CORA Cork Open Research Archive
Cartlann Taighde Oscailte Chorcaí

Title	Ireland's distinct constitutional vision: The 'administration of justice' in quasi-judicial bodies
Authors	Donson, Fiona;O'Donovan, Darren;Ryan, Aisling
Publication date	2024-10-03
Original Citation	Donson, F., O'Donovan, D. and Ryan, A. (2024) 'Ireland's distinct constitutional vision: The 'administration of justice' in quasi-judicial bodies', in Thomson, S., Groves, M. and Weeks, G. (eds.) Administrative Tribunals in the Common Law World. London: Bloomsbury, pp. 355-377.
Type of publication	Book chapter
Rights	© 2024, the editors and contributors severally. All rights reserved.
Download date	2026-11-08 16:10:59
Item downloaded from	https://hdl.handle.net/10468/16656



UCC
University College Cork, Ireland
Coláiste na hOllscoile Corcaigh

17

Ireland's Distinct Constitutional Vision: The 'Administration of Justice' in Quasi-Judicial Bodies

FIONA DONSON, DARREN O'DONOVAN AND AISLING RYAN*

Introduction

> Ireland stands out as having no political or ideological forces at play on policy approaches to the role of statutory dispute resolution bodies.[1]

Irish tribunals are numerous, but largely overlooked in terms of analysis and media attention, often only being discussed where scandals catapult them into national attention. The development of such bodies has arisen incrementally and largely haphazardly within a small constitutional space. As a result, administrative tribunals in Ireland are plagued by procedural issues, lack of resources and an atypical, complex constitutional framework. Their processes fail to adequately vindicate the rights of individual users who are required to bring claims to these bodies that emerge from the ashes of political crises, with limited reflection or engaged research on their nature and purpose.

The development of Ireland's tribunal bodies has been marked by distinctive anxieties that arise from the Constitution. Article 34.1 provides that 'justice shall be administered in courts', and judicial understandings of resulting separation of powers doctrine has resulted in sharp scrutiny of the boundary between administrative and judicial bodies. Article 37.1 does countenance the existence of such bodies, expressly mandating that they exercise only 'limited functions and powers

* This research was funded by The Traveller Equality and Justice Project and the European Union's Rights, Equality and Citizenship Programme (2014–2020) under Grant Agreement Number 963353–TEJP – REC-AG-2020 / REC-RDIS-DISC-AG-2020 for the period of January 2021–September 2023.

[1] K Mulvey (2011, March 10). 'All changes changed utterly – New times, new engagements and new solutions: How the employment relationship is changing'. Nineteenth John Lovett Memorial Lecture, University of Limerick. At the time of this lecture, Kieran Mulvey was Chief Executive of the Labour Relations Commission and Director General of the Workplace Relations Commission.

of a judicial nature'. Irish tribunal bodies have thus often had to sail through vexed constitutional waters, with the possibility of litigation arguably having a chilling effect on innovation. As we will discuss in this chapter however, the recent landmark Supreme Court case of *Zalewski v Workplace Relations Commission* [2021] IESC 24 may provide the stimulus for greater future reforms. In charting the fundamental restraints upon and requirements applying to tribunal work in Ireland, the Supreme Court has delivered greater certainty on what is permissible and possible. The Irish tribunal system may, at last, be poised to shift from defensive creation of limited, isolated bodies towards a more confident and consolidated vision of merits review.

Administrative Tribunals in Ireland: Distinct Anxieties and Silences

Defining a tribunal is fraught with difficulty, however Hogan, Morgan and Daly provide the following definition for the Irish context:

> Before going further, we ought to mention the commonly accepted definition of the term "tribunal". It is a body, independent of the Government or any other entity but at the same time not a court, which takes decisions affecting individual rights, according to some fairly precise (and usually legal) guidelines and by following a regular and fairly formal procedure.[2]

As this indicates, there has been no clear debate or policy on the development of an underlying system of tribunals in Ireland. Rather they have been created to meet the exigencies of the moment, in response to financial and legitimacy crises, increasing demand on the court system as the administrative state has grown, or sector specific attempts to improve access to justice. In Ireland, the term 'tribunal' is often used interchangeably with 'quasi judicial body', which reflects how their identity is often shaped by contrasts with the courts and judicial methodologies.

The majority of Irish tribunals fall within the 'court substitute' model, operating in the public law sphere and dealing with significant legal issues.[3] Harlow and Rawlings highlight two main justifications for establishing such tribunals: 'expertise' and their role as 'small claim courts' – that is overflow machinery to handle disputes assumed to be of small financial value or liable to generate a mass of claims likely to swamp the courts.[4] These rationalisations certainly mark out much of Ireland's approach in so far as we can indicate there has been one. The benefits of expert adjudication involving specialist knowledge in relation to complex legal

[2] G Hogan, DG Morgan and P Daly, *Administrative Law in Ireland*, 5th edn (Roundhall, 2019) at para 6.11.

[3] ibid at para 6.21.

[4] C Harlow and R Rawlings, *Law and Administration* (Cambridge University Press, 2021) at p 546.

and factual matters are acknowledged in institutional design. Such bodies include mental health tribunals, international protection appeals, planning appeals and social welfare appeals. Tribunals also operate in other fields such as equality and employment law where the state has chosen to create a tribunal to implement parts of the legal scheme.

To date the mosaic of tribunals within the Irish system has never been mapped and there is often little distinction made between different forms of tribunal – whether first instance adjudication, appeal bodies, bodies intersecting with Ombuds roles and bodies with policy formulation responsibilities. This lack of clarity is made all the more complex given the variety of names and lack of consistency around their choice. Terms such as Board/*Bord*, Commission, Tribunal and Ombudsman are used without, it seems, much regard to the individual meaning of such terms. Most confusing is perhaps the *Garda Síochána Ombudsman Commission* which combines Ombudsman and Commission to stand as a particular example of an independent investigative body dealing with complaints made by members of the public concerning the conduct of individual police officers.

The prevailing small claim courts vision has driven a profusion of appeals bodies. Ireland fits the international trend whereby tribunals grow more popular as the volume and complexity of decisions increases, and the administrative state widens and deepens. A distinctive stress is, however, laid upon bodies' ability to deal with disputes swiftly and at a cost saving. Conversely, each tribunals' funding and continued existence depends upon the priority accorded to the particular issues it deals with. There has been no drive to create a centralised tribunal system in like manner to Australia. This diversity has often led to instability, with some appeals bodies targeted in the 'bonfire of the quangos', the streamlining of government bodies which occurred after the country's economic collapse in 2008.[5] When the time came to identify key bodies to reorganise or downsize, it is unsurprising that some quasi-judicial bodies were in the firing line. In particular, the Department of Finance announced a plan to 'rationalise the industrial relations structure' of the state, merging a number of tribunal bodies from the employment sector and equality law.

The pragmatic accretion of isolated, sector-specific tribunal bodies in Ireland has resulted in a lack of visibility of their output. They are perceived as managing one-off disputes, increasingly through mediation and other private forms of settlement. Their possible contribution as early warning mechanisms for issues around legal interpretation and their work's normative effect on frontline decision-making has not been assessed. The decisions of many bodies are not publicly available.[6] This lack of visibility has adverse consequences for the normative effect, a flaw recently warned against by Australia's Royal Commission into

[5] M Murphy and J Hogan, 'Reflections on Post-bailout Policy Analysis in Ireland' (2020) 68(4) *Administration* 145–60, at 151.

