courts should go to the High Court. The Commission makes further recommendations to eliminate inconsistencies between appeal pathways and reduce pressures on the Court of Appeal.

Response

Comment

258. The Government agrees that, as appeal rights have evolved, they have reflected the particular characteristics of the specific courts and their processes rather than developing a consistent approach across all courts. The Government agrees that the scope for a consistent, principled approach should be examined.

Work to be undertaken – framework for appellate structure

259. The Government has directed officials to undertake a project to address inconsistencies that may have arisen in appeal pathways over time. The aims of this project include:

- To identify an agreed set of principles for appeal processes;
- To assess the applicability of a set of principles to respective courts of general and special jurisdiction, and identify what modifications to the principles and appellate processes might be necessary for particular courts; and
- To develop proposals for improving appellate pathways – using the agreed set of principles, modified if necessary – while safeguarding appellate rights and considering resource implications.

A report to Government is expected by December 2005 with recommendations to address inconsistencies.

Recommendations: Community Justice Officers

Law Commission recommendations

260. The Law Commission recommends that a new judicial officer, known as a Community Justice Officer, should exercise the current jurisdictions of Community Magistrates, Justices of the Peace (in the exercise of judicial functions), Disputes Tribunal Referees and Tenancy Adjudicators. These officers should be paid at a common rate, and warranted to sit in the Community Court in its criminal jurisdiction, and/or in the Tenancy Tribunal, and/or the Disputes Tribunal.

Response

Comment

261. The Government cannot identify any compelling reason for a single type of judicial officer to service each of the three jurisdictions of the Disputes Tribunal, Tenancy Tribunal and summary criminal jurisdiction, noting, in particular the different character of each. However, the Government acknowledges that issues identified within the summary criminal jurisdiction are of more pressing concern.

Proposed new initiative – Community Justice Officers (Criminal Summary Jurisdiction)

262. The Government considers that there is a need to address resourcing issues related to the lower end of the criminal jurisdiction (the jurisdictions presently exercised by Community Magistrates and Justices of the Peace) in the short term. The Government has therefore directed officials to develop a proposal to provide options to address these resource issues. The case for any additional funding required will be made through normal budget processes. It is intended to begin implementation of any changes in the 2005/2006 financial year.

Recommendations: Māori Land Court and Māori Appellate Court

Law Commission recommendations

263. The Law Commission recommends that the jurisdiction of the Māori Land Court be increased to include all disputes involving communal Māori assets, and that Māori Land Court Judges should have the ability to appoint pu-wananga (experts in tikanga Maori and whakapapa). The Commission recommends that the Māori Appellate Court be retained but proposes changes to appeal pathways, depending on whether issues are on matters of fact, law or tikanga.

Response

Comment

264. The Government notes that the Law Commission recommendations regarding the Māori Land Court fall into two different streams of work:

- The appropriate appellate structure for the Māori Land Court; and
- The jurisdiction of the Māori Land Court.

265. The Government considers further discussion and analysis is required within both of these work streams, and notes the differences between Commissioners in relation to appellate rights from the Māori Appellate Court.

266. Government has directed officials to consider the issues raised regarding the appropriate appellate structure for the Māori Land Court in the wider review of the appellate framework referred to above.

Work to be undertaken – extension of jurisdiction of Maori Land Court

267. The Government has directed officials from Ministry of Justice and Te Puni Kōkiri to consider the Law Commission's recommendations relating to the extension of the jurisdiction of the Māori Land Court, including the position of pu-wananga, and report back on possible options to progress this work by 30 September 2005.

Work currently underway – extension of jurisdiction of the Māori Land Court

268. The Māori Fisheries Bill currently before Parliament extends the jurisdiction of the Māori Land Court to include disputes relating to Māori fisheries settlement assets.

269. The Foreshore and Seabed Bill also before Parliament extends the Māori Land Court's jurisdiction to include group rights (Māori customary rights, territorial customary rights and ancestral connection) over the foreshore and seabed.

270. Marine farming (aquaculture) reform, which is being considered by Government, may also impact on the jurisdiction of the Māori Land Court.

Recommendations: High Court and Court of Appeal

Law Commission recommendations

271. The Law Commission notes that the High Court is generally operates effectively and efficiently but makes a number of recommendations to strengthen is supervisory role. These include recommendations regarding structure and appeal pathways that are addressed above. The Commission also recommends that the Commercial List should be discontinued; that a degree of specialisation be introduced in the civil jurisdiction by creating panels of expert Judges; and that Masters be tenured Primary Court Judges.

