

The Judicature Modernisation Legislation

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I INTRODUCTION

The recent Judicature Modernisation legislation has been described as providing a much-needed “update”¹ or “make-over”² to the statutory foundation of New Zealand’s court system, which has existed in its present form since 1908. The new “streamlin[ed]”³ legislation comprises five new Acts and 18 Amendment Acts which collectively repeal and replace the Judicature Act 1908, the Supreme Court Act 2003 and the District Courts Act 1947.⁴ This triumvirate has, to date, defined the make-up and functioning of New Zealand’s courts, and, in theory, described them for wider public understanding.

This note will begin by briefly describing the development of New Zealand’s court system. It will then examine the problems that emerged prior to the Judicature Modernisation legislation. Next, it will trace the process by which the legislation was initially introduced, describe the contribution made by public and stakeholder consultation, and outline its passage. Finally, it will outline key features of the legislation and their likely implications.

II THE DEVELOPMENT OF NEW ZEALAND’S COURT SYSTEM

The roots of New Zealand’s court system are found in an ordinance passed in December 1841 establishing the Supreme Court of New Zealand (now referred to as the High Court of New Zealand).⁵ The Supreme Court was a court of general jurisdiction intended, from the outset, to have even greater power than the superior courts of England, on which it was modelled.⁶

The jurisdiction of the present day High Court to hear varying kinds of cases of has remained, in many respects, unlimited. It retains “the primary

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1 Public Law & Policy Team “Watching Brief — April 2015” (14 April 2015) Russell McVeagh <www.russellmcveagh.com>.

2 Anthony Wicks “Make-over for courts imminent” (21 September 2016) Chapman Tripp <www.chapmantripp.com>.

3 Briony Davies “Judicature Modernisation Legislation” (15 February 2017) MinterEllisonRuddWatts <<https://minterellison.co.nz>>.

4 “Parliament makes major changes to NZ court system” (12 October 2017) New Zealand Law Society <www.lawsociety.org.nz>.

5 Supreme Court Ordinance 1841 5 Vict 1.

6 “History of the Court System” Nga Koti o Aotearoa Courts of New Zealand <www.courtsofnz.govt.nz>.

responsibility for maintaining consistency in the application of legal principle and in supervising the operation of other courts”.⁷

The legislature added to New Zealand’s superior courts when in 1862, the first Court of Appeal was convened to deal with appeals arising from decisions of the then Supreme Court.⁸ However, at the same time the Supreme Court and Court of Appeal were beginning to take shape as the arbiters of difficult questions of law, the fledgling government recognised that lower courts were also required to meet the colony’s needs at a grass-roots level.⁹ The initial results were a Court of Requests, used principally to deal with the recovery of debts, and the Court of Petty Sessions, which administered the criminal law.¹⁰ These were largely subsumed by Resident Magistrates Courts from 1846 onwards.¹¹

Although existing courts have since been renamed, and entirely new courts established, New Zealand’s court system has continued to rest upon this broad division between what have, respectfully, come to be referred to as *inferior* and *superior* courts.

After operating for some years through a patchwork of individual pieces of legislation, the structure of New Zealand’s superior courts was consolidated for the first time through the Judicature Act 1908. This critical piece of legislation (which undoubtedly served as a source document for New Zealand’s Constitution) set out the make-up, functions and jurisdictions of the modern High Court and Court of Appeal. It also codified the distinction between *inferior* courts — defined as “any court ... of inferior jurisdiction to the High Court” — and *superior* courts — referring, by implication, to the High Court and Court of Appeal.¹² The Judicature Act was supplemented, in a sense, by the enactment of the Supreme Court Act 2003, which established the modern Supreme Court as New Zealand’s highest court.

The *inferior* courts have also been subject to vast change. Following the 1978 *Report of Royal Commission on the Courts*, the growing role of the Magistrate Courts was recognised.¹³ In 1980, the presiding magistrates were given extended jurisdiction and renamed District Court Judges.¹⁴

The vast majority of the day-to-day interactions New Zealanders have with the court system continue to take place across 63 individual District Courts (as well the various divisions and tribunals under their

7 Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at [6.1].

8 “History of the Court System”, above n 6. The Court of Appeal only became a permanent court in 1958.

9 Peter Spiller, Jeremy Finn and Richard Boast *A New Zealand Legal History* (2nd ed, Brookers, Wellington, 2001) at 192.

