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REVIEW OF THE JUDICATURE ACT 1908

TOWARDS A CONSOLIDATED COURTS ACT

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The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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FOREWORD

The Law Commission has a reference from the Minister of Justice to review the Judicature Act 1908, and the other legislation governing the operation of the New Zealand courts of general jurisdiction, with a view to creating a consolidated Courts Act and updating and reorganising other provisions of the Judicature Act 1908.

The principal focus of this review is, therefore, on reorganisation, consolidation, and modernisation. It is not the intention that the Commission should revisit major matters of policy underlining the present legislation, such as the structure of the courts or matters of that character.

Since it was enacted, the Judicature Act 1908 has been raddled with amendments, the antecedents of which are often difficult to follow as they have become lost in the mists of time. Other legislation governing the courts of general jurisdiction has also been passed. As a result, we now have a distinctly patchwork quilt appearance of statutes relating to our trial and appellate courts, some of which overlap in various respects, or have problems or gaps in them. Some provisions have become redundant or outmoded. Consequently, a New Zealand citizen will have grave difficulty trying to appreciate the picture as a whole, and even trained lawyers routinely have difficulty with some aspects of the relationships between the various courts and jurisdictions.

This is not satisfactory from a constitutional point of view. A clear and unproblematic regime for the architecture and relationship of the New Zealand courts is vital to the very basis of this arm of government. The present situation also has the potential to impede access to justice: all citizens are bound by the law and all are entitled to resort to a court to enforce lawful obligations. It is undesirable that citizens and their legal representatives should have to struggle to piece together the whole picture from diverse statutory sources.

At a more pragmatic level, inevitably when there are individuated statutes for individuated courts there will be gaps or ‘rubs’ between them, or particular problems emerge over the passage of time which could stand attention, although they would not warrant an isolated statutory intervention. Other provisions simply become outdated and need modification. At least in this instance, consolidation and revision can and should go hand in hand.

The ultimate objective of this reference is to establish in one place, in clear and modern terms, the institutional and architectural basis of each of the New Zealand courts of general jurisdiction.

A task of this kind involves an exercise in judgement as to what is within the reference and what is not. Where we have been in doubt about whether a provision should be repealed or modified, we have tended to retain the status quo. We have been anxious not to give rise to substantive law changes by a side-wind. Sometimes we note difficulties with a provision, but indicate that reform, if called for at all, would be better undertaken in a different context, or by a further limited reference.

However, there are some areas in which we suggest changes which go beyond the consolidation of existing legislation. In particular, there are proposals made in relation to the appointment of judges, the possible abolition of civil jury trials, changes in the approach taken to vexatious litigation, wasted costs, and the constitution of a single District Court. We welcome submitters' comments on all of these matters.

In preparing this paper, we have had the benefit of views expressed by the heads of the various benches of the relevant courts as to any problems they see in the existing legislation. The release of this paper provides an opportunity for others, particularly members of the legal profession and the public, to comment on any matters raised, and identify other issues of concern and possible solutions. After further consultation, the Commission will issue a final report, setting out our recommendations.

We intend to include a complete draft bill for a new Courts Act in our final report (although this is dependent on drafting resources). This Issues Paper includes some draft provisions, where we have reached a preliminary view that new provisions may be helpful and that draft wording would be useful for consultation purposes. These also show that generic provisions relating to all courts are possible and useful.

Finally, I note that in March 2011, as part of this reference the Commission published Issues Paper 21, *Towards a New Courts Act – A Register of Judges' Pecuniary Interests?* The Commission will make its recommendations on that subject in our final report on this matter.



Hon Sir Grant Hammond KNZM
President of the Law Commission

Call for submissions

Submissions or comments (formal or informal) on this Issues Paper should be sent to Lecretia Seales, Senior Legal and Policy Adviser, by **Friday 27 April 2012**.

Law Commission

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or by email to judicatureactreview@lawcom.govt.nz

The Law Commission asks for any submissions or comments on this Issues Paper. The submission can be set out in any format but it is helpful to specify the number of the question you are discussing.

Submitters are invited to focus on any of the questions, particularly in areas that especially concern them, or about which they have particular views. It is certainly not expected that each submitter will answer every question.

Alternatively, submitters may like to make a comment about the review that is not in response to a question in the paper and this is also welcomed.

Official Information Act 1982

The Law Commission's processes are essentially public, and it is subject to the Official Information Act 1982. Thus copies of submissions made to the Law Commission will normally be made available on request, and the Commission may refer to submissions in its reports. Any requests for withholding of information on grounds of confidentiality or for any other reason will be determined in accordance with the Official Information Act 1982.

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Part 1

INTRODUCTION





Chapter 1

The legislative landscape

THE JUDICATURE ACT 1908

- 1.1 The Judicature Act 1908 is one of the sources of the New Zealand constitution. Together with the Supreme Court Act 2003 and the District Courts Act 1947, it provides the statutory foundation for the primary courts of the New Zealand judicial system.
- 1.2 The Judicature Act 1908 began life as a consolidation statute, amending and consolidating the law relating to the Supreme Court (the forerunner of today's High Court) and the Court of Appeal.¹ Section 16 of the Act recognises and affirms that the High Court has “all the jurisdiction which it had on the coming into operation of this Act and all judicial jurisdiction which may be necessary to administer the laws of New Zealand.” By virtue of the earlier provisions of the Supreme Court Acts of 1860 and 1882, the High Court has all the jurisdiction possessed by the superior courts in England at the time the 1860 Act came into force.
- 1.3 The Act divides the courts into inferior and superior courts. Section 2 of the Act provides that an inferior court is “any Court of judicature within New Zealand of inferior jurisdiction to the High Court”. By implication, the superior courts are the High Court, the Court of Appeal and the Supreme Court.
- 1.4 Until the enactment of the Constitution Act 1986, the Judicature Act 1908 also contained provisions guaranteeing judicial tenure and financial security.²
- 1.5 The Judicature Act 1908 has been amended more than 40 times since its enactment. The Act is divided into parts as follows:
 - (a) Part 1, which relates to the constitution, jurisdiction, practice, procedure, judges and officers of the High Court;
 - (b) Part 1A, which contains special provisions applying to certain proceedings in the High Court and the Federal Court of Australia;
 - (c) Part 2, which relates to the constitution and jurisdiction of the Court of Appeal;

- (d) Part 3, which is entitled “rules and provisions of law in judicial matters generally”, and covers a range of broadly court-related matters.
- 1.6 Section 51 of the Judicature Act 1908 authorises the making of rules regulating the practice and procedure of the High Court in all civil proceedings. The High Court Rules are set out in Schedule 2 to the Judicature Act 1908. They are developed by the Rules Committee,³ and are made by the Governor-General, with the concurrence of the Chief Justice and any two or more members of the Rules Committee (at least one of whom must be a judge).⁴
- 1.7 Section 51C of the Act also contains a power to make rules for the Supreme Court, the Court of Appeal, and for the criminal jurisdiction of the High Court. The Court of Appeal Rules were appended as Schedule 3 to the Act until 1974, but are now statutory regulations.⁵

Judicature Amendment Act 1972

- 1.8 The Judicature Amendment Act 1972 was enacted to create a new and simplified procedure for judicial review which would avoid the procedural complexities surrounding the use of common law prerogative writs,⁶ and to avoid the injustices which resulted from a plaintiff having selected the wrong remedy.⁷ It provides a statutory basis for judicial review in New Zealand, allowing the High Court to review the exercise of a statutory power.⁸
- 1.9 The Judicature Amendment Act 1972 is an unusual amending statute in that it must be read together with and is deemed part of the Judicature Act 1908,⁹ but it stands alongside it, rather than just resulting in amendments to the principal Act. Because of its status as an amending statute to the Judicature Act 1908, it falls under the umbrella of this review. However, the Commission has not been asked to consider the substance of the Judicature Amendment Act 1972. Any such review would be a significant and complex task, and would warrant a reference of its own. Our remit is limited to providing an appropriate legislative home for the statutory right of judicial review.

OBJECTIVE OF THIS REVIEW

Consolidating courts legislation

- 1.10 The ultimate objective of this reference is a consolidation of the legislation relating to the New Zealand trial and appellate courts into one clear, modern and coherent statute. Our aim is to produce a new Courts Bill, which consolidates the provisions of:
- the District Courts Act 1947;
 - the Supreme Court Act 2003; and
 - the relevant provisions of the Judicature Act 1908.

- 1.11 While this review focusses on reorganisation, modernisation and consolidation, to some extent consolidation and revision go hand in hand. This Issues Paper contains some proposals for legislative change that have arisen during our review or have been brought to our attention. We also discuss some areas relating to all the courts where we consider that the existing legislation does not make adequate provision, such as the process for the appointment of judges. The creation of a consolidated Courts Bill provides an opportunity to deal with such matters.
- 1.12 In terms of proposals for legislative revision, the focus of the discussion in this paper is primarily on the provisions of the Judicature Act 1908. There is some discussion of such provisions in the District Courts Act 1947 and the Supreme Court Act 2003 as have been drawn to our attention by the Chief Justice and the heads of bench. In the next stage of this review, in the course of consolidation, the provisions of the District Courts Act 1947 and the Supreme Court Act 2003 will be further considered by the Commission. We will not publish another Issues Paper in relation to that exercise, but we welcome any views that members of the public or the profession may have about how particular provisions of those statutes should be treated in consolidation.

Commercial provisions

- 1.13 There are a number of miscellaneous provisions of a commercial character which are contained in the Judicature Act 1908. These have been added to the Act by amendments over many years on an ad hoc basis, because no better home could be found for them. In our view those provisions, once reviewed, would either be better located in a new statute of a commercial nature, or retained where they are when the rest of the Act is repealed.

Judicial review

- 1.14 Judicial review is of sufficient importance that we consider it should have its own stand-alone statute, a new Judicial Review (Statutory Powers) Procedure Act. We discuss this further below.

Rules of court

- 1.15 We propose that rule making powers for the District Courts, High Court, Court of Appeal and Supreme Court should be included in a new Courts Bill. However, the High Court Rules should not be a schedule to the new Act. Instead, like the current rules of those other courts, they should be statutory regulations. This raises some difficult issues, which we discuss in chapter 8.

JUDICATURE AMENDMENT ACT 1972

- 1.16 As noted above, the Judicature Amendment Act 1972 falls under the umbrella of this review, but the Commission's remit is limited to providing an appropriate legislative home for the statutory right of judicial review.
- 1.17 As this project is not an opportunity to review the substance of the Judicature Amendment Act 1972, we initially considered whether a draft Judicial Review Bill could simply re-enact the existing provisions under a different name. However, this would be problematic, because the provisions of the Judicature Amendment Act 1972 are around 40 years old and do not conform to the modern legislative drafting style.
- 1.18 We have included a preliminary draft Judicial Review (Statutory Powers) Procedure Bill as appendix 1 to this paper. The draft bill contains redrafted provisions of the Judicature Amendment Act 1972 to update the language and improve the accessibility of the Act.
- 1.19 At first sight, the draft bill seems quite different because the provisions have been reordered and put into modern language, and some provisions have been collapsed into others. However, the draft has been prepared with the intention of not altering the substance of the provisions of the Judicature Amendment Act 1972.
- 1.20 Clause 7(2) of the draft Bill identifies certain provisions in the Employment Relations Act 2000 which confer exclusive jurisdiction on the Employment Court and Court of Appeal and which prevail over the Judicature Amendment Act 1972. Clause 7 of the draft bill differs from section 3A of the Judicature Amendment Act 1972, but merely clarifies the current position.

<p>Q1 Do you agree there should be a stand-alone Judicial Review (Statutory Powers) Procedure Bill?</p>
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PARTS OF THIS ISSUES PAPER

- 1.21 To complete part 1, in the next chapter we briefly describe the current New Zealand courts, by way of background.
- 1.22 In part 2 of the paper, we consider matters relating to judges, including appointments, acting and part-time judges, and judicial powers to make orders in relation to contempt and wasted costs.
- 1.23 In part 3, we discuss issues raised by this review and consolidation in relation to the architecture and procedure of the courts of general jurisdiction.

- 1.24 In part 4, we consider in detail other provisions of the Judicature Act 1908 which have not been examined in earlier parts of this paper, including a number of commercial provisions which have been collected together over the years in the Act.
- 1.25 In part 5, we discuss matters relating to representation in court that are raised by the current review, in particular interveners; counsel assisting the court; and applications to have actions declared to be vexatious, which are currently governed by provisions in the Judicature Act 1908.

-
- 1 Spiller, Finn and Boast *A New Zealand Legal History* (2nd ed, Brookers, Wellington, 2001) at 209.
 - 2 These sections were repealed by s 27 of the Constitution Act 1986. Equivalent provisions now appear in ss 23 and 24 of the Constitution Act 1986.
 - 3 Section 51B of the Judicature Act 1908 provides for the membership of the Rules Committee.
 - 4 Judicature Act 1908, s 51C.
 - 5 Court of Appeal Civil Rules 2005; Court of Appeal Criminal Rules 2001.
 - 6 JA Smillie “The Judicature Amendment Act 1977” [1978] NZLJ 232.
 - 7 PA Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at [26.5].
 - 8 The courts have a concurrent and wider jurisdiction under common law to review exercises of (non-statutory) public powers: *McGechan on Procedure* (online looseleaf ed, Brookers) at [JAIntro.01].
 - 9 Judicature Amendment Act 1972, s 1.

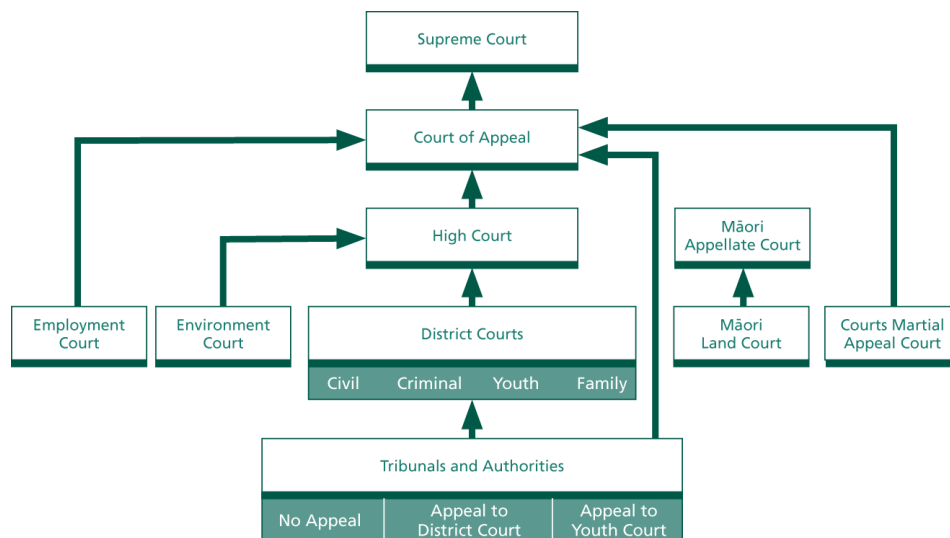
Chapter 2

The present

New Zealand courts

STRUCTURE

- 2.1 The structure of the New Zealand courts is helpfully summarised as follows on the Courts of New Zealand website.¹⁰



DISTRICT COURTS

- 2.2 Although in New Zealand we often refer to the District Court in the singular, there are in fact 63 District Courts located throughout New Zealand. Each one is separately constituted under the District Courts Act 1947.¹¹ The plurality of the District Courts is a matter we will discuss later in this Issues Paper.¹²

- 2.3 Courts of limited jurisdiction have administered justice in New Zealand since 1841. From 1893 until 1980 they were known as Magistrates' Courts and the magistrate was "the law in the only form it was personally seen ... He dispensed justice at the grass roots and was the visible guarantee of peaceful and orderly community life."¹³
- 2.4 By the mid-1970s there was distinct pressure to upgrade the status of Magistrates' Courts and Stipendiary Magistrates to better reflect the extent and degree of responsibility they exercised in the New Zealand legal system.
- 2.5 In 1978, a Royal Commission under the chairmanship of Sir David Beattie reviewed the history and structure of the Magistrates' Courts and concluded that there was a need "to increase the respect for, and the responsibilities of, these courts" while at the same time allowing them "essentially to remain the people's court", so that all sections of the community should be able to access them without anxiety or mistrust, and with the minimum of fuss.¹⁴
- 2.6 The Royal Commission also addressed the need for a Family Court as a distinct division of the District Court with its own "judicial philosophy", to cope with the changes that were taking place in society and family life in New Zealand. There was also concern over the need to increase the criminal jurisdiction of the Magistrates' Courts and to establish a better provision for small civil claims.
- 2.7 The recommendations of the Royal Commission were enacted in 1979. The Magistrates' Courts were renamed as District Courts and Stipendiary Magistrates became District Court judges, empowered to conduct jury trials and impose sentence.
- 2.8 The District Courts are courts of general jurisdiction, hearing both civil and criminal proceedings. In terms of the civil jurisdiction, generally they can hear any civil matter where the amount in dispute is not more than \$200,000.¹⁵
- 2.9 In their criminal jurisdiction, the District Courts conduct more than 95 % of all criminal cases, and hold the vast majority of jury trials. They have exclusive jurisdiction over lower level charges and overlapping, or concurrent, jurisdiction with the High Court in relation to what are presently known as "middle band offences".¹⁶ The only charges that cannot be heard by the District Courts are the most serious crimes, such as murder, manslaughter, treason, espionage and terrorism offences.¹⁷
- 2.10 In addition to their general jurisdiction, the District Courts have two specialist divisions, established by statute: the Family Court and Youth Court. Each division is headed by a Principal Judge who is responsible for ensuring the orderly and expeditious discharge of its business.¹⁸ Each Disputes Tribunal is also a division of the District Courts.¹⁹ Disputes Tribunals have limited civil jurisdiction for claims up to a value of \$15,000.²⁰ Finally, the District Courts also hear appeals from a number of specialist tribunals.

- 2.11 The District Courts are headed by the Chief District Court Judge. As at 16 December 2011, there were 149 District Court judges and 36 acting District Court judges. The District Courts disposed of 180,699 criminal cases and 916 defended civil cases in the 12 months to 30 June 2011.²¹

Family Courts

- 2.12 The Family Courts were established as divisions of the District Courts by the Family Courts Act 1980.²² Section 11 of the Act gives the courts jurisdiction for a wide variety of matters affecting couples, families and children. For example, the Family Courts deal with proceedings arising under the Property (Relationships) Act 1976, the Care of Children Act 2004 and the Adoption Act 1955.²³
- 2.13 The Governor-General may, by warrant, appoint any District Court judge as a Family Court judge, provided that he or she is “by reason of ... training, experience, and personality, a suitable person to deal with matters of family law”.²⁴
- 2.14 In addition to their jurisdiction, Family Courts are distinguishable from the general District Courts because of their less formal proceedings, the limits placed on attendance at hearings and publication of proceedings, the emphasis on conciliation, and because of the supportive services that accompany the Courts, such as the appointment of counsellors and other related officers.
- 2.15 There are 58 Family Courts throughout New Zealand and 43 Family Court-warranted judges.²⁵ The Family Court disposed of 66,015 substantive applications in the 12 months to 30 June 2011.²⁶

Youth Courts

- 2.16 Youth Courts were established as divisions of the District Courts by the Children, Young Persons and Their Families Act 1989.²⁷ A District Court judge may be designated as a Youth Court judge by the Chief District Court Judge provided that he or she is a suitable person to deal with matters within the jurisdiction of a Youth Court by virtue of training, experience, and personality and understanding of the significance and importance of different cultural perspectives and values.²⁸
- 2.17 Youth Courts have jurisdiction over most prosecutions of children aged 12 to 16. Like the Family Courts, attendance at their hearings and publication of their proceedings are restricted.
- 2.18 The Youth Courts disposed of 5049 cases in the 12 months to 30 June 2011.²⁹

HIGH COURT

- 2.19 What is now the High Court was established in 1841.³⁰ It is a single court of general jurisdiction which sits in 19 centres around New Zealand. As noted earlier, its jurisdiction is confirmed in section 16 of the Judicature Act 1908.
- 2.20 The High Court deals with the most serious types of criminal offences before a judge and jury, and can impose sentence in summary (judge alone) cases where a District Court considers that a penalty is warranted that exceeds the District Courts' jurisdiction. It also hears appeals from summary cases.
- 2.21 The court has virtually unlimited jurisdiction in civil cases, but generally deals only with those civil claims that exceed the jurisdiction of the District Courts or other courts and tribunals, or where particularly complex issues are involved. It has specific statutory jurisdiction under a number of Acts dealing with matters such as admiralty, company law, bankruptcy, the administration of estates and trusts, property transfer and land valuation.
- 2.22 The court also has "inherent" jurisdiction. This has been described as a reserve or fund of powers or a residual source of powers which the court may draw upon as necessary whenever it is just or equitable to do so.³¹ The inherent jurisdiction allows the court to deal with questions that cannot be dealt with in a satisfactory manner using only the powers conferred by statute or the rules of court, and ensures that parties are able to find a resolution to their disputes according to law. These powers are affirmed by section 16 of the Judicature Act 1908. The High Court is the only New Zealand court that has inherent jurisdiction.³²
- 2.23 The High Court has a supervisory role, being responsible for ensuring the legality of public sector conduct through judicial review and for most appeals from the District Courts and some tribunals. Rights of appeal to the High Court exist against the decisions of District, Family, Youth and Environment Courts and numerous administrative tribunals and regulatory bodies. Decisions of the High Court are binding on all lower courts until overruled by the Court of Appeal or Supreme Court.
- 2.24 At present, there are 35 High Court judges, including the Chief High Court Judge, and nine associate judges.³³ The High Court disposed of 1074 criminal and civil cases, and 1094 appeals, in the 12 months to 30 June 2011.³⁴

COURT OF APPEAL

- 2.25 New Zealand has had a Court of Appeal since 1862. Until 2003, it was New Zealand's highest domestic court.³⁵ Originally, the Court of Appeal consisted of judges of the Supreme Court (as the High Court was then called) on a rotating basis. Since 1958, however, it has had a permanent base in Wellington with High Court judges specifically appointed as Court of Appeal judges by the Governor-General.³⁶
- 2.26 The Court comprises a President and not fewer than five, nor more than nine, other judges.³⁷ Emphasis is often placed on the harmonious and collegial nature of the Court, which is made possible by the small number of judges, and it has been said that this “allowed it to develop the law of New Zealand in a logical and coherent fashion appropriate to local needs”.³⁸
- 2.27 As its name suggests, the Court of Appeal is almost exclusively an appellate court. It hears civil and criminal appeals from the High Court and appeals from the District Courts on serious criminal charges. It hears appeals from appellate decisions of the High Court in District Courts' cases and some tribunal matters with leave, if a further appeal is warranted. The court may also grant leave to hear appeals against pre-trial rulings in criminal cases, and appeals on questions of law from the Employment Court.
- 2.28 The Court of Appeal has limited original jurisdiction. Pursuant to section 64 of the Judicature Act 1908, the High Court can order the removal of a civil case to the Court of Appeal if the circumstances of the proceeding are exceptional. The High Court can also order that a criminal prosecution be tried at bar by the Court of Appeal with a jury on the ground of extraordinary importance or difficulty.³⁹ Some cases stated under the Commissions of Inquiry Act 1908 are also dealt with originally in the Court of Appeal.⁴⁰
- 2.29 The Court of Appeal is separated into criminal and civil divisions and usually sits as a bench of three judges.⁴¹ There are circumstances when it must sit as a Full Court of five judges,⁴² including where a case is considered of sufficient significance to warrant the consideration of a Full Court. When sitting as a three judge division, the bench usually includes one or two High Court judges, (as nominated by the Chief Justice), and must include at least one Court of Appeal judge.⁴³
- 2.30 The establishment of the Supreme Court has not supplanted the role of the Court of Appeal. As the Law Commission observed in *Delivering Justice for All*, a strong, intermediate appellate court at this level is essential for the health of the court system.⁴⁴ The workload of the Court of Appeal has not diminished,⁴⁵ and it continues to be the appellate court for most litigated cases, exercising an important role in developing legal principle and maintaining consistency in the application of the law.
- 2.31 The Court of Appeal disposed of 343 civil appeals and 557 criminal appeals in the 12 months to 30 June 2011.⁴⁶

SUPREME COURT

- 2.32 Before 2004, New Zealand's highest court of appeal was the Judicial Committee of the Privy Council, which sits in London.⁴⁷ The Supreme Court was established under the Supreme Court Act 2003 and was empowered to hear appeals from 1 July 2004. The Act abolished appeals to the Privy Council. One of the purposes of the Act was:⁴⁸

... to establish within New Zealand a new court of final appeal comprising New Zealand judges—

(i) to recognise that New Zealand is an independent nation with its own history and traditions; and

(ii) to enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history, and traditions; and

(iii) to improve access to justice ...

- 2.33 The Supreme Court sits in Wellington and hears appeals by leave of the Court. Leave will be granted if the Court considers it is necessary in the interests of justice to hear the appeal, on the grounds that:⁴⁹

- the appeal involves a matter of general or public importance;⁵⁰ or
- a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard; or
- the appeal involves a matter of general commercial significance.

- 2.34 In exceptional cases, the Supreme Court may grant leave to appeal against a decision made in a court other than the Court of Appeal.⁵¹

- 2.35 The Supreme Court comprises the Chief Justice and not fewer than four, nor more than five, other judges, appointed by the Governor-General.⁵² The Supreme Court disposed of 31 substantive appeals in the 12 months to 30 June 2011.⁵³

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- 10 Courts of New Zealand “Diagram of the Courts Structure” < www.courtsofnz.govt.nz > . We note that the diagram abbreviates a number of aspects of the structure of the courts – for example, appeals from District Court jury trials go directly to the Court of Appeal, rather than the High Court.
 - 11 District Courts Act 1947, s 3.
 - 12 Chapter 6.
 - 13 FR Macken “A Rose By Any Other Name” [1967] NZLJ 481 at 481.
 - 14 *Report of the Royal Commission on the Courts* (1978) at [258].
 - 15 District Courts Act 1947, s 29.
 - 16 District Courts Act 1947, s 28A(1)(b) and (c) and Part 1 of Schedule 1A. These will be known as Category 2 and 3 offences once the Criminal Procedure Act 2011 comes into force.
 - 17 District Courts Act 1947, s 28A(1)(b) and Part 2 of Schedule 1A. Once the Criminal Procedure Act 2011 comes into force, such “High Court-only” offences will be known as Category 4 offences – see Schedule 1 to the Criminal Procedure Act 2011 for a full list.
 - 18 Children Young Persons and Their Families Act 1989, s 434(7); Family Courts Act 1980, s 6(7).
 - 19 Disputes Tribunals Act 1988, s 4.
 - 20 Disputes Tribunals Act 1988, s 10. Where the parties agree, the value of claims before the Disputes Tribunals may be extended to \$20,000: Disputes Tribunals Act 1988, s 13.
 - 21 Courts of New Zealand “District Courts – workload statistics” < www.courtsofnz.govt.nz > and email from Kelly Laursen to Susan Hall regarding District Court and Youth Court disposal rates (14 November 2011). “Disposed of” means that the case reached a final outcome by any of the available means, including where a defendant was discharged, acquitted or convicted or where the case was stayed or not proceeded with, or, in civil cases, where a claim was withdrawn and where the parties settled the case.
 - 22 Section 4.
 - 23 In full, the courts deal with proceedings under the Adoption Act 1955, Adoption (Intercountry) Act 1997, Care of Children Act 2004, Children Young Persons and Their Families Act 1989, Child Support Act 1991, Civil Union Act 2004, Domestic Actions Act 1975, Domestic Violence Act 1995, Family Courts Act 1980, Family Proceedings Act 1980, Family Protection Act 1955, Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, Law Reform (Testamentary Promises) Act 1949, Marriage Act 1955, Mental Health (Compulsory Assessment and Treatment) Act 1992, Property (Relationships) Act 1976, Protection of Personal and Property Rights Act 1988, and the Wills Act 2007.
 - 24 Family Courts Act 1980, s 5.
 - 25 Ministry of Justice “Quick facts – Family Court of New Zealand” < www.justice.govt.nz > .
 - 26 Courts of New Zealand “District Courts – workload statistics” < www.courtsofnz.govt.nz > .
 - 27 Section 433.
 - 28 Section 435.
 - 29 Courts of New Zealand “District Courts – workload statistics” < www.courtsofnz.govt.nz > and email from Kelly Laursen to Susan Hall regarding District Court and Youth Court disposal rates (14 November 2011).
 - 30 It was known as the Supreme Court until it was renamed the High Court on 1 April 1980: Judicature Amendment Act 1979, s 2.

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- 31 IH Jacob “The Inherent Jurisdiction of the Court” (1970) *Current Legal Problems* 23 at 51.
- 32 Although all courts do possess inherent powers, which enable them to do what is necessary to exercise their statutory functions, powers and duties, and to control their own processes: *McMenamin v Attorney-General* [1985] 2 NZLR 274 (CA).
- 33 There are a further three warranted High Court judges who are not sitting at present while they undertake other roles.
- 34 Courts of New Zealand “Supreme Court, Court of Appeal and High Court – workload statistics” < www.courtsofnz.govt.nz >. These figures comprise 211 criminal cases, 863 civil cases, 269 civil appeals and 825 criminal appeals.
- 35 Before the establishment of the Supreme Court in 2003, New Zealand’s highest court of appeal was the Judicial Committee of the Privy Council which sits in London.
- 36 Judicature Act 1908, s 57(2).
- 37 Judicature Act 1908, s 2(b).
- 38 P Spiller, J Finn and R Boast *A New Zealand Legal History* (2nd ed, Brookers, Wellington, 2001) at 240.
- 39 Judicature Act 1908, s 69.
- 40 See, however, s 34 of the Inquiries Bill 2008, which provides instead for cases stated to be heard in the High Court.
- 41 However, any two judges may act as the Court for the purpose of delivering judgment and a single judge may make incidental orders and directions.
- 42 Judicature Act 1908, s 58D(4).
- 43 Judicature Act 1908, s 58A.
- 44 New Zealand Law Commission *Delivering Justice for All* (NZLC R85, 2004) at 277.
- 45 Although it is anticipated that the criminal appeal workload will gradually reduce once the Criminal Procedure Act 2011 comes into force.
- 46 Courts of New Zealand “Supreme Court, Court of Appeal and High Court – workload statistics” < www.courtsofnz.govt.nz >.
- 47 For the background to the establishment of the Supreme Court, see Gordon Thatcher “The Supreme Court of New Zealand” (2010) 36 *Commonwealth Law Bulletin* 461 and P Spiller, J Finn and R Boast *A New Zealand Legal History* (2nd ed, Brookers, Wellington, 2001) at 245–246.
- 48 Section 3(1)(a).
- 49 Section 13(2).
- 50 A significant issue relating to the Treaty of Waitangi is a matter of general or public importance: s 13(3).
- 51 Section 14. The courts to which this section applies are the High Court, the Employment Court, the Māori Appellate Court and the Courts Martial Appeal Court.
- 52 Section 17.
- 53 Courts of New Zealand “Supreme Court, Court of Appeal and High Court – workload statistics” < www.courtsofnz.govt.nz >.

Part 2

JUDGES



Chapter 3

Judicial appointments

INTRODUCTION

- 3.1 Judges have to be appointed for each of the courts that we have just described in chapter 2. In April 2002, the Advisory Group on the Establishment of the Supreme Court advised the then Attorney-General, Hon Margaret Wilson: “The issue of judicial appointments is fundamental. The group considers that all Judges should be appointed by a transparent process, with clear criteria, and adequate and appropriate consultation.”⁵⁴ The group suggested that further work should be undertaken on the judicial appointments process to ensure a more transparent and inclusive process.
- 3.2 We consider the comments by the Advisory Group still to be apposite today. Despite laudable attempts by successive Solicitors-General since the late 1990s to ensure a transparent and articulated process for judicial appointments, with more distinct consultation,⁵⁵ our enquiries suggest that the results have been uneven.
- 3.3 In this chapter, we deal with gaps in the legislation relating to the appointment of judges in New Zealand, particularly in relation to consultation and the criteria for appointments. We discuss the possible evolution of more generic appointments provisions, instead of having differing provisions for each of the courts located in different parts of a new Courts Bill. Preliminary draft provisions are attached as appendix 2.
- 3.4 We do not reconsider the basic tenet of the current process, that ultimately appointments are proposed by a member of the Executive. However, we are concerned to ensure that the current process is better reflected in the legislation to ensure transparency.
- 3.5 Although the following discussion does not specifically refer to Associate Judges of the High Court, the same principles are also relevant to the process for their appointment.

CURRENT LEGISLATIVE PROVISIONS

District Courts Act 1947

- 3.6 Section 5(1) of the District Courts Act 1947 provides that the Governor-General may from time to time appoint “fit and proper” people to be District Court judges. This is, however, qualified by section 5(3), which provides that no person shall be appointed a judge unless he or she has held a practising certificate as a barrister or solicitor for at least 7 years, or “has been continuously employed as an officer of the responsible department or Ministry of Justice for a period of at least 10 years, and during that period has been employed for not less than 7 years as the clerk or Registrar of a court, and is a barrister or solicitor who has been qualified for admission, or admitted, as such for not less than 7 years”.

Judicature Act 1908

- 3.7 Section 4(2) of the Judicature Act 1908 provides that “Judges of the High Court shall be appointed by the Governor-General in the name and on behalf of Her Majesty.” Section 6 provides that persons appointed as judges must have held a practising certificate as a barrister or solicitor for at least 7 years. Beyond these provisions, the Act is silent on the process for the appointment of High Court judges and the requirements for appointment. There is no “fit and proper” requirement for persons to be appointed to the superior courts.⁵⁶
- 3.8 The statutory provisions relating to the Court of Appeal are likewise relatively scant. These state that the Court of Appeal comprises judges of the High Court appointed by the Governor-General as judges of the Court of Appeal.⁵⁷ A judge may be appointed to be a Court of Appeal judge either at the time of appointment as a High Court judge or at any time thereafter. There are no additional statutory requirements, and there is no prescribed process for appointment.

Supreme Court Act 2003

- 3.9 The Supreme Court Act 2003 contains provisions regarding the appointment of Supreme Court judges. The only requirement is appointment as a judge of the High Court, and a Supreme Court judge may be appointed as a judge of the High Court either prior to, or at the same time as, appointment as a judge of the Supreme Court.⁵⁸

APPOINTMENT BY THE GOVERNOR-GENERAL

- 3.10 A judge is appointed by warrant by the Governor-General of New Zealand. This is uncontroversial, and in line with the principle adopted in other jurisdictions.
- 3.11 Since there is no difference between the courts in this regard, we consider there should be a generic appointments section in a new Courts Bill enabling the Governor-General to appoint judges by warrant to any of the courts we are considering.

ADVICE TO THE GOVERNOR-GENERAL

- 3.12 The Governor-General does not act on his or her own initiative. Somebody who is lawfully empowered to do so has to advise the Governor-General on the particular individual recommended for appointment so the actual appointment can be made. What is difficult, and has caused controversy from time to time, is the process leading up to that recommendation and whether there should be articulated criteria for appointment.
- 3.13 Under the present New Zealand regime, by convention the Prime Minister makes the recommendation to the Governor-General for the office of Chief Justice of New Zealand. This seems appropriate, given the constitutional significance of that office. Not only is the Chief Justice the Head of Bench in the Supreme Court of New Zealand, he or she is also the head of the New Zealand judiciary.⁵⁹ Further, the Chief Justice is Administrator of the Government when the Governor-General is overseas or unable to perform that office,⁶⁰ and it is the Prime Minister who recommends the appointment of the Governor-General to the Sovereign.
- 3.14 For all other judicial appointments, the Attorney-General advises the Governor-General. This appears to us to be sound. Apart from anything else, the Attorney-General is the Senior Law Officer in New Zealand, with a particular responsibility to advise the Executive with respect to matters affecting the judiciary.
- 3.15 Appointments are mentioned in Cabinet after they have been determined, but the convention is that they are not discussed or approved by Cabinet.

Issues

- 3.16 There is a point of fundamental principle as to whether the final decision on a recommendation should be removed altogether from the political sphere. We agree with the view expressed by two lawyers with experience as Attorneys-General, that the decision should rest with the Executive, which is then politically accountable for the choices it makes in this area.⁶¹ This is a very strong constitutional argument.

- 3.17 These days, the process for appointing judges to the District Courts is well set out on the Courts of New Zealand website.⁶² However, details of the process for appointing judges to the higher courts are not easily accessible to the public.⁶³
- 3.18 In contrast to New Zealand, a number of countries, including most recently the United Kingdom, have established a Judicial Appointments Commission to advise on appointments.⁶⁴ After calls for New Zealand to follow suit around the time our Supreme Court was established, the Ministry of Justice examined the possibility of establishing a judicial appointments commission in this country to identify and recommend suitable candidates for judicial office.⁶⁵ Ultimately, this was not progressed.
- 3.19 We consider that to shift the responsibility for recommendations of appointment from the Executive to a body such as an appointments commission would be a major policy change, and outside the scope of this project.
- 3.20 Even if that were not so, our preliminary research and enquiries suggest that a commission is not presently, or in the foreseeable future, a viable option for New Zealand. To take only one illustration, the Judicial Appointments Commission in the United Kingdom, which selects candidates for judicial office in courts and tribunals in England and Wales, and for some tribunals whose jurisdiction extends to Scotland and Northern Ireland, nominates more than 700 judges per annum. It is a substantial organisation with 15 commissioners, a highly refined selection process and significant support staff.⁶⁶ By way of contrast, New Zealand appoints perhaps a dozen judges per annum across all courts. The kind of institution needed to do the job adequately along the United Kingdom lines would require resources quite disproportionate to the number of appointments to be made in New Zealand.⁶⁷
- 3.21 However, in our view the current system could be improved if the legislation required the Attorney-General to consult with a range of persons prior to making a recommendation for appointment, and set out the criteria on which appointments should be made.

CONSULTATION

- 3.22 There is a consistent thread of criticism of the present system of consultation (to the extent that there is one) that, at least in relation to the higher courts, it is not known, transparent or operating on articulated criteria.
- 3.23 Traditionally, Attorneys-General in New Zealand have taken “soundings” from the Solicitor-General on appointments to the higher courts, and from the Secretary for Justice on appointments to the District Courts. However, there is no legislative requirement to do this.

- 3.24 To move on from the purely discretionary approach to consultation, the legislation could require the Attorney-General to consult with an appropriate range of people prior to making a recommendation to the Governor-General. The Attorney-General could consult more widely than with the prescribed persons, and could supplement the required consultation in other ways (such as advertising and interviews) if that was considered appropriate in particular cases.
- 3.25 As a minimum requirement, we consider the Attorney-General should be required to consult with the Chief Justice, the Solicitor-General, and the Presidents of the New Zealand Law Society and the New Zealand Bar Association before making any recommendations to the Governor-General for the appointment of judges to the higher courts. The Attorney-General should be required to consult with the same people for appointments to the District Courts, except for the Chief Justice, for whom the Chief District Court Judge would be substituted in relation to those appointments. In addition, the President of the Court of Appeal should be consulted on the appointment of other Court of Appeal judges, and the Chief High Court Judge should be consulted on the appointment of other High Court judges. There should also be a requirement for the Principal Judge of any division of the District Court to be consulted on an appointment to the relevant division.⁶⁸
- 3.26 We do not consider that it would be necessary for legislation to require the Attorney-General to undertake the same consultation again for an appointment elevating or moving a judge from one court to another.
- 3.27 This regime of consultation is similar to that proposed by successive Solicitors-General, and which operates to a greater or lesser extent today, depending on the preferences of the particular Attorney-General. It would create a legislated statutory minimum requirement for consultation, but leave it open to the Attorney-General to develop other techniques for making recommendations, as may be thought to be appropriate from time to time. We envisage that the Attorney-General would consult with a broader range of people, and possibly even suitable lay persons, in order to encourage diversity.

Q2 Should the Attorney-General be required, by legislation, to consult those persons set out in para 3.25 of this chapter in advising the Governor-General on judicial appointments?

CRITERIA FOR APPOINTMENT

- 3.28 The topic of criteria for judicial appointment has drawn both professional and mainstream media comment in recent years. There are two fundamental issues of principle relating to criteria for appointment of judges. First, there has to be sound structural protection against any political control of the judiciary.

- 3.29 Second, there are legitimate concerns with respect to diversity within the judiciary. Although some progress has been made regarding the appointment of women judges, the position is still not satisfactory.⁶⁹ Ethnic diversity also remains a particular concern.
- 3.30 In a recent speech, the Chief Justice remarked that, although it is controversial to say so, all of the experiences of a judge cannot help but impact upon substantive outcomes in judging.⁷⁰ Although personal beliefs or sympathies cannot deflect a judge from doing what is right according to law in the particular case, how the judge goes about “judging” is critical.
- 3.31 Further, quite apart from how judges actually rule, it has to be recalled that there are many other manifestations of the judge’s role where a diversity of viewpoints is a welcome and even necessary thing. Judges make numerous “corridor” contributions to the work of each other and how things are presented. For instance, a simple reminder that what is being done will have to be acceptable to a variety of cultures is sometimes of great importance.
- 3.32 It would be wrong also not to acknowledge that there are components of a judge’s work which do have distinct policy components (on which a judge is required to rule) and questions of that kind ought necessarily to reflect a spread of experience and background.
- 3.33 Judicial diversity is necessary to enhance the legitimacy of the courts and improve public confidence in them. It also provides important role models in society. We realise this is a complex matter, and that the need for greater diversity in senior members of the legal profession is a related issue, but the impact of diversity on the legitimacy and functioning of the judiciary is now simply too compelling for concrete steps not to be taken.
- 3.34 Diversity factors aside, there is universal agreement around the Western world that judges should be appointed “on merit”. We acknowledge that this term can be slippery and insufficiently precise. There is also a substantial literature that endeavours to assess what it means.
- 3.35 However, on closer analysis, there is general agreement that merit is a respectably well-understood term in a professional context. It includes such things as legal ability (most importantly sound knowledge of the law and experience of its application), qualities of character (such as personal honesty and integrity, open-mindedness and impartiality, an ability to listen, and collegiality), good judgement and common sense, and appropriate personal skills (particularly communications skills). These features need to exist alongside an effective appreciation and reflection of New Zealand society.
- 3.36 Obviously there is also a need for “horses for courses”. The combination of qualities required in a Family Court judge dealing day in and day out with a particular kind of subject matter is not necessarily the same as those sought in, say, an appellate judge.

- 3.37 Our provisional view is that while no single template is possible or desirable for New Zealand judges, it is possible to state some principles at a level of generality that ought to be required to be observed by an Attorney-General in making appointments.
- 3.38 We consider these to be:
- equality of opportunity for all who are eligible for judicial office;
 - appointment on merit;
 - the need for potential candidates for appointment to exhibit an awareness of and sensitivity to, the diversity of modern New Zealand, including tikanga Māori; and
 - the desirability of the judiciary being an adequate reflection of society, and exhibiting an appropriate degree of social awareness.
- 3.39 It is sometimes said that stating criteria in this way can actually inhibit the proper breadth of the appointment process, or that it is merely stating the obvious. Indeed, we have no doubt that these principles are already in the forefront of the minds of Attorneys-General. However, legislation of this character also has important symbolic and persuasive functions. We are, therefore, provisionally inclined to the view that criteria should be included in the legislation.

Q3 Should the criteria which the Attorney-General is obliged to consider in recommending a person for judicial appointment be set out in legislation?

Q4 Should the criteria reflect the principles in paragraph 3.38, or should they be something different?

PART-TIME APPOINTMENTS

- 3.40 Section 4C(1) of the Judicature Act 1908 provides that a judge of the High Court acts “on a full time basis” unless that judge is authorised by the Attorney-General to act on a part-time basis for any specified period. A judge authorised to act on a part-time basis must resume acting on a full-time basis at the end of the specified period. For the avoidance of doubt, it is made plain that such an appointment can be made from the inception of appointment as a judge, and may be made more than once in respect of the same judge. The authorisation may occur only on the request of the judge and with the concurrence of the Chief High Court Judge, who must have regard to the ability of the court to discharge its obligations in an “orderly and expeditious way”.

- 3.41 There is an equivalent provision in the District Courts Act 1947,⁷¹ but section 4C(8) of the Judicature Act 1908 provides that an authorisation may not apply to a judge of the Court of Appeal or Supreme Court. As a matter of principle, we cannot see why the Court of Appeal should be treated differently from the High Court.
- 3.42 In practice, part-time appointments are generally sought in two situations. First, part-time appointments may be particularly important to persons with family responsibilities, who cannot work full time. In that sense, part-time appointments are supportive of gender diversity.
- 3.43 At the other end of a career, an able judge may have served many years but wish to “scale down” his or her involvement prior to retirement. A judge might for instance serve 15 years full-time, but wish to serve the remaining five years of a 20 year judicial career part-time. There may be sound social and professional reasons for enabling this to occur, but arguably it is not possible under the current legislation because a part-time appointee must resume full-time work at the end of the specified period. In our view, the legislation should provide more flexibility in this regard, to enable an older judge to work reduced hours for a period of up to five years before retirement.

Q5 Should it be possible to appoint part-time judges in the Court of Appeal?

FORMAL CONSTRAINTS

- 3.44 In the New Zealand statutes we have under consideration there are important formal constraints on the appointment of judges.
- 3.45 First, no person is to be appointed as a judge unless that person has held a practising certificate as a lawyer in New Zealand for at least seven years. We are not aware of any dissatisfaction with that principle, or any suggestions that it needs to be altered.
- 3.46 Second, as a broad principle, judges must not undertake any other paid work. In short, they are expected to devote their full time attention to their judicial work. How this is achieved statutorily is somewhat untidy, and is less transparent than it should be.

No other employment or office

- 3.47 Section 4(2A) of the Judicature Act 1908 provides:
- A Judge must not undertake any other paid employment or hold any other office (whether paid or not) unless the Chief High Court Judge is satisfied that the employment or other office is compatible with judicial office.
- 3.48 This provision was inserted into the Act at the same time as other provisions dealing with part-time judges.⁷² Although we consider it applies to all judges, whether they are full- or part-time, this is not explicit on the face of the section.

- 3.49 The equivalent provision in the District Courts Act 1947 provides in addition that “no judge shall practise as a barrister or solicitor”.⁷³
- 3.50 There is also room for argument as to whether section 4(2A) of the Judicature Act 1908 applies to judges of the Supreme Court and Court of Appeal. Section 4 is in part 1 of the Judicature Act 1908, which deals with the High Court. The appellate judges are technically also judges of the High Court, although they do not sit on the High Court bench, and their relevant head of bench is not the Chief High Court Judge, but the President of the Court of Appeal or the Chief Justice (as the case may be).
- 3.51 Section 4(2A) was raised by counsel in *Saxmere Company Limited and Ors v Wool Board Disestablishment Company Limited*, but the Supreme Court found it unnecessary to decide whether subsection (2A) has any application to judges of the Court of Appeal or of the Supreme Court.⁷⁴ The Supreme Court noted that “it would be odd, to say the least, to require an appeal judge to obtain a consent of the kind envisaged by the subsection from the head of a lower bench.”⁷⁵ This approach has been criticised.⁷⁶
- 3.52 We consider the relevant section in a new Courts Bill should apply to all judges, whether they have a full- or part-time warrant, and it should be clear on its face that it applies to the appellate judges also. We are provisionally of the view that a generic section is appropriate, which clearly states that no judge may undertake any other paid employment, act as a barrister or solicitor, or hold any other office (whether paid or not), unless the particular head of bench for that judge is satisfied that employment or other office is compatible with judicial office.
- 3.53 This last point is important. Judges are from time to time asked to serve on such things as school boards or advisory organisations, some of distinct significance. There ought to be provision across all courts for prior clearance through the head of bench for any such undertaking as being not incompatible with judicial office.
- 3.54 This likely reflects the existing practice, but we think it should be provided for in legislation, so the position is clear to the public.

Q6 Should the provisions preventing judges from undertaking other employment or holding other office apply to judges of all courts? Should they apply to both part-time judges and full-time judges?

ACTING JUDGES

- 3.55 The appointment of acting or temporary judges has long been a contentious matter in many jurisdictions. Some jurisdictions preclude them altogether. In Australia, for instance, acting appointments are not permitted at the Federal level.⁷⁷

- 3.56 In New Zealand, there is a real mix of provisions. Section 11 of the Judicature Act 1908 is headed “temporary judges”. It provides that at any time during the illness or absence of any judge, or for any other temporary purpose, the Governor-General may appoint any person, including a former judge, to be a High Court judge for a term not exceeding 12 months. Any person so appointed may be reappointed, but no judge may hold office under section 11 for more than two years in the aggregate. Curiously, section 11A, which is headed “former judges”, then provides that the Governor-General may appoint any former judge to be an acting High Court judge for a term not exceeding two years, or one year if the former judge has attained the age of 72 years. No person can be appointed a temporary or acting High Court judge unless both the Chief Justice and the Chief High Court Judge have certified that, in their opinion, it is necessary for the “due conduct” of the court’s business.
- 3.57 Acting District Court judges may be appointed under section 10 of the District Courts Act 1947. A person (including a judge), who has attained the age of 70 years may be appointed for a period of up to one year, or for two or more periods not exceeding four years in the aggregate. Section 10A deals with acting retired judges, and provides that each appointment may not exceed 2 years, or one year if the person has attained 72 years.
- 3.58 There is no provision for acting judges in the Court of Appeal, but former judges of the Supreme Court and Court of Appeal can be appointed as acting judges in the Supreme Court under section 23 of the Supreme Court Act 2003.
- 3.59 The legislative provisions relating to acting judges therefore provide for different periods of appointment depending on whether a judge is a temporary or an acting judge, have different provisions regarding reappointments, and different provisions around the ages of retired acting judges in the different courts. The provisions relating to acting heads of bench also differ.⁷⁸
- 3.60 In considering these provisions, it is necessary to ask, why do we have them at all? Acting or temporary judges could serve several purposes. First, there may be temporary exigencies (such as illness) in a given bench. Second, an acting appointment might be considered to provide a training ground to determine whether the judge is suitable for permanent appointment. Third, acting appointments might functionally ease the judicial workload of a particular bench.
- 3.61 The training ground rationale, so far as we are aware, has not been resorted to in New Zealand, although we understand that people soon to be appointed as permanent judges may be appointed as temporary judges until there is a vacancy for a permanent judge. Sometimes, because of local exigencies, an acting judge has been appointed. It is impossible to provide a template for these. Illness might intrude, or a judge might be appointed to an inquiry, or be unavailable for other reasons.

