NEW ZEALAND LAW SOCIETY

NZLS EST 1869

JUDICATURE MODERNISATION BILL

20/02/2014

SUBMISSION ON THE JUDICATURE MODERNISATION BILL

1 The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Judicature Modernisation Bill (Bill).

Introduction

2 The Law Society's submission addresses various aspects of the Bill. Many are of a technical nature but some important issues of principle arise.

3 Key submissions are that:

3.1 the High Court Rules should not be included in legislation;

3.2 matters that have the potential to dispose of appeal rights should not effectively be determined by one Court of Appeal judge;

3.3 leave should not be required for appeals of interlocutory decisions by the High Court and certainly not for orders such as strikeout or summary judgment which finally determine substantive rights;

3.4 the Court of Appeal should be required to give reasons for refusing leave to appeal;

3.5 the Bill should specify the criteria for appointment and persons who should be consulted before a judge is appointed;

3.6 Part 5 of the Bill should use the language of the Electronic Transactions Act 2002 so far as possible.

THE HIGH COURT RULES SHOULD NOT BE INCLUDED IN THE BILL

4 The Bill proposes to retain the High Court Rules in a (nearly 800 page) schedule, preserving the status quo under the Judicature Act 1908.

5 The Law Commission recommended that the High Court Rules be taken out of the Judicature Act 1908 and made as regulations.[1] The Government initially accepted this recommendation[2] which was seen as recognising "that the High Court's inherent power to manage its own practice and procedure co-exists with rule-making powers provided in legislation."[3] The Bill's

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1 Law Commission "Review of the Judicature Act 1908", NZLC R126 at [3.15].

2 Government Response to the Law Commission's report: Review of the Judicature Act 1908: towards a new Courts Act, at [25].

3 Ibid.

explanatory note also refers to the goal of ensuring "court rules are made within parameters agreed by Parliament".[4]

6 No explanation has been offered for the Government's apparent change in position on this issue.[5]

7 The Law Society considers that the High Court Rules should be taken out of the Act and made as regulations, for the reasons set out below.

Primary legislation should not be amended by delegated legislation

8 Taking the High Court Rules out of the Act will end the confusing interplay between primary and subordinate legislation that currently exists. The High Court Rules by their nature require frequent amendment.[6] Parliament currently re-enacts hundreds of pages of technical court rules every few years and in the interim those statutory rules are amended by Order in Council using a "Henry VIII" power (under which a delegated authority, the Governor-General in Council, is empowered to make regulations amending primary legislation).

9 When the High Court Rules were enacted in 1985, Dr Michael Cullen said:

> It is to be noted that it appears to be appropriate within the legal profession to change statutes by delegated legislation – something we have grave doubts about doing in any other form of legislation.[7]

10 Other than in exceptional situations, delegated legislation should not be used to amend Acts of Parliament.[8] The High Court Rules do not qualify as an exceptional situation justifying such an approach.

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4 Page 3.

5 In its submission to the Law Commission, the Rules Committee apparently did not raise *vires* concerns regarding the current Rules, stating it considered that they were validly made. Nevertheless, the Rules Committee recommended expanded rule-making power, as did the Law Commission, to ensure there would be no problems ("real or perceived") with the lawfulness of the Rules. Clause 146 implements this recommendation. See Law Commission "Review of the Judicature Act 1908", NZLC R126 at [3.10]. See also the discussion in Law Commission "Review of the Judicature Act 1908", NZLC IP29 at [8.1] and Minutes of Rules Committee dated 9 June 2008.

6 The High Court Rules have been amended by Order in Council on 13 separate occasions since they were last enacted in 2008.

7 Dr Michael Cullen MP, NZPD 12 June 1985 at 4757, report of Statutes Review Committee on Judicature Amendment Bill.

8 Legislation Advisory Committee Guidelines at [10.1.8]: http://www2.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_10.html#10.1.8

Detailed procedures should not be promulgated by statute

11 The Rules Committee states in its policies that "[d]etailed procedures should be in separately promulgated rules and not in statutes".[9]

Consistency with the Court of Appeal and Supreme Court Rules

12 The inclusion of the High Court Rules in statute is also inconsistent with the treatment of the rules of the other senior courts. The Rules of the Supreme Court and the Court of Appeal are not included in legislation. The High Court Rules should have the same status.

13 Clauses 143 – 152 make detailed provision for the making of the rules of practice and procedure of all three courts.

The application of the regulations disallowance regime

14 The Law Commission concluded that "[i]t is appropriate that members of the public have the opportunity to be heard in relation to matters that affect their substantive rights.". Accordingly, the High Court Rules should not be excluded from the ambit of the regulations disallowance regime.[10] The Bill provides that the High Court Rules may be published under the Legislation Act 2012 as if they were a legislative instrument and the Legislation Act 2012 applies accordingly to rules published in that way.[11]

15 Clarifying the rule-making power and making its exercise subject to greater scrutiny, will serve to improve the transparency of court arrangements in a manner consistent with judicial independence, one of the purposes of the proposed Senior Courts Bill.[12]

16 The removal of the High Court Rules from statute would better reflect the fact that the Rules are delegated legislation that must be made within parameters set by Parliament.

Recommendations

17 The Law Society recommends that the High Court Rules be removed from the Bill and clause 182 be amended to include the High Court Rules in the list of rules that continue in force and

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9 http://www.courtsofnz.govt.nz/about/system/rules_committee/policies "Avoiding Procedural Rules in Statutes", last accessed on 22 January 2014.

10 Law Commission "Review of the Judicature Act 1908", NZLC R126, at [3.19].

11 Clause 151, and see explanatory note, p 28.

12 Clause 3(d).

are deemed to have been made under section 145. Consequential amendments would also need to be made to clauses 2 and 4.

PART 1 – SENIOR COURTS

SUBPART 3—COURT OF APPEAL

Clause 49 – Certain applications can be dealt with by 1 or 2 Judges

18 Clause 49 expands the power of individual judges in the Court of Appeal. At present, at least three judges are required to decide a matter that will determine an appeal.

19 Clause 49 allows two judges to determine applications for leave to appeal and to extend time. These are both applications that have the potential to put an end to appeal rights. It is undesirable that these matters be assigned to two judges, especially given that if the judges disagree, the applicant will be denied relief under clause 49(2). This means that one judge effectively determines the application if there is disagreement.

20 Clause 49 also enables a single judge to determine such matters as to whether the appeal should be struck out for want of prosecution, or failure to provide security for costs. Again, these are important matters that are more appropriately determined by two or three judges.

21 Clause 49 can be compared with clause 82 which provides for the interlocutory orders and directions that can be made by one Supreme Court judge. Clause 49(2) expressly excludes orders or directions that determine the proceeding or dispose of a question or an issue that is before the court in the proceeding. The Law Society considers that the same approach ought to be adopted for the Court of Appeal.

Recommendations

22 The Law Society recommends that clause 49 be amended to:

22.1 remove the provision for two judges to determine applications for leave to appeal and to extend time; and

22.2 require that any other application which determines the proceeding or disposes of a question or an issue that is before the court in the proceeding should be heard and determined by at least two judges.

