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November 2012, Wellington, New Zealand | REPORT 126

REVIEW OF THE JUDICATURE ACT 1908

TOWARDS A NEW COURTS ACT

A large, stylized, and tilted version of the Law Commission logo and text, rendered in a light blue color, serves as a background for the bottom half of the cover. It includes the coat of arms and the text 'LAW · COMMISSION' and 'TE · AKA · MATUA · O · TE · TURE'.



REVIEW OF THE JUDICATURE ACT 1908

TOWARDS A NEW
COURTS ACT

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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The Hon Judith Collins
Minister Responsible for the Law Commission
Parliament Buildings
WELLINGTON

26 November 2012

Dear Minister

REVIEW OF THE JUDICATURE ACT 1908: TOWARDS A NEW COURTS ACT
(NZLC R 126)

I am pleased to submit to you the above report under section 16 of the Law Commission Act 1985.

Yours sincerely

A handwritten signature in blue ink that reads "Grant Hammond". The signature is written in a cursive, flowing style.

Grant Hammond
President

Foreword

In late 2010, the Law Commission received a reference from the Minister of Justice under which it was asked to consider the creation of a single Courts Act consolidating the legislation governing the District Courts, High Court, Court of Appeal and Supreme Court; and the amendment, modernisation or repeal of certain provisions of the Judicature Act 1908.

The reference explicitly directed that the Commission not turn its attention to “major matters of policy”, such as the structure and character of the existing trial courts and appellate courts in New Zealand. The enterprise was to be directed to establishing the architecture and parameters of the jurisdiction of each of these courts in one statute, in a way which is principled, modern and clear, and easily accessible to all New Zealanders.

A reference of this character is well within the statutory jurisdiction of the Law Commission. Section 5 of the Law Commission Act 1985 imposes a duty on the Commission to take and keep under review the law of New Zealand with a view to its systematic development and reform, including, in particular, the desirability of simplifying the expression and content of the law as far as that is practicable. That includes the elimination of anomalies, the reduction of the number of separate enactments, and making the law “as accessible as is practicable”.

It is appropriate to emphasise the underlying reasons for the objectives of this reference. These are grounded in the rule of law. That requires all persons and authorities within a state, whether public or private, to be bound by, and entitled to, the benefit of laws publicly made and *publicly administered by the courts*. The very objective of the rule of law – an overarching principle of fundamental constitutional importance in our system – is that how courts are set up, what their jurisdiction is, and the essential operational characteristics must be clear, accessible and intelligible.

The thinking behind the reference is that this cannot presently be said, with a sufficient degree of confidence, as to the architecture of the New Zealand courts. This is because the legislation relating to the New Zealand trial and appellate courts is presently to be found in a melange of statutes: the Judicature Act 1908, the District Courts Act 1947; and the Supreme Court Act 2003. These statutes have evolved at widely differing times and have drafting styles that reflect their particular eras. They have become complex and difficult to follow, with many amendments. The interface between them is routinely awkward.

The reference as advanced to the Commission was not therefore one of “pure” consolidation under which those responsible for the reference could properly certify

that the law has not been changed at all (as is the case with a pure consolidation). It invited the bringing together of the trial and appellate courts statutes into one, with such matters as needed to be addressed, to enable that objective to be met. But the reference did not amount to an invitation to review the courts generally; still less to be something like a Royal Commission to enquire into the appropriateness of the present and future scope and operation of the New Zealand courts.

References of this kind always attract a certain amount of difficulty as to exactly where the line is to be drawn. Some submitters on the reference were clearly of the view that there should be a healthy measure of “real” reform. Some of the proposals made to us clearly went beyond any reasonable interpretation of the scope of the reference. However, in fairness to submitters we have endeavoured to include at least the tenor of their views, for such future consideration as they might attract.

The reference also attracted two particular kinds of difficulty. The initial view of the Commission, which we were strongly attracted to, was that it would best be attended to by the drafting of a new Courts Act, with commentary. At the inception of the reference the late George Tanner QC, formerly Chief Parliamentary Counsel and Compiler of Statutes for New Zealand, was a Commissioner. He was extremely well placed – and eager – to undertake this exercise. He was the ideal person to undertake the task, enjoying, as he did, the full confidence of the public sector and Ministers; and of the Bar and Bench for his sterling work over many years in New Zealand.

Regrettably, George died after a serious illness just as the project gained momentum. We were considering how that very considerable gap in our resource might be addressed when the Responsible Minister indicated in the letter of understanding issued to the Commission under the provisions of the Crown Entities Act that the Commission is not, for the moment at least, to undertake drafting exercises.

We were, however, concerned to see whether, as a matter of practicality, the sort of drafting exercise we had in mind was feasible. We are most grateful to the Acting Chief Parliamentary Counsel, Bill Moore, for making available to us the services of a professional drafter during the run-up to the last General Election, when there is less pressure on the Parliamentary Counsel Office. We were able to satisfy ourselves – the results are appended to Issues Paper 29 – that the exercise we had in mind is distinctly achievable. For instance, that drafter set out what the appointment provisions would look like in a consolidated statute.

A second complication then ensued. In the submissions we received on Issues Paper 29 it can be fairly said there was widespread support for the idea of a unitary court statute. However, what for the moment I will call “the Higher Courts” objected to a unitary statute on what, through their Heads of Bench, they characterised as constitutional grounds.

On closer examination, that objection needs refinement. The basic concern is that the High Court undoubtedly occupies a constitutional position, particularly in relation to judicial review, which is the vehicle by which unlawful governmental action is constrained. As we point out in the Report, however, nothing in what we recommend explicitly or impliedly reduces the present constitutional role and

jurisdiction of the High Court. All would be exactly as it was before the advent of such a statute.

The objection is therefore on a second ground, of a visceral character: that by being emplaced in a unitary statute along with the District Courts, the significant constitutional role of the High Court (and remembering that Court of Appeal and Supreme Court judges are also High Court judges in New Zealand) would somehow be diminished.

Arguments about “how things will look” are always difficult, and not amenable to scientific or precise answers. However, we doubt that the issue is one which will or should attract much attention from the citizens of New Zealand, particularly if it is accepted (as it is on all sides) that the constitutional position of the High Court will not in fact be altered. To our mind the important factor to have regard to is the utility of a unitary statute which inspired the advancement of the reference in the first place.

It can be said that it would be *possible* to have a binary system (say, a Senior Courts Act for the High Court and above, and an amended District Courts Act). That is not our preference, although we note the possibility. When work was still being undertaken in the way of drafting, it became readily apparent to us how much overlapping of statutes there would have to be. There is also the consideration that the District Court has long since been established as a jury trial court. Those responsible for the courts legislation in the United Kingdom have had no difficulty in seeing the Crown Court there (which in many respects has less jurisdiction than the District Court) as a “senior court”.

At the end of the day, however, our fundamental concern is for the citizens of New Zealand, who should be placed squarely at the forefront of any reform legislation. In our estimation they would be better served by a unitary Courts Act, rather than a scheme under which they and their advisers have to sit with several statutes in front of them to work out their position.



Grant Hammond
President

Acknowledgements

We are grateful to all the people and organisations that provided input during the course of this reference. This includes submitters to the Issues Papers, published in 2011 and 2012.

We particularly wish to thank the following people and organisations whom we met or consulted with in preparing this Report. Their generous contribution is much appreciated.

- The Judiciary
- Ministry of Justice
- New Zealand Bar Association
- New Zealand Centre for Public Law at Victoria University of Wellington
- New Zealand Law Society
- Parliamentary Counsel Office
- Russell McVeagh
- University of Otago Legal Issues Centre

DISCLOSURE OF INTEREST

Sir Grant Hammond, the President of the Law Commission, holds a warrant as a Judge of the Court of Appeal of New Zealand. If a Register of Judges' Pecuniary Interests Bill was to be enacted, he would likely have to disclose his pecuniary interests. He therefore took no part in the consideration of that issue or the drafting of chapter 6, which was finalised prior to the completion of the remainder of the Report. The Commissioners involved in that exercise were Drs John Burrows (who held a warrant at that particular time), Geoff McLay and Wayne Mapp.

In a letter dated 25 October 2012 the Minister of Justice gave formal permission under section 68(4) of the Crown Entities Act 2004 for the President to approve and sign this Report.

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Introduction and summary

JUDICATURE ACT 1908

The Judicature Act 1908 (the 1908 Act) 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.

The 1908 Act 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.

The 1908 Act has been amended more than 40 times since its enactment. Many of the sections in the Act are outdated, and it contains “hidden provisions”, namely those dealing with substantive commercial law and the judicial review provisions in the Judicature Amendment Act 1972.

The 1908 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; and
- (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 P Spiller, J Finn and R Boast *A New Zealand Legal History* (2nd ed, Brookers, Wellington, 2001) at 209.

TERMS OF REFERENCE

In 2010, the Law Commission received a reference to review the Judicature Act 1908, with a view to consolidating it in one statute, together with the provisions of the District Courts Act 1947 and the Supreme Court Act 2003.² The focus of the review was on reorganisation and modernisation. It was not the intention that the Law Commission would revisit major matters of policy underlining the present legislation. However, to some extent consolidation and revision go hand in hand, and the Commission makes a number of recommendations for the amendment of aspects of the current law.

Because of its status as an amending statute to the 1908 Act, the Judicature Amendment Act 1972 (1972 Amendment Act) falls under the umbrella of this review. However, the Commission has not been asked to consider the substance of the 1972 Amendment Act. 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, ensuring that any updated provisions do not alter the current substantive law.

It was intended that, in the course of consolidation, the provisions of the District Courts Act 1947 and the Supreme Court Act 2003 would be further considered. These more modern Acts do not require updating to the same extent as the Judicature Act, and in this Report we discuss only key issues relating to these two Acts that were raised in the course of consultation.

The review did not include an examination of the legislation governing specialist courts such as the Employment Court, Māori Land Court or Environment Court.

PROCESS OF THE REVIEW

Two issues papers were published in the course of the review. The first of these, entitled *Towards a New Courts Act – a Register of Judges Pecuniary Interests?* (Issues Paper 21),³ was published in March 2011, following the introduction to Parliament of Green MP Dr Kennedy Graham's Register of Pecuniary Interests of Judges Bill in November 2010. Issues Paper 21 sought views on issues associated with the recusal of judges and the establishment of a register of judges' pecuniary interests.

A second much broader issues paper seeking views on the wide-ranging provisions of the Judicature Act, entitled *Review of the Judicature Act 1908: Towards a Consolidated Courts Act* (Issues Paper 29),⁴ was published in February 2012.

Submissions were received in response to both issues papers.

² The Terms of Reference are attached as Appendix 1.

³ Law Commission *Towards a New Courts Act – A Register of Judges' Pecuniary Interests? Review of the Judicature Act 1908 First Issues Paper* (NZLC IP21, 2011).

⁴ Law Commission *Review of the Judicature Act 1908: Towards a consolidated Courts Act* (NZLC IP29, 2012).

In this Report, the Commission considers the feedback received from submitters and in consultation meetings, and makes recommendations on the matters discussed in both Issues Paper 21 and Issues Paper 29. A list of submitters who responded to one or both of the issues papers is included as Appendix 2.

Over the course of the review, the Commission met with practitioners, judges, officials, representatives from the New Zealand Centre for Public Law and other academics, and held a South Island Civil Justice Forum in conjunction with the Otago University Legal Issues Centre, to whom we are very grateful. The Forum provided us with an opportunity to consult more widely than would otherwise have been possible.

We are also grateful to Russell McVeagh for hosting an evening seminar to discuss the Commission's preliminary proposals.

PART 1 – THE STRUCTURE OF NEW COURTS LEGISLATION

Part 1 of this Report deals with structural issues associated with consolidating the legislation governing the District Courts, High Court, Court of Appeal and Supreme Court. In this Report we refer to the High Court, Court of Appeal and Supreme Court as the “Senior Courts”.

A consolidated Courts Act

Chapter 1 considers whether a single statute should govern the Senior and District Courts of New Zealand. In Issues Paper 29, the Commission took the preliminary view that the evolution of a unitary Courts Act was both desirable and feasible in legislative drafting terms.⁵ That approach was met with objection by some submitters, in particular the Senior Courts' judges, who were concerned that including the District Courts in a statute with the Senior Courts may diminish the constitutional role of the High Court, or at least appear to do so.

The Commission disagrees that a consolidated statute would have this effect. We recommend that the District Courts Act 1947, the Judicature Act 1908 and the Supreme Court Act 2003 should be consolidated into one modern Act, primarily because this would enhance access to justice through accessibility of the courts legislation, and its utility. Alternatively, a less attractive but still feasible option is that the District Courts Act 1947 could remain as a separate Act (with some revisions), and the Judicature Act 1908 and the Supreme Court Act 2003 consolidated into a Senior Courts Act.

We recommend that current references in legislation to “superior” courts or judges should be replaced with the word “senior” in new courts legislation, and that current statutory references to “inferior” courts or judges should instead refer to the District Court and/or other relevant court(s).

⁵ We included, at Appendices 2 to 4 of Issues Paper 29, a draft of the sort of provisions which would have to be made for Judges in a consolidated measure, to show what such drafting, in modern style, would look like.

Judicature Amendment Act 1972

Whatever approach to consolidation is adopted, downstream questions of legislative structure will necessarily have to be addressed and resolved. Chapter 2 considers the constitutionally important subject of judicial review, which is currently governed (although not exclusively so) by the 1972 Amendment Act. Its legislative placement is parasitic upon the 1908 Act, so if that statute is repealed, the 1972 Amendment Act will have to have a new “home”, either in consolidated courts legislation, or in a standalone statute.

In Issues Paper 29, the Commission took the view that a standalone Act – not altering the current law – would be both desirable and feasible, and a draft Judicial Review (Statutory Powers) Procedure Bill was prepared by Parliamentary Counsel. That draft is attached as Appendix 3. We remain of the view that if there is a consolidated Courts Act, there should be a standalone Judicial Review Act containing the substance of the provisions of the 1972 Amendment Act redrafted in modern language.

If instead there is to be a District Courts Act and a consolidated Senior Courts Act, the modernised provisions of the 1972 Amendment Act should appear in the statute governing the Senior Courts.

Chapter 2 also examines changes to the draft Judicial Review (Statutory Powers) Procedure Bill suggested by submitters.

Rules of court

Each of the four courts considered in this Report has its own rules, dealing primarily with practice and procedure. In chapter 3, we recommend that these rules not be included in primary legislation (as the High Court Rules currently are), as this would make the legislation too unwieldy and inflexible, and would detract from its accessibility. Instead, we recommend that the rules have the status of regulations. This would require greater detail to be included in the legislative provision enabling the making of the High Court rules.

We do not recommend any changes to the current processes for the making of rules.

Relocation of other provisions of the Judicature Act 1908

There are some provisions in the Judicature Act 1908 that would not sit appropriately in new courts legislation. In chapter 4, we recommend that the current Part 1A provisions, which relate to certain trans-Tasman proceedings, be moved to the Trans-Tasman Proceedings Act 2010, which did not exist at the time Part 1A was added to the 1908 Act.

We also recommend that the sections dealing with ad hoc commercial matters (sections 17A to 17E (liquidation of associations); sections 84-86 (sureties); section 88 (lost instruments); section 90 (stipulations in contracts as to time); section 92 (discharge of debt by acceptance of part in satisfaction); and sections 94A and 94B (payments under mistake)) be retained in legislation, but moved to a new miscellaneous commercial matters statute.

Moving the provisions relating to trans-Tasman proceedings and commercial matters into other legislation would improve the accessibility of these provisions and enhance the clarity of the courts legislation.

PART 2 – JUDGES

Judicial appointments

It is important that there is a clear and publicly known process for judicial appointments, to maintain the confidence of both the public generally and potential applicants for appointment. We discuss requirements for judicial appointments in chapter 5.

To address the problem of a lack of transparency regarding appointments to the Senior Courts, we recommend that the courts legislation should require the Attorney-General to publish the procedures for appointment that he or she will follow in each of the Senior Courts, which may reflect the published procedure for District Court appointments.

The courts legislation should also provide that in making appointments to the New Zealand courts, the Attorney-General must be satisfied, before advising the Governor-General on an appointment, that:

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

Consultation on appointments is also important. We consider the legislation should provide that, before recommending a judicial appointment the Attorney-General *must* consult:

- the Chief Justice, in the case of appointments to the Senior Courts, and the Chief District Court Judge, in the case of the District Court appointments;
- the Head of Bench of the court to which the appointment will be made (such as the President of the Court of Appeal, the Chief High Court Judge, or Principal Judges);
- the Solicitor-General;
- the President of the New Zealand Law Society; and

- the President of the New Zealand Bar Association.

The Attorney-General should also be *empowered* to consult such other persons as he or she considers to be appropriate in any given case.

Judicial conflicts of interest

To ensure public confidence in the judiciary, the public must be satisfied that cases are being decided in a manner that is fair and impartial. Chapter 6 discusses judicial conflicts of interest and ways to better avoid and deal with these.

The Commission recommends the amendment of section 4(2A) of the 1908 Act to ensure there is a clear statutory provision in new courts legislation prohibiting all judges (including full-time and appellate judges) from undertaking other employment or acting as a barrister or solicitor, and from holding other office (whether paid or not), unless the Chief Justice, in consultation with the relevant Head of Bench, has approved the other office as being consistent with judicial office. It is important for the public to know what types of activities will likely be considered consistent and inconsistent with judicial office, and the Chief Justice, in consultation with the Heads of Bench, should develop and publish guidelines on this.

We do not think there is any need for the establishment of a register of judges' pecuniary interests by statute. Although in principle there are arguments in favour of such a register, there are also significant practical difficulties associated with it. In order for such a register to be effective, it would need to contain a level of detail that would, in the Commission's view, intrude too far on the privacy of judges and their families. It would likely exacerbate existing difficulties in judicial recruitment and risks to judicial safety and security.

Judges are required to recuse themselves because of interests and associations that would not be captured in a pecuniary interests register, and the existence of a register would not relieve a judge from his or her recusal obligations in any particular case. We therefore consider the best way to deal with potential judicial conflicts of interest is to have clear, robust and well-publicised rules and processes for recusal. We recommend there be a statutory requirement for the Heads of Bench, in consultation with the Chief Justice, to develop clear rules and processes for recusal in their courts, based on a common set of principles developed by the judges. These recusal rules and processes should be published in the *Gazette* and on the internet.

Part-time and acting judges

The legislative provisions concerning part-time and acting judges are discussed in chapter 7.

The Commission recommends that new Courts legislation should continue to enable part-time judicial appointments for a specified period in all courts below the Supreme Court. We also recommend that there be flexibility to enable a judge to work part-time for a specified period of up to five years prior to retirement.

Given the potential risks associated with the use of acting judges, the Commission considers their use should be minimised as far as possible. As the District Courts are currently unable to manage their workloads without the regular use of acting judges, we recommend the statutory cap on the number of District Court judges should be reviewed, and a sufficient number of permanent judges appointed to ensure the District Courts can function effectively.

We propose other changes to the provisions enabling acting judges, including the introduction of requirements for acting judges to be former judges under the age of 75 years, for appointments to be for a specified period of up to two years, and for reappointment to be possible for a maximum of five years in total.

We also recommend a change to section 88A(4) of the Judicature Act 1908 to clarify that a retiring judge should be paid, on an extended term, in the same manner as an acting judge.

Leadership and accountability

Chapter 8 deals with several matters that broadly relate to leadership and accountability in the judiciary.

We make recommendations for the linkages between the Heads of Bench and the Chief Justice to be provided for in legislation, and for changes to the system of appointing acting heads of bench to enable the President of the Court of Appeal, the Chief High Court Judge and the Chief District Court Judge to nominate another judge to act in that judge's place, as the present system is inflexible and causes practical difficulties.

We also recommend that there be a statutory requirement for the Chief Justice to publish an annual report on the judiciary within six months of the end of the financial year of the Ministry of Justice. We envisage that such a report would contain matters such as an update from each of the Heads of Bench on the conduct of business in their courts, and an overview by the Chief Justice. The Ministry of Justice and the Chief Justice should agree the broad matters to be covered in the annual report. These matters should then be specified in the legislation.

Further recommendations in chapter 8 include statutory recognition of the principle that court officers undertaking judicial or registry functions are not subject to direction by Ministry officials, and a requirement for the publication of a list of reserved judgments for all judges in all courts on the Courts of New Zealand website.

Judicial powers

Two judicial powers – the statutory ability to hold someone in contempt of court and the jurisdiction to make a “wasted costs” order against counsel personally – were considered in Issues Paper 29. These are discussed further in chapter 9.

In respect of the former, we conclude there should be a generic “contempt in the face of the court” provision in a new Courts Act, dealing with all courts and proceedings,

and drafted in similar terms to section 365 of the Criminal Procedure Act 2011. A draft provision is attached as Appendix 4.

Regarding the latter, our preliminary view was that there should be a provision in new courts legislation enabling the trial and appellate courts to make a “wasted costs” order against counsel personally, drafted in similar terms to section 364 of the Criminal Procedure Act 2011. While this received some limited support, the majority of submitters disagreed with our proposal. Ultimately, these convinced us that such a provision would not be appropriate in new courts legislation, at least at this stage.

PART 3 – COURTS

Part 3 of this Report looks at particular issues raised in Issues Paper 29 in relation to the individual courts under consideration.

The Commercial List and specialisation in the High Court

The question of what should be done with the Commercial List provisions in the Judicature Act 1908 (sections 24A to 24G) inevitably raises the controversial issue of whether there should be some form of judicial specialisation in the High Court. This is discussed in chapter 10. There are difficulties in formulating policy in this area due to the lack of available data concerning the nature of the High Court’s civil workload.

In Issues Paper 29, the Commission outlined problems with the Commercial List, and proposed the development of specialist panels of judges in the High Court along the lines of those operating in many Australian courts.

The Senior Courts’ judges said they consider that judging in itself is a specialised form of legal practice, and that having specialisation in the High Court would have a negative impact on judicial appointment and cause practical difficulties for the Court. On the other hand, there appears to be significant support for at least the establishment of a specialist commercial panel among practitioners. The New Zealand Bar Association’s survey of its members indicated “overwhelming support” for judicial specialisation in some form.

The Commission considers that a sufficient need has been made out for the establishment of a commercial panel in the High Court. However, we are not presently satisfied, on the information available to us, that other panels are justifiable at this stage. We recommend that new courts legislation should empower the Attorney-General, with the concurrence of the Chief High Court Judge, to establish panels in the High Court by Order in Council. The precise number and placement of the judges on a panel should be a matter for the Chief High Court Judge, although, in our view, no judge should spend more than 50 per cent of his or her time on a panel. A senior High Court Judge should be assigned as the head of any panel.

We consider that the Commercial List should be abolished, and a commercial panel established as a pilot project to ascertain how a panel system would best work in New Zealand.

We do not accept that the establishment of panels of specialist judges in the High Court would in any way diminish the High Court's jurisdiction. The legislation would state explicitly that the existing jurisdiction of the High Court is "continued".

Civil jury trials

Civil jury trials in the High Court are rare these days, but the 1908 Act enables a party to a civil proceeding to have its case heard by a judge and jury where the relief claimed is payment of a debt, pecuniary damages, or recovery of chattels exceeding \$3,000 in value. This threshold is clearly out of date. Chapter 11 considers whether civil jury trials in the High Court should be retained, given their rare use and associated costs.

The Commission concludes that the right to a civil jury trial should be retained, but restricted to claims involving damage to a person's reputation, liberty, or sanctity of the person, where damages are at large. This should include claims for defamation, false imprisonment and malicious prosecution. Members of the public are likely to be best placed to assess damages in these cases.

District Courts

In Chapter 12, the Commission recommends the current 63 individual District Courts be formally recognised as one Court that sits in multiple localities (like the High Court). This would eliminate any practical issues that arise as a result of the separate status of the courts. It does not mean there would be a reduction in local courthouses.

We also recommend that the upper limit of the civil jurisdiction of the District Court be increased to \$500,000 from the current \$200,000, if modelling by the Ministry of Justice shows that this would be feasible. Such an increase would enable more litigants to utilise the District Courts' "settlement first" approach, which would increase access to justice, and would take into account not only inflation since the \$200,000 limit was set in 1992, but also future inflation and current land values.

Appellate courts

In chapter 13, we make recommendations to refine the provisions dealing with the composition of the Court of Appeal and the matters that may be dealt with by a single judge and a two judge panel. We also recommend that new courts legislation should contain a provision enabling the Court of Appeal to order a retrial in both civil and criminal matters, and conclude that the provision enabling trial at bar should be abolished.

The chapter also provides an update on the Commission's proposal in Issues Paper 29 to review appellate pathways.

PART 4 – REMAINING MATTERS

Miscellaneous provisions of the Judicature Act 1908

There are various other miscellaneous provisions of the 1908 Act that came to our attention during preliminary scoping of the project. These are discussed in chapter 14, where we confirm our provisional view, expressed in Issues Paper 29, that sections 18 (Crimes before 1840), 23 (Special sittings of the High Court), 26IB (Video link) and 54B (Discharge of juror or jury) are no longer required, and should not be carried over into new courts legislation.

We also conclude that section 55 of the 1908 Act (Absconding debtors) should be retained, but drafted in terms of the current District Courts Act 1947 equivalent provision, and that the maximum penalty in section 56A (Failure to respond to a witness summons) should be increased to \$1,000. Sections 94 (Effect of joint judgments) and 98A (Proceedings in lieu of writs) should also be retained in new courts legislation and clarified.

Finally, we recommend section 99 (Conflicts between equity and the common law) be re-enacted unchanged in new courts legislation.

Other participants in civil cases

There are a number of situations in which participants other than the parties to a case may take part in civil proceedings. In chapter 15 we discuss four of these “other participants”: McKenzie friends (support persons for unrepresented litigants); amici curiae (“friends of the court”); interveners; and technical advisors. The focus is on the appropriate level of formal prescription required for each in new courts legislation.

We conclude in respect of each of these four participants that:

- McKenzie friends should be renamed “support persons for self-represented litigants” and provided for in legislation, with additional assistance provided in guidelines or court rules, and that lawyers should not be able to take on this role;
- Legislation should provide for the ability of the courts to allow the input of an amicus curiae or an intervener, and should enable the making of court rules relating to these;
- The current provision relating to technical advisors (section 99B of the 1908 Act) should be carried over into new courts legislation.

We also recommend that section 99A, which provides for the payment of costs for interveners or counsel assisting the Court, be re-enacted, but amended to make it clear that it only applies to these persons.

Vexatious litigants

Where someone persistently and without any reasonable ground institutes vexatious legal proceedings, the High Court may, pursuant to section 88B of the

1908 Act, restrain that person from bringing or continuing civil proceedings. In Issues Paper 29, we noted that there are a number of problems with this means of dealing with “vexatious litigants” (as they are often called). We asked submitters whether New Zealand should move to a graduated civil restraint order regime like they have in the United Kingdom, or whether we should instead “fix” section 88B.

Given the unanimous support we received in submissions for a civil restraint order regime, we recommend in chapter 16 that section 88B of the 1908 Act be replaced with a provision enabling the making of three tiers of civil restraint orders:

- A **limited order**, which may be made by a judge of any court where a party has made two or more applications in a particular proceeding 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 the specific proceedings, without first obtaining the permission of the judge identified in the order.
- An **extended order**, which may be made by a judge of any court where a party has persistently issued claims or made applications that are totally without merit. An extended order restrains the party from issuing proceedings 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:
 - in any court, where the order is made by a High Court judge;
 - in the District Court, where the order is made by a District Court judge.
- A **general order**, which may be made by a High Court judge where the party against whom the order is made persists in issuing claims or making applications that are totally without merit, in circumstances where an extended order would not be sufficient or appropriate. Such an order will restrain a party from issuing any claim or making any application in any court without the permission of a High Court judge.

A full list of recommendations is attached as Appendix 5.

Part 1

THE STRUCTURE OF NEW COURTS LEGISLATION



LAW • COMMISSION
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Chapter 1

A consolidated Courts Act

INTRODUCTION

- 1.1 This chapter focuses on a fundamental issue arising from the Commission's terms of reference in the review of the Judicature Act 1908,⁶ namely whether there *should* be a unitary Courts Act, and considers the alternative legislative structures.
- 1.2 The major premise behind this reference – that there might be a unitary Courts Act – is neither new, nor somebody's “grand vision”.
- 1.3 In a number of Commonwealth jurisdictions, courts legislation has had to evolve to deal with concerns of complexity and problems of access to justice. This has led law reform agencies and Ministries of Justice to enquire whether a modern Courts Bill is possible, and what it might look like. As only one instance, the Law Reform Commission of Ireland was charged with tackling the formidable task of endeavouring to bring together almost 60 statutes relating to the courts in that jurisdiction since the establishment of that State in 1922.⁷

MODELS FOR STRUCTURING THE COURTS LEGISLATION

- 1.4 Broadly speaking, there are four possible approaches to the large task of reform invited by the prospect of a Courts Act.
 - There could be an individual Act for each of the courts in a given jurisdiction. At a very broad – though incomplete – level, that has been

⁶ See Appendix 1.

⁷ See Ireland Law Reform Commission *Consolidation and Reform of the Courts Act* (LRC CP46, 2007) at 1-3. See also chapter 4, which helpfully summarises endeavours in this sphere around Ireland, England and Wales, Singapore, New Zealand, some of the Australian states, and Australia.

the historic approach taken in New Zealand. It is also an approach which at an earlier time was suggested by the Australian Law Commission as a possible solution to the fragmented nature of the jurisdictional provisions regarding courts there.⁸

- Secondly, there could be a consolidated Act with the jurisdiction and related matters of each court being in individual parts of the Act. Each of the parts could first provide for particular matters relating to a particular court, with each division of the part being exclusively concerned with that court. Variations on this theme are possible: for instance, general provisions relating to judges and appointments and other common matters could be included in a separate part of the Act.
- Thirdly, a consolidated Act could take a “thematic” approach, whereby each part of the Act is concerned with a particular aspect of jurisdiction and the relevant provisions relating to each court contained in the individual division of each part.
- Fourthly, there could be some overlap and combinations of these models. Essentially, New Zealand has presently ended up with a hybrid model in that some courts have their own individual statute – such as the District Courts and the Supreme Court. Others – the High Court and the Court of Appeal – are in one statute that dates back to the English Judicature Act model. But there is some overlap between the Senior Courts in New Zealand, in that all judges from the High Court up, regardless of the particular court, are judges of the High Court.

1.5 However a consolidation exercise is to be advanced, it must necessarily provide for the following matters:⁹

- the administration of justice;
- the security of the courts as an independent arm of government;¹⁰
- the constitution and jurisdiction of the various courts;
- the allocation of jurisdiction between the various courts;
- the management of the courts;
- judges and officers of the courts; and
- appeal rights.

8 Australian Law Reform Commission *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903* (ALRC R92, 2001) at 689-694.

9 See Ireland Law Reform Commission, above n 7, at 249; and see generally Ross Cranston *How Law Works: The Machinery and Impact of Civil Justice* (Oxford University Press, United Kingdom, 2006).

10 See ss 23 and 24 of the Constitution Act 1986, and s 3(a) of the New Zealand Bill of Rights Act 1990.

- 1.6 If the exercise is to be done adequately, it must address the following core principles:
- accessibility;
 - simplicity;
 - certainty; and
 - efficiency.

A UNITARY STATUTE

- 1.7 The reference given to the Commission was specifically premised on the creation of a unified Courts Act for New Zealand. This was advanced to the Commission in light of the consideration given to this issue elsewhere in the Commonwealth to date, by the Commission's own earlier work on the structure of the courts¹¹ and the presentation of statute law,¹² and the Ministry of Justice's (then provisional) view that a unitary Act would be the best New Zealand solution.
- 1.8 In those circumstances the Commission did not find it necessary to deal with any arguments against that proposition, in effect in anticipation, in Issues Paper 29.¹³
- 1.9 However, the submission by the judges of the Senior Courts queries whether it is appropriate for there to be a single Courts Act in New Zealand. They would prefer two Acts: a District Courts Act and a Higher Courts Act.
- 1.10 The New Zealand Law Society's submission suggested that the judges of the Senior Courts together constitute "the judicial branch of government". It was concerned to ensure that the constitutional significance and the mana of the High Court not be diminished.
- 1.11 It is therefore appropriate that we should address these concerns and articulate the reasoning which, in the Commission's view, supports the proposition that there should be a unitary Courts Act for New Zealand.

11 See Law Commission *The Structure of the Courts* (NZLC R7, 1989) at 209: "The Judicature Act 1908 is essentially still the 1882 Act with more than 100 years of deletion, addition and amendment. It has long been in need of consolidation. The District Courts Act 1947 has been the subject of a name change, major excision, major grafting and much amendment since it was enacted. ... [I]t is appropriate for the 2 statutes to be brought together ... we call the single proposed statute the Courts Act." The President at that time was the Rt Hon Sir Owen Woodhouse. Sian Elias QC was a Commissioner.

12 See Law Commission *Presentation of Statute Law in New Zealand* (NZLC R104, 2008).

13 Law Commission *Review of the Judicature Act 1908: Towards a consolidated Courts Act* (NZLC IP29, 2012).

1.12 It is right to record the precise terms of the concerns raised by the judges and the Law Society.

1.13 The way the judges put the matter is as follows:¹⁴

There is a preliminary issue, not addressed in the Issues Paper, as to whether a consolidated Courts Act, covering all courts, is appropriate. The independence in their functions of the District Courts and other courts able to be judicially reviewed is protected by the same judicial review jurisdiction of the High Court. That is why the protections derived from the Act of Settlement 1701 and now contained in sections 23 and 24 of the Constitution Act 1986 are necessary protections for the judges of the High Court only. Although the terms “superior” and “inferior” courts may be misunderstood and might be re-expressed (in the United Kingdom the courts below the High Court are referred to as “subordinate courts”), they mark off a distinction which is important to the constitutional balances and which must be maintained and better explained. A consolidated Courts Act risks understanding of the division. It is not an exercise that has been attempted in comparable jurisdictions to ours. The preferable course is to maintain distinct statutes for the higher courts and the District and other courts.

1.14 The Law Society said that it is:

Important that any reforms to the Judicature Act must ... preserve fundamental features of our constitution. ... One such feature is that Superior Court judges – that is, Her Majesty’s judges signified by the Judicature Act hold a constitutional office. Together, such judges constitute the judicial branch of government. The organisation of the Superior Courts appellate structures has, of course, been accomplished by legislation, but the foundation from which all proceeds is the inherent jurisdiction of a judge to deal with all justiciable issues. This is the basis of judicial review, for example. Judicial powers can, of course, be augmented and regulated in various ways, and in particular contexts, by Parliamentary enactments. But the origin of those powers lies with the judicial power of the Sovereign, recognised since the early 17th century to be exercisable only through the Sovereigns judges. ... The Law Society considers it important that the detail of any reforming legislation be carefully considered so that it preserves the continuity of these constitutional arrangements – just as the Constitution Act itself did for the law making powers of Parliament.

1.15 The first point to note is that under the proposal for a unitary statute there would be no formal diminution whatsoever of the jurisdiction of the existing courts, including the Senior Courts. The statutory language which is widely used in a situation of this character is that the jurisdiction of the particular court is “continued”. It has always been interpreted as meaning that the jurisdiction of the court, as it previously existed, remains intact to the full reach of its then lawful parameters.

1.16 A second possible concern is a visceral one: how the rearrangement “looks”, and what that conveys to the New Zealand citizenry. It would be easy to be dismissive of such an objection. That would be wrong. There is much in

14 Professor Philip Joseph of the Faculty of Law, University of Canterbury raised like concerns in a letter submission to us.

the law that entirely turns on the appearance of something. Indeed, many legal principles rest on a justification that appearance can be as important as substance. Recusal law, to take only one instance, turns on such a premise.

- 1.17 Whilst acknowledging some force in that kind of objection, the first point to be made in reply is that the whole context must be taken into account. For instance, District Courts in New Zealand now have substantial civil and criminal jurisdiction. For a long time now, warranted District Court judges have sat with juries. At one time this trial vehicle was restricted to the High Court.
- 1.18 There is a strong argument that, particularly in its jury trial capability, the District Courts (as they presently stand) in New Zealand are, appearance wise, very important. Moreover, the District Courts of New Zealand themselves exercise extensive downward supervisory jurisdiction over a number of tribunals which could accurately, and not pejoratively, be described as “inferior tribunals”.
- 1.19 Secondly, the objection raised by the judges has caused no difficulty in the United Kingdom. As the courts legislation in that jurisdiction has now come to rest, by section 1 of the Senior Courts Act 1981:¹⁵

The senior courts of England and Wales shall consist of the Court of Appeal, the High Court of Justice, *and the Crown Court*, each having such jurisdiction as is conferred on it by or under this or any other Act.
(emphasis added)
- 1.20 Only the United Kingdom Supreme Court stands apart, under Part 3 of what now remains operative of the Constitutional Reform Act 2005. That Act came into force on 1 October 2009. Under it the jurisdiction of the Supreme Court corresponds to that of the House of Lords in its judicial capacity under the Appellate Jurisdiction Acts of 1876 and 1888, together with the devolution matters under the Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 2006, which were transferred to the Supreme Court from the Judicial Committee of the Privy Council.
- 1.21 The third point concerns the elegance of the architecture. This has functional importance in relation to clarity and simplicity of legislation.
- 1.22 A fourth point goes to the pragmatic characterisation and actual operation of legislation. If there is to be more than one statute, then there would have to be repetition of a number of important matters in each statute. Two readily appreciated examples will suffice. In our law of contempt, courts have certain inherent powers to deal with contempt of court. In our present courts legislation, there are several statutory in-court contempt provisions, not all in precisely the same statutory language. As will be seen later in this report

¹⁵ The jurisdiction of the Crown Court, under s 8 of the Senior Courts Act 1981 (UK), may be exercisable by any judge of the High Court but it is likewise (within the relevant terms) exercisable by any Circuit Judge, Recorder, or District Court Judge (Magistrates Courts).

we propose that, at least in relation to in-court contempt, there should be one standardised, statutory contempt provision. It makes no practical sense to have similar provisions in several statutes when they are dealing with precisely the same kind of behaviour. This leaves counsel and the public wondering where the provisions are and what the subtle differences between them mean. A second example is that if the Register of Judges Pecuniary Interests Bill currently before Parliament is enacted, either it would have to lead to (yet another) standalone Act, or, as we think to be the preferable course, it could simply form a Part of a Courts Act.¹⁶

- 1.23 Fifthly, and perhaps most importantly of all, there are high principles of access to justice involved here. The citizen should be at the centre of the legislation relating to the courts. The argument here is that the law should be accessible and understandable. A citizen, or increasingly a litigant in person, in considering his or her position has to get a coherent picture of the whole. Under the present courts legislation a citizen has to consult several Acts. A person who is contemplating litigation has to worry about whether he or she has started in the right court; what appeal rights there are to a more senior court (usually under another Act); how and why the various judges are appointed, and the limits of their authority. In short, particularly in the case of civil matters over which that litigant will routinely have a *choice* of dispute resolution fora, how far, if at all, a litigant would want to entrust his or her affairs to the courts is vastly complicated by the complexities and awkwardness of the legislative scheme that has evolved.
- 1.24 The Commission is not persuaded that the premise of a unitary Courts Act for New Zealand should be abandoned. Under it there would be no diminution of the jurisdiction and constitutional standing of the various courts in New Zealand, whether formally, or by the visceral impact of one statute. A critically important value of access to justice would be enhanced and the utility of the courts legislation improved.