272. The Law Commission recommends changes to appeal pathways, which are intended to improve the operation of the Court of Appeal, and recommends the Court of Appeal should always include one High Court Judge on secondment.

Response

Comment

273. The Government welcomes the observations of the Law Commission that the High Court generally operates effectively and efficiently. The Government agrees that the Court of Appeal is currently under pressure.

Work to be undertaken – discontinue commercial list

274. Government has directed officials to consult with potential Commercial List litigants, the judiciary and other stakeholders and report back by December 2005 with a proposal for the discontinuance of the Commercial List.

Work to be undertaken – address issues in Court of Appeal

275. The Government has asked officials to consider the issues in the Court of Appeal and to report to Government with immediate options to address these pressures by September 2005. As noted above, the Government has also asked officials to undertake a review appeal pathways, in response to the Law Commission's recommendations. Priority will be given to the issue of the workload of the Court of Appeal (particularly criminal appeals originating from decisions of the District Courts).

Comment – specialisation and panel system in the High Court

276. The Government agrees with the Law Commission that the size of the New Zealand jurisdiction and the number of judges means that specialist judges would result in the exclusion of work in the broad general jurisdiction. However, with regard to the

recommendations relating to a panel system and secondment of judges, the Government notes that the Chief High Court Judge is ultimately responsible for rostering and scheduling High Court Judges.

Comment – Masters of the High Court tenured as Primary Court Judges

277. The recommendation that Masters (now known as Associate Justices) be tenured Primary Court Judges can not be considered until decisions on a primary court structure are made. The Government has therefore asked officials to consider this proposal and make recommendations, as appropriate, to Government at that time.

Recommendations: Tribunals

Law Commission recommendations

278. The Law Commission recommends integrating many (around 90 that have been identified) tribunals into a unified tribunal framework administered by the Ministry of Justice. The following bodies would be excluded from this framework: the Waitangi Tribunal, the Securities Commission, the Commerce Commission, the Takeovers Panel, the Abortion Supervisory Committee, the Privacy Commissioner, the Employment Relations Authority, the Mental Health Review Tribunal, the New Zealand Parole Board, the Disputes Tribunal and the Tenancy Tribunal.

279. Future tribunals would be established only in accordance with principle and in conformity with fixed guidelines. Unless exceptional circumstances exist the Commission recommends new tribunals be integrated into the unified structure.

280. The Tribunal structure would have the following features:

- Headed by a President, who is a Primary Civil Court judge, together with two legally qualified deputies;
- A core of experienced tribunal members, who should sit in more than one of the constituent tribunals. The other members of tribunals should be people with particular skills and expertise in the specific areas;
- Appeals from tribunals within the unified framework should be to an appellate panel, made up of the President or Deputy President, a member of the tribunal in question, and a member from another tribunal. These appeals should be on matters of fact and/or law, depending on the primary statute which creates the particular tribunal; and
- Any further appeal should be by leave to a full bench of the High Court (two Judges), on a matter of law only.

281. The Law Commission also recommends that legislation should vest the President with the role of recommending to Government how particular tribunals can be merged, grouped or rationalised within the tribunal structure.

Response

Comment

282. The Government agrees that a more coherent structure should apply to the administration and operation of tribunals in New Zealand. It is committed to ensuring that the perception of independence of tribunals is maintained and enhanced as part of that structure.

283. The Government considers that any rationalisation of tribunals into a new structure should follow rather than precede the development of a set of guidelines for the administration and operation of tribunals.

Guidelines

Work to be undertaken – guidelines for administration and operation of current and future tribunals

284. Government has directed the Ministry of Justice to develop a set of guidelines for the administration and operation of current and future tribunals. The work will take account of the findings of the Law Commission. The project to develop the guidelines will include consideration of the following factors:

- Independent decision-making;
- Consistency of process;
- Administrative efficiency;
- Quality decision-making;
- Appropriate appellate pathway; and
- Appropriate scope.

285. The development of the guidelines will be led by the Ministry of Justice in consultation with agencies which currently operate the various tribunals. It is expected to be finished by December 2005.