[6] Recommendation 20.4 of that Royal Commission is that all decisions of Australia's federal administrative appeals tribunal which address significant issues of law or policy should be published.

the Robodebt Scheme.[7] Even one of the most developed appeals bodies, the International Protection Appeals Tribunal, embarked on a slow journey towards publication of its decisions. Prior to 2006, lawyers representing asylum applicants were barred from accessing copies of previous decisions made by the then Refugee Appeals Tribunal. In the case of *Opesyitan & others v The Refugee Appeals Tribunal*,[8] the Supreme Court overturned this practice, finding publication was required by the constitutional protection of fair hearing. It also underlined the importance of equality of arms between the parties by criticising the practice whereby presenting officers of the relevant statutory body – the Refugee Commissioner – *were* forwarded copies of the decisions. The Supreme Court stressed the value of consistency in decision-making, in particular in the relation to the interpretation of country-of-origin information. The fact the issue had to be litigated, however, points to a lack of reflection upon the normative, standard setting role of tribunals. It embodies how even specialist tribunals are not positioned as models for frontline decision-making, but as residual dispute resolution mechanisms. There is also a risk that a rigid imposition of judicial type approaches may stifle innovation or accessibility at the coalface.

As we will discuss throughout the chapter, Irish tribunals' work has often only gained prominence beyond their users if their procedures misfire or raise constitutional tension. Ireland has yet to undertake an equivalent of the Franks Committee on Tribunals and Inquiries or the Leggatt Report in the United Kingdom.[9] It has not adopted a unified framework or structure for the operation of tribunals. They are not viewed as contributing to a broader vision or system of an administrative justice system, as has been the case with the Australian Administrative Appeals Tribunal. Their work has been complicated by uncertain constitutional status and bounded by a cultural dynamic which juxtaposes their operation with that of the courts.

As the next section of the chapter discusses, the pursuit of economical and efficient tribunal decision-making has come into sharp tension with a central and often overriding theme within Irish administrative law – that of fair procedure. The recent Supreme Court decision in *Zalewski v Workplace Relations Commission*[10] focused in part on the constitutional law question of whether the Workplace Relations Commission (WRC) was administering justice and thus occupying a role that the Irish Constitution reserves for the courts. It embodies how the Irish Constitution offers a narrow and highly conditional constitutional gap for tribunal work. In a jurisdiction where support for tribunals has hinged upon their ability to offer cheaper, more accessible procedures, the case offers both firm limits upon, and a roadmap for, future development.

[7] Royal Commission into the Robodebt Scheme – Final Report – Volume 2 [2023] AURoyalC 3 (7 July 2023) at p 564.

[8] *Opesyitan & others v The Refugee Appeals Tribunal* [2006] IESC 53.

[9] Sir O Franks, (1957) Report of the Franks Committee on Administrative Tribunals and Inquiries (1957) Cmnd 218. Sir A Leggatt, Tribunals for Users, One System, One Service: Report of the Review of Tribunals, (HMSO 2001).

[10] *Zalewski v Workplace Relations Commission* [2021] IESC 24 [Hereinafter '*Zalewski*'.].

Situating Tribunals in the Irish Constitutional Context: 'The Administration of Justice' versus 'Administrative Justice'

In *Zalewski* the constitutionality of the arrangements for resolving workplace disputes was challenged. As noted already in this chapter, the WRC was established under the Workplace Relations Act 2015 as part of austerity measures. It consolidated a number of bodies (Labour Relations Commission, the National Employment Rights Authority, the Equality Tribunal, the Employment Appeals Tribunal and the Labour Court's first instance functions) into one overarching Tribunal. The body has a number of responsibilities including the resolution of industrial relations disputes, adjudication of employment and equality complaints, and the provision of workplace relations information. The development of the body as a wide-ranging Commission with a number of roles is symptomatic of the diverse expectations that can be placed on Irish tribunals.

Zalewski focused upon the adjudicatory function carried out by the Commission and the resultant question as to whether the power granted to it should have instead been designated for a court. The facts of the case offer a particularly stark example of how badly things can go wrong procedurally. It is perhaps unsurprising that the case resulted in significant reflections on the nature and quality of tribunal decision-making by the members of the Supreme Court of Ireland.

The applicant had brought a claim for unfair dismissal to the WRC under the Unfair Dismissals Act 1977. The parties to the dispute made written submissions and provided documentation, although the initial hearing was adjourned because a witness was unable to attend. When the parties attended the WRC for a subsequent hearing a few months later they were informed that a decision had already been made. The published decision that followed rejected the applicant's claim. However, the determination included a number of very significant errors:

> It contained a series of inaccuracies. It gave the impression to any reader that a hearing had taken place, where both sides had been given the opportunity of presenting their case. This was simply incorrect. It alleged the appellant had failed to file documentation. This, too, was incorrect. It was not simply that the decision contained errors concerning some aspects of a claim. That can happen. More seriously, it purported to give a full decision based on events and evidence which had simply never taken place at all.[11]

At first sight this appears to be entirely a matter of fair procedure and could have solely engaged what was primarily to become the second question raised by the case. The applicant, however, chose to query not only the process by which the WRC operated but also its fundamental position within the Constitution.[12]

[11] ibid per MacMenamin J, dissenting judgment at para 11.

[12] See P Daly, 'The Administration of Justice in Administrative Tribunals: Zalewski v. Adjudication Office' [2021] IESC 24 (Article 37.1)' (2023a) Administrative Law Matters Blog. Available at:

The Supreme Court was asked to consider a central constitutional question in Ireland: to what extent and in what circumstances can tribunals be said to be carrying out a constitutionally impermissible administration of justice? The second question in the case – considered later – whether the statutory framework adequately vindicated the procedural rights of a complainant before the WRC under the Constitution and the European Convention on Human Rights.

Central to the first question are two articles of the Irish Constitution. Article 34.1 requires that:

> Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.

The State argued in the case that the Commission was not carrying out such power, and even if it was, it could be saved by the subsequent constitutional provision of Article 37.1. This clause provides that:

> Nothing in this Constitution shall operate to invalidate the exercise of limited powers and functions of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and power, notwithstanding that such person or such body of person is not a judge or a court appointed or established as such under this Constitution.

The concept of the 'administration of justice' therefore underpins the operation of tribunals in Ireland. Do such bodies, applying as they do fairly precise sets of legal rules to settle decisions, and often undertaking adjudication on individual rights, administer justice? And what may be said to fall within the boundary of 'limited powers and functions of a judicial nature' and thus be permitted?

Prior to *Zalewski*, the long-agreed approach within Ireland to Article 34.1 was to be found in the case of *McDonald v Bord na gCon*.[13] In that case, relating to the operation of the Irish Greyhound Board, the Supreme Court had set out a list of five indicia of judicial power:

1. A dispute or controversy as to the existence of legal rights or a violation of the law.
2. The determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty.
3. The final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties.

www.administrativelawmatters.com/blog/2023/10/18/the-administration-of-justice-in-administrative-tribunals-zalewski-v-adjudication-office-2021-iesc-24-article-37-1/; and T Hickey, '*Zalewski* and the Future of Irish Public Law' (2024) 87 *Modern Law Review* 466.

[13] *McDonald v Bord na gCon* [1965] IR 217.