Interlocutory applications/orders

Clause 57 – Jurisdiction, Clauses 4 and 65 – definitions, Clauses 69 and 74 – Appeal against decisions of High Court in civil proceedings/Criteria for leave to appeal

No need for leave requirement in respect of interlocutory applications

23 Clause 57(2) changes the current law in a significant respect by denying an automatic right of appeal from any "interlocutory order" of the High Court. The Bill acknowledges that the current law is being changed, but provides no explanation of why this is necessary.

24 The Law Society maintains its position that there is no need for this change.[13] The Law Society is not aware of any empirical evidence to suggest that there is a problem with the Court of Appeal being burdened with interlocutory appeals.

25 Imposing a leave requirement is a significant fetter on the right of any litigant to challenge a decision of the High Court, guaranteed by section 27 of the New Zealand Bill of Rights Act 1990. The only way in which High Court judges can be held accountable is by way of appeal. A leave requirement means a further application, with additional delay and costs to the litigant.

Time limit

26 Clause 57(3) allows only 10 working days for bringing an application for leave. That is a very short time period, given the significance of the application. A period of 20 working days should apply, as in the case of an appeal.

Definition of interlocutory order and interlocutory application

27 If a provision is enacted preventing appeals from "interlocutory orders", it is important that the term is used consistently and is carefully defined. Otherwise significant litigation is likely to ensue.

28 Clause 57 refers to appeals from "an interlocutory order" while clauses 69 and 74, which relate to appeals to the Supreme Court, refer to decisions or orders "made on an interlocutory application". It would be desirable for clauses 57, 69 and 74 either to use the term "interlocutory order" or refer to decisions or orders "made on an interlocutory application".

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[13] The Law Society has previously submitted on this issue to the Ministry of Justice on 11 April 2013: available at http://www.lawsociety.org.nz/__data/assets/pdf_file/0007/72187/l-MoJ-proposed-amendment-to-section-66-of-the-Judicature-Act-1908-11-04-13.pdf.

29 If the term "interlocutory order" is used it should be defined in clause 4 (and in clause 65 if the term is to be used in clauses 69 and 74). The definition of "interlocutory application" in clauses 4 and 65 should be amended so that it is consistent with the definition of "interlocutory order".

30 In *Waterhouse v Contractors Bonding Ltd* [2013] 3 NZLR 361 the Court of Appeal held that as a matter of principle and logic the distinction between final and interlocutory judgments and orders should depend on whether they finally determine the substantive rights of the parties, or leave substantive rights to be determined at a future hearing. There are good reasons for this distinction in the context of a rule requiring leave to appeal interlocutory decisions:

30.1 if a decision does not finally determine the substantive rights of the parties, they live to fight another day. But the contrary is true if their rights are determined;

30.2 parties should not be discouraged from pursuing cheap and expeditious procedures by the fear that in doing so they might be prejudicing appeal rights;

30.3 decisions which do not finally determine the substantive rights of the parties are normally subsumed in the final judgment and are therefore indirectly appealable if they have affected the substantive outcome;

30.4 there is no issue of delay. If the decision finally determines the substantive rights of the parties, little is lost if full appeal rights with full time limits are afforded.[14]

31 Clauses 4 and 65 should define "interlocutory application" and "interlocutory order" consistently with this approach. These definitions should therefore not include applications and orders which would have the effect of finally disposing of proceedings, such as an application to strike out a claim.

32 The definition of "interlocutory application" in clauses 4 and 65 also states that it includes an "application for a new trial". The Rule 494 power to order a new trial was not carried over from the High Court Rules 1985 to the High Court Rules 2009. The definition of "interlocutory application" should be updated to reflect this development.

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[14] *Waterhouse v Contractors Bonding Ltd* [2013] 3 NZLR 361 at [27].

Recommendations

33 The Law Society recommends that:

33.1 clause 57(3) and (4) be deleted and clause 57(2) be amended to remove the references to subclauses (3) and (4);

33.2 if clause 57(3) and (4) are retained, then the period of 10 working days in clause 57(3) be increased to 20 working days;

33.3 if clause 57(3) and (4) are retained, then clause 57(3) be amended to replace "interlocutory order of the High Court" with "order of the High Court made on an interlocutory application";

33.4 if the term "interlocutory order" is retained, then it should be defined in clause 4 as an order made on an interlocutory application which does not finally determine substantive rights;

33.5 the definition of "interlocutory application" in clauses 4 and 65 should be amended to exclude applications for orders which have the effect of finally determining substantive rights and to remove the reference to an application for a new trial.

Clause 61 – Appeals against decisions of High Court on appeal from District Court, Family Court, or Youth Court

34 Clause 61 imposes a leave requirement in respect of decisions on appeal from lower courts. No time limit is specified.

Recommendation

35 The Law Society recommends that clause 61 should be consistent with clause 57, and that it should specify a 20 working day time limit.

Clause 62 – Reasons for granting or refusing leave to appeal

36 Clause 62 introduces a new provision, permitting the Court of Appeal to give no reasons for granting or refusing leave to appeal. No justification is offered for this provision, which can be contrasted with the clause 77 requirement that the Supreme Court give reasons for refusing leave to appeal.

37 The provision of reasons by a court is a fundamental aspect of the rule of law, endorsed by the Court of Appeal in *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546. It is an important discipline that promotes the transparency, consistency and predictability of leave decisions.

Recommendation

38 The Law Society recommends that the Court of Appeal be required to give brief reasons for refusing leave to appeal to the Court of Appeal.

SUBPART 5 – SENIOR COURT JUDGES

Clauses 90, 91, 92 – Heads of senior courts

39 Clauses 90(2), 91(2) and 92(2) provide for the Chief Justice, President of the Court of Appeal and Chief High Court Judge to make all necessary arrangements for the sessions of their respective courts, and the conduct of their courts' business.

40 Each of these clauses uses the words "may make all necessary arrangements for". Since this is a duty and not a power it would be more appropriate to use the word "must".

Recommendation

41 The Law Society recommends that the word "may" in each of clauses 90(2), 91(2) and 92(2) be replaced with the word "must".

Clause 93 – Judicial Appointment Process

42 Clause 93 requires the Attorney-General to publish information explaining his or her process for seeking expressions of interest in judicial appointment and for recommending persons for appointment. This clause reflects one of the recommendations made by the Law Commission in its *Review of the Judicature Act 1908 Towards a New Courts Act* Report No 126 (Recommendation 15).

43 The Law Commission also made the following recommendations on additional statutory criteria for appointment of judges, and with whom the Attorney-General should be required to consult before making recommendations:

> 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 Mäori; 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.

R 17 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.

44 There are few formal checks and balances in New Zealand upon the Executive's power to appoint judges. The independence of the judiciary and the rule of law would both benefit from greater specificity about what the criteria for appointment are and the identity of those who must be consulted. Matters of such constitutional importance should be contained in statute law.

45 As the Law Commission has said, the criteria for appointment are doubtless already applied, but it would engender public confidence and transparency to state them explicitly. Similarly, the Law Commission encountered little controversy when it came to the list of people who should be consulted.[15] The Law Society is not aware of any reason why these recommendations should not be adopted.

46 In terms of the detail of the Law Commission recommendations, the Law Society submits that it is not necessary to identify specific diversity categories (final bullet point of R16 (gender, cultural and ethnic)). Sections 64(1) and 27(5A) of the Constitutional Reform Act 2005 (UK), for example, simply refer to "diversity" without creating any specific categories:

> s 64(1) The Commission, in performing its functions under this Part, must have regard to the need to encourage diversity in the range of persons available for selection for appointments.