Comment – application of guidelines to existing and new tribunals

286. Following acceptance by the Government of the guidelines, existing tribunals will be considered against those guidelines to determine whether changes are necessary, or whether any merging, disestablishment, or other changes are necessary to ensure existing tribunals conform to the guidelines. Proposed new tribunals will be established in accordance with the guidelines.

Administration

Comment – administration of tribunals by Ministry of Justice

287. The Government acknowledges that, in some cases, the housing of a tribunal in a related Department or Ministry may lead to the perception of a lack of independence. Where, as part of the consideration of a tribunal against the proposed guidelines, a potential perceived lack of independence is established, that tribunal will be treated with some priority for consideration of transfer to the Ministry of Justice. This will

include consideration of tribunals highlighted by the Commission, including the Removal Review Residence Appeal and Refugee Status Appeals Authorities.

288. In the longer term, all other identified tribunals will be considered for transfer to the Ministry of Justice. In determining whether particular tribunals should be transferred to the Ministry of Justice, the costs and benefits of such a transfer will be considered prior to a decision being made. Where the costs of transferring outweigh the benefits, the tribunal will not be transferred to the Ministry of Justice (but will continue to operate consistently with the guidelines referred to above).

Unified Structure Headed by President

Comment – unified structure

289. The Government agrees that a unified tribunals structure should apply to most tribunals (regardless of which Department administers them). However, this should follow, rather than precede, the application of common guidelines to the various tribunals.

290. The establishment of such a unified structure headed by a President, and the associated appellate panel, will be considered further after the Government has accepted and applied the guidelines referred to above.

Recommendations: Open Justice – Family and Youth Proceedings

Law Commission recommendations

291. The Law Commission recommends that proceedings currently closed to the general public should remain closed. However, the Commission recommends aligning processes for Family proceedings (whether they occur in the Family Court or in other courts such as the High Court) with those in the Youth Court. Under the proposal:

- Accredited news media representatives would be permitted to attend proceedings;
- There would be no restrictions on reporting family proceedings (other than those involving children or domestic violence) unless the court ordered otherwise;
- In cases involving children, domestic violence and Youth Court proceedings, media reporting would be permitted, but details of those involved in the proceedings could not be published unless the leave of the court was obtained; and
- The court should not require a draft of any news report to be submitted for approval prior to publication.

Response

Comment

292. Government agrees with the Law Commission that Family proceedings should be more open, but that proceedings should remain closed to the general public. It intends to implement these recommendations as outlined below.

Work currently underway – Care of Children Bill

293. The Care of Children Bill, currently before the House, provides for reporting of all proceedings under the Care of Children Act, as long as names or identifying information about the parties and children involved are not published. The Bill also provides for support persons and accredited news media to attend those proceedings

Work currently underway – Openness in other family proceedings

294. The Ministry of Justice is currently analysing other family law statutes in light of the Law Commission's recommendations. A report is expected by December 2004, following which decisions on any legislative changes required will be made.

Comment – draft of report for Court's approval

295. The issue of a court requiring a draft of a news report prior to approval for publication is a matter best addressed by the Judiciary.

Recommendations: Open Justice – Criminal Courts

Law Commission recommendations

296. The Law Commission recommends that:

- Publication of identifying details of a person charged with an offence before they appear in court should be prohibited unless the person consents;
- After a person is charged there should be a general presumption that publication of their name or identifying particulars should generally be prohibited until the substance of the case is gone into by the court; and
- Where a request for name suppression of a victim in criminal proceedings is made, that request should be granted unless it would not be in the interests of justice to do so.

Response

Comment

297. The present laws are based on the assumption of open justice, with exceptions made where appropriate. The Law Commission's recommendations would fundamentally shift this presumption away from the principle of open justice. The Government considers that the existing laws relating to name suppression are appropriate and does not intend to make the changes recommended by the Law Commission.

Recommendations: Openness – Civil Jurisdiction

Law Commission recommendations

298. The Law Commission recommends that where practicable, the public should have access to routine civil procedural matters that are currently heard 'in chambers'.

Response

Comment

299. The issue of whether matters currently heard 'in chambers' should be open to the public, and the practicalities of achieving this is a matter for the Rules Committee. The Secretary for Justice will, therefore, consult with the Rules Committee on whether it agrees with this recommendation, and if so whether it will implement it.