4. The enforcement of those rights or liabilities or the imposition of a penalty by the court or by the executive power of the State which is called in by the court to enforce its judgment.
5. The making of an order by the court which, as a matter of history, is an order characteristic of courts in this country.

Despite its 'canonical' status on this question[14] this test was not without criticisms. Of particular concern was its circular nature: 'it seeks to identify what *should* be treated as a judicial function by reference to what *is* or *has been* treated as a judicial function'.[15]

On the specific facts of *Zalewski*, all members of the Supreme Court concluded that the WRC was indeed administrating justice and so fell within Article 34.1. The body made 'binding determinations on legal disputes between private parties according to law. That, in itself, is normally a core business of the courts'.[16] In addition, the WRC could compel witnesses, gave opportunities to parties to be heard and present evidence and the decision of the adjudicator was binding on the parties. The court concluded therefore that framework by which the WRC operated created:

> a machinery for the determination and decision by an independent body of complaints seeking relief, as a matter of law, and which permits the adjudication officer to make a binding decision on such complaint which can be enforced against the losing party. In these respects, the process is indistinguishable from the determination of a legal dispute before a court.[17]

The court therefore concluded that the first three criteria had been met. On the fifth criteria, O'Donnell J. rejected the argument of the State that the WRC was able to provide relief that was novel and went beyond that normally available under the common law. He found that 'the form of order made by a decision pursuant to the [Workplace Relations] 2015 Act is a final order determining the dispute and awarding redress of a kind known to the courts'.[18]

The question of compliance with the *McDonald v Bord na gCon* test therefore hinged on the fourth category regarding enforcement of rights. The 2015 Act provided for parties to apply to the District Court – a court of local and summary jurisdiction within Ireland – for enforcement proceedings. A previously available appeal to the Circuit Court, of higher status than the District Court, had been abolished in 2015. The District Court had a very limited discretionary space to alter the adjudicators award. Where satisfied the appropriate time had passed

[14] O'Donnell J in *Zalewski* (n 10) at para 75.
[15] Daly, 'The Administration of Justice in Administrative Tribunals: Zalewski v. Adjudication Office' (n 12) quoting Doyle, et al, 2008 at p 2020.
[16] O'Donnell J (n 10) at para 98.
[17] ibid.
[18] ibid.

without the employer complying with the order the court shall 'without hearing the employer or any evidence … make an order directing the employer to carry out the decision in accordance with its terms' under section 43(1) of the Act. The practical result, according to the Supreme Court, was that the determination of the Adjudication Officer was final and binding.

Given the Court had concluded the WRC fell within Article 34.1 of the Constitution as administering justice, the next question arising was whether the body could be 'saved' under Article 37. As noted earlier, this clause seeks to allow some space for administrative decision-makers to exercise some powers and functions which are of a judicial character. As Daly notes, it is 'remarkable' that the Irish courts have spent so little time considering this provision.[19] The case of *Re Solicitors Act 1954*[20] considered whether a professional disciplinary body could be created in order to regulate solicitors without judicial involvement. Despite the judiciary offering some scope to create such disciplinary structures, a defensive approach was taken in the aftermath of the case. A judicial role was embedded in such professional decision-making regimes, demonstrating as Daly notes 'a reluctance to test the limits of the courts' interpretation of the Constitution.'[21] As we argue later in this chapter, sensitivity to the 'chilling effect' of potential litigation has been seen in the state's legislative response to *Zalewski* and separation of powers issues generally.[22]

Zalewski is now the leading authority on the extent of the saver provision, in particular the meaning of the word 'limited' in Article 37. It sketches, for the first time, a vision of constitutionally 'proofed' administrative bodies which do not trammel upon the distinctive position of the judiciary. O'Donnell J concluded that the exemption in Article 37 needed to be read broadly. In determining whether the Tribunal's work was sufficiently 'limited' a range of matters should be taken into account. These included the Tribunal's subject-matter, the remedies available to it, enforceability of remedies and the availability of appeal.[23]

In relation to the WRC specifically, the court found that a number of elements to its powers that spoke to its operations being 'limited' in nature. It was 'limited by subject matter to those areas of employment law specifically identified in the Act'.[24] In addition, there were limitations on the awards which might be made and enforced which is complimented by the equally limited capacity of the District Court to substitute an order of reinstatement with compensation. Further, WRC decisions were subject to appeal with these being available as of right. The court also noted that judicial review was ultimately available to challenge a decision

[19] See Daly (n 12).

[20] *Re Solicitors Act 1954* [1960] IR 239.

[21] P Daly, 'The Irish Courts and the Administrative State' in Farrell and Howlin (eds), *The Oxford Handbook of Irish Politics*, (2019) Available at: https://ssrn.com/abstract=3398963 at p 6.

[22] F Donson and D O'Donovan, *Law and Public Administration in Ireland*, (Dublin, Clarus Press, 2015) at para 16.04.

[23] O'Donnell J (n 10), para 116.

[24] ibid.

of the Commission. Considering all these components together, the majority concluded that the WRC could be 'saved' from a finding of unconstitutionality based on Article 37.1.

Beyond the specifics of the case, the Supreme Court set out a revised approach to how Articles 34 and 37 operated. The position of administrative bodies has been provided with a firmer footing constitutionally. O'Donnell J recognised the need to more clearly situate the Court's understandings of Articles 34 and 37 within the modern context of administrative state:

> The great expansion in the role of the State in the 20th century, and the transfer by the legislature of functions, which previously might have been considered to be matters for the executive branch alone, to newly-created statutory bodies, and the concurrent general expansion of the power of judicial review of administrative action, has meant that the boundaries of law's empire, as it were, extend much further than might have been contemplated in 1922 or 1937. Looked at functionally, therefore, rather than from the perspective of legal theory, the decisions of the courts in this field have tended to a pragmatic outcome in which the assignment of the administration of justice to the judicial branch has not operated to hinder these developments, even if that has not been achieved by reasoning which … is not always necessarily intellectually satisfying or elegant, although, in that regard, it must be said that the approach of the case law is firmly in line with international comparators.[25]

Reflecting on the Article 34.1 checklist approach, as had operated under *McDonald v Bord na gCon*, O'Donnell J concluded it was not helpful when understood as that – a checklist. The courts should instead recognise Article 34.1 as requiring them to set out what the judiciary must do, and what other bodies can do. Judges should not focus their attention on five disparate elements and not on the broader purpose of the constitutional provision:

> The treatment of the criteria in McDonald as a checklist which must be minutely and precisely complied with risks missing the wood from the trees. It also encourages an approach to drafting that could remove proceedings from the field of the administration of justice because of some small, and in truth insignificant, deviation from the checklist. That would be a triumph of form over substance.[26]

Ultimately, the majority of courts did not abandon the *McDonald v Bord na gCon test* but rather placed it within a more contextual space allowing the courts to reflect on the specifics of the body, the overarching purpose it has and its field of operation. As Hickey notes, *Zalewski*:

> … might be understood 'as emphasising the importance of the existing jurisdiction of the courts', and as meaning that 'any provision subtracting from that jurisdiction, or creating parallel jurisdiction which might render the courts' traditional jurisdiction defunct, is one which should be closely scrutinised by the courts for compatibility with the Constitution.[27]

[25] ibid at para 90.
[26] ibid para 91.
[27] See Hickey (n 12) 480, quoting O'Donnell (n 10) at para 95.