- 3.62 It is fair to say that acting judges have most commonly been appointed because of insufficient permanent judges to get through the workload. Those appointed for this sort of reason have usually reached the statutory retirement age for judges of 70 years. In effect, they are given an extension of their judicial term, for a relatively short, but renewable, period. Broadly speaking, these extensions are confined to a period of one to four years.
- 3.63 The courts rely on the use of acting judges. It has been suggested to us that the District Courts, in particular, could not presently get through their workload without the assistance of acting judges. In the High Court, we understand that in recent years as many as six High Court judges (approximately one-sixth of the High Court bench) have held acting warrants.
- 3.64 This can create real anomalies. A judge who retires on a full pension under the pre-1992 judges' scheme can become an acting judge under the new scheme and in effect receive a salary plus what some might see as double retirement support. Of course, with the passage of time that possibility will fade away, but, particularly with District Court judges being appointed at a younger age today, the possibility of acting appointments on top of a normal full term of judicial service could numerically increase.
- 3.65 There is also a danger, routinely rehearsed in the academic literature, that judges approaching the retirement age could make decisions favourable to the government in order to secure an acting appointment. The Court of Appeal noted in *R v Te Kahu* that the appointment of temporary sheriffs in Scotland failed the requirement of an independent and impartial tribunal required by Scots law, which had incorporated the European Convention on Human Rights.⁷⁹ Also, the Supreme Court of Canada has held that the use of acting judges in the Ontario Provincial Court (being former judges appointed to serve "during pleasure") was inconsistent with the requirement for an independent judiciary provided for in the Canadian Charter of Rights and Freedoms.⁸⁰
- 3.66 The renewable nature of fixed term warrants exacerbates matters. Given that the renewable tenure is normally one or two years, it can be said that it is only marginally removed from tenure at pleasure.
- 3.67 In *Forge v ASIC*, the High Court of Australia held by a majority that the appointment of acting judges at State level would not deprive the particular court of the description of a "court".⁸¹ The majority saw the institutional integrity of such courts as not being inevitably compromised by the appointment of an acting judge.
- 3.68 In dissent, Kirby J skilfully assembled the arguments with respect to the inappropriateness of a significant shift of the judiciary from permanent tenure judges to acting judges as being threatening to the independence and impartiality of the judiciary. Nor, he thought, is the exclusive appointment of retired judges the answer: it merely reduces the institutional affront.

- 3.69 His concerns were that extensions for retired judges are dependent on the will of the Executive; some retired judges because of their desire for continuation in office are in some sense beholden to the will of the Executive; and some acting judges in Australia at least have mixed intervals of judicial service with private professional activities. Further, acting judges tend to lack staffing, full personal benefits and the institutional resources of permanent judges. In practice, they tend to play a more limited role in the court when compared with permanent judges. Overall, there is a concern over the breakdown in judicial culture of an exclusive, dedicated, tenured service.
- 3.70 Depending on the method of selection, the use of acting judges may also create a risk of particular judges being appointed to influence the outcome of a decision.⁸²
- 3.71 As a matter of fundamental principle, we incline to the view that judicial appointments in New Zealand should normally only be permanent. Resort should not be made to acting or temporary appointments merely to make up the numbers because of a failure of government to appoint sufficient permanent judges. Some exceptions may have to be entertained to cope with unexpected absences or extended illnesses, but acting appointments should generally be avoided. We are also provisionally of the view that there should be a generic legislative provision providing for acting judges, rather than both temporary and acting judges.
- 3.72 To minimise the use of acting judges, the statute should restrict the appointment of acting judges to situations where there is a temporary illness or absence of any judge, and where the Chief Justice or the Chief District Court Judge (depending, respectively, on whether it is a superior or inferior court appointment) has certified that the appointment is necessary for the proper conduct of the business of the relevant court.
- 3.73 The age and term requirements should also be standardised. In our view, only former judges under the age of 75 years should be eligible for appointment. We do not see how a person without experience as a judge can seriously be expected to step in as an acting judge, and a person who is about to be appointed as a permanent judge should be appointed as such, rather than as an acting or temporary judge until there is an actual vacancy.
- 3.74 An appointment should be for a specified term of up to two years. Reappointment for a further one or more terms should also be possible until a judge reaches the age of 75, but an acting judge's term of appointment should not exceed five years in aggregate.
- 3.75 Another issue of principle is whether the Court of Appeal should be treated differently from the trial courts. It seems odd that there is no provision enabling the appointment of acting judges to the Court of Appeal, although it does get assistance through having members of the High Court judiciary included in the divisional courts of the Court of Appeal.

- 3.76 Previously, acting judges could be appointed to the Court of Appeal, and it is hard to see why, as a matter of principle, the same sort of exigencies that might occur in other courts might not also occur in the Court of Appeal. We are provisionally of the view that the Court of Appeal should be included in a generic provision for acting judges.
- 3.77 Having acting judges in the Supreme Court may be considered problematic, as it is a final court, but the Court's constitution necessitates such appointments. There must be at least five, but can be six, judges appointed to the Supreme Court.⁸³ For the purposes of the hearing and determination of an appeal, the Court must comprise five judges.⁸⁴ For almost all of its history the Court has only had five judges, but sometimes a sixth has been appointed for a short period in anticipation of a retirement. Therefore, if there are only five judges and one of them has to recuse (stand down) for a conflict of interest or other good and sufficient reasons, the quorum then falls below the statutory minimum of the court.
- 3.78 Section 23 of the Supreme Court Act 2003, therefore, enables the Governor-General to appoint retired judges of the Supreme Court or Court of Appeal, who have not yet reached the age of 75 years, as acting judges. Under this provision, for instance, the Rt Hon Sir Thomas Gault and the Hon Sir Noel Anderson have been acting judges and able to assist the court as and when required.
- 3.79 Although the administration could overcome the difficulty by ensuring that there are always six permanent members of the Court, the practicality of this would depend on other factors such as the Court's workload.
- 3.80 Alternatively, the legislation could enable the Supreme Court to sit with a quorum of four judges, but that is an awkward solution because it may result in a split court.⁸⁵
- 3.81 The third alternative is to retain provision for acting judges. With regard to who those judges are to be, there seems to be no real danger in New Zealand in resorting to retired Supreme Court judges, as we understand that acting judges are not "cherry-picked"; rather, cases are allocated on a rotational basis from those acting judges who are available.
- 3.82 Finally, it has been suggested that the acting judge to be resorted to should be the most senior non-conflicted Court of Appeal judge.⁸⁶ However, we consider that this will likely give rise to practical difficulty, as the senior Court of Appeal judges routinely preside in that court, and all the judges in that court preside in Divisional Courts from time to time.
- 3.83 Despite the understandable concerns raised by commentators, it is difficult to see how the necessity to have the ability to resort to acting judges in the Supreme Court, even if only intermittently, can ever be avoided. Our preliminary view therefore is that the provision enabling acting judges should apply to the Supreme Court.


Q7 Should acting judges be permitted? If so, to what benches should they be appointed, and on what terms?

JUDICIAL RECUSAL

- 3.84 It is a fundamental proposition of our legal system that a court should be fair and impartial. However, sometimes things may come to light that suggest a judge's personal or prior "connection" with the case, or the circumstances of it, should lead that judge to not sit on it, notwithstanding the judge's initial allocation to that case.
- 3.85 From a practical point of view, there is presently no legislation or any rules of court dealing with the process of recusal. This means that it is difficult for the bar and for litigants in person to know how to advance any concerns they may have.
- 3.86 In an Issues Paper published in March 2011,⁸⁷ the Commission drew attention to the process problems in recusal cases, and the unsatisfactory state of practice surrounding them. We suggested each judicial bench be required to develop a recusal process, which should be published in the *Gazette*, similar to the way in which the President of the Court of Appeal is required to *gazette* the process for determining when a Full Court should be assembled. These recusal processes should also be available on the Courts' website,⁸⁸ as the other matters requiring *Gazette* notices currently are.
- 3.87 The submissions we received in response to the Issues Paper were generally supportive of this proposal, and we are therefore inclined to recommend it be included as a requirement in a new Courts Bill.
- 3.88 We welcome any further submissions on this issue.

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- 54 Report of the Advisory Group *Replacing the Privy Council: A new Supreme Court* (April 2002) at 39.
 - 55 John McGrath QC “Appointing the Judiciary” (1998) NZCJ 314; Terence Arnold QC “Judicial Appointments” (paper presented to the NZ Bar Association Conference, August 2003).
 - 56 However, Associate Judges of the High Court are required to be “fit and proper persons” under s 26C of the Judicature Act 1908.
 - 57 Judicature Act 1908, s 57.
 - 58 Section 20.
 - 59 Supreme Court Act 2003, s 18(1).
 - 60 Letters Patent Constituting the Office of Governor-General of New Zealand, cl 12.
 - 61 Rt Hon Paul East QC “A Judicial Commission?” (1995) NZLJ 189 and Rt Hon Sir Geoffrey Palmer SC “Judicial Selection and Accountability: Can the New Zealand System Survive?” in Gray and McLintock (eds) *Courts and Policy* (Brookers, Wellington, 1995) 11 at 84. See also Malleson and Russell (eds) *Appointing Judges in an Age of Judicial Power* (University of Toronto Press, Toronto, 2006).
 - 62 Ministry of Justice “Judicial Appointments: Office of District Courts Judge – March 2010” < www.courtsofnz.govt.nz > .
 - 63 A useful summary appears in a 2004 consultation paper by the Ministry of Justice on whether New Zealand should establish a Judicial Appointments Commission: see Ministry of Justice “Appointing Judges: A Judicial Appointments Commission for New Zealand? A public consultation paper” (April 2004).
 - 64 See Constitutional Reform Act 2005 (UK). The UK Judicial Appointments Commission was launched in April 2006. It is an independent public body responsible for recommending candidates for judicial office.
 - 65 Ministry of Justice “Appointing Judges: A Judicial Appointments Commission for New Zealand? A public consultation paper” (April 2004).
 - 66 The Commission has an excellent website that fully sets out its role, history and processes: see Judicial Appointments Commission < www.jac.judiciary.gov.uk > .
 - 67 The 2010/11 Annual Report of the JAC shows expenditure of approximately NZ\$18 million, even after making substantial savings of NZ\$3 million over the previous year, as part of a cost savings drive by the United Kingdom government.
 - 68 Principal Judges currently sit on interview panels for appointments to their divisions, but there is no requirement for this.
 - 69 Currently 10 of the 38 High Court judges are women, and 42 of the 149 District Court judges are women. Over the past five years, four out of 14 appointments to the High Court bench have been women.
 - 70 Dame Sian Elias, Chief Justice of New Zealand “Address to the Canadian Chapter of the International Association of Women Judges’ Conference” (Vancouver, Canada, 10 May 2011).
 - 71 Section 5AA.
 - 72 Judicature Amendment Act 2004.
 - 73 Section 5(5).
 - 74 *Saxmere Company Limited and Ors v Wool Board Disestablishment Company Limited* [2009] NZSC 122, [2010] 1 NZLR 76.

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- 75 At [9].
- 76 Phil Taylor “Judge faces being first to go to conduct panel” *The New Zealand Herald* (online ed, Auckland, 19 December 2009).
- 77 Commonwealth of Australia Constitution Act (Cth), s 72.
- 78 Compare Supreme Court Act 2003, s 19(1) and (2); Judicature Act 1908, ss 4A(4) and 57(7); District Courts Act 1947, s 5A(4).
- 79 *R v Te Kahu* [2006] 1 NZLR 459 at 470, citing *Starrs v Procurator Fiscal* (1999) 8 BHRR 1 and *Millar v Dickson* [2002] 3 All ER 104.
- 80 *Valente v R* [1985] 2 SCR 673.
- 81 *Forge v ASIC* [2006] HCA 44.
- 82 Petra Butler “The Assignment of Cases to Judges” (2003) 1 NZJPIL 84.
- 83 Supreme Court Act 2003, s 17(1).
- 84 Section 27(1).
- 85 Section 31 provides that if the judges are equally divided in opinion, the decision appealed from or under review is taken to be affirmed.
- 86 Michael Taggart “Acting Judges and the Supreme Court of New Zealand” (2008) 14 Canterbury Law Review 217.
- 87 Law Commission *Towards a New Courts Act – A Register of Judges’ Pecuniary Interests* (NZLC IP21, 2011).
- 88 Courts of New Zealand < www.courtsofnz.govt.nz > .



Chapter 4

Leadership and accountability

RESPONSIBILITY AND ACCOUNTABILITY

- 4.1 As we have already indicated, New Zealand has an unusual functional grouping in its trial and appellate courts. The High Court, Court of Appeal and Supreme Court all have different statutory responsibilities, but the judges of those courts (who actually form the particular “court”) are linked to a common college – that of their status as High Court judges. This is an important policy feature of the courts' architecture in New Zealand.
- 4.2 Within the higher courts, pursuant to section 4B of the Judicature Act 1908 the Chief High Court Judge is responsible to the Chief Justice for ensuring the orderly and prompt conduct of the High Court's business. The Chief High Court Judge may make all the arrangements that are necessary for the sittings of the Court and the conduct of its business. This amendment was put in place in 2003 when the Chief Justice moved to become Head of Bench in the Supreme Court and head of the judiciary in New Zealand.
- 4.3 There is no similar “linkage” within the higher courts for the President of the Court of Appeal. In our view, there ought to be a similar statutory accountability mechanism for the Presidency of the Court of Appeal. This would not be a radical change to the status quo: we understand that the Chief Justice has met for some time now on an inter-bench basis with the President of the Court of Appeal and the Chief High Court Judge to resolve matters of mutual necessity or interest.
- 4.4 In the District Courts, the late Chief Judge Johnson and the Principal Judges of the Family Court and the Youth Court had evolved a series of protocols which effectively resulted in the Principal Judges being responsible to the Chief District Court Judge for ensuring the orderly and prompt conduct of the District Courts' overall business.

- 4.5 We propose that these formal linkages should be expressly set out in a new Courts Bill. The Chief District Court Judge should continue to have authority in relation to, and responsibility for, the proposed single national District Court structure,⁸⁹ just as she currently does for the District Courts. The Principal Judges of the Youth Court and Family Court should be responsible to the Chief District Court Judge for ensuring the orderly and prompt conduct of the business of their divisions. In relation to the lower courts, the Chief District Court Judge would have final authority, thus preserving the distinction between the higher/lower courts structure. The Chief District Court Judge should be enabled to make all the arrangements that are necessary for the sittings of the District Court (and its divisions) and the conduct of the business of the District Court.
- 4.6 The Chief Justice of New Zealand, as head of the judiciary, would again have authority to engage with the Chief District Court Judge if and when it ever became necessary.
- 4.7 In short, putting in place these formal linkages would in practice amount to confirmation of what has already evolved. The Commission, however, considers this to be sufficiently important to warrant legislative recognition.

Q8 Do you agree that the linkages in the structure of the judiciary should be formally recognised in legislation?

Q9 If so:

- should the Principal Judges of the Youth Court and the Family Court be responsible to the Chief District Court Judge for ensuring the orderly and prompt conduct of the business of their divisions?
- should the President of the Court of Appeal and the Chief High Court Judge be accountable to the Chief Justice for the orderly and efficient operation of their benches?

Annual reporting obligation?

- 4.8 One further issue we raise for consideration is whether there should be a statutory requirement for the Chief Justice to produce an annual report on the judiciary in New Zealand.
- 4.9 It is of the greatest constitutional importance that the judiciary be independent of the Executive. The judiciary must, however, also be individually and collectively accountable for the proper discharge of its functions.
- 4.10 Individual accountability for decisions is secured through rights of appeal. In New Zealand, these rights are very broad. Complaints about inappropriate judicial conduct can be directed to the Judicial Conduct Commissioner.⁹⁰ The Commissioner is appointed by the Governor-General on the recommendation of the House of Representatives (not the Executive).⁹¹

- 4.11 However, there is no annual report on the judiciary as a whole. This means there are no consolidated statistics on what the judiciary is facing and how it is disposing of work, and how particular courts are performing.⁹² There are some figures published by the Ministry of Justice on the Courts of New Zealand website, giving raw case numbers only,⁹³ although we are advised that the next round of annual statistics, which will be published in early March 2012, will include some critical analysis approved by heads of bench.
- 4.12 The absence of an annual report means that there is no single place where the concerns and views of the judiciary as a whole can be expressed and published. The Chief Justice and the heads of bench do from time to time comment, whether in judgments, in a public forum or in speeches, on matters affecting the judiciary. They also make direct representation to individual Ministers and the Attorney-General. But there is not a “State of the Union” type address.
- 4.13 In the United Kingdom in July 2007, the Lord Chief Justice announced that the Judicial Executive Board had agreed that he should lay an annual review before Parliament in order to meet the needs of accountability to Parliament and the public in the light of the Constitutional Reform Act 2005 (UK). The House of Lords welcomed this decision and suggested that the report might encompass administrative issues and, where appropriate, areas of concern about the justice system, provided that there was no discussion of individual cases. It believed that the report would provide a useful opportunity for both Houses of Parliament to debate such matters on an annual basis, and for the Lord Chief Justice to engage effectively with parliamentarians and the public.⁹⁴ The first such review was published in March 2008. (However, in a follow-up report, the House of Lords described the Lord Chief Justice as subsequently resiling from the commitment to produce such a report on a strictly annual basis.⁹⁵)
- 4.14 A number of issues arise. First, at a level of principle, is it appropriate to have a statutory requirement for an annual report of this nature? In the United Kingdom, the Lord Chief Justice was very firmly of the opinion that a statutory requirement would not be desirable:⁹⁶
- We do not consider that would really be compatible with the independence of the judiciary as a separate arm of state. We do think it is appropriate that we should volunteer a review so that we are publicly accountable in that way, but it is important that we should be doing so of our own volition.
- 4.15 Second, there are practical considerations, such as the availability of adequate statistical material held by the Ministry of Justice and access by the judiciary to it. The Ministry of Justice advises that the judiciary has access to whatever statistics it may require, for regular reporting and ad hoc requests, and the Ministry is set up to support the actioning of such requests. Even so, a report of this kind could place a heavy burden on the Chief Justice, and additional resources may need to be provided.
- 4.16 If there was to be an annual report, should it be presented to Parliament, or simply made available to the public (for example on the Courts of New Zealand website)?

Q10 Should the Chief Justice be statutorily required to produce an annual report on the judiciary?

Q11 If so, should it be presented to Parliament, or simply made available to the public?

COURT STAFF EXERCISING JUDICIAL FUNCTIONS

- 4.17 Section 27 of the Judicature Act 1908 provides for the appointment from time to time of registrars and other officers under the State Sector Act 1988 “as may be required for the conduct of the business of the court”. Section 28 provides that every registrar and deputy registrar shall have all the powers and perform all the duties in respect of the court which registrars and deputy registrars have hitherto performed, or which by any rule or statute they may be required to perform.
- 4.18 Registrars of the various courts exercise both judicial and quasi-judicial powers. There has occasionally been discussion as to who is to supervise such officials in the exercise of their various functions.
- 4.19 In the past, the judiciary has expressed concern about a lack of institutional independence. In its 2010/2011 Annual Report, the Ministry of Justice acknowledged that it has no ability to direct or control staff in their judicial functions:⁹⁷

In delivering services, the Ministry recognises the importance of the constitutional requirement of independence in judicial function and works with the judiciary to ensure this independence is preserved and maintained. This reflects the need for judicial independence – the courts must be, and must be seen to be, separate from, and independent of, the executive.

Staff who exercise judicial functions do so under the supervision of judges and with the guidance provided in handbooks and other training material approved by the judges. The Ministry has no ability to direct or control staff in their judicial functions.

- 4.20 In our view, that statement reflects the correct principle. But, given the constitutional importance of the principle, it could be argued that it should be reflected in legislation, and included in a draft Courts Bill. This raises the question of whether it is possible to draw a legislative line between the judicial and non-judicial functions exercised by court staff. While the arrangement outlined by the Ministry of Justice in its annual report sounds clear, in practice there may be some difficulty in drawing bright lines between judicial and non-judicial functions of registrars.

Q12 Should a new Courts Bill codify the principle that court officers performing judicial functions are not subject to direction by the Ministry of Justice?

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- 89 For a discussion of this proposed structure, see chapter 6.
- 90 Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004.
- 91 Section 7(2).
- 92 By way of contrast, see the Ministry of Justice (UK) Judicial and Court Statistics 2010 < www.justice.gov.uk > .
- 93 Courts of New Zealand “Statistics” < www.courtsofnz.govt.nz > .
- 94 United Kingdom Select Committee on the Constitution *Relations between the executive, the judiciary and Parliament* (HL) (2006–07) HL 151 at [139].
- 95 United Kingdom Select Committee on the Constitution *Relations between the executive, the judiciary and Parliament: Follow-up Report* (HL) (2007–08) HL 177 at [22].
- 96 United Kingdom Select Committee on the Constitution, *Relations between the executive, the judiciary and Parliament: Follow-up Report* (HL) (2007–08) HL 177, Minutes of evidence 9 July 2008 at Q12.
- 97 Ministry of Justice *Annual Report 1 July 2010 – 30 June 2011* < www.justice.govt.nz > at 3.

Chapter 5

Some judicial powers

INTRODUCTION

- 5.1 On the whole, litigation in New Zealand courts proceeds in a temperate and appropriate way. Although the subject matter of litigation can be highly charged, there are not a lot of outbursts in court, nor many occasions when counsel act inappropriately in advancing their client's case. However, there will always be exceptional cases, and in those situations courts need powers to deal with them.
- 5.2 There are two powers in particular that fall within the scope of this review. The first is contempt of court. It has often been said that the contempt power of a judge is the single most powerful authority a judge has. If somebody is getting out of control in the court or refuses to recognise orders of the court, the judge has to have power to exercise – in an appropriate manner – punitive measures. These can range from requiring an apology, through to fines, and even imprisonment. There are a number of unsatisfactory features of our current law of contempt which led to the subject being included in this reference to the Commission.
- 5.3 A second area is the problem of legal counsel (as distinct from their clients) who spin a case out beyond all appropriate bounds, unduly consuming valuable public resources and causing great loss to the other party. Judges presently have limited inherent powers to deal with this, but the consequences often end up being visited upon the parties, rather than their counsel. A number of jurisdictions now have specific “wasted costs” provisions, which can be exercised against counsel and New Zealand has recently enacted such a provision in its criminal law.⁹⁸ Should there be a similar provision in the civil jurisdiction where this kind of abuse, when it occurs, is even more marked than in the criminal domain?
- 5.4 We will deal with each of these areas in turn. We discuss issues relating to the courts' power to deal with vexatious proceedings in the final chapter of this Issues Paper.

CONTEMPT

Introduction

- 5.5 The principal purposes of the law of contempt have been described as being to “preserve an efficient and impartial system of justice, public confidence in the administration of justice as administered by the courts, and to guarantee access to the courts by potential litigants”.⁹⁹ The law of contempt developed through the common law, but in New Zealand over the years there have been some limited statutory incursions. As a result, the law has a distinctly patchwork appearance, which is confusing for the public and creates difficulties for lawyers and the judiciary.
- 5.6 In this Issues Paper, we are dealing only with one aspect of the law of contempt – what is often called “contempt in the face of the court”. This is the only type of contempt that is statutorily provided for in the legislation we are reviewing. Each of the District Courts Act 1947, the Judicature Act 1908 and the Supreme Court Act 2003 has slightly different provisions relating to this type of contempt.¹⁰⁰ As part of the consolidation exercise we are undertaking, we need to consider which, if any, should be adopted in a new Courts Bill.

A preliminary issue

- 5.7 The Law Commission presently also has a reference from the Government to tackle all aspects of the law of contempt. That reference, which is still being scoped, provides an appropriate vehicle in which to deal with other, non-statutory, types of contempt. However, we acknowledge that the interface between the review in this Issues Paper of contempt in the face of the court, and the Law Commission’s broader contempt project, may be problematic.
- 5.8 For example, if, for the sake of argument, the latter project recommended that a Contempt Act be enacted that dealt with all types of contempt, this could overtake any contempt in the face of the court provision(s) in a new Courts Bill.
- 5.9 Further, the contempt reference is likely to include consideration of such issues as whether the maximum penalty for contempt should be changed, and whether a process for hearing contempt applications should be provided, by statute or otherwise. Neither of these matters is within our remit in this consolidation exercise.
- 5.10 However, if, as we currently propose, the various courts statutes are to be revoked and replaced by a new Courts Bill, something has to be done about contempt in the face of the court now. A “hole” cannot and should not be left in the law. Accordingly, we set out below our provisional views on what a contempt in the face of the court provision in a new Courts Bill should look like.

Contempt in the face of the court

- 5.11 A typical contempt in the face of the court provision, such as is found in s 56C of the Judicature Act 1908, provides:

56C Contempt of Court

- (1) If any person—
- (a) Assaults, threatens, intimidates, or wilfully insults a Judge, or any Registrar, or any officer of the Court, or any juror, or any witness, during his sitting or attendance in Court, or in going to or returning from the Court; or
 - (b) Wilfully interrupts or obstructs the proceedings of the Court or otherwise misbehaves in Court; or
 - (c) Wilfully and without lawful excuse disobeys any order or direction of the Court in the course of the hearing of any proceedings—
- any constable or officer of the Court, with or without the assistance of any other person, may, by order of the Judge, take the offender into custody and detain him until the rising of the Court.
- (2) In any such case as aforesaid, the Judge, if he thinks fit, may sentence the offender to imprisonment for any period not exceeding 3 months, or sentence him to pay a fine not exceeding \$1,000 for every such offence; and in default of payment of any such fine may direct that the offender be imprisoned for any period not exceeding 3 months, unless the fine is sooner paid.
- (3) Nothing in this section shall limit or affect any power or authority of the Court to punish any person for contempt of Court in any case to which this section does not apply.

- 5.12 As Lord Denning stated in *Morris v Crown Office*:¹⁰¹

The phrase “contempt in the face of the court” has a quaint old-fashioned ring about it; but the importance of it is this: of all the places where law and order must be maintained, it is here in the courts. The course of justice must not be deflected or interfered with. Those who strike at it strike at the very foundations of our society. To maintain law and order, the judges have and must have, power at once to deal with those who offend against it. It is a great power – a power instantly to imprison a person without trial – but it is a necessary power.

- 5.13 We are not aware of any suggestions that a contempt in the face of the court provision is no longer necessary. The question for consideration is what the provision, or set of provisions, in a new Courts Bill should look like.

Criminal procedure reforms

- 5.14 The Law Commission considered the “contempt in the face of the court” provisions in the criminal statutes recently in its review of the law relating to the suppression of names and evidence.¹⁰² In that report, we considered section 401 of the Crimes Act 1961 and section 206 of the Summary Proceedings Act 1957. Both of those sections deal with insults, interruptions and disobedience, but the Crimes Act 1961 provision (like the Judicature Act 1908 provision) also includes assaults and threats as amounting to contempt, whereas the Summary Proceedings Act 1957 provision does not.
- 5.15 The Commission recommended that the two criminal provisions be replaced by a single provision in the Criminal Procedure Bill, drafted in terms of the narrower section 206 of the Summary Proceedings Act 1957.¹⁰³ The Commission concluded:¹⁰⁴

Assault and threats are offences that may be prosecuted and, if proved, punished under the criminal law. We believe it would be preferable for those matters to be dealt with by the ordinary criminal process, rather than by way of contempt. The terms of section 401(1) [of the Crimes Act 1961] would allow a person who assaults a juror, for example, to be taken into custody, imprisoned or fined without the benefit of a trial or any of the other protections that would attach if he or she were charged under the criminal law.

- 5.16 This recommendation was carried through into section 365 of the Criminal Procedure Act 2011, which provides:¹⁰⁵

365 Contempt of court

- (1) This section applies if any person—
- (a) wilfully insults a judicial officer, or any Registrar, or any officer of the court, or any juror, or any witness, during his or her sitting or attendance in court, or in going to or returning from the court; or
 - (b) wilfully interrupts the proceedings of a court or otherwise misbehaves in court; or
 - (c) wilfully and without lawful excuse disobeys any order or direction of the court in the course of the hearing of any proceedings.
- (2) If this section applies,—
- (a) any constable or officer of the court, with or without the assistance of any other person, may, by order of a judicial officer, take the person into custody and detain him or her until the rising of the court; and
 - (b) the judicial officer may, if he or she thinks fit, sentence the person to—
 - (i) imprisonment for a period not exceeding 3 months; or
 - (ii) a fine not exceeding \$1,000 for each offence.

- (3) Nothing in this section limits or affects any power or authority of a court to punish any person for contempt of court in any case to which this section does not apply.

Our provisional view

- 5.17 We consider that a new Courts Bill should contain one generic provision dealing with contempt in the face of the court. This provision should apply to all the courts which are the subject of this reference. Our provisional view is that a section in similar terms to that recently enacted as section 365 of the Criminal Procedure Act 2011 should be adopted in a new Courts Bill. This has the benefit of consistency and it is the most current iteration of a contempt in the face of the court provision by our Parliament.
- 5.18 This section is broadly consistent with the current provision in the District Courts Act 1947, but is slightly narrower than the first limb of the provisions in the Judicature Act 1908 and the Supreme Court Act 2003. The former covers only wilful insults, while the latter two also refer to assault and threats. We see no reason to depart from the conclusion the Commission reached in 2009 that assaults and threats should be dealt with by the ordinary criminal process, rather than by way of contempt.
- 5.19 In our view, the savings provision in section 365(3) of the Criminal Procedure Act 2011 is intended to make it clear that the courts' inherent jurisdiction is retained in respect of other contempt matters (ie matters other than contempt in the face of the court). It is not intended that the court can still use its inherent jurisdiction to hold people in contempt when the matter already falls within the scope of the contempt in the face of the court section.
- 5.20 This is of some practical importance. Counsel and judges – understandably burdened with an already difficult body of law – are inclined to proceed on the basis that they can rely on the inherent jurisdiction or the statutory provision in a contempt in the face of the court situation. That is not our understanding, at least with respect to the Criminal Procedure Act 2011, and we think the same position should be made plain in the proposed Courts Bill provision.
- 5.21 Finally, if a generic provision was enacted in a new Courts Bill, there would be no need for section 365 of the Criminal Procedure Act 2011 to be retained. The broader provision, applying in all courts, could adequately deal with contempt in the face of the court in criminal as well as civil proceedings.
- 5.22 However, as contempt law has to be invoked in the equivalent of “battlefield conditions” when something unexpectedly breaks out in court, practitioners might immediately turn to the Criminal Proceedings Act 2011. For that reason, a “signpost” section 365 could be kept, directing the user to the relevant provision of the new Courts Act.
- 5.23 A draft contempt in the face of the court provision is set out in appendix 3.

Q13 Do you agree that there should be a generic provision in a new Courts Bill for contempt in the face of the court, dealing with all courts and proceedings, and drafted in similar terms to s 365 of the Criminal Procedure Act 2011?

WASTED COSTS IN CIVIL PROCEEDINGS

Introduction

- 5.24 Regrettably, there are sometimes civil cases in which counsel are responsible for litigation dragging on. There may be completely inappropriate discovery demands, interminable interlocutory applications, endless and unfocussed briefs, or a complete inability to conduct the case in a professional manner in court. This inflicts additional costs on the opposing parties and wastes valuable court resources. Where such situations arise, what can be done by the court in relation to the offending counsel?

The present law

- 5.25 The High Court has inherent jurisdiction to award costs against a lawyer for a “serious dereliction of duty to the court”. This would include such things as a power to disallow costs between a lawyer and their own client, and the power to order a lawyer personally to pay the costs of the other side. The authoritative decision on this in New Zealand is the judgment of the Judicial Committee of the Privy Council in *Harley v McDonald*.¹⁰⁶
- 5.26 The District Court has no inherent jurisdiction to award costs against lawyers.¹⁰⁷ Other courts without the inherent jurisdiction of the High Court, including specialist courts and the Supreme Court, are also unable to award costs against lawyers.
- 5.27 New Zealand is unusual because the power to require lawyers to personally pay costs in civil proceedings is grounded in the inherent jurisdiction of the court. It has not been altered by rules or statute.
- 5.28 In the criminal jurisdiction, however, the Criminal Procedure Act 2011 has introduced a statutory jurisdiction to make an order of costs for a procedural failure against the defendant, a defendant’s lawyer, or even the prosecutor. This jurisdiction does not apply to appellate proceedings.

5.29 Section 364 of that Act provides:¹⁰⁸

364 Costs orders

(1) In this section and section 381,—

costs order means an order under subsection (2)

procedural failure means a failure, or refusal, to comply with a requirement imposed by or under this Act or any rules of court or regulations made under it, or the Criminal Disclosure Act 2008 or any regulations made under that Act

prosecution—

(a) means any proceedings commenced by the filing of a charging document; but

(b) does not include an appeal.

(2) A court may order the defendant, the defendant's lawyer, or the prosecutor to pay a sum in respect of any procedural failure by that person in the course of a prosecution if the court is satisfied that the failure is significant and there is no reasonable excuse for that failure.

(3) The sum must be no more than is just and reasonable in the light of the costs incurred by the court, victims, witnesses, and any other person.

(4) A costs order may be made on the court's own motion, or on application by the defendant, the defendant's lawyer, or the prosecutor.

(5) Before making a costs order, the court must give the person against whom it is to be made a reasonable opportunity to be heard.

(6) A costs order may be made even if the defendant has not yet been convicted, or is eventually discharged, or the charge is dismissed.

(7) The court may make more than 1 costs order against the same person in the course of the same prosecution.

(8) The court may order that some or all of the amount ordered to be paid under a costs order be paid to any person connected with the prosecution.

(9) Subsections (2) to (8) do not limit or affect the Costs in Criminal Cases Act 1967.

5.30 The United Kingdom has statutory provisions and court rules which clarify the bounds of the power to award costs against counsel.¹⁰⁹ Australia relies on a mixture of legislation in some States, and also has detailed provisions in court rules which guide the exercise of the court's inherent jurisdiction. In Canada, court rules also contain provisions on the award of wasted costs.

The standard for the exercise of costs jurisdiction

- 5.31 The position in New Zealand under the common law, as set out by the Privy Council in *Harley v McDonald*, is that costs will only be awarded for a “serious dereliction of duty to the court”.¹¹⁰ The standard in the United Kingdom and Australia has been modified through statute, and extends to conduct which is “improper, unreasonable, or negligent”. This has been held to include conduct which is not in breach of the Professional Code of Conduct, but which nonetheless would be considered reprehensible by the consensus of professional opinion. Negligence is to be interpreted on its ordinary meaning, and it is not necessary to demonstrate that the conduct met the standard for a tortious claim of negligence.¹¹¹
- 5.32 Notwithstanding these apparently different formulations in New Zealand, the United Kingdom,¹¹² and Australia,¹¹³ the case law as a whole appears to emphasise the following:
- (a) The purpose of the jurisdiction is to compensate for a failure of duty to the Court, where this failure causes unnecessary costs. The jurisdiction also has a punitive element.
 - (b) The power to award costs against lawyers should not be used to compensate a client for a failure of duty to the client, though this may be a spin-off effect.
 - (c) The jurisdiction should be confined to questions which are apt for summary disposal, and should ordinarily be decided as part of the overall decision as to the costs.
 - (d) Complex factual questions about the lawyer’s conduct and actions, including breaches of duties to their client, should not be addressed through an award of costs. This should be addressed through disciplinary proceedings or through a claim against the lawyer directly.¹¹⁴
 - (e) Litigants have the right to be represented, however weak their case, and the courts should take care that the use of the jurisdiction to award costs against counsel does not encourage lawyers to act as gatekeepers and refuse to take on weak briefs.
 - (f) The presumption should be that a lawyer is acting on their client’s instructions, including in pursuing an unlikely claim, running tenuous arguments, and presenting highly unlikely accounts of the facts.
 - (g) An award of costs is not appropriate merely because the lawyer is doggedly pursuing a case that is doomed to fail.
 - (h) There must be a causative link between the misconduct of the lawyer and the costs incurred.
 - (i) Legal professional privilege will be waived if a party applies for an award of costs against their own lawyer.

The application of the principles in New Zealand

- 5.33 There have been three cases in New Zealand since *Harley v McDonald* where costs have been awarded personally against lawyers involved in proceedings. In *Body Corporate No 192964 v Auckland City Council*, the Court awarded costs against a lawyer who instituted proceedings on behalf of all the owners of units in a leaky apartment building, despite only receiving instructions from two thirds of the owners.¹¹⁵ The Court ordered that the proceedings be partially struck out in respect of 67 named plaintiffs who had not instructed the lawyer, and ordered the lawyer personally to pay the costs of the strike out application.
- 5.34 In *L v Chief Executive of the Ministry of Social Development*, Harrison J stated that two lawyers “were in gross dereliction of their duties to the Court in filing and advancing this proceeding, and that their conduct throughout was contrary to the proper, fair and efficient administration of justice.”¹¹⁶
- 5.35 In *ANZA Distributing New Zealand Ltd (in liq) v USG Interiors Pacific Ltd (No 2)*, Cooper J stated that certain costs were incurred as a result of the solicitor’s “failure to reach the minimum standard of competence that should be attained by officers of the Court.”¹¹⁷
- 5.36 There are a large number of cases in which costs have not been awarded, as the high standard of serious dereliction of duty to the Court has not been met.

Is reform needed?

- 5.37 Our provisional view is that reform is required. The present situation is inconsistent: there is a statutory wasted costs provision for criminal proceedings; there is inherent jurisdiction for proceedings in the High Court; but there is no jurisdiction in some other proceedings.
- 5.38 The existing position is also unclear. The courts have been coy about defining the standard of “misconduct” with any specificity, though they have emphasised that the standard is much higher than mere negligence or misjudgement.
- 5.39 The presumption in civil litigation is that costs should follow the event. This raises a concern in situations where costs are incurred as a result of the conduct of the lawyers, rather than the conduct and decisions of the parties to litigation. The jurisdiction to award costs against lawyers seeks to address this concern, on the basis that it is unjust for a party to litigation to be liable for costs incurred through the negligence or misconduct of a lawyer involved in the litigation.
- 5.40 On the other hand, insofar as the purpose of wasted costs orders is punitive, is it an appropriate way of dealing with gross misconduct, or would it be preferable to leave such misconduct to be dealt with by way of disciplinary proceedings?

- 5.41 The jurisdiction varies in breadth. There is a concern that expanding personal liability of lawyers for costs incurred in litigation could lead to greater “screening” by lawyers of potential claims, which would have a detrimental effect on access to the courts and would be contrary to the interests of justice. Also, personal liability for lawyers should not be an undue burden, especially given the need to make quick decisions in litigation, and the possibility of unreasonable or difficult clients.

Our provisional view

- 5.42 We are tentatively of the view that there should be legislative provision for wasted costs in New Zealand, on a similar model to that adopted recently by Parliament in section 364 of the Criminal Procedure Act 2011.
- 5.43 There are advantages in symmetry. But even apart from the adoption of that section by Parliament we think there are sound reasons for a limited wasted costs provision. We are not comfortable with an “open ended” discretion, as is currently provided under the inherent jurisdiction of the High Court.
- 5.44 Section 364 of the Criminal Procedure Act 2011 is predicated on a non-controversial pre-requisite: that there has been a procedural failure to comply with the rules of court, or with a relevant statute. If that is the case in a civil proceeding then the two evaluative factors would be whether the failure by a lawyer is “significant”, and that “there is no reasonable excuse” for that failure. That is a relatively tightly structured provision and is consistent with the principles contained in the case law. We consider that the civil wasted costs provision should also apply to appellate proceedings in the High Court, the Court of Appeal, and the Supreme Court.
- 5.45 A preliminary draft of such a provision is set out in appendix 4.

Q14 Do you agree that there should be a wasted costs provision in the new Courts Bill?

Q15 If so, do you agree with the draft provision set out in appendix 4?

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- 98 Criminal Procedure Act 2011, s 364.
- 99 ATH Smith *Reforming the New Zealand Law of Contempt of Court – An Issues/Discussion Paper* (18 April 2011) at 8.
- 100 District Courts Act 1947, s 112; Judicature Act 1908, s 56C; and Supreme Court Act 2003, s 35.
- 101 *Morris v Crown Office* [1970] 2 QB 114 at 122B-C.
- 102 Law Commission *Suppressing Names and Evidence* (NZLC R109, 2009).
- 103 At 71.
- 104 At 70.
- 105 This section is not yet in force.
- 106 *Harley v McDonald* [2001] UKPC 18, [2002] 1 NZLR 1.
- 107 *Ng v Cavanagh* [2000] DCR 495 (DC); *Hughes v Ratcliffe* (2000) 14 PRNZ 690 (HC). However, if a claim is appealed from the District Court to the High Court, there is authority for the proposition that the High Court has jurisdiction to award costs against lawyers in respect of District Court proceedings as well as the appeal: *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587 (HC).
- 108 This section is not yet in force.
- 109 A useful summary is available at < www.barcouncil.org.uk > .
- 110 *Harley v McDonald* [2001] UKPC 18, [2002] 1 NZLR 1.
- 111 *Ridehalgh v Horsefield* [1994] 3 All ER 848.
- 112 The leading cases in the United Kingdom are *Metcalf v Mardell* [2002] UKHL 27, [2002] 3 All ER 721 and *Ridehalgh v Horsefield* [1994] 3 All ER 848.
- 113 While there are differences in the wording of the legislation and rules in different Australian states, the general principles are the same. For the leading case at the Federal level, see *Levick v Commissioner of Taxation* (2000) 102 FCR 155.
- 114 In Australia, barristers have immunity from suit for the conduct of litigation, so there is no ability to claim against counsel directly. This was historically the position in the United Kingdom and New Zealand, but the immunity has been removed.
- 115 *Body Corporate No 192964 v Auckland City Council* HC Auckland CIV-2004-404-7207, 20 February 2006.
- 116 *L v Chief Executive of the Ministry of Social Development* (2008) 19 PRNZ 116 (HC) at [49].
- 117 *ANZA Distributing New Zealand Ltd (in liq) v USG Interiors Pacific Ltd (No 2)* CIV-2007-404-3474, 18 September 2009 at [52].

Part 3

THE COURTS



Chapter 6

The District Courts

A SINGLE NATIONAL DISTRICT COURT?

- 6.1 The New Zealand District Courts have evolved as if there is a single national District Court. However, as we discussed in chapter 2, that is not the way the courts are formally constituted under the District Courts Act 1947. Each of the 63 District Courts is a separate entity. The Governor-General is empowered to appoint places from time to time in which District Courts may be held for the exercise of their civil and criminal jurisdiction, or to deal with a specified class of matters.¹¹⁸ Each District Court has its own staff, and its own seal.
- 6.2 Two cases illustrate the conceptual difference between one court and many. In *Johnson v Allen*, a judgment prepared for sealing was headed “In the District Court at Hawera”, but was signed by the Deputy Registrar of the District Court at New Plymouth, and impressed with the seal of the New Plymouth court.¹¹⁹ The High Court held that the Deputy Registrar had no jurisdiction or authority to seal a proceeding which was then in another District Court, and that the seal of the Hawera court should have been applied. As a result, the judgment had not been properly sealed and a notice of appeal from the judgment had therefore not been validly filed and served.
- 6.3 In *Serious Fraud Office v Anderson*, three defendants were charged with conspiracy to defraud various lenders of finance.¹²⁰ Informations were laid in the Christchurch District Court, and the Serious Fraud Office subsequently applied to the Auckland District Court for warrants to arrest the defendants so that an application to extradite them from Brisbane could be made. The Court declined the application for warrants to arrest, on the basis that the District Court at Auckland had no power or jurisdiction to receive and determine an application for an arrest warrant to bring before the District Court at Christchurch persons charged in that court but who were abroad, not having been served with summonses. It noted that the District Court was not one court, but many, served by a common bench of judges.

- 6.4 Having described the separate constitution of each District Court, the Judge noted:¹²¹

There are obvious, indeed compelling, practical reasons why the law has long been thus. The District Court is a Court of record. Despite modern electronic means of communication (which all too often prove unreliable when they are most needed) it is extremely important that a Court have before it a complete file in relation to a case. In some circumstances, such as the need to bring in an arrested person before a Court as soon as practicable, that general approach must give way to other considerations. But, subject to that type of situation, the desirability of all aspects of a criminal proceeding, whether in the summary jurisdiction or in the preliminary hearing context or in the jury trial context, being contained within one file held and administered at one place is compelling. It avoids forum shopping – at least on a national basis – as well as those disasters which inevitably arise from having a multitude of cooks simultaneously endeavouring to prepare the one dish. It recognises the separate nature of each District Court.

- 6.5 The question is whether the practical reasons described for the District Courts being separate entities are outweighed by the problems it has the potential to create.
- 6.6 Some steps have already been taken to try to reduce the practical problems caused by the separate status of the courts. In 2011, the District Courts Act 1947 was amended to provide that a person appointed as a registrar may exercise the powers and perform the functions and duties of the registrar of any District Court.¹²² The powers of deputy registrars and bailiffs and deputy bailiffs were similarly extended.
- 6.7 In legislative terms, it would be a relatively easy task to incorporate the District Courts into a single national court. We note that the High Court operates as a single national court, despite sitting in 18 centres (a 19th centre, Masterton, is a filing-only registry).
- 6.8 This development would not have any adverse implications as to the allocation of cases and files between courthouses. Presently, the allocation of the proper District Court is governed by Rule 3.1 of the District Court Rules 2009. This regime is substantially similar to that contained in Rule 5.1 of the High Court Rules – and could apply to a nationally constituted District Court with little or no amendment.
- 6.9 Provisions relating to the appointment of registrars and other court officials would need to be amended to provide that they are appointed to the national court. A similar provision appears in the Judicature Act 1908 in respect of registrars of the High Court. A provision along the lines of section 50 of the Judicature Act 1908 could provide for each registrar to have custody of a seal of the single national District Court.

- 6.10 Constituting the District Courts as a single national court would also be consistent with the proposed new operating model for the District Courts in Auckland (namely North Shore, Warkworth, Auckland, Waitakere, Manukau, Papakura, and Pukekohe).¹²³ In a discussion document, the Ministry of Justice noted that the current operating model in the District Courts in Auckland lacks consistency: “each court operates independently and, as a result, operating structures and processes differ across registries and jurisdictions. For customers this means that the quality of service varies across courts.”¹²⁴
- 6.11 The Ministry proposes replacing this fragmented approach with an integrated approach to resource deployment, reorganising resources so they are shared across sites. The Auckland regional service delivery model for civil and family matters took effect from the end of January 2012.
- 6.12 In our view, the degree of integration and centralised management involved in the proposed new operating model is consistent with – and indeed might sit more comfortably within – a single national District Court.
- 6.13 We note that any move to a single national District Court will have a flow-on effect in terms of the Family Courts and the Youth Courts. At present, these are established by sections that provide that each District Court shall have a division to be known as a Youth Court/Family Court.¹²⁵ Thus there are multiple Youth Courts and Family Courts. If there was a single District Court, logically there would be a single Family Court and a single Youth Court.

Q16 Should there be one unitary District Court for New Zealand?

CIVIL JURISDICTION

Upper limit

- 6.14 As noted in chapter 2, the District Court can generally hear civil claims where the amount in dispute is not more than \$200,000,¹²⁶ although there is provision for a defendant to require a claim for more than \$50,000 to be transferred to the High Court.¹²⁷
- 6.15 The upper limit of the District Courts’ civil jurisdiction has remained unchanged since 1992.¹²⁸ It has been suggested in preliminary consultation that it is time that the upper limit was revisited. Inflation has significantly reduced the actual value of \$200,000 – the value of \$200,000 in 1992 is today more than \$300,000.¹²⁹ Accordingly there is an argument that the upper limit of the civil jurisdiction should be significantly increased just to take account of inflation.

- 6.16 Apart from arguments related to inflation, the District Courts are intended to be the “people’s courts” – local, readily accessible, providing justice speedily with a minimum of formality and expense. They are also intended to be the primary courts of first instance. There are valid arguments to be made as to the desirability of allowing a greater number of litigants to choose the manner in which their claims are decided by increasing the jurisdiction of the District Courts. We note that District Courts in the somewhat comparable jurisdictions of New South Wales and Queensland both have jurisdictional limits of A\$750,000.
- 6.17 A change to the upper limit of the District Courts’ civil jurisdiction involves substantive issues of policy. Relevant considerations include questions of geographical and financial accessibility. Many ordinary New Zealanders may find themselves involved in disputes involving more than \$200,000. It is important that they are able to gain access to the court system.
- 6.18 This in turn requires consideration of the forum in which civil proceedings can be conducted most efficiently and cost-effectively, and the relative workloads of the District Courts and the High Court. If the criminal workload of the District Courts has to be accorded priority, this may affect both the availability of judges and potentially their expertise in civil cases. A significant increase in the upper limit of the District Courts’ civil jurisdiction may also reduce the amount of civil litigation that the High Court hears. All these matters need to be carefully considered and weighed in the balance.

Q17 Should the upper limit of the civil jurisdiction of the District Courts be increased?

Q18 If so, should the upper limit be \$300,000 (to take account of inflation), or should the upper limit be increased further?

Specific exclusions and exceptions to the District Courts' civil jurisdiction

- 6.19 Some specific sections of the District Courts Act 1947 have been drawn to our attention as potentially requiring consideration. First, there are some qualitative restrictions on the civil jurisdiction of the District Courts. Section 29(1)(a) of the District Courts Act 1947 limits the courts’ jurisdiction to hear and determine any proceeding for the recovery of land – there is no such jurisdiction except as otherwise provided in the Act. Section 31 of the Act goes on to set out those recovery of land matters in which the District Courts do have jurisdiction – essentially cases in which the rent payable is \$62,500 or less, or the land has a value of \$500,000 or less; cases in which a tenant has refused to quit the land; or a person is unlawfully in possession of it.

- 6.20 Section 31 predates the passage of the Residential Tenancies Act 1986. Most of the work relating to recovery of land now falls within the exclusive jurisdiction of the Tenancy Tribunal. As with the general civil jurisdiction of the courts, the upper limits of \$62,500 and \$500,000 have not been amended since 1992, and are now worth significantly less in real terms.
- 6.21 Section 29(1)(b) of the Act provides that the District Courts have no jurisdiction where title to a franchise is in question. The word “franchise” does not bear its modern meaning (a sole right given to a person to engage in a particular business within a defined area) – instead it has a limited and technical meaning: a royal privilege or branch of the Crown prerogative subsisting in the hands of a subject.¹³⁰ This exclusion was introduced in 1947, having not featured in earlier legislation relating to the District Courts. It has been suggested that the object of the exclusion was to ensure that a particular class of action was reserved for the exclusive jurisdiction of the High Court – namely actions involving the validity of any privilege granted by royal prerogative – and that historically and judicially it is appropriate that such issues should be determined by a superior court.¹³¹
- 6.22 We suggest that the language of this section should be clarified to make it clear that it is not intended to exclude ordinary commercial franchises from the jurisdiction of the District Court.
- 6.23 Section 33 of the District Courts Act 1947 specifically gives the District Courts jurisdiction in respect of disputes between Building Societies and their members. This section has been overtaken by the expansion of the civil jurisdiction of the courts, and appears to be redundant.

Equitable jurisdiction

- 6.24 Section 34 of the District Courts Act 1947 provides that District Courts have equitable jurisdiction for claims up to \$200,000, except where a statute provides otherwise. Concerns have been expressed to us by some lawyers in the course of this review, and in the Law Commission’s review of the law of trusts, about retaining equity jurisdiction in the District Courts. However, on closer examination those concerns appear to relate to the exercise of the jurisdiction rather than its existence.
- 6.25 In any event, the jurisdiction seems to be practically necessary. If a person brings a claim for specific performance and/or damages where the subject matter of the dispute is around \$150,000, it would be Dickensian to have to go off to the High Court just for the specific performance decree.