Recommendations: Openness – Note Taking in Courts

Law Commission recommendations

300. The Law Commission recommends that there is no reason to continue the current convention that note-taking is disallowed in courtrooms.

Response

Comment

301. The issue of note-taking in courtrooms is the responsibility of the Judiciary.

Cabinet

CAB Min (13) 43/13

Copy No: 20

Minute of Decision

16 DEC 2013

Warren Kaye

Disputes Tribunal: Increasing the Maximum Claims Level

Portfolio: Justice

On 9 December 2013, following reference from the Cabinet Social Policy Committee, Cabinet:

1 out of scope

2

3

4

5 **agreed** that Disputes Tribunal hearings should be open to the public, except when the referee is mediating an agreement between the parties, or there are other circumstances that the referee considers warrant privacy or reporting restrictions;

6 out of scope

7 **agreed** to introduce a legislative presumption that referees' decisions should be published online, unless the referee considers there is good reason not to do so;

8 out of scope

9

10

11

Enclosed:

Excerpt from 'Disputes Tribunals: Increasing the maximum claim level'
Office of the Minister of Justice
Cabinet Social Policy Committee

Proposal

1. I seek agreement to:

   1.1. [Out of scope]

   1.2. strengthen safeguards and increase transparency to maintain public confidence in the Disputes Tribunals;

   1.3. [Out of scope]

[Out of scope – paragraph 2- first sentence of paragraph 6]

6. Therefore I also propose that:

   6.1. **[Out of scope]**

   6.2. hearings should be open to the public unless the referee is assisting the parties to reach a mediated agreement or there are other circumstances that the referee considers warrant privacy or reporting restrictions;

   6.3. **[Out of scope]**

   6.4. a legislative presumption be introduced that referee decisions be published online unless the referee considers there is good reason not to do so;

[Out of scope – paragraphs 6.5-26]

Public hearings to increase transparency

27. I propose to make Disputes Tribunal hearings open to the public. They are currently heard in private. Judicial proceedings must generally be conducted in open court (the public and media must be free to attend). A court or tribunal cannot sit in private except in a few closely defined circumstances (e.g. to protect certain vulnerable persons).

28. However, I also wish to retain the unique features of the Disputes Tribunals as an inexpensive, simple and fast dispute resolution mechanism. Accordingly, where the parties resolve their dispute through mediation, that process should remain private. The adjudication process should also remain private if there are other circumstances that the referee considers warrant privacy and referees will also be able to impose reporting restrictions on the media. This balanced approach will ensure free, open and frank discussions can continue to take place in pursuit of early resolution of disputes. But that

where mediation is unsuccessful, the hearing will be open to the public and the media consistent with the principle of open justice.

29. I propose:

29.1 **[Out of scope]**

29.2 to introduce a legislative presumption that referees' decision be published online unless the referee considers there is good reason not to do so.

30. Court and tribunal decisions are generally available to the public except in a few strictly defined circumstances. Well-reasoned decisions are integral to the parties' sense of a fair hearing.

[Out of scope – paragraph 31]

32. Tribunal decisions are not routinely published at present, although the Principal Disputes Referee has published some decisions of particular note in an anonymised form. My proposal will improve transparency and maintain public confidence in the Disputes Tribunals by making the outcomes of cases more accessible while also recognising that some decisions may not warrant or be suitable for publication. This mirrors the approach adopted for the publication of District Court decisions online.

[Out of scope – paragraph 33-57]

Recommendations

58. I recommend that the Cabinet Social Policy Committee:

[Out of scope paragraphs 1-4]

5. **agree** Disputes Tribunal hearings should be open to the public, except when the referee is mediating an agreement between the parties, or there are other circumstances that the referee considers warrant privacy or reporting restrictions;

[Out of scope paragraph 6]

7. **agree** to introduce a legislative presumption that referees' decisions should be published online unless the referee considers there is good reason not to do so;

MINISTRY OF JUSTICE
Tāhū o te Ture

27 March 2014

Ms Anne Darroch
Principal Disputes Referee
ANNE.DARROCH@justice.govt.nz

Dear Ms Darroch

Proposed Amendments to the Disputes Tribunals Act 1988

Further to Dianne Patrick's email of 5 March 2014, I am writing to describe the changes proposed in two Bills that will affect the Disputes Tribunals.

out of scope

Disputes Tribunals Amendment Bill

The Disputes Tribunals Amendment Bill will promote the changes the Government agreed to in December 2013. I have attached a description of these changes and the Cabinet paper. This information is also available on the Ministry's website.