10 At 192.

11 At 192.

12 Judicature Act 1908, s 2.

13 See Report of Royal Commission on the Courts (EC Keating, Government Printer, Wellington, 1978).

14 “History of the Court System,” above n 5.

supervisory jurisdiction).¹⁵ The jurisdiction and composition of these has, until very recently, been governed by the District Courts Act 1947, which has joined the Judicature Act as a fundamental piece of legislation.¹⁶

III THE PROBLEMS PRIOR TO THE PRESENT REFORMS

Despite numerous amendments over the decades, the Judicature Act 1908 and the District Courts Act 1947 were beginning to creak. In a 1987 report, the Law Commission commented that “[t]he Judicature Act 1908 is essentially still the 1882 Act with more than 100 years of deletion, addition and amendment.”¹⁷ The Law Commission’s recommendation, even then, was that a degree of modernisation was required.

The difficulties in administering modern justice via legislation dating back to 1908 (and with even older roots) became more apparent as time went on. The most recent iteration of the Judicature Act 1908 contained provisions that were dated in their language:

28 Powers of Registrars

(1) In order that the Court may be enabled to exercise the jurisdiction conferred upon it by this Act, every Registrar and Deputy Registrar shall have all the powers and perform all the duties in respect of the court ... which Registrars and Deputy Registrars have hitherto performed or which by any rule or statute they may be required to perform.

As well as provisions that were inarguably obsolete:

18 No jurisdiction in cases of felonies or misdemeanours committed prior to 14 January 1840

The court shall not have jurisdiction to try any felony or misdemeanour committed before 14 January 1840

These provisions sat alongside others that inserted a whole century later, and dealt with matters distinctly more modern. One example was s 26IB which allowed a Judge or Associate Judge to preside over specified types of hearing by video link.

With over 40 amendments, the Act had also lost any semblance of logical structure. It had only three distinct parts containing, between them, 198 unique provisions; some in force, others repealed. The Act also had three schedules and was to be read in conjunction with 11 other Amendment

15 For example, the Disputes Tribunal, the Tenancy Tribunal and the Accident Compensation Appeal Authority.

16 This was originally called the Magistrates’ Courts Act 1947, but its name was amended following the Royal Commission’s recommendation. See *Report of Royal Commission on the Courts*, above n 13, at [410].

17 Law Commission *The Structure of the Courts* (NZLC R7, 1989) at [570].

Acts and rules. The end result was a 115 page piece of legislation¹⁸ which was difficult for practitioners to fully grasp, and likely incomprehensible for the general public.

Quite apart from its internal difficulties, there were also issues with how the Act interacted with the District Courts Act 1947 and the Supreme Court Act 2003, both of which were drafted decades later, a fact reflected in the themes and language they employed.

IV THE LEGISLATIVE PROCESS

The Work of the Law Commission

It was against this backdrop that, in 2010, the Ministry of Justice tasked the Law Commission with reviewing the Judicature Act 1908 and other founding legislation. This was no broad mandate, however, as the changes envisioned were largely cosmetic.

The Commission's task was to consider the patchwork of legislation serving as the foundation of New Zealand's court system (principally the Judicature Act 1908, the District Courts Act 1947 and the Supreme Court Act 2003) and assess whether this legislation could be consolidated, to the greatest degree possible, into a single logically structured Courts Act using clear, modern language.¹⁹ Its task was not to consider whether the present structures could be improved or were fit for purpose.²⁰ What the Ministry of Justice sought was, in effect, a facelift.

Following the publication of two issues papers, the Law Commission finally released its report in 2012. Though it ran to 200 pages and canvassed a vast array of issues, at the heart of its report the Law Commission highlighted the need for reform that had been felt by many for some time:²¹

The very objective of the rule of law ... is that how courts are set up, what their jurisdiction is, and the essential operational characteristics must be clear, accessible and intelligible.

The thinking behind the reference is that this cannot presently be said, with a sufficient degree of confidence, as to the architecture of the New Zealand courts.

Among a mass of other changes, the Commission recommended that Parliament begin work on a unitary Courts Act which would better reflect the principles of clarity and accessibility.²² In line with its terms of reference,

18 Excluding Schedules and its accompanying Amendment Acts and rules.

19 Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R126, 2012) at iv.

20 At iv.

21 At iv.

22 At [1.23]–[1.24].

the Commission emphasised that the jurisdiction of the various courts should continue unaffected.

