

ORDER FROM CHAOS? TRIBUNAL REFORM IN NEW ZEALAND

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I. INTRODUCTION

In November 2006, the New Zealand Law Commission and the Ministry of Justice launched a joint program of tribunal reform in New Zealand. The aim of the project was to ‘provide a final report on the issues involved in establishing a unified tribunal structure, including the operational implications of the incremental inclusion of tribunals in the new structure’¹ and to ‘recommend a structure for existing tribunals as well as a framework for the establishment of tribunals in the future’.² This unusual joint endeavour was developed in incremental steps through a series of reports published by both the Law Commission and the Ministry.³ The most recent of these was published by the Law Commission late in 2008 and it is this document which forms the basis for the following discussion.⁴ It is important to note at this point that this report, although relatively comprehensive, was not intended to be the final document.⁵ Although the project made clear the direction that the Law Commission intended to pursue (and some elements of the reform had already been settled by Cabinet) it still remained at the stage of recommendation, with further reports and discussion expected.

At the time of writing this paper, however, it would appear that this 2008 report is as far as we are likely to get in the near future as the current government has put tribunal reform on ice. Given the current state of the tribunal sector in New Zealand, which is explored below, this is a disappointing but not entirely surprising development. Although the tribunal system in New Zealand has been ripe for reform almost since the first tribunal was established, successive attempts to introduce coherence to the ‘system’ have foundered in the difficult waters of the legislative process. The failure to properly consider the place of tribunals in the New Zealand legal system is an indictment of the political system rather than the tribunals themselves. From their humble (and relatively late) beginnings in 1908, tribunals now handle the vast majority of legally adjudicated disputes in New Zealand, particularly in the field of administrative law. Most grievances against the state will be addressed, at least initially, by a specialist adjudicative institution outside the formal court structure.⁶

Despite their fundamental importance to the delivery of justice in New Zealand, tribunals remain a largely forgotten element of the legal system, at least amongst academics. In academia, the tribunal is an unfashionable backwater, with few New Zealand texts giving more than the most cursory coverage of these institutions.⁷ It should be no surprise then, given their

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1 *Unified Tribunal Framework Terms of Reference* (2006).

2 Law Commission, *Tribunal Reform: Study Paper*, Study Paper 20 (2008) [4].

3 Law Commission, *Tribunals in New Zealand*, Issues Paper 6 (2008); Law Commission, *Table of All Bodies that May Be Considered Tribunals - Occasional Paper 2* (2008); New Zealand Ministry of Justice, *Tribunals in New Zealand: The Government's Preferred Approach to Reform* (2008).

4 Law Commission, above n 2.

5 Although styled as a study paper, the Law Commission report presents a clear structure for reform, particularly when read in tandem with the Ministry of Justice Report, to which it regularly refers.

6 Formally, this will usually be a tribunal, such as the Taxation Review Authority in relation to the Inland Revenue Department or the Residence Review Board in relation to residence decisions of the Immigration Service. .

7 There are a number of excellent specialist texts published outside New Zealand but given the importance of the subject, they are still few in number. See, eg, Peter Cane, *Administrative Tribunals and Adjudication* (2009). Cane himself comments on the dearth of writing in this area.

astonishingly low profile in New Zealand, that tribunals remain largely unloved, unnoticed and unreformed institutions. This article is a small attempt to turn the academic spotlight onto this crucial element of New Zealand's legal system, in the light of the Law Commission's proposals for reform.