THE ALTERNATIVE: A BINARY MODEL

- 1.25 If the Commission's recommendation that there be a unitary Courts Act is not adopted by the Government, it would be feasible to draft two statutes. This would involve leaving the District Courts Act intact (although it too requires revision), and constructing a consolidated Senior Courts Act. We prefer the English nomenclature of "senior" to terms which are slightly pejorative, like "superior" or "higher". This statute would cover the High Court, Court of Appeal and Supreme Court.
- 1.26 The main advantage of such a course appears to us to be that the coherence of the present Senior Courts would be maintained, in one statute. Any question of an *apparent* diminution of the role of those courts would be eradicated. If

16 We discuss the proposed Register of Pecuniary Interests of Judges Bill in more detail at chapter 6 below.

a binary model is adopted, the provisions of the Judicature Amendment Act 1972 could be incorporated into the Senior Courts Act, as discussed in the following chapter.

- 1.27 There are questions as to legislative implementation. If a binary statutory scheme is adopted, the Senior Courts Bill and the District Courts Amendment Bill should be treated as cognate Bills and dealt with together.

NOMENCLATURE

- 1.28 Whatever model is adopted, new courts legislation should refer to “senior”, rather than “superior” courts and judges. Similarly, current references in the 1908 Act to “inferior” courts should be updated to refer to “District” courts, or other named courts.

- | | |
|----|--|
| R1 | The District Courts Act 1947, the Judicature Act 1908 and the Supreme Court Act 2003 should be consolidated into a modern, clear, unitary Courts Act, with the existing jurisdiction of the courts under those Acts specifically continued. |
| R2 | If R1 is not accepted, as an alternative the District Courts Act 1947 should remain in effect, with revisions, but the Judicature Act 1908 and the Supreme Court Act 2003 should be consolidated into a Senior Courts Act, with the existing jurisdiction of the courts under those Acts specifically continued. |
| R3 | If there is a Senior Courts Bill and a District Courts Amendment Bill, they should be treated as cognate Bills and dealt with together. |
| R4 | New legislation should refer to “senior” courts, “District” courts and other named courts, rather than “superior” and “inferior” courts. |

Chapter 2

Judicial review

INTRODUCTION

- 2.1 Nobody questions the fundamental importance of the judicial review powers of the High Court. In New Zealand, the inherent jurisdiction of that court is still intact. However, nearly all applications for judicial review are made under the Judicature Amendment Act 1972 (1972 Amendment Act). That is essentially a “process” statute, and does not interfere as such with the grounds on which judicial review may be sought in the High Court.
- 2.2 Hence, the 1972 Amendment Act is one of two sources of jurisdiction for the Court to review exercises of public power that might affect rights, interests or expectations. It enables the High Court to review the exercise of a “statutory power”. However, the Court has a concurrent and wider jurisdiction under the common law to review exercises of “public power”.
- 2.3 In *Wilson v White*, the Court of Appeal reaffirmed that judicial review in New Zealand extends to all actions by public or private sector bodies that have public consequences and involve public law principles.¹⁷ In other words, in practice the High Court is less concerned with the source of power than with the nature and consequences of the power.

THE FUTURE OF THE JUDICATURE AMENDMENT ACT 1972

- 2.4 The 1972 Amendment Act is an unusual amending statute in that it must be read together with, and is deemed part of, the Judicature Act 1908,¹⁸ but it stands alongside the principal Act.
- 2.5 If, as we recommend, the Judicature Act 1908 is repealed, then the issue arises as to what should happen to the 1972 Amendment Act.
- 2.6 As a review of the substance of the 1972 Amendment Act is outside the scope of the Commission’s review of the 1908 Act, we initially considered whether

¹⁷ *Wilson v White* [2005] 1 NZLR 189 (CA) at [21].

¹⁸ Judicature Amendment Act 1972, s 1.

a draft judicial review bill could simply re-enact the existing provisions of the 1972 Amendment Act under a different name. However, Parliamentary Counsel advised that the 1972 Amendment Act could not sensibly be re-enacted in its current form, either as a standalone statute, or as a part of another Act, as the drafting would need to be updated to reflect the modern drafting style. We therefore suggested in Issues Paper 29 that the 1972 Amendment Act be redrafted to update the language (but not alter the substance) of the 1972 Amendment Act, and enacted as a standalone statute.¹⁹

- 2.7 A draft Judicial Review (Statutory Powers) Procedure Bill (draft Bill) was prepared by Parliamentary Counsel on an exploratory basis and included in Issues Paper 29.²⁰ The draft Bill is also included in this Report as Appendix 3.

Views of submitters

- 2.8 Submissions on whether there should be a standalone bill for judicial review were mixed.
- 2.9 The New Zealand Bar Association supported the Commission's proposal for a stand-alone judicial review bill, on the basis that no substantive change is effected. It had several suggestions for improvements it considered could be made to the draft Bill to help achieve this goal, which are discussed later in this chapter.
- 2.10 The New Zealand Law Society was not able to come to a unanimous view. It said some members favoured simply re-enacting the 1972 Amendment Act unchanged, as they were concerned about any unforeseen and undesirable consequences in reordering, modernising and collapsing several of the provisions. Other members agreed with our approach. As some put it, if one was demolishing and rebuilding a 1972 house in the exact same style, it would be rebuilt according to modern standards, not those in place in 1972. Various amendments were suggested to support the aim of not altering the intention or effect of the former Act. Again, these are discussed later in this chapter.
- 2.11 The Senior Courts' judges did not agree with our proposal for a redrafted standalone Act. They took the view that the 1972 Amendment Act itself should be re-enacted as a standalone Act, "at least until some thorough-going review [of judicial review] can be attempted".
- 2.12 The Department of Labour said it supported the development of a standalone Bill, but was concerned to ensure that the Employment Court's exclusive jurisdiction was not unintentionally limited.
- 2.13 An individual submitter and law firm Duncan Cotterill also agreed there should be a standalone Judicial Review Bill.

19 Law Commission *Review of the Judicature Act 1908: Towards a consolidated Courts Act* (NZLC IP29, 2012) at [1.16]-[1.20].

20 At appendix 1.

Commission's view

- 2.14 In order to leave the 1972 Amendment Act untouched, new courts legislation would need to either repeal most, but not all, of the 1908 Act, for example by leaving the commercial provisions in situ, or repeal the 1908 Act and contain a provision specifically preserving the 1972 Amendment Act, and possibly renaming it. We do not favour these options, as they would not enhance the accessibility of the 1972 Amendment Act provisions.
- 2.15 Instead, the Commission favours the enactment of a new standalone statute drafted in the modern style, but substantively the same as the 1972 Amendment Act. In our view, the subject of judicial review is so important in our governance system that it merits its own statute, even though in terms it applies only to the High Court of New Zealand.
- 2.16 Alternatively, while the provisions of the 1972 Amendment Act would sit awkwardly in a unitary courts statute, as the judicial review powers would not be exercised by the District Courts, if a decision was made to have a new Senior Courts Act and a District Courts Act, then the substance of the 1972 Amendment Act could be incorporated in the Senior Courts Act, as a separate Part.

CONTENT OF THE DRAFT BILL

- 2.17 As clause 3 of the draft Bill notes, the purpose of the Act would be to re-enact Part 1 of the 1972 Amendment Act, but in modern drafting style: “The reorganisation of those provisions and the changes made to the style and language are not intended to alter the interpretation or effect of those provisions as they appear in the new draft.”²¹
- 2.18 There was a consistent theme in submissions that a substantive review of the judicial review laws needs to be tackled in New Zealand. This would require a separate Law Commission reference (or Ministry of Justice consideration) and, given that previous preliminary efforts have proved highly controversial, would be a difficult enterprise.
- 2.19 As the Commission does not at this stage know whether there will in fact be a revised judicial review statute, we make no formal recommendations regarding the drafting particulars. We do, however, set out below the views of submitters in response to the draft Bill, and the Commission's thoughts on these.

Title

- 2.20 The Senior Courts' judges submitted that the title of the draft Bill – the Judicial Review (Statutory Powers) Procedure Bill – suggests the procedure is confined to review of statutory powers only, and said the title should be

²¹ Clause 3(2).

amended to make it clear that the law is not being changed. We would have no difficulty with the draft Bill being renamed, but that is a matter that will depend on the ultimate structure of new courts legislation. We note that the reference to “Statutory Powers” in the title of the draft Bill was taken directly from the Part 1 heading of the 1972 Amendment Act, and the legislation sets out the procedure for the review of statutory powers as that term is defined.

Clause 3(2)

- 2.21 The Law Society submitted that clause 3(2) would be clearer if it stated:

The reorganisation of those provisions and the changes made to their style and language in this Act are not intended to alter the interpretation or effect of those provisions as they appeared in the Judicature Amendment Act 1972.

- 2.22 The Commission regards this as a matter of drafting style to be considered by Parliamentary Counsel.

Clause 4

- 2.23 The Law Society said the definition of “person” in clause 4 omits references to a corporation sole and a body of persons whether incorporated or not. It said these should be included to avoid confusion about whether the law has been changed. We agree that, as no change to the definition of “person” is intended, it would be clearer to expressly include these references.

Clause 7

- 2.24 The Law Society submitted that clause 7(2) is new and appears to be unnecessary. It noted that the clause makes reference to certain provisions in the Employment Relations Act 2000, but omits reference to other provisions of that Act that it said appear to be relevant, for example sections 184, 193, 194 and 194A.
- 2.25 We do not agree that clause 7(2) is unnecessary, as it picks up the content of section 3A of the 1972 Amendment Act, and clarifies the jurisdiction of the Employment Court, High Court and Court of Appeal, without making any substantive change to the law. The clause states that the provisions of the draft Bill are subject to the provisions of the Employment Relations Act 2000 relating to the jurisdiction of the Employment Court and High Court in respect of applications for review, and then refers to particular sections. It is not therefore necessary for the clause to identify every relevant section of the Employment Relations Act.

Clause 8

- 2.26 The Law Society and the Senior Courts’ judges said clause 8(3) of the draft Bill should be redrafted to reflect accurately section 9(3) of the 1972 Amendment Act.

2.27 Section 9(3) of the 1972 Amendment Act provides:

It shall not be necessary for the statement of claim to specify the proceedings referred to in section 4(1) of this Act in which the claim would have been made before the commencement of this Part of this Act.

2.28 Section 4(1) of the 1972 Amendment Act states:

On an application which may be called an application for review, the High Court may, notwithstanding any right of appeal possessed by the applicant in relation to the subject-matter of the application, by order grant, in relation to the exercise, refusal to exercise, or proposed or purported exercise by any person of a statutory power, any relief that the applicant would be entitled to, in any one or more of the proceedings for a writ or order of or in the nature of mandamus, prohibition, or certiorari or for a declaration or injunction, against that person in any such proceedings.

2.29 Clause 8(3) of the draft Bill provides:

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.

2.30 The Law Society said clause 8(3) changes the meaning of section 9(3) of the 1972 Amendment Act. It said whereas section 9(3) provides that it is not necessary to specify which of the former “proceedings” would have been taken, clause 8(3) focuses on the relief that is sought. It said this appears inconsistent with Rule 5.27 of the High Court Rules, which requires relief to be specified in the statement of claim. We agree clause 8(3) of the draft Bill focuses on the relief sought, but we think it merely clarifies, rather than changes, the substance of section 9(3) of the 1972 Amendment Act. We also do not think it is inconsistent with Rule 5.27, as the draft clause says it is not necessary to specify that any relief is sought in the nature of the relief in the specified list, however it would still be necessary to state the relief sought, as discussed below.

2.31 The Senior Courts’ judges said section 9(2) and (7) of the 1972 Amendment Act should be retained in the draft Bill. The Law Society agreed. It said section 9(2) should be included, “as it helpfully summarises essential components of a judicial review statement of claim: facts, grounds and relief.” With regard to section 9(7), it said the provision was important, as it establishes that the 1972 Amendment Act “is not a stand-alone code, but that applications for review are also subject to the ordinary rules”.

2.32 Section 9(2) of the 1972 Amendment Act provides:

The statement of claim [for review] shall—

- (a) State the facts on which the applicant bases his claim to relief:

(b) State the grounds on which the applicant seeks relief:

(c) State the relief sought.

2.33 Section 9(7) provides:

Subject to this Part of this Act, the procedure in respect of any application for review shall be in accordance with rules of Court.

2.34 Clause 8(1) of the draft Bill states that an application for judicial review must be commenced by filing in the High Court a statement of claim and a notice of proceeding. Clause 8(2) says that Part 5 of the High Court Rules applies in relation to the commencement and filing of an application as if references to a plaintiff were references to an applicant and references to a defendant were references to a respondent.

2.35 High Court Rule 5.26 provides that a statement of claim must show the general nature of the plaintiff's claim to the relief sought, and must give sufficient particulars of time, place, amounts, names of persons, nature and dates of instruments, and other circumstances to inform the court and the party or parties against whom relief is sought of the plaintiff's cause of action." Rule 5.27 provides that a statement of claim must specify the relief or remedy sought. In addition, Rule 4.1 provides that "the practice and procedure of the court in all civil proceedings and interlocutory applications is regulated by these rules". In our view, these Rules essentially cover the matters dealt with in section 9(2) and (7) of the 1972 Amendment Act.

Clause 13

2.36 The Law Society said clause 13(1) refers to "lawyers", where it would be more appropriate to refer to "counsel" (as in section 10(1) of the 1972 Amendment Act and comparable provisions in the High Court Rules). We regard this as a drafting matter to be considered by Parliamentary Counsel. We note though that in light of the Lawyers and Conveyancers Act 2006, there is a move now to refer to "lawyer" in legislation.

Clause 14

2.37 The Bar Association submitted clause 14(2)(e) of the draft Bill effects a small change to the current section 10(2)(e) in that it omits the words "unless the judge...is satisfied that the party's refusal was reasonable in all the circumstances..." and replaces them with "(subject to the direction of the Judge hearing the application)". It said the draft seems to give a wider discretion to the judge who finally determines the application for review, and that it is unclear whether this was intended. We confirm that this was not intended, and that the clause will be further considered by Parliamentary Counsel to ensure no substantive change is made to a judge's powers under section 10(2)(e) of the 1972 Amendment Act.

2.38 The Law Society said in clauses 14(2)(a) and 14(2)(e) the words "at the hearing" are unnecessary and potentially limiting. It said, moreover, that

issues are frequently determined after the hearing, if the judge reserves his or her judgment.

- 2.39 The Law Society also said in clause 14(2)(b)(ii) the word “joined” should be changed to “added”, as under the Rules, parties, rather than the names of parties, are joined (Rules 4.55 and 4.56).
- 2.40 Although it is correct that issues may be determined after the hearing, for example in relation to costs or the implementation of orders, clause 14 only deals with orders and directions before the hearing of an application, so we do not think there is any need for alteration to subclauses (2)(a) and 2(e). Drafting terminology will be discussed with Parliamentary Counsel.

Clause 15

- 2.41 The Law Society submitted that clause 15 should refer to an “interlocutory order”, rather than an “interim order” (as per section 11 of the 1972 Amendment Act). We think “interim order” better captures the nature of the orders referred to in clause 15, and preserves the terminology in existing section 8 of the 1972 Amendment Act. In our view, no change is needed to clause 15 if the wording in clause 20 is altered, as discussed below.

Clause 16

- 2.42 The Bar Association said clause 16(3) of the draft Bill, which states that the section enabling the Court to grant the relief the applicant would be entitled to in proceedings for mandamus, prohibition or certiorari, or a declaration or an injunction, applies even if 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, omits the following qualifying words that currently appear in section 4(2A) of the 1972 Amendment Act:

But this subsection shall not be construed to enlarge or modify the grounds on which the Court may treat an applicant as being entitled to an order of or in the nature of certiorari or prohibition under the foregoing provisions of this section.

- 2.43 The Bar Association said it is unclear whether this was intended, and suggested it should be clarified.
- 2.44 The Commission finds it difficult to see how the subsection could be construed to enlarge or modify the grounds on which the Court may grant relief. The view of Parliamentary Counsel, which the Commission agrees with, is that the omitted words are unnecessary. If there is any doubt about that, however, the omitted words should be included.

Clause 20(1)

- 2.45 The Bar Association noted that clause 20(1) of the draft Bill states that any party who is dissatisfied with any *interim* or final order made in respect of an application may appeal to the Court of Appeal, whereas section 11 of the 1972 Amendment Act provides a right of appeal for “any *interlocutory* or

final order...”. The Bar Association said an interlocutory order is wide enough to include an interim order, but that an interim order may not include all interlocutory orders, for example orders made under clause 14 of the draft Bill. In the Bar Association’s view, interim orders would likely be interpreted as limited to interim orders made under clause 15 of the draft Bill, rather than including the orders provided for under clause 14. It submitted that, given the potential importance of some matters dealt with by the High Court by way of interlocutory order in judicial review proceedings, this appeal right should not be restricted, and that the word “interim” in draft clause 20(1) should be changed to “interlocutory”.

- 2.46 We agree with the Bar Association that interlocutory orders need to be included in the appeal provision to ensure no substantive change is made to the current 1972 Amendment Act.

Clause 23

- 2.47 The Law Society said the transitional provision refers to the 1972 Amendment Act continuing to apply to applications filed under that Act, which are “pending or in progress”. It said those latter words were unnecessary, providing that the application is filed under the 1972 Act. While that may be strictly correct, we think there is merit in making the position clear in any new legislation.

R5 The Judicature Amendment Act 1972 should be redrafted in modern language and enacted as a standalone Act, or, if R1 is not accepted, as part of a new Senior Courts Act.

Chapter 3

Rules of court

INTRODUCTION

- 3.1 All of the four courts discussed in this Report need, and have, rules of court relating to the way in which they deal with civil and criminal business. In this chapter we discuss the making of rules of court, and whether the rules should form part of the legislation itself, as the High Court Rules presently do.

CURRENT STATUTORY PROVISIONS

- 3.2 The Rules Committee is a statutory body established by section 51B of the Judicature Act 1908, which has an integral role in the making of rules of court.
- 3.3 Section 51C of the 1908 Act provides the power to make rules regulating the practice and procedure of the High Court, Court of Appeal and the Supreme Court (including the practice and procedure on appeals) “for the purposes of facilitating the expeditious, inexpensive, and just dispatch of the business of the court, or of otherwise assisting in the due administration of justice.” The 1908 Act also provides for specific rules relating to the nature and extent of reviews of the decisions of associate judges,²² form and manner of applications,²³ and the powers of registrars.²⁴
- 3.4 Section 122 of the District Courts Act 1947 provides for the making of rules regulating the practice and procedure of the District Courts and other specified matters.

²² Section 26P.

²³ Section 51E.

²⁴ Section 51F.

ISSUES PAPER PROPOSALS

- 3.5 In Issues Paper 29, the Commission proposed that a Courts Act should contain provisions enabling the Governor-General, by Order in Council, to make rules regulating the practice and procedure of each of the courts, and for these to be published as regulations.²⁵ This differs from the status quo, whereby the District Courts, Court of Appeal and Supreme Court Rules are published as regulations, but the High Court Rules are included as an appendix to the 1908 Act (even though that Act also allows the High Court Rules to be published separately as if they were regulations).²⁶
- 3.6 The Commission did not propose any changes to the current provisions that specify the persons who must agree to the making of any such rules before Orders in Council can be made, or to provisions concerning the role and composition of the Rules Committee. Thus, under the Commission's proposals the Governor-General in Council would continue to have the power to make rules for the Senior Courts only with the concurrence of the Chief Justice and any two or more members of the Rules Committee, of whom at least one must be a judge. For the District Courts, Orders in Council would continue to be made only with the concurrence of the Chief District Court Judge and two or more members of the Rules Committee, of whom at least one must be a District Court Judge.²⁷ Some submission comments suggested this may not have been clear to all readers.
- 3.7 The Commission explained in Issues Paper 29 that the reason the High Court Rules have been enacted as a schedule to the 1908 Act is because some of the Rules arguably go beyond regulating "practice and procedure", and we outlined options for ensuring the vires of the existing High Court Rules if they are no longer included in the statute itself.
- 3.8 We said we did not favour including a broad empowering provision in the statute enabling the making of rules relating to more than just practice and procedure, as this would not adequately define the rule-making power, and sought views on the following three options:
- Setting out specific rules in legislation (as the District Courts Act 1947 currently does);
 - Having a statutory provision enabling the making of rules relating to any matters that currently cause concern, in addition to matters of practice and procedure; or

25 Law Commission *Review of the Judicature Act 1908: Towards a consolidated Courts Act* (NZLC IP29, 2012) at chapter 8.

26 Section 51A.

27 Judicature Act, s 51C; District Courts Act 1947, s 122.

- Including a provision in a new Courts Bill that deems the existing High Court Rules to be validly made under the new statute, and enabling the making of new rules regulating practice and procedure.

VIEWS OF SUBMITTERS

- 3.9 The Rules Committee's submission disagreed that the High Court Rules should be statutory regulations, and expressed concern that "[r]elelegation to the status of regulations would, amongst other things, bring them within the jurisdiction of the Regulations Review Committee, whereby Parliamentarians may examine the merits of the High Court Rules and investigate complaints from the public as to their operation." The Rules Committee also expressed the view that the High Court is the key senior court with original jurisdiction, and it is appropriate that its rules have the status of a schedule to an Act to clarify the extent of its power to make rules. We do not think this follows if the rule-making procedures are to continue unaltered in substance.
- 3.10 With regard to the vires issue, the Rules Committee submitted that it believes all the existing High Court Rules are validly made. It did not support the option of including a provision in a new Courts Act that deems the existing High Court Rules to be validly made. This was largely because the Committee considered it would be an unusual use of Parliamentary procedure to make legislation deeming all the High Court Rules valid in the absence of a judicial declaration of invalidity, or any evidence of widespread concern. It also noted that there will inevitably need to be subsequent amendments, which would create two classes of rules, "the majority having the benefit of deemed validity, while a few (those created subsequently) would be theoretically challengeable on vires grounds."
- 3.11 The Committee further submitted that existing uncertainties could be drastically reduced, although not completely eliminated, by including a statutory power for the making of rules that:
- Impose obligations on a person who is not a party to the proceeding, whether before or after that proceeding is commenced;
 - Impose obligations on a person who is not a party to a proceeding in relation to the enforcement of a judgment in that proceeding;
 - Require any person to investigate and report to the Court on any matter arising about the performance or discharge of any order made by the Court; and/or
 - Regulate the conduct of a party or witness outside the courtroom in connection with a proceeding or contemplated proceeding.
- 3.12 The Senior Courts' judges said they agreed with the submission made by the Rules Committee.

- 3.13 The New Zealand Law Society submitted that it has no strong view in relation to how the High Court Rules should be treated in legislation, and commented that it would be undesirable to lose any of the flexibility that is currently provided by having the Rules Committee as the rule-making body. The Law Society said rules that go beyond matters of practice and procedure ought to be subject to ordinary legislative processes with the necessary checks and balances. It also said it was generally supportive of the Rules Committee's submission.
- 3.14 The New Zealand Bar Association submitted that the enactment of the Rules of the High Court as a schedule to the 1908 Act is not so problematic as to require change, and suggested the rules of the District Courts and all Senior Courts be included as a schedule in any new courts legislation.

COMMISSION'S CONCLUSION

- 3.15 The Commission considers that if there is to be a consolidated Courts Act, then the rules relating to each of the courts included in that Act should be treated in a similar manner, to ensure maximum clarity and accessibility for court users. In the Commission's view, a consolidated Courts Act would be too unwieldy if it contained the rules of each of the courts in schedules. Instead, rules of court should be made in accordance with the current processes provided for in the Judicature Act 1908 and the District Courts Act 1947, and they should all be regulations.
- 3.16 In order to minimise any real or perceived risk concerning the vires of the present High Court Rules, in addition to providing a mechanism for the making of rules relating to practice and procedure, the Commission considers the statute should specifically enable the making of rules relating to:
- attachment orders;
 - discovery against non-parties;
 - freezing orders;
 - search orders;
 - contempt;
 - charging orders;
 - possession orders;
 - arrest and sequestration orders; and
 - enforcement of judgments or orders.
- 3.17 Another way of achieving this, suggested by one submitter, would be to define "practice and procedure" as including matters that have been identified as potentially problematic. We have concerns that this would give an unnatural meaning to the phrase "practice and procedure", but ultimately the drafting

device should depend on the style adopted by the Parliamentary Counsel drafting the entire Bill, so as to ensure its overall consistency.

- 3.18 Although it submitted that it does not consider there are any vires issues, the Rules Committee should be consulted on whether any other rule-making powers should be specifically provided for in the primary legislation.
- 3.19 Given the special processes already in place for the making of rules of court, the Commission considered whether the rules should be excluded by statute from the ambit of the regulations disallowance regime. However, in light of our recommendations that legislation should enable the making of rules regarding matters that go beyond court practice and procedure, we do not recommend this. It is appropriate that members of the public have the opportunity to be heard in relation to matters that affect their substantive rights, and we would expect the Regulations Review Committee to take a cautious approach if considering any rules of court.

- R6 Existing processes for the making of rules relating to practice and procedure, and other specified matters, in the District Courts, High Court, Court of Appeal and Supreme Court should continue.
- R7 Rules for all the above courts should have the status of regulations.
- R8 Existing powers to make rules for each of the above courts should continue, but, for the High Court, the enabling provision in new legislation should be extended to include the power to make rules relating to:
- (a) Attachment orders;
 - (b) Discovery against non-parties;
 - (c) Freezing orders;
 - (d) Search orders;
 - (e) Contempt;
 - (f) Charging orders;
 - (g) Possession orders;
 - (h) Arrest and sequestration orders; and
 - (i) Enforcement of judgments or orders.

Chapter 4

Relocation of other provisions in the Judicature Act 1908

INTRODUCTION

- 4.1 There are two remaining matters discussed in Issues Paper 29²⁸ – trans-Tasman proceedings²⁹ and the “commercial sections” in the Judicature Act 1908³⁰ – that relate to the overall structure of a new Courts Act. This chapter deals with the most appropriate location of these provisions if new courts legislation is enacted.

TRANS-TASMAN PROCEEDINGS: PART 1A

- 4.2 Section 3 of the Judicature Amendment Act 1990 added Part 1A to the Judicature Act 1908. Part 1A is entitled “Special Provisions applying to certain proceedings in the High Court and the Federal Court of Australia”. It contains provisions that apply to New Zealand and Australian proceedings relating to the taking advantage of market power in trans-Tasman markets under specified provisions of the Commerce Act 1986 and the Trade Practices Act 1974 (Cth).
- 4.3 The provisions in Part 1A include 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 in New Zealand.

28 Law Commission *Review of the Judicature Act 1908: Towards a consolidated Courts Act* (NZLC IP29, 2012).

29 At chapter 13.

30 At chapter 14.

Trans-Tasman Proceedings Act 2010

- 4.4 In 2003, the Prime Ministers of Australia and New Zealand established a working group to look at the potential for the adoption of a trans-Tasman regime for allocation of forum and enforcement of judgments, based on the Australian inter-state arrangements already operating pursuant to the Service and Execution of Process Act 1992 (Cth). The working group's 2006 recommendations resulted in the "Agreement between the Government of New Zealand and the Government of Australia on Trans-Tasman Proceedings and Regulatory Enforcement", which was signed in July 2008. Legislation to implement the Agreement has been enacted in both countries.³¹ The New Zealand legislation, the Trans-Tasman Proceedings Act 2010 (TTPA) is expected to come into force later in 2012 when both New Zealand and Australia have finalised all the rules of court needed to support it.
- 4.5 The TTPA makes fundamental changes to the rules for service of New Zealand proceedings in Australia, and enforcement of Australian judgments in New Zealand.
- 4.6 It also covers:
- 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);³² and
 - Amendments to the Evidence Act 2006 provisions dealing with subpoenas.
- 4.7 The purpose of the TTPA is described in the Act as to:³³
- (a) streamline the process for resolving civil proceedings with a trans-Tasman element in order to reduce costs and improve efficiency; and
 - (b) minimise existing impediments to enforcing certain Australian judgments and regulatory sanctions; and
 - (c) implement the Trans-Tasman Agreement in New Zealand law.
- 4.8 When it comes into effect, the TTPA will complement subpart 1 of Part 4 of the Evidence Act 2006, which remains relevant to trans-Tasman proceedings.

31 Trans-Tasman Proceedings Act 2010; Trans-Tasman Proceedings Act 2010 (Cth).

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

33 Section 3(1).

- 4.9 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 will continue when the more general later legislation comes into force.

Most appropriate statute for Part 1A?

- 4.10 Issues Paper 29 sought views on whether the provisions in Part 1A of the Judicature Act 1908 should be included in new consolidated courts legislation or moved, without substantive amendment, to the TTPA.
- 4.11 Submitters who responded to this issue either actively supported moving the Part 1A provisions to the TTPA, or said they would have no concerns with such a move. The New Zealand Law Society favoured including the provisions of Part 1A in the TTPA, saying they are a more natural fit with the legislation specifically enacted for trans-Tasman proceedings, and will be less likely to be overlooked by practitioners if included in the TTPA. The Law Society considered that inclusion of the Part 1A provisions in a new Courts Bill would further fragment the process.
- 4.12 The Commission considers that moving the Part 1A provisions to the TTPA would make them more accessible to court users, and we therefore recommend this. To avoid any confusion, it may be useful for new courts legislation to have a “signpost” provision pointing out that provisions concerning trans-Tasman proceedings are included in the TTPA and the Evidence Act 2006.
- 4.13 If the Part 1A provisions are simply “relocated”, substantially unaltered, we foresee no difficulty arising with the Australian Government, as the Australian reciprocal Part 1A provisions are included in its TTPA equivalent (along with the relevant equivalent Evidence Act 2006 provisions). The matter should, of course, be discussed with the Australian Government before any legislation is introduced to Parliament.

R9 The provisions of Part 1A of the Judicature Act 1908 should not be included in new courts legislation. Instead, they should be moved, unaltered in substance, to the Trans-Tasman Proceedings Act 2010.

COMMERCIAL PROVISIONS

- 4.14 There are a number of provisions in Part 3 of the Judicature Act 1908 relating to what could broadly be termed “commercial issues”. These are:
- Sections 17A to 17E: Liquidation of associations;
 - Sections 84 to 86: Sureties;
 - Section 88: Lost negotiable instruments;
 - Section 90: Stipulations in contracts as to time;

- Section 92: Discharge of debt by acceptance of part in satisfaction; and
 - Sections 94A and 94B: Payments under mistake.
- 4.15 Some of these provisions were included in the Act at the time of its enactment, reflecting the placement of similar provisions in the United Kingdom legislation upon which the New Zealand Judicature Act 1908 was based. Others appear to have been included when amendments to the common law relating to commercial matters have been needed and no sensible alternative statute could be found.
- 4.16 In Issues Paper 29, we asked whether each of the commercial provisions set out above should be retained and, if so, where they should be located in the future (given our proposals for the repeal the Judicature Act 1908 and the creation a consolidated Courts Act).³⁴

Should any or all of the provisions be retained?

- 4.17 We can deal with the question of whether the above provisions should be retained relatively briefly, as no submitters advocated for the repeal of any of these provisions. Their reasons generally came down to one or more of three things: the provisions are still being used; they provide welcome clarity; and/or a failure to retain them would send an unintended message.
- 4.18 We consider these reasons to be legitimate and, accordingly, we recommend that all of these sections be retained. There is one matter where further comment is, however, required, and that is with respect to the liquidation of associations.
- 4.19 In Issues Paper 29 we asked “if [sections 17A to 17E] are retained, do you agree that the reference to partnerships in section 17A of the Judicature Act is unnecessary?”.³⁵ While two submitters agreed, the Law Society noted that the “Partnership Act [1908] has limited application to partnerships, applying only to those which have a ‘view to profit’ (section 4). Partnerships where the common goal is other than profit would be excluded from both Acts [the Partnership Act and the Limited Partnership Act].”
- 4.20 We accept the Law Society’s argument that the Partnership Act 1908 only applies to partnerships with a “view to profit” and, therefore, that the reference to partnerships in s 17A is required to catch other types of partnership. We note, though, that there does not seem to be a similar qualification in the Limited Partnerships Act 2008 for limited partnerships, and the Law Society provided no specific reference in its submission as it did with s 4 of the Partnership Act 1908.
- 4.21 We recommend, therefore, that the reference to “partnerships” remains, but that the overall situation be clarified when these sections are redrafted in

³⁴ *Review of the Judicature Act 1908: Towards a consolidated Courts Act*, above n 28, at chapter 14.

³⁵ At Q39.

new legislation. In particular, there should be clear and specific references to the “associations” that are excluded from the ambit of these sections by the operation of other Acts (as opposed to the “general” exclusion for bodies corporate in s 17A(1)(c)).³⁶

Where should the provisions be located in the future?

- 4.22 In Issues Paper 29, we put forward two primary options for dealing with the commercial provisions in the Judicature Act 1908 in the future. One was leaving them in a “rump” (and potentially renamed) Judicature Act, and the other was moving those provisions that need to survive to an entirely new statute. We also asked for submitters’ views on any other options for dealing with the commercial provisions.
- 4.23 Submitters’ views were mixed on the question of the best location for the commercial provisions – one submitter favoured the provisions being disseminated into the most appropriate existing Acts for them, others advocated for an entirely new Act, and one submitter saw merit in having a “rump” Judicature Act.
- 4.24 We do not favour the first option, as we have not been able to determine, and no-one was able to suggest, appropriate Acts for all of the provisions. The closest was, perhaps, the Mercantile Law Act 1908, which deals with, amongst other things, matters like mercantile agents, bills of lading and carriers. However, that Act has stood for over one hundred years in the form in which it stands, and it is a relatively cohesive Act as to its subject matter.
- 4.25 We are also not attracted to the third option, as it will be much “cleaner” to repeal the Judicature Act 1908 in its entirety, and a “rump” may not be an obvious place for users to look for these sections.
- 4.26 While we had some reservations about recommending the passing of a new Act for such a small number of provisions, it would be relatively simple to include the commercial provisions in a self-contained part of a new Courts Bill, to be carved off into a separate statute when it reaches the Committee of the Whole stage in the House.

R10 The following sections of the Judicature Act 1908 should be retained in a new miscellaneous commercial matters statute:

- Sections 17A to 17E (Liquidation of associations);
- Sections 84 to 86 (Sureties);
- Section 88 (Lost instruments);

³⁶ For example, some exclusions would be incorporated societies, which are dealt with by the Incorporated Societies Act 1908, partnerships with a view to profit, which are covered by the Partnerships Act 1908, and limited partnerships, which are dealt with by the Limited Partnerships Act 2008.

- Section 90 (Stipulations in contracts as to time);
- Section 92 (Discharge of debt by acceptance of part in satisfaction); and
- Sections 94A and 94B (Payments under mistake).

R11 The new liquidation of associations provisions should clarify the “associations” that are excluded from their ambit by the operation of other Acts.

Part 2

JUDGES



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Chapter 5

Appointment of judges

INTRODUCTION

- 5.1 The appointment of judges is a critical matter for New Zealand, both for reasons of principle and for pragmatic reasons.
- 5.2 At the level of high principle, the judiciary is the third arm of government. It is not elected, and enjoys the highest level of security of tenure of any institution in the country. It is therefore hugely important that appointments be made with great care and a full appreciation of the enduring nature of the appointment, which often lasts for 20 years or more.
- 5.3 Further, if New Zealand citizens lose confidence in the judiciary, or a given judge, then inevitably the rule of law suffers. Citizens will not, as is their right, resort to the courts (save where they are compelled to do so) for the resolution of their rights and obligations. By choice, they will turn to alternate dispute resolution vehicles.
- 5.4 Given this context, in Issues Paper 29 we suggested that the comment in April 2002 by the Advisory Group on the Establishment of the Supreme Court, that “all judges should be appointed by a transparent process, with clear criteria, and adequate and appropriate consultation”,³⁷ is still apposite.³⁸ We made certain preliminary proposals as to how this general principle could best be achieved in contemporary New Zealand circumstances, and for the foreseeable future.
- 5.5 In this chapter, we outline the current legislative provisions on judicial appointments, and discuss the Commission’s recommendations to enhance these.

37 Report of the Advisory Group *Replacing the Privy Council: A New Supreme Court* (April 2002) at 39.

38 Law Commission *Review of the Judicature Act 1908: Towards a consolidated Courts Act* (NZLC IP29, 2012) at [3.1]-[3.2].

THE PRESENT FORMAL PROVISIONS IN NEW ZEALAND LAW

District Courts Act 1947

- 5.6 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

- 5.7 With regard to the High Court, 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 such persons must have held a practising certificate as a barrister or solicitor for at least 7 years. Beyond those provisions, the Act is silent on the process for the appointment of High Court judges and the requirements for appointment. There is no formal “fit and proper” requirement for persons to be appointed to this court.³⁹
- 5.8 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.⁴⁰ 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

- 5.9 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. 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.⁴¹

39 However, Associate Judges of the High Court are required to be “fit and proper persons” by s 26C of the Judicature Act 1908.