CONSOLIDATION OF THE DISTRICT COURTS ACT 1947

- 6.26 As noted in chapter 1, the process of consolidating the provisions of the District Courts Act 1947 into a new Courts Bill will result in some of those provisions being reviewed and modernised. If there are specific issues relating to any provisions of that Act that the Commission should consider in this process, we would be very interested to receive comment or submissions in relation to them.

118 Section 4.

119 *Johnson v Allen* (1999) 12 PRNZ 615.

120 *Serious Fraud Office v Anderson* [2000] DCR 435.

121 At 439.

122 Section 12(2A).

123 Ministry of Justice *Discussion Document: Proposed new operating model for District Courts in Auckland* (2011).

124 At 9.

125 Children, Young Persons and Their Families Act 1989, s 433; Family Courts Act 1980, s 4.

126 District Courts Act 1947, ss 29 and 31.

127 District Courts Act 1947, s 43.

128 When it was changed by the District Courts Amendment Act (No 2) 1992.

129 Reserve Bank NZ Inflation Calculator: \$200,000 in Q1 1992 = \$313,431.43 in Q3 of 2011.

130 *Catalina Video and Distributing Company NZ Ltd v Uncle Alberts Video Ltd* [1991] DCR 12.

131 At 17.



Chapter 7

The commercial list and specialisation in the High Court

INTRODUCTION

- 7.1 Our terms of reference require us to review the commercial list, which was created by sections 24A to 24G of the Judicature Act 1908. As will become apparent, efforts to try and improve the advancement of commercial causes in the High Court, beginning in 1987 with this list, have had only limited success. The commercial bar has for some years now called for a separate commercial court, but that in turn has opened up a debate about the desirability or otherwise of specialisation in the High Court judiciary.
- 7.2 In this chapter, we begin by outlining the evolution and history of the commercial list as it stands in the High Court. We then move on to discuss specialisation more generally, before setting out some of the options for consideration.

THE COMMERCIAL LIST

Introduction

- 7.3 The accurate and efficient disposition of commercial litigation is important for the business community in New Zealand, and for those who deal with commercial interests in New Zealand from abroad.

- 7.4 The commercial list in the High Court was established as a pilot scheme in Auckland in 1987 by a working party, and became permanent four years later. It was intended to reduce the time for decisions in commercial matters, and in particular to reduce the interlocutory processes in cases on the list to expedite final decisions.¹³² It only deals with pre-trial matters; once the case is ready for hearing it is transferred back into the general list and will be heard by any High Court judge.

Legislative provisions

Establishment

- 7.5 Section 24A of the Judicature Act 1908 provides for a commercial list to be established in any office of the High Court by the Governor-General by notice in the *Gazette*,¹³³ and that the first commercial list shall be established at Auckland.¹³⁴ The commercial list at Auckland is the only *gazetted* commercial list, although we understand an extension of the list to Wellington is imminent. To this end, we note that, with effect from 23 November 2011, two judges based in Wellington (Miller and Clifford JJ) have been appointed as commercial list judges.¹³⁵

Eligibility of cases

- 7.6 Section 24B of the Judicature Act 1908 provides for the classes of proceedings eligible for entry on the commercial list. Broadly, these relate to various matters concerning commerce, shipping, insurance, banking and finance, intellectual property, applications under the Arbitration Act 1996, appeals and proceedings under specific provisions of the Commerce Act 1986, companies and securities law, and proceedings of a commercial nature required or permitted to be entered on a commercial list by or under any Act, the High Court Rules or rules made under s 51C of the Judicature Act 1908.¹³⁶
- 7.7 In addition, parties can refer a dispute over the construction, status or application of a contract or document in a “proceeding eligible for entry on a commercial list” to a commercial list judge for determination.¹³⁷
- 7.8 Where a statement of claim or statement of defence in any proceeding referred to in section 24B(1)(a) – (f) is filed in a registry of the court at which a commercial list is established, either a plaintiff or a defendant may require the proceeding to be entered on the commercial list by endorsing the statement of claim or the statement of defence (as the case may be) with the words “Commercial List”.¹³⁸ The proceeding must then be entered on the commercial list.

- 7.9 The High Court Rules also allow for an application to the Court for an order entering the proceeding on the commercial list where an endorsement at the time of filing did not occur.¹³⁹ Further, despite rule 5.1 of the High Court Rules (which provides for the “proper registry” for filing proceedings), a plaintiff may file “eligible proceedings” at a registry where there is a commercial list.¹⁴⁰ If the plaintiff does not do so, the defendant may still apply to a commercial list judge under rule 29.14(2) of the High Court Rules for an order transferring the proceeding to a registry of the Court where a commercial list is established.
- 7.10 Conversely, a commercial list judge may, on the application of any party or on the judge’s own initiative, at any time remove any proceeding from the commercial list.¹⁴¹

Composition

- 7.11 The commercial list is supervised by a judge nominated from time to time by the Chief Justice (after consultation with the Chief High Court Judge).¹⁴² The Chief Justice (again after consultation with the Chief High Court Judge) may also nominate one or more judges to help the supervising judge.¹⁴³ There are presently nine commercial list judges: seven in Auckland and two in Wellington.¹⁴⁴

Scope

- 7.12 As noted, the commercial list is intended to speed up the pre-trial stages of proceedings relating to eligible matters. To do this, the court is empowered to give “such directions as it thinks fit for the speedy and inexpensive determination of the real questions between the parties”;¹⁴⁵ parties to any proceedings on the commercial list can agree not to appeal decisions given;¹⁴⁶ proceedings on the list may not be tried by a jury;¹⁴⁷ and there are restrictions on the right of appeal from interlocutory decisions.¹⁴⁸

Case load

- 7.13 The case load for the commercial list varies from year to year, but it is clear that it has declined significantly and steadily since 1987 when the list was created. In its first year, 143 cases were filed on the list, but by 2002 the number filed on it in that year had dropped to 34.¹⁴⁹
- 7.14 When it was first established, the commercial list was credited with having a positive impact in speeding up the disposition of commercial cases.¹⁵⁰ However, over a decade ago, the Annual Report of the commercial list for the year ending 31 December 2000 reported signs that the list was losing its purpose, as many of the techniques used in it were integrated into general case management.¹⁵¹

- 7.15 This is reflected in the case law. For example, in *Commerce Commission v Cards NZ Ltd*, the first defendant applied to transfer proceedings from the High Court at Wellington to the commercial list at Auckland.¹⁵² The proceedings were quintessentially of a character for which the commercial list is intended to cater and Rodney Hansen J noted that in the past, and before the advent and refinement of case management systems in all registries, an application to transfer the proceedings to the commercial list could not have been resisted, and would probably not have been required. His Honour commented:¹⁵³

The discipline offered by the Commercial List made efficiencies possible that would have outweighed the disadvantages in cost and convenience of which the Commission complains.

- 7.16 However, while the Court considered that the commercial list will continue to offer advantages in some cases, there was no reason to think it would offer any tangible advantages when a proceeding was assigned to a judge for management through the interlocutory stages to trial.¹⁵⁴ The question in the particular case then fell to be determined on questions of cost, convenience and fairness.
- 7.17 Similarly, in the recent case of *Houghton v Saunders*, the High Court declined an application to transfer the proceeding to the commercial list in Auckland on the basis that the case was “not as well suited to the commercial list processes as to close management by a Judge, as has been the procedure to date.”¹⁵⁵
- 7.18 Recent figures provided by the Ministry of Justice of the number of cases filed on the commercial list confirm its limited use:¹⁵⁶

Year (ending June)	Number of cases filed
2006	15
2007	25
2008	17
2009	31
2010	16

- 7.19 Overall, therefore, while there are still some cases that are filed on, or transferred to, the commercial list (and indeed *Commerce Commission v Cards NZ Ltd* is an example of the latter), it would seem that the increase in intensive case management by assigned judges has reduced, and likely will further reduce, its scope.¹⁵⁷
- 7.20 The limited number of cases that the commercial list now serves suggests that it cannot continue in its present state. However, before moving on to discuss what could be done with it, it is necessary to consider a broader issue that sits in the background, namely, the appropriateness or otherwise of specialisation of judges in the High Court.

SPECIALISATION

- 7.21 The introduction of a commercial list was an incursion (albeit a limited one) into the otherwise generalist nature of the High Court judiciary. In other words, it introduced a degree of specialisation in that certain judges, and only those judges, deal with at least the preliminary matters on the commercial list. In this section, we briefly discuss the issue of specialisation and set out the arguments for and against it.
- 7.22 Specialisation is an increasing feature of New Zealand legal practice. Few lawyers would expect to cover the whole range of legal work, from criminal jury trials to judicial review applications to intellectual property disputes, let alone do so in the same week or even day. However, this is precisely what the High Court judiciary are expected to do.
- 7.23 New Zealand already has a number of specialist courts. The Employment Court, the Environment Court, the Māori Land Court and the Family Court are all well-established parts of the legal landscape in New Zealand, with specialist judges.
- 7.24 However, the High Court remains a court of general jurisdiction. Its judges are appointed to exercise the largest of all jurisdictions in New Zealand. Some practitioners and commentators argue that the increasing complexity of civil litigation means that greater specialisation in the High Court is required. On this view, increased specialisation would increase efficiency, as judges who are more familiar with a specific area of law will both hear the case and deliver judgment more quickly.¹⁵⁸ It has even been suggested that litigants are wary of generalist judges, and will opt instead for alternative dispute resolution procedures such as specialist arbitration.¹⁵⁹ In a recent study, the University of Otago Legal Issues Centre noted that anecdotal evidence suggests litigants are increasingly choosing alternative dispute resolution (ADR) over formal court procedures, despite the risks involved in forgoing trying the dispute in court, such as limited rights of appeal.¹⁶⁰
- 7.25 On the other hand, the generalist nature of the High Court is one of its great strengths, and there are substantial benefits in a broader, principled approach. If the generalist jurisdiction is eroded too much, the High Court risks losing flexibility and becoming fragmented.
- 7.26 There are real questions as to how much specialisation is healthy or practical in a bench the size of the High Court. Formal specialisation could have the effect of excluding some judges from exercising parts of the Court's jurisdiction entirely. There is also a danger that specialisation could constrain the development of the law, and lead to insularity, with the risk that the views of a small number of judges dominating a particular area of the law.
- 7.27 There are strongly divergent views in the judiciary on this issue. That in itself is a serious impediment to effective change: any proposal for change would need the support of the judiciary.

- 7.28 The purpose of this brief discussion about specialisation is not to argue for or against specialisation in the High Court, but to identify it as an issue, as it has a bearing on the approach to be taken to the commercial list.

OPTIONS FOR REFORM

- 7.29 We consider that there are five options for the commercial list:
- (a) no change (retain the commercial list as it is);
 - (b) abolish the commercial list and rely on case management procedures;
 - (c) retain and extend the commercial list;
 - (d) create a separate commercial court in the High Court;
 - (e) adopt a panel system, including a specialist commercial panel.

No change

- 7.30 The first option is to do nothing and retain the commercial list in its present form. There is one immediately obvious benefit in this - having been around for nearly 25 years, the judiciary and the Bar have become accustomed to the commercial list and know when it is and is not useful.
- 7.31 However, there are a number of problems with the commercial list. First, once pre-trial proceedings are concluded, cases on the list fall back into the general list for allocation of a judge for a substantive hearing. This has been described as its fundamental weakness.¹⁶¹ We agree that, having got the case ready for hearing in a timely manner, to then beat a retreat to the general list along with a myriad of other cases is inappropriate.
- 7.32 Further, there are clear disadvantages in terms of cost and travel for some litigants that arise if the commercial list is only based in Auckland (as it is at present). The normal rules that require plaintiffs to litigate in the defendant's place of residence do not apply.¹⁶² Having to move commercial list cases to Auckland seems unjustified, particularly given that some of the significant commercial litigation is against Crown entities, which are usually based in Wellington.
- 7.33 It is likely that these factors, coupled with the availability of ADR, have contributed to the departure of a respectable amount of commercial litigation from the regular courts of law. This has serious implications for the development of New Zealand law, which requires decisions of the superior courts.¹⁶³ Ironically this affects ADR systems, as mediators and arbitrators still make reference to the commercial law.

Abolish the commercial list

- 7.34 While the commercial list was a useful and successful trailblazer in the High Court, many of its advantages have been overtaken by developments in civil case management generally.¹⁶⁴ It is apparent that the list is slowly falling into disuse.
- 7.35 One option, therefore, is to acknowledge that the commercial list has served a worthwhile purpose, but that advances have been made since it was created in litigation generally and it is no longer necessary. This option would see the commercial list abolished. We note that the Law Commission recommended this in 2004,¹⁶⁵ but its recommendation was not implemented.

Extend the commercial list

- 7.36 On the other hand, the fact that some cases are still being entered on the commercial list suggests that some parties see tangible benefits to maintaining it. For instance, as Paterson J stated in *Cellier Le Brun Ltd v Le Brun*, the commercial list encourages the early definition of issues, it discourages appeals from interlocutory orders and there are more frequent calls compared with the normal steps in case management.¹⁶⁶ Therefore, another alternative would be to recognise that these benefits are worth keeping and that, instead of abolishing the list and getting rid of the good with the bad, these could, rather, be built on.
- 7.37 Two ways of doing this are immediately apparent – first, provision could be made that proceedings do not go back onto the general list when they come to be allocated for trial. Rather, they would remain on the commercial list and the substantive hearing would be presided over by a commercial list judge. Second, the commercial list could be extended to Wellington and Christchurch.
- 7.38 This would deal with two of the main criticisms – the delay caused by rejoining the general list once all pre-trial matters are completed and the cost to parties not located in Auckland who are forced to litigate there.
- 7.39 Of course, one would need to consider the advantages and disadvantages of what would inevitably be increased specialisation, as well as cost and judicial resource implications of any such expansion.

A commercial court

- 7.40 Following on from this, some would argue that if we are going to retain and revamp the commercial list we should go further and create a separate commercial court in the High Court. There are now commercial courts, or at least divisions, in many Commonwealth jurisdictions.

- 7.41 We describe, as only one example, the Commercial Court for England and Wales.¹⁶⁷ The High Court in that jurisdiction, as in New Zealand, is the senior civil court in England, but is split into three divisions – Family, Chancery and Queen’s Bench. The Queen’s Bench Division, which the Commercial Court is part of, deals with a wide range of contract law and personal injury/general negligence cases, but also has special responsibility as a supervisory court of lower courts and tribunals, and presiding over applications for judicial review.
- 7.42 The business of the Commercial Court is defined by the English Civil Procedure Rules as “any claim arising out of the transactions of trade and commerce” and specifically includes various claims relating to business documents or contracts, the export and import of goods, the carriage of goods, and so on.¹⁶⁸
- 7.43 The Commercial Court in London operates in a quite different context than New Zealand. The legal sector is a significant earner in the United Kingdom – in 2009 it generated £23b, the equivalent of 1.8% of that country’s GDP.¹⁶⁹ At the level of central government planning, promoting the United Kingdom’s legal services sector enjoys a prominent part.
- 7.44 A high premium is placed on efficiency in the Commercial Court. Anybody can look up on the internet the time it will take to get a hearing.¹⁷⁰ To take some examples, in November 2011, a one and a half to two hour application was shown as being available in January 2012, as were half days or one day applications. A one week trial could be heard in April 2012 and a four week trial in October 2012.
- 7.45 This kind of institution does not come cheap. The Rolls Building in London, in which the Commercial Court is now contained, was a heavy drain on Ministry of Justice funds, although that has to be placed in the context of the macro gain to the United Kingdom economy. Further, it is expensive to operate – it presently has 16 sitting High Court judges, not to mention clerks, registrars and other staff.
- 7.46 We are aware of the very distinct strain both on capital and personnel resources in relation to the High Court at Auckland, which would be the obvious – indeed the only – place to site such an institution. It seems unrealistic, at least for the foreseeable future, that any New Zealand administration would be prepared to fund even a modest standalone Commercial Court. Further, locating it in Auckland would not deal with the criticism of the present commercial list arrangement that Wellington and Christchurch are ignored.

Panel systems

- 7.47 Up to this point we have been focussing on specific ways to deal with commercial matters in the High Court. It would be outside our remit to delve into all possible areas of specialisation, but we cannot leave this topic without a discussion of one alternative model that could initially focus on commercial matters, but which has the potential to be expanded more broadly. That alternative model is what in Australia is often described as “panel systems” for superior trial courts.

New South Wales

- 7.48 In New South Wales, the Supreme Court is separated into the Common Law Division and the Equity Division.¹⁷¹ The former is similar to the New Zealand High Court, in that all judges do a mix of civil work and criminal work. The Common Law Division operates several lists, including an administrative law list, a defamation list, a possession list and a professional negligence list. The first claim on the time of judges who are on a list is the criminal business of the court, and they are also expected to do some work in the general civil jurisdiction of the court. As such, they are only part-time specialists.
- 7.49 The parties to litigation can identify the appropriate list they wish to be in,¹⁷² but allocation is ultimately subject to judicial control.¹⁷³ The cases within a list are managed by a list judge and, while best endeavours are made to have the case heard by a list judge, that is not guaranteed.

Victoria

- 7.50 The Trial Division of the Supreme Court of Victoria is further divided into the Commercial and Equity Division, the Common Law Division and the Criminal Division.¹⁷⁴ Judges sit in one or other of these divisions.
- 7.51 Since 1 January 2009, there has been a Commercial Court that operates within the Commercial and Equity Division.¹⁷⁵ It has seven lists and each list is managed by a “Judge in Charge”. Each proceeding in the Commercial Court is allocated to a docket of one of the lists, and judges are assigned to each list to manage and try the cases within that list.¹⁷⁶
- 7.52 It is open to parties to file cases in the Commercial Court, or opt simply to file in the general jurisdiction. However, even if a case is entered in the Commercial Court, it may be directed by a list judge to be removed if it would be more appropriately managed and tried elsewhere.

Queensland

- 7.53 The Trial Division of the Supreme Court of Queensland has operated a commercial list since 1 May 2002. It is designed to provide a streamlined process for the management and hearing of proceedings involving issues of a general commercial character, or arising out of trade or commerce in general, where the estimated length of trial is 10 days or fewer.¹⁷⁷ The list judges have a discretion as to whether or not to enter a case on the list.

Federal Court of Australia

- 7.54 In the Federal Court of Australia there is a full docket system – each case is allocated to a docket of a particular judge at the time of filing with the intention that it will remain with that judge for case management and disposition. Judges opt in to specialist lists and can serve there for three years at a time.

A panel system for New Zealand?

- 7.55 In our view, it would be possible to design a panel system appropriate to New Zealand's needs that would not disrupt the collegiate structure that underpins the higher courts. All High Court judges would have general jurisdiction, but a Judge could either opt in, or be allocated to, one of several panels. One of those panels could be a commercial list in the sense that those judges would both manage and decide commercial cases, dealing not only with interlocutory applications, but also with the substantive hearing. It is unnecessary at this juncture to discuss what other panels there might be, although we would be interested in hearing suggestions.
- 7.56 The existing court facilities could be used, and there could be commercial panels in Auckland and Wellington (at least), with, for example, four judges in Auckland with commercial list time, and two in Wellington. The judges would not be full time in the commercial list, but have to do some general list and criminal work.
- 7.57 The short point is not to settle now the precise details of a New Zealand panel model, but to ask whether advancement in the direction of a panel model for the High Court is appropriate for the New Zealand legal system.
- 7.58 If so, such development could be done by legislation. There is nothing unusual in this in a New Zealand context – there are, of course, divisions in the District Court which are legislated for, and for much the same reasons as would apply in the case of the High Court. Alternatively, this change could be done administratively, although this would require change to be effected from inside the judiciary and, as noted, views on this issue differ.

OUR PROVISIONAL VIEW

- 7.59 For the reasons already given, we do not think that the status quo should be maintained with respect to the commercial list. Nor, however, do we think that it should be abandoned in its entirety – as pointed out, there are still benefits to it. The remaining three options all have their merits, but cost implications would immediately seem to rule out a standalone commercial court.
- 7.60 This leaves a revamp and extension of the commercial list or a move to a panel system (of which a commercial panel would be one). For commercial matters there may, in effect, be no difference between the two. Rather, it is the scope to develop further panels in the panel system that sets them apart, and makes us inclined to prefer it. Indeed, this is what the Law Commission recommended in 2004,¹⁷⁸ and we see no reason to depart from those recommendations. While specific divisions beyond commercial matters may not be wanted at this stage, if a panel framework were set up, it would be easier to include other specialities at a later date.

Q19 Should the commercial list be continued in its present form?

Q20 If not:

- (a) Should it be abolished (in which case ordinary case management procedures would apply)?
- (b) Should it be extended to other centres?
- (c) Should it be extended to include substantive matters?
- (d) Should it be replaced with a stand-alone Commercial Court for the High Court?
- (e) Should it be replaced by a move to a panel system?

Q21 If a panel system were adopted:

- (a) what panels should there be?
- (b) should any such development be required by legislation, or done administratively?

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- 132 Andrew Beck “Do we need the Commercial List?” [2002] NZLJ 441 at 441.
- 133 Section 24A(1).
- 134 Section 24A(2).
- 135 Courts of New Zealand “Commercial List” < www.courtsofnz.govt.nz > .
- 136 Section 24B(1).
- 137 Section 24C(4).
- 138 High Court Rules, r 29.3.
- 139 Rule 29.4.
- 140 Rule 29.14(1).
- 141 Rule 29.13(1).
- 142 Judicature Act 1908, s 24C(1).
- 143 Section 24C(2).
- 144 Courts of New Zealand “Commercial List” < www.courtsofnz.govt.nz > .
- 145 Judicature Act 1908, s 24D.
- 146 Section 24E.
- 147 Section 24F.
- 148 Section 24G.
- 149 Andrew Beck “Do we need the Commercial List?” [2002] NZLJ 441 at 441.
- 150 Alan Galbraith QC “Facilitating and Regulating Commerce” (2002) 33 VUWLR 841 at 846.
- 151 *Annual Report of the Commercial List for the year ending 31 December 2000*.
- 152 *Commerce Commission v Cards NZ Ltd* HC Auckland CIV-2006-485-2535, 30 March 2007.
- 153 At [12].
- 154 At [13].
- 155 *Houghton v Saunders* HC Christchurch CIV-2008-409-348, 7 October 2011 at [55].
- 156 Email from Ministry of Justice to the Law Commission dated 13 September 2010.
- 157 To this end, we note that changes to case management in the general list proposed in the draft High Court Amendment Rules 2012 (version 1.9) may also have an adverse impact on the commercial list’s workload, as the commercial list’s advantages over the general list will be further eroded. These rules are scheduled to come into force on 1 May 2012.
- 158 Lawrence Baum “Probing the Effects of Judicial Specialization” (2009) 58 Duke Law Journal 1667 at 1676; Annette Marfording and Ann Eyland “Civil Litigation in New South Wales: Empirical and Analytical Comparisons with Germany” (2010) 28 UNSW Law Research Paper No. 2010-28 at 346.
- 159 Anthony Grant “Is the High Court’s civil jurisdiction in ‘a death spiral’? – Part 3” (2010) 153 NZ Lawyer Magazine 9.
- 160 Rachel Laing, Saskia Righarts, Mark Henaghan *A Preliminary Study on Civil Case Progression Times in New Zealand* (University of Otago Legal Issues Centre, Faculty of Law, 15 April 2011).

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- 161 Alan Galbraith QC “Facilitating and Regulating Commerce” (2002) 33 VUWLR 841 at 846.
- 162 High Court Rules, r 29.14(1).
- 163 See, generally, Alan Galbraith QC “Facilitating and Regulating Commerce” (2002) 33 VUWLR 841 at 843.
- 164 See, for example, Law Commission *Delivering Justice for All* (NZLC R85, 2004) at 269; Alan Galbraith QC “Facilitating and Regulating Commerce” (2002) 33 VUWLR 841 at 846; and *Commerce Commission v Cards NZ Ltd* HC Auckland CIV-2006-485-2535, 30 March 2007. See, also, the changes proposed for case management in the general list in the draft High Court Amendment Rules 2012 (version 1.9).
- 165 Law Commission *Delivering Justice for All* (NZLC R85, 2004).
- 166 *Cellier Le Brun v Le Brun* (2002) 16 PRNZ 376 at [14]. Similar comments have also been made in more recent cases, such as *Godfrey Waterhouse v Contractors Bonding Ltd* HC Auckland CIV 2010-404-3074, 13 December 2010 at [55]-[56] and *Allied Nationwide Finance Ltd (in rec) v Southland Building Society* HC Auckland CIV-2010-404-008228, 19 August 2011 at [48]. Again, though, a number of these features are likely to be adopted in the ordinary list when the changes to case management in the draft High Court Amendment Rules 2012 (version 1.9) come into force in mid-2012.
- 167 For a comprehensive Admiralty and Commercial Courts Guide, as was approved by the Rt Hon Lord Judge the Lord Chief Justice (and head of the Queen’s Bench Division), see Ministry of Justice (UK) < www.justice.gov.uk > .
- 168 Civil Procedure Rules, r 58.1(2).
- 169 Ministry of Justice “UK cements position as ‘centre of legal excellence’” (press release, 16 May 2011).
- 170 Ministry of Justice (UK) “Commercial Court lead times” < www.justice.gov.uk > .
- 171 Supreme Court of New South Wales “About us” < www.lawlink.nsw.gov.au > .
- 172 Uniform Civil Procedure Rules 2005, r 45.1.
- 173 Uniform Civil Procedure Rules 2005, r 45.2.
- 174 Supreme Court of Victoria “Court Structure” < www.supremecourt.vic.gov.au > .
- 175 Supreme Court of Victoria “Commercial Court” < www.supremecourt.vic.gov.au > .
- 176 Notice to Practitioners 2008 – Commercial Court, Supreme Court of Victoria, 12 December 2008.
- 177 Practice Direction No 3 of 2002, Supreme Court of Queensland, 26 March 2002 (as amended by Practice Direction No 2 of 2008, Supreme Court of Queensland, 14 August 2008).
- 178 Law Commission *Delivering Justice for All* (NZLC R85, 2004).

Chapter 8

High Court Rules

ISSUES

- 8.1 Section 51 of the Judicature Act 1908 authorises the making of rules *regulating the practice and procedure* of the High Court in all civil proceedings. The High Court Rules are set out in Schedule 2 to the Judicature Act 1908, and are therefore a statutory enactment. Section 51A of the Act provides that the High Court Rules (and any reprint) may be printed and published under section 14 of the Acts and Regulations Publication Act 1989 as if the High Court Rules were regulations within the meaning of that Act.
- 8.2 By way of contrast, the rules for the Supreme Court, Court of Appeal, criminal jurisdiction of the High Court and the District Courts are not appended as statutory schedules to the Judicature Act 1908, or any other Act, but are simply made as statutory regulations.
- 8.3 The reason for the different treatment of the High Court Rules lies in the need to avoid issues of “ultra vires” (which means unauthorised, or beyond the scope of powers granted by law). There are two aspects to the ultra vires issue: where the content of the rules extends beyond regulating the practice and procedure of the High Court (which is the extent of the scope of section 51); and where the rules incidentally amend certain statutes, which would be objectionable if the rules were made by regulation, but presents no problem if the rules are passed by statute.
- 8.4 In 2008, the Rules Committee identified a number of areas where the content of the rules might present ultra vires issues.¹⁷⁹ Among others, they included:
- (a) attachment orders;
 - (b) discovery against non-parties;
 - (c) freezing orders;
 - (d) search orders.

- 8.5 Issues of ultra vires may also potentially arise in relation to rules relating to contempt; rules relating to charging orders, sale orders, possession orders, arrest and sequestration orders; rules requiring a party to obtain leave to lodge an appeal or seek a review; and rules providing for the enforcement of judgments or orders, such as orders for the examination of a judgment debtor. This is not an exhaustive list – there may be other matters as well. We note that the arguments relating to ultra vires are much stronger in relation to some of these matters than others, but they are all areas in which doubts as to whether a rule is intra or ultra vires may arise.
- 8.6 Enacting the High Court Rules as a schedule to the Judicature Act 1908 overcomes any questions of ultra vires. However, the vehicle of a statutory schedule for rules is not without problems. Despite being a statutory schedule, the rules can be amended by regulation. As the Legislation Advisory Committee notes in its guidelines, provisions allowing for the making of regulations to amend an empowering statute should only be used in exceptional circumstances, not as a matter of routine.¹⁸⁰
- 8.7 At a practical level, because of the length of the rules this method of dealing with them vastly increases the size of the Judicature Act 1908 – the reprinted statute runs to more than 900 pages, of which the High Court Rules take up almost 800 pages.
- 8.8 A different approach is adopted in the District Courts. Rather than appearing in the District Courts Rules, a number of the matters mentioned above, which might raise questions of ultra vires, are provided for in substantive provisions of the District Courts Act 1947.¹⁸¹
- 8.9 This review provides an opportunity to reconsider the way the High Court Rules are established. If, as proposed, the review results in a new consolidated Courts Bill, that legislation is the logical place to set out any rule making powers relating to the courts. How should the High Court Rules be treated in the Bill? There are a number of possibilities.
- 8.10 There are two options which we are inclined to discard:
- (a) The rules could be enacted as a schedule to the new consolidated courts statute. This would avoid any questions of ultra vires, but it would have the same disadvantages as the present situation – the length of the resulting statute, and concerns about subsequent amendment of the schedule by regulation.
 - (b) The Courts Bill could contain a broad empowering provision, which avoids any issues of ultra vires by providing for the making of regulations relating to more than just practice and procedure. However, in our view this is undesirable – empowering provisions should be drafted so that the limits of the delegated legislative power are specified as clearly and precisely as possible.
- 8.11 There are three other options on which we would welcome submitters' views.

1. Setting out specific rules in legislation

- 8.12 The first option is to adopt the approach taken in the District Courts Act 1947 and set out any rules which might raise issues of ultra vires in the new consolidated Courts Bill itself.
- 8.13 Section 122 of the District Courts Act 1947 empowers the Governor-General, with the concurrence of the Chief District Court Judge and two or more members of the Rules Committee (of whom at least one is a District Court Judge) to make rules by Order in Council regulating the practice and procedure of the Court in the exercise of its jurisdiction. However, the Act also contains specific sections relating to matters that go beyond practice and procedure, such as attachment orders, charging orders, and orders for pre-commencement discovery.
- 8.14 If adopted for the High Court Rules, to successfully avoid any risk of ultra vires this option would require the identification of all the rules that might fall outside the terms of an empowering provision relating only to practice and procedure. Assuming those matters can be satisfactorily identified, the disadvantage of this approach for the High Court Rules is that the resulting statutory rules could only be changed by legislative amendment.
- 8.15 This option would also require portions of the current High Court Rules to be shifted out of the body of the existing rules and into the new bill. This may adversely affect the coherence of the remaining rules. It would also add to the length of the new Courts Bill.

2. Specific rule making powers for areas of concern

- 8.16 The second option is to provide a general rule making power in a new Courts Bill for rules relating to practice and procedure in the High Court, and also expressly set out powers to make rules relating to areas that currently cause concern. For example, the statute could provide that rules may be made providing for discovery and inspection of documents before the commencement of a proceeding. This has the advantage of addressing the ultra vires issue in relation to each area specified, but does not require the full rules to be set out in the legislation. Once rules are made, they could be adjusted without the need for statutory amendment. (A similar approach could be taken to the District Courts Rules in the new consolidated statute.)
- 8.17 Again, this option requires the successful identification and specification of all the areas of concern. This would not necessarily be an easy task, and there may be some disagreement as to where the boundaries lie.

3. Deeming the existing rules to be validly made

- 8.18 A third option is to include a provision in a new Courts Bill that deems the existing High Court Rules to be validly made under the new consolidated statute, and a further provision that authorises them to be printed and published as if they were regulations. Because the existing rules have already been enacted by statute, issues of ultra vires in relation to them would not arise.
- 8.19 The new Courts Bill would contain a power to make future rules regulating practice and procedure in the High Court. Any such rules would need to be within the scope of that empowering section.
- 8.20 This option would be an effective way of carrying the existing rules forward. However, issues may still arise in relation to subsequent amendments to the existing rules, where those are made by Order in Council.
- 8.21 Unlike option 2, this proposal would continue the differing treatment of the High Court and District Courts Rules.

Q22 How do you think the High Court Rules should be treated in legislation?

- Should rules that extend beyond matters of practice and procedure be set out in a new Courts Bill (like the relevant provisions of the District Courts Act 1947)?
- Should there be specific empowering provisions in a new Courts Bill for the making of rules that extend beyond matters of practice and procedure?
- Should the existing rules be deemed to be validly made under the new legislation?
- Is there another approach?

179 Minutes of the Rules Committee, 9 June 2008.

180 Legislation Advisory Committee Guidelines at [10.1.8] < www2.justice.govt.nz/lac/pubs/2001 > .

181 See, for example, District Courts Act 1947, s 56A (pre-commencement discovery); ss 84F and following (attachment orders); s 84O (contempt); s 85 (warrant of distress); ss 88-91 (sale of goods seized); s 96 (charging orders).



Chapter 9

Civil jury trials in the High Court

INTRODUCTION

- 9.1 Many people, including members of the legal profession, are unaware that parties to a civil dispute may have their case heard by a jury, provided certain criteria are met. Civil jury trials are rare in New Zealand now, so in considering the consolidation of the courts legislation it is necessary to consider whether legislation should continue to provide for trial by a judge and jury in civil proceedings, and, if so, in what circumstances.

THE CURRENT LAW IN NEW ZEALAND

- 9.2 Section 19A of the Judicature Act 1908 provides the right for a party to civil proceedings to have the case heard by a judge and jury in the High Court where:
- the relief claimed is payment of a debt, pecuniary damages, or recovery of chattels;
 - the value of the debt, damages or chattels exceeds \$3,000; and
 - notice is given to the Court and the other party.
- 9.3 The notice must be given at least five working days before the setting down date for the proceeding, or before the notice date set down by the judge.¹⁸²
- 9.4 The courts have held that “pecuniary damages” in section 19A does not include public law compensation sought for a breach of the New Zealand Bill of Rights Act 1990,¹⁸³ but does include a claim by one tortfeasor against another for contribution or indemnity under section 17(1) of the Law Reform Act 1936.¹⁸⁴

- 9.5 If a party meets the above criteria, the judge has an overriding discretion under section 19A(5) of the Judicature Act 1908 to order that a trial will be by judge alone, on application by either party, where:
- the trial or any issue within it will involve mainly difficult questions of law;¹⁸⁵ or
 - the trial will involve prolonged examination of documents or accounts,¹⁸⁶ or investigation of difficult questions relating to scientific, technical, business or professional matters.¹⁸⁷
- 9.6 The onus of establishing one of the factors identified in section 19A(5) falls on the party resisting trial by jury.¹⁸⁸
- 9.7 The judicial discretion in section 19A(5) was introduced in 1960 to the forerunner of this section.¹⁸⁹ The amendment was intended to remedy the defect in the law that a party that requested a trial by jury could not be denied that right, however inconvenient and unsatisfactory a trial before judge and jury might be.¹⁹⁰
- 9.8 Section 19B provides that all civil proceedings where no application is made for jury trial are to be tried before a judge alone, unless the judge considers the proceeding or issues within it can be more conveniently tried by a jury.
- 9.9 Together, sections 19A and 19B essentially give a *prima facie* right to trial by jury in any civil proceeding where the relief claimed exceeds \$3,000. This right is subject to a judicial discretion in the precisely defined circumstances set out in section 19A(5).
- 9.10 The courts will not interpret the *prima facie* right to a jury trial narrowly by basing the decision on considerations such as the greater efficiency and reduced cost of a judge alone trial.¹⁹¹
- 9.11 In *M v L*, the family of a student who had been the victim of sexual abuse by a school teacher sued the Crown, among other defendants, as the teacher's employer on the basis that it was vicariously liable for the teacher's actions and applied for the case to be heard by judge and jury.¹⁹² The Crown opposed the application for jury trial, arguing that the case would involve difficult questions of law such as vicarious liability, exemplary damages and fiduciary relationships. Giles J discussed *Guardian Assurance Co v Lidgard*,¹⁹³ where the Court of Appeal considered that a narrow interpretation to the grounds for declining a jury trial was appropriate. This was contrasted with the judgment of Barker J in *Shattock v Devlin*.¹⁹⁴ The judgment in *Shattock* did not refer to *Lidgard* and instead found that the court should discourage jury trials for pragmatic reasons. While sympathetic to Barker J's views, Giles J accepted that later cases had followed *Lidgard* rather than *Shattock*,¹⁹⁵ and found that, once the questions of law had been determined by the judge, it would be possible for a jury to satisfactorily consider the questions of fact raised by the case.¹⁹⁶

USE OF CIVIL JURY TRIALS IN NEW ZEALAND

- 9.12 Although sections 19A and 19B of the Judicature Act 1908 have been used and relied upon in the past, these days civil jury trials are seldom used in New Zealand. The Ministry of Justice's electronic Case Management System, which was introduced in 2003, records that in the last eight years only three civil jury trials actually took place in New Zealand.¹⁹⁷ Eight cases had initially been scheduled for a civil jury trial during that time. Four of those eight cases proceeded to trial, but only three civil jury trials took place, as two of the cases were heard together in a single trial. Four cases were discontinued before trial.
- 9.13 Sections 19A and 19B are now most commonly invoked in defamation cases.¹⁹⁸ In seven of the eight cases referred to above, the cause of action was defamation; one was a claim for damages resulting from imprisonment and assault by Police.
- 9.14 Where defamation proceedings are tried before a judge and jury, the judge must determine, on the basis of the evidence, whether the words complained of are reasonably capable of referring to the plaintiff. The question of whether or not the words complained of refer to the plaintiff is a question of fact to be determined by the jury.¹⁹⁹
- 9.15 Similarly, the judge must rule on whether the words used are, in the circumstances, reasonably capable of bearing a defamatory meaning in the minds of reasonable persons. If they are, the jury determines whether the words did in fact bear such a meaning.
- 9.16 The submissions of the parties on whether the matter in question is capable of a defamatory meaning, and the ruling of the judge on that issue must be made or given in the absence of the jury.²⁰⁰ The jury assesses the level of damages to be awarded to a successful plaintiff.²⁰¹
- 9.17 Applications for civil jury trials are rare, and most applications for a civil jury trial since 2005 have been declined, with the courts finding that either the grounds in section 19A(5) apply or that the matter can more conveniently be tried by judge alone under section 19B.²⁰²
- 9.18 The most likely reason for the rare use of civil juries in New Zealand is the accident compensation scheme and the corresponding lack of tort liability for accidents. Personal injury claims, and motor vehicle claims particularly, have made up a significant proportion of civil jury cases overseas. These types of claims are not tried in New Zealand because of the accident compensation legislation.

CIVIL JURY TRIALS IN OTHER JURISDICTIONS

9.19 Civil jury trials are available in most comparable jurisdictions.

United Kingdom

9.20 In England, jury trials are required in the Queen's Bench Division if, upon application, a claim is made for fraud (against the party applying for the action to be tried by jury), defamation, malicious prosecution or false imprisonment. In other cases, the Court has a discretion to order a jury trial.²⁰³ English case law suggests that, other than those actions for which a jury trial is generally required if requested, a jury trial order is rarely made in civil proceedings. In actions for personal injury, an order for a jury trial will only be made if there are exceptional circumstances.²⁰⁴

9.21 A recent United Kingdom Ministry of Justice report stated that there are now almost no civil cases decided by jury in England and Wales.²⁰⁵

Australia

9.22 In Australia, there has been a trend towards restricting the right to civil jury trial.²⁰⁶ The right to a civil jury trial has been abolished in South Australia,²⁰⁷ and restricted to claims of defamation, fraud, malicious prosecution, false imprisonment, seduction or breach of promise of marriage in Western Australia.²⁰⁸ In Tasmania, the right to a civil jury trial exists for most claims other than motor vehicle accidents, but it is virtually never used. In Queensland, there is a *prima facie* right to a civil jury trial, but there are numerous statutory limits on this, and civil jury trials are uncommon. In ACT, Northern Territory and the Federal Court, there is no *prima facie* right to a civil jury trial.²⁰⁹

9.23 The right to a civil jury trial has also been limited in New South Wales.²¹⁰ From 2001, a civil jury trial has only been available on application where the Court is satisfied that the interests of justice require the case to be tried by jury, or for all defamation cases unless the case involves prolonged examination of documents or scientific evidence, or both parties consent to the case being tried by judge alone. Most Australian civil jury trials are now conducted in Victoria,²¹¹ and some commentators have argued that Victoria may follow suit in reducing the right to civil jury trials.²¹²

Canada

- 9.24 In Canada, the Ontario Law Reform Commission reported on jury trials in civil cases in 1996.²¹³ The Commission noted that civil jury trials were available in all Canadian provinces,²¹⁴ except Quebec, which abolished them in 1976.²¹⁵ In Manitoba and Nova Scotia, jury trials are mandatory for specified claims, unless the parties consent to a claim being tried by judge alone. In Alberta, Saskatchewan, New Brunswick and Newfoundland, jury trials are not mandatory, but are available for certain claims. In British Columbia, jury trials are available for all types of civil claims, but the party requiring the jury must pay the costs of having a jury, which effectively limits the use of civil jury trials. On Prince Edward Island, jury trials are precluded for specified claims, but are otherwise available.²¹⁶ The Ontario Law Reform Commission found that civil jury trials are not used often in Canadian jurisdictions.²¹⁷ After reviewing and consulting on the experience in other jurisdictions and the arguments for and against retaining civil jury trials, the Ontario Commission recommended retaining civil juries and clarifying the grounds on which judges could strike out a jury notice.²¹⁸ However, these recommendations do not appear to have been implemented. It has been noted that in Canada personal injury cases and motor vehicle actions are the type of civil claims that are most frequently tried before a jury.²¹⁹

United States

- 9.25 Civil jury trials are much more common in the United States than in Canada. The Ontario Law Reform Commission estimated that there are 50,000 civil jury trials each year in the United States.²²⁰ The importance of civil jury trials in United States federal and state courts reflects the fact that the right to a civil jury trial is entrenched by the Seventh Amendment to the United States Constitution and by similar provisions in state constitutions.²²¹ However, even in the United States the use of civil jury trials has reduced as a proportion of the overall number of civil claims.²²²

ISSUES

- 9.26 There are a number of arguments in favour of the repeal of Section 19A. Even back in 1988, Barker J noted in *Shattock v Devlin* that civil jury trials are uncommon in New Zealand, and are rarely, if ever, encountered in any claims for damages other than for claims based on defamation, malicious prosecution and false imprisonment.²²³ The Judge was sympathetic to restrictions on civil jury trials, particularly in light of the limited availability of court time, and the extra time civil jury trials take up when compared with judge alone trials. For jury trials, extra time must be spent, for example in selecting jurors, delivering an opening address to the jury, settling legal issues, final addresses to the jury and the judge's summing up for the jury.

- 9.27 Further, a party that is unhappy with a jury's verdict will inevitably apply to set aside the jury's verdict or for a new trial. It is usually only when there has been a determination on the new trial application that judgment is entered and an appeal can be lodged. Conversely, in a judge alone trial, an appeal can be lodged at once.
- 9.28 There is also the issue of whether it is appropriate to expect members of the community to sit on a jury to consider a civil dispute. Generally, people who give up their time to undertake jury service do so because they accept there is a public duty to decide the guilt or innocence of a fellow citizen on a serious criminal charge. It is doubtful that potential jurors would be so willing to give up their time to adjudicate on what is essentially a private dispute between two or more parties. It is likely many employers would be less than impressed by the prospect of their employees taking time off work to sit on a jury considering a civil dispute.
- 9.29 In *M v L*, Giles J commented:²²⁴
- ...Over recent years there has been increasing demand and pressure on the Court system, accompanied by publicly expressed concerns as to delays, particularly in resolving civil litigation. Civil jury trials will do nothing to eliminate the perceived delay.
- 9.30 He contrasted the United Kingdom's approach of recognising a right to a jury only in certain limited types of cases with the more general New Zealand provision, and went on to say:²²⁵
- It is, of course, for Parliament to resolve this issue, not for the Courts which must simply construe and apply s 19A(5). In my view it is an area deserving of further consideration. Outside the field of defamation (and even there the need can be debated) there is, in my opinion, no demonstrable need for jury trials in the civil jurisdiction.
- 9.31 The relative inefficiency and costliness of jury trials in civil proceedings and the more restrictive approach in the United Kingdom and most Australian states are factors that add weight to the argument to repeal sections 19A and 19B, or to further restrict access to civil jury trials. In *Palmer v Danes Shotover Rafts Ltd*, William Young J commented that civil jury trials are now so rare that "an actual civil jury trial is regarded as a quaint curiosity within the legal fraternity".²²⁶ He referred to the risk of "aberrant results", because of the unfamiliarity of jurors, judges and lawyers with the civil jury trial process.²²⁷ However, he concluded that the balance struck by the legislation did not entitle the Court to interpret it as requiring jury trials to be treated as "an anachronism ... to be discouraged or thwarted at every opportunity".²²⁸ In *McInroe v Leeks*, the Court of Appeal stated:²²⁹

The importance of the right to a jury trial is not to be undervalued, even in today's conditions where such trials are, comparatively speaking, not common in the civil jurisdiction of the High Court. At issue is a balancing exercise, under which if the threshold requirements are made out the Court must give careful consideration to how best the trial process and its management can meet the overall justice of the case, placing due weight on the entitlement of a party to seek trial by jury. The significance of the jury influence on standards of behaviour, and of vindicating in an appropriate way those who have been wronged and also vindicating those who have been wrongly charged with infringing another's rights, must be kept firmly in mind.

- 9.32 The argument that civil jury trials are too costly and inefficient should not be overstated. There appears to be little evidence, other than anecdotal, for this view, or the alternative, that civil jury trials are valuable in spreading legal power within the community.²³⁰ The Ontario Law Reform Commission found in 1996 that civil jury trials on average cost \$1,600 more than a trial conducted by a judge alone.²³¹ However, they found that there were potential savings associated with civil jury trials because there appeared to be an increased number of claims that were settled before or during trial with jury trials. This meant that the overall cost of jury trials was insubstantial.²³² We should be careful in considering the Canadian findings, however, as it is not clear that the same results would be seen in New Zealand, where there are far fewer civil jury trials, and the nature of those trials differs substantially from the majority of those in Canada.
- 9.33 A further perceived risk of civil jury trials, alluded to by William Young J in *Palmer*, is that they produce unpredictable results.²³³ The Ontario Law Reform Commission also examined this assumption. The views they received through consultation suggested that this was not a sufficient basis for eliminating the civil jury. Some lawyers and judges suggested that the increased settlement rates in civil jury trials was due to perceived unpredictability, but others suggested that judges are equally unpredictable, or that truly “predictable” cases are likely to settle before trial so that all cases that reach trial are intrinsically “unpredictable”.²³⁴ Research attempting to evaluate the competency of juries has found that juries have a strong tendency to reach the same conclusions as judges.²³⁵ The Commission concluded that perceived unpredictability was not a compelling argument for reducing civil jury trials.
- 9.34 There is a difference in New Zealand, however, where few counsel and judges have experience in civil jury trials. This raises questions of competence to deal with civil jury trials that would not apply in Canada.

What value do civil jury trials add?

- 9.35 Jacqueline Horan researched the perceptions of the civil jury system in Victoria, Australia. She concluded that the availability of civil jury trials creates a number of benefits.²³⁶ The civil juries have come to have symbolic value to the contemporary Australian community.²³⁷ The civil jury system has symbolised the citizens' participation in the civil legal system. It allows community values to influence the legal system and allows the community to exert influence on future litigants.²³⁸ Research has found that civil juries are viewed positively in Victoria by jurors, which may have an impact on how they are viewed within the wider community. A further research finding was that jurors, judges and court staff expressed confidence in using the civil jury system.²³⁹ Horan argues that as a result of the positive community experiences with civil juries, the legitimacy of the legal system is promoted.²⁴⁰
- 9.36 Horan has also expressed concern about reforms of the civil jury system by Australian governments that have been based on opinions and biases, rather than facts. She has noted a lack of empirical data about the effects of abolition of civil jury systems.²⁴¹
- 9.37 Although there is potential for the same benefits that Horan has noted to apply in New Zealand, because civil juries are now seldom used, there is unlikely to be any beneficial impact in terms of community participation in the legal system.
- 9.38 It is a value judgement as to whether a matter should be determined by members of the community or a judge sitting alone. Rare use of the right to civil juries suggests that they are no longer valued by our society as they once may have been.
- 9.39 However, we note that there may be a stronger case for the use of a civil jury in defamation cases than in other civil cases, because defamation involves injury to reputation – ie the esteem in which the plaintiff is held by his or her fellow citizens. There is thus some logic in a panel of those fellow citizens being asked to determine (a) what they take the words used about the plaintiff to mean; (b) whether those words lower the standing of the plaintiff; and (c) how much money the defamation is worth.

OPTIONS FOR REFORM

- 9.40 If civil juries are to be retained, when should they be available? There are several options for how the law could address this.
- 9.41 One option would be to repeal section 19A and retain section 19B. Section 19A provides a *prima facie* right to a jury trial in certain civil proceedings, with judicial discretion to decline this if relatively limited grounds are met. Section 19B gives no right to parties to the proceedings, but allows the court the discretion to grant a civil jury trial based on convenience. If section 19A was repealed it seems unlikely that all of the same cases that would result in a jury trial under that section would be granted a jury trial under section 19B.
- 9.42 Another option for the reform of the civil jury provisions would be to adopt an approach similar to that used in the United Kingdom, and in some Australian and Canadian states, where only particular types of civil cases can be tried by jury. Some causes of action, generally those involving an assessment of the veracity of witnesses, such as defamation or false imprisonment, seem to be better suited to trial by jury. Such a restriction may provide more rational limits on the right to a civil jury trial than the current law, as they relate to the content of the issues to be decided. However, this option would limit the existing right.
- 9.43 At the very least, the \$3,000 threshold in section 19A(2) for the value of the debt, damages or chattels at issue should be raised. This amount was increased from \$1,000 in 1980 but has not been altered in more than 30 years. As the value of \$3,000 is now very different from what it was in 1980, and the sum is well below that which is generally sought in High Court actions, any threshold sum should be increased. This would limit the cases to which section 19A applies. It is highly unlikely that the \$3,000 threshold currently restricts any parties from being able to apply for a jury trial under section 19A. Amending the threshold would provide the opportunity to create a more meaningful gateway to the right under section 19A so that only the more serious cases have the option of a civil jury trial.

Q23 Should the new courts legislation make provision for civil jury trials?

Q24 If so, in what circumstances should a civil jury trial be available?

