25. Creating a system of appeal, review, and complaint

Where a public body or agency makes a decision that affects a person's rights or interests, that person should generally be able to have that decision reviewed in some way. The ability to review or appeal a decision helps to ensure that the decisions taken under the legislation are correct and 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. Judicial review (discussed below), will be available regardless of whether a statutory appeal or other complaint mechanism is provided for. This chapter is primarily concerned with the second process, a statutory right of review or appeal.

Some complaints may be easily resolved by an internal review conducted by the decision-making body, while other complaints might only be properly resolved by adjudication by an independent court, tribunal or other body.

The following factors are relevant to deciding what kind of appeal, review or complaint system is included in legislation.

- Is there a need for a right of challenge?
- What is the nature of the decision concerned?
- What internal review or complaint processes will be available?
- What bodies, such as the Office of the Ombudsman or Privacy Commissioner, will investigate or review the decision?
- In which court or tribunal and by what procedure will any external appeal be determined?

Guidelines

25.1. 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.

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[145]. In judicial review proceedings the court will determine whether the decision was made in accordance with the law, or if it was within the range of reasonable decisions that could have been made. The court may set the decision aside, to be re-made by the decision maker. In rare circumstances, the court may substitute its own decision.

Ouster clauses (sometimes called privative clauses) remove the ability of the courts to judicially review the decision. Ouster clauses interfere with the courts' constitutional role as interpreters of the law, and as such the courts will interpret such clauses strictly and may not give them their intended effect.

[145] http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html

25.2. Will the legislation provide for a process of internal review?

A process of internal review should be provided as the first stage in the complaints/appeal process.

Judicial review should not be relied on as the sole process of challenge.

It is good practice to provide for a process of internal review through which complaints are considered and a person or body within the department reviews the decision. Where used in appropriate cases (such as administrative decisions that relate to entitlements or benefits), 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. While many bodies operate internal review procedures without legislative provision, it is good practice for legislation to 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. It will generally be acceptable for the legislation to require a person to first apply for an internal review before appealing to an external body. This gives the public body the opportunity to correct any mistakes without the need to commence formal proceedings.

25.3. 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 not to do so.

Ombudsmen[146] have a general power to investigate the activities of a wide range of bodies (listed in the Ombudsmen Act 1975[147]) and report on the lawfulness, reasonableness, or correctness of those activities. These opinions are not binding (except in respect of opinions under the Official Information Act 1982[148]). 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 the right to complain to the Ombudsmen is being restricted.

25.4. Will decisions taken under the legislation be subject to a complaint to other statutory office holders or commissioners?

Existing commissioners and other specialist statutory office holders should have jurisdiction in respect of decisions relevant to their specialist areas.

A range of statutory office holders are empowered to investigate complaints relating to specific fields. Examples include the Commerce Commission[149], the Privacy Commissioner[150],

[146] http://www.ombudsman.parliament.nz/
[147] http://www.legislation.govt.nz/act/public/1975/0009/latest/DLM430984.html
[148] http://www.legislation.govt.nz/act/public/1982/0156/latest/DLM64785.html
[149] http://www.comcom.govt.nz/
[150] https://www.privacy.org.nz/

the Health and Disability Commissioner[151], the Human Rights Commissioner[152], and the Electricity Authority[153]. The scope of their powers differs. Some hold significant investigative and enforcement powers and have the ability to bring court proceedings, while others are empowered to investigate complaints and attempt to resolve them without recourse to the courts.

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.

25.5. Is the right of appeal in respect of decisions in criminal proceedings?

Appeals against decisions in criminal proceedings should be governed or be consistent with the Criminal Procedure Act 2011.

The Criminal Procedure Act 2011[154] provides a comprehensive appeal procedure in respect of criminal appeals. New legislation should not create a different criminal appeal procedure.

25.6. Will decisions taken under the legislation be subject to an appeal to the courts or other specialist body?

Legislation should identify which of the existing courts or specialist bodies will hear any appeal.

