Anita Miller

WHAT TOOK YOU SO LONG?

Exploring Delays by the Health and Disability Commissioner And Delay as a Basis for Judicial Review

LAWS 531: ADVANCED ADMINISTRATIVE LAW

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Contents

I Introduction

There are many reasons why administrative decision-making may take longer than affected individuals might like. The lack of adequate resources or an unexpected increase in workload may contribute to the length of time taken to reach a decision. Likewise, the complexity of the matter under consideration, or the practices adopted by a decision-maker, may influence timeliness. That said, it must be the case that decision-makers have some responsibility (statutory or otherwise) to act in a timely manner. Indeed, it is arguable that those exercising a power of decision ought to be "answerable to, and should be responsive to, those affected by that exercise of power."[1]

What, then, can be done by those who are left waiting? One option for affected individuals is to turn to the courts which, in their supervisory capacity, play an important role in holding statutory decision-makers to account. Delay with administrative processes has previously attracted the courts scrutiny, but there are limitations to the exercise of the courts discretion. In particular, there appears to be reluctance to intervene in the absence of inordinate delay coupled with specific prejudice flowing directly from the delay. And, in some cases the court may be concerned (or persuaded) that its intervention in an incomplete process is premature. To explore these matters further, this paper considers the courts preparedness to inquire into delay by using the investigative processes of the Health and Disability Commissioner (the Commissioner) to evaluate and (where appropriate) test the current law.

The Commissioner, who has a statutory discretion to investigate health professionals for alleged breaches of patient rights, operates under a statutory framework which has as its principal purpose the "fair, simple, speedy, and efficient" resolution of patient complaints.[2] Notwithstanding this, anecdotal evidence suggests that – at worst – some investigations may take up to two years to complete. Among other things, it is argued that the Commissioner's statutory purpose is a clear direction to act in a timely manner, and that his or her failure to do so is deserving of the courts scrutiny and intervention irrespective of any prejudice to the health professional under investigation. It is also suggested that although detriment arising from delay may be a helpful marker as to the seriousness of the departure from expected standards of procedural fairness, any assessment of harm resulting from the delay should be preserved for consideration of an appropriate remedy.

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[1] Justice Alan Robertson "Natural Justice or Procedural Fairness" (4 September 2015) Federal Court of Australia.<www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-robertson/robertson-j-20150904> (accessed 3 September 2017).

[2] Health and Disability Commissioner Act 1994, s 6.

II The Purpose and Availability of Judicial Review

First, it is appropriate to remind ourselves of the function of judicial review. The orthodox view of judicial review is that it provides those who are the subject of administrative decisions with the ability to test the validity of those decisions. Judicial review can also be regarded as a mechanism through which abuses of public power can be prevented. As the Supreme Court has observed:[3]

> Public bodies must exercise their statutory powers in accordance with the statutes that confer them. If they make decisions that are outside the limits of their powers they abuse them. The courts control any misuse of public power through judicial review.

More recently, the Supreme Court has noted that "judicial review is the common law means by which the courts hold officials to account".[4] As such, the higher courts play an important supervisory role in ensuring that public powers are not exceeded, and that the interests of the individual are protected.[5]

The exercise of a statutory power of decision, including a power to "make any investigation or inquiry into the rights, powers, privileges, immunities, duties or liabilities of any person" is expressly amenable to judicial review.[6] Non-statutory decisions are also susceptible to judicial review, provided that they are decisions of a public character.[7] Further, and importantly for the purpose of this discussion, a 'decision' is not strictly required in order to attract judicial scrutiny. The proposed or purported exercise of a statutory power may also be open to judicial review.[8] This means that decision-makers intending (or claiming) to make a decision may be subject to judicial scrutiny.

Those making statutory decisions are expected to act in accordance with the law, and to act fairly and reasonably. Indeed, it has been observed that "Parliament must be 'taken to

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[3] *Unison Networks Ltd v Commerce Commission* [2008] 1 NZLR 42 (SC) at [51].

[4] *Tannadyce Investments Limited v Commissioner of Inland Revenue* [2011] NZSC 158, at [3].

[5] See GDS Taylor *Judicial Review: A New Zealand Perspective* (2nd ed, Lexis Nexis, Wellington, 2010) at 3.

[6] Judicial Review Procedures Act 2016, s 5.

[7] Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014), at 1220.

[8] Judicial Review Procedure Act 2016, s 3.

withhold from decision-makers the power to act unfairly and unreasonably…".[9] Consistent with this, the three traditional grounds of judicial review are illegality, procedural impropriety and irrationality.[10] These grounds are not exhaustive, and each can be expanded to capture related concepts, such as bad faith or abuse of process, which further specify the circumstances in which a decision may be found to be invalid. The discretionary remedies open to a court on review include the ability to compel decision-makers to perform their duties, or to prohibit continuation of a process (or reliance on a decision) that has been found to be unlawful in an administrative law sense. [11]

III The Role of the Health and Disability Commissioner

As can be seen above, the courts have (discretionary) jurisdiction to inquire into the actions of statutory decision-makers, and an especial interest in ensuring procedurally fair processes. The Commissioner is an independent statutory agency established under the Health and Disability Commissioner Act 1994 (the Act) to protect and promote the rights of health consumers. The Commissioner receives complaints from patients (and other agencies) alleging breaches of the Code of Health and Disability Services Consumers' Rights (Code of Rights).[12] The Code of Rights, a regulation promulgated under the Act, establishes various rights for health consumers (including the right to services of an appropriate standard and the right to complain) and creates corresponding duties on health providers to uphold those rights.[13]

The Commissioner has a statutory obligation to ensure that all complaints are "appropriately dealt with".[14] This involves, in the first instance, a mandatory requirement to undertake a preliminary assessment of all complaints to decide what, if any, action to take.[15] Among other options, the Commissioner can decide to investigate a complaint and, if so, the health professional who is the subject of the complaint must be informed of the investigation and their right to provide a written response to the complaint within 15 working days.[16] Other than this obligation, and the need to give those who may be subject

[9] Christopher Forsyth and Mark Elliot "The Legitimacy of Judicial Review" (2003) P. L. 286, at 290.