The drafting process for this bill has not yet commenced.

I understand that you have some concerns about how some of these changes could operate - in particular, how hearing rooms will accommodate the additional people who could attend open hearings and how people will be moved in and out of the hearing room when a hearing shifts between its open and closed stages.

I would appreciate the opportunity to meet with you to develop a better understanding of your concerns and to identify practical ways of managing these issues.

Yours sincerely

Warren Fraser
Policy Manager
Court and Tribunals Policy
Policy Group

Enclosed:

Excerpt from 'FILENOTE: MEETINGS WITH ANNE DARROCH, PRINCIPAL DISPUTES REFEREE'

23 May 2014

This note records key points from Minister Borrows' meeting with Anne Darroch, Principal Disputes Referee (PDR), on Tuesday 20 May. Wayne Newall and I attended for the Ministry. Stuart Beresford and Oliver Searle were also present.

[Out of scope – paragraphs 2-6]

Policy issues associated with Cabinet decisions December 2013

a) Publication of Referees' decisions

7 PDR thought it helpful to have decisions of interest as currently published, though the process was labour intensive. She worried that publishing all Referees' decisions (under the Cabinet decision) would muddy the waters for users seeking guidance on the likely treatment of a prospective case. Anonymisation of some decisions would also present a challenge.

8 We suggested that compliance with the eventual publication requirement need not preclude highlighting decisions of interest, or grouping decisions (PDR had mentioned Consumer Guarantees Act cases). The design of a system for how decisions would be published was some way down the track. There may be scope for electronic processes to ease the publication burden.

9 PDR was concerned that, knowing their decisions would be published, Referees would want greater access to legal research assistance. There was only half a person available for this currently.

[Comment: This may be a natural reaction to greater scrutiny. But shouldn't Referees be making good decisions for their own sake? A good, reasoned, decision is not inherently linked to likelihood of publication. Accountability is a key part of the trade off in the Cabinet decisions – increased jurisdiction for greater accountability, transparency (through open hearings; publication) and safeguards for quality (requiring Referees to have legal qualifications). I doubt Ministers would have much sympathy for a request for greater research assistance. The quality of decision making can be tackled through PDR's best practice initiatives, and will hopefully be bolstered by the new qualification requirements.]

b) Open hearings

10 PDR noted that Referees did not operate a two-part process. There was not a natural break in their work that might allow for some steps in open court and others in private. A settlement opportunity could emerge at any time.

[Comment: Our pre-meeting discussion of this issue was inconclusive. And we'll need to work harder with the PDR. She has a clear view that mediation should always occur in private and appears yet to accept a change to open hearings.

We said our starting point was the Cabinet decision to move to open hearings. We were interested in exploring how to make that decision work. We suggested that there was no reason, for instance, that exploration of the issues at the start of a hearing could not be open to the public. It was also entirely possible to reach good settlements in open court with the public in attendance (if indeed anyone besides the parties turned up). The Cabinet decision would still allow a Referee to close the hearing if/when it seemed to the Referee a settlement might be reached more readily in private.]

11 She acknowledged that a move to open hearings did not necessarily mean that the public would attend. But in some cases the parties will likely bring supporters to observe. In cases involving prominent persons there may be public or media interest.

12 Open hearings would thus present some logistical challenges:

- Some venues had only small rooms available (so if the public was to be accommodated that would put pressure on venues)
- Referees are not supported by clerks and are left to manage parties themselves – presumably they would also be asked to manage the public during open hearings (e.g. if seeking to close the hearing and remove the public in order to mediate a settlement)
- Which also raised a question of security

[Comment: As discussed previously, we'll need to anticipate larger cases or those that might attract public or media interest and schedule these in larger rooms. The question of support to Referees in the management of the observing public is a legitimate one that we'll need to consider. Security issues are likely already to exist. The possible presence of "supporters" may exacerbate the security issue and we should look into that. Some changes to the Court Security Act are being promoted through the CATES Bill, including allowing Court Security Officers to use their powers at tribunal hearings held in buildings (usually courthouses) where they are present.]