[15] Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act* R126, 2012 at [5.50] and [5.55].

Recommendations

47 The Law Society recommends that the Bill adopt recommendations 16 and 17 of the Law Commission's *Review of the Judicature Act 1908 Towards a New Courts Act* Report No 12 by:

47.1 requiring consultation with the legal profession and the judiciary before making judicial appointments; and

47.2 specifying appropriate minimum criteria for selection but without identifying specific categories of diversity.

48 These comments also apply to the proposed appointment process for District Court judges contained in clause 192(3).

Clause 99 – eligibility for appointment as Chief Justice

49 Clause 99 precludes a Court of Appeal judge from being appointed Chief Justice. It is unclear why a Chief Justice could not be appointed from the ranks of Court of Appeal judges. It appears that clause 99 would prevent such an appointment.

Recommendation

50 The Law Society recommends that clause 99 be amended to make it clear that a Chief Justice is able to be appointed from the Court of Appeal.

Clause 140 – Judge not to undertake other employment or hold other office

51 The wording of clause 140 "A Judge or Associate Judge must not undertake any other paid employment or hold any other office (whether paid or not) without the approval of the Chief Justice in consultation …" is similar to that of section 4(2A) of the Judicature Act 1908 which currently provides:

> A Judge must not undertake any other paid employment or hold any other office (whether paid or not) unless the Chief High Court Judge is satisfied that the employment or other office is compatible with judicial office.

52 In *Saxmere v Wool Board Disestablishment Company*[16] one of the issues before the Supreme Court was whether the term "other office" encompasses anything other than a public office which might be incompatible with holding the position of a Judge. The Court did not consider

[16] *Saxmere v Wool Board Disestablishment Company* [2010] 1 NZLR 76 at [10].

it necessary to decide this question. There is therefore continuing uncertainty about the exact scope of these words.

Recommendation

53 The Law Society recommends that clause 140 make it clear whether "other office" only refers to public office or extends to other private positions.

Clauses 162 – 165 – Orders restricting commencement or continuation of proceeding: transitional provisions

54 Clause 10 of Schedule 4 provides that all orders that originated under the relevant Act or another enactment continued or repealed by the Bill and that are subsisting or in force on the commencement of that clause "have full effect as if they had originated under the corresponding provisions of [the Bill] and, where necessary, must be treated as having originated under [the Bill]."

55 It is not clear how this transitional provision is to apply to existing orders restricting institution of vexatious actions made under section 88B Judicature Act 1908. It would be desirable to specify how section 88B orders are to be treated.

Recommendation

56 The Law Society recommends that a transitional provision be inserted after clause 165 which:

56.1 provides that an existing section 88B order is to be given effect according to its terms; and

56.2 where no time limit has been specified for a section 88B order, specifies whether a time limit is to apply and what that time limit should be.

Clauses 167 and 401: publication of final judgments online

57 Clauses 167and 401, as well as proposed section 222B of the Employment Relations Act 2000 (cl 544), proposed section 288B of the Resource Management Act 1991 (cl 565) and proposed section 98B of Te Ture Whenua Maori Act 1993 (cl 571), require final judgments to be published online unless there is a good reason not to do so.

58 It can be frustrating for practitioners and members of the public to hear about judgments in the media and not be able to access them. The Bill should therefore include a requirement

that judgments be published online as soon as possible and at the same time that they are provided to the media.

Recommendation

59 The Law Society recommends that clauses 167 and 401, as well as proposed section 222B of the Employment Relations Act 2000 (cl 544), proposed section 288B of the Resource Management Act 1991 (cl 565) and proposed section 98B of Te Ture Whenua Maori Act 1993 (cl 571), be amended to include a requirement that final judgments to published online as soon as possible and at the same time they are provided to the media.

Clause 169 – Persons who may support self-represented litigant

60 Clause 169 provides for someone other than a barrister or solicitor to support a self-represented litigant in court.

61 It is not clear what the entitlement to "support" a self-represented litigant in court entails. It would be desirable for clause 162 to specify that a person who supports a self-represented litigant in court has no right to be heard. Any right to represent the person and speak on the person's behalf, would conflict with the Lawyers and Conveyancers Act 2006 and in particular the regulation under that Act of "reserved areas of work" which include "appearing as an advocate for any other person before any New Zealand court or New Zealand tribunal" (ss 6, 21, 24). It would be likely to have unintended consequences which would compromise the public interest in the effective, efficient and expeditious disposal of litigation. For example, the involvement of additional unregulated participants would increase the burden on the court system from unrepresented litigants. And it would also create incentives for proliferation of "legal advisers" without practising certificates.

Recommendation

62 The Law Society recommends that clause 169 be amended to specify that any person supporting a self-represented litigant does not have the right to be heard.

Clause 177 – service of process on Sunday

63 When the High Court Rules were enacted in 1985, the Auckland District Law Society and a firm of service agents submitted that the prohibition on Sunday service should be repealed.[17] The

[17] Rt Hon Geoffrey Palmer MP, NZPD 13 June 1985 at 4870, second reading of Judicature Amendment Bill.

Minister of Justice was concerned that there had not been an adequate opportunity to consult and so a compromise was struck in which service of subpoenas and injunctions would be allowed. The present law, which clause 177 proposes to continue, is confusing and out of date, and that this provision should not be carried over into the new legislation.

Recommendation

64 The Law Society recommends that clause 177 be deleted.

PART 2 – DISTRICT COURTS

PRELIMINARY PROVISIONS

Clause 185 – Interpretation

65 Clause 185 defines "trial judge" as:

> a District Court Judge appointed under section 195 to exercise the criminal jurisdiction of the District Court in relation to jury trials under the Criminal Procedure Act 2011

Recommendation

66 The Law Society recommends that clause 185 be amended to replace "trial Judge" with "jury trial Judge".

SUBPART 2—JUDGES

Clause 192(3) – Appointment of Judge

67 Similar issues arise in relation to the proposed appointment process for District Court judges as were raised above at paras 42 – 46 in relation to the appointment process for senior judges.

Recommendation

68 The Law Society recommends that the Bill require that District Court judges be appointed in consultation with others, and include appropriate minimum criteria for selection of District Court judges.

Clause 193 – Maximum number of Judges

69 Clause 193 states that the maximum number of judges is 156.

70 It would be desirable to make it clear that the maximum number of judges can be exceeded by the appointment of acting judges under clause 214. Clause 214 contemplates that acting

judges will be appointed if a judge is ill, absent or required for other office, or if it is necessary for another temporary need. In these circumstances it may be necessary to exceed 156 judges.

Recommendation

71 The Law Society recommends that a clause 193(3) be added which reads "Subsection (2) is subject to section 214".

SUBPART 3—COMMUNITY MAGISTRATES

Clause 221 – Appointment of Community Magistrate

72 Clause 221 states that:

> (1) The Governor-General may, on the advice of the Minister, appoint a Community Magistrate.
>
> (2) Before advising the Governor-General, the Minister may consult with any persons that the Minister considers appropriate.

Recommendation

73 The Law Society recommends that clause 221(1) be amended to read "The Governor-General may, on the advice of the Minister, appoint **as** a Community Magistrate **any person who is eligible for appointment**".