[10] Joseph, above n 7, at 919.

[11] Judicial Review Proceedings Act 2016, s 16(1)(a)(i) and s 16(1)(a)(ii).

[12] Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996.

[13] Rights 4 and 10.

[14] Health and Disability Commissioner Act 1994, s 14(1)(da).

[15] Section 33.

[16] Section 41. The Commissioner may, at his or her discretion, extend the 15 working days.

to adverse comment an opportunity to make submissions and be heard,[17] the requirements for the investigative process itself are not expressly stated in the Act. Instead, the procedure may be regulated as the Commissioner "thinks fit",[18] subject to the provisions of the Act.[19]

Following an investigation the Commissioner may issue a report setting out his or her opinion as to any breach of the Code of Rights and any recommendations the Commissioner "thinks fit."[20] Importantly, if the Commissioner's opinion is that a patient's rights have been breached, a health professional may be referred to the Director of Proceedings[21] for consideration of disciplinary action before the Health Practitioners Disciplinary Tribunal or proceedings before the Human Rights Review Tribunal.[22] Both Tribunals have potentially significant powers, including (respectively) the ability to cancel or otherwise restrict practice,[23] or to award damages.[24] A patient may also issue proceedings before the Human Rights Review Tribunal on the strength of the Commissioner's opinion that their rights have been breached.[25]

The implications for health professionals during the Commissioner's investigative process can be significant. For registered health professionals,[26] an investigation by the Commissioner gives their regulatory authority discretion to impose interim conditions either to restrict or to prevent their practice pending the outcome of the investigation.[27] An interim order to suspend a health professional from practice will inevitably impact on their ability to earn a living. And, it is not difficult to see how the existence of conditions (for

[17] Health and Disability Commissioner Act 1994, s 67.

[18] Section 59(5).

[19] Section 59(5).

[20] Section 45(2)(a).

[21] Sections 15 and 49. The Commissioner must appoint one of its employees as a director of proceedings, whose role (on referral from the Commissioner) is to decide whether to issue proceedings or take disciplinary action (or both) and to institute such proceedings as required.

[22] Section 47.

[23] Health Practitioners Competence Assurance Act 2003, s 101.

[24] The Human Rights Review Tribunal's ability to award damages is set out in the Health and Disability Commissioner Act 1994, s 57.

[25] Section 51.

[26] There are 21 health professions regulated by 16 authorities established under the Health Practitioners Competence Assurance Act 2003. Regulated professions include anaesthetic technicians, chiropractors, dentists, dental therapists and technicians, dispensing opticians, medical practitioners, medical laboratory scientists and technicians, medical radiation technicians, midwives, nurses, occupational therapists, optometrists, osteopaths, pharmacists, podiatrists, psychologists, psychotherapists, and physiotherapists.

[27] Health Practitioners Competence Assurance Act 2003, s 69.

example, a requirement to practise under the supervision of a professional peer) may affect a health professional's ability to retain or find employment. Even where no interim action is taken by a regulatory authority, health professionals may still be compelled to inform patients of the Commissioner's investigation,[28] or they may be required to inform employers or prospective employers of an ongoing investigation by the Commissioner. This could negatively impact on their practice or career progression over the period in question.

It is clear, therefore, that the Commissioner is a public body with the power to make determinations in respect of an individual's rights and obligations, and that the Commissioner's investigative processes may have a significant bearing on health professionals' current and future practice. With this in mind, the public law obligations relevant to delays with administrative processes are explored below.

IV Delay as Procedural Impropriety

A challenge based on delay will generally fall for consideration as procedural impropriety. Procedural impropriety is perhaps best understood as the failure to act in accordance with the principles of procedural fairness, a notion that is synonymous with the obligation on all public decision-makers, including the Commissioner, to comply with natural justice.

Natural justice is a "single but flexible"[29] concept which, at a minimum, requires that individuals are given notice of the matter under consideration, an opportunity to be heard, and an unbiased decision-maker. However, the duty to act fairly can "extend beyond the duty to listen and tell,"[30] and the context and circumstances will be relevant to other procedural duties that may apply. As to the latter, the nature of the interest at issue and the consequences of the administrative action are particularly relevant. As such:[31]

> [t]he more important and individual the interests, the more fact oriented are the issues, and the greater the consequences of the power: (a) the more likely is it that the principles of natural justice will apply, and (b) the greater will be the content of natural justice applicable.

[28] See Code of Rights, Right 6(3) "Every consumer has the right to honest and accurate answers to questions relating to services."

[29] Joseph, above n 7, at 1023.

[30] Michael Fordham QC *Judicial Review Handbook* (6th ed, Hart Publishing, Oxford, 2012) at 647.

[31] Taylor above n 5, at 507.

Accordingly, decisions that prevent a person from earning a living or practising his or her profession, and disciplinary action, have been found to "attract natural justice."[32] And, it has been recognised that the 'other procedural duties' that may apply in such cases include a timely determination:[33]

> 'The principles of natural justice demand that particular attention must be paid to the need for fairness' which 'includes having the allegations investigated promptly and determined as quickly as possible…'

As described above, the Commissioner's investigative processes have the very real potential to affect a health professional's practice and career. These are important individual interests, and delay with administrative processes that impact on such interests may amount to a breach of natural justice and procedural impropriety. To illustrate, the High Court has previously held that a regulatory authority's six month delay to consider a complaint and formulate a disciplinary notice (taking into account the additional two and a half years since the complaint was first received and subjected to initial investigation) meant that the applicant[34] for review "had not been proceeded against promptly and in accordance with the requirements of natural justice."[35] In reaching this view, the court paid particular regard to the decision-maker's statutory obligation (and failure) to "forthwith" give notice of the matter to the applicant.[36]

The court's view as to the statutory language in that case is consistent with the statement that "[t]he courts will not countenance undue delays where statutory procedures must operate summarily or expeditiously."[37] This statement also has some resonance in the context of the Commissioner's investigative processes. It cannot be overlooked that the stated purpose of the Act is to facilitate the "fair, simple, speedy, and efficient resolution" of patient complaints.[38] No real effort is required to get to the ordinary meaning of the Act's purpose. Put simply, 'speedy' means to "occur quickly" and efficiency denotes a

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[32] Taylor, above n 5, at 511.