Introduction into the House

The government's response came in the form of the 1,182 page Judicature Modernisation Bill.²³ Introducing the Bill on 27 November 2013, the Minister of Justice, the Hon Judith Collins MP, commented that "it is increasingly clear that we now have a 20th century court system that should be modernised to deliver in the 21st century".²⁴

The Bill departed from the unitary Courts Act idea the Law Commission had been asked to explore, and which it had recommended. It was split into five parts, each of which would become its own separate act. The Judicature Act 1908 and the Supreme Court Act 2003 were to be repealed and combined into a single Senior Courts Act. The District Court Act 1947 was to be repealed and replaced with a new District Courts Act. New Acts relating to judicial review, the use of electronic documents in court, and the award of interest on judgment sums would also be enacted.

The reluctance to pursue a single Courts Act likely owed a great deal to concerns raised by the Judges of the High Court, the Court of Appeal and the Supreme Court that such an act would undermine the distinction between the *inferior* and *superior* courts and blur their separate but important constitutional roles.²⁵ The Law Commission had considered these concerns prior to publishing its report, but concluded that they were outweighed by the ease and practicality of a single Courts Act.²⁶

The Bill attracted significant professional interest. Leading up to its June 2014 report, the Justice and Electoral Committee received 25 written submissions and heard 13.²⁷ These were tendered on behalf of the Judges of the Supreme Court, the Court of Appeal and the High Court collectively, as well as the Judges of the District Court, the New Zealand Law Society, the New Zealand Bar Association, and several notable firms and individuals.

Public and professional concern quickly centred on a key omission from the Bill. Section 3(1) of the Supreme Court Act 2003 previously specified that one of its purposes was "to enable important legal matters, including legal matters related to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history and traditions". Section 3(2) also specified that "[n]othing in this Act affect[ed] New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament." These expressions of commitment were omitted from s 3 of the Bill. In their submissions to the Electoral and Justice Committee, the Judges

23 During its first reading, the length of the Bill was a popular theme. The Hon Phil Goff MP commented that it could properly be called the "Forestry Destruction Bill": (5 December 2013) 695 NZPD 15311.

24 (5 December 2013) 695 NZPD 15299.

25 Law Commission, above n 19, at [1.13].

26 At [1.21]–[1.24].

27 Judicature Modernisation Bill 2013 (178-2) (select committee report) at 8.

of the Supreme Court, the Court of Appeal and the High Court highlighted this issue, as did the Labour Party minority on the Committee itself.²⁸ Writing extrajudicially, the Chief Justice also criticised this omission.²⁹ The omission was (partly) rectified following a series of Supplementary Order Papers introduced by Jacinda Ardern MP.³⁰

The Bill was split into its five constituent bills and 18 amendment bills before its third reading. The new package enjoyed cross-party support — as it had throughout its passage into law — and ultimately received 109 votes in favour, with 12 New Zealand First MPs voting against.³¹

V KEY FEATURES OF THE LEGISLATION

The new legislation introduced an array of changes of varying significance. In the interests of providing a workable overview, this note will focus on changes introduced by five key Acts.

Senior Courts Act 2016

The Senior Courts Act 2016 contains the matters which were once set out in the Judicature Act 1908 and the Supreme Court Act 2003. It took effect from 1 March 2017.

The substance of the previous legislation remains, for the most part, unchanged. Its language has, however, been updated in accordance with the goals of accessibility and modernisation. The High Court, the Court of Appeal and the Supreme Court are now referred to as *senior* rather than *superior* courts. Therefore, while the distinction between these and the *inferior* courts is maintained, the somewhat pejorative terminology has been removed. In contrast to the scattergun presentation of the old Judicature Act 1908, the Senior Courts Act is divided into six intelligible parts, which separately deal with the make-up and jurisdiction of the High Court, the Court of Appeal and the Supreme Court.³² Another part deals with the appointment and eligibility of Judges. The last part deals with the rules of each Court and incorporates several miscellaneous provisions which could not be relocated to more appropriate legislation.

Of the substantive changes, a number are worth highlighting. First, the High Court Rules, which had previously been incorporated as a Schedule

28 Judges of the Supreme Court, Court of Appeal and High Court “Submission of the Supreme Court, Court of Appeal and High Court on the Judicature Modernisation Bill” at 3–4.

29 Sian Elias “Judgery and the Rule of Law” (2015) 14 Otago LR 49.

30 Supplementary Order Paper 2015 (62) Judicature Modernisation Bill 2013 (178-2); and Supplementary Order Paper 2015 (63) Judicature Modernisation Bill 2013 (178-2). The reference to the Treaty of Waitangi in the old Supreme Court Act 2003 has not been carried over, although this may be because it is intended to be included in a future update to the Constitution Act 1986.