Importantly, the court also did not give carte blanche to tribunals to operate within this broadened constitutional space as they wished. The *Zalewski* challenge would throw up another key constitutional question which has been at the heart of administrative bodies and judicial review in Ireland – that of procedure.

Procedural Protections – The Judicialisation of Public Administration?

Linked with the separation powers issue in *Zalewski* were the factual questions relating to the procedural rules and operation of the WRC. Some of these reflected the less formal and more inquisitorial approach to tribunal decision-making. The facts of the case, however, went well beyond a more administrative form of operation and were rooted in serious failings. These were not necessarily or even evidently systemic, but allowed the court the opportunity to reflect on what procedures should be adopted within the defined constitutional space of administrative justice it had just laid down. Specifically, four challenges arose:

1. Adjudication Officers were not required to have legal qualifications, experience or training;
2. Evidence at hearings was not taken under oath;
3. The WRC procedures did not provide for cross examination of witnesses;
4. The proceedings were held 'otherwise than in public'.

These procedural flaws, the applicant argued, violated his personal constitution rights to fair procedure. Hickey has noted that with the constitutional revision undertaken by the court in *Zalewski* comes with a need to ensure that such bodies operate appropriately:

> [I]f Article 37.1 is now going to bark for the administrative state, then it is going have to bite for the constitutional state as well. If it is now to represent the pillar supporting non-judicial bodies that administer justice of the kind having profound effects on the fundamental interests of individuals, then it must also ensure that that justice is administered in ways that do not undermine the constitutional rights of those individuals.[28]

Central to this is the particular status of procedural rights within the Irish legal system. Unlike other jurisdictions where fair procedure is a rebuttable common law presumption[29] in Ireland the principles have a constitutional basis rooted in Article 40.3.1° requirement that the state shall 'protect … from unjust attack' the personal rights of the citizen.

[28] Hickey (n 12) at p 11.
[29] Donson and O'Donovan (n 22) at para 10.01.

Tribunals have often been praised for offering a more accessible, efficient and economical approach to dispute resolution.[30] It has been assumed that bodies such as the WRC are able to be accessed without legal representation. The lack of legal aid to support legal representation before bodies such as these embedded within the system the idea that such tribunals should be navigable without specialised representation.

In *Zalewski*, O'Donnell J directly acknowledges the potential value of policies underlying the establishment of tribunals such as the WRC which can provide relatively informal and efficient dispute resolution. Indeed, it is in this context that he rejects the first procedural complaint – that adjudicators should be legally trained:

> Courts and lawyers do not have a monopoly on fact-finding or even on law's application, and cannot claim infallibility in either respect.[31]

There is a tension here, however, that arises as other aspects of tribunal procedures become more court like. The increasing use of legal representatives in tribunal settings inevitably brings with it increased formalisation of the proceedings. For applicants and respondents able to afford representation this has benefits; for those who cannot, they are in danger of experiencing inequality of arms and inaccessible processes. While the *Zalewski* requirements apply only to those bodies which are involved in the administration of justice, a risk of broader chilling effects accompanies the judgment.

Genn, in her seminal work on tribunals in the UK, asks whether procedural informality might be a benefit or a trap for applicants.[32] The idea that tribunals such as the WRC are accessible without legal representation involves assumptions about accessibility, formality and any particular individual's ability to navigate legal, factual and procedural terrain. However, we have already noted that a key motivation for diverting legal issues into such bodies is one of cost. As systems become more formal, and take on more court style procedures, there is an ever increasing need to ensure equality of arms for parties in accessing legal representation.

Although the Supreme Court rejected the first procedural ground raised by *Zalewski*, the court then noted that the 'standard of justice administered under Article 37 cannot be lower or less demanding than the justice administered in courts under Article 34'.[33] This statement underlines that, for the Irish constitutional order, administrative bodies must deliver certain fundamental protections. O'Donnell J stressed that:

> [T]he function being performed and the power being exercised must comply with the fundamental components of independent, impartiality, dispassionate application of

[30] B McCabe, 'Perspectives on Economy and Efficiency in Tribunal Decision-Making' (2016) 85 *AIAL Forum* 40.
[31] O'Donnell (n 10) at para 13.
[32] H Genn, 'Tribunals and Informal Justice' (1993) 56 *MLR* 393, at 393.
[33] O'Donnell (n 10) at para 138.

> the law, openness, and, above all, fairness, which are understood to be the essence of the administration of justice.[34]

This statement of principle signals a process of judicial interrogation and oversight into institutional design, case handling and procedural fairness. Will debates over the extent of formal procedural protections required encrust and complicate the operation of future tribunal bodies in Ireland?

Returning to the specific pleadings in *Zalewski*, the Supreme Court concluded that there was a presumption that justice will be administered in public. As a result, the blanket statutory ban on hearings being held in public that had been operating at the time of the case was found to be unconstitutional.[35] In addition, the court found that the WRC should have the necessary powers for it to be able to act in accordance with court-like standards. Specifically, this included an ability to require evidence to be taken under oath including the related enforcement power of prosecution for providing false evidence. This was described by the court as being 'an important part of ensuring that justice is done in cases where there is serious and direct conflict of evidence'.[36] In addition, the court noted the importance of cross-examination of witnesses.[37]

MacMenamin J in his dissent raised particular concerns about the dangers of inconsistent practice that might arise between individual hearings where a clear procedure was not adopted across the WRC system. He therefore argued for adopting binding procedural rules to underpin the Commission's operation:

> Earlier this judgment noted that the WRC has not adopted any rules of procedure by statutory instrument. This, too, creates undesirable uncertainty, which arose in this case. Where significant issues are at stake, such as employment, parties are entitled to know, in advance, the rules of procedure to be applied prior to embarking on a hearing. This did not occur. This is not to say that the full range of fair procedures would be necessary in every case, but, in this one, they were necessary. In a case where there is a conflict of evidence, a person entrusted with making decisions or determinations which may affect someone's life, must make clear to the parties, from the outset, the scope of procedures which will apply in that given case. Such procedures are necessary for the administration of justice.[38]

The majority of the court, however, specifically allowed for the fact that tribunals need a degree of flexibility in their procedures.[39] There is an inherent danger of over formalisation arising from the judgment. Irish tribunals seem set on a process of accelerated reform from a relatively informal culture into a mandatory, formal court-like approach. While this, in itself, may not be problematic in terms of the

[34] ibid.
[35] ibid at paras 141–42.
[36] ibid at para 144.
[37] ibid at para 146.
[38] ibid at para 139.
[39] ibid at para 137.

principle, surrounding systems of access to justice such as legal aid will also need to be adapted to meet the challenge.

In the aftermath of *Zalewski* the Irish state passed the Workplace Relations (Miscellaneous Provisions) Act 2021 which embedded key components of the judgment into a formal structure. Thus, evidence may be given on oath or affirmation. So the judgment of the court by which the court noted swearing an oath as being 'an important part of ensuring that justice is done in cases where there is serious and direct conflict of evidence'[40] has subsequently become standard required practice while the WRC has adopted a presumption of public hearings.[41] Indeed, the revised scheme for the WRC appears to fall within the risk free drafting approach of adopting procedural rules as standard even where the court had noted that they are to be used in the most serious of cases.

