

Regulatory Impact Statement

Judicature Modernisation Bill: Review of the Judicature Act 1908 – Second Paper

Agency Disclosure Statement

1. This Regulatory Impact Statement (RIS) has been prepared by the Ministry of Justice. It provides an analysis of the second package of work forming the government response to the Law Commission report *Review of the Judicature Act 1908: Towards a consolidated Courts Act* and other associated matters.
2. We are time constrained due to the intended enactment date. Limited consultation has been undertaken in relation to the options in this paper, some of which are outside of the Commission's Report on the Judicature Act.
3. We do not have reliable data to assist in considering a number of the proposals in this paper. For example, while we have data regarding the numbers of appeals from the High Court to the Court of Appeal in civil matters, we cannot identify the portion of these that are in respect of interlocutory matters. Nor are we able to identify the numbers of applications to the High Court for an arbitrator to be appointed, as such applications would simply be noted as an originating application.
4. We have not been able to model the operational impacts of the proposals in this paper. However, the majority of these are expected to have limited operational impact.
5. None of the policy options discussed are likely to impose additional costs on businesses or impair private property rights, market competition, or the incentives on businesses to innovate and invest. Nor should any of these proposals override fundamental common law principles (as referenced in Chapter 3 of the Legislation Advisory Committee Guidelines).

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Introduction

1. In 2010, the Minister of Justice asked the Law Commission to review the Judicature Act 1908, and other legislation governing the operation of New Zealand's main courts. The Commission's final report, *Review of the Judicature Act 1908: Towards a consolidated Courts Act* was tabled in Parliament on 27 November 2012.
2. The main proposals in the Government response to that paper were included in the initial Cabinet paper and the accompanying Regulatory Impact Statement, which were considered by Cabinet on 15 April 2013 [CAB Min (13) 12/18]. The current paper takes forward a further 18 matters, seven of which are the subject of this RIS. The remaining matters have either been subject to a RIS as part of the first paper, the RIS produced for the Cabinet decision on civil fees (noted in [CAB Min (13) 16/10]) or do not require a RIS.
3. This paper assesses the following proposals:
 - Judicial matters*
 - Extending eligibility for judicial appointment;
 - Appeal processes*
 - Introducing a requirement to obtain leave to appeal from decisions of the High Court to the Court of Appeal in respect of interlocutory matters;
 - Removing the review process in respect of decisions of Associate Judges made in chambers and allowing all decisions of Associate Judges to be appealed;
 - Minor amendments to other Acts*
 - Updating penalties for various offences currently in the District Courts Act 1947;
 - Providing for a "nominated body" to appoint arbitrators in the event of parties not agreeing on an arbitrator under the Arbitration Act 1996; and
 - Providing the Copyright Tribunal with the power to make an interest award in its judgments; and
 - Extending the jurisdiction of Community Magistrates to amend and withdraw charges with the consent of the parties.
4. The status quo, problem and analysis are set out for each of these topics. A general overview of the Judicature Act review proposals is contained in the RIS attached to the first Cabinet paper.

Objectives

5. The Ministry is focussed on developing a modern, accessible and people-centred justice system. We want the most robust justice system possible, because of the importance of maintaining the rule of law. We also want to ensure the civil justice system promotes a more competitive and productive economy. To contribute to these overarching goals, the primary objectives of this package are to:
 - Maintain fundamental constitutional principles.
 - Enhance public confidence in the justice system, including by:
 - providing better information
 - enhancing transparency
 - ensuring impartial decision-making, and
 - encouraging accurate and fair decision-making.
 - Create a more efficient justice system, including:
 - faster and less expensive dispute resolution in court, and

- future-proofing legislation so that it does not create barriers to improving courts and justice services for the public.
6. The majority of proposals in this paper seek to address the latter objective by improving efficiencies in the courts system. However, we have sought to ensure that the other objectives are not compromised by the development of these proposals.

1 Eligibility for judicial appointment

Status Quo

7. The only legislated eligibility requirement to become a judge in New Zealand is that a person must have held a New Zealand practising certificate as a barrister or solicitor for at least seven years. The recommending agent (usually the Attorney-General) then decides which eligible candidates should be recommended for appointment based on non-statutory criteria.
8. The Attorney-General publishes a protocol setting out the non-statutory criteria which can be accessed on the website of the Ministry of Justice (in respect of District Court judges) or the Crown Law Office (in respect of senior court judges).

Problem

9. The requirement to hold a New Zealand practising certificate for seven years can exclude potentially suitable people from appointment particularly when they have worked abroad for sections of their legal career.

