechan and Goddard JJ held that the Chairperson sitting alone had no jurisdiction to strike out a claim. A full Tribunal was required to make a final determination. In *P v J*,[62] the High Court – including two members of the panel for the Tribunal – restated the position that,

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55 Meeting with Tribunal members, Wellington, 19 August 1999.
56 Supra note 33.
57 Ibid.
58 Supra note 13.
59 Supra note 36.
60 Supra note 33.
61 (1998) 5 HRNZ 511.
62 (27 October 1998) unreported, High Court, Auckland Registry, 117/98, Fisher J, Ms Smith, Mr Abbiss.

as the Tribunal had had the advantage of seeing the witnesses, the Court's view was not to be substituted in regard to the facts of the case. Justice Williams in *Proceedings Commissioner v Hatem*[63] stated that where a question of fact is likely to arise, three members of the High Court are required to hear Tribunal appeals. However, his Honour emphasised that this was the only situation in which such additional Court members were required. In *O'Neill v The Proceedings Commissioner*,[64] the issue was raised as to whether the Tribunal's requirement that briefs of evidence be exchanged simultaneously constituted an unfair judicial process. Justice Goddard held that the Tribunal was deemed a Commission of Inquiry and thus able to regulate its own procedure.

V. THE ADD-ON JURISDICTIONS

Since 1996, the Tribunal has been able to adjudicate on issues within the privacy and the health and disability jurisdictions, in addition to providing an enforcement option within the human rights jurisdiction.

1. Privacy Jurisdiction

Under the Privacy Act 1993,[65] a complainant can bring his or her own case before the Tribunal if it has been investigated by the Privacy Commissioner and found to have no substance, or if the Privacy Commissioner refers the complaint to the Proceedings Commissioner of the Human Rights Commission who decides not to take it further.[66]

The Tribunal establishes precedents that the Office of the Privacy Commissioner may draw upon when presented with similar complaints.[67] Having the enforcement option of proceedings before the Tribunal as a last resort encourages people to take the complaint resolution process seriously from the beginning.[68]

The Privacy Commissioner often adopts a policy of discontinuing an investigation in a variety of circumstances, which then enables people to appeal to the Tribunal directly. In this way, the Tribunal provides an important outlet for dissatisfied complainants, and serves as a check on the performance of the Office of the Privacy Commissioner.[69]

Having two systems of dispute resolution, each with their own characteristic method of operation, ensures that complainants receive a fair hearing. The preliminary process of inquiry through the Office of the Privacy Commissioner

63 (24 September 1997) unreported, High Court, Auckland Registry, 820/97, Williams J.
64 [1996] NZAR 508.
65 Sections 82-89.
66 Interview with a member of the Office of the Privacy Commissioner, Auckland, 7 July 1999.
67 Ibid.
68 Ibid.
69 Ibid.

resolves the majority of complaints. However, for dissatisfied complainants, the adversarial system of the Tribunal provides another possibility for resolution.[70]

In the *Privacy Act Review 1993*,[71] Commissioner Slane stated that:[72]

> [W]hile the specialist tribunal model is a good one, it may be that at some point in the future when the Act has been "bedded in" over a number of years efficiencies could be gained through placing the functions with the District Court. While as yet premature, there may in the longer term be positive benefits in bringing the jurisdiction into the mainstream of legal proceedings.

The question of whether the existing role of the Tribunal should be transferred to the District Court constituted a main point of discussion in the *Review of the Privacy Act 1993 Discussion Paper No. 6 Complaints and Investigation.*[73] Submissions made on the question overwhelmingly opposed the idea,[74] favouring instead the greater flexibility, speed and lower cost of the Tribunal. It was also seen as "less daunting" than a court for unrepresented plaintiffs and respondents.[75]

2. Health and Disability Jurisdiction

The power to bring complaints before the Tribunal from the health and disability jurisdiction is granted by sections 50 to 59 of the HDCA. Although the powers seem similar to those found in the Privacy Act and the HRA, the role of the Tribunal within this jurisdiction is quite different. Bringing a complaint before the Tribunal constitutes one of many options available to the Director of Proceedings.[76] However, it is the only avenue through which complainants in this jurisdiction may procure a remedy for themselves.