What is not clear to date is how far *Zalewski* is flowing out beyond the confines of the operation of its own tribunal – the WRC – and into other bodies. While the decision has been widely cited in cases there is limited evidence of the decision being applied to strike down decisions on judicial review. At the legislative level, signs are emerging of the wider impact. When the Central Bank (Individual Accountability Framework) Act 2023 was first published, discussions arose around its compliance with *Zalewski*.[42] The Act provided for a change to the Central Bank's administrative sanction procedure. Under the process, where there is a finding that a company has committed a 'prescribed contravention' of financial services requirements the Central Bank is required to make an application to the High Court for confirmation of the decision 'as soon as practicable'. This then embeds a judicial component into the procedure thus protecting it from Article 34. In addition, the Act requires changes to enhance procedural fairness and constitutional protections within the process including separating out investigative functions and decision-making functions. In some senses, the fact that this was regarded as a necessary change post-*Zalewski* perhaps underlines the limited engagement previously in the design of such processes given the significant danger of blending roles and potential bias claims within such systems while also being symptomatic of the state's over-cautious legislative response to judicial decisions. Maher and Mulholland[43] also note that 'similar adjustments are under consideration

[40] ibid at para 144.

[41] C Bracken, 'Comparative Approaches to the Enforcement of the Race Directive 2000/43/EC in Ireland' (2024) Traveller Equality & Justice Project Report (forthcoming) at para 34. Bracken notes that the WRC has adopted guidance on 'special circumstances' which would permit private hearings which includes medical conditions, the involvement of minors or issues of a sensitive natures such as arise in sexual harassment cases. See www.workplacerelations.ie/en/publications_forms/procedures_employment_and_equality_complaints.pdf, accessed 5 January 2024.

[42] D Maher and N Mulholland, 'Central Bank (Individual Accountability Framework) Bill: The Zalewski Judgement – A catalyst for change', (2022) Matheson Insights. Available at: www.matheson.com/insights/detail/central-bank-(individual-accountability-framework)-bill-the-zalewski-judgement---a-catalyst-for-change, accessed: 5 January 2024.

[43] ibid.

in relation to the Competition and Consumer Protection Commission and the Financial Services and Pensions Ombudsman'. Recent regulations relating to the Social Welfare Appeals Office expressly allow applicants to request an oral hearing in their matter.[44]

Lack of Independence and Effective Organisational Design

It is clear the *Zalewski* ruling has applied a distinct regulatory stimulus to the current and future operation of tribunals. We believe it is likely to stimulate the first true census of, and reflection on, standard operating procedures in tribunals in Ireland. Government will be required to take stock and, for the first time, survey the existing landscape against fresh, systemic requirements.

While it seems obvious that tribunals should be independent of government or other entities, this has not been the case in practice. Social security appeals in Ireland are heard by the Social Welfare Appeals Office, an office that is part of the Department of Social Protection. Appeals officers are appointed by the Minister and there is a perception that the appeals office is not sufficiently independent from other sections of the Department.[45] Local authority housing decisions are heard by internal appeals officers. The Residential Tenancies Board (RTB) is an appeals body responsible for first instance decisions (made by adjudicators) and tribunal decisions (made by tribunal members). Discussions regarding the need for *formal* independence, might also prompt overdue reflection upon indicia of effective, functional independence such as security of tenure and adequate resourcing. To date much reliance has been placed on wording which references independence – the 'independent adjudicator' – but which, in reality, provide little or no framework to ensure the practical implementation of this.[46]

The challenges of implementing *Zalewski* at the coalface cannot be underestimated. There is a lack of research even on the people who sit on Irish administrative tribunals. The pre-requisite qualifications and expertise vary hugely from tribunal to tribunal, and the ongoing training varies contextually too. Some tribunal members are employees of government departments or administrative tribunals, and others are fee paid independent contractors. For some practitioners, tribunal adjudication work is becoming less desirable as a career option due to the perceived inadequacy of the current daily rates. For example, Residential

[44] Minister for Social Protection, Social Welfare (Appeals) Regulations 2023. Available at: https://assets.gov.ie/252112/d7ae4fbf-ac41-4fcd-83e7-704e7c20b4b1.pdf.

[45] Free Legal Advice Centre, 'Not Fair Enough: Making the case for reform of the social welfare appeals system', (Dublin: FLAC, 2012). Available at: www.flac.ie/assets/files/pdf/not_fair_enough_final.pdf, accessed 5 January 2024.

[46] See, eg, the Workplace Relations Commission Act 2015, s 40(8) which states that: 'An adjudication officer shall be independent in the performance of his or her functions.'

Tenancy Board adjudicators are paid a flat fee of €616 per day for three hearings,[47] which provides only for the actual day of adjudications and does not include any additional preparatory period for cases or time for writing adjudication reports and determination orders. WRC external adjudicators are paid a daily rate of €525, although they can also receive sanction for one write-up day for every three days of hearings. There has been no increase since 2017 and frustration among external adjudicators is growing in relation to rates of pay, as well as lack of security of tenure and increased workload.[48] Similarly, a 2021 International Protection Tribunal Members survey shows the issue of fees arising in the immigration context. Anonymous quotations from Tribunal members in the report included the following: 'The fees currently payable to Tribunal members do not reflect the amount of work undertaken on average per file.' 'The fee also fails to reflect the significant emotional challenge inherent in the role' and 'The work is barely worth doing financially if assessed on an hourly rate. The researching and study of country-of-origin information can take days to properly assimilate … I think most of us feel that the amount of work that we have to do and the standard we have to achieve is under estimated and unappreciated by the Department of Justice.'[49] Tribunal adjudication is a responsible and onerous position, it is essential that tribunal members are well trained professionals, suited to adjudication work, and can devote sufficient time to considering cases before them.

There is also, disappointingly, evidence of significant underperformance in existing appeal bodies. An Bord Pleanála is the statutorily independent planning body responsible for deciding appeals on planning decisions. The body was traditionally afforded with the highest levels of deference from the judiciary.[50] This deferential attitude has, however, been all but eroded over the past 30 years, with poor decision making and management practices damaging the reputation of and trust in the body. Public controversies have led to an ongoing 'whole of institution' scoping review. The categories included in its Terms of Reference speak to the significant maladministration currently under investigation: conflicts of interest and objective or actual bias; statutory declarations; allocation of files; amendments to inspectors' reports; communication with external parties outside of formal statutory of administrative channels.[51] In 2023, the former Deputy Director of An Bord Pleanála, Paul Hyde, received a two-month sentence for breach of planning

[47] Residential Tenancies Board, 'Annual Report and Accounts 2022'. Available at: www.rtb.ie/images/uploads/forms/RTB_Annual_Report_2022_English.pdf at p 52.

[48] E Malone, 'Workplace Relations Commission adjudicators unhappy over pay and conditions', *The Irish Times* (24 April 2023). Available at: www.irishtimes.com/business/work/2023/04/24/workplace-relations-commission-adjudicators-unhappy-over-pay-and-conditions/.

[49] Department of Justice, 'End to End Review of International Protection Process: IPAT Members' Survey Report' (Stationery Office 2021) at pp 14–15. Available at: www.irishimmigration.ie/wp-content/uploads/2021/10/IPAT-Members-survey-report.pdf, accessed 5 January 2024.

[50] *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39.