40 Judicature Act 1908, s 57.

41 Section 20.

THE CURRENT MECHANICS OF APPOINTMENTS

- 5.10 In Issues Paper 29, we noted that all judges in the courts we are considering are appointed by warrant by the Governor-General of New Zealand.⁴²
- 5.11 By convention, the appointment of the Chief Justice is made on the recommendation of the Prime Minister to the Governor-General. In essence, this is due to the constitutional significance of the Office of the Chief Justice, who is also the head of the judiciary in New Zealand. We recommend this convention be continued, and be placed in legislation.
- 5.12 The Attorney-General advises the Governor-General on appointments to the High Court, Court of Appeal and Supreme Court. Appointments are mentioned in Cabinet after they have been determined, but by convention are not discussed or approved by Cabinet. In making the nominations, the Attorney-General is exercising dual roles. As the First Law Officer, he or she has a particular responsibility to advise the Executive on matters affecting the judiciary. But the decision actually taken and advanced to the Governor-General is by the Attorney-General as a member of the Executive.
- 5.13 The Attorney-General also recommends the appointment of District Court judges. At one time those recommendations were made by the Minister of Justice.⁴³ But it was thought appropriate to move that responsibility to the Attorney-General to distance that process from any suggestion of Ministry of Justice interference.
- 5.14 Other than the purely formal requirements outlined above, there are no statutory merit criteria for appointment. Nor are there currently any legislated requirements for advertisement, consultation and like matters.
- 5.15 Successive Solicitors-General have endeavoured, over the last decade or so, to put in place, at least as a matter of convention, a better process for appointments: mechanisms for advertising for vacancies, interviews and consultative processes. Those sort of measures have been largely adopted in the District Courts. How far they have been employed in the Senior Courts is not altogether easy to determine, but it appears they have not extended as far as what is done in the District Courts.

COMMISSION'S APPROACH IN ISSUES PAPER 29

- 5.16 The starting point of our preliminary consideration was the principle that all judges should be appointed by a transparent process, with clear criteria, and adequate and appropriate consultation. We sought to give support to the kind of mechanics which had been suggested by successive Solicitors-General, as

42 *Review of the Judicature Act: Towards a consolidated Courts Act*, above n 38, at [3.10].

43 We note that the Minister of Justice is still responsible for appointing community magistrates: District Courts Act 1947, s 11A.

our enquiries suggested that their proposals have been employed somewhat unevenly by different Attorneys-General.

- 5.17 In summary, we proposed that the Attorney-General should continue to make recommendations for appointment to the Governor-General. The Governor-General, of course, gives effect to the recommendation by his or her warrant. This presaged continuation of the very significant role of the Attorney-General.
- 5.18 We also suggested that there should be legislated criteria for appointment, and a required scheme of consultation on the part of the Attorney-General.

SUBMISSIONS

- 5.19 There was a very respectable level of support for the general propositions outlined above. However, concerns were raised by some submitters, which we can conveniently set out under five heads:
- A Judicial Appointments Commission;
 - Differentiation in appointment procedures for different courts;
 - Elevations to a higher court;
 - A possible check on the exercise of the appointment power by the Attorney-General; and
 - Public awareness of the procedures actually adopted (or to be adopted) by the Attorney-General.
- 5.20 Some of the submissions went beyond the terms of our reference, but out of respect for the submitters, we summarise them here. They may also afford valuable pointers for the future.

A Judicial Appointments Commission?

- 5.21 In Issues Paper 29, we noted that a number of countries, including, most recently, the United Kingdom, now have in place Judicial Appointment Commissions.⁴⁴ Generally, these are advisory bodies only. In other instances, they bring forward a small number of names from which the appointer must choose. It will be observed that such systems also have the functional effect of limiting the power of the appointer (by whatever name that person is called).
- 5.22 We suggested that there is a world of difference between the present context in New Zealand and that of the United Kingdom. Only about a dozen judges are appointed each year in New Zealand, compared to the several hundred per annum in England and Wales. And we said that to do the job properly would require, in a difficult fiscal climate, the establishment of a new agency.

⁴⁴ *Review of the Judicature Act 1908: Towards a consolidated Courts Act*, above n 38, at [3.18].

This would require resources quite disproportionate to the number of appointments to be made in New Zealand.

- 5.23 Some senior judges and former Heads of Bench nevertheless emphasised to us that, in their view, it is both appropriate and necessary that there *should* be a Judicial Appointments Commission in New Zealand. Their reasons related partly to a check on the power of any given Attorney-General, and because, in the past, some promising names had not been brought forward. Nevertheless, we are not persuaded that in the present or foreseeable circumstances a Judicial Appointments Commission is desirable or necessary in New Zealand. Both for the reasons we gave in Issues Paper 29, and also because the recommendations advanced later in this chapter will go, we think, some distance towards meeting the concerns which have been raised with us.

Differentiation in appointment procedures for different courts

- 5.24 Some submitters said that different considerations for appointments will be required between the various courts. That must be right. To take only one example, the difference between the kind of work being undertaken in the Family Court, with its heavy emphasis on human dilemmas and the resolution of them in a particular context, and in the Supreme Court, which is charged with the articulation and development of sound “ultimate” principles for New Zealand law, is relatively obvious. We had noted this problem in Issues Paper 29,⁴⁵ and had endeavoured to address it by suggesting that a common sense application of the generic merit principles we articulated would best address this problem. We are still of that view, and note that section 5(2) of the Family Courts Act 1980 provides that a judge of the Family Court can only be appointed if “he is, by reason of his training, experience and personality, a suitable person to deal with matters of family law.”

Elevations to a more senior court

- 5.25 In Issues Paper 29, we said we did not consider it should be necessary for legislation to require the Attorney-General to undertake consultation again for an appointment elevating a judge from one court to a higher court.⁴⁶ A “direct” appointment from the Bar (for example) to an appellate court would, of course, require observance of the initial appointment provisions.
- 5.26 Several submitters invited us to reconsider this, with one submitter suggesting a process to identify appropriate candidates for judicial promotion is equally, if not more, important than the appointment of a new Judge. The New Zealand Bar Association also stressed the importance of elevation from one court to another, and that it could “see no reason why the same obligation for consultation should not apply”.

⁴⁵ At [3.36].

⁴⁶ At [3.26].

- 5.27 The New Zealand Law Society stated the “profession has a vital interest in [promotions to the Court of Appeal or Supreme Court], and is likely to have information that would be of substantial importance in making promotions”, a comment that was echoed by the current Chief District Court Judge. The Senior Courts’ judges advocated for a published appointments process identifying those who must be consulted, and said that this should apply to appointments to the appellate courts.
- 5.28 In light of these submissions, we recommend the Attorney-General should be required by statute to undertake a full round of consultation again for elevations to a higher court. Given there are relatively few appellate appointments each year (where the majority of elevations occur),⁴⁷ we do not consider that this would place an undue burden on the Attorney-General (or the persons and groups to be consulted).

Additional check on appointments?

- 5.29 The arguments addressed to us under this head were not, and appropriately so, made on the basis of the criticism of any particular appointments or promotions which have taken place historically, or recently. They were directed to an issue which many see to be of constitutional importance and on which there are really two schools of thought.
- 5.30 The first is that appointing judges is a task which should not, without constitutional safeguards, be entrusted to a member of the Executive. Nor, as a matter of prudence, should it be entrusted to the exercise of judgment by a single individual, even one with the standing of the First Law Officer. This is because of the very great significance of the decisions which are made.
- 5.31 The second school of thought was articulated by the late Lord Bingham, who at the time was the most senior judge in England. He once referred with approval to what he regarded as the “wise words” of Alexander Hamilton, writing in the *Federalist Papers* with reference to judicial and other appointments under the proposed United States Constitution:⁴⁸

... I proceed to lay it down as a rule that one man of discernment is better fitted to analyse and estimate the peculiar qualities adapted to particular officers than a body of men of equal or perhaps even of superior discernment.

The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite

47 For example, in 2011 there was one elevation to the Supreme Court (Chambers J) and two elevations to the Court of Appeal (Wild and White JJ). To date in 2012 there has been one elevation to the Supreme Court (Glazebrook J) and one elevation to the Court of Appeal (French J).

48 Tom Bingham *Lives of the Law* (Oxford University Press, Oxford, 2011) at 72, citing Alexander Hamilton “No 76 The Appointing Power of the Executive” in *Federalist Papers* (New York, 1787-1788).

to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them.

- 5.32 The difficulty for the Commission in the review of the Judicature Act 1908 is that these issues go well beyond the scope of our reference. This is a modest consolidation project. We did not discuss this in Issues Paper 29, and it inherently raises some delicate and difficult constitutional questions which would properly support a full reference, on its own.
- 5.33 For what it is worth, we consider that the most obvious checks on an Attorney-General, were there to be any, would include: a Judicial Appointments Commission; some kind of nomination system from which choices would then be made by the Attorney-General; or a requirement for the concurrence of another person before an appointment could be made, perhaps the Chief Justice or relevant Head of Bench.⁴⁹

Awareness of process

- 5.34 A number of submissions noted that the processes being followed by Attorneys-General have not always been clear and well-publicised. We agree. It is important that there is a clear and publicly known process for judicial appointments, to maintain the confidence of both the public generally, and potential applicants for appointment. We discuss this further below.

COMMISSION'S VIEW

The process for appointment

District Courts

- 5.35 The District Courts have a more refined judicial appointments process than that relating to the Senior Courts. It is useful to set it out in full:⁵⁰

The steps in the process

The steps in the appointment process for District Court Judges are as follows:

1. Prospective candidates may submit an expression of interest for judicial office on the prescribed form at any time. Alternatively, as a result of the consultation process described below, prospective candidates may be nominated, invited to express their interest and to enter the process. All prospective candidates are provided with an application form for completion.
2. A proposed shortlist is submitted to the Attorney-General for approval. The Attorney-General, after such consultation as he or she believes necessary, decides who should be on the shortlist for interview. Those approved are interviewed.

49 We note that the Heads of Bench of the Senior Courts strongly support the concurrence proposition.

50 Ministry of Justice "Judicial Appointments: Office of District Court Judge" (August 2012) .

3. Following the interviews, the Solicitor-General and the President of the Law Society are consulted.
4. The interview panel reports on the interviews and the results of the assessments and checks to the Attorney-General, who may choose to interview candidates. The Attorney-General selects the candidate(s) for appointment, mentions the appointment(s) in Cabinet and tenders formal advice to the Governor-General.

The interview panel

The interview panel is the Chief District Court Judge, the Head of Bench where relevant, the Executive Judge for the relevant region and a representative of the Ministry of Justice.

Consultation

A range of groups and people are contacted at various stages in the appointment process. The intention is to ensure a sufficiently broad perspective is obtained as to prospective candidates. The Attorney-General regards the knowledge, experience and judgment of the professional legal community as a very good source of informed opinion on the relative merits of prospective candidates. They are prominent among those consulted accordingly.

The list of parties who may be contacted includes the Chief Justice, the President of the Court of Appeal, the New Zealand Bar Association, the President of the New Zealand Law Society and other organisations or groups representative of lawyers who the Attorney-General believes can contribute names of suitable persons. Such groups may include the New Zealand Bar Association, the Criminal Bar Association, and, in the interests of increasing diversity, the Women's Consultative Group of the New Zealand law Society, the Māori Law Society and women lawyers' associations. Also community groups with which the applicant has had involvement may be consulted. Nominations may also be sought from the Minister of Justice, the Chair for the Justice and Electoral Select Committee and the Opposition Spokespersons for the Attorney-General portfolio.

Information sought

Persons interested in appointment as a District Court Judge are asked to complete an expression of interest form and to provide a curriculum vitae. Candidates selected for interview are asked to provide information on their health status and financial security.

Expression of interest form

The expression of interest form is a formal document. It seeks a variety of personal and professional information such as a brief description of the person's legal experience. It also seeks the person's consent to the information being conveyed as necessary to those consulted during the appointment process. Information contained in the expression of interest form is intended to supplement material in the curriculum vitae. The form is also intended to provide an opportunity to highlight experience which is considered to be of particular relevance to the criteria on which appointments are made.

Statutory declaration

Enclosed with the expression of interest form is a statutory declaration as to convictions, disciplinary action, bankruptcy and tax status.

Curriculum vitae

Persons interested in appointment are also asked to provide a curriculum vitae so that more detail about their legal career, including a full work history, is available together with any relevant experience outside the law.

- 5.36 The website notes that there is an Attorney-General's Appointment Unit "attached" to the Ministry of Justice to deal with District Court appointments, but "its records are held separately from those of the Ministry". It has its own email address, telephone and facsimile numbers, and postal address. Its role is to provide administrative assistance throughout the appointments process.
- 5.37 The process for appointment of District Court judges appears to us to be appropriate, and should be continued.

Senior Courts

- 5.38 In the case of appointments to the Senior Courts (including Associate Judges), the administrative process is carried out under the direction of the Solicitor-General, although, as noted above, the actual nomination is by the Attorney-General.
- 5.39 We were pressed by nearly all submitters to ensure that the actual process followed for the Senior Courts should be more clearly and publicly spelled out. We agree with concerns that the process lacks transparency.
- 5.40 In our view, this problem could be addressed, and in a relatively flexible way, by prescribing that the Attorney-General must, from time to time, publish, perhaps on the Courts of New Zealand website,⁵¹ the procedures for appointment he or she will follow in each of the Senior Courts. These could include:
- giving public notice that an appointment is to be made;
 - inviting applications;
 - advising the particulars to be required of applicants; and
 - the process that will be followed.

Criteria for appointment

- 5.41 In Issues Paper 29, we noted there has been extensive discussion on the concept of "merit" and the criteria for judicial appointment around the western world in recent years.⁵² We suggested the time has come for the criteria for appointment in New Zealand to be stated in legislation, and set out what a draft provision might look like.

51 Courts of New Zealand < www.courtsofnz.govt.nz > .

52 *Review of the Judicature Act 1908: Towards a consolidated Courts Act*, above n 38, at [3.34].

- 5.42 In the submissions, the main opposition to this came from the Senior Courts' judges and two law firms. The general thrust of all three submitters was that there are advantages in flexibility that cannot be obtained in a statutory provision. One large law firm stated that the risk with legislative criteria is that "the Attorney-General will become tied down to particular criteria at the expense of taking a more rounded view of the merits of the particular individual (including the views of those with whom the Attorney-General has consulted)."
- 5.43 However, the majority of the submitters agreed with our provisional view that while no single template is achievable or desirable for New Zealand judges, it is possible to state some general principles that ought to be observed by an Attorney-General in making appointments. With the benefit of consultation we are still of that view.
- 5.44 A point raised by some submitters, including the New Zealand Law Society and Chief District Court Judge Doogue, was whether the criteria should be considered in a "two-step" process. While varying slightly in detail, the common thread was that the initial (and paramount) consideration should be "merit", but that if two candidates are equal then a diversity criterion should be applied.
- 5.45 In the United Kingdom, the House of Lords Select Committee on the Constitution has recommended that such a "tipping" or "tie-break" approach (which is enshrined in section 159 of the Equality Act 2010 (UK)) be used as part of the judicial appointments process.⁵³ This has been endorsed by the United Kingdom Ministry of Justice, which has stated that:⁵⁴
- We therefore intend **to enable the use of a 'tipping point' provision, but not to dilute the merit principle. It is intended that a "tipping point" principle could be applied and the provision that appointments be based solely on merit also be retained in the Constitutional Reform Act 2005.** This proposal will be developed in consultation with the [Judicial Appointments Commission], and we will consider the concerns expressed during consultation around the problem of prioritisation of different protected characteristics.
(Their emphasis)
- 5.46 The 2012 Annual Report of the Judiciary Diversity Taskforce notes that "[f]ollowing the [United Kingdom Ministry of Justice] consultation and subsequent publication of the Crime and Courts Bill, a designated team has been set up within the [Judicial Appointments Commission] to take this work forward."⁵⁵ Under the heading "Future actions planned", it then states:

53 House of Lords Select Committee on the Constitution *25th Report of Session 2010-12: Judicial Appointments* (28 March 2012) at [101].

54 Ministry of Justice (UK) Appointments and Diversity 'A Judiciary for the 21st Century': *Response to public consultation* (11 May 2012) at [96].

55 Judiciary Diversity Taskforce *Improving Judicial Diversity: Progress towards delivery of the 'Report of the Advisory Panel on Judicial Diversity 2010'* (September 2012) at 30.

It is understood that the Lord Chancellor may issue guidance to the [Judicial Appointments Commission] under the provisions of the [Constitutional Reform Act 2005]. Proposals for implementing the provisions consistent with any guidance issued will be put to [Judicial Appointments Commission] Commissioners in the latter part of 2012.

- 5.47 The “Forecast completion date” is listed as May 2013, depending upon the progress of the Crime and Courts Bill and United Kingdom Ministry of Justice guidance.
- 5.48 The situation in the United Kingdom is not directly comparable to that in New Zealand, given the absence of an equivalent to section 159 of the Equality Act 2010 (UK) on our statute book. The criteria we recommend below do provide for diversity to be taken account when the Attorney-General is considering an appointment. However, we consider that the United Kingdom experience should be monitored, as it may provide useful guidance as to whether such a provision should be introduced in New Zealand at a later date.
- 5.49 Accordingly, we recommend legislation should provide that in making appointments to the New Zealand courts, the Attorney-General must be satisfied, before advising the Governor-General on an appointment, that:
- (a) the person to be appointed a Judge has been selected on merit, having regard to that person’s –
 - (i) personal qualities (including integrity, sound judgment, and objectivity);
 - (ii) legal abilities (including relevant expertise and experience and appropriate knowledge of the law and its underlying principles);
 - (iii) social awareness of and sensitivities to tikanga Māori; and
 - (iv) social awareness of and sensitivities to the other diverse communities in New Zealand; and
 - (b) regard has been given to the desirability of the judiciary reflecting gender, cultural and ethnic diversity.
- 5.50 As we said in Issues Paper 29, doubtless criteria of this kind are in practice already in the forefront of an Attorney-General’s consideration.⁵⁶ However, to engender public confidence and transparency, these criteria should be explicitly stated in legislation.
- 5.51 We do not consider it necessary to make specific provision for their application to the circumstances of a given level of court. The differences in the kind of work being undertaken by a given court, and the needs of a particular Bench will be well known to, the Attorney-General, or his or her advisors, in any given case.

⁵⁶ *Review of the Judicature Act 1908: Towards a consolidated Courts Act*, above n 38, at [3.39].

- 5.52 Expressions of interest from persons who reflect the breadth of these criteria and who enjoy the confidence of the Bar should be encouraged.

Consultation

- 5.53 Consultation is an essential aspect of the appointments process. It must be both appropriate and adequate. In Issues Paper 29, we noted that, traditionally, Attorneys-General in New Zealand have taken “soundings” from the Solicitor-General on appointments to the Senior Courts, and from the Secretary for Justice on appointments to the District Courts.⁵⁷ We said further that the Chief Justice, the Presidents of the New Zealand Law Society and the New Zealand Bar Association, and the relevant Head of Bench have also been consulted, to a greater or lesser extent, depending on the preferences of the particular Attorney-General.
- 5.54 Our provisional view was that, for new appointments, consultation with all of these people should be mandatory, and formalised in legislation. This would be a minimum requirement, and we envisaged the Attorney-General would consult with a broader range of people, and possibly even suitable lay persons, in order to encourage diversity.⁵⁸
- 5.55 Submitters almost unanimously agreed with this formalisation, and with our proposed list of people to be consulted.
- 5.56 One submitter did suggest a mandatory list may mean other groups, such as the Women’s Consultative Group of the New Zealand Law Society, the Māori Law Society and the Women’s Lawyers Association, are passed by. However, we do not consider that this will be the case. As noted above, the proposal would not limit the Attorney-General to only those persons included in the mandatory list; he or she would be free to consult any and all other persons, including lay persons, who may provide relevant information.
- 5.57 Accordingly, we recommend the legislation provide that the Attorney-General *must* consult certain persons before advising the Governor-General on the appointment of a judge. These are:
- the Chief Justice, in the case of appointments to the Senior Courts, and the Chief District Court Judge, in the case of the District Court appointments;
 - the Head of Bench of the court to which the appointment will be made (such as the President of the Court of Appeal, the Chief High Court Judge, or Principal Judges);
 - the Solicitor-General;
 - the President of the New Zealand Law Society; and

⁵⁷ At [3.23].

⁵⁸ At [3.27].

- the President of the New Zealand Bar Association.

5.58 The Attorney-General should also be *empowered* to consult such other persons as he or she considers, in any given case, to be appropriate.

- R12 The formal requirements for appointment as a judge in the New Zealand trial and appellate courts should remain as set out in the District Courts Act 1947, the Judicature Act 1908 and the Supreme Court Act 2003.
- R13 The nomination for the Office of Chief Justice of New Zealand should continue to be made by the Prime Minister, and this should be provided for in new courts legislation.
- R14 The Attorney-General should continue to recommend the appointment of all District Court, High Court, Court of Appeal and Supreme Court judges.
- R15 The Attorney-General should be required by statute to publish, in written form and on the Courts of New Zealand website, the process he or she will follow in soliciting and advancing nominations for judicial appointment.
- R16 There should be additional statutory criteria for appointment as a judge as follows:
- (a) the person to be appointed a judge must be selected by the Attorney-General on merit, having regard to that person's –
 - personal qualities (including integrity, sound judgment, and objectivity);
 - legal abilities (including relevant expertise and experience and appropriate knowledge of the law and its underlying principles);
 - social awareness of and sensitivities to tikanga Māori; and
 - social awareness of and sensitivities to the other diverse communities in New Zealand; and
 - (b) regard must be given to the desirability of the judiciary reflecting gender, cultural and ethnic diversity.
- R17 Before making an appointment, whether “first instance” or an elevation to a higher court, the Attorney-General should be required by statute to consult:
- the Chief Justice, in the case of an appointment to the Higher Courts, and the Chief District Court Judge, in the case of appointment to the District Courts;
 - the Head of Bench of the court to which the appointment will be made;
 - the Solicitor-General;
 - the President of the New Zealand Law Society;
 - the President of the New Zealand Bar Association; and
 - such other persons as he or she considers to be appropriate.

Chapter 6

Judicial conflicts of interest

INTRODUCTION

- 6.1 Judges must have the respect and faith of the communities they serve to be effective. To achieve this, the public must be satisfied that cases are being decided fairly and impartially, on the basis of findings of fact and the application of the law to those facts, rather than on the basis of favouritism or prejudice. Judicial accountability is also essential to maintaining public confidence in the judiciary and the rule of law.
- 6.2 On appointment, a judge is required by statute to take an oath to do justice to all persons “without fear or favour, affection or ill-will”, which reflects the independence and impartiality required of a judge.
- 6.3 If, after being assigned to hear a case, a judge considers there are circumstances that raise doubts as to whether he or she should sit on that particular case, the judge may have to stand down, or “recuse”. The case will then be heard and decided by another judge. A judge cannot simply choose not to sit on a case to which he or she has been assigned. There has to be a proper reason for a judge to take this course, and the judge must be guided by the common law and judicial codes of practice in deciding whether or not it is appropriate to sit.
- 6.4 Issues around judicial conflicts of interest and recusal attracted public attention over allegations of inadequate disclosure by Wilson J in relation to his financial relationship with counsel appearing before him, as discussed in *Saxmere Company Limited v Wool Board Disestablishment Company Limited*.⁵⁹ Those allegations led to a complaint to the Judicial Conduct Commissioner, litigation, and ultimately the resignation of the Judge.

⁵⁹ *Saxmere Company Limited v Wool Board Disestablishment Company Limited* [2009] NZSC 72, [2010] 1 NZLR 35.

- 6.5 Subsequently, Green MP Dr Kennedy Graham's Register of Pecuniary Interests of Judges Bill was drawn from the Members' ballot, and introduced to Parliament on 11 November 2010. The purpose of the Bill is to:⁶⁰

Promote the due administration of justice by requiring judges to make returns of pecuniary interests to provide greater transparency within the judicial system and to avoid any conflict of interest in the judicial role.

- 6.6 The Bill had its first reading on 27 June 2012, and was referred to the Justice and Electoral Committee.
- 6.7 As a statutory requirement for a register of judges' pecuniary interests relates to matters being considered in the Commission's review of the Judicature Act 1908, the Commission published *Towards a New Courts Act – a Register of Judges Pecuniary Interests?* (Issues Paper 21) in March 2011.⁶¹
- 6.8 In this chapter, we return to the issues raised in Issues Paper 21, and consider how best to prevent and manage judicial conflicts of interest. First, we examine section 4(2A) of the Judicature Act 1908 (discussed in Issues Paper 29), which codifies the general principle that judges must not undertake any other paid work.⁶² Compliance with section 4(2A) reduces the potential for conflicts of interest to arise for a judge, and we make recommendations to improve the clarity and scope of the section. We then look at whether there is a need for the establishment of a register of judges' pecuniary interests along the lines of that proposed in the Register of Pecuniary Interests of Judges Bill which, at the time of writing, is before Parliament. Finally, we consider issues associated with judicial recusal, and make recommendations to improve the recusal process.⁶³

NO OTHER EMPLOYMENT OR OFFICE – SECTION 4(2A) OF THE JUDICATURE ACT 1908

- 6.9 Restrictions on outside work or appointments help to reduce the likelihood of a conflict of interest arising for a judge. In Issues Paper 29 we noted that how this is achieved statutorily is somewhat untidy, and less transparent than it should be.
- 6.10 Section 4(2A) of the Judicature Act 1908 is the relevant provision for Senior Court judges. It provides:

60 Register of Pecuniary Interests of Judges Bill 2010 (240-1), cl 3.

61 Law Commission *Towards a New Courts Act – A Register of Judges' Pecuniary Interests? Review of the Judicature Act 1908 First Issues Paper* (NZLC IP21, 2011).

62 Law Commission *Review of the Judicature Act 1908: Towards a consolidated Courts Act* (NZLC IP29, 2012) at [3.47]-[3.54].

63 See the disclosure of interest regarding this chapter at the beginning of the Report at page vii.

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.

- 6.11 Section 4(2A) was inserted into the Judicature Act 1908 at the same time as other provisions dealing with part-time judges.⁶⁴ In Issues Paper 29 we stated that although we consider section 4(2A) applies to all judges, whether they are full- or part-time, this is not explicit on the face of the section.
- 6.12 The equivalent provision in the District Courts Act 1947 provides in addition that “no judge shall practise as a barrister or solicitor”,⁶⁵ which suggests the provision was intended to apply only to part-time judges.
- 6.13 We also said in Issues Paper 29 that there is room for argument as to whether section 4(2A) of the 1908 Act applies to judges of the Supreme Court and the Court of Appeal. Section 4 is in Part 1 of the 1908 Act, 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).
- 6.14 The issue of whether section 4(2A) applies to judges of the Court of Appeal and the Supreme Court 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 this issue.⁶⁶ The Court did, however, note 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.”⁶⁷ Although this approach has been criticised,⁶⁸ it does indicate a need for amendment of the relevant statutory provision to reflect the appropriate lines of judicial authority and accountability.
- 6.15 In Issues Paper 29 we said we thought 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 the face of the section that it applies to both trial and appellate judges. We were provisionally of the view that a generic section would be 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.⁶⁹

64 Judicature Amendment Act 2004.

65 District Courts Act 1947, s 5(5).

66 *Saxmere Company Limited and Ors v Wool Board Disestablishment Company Limited* [2009] NZSC 122, [2010] 1 NZLR 76.

67 At [9].

68 Phil Taylor “Judge faces being first to go to conduct panel” *The New Zealand Herald* (online ed, Auckland, 19 December 2009).

69 *Review of the Judicature Act 1908: Towards a consolidated Courts Act*, above n 62, at [3.52].

- 6.16 The Senior Courts' judges submitted that while they see a provision such as section 4(2A) as appropriate in the case of part-time judges, they question the need for such a provision in relation to full-time judges. The judges said that at the time the provision was enacted it was understood that it was intended to apply only to part-time judges:

Since there is a strong convention that holding judicial office is a full-time occupation which precludes other office or employment, it has never been seen necessary to provide specifically for such a limitation until part-time appointment became an option. (The holding of offices and other extra-judicial associations judges may have is the subject of ethical guidelines and conventions and the approval of the Chief Justice or head of bench.)

- 6.17 The Senior Courts' judges submitted further that if the Commission proposes to maintain section 4(2A) in terms that do not make a distinction between part-time and full-time judges, or trial and appellate judges, then the provision should be changed to provide for notification to and approval by the Chief Justice after consultation with the head of bench on which the judge sits. They also stated that if the provision is to be retained, then it should make clear that there is no limitation on a judge being a trustee of a family trust or similar entity.

- 6.18 Other submitters who responded to this issue generally agreed the section 4(2A) restrictions should apply to all judges in all courts. The Crown Law Office does not agree there is room for doubt as to the application of section 4(2A) of the Judicature Act 1908, as the provision clearly applies to "a judge". It said the purpose of section 4(2A) is to ensure that other offices are compatible with judicial office for reasons of preserving the judge's impartiality and the respect in which the judicial role is held, but also in terms of time commitments. In the Crown Law Office's view, it is probably not possible or desirable to attempt to craft a provision that covers all roles, appointments or offices, whether paid or unpaid, that may be incompatible with judicial office:

Clearly there is a point at which the question must be subject to consideration by judges as a group and the judges may choose, for example, to develop guidelines for themselves.

- 6.19 The New Zealand Law Society said it agrees that the rules regarding employment and external activities undertaken by judges should be clarified, and that appropriate procedures should be put in place for seeking approval for such activities. The Law Society said the rules should be clearly and publicly stated, and should apply to all judges.
- 6.20 Looking at things from another angle, a community law centre submitted that allowing judges to sit on "school boards and the like" assists in diversity and gives judges an insight into community issues and a connection with grassroots New Zealand.
- 6.21 We agree there needs to be flexibility to enable judges to serve on school boards or advisory organisations, or to act as a trustee of a family trust, where this is compatible with judicial office (as is currently the case). It seems

sensible to follow the Senior Courts' judges' suggestion as to the appropriate procedure for a judge to obtain consent for the holding of any such office.

- 6.22 We do not agree, however, that the provision should only apply to part-time judges. Although full-time judges are unlikely to have time for other work, they may wish to hold other office, and consistent standards and procedures for approval should apply to them. We therefore think there should be a provision in new courts legislation providing that no judge (whether part-time or full-time, in a trial or an appellate court) may undertake any other paid employment or act as a barrister or solicitor. Nor should a judge be able to hold any other office (whether paid or not), unless that judge has notified the Chief Justice, and the Chief Justice, in consultation with the judge's Head of Bench (for judges in any Court other than the Supreme Court), is satisfied that the other office is compatible with judicial office, and the relevant judge has been advised of this.
- 6.23 Although prior clearance through the Chief Justice or relevant Head of Bench for any such undertaking likely reflects the existing practice, we think it should be provided for in legislation, so the position is clear to the public.
- 6.24 We also think it is important for the public to know what types of activities will likely be considered consistent and inconsistent with judicial office, and that the Chief Justice, in consultation with the Heads of Bench, should develop and publish guidelines on this.

- R18 There should be a clear statutory provision in new courts legislation prohibiting all judges from undertaking other employment or acting as a barrister or solicitor.
- R19 The statute should also prohibit judges from holding other office (whether paid or unpaid) unless the Chief Justice, in consultation with the relevant Head of Bench, has approved the other office as being consistent with judicial office.
- R20 The Chief Justice, in consultation with the other Heads of Bench, should develop guidelines on the types of activities that are and are not considered consistent with judicial office, and make those guidelines available to the public via the internet.

A REGISTER OF JUDGES' PECUNIARY INTERESTS?

- 6.25 Another mechanism that has been proposed as a way of avoiding judicial conflicts of interest is the establishment of a register of judges' pecuniary interests. This was explored in Issues Paper 21, which outlined the disclosure scheme for pecuniary interests of MPs, international comparisons for dealing with judges' interests, arguments in favour of the imposition of such a register, and difficulties associated with establishing and maintaining a register.⁷⁰

Summary of international comparisons

- 6.26 Issues Paper 21 contains details on developments in other countries regarding judicial interest registers. In this section of the Report, we summarise and update these developments.

United Kingdom

- 6.27 In the United Kingdom, when the highest court was the Appellate Committee of the House of Lords, the members of the Committee were Lords of Appeal in Ordinary appointed under the Appellate Jurisdiction Act 1876. Those appointments gave them full voting and other rights in the House of Lords. Although in practice the Law Lords did not usually participate in the legislative work of the House, they were nonetheless bound by the rules of the House, which required them to make entries on the House of Lords Register of Interests.
- 6.28 On the commencement of the United Kingdom Supreme Court in October 2009, the Lords of Appeal in Ordinary became Justices of the Supreme Court. They are still Peers of the Realm, but they are unable to sit or vote in the House while they remain in office as Justices of the Supreme Court. They are therefore treated as Peers on leave of absence, and do not make entries in the House of Lords Register of Interests.
- 6.29 In relation to the current practice, the United Kingdom Supreme Court website states:⁷¹

... the Justices have decided that it would not be appropriate or indeed feasible for them to have a comprehensive Register of Interests, as it would be impossible for them to identify all the interests, which might conceivably arise, in any future case that came before them. To draw up a Register of Interests, which people believed to be complete, could potentially be misleading. Instead the Justices of the Supreme Court have agreed a formal Code of Conduct by which they will all be bound, and which is now publicly available on the UKSC

70 *Towards a New Courts Act – A Register of Judges' Pecuniary Interests? Review of the Judicature Act 1908 First Issues Paper*, above n 61.

71 United Kingdom Supreme Court “About interests and expenses” < www.supremecourt.gov.uk > .

website. In addition all the Justices have taken the Judicial Oath – and they all took it again on 1 October 2009 – which obliges them to “do right to all manner of people after the law and usages of this Realm without fear or favour, affection or ill will”; and, as is already the practice with all other members of the judiciary, they will continue to declare any interest which arises in the context of a particular case and, if necessary, recuse themselves from sitting in that case - whether a substantive hearing, or an application for permission to appeal.

6.30 We note the Supreme Court website also provides information on annual judicial expenses, including figures for domestic travel, international travel, and subsistence for attendance at conferences and meetings of international organisations. The Law Commission would be pleased to see similar information provided in relation to our own courts on the Courts of New Zealand website.

6.31 There is presently an “e-petition” running in the United Kingdom, which requests that:

the Government bring about a Register of Pecuniary Interests of Judges Bill (as is currently being considered in New Zealand’s Parliament) or amend present UK legislation to require all members of the Judiciary to submit their interests & hospitality to a publicly available Register of Interests.

6.32 The e-petition closes on 20 October 2012 (one year after it was created). If it attracts 100,000 signatures, it will be considered for debate in the House of Commons. This seems highly unlikely, however, given the low number of signatures collected at time of writing.⁷²

United States of America

6.33 In the United States, federal and some state judges, court employees and other public officials are required to make annual financial disclosures. These financial disclosure requirements were designed to meet a growing public demand for accountability and integrity of public officials. Detailed information is required. The disclosure forms of judges are available to the public on the internet, although as a result of security concerns, judges may redact information from their financial disclosure reports in certain circumstances.

South Africa

6.34 Legislation in South Africa provides for the development of a code of judicial conduct and the establishment and maintenance of a register of judges’ “registrable interests”.⁷³ When Issues Paper 21 was published, draft

⁷² See < www.epetitions.direct.gov.uk > . As at 31 August 2012 only 22 people had registered their signatures.

⁷³ Judicial Service Commission Amendment Act 2008 (South Africa).

regulations on the code and the details of what the register of judges' interests would require were being consulted on.

- 6.35 At the time of writing this chapter, these were still being considered by an ad hoc Parliamentary committee.

India

- 6.36 In India, the Indian Supreme Court and a number of High Courts have voluntarily made publicly accessible asset declarations. Given the constitutional importance of judicial independence, this might be seen as the optimal approach if there is to be a judicial interests register, but this does not presently seem to be in contemplation by the New Zealand judiciary.

Key features of the MPs' register

- 6.37 In New Zealand, members of Parliament must make returns of pecuniary and other specified interests in accordance with the provisions of Part 1 of Appendix B of the Standing Orders of the House of Representatives.⁷⁴ These returns are maintained in a register by the Registrar (currently Dame Margaret Bazley) in accordance with Part 2 of Appendix B.
- 6.38 All returns and information held by the Registrar relating to an individual member are confidential. They must be destroyed after three terms of Parliament.
- 6.39 The Registrar must publish a summary of the returns of current members within 90 days of the due date for transmitting initial and annual returns. The summary must contain a fair and accurate description of the information contained in members' returns. The summary is presented to the House by the Speaker, and is available for public inspection, including on Parliament's website.
- 6.40 The Standing Orders define "pecuniary interest" as "a matter or activity of financial benefit to the member that is required to be declared under clause 5 or clause 8 [of Appendix B]". "Other specified interest" means "a matter or activity that may not be of financial benefit to the member and that is required to be declared under clause 5 or clause 8".
- 6.41 Members of Parliament are required to make an initial return and then an annual return each year as at 31 January.
- 6.42 Every return must contain the following information for the previous 12 months as at the effective date of the return:⁷⁵

74 Standing Orders of the House of Representatives 2011, SO 160.

75 Appendix B, cl 5.

- The name of each company of which the member is a director or holds or controls more than five per cent of the voting rights, and a description of the main business activities of each of those companies;
- The name of every other company or business entity in which the member has a pecuniary interest, and a description of the main business activities of each of those companies or entities;⁷⁶
- If the member is employed, the name of each employer of the member and a description of the main business activities of each of those employers;
- The name of each trust of which the member is aware, or ought reasonably to be aware, that he or she is a beneficiary or a trustee, (other than registered superannuation schemes);
- If the member is a member of the governing body of an organisation or a trustee of a trust that receives, or has applied to receive, Government funding, the name of that organisation or trust and a description of the main activities of that organisation or trust, unless it is a Government department, a Crown entity, or a State enterprise;⁷⁷
- The location of each parcel of real property in which the member has a legal interest or in which any such interest is held by a trust which the member knows (or ought reasonably to know) he or she is a beneficiary of, but does not include land held by a member as a trustee only or property owned by a disclosed superannuation scheme;
- The name of each registered superannuation scheme in which the member has a pecuniary interest;
- The name of each debtor of the member who owes more than \$50,000 to the member and a description, but not the amount, of such of the debts that are owed to the member by those debtors; and
- The name of each creditor of the member to whom the member owes more than \$50,000, and a description, but not the amount, of each of the debts that are owed by the member to those creditors.⁷⁸

76 A member does not have a pecuniary interest in a company or business entity (entity A) merely because the member has a pecuniary interest in another company or business entity that has a pecuniary interest in entity A: Appendix B, cl 4(2).

77 A member who is patron or vice-patron of an organisation that receives, or has applied to receive, Government funding, and who is not also a member of its governing body, does not have to name the organisation, unless the member has been actively involved in seeking such funding during the period covered by the return.