31 These Members of Parliament objected, principally, to the re-enactment of a mandatory retirement age for Judges.

32 For the sake of completeness, the author notes that the Act also contains the typical preliminary section setting out its commencement date and dealing with matters of interpretation.

to the Judicature Act 1908, are now published as separate legislative instruments in their own right.³³ They amount to Regulations which can be made and amended by Order in Council.³⁴

Section 19 contains perhaps the most significant change and amounts to something of an experiment. It establishes a “commercial panel of the High Court” to be composed of Judges selected by the Chief High Court Judge to hear and determine commercial proceedings.³⁵ This replaces the old “commercial list” provided for in s 24A of the Judicature Act, through which selected Judges simply case-managed complex commercial litigation up until trial, at which point they could be allocated to any Judge. The Governor-General may now, in consultation with the Chief Justice and the Chief High Court Judge, specify a commencement date for the panel, as well as the types of proceedings that may be assigned to it.³⁶ Reflecting its experimental nature, the Chief High Court Judge is also permitted to establish other panels of High Court Judges to deal with proceedings other than commercial proceedings, in consultation with the Attorney-General and the Chief Justice.³⁷ However, the Governor-General may also provide for the original commercial panel to cease operations from a specified date.³⁸ Parties are permitted to request their case be dealt with by a Judge on a particular panel.³⁹

This is a controversial development and the arguments for and against judicial specialisation cannot be accommodated in this note. Section 19 did find some support amongst the profession.⁴⁰ However, in their submissions to the Justice and Electoral Committee, the Judges of Supreme Court, the Court of Appeal and the High Court recorded they did not support this provision on the basis that it would deprive some judges of their jurisdiction and thereby erode their independence, as well as potentially distort recruitment to the senior courts.⁴¹

In an effort to reduce potential pre-trial delay in respect of civil matters, the leave of the High Court is now required for an interlocutory decision of that Court to be appealed, except where that decision is determinative of the proceeding — that is, a strike out application.⁴²

Another change of some significance is contained in ss 166–169. A new regime has been introduced for dealing with the rapidly worsening issue of vexatious litigants filing repeated meritless claims. As Buddle Findlay highlighted in their submissions to the Justice and Electoral Committee, these are often bankrupted persons or others bringing claims on behalf of

33 Although they technically still form part of the Senior Courts Act 2016 by incorporation.

34 Senior Courts Act, s 148.

35 Section 19(4).

36 Section 19(2)(a).

37 Section 19(3).

38 Section 19(2)(c).

39 Section 19(6).

40 Bell Gully “Bell Gully submission to Justice and Electoral Committee — Judicature Modernisation Bill” at [4]–[5]; and Buddle Findlay “Submissions on Judicature Modernisation Bill 2013 (178-1)” at [6]–[6.4].

41 Judges of the Supreme Court, Court of Appeal and High Court, above n 28, at [6].

42 Section 56.

asset-less bodies, such that cost orders are ineffective as a deterrent.⁴³ Unlike the previous s 88B of the Judicature Act, which targeted only a small number of the most serious vexatious litigants, the new regime allows the Court to make any of three graduated orders: a limited order (restraining a litigant in relation to a particular matter only); an extended order (restraining a litigant in relation to a particular or related matter); and, finally, a general order (restraining a litigant in relation to any civil proceeding). Given its breadth, only the Attorney-General is permitted to apply for a general order.⁴⁴

The new s 49 reduces the number of (permanent) Court of Appeal Judges required to deal with a range of matters in the civil jurisdiction. For example, two Judges are now able to determine an application for leave to appeal or an extension of time to appeal, including where such applications are contested and would effectively determine or dispose of the matter.⁴⁵ A single Judge may exercise the same powers where the application is uncontested.⁴⁶

A final substantive change comes via new transparency requirements in relation to the judicial appointment process introduced by s 93. For the first time, the Attorney-General will be required to publish information explaining his or her process for seeking expressions of interest for judicial appointment, and recommending persons for such appointment.

