THE IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL - A CRITIQUE OF ITS LEGISLATIVE BASIS

Doug Tennent, Lecturer in Law, Waikato University

Scope of Paper

The Immigration Advisors Licensing Act 2007 has been in force now for over six years. As we are all very aware this legislation has had a profound impact upon the Immigration Advising profession. It has in fact regulated the profession. The impact of this has been experienced in:

- the requirement s for licensing and registration;
- requirements in relation to management practices;
- requirements in relation to the Code of Conduct;
- the fact that the legislation is able to access the conduct of advisors and where it is considered to be appropriate, impose penalties upon an advisor.

Of the penalties that are available under s 51 of the legislation, the most severe is clearly the cancellation of licence. The body which is responsible for this is the Immigration Advisors Complaints and Disciplinary Tribunal (IACDT).

It is this Tribunal and its function which is the focus of this paper. I will look at the legislative structure of the Tribunal, noting what are seen to be significant shortcomings. Simon Laurent who has represented a number of advisors in disciplinary hearings in the Tribunal will focus more on specific issues regarding the role and functions of the Tribunal.

Initial Comments

From the outset I wish to make three general observations in relation to the legislation:

1. <u>The breadth of the definition of Immigration Advice.</u>

Immigration advice for the purpose of the legislation is set out in section 7 of the Immigration Advisors Licensing Act. It refers to using knowledge and experience in the immigration field to advise, direct, assist or represent another person in relation to an immigration matter. Further advice may be direct or indirect and doesn't need to be for pecuniary gain. Advice is distinguished from information. Katy Armstrong in her contribution in the Second Edition of the Immigration and Refugee text considers that the difference between advice and information relates to the provision of information on the one hand, and the interpretation of

immigration policy and law and how it would apply to a particular person (amounting to advice) on the other.[1]

Then as we are all aware under s 11 any person who provides advice is required to be registered in accordance with the provisions of the act unless they are one of the exempted categories one of which is lawyers. The very broad definition of immigration advice has a number of implications. One of these can be appreciated when one connects the Immigration Advisers Licensing Act with the Immigration Act 2009. The term immigration matter and the advising, assisting, directing and representing obviously refers to all actions in relation to relevant provisions of the Immigration Act. It is significant that Immigration Advice includes representation. This means representation before the Immigration and Protection Tribunal. As people are aware prior to the entry into force of the Immigration Advisors Licensing Act 2007 lay advocates could represent people in the Refugee Status Appeals Authority and the like. This came to an abrupt conclusion with the entry into force of the legislation. The impact of this is that from a legislative point of view the primary or principle representative before the IPT is the immigration advisor. A lawyer is granted jurisdiction to represent by virtue of the exemption provisions in section 11. This primary status includes representation in Refugee and Protected person matters. These require an oral hearing meaning that people will have to be comfortable in the skills of examination and cross examination.

These are skills usually acquired by lawyers firstly in undertaking legal professionals and then in practice. The legislation in effect broadens the role of the immigration advisor considerably. This has the consequential effect of increasing the expectations and responsibilities of immigration advisors. I don't think that the legislators appreciated this when they drafted the legislation. Traditionally Immigration Advisors have taken an active role in representing people in appeals against decline in residency and in humanitarian appeals against removal now deportation when a person is unlawfully in the country. Now the legislation sees immigration advisors to be the primary representative in humanitarian appeals against deportation of residents and in matters relating to Refugee and Protected person status. Some of the larger advisor practices I know are looking at appointing lawyers to undertake such work. For a smaller practice there come the issue of how to manage a client's situation when he or she having represented the client over a period of time becomes aware that an appeal in relation to say Protected person status is necessary. Such a client can find no other representation. The advisor feeling responsible proceeds to represent a person in an oral hearing which he or she has no experience with. Such a person can be subject to a complaint should the outcome of the appeal not be what the client was seeking. Is this fair?

Again it is important to state that it would appear that the legislature did not appreciate the full implications of the definition that was given to immigration advice. Another concern that I want to raise in this regard regards to the exemption category. One of the people exempted from the requirement to hold a practicing certificate are "people who advise in an informal or family context"[2]. What does this mean? How wide are its parameters? There are all sorts of possible interpretations of this.