The HDCA is a unique piece of legislation. It creates an avenue for consumer complaints, which in turn acts as a gateway to disciplinary actions by professional boards. Unlike the privacy and human rights jurisdictions, the Health and Disability Commissioner has a duty not only to settle matters but also to protect rights.[77] In order to fulfil this obligation, certain issues which may not necessarily be appropriate for the Tribunal hearings have to be taken to disciplinary hearings. Because the Commissioner's first priority is to protect rights, it is often the case that he or she cannot settle a complaint between the parties, as can be done in the other jurisdictions. The Commissioner must form an opinion and may then, depending on the seriousness of the matter, feel obliged to take the matter further. Any further action is then carried out by the Director

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70 Ibid.

71 Privacy Commissioner, *Necessary and Desirable – Privacy Act 1993 Review* (1993).

72 Ibid para 8.20.4.

73 Privacy Commissioner, *Review of the Privacy Act 1993 Discussion Paper No 6 Complaints and Investigation* (1997) 8.

74 Privacy Commissioner, supra note 71, para 8.20.3.

75 Ibid para 8.20.4.

76 HDCA, s 50.

77 At the time that the interviews were conducted for this article Ms Robyn Stent was the Health and Disability Commissioner.

of Proceedings.[78] Most complaints referred to the Director of Proceedings are referred for disciplinary hearings. However, once a complaint is referred, the Director of Proceedings must use his or her discretion to decide whether the matter will go to a disciplinary board or to the Tribunal.[79]

Most of the complaints referred by the Commissioner relate to medical misadventure. The Tribunal has interpreted the damages section of the HDCA – section 53(2) – to mean that compensatory damages are not available to a person whose claim is covered by the Accident Insurance Act 1998, regardless of whether he or she has received that cover or not. Therefore, in the majority of cases, damages will not be available. In addition, it is only on rare occasions that the Tribunal will award exemplary damages,[80] such damages having been refused in each of the two cases that have come before the Tribunal from this jurisdiction. The utilisation of the press on both occasions acted as an informal sanction on the defendant, obviating the need for the Tribunal to inflict additional punishment.[81] However, in a case where there has been no such widespread publicity, exemplary damages may be considered.[82] The result of such findings by the Tribunal means that in the case of extensive media coverage, the only remedy complainants are likely to receive is a statutory declaration that there was a breach.

VI. CONCLUSIONS

1. Three Questions

There are three questions that have arisen in the course of my research on the Tribunal. First, in such a potentially litigious area of the law, why have so few complaints come before the Tribunal? Secondly, why is the work of the Tribunal not subsumed within the jurisdiction of the District Court? Thirdly, what is the likely future of the Tribunal?

(a) Why are there so few Complaints?

There are several factors that may explain why there are so few complaints coming before the Tribunal. First, the majority of complaints are settled within each of the Commissions through the mediation and conciliation processes. Secondly, the Tribunal has limited rights of access, which ensures that it remains a forum of last resort in the process of grievance resolution. Thirdly, the health and disability jurisdiction, because of its dissatisfaction with earlier decisions, is sending few cases to the Tribunal. Fourthly, as precedents are established by the

78 The appointment of the Director of Proceedings is provided for in s 15 of the HDCA.
79 Interview with a member of the Health and Disability Commission, Wellington, 8 July 1999.
80 Ibid.
81 Supra note 36.
82 Ibid.

Tribunal, settlement on similar issues is being achieved more frequently in the conciliation and mediation processes. Finally, negative publicity, resulting from the mandamus proceedings instigated against the previous Chairperson, may have undermined public confidence in the Tribunal.

(i) Number of Complaints Settled in the Privacy and Human Rights Jurisdictions

For the year ending June 1997, 870 complaints were settled in the privacy jurisdiction by the Office of the Privacy Commissioner.[83] In the year ending June 1998, 804 complaints were resolved.[84] In that same year, eleven complainants initiated their own proceedings with the Tribunal. Eight of these were resolved, together with four cases which had been commenced in the previous year.[85]

The Human Rights Commission investigates approximately 300 complaints in the human rights jurisdiction each year. Of these, approximately 130 are conciliated or settled annually, and about 30 are referred to the Proceedings Commissioner. Of these, approximately 15 are settled rather than taken to the Tribunal. Thus, around 150 complaints are settled or conciliated each year.[86] The system is designed so that complainants must go through a Commission before gaining a right of access to the Tribunal, to ensure that the Tribunal does not get swamped with a large number of vexatious claims.[87] The process laid down by statute instructs that the Commission must first investigate and then attempt to conciliate. It is only after these two steps have been taken that enforcement procedures may be commenced.[88] Therefore, the fact that the various Commissions settle so many complaints internally indicates that the initial processes of mediation and conciliation, with enforcement proceedings available as a last resort, work effectively in the current legal climate.