78 In relation to disclosed creditors and debtors, a member must also declare if the rate of interest payable in relation to any debt owed to a person other than a registered bank or a building society is less than the normal market interest rate that applied at the time the debt was incurred, or, if the terms of the debt are amended, at the time of that amendment: Appendix B, cl 5.

- 6.43 Relationship property settlements and debts owed to the member by the member's spouse, domestic partner, parent, child, step-child, foster-child or grandchild do not have to be disclosed.⁷⁹ Nor do short-term debts for supply of goods or services.⁸⁰
- 6.44 Every return must also contain:
- The name of each country the member travelled to;
 - The purpose of such travel;
 - The name of each person who contributed to the costs of travel to and from the country, or accommodation costs (unless an exception applies);⁸¹
 - A description of each gift received by the member that has an estimated market value in New Zealand of more than \$500 and the name of the donor of each of those gifts (if known or reasonably ascertainable by the member):
 - Paid as a salary or allowances under the Civil List Act 1979, or the Remuneration Authority Act 1977, or as a funding entitlement for parliamentary purposes under the Parliamentary Service Act 2000; or
 - Paid in respect of any activity in which the member concluded his or her involvement prior to becoming a member.
- 6.45 The actual value, amount, or extent of any asset, payment, interest, gift or contribution or debt is not required to be disclosed.
- 6.46 Any member who becomes aware of an error or omission in any return previously made by that member must advise the Registrar as soon as practicable after becoming aware of it. The Registrar may, at the Registrar's own discretion, publish amendments on a website to correct such errors or omissions.
- 6.47 A member who has reasonable grounds to believe that another member has not complied with his or her obligations to make a return may request that the Registrar conduct an inquiry into the matter. The Standing Orders set out detailed provisions relating to such an inquiry.⁸²

79 Appendix B, cl 5.

80 Appendix B, cl 6.

81 Information does not have to be included in the return if the travel costs or accommodation costs were paid by or by any combination of: the member; the member's spouse or domestic partner; the member's parent, child, step- foster- or grandchild; the Crown; any government, parliament, or international parliamentary organisation, if the primary purpose of the travel was in connection with an official parliamentary visit.

82 Appendix B, cl 15A.

Arguments in favour of a register of judges' pecuniary interests

- 6.48 As a branch of government, it is vital that the judiciary has the confidence of the public. In Issues Paper 21 the Commission noted that there is value in the greater transparency a register would provide in that it may be said to increase public confidence in the integrity of the judiciary, reduce the risk of conflicts of interest arising, and ensure the maintenance of high standards and accountability.⁸³
- 6.49 While the existence of a register may not necessarily *prevent* conflicts arising, it may alert counsel or other members of the judiciary to the possibility of a conflict so that any issues can be properly explored.
- 6.50 The establishment of a register would also be consistent with the requirements for members of Parliament and Ministers to disclose their pecuniary interests, and international trends towards greater transparency in government.

Views of submitters in response to Issues Paper 21

- 6.51 Only one submitter, WM Wilson QC, expressly supported a requirement for a register of judges' pecuniary interests. He submitted that although disclosure on a register of his joint interest with Mr Galbraith would not have revealed their shareholder account balances at any time, such disclosure would have put the parties clearly on notice of the interest, and thus enabled them to seek any information which they wished to obtain about the interest.
- 6.52 Other submitters stressed the importance of ensuring public confidence in the judiciary, but did not suggest that a register was the best way to achieve that.
- 6.53 The New Zealand Bar Association pointed out that there is no evidence of a decline in public confidence in the judiciary.
- 6.54 The Chief Justice, the Bar Association and the Law Society submitted that the creation of a register is unnecessary and unjustified. A number of reasons were given:
- The fact that members of Parliament are required to disclose their pecuniary interests does not mean that the same requirement should apply to judges. Each branch of government performs a different role, and there should not be any assumption of equal treatment in terms of disclosure obligations.
 - Appeal rights and the ability to complain to the Judicial Conduct Commissioner about a judge's conduct also distinguish judges' decisions from those of members of the other branches of government.

83 *Towards a New Courts Act – A Register of Judges' Pecuniary Interests? Review of the Judicature Act 1908 First Issues Paper*, above n 61, at [8.23].

- The potential for judicial conflicts/apparent bias is wider than pecuniary interests alone. The entry of an interest on a register would not relieve the relevant judge from his or her obligations to determine whether recusal is warranted.
- The Chief Justice submitted that it may be constitutionally inappropriate for Parliament to enact legislation requiring existing judges to make disclosures on their interests in a register because this would adversely change their terms and conditions. Her Honour suggested that it would be undesirable for new and existing judges to operate under different terms in this regard, and that a register would exacerbate existing difficulties in persuading senior practitioners to accept judicial appointment.
- The Chief Justice also highlighted privacy and harassment concerns for judges and their families if a register was in place.
- The Law Society too expressed concerns that information on a register could be used for illegitimate purposes.
- In addition, the Law Society noted that, if there is to be a register, it may be necessary for judges to be able to respond to any public criticisms relating to their disclosures.

Commission's view

- 6.55 The Law Commission has no reason to think that public confidence in the judiciary is not high in New Zealand. While in principle there are arguments in favour of a register of judges' pecuniary interests, there are also significant practical difficulties associated with such a register. On balance, we do not think the establishment of a register is the best solution for managing judicial conflicts of interest.
- 6.56 When judicial conflicts of interest arise, they are more likely to involve the relationship between judge and counsel (as was the case in *Saxmere*) or a party to the proceedings, than a financial interest in the outcome of the proceedings. While it could be argued that there is merit in adopting a pre-emptive approach to avoid potential future situations arising, we are not convinced that a register would be effective in revealing actual or even potential conflicts of interest in many cases, and in our view the potential problems it would create outweigh the benefits.
- 6.57 The level of disclosure required for a register to operate effectively would be considerably greater than the disclosure currently required of members of Parliament, and would intrude too far on the privacy of judges and their families. It may also encourage people to structure their affairs to avoid having to make full disclosure.
- 6.58 In our view, the best way to deal with potential judicial conflicts of interest is to have clear, robust and well-publicised rules and processes for recusal, as discussed later in this chapter. If the judges implement the Commission's

recommendations on recusal procedure, and there is a statutory requirement for all judges to seek approval from the Chief Justice for any outside office (which would include acting as a trustee or director of an organisation), in our view there is no need for the additional requirement of a register of judicial interests.

Register of Pecuniary Interests of Judges Bill 2010

- 6.59 As most submitters who responded to Issues Paper 21 did not think there was a need for a register of judges' interests, they did not comment on issues relating to the most appropriate form such a register should take.
- 6.60 WM Wilson QC made the important point that a register should include liabilities as well as assets. For example, a loan from a financial institution to a judge is at least as relevant as a deposit by the judge with the institution.
- 6.61 While the Commission does not consider that a scheme requiring judges to disclose their pecuniary interests in a register is necessary or appropriate in New Zealand, as there is currently a Bill before the House to establish such a scheme, we should note that the Commission considers the Register of the Pecuniary Interests of Judges Bill would not be effective if enacted in its current form.

Level of detail

- 6.62 To be effective, the detail required to be disclosed in a register must be sufficient to disclose the nature of the relevant interests. For example, it would not be sufficient to disclose the existence of a trust, but not its holdings. If there is to be a register, sufficient detail would need to be disclosed to put counsel on notice of a potential conflict. However, this needs to be balanced against the privacy interests of individual judges.

Definition of pecuniary interest

- 6.63 The Bill defines "pecuniary interest" much more widely than the equivalent definition for the members of Parliament's register under the Standing Orders of the House of Representatives. Clause 5 of the Bill defines pecuniary interest to mean "any interest in anything that reasonably gives rise to an expectation of a gain or loss of money for a judge, or their spouse, partner, child, step-child, foster child or grandchild." Thus, when a judge is required by clause 9(1)(b) to disclose the name of each company or business in which the judge has a pecuniary interest, the list potentially extends to all companies and businesses in which their spouses and adult children and grandchildren have a financial interest. In our view, this intrudes too far into the security and safety interests of judges, and the privacy interests of individual judges and their families.
- 6.64 By way of contrast, the definition of pecuniary interest in the Standing Orders is limited to a matter or activity of financial benefit to the *member* that is

required to be declared under clause 5 or clause 8 of Appendix B of the Standing Orders.

- 6.65 We also note that the register for members of Parliament includes requirements for the disclosure of “other specified interests” in addition to pecuniary interests, which should also be considered if there is to be a judicial interests register.

Administration of the register

- 6.66 The Bill provides for the Judicial Conduct Commissioner to compile and maintain the register. However, the Judicial Conduct Commissioner would also be responsible for receiving and deciding complaints that a judge has failed to make a return of pecuniary interests in accordance with the statutory scheme. We are concerned at the conflation of roles this creates, and consider instead that, if there is to be a register, it should be compiled and maintained by a person in the office of the Chief Justice or nominated by the Chief Justice.

Publication of information contained in returns

- 6.67 The Bill requires the publication of the information contained in the returns. This contrasts with the members of Parliament’s register, where the requirement is only to publish a fair and accurate summary of the information contained in the returns. If there is to be a register, we suggest that a similar requirement would be appropriate for the register of pecuniary interests of judges, in the interests of protecting privacy. That summary would still need to contain sufficient detail on the nature of the interests to put counsel on notice of a potential conflict, however. The summary should be made publicly available on the Courts of New Zealand website.

R21 A register of judges’ pecuniary interests should not be established by statute in New Zealand.

R22 If, contrary to the above recommendation, there is to be such a register:

- it should include sufficient detail to disclose the nature of a judge’s interests (subject to the protection of the privacy interests of judges);
- the register should be compiled and maintained by a person in the office of, or nominated by, the Chief Justice;
- there should be a requirement for the publication of a fair and accurate summary of the information contained in the annual returns by judges; and
- the summary should be made publicly available on the Courts of New Zealand website.

RECUSAL

- 6.68 While the Commission does not consider there is a need for the establishment of a register of judges' pecuniary interests, we do think the processes around judicial recusal require attention.
- 6.69 As discussed in Issues Paper 21, the present substantive law on when a judge should not sit on a case by reason of a pecuniary interest was settled by the Supreme Court in *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd*.⁸⁴ In that case, the Court held that, subject to waiver and necessity, a judge is disqualified if a fair-minded lay observer might reasonably apprehend that there is a real and not remote possibility that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. There is to be no attempt to predict or enquire into the actual thought processes of the judge. Rather, it is necessary first to identify what it is said might lead a judge to decide a case other than on its legal and factual merits, and secondly, to articulate the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.
- 6.70 The Commission expressed the view that the substantive law relating to when a judge should recuse is in line with the law in other Commonwealth jurisdictions, and does not require amendment. We remain of that view, and none of the submitters who responded to Issues Paper 21 expressed any need for changes to be made to the substantive common law, or for it to be codified.
- 6.71 Although the Commission considers the substantive law to be satisfactory, aspects of the procedure relating to recusals remain unsatisfactory. There are no statutory provisions or rules of court dealing with the process of recusal. Instead, the common law and codes of practice govern the behaviour of New Zealand judges. In Issues Paper 21 we said these codes have no formal legal force, no specific sanctions for non-compliance, and are not generally available to the public. Excerpts from the benchbook that guides the Senior Courts' Judges were set out in Issues Paper 21.⁸⁵
- 6.72 The guidelines for judicial conduct are now available on the Courts of New Zealand website.⁸⁶ These reflect that it is often the judge whose impartiality is at issue who decides whether to hear the case or not.
- 6.73 In Issues Paper 21 we noted in the Court of Appeal there is a "convention" a recusal application is at least discussed with the other members of the hearing panel,⁸⁷ and that that caution had been further extended to the practice of

84 *Saxmere Company Limited v Wool Board Disestablishment Company Limited*, above n 59.

85 *Towards a New Courts Act – A Register of Judges' Pecuniary Interests? Review of the Judicature Act 1908 First Issues Paper*, above n 61, at 5.

86 "Guidelines for Judicial Conduct" Courts of New Zealand < www.courtsofnz.govt.nz > .

87 *R v Chatha* [2008] NZCA 466 at [16].

the hearing panel of three judges deciding a recusal application, not just the impugned judge.

- 6.74 It is easier to deal with the process for recusal determinations in appellate courts, because there is a collegiate body that a judge can refer to. In trial courts, where judges may be faced with urgent applications, often on the eve of trial, and sometimes in remote locations, it is more difficult.
- 6.75 As the particular circumstances of each bench may require different recusal processes, for example because of the number and accessibility of other judges on a particular bench, in Issues Paper 21 the Commission proposed that each court should develop its own recusal process, which should be gazetted by the relevant Head of Bench.
- 6.76 The submissions from the Law Society and the Bar Association both agreed with the Commission that changes should be made to the procedure relating to recusal. The Bar Association submitted the most appropriate solution would be for the Chief Justice, in consultation with other senior members of the judiciary, to establish and publish a protocol which expressly addresses the process issues, and which should apply to all courts and judges.
- 6.77 The Law Society submitted what is needed is a better understood and publicly available set of procedures that operate where a judge or litigant considers recusal may be necessary or there is a likelihood of complaint about the judge's suitability to hear a case. It agreed with the suggestion in Issues Paper 21 that each court should evolve its own recusal process and make that process available to the public.
- 6.78 Further, the Law Society considered any enhanced procedures should:
- refer to the desirability of the judge discussing the matter with colleagues;
 - outline the manner in which relevant material would be disclosed;
 - provide processes for the hearing of submissions on that material and the making of a reasoned decision; and
 - stress the importance of judges making any necessary disclosure as early as possible to give the parties adequate time to respond without jeopardising the fixture.
- 6.79 We agree these are desirable principles that should be reflected in recusal procedures developed by the judiciary.
- 6.80 The Chief Justice's submission in response to Issues Paper 21 stated that the judges see benefit in the approach for improvement of recusal procedures suggested by the Commission. The Senior Courts' judges' recent submission responding to Issues Paper 29 notes that the Heads of Bench have no objection to a requirement for publication of a recusal process for each bench, but have a preference for publication on the internet, rather than by *Gazette* notice.

- 6.81 The Commission considers that in order to deal with potential conflicts of interest, there must be clear, robust, and well-publicised rules and processes for recusal. While there may be differences between the courts that justify slightly different procedural approaches being adopted by each bench, the processes should be based on a common set of principles, including the principle that the individual judge alone does not have the final say as to whether there is a conflict or not, and should incorporate the matters raised by Law Society set out above. Each court's rules should also include clear procedures by which parties can challenge the refusal of a judge to recuse him or herself, and clarify the circumstances in which recusal would not be expected.
- 6.82 While the judges should develop their own rules and processes in relation to recusal in order to ensure their workability and to reflect judicial independence, we consider they should be required to do so by statute.
- 6.83 The statutory provision should also require the resulting rules and processes to be published on the internet, for example on the Courts of New Zealand website, and also published in the *Gazette*, to reflect their official status. We would encourage the judiciary to be pro-active in this regard.
- 6.84 In the Commission's view, making the suggested changes to the recusal process will be the most effective way to manage potential judicial conflicts of interests, and ensure public confidence in the judiciary remains high.

R23 There should be a statutory requirement for the Heads of Bench, in consultation with the Chief Justice, to develop clear rules and processes for recusal in their courts, based on a common set of principles developed by the judges.

R24 These recusal rules and processes should be published in the *Gazette* and on the internet.

Chapter 7

Part-time and acting judges

INTRODUCTION

- 7.1 As a general rule, judges work full-time from the date they are appointed, and they cease acting on retirement. In this chapter, we discuss the exceptions of part-time and acting judges.

PART-TIME JUDGES

- 7.2 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. An authorisation to work part-time 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”. There is an equivalent provision in the District Courts Act 1947.⁸⁸
- 7.3 Section 4C(8) of the 1908 Act provides that an authorisation under section 4C(1) may not apply to a judge of the Court of Appeal or Supreme Court, although section 57A enables Court of Appeal judges to act on a part-time basis if authorised by the Attorney-General to do so.

Issues Paper 29

- 7.4 In Issues Paper 29, the Commission indicated its preliminary view that High Court and Court of Appeal judges should be treated the same with regard to

⁸⁸ Section 5AA.

part-time appointments, and sought views on this.⁸⁹ The Commission noted that, in practice, part-time appointments are generally sought by persons with family responsibilities, who cannot work full-time, or by an able judge who has served many years but who may 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.

- 7.5 The Commission said there may be sound social and professional reasons for enabling this to occur, but that the current legislation requires a part-time appointee to resume full-time work at the end of the specified part-time period (although there is an ability to be appointed for further part-time periods, so the system could be operated in such a way as to allow a judge effectively to continue a part-time appointment if that judge did even one week full time in between part-time appointments). We said 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.

Views of submitters

- 7.6 The Senior Courts’ judges do not support having part-time judges in either the Court of Appeal or the Supreme Court, and pointed out that the existing provision for part-time judges in the Court of Appeal has never been used. The Senior Courts’ judges said the provision for part-time appointments was made to increase diversity in the judiciary, especially by enabling those with family responsibilities to accept judicial appointment with a reduced level of commitment for a period, and this need is less likely to arise in relation to appointments to appellate courts because of the age at which such appointments are made. In the judges’ view, the presence of a part-time judge would provide significant practical difficulties for courts which are small and which function best if they can operate collegially.

- 7.7 The Senior Courts’ judges also do not support changes to enable judges to take on a reduced load towards the end of their careers. They said the provision for part-time judges was principally aimed at making judicial office attractive to those with family responsibilities that prevented them in the short- or medium-term from full-time engagement:

While [part-time appointments later in a judge’s career] may prolong some judicial careers, it would do so at the expense of the practical problems arising from the presence of part-time judges and at the risk that those who partially disengage with no intention of full re-engagement will not perform at their highest level.

- 7.8 This view contrasts with that of the former Chief District Court Judge, the late Judge Johnson, who in consultation discussions with the Law Commission

⁸⁹ Law Commission *Review of the Judicature Act 1908: Towards a consolidated Courts Act* (NZLC IP29, 2012) at [3.41].

was firmly of the view it should be possible for older judges, in the District Courts at least, to scale down their workload prior to retiring.

- 7.9 The Human Rights Commission submitted that while family responsibilities are arguably not the sole reason for the absence of women from the judiciary, they must contribute to it in part. It said allowing part-time judges in the Court of Appeal would clearly go some way towards encouraging more women (and men with family responsibilities) to the Bench. It also pointed out allowing part-time work in the Senior Courts would not be unique to New Zealand, and that the House of Lords Constitution Committee recently recommended flexible working conditions should be more widely available as a way of encouraging applications for judicial appointment from women and others with caring responsibilities.
- 7.10 The New Zealand Law Society said it could see no reason why part-time appointments should not be permitted in the Court of Appeal.

Commission's view

- 7.11 The Commission remains of the view that new courts legislation should enable the appointment of part-time judges to all courts below the Supreme Court.⁹⁰
- 7.12 We think the legislation should enable flexibility so judges are able to work part-time at any point during their tenure, at the request of the judge, and with the consent of the Attorney-General and the relevant Head of Bench. Caring responsibilities are not confined to a set time in a person's life, and other life events may also make it desirable for a judge to be able to work part-time for a period. Although enabling part-time judicial work in the five years leading up to retirement may be more suitable for judges in the District Courts than the Senior Courts, the Commission considers it should be possible in any of the courts in which part-time work is permitted. The requirement for permission from the Attorney-General and the relevant Head of Bench means that part-time appointments will only occur when the appointment can be managed effectively.

R25 New courts legislation should enable part-time judicial appointments for a specified period in all courts below the Supreme Court.

R26 There should be flexibility to enable a judge to work part-time for a specified period up of to five years prior to retirement in all courts below the Supreme Court.

R27 Part-time appointments should only be made with the agreement of the Attorney-General and the relevant Head of Bench.

90 As alluded to in Issues Paper 29, the limited number of Supreme Court judges, and the quorum requirements there, would make part-time appointments to that court impractical from an operational perspective.

ACTING JUDGES

Issues Paper 29

- 7.13 In Issues Paper 29, the Commission pointed out the appointment of acting or temporary judges has long been a contentious matter in many jurisdictions, and that some jurisdictions preclude them altogether.⁹¹ Our own statutory provisions enabling acting judges lack consistency.
- 7.14 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.
- 7.15 Section 11A, which is headed “acting 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.
- 7.16 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 two years, or one year if the person has attained 72 years.
- 7.17 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.
- 7.18 The legislative provisions relating to acting judges therefore provide for varying 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 various courts.
- 7.19 We discussed in Issues Paper 29 how the use of acting judges may threaten the independence and impartiality of the judiciary in that they may be perceived as being more inclined to make decisions favourable to the Executive in order to secure reappointment as an acting judge.⁹² In Issues Paper 29, the Commission said, as a matter of fundamental principle, we incline to the

91 *Review of the Judicature Act 1908: Towards a consolidated Courts Act*, above n 89, at [3.55].

92 At [3.65].

view that judicial appointments in New Zealand should normally only be permanent, and that 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.⁹³ We said some exceptions may have to be entertained to cope with unexpected absences or extended illnesses, but acting appointments should be avoided.

- 7.20 We were provisionally of the view there should be a generic legislative provision providing for acting judges, rather than both temporary and acting judges, and that 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 (as appropriate) has certified that the appointment is necessary for the proper conduct of the business of the relevant court.
- 7.21 We also proposed the age and term requirements be standardised, and that only former judges under the age of 75 years should be eligible for appointment. We suggested appointment should be for a specified term of up to two years, with reappointment for a further one or more terms possible until a judge reaches the age of 75, with an acting judge's term of appointment to not exceed a maximum of five years in aggregate.
- 7.22 Finally, we also said provision should be made for the appointment of acting judges in the Court of Appeal, and that, 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 can be avoided.
- 7.23 The Commission sought views on whether acting judges should be permitted, and if so, to what benches, and on what terms.

Submissions

- 7.24 In their submission, the Senior Courts' judges sought to explain the difference between acting and temporary judges, which is not clear on the face of the Judicature Act 1908 provisions, in the following terms:

Acting judges are appointed to meet specific needs, and work only when called upon to do so by the Chief High Court Judge. They are paid only for the period they are actually working. Temporary judges are temporary full-time appointments and are paid for the period of their service on the same basis as full-time judges.

- 7.25 The judges said they did not see anything in these sections that requires amendment. Nor did they accept there is any substantive basis for concern about temporary judges or acting judges of the High Court, given the protection provided by the existing section 11B, which prevents the appointment of a temporary or acting judge unless the Chief Justice and Chief High Court Judge certify as to the operational necessity for the appointment.

93 At [3.71].

- 7.26 The Senior Courts' judges agreed with the Commission that provision should be made for former judges of the Court of Appeal to be appointed as acting judges of that Court, subject to similar provisions as apply to former judges acting as judges of the Supreme Court.
- 7.27 The New Zealand Bar Association agreed with the Commission that only former judges should be eligible for appointment as an acting judge, and that there is no good reason why there should not be acting judges in the Court of Appeal.
- 7.28 The Chief District Court Judge disagreed with the Commission that acting judges should only be appointed where unavoidable or to cover temporary illness or unexpected absence, unless there is first established a reasonable number of permanent judges sufficient to ordinarily conduct the work of the Court, including leave and administrative functions required of the District Court Bench.
- 7.29 The Chief District Court Judge said that while agreeing that from a constitutional standpoint appointment on a permanent basis gives a greater appearance of judicial independence, the simple truth is the District Courts cannot get through their workload without the assistance of acting judges. Her Honour made the important point that not getting through the workload in this context is a failure to deliver justice to New Zealanders. She also provided the following useful information on the work of District Court Judges:

On average, the District Courts dispose of 248,421 cases and applications annually, with an average 85,000 support sitting hours. This workload is handled by 133 full time District Court Judges. Though the total number of District Court Judges is 148, 16 have special duties and are not available to sit on the core business of the District Courts (criminal summary, jury, civil), Family Courts and Youth Courts. Those 16 include: those appointed to the Environment Court, Employment Court, Immigration and Protection Tribunal, the ACC Appeals District Court Registry; those seconded to the Supreme Court of Vanuatu; and the Chief District Court Judge, Principal Family Court Judge, and Principal Youth Court Judge, who have extensive administrative responsibilities.

In addition, those 133 judges are not available 100% of the time. A number have additional responsibilities outside of the core work of the District Courts, as legislation requires several boards and tribunals to be chaired by District Court Judges. These include the Parole Board, Land Valuation Tribunal, and Tax Review Authority. Each Judge also qualifies for long service leave every five years.

Looking to the future, from 2017 an increasing number of District Court Judges will reach the mandatory retirement age. If not replaced by permanent judges, the only possible way to get through the workload will be to use acting judges.

Given this, the ready availability of acting judges is crucial to the ability of the District Courts to deliver justice in a timely fashion. If the use of acting judges were restricted, there would be a smaller pool of judges to get through the same workload. The inevitable outcome is delaying disposing of cases and applications. The Judges of the District Courts

see this as a greater concern than the concerns about impartiality and independence raised in the Issues Paper.

For clarity, it should be mentioned that of the 32 acting judges of the District Court, four sit exclusively on the Parole Board and one exclusively on the Liquor Licensing Authority. This relieves permanent Judges of these extra responsibilities to allow focus on the District Court's core work. Furthermore, acting judges are specifically warranted to sit in either jury, general, family or civil cases. A number of acting judges is needed to ensure coverage across all of these practice areas.

Commission's view

- 7.30 Although the position of an acting judge was held lawful in *Wikio v Attorney-General*,⁹⁴ in light of the potential difficulties associated with acting judicial appointments discussed in Issues Paper 29,⁹⁵ the Commission still considers their use should be minimised to the extent possible. The highest priority for achieving this is for the government to re-examine the level of the statutory cap on District Court judges in section 5 of the District Courts Act 1947, and to appoint a sufficient number of permanent judges so the District Courts can function effectively. If acting judges are currently being appointed as a necessity, an increase in the number of permanent judges will decrease the number of acting appointments, and therefore seems unlikely to have major fiscal implications (although there would be some increased costs for allowances).
- 7.31 The Commission remains of the view that there is no need for a distinction between acting and temporary judges, and that there should be clear and consistent provisions governing the appointment and conditions of acting judges across the District Courts and all courts. Only retired judges aged less than 75 years should be eligible for appointment as an acting judge, as only persons with judicial experience can realistically be expected to cover the work of another judge. In addition to situations of temporary absence or illness, the provision should enable the appointment of acting judges to cover the work of judges who hold other office by virtue of their appointment as a judge.
- 7.32 For the Senior Courts, the Chief Justice should be required to certify that the appointment of an acting judge is necessary for the proper conduct of the court in respect of which the appointment is to be made. The Chief District Court Judge should be required to do the same in the case of an appointment of an acting District Court judge or an acting judge of any division of the District Courts.

94 *Wikio v Attorney-General* (2008) 8 HRNZ 544 (HC).

95 *Review of the Judicature Act 1908: Towards a consolidated Courts Act*, above n 89, at 30-34.

- R28 The statutory number of District Court judges should be reconsidered, and adjusted if necessary, to better reflect the District Courts' workload, and to minimise the need for acting judges in the District Courts.
- R29 An acting judge should only be appointed during the illness or absence of any judge, or for any other temporary purpose, or to fill an office required to be held by a judge.
- R30 The appointment of an acting judge should only be made on the certification by the Chief Justice or Chief District Court Judge (as appropriate) that the appointment is necessary for the proper conduct of the court in respect of which the appointment is to be made.
- R31 Only former judges under the age of 75 years should be eligible for appointment as an acting judge.
- R32 Appointment as an acting judge should be for a specified period of up to two years.
- R33 Reappointment as an acting judge should be possible, for a maximum of five years in total.

PAYMENT OF RETIRING JUDGES

- 7.33 Section 88A of the Judicature Act 1908 enables a judicial officer to continue in office beyond his or her retiring date to complete proceedings, but for no more than one month, save with the consent of the Minister of Justice.
- 7.34 Section 88A(4) is not entirely clear as to the calculation of payments to that judicial officer. It is possible, particularly in appellate courts, that the term may have to be extended whilst the retiring judge awaits a judgment of the court.
- 7.35 In principle, a retiring judge should be paid, on an extended term, only for the period he or she is actually working, at the appropriate daily rate.

- R34 A retiring judge should be paid, beyond his or her retiring date, only for the period he or she is actually working, at the appropriate daily rate.

Chapter 8

Leadership and accountability

INTRODUCTION

- 8.1 In Issues Paper 29, we discussed a number of topics that broadly relate to “leadership and accountability”.⁹⁶ These included:
- Linkages in the structure of the judiciary;
 - Acting Heads of Bench;
 - An annual report on the judiciary; and
 - Court officers performing judicial functions.
- 8.2 We address each of these matters in this chapter. We also touch on delays in the delivery of reserved judgments, a topic that was not in Issues Paper 29, but which was repeatedly brought to our attention during consultation.

LINKAGES IN THE STRUCTURE OF THE JUDICIARY

- 8.3 An important feature of the courts’ architecture in New Zealand is that the judges of the High Court, Court of Appeal and Supreme Court must all be High Court judges. Since 2003, when the Chief Justice became the Head of Bench in the Supreme Court and the head of the judiciary in New Zealand, the Chief High Court Judge has been responsible to the Chief Justice for ensuring the orderly and prompt conduct of the High Court’s business.⁹⁷ However, there is no similar accountability requirement for the President of the Court of Appeal.

⁹⁶ Law Commission *Review of the Judicature Act 1908: Towards a consolidated Courts Act* (NZLC IP29, 2012) at chapter 4.

⁹⁷ Judicature Act 1908, s 4B.

- 8.4 In the District Courts, the Commission understands that protocols operate so that the Principal Judges of the Family and Youth Courts are in effect responsible to the Chief District Court Judge for ensuring the orderly and prompt conduct of the District Courts' overall business.
- 8.5 In Issues Paper 29, the Commission proposed that this be made a statutory requirement, and sought views on this.⁹⁸ We also asked whether the President of the Court of Appeal should be statutorily responsible to the Chief Justice for the conduct of the Court of Appeal's overall business.⁹⁹
- 8.6 All the submitters who addressed these questions agreed that the linkages in the structure of the judiciary should all be formally recognised in legislation, including a requirement that the President of the Court of Appeal and Chief High Court Judge should be accountable to the Chief Justice for ensuring the orderly and efficient operation of their benches, and that the Principal Family and Youth Court Judges should be accountable to the Chief District Court Judge in the same way. This would make the present arrangements transparent and more consistent.
- 8.7 As the Head of the Judiciary, the Chief Justice would have the ability to engage with the Chief District Court Judge.

R35 Legislation should provide that the President of the Court of Appeal and the Chief High Court Judge are accountable to the Chief Justice for ensuring the orderly and efficient operation of the Court of Appeal and High Court respectively.

R36 Legislation should provide that the Principal Judges in the divisions of the District Courts are responsible to the Chief District Court Judge for ensuring the orderly and efficient operation of their divisions.

ACTING HEADS OF BENCH

- 8.8 The Senior Courts' judges submitted that there is a need to make provision for the President of the Court of Appeal and the Chief Judge of the High Court to nominate an Acting President or Acting Chief High Court Judge. The reason given is that the present statutory provisions, which provide that when either the President or Chief Judge is unable to act the next senior judge acts as Acting President or Acting Chief High Court Judge,¹⁰⁰ are impractical when the next senior judge is not presently sitting because of appointment to a Royal Commission or to another office able to be held by a judge. The judges suggested that the President or Chief High Court Judge could be empowered to nominate a judge to act with the concurrence of the Chief Justice.

98 *Review of the Judicature Act 1908: Towards a consolidated Courts Act*, above n 96, at [4.5].

99 At [4.3].

100 *Judicature Act 1908*, ss 4A(4) and 57(7), respectively.

- 8.9 We agree that such a provision would be sensible, and consider that the relevant provision in the District Courts Act 1947 should be similarly amended.

R37 Sections 4A(4) and 57(7) of the Judicature Act 1908, and 5A of the District Courts Act 1947, should be amended to allow the President of the Court of Appeal, the Chief High Court Judge, and the Chief District Court Judge to nominate another judge to act in that judge's place with the agreement of the Chief Justice.

ANNUAL REPORT

- 8.10 A further accountability matter raised in Issues Paper 29 was whether there should be a statutory requirement for the Chief Justice to produce an annual report on the judiciary in New Zealand.¹⁰¹ We stressed that judicial independence is a fundamental aspect of the New Zealand constitution, but said the judiciary must also be individually and collectively accountable for the proper discharge of its functions. There is individual accountability for judicial decisions through rights of appeal, and the statutory processes for dealing with complaints about inappropriate judicial conduct. However, there is no annual report on the judiciary as a whole. 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.
- 8.11 From 1998 to 2008, the Court of Appeal produced an annual report relating to significant cases in that Court. In February 2012, the Chief High Court Judge presented a report on events of note in the High Court during 2011, and stated that in the future the Court intends to report annually on the previous calendar year. This is a useful resource, but is confined to the High Court only.
- 8.12 Courts in other jurisdictions also produce annual reports, the contents of which vary according to the particular jurisdiction. For example, in the 2011 Year-End Report on the United States Federal Judiciary, the Chief Justice took the opportunity to address the issue of whether the Judicial Conference's Code of Conduct for United States Judges should apply to the Supreme Court, and provided clarification on how the Justices address ethical issues.¹⁰² The report also contained a short appendix, which summarised the workload of the courts for the year.
- 8.13 In the United Kingdom, the Supreme Court Annual Report and Accounts 2011-2012 covered a variety of matters including the mission, values and objectives of the Court, appointments to the Court and the selection process,

101 *Review of the Judicature Act 1908: Towards a consolidated Courts Act*, above n 96, at [4.8]-[4.16].

102 "Chief Justice's Year-End Reports on the Federal Judiciary" (2011) Supreme Court of the United States < www.supremecourt.gov > .

court statistics, a summary of high profile cases and judgments, external relations and corporate services.¹⁰³

- 8.14 In Issues Paper 29, the Commission asked whether there should be a statutory requirement for the Chief Justice to produce an annual report on the Judiciary, and, if so, whether it should be presented to Parliament, or simply made available to the public. We noted that there are practical considerations associated with such an exercise, such as the availability of adequate statistical material held by the Ministry of Justice and the potential need for additional resources to assist the Chief Justice.

Submissions

- 8.15 The Senior Courts' judges submitted that they did not consider that an annual report should be required by legislation. They said it would also be constitutionally inappropriate for the judiciary to report to Parliament, as it is a separate branch of government. The judges pointed out that, unlike in the United Kingdom and some Australian states, in New Zealand the judiciary has no powers of self-administration or control of financial expenditure, or the necessary personnel and other resources required to undertake the task of preparing an annual report. The judges said they would prefer to concentrate on regular and current publication by the Ministry of Justice of information that is useful in understanding the operation of the courts and their performance. We understand that the judges are engaging with the Ministry of Justice to improve the statistical material provided to the judiciary, which would be available for publication.
- 8.16 An individual submitter suggested there should be an annual report containing an account from each of the Heads of Bench on the conduct of business in their court, and an overview by the Chief Justice. It was also noted that one advantage of having a legislative provision is that it would provide a regularised timeframe and a general sense of content, for example, a requirement for the report to include figures on volumes and timeliness, and commentary on these, including any trends in the figures that may be provided on the Courts of New Zealand website. In the absence of a legislative requirement for an annual report, there is a risk that the content will fluctuate and the timing of issuing the report will vary.
- 8.17 Submissions also raised the point that an annual report is not a judgment and will likely raise legitimate questions, which should be responded to.
- 8.18 While acknowledging the limits of the Commission's review, a submission by Richard Cornes, an academic researching the role of the Chief Justice of New Zealand, noted that New Zealand judges work in constitutional arrangements that provide the elected branches of government with very significant power, and he made arguments for handing responsibility for leadership and management of the judicial branch to a New Zealand Judicial

103 "Annual Report and Accounts" The Supreme Court (UK) < www.supremecourt.gov.uk > .

Council presided over by the Chief Justice, with appropriate resources to redress the constitutional balance to better protect the judiciary. Suggested functions for such a Judicial Council included:

- administration of the judicial branch, including preparation of the branch's budget and day to day management of judicial business;
- strategic oversight and planning for the judicial branch, including fostering research links with academia with the specific aim of improving the operation of the judiciary;
- via the Chief Justice and other Heads of Bench, a consultative role in judicial appointments and promotions;
- communications for the judicial branch – conveying the overall function of the judiciary, reacting as appropriate to stories concerning the judiciary, and conveying the outcomes of individual cases;
- a role, under the management of the chief Justice, in the appointment of the Judicial Conduct Commissioner and associated panels;
- judicial training;
- reporting annually to Parliament on the performance of the judicial branch; and
- maintenance of links with equivalent judicial bodies on other countries.

Commission's view

- 8.19 The establishment of a Judicial Council is not contemplated in the scope of the Commission's limited review of the Judicature Act, but the Commission looks forward to reading the results of Dr Cornes' research, expected to be published in 2013.
- 8.20 The Commission remains of the view that the Chief Justice should publish an annual report on the judiciary, and agrees with the suggestion that an update from each of the Heads of Bench should form part of this. Although more statistics are now available on the Courts of New Zealand website,¹⁰⁴ it would be helpful to have critical analysis of these, and an overall view of the shape of the judiciary and the issues facing the courts.
- 8.21 It would be useful for requirements on the contents of the report to be set out in legislation, but this may depend on the data that can be made available by the Ministry of Justice.
- 8.22 As a separate branch of government, we do not think the judiciary should be required to present an annual report to Parliament, but the statute should require an annual report to be made available to the public, by a set period of

104 See, for example, Courts of New Zealand "Statistics" < www.courtsofnz.govt.nz/from/statistics > .

time after the end of the Ministry of Justice's financial year. We suggest that six months would be appropriate, but the due date should be agreed by the Chief Justice and the Ministry of Justice.

R38 There should be a statutory requirement for the Chief Justice to publish an annual report on the judiciary within six months of the end of the financial year of the Ministry of Justice (or such other date agreed by the Chief Justice and the Ministry of Justice).

R39 The Ministry of Justice and the Chief Justice should agree the broad matters to be covered in the annual report on the judiciary, which should be specified in new courts legislation.

COURT OFFICERS PERFORMING JUDICIAL FUNCTIONS

8.23 In Issues Paper 29, the Commission noted that 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".¹⁰⁵ 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.

8.24 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. 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:¹⁰⁶

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.