2. <u>The difference between penalties which are focused upon promoting professionalism and assisting advisors who may have encountered difficulties in a manner giving rise to a complaint, and penalties which have the primary purpose of censure or sanction.</u>

---

1 In D Tennent, *Immigration and Refugee Law* (2nd Edition, 2013)

2 It will be interesting to see how the boundaries between informal and formal advice are established.

The first general point relates to the broadened and increased role of immigration advisors and the implication of this with regards to the complaints and disciplinary process. This second observation relates directly to the disciplinary process established under the Immigration Advisors Licensing Act 2007. As already noted the purpose of the Immigration Advisors Licensing Act was to regulate this profession. Section 3 of the Act sets out its purpose which is:

> To promote and protect the interests of consumers receiving immigration advice, to enhance New Zealand's reputation as a migration destination and to regulate people receiving immigration advice.

From this we can see that the focus is on the "consumer" - the recipient of immigration advice - and the reputation of New Zealand. In introducing the Bill in its first reading the then Minister of Immigration Hon David Cunliffe noted that the Bill:

> creates a new regulatory framework for the regulation of individuals who provide immigration advice both on shoe and offshore. Although many immigration advisers provide good services, there are currently insufficient constraints or market incentives to prevent advisors from providing unethical or incompetent services. This legislation puts New Zealand in line with countries such as Australia and Britain.

Finally it is useful to note the observation of Priestley J in *ZW v Immigration Advisors Authority:*

> In response to concerns over the competency and practices of immigration advisers. Parliament enacted the Immigration Advisors Licencing Act.[3]

While Priestley J's comments may be considered as somewhat negative the other two provisions can be seen to be positive through focusing on the assurance of professional standards in the Immigration Advising profession. So from the onset it is suggested that the focus of the legislation is indeed to be positive rather than punitive. However if a body is going to be regulated, there does need to be some disciplinary procedure. Inherent in a disciplinary procedure are appropriate forms of sanction. Again the focus of the disciplinary proceedings is important. It is submitted that the appropriate focus is well expressed by the Supreme Court in the case of *Z v Dental Complaints Assessment Committee.*[4]The court noted:

> The purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure that appropriate standards of conduct are maintained in the occupation concerned.[5]

This again is supportive of an approach which focuses upon the promotion of professionalism rather than the imposition of sanctions.

3. <u>Lack of statutory detail about how the Tribunal functions</u>

Section 40 (2) of the legislation provides for the staffing of the Tribunal. There is to be a Chairperson appointed by the Governor-General acting in consultation with the appropriate Ministers.[6] There is also the further provision for other members to be appointed by the Governor-General.

---

[3] *ZW v Immigration Advisers Authority* HC AK CIV-2011-404-005399 [17 May 2012] para [3]
[4] *Z v Dental Complaints Assessment Committee* [2009} 1 NZLR 1.
[5] *Z v Dental Complaints Assessment Committee* [2009} 1 NZLR 1. At [97]

[6] Section 40 (2) (a) *immigration Advisers Licensing Act* 2007

Under the legislation disciplinary action in relation to either client/consumer complaints or own motion referrals of the Registrar are the responsibility of the Registrar and the IACDT.

What is significant is that in the original version of the legislation there was no provision for a separate Tribunal. The recommendation for a separation Tribunal came about as the result as a unanimous recommendation of the Transport and Industrial Relations Select Committee.[7] The purpose of this was to split the disciplinary functions of the Authority between the then Department of Labour (in the for the IAA) and the Tribunal which was to be administered by the Department of Justice. The purpose of this was to make the Authority more independent thereby ensuring its integrity.[8] It was felt that it was problematic for the Registrar to both initiate a complaint against an advisor and then impose sanctions. There were clear questions of separation and independence.[9]

It is important to note that the recommendation by a Select Committee of a statutory judicial Tribunal during the Select Committee process amounts to a significant change in the legislation. It is perhaps because of this that the statutory provisions in relation to the Tribunal lack detail. This in turn it is submitted raises problems.