Although this article uses the Law Commission's proposals as its context, its underlying themes are more generic. The Law Commission's approach (influenced by the Ministry of Justice) was to define tribunals as a single and distinct sector of the legal system. This sector, thus defined, was subject to a series of overarching reform proposals to create a single tribunal structure and a single legislative framework. The umbrella approach to tribunals, which is such an integral part of the Law Commission's proposals, is also reflected in the proposal to create a pan-tribunal set of procedures aimed at giving greater coherence to the tribunal 'system'. This article argues that although the work of the Commission includes a number of positive proposals, they reflect a fundamental misunderstanding of the place and role of tribunals in the New Zealand legal system. Rather than seeing tribunals as a discrete system in need of overall reform, it is argued that individual tribunals should be seen as part of specific systems of specialist dispute resolution. For this reason they need to be considered in the context of other dispute resolution and dispute avoidance mechanisms (both judicial and non-judicial). This failure to put tribunals in their proper place is a phenomenon repeated (although to varying degrees) in most common law jurisdictions and the approach of the Law Commission reflects such overseas experiences. However, recent developments in the UK as a result of the Leggatt Review of Tribunals⁸ and the later White Paper on Administrative Justice have seen a slow recognition that tribunals are part of a system that needs to be focused primarily on getting decisions right in the first instance rather than putting them right after the event.⁹

It is the submission of this author that New Zealand, and indeed most other jurisdictions following the Westminster model, would benefit from such a return to first principles in consideration of the role of tribunals. Such a functional analysis would lead both to a better understanding of the role of tribunals in the legal system and allow us to construct more effective systems of dispute resolution (and avoidance), particularly in the field of administrative law. It may also lead us to the conclusion that a tribunal is not the most effective or efficient place to ensure that these disputes are resolved and drive us to consider why they occur in the first place.

II. TRIBUNALS AND SPECIALIST JUSTICE IN NEW ZEALAND

One of New Zealand's founding legal myths is the belief in the unity of its legal structure.¹⁰ This quasi-Diceyan mantra states that New Zealand is a system of generalist justice in the form of a single set of all-purpose courts. According to this view, specialist forms of dispute resolution are an unwelcome exception, to be tolerated only in the most exceptional of circumstances and confined to an absolute minimum. In purely formal terms, of course, Dicey's dream remains intact and New Zealand's judiciary remains clearly unified, at least at the higher echelons. However, beneath this formal veneer of unity, the reality is very different. The practical reality for most users of the legal system, and particularly those who have a dispute with the state, is far from unified. For most, the judicial experience begins and ends with a specialist dispute resolution institution, often in the shape of a tribunal.¹¹

8 The Stationery Office (UK), *Report of the Review of Tribunals by Sir Andrew Leggatt: Tribunals for Users – One System, One Service* (2001).

9 UK Department of Constitutional Affairs, *Transforming Public Services: Complaints, Redress and Tribunals*, Cm 6243 (2004). The academic literature on this approach to administrative law (now often styled as administrative justice) is extensive and far beyond the scope of this article. For an overview see Carol Harlow and Rick Rawlings, *Law and Administration* (2nd ed, 1998).

10 A myth shared by most that follow the Westminster model.

11 Although the most common method of resolving an administrative dispute in New Zealand is likely to be internal review (followed closely one suspects by the Office of the Ombudsmen). Unfortunately, lack of research in this field means such comments are supposition only.

As the Law Commission has recognised, such specialisation is not new and specialist tribunals are almost as old as the New Zealand legal system itself.¹² The UK, like New Zealand, has long utilised specialised judicial forms, particularly in the administrative sphere, although it has also been somewhat in denial about their use. The reasons that had led the UK administration to develop specialist tribunals from the late 19th century onwards also applied to the fledgling colonial government, although their adoption in New Zealand was slightly later.¹³ The growth in the state required mechanisms for making decisions when disputes arose over executive actions.¹⁴ Non-judicial, administrative tribunals were cheaper, more manageable and allowed citizens a right of appeal against the actions of the state that they normally would not have. These reasons were often contradictory, of course, leading to a large variety of tribunals being created for a variety of legitimate and, not so legitimate, reasons.¹⁵ It is this variety of drivers that has led to the variety of forms we see today.