Clause 232 – Indemnity to Community Magistrate

74 Clause 232(6) states that:

> Application for a certificate under any of subsections (2), (4), and (5) may be made by a Community Magistrate at any time to a Judge in Chambers, and the Judge has power to grant the certificate after considering all evidence that is given before him or her either orally or in the form of affidavits.

Recommendation

75 The Law Society recommends that clause 232(6) be amended to replace "subsections (2), (4), **and** (5)" with "subsections (2), (4), **or** (5)".

Clause 242 – Remuneration of Chief Community Magistrate and Community Magistrates

76 Clause 242(3) states that:

> An Order in Council made under subsection (2)(a) is a legislative instrument, but not a disallowable instrument, for the purposes of the Legislation Act 2012 and must be presented to the House of Representatives under section 41 of that Act.

Recommendation

77 The Law Society recommends that "subsection (2)(a)" be deleted and replaced with "subsection (1)(b) or (2)".

Clause 248 – Appointment of bailiffs

78 Clause 248(3) states that:

> A bailiff must take an oath of office in the following form (or make an affirmation as provided by section 4 of the Oaths and Declarations Act 1957): … [English form; Maori form]

Recommendation

79 The Law Society recommends that clause 248(3) be amended to read "A bailiff must take an oath of office in **either of** the following forms (or make an affirmation as provided by section 4 of the Oaths and Declarations Act)".

SUBPART 4 – JURISDICTION

Clause 256 – Jurisdictional limit of District Court

80 The Law Commission's report recommended that the jurisdictional limit of the District Court be raised to $500,000. The Bill as drafted contains a limit of $350,000, which is slightly more than the effect of inflation on the current limit, $200,000, since that limit was set in 1992. It would be desirable to provide for a mechanism for inflation-adjustments to occur either automatically, or by way of annual or biennial Order in Council. This would avoid repetition of the process of steady devaluation of the limit that occurs when Parliament does not have a regular opportunity to re-set the limit.

Recommendation

81 The Law Society recommends that clause 256 be amended to provide for the District Court's jurisdictional limit to be increased to reflect inflation either automatically or by Order in Council.

SUBPART 5—TRANSFER OF PROCEEDINGS

Clause 278 – Costs in cases transferred

82 Clause 278(1)(c) refers to a transfer "within the District Court". The current section 48 relates to transfers from one District Court to another District Court. With the unification of the District Courts it is not clear what transfers are contemplated by the reference to "within the District Court". If it is a reference to a transfer within the District Court from one registry to another pursuant to the Rules, then clause 278(1)(c) could be amended to read "from one District Court registry to another".

83 However, clause 278 concerns which court is to deal with costs in a proceeding transferred from one court to another. Where there is a single court this should not be necessary, and it would be better to omit the reference to "within the District Court".

Recommendation

84 The Law Society recommends that clause 278(1)(c) be omitted.

SUBPART 6—PROCEDURE

Clause 280 – Minors

85 Clause 280 deals with minors. In clause 280(1) and (4) there is reference to a "minor under the age of 18 years". In clause 280(4) there is also a reference to a "minor over the age of 18 years". But clause 280(3) defines "minor" as a "person who is under the age of 18 years".

86 Given that minor is defined as a person under the age of 18, the references to "under the age of 18 years" in clause 280(1) and (4) are redundant.

87 The reference to "minor over the age of 18 years" is confusing. The recommendations below assume that this reference is intended to encompass persons over the age of 18 but under the age of 21 years.

Recommendations

88 The Law Society recommends that clause 280 be recast as follows:

> (1) Any minor who is or has been married or in a civil union may be a party to a proceeding in contract or tort in his or her own name.
>
> (2) A judgment in a proceeding under subsection (1) may be given and enforced in the minor's own name.

(3) In this section, minor means a person who is under the age of 18 years.

(4) Any minor who is or has been married or in a civil union and any person over the age of 18 years **but under the age of 21 years** may make or be a party to an application under section 8 of the Domestic Actions Act 1975 without a next friend or guardian ad litem.

(5) The court may make orders on an application referred to in subsection (4), and proceedings to enforce an order may be taken, in the minor's own name.

Clause 281 – Persons jointly liable

89 Clause 281 states that:

> In a claim against 2 or more persons who are jointly liable,—
>
> (a) it is sufficient to serve any 1 or more of those persons; and
>
> (b) judgment may be obtained, and execution issued against a person served, whether or not the others jointly liable have been served or sued or are within the jurisdiction of the court; and
>
> (c) a person against whom judgment is obtained and who has satisfied the amount of the judgment in full or in part may recover contribution from any other person jointly liable.

90 It is necessary to reconcile clause 281 with section 17 of the Law Reform Act 1936 which provides for proceedings against, and contribution between, joint and several tortfeasors.

91 The equivalent section in the Judicature Act 1908 (section 94) does not apply where section 17 applies (section 17(5) provides that section 94 does not apply to any action or proceeding to which section 17 applies).

92 If the equivalent High Court and District Court rules are intended to operate in the same fashion then section 17(5) should be amended to include a reference to the proposed clause 281. Alternatively clause 281 could provide that it is subordinate to section 17.

Recommendation

93 The Law Society recommends that section 17(5) of the Law Reform Act 1936 be amended, to replace the reference to section 94 of the Judicature Act 1908 with a reference to clause 281.

Clause 286 – Who may take affidavit

94 Clause 286 concerns who may take an affidavit. In clause 286(1) and (2) there are references to such persons 'swear[ing] an affidavit'. However it is the deponent who swears or affirms

the contents of an affidavit by making an oath and he or she does so before a lawyer or other qualified person.

Recommendation

95 The Law Society recommends that:

95.1 The verb used in relation to affirmations, "take", should be used instead of 'swear' where it appears in clause 286.

95.2 Alternatively, the proposed clause could be recast so that it reads from the perspective of the deponent and provides that a person swearing an affidavit or making an affirmation to be used in court must do so before one of the persons listed.

SUBPART 7—HEARING

Clause 291 – Equity and good conscience

96 Clause 291 provides that in a proceeding where the amount claimed or the value of the property in issue does not exceed $3,000, the court may receive evidence that might otherwise be inadmissible and determine the proceeding according to "equity and good conscience". The $3,000 figure was inserted in the equivalent existing provision (section 59) in substitution for $500 as from November 1989. If adjusted for CPI changes that figure should now be in excess of $5,000.

97 It may however be preferable to use as a threshold the $15,000 jurisdictional limit of the Disputes Tribunal: Disputes Tribunals Act 1988, section 10. If the Disputes Tribunal has the jurisdiction to determine a claim with an "equity and good conscience" jurisdiction it makes sense for a District Court judge also to have the power to determine a case of the same value on this basis.

Recommendation

98 The Law Society recommends that clause 291 be amended to replace "$3,000" with "$15,000", or at least "$5,000".

Clause 293 – Reference to arbitration

99 Clause 293 provides for references to arbitration.

100 Clause 293(3) provides that a reference made by a judge may be revoked (on application) if the arbitral tribunal does not "make an award" within 20 working days after the date of the reference. Two issues arise in respect of this subclause.