I wish therefore to consider issues arising out of the statutory structure under these headings:

1. There are no requirements set out in relation to the qualifications or credentials of the members of the Tribunal;

2. There is no statutory requirement to have more than one member on the Tribunal;

3. The fact that the Tribunal has the jurisdiction to regulate its procedures as it thinks fit.

4. The limited discretionary powers provided to the Registrar in relation to referring matters to the Tribunal;

5. The limited powers of appeal with regards to the decisions of the Tribunal.

1. No statutory requirements as to the qualifications/experience of the Chair or other members of the Tribunal

Comparing this with the Immigration and Protection Tribunal the Chair is required to be a District Court Judge,[10] while the other members are required to have had five years legal practicing experience or some equivalent experience.[11] With the IPT the members are interpreting the law and applying the law to different immigration fact scenarios. With the IACDT the Tribunal is considering a complaint about the conduct of an advisor either from a consumer or by the Registrar on his or her own motion. This involves professional practice in the field of immigration advice. This is both a specialist and complicated area. A person needs to have some understanding about the background of Immigration advice and the issues both legal and ethical that arise out of this. There are many examples of this. If one takes the Code of Conduct perhaps the most challenging obligation is to avoid conflict of

[7] Immigration Advisors Licensing Bill (Select Committee Report) at p 10
[8] Immigration Advisors Licensing Bill (Select Committee Report) at p 10.
[9] Immigration Advisors Licensing Bill (Select Committee Report at p 10.
[10] Section 219 (1) (a) immigration Act 2009
[11] Section 219 (1) (b) immigration Act 2009

interest. Many situations face advisors with challenges in this regard. When processing a Skilled Migrant application an advisor needs to have considerable communication with the potential employer. A number of issues may arise with regards to conditions of employment and the like. Should an advisor be asked to draft an employment agreement it has to be acceptable to both parties. If the advisor feels it necessary to advise the client to be more modest in his or her terms and conditions to secure the finalisation of the agreement there are clear possible questions about conflict of interest. What is the situation if the client later claims that the advisor encouraged him or her to consent to an agreement with a lower amount of remuneration than he or she felt entitled to?

In the same manner one has an advisor who lodges an appeal late to the Immigration and Protection Tribunal. This is not a fraudulent act but it can have disastrous effects for the client. What is the appropriate penalty?

This illustrates the importance of having people on the Tribunal who have some background in Immigration Advice. The fact that this is a specialist Tribunal justifies this. If this requirement is not included in the legislation then as an alternative, provision could be made for an *amicus curiae* to be present in hearings where appropriate. This is a person who is not a party to a case but is able to inform a judge or a decision maker on a point of law or on a matter of practice.[12]

An example of this can be found in the current Accident Compensation legislation. Under this legislation the appellant court is the District Court. Provision is made for a judge to appoint an assessor where it is considered that the appeal involves consideration of matters of a professional, technical or specialised nature and it would be desirable to appoint an assessor with expertise in such matters.[13] The assessor is able to guide the judge on these specialised or technical matters.

Another even more relevant instance is the power of a Lawyers' Standards Committee to appoint an investigator to assist with complaints against lawyers.[14] An investigator may be, for instance, an accountant or anyone who has "special skills" which can be brought to bear on the substance of a complaint.[15] Professional Conduct Committees assessing complaints against medical practitioners have a similar power to engage a legal adviser or investigator

It would be appropriate for an appointee to the Tribunal to have practical experience of work in the immigration field. For this reason lawyers sit on Lawyers' Standards Committees – but also have the power to co-opt expert advice in particular areas. It is also worth noting the stipulation about membership of the Health Practitioners Disciplinary Tribunal contained in the empowering Act:

> In considering the suitability of any person for inclusion on the panel, the Minister must have regard not only to the person's personal attributes but also to the person's knowledge and experience of matters likely to come before the Tribunal.[16]

Formatted: Quote

Given that the Tribunal is specialised and has the jurisdiction to make a decision which can have a disastrous impact upon an advisor, the fact that the legislation does not either require