[33] Fordham above n 30, at 648, citing *Durity v Attorney-General of Trinidad and Tobago* [2008] UKPC 59 at [29].

[34] 'Applicant' is used in this paper to refer to the applicant for judicial review in any given case.

[35] *Staite v The Psychologists Board* [1998] NZAR 128, at 133.

[36] At 132. The Court held that "forthwith" is not an absolute, but that a delay of six months was too long.

[37] Joseph, above n 7, at 1028.

[38] Health and Disability Commissioner Act 1994, s 6.

"well-organised" and "coordinated" process.[39] It is difficult to see how the need for speed and efficiency is anything other than a clear statutory indication that the Commissioner must act in a timely manner. The Act's stated purpose must, therefore, be a strong factor in support of a possible challenge for delay. At the very least, this purpose could be said to 'colour' the natural justice and timeliness obligations that apply to the Commissioner's investigative processes.

In addition to the requirement for natural justice found at common law, s 27(1) of the New Zealand Bill of Rights Act 1990 (BORA) affirms the right to the observance of the principles of natural justice by any "public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law." This statutory recognition of a right to natural justice has been considered, and applied, by courts determining judicial review applications brought for delay. In one case, the court framed its power to intervene for delay with express reference to s 27(1) BORA, noting (as to the observance of natural justice) that:[40]

> One of those principles of natural justice is that decisions when they are sought through the courts should be provided with reasonable promptitude…If parties cannot obtain decisions on matters that are before the courts within acceptable timeframes it erodes the rule of law.

However, while s 27(1) BORA is said to supplement the common law and the administrative law grounds of review,[41] it is notable that the Court of Appeal has held that resort to this provision does not add anything where it is "clear beyond doubt" that the agency in question was "subject to the principles of natural justice anyway."[42] And, it is also evident that even where a statute omits express reference to procedural fairness the courts are prepared to "supplement the procedures by reference to common law standards of fairness."[43] It is suggested that NZBORA does not add significantly more to any challenge for delay that may be brought against the Commissioner. It is undeniable that the Commissioner is subject to the requirements for natural justice; and, while the Act does not specify wide-ranging procedural fairness requirements, adding a procedural obligation of timeliness is wholly consistent with the Act's 'speedy and efficient' purpose.

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[39] Judy Pearsall (ed) *Concise Oxford Dictionary* (10th ed, Oxford University Press, New York, 1999).

[40] *Ngunguru Coastal Investments v Maori Land Court* [2011] NZAR 354, [23]. The applicant complained that the Māori Land Court had not issued a judgment more than three years after the hearing date.

[41] Joseph, above n 7, at 926.

[42] *Chow v The Canterbury District Law Society anor* CA85/05, 8 December 2005 at [31].

[43] Joseph, above n 7, at 1028.

Another relevant consideration under the head of procedural impropriety is legitimate expectation. Legitimate expectation is an aspect of procedural fairness that may oblige a decision-maker to act in accordance with its express or implied representations. In those circumstances:[44]

> [t]he legitimate expectation derives its justification from the principle of allowing an individual to rely on assurances given, and to promote certainty and consistent administration.

In New Zealand, it has been said that the ground of review for unreasonable delay "is founded on legitimate expectation of a decision within a reasonable time."[45] This statement derives from an immigration case in which the applicant complained of a three and a half year delay with deciding his application for permanent residency.[46] Review was not sought on the basis of legitimate expectation, but the court nevertheless held that there was an implied representation as to timeliness, and that the relationship between the decision-maker and the applicant gave rise to a "naturally and objectively accepted" expectation that the decision would be made in a timely manner.[47]

On this basis, in addition to the presumption of an outcome within a reasonable time that may be taken from the Act's principal purpose, any express or implied assurances given by the Commissioner as to the timeframe for an investigation will be relevant to the courts scrutiny in a challenge for delay. That said, it seems unlikely that a well-advised Commissioner will risk such scrutiny by offering express promises to health professionals as to when an investigation will be completed. In any event, while promises or practices may give rise to a legitimate expectation, the doctrine itself simply "triggers the requirements of natural justice."[48] There is, therefore, an overlap between legitimate expectation and breach of natural justice as a ground of review. Notwithstanding this, and regardless of which basis is relied upon, case law indicates that those looking to challenge a process for delay must meet additional requirements to justify relief.

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[44] Lord Woolf, Jeffrey Jowell, Andrew Le Sueur, Catherine Donnelly and Ivan Hare *De Smith's Judicial Review* (7th ed, Sweet & Maxwell, London, 2013) at 663.

[45] Taylor, above n 5, at 591.

[46] *Vea v Minister of Immigration* [2002] NZAR 171 (HC).

[47] At 182.

[48] Joseph, above n 7, at 1030.

V Something More than Mere Delay

Delay, without more, is unlikely to be sufficient to warrant the courts intervention. The alleged delay must be inordinate, and the courts will also invariably look for evidence of detriment as a result of the delay. These factors are highly relevant to the courts preparedness to exercise their discretion in judicial review, and this section critically examines the considerations relevant to an assessment of 'undue' delay, and the requirement for prejudice, with reference to the Commissioner's investigative processes.