101 First, the 20 working days runs from the date of the order making the reference. Even in the case of a modest arbitration it may well take more than 20 working days to deal with pleadings, discovery, the giving of evidence, and to write the award. In contrast an adjudicator under the Construction Contracts Act 2002 has at least 20 days after the parties have filed all of their papers before he or she is required to determine the dispute.[18]

102 Second, whether an arbitral tribunal "makes an award" can, in some instances, be a function of the parties' conduct rather than the arbitrator's timeliness. It is common for an arbitrator to prepare but not issue an award and indicate that the award will be made available on payment by the parties of his or her fee. It should not be the position that a party should have the ability to apply to revoke a reference in circumstances where the delay is attributable to a failure to meet the arbitrator's costs.

Recommendation

103 The Law Society recommends that:

103.1 the reference to 20 working days be replaced with a reference to "a reasonable period"; and

103.2 the words "make an award" be replaced with the words "make an award available".

SUBPART 10—ENFORCEMENT OF JUDGMENTS

Clause 324 – Proceeding on cross-judgment

104 Clause 324 provides for enforcement proceedings where there are cross-judgments between parties. Clause 324(3) states:

> Satisfaction must be entered for the remainder as well as satisfaction for the smaller amount, and, if both amounts are equal, satisfaction must entered for both.

105 The retention of the concept of entry of satisfaction seems at odds with the goal of modernisation. *McGechan on Procedure* observes in respect of High Court Rule 11.28, which provides for entry of satisfaction of judgment:

[18] Construction Contracts Act 2002 s 46.

> This procedure is rarely used. It is not a prerequisite to effective satisfaction of judgment. Its usual function is to place on the official judgment record notice that judgment has been satisfied. The step has potential advantages in proving satisfaction against possibility of dispute on the point in the distant future, and of minimising the likelihood that execution process will issue on judgment through oversight or misunderstanding.[19]
>
> The rule requires satisfaction to be "entered". The direction made sense alongside former r 306, which required judgments to be entered in a book kept for the purpose. Rules 11.11-11.14 no longer require judgments to be so "entered". Quite where, in that situation, satisfactions now will be "entered" is not clear. The obviously desirable course from the viewpoint of the party producing proof of satisfaction is to see that notice to that effect is placed on the Court file of pleadings.[20]

106 It would be desirable for clause 342(3) to be rephrased or at least for the concept of "satisfaction being entered" in clause 324(3) to be defined so as make it clear what satisfaction is, and when satisfaction should be entered under subclause (3) (presumably only when the remainder has been satisfied).

Recommendation

107 The Law Society recommends that:

107.1 The word "be" be inserted in clause 324(3) so that it reads:

> (3) Satisfaction must be entered for the remainder as well as satisfaction for the smaller amount, and, if both amounts are equal, satisfaction must **be** entered for both.

107.2 Clause 324(3) be rephrased:

> (3) If satisfaction is entered, it must be entered for the remainder as well as satisfaction for the smaller amount, and, if both amounts are equal, satisfaction must be entered for both.

107.3 Clauses 324(4) and 324(4) be inserted which defines "entry of satisfaction" along the following lines:

> (4) Satisfaction is entered when a notice that the judgment has been satisfied has been filed in the court registry.
>
> (5) Satisfaction can only be entered under clause 324(3) when the remainder has been satisfied by payment, levy, or in another way.

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19 *McGechan on Procedure* (Thomson Brookers, Looseleaf) HR11.28.01

20 *McGechan on Procedure* HR11.28.02.

Clause 331 – Application for financial assessment hearing

108 Clause 331 states that:

> (1) This section applies if a judgment creditor applies, in a form approved by the chief executive, for a hearing (a financial assessment hearing) for the judgment debtor or, if the judgment debtor is a body corporate, an officer of the judgment debtor to be questioned about the judgment debtor's means for satisfying the judgment debt.
>
> (2) The court must issue a summons, in a form approved by the chief executive, requiring the judgment debtor or an officer of the judgment debtor to attend the hearing.
>
> (3) The court may also—
>
> (a) order any of the judgment debtor's books or other documents to be produced at the hearing:
>
> (b) order that the hearing be held at a place other than in a court:
>
> (c) impose such other terms and conditions as the court thinks proper in respect of the hearing.
>
> (4) The summons must be served on the judgment debtor by a person referred to in section 390(3)(b).
>
> (5) The court may cancel a hearing at the request of the judgment creditor.

109 Clause 333(1) states that:

> (1) A financial assessment hearing must not be held until at least 3 working days, or any shorter period agreed by the judgment debtor, has passed after the date on which the summons was served.

110 It would be helpful for the limit on when a financial assessment hearing can be held to be included in the clause which sets out the procedure for summonsing a judgment debtor to a financial assessment hearing.

Recommendation

111 The Law Society recommends that the text of clause 333(1) be inserted as new clause 331(5) between the current clause 331(4) and (5).

Clause 340 – Liability of employer

112 Clause 340(1)(a) states that:

> (1) Subject to section 339(3), as long as an attachment order remains in force, the employer to whom it relates must from time to time, whenever any money becomes due and payable by the employer to the judgment debtor by way of salary or wages,—
>
> (a) deduct from that money a sufficient amount to satisfy the charge on the money so far as the same has accrued before the day on which the salary or wages becomes due and payable; and …

113 The Law Society makes the following drafting recommendations.

Recommendations

114 The Law Society recommends that:

114.1 the wording in clause 340(1) "whenever any money becomes due and payable by the employer to the judgment debtor by way of salary or wages" be changed to "whenever any salary or wages becomes payable by the employer to the judgment debtor";

114.2 clause 340(1)(a) be amended to read "deduct from **those salary or wages**" and "the charge on **those salary or wages**";

114.3 the words "created by section 339(1)" be added after "the charge on those salary or wages"; and

114.4 "the same" be changed to "that charge".

so that the clause reads:

> (a) deduct from **those salary or wages** a sufficient amount to satisfy **the charge on those salary or wages** so far as **that charge** has accrued before the day on which the salary or wages becomes due and payable; and

Clause 346 – Process for dealing with application for contempt of enforcement proceedings

115 Clause 346 states that:

> (1) On receipt of an application under section 345(3), the Registrar must— appoint a time and place for the hearing of the application if satisfied, on the basis of information provided with the application, that the judgment debtor has sufficient means to pay the judgment debt but refuses to do so; or if not so satisfied, refer the application to a Judge.
>
> (2) On the referral of an application under subsection (1)(b), the Judge must — deal with the application on the papers; and consider whether he or she is satisfied, on the basis of information provided with the application, that the judgment debtor has sufficient means to pay the judgment debt but refuses to do so.
>
> (3) If the Judge is so satisfied, he or she must direct the Registrar to appoint a time and place for the hearing of the application.
>
> (4) If the Judge is not so satisfied, he or she must decline the application.
>
> (5) If the Registrar appoints a time and place for the hearing of the application under subsection (1)(a) or (3), the judgment debtor must be served with a copy of the application, and a notice of the time and place so appointed, by a person referred to in section 390(3)(c).

(6) The Registrar must notify the judgment creditor of the time and place so appointed.

(7) If the application is declined under subsection (4), the Registrar must notify the judgment creditor that the application has been declined.