Regulatory Impact Analysis

10. We have considered widening the eligibility criteria so that recognition can be given to New Zealand qualified practitioners with sufficient legal experience in comparable overseas jurisdictions (option A) or retaining the status quo (option B). Changes in how appointments to judicial office occur are relevant to the objective of enhancing public confidence in the justice system.
11. Legislation sets out minimum criteria for appointment to judicial office. In reality, most judicial appointments would have well in excess of 7 years practice experience. However, option A would ensure that the largest pool of appropriately qualified lawyers are available for appointment to judicial office, while ensuring that appointees have an appropriate understanding of New Zealand's legal system and community.

2 Appeals in respect of Interlocutory Matters

Status quo

12. Section 66 of the Judicature Act permits an appeal to the Court of Appeal as of right in respect of any judgment, order or decree of the High Court.
13. Prior to November 2011, the Court of Appeal had issued a number of judgments that sought to limit this right in respect of appeals from interlocutory matters. These decisions sought to establish a line of authority which held that decisions regarding the management of the proceedings would not "ordinarily" be open to appeal, whereas decisions that had "some substantive effect" on the rights or liabilities in issue in the proceedings were appealable.
14. This line of authority was overruled by the Supreme Court in *Siemer v Heron* [2011] NZSC 133, in which four of the five Judges held that s 66 provided a right of appeal in respect of all decisions of the High Court, including decisions related solely to the management of a proceeding.

15. In 2012, 244 notices of appeal in civil matters were filed in the Court of Appeal. It is not possible from the data available to identify what these appeals relate to – ie, whether they arise in respect of interlocutory matters. It is expected, however, that the numbers of such appeals have been low. A cursory review of the reported judgments of the Court of Appeal in 2012 indicates that only 18 of these related to interlocutory matters.

Problem

16. The impact of the Supreme Court judgment is not yet measurable. However, there is concern that it could lead to a significant increase in the number of appeals from case management decisions which could increase delays in the courts system. Of particular concerns is that appeals from interlocutory matters are often prioritised in order to minimise delay to the underlying case; this leads to other appeals being delayed as fixtures are lost to enable prioritised appeals to be accommodated.
17. While there are few appeals from interlocutory decisions, they are capable of causing significant injustice and delay. Research undertaken by the Rules Committee in 2010 identified appeals from interlocutory decisions of the High Court that were determined by the Court of Appeal in 2009. This research indicated a range of between 6 weeks and 2 years between the decision of the High Court being appealed and the determination of the Court of Appeal.
18. Such appeals also increase the costs of litigation more generally; which often leads to unfairness to litigants in having to expend substantial resources to defend meritless appeals.

Regulatory Impact Analysis

19. The following options for regulating appeals from interlocutory matters have been considered:
 - A. Preferred option: Introduce a requirement that leave be obtained prior to any appeal from an interlocutory decision being brought;
 - B. Introduce a requirement that leave be obtained prior to any appeal from an interlocutory decision being brought, subject to certain specified exceptions which protect appeal rights in respect of decisions concerning the liberty of the person, the custody of children and others that are in the nature of a final determination;
 - C. Status quo: maintain the current general right of appeal from all decisions of the High Court;
 - D. Retain current general right of appeal but introduce specific power to make rules introducing leave requirements.
20. No detailed consideration was given to the option of removing the right of appeal from interlocutory decisions as it was considered an unreasonable limitation on individuals' access to the courts.
21. On balance, Option A is preferred. Targeted consultation was undertaken in respect of this proposal with the New Zealand Law Society, the New Zealand Bar Association, the Commerce Commission, Financial Markets Authority and members of the judiciary. Consultation responses indicated some support for Option B but noted a risk that setting out specific exceptions in legislation risked developing inconsistent case law focussed on the interpretation of a particular exception. In addition, in considering whether to grant leave in any particular case a court would consider factors such as those proposed to be incorporated in the list of exceptions, with leave unlikely not to be granted in such cases.