A 'Undue' Delay

Not all delay will be undue delay. The "practicalities and realities"[49] of administrative decision-making must be taken into account, and it must be recognised that some time is necessary to protect the steps needed for procedural fairness. That said, "submission to the decision-maker's 'jurisdiction' does not entail acceptance of an arbitrary or discretionary period of resolution."[50]

It is evident, however, that the length of the delay may be less decisive than the underlying purpose of the (delayed) process in question. As such, a 16 month delay in laying a disciplinary charge, contrary to the statutory requirement to act 'as soon as practicable', was regarded as "unfortunate" but insufficient to justify the court's intervention given the protective purpose of disciplinary processes:[51]

> That purpose requires that there should be a full investigation of allegations of misconduct, and that the Court should be slow to adopt a course which may inhibit such an investigation. The interests of justice extend far beyond the interests of the practitioner.

The underlying purpose of the Commissioner's investigative processes is to determine whether a patient's rights have been breached. This is an important function, and patient complaints are clearly deserving of investigation. However, where there has been excessive delay, this factor should not be sufficient in itself to dissuade the court from

[49] *Staite*, above n 35, at 132.

[50] *Vea*, above n 46, at 183.

[51] *Chow* above n 42, at [42], citing *Auckland District Law Society v Leary* HC Auckland M1471/84, 12 November 1985.

intervening. Instead, the extent to which any delay may be appropriate will depend on the circumstances, and the (un)reasonableness of the delay will depend on:[52]

> …the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case.

These considerations, with a particular focus on (and arguments about) the Commissioner's investigative processes, are explored further below.

1. Assessing Complexity

There can be little doubt that patient complaints can involve complex issues, and it is recognised that in some cases it may be necessary for the Commissioner to obtain large amounts of factual information and expert evidence. Complex complaints will, therefore, generally justify more time, and indeed the Commissioner signals to complainants and health providers that investigations "involving many providers and wide-ranging issues" may take more than 18 months.[53] But, even where a complaint is deserving of expert input, and involves multiple parties, this is not necessarily indicative of complexity.

The Commissioner's open-ended indication of 18 months or longer cannot be regarded as a reasonable timeframe, nor a timeframe that a health professional (or the court) should be required to accept, where it would be arbitrary in all the circumstances for an investigation to take so long. In assessing the delay, the court must be prepared to undertake a close scrutiny of the facts to establish the "inherent time requirements of the case".[54] This does not require the court to make any determination as to the merits of the matter under investigation; rather, the question is whether the complaint is one which justifies a prolonged investigation.

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[52] *Blencoe v British Colombia (Human Rights Commission)* [2000] 2 RCS 307, at [122]. These factors broadly mirror the considerations that apply to assessment of undue delay in the criminal jurisdiction. Section 25(b) New Zealand Bill of Rights Act 1990 provides for the right to be tried without undue delay; see *Williams v R* [2009] NZSC 41, [2009] 2 NZLR 750 (SC), which approved the statements made by the Court of Appeal in the leading decision of *Martin v Tauranga District Court* [1995] NZLR 419 as to the relevant principles for determining undue delay. See also *R v Morin* [1992] 1 SCR 771.

[53] Health and Disability Commissioner *Guide for Complainants* < <www.hdc.org.nz/media/250376/hdc%20guide%20for%20complainants.pdf>; and Health and Disability Commissioner *Guide for Providers* www.hdc.org.nz/media/250373/hdc%20guide%20for%20providers.pdf (accessed 3 September 2017).

[54] *Blencoe* above n 52, at [164].

It is submitted that this assessment must also take account of the Act's requirement for speed and efficiency. The Commissioner is surely required to ensure that the time taken is not beyond that which is necessary to determine the matter. In addition, some weight may be given to the fact that the Commissioner's office exists principally to resolve patient complaints; that experience and expertise is arguably relevant to any assessment of the Commissioner's ability to efficiently manage difficult issues. Against this, a health professional who can present independent evidence that the complaint under consideration is not factually or legally complex may be able to show that the time taken is 'undue' in the circumstances. In other words, delay as a result of inefficiency, as opposed to outright complexity, may be more likely to attract the courts attention.

2. Assessing Patient Interests

Issues arising from delay, and any challenge on the basis of delay, cannot be regarded as simply a conflict between the Commissioner and the health professional concerned. Patients who allege that their rights have been breached have an obvious interest in their complaint being investigated and resolved by the Commissioner. Strictly speaking, the Commissioner is the only body that can definitively determine that there has been a breach of the Code of Rights. Hence, any disruption or delay to the Commissioner's investigative processes could have a significant effect on a patient's ability to seek redress for alleged wrongdoing.[55] The courts have also previously recognised the "obvious public interest in having [a] complaint properly adjudicated."[56] As a result, the Commissioner's role as a "public watchdog"[57] of patient interests, and the public interest in the proper accountability for health professionals, will also be relevant to any consideration of the Commissioner's investigative functions.

While it might be said that the Act's requirement for speedy and efficient resolution of patient complaints exists primarily to promote and protect patient interests, it cannot sensibly be argued that the Commissioner has no corresponding responsibility to be timely and responsive in his or her dealings with a health professional under investigation. In addition, as is evident from the discussion above, the important individual interests at stake

[55] It is not inconceivable that a patient might seek judicial review for delay by the Commissioner.

[56] *Staite*, above n 35, at 132, although in that case the court still granted relief due to the prejudice to the applicant.

[57] Ron Paterson "Public Watchdog" (4 May 2006) New Zealand Doctor <www.hdc.org.nz/media/147675/public%20watchdog%20(3%20may).pdf>.

clearly attract natural justice and related procedural duties, including timeliness. Without minimising the significance of a patient's interests, there is an equally important public interest in ensuring that statutory decision-makers comply with the rules that apply to them. The courts role in judicial review includes ensuring that the interests of individuals are protected from abuses of public power, and delays by administrative decision-makers have previously been found to amount to a "clear abuse of process":[58]

> …the matter must be looked at overall, and from the reasonable perspective of the subject of the disciplinary process. In my view [the applicant] has suffered an unacceptable abuse of process by reason of delay.