(ii) Limited Access to the Tribunal

The limited access to the Tribunal that is set out in statute is discussed above.[89] The Tribunal has been established as a forum of last resort. It is pertinent to note that if the Office of the Privacy Commissioner or Health and Disability Commissioner utilises the Tribunal to shorten queues, Parliament's intention in relation to limited access could be circumvented.

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83 Slane, *Report of the Privacy Commissioner for the Year Ended 30 June 1997* (1997) 12.
84 Ibid 20.
85 Slane, *Report of the Privacy Commissioner for the Year Ended 30 June 1998* (1998) 34.
86 Email to the author from Ms Pam Rowe, Secretary to the Proceedings Commissioner, Human Rights Commission, 7 September 1999.
87 Supra note 13.
88 Ibid.
89 See Part II.

(iii) The Health and Disability Jurisdiction

The Health and Disability Commission has expressed dissatisfaction with the decisions of the Tribunal on cases from its jurisdiction. However, the limited number of cases flowing from its jurisdiction could also be a result of the structure of grievance resolution that is set out in the HDCA. Although the Tribunal is the only forum that provides a remedy specifically for the complainant, it is only one of several forums at the fifth level of dispute resolution as established by the Act. The lack of cases from this jurisdiction has contributed to the fact that the Tribunal has not yet been firmly established as a helpful option within that jurisdiction. With more experience it is likely that the Tribunal will also have a constructive contribution to make in the area of health and disability consumer law.

(iv) The Effect of Establishing Clear Precedent

Within the human rights jurisdiction it has been found that where a significant number of precedent cases have been decided, parties are more strongly influenced to settle rather than take the same issues before the Tribunal. Parties are less likely to expend money and resources on going through the Tribunal process when its attitude towards their dispute has already been clearly established.[90] Both the Privacy Commission and the Human Rights Commission have found the Tribunal's decisions to be helpful in gaining settlement and conciliation at the mediation stage of the dispute resolution process. This is consistent with Parliament's intention that the Tribunal would not only be conciliatory, but would also act as "a guide for the future, giving the direction to be followed".[91]

(v) The Mandamus Proceedings

In *Peter Edwin Gill Hosking (the Proceedings Commissioner) v The Complaints Review Tribunal*, evidence was given in pleadings to show that five complaints filed between October 1993 and August 1994, and heard between June 1994 and May 1995, had not been decided by June 1996. Proceedings were brought because of the Human Rights Commission and the Proceedings Commissioner's concerns about the impact of the excessive delay on complainants and defendants. An order in the nature of a mandamus was sought, requiring the Tribunal to deliver its five outstanding decisions "forthwith".[92] A second Chairperson was appointed under the Act, and the decisions were released. As a result, the Proceedings Commissioner withdrew the proceedings and the newly appointed Chairperson continued on the Tribunal.

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90 Supra note 13.
91 Supra note 2, 1253.
92 Affidavit of Mr Peter Edwin Gill Hosking in support of application for judicial review/mandamus, affirmed at Auckland 12 June 1996.

The mandamus proceedings created a review of the way in which the Tribunal was organised and operated. With the appointment of a new Chairperson and the allocation of centralised offices, the Tribunal is better equipped to fulfil its statutory function.

The fact that there are fewer cases than might be expected from this area of law indicates that the statutory frameworks of mediation and conciliation established in the HRA, Privacy Act and HDCA are operating in an efficient manner, although it may also imply that the Tribunal is not yet meeting the needs of certain jurisdictions.

(b) Why is the Tribunal's Function Not Transferred to the District Court?

Many of the Tribunal's powers under the HRA mirror those of the District Court. The small number of cases that come through the Tribunal, and the length of time required before a complaint receives a hearing, raises the question as to whether there is any real need for the Tribunal. These factors give rise to the second question: why is the function of the Tribunal not subsumed within the jurisdiction of the District Court?

(i) Powers Similar to the District Court

There are two striking similarities between the powers of the Tribunal and those of the District Court. First, they both have the same limit on the amount of damages that can be awarded. Whilst the $2,000 limit set for the EOT was commensurate with that of the Magistrates Court, the Tribunal can now award damages of up to $200,000 in line with the District Court.[93] The second similarity between the District Court and the Tribunal is the ability to commit for contempt.[94] The Chairperson of the Tribunal has the power either to imprison for ten days or to impose a fine of $1,500 on any person who acts in contempt by, for example, disrupting proceedings, assaulting a member, or disobeying an order of the Tribunal.[95] This is similar, although not identical, to the power of a District Court Judge to commit a person for contempt of court.