District Courts Act 2016

The District Courts Act 2016 replaces and repeals the old District Court Act 1947. The most significant change brought in by the new District Courts Act 2016 is symbolic. Under the old legislation, the majority of civil and criminal cases in New Zealand were heard across 63 separate District Courts, each with an independent staff and seal. Section 3 of the new Act establishes a single District Court of New Zealand, with a number of branches. This re-structuring was supported by the Judges of the District Court.⁴⁷

The list of substantive amendments is again relatively short. The District Court's civil jurisdiction has been increased from \$200,000 to \$350,000.⁴⁸ This is a somewhat controversial step. An editorial in the New Zealand Law Journal referred to "widespread concern in the profession at the way in which District Court civil litigation is handled" and pointed out that only about ten percent of the District Court's workload is, in fact, civil — the alleged result being that the now unitary District Court is ill-equipped to handle complex litigation of this type.⁴⁹ Conversely, the minimum limit for

43 Buddle Findlay, above n 40, at [7.1]–[7.3].

44 Section 169.

45 Section 49(2).

46 Section 49(3).

47 Judges of the District Court "Submission of the Judges of the District Courts to the Justice and Electoral Select Committee" at [3].

48 District Court Act 2016, ss 74–78.

49 Bernard Robertson "Editorial: the court system" (2012) 3 NZLJ 77 at 77.

transfer to the High Court, at the defendant's request, has now been raised from \$50,000 to \$90,000.

Pursuant to ss 213–216, a District Court Judge can now also make the same series of graduated orders restraining a litigant from commencing or continuing a civil proceeding. However, a general order can only be made in the High Court, given the limitation that such an order places on an individual's access to justice. Likewise, s 11(3) provides that the same transparency requirements apply to District Court Judges as to Judges of the Senior Courts.

Electronic Courts and Tribunals Act 2016

The Electronic Courts and Tribunals Act 2016 clears a path for the use of electronic documents in New Zealand courts and tribunals. Section 7 allows a court or tribunal — or a participant in either — to use “permitted documents” in, or with respect to, the proceedings of that court or tribunal.

“Permitted documents” is a catch-all term but specifically excludes specific types of documents, including documents given on oath or affirmation, a statutory declaration, a will or other testamentary instrument.⁵⁰ These cannot be submitted in electronic form unless and until they are declared *permitted documents* by the Governor-General by Order in Council.

Except in limited circumstances, nothing in this legislation requires a person to use, provide or accept a document in electronic form without that person's consent.⁵¹

The Electronic Courts and Tribunals Act 2016 is, however, simply an enabling provision. It provides scarce detail as to the practicalities of using electronic documents. As such, additional guidance is likely to be required in the form of Practice Notes. The various rules applying to different courts are also likely to require amendment.

To allow for these changes to be put in place, despite having a commencement date of 1 March 2017, the Act will have no operational effect in individual courts until an Order in Council is made by the Governor-General applying it to that court or tribunal.

Interest on Money Claims Act 2016

The effect of this new legislation is comparatively simple. It introduces a single statutory system for the calculation and award of interest on money claims taken in New Zealand courts. The award of interest is now mandatory regardless of the judgment sum,⁵² and is to be paid from the day on which the money claim is quantified until the date of payment.⁵³ The rate of interest

50 Electronic Courts and Tribunals Act 2016, s 4.

51 Section 7.

52 Interest on Money Claims Act 2016, s 10.

53 Section 9.

will be the fluctuating market rate,⁵⁴ such that it will no longer be necessary to adjust this through orders of council.

The legislation also requires the Ministry of Justice to establish a website with an interest calculator, to make this calculation easy and accessible.⁵⁵

Judicial Review Procedure Act 2016

The Judicial Review Procedure Act 2016 codifies the provisions relating to judicial review which were previously found in Part 1 of the Judicature Amendment Act 1972. The changes are again stylistic rather than substantive. Section 3(2) expressly states the re-organisation of the provisions of Part 1, and the changes made to their style and language are not intended to alter the interpretation or effect of those provisions. It is effectively a modern re-enactment of the existing position.⁵⁶

VI CONCLUSION

It is uncontroversial that the statutory foundation of New Zealand's court system needed to be refreshed to allow it to be more readily accessed and understood by the profession and the public. The Judicature Modernisation legislation was not intended to lead to complex reform of practice or principle. Nevertheless, the development, drafting and enactment of its five Acts and 18 Amendment Acts was a complex exercise by virtue of the sheer volume of content requiring consideration. The task has been carried out neatly and effectively, and those involved should be commended for their work. The expected result is that New Zealand's court system will be better equipped to serve its purpose in the 21st century.

54 Based on the average of the previous six months' retail rate, six month term deposit rate published by the Reserve Bank, plus a margin of 0.15 per cent compounding annually.

55 Section 13.

56 For detailed criticisms of re-enactment in this form, see Morgan Watkins "Proceed with Caution: Law Reform, Judicial Review and the Judicature Modernisation Bill" (2016) 47 VUWLR 149.