In investigative processes considerable weight must be placed on procedural fairness obligations that exist (at least in large part) to protect the interests of the person under investigation. Therefore, the extent to which any delay by the Commissioner may be regarded as 'undue' must appropriately take these important public law obligations into account.

3. Considering a Health Professional's Conduct

The conduct of an applicant for review is relevant to assessing the reasonableness of the delay. Thus, repeated demands for (irrelevant) documents and requests for extensions that "contributed in large measure" to delay has previously denied relief.[59] The courts' refusal to exercise its discretion for delay where an applicant's behaviour suggests deliberate stalling is an understandable, and probably sensible, limitation. Without doubt, health professionals (and their advisers) should be mindful that any objectively 'negative' actions may affect the courts willingness to intervene.

While intentional delaying tactics may justify the courts reluctance, 'positive' conduct should also be given appropriate weight. For example, where a health professional can show that they have responded to the Commissioner's investigation promptly, including by complying with reasonable time limits and otherwise engaging with (or even attempting to advance) the process, this may favour an argument for 'undue' delay. Indeed, a health professional's case would no doubt be further strengthened by evidence that the Commissioner has – in contrast and without reasonable explanation – been slow at almost every step along the way.

[58] *Bates v The Valuers Registration Board* [2015] NZHC 1312, at [90].

[59] *Patel v Complaints Assessment Committee* HC Wellington CIV-2005-404-815, 20 July 2006 at [80].

That said, it is not accepted that the courts should refuse to entertain applications made by health professionals who do not take active steps in the face of delay. Case law indicates that applicants who 'sit on their hands' may be said to waive their right to later object to the delay for acquiescence. Certainly, in Canada the position is clear that the failure to raise the issue of delay, or to take steps to expedite the matter, may disentitle an applicant to relief.[60] On the contrary, the courts may be more willing to find an abuse of process where attempts at progress are met with inaction.[61]

It is acknowledged that it may be beneficial (and even prudent) for health professionals experiencing delays with the Commissioner's investigative processes to raise their objections to the time taken. But, the need to actively plead delay in order to invite the courts supervisory jurisdiction is arguably at odds with the fact that it is the statutory decision-maker which has the (positive) public law obligation to act in a procedurally fair – including timely – manner. In light of this, it seems unduly harsh for the courts to refuse to exercise their discretion simply because a health professional has accepted the Commissioner's investigative processes without complaint, notwithstanding the (inordinate) time that is then taken to conduct the investigation. Put simply, health professionals should be entitled to trust that the Commissioner will act in a procedurally fair manner. In turn, all individuals who are subject to administrative processes ought to retain the ability to test the validity of those processes, and to seek to prevent any abuse of process, regardless of whether any attempt was made to influence the manner in which the decision-maker (here, the Commissioner) exercised their statutory powers.

4. Other Circumstances - Resource Limitations

The actions of a decision-maker will also be relevant to the courts assessment of the time taken, and often this may involve consideration of arguments as to limited resources. The extent to which resource limitations might influence the courts on review is not settled, however one case suggests that the courts may be disinclined to look behind resource arguments. In that case, the court expressed a view that it was "not in a position" to assess whether or not the decision-maker was properly resourced or "whether he might make better use of the resources he has".[62] Notwithstanding this, and despite a conclusion that

[60] Gerald P Heckman "Remedies for Delay in Administrative Decision-making: Where Are We After Blencoe?" [2011] 24 Can. J Admin. L & Prac 178, at 185.

[61] At 186.

[62] *Deliu v The Office of the Judicial Conduct Commissioner* [2012] NZHC 356, at [46].

the applicant had a "legal right" to have his complaint processed "in a timely manner,"[63] the court declined to grant relief because (among other things) the decision-maker had "pointed squarely to a lack of resources."[64]

Against this, in the criminal jurisdiction the courts have been reluctant to accept resource constraints as a justification for delay.[65] While criminal matters might understandably attract a higher degree of scrutiny to protect individual liberties, there is no acceptable reason why a statutory decision-maker like the Commissioner, whose processes may have an equally significant impact on an individual's interests, should be permitted to excuse their delay for resource reasons. This is particularly so where there is any suggestion of systemic issues that have not been addressed, or where inefficiencies might better explain the time taken.

The Commissioner has previously pleaded "limited resources" when faced with judicial review, albeit not for delay.[66] However, although the Act's requirement for speed and efficiency cannot be entirely divorced from the availability of resources, the Commissioner is not unique in being required to fulfil a statutory purpose within a budget. To the extent that resourcing issues might be said to have caused a delay it is relevant that, quite clearly, a health professional under investigation by the Commissioner has no control over strategic decisions as to the allocation of resources, nor 'upstream' decisions as to funding of the Commissioner's office. In contrast, the Commissioner has responsibility to decide how best to employ public funds to achieve "speedy and efficient" resolution of patient complaints. The Commissioner also has the ability to seek increased funding, or to highlight funding issues, where this purpose cannot be achieved.[67] Relevantly, only a very small proportion of complaints received by the Commissioner are in fact investigated.[68] Yet, in recent years the Commissioner has not been able to achieve performance targets for the time taken to resolve complaints.[69] It is not apparent that additional funding has been

[63] *Deliu* above n 62, at [53].

[64] At [55].

[65] See *Martin v Tauranga District Court* [1995] 2 NZLR 419 (CA), at 425 and 431.

[66] *Meek v Health and Disability Commissioner* [2016] NZHC 1205, at [59].

[67] See *Deliu* above n 62, at [46] where it was expressly noted that the decision-maker had "made his views on resourcing apparent in this annual report." In other words, efforts had been made to bring the resource issue to the attention of those responsible for funding.