116 The Law Society makes the following drafting recommendations.

Recommendations

117 The Law Society recommends that clause 346 be amended so that:

117.1 clause 346(3) and (4) become clause 346(2)(c) and (d) (so that the reference to "so satisfied" follows clause 346(2)(b) directly);

117.2 the words "the judgment debtor ... 390(3)(c)" in clause 346(5) become clause 346(5)(a) (which would be clause 346(3)(a) if the above change is also adopted); and

117.3 clause 346(6) be made into clause 346(5)(b) (which would be clause 346(3)(b) if the above recommendations are also adopted).

118 The clause amended as recommended would read:

(1) On receipt of an application under **section 345(3)**, the Registrar must—

(a) appoint a time and place for the hearing of the application if satisfied, on the basis of information provided with the application, that the judgment debtor has sufficient means to pay the judgment debt but refuses to do so; or

(b) if not so satisfied, refer the application to a Judge.

(2) On the referral of an application under **subsection (1)(b)**, the Judge must—

(a) deal with the application on the papers; and

(b) consider whether he or she is satisfied, on the basis of information provided with the application, that the judgment debtor has sufficient means to pay the judgment debt but refuses to do so.

(c) if the Judge is so satisfied, direct the Registrar to appoint a time and place for the hearing of the application.

(d) if the Judge is not so satisfied, decline the application.

(3) If the Registrar appoints a time and place for the hearing of the application under **subsection (1)(a) or (2)(c)**,

(a) the judgment debtor must be served with a copy of the application, and a notice of the time and place so appointed, by a person referred to in **section 390(3)(c)**.

(b) the Registrar must notify the judgment creditor of the time and place so appointed.

> (4) If the application is declined under **subsection (4)**, the Registrar must notify the judgment creditor that the application has been declined.

Clause 349 – Warrant to seize property

119 Clause 349 provides for the authority of a bailiff or constable to seize property under a warrant. A bailiff or constable may not seize tools of trade "to a value not exceeding $500".

120 The figure of $500 used in clause 349(2)(a)(i) has been the same since 1986. If adjusted for CPI changes that figure is, nowadays, in excess of $1,000 dollars.

Recommendation

121 The Law Society recommends that the reference to $500 in clause 349(2)(a)(i) be amended to refer to $1,000.

Clause 351 – Disposal of securities seized

122 Clause 351 states that:

> (1) The bailiff who seizes securities referred to in section 349(2)(b) must deliver them to the Registrar.
>
> (2) The Registrar must hold the securities for the benefit of the execution creditor as security for the execution debtor's debts under section 349(1).
>
> (3) The execution creditor may sue for the money secured by or payable under the securities on their due date and may sue—
>
> (a) in the name of the execution debtor; or
>
> (b) in the name of any person in whose name the person against whom execution has issued might have sued.

123 The terms "execution creditor" and "execution debtor" appear in this clause for the first time. The term "execution creditor" also appears in clause 361. These terms are defined in High Court Rule 4.57 as:

> **execution creditor** means a person who has issued an enforcement process under Part 17;
>
> **execution debtor** means a person against whose property an enforcement process has been issued under Part 17.

124 The terms "enforcement debtor" and "enforcement creditor" are used in the District Court Rules.

125 The terms “judgment creditor” and “judgment debtor” are used elsewhere in the Bill, including in particular in clause 349.

126 It would be desirable to use consistent terminology so far as possible.

Recommendation

127 The Law Society recommends that clauses 351 and 361 be amended by replacing references to “execution creditor” and “execution debtor” with references to “judgment creditor” and “judgment debtor” so that the same language is used in clauses 351 and 361 as is used in clause 349 and elsewhere in the Bill.

Clauses 353 and 354 – Period to elapse before sale; Goods must be sold by public auction unless court orders otherwise

128 Clause 353 states that:

> (1) Goods seized under a warrant to seize property must not be sold before 5 working days after the date of seizure have elapsed.
>
> (2) Subsection (1) does not apply if—
>
> (a) the goods are perishable; or
>
> (b) the owner of the goods makes a written request (which may be by email or other electronic means) for earlier sale.

129 Clause 354 states that:

> (1) Goods seized under a warrant to seize property must be sold by public auction unless a court orders otherwise.
>
> (2) A bailiff who is authorised to execute a warrant to seize property may, if he or she first obtains the Registrar's written approval (which may be given by email or other electronic means), sell goods seized under the warrant without the necessity of taking out an auctioneer's licence.
>
> (3) Subsection (2) overrides the Auctioneers Act 1928 or any other enactment or rule of law to the contrary.
>
> (4) The jurisdiction of a court under this section may be exercised by the Registrar.

130 The Law Society makes the following drafting recommendations.

Recommendations

131 The Law Society recommends that:

131.1 the heading of 353 be changed to "Sale of goods seized under warrant to seize property";

131.2 the heading of 354 be changed to "Bailiff not required to hold auctioneer's licence";

131.3 clause 354(1) be moved to clause 353(1);

131.4 clause 353(1) be amended to refer to the possibility of a claim under s360 halting the sale;

131.5 the second and third clauses in clause 354(2) be switched so that what the bailiff may do is set out prior to the proviso "A bailiff who is authorised ... may sell goods seized ... provided (instead of "if", given the proposed re-ordering) he or she first obtains the Registrar's written approval."; and

131.6 the words "without the necessity of taking out" in clause 354(2) be changed to "without needing to take out".

132 The clauses amended as recommended would read:

353 Sale of goods seized under warrant to seize property

(1) Goods seized under a warrant to seize property must be sold by public auction unless a court orders otherwise or the sale is halted by a claim under s 360.

(2) Goods seized under a warrant to seize property must not be sold before 5 working days after the date of seizure have elapsed.

(3) Subsection (1) does not apply if—

(a) the goods are perishable; or

(b) the owner of the goods makes a written request (which may be by email or other electronic means) for earlier sale.

354 Bailiff not required to hold auctioneer's licence

(1) A bailiff who is authorised to execute a warrant to seize property may sell goods seized under the warrant without needing to take out an auctioneer's licence provided he or she first obtains the Registrar's written approval (which may be given by email or other electronic means).

(2) Subsection (2) overrides the Auctioneers Act 1928 or any other enactment or rule of law to the contrary.

(3) The jurisdiction of a court under this section may be exercised by the Registrar.

133 Clause 358(2)(a) will need to be amended to refer to section 353 as well as section 354 if these recommendations are adopted.

Clause 355 – Purchaser from bailiff acquires goods free of all ownership and other proprietary interests

134 Clause 355(1) provides:

> A person who purchases from a bailiff goods seized under a warrant to seize property and who purchases without any claim to the goods having been made to the bailiff acquires good title to the goods free of all ownership interests and other proprietary interests held in them before the sale.

Recommendation

135 In order to make the connection between clauses 355 and 360 clear, the Law Society recommends that clause 355(1) be amended to read:

> A person who purchases from a bailiff goods seized under a warrant to seize property acquires good title to the goods free of all ownership interests and other proprietary interests held in them before the sale, **provided that no claim to the goods has been made under section 360**.

Clause 360 – Sale of goods subject to third party claim

136 Clause 360(2)(b) provides that a third party can give the bailiff security for the value of the goods "in the prescribed manner" as one of the means by which a sale of goods seized under a warrant may be halted. Clause 360(4) provides for the amount of the value of the goods to be fixed by appraisement in the "prescribed manner".