There is no common law right to a civil appeal (judicial review exists independently in the common law). Any appeal right must be granted by legislation and expressly stated.

Where a right of appeal from a decision or internal review is granted, the legislation should identify which body 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[155]) and specialist bodies and courts (such as the Tenancy Tribunal[156], the Social Security Appeal Authority[157], Environment Court[158], and Employment Court[159]).

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.

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[151] http://www.hdc.org.nz/
[152] http://www.hrc.co.nz/
[153] https://www.ea.govt.nz/
[154] http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3359962.html
[155] https://www.courtsofnz.govt.nz/about/system/role/overview
[156] http://www.justice.govt.nz/tribunals/tenancy-tribunal
[157] http://www.justice.govt.nz/tribunals/social-security-appeal-authority
[158] http://www.justice.govt.nz/courts/environment-court
[159] http://www.justice.govt.nz/courts/employment-court

New 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 16 and 17.

25.7. What rules or procedures apply to appeals to the District Court or High Court in respect of civil proceedings?

Appeals in civil proceedings should be governed by the procedures in the District Court Rules or High Court Rules.

The District Court Rules[160] and High Court Rules[161] establish the appeal procedures that apply to civil appeals to those courts. New legislation should use these existing procedures unless there are good reasons to create an entirely new procedure.

Subsequent appeals (that is, those to the Court of Appeal and Supreme Court) should be governed by the respective rules of those courts.

25.8. What type of appeal will be granted?

Legislation should identify the type of appeal procedure to be adopted.

If new legislation does not rely on an existing appeal procedure (District Court Rules, High Court Rules, or existing tribunal rules), 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 an appeal by way of case stated and pure appeals. These two models can be restrictive in terms of the evidence that the court can consider and what outcomes can be achieved. 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.

[160] http://www.legislation.govt.nz/regulation/public/2014/0179/11.0/DLM6129567.html
[161] http://www.legislation.govt.nz/act/public/1908/0089/latest/DLM147653.html

25.9. Will the right to bring an appeal be limited?

The right 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 endless re-litigation of the same issues. However, any limits must be reasonable. Unreasonable limits may result in the right to bring the appeal being of little worth. Two common limitations that promote finality are to impose time limits (on first and subsequent appeals) and leave (permission) requirements on subsequent appeals.

- **Time limits on when an appeal must be brought:** Set a time limit for bringing an appeal. 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.

- **Leave requirements on a second right of appeal:** A second right of appeal should generally be available only with the leave of the first appellate body, or with special leave from the second appellate body. The statute should state the criteria for the granting of leave. Typically, these will include either the interests of justice or the public interest in having an important question of law resolved.

25.10. Will the subject matter of the appeal be limited?

The subject matter of an appeal should not be unreasonably limited.

Legislation should explicitly set out any limitations on the content of the appeal. If imposing limitations would leave an individual with no effective recourse to the courts, the right of appeal should not be limited.

The type of issues that may be considered on appeal should be determined in light of the purpose of providing the appeal, the competence of the appellate body, and the appropriate balance between finality on one hand, and accurate fact-finding and correct interpretation of the law on the other.

A decision may be appealed on the grounds that the factual findings at first instance are wrong (error of fact), or that the decision maker applied the law incorrectly (error of law). However, statutes may, and often do, limit a right of appeal simply to questions of law. The distinction between the two is not always clear-cut and legal advisers should be consulted.

25.11. What safeguards have been 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.

The character of the decision maker and the context of the decision that is made will determine to an extent which procedural protections are appropriate and proportionate for the new appeal process. Each protection risks creating a longer process, increased costs, or

added complexity. However, these risks must be balanced against the need to ensure that any appeal is conducted fairly and in accordance with the principles of natural justice.

Some common protections, many of which are provided for in the Criminal Procedure Act, and the District Court Rules and High Court Rules, that may be appropriate and proportionate 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.

Legislation must state if any of the above protections are not included. If it does not, the court may “read into” the legislation those protections that it considers are necessary to give the legislation a meaning that is consistent with NZBORA.