[Out of scope – paragraphs 13-16]

Postscript

17 Outside the meeting and upon parting, PDR commented to us that "you can't have it all". The publication decision will mean Referees want more legal research support.

[Out of scope – rest of paragraph 17]

18 We replied that Ministers may indeed want it all. And that we – the Ministry and the PDR – will need to work together to find practical ways forward.

Next Steps

19 Policy needs to issue drafting instructions to Parliamentary Counsel so that a bill can be developed. It would be good to meet with PDR again in the near future. Her letter of 17 April remains for reply. We could set out our ideas for taking Cabinet's decisions forward in a response and invite further discussion at a meeting time scheduled in the letter.

Warren Fraser

Policy Manager, Courts and Tribunals Policy

Enclosed:

Excerpt from 'Agenda: Meeting with Principal Disputes Referee, Anne Darroch, and Referee Dr Cynthia Hawes'

12 June 2014

[Out of scope – paragraphs 1-2a]

b) Open Hearings

- How can we best manage the occasional need for larger hearing rooms?
- What support might referees need to manage the small number of hearings that do attract a number of supporters, or public attendance, or media profile?

Open hearings in the Tenancy Tribunal have not resulted in vastly greater public attendance at hearings.

However, for DT cases with media profile, or where parties wish to bring supporters, we have to consider practical issues like the **size and availability of hearing rooms** that can accommodate public attendance.

Media requests or inquiries will help with advance notice. On the day, once a room is full, it's full…just like any other public gallery at court.

The scheduling process can help. There may be a small scheduling delay in finding an appropriate room where we know more space is required. (A bit like multi-party hearings now?)

Managing public attendance might require guidance available at hearing – i.e. attendance at an open hearing is to witness and observe; not to participate.

Security? Will likely be managed on a risk assessment, as required basis.

PDR suggested that a clerk or court taker could help a referee to manage "profile" cases. Budget constraints will make that difficult to accommodate.

- *Publication of Referees' decisions*

- What issues will we need to consider in devising a system for publication of referees' decisions?
- Does publication make a case for greater availability of legal research assistance to referees?

How does the current publication of decisions of interest work? Who publishes? Who anonymises?

Publishing a volume of cases – 16,000-20,000 – will be difficult. The development of electronic ways of working could help.

When should decisions be anonymised?

What good reasons might exist for not publishing some decisions?

Publication of decisions opens referees up to greater accountability. But there is nothing inherent in publishing that should influence the quality of a referee's decision. Requiring legal qualifications is designed to assist quality decision making.

[The fundamental underpinning of the Open Justice principle is that judicial proceedings must be conducted in open court (the public and media must be free to attend) and a court cannot sit in private, except for in a few closely defined circumstances (for example, to protect certain persons or if there are nationals security concerns). Likewise, the court record should be available for public viewing; again, except for in a few strictly defined circumstances.

The principle of open justice is important to:

- deter inappropriate behaviour on the part of courts (and to encourage them to act fairly and independently);
- maintain public confidence in the administration of justice (reducing the risk that members of the public will be motivated to take justice into their own hands); and
- promote the accountability of the parties and deter inappropriate behaviour by participants in the process.]

Enclosed:

Excerpt from 'Meeting regarding proposed Disputes Tribunals reforms'
Held on Thursday 12 June 2014 at the Justice Centre, Room 3.14

Attendees

- Anne Darroch (Principal Disputes Referee)
- Cynthia Hawes (Referee and Associate Professor of Law at Canterbury University)
- Sarah Turner (General Manager, Courts and Justice Services Policy)
- Warren Fraser (Manager, Courts and Tribunals Policy
- Wayne Newall (Acting National Manager, Specialist Courts, Special Jurisdictions)
- Emily Owen (Manager, Operations Support, Special Jurisdictions)
- Angela Holmes (Senior Policy Advisor, Courts and Tribunals Policy)
- Paul McGregor (Policy Advisor, Courts and Tribunals Policy)

[Out of scope – paragraphs 1-17]

Logistical issues related to open hearings and increased jurisdiction

18. The discussion focussed on the practical problems that may arise from Cabinet's December 2013 decisions. Anne felt more court staff would be required to accommodate these changes and that they would substantially change the nature of the DT from a tribunal to a court.