[51] An Bord Pleanála, 'Terms of Reference for investigation by Lorna Lynch SC' (2023). Available at: www.pleanala.ie/getmedia/d646ffe3-349b-4a4b-a55c-cdc91de4849a/Terms-of-reference-External-Scoping-Investigation-ABP.pdf?ext=.pdf, accessed 5 January 2024.

laws. Speaking in court during the sentencing hearing, Judge James McNulty noted: 'What makes these offences so serious is that the work of An Bord Pleanála is quasi judicial' and '[i]t is at the high end of quasi judicial'.[52] Hyde successfully appealed the custodial sentence on the basis of its severity with Cork Circuit Court increasing the sentence length to three months, but suspended it in full, while also imposing fines totalling €6,000.[53]

Given the role which planning issues played in Ireland's economic collapse in 2008, the body was amongst the highest profile tribunals in the state. This visible breach of trust has been a blow to public confidence in administrative decision-making outside the courts. It is perhaps, then, not surprising that an overhaul of the planning system in proposed in the current Planning and Development Bill 2023 which will include a new name for the planning tribunal – An Coimisiún Pleanála – to be run by a Chief Planning Commissioner and employing 14 commissioners.[54]

A perplexing paradox that emerges post-*Zalewski* is how tribunals can continue to offer distinctive benefits, when they are expected to be court-like in key aspects of procedure. They are also being called upon to navigate this tension in circumstances where legal aid is not available for the parties. There is an urgent need to think systematically and holistically about why we have these administrative bodies, what they do, and why what they do is different from judicial decision-making. While it raises significant challenges, *Zalewski* should at least bring to an end the quietism and anxiety that surrounded the status of tribunal work. This traditional discomfort in classifying or describing tribunal adjudication reflected Ireland's complex, atypical constitutional framework.

This in part flows from the separation of powers under the Irish Constitution, and a formalist adherence to the strict division between concepts that are often nebulous. As Cane observes:

> The concepts of legislative, executive and judicial functions are extremely abstract. Their abstraction partly explains why it has been found very difficult to provide robust accounts of the distinctive nature of various functions and of the differences between them. It also explains why the prefix 'quasi' is sometimes added particularly to the terms 'legislative' and 'judicial': the prefix typically indicates that the speaker senses a distinction between the real thing and the imitation, but cannot pinpoint it with confidence.[55]

[52] N Baker, 'Former deputy chair of An Bord Pleanála Paul Hyde handed two-month jail sentence', *The Irish Examiner* (30 June 2023). Available at: www.irishexaminer.com/news/courtandcrime/arid-41173816.html.

[53] P Sheehy, 'Former ABP deputy chair Paul Hyde wins sentence appeal', RTÉ (15 November 2023). Available at: www.rte.ie/news/ireland/2023/1115/1416640-paul-hyde-appeal/, accessed 5 January 2024.

[54] T Meskill, 'An Bord Pleanála to be renamed as part of changes under draft bill', RTÉ (26 January 2023). Available at: www.rte.ie/news/politics/2023/0126/1351996-draft-planning-development-bill/, accessed 5 January 2024.

[55] P Cane, *Administrative Tribunals and Adjudication* (Hart Publishing, 1st edn published 2009, paperback 2010) at p 140.

Jurisprudence of the Irish courts traditionally leant towards a strong conception of separation of powers, with jurists such as Hardiman J propounding 'the primal constitutional position of the doctrine'.[56] However, some jurists understand the doctrine in more malleable terms. Writing extra-judicially, Mr Justice Fennelly notes: 'the constitutional scheme does not, however, establish a rigid system of exclusive powers of the legislative, executive and judicial branches, within their proper spheres'.[57] The fallout from *Zalewski* will see a welcome wave of reflection upon the relationship between quasi-judicial and administrative decision making, and what distinguishes one from the other.[58]

The disparate, ad hoc nature of administrative tribunals in Ireland has contributed to a disorganised and opaque systems of administrative decision-making. Individuals are also forced to navigate appeals systems without legal representation, as civil legal aid is generally not available for tribunal-level matters. The current legal aid scheme excludes administrative bodies and quasi-judicial tribunals, with the exception of the International Protection Appeals Tribunals. Ironically, the applicant in *Zalewski* was awarded full costs for his High Court and Supreme Court actions but was statute barred from receiving any costs or legal aid funding in relation to the WRC case that prompted the litigation.[59] The result has been significant, ongoing access to justice issues with many individuals lacking the knowledge, capacity, or confidence to represent themselves before administrative tribunals. Inequality of arms between the parties are common at oral hearings, and parties who do elect for legal representation, will bear the cost regardless of the outcome.

There are also significant rule of law issues arising from the lack of public awareness of what tribunals 'do', and how you can bring an appeal before the relevant administrative tribunal. For instance, the 'Summary of the submissions received to the 2021 Public Consultation on the Review of the Equality Acts' (published in June 2023),[60] highlighted widespread public misunderstanding of which body is responsible for equality law matters. The relevant body – the WRC – was found to not commonly be understood by the public as hearing equality and discrimination cases. The report noted that there was 'significant confusion for persons, wishing to take a claim related to equality in accessing goods and

[56] Mr Justice Fennelly, 'The Courts and the Doctrine of Separation of Powers in the Irish Constitution' in E Carolan (ed), *Judicial Power in Ireland* (Institute of Public Administration, 2018) at p 48, citing Hardiman J in *Sinnott v Minister for Education* [2004] 2 IR 545, 702.

[57] Mr Justice Fennelly, ibid at p 49.

[58] Hickey (n 12).

[59] C Connolly, and K Liddy-Cormican, 'A recent Irish Supreme Court decision in the context of adjudication of workplace disputes may have implications for a wide range of decision-making bodies' (2021). Available at: www.addleshawgoddard.com/en/insights/insights-briefings/2021/litigation/decision-making-by-quasi-judical-bodies---the-implications-of-zalewski/.

[60] Department of Children, Equality, Disability, Integration and Youth, 'Summary of the submissions received to the 2021 Public Consultation on the Review of the Equality Acts' (June 2023). Available at: www.gov.ie/en/press-release/cafb4-minister-ogorman-publishes-report-on-the-submissions-to-the-public-consultation-on-the-review-of-the-equality-acts/.

services, in understanding that complaints about discrimination outside of the workplace must go to body with the word 'workplace' in its title.'

The lack of organisational design has contributed to complex appeals pathways. The England and Wales Law Commission outlines how there are four broad pillars of administrative justice: internal mechanisms of redress; external non-court avenues of redress (public inquiries and tribunals); ombudsmen; and the courts.[61] Ireland cannot neatly compartmentalise different pathways of redress due to the way in which the different complaint mechanisms have evolved, and how many tribunals are not independent of government departments.

In some areas of administration, there is no tribunal in place to hear appeals, and challenges to decisions are instead channelled into the courts system. For example, if a party wishes to appeal a first instance Equal Status Acts decision, the appeal is to the Circuit Court whereas a decision relating to a claim made under the Employment Equality Acts is appealed to the non-judicial Labour Court. This causes confusion in circumstances where both original decisions are made at first instance in the WRC. Certain decisions made by the Competition and Consumer Protection Commission are appealed to the High Court. Decisions made by the Financial Services and Pensions Ombudsman (FPSO) are appealed to the High Court. The FPSO has both investigatory and adjudicatory functions under statute, so both ombud and tribunal functions are housed within the same body.