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- 182 High Court Rules, r 7.14.
- 183 However, claims for compensation for breach of the New Zealand Bill of Rights Act 1990 may be considered under the section 19B(2) discretion to direct trial by jury: *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA) at 677 – 678; *Reekie v Attorney-General* HC Auckland CIV-2008-404-5757, 21 September 2009 at [8] – [9].
- 184 *Collinson v Wairarapa AA Mutual Insurance Co* [1958] NZLR 1 (CA).
- 185 See, for example, *Prebble v TVNZ Ltd* [1993] 3 NZLR 513 (a defamation case that was held to involve difficult questions in relation to business matters, which was an investigation that could not conveniently be made with a jury).
- 186 See, for example, *Siemer v Fardell* CA171/07, 22 November 2007; *Rawlinson v Purnell, Jenkinson & Roscoe* (1996) 10 PRNZ 177 (CA) (examination of a considerable, but not vast, number of documents held not to involve a “prolonged examination”).
- 187 See, for example, *Wyatt v Iversen* HC Napier CP15/98, 30 June 2000 (application for judge-alone trial refused in case regarding a claim of negligence for a misdiagnosis of emphysema); *X v Y* [1996] 2 NZLR 196 (application for judge-alone trial refused in case regarding a claim of negligence for a treatment of a newborn).
- 188 *M v L* [1998] 3 NZLR 104 (HC); *News Media (Auckland) Ltd v Young* [1989] 2 NZLR 173 (CA).
- 189 Judicature Amendment Act 1960, s 4, introduced by s 2(5) of the Judicature Amendment Act (No 2) 1955.
- 190 *Guardian Assurance Co Ltd v Lidgard* [1961] NZLR 860 (CA) at 863.
- 191 *McGechan on Procedure* (online looseleaf ed, Brookers) at [J19B.01].
- 192 *M v L* [1998] 3 NZLR 104 (HC).
- 193 *Guardian Assurance Co Ltd v Lidgard* [1961] NZLR 860 (CA).
- 194 *Shattock v Devlin* (1988) 1 PRNZ 271 (HC).
- 195 See, for instance, *Willis v Katavich* (No 1) HC Auckland A547/85, 19 November 1987; *Smith v Television New Zealand Ltd* (1994) 7 PRNZ 456 (HC).
- 196 *M v L* [1998] 3 NZLR 104 (HC) at 124-125.
- 197 Email from the Ministry of Justice to the Law Commission (16 August 2011).
- 198 For example, *Television New Zealand Ltd v Haines* CA96/06, 6 September 2006; *Haines v Television New Zealand Ltd* HC Auckland CIV-2002-404-2102, 5 April 2006; *Television New Zealand Ltd v Quinn* [1996] 3 NZLR 24 (CA); *Television New Zealand Ltd v Prebble* [1993] 3 NZLR 513 (CA).
- 199 *Laws of New Zealand Defamation* (online ed) at [215].
- 200 Defamation Act 1992, s 36.
- 201 *Delaney v News Media Ownership Ltd* [1976] 1 NZLR 322 (SC).
- 202 *Reekie v Attorney-General* HC Auckland CIV-2008-404-5757, 21 September 2009; *Berryman v Attorney-General* HC Wellington CIV-2006-485-751, 31 July 2009; *Gregory v Gollan* SCNZ SC4/2009, 30 March 2009; *Gregory v Gollan* (2008) 19 PRNZ 450 (CA); *Greer v Prison Manager at Rimutaka Prison* HC Wellington CIV-2008-485-1603, 23 October 2008; *Siemer v Fardell* CA171/07, 22 November 2007; *Siemer v Fardell* HC Auckland CIV-2003-404-5782, 3 April 2007; *Television New Zealand Ltd v Haines* CA96/06, 6 September 2006; *Haines v Television New Zealand Ltd* HC Auckland CIV-2002-404-2102, 5 April 2006; *Order of St John Northern Regional Trust v Gemini 10 Ltd* HC Auckland CIV-2002-404-1559, 16 August 2005.

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- 203 Senior Courts Act 1981 (UK), s 69; Rules of Senior Courts, O33, rr 2 and 5.
- 204 *Ward v James* [1966] 1 QB 273 (CA); *Sims v William Howard & Sons Ltd* [1964] 2 QB 409 (CA); *Hennell v Ranaboldo* [1963] 3 All ER 684 (CA).
- 205 Ministry of Justice (UK) *Diversity and Fairness in the Jury System* (Ministry of Justice Research Series 2/07, 2007) at 2.
- 206 Jacqueline Horan “Perceptions of the Civil Jury System” (2005) 31 Monash U L R 120 at 120.
- 207 Juries Act 1927 (SA), s 5. No investigation into the workings of the civil jury system was conducted before the right to a civil jury trial was removed in South Australia: Jacqueline Horan “The Lore and Lore of the Australian Civil Justice System” (University of Melbourne, Faculty Research Workshop Paper).
- 208 Supreme Court Act 1935 (WA), s 42.
- 209 Jacqueline Horan “The Lore and Lore of the Australian Civil Justice System” (University of Melbourne, Faculty Research Workshop Paper) at 1 – 2.
- 210 Courts Legislation Amendment (Civil Juries) Act 2001 (NSW).
- 211 Jacqueline Horan “Perceptions of the Civil Jury System” (2005) 31 Monash U L R 120 at 121.
- 212 James Crawford and Brian Opeskin *Australian Courts of Law* (4th ed, Oxford University Press, 2004) at 82.
- 213 Ontario Law Reform Commission *Report on the Use of Jury Trials in Civil Cases* (1996).
- 214 Alberta: Jury Act RSA 2000 c J-3, s 17; British Columbia: Supreme Court Act RSBC 1996, c 443, s 17, Jury Act RSBC 1996 c 242, ss 14 – 23; Manitoba: Jury Act CCSM c J30, s 32, Court of Queen’s Bench Act CCSM c C280, s 64; New Brunswick: Jury Act SNB 1980 c J-3.1, s 33, Rules of Court, NB Reg 82-73, rule 46; Newfoundland and Labrador: Jury Act 1991 SNL c 16, s 32; Nova Scotia: Judicature Act RSNS 1989 c 240, s 34; Prince Edward Island: Jury Act RSPEI 1988 c J-5.1, s 3; Saskatchewan: Jury Act 1998 SS 1998 c J-4.2, ss 15 – 19.
- 215 Jurors Act SQ 1976 c.9, s 56.
- 216 Ontario Law Reform Commission *Report on the Use of Jury Trials in Civil Cases* (1996) at 13 – 14.
- 217 Ontario Law Reform Commission *Report on the Use of Jury Trials in Civil Cases* (1996) at 16.
- 218 At 87.
- 219 At 1.
- 220 At 17, citing Galanter “The Regulatory Function of the Civil Jury” in Litan (ed) *Verdict: Assessing the Civil Jury System* (1993) 61 at 63.
- 221 Ontario Law Reform Commission *Report on the Use of Jury Trials in Civil Cases* (1996) at 17; Ontario *Royal Commission Inquiry into Civil Rights* (1968) Report no 1, vol 2; Ontario Law Reform Commission *Report on Administration of Ontario Courts* (1973) Part I.
- 222 Galanter “The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts” (2004) 1 J Empirical Legal Studies 459 at 460 – 461. Galanter found that as a percentage of civil dispositions in 2002, civil jury trials were less than one-sixteenth what they had been in 1962: in 1962, 5,820 (11.5 %) dispositions were by jury trial, while in 2002 jury trial dispositions were 4,569 (1.8 %).
- 223 *Shattock v Devlin* (1988) 1 PRNZ 271 (HC) at 276.
- 224 *M v L* [1998] 3 NZLR 104 (HC) at 116.

225 At 116-117.

226 *Palmer v Danes Shotover Rafts Ltd* (1999) 14 PRNZ 57 (HC) at [8].

227 At [10].

228 At [11].

229 *McInroe v Leeks* [2000] 2 NZLR 721 (CA) at [21].

230 Jacqueline Horan “Perceptions of the Civil Jury System” (2005) 31 Monash U L R 120 at 120.

231 Ontario Law Reform Commission *Report on the Use of Jury Trials in Civil Cases* (1996) at 77.

232 At 77.

233 *Palmer v Danes Shotover Rafts Ltd* (1999) 14 PRNZ 57 (HC).

234 At 78.

235 Kalven and Zeisel *The American Jury* (University of Chicago Law School, 1966) at 58.

236 Jacqueline Horan “Perceptions of the Civil Jury System” (2005) 31 Monash U L R 120 at 148 – 151.

237 At 148.

238 At 148 – 149.

239 At 149 – 150.

240 At 151.

241 Jacqueline Horan “The Lore and Lore of the Australian Civil Justice System” (University of Melbourne, Faculty Research Workshop Paper) at 25.



Chapter 10

Court of Appeal

INTRODUCTION

- 10.1 The Judicature Act 1908 provides for the constitution and proceedings of the Court of Appeal.²⁴² In this chapter we set out some matters that have been identified in reviewing the provisions of the Act that relate to the Court of Appeal.

COMPOSITION OF THE COURT OF APPEAL

- 10.2 Sections 58 to 58F of the Judicature Act 1908 contain provisions dealing with the composition of the Court of Appeal. Essentially, these provide that the Court of Appeal generally sits in divisions of three judges. There are separate divisions for criminal and civil proceedings. The Court must adopt a procedure for assigning judges to act as members of a criminal or civil division of the Court, and that procedure must be published in the *Gazette*.
- 10.3 The Court must sit as a Full Court of five judges to hear and determine cases that are considered to be of sufficient significance to warrant this, and cases referred to the Full Court from a division of the Court. The question of whether a case is of sufficient significance to warrant the consideration of a Full Court must be determined in accordance with the then current procedure adopted by the Court and published in the *Gazette*.²⁴³
- 10.4 Section 61A provides that one Court of Appeal judge, sitting in chambers, may make any incidental orders and give incidental directions in any civil appeal or proceeding before the Court of Appeal, not being an order or a direction that determines the appeal or disposes of any question or issue that is before the Court in the appeal or proceeding.

- 10.5 With regard to criminal matters, the Criminal Procedure Act 2011 specifies that a judge of the Court of Appeal may make any incidental orders and give any incidental directions that he or she thinks fit, other than an order or a direction that determines the appeal or disposes of any question that is before the Court in the appeal.²⁴⁴
- 10.6 Section 58A(2) of the Judicature Act 1908 requires the Chief Justice to nominate judges of the High Court who may comprise members of the Court of Appeal for the purposes of a specified criminal case or cases, or all criminal cases in a specified period, not exceeding three months. The Chief Justice is required to consult with the Chief High Court Judge and the President of the Court of Appeal on any nomination. A virtually identical provision relating to civil proceedings can be found in section 58B(2).
- 10.7 Sections 58A and 58B contain long provisions regarding the number of High Court judges that may sit in each division of the Court of Appeal. Section 58A provides that in criminal appeals divisions, there must be:
- three Court of Appeal judges;
 - two Court of Appeal judges and one High Court judge nominated by the Chief Justice; or
 - one Court of Appeal judge and two High Court judges nominated by the Chief Justice.
- 10.8 Section 58B deals with the composition of civil appeals divisions, and essentially repeats the requirements for criminal proceedings in section 58A.

Reform

- 10.9 As they are cumbersome and repetitive, in our view sections 58A to 58F could be drafted much more simply to make the legislation clearer and more accessible to both the public and the legal profession.
- 10.10 Further, the present requirement for three judges to sit in each division (unless the matter requires a Full Court or is an incidental order or direction in a civil matter) is resource intensive and may be unnecessary for some matters. It has been suggested to us that it should be possible for the Court of Appeal to sit as a panel of two judges for contested applications for leave to appeal and contested applications for extensions of time in which to appeal. The Criminal Procedure Act 2011 provides for this in criminal proceedings,²⁴⁵ and we consider the same regime should apply to equivalent applications in the civil jurisdiction. We do not see any good reason for criminal and civil proceedings to be inconsistent in this regard. If two judges were permitted to determine these limited matters, at least one should be required to be a permanent member of the Court of Appeal.
- 10.11 If the above change was made, for the purposes of appeals, the Court should continue to be required to sit in panels of three, unless the matter warrants consideration by a Full Court.

- 10.12 Rather than specifying what a single Court of Appeal judge is empowered to do, another option would be for the courts legislation to state that a single Court of Appeal judge may deal with everything except appeals, contested applications for leave to appeal, and contested applications for extension of time in which to appeal. As a safeguard, there could be an automatic right of review of any decision made by a single judge, except where the decision involves a review of a decision of the Registrar.
- 10.13 If such a change were made, section 61A of the Judicature Act 1908 and the corresponding provision in the Criminal Procedure Act 2011 would require consequential amendment.
- 10.14 Although we have heard calls for the administration of panels to be left to the President and the other judges of the Court of Appeal without the present requirement for these procedures to be the subject of a *Gazette* notice, we consider that a requirement to make the Court's procedures publicly available is appropriate. The Court should operate in a transparent fashion, and the public has a right to know how the number and allocation of judges hearing a matter is determined. We understand that counsel often make enquiries with the court staff in this regard.
- 10.15 We note that there is no *Gazette* protocol for when the High Court sits as a Full Court. Likewise, there is no *Gazette* protocol for when the Supreme Court sits in two, three or five judge leave panels. It is desirable that there be consistency between the courts in this regard, and consideration should be given to requiring the Supreme Court and the High Court to make their own procedures for determining the number of judges on a panel available to the public.
- 10.16 Our preliminary consultation indicated that there is no need to maintain section 58F of the Judicature Act 1908 in new courts legislation, because it is highly unlikely to be used. Section 58F provides for a High Court judge to sit on a Full Court in the Court of Appeal in particular circumstances. We agree that this section is unnecessary and does not need to be carried over into new legislation. If a matter is significant enough to warrant a hearing before a Full Court, then it is appropriate that the hearing panel should comprise five Court of Appeal judges.
- 10.17 Currently, the Chief Justice determines which High Court judges are to sit in the Court of Appeal, in consultation with the President of the Court of Appeal and the Chief High Court Judge. It has been suggested to us that it would be more appropriate for the President to select which judges should sit on the Court of Appeal, with the concurrence of the Chief High Court Judge. We agree that this would be simpler to administer, and would assist with the integration of seconded judges onto the Court of Appeal.

- 10.18 Currently, when a High Court judge is selected to assist the Court of Appeal with its work, sections 58A(3) and 58B(3) (which deal with criminal and civil matters, respectively) provide that a nomination of a High Court judge by the Chief Justice must be made either in respect of a specified case or specified cases, or in respect of every case to be heard by the Court of Appeal during a specified period not exceeding three months. The Chief Justice must specify whether that judge is to work on civil or criminal appeals.
- 10.19 It has been suggested to us that it is unnecessary for a judge to be allocated exclusively to a criminal or civil division, and that it would be more efficient for the selected judge to be seconded for a period of three months, and to sit on whatever appeals the President nominates, regardless of whether they are civil or criminal, as the permanent judges do.
- 10.20 There would need to be a limit on the President's powers to select High Court judges, as it would be constitutionally improper for the President to continuously roll over a High Court judge's selection for three month periods, thus effectively enabling that judge to sit permanently on the Court of Appeal without having been appointed as a Court of Appeal judge by the Governor-General in the usual fashion.
- 10.21 We consider the statute should specify a maximum period of time, such as four months in any calendar year, in which a High Court judge may sit on the Court of Appeal.

Q25 Should a new Courts Bill allow two Court of Appeal judges in civil cases to sit on contested applications for leave to appeal and contested applications for extensions of time in which to appeal?

Q26 What matters should a Court of Appeal judge sitting alone be able to deal with?

Q27 Should the Court of Appeal be required to make its procedures for determining the number of judges on a panel available to the public? If so, should the same principle apply in the High Court and Supreme Court?

Q28 Do you agree that section 58F, which allows a High Court Judge to sit on a Full Court of the Court of Appeal, is unnecessary and should be omitted from a new Courts Bill?

Q29 What limitations should be placed on bringing in High Court judges to sit as part of the Court of Appeal?

MISCELLANEOUS PROVISIONS

Section 60(1): Specific rule-making power

- 10.22 Section 60(1) of the Judicature Act 1908 provides that the Court of Appeal may appoint ordinary or special sittings of the Court and may make rules in respect of “the places and times for holding sittings of the court, the order of disposing of business, and any other necessary matters”. Discussion with the current Court of Appeal indicates that the rule-making power has never actually been used by any Court of Appeal, and is unlikely to be. This power is additional to the general power to make rules set out in section 51C, which has a number of procedural requirements.
- 10.23 As section 60(1) seems unnecessary, we propose that it not be carried over in the new courts legislation.

Q30 Do you agree that section 60(1) of the Judicature Act 1908 is unnecessary and should be omitted from a new Courts Bill?

Sections 60(4) and 61: Power of adjournment

- 10.24 Sections 60(4) and 61 of the Judicature Act 1908 both contain a power of adjournment. Section 60(4) provides:
- The court has power from time to time to adjourn any sitting until such time and to such place as it thinks fit.
- 10.25 Section 61 provides:
- Where, by reason of the absence of all or any 1 or more of the Judges of the Court of Appeal at the time appointed for the sitting of the court or any adjournment thereof, it is necessary to adjourn the sitting of the court to a future day, any 1 or more of the Judges at the time appointed for such sitting, or at the time of any adjournment thereof, or the Registrar of the said court in case none of the Judges thereof are present, may adjourn or further adjourn such sitting to such future day and hour as such Judge or Judges or such Registrar think fit.
- 10.26 There is no need for both these sections to be carried forward into new consolidated courts legislation. It has been noted that resort to section 61 appears to be rare.²⁴⁶ We propose including a single provision in the Courts Bill relating to adjournment in the Court of Appeal.

Section 62: Power to remit proceedings to the High Court

10.27 Section 62 of the Judicature Act 1908 provides that:

The Court of Appeal shall have power to remit any proceedings in any cause pending before it to the High Court or a single Judge thereof.

10.28 In *Lockwood v Bostik*, the Court of Appeal doubted there was a power under section 62 for it to order a civil retrial in the High Court.²⁴⁷ In that case, the request for a retrial was not made until the Court of Appeal hearing. The Court found that it could order a new trial only if an application had first been made to the High Court for a new trial, that application failed, and an appeal against the refusal to make an order for a new trial was then brought to the Court of Appeal.²⁴⁸ Unlike in its criminal jurisdiction, there is no express power for the Court of Appeal to order a retrial in a civil matter. The Court acknowledged its power to remit proceedings to the High Court under section 62, but saw that as being different in kind from a direction for a retrial. The Court also noted that the Court of Appeal of England and Wales (Civil Division) has an express power to order a new trial in civil matters.²⁴⁹ In the context of the appeal before it, the Court did not consider that it was possible to direct that there be a new trial.²⁵⁰ It distinguished the situation where the High Court trial was a nullity for any reason.

10.29 An application was made to the Supreme Court for leave to appeal on the basis of the way in which the Court of Appeal went about remedying its finding that the reasons given by the High Court were inadequate. Leave was declined, but the Supreme Court specifically stated:²⁵¹

we have not found it necessary to consider whether the Court of Appeal was correct in the view it took concerning the circumstances in which it has power to order a retrial in a civil matter.

10.30 Although section 62 may be expressed broadly enough to encompass a civil retrial in the High Court, given the doubt raised by the Court of Appeal itself, in our view a new Courts Bill should make it clear that the Court of Appeal may order a retrial in civil matters, as it may in criminal matters.²⁵²

Section 64: Transfer of civil proceedings from High Court to Court of Appeal

10.31 Section 64 of the Judicature Act 1908 provides that the High Court may order the transfer to the Court of Appeal of a civil proceeding pending before the High Court in exceptional circumstances.

- 10.32 It has been suggested to us that it would be more appropriate for there to be a power for a High Court judge to give leave for the parties to ask the Court of Appeal to transfer proceedings, with the decision on whether removal actually occurs being left to the Court of Appeal. Given that a transfer will affect the Court of Appeal's workload, we think this suggestion is sensible, and is preferable to a power in the Court of Appeal to send a case transferred to the Court of Appeal by the High Court back down again. Being moved from court to court would not be fair on the parties.

Q31 Do you agree that the Court of Appeal should be responsible for deciding whether a case is removed from the High Court into the Court of Appeal?

TRIAL AT BAR: SECTION 69

- 10.33 Section 69 of the Judicature Act 1908 is an archaic provision that states that the Court of Appeal may hear and determine a criminal trial of extraordinary importance or difficulty as the court of first instance. It allows the trial to be held before a jury summoned from a jury district selected by the Court. In cases to which section 69 applies, the proceedings are on the same basis as a trial at bar in England (or as near to it as possible), and the Court of Appeal has the same jurisdiction, authority and power as the Queen's Bench has in England in respect of trials at bar.
- 10.34 In England, a trial at bar originally involved the trial of a civil matter, or of a prisoner, before the Court itself, instead of, as was the normal rule, at *nisi prius* (ordinary jury trial). Whether such a trial was granted was entirely within the discretion of the Court, unless the Crown was actually and immediately interested, in which case the Attorney-General was entitled to demand such a trial as of right. For the purpose of such a trial, a special jury was empanelled.
- 10.35 Trial at bar was used in England in cases of high public interest or importance. An example of such a trial was the 1873 trial of Arthur Orton on a charge of perjury for swearing that he was Sir Roger Tichborne in order to claim an inheritance. Further English examples include the cases of *R v Jameson*²⁵³ and *R v Lynch*.²⁵⁴
- 10.36 It appears that the last time the trial at bar procedure was used in England was in the trial of Roger Casement, an Irish Nationalist who was convicted of treason and executed for acts committed in Germany in 1916.²⁵⁵ It is telling that the trial at bar process was not invoked in England in 1945 for the high profile trial of William Joyce, who was charged with treason for aiding and assisting Germany during World War II.²⁵⁶
- 10.37 It does not appear that there has ever been a trial at bar under section 69 of the Judicature Act 1908 in New Zealand.

Reform

- 10.38 A good argument can be made that use of the trial at bar procedure would curtail a defendant's rights. With a trial at bar, an appeal to the Court of Appeal would not be available because the trial at first instance is before that Court. Moreover, there are no criteria in the Act as to what constitutes a case of extraordinary importance or difficulty that would warrant a trial at bar. A decision to use section 69 in the case of a specific defendant could justifiably be viewed as discriminatory, unfair and contrary to the principle of the rule of law. No doubt this accounts for why the process has never been used in New Zealand.
- 10.39 By way of contrast, in the civil jurisdiction section 64 of the Judicature Act 1908 provides that if the circumstances of a civil proceeding are exceptional, the High Court may order that the proceeding be transferred to the Court of Appeal. The section sets out instances of when the circumstances of a proceeding may be exceptional, and the matters a judge must have regard to in deciding whether to transfer a proceeding under this section.
- 10.40 It has been nearly 100 years since trial at bar was used in England. More importantly, the process has never been invoked in New Zealand. Given that it is an extraordinary departure from the normal criminal process, it does not seem likely that it ever will, or should, be used. In our view, the provision is no longer necessary or appropriate, and should not be included in the proposed new courts legislation.

Q32 Do you agree that section 69 of the Judicature Act, which provides for trial at bar, should be repealed and not re-enacted in the new courts statute?

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- 242 Judicature Act 1908, Part 2.
- 243 Section 58F.
- 244 Section 333 (4) (not yet in force).
- 245 Section 333 (not yet in force).
- 246 *McGechan on Procedure* (online looseleaf ed, Brookers) at [J61.01].
- 247 *Lockwood v Bostik* [2010] NZCA 436.
- 248 At [41].
- 249 Civil Procedure Rules (UK), r 52(10)(2)(c).
- 250 At [43].
- 251 *Bostik v Lockwood* [2010] NZSC 150 at [3].
- 252 Crimes Act 1961, ss 378D, 382(2)(e) and 385(2).
- 253 *R v Jameson* [1896] 2 QB 425, involving a charge of treason for preparing a military expedition to proceed against the dominions of a friendly state for an unsuccessful raid in South Africa that was intended to trigger an uprising of British workers.
- 254 *R v Lynch* [1903] 1 KB 444, [1900-3] All ER Rep 688, where Colonel Arthur Lynch was charged with treason for commanding an Irish Battalion against the English during the Boer War.
- 255 *R v Casement* [1917] 1 KB 98, [1916-17] All ER Rep 214 (CA).
- 256 *R v Joyce* [1945] 2 All ER 673 (CA). William Joyce, who became known as Lord Haw-Haw, was an announcer for an English-language propaganda radio programme broadcast by Nazi Germany with the aim of demoralising Allied troops and the British public. Joyce was found guilty and was executed in 1946.

Chapter 11

Appellate pathways

ISSUES

- 11.1 Originally, we intended to deal in this Issues Paper with section 66 of the Judicature Act 1908, which permits appeals from the High Court to the Court of Appeal as of right. This section has given rise to substantial difficulties over the years as to what appeals come within its purview.²⁵⁷ However, our research and initial consultation suggest that dealing with one section relating to appeals in isolation creates its own problems, and that there are a number of other matters in relation to appeals that require consideration. We have reluctantly come to the view that overall appeal pathways would be better dealt with in a standalone appeals reference. While there may be other areas that should also be considered, the appeals issues that are most immediately apparent to us are set out below.
- 11.2 First, section 66 of the Judicature Act 1908, always notoriously difficult, was noted recently by the Supreme Court as being in need of a fundamental rethink.²⁵⁸ The same observation had been made to the Commission by the Court of Appeal in preliminary consultation.
- 11.3 Second, the Court of Appeal continues to be an extremely busy intermediate appellate court with a significant number of lower level criminal appeals. We do not intend by the use of that expression to be pejorative – every criminal appeal is of great significance to the appellant. But there is a question as to whether many of those appeals merit the attention of the permanent court, or a divisional court in the Court of Appeal. While we understand that it is anticipated that the workload of the Court of Appeal will reduce in the next few years as a result of the passage of the Criminal Procedure Act 2011, it may be that the issue of whether there should be a divisional Court in the High Court, with two or three High Court judges to hear such appeals, ought to be revisited at some stage.

- 11.4 A number of issues also arise in relation to appeals to the Supreme Court. For example, the Supreme Court has identified (but has not yet had to determine) a potential jurisdictional issue around its ability to hear an appeal that is in substance a criminal proceeding (but which would fall outside section 10 of the Supreme Court Act 2003), yet is in form a civil proceeding.²⁵⁹
- 11.5 The time has perhaps also come for another review of what civil appeals, particularly on points of law, should terminate in the Court of Appeal, and when there should be the ability to seek leave to appeal to the Supreme Court. In particular, there needs to be a principled approach to when what could potentially be three separate appeals (with leave) on questions of law should be entertained. This issue warrants some further explanation, as it is an area on which there has been surprisingly little comment to date.

Statutory bars on civil appeals to the Supreme Court

- 11.6 Section 7(a) of the Supreme Court Act 2003 provides that:

The Supreme Court can hear and determine an appeal by a party to a civil proceeding in the Court of Appeal against any decision made in the proceeding, unless—

(a) an enactment other than this Act makes provision to the effect that there is no right of appeal against the decision; or...

- 11.7 There are a number of statutes that contain a provision along the lines that “the decision of the Court of Appeal on an appeal under this section, or any application for leave to appeal to the Court, shall be final”. Two examples appear in section 428(3) of the Maritime Transport Act 1949 and section 163(4) of the Accident Compensation Act 2001. Those provisions operate in a context in which there has been an appeal on a point of law to the High Court, followed by an appeal on a point of law (with leave) to the Court of Appeal. In such cases, the Supreme Court will not, pursuant to section 7(a) of the Supreme Court Act 2003, have jurisdiction to hear a further appeal.
- 11.8 Then there are provisions that are less clear than is desirable. For instance, sections 97(4) and 98 of the Patents Act 1953 appear, when read together, to be a similar kind of bar, although the point has not been decided. Under the Patents Act 1953, the decision of the High Court will be final (section 97(4)), but this is subject to the ability to appeal to the Court of Appeal (section 98). With no reference to a further appeal to the Supreme Court, the implication is that these sections “[make] provision to the effect that there is no right of appeal against the decision” of the Court of Appeal.²⁶⁰
- 11.9 A useful starting point for consideration of this issue is the report of the Advisory Group established in 2001 to advise the Attorney-General on the purpose, structure, composition and role of a final court of appeal.²⁶¹ In considering the jurisdiction of the Supreme Court, and in particular a “two-tier appellate system”, it stated:²⁶²

64. The Advisory Group considers that there should be at least two opportunities to appeal a judicial decision on a substantive matter...

65. Currently, appeal rights from different courts and quasi-judicial bodies vary significantly, often with little apparent justification. If the Supreme Court is to focus on law clarification and development the Advisory Group considers that the opportunity to appeal to that court should, in principle, be available in the full range of cases, whether from specialist or general courts. In other words, the Supreme Court should be the court which has the ultimate responsibility for the judicial clarification and development of the law in New Zealand.

- 11.10 After discussing how the introduction of the Supreme Court could lead to some situations where three appeals were potentially available,²⁶³ but that leave requirements would mean that there would not necessarily be any need to limit the number of appeal opportunities,²⁶⁴ the report stated:²⁶⁵

71. The group considers that the various statutes limiting appeals to the Court of Appeal and other courts should be analysed to determine whether there should be any exceptions to the general principle that any matter should be able to be appealed to the Supreme Court with the leave of that Court.

- 11.11 When the Supreme Court Act 2003 was enacted, it would seem that many of the statutes that provided that a decision of the Court of Appeal was final were reviewed. For example, section 85 of the Protection of Personal and Property Rights Act 1988 and section 120 of the Child Support Act 1991 both had references to Court of Appeal decisions being final removed by the Supreme Court Act 2003, whereas section 93 of the Domestic Violence Act 1995, which also contained such a “finality” provision, was not changed.²⁶⁶
- 11.12 The resulting position is that there are at present at least 15 statutes in existence that contain provisions declaring that certain decisions of the Court of Appeal are final. As noted above with respect to the Patents Act 1953, there are also statutes that arguably “[make] provision to the effect that there is no right of appeal against the decision” of the Court of Appeal.
- 11.13 Further, we note that legislation is still being drafted that declares decisions of the Court of Appeal to be final. For example, clause 62(4) of the Non-bank Deposit Takers Bill, which was introduced into Parliament on 3 August 2011 and had its first reading on 10 August 2011, provides that “[t]he decision of the Court of Appeal on any application for leave to appeal, or on an appeal under this section, is final.”
- 11.14 It would, accordingly, appear that any remaining “finality” provisions have been retained on purpose, and this is reinforced by the fact that legislation is still being drafted that has this same effect. Having said that, some statutes may have been overlooked.
- 11.15 In any event, there are sound arguments in favour of the Supreme Court having final oversight of all legal questions in New Zealand. To take the accident compensation scheme, which is an important social matter, an appeal on a point of law in such a case has the potential to affect hundreds of claimants. There are decisions in the Court of Appeal which have done just that.

- 11.16 On the other hand, there are quite extensive review provisions on such claims. To then add a possible three tiers of appeals on a question of law may be thought to be simply too great a burden for litigants (particularly when the individuated claim itself may not be large).
- 11.17 It may be appropriate for all remaining “finality” provisions to be reviewed to determine whether they are still warranted. Further, the situation in those statutes where the Supreme Court’s jurisdiction (or lack thereof) is dealt with only implicitly, some of which, for example the Patents Act 1953 and the Dairy Industry Restructuring Act 2001, are highly significant, should be clarified.

Conclusion

- 11.18 We have come to the provisional view that the whole question of appellate pathways should be reviewed en bloc. It is likely that the Commission will approach the Minister of Justice with a view to being accorded such a reference.

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- 257 Andrew Beck “When is a judgment not a judgment?” [2007] NZLJ 381.
- 258 *Siemer v Heron* [2011] NZSC 133.
- 259 *Bujak v The District Court at Christchurch* [2009] NZSC 96 at [2].
- 260 Supreme Court Act 2003, s 7(a).
- 261 Advisory Group *Replacing the Privy Council: A New Supreme Court* (prepared for the Attorney-General, 2002).
- 262 At [64]-[65].
- 263 At [68].
- 264 At [69].
- 265 At [71].
- 266 Given all three of these provisions were referred to one after another in Appendix C to the report, which provided an overview of appeal paths from New Zealand courts and listed the various appeal rights in general courts and from specialist courts and tribunals, it seems unlikely that section 93 of the Domestic Violence Act 1995 was simply overlooked.

Part 4

OTHER PROVISIONS OF THE JUDICATURE ACT





Chapter 12

Equity and the common law: section 99

INTRODUCTION

12.1 Section 99 of the Judicature Act 1908 provides:

In cases of conflict rules of equity to prevail

Generally in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter the rules of equity shall prevail.

- 12.2 The provision has been in force in England and New Zealand for over 100 years and is the legislative statement of a rule – that equity prevails over the common law – that was first established in 1615.²⁶⁷ The general issue is whether the section should be revoked.
- 12.3 When considering the provision there is a temptation to get distracted by arguments about the fusion of law and equity. This is partly because the provision has been relied upon to allow courts to follow equitable practices and procedures, or to apply equitable remedies, in preference to common law ones.
- 12.4 The extent to which the provision is relevant to the fusion debate depends on how section 99 is interpreted. If “rules” includes procedure and practice and “conflict or variance” mean “different” then, as courts seek to apply equitable remedies and defences in common law actions (and vice versa), the provision is relevant.
- 12.5 However, in our view the scope of section 99 is narrow. When its predecessor was first introduced in England,²⁶⁸ it was only one of a number of rules of procedure and substance which sought to smooth the administrative and procedural fusion of law and equity. Properly interpreted, it relates to matters of substance, rather than practice and procedure, or judicial remedies.

LEGISLATIVE HISTORY

Supreme Court of Judicature Act 1873 (UK)

- 12.6 Section 99 is based on section 25(11) of the Supreme Court of Judicature Act 1873 (UK) (“SCJA”). The SCJA implemented the reform of the English court system which saw the amalgamation of the equity and common law courts. The Courts of Chancery, Queen’s Bench, Common Pleas, Exchequer, Admiralty, Probate and Divorce and Bankruptcy were combined in the Supreme Court of Judicature, which comprised the High Court and Court of Appeal. The High Court was organised into five, and later three, divisions (Queen’s Bench, Chancery and Family).
- 12.7 Before the 1873 reforms, the two jurisdictions possessed different procedural powers, offered different remedies and, in some cases, dealt with different substantive areas of law. When a matter involved questions of both common law and equity, actions had to be commenced in both courts. This added considerable complexity and delay. The SCJA comprehensively fused the administration of the two streams of law so that:²⁶⁹
- every judge of every division must recognize and give effect to all equitable rights, obligations and defences and, subject to the supremacy of equity, to all legal rights and obligations, and must grant all such remedies as the parties may be entitled to in respect of any legal or equitable claim so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and multiplicity of legal proceedings avoided.
- 12.8 After 1873 the benefits of both systems were available to every litigant wherever their action was tried. However, the amalgamation of the courts meant that the relationship between their procedures and between any conflicting rules adopted by the two streams of law had to be worked out.
- 12.9 To this end, first, section 24 of the SCJA set out broad *procedural* rules for the new court. Among other things, its seven subsections made it clear that judges in all divisions of the High Court were to give equitable relief and allow equitable defences in the same manner as would have been the case before the Court of Chancery; that judges were required to recognise all equitable estates, titles, rights, duties and liabilities; and that, subject to the aforesaid provisions about equity, judges were required to give effect to all legal claims, demands, estates, titles, rights, and so on of common law or created by statute.
- 12.10 Second, section 25 of the SCJA was directed at resolving any *substantive* conflicts between the rules of equity and the common law. The first 10 subsections of section 25 dealt with 10 matters where the common law and equity rules were known to conflict. These included:
- the order of priority of payment of debts of a person dying insolvent;

- the rule that merger of estates depends on intent and is not automatic;
 - the right of a mortgagor to bring an action for possession against a third person without joining the mortgagee;
 - equity's approach to time being of the essence of contracts;
 - the rules relating to the custody and education of infants.
- 12.11 Because of the possibility that some other conflicts had been overlooked, section 25(11) (which is mirrored by our section 99) was added as a catch-all provision.²⁷⁰ The section, then, was one of a number of instructions given to judges as to how the new combined courts were to operate.²⁷¹
- 12.12 The primacy of equity was first established in 1615, in the wake of the *Earl of Oxford's case*, when James I intervened in an ongoing dispute between the Court of Chancery and the common law courts about the former's use of injunctions to prevent the enforcement of common law judgments, or prohibit individuals from pursuing actions in the common law courts. James I's conclusion was that equity was to prevail.
- 12.13 That equity should prevail followed from the original purpose of the jurisdiction – which was to mitigate the rigours and strictness of the common law and to fill in gaps where the common law provided no answer. It has also been suggested that section 25(11) of the SCJA was required because section 24(5) abolished the practice of restraining proceedings by injunction – the mechanism by which the supremacy of equitable rules had previously been assured in cases of conflict.²⁷² Section 24 itself, and today's section 49(2) of the Senior Courts Act 1981 (UK), legislate for the primacy of equity, given that the paragraphs relating to common law claims and rights are expressed to be “subject to” the provisions giving effect to equitable claims and rights.
- 12.14 The provisions of the English Judicature Acts were subsequently adopted by other common law jurisdictions. Equivalents to section 25(11) of the SCJA remain in force in, among others, the Republic of Ireland,²⁷³ Northern Ireland,²⁷⁴ in the legislation of all the Australian states and territories,²⁷⁵ and all the Canadian jurisdictions (except Quebec) and at the federal level.²⁷⁶

New Zealand

- 12.15 The superior courts of New Zealand have always exercised full jurisdiction in both common law and equity.²⁷⁷ Despite this, there were no legislative equivalents of sections 24 or 25 of the SCJA in New Zealand until 1882.
- 12.16 In the 1840s/1850s a set of Supreme Court rules had been devised by Chief Justice Martin and (then) Justice Henry Chapman “designed for simplicity and accessibility of procedure (without the fictions and technical forms of the English courts and with the aim of fusing law and equity procedures)”.²⁷⁸ The rules remained in force until 1882. Those rules did not tackle the question of conflict directly, meaning that the courts were left to decide upon clashes between the common law and equity at their discretion.

- 12.17 In 1881, a subcommittee of the Law Procedure Commission drafted a new set of procedural rules. The subcommittee noted that one of the aims of the new code of procedure was to ensure that “the laws of the colony shall be administered as one organic whole, irrespective of any division into law and equity”.²⁷⁹ The report further stated:²⁸⁰

The desirability of bringing about a fusion of the systems of law and equity is now admitted to be the chief object that ought to be kept in view in any attempt to reform civil procedure.

The framers of the existing rules of procedure and practice in the Supreme Court [the Martin / Chapman rules] seem to have recognized the great importance of this, and have indeed done so much towards bringing about the desired result that your Sub-Committee can only be considered as following in their footsteps. In England, as the Commission are aware, the recent important changes in the law of procedure have also been made principally with the same object.

Your Sub-Committee consider that, as the chief obstacle, arising from part of the law being administered by one class of Courts and part by another class of Courts, as formerly in England does not exist in this colony, there should be no insuperable difficulty in accomplishing this object.

It will accordingly be found that in the code no reference is made to the division, and that it is drafted throughout on the assumption that they will be so administered.

All that seems necessary to complete the work is an Act providing for the cases in which there is any conflict between the rules of the two systems, and section 5 of the Law Amendment Act, 1878, [which mirrored section 25(11) SCJA] appears to your Sub-Committee sufficient for this purpose.

- 12.18 Subsequently, sections 25(1)–(11) of the SCJA were enacted as sections 2 to 11 of the Law Amendment Act 1882.²⁸¹ Section 24 of the SCJA, however, was omitted with the result that there was no legislative statement that all courts of full jurisdiction were to grant both equitable and common law remedies and to allow equitable and common law defences. Presumably, given the history of New Zealand’s court system, this was considered superfluous.
- 12.19 Today, in section 99, the Judicature Act 1908 retains only the catch-all provision. With the exception of section 90 of the Judicature Act 1908 (time of the essence), the specific rules that made up section 25(1)–(10) of the SCJA either have been repealed or replaced by new legislation.²⁸²

APPLICATION OF THE PROVISION

- 12.20 Reference has been made to, or reliance placed on, section 99 or one of its two predecessors in 21 New Zealand cases since 1883. There have been seven cases since the mid-1960s. The English equivalent features in over 100 cases.
- 12.21 It is arguable that the provision was essential to the outcome of only a few of the cases, and that in some instances it has been misapplied. In some cases there was no true conflict or variance.

12.22 The fact that there have been few cases involving a true conflict is perhaps not surprising.²⁸³ Writing in 1948, Lord Justice Evershed said:²⁸⁴

Appeals to section 25 of the Judicature Act like appeals in a construction case to the general sense and structure of the document are apt to be regarded as the last argument of forlorn hope.

... the assumption on which [s 25(11)] of the Judicature Act has rested, was, broadly speaking, not well founded : for except in procedural matters there was little or no conflict or variance between Equity and the Common Law. Equity then, as it has done since, operated as a supplement to law.

New Zealand case law

12.23 Section 99 and its New Zealand predecessor have been considered in relation to eight areas of true or apparent conflict:

- (a) to enable a court to recognise a lease that was unenforceable at law but specifically enforceable in equity;²⁸⁵
- (b) to enable a lessee to obtain a decree of indemnity from an assignee who was in breach of a covenant in the lease, for which breach the lessee was liable and in the position of a surety;²⁸⁶
- (c) to enable a court to recognise a gift that was incomplete at law as an enforceable contract in equity, from the date of the original promise;²⁸⁷
- (d) to confirm that a party could repudiate a contract for lack of title;²⁸⁸
- (e) to confirm that a plaintiff could claim interest on a deposit after the rescission of contract, where the position at common law was unclear;²⁸⁹
- (f) section 99 was mentioned in argument in relation to whether an assignment of a contract had been effective in equity, although it had not been effected in writing as to satisfy section 130 of the Property Law Act 1952;²⁹⁰
- (g) to enable a court to state that the equitable rule relating to estoppel by deed should be adopted in New Zealand;²⁹¹
- (h) the distinction between the invalidating effects of (equitable) innocent and (common law) fraudulent misrepresentation.²⁹²

12.24 Section 99 has also been used to reinforce:

- The express provision as to the primacy of the equitable rule on merger, previously found in section 30 of the Property Law Act 1952.²⁹³
- The express provision of the equitable rule in section 90 of the Judicature Act 1908 that time is not deemed to be of the essence of a contract unless made so by express stipulation or necessary implication.²⁹⁴

12.25 Finally, reference was made to section 99 in *X v Attorney-General*, where the basis of compensation or damages for breach of confidence claims was considered.²⁹⁵ Williams J discussed the fusion of law and equity and the decision in *Aquaculture Corp v New Zealand Green Mussel Co Ltd*²⁹⁶ and stated:²⁹⁷

What must be further examined is the nature of the relief to which X is entitled and the principles on which it is to be calculated. *Aquaculture*, the cases which have followed it and the academic writing give little guidance as to the principles to be applied in resolving those questions. For instance, might the Judicature Act 1908, section 99 have a part to play in deciding whether common law damages replace equitable compensation?

12.26 Williams J went on to award “general or equitable damages or compensation” in reliance on *Aquaculture*, at an amount which “will reflect the effect on both parties in a just and equitable way and which will endeavour to compensate him for the value to him of the information disclosed.”²⁹⁸

English case law

12.27 In England, courts have placed reliance on section 25(11) and its successors in resolving, or considering, possible conflicts on the following matters:

- fraudulent and innocent misrepresentation;²⁹⁹
- estoppel by deed;³⁰⁰
- reinforcing the primacy of the equitable rule making time of the essence;³⁰¹
- rescission for common law duress and undue influence at equity;³⁰²
- actions for a contribution by a surety against a co-surety,³⁰³ and for contribution between partners;³⁰⁴
- an equitable assignor’s right to sue;³⁰⁵
- equitable relief from penalty clauses in contracts;³⁰⁶
- the equitable rules that fraudulent concealment alone is a good answer to the Statute of Limitations (the common law required fraud as well as fraudulent concealment);³⁰⁷
- the rule that equity allows a deed to be varied by a simple agreement;³⁰⁸
- in equity, accord and satisfaction are an answer to an action for a speciality debt;³⁰⁹
- where there is a licence and an agreement to give a person a right which is given for value, the right is enforceable in equity;³¹⁰
- the prevalence of equitable rules of discovery;³¹¹
- the equitable rule that allowed the court to strike out interrogatories if they may tend to incriminate;³¹²

- the liability of an executor who loses estate property (wilful default required in equity),³¹³
- payment of creditors by the executor or administrator of an insolvent estate,³¹⁴
- whether a lawyer in an action who has been replaced can obtain an order for his costs from the party,³¹⁵
- equity (as opposed to common law) is open on a Sunday.³¹⁶

Conflict or variance required

12.28 The authors of *Meagher Gummow and Lehane's Equity: Doctrines and Remedies* note that section 25(11) does not “speak of inconsistent remedies reached upon consideration of the same facts”, but of conflict or variance between rules relating to the same matter.³¹⁷ They argue that a number of section 25(11) cases have not involved a true conflict.

12.29 Two English cases are usually cited as good examples of where a conflict existed. In *Job v Job*, the assets of a testator came into the hands of his executor, but were afterwards lost to the estate through no wilful default on the part of the executor.³¹⁸ Under common law the executor was strictly liable, whereas in equity he was only liable on proof of wilful default. Jessel MR treated the case as one of conflict and applied the equitable rule.

12.30 In *Lowe & Sons v Dixon & Sons*, three firms purchased a shipment of wheat as joint partners.³¹⁹ One of the firms went into liquidation and the question was whether and to what extent the other two firms had to contribute to make good the default of the third. Lopes J found that:³²⁰

At law, if several persons have to contribute a certain sum, the share which each has to pay is, the total amount divided by the number of contributors; and no allowance is made in respect of the inability of some of them to pay their shares. But, in equity, those who can pay must not only contribute their own shares, but they must also make good the shares of those who are unable to furnish their own contribution. Inasmuch, therefore, as the rules of equity prevail, the defendants must make good each one-half of that which Lund, Beveridge, & Co. are unable to pay.

- 12.31 In contrast, *Walsh v Lonsdale* is generally accepted to be a case where there was no true conflict.³²¹ The case involved an agreement by Lonsdale to let a cotton mill to Walsh, with rent to be payable in advance. The agreement was not made by deed so there was no lease at law. Walsh occupied the mill and paid some rent, but not in advance. Lonsdale demanded a year's rent in advance and when Walsh refused, Lonsdale distrained. Walsh brought an action claiming damages for unlawful distress. At common law the lease was not recognised on its terms and it was illegal to distrain for rent in advance. But equity would have granted specific performance of the agreement for the lease. Before the SCJA, a number of actions could have been taken in different courts: Walsh or Lonsdale could have sought specific performance in the Court of Chancery; Walsh could have sought damages for illegal distress in the common law courts; and Lonsdale could have sought an injunction from Chancery to restrain an action for damages. The court held that it could recognise the equitable lease and resolve the whole dispute before it.
- 12.32 *Walsh v Lonsdale* is sometimes cited as a case within section 25(11). However, Maitland and the authors of *Meagher Gummow and Lehane* have disputed that *Walsh v Lonsdale* involved a conflict of rules within the provision,³²² although the latter acknowledge that the competing rules could produce an impasse from inconsistent remedies. Before the SCJA, the same outcome would have been reached, it just would have taken a lot more litigation to get there. What *Walsh v Lonsdale* illustrates is the procedural change introduced by the SCJA – it enabled the dispute to be decided at one hearing.³²³ The New Zealand cases of *Morris v Montague*³²⁴ and *In re Alexander, ex p Grainger*,³²⁵ which applied section 11 of the Law Amendment Act 1882 in reliance on *Walsh v Lonsdale* arguably fall into the same category.
- 12.33 *McKerrow v Tattle* is another local example of a case where it is arguable that no conflict existed.³²⁶ It involved a breach of a covenant by the assignee of a lease. It was accepted that the lessee was liable for the assignee's breach and that the lessee was in the position of a surety. At common law, the lessee was entitled to recover the damages paid from the assignee, but at equity he could obtain a decree of indemnity (and possibly payment) from the assignee before making any payment of damages. Cooper J accepted that equity prevailed due to section 11 and that the lessee was entitled to a decree.³²⁷ In fact then, the case merely involved different remedies. The court could have used the equitable one without reliance on section 11.
- 12.34 Courts have declined to apply the provision in some cases where no true conflict existed. *Riddiford v Warren* involved an action in equity for rescission of a contract for the sale of goods for innocent misrepresentation.³²⁸ The court considered the impact of section 11 of the Law Amendment Act 1882, but held that contracts for the sale of goods (unlike land or insurance contracts) had never been liable to rescission for innocent misrepresentation at equity.³²⁹ It followed that there could be no conflict with the common law position.

Section 99 applies to substantive law, not practice or procedure

- 12.35 The point made above is reinforced by the line of authority that section 99 applies to matters of substantive law and not to practice or procedure.³³⁰ This follows from the context of section 25 of the SCJA which, as noted, dealt with substantive conflicts, in contrast to the procedurally focussed section 24 of the SCJA.
- 12.36 An example is *Mayor, Councillors and Citizens of City of Dunedin v Searl*.³³¹ A tenant sought relief against forfeiture of the lease for non-payment of rent. Before the SCJA, relief could be obtained at both common law and equity, and there was no difference in the principle on which relief was administered in the two courts. However, the common law and Chancery procedures differed. Sim J queried whether he was obliged under section 99 to follow the Chancery procedure, but observed that section 99 relates to matters of “substantive law, not mere practice”. It followed that the common law procedure could still be followed.

Application in courts with no, or limited, equitable jurisdiction

- 12.37 Section 99 applies to all courts, so every judge is required to give effect to the principle that equity prevails. This means, for example, that all courts are required to recognise equitable rights and estates. But, a court cannot hand down an equitable remedy if it does not have jurisdiction in equity: section 99 does not extend the jurisdiction of inferior courts.
- 12.38 In both *Morris v Montague*³³² and *Rewiri v Eivers*,³³³ despite having no equitable jurisdiction, Magistrates’ Courts treated an agreement for a lease for a term of years on the same footing as if a deed of lease had been actually executed. In *Rewiri*, Cooper J said:³³⁴

In my opinion it was plainly the intention of the Legislature, when it enacted the Law Amendment Act, 1882, that the rules of equity should prevail in all Courts, and the fact that the two sections I have quoted have been reproduced in the Judicature Act does not, in my opinion confine their operation to actions or proceedings in the Supreme Court.

- 12.39 In contrast, in *Taranaki Hospital Board v Brown* the Supreme Court held that the Magistrates’ Court had no jurisdiction to hear an action that necessarily involved rectification of an agreement:³³⁵

The learned Magistrate relies upon section 99 of the Judicature Act, 1908 ... and he rightly says that this provision has been held to be not limited to matters litigated in the Supreme Court but to extend to actions in the Magistrates’ Court. But that does not mean that the section confers upon the Magistrates’ Court a general jurisdiction in equity. ...if ... in any other matter which it is within the jurisdiction of the Magistrate to decide, there is conflict or variance between the rules of equity and the rules of common law, then the rules of equity shall prevail and the Magistrate must apply them accordingly. That, however, is a different thing from exercising an equitable jurisdiction in the sense of granting a relief that can only be granted by a Court which has equitable jurisdiction.

SHOULD SECTION 99 BE RETAINED?

12.40 There are three options:

- (a) The rule should be retained because there may still be matters where common law and equitable rules conflict, and equity should continue to prevail in those circumstances.
- (b) The rule should be repealed because conflicts are unlikely to occur in the future, or if they do this will happen infrequently and that equity should prevail is sufficiently well established.
- (c) The rule should be repealed because, if future conflicts occur, the court should have the discretion to give primacy to either the equitable or common law rule, depending on which is the more appropriate in the circumstances of the case.