[68] For the 2015/2016 year 1,958 complaints were received, of which only 80 were investigated. Health and Disability Commissioner *Annual Report for the Year Ended 30 June 2016* (31 October 2016), at 5.

[69] At 35. For the year ended 30 June 2016, 71 complaints were 12 to 24 months old, and 7 complaints were unresolved after more than 24 months.

sought to improve responsiveness to those affected by the Commissioner's investigative processes.

In light of these factors, there should be greater scope (or, at least, less reluctance) for the courts to assess the availability and application of resources when presented with arguments of resource constraint in cases of delay. In exercising their supervisory functions, the courts should be prepared to inquire into *all* the circumstances that are relevant to the way in which decision-making processes are conducted, and they should be alive to breaches of natural justice for any reason.

B Prejudice

Not all delay will justify the courts intervention: case law suggests that the courts will also look for some degree of prejudice that flows from the delay, and a failure to plead any prejudice whatsoever is likely to be fatal to obtaining relief.[70]

In the context of investigative processes it is appropriate to observe that an investigation may have a negative impact on an individual even if it is progressed promptly. As such, decision-makers will not be held to account for the detrimental effects of a process that may have existed without delay. Then again, where the time taken to progress an investigation is "beyond the inherent time requirements" perceived to be necessary for the subject matter of the investigation,[71] the question becomes one of whether a fair hearing can be held notwithstanding the delay. That is, the impact of the delay on the applicant's ability to 'defend' themselves will become relevant. Prejudice has therefore been established where delay was coupled with the decision-maker's failure to provide details of an investigative report and an opportunity to be heard on that report.[72] Similarly, evidential issues relating to the availability of witnesses due to delay may be relevant, including where 'defence' witnesses have died during a protracted investigation.[73] In contrast, and consistent with the courts concern for the context, delay may be found to cause "[no] prejudice in terms of the availability of a fair hearing," when weighed against the seriousness of the allegations.[74]

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[70] *Patel* above n 59.

[71] *Blencoe* above n 52, at [163]

[72] *Staite*, above n 35, at 133.

[73] *Bates*, above n 58, at [88].

[74] *Chow*, above n 42, at [41].

Even where delay does not appear to compromise a fair hearing, other forms of prejudice may trigger the courts preparedness to intervene, including detriment arising from the inability to work, reputational damage or psychological harm. Therefore, it has been accepted that an applicant suffered prejudice during a three year period of delay because of the professional and emotional toll of the possible loss of his career, and the need to explain the disciplinary charge to prospective clients, which negatively impacted on his business.[75]

Perhaps understandably, a health professional might only feel compelled to challenge a procedural delay where some observable detriment has arisen due to the inordinate length of time taken. While prejudice will always be dependent on the particular facts, it is not controversial to suggest that a health professional's ability to test a disputed account of alleged conduct will be significantly affected where, during a lengthy investigation, the patient has died or become so unwell that they can no longer participate in the process.[76]

Similarly, even where delay does not impact on a health professional's ability to respond to a complaint, it is not contentious to suggest that a health professional faced with an extended investigative process may suffer stress beyond that which might be expected in the ordinary course of an investigation. Anxiety may also arise from increasingly intolerable restrictions on a health professional's practice, and it may well be compounded by any uncertainty as to when an outcome will be achieved. In truly exceptional cases it may be argued that prejudice "arises simply as an inference that prejudice occurs, by reason of a long passage of time, without there having to be proof".[77] It is acknowledged, however, that so-called presumptive prejudice is very rarely found to exist.

However, notwithstanding the likelihood that many health professionals will be able to show some detriment arising from a lengthy delay, should prejudice always be necessary to establish a basis for judicial review for delay?

C The (Proper) Role of Prejudice

It must be accepted that obvious prejudice will provide the clearest basis for the courts intervention and, relatedly, actual prejudice may also provide a helpful indicator as to the

[75] *Bates*, above n 58, at [88] and [89].

[76] Note that there is no specific requirement for the Commissioner to conclude an investigation on the death of the complainant.

[77] *Ford v Medical Practitioners Disciplinary Tribunal* HC Wellington, CP 268/01, 18 February 2002 at [8].

seriousness of the departure from expected standards of procedural fairness. However, the assessment of prejudice can be fraught with (subjective) difficulties. In Canada's leading case on administrative delay, involving a 30 month interval between allegations of sexual harassment and the proposed hearing, the applicant complained that potential witnesses had died; memories were fading; he was unemployable and subject to ongoing media scrutiny; and that he and his wife had been treated for depression.[78]

The majority held that the threshold for intervention required "actual prejudice of such magnitude that the public's sense of decency and fairness is affected."[79] Despite recognising the "obvious prejudice" to the applicant, and expressing real concern about the lack of efficiency by the decision-maker, the majority found that this threshold was not met.[80] In contrast, the minority asserted:[81]

> Abusive administrative delay is wrong and it does not matter if it wrecks only your life and not your hearing….Unreasonable delay is not limited to situations that bring the…system into disrepute either by prejudicing the fairness of a hearing or otherwise rising above a threshold of shocking abuse.

These divergent views arising from the same set of facts have been explained by the majority's concern not to grant the relief – a stay of proceedings – sought by the applicant: "the dissent's focus on the availability of the less drastic remedies…led it to apply a less stringent threshold."[82] While the minority also concluded that a stay was not appropriate in the absence of evidence that the applicant would be deprived of a fair hearing, it would have granted an order for an expedited hearing.[83] It is apparent, therefore, that the extremely high level of unfairness required in Canada results from a focus on remedy as opposed to an objective assessment of the impact on the applicant.

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[78] *Blencoe* above n 52.

[79] At [133].

[80] At [133]-[135].

[81] At [155].