[12] Peter Spiller *Dictionary of Law* Third Edition
[13] Section 157 (1) *Accident Compensation Act* 2001
[14] Lawyers and Conveyancers Act 2006, s 144
[15] Lawyers and Conveyancers Act (Lawyers' Complaints Service and Standards Committees) Regulations 2008, Reg 33
[16] Health Practitioners Competence Assurance Act 2003, s 87

Formatted: English (New Zealand)

Formatted: English (New Zealand)

that members of the Tribunal have experience in this area of work or to have the provision for an *amicus curiae* is, it is submitted, dangerous. It allows for the making of the decision which does not take account of the unique circumstances of immigration advice. This is something which needs to be addressed.

2. No requirement to have more than one member on the Tribunal

While Immigration Act 2009 does not specifically require there to be more than one member of the IPT, the manner in which the legislation is drafted clearly indicates that there is an expectation - indeed requirement - that there will be more than one member. This is evidenced by the fact that: [17]

- the Chair determines who will deliberate over different cases;
- the Chair can determine that one member hear interrelated matters;
- the chair is able to direct that more than one member hears a particular matter.

There are clear reasons why the Tribunal should have more than one member. These are:

- the advantage of differing points of view and different perspectives - this all contributes to a healthy development of jurisprudence in a particular area;
- members are able to communicate and consult. Again this promotes more carefully considered decisions;
- the presence of different members can promote some checks and balances against individual members making extreme decisions;
- the difficulty in appointing someone suitably qualified to rehear the case if a complaint is overturned on judicial review.

Lawyers' Standards Committees must be composed of at least 3 members, one of whom must be a non-lawyer.[18] Doctors' Professional Conduct Committees are required to have a similar composition;[19] and their Tribunal – equivalent in stature to the IACDT – must contain a Chair plus 4 members of the panel maintained by the Minister of Health.[20]

The small size of the immigration advice industry obviously raises a logistical challenge to the idea of having multiple members on a minor tribunal. One way to address this would be to incorporate IACDT work into the programme of an existing disciplinary tribunal and to hire and train additional membership including both those with immigration knowledge plus "lay" members. The Ministry of Business, Innovation and Employment has recently announced a wide-ranging review of the immigration advice system, and its Terms of Reference extend to the composition and statutory basis of the Tribunal. This presents an opportunity to review the entire premise of how the Tribunal should operate in the future.

3. The Tribunal's ability to regulate its procedure as it sees fit

[17] Section 222 *Immigration Act* 2009
[18] Lawyers and Conveyancers Act 2006, s 129
[19] Health Practitioners Competence Assurance Act 2003, s 71
[20] Ibid, s 88

Formatted: Bullet
Formatted: English (New Zealand)
Formatted: English (New Zealand)
Formatted: English (New Zealand)

There are clear procedural requirements for the grounds for a complaint against an advisor,[21] the requirements in relation to the content of the complaint, [22] and the procedure on receipt of the complaint by the Registrar.[23] However in terms of the procedure of the Tribunal when considering the complaint, the Tribunal is given the power to regulate its procedures as it deems fit.[24] The section does proceed to clarify that the Tribunal may *request* further information in relation to a complaint and request that a person appear before the Tribunal to make a statement or provide an explanation in relation to a complaint.[25] It is important to note that the Tribunal may do this at its absolute discretion and it can only *request* further information or for a person to come before the tribunal. It does not have a power to summons.

This is in direct contrast with the Immigration and Protection Tribunal which may require the production of documents and summons a person to give evidence.[26] The Health Practitioners Disciplinary Tribunal also has the power of summons.[27] To empower a Tribunal to make a decision which could adversely affect a person in an extreme manner without giving it the power to fully investigate a complaint is dangerous and unfair. The Tribunal is required to reach a decision. Yet it is not provided all of the investigatory tools to ensure that the decision is a fair one. Again this is unfair and is an issue which needs to be addressed.