12.41 For the reasons set out below, we favour the retention of section 99.

12.42 It is difficult to offer a definitive view on whether any further conflicts will arise. On one view it seems unlikely, given that so much time has passed since the original enactment. A survey of New Zealand commentaries and cases on the matters dealt with in the English cases listed above shows that, in general, the rules established in those cases tend to be considered settled law here or have been legislated for.³³⁶

12.43 However, the case law also reveals a diverse range of areas where conflicting rules of equity and the common law have been contemplated and shows that conflicts have sometimes related to narrow, technical rules that may not frequently come before the courts. So, while unlikely, future conflicts cannot be ruled out.

12.44 A second factor in favour of keeping the provision is that it does not pose any significant problems. There may be a view that its retention might hinder the fusion of law and equity because it limits the courts' ability to further "intermingle" common law and equitable rules in a way that results in "practical justice"³³⁷ or in "a just and equitable result".³³⁸ This is particularly the case if it is given a broad interpretation.³³⁹

12.45 However, if the narrow view of section 99 set out above is valid, then it does not prevent the gradual development of common law or equitable doctrine that inevitably takes place over time. If fusion is taken to mean the application of equitable remedies and defences to common law actions and vice versa, section 99 is of little or no relevance.

- 12.46 The provision cannot be said to have caused such a hindrance thus far. It has not been a factor in the New Zealand judgments that have favoured fusion. The extension of the notion of contributory negligence to equitable compensation in *Day v Mead*,³⁴⁰ and the acknowledgement in *Aquaculture Corp v New Zealand Green Mussel Co Ltd*³⁴¹ that exemplary damages are available for breaches of equitable duties, shows that New Zealand courts have felt able to develop the law of civil remedies without legislative hindrance.
- 12.47 Third, we are not aware of any dispute with the proposition that, in a case of conflict between substantive rules, equity should prevail. We have not found any suggestion in equity texts, cases or other commentary that the rule should be repealed.³⁴² In contrast, other jurisdictions have retained the rule in recent rewrites of their equivalent judicature or courts legislation.
- 12.48 While the provision has received little attention from law reform bodies, those that have considered it have favoured its preservation. The Law Reform Commission of Ireland has recently recommended that it be retained in its review of Ireland's Courts Acts.³⁴³ Both the New South Wales³⁴⁴ and Queensland³⁴⁵ Law Reform Commissions have considered the rule, but only in relation to the question of whether their Supreme Court Acts were the appropriate places for it given that the rule was intended to be applied by all courts.³⁴⁶
- 12.49 For the sake of completeness, in the New Zealand Law Commission's 1991 review of the Property Law Act 1952, the existence of section 99 was given as justification for the repeal of section 30 of that Act. Section 30 had started life as one of the enumerated conflicts in section 25 SCJA and as section 5 of our Law Amendment Act 1882.³⁴⁷ The Law Commission's preliminary paper states:³⁴⁸
- Section 30 ... may now be superfluous. It is intended to make clear that the equitable rule on merger must prevail over the common law rule (*In re Waugh, Sutherland v Waugh* [1955] NZLR 1129). *But this is sufficiently achieved in general terms by section 99 of the Judicature Act 1908.* It therefore does not seem necessary to repeat section 30.³⁴⁹
- 12.50 Finally, there is a question as to what signal would be given by the repeal of section 99 and what the outcome should be if a conflict were to arise in the future. The position would not be straightforward. Notwithstanding section 17(2) of the Interpretation Act 1999 (non-revival of previous position), there would be a question as to whether the pre-existing rule (that equity prevails) continues to apply or whether the repeal should be taken to have changed the law.³⁵⁰ Might, therefore, its repeal suggest that the conflicts addressed in the case law set out above are open to judicial reconsideration?
- 12.51 For these reasons, we incline towards the retention of the provision. However, we are interested in hearing submitters' views.

Q33 Should section 99 of the Judicature Act be retained?

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- 267 By James I in the wake of the *Earl of Oxford's case*.
- 268 As section 25(11) of the Supreme Court of Judicature Act 1873 (UK).
- 269 As provided in the Senior Courts Act 1981 (UK), s 49(2) (formerly the Supreme Court Act 1981). This is the modern version of section 24(7) of the 1873 Act. Steps had been taken to amalgamate the two jurisdictions and reduce delay throughout the 19th Century.
- 270 It provided: "Generally in all matters not herein-before particularly mentioned, in which there is any conflict or variance between the Rules of Equity and the Rules of the Common Law with reference to the same matter, the Rules of Equity shall prevail." In his speech to the House of Lords on the first reading of the Supreme Court of Judicature Bill, the Lord Chancellor, Lord Selbourne said: "There are some points, however, in which, from this division of jurisdiction, unnecessary discrepancies have been introduced by reason of arbitrary rules established in different Courts. They are not very numerous. It is possible that some may have been overlooked: and on the suggestion of a high authority, I have added in the Bill general words to provide that where there is any variance between the rules of law and those of equity, and the matter is not expressly dealt with, the rules of equity shall prevail." See Hansard, 13 February 1873, 339.
- 271 It remains in force in the UK as Senior Courts Act 1981 (UK), s 49 (formerly the Supreme Court Act 1981). Many of the specific rules set out in ss 25(1)–(10) have been moved to other legislation.
- 272 R Meagher et al *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th ed, Butterworths LexisNexis, Sydney, 2002) at [2-065].
- 273 Supreme Court of Judicature Act (Ireland) 1877. See also Law Reform Commission of Ireland *Report on Consolidation and Reform of the Courts Acts* (LRC 97-2010) at 460 and cl 97 of the Draft Courts (Consolidation and Reform) Bill (Ireland).
- 274 Judicature (Northern Ireland) Act 1978, s 86.
- 275 See, for example, Law Reform (Law and Equity) Act 1972 (NSW), s 5; Supreme Court Act 1935 (SA), s 10(2); Supreme Court Act 1986 (Vic), s 29(1); Supreme Court Act 1935 (WA), s 25(11).
- 276 See, for example, Law and Equity Act RSBC 1996, c 253, s 44; Judicature Act RSA 2000, c J-2, s 15.
- 277 Supreme Court Ordinance 1841. See also, the Supreme Court Ordinance 1844, ss 2 and 3, the Supreme Court Act 1860, ss 4 and 5, Supreme Court Act 1882, s 16 and (now) the Judicature Act 1908, s 16.
- 278 P Spiller, J Finn and R Boast *A New Zealand Legal History* (2nd ed, Brookers, Wellington, 2001) at 205.
- 279 *Report of the Sub-Committee Appointed to Prepare a Code of Procedure* [1881] I AJHR A6 at 9.
- 280 At 9.
- 281 Almost exact replicas of ss 24 and 25 SCJA were enacted in the Law Amendment Act 1878, but it is not clear that those provisions were ever brought into force. References to the provisions by the 1881 Law Procedure Commission indicate that they were not in force at that time and Spiller, Finn and Boast state that the Commission's recommendation that equity should prevail found its expression in the later Law Amendment Act 1882 (s 11) (they do not mention the earlier Act): see P Spiller, J Finn and R Boast *A New Zealand Legal History* (2nd ed, Brookers, Wellington, 2001) at 207.
- 282 For example, the provision relating to the custody and education of infants was repealed by the Guardianship Act 1968, and the rules on equitable waste, merger and suits for possession of land by a mortgagor were moved to the Property Law Act in 1908.
- 283 Referring to section 25(11) SCJA, the editor of *Snell's Equity* states that "[a]s might be expected, it has not often been necessary to resort to this provision": J McGhee (ed) *Snell's Equity* (30th ed, Sweet & Maxwell, London, 2000) at [1-24].
- 284 Lord Justice Evershed "Equity after fusion: federal or confederate" [1948] JSPTL 171 at 176, 181.

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- 285 *Morris v Montague* (1883) 2 NZLR (SC) 418 and *In re Alexander, ex p Grainger* (1892) 11 NZLR 682 (SC), both relying on *Walsh v Lonsdale* (1882) 21 Ch D 9 (CA).
- 286 *McKerrow v Tattle* (1905) 25 NZLR 881 (SC). However, the court found that section 11 was of no effect where the court in which the action was brought (here the Magistrates' Court) had no equitable jurisdiction. The Magistrates' Courts' jurisdiction was defined under the Magistrates' Courts Act 1893.
- 287 *In re Hume, ex p OA* (1909) 28 NZLR 793 (SC).
- 288 *MacDonald v Marson* (1913) 33 NZLR 248 (SC).
- 289 *Moss v Perpetual Trustees Estate and Agency Co of NZ Ltd* [1923] NZLR 264 (SC).
- 290 *CB Peacock Land Co Ltd v Hamilton Milk Producers Co Ltd* [1963] NZLR 576 (CA).
- 291 *Walters v Icon Central Ltd* HC Auckland CIV-2010-404-4877, 7 March 2011. See also *Greer v Kettle; Re Parent Trust & Finance Co Ltd* [1937] 4 ALL ER 396 (HL).
- 292 *Hall v Guardian Trust and Executors Co NZ Ltd* [1938] NZLR 922 (CA); *Riddiford v Warren* (1901) 20 NZLR 572 (CA).
- 293 *Robert Bryce & Co Ltd v Stowe Hill Investments Ltd* [2000] 3 NZLR 535 (CA) at [32].
- 294 *Cobbett v Sexton* [1920] NZLR 223 (SC). See also *Morris v Robert James Investments Ltd* [1994] 2 NZLR 275 where the court relies on dicta of Browne-Wilkinson VC in *British and Commonwealth Holdings Plc v Quadrex Holdings Inc* [1989] QB 842 at 856: since equity now prevailed by virtue of the Judicature Act, this was the prevailing rule. There was no specific reference to section 99.
- 295 *X v Attorney-General* [1997] 2 NZLR 623 (HC).
- 296 *Aquaculture Corp v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 (CA). In this case, the Court of Appeal held (at 301) that (per Lord Cooke): "For all purposes now material, equity and common law are mingled or merged. The practicality of the matter is that in the circumstances of the dealings between the parties the law imposes a duty of confidence. For its breach a full range of remedies should be available as appropriate, no matter whether they originated in common law, equity or statute."
- 297 At 633.
- 298 At 637.
- 299 *Redgrave v Hurd* (1881) 20 Ch D 1 (CA); *London General Omnibus Co Ltd v Holloway* [1911-1913] All ER Rep 518 (CA).
- 300 *Greer v Kettle; Re Parent Trust & Finance Co Ltd* [1937] 4 All ER 396 (HL).
- 301 *United Scientific Holdings Ltd v Burnley Borough Council* [1977] 2 All ER 62; *Cheapside Land Development Co Ltd and another v Messels Service Co* [1978] AC 904 (HL); *Re Olympia and York Canary Wharf Ltd; Bear Stearns International Ltd v Adamson* [1993] BCC 159 (Ch D), *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch 1, [1991] 2 All ER 477 (CA); *Lock v Bell* [1931] 1 Ch 35.
- 302 *Halpern v Halpern (Nos 1 and 2)* [2007] EWCA Civ 291, [2008] QB 195 (CA).
- 303 *Hampton v Minns* [2002] 1 All ER (Comm) 481, [2002] 1 WLR 1 (Ch D); *Wolmershausen v Gullick* 2 Ch 514 (Ch D).
- 304 *Lowe & Sons v Dixon & Sons* (1885) 16 QBD 455 (QBD).
- 305 *Three Rivers District Council v Governor and Company of the Bank of England* [1996] QB 292 (CA).
- 306 *Jobson v Johnson* [1989] 1 All ER 621 (CA).
- 307 *Lynn v Bamber* [1930] 2 KB 72 (KBD).

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- 308 *Berry v Berry* [1929] 2 KB 316 (Div Ct).
- 309 *Steeds v Steeds* (1889) 22 QBD 537.
- 310 *Hurst v Picture Theatres Ltd* [1915] 1 KB 1 (CA).
- 311 *Bustros v White* 1 QBD 423 (CA); *Anderson v Bank of British Columbia* 2 Ch D 644 (CA); *Bolckow, Vaughn & Co v Fisher* 10 QBD 161 (CA); *Kearlsey v Philips* 10 QBD 36 (Div Ct).
- 312 *Atherley v Harvey* 2 QBD 524 (Div Ct).
- 313 *Job v Job* 6 Ch D 562 (Ch D).
- 314 *In re Radcliffe* 7 Ch D 733 (Ch D), *Vibart v Coles* 24 QBD 364 (CA) and *In re Wells* 45 Ch D 569 (Ch D).
- 315 *Grant v Holland* 3 CPD 180 (Div Ct).
- 316 *In re "N" (Infants)* [1967] Ch D 512 (Ch D).
- 317 R Meagher et al *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th ed, Butterworths LexisNexis, Sydney, 2002) at [2-115].
- 318 *Job v Job* (1877) 6 Ch D 562 (Ch D).
- 319 *Lowe & Sons v Dixon & Sons* (1885) 16 QBD 455 (QBD).
- 320 At 458.
- 321 *Walsh v Lonsdale* (1882) 21 Ch D 9 (CA).
- 322 See FW Maitland *Equity* (Cambridge University Press, Cambridge, 1936) at 157 and R Meagher et al *Meagher Gummow and Lehane's Equity: Doctrines and Remedies* (4th ed, Butterworths LexisNexis, Sydney, 2002) at [2-180].
- 323 See Jill E Martin (ed) *Hanbury and Maudsley's Modern Equity* (13th ed, Stevens & Co, London, 1989) at 16. See also FW Maitland *Equity* (Cambridge University Press, Cambridge, 1936) at 157.
- 324 *Morris v Montague* (1883) 2 NZLR 418 (SC).
- 325 *In re Alexander, ex p Grainger* (1892) 11 NZLR 682 (SC).
- 326 *McKerrow v Tattle* (1905) 25 NZLR 881 (SC).
- 327 However, the court found that section 11 was of no effect where the court in which the action was brought (here the Magistrates' Court) had no equitable jurisdiction. The Magistrates' Courts' jurisdiction was defined under the Magistrates' Courts Act 1893.
- 328 *Riddiford v Warren* (1901) 20 NZLR 572 (CA). See also *Kendall v Hamilton* 4 App Cas 504 (HL) and *Powell v Brodhurst* [1901] 2 Ch 160 (Ch D) where, although pleaded, the provision did not come into play because equity never dealt with the particular issue of partnership at hand (Kendall) and you could not recover a mere money demand in Chancery (Powell).
- 329 Unless the misrepresentation was such that there was a complete difference in substance between the thing bargained for and the thing obtained, so as to constitute a failure of consideration. But, see *Root v Badley* [1960] NZLR 756.
- 330 See *Mayor, Councillors and Citizens of City of Dunedin v Searl* (1915) 34 NZLR 861; *Cobbett v Sexton* [1920] NZLR 223; *Rewiri v Eivers* [1917] NZLR 479; and see *La Grange v McAndrew* 4 QBD 210 (Div Ct); *Harrison v Duke of Rutland* [1891-1894] All ER Rep 514 (CA).
- 331 *Mayor, Councillors and Citizens of City of Dunedin v Searl* (1915) 34 NZLR 861.
- 332 *Morris v Montague* (1883) 2 NZLR (SC) 418.

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- 333 *Rewiri v Eivers* [1917] NZLR 479.
- 334 At 482.
- 335 *Taranaki Hospital Board v Brown* [1941] NZLR 586 at 587.
- 336 For instance, rescission of a contract for innocent or fraudulent misrepresentation is dealt with in the Contractual Remedies Act 1979.
- 337 As desired in *Halpern v Halpern (Nos 1 and 2)* [2007] EWCA Civ 291, [2008] QB 195, relying on *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218.
- 338 As desired in *X v Attorney-General* [1997] 2 NZLR 623 (HC).
- 339 See the views expressed in A Burrows “We do this at common law but that in equity” (2002) OJLS 1. See also Sir Anthony Mason “The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: An Australian Perspective” in D Waters (ed) *Equity, Fiduciaries and Trusts* (Carswell, Ontario, 1993) at 9: “the traditional principles of equity are not so invincibly superior to the concepts of the common law that equity cannot occasionally profit from common law ideas. And, though the courts should look at policy arguments with due circumspection, it would be absurd to suggest that the courts cannot adjust or modify equitable principle on policy grounds where to do so is appropriate.”
- 340 *Day v Mead* [1987] 2 NZLR 443 (CA).
- 341 *Aquaculture Corp v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 (CA).
- 342 Only the authors of *Meagher, Gummow and Lehane* go into any detailed discussion of the provision, linking what they consider to be misunderstandings of the breadth of the provision to the growth of the “fusion fallacy”. R Meagher, D Heydon, M Leeming *Meagher, Gummow and Lehane’s Equity Doctrines and Remedies* (4th ed, Butterworths LexisNexis, Sydney, 2002) at chapter 2.
- 343 Law Reform Commission of Ireland *Report on Consolidation and Reform of the Courts Acts* (LRC 97-2010) at 460 and cl 97 of the Draft Courts (Consolidation and Reform) Bill. See also Law Reform Commission of Ireland *Consultation Paper on the Consolidation and Reform of the Courts Acts* (LRC CP 46-2007) at 47–49 and 107.
- 344 New South Wales Law Reform Commission *Law and Equity* (Report 13, 1971).
- 345 Queensland Law Reform Commission *A Bill to consolidate, amend and reform the Supreme Court Acts and ancillary Acts regulating civil proceedings in the Supreme Court* (Report 32, 1988).
- 346 Consequently, in New South Wales, the Law and Equity Act 1972 makes clear that the rule was part of the general law of New South Wales. The Queensland Law Reform Commission determined that the provision should be retained in the new Supreme Court Act.
- 347 It provided: “No merger by operation of law. There shall not be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity.” In 1908, the provision was shifted to the Property Law Act 1908, s 11, later being enacted as s 30 of the 1952 Act.
- 348 New Zealand Law Commission *The Property Law Act 1952* (NZLC PP16 1991) at para [147].
- 349 Accordingly, the merger provision does not appear in the Property Law Act 2007. The provision remains in force in the UK: Law of Property Act 1925 (UK), s 189.
- 350 JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 614–615.



Chapter 13

Miscellaneous provisions of the Judicature Act 1908

INTRODUCTION

- 13.1 In this chapter we consider a number of miscellaneous provisions of the Judicature Act 1908. These are sections that are largely procedural or technical in nature, but relate to the processes and powers of the courts. We have grouped these disparate provisions according to the parts in the Act to which they primarily relate.
- 13.2 We do not discuss any matters which are purely questions of drafting. These will be identified in the preparation of a Courts Bill accompanying our final report.

PART 1 – THE HIGH COURT

Section 18: Crimes before 1840

- 13.3 Section 18 of the Judicature Act 1908 provides that “[t]he Court shall not have jurisdiction to try any felony or misdemeanour committed before the 14th day of January 1840”. This is a straightforward section restricting the High Court’s jurisdiction to crimes committed on or after 14 January 1840, the date of the proclamation of the British Crown’s right of pre-emption in New Zealand.³⁵¹
- 13.4 Given that more than 170 years have passed since the date to which the section refers, it is safe to conclude that it would now be impossible for a living person to have committed a crime outside of the temporal jurisdiction of the High Court. Section 18 is therefore no longer necessary to New Zealand’s law, and we propose that it be repealed.

Section 23: Special sittings of the High Court

- 13.5 Section 23 provides that the Governor-General in Council may appoint special sittings of the High Court for the despatch of civil or criminal business, to be held at such time and place or places, and before such judge or judges as he or she considers fit.
- 13.6 We do not think there is any reason to retain this cumbersome process. Rather, the new legislation should enable the Governor-General to declare by way of a *Gazette* notice that an office of the High Court is established at a place and on a date stated in the notice, and there should also be a provision enabling judges to hold a sitting of the High Court at a time and place the judge thinks fit (as section 52 of the Act currently provides).

Section 26IB: Video link

- 13.7 Section 26IB enables a judge or associate judge to preside at a hearing of specified matters by way of video link. This section appears to now be unnecessary in light of the enactment of the Courts (Remote Participation) Act 2010 and the Evidence Act 2006. We are inclined not to include a similar provision in a draft Courts Bill.

Section 26P: Decisions of associate judges amenable to review or appeal

- 13.8 We are aware there are differing views on the scope of section 26P of the Act, which has spawned a number of appeals. This section provides that orders or decisions made by an associate judge in chambers may be reviewed by the High Court, whose decision is final, whereas an order or decision of an associate judge in any proceedings may be appealed to the Court of Appeal. Distinguishing between what is reviewable and what is appealable can be difficult, and should be clarified in legislation to the extent possible.
- 13.9 The Commission has been advised that the Rules Committee is presently examining this issue, and we therefore do not intend to propose any amendment to section 26P while the Rules Committee's work on issues relating to this section is still in progress.

Section 54B: Discharge of juror or jury

- 13.10 Section 54B, which provides that nothing in the Judicature Act 1908 affects the powers to discharge a juror or jury under section 22 of the Juries Act 1981, appears to have been rendered meaningless by earlier amendments to the section. We can see no reason for including an equivalent provision in new legislation. The Juries Act 1981 would still apply without this provision.

Section 55: Absconding debtors

- 13.11 Section 55 provides judges with a power to order the arrest and imprisonment of an absconding debtor if the debtor does not give security guaranteeing that he or she will not leave New Zealand without leave of the High Court.³⁵²
- 13.12 Section 55(1) provides: “A person shall not be arrested upon mesne process in any civil proceedings in the High Court”. In England, “mesne process” described the writs issued subsequent to the original writ, but before a final process to enforce execution. The subsection has been described as “both obsolete and confusing”.³⁵³
- 13.13 Subsection 2 is written in equally archaic language. It essentially provides that the court has a discretion before final judgment in civil proceedings to order the arrest of a defendant, unless payment of a security, not exceeding the amount claimed, is made, where:
- the plaintiff has good cause of action in the sum of \$100 or more;
 - there is probable cause for believing the defendant is about to depart New Zealand; and
 - there is evidence that the defendant’s absence will materially prejudice the plaintiff in the prosecution of the proceedings.
- 13.14 Section 55 is concerned with the arrest of a defendant who is absconding *before* judgment, with the aim of frustrating the plaintiff’s action and ability to obtain judgment.³⁵⁴ The court will only order the arrest of the defendant where the defendant’s evidence is materially necessary for the plaintiff’s case. It is not sufficient that the defendant’s absence would make it difficult or impossible for the plaintiff to obtain payment from the defendant if the defendant left New Zealand.
- 13.15 A slightly different scenario applies in the case where the proceedings are for a penalty, or a sum in the nature of a penalty, in respect of any contract. For these, it is not necessary to prove that the absence of the defendant from New Zealand will materially prejudice the plaintiff in the prosecution. The security given, instead of being to ensure that the defendant will not go out of New Zealand, must be to the effect that any sum recovered against the defendant in those proceedings will be paid or that the defendant is to be sent to prison.³⁵⁵
- 13.16 When there is judgment against a defendant, the order for arrest previously obtained against the defendant is discharged.³⁵⁶
- 13.17 The High Court Rules detail the process for the plaintiff to apply for an order, and for the defendant to apply to have it rescinded, as well as the details of how a security may be given.³⁵⁷

- 13.18 The provision was used in *Kelly v Schofield* where the defendant was an aircraft repairer hired to repair the plaintiffs' glider after a crash.³⁵⁸ While the glider was in the defendant's possession, the defendant crashed the glider again in circumstances where he may have been liable for the damage. The plaintiff sought and received an order from the court under section 55 because the defendant appeared to be on the verge of shifting permanently to Australia. The defendant was arrested with an order that he be imprisoned for three months unless and until he gave security by way of a \$55,000 deposit.

The impact of freezing orders

- 13.19 The development of the Mareva injunction is relevant to whether section 55 should be carried over into new courts legislation.³⁵⁹ A Mareva injunction is an interim injunction preventing a defendant from removing, disposing of, or charging assets either within or outside of the jurisdiction. It provides an alternative means through which plaintiffs can obtain some protection against absconding debtors. The injunctions have been renamed freezing orders.³⁶⁰ The power of the Court to issue freezing orders is recognised and confirmed in the High Court Rules.³⁶¹
- 13.20 There are four essential requirements for the granting of a freezing order:³⁶²
- the plaintiff must have a good arguable case;³⁶³
 - the defendant must have assets to which the order may apply;³⁶⁴
 - there must be a real risk that the property will be moved out of the jurisdiction or dissipated;³⁶⁵ and
 - the Court must stand back and weigh the interests of justice and balance of convenience.³⁶⁶
- 13.21 Freezing orders appear to be used much more frequently than section 55 of the Judicature Act 1908. This is likely to be because they are available on a wider basis than section 55 orders, which need evidence that the defendant's absence will materially prejudice the plaintiff in the prosecution of the proceedings. The focus in the freezing order requirements on the risk that property will be removed or dissipated gets to the heart of what is more often the risk or problem in cases of absconding debtors. A freezing order is likely to be the better option in many cases, which raises the issue of whether section 55 remains relevant and necessary.
- 13.22 Arresting a defendant in a civil proceeding does seem a relatively extreme step, and we doubt whether it is appropriate for the courts to continue to have this power in addition to the power to issue a freezing order. It has been suggested that section 55 could be used in support of a freezing order to compel the attendance of a defendant at court for examination.³⁶⁷

District Courts Act 1947 provision

13.23 It is useful to note that the equivalent provision in the District Courts Act 1947 provides for a similar power, but in a somewhat more modern form.³⁶⁸ The key differences in the District Courts Act provision are:

- the defendant's intention to evade payment must be proven, rather than the effect of prejudicing the plaintiff's case;
- there is no requirement for the debt to be at least \$100;
- the judge is given the discretion to discharge the defendant or hold the defendant on bail. If imprisonment is resorted to, it can be for a maximum of four days rather than six months; and
- the judge can require the person asking for the order to lodge a security of up to \$2000.

13.24 The District Courts Act 1947 provision is drafted in a manner that is more accessible than section 55 of the Judicature Act 1908, and it seems to be a more measured response to the circumstances. We are not convinced that section 55 should be retained, but if it is, the drafting should be similar to the District Courts Act 1947 provision.

Q34 Should the new Courts Bill include a provision enabling the arrest of absconding debtors?

Section 56A: Failure to respond to a witness summons

13.25 Section 56A provides for a fine of up to \$500 to be imposed on a person who fails to respond to a witness summons. It has been suggested to us that the maximum penalty is too low.

13.26 The penalty for "neglecting a witness summons" in section 54 of the District Courts Act 1947 is a fine not exceeding \$300. Section 159 of the Criminal Procedure Act 2011,³⁶⁹ dealing with the failure to respond to a witness summons in the criminal jurisdiction, provides for a fine not exceeding \$1,000. We note the fine for failing to attend for jury service under the Juries Act 1981 is also \$1,000.³⁷⁰

13.27 The maximum fines for failing to respond to a witness summons under the Judicature Act 1908 and the District Courts Act 1947 do seem low in comparison to the \$1,000 fine in the Criminal Procedure Act 2011. We suggest the provisions in the criminal and civil jurisdictions should be consistent. Our provisional view is that the relevant provision in the new Courts Bill should reflect section 159 of the Criminal Procedure Act 2011.

Q35 Do you agree that the maximum fine for failing to respond to a witness summons in the civil jurisdiction should be the same as in the criminal jurisdiction (\$1,000)?

PART 1A – TRANS-TASMAN PROCEEDINGS

- 13.28 Trans-Tasman proceedings are governed by the provisions of the Trans-Tasman Proceedings Act 2010 (“TTPA”), Part 4 of the Evidence Act 2006 and Part 1A of the Judicature Act 1908. The Australian counterpart legislation is contained in one Act, the Trans-Tasman Proceedings Act 2010 (Cth).
- 13.29 Part 1A was inserted into the Judicature Act 1908 as from 1 July 1990.³⁷¹ It contains provisions that apply to Australian and New Zealand proceedings relating to the taking advantage of market power in trans-Tasman markets, namely:
- proceedings in the High Court under specified provisions of the Commerce Act 1986, but that may be tried or heard in Australia;³⁷² and
 - proceedings in the Federal Court of Australia under specified provisions of the Trade Practices Act 1974 (Cth), but that may be tried or heard at a sitting of that court in New Zealand.³⁷³
- 13.30 The provisions in Part 1A cover matters such as the circumstances in which the High Court may order New Zealand proceedings to be heard in Australia, subpoenas, the administration of oaths, contempt of the Federal Court of Australia, and arrangements to facilitate sittings of the New Zealand High Court in Australia, and the Federal Court of Australia in New Zealand.
- 13.31 Twenty years after the insertion of Part 1A, the TTPA was passed by the New Zealand Parliament. It implements the Agreement between the Government of New Zealand and the Government of Australia on Trans-Tasman Court Proceedings and Regulatory Enforcement, signed on 24 July 2008. Its purposes also include streamlining the process for resolving civil proceedings with a trans-Tasman element in order to reduce costs and improve efficiency, and minimising impediments to enforcing certain Australian judgments and regulatory sanctions.³⁷⁴ (At the time of writing, the operative provisions of the Act are not yet in force.)
- 13.32 The TTPA provides for the following matters:
- service in Australia of initiating documents for civil proceedings commenced in New Zealand courts and tribunals;
 - New Zealand courts declining jurisdiction and, by order, staying proceedings in New Zealand on the grounds that an Australian court is the more appropriate forum to determine the proceedings;
 - New Zealand courts giving interim relief in support of civil proceedings commenced in Australian courts;

- parties and counsel in Australia appearing remotely in civil proceedings in New Zealand courts (and parties and counsel in New Zealand appearing remotely in Australian civil proceedings);³⁷⁵
 - recognition and enforcement in New Zealand of specified judgments of Australian courts and tribunals; and
 - amendments to the Evidence Act 2006 provisions dealing with subpoenas.
- 13.33 Section 6 of the TTPA provides that nothing in that Act limits or affects Part 1A of the Judicature Act 1908, so the specific provisions in Part 1A remain untouched by the more general later legislation.
- 13.34 At the time the TTPA was being drafted, there were already provisions dealing with the trans-Tasman subpoena and evidence regime in the Evidence Act 2006. These provisions were left in the Evidence Act 2006, with modifications, largely because that Act was so new. Trans-Tasman proceedings are just one part of the Evidence Act 2006 provisions relating to evidence from overseas or to be used overseas.
- 13.35 Since all of the relevant provisions would not be contained in the TTPA, there was no impetus at the time to shift the provisions in Part 1A of the Judicature Act 1908 to the TTPA.
- 13.36 The TTPA applies to trans-Tasman proceedings generally. It covers some, but not all, of the elements of the Part 1A regime, which applies only to a narrow class of proceedings. While the TTPA deals with the recognition and enforcement in New Zealand of judgments given in Australian trans-Tasman proceedings, Part 1A goes further by allowing the New Zealand High Court to sit in Australia in certain circumstances, and provides support for the Australian Federal Court to sit in New Zealand.
- 13.37 Part 1A of the Judicature Act 1908 clearly needs to be retained, but it may be a better fit with the provisions of the TTPA than with the new courts legislation. We are considering leaving Part 1A out of the draft Courts Bill and providing for the entire Part to be moved, without substantive amendment, to the TTPA, where it may be more accessible to users. However, it would not bring all of the provisions relating to trans-Tasman proceedings into one place, as some are contained in the Evidence Act 2006.

Q36 Should the provisions in Part 1A of the Judicature Act 1908 be included in a new consolidated Courts Bill, or in the Trans-Tasman Proceedings Act 2010?

PART 3 – GENERAL RULES AND PROVISIONS

Section 94: Effect of joint judgments

- 13.38 Under section 94 of the Judicature Act 1908, where parties are jointly liable, a judgment against one or more of those parties does not operate as a bar or a defence to a proceeding against the other jointly liable party or parties, except to the extent that the judgment has been satisfied.³⁷⁶ This section modified the common law.³⁷⁷
- 13.39 The case of *W C Fowler and Sons Ltd v St Stephens Board of Governors*, in which a school paid money to an agent who liaised with Gullivers Sports travel to book a rugby tour party to Europe, illustrates this provision in action.³⁷⁸ The agent misappropriated a substantial portion of the school's payment for the trip and absconded to Australia, leaving Gullivers unpaid. Gullivers sued the school. Section 94 meant that the school could be sued by Gullivers despite judgment against the agent.
- 13.40 The scope of application of section 94 has been narrowed by section 17(5) of the Law Reform Act 1936. This section specifically excludes section 94 of the Judicature Act 1908 from applying in the case of persons who commit torts (ie tortfeasors). Section 17 of the Law Reform Act 1936 provides specific rules applying in the case of proceedings against and contribution between joint and severally liable tortfeasors. Judgment for damages recovered against one tortfeasor is not a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor.³⁷⁹
- 13.41 The Commission has recently received a separate reference to review joint and several liability. In the meantime, as it modifies the common law, section 94 (or its equivalent) should remain on the statute books. However, its scope could be made clearer on the face of the provision if the exclusion of tortfeasors in section 17(5) of the Law Reform Act 1936 was cross-referenced or made clear in the wording of what is currently section 94.

Section 98A: Proceedings in lieu of writs

- 13.42 Section 98A was inserted from 1 January 1986 by section 8(1) of the Judicature Amendment Act (No 2) 1985. It removed the court's power to grant relief by writ and replaced this with the power to grant the same relief by way of judgment or order. The section explicitly does not apply to the writs of habeas corpus, execution and any writ in aid of the writ of execution, but does apply to all other writs.
- 13.43 This provision reflected a similar amendment made in England by section 7(1) of the Administration of Justice (Miscellaneous Provisions) Act 1938 (UK), but which only replaced the prerogative writs of mandamus, prohibition and certiorari.

- 13.44 There do not appear to be any cases in which section 98A has been at issue. Originally, it was essential to have a writ in order to have a case heard by a court in England. Numerous different writs developed as the basis for different types of claims. However, the importance of writs diminished in recent centuries, with the focus shifting from the need to have the correct writ to advance a claim to a more unified procedure for all civil actions.
- 13.45 Section 98A effectively removes the need for writs in New Zealand. They are now seldom referred to, with the exception of the writ of habeas corpus, which is not replaced by this provision, and the prerogative writs of mandamus, prohibition and certiorari, which continue to be available in the field of judicial review.
- 13.46 Section 98A is unsatisfactory in terms of being clear law. It refers to the court's jurisdiction "to grant any relief or remedy or do any other thing by way of writ" immediately before the commencement of this section on 1 January 1986. It seems to be impossible to determine all of the writs that were replaced by the court's power on this date. The provision was clearly phrased this way in order to maintain the courts' powers as they were at the time of the commencement of the provision, and to avoid reinstituting any powers under writs that had been previously abolished.³⁸⁰ The provision should be rewritten in a way that retains its meaning and effect, but is phrased more clearly.

Q37 Do you agree with the proposals to retain and clarify:

- (a) section 94 (effect of joint judgments)?
- (b) section 98A (proceedings in lieu of writs)?

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- 351 At the time of enactment, the old Supreme Court had this jurisdiction.
- 352 Section 55 appears to have been introduced as a substitute for the prerogative writ of *ne exeat regno*: *Gorlitz v Kubelik* (1908) 10 GLR 705. The writ remains available in England, but appears to be no longer available in New Zealand in respect of civil claims for debt, although it may still be available in the public law arena: *Parsons v Burk* [1971] NZLR 244.
- 353 *McGechan on Procedure* (online looseleaf ed, Brookers) at [J55.04].
- 354 At [J55.01], cited with approval in *Kelly v Schofield* HC Auckland CP1327/86, 10 December 1986.
- 355 Judicature Act 1908, s 55(3).
- 356 *Felton v Callis* [1968] 3 All ER 673; *Hunter v Sullivan* (1911) 14 GLR 293. In *Lawson, Swain & Walker Ltd v Montefiore* [1919] NZLR 666, Cooper J said (at 668): “Section 55 of the Judicature Act 1908 was not intended to give any right to a plaintiff to arrest a defendant if the absence of a defendant would render it difficult or impossible for a plaintiff to obtain the fruits of his judgment if the defendant left the Dominion, but is limited to cases where the evidence of a defendant is materially necessary for the plaintiff to prove his case.”
- 357 High Court Rules, rr 17.88 – 17.92.
- 358 *Kelly v Schofield* HC Auckland CP1327/86, 10 December 1986.
- 359 The Mareva injunction developed from *Nippon Yusen Kaisha v Karageorgis* [1975] 1 WLR 1093 and *Mareva Compania Naviera SA v International Bulk Carriers SA* [1975] 2 Lloyd’s Rep 509. It was adopted in New Zealand in *Mosen v Donselarr* (1978) 2 PRNZ 482 and *Hunt v BP Exploration Co (Libya) Ltd* [1980] 1 NZLR 104.
- 360 High Court Rules, r 32.2.
- 361 Part 32.
- 362 *Laws of New Zealand Creditors’ Remedies: Part II Pre-judgment remedies/Freezing Orders* (online ed) at [9]; Rt Hon P Blanchard (ed) *Civil Remedies in New Zealand* (Brookers, Wellington, 2003) at 284.
- 363 High Court Rules, r 32.5(1)(b); *Bank of New Zealand v Hawkins* (1989) 1 PRNZ 451.
- 364 Under r 32.2 of the High Court Rules, the injunctions apply to assets located in or outside New Zealand. The defendant must have a beneficial interest in the assets: *Westpac Banking Corporation v Gill (no 1)* (1987) 2 PRNZ 52.
- 365 *Sich v Sich* [1992] 2 NZLR 544 (CA); *Third Chandris Shipping Corporation v Unimarine SA* [1979] QB 645.
- 366 *Whitmarsh v A’mon Corporation Ltd* (1988) 2 PRNZ 576 at 579; *Bank of New Zealand v Hawkins* (1989) 1 PRNZ 451.
- 367 Rt Hon P Blanchard (ed) *Civil Remedies in New Zealand* (Brookers, Wellington, 2003) at [6.2.1].
- 368 District Courts Act 1947, s 109.
- 369 Not yet in force.
- 370 Juries Act 1981, s 32.
- 371 Judicature Amendment Act 1990, s 3.
- 372 Commerce Act 1986, ss 36A, 98H or 99A.
- 373 Trade Practices Act 1974 (Cth), ss 46A, 155A or 155B.
- 374 Trans-Tasman Proceedings Act 2010, s 3.

375 Other than to give, examine a person giving, or making submissions in relation to, remote evidence, under ss 168 to 172 of the Evidence Act 2006.

376 *Laws of New Zealand* Guarantees and Indemnities (online ed) at [118].

377 In *King v Hoare* (1844) 13 M & W 495, it was held that when a judgment was obtained against one joint debtor, the cause of action against both debtors merged into the judgment. This meant a subsequent action could not be brought against the other joint debtor.

378 *W C Fowler & Sons Ltd v St Stephens College Board of Governors* [1991] 3 NZLR 304.

379 Law Reform Act 1936, s 17(1)(a).

380 For instance, the writ of summons.



Chapter 14

The commercial provisions in the Judicature Act 1908

INTRODUCTION

- 14.1 The Judicature Act 1908 contains a number of provisions that are unrelated to the role and structure of the courts. Some of these were introduced into the Act when no sensible alternative statute could be found. Others were included in the Act at the time of its enactment in New Zealand, reflecting the placement of similar provisions in the United Kingdom legislation upon which the Judicature Act 1908 was based. As a result, the Act includes an odd assortment of provisions with a commercial flavour. If a new Courts Bill is introduced, another home will need to be found for such of these “commercial” sections as should continue in law. We discuss how this might be achieved at the end of this chapter.
- 14.2 The particular sections addressed are:
- (a) sections 17A – 17E (liquidation of associations);
 - (b) sections 84 – 86 (sureties);
 - (c) section 88 (lost negotiable instruments);
 - (d) section 90 (stipulations in contracts as to time);
 - (e) section 92 (discharge of debt by acceptance of part in satisfaction of the whole);
 - (f) sections 94A – 94B (payments under mistake).

SECTIONS 17A TO 17E: LIQUIDATION OF ASSOCIATIONS

- 14.3 Sections 17A to 17E address what is to happen when an “association” needs to go into liquidation. An association is defined as a partnership, company, or other body corporate, or unincorporated body (other than a company under the Companies Act 1955 or Companies Act 1993, or a body corporate, which may be put into liquidation under an Act under which it was constituted).³⁸¹ The High Court is given jurisdiction to appoint a liquidator when it is satisfied that the association is dissolved or has ceased to carry on business, or the association is unable to pay its debts, or it is just and equitable that it should be put into liquidation.³⁸² Section 17C provides guidance in determining when an association can be considered to be unable to pay its debts.³⁸³
- 14.4 Section 17B applies Part 16 of the Companies Act 1993 (which relates to liquidations of companies) to associations. With the necessary modifications to the descriptions of the bodies and persons involved and exclusions of certain irrelevant sections, this part of the Companies Act 1993 applies to the partnerships, companies and bodies that meet the definition of association under section 17A. This imports provisions relating to the process of liquidation, the duties, rights and powers of liquidators, the qualifications and supervision of liquidators, and creditors’ claims. In *Commissioner of Inland Revenue v Official Assignee*, it was decided that section 17B and the application of Part 16 of the Companies Act 1993 did not apply where both partners to a partnership were adjudged bankrupt rather than the association itself being liquidated.³⁸⁴
- 14.5 A liquidator is empowered to require any person who is liable to pay or to contribute to the payment of the association’s debts, liabilities and the costs of liquidation to pay or contribute accordingly.³⁸⁵ Where a liquidator is in place actions or proceedings cannot be taken against a person liable to pay or contribute to the association’s debts except with the court’s leave and subject to the terms imposed by the court.³⁸⁶
- 14.6 Sections 17A to 17E were inserted into the Judicature Act 1908 in 1994.³⁸⁷ They were introduced at the time of the coming into force of the Companies Act 1993. The Judicature Amendment Act 1993 also repealed Part 11 of the Companies Act 1955, which related to the winding up of unregistered companies.³⁸⁸ Provisions addressing unregistered companies were not included in the Companies Act 1993, presumably to keep the new Companies Act focused purely on registered companies. The legislative provisions for the winding up of unregistered companies needed to be preserved, however. At the time, the Judicature Act 1908 was considered to be the most suitable place for them.

- 14.7 One issue with the liquidation provisions in the Judicature Act 1908 is the extent to which the provisions have been overtaken by other legislation. The Limited Partnerships Act 2008 establishes a liquidation procedure for limited partnerships, which would previously have been covered by sections 17A to 17E. There is no cross-referencing between the two Acts or exemption of limited partnerships from the application of sections 17A to 17E. Similarly, partnerships are covered by the Partnerships Act 1908, which includes provisions on the dissolution of a partnership and its consequences. Given these other legislative provisions, we doubt that the reference to partnerships in section 17A is still necessary.
- 14.8 Liquidations of incorporated societies are covered by the Incorporated Societies Act 1908 and, in accordance with section 17A(1)(c) of the Judicature Act 1908, sections 17A to 17E do not apply to them. There is a question of how many types of association that are not incorporated societies, companies, bodies corporate covered by other legislation, or limited partnerships, continue to exist. However, there do seem to be some unincorporated societies that need to have statutory liquidation provisions in place. We think it is, therefore, necessary to retain provisions regarding the liquidation of associations on the statute book. But, where do they belong?
- 14.9 One option is to shift these provisions back to the companies' legislation. In the United Kingdom, similar provisions to these are included in the Companies Act 1948 where the entities at issue are described as “unregistered companies”, but are defined to include the same types of association as covered by sections 17A to 17E of the Judicature Act 1908.³⁸⁹ The Companies Act 1993 contains a variety of provisions, not all of which are closely related to registered companies.
- 14.10 Alternatively, these provisions could be retained in a “rump” Judicature Act. (We discuss this option further at the end of this chapter.)

Q38 Do you think there is a need to retain statutory provisions along the lines of sections 17A to 17E governing the liquidation of associations?

Q39 If these provisions are retained, do you agree that the reference to partnerships in section 17A of the Judicature Act is unnecessary?

Q40 If the provisions are retained, could they be included in the Companies Act 1993?

SECTIONS 84 TO 86: SURETIES

- 14.11 Sections 84 to 86 of the Judicature Act 1908 state the law applying to a surety (a guarantor) who pays a debt or satisfies a duty on behalf of a debtor. Section 84 allows a guarantor who pays or satisfies a debt or duty to have assigned to him or her any judgment or security held by the creditor in respect of the debt or duty. This is regardless of whether the judgment or security is deemed at law to be satisfied by the payment of the debt or performance of the duty.
- 14.12 Section 85(1) gives this guarantor the right to stand in the place of the creditor (known as “subrogation”) for all the rights possessed by the creditor in respect of the debt or duty.³⁹⁰ This allows the guarantor to obtain indemnification (that is, compensation or reimbursement) for the amount paid and loss sustained in satisfying the debt or duty. Under section 85(2), the payment, satisfaction or performance cannot be filed in court in an action or proceeding by the guarantor.
- 14.13 Section 86 provides that a guarantor who is a co-surety, co-contractor or co-debtor cannot use sections 84 and 85 to recover more than a just proportion of the debt paid.
- 14.14 Sections 84 to 86 accord statutory recognition to existing equitable principles.³⁹¹ It seems that the law is the same in the United Kingdom, but that jurisdiction has no statutory equivalent of these provisions. In equity the basis of the guarantor’s right to a creditor’s security on payment of the guaranteed debt arises from the obligation imposed on the principal debtor to indemnify the guarantor.³⁹²
- 14.15 Interpretation of the sureties provisions by the courts and the common law rules about the position of guarantors have led to the development of further principles in this area of law. The leading cases on section 84 are *Official Assignee v Tizard*³⁹³ and *De Pelichet McLeod & Co Ltd v Lysnar*.³⁹⁴ From these cases it is clear that section 84 is for the benefit of a person who pays the whole of a debt or performs the whole of a duty rather than just part, but that the section is not an exclusive code.
- 14.16 Section 85 means that at any time after the debt is due, a guarantor may pay off the creditor and then, on giving a proper indemnity for costs, may sue the principal debtor in the creditor’s name.³⁹⁵ A guarantor is also entitled to the same priority on a bankruptcy or liquidation of the principal debtor as the creditor would have enjoyed.³⁹⁶ A further implication of section 85 is that a guarantor can recover from the principal debtor the costs of defending an action brought by the creditor, if the defence was undertaken with the debtor’s authority.³⁹⁷

- 14.17 A guarantor's right to contribution³⁹⁸ from any co-guarantors after paying the debt only arises after the guarantor has paid more than his or her total proportion or share of the common liability.³⁹⁹ A guarantor who has made payment of more than his or her proportionate share of common liability has a statutory right to an assignment of all the rights and securities held by the creditor for the purpose of obtaining contribution, but only once the creditor has received full payment of the debts.⁴⁰⁰

Issues with surety provisions

- 14.18 The case law indicates that the scope of sections 84 to 86 is quite narrow and that in many cases the statute does not apply. For instance, the statutory requirement that in order for a guarantor to be able to stand in the place of the creditor, the guarantor must have paid the full debt, limits the application of the provisions. In both *Official Assignee v Tizard*⁴⁰¹ and *De Pelichet McLeod & Co Ltd v Lysnar*,⁴⁰² the amount paid was not the full debt. However, the rules of equity applied to produce the same result that would have been reached if the Act did apply.
- 14.19 There is no indication that sections 84 to 86 are intended to be a code. Much of the law on this subject is provided by cases. Where the statute does not apply, but the common law does (such as where there is only part payment of a debt), there is a difference in the rights obtained by the guarantor. Under the statute, the guarantor gains rights identical to those the creditor has against the debtor, while under the rule of equity the rights can be wider.⁴⁰³ Another difference is the equitable right to subrogation only applies when the guarantee has been undertaken at the principal debtor's actual or constructive request. This is not the case with the statutory right.⁴⁰⁴
- 14.20 There appears to be some confusion regarding the court in which an action can be brought. One New Zealand commentary states that a guarantor who wishes to enforce the right to an indemnity from the debtor may bring an action for indemnification in the High Court or District Court (if the amount of the claim is within the District Court's jurisdiction).⁴⁰⁵ However, in the Family Court case of *WBA v LMA* it was held that the Judicature Act 1908 provisions did not apply because the Act only applied to the superior courts.⁴⁰⁶

- 14.21 Case law indicates that parties can contract out of the guarantor's right to subrogation and the Judicature Act 1908 does not prevent this.⁴⁰⁷ In these cases, sections 84 to 86 do not apply.⁴⁰⁸ Parties are also free to exclude or modify rights to contribution by express agreement.⁴⁰⁹ Given the ability to exclude the rights provided for in the statute, it is questionable whether there is much value in having the statutory provisions. Further, it appears that the rules of equity apply more broadly than the statutory provisions, and provide similar rights. In many cases, the rules of equity are relied upon because circumstances do not fit within the scope of the Judicature Act 1908. Having said that, retaining statutory provisions for sureties would continue to provide a degree of clarity about the law and would ensure that the position in law is not altered. Subject to the views of submitters, we are inclined to retain the surety provisions, but they would not fit well into a new Courts Bill. The question then arises as to the most appropriate home for them, and we discuss this further at the end of this chapter.
- 14.22 If retained, the language in the provisions requires updating (for instance, reference to a "specialty" may now be obsolete) and it should be made clear whether they can be relied on in the District Court.

Q41 Do you agree that sections 84 to 86 of the Judicature Act, which relate to sureties, should be retained?

SECTION 88: LOST INSTRUMENTS

- 14.23 Section 88 provides that where an action is based on a negotiable instrument that has been lost, the court may allow the action to proceed, provided an indemnity is given. Negotiable instruments are documents guaranteeing the payment of a specific amount of money, either on demand, or at a set time. They include bills of exchange, such as cheques, and promissory notes.
- 14.24 Section 88 modified the common law rule, which required that if a negotiable instrument was lost, no action could be brought on the instrument or on the consideration for it.⁴¹⁰ There does not appear to be any New Zealand case law on either this provision, or section 118 of the District Courts Act 1947, which is the District Courts equivalent. It is not clear how frequently these provisions are relied upon.
- 14.25 The Bills of Exchange Act 1908 also contains a provision that is almost identical to section 88 of the Judicature Act 1908.⁴¹¹ This section has the same effect as section 88 of the Judicature Act 1908, but applies only to bills of exchange and promissory notes.

Issues

- 14.26 The existence of the Bills of Exchange Act 1908 provision raises the question of whether sections 88 of the Judicature Act 1908 and 118 of the District Courts Act 1947 are necessary. The Bills of Exchange Act 1908 is based on the Bills of Exchange Act 1882 (UK), which includes an identical provision on lost bills of exchange, cheques and promissory notes. The United Kingdom also has a “lost negotiable instruments” provision in the Common Law Procedure Act 1854 (UK) that is nearly identical to section 88 of the Judicature Act 1908.⁴¹² It has been suggested that this provision was retained when the Bills of Exchange Act 1882 (UK) was enacted because it applies to all negotiable instruments, and not merely to the instruments specified in the Bills of Exchange Act 1882 (UK) (bills of exchange, cheques and promissory notes). Further, circular notes are a form of negotiable instruments that appear to be within the ambit the Common Law Procedure Act 1854 (UK) provision, but not the Bills of Exchange Act 1882 (UK) provision.⁴¹³
- 14.27 Therefore, we cannot be sure that there are no negotiable instruments in use in addition to those covered by the Bills of Exchange Act 1908 provision. The possibility of new negotiable instruments developing must also be considered. Our preliminary view is that section 88 of the Judicature Act and section 118 of the District Courts Act 1947 should therefore be retained.