To understand the current structure and its fundamental contradictions it is important to understand where it came from. Tribunals began as institutions of administrative law and, like most of administrative law in New Zealand, they were a pragmatic response to a political reality.¹⁶ The first New Zealand Tribunal,¹⁷ in common with every tribunal since, was established as a specific response to a particular form of dispute. There was no intention that this institution would become a standard feature of dispute resolution in New Zealand. It was established to resolve disputes concerning military pensions without recourse to the judiciary, nothing else. Unlike the courts, tribunals could not be slotted into an overarching system and each was established as an individual stand-alone specialist institution. The early acceptance of specialised non-court-based justice in New Zealand has not stopped almost continuous attempts at unification and judicialisation of the sector.¹⁸

The first tribunals in New Zealand were specialist institutions of administrative law charged with making decisions or, more commonly, reviewing decisions of the state.¹⁹ This administrative form of tribunal continues to exist and their growth in both size and importance means that today they almost deserve the epithet ‘system’ themselves. They can be easily be identified as a group of ‘administrative tribunals’, something that the Law Commission did in its early work on this project. The Law Commission’s work identified 19 such tribunals in New Zealand in 2007, although this may be reduced to 16 during 2009.²⁰ Nevertheless, the definition adopted by the Law Commission as to which of these bodies can be classified as tribunals is itself open to question.²¹

12 Law Commission, *Tribunals in New Zealand*, above n 3, 15.

13 The exact reasons for the creation of tribunals in the UK remain contested and are beyond the scope of this article. For an overview, see Patrick Birkinshaw, *Grievance, Remedies and the State* (2nd ed, 1994).

14 Sir William Wade and Christopher Forsyth, *Administrative Law* (9th ed, 2004) 906.

15 See, eg, Tony Prosser’s discussion of *Unemployment Assistance Act 1934* (UK) tribunals being used as way of deflecting policy complaints: Tony Prosser, ‘Poverty, Ideology and Legality: Supplementary Benefit Appeal Tribunals and Their Predecessors’ (1977) 4 *British Journal of Law and Society* 59. Immigration tribunals have often been accused of playing the same role.

16 Law Commission, *Tribunals in New Zealand*, above n 3, 15.

17 The 1908 Military Pensions Tribunal.

18 See, eg, Legislative Advisory Committee, Parliament of New Zealand, *Administrative Tribunals*, Report No 3 (1989).

19 In common with most common law tribunal systems.

20 The new Zealand Government intends to create a single Immigration and Protection Tribunal to replace four existing tribunals: The Residence Review Board, the Refugee Status Appeals Authority, the Removal Review Authority, and the Deportation Review Tribunal (DRT). *NZ Immigration Bill 132-3* (2007)

21 The distinctions used in the Law Commission’s work are open to debate. One could put forward a robust argument to include the Mental Health Review Tribunal as a public tribunal, for example. The exclusion of the ACC complaints process is also questionable.

During the 20th century these or administrative tribunals were joined by an ever growing group of quasi-public examples. These are far less easy to classify and it is at this point that the whole notion of a tribunal system (or even a distinct institution recognisable as a tribunal) starts to get questionable. The vast majority of these tribunals have been established to resolve disputes concerning the growing number of professional bodies regulated by statute.²² A smaller number were established to resolve specific disputes which arose from statutory regulatory regimes.²³ More recently, another group of semi-judicial bodies have been created to resolve more general disputes amongst the general population.²⁴ Whether these can be classified as tribunals at all is again open to discussion. The Disputes Tribunal in particular has all the hallmarks of a small claims court and its discussion as part of a tribunal system relies heavily upon the definition of tribunal used. Despite the problems of definition, these four functional variants make up the system of tribunals in New Zealand, at least as understood by the Law Commission.²⁵

With each new tribunal, the system has grown ever more complex and confusing. Duplication is common and many tribunals operate as orphans, lacking resources and cut off from the experience that could be gained from other institutions with similar functions.²⁶ Yet, despite several attempts to mould these disparate institutions into a coherent structure, the system remains largely unchanged since the development of the earliest tribunals. The reason why such attempts have failed can largely be attributed to the low priority that tribunals, and administrative justice in general, have been accorded in New Zealand. The current reform proposals are far from perfect, but they would at least have introduced a much needed degree of coherence into the current structure.²⁷ For now, the tribunal system in New Zealand remains a confusing minefield for applicants and decision makers alike.