Nason notes that 'the design and form of administrative justice oversight varies considerably depending on the context' and that 'modern administrative justice systems are ultimately characterized by multiple different pathways by which doing justice is perceived in a range of guises'.[62] Tribunals are a key oversight mechanism, but in the Irish context we tend to muddle different oversight mechanisms together, or as outlined above, rely entirely on the courts to provide oversight of first instance decision making. The manner in which tribunal adjudication has been set up in Ireland has led to a proliferation of bodies across the administrative state. Some of these tribunals make an extremely low number of decisions annually. This begs the question as to whether there could be 'grouping' of functions, reducing cost through pooling of resources and expertise.

Access to Justice and Normative Effect in the Irish Tribunal System

Amongst the most damaging impacts of the opacity of Ireland's system is an absence of policy reflection upon how these bodies deliver for their users or

[61] The Law Commission, Administrative Redress: Public Bodies and the Citizen (2010). Available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc322_Administrative_Redress.pdf.

[62] S Nason, 'Oversight of Administrative Justice Systems' in M Hertogh, R Kirkham, R Thomas and J Tomlinson, (eds) *The Oxford Handbook of Administrative Justice* (OUP 2022), 155–76 at 173.

contribute to improved frontline decision-making in government departments. Research into the experiences of tribunal users is extremely limited, with surveys undertaken indicating that 'satisfaction' within tribunal outcomes and experience seemed to be heavily dependent upon the substantive outcome of a decision.[63] The sole prevailing tool for measuring impact remains the internal 'customer service surveys' which can provide only a limited insight into the overall operation of such bodies. Such views are often informed by the outcomes of complaints rather than the experience of access to justice.[64]

The question of whether appeals bodies have a normative effect upon departmental practices is also under-studied. One can, however, point to key areas where successful appeals rate trends have been concerningly high. The 2022 Social Welfare Appeals Office Annual Report records that 24,267 appeals were finalised in 2022; 12,654 (52.1%) of the appeals finalised had a favourable outcome for the appellant.[65] Looking back ten years, to the same year of the highly critical FLAC report discussed below, the 2012 SWAO Annual Report states that of the 32,558 appeals finalised in 2012, 16,417 (50.4%) had a favourable outcome for the appellant. These are unacceptably high numbers of revised decisions, likely indicative of poor first instance decision-making and information-gathering practices.

In 2021, the Comptroller and Auditor General called for the department to undertake a range of actions to improve the quality of its first instance decision-making.[66] It recommended that it should 'carry out periodic reviews of successfully appealed cases where no new or additional material information was provided' on the basis that 'these reviews could assist the Department in learning from the cases determined by appeals officers and in improving the quality of decisions made by its deciding officers in determining claims'.[67] Often high rates of successful appeal are attributed to the failure of individuals to provide sufficient information to ground their claims. The Comptroller and Auditor General called for the department to assess the administrative burden it was imposing upon people with disability in particular. It further required the department to 'examine the application process and related guidance for schemes which are medically or social and care needs assessed in order to ensure claimants are able to supply all necessary information to assess eligibility when they are making a claim'.[68] The Department was also asked to 'review its current procedures so as to ensure that all claimants are informed clearly of the reason(s) for refusal of claims'.[69]

[63] R Murphy, D McGuinness, E Bainbridge, L Brosnan, M Keys, H Felzmann, K Murphy, B Hallahan, A Higgins and C McDonald, 'Service Users' Experiences of Mental Health Tribunals in Ireland: A Qualitative Analysis' (2017) *Irish Journal of Psychological Medicine* 34(4) 233–42. Available at: https://doi.org/10.1017/ipm.2017.11.

[64] ibid.

[65] Social Welfare Appeals Office, 'Annual Report 2022' at p 20. Available at: https://assets.gov.ie/267678/fa47277b-b0f6-42cd-b9f9-7844d552961c.pdf.

[66] Comptroller and Auditor General of Ireland, 'Chapter 10: Management of Social Security Appeals' in *Report on the Accounts of Public Services 2020* (Stationery Office, 2021).

[67] ibid at para 10.60, Recommendation 10.4.

[68] ibid Recommendation 10.5.

[69] ibid Recommendation 10.1.

Recent regulations reforming the Appeals Office functioning have offered limited, tacit recognition of negative dynamics. Article 5 of the Social Welfare (Appeals) Regulations 2023 provides for a 'feedback loop' between the Social Welfare Appeals Office and the Department of Social Protection. The Chief Appeals Officer is empowered provide feedback and guidance to the Minister and to Department staff on what they view as appropriate interpretation of statutory provisions. This is a rare instance of an Irish appeals body being tasked with uplifting first instance decision-making. While community legal centres welcomed this when consulted on the regulations, they also noted the importance of moving to a stronger system of publication of appeals decisions. A 2023 report entitled 'Transparency and Consistency within the Social Welfare Appeals Process' argued that 'a publicly available online database of the SWAO could provide additional and significant assistance in the resolution of cases and in the appeal process'.[70] It argued that decisions which clarify a point of law or involve a statutory interpretation should be prioritised for publication. Currently, Community Law & Mediation – a community law centre – offer the only database compiled by social sector organisations and advocates and dependent upon consent by their clients.

The new feedback mechanism, however, also serves to highlight abiding tensions regarding the independence of the Social Welfare Appeals Office itself. The Minister for Social Protection appoints the Chief Appeals Officer, Deputy Chief Appeals Officers and Appeals Officers. The Social Welfare Appeals Office is part of the Department of Social Protection. There is no essence of an independent review mechanism and, as Daly notes, in *Zalewski* the court demonstrated an 'insistence on putting administrative independence on a constitutional footing'.[71] As far back 2012, the Free Legal Advice Centre published a report highly critical of the Social Welfare Appeals Office, noting 'the appeals system is failing those whom it is intended to serve and that the basic rights of access to social welfare, to fair procedures and to an effective remedy are not available as needed'.[72] It set out detailed reform recommendations regarding first instance and appellate decision-making on social security decisions, and the need for an independent tribunal.

In recent years, tribunals in Ireland are promoting mediation over adjudication as a form of dispute resolution. In October 2022, the RTB implemented a policy change whereby mediation was introduced as the 'primary default route for resolving disputes'.[73] This was done on the basis of the Housing for All 2021 Plan, whereby the government seeks to resolve disputes earlier on, without recourse to adjudication or tribunal processes. Similarly, the WRC has recently introduced a

[70] Age Action, Community Law and Mediation, Cross Care, Disability Federation of Ireland, Joint Submission to the public Consultation on Changes to the Social Welfare Appeals Regulations (2023) at p 4. Available at: https://communitylawandmediation.ie/wp-content/uploads/2023/06/Submission-to-the-public-consultation-on-changes-to-the-Social-Welfare-Appeals-Regulations-19-May-2023.pdf.

[71] Daly (n 12).

[72] FLAC (n 45).