Q42 Do you agree that sections 88 of the Judicature Act and 118 of the District Courts Act, which relate to lost instruments, should be retained?

SECTION 90: STIPULATIONS IN CONTRACTS AS TO TIME

- 14.28 Section 90 of the Judicature Act 1908 provides that the equitable rule regarding stipulations in contracts as to time prevails over the common law rule.
- 14.29 At common law, a stipulation as to time was generally considered to be of the essence of the contract and the contract could be terminated if the time condition was breached.⁴¹⁵
- 14.30 In equity, a stipulation as to time is deemed not essential to a contract unless the contract explicitly provides this, or it must necessarily be implied that this is what is intended, or if the defaulting party had been given reasonable opportunity to comply.⁴¹⁶
- 14.31 When time is not of the essence in a contract, the breach of a time condition does not entitle the innocent party to repudiate the contract. Nor does it prevent the party in default from suing for specific performance. However, under section 90 the innocent party may recover damages for the breach of the stipulation as to time.⁴¹⁷

14.32 In summary, time will not be of the essence unless:⁴¹⁸

- (a) the contract expressly provides that time conditions must be strictly complied with (express provision);
- (b) the nature of the subject matter of the contract or surrounding circumstances show that the parties intended that time was of the essence (necessary implication); or
- (c) the party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence.

14.33 Section 90 was based on section 25(7) of the Supreme Court of Judicature Act 1873 (UK) – that is, the legislation that effected the procedural and administrative fusion of the courts of common law and equity in England. Section 90 of the Judicature Act 1908 was one of a number of provisions directed at resolving conflicts between common law and equitable rules that existed at the time of the legislation. It was first introduced in New Zealand as section 8 of the Law Amendment Act 1882, and is reinforced by section 99 of the Judicature Act 1908, which provides that generally in cases of conflict between the rules of common law and equity, the equitable rule is to prevail.⁴¹⁹

14.34 Section 90 is referred to in several recent judgments. The Supreme Court referred to this provision in *Mana Property Trustee Ltd v James Developments Ltd*, a case regarding a contract for sale of land and whether a provision regarding the exact size of the land was essential to the agreement.⁴²⁰ The Supreme Court used section 90 to show that time for settlement is generally not of the essence in a land sale contract.⁴²¹ In *Steele and Roberts v Serepisos*,⁴²² Tipping J quoted Cooke J's judgment in *Hunt v Wilson*⁴²³ where section 90 was discussed. In *Hunt*, it was decided that the equitable approach, as set out in section 90, applied where there was no fixed date for the completion of a contract. In *Steele*, the Supreme Court found that because section 90 indicated the equitable approach prevailing over common law, notice had to be provided if the time stipulation in a contract without a fixed date for completion was to become essential.⁴²⁴ Section 90 has also been referred to in several High Court cases regarding contracts for sale of land.⁴²⁵

Issues

14.35 We have not found any evidence of problems with the current operation and use of section 90. However, there is a question as to whether section 90 is actually necessary, given that section 99 would give the equitable rule primacy in any case.

14.36 Another example of a provision that made it clear that a specific rule of equity applied in place of a common law rule was section 30 of the Property Law Act 1952. In the 1991 paper reviewing this Act, the Law Commission suggested that section 30 was not necessary, given the general provision in section 99 of the Judicature Act 1908.⁴²⁶ The provision was subsequently repealed.

- 14.37 Section 90 varies the common law, and is consistently relied upon by the courts in the interpretation of contracts. We therefore consider that the retention of the more specific rule in section 90 is useful, despite section 99 generally giving primacy to rules of equity over common law, as it clarifies the position in specific circumstances. There is a danger that a repeal of section 99 could cause confusion and erroneously give the impression of a change to the legal position. Our preliminary view is therefore that section 90 should be retained in legislation, but the Courts Bill is unlikely to be the best place for this.

Q43 Do you agree that section 90 of the Judicature Act, which relates to stipulations in contracts as to time, should be retained, or is section 99 sufficient?

SECTION 92: DISCHARGE OF DEBT BY ACCEPTANCE OF PART IN SATISFACTION

- 14.38 The effect of section 92 of the Judicature Act 1908 is that where a creditor, or his or her agent, acknowledges in writing that receipt of part of a debt owed to him or her satisfies the whole of the debt, that acknowledgement releases the debtor from the obligation to pay the debt.
- 14.39 This provision modified the common law, which provided that no debt could be released on payment of part of it; the debt had to be repaid in full.⁴²⁷
- 14.40 In order for section 92 to apply, there must be an acknowledgement in writing, and it must expressly state that the part-payment of the debt is in satisfaction of the whole debt.⁴²⁸ Section 92 has been referred to in a number of cases, but in most it is held not to apply because there has not been a clear acknowledgement in writing that meets these requirements.⁴²⁹
- 14.41 The provision does not apply where the claim is for an unliquidated sum or where the amount of the debt is disputed. In these cases it cannot be said that what is offered equates with what is owing because there is insufficient definition of what is owing.⁴³⁰
- 14.42 We are not aware of any issues with this provision. It appears to be well-understood and regularly relied on. Because section 92 varies the common law, it should be retained in statute. Again, the Courts Bill is unlikely to be the best place for this section.

Q44 Do you agree that section 92, which relates to discharge of debt by acceptance of part in satisfaction, should be retained?

SECTIONS 94A AND 94B: PAYMENTS UNDER MISTAKE

- 14.43 Sections 94A and 94B were inserted, as from 28 September 1958, by section 2 of the Judicature Amendment Act 1958. Section 94A(1) provides that where a payment has been made under a mistake, relief is available regardless of whether the mistake is one of fact or law or a mixture of both. Under section 94A(2), a mistake is to be judged according to the law at the time the payment was made, not the law as it is prior to alteration.⁴³¹ Money paid on the strength of case law that is subsequently reversed is still not recoverable.⁴³²
- 14.44 Section 94B provides that relief can be denied in the case of a payment made under mistake of fact or law if three factors are present:⁴³³
- the payee received the money in good faith;
 - the payee altered its position in reliance on the validity of the payment; and
 - the Court considers it inequitable to grant relief.
- 14.45 In cases falling under these provisions, the Court is entitled to look at the equities from the point of view of both the payee and the payer.⁴³⁴ The weighing up of these equities can be summed up in the question of whether it would be unconscionable to grant relief in the light of the reasonable expectations of the parties.⁴³⁵ The onus is on the defendant to show that the three factors are present.⁴³⁶
- 14.46 In order to meet the alteration of position factor, it is not enough for a defendant to use the money in the ordinary course of business.⁴³⁷ If the payee is aware of the mistake, it is not possible to find that the payee altered its position in reliance on the validity of the payment.⁴³⁸
- 14.47 Section 94B was introduced for the purpose of alleviating the harshness of the common law, and to achieve a fair and just result where money has been paid by mistake by relieving the payee from what would otherwise be an unfair burden when the funds have been lost in whole or in part.⁴³⁹

Effect of common law developments

- 14.48 Case law has made it clear that the statutory defence to having to repay payments received under a mistake in section 94B does not exclude the equitable defence of change of position. If the payee's position has so changed that it would be inequitable in all circumstances to require restitution in whole or in part, the payee will not have to repay the money.⁴⁴⁰ This common law defence is wider than section 94B. The payee simply has to have changed their position rather than altering their position in reliance upon the validity of the payment.⁴⁴¹ It has been suggested that the common law rule has now overtaken and encompasses section 94B.⁴⁴²

The *Lipkin Gorman* principle can be stated as being that it is a defence to a claim for repayment of money paid under a mistake that the defendant's position has so changed that it would be inequitable in all the circumstances to require restitution in whole or in part. If that is a wider concept than s 94B, then it can sit comfortably alongside it, just as s 94B can sit with the doctrine of true estoppel. It may be that the equitable principle has now overtaken and embraces the statutory provision, which could be seen as no longer necessary to provide an otherwise unavailable remedy. But the existence of s 94B is no reason for refusing to allow the equitable principle to operate, nor for inhibiting its development.

14.49 It follows that it may no longer be necessary to retain section 94B to provide the defence, or that if there is to be a statutory defence to repayment of payments made under mistake that it should encompass the whole of the law applying in this area. It has been suggested that the “practical effect of the Court’s recognition of the common law version of the change of position defence is to render s 94B redundant.”⁴⁴³ Because the scope of the common law defence is considerably wider than section 94B, there is no reason to rely upon the statute.

14.50 The cases of *Lipkin Gorman* and *National Bank of New Zealand* have raised a wider issue of importance in relation to the interaction between statutes and the common law. These decisions have not allowed a statutory intervention to freeze further development in the common law or to make development entirely dependent on further legislative attention. Commentators have generally considered this to be a positive step.⁴⁴⁴ However, it does raise questions about whether Parliament would want to retain a statutory defence that has now been superseded by the common law. Grantham and Rickett state:⁴⁴⁵

... Parliament has expressed its will on the subject and has chosen to afford a defence only in limited circumstances. Consequently, there must be some unease with the judicial recognition of a co-extensive defence that effectively abrogates those statutory limitations.

14.51 A further issue relates to section 94A(2). The statutory position in New Zealand is clearly that relief will not be given in regard to a payment made at a time when the law is or is understood to allow the payee to keep the payment only on the basis that the law is subsequently changed or shown not to have been as it was understood to be at the time of the payment. However, the House of Lords has held that there is no principle of English law that payments made under a settled understanding of the law that was subsequently departed from by judicial decision were not recoverable in restitution on the grounds of mistake of law.⁴⁴⁶ In this respect, therefore, the common law differs from the position in the statute.

Reform

- 14.52 We have given consideration to whether sections 94A and 94B should be amended to reflect the common law developments. However, we do not think that such a step can be recommended as a part of this review. Rather, there may be cause for the provisions to be reviewed as a part of a full review of the law of mistake. There are significant issues to be considered regarding the relationship of statute and the common law. Our preliminary view is that, for the present, these provisions should be retained in statute in their current form.

Q45 Do you agree that sections 94A and 94B of the Judicature Act should be retained until they have been considered as part of a review of the law of mistake?

OPTIONS FOR LOCATION OF COMMERCIAL PROVISIONS

- 14.53 Each of the commercial legislative provisions discussed in this chapter that are to be retained in statute require a home. We do not think the proposed consolidated courts legislation would be the most appropriate statute for these provisions, as its focus will be on the structure and processes of New Zealand's courts system.
- 14.54 We have considered whether the commercial provisions discussed in this chapter could be dispersed among existing statutes relating to their subject matter, but there does not appear to be a strong case for this. The subject of each of these provisions is quite specific, and does not cohesively fit with other statutes. Further, dispersing the provisions into other statutes could lead to confusion about where they are located.
- 14.55 We have also considered the possibility of including all of the provisions in an existing Act, such as the Mercantile Law Act 1908. However, neither this Act, nor any other on the statute book, appears to deal with such similar subject matters that these provisions would be a sensible fit.
- 14.56 Ideally, any necessary commercial provisions should remain together. If they are not included in the courts legislation, there are two main ways to achieve this. First, the provisions could remain as "leftover" provisions in the Judicature Act 1908. Second, they could be included in a new stand-alone Act containing miscellaneous commercial provisions.

Leaving the commercial sections in the Judicature Act

- 14.57 One option for the location of the commercial provisions is to repeal all the substantive sections of the Judicature Act 1908, except for these commercial provisions. The substance of the repealed sections would for the most part be incorporated into the new courts legislation. The commercial provisions would then continue in force under the Judicature Act 1908.

- 14.58 The name of the Judicature Act could be changed at the same time. As the name “judicature” indicates that the statute is related to the courts, it could create confusion if a Judicature Act was still in force after the enactment of a new Courts Bill. Instead, the Act containing the remnants of the Judicature Act 1908 could be renamed appropriately to reflect the commercial nature of the remaining provisions. The provisions would retain their current section numbers. This approach has the advantage of simplicity in that a policy case would not need to be made out for the introduction of another completely new Act in addition to a Courts Bill. Any retained provisions would not need to be amended or modernised.
- 14.59 On the other hand, this approach would result in a somewhat messy former Judicature Act 1908 with all but a small number of sections repealed. It would mean that the 1908 statute could not be completely repealed when the consolidated courts legislation took effect.
- 14.60 While changing the name of the statute containing the leftover provisions would alleviate confusion about where provisions relating to the courts are, it could create confusion about which statute these commercial provisions are in. However, as the Judicature Act 1908 is already not an obvious choice for the location of the provisions, it would arguably be no worse than the current position for those not already familiar with the provisions.
- 14.61 Although the United Kingdom commonly uses this approach in law reform, retaining the Judicature Act 1908 for a small number of provisions would be a relatively unusual step in New Zealand. However, there are examples of other “rump” statutes, such as the Criminal Justice Act 1985, the Education Act 1964 and the Local Government Act 1974.

Introducing a new Act for the commercial sections

- 14.62 An alternative option is to repeal the Judicature Act 1908 completely and introduce a new bill containing only the commercial provisions of the Act. This approach would result in a much cleaner statute. Because the provisions would be redrafted, it would be necessary to modernise them so they are drafted in plain-English and in a straightforward style.
- 14.63 However, the option of a new Act would complicate the process of gaining policy approval for the new legislation resulting from this review. It may be difficult to justify a completely new statute for such a small number of provisions. Further, the sections in question have disparate and unrelated subject matters, meaning that a new Act would be no more cohesive than retaining these sections in the Judicature Act. It is also significant that redrafting the commercial provisions in a new bill would likely require policy changes to be made to them, rather than just modernising the language of the provisions.

Q46 Where should any necessary commercial provisions currently found in the Judicature Act be located in the future? For example:

- in a “rump” Judicature Act? or
- in a completely new statute? or
- other?

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- 381 Section 17A(1).
- 382 Section 17A(4).
- 383 See, for example, *Trustees Executors Ltd v Mt Auckland Forest Partnership* (2005) 2 NZCCLR 338 (HC).
- 384 *Commissioner of Inland Revenue v Official Assignee* [2000] 2 NZLR 198 (CA).
- 385 Section 17D.
- 386 Section 17E.
- 387 Judicature Amendment Act 1993, s 2.
- 388 Judicature Amendment Act 1993, s 3.
- 389 Companies Act 1948 (UK), s 398.
- 390 *Laws of New Zealand* Guarantees and Indemnities (online ed) at [131].
- 391 *Morrison Short Term Investments v Coakle* HC Auckland CIV-2009-404-6528, 19 February 2010 at [13].
- 392 *Laws of New Zealand* Guarantees and Indemnities (online ed) at [132], citing *Yonge v Reynell* (1852) 9 Hare 809, 68 ER 744.
- 393 *Official Assignee v Tizard* HC Dunedin CP44/92, 19 August 1993.
- 394 *De Pelichet McLeod & Co Ltd v Lysnar* [1928] GLR 204.
- 395 *Laws of New Zealand* Guarantees and Indemnities (online ed) at [125]; *Swire v Redman* (1876) 1 QBD at [541].
- 396 *Laws of New Zealand* Guarantees and Indemnities (online ed) at [151]; Insolvency Act 2006, s 272 states this explicitly in the context of bankruptcy.
- 397 *Laws of New Zealand* Guarantees and Indemnities (online ed) at [153]; *Crampton v Walker* (1860) 3 E & E 321, 121 ER 463.
- 398 That is, the right of a person who has paid an entire debt to recoup a proportionate share of the payment from another person who is equally responsible for the payment of that debt or liability.
- 399 *Laws of New Zealand* Guarantees and Indemnities (online ed) at [161]; *Plant v Calderwood* [1969] NZLR 752 (SC); *Davies v Humphreys* (1840) 6 M & W 153, 151 ER 361.
- 400 *De Pelichet McLeod & Co Ltd v Lysnar* [1928] GLR 204; *Duncan Fox & Company v North and South Wales Bank* (1880) 6 Apps Cas 1, [1874-80] All ER Rep Ext 1406.
- 401 *Official Assignee v Tizard* HC Dunedin CP44/92, 19 August 1993.
- 402 *De Pelichet McLeod & Co Ltd v Lysnar* [1928] GLR 204.
- 403 For instance, in *Badeley v Consolidated Bank* (1886) 34 Ch D 536, it was held (at 556) that the fact that a creditor who has obtained judgment against one partner of a firm cannot sue another partner of the same firm does not take away the rights of a guarantor for one partner against another partner. (The rule barring a creditor from suing a second partner has now been abrogated by s 94 of the Judicature Act 1908.)
- 404 *Laws of New Zealand* Guarantees and Indemnities (online ed) at [140]; *Alexander v Vane* (1836) 1 M & W 511, 150 ER 537.
- 405 *Laws of New Zealand* Guarantees and Indemnities (online ed) at [155].

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- 406 *WBA v LMA FC Chch* FAM-2008-009-002782, 27 October 2009.
- 407 *Re Fernandes, ex parte Hope* (1844) 3 Mont D & De 720.
- 408 *Richmond Ltd v PPCS Ltd* (2003) 9 NZCLC 263,115.
- 409 *Spanbild v Urquhart* HC Auckland CIV 2008-404-004784, 4 December 2009, which refers to James O'Donovan and John Phillips *Modern Contract of Guarantee* (Sweet & Maxwell, London, 2003) and *Trotter v Franklin* [1991] 2 NZLR 92 (HC).
- 410 *Pierson v Hutchinson* (1809) 2 Camp 211.
- 411 Bills of Exchange Act 1908, s 70.
- 412 Common Law Procedure Act 1854 (UK), s 87.
- 413 F Ryder and A Bueno *Byles on Bills of Exchange* (Sweet and Maxwell, London, 1988) at 433.
- 414 At 433.
- 415 *Parker v Thorold* (1852) 16 Beav 59; 51 ER 698; *Bowes v Shand* (1877) 2 App Cas 455, [1874-80] All ER Rep 174; *Reuter Hufeland & Co v Sala & Co* (1879) 4 CPD 239 (CA); *Sharp v Christmas* (1892) 8 TLR 687 (CA); and *Hartley v Hymans* [1920] 3 KB 475, [1920] All ER Rep 328.
- 416 *Morris v Robert James Investments Ltd* [1994] 2 NZLR 275 (CA).
- 417 *Raineri v Miles* [1981] AC 1050 (HL).
- 418 *Laws of New Zealand Contract* (online ed) at [284].
- 419 Section 99 was originally s 25(11) of the Supreme Court of Judicature Act 1873 (UK) and s 11 of the Law Amendment Act 1882 (NZ). Section 99 is discussed in chapter 12.
- 420 *Mana Property Trustee Ltd v James Developments Ltd* [2010] NZSC 90, [2010] 3 NZLR 805.
- 421 At [35].
- 422 *Steele and Roberts v Serespisos* [2006] NZSC 67, [2007] 1 NZLR 1 at [47].
- 423 *Hunt v Wilson* [1978] 2 NZLR 261 (CA) at 272 – 273.
- 424 At [60].
- 425 For instance, *Arranmore Developments v Zeeland Developments Ltd* HC Auckland CIV-2009-404-4342, 19 May 2010; *Garton Holdings Ltd v Ngahina Trust* HC Wellington CIV-2008-485-1234, 26 August 2008; *Portside Apartments Ltd v Breakers Gisborne Ltd* (2008) 9 NZCPR 578 (HC); *Fowke v Rhodes* HC Christchurch M259/00, 21 March 2001.
- 426 Law Commission *The Property Law Act 1952: A Discussion Paper* (NZLC PP16, 1991) at 46 – 47.
- 427 *Meikle v Wellington Loan Co Ltd* (1911) 31 NZLR 217 (SC).
- 428 *Meikle v Wellington Loan Co Ltd* (1911) 31 NZLR 217 (SC); *Chambers v Commissioner of Stamp Duties* [1943] NZLR 504 (CA); *Re McCathie (dec'd)* [1969] NZLR 393 (SC).
- 429 See, for instance, *Wilding v Vango Ltd* HC Auckland CIV-2010-404-1161, 2 June 2010; *Harris v Birchwood Farm Holdings Ltd* [2002] 2 ERNZ 392 (EMC).
- 430 *James Wallace Pty Ltd v William Cable Ltd* [1980] 2 NZLR 187 (CA); *Homeguard Products (NZ) Ltd v Kiwi Packaging Ltd* [1981] 2 NZLR 322; *Laws of New Zealand Contract* (online ed) at [78].
- 431 *McGechan on Procedure* (online looseleaf ed, Brookers) at [J94A.01].

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- 432 *Julian v Mayor of Auckland* [1927] NZLR 453, [1927] FLR 359 (SC). In this case, the plaintiff made rate payments at an increased level in respect of a property at a time when the municipal corporation was required to give notice of increases to rates. In the intervening period, the Supreme Court decided the case of *Mayor of Auckland v Irvine and Stevenson's St George Co* [1926] NZLR 734; GLR 538 (SC) and found that a Municipal Corporation was not entitled during the year for which a rate had been struck to increase the rateable value of a property then entered on the rate-book and to charge the rate upon the increased value. However, the plaintiff in *Julian* could not benefit from this decision when the payment had been made voluntarily.
- 433 *McGechan on Procedure* (online looseleaf ed, Brookers) at [J94B.02].
- 434 *Thomas v Houston Corbett & Co* [1969] NZLR 151 (CA).
- 435 *Farmers' Mutual Insurance Ltd v QBE Insurance International Ltd* [1993] 3 NZLR 305 (HC) at 316; *Wellington City Council v New Zealand Law Society* [1990] 2 NZLR 22 (CA) at 26.
- 436 *Bank of New Zealand v Westpac Banking Corporation Ltd* (1991) 3 NZBLC 102,442.
- 437 *KJ Davies (1976) Ltd v Bank of New South Wales* [1981] 1 NZLR 262 (HC) at 264 and 265; *Farmers Trading Co Ltd v Holdgate* (1986) 1 PRNZ 26 at 28 and 29. In *KJ Davies*, the appellant company drew an open cheque for \$2500 on the respondent bank but later countermanded the authorisation for the bank to make payment. A teller, not having been notified of the countermand, paid the cheque. The proceeds of the cheque were paid to the company's account and used in the normal course of its business. The Court of Appeal held that the bank was entitled to receive the payment back.
- 438 *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211 (CA) at 227 and 232, where the payee argued with the payer bank that the payment was a mistake but kept it at the bank's insistence and then invested it.
- 439 *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211 (CA) at 218.
- 440 *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211 (CA), applying *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548; [1992] 4 All ER 512.
- 441 *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1997] 1 NZLR 724 (HC) at 732, affirmed *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211 (CA).
- 442 *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211 (CA) at 219.
- 443 R Grantham and C Rickett "Change of Position in New Zealand" (1999) 5 NZBLQ 75 at 77.
- 444 P Birks "A Bank's Mistake Payments: Two Recent Cases and their Implications" (2000) 6 NZBLQ 155 at 162; P Watts "Restitution" [1999] NZ Law Rev 276; C Cato "Restitution, Mistake and Change of Circumstances" [1999] NZLJ 132; R Grantham and C Rickett "Change of Position in New Zealand" (1999) 5 NZBLQ 75 at 77.
- 445 R Grantham and C Rickett "Change of Position in New Zealand" (1999) 5 NZBLQ 75 at 77.
- 446 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349; [1998] 4 All ER 513.

Part 5

REPRESENTATION





Chapter 15

Representation and other participants

INTRODUCTION

- 15.1 The adversarial system is based on the assumption that two conflicting arguments will be put before an impartial judge, who will make a decision on the merits. The general principle is that the only people who should participate in litigation are the parties: those whose presence before the Court is necessary to determine justly the issues arising, or who should be bound by any judgment given.⁴⁴⁷
- 15.2 This chapter considers what happens when the traditional approach of relying on the parties before the Court to present the evidence and argument required for the Court to properly decide the case may not be sufficient. In those circumstances, the involvement of non-parties may be required.
- 15.3 Such a situation may arise where a case involves a question of law of major public importance, with implications that go beyond the interests of the immediate parties. It may also arise where a party is representing him or herself. The system tends to assume that parties will be represented by counsel, but there is no obligation to be legally represented.
- 15.4 There are a variety of reasons that people may not have legal representation. They may be representing themselves by choice, or because they cannot afford legal assistance and do not qualify for legal aid. Whatever the circumstances, in a recent report released by the United Kingdom Civil Justice Council, a working group considering access to justice for self-represented litigants noted “It is hard to overstate just how difficult it can be – for the person, for the court and for other parties – when someone self-represents.”⁴⁴⁸

- 15.5 There is a shortage of empirical data in New Zealand about the overall volumes of self-represented litigants, and their rate of growth or decline, particularly in the civil jurisdiction,⁴⁴⁹ but concern has grown in recent years about the number of individuals appearing before the courts without legal representation, and there is certainly a perception that numbers are increasing.⁴⁵⁰
- 15.6 There is a tendency to view self-representation as a problem:⁴⁵¹
- The orthodox approach to self-represented litigants is that they place additional strain on an already stretched civil justice system. Judges have observed that litigants in person need to have procedural steps explained to them, their pleadings need to be untangled and the legal issues identified, they need to be carefully assisted in leading evidence, and their grasp of advocacy is generally non-existent.
- 15.7 At one end of the spectrum, one academic has recently suggested that the possibility of mandatory representation under certain circumstances must not be ruled out.⁴⁵² At the other end, it has been suggested that we should change the way we view the civil justice system – a litigant should not be disadvantaged by a systemic bias in favour of representation because they have chosen, or have been forced, to represent themselves.⁴⁵³
- 15.8 Sometimes legal representation is expressly excluded by statute.⁴⁵⁴ In some courts, legislation expressly allows lay advocates or representatives who are not legally qualified.⁴⁵⁵ But these examples are exceptions. People representing themselves may also have assistance in court from a person known as a “McKenzie friend”,⁴⁵⁶ but that assistant cannot act as an advocate and address the court without the court’s permission.
- 15.9 It is beyond the scope of this Issues Paper to address the full range of issues and possible responses raised by self-representation. Our discussion focuses on situations in which the involvement of a non-party may be required in civil proceedings, (for example, because a party is self-represented, or the court requires more information, or wider interests are involved), and whether that involvement should be provided for in legislation.

OTHER PARTICIPANTS

- 15.10 The courts do allow the participation of different types of non-parties in a case. These can be important in the case of a self-represented litigant. Equally, they can be completely independent of either party, but of great assistance to the court. This section looks at the following types of participants to see whether further legislative intervention is needed that may involve new courts legislation:
- McKenzie friends;
 - amicus curiae;
 - technical advisors; and
 - interveners.

McKenzie friends

- 15.11 Any unrepresented party to civil or criminal litigation is entitled to have a support person to provide assistance in court. The support person may attend as a friend of the party, may take notes, may quietly make suggestions and may give advice.⁴⁵⁷ These support people are known as “McKenzie friends” after the United Kingdom case that confirmed their legitimacy.⁴⁵⁸ McKenzie friends are permitted in almost all common law courts.⁴⁵⁹
- 15.12 A McKenzie friend does not have the right to take part in the proceedings as an advocate. However, the court has the discretion to allow the friend to play a greater role, such as speaking for the party if they think this is appropriate. This discretion must be exercised in the proper manner and in the interests of justice. The opposing party is equally entitled to a fair trial. If the court considers that a particular McKenzie friend will obstruct the efficient administration of justice then the court can decline to allow that person to act as a McKenzie friend or remove someone who is already acting as a McKenzie friend.⁴⁶⁰
- 15.13 In the United Kingdom, there was confusion among litigants and their friends and relatives about the role that a non-lawyer support person could play in court. Despite expectations that these support people could turn up to court and address the court on behalf of a litigant, cases such as *Izzo v Philip Ross & Co*⁴⁶¹ made it clear that permission for a McKenzie friend to address the court was an indulgence and courts should consider matters on a case-by-case basis.⁴⁶² There were, however, some inconsistencies in the rules applied to McKenzie friends.⁴⁶³ This led to requests for further guidance on representation in the Civil Procedure Rules and practice notes. The Master of the Rolls as the Head of Civil Justice has issued a guidance note on McKenzie friends for the Civil and Family courts.⁴⁶⁴ This outlines what a McKenzie friend can and cannot do. It states that a self-represented litigant has the right to use a McKenzie friend and the litigant should apply requesting the assistance at the earliest possible stage and provide details of the proposed McKenzie friend. It makes it clear that the court should provide reasons for a decision to refuse to allow a litigant to use a McKenzie friend. The Civil Justice Council has also recently proposed a draft code of conduct for McKenzie friends.⁴⁶⁵
- 15.14 There have been cases involving “professional” McKenzie friends. These are people from support groups or non-governmental organisations who have experience helping litigants with court proceedings.⁴⁶⁶ An example in the United Kingdom was Dr Pelling, a campaigner for fathers’ rights who frequently acted as a McKenzie friend. On occasion he was refused leave to act as a McKenzie friend on the basis that his campaigning agenda and adversarial approach were not considered appropriate, and his experience may have led him to conduct the case himself rather than remain in the role of an assistant.⁴⁶⁷

- 15.15 A McKenzie friend could be a lawyer who is not “on the record”, as was the case in *McKenzie v McKenzie*.⁴⁶⁸ However, a lawyer, whether funded privately or by legal aid cannot be obliged to accept the role of McKenzie friend if he or she is unwilling to do so. In *R v Hill*, the Court of Appeal discussed the fact that there does not seem to be any authority for allowing lawyers to act as McKenzie friends.⁴⁶⁹ The Court noted that this raises issues about legal professional privilege, the duties and liability of a lawyer to the accused, and the lawyer’s duty to the court.⁴⁷⁰
- 15.16 There has been some speculation that the global financial crisis and the straitened circumstances of more litigants may lead to an increase in the reliance upon McKenzie friends rather than lawyers.⁴⁷¹ Greater use of McKenzie friends could create a greater need for guidelines or regulation of the role of McKenzie friends in the New Zealand courts.

Q47 Are there any problems with the use of McKenzie friends?

Q48 Should McKenzie friends be permitted in court?

Q49 If so, should there be legislation, regulations or guidelines outlining the role of McKenzie friends in the New Zealand courts?

Q50 Should a person be able to have a lawyer as their McKenzie friend?

Amicus curiae

- 15.17 An amicus curiae, or friend of the court, is not a party to an action, but a person appointed by the court to assist it, either by providing information and submissions about a particular area of the law or, where one of the parties is unrepresented, by advancing legal arguments on that party’s behalf.⁴⁷² The former role involves giving assistance to the court in a neutral and comprehensive way, ensuring all aspects of a dispute are teased out and addressed. The latter may involve partisan advocacy, including confrontation with opposing counsel.⁴⁷³
- 15.18 The appointment of an amicus, and the extent to which he or she may file documents and present arguments, are at the discretion of the court. The appointment of an amicus does not require the consent of the parties.⁴⁷⁴

What is the role of an amicus?

- 15.19 In the United Kingdom, a memorandum issued to judges in 2001 makes it clear that the role of the amicus in that country is expressly rooted in assistance to the court.⁴⁷⁵ The court may seek the assistance of an amicus (renamed an “advocate to the court”) when there is a danger of an important and difficult point of law being decided without the court hearing relevant argument. The function of the advocate to the court is to give the court assistance on the relevant law and its application to the facts of the case. It is not his or her function to represent anyone.
- 15.20 In New Zealand, the term *amicus curiae* is used to cover a wider range of circumstances where counsel are appointed to assist the court. They have been appointed:
- (a) to present legal arguments for a party who does not or cannot appear;⁴⁷⁶
 - (b) for a class of persons that might be affected by a judgment;⁴⁷⁷
 - (c) where a party to a proceeding is not represented by counsel in certain circumstances, such as where he or she is unfit to represent him or herself,⁴⁷⁸ or is unable to obtain representation;⁴⁷⁹
 - (d) where the case raises complex issues such as matters of human rights or international law.⁴⁸⁰
- 15.21 Despite the range of roles an amicus may take on, the core of the role remains constant: an amicus does not act on instructions from a party to the proceedings or a client. The amicus selects independently arguments which he or she thinks are appropriate to put before the court, or discharges requests from the court for analysis of a particular matter.⁴⁸¹

Appointment of an amicus curiae

- 15.22 The power to appoint counsel to assist the court is not explicitly provided for by statute, but is grounded in the inherent jurisdiction of the High Court. There are some express powers to appoint counsel. For example, rule 4.27 of the High Court Rules and rule 3.33.8 of the District Courts Rules provide that the court may make certain directions in relation to representation of specified classes of person or the public interest, on application by a party or an intending party, or on its own initiative. Among the available directions, the court may appoint counsel to represent minors, unborn persons, absentees or unrepresented persons; or direct that the Attorney-General or the Solicitor-General be served; or that any chief executive of a Government department or other officer may represent the public interest.

- 15.23 In a civil proceeding, section 61A of the Judicature Act 1908 provides that a single judge of the Court of Appeal may make incidental orders or directions in relation to a proceeding, provided the order or direction does not “determine the appeal or dispose of any question or issue that is before the court in the appeal or proceeding”.
- 15.24 Rules 5 and 7 of the Court of Appeal Civil Rules provide that a single judge may “give any directions that seem necessary for the just and expeditious resolution of any matter that arises in the proceeding”. Rule 5 of the Supreme Court Rules 2004 provides a similar power in relation to “any matter that arises in a case”, and rule 7 provides the power may be exercised by a single permanent judge.
- 15.25 In relation to criminal proceedings, section 333(4) of the Criminal Procedure Act 2011 is drafted in similar terms to section 61A of the Judicature Act 1908 (although section 333(4) is not yet in force).

When should an amicus be appointed?

- 15.26 In *Levy v Victoria*, Brennan CJ said that the footing on which an amicus curiae is heard is that the person is willing to offer the court a submission on law or relevant fact that will significantly assist the court.⁴⁸² He added a proviso – any cost to the parties or any delay consequent on agreeing to hear the amicus must not be disproportionate to the assistance that is expected.
- 15.27 In our view, care should be taken not to allow the role of counsel assisting the court to become a surrogate or parallel legal aid system. Where a party chooses to be self-represented, appointment of a friend of the court may be inappropriate. Similarly, where legal aid has been declined and the affected party seeks the appointment of counsel to assist the court, care must be taken not to undermine the legal aid decision.
- 15.28 When counsel to assist is appointed, his or her duty is to provide whatever assistance the court requires. He or she is not a party to the appeal and has no entitlement to be heard. Both the appointment and the extent to which the appointed counsel may file documents and present legal argument is an exercise of the court’s discretion.⁴⁸³ It is very important that the extent of counsel’s brief is communicated clearly when he or she is appointed.
- 15.29 Counsel assisting the court is expected to assist the court in a neutral and comprehensive way. His or her assistance will, however, often require him or her to advance a particular stance or viewpoint. The Court of Appeal has held that in the context of contempt proceedings there is nothing wrong with counsel assisting the court adopting a partisan role.⁴⁸⁴

- 15.30 Where an amicus is appointed to represent the interests of an otherwise unrepresented person or group, he or she will almost inevitably present partisan argument.⁴⁸⁵ This can create some conceptual difficulties. In *The Beneficial Owners of Whangaruru Whakaturia No 4 v Warin & Ors*, the appellants sought to appeal against a decision of the High Court holding that the first respondents had an indefeasible title in respect of certain land. The appellants, the beneficial owners of the land, were never parties to the proceeding, but counsel was appointed by the High Court as amicus curiae. The Court of Appeal noted that although in formal terms, counsel was appointed as amicus, the manner in which he approached his brief blurred that role, and in the end he advanced the interests of the appellants as if they were parties to the proceeding.
- 15.31 The Court of Appeal held that the beneficial owners of the land did not have standing to appeal. It noted that the case demonstrated how, if an amicus is permitted to participate in a proceeding essentially as a party, confusion may result as to rights and obligations in subsequent stages of the proceeding:⁴⁸⁶
- The issue for us is the right of appeal, but the potential problems where successful parties want to seek costs against an amicus whose participation in the proceeding necessitate substantial additional work for the parties, are very real. Although there is provision for the payment of costs from public funds under the Judicature Act, that could be problematic where the participation of an amicus strays into the realm of truly partisan advocacy rather than impartial presentation of information to the court.
- 15.32 The Court suggested that if the genesis of the amicus's inclusion in a proceeding is viewed as emanating from the court, rather than from an instructing party, then conceptual problems such as whether there is a right to appeal disappear. Once judgment is issued, the court's need for the amicus is exhausted, whether or not the represented group's interest has prevailed.⁴⁸⁷
- 15.33 One issue that arises is that the distinction between an amicus curiae and an intervener can become blurred. In cases where the issues that the non-party will address require substantially partial legal argument, it may be more appropriate that the non-party seeks leave to appear as an intervener (discussed below), rather than the court appointing an amicus. The High Court discussed the distinction between an amicus curiae and an intervener in *Auckland Area Health Board v Attorney-General*.⁴⁸⁸ That case concerned an application by doctors from the intensive care unit of Auckland Hospital for a declaration clarifying whether in law they would be guilty of culpable homicide if they withdrew the ventilatory-support system maintaining the breathing and heartbeat of a patient with advanced Guillain-Barre syndrome.

- 15.34 The Attorney-General was originally named as a defendant in the proceeding, but the proceeding was then reconstituted as an originating application. The Attorney-General was granted a right of appearance. He originally wished to be heard as *amicus curiae*, to bring relevant factual and legal considerations to the attention of the court. However, the High Court suggested that this status would not be appropriate, as the Attorney-General had responsibilities in the matter in his own right – the relief sought, if granted, would impinge on the prosecutorial discretion and prerogative powers of the Crown.⁴⁸⁹ Accordingly the Attorney-General sought, and was granted, leave to be heard as intervener.
- 15.35 Where the court requires the assistance of counsel because one of the parties is no longer legally represented, it may be the most efficient practice to appoint that party's former counsel.⁴⁹⁰ In *Duncan v Medical Practitioners Disciplinary Committee*, the Court of Appeal was faced with a respondent who indicated that he did not intend to take part in the appeal.⁴⁹¹ Because the case raised issues of public importance, the Court decided to appoint counsel who had appeared for the respondent in the High Court to assist the court. This is a practice which has also been endorsed in relation to criminal cases.⁴⁹² Where counsel was appointed to assist the lower court, that counsel will generally be retained, if needed, for the appeal.⁴⁹³

Legislative reform

- 15.36 A question for consideration is whether the power to appoint an *amicus curiae* should be codified in legislation. Such a provision could provide clarity about when an *amicus curiae* can participate in a case and what role they may have.

Q51 Should there be a specific statutory provision in the new Courts Bill enabling the appointment of *amicus curiae*?

Q52 If so, on what grounds/in what circumstances should an *amicus* be appointed?

Technical advisors

- 15.37 Section 99B(1) of the Judicature Act 1908 gives the Court of Appeal and the Supreme Court the power to appoint a technical adviser to assist it in an appeal where questions arise from evidence relating to scientific, technical, or economic matters, or from other expert evidence. The technical adviser's advice may be given such weight as the court thinks fit.⁴⁹⁴
- 15.38 A technical advisor may be appointed at the impetus of the court itself or following application of one of the parties.⁴⁹⁵ The court may remove an advisor for the reasons of disability affecting performance, neglect of duty, bankruptcy or misconduct, and an advisor may resign.⁴⁹⁶ The court determines the rate of remuneration for the advisor.⁴⁹⁷

- 15.39 Sections 99B to 99D, which provide for the role of a technical advisor, were inserted in 1999,⁴⁹⁸ and amended in 2003 to take into account the establishment of the Supreme Court.⁴⁹⁹
- 15.40 We are not aware of any cases in which a court has used its power under section 99B to appoint a technical adviser, and so as Williams J noted in 2000, the courts' approach to the appointment of technical advisers is uncharted territory.⁵⁰⁰

In particular, this Court is unaware whether the Court of Appeal is likely to seek the adviser's assistance by having [the] adviser sit with it during a hearing or whether such assistance will only be given out of Court. Both possibilities seem to be open on the terms of s 99B.

Q53 Why have the provisions of the Judicature Act 1908 allowing the appointment of technical advisors not been used?

Q54 Is there a need for guidelines for technical advisers, including matters such as who can be an adviser, and what type of evidence they can give?

Interveners

- 15.41 Intervention is a procedure that allows non-parties to become involved in litigation. These non-parties are known as interveners. Intervenors remain as non-parties to the litigation in that they do not have a direct stake in the outcome of the case, but they may participate in it by making written or oral submissions to the court. There is no clear legislative basis for intervention in New Zealand.⁵⁰¹ The High Court Rules, Court of Appeal Rules and Supreme Court Rules are silent on third party interventions. Nonetheless, there appears to be a healthy practice of third party interventions. Intervenors have appeared in the New Zealand Supreme Court at least 16 times since 2004.⁵⁰²
- 15.42 The authority of the court to allow intervention comes from its inherent jurisdiction. There is nothing in the rules of court to prevent the court exercising its inherent jurisdiction to join an interested party in an appropriate case.⁵⁰³ The Human Rights Commission has as one of its functions the role of applying to court to act as an intervener in proceedings if doing so will facilitate it being an advocate for human rights.⁵⁰⁴
- 15.43 Interventions by third parties can be in the public interest or for the intervener's own private interest, depending on the aim of the intervener. Intervenors in the private interest are less common because someone whose private interests are directly affected by a case can be named as an interested party by the claimant or defendant, joined as a party by the court, or can apply to join the case as a party themselves.⁵⁰⁵ However, sometimes there are intervenors in the private interest.⁵⁰⁶ The Attorney-General regularly intervenes in cases for the Government. Intervention is most common in judicial review cases,⁵⁰⁷ as frequently:⁵⁰⁸

...the challenge to the exercise of the statutory power or decision of a public body will have consequential effects upon others who obtained beneficial entitlements or expectations following upon the exercise of such power.

15.44 Unlike general intervention by non-parties, there is a long history of authority for public interest intervention by the Attorney-General in New Zealand.⁵⁰⁹ The main relevant authorities for the role of interveners are those from the High Court and the Court of Appeal.

15.45 Intervention can provide the court with an enhanced perspective on the questions at issue in the proceedings, promote better and more informed decision-making and increase public acceptance of court decisions. Intervention by individuals, public interest groups and others can play an important part in presenting a court with the perspectives it needs in order to make fully informed decisions. It may also allow broader participation in litigation, particularly from non-traditional interests who may otherwise find it difficult to gain access to the judicial system.

15.46 But intervention can also raise issues of potential prejudice and unfairness to the original parties to the proceeding. As Lord Woolf has noted:⁵¹⁰

The practice of allowing third persons to intervene in proceedings brought by and against other persons which do not directly involve the person seeking to intervene has become more common in recent years but it is still a relatively rare event. The intervention is always subject to the control of the court and whether the third person is allowed by the court to intervene is usually dependent upon the court's judgment as to whether the interests of justice will be promoted by allowing the intervention. Frequently the answer will depend upon whether the intervention will assist the court itself to perform the role upon which it is engaged. The court has always to balance the benefits which are to be derived from the intervention as against the inconvenience, delay and expense which an intervention by a third person can cause to the existing parties.

15.47 Overseas experiences have indicated that a well-regulated system of public interest intervention can both assist the courts and increase public confidence in the judiciary.⁵¹¹

15.48 It has been argued that the lack of regulation regarding intervention does not provide sufficient certainty as to when an application for intervention will be accepted or the type of conditions that will be attached to each intervener status.⁵¹²

When is intervention allowed?

- 15.49 Traditionally it has been difficult to convince the court that intervention is justified. Courts have been reluctant to depart from the traditional privity of litigation. However, it appears that interventions are becoming more common. Public interest intervention is a relatively recent development that can be seen as following on from the increasing acceptance of the law-making role of the courts that has developed internationally in recent decades.⁵¹³ In other comparable jurisdictions intervention has increasingly been allowed where the applicant has a significant interest in the litigation and the participation of an intervener will not unduly delay or prejudice the determination of the rights of the original parties. With the exception of Canada, Commonwealth jurisdictions generally have a relatively undeveloped system and jurisprudence for intervention.⁵¹⁴
- 15.50 In New Zealand, a new approach is emerging in some cases, particularly public law matters such as New Zealand Bill of Rights Act 1990 cases, which have the potential to affect many people far beyond the immediate dispute. A case may be appropriate for an intervention if it raises an issue of public importance, and there is a risk that this public interest may not be sufficiently addressed by the submissions of the parties alone. In *Drew v Attorney-General*, McGrath J held that an intervention should be allowed “where the assistance likely to be offered outweighs any potential detriments to the various interests”.⁵¹⁵ The primary consideration appears to be whether the assistance from an intervener’s submissions goes beyond the assistance that counsel for the parties can provide.⁵¹⁶

Details

- 15.51 Interveners are sometimes given leave to make oral presentations, and other times they are restricted to written submissions. In the United Kingdom, the general rule is that the proposed intervener must approach the parties for their consent to the intervention. The courts generally grant leave to intervene despite at least one party having refused consent, but the requirement allows the parties to express their views to the court. This is particularly important in relation to whether an intervener is granted leave to make oral submissions at the hearing: a party may consent to an intervention by way of written submissions, but not to oral submissions.⁵¹⁷
- 15.52 Often intervention is granted on terms that restrict the intervener’s role. The court must consider whether the intervener should be bound to take the record as it is and not adduce further evidence; whether the intervener should be prevented from being able to seek costs even where costs may be able to be awarded against them; and requirements as to the promptitude of filing any necessary papers.
- 15.53 Interveners can be required to meet the additional costs of other parties occasioned by their intervention.⁵¹⁸ Whether they can be liable for costs additional to this is not clear.

- 15.54 In practice, it is often not until the appeal stage that a case picks up some momentum, and this is when some interveners try to get involved. These interveners can then sometimes seek leave to introduce new evidence on the appeal. However, in principle there is no *prima facie* right to add to the record upon being granted status as an intervener. It can be problematic to have a large amount of additional material introduced at this stage and to provide fair notice to parties in an appellate proceeding. It may be that there should be rules regarding the introduction of new evidence and the relevance of interveners' submissions.

Intervention in other countries

- 15.55 In the United Kingdom, the practice of third party interventions in the higher courts has been described as having grown steadily from about 1995, a trend that has been attributed in part to the passage of the Human Rights Act 1998 (UK):⁵¹⁹

Even before the Act was passed, UK courts had already begun to pay greater attention to the provisions of the European Convention on Human Rights. And it is likely that UK courts were mindful of the much more generous provision for third party interventions before the European Court of Human Rights.

- 15.56 Unlike New Zealand, the United Kingdom's legislation makes explicit provision for interveners. The rules of the Appellate Committee of the House of Lords,⁵²⁰ the United Kingdom Supreme Court,⁵²¹ the Privy Council⁵²² and the European Court of Human Rights all make explicit provision for third party interventions. The procedure rules for the Supreme Court make provision for applications to the Court for permission to intervene in an appeal by:⁵²³

- (a) any official body or non-governmental organization seeking to make submissions in the public interest,
- (b) any person with an interest in proceedings by way of judicial review,
- (c) any person who was an intervener in the court below or whose submissions were taken into account.

- 15.57 There is a prescribed application form, and interventions may be allowed by written submissions only or by way of both oral and written submissions.⁵²⁴

- 15.58 While the Civil Procedure Rules that govern the United Kingdom High Court do not refer to interventions directly, the Practice Direction to Part 54 of the Rules refers to "applications to intervene",⁵²⁵ and there is a procedure in the rules governing judicial review proceedings that allows interventions in practice. However, there is no formal provision for interventions in the Court of Appeal, which is where many interventions occur.⁵²⁶ There is no consistency of practice and there are at least two methods by which a party can apply to intervene in the Court of Appeal: a formal application, or a letter to the Civil Appeals Office requesting leave to intervene.

15.59 As in New Zealand, there is no legislation setting out when interveners should be allowed. Third parties have been allowed to intervene because of their knowledge, concern and experience.⁵²⁷

15.60 The Rules of the Supreme Court of Canada have allowed significant participation of interveners since 1987,⁵²⁸ and intervention “has become the norm rather than the exception in cases before the Supreme Court of Canada”.⁵²⁹ A group or individual has a right to intervene before the Supreme Court where they were granted leave to intervene in the court below and the Attorney-General of a province, territory or the federal government may intervene as of right if there is a constitutional question before the Court.⁵³⁰ In all other cases, leave of the Court must be given to intervene.⁵³¹ Applications must identify the applicant, and their interest in the proceeding, “including any prejudice that the person interested in the proceeding would suffer if the intervention were denied”.⁵³² An important provision requires an intervener not to duplicate the submissions of the parties but instead to:⁵³³

... set out the submissions to be advanced by the person interested in the proceeding, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties ...

15.61 Australia has taken a somewhat more restrictive approach, and there has been relatively little jurisprudence on interventions. The High Court of Australia’s approach has been largely ad hoc. It was not until the mid-1990s that the Court began to expand the grounds for intervention beyond the test of strict legal interest.⁵³⁴ In the case of *Levy v Victoria* the Court allowed the intervention of a number of interveners, including state attorneys-general and media organisations, on a question of whether state duck hunting regulations raised free speech implications.⁵³⁵ Chief Justice Brennan noted that an intervener must ordinarily show an interest that would be directly affected by a decision, but that legal interests may be affected in indirect ways, such as the operation of a precedent.

Legislation for interveners

15.62 The rising scope for intervention could be seen as increasing the need to spell out in legislation such matters as when interveners should be allowed, and what their rights are. The Commission’s view is that any legislative provisions should enable the court to have sufficient discretion to tailor the extent of the role of the intervener to the particular proceedings, allowing the court to maximise efficiency and balance the concerns of both the parties and the intervener.

15.63 While it may be useful to have a provision stating the court’s power to grant a third party leave to act as an intervener, it is likely that details regarding the process for intervention and role of an intervener are more suited to being set out in rules than in the new consolidated courts statute.

15.64 The matters that could be clarified in rules include:

- the costs that an intervener can be liable for;
- the process for making an application to intervene, and what material the prospective intervener must provide to the court;
- the time for filing an application;
- criteria for determining whether leave to appear will be granted;
- when an intervener may give written submissions and oral submissions;
- any restrictions on the parameters of matters that interveners can discuss; and
- whether new evidence can be introduced by an intervener at an appeal stage.

Q55 To what extent should legislation set out the law relating to interveners? What matters should be addressed in rules?

Q56 What rights should be accorded to interveners? Are there any rights of parties which interveners should not have?

PAYMENT OF COSTS

15.65 Section 99A provides the Court with certain powers to make orders as to payment of costs. The section is generally viewed as giving the Court discretion to make orders for payment of costs where the Attorney-General or Solicitor-General or any other person acts as an intervener or counsel assisting the court. However, there has been discussion in the cases as to whether it is limited to cases of interveners and counsel assisting the court, or whether it extends more widely.