8.25 In our view, that statement reflects the correct principle. In Issues Paper 29, we said that, given its constitutional importance, it could be argued the principle should be reflected in legislation, and included in a new Courts Act. 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.

¹⁰⁵ *Review of the Judicature Act 1908: Towards a consolidated Courts Act*, above n 96, at [4.17].

¹⁰⁶ Ministry of Justice *Annual Report 1 July 2010 – 30 June 2011* < www.justice.govt.nz > at 3.

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.

- 8.26 The Commission asked submitters for views on whether new courts legislation should codify the principle that court officers performing judicial functions are not subject to direction by the Ministry of Justice.
- 8.27 The Senior Courts' judges agreed new courts legislation should codify the principle that court officers performing judicial functions are not subject to direction by the Ministry of Justice, and said the provision should reflect that the principle applies more generally to court officers undertaking both judicial and registry functions. The judges said further that:

It is a deficiency in the current administration of the Courts that the lines between what is properly the subject of Executive control and what is properly subject to judicial direction in the administration of the Courts are not properly maintained. We have been trying to engage with the Ministry on this point, one in which the New Zealand legal system is vulnerable to proper criticism.

- 8.28 We consider there should be a statutory provision to make it plain to all that court officers undertaking judicial or registry functions are not subject to direction by Ministry officials. We would encourage further discussion between the Ministry of Justice and the judiciary on this issue.

R40 New courts legislation should codify the principle that court officers performing judicial functions are not subject to direction by the Ministry of Justice.

RESERVED JUDGMENTS

- 8.29 In consultation discussions on Issues Paper 29, there was one matter, not discussed in the issues papers, which was consistently raised with Commission staff: the time taken for reserved judgments, and a perceived lack of judicial accountability for ensuring the efficient delivery of these.
- 8.30 In the Commission's view, imposing a time limit on the delivery of judgments would be inconsistent with judicial independence, and it would be impossible for legislation to capture the scenarios that may lead to a delay in the delivery of a judgment. We do, however, think the public has a genuine interest in knowing what judgments are outstanding in each court, and the judges responsible for delivering these. We consider that a list of reserved judgments for every judge in each of the District Courts, High Court, Court of Appeal and Supreme Court could easily, and should, be made available on the Courts of New Zealand website on the first day of each calendar month.¹⁰⁷

¹⁰⁷ We note that this already happens in the Supreme Court: Courts of New Zealand "Supreme Court Reserved Decisions" < www.courtsofnz.govt.nz > .

R41 A list of reserved judgments for every judge in each of the District Courts, High Court, Court of Appeal and Supreme Court should be published on the Courts of New Zealand website on the first day of every month.

Chapter 9

Some judicial powers

INTRODUCTION

- 9.1 In chapter 5 of Issues Paper 29,¹⁰⁸ we looked at, and made provisional proposals in respect of, two judicial powers:
- the statutory ability to find someone in contempt of court;¹⁰⁹ and
 - the jurisdiction to make a “wasted costs” order against counsel personally.¹¹⁰
- 9.2 While the first of these attracted little comment, the latter proved to be one of the more controversial aspects of Issues Paper 29. Accordingly, the majority of this chapter is devoted to “wasted costs” orders, although we first deal briefly with (what we call) “statutory contempt”.

CONTEMPT IN THE FACE OF THE COURT

- 9.3 The statutory power to hold someone in contempt of court is commonly known as “contempt in the face of the court”.¹¹¹ This is because it covers misconduct in court (and in some circumstances on the way to and from court), and disobedience of court orders. Where a person acts in such a way, the presiding Judge is empowered to have the “contemnor” taken into custody and detained until the rising of the court. The Judge can, ultimately, sentence the person to a term of imprisonment or impose a fine.¹¹²

108 Law Commission *Review of the Judicature Act 1908: Towards a consolidated Courts Act* (NZLC IP29, 2012).

109 At [5.5]-[5.23].

110 At [5.24]-[5.45].

111 See, for example, *Morris v Crown Office* [1970] 2 QB 114 at 122B-C.

112 The maximum penalties under the existing courts legislation range from 5 days imprisonment and/or a fine of \$5,000 (Supreme Court Act 2003, s 35) to 3 months imprisonment or a fine of \$1,000 (District Courts Act 1947, 112; Judicature Act 1908, s 56C).

- 9.4 In Issues Paper 29, we noted that there are a number of differently worded contempt in the face of the court provisions currently in existence, and we identified three issues relating to them:¹¹³
- Should they include assaults on, and threats to, judges, court staff, jurors and witnesses (as some of the existing provisions do), or should these specific matters be left to the general criminal law?
 - Does the “savings” subsection in each of the provisions retain the courts’ inherent powers only in respect of other contempt measures, or also with respect to contempt in the face of the court?
 - Is there any reason to have separate provisions for contempt in the face of the court either between the courts, or for civil matters and criminal cases?
- 9.5 Our provisional view was that assaults and threats should not come within the sections’ scope,¹¹⁴ the “savings” subsection only retains the courts’ inherent powers in respect of other contempt measures (and that this should be made clear),¹¹⁵ and that there was no reason to have separate provisions for either.¹¹⁶
- 9.6 Following on from this last point, we considered that there should be one provision in a new Courts Act that should apply to all courts and proceedings.¹¹⁷ Therefore, the specific criminal provision recently enacted as section 365 of the Criminal Procedure Act 2011 would no longer be required,¹¹⁸ but could rather be replaced with a “signpost” provision directing the user to the relevant section of the new Courts Act.¹¹⁹ However, we considered section 365 to be a good model, and we ultimately proposed in Issues Paper 29 that the contempt in the face of the court provision in new courts legislation should be drafted in similar terms.
- 9.7 We summed all this up by asking the question:¹²⁰

113 *Review of the Judicature Act 1908: Towards a new Courts Act*, above n 108, at [5.18]-[5.22].

114 At [5.18]. This was consistent with what we had said in an earlier review of the contempt in the face of the court provisions in the Crimes Act 1961 and the Summary Proceedings Act 1957: Law Commission *Suppressing Names and Evidence* (NZLC R109, 2009).

115 At [5.19]-[5.20].

116 At [5.21].

117 At [5.17].

118 We note that it is not yet in force.

119 *Review of the Judicature Act 1908: Towards a new Courts Act*, above n 108, at [5.22]. This was because contempt provisions often have to be invoked in “battlefield conditions”.

120 At Q13. We also provided a draft provision, at appendix 3, to enable submitters to see precisely what we were proposing.

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?

- 9.8 No submitters disagreed with our proposal, and many expressly agreed with it. Accordingly, we recommend that the draft contempt provision from Issues Paper 29 be included in new courts legislation, and that section 365 of the Criminal Procedure Act 2011 be repealed and replaced with a “signpost” provision. The draft provision is included in this Report as Appendix 4.
- 9.9 One final point does, though, need to be addressed before we leave this topic. In Issues Paper 29, we noted that the Law Commission had recently received a reference to address the whole law of contempt, and that the interface between that reference and the present consideration of only the contempt in the face of the court provisions could be problematic.¹²¹ However, we concluded that, as the overall proposal in Issues Paper 29 was to repeal all the existing courts legislation and replace it with a new Courts Act, something needed to be done about contempt in the face of the court now, so as not to leave a “hole”.¹²²
- 9.10 We did not receive any negative feedback on our proposed way forward. Further, given that the Law Commission has not commenced the general contempt reference at the time of writing this Report, we are fortified in our view that this is the appropriate course.

R42 There should be a generic provision in new courts legislation for contempt in the face of the court, dealing with all courts and proceedings, and drafted in similar terms to section 365 of the Criminal Procedure Act 2011.

R43 Section 365 of the Criminal Procedure Act 2011 should be repealed, with a “signpost” provision retained in its place directing users to the relevant section of the new courts legislation.

WASTED COSTS

- 9.11 One of the most controversial parts of Issues Paper 29 was the suggestion that there be a statutory “wasted costs” provision in new courts legislation, drafted in similar terms to section 364 of the Criminal Procedure Act 2011. We discuss this further below.

Issues Paper proposal

- 9.12 In Issues Paper 29, we defined the perceived problem as follows:¹²³

¹²¹ At [5.7].

¹²² At [5.10].

¹²³ *Review of the Judicature Act 1908: Towards a new Courts Act*, above n 108, at [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?

- 9.13 We discussed how the ability to order costs against counsel in civil cases is grounded in the High Court’s inherent jurisdiction, which means that none of the other courts can make such orders.¹²⁴ We also noted that a “wasted costs” provision had recently been enacted in first instance criminal matters,¹²⁵ and that other jurisdictions use a mixture of statutory provisions and court rules.¹²⁶
- 9.14 We then discussed the standard for the exercise of the costs jurisdiction, which the Judicial Committee of the Privy Council in *Harley v McDonald* had held to be a “serious dereliction of duty to the court”.¹²⁷ We also discussed the other key principles to have emerged from case law and noted there had only been three cases since *Harley v McDonald* in which costs had been awarded against counsel personally, despite a large number of cases in which such an order had been sought.¹²⁸
- 9.15 The Commission provisionally concluded that reform is needed, for the following reasons:¹²⁹
- The present situation is inconsistent between criminal and civil proceedings, and between the various courts; and
 - The present situation is unclear, for example as to what “misconduct” means.
- 9.16 However, we did have some reservations, in particular that it might be better to leave counsel misconduct to be dealt with by way of disciplinary proceedings and that expanding the jurisdiction could lead to greater “screening” of cases by lawyers.¹³⁰ We also noted that it could be an undue burden, given lawyers often have to make decisions in litigation and there can be unreasonable or difficult clients.

124 At [5.25]-[5.27].

125 At [5.28]-[5.29].

126 At [5.30].

127 *Harley v McDonald* [2001] UKPC 18, [2002] 1 NZLR 1 at [48].

128 *Review of the Judicature Act 1908: Towards a new Courts Act*, above n 108, at [5.32]-[5.36]. We note that, since Issues Paper 29 was released, one of these costs orders has been quashed on appeal: see *Deliu v The Chief Executive of the Ministry of Social Development* [2012] NZCA 406.

129 At [5.37]-[5.38].

130 At [5.40]-[5.41].

- 9.17 Despite these reservations, we proposed a legislative provision along the lines of section 364 of the Criminal Procedure Act 2011, given the advantages in symmetry and that there are sound reasons for doing so, such as removing the current “open ended” discretion the High Court has.¹³¹ We noted the provision was based on a “procedural failure to comply” that was “significant” and for which there was “no reasonable excuse”, and so would be relatively tightly structured and consistent with the principles contained in the case law. We also recommended it apply in all the trial and appellate courts.
- 9.18 We concluded by asking whether submitters agreed that there should be a wasted costs provision in new courts legislation and, if so, whether they had any views on the draft provision in Appendix 4 of Issues Paper 29.¹³²

Submissions

- 9.19 Seven submitters answered these questions and, while there was some limited support for the wasted costs proposal, most were not in favour of it. This is not surprising. The majority of submitters were lawyers, who would naturally be wary about any proposal to codify (and in some ways extend) the courts’ jurisdiction to order costs against them personally.
- 9.20 The New Zealand Law Society submitted that, while in theory a wasted costs jurisdiction may have a role to play in ensuring the proper use of court processes, in practice the matter is fraught with difficulty and a statutory provision may create more problems than it solves. In particular, it pointed to: the very small number of cases where the jurisdiction is relevant; the presence of disciplinary proceedings; the conflict of interest that inevitably arises for the counsel involved (and the time and money required consequent on that); the likelihood of abuse by angry and frustrated judicial officers; and the stultifying effect it may have on the legal profession. The Law Society said if the Commission is to proceed with a wasted costs provision, substantial drafting would be required to deal with conflicts of interest.
- 9.21 The New Zealand Bar Association also had real reservations about the proposed wasted costs regime and would support the inclusion of such a provision only if it not only preserved the current limits, but clearly confined it still further, and replaced, rather than supplemented, the existing jurisdiction. It suggested a number of changes that would need to be made to the proposed provision to do this, including:
- restricting the jurisdiction to the High Court only;

131 At [5.42]-[5.43].

132 At Q14 and Q15. As with contempt in the face of the court, we provided a draft provision, at appendix 4, to enable submitters to see precisely what we were proposing.

- making it clear that it is only true “procedural failures” that are covered, as it considers that the definition, despite saying this, would actually extend in practice to substantive failures;
 - requiring that only failures that are a “serious dereliction of the lawyer’s duty to the court” be caught;
 - expressly limiting the jurisdiction to only matters that can be determined summarily;
 - restricting the size of any order to scale, increased or indemnity costs;
 - expressly providing that it replaces the High Court’s inherent jurisdiction; and
 - providing for a means for confidentiality (where appropriate) and more stringent procedural requirements for the commencement and conduct of an application.
- 9.22 It was not only lawyers who were opposed to the wasted costs suggestion. The District Courts’ judges considered that the proposed jurisdiction would simply invite more applications and would distract from the primary proceedings, and said that foreign jurisdictions with such provisions have not seen any benefits.
- 9.23 The Senior Courts’ judges were more neutral, accepting the advantage in symmetry between the criminal and civil jurisdictions. However, they did not expressly support the proposal, noting that their understanding was that the equivalent provision in the United Kingdom has been met with some criticism and has only rarely been used.
- 9.24 Finally, one submitter was happy with the draft provision, so long as the meaning of “significant” (in the requirement that the Court must be “satisfied that the failure is significant”) is spelt out. The submitter’s suggested definition was:
- Significant means a failure which–
- (a) a competent lawyer would be expected by the court not to make; and
 - (b) which has adversely affected the procedural rights of an opposite party, or the court’s ability to achieve justice.

Commission’s view

- 9.25 We had difficulty understanding the principle behind the Bar Association’s submission that any provision should restrict the jurisdiction to the High Court only. In our view, there is nothing different about the matters that come before the High Court that would make it the only court where a wasted costs order could be relevant.

Rather, the reason why it is the sole court that can make such an order at present seems to simply be that it is the only court with inherent jurisdiction.¹³³

- 9.26 On the other hand, we accept the Bar Association’s submission that, while consistency with the criminal jurisdiction is desirable, alignment with section 364 of the Criminal Procedure Act 2011 should not be the overriding objective. Indeed, we note that the reforms in that Act were introduced to “require changes to some long-established and entrenched behaviours and practices” in the criminal jurisdiction.¹³⁴ The wasted costs provision was part of a “benefits and sanctions regime” unique to that Act, which was intended to “encourage parties to comply with procedural requirements”.¹³⁵ As such, it is not necessarily automatically transferrable to the civil jurisdiction, where those behaviours and practices may not exist (or be as apparent).
- 9.27 We also accept that the difference in terminology between the draft provision¹³⁶ and the principles contained in the case law could be interpreted as a shift away from the established jurisprudence. For instance, we agree with the Bar Association’s submission that the test in subsection (2) of the proposed draft provision – that the “failure is significant and there is no reasonable excuse for that failure” – could be seen to be less stringent than the current “serious dereliction of duty to the court” test.
- 9.28 Overall, the submissions we received convinced us we should not presently recommend the draft provision be enacted as it is. We considered whether to recommend the enactment of an amended provision, but ultimately were persuaded not to recommend there be a wasted costs provision in new courts legislation.
- 9.29 One of the primary reasons for this was the lack of support from the judges for having any such provision. Had the judges required more power to deal with counsel misconduct in civil cases, they would no doubt have made this plain to us in their submissions. The absence of any such feedback to this effect is, therefore, telling. Indeed, the District Courts’ judges specifically said they do not want such a power.

R44 A “wasted costs” provision should not be included in new courts legislation.

133 See, for example, *Hughes v Ratcliffe* (2000) 14 PRNZ 690 (HC) at [57].

134 *Criminal Procedure (Reform and Modernisation) Bill* 2010 (243-1) at 7.

135 At 7.

136 *Review of the Judicature Act 1908: Towards a new Courts Act*, above n 108, at appendix 4.

Part 3

COURTS



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Chapter 10

The Commercial List and specialisation in the High Court

INTRODUCTION

- 10.1 The Commission's terms of reference included an examination of what, if anything, should be done about the existing Commercial List in the High Court,¹³⁷ and what, if anything, should replace it.
- 10.2 As we noted in Issues Paper 29, this issue is a subset of a matter of much greater controversy, which has sparked what, at times, has been a sharp debate in New Zealand over the last decade or so: how far, if at all, should some form of judicial specialisation be effected in the High Court of New Zealand?¹³⁸

The historical position

- 10.3 Given the character of the concerns expressed by the Senior Courts' judges to the Commission, it is appropriate to first note how the High Court came about, and certain features of its current jurisdiction.

137 Judicature Act 1908, ss 24A to 24G.

138 Law Commission *Review of the Judicature Act 1908: Towards a consolidated Courts Act* (NZLC IP29, 2012) at [7.21]-[7.28].

- 10.4 The Supreme Court (as it then was) was established in December 1841. It was one of the most significant institutions of the new colony of New Zealand. The Court was given the combined jurisdiction of the common law and equity courts in England, as well as testamentary, lunacy, vice-admiralty and criminal jurisdiction.¹³⁹
- 10.5 Thus, right from the outset, what is now the New Zealand High Court operated on a different basis from the English higher courts, divided as they were into separate jurisdictions, particularly those of common law and equity.¹⁴⁰
- 10.6 Included in this broad jurisdiction – rightly entitling the High Court to be described as a court of general jurisdiction – were the prerogative writs and the critically important function of judicial review of the lawfulness of government actions. It is for this reason that the High Court is rightly described as being a court with constitutional responsibility. And it is for this reason that, whilst still retaining the ability to resort to the common law, it is this court which exercises the modern “remedy” of judicial review under the Judicature Amendment Act 1972.
- 10.7 The jurisdiction of the High Court has not fundamentally changed in the 171 years since the 1841 Ordinance. The historic jurisdiction has been rolled forward and added to from time to time by legislation giving it jurisdiction in subject areas which have come into existence since that time.
- 10.8 The Court has sat throughout New Zealand, as and when required, although its size and caseload have increased dramatically. The first volume of the New Zealand Law Reports, which was published in 1883, lists only the Chief Justice and four Supreme Court (as it then was) judges. Today there are at least 36.¹⁴¹ The Court sits throughout the country. All High Court judges have all the jurisdiction of that Court, and, by the close of their judicial career, many will have sat on cases in a good number of the registries around New Zealand.
- 10.9 The only historical incursions by way of specialisation into this regime (and then by management regimes) were the creation of the Administrative Division (now defunct) and the Commercial List (to which we have already referred).

139 Ordinance 1, Session 2, 1841. That ordinance was disallowed by the Colonial Office. It was replaced with an amended and amplified version in 1844. The creation of a court with such all-encompassing jurisdiction was routine in the Australian colonies. Much of the ordinance setting up the Supreme Court appears to have been drawn from the Supreme Court Act 1837 (SA).

140 See generally JL Robson (ed) *New Zealand: The Development of its Law and Constitution* (2nd ed, Stevens, London, 1967) at 86-92 and 154-176.

141 The calculation depends on how one includes retirements, acting judges, and so on.

- 10.10 In England and Wales, by contrast, the High Court is split into three divisions: Queen's Bench; Chancery; and Family. Judges are appointed to one of those divisions.¹⁴² The divisions of the High Court are not separate courts, but have somewhat separate procedure and practices adapted to their particular purposes. Although certain kinds of cases will be assigned to each division, depending on their subject matter, each division can, and does, exercise the entire jurisdiction of the High Court. However, commencing proceedings in the wrong division may have adverse consequences in such things as costs.
- 10.11 Within those formal divisions there are specialised courts. For present purposes it is necessary only to note that the specialised courts of the Queen's Bench Division include: the Technology and Construction Court; the Commercial Court; the Admiralty Court; and the Administrative Court. The Chancery Division has equity jurisdiction and also specialist courts in the Patent's Court and the Companies Court, which deal with intellectual property and company law matters respectively. Chancery also handles tax appeals.
- 10.12 Due to the current debate in New Zealand over the possibilities of a Commercial Court, it is worth noting here that the business of the Commercial Court in London is defined by the Civil Procedures Rules as:¹⁴³
- ...any claim arising out of the transactions of trade and commerce and includes any claim relating to–
- (a) a business document or contract;
 - (b) the export or import of goods;
 - (c) the carriage of goods by land, sea, air or pipeline;
 - (d) the exploitation of oil and gas reserves or other natural resources;
 - (e) insurance and reinsurance;
 - (f) banking and financial services;
 - (g) the operation of markets and exchanges;
 - (h) the purchase and sale of commodities;
 - (i) the construction of ships;
 - (j) business agency; and
 - (k) arbitration.
- 10.13 Because of the important supervisory role of the New Zealand High Court, it should be noted that it is the Court of Queen's Bench in England which

142 Senior Courts Act 1981. The senior courts of England and Wales were originally created by the Judicature Act as "the Supreme Court of Judicature". It was renamed the "Supreme Court of England and Wales" in 1981, and again the "Senior Courts of England and Wales" by the Constitutional Reform Act 2005. The Senior Courts of England consist of the Court of Appeal, the High Court of Justice, and the Crown Court.

143 Civil Procedure Rules (UK), r 58.2(2).

has special responsibility as a supervisory court of lower courts, tribunals and governmental authority through the Administrative Court, although that remedy is complicated by the now existence of the Upper Tribunal.¹⁴⁴ Today judges from the Chancery Division and the Family Division of the High Court are from time to time assigned to sit in it, as well as the Queen's Bench judges.

- 10.14 Why has this divergence in structure developed in New Zealand and England and Wales? First, there is the historical reason already adverted to. For much of the first hundred years or so of the fledgling colony of New Zealand there simply was not the work available to have occasioned any such approach. As late as the outbreak of World War II there was still only the Chief Justice and eight Supreme Court Judges (as they were then) in New Zealand. They also sat on the Court of Appeal as and when required. The permanent Court of Appeal was not formed until 1957.
- 10.15 In England on the other hand, the volume of work and what was perceived to be the need for, and advantages of, specialisation led the legal system there in a different direction.
- 10.16 The essence of the present debate in New Zealand is whether circumstances have changed to such an extent that some form of High Court specialisation is now required. Before we turn to that issue, however, there is a constitutional question we must address.

A constitutional point

- 10.17 At one time, it appeared to be suggested to us that the existing “shape” of the High Court cannot, or should not, be altered for constitutional reasons. In case that argument should continue to be presented, the Commission would make these points.
- 10.18 First, this Report does not in any way recommend the diminution of the jurisdiction of the High Court. On the contrary, we recommend – as is the customary drafting practice both in this country and the United Kingdom – that the existing jurisdiction of the High Court be “continued” under new legislation. If a thesis of the unitary and indissoluble powers for the High Court (or the old Supreme Court of Judicature) was constitutionally sound, then it would necessarily have prevented the developments which have taken place in England and Wales and many other Commonwealth jurisdictions. The real issue is therefore how that jurisdiction is to be exercised, or given effect to.
- 10.19 Secondly, in New Zealand there is not currently, and never has been so far as we are aware, any suggestion that the judicial review power allocated to the High Court of New Zealand can or should be exercisable in any other court. At least implicit in the concern of the Senior Courts' judges is a concern that their “constitutional” role not be eroded, or trenched upon. Without meaning

¹⁴⁴ See Henry Woolf and others (eds) *De Smith's Judicial Review* (6th ed, Sweet & Maxwell, United Kingdom, 2007) at [15-093]-[15-099] and chapter 16.

any disrespect, it is difficult to envisage any administration in New Zealand giving “judicial review power” to the District Court.

- 10.20 Thirdly, it cannot be the case that the jurisdiction of the High Court of New Zealand *must* remain in its original form: that of a generalist court exercising jurisdiction throughout New Zealand, in all matters, in all places. The short answer to any such proposition is that the circumstances that the country faces may change, such that some better and more appropriate arrangements are needed now or in the foreseeable future.
- 10.21 It follows that the essential questions are: what is the case for change at this time; and if such a case is made out, what form should it take?

SUBMISSIONS

The views of the judges

- 10.22 We next summarise the views advanced by the judges in the collective submission signed off by the Senior Courts’ Heads of Bench, and in some cases individually, as follows.
- 10.23 First, it is said that judging *in itself* is a specialised form of legal practice in which the judge properly looks to counsel for the specialist subject-matter arguments. And the point is made: “There does not seem to be any evidence that appeals from generalist judges are more likely to be overturned on appeal, or that there are real efficiency gains to be made by specialisation.”
- 10.24 Secondly, in accepting a High Court warrant, a judge necessarily “gives up” a career where that person will have some real standing, and in most cases a better financial return than that provided to the judiciary. It is undoubtedly correct that in accepting a judicial appointment a High Court judge is undertaking a large element of public service, particularly when the necessary restrictions on lifestyle are also taken into account. Part of the attraction of the judicial role is the wider spectrum of work available to that person, and the intrinsic intellectual interest and practical implications which this holds. If that is so – and we think it is – this might have implications for judicial recruitment. We are satisfied that recruitment has been a problem in the High Court, particularly in relation to senior members of the Bar. Of course, this issue can be a double-edged sword: some counsel might prefer to be able to specialise more in the High Court.
- 10.25 Thirdly, it is said that the claim that “cases more properly belonging in the High Court are being diverted to arbitration...is not borne out by the evidence so far assembled...”. We think a fair reading of the judges’ submissions is that the evidence for specialist panels other than commercial work is, at least at present, not made out either.
- 10.26 Fourthly, the practical management and personnel difficulties even with panels (let alone divisions) being raised is pointed to. Are judges to be directed to panels, or are judges in effect to “volunteer”?

10.27 In terms of actual solutions, the Senior Courts' judges' submission states:

Division of the jurisdiction of the High Court among judges according to specialised groupings is a major change which carries risks to the legal order.

...

Fragmentation of the jurisdiction of the High Court risks undermining its ability to fulfil ... the application of the general principles of the common law ... increasing the burden on the Appellate Courts and impoverishing the development and application of the common law, the principles of which are not confined by the classifications of law that it is for some purposes useful to adopt.

...

A panel system according to such classifications risks the real strength in a common law system of a Superior Court of general jurisdiction [which is] able to keep the whole under review in application of principles of general application.

10.28 If, however, the Commission were to recommend some degree of formal partition and that it be legislatively imposed, the Senior Courts' judges "consider that an incremental approach first building on the Commercial List, as the Issues Paper suggests, is preferable before further specialisation is attempted."

The New Zealand Bar Association

10.29 In its detailed and careful submission, the New Zealand Bar Association included a survey of the Bar on the issue of judicial specialisation. Eighty-four per cent of members questioned indicated that they support judicial specialisation in some form. In the submission of the Bar Association: "this shows overwhelming support for judicial specialisation from members of the Bar".

10.30 The submission further notes:

Specialisation in one form or another is a reality in the modern practice of law and has been for some time now. It is an issue of relevance, not just for legal practitioners and their clients, but also to the judiciary.

10.31 The Bar Association supported the Commission's provisional view that its review of the Commercial List provisions in the Judicature Act 1908 should involve a consideration of specialisation in the High Court judiciary more generally.

10.32 The Bar Association suggested there are two broad categories of commercial cases. The first involves commercial disputes where the parties can *choose* how those disputes can be determined. The second category of cases is "involuntary" commercial cases where the court system must be used. For example, various insolvency matters, or proceedings required by statute, such as under the Commerce Act 1986.

10.33 It noted that, in both categories, specialisation can materially contribute:

to confidence in the administration of justice, and as a consequence the optimum working and reputation of the New Zealand markets, including to attract and retain investment, and the confidence of those participating in those markets.

- 10.34 The Bar Association then usefully summarised the position in other jurisdictions and noted that:

Many of the countries that are actually embracing specialisation are relatively small, and that on the international experience size alone is not a significant inhibiting factor.

- 10.35 The Bar Association pointed to the Australian Law Reform Commission Report on the Australian justice system,¹⁴⁵ noting that one of the more successful developments in Australia in recent years was the 1997 introduction into the Federal Court of a modified individual docket system for case management, enabling judges to handle cases from initial filing through to final resolution, and the successful introduction of specialist panels in the Federal jurisdiction. The latter happened first in the larger registries of Sydney and Melbourne in areas such as intellectual property, taxation and trade practices (anti-trust/competition law, human rights, admiralty law and industrial law). That panel system was then extended to other registries.

- 10.36 The Bar Association rightly acknowledges that the panel system in Australia is not perfect and does not have full support:

Anecdotal feedback is that some Federal Court (and other) judges see it as somewhat elitist and that it favours judges who are based in Sydney and Melbourne and those judges whom have an interest in IP and competition law. The concerns that have been raised however do not detract from what is generally seen as the overall success of the regime.

- 10.37 It is convenient to interpolate here that, generally speaking, the Australian state systems which have panels¹⁴⁶ have likewise attracted general support.

New Zealand Law Society

- 10.38 The New Zealand Law Society is of the view that the Commercial List should not be retained in its present form, and that a panel system should be adopted. It submitted:

The Commercial List is less relevant than it once was, and that in large part is because of universal case management and the availability of assigned judges in appropriate cases. But the need to improve on the way in which commercial cases are managed and disposed of is undiminished. Alternative dispute resolution (ADR) is a significant reason for the decline in commercial proceedings but, in the Law Society's opinion, so too are other factors such as delay, case management inefficiencies and an absence of wider specialisation. ... We are particularly concerned about the prospect of the law not being

145 Australian Law Reform Commission *Managing Justice: A Review of the Federal Justice System* (ALRC R89, 2000).

146 Described in *Review of the Judicature Act 1908: Towards a consolidated Courts Act*, above n 138, at [7.47] – [7.54].

developed and articulated as fully as it might be because of a decline in judgments in commercial cases. This is an issue that is important to the commercial community.

10.39 The Law Society particularly supports “a specialist commercial panel”. Its reasoning is as follows:

- (a) A commercial panel is a pragmatic half-way house between an (unaffordable) Commercial Court and a wholly generalist jurisdiction. Judges with an interest in, and an aptitude for, commercial matters could sit on the panel part-time, with the result that some of the advantages of specialisation are achieved but not at the loss of advantages of a generalist jurisdiction.
- (b) This model would address one of the failings of the Commercial List, which is that cases ready for a trial return to the general list.
- (c) By having an assigned judge from start to finish, efficiencies will be achieved and a single judicial officer will be responsible for ensuring that the case is disposed of in an appropriate and timely way.
- (d) A move to a commercial panel, rather than retaining and improving on the Commercial List, will more readily permit the possibility of further specialist panels if that proves to be appropriate.

10.40 If a commercial panel is not to be set up, the Law Society supports the Commission’s next best option, which is a revamp and extension of the Commercial List.

RELEVANT CONSIDERATIONS

Empirical difficulties

10.41 It would not be sensible for any jurisdiction to introduce change into a quality generalist jurisdiction unless the need to do so can be properly demonstrated. We have endeavoured to get to grips with how much work there is in particular categories of proceedings in the High Court, that might attract the need for panel attention.

10.42 Unfortunately, the Ministry of Justice statistics do not drill down into this issue. There appear to be at least two reasons for this. First, if reference is made to the Annual Report of the Ministry of Justice for 1 July 2010 to 30 June 2011, it will be noted that the ultimate justice sector outcome is “a safe and just society, which is achieved through two high-level sector outcomes of safer communities and the civil and democratic rights and obligations enjoyed”.¹⁴⁷

10.43 There are then 8 specific shared outcomes which are sought to be advanced. There is a very heavy emphasis in those desired outcomes on crime reduction and offenders being held to account. Indeed no *direct* outcome relating to civil

¹⁴⁷ Ministry of Justice “*Annual Report 1 July 2010 – 30 June 2011*” at 4. At the time of writing, this was the most recent Report available to the Commission < www.justice.govt.nz > .

justice is listed at all. The nearest is Outcome 4 “Accessible Justice Services” which “seeks that individuals and communities have access to resources, legal information and representation, as necessary, so that they can have their rights upheld and fulfil their legal obligations”. It is a fair comment on the objectives of the justice sector, as thus expressed in the Annual Report, that civil justice does not rate anywhere near the top of the list. Hence, for reporting purposes, the statistical priorities reflect the outcomes sought to be achieved.

- 10.44 The second reason likely flows from this first point. In the Ministry’s Annual Reports, civil justice statistics receive little attention, and then only in a global sense. For instance, in the “output” of the “higher court services”, the High Court is dealt with in a single line (number of civil cases “managed by the High Court”) as being an actual figure of 3,771 cases, against an expressed standard of 3,950.¹⁴⁸ By comparison, the number of civil cases “managed” by the District Court in that year was 36,266.¹⁴⁹ The short point here is that the Ministry appears to be interested in management statistics, but correlated for its own reporting purposes.¹⁵⁰
- 10.45 Over the last quarter of a century the judiciary has expressed concern about the lack of statistics as to the *character of work* going through the courts. This would tell Heads of Bench, List Judges and indeed the judiciary and the public generally, what kind of things are being dealt with, and to what extent, by our courts.
- 10.46 The Judicial and Court Statistics 2011, published on 28 June 2012 by the Ministry of Justice in the United Kingdom, give a much more precise idea of what is happening in the United Kingdom courts.¹⁵¹ By way of example, it is recorded that of the 4,726 claims issued in the Queen’s Bench Division at the Royal Courts of Justice in London, a quarter related to debt, and around one in five were related to breach of contract.¹⁵² That sort of information indicates what kinds of things are coming before the courts, and is functionally useful.
- 10.47 The Chief High Court Judge has rightly been concerned to try and “excavate” (to use her terminology) relevant figures. For instance, it has been established that in 2007 the High Court disposed of 1,349 general proceedings; in 2011 the Court disposed of 2,062. Between six to 10 per cent of civil proceedings were disposed of through a full defended civil trial. But a high percentage (nearly 25 per cent) of High Court civil cases are disposed of by summary judgment today. It is useful at this point to also note, because of the

148 At 47.

149 At 51.

150 This is reflected in what is made available to the High Court, for inclusion in the High Court Review which is published on the Courts of New Zealand website. Those figures too, are globalised, not broken down.

151 Ministry of Justice (UK) “Judicial and Court Statistics 2011” < www.justice.gov.uk > .

152 At 10.

importance of it in the context of the High Court, the figure of 157 judicial review applications disposed of in 2011.

- 10.48 The Ministry of Justice has however been able to assist the Commission with figures from one specific exercise. A sample of physical civil court files was reviewed in the Wellington and Auckland High Court registries in 2010. In Wellington, a sample of 95 cases from the civil ready list that was disposed of between 1 January 2008 and 28 April 2010 was reviewed. A sample of 140 civil cases in Auckland (mostly general proceedings) that were filed between 2008 and 2010 and were subsequently disposed of was also taken from the civil ready list. The sample had to be restricted to those years due to restrictions around accessing archived files. There is an admitted difficulty with this procedure in that older cases (which often require more time to hear and extensive case management) were excluded.

- 10.49 The material so reviewed produced the following outcome.

WELLINGTON SAMPLE	
Case Category	Total
Breach of Contract	14
Breach of Fiduciary Duty	3
Breach of Statutory Duty	2
Citizenship Act 1997	1
Companies Act 1993	6
Contract	9
Copyright	1
Damage to Property	2
Defamation	1
Department of Social Welfare	7
Enforcement of Judgment	1
Fair Trading Act 1986	3
Family Protection Act 1955	1
Incorporated Societies Act 1908	1
Insolvency Act 2006	1
Land Act 1948	1
Leaky Home	5
Lease	1

WELLINGTON SAMPLE	
Negligence	3
NZ Bill of Rights Act 1990	3
Property (Relationships) Act 1976	1
Property Act 1952	1
Public Works Act 1981	1
Tax	6
Trust	3
Trustee Act 1956	2
(blank)	15
Grand Total	95

AUCKLAND SAMPLE	
Case Category	Total
Bill of Exchange Act 1908	1
Building Contract	2
Citizenship Act 1977	1
Companies Act 1993	13
Construction	1
Consumer Guarantees	1
Contract	12
Copyright	1
Declaration	1
Fair Trading Act 1986	14
Family	4
Guarantee	1
Insolvency Act 2006	2
Insurance	4
Leaky building claim	12
Lease	2
Māori Customary Law	1

AUCKLAND SAMPLE	
Maritime Transport Act 1994	1
Mortgage	2
Negligence	9
Partnership Act 1908	1
Property	3
Public Works Act 1981	1
Resource Management Act 1991	1
Sale & Purchase	9
Tax	3
Tort	2
Trust	7
Trustee Act 1956	1
Unit Titles Act 2010	1
(blank)	28
Grand Total	142

TOTAL SAMPLE		
Case Category	Total	%
Bill of Exchange Act 1908	1	0.42
Breach of Fiduciary Obligation	3	1.27
Breach of Statutory Duty	2	0.84
Building Contract	2	0.84
Citizenship Act 1977	2	0.84
Companies Act 1993	19	8.02
Construction	1	0.42
Consumer Guarantees	1	0.42
Contract	35	14.77
Copyright	2	0.84
Damage to Property	2	0.84
Declaration	1	0.42

TOTAL SAMPLE		
Defamation	1	0.42
Department of Social Welfare	7	2.95
Enforcement of Judgment	1	0.42
Fair Trading Act 1986	17	7.17
Family	5	2.11
Guarantee	1	0.42
Incorporated Societies Act 1908	1	0.42
Insolvency Act 2006	3	1.27
Insurance	4	1.69
Land Act 1948	1	0.42
Leaky Building Claim	17	7.17
Lease	3	1.27
Māori Customary Law	1	0.42
Maritime Transport Act 1994	1	0.42
Mortgage	2	0.84
Negligence	12	5.06
New Zealand Bill of Rights Act 1990	3	1.27
Partnership Act 1908	1	0.42
Property	4	1.69
Property (Relationships) Act 1976	1	0.42
Public Works Act 1981	2	0.84
Resource Management Act 1991	1	0.42
Sale & Purchase	9	3.80
Tax	9	3.80
Tort	2	0.84
Trust	10	4.22
Trustee Act 1956	3	1.27
Unit Titles Act 2010	1	0.42
(blank)	43	18.14

TOTAL SAMPLE		
Grand Total	237	100

- 10.50 This classification was done by court staff based on their interpretation of the relevant statements of claim. Consequently the classification is not necessarily as accurate as if it had been done by legally trained people. And because a large number of case categories were used, each of which was relatively small, it is difficult to get a broad sense of the overall classes of case. The samples also excluded a number of cases that settled. Nevertheless, there are features of interest in the tables.
- 10.51 First, contract-related cases were over one third of the total. And, it is likely agreements for sale and purchase were in some sense contract disputes also. Fair Trading Act cases were close to 20 per cent, as were leaky building claims. Many other categories, however, had only one or two claims.
- 10.52 As a comparison, in the Commercial Court in London some 1331 claims were issued in 2011. Around 54 per cent of these related to breach of contract, agreement or debt.
- 10.53 As to commercial work “diverted” away from the High Court to alternative dispute resolution, the Commission is not, and nor is anybody else, in a position to get behind the decisions made by commercial solicitors, their clients and senior counsel as to why and how much work goes in a particular direction outside the High Court. Those discussions are confidential, and we cannot “discover” them out of court records. Patently, a number of factors must enter into such a decision, amongst which must be practical accessibility to justice, cost, and the timeousness and quality of a given result.
- 10.54 We do, however, consider that the concerns expressed by commercial solicitors and counsel that this diversion *is* occurring are entitled to real weight. It seems there has been a respectable “bleeding off” of civil litigation where there is a choice of the means of disposal of a dispute. That aspect, according to the Bar, has contributed to the rise, or at least fuller use of, alternative dispute resolution, and less use of the formal civil justice system.