[82] Heckman, above n 60, at 181, citing David Mullan and Deirdre Harrington "The Charter and Administrative Decision-Making: The Dampening Effects of Blencoe" (2002) 27 Queen's L.J. 879, at 908.

[83] *Blencoe* above n 52, at [185] - [190]. See also David Mullan and Deirdre Harrington "The Charter and Administrative Decision-Making: The Dampening Effects of Blencoe" (2002) 27 Queen's L.J. 879, footnote 85: "In fact, the majority did direct that the matter return to the Tribunal where it was thereafter dealt with expeditiously, some five months after the Supreme Court rendered judgment". The Tribunal held that Mr Blencoe had sexually harassed the one remaining complainant, and awarded her $5,000.

This suggests that consideration of prejudice and remedies can (and do) overlap. To that end, it is clearly arguable that the assessment of harm resulting from a delay can (and perhaps properly should) be preserved for consideration of an appropriate remedy, rather than acting as a threshold for establishing undue delay.

In support of that contention, and with specific reference to the Commissioner's investigative processes, it is obvious, first, that there is a statutory obligation to proceed promptly. This requirement exists irrespective of the existence of any harm. Accordingly, if it can be shown – having regard to all the circumstances of the matter under investigation – that the Commissioner has not acted expeditiously, it is not altogether clear why the court ought to require actual harm as a result. The courts inquiry is not, after all, an assessment of alleged negligence. Rather, it is arguable that the failure to comply with the statutory purpose gives rise to an obvious procedural invalidity, and that "any unfairness, whether apparent or actual, strikes at the roots of justice."[84] This speaks the language of judicial review, which seeks to prevent abuses of public power.

In addition, it must be the case that departures from a fair procedure should matter for reasons other than individual detriment. The Commissioner, as a public agency exercising a statutory power of investigation, should be expected to act fairly and to observe the principles of natural justice. The failure to comply with procedural fairness requirements may have potentially far-reaching implications. It is not inconceivable that a health professional may lose trust and confidence in the Commissioner's functions, which could have repercussions for their – or their colleagues' – future engagement with the Commissioner's office. Any impairment to the Commissioner's reputation in the wider health sector as a result of delayed processes has the potential to undermine the Commissioner's role as a public watchdog for patient interests. Conversely, a failure to hold the Commissioner to account for the (unfair) manner in which investigations are conducted may reinforce behaviour that is inconsistent with the Commissioner's obligation to comply with natural justice.

The nature of the remedies available in judicial review is also relevant to this argument. In particular, it is not obligatory in every case where there is inordinate delay for the courts to make an order to prevent that process from continuing. An order to quash a process that is vitiated by procedural impropriety is an entirely discretionary and significant step which would not be taken lightly. Instead, the appropriate remedy will be informed by all the

[84] Fordham, above n 30, at 622, citing *R v Leicester City Justices, ex p Barrow* [1991] 2 QB 260, 290D-E, Lord Donaldson MR.

relevant information before the court, and the extent to which there has been prejudice to the individual concerned will be one relevant consideration. Except in extraordinary cases, the court will no doubt be slow to prevent the continuation of the Commissioner's investigative processes. Even where there is debate about the degree of prejudice needed to invite such a remedy, other relevant factors might persuade the court that it is proper to do so, including the length of the delay as against the complexity or seriousness of the issue under investigation, and whether or not the delay has given rise to other procedural issues (such as perceived bias or predetermination) that cannot be cured if the process continues.[85]

In other cases, the failure by the Commissioner to perform statutory tasks in the manner required (i.e. expeditiously) may properly result in an order for an expedited process. It is noteworthy that the interests of both the health professional and the patient (and the broader public interest) are served by requiring the Commissioner to perform his or her investigative processes "according to law".[86] In those circumstances, it is not clear that specific prejudice to the health professional ought to be necessary to establish inordinate delay that may, in turn, justify the courts intervention. Rather, there is merit in an argument that exercising the courts remedial discretion to compel prompt performance may in fact act to *prevent* significant prejudice from arising. So, where delay has not (yet) irrevocably damaged the ability to respond to the complaint, it may still be appropriate that a fair hearing is protected from the potentially damaging impact of an ongoing delay.

Where there is insufficient detriment to justify such orders, the court still has discretion to make a declaration, which can provide "a clear signpost for future direction".[87] This is another means by which the courts can supervise, and instruct, statutory decision-makers and hold public bodies to account. Thus, a lesser degree of prejudice may still warrant an indication from the court that there is an obligation of timeliness that has not been adhered to. Such a response is arguably more consistent with the courts supervisory functions than an approach that indicates (irrespective of the length of the delay) that the harm is not yet 'bad enough' to justify judicial scrutiny.

Overall, it is suggested that the factors described above provide valid grounds for an argument that prejudice should not be an essential element for establishing a basis for judicial review for delay.

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[85] See *Bates* above n 58.

[86] Joseph, above n 7, at 1160.

[87] *Deliu*, above n 62, at [55].

VI Prematurity

Finally, even if there is a lengthy delay, and some injustice arising from that delay, the courts may be concerned (or persuaded) not to be too hasty in exercising their supervisory functions. It has been observed that where processes leading up to a final decision are incomplete, judicial review "remains discretionary and will be exceptional."[88] Therefore, decision-makers faced with an application for review before a final decision has been made may well argue that it is premature.

An application for review may be 'too soon' if the decision-maker has not yet determined the facts, or completed its assessment of the matter.[89] Similarly, challenges against preliminary decisions may be seen to "fragment and protract" administrative processes that should be allowed to run their course.[90] It is not inconceivable that the Commissioner may resist judicial scrutiny of his or her investigative processes on these bases, and on the basis that the health professional may well be vindicated by the final process notwithstanding any delay. That said, future vindication does not undo current or developing prejudice. And, where the time taken to assess the issue is inconsistent with Commissioner's procedural duties, it may be that the process should not be permitted to continue to 'run its course' unchecked.

