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By email: Kelly.Harris@justice.govt.nz

Proposed amendment to section 66 of the Judicature Act 1908

Thank you for your email and consultation paper of 26 March 2013 regarding the Ministry of Justice's proposal to amend section 66 of the Judicature Act 1908.

General comments

The Ministry has undertaken an investigation as to possible reform of section 66 of the Judicature Act 1908. It has proposed introducing a leave requirement for appeal from some interlocutory decisions in the High Court. The Ministry assumes that this option will now be progressed.

It is of considerable concern that the Ministry has not identified what mischief it is attempting to cure by introducing a leave requirement. Nor has it identified in detail what material it has considered to lead it to this conclusion.

In the Law Society's view, no need for alteration of the current law has been identified. An investigation undertaken on behalf of the Rules Committee in 2012 established that there were very few interlocutory appeals taken to the Court of Appeal, and that there was no case to support any suggestion that there was an undue burden on the Court or that cases were routinely being held up by interlocutory appeals.

It needs to be borne in mind that a leave requirement places a substantial fetter on access to justice. A leave application is costly to prepare and argue, and involves further delay in having the dispute between the parties resolved. If leave is granted, the appeal hearing is delayed. If leave is refused, the appellant remains aggrieved because the merits have not been determined. In most cases, the whole appeal could be disposed of in the same period of time that is required to deal with a leave application.

The Ministry suggests that there are some interlocutory applications that will not be subject to leave, referring to other jurisdictions where lists of exceptions are provided, and to the case law prior to *Siemer v Heron* [2012] 1 NZLR 309 (SC), where the Court developed a vague and unsatisfactory classification system.

Lists of exceptional cases are never satisfactory. Although other jurisdictions have experimented with these, and they were part of the United Kingdom rules in the past, they are inherently flawed. The list will never cater for all possible cases where appeals might be considered useful, and will become the target for amendment over time, leading to unnecessary complexity in the law for no particular benefit.

The system prior to *Siemer v Heron* was open-ended and unfair. It became something judges relied on to preclude appeals they did not wish to hear. In *Siemer*, the Supreme Court was critical of the approach and said (paragraph 19):

> *The Court of Appeal's general approach has involved a reading down of the language of s 66 but, it must be said, the Court has struggled to articulate a consistent approach.*

The Court struggled to articulate a consistent approach because it was attempting to define the impossible. There is simply no easy way to draw a line between those interlocutory appeals that might be regarded as "worthy" and those which are considered "unworthy" of an appeal right.

The fact remains that a decision has been made by the High Court, and there ought to be accountability for the correctness of such decisions. To suggest otherwise denies the rule of law. Where a party considers it sufficiently important to take the matter to appeal, that possibility should be available. What the system needs to provide is a way of ensuring that a swift answer can be provided in circumstances where that is needed.

The Ministry's attention should be focused on ensuring that there are proper resources to deal with appeals, and systems to allow for speedy appeals where the matter is able to be resolved without going through the very slow process currently operated by the Court of Appeal. At present, the Court is not even allocating fixtures six months after the application for a fixture has been made.

<u>Consultation questions</u>

1. *Do you agree that appeals from interlocutory decisions should be subject to a leave requirement?*

   The Law Society does not agree that appeals from interlocutory decisions should be subject to a leave requirement. The need for such a requirement has not been demonstrated, and it is unlikely to contribute to an improvement in the justice provided by the courts.

2. *Do you agree that certain appeals from interlocutory decisions should be excluded from a requirement to obtain leave?*

   The Law Society does not agree with a category approach where some interlocutory appeals are treated differently from others. There is no satisfactory way of drawing the type of distinction the Ministry proposes.

3. *Do you agree that the approach of listing categories of decisions that should not require leave is the best approach?*

   The Law Society does not agree with a listing of exceptional situations. Listing has never proved an appropriate way of resolving this type of issue.

4. *If not, do you consider the definitional approach, such as that proposed for the Rules Committee in 2010/2011 would be preferable?*

5. *If so, are there particular categories of decision that you consider should be added to this list?*

6. *Do you think it is appropriate to include a provision allowing categories to be added by way of Rule?*

   Regarding questions 4 to 6, the Law Society does not agree with a "definitional approach", and notes that this was never endorsed by the Rules Committee. It would involve a return to the unsatisfactory law prior to *Siemer v Heron* that was criticised by the Supreme Court.

7. *Do you agree that leave should be sought directly from the Court of Appeal?*

   The Law Society does not agree that leave is appropriate. If a leave requirement is to be imposed, then leave should be sought from the Court of Appeal. However, leave appeals to the Court of Appeal are very costly. Any such system would need to operate at a substantial discount from the fee and costs regimes that are currently operated in the Court of Appeal.

8. *If so, do you think that applications for leave should be determined without an oral hearing?*

9. *Do you consider that applications for leave can be determined by a single judge or should there be a panel of two to three judges to determine such applications?*

   Regarding questions 8 to 9, it would be appropriate for leave applications to be determined without an oral hearing, as in the Supreme Court. However, this should not be left to a single judge. A panel should operate in the same way as in the Supreme Court.

10. *Do you think that it is necessary or appropriate to include matters to take into account in primary legislation?*

11. *If so, do you think that the proposed matters to be listed are adequate?*

    Regarding questions 10 to 11, there does not appear to be any need to include specified matters that the court is to take into account. This returns to the unsatisfactory classification system of the law prior to *Siemer v Heron.*

12. *Do you agree that all decisions of associate Judges should be subject to appeal in the same way as decisions of judges?*

    This is a matter that has caused much unnecessary litigation, and remains confusing even for the courts. Section 26P of the Judicature Act operates on an arbitrary basis, depending on which judicial officer heard the application. That is an unsatisfactory basis for a rule providing for accountability by way of appeal. The Law Society agrees that decisions of Associate Judges should be subject to appeal in the same way as all decisions of the High Court.

If you wish to discuss any matters raised in this letter please contact the Civil Litigation and Tribunals Committee convener, Andrew Beck, through the committee secretary, Rhyn Visser (phone (04) 463 2962 or email rhyn.visser@lawsociety.org.nz.

Yours sincerely

Jonathan Temm
President