- 10.55 It is difficult to see that trend not continuing. “Mediated justice” is now an established fact-of-life. It integrates law and lawyers with the psychological and social realities of people living together. It is a more robust justice where interests, perceptions and entitlements are all given weight. Settlements are not mere capitulations to the over-whelming costs and delays of litigation. Traditional “adjudicated justice” is certainly under pressure from the concern of “mediated justice” to integrate the rule of law with the present needs and interests of real people. A failure to deliver what consumers really want, and need, will inevitably deal a severe blow to the future prospects of adjudicative civil justice.¹⁵³

Qualitative assessment

- 10.56 Leaving aside such statistical evidence, there is the awkward question of whether there is a want of confidence in some High Court judges, particularly in the commercial law area.
- 10.57 It has been suggested to the Commission, and asserted in some professional literature, that some High Court judges are regarded as professionally “weak” in this area. And that this has had the unfortunate effect – given that litigants do not know what judge they are going to get in advance – of diverting some work away from the courtroom door, at the outset. Counsel, or so it is said, do not want the courtroom risk of an underperforming judge.
- 10.58 Whatever the truth of those assertions in individual instances, submitters in general expressed real confidence in the High Court judiciary in New Zealand. There are objective ways of checking this. One is to ask how New Zealand judgments are received in other jurisdictions. In a good number of instances they have been referred to with approval by other senior courts. One example is the case of *Guardian News and Media Limited v City of Westminster Magistrates Court in the United States of America*,¹⁵⁴ where Lord Justice Toulson (with Lord Neuberger concurring) approved and relied on a judgment of the Supreme Court of New Zealand.
- 10.59 Another test is whether overseas institutions and persons will actually resort to New Zealand as a jurisdiction for their business affairs. New Zealand is considered to have sophisticated levels of advice from lawyers and

153 A very pessimistic assessment – that civil litigation as we know it in the Senior Courts will come to an end – has been proffered by Hon John Doyle AC, the retiring Chief Justice of South Australia, in “Imagining the past, remembering the future: the demise of civil litigation” (2012) 86 ALJ 240. He states (at 245): “The unpalatable fact is that the distinctive features of our common law system of civil litigation are the sources of the problems that are strangling our system.” See also S Righarts and M Henaghan “Public Perceptions of the New Zealand Court System: An Empirical Approach to Law Reform” (2010) 12 Otago Law Review 329; G Davies “Can Dispute Resolution be Made Generally Available” (2010) 12 Otago Law Review 305; L Arthur “Reform of the Civil Justice System: The New Meaning of Justice and the Mitigation of Adversarial Litigation Culture” (2011) 19(2) Waikato Law Rev 160.

154 *Guardian News and Media Limited v City of Westminster Magistrates Court in the United States of America* [2012] EWCA Civ 420.

accountants, and a judiciary that is relatively advanced in understanding trusts.¹⁵⁵ Tax legislation requires the disclosure of details of foreign trusts by New Zealand resident trustees of foreign trusts. The Inland Revenue Department has advised us that since October 2006 there have been approximately 7,500 foreign trust registrations. That does not suggest some kind of crisis of confidence in this jurisdiction.

- 10.60 Statistics are not all: how things present themselves to the business sector is an important intangible element. And there can be little doubt, given the worldwide acceptance of its importance in many jurisdictions, that the actual “availability” – regardless of the numerical impact – of a commercial court or panel is perceived to be of some moment. It is a confidence factor in a particular jurisdiction that is not easily quantified.
- 10.61 Part of the strategy of the present New Zealand administration is to encourage a growing and vibrant economy. Commercial disputes are necessarily part of any such regime. Efficient and adequate dispute resolution mechanisms are an important support mechanism. So is “certainty” in commercial law. That can only be supplied by the courts. Mediators and arbitrators need to know what the current legal context is in which to assess matters which come before them. In that sense, in-court and out-of-court dispute mechanisms are complementary.

Managerial improvements

- 10.62 The point was rightly made to the Commission that, in rules of court terms, what were “innovations” in the Commercial List have, along with further developments, taken (or are about to take) their place in the standard Rules. That has been the lasting legacy of the Commercial List: overall, better case management.
- 10.63 That, by itself, will not however yield up what seems to be at the heart of the concern of the Bar and the commercial community: the need for judges who “know” their commercial law through and through, for ready application in the particular case.

Personnel problems

- 10.64 Patently, a number of the present High Court judges do not welcome the prospect of a number of judges being “siphoned off” from the general High Court pool to serve a respectable percentage of their time on a commercial panel.
- 10.65 Our response is three-fold. It is the proper needs of the public which come first. Secondly, distinctions have always had to be made in the judiciary, for particular purposes, such as divisional appellate courts and the like. The

155 Mark Bridges “Recent international trust cases will have a material impact on the trusts industry” (paper presented to the Society of Trusts and Estate Practitioners, New Zealand Trusts Conference, Auckland, March 2012).

judicial principle has to be that a judge serves where, and as, required. Thirdly, as we suggested in Issues Paper 29, “panel judges” should still be required to do other High Court work.

CONCLUSION

- 10.66 In all the circumstances, and after carefully considering the very helpful submissions we received in this subject area, we consider that a sufficient need has been made out for the establishment of a commercial panel in the High Court. However, we are not presently satisfied, on the information currently available to us, that other panels or other sub-sets are justifiable at this stage.
- 10.67 We do not consider that a commercial panel, or indeed other particular panels, should be created by the legislation itself. Rather, we think that legislation should empower the Attorney-General, with the concurrence of the Chief High Court Judge, to establish panels in the High Court by Order in Council. The precise number and placement of those judges on a panel should be a matter for the Chief High Court Judge, and there should be a senior High Court judge assigned as the head of any panel. It may be desirable to have more flexible rules adduced for the benefit of the commercial panel work. That is a matter which can readily be attended to by the Rules Committee.
- 10.68 The extent of the jurisdiction of the High Court’s commercial panel, and so how much work is moved into it from the general ready list, will need to be settled. The definition utilised in the Commercial Court in London would be a useful starting point for consideration. It may be that intellectual property could usefully be added to that list. While on the figures available to us at the time there is no case for a separate panel under this head, a number of submissions were made in support of this proposition and this area is important to the New Zealand economy.
- 10.69 We consider it important to the High Court collectively, and to the judges concerned, that their secondment to the commercial panel should not exceed 50 per cent of their sitting time. If it transpires that more commercial panel sitting time is required, then more judges should be added to the panel, rather than detracting from the 50:50 ratio. This is very much a management matter for the Chief High Court Judge.
- 10.70 The commercial panel could usefully be regarded as a pilot project as to how a panel system will best work in New Zealand. The Chief High Court Judge should be required to report on its operations to the Attorney-General, 24 months after its establishment.
- 10.71 To assist with determining whether any other panels are required in the future, the Ministry of Justice should ensure that further and better particulars of the classes of work being processed in the trial and appellate courts is made publicly available, in its Annual Reports, and on the Courts of New Zealand website.

10.72 Finally, the Commercial List, and any accompanying rules, should be dissolved.

- R45 New courts legislation should empower the Attorney-General, with the concurrence of the Chief High Court Judge, to establish panels in the High Court by Order in Council.
- R46 The precise number and placement of those judges on a panel should be a matter for the Chief High Court Judge, although no judge should spend more than 50 per cent of his or her time on a panel.
- R47 There should be a senior High Court judge assigned as the head of any panel.
- R48 Matters of practice and procedure relating to any panels should be considered by the Rules Committee.
- R49 A commercial panel should be established in the High Court, with a jurisdiction largely mirroring that of the Commercial Court in London, with the addition of intellectual property.
- R50 The commercial panel should be regarded as a pilot project, and the Chief High Court Judge should be required to report on its operations to the Attorney-General, 24 months after its establishment.
- R51 The Ministry of Justice should ensure that further and better particulars of the classes of work being processed in the trial and appellate courts are made publicly available, in its Annual Reports, and on the Courts of New Zealand website.
- R52 The Commercial List and any accompanying rules should be dissolved.

Chapter 11

Civil jury trials in the High Court

INTRODUCTION

- 11.1 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 exceeding \$3,000 in value. This right is subject to the judge's overriding discretion to order that a trial will be by judge alone in particular circumstances.¹⁵⁶
- 11.2 In the Law Commission's 1989 Report on the structure of the courts, the Commission observed that in the civil jurisdiction jury trials had almost disappeared.¹⁵⁷ Whereas in the 1960s about one third of all civil trials in the Supreme Court (as it then was) had juries, by 1986 the figure was less than one per cent of civil cases proceeding to judgment.
- 11.3 More recently, in Issues Paper 29 the Commission noted that in the preceding eight years only three civil jury trials actually took place in New Zealand.¹⁵⁸ The latest figures show that over the last five financial years, two civil jury trials were scheduled to take place in New Zealand, but only one actually proceeded to trial. Both were defamation cases.¹⁵⁹
- 11.4 The Commission highlighted concerns regarding the relative inefficiency and costliness of jury trials in civil proceedings, the lack of experience in dealing with them by some judges and counsel, and stated that the rare use of the right to civil juries suggests they are no longer valued by our society as they once

156 Judicature Act 1908, s 19A(5).

157 Law Commission *The Structure of the Courts* (NZLC R7, 1989) at 127.

158 Law Commission *Review of the Judicature Act 1908: Towards a consolidated Courts Act* (NZLC IP29, 2012) at [9.12].

159 Letter from Andrew Bridgman (Ministry of Justice) to Hon Sir Grant Hammond (Law Commission) regarding statistical information on the courts' civil workload (13 August 2012).

may have been. The Commission noted, however, 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 the esteem in which the plaintiff is held by his or her fellow citizens.¹⁶⁰

- 11.5 Issues Paper 29 also discussed the approach to civil jury trials in other jurisdictions, and options for reform in New Zealand.¹⁶¹ The Commission sought views on whether new courts legislation should still make provision for civil jury trials, and, if so, in what circumstances.

SUBMISSIONS

- 11.6 Submitters had mixed views on civil jury trials. One view was that a new Courts Act would be an appropriate vehicle for abolishing them altogether. Arguments in support of this included the low number of civil jury trials, the length of time taken to select and empanel a jury, the difficulty in getting juries that are a fair cross-section of society, and the complexities of defamation cases (where civil juries are most often used).
- 11.7 The New Zealand Law Society said there was a lack of unanimity among its members regarding retention of civil jury trials, with some members of the view that civil jury trials are capricious and ought to be abolished, and others considering they should be retained, at least for certain cases. Those who favoured retention did so on the basis that in some cases the buffer the jury provides between the “establishment” and the claimant can be very important, particularly in circumstances where the claimant is a challenger or critic of the establishment. As well, in certain cases there is a risk a judge alone may be less in touch with common usage and so have a different view of whether an injustice has occurred than would the claimant’s peers. Supporters of jury trials stressed it is an important right that should not be removed lightly. Further, safeguards currently exist to ensure complex legal cases are not tried before juries.
- 11.8 The Law Society submitted that if civil jury trials are to be kept, the \$3,000 threshold should be “increased substantially”, and they should be limited, as in other jurisdictions, to certain types of cases, including defamation, malicious prosecution and false imprisonment.
- 11.9 The New Zealand Bar Association’s submission noted consistency of verdicts across civil jury trials is considered to be significantly more elusive than in judge-alone civil trials, and the cost of civil jury trials is not warranted by their number. However, it submitted that civil jury trials continue to have a very important part to play in defamation cases:

160 *Review of the Judicature Act 1908: Towards a consolidated Courts Act*, above n 158, at [9.39].

161 At [9.19]-[9.25] and [9.40]-[9.43], respectively.

Assessment of character by one's peers, particularly in the face of important defences such as truth, honest opinion, qualified and absolute privilege is considered to properly be the domain of citizens. The reputation in which a plaintiff is held by his or her fellow citizens is, it is considered, a proper issue for the retention of jury trials in defamation.

- 11.10 The Senior Courts' judges submitted that there is no compelling case for retaining civil juries, but said they would not oppose retention of the right to a civil jury for cases such as defamation or false imprisonment.

COMMISSION'S VIEW

- 11.11 Although civil jury trials are rare, our consultation suggested the right to trial by a civil jury should not be abolished, but should be restricted to cases with particular characteristics, rather than claims that meet a particular damages threshold set out in statute. As a starting point, we consider civil claims should be heard by a judge alone unless there is something special about the case that renders it more suitable for trial before a jury than a judge alone. In our view, special cases are those where the loss relates to reputation, liberty, or sanctity of the person, where damages are "at large". We consider that claims for defamation, false imprisonment and malicious prosecution share these characteristics.

Defamation

- 11.12 There are features of defamation claims that make them the most suitable civil claims for trial by jury in our view. Defamation is concerned with statements that may tend to lower the plaintiff in the estimation of right-thinking members of society generally.¹⁶² A jury may be said to be in a better position than a judge to determine this, and to gauge current societal views and the value of a loss of reputation.

False imprisonment

- 11.13 False imprisonment is committed when a person is detained or imprisoned by another person acting without lawful justification.¹⁶³ In a claim for false imprisonment the plaintiff is entitled to recover compensatory damages for the imprisonment and for distress, humiliation or fear. Damages are at large, and may depend on the value society places on freedom at a particular point in time. Members of society are therefore likely to be best placed to assess damages in these cases.

162 *Sim v Stretch* [1936] 2 All ER 1237 (HL) at 1240 per Lord Atkin.

163 Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at [4.5.01].

Malicious prosecution

- 11.14 For a claim in malicious prosecution to succeed, it must be shown that criminal prosecution proceedings were instituted both maliciously and without reasonable and probable cause, and the plaintiff suffered damage as a consequence of the proceedings. Damage may include loss of reputation or liberty, so claims for malicious prosecution may share some of the characteristics of claims for defamation or false imprisonment.
- 11.15 The tort was established before there was a police force responsible for enforcing the criminal law, and was designed to deter the bringing of unfounded criminal charges by private citizens against others in the community, and to provide a means for an accused to restore his or her reputation. Strict conditions must be satisfied before liability can be imposed. It has been noted that claims for malicious prosecution are not brought very often, and that they succeed even more infrequently.¹⁶⁴
- 11.16 A lack of reasonable and probable cause is an essential element in establishing liability for malicious prosecution. The burden of proving the absence of such cause lies with the plaintiff. In jury trials, it is for the jury to find the facts upon which the question of reasonable and probable cause depends, but it is for the *judge* to decide whether those facts in truth amount to an absence of reasonable and probable cause. This practice appears to have developed because this task is too difficult for a jury. In *Stewart v Equitable Life Assurance Society of the United States*, Richmond J expressed the view that:¹⁶⁵
- It is next to impossible, as all Judges know, to get a jury to understand their duty in cases of this kind – to get them really to look at the circumstances as they necessarily appeared to the defendants at the time, and see whether there was not reasonable ground for instituting a prosecution.
- 11.17 The question of whether the defendant acted out of malice is for the jury, but the judge must decide as a preliminary matter whether there is any evidence of malice to go before it.¹⁶⁶ If damage is proved, damages are at large, and would also be determined by the jury.
- 11.18 If the right to a civil jury trial is restricted to claims relating to the torts discussed above, in the Commission's view there is no need for the retention of a provision equivalent to section 19A(5) of the Judicature Act 1908, which enables a judge to hear a case alone if it is proven that the trial or any issue within it will involve mainly difficult questions of law, involve prolonged examination of documents or accounts, or investigation of difficult questions relating to scientific, technical, business or professional matters. Civil jury trials would therefore be available as of right for defamation, false

¹⁶⁴ At [18.2.01].

¹⁶⁵ *Stewart v Equitable Life Assurance Society of the United States* (1890) 8 NZLR 647 (SC) at 653.

¹⁶⁶ *Banbury v Bank of Montreal* [1918] AC 626 (HL) at 670.

imprisonment and malicious prosecution proceedings, upon the giving of notice by either of the parties to the proceeding, with no residual judicial discretion to determine that the matter should be heard by a judge sitting alone.

- 11.19 Although defamation cases may be heard in the District Courts, there is no equivalent to section 19A of the Judicature Act 1908 in the District Courts Act 1947, and the Commission has seen no reason to recommend an extension of the availability of civil jury trials to the District Courts in new courts legislation.

R53 Civil jury trials should only be available in the High Court for claims for defamation, false imprisonment or malicious prosecution.

R54 In High Court claims for defamation, false imprisonment or malicious prosecution, trial by jury should be available as of right, upon the serving of notice by either party to the proceeding.

Chapter 12

The District Courts

INTRODUCTION

- 12.1 If, as we recommend, the existing courts legislation is to be consolidated into a new Courts Act, the District Courts, as the primary distributors of “grass roots justice”, will obviously form a fundamental part of this exercise.
- 12.2 In this chapter, we focus on two topics relating to the architecture of the District Courts that we sought input on in Issues Paper 29:¹⁶⁷
- whether the 63 District Courts should be replaced with one unitary District Court; and
 - whether the upper limit of the District Courts’ jurisdiction should be increased (and, if so, to what level).
- 12.3 We also briefly discuss other provisions in the District Courts Act 1947.

A SINGLE NATIONAL DISTRICT COURT?

Issues Paper 29

- 12.4 In Issues Paper 29, we noted that the New Zealand District Courts have evolved as if there is a single national District Court, but that this is not the way the courts are formally constituted under the District Courts Act.¹⁶⁸ Rather, each of the 63 District Courts is a separate entity. We then went on to point out the practical issues this has raised, citing *Johnson v Allen*¹⁶⁹ and *Serious Fraud Office v Anderson*,¹⁷⁰ which we weighed against the problems that a unitary District Court has the potential to create.

167 Law Commission *Review of the Judicature Act 1908: Towards a consolidated Courts Act* (NZLC IP29, 2012) at chapter 6.

168 At [6.1]-[6.13].

169 *Johnson v Allen* (1999) 12 PRNZ 615 (HC).

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

- 12.5 Even though some steps had already been taken to reduce the practical problems caused by the separate status of the courts,¹⁷¹ we still preferred a unitary model for the following reasons:
- Legislatively, it would be a relatively easy task to incorporate the District Courts into a single national court, as this is how the High Court is constituted;
 - There would be no adverse implications for the allocation of cases and files between courthouses, as Rule 3.1 of the District Court Rules 2009 would continue to apply with little or no amendment required;
 - Registrars and other court officials could be legislatively provided for in the same way as happens in the High Court; and
 - It would be consistent with the proposed new operating model for the District Courts in Auckland.

Submissions

- 12.6 The majority of the submitters agreed with our proposal. Some noted that they had experienced problems like those identified in Issues Paper 29. Others made little or no further comment. Indeed, we suspect that a number of everyday users of the District Courts are unaware that they are each individually constituted, and believe that the proposed model is already in operation.
- 12.7 One or two concerns were raised, however, about the flow-on effects of such a change. Some of these, such as any necessary amendments to the Justices of the Peace Act 1957, can be dealt with as consequential amendments in any new courts legislation.
- 12.8 Another submitter was concerned about how the unitary model might affect the community and local incentives that are currently in place and operating in the District Courts. The submitter had a number of questions, all of which relate, in one way or another, to the ability of each District Court to adapt to meet the needs of its unique community.

¹⁷¹ For example, registrars, deputy registrars, bailiffs and deputy bailiffs may now exercise their powers and perform their functions and duties at any District Court: District Courts Amendment Act 2011, ss 5 to 8.

Our view

- 12.9 We are grateful these concerns have been raised, but consider they are more apparent than real. The movement from individual District Courts in each region to one unitary District Court, which sits in each of the same regions, is primarily a matter of form, rather than substance. For all intents and purposes, each District Court will continue to operate as it is currently, and will be free to develop to meet the needs of its community.¹⁷²
- 12.10 In light of our recommendation that the courts legislation be consolidated into one Act, we consider that the case for one unitary District Court is even stronger, as it will enable there to be uniformity with the national High Court. It would be strange for the mechanics of these two courts (for example, provisions relating to registrars, offices and so on), both of whose primary business involves conducting civil and criminal hearings, to be different, and we have heard no suggestion that the current District Courts model is the more appropriate of the two.

R55 There should be one unitary District Court for New Zealand.

CIVIL JURISDICTION

Issues Paper 29

- 12.11 Issues Paper 29 raised the question of the appropriate civil jurisdiction limit of the District Courts.¹⁷³ We noted that the current limit of \$200,000 was set in 1992 and that, due to inflation, that amount would be worth more than \$300,000 in today's money.¹⁷⁴
- 12.12 We then went on to comment that the District Courts are the "people's courts" and are intended to be the primary courts of first instance, and that there are valid arguments that the limit should be even higher than \$300,000 (for example, New South Wales and Queensland both are at A\$750,000). However, we noted that a decision such as this involves substantive issues of policy, including questions of geographical and financial accessibility, and considerations regarding the most efficient and cost-effective forum, the need to balance civil and criminal matters, and the availability and expertise of judges.

172 For instance, the new model would not inhibit New Zealand's first Alcohol and Other Drug (AOD) Court pilot, which will begin sitting in the Waitakere and Auckland District Courts in November 2012: Minister of Justice Judith Collins and Associate Health Minister Peter Dunne "Providers sought for alcohol and drug court" (press release, 6 July 2012).

173 *Review of the Judicature Act 1908: Towards a new Courts Act*, above n 167, at [6.14]-[6.18].

174 Updating these figures, \$200,000 in Q1 of 1992 is now \$315,049.83 in Q2 of 2012: New Zealand Inflation Calculator < www.rbnz.govt.nz > .

Submissions

- 12.13 Almost all submitters were in favour of increasing the upper limit of the District Courts' jurisdiction. The lone dissenter argued that the procedure for bringing a claim in the District Courts is not amenable to complicated claims, which might involve multiple causes of action or more than two parties, and said that claims of a higher value are more likely to be complicated claims.
- 12.14 However, even if it is right that the District Courts are not well placed to handle complicated claims (a point which is debatable), we do not accept that the value of a claim is necessarily a proxy for how complicated it is.¹⁷⁵ In any event, we are not suggesting the District Courts have any exclusive jurisdiction (a point we return to below), or the ability to apply to transfer a claim from the District Court to the High Court, when the relevant conditions are met,¹⁷⁶ be disturbed.¹⁷⁷
- 12.15 In terms of the size of any increase in the civil jurisdiction limit, there was disagreement as to the level to which it should be raised. Some favoured an increase to only the inflationary measure of \$300,000, while others suggested \$400,000 or \$500,000.
- 12.16 The District Courts' Civil Committee advocated most strongly for an increase to \$500,000. In its view, such an increase would mean more litigants could utilise the District Courts' "settlement first" approach, which would increase access to justice. It also noted there are now more specialised civil designated judges (who are specifically trained in case settlement and with civil litigation and commercial backgrounds) on the District Courts bench, and inflation alone does not reflect the growing transactional, commercial and land values in New Zealand's economy. A limit of \$500,000 was also the most popular option (with 45 per cent support) in a survey the New Zealand Bar Association conducted of its members (56 per cent of members said the jurisdiction should be increased).
- 12.17 The New Zealand Law Society submitted that the civil jurisdiction limit should be \$400,000, but did not provide any reasons why, other than that the A\$750,000 limits in New South Wales and Queensland appear too high for New Zealand circumstances.¹⁷⁸ Those who favoured \$300,000 (including the Senior Courts' judges) seemed to base this solely on the inflationary measure.

175 Indeed, we made the same point back in 1987: see Law Commission *The Structure of the Courts* (NZLC R7, 1989) at [197].

176 District Courts Act 1947, s 43.

177 We do expect, though, that if the District Courts' civil jurisdiction limit is increased then the \$50,000 minimum value of the claim before transfer can be effected as of right (s 43(1)) would also need to be increased. It is, at present, one quarter of the civil jurisdiction limit, and we would expect that it would remain at approximately that proportion.

178 At the other end of the scale, they consider that the jurisdiction of the Disputes Tribunal should be increased to \$50,000. We simply note this, as it is a matter which falls outside our Terms of Reference.

Our view

- 12.18 We consider that, ideally, the civil jurisdiction limit should be raised to \$500,000, largely for the reasons advanced by the District Courts' Civil Committee. We also note that the matter may not be looked at again for a long time, and therefore a limit of \$500,000 seems reasonable.¹⁷⁹
- 12.19 We say “ideally” because, as noted in Issues Paper 29, it is difficult to gauge what effect such an increase might have on, for example, the number of District Courts and judges required. We have discussed this with the Ministry of Justice, which agrees there may be resourcing implications from any significant increase to the jurisdiction of the District Court. However, while the Ministry does not have adequate data at this time to ascertain just what these would be, it considers they would likely be relatively minor.
- 12.20 Our recommendation is, therefore, to raise the limit to \$500,000, but this can only be provisional until such time as modelling can be done by the Ministry to determine the practical effect of such an increase and whether it is in fact feasible.
- 12.21 Finally, as noted above, it was also suggested to us that, in addition to increasing the civil jurisdiction limit in the District Courts, those Courts should have exclusive jurisdiction up to a certain level.¹⁸⁰ Again, though, to take into account the fact that claims of low value may still be complicated, we prefer a concurrent regime, as there is at present, with the ability to transfer a case between the courts where the relevant conditions are met.¹⁸¹

R56 The upper limit of the civil jurisdiction of the District Courts should be increased to \$500,000 if this is feasible in terms of judicial and court resources.

OTHER DISTRICT COURTS MATTERS

- 12.22 In Issues Paper 29 we referred to the following provisions of the District Courts Act:¹⁸²
- Section 29(1)(a), which generally limits the jurisdiction regarding recovery of land, and section 31, which provides exceptions to this;
 - Section 29(1)(b), which excludes jurisdiction where title to a franchise is in question;

179 We note that, since 2000, New Zealand's CPI (“consumer price index”) inflation has averaged around 2.7%: “Key graphs – inflation” Reserve Bank of New Zealand < www.rbnz.govt.nz > .

180 For instance, the District Courts' Civil Committee suggested that this should be \$100,000 (against a civil jurisdiction limit of \$500,000).

181 District Courts Act 1947, ss 43 to 48.

182 *Review of the Judicature Act 1908: Towards a New Courts Act*, above n 167, at [6.19]–[6.26].

- Section 33, which gives jurisdiction in respect of Building Societies and its members; and
- Section 34, which gives the District Court equitable jurisdiction for claims up to \$200,000 (unless otherwise excluded).

12.23 For each, we pointed out issues that had arisen with the provisions. In some instances, we proposed clarification (for example, section 29(1)(b)), and in others we suggested that they should be omitted from a new Courts Act (for example, section 33). No submissions were received on any of these sections, or the District Courts Act generally. We therefore make no further recommendations on the provisions of this Act. The issues referred to in Issues Paper 29 will inevitably be examined during the drafting process if the District Courts Act is to be included in consolidated courts legislation.

Chapter 13

The appellate courts

INTRODUCTION

- 13.1 This chapter discusses the Court of Appeal and the Supreme Court.
- 13.2 The former is currently provided for in Part 2 of the Judicature Act 1908. In Issues Paper 29, we raised several issues relating to the Court of Appeal that had been identified in preliminary consultation, and made proposals as to how these could be resolved.¹⁸³ We discuss these further below.
- 13.3 The Supreme Court is governed by the Supreme Court Act 2003. Given this is a relatively new statute, it was discussed only briefly in the “Appellate pathways” chapter in Issues Paper 29, where we concluded that any issues relating to appeals to the Supreme Court should be dealt with in a separate appeals reference.¹⁸⁴ In the second section of this chapter, we provide an update on this.

COURT OF APPEAL

Composition

- 13.4 Sections 58 to 58F of the Judicature Act 1908 deal with the composition of the Court of Appeal. These were summarised in Issues Paper 29, where the Commission said the provisions are cumbersome and repetitive, and proposed that they be redrafted to make them clearer and more accessible to users of the courts legislation.¹⁸⁵
- 13.5 In Issues Paper 29, the Commission said the present requirement for three judges to sit in each division of the Court of Appeal (unless the matter requires a full court or is an incidental order or direction in a civil matter)

183 Law Commission *Review of the Judicature Act 1908: Towards a consolidated Courts Act* (NZLC IP29, 2012) at chapter 10.

184 At chapter 11.

185 At [10.2]-[10.8].

is resource intensive and may be unnecessary for some matters. We noted the more recently enacted Criminal Procedure Act 2011 provides 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, and proposed that, for consistency, the same regime should apply to equivalent applications in the civil jurisdiction. We said that if two judges were permitted to determine these limited matters, at least one judge should be required to be a permanent member of the Court of Appeal, and that for the purposes of appeals, the Court should continue to be required to sit in panels of three, unless the matter warrants consideration by the full Court.

- 13.6 We proposed that, rather than specifying what a single Court of Appeal judge is empowered to do, new courts legislation should state 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. We suggested, as a safeguard, there could be an automatic right of review of any decision made by a single judge, except where the decision itself was a review of a decision by a Registrar. We noted if such a change was made, the corresponding provision in the Criminal Procedure Act 2011 would require consequential amendment.
- 13.7 Submitters who responded on these issues (the New Zealand Law Society, Duncan Cotterill and the Senior Courts' judges) all broadly agreed with the above proposals. However, the Crown Law Office said the composition of the Court of Appeal is generally well understood, and that it was not certain any change is required. We do, however, think the provisions would be much simpler and easier to understand if the above changes were made in new courts legislation.
- 13.8 The Law Society noted there would need to be provision for a further member of the Court of Appeal to be co-opted if there was a division of opinion on a two-judge panel. However, we are not sure that this is practical, as in reality it would require an entirely new panel of three judges to decide the application. We consider that, in line with what happens in the Supreme Court,¹⁸⁶ if there is a division of opinion, the application should be dismissed.

R57 Sections 58 to 58F of the Judicature Act 1908 should be made clearer in new courts legislation.

R58 Section 61A of the Judicature Act 1908 should be redrafted to enable a single Court of Appeal judge to deal with all applications except appeals, contested applications for leave to appeal, and contested applications for extensions of time in which to appeal, with a right of review to a three judge panel as of right. A consequential amendment to the same effect should be made to the Criminal Procedure Act 2011.

¹⁸⁶ Supreme Court Act 2003, s 31(2).

R59 New courts legislation should allow two Court of Appeal judges (one of whom must be a permanent member of the Court) in civil cases to sit on contested applications for leave to appeal and contested applications for extensions of time in which to appeal. If there is a division of opinion, the application would be declined.

Publication of procedures

- 13.9 In Issues Paper 29, we also asked whether the Court of Appeal should continue to be required to make its procedures for determining the number of judges on a panel available to the public, and, if so, whether the same principle should apply in the High Court and Supreme Court.
- 13.10 The New Zealand Law Society and Duncan Cotterill answered both these questions affirmatively. The Senior Courts' judges said that, although the Court of Appeal currently publishes its procedures for determining which matters are dealt with by panels of three judges (permanent court or divisional court) and which matters are dealt with by a full Court, these are in general terms, given the need for flexibility, so it is unclear what purpose is served by this. The judges said the Court of Appeal is happy to continue to publish its procedures, but suggested publication be on the Courts of New Zealand website, rather than in the *Gazette*. The Senior Courts' judges did not see any need to extend requirements for publication of the procedures for determining the number of judges allocated to hearings to the Supreme Court or the High Court.
- 13.11 The Commission considers that the courts should operate in a transparent fashion, and the public have a right to know how the number and allocation of judges hearing a matter is determined. In our view, there should be consistency between the courts, so there should be a published protocol for when the High Court sits as a full Court and for when the Supreme Court sits in two, three or five judge leave panels. These procedures should be published both in the *Gazette* (to reflect their official status) and online on the Courts of New Zealand website to enable greater accessibility by members of the public.

R60 The High Court, Court of Appeal and Supreme Court should each be required in new courts legislation to publish, by way of *Gazette* notice and the Courts of New Zealand website, a protocol for when the judges sit as a full Court or in each of their particular panels.

High Court judges sitting in divisions of the Court of Appeal

- 13.12 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. Sections 58A(3)¹⁸⁷ and 58B(3)¹⁸⁸ of the Judicature Act 1908 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.
- 13.13 In Issues Paper 29, we suggested it may 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.¹⁸⁹ We said it would be more efficient for the selected judge to be seconded for a period of up to three months, and to sit on whatever appeals the President nominates, regardless of whether they are civil or criminal, as the permanent judges do. We also suggested there be a limit on the President's powers to roll over a High Court judge's selection, so that a High Court judge could sit in the Court of Appeal for no more than four months aggregate in any calendar year. The Senior Courts' judges and the New Zealand Law Society agreed with these proposals. We therefore make recommendations accordingly.

- R61 The President of the Court of Appeal, with the concurrence of the Chief High Court Judge, should be empowered to select the High Court judges who will sit in the Court of Appeal.
- R62 High Court judges should be seconded to the Court of Appeal for a particular case, or for one or more specified periods of up to three months, to a maximum of four months aggregate in a calendar year.
- R63 The President of the Court of Appeal should allocate the workload of a High Court judge sitting in the Court of Appeal.

High Court judges sitting on a full Court of the Court of Appeal

- 13.14 Another issue raised in Issues Paper 29 was whether section 58F of the Judicature Act 1908, which provides for a High Court judge to sit on a full Court of the Court of Appeal in particular circumstances, should be maintained in new courts legislation. The Commission said that if a matter is significant enough to warrant a hearing before the full Court, then it is

187 Which deals with criminal matters.

188 Which deals with civil matters.

189 *Review of the Judicature Act 1908: Towards a consolidated Courts Act*, above n 183, at [10.17].

appropriate that the hearing panel should comprise five Court of Appeal judges.

- 13.15 The New Zealand Law Society and the Senior Courts' judges agreed. One submitter thought the Court should retain the flexibility to have a High Court judge sitting on a full Court, but we consider that there are sufficient retired appellate judges who could sit in an acting capacity if the need arose.

R64 Section 58F of the Judicature Act 1908, which allows a High Court Judge to sit on a full Court of the Court of Appeal, should not be included in new courts legislation.

Section 60(1) – Specific rule-making power

- 13.16 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”.
- 13.17 In Issues Paper 29, the Commission said that the section 60(1) power had never actually been used by any Court of Appeal, and, according to the judges, was unlikely to ever be used.¹⁹⁰ We therefore suggested that section 60(1) was unnecessary, and proposed that it not be carried over in the new courts legislation.
- 13.18 While the Senior Courts' judges agreed, both Duncan Cotterill and the New Zealand Law Society submitted that a flexible approach to the place and time of sittings is of great value in an emergency, citing the Christchurch earthquakes in particular. We agree there should be provision for emergency sittings of the Court, but think the relevant provision should be simplified.

R65 Section 60(1) of the Judicature Act 1908, which deals with specific rule-making powers in the Court of Appeal, should be repealed and replaced with a provision enabling the court to sit when and where it chooses in extraordinary circumstances.

Power to remit proceedings to the High Court

- 13.19 In Issues Paper 29, the Commission raised the issue of the scope of section 62 of the Judicature Act 1908 in light of the decision in *Lockwood v Bostik*,¹⁹¹ and said new courts legislation should make it clear that the Court of Appeal may

¹⁹⁰ At [10.22].

¹⁹¹ *Lockwood v Bostik New Zealand Ltd* [2010] NZCA 436 (leave to appeal declined: *Bostik New Zealand Ltd v Lockwood* [2010] NZSC 150).

order a retrial in civil matters, as it may in criminal matters.¹⁹² No submitters disagreed and we recommend accordingly.

R66 There should be a clear provision in new courts legislation enabling the Court of Appeal to order a retrial in both civil and criminal matters.

Transfer of proceedings from High Court to Court of Appeal

- 13.20 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. As noted in Issues Paper 29, preliminary consultation led the Commission to suggest 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 whether the proceedings may be transferred, with the Court of Appeal determining whether it should hear the matter.¹⁹³
- 13.21 The Senior Courts' Judges and the New Zealand Law Society agreed, although the latter stated that filing fees in respect of interlocutory applications to the Court of Appeal would need to be reviewed, as they are substantially higher than those in the High Court.¹⁹⁴
- 13.22 On the other hand, Duncan Cotterill disagreed with the proposal. In its view:
- ...The limits on allowing the removal of a proceeding directly to the Court of Appeal already protect the Court of Appeal from being overwhelmed. Requiring leave from the High Court to make the application, and then an application to the Court of Appeal would double the court's workload in determining whether to remove a case. If the Court of Appeal judges believe that too many proceedings are being removed from the High Court then the criteria could be reassessed, but we do not believe that a two-step process for the removal should be adopted.
- 13.23 We accept this last argument, and consider that it would place an undue burden on litigants to have to seek leave from the High Court to ask the Court of Appeal whether the proceedings may be transferred, and then have the Court of Appeal determine whether it should hear the matter. Further, we are not aware of any evidence that the High Court has been granting applications under section 64 inappropriately; indeed, in a recent case an application was declined despite all parties consenting to it.¹⁹⁵ The existing test sets a high threshold ("exceptional circumstances") and the Court has

192 *Review of the Judicature Act 1908: Towards a consolidated Courts Act*, above n 183, at [10.30].

193 At [10.32].

194 While this last point is outside the scope of our terms of reference, we note that the Ministry of Justice has recently issued a consultation paper on civil fees: Ministry of Justice *Civil fees review: A public consultation paper* (September 2012).

195 *Royal Forest and Bird Protection Society of New Zealand Incorporated v Buller Coal Limited* [2012] NZHC 1736.

noted that the power should be exercised only “sparingly”.¹⁹⁶ We therefore do not recommend any change to the current position.