137 Clause 185 defines "prescribed" as "prescribed by regulations made under section 413". However, the relevant processes are set out in the Rules, not regulations (and could not be the subject of regulations under clause 413). The words "prescribed manner" should be "manner prescribed in the Rules." Alternatively, the definition of "prescribed" could be amended to include the Rules.

Recommendation

138 The Law Society recommends that clause 360 be amended so that the references to "prescribed manner" are replaced with "manner prescribed in the Rules".

Clause 361 – Third party claim process

139 Clause 361(1) provides that the bailiff may obtain a summons requiring the execution creditor and the claimant to appear before the court. Clause 361(2) provides that in the case of a claim under clause 360 in respect of property that is the subject of a financing statement registered on the personal property securities register kept under the Personal Property Securities Act 1999, the bailiff must obtain a summons requiring the claimant to appear before the court.

140 Clause 361(2) refers to a claim made "under section 360". There is no corresponding reference to section 360 in clause 361(1). As a result it is not clear whether clause 361(1) also applies to claims where the clause 360 process is not followed. The words "under section 360" could be added to clause 361(1) to make this clear.

Recommendation

141 The Law Society recommends that the words "under section 360" be added to clause 361(1).

Clauses 379 and 387 – Irregularity or informality in execution of warrant

142 Clause 379(2) provides that a person aggrieved by an irregularity or informality in the execution of a warrant for the recovery of land, may sue the person who applied for the warrant only for special damage. If the special damage proved is not more than $5, then the aggrieved person is not entitled to costs, unless the court orders otherwise.

143 Clause 387(2) similarly limits the damage for which an aggrieved person may sue a court officer in respect of irregularity or informality in the execution of a warrant. However clause 387(2) provides that the aggrieved person is not entitled to costs if the special damage provide is not more than $30, unless the court orders otherwise.

Recommendation

144 The Law Society recommends that $5 in clause 379(2) be changed to $30 for consistency with clause 387.

Clause 386 – Neglect by bailiffs

145 Clause 386 provides for the court to order a bailiff to pay damages on "the complaint of a person aggrieved" if an opportunity of executing a warrant to seize property is lost through the fault of the bailiff or a person under his or her authority.

Recommendation

146 The Law Society recommends that clause 386(1) be amended to change "complaint" to "application".

SUBPART 11—MISCELLANEOUS AND GENERAL PROVISIONS

Clause 392 – Arrest of debtor about to leave New Zealand

147 Clause 392 deals with the arrest of debtors about to leave New Zealand. Clause 392(3) permits a judge to require the applicant for a warrant to deposit in the court an amount not exceeding $2,000 or to give surety for that amount. This is required for the purposes of payment of any compensation that may be ordered to be paid to the defendant under clause 392(9).

148 The $2,000 figure was fixed in 1980. If the application proves to be misconceived, arresting an alleged debtor who is about to leave the country is a serious infringement of his or her liberty and the amount required to properly compensate him or her is likely to be well in excess of $2,000. On a CPI adjusted basis $2,000 is about $10,000 today.

Recommendation

149 The Law Society recommends that the reference in clause 392(9) to "$2,000" be replaced with "$10,000".

Clause 401 – Final written judgments to be published on Internet

150 Clause 401 (requiring final written judgments of the District Court to be published on the internet) does not contain the provision for publishing a judgment in part if there are good reasons for doing so, which appears in the equivalent provision applicable to senior courts, the Employment Court, the Environment Court and Maori Land Court.[21]

151 There are many District Court decisions, and in particular Family Court decisions, which are likely to require suppression and benefit from the option to publish part of the decision.

Recommendation

152 The Law Society recommends that the wording of clause 401 be amended to track the wording of clause 167, and proposed section 222B of the Employment relations Act 2000 (cl 544); proposed section 288B of the Resource Management Act 1991 (cl 565) and proposed section

[21] Cl 167; proposed s 222B of the Employment relations Act 2000 (cl 544); proposed s 288B of the Resource Management Act 1991 (cl 565) and proposed s 98B of the Te Ture Whenua Maori Act 1993 (cl 571).

98B of Te Ture Whenua Maori Act 1993 (cl 571), so as to allow part-publication of District Court decisions.

PART 3: JUDICIAL REVIEW PROCEDURE

Clause 424 – Interpretation

153 The current definition of "person" in the Judicature Amendment Act 1972 refers to a corporation sole and a body of persons whether incorporated or not. The clause 424 definition specifically refers only to the District Court, Maori Land Court and Maori Appellate Court. To avoid confusion about whether the law has been changed, clause 424 should continue to refer to a corporation sole and a body of persons whether incorporated or not.

Recommendation

154 The Law Society recommends that the clause 424 definition of "person" be amended to insert "(d) a corporation sole: and (e) a body of persons whether incorporated or not".

Clause 427 – This Part subject to certain provisions of Employment Relations Act 2000

155 Clause 427(2) refers to certain provisions in the Employment Relations Act 2000 which concern the exclusive jurisdiction of tribunals under that Act, but omits reference to other provisions of that Act that appear to be equally relevant.

Recommendation

156 The Law Society recommends that the clause 427(2) be amended to add references to the following provisions of the Employment Relations Act 2000:

156.1 section 184 (restriction on review of Employment Relations Authority);

156.2 section 193 (proceedings of Employment Court not to be questioned);

156.3 section 194 (exclusive jurisdiction of Employment Court to hear and determine certain judicial review applications); and

156.4 section 194A (restrictions on applications for review by certain employees).

Clause 428 – Application for Judicial Review

157 Clause 428 sets out the requirements for commencing an application for judicial review.

158 Clause 428(1) omits a requirement equating to the present section 9(2)(b) of the Act, to state the grounds on which relief is sought. This requirement does not appear in Part 5 of the High Court Rules either. In the judicial review context, this requirement assists in identifying the matters at issue and facilitates timeliness of proceedings.

159 Clause 428(3) of the Bill does not correspond to the provision it replaces, section 9(3). Section 9(3) provides that it is not necessary to specify which of the former "proceedings" would have been taken. Clause 428(3) provides that the statement of claim need not state that certain "relief" is sought, which is inconsistent with Rule 5.27 (which requires relief to be specified in the statement of claim). The statement of claim in judicial review proceedings should state whether, for example, an injunction or declaration is sought.

160 Section 9(7) of the Judicature Amendment Act 1972 ("Subject to this Part of this Act, the procedure in respect of any application for review shall be in accordance with rules of Court.") has not been carried over into the Bill. This provision is important because it makes it clear that the Judicature Amendment Act 1972 is not a stand-alone procedural code, but that applications for review are also subject to the ordinary rules. There are other Parts of the High Court Rules (other than Part 5) which are applied in the judicial review context, for example the discovery rules (Part 8).

Recommendations

161 The Law Society recommends that:

161.1 Clause 428 be amended to include a requirement that the statement of claim state the grounds on which relief is sought;

161.2 Clause 428(3) be amended to read "The statement of claim need not specify that the claim is made in any of the following proceedings …"

161.3 A new provision "Subject to this Part of this Act, the procedure in respect of any application for review shall be in accordance with the High Court Rules." be inserted either as clause 428(4) or as a stand-alone provision after clause 441.

PART 4 – INTEREST ON MONEY CLAIMS

162 The introduction of a single statutory system for the award of interest on money claims is a welcome initiative and is likely to reduce costs, and provide greater certainty for litigants and a more just outcome in a wide range of litigation.