Another significant lacuna in the Act (including the Schedule relating to the IACDT) is the failure to specify whether and how the IACDT can publish its decisions – and more particularly, publish the names of the parties. This stands in stark contrast to the disciplinary regimes of lawyers and health practitioners. The issue was put to the Tribunal in an early case that as the Act had not conferred authority to publish decisions, it could not publish them at all unless the Act was changed. However, the Tribunal treated the issue of publication, and the release of names, as a procedural issue only and set up its own yardstick with a presumption in favour of publication and "naming and shaming".[28] That presumption runs counter to the actual practice in other fields. For example, the Law Society will publish brief particulars of successful complaints in *Law Talk*, but naming the lawyer is the exception rather than the rule.

Formatted: Font: Italic

4. The limited referral powers of the Registrar

As noted the Registrar has jurisdiction to:

- refer a complaint made by a 'consumer' to the Tribunal;[29]
- refer a complaint to the Tribunal of his or her 'own motion'. This is where the registrar considers that a particular advisor has been guilty of negligence, incompetence, dishonesty and the like.[30]

In terms of a complaint by a 'consumer' the Registrar must determine that the complaint falls within the statutory framework in terms of a valid complaint and then determine whether the

[21] Section 44 (2) *Immigration Advisors Licensing Act* 2007
[22] Section 44 (2) *Immigration Advisors Licensing Act* 2007
[23] Section 45 *Immigration Advisors Licensing Act* 2007
[24] Section 49 *Immigration Advisers Licensing Act* 2007
[25] Section 49 (4) *Immigration Advisers Licensing Act* 2007.
[26] Schedule 2 Clauses 8-12 *Immigration Act* 2007
[27] Health Practitioners Competence Assurance Act 2003, Schedule 1, s 8
[28] *CO v DSI* (2011) NZIACDT 12
[29] Section 45 (2) *Immigration Advisors Licensing Act* 2007.
[30] Section 46 *Immigration Advisers Licensing Act* 2007

Formatted: English (New Zealand)
Formatted: Font: Italic
Formatted: English (New Zealand)

subject matter of the complaint is trivial or of an inconsequential nature.[31] If this is the case then the complaint should not be pursued. If the Registrar considers that the complaint should be pursued he or she is required to request that the complainant try and resolve the matter through the advisors own complaint procedure.[32] If it is not possible to deal with the complaint under such a procedure, the Registrar is required to refer the matter to the Tribunal for determination.[33]

The Registrar's stance has been that the discretion ~~given to the Registrar~~ available in this regard is limited. He or she is required to refer the complaint. His or her jurisdiction to have the complaint dealt with under the complaints procedure of the immigration advisor concerned is also limited. He or she is only able to request that the complainant consider dealing with the complaint under such a procedure. It is suggested that there needs to be stronger statutory language with regards to the use of the immigration advisor's own complaints procedure. It is submitted that the word 'request' should be replaced with something like "Encourage in the strongest terms the use of the complaints procedure". Then there could also be the addition of wording such as

> only where the Registrar is satisfied that there is no possibility of the matter being resolved through the relevant complaints procedure is the Registrar to refer the matter to the Tribunal for determination.

In this way internal resolution is being encouraged to the maximum extent with the referral to the Tribunal only being a last resort.

The other suggested amendment relates to the phase 'trivial or inconsequential nature.' In is suggested that this is a situation where it would be appropriate for the legislation to provide clear examples of what amounts to trivial or inconsequential. This is done in some pieces of legislation and it is suggested that this is a situation where it would be appropriate to provide examples.

In terms of the 'own motion' referral again it is recommended that the legislation should provide for a requirement for the Registrar to try and resolve the issue with the Immigration Advisor him- or herself and only refer the matter to the Tribunal where such resolution is not possible or where the matter is one of such gravity that it should be referred immediately to the Tribunal.

The core purpose of these recommendations is to try and encourage resolution at the Authority level and only refer matters to the Tribunal where such resolution is not possible or where the matter is of such gravity that the only appropriate body to deal with it is the Tribunal.