R67 Section 64 of the Judicature Act 1908 (Transfer of civil proceedings from High Court to Court of Appeal) should be retained, unchanged, in new courts legislation.

Trial at Bar

- 13.24 Section 69 of the Judicature Act 1908 is an archaic provision, which 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.
- 13.25 In Issues Paper 29, we outlined the history of the trial at Bar in England, and gave examples of its historical usage.¹⁹⁷ We noted that trial at bar under section 69 appears never to have been applied in New Zealand, pointed out the lack of criteria in the provision, and said 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.
- 13.26 The Commission proposed that the provision be abolished, and all submitters who addressed this issue agreed. We therefore recommend accordingly.

R68 Section 69 of the Judicature Act 1908 (Trial at bar) should be repealed.

Appellate pathways to the Court of Appeal

- 13.27 In Issues Paper 29, we referred to the long-standing issues relating to section 66 of the Judicature Act 1908.¹⁹⁸ This is an important provision relating to interlocutory appeals.
- 13.28 We deferred dealing with the section pending the release of a judgment by the Supreme Court in *Siemer v Heron*.¹⁹⁹ That judgment indicates that the section may need legislative attention, but the Minister of Justice has advised the Commission that that matter will be attended to by the Ministry of Justice. Accordingly, we make no recommendation in this regard.

196 At [31].

197 *Review of the Judicature Act 1908: Towards a consolidated Courts Act*, above n 183, at [10.33]–[10.37].

198 At [11.1].

199 *Siemer v Heron* [2011] NZSC 133, [2012] 1 NZLR 309.

- 13.29 We also raised the question of whether there is a case for an intermediate appellate division in the High Court for District Court jury trial appeals.²⁰⁰ We understand the Commission will be given a separate reference on that issue, so we make no present recommendation on this either.

THE SUPREME COURT

Introduction

- 13.30 The Supreme Court Act 2003 is a relatively recent statute. Hence, much less modernisation of language or provisions is required than for, say, the Judicature Act 1908.
- 13.31 If there is to be a unitary statute, in our view the Supreme Court Act should be consolidated in that Courts Act. If the decision is made in favour of binary statutes, then the present Supreme Court Act should be incorporated into the proposed Senior Courts Act.

Limitations on appeals to the Supreme Court

- 13.32 In the “Appellate pathways” chapter of Issues Paper 29, the Commission’s principal concern was with respect to statutory bars on civil appeals to the Supreme Court under some statutes.²⁰¹
- 13.33 There are more than 20 statutes where appeals, even on points of law, are precluded from being advanced to the Supreme Court of New Zealand.²⁰² We suggested that it may well be timely to review these provisions to ascertain whether they are appropriate in today’s circumstances.
- 13.34 Our provisional view was that there is an issue of principle regarding whether the Supreme Court should have final oversight of all legal questions in New Zealand. However, it was obvious that some significant issues of public policy might be raised in relation to important statutes. We suggested that it might be appropriate to have an “appellate pathways” reference advanced to the Commission where these matters could be distinctly considered.

Update

- 13.35 Little in the way of submissions was received on the issue of appeals to the Supreme Court. Since Issues Paper 29 was published, the matter has been discussed with the Minister of Justice who has indicated that she is not presently minded to extend a reference to the Commission to consider this subject. If work is to be undertaken on this general issue in the future, it

200 *Review of the Judicature Act 1908: Towards a consolidated Courts Act*, above n 183, at [11.3].

201 At [11.6]–[11.17].

202 See, for example, s 428(3) of the Maritime Transport Act 1949 and s 163(4) of the Accident Compensation Act 2001.

would appear therefore that it will need to be attended to within the Ministry of Justice.

- 13.36 From a statutory drafting point of view, if changes are to be made to the “precluded” avenues of appeal, amendments would need to be made to the particular statutes that confer jurisdiction on other courts.
- 13.37 To take a simple illustration, under the existing Patents Act it appears that it is not possible to advance a point of law on appeal beyond the Court of Appeal.²⁰³ That position seems to have been maintained in the Patents Bill that is currently before Parliament.²⁰⁴ It is the patents legislation, not the Judicature Act 1908 or a new Courts Act, which would require amendment to make it possible to obtain leave for a Supreme Court appeal in this subject area.
- 13.38 In the circumstances, and given the Minister’s advice, we make no recommendation regarding appeals to the Supreme Court.

203 Patents Act 1953, ss 97(4) and 98.

204 Patents Bill 2008 (235-2), cl 264.

Part 4

REMAINING MATTERS



Chapter 14

Other provisions in the Judicature Act 1908

INTRODUCTION

- 14.1 This chapter considers a variety of provisions in the Judicature Act 1908 discussed in Issues Paper 29 and makes recommendations for their retention in new courts legislation or repeal.

EQUITY AND THE COMMON LAW

- 14.2 The rule that equity prevails over the common law is well-established, having first been introduced in 1615.²⁰⁵ At present, it is reflected in section 99 of the Judicature Act 1908, which provides that:

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.

- 14.3 In Issues Paper 29, we noted that, when considering the provision, there is a temptation to get distracted by arguments about the fusion of law and equity.²⁰⁶ However, our view was that, properly interpreted, the section relates to matters of substance, rather than practice and procedure or judicial remedies, in which case it is of less relevance to the fusion debate.²⁰⁷
- 14.4 In support of this position, we traced the legislative history of section 99, starting with section 25(11) of the Supreme Court of Judicature Act 1873 (UK). We then went on to consider how the provision had been applied in New Zealand, and how the equivalent United Kingdom provisions had been applied in its courts.

205 By James I in the wake of the Earl of Oxford's case.

206 Law Commission *Review of the Judicature Act 1908: Towards a consolidated Courts Act* (NZLC IP29, 2012) at [12.3].

207 At [12.5].

- 14.5 Against that background, our view was that there were three options for dealing with section 99 in new courts legislation:²⁰⁸
- (a) The rule could 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 could 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 could 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.
- 14.6 Our provisional view was that section 99 should be retained, for the following reasons:²⁰⁹
- It is difficult to offer a definitive view on whether any further conflicts will arise;
 - It does not pose any significant problems;
 - We are not aware of any dispute with the proposition that, in a case of conflict between substantive rules, equity should prevail;
 - The law reform bodies that have considered it have favoured its preservation; and
 - 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.
- 14.7 No submitters disagreed, and the New Zealand Law Society, the New Zealand Bar Association and the Senior Courts' judges all expressly stated that section 99 should be kept. Further, we note that the retention of section 99 would be in line with the United Kingdom, which has its equivalent provision in its Senior Courts Act 1981.²¹⁰
- 14.8 Accordingly, we recommend that section 99 of the Judicature Act 1908 should be retained in new courts legislation.

R69 Section 99 of the Judicature Act 1908 (In cases of conflict rules of equity should prevail) should be retained in new courts legislation.

208 At [12.40].

209 At [12.41]-[12.51].

210 Section 49.

MISCELLANEOUS SECTIONS OF THE JUDICATURE ACT 1908

- 14.9 The miscellaneous provisions in the Judicature Act 1908 discussed in chapter 13 of Issues Paper 29 can largely be divided into two categories – those that do not need to be carried over to new courts legislation, and those that we suspected would need to be retained, but which are potentially problematic in the way that they are drafted at present. Then there is one remaining matter – section 26P (decisions of associate judges amenable to review of appeal) – that arguably falls into a category of its own. We discuss each in turn.

Provisions that do not need to be carried over

- 14.10 The Commission noted the following provisions of the Judicature Act 1908 as likely not being required in future courts legislation:
- (a) Section 18 (Crimes before 1840);
 - (b) Section 23 (Special sittings of the High Court);
 - (c) Section 26IB (Video link); and
 - (d) Section 54B (Discharge of juror or jury).
- 14.11 No submitters took any issue with these provisions not being included in a new Courts Act, and we recommend accordingly.

- R70 The following provisions of the Judicature Act 1908 should not be carried over into new courts legislation:
- (a) Section 18 (Crimes before 1840);
 - (b) Section 23 (Special sittings of the High Court);
 - (c) Section 26IB (Video link); and
 - (d) Section 54B (Discharge of juror or jury).

Provisions to be retained

- 14.12 The following provisions of the Judicature Act 1908 fall into the category of needing to be retained in new courts legislation, but potentially requiring amendment or clarification:
- (a) Section 55 (Absconding debtors);
 - (b) Section 56A (Failure to respond to a witness summons);
 - (c) Section 94 (Effect of joint judgments); and
 - (c) Section 98A (Proceedings in lieu of writs).
- 14.13 We deal with each in turn.

Section 55: Absconding debtors

- 14.14 Pursuant to section 55 of the Judicature Act 1908, a Judge can 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. A similar provision exists in the District Courts, albeit worded in a somewhat more modern form.²¹¹ Given the development of freezing orders, and that arresting defendants in civil proceedings is a somewhat extreme measure, in Issues Paper 29 we asked whether such a provision should be carried over into new courts legislation.
- 14.15 All submitters who answered this question favoured an absconding debtors provision being included in new courts legislation. The New Zealand Law Society considered that freezing orders are not a replacement for the remedy that such a provision provides. The Senior Courts' judges agreed, and did not see any compelling case for omission of such a power.
- 14.16 Duncan Cotterill and the Law Society both tended to agree that the new provision should be drafted in terms of that in the District Courts Act 1947, although the latter noted that the maximum security of \$2,000 in section 109 would be too low for the higher value claims that are typically heard in the High Court.
- 14.17 In light of the support for the retention of an absconding debtors provision, we are content for an absconding debtors provision to form part of a new Courts Act. We agree that the provision should be drafted in terms of the District Courts Act 1947 section, and that a security of \$2,000 is too low. The Judicature Act 1908 formulation in this respect – that the amount of security should be fixed by the Judge and must not exceed the amount claimed in the proceedings – is to be preferred.

R71 An absconding debtors provision should be carried over into new courts legislation, drafted in similar terms to section 109 of the District Courts Act 1947, but with the maximum amount of security increased to an amount not exceeding the amount claimed in the proceeding.

Section 56A: Failure to respond to a witness summons

- 14.18 The maximum fine for a failure to respond to a witness summons in the High Court is \$500.²¹² In the District Courts it is \$300.²¹³ In Issues Paper 29, we suggested that these might be too low, particularly given the maximum fine

211 District Courts Act 1947, s 109.

212 Judicature Act 1908, s 56A.

213 District Courts Act 1947, s 54.

in the Criminal Procedure Act 2011 for this is \$1,000,²¹⁴ and the penalty for failing to attend for jury service is a fine not exceeding \$1,000.²¹⁵

- 14.19 All submitters who responded to this issue agreed that the maximum fines should be consistent at \$1,000, and we recommend accordingly.

R72 The maximum fine in new courts legislation for failing to respond to a witness summons should be increased to \$1,000.

Section 94: Effect of joint judgments

- 14.20 Section 94 of the Judicature Act 1908 modified the common law so that, 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. In Issues Paper 29, the Law Commission noted that the provision's scope had been narrowed by section 17(5) of the Law Reform Act 1936, but that this was not clear on the face of section 94. We proposed to retain the provision, but to clarify it by either cross-referencing section 17(5) of the Law Reform Act 1936 or making this apparent in the wording of the new section.
- 14.21 All submitters who addressed this issue supported the retention of section 94 in new courts legislation. The New Zealand Law Society also approved of the proposal to cross-reference it with section 17(5) of the Law Reform Act 1936, but the Senior Courts' judges suggested that while clarification "may well be desirable", it may be better to wait until the Commission has reported on its reference to review the joint and several liability rule.
- 14.22 Given the support for our preliminary view that section 94 of the Judicature Act 1908 should be retained, that is what we are recommending. In terms of clarification, while ideally a recommendation on this would await the outcome of the Commission's review of joint and several liability, the Report on that project is unlikely to be completed until the 2013/14 work year.²¹⁶ Accordingly, we consider that, in the meantime, the provision in new courts legislation should be cross-referenced with section 17(5) of the Law Reform Act 1936.

R73 Section 94 of the Judicature Act 1908 (Effect of joint judgments) should be retained in new courts legislation and clarified by cross-referencing it with section 17(5) of the Law Reform Act 1936.

²¹⁴ Section 159 (not in force).

²¹⁵ Juries Act 1981, s 32.

²¹⁶ Law Commission 2012-2015 *Statement of Intent* (NZLC, 2012) at 23.

Section 98A: Proceedings in lieu of writs

- 14.23 Section 98A was inserted into the Judicature Act 1908 in 1985 to reflect the changing focus from the need to have the correct writ to advance a claim to a more unified procedure for all civil actions. It was worded in very broad terms, seemingly 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. In Issues Paper 29, we expressed concern that the section was unsatisfactory in terms of being clear law, and our provisional view was that it should be retained, but phrased more clearly in new courts legislation.
- 14.24 While submitters generally agreed with the retention of section 98A, they urged us to be cautious in recommending any change to it. The Law Society advised that, to its knowledge, there had been no problems with the provision and would not support clarification in the absence of clear evidence that it was necessary. In its view, redrafting risks unintentionally excluding or limiting important, although little used, powers. Similarly, the Senior Courts' judges would not like to see amendments to the provision if the result is doubt as to whether amendment or retention of the status quo was intended.
- 14.25 Given the general agreement that the provision should be retained, we do recommend this. However, the question of whether to clarify the provision is problematic. We agree that unintended consequences must be avoided, but also do not like the idea of a modern courts statute, which will be a fundamental resource for litigants in person, carrying forward such uncertain provisions. In our view, every effort should be made by the drafters of new Courts legislation to capture the meaning and effect of section 98A in accessible and clear language.

R74 Section 98A of the Judicature Act 1908 (Proceedings in lieu of writs) should be retained in new courts legislation but redrafted in accessible and clear language.

Decisions of Associate Judges

- 14.26 The final matter in this chapter is the difficult issue of the review of, or appeals against, decisions of Associate Judges, which is presently found in section 26P of the Judicature Act 1908. In Issues Paper 29, we noted that we had been advised that the Rules Committee was considering the issue, and therefore we did not intend to propose any amendments while its work was still continuing.
- 14.27 We note the following passage from the Rules Committee's minutes of meeting held on 3 October 2011:²¹⁷

²¹⁷ Rules Committee Minutes of meeting held on 3 October 2011 < www.courtsofnz.govt.nz/about/system/rules_committee > (6 October 2011) at 4-5.

3. Review/Appeal from Associate Judge Decisions and Interlocutory Appeals to the Court of Appeal

The Chair re-activated this Agenda item, which comprises two distinct issues. First, the review of an Associate Judge's decision by a High Court Judge. The Chair commented that in light of the recent reforms on case management and discovery, it would be desirable if Associate Judges' decisions could be reviewed more quickly in the High Court by the same registry than if they were removed to the Court of Appeal. Second, whether appeals against non-dispositive interlocutory decisions should only be by way of leave. The Chair sought comment from the Committee on these issues.

Some Associate Judges' decisions fall to be reviewed in the High Court while others are appealed to the Court of Appeal. Justice Winkelmann expressed concern at the inconsistency that summary judgments by Associate Judges go to appeal whereas strike-out applications go to review. The Chief Justice pointed out that there are substantively different outcomes between summary judgment and strike-out, justifying two different procedures.

Presently, after an Associate Judge's decision has been reviewed, there is still a further right of appeal to the Court of Appeal. Justice Asher suggested that to remove the right of review of Associate Judge's decisions by High Court Judges also removes the hierarchical distinction between the judges and would be a significant policy-level change which must be addressed. Mr Beck opined that the distinction between Associate Judges and Judges was unacceptable as chance often dictates which judge hears a case. The Chief Justice was reluctant to remove a right of appeal simply to remove hierarchy, and expressed the view that there was a place for hierarchy. The Chief Justice favoured retaining the current position on reviews. The Committee moved to discuss the second issue of appeals against non-dispositive interlocutory decisions.

...

- 14.28 We take from this that the Rules Committee has resolved not to progress its review of the matter any further, and it does not seem to have been considered again at any subsequent meetings. However, as recently as August 2012 there have been calls for the “divergent paths created in s 26P of the Judicature Act” to be “comprehensively reviewed in order to remove the difficulties that have now plagued this aspect of the law for some 25 years.”²¹⁸
- 14.29 As noted in Issues Paper 29, we consider that dealing with specific appeal sections in isolation creates its own problems.²¹⁹ Accordingly, we recommend that section 26P be carried over into new courts legislation as it is, until such time as appellate pathways are reviewed generally.

R75 Section 26P of the Judicature Act 1908 (Review of, or appeals against, decisions of Associate Judges) should be re-enacted, unchanged, in new courts legislation, pending a review of appellate pathways generally.

218 Andrew Beck “Litigation” [2012] NZLJ 235 at 238.

219 *Review of the Judicature Act 1908: Towards a new Courts Act*, above n 206, at [11.1].

Chapter 15

Other participants

INTRODUCTION

- 15.1 In Issues Paper 29, the Law Commission discussed a number of situations in which participants other than the parties to a case may take part in civil proceedings.²²⁰ Such “other participants” become involved for a variety of reasons – for example, because a litigant is self-represented and would like assistance from a friend, the court requires information that the parties cannot provide, or wider interests are involved, such as those of the public at large.
- 15.2 Specifically, the Commission looked at the following:
- McKenzie friends (support persons for unrepresented litigants);
 - amicus curiae (a “friend of the court”);
 - interveners; and
 - technical advisors.
- 15.3 The Commission noted the current level of formal prescription, ranging from largely non-existent (McKenzie friends) through to varying degrees of coverage in the rules of court (amicus curiae and interveners) and legislation (technical advisors), and asked generally whether the present means of dealing with other participants are still appropriate.
- 15.4 The Commission also looked at section 99A of the Judicature Act 1908, which is titled “Costs where intervener or counsel assisting Court appears”, and sought feedback on whether this provision should be clarified and/or otherwise amended in new courts legislation.
- 15.5 In this chapter, we discuss the submissions received regarding these “other participants”, and the section 99A payment of costs provision, and make recommendations in respect of each. As noted in Issues Paper 29, the stand-

²²⁰ Law Commission *Review of the Judicature Act 1908: Towards a consolidated Courts Act* (NZLC IP29, 2012) at chapter 15.

alone topic of self-representation is outside our terms of reference, but, where relevant, submitters' comments about this subject have been incorporated into our discussion.

MCKENZIE FRIENDS

Introduction

- 15.6 The court environment can be daunting for many litigants, and those who do not have legal representation can often feel isolated and overwhelmed. While there are court staff available to help, they have official roles to attend to and, as such, are not always able to provide lay litigants with all the assistance they would like. And when the hearing begins, a self-represented party is essentially left to fend for him or herself, albeit under the direction of the presiding Judge.
- 15.7 For these reasons, the courts will usually allow unrepresented parties to have a support person with them in court. However, the court can refuse to permit this if it will obstruct the efficient administration of justice.
- 15.8 The support person, known as a “McKenzie friend” after the United Kingdom case that confirmed the legitimacy of the process,²²¹ may sit with the litigant, take notes, and quietly offer suggestions and advice. However, there have sometimes been arguments as to what, if anything, a support person can do beyond this.
- 15.9 In Issues Paper 29, the Commission noted that some McKenzie friends have come to court expecting to be able to address the judge directly on behalf of the litigant, only for this to be denied.²²² This can place more pressure on the self-represented party, who may have been operating under the same belief and so not have prepared as thoroughly as he or she might otherwise have.
- 15.10 The Commission also discussed how the role has arguably been abused at times in the United Kingdom when “professional” McKenzie friends, who may be being paid or have their own agenda to push, have been engaged by the self-represented litigant.²²³ It was also noted that there has been confusion as to whether a lawyer can be a McKenzie friend, in light of barristers' and solicitors' ethical obligations to the court.²²⁴

221 *McKenzie v McKenzie* [1970] 3 All ER 1034. We note that, while we use the term McKenzie friend in this chapter, we do so only for consistency with Issues Paper 29 and consider that this term should be replaced with “support person” in new courts legislation. It inhibits access to justice to continue to refer to such “lawyer’s terms” and a self-represented litigant who, on turning up at court was asked whether their support person is a “McKenzie friend”, would quite rightly be confused.

222 *Review of the Judicature Act 1908: Towards a consolidated Courts Act*, above n 220, at [15.13].

223 At [15.14].

224 At [15.15].

- 15.11 The Commission asked for submitters to advise whether they had experienced any problems with the use of McKenzie friends. The Commission also asked whether McKenzie friends should continue to be permitted and, if so, whether there is a need for legislation, regulations or guidelines outlining their role in the New Zealand courts. Finally, the Commission sought feedback as to whether a person should be able to have a lawyer as a McKenzie friend.

Support for McKenzie friends

- 15.12 The submissions the Commission received indicated widespread support for McKenzie friends, albeit so long as they are unpaid and are confined to their current role in court.
- 15.13 The New Zealand Law Society noted that while the overseas experience of “semi-professional” McKenzie friends is not really an issue in New Zealand, problems have sometimes arisen when people who have an interest in concurrent proceedings, or are members of a group with particularly focussed interests, take on the role of McKenzie friend. However, the Law Society summed up the value, and future importance, of a self-represented litigant being able to have a McKenzie friend as follows:

McKenzie friends are able to provide advice and support to a number of the most vulnerable litigants in the court system and accordingly enhance access to justice. Given the new restrictions on legal aid, this support is likely to become increasingly important as many litigants will be unrepresented.

Commission’s view

Entitlement

- 15.14 As a starting point, the Commission considers that the existing position, namely that self-represented litigants should be able to have a support person with them in court unless that person will obstruct the efficient administration of justice, should be retained. The question becomes, then, whether this over-arching principle should be statutorily recognised.
- 15.15 The Commission considers that there is merit in such a provision being included in new courts legislation. A consolidated Courts Act, such as is proposed, should be a fundamental resource for self-represented litigants. They should be able to look at the legislation to see that they are generally entitled to a support person to assist them. It is ironic that, at present, this right is rooted in the common law, which is perhaps the last place that a self-represented litigant can be expected to find it.
- 15.16 Any empowering provision would also need to limit the general right, to take into account situations where, for example, the support person is being disruptive or is attempting to subvert the proceedings for other purposes, or is refusing to accept any necessary confidentiality requirements. Given the wide-ranging circumstances in which a court may need to deny a person the

assistance of a McKenzie friend, the Commission sees merit in the United Kingdom test whereby the court may decline a self-represented litigant's request for a support person where it is satisfied that "the interests of justice and fairness do not require the litigant to receive such assistance."²²⁵

- 15.17 Beyond this general principle, the Commission considers that, as in the United Kingdom, it would be useful for there to be some guidance as to the factors that should and should not be taken into account in determining whether to refuse such assistance. It is convenient to deal with this in the next section relating to the role of the McKenzie friend, as it is not proposed that such guidance be included in legislation.

Role

- 15.18 The question of whether or not the role of (as distinct from the entitlement to) a McKenzie friend should be formally provided for is problematic. It was felt by many submitters that there does need to be some guidance as to the usual role of McKenzie friends and limitations on what they can do, but equally submitters did not want the Commission to be too prescriptive.
- 15.19 There seemed to be a general consensus among submitters that the core role of the McKenzie friend is to sit with the self-represented litigant, take notes and quietly offer suggestions and advice. The Commission agrees, and considers that this should form part of the empowering provision, again on the basis that this information should be easily accessible to the self-represented litigant.
- 15.20 However, the Commission would not want to go beyond this in the empowering provision. For instance, while submitters were also agreed that McKenzie friends should not typically be able to address the judge directly, an element of flexibility is required. For example, there may be rare situations, such as where the litigant has a speech impediment, where it is necessary for the court to grant the McKenzie friend speaking rights.

Legislative recognition

- 15.21 The Commission considers that the best approach would be for the empowering provision to include the following elements:
- (a) the general entitlement to a support person;
 - (b) the test for when the court can refuse to permit this; and
 - (c) the core roles of the support person (what the support person can always do).
- 15.22 The Commission also considers that guidelines or rules should be developed as to how the courts will approach the refusal test in (b), and when they will allow a support person to go beyond the core roles in (c).

²²⁵ *Practice Guidance: McKenzie Friends (Civil and Family Courts)* [2010] 4 All ER 272 at 273.

- 15.23 In terms of these, we would support the New Zealand Bar Association's submission that the *United Kingdom Practice Guidance: McKenzie Friends (Civil and Family Courts)* could, with modification, be adopted in New Zealand.²²⁶ For instance, these guidelines include the factors that should and should not be taken into account in determining whether to refuse such assistance, matters relating to rights of audience and rights to conduct litigation, and remuneration.
- 15.24 Another example is the New Zealand Family Court's standard form application by the unrepresented party to have a lay assistant, which includes an undertaking that must be signed by the assistant accepting the limits of their role in court, and agreeing to maintain the confidentiality of the proceedings.

A lawyer as a McKenzie friend?

- 15.25 One submitter supported the idea of lawyers acting as McKenzie friends, although no reasons for this were provided. On the other hand, the Law Society and the Bar Association did not, although the former would allow it in exceptional cases.
- 15.26 The Commission concurs with the view expressed by the Law Society that, as lawyers are subject to ethical obligations to their clients and have duties to the court, combining the two could blur the roles and lead to confusion. The Law Society suggested that, if practising lawyers wish to support a person who cannot afford legal representation, the better approach would be for the lawyer to represent the party by acting pro bono as a lawyer, rather than as a McKenzie friend. The Commission agrees.

- R76 New courts legislation should provide for the following with respect to support persons for self-represented litigants:
- (i) A self-represented litigant's general entitlement to a support person;
 - (ii) The court's ability to refuse to permit a support person where it is satisfied that, in the particular case, the interests of justice and fairness do not require the litigant to receive such assistance;
 - (iii) The core roles of a support person, namely to sit with the self-represented litigant, take notes and quietly offer suggestions and advice.
- R77 Guidelines or rules should be developed as to how the courts will approach the refusal test in R76 (ii), and when they will allow a support person to go beyond the core roles in R76 (iii).
- R78 A barrister and/or solicitor of the High Court of New Zealand should not be permitted to be a support person to a self-represented litigant.

226 *Practice Guidance: McKenzie Friends (Civil and Family Courts)*, above n 225.

AMICUS CURIAE

Introduction

- 15.27 An amicus curiae, or “friend of the court” as it is now called in the United Kingdom,²²⁷ is not a party to an action, but a person appointed by the Court.²²⁸ The role of an amicus is either “to help the court by expounding law impartially, or if one of the parties were unrepresented, by advancing legal arguments on his behalf.”²²⁹
- 15.28 As will be immediately apparent, these two roles are quite different. As the Court stated in *The Beneficial Owners of Whangaruru Whakaturia No 4 v Warin*:²³⁰
- ...There is a substantial difference between expounding law impartially and advancing legal arguments on a party’s behalf. The latter involves partisan advocacy, while the former does not; the latter involves engaged confrontation with opposing counsel, but the former involves giving assistance to the court in a neutral and comprehensive way, particularly to ensure that all aspects of a dispute are teased out and addressed.
- 15.29 In Issues Paper 29, the Commission identified some of the different situations that amici curiae have been appointed in,²³¹ while noting that the core remains constant: an amicus curiae does not act on instructions from a party to the proceedings, rather, the “amicus selects independently arguments which he/she thinks are appropriate to put before the Court, or...discharges requests from the Court for analysis of one matter or another.”²³²
- 15.30 The Commission then pointed out there are no sections in the existing courts legislation expressly allowing for the appointment of an amicus curiae. Rather, there is a mix of provisions and court rules, some relating to the appointment of counsel generally and others to incidental directions and orders the courts can make in relation to proceedings.²³³
- 15.31 We discussed when an amicus should and should not be appointed,²³⁴ and asked whether the power to appoint an amicus curiae should be codified in legislation, and, if so, what the nature of that power should be.

227 Lord Goldsmith QC, Attorney-General to the United Kingdom “Advocate to the Court” *Law Society Gazette* (United Kingdom, 1 February 2002) < www.lawgazette.co.uk > .

228 *The Beneficial Owners of Whangaruru Whakaturia No 4 v Warin* [2009] NZCA 60, [2009] NZAR 523 at [19].

229 *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 at 266 per Salmon LJ.

230 *The Beneficial Owners of Whangaruru Whakaturia No 4 v Warin*, above n 228, at [20].

231 *Review of the Judicature Act 1908: Towards a consolidated Courts Act*, above n 220, at [15.20].

232 *Solicitor-General v Moodie HC Wellington* CIV-2005-485-1026, 25 July 2006 at [19].

233 *Review of the Judicature Act 1908: Towards a consolidated Courts Act*, above n 220, at [15.22]-[15.25].

234 At [15.26]-[15.35].

Formal provision for an amicus curiae?

- 15.32 Only two submitters thought a legislative provision relating to amici curiae was necessary. One of these, the Department of Labour, drew parallels with section 269 of the Immigration Act 2009, which enables the appointment of counsel assisting the court in Immigration and Protection Tribunal and court proceedings involving classified information.
- 15.33 Other submitters, including the Law Society, the Crown Law Office, the Bar Association and the Senior Courts' judges, did not consider such a provision to be necessary at this point in time.
- 15.34 The Bar Association did, though, state that the grounds on which amici curiae can be appointed should be elaborated in rules or elsewhere, noting that at times they are appointed in circumstances where they then move into partisan advocacy, the difficulties this can lead to when the matter gets appealed, and that it could become a form of de facto legal aid.
- 15.35 On the other hand, the Law Society considered that it would be potentially dangerous to attempt to be overly prescriptive in identifying the specific situations in which it is appropriate to appoint an amicus, and that a review of the case law does not suggest that the power is being over-used, but should be left to judges in individual cases.
- 15.36 The Commission agrees with submitters that, given the range of situations and roles that amici curiae are required for, a detailed legislative provision enabling their appointment would not be appropriate. An amicus curiae can be contrasted with, for example, a McKenzie friend, the latter being a right of the self-represented litigant, while the former is at all times there to assist the court. As such, the need for a legislative provision is not the same and, indeed, it would be quite wrong for self-represented litigants to see the appointment of an amicus as some form of de facto legal aid.
- 15.37 However, the Commission considers that some elaboration in court rules would be useful. At a minimum, the ability of the court to appoint an amicus curiae should be spelt out. It is awkward, to say the least, that the courts are at present required to appoint amici under general rules relating to incidental orders and directions.²³⁵

R79 There should be a provision in new courts legislation stating that the court may appoint an amicus curiae, and enabling the making of rules regarding the circumstances in which an amicus may be appointed.

235 For example, Court of Appeal Civil Rules, rr 5 and 7.

INTERVENERS

Introduction

- 15.38 The role of an intervener is closely related to that of an amicus curiae. Interveners are also not parties to the case,²³⁶ but they can be permitted to participate in the proceedings if it is in the public interest or, less commonly, for their own private interest.
- 15.39 In Issues Paper 29, the Commission noted that 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.”²³⁷ However, it can also raise issues of potential prejudice and unfairness to the parties to the proceeding, and cause inconvenience, delay and expense.²³⁸
- 15.40 The Commission commented that while it has traditionally been difficult to convince the courts that intervention is justified, this is perhaps no longer the case, with intervention becoming increasingly common.²³⁹ However, it remains largely unregulated – there is no legislative foundation for intervention and, like the appointment of an amicus curiae, it is dealt with somewhat obliquely in court rules, and/or relies on the inherent jurisdiction of the High Court. There is certainly no detail in the rules as to when intervention will be permitted and, if so, what the intervener will be allowed to do.
- 15.41 In Issues Paper 29 the Commission noted that in the United Kingdom and Canada, there has been a trend towards dealing with intervention explicitly in rules of court, although Australia still largely relies on the common law. The Commission asked whether legislation and/or rules are required to provide for interveners, and, if so, what rights interveners should have.²⁴⁰

Formal provision for interveners?

- 15.42 There was general support in submissions for intervention to be explicitly provided for, although submitters differed as to whether this should be done in legislation or rules.
- 15.43 Duncan Cotterill suggested that legislation should provide for the possibility of intervention, while rules should set out matters such as the process of

236 *The Beneficial Owners of Whangaruru Whakaturia No 4 v Warin*, above n 228, at [27], citing *Fairfax v C* [2008] NZCA 39 at 29.

237 *Review of the Judicature Act 1908: Towards a consolidated Courts Act*, above n 220, at [15.45].

238 At [15.46].

239 At [15.49]-[15.50].

240 At [15.62]-[15.63].

making an application for the appointment of an intervener, the rights and obligations of an intervener, and any costs issues.

- 15.44 On the other hand, the Crown Law Office said it would not support legislation, given the wide range of circumstances relating to which intervention may be contemplated or permitted, and the lack of documented problems in this area. It submitted any codification should be done in rules. Similarly, the Senior Courts' judges also did not see any need for legislative provisions relating to interveners. They stated if any prescription is required, the rules of the relevant court would appear to be the appropriate vehicle.
- 15.45 The Law Society considered a formal framework for intervention, including the appropriate role of interveners and the correct process for appointment, could be done through rules of court, albeit at a fairly "high level" so that judges retain a high degree of discretion in any particular case. The New Zealand Bar Association was happy with either legislation or rules.
- 15.46 The rights that interveners should have also attracted differing views. Duncan Cotterill, for instance, considered interveners should have the right to make submissions as if they were a party to the proceedings, and to present evidence with leave of the court. The Law Society, however, was of the view that, as a matter of general principle, the role of an intervener should normally be significantly less than that of parties to the case, reflecting current practice. It submitted that the precise scope of an intervener's role in any particular case should be left to the presiding judge.
- 15.47 In light of the similarities (and arguably cross-over in some circumstances) between an amicus curiae and an intervener, the Commission sees merit in these both being treated in the same way – namely, by having a legislative provision providing for the ability to intervene/appoint an amicus, and the making of associated rules.

R80 There should be a provision in new courts legislation enabling the participation of an intervener in a proceeding, and the making of rules relating to interveners.

PAYMENT OF COSTS

Introduction

- 15.48 As noted above, input from an amicus curiae or an intervener may provide a number of benefits. It therefore seems only fair that, in appropriate situations, they be recompensed. Similarly, given their input may also extend the length of proceedings, which adds to the costs incurred by the parties, there also needs to be an ability for the parties to claim for the additional expense they face because of the presence of these other participants.

- 15.49 In Issues Paper 29, the Commission noted these situations are dealt with by section 99A of the Judicature Act 1908,²⁴¹ which is generally understood as allowing the court to order one of three things:
- (a) Where the Attorney-General or Solicitor-General acts as intervener or counsel assisting the court, that the parties pay their costs in doing so;²⁴²
 - (b) Where any other person acts as intervener or counsel assisting the court, the parties or the public pay the costs of that person in doing so.²⁴³
 - (c) Where the Attorney-General, Solicitor-General or any other person acts as intervener or counsel assisting the court, they pay the costs incurred by the parties in them doing so.²⁴⁴
- 15.50 However, there has been discussion as to whether section 99A goes wider than this, to enable the Court to order the payment of the costs of persons other than interveners or counsel assisting the court out of public funds.²⁴⁵ If so, it may be arguable that *parties to the proceeding can claim under the provision*.
- 15.51 The most recent authorities have doubted that this is the correct interpretation. For example, in *New Zealand Federation of Commercial Fishermen (Inc) v Ministry of Fisheries*, McGechan J stated:²⁴⁶
- ...Ignoring the marginal note to the section, read as a whole it nevertheless draws a distinction between "party" to a proceeding and the Attorney-General, Solicitor-General, or (relevantly) "other person" appearing to present argument. It is at least open to the interpretation it is intended to apply only in favour of a non-party participant; most obviously a permitted intervener or amicus curiae. Such would make sense. A party can claim costs under normal court rules eg Rule 46. 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.
- 15.52 In light of the differing views, the Commission asked whether section 99A should be available only to interveners and counsel assisting the court, or whether it should also be available to parties. And if the former, we asked whether the section needs to be amended.

241 *Review of the Judicature Act 1908: Towards a consolidated Courts Act*, above n 220, at [15.65].

242 Section 99A(1)(a).

243 Section 99A(1)(b).

244 Section 99A(1)(c).

245 See, for example, *New Zealand Fishing Industry Board v Attorney-General* (1992) 6 PRNZ 500 (HC) at 504.

246 *New Zealand Federation of Commercial Fishermen (Inc) v Ministry of Fisheries* [1996] 2 NZLR 230 (HC) at 232.

Resolving the ambiguity

- 15.53 Three submitters commented. Duncan Cotterill and the Law Society were of the view that the section should only apply to interveners and counsel assisting the court, and that it should be amended to make this clear. On the other hand, the Senior Courts' judges considered the provision should be available to parties as well as to interveners and counsel assisting the court.
- 15.54 The Commission considers the provision was only ever intended to apply to situations involving interveners or counsel assisting the court. Further, largely for the reasons advanced by McGechan J in *New Zealand Federation of Commercial Fishermen (Inc) v Ministry of Fisheries*, the Commission considers this to be the appropriate position. In light of the ambiguity, however, the provision should be amended in new courts legislation to make this clear.

R81 Section 99A of the Judicature Act 1908 should be carried over into new courts legislation, but should be amended to make it clear that it only applies in situations involving interveners or counsel assisting the court.

TECHNICAL ADVISORS

Introduction

- 15.55 Since 1999, the Court of Appeal has had the statutory ability to appoint a technical advisor to assist it in an appeal where questions arise from evidence relating to scientific, technical, or economic matters, or from other expert evidence.²⁴⁷ The Supreme Court has had the same power since its establishment in 2004.²⁴⁸
- 15.56 However, neither court has ever used the power, and it has been noted it is unclear just how the technical advisor would give assistance if appointed.²⁴⁹ In Issues Paper 29, the Commission asked for views on why the provision has not been used, and whether there is a need for guidelines on the appointment of technical advisors.²⁵⁰

Does anything need to be done?

- 15.57 In relation to the issue of why section 99A of the Judicature Act 1908 has never been used, Duncan Cotterill and the New Zealand Law Society ventured the explanation that it does not sit well with the adversarial approach to litigation we have in New Zealand. Duncan Cotterill suggested that, if a technical advisor is needed, the parties would call experts

247 Judicature Act 1908, s 99B(1).

248 Supreme Court Act 2003, s 48(1).

249 *Vector Ltd v Transpower New Zealand Ltd* (2000) 14 PRNZ 240 (HC) at [49].

250 *Review of the Judicature Act 1908: Towards a consolidated Courts Act*, above n 220, at Q53-Q54.

themselves. On the other hand, the Law Society noted that throughout legal history judges have often had to grapple with complex technical evidence, without the assistance of “independent” advisors.