		Appeals from Interlocutory Matters Options			
		A Leave required (preferred)	B Leave required with exceptions	C Status quo	D Allow for future amendment by Rule
Objectives	Enhance public confidence in justice system	✓✓✓ Strengthens the Court's ability to resolve ancillary matters speedily, saving court time and reducing costs to the parties. Risks meritorious appeals hindered by having to obtain leave.	✓✓ Same benefits as option A. Inclusion of exceptions creates risk of inconsistency arising in the interpretation of their scope.	✓✓ Broad appeal rights provide greatest access to error correction. Delays created by meritless interlocutory appeals affect public confidence in the justice system.	✓ Giving power to restrict access to appeal by Rules creates uncertainty and is less transparent than incorporation into primary legislation.
	Maintain fundamental constitutional principles	✓ Requiring leave to appeal may appear to restrict a person's ability to access justice.	✓✓ As for option A, but limits on the leave requirement protect matters of particular significance.	✓✓✓ Retains existing extensive appeal rights.	✗ Giving power to restrict access to appeal by Rules creates uncertainty and is less transparent than incorporation into primary legislation.
	Create a more efficient justice system	✓✓✓ Could reduce delays and costs by enabling the appeal court to regulate access to it.	✓✓✓ Could reduce delays and costs by enabling the appeal court to regulate access to it.	✗ Broad appeal rights risk creating delays in reaching resolution of disputes and create additional costs to the parties.	✓✓✓ Would future proof processes by providing flexibility to introduce leave requirement to regulate the business of the Court.
Conclusion		Does not fully meet objectives, but strong positive impact. Risks creating delay in meritorious cases.	Does not fully meet objectives, but strong positive impact. Some risk of inconsistency.	Does not fully meet objectives, and risks creating inefficiencies.	Does not fully meet objectives and creates risk of uncertainty and lack of transparency.

3 Appeal paths from decisions of Associate Judges

Status Quo

22. Currently, s 26P of the Judicature Act seeks to differentiate appeal pathways in respect of decisions taken by Associate Judges. Decisions that are made “in chambers” are not appealable directly to the Court of Appeal, but can be reviewed by a High Court Judge; decisions made in court are appealable in accordance with s 66 of the Act. This provision applies to civil proceedings only.

Problem

23. Difficulty has arisen in differentiating when a decision of an Associate Judge is taken “in chambers” or not. Case law has not clarified this matter and this provision continues to cause confusion. This creates a risk of individuals being denied a right of appeal by following the incorrect path to challenge a decision in the first instance and time expiring to pursue the appropriate path.
24. In addition, it raises the bigger question as to why appeals from decisions of Associate Judges should be treated differently from those of High Court judges. Whilst the jurisdiction of Associate Judges is restricted, when acting within that jurisdiction, their decisions have all the force and effect of High Court decisions. It therefore appears anomalous to have different appeal paths relating to whether a decision is taken by an Associate Judge or not.

Regulatory Impact Analysis

25. We have considered removing the review process and making all decisions of Associate Judges appealable (option A) or the status quo (option B). The relevant objective is enhancing public confidence in the justice system.
26. Option A would improve public understanding of appropriate appeal paths by harmonising the processes of all decisions taken in the High Court. Court users would not be prejudiced in challenging decisions by a lack of clarity regarding appropriate appeal processes.
27. This option also removes the anomaly in treatment of decisions of Associate Judges depending on whether they are made “in chambers” or not. Anomalous court processes diminish public confidence in the justice system; hence remedying this anomaly would assist in enhancing public confidence in the system.

4 Offence penalty levels

Status Quo

28. The District Courts Act 1947 contains a number of specialised offences targeting the conduct of court officials or behaviour towards court officials. The penalties for these offences vary but are low in comparison to offences of a similar nature.

Problem

29. The penalties are very low in comparison to similar fines in the Crimes Act 1961 and the Summary Offences Act 1981. The penalties for these offences were last updated in 1980 and require updating.

Regulatory Impact Analysis

30. Unfortunately, we do not have data on how often the offence provisions in the District Courts Act are used. Data recorded in CMS does not identify charges brought under these provisions. It is likely, however, that these provisions are rarely, if ever, used.

31. While we consider that the existence of these offences would benefit from full re-consideration, we have not been able to do so in the context of the new courts legislation. Accordingly, we have sought to pursue an option that would ensure that these offences can fulfil their intended function in current conditions.
32. We have considered the options outlined in the table below. These provisions are aimed at ensuring appropriate behaviour towards the courts and court officers. Accordingly, the relevant objective is enhancing public confidence in the justice system.

Offence	Inflation-adjust the penalty amount (to the nearest \$1000) (Option A)	Remove offence and penalty (Option B)	Status quo (Option C)
Assaulting an officer of the court	Fine of up to \$2000. Provision duplicates common assault provision.	This type of offence is captured by generic assault. Preferred option.	Fine of up to \$300. Amount out of date (last updated 1980). Provision duplicates generic common law assault provision in the Summary Offences Act 1981.
Extortion or misconduct by certain court officials while acting on court business, or officer of the court failing to account for or pay money received under the authority of the District Courts Act	Fine of up to \$2000. Reflects seriousness of conduct. Preferred option.	Extortion is likely to be covered by Blackmail offence in the Crimes Act 1961. Other Crimes Act offences regarding bribery and corruption also relevant. No existing offence of 'misconduct', which is a lower level offence than those covered in the Crimes Act.	Fine of up to \$300. Amount out of date (last updated 1980). Substantial cross-over with existing offences in the Crimes Act 1961
Officer of the court acting as solicitor or agent of party to proceedings	Fine of up to \$1000. Reflects seriousness of conduct. Preferred option.	Arguable that this could be addressed by way of restrictions on concurrent employment through employment agreements.	Fine of up to \$150. Amount out of date (last updated 1980).
Constable refusing to assist court	Fine of up to \$1000. Reflects seriousness of conduct. Preferred option.	No similar provision exists to target specific behaviour not punishable elsewhere.	Fine of up to \$75. Amount out of date (last updated 1980).