However, while the Commissioner might argue that judicial review is premature during the investigative phase, the so-called 'ripeness doctrine' (which asserts prematurity of review) has been held to have little relevance in New Zealand because the statutory recognition of judicial review expressly allows the courts to review the proposed exercise of statutory powers.[91] In any event, the High Court has observed that "even at a preliminary stage a power to investigate and recommend may "go off the rails", such that it is necessary that a court quash the decision."[92] Thus, where a court identified that a decision-maker intended to conduct a process that did not comply with natural justice it concluded that it was not premature to seek relief.[93] Likewise, where issues such as bias or prejudice caused by

[88] *Zhao v New Zealand Law Society* [2012] NZHC 2169, [2012] NZAR 894, at [67].

[89] Lord Woolf, above n 44, at 921.

[90] Gerald Heckman "Developments in Remedial Discretion on Judicial Review: Prematurity and Adequate Alternative Remedies" (2017) 30 Can. J. Admin L. & Prac. 1, at 6.

[91] *Singh v Chief Executive of Ministry of Business, Innovation and Employment* [2014] NZCA 220; [2014] 3 NZLR 23 (CA) at [34]; see also Judicial Review Procedure Act 2016, s 3(1)(c).

[92] *Zhao*, above n 88, at [66].

[93] See for example *Attorney-General v Zaoui (No. 2)* [2005] 1 NZLR 690 (CA) at [183] – [184].

delay could not be remedied by continuation of the process, the courts have been prepared to inquire into and remedy those issues at a preliminary stage.[94] On the right facts, a court may well conclude that the Commissioner has 'gone off the rails' such that it is deserving of inquiry at an early stage. The "strength and seriousness of the natural justice claim" may well be influential in the courts assessment of whether 'prematurity' will prevail over its supervisory role to prevent abuses of public power.[95]

Another consideration (or argument) that arises with prematurity is the availability of appeal. While judicial review is an important tool for holding state actors to account, it is not the only way in which the exercise of statutory powers may be scrutinised. A statutory right of appeal enables courts to examine decisions, and may provide considerable flexibility to reach a substantively different outcome based on an assessment of the merits of the case. It has been said that it is precisely because access to justice is achievable through other means that courts may be "reluctant to entertain challenges of pure administrative delay….dressed up [as] procedural irregularity."[96]

In the context of the Commissioner's processes it is highly relevant that the Act provides no statutory rights of appeal. The Commissioner's opinion is, however, the product of the exercise of the Commissioner's statutory powers and the High Court has previously proceeded on the basis that such an opinion can be challenged by way of judicial review.[97] Even where administrative processes do have rights of appeal they are generally not exercisable until a final decision is made; it may well be arguable that an appeal is not an adequate remedy where it is necessary to await the outcome of a procedurally unfair process before having an opportunity to press a case for delay. Perhaps more importantly, the courts have recognised that judicial review is still available where there are rights of appeal,[98] and that there is discretion to grant relief even if an applicant has a right of appeal in relation to the subject matter of the application.[99]

It is acknowledged that there may be cases where judicial review is 'too soon'. However, the lack of any appeal rights is particularly significant for health professionals seeking to

[94] See for example *Bates* above n 58, at [35] – [36].

[95] Heckman, above n 90, at 9.

[96] Suzanne Lambert and Andrea Lindsay Strugo "Delay as a Ground of Review" [2005] JR 253, at 271.

[97] *Stubbs v Health and Disability Commissioner* HC Wellington, CIV 2009-485-2146, 29 January 2010, at [35].

[98] *Singh*, above n 91.

[99] Judicial Review Procedure Act 2016, s 16(3)(a).

challenge the Commissioner for delay. In addition, it is evident that raising prematurity to defeat judicial review may be overcome anyway if it can be shown that (undue) delay in the purported exercise of a statutory power has become inconsistent with the principles of natural justice to the extent that it justifies early intervention.

VII Conclusion

There are two key factors relevant to the courts preparedness to inquire into, or to grant relief, for delay: it must be shown that the delay was improper in all the circumstances, and that it has caused prejudice either to a fair hearing or in other respects. This paper has explored these requirements, and the issue of prematurity, with reference to the Commissioner's investigative processes. In doing so, it has been argued that the Act's principal purpose provides a clear statutory direction to the Commissioner to act in a timely manner; this obligation, and related procedural duties, have been shown to have some relevance to the assessment of the 'circumstances' of the (undue) delay. In particular, having regard to the statutory purpose, it may be appropriate for the courts to fully explore the legitimacy of any arguments as to complexity and resource constraint when determining the appropriateness of the time taken by the Commissioner. Inefficiency, and systemic funding issues, should not be permitted to frustrate the need for speed and efficiency.

In addition, while the existence of prejudice appears to be significant to the distinction between reasonable (and therefore acceptable) delay and unreasonable delay, it has been suggested that the Commissioner's failure to act in a timely manner is a matter that is deserving of the courts scrutiny irrespective of any prejudice to the health professional concerned. Instead, prejudice should be preserved for consideration of an appropriate remedy. That is, discretionary remedies will be properly informed by all the relevant information – including the extent to which there has been detriment as a result of the delay – but detriment should not be necessary to establish procedural impropriety. For example, expediting the investigative process may be appropriate where a fair hearing is not (yet) compromised; such an order would be consistent with the Act's purpose, and in the interests of the patient and the health professional regardless of the extent of the prejudice already experienced.

Finally, although seeking review of an incomplete process may attract arguments that the claim is brought 'too soon', the courts have shown a willingness to scrutinise processes at an early stage where it can be shown that it has either 'gone off the rails' or where serious natural justice issues are at stake. For health professionals, the Act's speedy and efficiency

purpose, coupled with a lack of any appeal rights, is a significant factor against arguments of prematurity where there has been delay.

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