15.66 The section states:

Costs where intervener or counsel assisting Court appears -

(1) Where the Attorney-General or the Solicitor-General or any other person appears in any civil proceedings or in any proceedings on any appeal and argues any question of law or of fact arising in the proceedings, the court may, subject to the provisions of any other Act, make such order as it thinks just—

(a) as to the payment by any party to the proceedings of the costs incurred by the Attorney-General or the Solicitor-General in so doing; or

(b) as to the payment by any party to the proceedings or out of public funds of the costs incurred by any other person in so doing; or

(c) as to the payment by the Attorney-General or the Solicitor-General or that other person of any costs incurred by any of those parties by reason of his so doing.

(2) Where the court makes an order pursuant to subsection (1)(b), the Registrar of the court shall forward a copy of the order to the chief executive of the Ministry of Justice who shall make the payment out of money appropriated by Parliament for the purpose.

- 15.67 In *New Zealand Federation of Commercial Fishermen (Inc) v Ministry of Fisheries*, the New Zealand Federation of Commercial Fishermen and others sought judicial review of a decision of the Minister of Fisheries relating to the total allowable catch for a particular area, claiming that it favoured recreational rather than commercial interests.⁵³⁶ The Fishing Council was joined as a respondent to represent recreational interests. It applied under section 99A of the Judicature Act 1908 for an order directing that its legal costs be paid out of public funds, on the basis that its involvement by way of evidence or submissions would probably benefit the court and that there was substantial public interest in the outcome.
- 15.68 The Court considered it doubtful whether there was jurisdiction under section 99A for such an award of costs, since the use of the words “other person” in section 99A(1) could mean that parties cannot apply for costs under this section, but should rather do so under the normal rules.⁵³⁷ While it did not decide the point, the Court considered the section was at least open to the interpretation that it is intended to apply only in favour of a non-party participant, most obviously a permitted intervener or *amicus curiae*.⁵³⁸
- Such would make sense. A party can claim costs under normal Court rules...It is only a non-party who needs this special protection, or to be drawn specially within costs powers. Moreover, it would be curious if provisions restricting legal aid could be circumvented in this purely discretionary way. One doubts whether such was intended.
- 15.69 The Court noted that there is a difference between recognising a right of appearance, and directing that taxpayers fund that appearance.⁵³⁹
- 15.70 In this regard the Court differed from an earlier decision in *New Zealand Fishing Industry Board v Attorney-General*, in which Master Williams QC considered that, despite the title to section 99A, orders were not confined to persons appearing purely as interveners or counsel assisting the court.⁵⁴⁰
- 15.71 In *Diagnostic Medlab Ltd v Auckland District Health Board*, the Court agreed that section 99A appeared to relate only to non-parties, but observed that an intervener might well also be a party in terms of the costs rules in the High Court Rules.⁵⁴¹
- 15.72 In *El-Nemr v Accident Compensation Corporation*, the plaintiff was unrepresented and applied for an order under rule 4.27(b) of the High Court Rules that the Court appoint a lawyer to represent him.⁵⁴² He also sought for the lawyer to be paid out of public funds. The plaintiff had tried to apply for legal aid, but claimed that the lawyer he had consulted had refused to make the application.
- 15.73 Mallon J noted that to make an order that public funds be used, section 99A of the Judicature Act 1908 would need to be used. Her Honour found that this would not be appropriate, as it would have the effect of circumventing the legal aid scheme. In any event, the court did not consider that the case met the criteria for an order under section 99A.

15.74 In *NZ Fishing Industry Board v Attorney-General*, Master Williams QC also made the following observations about s 99A:⁵⁴³

- (a) Orders will normally be confined to cases where there is a substantial public interest in the outcome of the litigation;
- (b) Orders will normally be confined to proceedings where the Court's consideration of the issues is likely to be materially assisted by evidence or submission or both on any question of law or fact arising in the proceedings from those representing a field of interest relevant to the proceedings beyond their private or personal viewpoint;
- (c) Orders will normally be confined to assist those who are already parties to any particular proceeding or those who are appointed by this Court to represent a particular sectional interest.

Q57 Should s 99A be available only to interveners and counsel assisting, or should it also be available to parties? If the former, does the section require amendment?

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- 447 High Court Rules, r 4.1; District Court Rules 2009, r 3.33.1
- 448 Civil Justice Council *Access to Justice for Litigants in Person (or self-represented litigants)* (November 2011) at 8.
- 449 We note that Bridgette Toy-Cronin, an Otago Law School PhD student, has been awarded an inaugural New Zealand Law Foundation Doctoral Scholarship to carry out an empirical and theoretical examination of the place of litigants in person in New Zealand's civil courts – see University of Otago “Legal Issues Centre Scholarships for Bridgette Toy-Cronin and Warren Forster” < www.otago.ac.nz >. We also note that in 2009, the Research, Evaluation and Modelling Unit of the Ministry of Justice presented the findings of an exploratory study into self-representation undertaken in the family and summary criminal jurisdictions in New Zealand – see M Smith, E Banbury and S Ong *Self-Represented Litigants: An Exploratory Study of Litigants in Person in the New Zealand Criminal Summary and Family Jurisdictions* (Ministry of Justice, Wellington, 2009).
- 450 M Smith, E Banbury and S Ong *Self-Represented Litigants: An Exploratory Study of Litigants in Person in the New Zealand Criminal Summary and Family Jurisdictions* (Ministry of Justice, Wellington, 2009) at [1.1.2].
- 451 Duncan Webb “The right not to have a lawyer” (paper presented to National Judicial College of Australia, Confidence in the Courts Conference, Canberra, 2007) at 2.
- 452 Rabeea Assy “Revisiting the Right to Self-Representation in Civil Proceedings” (2011) 30 CJQ 267.
- 453 Duncan Webb “The right not to have a lawyer” (paper presented to National Judicial College of Australia, Confidence in the Courts Conference, Canberra, 2007) at 17.
- 454 For example, generally people involved in a Disputes Tribunal hearing are not allowed to have a lawyer.
- 455 For example, in employment cases, or in the Māori Land Court with the court's permission. The Youth Court can appoint a lay advocate to appear in support of a child or young person charged with an offence, to represent their interests or those of their family, and to ensure the court is aware of all relevant cultural matters.
- 456 After the decision in *McKenzie v McKenzie* [1970] 3 All ER 1034.
- 457 *Mihaka v Police* [1981] 1 NZLR 54, citing *Collier v Hicks* (1891) 2 B & Ad 663, 109 ER 1290 and *McKenzie v McKenzie* [1970] 3 All ER 1034. Applied in *Muir v Police* (1986) 2 CRNZ 12.
- 458 *McKenzie v McKenzie* [1970] 3 All ER 1034. This was a divorce case in which the husband had had legal aid withdrawn. An Australian barrister unqualified to appear in court in the United Kingdom offered assistance. While the trial judge declined to allow this support person's assistance, on appeal it was held that Mr McKenzie was entitled to the assistance of such a person.
- 459 C Cameron and E Kelly “Litigants in person: Part I” (2002) 32 HKLJ 313 at 319.
- 460 A Northover and N Fisher “Keeping it in the family: Will the credit crunch tempt more litigants to adopt a *McKenzie* friend?” (2008) 158 *New Law Journal* 1739 at 1739.
- 461 *Izzo v Philip Ross & Co* [2001] All ER (D) 464.
- 462 Judge S Stevenson “I am his litigation friend” (2001) 151 *New Law Journal* 1726.
- 463 B Hansen “Common Law McKenzie Friend” (July 2011) Bond University < www.works.bepress.com > at 10.
- 464 The latest version is Lord Neuberger of Abbotsbury, Master of the Rolls, and Sir Nicholas Wall, President of the Family Division “Practice Guidance: McKenzie Friends (Civil and Family Courts)” (12 July 2010).

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- 465 Civil Justice Council *Access to Justice for Litigants in Person (or self-represented litigants)* (November 2011) at App 5.
- 466 A Northover and N Fisher “Keeping it in the family: Will the credit crunch tempt more litigants to adopt a *McKenzie* friend?” (2008) 158 *New Law Journal* 1739 at 1739.
- 467 *R v Bow County Court Ex Parte Pelling (No 1)* [1999] 4 All ER 751.
- 468 *McKenzie v McKenzie* [1970] 3 All ER 1034.
- 469 *R v Hill* [2004] 2 NZLR 145 at [54].
- 470 At [52].
- 471 A Northover and N Fisher “Keeping it in the family: Will the credit crunch tempt more litigants to adopt a *McKenzie* friend?” (2008) 158 *New Law Journal* 1739 at 1739.
- 472 *The Beneficial Owners of Whangaruru Whakaturia No 4 v Warin & Ors* [2009] NZCA 60, [2009] NZAR 523, at [19], citing Salmon LJ in *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 at 226.
- 473 *The Beneficial Owners of Whangaruru Whakaturia No 4 v Warin & Ors* [2009] NZCA 60, [2009] NZAR 523 at [20].
- 474 At [21].
- 475 See Memorandum on Requests for the appointment of an Advocate to the Court issued by the Attorney-General and the Lord Chief Justice on 19 December 2001, Law Gazette < www.lawgazette.co.uk >.
- 476 *Wanganui District Council v Tangaroa* [1995] 2 NZLR 706; *B v M* [2006] NZSC 86. In *R v Kim* [2009] NZCA 294, the accused had left the country without giving instructions in relation to a criminal appeal that called his acquittal into question.
- 477 *NZ Dairy Workers Union Inc v New Zealand Milk Products Ltd* [2004] 3 NZLR 652 (CA).
- 478 *Erwood v Maxted* [2008] NZCA 139.
- 479 *R v Osborne* [2009] NZCA 168. Osborne pleaded guilty to murder and was sentenced to life imprisonment. He appealed, and instructed counsel but the Legal Aid Services Agency declined funding. Faced with an illiterate young man facing life imprisonment without legal representation, the Court appointed amicus curiae.
- 480 *Siemer v Solicitor-General* (2009) 2 NZLR 556.
- 481 *Solicitor-General v Moodie* HC Wellington CIV 2005-485-001026, 25 July 2006 at [19].
- 482 *Levy v Victoria* (1997) 189 CLR 579 at 604.
- 483 *The Beneficial Owners of Whangaruru Whakaturia No 4 v Warin & Ors* [2009] NZCA 60, [2009] NZAR 523.
- 484 *Solicitor-General v Miss Ellis* (2007) 1 NZLR 655.
- 485 *The Beneficial Owners of Whangaruru Whakaturia No 4 v Warin & Ors* [2009] NZCA 60 at [26].
- 486 At [25].
- 487 At [26].
- 488 *Auckland Area Health Board v Attorney-General* [1993] 1 NZLR 235 at 240.
- 489 At 240.

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- 490 *Solicitor-General v Miss Ellis* (2007) 1 NZLR 655.
- 491 *Duncan v Medical Practitioners Disciplinary Committee* (1986) 1 NZLR 513.
- 492 *R v Lee* (2006) 3 NZLR 42.
- 493 *Accident Compensation Corporation v Ambros* (2008) 1 NZLR 340.
- 494 Section 99B(3).
- 495 Section 99C(1).
- 496 Section 99C(2) and (3).
- 497 Section 99C(4).
- 498 Judicature (Rules Committee and Technical Advisers) Amendment Act 1999, s 2.
- 499 Supreme Court Act 2003, sch 1.
- 500 *Vector Ltd v Transpower New Zealand Ltd* (2000) 14 PRNZ 240 at [49].
- 501 In *Hosking v Runting* HC Auckland CP527/02, 11 February 2003, Randerson J suggested (at [7]) that the jurisdictional basis for intervention can be found in rules 9 (dealing with cases not provided for) and 438(3) (which enables the court to make such orders and to give such directions as appear best adapted to securing the just, expeditious and economic disposal of the proceeding) of the High Court Rules.
- 502 They have also appeared 28 times in the Court of Appeal and 27 times in the High Court in this period. Interveners in the Supreme Court have included the Ngati Makino Heritage Trust (*New Zealand Māori Council and others v Attorney-General* [2008] NZSC 34), the International Trademark Association (*Austin Nichols & Co v Sticking Lodestar* [2008] 2 NZLR 14 (SC)), the New Zealand Council of Trade Unions (*Bryson v Three Foot Six Limited* [2005] NZSC 54), and a joint intervention by the New Zealand Law Society and the New Zealand Bar Association (*Chamberlains v Lai* [2007] 2 NZLR 7).
- 503 *Sanofi-Adventis Deutschland GmbH v Aft Pharmaceuticals Limited* HC Auckland CIV 2009-404-001795, 9 August 2011.
- 504 Human Rights Act 1993, s 5(2).
- 505 JUSTICE “To Assist the Court: Third Party Interventions in the UK” (2009) < www.justice.org.uk >.
- 506 For example, in relationship property proceedings: *X v X* HC Auckland CIV-2006-404-903, 4 July 2006.
- 507 Recent cases include *Deadman v Luxton* HC Wellington CP71/99, 4 May 1999; *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries* (2002) 16 PRNZ 501 (HC); *Wellington International Airport Ltd v Commerce Commission* HC Wellington CP151/02 19 July 2002; *Wilson v Attorney-General [Judicial Conduct] (No.2)* [2010] NZAR 509.
- 508 *Wilson v Attorney-General [Judicial Conduct] (No.2)* [2010] NZAR 509 at [19].
- 509 See, for example, *Re Rhodes* [1933] NZLR 1348.
- 510 *Re Northern Ireland Human Rights Commission (Northern Ireland)* [2002] UKHL 25 at [32].
- 511 George Williams “The *Amici Curiae* and Intervener in the High Court of Australia: a Comparative Analysis” (2000) 28 FLR 365 at 372 – 373.
- 512 E Clark “The Needs of the Many and the Needs of the Few: A New System of Public Interest Intervention for New Zealand” (2005) 36 VUWLR 71 at 83.

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- 513 E Clark “The Needs of the Many and the Needs of the Few: A New System of Public Interest Intervention for New Zealand” (2005) 36 VUWLR 71 at 72.
- 514 At 72 – 73.
- 515 *Drew v Attorney-General* [2001] 2 NZLR 428 (CA) at 432.
- 516 E Clark “The Needs of the Many and the Needs of the Few: A New System of Public Interest Intervention for New Zealand” (2005) 36 VUWLR 71 at 80.
- 517 JUSTICE “To Assist the Court: Third Party Interventions in the UK” (2009) < www.justice.org.uk > at [59]-[60].
- 518 *New Zealand Fire Service Commission v Ivamy* (1995) 8 PRNZ 632 at 634.
- 519 JUSTICE To Assist the Court: Third Party Interventions in the UK (2009) < www.justice.org.uk > at [17].
- 520 Practice Directions and Standing Orders applicable to civil appeals (approved 8 October 2007), r 37.
- 521 Supreme Court Rules 2009 (UK), r 15.
- 522 The Judicial Committee (Appellate Jurisdiction) Rules Order 2009 (SI 2009/224), r 27(1).
- 523 Supreme Court Rules 2009 (UK), r 15.
- 524 Rule 26(2).
- 525 At [13.5].
- 526 It has been suggested that this creates uncertainty and a lack of transparency: JUSTICE To Assist the Court: Third Party Interventions in the UK (2009) < www.justice.org.uk > at [20].
- 527 *R v Monopolies and Mergers Commission and Secretary of State for the Trade and Industry Ex Parte Milk Marque Ltd* [2000] COD 329 at 330 (QB). The most authoritative judicial statement on this is from Lord Woolf in *Re Northern Ireland Human Rights Commission* [2002] UKHL 25 who (at [34]) stated that the determinative factor in deciding intervention applications is whether the intervention will serve the interests of justice and in particular assist the court, and that this must be balanced against any inconvenience, delay and expense of the intervention.
- 528 Rules of the Supreme Court of Canada 1974, as amended by SOR/83-930, s 1 and SOR/87-292.
- 529 Andrea Loux “Hearing a ‘Different Voice’: Third Party Interventions in Criminal Appeals” (2000) 53 Current Legal Problems 459.
- 530 Supreme Court Rules, r 61(4).
- 531 Rule 55.
- 532 Rule 57(1).
- 533 Rule 57(2)(b). This has been described this as the “most important requirement” of an intervener: J C Major “Interveners and the Supreme Court of Canada” (1999) National 27.
- 534 JUSTICE To Assist the Court: Third Party Interventions in the UK (2009) < www.justice.org.uk >, citing Kenny “Interveners and Amici Curiae in the High Court” (1998) 20 Adel L R 159 at 161 – 167.
- 535 *Levy v Victoria* [1997] HCA 31.
- 536 *New Zealand Federation of Commercial Fishermen (Inc) v Ministry of Fisheries* [1996] 2 NZLR 230.
- 537 At 232.
- 538 At 232.

539 At 233.

540 *New Zealand Fishing Industry Board v Attorney-General* (1992) 6 PRNZ 500 (HC) at 504.

541 *Diagnostic Medlab Ltd v Auckland District Health Board* HC Auckland CIV 2006-404-4724, 13 June 2007.

542 *El-Nemr v Accident Compensation Corporation* HC Wellington CIV-2007-485-1970, 12 May 2009.

543 *New Zealand Fishing Industry Board v Attorney-General* (1992) 6 PRNZ 500 (HC) at 504.



Chapter 16

Vexatious actions

INTRODUCTION

- 16.1 Access to the courts is an integral element of the rule of law, and a fundamental right in a democracy.⁵⁴⁴ However, sometimes people use the courts in ways that strain the resources of the justice system and place undue pressure on other parties, court staff and judicial officers. Some people repeatedly bring civil proceedings, often involving the same subject matter, against others, despite the courts finding that their claims are without merit. Others respond to a decision that goes against them by bringing still more proceedings, drawing in an ever-widening circle of defendants.
- 16.2 There are mechanisms operating in the courts system that have the effect of discouraging people from taking proceedings to court unless they have a genuine cause of action, but these are not always enough. Further, while the High Court has inherent jurisdiction to restrain a plaintiff from making applications within an existing proceeding (on the basis that they are vexatious), without the leave of the Court,⁵⁴⁵ it does not have the power under its inherent jurisdiction to prevent a person from commencing proceedings that appear to be vexatious.⁵⁴⁶ Nor does it have inherent jurisdiction to prevent a plaintiff from instituting future actions without leave.⁵⁴⁷
- 16.3 Accordingly, New Zealand has, since 1965, had statutory measures in place to help the courts deal with litigants who persistently bring vexatious civil proceedings against others.⁵⁴⁸ This Issues Paper examines those provisions, and asks whether they are satisfactory and sufficient, or whether they need to be improved.

THE NEW ZEALAND EXPERIENCE

Statutory provisions

- 16.4 Section 88B of the Judicature Act 1908 provides the High Court with the power to restrain a person from bringing or continuing civil proceedings in certain circumstances. The section provides:

(1) If, on an application made by the Attorney-General under this section, the High Court is satisfied that any person has persistently and without any reasonable ground instituted vexatious legal proceedings, whether in the High Court or in any inferior Court, and whether against the same person or against different persons, the Court may, after hearing that person or giving him an opportunity of being heard, order that no civil proceeding or no civil proceeding against any particular person or persons shall without the leave of the High Court or a Judge thereof be instituted by him in any Court and that any civil proceeding instituted by him in any Court before the making of the order shall not be continued by him without such leave.

(2) Leave may be granted subject to such conditions (if any) as the Court or Judge thinks fit and shall not be granted unless the Court or Judge is satisfied that the proceeding is not an abuse of the process of the Court and that there is prima facie ground for the proceeding.

(3) No appeal shall lie from an order granting or refusing such leave.

- 16.5 People against whom section 88B orders are made are commonly described as “vexatious litigants”, although that wording does not appear in the section itself. For convenience, we adopt that phrase in this Issues Paper.
- 16.6 While restraining someone from bringing or continuing legal proceedings is a drastic restriction of civil rights,⁵⁴⁹ the courts have held that section 88B is a justified limitation of the rights contained in section 27 of the New Zealand Bill of Rights Act 1990.⁵⁵⁰ Further, the provision does not operate as a complete bar on access to the courts – a person against whom an order has been made can still bring proceedings, but requires leave of the court to do so.
- 16.7 The courts have indicated that there are a number of reasons that justify restraining a vexatious litigant:⁵⁵¹
- (a) the entitlement of the defendants to protection;
 - (b) the need to use the limited resources of the judicial system for the resolution of genuine proceedings;
 - (c) perhaps even the interests of the vexatious litigant him/herself.
- 16.8 The combination of the detrimental effects that vexatious litigation can have on courts and individuals has been described as having a wider negative impact on society as a whole, by weakening the court’s ability to properly administer justice:⁵⁵²

It is not an exaggeration to say that ultimately vexatious litigation, by posing such a threat to the proper administration of justice, tends to undermine the rule of law.

16.9 The powers set out in section 88B are a measure of the last resort. As already noted, the justice system contains other disincentives to discourage litigants from bringing proceedings that have no merit or substance, including:⁵⁵³

- (a) court fees and charges;
- (b) the cost of legal representation, at least where the litigant uses a lawyer;
- (c) the risk of a costs order being made against the litigant if the case is unsuccessful;
- (d) the court's power to order security for costs, requiring a litigant to pay an amount by way of security for costs to the court at the outset of the proceedings;⁵⁵⁴
- (e) the power of the court to strike out pleadings that do not disclose a cause of action, or are frivolous and vexatious.⁵⁵⁵

16.10 However, these measures are not always effective. For example, cost may not deter a persistent vexatious litigant, particularly if he or she is not represented by counsel. Further, while the court's power to strike out a pleading might bring an end to an individual case, it is only available once a pleading has been filed, by which point the resources of the court and the other party are already engaged.

16.11 Therefore, where other measures and powers have failed to discourage a litigant from bringing or continuing proceedings that are without merit, the more extreme measure of making an application under section 88B may be required.

Orders and applications under section 88B

16.12 Relatively few applications under section 88B, or its predecessor sections, have been made and there are only a handful of orders under section 88B in existence. Only two orders have been made by the High Court since December 2007. In 2001, the Court of Appeal noted that this reflected an appropriately conservative approach by successive Attorneys-General, "no doubt mindful of the fundamental constitutional importance of the right of access to the Courts."⁵⁵⁶

16.13 There has not been a significant increase in applications for vexatious proceedings orders in New Zealand in the last five years. The Crown Law Office advises that each year it receives one or two requests for applications to be made under s88B, and that there has been no appreciable increase in such requests since 2006.

- 16.14 However, Crown Law considers that there is some evidence that vexatious or potentially vexatious litigants may be taking up more court time than previously, having regard to the number of proceedings in which they are or have been engaged.
- 16.15 There may be a number of causes for the relatively low numbers of orders made under section 88B. It may be that there are not significant numbers of problem litigants, or that applications are not made sufficiently often, or that the threshold for granting an order is too high.

Features of the New Zealand system

- 16.16 Applications under section 88B may only be brought by the Attorney-General or the Solicitor-General.⁵⁵⁷ In practice, it is the Solicitor-General who exercises this function.
- 16.17 The test for an order is whether the litigant has persistently instituted vexatious legal proceedings without reasonable grounds, in the High Court or any inferior court. It does not matter whether the proceedings are issued against the same person or different people. An order under the section may only be made when multiple proceedings have been commenced by the respondent.
- 16.18 The Court can only make an order under section 88B to restrain the litigant from filing or continuing any civil proceedings. Therefore, a person who is declared to be a vexatious litigant under section 88B is still able to bring private criminal proceedings.
- 16.19 Section 88B effectively gives the Court two options in terms of orders. The Court can either order that the litigant cannot bring any civil proceedings at all without leave, or it can make a more limited order that the litigant cannot bring any civil proceedings against a particular person or persons without leave.
- 16.20 There are some specific issues that arise in relation to the operation of section 88B, which we will discuss later in this chapter. In summary:
- (a) Should the right to apply for an order under section 88B continue to be limited to the Attorney-General?
 - (b) Should orders under section 88B extend to criminal proceedings, interlocutory proceedings and/or appeals?
 - (c) Do the criteria for granting an order need to be revisited?
 - (d) How long should orders under section 88B last?
 - (e) Should a vexatious litigant have to get leave to appeal against the making of an order?
- 16.21 However, before we examine those matters, a more fundamental question arises: do we need a more nuanced system than the one which section 88B provides? Should we replace it with a graduated approach along the lines of that adopted in the United Kingdom and recommended in the state of Victoria?

GRADUATED SYSTEM OF ORDERS

United Kingdom

Civil restraint orders

- 16.22 In England and Wales, the Civil Procedure Rules and a supporting Practice Direction provide for a system of graduated orders to restrain vexatious litigants.⁵⁵⁸ There are three classes of order:
- (a) a limited civil restraint order.
 - (b) an extended civil restraint order.
 - (c) a general civil restraint order.
- 16.23 Where a statement of case or application is struck out, or dismissed, and is totally without merit, the court order must specify that fact and the court must consider whether to make a civil restraint order.⁵⁵⁹ A party to a proceeding may also apply for any civil restraint order.
- 16.24 A *limited civil restraint order* may be made by a judge of any court where a party has made two or more applications that are totally without merit. The effect of the order is to restrain the party against whom it is made from making any future applications in *those particular proceedings*, without first obtaining the permission of a judge identified in the order.
- 16.25 If the party makes a further application in the proceedings without judicial permission, the application will be automatically dismissed without the judge having to make any order, or the other party needing to respond. A limited civil restraint order will remain in effect for the duration of the proceedings, unless the court otherwise orders.
- 16.26 The middle tier of the system provides for an extended civil restraint order to be made where a party has persistently issued claims or made applications that are totally without merit. Extended civil restraint orders may be made by a judge of the Court of Appeal, a judge of the High Court, or a designated civil judge or his appointed deputy in a County Court.
- 16.27 An extended civil restraint order restrains the party from issuing claims or making applications concerning *any matter involving or relating to or touching upon or leading to the proceedings in which the order is made*, except with permission of a judge:
- (a) in any court, where the order is made by a Court of Appeal judge;
 - (b) in the High Court or any County Court where the order is made by a High Court judge;

- (c) in the County Court, where the order is made by a County Court judge.
- 16.28 An extended civil restraint order will be made for a specified period no greater than two years (although the duration may be extended).
- 16.29 The most restrictive measure, a *general civil restraint order*, may be made by a judge of the Court of Appeal, or the High Court, or a designated civil judge or his appointed deputy in a County Court, where the party against whom the order is made persists in issuing claims or making applications which are totally without merit, in circumstances where an extended civil restraint order would not be sufficient or appropriate.
- 16.30 A general civil restraint order restrains a party from issuing *any claim or making any application* without permission of a judge:
 - (a) in any court, where the order is made by a Court of Appeal judge;
 - (b) in the High Court or any County Court where the order is made by a High Court judge
 - (c) in the County Court, where the order is made by a County Court judge.
- 16.31 Like an extended civil restraint order, the general order operates for up to two years, but may be extended.
- 16.32 A party who is subject to a general civil restraint order may not make an application for permission to issue a claim or make an application, or apply for amendment or discharge of the order, without first serving notice of the application on the other party.

Applications for vexatious litigant orders

- 16.33 In addition to the civil restraint orders found in the Civil Procedure Rules, the Attorney-General has the power under section 42 of the Senior Courts Act 1981 (UK) (previously the Supreme Court Act 1981 (UK)) to apply to the High Court for an order against a person who repeatedly makes applications to the court that are without merit. Such orders may be either for a specified period of time or indefinite, and may apply to civil proceedings, criminal proceedings or both.
- 16.34 Section 42 provides that the Attorney-General may apply for an order against a person who has litigated “habitually and persistently and without any reasonable ground”. Section 33 of the Employment Tribunals Act 1996 (UK) is in similar terms. The number of proceedings required to meet the test is not specified in the legislation, but normal cases involve at least five or six vexatious actions.⁵⁶⁰ The court will take into account all the surrounding circumstances including the general character of the litigation, the degree of hardship suffered by defendants and the likelihood of the conduct continuing if an order is not obtained. Lists of vexatious litigants are publicly available on the United Kingdom Courts Services website.⁵⁶¹

- 16.35 It would seem that the number of applications for orders under section 42 of the Senior Courts Act 1981 (UK) and section 33 of the Employment Tribunals Act 1996 (UK) has reduced as the jurisprudence relating to civil restraint orders develops.⁵⁶² The implication is that the more draconian and inflexible vexatious litigant regime may eventually come to be redundant.

Victoria

- 16.36 A similar three tiered approach was recently recommended by the Law Reform Committee of the Parliament of Victoria, Australia.⁵⁶³ The Committee's preferred approach was to prevent vexatious litigants wherever possible, and to manage one-off or infrequent vexatious proceedings more effectively without restricting general rights of access to justice. The Government of Victoria has not yet implemented the proposed reforms.

A graduated system for New Zealand?

- 16.37 One option for New Zealand is to move to a more graduated system, along the lines of the models discussed above. This might consist of three tiers of available orders:
- (a) A limited order, which restrains the party from making any future applications in those particular proceedings without leave;
 - (b) An extended order, available in the case of persistent claims or applications, which operates in relation to any matter involving, relating to or touching upon the proceedings;
 - (c) A general order, available in the case of persistent claims where an extended order is not sufficient, which restrains the party from issuing any civil claim or application without leave.
- 16.38 The chief advantage of a graduated system is that it would allow for a more proportionate response to litigants who bring vexatious proceedings. This would not only be consistent with the protections in the New Zealand Bill of Rights Act 1990, it might also allow intervention to prevent vexatious actions at an earlier stage, rather than as a very last resort.
- 16.39 We expect that such a system would replace section 88B, although we note that, at least at present, the two systems sit in parallel in the United Kingdom.

Q58 Should New Zealand continue its existing approach to vexatious litigants (subject to some statutory amendments), or should it adopt a graduated approach to restraining vexatious litigants similar to that used in the United Kingdom and recommended in Victoria?

AMENDING SECTION 88B

- 16.40 If a graduated approach is not adopted in New Zealand, there are a number of issues to consider in relation to section 88B of the Judicature Act 1908 that need to be resolved before it is re-enacted in a new consolidated courts statute. Before discussing these in detail, we briefly outline the model used in many states in Australia to deal with vexatious proceedings.

Standing Committee of Attorneys-General

- 16.41 In 2004, Queensland developed a model bill dealing with vexatious proceedings, under the auspices of the Standing Committee of Attorneys-General (“the SCAG model”).⁵⁶⁴ Since then, a number of Australian states have passed legislation based on the model bill, including the Northern Territory⁵⁶⁵ and New South Wales.⁵⁶⁶
- 16.42 The SCAG model, like section 88B, provides for a sanction of last resort, and operates on the same basic premise, requiring a litigant to repeatedly bring vexatious proceedings. However, the model differs from the New Zealand legislation in some ways that make it easier to obtain a vexatious proceedings order than an order under section 88B.
- 16.43 For example, the Queensland Act allows a broader range of people to apply for orders. Applications for a vexatious proceedings order may be made by:⁵⁶⁷
- (a) the Attorney-General; or
 - (b) the Crown Solicitor; or
 - (c) the registrar of the Court; or
 - (d) a person against whom another person has instituted or conducted a vexatious proceeding; or
 - (e) a person who has a sufficient interest in the matter.
- 16.44 The last two categories of applicant require leave of the Court to apply for an order.
- 16.45 The Queensland statute also extends the scope of matters to be considered in making the order to include proceedings brought by the litigant in other jurisdictions, and allows orders to be made in relation to proceedings initiated by other persons acting in concert with vexatious litigants.

16.46 It also lowers the threshold for making orders. The Court may make an order if it is satisfied that a person has frequently instituted or conducted vexatious proceedings in Australia; or is acting in concert with a person who has instituted or conducted a vexatious proceeding in Australia, or is the subject of a vexatious proceedings order.⁵⁶⁸ A “vexatious proceeding” includes:⁵⁶⁹

- (a) a proceeding that is an abuse of the process of a court or tribunal; and
- (b) a proceeding instituted to harass or annoy, to cause delay or detriment, or for another wrongful purpose; and
- (c) a proceeding instituted or pursued without reasonable ground; and
- (d) a proceeding conducted in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.

16.47 If found to be made out, the Court may make any or all of the following orders:⁵⁷⁰

- (a) an order staying all or part of any proceeding in Queensland already instituted by the person;
- (b) an order prohibiting the person from instituting proceedings, or proceedings of a particular type, in Queensland;
- (c) any other order the Court considers appropriate in relation to the person (such as an order directing that the person may only file documents by mail, or an order to give security for costs, or an order for costs).

16.48 Orders can be made in relation to proceedings of any kind, within the jurisdiction of any court or tribunal.

16.49 Against that background, we now return to some of the problems that have been identified with the New Zealand provision, and how it might be improved.

Who can bring an application under section 88B?

16.50 Section 88B provides for the Attorney-General to bring an application for an order, although, as noted above, the power can also be exercised by the Solicitor-General, and in practice is.

16.51 In other jurisdictions, there has been a move towards giving standing to apply for vexatious proceedings orders to other people, such as parties who are being sued. In 2008, the Victoria Law Reform Committee noted that Victoria was now the only jurisdiction in Australia where the Attorney-General still had a monopoly on applications.⁵⁷¹ In the United Kingdom, parties to a proceeding can apply for any level of civil restraint order and the courts have the power to initiate an application for a civil restraint order themselves.

- 16.52 There are arguments in favour of limiting the right to apply for orders under section 88B to the Attorney-General and the Solicitor-General. An order under section 88B is a significant curtailment of civil rights. In that sense, limiting who can apply for such an order operates as an important safeguard. Crown Law's filtering role also prevents the risk of an application for an order under section 88B being brought by a party for malicious or tactical reasons, as a tool of litigation strategy.
- 16.53 On the other hand, given the effect of the actions of vexatious proceedings on the people sued, it can be argued that those parties should be able to apply for orders as well. Submitters to the Victoria Law Reform Committee argued that other parties were more likely to be aware of the vexatious nature of the behaviour, and have more incentive to take action.
- 16.54 Some statutes extend standing beyond law officers, but require other parties to get leave from the court before making an application, in order to prevent misuse of the power.⁵⁷² Our provisional view is that such a "halfway house" approach provides a good balance and may be warranted in New Zealand.

Q59 Who should have standing to bring an application under section 88B:

- law officers only?
- other parties?
- the courts?

Q60 If standing is extended to other parties, should they be required to seek leave before making an application?

What proceedings can orders apply to?

Criminal proceedings

- 16.55 The wording of section 88B requires the High Court to be satisfied that a person has persistently and without any reasonable ground instituted vexatious "legal proceedings". If the Court is so satisfied, it can make an order preventing the person from filing or continuing any "civil proceeding".
- 16.56 The result is that the Court can take into account any legal proceedings, civil or criminal, instituted by the litigant when deciding whether to make an order, but can only make an order under section 88B to restrain the litigant from filing or continuing civil proceedings. Therefore, a person who is declared to be a vexatious litigant under section 88B is still able to bring private criminal proceedings.

- 16.57 Although prosecution of offences is regarded as a central function of the State, in 2000 the Law Commission concluded that private prosecutions continued to have an important constitutional and theoretical place in the justice system.⁵⁷³ Private prosecutions provide an important safeguard for citizens against capricious, corrupt or biased failure or refusal to prosecute offenders.⁵⁷⁴
- 16.58 However, although they provide this check on the power of the State, private prosecutions also carry with them the risk of abuse, and lack some of the safeguards that exist in the public prosecution system. Vengeful or vexatious private prosecutions can cause considerable distress for defendants, and are an abuse of the process of the court, and a waste of time and resources.
- 16.59 The arguments are finely balanced. However, given there are some existing controls on private prosecutions that can prevent them being used vexatiously,⁵⁷⁵ and further limits on the ability to commence a private prosecution have been enacted in the Criminal Procedure Act 2011,⁵⁷⁶ our preliminary view is that it would not be appropriate to extend section 88B of the Judicature Act 1908 to criminal proceedings.

Interlocutory proceedings and appeals

- 16.60 At present, interlocutory applications are not included in the proceedings which a court may take into account when considering an application under section 88B.⁵⁷⁷
- 16.61 The question of whether appeals are properly characterised as proceedings for the purposes of section 88B is less clear. In *Re Wiseman*, the Court of Appeal held that the lodging of appeals involves the institution of proceedings.⁵⁷⁸ However, a Full Court in *Attorney-General v Collier* considered that the point had not been determined in New Zealand, and suggested that caution was needed in taking an expansive approach to the language of a section that impacts upon rights of access protected by the New Zealand Bill of Rights Act 1990.⁵⁷⁹ In *Attorney-General v Heenan*, the High Court was not required to decide the point, but noted that an appeal may at least be taken into account in the overall assessment of the respondent's litigious behaviour.⁵⁸⁰
- 16.62 This question has been resolved by legislation in some other jurisdictions. For example, the SCAG model bill defines vexatious proceedings broadly, to include interlocutory applications and appeals.⁵⁸¹

Q61 Should section 88B of the Judicature Act 1908 be extended to allow orders to be made to prevent a person instituting criminal proceedings?

Q62 Should the courts be able to take interlocutory applications and appeals into account as proceedings that have been instituted when considering applications under section 88B?

Criteria for obtaining an order

- 16.63 Section 88B requires the Court to be satisfied that a person has *persistently* and *without any reasonable ground* instituted *vexatious legal proceedings*. Once those grounds are established, the Court can decide whether to exercise its discretion to make an order, and if so, what the terms of the order should be.
- 16.64 The term “vexatious” is not defined. Vexatious in the legal sense requires something more than mere irritation – some element of impropriety or abuse. It has been noted that the words “frivolous or vexatious” are often used interchangeably with the term “abuse of the process of the court.”⁵⁸²
- 16.65 It is not clear that the requirement that proceedings must be instituted “without any reasonable ground” adds anything to the term “vexatious”, as the concept of being without any reasonable ground seems to be inherent in the latter term. Otherwise, it would be possible for a litigant to persistently institute vexatious legal proceedings *with* reasonable ground.⁵⁸³ Our provisional view is that, if a provision akin to section 88B is retained, the requirement that the proceeding be instituted “without any reasonable ground” be removed.
- 16.66 Section 88B also requires that the person against whom the order is sought has brought vexatious proceedings “persistently.” In *Brogden v Attorney-General*, the Court of Appeal held that whether proceedings have been instituted “persistently” depends not only on the number of proceedings, but on their character, their lack of any reasonable ground, and the way in which they have been conducted.⁵⁸⁴
- 16.67 The Court’s approach in this case has been criticised on the ground that most of the factors relied on as being relevant to determining “persistence” are in fact taken into account in other parts of the statutory test, and should not be used to satisfy the persistence element as well.⁵⁸⁵
- 16.68 In the United Kingdom, the requirement of “persistence” has been removed from the lowest tier of available orders – for a limited civil restraint order, a party need only establish that the litigant has filed two or more proceedings. Persistence is still required for the extended and general civil restraint orders.
- 16.69 In Australia, those states that have adopted the SCAG model bill do not require “persistence”. Instead, they use a less strict test of “frequently” bringing vexatious legal proceedings.⁵⁸⁶

- 16.70 A number of American states adopt an approach of using numerical criteria to decide whether a person should be declared a vexatious litigant. For example, in Florida, a vexatious litigant may be defined as someone who has taken, on his or her own, five or more civil actions in any Florida state court (except for small claims) over the immediately preceding five years, which have been finally and adversely determined against him or her.⁵⁸⁷ While this creates an element of certainty, it involves choosing an arbitrary number of proceedings as the trigger point. Further, the courts can only act once those proceedings have all been finally adversely decided and, in the interim, the litigant may file any number of vexatious proceedings.

Q63 Should the meaning of “vexatious” be clarified in section 88B? If so, how?

How long should an order last?

- 16.71 Section 88B does not provide for the revocation, setting aside or variation of orders.⁵⁸⁸ This begs the question: can the court set aside an order when it is no longer necessary? Or, does it remain in place indefinitely?
- 16.72 In the United Kingdom, there are time limits to the operation of civil restraint orders. Further, the Civil Procedure Rules specifically provide that the vexatious litigant may apply for amendment or discharge of the order provided he has first obtained the permission of a judge identified in the order.
- 16.73 We consider that a time limit for an order should be statutorily provided for, or at the very least the vexatious litigant should be able to apply to the Court for amendment or discharge of the order. It is inappropriate, in our view, for this to be left to the inherent jurisdiction of the court.

Q64 Should section 88B provide a time limit for the application of an order?

Q65 Should the section provide for the revocation, variation or setting aside of orders made under the section?

Is leave required to appeal against an order?

- 16.74 Section 88B(1) gives the High Court power to order that no civil proceeding shall be instituted by a particular person “in any Court”. In *Heenan v Official Assignee*, the Attorney-General contended that the effect of this wording was that Mr Heenan could not appeal to the Court of Appeal against the decision declaring him to be a vexatious litigant without the leave of the High Court.⁵⁸⁹

- 16.75 The Court of Appeal rejected this argument, concluding that any statutory restriction on the right of access to the courts must be clear. It held that the words “in any Court” in section 88B were potentially ambiguous, and accordingly it was proper to read down the expression so it did not include the Court of Appeal or the Supreme Court.⁵⁹⁰ It also considered that the words “in any Court” in section 88B were shorthand for the reference earlier in the section to “in the High Court or in any inferior Court.”⁵⁹¹
- 16.76 *Heenan* has decided the question in New Zealand as to whether leave is required for an appeal against an order under section 88B, but the question remains as to whether the policy position is correct – should vexatious litigants have to apply for leave to appeal against an order under section 88B? In the United Kingdom, the Civil Procedure Rules provide that leave is required to appeal against any civil restraint order – an application for permission to appeal may be made to the lower court at the hearing at which the decision to be appealed was made, or to the appeal court in an appeal notice.⁵⁹²
- 16.77 Given that an order under section 88B represents a significant restriction of a person’s right of access to the courts, our preliminary view is that it is appropriate that there be an appeal as of right against any such order.

Q66 Should appeals against orders made under section 88B be as of right, or require leave?

Applications for leave to continue or issue proceedings

- 16.78 Where an order has been made under section 88B, a vexatious litigant must seek leave before he or she can institute or continue civil proceedings. One area of ambiguity is whether the litigant must serve the application for leave on the intended other party and, if so, whether service and the right of appearance lie with Crown Law (as counsel for the Attorney-General) or with the intended defendant.
- 16.79 Neither the Judicature Act 1908 nor the High Court Rules expressly state whether the potential defendant is entitled to be served with a copy of the application for leave and to appear at the hearing. In *Re Collier*, the High Court concluded that while applications for leave under section 88B(2) should usually be dealt with on an ex parte basis, the Court has inherent jurisdiction to direct that the Attorney-General and, if appropriate, the proposed defendants be served with the application, and that those parties have the opportunity to appear if they see fit.⁵⁹³ However, the Court noted that neither the Attorney-General, nor the intended defendants, should be lightly troubled by the application.
- 16.80 On the one hand, one of the objects of an order under section 88B is to protect other parties from unnecessary costs and anxiety caused by the activities of the vexatious litigant. Requiring or allowing that litigant to serve an application for leave on the other party may provide them with another avenue for continuing their vexatious behaviour.

- 16.81 Having said that, the intended defendant may well want the opportunity to oppose an application for leave to issue or continue proceedings, and it is in the interests of the defendant and the court to ensure that further unmeritorious claims are identified before proceedings are issued.
- 16.82 In the United Kingdom, the point is dealt with expressly in a practice direction made under the Civil Procedure Rules.⁵⁹⁴ The practice direction provides that applications for leave must be served on the other party, who is given the opportunity to respond in writing. The application is determined without a hearing.
- 16.83 Our provisional view is that the approach taken in *Re Collier* is appropriate, and that this should be made clear in any future provision based on section 88B.

Q67 What approach should be taken to service and determination of applications for leave to institute or continue proceedings where an order has been made under section 88B?

-
- 544 *Re H&W Wallace Ltd (in liquidation)* [1994] 1 NZLR 235 at 241. The right to bring civil proceedings involving the Crown, and judicial review proceedings, is protected by section 27(2) and (3) of the New Zealand Bill of Rights Act 1990. Also, article 14 of the United Nations International Covenant on Civil and Political Rights encompasses the right of access to the courts.
- 545 *Grepe v Loam* (1887) 37 Ch D 168 (CA).
- 546 IH Jacob “The Inherent Jurisdiction of the Court” (1970) 23 Current Legal Problems 23 at 43.
- 547 *Stewart v Auckland Transport Board* [1951] NZLR 576.
- 548 The current provision, section 88B of the Judicature Act 1908, began in 1965 as section 71A, with the section number being changed to section 88A in 1966 and then to its current position in 2005: see Judicature Amendment Act 1965, s 3; Judicature Amendment Act 1966, s 3; and Judicature Amendment Act (no 2) 2005, s 5(1), respectively.
- 549 *Attorney-General v Jones* (1990) 1 WLR 859 at 865.
- 550 *Attorney-General v Hill* (1993) 7 PRNZ 20 (HC) at [6]; *Attorney-General v Brogden* [2001] NZAR 158 (HC) at [23].
- 551 *Attorney-General v Hill* (1993) 7 PRNZ 20 (HC) at 26-27, citing *Attorney-General v Jones* (1990) 1 WLR 859 at 865 and *Re Wiseman* HC Auckland M672/67, 20 February 1968 and CA10/68, 28 May 1969 at 6.
- 552 Rt Hon Sir Anthony Clarke, MR “Vexatious litigants and access to justice: past, present, future” (30 June 2006) < www.judiciary.gov.uk > at [21].
- 553 Law Reform Committee, Parliament of Victoria, Australia *Inquiry into vexatious litigants* Parliamentary Paper no. 162, Session 2006 – 2008 < www.parliament.vic.gov.au > at [1.1.1].
- 554 High Court Rules, r 5.45.
- 555 High Court Rules, r 15.1.
- 556 *Brogden v Attorney-General* [2001] NZAR 809 (CA) at [20].
- 557 Section 88B only provides for applications to be brought by the Attorney-General, but pursuant to section 9A of the Constitution Act 1986, the Solicitor-General may perform a function or duty imposed, or exercise a power conferred, on the Attorney-General.
- 558 Civil Procedure Rules (UK) r 3.11 and Practice Direction 3c – Civil Restraint Orders.
- 559 Civil Procedure Rules (UK) rr 3.3(7), 3.4(6) and 23.12. Rule 52.10(6) makes similar provision where an appeal court refuses an application for permission to appeal, strikes out an appellant’s notice or dismisses an appeal.
- 560 Attorney General’s Office (UK) “Vexatious Litigants” < www.attorneygeneral.gov.uk > .
- 561 Ministry of Justice (UK) “Vexatious Litigants” < www.justice.gov.uk > .
- 562 Ministry of Justice (UK) “Vexatious Litigants” < www.justice.gov.uk > .
- 563 Law Reform Committee, Parliament of Victoria, Australia *Inquiry into vexatious litigants* Parliamentary Paper no. 162, Session 2006 – 2008.
- 564 Vexatious Proceedings Act 2005 (Qld).
- 565 Vexatious Proceedings Act 2007 (NT).
- 566 Vexatious Proceedings Act 2008 (NSW).
- 567 Vexatious Proceedings Act 2005 (Qld), s5.

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- 568 Section 6(1).
- 569 Schedule Dictionary.
- 570 Section 6(2).
- 571 Law Reform Committee, Parliament of Victoria, Australia *Inquiry into vexatious litigants* Parliamentary Paper no. 162, Session 2006 – 2008 < www.parliament.vic.gov.au > at [10.4].
- 572 See, for example, Vexatious Proceedings Act 2005 (Qld), s 5; Family Violence Protection Act 2008 (Vic), s 189.
- 573 Law Commission *Criminal Prosecution* (NZLC R66, 2000) at 92.
- 574 *Gouriet v Union of Post Office Workers* [1978] AC 435 at 498; Law Commission *Criminal Prosecution* (NZLC PP28, 1997) at 136.
- 575 In particular, section 77A of the Summary Proceedings Act 1957 confers on the Attorney-General the power to stay a prosecution. This provision will be replaced by s 176 of the Criminal Procedure Act 2011 when it comes into force.
- 576 See, for example, Criminal Procedure Act 2011, s 26.
- 577 *Attorney-General v Collier* [2001] NZAR 137 (HC) at [39]; *Attorney-General v Heenan* [2009] NZAR 763 (HC) at [27].
- 578 *Re Wiseman* HC Auckland M672/67, 20 February 1968 and CA10/68, 28 May 1969.
- 579 *Attorney-General v Collier* [2001] NZAR 137 (HC) at [32].
- 580 *Attorney-General v Heenan* [2009] NZAR 763 (HC) at [30].
- 581 See, for example, Vexatious Proceedings Restriction Act 2002 (WA), s 3.
- 582 IH Jacob “The Inherent Jurisdiction of the Court” (1970) 23 Current Legal Problems 23 at 41.
- 583 Taggart and Klosser “Controlling Vexatious Litigants” in Groves M (ed) *Law And Government in Australia* (Federation Press, Sydney, 2005) at 290.
- 584 *Brogden v Attorney-General* [2001] NZAR 809 (CA) at [21]. The appellant had brought only three proceedings, one of which had not been heard. He appealed against the vexatious proceedings order on the ground that this small number of proceedings could not satisfy the requirement of persistence.
- 585 Taggart and Klosser, “Controlling Vexatious Litigants” in Groves M (ed) *Law And Government in Australia* (Federation Press, Sydney, 2005). As the authors state, “[t]he rolling together of all the factors in *Brogden’s* case obscured the lack of persistence”.
- 586 Vexatious Proceedings Act 2005 (Qld), s 6; Vexatious Proceedings Act (NT), s 7; Vexatious Proceedings Act 2008 (NSW), s 8.
- 587 Title VI Civil Practice and Procedure, 68 Florida Code, §68.093.
- 588 Taggart and Klosser, “Controlling Vexatious Litigants” in Groves M (ed), *Law and Government in Australia* (Federation Press, Sydney, 2005) at 294.
- 589 *Heenan v Official Assignee* [2010] NZCA 135.
- 590 At [11].
- 591 At [15].
- 592 Civil Procedure Rules (UK), r 52.4.
- 593 *Re Collier* [2008] 2 NZLR 505 at [27]–[28].

594 Civil Procedure Rules, Civil Restraint Orders, Practice Direction Part 3C, April 2010.



Questions

We welcome your views on the following questions, based on issues discussed in this paper. Please feel free, however, to make any other comments or submissions in relation to this review. Information on how to make a submission appears on page 2 of the Issues Paper.

CHAPTER 1

Q1 Do you agree there should be a stand-alone Judicial Review (Statutory Powers) Procedure Bill?

CHAPTER 3

Q2 Should the Attorney-General be required, by legislation, to consult those persons set out in para 3.25 in advising the Governor-General on judicial appointments?

Q3 Should the criteria which the Attorney-General is obliged to consider in recommending a person for judicial appointment be set out in legislation?

Q4 Should the criteria reflect the principles in paragraph 3.38, or should they be something different?

Q5 Should it be possible to appoint part-time judges in the Court of Appeal?

Q6 Should the provisions preventing judges from undertaking other employment or holding other office apply to judges of all courts? Should they apply to both part-time judges and full-time judges?

Q7 Should acting judges be permitted? If so, to what benches should they be appointed, and on what terms?

CHAPTER 4

Q8 Do you agree that the linkages in the structure of the judiciary should be formally recognised in legislation?