(ii) Flexibility

The Tribunal provides a more flexible system than that of the District Court, a point the Chairperson emphasises to counsel during the directions conference. The Tribunal is more flexible as to starting and finishing times, as some of its members may have to travel long distances, and may thus prefer to finish later in the evening rather than extend the hearing for an extra day.[96]

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93 HRA, s 89.
94 HRA, s 114.
95 HRA, s 114.
96 Supra note 36.

(iii) Consistency of Decisions

The comparatively small number of adjudicators on the Tribunal is a factor in the consistency of its decisions.[97] Were the function of the Tribunal to be transferred to the District Court, counsel may have a difficult job in explaining specialist legislation not dealt with frequently – such as the Privacy Act – to any one of 120 District Court Judges. Unless there was going to be a lot of litigation, or privacy cases were confined to one or two judges, the Court would be more likely to come to inconsistent decisions, resulting in many more appeals to the High Court.[98] According to a member of the Office of the Privacy Commissioner, a process which combines the tribunal system and the mediation and conciliation system is the most effective way of resolving complaints.[99]

(iv) Efficiency of the Tribunal System

The Tribunal functions very efficiently once proceedings are commenced. The delay usually arises at some point in the process before a complaint is lodged with the Tribunal. The current Chairperson maintains a brisk case management approach, which means that a complaint is usually resolved within three or four months of it being filed.[100] Because of the delays that occur within the various Commissions, many people perceive the length of time required to gain a resolution through the Tribunal to be over two years. However, the complaint resolution process within each Commission resolves hundreds of cases earlier in the dispute resolution process, before the Tribunal is even considered as an option. To transfer the whole process to the District Court could mean losing the efficient resolution evident in the majority of cases, in addition to the expertise that has developed within the Commissions. It is important to view the Tribunal in the context of the jurisdictions that it serves. Its value is found not only in the number of cases that it resolves, but also in the force that it gives to the settlement processes, enabling parties to see that this is an area of law that must be taken seriously.

(c) What is the Likely Future of the Tribunal?

The current workload of the Tribunal does not seem to be increasing. Over the last three years its spread has been fairly consistent, with the exception of a larger focus on privacy matters. Whether the workload will increase depends in part on how the health and disability jurisdiction develops.[101] A further variable that may affect the growth of the Tribunal is the appointment of new statutory officers. For example, since the end of 1999, the tenure of one of the statutory

97 Supra note 55.
98 Supra note 66.
99 Ibid.
100 Supra note 13.
101 Supra note 36.

officers involved with the Tribunal has ended, and another officer has been appointed. This is an important factor, as it may influence the volume of work that is referred to the Tribunal from the different jurisdictions.

Insufficient funding has hindered the Privacy Commissioner's ability to process complaints quickly. To eliminate the backlog, the Office of the Privacy Commissioner is considering giving people the opportunity to take their cases directly to the Tribunal where appropriate cases, in order to achieve a faster resolution.[102] However, this will require greater governmental resourcing to deal with cases at the Tribunal level rather than through the conciliation process. There is also a risk that "vexatious" complainants will go directly to the Tribunal.

However, despite the foreseeable risks, it is very likely that the number of cases going to the Tribunal from the privacy jurisdiction will increase.[103] Although such direct access may bring more work to the Tribunal, it would seem to circumvent Parliament's original intention for the Tribunal, namely to keep it as a forum of last resort.

Whilst the future of the Tribunal is not easy to predict, what seems certain is that it will develop in one of three directions. First, it is possible that it will continue to proceed at the rate of approximately 30 cases per year, adjudicating on new issues of law as they arise. Secondly, the number of cases before the Tribunal may steadily decrease as the law becomes more settled in the different jurisdictions.[104] Finally, the work of the Tribunal could significantly increase if it is permitted to be used as a tool to reduce the length of the complaint queue within the privacy and health and disability jurisdictions. The Tribunal performs an effective role in defining the law and providing settlement where none could be achieved at an earlier level of dispute resolution. However, to place on the Tribunal the burden of settling complaints in the manner of the various Commissions threatens its efficacy as an instrument of definition and resolution within the jurisdictions over which it presides.

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102 In "Diversion Plan Will Help Complaints Backlog", *Private Word: News from the Office of the Privacy Commissioner Issue 35* (1999) 2, it was stated that "the Privacy Commissioner has decided to divert as many as possible to more costly, formal hearings in front of the three-person Complaints Review Tribunal".

103 Supra note 66.

104 However, with the addition of the privacy jurisdiction, such a decrease is less likely due to the breadth of privacy issues.