[73] Residential Tenancies Board, 'Annual Report and Accounts 2022' (n 47).

new mediation model, seeking to resolve unfair dismissal claims through mediation. It reports a 30% increase in both parties agreeing to mediation. While we agree that '[a]ssisting amicable resolution is effective',[74] we have concerns that the current move to a 'default' mediation is being done as a cost-saving measure, without reflection on whether the relevant dispute is suitable for the parties involved, particularly where parties are navigating administrative justice systems. Hare argues that 'access to legal resources and representation are necessary for tenants to effectively represent themselves in mediation'.[75]

In circumstances where there is no legal aid available for cases before the WRC or RTB, empirical research is urgently needed to investigate the rise of tribunal mediations, taking account of intersecting societal structures that impact on participation. Is mediation forming a central part of tribunal work because it is effective and fair, or because it is cheap? There are significant power imbalances at play, particularly between employer and employee, and landlord and tenant, that require careful consideration before embracing mediation in these contexts. The Irish tribunal sector would benefit from an oversight body, such as the Administrative Justice Council, to begin the process of collecting and analysing data, with a view to feeding into future reform projects. At present, we do not even have a strong research cluster in the area, akin to the UK Administrative Justice Institute, perhaps, in part, due to the predominance of constitutional theory in public law discourse.[76]

A final significant issue facing access to justice in tribunal administration concerns the enforcement of decisions following inter-party disputes. Writing in the context of the RTB, the *Dublin Inquirer* reports that there is a perception that awards and damages are left unpaid following the issuing of determination orders.[77] The RTB's Strategy Statement 2023–2025 Public Consultation report acknowledges this concern regarding non-compliance with determination orders and introduced 'a pilot Order Enforcement Facilitation Project', aiming to prevent parties needing to enforce determination orders through the courts, instead attempting to resolve non-compliance through a facilitated mediation.[78] While we welcome the issue of enforcement being addressed, there must be concern over how seriously tribunal decisions are being taken by parties. Significant rights and entitlements are adjudicated on across the tribunal sector in Ireland, but it is sidelined in public law discourse. Enforcement of tribunal decisions was presented

[74] C Hodges, 'Delivering Administrative Justice: Implications for System Design' in Hertogh, Kirkham, Thomas and Tomlinson (n 45) 177–202 at 190.

[75] R Hare, 'Mitigating Power Imbalance in Eviction Mediation: A Model for Minnesota' (2020) *Law and Inequality: A Journal of Theory and Practice* 38(1) 135–64.

[76] Donson and O'Donovan (n 22).

[77] L Neylon, 'Landlord and Tenants Ignore RTB Rulings Too Often, Board Members Worry', *Dublin Inquirer* (8 February 2023). Available at: https://dublininquirer.com/2023/02/08/landlords-and-tenants-ignore-rtb-rulings-too-often-board-members-worry/.

[78] Residential Tenancies Board, 'RTB Statement of Strategy 2023–2025 Public Consultation Report' Available at: www.rtb.ie/images/uploads/forms/RTB_Strategy_2023-2025_consultation_%28WEB%29.pdf.

as an area in need of reform in the Irish Human Rights and Equality Commission's submission to the equality legislation review. IHREC, submits that the enforcement of decisions of the WRC (first instance body) and Labour Court (appeal body) 'should be more expansive'.[79]

The role of the Ombud is underexplored here. This could be a suitable body to drive enforcement and monitor trends across different administrative tribunals. Thomas argues that ombuds are well positioned to complement individual redress mechanisms, and to provide a depth and breadth of scrutiny that individual decision redress mechanism cannot.[80] While appeals bodies are often focused upon the services users who present before them for adjudication, there is a much wider community whom they also serve. These are the *prevented* users of tribunals: individuals who gain the benefit of appeals rulings through transformed first instance processes. Systems which are aimed at efficiency need to ensure their work is communicated, studied and reflected upon. Effective dispute resolution also needs to aim for the prevention of future disputes through transformed frontline relationships. Ireland's appeal bodies have unfortunately limited platforms, tools and resources to pursue such systemic impacts.

Conclusion: Reform and Future Directions

Reform of administrative tribunals in Ireland is long overdue. Due to the disparate nature of tribunal/quasi-judicial functions and powers across public administration, a challenge will be identifying where to start. The absence of a centralised body with responsibility for training, research, data collection, and reform proposals for tribunals, exacerbates the problems explored above because no one has a holistic view of the field. Individual tribunals are concerned with immediate problems within their sector. There is a failure to weave the threads together as part of the wider fabric of administrative justice.[81] The *Zalewski* case illustrates the reactive, rather than proactive, nature of any change to tribunal powers and structure in the Irish administrative state. A significant limitation is the tendency towards looking at administrative problems with a constitutional spyglass, honing in on the big constitutional issues, but ignoring the interrelated and connected web of administrative justice issues. We previously observed:

> While there have been extensive constitutional convention debates proposing referenda to reform the state's constitutional framework, these have largely failed to address

[79] Irish Human Rights and Equality Commission, 'Submission on the Review of the Equality Acts', (July 2023). Available at: www.ihrec.ie/app/uploads/2023/07/Submission-on-the-Review-of-the-Equality-Acts.pdf.

[80] R Thomas, 'The Northern Ireland Public Services Ombudsman's Report into Personal Independence Payment and Collective Administrative Justice (Pt 1)' (2023) 30 *Journal of Social Security Law* 143.

[81] M Doyle and N O'Brien, *Reimagining Administrative Justice: Human Rights in Small Places*, (Palgrave Pivot 2020).

> questions of administrative justice. This emphasis on the constitutional to the detriment of the administrative is extremely disappointing, as while it may be said that we have a constitutional vocabulary of rights and values, we have not yet formed an effective administrative and inter-institutional grammar for their delivery.[82]

There are seeds of reform on the horizon, with a renewed interest in the area following *Zalewski* and a growing body of scholarship on administrative tribunals.[83] It is likely that multiple tribunals are operating in a manner that may be inconsistent with *Zalewski*, with many tribunal hearings taking place in private, without provision for Court-like practices.

The Irish Law Reform Commission's Fifth Programme of Law Reform was approved by government in March 2019. The first listed project is the reform of 'Non-Court Adjudicative Bodies and Appeals to Court'. The Commission has yet to move to consultation stage to date. The project aims to 'examine the case for a reformed system, including the approach to evidential matters and simplifying the avenues of appeal to the courts from such bodies'.[84] It is likely that *Zalewski* has raised a host of unforeseen issues for the Commission to consider. It is not clear why the Commission is targeting the very broad class of 'non-court adjudicative bodies', as opposed to 'quasi-judicial bodies' or 'administrative tribunals'. It is likely that any public body with a decision-making function could be described as a 'non-court adjudicative body'. The Law Reform Commission discontinued several of its law reform projects in 2023, but the reform of non-court adjudicative bodies survived the cull.[85] However, no further information as to the reason for the delay in progressing projects has been made publicly available.

Any consultation by the Commission is likely to attract significant interest from a wide range of stakeholders. Further reflection on the purpose of administrative tribunals, what sets them apart from different types of decision-making and why, is required to ensure that any proposals are specific, implementable, and user focused. Time is of the essence for, as this chapter demonstrates, significant reform is needed to Irish administrative tribunals to ensure rights are vindicated and public resources are effectively utilised.

[82] Donson and O'Donovan (n 22) at para 16.09.

[83] BM Barry, 'Workplace Dispute Resolution in Ireland at a Crossroads: Challenges and Opportunities' (2021) 66 *The Irish Jurist* 44.

[84] Law Reform Commission, Fifth Programme of Law Reform, LRC 120-2019 at p 3.

[85] Law Reform Commission, Rationalisation of Fifth Programme of Law Reform (2023). Available at: www.lawreform.ie/press-room/rationalisation-of-fifth-programme-of-law-reform.1123.html.