In fact the IACDT has recently challenged the IAA's historical passive stance to receiving and referring complaints as a "post box" rather than using its powers to screen complaints by a more aggressive use of s 45 of the Act. In *ZQI v DI* the Tribunal was critical of the Authority's treatment of allegations by a complainant as grounds for complaint in themselves, instead of investigating whether there was any objective basis for the complaint beyond what the complainant said.[34] It was pointed out that the Tribunal is not itself an

Formatted: Font: Italic

[31] Section 45 (c) *immigration Advisors Licensing Act* 2007
[32] Section 45 (1) (d) *Immigration Advisors Licensing Act* 2007
[33] Section 45 (2) *Immigration Advisors Licensing Act* 2007
[34] *ZQI v DI* [2013] NZIACDT 70

Formatted: Font: Italic
Formatted: English (New Zealand)

investigative body, and that the Authority could not therefore abrogate its duty to prepare the complaint for referral by gathering and evaluating information to test against the allegations.

The Tribunal rejected the Registrar's assertion that the Act does not authorise the IAA to conduct its own enquiries about the complaint, by pointing to provisions of the Act which empower it to carry out inspections to gather information about complaints.[35] The Tribunal in particular highlighted that s 45(1)(b) directs the IAA to "determine" whether grounds of complaint exist, rather than uncritically accept allegations at face value.[36] Such determination is a substantive power of decision and is an "important statutory function". It is worth noting the observation that:

> Referring a complaint relying on unfounded allegations is not fair to advisers either. The complaint has significant implications for the adviser, particularly when the unsupported allegation is serious. . . .
>
> It is also costly and distressing for advisers to have to respond to such complaints. Furthermore, advancing complaints without evidence may well divert complainants from providing the probative evidence they do not appreciate is necessary to support their complaint.[37]

The Statement of Complaint process introduced this year in the IACDT Practice Note requires the Registrar to "[s]et out the *material facts* alleged to support the complaint" [*italics added*]. Its failure to do so in *ZQI v DI* helped the Tribunal to decide to throw the complaint out entirely.

5. Limited appeal from Tribunal decisions

Section 81 Immigration Advisors Licensing Act 2007 sets out which decisions of the Tribunal may be appealed to the District Court. These are:

- a decision of the Tribunal to cancel or suspend the person's licence;
- any other sanction decisions of the Tribunal.[38]

There is no general provision right of appeal. This point has been strongly affirmed by Priestley J in *ZW v Immigration Advisers Authority*.[39] Priestley J proceeds to note that this is in contrast with other disciplinary bodies dealing with other professional groups. For example section 116 of the Real Estate Agents Act 2008 and section 253 of the Lawyers and Conveyancers Act 2006 both allow for a general right of appeal. The limited right of appeal arises directly from the recommendation of the select committee.[40] No solid reason is provided for this position in the report.

Indeed, the Select Committee only ever appeared to envision one decision being made out of a complaint – the decision to impose sanctions. It is notable that s 51(2) of the Act explicitly refers to issuing a reasoned decision on sanctions in writing, while s 50 which covers the determination of the complaint does not refer to issuing a decision. This corresponds with the Select Committee Report which nowhere raises the prospect of issuing two decisions instead of one. This raises the real prospect that the Tribunal has overstepped the will of Parliament by issuing both a "substantive" decision and a "sanctions" decision. In other words, there is

[35] Immigration Advisers Licensing Act 2007, ss 56 - 57
[36] *ZQI v DI* [2013] NZIACDT 70 at [70] – [73]
[37] Ibid at [79], [81]
[38] Section 81 *Immigration Advisers Licensing Act* 2007
[39] *ZW v Immigration Advisers Authority* HC AK CIV-2011-404-005399 (17 may 2012) para [33]
[40] *Immigration Advisers Licensing Bill* (270-2) (Select Committee Report) at 15

Formatted: Quote
Formatted: Font: Italic
Formatted: English (New Zealand)
Formatted: English (New Zealand)
Formatted: English (New Zealand)

no general right of appeal because the Select Committee never contemplated the need for one.

In terms of establishing the appropriate approach for determining liability, the Tribunal has been guided by the decision of the Supreme Court in *Z v Dental Complaints Assessment Committee*.[41] This decision makes some very important statements in terms of the appropriate approach for establishing liability in professional disciplinary matters.