- 15.58 The Senior Courts’ judges were of the view technical advisors have not been used because parties have not sought their appointment. Further, in areas where particular expertise is seen as necessary, they submitted there are more specific provisions available (for example, in commerce cases and cases involving allegations of unlawful discrimination).
- 15.59 The Commission is not convinced all of these reasons stand up to scrutiny. For instance, the main point of the technical advisor (as we see it) is to assist the appellate judges to understand expert evidence that has been called by the parties, which will usually have happened at first instance. As such, it is only indirectly related to the adversarial system and the calling of evidence.
- 15.60 Further, despite parties being able to apply for a technical advisor to be appointed, the Commission considers the purpose of the provision to be for the court to appoint one of its own impetus. The point of a technical advisor is to help the appellate judges understand the expert evidence presented by the parties, and the court will normally be best-placed to determine if it requires this assistance.
- 15.61 The Commission considers the Law Society’s second point is probably correct: the appellate court judges have traditionally had to deal with complex expert evidence themselves without reference to any external advisors, and have usually done so admirably. It is perhaps not surprising then that they have continued to do so, notwithstanding that they can now obtain help if they so require.
- 15.62 In any event, no submitters suggested that the provision should not be kept, or that any further guidance is necessary, so the Commission is content for it to be carried over into new legislation as it is.

R82 The provisions relating to technical advisors should be carried over into new courts legislation.

Chapter 16

Vexatious actions

INTRODUCTION

- 16.1 In this chapter we discuss what should be done when people persistently bring vexatious actions against others. This was discussed in the final chapter of Issues Paper 29,²⁵¹ where the Commission noted that New Zealand has had a statutory measure in place since 1965 to help the courts deal with vexatious actions,²⁵² but said there has been concern that the relevant provision, section 88B of the Judicature Act 1908, is no longer sufficient or appropriate.
- 16.2 Section 88B provides the High Court with the power to restrain a person from bringing or continuing civil proceedings in certain circumstances. It states:
- (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.

251 Law Commission *Review of the Judicature Act 1908: Towards a consolidated Courts Act* (NZLC IP29, 2012) at chapter 16.

252 The current provision, s 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 (respectively) Judicature Amendment Act 1965, s 3; Judicature Amendment Act 1966, s 3; and Judicature Amendment Act (no 2) 2005, s 5(1).

IDENTIFIED PROBLEMS

The problems with the current approach

- 16.3 In Issues Paper 29, the Law Commission identified a number of problems with the current regime, which were largely confirmed by submitters. These included that:
- (a) section 88B is a remedy of last resort, and the threshold for intervention is high;
 - (b) the current test does not take into account interlocutory applications, and its position on appeals is unclear;
 - (c) there is little flexibility as to remedy – as the New Zealand Bar Association described it, the orders available to the High Court require a rigid “all or nothing” approach, which does not allow the Court the flexibility to impose controls appropriate to particular circumstances;
 - (d) only the Attorney-General (or, as is the case in practice, the Solicitor-General) may apply for an order under section 88B, making the remedy less accessible; and
 - (e) only the High Court has the power to make an order.
- 16.4 In Issues Paper 29 we also outlined the graduated system of civil restraint orders that has been implemented in the United Kingdom.²⁵³ These start with a limited order, which operates only to prevent future applications in the particular proceedings. The next step is an extended order, which stops actions involving, relating or touching upon the proceedings. The final level is a general order, which restrains the party from issuing any civil claim or application. At all levels, the party can still obtain leave to bring a claim.
- 16.5 The Commission asked whether New Zealand should adopt a similar approach.²⁵⁴ In our view, the chief advantage of such a system is that it would allow for a more proportionate response to litigants who persistently bring vexatious proceedings. This would not only be consistent with the protections in the New Zealand Bill of Rights Act 1990, but it might also allow intervention at an earlier stage, rather than as a very last resort. We noted in Issues Paper 29 that we expected such a system would replace, rather than supplement section 88B of the Judicature Act 1908.

Submissions

- 16.6 All submitters who commented on this part of Issues Paper 29 supported the move to a graduated system of orders.

253 *Review of the Judicature Act 1908: Towards a consolidated Courts Act*, above n 251, at [16.22]-[16.32].

254 At [16.37]-[16.39].

- 16.7 The Senior Courts' judges agreed that section 88B is no longer adequate, and there should be a move to a system allowing for more flexible, tailored solutions. However, unlike the other submitters, the judges suggested that section 88B should still be retained, as a measure of last resort. They noted that, in the United Kingdom, the graduated civil restraint order system sits alongside a more general power to restrain vexatious proceedings, set out in section 42 of the Senior Courts Act 1981 (UK).
- 16.8 While this is correct, we note the United Kingdom provision extends to criminal proceedings, so in fact their section contains powers additional to those set out in the Civil Procedure Rules.
- 16.9 On the other hand, the Bar Association submitted it would prefer not to retain section 88B, but rather to have only one source of jurisdiction in the new Courts Act. It considered "a new statutory regime adopting a graduated system, but absorbing some elements of section 88B, would work well."

A CIVIL RESTRAINT ORDER REGIME

- 16.10 The Commission considers that New Zealand should introduce a graduated system of orders for restraining vexatious civil proceedings. In our view, the top tier of this system should incorporate the key features of section 88B and, on that basis, the existing provision should not be re-enacted in new courts legislation. We set out below how we consider such a graduated system should operate in New Zealand.²⁵⁵

The making of the application

Who should have standing to apply for an order?

- 16.11 In other jurisdictions, there has been a move towards granting standing to apply for restraint orders to other parties, such as the defendants who are being sued by the litigant in question. In Australia, Victoria is the only jurisdiction where the Attorney-General still has a monopoly on applications.²⁵⁶ In the United Kingdom, parties to a proceeding can apply for any level of civil restraint order,²⁵⁷ and the courts have the power to initiate an application themselves.²⁵⁸

255 While the detail of the scheme was framed in Issues Paper 29 as relating to amending s 88B of the Judicature Act 1908 (if we had decided not to recommend a move to a graduated system), the same principles largely apply to both civil restraint models.

256 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].

257 Civil Procedure Rules (UK), Practice Direction 3C – Civil Restraint Orders, 5.1.

258 Civil Procedure Rules (UK), r 3.3.

- 16.12 Submitters' views on the question of standing were mixed. Most were in favour of extending standing to bring an application to parties, at least in relation to the lower levels of order.
- 16.13 A civil restraint order curtails civil rights, and limiting who can apply for such an order may operate as an important safeguard. It may also prevent the risk of an application being brought by a party for malicious or tactical reasons, as a tool of litigation strategy. On the other hand, parties to vexatious litigation are more likely to be aware of the nature of the behaviour, and have more incentive to take action.
- 16.14 The New Zealand Law Society submitted that under a graduated system, in addition to the Attorney-General (or Solicitor-General), the parties to the relevant proceedings should have standing to bring an application for the first two tiers of civil restraint order. However, it proposed that leave of the court should be required, to minimise the risk of ill-conceived or inappropriate applications. The Law Society proposed only the Attorney-General (or Solicitor-General) should have standing to apply for the most restrictive civil restraint order.
- 16.15 The Law Society did not consider the courts should be able to make orders of their own motion, because of the potential risk that this might create perceptions of bias. Rather, it proposed that protocols be developed whereby the courts can refer potential vexatious litigants for investigation and possible action, for example to the Solicitor-General.
- 16.16 The Crown Law Office agreed only the Attorney-General should be able to seek the most restrictive order, as it would be difficult for other applicants to speak to the wider public interest and to balance the potentially competing principles of access to the courts and the need to protect respondents and the courts from actions that are without foundation.
- 16.17 On the other hand, the Bar Association proposed that the Attorney-General should only have standing (but not exclusive standing) at the intermediate and final stages of the system. It also proposed that the courts should be able to initiate orders on their own motion, as in the United Kingdom and Standing Committee of Attorneys-General model in Australia. It stated that "[t]he judges (and court officials) will often be best placed to identify persons who are making unmeritorious claims, and to assess what kind of order would be appropriate."
- 16.18 The Bar Association recommended the courts should also be able to make an order on the application of:
- (a) court registrar;
 - (b) a person against or in relation to whom the litigant has instituted or conducted a vexatious proceeding; or
 - (c) a person who, in the opinion of the court, has a sufficient interest in the matter (for example, someone who has been threatened with a vexatious

action, or a member of the litigant's family who is adversely affected by his/her conduct).

- 16.19 On the question as to whether other parties should require leave before applying for an order, Duncan Cotterill observed that the discretion as to whether to grant an order will still lie with the court – a leave requirement before one can make an application adds little to the process.
- 16.20 The Commission believes the courts should be able to initiate an application for a civil restraint order themselves, as they will often be uniquely placed to assess the behaviour of a party to one or more proceedings. We also consider that the parties to a vexatious proceeding should be able to apply for any level of restraint order, as should either of the law officers (the Attorney-General or the Solicitor-General).
- 16.21 We do not propose to extend standing to make an application to “other interested parties”. If the defendant to the litigation is not sufficiently concerned to bring an application, we do not consider that a person who only has an interest in the litigation should have standing to do so.
- 16.22 Finally, we agree with the view expressed by Duncan Cotterill that an application should not require leave.

R83 New Zealand should adopt a system of graduated orders for dealing with persons who bring vexatious proceedings.

R84 The following should have standing to bring an application for any level of order restraining vexatious proceedings:

- (a) The courts of their own motion;
- (b) Parties to the proceedings;
- (c) The law officers.

Interlocutory proceedings, appeals and criminal prosecutions

- 16.23 One of the problems we identified in Issues Paper 29 was whether or not the courts should be able to take into account interlocutory proceedings and appeals when considering applications for civil restraint orders.²⁵⁹ All submitters agreed that they should, and we consider this to be appropriate and necessary.
- 16.24 We also consider that, as at present, the courts should also be able to take into account criminal prosecutions initiated by the litigant. No submitters suggested this should not be the case.

259 *Review of the Judicature Act 1908: Towards a consolidated Courts Act*, above n 251, at [16.60]-[16.62]. We note that a Full Court in *Attorney-General v Reid* [2012] NZHC 2119 has recently held (at [54]) that, having regard to *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1, on the current wording of s 88B it would be inappropriate to treat appeals as “legal proceedings” that have been “instituted”.

R85 The courts should be able to take into account interlocutory applications, appeals and criminal prosecutions brought by the litigant when considering applications for civil restraint orders.

Determination of the application and effects of the order

Classes of order

16.25 We set out below the features of a graduated system of orders that we consider should be adopted in New Zealand. As in the United Kingdom, in our view there should be three tiers:

- (a) a limited order;
- (b) an extended order; and
- (c) a general order.

16.26 We do not consider that a lower tier order needs to be made against a litigant before moving to the next level. However, we expect that, in practice, this will be what happens, as the point of the graduated system is to allow the court to deal with a person's behaviour in an immediate and targeted way, rather than as a matter of last resort (as is the case at present).

Limited order

16.27 A limited order may be made by a judge of any court where a party has made two or more applications in a particular proceeding 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 the specific proceedings, without first obtaining the permission of the judge identified in the order.

16.28 If the party makes a further application in the proceeding without permission, the application will be automatically dismissed without the judge having to make any order, or the other party needing to respond. A limited order will remain in effect for the duration of the proceedings, unless the court otherwise orders.

Extended order

16.29 The middle tier of the system provides for an extended order to be made by a judge of any court where a party has persistently issued claims or made applications that are totally without merit. An extended order restrains the party from issuing proceedings 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 High Court judge;
- (b) in the District Court, where the order is made by a District Court judge.

- 16.30 An extended order is made for a specified period of no greater than three years (although the duration may be extended).

General order

- 16.31 The most restrictive measure, a general order, may be made by a High Court judge where the party against whom the order is made persists in issuing claims or making applications that are totally without merit, in circumstances where an extended order would not be sufficient or appropriate.
- 16.32 A general order restrains a party from issuing any claim or making any application in any court without permission of a High Court judge. A general order operates for up to three years, but may be extended.

- R86 There should be three tiers of civil restraint orders:
- (a) A limited order, which restrains the party from making any applications in a particular proceeding without leave;
 - (b) An extended order, which restrains the party from issuing proceedings or making any applications in relation to any matter involving, relating or touching upon the proceedings in which the order was made without leave;
 - (c) A general order, which restrains the party from issuing any civil proceedings or making any applications without leave.

Should orders restrain criminal proceedings?

- 16.33 Under the current provision, the High Court cannot make an order preventing a person from commencing a criminal prosecution. In Issues Paper 29, the Commission discussed the role of private prosecutions as a check on the power of the State, but also acknowledged their potential for abuse.²⁶⁰ We noted that there are some controls on private prosecutions in the Summary Proceedings Act 1957 that can prevent them from being used vexatiously, and that these are being strengthened by the Criminal Procedure Act 2011 (once the relevant provisions comes into force). Our preliminary view was that it would not be appropriate to extend civil restraint orders to criminal proceedings.
- 16.34 Submitters were divided on this issue. The Senior Courts' judges and the majority of the Bar Association thought that section 88B of the Judicature Act 1908 should be limited to civil proceedings. On the other hand, the Law Society, the Crown Law Office and the District Courts' judges consider that it should extend to criminal proceedings, as private prosecutions are seldom of constitutional significance and are open to abuse, given the low cost of initiation and lack of requirement for pre-trial information exchange.

²⁶⁰ At [16.55]-[16.59].

- 16.35 The Law Society commented that the general provision in the United Kingdom (section 42 of the Senior Courts Act 1981 (UK)) extends to criminal proceedings. However, we note that only the Attorney-General can apply for an order under this provision and the threshold is high – normal cases require at least five or six vexatious actions to have been filed. The Law Society also noted that while the courts have inherent power to stay criminal proceedings that are an abuse of process, this power is rarely used and is likely to require the defendant to submit evidence and effectively argue the merits of the case.
- 16.36 The Commission considers that, given the existing safeguards (and that these are being strengthened), it is not necessary to extend the vexatious actions provisions to enable them to prevent the institution of criminal proceedings.

R87 Civil restraint orders should not prevent the initiation of a criminal prosecution.

Post-order considerations

Is leave required to appeal against an order?

- 16.37 In Issues Paper 29, the Commission noted that, while section 88B of the Judicature Act 1908 is ambiguous on its face as to whether leave is needed to appeal against a restraint order, the Court of Appeal has interpreted it as not requiring such.²⁶¹ We sought views on this policy issue. In the United Kingdom, leave is required to appeal against any civil restraint order, but given section 88B orders are a significant restriction of a person's right of access to the courts, our preliminary view was that it is appropriate that there be an appeal as of right.
- 16.38 Submitters were mixed on this question. Some, including the Senior Courts' judges and the Law Society, considered that appeals should be as of right. Others, including the Bar Association, said leave should be required.
- 16.39 We note that in New Zealand the typical approach is for unsuccessful parties to litigation to have a first appeal as of right, and it is only if they seek to appeal further that leave is then required.²⁶² However, an argument could be made that applications for restraint orders are not "typical", because before they are granted it must be shown that the respondent has been abusing the court processes. Accordingly, it could be said that a leave requirement would ensure that the restrained litigant is not continuing to act in such a manner. On the other hand, an application for a restraint order is itself "new" litigation (at least at the extended order and general order tiers), in which case the subject of any such order should perhaps be treated as any other unsuccessful party.

261 *Review of the Judicature Act 1908: Towards a consolidated Courts Act*, above n 251, at [16.74]-[16.77], citing *Heenan v Official Assignee* [2010] NZCA 135.

262 This can be contrasted with the United Kingdom, where in the ordinary course any unsuccessful litigant requires permission to appeal.

- 16.40 On balance, we are not prepared to recommend the imposition of a leave requirement before a litigant can appeal against a civil restraint order. We note that, unless the court grants a stay of the order pending appeal, the restrained litigant will still need to seek leave before instituting any proceedings or applications caught by it, so the order will not be thwarted by the litigant dragging matters out by using the appeal processes.

R88 Leave should not be required for a first appeal against a civil restraint order.

Applications for leave to continue or issue proceedings

- 16.41 Where a civil restraint order has been made, the subject of the order must seek leave before he or she can institute or continue civil proceedings caught by it. 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 the Crown Law Office (as counsel for the Attorney-General), or with the intended defendant.
- 16.42 Nowhere is it expressly stated 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.²⁶³ However, the Court noted that neither the Attorney-General, nor the intended defendants, should be lightly troubled by the application.
- 16.43 In Issues Paper 29, the Commission stated that we agreed with the approach in *Re Collier*, and we asked for submitters' views.²⁶⁴ The Law Society, the Bar Association and the Senior Courts' judges all supported this approach. The Bar Association stated that:
- ...The normal rule should therefore be that applications are dealt with *without notice* and the court should only require service on other parties if it is considering granting the application, or otherwise needs the assistance of opposing argument in determining where the merits lie.
- 16.44 Indeed, it was further submitted by the Bar Association that “[t]he applicant should be prohibited from serving his/her application on any person unless so directed by the Court, as is the case in the New South Wales Act.”
- 16.45 We agree with both these points, and we recommend accordingly.

263 *Re Collier* [2008] 2 NZLR 505 (HC) at [27]–[28].

264 *Review of the Judicature Act 1908: Towards a consolidated Courts Act*, above n 251, at [16.78]–[16.83].

R89 After a restraint order has been made, applications for leave to continue or issue proceedings should usually be dealt with on a without-notice basis. The applicant should be prohibited from serving his or her application on any person unless so directed by the court.

QUERULOUS LITIGANTS

16.46 Before we conclude this chapter, it is necessary to deal with one final matter. This is what has been termed “querulous litigants”. The issue they present has been described in the following way:²⁶⁵

Such research as there is tends to suggest that initially the querulous litigant had a legitimate grievance. The judicial or other resolution of that grievance, however, never satisfies or brings finality. The litigant will sue and re-sue. Attempts are made to circumvent matters which are *res judicata* by collateral attack. Judges and law officers become litigation targets. When there is some statutory complaints procedure against judicial officers, targeted too will be the complaints adjudicator. Appeal tracks are pursued and re-pursued.

16.47 The Bar Association in its submission has asked us to consider this category of litigants in the context of the restraint of vexatious proceedings. It submitted:

- (a) That the High Court Rules dealing with incapacitated persons be amended by:
 - removing the power under Rule 4.42 for the Court to order costs against a litigation guardian; and
 - amending Rules 4.30 and 4.35 in order to empower the Court, where it considers appropriate, to appoint an *amicus curiae* to assist the Court in relation to an incapacitated person in lieu of appointing a litigation guardian.
- (b) That section 88B of the Judicature Act 1908 be amended by conferring on the Court a discretion in cases where the Court considers the proceeding brought by the incapacitated person, or any defence or counterclaim raised by such incapacitated person to have merit, to refer the proceeding to the Public Defender’s Office for assignment by that Office of counsel to represent the litigant and take over from the litigant the conduct of the proceeding, defence or counterclaim.

²⁶⁵ *Corbett v Western* [2011] 3 NZLR 41 (HC) at [8].

- 16.48 We have considerable sympathy for the position that lawyers find themselves in when dealing with problem litigants, whether it be acting for them (in one capacity or another) or representing the opposing party. However, it is outside our terms of reference to consider incapacitated persons, particularly where the suggested changes are matters properly left to the Rules Committee. We do note, though, as the Bar Association acknowledges, that the graduated civil restraint order system we are recommending will cover the querulous litigant, and will hopefully assist in this regard.

Appendices



Appendix 1

Terms of reference

The Commission will review the Judicature Act 1908, and other legislation governing the operation of the New Zealand courts of general jurisdiction with a view to creating a consolidated Courts Act and a new Civil Procedure Act and updating and reorganising other provisions of the Judicature Act 1908.

The focus of the review is on reorganisation and modernisation: the Commission does not intend to revisit major matters of policy underlying the present legislation.

The issues to be considered by the Commission will include:

- (a) the creation of a Courts Act consolidating the legislation governing the District Courts, High Court, Court of Appeal and Supreme Court (for example, consolidating provisions for appointment, including part time appointment);
- (b) the creation of a new Civil Procedure Act (incorporating the Rules Committee and judicial review);
- (c) the amendment, modernisation or repeal of other provisions of the Judicature Act 1908 including:
 - s 17A-17E (dealing with liquidation of associations)
 - ss 24A-24G (Commercial List)
 - s 51B(1)(h) (membership of the Rules Committee)
 - s 83-86 (sureties)
 - s 88 (lost instruments)
 - s 88B (restriction on institution of vexatious actions)
 - s 90 (stipulations not of the essence of contracts)
 - s 92 (discharge of debt by acceptance of part in satisfaction)
 - s 94 (judgment against one of several persons jointly liable not a bar to action against others)
 - ss 94A-94B (payments made under mistake of law)

- s 99 (in cases of conflict rules of equity to prevail)
- s 18 (no jurisdiction in cases of felonies or misdemeanors committed prior to 14 January 1840)
- s 19A (certain civil proceedings may be tried by jury)
- s 23 (Governor-General may appoint special sittings)
- s 55 (absconding debtors)
- s 69 (trial at bar)

Appendix 2

Lists of submitters

The following lists include people the Law Commission had meetings with in the course of this project, as well as people and organisations who made submissions to the Commission.


ISSUES PAPER 21

- The Chief Justice
- Gavin Hillary
- New Zealand Bar Association
- New Zealand Law Society
- Nigel Wilson
- William Wilson QC

ISSUES PAPER 29

- Bell Gully
- Richard Cornes
- Crown Law Office
- Department of Labour
- Duncan Cotterill
- Dunedin Community Law Centre
- Sir Thomas Eichelbaum
- Stewart Germann
- Wayne Goodall

- Anthony Grant
- Heads of Bench of the Senior Courts
- Human Rights Commission
- Professor Philip Joseph
- Judges of the District Courts
- Judges of the Environment Court
- Dr Don Mathieson QC
- Ministry of Economic Development
- Ministry of Justice
- Anna Moodie
- New Zealand Bar Association
- New Zealand Law Society
- Philip Revell
- David Roughan
- Royal Federation of NZ Justices Associations Inc
- Rules Committee
- Paul von Dadelszen
- Whitihereia Community Law Centre
- Sharron Wooler
- Ronald Young J



Appendix 3

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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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

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

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- (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

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.

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- (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

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:

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- (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.

- (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

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- (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.

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- (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

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 4

Draft contempt in the face of the court provision

**Courts Bill
(excerpt)**

Draft prepared by Parliamentary Counsel for the
Law Commission

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 5

List of recommendations

CHAPTER 1 – A CONSOLIDATED COURTS ACT

- R1 The District Courts Act 1947, the Judicature Act 1908 and the Supreme Court Act 2003 should be consolidated into a modern, clear, unitary Courts Act, with the existing jurisdiction of the courts under those Acts specifically continued.
- R2 If R1 is not accepted, as an alternative the District Courts Act 1947 should remain in effect, with revisions, but the Judicature Act 1908 and the Supreme Court Act 2003 should be consolidated into a Senior Courts Act, with the existing jurisdiction of the courts under those Acts specifically continued.
- R3 If there is a Senior Courts Bill and a District Courts Amendment Bill, they should be treated as cognate Bills and dealt with together.
- R4 New legislation should refer to “senior” courts, “District” courts and other named courts, rather than “superior” and “inferior” courts.

CHAPTER 2 – JUDICIAL REVIEW

- R5 The Judicature Amendment Act 1972 should be redrafted in modern language and enacted as a standalone Act, or, if R1 is not accepted, as part of a new Senior Courts Act.

CHAPTER 3 – RULES OF COURT

- R6 Existing processes for the making of rules relating to practice and procedure, and other specified matters, in the District Courts, High Court, Court of Appeal and Supreme Court should continue.
- R7 Rules for all the above courts should have the status of regulations.

- R8 Existing powers to make rules for each of the above courts should continue, but, for the High Court, the enabling provision in new legislation should be extended to include the power to make rules relating to:
- (a) Attachment orders;
 - (b) Discovery against non-parties;
 - (c) Freezing orders;
 - (d) Search orders;
 - (e) Contempt;
 - (f) Charging orders;
 - (g) Possession orders;
 - (h) Arrest and sequestration orders; and
 - (i) Enforcement of judgments or orders.

CHAPTER 4 – RELOCATION OF OTHER PROVISIONS IN THE JUDICATURE ACT 1908

- R9 The provisions of Part 1A of the Judicature Act 1908 should not be included in new courts legislation. Instead, they should be moved, unaltered in substance, to the Trans-Tasman Proceedings Act 2010.
- R10 The following sections of the Judicature Act 1908 should be retained in a new miscellaneous commercial matters statute:
- Sections 17A to 17E (Liquidation of associations);
 - Sections 84 to 86 (Sureties);
 - Section 88 (Lost instruments);
 - Section 90 (Stipulations in contracts as to time);
 - Section 92 (Discharge of debt by acceptance of part in satisfaction); and
 - Sections 94A and 94B (Payments under mistake).
- R11 The new liquidation of associations provisions should clarify the “associations” that are excluded from their ambit by the operation of other Acts.

CHAPTER 5 – APPOINTMENT OF JUDGES

- R12 The formal requirements for appointment as a judge in the New Zealand trial and appellate courts should remain as set out in the District Courts Act 1947, the Judicature Act 1908 and the Supreme Court Act 2003.

- R13 The nomination for the Office of Chief Justice of New Zealand should continue to be made by the Prime Minister, and this should be provided for in new courts legislation.
- R14 The Attorney-General should continue to recommend the appointment of all District Court, High Court, Court of Appeal and Supreme Court judges.
- R15 The Attorney-General should be required by statute to publish, in written form and on the Courts of New Zealand website, the process he or she will follow in soliciting and advancing nominations for judicial appointment.
- R16 There should be additional statutory criteria for appointment as a judge as follows:
- (a) the person to be appointed a judge must be selected by the Attorney-General on merit, having regard to that person's –
 - personal qualities (including integrity, sound judgment, and objectivity);
 - legal abilities (including relevant expertise and experience and appropriate knowledge of the law and its underlying principles);
 - social awareness of and sensitivities to tikanga Māori; and
 - social awareness of and sensitivities to the other diverse communities in New Zealand; and
 - (b) regard must be given to the desirability of the judiciary reflecting gender, cultural and ethnic diversity.
- R17 Before making an appointment, whether "first instance" or an elevation to a higher court, the Attorney-General should be required by statute to consult:
- the Chief Justice, in the case of an appointment to the Higher Courts, and the Chief District Court Judge, in the case of appointment to the District Courts;
 - the Head of Bench of the court to which the appointment will be made;
 - the Solicitor-General;
 - the President of the New Zealand Law Society;
 - the President of the New Zealand Bar Association; and
 - such other persons as he or she considers to be appropriate.

CHAPTER 6 – JUDICIAL CONFLICTS OF INTEREST

- R18 There should be a clear statutory provision in new courts legislation prohibiting all judges from undertaking other employment or acting as a barrister or solicitor.

- R19 The statute should also prohibit judges from holding other office (whether paid or unpaid) unless the Chief Justice, in consultation with the relevant Head of Bench, has approved the other office as being consistent with judicial office.
- R20 The Chief Justice, in consultation with the other Heads of Bench, should develop guidelines on the types of activities that are and are not considered consistent with judicial office, and make those guidelines available to the public via the internet.
- R21 A register of judges' pecuniary interests should not be established by statute in New Zealand.
- R22 If, contrary to the above recommendation, there is to be such a register:
- it should include sufficient detail to disclose the nature of a judge's interests (subject to the protection of the privacy interests of judges);
 - the register should be compiled and maintained by a person in the office of, or nominated by, the Chief Justice;
 - there should be a requirement for the publication of a fair and accurate summary of the information contained in the annual returns by judges; and
 - the summary should be made publicly available on the Courts of New Zealand website.
- R23 There should be a statutory requirement for the Heads of Bench, in consultation with the Chief Justice, to develop clear rules and processes for recusal in their courts, based on a common set of principles developed by the judges.
- R24 These recusal rules and processes should be published in the *Gazette* and on the internet.

CHAPTER 7 – PART-TIME AND ACTING JUDGES

- R25 New courts legislation should enable part-time judicial appointments for a specified period in all courts below the Supreme Court.
- R26 There should be flexibility to enable a judge to work part-time for a specified period up of to five years prior to retirement in all courts below the Supreme Court.
- R27 Part-time appointments should only be made with the agreement of the Attorney-General and the relevant Head of Bench.
- R28 The statutory number of District Court judges should be reconsidered, and adjusted if necessary, to better reflect the District Courts' workload, and to minimise the need for acting judges in the District Courts.

- R29 An acting judge should only be appointed during the illness or absence of any judge, or for any other temporary purpose, or to fill an office required to be held by a judge.
- R30 The appointment of an acting judge should only be made on the certification by the Chief Justice or Chief District Court Judge (as appropriate) that the appointment is necessary for the proper conduct of the court in respect of which the appointment is to be made.
- R31 Only former judges under the age of 75 years should be eligible for appointment as an acting judge.
- R32 Appointment as an acting judge should be for a specified period of up to two years.
- R33 Reappointment as an acting judge should be possible, for a maximum of five years in total.
- R34 A retiring judge should be paid, beyond his or her retiring date, only for the period he or she is actually working, at the appropriate daily rate.

CHAPTER 8 – LEADERSHIP AND ACCOUNTABILITY

- R35 Legislation should provide that the President of the Court of Appeal and the Chief High Court Judge are accountable to the Chief Justice for ensuring the orderly and efficient operation of the Court of Appeal and High Court respectively.
- R36 Legislation should provide that the Principal Judges in the divisions of the District Courts are responsible to the Chief District Court Judge for ensuring the orderly and efficient operation of their divisions.
- R37 Sections 4A(4) and 57(7) of the Judicature Act 1908, and 5A of the District Courts Act 1947, should be amended to allow the President of the Court of Appeal, the Chief High Court Judge, and the Chief District Court Judge to nominate another judge to act in that judge's place with the agreement of the Chief Justice.
- R38 There should be a statutory requirement for the Chief Justice to publish an annual report on the judiciary within six months of the end of the financial year of the Ministry of Justice (or such other date agreed by the Chief Justice and the Ministry of Justice).
- R39 The Ministry of Justice and the Chief Justice should agree the broad matters to be covered in the annual report on the judiciary, which should be specified in new courts legislation.
- R40 New courts legislation should codify the principle that court officers performing judicial functions are not subject to direction by the Ministry of Justice.

- R41 A list of reserved judgments for every judge in each of the District Courts, High Court, Court of Appeal and Supreme Court should be published on the Courts of New Zealand website on the first day of every month.

CHAPTER 9 – SOME JUDICIAL POWERS

- R42 There should be a generic provision in new courts legislation for contempt in the face of the court, dealing with all courts and proceedings, and drafted in similar terms to section 365 of the Criminal Procedure Act 2011.
- R43 Section 365 of the Criminal Procedure Act 2011 should be repealed, with a “signpost” provision retained in its place directing users to the relevant section of the new courts legislation.
- R44 A “wasted costs” provision should not be included in new courts legislation.

CHAPTER 10 – THE COMMERCIAL LIST AND SPECIALISATION IN THE HIGH COURT

- R45 New courts legislation should empower the Attorney-General, with the concurrence of the Chief High Court Judge, to establish panels in the High Court by Order in Council.
- R46 The precise number and placement of those judges on a panel should be a matter for the Chief High Court Judge, although no judge should spend more than 50 per cent of his or her time on a panel.
- R47 There should be a senior High Court judge assigned as the head of any panel.
- R48 Matters of practice and procedure relating to any panels should be considered by the Rules Committee.
- R49 A commercial panel should be established in the High Court, with a jurisdiction largely mirroring that of the Commercial Court in London, with the addition of intellectual property.
- R50 The commercial panel should be regarded as a pilot project, and the Chief High Court Judge should be required to report on its operations to the Attorney-General, 24 months after its establishment.
- R51 The Ministry of Justice should ensure that further and better particulars of the classes of work being processed in the trial and appellate courts are made publicly available, in its Annual Reports, and on the Courts of New Zealand website.
- R52 The Commercial List and any accompanying rules should be dissolved.

CHAPTER 11 – CIVIL JURY TRIALS IN THE HIGH COURT

- R53 Civil jury trials should only be available in the High Court for claims for defamation, false imprisonment or malicious prosecution.
- R54 In High Court claims for defamation, false imprisonment or malicious prosecution, trial by jury should be available as of right, upon the serving of notice by either party to the proceeding.

CHAPTER 12 – THE DISTRICT COURTS

- R55 There should be one unitary District Court for New Zealand.
- R56 The upper limit of the civil jurisdiction of the District Courts should be increased to \$500,000 if this is feasible in terms of judicial and court resources.

CHAPTER 13 – THE APPELLATE COURTS

- R57 Sections 58 to 58F of the Judicature Act 1908 should be made clearer in new courts legislation.
- R58 Section 61A of the Judicature Act 1908 should be redrafted to enable a single Court of Appeal judge to deal with all applications except appeals, contested applications for leave to appeal, and contested applications for extensions of time in which to appeal, with a right of review to a three judge panel as of right. A consequential amendment to the same effect should be made to the Criminal Procedure Act 2011.
- R59 New courts legislation should allow two Court of Appeal judges (one of whom must be a permanent member of the Court) in civil cases to sit on contested applications for leave to appeal and contested applications for extensions of time in which to appeal. If there is a division of opinion, the application would be declined.
- R60 The High Court, Court of Appeal and Supreme Court should each be required in new courts legislation to publish a protocol, by way of *Gazette* notice and the Courts of New Zealand website, for when the judges sit as a full Court or in each of their particular panels.
- R61 The President of the Court of Appeal, with the concurrence of the Chief High Court Judge, should be empowered to select the High Court judges who will sit in the Court of Appeal.

- R62 High Court judges should be seconded to the Court of Appeal for a particular case, or for one or more specified periods of up to three months, to a maximum of four months aggregate in a calendar year.
- R63 The President of the Court of Appeal should allocate the workload of a High Court judge sitting in the Court of Appeal.
- R64 Section 58F of the Judicature Act 1908, which allows a High Court Judge to sit on a Full Court of the Court of Appeal, should not be included in new courts legislation.
- R65 Section 60(1) of the Judicature Act 1908, which deals with specific rule-making powers in the Court of Appeal, should be repealed and replaced with a provision enabling the court to sit when and where it chooses in extraordinary circumstances.
- R66 There should be a clear provision in new courts legislation enabling the Court of Appeal to order a retrial in both civil and criminal matters.
- R67 Section 64 of the Judicature Act 1908 (Transfer of civil proceedings from High Court to Court of Appeal) should be retained, unchanged, in new courts legislation.
- R68 Section 69 of the Judicature Act 1908 (Trial at bar) should be repealed.

CHAPTER 14 – OTHER PROVISIONS IN THE JUDICATURE ACT 1908

- R69 Section 99 of the Judicature Act 1908 (In cases of conflict rules of equity should prevail) should be retained in new courts legislation.
- R70 The following provisions of the Judicature Act 1908 should not be carried over into new courts legislation:
- Section 18 (Crimes before 1840);
 - Section 23 (Special sittings of the High Court);
 - Section 26IB (Video link); and
 - Section 54B (Discharge of juror or jury).
- R71 An absconding debtors provision should be carried over into new courts legislation, drafted in similar terms to section 109 of the District Courts Act 1947, but with the maximum amount of security increased to an amount not exceeding the amount claimed in the proceeding.
- R72 The maximum fine in new courts legislation for failing to respond to a witness summons should be increased to \$1,000.

- R73 Section 94 of the Judicature Act 1908 (Effect of joint judgments) should be retained in new courts legislation and clarified by cross-referencing it with section 17(5) of the Law Reform Act 1936.
- R74 Section 98A of the Judicature Act 1908 (Proceedings in lieu of writs) should be retained in new courts legislation but redrafted in accessible and clear language.
- R75 Section 26P of the Judicature Act 1908 (Review of, or appeals against, decisions of Associate Judges) should be re-enacted, unchanged, in new courts legislation, pending a review of appellate pathways generally.

CHAPTER 15 – OTHER PARTICIPANTS

- R76 New courts legislation should provide for the following with respect to support persons for self-represented litigants:
- (i) A self-represented litigant's general entitlement to a support person;
 - (ii) The court's ability to refuse to permit a support person where it is satisfied that, in the particular case, the interests of justice and fairness do not require the litigant to receive such assistance;
 - (iii) The core roles of a support person, namely to sit with the self-represented litigant, take notes and quietly offer suggestions and advice.
- R77 Guidelines or rules should be developed as to how the courts will approach the refusal test in R76 (ii), and when they will allow a support person to go beyond the core roles in R76 (iii).
- R78 A barrister and/or solicitor of the High Court of New Zealand should not be permitted to be a support person to a self-represented litigant.
- R79 There should be a provision in new courts legislation stating that the court may appoint an *amicus curiae*, and enabling the making of rules regarding the circumstances in which an *amicus* may be appointed.
- R80 There should be a provision in new courts legislation enabling the participation of an intervener in a proceeding, and the making of rules relating to interveners.
- R81 Section 99A of the Judicature Act 1908 should be carried over into new courts legislation, but should be amended to make it clear that it only applies in situations involving interveners or counsel assisting the court.
- R82 The provisions relating to technical advisors should be carried over into new courts legislation.

CHAPTER 16 – VEXATIOUS ACTIONS

- R83 New Zealand should adopt a system of graduated orders for dealing with persons who bring vexatious proceedings.
- R84 The following should have standing to bring an application for any level of order restraining vexatious proceedings:
- (a) The courts of their own motion;
 - (b) Parties to the proceedings;
 - (c) The law officers.
- R85 The courts should be able to take into account interlocutory applications, appeals and criminal prosecutions brought by the litigant when considering applications for civil restraint orders.
- R86 There should be three tiers of civil restraint orders:
- (a) A limited order, which restrains the party from making any applications in a particular proceeding without leave;
 - (b) An extended order, which restrains the party from issuing proceedings or making any applications in relation to any matter involving, relating or touching upon the proceedings in which the order was made without leave;
 - (c) A general order, which restrains the party from issuing any civil proceedings or making any applications without leave.
- R87 Civil restraint orders should not prevent the initiation of a criminal prosecution.
- R88 Leave should not be required for a first appeal against a civil restraint order.
- R89 After a restraint order has been made, applications for leave to continue or issue proceedings should usually be dealt with on a without notice basis. The applicant should be prohibited from serving his or her application on any person unless so directed by the court.

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