Action points:

- Policy to begin drafting bill
- Anne and Cynthia will need to give their concerns at the select committee stage

Publication of referee's decisions

19. Warren confirmed previous discussion with Anne:

- A selection of 'useful' decisions would still be able to be published
- Publication requirement would not come into play for perhaps another 24 months
- Publication requirement could 'piggy back' on whatever system or process is put in place for District Court decisions.
- Anonymisation would not be required (unless the referee felt it necessary) because the hearings would no longer be held in private.

20. Anne and Cynthia aired their concerns, which included:

- Referees would be slower to deliver decisions because they would feel their decision might be critiqued by academics, law practitioners etc
- Parties may start bringing a number of decisions with them to hearings, which wouldn't be useful.
- Most matters before the DT were of very low public interest. Recording them for all to see might put people off using the DT. Or it might allow curious parties (such as neighbours) to find out private information (such as financial difficulty) about individuals.

21. Warren agreed these were legitimate concerns. However, Cabinet had weighed up these concerns and made its call on where the balance should lie.

22. Warren noted that the Ministry needed to draft a bill and that the place for Anne and Cynthia to raise these concerns was at the select committee stage.

23. Warren also noted that he had slowed up the drafting of the bill to allow these discussions to happen at this early stage, in case the bill was passed with these changes in it.

Action points:

- Policy to begin drafting bill
- Anne and Cynthia will need to give their concerns at the select committee stage

[Out of scope – paragraphs 24-25]

Enclosed:

Excerpt from 'Additional Proposals for the Courts and Tribunals Enhanced Services Bill'

10 April 2015

Action Sought	Timeframe/Deadline
Decide which additional proposals if any should be included in the Courts and Tribunals Enhanced Services Bill (CATES)	At your convenience

[Out of scope – remainder of page 1]

Additional Proposals for the Courts and Tribunals Enhanced Services Bill

Purpose
[Out of scope – paragraph 1]

2. The paper also provides a fuller explanation of the rationale for proposing that Cabinet should rescind two earlier decisions requiring open Disputes Tribunals hearings and the publication of Disputes Tribunals decisions.

[Out of scope – paragraphs 3-7]

Rationale for rescinding Disputes Tribunals decisions

8. The decisions to open Disputes Tribunals hearings to the public and to publish Disputes Tribunal decisions were part of a suite of changes to increase transparency across courts and tribunals. Following further consideration and discussion with key stakeholders, we now recommend the rescinding of these decisions on the grounds that they are not appropriate for the Disputes Tribunals and could fundamentally alter their unique nature. The Disputes Tribunals were established to provide a simple, inexpensive and informal dispute resolution forum that did not operate like a court. These characteristics could be muted if the tribunals were to operate more like courts with open hearings and published decisions. If you agree, the draft Cabinet paper will also ask Cabinet to rescind these decisions.

[Out of scope – paragraphs 9-20]

B) *Rationale for rescinding Disputes Tribunals Cabinet decisions*

21. You asked for a fuller explanation of the rationale for the proposal to ask Cabinet to rescind the earlier decisions to open Disputes Tribunals hearings to the public and to publish most Disputes Tribunal decisions.

22. These decisions were part of a suite of changes to increase transparency across courts and tribunals. Following further consideration and discussion with key stakeholders, including Principal Disputes Referee Anne Darroch, we now recommend the

rescinding of these decisions on the grounds that they are not appropriate for the Disputes Tribunals and could fundamentally alter their unique nature.

23. The Disputes Tribunals were established to provide a simple, inexpensive and informal dispute resolution forum that does not operate like a court. These characteristics could be muted if the tribunals were to operate more like courts with open hearings and published decisions. The loss of privacy could dissuade some potential claimants from using the Tribunals.

24. Referees seek to settle disputes through mediation and if this is not possible, they decide matters on their merits rather than points of law. Private hearings facilitate this process. Parties might not be as willing to compromise when their supporters are present.

25. The publication of decisions was intended to be implemented in conjunction with the development of electronic courts. The Ministry considers that the benefits of manual publication would not outweigh the significant costs. These decisions do not set precedents and most relate to private matters of little interest to the general public.

26. At present, the Principal Disputes Referee periodically publishes a small number of decisions of particular note in an anonymised form. These are organised into categories to allow potential users to easily identify relevant cases. This practice will continue.