In *ZW* it was clearly confirmed that the appropriate approach for determining liability in disciplinary matters was the application of the balance of probability test. Essentially this means that it is necessary to establish that it is more likely than not that the advisor was liable for negligence, or dishonesty or the breach of the Code. The balance of probabilities must be clearly applied to the facts at hand. Further the balance of probabilities needs to be applied flexibly. The reason for this is that with a more serious allegation more cogent evidence is required to establish liability on the balance of probabilities than is the case with less serious allegations.42 There are two reasons for this:

- a more serious allegation such as fraud is less likely to occur than a less serious allegation such as negligence; and
- because of the seriousness of the allegation justice requires that there be stronger evidence to satisfy the balance of probability standard.[43] This also acknowledges the impact of the finding of liability.

Hence what is required is more than the application of the balance of probabilities. It is the establishment of the balance of probabilities on the basis of certain facts with the important qualification that where the allegations are serious the evidence that is required to be produced to establish liability must be cogent.

This is a complicated and challenging task for a Tribunal. The importance of this task is magnified when one considers the impact that a finding of liability can have on an Immigration advisor. While cancellation of licence is clearly devastating so is the suspension of a licence for say six months. There are clear reputational and financial implications to this. There are reputational implications as does a censure. This clearly points to the need for the Tribunal to take extreme care when considering a referral and determining liability on the balance of probabilities.

All of this clearly implies that there should be a general right of appeal with regard to the determinations of the Tribunal as to liability. The need for a general right of appeal is highlighted by an observation of Priestley J in *ZW*. It is useful to quote this observation in full:

> The absence of any general appeal right heightens the obligations of the tribunal to ensure its allegations are correct. This is particularly the case when it can sit with one member, when there is a statutory obligation for it to deal with complaints on the papers and where the written English language skills of some immigration advisers before it are limited.[44]

This observation of the Judge, it is submitted, highlights the flaws that arise out of the absence of a general right of appeal. The observation that the absence of a general right of

[41] *Z v Dental Complaints Assessment Committee* [2008] NZLR NZSC 55
[42] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55 [2009] 1 NZLR 1 para [102]
[43] *Z v Dental Complaints Assessment Committee* [2008] NZSC [2009] 1 NZLR 1 para [102]
[44] *ZW v Immigration Advisers Authority* HC AK CIV-2011-404-005399 [17 May 2012] para [40]

appeal requires the member to ensure that his decisions are correct is astounding to say the least. The purpose of appeal is to subject decision making to appropriate scrutiny. The lack of a general right of appeal means that this does not occur. This undermines one of the core principles of our litigation process.

Clearly therefore there needs to be a general right of appeal that extends to the determination of liability. This is necessitated not only by basic principles of justices but more specifically by the complexities of the decision making in this context and the adverse consequences of a determination of liability require this.

Conclusions

It is submitted therefore that the Immigration Advisers Licensing Act 2007 represents an unbalanced piece of legislation. On the hand it clearly implements a regulatory process which was the core purpose of the legislation. Regulation requires the upholding of professional standards. Part of this is a disciplinary process for those who fail to uphold such standards. However the disciplinary process must be applied fairly. Basic principles of justice not only require this but so does the fact that an adverse finding resulting in the imposition of liability has serious consequences for the affected advisor.

This paper suggests that the disciplinary aspects of the legislation are both flawed and unfair. The flaws lie in the fact that;

- there are no minimal requirements for qualifications and experience of the members of the Tribunal;
- there is no requirement for there to be more than one member of the Tribunal;
- there is an absence of statutory procedure structure to guide the work of the Tribunal;
- there is insufficient discretionary flexibility given to the Registrar;
- there is no general right of appeal.

The unfairness is identified in the fact that:

- the presence of only one member means that there are no checks and balances of his decision making;
- the absence of jurisdictional power to require the submission of documents or allow the summonsing of a witness means that a decision can be made without a full consideration of all of the necessary evidence;
- the lack of a general right of appeal means that the decisions of the one member of the Tribunal cannot be subjected to appropriate scrutiny.

This it is submitted is an unacceptable state of affairs and needs addressing.

Doug Tennent

2nd December 2013