5 Appointment of Arbitrators

Status Quo

33. Schedule 1 to the Arbitration Act 1996 contains provisions that apply to arbitrations in New Zealand. One such provision governs the appointment of arbitrators in the event that the parties to arbitration cannot agree (cl 11). At present, that provision relies on the High Court to appoint arbitrators in the event that parties fail to appoint an arbitrator, or insufficient numbers of arbitrators.

Problem

34. It is not a good use of the limited resource available for the High Court to carry out this task. In addition, the High Court is not best placed to know which arbitrator(s) would be suitable, in terms of availability and expertise, to conduct the arbitration in respect of which they are being asked to act.
35. We do not have data to show how often this process is used. We expect that the numbers of applications under this clause to be low.

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36. We have considered amending the Act to provide for appointments to be made by a nominated body, proposed to be an existing private entity nominated to undertake the task by the Minister of Justice (option A) or the status quo (option B). The relevant objective is creating a more efficient justice system.
37. Option A would ensure that the body responsible for arbitrator appointments in these circumstances would have the requisite knowledge and expertise to undertake the task. It would also speed up such appointments as parties would not need to pursue court proceedings to have an arbitrator appointed. However, it is acknowledged that we have no data to indicate the use of this provision or the likely impact of shifting the role from the High Court to a private body and no consultation on this proposal has been undertaken.

6 Copyright Tribunal

Status Quo

38. Part 8 of the Copyright Act 1994 gives the Copyright Tribunal jurisdiction to assess the reasonableness of copyright licensing schemes or copyright licences that are offered by copyright collecting societies. It has the power to rewrite existing conditions (including the fees payable) and to write in new conditions.
39. The Copyright Tribunal receives relatively few cases (30 new matters in the 2012/13 financial year), a substantial increase from the 2009/2010 financial year (the next most recent year for which we have data) that records only 2 new matters.

Problem

40. Changes the Tribunal makes to a licence or licensing scheme can result in a party owing a substantial debt to the other party following the proceedings. Despite this, the Copyright Tribunal does not have the power to make an interest award in its judgments. This absence was highlighted by the Tribunal in a 2010 case between *Phonographic Performances (NZ) Ltd v Radioworks Ltd*. The interest at stake in that case has been estimated to be over \$400,000.
41. The Law Commission's Report *Aspects of Damages: The Award of Interest on Money Claims*, Report No. 28, noted that the object of an award of interest in court proceedings is to

compensate the plaintiff for not having the money during the period for which it is due and unpaid. The Commission said:

As a matter of general principle...people kept out of pocket should be able to recover interest on money owed to them from the date they were entitled to the money until it is paid in full. The law should compensate plaintiffs realistically for the loss they suffered.

42. The absence of a power to award interest may also affect the behaviour of the parties to a dispute by giving a party an incentive to delay proceedings.

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43. We have considered amending the Copyright Act 1994 to clarify that the Copyright Tribunal may award interest in accordance with the Interest on Money Claims Bill (option A) or retaining the status quo (option B). The relevant objectives are:
 - ensuring public confidence in the justice system by ensuring that parties to Copyright Tribunal proceedings are adequately compensated for any amounts owing to them; and
 - creating a more efficient justice system by ensuring that the regime under Part 8 of the Copyright Act provides an efficient way to resolve disputes.
44. Option A would ensure that parties are adequately compensated for amounts owing to them and reduce perverse incentives for delay. It will also bring the Copyright Tribunal into line with most other courts and tribunals, such as Disputes Tribunals.

7 Community Magistrates

Status Quo

45. Community Magistrates are judicial officers who sit on a wide range of less serious cases in the criminal jurisdiction of the District Court. They increase the judicial resource available to the courts and free up the expertise of District Court Judges for more complex cases.
46. The jurisdiction of Community Magistrates has recently been clarified in the Criminal Procedure Act 2011. In essence, this jurisdiction is limited to most category 1 offences, some category 2 offences, and some (limited) procedural matters in respect of other offences.