As should already be clear, the use of the term, 'system', is highly misleading and its use actually prejudices any analysis of the operation of New Zealand's system of specialist justice. In fact, the development of tribunals has been anything but coherent and any attempt to corral them into a single system must by definition be post facto. To define tribunals as a single system, capable of overall reform requires a formalist definition (and a rather broad one at that), rather than a functional one. Such a definition, based as it is upon the structure of the institution rather than its wider functions, is open to significant interpretation and debate. The most obvious point to note is that even if one uses a formalist approach, the differences between individual tribunals are dramatic.

When one looks closely at the institutions classified as tribunals by the New Zealand Law Commission, it is extremely difficult to find overall consistency, with a wide variety of procedures, functions and powers being utilised. Indeed, the only thing that they all clearly have in common is that they are non-judicial dispute resolution mechanisms.²⁸ This leads us to pose a fundamental question. Are we actually looking at one 'tribunal' system or many? This may seem like a rather academic question, but it is of fundamental importance to the future development of specialised justice in New Zealand. The New Zealand Law Commission's reforms were premised upon such an underlying unity. If this unity does not exist, the proposed reform program would lose much of its rationale.

22 For example, Electrical Workers Registration Board, Veterinary Council of New Zealand.

23 For example, Land Valuation Tribunals, Copyright Tribunal.

24 This is a very small and eclectic group which comprises the Disputes Tribunal, Motor Vehicles Disputes Tribunals, Human Rights Review Tribunal, Weathertight Homes Tribunal and Tenancy Tribunal.

25 Law Commission, *Tribunals in New Zealand*, above n 3.

26 The Ministry of Justice Tribunal Unit provides administrative support to some tribunals, but its role beyond this is limited.

27 I have made clear my views on this elsewhere. See W John Hopkins, 'Tribunal Reform in New Zealand: Could Do Better?' (2009) 106 *NZ Lawyer* 15.

28 Even this is questionable given the role of the judiciary in providing personnel for a large number of tribunals.

III. TRIBUNAL REFORM IN NEW ZEALAND

The problems that have emerged with the growth of these specialist non-judicial entities have not gone unnoticed, yet despite a regular flow of reports and proposals over the past fifty years, the tribunal structure in New Zealand remains the unruly cousin in the New Zealand legal family. Not for New Zealand the single appeals tribunal favoured by the Australian federal level²⁹ nor the umbrella system popular at State level³⁰. Even the minimal legislative framework provided by the UK's *Tribunals and Inquiries Act 1992* remains unknown in New Zealand.³¹ Ironically, in a country addicted to legislation, New Zealand's tribunals remain without any set of coherent legal frameworks.³²

The reasons for this are relatively simple. Academics, with their bad dose of 'appeal courtitis' do not waste their time on such trivial matters (with a few notable exceptions)³³ while politicians have little appetite for such administrative reforms. Tribunals are an unfashionable quasi-legal backwater and not vote-winning headline grabbers. For these reasons, the only meaningful reforms over the past half century were a failed (and all but forgotten) attempt at an Administrative Appeal Court,³⁴ and the establishment of a tribunals unit within the Ministry of Justice to provide administrative assistance.³⁵ Outside these minimal, and at times ineffective, attempts at coherence, the structure has remained largely ad hoc.

The problem with this state of affairs is that although tribunals may not figure heavily in the minds of New Zealand's leaders and thinkers, they matter disproportionately to individuals faced with the need to resolve a perceived injustice, particularly against the state. When you find your Accident Compensation Commission claim is rejected or your visa is revoked, the tribunal system becomes very important indeed. In a wide range of subject areas, the tribunals are the 'court of first instance' for the citizen. In most cases they will also be the final arbiter, particularly against the state. The cost of mounting a judicial review action and the limits of legal aid mean that few citizens can access judicial review in New Zealand. Tribunals therefore matter to the individual. It is for this reason that this author welcomed the Law Commission's proposals, despite their obvious flaws.³⁶