Q9 If so:

- should the Principal Judges of the Youth Court and the Family Court be responsible to the Chief District Court Judge for ensuring the orderly and prompt conduct of the business of their divisions?
- should the President of the Court of Appeal and the Chief High Court Judge be accountable to the Chief Justice for the orderly and efficient operation of their benches?

Q10 Should the Chief Justice be statutorily required to produce an annual report on the judiciary?

Q11 If so, should it be presented to Parliament, or simply made available to the public?

Q12 Should a new Courts Bill codify the principle that court officers performing judicial functions are not subject to direction by the Ministry of Justice?

CHAPTER 5

Q13 Do you agree that there should be a generic provision in a new Courts Bill for contempt in the face of the court, dealing with all courts and proceedings, and drafted in similar terms to s 365 of the Criminal Procedure Act 2011?

Q14 Do you agree that there should be a wasted costs provision in the new Courts Bill?

Q15 If so, do you agree with the draft provision set out in appendix 4?

CHAPTER 6

Q16 Should there be one unitary District Court for New Zealand?

Q17 Should the upper limit of the civil jurisdiction of the District Courts be increased?

Q18 If so, should the upper limit be \$300,000 (to take account of inflation), or should the upper limit be increased further?

CHAPTER 7

Q19 Should the commercial list be continued in its present form?

Q20 If not:

- (a) Should it be abolished (in which case ordinary case management procedures would apply)?
- (b) Should it be extended to other centres?
- (c) Should it be extended to include substantive matters?
- (d) Should it be replaced with a stand-alone Commercial Court for the High Court?
- (e) Should it be replaced by a move to a panel system?

Q21 If a panel system were adopted:

- (a) what panels should there be?
- (b) should any such development be required by legislation, or done administratively?

CHAPTER 8

Q22 How do you think the High Court Rules should be treated in legislation?

- Should rules that extend beyond matters of practice and procedure be set out in a new Courts Bill (like the relevant provisions of the District Courts Act 1947)?
- Should there be specific empowering provisions in a new Courts Bill for the making of rules that extend beyond matters of practice and procedure?
- Should the existing rules be deemed to be validly made under the new legislation?
- Is there another approach?

CHAPTER 9

Q23 Should the new courts legislation make provision for civil jury trials?

Q24 If so, in what circumstances should a civil jury trial be available?

CHAPTER 10

Q25 Should a new Courts Bill allow two Court of Appeal judges in civil cases to sit on contested applications for leave to appeal and contested applications for extensions of time in which to appeal?

Q26 What matters should a Court of Appeal judge sitting alone be able to deal with?

Q27 Should the Court of Appeal be required to make its procedures for determining the number of judges on a panel available to the public? If so, should the same principle apply in the High Court and Supreme Court?

Q28 Do you agree that section 58F, which allows a High Court Judge to sit on a Full Court of the Court of Appeal, is unnecessary and should be omitted from a new Courts Bill?

Q29 What limitations should be placed on bringing in High Court judges to sit as part of the Court of Appeal?

Q30 Do you agree that section 60(1) of the Judicature Act 1908 is unnecessary and should be omitted from a new Courts Bill?

Q31 Do you agree that the Court of Appeal should be responsible for deciding whether a case is removed from the High Court into the Court of Appeal?

Q32 Do you agree that section 69 of the Judicature Act, which provides for trial at bar, should be repealed and not re-enacted in the new courts statute?

CHAPTER 12

Q33 Should section 99 of the Judicature Act be retained?

CHAPTER 13

Q34 Should the new Courts Bill include a provision enabling the arrest of absconding debtors?

Q35 Do you agree that the maximum fine for failing to respond to a witness summons in the civil jurisdiction should be the same as in the criminal jurisdiction (\$1,000)?

Q36 Should the provisions in Part 1A of the Judicature Act 1908 be included in a new consolidated Courts Bill, or in the Trans-Tasman Proceedings Act 2010?

Q37 Do you agree with the proposals to retain and clarify:
(a) section 94 (effect of joint judgments)?
(b) section 98A (proceedings in lieu of writs)?

CHAPTER 14

Q38 Do you think there is a need to retain statutory provisions along the lines of sections 17A to 17E governing the liquidation of associations?

Q39 If these provisions are retained, do you agree that the reference to partnerships in section 17A of the Judicature Act is unnecessary?

Q40 If the provisions are retained, could they be included in the Companies Act 1993?

Q41 Do you agree that sections 84 to 86 of the Judicature Act, which relate to sureties, should be retained?

Q42 Do you agree that sections 88 of the Judicature Act and 118 of the District Courts Act, which relate to lost instruments, should be retained?

Q43 Do you agree that section 90 of the Judicature Act, which relates to stipulations in contracts as to time, should be retained, or is section 99 sufficient?

Q44 Do you agree that section 92, which relates to discharge of debt by acceptance of part in satisfaction, should be retained?

Q45 Do you agree that sections 94A and 94B of the Judicature Act should be retained until they have been considered as part of a review of the law of mistake?

Q46 Where should any necessary commercial provisions currently found in the Judicature Act be located in the future? For example:

- in a “rump” Judicature Act? or
- in a completely new statute? or
- other?

CHAPTER 15

Q47 Are there any problems with the use of McKenzie friends?

Q48 Should McKenzie friends be permitted in court?

Q49 If so, should there be legislation, regulations or guidelines outlining the role of McKenzie friends in the New Zealand courts?

Q50 Should a person be able to have a lawyer as their McKenzie friend?

Q51 Should there be a specific statutory provision in the new Courts Bill enabling the appointment of amicus curiae?

Q52 If so, on what grounds/in what circumstances should an amicus be appointed?

Q53 Why have the provisions of the Judicature Act 1908 allowing the appointment of technical advisors not been used?

Q54 Is there a need for guidelines for technical advisors, including matters such as who can be an adviser, and what type of evidence they can give?

Q55 To what extent should legislation set out the law relating to interveners? What matters should be addressed in rules?

Q56 What rights should be accorded to interveners? Are there any rights of parties which interveners should not have?

Q57 Should s 99A be available only to interveners and counsel assisting, or should it also be available to parties? If the former, does the section require amendment?

CHAPTER 16

Q58 Should New Zealand continue its existing approach to vexatious litigants (subject to some statutory amendments), or should it adopt a graduated approach to restraining vexatious litigants similar to that used in the United Kingdom and recommended in Victoria?

Q59 Who should have standing to bring an application under section 88B:

- law officers only?
- other parties?
- the courts?

Q60 If standing is extended to other parties, should they be required to seek leave before making an application?

Q61 Should section 88B of the Judicature Act 1908 be extended to allow orders to be made to prevent a person instituting criminal proceedings?

Q62 Should the courts be able to take interlocutory applications and appeals into account as proceedings that have been instituted when considering applications under section 88B?


Q63 Should the meaning of “vexatious” be clarified in section 88B? If so, how?

Q64 Should section 88B provide a time limit for the application of an order?

Q65 Should the section provide for the revocation, variation or setting aside of orders made under the section?

Q66 Should appeals against orders made under section 88B be as of right, or require leave?

Q67 What approach should be taken to service and determination of applications for leave to institute or continue proceedings where an order has been made under section 88B?



Appendix 1

Draft Judicial Review (Statutory Powers) Procedure Bill

**Judicial Review
(Statutory Powers)
Procedure Bill**

Draft prepared by Parliamentary Counsel for the
Law Commission

Judicial Review (Statutory Powers) Procedure Bill

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cl 1	Judicial Review (Statutory Powers) Procedure Bill	
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The Parliament of New Zealand enacts as follows:

- 1 Title**
This Act is the Judicial Review (Statutory Powers) Procedure Act **2012**.
- 2 Commencement**
This Act comes into force on **[date]**.

**Part 1
Preliminary provisions**

- 3 Purpose of this Act**
 - (1) The purpose of this Act is to re-enact Part 1 of the Judicature Amendment Act 1972, which sets out procedural provisions for the judicial review of—
 - (a) the exercise of a statutory power;
 - (b) the failure to exercise a statutory power.
 - (2) The reorganisation of those provisions and the changes made to their style and language are not intended to alter the interpretation or effect of those provisions as they appear in this Act.
- 4 Interpretation**
In this Act, unless the context otherwise requires,—
applicant means a person who has filed an application
application for judicial review and **application** mean an application for judicial review in relation to the exercise, refusal to exercise, or proposed or purported exercise, by any person of a statutory power
court means the High Court of New Zealand
decision includes a determination or an order
Judge means a Judge of the High Court

**Judicial Review (Statutory Powers)
Procedure Bill**

Part 1 cl 5

licence includes any permit, warrant, authorisation, registration, certificate, approval, or similar form of authority required by law

person, in relation to the exercise, refusal to exercise, or proposed or purported exercise by any person of a statutory power of decision, includes—

- (a) the District Court:
- (b) the Maori Land Court:
- (c) the Maori Appellate Court

presiding officer includes—

- (a) a Judge:
- (b) a Registrar

statutory power has the meaning given to it by **section 5**

statutory power of decision means a power or right conferred by or under any Act, or by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate, to make a decision deciding or prescribing or affecting—

- (a) the rights, powers, privileges, immunities, duties, or liabilities of any person; or
- (b) the eligibility of any person to receive, or to continue to receive, a benefit or licence, whether that person is legally entitled to it or not.

Compare: 1972 No 130 s 3

5 Meaning of statutory power

- (1) In this Act, **statutory power** means a power or right to do any of the things specified in **subsection (2)** that is conferred by or under—
 - (a) any Act; or
 - (b) the constitution or other instrument of incorporation, rules, or bylaws of any body corporate.
- (2) The things referred to in **subsection (1)** are—
 - (a) to make any regulation, rule, bylaw, or order, or to give any notice or direction that has effect as subordinate legislation; or
 - (b) to exercise a statutory power of decision; or

- (c) to require any person to do or refrain from doing anything that, but for such requirement, the person would not be required by law to do or refrain from doing; or
- (d) to do anything that would, but for such power or right, be a breach of the legal rights of any person; or
- (e) to make any investigation or inquiry into the rights, powers, privileges, immunities, duties, or liabilities of any person.

Compare: 1972 No 130 s 3

6 Act binds the Crown

- (1) This Act binds the Crown.
- (2) However, in its application to the Crown, this Act must be read subject to the Crown Proceedings Act 1950.

Compare: 1972 No 130 ss 13, 14(2)

7 This Act subject to certain provisions of Employment Relations Act 2000

- (1) This Act is subject to the provisions of the Employment Relations Act 2000 relating to the jurisdiction of the Employment Court and High Court in respect of—
 - (a) applications for review; or
 - (b) proceedings for a writ or order of, or in the nature of, mandamus, prohibition, certiorari; or
 - (c) proceedings for a declaration or injunction against any body constituted by, or any person acting under, the Employment Relations Act 2000.
- (2) In particular, this Act is subject to the following provisions of the Employment Relations Act 2000:
 - (a) section 187(1)(h), (i), and (j) (which confers on the Employment Court exclusive jurisdiction to hear and determine certain proceedings and applications);
 - (b) section 213 (which confers on the Court of Appeal exclusive jurisdiction in relation to the review of any proceedings before the Employment Court).

Compare: 1972 No 130 s 3A

**Judicial Review (Statutory Powers)
Procedure Bill**

Part 2 cl 9

**Part 2
Judicial review**

8 Application for judicial review

- (1) An application must be commenced by filing in the High Court—
 - (a) a statement of claim; and
 - (b) a notice of proceeding.
- (2) **Part 5 of the High Court Rules** applies in relation to the commencement and filing of an application as if—
 - (a) references to a plaintiff were references to an applicant; and
 - (b) references to a defendant were references to a respondent.
- (3) The statement of claim need not state that any of the following relief is sought:
 - (a) mandamus;
 - (b) prohibition;
 - (c) certiorari;
 - (d) declaration;
 - (e) injunction.

Compare: 1972 No 130 s 9(1), (3), (7); 1908 No 89 Schedule 2 r 30.3(1)

9 Respondents

- (1) The following persons must be named as a respondent to an application:
 - (a) the person whose act or omission is the subject matter of the application; and
 - (b) if the application relates to any decision made in proceedings, every party to those proceedings.
- (2) If the act or omission is that of 2 or more persons acting together under a collective title, then those persons by their collective title must be named as respondents to the application.
- (3) For the purposes of **subsection (1)(a)**, where the act or omission is that of a presiding officer of any court or tribunal, that court or tribunal, and not the presiding officer, must be named as the respondent to the application.

- (4) **Subsection (1)(b)** is subject to any direction made by a Judge under **section 14**.

Compare: 1972 No 130 s 9(4), (4A)(a), (5)

10 Respondent to file statement of defence

- (1) A respondent to an application must file a statement of defence unless otherwise directed by a Judge under **section 14**.
- (2) Where, in accordance with **section 9(3)**, a court or tribunal is named as a respondent to an application, the presiding officer of that court or tribunal whose act or omission is the subject matter of the application may file a statement of defence on behalf of the court or tribunal.

Compare: 1972 No 130 s 9(4A)(b), (6)

11 Proceedings for mandamus, prohibition, or certiorari must be treated as application for review

- (1) This section applies if, in relation to the exercise, refusal to exercise, or proposed or purported exercise of a statutory power, proceedings are commenced for a writ or an order of or in the nature of—
- (a) mandamus; or
 - (b) prohibition; or
 - (c) certiorari.

- (2) If this section applies, the proceedings must be treated and disposed of as if they were an application for judicial review.

Compare: 1972 No 130 s 6

12 Proceedings for declaration or injunction may be treated as application for review

- (1) This section applies if—
- (a) proceedings are commenced for a declaration or an injunction, or both, with or without a claim for other relief; and
 - (b) the exercise, refusal to exercise, or proposed or purported exercise of a statutory power is an issue in the proceedings.
- (2) If this section applies, the court on the application of any party may, if it considers it appropriate, direct that the proceedings

**Judicial Review (Statutory Powers)
Procedure Bill**

Part 2 cl 14

be treated and disposed of, so far as they relate to the issue in **subsection (1)(b)**, as if they were an application for judicial review.

Compare: 1972 No 130 s 7

13 Convening of case management conference

- (1) A Judge may, at any time, convene a case management conference (a **conference**) for—
 - (a) the parties; or
 - (b) the intended parties; or
 - (c) the lawyers for the parties or intended parties.
- (2) The purpose of a conference is to ensure that—
 - (a) any application or intended application may be determined in a convenient and expeditious manner; and
 - (b) all matters in dispute may be effectively and completely determined.
- (3) A conference may be convened by a Judge on the Judge's own initiative or on the application of 1 or more parties or intended parties.
- (4) A conference may be convened on such terms as the Judge thinks fit.
- (5) At a conference, the presiding Judge may make any of the orders and directions specified in **section 14**.

Compare: 1972 No 130 s 10(1)

14 Orders and directions

- (1) A Judge may make any of the orders and directions specified in **subsection (2)**—
 - (a) at a case management conference convened under **section 13**; or
 - (b) at any other time before the hearing of the application.
- (2) The orders and directions referred to in **subsection (1)** are orders and directions to—
 - (a) settle the issues to be determined at the hearing;
 - (b) direct that—
 - (i) a person be named, or not named, as a respondent; or
 - (ii) the name of any party be joined or struck out:

- (c) direct which parties are to be served:
- (d) direct a person to file a statement of defence within a specified time:
- (e) require a party to make an admission in respect of a question of fact and, if the party refuses or fails to make an admission of that kind, require that the party (subject to the direction of the Judge hearing the application) bear the costs of proving that question at the hearing:
- (f) fix a time by which any affidavits or other documents must be filed:
- (g) require the provision of further or better particulars of—
 - (i) any facts; or
 - (ii) the grounds for relief; or
 - (iii) the relief sought; or
 - (iv) the grounds of defence; or
 - (v) any other circumstances connected with the application:
- (h) require a party to make discovery, produce documents, or both:
- (i) permit a party to administer interrogatories:
- (j) in the case of an application for review of a decision made in the exercise of a statutory power of decision, determine whether the whole or any part of the record of the proceedings in which the decision was made should be filed, and give any directions as to its filing:
- (k) exercise any powers of direction or appointment vested in the court or a Judge by the **High Court Rules** in respect of originating applications:
- (l) fix a time and a place for the hearing of the application:
- (m) give any consequential directions the Judge considers necessary.

Compare: 1972 No 130 s 10(2), (3)

15 Interim orders

- (1) At any time before the final determination of an application, the court may, on the application of a party, make an interim order of the kind specified in **subsection (2)** if, in its opinion, it is necessary to do so to preserve the position of the applicant.

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Procedure Bill**

Part 2 cl 16

- (2) The interim orders referred to in **subsection (1)** are interim orders to—
 - (a) prohibit a respondent from taking any further action that is, or would be, consequential on the exercise of the statutory power:
 - (b) prohibit or stay any proceedings, civil or criminal, in connection with any matter to which the application relates:
 - (c) declare any licence that has been revoked or suspended in the exercise of the statutory power, or that will expire by the passing of time before the final determination of the application, to continue and, where necessary, to be deemed to have continued in force.
- (3) However, if the Crown is a respondent—
 - (a) the court may not make an order against the Crown under **subsection (2)(a) or (b)**; but
 - (b) the court may, instead, make an interim order to—
 - (i) declare that the Crown ought not to take any further action that is, or would be, consequential on the exercise of the statutory power:
 - (ii) declare that the Crown ought not to institute or continue any proceedings, civil or criminal, in connection with any matter to which the application relates.
- (4) An order under **subsection (2) or (3)** may—
 - (a) be made subject to such terms and conditions as the court thinks fit; and
 - (b) be expressed to continue in force until the application is finally determined or until such other date, or the happening of such other event, as the court may specify.

Compare: 1972 No 130 s 8

16 Relief that court may grant

- (1) The High Court may, by order, grant an applicant any relief that the applicant would be entitled to in proceedings for—
 - (a) a writ or an order of, or in the nature of,—
 - (i) mandamus; or
 - (ii) prohibition; or
 - (iii) certiorari; or

- (b) a declaration or an injunction.
- (2) If an applicant is entitled to an order declaring that a decision made in the exercise of a statutory power of decision is unauthorised or otherwise invalid, the court may, instead of making that order, set aside the decision.
- (3) This section applies even if—
 - (a) the applicant has a right of appeal in relation to the subject matter of the application:
 - (b) the person who has exercised, or is proposing to exercise, a statutory power to which the application relates was not under any duty to act judicially.

Compare: 1972 No 130 s 4(1)–(2A)

17 Court may direct reconsideration of matter to which statutory power of decision relates

- (1) This section applies if the court is satisfied that an applicant who has filed an application for judicial review in relation to the exercise, refusal to exercise, or purported exercise of a statutory power of decision is entitled to relief under **section 16**.
- (2) The court may make a direction under **subsection (3)** in addition to or instead of granting any relief under **section 16**.
- (3) The court may direct any person whose act or omission is the subject matter of the application to reconsider and determine, either generally or in respect of any specified matters, the whole or any part of any matter to which the application relates.
- (4) In giving a direction to any person under **subsection (3)**, the court must—
 - (a) advise the person of the reasons for the direction; and
 - (b) give the person such directions as it thinks just as to the reconsideration or otherwise of the whole or any part of the matter that is referred back for reconsideration.
- (5) If the court makes a direction under **subsection (3)**, it may make an interim order under **section 15**, and that section applies so far as it is applicable and with all necessary modifications.

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- (6) If a matter is referred back to any person under **subsection (3)**,—
- (a) the act or omission that is to be reconsidered continues to have effect (subject to any interim order) unless and until it is revoked or amended by that person;
 - (b) the person has jurisdiction to reconsider and determine the matter in accordance with the court's directions despite anything in any other enactment;
 - (c) the person must have regard to—
 - (i) the court's reasons for giving the direction; and
 - (ii) the court's directions.

Compare: 1972 No 130 s 4(5)–(6)

18 Discretion of court to refuse to grant relief

- (1) The court may refuse to grant relief to an applicant on any ground if, before 1 January 1973, the court had discretion to refuse to grant relief on that ground in any of the proceedings specified in **section 16(1)**.
- (2) However, the court may not exercise its discretion in **subsection (1)** to refuse to grant relief on the ground that the relief sought in any of the proceedings specified in **section 16(1)** should have been sought in any other of those proceedings.

Compare: 1972 No 130 s 4(3), (4)

19 Discretion of court to refuse to grant relief for defect in form or technical irregularity

- (1) This section applies if, in any application for judicial review in relation to the exercise, refusal to exercise, or purported exercise of a statutory power of decision,—
- (a) the sole ground of relief established is a defect in form or a technical irregularity; and
 - (b) the court finds that no substantial wrong or miscarriage of justice has occurred.
- (2) If this section applies, the court may—
- (a) refuse to grant relief; and
 - (b) where a decision has already been made, make an order validating the decision despite the defect or irregularity.

- (3) An order made under **subsection (2)(b)** has effect from such time and on such terms as the court thinks fit.

Compare: 1972 No 130 s 5

20 Appeals

- (1) Any party who is dissatisfied with any interim or final order made in respect of an application may appeal to the Court of Appeal.

- (2) **Section 00 of the Courts Act 2012** (*section 66 of the Judicature Act 1908*) applies to an appeal made under **subsection (1)**.

Compare: 1972 No 130 s 11

21 References in enactments

Every reference in an enactment to proceedings for a writ or an order of or in the nature of mandamus, prohibition, or certiorari, or for a declaration or an injunction, must, unless the context otherwise requires, be read as including a reference to an application for review.

Compare: 1972 No 130 s 16

Part 3

Repeal and transitional provisions

22 Repeal

The Judicature Amendment Act 1972 (1972 No 130) is repealed.

23 Transitional provisions

- (1) This section applies to all judicial review proceedings commenced under the Judicature Amendment Act 1972 that are pending or in progress immediately before the commencement date.
- (2) Despite the repeal of the Judicature Amendment Act 1972, judicial review proceedings to which this section applies are to be continued and completed under that Act as if that Act had not been repealed.
- (3) If any question arises as to the continuation or completion of a proceeding under **subsection (2)**, the court may, either on the

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application of a party to the proceeding or on its own initiative, determine the question and give any directions that it thinks fit in the interests of justice.

- (4) In this section, **commencement date** means the date on which this Act comes into force.



Appendix 2

Draft Courts Bill – Judges

**Courts Bill
(excerpt)**

Draft prepared by Parliamentary Counsel for the
Law Commission

Courts Bill

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The Parliament of New Zealand enacts as follows:

**Part 00
Judges**

1 Purpose of this Part

The purpose of this Part is to provide for the appointment of the New Zealand Judiciary, which is a separate and independent branch of government with the role of upholding the rule of law.

2 Interpretation

In this Part,—

acting Judge means a Judge appointed an acting Judge of a court under **section 22**

court means—

- (a) the Supreme Court;
- (b) the Court of Appeal;
- (c) the High Court;
- (d) the District Court

part-time Judge means a permanent Judge of a court who is authorised under **section 19** to sit on a part-time basis

permanent Judge means a Judge of a court who is not an acting Judge.

Head Judges

3 Head of New Zealand Judiciary

The Chief Justice is head of the New Zealand Judiciary.

Compare: 2003 No 53 s 18(1)

4 Head of Supreme Court

- (1) The Chief Justice is head of the Supreme Court.
- (2) The Chief Justice—

- (a) must ensure the orderly and prompt conduct of the Supreme Court's business; and
- (b) may make all necessary arrangements for—
 - (i) the sittings of the Supreme Court; and
 - (ii) the conduct of the Supreme Court's business.

5 Head of Court of Appeal

- (1) The President of the Court of Appeal is head of the Court of Appeal and is responsible to the Chief Justice for ensuring the orderly and prompt conduct of the Court of Appeal's business.
- (2) The President of the Court of Appeal may make all necessary arrangements for—
 - (a) the sittings of the Court of Appeal; and
 - (b) the conduct of the Court of Appeal's business.

6 Head of High Court

- (1) The Chief High Court Judge is head of the High Court and is responsible to the Chief Justice for ensuring the orderly and prompt conduct of the High Court's business.
- (2) The Chief High Court Judge may make all necessary arrangements for—
 - (a) the sittings of the High Court; and
 - (b) the conduct of the High Court's business.

Compare: 1908 No 89 s 4B

7 Head of District Court

- (1) The Chief District Court Judge is head of the District Court and every division of that court.
- (2) The Chief District Court Judge—
 - (a) must ensure the orderly and prompt conduct of the District Court's business; and
 - (b) may, after consultation with the principal Judge of every division of the District Court, make all necessary arrangements for—
 - (i) the sittings of the District Court; and
 - (ii) the conduct of the District Court's business.

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Part 00 cl 10

*Eligibility for judicial appointment***8 General eligibility criteria**

- (1) A person may be appointed a Judge only if that person has held a practising certificate for at least 7 years as—
 - (a) a barrister;
 - (b) a solicitor;
 - (c) a barrister and solicitor.
- (2) A person who does not satisfy the requirement in **subsection (1)** may nevertheless be appointed a District Court Judge if that person—
 - (a) has been admitted, or been qualified to be admitted, as a barrister and solicitor of the High Court for at least 7 years; and
 - (b) has been continuously employed by the Ministry of Justice for at least 10 years; and
 - (c) has, during the period specified in **paragraph (b)**, been employed as a Registrar of a court for at least 7 years.

Compare: 1908 No 89 s 6; 1947 No 16 s 5(3)

9 Additional eligibility criteria for appointment as Supreme Court Judge

- (1) A person may be appointed a Judge of the Supreme Court only if that person—
 - (a) is a Judge of the High Court or the Court of Appeal; or
 - (b) is appointed a Judge of the High Court or the Court of Appeal at the same time as being appointed a Judge of the Supreme Court.
- (2) The requirements in **subsection (1)** are additional to the general eligibility criteria in **section 8**.

Compare: 2003 No 53 s 20(1)

10 Additional eligibility criteria for appointment as Court of Appeal Judge

- (1) A person may be appointed a Judge of the Court of Appeal only if that person—
 - (a) is a Judge of the High Court; or
 - (b) is appointed a Judge of the High Court at the same time as being appointed a Judge of the Court of Appeal.

- (2) The requirements in **subsection (1)** are additional to the general eligibility criteria in **section 8**.

Compare: 1908 No 89 s 57(3)

11 Additional eligibility criteria for appointment as Chief High Court Judge

- (1) A person may be appointed the Chief High Court Judge only if that person—
- (a) is a High Court Judge; but
 - (b) is not a Supreme Court Judge or Court of Appeal Judge.
- (2) The requirements in **subsection (1)** are additional to the general eligibility criteria in **section 8**.

Compare: 1908 No 89 s 4A(1)

Appointments

12 Judges appointed by Governor-General

- (1) The Chief Justice is appointed by the Governor-General on the advice of the Prime Minister.
- (2) Every other Judge is appointed by the Governor-General on the advice of the Attorney-General.

13 Requirements before Attorney-General advises Governor-General on appointment of Judge

- (1) Before advising the Governor-General on the appointment of a Judge under **section 12(2)**, the Attorney-General must—
- (a) be satisfied of the matters set out in **section 14**; and
 - (b) undertake the consultation required by **section 15**.
- (2) **Subsection (1)** does not apply if the person to be appointed a Judge—
- (a) already holds a judicial appointment; or
 - (b) has previously held a judicial appointment.

14 Attorney-General to be satisfied of certain matters before advising on appointment of Judge

The matters referred to in **section 13(1)(a)** of which the Attorney-General must be satisfied before advising the Governor-General on an appointment are—

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- (a) that the person to be appointed a Judge has been selected on merit, having regard to that person's—
 - (i) personal qualities (including integrity, sound judgement, and objectivity); and
 - (ii) legal abilities (including relevant expertise and experience and appropriate knowledge of the law and its underlying principles); and
 - (iii) social awareness and sensitivities to the diverse communities in New Zealand; and
- (b) that regard has been given to the desirability of the judiciary reflecting gender and ethnic diversity.

15 Attorney-General to consult certain persons before advising on appointment of Judge

- (1) Before advising the Governor-General on the appointment of a Supreme Court Judge, the Attorney-General must consult—
 - (a) the Chief Justice; and
 - (b) the persons specified in **subsection (5)**; and
 - (c) any other person the Attorney-General considers appropriate.
- (2) Before advising the Governor-General on the appointment of a Court of Appeal Judge, the Attorney-General must consult—
 - (a) the Chief Justice; and
 - (b) the President of the Court of Appeal; and
 - (c) the persons specified in **subsection (5)**; and
 - (d) any other person the Attorney-General considers appropriate.
- (3) Before advising the Governor-General on the appointment of a High Court Judge, the Attorney-General must consult—
 - (a) the Chief Justice; and
 - (b) the Chief High Court Judge; and
 - (c) the persons specified in **subsection (5)**; and
 - (d) any other person the Attorney-General considers appropriate.
- (4) Before advising the Governor-General on the appointment of a District Court Judge, the Attorney-General must consult—
 - (a) the Chief District Court Judge; and
 - (b) the persons specified in **subsection (5)**; and

- (c) any other person the Attorney-General considers appropriate.
- (5) The persons referred to in **subsections (1)(b), (2)(c), (3)(c), and (4)(b)** are—
 - (a) the Solicitor-General; and
 - (b) the President of the New Zealand Law Society; and
 - (c) the President of the New Zealand Bar Association.

16 Judges appointed as permanent Judges

- (1) A Judge is appointed a permanent Judge of a court.
- (2) This section is subject to—
 - (a) **section 19**; and
 - (b) **section 22**.

Compare: 1908 No 89 ss 4C(1), 57A(1); 1947 No 16 s 5AA(1)

17 Supreme Court Judge continues as Judge of High Court but no other court

- (1) When appointed a Judge of the Supreme Court, that Judge—
 - (a) continues to be a Judge of the High Court and may exercise any of the powers of a Judge of the High Court; but
 - (b) vacates office as Judge of any other court.
- (2) A Judge of the Supreme Court who vacates office as a Judge of a court under **subsection (1)(b)** may nevertheless continue in office to determine, give judgment in, or otherwise complete, a proceeding heard by the Judge (either alone or with others) when he or she sat in that court.

Compare: 2003 No 53 ss 20(2), 21

18 Court of Appeal Judge continues as Judge of High Court

When appointed a Judge of the Court of Appeal, that Judge continues to be a Judge of the High Court and may sit as, or exercise the powers of, a Judge of the High Court.

Compare: 1908 No 89 s 57(4)

*Part-time Judges***19 Attorney-General may authorise permanent Judges to sit part-time**

- (1) A permanent Judge, other than a Supreme Court Judge, may seek the authorisation of the Attorney-General to sit on a part-time basis for a specified period.
- (2) The Attorney-General may grant an authorisation sought by a Judge under **subsection (1)** only with the agreement of—
 - (a) the President of the Court of Appeal, if the Judge is a Court of Appeal Judge;
 - (b) the Chief High Court Judge, if the Judge is a High Court Judge but not a Court of Appeal Judge;
 - (c) the Chief District Court Judge, if the Judge is a District Court Judge.
- (3) In considering whether to agree under **subsection (2)** to the granting of an authorisation, the President of the Court of Appeal, or the Chief High Court Judge, or the Chief District Court Judge, as the case may be, must have regard to the need to ensure the orderly and prompt conduct of court business.
- (4) An authorisation may take effect from—
 - (a) the date the Judge commences office; or
 - (b) any other date.
- (5) A Judge may be authorised to sit part-time for a specified period on more than 1 occasion.
- (6) A Judge authorised to sit part-time for a specified period resumes sitting on a full-time basis at the end of that period.

Compare: 1908 No 89 ss 4C(1)–(6), 57A(2)–(6); 1947 No 16 s 5AA(2), (3), (4), (6)

*Acting Judges***20 Acting Chief Justice**

- (1) While the office of Chief Justice is vacant, or the Chief Justice is outside New Zealand, the Judge of the Supreme Court who is next senior after the Chief Justice and who is available is authorised to act as Chief Justice.
- (2) If because of illness or a reason other than absence from New Zealand the Chief Justice is unable to perform the duties of that office, the Governor-General may authorise the Judge of the

Supreme Court who is next senior after the Chief Justice and who is available to act as Chief Justice until the Chief Justice resumes those duties.

- (3) While authorised to act as Chief Justice, a senior Judge of the Supreme Court is empowered to—
 - (a) perform the duties of the Chief Justice; and
 - (b) exercise any power of the Chief Justice.
- (4) This section does not affect clause 12 of the Letters Patent Constituting the Office of Governor-General of New Zealand.
Compare: 2003 No 53 s 19(1)–(3)

21 Acting President of Court of Appeal, acting Chief High Court Judge, and acting Chief District Court Judge

- (1) This section applies during any period during which—
 - (a) the office of the President of the Court of Appeal is vacant, or the President of the Court of Appeal is—
 - (i) absent from New Zealand; or
 - (ii) unable for any other reason (including illness) to perform the duties of that office:
 - (b) the office of the Chief High Court Judge is vacant, or the Chief High Court Judge is—
 - (i) absent from New Zealand; or
 - (ii) unable for any other reason (including illness) to perform the duties of that office:
 - (c) the office of the Chief District Court Judge is vacant, or the Chief District Court Judge is—
 - (i) absent from New Zealand; or
 - (ii) unable for any reason (including illness) to perform the duties of that office.
- (2) If **subsection (1)(a)** applies, the Judge of the Court of Appeal who is next senior after the President of the Court of Appeal and who is available is authorised to act in place of the President of the Court of Appeal.
- (3) If **subsection (1)(b)** applies, the Judge of the High Court who is next senior after the Chief High Court Judge and who is available is authorised to act in place of the Chief High Court Judge.

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- (4) If **subsection (1)(c)** applies, the Governor-General may, on the advice of the Attorney-General, appoint a District Court Judge to act in place of the Chief District Court Judge.
- (5) During the period in which a Judge acts under any of **subsections (2) to (4)**, the Judge is empowered to—
 - (a) perform the functions and duties of the judicial office in which the Judge is acting; and
 - (b) exercise all the powers of the judicial office in which the Judge is acting.

Compare: 1908 No 89 ss 4A(4), (5), 57(7); 1947 No 16 s 5A(4)

22 Appointment of acting Judges

- (1) The Governor-General may, on the advice of the Attorney-General, appoint 1 or more acting Judges of a court.
- (2) Only former Judges under the age of 75 years are eligible for appointment under **subsection (1)**.
- (3) An appointment under **subsection (1)** may be made during the illness or absence of any Judge, or for any other temporary purpose.
- (4) In this section, **former Judge** means,—
 - (a) in respect of an appointment of an acting Supreme Court Judge,—
 - (i) a retired Supreme Court Judge; or
 - (ii) a retired Court of Appeal Judge; and
 - (b) in respect of an appointment of an acting Judge of any other court, a Judge who has—
 - (i) retired from holding office as a Judge of that court; or
 - (ii) resigned from holding office as a Judge of that court.

Compare: 1908 No 89 ss 11(1), 11A(1); 2003 No 53 s 23(1), (2)

23 Requirements before Attorney-General gives advice on appointment of acting Judge

- (1) Before advising the Governor-General to make an appointment under **section 22**, the Attorney-General must have received a certificate certifying that the appointment is necessary

for the proper conduct of the court in respect of which the appointment is to be made.

- (2) A certificate required by **subsection (1)** must be signed—
- (a) by the Chief Justice in the case of an appointment of—
 - (i) an acting Supreme Court Judge; or
 - (ii) an acting Court of Appeal Judge; or
 - (iii) an acting High Court Judge; or
 - (b) by the Chief District Court Judge in the case of an appointment of—
 - (i) an acting District Court Judge; or
 - (ii) an acting Judge of any division of the District Court.

Compare: 1908 No 89 s 11B; 2003 No 53 s 23(6)

24 Term of appointment of acting Judges

- (1) An appointment under **section 22** must be for a specified term that—
- (a) is not more than the time until the Judge will reach the age of 75 years; and
 - (b) in any case, is not more than 2 years.
- (2) When an acting Judge's term of appointment ends, the acting Judge may at any time be reappointed for 1 or more further terms.
- (3) However, an acting Judge's term of appointment may not exceed 5 years in aggregate.

Compare: 1908 No 89 s 11(2)

25 Acting Judge may only act to extent authorised

- (1) An acting Judge appointed under **section 22** may only act to the extent authorised in accordance with **subsections (2) to (5)**.
- (2) An acting Supreme Court Judge may be authorised by the Chief Justice to—
- (a) hear and determine proceedings within a specified period; or
 - (b) hear and determine specified proceedings.
- (3) An acting Court of Appeal Judge may be authorised by the President of the Court of Appeal to—

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- (a) hear and determine proceedings within a specified period; or
 - (b) hear and determine specified proceedings.
- (4) An acting High Court Judge may be authorised by the Chief High Court Judge to—
 - (a) act during 1 or more specified periods; and
 - (b) act in 1 or more specified places.
- (5) An acting District Court Judge may be authorised by the Chief District Court Judge to—
 - (a) act during 1 or more specified periods; and
 - (b) act in 1 or more specified places.
- (6) An acting Judge of any division of the District Court may be authorised by the Chief District Court Judge to—
 - (a) act during 1 or more specified periods; and
 - (b) act in 1 or more specified places.

Compare: 1908 No 89 s 11A(2); 1947 No 16 s 10A(4); 2003 No 53 s 23(3), (4)

26 Jurisdiction, powers, protections, etc, of acting Judges

An acting Judge, while acting to the extent authorised by **section 25** as a member of a court, has the jurisdiction, powers, protections, privileges, and immunities of a Judge of that court.

Compare: 1908 No 89 s 11A(4); 1947 No 16 s 10A(5); 2003 No 53 ss 19(3), 23(7)

27 Conclusive proof of acting Judge's authority

- (1) The fact that an acting Judge does the following is conclusive proof of the Judge's authority to do so:
 - (a) performs any function or duty, or exercises any power, in reliance on **section 20(3)** or **21(5)**;
 - (b) acts to the extent authorised under **section 25** as a member of a court.
- (2) No action of the Judge, and no decision of the court, may be questioned on the ground that the occasion for the Judge to perform any function or duty or to exercise any power or act as a member of the court had not arisen or had ceased.

Compare: 1908 No 89 s 4A(6); 2003 No 53 ss 19(4), 23(9)

*Seniority of Judges***28 Chief Justice most senior Judge**

The Chief Justice is senior to all other Judges.

Compare: 2003 No 53 s 18(1)

29 Seniority of Supreme Court Judges

- (1) Supreme Court Judges are senior to—
 - (a) Court of Appeal Judges; and
 - (b) High Court Judges who are not Supreme Court Judges.
- (2) Supreme Court Judges (other than the Chief Justice) are senior to each other in order of date of appointment.
- (3) If 2 or more Supreme Court Judges (other than the Chief Justice) have the same date of appointment, then seniority among those Judges is determined as follows:
 - (a) Judges who have been Court of Appeal Judges are senior to Judges who have not been Court of Appeal Judges:
 - (b) Judges who have been Court of Appeal Judges have among themselves the seniority they would have if those Judges were still Court of Appeal Judges:
 - (c) Judges who have not been Court of Appeal Judges but have previously been High Court Judges have seniority among themselves according to their seniority as High Court Judges:
 - (d) Judges who have not previously been High Court Judges but have previously held other judicial office in New Zealand are senior to Judges who have not previously held judicial office in New Zealand.

Compare: 2003 No 53 s 18(2), (3), (4)

30 Seniority of Court of Appeal Judges

- (1) Court of Appeal Judges are senior to High Court Judges.
- (2) The President of the Court of Appeal is senior to all other Court of Appeal Judges.
- (3) Court of Appeal Judges (other than the President) are senior to each other in order of date of appointment.
- (4) If 2 or more Court of Appeal Judges (other than the President) have the same date of appointment, then seniority among those

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Judges is determined according to their seniority as High Court Judges.

Compare: 1908 No 89 s 57(6)–(6C)

31 Seniority of High Court Judges

- (1) High Court Judges are senior to District Court Judges.
- (2) High Court Judges who are not Supreme Court Judges or Court of Appeal Judges have seniority among themselves as follows:
 - (a) the Chief High Court Judge is senior to all the other Judges:
 - (b) the other Judges are senior to each other in order of appointment:
 - (c) 2 or more Judges having the same date of appointment—
 - (i) have seniority according to the precedence assigned to them by the Governor-General on appointment; or
 - (ii) if no precedence was assigned to them, have seniority according to the order in which they took the judicial oath.
- (3) To avoid doubt, a Court of Appeal Judge who resigns from that office without resigning as a High Court Judge has, as a High Court Judge, the seniority that he or she would have had if he or she had not been appointed a Court of Appeal Judge.

Compare: 1908 No 89 ss 4(3), 57(6D)

32 Chief District Court Judge most senior District Court Judge

The Chief District Court Judge is senior to all other District Court Judges.

33 Permanent Judges senior to acting Judges

A permanent Judge of a court is senior to an acting Judge of the same court.

Compare: 1908 No 89 s 4(3A); 2003 No 53 s 18(5)

34 Seniority of acting Judges

Acting Judges of a court have among themselves the seniority they would have if they were permanent Judges of that court.

*Tenure of office***35 Tenure of office of Supreme Court Judges, Court of Appeal Judges, and High Court Judges**

(1) This section applies to—

- (a) Supreme Court Judges; and
- (b) Court of Appeal Judges; and
- (c) High Court Judges (other than the Chief High Court Judge).

(2) A Judge continues to hold office until the earliest of the following:

- (a) the Judge ceases to hold office as a High Court Judge;
- (b) the Judge resigns from office;
- (c) the Judge retires from office;
- (d) the Judge is removed from office.

Compare: 1908 No 89 s 57(5); 2003 No 53 s 22

36 Tenure of office of Chief High Court Judge

The Chief High Court Judge continues to hold that office until the earliest of the following:

- (a) the Judge is appointed as a Supreme Court Judge;
- (b) the Judge is appointed as a Court of Appeal Judge;
- (c) the Judge resigns from office as Chief High Court Judge;
- (d) the Judge ceases to hold office as a High Court Judge;
- (e) the Judge retires;
- (f) the Judge is removed from office.

Compare: 1908 No 89 s 4A(2)

37 Tenure of office of Chief District Court Judge

The Chief District Court Judge continues to hold that office until ceasing to hold office as a District Court Judge.

Compare: 1947 No 16 s 5A(2)

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38 Tenure of office of District Court Judges

A District Court Judge continues to hold office until the earliest of the following:

- (a) the Judge resigns from office:
- (b) the Judge retires from office:
- (c) the Judge is removed from office.

39 Resignation

A Judge may resign from office at any time by written notice to the Attorney-General.

Compare: 2003 No 53 s 23(10)

40 Governor-General must approve certain resignations

The prior approval of the Governor-General is required if—

- (a) the Chief Justice proposes to resign from that office without resigning from office as a Supreme Court Judge or High Court Judge:
- (b) a Court of Appeal Judge (including the President of the Court of Appeal) proposes to resign from office without resigning from office as a High Court Judge:
- (c) the Chief High Court Judge proposes to resign from that office without resigning from office as a High Court Judge:
- (d) the Chief District Court Judge proposes to resign from that office without resigning office from as a District Court Judge.

Compare: 1908 No 89 ss 4A(3), 57(5); 1947 No 16 s 5A(3)

41 Judges to retire at 70 years

- (1) Every Judge must retire on attaining the age of 70 years.
- (2) This section does not apply to a former Judge appointed under **section 22** as an acting Judge.

Compare: 1908 No 89 s 13; 1947 No 16 s 7(2)

42 Removal of Judge from office

- (1) A High Court Judge may be removed from office only in accordance with section 23 of the Constitution Act 1986.

- (2) A District Court Judge may be removed from office only by the Governor-General on the advice of the Attorney-General.
- (3) The removal of a Judge is initiated in accordance with sections 33 and 34 of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004.

Compare: 1947 No 16 s 7(1), (1A)

Salaries and allowances

43 Salaries and allowances of permanent Judges

- (1) This section applies to permanent Judges.
- (2) Judges must be paid, out of public money, without further appropriation than this section,—
 - (a) salaries at such rates as the Remuneration Authority from time to time determines; and
 - (b) such allowances as the Remuneration Authority from time to time determines; and
 - (c) such additional allowances, being travelling allowances or other incidental or minor allowances, as the Governor-General may from time to time determine.

Compare: 1908 No 89 s 9A(1); 1947 No 16 s 6(1)

44 Salaries and allowances of part-time Judges

The salary and allowances payable for a period during which a Judge of a court acts on a part-time basis must be calculated and paid as a pro rata proportion of the salary and allowances for a permanent Judge of that court (other than the head of that court).

Compare: 1908 No 89 s 9A(4); 1947 No 16 s 6(2A)

45 Salaries and allowances of acting Judges

An acting Judge, while acting to the extent authorised under **section 25** as a member of a court, but not otherwise, must be paid—

- (a) a salary at the rate for the time being payable to a permanent Judge of that court (other than the head of that court); and

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- (b) the allowances referred to in **section 43(2)(c)** payable to a Judge of that court (other than the head of that court).

Compare: 1908 No 89 ss 11(3), 11A(3); 2003 No 53 s 23(8)

46 Higher duties allowance

- (1) In addition to the payments specified in **sections 43 to 45**, a higher duties allowance calculated in accordance with **subsection (2)** is—

- (a) payable to a High Court Judge who—
- (i) is, or was, under **section 00 of the Courts Act 2012** (*sections 58A to 58C and 58F of the Judicature Act 1908*) serving as a member of—
 - (A) a criminal or civil division of the Court of Appeal; or
 - (B) the full Court of Appeal; but
 - (ii) is not, or was not, a permanent Judge of the Court of Appeal; and
- (b) payable only in respect of the periods of the Judge's service as a member of the division or full Court of Appeal.

- (2) The higher duties allowance is calculated at a rate expressed per day of service as a member of the division or full court in accordance with the following formula:

$$(a - b) \times c/d$$

where—

- a is the applicable yearly rate of salary determined by the Remuneration Authority to be payable to a permanent Judge
 - b is the applicable yearly rate of salary determined by the Remuneration Authority to be payable to a Judge who is not a permanent Judge
 - c is 0.0383561 (the standard payroll factor, which represents the proportion of an annual salary that is paid per fortnight)
 - d is 10 (the number of working days per fortnight).
- (3) In this section **permanent Judge of the Court of Appeal** means a Judge of the Court of Appeal holding office under

section 00 of the Courts Act 2012 (*section 57(2) of the Judicature Act 1908*).

Compare: 1908 No 89 s 9A(1A)

47 Reduction in salary and allowances of principal Judge in particular case

- (1) This section applies if a principal Judge of a division of the District Court ceases to hold the position of principal Judge but continues to hold office as a District Court Judge.
- (2) If this section applies, the salary and allowances of the Judge are reduced by the amount of any salary or allowances that the person received solely because of being the principal Judge.

Compare: 1947 No 16 s 6(2B)

48 Salary of Judges not to be diminished

- (1) The salary of a Judge must not be diminished during the continuance of the Judge's appointment.
- (2) For the purpose of **subsection (1)**, none of the following is a diminution of salary:
 - (a) the payment of a salary on a pro rata basis under **section 44**;
 - (b) the cessation of the payment of a higher duties allowance payable and calculated under **section 46**;
 - (c) the payment of reduced salary and allowances under **section 47**.

Compare: 1908 No 89 s 9A(5); 1947 No 16 s 6(2), (2C)

Restrictions

49 Judge not to undertake other employment or hold other office

- (1) A Judge must not undertake any other paid employment or hold any other office (whether paid or not) without the approval of the appropriate head of court.
- (2) An approval under **subsection (1)** may only be given if the appropriate head of court is satisfied that undertaking the employment or holding the office is compatible with the Judge's judicial office.
- (3) In this section, **appropriate head of court** means—

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- (a) the Chief Justice, if the Judge is a Supreme Court Judge;
- (b) the President of the Court of Appeal, if the Judge is a Court of Appeal Judge;
- (c) the Chief High Court Judge, if the Judge is a High Court Judge but not a Court of Appeal Judge;
- (d) the Chief District Court Judge, if the Judge is a District Court Judge.

Compare: 1908 No 89 s 4(2A); 1947 No 16 s 5(4)

50 Judge not to practise

A Judge must not practise as—

- (a) a barrister; or
- (b) a solicitor; or
- (c) a barrister and solicitor.

Compare: 1947 No 16 s 5(5)

51 Terms and conditions of appointment not to be changed without consent

No changes may be made to the terms and conditions of a Judge's appointment without the Judge's consent.

Compare: 1908 No 89 ss 4C(7), 57A(7); 1947 No 16 s 5AA(7)



Appendix 3

Draft Courts Bill – Contempt in the face of the court

**Courts Bill
(excerpt)**

Draft prepared by Parliamentary Counsel for the
Law Commission

Courts Bill

cl 00

00 Contempt of court

- (1) This section applies if any person—
 - (a) wilfully insults a judicial officer, or any Registrar, or any officer of the court, or any juror, or any witness, during his or her sitting or attendance in court, or in going to or returning from the court; or
 - (b) wilfully interrupts the proceedings of a court or otherwise misbehaves in court; or
 - (c) wilfully and without lawful excuse disobeys any order or direction of the court in the course of the hearing of any proceeding.
- (2) If this section applies,—
 - (a) any constable or officer of the court, with or without the assistance of any other person, may, by order of a judicial officer, take the person into custody and detain him or her until the rising of the court; and
 - (b) the judicial officer may, if he or she thinks fit, sentence the person to—
 - (i) imprisonment for a period not exceeding 3 months; or
 - (ii) a fine not exceeding \$1,000 for each offence.
- (3) Nothing in this section limits or affects any power or authority of a court to punish a person for any conduct that constitutes contempt of court in respect of which—
 - (a) this section does not apply; and
 - (b) the criminal law does not apply.

Compare: 2011 No 81 s 365



Appendix 4

Draft Courts Bill – Wasted costs

**Courts Bill
(excerpt)**

Draft prepared by Parliamentary Counsel for the
Law Commission

cl 00

Courts Bill

00 Liability of party's lawyer for costs in respect of procedural failure

(1) In this section,—

costs order means an order under **subsection (2)****procedural failure** means a failure, or refusal, to comply with a requirement imposed by or under—

- (a) this Act; or
- (b) any rules of court; or
- (c) any Act under which the proceeding is brought; or
- (d) any regulations or rules made under an Act of the kind specified in **paragraph (c)**

proceeding includes a proceeding on appeal.

- (2) A court may order a party's lawyer to pay a sum in respect of any procedural failure by that lawyer in the course of a proceeding if the court is satisfied that the failure is significant and there is no reasonable excuse for that failure.
- (3) The sum must be no more than is just and reasonable having regard to the costs incurred by—
 - (a) the court;
 - (b) the parties;
 - (c) any witnesses;
 - (d) any other person.
- (4) A costs order may be made—
 - (a) on the application of any party; or
 - (b) on the court's own initiative.
- (5) Before making a costs order, the court must give the lawyer against whom it is to be made a reasonable opportunity to be heard.
- (6) A costs order may be made at any time during a proceeding, and even if the proceeding is dismissed or discontinued.
- (7) The court may make more than 1 costs order against the same lawyer in the course of the same proceeding.
- (8) This section does not limit or affect the court's jurisdiction to award costs to or against any party to the proceeding.