Problem

47. Community Magistrates cannot amend or withdraw charges outside of their jurisdiction, even where the parties agree. This means that this work will instead need to be undertaken by a judge.
48. It is not possible to obtain accurate figures in respect of the potential workload arising from these cases as it is not possible (from the systems operated by courts) to isolate matters concluded by charges being withdrawn or amended from dismissals by Community Magistrates.
49. However, we do know that in the 12 month period ending 1 July 2013, 1451 cases before Community Magistrates (or 4% of Community Magistrates disposals) were withdrawn by consent or dismissed for want of prosecution and are now outside of Community Magistrates' jurisdiction. Auckland metro courts are most impacted, accounting for 935 or 64% of these disposals. Hamilton and Tauranga courts, by comparison, accounted for 268 (18%) and 144 (10%) respectively.

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50. We have considered amending the Criminal Procedure Act to enable Community Magistrates (together with judicial officers performing a similar role, being Justices of the

Peace and Registrars) to withdraw or amend charges where the parties consent (option A). We also considered the status quo (option B). The relevant objective is to create a more efficient justice system.

51. Option A would assist in ensuring that criminal matters are dealt with as expeditiously as possible, whilst ensuring that more serious matters are still addressed by judges.

Consultation

52. During development of these proposals officials met with the Chief Justice, President of the Court of Appeal, Chief High Court Judge, Chief District Court Judge, and Attorney-General. The New Zealand Law Society and the New Zealand Bar Association were consulted on some topics.
53. Stakeholder and judicial views have been taken into consideration in the development of our analysis.
54. The Treasury, New Zealand Police, Crown Law Office, Ministry of Business, Innovation and Employment, Commerce Commission, and Financial Markets Agency (appeals from interlocutory matters and appeal paths from Associate Judge decisions only) have been consulted. The proposal regarding the Copyright Tribunal was developed with the Ministry of Business, Innovation and Employment.
55. The Ministry of Justice commissioned advice from a Queens Counsel in respect of appeals from interlocutory matters and appeal paths from Associate Judge decisions, who reviewed a more detailed options paper in respect of these topics.

Conclusion

56. The assessed options are summarised in the table below, with preferred options indicated where applicable.

Topic	Options	Conclusion
1. Eligibility for judicial appointment	A. Allow overseas legal experience to count towards eligibility	Preferred as provides largest pool of appropriately qualified lawyers while ensuring judicial appointees have proper understanding of New Zealand's legal system and community
	B. Status quo	
2. Appeals arising from interlocutory matters	A. Introduce requirement to obtain leave to appeal from an interlocutory matter	Preferred as strengthens the Court's ability to resolve ancillary matters speedily while providing certainty of process
	B. Introduce requirement to obtain leave from Court of Appeal to appeal from an interlocutory matter, subject to specified exceptions	
	C. Retain general right of appeal (status quo)	
	D. Provide for the introduction of a requirement for leave to be made by Rule	
3. Appeal paths from decisions of Associate Judges	A. Remove review and make all decisions appealable	Preferred as provides clarity of appeal processes
	B. Retain different appeal paths from decisions of Associate Judges (status quo)	

4. Offence penalty levels	A. Inflation-adjust penalty levels, rounded up to nearest \$1000.	Preferred as reflects appropriate seriousness of conduct
	B. Repeal penalty and offence.	Preferred for one offence as duplicates existing offence
	C. Leave offence penalty levels unchanged (status quo).	
5. Appointment of arbitrators	A. Amend Act to provide for nominated bodies	
	B. Status quo	
6. Copyright Tribunal	A. Clarify that Copyright Tribunal may award interest	
	B. Status quo	
7. Community Magistrates	A. Allow Community Magistrates, Justices of the Peace and Registrars to amend or withdraw charges with the consent of the parties	Preferred as ensures criminal matters dealt with expeditiously, while ensuring judges consider more serious matters
	B. Status quo	

Implementation

57. The proposed changes will not present significant implementation issues. The proposals in this paper require repealing, consolidating and re-enacting legislation. Consequential amendments to other legislation would be required. Implementation dates will depend on the Government's legislative programme and allocation of legislative priorities.
58. Once Cabinet makes policy decisions, Ministers are likely to issue a press release to publicise the proposals. If the legislation is enacted, the Ministry of Justice will update Ministry of Justice websites, and publish informational material for the public, to reflect the changes.

Monitoring, evaluation and review

59. The Ministry of Justice will continue to monitor courts legislation, and is working on improving data collection to better evaluate policy options.