IV. THE LAW COMMISSION PROPOSALS

The Law Commission/Ministry of Justice proposals are at the same time both broad and conservative in nature. They are broad in that they attempt to unify the entire tribunal system, as defined by the Law Commission. They are also conservative, in that such reform is largely structural and concerned with creating a neat administrative system in which all tribunals can be placed. This proposed package of reforms would certainly make the system more coherent

29 The Administrative Appeals Tribunal.

30 For example, the Victorian Civil and Administrative Tribunal.

31 And now the *Tribunals, Courts and Enforcement Act 2007* (UK).

32 With the exception of the *Commissions of Inquiry Act 1908* (NZ), which has been used as a surrogate tribunal Act in a number of cases, including the Refugee Status Appeals Authority and the Deportation Review Tribunal. The Law Commission has recognised 60 examples. See Law Commission, *A New Inquiries Act*, NZLC R 102 (2008) 186. The fact that an Act established to formalise inquiries has been used to provide a legislative basis for tribunals (which by definition are an entirely different beast) shows the extent of the legislative confusion in New Zealand.

33 Don Patterson, *An Introduction to Administrative Law in New Zealand* (1967) is the clearest example.

34 The Administrative Division of the Supreme Court (now High Court) was established in 1968 and abolished 20 years later. For more details, see Richard Wild, 'The Administrative Division of the Supreme Court of New Zealand' (1972) 22(4) *University of Toronto Law Journal* 258.

35 The Tribunals Unit of the Ministry of Justice, established in 2002.

36 W John Hopkins, above n 27.

but it may also unintentionally lead to a dangerous shift towards legalism and isolation from the wider dispute resolution sector.

The reform package focuses on the structural organisation of the tribunal scheme. The key proposal is the establishment of a single legislative framework to encompass all tribunals (as defined by the Law Commission). The legislative framework would see a standardisation of procedures and powers (including powers to summon witnesses or evidence, administer oaths and require disclosure)³⁷ as well as the introduction of an automatic right of appeal (limited in many instances). There is no doubt that these reforms would introduce a degree of coherence to the current confusing structure. There are also certain elements which are difficult to argue with. The introduction of a more transparent and independent appointment process, for example, would undoubtedly improve the perceived independence of those tribunals which are currently seen as too close to key stakeholders (usually the state).³⁸

Alongside the single legislative framework, the reforms are based upon the creation of a 'unified' tribunal sector. This would see the creation of three branches within the single unified structure. The Administrative Review Division, as the name suggests, would comprise those tribunals which review the decisions of the executive, although not all such bodies would fall under this division, with internal complaints mechanisms in particular falling outside the reform project entirely.³⁹ An Inter Partes Dispute Division would comprise a very small, and somewhat eclectic, group of tribunals which the Law Commission perceives as primarily concerned with disputes between individuals.⁴⁰ These divisions would be led by a head of division charged with overall oversight of procedures, training and administration. Alongside the two divisions, an Occupational and Industry Regulations Group would comprise a looser collection of tribunals headed by a chair. This individual would have less active involvement than his or her divisional counterpart. The unified structure would not have a single appeal tribunal.

Although this scheme has an appealing symmetry to it (although the Law Commission needed to draw some dubious distinctions to achieve it), closer inspection reveals that the impression of unity is somewhat spoilt by the reality. What is actually proposed is a 'nesting' approach with a variety of subsets within the single framework. A significant number of tribunals will still operate outside the unified structure,⁴¹ with most internal tribunals outside the legislative framework altogether. This is superficial unity at best and it begs several questions, not least of which is "Why persevere with such a convoluted structure in the name of unachievable unity?" Will such limited 'unity' really add anything to the system?

Although some tribunals would clearly benefit from closer relations with other tribunals to share resources, experiences and training, for example, this could be achieved without the grand unification proposed. In addition, users seem to gain little from such an overarching approach. What are required are several entry points into the system to allow for the resolution of particular classes of dispute. The structure behind the front door is irrelevant to their requirements. Although this key point is mentioned in the Law Commission's issues paper,⁴² it seems lost in the drive towards a single legislative frame and unified structure.⁴³ Somewhere along the line, the cart appears to have been put in front of the horse.