[Out of scope – paragraphs 27-28]

Recommendations

29. It is recommended that you:

[Out of scope – paragraphs 29.1-29.5]

6. Agree that the Cabinet paper include a proposal to rescind the Disputes Tribunals decisions requiring open hearings and publication of most decisions on the grounds that this could fundamentally alter the unique nature of the tribunals by making them too much like courts;

[Out of scope – paragraph 29.7]

[Out of scope – appendices 1-3]

Enclosed:

Excerpt from 'Cabinet Minute of Decision'
SOC-16-MIN-0066

Cabinet Social Policy Committee
Modernising the Courts and Tribunals System
Portfolio Courts

On 1 June 2016, the Cabinet Social Policy Committee:

1. **noted** that the following amendments will modernise the way the courts and tribunals system operates;

[Out of scope – paragraphs 2-6]

7. **noted** that in December 2013, Cabinet agreed to amend the Disputes Tribunals Act 1988 to:
   7.1. require Disputes Tribunal hearings to be open to the public, except when the referee is mediating an agreement between the parties, or there are other circumstances that the referee considers warrant privacy or reporting restrictions;

   7.2. introduce a legislative presumption that referees' decisions should be published online unless the referee considers there is good reason not to do so;

[CAB Min (13) 43/13]

8. **agreed** that the approach in paragraph 7 above is not appropriate for the Disputes Tribunals and could fundamentally alter their unique nature;

9. **agreed to recommend** that Cabinet rescind the decision referred to in paragraph 7;

[Out of scope – paragraphs 10-24]

Enclosed:

Excerpt from 'Modernising the Courts and Tribunals System'

Proposal

1. I seek approval for legislative amendments to modernise the way the courts and tribunals system operates.

[Out of scope – paragraphs 2-27]

Rescinding Cabinet decisions relating to the Disputes Tribunals

28 I propose to rescind Cabinet's decisions to:

28.1. require Disputes Tribunal hearings to be open to the public, except when the referee is mediating an agreement between the parties, or there are other circumstances that the referee considers warrant privacy or reporting restrictions;

28.2. introduce a legislative presumption that referees' decisions should be published online unless the referee considers there is good reason not to do so [CAB Min (13) 43/13].

29 Following further consideration and discussion with key stakeholders, I have concluded that this approach is not appropriate for the Disputes Tribunals and could fundamentally alter their unique nature.

30 Disputes Tribunals provide a simple, inexpensive and informal dispute resolution forum. Referees seek to settle disputes through mediation and if this is not possible, they decide matters on their merits rather than points of law. Private hearings facilitate this process. Similarly, the loss of privacy associated with the publication of most decisions could dissuade some people from using the tribunals. The Principal Disputes Referee periodically publishes a small number of decisions of particular note in an anonymised form on the internet. This makes important decisions accessible to the public.

31 Cabinet has agreed to rescind the equivalent decisions requiring publication of judicial decisions online through a Supplementary Order Paper (SOP) to the Judicature Modernisation Bill.

[Out of scope – paragraphs 32-77.6]

7 **note** Cabinet agreed to amend the Disputes Tribunals Act 1988 to:

7.1 require Disputes Tribunal hearings to be open to the public, except when the referee is mediating an agreement between the parties, or there are other circumstances that the referee considers warrant privacy or reporting restrictions;

[Out of scope – paragraphs 77.7.2-77.26]

Enclosed:

Excerpt from 'Cabinet Minute of Decision'
CAB-16-MIN-0250.01

Modernising the Courts and Tribunals System
Portfolio Courts

On 7 June 2016, following reference from the Cabinet Social Policy Committee (SOC), Cabinet:

1. **noted** that the following amendments will modernise the way the courts and tribunals system operates;

[Out of scope – paragraphs 2-6]

7. **noted** that in December 2013, Cabinet agreed to amend the Disputes Tribunals Act 1988 to:

   7.1 require Disputes Tribunal hearings to be open to the public, except when the referee is mediating an agreement between the parties, or there are other circumstances that the referee considers warrant privacy or reporting restrictions;

   7.2 introduce a legislative presumption that referees' decisions should be published online unless the referee considers there is good reason not to do so;

[CAB Min (13) 43/13]

8. **agreed** that the approach in paragraph 7 above is not appropriate for the Disputes Tribunals and could fundamentally alter their unique nature;
9. **rescinded** the decisions referred to in paragraph 7;

[Out of scope – paragraphs 10-25]