163 The Law Society makes the following drafting recommendations.

Clause 449 – Period for mandatory award of interest

164 Clause 445(2)(b) states that:

> (2) That purpose is to be achieved by the award of interest in accordance with the following principles:
>
> (b) interest is to be paid from the day on which the money claim is quantified until the day of payment.

165 Clause 449(1)(a) states that:

> (1) When giving a money judgment, a court must award interest under this Part for the period that—
>
> (a) begins on the day on which the cause of action arose or, if the amount on which interest is to be awarded was not quantified at that day, on a later day that the court specifies in the judgment as the day at which that amount was quantified;

166 There are number of causes of action in tort involving claims for unliquidated damages where interest would normally run from the date of the cause of action. Clause 449(1)(a) and the worked example at clause 455 suggest that the standard position under the Bill will be that interest runs from a later date unless special circumstances can be shown under clause 458.

167 Defining the term "quantified" as used in clauses 445(2)(b) and 449(1)(a) and/or removing the reference to "later" in clause 449(1)(a) would avoid uncertainty as to when a claim is "quantified" and ensure that clause 449(1)(a) is not interpreted so that a plaintiff whose claim is for unliquidated damages (e.g., in a tort claim) and whose loss is quantified at the time it is suffered in the ordinary way, is worse off under the new regime.

Recommendation

168 The Law Society recommends that clause 449(1)(a) be amended to ensure that plaintiffs with a claim for unliquidated damages which would ordinarily earn interest from the date the cause of action arose are not worse off under the new provisions.

Clause 452 – Calculation of interest awarded under section 450

169 Clause 452(1) provides that the interest to be awarded on a monetary judgment under clause 450 is to be calculated at the interest rate or rates using the Internet site calculator in

accordance with clauses 454 and 455 (except if the Part provides otherwise). Clause 452(2) defines interest rate as:

> an annual rate equivalent to the 6-month retail deposit rate as published from time to time by the Reserve Bank of New Zealand (or, if some other indicator interest rate is prescribed as the base rate for the purposes of this section, the prescribed base rate), plus 0.15% (or, if some other percentage is prescribed as the premium for the purposes of this section, the prescribed premium).

170 It would be desirable to clarify that the interest rate to be used is the weighted average 6 month retail deposit rate for the relevant period (rather than the rate at the beginning or end of the period, for example).

Recommendation

171 The Law Society recommends that clause 452(1) should be amended by adding the words "for that period" after "Interest awarded under section 450 for a period is to be calculated at the relevant interest rate or interest rates".

Clause 460 – Interest on costs

172 Clause 460(1) provides that a court may not award interest on costs awarded to a party for a period before the date when the costs are "awarded". The Court of Appeal in *Chesterfields Preschools Ltd v Commissioner of Inland Revenue* determined that under the existing High Court Rules, there did not need to be an order to pay a specific sum by way of costs before interest would be payable. The Court established that the correct position is that an award of costs accrues interest if the Court has either:

172.1 awarded costs in a specific sum; or

172.2 although not awarding a specific sum, made a costs order in terms that enable the costs to be calculated or determined without reference back to the Court. That might be pursuant to the High Court costs rules, or it might be by some other mechanism stipulated by the Court.[22]

173 It is not clear whether the Court of Appeal's interpretation in *Chesterfields Preschools* continues to apply.

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[22] *Chesterfields Preschools Ltd v Commissioner of Inland Revenue* [2013] 2 NZLR 499 (CA) at [20].

Recommendation

174 The Law Society recommends that clause 460 be amended to insert a subsection (4) which provides:

> 460(4) In this section costs are awarded when:
> (a) the court orders costs in a specific sum; or
> (b) the court orders costs in terms that enable costs to be determined.

PART 5 – ELECTRONIC COURTS AND TRIBUNALS

Clauses 480, 481, 482, 484, 490, 491, 492 and 493 – changes to language used in Electronic Transactions Act 2002

175 The test in clauses 480, 481, 482, 484, 490, 491, 492 and 493 for when information is in writing, is recorded in writing, must be given in writing, must be provided in a certain form, must be retained in electronic form, must be provided or produced in paper-based form and when information is provided in a manner that complies with a paper-based or electronic form is:

> if the information is readily accessible *and* usable for subsequent reference.

176 This language differs from that used in sections 18, 19, 20, 21, 26 and 27, 28, 29 of the Electronic Transactions Act 2002:

> if the information is readily accessible so as to be usable for subsequent reference.

177 The language used in the Electronic Transactions Act 2002 precisely tracks the language used in the Uncitral Model Law on Electronic Commerce which has been widely adopted internationally and is well understood.

178 The test adopted in clauses 480, 481, 482, 484, 490, 491, 492 and 493 appears to be a different test to that used in the Electronic Transactions Act 2002 and Uncitral Model Law on Electronic Commerce. At a minimum the difference is confusing and likely to give rise to uncertainty.

179 The "so as to be usable" test is also used in clause 489(1)(b) (requirement to retain document or information that is in paper-based form). The language used in clauses 480, 481, 482, 484, 490, 491, 492 and 493 should be consistent with the language used in clause 489.

Recommendation

180 The Law Society recommends that the language used in clauses 480, 481, 482, 484, 490, 491, 492 and 493 be amended to track the language of the Electronic Transactions Act 2002.

Other Part 5 provisions – language used different to that used in Electronic Transactions Act 2002

181 In addition to the more significant change identified above, there are a number of minor drafting changes made in the Bill to the language used in the Electronic Transactions Act 2002.

182 For example clause 485(b) refers to the signature being as reliable as appropriate "for" the purpose for which it is required while section 22(1)(a) refers to the signature being as reliable as appropriate "given" the purpose for which it is required. Clause 490 (Requirement to retain information that is in electronic form) refers to "paper-based form" and "maintaining the integrity" while section 26 of the Electronic Transactions Act 2002 refers to "paper or other non-electronic form" and "assuring the maintenance of the integrity of the information". Similar changes have been made to clauses 493, 494 and 495.

183 It seems unlikely that differences in substance were intended by these drafting changes. But if that is the case then minor drafting differences are unhelpful and risk causing confusion.

Recommendation

184 The Law Society recommends that the language used in Part 5 of the Bill use the language of the Electronic Transactions Act 2002 so far as possible.

SCHEDULE 4 – TRANSITIONAL PROVISIONS RELATING TO SENIOR COURTS

Clause 7 – Interpretation

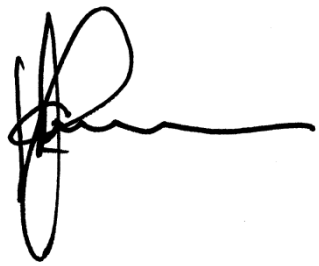
185 Clause 7 of Schedule 4 defines judicial officer as a judge, registrar or deputy registrar of a senior court. "Associate judge" should also be included in this definition to ensure that associate judges have the benefit of clause 8 of that Schedule ("Judicial officers to continue in office").

Recommendation

186 The Law Society recommends that the definition of "judicial officer" in clause 7 of schedule 4 be amended to include "associate judge".

Conclusion

187 The Law Society wishes to appear in support of this submission. The Law Society is also willing to meet with the Committee or officials advising if the Committee considers that would be of assistance.



Chris Moore
President
20 February 2014