There is no clearer example of the dangers of such enforced unity than that of New Zealand's administrative tribunals. These institutions have tended to be seen as a part of a wider system

37 Law Commission, above n 2, 89–104.

38 Ibid 81.

39 For example, the ACC review structure.

40 Classifying the Human Rights Tribunal alongside the Weathertight Home Tribunal seems to be drawing a rather long bow.

41 There are 24 listed by the Law Commission.

42 Law Commission, *Tribunals in New Zealand*, above n 3, 148, 161.

43 The Unified Tribunal section of the 2008 Study Paper makes no mention of it.

of tribunals, rather than as part of administrative law,⁴⁴ which comes with an assumption that their role is to put things right, not encourage administrative bodies to get it right in the first place. However, the functions of administrative tribunals are very different from these other varieties of alternative dispute resolution.⁴⁵ Administrative tribunals are the de facto courts of first instance in New Zealand administrative law.⁴⁶ As such, they need to be considered in tandem with other elements of the administrative legal order, rather than other tribunals. When we take this approach, other more fundamental questions start to emerge, most notably “Are tribunals the best mechanism for the resolution of such administrative disputes?” and “Would mechanisms which avoid the need for dispute resolution and encourage good administration be more appropriate?”⁴⁷

A second assumption which underpins the unified approach is the belief that increased standardisation of procedures through a legislative framework is a self-evident ‘good thing’.⁴⁸ The proposals put this into practice with an emphasis on the use of natural justice in tribunal procedures.⁴⁹ This may be a positive development but it is not self-evident and needs to be considered carefully. The idea that tribunals should follow procedures rooted in the adversarial procedures of the courts, as this reform proposes, presupposes an adversarial tribunal.

Such an adversarial approach, particularly as utilised in New Zealand’s common law system requires the use of technical, quasi-judicial procedural rules, and brings with it a need for greater legal expertise and, thus, the use of lawyers. Do we really want the imposition of court-based principles of natural justice in the tribunal arena?⁵⁰ Natural justice, as understood in New Zealand, exists to ensure equality of arms between the combatants in an adversarial trial environment.⁵¹ However, the use of a form of ‘natural justice’ born in the adversarial court structure in a tribunal context presupposes such an adversarial approach is appropriate across the entire tribunal system. Inquisitorial tribunals will still require procedural safeguards, but they will not necessarily be the same as for an adversarial court. It is not clear, therefore, that a ‘one size fits all’ approach to procedural fairness in the tribunal sector is appropriate. It may have the effect of making tribunals cheap courts, rather than effective dispute resolution mechanisms in their own right.⁵²

44 The reasons for this approach are never fully articulated in any research on the subject and seem based upon an assumption that all tribunals are comparable. It is the submission of this author that this assumption is incorrect.

45 There is not time to explore the alternative dispute resolution (ADR) revolution here, relevant as it is to this paper. It should be noted, however, that the term ‘alternative’ is highly misleading. In fact these dispute resolution mechanisms are the norm.

46 They can even be regarded as the appeal courts in some instances, with officials and or internal tribunals making the first decisions or hearing the first instance complaint.

47 The Office of the Ombudsmen has often emphasised such a ‘fire watching’ approach and the need to improve internal procedures thus avoiding the need for dispute resolution. See, eg, New Zealand Ombudsmen, *Annual Report 2007* (2007) 15; New Zealand Ombudsmen, *Annual Report 2008* (2008) 21.

48 Over 50 per cent of civil cases as a whole are heard by tribunals. Patricia McConnell, ‘The Future of Tribunals in New Zealand’ in Robin Creyke (ed), *Tribunals in the Common Law World* (2008) 193–202. Given the number of cases heard by administrative tribunals and scarcity of judicial review in New Zealand, the logic is inescapable.

49 Law Commission, *Tribunal Reform: Study Paper*, above n 2, 93–7.

50 For a discussion of the limits of adversarial justice, see the work of Carrie Menkel-Meadow including ‘Will Managed Care Give Us Access to Justice?’ in R Smith (ed), *Achieving Civil Justice: Appropriate Dispute Resolution in the 1990s* (1996).

51 Peter Cane, *Introduction to Administrative Law* (1996) 163–70.

52 The dangers of this are discussed in Hazel Genn, ‘Tribunals and Informal Justice’ (1993) 56 *Modern Law Review* 393.

A related issue is the assumption that increasing the involvement of the judiciary in the tribunal structure will improve things.⁵³ Again, this may be true but the issue has not been properly considered in the Law Commission's proposals. Judges are expensive beasts and tend to come with judicial baggage. They are used to the realities of the courtroom and there is always the danger that their involvement will bring a greater judicialisation of tribunal processes. The greater use of lawyers across the tribunal system, which appears to flow from the Law Commission's approach, creates the danger of increased formality and, thus, increased costs in these non-judicial dispute resolution mechanisms.

The Law Commission, in its report, deals with the issue of costs, and particularly the cost of legal advice, in relation to a number of tribunals. The response is to increase the legal aid entitlement for complainants. However, this seems to again presuppose a judicial approach to tribunals. Administrative tribunals in particular are intended (at least in the majority of cases) to offer the citizen an easy method of challenging a decision. If a lawyer is needed, this raises the question of whether the adversarial procedures used are appropriate to the dispute in question. It is the submission of the author that starting from the position that the state pay the lawyer, thus increasing the cost of administrative justice, is not the answer. Instead we need to be asking some fundamental questions about why the aggrieved citizen needs a lawyer in the first place. Do other dispute resolution mechanisms offer a more effective alternative than the tribunal?

V. THE FUTURE OF NEW ZEALAND TRIBUNALS

Overall, the criticisms explored above can be traced back to the remit established at the start of this reform project which drove the Law Commission (not unwillingly) towards a strategy of structural reform and away from an approach that addressed the underlying functions of the tribunals. However, tribunals are inherently functional entities and it therefore seems strangely counterintuitive to engage in a reform of them from a structural standpoint. Functional institutions need a functional approach to reform. The Law Commission's failure to undertake its reform from this standpoint is at the root of the criticisms made in this article. To some extent this may reflect the remit given to the Commission and the limits that the Ministry of Justice imposed upon the reform program. There is much time spent in the Law Commission's original issues paper on the needs of individuals but the final results are extremely disappointing. The reasons for this lack of user focus are to be found not in the final report but in the structural approach taken throughout the reform process. There is, for example, reference to a single 'shopfront' for those individuals seeking redress. This is to be commended and shows exactly the functional, user-focused approach necessary for an effective system. Unfortunately, the idea is never properly elaborated upon with the structural neatness of the system instead taking centre stage in the recommendations.

Despite the comments above, the purpose of this paper is not to criticise the work of the Law Commission in its efforts to reform the tribunal sector in New Zealand. The project was and is a long overdue attempt to introduce some much needed rationality into the New Zealand tribunal structure. The Law Commission should be commended for its role in trying achieving this. However, in taking the approach they have, the proposals run the risk of failing to address the fundamental questions surrounding the role and function of tribunals in the wider legal system. By assuming that the tribunal sector can be reformed as a whole, the proposals do not sufficiently address the impact of tribunals upon the lives of individuals. Tribunals need to be seen not as a system of cheap courts, but as a part of the wider system of dispute resolution in New Zealand. In these times of economic hardship, the current reform process offers a prime opportunity to reduce transaction costs in administrative justice and focus our minds on delivering a better and more efficient tribunal system. Unfortunately, the uniform approach of these reforms have the potential to unintentionally do the exact opposite and reduce the very elements of the tribunal system which make it so attractive in a modern system of dispute resolution.

53 For example, in relation to the hearing of appeals and having a judge as head of the tribunal system.